

#### FIRST AMENDMENT TO CONFIRMATION LETTER

This First Amendment to Confirmation Letter ("First Amendment") is entered into this 23<sup>rd</sup> day of August, 2010 by and between Southwestern Public Service Company, a New Mexico corporation ("Buyer"), and Calpine Energy Services, L.P., a Delaware limited partnership ("Seller").

WHEREAS, Buyer and Seller entered into a Confirmation Letter dated May 7, 2010 (the "Confirmation Letter") pursuant to which Seller agrees to sell Capacity and Unit Firm Energy to Buyer; and,

WHEREAS, the Parties wish to enter into this First Amendment to reflect an extension of the NMPRC approval contingency period.

NOW, THEREFORE, in consideration of these premises, the mutual promises set forth in the Confirmation Letter, and the mutual promises of the Parties set forth below, Buyer and Seller agree as follows:

1. Defined Terms. Unless otherwise defined herein, capitalized terms used in this First Amendment shall have the meanings given to them in the Confirmation Letter.

2. Amendment. The first sentence of the third paragraph of the "Contingencies" section of the Confirmation Letter is hereby deleted and replaced in its entirety with the following language:

In the event that Buyer timely applies for NMPRC approval pursuant to the above paragraph but is unable, despite Buyer's commercially reasonable efforts, to obtain NMPRC approval without conditions satisfactory to Buyer, Buyer shall have the right to terminate this Confirmation, by written notice to Seller, at any time within nine months following the date of this Confirmation.

3. Other Terms and Provisions of Confirmation Letter. Except as expressly amended herein, all other terms and provisions of the Confirmation Letter remain valid and in full force and effect.

4. Successors and Assigns. The terms, covenants and conditions of this First Amendment shall bind and inure to the benefit of the Parties and their respective representatives, successors and permitted assigns. The Parties and each of their respective representatives, successors and permitted assigns shall take any action necessary or proper to carry out the purpose and intent of this First Amendment.

5. No Third Party Beneficiaries. This First Amendment shall not confer any rights or remedies on any person or entity other than Buyer and Seller and their respective successors and permitted assigns.

6. Severability. The invalidity, illegality or unenforceability in any jurisdiction of any provision in or obligation under this First Amendment or any other documents or instruments related hereto shall not affect or impair the validity, legality or enforceability of the

remaining provisions or obligations under this First Amendment or such other document or instrument.

7. Headings. Section headings in this First Amendment are included herein for convenience of reference only and shall not constitute a part of this First Amendment for any other purpose or be given any substantive effect.

8. Counterparts. This First Amendment may be executed in two (2) or more counterparts and by different Parties on separate counterparts, all of which shall be considered one and the same agreement and each of which shall be deemed an original.

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IN WITNESS WHEREOF, the Parties have caused this First Amendment to be duly executed effective as of the date first set forth above.

Dated: August 23, 2010

Southwestern Public Service Company, a  
New Mexico corporation

By: [Signature]  
Name: TIM KAWAKAMI  
Title: DIRECTOR, PURCHASED POWER  
XCEL ENERGY SERVICES INC.  
AS AGENT FOR SOUTHWESTERN  
PUBLIC SERVICE COMPANY

Dated: August 23, 2010

Calpine Energy Services, L.P., a Delaware  
limited partnership

By: [Signature]  
Name: Thad Hill  
Title: EVP and Chief Commercial Officer

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### SECOND AMENDMENT TO CONFIRMATION LETTER

This Second Amendment to Confirmation Letter ("Second Amendment") is entered into as of February 26, 2014, by and between Calpine Energy Services, L.P., a Delaware limited partnership ("Seller") and Southwestern Public Service Company, a New Mexico corporation ("Buyer"). Buyer and Seller are hereinafter referred to individually as a "Party" and collectively as the "Parties".

WHEREAS, Buyer and Seller have entered into that certain EEI Master Power Purchase and Sale Agreement, version 2.1 (4/25/00) dated as of May 7, 2010 and a Confirmation Letter dated May 7, 2010 (the "Confirmation Letter") pursuant to which Seller agreed to sell Capacity and Unit Firm Energy to Buyer, as amended; and

WHEREAS, Buyer and Seller desire to further amend the Confirmation Letter to reflect changes expected to result from the commencement of the Southwest Power Pool (the "SPP") Integrated Marketplace (the "SPP Market") expected to commence on or about March 1, 2014.

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, Buyer and Seller hereby agree as follows:

1. Defined Terms. Unless otherwise defined, capitalized terms used but not defined herein shall have the meanings set forth in the Confirmation Letter.

2. Amendment. The attached Day-Ahead and Real Time Energy Market Protocols ("Exhibit A") are hereby incorporated into the Confirmation Letter. For avoidance of doubt, the Confirmation Letter shall be deemed to be amended to reflect all of the rules that are implemented as part of the SPP Market ("SPP Market Rules").

3. Term. Upon commencement of the SPP Market, Seller agrees to offer available energy in accordance with the Confirmation Letter to the SPP Market in conformance with the SPP Market Rules.

4. Other Terms and Provisions of Confirmation Letter. Except as expressly amended herein, all other terms and provisions of the Confirmation Letter remain valid and in full force and effect.

5. Successors and Assigns. The terms, covenants and conditions of this Second Amendment shall bind and inure to the benefit of the Parties and their respective representatives, successors and permitted assigns. The Parties and each of their respective representatives, successors and permitted assigns shall take any action necessary or proper to carry out the purpose and intent of this Second Amendment.

6. No Third Party Beneficiaries. This Second Amendment shall not confer any rights or remedies on any person or entity other than Buyer and Seller and their respective successors and permitted assigns.

7. Severability. The invalidity, illegality or unenforceability in any jurisdiction of any provision in or obligation under this Second Amendment or any other documents or instruments related hereto shall not affect or impair the validity, legality or enforceability of the remaining provisions or obligations under the Second Amendment or such other document or instrument.

8. Headings. Section headings in this Second Amendment are included herein for convenience of reference only and shall not constitute a part of this Second Amendment for any other purpose or be given any substantive effect.

9. Counterparts. This Second Amendment may be executed in two (2) or more counterparts and by different Parties on separate counterparts, all of which shall be considered one and the same agreement and each of which shall be deemed an original.

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IN WITNESS WHEREOF, the Parties have caused this Second Amendment to be executed as of the day and year first written above.

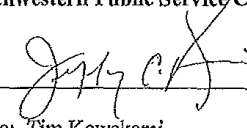
**Calpine Energy Services, L.P.**

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

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

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

**Southwestern Public Service Company, a New Mexico corporation**

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

*for* Name: Tim Kawakami

Title: Director, Purchased Power  
Xcel Energy Services Inc. as Agent for  
Southwestern Public Service Company

IN WITNESS WHEREOF, the Parties have caused this Second Amendment to be executed as of the day and year first written above.

Calpine Energy Services, L.P.

By: Steven D Pruett

Name: Steven D. Pruett

Title: Senior Vice President

km 701 CS

Southwestern Public Service Company, a New Mexico corporation

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

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

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

Xcel Energy Services Inc. as Agent for  
Southwestern Public Service Company

**EXHIBIT A**

**Day-Ahead and Real Time Energy Market Protocols**

**Bilateral Settlement Schedule Option**

The Seller shall offer Buyers' share of the Facility's Contract Capacity (200 MW) in to the SPP Day-Ahead market every day unless notifying the Buyer of an outage as described in the Confirmation Letter.

After the Day-Ahead results are published by SPP:

- A. Buyer and Seller shall agree upon a "look back calculator" (via a mutually agreeable calculation spreadsheet) that will determine the DA Schedule at the time of the posted DA Market results. It is understood that the look back calculator is intended to capture the Confirmation Letter characteristics as closely as possible. Energy will be deemed scheduled if certain tests are confirmed using the look back calculator. The look back calculator will take into account the previous day's Schedule to determine minimum downtime, scheduling and variable charges.
- B. Within three (3) days following publishing of the DA Market results, Seller shall submit a Day Ahead Bilateral Settlement Schedule ("BSS") at the Facility Settlement Location for the amount of Buyer's Energy where the sum of the revenues at the Facility's LMP exceeds the contracted costs as determined by the look back calculator.
- C. The hourly volume shall be 200 MW unless instructed otherwise.
- D. The BSS shall cover a minimum of eight (8) consecutive hours with eight (8) hours minimum downtime between Schedules.
- E. Contract Price shall include:
  - a. Variable O&M Charge
  - b. Quantity of Gas[Start Up + Energy] x Daily Gas Price Panhandle, Tx-Okla + \$0.48 per MMBTU plus the applicable City of Coweta Utilities Tax
  - c. Scheduling Charges
- F. Buyer shall be paid directly by SPP (via the BSS) the applicable DA LMP for the Buyer's Energy for all hours and MWs that the BSS occurs.
- G. The BSS Option will be evaluated over contiguous commitment periods, including those that span multiple days.
- H. The Bilateral Settlement Schedule option shall be in effect everyday unless Seller is notified by 8:00 am CPT to cease or to establish a Must Run Self-Commit Option.
- I. Within one hour after the Day-Ahead Market clears, an email will be sent by Buyer to Seller at [SPScontract@calpine.com](mailto:SPScontract@calpine.com) with the Day-Ahead Schedule that will be entered into SPP as a BSS. If no energy is scheduled on Buyer's behalf as a BSS, then within 15 minutes of the receipt of such email, an email



will be sent by Seller to Buyer at [dirlectricmarketerssps@xcelenergy.com](mailto:dirlectricmarketerssps@xcelenergy.com) declaring whether the Contract Capacity otherwise was scheduled into the Day-Ahead Market.

- J. For any hours where no Day-Ahead Schedule will be entered into SPP as a Day-Ahead Bilateral Settlement Schedule and the Contract Capacity was not otherwise committed to the Day-Ahead Market, Seller will notify Buyer of any Contract Capacity that did not clear in the Day-Ahead Market. Buyer will have the right, subject to the contractual notification times, to dispatch in the Real-Time market any capacity not cleared in the Day-Ahead Market.
- K. Within three (3) days of the Operating Day, as defined under Attachment AB of the SPP Tariff, Seller shall submit a Real-Time BSS at the Facility Settlement Location for the amount of Buyer's energy dispatched in Real-Time.
- L. Buyer will be responsible for any Make Whole Payment Uplift charges associated with energy dispatched by Buyer in Real-Time.

### THIRD AMENDMENT TO CONFIRMATION LETTER

This Third Amendment to Confirmation Letter (“Third Amendment”) is entered into as of June 25, 2014, by and between Calpine Energy Services, L.P., a Delaware limited partnership (“Seller”) and Southwestern Public Service Company, a New Mexico corporation (“Buyer”). Buyer and Seller are hereinafter referred to individually as a “Party” and collectively as the “Parties”.

WHEREAS, Buyer and Seller have entered into a Confirmation Letter dated May 7, 2010 (the “Confirmation Letter”) pursuant to which Seller agreed to sell Capacity and Unit Firm Energy to Buyer, as amended by the First Amendment thereto dated August 23, 2010 and by the Second Amendment thereto dated February 26, 2014; and

WHEREAS, Buyer and Seller desire to further amend the Confirmation Letter to reflect changes expected to result from the commencement of the Southwest Power Pool (the “SPP”) Integrated Marketplace (the “SPP Market”) that commenced on March 1, 2014; and

WHEREAS, Buyer and Seller desire to replace in its entirety Exhibit A to the Second Amendment with Exhibit A to this Third Amendment.

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, Buyer and Seller hereby agree as follows:

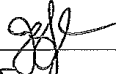
1. Capitalized terms used but not defined herein shall have the meanings set forth in the Confirmation Letter.
2. The attached Day-Ahead and Real Time Energy Market Protocols (“Exhibit A”) are hereby incorporated into this Confirmation Letter and shall replace in their entirety Exhibit A to the Second Amendment as of the date hereof and Exhibit A to the Second Amendment shall no longer be in effect.
3. Upon commencement of the SPP Market, which was launched on March 1, 2014, Seller agrees to offer available energy in accordance with the Confirmation Letter (as amended by this Third Amendment) to the SPP Market in conformance with the SPP Market Rules (as defined below).
4. Exhibit A sets forth the understanding of the Parties to implement the Change in Regional Territory provision of the Confirmation Letter relating to the SPP Market. All terms and conditions of the Confirmation Letter remain unchanged except as set forth herein.

5. For avoidance of doubt, the Confirmation Letter shall be deemed to be amended to reflect all of the rules that are implemented as part of the SPP Market (“SPP Market Rules”).

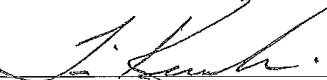
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IN WITNESS WHEREOF, the Parties have caused this Third Amendment to be executed as of the day and year first written above.

**Calpine Energy Services, L.P.**

By:  *cy*  
Name: Jennings Goodman  
Title: Vice President

**Southwestern Public Service Company, a New Mexico corporation**

By:   
Name: Tim Kawakami  
Title: Director, Purchased Power  
Xcel Energy Services Inc., as Agent for  
Southwestern Public Service Company, a New  
Mexico corporation

## EXHIBIT A

### Day-Ahead and Real Time Energy Market Protocols

#### **Bilateral Settlement Schedule Option**

The Seller shall offer the Contract Capacity (200 MW) into the Southwest Power Pool, Inc. ("SPP") Day-Ahead ("DA") market ("DA Market") and Real Time Energy Balancing market ("RTBM") on behalf of the Buyer every day unless Seller notifies the Buyer of a Planned Outage or an unscheduled or Forced Outage as described in the Confirmation Letter.

After the DA Market results are published by SPP:

- A. Buyer and Seller shall agree upon a "look back calculator" (via a mutually agreeable calculation spreadsheet) that will determine the DA Bilateral Settlement Schedule ("DA BSS") at the time of the posted SPP DA Market results; It is understood that the look back calculator is intended to capture the Confirmation Letter dispatch characteristics as closely as possible. The look back calculator will take into account the previous day's DA BSS to determine minimum downtime, minimum runtime, scheduling and variable charges. If Seller offers the Contract Capacity at dispatch characteristics consistent with or less than the Confirmation Letter terms, the look back calculator shall be used to determine the Requested Energy, subject to the Contract Capacity being committed by SPP for the hours committed in the DA Market.
- B. Within three (3) days following publishing of the DA Market results, Seller shall submit and Buyer shall confirm a DA BSS at the Delivery Point for the amount of Buyer's Requested Energy where the sum of the revenues at the Facility's LMP exceeds the contracted costs as determined by the look back calculator.
- C. If Buyer sends a DA BSS to Seller as calculated by the look back calculator and the Contract Capacity is not committed by SPP in the DA Market for any portion of the DA BSS, then no DA BSS shall be entered for the period the Contract Capacity was not committed in the DA Market as long as Seller offered the Contract Capacity in the DA Market at or lower than the dispatch characteristics as described in Section F hereof. If Buyer sends a DA BSS to Seller as calculated by the look back calculator and the Contract Capacity is not committed in the DA Market for any portion of the DA BSS, Seller shall provide to Buyer the dispatch characteristics that were used to offer the Contract Capacity into the DA Market for the applicable day.

- D. The hourly volume of the DA BSS shall be 200 MW unless instructed otherwise by SPS.
- E. The DA BSS shall cover a minimum eight (8) consecutive hours for the 150 MW and 200 MW Scheduled Quantity. There shall be a minimum of eight (8) hours minimum downtime between DA BSS schedules.
- F. The dispatch characteristics shall be consistent with the Confirmation Letter and include the following:
  - a. Variable O&M Charge
  - b. Quantity of Gas multiplied by the Cost of Gas
  - c. Scheduling Charges
  - d. Other variable costs Buyer is obligated to pay Seller under the Confirmation Letter (*e.g.* Emissions Costs).
- G. Seller's submittal and Buyer's confirmation of a DA BSS or a Real Time BSS (as defined below) shall be deemed Delivered Energy at the Delivery Point.
- H. Buyer shall be settled directly by SPP for the Delivered Energy pursuant to the DA BSS or Real Time BSS.
- I. In the event the Turbine is unavailable or de-rated as a result of an unscheduled outage or Forced Outage, the Seller has the option to deliver Replacement or Alternate Energy at the Delivery Point.
- J. The DA BSS option, as described in A through H above, will be evaluated over contiguous commitment periods, including those that span multiple days.
- K. The DA BSS option shall be in effect everyday for the purposes of the Energy Call Option unless Seller is notified by 8:00 am CPT to cease or to establish a self-commitment of the Contract Capacity for the subsequent calendar day.
- L. Within one hour after SPP posts the DA Market results, an email will be sent by Buyer to Seller at [SPScontract@calpine.com](mailto:SPScontract@calpine.com) with the schedule that will be entered into SPP as a DA BSS. The email from Buyer to Seller shall indicate 0 MW for all hours in which there is no schedule. If there is no energy schedule for any hour for such day, then within 15 minutes of the receipt of such email, an email will be sent by Seller to Buyer at [dlrtelectricmarketerssps@xcelenergy.com](mailto:dlrtelectricmarketerssps@xcelenergy.com) declaring whether the Contract Capacity otherwise was committed into the DA Market.

- M. For any hours where no schedule will be entered into SPP as a DA BSS and the Contract Capacity was not otherwise committed to the DA Market, Buyer will have the right, subject to the contractual notification times and SPP commitment, to dispatch in the RTBM any capacity not cleared in the DA Market.
- N. If the Contract Capacity is dispatched in the RTBM pursuant to a Buyer request described in M above, within three (3) days of the Operating Day (Operating Day as defined under Attachment AE of the SPP Tariff) Seller shall submit and Buyer shall confirm a Real-Time Bilateral Settlement Schedule ("Real-Time BSS") at the Delivery Point for the amount of Buyer's schedule dispatched in Real-Time.
- O. In the event that Seller is unable to deliver due to an unscheduled outage or Forced Outage, Seller shall notify Buyer within fifteen (15) minutes or as soon as reasonably practical of such unscheduled outage or Forced Outage. The notification shall notify Buyer of the occurrence of the unscheduled outage or Forced Outage, the anticipated shortfall amount and duration to the schedule. For any anticipated shortfall amount resulting from an unscheduled outage or Forced Outage of the Turbine, the shortfall amount shall be allocated to Buyer on a pro rata basis equal to the Schedule energy amount divided by the capacity of the Turbine. A Real-Time BSS from Buyer to Seller will be entered by Seller and confirmed by Buyer in an amount equal to the shortfall caused by the an unscheduled outage or Forced Outage unless Replacement Energy or Alternate Energy is provided. The entry of a Real-Time BSS from Buyer to Seller will not affect any previously entered DA BSS from Seller to Buyer.
- P. Buyer shall be responsible for any SPP Integrated Market imbalance charges, scheduling charges, offsets or other costs associated with a Real Time BSS ("Charges"). The Charges shall be documented and shall be associated with the Contract Capacity. Seller agrees to provide Buyer reasonable documentation to support such Charges.



Calpine Energy Services, L.P.  
717 Texas Avenue, Suite 1000  
Houston, Texas 77002  
(713) 830-8333  
Fax: (713) 830-8868

**CONFIRMATION LETTER  
(EEI)**

**"CONFIDENTIALITY NOTICE: The information is intended only for the use of the individual or entity named below. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution, or taking of any action in reliance on the contents of this information is strictly prohibited. If you have received this transmission in error, please immediately notify us by telephone to arrange for return of the documents."**

Date: June 1, 2012  
To: Southwestern Public Service Company  
Attention: Purchased Power Department  
Fax No.:  
From: Calpine Energy Services, L.P.  
Re: Calpine Deal Number:  
Calpine Agreement Number:

**This Confirmation amends, restates and supersedes in its entirety the Confirmation dated prior to the date hereof in respect of this Transaction.**

The purpose of this Confirmation is to confirm the terms and conditions of the transaction (the "Transaction") agreed upon by Buyer and Seller as of the Trade Date specified below. This Confirmation is being provided pursuant to, in accordance with and is subject to the provisions of to that certain EEI Master Power Purchase and Sale Agreement, version 2.1 (4/25/00) by and between Southwestern Public Service Company ("SPS") and Calpine Energy Services, L.P. ("CES") dated as of May 7, 2010 (the "Agreement"). Notwithstanding any contrary provisions in the Agreement, any conflict between this Confirmation and the Agreement shall be resolved in favor of this Confirmation. Buyer and Seller shall be referred to individually herein as a "Party" and collectively herein as the "Parties." Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Agreement.

**We confirm the following terms of our Transaction:**

**Buyer:** SPS  
**Seller:** CES  
**Trade Date:** June 1, 2012



**Product:** Capacity and a day ahead Energy Call Option on Energy. Buyer shall have the right to call for either 50 MW, 130 MW, or 200 MW contract Quantity of Energy to be delivered during any day of the Delivery Period within a Schedule, effected by Buyer consistent with the scheduling provisions hereof. In no event shall Buyer be entitled to schedule volumes other than that stated in the preceding sentence.

**Quantity of Capacity and Energy:** 200 MW ("Contract Capacity") of Capacity and Unit Firm Energy (as defined below, "Energy") from the Turbine at the Facility. For purposes of this Transaction and Confirmation, the definition of "Unit Firm" in Schedule P of the Agreement is hereby changed to read as follows:

"Unit Firm" means, with respect to this Transaction, that the Energy that is the subject of the Transaction is intended to be supplied from the Turbine (as defined in the Confirmation), and in the event the Turbine is unavailable or de-rated as a result of an unscheduled outage or "Forced Outage" (as defined in the NERC Generating Unit Availability Data System (GADS) Forced Outage reporting guidelines) and (i) Seller elects not to deliver Replacement Energy or Alternate Energy, or (ii) Seller elects to deliver Alternate Energy but Buyer elects not to accept or receive Alternate Energy, Buyer's obligation to pay the Capacity Payment shall be reduced by the Capacity Availability Adjustment Amount, but no other damages shall apply in such instances, including without limitation the damages set out in Article Four of the Agreement.

Further, except as provided above, Seller's failure to deliver under a "Unit Firm" Transaction shall be excused: (i) by an event or circumstance that affects the Turbine so as to prevent Seller from performing its obligations, which event or circumstance was not anticipated as of the date the Transaction was agreed to, and that is not within the reasonable control of, or the result of the negligence of, Seller or (ii) by Buyer's failure to perform. In any of such events described in the foregoing sentence, Seller shall not be liable to Buyer for any damages, including any amounts determined pursuant to Article Four.

An unscheduled outage or Forced Outage may not be based, in whole or in part, on (i) Seller's increased costs of operating the Facility, or (ii) Seller's ability or desire to enter into transactions with third parties. Seller may provide Replacement Energy or Alternate Energy to restore Buyer's Schedule in the event of an unscheduled outage, Forced Outage or derate of the Turbine as set forth below.

**Contract Price:** For purposes of the reference to "Contract Price" in Article Three and the definition of Force Majeure in the Agreement, "Contract Price" means the sum of (i) the Capacity Payment (calculated using the pertinent monthly Capacity Price consistent with the "Capacity Availability Adjustment" below), plus (ii) the Variable O&M Charge, multiplied by the Quantity of Energy delivered each month, plus (iii) any Scheduling Charges per month, plus (iv) the Cost of Gas for the applicable calendar month.

Seller shall show the individual components of the Contract Price (subsections (i) through (iv) above in this section) on each monthly invoice submitted to Buyer for payment.

**Capacity Payment:** The "Capacity Payment" for each month as used herein equals the Capacity Price multiplied by the Contract Capacity, reduced by the Capacity Availability Adjustment. The applicable Capacity Prices for each month and each year of the Delivery Period of this Confirmation are as set forth in the Table below. The Summer Months are defined as the months of June, July, August, and September during the Delivery Period. The Non-Summer Months are defined as the months of January, February, March, April, May, October, November, and December during each year of the Delivery Period.

Calendar Period	Capacity Price - Summer Months	Capacity Price - Non-Summer Months
June 1, 2014 – May 31, 2015	[REDACTED]	[REDACTED]
June 1, 2015 – May 31, 2016	[REDACTED]	[REDACTED]
June 1, 2016 – May 31, 2017	[REDACTED]	[REDACTED]
June 1, 2017 – May 31, 2018	[REDACTED]	[REDACTED]
June 1, 2018 -Sept 30, 2018	[REDACTED]	[REDACTED]
Oct 1, 2018 – May 31, 2019	[REDACTED]	[REDACTED]

**Variable O&M Charge:** \$ [REDACTED] per MWh multiplied by the Inflation Factor.

**Scheduling Charge:** Except when the Buyer schedules only 50 MW Quantity of Energy, in which case no Scheduling Charge will apply. Buyer shall pay a "Scheduling Charge" for each Schedule submitted by Buyer and dispatched by Seller, calculated using the following formula:

[REDACTED]

The Scheduling Charge calculated above shall not exceed the amount equal to ([REDACTED] x Inflation Factor) for any 24 hour period, except in the circumstance that two separate Schedules were submitted for such 24 hour period.

For the avoidance of doubt, Scheduling Charges also apply if Seller delivers Replacement Energy or Alternate Energy. An additional Scheduling Charge will not be assessed in relation to a Turbine restart during a single continuous period scheduled by Buyer following an unscheduled outage or Forced Outage not caused by Force Majeure.

**Provision of Gas:** Seller shall provide Gas corresponding to Energy Buyer schedules in accordance with the "Option Exercise, Scheduling" section herein.

**Contract Heat Rate:** The Contract Heat Rate is as set forth in the table below:

Contract Heat Rate (MMBtu/MWh)			
Contract Year	Scheduled Quantity		
	50 MWh/hr	130 MWh/hr	200 MWh/hr
June 1, 2014 – Sept 30, 2018	■	■	■
Oct 1, 2018 – May 31, 2019	■	■	■

**Quantity of Gas:** a) Seller shall provide the applicable Quantity of Gas corresponding to the respective Quantity of Energy Scheduled pursuant hereto, as set forth in the tables below:

June 1, 2014 – Sept 30, 2018 Quantity of Gas -- Energy		
Quantity of Energy Scheduled (MWh)	Contract Heat Rate (MMBtu/MWh)	Quantity of Gas (MMBtu/hr)
50	■	■
130	■	■
200	■	■

Oct 1, 2018 – May 31, 2019 Quantity of Gas -- Energy		
Quantity of Energy Scheduled (MWh)	Contract Heat Rate (MMBtu/MWh)	Quantity of Gas (MMBtu/hr)
50	■	■
130	■	■
200	■	■

In the event of any unexcused failure of Seller to deliver Energy hereunder, or Buyer deciding not to accept Alternate Energy, Buyer's corresponding payment obligation for Gas shall be proportionately reduced.

b) In addition, Seller shall provide the applicable Quantity of Gas required for start up gas as shown in the table below:

Quantity of Gas -- Start Up (MMBtu/Schedule)	
130MW or 200MW	█

c) The total Quantity of Gas to be provided by Seller on a given day will be calculated as follows:

The product of the number of hours scheduled and corresponding Quantity of Gas per the "Quantity of Gas -- Energy" table above plus the Quantity of Gas required for start up for each Schedule as shown in the "Quantity of Gas -- Start Up" table above (if applicable).

**Cost of Gas:**

The "Cost of Gas" shall be the aggregate of the Daily Gas Costs for each Gas Day during the calendar month plus any Intra-Day Scheduling Costs for the applicable calendar month. The "Daily Gas Cost" will be calculated b

█ (which constitutes a reasonable value of what is expected to be, as of the Trade Date, the actual cost of gas delivered to the Facility) plus the applicable City of Coweta Utilities Tax as it exists currently under Municipal Code Section 7-401 or as may exist in the future pertinent to the Delivery Period hereof.

**Delivery Period:**

June 1, 2014 through May 31, 2019, Hour Ending ("HE") 0100 through HE 2400 CPT, Monday through Sunday including NERC holidays.

**Delivery Point:**

The Delivery Point will be at the point of interconnection of the Facility to the SPP transmission grid (GSWS.ONETA).

Buyer shall be responsible for all applicable transmission service charges and transmission losses at and after the Delivery Point for transmission service as to Energy or Replacement Energy delivered and at and after the alternate delivery point for any Alternate Energy delivered. Seller shall be responsible for all applicable transmission service charges and transmission losses before the Delivery Point for transmission service as to Energy or

Replacement Energy delivered and before the alternate delivery point for any Alternate Energy delivered.

**Replacement Energy;  
Alternate Energy:**

In the event that a Transmission Provider curtails firm transmission service procured by Buyer consistent with the "Contingencies" Section hereof, such that Buyer is unable to accept all or a portion of the scheduled Energy at the Delivery Point or at a Buyer approved alternate delivery point, Buyer shall be excused from accepting delivery of and paying for the curtailed Energy and from paying for the corresponding pro-rata amount of Gas provided by Seller to the Turbine.

In the event the Turbine is unavailable or de-rated as a result of an unscheduled outage or Forced Outage, Seller may, in its sole reasonable discretion, deliver replacement Energy from an alternate turbine at the Facility ("Replacement Energy"). If Seller reasonably determines it is unable to deliver Energy to Buyer from the Facility for such purpose in whole or in part, Seller may offer to deliver replacement Energy to Buyer from an alternate source to an alternate delivery point that is on the border of or within the SPS electrical service area transmission system ("Alternate Energy"), provided that Seller's offer provides Buyer with all information regarding the total cost for Alternate Energy. Buyer will, in its sole reasonable discretion, have the right to accept or reject Seller's offer to deliver such Alternate Energy, in relation to any specific Schedule. To the extent Seller provides Replacement Energy or Buyer accepts Alternate Energy, the amounts of Replacement Energy and Alternate Energy delivered by Seller to Buyer shall constitute Energy delivered under this Confirmation and shall be deemed delivered from the Turbine for purposes of calculating the Contract Price and Capacity Availability Adjustment Amount (defined below). Notwithstanding the previous sentence, in connection with Seller's delivery to Buyer of Alternate Energy the Cost of Gas charged to Buyer will be adjusted by agreement of the Parties in response to Seller's offer to deliver Alternate Energy.

**Option Exercise;  
Scheduling:**

All Scheduling shall be subject to and limited by any applicable Rules promulgated by North American Electric Reliability Council ("NERC") or its successor, the SPP or its successor, and good utility practice (the "Scheduling Rules"). With respect to any changes in the Scheduling Rules, Buyer will manage and accept the risk of electric transmission scheduling requirements necessary to accommodate delivery. Buyer shall have the right, but not the obligation, to exercise its Energy Call Option by delivering notice of its option exercise to Seller no later than 8:00 a.m. CPT on the Business Day prior to the day on which the Energy is to be delivered. Buyer shall have the right, but not the obligation, to schedule Energy ("Requested Energy") for any day as follows:

(1) Buyer shall schedule deliveries in consecutive one-hour increments for a minimum of three consecutive hours for the first 50 MW, and eight consecutive hours for Schedules of 130 MW and 200MW (no maximum number of consecutive hours).

(2) Buyer may make intra-day changes to a previously submitted day-ahead schedule ("Intra-Day Scheduling Change"), provided that Buyer provides Seller advance notice of at least four hours prior to the first hour affected by the Intra-Day Scheduling Change, and if the Turbine requires a Cold Start, then Buyer shall provide advance notice of at least six hours prior to the start of the first hour affected by the Intra-Day Scheduling Change. If Buyer elects to make an Intra-Day Scheduling Change, Seller shall have the right to charge Buyer for quoted costs (consistent with the process described below) to accommodate such a change ("Intra-Day Scheduling Cost"); provided, however, that Intra-Day Scheduling Costs shall consist only of costs associated with the change in Gas requirements as a result of the Intra-Day Scheduling Change. No later than one hour after receiving notice from Buyer of an Intra-Day Scheduling Change, Seller shall provide Buyer with a quote of the Intra-Day Scheduling Cost associated with implementation of the Intra-Day Scheduling Change. Upon receiving notice of the Intra-Day Scheduling Cost, Buyer shall immediately notify Seller of its decision either to accept or withdraw the Intra-Day Scheduling Change request.

(3) Buyer may schedule deliveries at any start time; provided, however, that Buyer shall not be entitled to a second intra-day Schedule, or a start for a subsequent day's Schedule, until the expiration of eight hours from the previous Shutdown.

**Capacity  
Availability  
Adjustment:**

To the extent Seller fails to deliver Energy from the Turbine because the Turbine is unavailable or de-rated as a result of an unscheduled outage or Forced Outage and (i) Seller elects not to deliver Replacement Energy or Alternate Energy or (ii) Seller elects to deliver Alternate Energy but Buyer elects not to accept or receive Alternate Energy, Buyer's obligation to pay the Capacity Payment shall be reduced by the Capacity Availability Adjustment Amount, but no other damages shall apply in such instances, including without limitation the damages set out in Article Four of the Agreement.

Seller guarantees the monthly Capacity Availability at 96% during Summer Months and 93% during Non-Summer Months. If the Capacity Availability falls below 96% (calculated on a four month rolling average of the Summer Months during the Delivery Period) during a Summer Month or 93% during a Non-Summer Month (calculated on a four month rolling average of the Non-Summer Months during the Delivery Period), Seller will credit Buyer 1.5% of the capacity payment for each 1% that the Capacity Availability

falls below the guaranteed amount (the "Capacity Availability Adjustment Amount"). Notwithstanding the foregoing, the Capacity Availability prior to the fourth Summer Month and prior to the fourth Non-Summer Month during the initial year of the Delivery Period shall be determined as to each individual month for the first three Summer Months and the first three Non-Summer Months, rather than on such rolling average basis. In determining the Capacity Availability, (i) Force Majeure outages and Planned Maintenance (within the permitted limits stated in the "Planned Maintenance" section below) shall not reduce the calculated Monthly Availability and (ii) Replacement Energy and Alternate Energy delivered hereunder shall be treated as equivalent to the delivery of Energy from the Turbine. The Capacity Availability Adjustment Amount can never exceed Capacity Price for such month multiplied by the contract Quantity. Seller will credit Buyer any Capacity Availability Adjustment Amount in the Invoice for the month following the conclusion of each calendar month during the Delivery Period.

The Hourly Availability will be calculated each hour Energy is scheduled using the following equation:

[REDACTED]

If no Energy is scheduled, the Hourly Availability is equal to 1

The Capacity Availability for each month will be calculated using the following equation:

[REDACTED]

The Capacity Payment for each month will be computed using the following equation:

CP = [REDACTED], where:

CP = the Capacity Payment expressed in Dollars for such month,

UCP = the unadjusted Capacity Payment = 200,000 KW x (CR), expressed in Dollars for such month,

CR = Capacity Price expressed in US Dollars per KW-month, for the applicable month during the Delivery Period, and

CAA = the Capacity Availability Adjustment Amount expressed in Dollars and calculated as:

For Summer Months:

(a) If CAA for such Month is [REDACTED]

(b) if CARA for such Month is [REDACTED]

and

For Non-Summer Months:

(a) if CARA for such Month is [REDACTED]

(b) if CARA for such Month is [REDACTED]

Where:

CARA = is the four-month rolling average of CA calculated using the values for the 3 previous Summer Months or Non-Summer Months, as the case may be plus the value of the current month. For the first three Summer Months and the first three Non-Summer Months, CARA shall equal the value of CA for each month. For example:

For the month of June 2014, the CARA shall equal the monthly value of CA for June 2014;

For the month of September 2014, the CARA shall be the average of the monthly values for CA for June, July, August and September 2014;

For the month of June 2015, the CARA shall be the average of the monthly values for CA for July, August and September 2014 and the monthly value for CA for June 2015;

For the month of February 2014, the CARA shall equal the value of CA for February 2014; and

For the month of April 2014, the CARA shall equal the average of the monthly values for CA for January, February, March and April 2014.

Seller shall provide to Buyer calculations and supporting documentation of the HA on a daily basis, and the CA and CAA on a monthly basis.

**Planned Maintenance:**

"Planned Maintenance" means a planned outage scheduled in advance for the Turbine only during the Non-Summer Months. Any requests by Seller to schedule Planned Maintenance during any other month shall be subject to the prior written approval of Buyer. On or before August 1 of each year, beginning on August 1, 2013, Seller will provide a binding schedule of Planned Maintenance for the following year (subject to modification with due notice as set forth below) and a non-binding schedule of Planned Maintenance for the balance of the Delivery Period.



Seller shall be permitted a maximum of 480 hours of Planned Maintenance for each calendar year for the Turbine without reduction of CA for purposes of the Capacity Availability Adjustment; provided, however, that Seller shall be permitted 740 hours of Planned Maintenance during one calendar year during the Delivery Period (but not during the first two calendar years of the Delivery Period), not reducing CA for purposes of calculating the Capacity Availability Adjustment.

Seller shall provide Buyer with reasonable advance notice of any change in any Planned Maintenance schedule consistent with the following:

<b>Planned Maintenance Expected Duration</b>	<b>Advance Notice Required</b>
(1) Less than 2 Days	at least 24 hours
(2) 2 to 5 Days	at least 7 Days
(3) Major overhauls (over 5 Days)	at least 90 Days

**Contingencies:**

The commencement of the Parties' performance obligations as to Product delivery and receipt under this Confirmation is also contingent upon the approval by the New Mexico Public Regulation Commission ("NMPRC"). For the avoidance of doubt, the Seller will not be obligated to schedule or deliver the Product and Buyer will not be obligated to pay for the Product until this Confirmation is approved by the NMPRC subject to Buyer's termination rights in the immediately following paragraph. No later than sixty (60) calendar days after the Parties' execution of this Confirmation, Buyer shall request approval of this Transaction and Confirmation from the NMPRC. Buyer shall use commercially reasonable efforts to obtain NMPRC Approval, and Seller shall cooperate reasonably with Buyer's efforts to seek NMPRC Approval. Buyer shall promptly provide written notice to Seller upon grant of NMPRC approval, and this contingency, subject to Buyer's termination rights in the immediately following paragraph, will have no further effect.

In the event that Buyer timely applies for NMPRC approval pursuant to the above paragraph but is unable, despite Buyer's commercially reasonable efforts, to obtain (a) NMPRC approval or (b) NMPRC approval without conditions satisfactory to Buyer, Buyer shall have the right to terminate this Confirmation, without any further financial or other obligation to Seller as a result of such termination, by written notice to Seller (not more than forty-five (45) days after the date the NMPRC publishes the order. Upon Seller's receipt of such notice, this Confirmation shall be immediately terminated, and each Party shall be relieved of all obligations pursuant to this Confirmation without any further financial or other obligation to the other Party as a result of such termination or otherwise; provided, however, that each Party shall

be responsible for its own costs and expenses incurred prior to such termination.

Notwithstanding anything to the contrary herein, if the NMPRC has not published an order approving this Transaction on or before March 15, 2013, then either Party shall have the right to terminate this Confirmation with written notice to the other Party. Upon receipt of such written notice, this Confirmation shall be immediately terminated, and each Party shall be relieved of all obligations pursuant to this Confirmation without any further financial or other obligation to the other Party as a result of such termination or otherwise; provided, however, that each Party shall be responsible for its own costs and expenses incurred prior to such termination.

**Credit:** Effective from May 1, 2014 and through the Delivery Period, Seller is obligated to provide and maintain Required Credit Support. If Seller fails to provide or maintain the Required Credit Support during the period from such date through the end of the Delivery Period, Buyer shall have the right to terminate this Confirmation upon providing at least ninety (90) days' written notice of same to Seller unless during the initial twenty (20) days of such ninety (90) day period Seller provides the Required Credit Support.

**Taxes:** Except for Emissions Costs, Seller shall be solely responsible for (i) any and all present and future taxes and other impositions of Governmental Authorities relating to the construction, ownership or leasing, operation or maintenance of the Facility, or any components or appurtenances thereof, including taxes and impositions that vary based upon the amount of power produced, the amount and/or nature of fuel consumed, and/or the amount and/or nature of wastes produced by the Facility, and (ii) all ad valorem taxes relating to the Facility; provided that responsibility for the local City of Coweta Utilities Tax will be as stated in the "Cost of Gas" section hereof.

The Parties shall cooperate to minimize tax exposure; however, neither Party shall be obligated to incur any financial burden to reduce taxes for which the other Party is responsible hereunder. All Energy delivered by Seller to Buyer hereunder shall be sales for resale, with Buyer reselling such Energy. Buyer shall obtain and provide Seller with any certificates required by any Governmental Authority, or otherwise reasonably requested by Seller to evidence that the deliveries of Energy hereunder are sales for resale.

**Emissions Cost and Allowances:**

(a) Notwithstanding anything to the contrary herein, Buyer shall reimburse Seller for all Emissions Costs that are incurred by Seller on or after June 1, 2014 (the "Commencement Date") and that are

applicable during the Delivery Period, resulting from the imposition of any Law existing on the Trade Date by a Governmental Authority with jurisdiction over Seller and/or the Facility, and/or any new environmental or other Law, or the modification or new interpretations of existing Law(s) which become effective subsequent to the Trade Date.

(b) As applicable, Seller shall include any Emissions Costs payable by Buyer in its monthly invoice to Buyer, as provided in Article 6 of the Agreement.

(c) At Buyer's request, Seller shall provide Buyer a copy of any reporting, estimates or other compliance documentation submitted to any Governmental Authority pertaining to any Law resulting in Emissions Costs for the Turbine (or Facility, as applicable).

(d) With respect to any Emissions Costs incurred by Seller on or after the Commencement Date as a result of any new environmental or other Law, or the modification or new interpretations of existing Law affecting emissions of carbon dioxide ("CO<sub>2</sub>") and becoming effective subsequent to the Trade Date (any such new or existing Law hereinafter, "Environmental Change in Law"), Seller shall provide Buyer with written notice thereof as promptly as practicable after Seller obtains knowledge thereof, but in no event less than three (3) months after the date on which the Environmental Change in Law becomes effective (an "Environmental Change in Law Notice").

(e) If Buyer receives an Environmental Change in Law Notice, Buyer and Seller shall negotiate in good faith and shall use commercially reasonable efforts to develop and agree upon a written amendment to this Transaction in a timely manner to govern the procurement, disposition, transfer, use, and market price determinations (including applicable indices) of, and accounting and billing for, Emission Costs for the applicable compliance period (as modified from time to time, "Emissions Plan") and to cooperate with and be responsive to each other and each other's reasonable requests in the development of the Emissions Plan. For the avoidance of doubt, the Parties agree that the essential business purpose of this Emissions Costs and Allowances section is for Buyer to bear all Emissions Costs related to the production or sale of Delivered Energy during the period commencing on the Commencement Date and ending at the expiration of the Delivery Period.

(f) Seller will as soon as practicable notify Buyer, in writing, if it anticipates that Seller will be required to obtain, hold or surrender emissions credits, allocations, allowances or offsets relating to any CO<sub>2</sub> emissions from the Facility attributable to Delivered Energy. In the event that Seller receives any credits, allocations, allowances, offsets, legally acceptable tradable instrument, or similar item of value ("Credit") related to the operation of the

Turbine and/or emissions of CO2 from the Turbine, a pro rata share of such Credits that are attributable to the Turbine shall be applied to mitigate or offset the emissions and/or the Emissions Costs, as applicable, incurred by Seller as a result of operation of the Turbine for the sale of Delivered Energy hereunder, in advance of Seller seeking reimbursement from Buyer hereunder. For purposes of the preceding sentence, the pro rata share shall be calculated based on the same methods, formulae and/or calculations used by the Governmental Authority to determine the Emissions Costs for any given compliance period (e.g., (i) if Emissions Costs are imposed on Seller based on the Capacity of the Facility, then the pro rata share of Credits shall be equal to Buyer's percentage of Contract Capacity from the Facility, or (ii) if Emissions Costs are imposed on Seller based on the volumetric production or sale of Energy from the Facility during a given compliance period, then the pro rata share of Credits shall be equal to the amount of Delivered Energy during such period, divided by the total amount of Energy produced or sold from the Facility during that same period). If Seller receives some type of corporate wide allocation of Credit which allocation is not directly, but at least indirectly, related to the Turbine, its emissions and/or operation for the sale of Delivered Energy, Buyer and Seller shall work together in good faith to establish a reasonable allocation for the Turbine.

(g) As an alternative to reimbursing Seller for any Emissions Costs pursuant to paragraph (a) of this section, Buyer may, at its election, provide to Seller CO2 emissions allowances to cover Buyer's share of Emissions Costs from the Turbine (or Facility in the case of Replacement Energy) as may be applicable and/or required by Law, net of Buyer's pro-rata share of Credits allocated or granted to the Turbine (or Facility in the case of Replacement Energy) by a Governmental Authority.

(h) If Buyer elects to provide Seller with emissions allowances to cover Buyer's share of any Emissions Costs per the preceding paragraph (g), Buyer shall have until thirty (30) days prior to any compliance deadline (taking into account seasonal, annual or other compliance period deadlines) to fund the applicable allowance accounts for the Facility with, or otherwise provide to Seller, any CO2 emissions allowances required by Law as a result of emissions of CO2 attributable to Delivered Energy from the Turbine or Facility during such compliance period. In the event that, prior to the date that is thirty (30) days before any such compliance deadline, Buyer fails to provide such required emissions allowances (if any), Seller shall supply such required emissions allowances on behalf of Buyer and shall charge all reasonable costs and expenses associated therewith (including brokers' and attorneys' fees, as applicable) to Buyer in the next monthly invoice. Any remaining allowances in excess of actual compliance requirements shall be netted against the following

period's compliance requirement (to the extent authorized by Law) or returned to Buyer, at Buyer's sole discretion.

(i) Without affecting or otherwise diminishing in any way Buyer's reimbursement obligation pursuant to paragraphs (a) and (j) of this section and/or Buyer's obligation to provide emissions allowances pursuant to paragraphs (g) and (h) of this section, nothing herein shall relieve Seller of its obligation to comply, at its sole cost, with any permit condition or emission limit or standard (including an emission limit or standard related to CO<sub>2</sub>) imposed specifically on the Facility.

(j) Should Seller supply Alternate Energy to Buyer from an identified alternate source, Seller shall be entitled to recover, and Buyer shall be obliged to pay an amount equal to any Emissions Costs assessed by such alternate source upon the sale of Alternate Energy to Buyer, which amount is intended to recover the alternate source's costs to comply with any Environmental Change in Law ("Alternate Energy Emissions Costs"); provided that (i) in no event shall Buyer's obligations with respect to Alternate Energy Emissions Costs be greater than if such Alternate Energy had been delivered from the Turbine. In no event will Buyer be responsible for providing or reimbursing Seller for Emissions Costs with respect to Alternate Energy acquired from the market and not an identified alternate source.

**SPP Integrated  
Market Effects:**

The Parties recognize and acknowledge that SPP has announced plans to create and launch an integrated marketplace initially with a planned launch date of March 1, 2014. The Parties further agree that the new SPP integrated marketplace may materially affect each Party's ability to perform under this Confirmation. For that reason, the Parties agree to use good faith efforts to negotiate an amendment to this Confirmation in a reasonable amount of time to address such market changes. Such amendment shall be subject to NMPRC approval.

**Change in  
Regional Territory:**

In the event of a change in the operation or organizational structure of the regional territory which includes the Facility or Buyer's service area (including a change or other modification of an ISO, RTO, or realignment of the transmission system) and such change is reasonably anticipated to affect materially either Party's ability to perform its obligations hereunder, including without limitation result in a material shift in the Parties' relative financial risks, the representatives of each Party shall convene within fifteen (15) days of written notification from either Party and shall provide recommendations for the Parties' appropriate action. Both Parties thereafter shall negotiate in good faith an amendment to this Agreement or take other appropriate actions, the effect of which will be to preserve or restore the respective Parties, as

closely as possible, to the same business and economic positions that existed prior to such change.

**FERC Order No. 717;  
Compliance with  
Applicable Law:**

Buyer conducts its operations (i) in a manner intended to comply with FERC Order No. 717, Standards of Conduct for Transmission Providers requiring the separation of its transmission function and its marketing function. Seller represents that it has entered into an interconnection agreement with the applicable interconnection provider and will maintain such agreement throughout the term hereof. To the full extent authorized by FERC regulations and the FERC standards of conduct, Seller hereby authorizes Buyer to contact and obtain information concerning the Facility and its interconnection agreement directly from the interconnection provider and to the extent necessary Seller shall provide written notice to the interconnection provider confirming such authorization.

Each Party shall at all times comply with all pertinent Laws and applicable licenses and permits of any Governmental Authority, now in effect or hereafter enacted, amendments to any of the foregoing, interpretations of any of the foregoing by a Governmental Authority having jurisdiction, and all applicable judicial, administrative, arbitration and regulatory decrees, judgments, injunctions, writs, orders, awards or like actions (including those relating to human health, safety, the natural environment or otherwise), except for any non-compliance that, individually or in the aggregate, could not reasonably be expected to have a material effect on the business or financial condition of the Party or its ability to fulfill its commitments hereunder. As applicable, each Party shall give all required notices, shall procure and maintain all necessary governmental permits, licenses, and inspections necessary for performance of this Confirmation, and shall pay its respective charges and fees in connection therewith.

**Miscellaneous:**

Seller shall not make unilateral application to the Federal Energy Regulatory Commission for a change in rates, terms and conditions herein under Section 205 of the Federal Power Act, and Buyer shall not seek any relief under Section 206 of the Federal Power Act concerning the rates, terms and conditions herein.

Except as expressly provided by this Confirmation, Buyer and Seller further agree that the standard of review for changes to this Confirmation proposed by any person, including a non-party or the Federal Energy Regulatory Commission acting sua sponte shall be the "public interest" application of the "just and reasonable" standard of review set forth in United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) and Federal Power

*Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) and clarified by *NRG Power Marketing LLC v. Maine Pub. Util. Comm'n* 558 U.S. (2010) (commonly known as the "Mobile-Sierra" doctrine).

The Parties agree that telephone conversations may be recorded; that such recordings are evidence of communications and instructions between the Parties; and that they are admissible evidence in the event of a dispute.

**Notices:**

To Buyer:

Southwestern Public Service Company, c/o Xcel Energy Services Inc.,

1800 Larimer Street, Suite 1000, Denver CO 80202.

Attn: Manager, Structured Purchases

To Seller:

As set forth in the Agreement

**Definitions:**

"Capacity" means the megawatt output level that the Turbine is capable of continuously producing and making available at the Delivery Point during each hour of the Delivery Period.

"Catastrophic Equipment Failure" means either a sudden unexpected failure of a major piece of equipment, mechanical or equipment breakdown which (i) substantially reduces or eliminates the capability of the Turbine to produce Energy, (ii) is beyond the reasonable control of Seller and could not have been prevented by the exercise of reasonable due diligence by Seller, and (iii) is caused by Force Majeure, the negligence of a third party engaged in maintenance or repair activities with respect to the Turbine, or any other cause beyond the reasonable control of the Party relying on such cause to excuse its performance.

"Contract Heat Rate" means the ratio of fuel consumed to electricity produced relating to the pricing of Fuel Conversion Services, shall have the values stated in the "Contract Heat Rate" Section of this Confirmation.

"CPT" means Central Prevailing Time.

"Credit Delivery Amount" means (i) [REDACTED] for the period from and including June 1, 2014 through May 31, 2016, (ii) [REDACTED] for the period from and including June 1, 2016 through May 31, 2017, and (iii) [REDACTED] for the period from and including June 1, 2017 through May 31, 2019.

"Delivered Energy" means, pursuant to a Request for Energy, the amount of (i) metered Requested Energy expressed in MWh produced at the Facility and delivered at the Delivery

Point, (ii) Requested Energy scheduled and delivered as Replacement Energy, and (iii) Alternate Energy provided by Seller from an identified alternate source.

