

**BOP O&M TERM SHEET**

THIS TERM SHEET 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 TERM SHEET OR ON STATEMENTS MADE DURING NEGOTIATIONS PURSUANT TO THIS TERM SHEET SHALL BE AT THAT PARTY'S OWN RISK. UNTIL THE PARTIES HAVE COMPLETED THEIR DUE DILIGENCE AND A DEFINITIVE 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 TERM SHEET OR IN THE COURSE OF ANY NEGOTIATIONS.

<u>Operator:</u>	[ ] (" <b>Operator</b> ").
<u>Owner:</u>	PacifiCorp, an Oregon corporation d/b/a Rocky Mountain Power (" <b>Owner</b> "). Owner and [ ] (" <b>Developer</b> ") have entered into that certain Build Transfer Agreement (" <b>Build Transfer Agreement</b> ") whereby Owner shall purchase (and Developer shall sell and transfer) the Facility (as defined below) prior to Closing Completion (as defined in the Build Transfer Agreement).
<u>Scope:</u>	Operator and Owner would enter into an Operations and Maintenance Agreement (the " <b>Agreement</b> ") for the provision of BOP O&M Services (defined below) with respect to a photovoltaic power plant (the " <b>Facility</b> ") to be located in [ ] Utah (the " <b>Site</b> ") and to be constructed pursuant to a Balance of Plant Engineering, Procurement and Construction Agreement (the " <b>EPC Agreement</b> ") between [ ] (" <b>EPC Contractor</b> ") and Developer. The EPC Agreement will be assigned by Developer to Owner prior to Project Mechanical Completion and the commencement of the Term of the Agreement (at closing of the Build Transfer Agreement).

<u>O&amp;M Services:</u>	<p>Operator shall provide all typical and customary, necessary and recommended preventative, scheduled and unscheduled maintenance services for the entire Facility, excluding the SMA Services (defined below), for the duration of the Term (the “<b>BOP O&amp;M Services</b>”), which shall include (i) certain basic services that constitute typical and customary operation and maintenance activities for a regulated electric utility, to be defined and set forth in an exhibit to the Agreement, but including, at a minimum, annual cleaning (x2), full preventative maintenance (including mechanical, electrical, inverter and MV/HV maintenance services), visual inspection, system testing and calibration, corrective and unscheduled maintenance, failure response, notifications, forecasting, staffing and remote monitoring, warranty support, asset management, regulatory/compliance, site and vegetation management (including any site grading and maintenance of storm water structures), garbage disposal, security services, perimeter fencing, restroom and Facility maintenance (including janitorial services), water supply, dust containment, snow removal, road maintenance, reporting and compliance (including environmental compliance), training of personnel, cooperation and coordination with the SMA Contractor providing the SMA Services for Owner (and the turbine supplier under the Turbine Supply Agreement, if applicable) and reasonable assistance to Owner in its annual operation, maintenance, administrative and general budgeting and capital planning efforts (the “<b>Basic Services</b>”), (ii) any additional services requested by Owner or recommended by Operator and documented in a written change order executed by the parties (the “<b>Additional Services</b>”) and (iii) any emergency services necessary to address emergency affecting the safety or protection of persons or endangering the Facility or other property located at the Site (the “<b>Emergency Services</b>”).</p> <p>The services to be performed by Operator do not include provision of services, parts, and other work (the “<b>SMA Services</b>”) to be furnished by a separate contractor (the “<b>SMA Contractor</b>”) under the Service and Maintenance Agreement (the “<b>SMA</b>”) to be entered into by Owner but do include interfacing, coordinating and cooperating with the SMA Contractor and enforcing the terms and conditions of the SMA Services in relation to the Facility.</p>
<u>Spare Parts Title:</u>	<p>Operator shall maintain any initial spare parts provided by Owner or EPC Contractor and otherwise supply all necessary and recommended spare parts and consumables for the Facility and performance of the BOP O&amp;M Services (the “<b>Spare Parts</b>”). Operator shall maintain the Spare Parts at its own expense at the Site and on a dedicated basis for exclusive use for the Facility; <i>provided, however</i>, that with respect to Spare Parts related to Extra Work, Operator shall offer to sell to Owner such Spare Parts as are manufactured by Operator or its affiliates at Operator’s then-current market prices in the United States for spare parts and consumables for utility-scale projects subject to an agreed-upon discount set forth in the Agreement.</p> <p>Operator shall provide a monthly report with respect to the inventory of Spare Parts, including any parts procured or replaced during such period, and shall make recommendations to Owner regarding the appropriate number and type of Spare Parts for the Facility. All Spare Parts procured or used with respect to the Facility shall be new OEM parts that comply with any applicable warranty requirements. Title to such Spare Parts shall transfer from Operator to Owner upon the earlier of Owner’s payment therefor or installation of the same into the Facility.</p>

<u>O&amp;M Fee:</u>	The Agreement shall provide for a typical and customary fixed annual fee (the “ <b>BOP O&amp;M Fee</b> ”). Operator shall not be entitled to any additional compensation, except as set forth in a change order with respect to Additional Services or with respect to Emergency Services or in connection with Owner’s purchase of Spare Parts as described above.
<u>Term:</u>	The Agreement shall be executed and effective on or before the date that the EPC Agreement is executed by both Developer and EPC Contractor, <i>provided</i> that the operational term of the Agreement shall be a period of twenty (20) years, commencing upon Substantial Completion (as defined in the EPC Agreement) of the Facility (the “ <b>Term</b> ”).
<u>Independent Contractor:</u>	Operator is acting and shall be deemed for all purposes to be an independent contractor and nothing in the Agreement shall be construed as constituting any relationship with Owner other than that of owner and independent contractor. Owner and Operator are not partners, agents or joint venturers with each other, and the Agreement is not intended to nor shall it be construed to create a partnership or joint venture between Owner and Operator. Operator shall complete the BOP O&M Services according to its own means and methods of work, which shall be in the exclusive charge and control of Operator and which shall not be subject to the control and supervision of Owner, except as to the results of the BOP O&M Services.
<u>Subcontracts:</u>	Subject to Owner’s consent, not to be unreasonably withheld, Operator may enter into subcontracts for particular aspects of its obligations under the Agreement. All subcontracts shall incorporate and flow-down applicable requirements from the Agreement (including with respect to insurance), be assignable to the Owner upon termination of the Agreement and provide that Owner is a third-party beneficiary thereunder. Operator shall ensure that all subcontracts contain warranties with respect to services and equipment that comply with Owner’s warranty requirements.
<u>Personnel:</u>	Operator shall provide an appropriate number of suitably qualified, trained, competent and experienced management, operating and maintenance personnel necessary to perform the BOP O&M Services, and such personnel shall perform such BOP O&M Services in accordance with the applicable Requirements (defined below). Operator shall pay all wages and benefits required by applicable law or contract with respect to personnel performing the BOP O&M Services. Operator shall be responsible for all matters relating to labor relations, working conditions, training, employee benefits, safety programs and related matters pertaining to such personnel, including, if applicable, with any prevailing wage, project labor or other requirements.

<u>Business Practices:</u>	Operator, its employees, agents, representatives and subcontractors shall at all times maintain high ethical standards and avoid conflicts of interest in performing the BOP O&M Services. In conjunction with its performance of BOP O&M Services, Operator and its employees, officers, agents and representatives shall comply with, and cause its subcontractors and their respective employees, officers, agents and representatives to comply with, all applicable laws prohibiting bribery, corruption, kick-backs or similar unethical practices including, without limitation, the United States Foreign Corrupt Practices Act and Owner's "code of business conduct", which code of business conduct would be included as an exhibit to the Agreement.
<u>O&amp;M Manual:</u>	The Agreement shall provide typical and customary provisions regarding Operator's provision of an O&M Manual for Owner's review and approval.
<u>Annual Maintenance Plan:</u>	The Agreement shall provide typical and customary provisions regarding Operator's provision of an Annual Maintenance Plan for Owner's review and approval. Such Annual Maintenance Plan shall be integrated with the BOP O&M Manual.
<u>Reporting Requirements:</u>	Operator shall provide usual and customary reports and summaries to Owner, including: (a) a daily production report (via email and File Share upload) relating to the weather, irradiance, availability and performance of the Facility, (b) a detailed monthly report (in written and electronic format) relating to the monthly and year-to-date availability and performance of the Facility, inverter performance metrics, spare parts utilization and inventory, equipment failures and warranty claims, OSHA and safety-related matters, scheduled and unscheduled maintenance activities, alarm logs and failure reports and any Emergency Services or Additional Services performed, and (c) an annual report (in written and electronic format) including a summary of the monthly performance reports together with totals for the Performance Guarantee calculations and performance metrics and Owner recommendations.
<u>Forecasting:</u>	Operator shall deliver to Owner (i) day-ahead and hour-ahead (with five (5) minute increments) forecasts of electrical energy deliveries from the Facility using Operator's then current forecasting tools, (ii) projections of scheduled outages of the Facility developed in conjunction with input from the SMA Contractor and (iii) notification of changes to any forecast of electrical energy deliveries or of any forced outage of the Facility.
<u>Notifications:</u>	Operator shall promptly notify Owner regarding any pending or threatened litigation, claim, dispute, action, investigation or proceeding relating to the Facility, any refusal or threatened refusal to grant, renew, or extend any permit, any discovery of any existing or concealed hazardous substances, forced outages of the Facility (and the known causes thereof and the corrective action taken with respect thereto), all notices and other communications from any governmental authority in relation to the Facility and any other event or circumstance that reasonably could be expected to adversely impact the operation of the Facility including labor disputes, violations of applicable laws or applicable permits, material damage to any of the major pieces of equipment comprising the Facility, or notices or other communications from the transmission provider.

<u>Monitoring Services:</u>	<p>Operator shall staff and maintain a first-tier network operations center, and shall provide remote monitoring of the Facility therefrom on a twenty-four (24) hour a day, seven (7) days a week basis via connection with the Facility's SCADA system. Remote monitoring shall include real time performance, weather and operational metrics and remote event notification. Operator shall cause Owner to have a direct, real-time data feed with respect to the foregoing, install and maintain a dedicated T-1 line and such other telecommunications and equipment necessary to support the same, and shall host and maintain an electronic file share ("<b>File Share</b>") and provide Owner with a license to access same.</p> <p>Operator shall maintain on-site and area staffing consistent with minimum levels and qualifications to be established and included in the O&amp;M Manual.</p>
<u>Alarm and Failure Response:</u>	<p>The Agreement shall provide for typical and customary provisions regarding Operator's response to an alarm, the failure notification protocol for the Facility and Operator's other response obligations. Operator shall promptly curtail the production of the Facility upon direction by the transmission provider, utility or other governmental authority.</p>
<u>Minimal Interference:</u>	<p>Operator shall use commercially reasonable efforts, in light of the circumstances at the time, to perform the BOP O&amp;M Services in a manner that will minimize interference with the operation of the Facility and to conduct its work at such times so as to minimize reduction of production in respect of the Facility, including where applicable, coordination with the SMA Contractor. Unless granted prior written approval from Owner, Operator shall not conduct any scheduled maintenance on Facility equipment that would reasonably be expected to reduce Facility production during May 1 through October 31 of any year.</p>
<u>Hazardous Substances:</u>	<p>Operator shall minimize the use of hazardous substances and shall not and shall not permit any of its subcontractors, directly or indirectly, to use, handle, store, generate, manufacture, transport or release any hazardous substances in, on or under the Facility, the Site and any adjacent areas thereto, except to the extent required for the performance of the BOP O&amp;M Services, and, in each such case in accordance with the Requirements. Operator shall promptly comply with all orders and directives of all governmental authorities regarding the use, transportation, storage, handling or presence of hazardous substances. If Operator discovers, encounters or is notified of the presence or any release of any hazardous substances at the Site, Operator shall promptly notify Owner thereof and stop work in and restrict access to the area containing such hazardous substances. Operator shall conduct and complete all investigations, studies, sampling, testing and remediation of the Site as required by the Requirements in connection with the release of hazardous substances by Operator. Operator shall not be entitled to any extension of time or additional compensation for any delay or costs incurred by Operator as a result of the remediation or removal of hazardous substances for which Operator is responsible.</p>

<u>Standard of Performance:</u>	All BOP O&M Services shall be performed by Operator in a good and workmanlike manner, free of any defect or deficiency, consistent with prudent industry practices with respect to first-tier, grid-interconnected, rate-based, utility-scale wind facilities in the Western United States, applicable laws, applicable permits, governmental approvals, applicable project documents, the Warranties, the O&M Manual, the Safety Plan and Owner's operating procedures (collectively, the " <b>Requirements</b> ").
<u>Services Warranty:</u>	The Agreement shall provide for typical and customary provisions with respect to Contractor's warranty of the BOP O&M Services, including a services warranty that extends at least two (2) years after the conclusion of the Term of the Agreement and extensions of the services warranty for two (2) years following repair and replacement of parts and equipment.
<u>Warranty Enforcement:</u>	Operator shall, on Owner's behalf, maintain, administer and pursue claims with respect to all applicable warranties provided by EPC Contractor, SMA Contractor, turbine supplier and other suppliers of the inverters and other components of the Facility (the " <b>Warranties</b> "). Operator shall manage, supervise and verify that all persons providing Warranties for the Facility comply promptly and diligently with all of their respective warranty obligations and coordinate and schedule the provision of all warranty work with the BOP O&M Services. Operator shall keep Owner reasonably informed of the status of any warranty claims and, in any case, provide information and documentation reasonably requested by Owner. Operator shall not be required to commence or prosecute a legal action (whether litigation, arbitration or otherwise) to enforce a warranty claim, except as may be agreed as part of the Additional Services, but Operator shall cooperate with Owner's reasonable requests in connection with any such legal action.
<u>Safety Requirements:</u>	Operator shall take necessary safety and other precautions to protect property and persons from damage, injury or illness arising out of the performance of the BOP O&M Services and be responsible for the compliance by Operator, its employees, agents, representatives and subcontractors with all requirements governing occupational health and safety in accordance with the Requirements. Operator shall be solely responsible for initiating, maintaining, and supervising all safety measures and programs in connection with the performance of the BOP O&M Services. Not later than one hundred twenty (120) days prior to the commencement of the Term, Operator shall provide Owner with a Site-specific safety plan in connection with Operator's performance of its obligations that complies with the Requirements (the " <b>Safety Plan</b> "). Owner shall be entitled to review and provide comments to the Safety Plan and Operator shall incorporate any comments provided by Owner. Operator shall be responsible for updating and revising the Safety Plan to comply with all Requirements, including any changes thereto. Operator shall comply with the Safety Plan including with respect to passes, badges, drug and alcohol testing and conduct on the Site.
<u>Performance Guarantee:</u>	The Agreement shall provide for typical and customary performance guarantee provisions.

<u>Credit Support:</u>	Operator shall deliver (i) an ultimate parent guaranty covering Operator's performance under the Agreement, the Performance Guarantee and any other agreements or undertakings related to the O&M Services or the Facility and (ii) such other credit support as may reasonably be required by Owner.
<u>Regulatory/ Compliance:</u>	Operator shall register with the North American Electric Reliability Corporation (NERC) as the " <b>Generator Operator</b> " with respect to the Facility and shall cause the Facility to comply with all requirements of any governmental authorities including, but not limited to, NERC, WECC, CAISO, WREGIS and the UPSC.
<u>Project Labor:</u>	Operator shall ensure compliance and confirm labor union agreement with all project labor agreements related to the Facility.
<u>Training:</u>	Operator shall provide typical and customary training sessions to Owner's personnel each year.
<u>Force Majeure; Excusable Events:</u>	In the event a force majeure (to be defined) or excusable event (to be defined, but including Owner-caused delays and changes in law) prevents Operator from performing any services, Operator shall be excused from performing such services for the duration of the event. Owner may, at its sole option, request that Operator remediate the effects of such event by agreeing to a change order that details the remediation work and Operator's fee to perform such work.
<u>Site Access:</u>	Owner shall provide Operator with such access to the Facility as reasonably necessary to enable Operator to perform its obligations, including ingress and egress rights to the Site. Such access shall extend to the employees, contractors and subcontractors of Operator and to local electric utility personnel, and be in accordance with any ground lease, easement or related instrument in effect with respect to the Site. Operator shall take commercially reasonable efforts to perform its obligations in such a manner that minimize the inconvenience to and interference with Owner's use of the Site and SMA Contractor's performance of the SMA Services.
<u>Indemnification:</u>	Operator shall indemnify Owner and its affiliates, successors, assigns, officers, directors, employees and agents (" <b>Owner Parties</b> "), and hold them harmless from and against all reasonable out-of-pocket costs, expenses and actual liabilities arising out of or relating to any claim or any litigation or other proceeding that relate to (a) claims for injury or property damage, (b) worker's compensation claims, (c) penalties due to failure to comply with applicable law, (d) taxes owed by Operator, (e) Liens arising with respect to the Facility and (f) hazardous substances.
<u>Liens:</u>	Operator shall keep and maintain the Facility and the Site free and clear of all liens, encumbrances, claims, charges that if unpaid, might become a lien, and rights of retention (" <b>Liens</b> ") resulting from the action of Operator or work done at the request of Operator (including without limitation, work done by any subcontractor, supplier of goods or services, employee, material man or laborer). Operator shall take prompt steps to discharge any such Lien. Operator shall require each of its subcontractors to make payments to their respective subcontractors and sub-subcontractors in a similar manner, and Operator shall indemnify and hold harmless Owner for any losses or expenses incurred by Owner (including reasonable attorneys' fees) in discharging

	any such Lien. Upon request from Owner, Operator shall request lien waivers from a subcontractor upon completion and payment for such subcontractor's relevant work and, upon request from Owner, Operator shall supply copies of such lien waivers to Owner.
<u>Termination Rights:</u>	<p>The Agreement shall provide for typical and customary termination rights and associated termination payments, including termination for insolvency, bankruptcy, non-payment, prohibited assignment, etc.</p> <p>Following any termination of the Agreement for any reason, Operator shall (a) withdraw from the Site and expeditiously transfer to Owner any Spare Parts, warranties, manuals, software licenses, keys, access credentials, records, reports and other documentation relating to the Facility and BOP O&amp;M Services and (b) cooperate with Owner and any replacement operator concerning the transition of operational responsibility for the Facility.</p>
<u>Insurance:</u>	<p>Operator shall maintain in effect, insurance coverage of the following types and limits in addition to any other coverage required by law:<sup>1</sup></p> <ul style="list-style-type: none"> <li>i. <u>Workers' Compensation Insurance.</u> Workers' Compensation in the minimum amount required by statute and Employers' Liability with minimum limit of \$1,000,000.</li> <li>ii. <u>Commercial General Liability Insurance.</u> Commercial General Liability on an "occurrence form" in the minimum amount of \$2,000,000 per occurrence combined single limit and \$3,000,000 in aggregate, including (a) broad form contractual liability coverage, (b) products/completed operations, (c) personal injury, (d) independent contractors and (e) sudden and accidental pollution liability (if not provided by separate pollution coverage). Coverage shall include a cross liability/severability of interests clause.</li> <li>iii. <u>Automobile Liability Insurance.</u> Comprehensive Automobile Liability in the minimum amount of \$1,000,000 each accident combined single limit, including owned, hired and non-owned vehicles.</li> <li>iv. <u>Umbrella or Excess Liability Insurance.</u> Umbrella/Excess Insurance on an "occurrence form" in the minimum amount of \$20,000,000 each occurrence and annual aggregate which shall be in excess of the primary coverage referred to in clause (i) (employer's liability only), clause (ii) and clause (iii) above.</li> <li>v. <u>Pollution Liability.</u> Pollution liability coverage with a limit of not less than \$3,000,000 per claim and in the annual aggregate.</li> </ul> <p>Operator (or its particular contractor or subcontractor) must provide Owner with 30-days prior written notice before any required insurance policy expires, is cancelled, or is altered.</p> <p>Deductible or retention amounts under the required policies must not exceed 5% of the per occurrence coverage limits, without the express written consent of Owner.</p> <p>Each contract of insurance must be with an insurer approved to do business in the State of Utah, is "A-" Rated or better by A.M. Best Company (see <a href="http://www.ambest.com">www.ambest.com</a>)</p>

<sup>1</sup> Insurance coverage, including limit amounts, is subject to further review and change by PacifiCorp.