"Emissions Cost(s)" means (i) the cost of allowances, charges, credits, offsets, taxes, fees, other costs or other legally acceptable tradable instruments related to CO2 emissions attributable to the combustion of fuel to produce Delivered Energy during the Delivery Period and (ii) the amount of any taxes assessed based on the quantity of CO2 emissions attributable to the combustion of fuel to produce Delivered Energy during the Delivery Period, in each case that are incurred by or imposed upon Seller on and after the Commencement Date. In no event shall Emissions Costs include any Facility, Turbine, or alternate source, capital expenditures, repairs, enhancements, additions, labor and materials or other similar expenditures.

"Energy" means electric energy having characteristics commonly known as three phase alternating current, with a nominal frequency of 60 Hertz, a nominal voltage equivalent to that of the transmission system into which it is being delivered at the Delivery Point or, if applicable, an alternate delivery point, and measured in KWh or MWh.

"Energy Call Option" means Buyer's right, but not obligation, to notify Seller to deliver Energy for a period specified by Buyer.

"Facility" means the Oneta Energy Center located in Broken Arrow, Oklahoma.

"Fired Hours" means the greater of (i) 24 or (ii) number of continuous hours in a Schedule.

"Force Majeure" for purposes of this Confirmation only, means one or more events or circumstances resulting in an interruption or failure of service or deficiency in the quality or quantity of service, or any other failure to perform if such failure: (i) is not caused by the affected Party's fault or negligence; (ii) is beyond the Party's reasonable control and; (iii) and which, by exercise of reasonable diligence the Party is unable to prevent or overcome, such events or circumstances including but not limited to, storm, flood, tornado, lightning, earthquake, explosion, transmission failures, disruptions and/or curtailment by transmission providers, interruption and/or curtailment of firm gas transportation, civil disturbance, sabotage, war or other armed conflict, insurrection, terrorism, act of God, action of a court, or compliance with any court order, or Law having the effect of Law promulgated by a Governmental Authority having jurisdiction or Catastrophic Equipment Failure. Notwithstanding the foregoing, economic hardship of either Party shall not constitute a Force Majeure under this Confirmation. Any obligation to pay an amount otherwise owed may not be excused by Force Majeure.

"Gas" means natural gas of a quality that meets or exceeds the manufacturer's specifications for the Turbine.

"Gas Day" shall mean the 24 hour period beginning at 9:00 am (CPT) each day during the Delivery Period. The first Gas Day of each calendar month will begin at 9:00 am (CPT) on the first calendar day of each month and the last Gas Day of each month will end at 9:00 am (CPT) on the first calendar day of the subsequent month.

"GDP-IPD" shall mean Gross Domestic Product Implicit Price Deflator as first published by the United States Department of Commerce from time to time.

"Governmental Authority" means any federal, state, local, tribal or municipal governmental body, and governmental, quasi-governmental, regulatory or administrative agency, commission, body or other authority exercising or entitled to exercise any administrative, executive, judicial,



legislative, policy, regulatory or taxing authority or power or any court or governmental, quasi-governmental, regulatory, administrative or tribal dispute resolution tribunal or other body having jurisdiction over a subject matter of the Agreement or this Confirmation.

"Inflation Factor" shall mean a factor escalating on January 1 of each calendar year, beginning January 1, 2013, based on the change in the value of the first published GDP-IPD during the fourth calendar quarter of the previous year and the fourth calendar quarter of the year previous to that year. For example, escalation of the Scheduling Charge and Variable O&M for 2013 will be based on the percentage change difference between the first published GDP-IPD in the fourth calendar quarter of 2011 and the first published GDP-IPD in the fourth calendar quarter of 2012.

"Investment Grade Rating" means a senior unsecured bond rating (unenhanced by third party support) assigned by S&P of BBB- or higher and by Moody's of Baa3 or higher; provided that if any senior unsecured bond rating (unenhanced by third party support) is exactly equivalent to BBB-/Baa3, the rated entity shall not be on credit watch or negative outlook by such rating agency.

"Law" means any applicable statute, law, ordinance, Rule, regulation, ruling, order, writ, injunction, judgment, decree, directive, policy, procedure, or other legal or regulatory determination or interpretation by a Governmental Authority of competent jurisdiction.

"Letter of Credit" means one or more irrevocable, transferable standby letters of credit for the Delivery Period issued by a U.S. commercial bank or financial institution (or a foreign bank with a U.S. branch) with such bank having 1) a credit rating of at least A- from S&P or A3 from Moody's and 2) assets of at least \$ [REDACTED] (in US dollars) substantially in the form attached hereto as Exhibit A. Costs of a Letter of Credit shall be borne by the applicant therefor.

"Request for Energy" means the request by Buyer for the delivery of Requested Energy, including changes thereto, in accordance with the applicable provisions of the Scheduling section hereof.

"Required Credit Support" means that the Seller is required to provide to Buyer one of the following for the term of this Transaction, including any extensions thereof, at its option: (i) verifiable written evidence that it has achieved and maintains a senior unsecured bond rating (unenhanced by third party support) that is an Investment Grade Rating; (ii) a corporate Guarantee, substantially in the form attached hereto as Exhibit B, equal to the Credit Delivery Amount from an entity that has a credit rating that is an Investment Grade Rating and is reasonably acceptable to Buyer; provided that any entity that has an Investment Grade Rating that is an Affiliate of Seller shall be deemed accepted by Buyer; (iii) a Letter of Credit, substantially in the form attached hereto as Exhibit A, equal to the Credit Delivery Amount; (iv) an amendment to that certain Letter of Credit issued by Union Bank N.A. on December 1, 2011, as amended, equal to the Credit Delivery Amount; or (v) a cash deposit, equal to the Credit Delivery Amount, to a separate escrow-only entity acceptable to Buyer in a form acceptable to Buyer. Interest accruing on cash deposited in escrow (at the interest rate pertinent to such escrow account) shall be transferred to Seller monthly within three Business Days following the close of each calendar month. Seller shall replenish the Required Credit Support equal to the Credit Delivery Amount within fifteen (15) Business Days after any draw on the Security Fund by Buyer.

"Rule" means any requirement, tariff, rule, order, regulation, and procedure authorized or established by the applicable Governmental Authority that may affect the Parties' obligations in this Confirmation, as may be amended from time to time.

"Schedule" shall commence with the first hour in which the Product is scheduled for delivery and shall end with the last hour in which scheduled Energy is greater than zero. Buyer's receipt of Energy continuously over two or more successive days shall be considered a single Schedule for purposes of calculating the Scheduling Charge hereunder.

"Shutdown" means the end of a Schedule.

"SPP" means the Southwest Power Pool or a successor Transmission Provider thereto.

"Transmission Provider" means any electric utility, transmission operator, independent coordinator of transmission, or other entity that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce from whom transmission services, ancillary and other services are necessary for Buyer's receipt of Seller's delivery of Energy hereunder to Buyer at the Delivery Point and/or Buyer's receipt of Energy hereunder from Seller at the Delivery Point.

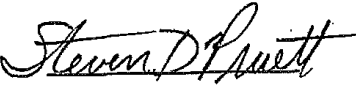
"Turbine" means unit no. 2.1 of the Facility.

[Remainder of Page Intentionally Left Blank]

Please confirm that the foregoing correctly sets forth the terms of our agreement by executing the copy of this Confirmation and returning it to us.

**Calpine Energy Services, L.P.**

**Southwestern Public Service Company  
a New Mexico corporation**

By: 

By: 

Name: Steven D. Pruett

Name: Riley Hill

Title: Senior Vice President

Title: President and CEO

**EXHIBIT A**  
**FORM OF LETTER OF CREDIT**

\*\*\*\*\*DRAFT ONLY\*\*\*\*\*

<b>BENEFICIARY:</b> SOUTHWESTERN PUBLIC SERVICE COMPANY C/O XCEL ENERGY SERVICES INC. 1800 LARIMER STREET, 13 <sup>TH</sup> FLOOR DENVER, CO 80202	<b>APPLICANT:</b> CALPINE DEVELOPMENT HOLDINGS, INC. 717 TEXAS AVENUE, SUITE 1000 HOUSTON, TX 77002
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IRREVOCABLE STANDBY LETTER OF CREDIT NO: \_\_\_\_\_

DATE OF ISSUANCE: \_\_\_\_\_  
EXPIRATION DATE: \_\_\_\_\_

AS THE ISSUING BANK ("ISSUER"), WE, \_\_\_\_\_, HEREBY ESTABLISH THIS IRREVOCABLE STANDBY LETTER OF CREDIT NO. \_\_\_\_\_ IN FAVOR OF THE ABOVE-NAMED BENEFICIARY ("BENEFICIARY") FOR THE ACCOUNT OF THE ABOVE-NAMED APPLICANT ("APPLICANT") IN THE AMOUNT OF USD \$ \_\_\_\_\_ (\_\_\_\_ U.S. DOLLARS).

FUNDS UNDER THIS LETTER OF CREDIT ARE AVAILABLE TO BENEFICIARY AGAINST PRESENTATION OF DOCUMENTS NO.1 AND 2 SIGNED BY AN AUTHORIZED REPRESENTATIVE OR OFFICER OF BENEFICIARY INDICATING HIS OR HER TITLE OR OTHER OFFICIAL CAPACITY.

1. BENEFICIARY'S DRAFT(S) AT SIGHT IN THE FORM OF EXHIBIT "A" ("SIGHT DRAFT"), HERETO REFERENCING THIS LETTER OF CREDIT NO. \_\_\_\_\_ STATING THE AMOUNT OF THE DEMAND AND;
2. BENEFICIARY'S SIGNED STATEMENT STATING THAT:

(A) " THE AMOUNT SPECIFIED ON THE SIGHT DRAFT OF EVEN DATE HERewith IS THREE DAYS PAST DUE AND PAYABLE BY CALPINE ENERGY SERVICES, L.P. UNDER THE AGREEMENT;" OR

(B) "LETTER OF CREDIT NO. \_\_\_\_\_ WILL EXPIRE IN THIRTY (30) DAYS OR LESS AND APPLICANT HAS NOT PROVIDED REPLACEMENT SECURITY PER THE TERMS OF THE AGREEMENT."

ISSUER WILL HONOR DOCUMENTS PRESENTED IN COMPLIANCE WITH THE TERMS OF THIS LETTER OF CREDIT AT THE ISSUER'S OFFICE [INSERT ISSUER'S ADDRESS] ON OR BEFORE THE STATED EXPIRATION DATE, AS SUCH EXPIRATION DATE MAY BE EXTENDED HEREUNDER.

**SPECIAL CONDITIONS:**

1. PARTIAL AND MULTIPLE DRAWINGS UNDER THIS LETTER OF CREDIT ARE PERMITTED. FOLLOWING ANY PARTIAL DRAW ISSUER WILL ENDOSE THIS LETTER OF CREDIT AND WILL RETURN THE ORIGINAL LETTER OF CREDIT BACK TO THE BENEFICIARY UNLESS FULLY UTILIZED.
2. ALL BANKING CHARGES ASSOCIATED WITH THIS LETTER OF CREDIT ARE FOR THE ACCOUNT OF THE APPLICANT.
3. THIS LETTER OF CREDIT EXPIRES ON THE EARLIER OF:  
(A) EXPIRATION DATE.

\*\*\*\*\*DRAFT ONLY\*\*\*\*\*

(B) UPON RECEIPT OF A NOTICE FROM THE BENEFICIARY STATING THAT THE APPLICANT HAS PROVIDED REPLACEMENT SECURITY PER THE TERMS OF THE AGREEMENT ACCOMPANIED BY THE ORIGINAL LETTER OF CREDIT AND ORIGINAL AMENDMENT (S) IF ANY.

(C) THE DATE WHEN THE BENEFICAIRY HAS RETURNED THIS LETTER OF CREDIT FOR CANCELLATION.

EXCEPT AS STATED HEREIN, THIS LETTER OF CREDIT IS NOT SUBJECT TO ANY CONDITION OR QUALIFICATION AND IS OUR INDIVIDUAL OBLIGATION WHICH IS IN NO WAY CONTINGENT UPON REIMBURSEMENT OR ANY RIGHT OF SUBROGATION. WE IRREVOCABLY WAIVE ANY AND ALL RIGHTS OF SUBROGATION, WHETHER AS PROVIDED BY STATUTE OR OTHERWISE, NOW OR HEREAFTER THAT MIGHT, BUT FOR SUCH WAIVER EXIST, IN RESPECT TO THIS LETTER OF CREDIT OR ANY PAYMENT WE MAKE UNDER IT, AS TO THE APPLICANT, YOU, OR THE TRANSACTION BETWEEN YOU AND THE APPLICANT. WE FURTHER GIVE IRREVOCABLE NOTICE THAT WE ARE NOT NOW AND WILL NOT BE THE SECONDARY OBLIGOR OR CO-OBLIGOR OF APPLICANT'S OBLIGATIONS AND LIABILITIES TO YOU FOR ANY PURPOSE. OUR OBLIGATIONS TO YOU UNDER THIS LETTER OF CREDIT ARE OUR PRIMARY OBLIGATIONS AND ARE STRICTLY AS STATED HEREIN.

THIS STANDBY LETTER OF CREDIT IS SUBJECT TO THE UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (2007 REVISION), INTERNATIONAL CHAMBER OF COMMERCE PUBLICATION NO. 600 (THE "UCP"), EXCEPT TO THE EXTENT THAT THE TERMS HEREOF ARE INCONSISTENT WITH THE PROVISIONS OF THE UCP, INCLUDING BUT NOT LIMITED TO ARTICLES 14(B) AND 36 OF THE UCP, IN WHICH CASE THE TERMS OF THIS LETTER OF CREDIT SHALL GOVERN. WITH RESPECT TO ARTICLE 14(B) OF THE UCP, ISSUER SHALL HAVE A REASONABLE AMOUNT OF TIME, NOT TO EXCEED THREE (3) BANKING DAYS FOLLOWING THE DATE OF ISSUER'S RECEIPT OF DOCUMENTS FROM THE BENEFICIARIES (TO THE EXTENT REQUIRED HEREIN), TO EXAMINE THE DOCUMENTS AND DETERMINE WHETHER TO TAKE UP OR REFUSE THE DOCUMENTS AND TO INFORM BENEFICIARY ACCORDINGLY.

IN THE EVENT OF AN ACT OF GOD, RIOT, CIVIL COMMOTION, INSURRECTION, WAR OR ANY OTHER CAUSE BEYOND ISSUER'S CONTROL THAT INTERRUPTS ISSUER'S BUSINESS (COLLECTIVELY, AN "INTERRUPTION EVENT") AND CAUSES THE PLACE FOR PRESENTATION OF THIS LETTER OF CREDIT TO BE CLOSED FOR BUSINESS ON THE LAST DAY FOR PRESENTATION, THE EXPIRY DATE OF THIS LETTER OF CREDIT WILL BE AUTOMATICALLY EXTENDED WITHOUT AMENDMENT TO A DATE THIRTY (30) CALENDAR DAYS AFTER THE PLACE FOR PRESENTATION REOPENS FOR BUSINESS.

\*\*\*\*\*DRAFT ONLY\*\*\*\*\*

EXHIBIT "A"  
TO LETTER OF CREDIT  
SIGHT DRAFT

AT SIGHT, PAY TO THE ORDER OF [NAME OF BENEFICIARY TO BE INSERTED], THE  
AMOUNT OF USD \$ ( AND 00/100THS U.S. DOLLARS).

DRAWN UNDER. IRREVOCABLE STANDBY LETTER OF CREDIT NO.  
\_\_\_\_\_

DATED: \_\_\_\_\_ 20\_\_\_\_  
[NAME OF BENEFICIARY TO BE INSERTED]

BY: ITS AUTHORIZED REPRESENTATIVE  
OR OFFICER [TITLE OR OTHER OFFICIAL  
CAPACITY TO BE INSERTED]

TO:  
[BANK NAME]  
[STREET ADDRESS]  
[CITY, STATE, ZIP]  
ATTENTION: \_\_\_\_\_

**EXHIBIT B**  
**FORM OF GUARANTEE**

Guarantee

This GUARANTEE dated as of \_\_\_\_\_, 201\_ (the "Effective Date"), is made by Calpine Corporation, a Delaware corporation ("Calpine"), for the benefit of Southwestern Public Service Company, a New Mexico corporation ("Beneficiary").

WHEREAS, Beneficiary and Calpine Energy Services, L.P., a Delaware limited partnership ("CES") and a subsidiary of Calpine, have entered into that certain Edison Electric Institute Master Power Purchase and Sale Agreement and related Confirmation Letter, each dated \_\_\_\_\_, 201\_ (collectively the "Agreement");

NOW, THEREFORE, for value received, and as an inducement to Beneficiary to enter into the Agreement with CES, Calpine agrees as follows:

1. **Guarantee.** Calpine irrevocably and unconditionally guarantees (as primary obligor and not merely as surety) to the prompt and complete payment when due, by acceleration or otherwise, of all amounts (whether present or future, actual or contingent) payable by CES under the Agreement and any amendments thereto whether or not such amounts become due before or after the Effective Date (each an "Obligation") commencing on the Effective Date and terminating on the date ("Termination Date") that is the earlier of (i) May 31, 2019 (ii) the fifteenth (15<sup>th</sup>) Business Day after prior written notice of termination of this Guarantee has been received by Beneficiary, or (iii) the date when all Obligations have been paid. The aggregate liability of Calpine under this Guarantee at any time shall not exceed U.S. \$\_\_\_\_\_ (\_\_\_\_\_ MILLION AND NO/100 UNITED STATES DOLLARS) (the "Guarantee Cap Amount"), exclusive of any costs and expenses incurred by Beneficiary to collect or enforce any of the obligations under this Guarantee. This is a guarantee of payment and not of collection. If CES fails to pay any Obligation for any reason, Calpine will pay or cause to be paid such Obligation directly for Beneficiary benefit promptly upon Beneficiary's demand therefor and without Beneficiary having to make prior demand on CES. All payments hereunder shall be made without reduction, whether by offset, payment in escrow, or otherwise, except to the extent of any defenses to payment or performance which CES may have under the Agreement, except for defenses arising out of the bankruptcy, insolvency, dissolution or liquidation of CES, the power or authority of CES to enter into the Agreement, and to perform thereunder, and the lack of validity or enforceability of the Agreement or any other documents executed in connection with the Agreement. Exclusive of the Guarantee Cap Amount, Calpine is liable for, and hereby indemnifies Beneficiary for Beneficiary's reasonable costs and expenses, including but not limited to reasonable attorneys' fees, reasonable costs and disbursements, incurred in any effort to collect or enforce any of the obligations under this Guarantee, whether or not any lawsuit is filed. Notwithstanding anything to the contrary herein, this Guarantee shall continue to be effective or reinstated, as the case may be, if at any time payment of the Obligations, or any part thereof, is rescinded or must otherwise be returned by Beneficiary upon the insolvency, bankruptcy or reorganization of CES or otherwise, all as though the payment of such Obligations had not been made.

2. **Calpine's Obligation.** Subject to Sections 1 and 3, Calpine's obligations under this Guarantee are absolute and unconditional, shall remain in force until the Termination Date (and shall continue to remain in force following the Termination Date with respect to any Obligations of

CES arising with respect to any Agreement entered into on or prior to the Termination Date) and shall not be released or discharged for any reason whatsoever prior thereto, including without limitation:

- (i) the extension of time for payment or performance of any Obligation or the amendment, extension or renewal of the Agreement or any Obligation, except that any such extension, amendment or renewal shall not enlarge Calpine's obligations under this Guarantee and Calpine shall have the benefit of any such extension, amendment or renewal to the same extent as CES (e.g., if CES's time for payment of an Obligation has been extended, Calpine shall have no obligation under this Guarantee to make payment of such Obligation until such time as CES is required under the extension to make payment);
- (ii) any delay or failure by Beneficiary to enforce or exercise any right or remedy under the Agreement or this Guarantee (except the statute of limitations applicable by law to this Guarantee, if any), or waiver by Beneficiary of any such right or remedy, all of which rights and remedies shall be cumulative and not mutually exclusive;
- (iii) any transfer, assignment or mortgaging by Beneficiary of any interest in the Agreement or this Guarantee;
- (iv) the voluntary or involuntary liquidation, dissolution, sale or other disposition of all or substantially all the assets and liabilities, or the voluntary or involuntary receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganization or other similar proceeding affecting CES, or the disaffirmance of the Agreement in any such proceeding;
- (v) any merger, consolidation or other reorganization to which CES, Calpine or any related entity is a party, or any direct or indirect sale or disposition of Calpine's or CES's assets or Calpine's direct or indirect ownership interest in CES; or
- (vi) the existence, validity, enforceability, perfection, release, or extent of any collateral for such Obligations. Beneficiary shall not be obligated to file any claim relating to the Obligations owing to it in the event that CES becomes subject to a bankruptcy, reorganization, or a similar proceeding, and the failure of Beneficiary to so file shall not affect Calpine's obligations hereunder.

3. Assignment. Calpine may not assign this Guarantee or its obligations hereunder without the prior written consent of Beneficiary, which consent of Beneficiary shall not be unreasonably withheld or delayed. Any reasonable uncertainty on the part of Beneficiary concerning the ability on the part of any potential assignee of Calpine to carry out Calpine's obligations hereunder shall be considered a reasonable basis for withholding consent, unless and until the potential assignee can reasonably satisfy Beneficiary that the potential assignee is capable of performing the obligations of Calpine hereunder.

4. Waivers by Calpine. Calpine waives (i) notice of the acceptance of this Guarantee, demand or presentment for payment to CES or the making of any protest, notice of the amount of the Obligations outstanding at any time, notice of failure to perform on the part of CES, notice of any amendment, modification or waiver of or under the Agreement, and all other notices or demands not specified hereunder, and (ii) any requirement that Beneficiary exhaust any right or take any action against CES, any collateral security or any other guarantor or surety, whether or not Beneficiary shall have resorted to any such collateral security, or shall have proceeded against



any other obligor principally or secondarily obligated with respect to any of the Obligations. Calpine agrees that Beneficiary may, at any time and from time to time, either before or after the maturity thereof, without notice to or further consent of Calpine, make any agreement with CES or with any other party to or person liable on any of the Obligations, or interested therein, for the extension, renewal, payment, compromise, discharge or release thereof, in whole or in part, or for any modification of the terms thereof or any agreement between Beneficiary and CES or any such other party or person, without in any way impairing or affecting this Guarantee.

5. Representations and Warranties. Calpine hereby represents and warrants that it has all necessary and appropriate powers and authority to execute and perform under this Guarantee and that such Guarantee constitutes its legal, valid and binding obligations enforceable against it in accordance with its terms (except as enforceability may be limited by bankruptcy, insolvency, moratorium and other similar laws affecting enforcement of creditors' rights in general principles of equity).

6. Subrogation. Calpine will not exercise any rights that it may acquire by way of subrogation until all Obligations (within the Guarantee Cap Amount) to Beneficiary shall have been paid in full. If any amount shall be paid to Calpine in violation of the preceding sentence, such amount shall be held for the benefit of Beneficiary and shall forthwith be paid to Beneficiary to be credited and applied to the Obligations, whether matured or un-matured. Subject to the foregoing, upon payment of all the Obligations, Calpine shall be subrogated to the rights of Beneficiary against CES, and Beneficiary agrees to take at Calpine's expense such steps as Calpine may reasonably request to implement such subrogation.

7. Miscellaneous. No provision of this Guarantee may be amended or waived except by a written instrument executed by Calpine and Beneficiary. This Guarantee shall not be deemed to benefit any person except CES, Calpine and Beneficiary. In case any one or more of the provisions contained in this Guarantee should be invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

8. Governing Law. **THIS GUARANTEE SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK WITHOUT REFERENCE TO CHOICE OF LAW DOCTRINE. CALPINE HEREBY IRREVOCABLY WAIVES ANY AND ALL RIGHT TO A TRIAL BY JURY WITH RESPECT TO ANY LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THIS GUARANTEE.**

9. Notices. Notices under this Guarantee shall be deemed received if sent to the address specified below: (i) on the day received if served by overnight express delivery, and (ii) four business days after mailing if sent by certified, first class mail, return receipt requested. Any party may change its address to which notice is given hereunder by providing notice of same in accordance with this Section 9.

To Beneficiary: Southwestern Public Service Company  
1800 Larimer Street, Suite 1000, Denver CO 80202  
Denver, CO 80202  
Attn: Managing Director, Risk Strategy and Control

With copy to: Southwestern Public Service Company,  
c/o Xcel Energy Services Inc.,  
1800 Larimer Street, Suite 1000, Denver CO 80202

Attn: Manager, Structured Purchases

To Calpine: Calpine Corporation  
717 Texas Avenue, Suite 1000  
Houston, TX 77002  
Attn: Risk Management Counsel

With copy to: Calpine Energy Services, L.P.  
717 Texas Avenue, Suite 1000  
Houston, TX 77002  
Attn: Director of Corporate Credit

IN WITNESS WHEREOF, Calpine has executed this Guarantee as of the date first above written.

CALPINE CORPORATION  
(a Delaware Corporation)

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

## **FIRST AMENDMENT TO CONFIRMATION LETTER**

This First Amendment to Confirmation Letter (“First Amendment”) is entered into as of June 25, 2014, by and between Calpine Energy Services, L.P., a Delaware limited partnership (“Seller”) and Southwestern Public Service Company, a New Mexico corporation (“Buyer”). Buyer and Seller are hereinafter referred to individually as a “Party” and collectively as the “Parties”.

**WHEREAS**, Buyer and Seller have entered into a Confirmation Letter dated June 1, 2012 (the “Confirmation Letter”) pursuant to which Seller agreed to sell Capacity and Unit Firm Energy to Buyer, as amended; and

**WHEREAS**, Buyer and Seller desire to amend the Confirmation Letter to reflect changes expected to result from the commencement of the Southwest Power Pool (the “SPP”) Integrated Marketplace (the “SPP Market”) that commenced on March 1, 2014.

**NOW, THEREFORE**, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, Buyer and Seller hereby agree as follows:

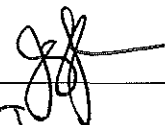
1. Capitalized terms used but not defined herein shall have the meanings set forth in the Confirmation Letter.
2. The attached Day-Ahead and Real Time Energy Market Protocols (“Exhibit A”) are hereby incorporated into the Confirmation Letter.
3. Upon commencement of the SPP Market, which was launched on March 1, 2014, Seller agrees to offer available energy in accordance with the Confirmation Letter (as amended by this First Amendment) to the SPP Market in conformance with the SPP Market Rules (as defined below).
4. Exhibit A sets forth the understanding of the Parties to implement the Change in Regional Territory provision of the Confirmation Letter relating to the SPP Market. All terms and conditions of the Confirmation Letter remain unchanged except as set forth herein.

5. For avoidance of doubt, the Confirmation Letter shall be deemed to be amended to reflect all of the rules that are implemented as part of the SPP Market (“SPP Market Rules”).


[Intentionally left blank, signature page to follow]

IN WITNESS WHEREOF, the Parties have caused this First Amendment to be executed as of the day and year first written above.

**Calpine Energy Services, L.P.**

By:  *cf*  
Name: Jennings Goodman  
Title: Vice President

**Southwestern Public Service Company, a New Mexico corporation**

By:   
Name: Tom Rauskarni  
Title: Director, Purchased Power  
Xcel Energy Services Inc., as Agent for  
Southwestern Public Service Company, a New  
Mexico corporation

## EXHIBIT A

### Day-Ahead and Real Time Energy Market Protocols

#### **Bilateral Settlement Schedule Option**

The Seller shall offer the Contract Capacity (200 MW) into the Southwest Power Pool, Inc. ("SPP") Day-Ahead ("DA") market ("DA Market") and Real Time Energy Balancing market ("RTBM") on behalf of the Buyer every day unless Seller notifies the Buyer of a Planned Outage or an unscheduled or Forced Outage as described in the Confirmation Letter.

After the DA Market results are published by SPP:

- A. Buyer and Seller shall agree upon a "look back calculator" (via a mutually agreeable calculation spreadsheet) that will determine the DA Bilateral Settlement Schedule ("DA BSS") at the time of the posted SPP DA Market results. It is understood that the look back calculator is intended to capture the Confirmation Letter dispatch characteristics as closely as possible. The look back calculator will take into account the previous day's DA BSS to determine minimum downtime, minimum runtime, scheduling and variable charges. If Seller offers the Contract Capacity at dispatch characteristics consistent with or less than the Confirmation Letter terms, the look back calculator shall be used to determine the Requested Energy, subject to the Contract Capacity being committed by SPP for the hours committed in the DA Market.
- B. Within three (3) days following publishing of the DA Market results, Seller shall submit and Buyer shall confirm a DA BSS at the Delivery Point for the amount of Buyer's Requested Energy where the sum of the revenues at the Facility's LMP exceeds the contracted costs as determined by the look back calculator.
- C. If Buyer sends a DA BSS to Seller as calculated by the look back calculator and the Contract Capacity is not committed by SPP in the DA Market for any portion of the DA BSS, then no DA BSS shall be entered for the period the Contract Capacity was not committed in the DA Market as long as Seller offered the Contract Capacity in the DA Market at or lower than the dispatch characteristics as described in Section F hereof. If Buyer sends a DA BSS to Seller as calculated by the look back calculator and the Contract Capacity is not committed in the DA Market for any portion of the DA BSS, Seller shall provide to Buyer the dispatch characteristics that were used to offer the Contract Capacity into the DA Market for the applicable day.

- D. The hourly volume of the DA BSS shall be 200 MW unless instructed otherwise by SPS.
- E. The DA BSS shall cover a minimum of (i) three (3) consecutive hours for the first 50 MW Scheduled Quantity or (ii) eight (8) consecutive hours for the 130 MW and 200 MW Scheduled Quantity. There shall be a minimum of eight (8) hours minimum downtime between DA BSS schedules.
- F. The dispatch characteristics shall be consistent with the Confirmation Letter and include the following:
  - a. Variable O&M Charge
  - b. Quantity of Gas multiplied by the Cost of Gas
  - c. Scheduling Charges
  - d. Other variable costs Buyer is obligated to pay Seller under the Confirmation Letter (*e.g.* Emissions Costs).
- G. Seller's submittal and Buyer's confirmation of a DA BSS or a Real Time BSS (as defined below) shall be deemed Delivered Energy at the Delivery Point.
- H. Buyer shall be settled directly by SPP for the Delivered Energy pursuant to the DA BSS or Real Time BSS.
- I. In the event the Turbine is unavailable or de-rated as a result of an unscheduled outage or Forced Outage, the Seller has the option to deliver Replacement or Alternate Energy at the Delivery Point.
- J. The DA BSS option, as described in A through H above, will be evaluated over contiguous commitment periods, including those that span multiple days.
- K. The DA BSS option shall be in effect everyday for the purposes of the Energy Call Option unless Seller is notified by 8:00 am CPT to cease or to establish a self-commitment of the Contract Capacity for the subsequent calendar day.
- L. Within one hour after SPP posts the DA Market results, an email will be sent by Buyer to Seller at [SPScontract@calpine.com](mailto:SPScontract@calpine.com) with the schedule that will be entered into SPP as a DA BSS. The email from Buyer to Seller shall indicate 0 MW for all hours in which there is no schedule. If there is no energy schedule for any hour for such day, then within 15 minutes of the receipt of such email, an email will be sent by Seller to Buyer at [dlrtelectricmarketerssps@xcelenergy.com](mailto:dlrtelectricmarketerssps@xcelenergy.com) declaring whether the Contract Capacity otherwise was committed into the DA Market.

- M. For any hours where no schedule will be entered into SPP as a DA BSS and the Contract Capacity was not otherwise committed to the DA Market, Buyer will have the right, subject to the contractual notification times and SPP commitment, to dispatch in the RTBM any capacity not cleared in the DA Market.
- N. If the Contract Capacity is dispatched in the RTBM pursuant to a Buyer request described in M above, within three (3) days of the Operating Day (Operating Day as defined under Attachment AE of the SPP Tariff) Seller shall submit and Buyer shall confirm a Real-Time Bilateral Settlement Schedule ("Real-Time BSS") at the Delivery Point for the amount of Buyer's schedule dispatched in Real-Time.
- O. In the event that Seller is unable to deliver due to an unscheduled outage or Forced Outage, Seller shall notify Buyer within fifteen (15) minutes or as soon as reasonably practical of such unscheduled outage or Forced Outage. The notification shall notify Buyer of the occurrence of the unscheduled outage or Forced Outage, the anticipated shortfall amount and duration to the schedule. For any anticipated shortfall amount resulting from an unscheduled outage or Forced Outage of the Turbine, the shortfall amount shall be allocated to Buyer on a pro rata basis equal to the Schedule energy amount divided by the capacity of the Turbine. A Real-Time BSS from Buyer to Seller will be entered by Seller and confirmed by Buyer in an amount equal to the shortfall caused by the an unscheduled outage or Forced Outage unless Replacement Energy or Alternate Energy is provided. The entry of a Real-Time BSS from Buyer to Seller will not affect any previously entered DA BSS from Seller to Buyer.
- P. Buyer shall be responsible for any SPP Integrated Market imbalance charges, scheduling charges, offsets or other costs associated with a Real Time BSS ("Charges"). The Charges shall be documented and shall be associated with the Contract Capacity. Seller agrees to provide Buyer reasonable documentation to support such Charges.



[Execution Version]

# **WIND ENERGY PURCHASE AGREEMENT**

**BETWEEN**

**SOUTHWESTERN PUBLIC SERVICE COMPANY**

**AND**

**BONITA WIND ENERGY, LLC**



- March 7, 2017 -

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**WIND ENERGY PURCHASE AGREEMENT  
BETWEEN  
SOUTHWESTERN PUBLIC SERVICE COMPANY  
AND  
BONITA WIND ENERGY, LLC**

This Wind Energy Purchase Agreement (this "PPA") is made as of this 7<sup>th</sup> day of March 2017 (the "Effective Date"), by and between (i) **Southwestern Public Service Company**, a New Mexico corporation with a principal place of business at 1800 Larimer Street, Denver, CO 80202 ("Company"), and (ii) **Bonita Wind Energy, LLC**, a Delaware limited liability company with a principal place of business at 700 Universe Boulevard, Juno Beach, FL 33418 ("Seller"). Company and Seller are hereinafter referred to individually as a "Party" and collectively as the "Parties;" and

WHEREAS Seller desires to develop, design, construct, interconnect, own, operate and maintain an approximately 230 MW wind generation project consisting of an approximately 80 MW component ("Phase I"), and an approximately 150 MW component ("Phase II", the Phase I component and the Phase II component, jointly the "Facility"); and

WHEREAS, in accordance with this PPA, Seller desires to sell and deliver, and Company desires to accept and receive, certain products and services generated and delivered from the Facility (as such Facility is detailed herein) to the Point of Delivery at the prices and on the terms and conditions set forth in this PPA.

NOW THEREFORE, in consideration of the mutual covenants herein contained, the sufficiency and adequacy of which are hereby acknowledged, the Parties agree to the following:

**Article 1 - Rules of Interpretation**

1.1 Interpretation.

(A) Capitalized terms listed in this PPA shall have the meanings set forth in Exhibit A - Definitions or as otherwise defined in this PPA, whether in the singular or the plural or in the present or past tense. Words not otherwise defined in this PPA shall (i) have meanings as commonly used in the English language, (ii) be given their generally accepted meaning consistent with Good Utility Practice, and (iii) be given their well-known and generally accepted technical or trade meanings.

(B) The following rules of interpretation shall apply: (1) The masculine shall include the feminine and neuter; (2) references to "Articles," "Sections" or "Exhibits" shall be to articles, sections, or exhibits of this PPA except as the context may otherwise require; (3) all Exhibits are incorporated into this PPA (*provided, however*, that in the event of a conflict with the terms of this PPA, the PPA shall control); and (4) use of the words "include" or "including" or similar words shall be interpreted as "include without limitation" or "including, without limitation."

(C) This PPA was negotiated and prepared by both Parties with the advice and participation of counsel. None of the provisions hereof shall be construed against one Party on the ground that such Party is the author of this PPA or any part hereof.

### 1.2 Interpretation with Other Agreements.

(A) This PPA does not provide Seller authorization to interconnect the Facility or inject power into the Transmission Authority's System. Seller shall contract for interconnection services in accordance with the applicable Transmission Tariff. Seller acknowledges that the Interconnection Agreement is/will be a separate contract and that (i) this PPA is not binding on the Transmission Authority, (ii) this PPA does not create any rights between Seller and the Transmission Authority, and (iii) the Interconnection Agreement does not modify the Parties' rights and obligations under this PPA. The applicable Transmission Authority shall be deemed to be a separate and unaffiliated contracting party for purposes of this PPA, regardless whether such Transmission Authority is Company or an Affiliate of Company.

(B) This PPA does not provide for the supply of retail power for purposes of operating the Facility, including start-up, shut-down, oil heating, turbine adjustment, HVAC or any other purpose ("House Power"). Seller shall contract with the utility providing House Power to the Site (the "Local Provider") for the supply of House Power. Seller acknowledges that (i) Seller must obtain House Power for each of the Phase I and Phase II components of the Facility independently, (ii) this PPA is not binding on the Local Provider, (iii) this PPA does not create any rights between Seller and the Local Provider, and (iv) Seller's contract for House Power does not affect the Parties' rights and obligations under this PPA. For purposes of this PPA, the Local Provider shall be deemed to be a separate and unaffiliated contracting party regardless whether the Local Provider is Company or an Affiliate of Company; *provided that*, if (and only if) the Local Provider is Company or an Affiliate of Company, Seller may obtain House Power by self-generating and netting such self-generation from the Contract Energy provided to Company unless prohibited by Applicable Law.

1.3 Good Faith and Fair Dealing. The Parties shall act reasonably and in accordance with the principles of good faith and fair dealing in the performance of this PPA. Unless expressly provided otherwise in this PPA, (a) when this PPA specifically references the consent, approval, or similar action by a Party, such consent or approval shall not be unreasonably withheld, conditioned or delayed, and (b) wherever this PPA specifically gives a Party a right to determine, require, specify or take similar action with respect to a matter, such determination, requirement, specification or similar action shall be Commercially Reasonable.

## **Article 2 - Term and Termination**

This PPA shall become effective as of the date of its execution, and shall remain in full force and effect until 11:59 pm on the 30<sup>th</sup> anniversary of the Commercial Operation Date (the "Scheduled Termination Date"), subject to early termination as

provided in this PPA. Applicable provisions of this PPA shall continue in effect after termination to the extent necessary to (i) provide for final billings, payments and adjustments, (ii) enforce or complete the duties, obligations or responsibilities of the Parties (including under Sections 12.1(B)-(D), Section 12.2(C), Sections 12.3(B)-(D), Section 12.4, Article 13 and Article 17 below), and (iii) address any remedies or indemnifications arising prior to termination.

### **Article 3 - Facility Description**

3.1 Description. Seller shall construct, interconnect, own, operate, and maintain each of the Phase I and Phase II components of the Facility, as further described in Exhibit C - Facility Description. A scaled map that identifies the Site for each of the Phase I and Phase II components of the Facility, the location of the Facility, the Interconnection Point and Interconnection Facilities, the Delivery Points for each of the Phase I and Phase II components of the Facility, and other important facilities, is included in Exhibit C - Facility Description.

#### 3.2 General Design of the Facility.

(A) Seller shall cause the design, construction, operation and maintenance of the Facility in accordance with Good Utility Practices and the Interconnection Agreement.

(B) The Facility shall include all equipment specified in Exhibit C - Facility Description for each of the Phase I and Phase II components and otherwise necessary to fulfill Seller's obligations under this PPA, including all equipment necessary (i) to meet the requirements of Exhibit I - Operating Standards, and (ii) to interconnect successfully with the Transmission Authority's System for the delivery of Renewable Energy to the Point of Delivery.

(C) The Nameplate Capacity of the Facility (the aggregate of the Phase I and Phase II components) shall be 230 MW (+/- the increment of one Wind Turbine more or less). Seller shall certify to Company the final actual Nameplate Capacity of the Facility promptly following COD.

### **Article 4 - Implementation**

#### 4.1 Project Development.

(A) Seller shall enter into and perform at its expense all contracts required for (i) the engineering, procurement, construction, acquisition, manufacture, delivery and installation of the Facility, and (ii) the generation and delivery of Renewable Energy from the Facility to the Point of Delivery (generally, the "Construction Contract(s)") with qualified and experienced contractors. Upon written request by Company, Seller shall provide a memorandum of agreement executed by Seller and the contracting party related to a Construction Contract. Such memorandum of agreement shall set forth the basic terms of such contract, including the names of the parties thereto, the date of such contract, a summary of any products or services to be provided



and other information reasonably sufficient for Company to determine that the Construction Contract contains those obligations necessary for Seller to satisfy the Construction Milestones. All such memorandum or any Construction Contracts obtained by Company shall be deemed Confidential Information subject to Section 20.18 below.

(B) In its efforts to achieve COD, Seller shall use Commercially Reasonable Efforts to achieve the milestones set forth in Exhibit B – Construction Milestones, and shall notify Company promptly following achievement of each such milestone.

(C) Prior to the Commercial Operation Date, Seller shall (i) submit monthly progress reports to Company in a form agreed by the Parties, advising Company of the current status of each Construction Milestone, any significant developments or delays (along with an action plan for making up delays), and Seller's best estimate of the Commercial Operation Date; (ii) if applicable, provide copies of reports submitted to the Facility Lender relating to status, progress and development of the Facility, and (iii) invite Company to participate in monthly meetings to discuss the progress reports, answer questions, and assess the schedule. Upon the Company's reasonable prior written request and during normal business hours, Seller shall make all relevant counterparties under the Construction Contracts available to Company in order to keep Company fully informed on the development status of the Facility.

(D) Upon the Company's reasonable prior written request and during normal business hours, Company shall have the right to monitor the construction, start-up, testing, and operation of the Facility at the Site to verify compliance with this PPA, *provided, however*, that Company shall comply with all of Seller's applicable safety and health rules and requirements.

(E) Neither Company's review of Construction Contracts and Seller's reports, nor its discussions with Seller and its contractors, nor its monitoring of development and construction the Facility, shall be construed as endorsement by Company of the design, engineering, construction or testing thereof nor as any express or implied warranty as to the performance, safety, durability, or reliability of the Facility.

#### 4.2 Environmental Matters.

(A) No later than 60 Days following satisfaction or waiver of the last Condition Precedent set forth in Article VI hereof, Seller shall provide to Company a completed independent "Phase I" environmental investigation of the Site that meets ASTM 1527-13 or its equivalent (including associated raw data, if requested by Company). Seller shall notify Company promptly (i) if (and to what extent) any Environmental Contamination on the Site will preclude or interfere with Seller's ability to perform its obligations under this PPA, and (ii) if applicable, Seller's plan for remediation thereof that would allow Seller to perform this PPA as and when due. The Phase I report delivered to Company under this paragraph shall be deemed Confidential Information for purposes of Section 20.18.

(B) Throughout the Term, Seller promptly shall:

1. disclose to Company any Environmental Contamination and, if required by law (including the requirements of any Permit), remediate (i) any Environmental Contamination identified at the Site caused by Seller, (ii) any preexisting Environmental Contamination at the Site discovered, impacted or exacerbated by Seller, or (iii) any Environmental Contamination at the Site that is otherwise the responsibility of Seller, *provided that*, Company acknowledges that Seller retains the right to choose the parcels within the Site to construct Wind Turbines and associated equipment;

2. if pursuant to a reasonable request, provide to Company copies of any further environmental assessments or investigations of the Site (including associated raw data); and

3. disclose to Company the existence of any enforcement, legal, or regulatory action or proceeding relating to any alleged presence of Environmental Contamination and/or the alleged violation of any Applicable Law related to the protection of endangered, migratory or other protected species.

(C) For purposes hereof:

1. “Environmental Contamination” means the introduction or presence of Hazardous Materials at such levels, quantities or location, or of such form or character, that (i) requires remediation under Applicable Law, (ii) present a material risk that the Site will not be available or usable for the purposes contemplated by this PPA, and/or (iii) will preclude or interfere with Seller’s ability to perform its obligations under this PPA as and when due.

2. “Hazardous Materials” means any substance, material, gas, or particulate matter that is regulated by any Governmental Authority as an environmental pollutant or dangerous to public health, public welfare, or the natural environment (including protection of non-human forms of life, land, water, groundwater, and air), including any material or substance that is (i) defined as “toxic,” “polluting,” “hazardous waste,” “hazardous material,” “hazardous substance,” “extremely hazardous waste,” “solid waste” or “restricted hazardous waste” under any provision of local, state, or federal law; (ii) petroleum, including any fraction, derivative or additive; (iii) asbestos; (iv) polychlorinated biphenyls; (v) radioactive material; (vi) designated as a “hazardous substance” pursuant to the Clean Water Act, 33 U.S.C. §1251 *et seq.* (33 U.S.C. §1251); (vii) defined as a “hazardous waste” pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. §6901 *et seq.* (42 U.S.C. §6901); (viii) defined as a “hazardous substance” pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601 *et seq.* (42 U.S.C. §9601); (ix) defined as a “chemical substance” under the Toxic Substances Control Act, 15 U.S.C. §2601 *et seq.* (15 U.S.C. §2601); or (x) defined as a pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §136 *et seq.* (7 U.S.C. §136).

#### 4.3 Permits.

(A) Seller shall obtain and pay for all Permits necessary or advisable under Good Utility Practice for the construction, ownership, operation and maintenance of the Facility and the generation and delivery of the output from the Facility to Company. Seller shall keep Company reasonably informed as to the status of its permitting efforts. Seller shall promptly inform Company of (i) any Permits which Seller is unable to obtain, that are delayed, limited, suspended, terminated or otherwise constrained, along with a statement of whether and to what extent this circumstance may limit or preclude Seller's ability to perform under this PPA, and (ii) Seller's plan to overcome such issue(s) to allow Seller to perform this PPA as and when due. Company shall have the right to inspect and obtain copies of all Permits held by Seller.

(B) Seller represents and warrants to Company that, except for those Permits identified in Exhibit F - Seller's Needed Permits (each of which Seller anticipates will be obtained by Seller in the ordinary course of business), all Permits and other actions required by applicable Governmental Authorities to authorize Seller's execution, delivery and performance of this PPA have been duly obtained and are in full force and effect.

(C) Throughout the Term, Seller promptly shall disclose to Company the existence of any enforcement, legal, or regulatory action or proceeding relating to the alleged violation of any Permit held by Seller, which proceeding (if successful) could materially interfere with Seller's performance of this PPA.

(D) For purposes hereof, "Permits" means all applicable construction, land use, air quality, emissions control, environmental, protected species, and other permits, licenses and approvals from any Governmental Authority for construction, ownership, operation and maintenance of the Facility and the generation and delivery of Renewable Energy therefrom.

4.4 Governmental Inspections. Seller shall notify Company (i) sufficiently in advance of any known upcoming significant inspections by any Governmental Authority relating to the Facility, to allow Company the opportunity to attend, and (ii) promptly after any unscheduled or impromptu inspection with a description of the nature and outcome of such inspection.

#### 4.5 Commercial Operation.

(A) Subject to a Permitted Extension, Seller shall cause COD to occur at the Facility no later than December 31, 2018 (the "Target COD"); *provided*, Company shall not be obligated to accept and establish a Commercial Operation Date earlier than October 2, 2018. Notwithstanding the foregoing, the Target COD may be extended for not more than:

1. 90 days on a day-for-day basis if Seller has used Commercially Reasonable Efforts (including Seller's timely filing of required documents and payment of all applicable fees) to obtain permits necessary for the

construction and operation of the Facility in accordance with this PPA but is unable to obtain such permits due to delays beyond Seller's reasonable control ("Permitting Delay"); or

2. 90 days on a day-for-day basis if Seller has used Commercially Reasonable Efforts (including Seller's timely filing of required documents and payment of all applicable fees) to have the Facility physically interconnected to the Transmission Authority's System and to complete all Seller's Interconnection Facilities needed, if any, in order to interconnect the Facility to the Transmission Authority's System, but fails to secure any necessary commitments from the Transmission Authority for such interconnection, related agreements and upgrades due to delays beyond Seller's reasonable control ("Transmission Delay", each of (1) and (2), a "Permitted Extension").

Seller shall provide notice to Company promptly upon Seller becoming aware of the facts or circumstances giving rise to a Permitted Extension. If Seller claims any one or more of the foregoing Permitted Extensions, such extensions cannot cumulatively exceed 90 days and all Permitted Extensions taken shall be concurrent, rather than cumulative, during any overlapping days.

(B) Seller shall notify Company of the date on which Seller believes the Facility has achieved Commercial Operation (a "COD Notice"). A COD Notice shall include all necessary supporting documentation of the satisfaction or occurrence of all COD Conditions. Company shall have 10 Business Days to review a COD Notice and raise any Commercially Reasonable objection to Seller's satisfaction of any of the COD Conditions, *provided, however*, that Seller's COD Notice shall be deemed accepted by Company if Company fails to object within such time period. Seller may notify Company of completion of one or more COD Conditions on an individual and incremental basis prior to COD, *provided, however*, that Company shall in all cases have up to 10 Business Days to review and object to each such notice.

(C) For purposes hereof:

1. the "Commercial Operation Date" or "COD" means 12:01 am on the Day following the date on which Company receives Seller's COD Notice, without valid objection thereto by Company; and

2. the "COD Conditions" are:

(a) an officer of Seller, authorized to bind Seller and who is familiar with the Facility, has provided written confirmation that (1) all necessary and material Permits have been obtained and are in full force and effect, (2) Seller is in compliance with this PPA in all material respects, (3) Seller has made all necessary arrangements to obtain and pay the Local Provider for House Power, and (4) the Facility is available to commence normal operations in accordance with Seller's Interconnection Agreement, operating agreements, Construction Contracts, and applicable manufacturers' warranties;

(b) Seller has proven to Company's reasonable satisfaction that (1) Seller and the Transmission Authority have executed the Interconnection Agreement, and Seller is in compliance with all requirements of the Interconnection Agreement and has received no notice of breach thereof from the Transmission Authority, (2) the Facility is interconnected to the Transmission Authority's System, has been fully tested, has achieved initial synchronization, and has been successfully operated at a generation level acceptable to the Transmission Authority, without experiencing any abnormal or unsafe operating conditions on any interconnected system, and (3) Seller has made all other arrangements necessary to deliver Renewable Energy from the Facility to the Point of Delivery during the Term;

(c) Seller has obtained and provided to Company an independent registered professional engineer's certification stating that the Facility has been completed in all material respects, except for "punch list" items that do not have a Material Adverse Effect on the ability of the Facility to operate for its intended purpose;

(d) Seller has demonstrated the reliability of the Facility's communications systems and AGC interface with Company's EMCC, and the capability of the Facility to receive and respond to signals from Company's SCADA System; and

(e) Wind Turbines comprising at least 95% of the Nameplate Capacity planned for the Facility, and associated equipment sufficient to allow such Wind Turbines to generate and deliver Renewable Energy to the Point of Delivery, have been installed and are operational.

(D) For purposes hereof, the first "Commercial Operation Year" shall mean the period starting at 12:01 a.m. on the Commercial Operation Date and ending at 11:59 pm on the last Day of the calendar month in which the first anniversary of COD occurs, and each successive "Commercial Operation Year" shall mean the 12 month period following the prior Commercial Operation Year.

#### 4.6 Test Energy.

(A) Seller shall provide Company and Transmission Authority with the information necessary to have the Facility registered with the Transmission Authority for inclusion in any generation modeling maintained by the Transmission Authority, sufficiently in advance to allow the Facility to be registered in such model at least four months prior to generating any Test Energy. Company shall cooperate reasonably under this PPA to assist in the registration of the Facility to allow generation of Test Energy, *provided, however*, that Company shall not be obligated to undertake any obligations or duties performed by the Transmission Authority in the normal course of business.

(B) Seller shall coordinate the production and delivery of Test Energy with Company, with not less than five Business Days' prior Notice, or such other Commercially Reasonable prior Notice as Company may reasonably request.

(C) For purposes hereof, “Test Energy” means Renewable Energy generated by the Facility prior to COD, required to satisfy the COD Conditions.

## **Article 5 - Delivery**

### **5.1 Arrangements.**

(A) Seller shall be responsible for arranging, maintaining and paying the costs associated with the interconnection of the Facility to the Transmission Authority’s System. Seller shall comply with the Transmission Authority’s requirements for interconnection and shall comply with all requirements set forth in the applicable Transmission Tariff. The interconnection applications shall request that the Transmission Authority study the Phase I and Phase II components separately for Energy Resource Interconnection Service under the Transmission Tariff. The resulting Interconnection Agreement shall include the Nameplate Capacity in Energy Resource Interconnection Service.

(B) Seller hereby authorizes Company to contact, discuss and obtain information concerning both the Phase I and Phase II components of the Facility and the associated Interconnection Facilities directly with/from the Transmission Authority. Promptly upon request by Company, Seller shall confirm such authorization in writing to the Transmission Authority and any applicable transmission owners in such form as may be requested by Company or the Transmission Authority.

(C) To the extent applicable, Company shall be the market participant for the Facility, as defined by the Transmission Authority.

(D) Seller shall be responsible for all interconnection, electric losses, transmission and ancillary service arrangements and costs required to deliver Renewable Energy from the Facility to the Point of Delivery. Company shall be responsible for all electric losses, transmission and ancillary service arrangements and costs required to transmit and deliver Renewable Energy beyond the Point of Delivery.

### **5.2 Market Changes.**

(A) If at any time during the Term, the Transmission Authority changes, or the facilities at the Point of Delivery cease to be subject to, the Transmission Tariff, the Parties shall, and Seller shall cooperate in good faith to facilitate the delivery of Renewable Energy from the Point of Delivery to Company’s load, while attempting to preserve to the maximum extent possible, and at the lowest reasonable cost, the benefits, burdens and obligations set forth in this PPA as of the Effective Date.

(B) If and to the extent that changes to the rules of the Market Operator require Company to change the manner in which Company schedules and dispatches the Facility, the Parties shall, and Seller shall cooperate in good faith to change their protocols for operation of the Facility accordingly, while attempting to preserve to the

maximum extent possible, and at the lowest reasonable cost, the benefits, burdens and obligations set forth in this PPA as of the Effective Date.

(C) In the event Seller incurs costs, fees and expenses in making improvements to the Facility necessary to comply with this Section 5.2 (“Compliance Expenditures”) and such Compliance Expenditures must be capitalized by Seller under generally accepted accounting principles consistently applied, then Company shall reimburse Seller for such Compliance Expenditures at a rate equal to one percent (1%) of such Compliance Expenditures per month, commencing on the first month following substantial completion of such improvements and ending upon the 100<sup>th</sup> month thereafter; *provided*, if there are less than 100 months remaining in the Term, then the one percent (1%) reimbursement percentage shall be adjusted appropriately to reflect the remainder of the Term.

### 5.3 Electric Metering Devices.

(A) All Electric Metering Devices used to measure energy shall be owned, installed, and maintained in accordance with the Interconnection Agreement, at no cost to Company.

1. Meter readings will be adjusted to reflect losses from the Electric Metering Devices to the Point of Delivery in accordance with applicable manufacturers’ parameters or as otherwise agreed by the Parties.

2. Seller shall arrange any necessary authorization to provide Company access to all Electric Metering Devices for purposes related to this PPA, and shall provide Company the opportunity to be present at any time when such Electric Metering Devices are to be inspected, tested or adjusted.

(B) Either Party may elect to install and maintain, at its own expense, backup metering devices (“Back-Up Metering”), *provided, however*, that the specifications, installation and testing of any such Back-Up Metering shall be consistent with the requirements for the Electric Metering Devices. Upon written request from the other Party, the installing Party shall test the Back-Up Metering. The actual cost of any such test shall be borne by the Party requesting the test, unless, upon such test, Back-Up Metering is inaccurate by more than one percent, in which case the cost of the retest shall be borne by the installing Party. If requested in writing, the installing Party shall provide copies of any inspection or testing reports to the requesting Party.

(C) If an Electric Metering Device or Back-Up Metering fails to register, or if the measurement is inaccurate by more than one percent, an adjustment shall be made correcting all measurements as follows:

1. If the Electric Metering Device is found to be defective or inaccurate, the Parties shall use Back-up Metering, if installed, to determine the amount of such inaccuracy, *provided, however*, that Back-Up Metering has been tested and maintained and adjusted for losses on the same basis as the Electric Metering Device. If Back-Up Metering is not installed, or Back-Up Metering is also

found to be inaccurate by more than one percent, the Parties shall use the best available information for the period of inaccuracy, adjusted for losses to the Point of Delivery in accordance with applicable manufacturers' parameters or as otherwise agreed by the Parties.

2. If the Parties cannot agree on the actual period during which inaccurate measurements were made, the period shall be the shorter of (i) the last one-half of the period from the last previous test of the Electric Metering Device to the test that found the Electric Metering Device to be defective or inaccurate, or (ii) 180 Days immediately preceding the test that found the Electric Metering Device to be defective or inaccurate.

3. To the extent that an adjustment period covers a period of deliveries for which payment has already been made by Company, Company shall use the corrected measurements as determined in accordance with this Article 5 to re-compute the amount due for the period of the inaccuracy and shall subtract the previous payments made by Company for this period from such re-computed amount. The net difference shall be reflected as an adjustment on the next regular invoice in accordance with Article 9.

## **Article 6 - Conditions Precedent**

### **6.1 State Regulatory Approval.**

(A) No later than 45 Days after the date of this PPA, Company may apply to the State Regulatory Agency for State Regulatory Approval. If Company fails to apply for State Regulatory Approval within 45 Days following the date of this PPA, Company shall be deemed to have waived its right to obtain State Regulatory Approval and to terminate this PPA under this Section 6.1, and this PPA shall remain in full force and effect thereafter.

(B) If Company applies for State Regulatory Approval, Company shall use Commercially Reasonable Efforts to obtain State Regulatory Approval as soon as reasonably practicable. Seller shall cooperate reasonably with Company's efforts to obtain State Regulatory Approval.

(C) If Company applies for State Regulatory Approval, Company shall have the right to terminate this PPA, without any further financial or other obligation to Seller as a result of such termination, by notice to Seller:

1. at any time within 30 Days following issuance of a written order by the State Regulatory Agency rejecting State Regulatory Approval, or granting State Regulatory Approval with conditions unacceptable to Company in its sole discretion; or

2. at any time between the 240<sup>th</sup> and 270<sup>th</sup> Day following Company's application for State Regulatory Approval, if prior to the date of such



termination the State Regulatory Agency has not issued a written order granting or rejecting State Regulatory Approval.

If Company is eligible but fails to terminate this PPA by the applicable date, Company shall be deemed to have waived its right to terminate this PPA under this Section 6.1(C), and this PPA shall remain in full force and effect thereafter.

6.2 Related Transaction CPs. The Parties acknowledge and agree that they (or their Affiliates) are negotiating a purchase and sale agreement along with other definitive agreements (collectively the “PSA”) for the transfer by an Affiliate of Seller (the “PSA Seller”) to Company of a separate, approximately 478 MW wind farm located in Hale County, Texas, known as the Hale Wind Project (the “Hale Project”). As such, (A) either Party will have the right, but not the obligation, to terminate this PPA by Notice to the other Party within 10 Business Days following (i) the failure of the Company and PSA Seller to execute the PSA on or before June 30, 2017; (ii) the failure by Company to obtain, pursuant to the terms of the PSA, the Buyer’s Regulatory Approvals (as such term is defined in the PSA); and (B) if Closing (as defined in the PSA) does not occur pursuant to the PSA, then Company will have the right, but not the obligation, to terminate this PPA by Notice to Seller within 10 Business Days following the termination of the PSA; *provided*, such termination is pursuant solely to Section 2.8(a)(ii)(A) of the PSA (Bankruptcy Event), Section 2.8(a)(ix) of the PSA (Update), or Section 2.8(a)(xv) of the PSA (material breach). Such termination, as specified in subpart (A) and (B) above being the terminating Party’s sole and exclusive remedy as a result of the termination of this PPA pursuant to this Section 6.2. Company shall provide Seller written notice if and when the Buyer’s Regulatory Approvals have been obtained and the Closing has occurred.

6.3 Seller CPs. Either Party shall have the right to terminate this PPA, without any further financial or other obligation to the other as a result of such termination, by Notice to the other Party within fourteen (14) Days following the failure of Seller to (i) obtain approvals of Seller’s management and board of directors (or equivalent governing body) required for the performance of this Agreement on or before April 30, 2017, and (ii) to cause and Transmission Authority to execute the Interconnection Agreement on or before February 1, 2018. If either Party is eligible but fails to terminate this PPA by the applicable date, then such Party shall be deemed to have waived its right to terminate this PPA under this Section 6.3, and this PPA shall remain in full force and effect thereafter.

## Article 7 - Sale and Purchase

### 7.1 General Obligation.

(A) Beginning on the Commercial Operation Date, Seller shall generate from the Facility, deliver to the Point of Delivery, and sell to Company, and Company shall receive and purchase at the Point of Delivery, the Renewable Energy and other products and services required by this PPA. Seller shall not curtail or interrupt deliveries of Renewable Energy to Company for economic reasons of any type; *provided, however, that* (i) Seller's obligation to generate, deliver and sell to Company the products and services required hereunder shall be excused during Seller Excuse Hours, and (ii) Seller shall be permitted to curtail or interrupt that curtailed energy provided for in Section 8.3.

(B) Title and risk of loss of the products and services transacted by this PPA shall transfer from Seller to Company at the Point of Delivery.

7.2 AGC. Beginning on the Commercial Operation Date, Company shall dispatch the Facility through the EMCC AGC system. Seller shall ensure that, throughout the Term:

(A) the SCADA signal is capable of functioning on all AGC Set Points within the margin of error specified in the manufacturer's energy set point margin of error; and

(B) the Facility AGC Remote/Local status is in "Remote" set-point control during normal operations.

7.3 Green Benefits. The Parties acknowledge that existing and future Applicable Laws create value in the ownership, use or allocation of RECs. The Parties acknowledge that Company is not purchasing the RECs associated with the Renewable Energy or Test Energy purchased hereunder. Seller hereby grants Company the option to commence purchasing all of the RECs associated with the Renewable Energy on a prospective basis (the "REC Option"). Company may exercise its REC Option by providing Seller with 12-months prior written Notice of its intent to begin purchasing the RECs for the remainder of the Term. Seller shall be compensated for such RECs at a rate of \$1.05 per REC. Notwithstanding the foregoing, if at any time during the Term, Seller, or an Affiliate of Seller, originates a long term transaction (i.e., of a one year or greater duration) for the sale of RECs attributable to the Facility with an unaffiliated third party, by notice to Company (a "REC Notice"), Seller first shall offer to sell the RECs to Company on the same terms (the "REC ROFO"). The REC Notice shall identify (i) the nature and terms of the transaction, and (ii) the minimum price which Seller is willing to accept to proceed with the contemplated third party transaction. All information disclosed to Company by Seller with respect to the ROFO shall be deemed Confidential Information subject to Section 20.18.

(A) Seller shall allow Company 20 Business Days after the REC Notice to consider a proposed transaction. Within such period, Company shall either

(i) exercise its REC ROFO on substantially comparable terms to the proposed transaction or (ii) waive its REC ROFO (and its REC Option) with respect to, and for the duration of, that transaction. If Company fails to respond to a ROFO Notice within such 20 Business Day period, Company shall be deemed to have waived its ROFO right with respect to that transaction.

(B) If Company exercises its REC ROFO, the Parties shall have an additional 20 Business Day period to sign definitive agreements on terms no less favorable to Company than those contained in the REC ROFO Notice.

(C) If Company does not exercise its REC ROFO, Seller shall have the right to close its proposed transaction with the identified prospective buyer, *provided, however, that* such transaction shall have a purchase price of not less than the minimum price set forth in the REC ROFO Notice and the transaction shall have been closed not more than 30 Business Days following expiration of the Company's right to exercise its REC ROFO.

#### 7.4 Ancillary Services.

(A) Company shall be entitled to, and Seller shall make available to Company all Ancillary Services associated with the Facility, at no additional charge to Company. Seller shall use Commercially Reasonable Efforts to maximize the Ancillary Services available from the Facility, *provided, however, that* Seller shall be required to make any material capital expenditures or incur any significant increased operating expenses in connection with such efforts.

(B) Any compensation Seller receives under the Interconnection Agreement or otherwise from third parties for Ancillary Services shall be provided to Company at no additional cost to Company under this PPA. To implement the foregoing, Seller shall credit Company, as a reduction to Seller's monthly invoice or other mutually-agreed mechanism, for any compensation that Seller receives from third parties for Ancillary Services; *provided, that* if a Governmental Authority or Transmission Authority implements new or revised requirements for generators to create, modify, or supply Ancillary Services, requiring Seller to install additional equipment after the date hereof to meet such requirements, then Seller shall be allowed to reduce the amount to be credited to Company for Ancillary Services by an amount sufficient to recover the cost of such additional equipment. Any cost not so recovered by Seller in any billing period shall be carried forward as a reduction of the amount of the credit in subsequent billing periods.

(C) For purposes hereof, "Ancillary Services" means ancillary services addressed under the Transmission Tariff from time to time (if any), which are associated, directly or indirectly, with the capacity of the Facility or the generation and/or transmission of Renewable Energy from the Facility from time to time, including any rights to compensation therefor. By way of example only, "Ancillary Services" may include capacity or reliability attributes, resource adequacy characteristics, locational benefit attributes, and/or VaR generation.

## Article 8 - Payment Calculations

### 8.1 Payment for Renewable Energy.

(A) Company shall pay Seller a payment rate equal to 70% of the Energy Payment Rate for the first Commercial Operation Year, for all Test Energy delivered to Company.

(B) Commencing on the Commercial Operation Date, Company shall pay the Energy Payment Rate to Seller for all Renewable Energy delivered to the Point of Delivery; *provided* that Company shall never be required to pay for net instantaneous output of the Facility (as measured at the Point of Delivery) in excess of the Nameplate Capacity.

(C) The Energy Payment Rate shall be deemed Confidential Information for purposes of Section 20.18 below.

### 8.2 Reserved.

### 8.3 Curtailment.

(A) Company, or Transmission Authority, may require Seller, by telephonic communication or through use of the AGC Set Point to curtail the delivery of Renewable Energy to Company from the Facility, for any reason and in their sole discretion. Seller shall promptly comply with each such notification.

(B) For purposes hereof:

1. "Compensable Curtailment" means a curtailment of generation or delivery of Renewable Energy following COD arising out of the following (and only the following):

(a) a curtailment of the Facility by Company under Section 8.3(A); and

(b) Company's scheduling and other market participation activities, including (A) any energy offer made by Company with respect to the Facility, or (B) negative nodal/LMP pricing that results in Company's curtailment of the facility under Section 8.3(A).

(c) an election by Company to utilize non-firm transmission service to transmit Renewable Energy from the Point of Delivery to its load, and such non-firm transmission service is restricted or reduced by the applicable transmission service provider, except as provided in paragraph 2(c) below.

2. "Non-Compensable Curtailment" means any curtailment of the output of the Facility other than a Compensable Curtailment. By way of example only, Non-Compensable Curtailments include curtailments of generation or delivery of Renewable Energy arising out of:

(a) any action by the Transmission Authority, including any declaration of an Emergency Condition or Force Majeure under and as defined in the Interconnection Agreement;

(b) the restriction or reduction of maximum permissible output related to the Facility's Interconnection Agreement(s) including any operating limits imposed by the Transmission Authority;

(c) the restriction or reduction of non-firm transmission service by the applicable transmission service provider to the extent such restriction or reduction would also have been imposed even if firm transmission service had been in place;

(d) planned or unplanned maintenance outages on any part of the transmission system or any testing of the transmission system, only to the extent that such maintenance outages or testing of the transmission system results in a curtailment of the output of the Facility;

(e) the lack of available transmission from the Facility to the Point of Delivery;

(f) Seller's failure to maintain in full force and effect any Permit to own, operate and/or maintain the Facility;

(g) a civil, regulatory or criminal proceeding for the protection of endangered, migratory or other protected species; and

(h) Seller's failure to abide by the AGC Protocols, or a failure of the Facility to respond to AGC instructions from the EMCC.

3. "Compensable Curtailment Energy" means, for any period, when the AGC Set Point is below the Potential Energy, the MWh represented by the Potential Energy less the Renewable Energy actually generated (if any), during such period. For purposes of determining Compensable Curtailment Energy, the amount of Potential Energy at any given time shall be calculated using the best-available data and methods to determine an accurate representation of the amount of curtailed Renewable Energy:

(a) To the extent available, the Parties shall use Seller's real time Park Potential communicated to Company through the SCADA System as the proxy for Potential Energy, except to the extent that Park Potential is demonstrated not to accurately reflect the Potential Energy (plus or minus 2% average error for non-curtailment periods where generation exceeds 50% of nameplate capacity during one month).

(b) During those periods of time when the Park Potential is unavailable or does not accurately represent Potential Energy, the Parties shall use the best available data obtained through Commercially Reasonable methods to determine the Potential Energy.

4. “Tax Benefits” means an amount equal to (a) the PTCs to which Seller would have been entitled with respect to Renewable Energy that could have been delivered but for a Compensated Curtailment pursuant to Section 8.3(B), plus (b) a “gross up” amount to take into account the federal, state and local income tax to Seller on such payments in lieu of PTCs so that the net amount retained by Seller, after payment of federal, state and local income taxes, is equal to the amount set forth in subpart (a) of this definition. The calculation of such “gross up” amount shall be made on the assumption that the Seller is subject to federal income taxation, and state and local taxation with respect to amounts described in this Section 8.3(B)(4), at the highest applicable statutory rate applicable to corporations for the relevant period or periods, and shall take into account the deductibility (for federal income tax purposes) of applicable state and local taxes.

5. In administering curtailments in accordance with this Section 8.3, the Parties shall utilize the Curtailment Administration Protocols set forth in Exhibit L – Curtailment Administration Protocols of this PPA, provided, however, that any conflict between this Section 8.3 and Exhibit L shall be resolved in favor of this Section 8.3.

(C) No payment shall be due to Seller from Company for Renewable Energy curtailed as a consequence of any Non-Compensable Curtailment, or for Compensable Curtailment Energy prior to COD.

(D) For all Compensable Curtailments following COD, Company shall pay to Seller (i) all amounts that Seller would have received from Company under this PPA had the resulting Compensable Curtailment Energy actually been delivered, plus (ii) the amount of any associated Tax Benefits to which Seller would have been entitled but did not receive as a result, on a grossed-up basis, assuming that Seller has elected to receive PTCs. For the avoidance of doubt, Seller shall not be entitled to recover any Tax Benefits to the extent Seller would not have been entitled to receive PTCs had the Compensable Curtailment Energy actually been delivered.

## **Article 9 - Billing and Payment**

### **9.1 Billing.**

(A) The billing period under this PPA shall be the calendar month.

(B) As soon as practicable and in any event within 10 Days after the end of each month, Company shall provide to Seller a statement containing Company’s calculation of the amount due to Seller for such month, including the applicable billing parameters based upon Company’s reading of the Electric Metering Devices consistent with Section 5.2.

(C) No later than 15 Business Days following receipt of Company’s billing statement, Seller shall submit an invoice to Company in a form and by a method to be agreed by the Parties, showing the amount due Seller for the relevant month, specifying the products and services provided, all billing parameters, rates and factors,

and any other data relevant to the calculation of payments due to Seller. Such invoice shall include an explanation of any items in dispute, as well as all supporting documentation upon which Seller relies.

9.2 Payment. All payments shall be remitted via check or electronic funds transfer, as designated by the owed Party, on or before the 15<sup>th</sup> Business Day following receipt of the invoice. Remittances received by mail will be considered to have been paid when due if the postmark indicates the payment was mailed on or before the 15<sup>th</sup> Business Day following receipt of the billing invoice.

(A) If a payment is late, a late payment charge shall be applied to the unpaid balance for the number of days payment was late and shall be added to the next billing statement. Late payment charges shall include interest calculated using the prime rate of interest as published on the date of the invoice in *The Wall Street Journal* (or, if unavailable, an equivalent publication on or about that date).

(B) Company at any time may offset against amounts owed to Seller, any liquidated amounts, accrued damages and other payments, and undisputed billing errors and adjustments, which are owed by Seller to Company.

(C) Seller and Company may and shall net their obligations to each other under this PPA, and payment of the net amount shall discharge all mutual undisputed obligations between the Parties.

9.3 Billing Disputes. Either Party may dispute invoiced amounts pursuant to Section 13.1, but shall pay to the other Party at least the portion of invoiced amounts that is not disputed, on or before the invoice due date. When the billing dispute is resolved, the owing Party shall pay the amount owed within five (5) Business Days of the date of such resolution, with late payment interest charges calculated on the amount owed in accordance with Section 9.2(A).

## **Article 10 - Operations and Maintenance**

### **10.1 Operation and Administration**

(A) Seller shall staff, control, and operate the Facility consistent with Good Utility Practices, Exhibit I – AGC Protocols; Data Collection; Technical Specifications and this PPA. Seller shall cause personnel to be available 24x7 via telephone or other electronic means with (i) the capability of remotely starting, operating and stopping the Facility within 10 minutes, and (ii) the ability to be present at the Site within 60 minutes.

(B) Seller shall comply with Good Utility Practices, the requirements of all Governmental Authorities and all reasonable requirements of Company in the operation of the Facility. By way of example only, Seller shall perform all capacity testing of the Facility and related reporting, as and when required by Governmental Authorities.

(C) Seller shall provide to Company a day-ahead availability forecast in accordance with Exhibit I - AGC Protocols; Data Collection; Technical Specifications and any other reporting requirements required for compliance with NERC reliability standards. Company shall forward Seller's forecast to the applicable local reliability coordinator on Seller's behalf, *provided, however*, that Seller shall remain responsible to ensure the timeliness and accuracy of forecasts and any changes to the real-time or forecast availability of the Facility. If and to the extent that the ERO modifies the forecasting or other reporting requirements imposed on Company or the Facility, Seller shall timely provide required data to Company or the ERO, as applicable.

#### 10.2 Facility Maintenance.

(A) Seller shall maintain the Facility in accordance with Good Utility Practice. Seller shall coordinate its regular maintenance requirements for the Facility with Company ("Maintenance Schedules"). Maintenance Schedules shall be provided to Company in writing and sufficiently in advance for Commercially Reasonable review, and Company may, within ten (10) days after receipt of the schedule, request reasonable modifications to the Maintenance Schedule. Seller shall be permitted to reduce deliveries of Renewable Energy and cease operation of the entire Facility or individual units, if applicable, during any period of Facility maintenance.

(B) Seller shall coordinate with Company and the Transmission Authority the timing and duration of planned outages.

(C) When Forced Outages occur, Seller shall notify Company's EMCC of the existence, nature, start time, and expected duration of the Forced Outage as soon as practical, but in no event later than one hour after the Forced Outage occurs. Seller shall immediately inform Company's EMCC of changes in the expected duration of the Forced Outage except to the extent relieved of this obligation by Company's EMCC with respect thereto.

#### 10.3 Books and Records.

(A) Seller shall maintain an accurate and up-to-date operating log at the Facility, in electronic format, with records of production for each clock hour; changes in operating status; Forced Outages; information required by Governmental Authorities in the prescribed format; and other information reasonably requested by Company.

(B) Seller and Company shall each keep complete and accurate records and all other data required by each of them for the purposes of proper administration of this PPA, including metering, billing and payment records, and such records as may be required by Governmental Authorities. Originals or copies of all Operating Records shall be maintained at Seller's Juno Beach, Florida facility or such other mutually-agreeable location. Company may examine and make copies of such Operating Records from time to time upon request, during normal business hours.

10.4 Access to Facility. Representatives of Company shall have access to the Facility from time to time, on Commercially Reasonable prior notice, to read meters,



perform inspections and take such other actions as may be appropriate to facilitate Company's performance of this PPA. While at the Facility, such representatives shall observe Seller's safety precautions and shall conduct themselves in a manner that will not interfere with operation of the Facility.

#### 10.5 Real Time Data.

(A) Seller shall communicate all data necessary for Company to integrate the Facility into Company's EMCC in real time through the Facility's SCADA System in accordance with Exhibit I - AGC Protocols; Data Collection; Technical Specifications. Seller shall maintain the Facility's SCADA System so that it is capable of interfacing with and reacting to Company's AGC Set-Point and responding to signals from the Company's EMCC in accordance with the AGC Protocols.

(B) Seller shall use Commercially Reasonable Efforts to adjust the real time Park Potential of the Facility when Company communicates to Seller a measured difference of plus or minus two percent between the metered Renewable Energy and Park Potential, during periods when generation is not curtailed.

(C) From and after the Commercial Operation Date, Seller provide Company, at Seller's expense, real time performance and meteorological data for all Wind Turbines and wind energy-standard remote sensing technologies at the Facility in accordance with Exhibit I - AGC Protocols; Data Collection; Technical Specifications for the Term of this PPA. Seller shall maintain data collection systems that are compatible with Company's PI System. Seller shall ensure that real time communications capabilities are available and maintained for transmission to Company's PI System. Seller shall ensure that all meteorological equipment at a minimum meets the specifications set forth in Exhibit I - AGC Protocols; Data Collection; Technical Specifications. Company shall have the right to disclose data gathered through the Company's PI System publicly; *provided, however*, that such data is (i) masked to obscure the origin of the data and (ii) aggregated so that the data cannot be correlated and used by competitors of Seller and/or the supplier of the Wind Turbines.

10.6 Accreditation. Seller shall perform at Seller's expense, any reporting and testing of the Facility required by Governmental Authorities in a manner to permit accreditation of the Facility and qualification as a Capacity Resource.

#### 10.7 Operating Committee and Operating Procedures.

(A) Company and Seller shall each appoint one representative and one alternate representative to act as the Operating Committee in matters relating to the Parties' performance obligations under this PPA and to develop operating arrangements for the generation, delivery and receipt of Renewable Energy from the Facility. The Parties' initial representatives on the Operating Committee are set forth in Exhibit D - Notices.

(B) The Operating Committee may develop mutually agreeable written Operating Procedures consistent with the requirements of this PPA, to address matters

such as day-to-day communications; key personnel; operations-center interface; metering, telemetering, telecommunications, and data acquisition procedures; operations and maintenance scheduling and reporting; reports; operations log; testing procedures; and such other matters as may be mutually agreed upon by the Operating Committee.

(C) The Operating Committee shall review the requirements for AGC and Data Collection from time to time after the date hereof and may agree on modifications thereto to the extent necessary or convenient for operation of the Facility in accordance with this PPA.

(D) The Operating Committee shall have authority to act in all technical and day-to-day operational matters relating to performance of this PPA and to attempt to resolve potential disputes, *provided, however*, that except as explicitly provided herein, the Operating Committee shall have no authority to amend or waive any provision of this PPA.

## **Article 11 - Security for Performance**

### **11.1 Security Fund.**

(A) During the Term of this PPA, Seller shall fund and maintain security in favor of Company, at Seller's expense, to secure Seller's obligations to Company under this PPA (the "Security Fund"), in accordance with this Article 11.

Seller shall establish and fund the initial Security Fund in the amount of \$5,750,000 no later than 30 Days following execution of this Agreement. Within 5 Business Days following Company's receipt of State Regulatory Approval, the amount of the Security Fund shall be increased to \$28,750,000. Within 5 Business Days following COD, the amount of the Security Fund shall be reduced to \$17,250,000, which amount shall remain in place for the Term.

(B) Company may draw from the Security Fund such amounts as are necessary to recover amounts owing to Company pursuant to this PPA, including any Liquidated Delay Damages, Actual Damages, liquidated damages for failure to achieve COD, and any amounts for which Company is entitled to indemnification under this PPA. Company may, in its sole discretion, draw all or any part of such amounts from any form of security to the extent available pursuant to this Article 11 and in any sequence Company may select. Company's failure or delay to draw any amount from the Security Fund in any instance shall not prejudice Company's rights to subsequently recover such amount from the Security Fund or in any other manner.

(C) Company shall notify Seller within 5 Business Days following any draw on the Security Fund by Company, including the amount thereof and the basis therefor.

11.2 Replenishment. Seller shall replenish the Security Fund to the applicable levels set forth in Section 11.1(B) within 15 Business Days after Company makes a

draw on the Security Fund; *provided*, following COD such replenishment shall not exceed the amount remaining under the Damage Cap (as provided in Section 12.4(A)). Notwithstanding the foregoing, within 15 Business Days after Company makes a draw on the Security Fund associated with the damages described in Section 12.4(B), Seller shall replenish all amounts drawn from the Security Fund.

### 11.3 Form.

(A) The Security Fund may be in the form of an irrevocable standby letter of credit substantially in the form of Exhibit G – Form of Letter of Credit (a “Letter of Credit”) from a financial institution reasonably acceptable to Company (“Issuer”).

1. The Issuer of the Letter of Credit shall have and maintain a Credit Rating equivalent to A- (or better) by Standard & Poors and A3 (or better) from Moodys. If such Credit Rating is A- or A3, the Issuer must not be on credit watch by any rating agency.

2. The Letter of Credit must be for a minimum term of 360 Days. Seller shall give Company at least 30 Days advance notice prior to any expiration or earlier termination of the Letter of Credit. Seller shall cause the renewal or extension of the Letter of Credit for additional consecutive terms of 360 Days or more (or, if shorter, the remainder of the Term) more than 30 Days prior to each expiration date of the security. If the Letter of Credit is not renewed or extended at least 30 Days prior to its expiration date or otherwise is terminated early, Company shall have the right to draw immediately upon the Letter of Credit and to place the amounts so drawn, at Seller’s cost and with Seller’s funds, in an Escrow Account in accordance with paragraph (B) below, until and unless Seller provides a substitute form of security meeting the requirements of this Section 11.3.

(B) The Security Fund may be in the form of U.S. currency deposited into an escrow account with a state- or federally-chartered commercial bank with an office in the State of Minnesota, with net assets of at least \$1 billion (the “Escrow Account”).

1. The Escrow Account shall be governed by an escrow agreement in form mutually satisfactory to Seller, Company and the escrow agent, *provided* that (a) Company shall hold a first and exclusive perfected security interest in the funds in the Escrow Account, (b) Company shall be permitted unilaterally to draw down any amount therein, regardless of any protest by Seller or any other party liable thereon (*provided* that nothing in the Escrow Agreement shall preclude any protest against Company by Seller, following any draw, that such draw did not comply with this Agreement), and (c) Seller shall pay all fees and expenses of the escrow agent.

2. Funds held in the Escrow Account may be invested as Seller may direct in any of the following:

- a money-market fund sponsored by the escrow agent;

- U.S. treasury obligations with a maturity of 90 Days or less;
- commercial paper rated “A” or better, with a maturity of 90 days or less; and
- other liquid investment-grade investments with maturities of three months or less, approved by Company in advance (such approval not to be unreasonably withheld or delayed).

3. All investment income on the Escrow Account shall be taxable to, and accrue for the benefit of, Seller. After the Commercial Operation Date, periodic sweeps by Seller for recovery of interest earned by the escrowed funds shall be allowed, and, at any time the balance in the Escrow Account exceeds the required amount of security, the escrow agent may remit any excess to Seller.

(C) The Security Fund may consist of a guaranty substantially in the form of Exhibit G-2 (Guaranty), from an Issuer, parent or other guarantor (“Guarantor”) with a minimum net worth of \$250,000,000 and a senior unsecured credit rating (unenhanced by third-party support) equivalent to Investment Grade. If such senior unsecured credit rating of the Guarantor is exactly equivalent to Investment Grade, then the Guarantor must not be on credit watch or have a negative outlook by a rating agency. If the credit rating of the Guarantor is downgraded below Investment Grade or if there has been an event that has a Material Adverse Effect to the creditworthiness of the Guarantor (as determined reasonably by Company), then Seller shall be required to convert the guarantee provided by such Guarantor to a Security Fund instrument meeting the criteria set forth in either sub-paragraph (1) or sub-paragraph (2) above no later than 10 Business Days after receiving information from or about the Guarantor that the Guarantor no longer satisfies the requirements of this paragraph.

(D) Upon request by Seller, Company shall negotiate in good faith immaterial changes to Exhibit G – Form of Letter of Credit and/or Exhibit H – Form of Guaranty, *provided* that Seller shall pay or reimburse Company for the incremental direct expenses (including the fees and expenses of counsel) incurred by Company after the Effective Date in connection therewith.

(E) Seller may change the form of the Security Fund at any time and from time to time upon Commercially Reasonable prior notice to Company, *provided, however,* that the Security Fund must at all times satisfy the requirements of this Article 11.

11.4 Re-Evaluation. Company may reevaluate from time to time the value of any Security posted by Seller to determine, in a Commercially Reasonable manner, whether (i) it continues to satisfy the requirements in this PPA or (ii) there has been a change that has a Material Adverse Effect in the creditworthiness of the Issuer or guarantor, such that it does not satisfy, or with the passage of time it will no longer satisfy, requirements of this PPA. If Company determines, in a Commercially Reasonable manner, that there has been an event that has caused, or will cause with the passage of time, Seller’s Security to no longer satisfy the requirements of this PPA,

then Company shall provide prompt Notice to Seller of such event and after receipt of such Notice, Seller shall be required to provide alternative Security that satisfies the terms of this PPA.

11.5 Survival. The Security Fund shall survive termination of this PPA to be available to pay any amounts owed to Company arising prior to or upon termination. Promptly following (i) the end of the Term and the completion of all of Seller's obligations under this PPA, or (ii) termination of this PPA for any reason prior to the Scheduled Termination Date, Company shall determine reasonably the amount, if any, owed by Seller for any obligations or damages arising out of this PPA. Company may draw such amount and shall release the balance of the Security Fund (including any accumulated interest, if applicable) to Seller.

11.6 Expenses. Seller shall reimburse Company for its direct expenses (including the fees and expenses of counsel) incurred by Company after the Effective Date in connection with the preparation, negotiation, execution and/or release (including making a draw of funds) of the Security Fund under this Article 11.

## **Article 12 - Default and Remedies**

### **12.1 Default by Seller: General**

(A) Events. Any of the following events shall constitute a default by Seller under this PPA. If no cure period is provided below, such default shall be deemed an Event of Default by Seller immediately upon its occurrence. If a cure period is provided below, such default shall mature into an Event of Default if not cured within the indicated cure period, subject to Section 13.3 below.

1. Seller's application for, or consent (by admission of material allegations of a petition or otherwise) to, the appointment of a receiver, trustee or liquidator for Seller or for all or substantially all of its assets, or its authorization of such application or consent, or the commencement of any proceedings seeking such appointment without such authorization, consent or application, which proceedings continue undismissed or unstayed for a period of 60 Days from inception.

*Cure Period:* None.

2. Seller's authorization or filing of a voluntary petition in bankruptcy or application for or consent (by admission of material allegations of a petition or otherwise) to the application of any bankruptcy, reorganization, readjustment of debt, insolvency, dissolution, liquidation or other similar law of any jurisdiction or the institution of such proceedings against Seller without such authorization, application or consent, which proceedings remain undismissed or unstayed for 60 Days from its inception or which result in adjudication of bankruptcy or insolvency within such time.

*Cure Period:* None.

3. Seller's assignment of this PPA or the Facility, or any Change of Control, not permitted by Section 19.1.

*Cure Period:* None.

4. Any representation or warranty made by Seller in this PPA is false or misleading in any material respect when made or deemed made and such failure has a Material Adverse Effect on Seller's ability to perform this PPA.

*Cure Period:* 20 Business Days after Company provides notice of such breach; *provided*, if a change in law occurs during the term causes a representation or warranty made by Seller to be materially false or misleading, such breach of the representation or warranty shall not be an Event of Default if Seller has used Commercially Reasonable efforts to comply with such change in law in order to make the representation and warranty no longer false or misleading.

5. Seller's failure to establish and maintain the Security Fund as and in the amounts required under Article 11.

*Cure Period:* Five (5) Business Days after Company provides notice of Seller's failure.

6. Seller's failure to obtain and maintain insurance in scope and amounts required under Article 16.

*Cure Period:* 10 Business Days after Company provides notice of Seller's failure.

7. Seller's failure to make any payment to Company as and when required by this PPA, including Liquidated Delay Damages, Actual Damages, and any required indemnification.

*Cure Period:* 10 Business Days after the date Seller receives notice from Company that the amount is overdue.

8. Reserved.

9. A breach by Seller of the Interconnection Agreement, which breach materially interferes with Seller's delivery of Renewable Energy to the Point of Delivery, Company's ability to accept Renewable Energy at the Point of Delivery, Company's ability to transmit Renewable Energy beyond the Point of Delivery, and/or otherwise has a Material Adverse Effect on Company.

*Cure Period:* 30 Days from the breach or the cure period allowed by the Interconnection Agreement (whichever is longer).

10. Beginning with the second Commercial Operation Year, the failure of the Facility to achieve the Guaranteed Mechanical Availability Percentage (as determined pursuant to Exhibit M).

*Cure Period:* As provided for in Exhibit M.

11. The failure by Seller to perform or observe any other material obligation to Company under this PPA, unexcused by Force Majeure (other than failure to achieve COD, which is addressed in Section 12.2 below).

*Cure Period:* 30 Days after notice thereof shall have been given by Company; *provided*, that if such default is not reasonably capable of cure within such 30-Day period, Seller shall have such additional period of time (not to exceed 90 Days in any event) as is reasonably necessary for cure, so long as Seller initiates cure within such 30-Day period and diligently prosecutes the cure to conclusion thereafter.

(B) Remedies for Default. In connection with any default by Seller under this Section 12.1 (whether or not cured by Seller), Company may:

1. Seek Actual Damages in such amounts and on such basis for the default as authorized by this PPA;
2. Offset against any payments due to Seller, any Actual Damages and other amounts due from Seller; and/or
3. Draw any Actual Damages and other amounts due from Seller, from the Security Fund.

(C) Termination for Event of Default. Upon and at any time following an Event of Default by Seller under this Section 12.1, in addition to its rights under Section 12.1(B) above, Company may terminate this PPA immediately upon notice to Seller, without penalty or further obligation to Seller. In connection with any such termination, Company may collect from Seller (subject to the Damage Cap) all Actual Damages arising from such Event of Default through the Scheduled Termination Date.

(D) Specific Performance. In addition to the other remedies specified herein, upon any Event of Default of Seller under this Section 12.1, Company may elect to treat this PPA as being in full force and effect and Company shall have the right to specific performance.

(E) Termination for a Change in Tax Law. If, upon and at any time prior to the Commercial Operation Date, Seller suffers a Change in Tax Law that materially adversely affects Seller, then Seller may terminate this PPA upon 30 Business Days prior written notice to Company; *provided*, such termination notice must be delivered by Seller to Buyer on or prior to the Commercial Operation Date. In connection with any such termination, Seller shall, within five (5) Business Days of such Termination, pay to

Company a termination fee equal to \$10/kW of the Nameplate Capacity, such termination fee being the Company's sole and exclusive remedy for a Change in Tax Law termination by Seller.

## 12.2 Default by Seller: Failure to Achieve COD.

(A) COD Delay. Subject to a Permitted Extension, Seller shall be in default under this PPA if the Facility fails to achieve COD by the Target COD ("COD Delay"). Seller shall be liable to pay \$57,500 per Day ("Liquidated Delay Damages") to Company as a liquidated damage and not a penalty, in lieu of Actual Damages, for any COD Delay. Except as provided in Section 12.2(C) below, the payment of Liquidated Delay Damages shall be Company's sole and exclusive remedy for a COD Delay. Liquidated Delay Damages shall begin to accrue on the Day after the Target COD (as it may be extended due to Force Majeure or a Permitted Extension) until the first to occur of COD or termination of this PPA pursuant to Section 12.2(C) below.

(B) Cure. Subject to a Permitted Extension, Seller shall have a cure period of 45 days for its failure to achieve Commercial Operation by the Target COD, *provided, however,* that if during such period Seller provides a written opinion from a mutually-agreeable independent engineer that COD can reasonably be achieved within an additional 45 Day period, then the cure period shall be 90 Days after the Target COD to achieve Commercial Operation. The payment of accrued Liquidated Delay Damages shall be a condition to any such cure.

(C) Termination. Failure to cure a COD Delay within the applicable cure period set forth in Section 12.2(B) shall be an Event of Default by Seller. Upon such an Event of Default, Company may as its sole and exclusive remedy for a COD Event of Default (i) terminate this PPA immediately upon notice to Seller, without penalty or further obligation to Seller except as to costs and balances incurred prior to the effective date of such termination, and (ii) in connection therewith, in lieu of Actual Damages for the balance of the Term, collect from Seller liquidated damages therefor in the amount of \$28,750,000 *less* the Liquidated Delay Damages paid by Seller to Company pursuant to Section 12.2(A).

## 12.3 Default by Company.

(A) Events. Any of the following events shall constitute a default by Company under this PPA. If no cure period is provided below, such default shall be deemed an Event of Default by Company immediately upon its occurrence. If a cure period is provided below, such default shall mature into an Event of Default if not cured within the indicated cure period, subject to Section 13.3 below.

1. Company's application for, or consent (by admission of material allegations of a petition or otherwise) to, the appointment of a receiver, trustee or liquidator for Company or for all or substantially all of its assets, or its authorization of such application or consent, or the commencement of any proceedings seeking such appointment without such authorization, consent or



application, which proceedings continue undismissed or unstayed for a period of 60 Days from inception.

*Cure Period:* None.

2. Company's authorization or filing of a voluntary petition in bankruptcy or application for or consent (by admission of material allegations of a petition or otherwise) to the application of any bankruptcy, reorganization, readjustment of debt, insolvency, dissolution, liquidation or other similar law of any jurisdiction or the institution of such proceedings against Company without such authorization, application or consent, which proceedings remain undismissed or unstayed for 60 Days from its inception or which result in adjudication of bankruptcy or insolvency within such time.

*Cure Period:* None.

3. Company's assignment of this PPA not permitted by Section 19.2.

*Cure Period:* None.

4. Any representation or warranty made by Company in this PPA is false or misleading in any material respect when made or deemed made and such failure has a Material Adverse Effect on Company's ability to perform this PPA.

*Cure Period:* 20 Business Days after Seller provides notice of such breach; *provided*, if a change in law occurs during the term causes a representation or warranty made by Company to be materially false or misleading, such breach of the representation or warranty shall not be an Event of Default if Company has used commercially reasonable efforts to comply with such change in law in order to make the representation and warranty no longer false or misleading.

5. Any representation or warranty by Company in this PPA that has a Material Adverse Effect on Company's ability to perform this PPA is proven to have been false in any material respect when made.

*Cure Period:* None.

6. Company's failure to make any payment to Seller as and when required by this PPA, including invoiced amounts, Actual Damages and any required indemnification.

*Cure Period:* 10 Business Days after the date Company receives notice from Seller that the amount is overdue.

7. Reserved.

8. The failure by Company to perform or observe any other material obligation to Seller under this PPA, unexcused by Force Majeure.

*Cure Period:* 30 Days after notice thereof shall have been given by Seller; *provided*, that if such default is not reasonably capable of cure within such 30-Day period, Company shall have such additional period of time (not to exceed 120 Days in any event) as is reasonably necessary for cure, so long as Company initiates cure within such 30-Day period and diligently prosecutes the cure to conclusion thereafter.

(B) Remedies for Default. In connection with any default by Company (whether or not cured by Company), Seller may:

1. Seek Actual Damages in such amounts and on such basis for the default as authorized by this PPA; and/or
2. Offset against any payments due to Company, any Actual Damages and other amounts due from Company.

(C) Termination for Event of Default. Upon an Event of Default by Company, in addition to its rights under Section 12.3(B) above, Seller may terminate this PPA immediately upon notice to Company, without penalty or further obligation to Company, and in connection therewith, collect from Company all Actual Damages arising from such Event of Default through the Scheduled Termination Date.

(D) Specific Performance. In addition to the other remedies specified herein, upon any Event of Default of Company under this Section 12.3, Seller may elect to treat this PPA as being in full force and effect and Seller shall have the right to specific performance.

#### 12.4 Limitations on Damages.

(A) Except as otherwise provided in Section 12.4(B), Seller's aggregate financial liability to Company for Actual Damages following COD shall not exceed \$17,250,000 (the "Damage Cap"). If at any time following COD, Company incurs damages in excess of the Damage Cap that Seller does not pay when billed by Company, Company shall have the right to terminate this PPA upon notice to Seller, without further obligation by either Party except as to costs and balances incurred prior to the effective date of such termination.

(B) Actual Damages payable by Seller arising out of any of the following events shall not be subject to the Damage Cap and shall not be credited against the Damage Cap:

1. damage to Company-owned facilities proximately caused by negligence, breach of this PPA or other misconduct by Seller, its directors, officers, employees and agents;

2. Seller's intentional misrepresentation or intentional misconduct in connection with this PPA or the operation of the Facility;
3. the sale or diversion by Seller to a third party of any capacity or energy from the Facility, excluding any sales in mitigation of damages;
4. Seller's failure (i) to maintain insurance coverages in the types and amounts required by this PPA or (ii) to apply any insurance proceeds as required by Section 16.4;
5. any claim for indemnification under this PPA;
6. any Environmental Contamination caused by Seller; or
7. damages incurred by Company in connection with any bankruptcy or insolvency proceeding involving Seller, including Company's loss of the benefit of its bargain due to rejection or other termination of this PPA in such proceeding.

(C) The Parties confirm that the express remedies and measures of damages provided in this PPA satisfy the essential purposes hereof. If no remedy or measure of damages is expressly herein provided, the obligor's liability shall be limited to all direct damages proximately caused by such default ("Actual Damages") incurred by the non-defaulting Party, *provided* that if Seller is the defaulting Party, Actual Damages recoverable by Company hereunder may include Replacement Power Costs. **Neither Party shall be liable to the other Party for consequential, incidental, punitive, exemplary, special, treble, equitable or indirect damages, lost profits or other business interruption damages regardless of whether the relevant cause of action arises from statute, in tort or contract** (except to the extent expressly provided herein); *provided, however*, that if either Party is held liable to a third party for such damages and the Party held liable for such damages is entitled to indemnification from the other Party hereto, the indemnifying Party shall be liable for, and obligated to reimburse the indemnified Party for all such damages.

(D) To the extent damages required to be paid hereunder are liquidated, the Parties acknowledge that actual damages would be substantial but difficult or impossible to determine, that otherwise obtaining an adequate remedy is inconvenient, and that the liquidated damages constitute a reasonable approximation of the harm or loss.

(E) Notwithstanding any other provision of this Agreement to the contrary, in no circumstance shall Seller be entitled to an increase, or shall Company be entitled to a decrease, in the Energy Payment Rate under this PPA and neither Seller nor Buyer shall claim that any delay or other circumstance under this PPA entitles it to anything other than the applicable Energy Payment Rate set forth in this PPA.

## 12.5 Step-In Rights.

(A) Upon the occurrence of a default by Seller following COD that could be cured by Company's possession of the Facility, the Phase I and Phase II components of the Facility, as appropriate, Company shall have the right, but not the obligation, to assume control and operate the Facility, the Phase I and Phase II components of the Facility, as appropriate, as agent for Seller (whether voluntary or involuntary) in accordance with Seller's rights, obligations, and interest under this PPA ("Step-In Rights"). Company shall give Seller and the Facility Lender at least 10 Business Days' notice in advance of exercising Company's Step-In Rights. Exercise of Step-In Rights *per se* shall not be deemed to cure the associated default, and shall not preclude or limit Company's right to exercise its other remedies against Seller under this PPA.

(B) Seller irrevocably appoints Company as Seller's attorney-in-fact for the exclusive purpose of executing such documents and taking such other actions as Company may reasonably deem necessary, appropriate or prudent to implement its Step-In Rights.

(C) Company acknowledges that Company may be required and shall relinquish or delay exercise of its Step-In Rights in the event that the Facility Lender elects to appoint a receiver, foreclose and/or otherwise obtain possession of the Facility, the Phase I and Phase II components of the Facility, as appropriate, under the Financing Documents. Seller shall not grant any person, other than the Facility Lender, a right to possess, assume control of, or operate the Facility, the Phase I and Phase II components of the Facility in derogation of Company's Step-In Rights.

(D) Seller shall reimburse Company for its actual and documented expenses and costs (including the fees and expenses of counsel) incurred by Company in connection with exercising its Step-In Rights ("Step-In Costs").

(E) During the period of Company's exercise of its Step-In Rights:

1. Company shall implement its Step-In Rights and operate the Facility in conformance with Good Utility Practice.
2. Company shall perform Seller's obligations in a manner consistent with Seller's duties under this PPA.
3. Seller shall retain legal title to and ownership of the Facility.
4. Seller shall make available at the Facility, the Phase I and Phase II components of the Facility, as appropriate, all documents, contracts, books, manuals, reports, and records required for Company to construct, operate, and maintain the Facility, the Phase I and Phase II components of the Facility, as appropriate.

5. Seller shall give Company, its employees and contractors, unrestricted access to the Site and the Facility, Phase I and Phase II components of the Facility, as appropriate.

6. Seller shall cooperate in the implementation of Company's Step-In Rights.

7. Company shall devote the Renewable Energy generated and delivered from the Facility during such period towards satisfaction of Seller's obligations hereunder.

(F) During the period of Company's exercise of its Step-In Rights, Company shall purchase the Renewable Energy from the Facility as provided herein; *provided* that Company may withhold its Step-In Costs from payments due to Seller hereunder. In the event that net revenues due to Seller are insufficient to cover such Step-In Costs, Company may draw upon the Security Fund to cover such Step-In Costs.

(G) Company may relinquish its Step-In Rights at any time, on at least 15 Days' notice to Seller and the Facility Lender. Company shall relinquish its Step-In Rights on the earliest of (i) termination of this PPA, or (ii) Seller's (or the Facility Lender's) cure of the default that led to exercise of Company's Step-In Rights within the applicable cure period set forth herein.

(H) This Section 12.5 shall be specifically enforceable by Company, without bond and without the need to prove irreparable harm.

(I) Exercise of its Step-In Rights shall not constitute an assumption by Company of any liability of Seller.

12.6 Bankruptcy. This PPA grants each Party the contractual right to "cause the liquidation, termination or acceleration" of the transactions within the meaning of Sections 556, 560 and 561 of the U.S. Bankruptcy Code, as they may be amended superseded or replaced from time to time. Upon a bankruptcy, a non-defaulting Party shall be entitled to exercise its rights and remedies under this PPA in accordance with the safe harbor provisions of the Bankruptcy Code set forth in, *inter alia*, Sections 362(b)(6), 362(b)(17), 362(b)(27), 362(o), 546(e), 548(d)(2), 556, 560 and 561, as they may be amended, superseded or replaced from time to time

12.7 Cumulative Remedies. Except as explicitly provided to the contrary in this PPA, each right or remedy of the Parties provided for in this PPA shall be cumulative of and shall be in addition to every other right or remedy provided for in this PPA, and the exercise of one or more of the rights or remedies provided for herein shall not preclude the simultaneous or later exercise by such Party of any other rights or remedies provided for herein.

12.8 Duty to Mitigate. Each Party shall use Commercially Reasonable Efforts to mitigate any damages it may incur as a result of a default by the other Party under this PPA.