	<p>and must include the following provisions or endorsements:</p> <p>(A) <u>Additional Insured</u>. Naming Owner, its directors, officers, and employees as additional insureds on the general liability, automobile liability, pollution liability and excess/umbrella insurance policies.</p> <p>(B) <u>Primary Insurance</u>. Stating that the insurance is primary insurance with respect to the interest of Owner and that any insurance maintained by Owner is excess and not contributory insurance.</p> <p>(C) <u>Subrogation Waivers</u>. Providing Owner with waivers of subrogation on all coverages.</p> <p>(D) <u>Separation of Insured</u>. Providing for “<b>Separation of Insured</b>” coverage in the general liability, automobile liability, pollution liability and excess/umbrella insurance policies.</p> <p>(E) <u>Conversion from Claim Made to Occurrence</u>. Providing that, if any policy is maintained on a “claims made” form and is converted to an “occurrence form”, the new policy will be endorsed to provide coverage back to a retroactive date acceptable to Owner.</p> <p>(F) <u>Notice Requirement</u>. Providing that Owner is entitled to 30-days’ prior written notice before such contract of insurance expires, is cancelled, or is altered.</p> <p>Before Operator or any of its subcontractors enters upon the Site, Operator must provide Owner with certificates of insurance that name Owner as an additional insured and that evidence the coverage required by the Agreement, including additional insured endorsement numbers.</p>
<u>Intellectual Property Matters:</u>	<p>Owner shall hold title to any drawings, specifications, documents, plans and designs, licenses or other work product provided by or on behalf of Operator in connection with the BOP O&amp;M Services. In addition, Operator shall grant to Owner, for the life of the Facility, a paid-up, irrevocable, non-exclusive, transferrable, royalty-free right and license under all intellectual property rights that are used by Operator in providing the BOP O&amp;M Services as necessary to own, use, operate, maintain, service, repair, alter commission, decommission, remove, dispose of and transfer ownership of the Facility.</p>
<u>Limitation of Liability:</u>	<p>The Agreement shall provide for typical and customary terms regarding Operator’s aggregate liability for all losses and all other costs and obligations arising out of or relating to the Agreement (with a liability cap in any contract year of 200% of the fee).</p> <p>With the exception of the obligations to indemnify against claims of third parties (and without limiting any obligation of the Operator to pay liquidated damages under the Agreement or the Performance Guarantee), neither party shall be liable to the other for any consequential, incidental, punitive, exemplary or indirect damages or lost profits; <i>provided</i> that to the extent not fully covered by insurance, each party shall remain liable for any damage to or loss of any property or equipment (including</p>

	any deductible amounts) caused by such party's fraud, negligence, gross negligence, or willful misconduct.
<u>Taxes:</u>	Operator shall pay any and all sales and use, goods and services, value added, customs and duties (including federal import taxes, including any import duties or fees, on materials imported for performance of the BOP O&M Services), withholding, service, general excise, ad valorem or similar taxes to the extent assessed or assessable under applicable law, and taxes measured by or imposed on the net income or net profit of Operator.
<u>Records; Audit:</u>	Operator shall maintain in accordance with good regulated utility accounting practices all records relating to the provision of the BOP O&M Services and the Facility for a period not less than the Term of the Agreement plus five (5) years. To the extent specified in the O&M Manual, such records shall be maintained in electronic form on the File Share. In addition, Owner shall have the right to audit and inspect Operator's records upon reasonable advance notice.
<u>Assignment:</u>	Neither party may assign its rights and obligations under the Agreement without the non-assigning party's prior written consent, which consent shall not be unreasonably withheld except that Owner may, without the consent of Operator, 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 consistent with the assignment provisions of the Build Transfer Agreement.
<u>Confidentiality:</u>	Each party shall keep confidential and not disclose any confidential information of the other party, subject to customary exceptions. Notwithstanding the foregoing, Operator shall 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.
<u>Dispute Resolution;</u> <u>Governing Law:</u>	<p>This Term Sheet is, and the Agreement shall be, governed by the laws of the State of Utah, without regard to its conflict of laws provisions.</p> <p>The parties shall submit to the exclusive jurisdiction of the United States Federal District Court located in Salt Lake City, Utah, or, if such court does not have subject matter jurisdiction, the state courts of the State of Utah. Each party shall waive any objection to forum or venue, and any right to jury trial. The parties shall consent to joinder or consolidation with respect to any disputes involving common issues of law or fact with respect to the Facility, the EPC Agreement or any other agreement relating to the Facility.</p> <p>Any disputes between the parties not resolved via good faith negotiations may proceed to litigation unless the parties mutually agree to arbitration, which arbitration shall be in accordance with the Commercial Arbitration Rules of the American Arbitration Association.</p>

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**BUILD TRANSFER AGREEMENT**

**by and between**

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

**as Seller,**

**and**

**PacifiCorp d/b/a Rocky Mountain Power,**

**as Purchaser**

**[\_\_\_\_\_] , 2019**

**[NAME OF PROJECT]**

**[County], [State]**

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Exhibit C – Forms of Assignment and Assumption Agreements

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<sup>1</sup> NTD: To be deleted if replaced with alternative form of security acceptable to Purchaser in its sole discretion.

<sup>2</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>3</sup> NTD: For wind Projects only.

<sup>4</sup> NTD: Project Contracts shall include the Construction Agreements.

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<sup>5</sup> NTD: To be provided by Purchaser.

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

## **BUILD TRANSFER AGREEMENT**

**THIS BUILD TRANSFER AGREEMENT** (the “Agreement”) is made and entered into effective as of [\_\_\_\_], 2019 (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>7</sup> [wind-powered]<sup>8</sup> electric generating facility to be located in [County], [State] and known as [Common Name], which is nominally rated at approximately [\_\_\_\_] MW (dc) (the “Project”).<sup>9</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 to enter into this Agreement and consummate the transactions contemplated by this Agreement: (i) Seller’s Parent Guarantor, who will derive direct and indirect benefits from Seller entering into this Agreement, is guaranteeing all obligations, including the indemnity obligations, of Seller in this Agreement, on the terms and subject to the conditions of the Seller’s Parent Guaranty; (ii) Seller has granted to Purchaser a security interest in the Project Assets, on the terms and subject to the conditions of the Security Agreement; (iii) Seller has granted a mortgage interest in the Project Site, on the terms and subject to the conditions of the Deed of Trust; and (iv) Pledgor, who will derive direct and indirect benefits from Seller entering into this Agreement, has pledged to Purchaser one hundred percent (100%) of the ownership interest in Seller, on the terms and subject to the conditions of the Pledge 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

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<sup>7</sup> NTD: For solar Projects only.

<sup>8</sup> NTD: For wind Projects only

<sup>9</sup> NTD: This Agreement has been prepared to accommodate solar and wind Projects. Conforming changes will be required to accommodate geothermal Projects.

consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows.

## **AGREEMENT**

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

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.

“Accommodation Agreement” means an accommodation agreement with regard to oil and gas or mineral extraction rights at or below the Project Site and associated surface use rights, executed by and between Seller and one or more Mineral Owners and/or Mineral Operators that is substantially and in all material respects in the form attached hereto as Exhibit M-1 (Oil & Gas) or Exhibit M-2 (Minerals).

“Accommodation Payment” means any payment made by or on behalf of Purchaser on or before the date that is sixty (60) months following the Closing Date to any Mineral Operator or Mineral Owner not party to an Accommodation Agreement as of the Closing Date to the extent such payment results from Purchaser’s ownership, use or operation of the Project (as the Project is situated on the Closing Date) on portions of the Project Site at or below which such Mineral Operator or Mineral Owner owns or controls oil and gas or mineral extraction rights.

“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 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” 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.

“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).

“Bankruptcy” means, with respect to a Person, that such Person (a) commences a voluntary case under the Bankruptcy Code; (b) files a petition seeking to take advantage of any Bankruptcy Laws; (c) consents to or fails to contest in a timely and appropriate manner any petition filed against it in an insolvency case under the Bankruptcy Laws; (d) applies for, or consents to or fails to contest in a timely and appropriate manner, the appointment of, or the taking of possession by, a receiver, custodian, trustee, liquidator or the like of itself or of a substantial part of its assets; (e) admits in writing its inability to pay, or generally not be paying, its debts (other than those that are the subject of bona fide disputes) as they become due; (f) makes a general assignment for the benefit of creditors; (g) takes any action for the purpose of effecting any of the foregoing; or (h) has a case or other proceeding commenced by a third party against it seeking (i) relief under any Bankruptcy Laws or (ii) the appointment of a trustee, receiver, custodian, liquidator or the like of such Person of all or any substantial part of its assets, and such case or proceeding continues undismissed or unstayed for a period of sixty (60) days.

“Bankruptcy Code” means Title 11 of the United States Code, as amended from time to time, or any similar federal or state law for the relief of debtors.

“Bankruptcy Laws” means the Bankruptcy Code and all other liquidation, bankruptcy, assignment for the benefit of creditors, conservatorship, moratorium, receivership, insolvency, rearrangement, reorganization or similar debtor relief laws of the United States or other applicable jurisdictions in effect from time to time.

“Bargain and Sale Deed” means the grant, bargain, sale deed in substantially and all material respects in the form of Exhibit D to this Agreement.<sup>10</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>11</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

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<sup>10</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>11</sup> NTD: To be updated to reflect changes pursuant to tax reform/extenders.

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 either or both Salt Lake City Utah, or New York, New York are authorized or obligated to close.

“Claim” means any demand, claim, action, investigation, legal proceeding (whether at law or in equity) or arbitration.

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

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

“Closing Completion” has the meaning set forth in the EPC Agreement.<sup>12</sup>

“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.

“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).

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<sup>12</sup> NTD: Closing Completion will be defined in greater detail in the EPC Agreement but shall be a milestone occurring before mechanical completion at which time material physical work with respect to the Facility remains outstanding.

<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.

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

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

“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 or on behalf of 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 (including the Project Assets), in each case, in order for the Project (including the Project Assets) to achieve Substantial Completion and 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 voting securities or interests, by contract or otherwise, excluding in each case, any secured lender of such Person.

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

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

“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.

“Deed of Trust” means the deed of trust by and between Seller and Purchaser, in the form attached hereto as Exhibit K.

“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]<sup>20</sup> [wind]<sup>21</sup> 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>22</sup> [wind]<sup>23</sup> energy generated by use of [solar]<sup>24</sup> [wind]<sup>25</sup> generation technologies by the Project, or

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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.

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

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



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, 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., (r) National Historic Preservation Act, 54 U.S.C. § 300101 et seq., and (s) state equivalents to items (a) through (r).

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

“EPC Agreement” means [that certain Engineering, Procurement and Construction Agreement]<sup>26</sup> [Balance of Plant Engineering, Procurement and Construction Agreement]<sup>27</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).

“ESA” has the meaning set forth in Section 6.1.15.

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

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

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

<sup>27</sup> NTD: For wind Projects only.

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

[“Facility” means “facility” within the meaning of Code Section 45(d)(1) and Internal Revenue Service Revenue Ruling 94-31.]<sup>28</sup>

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

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

“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, 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

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<sup>28</sup> NTD: For wind Projects only.

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>29</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.

“Interconnection Agreement” means a final generator interconnection agreement to be entered into between Seller and Transmission Provider, which provides, among other things, for the electrical interconnection of the full amount of electrical capacity from the Project to the transmission system of Transmission Provider at the Point of Interconnection, which amount shall not be less than the Planned Project Size of electrical capacity.

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

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<sup>29</sup> NTD: All references to HSR Act in this Agreement shall apply, only if applicable.

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

“Mineral Operator” means all Persons which own, lease or control oil and gas or mineral extraction rights at or below the Project Site and which have active wells or drilling rigs or mining activities located on the Project Site, or have received a permit to drill or to extract minerals from the State of [ ] for the same, including the Persons listed on Schedule 1.1(o).

“Mineral Owner” means all Persons (other than the Federal Government) which own or lease oil and gas or mineral extraction rights at or below the Project Site and whose oil and gas or mineral extraction rights are not controlled by a Mineral Operator.

“Mineral Rights Negotiation Process” means the following actions to be taken (in sequential order) by Seller with respect to each Mineral Operator and Mineral Owner with the intent of executing and delivering an Accommodation Agreement for the Project with each Mineral Operator and Mineral Owner on or before the Closing Date: (a) delivery to such Mineral Operator or Mineral Owner of a form of non-disclosure agreement and the form of Accommodation Agreement in the form attached hereto as Exhibit M-1 or Exhibit M-2, including information regarding the Project location; (b) negotiation and execution of a non-disclosure agreement; (c) mutual exchange of information regarding oil and gas and mineral rights extraction location and operational data as well as any other relevant information regarding the Project; and (d) negotiation and execution of an Accommodation Agreement.

“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>30</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 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.

“PacifiCorp Transmission” means PacifiCorp, an Oregon corporation, including the Grid Operations business unit, 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.

“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

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<sup>30</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.

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; (h) Liens created pursuant to the Purchaser Security Agreements; and (i) 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.

"Planned Project Size" means [\_\_\_\_\_] MW or such other amount as the Parties may mutually agree in writing in their sole discretion.

"Point of Interconnection" means the point where the Project interconnects to the transmission system of Transmission Provider.

"Pledge Agreement" means the pledge agreement by and between Seller and Purchaser, in the form attached hereto as Exhibit L.

"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 Interconnection Agreement, 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 [State] 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], [State], 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.

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

“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 Security Agreements means, collectively, the Security Agreement, the Deed of Trust and the Pledge Agreement.

“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, provided that in no event shall Seller or any Affiliate of Seller be a Representative of Purchaser for purposes of this Agreement.

“Resource Data” means, all [solar irradiance]<sup>31</sup> [wind]<sup>32</sup> and meteorological data (including wind speed and other relevant wind data or characteristics with respect to the Project Site) 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.

“Security Agreement” means the security agreement by and between Seller and Purchaser, in the form attached hereto as Exhibit J.

“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, Seller’s Parent Guarantor or Pledgor; (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 Purchaser Security Agreements or the transactions contemplated hereby or thereby; or (d) the ability of Seller, Seller’s Parent Guarantor or Pledgor to perform its obligations under this Agreement or the Ancillary Agreements or Purchaser Security Agreements to which it 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

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

<sup>32</sup> NTD: For wind Projects only.

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).

“Seller’s Parent Guarantor” means [\_\_\_\_\_].<sup>33</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>34</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.

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<sup>33</sup> NTD: Seller’s Parent Guarantor to be provided by Seller and acceptable to Purchaser.

<sup>34</sup> NTD: For wind Projects only

“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 [\_\_\_\_\_].<sup>35</sup>

“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 Transmission.

[“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>36</sup>

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

“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 and

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<sup>35</sup> NTD Purchaser to identify Title Company.

<sup>36</sup> NTD: For wind Projects only.

any rules and regulations promulgated thereunder.

(e) References to a Person are also to its permitted successors and assigns, and in the case of any Governmental Authority, to any Person(s) succeeding to its functions and capacities.

(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”). When expressing an obligation of a Person, the words “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) Relative to the determination of any period of time, “from” means “including and after,” “to” means “to but excluding”, and “through” means “through and including”.

(l) 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.

1.4 Interpretation with FERC Orders. Each Party conducts and shall conduct its operations in a manner intended to comply with FERC Order No. 717, Standards of Conduct for

Transmission Providers, and its companion orders, requiring the separation of its transmission and merchant functions. Moreover, the Parties acknowledge that Transmission Provider's transmission function offers transmission service on its system in a manner intended to comply with FERC policies and requirements relating to the provision of open-access transmission service. The Parties recognize that Seller will enter into the Interconnection Agreement with the Transmission Provider.

(a) The Parties acknowledge and agree that the Interconnection Agreement shall be a separate and free-standing contract and that the terms hereof are not binding upon the Transmission Provider.

(b) Notwithstanding any other provision in this Agreement, nothing in the Interconnection Agreement, nor any other agreement between Seller on the one hand and Transmission Provider on the other hand, nor any alleged event of default thereunder, shall alter or modify the Parties' rights, duties, and obligation hereunder. This Agreement shall not be construed to create any rights between Seller and the Transmission Provider.