## Article 13 - Dispute Resolution

### 13.1 Negotiation.

(A) In the event of any dispute arising under or associated with the Parties' performance of this PPA (a "Dispute"), within 10 Business Days following notice by either Party (a "Dispute Notice"), (i) each Party shall appoint a representative, and (ii) the representatives shall meet, negotiate and attempt in good faith to resolve the Dispute quickly, informally and inexpensively.

(B) In the event the Parties' representatives cannot resolve the Dispute within 30 Business Days after the first meeting, either Party may request that consideration and resolution of the Dispute be transferred to senior management. Within 10 Business Days following such a request, each Party shall submit a written summary of the Dispute describing the issues and claims to a senior officer of each Party designated to address the Dispute. Within 10 Business Days after receipt of each Party's Dispute summaries, the designated senior managers for both Parties shall negotiate in good faith to resolve the Dispute. If such senior managers are unable to resolve the Dispute thereafter, either Party may seek available legal remedies, subject to Section 13.3.

13.2 Time Bar. If no Dispute Notice has been issued within 18 months following the occurrence of events or circumstances giving rise to the Dispute (regardless of the actual knowledge of either Party of such events and circumstances), all claims related to such Dispute (including any allegations of billing errors) shall be deemed waived and the aggrieved Party shall thereafter be barred from proceeding thereon.

13.3 No Termination Pending Dispute Resolution. Notwithstanding Section 12.1 or Section 12.3 to the contrary:

(A) An Event of Default shall not be deemed to have occurred (and hence neither Party may terminate this PPA) for failure by the other Party to pay any amount(s) allegedly due totaling less than \$100,000, if (1) such amount(s) are disputed in good faith, (2) the Party alleged to owe such amount(s) promptly commences and diligently pursues resolution of the Dispute pursuant to Section 13.1, and (3) the owed amount (if any) is paid within 10 Business Days after all dispute resolution mechanisms are completed with respect thereto.

(B) An Event of Default by Seller shall not be deemed to have occurred (and hence Company may not terminate this PPA) for failure by Seller to pay any amount(s) allegedly due totaling \$100,000 or more, if

1. such amount(s) are disputed by Seller in good faith;
2. Seller promptly commences and diligently pursues resolution of the Dispute pursuant to Section 13.1;

3. Seller (or Seller's Guarantor) either holds an Investment Grade Credit Rating, or posts cash collateral to secure its obligations (if any) with respect to the disputed amount(s), in an amount equal to the amount(s) in dispute, under a mutually agreeable third-party escrow agreement, in addition to the Security Fund; and

4. the owed amount (if any) is paid by Seller within 10 Business Days after all dispute resolution mechanisms are completed with respect thereto.

(C) An Event of Default by Company shall not be deemed to have occurred (and hence Seller may not terminate this PPA) for failure by Company to pay any amount(s) allegedly due totaling \$100,000 or more, if

1. such amount(s) are disputed by Company in good faith;

2. Company promptly commences and diligently pursues resolution of the Dispute pursuant to Section 13.1;

3. Company either holds an Investment Grade Credit Rating, or posts cash collateral to secure its obligations (if any) with respect to the disputed amount(s), in an amount equal to the amount(s) in dispute, under a mutually agreeable third-party escrow and account control agreement; and

4. the owed amount (if any) is paid by Company within 10 Business Days after all dispute resolution mechanisms are completed with respect thereto.

13.4 Governing Law. The interpretation and performance of this PPA and all actions related hereto (whether sounding in contract, tort or otherwise), shall be governed and construed in accordance with the laws of the State of Texas, exclusive of conflict of laws principles.

13.5 Venue. The Parties submit to the exclusive jurisdiction of the State courts or Federal District courts of the State of Texas for purposes of resolving any Dispute hereunder. Venue for any court proceedings shall lie exclusively in the State court located in Dallas County, Texas or the Federal District Court for the Northern District of Texas located in the city of Dallas, Texas, and the Parties hereby irrevocably submit to the exclusive jurisdiction and venue of such courts and hereby waive any objection that it now or may in the future have to any of such courts as the proper forum for any such action, suit or proceeding.

13.6 Waiver of Jury Trial. **Seller and Company each hereby knowingly, voluntarily and intentionally waive any rights they may have to a trial by jury** in respect of any litigation based hereon, or arising out of, under, or in connection with, this PPA or any course of conduct, course of dealing, statements (whether oral or written) or actions of Seller and Company related hereto and expressly agree to have any Disputes be adjudicated by a judge of the court having jurisdiction, without a jury.

## Article 14 - Force Majeure

14.1 Definition. For purposes hereof, “Force Majeure” means an event or circumstance that prevents a Party from performing its obligations under this PPA, which event or circumstance (i) was not anticipated as of the date of this PPA, (ii) is not within the control of or the result of the fault or negligence of the Party claiming excuse, and (iii) which by exercise of due diligence and foresight could not reasonably have been avoided; *provided, however*, that Force Majeure shall not include:

- a. inability, or excess cost, to procure any equipment necessary to perform this PPA;
- b. acts or omissions of a third party (including vendors and contractors to Seller), unless such acts or omissions are themselves excused by reason of Force Majeure;
- c. failure timely to apply for, or diligently pursue, the Permits set forth on Exhibit F – Seller’s Needed Permits hereto;
- d. mechanical or equipment breakdown or inability to operate, attributable to circumstances occurring within design criteria and normal operating tolerances of similar equipment;
- e. Environmental Contamination at the Site (i) discovered by, (ii) caused by, or (iii) exacerbated by and, in the case of (i), (ii) and (iii) the remediation of which is the responsibility of Seller pursuant to Applicable Law or Permit;
- f. changes in market conditions;
- g. changes of law; or
- h. labor strikes, slowdowns, work stoppages, or other labor disruptions.

By way of example only, “Force Majeure” includes any delay or failure by the Transmission Authority to perform its obligations under the Interconnection Agreement.

14.2 Applicability of Force Majeure. A Party shall be relieved of its obligations to perform this PPA and shall not be considered to be in default with respect to any obligation under this PPA if and to the extent such Party is prevented from fulfilling such obligation by Force Majeure, *provided, however*, that: (i) such Party gives prompt notice describing the circumstances and impact of the Force Majeure; (ii) the relief from its obligations sought by such Party is of no greater scope and of no longer duration than is required by the Force Majeure; (iii) such Party proceeds with due diligence to overcome the Force Majeure and resumes performance of its obligations under this PPA as soon as practicable thereafter; and (iv) such Party provides notice upon conclusion of the Force Majeure.



#### 14.3 Limitations on Effect of Force Majeure.

(A) Force Majeure shall only relieve a Party of such obligations as are actually precluded by the Force Majeure.

(B) In no event will the existence of Force Majeure extend this PPA beyond its stated Term.

(C) If Force Majeure continues for an uninterrupted period of 180 Days (with respect to Force Majeure occurring prior to COD) or for an uninterrupted period of 360 Days (with respect to Force Majeure occurring after COD), either Party may, at any time following the end of such period, terminate this PPA upon notice to the other Party, without further obligation by either Party except as to costs and balances incurred prior to the effective date of such termination.

14.4 Delays Attributable to Company. Seller shall be excused from performing its obligations under this PPA where Seller can establish that such a failure was caused by any delay or failure by Company to perform its obligations under this PPA, whether or not caused by Force Majeure.

### **Article 15 - Representations and Warranties**

Each Party hereby represents and warrants to the other as follows, which representations and warranties shall be deemed to be repeated, if applicable, by each Party throughout the Term:

(A) Such Party is a valid separate legal entity, duly organized, validly existing and in good standing under Applicable Law. It is qualified to do business in the State in which the Facility is located and each other jurisdiction where the failure to so qualify would have a Material Adverse Effect on the business or financial condition of the other Party. It has all requisite power and authority to conduct its business, to own its properties, and to execute, deliver, and perform its obligations under this PPA.

(B) The Party's execution, delivery, and performance of all of its obligations under this PPA have been duly authorized by all necessary organizational action, and do not and will not:

1. subject to the Company CPs, the Seller CPs and receipt by Seller of the Seller's Needed Permits, require any consent or approval by any governing corporate or management body, other than that which has been obtained and is in full force and effect (evidence of which shall be delivered to the other Party upon its request);

2. violate any Applicable Law, the violation of which could have a Material Adverse Effect on the representing Party's ability to perform its obligations under this PPA;

3. result in a breach or constitute a default under the representing Party's formation documents, bylaws or equivalent, or under any agreement relating to its management or affairs, any indenture or loan or credit agreement, or any other agreement, lease, or instrument to which it is a party or by which it or its properties or assets may be bound or affected, the breach or default of which could reasonably be expected to have a Material Adverse Effect on the representing Party's ability to perform its obligations under this PPA; or

4. result in, or require the creation or imposition of any mortgage, deed of trust, pledge, lien, security interest, or other charge or encumbrance of any nature (other than as may be contemplated by this PPA) upon or with respect to any of the assets or properties of the representing Party now owned or hereafter acquired, the creation or imposition of which could reasonably be expected to have a Material Adverse Effect on the representing Party's ability to perform its obligations under this PPA.

(C) This PPA is a valid and binding obligation of the representing Party.

(D) The execution and performance of this PPA will not conflict with or constitute a breach or default under any contract or agreement of any kind to which the representing Party is a party or any judgment, order, or Applicable Law, applicable to it or its business.

(E) Within the meaning of the U.S. Bankruptcy Code, (i) this PPA constitutes a "master netting agreement," (ii) all transactions pursuant to this PPA constitute "forward contracts" or a "swap agreement," (iii) the representing Party is a "forward contract merchant" and "master netting agreement participant," and (iv) all payments made or to be made pursuant to this PPA constitute "settlement payments."

(F) Such Party is (i) an "eligible contract participant" as defined in the Commodity Exchange Act, as amended, 7 U.S.C. §1a(12), (ii) a "market participant" under applicable exchange and market rules; (iii) a producer, processor, or commercial user of, or a merchant handling, the commodity which is the subject of this PPA, or the products or by products thereof; and (iv) entering into this PPA solely for purposes related to its business as such.

## **Article 16 - Insurance**

16.1 Evidence of Insurance. No later than commencement of construction and thereafter prior to each applicable expiration date, Seller shall provide Company with two copies of insurance certificates acceptable to Company evidencing that insurance coverages for the Facility are in force and in compliance with the specifications for insurance coverage set forth in Exhibit E - Insurance to this PPA. Such certificates shall:

(A) name Company as an additional insured (except worker's compensation);

(B) provide that Company shall receive 30 Days prior written notice of non-renewal or cancellation of the corresponding policies (except that such notice may be 10 Days for non-payment of premiums);

(C) provide a waiver of any rights of subrogation against Company, its Affiliates and their officers, directors, agents, subcontractors, and employees; and

(D) indicate that the Commercial General Liability policy has been endorsed as described above.

16.2 Policy Requirements. All policies shall be written with insurers with an AM Best rating of at least A-VII or a Standard & Poor's rating of at least A. All policies shall be written on an occurrence basis, except as provided in Section 16.4. All policies shall contain an endorsement that Seller's policy shall be primary in all instances regardless of like coverages, if any, carried by Company. Seller may satisfy its insurance requirements using any reasonable combination of primary and secondary coverage.

16.3 No Implied Limitation. Seller's liability under this PPA is not limited to the amount of insurance coverage required herein.

16.4 Term and Modification of Insurance.

(A) All insurance required under this PPA shall cover occurrences during the Term and for a period of two years after the Term. In the event that any insurance as required herein is commercially available only on a "claims-made" basis, such insurance shall provide for a retroactive date not later than the date of this PPA and such insurance shall be maintained by Seller for a minimum of six years after the Term.

(B) Company shall have the right, at times deemed appropriate to Company during the Term, to request Seller to modify the insurance minimum limits specified in Exhibit E - Insurance in order to maintain Commercially Reasonable coverage amounts. Seller shall make Commercially Reasonable Efforts to comply with any such request.

(C) If any insurance required to be maintained by Seller hereunder ceases to be reasonably available and commercially feasible in the commercial insurance market, Seller shall provide notice to Company, accompanied by a certificate from an independent insurance advisor of recognized national standing, certifying that such insurance is not reasonably available and commercially feasible in the commercial insurance market for electric generating plants of similar type, geographic location and capacity. Upon receipt of such notice, Seller shall use Commercially Reasonable Efforts to obtain other insurance that would provide comparable protection against the risk to be insured.

16.5 Application of Proceeds. Except to the extent otherwise required by the Financing Documents, Seller shall apply any casualty insurance proceeds to reconstruction of the Facility following any material casualty to the Facility that occurs more than eighteen (18) months prior to the Scheduled Termination Date.

## Article 17 - Indemnity

17.1 Indemnification: General. Each Party (the “Indemnifying Party”) shall indemnify, defend and hold the other Party (the “Indemnified Party”) harmless from and against all third-party claims, demands, lawsuits (including citizen suits), losses, liabilities, fines, penalties, and expenses (including attorneys’ fees) (generally, “Losses”) to the extent caused by:

- a default under this PPA by the Indemnifying Party;
- a violation or alleged violation of Applicable Laws by the Indemnifying Party; and
- the negligence, intentional acts and other misconduct of the directors, officers, employees, or agents of the Indemnifying Party.

17.2 Indemnification: Environmental. Seller shall indemnify, defend and hold Company harmless from and against all Losses arising out of any claim by any Governmental Authority or other third party alleging Environmental Contamination at the Site and/or illegal disposal of Hazardous Materials off-Site, regardless of merit and regardless of Seller’s responsibility therefor.

### 17.3 Limitations.

(A) The foregoing indemnification obligations shall apply notwithstanding any contributory misconduct of the Indemnified Party, but the Indemnifying Party’s liability to indemnify the Indemnified Party shall be reduced in proportion to the percentage by which the Indemnified Party’s misconduct caused the damages.

(B) Neither Party shall be indemnified for Losses resulting from the sole negligence or willful misconduct of the directors, officers, employees, or agents of such Party.

(C) These indemnity provisions shall not be construed to relieve any insurer of its obligation to pay claims consistent with the provisions of a valid insurance policy. Nothing in this Article 17 shall enlarge or relieve Seller or Company of any liability to the other for any breach of this PPA.

### 17.4 Procedures.

(A) Promptly after receipt by a Party of any claim or notice of the commencement of any action, administrative, or legal proceeding, or investigation as to which the indemnity provided for in this Article 17 may apply, the Indemnified Party shall provide notice thereof to the Indemnifying Party; *provided* that a delay in providing such notice shall limit the obligations of the Indemnifying Party only to the extent that such delay actually prejudices the ability of the Indemnifying Party to contest the claim or defend the proceeding.

(B) The Indemnifying Party shall assume the defense thereof with counsel designated by such Party and satisfactory to the Indemnified Party, *provided, however,* if the defendants in any such action include both the Indemnified Party and the Indemnifying Party, and the Indemnified Party shall reasonably conclude that there may be legal defenses available to it which are different from or additional to, or inconsistent with, those available to the Indemnifying Party, the Indemnified Party shall have the right to select and be represented by separate counsel, at the Indemnifying Party's expense.

(C) If an Indemnifying Party fails to assume the defense of a claim meriting indemnification, the Indemnified Party may contest, settle, or pay such claim at the expense of the Indemnifying Party, *provided, however, that* settlement or full payment of any such claim may be made only following consent of the Indemnifying Party or, absent such consent, written opinion of the Indemnified Party's counsel that such claim is meritorious or otherwise warrants settlement.

17.5 Amounts Owed. In the event that a Party is obligated for indemnification under this Article 17, the amount owing to the Indemnified Party will be the amount of the Indemnified Party's actual loss net of any insurance proceeds received by the Indemnified Party following a Commercially Reasonable effort by the Indemnified Party to obtain such insurance proceeds.

## **Article 18 - Lender Provisions**

### **18.1 Accommodation of Facility Lender.**

(A) Company shall provide such consents to collateral assignment, certifications, representations, estoppels, information or other documents, as may be reasonably requested by Seller in connection with the financing of the Facility or the Financing Documents in a manner consistent with the terms set forth in Exhibit K – Lender Consent Provisions (generally, a "Lender Consent"), *provided, however,* that in providing a Lender Consent, Company shall have no obligation to:

1. modify the terms of this PPA;
2. provide any consent or enter into any agreement that has a Material Adverse Effect on any of Company's rights, benefits, risks, or obligations under this PPA;
3. transfer or release any property or property interests of Company;
4. release or subordinate (or cause the release or subordination) of any lien on any property of Company for the benefit of Seller or the Facility Lender; or
5. permit any lien to be placed on property of Company.

(B) Seller shall reimburse, or shall cause the Facility Lender to reimburse, Company for the direct expenses (including the fees and expenses of counsel) incurred by Company in the preparation, negotiation, execution and/or delivery of each Lender Consent and any documents requested by Seller or the Facility Lender pursuant to this Section 18.1.

## 18.2 Notices.

(A) Seller shall provide Company with a notice identifying the Facility Lender and providing appropriate contact information for the Facility Lender. Following receipt of such notice, Company shall provide to the Facility Lender a copy of each notice of alleged default delivered to Seller under Section 12.1 or Section 12.2, and Company will accept a cure thereof performed by the Facility Lender, so long as the cure is accomplished within the applicable cure period set forth in this PPA or the relevant Lender Consent.

(B) Within 10 Days following Seller's receipt of each notice of default or Facility Lender's intent to exercise any remedies under the Financing Documents, Seller shall deliver a copy of such notice to Company.

## **Article 19 - Assignment**

### 19.1 Assignment by Seller.

(A) Except for a Permitted Transfer, Seller shall not (i) sell, exchange or otherwise transfer the Facility or any material portion thereof to any third party, or (ii) undergo any Change of Control (whether voluntary or by operation of law), absent the prior written consent of Company, which shall not be unreasonably withheld, conditioned or delayed. Company shall have no obligation to provide any consent under this Section unless:

1. Seller has complied with Sections 19.3, 19.4, if and as applicable;
2. Seller has provided to Company such information concerning the transferee's direct and indirect ownership as Company reasonably requests;
3. the transferee has substantial experience in the operation of power generation facilities akin to the Facility, either directly, through its affiliates or through a Qualified Operator;
4. the transferee (together with its parents and affiliates) enjoys an Investment Grade Credit Rating or other creditworthiness satisfactory to Company;
5. Seller has provided to Company at least 30 days' prior notice of the transaction; and

6. Seller pays or reimburses Company for the direct expenses (including the fees and expenses of counsel) incurred by Company in connection with the transaction.

(B) Except for a Permitted Transfer, any Change of Control or sale, transfer, or assignment of any interest in the Facility effected without fulfilling the requirements of this PPA shall be null, void and a breach of this PPA. Seller shall provide Company Notice of any Permitted Transfer no later than 30 Days after the transfer.

(C) Seller shall assign this PPA to any successor owner of the Facility, and shall cause such successor to assume all obligations of Seller (accrued and prospective) hereunder via a writing reasonably satisfactory to Company. Seller also may assign this PPA for collateral purposes to any Facility Lender.

(D) Except as permitted in this Section 19.1, Seller may not assign this PPA or any portion hereof. No assignment shall relieve Seller of its obligations under this PPA, nor impair any security posted by Seller unless such security is replaced in accordance with Article 11. Before this PPA is assigned by Seller, the assignee must first obtain such approvals as may be required by all applicable Governmental Authorities.

#### 19.2 Assignment by Company.

(A) Subject to Section 19.2(C), Company may assign this PPA to any Affiliate, or to any successor that provides retail electric service in all or substantially all of Company's service territory and is subject to rate and quality service regulation under the jurisdiction of the Public Utility Commission of Texas or the New Mexico Public Regulation Commission. Any other assignment of this PPA by Company shall require the prior written consent of Seller, not to be unreasonably withheld, conditioned or delayed.

(B) If an assignee of Company enjoys a Credit Rating equal to or better than Investment Grade or Company's Credit Rating as of the date of assignment (whichever is higher), Seller shall release Company from its obligations hereunder if so requested by Company. Except for the foregoing, no assignment shall relieve Company of its obligations under this PPA.

(C) Any assignee of Company shall assume all obligations of Company (accrued and prospective) hereunder via a writing reasonably satisfactory to Seller. Before this PPA is assigned by Company, the assignee must first obtain such approvals as may be required by all applicable Governmental Authorities.

#### 19.3 ROFO.

(A) Except with respect to a Permitted Transfer, at any time after the Commercial Operation Date and during the Term,

- (1) if Seller proposes to sell the Facility to an unaffiliated third party, Seller shall first offer to sell the Facility to Company via notice to Company,
- (2) if Seller's parent proposes to sell a majority of the equity interests in Seller to an unaffiliated third party, Seller shall cause its parent first to offer to sell such equity interests to Company via notice to Company, and
- (3) if Seller's parent owns no assets other than its equity interests in Seller and the parent of Seller's parent proposes to sell a majority of the equity interests in Seller's parent to an unaffiliated third party, Seller shall cause its parent's parent first to offer to sell such equity interests to Company via notice to Company

(in each case, a "ROFO Notice"). Any ROFO Notice shall describe the proposed transaction, including the minimum price, status of title to the Site, liabilities to be assumed and other terms which Seller or its relevant parent (as applicable) is willing to accept to proceed with the contemplated transaction. The contents of a ROFO Notice shall be deemed Confidential Information for purposes of Section 20.18 below.

(B) Following issuance of a ROFO Notice, Seller shall allow Company 60 Days to investigate the proposed transaction and conduct due diligence. Due diligence shall include such physical inspections, surveys and operating tests of the Facility and the Site, such reviews of Seller's contracts, books and records, and interviews of such personnel, as Company may reasonably request. All information obtained by Company from such investigations shall be deemed Confidential Information subject to Section 20.18 below. Within such 60-Day period, Company may elect to purchase the Facility or the relevant equity interests (as applicable) on substantially the same terms as set forth in the ROFO Notice. If Company fails to notify Seller of Company's election within such 60-Day period, Company shall be deemed to have rejected the transaction.

(C) If Company elects to purchase the Facility or the specified equity interests (as applicable), the Parties shall negotiate in good faith towards the execution of a mutually satisfactory, definitive contract for the transaction (a "PSA"). The PSA shall be in a form customary for such a transaction, will include the price and other terms set forth in the ROFO Notice, including customary and reasonable representations, warranties, indemnities, covenants and agreements, which shall survive for customary and reasonable periods of time following the execution of the PSA.

(D) If Company rejects the transaction described in a ROFO Notice, Seller shall have the right to sell the Facility (or Seller's relevant parent shall have the right to sell the specified equity interests, as applicable) on terms not more favorable to Seller or its parent vs. the terms set forth in the ROFO Notice, at any time within the twelve-month period following issuance of the ROFO Notice. If Seller or its relevant



parent fails to close a transaction on such terms within such 12-month period, any sale of the Facility or equity interests in Seller shall again be subject to this Section 19.3.

(E) This Section 19.3 shall be specifically enforceable by Company, without bond and without the need to prove irreparable harm.

(F) Seller shall cooperate in all respects reasonably necessary for Company to exercise its ROFO rights, and shall operate the Facility in the ordinary course of business following the date of issuance of a ROFO Notice.

#### 19.4 PFT.

(A) Seller shall give Company at least 90 Days' prior notice (a "PFT Notice") of any Pending Facility Transaction that does not otherwise trigger Company's ROFO rights under Section 19.3, in order to provide Company with an opportunity to discuss and negotiate with Seller the possible sale of the Facility to Company. Any PFT Notice shall include a fair summary of Seller's plans with respect to the Facility in connection with the proposed Pending Facility Transaction, to the extent then known by Seller. The contents of a PFT Notice shall be deemed Confidential Information for purposes of Section 20.18 below.

(B) Seller shall have no obligation to sell nor shall Company have any obligation to purchase the Facility, following any PFT Notice. Issuance of a PFT Notice shall not relieve Seller of its obligation to offer a ROFO to Company if and when applicable pursuant to Section 19.3. In the event that the transaction giving rise to the PFT Notice has not been completed within twelve months following a PFT Notice, Seller shall be required to resubmit a PFT Notice for such transaction.

(C) Any breach of this Section 19.4 shall entitle Company to liquidated damages from Seller in the amount of \$1,000,000.

(D) For purposes hereof, a "Pending Facility Transaction" or "PFT" means:

1. except with respect to a Permitted Transfer, any Change of Control of Seller;

2. the issuance by Seller or any of its Affiliates of a request for proposals or the response by Seller or any of its Affiliates to a request for proposal or similar process (e.g., auction) for the purchase or sale to any unaffiliated third party of any equity interests in Seller or the Facility, or any group(s) of assets or equity interests that includes the Facility;

3. the commencement by Seller or any of its Affiliates of substantive negotiations with any unaffiliated third party with respect to the sale of any equity interests in Seller or the Facility, or any group(s) of assets or equity interests that includes the Facility; or

4. the execution by Seller or any of its Affiliates of any letter of intent, memorandum of understanding or similar document, whether or not legally binding, which contemplates the sale or lease to an unaffiliated third party of any equity interests in Seller or the Facility or any group(s) of assets or equity interests that includes the Facility;

*provided, however,* that a PFT does not include (i) any financing or refinancing of the Facility Debt or a tax equity financing, (ii) any transaction among Affiliates of Seller, (iii) a Permitted Transfer and/or (iv) any transaction for which Seller offers ROFO rights to Company under Section 19.3.

#### 19.5 Option.

(A) Seller hereby grants to Company, and its Affiliates the option to purchase the Facility Property on terms and conditions set forth in this Section ("Option"). The Option may be exercised by Company only if the following two conditions are met: 1) the NextEra YieldCo has been dissolved or wound up; and, (2) the Option is exercised within six (6) months prior to the Scheduled Termination Date, with the closing of the Option to occur upon the termination of this PPA.

1. For purposes of the Option, the term "NextEra YieldCo" means, collectively, NextEra Energy Operating Partners, LP and any entity in which NextEra Energy Operating Partners, LP holds, directly or indirectly, fifty percent (50%) or more of the equity interests in Seller.

2. For purposes of the Option, the term "Facility Property" means, collectively, all property rights necessary for the use of the Facility for its intended purpose, including (i) the Facility; (ii) the Site; (iii) Seller's Interconnection Facilities; (iv) the Facility collection facilities and substation; (v) Seller's rights and obligations under the Interconnection Agreement; (vi) Permits, and all material contracts; and (vii) all Facility fixtures, equipment and personal property.

(B) In the event Company exercises its Option consistent with this provision, Seller shall convey the Facility Property to Company or its designated Affiliate upon payment to Seller of an amount equal to the higher of (i) fair market value of the Facility Property (including any break-up or pre-payment fees associated with a financing), or (ii) the then existing balance of all Facility Debt.

1. Within thirty (30) Days of Company's Option exercise, the Parties shall jointly appoint a qualified, independent appraiser. If the Parties cannot agree, then each Party shall select an appraiser and the two appraisers shall appoint the appraiser. Seller shall provide all information regarding the Facility Property necessary for the appraiser's determination of fair market value. The appraiser shall complete its appraisal within sixty (60) Days of receipt of all such necessary data. The costs of the appraisal shall be included as part of the purchase price. During the period in which the appraiser is evaluating the Facility Property, as applicable, Seller shall

allow Company or its Affiliate the Commercially Reasonable opportunity to investigate the proposed transaction and conduct due diligence.

2. Upon determination of fair market value of the Facility Property, the Parties shall use Commercially Reasonable Efforts to negotiate and sign definitive agreements consummating the transaction on an “as is, where is” basis within ninety (90) Days. Upon payment of the purchase price, Seller shall execute and deliver to Company or its Affiliate all instruments necessary to effect transfer of ownership of the Facility Property to Company or its Affiliate, subject only to the liens of Facility Lender which Lenders the Company or its Affiliate elects to assume.

3. After the Company's Option is exercised and continuing through closing on any resulting sale, Seller shall maintain the physical Facility Property in Commercially Reasonable condition and to perform in accordance with those contractual and other obligations under agreements comprising any portion of the Facility Property.

#### 19.6 Reserved.

### **Article 20 - Miscellaneous**

#### 20.1 Notices.

(A) Notices required by this PPA shall be in writing and addressed to the other Party at the addresses noted in Exhibit D - Notices, as either Party updates such addresses from time to time by notice to the other Party. Notices shall be deemed effective when receipt is acknowledged in writing by the counterparty (or absent such acknowledgement, when delivered via third-party messenger or via FedEx or other reputable overnight courier service). Any notice shall be deemed to have been received by the close of the Business Day on which it was delivered. Real-time or routine communications concerning Facility operations shall be exempt from this Section 20.1(A).

(B) The Parties recognize the need for accurate communications between them. Each Party consents to the recording of telephone conversations between their employees and representatives, related to the performance and administration of this PPA.

#### 20.2 Taxes.

(A) Company shall purchase all Renewable Energy on a wholesale basis, for resale to Company's wholesale and retail customers. Company shall obtain and provide Seller with any certificates required by any Governmental Authority or otherwise reasonably requested by Seller to evidence that the deliveries of Renewable Energy hereunder are sales for resale.

(B) As between the Parties, Company shall be solely responsible for the payment of (1) any sales, use or equivalent taxes imposed by Governmental

Authorities, whether now in existence or hereafter enacted, on the purchase of Renewable Energy hereunder at the Point of Delivery, and (2) any taxes imposed by Governmental Authorities, whether now in existence or hereafter enacted, on the transmission of Renewable Energy beyond the Point of Delivery.

(C) Subject to Section 20.2(B), Seller shall be solely responsible for any and all present and future taxes and other impositions of Governmental Authorities relating to the construction, ownership or leasing, operation or maintenance of the Facility and the Site (including *ad valorem* taxes on the Facility and the Site), and any taxes imposed prior to the Point of Delivery with respect to the products and services to be sold and delivered to Company hereunder, whether calculated based upon cost, value, labor, capital, production, savings, green attributes or other parameters. Seller's prices under Article 8 are inclusive of such taxes and impositions during the Term, and Seller assumes the risk of changes in such taxes after the date hereof.

(D) The Parties shall cooperate to minimize tax exposure, *provided, however*, that neither Party shall be obligated to incur any financial burden to reduce taxes for which the other Party is responsible hereunder.

20.3 Applicable Laws. Each Party shall comply with all Applicable Laws (including the Transmission Authority Tariff), except for any non-compliance that (individually or in the aggregate) could not reasonably be expected to have a Material Adverse Effect on the other Party or on such Party's ability to perform this PPA.

(A) As applicable, each Party shall give all required notices, shall procure and maintain all Permits necessary for performance of this PPA, and shall pay its respective charges and fees in connection therewith.

(B) Each Party shall promptly disclose to the other Party, any violation of any Applicable Laws arising out of the Facility and/or performance of this PPA.

(C) Upon permanent cessation of generation from the Facility, Seller shall decommission and remove the Facility and remediate the Site as, if and when required by Applicable Laws.

(D) Seller acknowledges that as a government contractor Company is subject to Applicable Laws regarding equal employment opportunity and affirmative action, including 41 C.F.R. §60-1.4(a)(1-7). Such Applicable Laws may also be applicable to Seller as a subcontractor to Company. All such Applicable Laws shall be deemed to be incorporated herein as required by Applicable Law.

(E) Each Party assumes the risk of changes in Applicable Laws following the date hereof, that affect such Party's costs of ownership and operation of its assets, and its performance of this PPA, except as otherwise specifically set forth herein.

20.4 Fines and Penalties. Seller shall pay when due all fees, fines, penalties and costs incurred by Company, Seller and/or their agents, employees or contractors arising from noncompliance by Seller, its employees, or subcontractors with any

provision of this PPA, or any contractual obligation, Permit or requirements of Applicable Law, except for such fines, penalties and costs that are being actively contested in good faith and with due diligence by Seller and for which adequate financial reserves have been set aside to pay such fines, penalties or costs in the event of an adverse determination.

#### 20.5 Rate Changes.

(A) The terms and conditions and the rates for service specified in this PPA shall remain in effect for the Term hereof. Neither Party shall seek (nor support any third party seeking) any prospective or retroactive change to the rates or terms of service under this PPA pursuant to Section 205, 206 or 306 of the Federal Power Act.

(B) The standard of review for changes to this PPA whether proposed by a Party, a non-party, or FERC acting *sua sponte* shall be the “public interest” standard of review set forth in *United Gas Pipe Line v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (aka the “Mobile-Sierra doctrine”), as interpreted in *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1*, 128 S. Ct. 2733 (2008).

20.6 Certifications. Each Party shall deliver or cause to be delivered to the other Party certificates of its officers, accountants, engineers or agents as to matters as may be reasonably requested, and shall make available personnel and records relating to the Facility to the extent that the requesting Party requires the same in order to fulfill any regulatory reporting requirements, or to assist the requesting Party in litigation, including administrative proceedings before the Public Utility Commission of Texas and/or the New Mexico Public Regulation Commission.

20.7 Disclaimer of Third Party Beneficiaries. In executing this PPA, Company does not and does not intend to extend its credit or financial support for the benefit of any Facility Lender or any other third party transacting with Seller. Nothing in this PPA shall be construed to create any duty to, or standard of care with reference to, or any liability to, any person not a party to this PPA.

#### 20.8 Relationship of the Parties.

(A) This PPA shall not be interpreted to create an association, joint venture, or partnership between the Parties, nor to impose any partnership obligation or liability upon either Party. Except as specifically provided for in this PPA to the contrary, neither Party shall have any right, power, or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as an agent or representative of, the other Party.

(B) Seller shall be solely liable for the payment of all wages, taxes, and other costs related to the employment of persons to perform such services, including all federal, state, and local income, social security, payroll, and employment taxes and statutorily mandated workers’ compensation coverage. None of the persons employed

by Seller shall be considered employees of Company for any purpose; nor shall Seller represent to any person that he or she is or shall become a Company employee.

20.9 Survival of Obligations. Cancellation, expiration, or earlier termination of this PPA shall not relieve the Parties of obligations, including warranties, remedies, or indemnities, that by their nature should survive such cancellation, expiration, or termination, which obligations shall survive for the period of the applicable statute(s) of limitation.

20.10 Severability. In the event any of the terms, covenants, or conditions of this PPA, its Exhibits, or the application of any such terms, covenants, or conditions, shall be held invalid, illegal, or unenforceable by any court or administrative body having jurisdiction, all other terms, covenants, and conditions of the PPA and their application not adversely affected thereby shall remain in force and effect; *provided, however, that* Company and Seller shall negotiate in good faith to attempt to implement an equitable adjustment in the provisions of this PPA with a view toward effecting the purposes of this PPA by replacing the provision that is held invalid, illegal, or unenforceable with a valid provision the economic effect of which comes as close as possible to that of the provision that has been found to be invalid, illegal or unenforceable.

20.11 Complete Agreement; Amendments. The terms and provisions contained in this PPA constitute the entire agreement between Company and Seller with respect to the Facility and shall supersede all previous communications, representations, or agreements, either verbal or written, between Company and Seller with respect to the sale of Renewable Energy from the Facility. Any amendment of this PPA, or any waiver of any provision hereof, shall be evidenced by a writing signed by the Party/ies to be bound thereby.

20.12 Waiver. The failure of either Party to enforce or insist upon compliance with or strict performance of any of the terms or conditions of this PPA, or to take advantage of any of its rights hereunder, shall not constitute a waiver or relinquishment of any such terms, conditions, or rights, but the same shall be and remain at all times in full force and effect.

20.13 Binding Effect. This PPA is binding upon and shall inure to the benefit of the Parties hereto and their respective successors, legal representatives, and assigns.

20.14 Headings. Captions and headings used in this PPA are for ease of reference only and do not constitute a part of this PPA.

20.15 Counterparts. This PPA may be executed in counterparts, and each executed counterpart shall have the same force and effect as an original instrument.

20.16 Press Release. Upon the request of either Party, the Parties shall develop a mutually agreed joint press release to be issued describing the location, size and nature of the Facility, the term of this PPA, and other relevant factual information about the relationship.

20.17 Exhibits. Either Party may change the information in Exhibit D - Notices at any time by notice without the approval of the other Party. All other Exhibits may be changed to the extent allowed by specific provisions of this PPA or with the mutual consent of both Parties.

20.18 Confidentiality.

(A) For purposes hereof, "Confidential Information" means:

1. information specifically designated as Confidential Information in this PPA; and
2. written information delivered by one Party to the other from time to time during the Term, which information is labeled prominently as "Confidential," "Proprietary" or the like and specifically references this PPA.

*provided, however,* that "Confidential Information" shall not include information that:

- (x) is publicly available as of the date hereof, or becomes publicly available during the Term through no fault of the recipient Party;
- (y) can be documented was independently developed by the recipient Party; and/or
- (z) is disclosed to the recipient Party from an ultimate source other than the protected Party, without breach of this PPA by the recipient Party.

(B) The recipient Party shall (i) maintain the confidentiality of all Confidential Information of the protected Party, using the same degree of care used by the recipient Party to protect its own Confidential Information (and in any event not less than a reasonable degree of care), and (ii) shall use Confidential Information only in connection with its performance of this PPA. Confidential Information may be disclosed by the recipient Party to its agents, employees, directors, officers, consultants, auditors, lenders and equity investors, subject to their acceptance of the obligations of confidentiality imposed hereby and for whose violations of this Section 20.18 the recipient Party shall be responsible.

(C) In the event that Confidential Information is disclosed to a State Regulatory Agency, its staff, intervenors or consumer counsel in any regulatory or administrative proceedings before a State Regulatory Agency, the disclosing Party shall submit such Confidential information in accordance with applicable State Regulatory Agency confidentiality rules and procedures. In the event that Confidential Information must otherwise be disclosed by Applicable Law (e.g. pursuant to subpoena or civil discovery), the Party required to make disclosure shall notify the protected Party sufficiently in advance to allow the protected Party a reasonable opportunity to obtain a protective order or seek other remedies, prior to disclosure by the recipient Party.

*[remainder of this page intentionally left blank]*

IN WITNESS WHEREOF, the Parties have executed this PPA as of the date first set forth above.

*Seller:*

**Bonita Wind Energy, LLC**

By:   
\_\_\_\_\_  
Michael O'Sullivan  
Senior Vice President

*Company:*

**Southwestern Public Service Company**

By: \_\_\_\_\_  
David T. Hudson  
President, Southwestern Public Service  
Company



IN WITNESS WHEREOF, the Parties have executed this PPA as of the date first set forth above.

*Seller:*

**Bonita Wind Energy, LLC**

By: \_\_\_\_\_  
Michael O'Sullivan  
Senior Vice President

*Company:*

**Southwestern Public Service Company**

By: David T. Hudson  
David T. Hudson  
President, Southwestern Public Service  
Company

## EXHIBIT A

### DEFINITIONS

The following terms shall have the meanings set forth herein:

“Actual Damages” has the meaning set forth in Section 12.4(C).

“Affiliate” of any designated Person means any person or entity that directly or indirectly controls, is under the control of, or is under common control with, the designated Person by the power to direct or cause the direction of the management of the policies of designated Person, whether through ownership interest, by contract or otherwise.

“AGC” or “Automatic Generation Control” means the equipment and capability of an electric generation facility automatically to adjust the generation quantity within the applicable Balancing Authority with the purpose of interchange balancing and specifically, the Facility’s capability of accepting an AGC Set-Point electronically, and the automatic adjustment and regulation of the Facility’s energy production via the SCADA System.

“AGC Protocols” means the protocols for AGC included in Exhibit I - AGC Protocols; Data Collection; Technical Specifications, as such protocols may be modified from time to time in accordance with Section 10.7.

“AGC Remote/Local” means a handshake electronic signal sent from the Facility to the EMCC AGC system, and from the EMCC AGC system to the Facility, indicating the Facility is receiving AGC Set-Point locally (from the Facility) or remotely (EMCC AGC system) and is following that AGC Set-Point.

“AGC Set-Point” means the Company-generated analog or digital signal sent by the SCADA System to the Facility, representing the quantity of Renewable Energy to be generated by the Facility. The AGC Set-Point is calculated by the EMCC AGC system and communicated electronically to the Facility via the SCADA System.

“Applicable Law” means all laws, statutes, treaties, codes, ordinances, regulations and rules, certificates, orders, licenses, and permits of any Governmental Authority that are applicable to a Party, the business of a Party or the Facility, now in effect or hereafter enacted, including amendments to or interpretations of any of the foregoing by a Governmental Authority having jurisdiction, and all applicable judicial, administrative, arbitration and regulatory decrees, judgments, injunctions, writs, orders, awards and/or like actions.

“Back-Up Metering” shall have the meaning set forth in Section 5.2(B).

“Balancing Authority” means the system of electrical generation, distribution and transmission facilities within which generation is regulated in order to maintain interchange schedules with other such systems.

“Business Day” means any Day that is not a Saturday, a Sunday, or a NERC recognized holiday.

“Capacity Resource” means the amount of net generating capacity associated with the Facility for which capacity credit may be obtained under applicable ERO or Transmission Authority planning reserve procedures and requirements, if any.

“Change in Tax Law” means prior to the Commercial Operation Date (a) any change in or amendment to the Code or another applicable federal income tax statute, or (b) any change in, or issuance of, or promulgation of any temporary or final Treasury Regulations promulgated thereunder that would result in any change to the interpretation of the Code or existing Treasury Regulations that (i) materially and directly reduces the applicable depreciation or amortization periods, methods, amounts or conventions for the Seller or the Facility, or (ii) materially and directly limits, restricts, reduces, recaptures, defers or disallows PTCs or the ability of the Seller to claim PTCs, in each case after the Effective Date.

“Change of Control” means the occurrence of any one of the following events with respect to Seller or any direct or indirect owner of a majority of the ownership interests in Seller: (i) a transfer of a majority of the ownership interests in Seller or such owner; or (ii) any consolidation or merger of Seller or such owner in which Seller or such owner, as the case may be, is not the continuing or surviving entity, or (iii) a sale or conveyance of any direct or indirect ownership interest in Seller following which NextEra Energy, Inc. is no longer the direct or indirect owner of at least 50% of the ownership interests of Seller; *provided, however, that* a Change of Control shall not be deemed to have occurred as a result of a Permitted Transfer.

“COD Conditions” means all of the requirements that must be satisfied by Seller as a prerequisite to achieving Commercial Operation. The COD Conditions are set forth in Section 4.5.

“Code” means the United States Internal Revenue Code of 1986, as amended from time to time, and any successor statute.

“Commercial Operation” means the period beginning on the Commercial Operation Date and continuing through the balance of the Term of this PPA.

“Commercial Operation Date” or “COD” shall have the meaning set forth in Section 4.5.

“Commercial Operation Year” shall have the meaning set forth in Section 4.5(E).

“Commercially Reasonable” or “Commercially Reasonable Efforts” means, with respect to any action to be taken or attempted by a Party under this PPA, the level of effort in light of the facts known to such Party at the time a decision is made that: (a) can reasonably be expected to accomplish the desired action at a reasonable cost; (b) is consistent with Good Utility Practices; and (c) takes into consideration the

amount of advance notice required to take such action, the duration and type of action, and the competitive environment in which such action occurs.

“Compensable Curtailment” and “Compensable Curtailment Energy” shall have the meanings set forth in Section 8.3(B).

“Compliance Expenditures” shall have the meaning set forth in Section 5.2(C).

“Confidential Information” shall have the meaning set forth in Section 20.18(A).

“Construction Contracts” shall have the meaning set forth in Section 4.1.

“Construction Milestones” means the dates set forth in Exhibit B – Construction Milestones.

“Credit Rating” of any Person means the lowest rating assigned to such Person’s long-term debt or deposit obligations (unenhanced by third-party support) by Standard & Poors, Moody’s and Fitch Ratings. If such Person has no outstanding long-term debt or deposit obligations, or if no rating is assigned to such obligations, “Credit Rating” shall mean the lowest general corporate credit rating or long-term issuer rating assigned to such Person by Standard & Poors, Moody’s or Fitch Ratings.

“Damage Cap” shall have the meaning set forth in Section 12.4.

“Day” means a calendar day.

“Dispute” shall have the meaning set forth in Article 13.

“Electric Metering Devices” means revenue quality meters, metering equipment and data processing equipment used to measure, record and transmit data with respect to the output of Renewable Energy from the Facility, including metering current transformers and metering voltage transformers.

“Eligible Energy Resource” means any generation resource eligible to be certified to generate, claim, own or use Renewable Energy Credits and green tags pursuant to the protocols and procedures developed and approved by applicable Government Authorities for the REC Registration Program.

“Emergency” means any event or occurrence after the date of this PPA that results in the declaration of an Emergency Condition under and as defined in the Interconnection Agreement.

“Energy Markets Control Center” or “EMCC” means Company's merchant representatives responsible for dispatch of generating units, including the Facility.

“Energy Payment Rate” shall have the meaning set forth in Exhibit J.

“Energy Resource Interconnection Service” means the type of interconnection service which allows Seller to connect the Facility to the transmission or distribution system, as applicable, as an “Energy Resource” as defined by the Transmission Tariff, and be eligible to deliver the Facility’s output using the existing firm or non-firm capacity on the transmission system on an as-available basis.

“Environmental Contamination” shall have the meaning set forth in Section 4.2.

“ERO” means the Electric Reliability Organization certified by FERC pursuant to Section 215 of the Federal Power Act or any successor organization. The certified ERO as of the date of this PPA is the Southwest Power Pool, Inc., or its successor as to any function.

“Event of Default” shall have the meaning set forth in Article 12.

“Facility” means Seller’s electric generating facilities, associated balance of plant, parts, fixtures and equipment, and all equipment necessary to interconnect to the Transmission Authority’s System, all such facilities as associated with each of the Phase I and Phase II components of the Facility and as further described in Exhibit C - Facility Description, including Seller’s rights to the Site and all of the following: buildings, turbines, generators, step-up transformers, output breakers, facilities necessary to connect to the Interconnection Point, protective and associated equipment, improvements, and other tangible and intangible assets, contract rights, Permits, easements, rights of way, surface use agreements and other interests or rights in real estate, owned or used for construction, operation, maintenance, generation and delivery of the capacity and energy subject to this PPA.

“Facility Debt” means the obligations of Seller or its Affiliates to any Facility Lender pursuant to the Financing Documents, including distributions, indemnities, principal of, premium and interest on indebtedness, fees, expenses or penalties, amounts due upon acceleration, prepayment or restructuring, swap or interest rate hedging breakage costs and any fees or interest due with respect to any of the foregoing.

“Facility Lender” means, collectively, any lenders or tax equity investors providing Facility Debt, including any successors or assigns thereof.

“Federal Power Act” means the provisions of 16 U.S.C. §791(A) *et seq.* and amendments or supplements thereto.

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

“Financing Documents” means the loan and credit agreements, notes, bonds, indentures, security agreements, lease financing agreements, mortgages, deeds of trust, interest rate exchanges, swap agreements and other documents relating to the development, bridge, construction or permanent debt financing and/or tax equity or portfolio financing for the Facility, including any credit enhancement, credit support,

working capital financing, or refinancing documents, and any and all amendments, modifications, or supplements to the foregoing that may be entered into from time to time at the discretion of Seller in connection with development, construction, ownership, leasing, operation or maintenance of the Facility.

“Forced Outage” means any condition at the Facility that requires the immediate and unplanned removal of the Facility, or at least ten percent thereof, from service, another outage state, or a reserve shutdown state, resulting from immediate mechanical/electrical/hydraulic control system trips and operator-initiated trips in response to abnormal Facility conditions or alarms.

“Guaranteed Mechanical Availability Factor” shall have the meaning set forth in Exhibit M.

“Good Utility Practices” means the practices, methods, standards and acts engaged in or approved by a significant portion of the applicable segment of the electric power generation industry pertaining to facilities of the type, similar size and location to the Facility that, at a particular time, in the exercise of Commercially Reasonable judgment, in light of the facts that are known (or reasonably should have been known) at the time a decision was made, would have been expected to accomplish the desired result in a manner consistent with Applicable Law, Permits, codes, standards, equipment manufacturer’s recommendations, reliability, safety, environmental protection, economy, and expedition. Good Utility Practices is not limited to the optimum practice, method, standard or act to the exclusion of all others, but rather to those practices, methods, standards and acts generally acceptable or approved by a significant portion of the applicable segment of the electric power generation industry in the relevant region, during the relevant period.

“Governmental Authority” means any federal, state, local or municipal governmental body; any governmental, quasi-governmental, regulatory or administrative agency, commission, body or other authority exercising or entitled to exercise any administrative, executive, judicial, legislative, policy, regulatory or taxing authority or power; and/or any court or governmental tribunal. By way of example only, “Governmental Authorities” include NERC, the ERO, the Market Operator (if any), an applicable State Regulatory Agency, the Transmission Authority and FERC, and successor organizations.

“Guarantor” has the meaning set forth in Section 11.3(C).

“Hale Project” has the meaning set forth in Section 6.2.

“Interconnection Agreement(s)” means the separate contract for interconnection of the Facility to the Transmission Authority’s System, as such agreement may be amended from time to time. For purposes of this PPA, the Interconnection Agreement shall be interpreted to include any third party facility construction agreement or other agreement required by the Transmission Authority to interconnect the Facility in accordance with the Transmission Tariff. For the

avoidance of doubt, “Interconnection Agreement” excludes any provisional interconnection agreement.

“Interconnection Facilities” means, with respect to the Facility, those facilities designated in the Interconnection Agreement for the direct purpose of interconnecting each of the Phase I and Phase II components of the Facility to the Transmission Authority’s System at the Interconnection Point, along with any easements, rights of way, surface use agreements and other interests or rights in real estate reasonably necessary for the construction, operation and maintenance of such facilities, whether owned by Seller, the Transmission Authority or another entity. This equipment is conceptually depicted in Exhibit C - Facility Description to this PPA.

“Interconnection Point” means, with respect to the Facility, the physical point within the operational authority of the Transmission Authority as specified in the Interconnection Agreement at which electrical interconnection is made between the Facility and the Transmission Authority’s System in accordance with the Transmission Tariff and the Interconnection Agreement.

“Investment Grade” means that the long-term Credit Rating of such Person satisfies two of the following three rating requirements (a) BBB- or better by Fitch Ratings, (b) BBB- or better by Standard & Poor’s, or (c) Baa3 or better by Moody’s. For the avoidance of doubt, if such Person satisfies any two of the foregoing rating requirements the standard shall have been met.

“kW” means kilowatt, and “kWh” means kilowatt hour.

“Lender Consent” shall have the meaning set forth in Section 18.1.

“Maintenance Schedule” has the meaning set forth in Section 10.2.

“Market Operator” means the entity that instructs market participants and/or generators to regulate generation assets (including the Facility) within any energy market in which Company participates, based on price-based offer curves for the purpose of matching generation output to system load demand while maintaining bulk electric system reliability. If such entity is the Transmission Authority, then “Market Operator” shall mean such entity acting in its capacity as such.

“Material Adverse Effect” means any effect (or effects taken together) that is materially adverse to the present or future business, operations, assets, liabilities, properties, results in operations or condition (financial or otherwise), prospects, or property of a Party, its business, or this PPA.

“MW” means megawatt or one thousand kW, and “MWh” means megawatt hours.

“Nameplate Capacity” of the Facility means the sum of the designed maximum outputs of each Wind Turbine comprising the Facility, as designated by the turbine manufacturer.

“NERC” means the North American Electric Reliability Council or any successor organization.

“Non-Compensable Curtailment” shall have the meaning set forth in Section 8.3(B).

“Operating Committee” means one representative each from Company and Seller, pursuant to Section 10.7.

“Operating Procedures” means those procedures developed by the Operating Committee pursuant to Section 10.7, if any.

“Operating Records” means all agreements associated with the Facility, operating logs, blueprints for construction, operating manuals, all warranties on equipment, and all documents, whether in printed or electronic format, that Seller uses or maintains for the operation of the Facility.

“Park Potential” means the number of MW that depicts Seller’s real time calculation of the Potential Energy capable of being provided by the Facility, the Phase I and Phase II components of the Facility, as applicable, to Company at the Point of Delivery. Park Potential shall be calculated using the best-available data obtained through Commercially Reasonable methods; and shall be dependent upon measured wind speeds, power curves, Wind Turbine availability, and derate(s) and transmission line losses, and any other adjustment necessary to accurately reflect the Potential Energy at the Point of Delivery. Park Potential should be provided to the Company in real time through the Company’s SCADA System in accordance with the AGC Protocols.

“Party” and “Parties” shall have the meanings set forth in the introductory paragraph.

“Pending Facility Transaction” or “PFT” shall have the meaning set forth in Section 19.4.

“Permit” shall have the meaning set forth in Section 4.3.

“Permitted Extension” shall have the meaning set forth in Section 4.5(A)(2).

“Permitted Transfer” means any of the following (a) transactions among Affiliates of Seller, including any corporate reorganization, merger, combination or similar transaction or transfer of assets or ownership interests involving Seller or its Affiliates; *provided* (i) NextEra Energy, Inc. retains the authority, directly or indirectly, to Control the Seller, or (ii) a wholly-owned, indirect subsidiary of NextEra Energy, Inc. operates the Facility, (b) any exercise by a Facility Lender of its rights and remedies under the Financing Documents, (c) a Change of Control of NextEra Energy, Inc., (d) any change of economic and voting rights triggered in Seller’s organization documents arising from the financing of the Facility and which does not result in the transfer of ownership, economic or voting rights in any entity that had no such rights



immediately prior to the change, (e) the direct or indirect transfer of shares of, or equity interests in, the Seller to a Facility Lender; or (f) a transfer of the Facility or the Facility packaged with any of the following (i) all or substantially all of the assets of NextEra Energy Resources, LLC (“NEER”) or NextEra Energy, Inc.; (ii) all or substantially all of NEER’s or its ultimate parent company’s renewable energy generation portfolio; or (iii) all or substantially all of NEER’s or its ultimate parent company’s wind generation portfolio; *provided, that* in the case of each of (i), (ii) and (iii), the entity that operates the Facility following such transfer is (or contracts with) a Qualified Operator; *provided, further* that prior to or concurrent with any Permitted Transfer, the transferee shall agree in writing to be bound by the terms and conditions hereof and furnish a copy of the transfer to the Company.

“Permitting Delay” shall have the meaning set forth in Section 4.5(A)(1).

“PFT Notice” shall have the meaning set forth in Section 19.4.

“PI System” means the “plant information” system for the Facility, as described and implemented in Exhibit I - AGC Protocols; Data Collection; Technical Specifications.

“Point of Delivery” means, with respect to the Facility, the physical point within the operational authority of Transmission Authority at which Seller makes available and delivers to Company the Renewable Energy being provided by Seller to Company under this PPA. The Point of Delivery is at the high side of the step-up transformer at the applicable Substation for each of the Phase I and Phase II components of the Facility, as specified in Exhibit C - Facility Description to this PPA.

“Potential Energy” for any period of time means the MWh of energy that the Facility, the Phase I and Phase II components of the Facility, as applicable, is actually capable of delivering to the Point of Delivery by virtue of the Park Potential during such period.

“PTCs” means Production Tax Credits applicable to electricity produced from certain renewable resources pursuant to 26 U.S.C. §45, or such substantially equivalent tax credit that provides Seller with a tax credit based on energy production from the Facility.

“Qualified Operator” means an operator of wind generation facilities that is nationally recognized and that demonstrates to Company’s reasonable satisfaction that such operator has sufficient experience to successfully operate the Facility, including a minimum of three (3) years’ experience in the wind energy generation and operation business, and owns, controls or operates a minimum of 6,000 MWs of wind energy generation capacity.

“REC Registration Program” means the applicable State, regional, or federal program established to register Eligible Energy Resources such as the Facility, and create and certify RECs arising from energy generated from such Resources,

including any rights associated with any renewable energy information or tracking system that exists or may be established by Applicable Law with regard to monitoring, registering, tracking, certifying, or trading such credits. For purposes of this PPA, the REC Registration program shall mean the Midwest Renewable Energy Tracking System (aka M-RETS).

“Renewable Energy” means in **Texas**: electric energy generated from Renewable Energy Technology, as defined in PUCT Substantive Rule 25.173(c)(17) and in **New Mexico**: renewable energy within the meaning of Part 572 of Title 17, Chapter 9, New Mexico Administrative Code.

“Renewable Energy Credit” or “REC” means in **Texas**: pursuant to PUCT Substantive Rule 25.173(c)(13), one MWh of Renewable Energy that is physically metered, verified in Texas and meets the requirements set forth in subsection (e) of PUCT Substantive Rule 25.173 and in **New Mexico**: a renewable energy certificate within the meaning of Part 572 of Title 17, Chapter 9, New Mexico Administrative Code, with respect to 1,000 kWh of generated Renewable Energy. For the avoidance of doubt, RECs exclude (i) PTC’s, investment tax credits and any other local, state or federal deductions and tax credits providing a tax benefit to Seller based on ownership of, or energy production from, the Facility, and (ii) depreciation and other tax benefits arising from ownership or operation of the Facility unrelated to its status as a generator of renewable or environmentally clean energy.

“Replacement Power Costs” for any period mean the costs incurred by Company to replace the products and services which Seller was required to provide under this PPA (but failed to so provide) during such period, less the sum of any payments from Company to Seller under this PPA that were eliminated with respect to such period as a result of such failure. Replacement Power Costs shall be determined on an hourly basis and shall equal the sum of the following for each hour where the following calculation achieves a positive number:

Hourly Replacement Power Costs = (A + B + C + D) – E, where

- “A” = the product of (x) the number of MW of lost capacity, derived by subtracting the number of MW of capacity of the Facility that qualifies for capacity credit actually made available to Company from the amount of qualifying capacity associated with the entire Facility, and (y) the applicable market price for capacity made available to Company’s system, for such hour;
- “B” = the price paid by Company for the MWh of energy purchased by Company to replace the Contract Energy that was not delivered under this PPA during such hour;
- “C” = the product of (x) the number of MWh of energy purchased by Company with respect to such hour, to replace the Expected Facility

Output that was not delivered under this PPA, and (y) the actual cost of registered RECs for that number of MWh, for such hour;

“D” = the actual cost of transmission, ancillary services, fuel and fuel transportation, other incremental costs, and any related penalties that could not be avoided or mitigated, and transaction charges to deliver reasonably available energy to Company in amounts equal to the number of MWh for which Replacement Power Costs are owed; and

“E” = the sum of all payments avoided by Company as a result of Seller’s breach, for such hour, including avoided payments under Article 8.

“ROFO” and “ROFO Notice” shall have the meanings set forth in Section 19.3.

“SCADA” means supervisory control and data acquisition.

“Scheduled Termination Date” shall have the meaning set forth in Article 2.

“Security Fund” shall have the meaning set forth in Section 11.1.

“Seller Excuse Hours” means those hours during which Seller is unable to schedule or deliver Renewable Energy to Company as a result of (A) Non-Compensable Curtailments; (B) Force Majeure; (C) a Transformer Failure; or (D) Company’s failure to perform.

“Site” means, with respect to the Project, the parcels of real property on which each of the Phase I and Phase II components of the Facility will be located, including any easements, rights of way, surface use agreements and other interests or rights in real estate necessary for the construction, operation and maintenance of the Facility. The Site is more specifically described in Exhibit C - Facility Description to this PPA.

“State Regulatory Agency” means the Public Utility Commission of Texas and/or the New Mexico Public Regulation Commission, or any successor agencies.

“State Regulatory Approval” means a written initial order of the State Regulatory Agency approving this PPA in such a manner that all costs incurred by Company under this PPA will be recoverable from retail customers in a timely manner through fuel clauses and, if applicable, base rates pursuant to Applicable Law subject only to the requirement that the State Regulatory Agency retain ongoing prudence review of Company’s performance and administration of this PPA.

“Step-In Rights” shall have the meaning set forth in Section 12.5.

“Substation” means the substation at which the Point of Delivery is located for each of the Phase I and Phase II components of the Facility, as depicted in Exhibit C – Facility Description.

“Target COD” shall have the meaning set forth in Section 4.5(A).

“Term” means the period of time during which this PPA remains in full force and effect, as further defined in Article 2.

“Test Energy” shall have the meaning set forth in Section 4.6.

“Transformer Failure” means a failure for any cause to all or part of the high voltage equipment including the transformer, the associated circuit breakers and any and all other high voltage switchgear and associated equipment; *provided*, any such failure cannot exceed one year in duration.

“Transmission Authority” means collectively those entities owning and/or operating the interconnected transmission system applicable to Seller and the Facility pursuant to a Transmission Tariff, including (i) Southwest Power Pool, Inc., or its successor as to any function, operating under and in accordance with its Transmission Tariff, and (ii) all entity(s) responsible under the Interconnection Agreement for providing the transmission lines, any Interconnection Facilities and other equipment and facilities with which the Facility interconnects at the Interconnection Point and transmission system.

“Transmission Authority’s System” means the contiguously interconnected electric transmission and sub-transmission facilities, over which the Transmission Authority has rights (by ownership or contract) to provide bulk transmission of capacity and energy from the Interconnection Point.

“Transmission Delay”, shall have the meaning set forth in Section 4.5(A)(2).

“Transmission Tariff” means the applicable Open Access Transmission Tariff of the Transmission Authority, as amended from time to time.

“Wind Turbine(s)” means the wind-energy generating devices that are included in the Facility. The manufacturer and model number of the Wind Turbines is identified on Exhibit C – Facility Description.

\* \* \* \* \*

**EXHIBIT B**

**CONSTRUCTION MILESTONES**

**PHASE I CONSTRUCTION MILESTONES**

<b>Milestone</b>	<b>Outcome</b>
Completed	Seller shall have achieved closing on financing for the Facility or provided Company with proof of financial capability to construct the Facility.
Completed	Seller and the Transmission Authority shall have executed the Interconnection Agreement.
6/30/2018	Seller and all required counterparties shall have executed such Construction Contracts as are needed to construct the Facility.
10/30/2018	Seller shall have laid the foundation for all Facility buildings, generating facilities and step-up transformation facilities.
11/30/2018	The Wind Turbines and step-up transformer shall have been delivered and installed at the Site.
11/30/2018	Seller's Interconnection Facilities shall have been constructed, and such facilities are capable of being energized.
12/1/2018	Start-up testing of the Facility commences.

**PHASE II CONSTRUCTION MILESTONES**

<b>Milestone</b>	<b>Outcome</b>
Completed	Seller shall have achieved closing on financing for the Facility or provided Company with proof of financial capability to construct the Facility.
2/1/2018	Seller and the Transmission Authority shall have executed the Interconnection Agreement.
6/15/2018	Seller and all required counterparties shall have executed such Construction Contracts as are needed to construct the Facility.
10/15/2018	Seller shall have laid the foundation for all Facility buildings, generating facilities and step-up transformation facilities.
11/30/2018	The Wind Turbines and step-up transformer shall have been delivered and installed at the Site.
11/30/2018	Seller's Interconnection Facilities shall have been constructed, and such facilities are capable of being energized.
12/1/2018	Start-up testing of the Facility commences.

## EXHIBIT C

### FACILITY DESCRIPTION AND SITE MAPS

The Facility shall be located on the Site and shall be identified as Seller's Bonita Winds Generation Facility. Maps and one-line diagrams of the Facility, the Lorenzo Project, the Wildcat Project and associated equipment are included as part of this Exhibit.

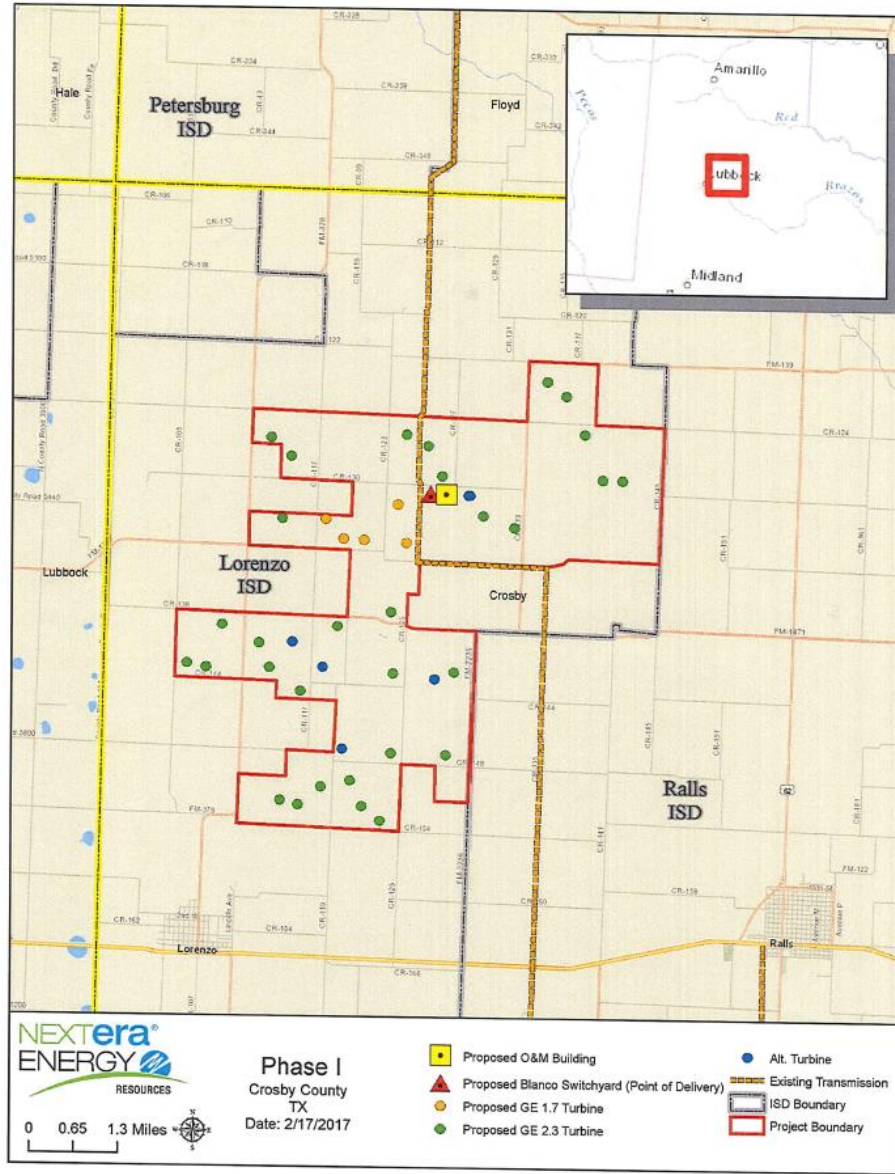
The address of Phase I of the Facility is County Road 125, Crosbyton, TX 79322.

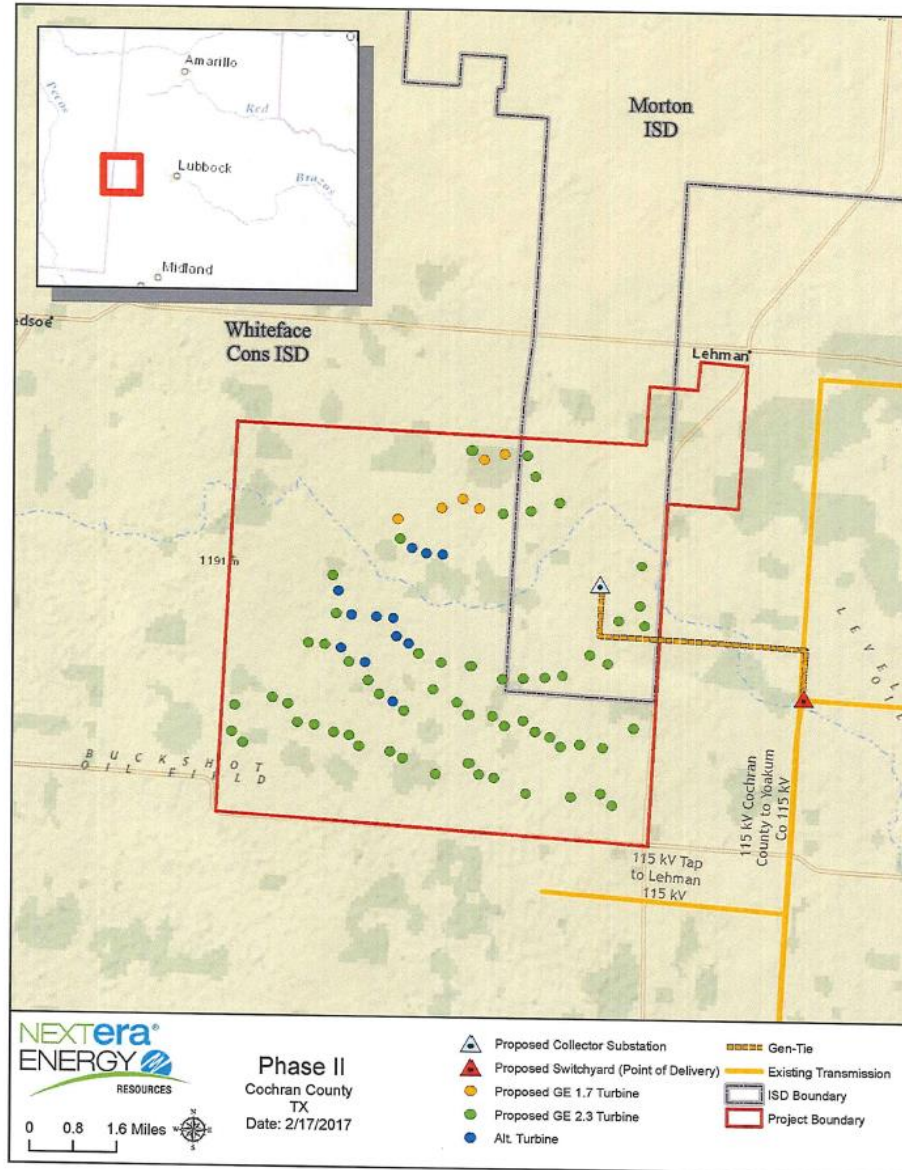
The address of Phase II of the Facility is County Road 117, Morton, TX 79346.

The Facility includes the following specific components:

- \* 12 safe harbored GE 1.715 MW 103m Rotor Diameter / 80m Hub Height turbines and 91 GE 2.3 MW 116m Rotor Diameter / 90m Hub Height turbines;
- \* panel space and 125VDC battery supplied voltage necessary to accommodate the metering, telemetering and communications equipment required by the PPA;
- \* communication circuits from the Facility to the EMCC for the purpose of telemetering, supervisory control/data acquisition, and voice communications as required by Company;
- \* equipment and software necessary to receive, accept and react to an AGC signal from the Company's SCADA System and to comply with the AGC Protocols as further specified on Exhibit I - AGC Protocols; Data Collection; Technical Specifications;
- \* each Wind Turbine to be equipped with meteorological measurement equipment (e.g. anemometers), individually linked to Seller's information system;
- \* the capability of sending real time data and OPC interface to Company's PI System; and
- \* all equipment required to meet FERC Order Number 827 for Reactive Power Requirements for Non-Synchronous Generation.

Site Maps

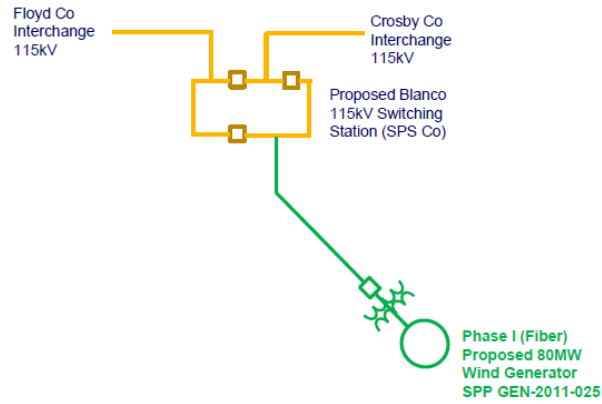




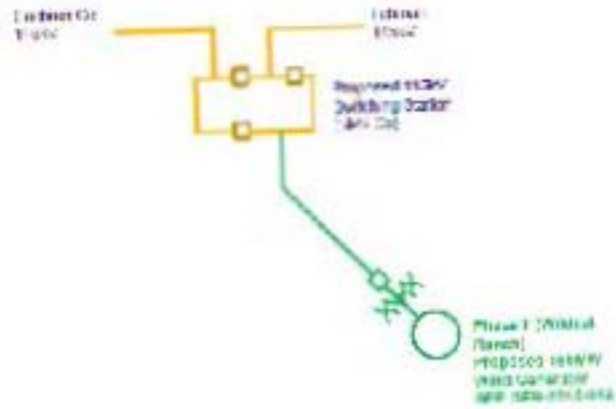


# One Line Diagram

## Phase I One-Line Diagram



### Phase II One-Line Diagram



**EXHIBIT D**

**NOTICES AND CONTACT INFORMATION**

<u><b>Company</b></u>	<u><b>Seller</b></u>
<p><b>Notices:</b>  <u>Tara Fowler</u>  Renewable Purchased Power Manager  Xcel Energy Services Inc.  1800 Larimer Street, Suite <u>1000</u>  Denver, CO 80202</p> <p><i>with a cc to:</i>  <u>Bruce Hallett</u>  Purchased Power Analyst  Xcel Energy Services Inc.  1800 Larimer Street, Suite 1000  Denver, CO 80202</p>	<p><b>Notices:</b>  Bonita Wind Energy, LLC  700 Universe Blvd.  Juno Beach, FL 33408 - 0420  Attention: Megan Kiernan  Phone: (561) 304-5566</p> <p><i>with a cc to:</i>  Bonita Wind Energy, LLC  700 Universe Blvd.  Juno Beach, FL 33408 - 0420  Attention: Associate General Counsel  Phone: (561) 304-5220</p>
<p><b>Operating Committee Representative:</b>  <u>Tara Fowler</u>  Renewable Purchased Power Manager  Xcel Energy Services Inc.  1800 Larimer Street, Suite 1000  Denver, CO 80202</p> <p><b>Alternate:</b>  <u>Bruce Hallett</u>  Purchased Power Analyst  Xcel Energy Services Inc.  1800 Larimer Street, Suite 1000  Denver, CO 80202</p>	<p><b>Operating Committee Representative:</b>  Bonita Wind Energy, LLC  700 Universe Blvd.  Juno Beach, FL 33408 - 0420  Attention: Megan Kiernan  Phone: (561) 304-5566</p> <p><b>Alternate:</b>  Bonita Wind Energy, LLC  700 Universe Blvd.  Juno Beach, FL 33408 - 0420 Attention:  Justin Fong  Phone: (561) 304-5685</p>
<p><b>Real-Time Contact Information</b>  <u>EMCC</u> (24 hour coverage):  Phone: 303-571-6280</p> <p><u>Transmission Ops:</u>  Phone:</p>	<p><b>Real-Time Contact Information</b>  Fleet Performance and Diagnostics Center  (FPDC)</p> <p>Phone:(561) 694-3636 Toll  Free: (866)375-3737  Fax: (561) 694-3615</p>

**EXHIBIT E**

**INSURANCE COVERAGE**

Type of Insurance	Minimum Limits of Coverage
Commercial General Liability (CGL) and commercial umbrella	\$11,000,000 combined single limit each occurrence and the aggregate, where applicable. [If CGL insurance contains a general aggregate limit, it shall apply separately to the Facility].

CGL insurance shall be written on ISO occurrence form CG 00 01 01 96 (or a substitute form providing equivalent coverage) and shall cover liability arising from premises, operations, independent contractors, products/completed operations, contracts, property damage, personal injury and advertising injury, and liability assumed under an insured contract (including the tort liability of another assumed in a business contract), all with limits as specified above. CGL insurance shall include ISO endorsement CG 24 17 (or an equivalent endorsement) which modifies the definition of “Insured contract” to eliminate the exclusion of easement or license agreements in connection with construction or demolition operations on or within 50 feet of a railroad. There shall be no endorsement or modification of the CGL insurance limiting the scope of coverage for liability arising from explosion, collapse, or underground property damage.

Company shall be included as an insured under the CGL policy, using ISO additional insured endorsement CG 20 10 (or a substitute providing equivalent coverage), and under the commercial umbrella insurance. The commercial umbrella insurance shall provide coverage over the top of the CGL insurance, the Business Automobile Liability insurance, and the Employers Liability insurance. The CGL and commercial umbrella insurance to be obtained by or on behalf of Seller shall be endorsed as follows:

Such insurance as afforded by this policy for the benefit of Company shall be primary as respects any claims, losses, damages, expenses, or liabilities arising out of this PPA, and insured hereunder, and any insurance carried by Company shall be excess of and noncontributing with insurance afforded by this policy.

Business Automobile Liability	\$2,000,000 combined single limit (each accident), including all Owned, Non-Owned, Hired and Leased Autos.
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Business Automobile Liability insurance shall be written on ISO form CA 00 01, CA 00 05, CA 00 12, CA 00 20, or a substitute form providing equivalent liability coverage. If necessary, the policy shall be endorsed to provide contractual liability coverage equivalent to that provided in the 1990 and later editions of CA 00 01.

Workers Compensation	Statutory Requirements. Seller may comply with these requirements through the use of a qualified self-insurance plan.
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[Exhibit E - continued]

Type of Insurance	Minimum Limits of Coverage
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Employers Liability	\$2,000,000 each accident for bodily injury by accident, or \$2,000,000 each employee for bodily injury by disease.
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Builder's Risk	Probable Maximum Loss of the Facility.
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Builder's Risk insurance, or an installation floater, shall include coverage for earthquake and flood, collapse, faulty workmanship, materials and design, testing of machinery or equipment, freezing or changes in temperature, debris removal, and partial occupancy.

Pollution Liability	\$5,000,000 each occurrence.
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All-Risk Property insurance covering physical loss or damage to the Facility	Probable Maximum Loss of the Facility. A deductible may be carried which deductible shall be the absolute responsibility of Seller.
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All-Risk Property insurance shall include: (i) coverage for fire, flood, wind and storm, tornado and earthquake with respect to facilities similar in construction, location and occupancy to the Facility, with sublimits of no less than \$10,000,000 each for flood and earthquake; and (ii) Boiler and Machinery insurance covering all objects customarily subject to such insurance, including boilers and turbines, in an amount equal to their probable maximum loss.

Business Interruption insurance	Amount required to cover Seller's continuing or increased expenses, resulting from full interruption, for a period of 12 calendar months.
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Business Interruption insurance shall cover loss of revenues or the increased expense to resume operations attributable to the Facility by reason of total or partial suspension or delay of, or interruption in, the operation of the Facility as a result of an insured peril covered under Property insurance as set forth above, to the extent available on Commercially Reasonable terms as determined by Company, subject to a Commercially Reasonable deductible that shall be the responsibility of Seller. Notwithstanding any other provision of this PPA, Seller shall not be required to have Business Interruption insurance until the Commercial Operation Date.

## EXHIBIT F

### SELLER'S NEEDED PERMITS

<u>Agency</u>	<u>Permit Required</u>
Federal Aviation Administration	Determination of No Hazard
Federal Energy Regulatory Commission	Market-Based Rate Authorization
Cochran and Crosby County	Approval for Work in County Right-of-Way
Texas Department of Transportation	Road Entrance
Texas Department of Transportation	Driveway Permit
Texas Department of Transportation	Utility Permit
Texas Department of Transportation	Highway Access and Crossing Permits
Texas Department of Transportation	Oversized and/or Overweight Permit

## EXHIBIT G

### FORM OF LETTER OF CREDIT

[LETTERHEAD OF ISSUING BANK]

Irrevocable Standby Letter of Credit      Date of Issuance: \_\_\_\_\_  
No: \_\_\_\_\_

Beneficiary: [ OpCo ]

Initial Expiration Date: [Must be at least  
one year after date of issuance]

Applicant:

As the Issuing Bank ("Issuer"), we, [Name of Issuing Bank], hereby establish this irrevocable Standby Letter of Credit No. \_\_\_\_\_ (this "Letter of Credit") in favor of the above-named beneficiary ("Beneficiary") for the account of the above-named applicant ("Applicant") in the amount of US\$\_\_\_\_\_ (\_\_\_\_\_ Million U.S. Dollars).

Beneficiary may draw all or any portion of this Letter of Credit at any time and from time to time, and Issuer will make funds immediately available to Beneficiary upon presentation of Beneficiary's draft(s) at sight in substantially the form attached hereto as Exhibit "A" ("Draft Certificate and Sight Draft"), drawn on Issuer and accompanied by this Letter of Credit. All Draft Certificates and Sight Drafts must be signed on behalf of Beneficiary, and the signatory must indicate his or her title or other official capacity. No other documents will be required to be presented. Issuer will effect payment under this Letter of Credit within the next banking day after presentment of any Draft Certificate and Sight Draft. Payment shall be made in U.S. Dollars with Issuer's own funds in immediately available funds.

Issuer will honor any Draft Certificate and Sight Draft presented in substantial compliance with the terms of this Letter of Credit at the Issuer's letterhead office, the office located at \_\_\_\_\_ or any other full service office of the Issuer on or before the above-stated expiration date, as such expiration date may be extended hereunder. Partial and multiple draws and presentations are permitted on any number of occasions. Following any partial draw, Issuer will endorse this Letter of Credit and return the original to Beneficiary.

This Letter of Credit is issued pursuant to the provisions of that certain [Wind] [Solar] Energy Purchase Agreement between Beneficiary and Applicant dated as of \_\_\_\_\_, 20\_\_ (as the same may have been or may be amended from time to time, the "PPA"). Notwithstanding any reference in this Letter of Credit to the PPA or any other documents, instruments or agreements, or references in the PPA or any other documents, instruments or agreements to this Letter of Credit, this Letter of Credit contains the entire agreement between Beneficiary and Issuer relating to the obligations of Issuer hereunder.

This Letter of Credit will be automatically extended each year without amendment for a period of one (1) year from the expiration date hereof, as extended, unless at least thirty (30) days prior to the expiration date, Issuer notifies Beneficiary by registered or certified mail that it elects not to extend this Letter of Credit for such additional period. Notice of non-extension will be given by Issuer to Beneficiary at Beneficiary's address set forth herein or at such other address as Beneficiary may designate to Issuer in writing at Issuer's letterhead address.

This Letter of Credit is freely transferable by Beneficiary in whole or in part, and the number of transfers is unlimited. Issuer shall effect any transfers immediately upon presentation to Issuer of this Letter of Credit and a completed written transfer request substantially in the form attached hereto as Exhibit "B." Any transfer fees assessed by Issuer will be payable solely by Beneficiary.

Issuer waives any rights it may have, at law or otherwise, to subrogate to any claims which Beneficiary may have against Applicant or Applicant may have against Beneficiary.

This Letter of Credit is subject to the uniform customs and practice for documentary credits (2007 Revision), International Chamber of Commerce publication No. 600 (the "UCP"), except to the extent that the terms hereof are inconsistent with the provisions of the UCP, including but not limited to Articles 14(b) and 36 of the UCP, in which case the terms of this Letter of Credit shall govern. With respect to Article 14(b) of the UCP, Issuer shall have a reasonable amount of time, not to exceed three (3) banking days following the date of Issuer's receipt of documents from Beneficiary (to the extent required herein), to examine the documents and determine whether to take up or refuse the documents and to inform Beneficiary accordingly.

In the event of an act of God, riot, civil commotion, insurrection, war or any other cause beyond Issuer's control that interrupts Issuer's business and causes the place for presentation of this Letter of Credit to be closed for business on the last day for presentation, the expiry date of this Letter of Credit will be automatically extended without amendment to a date thirty (30) calendar days after the place for presentation reopens for business.

ISSUER:

By: \_\_\_\_\_  
Authorized Signature



**EXHIBIT "A"**  
TO LETTER OF CREDIT

**DRAFT CERTIFICATE AND SIGHT DRAFT**

The Beneficiary is entitled to draw under the Letter of Credit an amount equal to \$\_\_\_\_\_, for the following reason [check applicable provision]:

A. Beneficiary is entitled to draw pursuant to section  of that certain PPA between Beneficiary and Applicant dated as of \_\_\_\_\_, 20\_\_ (as the same may have been or may be amended from time to time, the "PPA").

B. The Letter of Credit will expire in fewer than 30 days from the date hereof, and Applicant has not provided to Beneficiary alternate security (as allowed under the PPA).

Draft Number \_\_\_\_\_  
\$ \_\_\_\_\_

At sight, pay to the order of [Name of Beneficiary to be inserted], the amount of USD \$\_\_\_\_\_ (\_\_\_\_\_ and 00/100ths U.S. Dollars).

Value received and charged to the account of: [Name of Issuer and address].  
Drawn under [Name of Issuer to be inserted] Standby Letter of Credit No.  
\_\_\_\_\_.

Dated: \_\_\_\_\_

[OpCo]

By: \_\_\_\_\_  
[name and title]

Account: [Applicant to be inserted]

**EXHIBIT "B"**  
TO LETTER OF CREDIT

**FORM OF TRANSFER REQUEST**

Irrevocable Standby Letter of Credit No. \_\_\_\_\_

Current Beneficiary:

Applicant:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

To: [Name of Issuer] ("Issuer")

The undersigned, as the current "Beneficiary" of the above-referenced Letter of Credit, hereby requests that you reissue the Letter of Credit in favor of the transferee named below [insert transferee name and address below]:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

From and after the date this transfer request is delivered to Issuer, the transferee shall be the "Beneficiary" under the Letter of Credit for all purposes and shall be entitled to exercise and enjoy all of the rights, privileges and benefits thereof.

Dated: \_\_\_\_\_

[OpCo]

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

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

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

[Notary Acknowledgement]

To be signed by a person purporting to be an authorized representative of Beneficiary and indicating his or her title or other official capacity, and acknowledged by a notary public.

**EXHIBIT H**  
**FORM OF GUARANTY**

**GUARANTY**

This Guaranty is executed and delivered as of this \_\_\_\_ day of \_\_\_\_\_, 20\_\_ by \_\_\_\_\_, a \_\_\_\_\_ [corporation] ("Guarantor"), in favor of [OpCo] ("Company"), in connection with the performance by \_\_\_\_\_, a \_\_\_\_\_ [limited liability company] ("Seller") of a [Wind] [Solar] Energy Purchase Agreement dated \_\_\_\_\_, 20\_\_ between Seller and Company (the "PPA").

- RECITALS -

A. Seller owns and operates a [wind] [solar] power electric generation facility having total nameplate capacity of approximately \_\_\_\_ MW located in \_\_\_\_\_ County, \_\_\_\_\_ (the "Facility").

B. Seller and Company have entered into the PPA for the purchase and sale of capacity and electrical energy from the Facility on the terms and conditions set forth therein.

C. Seller is a direct or indirect, wholly owned subsidiary of Guarantor. Guarantor expects to derive substantial benefits from the performance of the PPA by Seller and Company. To induce Company to enter into and continue the PPA and to consummate the purchase and sale of electrical energy contemplated by the PPA, Guarantor has agreed to guarantee the obligations of Seller as provided in this Guaranty.

NOW, THEREFORE, in consideration of the foregoing, Guarantor agrees as follows:

- AGREEMENT -

1. Guaranty. Subject to the provisions of this Guaranty, Guarantor hereby absolutely, irrevocably, unconditionally, and fully guarantees to Company the due, prompt, and complete observance, performance, and discharge of each and every payment obligation of Seller under the PPA, whether incurred before or after the date of delivery of this Guaranty (the "Obligations"). This is a guaranty of payment, not of collection, and as such, Company shall not be required to institute, pursue, or exhaust any remedies against Seller before instituting suit, obtaining judgment, and executing thereon against Guarantor under this Guaranty.

2. Maximum Liability. Notwithstanding anything herein to the contrary, Guarantor's maximum liability under this Guaranty shall be limited to twenty-eight million, five-hundred thousand dollars (US\$28,500,000), *plus* one million dollars (US\$1,000,000) for the costs of collection with respect to any valid claim(s) made by

Company hereunder that are incurred in the enforcement or protection of the rights of the Company; *provided*, Guarantor shall not be liable for such fees and expenses of Counterparty under this Section 2 if it is finally determined by a court of competent jurisdiction that no payment under this Guaranty is due.

3. Rights of Company. Guarantor hereby grants to Company, in Company's discretion and without the need to notify or obtain any consent from Guarantor, and without termination, impairment, or any other effect upon Guarantor's duties hereunder, the power and authority from time to time:

(a) to renew, compromise, extend, accelerate, or otherwise change, substitute, supersede, or terminate the terms of performance of any of the Obligations, in each case in accordance with the PPA;

(b) to grant any indulgences, forbearances, and waivers, on one or more occasions, for any length of time, with respect to Seller's performance of any of the Obligations; and

(c) to accept collateral, further guaranties, and/or other security for the Obligations, and, if so accepted, then to impair, exhaust, exchange, enforce, waive, or release any such security.

4. Performance. If any of the Obligations are not performed according to the tenor thereof, and any applicable notice and cure period provided by the PPA has expired ("Default"), Guarantor shall promptly upon receipt of written demand by Company (a) perform or cause Seller to perform the Obligation in Default, and (b) pay, reimburse, and indemnify Company against any liabilities, damages, and related costs (including attorneys' fees) incurred by Company as a result thereof, all in such manner and at such times as Company may reasonably direct.

5. Satisfaction. Satisfaction by Guarantor of any duty hereunder incident to a particular Default or the occurrence of any other Default shall not discharge Guarantor except with respect to the Default satisfied, it being the intent of Guarantor that this Guaranty be continuing until the earlier of: (1) such time as all of the Obligations have irrevocably been discharged in full, (2) the 30<sup>th</sup> anniversary of this Guaranty (*provided* that Guarantor's liability with respect to Obligations incurred prior to such date shall not terminate) or (3) such time as the Seller has provided an alternate form of Security Fund (as defined in the PPA) under Article 11 of the PPA in substitution for this Guaranty, it being understood that Guarantor shall not be released hereunder prior to the full discharge of the Obligations unless such alternate Security Fund has been deposited, at which time this Guaranty shall automatically terminate. If at any time the performance of any Obligation by Seller or Guarantor is rescinded or voided under the federal Bankruptcy Code or otherwise, then Guarantor's duties hereunder shall continue and be deemed to have been automatically reinstated, restored, and continued with respect to that Obligation, as though the performance of that Obligation had never occurred, regardless of whether this Guaranty otherwise had terminated or would have been terminated following or as a result of that performance.

6. Notice of Acceptance. Guarantor waives and acknowledges notice of acceptance of this Guaranty by Company.

7. Waivers by Guarantor. Guarantor hereby waives and agrees not to assert or take advantage of:

(a) all set-offs, counterclaims, and, subject to Section 4 above, all presentments, demands for performance, notices of non-performance, protests, and notices of every kind that may be required by Applicable Laws;

(b) any right to require Company to proceed against Seller or any other person, or to require Company first to exhaust any remedies against Seller or any other person, before proceeding against Guarantor hereunder;

(c) any defense based upon an election of remedies by Company;

(d) any duty of Company to protect or not impair any security for the Obligations;

(e) the benefit of any laws limiting the liability of a surety, subject to Section 16 below;

(f) any duty of Company to disclose to Guarantor any facts concerning Seller, the PPA or the Facility, or any other circumstances, that would or allegedly would increase the risk to Guarantor under this Guaranty, whether now known or hereafter learned by Company, it being understood that Guarantor is capable of and assumes the responsibility for being and remaining informed as to all such facts and circumstances; and

(g) until all Obligations in Default have been fully paid and/or performed, any rights of subrogation, contribution, reimbursement, indemnification, or other rights of payment or recovery for any payment or performance by it hereunder. For the avoidance of doubt, if any amount is paid to Guarantor in violation of this provision, such amount shall be held by Guarantor for the benefit of, and promptly paid to, Company.

8. Cumulative Remedies. The rights and remedies of Company hereunder shall be cumulative and not alternative to any other rights, powers, and remedies that Company may have at law, in equity, or under the PPA. The obligations of Guarantor hereunder are independent of those of Seller and shall survive unaffected by the bankruptcy of Seller. Company need not join Seller in any action against Guarantor to preserve its rights set forth herein.

9. Representations and Warranties. Guarantor represents and warrants to Company as follows:

(a) Guarantor is a corporation, duly organized, validly existing, and in good standing under the laws of the state of its incorporation. Seller is a direct or

indirect wholly-owned subsidiary of Guarantor. Guarantor has all necessary corporate power and authority to execute and deliver this Guaranty and to perform its obligations hereunder.

(b) The execution, delivery and performance of this Guaranty has been duly and validly authorized by all corporate proceedings of Guarantor and is not in violation of any law, judgment of court or government agency. This Guaranty has been duly and validly executed and delivered by Guarantor and constitutes a legal, valid and binding obligation of Guarantor, enforceable against Guarantor in accordance with its terms, except as the enforceability thereof may be limited by the effect of any applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors' rights generally and by general principles of equity.

10. Collection Costs. Subject to Section 2 hereof, Guarantor hereby agrees to pay to Company, upon demand, and in addition to the maximum liability set forth in Section 2 hereof, all reasonable and actual attorneys' fees and other expenses which Company may expend or incur in enforcing the Obligations against Seller and/or enforcing this Guaranty against Guarantor, whether or not suit is filed, including, without limitation, all attorneys' fees, and other expenses incurred by Company in connection with any insolvency, bankruptcy, reorganization, arrangement, or other similar proceedings involving Seller that in any way affect the exercise by Company of its rights and remedies hereunder.

11. Severability. Should any one or more provisions of this Guaranty be determined to be illegal or unenforceable, all other provisions nevertheless shall be effective.

12. Waiver or Amendment. No provision of this Guaranty or right of Company hereunder can be waived, nor can Guarantor be released from Guarantor's duties hereunder, except by a writing duly executed by Company. This Guaranty may not be modified, amended, revised, revoked, terminated, changed, or varied in any way whatsoever except by the express terms of a writing duly executed by Company.

13. Successors and Assigns. This Guaranty shall inure to the benefit of and bind the successors and assigns of Company and Guarantor.

14. Governing Law. This Guaranty shall be governed by and construed in accordance with the law of the State of New York without regard to the principles of conflicts of law thereof (other than Section 5-1401 of the New York General Obligations Law).

15. Notices. All notices, requests, claims, demands, and other communications hereunder shall be in writing and shall be given (and shall be deemed to have been duly given upon receipt) by delivery in the manner contemplated by the PPA, addressed as follows:

(a) if to Company: as provided in the PPA



## EXHIBIT I

### AGC PROTOCOLS; DATA COLLECTION; TECHNICAL SPECIFICATIONS

#### AGC

##### 1. AGC Communications between Company and Seller

Company will receive and send AGC Set-Point and related data over an analog or digital line. The data points covered under this PPA, as described below, may overlap data requirements for the Transmission Authority or Company's applicable forecasting group.

##### 2. AGC Data Points to be sent from Seller to Company via SCADA

The following data points will be transmitted via SCADA from Seller to Company and represent Facility level data:

<u>Description</u>	<u>Units</u>
AGC Set-Point (echo)	MW
Power demand	MW
Actual power	MW
Park Potential	MW
Actual reactive power	Mvars
Average Voltage	kV
Number of turbines online and running	Integer
AGC Status	Remote/Local

##### 3. Response times and limitations of Facility in regards to AGC

The following protocols outline the expectations for responding to the AGC Set-Point. Except in the case of the Frequency of Changes, these protocols will be generally bound by the manufacturers' specifications for the equipment that Seller has chosen for the Facility.

a. Allowable Variances in Excess of AGC Set-Point. Once the Facility has reached the AGC Set-Point, there may be variances in excess of such set-point up to 2% on average as measured during a 10-minute period. This is due to changing wind conditions vs. the manufacturer's specifications for responding to those new conditions.

b. Frequency of Changes. Company may send a new AGC Set-Point to the Facility as frequently as the Wind Turbine manufacturer specifications allow.



c. Range of AGC Set-Point. The range of set point values can be between 0% and 100% of Park Potential.

#### **4. Backup Communications**

In the event of an AGC failure, Company and Seller shall communicate via telephone in order to correct the failure.

### **DATA COLLECTION**

#### **1. Data**

At least two months prior to the Commercial Operation Date, Seller will deliver to Company a report showing (i) manufacturer, model, and year of all Wind Turbines and meteorological instrumentation and (ii) the latitude, longitude and hub height at every Wind Turbine and meteorological tower.

Beginning upon COD, Seller shall transmit and provide to Company the real-time data set forth below, refreshed in approximately four-ten (4-10) second intervals with regard to its generation of Renewable Energy at the Facility:

a. Five data points from each Wind Turbine:

1. Turbine generation (kW)
2. Wind Speed (meters per second - mps)
3. Turbine Availability
4. A calculation of Wind Direction (in degrees relative to true north)
5. Temperature (Celsius)

b. Four data points from each Meteorological Tower:

1. Wind Speed\*\* (mps)
2. Wind Direction\*\* (degrees relative to true north)
3. Temperature (Celsius)
4. Pressure (mb)

\*\* = at all metered heights.

c. In addition to the other requirements for data collection, Seller shall install, maintain and operate industry approved remote sensing technologies. The data stream from such sensing technologies to the Company's PI System must be reliable during periods of transmission-related curtailments and must include battery back-up at the meteorological tower and a local source of electricity to power the PI System and interconnectivity between the Facility and Company during transmission outages.

d. Seller shall provide a map and key for each Wind Turbine sufficient to allow Company to correlate the data received through the PI System to each individual Wind Turbine.

## 2. Forecasting Requirements

a. The forecast shall be posted by 5 am every day and shall be applicable through the end of the next day. For example, at 5 am on Monday, an availability forecast is required for Tuesday (midnight to midnight). On Tuesday, the forecast for Wednesday, Wednesday for Thursday, and so on. The forecast shall be submitted through an availability forecast system as specified by Company to Seller. Prior to the Commercial Operation Date, Company shall provide Seller with information necessary for Seller to access the chosen availability forecast system.

b. If any events or circumstances reduce the forecasted availability of the Facility by 5 MW or more, such reduction shall be (1) communicated to the real-time operator via telephone with (2) immediate update to the availability forecast in the availability forecast system. For example:

i. A disturbance at a 100.5 MW (67 x 1.5 MW wind turbines) wind plant causes 26 wind turbines (39 MW) to become unavailable. Only two turbines were planned to be down for maintenance (3 MW). The expected reduction in the available capacity is 39 MW; exceeding the 5 MW requirement. A phone call to real-time operations with immediate update of the availability forecast is required. At the time of the outage, the estimated expected duration was thought to be six hours. Three hours into the outage, it became known that the 26 turbines would be available in an hour. A phone call notifying real-time of the change in availability is required with a coincident update in the availability forecast system.

ii. A disturbance at a 10 MW (8 x 1.25 MW turbines) wind plant forces 4 turbines (5 MW) off-line. Because the disturbance equals 5 MW, a phone call to real-time operations with immediate update of the availability forecast is required. If the disturbance had only affected 3 turbines (3.75MW), then no immediate action would be necessary.

iii. A 20 MW (20 x 1 MW turbines) wind plant is off-line for transmission maintenance. The maintenance work is completed 2 hours ahead of the projected completion. Because the change is greater than 10 MW, prior to coming on-line, a phone call is required coincident with an update to the availability forecast system to indicate the new availability.

## **SURFACE WEATHER SYSTEM TECHNICAL SPECIFICATIONS**

The Surface Weather System shall satisfy the following technical specifications, all at Seller's cost:

### Vaisala Hydromet System AWS301 (Quantity: 1)

- Data Collection and Processing System (DCP)
- AWS base unit w/ QML201C logger and BOX652 enclosure for DCP with Installation Frame and Radiation Shield

- Basic 24VDC main power supply
- Extra 24VDC main power supply
- Interface for 2x12V/26Ah Internal Batteries
- BAR0-1QML press. sensor Class A calibration
- PWD22 heated 3.85m cable + mounting
- QMD202 display and keypad inside enclosure
- Standard AWS310 configuration for data collection unit with non-metric (US) units
- Wall/H Frame installation kit
- Rubber enclosure flanges Option
- TERMBOX-1212 option
- MCC301 Observation Software (Standard)
- RS-232 Maintenance Cable for DCP
- Removable CF Card 2 GB for DCP with Industrial Temperature Range (2 pcs)
- RS-485 (2-w) Interface with DCP with Connector, Wiring and Surge Protector Using COM 1
- DSI486 Dual RS-485 Module for DCP (2 x RS-485 (2-w) + 1 x SDI-12) DSI486 Dual RS-485 Module for DCP (2 x RS-485 (2-w) + 1 x SDI-12)
- Sensor Interface for DCP with Connector and Wiring to one (1) HMP155 Air Temperature and Relative Humidity Sensor, Heated RH, via RS-485 (2-w) using mod 2 DSI486 port 2
- Sensor Interface for DCP Surge Protection, Connectors and Wiring to one (1) WMT702 Ultrasonic Wind Sensor (Heated) via RS-485 (2-w). ADC40V60 req. using mod 1 DSI486 port 2
- Sensor Interface for DCP Surge Protection, Connectors and Wiring to one (1) WMT702 Ultrasonic Wind Sensor (Heated) via RS-485 (2-w). ADC40V60 req. using mod 2 DSI486 port 2

#### Backup Batteries (Quantity: 1)

- Battery 12V 26Ah

#### LCD Display & Keyboard Unit (Quantity: 1)

- Display/Keyboard for MAWS Enclosure Door

#### Hub Height Level Sensors/ 1 RHAT & 2 WIND - Air Temp, RH and Dew Point

- 1 x HMP155 Humidity and Temperature Probe, Heated RH (separate T and RH via RS485)
- 2 x WMT702 transd.+arms heat 10m cable + mast mount
- 1 x Radiation Shield for Humidity and Temperature Probe with Mounting Kit (installed on pole mast 60-100 mm)
- Cable, Extension M112 8N Female to Male, 3M (8-pin F-M connectors)

- Cable to connect sensor to WSP150, cut to length, plus connection from WSP150 to Termination Box
- Surge Protector — For Data and Power Wiring
- 2 x WMT702 transducers+ arms heated 10m cable + mast mount
  - Stainless Steel Enclosure
  - Heated transducers and arms
  - RS-485/RS-422/RS-232
  - Metric Setup
  - No Power Supply or Cable
  - No Mounting Adaptor
  - Basic Configuration Work
  - Manual
- Mounting Adaptor 30 mm
- RS-485 and Power Cable for MAWS/WMT702, 10M Cable to connect sensor to WSP150, cut to length, plus connection from WSP150 to Termination Box
- Surge Protector — For Data and Power Wiring
- 8' Retractable Boom w/Sensor Mount (Quantity: 2)
- 12 pair data cable, 22 gauge, open leads, Hub Height
- Termination Box with Mounting Kit (Hub Height), mounted at Hub Height Level
- 5 Conductor Power Cables, 16 gauge, open leads, Hub Height
- OPTIONAL Ice Condition Monitoring : PWD22 heated 3.85m cable + mounting

#### Extended Warranty

- Extended Warranty for up to four (4) years

Additionally, the installation of the Vaisala Surface Weather System shall require the following services: Configuration Work, Site Survey, Instrument Installation Day on Site-Vaisala, and Project Engineering/Management Work.

#### Reactive Power

[The Facility shall meet FERC Order Number 827 for Reactive Power Requirements for Non-Synchronous Generation].