(c) Seller expressly recognizes that, for purposes hereof, the Transmission Provider shall be deemed to be a separate entity and separate contracting party from PacifiCorp whether or not the Interconnection Agreement is entered into with Transmission Provider or an Affiliate thereof. Seller acknowledges that PacifiCorp, acting in its merchant capacity function as purchaser hereunder, has no responsibility for or control over Transmission Provider, and (except as specifically provided herein) is not liable for any breach of agreement or duty or failure of performance by Transmission Provider.

## **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, acquire 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, simultaneously with 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, Project Permits and Project Real Property Agreements; and (b) all of Seller's obligations arising under the Project Contracts, Project Permits and Project Real Property Agreements, 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 (or any Person acting on behalf of

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 relating to, resulting from or arising out of 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 relating to, resulting from or arising out of 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 relating to, resulting from or arising out of: (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 relating to, resulting from or arising out of the Project Contracts or Project Real Property Agreements relating to the period prior to Closing and not expressly assumed by Purchaser pursuant to Section 2.1.2, and all Liabilities relating to, resulting from or arising out of Contracts relating to the Project, the Project Assets or the Project Site which are not Project Contracts or Project Real Property Agreements;

(vi) all Liabilities of Seller and any of its Affiliates relating to, resulting from or arising out of 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 relating to, resulting from or arising out of 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 relating to, resulting from or 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 relating to, resulting from or arising out of 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, resulting from or arising out of 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.

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 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 PacifiCorp, 1407 W. North Temple, Suite 310, Salt Lake City, Utah, 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 by the applicable Party, 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 will execute and deliver or pay (as applicable) to Seller the following items:

(a) a counterpart signature page to the Bill of Sale in substantially and all material respects in 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 and all material respects in 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) [any declaration of value forms for property taxation purposes required by Law, executed by an authorized representative of Purchaser, with respect to the Project

Site]<sup>37</sup>;

(e) 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 Oregon 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;

(f) 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

(g) 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>38</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) [any declaration of value forms for property taxation purposes

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<sup>37</sup> NTD: To be deleted if not applicable.

<sup>38</sup> NTD: To be deleted if not applicable.

required by Law , executed by an authorized representative of Seller, with respect to the Project Site];<sup>39</sup>

(h) 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, with respect to Seller (or its direct or indirect regarded owner, as applicable);

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

(j) 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;

(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>40</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 Assumed Liabilities; and (c) otherwise to complete the transactions contemplated by this Agreement.

### 2.6.2 Pre-Closing Books and Records.

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<sup>39</sup> NTD: To be included only if required.

<sup>40</sup> NTD: Any additional studies and reports to be determined.

(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 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 all 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 all requisite 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 and validly 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 Actions (a) outstanding or pending to which Seller or any of its Affiliates is a party or (b) to Seller's Knowledge, threatened against Seller or any of its Affiliates or any of its or their respective assets and properties, including the Project or Project Assets, in each case, which seek or 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, commissioning, ownership, operation, use or maintenance of the Project in accordance with Good Utility Practice 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 any Affiliate of Seller, 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) neither Seller nor any Affiliate of Seller has 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, Intellectual Property, 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, Intellectual Property, 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, electric capacity, 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(l) 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>41</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

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<sup>41</sup> NTD – To be revised and conformed to reflect specific employee and employee benefits matters applicable to Seller.

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 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 or any of its Affiliates or any of their respective Representatives 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, correct 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 and Purchaser Security Agreements. Each of Seller's Parent Guarantor and Pledgor is duly formed, validly existing and in good standing, as applicable, under the Laws of the jurisdiction of its formation. Each of Seller, Seller's Parent Guarantor and Pledgor has full power and authority to execute and deliver the Seller's Parent Guaranty or Purchaser Security Agreements to which it is a party and to perform its obligations thereunder. The execution and delivery by each of Seller, Seller's Parent Guarantor and Pledgor of the Seller's Parent Guaranty or Purchaser Security Agreements and the performance each of Seller, Seller's Parent Guarantor and Pledgor of its respective obligations thereunder have been duly and validly authorized by all necessary action. Each of Seller's Parent Guaranty and the Purchaser Security Agreements is in full force and effect and constitutes valid and binding obligations of Seller, Seller's Parent Guarantor or Pledgor, as the case may be, enforceable against Seller, Seller's Parent Guarantor or Pledgor, as the case may be, 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 all 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 all requisite 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 Actions (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 seek or 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 or any of its Affiliates or any of their respective Representatives 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 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, shall not 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 applicable Permits, consents, approvals and authorizations of all third parties and Governmental Authorities and, if applicable, the HSR Act filing. 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 Reserved.

5.4 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 Governmental Authorities under any applicable Laws. The Parties shall promptly make any appropriate or necessary subsequent or supplemental filings, and shall promptly furnish each other with copies of any notices, correspondence or other written communication from the relevant Governmental Authority.

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>42</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 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

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<sup>42</sup> NTD – If any portion of the Project Site or Easements are located on federal land, a CFedS will be necessary.

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.

#### 5.7.5 Accommodation Agreements.

(a) As soon as reasonably practicable following the Execution Date, Seller shall commence the Mineral Rights Negotiation Process and thereafter shall use commercially reasonable efforts to (i) deliver a form of non-disclosure agreement and the Accommodation Agreement in the form attached hereto as Exhibit M-1 or Exhibit M-2, including information regarding the Project location, to one hundred percent (100%) of the Mineral Operators listed on Schedule 1.1(o) and to all other Mineral Operators and Mineral Owners and (ii) pursue negotiation and execution of such non-disclosure agreements and, upon execution of any such non-disclosure agreements, pursue negotiation and execution of Accommodation Agreements, substantially and in all material respects in the form attached hereto as Exhibit M-1 or Exhibit M-2, with all such Mineral Operators and Mineral Owners prior to the Closing.

(b) From and after the Closing, for a period of seventy-two (72) months following the Closing Date, Seller shall reimburse Purchaser for any Accommodation Payment made by or on behalf of Purchaser within ten (10) Business Days of written request for reimbursement from Purchaser, provided that such written request for reimbursement shall contain reasonable documentation to substantiate the requested reimbursement amount and the basis of the Accommodation Payment.

#### 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 applicable Laws, Project Permits and 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 and (e) 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; provided, that Seller provides Purchaser with any proposed changes to such forms at least ten (10) Business Days prior to executing such Contract; provided, further that in no event shall such proposed changes (i) have or would reasonably be expected to have an adverse and material effect on the capacity, availability, operations (including costs of operations), maintenance (including the cost of maintenance), reliability, or safety (including safety of construction) of the Project; (ii) cause or would reasonably be expected to cause the Project not to achieve the Commercial Operation Date by the Commercial Operation Deadline; (iii) amend any of the performance remedies or warranties or the Technical Specifications (as defined in the EPC Agreement) applicable to the Project; or (iv) amend any of the defined terms or provisions from the EPC Agreement or any other Project Contract, to the extent such defined terms or provisions are referred to in this Agreement;

(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 (including change orders) in any material respect, terminate or assign, waive, release or assign any material rights or claims under or provide any material consent under, in each case, the EPC Agreement or any other Project Contract, including any modification, amendment, consent, waiver, release or assignment that: (i) has or would reasonably be expected to have an adverse and material effect on the capacity, availability, operations (including costs of operations), maintenance (including the cost of maintenance), reliability, or safety (including safety of construction) of the Project; (ii) causes or would reasonably be expected to cause the Commercial Operation Date not to occur by the Commercial Operation Deadline; (iii) amends any of the performance remedies or warranties or the Technical Specifications (as defined in the EPC Agreement) applicable to the Project; or (iv) amends any of the defined terms or provisions from the EPC Agreement or any other Project Contract, to the extent such defined terms or provisions are referred to in this Agreement; 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(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

(g) 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 not 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), including any Reports delivered pursuant to Section 5.15.2, 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 obtain letters or other authorizations from such Persons who prepared the 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.

**5.17 Interconnection Agreement.** Seller shall provide Purchaser true, correct and complete copies of all material documentation, and material correspondence with Transmission Provider, in connection with the Interconnection Agreement and obtaining interconnection rights for the Project pursuant thereto. Purchaser may review and comment on the proposed Interconnection Agreement with respect to matters for which Purchaser may have Liability or which affect the interconnection rights after the Closing Date as reasonably and timely requested by Purchaser. Purchaser shall cooperate and respond to any reasonable and timely request from Seller for input or information with respect to obtaining Interconnection Rights with respect to the Project. Seller may not enter into the final Interconnection Agreement without the prior written approval of Purchaser (such approval not to be unreasonably withheld, conditioned or delayed).

## **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 HSR Act. 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, 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 Closing Completion 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 Closing Completion 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>43</sup> and any other property that is part of the Project, including the Project Assets, began in [\_\_\_\_];<sup>44</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>45</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 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.

6.1.15 Phase I ESA. Purchaser has received 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.

6.1.16 Interconnection Rights. The Interconnection Agreement has been finalized and executed by the parties thereto in accordance with Section 5.12, any necessary FERC acceptance of the Interconnection Agreement shall have been obtained, and the Interconnection Agreement provides all rights necessary for the Project to interconnect the full amount of the electrical capacity from the Project to the transmission system of Transmission Provider at the Point of Interconnection, which amount shall not be less than the Planned Project Size of electrical capacity.

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):

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

<sup>44</sup> NTD: Seller to provide.

<sup>45</sup> NTD: For wind Projects only.

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 HSR Act. 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; (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; or (c) there has been a breach by Seller or Pledgor of any representation, warranty, covenant or agreement contained in any Purchaser Security Agreement to which it is a party, and such breach has not been cured to Purchaser's reasonable satisfaction within five (5) Business Days following Seller's receipt of written notice of such breach, provided that such 5-Business Day period shall be extended if: (i) such breach is reasonably capable of cure and curing such breach reasonably requires more than five (5) Business Days; and (ii) Seller commences such cure within such 5-Business Day period and diligently prosecutes and completes such cure within an additional five (5) Business Days;



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>46</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>47</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 Purchaser Bankruptcy. By Seller upon written notice to Purchaser, upon the Bankruptcy of Purchaser; or

7.1.8 Seller Bankruptcy. By Purchaser upon written notice to Seller, upon the Bankruptcy of Seller, Seller's Parent Guarantor or Pledgor.

7.2 Effect of Termination or Breach Prior to Closing. If this Agreement is validly

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<sup>46</sup> NTD: Purchaser to provide the Outside Date consistent with the RFP.

<sup>47</sup> NTD: Purchaser to provide the Reports Cut-Off Date.

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. 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));

8.1.5 the Construction Costs; or

8.1.6 the Accommodation Payments.

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 Claim 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 Claim, 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 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 Claim. Notwithstanding the Indemnifying Party's election to assume the defense or investigation of such Claim, 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, 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 or any breach or default in performance of any covenant, obligation or agreement 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, warranties, covenants, obligations or agreements; provided that, and for the

avoidance of doubt, such qualifiers shall be taken into account initially in determining whether a breach of any representations, warranties, covenants, obligations or agreements of Seller or Purchaser has occurred.

## **ARTICLE IX<sup>48</sup>**

### **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.

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<sup>48</sup> NTD: The tax provisions in this Agreement remain subject to further change based on input from PacifiCorp's tax advisors.

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>49</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>50</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>51</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>52</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)

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<sup>49</sup> NTD: For wind Projects only.

<sup>50</sup> NTD: Modify as applicable for solar and wind Projects.

<sup>51</sup> NTD: Modify as applicable for solar and wind Projects.

<sup>52</sup> NTD: Modify as applicable for solar and wind Projects.

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>53</sup>

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>54</sup> and any other property that is part of the Project, including the Project Assets, began in [\_\_\_\_],<sup>55</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>56</sup> and any other property that is part of the Project, including the Project Assets.<sup>57</sup> The Project, including the Purchased Assets, will be Placed In Service in [\_\_\_\_]<sup>58</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.

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

<sup>54</sup> NTD: For wind Projects only.

<sup>55</sup> NTD: Seller to provide.

<sup>56</sup> NTD: For wind Projects only.

<sup>57</sup> NTD: Modifications may be required based on future “begin construction” guidance for solar and wind projects.

<sup>58</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.



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 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>59</sup> including the ability of the Project to be Placed In Service in [\_\_\_\_\_] <sup>60</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

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<sup>59</sup> NTD: To be modified as relevant for the particular Project.

<sup>60</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.

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 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 or the Purchaser Security Agreements, 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; provided that, Seller Indemnified Parties and Purchaser Indemnified Parties shall be third-party beneficiaries of this Agreement solely with respect to their rights to seek indemnification pursuant to Article VIII.

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) any successor to Purchaser where such assignment does not occur by operation of Law; (b) a Person (other than a natural person) providing wholesale or retail electric service in Utah; or (c) 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 and each of the Purchaser Security Agreements remains in full force and effect in accordance with its terms and without change due to such transfer or assignment (or, in the case of the Purchaser Security Agreement, to the extent necessary because of such assignment or delegation, the Purchaser Security Agreements are amended and restated in form and substance satisfactory to Purchaser in its sole discretion); 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. Signatures to this Agreement transmitted by facsimile transmission, by email in "portable document format" (.pdf) form, or by any other electronic means intended to preserve the original graphic and pictorial appearance of a document, will have the same effect as physical delivery of the paper document bearing the original signature.

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

13.16 No Partnership or Joint Venture. The Parties do not intend to create a partnership or joint venture by virtue of this Agreement. Neither Party will owe any fiduciary duty to the other Party by virtue of this Agreement or any other document or Contract contemplated hereby.

[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>61</sup>

See attached

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<sup>61</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>6263</sup>

See attached

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<sup>62</sup> NTD: The version of the term sheet to be attached to be based on the type of the Project.

<sup>63</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>6465</sup>

See attached

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<sup>64</sup> NTD: The version of the term sheet to be attached to be based on the type of the Project.

<sup>65</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>66</sup>  
See attached]<sup>67</sup>

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<sup>66</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>67</sup> NTD: For wind Projects only.

Exhibit H

[Exhibit I  
Form of Service and Maintenance Agreement<sup>68</sup>  
See attached]<sup>69</sup>

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<sup>68</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>69</sup> NTD: For wind Projects only.

Exhibit I

Exhibit J

Form of Security Agreement

[To be provided by Purchaser]

Exhibit J

Exhibit K

Form of Deed of Trust

[To be provided by Purchaser]

Exhibit L

Form of Pledge Agreement

[To be provided by Purchaser]

Exhibit L

Exhibit M-1  
Form of Oil and Gas Accommodation Agreement

Exhibit M-1

Exhibit M-2  
Form of Mineral Accommodation Agreement

Exhibit M-2



**CONSTRUCTION COMPLETION MANAGEMENT AGREEMENT  
TERM SHEET<sup>1</sup>**

THIS TERM SHEET 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 TERM SHEET OR ON STATEMENTS MADE DURING NEGOTIATIONS PURSUANT TO THIS TERM SHEET SHALL BE AT THAT PARTY'S OWN RISK. UNTIL THE PARTIES HAVE COMPLETED THEIR DUE DILIGENCE AND A DEFINITIVE 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 TERM SHEET OR IN THE COURSE OF ANY NEGOTIATIONS.

<u>Construction Manager:</u>	[ ] (" <b>Construction Manager</b> ").
<u>Owner:</u>	PacifiCorp an Oregon corporation d/b/a Rocky Mountain Power (" <b>Owner</b> "). Construction Manager and Owner have entered into that certain Build Transfer Agreement (" <b>Build Transfer Agreement</b> ") whereby Owner shall purchase (and Construction Manager shall sell and transfer) the Facility (as defined below) prior to Closing Completion (as defined in the Build Transfer Agreement).
<u>Relationship of Parties:</u>	Owner designates Construction Manager as its representative and agent to perform the duties per the performance standard, including to act as agent under all construction contracts and interconnection agreements to be set forth on an exhibit to the Agreement (the " <b>Project Development Contracts</b> ").
<u>Limitations on Authority:</u>	Construction Manager may not take certain actions without the prior written approval of Owner, including but not limited to: declaring an event of force majeure or event of default under any of the Project Development Contracts; materially amending, modifying, terminating or waiving any of the Project Development Contracts; initiating or settling any dispute.
<u>Scope:</u>	Construction Manager and Owner would enter into a Construction Completion Management Agreement (the " <b>Agreement</b> ") for the provision of CCM Services (defined below) with respect to a renewable power plant (the " <b>Facility</b> ") to be located in [ ] (the " <b>Site</b> ") and to be constructed pursuant to an Engineering, Procurement and Construction Agreement (the " <b>EPC Agreement</b> ") between Construction Manager and [ ] (" <b>EPC Contractor</b> "), which will be assigned by Construction Manager to Owner at the closing under the Build Transfer Agreement.