\* \* \* \* \*

**EXHIBIT J**

**ENERGY PAYMENT RATE**

*This entire Exhibit shall be deemed Confidential Information subject to Section 20.18.*

Commercial Operation Year	Energy Payment Rate (\$/MWh)	Commercial Operation Year	Energy Payment Rate (\$/MWh)
1	\$18.10	16	\$24.36
2	\$18.46	17	\$24.85
3	\$18.83	18	\$25.34
4	\$19.21	19	\$25.85
5	\$19.59	20	\$26.37
6	\$19.98	21	\$26.90
7	\$20.38	22	\$27.43
8	\$20.79	23	\$27.98
9	\$21.21	24	\$28.54
10	\$21.63	25	\$29.11
11	\$22.06	26	\$29.69
12	\$22.51	27	\$30.29
13	\$22.96	28	\$30.89
14	\$23.41	29	\$31.51
15	\$23.88	30	\$32.14

## EXHIBIT K

### LENDER CONSENT PROVISIONS

In the event Seller seeks to enter into any Financing Document or collaterally assigns its rights hereunder to a Facility Lender as security, any related Lender Consent will contain provisions substantially as follows:

1. Seller and Company will neither modify nor terminate the PPA other than as provided herein, without the prior written consent of the Facility Lender.
2. The Facility Lender shall have the right, but no obligation, to do any act required to be performed by Seller under the PPA, and any such act performed by the Facility Lender shall be as effective to prevent or cure a default as if done by Seller itself.
3. If Company becomes entitled to terminate the PPA due to an uncured Event of Default by Seller, Company shall not terminate the PPA unless it has first given notice of such uncured Event of Default to the Facility Lender and has given the Facility Lender the same cure period afforded to Seller under Section 12.1 of the PPA, plus (a) an additional 30 Days beyond Seller's cure period to cure any monetary Event of Default, and (b) an additional 60 Days beyond Seller's cure period to cure any non-monetary Event of Default; *provided, however*, that if the Facility Lender requires possession of the Facility in order to cure the Event of Default, and if the Facility Lender diligently seeks possession, the Facility Lender's additional 30 Day or 60 Day cure period shall not begin until foreclosure is completed, a receiver is appointed, any bankruptcy stay is removed, or possession is otherwise obtained by or on behalf of the Facility Lender.
4. The Facility Lender shall provide to Company a copy of any notices of default and/or intent to exercise remedies delivered to Seller under the Financing Documents.
5. Neither the Facility Lender nor any other participant in the Facility Debt shall be obligated to perform or be liable for any obligation of Seller under the PPA until and unless any of them assumes the PPA through the exercise of the Facility Lender's rights and remedies.
6. Any party assuming the PPA through the exercise of the Facility Lender's rights and remedies shall remain subject to the terms of the PPA and shall (i) assume all of Seller's obligations under the PPA, (ii) cure any then-existing defaults capable of cure by performance or the payment of money damages, (iii) be, or contract with, a Qualified Operator; and (iv) enjoy (together with its parents and affiliates) an Investment Grade Credit Rating or other creditworthiness satisfactory to Company. In the event that the Facility Lender or its successor assumes the PPA in accordance with this paragraph 6, Company shall continue the PPA with the Facility Lender or its successor, as the case may be, substituted wholly in the place of Seller.
7. In the event that the Facility Lender or its successor assumes the PPA in accordance with paragraph 6, within 90 Days of any termination of the PPA as a result of rejection in any bankruptcy or insolvency proceeding, the Facility Lender (or its successor) and Company shall enter into a new power purchase agreement on the same terms and conditions as the PPA and for the period that would have been remaining under the PPA but for such termination.

## EXHIBIT L

### CURTAILMENT PROTOCOL

This Curtailment Protocol is applicable to the Wind Energy Purchase Agreement (“WEPA”) between Southwest Public Service Company and Bonita Wind Energy, LLC and addresses how the Company and Seller define, validate and administer the Non-Compensable Curtailment provisions of Section 8.3(B)(2)(i)-(viii) of the WEPA. Capitalized terms used herein but not otherwise defined shall have the meaning set forth in the WEPA. This Curtailment Protocol is not intended to amend, and will be construed in accordance with, the terms and conditions of the WEPA. In the event of a dispute between the Parties regarding the application of this Curtailment Protocol, such dispute will be resolved pursuant to Article XIII of the WEPA.

For the avoidance of doubt, curtailments of the Facility pursuant to the WEPA shall be implemented and administered with respect to each of the Phase I and Phase II components of the Facility separately. The determination of whether a curtailment is Compensable or Non-Compensable shall be based on which of the Phase I and Phase II components of the Facility(or both) has experienced a curtailment.

For purposes of making a Non-Compensable Curtailment Energy determination pursuant to the WEPA, the Parties agree to the following:

1. Section 8.3(B)(2)(a): *Emergency Condition*
  - a. Curtailment Information provided by the Transmission Authority will be used in determining whether a curtailment was the result of an Emergency.
2. Section 8.3(B)(2)(ii)(iii): *the restriction or reduction of firm or non-firm transmission service by the applicable transmission service provider*
  - a. Curtailments of the Company’s Firm Transmission Service for the Facility are Non-Compensable.
  - b. Curtailments of the Company’s transmission service for the Facility, other than the Company’s Firm Transmission Service, are Compensable.
  - c. Reliability instructions or directives from the Transmission Authority to reduce output from the Facility are:
    - i. Non-Compensable if Company has Firm Transmission Service for the Facility.
    - ii. Compensable if Company is utilizing transmission service for the Facility other than Firm Transmission Service.
3. Section 8.3(B)(2)(d): *maintenance outages of the transmission system*
  - a. Restrictions or reductions to the output of the Facility or Company’s transmission service arrangements under the circumstance(s) identified in

Section 8.3(B)(2)(iv) are Non-Compensable regardless of the level of the Company's transmission service. These restrictions or reductions are implemented by the Transmission Authority on an impact factor basis, without regard for the level of transmission service and are implemented when other actions available to the Transmission Authority are not sufficient to maintain acceptable flow limits on the transmission system. However, to the extent maintenance outages result in negative pricing rather than restrictions or reductions to the output of the Facility or Company's transmission arrangements, such outages are not covered by Section 8.3(B)(2) of the WEPA.

4. Parties shall use Curtailment Information in making a Non-Compensable Curtailment Energy determination. Company will include Curtailment Information sufficient to support any Non-Compensable Curtailment Energy determination in the billing parameter statement delivered to Seller.

"Curtailment Information" shall mean (i) Emergency Condition-related information, (ii) transmission service curtailment-related information, or (iii) maintenance outages or testing-related information, such Curtailment Information to be made available by the Transmission Authority to Company or Seller.



## EXHIBIT M

### MECHANICAL AVAILABILITY PERCENTAGE

For the avoidance of doubt, the Mechanical Availability Percentage for the Facility, including all related calculations, shall be determined on an aggregate and combined basis taking into account the availability of each of the Phase I and Phase II components of the Facility.

Section 1, Definitions.

Capitalized terms used in this Exhibit M and not defined herein shall have the meaning assigned in Exhibit A, Definitions of the PPA.

“Actual Availability Percentage” means, with respect to any given Availability Period, a percentage calculated as (a) 100, multiplied by (b) the result of (i) the sum of all Available Hours for all Wind Turbines that were part of the Facility at the beginning of such Availability Period, divided by (ii) the sum of all Period Hours in such Availability Period for all Wind Turbines that were part of the Facility at the beginning of the such Availability Period.

“Actual Facility Output” means the Energy (in MWh) generated by the Facility and delivered to the Point of Delivery.

“Aggregate Availability Damages Cap” has the meaning set forth in Section 2(3) of this Exhibit.

“Annual Availability Damages Cap” has the meaning set forth in Section 2(3) of this Exhibit.

“Annual Report” has the meaning set forth in Section 2(4) of this Exhibit.

“Availability Damages” has the meaning set forth in Section 2(2) of this Exhibit.

“Available Hours” means the portion of Period Hours, with respect to any given Wind Turbine, in which such Wind Turbine was electrically connected to the Interconnection Facilities. Available Hours are counted by a Wind Turbine’s programmable logic controller. Available Hours shall include all Excused Hours during which a Wind Turbine was not electrically connected to the Interconnection Facilities. Available Hours will also include the time during which a Wind Turbine is deliberately de-energized to optimize output from the Facility and the time required to return Wind Turbines to service after termination of any Seller Excuse Hours event. For the avoidance of doubt, Available Hours shall not include any scheduled maintenance hours.

“Availability Period” means each Calendar Year during the Term.

“Availability Termination” has the meaning set forth in Section 3(b) of this Exhibit.

“Cure” has the meaning set forth in Section 3(b) of this Exhibit.

“Expected Facility Output” means 1,029,563 MWhs per Calendar Year.

“Excused Hours” means during an Availability Period all (a) Seller Excuse Hours, and (b) other hours during which Company is unable for any reason (other than due to a breach by Seller of its obligations under this Agreement) to accept delivery of any Energy that the Facility is otherwise capable of producing.

“GMAP Default” has the meaning set forth in Section 2(3)(b) of this Exhibit.

“Guaranteed Mechanical Availability Percentage” has the meaning set forth in Section 2(1) of this Exhibit.

“Period Hours” means the sum total of hours for any given Availability Period.

“Unavailable Hours” means those hours a Wind Turbine is not available to operate because it is (a) in an emergency, stop, service mode or pause state (except to the extent that such emergency, stop, service mode or pause state also constitutes an Emergency); (b) in “run” status and faulted; (c) included in a scheduled maintenance outage; or (d) otherwise not operational or capable of delivering Energy to the Point of Delivery; *provided, however*, that notwithstanding the preceding, for purposes of determining Available Hours, a Wind Turbine shall be deemed to have been available to operate during hours in which it is not operating during Excused Hours.

“Unexcused Hours” means the positive difference, if any, calculated by subtracting Excused Hours from Unavailable Hours (e.g., 5,000 Unavailable Hours – 3,000 Excused Hours = 2,000 Unexcused Hours).

## Section 2, Availability Guarantee.

1. Availability Guarantee. Commencing on the first day of the second Commercial Operation Year and for the remainder of the Term, Seller guarantees that the Facility shall have achieved an Actual Availability Percentage during each Availability Period equal to or greater than 90% for the first 20 years and 85% for the remainder of the Term (a “Guaranteed Mechanical Availability Percentage”).

2. Availability Damages. For any Availability Period during which Seller fails to achieve the Guaranteed Mechanical Availability Percentage, Seller shall pay Company damages in the amount equal to (a) the Renewable Energy Payment Rate times, (b) the Guaranteed Mechanical Availability Percentage minus the Actual Availability Percentage for such Availability Period (both expressed as a decimal), multiplied by (c) the Expected Facility Output for such Availability Period (the “Availability Damages”), but in no event in excess of the Annual Availability Damages Cap and the Aggregate Availability Damages Cap. A sample calculation of the

Availability Damages that would be owed by Seller under certain stated assumptions is provided as Attachment 1 to this Exhibit M.

3. Damages Cap, GMAP Default.

(a) The total Availability Damages payable by Seller for failure to achieve the Guaranteed Mechanical Availability Percentage in any Availability Period shall be capped annually at \$989,000 ("Annual Availability Damages Cap") and in the aggregate at \$9,890,000 ("Aggregate Availability Damages Cap") over the Term of the PPA.

(b) If Seller (i) fails to achieve the Guaranteed Mechanical Availability Percentage in (A) three consecutive Availability Periods, or (B) four of six consecutive Availability Periods, or (ii) achieves an Actual Availability Percentage of less than 65% in any Availability Period (each a "GMAP Default"), then Company may terminate the PPA pursuant to Section 12.1(H)(10) of the PPA by providing written Notice to Seller within 30 days of delivery of the Annual Report reflecting the GMAP Default (an "Availability Termination"), *provided*, if the GMAP Default is related to (ii) above, then Seller may cure such failure by achieving the Guaranteed Mechanical Availability Percentage in the first Availability Period following the Availability Period in which the failure occurred (the "Cure"). If Seller fails to Cure, Company may terminate the PPA pursuant to an Availability Termination without any additional Cure Period.

4. Annual Report. At the beginning of the second Availability Period and at the beginning of each Availability Period thereafter, no later than the 30th Business Day of such Availability Period, Seller shall deliver to Company a calculation showing Seller's computation of the Actual Availability Percentage of the Facility for the previous Availability Period and the Availability Damages, if any, due to Company (the "Annual Report"). Such Annual Report shall include PI tags for the various turbine states and a key for the turbine states. Such Annual Report shall also include the total amount of Availability Damages paid to Company and shall provide notice that the Aggregate Availability Damages Cap has been reached, if applicable. If Availability Damages are due from Seller, Seller shall pay such damages no later than the 10th Business Day after providing the Annual Report; *provided*, if the Availability Damages are a negative number, the Availability Damages will be deemed to be zero dollars.

5. Disputes. Disputes as to any calculations under this Exhibit M shall be addressed as provided in Article 13 of the PPA.

**ATTACHMENT 1 TO EXHIBIT M  
EXAMPLE CALCULATION OF AVAILABILITY DAMAGES**

**I. Example of Availability Percentage Calculation (PASSED)**

The sample calculation set forth below is based on the following assumed facts:

During the Availability Period in question, 103 Wind Turbines had been completed and were part of the Facility, bringing the Facility Nameplate Capacity to 230 MW.

The Wind Turbines had the following operating characteristics:

	Hours	Wind Turbines Affected	Wind Turbine Hours
Period Hours ("PH")	8,760	103	902,280
Unavailable Hours ("FOH")			12,000
Excused Hours ("EH")			4,000
Unexcused Hours ("UH")			8,000

FOH includes all hours for which the Wind Turbines were unavailable.

EH includes, for example, Seller Excuse Hours.

Given these assumed facts, the Available Hours for the Wind Turbines during the Availability Period would be calculated as follows:

$$UH = FOH - EH$$

$$8,000 \text{ hours} = 12,000 \text{ hours} - 4,000 \text{ hours}$$

$$\text{Sum of Available Hours} = PH - UH$$

$$894,280 \text{ hours} = 902,280 \text{ hours} - 8,000 \text{ hours}$$

**Actual Facility Availability Percentage**

Given these assumed facts, the Actual Availability Percentage for the Facility during the Availability Period in question would be calculated as follows:

- (a) Available Hours: 894,280 hours
- (b) Sum of Period Hours: 902,280 hours
- (c) Actual Availability Percentage: (Sum of Available Hours/Sum of Period Hours) x 100

$$= (894,280/902,280 \text{ hours}) \times 100 = 99.1\%$$

## II. Example of Availability Percentage Calculation (FAILED)

The sample calculation set forth below is based on the following assumed facts:

During the Availability Period in question, 103 Wind Turbines had been completed and were part of the Facility, bringing the Final Facility Installed Capacity to 230 MW.

The Wind Turbines had the following operating characteristics:

	Hours	Wind Turbines Affected	Wind Turbine Hours
Period Hours ("PH")	8,760	103	902,280
Unavailable Hours ("FOH")			110,000
Excused Hours ("EH")			6,000
Unexcused Hours ("UH")			104,000

FOH includes all hours for which the Wind Turbines were unavailable.

EH includes, for example, Seller Excuse Hours.

Given these assumed facts, the Available Hours for the Wind Turbines during the Availability Period would be calculated as follows:

$$UH = FOH - EH$$

$$104,000 \text{ hours} = 110,000 \text{ hours} - 6,000 \text{ hours}$$

$$\text{Sum of Available Hours} = PH - UH$$

$$798,280 \text{ hours} = 902,280 \text{ hours} - 104,000 \text{ hours}$$

### Actual Facility Availability Percentage

Given these assumed facts, the Actual Availability Percentage for the Facility during the Availability Period in question would be calculated as follows:

- (a) Available Hours: 798,280 hours
- (b) Sum of Period Hours: 902,280 hours
- (c) Actual Availability Percentage: (Sum of Available Hours/Sum of Period Hours) x 100

$$= (798,280 \text{ hours}/902,280 \text{ hours}) \times 100 = 88.5\%$$

### **Example of Availability Damages**

Example of Availability Damages based on the following assumed facts:

- (a) Seller's Guaranteed Mechanical Percentage= 90%.
- (b) Seller's Actual Availability Percentage= 88.5%.
- (c) Renewable Energy Payment Rate = \$18.10
- (d) Expected Facility Output = 1,029,563 MWhs.

Given these assumed facts, Seller calculates the Availability Damages due to Company as follows:

Renewable Energy Payment Rate x ((Guaranteed Mechanical Availability Percentage – Actual Availability Percentage) x Expected Facility Output) = Availability Damages.

$$\$18.10 \times ((90\% - 88.5\%) \times 1,029,563) = \$279,526.35$$

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## **COAL SUPPLY AGREEMENT – HARRINGTON STATION**

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by and between

**TUCO INC.,**  
a Delaware corporation,  
**Seller**

and

**SOUTHWESTERN PUBLIC SERVICE COMPANY,**  
a New Mexico corporation and electric utility subsidiary of Xcel Energy, Inc., a Minnesota corporation,  
**Buyer**

**Effective January 1, 2018**

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## **COAL SUPPLY AGREEMENT – HARRINGTON STATION**

**THIS COAL SUPPLY AGREEMENT – HARRINGTON STATION** is made and entered into this 12th day of January, 2018, with an effective date of commencement of January 1, 2018 (**Effective Date**) by and between TUCO INC., a Delaware corporation, (**Seller**) and Southwestern Public Service Company, a New Mexico corporation (**Buyer**) (collectively, **Parties**) (**Agreement**).

### **RECITALS**

**WHEREAS** Buyer is a public utility engaged in the generation, transmission and sale of electric power and energy and requires a long-term supply of crushed, ready-to-burn coal for use as boiler fuel at its Harrington Station power plant near Amarillo, Texas (**Harrington Station**); and

**WHEREAS** Seller has access through the marketplace to the quantity and quality of uncommitted commercial coal desired by Buyer as set forth in this Agreement and can deliver such coal to Buyer for the operation of Buyer's Harrington Station; and

**WHEREAS** Seller desires to sell to Buyer, and Buyer desires to purchase from Seller, all coal required by Buyer for the Harrington Station;

**NOW, THEREFORE**, in consideration of the payments, premises, and mutual covenants and agreements contained in this Agreement, the Parties agree as follows:

1. **TERM OF AGREEMENT.** This Agreement shall be effective on the Effective Date and ending at the later of (i) midnight December 31, 2022, or (ii) until complete performance, including any makeup of deficiencies in delivery of coal to Buyer for which payment has been made under the terms of this Agreement which Seller may take under the terms of its appropriate coal purchase contracts (**Initial Term**). The Parties further agree this Agreement may, upon mutual written agreement, be extended for one five (5) year period, or such longer period which Buyer and Seller may agree, on the same terms, covenants, and conditions of this Agreement or as the Parties may otherwise agree (**Extended Term**). The word "Term" as used this Agreement shall refer to the Initial Term as extended by an Extended Term. Any request for extension of the Initial Term shall be made in writing at least 180 calendar days prior to the expiration of the Term.
2. **SALE AND PURCHASE.**
  - 2.1 **Volume.** During the Term of this Agreement, Seller will sell, and Buyer will purchase, subject to the terms of this Agreement, all coal necessary to meet Buyer's coal requirements for use at the Harrington Station for generation of electricity and stockpiling as Inventory.
  - 2.2 **Estimate of Annual Quantity.** On or before October 1, 2017, and by each subsequent October 1 during the Term of this Agreement, Buyer shall notify Seller of Buyer's reasonable estimate of the annual coal requirements to meet the Harrington Station's projected burn for the following year (**Annual Quantity**) (**Annual Notice**). In addition to Annual Quantity, the Annual Notice shall also include Buyer's reasonable estimates of the Annual Quantity for the one year and two years subsequent to the Annual Quantity

year (**Three Year Notice**). The Annual Quantity and the estimate for the Three Year Notice shall be stated each year on Exhibit A, which is incorporated by reference.

- 2.3 **Suppliers and Exhibit D.** The Parties acknowledge Seller has or will contract with certain suppliers under the agreements listed on Exhibit D for purchasing coal, coal handling and processing, coal transportation, railcars, railcar maintenance services, and related services enabling Seller to perform under this Agreement (**Supplier Agreements**). All current agreements listed on, and all subsequent agreements added to, Exhibit D during the Term of this Agreement are subject to Buyer's prior approval, which approval shall not be unreasonably withheld, delayed, or conditioned.

Seller shall acquire by separate agreement coal sufficient to satisfy Buyer's Annual Quantity requirements and such additional coal as may be necessary to provide a continuous supply of coal to meet the Harrington Station annual burn and for Inventory for the Harrington Station. Seller's coal purchases under this Section 2.3 shall generally comply with Buyer's approved coal purchasing practices and procedures at unrelated facilities as they may change from time to time. Procedures as of the Effective date call for contracting for coal on a three year plan, typically contracting for seventy-five percent (75%) of coal needs for year one, fifty percent (50%) for year two, and twenty-five percent (25%) for year three. Each of Seller's coal supply agreements with third party vendors shall be approved by Buyer and listed on Exhibit D to this Agreement.

The Parties acknowledge that Seller has negotiated with Savage Harrington Corporation (**Savage Harrington**) a coal handling service agreement (**Harrington CHSA**) under which Savage Harrington agrees to perform coal handling, crushing, processing, facilities and equipment maintenance and repair, railcar maintenance, storage, and transportation leasing, and final delivery of processed coal at the Harrington Station bunkers, all as provided in the Harrington CHSA, which Harrington CHSA will be effective contemporaneously with this Agreement and listed on Exhibit D.

In addition to the foregoing Supplier Agreements, Seller may enter into additional agreements for inclusion in Exhibit D as reasonable and necessary to enable Seller to provide for the continuous delivery of processed coal to the Harrington Station. Buyer also acknowledges Seller will incur interest and loan expenses incident to a revolving line of working capital credit (**RLOC**) that will be obtained by Seller to fund current obligations under each Exhibit D agreement, the costs of which shall be reimbursable to Seller as provided in the Margin Agreement and Calculation Example (**Margin Agreement**) attached as Exhibit C.

### 3. **CHANGES IN ANNUAL DELIVERY RATE.**

- 3.1 **Insufficient Annual Quantity.** Should (a) Seller determine at any time, for any reason other than Seller's default, it will be unable to make delivery of the Annual Quantity for a calendar year under the existing Supplier Agreements, as same may be increased or decreased under Section 2.2 above; or (b) should Buyer determine the Annual Quantity will be insufficient to meet Buyer's coal requirements for the Harrington Station, then, as soon as possible after such determination, Seller or Buyer, respectively, shall so notify each other of same and Seller shall use its best efforts to arrange for the purchase, receiving, transportation, unloading, handling, crushing, weighing and/or delivery of

coal sufficient to make such deliveries or to meet such requirements. Should Seller be unable to negotiate such contracts or should they not be approved by Buyer, Buyer shall be free to pursue for its own account the purchase of sufficient coal to meet such deliveries or to meet such requirements, and Seller shall be excused from and shall not be liable for damages to Buyer on account of the inability to make delivery of such Annual Quantity or increased need of coal by Buyer so long as same is not due to the default, gross negligence or willful act of Seller. Should additional coal purchase contracts be added to Exhibit D and should Buyer be unable to accept delivery of all coal Seller is obligated to purchase under all such purchase contracts during a calendar year, other than such failure resulting from one or more events of force majeure as defined in Section 10.1, or resulting from Seller's failure to perform, then Seller may, but is not obligated to, sell such coal as Buyer is unable to accept delivery of to third parties and credit the cost of same to Buyer under Section 7 but, subject to any such credit, Buyer shall bear all costs of such coal to Seller, including cost of disposal and transportation, and payment therefore shall be made in accordance with the provisions of Section 7; provided Seller has used reasonable efforts to mitigate any damages or uncredited costs to Buyer.

3.2 **Third Party Liability.** If Seller incurs a payment liability to a third party supplying coal or performing services in connection with coal under a contract listed on Exhibit D during any monthly billing period or periods when no coal is purchased under this Agreement other than as a result of default, gross negligence or willful act of Seller, Buyer shall reimburse Seller for any such payment in full on a current monthly basis.

3.3 **Inventory.** The term "Inventory" as used in this Agreement shall mean all coal stockpiled at Seller's facilities adjacent to the Harrington Station and in transit to the Harrington Station from and after the time the title to the purchased coal passes to Seller from suppliers. During the Term of this Agreement, subject to any constraints that Buyer may place on Seller under Sections 2.2 and 3.1 of this Agreement that impairs Seller's ability to maintain Inventory, Seller will employ commercially reasonable efforts to maintain Inventory between forty (40) to sixty (60) days of burn. Days of burn shall be calculated using a maximum daily burn rate of 13,919 tons per day, or such other maximum daily burn rate as Buyer may designate from time to time.

If the Inventory for the Harrington Station falls below fifty percent (50%) of the target inventory level, as may be adjusted from time to time, senior level managers of the Parties will meet and confer within five (5) business days of notice from either Party to determine whether there is a course of action to eliminate the deficient Inventory level. If the Parties (i) are unable to determine a course of action or are unable to agree on a course of action within five (5) business days; or (ii) determine there is a course of action, but such deficient Inventory level is not eliminated within thirty (30) calendar days or within such other mutually agreed upon time period, Buyer may exercise all march-in and associated rights under Section 10.6 below. The rights and remedies in this Section 3.3 shall be in addition to, and shall not be in lieu of or act as a limitation on, any other rights and remedies Buyer may have under this Agreement or otherwise.

3.4 **Equal Increments of Coal.** To the extent commercially practicable, Seller shall deliver the coal it is obligated to sell, and Buyer shall accept delivery of the coal it is obligated to

purchase, each year in approximately equal increments or such other delivery schedules to which the Parties may agree, in writing, from time to time.

4. **POINTS OF DELIVERY AND TITLE.** Delivery of coal to Buyer under this Agreement shall be in Buyer's coal bunkers at the Harrington Station or any other mutually agreeable location (**Point of Delivery**). Title to the coal shall pass from Seller to Buyer at the Point of Delivery, and Buyer shall thereafter be deemed to be in exclusive control and possession of the coal and fully responsible for it. Seller warrants it has the right to sell the coal sold and delivered to Buyer under this Agreement and will defend and hold Buyer harmless from any claims, liens, or encumbrances arising from a failure of Seller's right to sell the delivered coal.

5. **QUALITY, QUANTITY, SAMPLING, AND ANALYSIS OF COAL.**

5.1 **Quality.** The quality of coal delivered by Seller to Buyer shall be determined by analysis of samples taken as provided in Section 5.4 below.

All analyses performed on the coal samples shall utilize current versions of procedures approved by the American Society for Testing and Materials (**ASTM**). Unless specifically stated and mutually agreed to otherwise, procedures utilized to determine the quality of coal delivered by Seller to Buyer shall be as follows:

ASTM TEST	DESCRIPTION OF TESTING PARAMETER
D1857/ D1857M-16	Standard Test Method for Fusibility of Coal
D2013/ D2013M-12	Practice for Preparing Coal Samples for Analysis
D5865-13	Standard Test Method for Gross Calorific Value of Coal and Coke
D2234/ D2234M-16	Standard Practice for Collection of a Gross Sample
D3172-13	Practice for Proximate Analysis of Coal and Coke
D3302/ D3302M-15	Standard Test Method for Total Moisture in Coal
D3174-12	Standard Test Method for Ash in the Analysis Sample of Coal and Coke from Coal
D5016-16	Standard Test Method for Total Sulfur in Coal and Coke Combustion Residues Using a High Temperature Tube Furnace Combustion Method with Infrared Absorption
D3173	Standard Test for Moisture in the Analysis of Coal and Coke

5.2 **Material Impurities and Size.** The coal shall be substantially free of magnetic materials and other (non-coal) material impurities. Coal shall be sized to nominal three-quarters of an inch by zero ( $\frac{3}{4}$ " x 0).

5.3 **Sampling.** Each sample taken by Seller or Seller's representative shall be delivered to Buyer and Buyer shall divide such sample into three parts, one for use by Buyer and two to be retained by Buyer for not less than forty-five (45) calendar days under proper storage conditions. During such forty-five (45) calendar day period, upon Seller's request, Buyer shall send to Seller one such retained part and thereupon shall retain the third part for ninety (90) calendar days or until notified by Seller to release the same.

Buyer shall have the right to have a representative present at any and all times to observe such sampling.

- 5.4 **Coal Bunker Sampling.** As coal is delivered from Seller's coal piles or coal trains to the coal bunkers at the Harrington Station, it shall be sampled by Seller or Seller's representative using automatic mechanical samplers located on CV400 and CV410 conveyor belts utilized to transport coal from Seller's stockpile or Seller's trains to the Point of Delivery. All coal samples collected shall be sealed in air-tight sample bags, weighed, and properly labeled. Coal sample labels shall, at a minimum, provide the station name, station unit(s), the belt/sampler used to collect the sample, the date and time the sample was collected, and the weight of the sample. All such coal samples shall be forwarded to the Nichols Station laboratory for analysis to determine the quality of coal delivered to Buyer's coal bunkers. A copy of the procedures used to collect bunker coal samples and transfer these same samples to the Nichols Station laboratory can be provided to Buyer upon request.

In the event there is a dispute over the accuracy of any analysis by Buyer, the reserve or referee sample split shall be sent to an independent commercial testing laboratory mutually selected by Buyer and Seller and said commercial testing laboratory shall use methods approved by ASTM or other mutually acceptable procedures. The cost the analysis by the commercial testing laboratory shall be borne equally by Buyer and Seller. Seller shall have the right to have a representative present at any and all times to observe such sampling and analysis.

- 5.5 **Results of Analysis.** The results of the sampling and analysis by Buyer shall be accepted as the quality and characteristics of the coal delivered to the Harrington Station bunkers, and the same shall be used to verify the coal quality for coal delivered during each month from Seller's coal pile or coal trains; provided, however, that if either Party shall at any time question the correctness of any analysis made by Buyer, it shall have the right to have the referee or reserve split analyzed by an independent commercial testing laboratory mutually selected by Buyer and Seller and said laboratory shall use methods approved by ASTM or other mutually acceptable procedures. The analysis obtained by such laboratory shall be accepted as the quality and characteristics of the coal represented by the sample. The Party questioning the correctness of the original analysis shall pay the cost of such analysis if no adjustment to the price of coal is required as a result of such analysis. If the analysis causes a price adjustment, Buyer shall pay the cost of such analysis. If the coal quality of the coal delivered to the Harrington Station bunkers varies from the coal quality for such coal as determined pursuant to the Supplier Agreements, at Buyer's request, the Parties shall determine and resolve the cause of the discrepancy, and make necessary adjustments, if any, to Buyer's satisfaction.

- 5.6 **Coal Characteristics.** Seller represents the characteristics of the coal sold under this Agreement shall be within the ranges for typical coal as set forth in Exhibit B.

## 6. **WEIGHTS.**

- 6.1 **Scales.** The weights of coal sold by Seller and purchased hereunder by Buyer shall be determined on coal mill integrators at the Harrington Station. Such integrators shall be

properly inspected and calibrated by Buyer at regular intervals not more than six (6) months in duration. The weights determined on the mill integrators and reported monthly to Seller by Buyer shall be accepted as the quantity of coal delivered by Seller to Buyer at the Point of Delivery. The reported quantity of coal shall be used by Seller to prepare its invoices to Buyer and Buyer shall pay such invoices in accordance with Sections 7 and 8.

- 6.2 **Seller's Representative.** Seller shall have the right to have a representative present at any and all times to observe the weighing of the coal. If either Party should at any time question the accuracy of the scales, such Party may request a prompt test and adjustment of the scales. If the scales are determined to be accurate, the requesting Party shall pay all expenses of testing. If the scales are determined to be in error, Buyer shall pay all expenses of testing and adjusting of the scales and an appropriate adjustment shall be made in weight and related invoices and payments. Such adjustment shall be retroactive to the time of the error if such time can be factually ascertained. If the time of the error cannot be so ascertained, it will be deemed to be one-half the time between the last testing of such scales and the time the error in weighing was corrected.

## 7. **PRICE OF COAL.**

- 7.1 **Price Components.** Seller will bill Buyer monthly for the coal delivered to Buyer at the bunkers at Harrington Station during the period covered by such billing. For each billing period, billing will be at a rate stated in dollars per ton of coal delivered equal to the sum of cost elements in Sections 7.1(A), (B), (C), (D), and (E) below, without duplication to its respective and individual components, divided by the quantity of tons of coal delivered to the Harrington Station bunkers during the billing period, plus the Harrington Monthly Margin Amount provided for in Section 7.1(F) below and as calculated as provided in Exhibit C:

- A. **Coal Cost.** The cost of coal, including the base prices F.O.B. mine with any quality or other adjustments pursuant to the applicable Supplier Agreements.
- B. **Third Party Costs.** The cost charged to Seller by third parties to transport coal from the mine point of receipt to Seller's unloading facilities adjoining Buyer's Harrington Station.
- C. **Harrington CHSA Costs.** All amounts payable by Seller under the Harrington CHSA, or any successor or assignee of Savage Harrington permitted by the terms of the Harrington CHSA, including financial costs to Seller of carrying any such payments so made during any period when current monthly billing in full to Buyer is not authorized by the terms of this Agreement, or any amendment to this Agreement, such financial costs to be determined at an interest rate at the lesser of the Prime Rate, as such term is defined in Section 8.3 below, plus two percent (2%) or such interest rate to be agreed upon between Savage Harrington and Seller and approved by Buyer, calculated and compounded monthly from the due date to date of payment (**Interest**); provided, however, there shall be excluded from the foregoing any late charges in the nature of

interest incurred by Seller to Savage Harrington attributable to Seller's failure to apply payments actually made by Buyer on a timely basis.

Amounts payable by Seller under the Harrington CHSA include, without limitation, the cost incurred by or charged to Seller, for owning, leasing, storing, maintaining, or furnishing rail cars and coal processing equipment and for handling, storing, crushing, processing, weighing and delivering such coal.

D. **Section Intentionally Omitted.**

E. **Costs of Coal Loss.** One percent (1%) of the sum of components under Sections 7.1(A) and (B) above to provide reimbursement to Seller for coal losses and in lieu of any other charge to Buyer for Inventory adjustments, such percentage to be reviewed every two (2) years, commencing two (2) years from the end of Seller's 2018 Fiscal Year and in the last year of the Term, and adjusted, if necessary, to reflect actual coal losses incurred during the prior two (2) year period and to be used in computing coal losses and the percentage to be set under this Section 7.1(E) for the subsequent two (2) year period. Such coal losses shall be trued-up through Seller's Inventory account as provided in Section 7.4 below.

F. **Harrington Monthly Margin Amount.** In addition to any amounts due Seller under Sections 7.1(A) through 7.1(E) above, the Harrington Monthly Margin Amount provided for in the Margin Agreement attached as Exhibit C and incorporated by reference. The Harrington Monthly Margin Amount requires the calculation of the Total Monthly Margin Amount utilizing costs incurred by Seller with respect to this Agreement and the Coal Supply Agreement – Tolk Station between Seller and Buyer effective January 1, 2018 (Tolk Agreement), but the Harrington Monthly Margin Amount shall not be duplicative to any amount calculated and owed under the Tolk Agreement for coal delivered to the Tolk Station. Any reference to the Total Monthly Margin Amount in the Tolk Agreement is a reference to this same amount and calculation, but will be allocated under the Tolk Agreement based on the Tolk Percentage Share.

7.2 **Proration.** If any single payment or credit arises under Sections 7.1(A), (B), or (C), but does not relate solely to coal delivered to Buyer during the month the same arises, and such single payment or credit meets or exceeds Five Hundred Thousand Dollars (U.S. \$500,000), irrespective of whether such payments are made voluntarily or by agreed settlement of a disputed claim, or by determination or judgment of a regulatory body or court, the payment or credit will be prorated over twelve (12) months and paid in monthly installments which will include all costs of financing and Interest calculated as provided in Section 7.1(C).

7.3 **Accounting Procedure.** Seller shall use generally accepted accounting principles and per ton weight averaging determined at the close of each calendar month in determining the amount of the applicable cost components prescribed above for the determination of the price of coal sold under this Agreement. Any accounting procedure employed by Seller, however, may be changed by it so long as such changed accounting procedure is a generally accepted accounting practice.



7.4 **Accounting Adjustments.** During the Term of this Agreement, in consultation with Buyer's accounting professionals, Seller will make monthly accounting adjustments for Seller's fiscal year as necessary to reconcile, at Seller's fiscal year end, book inventories to the physical inventories of coal at the Harrington Station determined in accordance with the physical inventory survey at the Harrington Station. This reconciliation of Seller's book inventories to physical inventories will include Seller's book inventory per ton weighted average cost basis and tonnage and will be completed by a credit or payment adjustment to Buyer by Seller to be submitted on or about December 15 of each of Seller's fiscal years during the Term of this Agreement.

Commencing with Seller's 2019 fiscal year pursuant to the March 28, 2006 Lost Coal Letter Agreement between Seller and Buyer, a copy of which is attached as Exhibit E and incorporated by reference, the lost coal adjustment factors under this Agreement may be adjusted with agreement of the Parties as a positive percentage as provided in Section 7.1(E), to be adjusted on an as needed basis by agreement between the Parties, to minimize the payments or credits necessary to annually reconcile Seller's book inventories to the physical coal inventory at the Harrington Station at the end of each of Seller's fiscal years during the Term.

Commencing with Seller's 2019 fiscal year, an annual inventory true up for the Harrington Station will be conducted, to provide for a reconciliation, taking into consideration the lost coal factors set in accordance with the preceding paragraph, at Seller's fiscal year end, of Seller's book inventories to physical inventories determined by survey conducted at Seller's request by qualified third parties and certified to Buyer and Seller. This reconciliation will include Seller's cost basis and tonnage and will be completed by a credit or payment invoice to Buyer by Seller to be submitted on or before forty-five (45) calendar days after the end of each of the Seller's fiscal years during the Term of this Agreement.

In consultation with Buyer, Seller will conduct any additional surveys or GPS volumetric surveys each year as the Parties agree are appropriate to maintain an accurate account of the physical inventory for coal at the Harrington Station. The costs associated with the annual survey and any additional surveys as provided in this Agreement will be reimbursed to Seller through the cost reimbursement provisions of this Agreement.

It is the intent of the Parties, upon the expiration or earlier termination of this Agreement, to the extent there is a disparity between Seller's book inventory and the physical inventory for coal at the Harrington Station, Buyer will purchase and pay for coal in inventory at the Harrington Station in a quantity equal to Seller's book inventory, regardless of the physical inventory, such that Seller will be able to pay in full all debt which financed Seller's coal inventory in accordance with the terms of Seller's approved coal inventory financing agreements. On the payment for Seller's book inventory as provided herein, Buyer will own any coal in inventory without further compensation or obligation to Seller.

8. **BILLINGS AND PAYMENTS.**

8.1 **Billings.** Seller will bill Buyer by the eighth (8<sup>th</sup>) day of the calendar month following the close of the billing month, and Buyer will pay Seller in full by wire transfer of funds by the first business day after the fifteenth day of that calendar month. Buyer shall furnish Seller with the quantity of coal sold to Buyer under Section 7.1(A) in sufficient time to enable Seller to bill Buyer. All statements, billings, and payments shall be subject to correction of any errors until the expiration of two (2) years after the date of invoice of Seller.

8.2 **Examination.** Both Seller and Buyer shall have the right to examine, at reasonable times, books, records, laboratory tests, audits, and charts of the other to the extent necessary to verify the accuracy of any statement, test, chart, or computation made under or pursuant to any of the provisions of this Agreement. Buyer shall also have the right to examine books of Seller, but not more than once per calendar year. Any information or material obtained as a result of such examination shall not be disclosed by the Party receiving the information or material without the prior written consent of the other Party, which consent shall not be unreasonably withheld. Copies of audit information received or generated by Seller relating to the Harrington CHSA shall be provided to Buyer.

8.3 **Interest.** If either Buyer or Seller fails to pay the other an amount that is due and owing, interest shall accrue on the unpaid amount at the rate of one percent over the Prime Rate until paid. For the purposes of this Agreement, "Prime Rate" is defined as the annual rate of interest published and in effect according to The Wall Street Journal on the date the obligation to pay interest on such amount commences. If the Wall Street Journal ceases to publish a Prime Rate, the Parties shall meet in good faith to designate a substitute source of a Prime Rate.

9. **REGULATORY BODIES.** This Agreement shall be subject to all applicable orders, directives, rules and regulations of any governmental agency having jurisdiction over this Agreement, one or more of the Parties, or the matters covered by this Agreement.

10. **FORCE MAJEURE.**

10.1 **Definition.** The term "force majeure" as used herein shall mean acts of God, acts of the public enemy, blockades, insurrections, strikes, or differences with workmen, riots, disorders, civil disturbances, fires, explosions, storms, floods, landslides, washouts, labor and material shortages, boycotts, breakdowns of or damage to plants, equipment or facilities, interruptions or breakdowns of the power system serving either Buyer's or Seller's facilities, interruptions to transportation, default or inability or failure to supply by Seller's coal suppliers for reasons other than Seller's default in its contracts with such suppliers so long as such default is not due to any action or inaction of Buyer, embargoes, acts of military authorities, acts of local, state or federal agencies or regulatory bodies, court actions, arrests and restraints, the failure, inability, or default of Savage Harrington to unload, handle; crush and/or deliver into Buyer's bunkers the quantities of conforming coal required by the terms of the Coal Handling Service Agreement for reasons other than Seller's default thereunder or Seller's failure to furnish sufficient quantities of conforming coal to permit Savage Harrington's

performance, and, without limitation by enumeration, any other cause or causes not reasonably within the control and without the fault or negligence of the Party in default, whether of the kind above enumerated or not, which wholly or partly prevent (i) the supply of coal to Seller or (ii) the receiving, transporting, unloading, handling, crushing, weighing or delivering of the coal by Seller or (iii) the acceptance or the utilizing of the coal by Buyer.

In addition, if either Party is delayed, restricted or prohibited from installing, constructing or operating the equipment or facilities necessary for it to perform its part of this Agreement or is otherwise impaired from operating its property as a result of restrictions upon, delays, in receiving, or failures to receive, any permits, approvals, licenses or other governmental entitlements, such restrictions, delays or failures, regardless of the reason therefore, shall be deemed to be force majeure.

- 10.2 **Obligations Under Force Majeure.** If because of force majeure, either Party is unable to carry out any of its obligations under this Agreement, and if such Party shall promptly give to the other Party written notice of such force majeure, then the obligations of the Party giving such notice shall be suspended to the extent made necessary by such force majeure and during its continuance; provided, however, the Party giving such notice shall use its best efforts to eliminate such force majeure insofar as possible with a minimum of delay. Nothing herein contained shall cause the Party affected by the force majeure to submit to what it considers to be unreasonable conditions or restrictions or to submit to an unfavorable labor agreement, and it is agreed any settlement of labor strikes or differences with workmen shall be entirely within the sole discretion of the affected Party. Buyer shall pay for all coal to which Buyer has obtained title prior to the date of Buyer's notice of force majeure to Seller. Any deficiencies in deliveries or acceptance of coal under this Agreement, caused by force majeure, shall not be made up except by mutual consent. Force majeure shall not relieve any Party of the obligation to make any payments due under this Agreement.
- 10.3 **Suspension.** Either Party shall have the right to elect to suspend the sale or purchase of coal, as the case may be, for the period of time during which such force majeure may exist. Buyer, if it so elects, shall have the right during such period to purchase coal from other sources and Seller, if it so elects, shall have the right during such period to sell coal to others.
- 10.4 **Effect of Prohibition.** It is expressly understood any prohibition to take deliveries of, or to utilize the coal subject to this Agreement, which is imposed upon the Buyer by means of laws, regulations or orders of a court or administrative body, whether or not such event is beyond the control of Buyer, shall not for the purposes of this Agreement negate the agreement set forth in Sections 10.5 and 10.6(C) below.
- 10.5 **Steps to Avoid Restriction.** The Parties recognize, during the term of this Agreement, any treaty, legislative or regulatory bodies or the courts having competent jurisdiction over the subject matter of this Agreement and/or the Parties may change, enact, promulgate, issue, revise, and/or interpret treaties, laws or regulations, rules, orders, enforcement procedures or permits such as, but not limited to, those relating to air quality, global climate change, emissions or other environmental concerns (**Change in Law**), the effect of which may preclude, prevent, materially impede or materially restrict

the utilization of the coal subject to this Agreement in conformance with the Change in Law without material modification or substantially changing or altering the equipment in which it will be utilized, or Buyer's operations, or otherwise result in a material increase in the cost of operation of the Harrington Station, including, but not limited to, costs associated with controlling the amount of carbon, mercury, or other elements and/or substances emitted or discharged from the Harrington Station.

If any such laws, regulations or orders are imposed, Buyer shall immediately notify Seller. Buyer and Seller shall promptly meet to consider what steps can be taken in the handling and combustion of coal at Harrington Station to avoid such restriction; and, if such steps are available and feasible and will not result in unreasonable expense to Buyer, Buyer shall promptly take such steps. Such steps shall include the installation of equipment which is commercially available and which can be reasonably expected to avoid the effect of such restriction or which will result in compliance therewith. If no such steps are available, or if such steps are not feasible or will result in unreasonable expense to Buyer, Buyer shall so advise Seller.

Thereupon, Seller shall promptly consider with its suppliers what steps can be taken in the mining and preparation of coal at its suppliers' mines to avoid such restriction, and if such steps are available at a reasonable expense, such steps will be taken. If the price of coal to Seller is increased to compensate Seller's supplier for any additional reasonable capital and expense incurred by it in taking such steps, upon the approval of Buyer, the price of such coal sold to Buyer under this Agreement will be similarly increased so long as such price increase is reasonable. No expense or price increase contemplated by this Section 10.5 shall be deemed reasonable if it would result in a total cost to Buyer, in using Seller's coal, in excess of One Million Dollars (U.S. \$1,000,000) of capital costs in the aggregate, or in excess of Five Hundred Thousand Dollars (U.S. \$500,000) of annual operation and maintenance costs in the aggregate. If no remedial steps are available for Seller's suppliers, Buyer shall have the right upon one year's notice to Seller, to terminate this Agreement, subject to the obligation to pay amounts due, but unpaid on the date of termination, under Section 7.1 and Exhibit C.

Additionally, and notwithstanding the foregoing, to the extent Supplier Agreements listed on Exhibit D (as Exhibit D may be amended from time to time by the addition of new or modified agreements) contain rights or remedies for Seller to terminate or otherwise modify the obligations of Seller under the Supplier Agreements, including, without limitation, rights and remedies under Section 15 of Seller's coal purchase Supplier Agreements to terminate such agreements in the event of a Change in Law or otherwise, Buyer shall have the right to direct Seller, and if so directed, Seller agrees to exercise such rights and remedies under the Supplier Agreements if the conditions for such exercise are met, and Buyer shall have the right to terminate this Agreement or modify its obligations under this Agreement consistent with the rights and remedies exercised by Seller under the Supplier Agreements.

**10.6 Delivery Failure or Preclusion.**

- A. In the event Seller fails to continue or is unable or precluded from continuing deliveries of coal to Buyer as provided in this Agreement, whether or not such failure is due to force majeure, and the reason therefore would not preclude

Buyer from the operation of Seller's facilities or performance of the contracts required to continue deliveries to Buyer, in addition to any other rights and remedies Buyer may have under this Agreement, at law or in equity, Buyer shall have the right to act in behalf of and in the place and stead of Seller to take whatever steps or actions are necessary to perform that portion of the agreements listed on Exhibit D (including, if deemed necessary by Buyer, to demand and receive from Seller an assignment of such agreements), and the facilities operated under this Agreement, which Seller is not performing until such time as Seller is ready and able to resume the deliveries of coal.

- B. When Seller is ready and able to resume deliveries of coal, Buyer will reinstate Seller to possession of whatever facilities it had taken, will reassign any agreements which had been assigned to it and will account for its operation of Seller's facilities and its performance of Seller's contracts. Buyer will indemnify and hold Seller harmless against any and all claims and causes of action, of whatsoever nature and description, for damage to property, normal wear and tear excepted, or injury to or death of any person directly caused by Buyer or by a third party acting on Buyer's behalf occurring during or as a consequence of Buyer's takeover of said facilities or performance of said contracts.
- C. Except as otherwise provided in Section 10.6(D) below, in the event Buyer takes over the operation of any facilities or contracts pursuant to Section 10.6(A), it will pay Seller for coal delivered to Buyer in accordance with Sections 7 and 8, except for the Monthly Administrative/Capital Fee under the Exhibit C Margin Agreement, but Seller shall reimburse Buyer for the reasonable costs incurred by Buyer in taking over and operating Seller's facilities or performing Seller's contracts and Seller shall include such reimbursement in the price of coal provided for in Section 7.1(A).
- D. In the event (i) Buyer permanently takes over any facilities or contracts as a consequence of Seller's insolvency, bankruptcy, or abandonment of its obligations to Buyer or to its third party suppliers; or (ii) the inability of Seller to deliver coal to Buyer for six (6) consecutive months for any reason, this Agreement shall automatically terminate and Buyer shall permanently take over all agreements listed in Exhibit D, will purchase and pay for Seller's entire Inventory, as defined in Section 3.3 above, at Seller's cost as calculated in Section 7.1 as of the date of permanent takeover and will reimburse Seller in full for any charges incurred by Seller under Section 7.1 prior to the date of termination, but not yet paid by Buyer as of the date of termination, including, without limitation, all then-outstanding amounts due under the RLOC for payments made on Exhibit D agreements.
- E. In the event Buyer fails to accept deliveries of coal under this Agreement for a period of sixty (60) consecutive calendar days for any reason, including force majeure, and Seller is unwilling to accept the financial risk involved in Buyer's extended failure to accept deliveries of coal under this Agreement, then Seller shall have the right, and without prejudice to any other right of Seller, to demand Buyer assume, and thereupon this Agreement shall terminate and Buyer will (i) assume Seller's obligations under the agreements listed in

Exhibit D; and (ii) purchase and pay for Seller's entire Inventory, as defined in Section 3.3 above, at Seller's cost as calculated in Section 7.1 as of the date of permanent takeover; (iii) reimburse Seller in full for any charges incurred by Seller under Section 7.1 prior to the date of termination, but not yet paid by Buyer as of the date of termination, including, without limitation, all then-outstanding amounts due under the RLOC; and (iv) reimburse Seller for reasonable out of pocket costs, including reasonable attorney fees, incurred in implementing this Section 10.6(E), subject to the terms and conditions provided in the Margin Amendment Agreements attached as Exhibits 1 and 3 to Exhibit C.

10.7 **Early Termination.** In addition to the early termination provisions of Sections 10.6(D) and (E), Buyer and Seller reserve the right to terminate this Agreement on at least one (1) year's written notice to the other. On the date that is one (1) year from the date of such notice, or if a date is set forth in the notice for termination that is more than one (1) year from the date of such notice, then on the date set forth in such notice, this Agreement shall terminate and Buyer will (i) assume Seller's obligations under the agreements listed in Exhibit D; (ii) purchase and pay for Seller's entire Inventory, as defined in Section 3.3 above, at Seller's cost as calculated in Section 7.1 as of the date of permanent takeover; (iii) reimburse Seller in full for any charges incurred by Seller under Section 7.1 prior to the date of termination, but not yet paid by Buyer as of the date of termination, including, without limitation, all then-outstanding amounts due under the RLOC for payments made on Exhibit D agreements; (iv) if Seller is not the party giving notice of early termination, reimburse Seller for reasonable out of pocket costs, including reasonable attorney fees incurred in implementing this Section 10.7, subject to the terms and conditions provided in the Margin Amendment Agreements attached as Exhibits 1 and 3 to Exhibit C; and (v) if Seller is not the party giving notice of early termination, pay to Seller an amount equal to the sum of one month of Seller's then current monthly Administrative/Capital Fees and Operating Expenses multiplied by two (2). After notice by either Party, during the period leading up to and on the date of termination, if Buyer instructs Seller in writing on how it wishes Seller to manage the contracts in Exhibit D in accordance with their terms during such period, including, without limitation, exercising any rights under such contracts to provide notice of termination, to terminate, to reduce coal deliveries and inventory, and to reduce rail transportation, Seller shall follow such instructions from Buyer.

## 11. **DEFAULT AND WAIVER.**

11.1 **Notice.** It is covenanted and agreed if either Party deems the other Party (**Defaulting Party**) has failed to perform any of the covenants or obligations imposed upon it under this Agreement, the Party asserting default shall deliver to the Defaulting Party written notice stating specifically the claimed default. The Defaulting Party shall have thirty (30) calendar days after receipt of the aforesaid notice in which to remedy or remove the claimed default, and if it fails to do so in such time, the other Party may pursue such remedies as may be available to it.

11.2 **March-In Rights.** As noted in Section 2.3 of this Agreement, Seller has entered into the Harrington CHSA under which Savage Harrington agrees to perform coal handling, crushing, processing, facilities and equipment maintenance and repair, railcar maintenance, storage, and transportation leasing, and final delivery of processed coal at

the Harrington Station bunkers, all as provided in the Harrington CHSA. To enable Seller to enter into the Harrington CHSA and in consideration of Seller's obligations assumed in the Harrington CHSA, Buyer and Seller agree as follows:

Under conditions precedent as set forth under Section 10.6 of this Agreement and the Harrington CHSA and Access Agreement attached as Exhibit N to the Harrington CHSA, SPS may during the Term come into possession of the Property, Facilities, and Railcars, as defined in the Harrington CHSA (**March-In**). In the event of a force majeure or other event giving rise to a March-In circumstance, Seller and Savage Harrington agree to provide immediate access to, and the use of, the Facilities and Railcars to SPS or SPS' designated contractor or cause the Railcars and Facilities, respectively, to be restored or leased to SPS or SPS' designated contractor for SPS to perform under the Harrington CHSA and the Harrington CHSA. In the event of a default by Savage Harrington or Seller under the Harrington CHSA, or Seller under the Harrington CHSA, SPS may, instead of Seller and in satisfaction of its March-In obligations to Seller and Savage Harrington, provide its own employees to perform all Coal handling functions including Operation and Maintenance of Railcars at any and all times Savage Harrington and/or Seller fails, to keep SPS' coal bunkers sufficiently filled to permit continuous operation of SPS' Harrington Station units. While SPS is providing its own employees to perform Coal handling and Railcar Operation and Maintenance services, SPS and Seller are released from Seller's obligation to make the Operating and Maintenance Costs payments to the extent of, but not in excess of, Operating and Maintenance Costs actually paid out by Seller which would otherwise have been payable to Savage Harrington under the Harrington CHSA. SPS shall withdraw its employees and Seller will resume the payment procedures under the Harrington CHSA at such time as Savage Harrington and/or Seller have the capability to meet the requirements of Section 3 of the Harrington CHSA.

- 11.3 **No Waiver.** No waiver by either Party of any one or more default by the other in the performance of any provision of this Agreement shall operate or be construed as a waiver of any future default or defaults, whether of a like or of a different character.
- 11.4 **General Rights.** In the event of an uncured default by either Party, in addition to all remedies provided under this Agreement, the non-defaulting Party shall have all rights and remedies at law or in equity in any litigation or arbitration initiated under this Agreement.

12. **DISPUTE RESOLUTION THROUGH BINDING ARBITRATION.**

- 12.1 **Informal Dispute Resolution.** If any dispute arises between Buyer and Seller under this Agreement, the aggrieved Party will promptly notify the other Party, in writing, of its intent to invoke this dispute resolution procedure. The Parties will meet as soon as practicable in good faith to attempt to resolve such dispute. If the Parties fail to resolve the dispute within thirty (30) business days after the delivery of such written notice, then within five (5) business days thereafter, Seller will nominate two (2) senior level managers and Buyer will nominate two (2) senior level managers to meet at a mutually agreed upon location in the Denver metropolitan area, or a location as otherwise agreed, to attempt, in good faith, to resolve the dispute. If the Parties are unable to resolve the dispute to their mutual satisfaction within ten (10) business days after such nomination, the Parties are free to pursue relief under Section 12.2 of this Agreement.

Notice and cure periods provided in Section 11.1 shall run concurrently with the time periods set forth in this Section 12.1, unless the Parties otherwise agree.

- 12.2 **Arbitration.** Any and all disputes, claims, or controversies between the Parties, including any assignees of the Parties, arising out of or relating to this Agreement that are not resolved by their mutual agreement shall be submitted to binding arbitration in the State of Texas before the American Arbitration Association (AAA) under the AAA's commercial arbitration rules then in effect, subject to the provisions of this Section 12.2, except and excluding matters involving a dispute claim or controversy by Buyer or Seller for specific performance, in which case all claims at law or in equity may be filed in a Texas state or federal court having jurisdiction over the dispute, in the Buyer's or Seller's sole discretion as the case may be. The Party calling for arbitration (**Initiating Party**) shall give written notice to the other Party setting forth: (a) a statement of the issue(s) to be arbitrated; (b) a statement of the claim showing that the Initiating Party is entitled to relief; and (c) a statement of the relief to which the Initiating Party claims to be entitled. Within thirty (30) calendar days from the receipt of such notice, the other Party (**Receiving Party**) may submit its written response and give notice in the same manner required above of additional issues to be arbitrated. The Initiating Party shall have twenty (20) calendar days from receipt of said response to respond to any issues submitted for arbitration by the Receiving Party.

Within sixty (60) calendar days of the date of the Initiating Party's written notice requesting arbitration, the Parties shall agree upon a competent and impartial person to act as the arbitrator. In the event the Parties cannot agree on the arbitrator, the arbitrator shall be selected pursuant to the rules of the American Arbitration Association (AAA) and the selection shall be binding and non-appealable.

The Parties will participate in the arbitration in good faith and shall share in its costs in accordance with this Agreement. The Parties shall share equally in the costs of the arbitrator and pay their own attorneys' fees and costs, subject to any attorneys' fees and costs awarded by the arbitrator. The provisions of this Section 12.2 may be enforced by any court of competent jurisdiction, and the Party seeking enforcement shall be entitled to an award of all costs, fees and expenses, including reasonable attorneys' fees, to be paid by the Party against whom enforcement is ordered. The arbitrator shall not award any special, indirect, incidental, consequential, punitive or exemplary damages against either Party. Judgment upon the award rendered by the arbitrator may be entered in any court having competent jurisdiction. Upon the conclusion of any arbitration proceedings under this Agreement, the arbitrator shall render findings of fact and conclusions of law and a final written arbitration award setting forth the basis and reasons for any decision reached (**Final Award**) within thirty (30) calendar days of the conclusion of the arbitration and shall deliver such documents to the Parties, together with a signed copy of the Final Award. Subject to the provisions of this Agreement, the Final Award shall constitute a conclusive determination of all issues in question, binding upon the Parties, and shall include an affirmative statement to such effect. The arbitrator chosen in accordance with these provisions shall not have the power to alter, amend, or otherwise affect the terms of these arbitration provisions or any of the other provisions of this Agreement. Except as specifically otherwise provided in this Agreement, arbitration conducted in accordance with this Agreement shall be the sole and exclusive means of seeking redress of the Parties.



13. **NOTICES.** All notices, statements, demands, requirements, or other communications and documents (**Communications**) required or permitted to be given, served, or delivered by or to either Party or any intended recipient under this Agreement shall be in writing and shall be either delivered by hand, sent by a nationally recognized overnight courier service, or to such other address as either Party may from time to time have notified the other Party as being its address for purposes of this Agreement to the exclusion of all previously applicable addresses. Communications shall be deemed to have been given, served, or delivered upon delivery or, if delivery is refused, upon first attempted delivery, between 9 a.m. and 5 p.m. in the recipient's time zone. The addresses of the Parties are as follows:

**If intended for Seller:** TUCO INC.  
*Attention: Vice President*  
6900 I-40 West, Suite 240  
Amarillo, Texas 79106

and

TUCO INC.  
*Attention: Vice President*  
5251 DTC Parkway, Suite 800  
Greenwood Village, Colorado 80111-2737

**With a copy, which copy does not constitute notice, to:**

John J. Coates, Esq.  
DILL DILL CARR STONBRAKER & HUTCHINGS, P.C.  
455 Sherman Street, Suite 300  
Denver, Colorado 80203

or such other persons or such other address as Seller shall have designated by due notice to Buyer.

**If intended for Buyer:** Xcel Energy  
Director, Fuel Supply Operations  
1800 Larimer Street, Suite 1000  
Denver, Colorado 80202

**With a copy, which copy does not constitute notice, to:**

Xcel Energy  
Assistant General Counsel Energy Supply  
1800 Larimer Street, Suite 1100  
Denver, Colorado 80202

or such other persons or such other address as Buyer shall have designated by due notice to Seller.

Rejection or refusal to accept delivery or the inability to deliver because of changed address of which no notice was given shall be deemed to be receipt of notice as of the date such notice was deposited in the mail or delivered to the courier. In the event of a change of address by

Buyer or Seller, Buyer and Seller shall also give notice of such change in address to the other Party.

14. **MISCELLANEOUS.**

14.1 **Limitation on Damages.** Under no circumstances shall either Party be liable to the other Party for consequential, indirect, or exemplary damages.

14.2 **Assignment.** Each Party shall have the right to assign its rights and delegate its obligations under this Agreement, in whole or in part, to any third party at any time during the Term upon receiving the prior written consent of the other Party, such consent not to be unreasonably conditioned, withheld, or delayed; provided, however, any such assignment shall be expressly made subject to all the terms, conditions, and covenants of this Agreement. For avoidance of doubt, a Party's consent to a proposed assignment shall not be deemed to have been unreasonably withheld if the proposed assignee is not technically and financially capable of performing the assigning Party's obligations under this Agreement, including, without limitation, indemnification obligations. Notwithstanding the foregoing, Buyer consents to Seller's execution of a collateral assignment of Seller's rights under this Agreement to Seller's RLOC lenders, which assignment shall be subordinate in all respects to all rights and obligations of Buyer under this Agreement.

14.3 **Taxes and Assessments.** Subject to the terms of this Agreement, the Seller shall pay or cause to be paid all taxes and assessments imposed on Seller with respect to the coal sold under this Agreement prior to its delivery to Buyer, and Buyer shall pay or cause to be paid all taxes and assessments imposed upon Buyer with respect to the coal received by it under this Agreement after its receipt by Buyer. Neither Party shall be responsible or liable for any taxes or other statutory charges levied or assessed against any of the facilities of the other Party used for the purpose of carrying out the provisions of this Agreement.

14.4 **Controlling Law.** The terms and conditions of this Agreement and subsequent performance of this Agreement shall be construed and controlled by the laws of the State of Texas. The Parties agree any claim or suit arising out of this Agreement and not subject to arbitration under Section 12.2, shall be brought in a state or federal court in Texas having jurisdiction over the claims at issue.

14.5 **Waiver of Jury Trial.** The Parties hereby knowingly, voluntarily, and intentionally waive the right either may have to a trial by jury in respect of any litigation that is not subject to arbitration under Section 12.2, or arising out of, under, or in connection with this Agreement and any document executed in connection with this Agreement, or any course of conduct, course of dealing, statements, whether oral or written, or actions of either Party. This provision is a material inducement for the Parties to enter into this transaction.

14.6 **Entire Agreement.** This Agreement constitutes the entire agreement of the Parties and no amendment or modification of this Agreement shall be valid or binding unless reduced to writing and executed by the Parties or their permitted assigns.

- 14.7 **Headings.** The topical headings used herein are inserted for convenience and reference only and shall not be construed as having any substantive significance or meaning whatsoever or as indicating all of the provisions of this Agreement relating to any particular topic are to be found in any particular section. The headings or captions of this Agreement in no way define, describe, extend or limit the scope, meaning or intent of this Agreement.
- 14.8 **Attorneys' Fees; Litigation.** Notwithstanding any provisions in this Agreement to the contrary, in the event of litigation regarding this Agreement, the prevailing Party will be entitled to recover their reasonable attorneys' fees and costs.
- 14.9 **Successors and Assigns.** This Agreement will bind and inure to the benefit of the respective successors and permitted assigns of the Parties.
- 14.10 **Survival.** The Parties' representations and warranties and provisions of this Agreement that contemplate performance after expiration or termination of this Agreement shall survive the expiration or termination of this Agreement.
- 14.11 **Counterparts.** This Agreement may be executed in any number of original counterparts, all of which evidence only one agreement, and only one of which need be produced for any purpose. This Agreement may be executed and delivered by facsimile, portable document format (.pdf), or other electronic delivery, each of which will be as binding and effective as an original signature.
- 14.12 **Not Binding Until Execution.** The submission of this Agreement for examination does not constitute an offer by or to either Party. This Agreement will be effective and binding only after execution and delivery by the Parties.
- 14.13 **Modifications; Waivers.** No or other modifications or changes to this Agreement shall be effective or binding on either Party unless the same shall be in a writing executed by both Parties. No waiver by either Party of any one or more defaults by the other in the performance of this Agreement shall operate or be construed as a waiver of any future default or defaults, whether of a like or different nature.
- 14.14 **Time Periods.** Time is of the essence under this Agreement. In the event the last day permitted for the performance of any act required or permitted under this Agreement falls on a day other than a Business Day, the time for such performance will be extended to the next succeeding Business Day. Each time period under this Agreement will exclude the first day and include the last day of such time period.
- 14.15 **Schedules.** All recitals, schedules, and exhibits referred to in this Agreement are incorporated in this Agreement by reference and will be deemed part of this Agreement for all purposes as if set forth at length in the body of the Agreement.
- 14.16 **Severability.** The invalidation or unenforceability in any particular circumstances of any of the provisions of this Agreement will in no way affect any of the other provisions of this Agreement, which will remain in full force and effect.

- 14.17 **No Joint Venture, Partnership, Agency, Etc.** This Agreement will not be construed as in any way establishing a partnership, joint venture, express or implied agency, or employer employee relationship between Buyer and Seller.
- 14.18 **No Third-Party Beneficiaries.** This Agreement does not create, and shall not be construed as creating, any rights enforceable by any person not a Party, or a successor or assign of a Party, to this Agreement.
- 14.19 **Further Assurances.** After this Agreement is fully signed, Seller and Buyer each will execute and deliver such additional documents, instruments, and assurances, and take such further actions as may be necessary to carry out the provisions of this Agreement or give effect, confirm, assure, or validate any of the transactions contemplated by this Agreement, whenever reasonably requested by the other Party.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the day and year first above written.

SELLER:

TUCO INC.,  
a Delaware corporation

By: Charles S. McNeil

Charles S. McNeil  
Its President

BUYER:

SOUTHWESTERN PUBLIC SERVICE COMPANY,  
a New Mexico corporation

By: Thomas A. Imbler

Thomas A. Imbler  
Vice President, Commercial Operations  
Xcel Energy Services Inc., a Delaware corporation,  
as Authorized Signatory for  
Southwestern Public Service Company

ANNUAL COAL QUANTITIES AND THREE YEAR ESTIMATE NOTICE

2018 BURR FORECAST (TONS)													
	January	February	March	April	May	June	July	August	September	October	November	December	Totals
Harrington 1	93,819	100,660	97,465	72,335	90,445	95,344	96,389	117,939	89,469	102,087	77,502	100,074	1,133,528
Harrington 2	109,660	81,881	97,291	99,177	83,136	95,689	106,339	105,168	78,358	112,665	83,501	95,035	1,147,900
Harrington 3	107,746	100,791	98,511	81,323	107,827	89,062	101,040	96,521	71,704	0	89,044	89,204	1,032,773
Tolk 1	78,840	21,439	19,018	78,263	80,108	143,166	161,111	161,937	154,570	75,382	82,989	78,840	1,135,663
Tolk 2	84,346	76,184	73,349	54,303	84,346	154,226	148,730	153,192	149,757	80,932	73,349	84,346	1,216,960
H & T Totals	474,411	380,955	385,634	385,401	445,862	577,487	613,609	634,757	543,858	370,966	406,385	447,499	5,666,824
Harr Totals	311,225	283,332	293,267	252,835	281,408	280,095	303,768	319,628	239,531	214,752	250,047	284,313	3,314,201
Tolk Totals	163,186	97,623	92,367	132,566	164,454	297,392	309,841	315,129	304,327	156,214	156,338	163,186	2,352,623
THREE YEAR ESTIMATE													
	2019	2020	2021	2019	2020	2021	2019	2020	2021	2019	2020	2021	Totals
Harrington 1	28,085	5,502	76,349	14,589	17,969	66,949	80,598	94,181	18,196	10,867	0	76,459	489,743
Harrington 2	87,496	97,827	73,131	38,617	53,000	79,840	78,460	85,960	46,851	50,116	51,207	79,359	821,864
Harrington 3	104,728	86,296	79,325	93,591	73,115	82,309	91,982	82,942	77,652	87,251	77,562	82,976	1,019,728
Tolk 1	128,975	118,970	127,758	98,307	115,839	114,501	126,984	129,454	107,307	117,900	100,409	101,006	1,387,411
Tolk 2	124,391	118,866	111,385	107,073	123,920	104,407	124,292	127,182	102,661	124,189	98,941	108,739	1,376,045
H & T Totals	473,674	427,460	467,949	352,177	383,843	448,007	502,316	519,718	352,667	390,322	328,118	448,540	5,094,791
Harrington 1	82,546	87,075	80,412	21,767	28,102	78,447	96,400	92,881	45,169	42,983	22,268	80,212	758,262
Harrington 2	82,585	0	0	35,905	80,238	79,740	77,127	101,879	54,169	74,203	37,490	76,497	699,831
Harrington 3	76,857	76,574	84,124	88,173	57,119	92,848	90,739	93,946	91,115	86,316	84,953	80,815	1,003,577
Tolk 1	113,062	106,637	86,606	98,401	106,880	123,101	120,985	141,350	116,376	126,974	109,372	108,913	1,358,656
Tolk 2	113,708	103,457	102,522	51,830	8,432	114,464	115,811	130,771	110,587	125,020	104,103	110,557	1,191,264
H & T Totals	468,756	373,743	353,664	296,076	280,770	488,600	501,062	560,827	417,416	455,495	358,187	456,994	5,011,590
Harrington 1	81,075	68,575	81,485	18,653	28,375	86,971	99,111	107,893	58,905	92,215	34,746	82,227	840,230
Harrington 2	79,554	76,703	72,422	56,115	48,137	81,017	98,520	88,671	72,340	93,863	46,861	89,382	903,584
Harrington 3	74,978	75,884	69,107	85,930	81,509	85,402	87,519	77,066	53,015	6,972	73,503	76,103	846,986
Tolk 1	109,380	85,607	0	77,918	107,360	126,720	125,609	137,119	113,414	131,551	107,225	113,861	1,235,766
Tolk 2	106,006	96,056	99,985	82,874	102,664	130,399	125,872	143,339	114,726	129,552	109,186	113,496	1,354,536
H & T Totals	450,992	402,825	322,998	321,490	368,045	510,507	536,630	554,087	412,400	454,154	371,520	475,070	5,160,717

**EXHIBIT B**

**TYPICAL COAL QUALITY AND CHARACTERISTICS  
OF SOUTHERN POWDER RIVER BASIN "8800 BTU" COAL**

<b>PROXIMATE ANALYSIS-CALCULATED AS-RECEIVED BASIS</b>	<b>TYPICAL</b>	<b>MIN-MAX</b>
Moisture, %	26.70	24.1-27.9
Ash, %	4.90	3.6-6.8
Volatile Matter, %	31.10	28.4-34.7
Fixed Carbon, %	37.00	33.8-40.8
Btu/Lb.	8877	8500-9100
Sulfur, %	0.25	0.12-0.36
SO <sub>2</sub> Lb/MM Btu	0.55	0.29-0.81
<b>ULTIMATE ANALYSIS-CALCULATED AS-RECEIVED BASIS</b>	<b>TYPICAL</b>	<b>MIN-MAX</b>
Moisture, %	26.70	24.1-27.9
Ash, %	4.90	3.6-6.8
Hydrogen, %	3.50	3.1-4.0
Carbon, %	51.70	51-56
Nitrogen, %	0.70	0.5-1.0
Sulfur, %	0.25	0.12-0.36
Oxygen, % (By Difference)	12.20	10.6-14.3
<b>DRY, WHOLE COAL BASIS</b>	<b>TYPICAL</b>	<b>MIN-MAX</b>
Chlorine (ppm)	8.70	7-14
Mercury (ppm)	0.065	0.050-0.102
<b>MINERAL ANALYSIS OF ASH % IGNITED BASIS</b>	<b>TYPICAL</b>	<b>MIN-MAX</b>
Silicon Dioxide	34.70	36.1-45.2
Aluminum Oxide	17.60	16.1-19.5
Titanium Oxide	1.40	0.90-1.7
Ferric Oxide	6.10	3.3-9.2
Calcium Oxide	21.90	18.1-33.2
Magnesium Oxide	4.90	3.8-7.5
Potassium Oxide	0.50	0.3-0.6
Sodium Oxide	1.50	0.8-2.2
Sulfur Trioxide	9.40	4.2-13.6
Phosphorus Pentoxide	1.10	0.3-3.0
Manganese Oxide	0.04	0.6-1.3
Strontium Oxide	0.30	0.2-0.6
Barium Oxide	0.60	0.4-1.2
Undetermined		
<b>FUSION TEMPERATURE, DEGREES F - REDUCING</b>	<b>TYPICAL</b>	<b>MIN-MAX</b>
Initial Deformation	2153	1998-2362
H = W	2173	2011-2379
H = ½ W	2189	2020-2396
Fluid	2207	2033-2437
<b>FUSION TEMPERATURE, DEGREES F - OXIDIZING</b>	<b>TYPICAL</b>	<b>MIN-MAX</b>
Initial Deformation	2216	2076-2404
H = W	2233	2089-2417
H = ½ W	2246	2094-2442
Fluid	2267	2105-2497

**EXHIBIT B**

<b>HARDGROVE GRINDABILITY INDEX</b>	<b>TYPICAL</b>	<b>MIN-MAX</b>
	58	51-74
<b>WATER SOLUBLE ALKALIES - % AS DETERMINED</b>	<b>TYPICAL</b>	<b>MIN-MAX</b>
Potassium Oxide	0.004	0.003-0.010
Sodium Oxide	0.060	0.010-0.110
<b>EQUILIBRIUM MOISTURE - %</b>	<b>TYPICAL</b>	<b>MIN-MAX</b>
	25.73	23.6-26.8
<b>BASE: ACID RATIO</b>	<b>TYPICAL</b>	<b>MIN-MAX</b>
	0.66	0.3-1.2
<b>T250 - DEGREES F</b>	<b>TYPICAL</b>	<b>MIN-MAX</b>
	2245	2067-2459

## MARGIN AGREEMENT AND EXAMPLE CALCULATION

The Harrington Monthly Margin Amount referenced in Section 7.1(F) of this Agreement is calculated as follows: (Harrington Percentage Share x Total Monthly Margin Amount).

“Harrington Percentage Share” means a percentage equal to the quantity of tons of coal delivered to the Harrington Station bunkers during the month divided by the total quantity of tons of coal delivered to the Harrington Station bunkers and to the Tolk Station bunkers during the month.

“Total Monthly Margin Amount” means the sum of (i) the Working Capital Cost incurred by Seller in connection with this Agreement and the Tolk Agreement for that month (Margin Item A); (ii) Inventory interest charges to Seller with respect to this Agreement and the Tolk Agreement for that month (Margin Item B); (iii) the fixed monthly Administrative/Capital Fee of \$72,500 (Margin Item C); (iv) the Tax Adjustment, if any, for that month (Margin Item E); and (v) Operating Expenses of Seller; plus extraordinary expenses, if any, incurred from time to time under the December 14, 2010 Margin Amendment Agreement (Margin Amendment Agreement) attached as Exhibit 1 to this Exhibit C (Margin Item F). Margin Items D, G, H and I are no longer applicable. The methods for calculation and determination of Margin Items A, B, C, E, and F are set forth in Exhibits 1 and 3 of this Exhibit C. Each of the 2010, 1996, and 2001 Margin Amendment Agreements attached as Exhibits 1, 2, and 3 to this Exhibit C, respectively, are provided only as a demonstration of the approach and methodology the Parties intend to use in connection with the determination and calculation of the Harrington Monthly Margin Amount under this Agreement. Each of Exhibits 1, 2, and 3 to this Exhibit C and the April 30, 1979 Coal Supply Agreement or related agreements to which the Exhibits apply, are not incorporated into the terms of this Agreement, nor shall any such terms and conditions be a part of this Agreement. It is the intent of the Parties by the attachment of Exhibits 1, 2, and 3 to this Exhibit C to provide historical context for the method to be used for determining and calculating various items of the Harrington Monthly Margin Amount in this Exhibit C, to the extent each Margin Item is still applicable.

An example Margin Agreement calculation is set forth on the following pages:

***[REMAINDER OF PAGE INTENTIONALLY BLANK.]***



**EXHIBIT C**

**SAMPLE CALCULATION**

	<b>INVENTORY VALUATION</b>	<b>HARRINGTON</b>	<b>TOLK</b>
	First of month Inventory Valuation	\$16,341,875.15	\$30,071,036.31
	End of month Inventory Valuation	\$20,341,875.15	\$34,071,036.31
	Average Inventory Valuation	\$18,341,875.15	\$32,071,036.31
	Combined Plant Total Average Inventory Valuation	<b>\$50,412,911.46</b>	

	<b>HARRINGTON</b>	<b>TOLK</b>
Monthly Delivered Tons	148,585	132,613

<b>MARGIN COMPONENTS</b>		
		<b>Harrington / Tolk</b>
<b>1</b>	<b>Daily Operating Loan Financing Rate</b>	
	Operating Loan Facility Cap - effective 01.01.18 <i>[This operating loan facility cap is for informational purposes only. The margin is not calculated on these numbers.]</i>	\$85,000,000.00
	Total Operating Loan Interest for Billing Month	\$132,274.86
	Total Operating Loan Fees and Expenses for Billing Month	\$4,622.03
	Seller's Intangible at Closing <i>[intentionally left blank - N/A]</i>	
	Remaining Billing Months <i>[intentionally left blank - N/A]</i>	
<b>A</b>	<b>Incurred Working Capital Costs</b>	
	Operating Loan Interest, Fees, and Expenses	\$136,896.89
	Less Inventory Interest Charge	\$108,907.55
	Equals Incurred Working Capital Costs	\$27,989.34
<b>B</b>	<b>Inventory Interest Charge</b>	\$108,907.55
<b>C</b>	<b>Monthly Administrative/Capital Fee</b>	\$72,500.00
<b>D</b>	<b>Return on Unamortized Seller's Intangible for Billing Month</b> <i>[intentionally left blank - N/A]</i>	
<b>E</b>	<b>Tax Adjustment</b> <i>[if any, from time to time]</i>	
<b>F</b>	<b>Operating Expenses</b>	
	Operating Expenses as of 01.01.18	\$1,640,000.00
	Increase per Margin Amendment Agreement <i>[to be determined]</i> eff. 01.01.19	
	Operating Expenses for Monthly Margin Calculation [Operating Expenses for 2018/12]-Monthly Installment	\$136,666.67
<b>G</b>	<b>Seller's Actual Federal Corporate Income Tax Rate</b> <i>[intentionally left blank - N/A]</i>	
<b>H</b>	<b>Amortization of Seller's Intangible</b> <i>[intentionally left blank - N/A]</i>	
<b>I</b>	<b>Income Tax on Return on Unamortized Seller's Intangible</b> <i>[intentionally left blank - N/A]</i>	
<b>MARGIN CALCULATION</b>		
<b>A</b>	Incurred Working Capital Costs	\$27,989.34
<b>B</b>	Inventory Interest Charge	\$108,907.55
<b>C</b>	Administrative/Capital Fee	\$72,500.00
<b>E</b>	Tax Adjustment <i>[if any, from time to time]</i>	
<b>F</b>	Operating Expenses	\$136,666.67
	Extraordinary Expenses <i>[if any, from time to time]</i>	
	<b>Total Monthly Margin Amount</b>	<b>\$346,063.56</b>

**SAMPLE CALCULATION**

**Harrington Monthly Margin Amount Calculation**

Harrington Percentage Share equals Harrington Monthly Tons/(Tolk Monthly Tons + Harrington Monthly Tons) = 148,585/(148,585 + 132,613) = 52.84%

Total Monthly Margin Amount = \$346,063.56

Harrington Monthly Margin Amount = (Total Percentage Share x Total Monthly Margin Amount) = (.5284 x \$346,063.56) = \$182,859.99

	MONTHLY MARGIN CALCULATION	HARRINGTON	TOLK
	Percentage Share of Monthly Margin Amount	\$182,859.99	\$163,203.57

**EXHIBIT 1 TO EXHIBIT C**

**2010 MARGIN AMENDMENT AGREEMENT**



1800 Larimer St., Suite 1000  
Denver, CO. 80202

December 14, 2010

TUCO INC.  
Charles S. McNeil, President  
3300 S. Parker Road, Suite 310  
Aurora, Colorado 80014

TUCO INC.  
Attention: Vice President  
6900 I-40 West, Suite 240  
Amarillo, Texas 79106

**Re: Acceptance of TUCO Proposal with respect to Renegotiation of Margin**

Dear Charlie:

Southwestern Public Service Company ("SPS") and TUCO Inc. ("TUCO") entered into discussions in an attempt to renegotiate the Margin, as such term is defined in each of the following (collectively the "Margin Amendments"):

1. Margin Amendment to Coal Supply Agreement – Harrington between TUCO Inc. and Southwestern Public Service Company dated as of September 30, 1996, as amended by the 2001 Margin Amendment to Coal Supply Agreement (Harrington Station) dated as of September 18, 2001; and
2. Margin Amendment to Coal Supply Agreement – Tolk between TUCO Inc. and Southwestern Public Service Company dated as of September 30, 1996, as amended by the 2001 Margin Amendment to Coal Supply Agreement (Tolk Station) dated as of September 18, 2001.

Pursuant to a meeting on December 13, 2010 and subsequent discussions, the proposal with respect to the Margin Amendments is as follows (to be effective as of January 1, 2011):

**EXHIBIT 1 TO EXHIBIT C**

1. Set Margin Item F at a total of \$1,480,000.
2. Margin Item F shall increase each year, beginning on January 1, 2012, by an amount equal to the greater of: (a) two and one half percent (2.5%), or (b) the percentage increase in the Consumer Price Index for the year immediately preceding the increase.
3. Set Margin Item C at a total of \$135,000 per year.
4. The following one-time out-of-pocket costs actually incurred by TUCO shall be outside of Margin Item F and shall be reimbursed through an approved activity letter:
  - a. Legal <sup>and expert CDM</sup> costs of negotiating and documenting a new rail contract
  - b. Cost of the proposed computer software upgrade
  - c. Costs of changing from LIFO to Average Cost coal inventory accounting
  - d. Legal costs of restating the SPS/TUCO agreements
5. TUCO shall follow SPS's coal procurement strategy.

SPS accepts TUCO's proposal. The terms above shall become effective as of January 1, 2011, and the Margin Amendments shall be amended accordingly. All other terms and conditions of the Margin Amendments will remain unchanged and will remain in full force and effect.

SPS appreciates TUCO's efforts to address the concerns raised by SPS and its willingness to renegotiate the Margin at this time.

If you are in agreement with the above, please so indicate by executing this letter in the place provided below.

Sincerely,



Susan Arigoni  
Vice President - Fuels  
Xcel Energy Services Inc., as agent for  
Southwestern Public Service Company

Acknowledged and Agreed:

TUCO INC.

By: Charles S. McNeil  
Name: Charles S. McNeil  
Title: President  
Date: 12-15-10

**EXHIBIT 1 TO EXHIBIT C**

cc: John J. Coates  
DILL DILL CARR STONEBRAKER & HUTCHINGS, P.C.  
455 Sherman Street, Ste. 300  
Denver, Colorado 80203

**EXHIBIT 1 to EXHIBIT C**

In addition to the terms of the foregoing December 14, 2010 Margin Amendment Agreement, the following provisions apply to the calculation of the Harrington Monthly Margin Amount under Section 7.1.

**Margin Items A and B: Incurred Working Capital Costs and Inventory Interest Charge.** In order to determine the Incurred Working Capital Costs (Margin Item A) Seller will provide Buyer the actual cost to Seller during each month of financing its investment in the Coal Inventory under this Agreement, which includes the interest amount and fees Seller is charged for its RLOC, including, without limitation, interest hedging (subject to the prior written approval of Buyer, which approval shall not be unreasonably withheld, conditioned or delayed) referred to as the Operating Loan Interest, Fees, Expenses. The Inventory Interest Charge (determined below) is subtracted from the Operating Loan, Fees and Expenses resulting in the Incurred Working Capital Costs for that month.

The Inventory Interest Charge (Margin Item B) included as part of the monthly total Operating Loan Interest, Fees and Expenses is the monthly interest amount on the Coal Inventory. The Parties acknowledge the RLOC will be used to finance the Inventory and payments due under the Exhibit D agreements. As to any month in which no coal is delivered to Buyer, such month's cost of financing under the RLOC shall be accrued and included in the price of Coal next delivered to Buyer or paid in association with remedies exercised under Section 10.6 of this Agreement.

**Margin Item C: Administrative/Capital Fee.** The Administrative/Capital Fee is a single fixed payment of \$72,500 per month covering both the Tolk and Harrington Stations. The Administrative/Capital Fee shall not be adjusted during the Initial Term or decreased during any Extended Term. In the event of an Extended Term, Seller reserves the right to seek an increase in the Administrative/Capital Fee to reflect increases in inflation or changes in economic circumstances. Closure of one but not both of the Tolk or Harrington Stations during the Term or Extended Term shall not reduce the amount of the Administrative/Capital Fee due under the surviving Coal Supply Agreement.

**Margin Item E: Costs of Assessments and Taxes.** All assessments and taxes, except federal and state income taxes, levied on Seller for any activity of Seller under this Agreement.

**Margin Item F: Operating Expenses.** The Operating Expense item has an annual base rate of \$1,480,000 as of January 1, 2011 and is adjusted annually as provided in the foregoing December 14, 2010 Margin Amendment Agreement.

The following terms originating from the September 30, 1996 Margin Amendment to the Coal Supply Agreement – Harrington Station, as amended effective January 1, 2002, which amendments are attached as Exhibits 2 and 3 to this Exhibit C, apply for calculation of periodic adjustment to payments due under Item F, Operating Expenses:

Operating Expenses shall be calculated based on the Margin Amendment Agreement providing for a base rate of \$1,640,000 as of January 1, 2018 and escalated at the beginning of each year thereafter commencing January 1, 2019 through the Term of this Agreement by the lesser of 2.5% or the percentage increase in the Consumer Price Index for All Items - Urban Consumers as published by the Bureau of Labor Statistics for the year immediately preceding the increase. The annual Operating Expenses shall be paid in equal monthly installments. These Operating Expenses include, but are not

**EXHIBIT 1 to EXHIBIT C**

limited to, all in-house and outside legal fees, consulting, or other services reasonably required to administer this Agreement and the Harrington Agreement, to the extent not duplicated elsewhere. However, these Operating Expenses will not include extraordinary expenses which Buyer may agree to pay, which agreement shall not be unreasonably withheld, conditioned, or delayed, in connection with renegotiation or replacement of mine, freight, or handling agreements approved by Buyer as Approved Activities (**Approved Activity**). In addition to Operating Expenses, Buyer will pay to or reimburse Seller for awards of damages against Seller and costs and attorneys' fees incurred by Seller in (1) prosecuting any Approved Activity and (2) defending any non-tortious litigation, administrative proceeding, arbitration, rail rate review, or other activity arising out of Seller's reasonably prudent and good faith performance of its duties in connection with contracts with third parties required by this Agreement and the Harrington Agreement. The expenses paid or reimbursed to Seller in accordance with the preceding two sentences will be accounted for and paid under the category specified in Margin Item F unless otherwise agreed by Seller and Buyer. If Seller receives payment from any settlement or award in any activity specified in the immediately preceding provisions (1) and (2) of this paragraph, such payment will be paid over to Buyer after deduction of unreimbursed fees, costs, and expenses, and Buyer will accept such payment without adjustment of the Margin with respect to such activity. Seller will notify Buyer of any claim with respect to any such activity and Buyer will have the right to participate therein with counsel of Buyer's choosing. Seller will not settle or compromise any such claim as to which Buyer is obligated to pay or reimburse Seller without the prior written consent of Buyer.

**EXHIBIT 2 TO EXHIBIT C**

**1996 MARGIN AMENDMENT AGREEMENT**

**MARGIN AMENDMENT  
TO  
COAL SUPPLY AGREEMENT -- HARRINGTON STATION  
BETWEEN TUCO INC., as "Seller" AND SOUTHWESTERN  
PUBLIC SERVICE COMPANY as "Buyer"**

This Margin Amendment to the above referenced Coal Supply Agreement is entered into between TUCO INC. and Southwestern Public Service Company as of this 30th day of September, 1996.

Whereas, TUCO INC. ("Seller") and Southwestern Public Service Company ("Buyer") have agreed to the following terms and conditions in order to fulfill the contractual rights and obligations of each party under the Coal Supply Agreement dated April 30, 1979, for the Harrington Station ("this Agreement").

Now, Therefore, Seller and Buyer agree to amend this Agreement to define the margin amounts due to Seller for coal supplied to Buyer for its native system requirements. In consideration of the benefits to be realized and of their mutual promises, Buyer and Seller agree as follows:

1. Price of Coal. Effective October 1, 1996, Article VIII.1.G of this Agreement shall be deleted in its entirety and replaced by the following for Buyer's native system requirements:

**G. Margin:**

1. Either Seller or Buyer, in its sole discretion, may provide written notice of its desire to renegotiate the margin set forth herein ("Margin") on or before July 1st of each year, commencing July 1, 2001, for a Margin to become effective on January 1st of the following year. The parties shall have 30 days from the date written notice of a desire to redetermine the Margin is delivered to negotiate any changes or replacements for the Margin. If the parties are unable to agree upon a new or revised Margin within thirty days of the notice, then the dispute shall be resolved by arbitration as provided in Article XII of this Agreement. Provided, however, that in all events (a) any renegotiated Margin or Margin Rate will include amounts sufficient to pay the Margin components specified in Article VIII.1.G.3. A, B, D, E, G, H, and I of this Agreement (b) any adjustments in Seller's costs included in any such Margin component may result in a corresponding adjustment to such Margin components (c) if any refinancing of Seller's debt results in a lower interest rate the benefit thereof will correspondingly reduce the Margin, (d) the percentage specified in Article VIII.1.G.3. C may not increase and (e) the Monthly Seller's Amortization payment specified in Exhibit VIII.1.G.1. used to compute the Margin component



**EXHIBIT 2 TO EXHIBIT C**

specified in Article VIII.1.G.3. H may not increase. Seller will use its best efforts to minimize Seller's costs covered by the Margin calculations.

2. Definitions: As used in this Agreement, the following terms shall have the following meanings:

"Operating Loan Facility" is the loan facility, together with all amendments and extensions thereto, entered into by Seller as borrower to provide working capital for mine, freight, handling costs, increases or decreases in deferred tax payments related to inventory, deferral of payments by Buyer in accordance with Article VIII.1.H of this Agreement and financing of inventory (including debt service reserve), and providing for a maximum loan principal limit of \$65,000,000, and all replacement facilities prudently entered into by Seller for the same purpose. Seller agrees to use its best efforts to minimize the costs incurred under the Operating Loan Facility and agrees not to increase the maximum principal amount of the Operating Loan Facility without Buyer's prior written consent.

"Harrington Average Inventory Valuation" is the average of the first and end of the billing month book value of the mine and transportation cost remaining in Seller's inventory at Harrington station for the billing month net of accrued inventory losses.

"Tolk Average Inventory Valuation" is the average of the first and end of the billing month book value of the mine and transportation cost remaining in Seller's inventory at Tolk station for the billing month net of accrued inventory losses.

"Seller's Investment," "Seller's Intangible," and "Seller's Intangible Interest Rate" as related to this Agreement and the Coal Supply Agreement dated April 30, 1979 for the Tolk Station are set out in Exhibit "VIII.1.G.1" attached to and made a part of this Agreement.

"Approved Activities" are activities receiving prior approval from Buyer relating to litigation, regulatory proceedings, arbitration, and rail rate reviews. Such prior approval will not be unreasonably withheld.

**EXHIBIT 2 TO EXHIBIT C**

3. **Components:** The components comprising the margin rate ("MR") are:
- A. **Incurred Working Capital Costs** - The actual interest costs plus the fees and expenses (including yield-maintenance amounts and reimbursement of debt service reserve advances) incurred on the Operating Loan Facility for the billing month minus the amount of the actual Inventory Interest Charge in Section VIII.1.G.3.B of this Agreement. Such Incurred Working Capital costs shall be documented by Seller, showing daily balances and interest charges for verification.
  - B. **Inventory Interest Charge** - The sum of the values resulting from multiplying the daily financing rate under the Operating Loan Facility by the sum of the Harrington Average Inventory Valuation and the Tolk Average Inventory Valuation.
  - C. **Administrative Fee** - 0.5% times the sum of the Harrington Average Inventory Valuation and the Tolk Average Inventory Valuation, the product of which is divided by twelve.
  - D. **Return on the unpaid, Unamortized Seller's Intangible** - This value shall be calculated by multiplying Seller's Intangible Interest Rate by the unpaid, unamortized balance of Seller's Intangible for the billing month as shown on Exhibit "VIII.1.G.1".
  - E. **Tax Adjustment** - The Tax Adjustment shall be calculated monthly by multiplying the unpaid, unamortized balance of Seller's Intangible for the billing month (as shown in "Exhibit VIII 1.G.1") by the Tax Factor divided by the number of months remaining to pay the Seller's Intangible all as shown in Exhibit VIII.1.G.1. Notwithstanding any other provision hereof appearing to the contrary, the Tax Factor and Effective Tax Rate shall be revised to reflect changes in Tax rates or charges, provided, that should changes in the tax laws or regulations cause the use of this formula to fail to reflect Seller's actual effective tax rates, then the parties will cooperate in revising this factor.

Tax Factor = [Effective Tax Rate/(1-Effective Tax Rate)] and,  
Effective Tax Rate = [Texas Franchise Tax multiplied by (1-G)] + G  
Where Texas Franchise Tax is set by Texas Tax  
Code § 171.001 *et seq.*, or its replacement, such as  
a Texas income tax or other tax on revenue or net  
income.

**EXHIBIT 2 TO EXHIBIT C**

An example of the calculation of the initial Effective Tax Rate and the Tax Factor (which contains assumptions which may not reflect actual amounts) is as follows:

Effective Tax Rate Calculation:  
 $(4.5\% \times (1-34\%)) + 34\% = 36.97\%$

Tax Factor calculation  
 $36.97\% / (1-36.97\%) = 58.655\%$

Tax Adjustment  
 $(\$41,000,000 \times 58.655\%) / 240 = \$100,202.92$

- F. Operating Expenses - Operating Expenses are set at \$676,828.70 for the balance of calendar year 1996 and thereafter set at \$1,000,000.00 per calendar year and escalated in each year commencing for the year 1997 by the change in the CPI for all items -Urban Consumers, according to the latest index for the previous year as published by the Bureau of Labor Statistics by January 31st of the current year, as compared to the most recent index published by January 31, 1996. All such payments shall be divided equally for each month of the current year of this Agreement. These Operating Expenses include, but are not limited to, all in-house and outside legal fees, consulting or other services reasonably required to administer this Agreement and the Harrington Agreement. However, these Operating Expenses will not include extraordinary expenses which Buyer may agree to pay (such agreement not to be unreasonably withheld) in connection with renegotiation or replacement of mine, freight, or handling agreements approved by Buyer as Approved Activities. In addition to the Operating Expenses, Buyer will pay to or reimburse Seller for awards of damages against Seller and costs and attorneys' fees incurred by Seller in (1) prosecuting any Approved Activity and (2) defending any non-tortious litigation, administrative proceeding, arbitration, rail rate review, or other activity arising out of Seller's reasonably prudent and good faith performance of its duties in connection with contracts with third-parties required by this Agreement and the Harrington Agreement. The expenses paid or reimbursed to Seller in accordance with the preceding two sentences will be included in the category specified in Article VIII.1.D, unless otherwise agreed by Seller and Buyer. If Seller receives payment from any settlement or award in any activity specified in Subsections (1) and (2) of this Section, such payment will be paid over to Buyer after deduction of unreimbursed fees, costs, and expenses, and Buyer will accept such payment without adjustment of the Margin with respect to such activity. Seller will notify

**EXHIBIT 2 TO EXHIBIT C**

Buyer of any claim with respect to any such activity and Buyer will have the right to participate therein with counsel of Buyer's choosing. Seller will not settle or compromise any such claim, as to which Buyer is obligated to pay or reimburse Seller, without the prior written consent of Buyer. Provided that nothing contained in this paragraph is intended or will be construed as entitling Buyer to recover costs or attorneys' fees incurred in the defense of any action involving a claim between Buyer and Seller not otherwise recoverable as a matter of applicable law.

- G. Seller's actual federal corporate income tax rate (26 U.S.C. § 11 (b)(1) or its replacement) for the current year, subject to certification by a nationally recognized accounting firm and appropriate adjustment of the tax rate, if required as a result of such certification.
- H. Amortization of the Seller's Intangible - This value shall be the amortization schedule monthly amount as specified in Exhibit "VIII.1.G.1."
- I. Income Tax on Return on unpaid, Unamortized Seller's Intangible - This value shall be the result of Factor D times the Tax Factor, thus:

$$I = D \text{ multiplied by the Tax Factor}$$

- 4. The components shall be applied to the following formula to determine the appropriate monthly margin for all years prior to calendar year 2017:

$$MR = (A + B + C + D + E + F + H + I) / (98,790,000/12)$$

Margin = MR multiplied by 52,200,000/12, minus (1) any amounts incurred under Article VIII.1.E., and (2) actual interest earned by Seller on deferral of payments to Buyer by Seller in accordance with Article VIII.1.H.

For any period in which there are no coal deliveries, the accumulation of the unpaid portions of the Margin payment(s), which would otherwise have been paid if coal were being delivered during such period, plus actual interest on components Article VIII.1.G.3.A and B and interest at the Seller's Intangible Interest Rate on components Article VIII.1.G.3.D, F, and H, will be paid in the first month in which coal deliveries commence or, if sooner, the time at which Buyer is obligated to purchase Seller's entire inventory of coal.

- 5. Setoff - Buyer agrees not to setoff against the Margin any claim which Buyer may have against Seller which does not arise out of calculation of the Margin,

**EXHIBIT 2 TO EXHIBIT C**

Margin Rate, Margin Payment, or any component thereof, or Margin payments paid or payable to Seller. Nothing in this Agreement is intended or may be construed as a waiver of any right of Buyer to dispute Buyer's obligation for or the proper calculation of the Margin, Margin Rate, Margin Payment, or any component thereof, or to exercise any right which Buyer has to withhold the disputed amount of any payment with respect to Buyer's obligation for or the proper calculation of the Margin, or any component thereof. Nothing in this Amendment is intended or may be construed to create any limitation on Buyer's right to collect any judgment which may be entered against Seller in favor of Buyer; however, Buyer may not setoff the amount of such judgment against the Margin other than Seller's net profit included in the components specified in Article VIII.1.G.3. C and D.

EXHIBIT 2 TO EXHIBIT C

EXECUTED as of the date first appearing above.

TUCO INC.

By: Charles S. McNeil  
Title: PRESIDENT

SOUTHWESTERN PUBLIC SERVICE  
COMPANY

By: Kenneth L. Lott  
Title: Senior Vice President

EXHIBIT 2 TO EXHIBIT C

EXHIBIT VIII. I.G. 1

CALCULATION OF SELLER'S INVESTMENT, ETC.

Seller's Intangible, on September 30, 1996, is \$41,618,937. Seller's Intangible will amortize with the Buyer's payment of the Monthly Intangible Amortization Payment, and Buyer will pay to Seller a Monthly Return on the unpaid, Unamortized Seller's Intangible at a rate of 8.692% per annum on the unpaid, Unamortized Seller's Intangible per the schedule below. The unpaid, Unamortized Seller's Intangible will accrue interest at Seller's Intangible Interest Rate until Seller's Investment is paid in full. The Seller's Investment which is related to this Agreement for purposes of this Agreement will be the unpaid, Unamortized Seller's Intangible plus an amount equal to (a) the "Yield Maintenance Amount" determined in accordance with the Yield Maintenance Amount definition attached hereto plus (b) any accrued and unpaid return on the unpaid, Unamortized Seller's Intangible, plus (c) an amount necessary to fully pay Seller's federal and state taxes, if any, on a grossed up basis which results from payment of Seller's investment, (*i.e.*, unpaid, Unamortized Seller's Intangible multiplied by the Tax Factor), plus (d) any third party costs incurred in connection with prepayment of Seller's Intangible, plus (e) any damages to Seller as a result of prepayment of Seller's Intangible [not recovered under item (a) above].

Seller's Intangible	
Interest Rate	8.692% / year

For sake of clarification, Seller's Investment will be allocated 47% to Tolk Station and 53% to Harrington Station through December 31, 2016. Seller's Investment will be allocated 100% to Tolk after December 31, 2016.