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

<u>CCM Services:</u>	Construction Manager shall provide all necessary and appropriate construction management services and warranty support services for the entire Facility for the duration of the Term (the “ <b>CCM Services</b> ”), including as set forth on <b>Exhibit A</b> hereto. Construction Manager shall be responsible for and shall cause the Project to be completed in accordance with the milestones in the project schedule. Failure by the EPC Contractor to cause the Project to be completed in accordance with the milestones in the project schedule shall not relieve Construction Manager of its responsibility for or liability in respect of the same.
<u>Construction Contractor Claims:</u>	Construction Manager shall have the authority to assert and control, at Construction Manager’s sole expense, any claims that Owner may have against EPC Contractor, or any other contractor under the Project Development Agreements, <i>provided</i> that Construction Manager shall promptly notify Owner and shall not settle any claim without Owner’s consent. All liquidated damages payable under the Project Development Agreements shall be for the account of Owner, <i>provided</i> that if and to the extent Construction Manager has liability to Owner under the Build Transfer Agreement for liquidated damages similar to the liquidated damages collected by Owner or Construction Manager on behalf of Owner under the Project Development Agreements, then such collected liquidated damages shall offset and reduce Construction Manager’s liability to Owner for such similar liquidated damages under the Build Transfer Agreement.
<u>Performance Security:</u>	Construction Manager will cause [ ] (“ <b>Construction Manager Parent</b> ”), its parent, to provide or maintain any Owner parent guaranty or equivalent security required under any Project Development Contract (“ <b>Performance Security</b> ”) until the Final Completion Date. Construction Manager and Construction Manager Parent will not have any obligation to provide Performance Security from or after payment of all sums due to the EPC Contractor and other contractors under the Project Development Contracts as of the Final Completion Date.
<u>Payment Obligations; Sole Compensation:</u>	<p>Construction Manager shall be responsible for and make all payments under the Project Development Contracts that have not been paid as of the closing of the Build Transfer Agreement, including but not limited to all Construction Costs and any other ancillary costs associated with construction of the Facility. Owner will submit any invoices received under the Project Development Contracts to the Construction Manager for review, approval and payment.</p> <p>Owner will reimburse Construction Manager on a monthly basis for payments made under the Project Development Contracts for (i) any amounts owed as a result of any change order approved by Owner, or (ii) any amounts owed pursuant to indemnification obligations under any Project Development Contracts for losses due to Owner after the closing of the Build Transfer Agreement. Construction Manager will give Owner at least 10 business days’ prior notice of any reimbursable expense before such amount is due, and Owner will pay Contract Manager such amount within 10 business days of the receipt of such invoice.</p> <p>Construction Manager’s sole compensation is payment of the Purchase Price under the Build Transfer Agreement.</p>

<u>Standard of Performance:</u>	All CCM Services shall be performed by Construction Manager in a good and workmanlike manner, free of any defect or deficiency, consistent with prudent industry practices with respect to first-tier, grid-interconnected, rate-based, utility-scale solar plants in the Western United States, applicable laws, applicable permits, governmental approvals, applicable project documents, the Warranties, the CCM Manual, the Safety Plan and Owner's operating procedures (collectively, the " <b>Requirements</b> ").
<u>Effectiveness:</u>	The Agreement shall be executed and become effective on the closing of the Build Transfer Agreement.
<u>Term:</u>	The term of the Agreement shall commence on closing of the Build Transfer Agreement and end on the later of (i) Final Completion under the EPC Agreement and (ii) the final resolution of any claims under the Project Development Contracts (the " <b>Term</b> ").
<u>Independent Contractor:</u>	Construction Manager is acting and shall be deemed for all purposes to be an independent contractor and nothing in the Agreement shall be construed as constituting any relationship with Owner other than that of owner and independent contractor. Owner and Construction Manager are not partners, agents or joint venturers with each other, and the Agreement is not intended to nor shall it be construed to create a partnership or joint venture between Owner and Construction Manager. Construction Manager shall complete the CCM Services according to its own means and methods of work, which shall be in the exclusive charge and control of Construction Manager and which shall not be subject to the control and supervision of Owner, except as to the results of the CCM Services.
<u>Personnel:</u>	Construction Manager shall provide an appropriate number of suitably qualified, trained, competent and experienced management, operating and maintenance personnel necessary to perform the CCM Services, and such personnel shall perform such CCM Services in accordance with the applicable Requirements (defined below). Construction Manager shall pay all wages and benefits required by applicable law or contract with respect to personnel performing the CCM Services. Construction Manager shall be responsible for all matters relating to labor relations (including confirming labor union agreement with applicable project labor agreements), working conditions, training, employee benefits, safety programs and related matters pertaining to such personnel, including, if applicable, with any prevailing wage, project labor or other requirements.
<u>Reporting Requirements:</u>	Construction Manager shall prepare and deliver a bi-weekly status report depicting: (a) construction progress, (b) a comparison of the planned versus the action schedule of construction activities, and (c) any other information reasonably requested to be included by Owner. Construction Manager will also promptly notify Owner of any accidents involving injury to anyone, or material damage to any of the assets or rights of Owner, any incident that may result in a material delay to achieving Substantial Completion or Final Completion (each as defined in the EPC Agreement), any environmental non-compliance, any breach of a Permit, any event of force majeure or event of default, or any other emergency.

<u>Cooperation:</u>	Construction Manager shall cooperate with Owner in its performance of Owner's obligations. Construction Manager will act in accordance with the Requirements.
<u>Site Access:</u>	Owner shall provide Construction Manager with such access to the Facility as reasonably necessary to enable Construction Manager to perform its obligations, including ingress and egress rights to the Site. Construction Manager shall take commercially reasonable efforts to perform its obligations in such a manner that minimize the inconvenience to and interference with Owner's use of the Site.
<u>Indemnification:</u>	Construction Managers shall indemnify Owner and its affiliates, successors, assigns, officers, directors, employees and agents (" <b>Owner Parties</b> "), and hold them harmless from and against all reasonable out-of-pocket costs, expenses and actual liabilities arising out of or relating to any claim or any litigation or other proceeding that relate to (a) claims for injury or property damage, (b) worker's compensation claims, (c) penalties due to failure to comply with applicable law, (d) taxes owed by Construction Manager, (e) Liens arising with respect to the Facility and (f) hazardous substances.
<u>Liens:</u>	Construction Manager shall keep and maintain the Facility and the Site free and clear of all liens, encumbrances, claims, charges that if unpaid, might become a lien, and rights of retention (" <b>Liens</b> ") resulting from the action of Construction Manager or work done at the request of Construction Manager (including without limitation, work done by any subcontractor, supplier of goods or services, employee, material man or laborer). Construction Manager shall notify Owner of any Lien and as soon as reasonably practicable pay or discharge any Lien
<u>Termination Rights:</u>	<p>The Agreement shall provide for typical and customary termination rights, including termination for insolvency, bankruptcy, non-payment, prohibited assignment, etc.</p> <p>Following any termination of the Agreement for any reason, Construction Manager shall no longer have any authority with respect to the Project.</p>
<u>Insurance:</u>	<p>Construction Manager shall maintain in effect, insurance coverage of the following types and limits in addition to any other coverage required by law:<sup>2</sup></p> <ul style="list-style-type: none"> <li>i. <u>Workers' Compensation Insurance.</u> Workers' Compensation in the minimum amount required by statute and Employers' Liability with minimum limit of \$1,000,000.</li> <li>ii. <u>Commercial General Liability Insurance.</u> Commercial General Liability on an "occurrence form" in the minimum amount of \$2,000,000 per occurrence combined single limit and \$3,000,000 in aggregate, including (a) broad form contractual liability coverage, (b) products/completed operations, (c) personal injury, (d) independent contractors and (e) sudden and accidental pollution liability (if not provided by separate pollution coverage). Coverage shall include a cross liability/severability of interests clause.</li> <li>iii. <u>Automobile Liability Insurance.</u> Comprehensive Automobile Liability in the minimum amount of \$1,000,000 each accident combined single limit, including owned, hired and non-owned vehicles.</li> </ul>

<sup>2</sup> Insurance coverage, including limit amounts, is subject to further review and change by PacifiCorp.

	<p>iv. <u><b>Umbrella or Excess Liability Insurance.</b></u> Umbrella/Excess Insurance on an “occurrence form” in the minimum amount of \$20,000,000 each occurrence and annual aggregate which shall be in excess of the primary coverage referred to in clause (i) (employer’s liability only), clause (ii) and clause (iii) above.</p> <p>Construction Manager (or its particular contractor or subcontractor) must provide Owner with 30-days prior written notice before any required insurance policy expires, is cancelled, or is altered.</p> <p>Deductible or retention amounts under the required policies must not exceed 5% of the per occurrence coverage limits, without the express written consent of Owner.</p> <p>Each contract of insurance must be with an insurer approved to do business in the State of Utah, is “A-” Rated or better by A.M. Best Company (see <a href="http://www.ambest.com">www.ambest.com</a>) and must include the following provisions or endorsements:</p> <p>(A) <u><b>Additional Insured.</b></u> Naming Owner, its directors, officers, and employees as additional insureds on the general liability, automobile liability, pollution liability and excess/umbrella insurance policies.</p> <p>(B) <u><b>Primary Insurance.</b></u> Stating that the insurance is primary insurance with respect to the interest of Owner and that any insurance maintained by Owner is excess and not contributory insurance.</p> <p>(C) <u><b>Subrogation Waivers.</b></u> Providing Owner with waivers of subrogation on all coverages.</p> <p>(D) <u><b>Separation of Insured.</b></u> Providing for “<b>Separation of Insured</b>” coverage in the general liability, automobile liability, pollution liability and excess/umbrella insurance policies.</p> <p>(E) <u><b>Conversion from Claim Made to Occurrence.</b></u> Providing that, if any policy is maintained on a “claims made” form and is converted to an “occurrence form”, the new policy will be endorsed to provide coverage back to a retroactive date acceptable to Owner.</p> <p>(F) <u><b>Notice Requirement.</b></u> Providing that Owner is entitled to 30-days’ prior written notice before such contract of insurance expires, is cancelled, or is altered.</p> <p>Before Construction Manager or any of its subcontractors enters upon the Site, Construction Manager must provide Owner with certificates of insurance that name Owner as an additional insured and that evidence the coverage required by the Agreement, including additional insured endorsement numbers.</p>
<u><b>Records; Audit:</b></u>	<p>Construction Manager shall maintain in accordance with good regulated utility accounting practices all records relating to the provision of the CCM Services and the Facility for a period not less than the Term of the Agreement plus five (5) years. To the extent specified in the CCM Manual, such records shall be maintained in</p>

	electronic form on a file sharing site. In addition, Owner shall have the right to audit and inspect Construction Manager's records upon reasonable advance notice.
<u>Business Practices:</u>	Construction Manager, its employees, agents, representatives and subcontractors shall at all times maintain high ethical standards and avoid conflicts of interest in performing the CCM Services. In conjunction with its performance of CCM Services, Construction Manager and its employees, officers, agents and representatives shall comply with, and cause its subcontractors and their respective employees, officers, agents and representatives to comply with, all applicable laws prohibiting bribery, corruption, kick-backs or similar unethical practices including, without limitation, the United States Foreign Corrupt Practices Act and Owner's "code of business conduct", which code of business conduct would be included as an exhibit to the Agreement.
<u>Assignment:</u>	Neither party may assign its rights and obligations under the Agreement without the non-assigning party's prior written consent, which consent shall not be unreasonably withheld except that Owner may, without the consent of Construction Manager, 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 consistent with the assignment provisions of the Build Transfer Agreement.
<u>Confidentiality:</u>	Each party shall keep confidential and not disclose any confidential information of the other party, subject to customary exceptions. Notwithstanding the foregoing, Construction Manager shall 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.
<u>Dispute Resolution:</u> <u>Governing Law:</u>	<p>This Term Sheet is, and the Agreement shall be, governed by the laws of the State of Utah, without regard to its conflict of laws provisions.</p> <p>The parties shall submit to the exclusive jurisdiction of the United States Federal District Court located in Salt Lake City, Utah, or, if such court does not have subject matter jurisdiction, the state courts of the State of Utah. Each party shall waive any objection to forum or venue, and any right to jury trial. The parties shall consent to joinder or consolidation with respect to any disputes involving common issues of law or fact with respect to the Facility, the EPC Agreement or any other agreement relating to the Facility.</p> <p>Any disputes between the parties not resolved via good faith negotiations may proceed to litigation unless the parties mutually agree to arbitration, which arbitration shall be in accordance with the Commercial Arbitration Rules of the American Arbitration Association.</p>

## **Exhibit A**

### **CCM Services**

Construction Manager shall provide the following services under the Agreement.

**1) Construction Management Services:** Construction Manager shall provide Construction Management Services including:

- i. Performing all duties and obligations of Owner under the Project Development Contracts, other than Owner's obligation with respect to access to the Site
- ii. Delivering any completion certificate under the Project Development Contracts to the respective counterparties in the name of and on behalf of Owner
- iii. Exercising any step-in and cure rights of Owner (if any) to execute and perform the obligations of each counterparty to the Project Development Contracts in the event of a default by a counterparty
- iv. Paying all invoices issued under the Project Development Contracts, monitoring all costs associated with construction, and informing the Company with respect thereto
- v. Supervising, coordinating, administering, managing and monitoring the construction of the Facility and construction work in accordance with the Project Development Contracts and the Project Schedule:
  1. The construction, start-up, commissioning, testing and performance of the Facility under the Project Development Contracts
  2. All quality assurance procedures necessary under the Project Development Contracts
  3. Coordination of work of the construction contractors
  4. All permitting, design, architecture and engineering and procurement for the Facility
- vi. Supervising and administering the performance by counterparties to the Project Development Contracts of their obligations and covenants under the relevant Project Development Contracts
- vii. Taking necessary steps to cause the Commercial Operation Date to occur prior to the Commercial Operation Deadline
- viii. Promptly forwarding to Owner all correspondence related to the Facility
- ix. Maintaining, administering and preserving and performing any obligations of Owner under and obtaining in the name of Owner all necessary Permits
- x. Assisting and cooperating with the Owner in its enforcement of the Project Development Contracts
- xi. Monitoring, managing and enforcing safety programs
- xii. Approving punch lists and monitoring and managing the performance of the construction contractors in connection with the finalization of items on the punch lists and each of the milestones for Financial Completion
- xiii. Conducting meetings with construction contractors as reasonably appropriate to monitor the progress of the Facility
- xiv. Overseeing the completion of any warranty work carried over from construction
- xv. Providing information reasonably requested by Owner in connection with requirements of any financing party
- xvi. Maintain any credit support required under the Project Development Contracts through Final Completion, and
- xvii. Such other services as may be mutually agreed upon by the parties

**2) Warranty Support Services:**

- a. Construction Manager shall provide Warranty Support Services including:
  - i. Managing the warranty investigation and claim process in consultation with Owner regarding Facility performance and other operation matters and recommend potential corrective action
  - ii. If Facility performance issues are covered under the Warranties, Construction Manager shall be responsible for pursuing compliance of all performance obligations owed to Owner under the Project Development Contracts
- b. Construction Manager's obligations for pursuing compliance with the Warranties are limited to:
  - i. Timely notification to Warranty provider, and
  - ii. Providing reasonable information to such Warranty provider
- c. Construction Manager shall not be liable for:
  - i. The performance or failure to perform of the Facility
  - ii. The performance or failure to perform by the provider of any Warranty
  - iii. Any act or omission of any provider of any Warranty
  - iv. Initiating or assisting with respect to any disputes or dispute resolution between Owner and provider of any Warranty



**SERVICE AND MAINTENANCE AGREEMENT TERM SHEET<sup>1</sup>**

THIS TERM SHEET 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 TERM SHEET OR ON STATEMENTS MADE DURING NEGOTIATIONS PURSUANT TO THIS TERM SHEET SHALL BE AT THAT PARTY'S OWN RISK. UNTIL THE PARTIES HAVE COMPLETED THEIR DUE DILIGENCE AND A DEFINITIVE 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 TERM SHEET OR IN THE COURSE OF ANY NEGOTIATIONS.

<u>Contractor:</u>	[ ] (" <b>Contractor</b> ").
<u>Owner:</u>	PacifiCorp, an Oregon corporation d/b/a Rocky Mountain Power (" <b>Owner</b> "). Owner and [ ] (" <b>Developer</b> ") have entered into that certain Build Transfer Agreement (" <b>Build Transfer Agreement</b> ") whereby Owner shall purchase (and Developer shall sell and transfer) the Facility (as defined below) prior to Closing Completion (as defined in the Build Transfer Agreement).
<u>Scope:</u>	Contractor and Owner would enter into a Service and Maintenance Agreement (the " <b>Agreement</b> ") for the provision of scheduled and unscheduled maintenance services on wind turbine generators (" <b>WTGs</b> "), towers, SCADA system, fire suppression system, switchgear, climb assists and other ancillary WTG related equipment (and on replacement parts installed in any of them) (the " <b>Serviced Equipment</b> ") at Owner's wind-powered electric generation facility (the " <b>Facility</b> ") to be located in [ ] (the " <b>Site</b> ") and to be constructed pursuant to a Balance of Plant Engineering, Procurement and Construction Agreement (the " <b>EPC Agreement</b> ") between [ ] (" <b>EPC Contractor</b> ") and Developer. The EPC Agreement will be assigned by Developer to Owner prior to Project Mechanical Completion and the commencement of the Term of the Agreement (at closing of the Build Transfer Agreement). In addition to the Agreement, there will be a separate Turbine Supply Agreement (" <b>TSA</b> ") with respect to the WTGs to be executed by Contractor and Developer.
<u>SMA Services:</u>	<p>Contractor shall provide all typical and customary, necessary and recommended preventative, scheduled and unscheduled maintenance services for the Serviced Equipment for the duration of the Term, which services shall include typical and customary long-term servicing activities for WTGs, to be defined and set forth in an exhibit to the Agreement, but including, at a minimum, (a) Planned Maintenance and Unplanned Maintenance including provision and maintenance of all labor, tools and safety equipment required for such maintenance and service of WTGs, (b) In-and-Out Activities and (c) services comprising or related to inspections and testing of parts or components of the WTGs including vibration analysis (the "<b>SMA Services</b>").</p> <p>In addition, Contractor may perform certain extra work requested by Owner or recommended by Contractor and documented in a written change order executed by Owner and Contractor (the "<b>Extra Work</b>").</p>

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

<u>Planned Maintenance:</u>	<p><b>“Planned Maintenance”</b> shall include any and all typical and customary inspection, testing, maintenance and replacement of Covered Parts and Miscellaneous Hardware of the Serviced Equipment and any SMA Services as may be necessary:</p> <ul style="list-style-type: none"> <li>(i) to complete all inspections in accordance with a schedule and scope of work to be agreed by Owner and Contractor and set forth in the Agreement (the <b>“Scheduled Inspections”</b>);</li> <li>(ii) to perform, as necessary, typical and customary maintenance on each WTG following the removal of such WTG from electric or power generation service due to Planned Maintenance (a <b>“Planned Maintenance Outage”</b>); and</li> <li>(iii) to repair or replace Covered Parts as required by the original manufacturer’s recommendations, including all Service Bulletins issued by Contractor or its Affiliates and relating to potential defects of the Covered Parts or any parts or components thereof.</li> </ul>
<u>In-and-Out:</u>	Contractor shall be responsible for all in-and-out activities (and costs related thereto) necessary to perform all Planned Maintenance on the Serviced Equipment, including (a) the removal, disassembly and opening of all coverings, assemblies, systems, structures and components of the Serviced Equipment so as to allow access as required, (b) the replacing, reassembly and closing of such coverings, assemblies, systems, structures and components of the Serviced Equipment that were affected, and (c) the provision of all tools, equipment, labor, technical direction, and start-up support in connection therewith (the <b>“In-and-Out Activities”</b> ).
<u>Covered Parts:</u>	During the Term, Contractor shall provide Covered Parts, Miscellaneous Hardware and Spare Parts for Planned Maintenance, Unplanned Maintenance and Extra Work. <b>“Covered Parts”</b> shall include parts typical and customary in the operation of WTGs of the model(s) used in the Facility.
<u>Miscellaneous Hardware:</u>	<b>“Miscellaneous Hardware”</b> shall include the consumable and contingency hardware (such as bolts, studs, screws, nuts, washers, lock wire, lock washers, pins and springs) required for disassembly and reassembly of the Serviced Equipment.
<u>Spare Parts Title:</u>	<p>Contractor shall maintain any initial spare parts provided by Owner or EPC Contractor and otherwise supply (in conjunction with provision of Spare Parts by the Contractor under the TSA) all necessary and recommended spare parts and consumables for the Facility (collectively, the <b>“Spare Parts”</b>). Contractor shall maintain the Spare Parts at its own expense at the Site and on a dedicated basis for exclusive use for the Facility; <i>provided, however</i>, that with respect to Spare Parts related to Extra Work, Contractor shall offer to sell to Owner such Spare Parts as are manufactured by Contractor or its affiliates (including Seller under the TSA) at Contractor’s then-current market prices in the United States for spare parts and consumables subject to an agreed-upon discount set forth in the Agreement.</p> <p>Contractor shall provide a monthly report with respect to the inventory of Spare Parts, including any parts procured or replaced during such period, and shall make recommendations to Owner regarding the appropriate number and type of Spare Parts for the Facility. Title to such Spare Parts shall transfer from Contractor to Owner upon the earlier of Owner’s payment therefor or installation of the same into the Facility.</p>

	All Spare Parts procured or used with respect to the Facility shall be new OEM parts that comply with any applicable warranty requirements.
<u>Technical Advisory Services:</u>	“ <b>Technical Advisory Services</b> ” shall include technical advice, instruction, direction, information, or assistance and counsel provided by Contractor or its personnel (including, but not limited to, the individual who shall be on-Site on a full-time basis) or any field engineers, supervisors or inspectors who may be provided by Contractor for the purpose of Planned Maintenance, Unplanned Maintenance or Extra Work concerning installation, operation, inspection, maintenance, repair and removal of Covered Parts or for the Serviced Equipment. Unless otherwise specified in the Agreement, Technical Advisory Services would not include supervision or management of Owner’s employees, agents, or other contractors.
<u>Unplanned Maintenance:</u>	Contractor shall provide all Covered Parts, Miscellaneous Hardware, tools and equipment (including cranes) and SMA Services, and undertake all activities necessary to plan and perform all Unplanned Maintenance. “ <b>Unplanned Maintenance</b> ” shall include any and all inspection, testing, maintenance, replacement and refurbishment of parts and components of the Serviced Equipment and the performance of SMA Services as may be necessary to remedy any sudden and accidental in-service failure of any part or component (without prejudice to Contractor’s warranty obligations), including any “downstream” or “collateral” physical property damage caused by Covered Parts, Miscellaneous Hardware or SMA Services provided by Contractor. Contractor’s Unplanned Maintenance obligations would result from (without limitation) the following circumstances: (a) the Covered Parts or Miscellaneous Hardware proved defective, (b) damage occurred to the Serviced Equipment, Covered Parts or Miscellaneous Hardware while within the care, custody and control of Contractor (e.g., foreign object damage), (c) the root technical cause of an incident involving a Covered Part or Miscellaneous Hardware cannot be determined after a reasonable time for technical assessment, or (d) a Covered Part fails after a Planned Maintenance interval has been extended based on Contractor’s technical recommendation.
<u>SMA Fee:</u>	The Agreement shall provide for a typical and customary fixed annual fee (the “ <b>SMA Fee</b> ”). Contractor shall not be entitled to any additional compensation, except as set forth in a change order with respect to Extra Work and in connection with Owner’s purchase of Spare Parts as described above.
<u>Term:</u>	The Agreement shall be executed and effective on or before the date that the EPC Agreement is executed by both Developer and EPC Contractor, <i>provided</i> that the operational term of the Agreement shall commence upon Project Mechanical Completion (as defined in the EPC Agreement) of the Facility and expire upon the date that is twenty (20) calendar years from the commencement of the Agreement (the “ <b>Term</b> ”).

<u>Independent Contractor:</u>	Contractor is acting and shall be deemed for all purposes to be an independent contractor and nothing in the Agreement shall be construed as constituting any relationship with Owner other than that of owner and independent contractor. Owner and Contractor are not partners, agents or joint venturers with each other, and the Agreement is not intended to nor shall it be construed to create a partnership or joint venture between Owner and Contractor. Contractor shall complete the SMA Services according to its own means and methods of work, which shall be in the exclusive charge and control of Contractor and which shall not be subject to the control and supervision of Owner, except as to the results of the SMA Services.
<u>Subcontracts:</u>	Subject to Owner's consent, not to be unreasonably withheld, Contractor may enter into subcontracts for particular aspects of its obligations under the Agreement. All subcontracts shall incorporate and flow-down applicable requirements from the Agreement (including with respect to insurance), be assignable to the Owner upon termination of the Agreement and provide that Owner is a third-party beneficiary thereunder. Contractor shall ensure that all subcontracts contain warranties with respect to services and equipment that comply with Owner's warranty requirements.
<u>Personnel:</u>	Contractor shall provide an appropriate number of suitably qualified, trained, competent and experienced management, operating and maintenance personnel necessary to perform the SMA Services, and such personnel shall perform such SMA Services in accordance with the applicable Requirements (defined below). Contractor shall pay all wages and benefits required by applicable law or contract with respect to personnel performing the SMA Services. Contractor shall be responsible for all matters relating to labor relations (including confirming labor union agreement with applicable project labor agreements), working conditions, training, employee benefits, safety programs and related matters pertaining to such personnel, including, if applicable, with any prevailing wage, project labor or other requirements.
<u>Business Practices:</u>	Contractor, its employees, agents, representatives and subcontractors shall at all times maintain high ethical standards and avoid conflicts of interest in performing the SMA Services. In conjunction with its performance of the SMA Services, Contractor and its employees, officers, agents and representatives shall comply with, and cause its subcontractors and their respective employees, officers, agents and representatives to comply with, all applicable laws prohibiting bribery, corruption, kick-backs or similar unethical practices including, without limitation, the United States Foreign Corrupt Practices Act and Owner's "code of business conduct", which code of business conduct would be included as an exhibit to the Agreement.
<u>SMA Manual:</u>	The Agreement shall provide typical and customary provisions regarding Contractor's provision of an SMA Manual (similar to an O&M Manual) for Owner's review and approval.
<u>Annual Maintenance Plan:</u>	The Agreement shall provide typical and customary provisions regarding Contractor's provision of an Annual Maintenance Plan for Owner's review and approval. Such Annual Maintenance Plan shall be integrated with the SMA Manual.
<u>Minimal</u>	Contractor shall use commercially reasonable efforts, in light of the circumstances at the time, to perform the SMA Services in a manner that will minimize interference

<u>Interference:</u>	with the operation of the Facility (by the BOP O&M operator) and to conduct its work at such times so as to minimize reduction of production in respect of the Facility.
<u>Hazardous Substances:</u>	Contractor shall minimize the use of hazardous substances and shall not and shall not permit any of its subcontractors, directly or indirectly, to use, handle, store, generate, manufacture, transport or release any hazardous substances in, on or under the Facility, the Site and any adjacent areas thereto, except to the extent required for the performance of the SMA Services, and, in each such case in accordance with the Requirements and at the sole cost and expense of Contractor. Contractor shall promptly comply with all orders and directives of all governmental authorities regarding the use, transportation, storage, handling or presence of hazardous substances. If Contractor discovers, encounters or is notified of the presence or any release of any hazardous substances at the Site, Contractor shall promptly notify Owner thereof and stop work in and restrict access to the area containing such hazardous substances. Contractor shall conduct and complete all investigations, studies, sampling, testing and remediation of the Site as required by the Requirements in connection with the release of hazardous substances by Contractor. Contractor shall not be entitled to any extension of time or additional compensation for any delay or costs incurred by Contractor as a result of the remediation or removal of hazardous substances for which Contractor is responsible.
<u>Title; Risk:</u>	The Agreement shall provide for typical and customary provisions with respect to delivery of Covered Parts and Miscellaneous Hardware as well as transfer of title.
<u>Standard of Performance:</u>	All SMA Services shall be performed by Contractor in a good and workmanlike manner, free of any defect or deficiency, consistent with prudent industry practices with respect to first-tier, grid-interconnected, rate-based wind facilities in the Western United States, applicable laws, applicable permits, governmental approvals, applicable project documents, the warranties applicable to the Serviced Equipment and the Covered Parts, the SMA Manual, the Safety Plan and Owner's operating procedures (collectively, the " <b>Requirements</b> ").
<u>Services Warranty:</u>	The Agreement shall provide for typical and customary provisions with respect to Contractor's warranty of the SMA Services, including a services warranty that extends at least two (2) years after the conclusion of the Term of the Agreement and extensions of the services warranty for two (2) years following repair and replacement of parts and equipment.
<u>Safety Requirements:</u>	Contractor shall take necessary safety and other precautions to protect property and persons from damage, injury or illness arising out of the performance of the SMA Services and be responsible for the compliance by Contractor, its employees, agents, representatives and subcontractors with all requirements governing occupational health and safety in accordance with the Requirements. Contractor shall be solely responsible for initiating, maintaining, and supervising all safety measures and programs in connection with the performance of the SMA Services. Contractor shall strictly comply with the terms of Owner's site safety plan (the " <b>Safety Plan</b> "). Owner shall be entitled to review and provide comments to the Safety Plan and Contractor shall incorporate any comments provided by Owner. Contractor shall be responsible for updating and revising the Safety Plan to comply with all Requirements including any changes thereto. Contractor shall comply with the

	Safety Plan including with respect to passes, badges, drug and alcohol testing and conduct on the Site.
<u>Performance Guarantee:</u>	The Agreement shall provide for typical and customary performance guarantee provisions.
<u>Credit Support:</u>	Contractor will provide such credit support as may be reasonably required by Owner based on Owner's analysis of relevant financial criteria with respect to Contractor's financial capability to satisfy its obligations under the Agreement.
<u>Regulatory/ Compliance:</u>	Contractor shall comply with all requirements of any governmental authorities including, but not limited to, NERC, WECC, CAISO, WREGIS and the UPSC, as applicable.
<u>Site Access:</u>	Owner shall provide Contractor with such access to the Facility as reasonably necessary to enable Contractor to perform its obligations, including ingress and egress rights to the Site. Such access shall extend to the employees, contractors and subcontractors of Contractor and to local electric utility personnel, and be in accordance with any ground lease, easement or related instrument in effect with respect to the Site. Contractor shall take commercially reasonable efforts to perform its obligations in such a manner that minimize the inconvenience to and interference with Owner's use of the Site.
<u>Indemnification:</u>	Contractor shall indemnify Owner and its affiliates, successors, assigns, officers, directors, employees and agents (" <b>Owner Parties</b> ") and hold them harmless from and against all reasonable out-of-pocket costs, expenses and actual liabilities arising out of or relating to any claim or any litigation or other proceeding that relate to (a) claims for injury or property damage, (b) worker's compensation claims, (c) penalties due to failure to comply with applicable law, (d) taxes owed by Contractor, (e) Liens arising with respect to the Facility and (f) hazardous substances.
<u>Liens:</u>	Contractor shall keep and maintain the Facility and the Site free and clear of all liens, encumbrances, claims, charges that if unpaid, might become a lien, and rights of retention (" <b>Liens</b> ") resulting from the action of Contractor or work done at the request of Contractor (including without limitation, work done by any subcontractor, supplier of goods or services, employee, material man or laborer). Contractor shall take prompt steps to discharge any such Lien. Contractor shall require each of its subcontractors to make payments to their respective subcontractors and sub-subcontractors in a similar manner, and Contractor shall indemnify and hold harmless Owner for any losses or expenses incurred by Owner (including reasonable attorneys' fees) in discharging any such Lien. Upon request from Owner, Contractor shall request lien waivers from a subcontractor upon completion and payment for such subcontractor's relevant work and, upon request from Owner, Contractor shall supply copies of such lien waivers to Owner.
<u>Termination Rights:</u>	<p>The Agreement shall provide for typical and customary termination rights and associated termination payments, including termination for insolvency, bankruptcy, non-payment, prohibited assignment, etc.</p> <p>Following any termination of the Agreement for any reason, Contractor shall</p>

	(a) withdraw from the Site and expeditiously transfer to Owner any Spare Parts, warranties, manuals, software licenses, keys, access credentials, records, reports and other documentation relating to the Facility and the SMA Services and (b) cooperate with Owner and any replacement service provider concerning the transition to such replacement service provider.
<u>Insurance:</u>	The Agreement shall provide for typical and customary insurance provisions with respect to coverage for Contractor's performance of its obligations with respect to the Facility.
<u>Intellectual Property Matters:</u>	Owner shall hold title to any drawings, specifications, documents, plans and designs, licenses or other work product provided by or on behalf of Contractor in connection with the SMA Services. In addition, Contractor shall grant to Owner, for the life of the Facility, a paid-up, irrevocable, non-exclusive, transferrable, royalty-free right and license under all intellectual property rights that are used by Contractor in providing the SMA Services as necessary to own, use, operate, maintain, service, repair, alter commission, decommission, remove, dispose, and transfer ownership of the Facility.
<u>Limitation of Liability:</u>	<p>The Agreement shall provide for typical and customary terms regarding Contractor's aggregate liability for all losses and all other costs and obligations arising out of or relating to the Agreement (with a liability cap in any contract year of 200% of the fee).</p> <p>With the exception of the obligations to indemnify against claims of third parties (and without limiting any obligation of the Contractor to pay liquidated damages under the Agreement or the Performance Guarantee), neither party shall be liable to the other for any consequential, incidental, punitive, exemplary or indirect damages or lost profits; <i>provided</i> that to the extent not fully covered by insurance, each party shall remain liable for any damage to or loss of any property or equipment (including any deductible amounts) caused by such party's fraud, negligence, gross negligence, or willful misconduct.</p>
<u>Taxes:</u>	Contractor shall pay any and all sales and use, goods and services, value added, customs and duties (including federal import taxes, including any import duties or fees, on materials imported for performance of the SMA Services), withholding, service, general excise, ad valorem or similar taxes to the extent assessed or assessable under applicable law, and taxes measured by or imposed on the net income or net profit of Contractor.
<u>Records; Audit:</u>	Contractor shall maintain in accordance with good regulated utility accounting practices all records relating to the provision of the SMA Services and the Facility for a period not less than the Term of the Agreement plus five (5) years. To the extent specified in the SMA Manual, such records shall be maintained in electronic form on the secure shared file site relating to the Facility. In addition, Owner shall have the right to audit and inspect Contractor's records upon reasonable advance notice.
<u>Assignment:</u>	Neither party may assign its rights and obligations under the Agreement without the non-assigning party's prior written consent, which consent shall not be unreasonably

	withheld except that Owner may, without the consent of Contractor, 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 consistent with the assignment provisions of the Build Transfer Agreement.
<u>Confidentiality:</u>	Each party shall keep confidential and not disclose any confidential information of the other party, subject to customary exceptions. Notwithstanding the foregoing, Contractor shall 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.
<u>Dispute Resolution;</u> <u>Governing Law:</u>	<p>This Term Sheet is, and the Agreement shall be, governed by the laws of the State of Utah, without regard to its conflict of laws provisions.</p> <p>The parties shall submit to the exclusive jurisdiction of the United States Federal District Court located in Salt Lake City, Utah, or, if such court does not have subject matter jurisdiction, the state courts of the State of Utah. Each party shall waive any objection to forum or venue, and any right to jury trial. The parties shall consent to joinder or consolidation with respect to any disputes involving common issues of law or fact with respect to the Facility, the EPC Agreement or any other agreement relating to the Facility.</p> <p>Any disputes between the parties not resolved via good faith negotiations may proceed to litigation unless the parties mutually agree to arbitration, which arbitration shall be in accordance with the Commercial Arbitration Rules of the American Arbitration Association.</p>



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**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**

- Exhibit 1 – Scope of Work and Facility Specifications
- 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 4 – Milestone Schedule
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- Exhibit 23 – EITC and Depreciation Exhibit
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- Exhibit 26 – Reserved
- Exhibit 27 – Spare Parts
- Exhibit 28 – FERC Electrical Plant Chart of Accounts
- 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.

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<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.

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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.

“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.

“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).

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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.

“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;
- (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.

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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.



“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, 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.

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

“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.

“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.

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

“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 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 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

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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.



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>

“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.

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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.

<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.

“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.

“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 Title 54, Chapter 17, Part 8, Section 801 *et. al.*, 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.<sup>13</sup>

**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.

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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.

<sup>13</sup> Note to Bidders: Article 15 will be modified to provide for achievement of "Closing Completion" as a pre-condition to the Start-up and Commissioning requirements set forth in the Technical Specifications and Exhibit 25. Closing Completion will occur before the Availability Test and Functional Test when material physical Work with respect to the Facility remains outstanding.

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 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>14</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;

(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;

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<sup>14</sup> Note to Bidders: The minimum number of installed MWs will be based on the expected size of DC project.



(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>15</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 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

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<sup>15</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.

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:

*[Signature Page to EPC Agreement – [\_\_\_\_\_] Solar Project]*

### SOLAR O&M TERM SHEET<sup>1</sup>

THIS TERM SHEET 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 TERM SHEET OR ON STATEMENTS MADE DURING NEGOTIATIONS PURSUANT TO THIS TERM SHEET SHALL BE AT THAT PARTY'S OWN RISK. UNTIL THE PARTIES HAVE COMPLETED THEIR DUE DILIGENCE AND A DEFINITIVE 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 TERM SHEET OR IN THE COURSE OF ANY NEGOTIATIONS.

<u>Operator:</u>	[ ] (" <b>Operator</b> ").
<u>Owner:</u>	PacifiCorp, an Oregon corporation d/b/a Rocky Mountain Power (" <b>Owner</b> "). Owner and [ ] (" <b>Developer</b> ") have entered into that certain Build Transfer Agreement (" <b>Build Transfer Agreement</b> ") whereby Owner shall purchase (and Developer shall sell and transfer) the Facility (as defined below) prior to Closing Completion (as defined in the Build Transfer Agreement).
<u>Scope:</u>	Operator and Owner would enter into an Operations and Maintenance Agreement (the " <b>Agreement</b> ") for the provision of O&M Services (defined below) with respect to a photovoltaic power plant (the " <b>Facility</b> ") to be located in [ ] Utah (the " <b>Site</b> ") and to be constructed pursuant to an Engineering, Procurement and Construction Agreement (the " <b>EPC Agreement</b> ") between [ ] (" <b>EPC Contractor</b> ") and Developer. The EPC Agreement will be assigned by Developer to Owner prior to Substantial Completion and the commencement of the Term of the Agreement (at closing of the Build Transfer Agreement).

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

<u>O&amp;M Services:</u>	<p>Operator shall provide all necessary and recommended preventative, scheduled and unscheduled maintenance services for the entire Facility for the duration of the Term (the “<b>O&amp;M Services</b>”), which shall include (i) certain basic services that constitute customary operation and maintenance activities for a regulated electric utility, to be defined and set forth in an exhibit to the Agreement, but including, at a minimum, annual cleaning (x2), full preventative maintenance (including mechanical, electrical, inverter, tracker and MV/HV maintenance services), visual inspection, system testing and calibration, corrective and unscheduled maintenance, failure response, notifications, forecasting, staffing and remote monitoring, warranty support, asset management, regulatory/compliance, site and vegetation management (including any site grading and maintenance of storm water structures), garbage disposal, security services, perimeter fencing, restroom and Facility maintenance (including janitorial services), water supply, dust containment, snow removal, road maintenance, reporting and compliance (including environmental compliance), training of personnel and reasonable assistance to Owner in its annual operation, maintenance, administrative and general budgeting and capital planning efforts (the “<b>Basic Services</b>”), (ii) any additional services requested by Owner or recommended by Operator and documented in a written change order executed by the parties (the “<b>Additional Services</b>”) and (iii) any emergency services necessary to address emergency affecting the safety or protection of persons or endangering the Facility or other property located at the Site (the “<b>Emergency Services</b>”).</p>
<u>Spare Parts Title:</u>	<p>Operator shall maintain any initial spare parts provided by Owner or EPC Contractor and otherwise supply all necessary and recommended spare parts and consumables for the Facility (the “<b>Spare Parts</b>”). Operator shall maintain the Spare Parts at its own expense at the Site and on a dedicated basis for exclusive use for the Facility; <i>provided, however</i>, that with respect to Spare Parts related to Extra Work, Operator shall offer to sell to Owner such Spare Parts as are manufactured by Operator or its affiliates at Operator’s then-current market prices in the United States for spare parts and consumables for utility-scale projects subject to an agreed-upon discount set forth in the Agreement.</p> <p>Operator shall provide a monthly report with respect to the inventory of Spare Parts, including any parts procured or replaced during such period, and shall make recommendations to Owner regarding the appropriate number and type of Spare Parts for the Facility. All Spare Parts procured or used with respect to the Facility shall be new OEM parts that comply with any applicable warranty requirements. Title to such Spare Parts shall transfer from Operator to Owner upon the earlier of Owner’s payment therefor or installation of the same into the Facility.</p>

<u>O&amp;M Fee:</u>	Owner shall pay Operator a fee of \$[___]/kW (DC) determined on the basis of final capacity of the Facility as certified under the EPC Agreement (the “ <b>O&amp;M Fee</b> ”). The O&M Fee shall be paid in semi-annual installment in arrears and subject to escalation at 1.5 percent (1.5%) per annum. The O&M Fee covers all Basic Services. Operator shall not be entitled to any additional compensation, except as set forth in a change order with respect to Additional Services or with respect to Emergency Services or in connection with Owner’s purchase of Spare Parts as described above. Payment for Additional Services or Emergency Services shall be capped at (i) Operator’s personnel costs (at an agreed rate schedule) plus (ii) any actual, direct third-party costs to Operator plus a markup of five percent (5%).
<u>Term:</u>	The Agreement shall be executed and effective on or before the date that the EPC Agreement is executed by both Developer and EPC Contractor, <i>provided</i> that the operational term of the Agreement shall be a period of five (5) years, commencing upon Substantial Completion (as defined in the EPC Agreement) of the Facility (the “ <b>Term</b> ”) with mutually agreed term extension provisions.
<u>Independent Contractor:</u>	Operator is acting and shall be deemed for all purposes to be an independent contractor and nothing in the Agreement shall be construed as constituting any relationship with Owner other than that of owner and independent contractor. Owner and Operator are not partners, agents or joint venturers with each other, and the Agreement is not intended to nor shall it be construed to create a partnership or joint venture between Owner and Operator. Operator shall complete the O&M Services according to its own means and methods of work, which shall be in the exclusive charge and control of Operator and which shall not be subject to the control and supervision of Owner, except as to the results of the O&M Services.
<u>Subcontracts:</u>	Subject to Owner’s consent, not to be unreasonably withheld, Operator may enter into subcontracts for particular aspects of its obligations under the Agreement. All subcontracts shall incorporate and flow-down applicable requirements from the Agreement (including with respect to insurance), be assignable to the Owner upon termination of the Agreement and provide that Owner is a third-party beneficiary thereunder. Operator shall ensure that all subcontracts contain warranties with respect to services and equipment that comply with Owner’s warranty requirements.
<u>Personnel:</u>	Operator shall provide an appropriate number of suitably qualified, trained, competent and experienced management, operating and maintenance personnel necessary to perform the O&M Services, and such personnel shall perform such O&M Services in accordance with the applicable Requirements (defined below). Operator shall pay all wages and benefits required by applicable law or contract with respect to personnel performing the O&M Services. Operator shall be responsible for all matters relating to labor relations, working conditions, training, employee benefits, safety programs and related matters pertaining to such personnel, including, if applicable, with any prevailing wage, project labor or other requirements.



<u>Business Practices:</u>	Operator, its employees, agents, representatives and subcontractors shall at all times maintain high ethical standards and avoid conflicts of interest in performing the O&M Services. In conjunction with its performance of O&M Services, Operator and its employees, officers, agents and representatives shall comply with, and cause its subcontractors and their respective employees, officers, agents and representatives to comply with, all applicable laws prohibiting bribery, corruption, kick-backs or similar unethical practices including, without limitation, the United States Foreign Corrupt Practices Act and Owner's "code of business conduct", which code of business conduct would be included as an exhibit to the Agreement.
<u>O&amp;M Manual:</u>	Not later than one hundred eighty (180) days prior to the commencement of the Term, Operator shall prepare and submit, for Owner's review and approval, a manual relating to the operation and maintenance of the Facility that incorporates any specific service requirements necessary to comply with the Requirements or that are an integral part of Operator's obligations in connection with the O&M Services (the " <b>O&amp;M Manual</b> "). Owner shall provide comments, if any, to the O&M Manual to Operator within thirty (30) days after Owner's receipt of such O&M Manual. Operator shall modify the O&M Manual based upon Owner's comments and shall provide Owner with a copy of such revised O&M Manual within thirty (30) days after Operator's receipt of Owner's comments. Once approved by the parties, the O&M Manual may not be amended or modified without the written consent of the parties, which approval shall not be unreasonably withheld.
<u>Annual Maintenance Plan:</u>	Not later than ninety (90) days prior to the commencement of each contract year, Owner and Operator shall meet to discuss the projected O&M Services for the Facility to be performed for such upcoming calendar year in accordance with the Requirements. Within twenty (20) days after each such meeting, Operator shall prepare and submit, for Owner's review and approval, a recommended plan (an " <b>Annual Maintenance Plan</b> ") setting forth (i) Operator's intended work plan for the O&M Services, (ii) the expected duration of the performance of any scheduled maintenance, (iii) a description of the O&M Services to be performed, and (iv) any other related activities for each calendar month over the ensuing contract year, which Annual Maintenance Plan shall be in compliance with the Requirements. Owner shall provide comments to the Annual Maintenance Plan, if any, to Operator within fifteen (15) days after such meeting. Operator shall modify the Annual Maintenance Plan based upon Owner's comments. Once approved by the parties, the Annual Maintenance Plan may not be amended or modified without the written consent of the parties, which approval shall not be unreasonably withheld. The approved Annual Maintenance Plan shall be integrated into the O&M Manual.

<u>Reporting Requirements:</u>	Operator shall provide usual and customary reports and summaries to Owner, including: (a) a daily production report (via email and File Share upload) relating to the weather, irradiance, availability and performance of the Facility, (b) a detailed monthly report (in written and electronic format) relating to the monthly and year-to-date availability and performance of the Facility, inverter performance metrics, spare parts utilization and inventory, equipment failures and warranty claims, OSHA and safety-related matters, scheduled and unscheduled maintenance activities, alarm logs and failure reports and any Emergency Services or Additional Services performed, and (c) an annual report (in written and electronic format) including a summary of the monthly performance reports together with totals for the Performance Guarantee calculations and performance metrics and Owner recommendations.
<u>Forecasting:</u>	Operator shall deliver to Owner (i) day-ahead and hour-ahead (with five (5) minute increments) forecasts of electrical energy deliveries from the Facility using Operator's then current forecasting tools, (ii) projections of scheduled outages of the Facility and (iii) notification of changes to any forecast of electrical energy deliveries or of any forced outage of the Facility.
<u>Notifications:</u>	Operator shall promptly notify Owner regarding any pending or threatened litigation, claim, dispute, action, investigation or proceeding relating to the Facility, any refusal or threatened refusal to grant, renew, or extend any permit, any discovery of any existing or concealed hazardous substances, forced outages of the Facility (and the known causes thereof and the corrective action taken with respect thereto), all notices and other communications from any governmental authority in relation to the Facility and any other event or circumstance that reasonably could be expected to adversely impact the operation of the Facility including labor disputes, violations of applicable laws or applicable permits, material damage to any of the major pieces of equipment comprising the Facility, or notices or other communications from the transmission provider.
<u>Monitoring Services:</u>	<p>Operator shall staff and maintain a first-tier network operations center, and shall provide remote monitoring of the Facility therefrom on a twenty-four (24) hour a day, seven (7) days a week basis via connection with the Facility's SCADA system. Remote monitoring shall include real time performance, weather and operational metrics and remote event notification. Operator shall cause Owner to have a direct, real-time data feed with respect to the foregoing, install and maintain a dedicated T-1 line and such other telecommunications and equipment necessary to support the same, and shall host and maintain an electronic file share ("<b>File Share</b>") and provide Owner with a license to access same.</p> <p>Operator shall maintain on-site and area staffing consistent with minimum levels and qualifications to be established and included in the O&amp;M Manual.</p>

<u>Alarm and Failure Response:</u>	<p>Operator shall, in consultation with Owner, establish an alarm and failure notification protocol. Pursuant to the O&amp;M Manual, upon receiving a system alarm or failure notification, Operator shall initiate a response plan appropriate in light of the nature of the alarm or failure. Owner and Operator shall agree on a detailed, tiered failure response protocol, which shall require Operator to respond on-site to failures involving the outage of the Facility or one or more inverters within four (4) hours.</p> <p>Operator shall promptly curtail the production of the Facility upon direction by the transmission provider, utility or other governmental authority.</p>
<u>Minimal Interference:</u>	<p>Operator shall use commercially reasonable efforts, in light of the circumstances at the time, to perform the O&amp;M Services in a manner that will minimize interference with the operation of the Facility and to conduct its work at such times so as to minimize reduction of production in respect of the Facility. Unless granted prior written approval from Owner, Operator shall not conduct any scheduled maintenance on Facility equipment that would reasonably be expected to reduce Facility production during summer peak hours.</p>
<u>Hazardous Substances:</u>	<p>Operator shall minimize the use of hazardous substances and shall not and shall not permit any of its subcontractors, directly or indirectly, to use, handle, store, generate, manufacture, transport or release any hazardous substances in, on or under the Facility, the Site and any adjacent areas thereto, except to the extent required for the performance of the O&amp;M Services, and, in each such case in accordance with the Requirements. Operator shall promptly comply with all orders and directives of all governmental authorities regarding the use, transportation, storage, handling or presence of hazardous substances. If Operator discovers, encounters or is notified of the presence or any release of any hazardous substances at the Site, Operator shall promptly notify Owner thereof and stop work in and restrict access to the area containing such hazardous substances. Operator shall conduct and complete all investigations, studies, sampling, testing and remediation of the Site as required by the Requirements in connection with the release of hazardous substances by Operator. Operator shall not be entitled to any extension of time or additional compensation for any delay or costs incurred by Operator as a result of the remediation or removal of hazardous substances for which Operator is responsible.</p>
<u>Standard of Performance:</u>	<p>All O&amp;M Services shall be performed by Operator in a good and workmanlike manner, free of any defect or deficiency, consistent with prudent industry practices with respect to first-tier, grid-interconnected, rate-based, utility-scale solar plants in the Western United States, applicable laws, applicable permits, governmental approvals, applicable project documents, the Warranties, the O&amp;M Manual, the Safety Plan and Owner's operating procedures (collectively, the "<b>Requirements</b>").</p>
<u>Services Warranty:</u>	<p>Operator shall warrant in the Agreement that the O&amp;M Services will be performed in a good and workmanlike manner and be free from defects in workmanship and materials in accordance with the Requirements for a period of two (2) years after the completion thereof (the "<b>Services Warranty</b>"). When Operator detects or is notified of a defect covered by the Services Warranty, Operator shall, at its sole cost and expense, promptly repair, replace, and/or re-perform the services and/or materials as necessary to cure such defect. For any O&amp;M Services (including any</p>

	parts or equipment) required to be re-performed, repaired, corrected or replaced following discovery of a defect, the Services Warranty shall be extended for two (2) additional years after the date such performance, repair, correction or replacement is complete. In addition, to the extent not covered by a Warranty, Operator shall ensure that any replacement modules, inverters, trackers or other key equipment have warranties consistent with Owner's warranty requirements.
<u>Warranty Enforcement:</u>	Operator shall, on Owner's behalf, maintain, administer and pursue claims with respect to all applicable warranties provided by EPC Contractor and suppliers of the modules, inverters, trackers and other components of the Facility (the " <b>Warranties</b> "). Operator shall manage, supervise and verify that all persons providing Warranties for the Facility comply promptly and diligently with all of their respective warranty obligations and coordinate and schedule the provision of all warranty work with the O&M Services. Operator shall keep Owner reasonably informed of the status of any warranty claims and, in any case, provide information and documentation reasonably requested by Owner. Operator shall not be required to commence or prosecute a legal action (whether litigation, arbitration or otherwise) to enforce a warranty claim, except as may be agreed as part of the Additional Services, but Operator shall cooperate with Owner's reasonable requests in connection with any such legal action.
<u>Safety Requirements:</u>	Operator shall take necessary safety and other precautions to protect property and persons from damage, injury or illness arising out of the performance of the O&M Services and be responsible for the compliance by Operator, its employees, agents, representatives and subcontractors with all requirements governing occupational health and safety in accordance with the Requirements. Operator shall be solely responsible for initiating, maintaining, and supervising all safety measures and programs in connection with the performance of the O&M Services. Not later than one hundred twenty (120) days prior to the commencement of the Term, Operator shall provide Owner with a Site-specific safety plan in connection with Operator's performance of its obligations that complies with the Requirements (the " <b>Safety Plan</b> "). Owner shall be entitled to review and provide comments to the Safety Plan and Operator shall incorporate any comments provided by Owner. Operator shall be responsible for updating and revising the Safety Plan to comply with all Requirements, including any changes thereto. Operator shall comply with the Safety Plan including with respect to passes, badges, drug and alcohol testing and conduct on the Site.
<u>Performance Guarantee:</u>	Operator shall deliver a performance guarantee (" <b>Performance Guarantee</b> ") to Owner which shall guarantee that the actual annual output of the Facility is at least ninety-eight percent (98%) of the expected output on a weather-adjusted basis, subject to customary limitations with respect to force majeure, scheduled maintenance and outages directed by Owner or the transmission provider. Shortfalls in output shall be compensated based upon Owner's avoided energy price. Operator shall be excused under the Performance Guarantee if Owner terminates the O&M Agreement for convenience. Owner may, in its sole discretion, accept an availability guarantee in lieu of the Performance Guarantee.

<u>Credit Support:</u>	Operator shall deliver (i) an ultimate parent guaranty covering Operator's performance under the Agreement, the Performance Guarantee and any other agreements or undertakings related to the O&M Services or the Facility and (ii) such other credit support as may reasonably be required by Owner.
<u>Regulatory/ Compliance:</u>	Operator shall register with the North American Electric Reliability Corporation (NERC) as the " <b>Generator Operator</b> " with respect to the Facility and shall cause the Facility to comply with all requirements of any governmental authorities including, but not limited to, NERC, WECC, CAISO, WREGIS and the UPSC.
<u>Project Labor:</u>	Operator shall ensure compliance and confirm labor union agreement with all project labor agreements related to the Facility.
<u>Training:</u>	Operator shall provide two (2) separate eight (8) hour training sessions per year for Owner's personnel.
<u>Force Majeure; Excusable Events:</u>	In the event a force majeure (to be defined) or excusable event (to be defined, but including Owner-caused delays and changes in law) prevents Operator from performing any services, Operator shall be excused from performing such services for the duration of the event. Owner may, at its sole option, request that Operator remediate the effects of such event by agreeing to a change order that details the remediation work and Operator's fee to perform such work.
<u>Site Access:</u>	Owner shall provide Operator with such access to the Facility as reasonably necessary to enable Operator to perform its obligations, including ingress and egress rights to the Site. Such access shall extend to the employees, contractors and subcontractors of Operator and to local electric utility personnel, and be in accordance with any ground lease, easement or related instrument in effect with respect to the Site. Operator shall take commercially reasonable efforts to perform its obligations in such a manner that minimize the inconvenience to and interference with Owner's use of the Site.
<u>Indemnification:</u>	Operators shall indemnify Owner and its affiliates, successors, assigns, officers, directors, employees and agents (" <b>Owner Parties</b> "), and hold them harmless from and against all reasonable out-of-pocket costs, expenses and actual liabilities arising out of or relating to any claim or any litigation or other proceeding that relate to (a) claims for injury or property damage, (b) worker's compensation claims, (c) penalties due to failure to comply with applicable law, (d) taxes owed by Operator, (e) Liens arising with respect to the Facility and (f) hazardous substances.
<u>Liens:</u>	Operator shall keep and maintain the Facility and the Site free and clear of all liens, encumbrances, claims, charges that if unpaid, might become a lien, and rights of retention (" <b>Liens</b> ") resulting from the action of Operator or work done at the request of Operator (including without limitation, work done by any subcontractor, supplier of goods or services, employee, material man or laborer). Operator shall take prompt steps to discharge any such Lien. Operator shall require each of its subcontractors to make payments to their respective subcontractors and sub-subcontractors in a similar manner, and Operator shall indemnify and hold harmless Owner for any losses or expenses incurred by Owner (including reasonable attorneys' fees) in discharging any such Lien. Upon request from Owner, Operator shall request lien waivers from a

	subcontractor upon completion and payment for such subcontractor's relevant work and, upon request from Owner, Operator shall supply copies of such lien waivers to Owner.
<u>Termination Rights:</u>	<p>Owner may terminate the Agreement for convenience upon sixty (60) days' notice in which case Owner shall pay Operator for any O&amp;M Services performed to date, plus Operator's reasonable demobilization expenses (not to exceed a demobilization cap to be agreed by the parties).</p> <p>In the event of an Operator Default, (a) Owner may terminate the Agreement and exercise any rights available thereunder, at law or in equity, and (b) Operator shall pay Owner a termination payment equal to the positive difference between the O&amp;M Fee and the cost to Owner of, or market price associated with, procuring replacement services for the remainder of the Term.</p> <p>For purposes hereof, an "<b>Operator Default</b>" shall include any of the following:</p> <ul style="list-style-type: none"> <li>i. Operator becomes insolvent;</li> <li>ii. Operator fails to pay to Owner any amounts due (other than any amounts which are the subject of a bona fide dispute) within thirty (30) days after written notice of such failure from Owner to Operator;</li> <li>iii. Operator fails to perform any of its material obligations and such failure is not remedied within thirty (30) days after written notice of such failure from Owner to Operator;</li> <li>iv. Any representation or warranty by Operator is false or misleading;</li> <li>v. Operator attempts to assign the Agreement in violation of its terms;</li> <li>vi. Operator or any affiliate defaults under any other agreement, warranty, guaranty or instrument relating to the operation or construction of the Facility, the equipment comprising the Facility or the O&amp;M Services;</li> <li>vii. The Facility production is below ninety percent (90%) for any consecutive twenty-four (24) month period; or</li> <li>viii. The aggregate liability of Operator exceeds Operator's Limitation of Liability in any period.</li> </ul> <p>In the event of an Owner default, as its sole remedy therefor, (a) Operator may terminate the Agreement and (b) Owner shall pay Operator for any O&amp;M services performed to date, plus Operator's reasonable demobilization expenses (not to exceed a demobilization cap to be agreed to by the parties).</p> <p>Following any termination of the Agreement for any reason, Operator shall (a) withdraw from the Site and expeditiously transfer to Owner any Spare Parts, warranties, manuals, software licenses, keys, access credentials, records, reports and other documentation relating to the Facility and O&amp;M Services and (b) cooperate with Owner and any replacement operator concerning the transition of operational</p>

	responsibility for the Facility.
<u>Insurance:</u>	<p>Operator shall maintain in effect, insurance coverage of the following types and limits in addition to any other coverage required by law:<sup>2</sup></p> <ul style="list-style-type: none"> <li>i. <u>Workers' Compensation Insurance.</u> Workers' Compensation in the minimum amount required by statute and Employers' Liability with minimum limit of \$1,000,000.</li> <li>ii. <u>Commercial General Liability Insurance.</u> Commercial General Liability on an "occurrence form" in the minimum amount of \$2,000,000 per occurrence combined single limit and \$3,000,000 in aggregate, including (a) broad form contractual liability coverage, (b) products/completed operations, (c) personal injury, (d) independent contractors and (e) sudden and accidental pollution liability (if not provided by separate pollution coverage). Coverage shall include a cross liability/severability of interests clause.</li> <li>iii. <u>Automobile Liability Insurance.</u> Comprehensive Automobile Liability in the minimum amount of \$1,000,000 each accident combined single limit, including owned, hired and non-owned vehicles.</li> <li>iv. <u>Umbrella or Excess Liability Insurance.</u> Umbrella/Excess Insurance on an "occurrence form" in the minimum amount of \$20,000,000 each occurrence and annual aggregate which shall be in excess of the primary coverage referred to in clause (i) (employer's liability only), clause (ii) and clause (iii) above.</li> <li>v. <u>Pollution Liability.</u> Pollution liability coverage with a limit of not less than \$3,000,000 per claim and in the annual aggregate.</li> </ul> <p>Operator (or its particular contractor or subcontractor) must provide Owner with 30-days prior written notice before any required insurance policy expires, is cancelled, or is altered.</p> <p>Deductible or retention amounts under the required policies must not exceed 5% of the per occurrence coverage limits, without the express written consent of Owner.</p> <p>Each contract of insurance must be with an insurer approved to do business in the State of Utah, is "A-" Rated or better by A.M. Best Company (see <a href="http://www.ambest.com">www.ambest.com</a>) and must include the following provisions or endorsements:</p> <ul style="list-style-type: none"> <li>(A) <u>Additional Insured.</u> Naming Owner, its directors, officers, and employees as additional insureds on the general liability, automobile liability, pollution liability and excess/umbrella insurance policies.</li> <li>(B) <u>Primary Insurance.</u> Stating that the insurance is primary insurance with respect to the interest of Owner and that any insurance maintained by Owner is excess and not contributory insurance.</li> </ul>

<sup>2</sup> Insurance coverage, including limit amounts, is subject to further review and change by PacifiCorp.

	<p>(C) <u>Subrogation Waivers</u>. Providing Owner with waivers of subrogation on all coverages.</p> <p>(D) <u>Separation of Insured</u>. Providing for “<b>Separation of Insured</b>” coverage in the general liability, automobile liability, pollution liability and excess/umbrella insurance policies.</p> <p>(E) <u>Conversion from Claim Made to Occurrence</u>. Providing that, if any policy is maintained on a “claims made” form and is converted to an “occurrence form”, the new policy will be endorsed to provide coverage back to a retroactive date acceptable to Owner.</p> <p>(F) <u>Notice Requirement</u>. Providing that Owner is entitled to 30-days’ prior written notice before such contract of insurance expires, is cancelled, or is altered.</p> <p>Before Operator or any of its subcontractors enters upon the Site, Operator must provide Owner with certificates of insurance that name Owner as an additional insured and that evidence the coverage required by the Agreement, including additional insured endorsement numbers.</p>
<u>Intellectual Property Matters:</u>	Owner shall hold title to any drawings, specifications, documents, plans and designs, licenses or other work product provided by or on behalf of Operator in connection with the O&M Services. In addition, Operator shall grant to Owner, for the life of the Facility, a paid-up, irrevocable, non-exclusive, transferrable, royalty-free right and license under all intellectual property rights that are used by Operator in providing the O&M Services as necessary to own, use, operate, maintain, service, repair, alter commission, decommission, remove, dispose of and transfer ownership of the Facility.
<u>Limitation of Liability:</u>	<p>The Agreement shall provide for typical and customary terms regarding Operator’s aggregate liability for all losses and all other costs and obligations arising out of or relating to the Agreement (with a liability cap in any contract year of 200% of the fee).</p> <p>With the exception of the obligations to indemnify against claims of third parties (and without limiting any obligation of the Operator to pay liquidated damages under the Agreement or the Performance Guarantee), neither party shall be liable to the other for any consequential, incidental, punitive, exemplary or indirect damages or lost profits; <i>provided</i> that to the extent not fully covered by insurance, each party shall remain liable for any damage to or loss of any property or equipment (including any deductible amounts) caused by such party’s fraud, negligence, gross negligence, or willful misconduct.</p>
<u>Taxes:</u>	Operator shall pay any and all sales and use, goods and services, value added, customs and duties (including federal import taxes, including any import duties or fees, on materials imported for performance of the O&M Services), withholding, service, general excise, ad valorem or similar taxes to the extent assessed or assessable under applicable law, and taxes measured by or imposed on the net income or net profit of Operator.



<u>Records; Audit:</u>	Operator shall maintain in accordance with good regulated utility accounting practices all records relating to the provision of the O&M Services and the Facility for a period not less than the Term of the Agreement plus five (5) years. To the extent specified in the O&M Manual, such records shall be maintained in electronic form on the File Share. In addition, Owner shall have the right to audit and inspect Operator's records upon reasonable advance notice.
<u>Assignment:</u>	Neither party may assign its rights and obligations under the Agreement without the non-assigning party's prior written consent, which consent shall not be unreasonably withheld except that Owner may, without the consent of Operator, 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 consistent with the assignment provisions of the Build Transfer Agreement.
<u>Confidentiality:</u>	Each party shall keep confidential and not disclose any confidential information of the other party, subject to customary exceptions. Notwithstanding the foregoing, Operator shall 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.
<u>Dispute Resolution;</u> <u>Governing Law:</u>	<p>This Term Sheet is, and the Agreement shall be, governed by the laws of the State of Utah, without regard to its conflict of laws provisions.</p> <p>The parties shall submit to the exclusive jurisdiction of the United States Federal District Court located in Salt Lake City, Utah, or, if such court does not have subject matter jurisdiction, the state courts of the State of Utah. Each party shall waive any objection to forum or venue, and any right to jury trial. The parties shall consent to joinder or consolidation with respect to any disputes involving common issues of law or fact with respect to the Facility, the EPC Agreement or any other agreement relating to the Facility.</p> <p>Any disputes between the parties not resolved via good faith negotiations may proceed to litigation unless the parties mutually agree to arbitration, which arbitration shall be in accordance with the Commercial Arbitration Rules of the American Arbitration Association.</p>

**TURBINE SUPPLY AGREEMENT TERM SHEET<sup>1</sup>**

THIS TERM SHEET 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 TERM SHEET OR ON STATEMENTS MADE DURING NEGOTIATIONS PURSUANT TO THIS TERM SHEET SHALL BE AT THAT PARTY'S OWN RISK. UNTIL THE PARTIES HAVE COMPLETED THEIR DUE DILIGENCE AND A DEFINITIVE 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 TERM SHEET OR IN THE COURSE OF ANY NEGOTIATIONS.

<u>Seller:</u>	[ ] (" <b>Seller</b> ").
<u>Developer:</u>	[ ] (" <b>Developer</b> ").
<u>Owner:</u>	PacifiCorp, an Oregon corporation d/b/a Rocky Mountain Power (" <b>Owner</b> "). Owner and Developer have entered into that certain Build Transfer Agreement (" <b>Build Transfer Agreement</b> ") whereby Owner shall purchase (and Developer shall sell and transfer) the Facility (as defined below) prior to Closing Completion (as defined in the Build Transfer Agreement).
<u>Overview:</u>	Seller and Developer would enter into a Turbine Supply Agreement (the " <b>Agreement</b> ") for the supply and commissioning of Wind Turbine Generators (" <b>WTGs</b> ") with respect to a wind-powered electric generation facility (the " <b>Facility</b> ") to be located in [ ] (the " <b>Site</b> ") and to be constructed pursuant to a Balance of Plant Engineering, Procurement and Construction Agreement (the " <b>EPC Agreement</b> ") between [ ] (" <b>EPC Contractor</b> ") and Developer. The EPC Agreement and the Agreement will be assigned by Developer to Owner prior to Project Mechanical Completion and the commencement of the Term of the Agreement (at closing of the Build Transfer Agreement). In addition to the Agreement, there will be a separate Service and Maintenance Agreement (" <b>SMA</b> ") with respect to the WTGs to be executed by Seller and Developer and assigned by Developer to Owner at closing of the Build Transfer Agreement.

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

<u>Scope of Supply and Other Obligations</u>	<p>Seller shall supply the following equipment under the Agreement:</p> <p>1) WTGs: The WTGs shall include the tower, nacelle, hub, climb assist and blades, and all mechanical and electrical equipment within the WTGs.<sup>2</sup></p> <p>2) SCADA: [____].<sup>3</sup></p> <p>3) Spare Parts: Spare parts for the Facility are included as part of the Purchase Price and shall be maintained by Contractor under the SMA.</p> <p>4) Tools: Seller will provide to Developer, equipment, on a loan and return basis, necessary for EPC Contractor to lift, rig and install the WTG for up to [twelve (12)] weeks following the date of delivery of the last component under the Agreement.</p> <p>4) Meteorological System: [____].<sup>4</sup></p> <p>5) Type Certificates: Seller will provide Developer with type certificates applicable to the WTGs prior to making any deliveries to the Site and Seller will represent at the time of delivery that such type certificates have not been revoked and that there have been no changes to the WTs which would invalidate any type certificate.</p> <p>6) [____].<sup>5</sup></p> <p>Seller shall ensure that the supply of all equipment listed herein is coordinated with the EPC Contractor to minimize interference with the performance of the EPC Contractor's obligations under their respective agreements and to allow each party to fulfill its respective obligations in a timely and efficient manner.</p>
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<sup>2</sup> Note to Bidders: Please provide additional technical detail regarding WTG scope of supply.

<sup>3</sup> Note to Bidders: Please provide proposal for SCADA supply.

<sup>4</sup> Note to Bidders: Please provide proposal for meteorological system.

<sup>5</sup> Note to Bidders: Please include information regarding additional scope items included in bid.

<u>Purchase Price and Change Orders:</u>	<p>The WTG unit price for [_____] <sup>6</sup> WTGs with [_____] <sup>7</sup> meter hub height tower, blades, [_____] <sup>8</sup> meter rotor diameter, tower, five (5) year equipment defects warranty, Facility SCADA System, Facility turbine monitoring system, technical field assistance and commissioning of the WTG but not including wind delay or weather delay in the price or schedule, and including Spare Parts, transportation of the components from the manufacturing or assembly facility to the Facility (including charges to return the component lifting, support and handling fixtures, shipping containers and other transportation equipment to the point of origin) shall be [\$_____].<sup>9</sup></p> <p>[_____].<sup>10</sup></p> <p>For a change order to be effective, it shall be signed by both Parties to the Agreement and shall state agreement upon (i) a change in the equipment supply obligations, if any, (ii) the amount of the adjustment in the Purchase Price, if any, and/or (iii) the extent of the adjustment, if any, to the delivery schedule, including the guaranteed milestone dates.</p> <p>Typical and customary change order provisions will be included (similar to other RFP documents).</p>
<u>Payment and Invoicing:</u>	<p>The Payment Schedule shall include typical and customary milestone payments culminating with payments at final completion of the WTGs and following Build Transfer Agreement payment requirements.</p>
<u>Transportation and Delivery:</u>	<p>The Agreement shall provide for typical and customary provisions regarding transportation and delivery of WTGs and appurtenant equipment.</p>
<u>Delivery Delays and Delivery Delay Liquidated Damages</u>	<p>Seller shall deliver the WTGs and appurtenant equipment on or before the applicable guaranteed delivery dates.</p> <p>Typical and customary liquidated damages provisions shall apply for failure to complete delivery of complete WTGs by the applicable guaranteed delivery dates.<sup>11</sup></p>

<sup>6</sup> Note to Bidders: Model of WTG to be determined.

<sup>7</sup> Note to Bidders: To be determined.

<sup>8</sup> Note to Bidders: To be determined.

<sup>9</sup> Note to Bidders: To be determined.

<sup>10</sup> Note to Bidders: If additional scope items are available as cost adders, please provide itemized costs for such typical and customary or recommended adders on a per unit and per project basis.

<sup>11</sup> Note to Bidders: Please provide liquidated damages to be included in definitive TSA.

<u>Mechanical Completion, Commissioning and Commercial Operation</u>	<p>The Agreement will provide for typical and customary provisions regarding mechanical completion, commissioning and commercial operation.</p> <p>Seller shall perform a typical and customary availability test following acceptance of a commissioning completion certificate and shall be required to achieve a specified availability rate.</p> <p>Following commissioning completion, Developer shall commence commercial operation of the WTGs and Seller shall be responsible for completion of punch list items and outstanding equipment supply obligations. Such activities will be conducted so as to minimize interference with commercial operation of the WTGs.</p>
<u>Commissioning Delays and Commissioning Delay Liquidated Damages</u>	<p>Seller shall commission each WTG on or before the applicable guaranteed commissioning completion date for such WTG.</p> <p>Typical and customary liquidated damages provisions and related liability caps shall apply for failure to complete commissioning of WTGs by the applicable guaranteed commissioning dates.<sup>12</sup></p>
<u>Technical Advisory Services:</u>	<p>Seller shall provide at the Site, a technical advisor for each main crane used at the Facility and supporting personnel as required, beginning on the date of delivery of the first component (nacelle, blade, hub or tower section). Technical advisors shall be available for consultation and clarification regarding installation manuals, Mechanical Completion checklists and technical specifications.</p>
<u>Permits</u>	<p>Seller shall obtain and maintain all permits required to be obtained in the name of the Seller which are necessary to lawfully perform the equipment supply obligations and warranty obligations including but not limited to (i) transport of the WTGs, (ii) disposing of and/or transporting hazardous substances, and (iii) employing or otherwise engaging personnel of Seller.</p> <p>Buyer shall obtain and maintain all permits required to develop, construct, install, engineer, own start-up, operate or maintain the Project.</p>
<u>Independent Contractor:</u>	<p>Seller is acting and shall be deemed for all purposes to be an independent contractor and nothing in the Agreement shall be construed as constituting any relationship with Developer other than that of Developer and Seller as independent contractor. Developer and Seller are not partners, agents or joint venturers with each other, and the Agreement is not intended to nor shall it be construed to create a partnership or joint venture between Developer and Seller. Seller shall complete its obligations under the Agreement according to its own means and methods of work, which shall be in the exclusive charge and control of Seller (taking into account cooperation with EPC Contractor with respect to their respective obligations) and which shall not be subject to the control and supervision of Developer, except as to the results of the services provided under the Agreement.</p>

<sup>12</sup> Note to Bidders: Please provide liquidated damages to be included in definitive TSA.

<u>Subcontracts:</u>	Subject to Developer's consent, not to be unreasonably withheld, Seller may enter into subcontracts for particular aspects of its obligations under the Agreement. All subcontracts shall incorporate and flow-down applicable requirements from the Agreement (including with respect to insurance), be assignable to Developer upon termination of the Agreement and provide that Developer is a third-party beneficiary thereunder. Seller shall ensure that all subcontracts contain warranties with respect to services and equipment that comply with Developer's warranty requirements.
<u>Personnel:</u>	Seller shall provide an appropriate number of suitably qualified, trained, competent and experienced personnel necessary to perform the its obligations under the Agreement, and such personnel shall perform such obligations in accordance with the applicable Requirements (defined below). Seller shall pay all wages and benefits required by applicable law or contract with respect to personnel performing its obligations under the Agreement. Seller shall be responsible for all matters relating to labor relations, working conditions, training, employee benefits, safety programs and related matters pertaining to such personnel, including, if applicable, with any prevailing wage, project labor or other requirements.
<u>Business Practices:</u>	Seller, its employees, agents, representatives and subcontractors shall at all times maintain high ethical standards and avoid conflicts of interest in performing Seller's obligations under the Agreement. In conjunction therewith, Seller and its employees, officers, agents and representatives shall comply with, and cause its subcontractors and their respective employees, officers, agents and representatives to comply with, all applicable laws prohibiting bribery, corruption, kick-backs or similar unethical practices including, without limitation, the United States Foreign Corrupt Practices Act and Developer' "code of business conduct" or similar document, which code of business conduct would be included as an exhibit to the Agreement.
<u>Notifications:</u>	Seller shall promptly notify Developer regarding any pending or threatened litigation, claim, dispute, action, investigation or proceeding relating to the Facility or the WTGs, any refusal or threatened refusal to grant, renew, or extend any permit required for Seller to fulfill its obligations under the Agreement, all notices and other communications from any governmental authority in relation to the Facility or the WTGs and any other event or circumstance that reasonably could be expected to adversely impact Seller's ability to fulfill its obligations under the Agreement including labor disputes, violations of applicable laws or applicable permits, or material damage to any of the major pieces of equipment.
<u>Minimal Interference:</u>	Seller shall use commercially reasonable efforts, in light of the circumstances at the time, to perform its obligations under the Agreement in a manner that will minimize interference with EPC Contractor and/or the operation of the Facility and to conduct its work at such times so as to minimize reduction of production in respect of the Facility, as applicable.

<u>Hazardous Substances:</u>	Seller shall minimize the use of hazardous substances and shall not and shall not permit any of its subcontractors, directly or indirectly, to use, handle, store, generate, manufacture, transport or release any hazardous substances in, on or under the Facility, the Site and any adjacent areas thereto, except to the extent required for the performance of its obligations under the Agreement, and, in each such case in accordance with the Requirements. Seller shall promptly comply with all orders and directives of all governmental authorities regarding the use, transportation, storage, handling or presence of hazardous substances. If Seller discovers, encounters or is notified of the presence or any release of any hazardous substances at the Site, Seller shall promptly notify Developer thereof and stop work in and restrict access to the area containing such hazardous substances. Seller shall conduct and complete all investigations, studies, sampling, testing and remediation of the Site as required by the Requirements in connection with the release of hazardous substances by Seller. Seller shall not be entitled to any extension of time or additional compensation for any delay or costs incurred by Seller as a result of the remediation or removal of hazardous substances for which Seller is responsible.
<u>Standard of Performance:</u>	All Seller obligations under the Agreement shall be performed by Seller in a good and workmanlike manner, free of any defect or deficiency, consistent with prudent industry practices with respect to first-tier, grid-interconnected, rate-based, utility-scale wind generating facilities in the Western United States, applicable laws, applicable permits, governmental approvals, applicable project documents, the Warranties, the Safety Plan, the technical specifications and landowner requirements (collectively, the “ <b>Requirements</b> ”).
<u>Equipment Warranty:</u>	Seller shall warrant in the Agreement that each WTG, its appurtenant components, the SCADA System and each Spare Part is new and unused, free of defects in design, materials, engineering, manufacture, assembly or workmanship and in compliance with the technical specifications and shall perform its intended function to generate or assist in generating electricity from wind as specified in the Agreement from the date of execution of the Agreement until two (2) years from completion of Facility commissioning or take-over of the WTG by Developer (the “ <b>Warranty Period</b> ”). During the Warranty Period, Seller shall have responsibility for repairing or replacing defective components with new or refurbished components (such refurbished components having the same expected performance and longevity as new components). Documentation shall be provided along with refurbished components detailing the component’s history and refurbishment completed to date. In the event of a repair or replacement of components, the Warranty Period will extend to the longer of (x) the expiration of the base warranty period of the applicable component and (y) two (2) years from the date of completion of the warranty repair/replacement work.
<u>Other Warranties and Performance Guarantees</u>	The Agreement shall provide for typical and customary warranties and liquidated damages, as applicable, with respect to the performance of the WTGs and appurtenant components, WTG characteristics and serial defects. <sup>13</sup>
<u>Safety</u>	Seller shall take necessary safety and other precautions to protect property and

<sup>13</sup> Note to Bidders: Please provide liquidated damages to be included in definitive TSA.

<u>Requirements:</u>	persons from damage, injury or illness arising out of the performance of its obligations under the Agreement and be responsible for the compliance by Seller, its employees, agents, representatives and subcontractors with all requirements governing occupational health and safety in accordance with the Requirements. Seller shall be solely responsible for initiating, maintaining, and supervising all safety measures and programs in connection with the performance of its obligations under the Agreement. Seller shall provide Developer with a Site-specific safety plan in connection with Seller's performance of its obligations that complies with the Requirements (the " <b>Safety Plan</b> "). Developer shall be entitled to review and provide comments to the Safety Plan and Seller shall incorporate any comments provided by Developer. Seller shall be responsible for updating and revising the Safety Plan to comply with all Requirements including any changes thereto. Seller shall comply with the Safety Plan including with respect to passes, badges, drug and alcohol testing and conduct on the Site.
<u>Credit Support:</u>	Seller will provide such credit support as may be reasonably required by Owner based on Owner's analysis of relevant financial criteria with respect to Seller's financial capability to satisfy its obligations under the Agreement.
<u>Force Majeure; Excusable Events:</u>	In the event a force majeure (to be defined but limited to an event in the state where the Facility is located or within a two hundred (200) mile radius of the delivery point) or excusable event (to be defined) prevents Seller from performing any services, Seller shall be excused from performing such services for the duration of the event, but in any event, no longer than Seller is incapable of performing its obligations. Developer may, at its sole option, request that Seller remediate the effects of such event by agreeing to a change order that details the remediation work and Seller's fee to perform such work.
<u>Site Access:</u>	Developer shall provide Seller with such access to the Facility as reasonably necessary to enable Seller to perform its obligations, including ingress and egress rights to the Site. Such access shall extend to the employees, contractors and subcontractors of Seller and be in accordance with any ground lease, easement or related instrument in effect with respect to the Site. Seller shall take commercially reasonable efforts to perform its obligations in such a manner that minimize the inconvenience to and interference with Developer's use of the Site.
<u>Indemnification:</u>	Seller shall indemnify Developer and its affiliates, successors, assigns, officers, directors, employees and agents (" <b>Developer Parties</b> "), and hold them harmless from and against all reasonable out-of-pocket costs, expenses and actual liabilities arising out of or relating to any claim or any litigation or other proceeding that relate to (a) claims for injury or property damage, (b) worker's compensation claims, (c) penalties due to failure to comply with applicable law, (d) taxes owed by Seller, (e) Liens arising with respect to the Facility and (f) hazardous substances.
<u>Liens:</u>	Seller shall keep and maintain the Facility and the Site free and clear of all liens, encumbrances, claims, charges that if unpaid, might become a lien, and rights of retention (" <b>Liens</b> ") resulting from the action of Seller or work done at the request of Seller (including without limitation, work done by any subcontractor, supplier of goods or services, employee, material man or laborer). Seller shall take prompt steps to discharge any such Lien. Seller shall require each of its subcontractors to make



	<p>payments to their respective subcontractors and sub-subcontractors in a similar manner, and Seller shall indemnify and hold harmless Developer for any losses or expenses incurred by Developer (including reasonable attorneys' fees) in discharging any such Lien. Upon request from Developer, Seller shall request lien waivers from a subcontractor upon completion and payment for such subcontractor's relevant work and, upon request from Developer, Seller shall supply copies of such lien waivers to Developer.</p>
<u>Termination Rights:</u>	<p>The Agreement shall provide for typical and customary termination rights and associated termination payments, including termination for insolvency, bankruptcy, non-payment, prohibited assignment, etc.</p> <p>Following any termination of the Agreement for any reason, Seller shall (a) withdraw from the Site and expeditiously transfer to Developer any Spare Parts, warranties, manuals, software licenses, keys, access credentials, records, reports and other documentation relating to the Facility, the WTGs and any appurtenant equipment and (b) cooperate with Developer and any replacement turbine supplier concerning the transition of turbine supply responsibility for the Facility.</p>
<u>Insurance:</u>	<p>Seller shall maintain in effect, insurance coverage of the following types and limits in addition to any other coverage required by law:<sup>14</sup></p> <ul style="list-style-type: none"> <li>i. <u>Workers' Compensation Insurance.</u> Workers' Compensation in the minimum amount required by statute and Employers' Liability with minimum limit of \$1,000,000.</li> <li>ii. <u>Commercial General Liability Insurance.</u> Commercial General Liability on an "occurrence form" in the minimum amount of \$2,000,000 per occurrence combined single limit and \$3,000,000 in aggregate, including (a) broad form contractual liability coverage, (b) products/completed operations, (c) personal injury, (d) independent contractors and (e) sudden and accidental pollution liability (if not provided by separate pollution coverage). Coverage shall include a cross liability/severability of interests clause.</li> <li>iii. <u>Automobile Liability Insurance.</u> Comprehensive Automobile Liability in the minimum amount of \$1,000,000 each accident combined single limit, including owned, hired and non-owned vehicles.</li> <li>iv. <u>Umbrella or Excess Liability Insurance.</u> Umbrella/Excess Insurance on an "occurrence form" in the minimum amount of \$20,000,000 each occurrence and annual aggregate which shall be in excess of the primary coverage referred to in clause (i) (employer's liability only), clause (ii) and clause (iii) above.</li> </ul> <p>Seller (or its particular contractor or subcontractor) must provide Developer with 30-days prior written notice before any required insurance policy expires, is cancelled, or is altered.</p>

<sup>14</sup> Note to Bidders: Insurance coverage, including limit amounts, is subject to further review and change by PacifiCorp.

	<p>Deductible or retention amounts under the required policies must not exceed 5% of the per occurrence coverage limits, without the express written consent of Developer.</p> <p>Each contract of insurance must be with an insurer approved to do business in the State of Utah, is “A-” Rated or better by A.M. Best Company (see <a href="http://www.ambest.com">www.ambest.com</a>) and must include the following provisions or endorsements:</p> <p>(A) <u>Additional Insured</u>. Naming Developer, its directors, officers, and employees as additional insureds on the general liability, automobile liability, pollution liability and excess/umbrella insurance policies.</p> <p>(B) <u>Primary Insurance</u>. Stating that the insurance is primary insurance with respect to the interest of Developer and that any insurance maintained by Developer is excess and not contributory insurance.</p> <p>(C) <u>Subrogation Waivers</u>. Providing Developer with waivers of subrogation on all coverages.</p> <p>(D) <u>Separation of Insured</u>. Providing for “<b>Separation of Insured</b>” coverage in the general liability, automobile liability, pollution liability and excess/umbrella insurance policies.</p> <p>(E) <u>Conversion from Claim Made to Occurrence</u>. Providing that, if any policy is maintained on a “claims made” form and is converted to an “occurrence form”, the new policy will be endorsed to provide coverage back to a retroactive date acceptable to Developer.</p> <p>(F) <u>Notice Requirement</u>. Providing that Developer is entitled to 30-days’ prior written notice before such contract of insurance expires, is cancelled, or is altered.</p> <p>Before Seller or any of its subcontractors enters upon the Site, Seller must provide Developer with certificates of insurance that name Developer as an additional insured and that evidence the coverage required by the Agreement, including additional insured endorsement numbers.</p>
<u>Intellectual Property Matters:</u>	<p>Developer shall hold title to any drawings, specifications, documents, plans and designs, licenses or other work product provided by or on behalf of Seller in connection with the WTGs and appurtenant equipment. In addition, Seller shall grant to Developer, for the life of the Facility, a paid-up, irrevocable, non-exclusive, transferrable, royalty-free right and license under all intellectual property rights that are necessary to own, use, operate, maintain, service, repair, alter commission, decommission, remove, dispose of and transfer ownership of the WTGs and ultimately, the Facility.</p>
<u>Limitation of Liability:</u>	<p>The Agreement shall provide for typical and customary limitations of liability with respect to Seller. In any event, the cap on Seller’s aggregate liability for all losses and all other costs and obligations arising out of or relating to the Agreement shall equal an amount equal to the Purchase Price (“<b>Seller’s Limitation of Liability</b>”).</p> <p>With the exception of the obligations to indemnify against claims of third parties</p>

	(and without limiting any obligation of the Seller to pay liquidated damages under the Agreement), neither party shall be liable to the other for any consequential, incidental, punitive, exemplary or indirect damages or lost profits; <u>provided</u> that to the extent not fully covered by insurance, each party shall remain liable for any damage to or loss of any property or equipment (including any deductible amounts) caused by such party's fraud, negligence, gross negligence, or willful misconduct.
<u>Taxes:</u>	Seller shall pay any and all sales and use, goods and services, value added, customs and duties (including federal import taxes, including any import duties or fees, on materials imported for performance of its obligations hereunder), withholding, service, general excise, ad valorem or similar taxes to the extent assessed or assessable under applicable law, and taxes measured by or imposed on the net income or net profit of Seller.
<u>Records; Audit:</u>	Seller shall maintain in accordance with good regulated utility accounting practices all records relating to the provision of the WTGs, their appurtenant equipment and the Facility for a period not less than five (5) years. To the extent specified in the O&M Manual, such records shall be maintained in electronic form on the File Share. In addition, Developer shall have the right to audit and inspect Seller's records upon reasonable advance notice.
<u>Assignment:</u>	Neither party may assign its rights and obligations under the Agreement without the non-assigning party's prior written consent, which consent shall not be unreasonably withheld except that Developer/Owner 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 consistent with the assignment provisions of the Build Transfer Agreement.
<u>Confidentiality:</u>	Each party shall keep confidential and not disclose any confidential information of the other party, subject to customary exceptions. Notwithstanding the foregoing, Seller shall acknowledge that the UPSC and the Utah [_____], have the power to examine Developer's books, records, minutes, papers and property and may, from time to time, request or require Developer 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.
<u>Dispute Resolution;</u> <u>Governing Law:</u>	<p>This Term Sheet is, and the Agreement shall be, governed by the laws of the State of Utah, without regard to its conflict of laws provisions.</p> <p>The parties shall submit to the exclusive jurisdiction of the United States Federal District Court located in Salt Lake City, Utah, or, if such court does not have subject matter jurisdiction, the state courts of the State of Utah. Each party shall waive any objection to forum or venue, and any right to jury trial. The parties shall consent to joinder or consolidation with respect to any disputes involving common issues of law or fact with respect to the Facility, the EPC Agreement or any other agreement relating to the Facility.</p> <p>Any disputes between the parties not resolved via good faith negotiations may proceed to litigation unless the parties mutually agree to arbitration, which arbitration shall be in accordance with the Commercial Arbitration Rules of the American</p>

	Arbitration Association.
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**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.

“Closing Completion” has the meaning set forth in Section 7.4.

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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.

“Closing Completion Certificate” means a certificate in the form of Exhibit 17G.

“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.

“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

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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.

(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.

“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 7.7.

“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 Closing Completion Date” means [\_\_\_\_].

“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.

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<sup>6</sup> Note to Bidders: Please provide the proposed Guaranteed Mechanical Completion Date.



“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 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 7.5(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 7.9(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>

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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.

“Project Mechanical Completion” has the meaning set forth in Section 7.6.

“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 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

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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.

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 7.5(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;

(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.

"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 7.5.

"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;

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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.



(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 Title 54, Chapter 17, Part 8, Section 801 *et. al.*, 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 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.

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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.

## **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 7.9(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 7.8.

**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 7.8.

**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 7.8.

**7.4 Closing Completion.** Contractor shall cause Closing Completion with respect to the Facility to occur on or before the Guaranteed Closing Completion Date and otherwise in accordance with the requirements of this Agreement. “Closing Completion” means, as to the Facility, the achievement of the following:<sup>11</sup>

**7.5 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) Closing Completion and valid delivery and acceptance by Owner of a Closing Completion Certificate with respect to the Facility;

(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;

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<sup>11</sup> Note to Bidders: The requirements for achieving Closing Completion will be provided by PacifiCorp but modeled after the requirements for the other milestones in Article 7. Closing Completion will occur before Mechanical Completion when material physical Work with respect to the Facility remains outstanding.



(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 7.8.

(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 7.8, 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 7.5(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 7.5(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.

**7.6 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 7.5(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 7.8.

(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.

**7.7 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 7.6;

(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 7.8.

**7.8 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 7.8. 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 7.8, 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.

## **7.9 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 7.9(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>12</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 7.9 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 defenses that it may have under law that any liquidated damage payable hereunder is a penalty or otherwise void under law.

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<sup>12</sup> Note to Bidders: Please provide liquidated damages to be included in definitive BOP EPC.

(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 7.9(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 7.9 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 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 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 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 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 Indemnitee, 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 Indemnitee 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 Indemnitee reasonably believes that the matter in question involves potential criminal liability against such Indemnitee. Other than as provided in this Section 19.5, the Indemnifying Party shall not settle any claim without the prior written approval of the Indemnitee, which approval shall not be unreasonably withheld, delayed or conditioned. The Indemnitee 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:\_\_\_\_\_