EXHIBIT 2 TO EXHIBIT C

<u>Date</u>	<u>Beginning of the Month Unamortized Seller's Intangible</u>	<u>Monthly Seller's Intangible Amortization Payment</u>	<u>Monthly Return on the Unamortized Seller's Intangible</u>	<u>End of the Month Unamortized Seller's Intangible</u>
Sep-96	41,618,937	0	0	41,618,937
Oct-96	41,618,937	173,412	452,190	41,445,525
Nov-96	41,445,525	173,412	300,204	41,272,113
Dec-96	41,272,113	173,412	298,948	41,098,700
Jan-97	41,098,700	173,412	297,692	40,925,288
Feb-97	40,925,288	173,412	296,436	40,751,876
Mar-97	40,751,876	173,412	295,179	40,578,464
Apr-97	40,578,464	173,412	293,923	40,405,051
May-97	40,405,051	173,412	292,667	40,231,639
Jun-97	40,231,639	173,412	291,411	40,058,227
Jul-97	40,058,227	173,412	290,155	39,884,815
Aug-97	39,884,815	173,412	288,899	39,711,402
Sep-97	39,711,402	173,412	287,643	39,537,990
Oct-97	39,537,990	173,412	286,387	39,364,578
Nov-97	39,364,578	173,412	285,131	39,191,166
Dec-97	39,191,166	173,412	283,875	39,017,753
Jan-98	39,017,753	173,412	282,619	38,844,341
Feb-98	38,844,341	173,412	281,363	38,670,929
Mar-98	38,670,929	173,412	280,106	38,497,517
Apr-98	38,497,517	173,412	278,850	38,324,104
May-98	38,324,104	173,412	277,594	38,150,692
Jun-98	38,150,692	173,412	276,338	37,977,280
Jul-98	37,977,280	173,412	275,082	37,803,868
Aug-98	37,803,868	173,412	273,826	37,630,456
Sep-98	37,630,456	173,412	272,570	37,457,043
Oct-98	37,457,043	173,412	271,314	37,283,631
Nov-98	37,283,631	173,412	270,058	37,110,219
Dec-98	37,110,219	173,412	268,802	36,936,807
Jan-99	36,936,807	173,412	267,546	36,763,394
Feb-99	36,763,394	173,412	266,290	36,589,982
Mar-99	36,589,982	173,412	265,033	36,416,570
Apr-99	36,416,570	173,412	263,777	36,243,158
May-99	36,243,158	173,412	262,521	36,069,745
Jun-99	36,069,745	173,412	261,265	35,896,333
Jul-99	35,896,333	173,412	260,009	35,722,921
Aug-99	35,722,921	173,412	258,753	35,549,509
Sep-99	35,549,509	173,412	257,497	35,376,096
Oct-99	35,376,096	173,412	256,241	35,202,684
Nov-99	35,202,684	173,412	254,985	35,029,272
Dec-99	35,029,272	173,412	253,729	34,855,860
Jan-00	34,855,860	173,412	252,473	34,682,448
Feb-00	34,682,448	173,412	251,217	34,509,035
Mar-00	34,509,035	173,412	249,960	34,335,623
Apr-00	34,335,623	173,412	248,704	34,162,211
May-00	34,162,211	173,412	247,448	33,988,799
Jun-00	33,988,799	173,412	246,192	33,815,386
Jul-00	33,815,386	173,412	244,936	33,641,974
Aug-00	33,641,974	173,412	243,680	33,468,562
Sep-00	33,468,562	173,412	242,424	33,295,150
Oct-00	33,295,150	173,412	241,168	33,121,737
Nov-00	33,121,737	173,412	239,912	32,948,325
Dec-00	32,948,325	173,412	238,656	32,774,913
Jan-01	32,774,913	173,412	237,400	32,601,501



EXHIBIT 2 TO EXHIBIT C

Feb-01	32,801,501	173,412	238,144	32,428,088
Mar-01	32,428,088	173,412	234,887	32,254,878
Apr-01	32,254,878	173,412	233,831	32,081,264
May-01	32,081,264	173,412	232,375	31,907,852
Jun-01	31,907,852	173,412	231,119	31,734,439
Jul-01	31,734,439	173,412	229,883	31,561,027
Aug-01	31,561,027	173,412	228,607	31,387,615
Sep-01	31,387,615	173,412	227,351	31,214,203
Oct-01	31,214,203	173,412	226,095	31,040,791
Nov-01	31,040,791	173,412	224,839	30,867,378
Dec-01	30,867,378	173,412	223,583	30,693,966
Jan-02	30,693,966	173,412	222,327	30,520,554
Feb-02	30,520,554	173,412	221,071	30,347,142
Mar-02	30,347,142	173,412	219,814	30,173,729
Apr-02	30,173,729	173,412	218,558	30,000,317
May-02	30,000,317	173,412	217,302	29,826,905
Jun-02	29,826,905	173,412	216,046	29,653,493
Jul-02	29,653,493	173,412	214,790	29,480,080
Aug-02	29,480,080	173,412	213,534	29,306,668
Sep-02	29,306,668	173,412	212,278	29,133,256
Oct-02	29,133,256	173,412	211,022	28,959,844
Nov-02	28,959,844	173,412	209,766	28,786,431
Dec-02	28,786,431	173,412	208,510	28,613,019
Jan-03	28,613,019	173,412	207,254	28,439,607
Feb-03	28,439,607	173,412	206,998	28,266,195
Mar-03	28,266,195	173,412	204,741	28,092,782
Apr-03	28,092,782	173,412	203,485	27,919,370
May-03	27,919,370	173,412	202,229	27,745,958
Jun-03	27,745,958	173,412	200,973	27,572,546
Jul-03	27,572,546	173,412	199,717	27,399,134
Aug-03	27,399,134	173,412	198,461	27,225,721
Sep-03	27,225,721	173,412	197,205	27,052,309
Oct-03	27,052,309	173,412	195,949	26,878,897
Nov-03	26,878,897	173,412	194,693	26,705,485
Dec-03	26,705,485	173,412	193,437	26,532,072
Jan-04	26,532,072	173,412	192,181	26,358,660
Feb-04	26,358,660	173,412	190,925	26,185,248
Mar-04	26,185,248	173,412	189,668	26,011,836
Apr-04	26,011,836	173,412	188,412	25,838,423
May-04	25,838,423	173,412	187,156	25,665,011
Jun-04	25,665,011	173,412	185,900	25,491,599
Jul-04	25,491,599	173,412	184,644	25,318,187
Aug-04	25,318,187	173,412	183,388	25,144,774
Sep-04	25,144,774	173,412	182,132	24,971,362
Oct-04	24,971,362	173,412	180,876	24,797,950
Nov-04	24,797,950	173,412	179,620	24,624,538
Dec-04	24,624,538	173,412	178,364	24,451,125
Jan-05	24,451,125	173,412	177,108	24,277,713
Feb-05	24,277,713	173,412	175,852	24,104,301
Mar-05	24,104,301	173,412	174,595	23,930,889
Apr-05	23,930,889	173,412	173,339	23,757,477
May-05	23,757,477	173,412	172,083	23,584,064
Jun-05	23,584,064	173,412	170,827	23,410,652
Jul-05	23,410,652	173,412	169,571	23,237,240
Aug-05	23,237,240	173,412	168,315	23,063,828
Sep-05	23,063,828	173,412	167,059	22,890,415
Oct-05	22,890,415	173,412	165,803	22,717,003

Exhibit 2 to Exhibit C to January 1, 2018 Coal Supply Agreement - Harrington Station  
between TUCO INC. (Seller) and Southwestern Public Service Company (Buyer)

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EXHIBIT 2 TO EXHIBIT C

Nov-05	22,717,003	173,412	164,547	22,543,591
Dec-05	22,543,591	173,412	163,291	22,370,179
Jan-06	22,370,179	173,412	162,035	22,196,766
Feb-06	22,196,766	173,412	160,779	22,023,354
Mar-06	22,023,354	173,412	159,522	21,849,942
Apr-06	21,849,942	173,412	158,266	21,676,530
May-06	21,676,530	173,412	157,010	21,503,117
Jun-06	21,503,117	173,412	155,754	21,329,705
Jul-06	21,329,705	173,412	154,498	21,156,293
Aug-06	21,156,293	173,412	153,242	20,982,881
Sep-06	20,982,881	173,412	151,986	20,809,469
Oct-06	20,809,469	173,412	150,730	20,636,056
Nov-06	20,636,056	173,412	149,474	20,462,644
Dec-06	20,462,644	173,412	148,218	20,289,232
Jan-07	20,289,232	173,412	146,962	20,115,820
Feb-07	20,115,820	173,412	145,706	19,942,407
Mar-07	19,942,407	173,412	144,450	19,768,995
Apr-07	19,768,995	173,412	143,193	19,595,583
May-07	19,595,583	173,412	141,937	19,422,171
Jun-07	19,422,171	173,412	140,681	19,248,758
Jul-07	19,248,758	173,412	139,425	19,075,346
Aug-07	19,075,346	173,412	138,169	18,901,934
Sep-07	18,901,934	173,412	136,913	18,728,522
Oct-07	18,728,522	173,412	135,657	18,555,109
Nov-07	18,555,109	173,412	134,401	18,381,697
Dec-07	18,381,697	173,412	133,145	18,208,285
Jan-08	18,208,285	173,412	131,889	18,034,873
Feb-08	18,034,873	173,412	130,633	17,861,460
Mar-08	17,861,460	173,412	129,377	17,688,048
Apr-08	17,688,048	173,412	128,120	17,514,636
May-08	17,514,636	173,412	126,864	17,341,224
Jun-08	17,341,224	173,412	125,608	17,167,812
Jul-08	17,167,812	173,412	124,352	16,994,399
Aug-08	16,994,399	173,412	123,096	16,820,987
Sep-08	16,820,987	173,412	121,840	16,647,575
Oct-08	16,647,575	173,412	120,584	16,474,163
Nov-08	16,474,163	173,412	119,328	16,300,750
Dec-08	16,300,750	173,412	118,072	16,127,338
Jan-09	16,127,338	173,412	116,816	15,953,926
Feb-09	15,953,926	173,412	115,560	15,780,514
Mar-09	15,780,514	173,412	114,304	15,607,101
Apr-09	15,607,101	173,412	113,047	15,433,689
May-09	15,433,689	173,412	111,791	15,260,277
Jun-09	15,260,277	173,412	110,535	15,086,865
Jul-09	15,086,865	173,412	109,279	14,913,452
Aug-09	14,913,452	173,412	108,023	14,740,040
Sep-09	14,740,040	173,412	106,767	14,566,628
Oct-09	14,566,628	173,412	105,511	14,393,216
Nov-09	14,393,216	173,412	104,255	14,219,803
Dec-09	14,219,803	173,412	102,999	14,046,391
Jan-10	14,046,391	173,412	101,743	13,872,979
Feb-10	13,872,979	173,412	100,487	13,699,567
Mar-10	13,699,567	173,412	99,231	13,526,155
Apr-10	13,526,155	173,412	97,974	13,352,742
May-10	13,352,742	173,412	96,718	13,179,330
Jun-10	13,179,330	173,412	95,462	13,005,918
Jul-10	13,005,918	173,412	94,206	12,832,506

**EXHIBIT 2 TO EXHIBIT C**

Aug-10	12,832,508	173,412	92,950	12,659,093
Sep-10	12,859,093	173,412	91,894	12,485,681
Oct-10	12,485,681	173,412	90,438	12,312,269
Nov-10	12,312,269	173,412	89,182	12,138,857
Dec-10	12,138,857	173,412	87,928	11,965,444
Jan-11	11,965,444	173,412	86,670	11,792,032
Feb-11	11,792,032	173,412	85,414	11,618,620
Mar-11	11,618,620	173,412	84,158	11,445,208
Apr-11	11,445,208	173,412	82,901	11,271,795
May-11	11,271,795	173,412	81,645	11,098,383
Jun-11	11,098,383	173,412	80,389	10,924,971
Jul-11	10,924,971	173,412	79,133	10,751,559
Aug-11	10,751,559	173,412	77,877	10,578,146
Sep-11	10,578,146	173,412	76,621	10,404,734
Oct-11	10,404,734	173,412	75,365	10,231,322
Nov-11	10,231,322	173,412	74,109	10,057,910
Dec-11	10,057,910	173,412	72,853	9,884,498
Jan-12	9,884,498	173,412	71,597	9,711,085
Feb-12	9,711,085	173,412	70,341	9,537,673
Mar-12	9,537,673	173,412	69,085	9,364,261
Apr-12	9,364,261	173,412	67,828	9,190,849
May-12	9,190,849	173,412	66,572	9,017,436
Jun-12	9,017,436	173,412	65,316	8,844,024
Jul-12	8,844,024	173,412	64,060	8,670,612
Aug-12	8,670,612	173,412	62,804	8,497,200
Sep-12	8,497,200	173,412	61,548	8,323,787
Oct-12	8,323,787	173,412	60,292	8,150,375
Nov-12	8,150,375	173,412	59,036	7,976,963
Dec-12	7,976,963	173,412	57,780	7,803,551
Jan-13	7,803,551	173,412	56,524	7,630,138
Feb-13	7,630,138	173,412	55,268	7,456,726
Mar-13	7,456,726	173,412	54,012	7,283,314
Apr-13	7,283,314	173,412	52,755	7,109,902
May-13	7,109,902	173,412	51,499	6,936,490
Jun-13	6,936,490	173,412	50,243	6,763,077
Jul-13	6,763,077	173,412	48,987	6,589,665
Aug-13	6,589,665	173,412	47,731	6,416,253
Sep-13	6,416,253	173,412	46,475	6,242,841
Oct-13	6,242,841	173,412	45,219	6,069,428
Nov-13	6,069,428	173,412	43,963	5,896,016
Dec-13	5,896,016	173,412	42,707	5,722,604
Jan-14	5,722,604	173,412	41,451	5,549,192
Feb-14	5,549,192	173,412	40,195	5,375,779
Mar-14	5,375,779	173,412	38,939	5,202,367
Apr-14	5,202,367	173,412	37,682	5,028,955
May-14	5,028,955	173,412	36,426	4,855,543
Jun-14	4,855,543	173,412	35,170	4,682,130
Jul-14	4,682,130	173,412	33,914	4,508,718
Aug-14	4,508,718	173,412	32,658	4,335,306
Sep-14	4,335,306	173,412	31,402	4,161,894
Oct-14	4,161,894	173,412	30,146	3,988,481
Nov-14	3,988,481	173,412	28,890	3,815,069
Dec-14	3,815,069	173,412	27,634	3,641,657
Jan-15	3,641,657	173,412	26,378	3,468,245
Feb-15	3,468,245	173,412	25,122	3,294,833
Mar-15	3,294,833	173,412	23,866	3,121,420
Apr-15	3,121,420	173,412	22,609	2,948,008

**EXHIBIT 2 TO EXHIBIT C**

May-15	2,948,008	173,412	21,353	2,774,596
Jun-15	2,774,596	173,412	20,097	2,601,184
Jul-15	2,601,184	173,412	18,841	2,427,771
Aug-15	2,427,771	173,412	17,585	2,254,359
Sep-15	2,254,359	173,412	16,329	2,080,947
Oct-15	2,080,947	173,412	15,073	1,907,535
Nov-15	1,907,535	173,412	13,817	1,734,122
Dec-15	1,734,122	173,412	12,561	1,560,710
Jan-16	1,560,710	173,412	11,305	1,387,298
Feb-16	1,387,298	173,412	10,049	1,213,886
Mar-16	1,213,886	173,412	8,793	1,040,473
Apr-16	1,040,473	173,412	7,536	867,061
May-16	867,061	173,412	6,280	693,649
Jun-16	693,649	173,412	5,024	520,237
Jul-16	520,237	173,412	3,768	346,824
Aug-16	346,824	173,412	2,512	173,412
Sep-16	173,412	173,412	1,256	0
	<b>Total</b>	<b>41,618,937</b>	<b>36,476,840</b>	

**Note:**

The Monthly Seller's Intangible Amortization Payment and the Monthly Return on the Unamortized Seller's Intangible each month are billed on the 8th of the following month.

Example: Oct-96 will be billed on November 8, 1996

**EXHIBIT 2 TO EXHIBIT C**

**DEFINITION OF "YIELD MAINTENANCE AMOUNT"**

**"Yield-Maintenance Amount"** shall mean an amount equal to the excess, if any, of the Discounted Value of the Unamortized Seller's Intangible over the Unamortized Seller's Intangible. The Yield-Maintenance Amount shall in no event be less than zero.

**"Discounted Value"** shall mean the amount obtained by discounting all Remaining Scheduled Payments with respect to such Unamortized Seller's Intangible from their respective scheduled due dates to the Settlement Date in accordance with accepted financial practice and at a discount factor (as converted to reflect the periodic basis on which the Monthly Return on the unpaid Unamortized Seller's Intangible is payable if payable other than on a semi-annual basis) equal to the Reinvestment Yield with respect to the Unamortized Seller's Intangible.

**"Reinvestment Yield"** shall mean the yield to maturity implied by (1) the yields reported, as of 10:00 am (New York City local time) on the Business Day next preceding the Settlement Date, on the display designated as "Page 678" on the Telerate Service (or such other display designated as "Page 678" on the Telerate Service) for actively traded U.S. Treasury securities having a maturity equal to the Remaining Average Life of the Unamortized Seller's Intangible as of such Settlement Date, or if such yields shall not be reported as of such time or the yields reported as of such time shall not be ascertainable, (ii) the Treasury Constant Maturity Series yields reported, for the latest day for which such yields shall have been so reported as of the Business Day next preceding the Settlement Date, in Federal Reserve Statistical Release H.15(519) (or any comparable successor publication) for actively traded U.S. Treasury securities having a constant maturity equal to the Remaining Average Life of the Unamortized Seller's Intangible as of such Settlement Date. Such implied yield shall be determined, if necessary, by (a) converting U.S. Treasury bill quotations to bond-equivalent yields in accordance with accepted financial practice and (b) interpolating linearly between yields reported for various maturities.

**"Business Day"** shall mean any day other than a Saturday or a Sunday or a day on which commercial banks in New York City are required or authorized to be closed.

**"Remaining Average Life"** shall mean the number of years (calculated to the nearest one-twelfth year) obtained by dividing (i) the Unamortized Seller's Intangible into (ii) the products obtained by multiplying (a) each Remaining Scheduled Payment of Unamortized Seller's Intangible (but not of Seller's Monthly Return) by (b) the number of years (calculated to the nearest one-twelfth year) which will elapse between the Settlement Date and the scheduled due date of such Remaining Scheduled Payment and adding the results.

**"Remaining Scheduled Payments"** shall mean all payments of the Unamortized Seller's Intangible together with the Monthly Return thereon that would be due on or after the Settlement Date (assuming that all payments of Seller's Intangible and the Monthly Return thereon were paid in accordance with the table attached to Exhibit VIII.1.G.1) as if no payment of the

**EXHIBIT 2 TO EXHIBIT C**

Unamortized Seller's Intangible or Monthly Return thereon were made prior to its scheduled due date.

"Settlement Date" shall mean the date upon which Unamortized Seller's Intangible is to be paid.

**EXHIBIT 3 TO EXHIBIT C**

**2001 MARGIN AMENDMENT  
TO  
COAL SUPPLY AGREEMENT  
(HARRINGTON STATION)  
BETWEEN TUCO INC., and SOUTHWESTERN PUBLIC SERVICE COMPANY**

This **2001 Margin Amendment** to the above referenced Coal Supply Agreement dated April 30, 1979, as amended, is made and entered into between TUCO INC. and Southwestern Public Service Company as of the 18<sup>th</sup> day of September 2001.

**WITNESSETH:**

**Whereas**, TUCO INC. ("Seller") and Southwestern Public Service Company ("Buyer") are parties to that certain Coal Supply Agreement made and entered into as of April 30, 1979, as restated to incorporate all amendments through December 31, 1994 (the "Agreement") and as further amended by the Margin Amendment dated September 30, 1996 ("1996 Margin Amendment"); and

**Whereas**, Buyer and Seller have agreed to a renegotiated Margin as of September 18, 2001 and wish to amend the Agreement and the 1996 Margin Amendment to memorialize the renegotiated Margin.

**Now Therefore**, Seller and Buyer agree to amend the Agreement and the 1996 Margin Amendment effective January 1, 2002, to modify the Margin payable to Seller for coal supplied to Buyer for its native system requirements as follows:

1. Article VIII.1.G.1 shall be deleted in its entirety and replaced by the following:
  1. Either Seller or Buyer, in its sole discretion, may provide written notice of its desire to renegotiate the margin set forth herein ("Margin") on or before July 1<sup>st</sup> of each year, commencing July 1, 2006, for a Margin to become effective on January 1<sup>st</sup> of the following year. The parties shall have thirty (30) days from the date written notice of a desire to renegotiate the Margin is delivered to negotiate any changes or replacements for the Margin. If the parties are unable to agree upon a new or revised Margin within thirty (30) days of the notice, then the dispute shall be resolved by arbitration as provided in Article XII of this Agreement. Provided, however, that in all events: (a) any negotiated Margin or Margin Rate will include amounts sufficient to pay the Margin components specified in Article VIII.1.G.3.A, B, D, E, G, H, and I of this Agreement. (b) any adjustments in Seller's costs included in any such Margin component may result in a corresponding adjustment to such Margin components, (c) if any refinancing of Seller's debt results in a lower interest rate the benefit thereof will correspondingly reduce the Margin, (d) the amount specified in Article VIII.1.G.3 C. may not increase and (e) the Monthly Seller's Amortization payment specified in Exhibit VIII.1.G.1. used to compute the Margin component specified in Article

**EXHIBIT 3 TO EXHIBIT C**

VIII.1.G.3.H. may not increase. Seller will use its best efforts to minimize Seller's costs covered by the Margin calculations.

2. Article VIII.1.G.3.C shall be deleted in its entirety and replaced by the following:  
C. Administrative Fee – A fixed payment of \$120,000.00 per calendar year divided equally into twelve (12) monthly installments.
3. Article VIII.1.G.3.F shall be deleted in its entirety and replaced by the following:  
F. Operating Expenses – Operating Expenses shall be set at \$1,050,000.00 per calendar year and this amount shall be escalated at the beginning of each year commencing with the year 2003 by the greater of 5% or the change in the CPI for all items – Urban Consumers, according to the latest index for the previous year as published by the Bureau of Labor Statistics prior to January 31<sup>st</sup> of the current year, as compared to the most recent index published by January 31, 2002. The annual Operating Expenses shall be paid in equal monthly installments. These Operating Expenses include, but are not limited to, all in-house and outside legal fees, consulting or other services reasonably required to administer this Agreement and the Tolk Agreement. However, these Operating Expenses will not include extraordinary expenses, which Buyer may agree to pay (such agreement not to be unreasonably withheld) in connection with renegotiation or replacement of mine, freight, or handling agreements approved by Buyer as Approved Activities. In addition to Operating Expenses, Buyer will pay to or reimburse Seller for awards of damages against Seller and costs and attorney's fees incurred by Seller in (1) prosecuting any Approved Activity and (2) defending any non-tortious litigation, administrative proceeding, arbitration, rail rate review, or other activity arising out of Seller's reasonably prudent and good faith performance of its duties in connection with contracts with third-parties required by this Agreement and the Tolk Agreement. The expenses paid or reimbursed to Seller in accordance with the preceding two sentences will be included in the category specified in Article VIII.1.D, unless otherwise agreed by Seller and Buyer. If Seller receives payment from any settlement or award in any activity specified in Subsections (1) and (2) of this Section, such payment will be paid over to Buyer after deduction of unreimbursed fees, costs, and expenses, and Buyer will accept such payment without adjustment of the Margin with respect to such activity. Seller will notify Buyer of any claim with respect to any such activity and Buyer will have the right to participate therein with counsel of Buyer's choosing. Seller will not settle or compromise any such claim, as to which Buyer is obligated to pay or reimburse Seller, without the prior written consent of Buyer. Provided that nothing contained in this paragraph is intended to or will be construed as entitling Buyer to recover costs or attorney's fees incurred in the defense of any action involving a claim between Buyer and Seller not otherwise recoverable as a matter of applicable law.

All other terms and conditions of the Agreement and the 1996 Margin Amendment not modified hereby shall remain in full force and effect.



**EXHIBIT 3 TO EXHIBIT C**

**In Witness Whereof**, the parties have caused this 2001 Margin Amendment to be executed by their duly authorized representatives as of the date first written above.

TUCO INC.

By: Charles D. Meind

Title: PRESIDENT

Date: 12-27-01

SOUTHWESTERN PUBLIC SERVICE COMPANY

By: Kelly Krittenmaker

Title: VP, TRADING, MARKETING & SUPPLY

Date: 1/29/03

**EXHIBIT D**

**SELLER'S CONTRACTS CONCERNING COAL SUPPLIED TO THE HARRINGTON STATION**

1. November 1, 2010 Coal Purchase and Sale Agreement between TUCO INC. (TUCO) and Cloud Peak Energy Resources LLC (Cloud Peak) (Cloud Peak Contract).
2. January 1, 2017 Second Amended and Restated Confirmation Notice 2304 between TUCO and Cloud Peak, and January 2, 2018 Letter Agreement between TUCO and Cloud Peak confirming carryover of 2017 contract tons into 2018, all in accordance with and supplementing the Cloud Peak Contract.
3. October 30, 2017 Confirmation Notice 2521 between TUCO and Cloud Peak, in accordance with and supplementing the Cloud Peak Contract.
4. December 15, 2010 Master Coal Supply Agreement between TUCO and Peabody COALSALES, LLC (Peabody) (Peabody Coal Contract).
5. January 1, 2018 Confirmation Notice 2018-1 between TUCO and Peabody in accordance with and supplementing the Peabody Coal Contract *[pending]*.
6. December 31, 2010 Coal Purchase and Sale Agreement between TUCO and Arch Coal Sales Company, Inc. (Arch) (Arch Coal Contract).
7. December 31, 2010 Guaranty by Arch Coal Inc. in favor of TUCO.
8. October 30, 2017 Confirmation Notice MO 5513 between TUCO and Arch in accordance with and supplementing the Arch Coal Contract.
9. June 28, 2016 Letter Agreement between TUCO and Southwestern Public Service Company (SPS) re Carryover of Coal Supply Agreement Vendors into 2018.
10. January 1, 2018 Coal Handling Service Agreement between TUCO and Savage Harrington Corporation concerning coal handling at the Harrington Station.
11. January 1, 2018 Access Agreement for the Harrington Station.
12. October 15, 2017 BNSF Railway Company's Coal Unit Train Commitment Certificate Numbers BNSF 90068-0081 and 90068-0082.
13. February 28, 2003 Railroad Car Net Lease Agreement between TUCO INC., as Lessee, and Trinity Industries Leasing Company, as Lessor, including Exhibits A, B, and C, and Schedule 1, as amended effective January 1, 2018.
  - a. Riders 1 dated January 17, 2003 and January 29, 2003, as amended April 1, 2003 and January 1, 2018;

**EXHIBIT D**

- b. Rider 2 dated January 29, 2003, as amended April 4, 2003, March 23, 2007, and January 1, 2018;
  - c. Rider 3 dated May 22, 2003, as amended March 23, 2007 and January 1, 2018;
  - d. Rider 4 dated June 19, 2003, as amended effective January 1, 2018;
  - e. Rider 7 dated July 10, 2003, as amended March 23, 2007 and January 1, 2018;
  - f. Rider 8 dated July 10, 2003, as amended effective January 1, 2018;
  - g. Rider 10 dated January 10, 2008, as amended June 12, 2013 and January 1, 2018; and
  - h. Rider 11 dated October 31, 2008, as amended May 5, 2014 and January 1, 2018.
- 14. March 17, 2003 Train Set Sublease between TUCO and Savage Tolk Corporation and Savage Harrington Corporation relating to Railcars and its First Amendment, as amended January 1, 2018.
  - 15. May 1, 2013 Railroad Car Maintenance Agreement and its Riders 1.1 and 2.0, as amended effective January 1, 2017, between Trinity Rail Management, Inc., Savage-Tolk Energy Services, and Savage-Harrington Energy Services, as amended from time to time.
  - 16. January 1, 2018 Rail Operation Services, Switching, and Handling Agreement between TUCO and BNSF Railway Company.
  - 17. January 1, 2018 Services Agreement between TUCO and Midland Railway Services, Inc.
  - 18. November 8, 2016 Railcar Storage Track Lease Agreement between TUCO and Texas Northwestern Railroad, as amended from time to time.
  - 19. October 24, 2017 Railcar Storage Agreement between TUCO and Thunder Basin Coal Company, L.L.C.
  - 20. November 3, 2017 Railcar Storage Agreement between TUCO and Nebraska Northwestern Railroad, Inc.
  - 21. TUCO's contractual retention of FIS Energy Systems Inc. (FIS), including, without limitation, FIS Order No. 0347940 L01196224 as provided in the August 15, 2017 Letter Agreement between TUCO and SPS.
  - 22. January 1, 2018 Rail Services Agreement between TUCO and Savage Harrington Corporation.

EXHIBIT E

LOST COAL LETTER AGREEMENT

**TUCO INC.**

TUCO INC.  
500 S. Taylor St., Suite 1050  
Amarillo, Texas 79101-2446  
Telephone: 806-371-7341  
Fax: 806-371-7528

March 28, 2006

Patrick Panzarino  
Director of Coal Supply  
Xcel Energy  
1099 18<sup>th</sup> Street  
Denver, CO 80202

Re: April 30, 1979 Coal Supply Agreement between TUCO INC. ("Seller") and Southwestern Public Service Company ("Buyer") relating to the Harrington Station, as amended ("Harrington Agreement"); and April 30, 1979 Coal Supply Agreement between TUCO INC. ("Seller") and Southwestern Public Service Company ("Buyer") relating to the Tolk Station, as amended ("Tolk Agreement") (collectively, the "Coal Supply Agreements")

Dear Mr. Panzarino:

This letter is submitted by TUCO INC. ("TUCO") to confirm its agreement with Southwestern Public Service Company ("SPS") concerning amendments to the lost coal factor provisions under Article VIII, Section F of the Coal Supply Agreements.

Effective for TUCO's 2005 fiscal year ending September 30, 2006, TUCO and SPS agree that the provisions of Article VIII, Section F in each of the Harrington and Tolk Agreements will no longer be the mechanisms for accounting for lost coal under the Coal Supply Agreements.

For TUCO's 2005 fiscal year, in consultation with SPS's accounting professionals and commencing March 2006, TUCO will make monthly accounting adjustments for TUCO's 2005 fiscal year as necessary to reconcile, at TUCO's fiscal year end, TUCO's LIFO book inventories to the physical inventories of coal at the Tolk and Harrington Stations determined in accordance with the July 2005 physical inventory surveys at the Tolk and Harrington Stations performed in accordance with the American Society for Testing and Materials standards ("ASTM Surveys"). This reconciliation of TUCO's LIFO book inventories to physical inventories will include TUCO's book inventory cost basis, tonnage, and Btu quality, and will be completed by a credit or payment invoice to SPS by TUCO to be submitted on or before November 15, 2006. TUCO's obligation to continue the monthly adjustments

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Patrick Pabzarino  
March 28, 2006  
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provided for in this paragraph after April 2006 is contingent upon TUCO successfully increasing its credit facility effective May 2006 by Twenty Five Million Dollars (U.S. \$25,000,000)

Commencing with TUCO's 2006 fiscal year, the lost coal adjustment factors under each of the Coal Supply Agreements will be set as a positive percentage, to be adjusted on an as needed basis by agreement between the parties, to minimize the payments or credits necessary to annually reconcile TUCO's LIFO book inventories to the physical coal inventories at the Tolk and Harrington Stations at the end of each of TUCO's fiscal years during the term of each Coal Supply Agreement.

Commencing with TUCO's 2006 fiscal year, an annual inventory true up for each of the Tolk Station and the Harrington Station will be conducted, to provide for a reconciliation, taking into consideration the lost coal factors set in accordance with the preceding paragraph; at TUCO's fiscal year end, of TUCO's LIFO book inventories to physical inventories determined by ASTM Survey, conducted at TUCO's request by qualified third parties and certified to TUCO and SPS. This reconciliation will include TUCO's cost basis, tonnage, and Btu quality and will be completed by a credit or payment invoice to SPS by TUCO to be submitted on or before forty-five (45) days after the end of each of TUCO's fiscal years during the term of this agreement.

In consultation with SPS, TUCO will conduct any additional ASTM Surveys or GPS volumetric surveys each year as the parties agree are appropriate to maintain an accurate account of the physical inventories for coal at the Tolk and Harrington Stations. The costs associated with the annual ASTM Survey and any additional surveys as provided herein will be reimbursed to TUCO through the cost reimbursement provisions of the Coal Supply Agreements.

TUCO also will cause its LIFO book inventory computer software to be modified as necessary to accomplish the annual true up of LIFO book inventory to physical inventory contemplated herein and that the costs of such modifications will be reimbursed to TUCO through the cost reimbursement provisions of the Coal Supply Agreements.

It is the intent of the parties that upon the expiration or earlier termination of each of the Coal Supply Agreements, to the extent there is a disparity between TUCO's LIFO book inventory and the physical inventory for coal at the Tolk or Harrington Station, SPS will purchase and pay for coal in inventory at the applicable Station in a quantity equal to TUCO's LIFO book inventory, regardless of the physical inventory, such that TUCO will be able to pay in full all debt which financed TUCO's coal inventories in accordance with the terms of TUCO's approved coal inventory financing agreements. Upon the payment for TUCO's LIFO book inventory as provided herein, SPS will own any coal in inventory without further compensation or obligation to TUCO.

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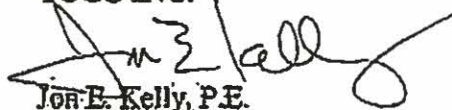
Patrick Panzarino  
March 28, 2006  
3 of 3

Except as amended herein, all other provisions of the Agreements remain in full force and effect.

If the foregoing meets with your approval, please sign a duplicate original of this letter and return it to me as soon as practicable.

Sincerely,

TUCO INC.

  
Jon E. Kelly, P.E.  
Vice President

cc: Charles McNeil  
George Davies, Esq.  
Ray Gardner, Esq.

ACCEPTED AND AGREED TO:

SOUTHWESTERN PUBLIC SERVICE COMPANY

By:

  
Patrick Panzarino

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## **COAL SUPPLY AGREEMENT – TOLK STATION**

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by and between

**TUCO INC.,**  
a Delaware corporation,  
**Seller**

and

**SOUTHWESTERN PUBLIC SERVICE COMPANY,**  
a New Mexico corporation and electric utility subsidiary of Xcel Energy, Inc., a Minnesota corporation,  
**Buyer**

**Effective January 1, 2018**

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## **COAL SUPPLY AGREEMENT – TOLK STATION**

**THIS COAL SUPPLY AGREEMENT – TOLK STATION** is made and entered into this 12th day of January, 2018, with an effective date of commencement of January 1, 2018 (**Effective Date**) by and between TUCO INC., a Delaware corporation, (**Seller**) and Southwestern Public Service Company, a New Mexico corporation (**Buyer**) (collectively, **Parties**) (**Agreement**).

### **RECITALS**

**WHEREAS** Buyer is a public utility engaged in the generation, transmission and sale of electric power and energy and requires a long-term supply of crushed, ready-to-burn coal for use as boiler fuel at its Roy Tolk Station power plant near Muleshoe, Texas (**Tolk Station**); and

**WHEREAS** Seller has access through the marketplace to the quantity and quality of uncommitted commercial coal desired by Buyer as set forth in this Agreement and can deliver such coal to Buyer for the operation of Buyer's Tolk Station; and

**WHEREAS** Seller desires to sell to Buyer, and Buyer desires to purchase from Seller, all coal required by Buyer for the Tolk Station;

**NOW, THEREFORE**, in consideration of the payments, premises, and mutual covenants and agreements contained in this Agreement, the Parties agree as follows:

1. **TERM OF AGREEMENT.** This Agreement shall be effective on the Effective Date and ending at the later of (i) midnight December 31, 2022, or (ii) until complete performance, including any makeup of deficiencies in delivery of coal to Buyer for which payment has been made under the terms of this Agreement which Seller may take under the terms of its appropriate coal purchase contracts (**Initial Term**). The Parties further agree this Agreement may, upon mutual written agreement, be extended for one five (5) year period, or such longer period which Buyer and Seller may agree, on the same terms, covenants, and conditions of this Agreement or as the Parties may otherwise agree (**Extended Term**). The word "Term" as used this Agreement shall refer to the Initial Term as extended by an Extended Term. Any request for extension of the Initial Term shall be made in writing at least 180 calendar days prior to the expiration of the Term.
2. **SALE AND PURCHASE.**
  - 2.1 **Volume.** During the Term of this Agreement, Seller will sell, and Buyer will purchase, subject to the terms of this Agreement, all coal necessary to meet Buyer's coal requirements for use at the Tolk Station for generation of electricity and stockpiling as Inventory.
  - 2.2 **Estimate of Annual Quantity.** On or before October 1, 2017, and by each subsequent October 1 during the Term of this Agreement, Buyer shall notify Seller of Buyer's reasonable estimate of the annual coal requirements to meet the Tolk Station's projected burn for the following year (**Annual Quantity**) (**Annual Notice**). In addition to Annual Quantity, the Annual Notice shall also include Buyer's reasonable estimates of the Annual Quantity for the one year and two years subsequent to the Annual Quantity

year (**Three Year Notice**). The Annual Quantity and the estimate for the Three Year Notice shall be stated each year on Exhibit A, which is incorporated by reference.

- 2.3 **Suppliers and Exhibit D.** The Parties acknowledge Seller has or will contract with certain suppliers under the agreements listed on Exhibit D for purchasing coal, coal handling and processing, coal transportation, railcars, railcar maintenance services, and related services enabling Seller to perform under this Agreement (**Supplier Agreements**). All current agreements listed on, and all subsequent agreements added to, Exhibit D during the Term of this Agreement are subject to Buyer's prior approval, which approval shall not be unreasonably withheld, delayed, or conditioned.

Seller shall acquire by separate agreement coal sufficient to satisfy Buyer's Annual Quantity requirements and such additional coal as may be necessary to provide a continuous supply of coal to meet the Tolk Station annual burn and for Inventory for the Tolk Station. Seller's coal purchases under this Section 2.3 shall generally comply with Buyer's approved coal purchasing practices and procedures at unrelated facilities as they may change from time to time. Procedures as of the Effective date call for contracting for coal on a three year plan, typically contracting for seventy-five percent (75%) of coal needs for year one, fifty percent (50%) for year two, and twenty-five percent (25%) for year three. Each of Seller's coal supply agreements with third party vendors shall be approved by Buyer and listed on Exhibit D to this Agreement.

The Parties acknowledge that Seller has negotiated with Savage Tolk Corporation (**Savage Tolk**) a coal handling service agreement (**Tolk CHSA**) under which Savage Tolk agrees to perform coal handling, crushing, processing, facilities and equipment maintenance and repair, railcar maintenance, storage, and transportation leasing, and final delivery of processed coal at the Tolk Station bunkers, all as provided in the Tolk CHSA, which Tolk CHSA will be effective contemporaneously with this Agreement and listed on Exhibit D.

In addition to the foregoing Supplier Agreements, Seller may enter into additional agreements for inclusion in Exhibit D as reasonable and necessary to enable Seller to provide for the continuous delivery of processed coal to the Tolk Station. Buyer also acknowledges Seller will incur interest and loan expenses incident to a revolving line of working capital credit (**RLOC**) that will be obtained by Seller to fund current obligations under each Exhibit D agreement, the costs of which shall be reimbursable to Seller as provided in the Margin Agreement and Calculation Example (**Margin Agreement**) attached as Exhibit C.

3. **CHANGES IN ANNUAL DELIVERY RATE.**

- 3.1 **Insufficient Annual Quantity.** Should (a) Seller determine at any time, for any reason other than Seller's default, it will be unable to make delivery of the Annual Quantity for a calendar year under the existing Supplier Agreements, as same may be increased or decreased under Section 2.2 above; or (b) should Buyer determine the Annual Quantity will be insufficient to meet Buyer's coal requirements for the Tolk Station, then, as soon as possible after such determination, Seller or Buyer, respectively, shall so notify each other of same and Seller shall use its best efforts to arrange for the purchase, receiving, transportation, unloading, handling, crushing, weighing and/or delivery of coal sufficient

to make such deliveries or to meet such requirements. Should Seller be unable to negotiate such contracts or should they not be approved by Buyer, Buyer shall be free to pursue for its own account the purchase of sufficient coal to meet such deliveries or to meet such requirements, and Seller shall be excused from and shall not be liable for damages to Buyer on account of the inability to make delivery of such Annual Quantity or increased need of coal by Buyer so long as same is not due to the default, gross negligence or willful act of Seller. Should additional coal purchase contracts be added to Exhibit D and should Buyer be unable to accept delivery of all coal Seller is obligated to purchase under all such purchase contracts during a calendar year, other than such failure resulting from one or more events of force majeure as defined in Section 10.1, or resulting from Seller's failure to perform, then Seller may, but is not obligated to, sell such coal as Buyer is unable to accept delivery of to third parties and credit the cost of same to Buyer under Section 7 but, subject to any such credit, Buyer shall bear all costs of such coal to Seller, including cost of disposal and transportation, and payment therefore shall be made in accordance with the provisions of Section 7; provided Seller has used reasonable efforts to mitigate any damages or uncredited costs to Buyer.

- 3.2 **Third Party Liability.** If Seller incurs a payment liability to a third party supplying coal or performing services in connection with coal under a contract listed on Exhibit D during any monthly billing period or periods when no coal is purchased under this Agreement other than as a result of default, gross negligence or willful act of Seller, Buyer shall reimburse Seller for any such payment in full on a current monthly basis.
- 3.3 **Inventory.** The term "Inventory" as used in this Agreement shall mean all coal stockpiled at Seller's facilities adjacent to the Tolk Station and in transit to the Tolk Station from and after the time the title to the purchased coal passes to Seller from suppliers. During the Term of this Agreement, subject to any constraints that Buyer may place on Seller under Sections 2.2 and 3.1 of this Agreement that impairs Seller's ability to maintain Inventory, Seller will employ commercially reasonable efforts to maintain Inventory between forty (40) to sixty (60) days of burn. Days of burn shall be calculated using a maximum daily burn rate of 13,919 tons per day, or such other maximum daily burn rate as Buyer may designate from time to time.

If the Inventory for the Tolk Station falls below fifty percent (50%) of the target inventory level, as may be adjusted from time to time, senior level managers of the Parties will meet and confer within five (5) business days of notice from either Party to determine whether there is a course of action to eliminate the deficient Inventory level. If the Parties (i) are unable to determine a course of action or are unable to agree on a course of action within five (5) business days; or (ii) determine there is a course of action, but such deficient Inventory level is not eliminated within thirty (30) calendar days or within such other mutually agreed upon time period, Buyer may exercise all march-in and associated rights under Section 10.6 below. The rights and remedies in this Section 3.3 shall be in addition to, and shall not be in lieu of or act as a limitation on, any other rights and remedies Buyer may have under this Agreement or otherwise.

- 3.4 **Equal Increments of Coal.** To the extent commercially practicable, Seller shall deliver the coal it is obligated to sell, and Buyer shall accept delivery of the coal it is obligated to purchase, each year in approximately equal increments or such other delivery schedules to which the Parties may agree, in writing, from time to time.

4. **POINTS OF DELIVERY AND TITLE.** Delivery of coal to Buyer under this Agreement shall be in Buyer's coal bunkers at the Tolk Station or any other mutually agreeable location (**Point of Delivery**). Title to the coal shall pass from Seller to Buyer at the Point of Delivery, and Buyer shall thereafter be deemed to be in exclusive control and possession of the coal and fully responsible for it. Seller warrants it has the right to sell the coal sold and delivered to Buyer under this Agreement and will defend and hold Buyer harmless from any claims, liens, or encumbrances arising from a failure of Seller's right to sell the delivered coal.

5. **QUALITY, QUANTITY, SAMPLING, AND ANALYSIS OF COAL.**

5.1 **Quality.** The quality of coal delivered by Seller to Buyer shall be determined by analysis of samples taken as provided in Section 5.4 below.

All analyses performed on the coal samples shall utilize current versions of procedures approved by the American Society for Testing and Materials (ASTM). Unless specifically stated and mutually agreed to otherwise, procedures utilized to determine the quality of coal delivered by Seller to Buyer shall be as follows:

ASTM TEST	DESCRIPTION OF TESTING PARAMETER
D1857/ D1857M-16	Standard Test Method for Fusibility of Coal
D2013/ D2013M-12	Practice for Preparing Coal Samples for Analysis
D5865-13	Standard Test Method for Gross Calorific Value of Coal and Coke
D2234/ D2234M-16	Standard Practice for Collection of a Gross Sample
D3172-13	Practice for Proximate Analysis of Coal and Coke
D3302/ D3302M-15	Standard Test Method for Total Moisture in Coal
D3174-12	Standard Test Method for Ash in the Analysis Sample of Coal and Coke from Coal
D5016-16	Standard Test Method for Total Sulfur in Coal and Coke Combustion Residues Using a High Temperature Tube Furnace Combustion Method with Infrared Absorption
D3173	Standard Test for Moisture in the Analysis of Coal and Coke

5.2 **Material Impurities and Size.** The coal shall be substantially free of magnetic materials and other (non-coal) material impurities. Coal shall be sized to nominal three-quarters of an inch by zero ( $\frac{3}{4}$ " x 0).

5.3 **Sampling.** Each sample taken by Seller or Seller's representative shall be delivered to Buyer and Buyer shall divide such sample into three parts, one for use by Buyer and two to be retained by Buyer for not less than forty-five (45) calendar days under proper storage conditions. During such forty-five (45) calendar day period, upon Seller's request, Buyer shall send to Seller one such retained part and thereupon shall retain the third part for ninety (90) calendar days or until notified by Seller to release the same. Buyer shall have the right to have a representative present at any and all times to observe such sampling.

- 5.4 **Coal Bunker Sampling.** As coal is delivered from Seller's coal piles or coal trains to the coal bunkers at the Tolk Station, it shall be sampled by Seller or Seller's representative using automatic mechanical samplers located on CV400 and CV410 conveyor belts utilized to transport coal from Seller's stockpile or Seller's trains to the Point of Delivery. All coal samples collected shall be sealed in air-tight sample bags, weighed, and properly labeled. Coal sample labels shall, at a minimum, provide the station name, station unit(s), the belt/sampler used to collect the sample, the date and time the sample was collected, and the weight of the sample. All such coal samples shall be forwarded to the Nichols Station laboratory for analysis to determine the quality of coal delivered to Buyer's coal bunkers. A copy of the procedures used to collect bunker coal samples and transfer these same samples to the Nichols Station laboratory can be provided to Buyer upon request.

In the event there is a dispute over the accuracy of any analysis by Buyer, the reserve or referee sample split shall be sent to an independent commercial testing laboratory mutually selected by Buyer and Seller and said commercial testing laboratory shall use methods approved by ASTM or other mutually acceptable procedures. The cost the analysis by the commercial testing laboratory shall be borne equally by Buyer and Seller. Seller shall have the right to have a representative present at any and all times to observe such sampling and analysis.

- 5.5 **Results of Analysis.** The results of the sampling and analysis by Buyer shall be accepted as the quality and characteristics of the coal delivered to the Tolk Station bunkers, and the same shall be used to verify the coal quality for coal delivered during each month from Seller's coal pile or coal trains; provided, however, that if either Party shall at any time question the correctness of any analysis made by Buyer, it shall have the right to have the referee or reserve split analyzed by an independent commercial testing laboratory mutually selected by Buyer and Seller and said laboratory shall use methods approved by ASTM or other mutually acceptable procedures. The analysis obtained by such laboratory shall be accepted as the quality and characteristics of the coal represented by the sample. The Party questioning the correctness of the original analysis shall pay the cost of such analysis if no adjustment to the price of coal is required as a result of such analysis. If the analysis causes a price adjustment, Buyer shall pay the cost of such analysis. If the coal quality of the coal delivered to the Tolk Station bunkers varies from the coal quality for such coal as determined pursuant to the Supplier Agreements, at Buyer's request, the Parties shall determine and resolve the cause of the discrepancy, and make necessary adjustments, if any, to Buyer's satisfaction.
- 5.6 **Coal Characteristics.** Seller represents the characteristics of the coal sold under this Agreement shall be within the ranges for typical coal as set forth in Exhibit B.

6. **WEIGHTS.**

- 6.1 **Scales.** The weights of coal sold by Seller and purchased hereunder by Buyer shall be determined on coal mill integrators at the Tolk Station. Such integrators shall be properly inspected and calibrated by Buyer at regular intervals not more than six (6) months in duration. The weights determined on the mill integrators and reported monthly to Seller by Buyer shall be accepted as the quantity of coal delivered by Seller

to Buyer at the Point of Delivery. The reported quantity of coal shall be used by Seller to prepare its invoices to Buyer and Buyer shall pay such invoices in accordance with Sections 7 and 8.

- 6.2 **Seller's Representative.** Seller shall have the right to have a representative present at any and all times to observe the weighing of the coal. If either Party should at any time question the accuracy of the scales, such Party may request a prompt test and adjustment of the scales. If the scales are determined to be accurate, the requesting Party shall pay all expenses of testing. If the scales are determined to be in error, Buyer shall pay all expenses of testing and adjusting of the scales and an appropriate adjustment shall be made in weight and related invoices and payments. Such adjustment shall be retroactive to the time of the error if such time can be factually ascertained. If the time of the error cannot be so ascertained, it will be deemed to be one-half the time between the last testing of such scales and the time the error in weighing was corrected.

7. **PRICE OF COAL.**

- 7.1 **Price Components.** Seller will bill Buyer monthly for the coal delivered to Buyer at the bunkers at Tolk Station during the period covered by such billing. For each billing period, billing will be at a rate stated in dollars per ton of coal delivered equal to the sum of cost elements in Sections 7.1(A), (B), (C), (D), and (E) below, without duplication to its respective and individual components, divided by the quantity of tons of coal delivered to the Tolk Station bunkers during the billing period, plus the Tolk Monthly Margin Amount provided for in Section 7.1(F) below and as calculated as provided in Exhibit C:

- A. **Coal Cost.** The cost of coal, including the base prices F.O.B. mine with any quality or other adjustments pursuant to the applicable Supplier Agreements.
- B. **Third Party Costs.** The cost charged to Seller by third parties to transport coal from the mine point of receipt to Seller's unloading facilities adjoining Buyer's Tolk Station.
- C. **Tolk CHSA Costs.** All amounts payable by Seller under the Tolk CHSA, or any successor or assignee of Savage Tolk permitted by the terms of the Tolk CHSA, including financial costs to Seller of carrying any such payments so made during any period when current monthly billing in full to Buyer is not authorized by the terms of this Agreement, or any amendment to this Agreement, such financial costs to be determined at an interest rate at the lesser of the Prime Rate, as such term is defined in Section 8.3 below, plus two percent (2%) or such interest rate to be agreed upon between Savage Harrington and Seller and approved by Buyer, calculated and compounded monthly from the due date to date of payment (Interest);\_provided, however, there shall be excluded from the foregoing any late charges in the nature of interest incurred by Seller to Savage Tolk attributable to Seller's failure to apply payments actually made by Buyer on a timely basis.

Amounts payable by Seller under the Tolk CHSA include, without limitation, the cost incurred by or charged to Seller, for owning, leasing, storing, maintaining, or furnishing rail cars and coal processing equipment and for handling, storing, crushing, processing, weighing and delivering such coal.

- D. **Operator Bonus/Penalty Costs.** Notwithstanding the foregoing in Section 7.1(C) above, Buyer and Seller agree, with respect to the Operator Bonus/Penalty under the Tolk CHSA, since Buyer is ultimately responsible for paying the full amount of any such Bonus payable to Savage Tolk, Buyer shall be entitled to receive the full amount of any such Penalty paid to Seller, with no amount of any such Penalty allocable to Seller. The calculation under Section 7.1(C) above shall credit Buyer accordingly.
- E. **Costs of Coal Loss.** One-half percent (½%) of the sum of components under Sections 7.1(A) and (B) above to provide reimbursement to Seller for coal losses and in lieu of any other charge to Buyer for Inventory adjustments, such percentage to be reviewed every two (2) years, commencing two (2) years from the end of Seller's 2018 Fiscal Year and in the last year of the Term, and adjusted, if necessary, to reflect actual coal losses incurred during the prior two (2) year period and to be used in computing coal losses and the percentage to be set under this Section 7.1(E) for the subsequent two (2) year period. Such coal losses shall be trued-up through Seller's Inventory account as provided in Section 7.4 below.
- F. **Tolk Monthly Margin Amount.** In addition to any amounts due Seller under Sections 7.1(A) through 7.1(E) above, the Tolk Monthly Margin Amount provided for in the Margin Agreement attached as Exhibit C and incorporated by reference. The Tolk Monthly Margin Amount requires the calculation of the Total Monthly Margin Amount utilizing costs incurred by Seller with respect to this Agreement and the Coal Supply Agreement – Harrington Station between Seller and Buyer effective January 1, 2018 (**Harrington Agreement**), but the Tolk Monthly Margin Amount shall not be duplicative to any amount calculated and owed under the Harrington Agreement for coal delivered to the Harrington Station. Any reference to the Total Monthly Margin Amount in the Harrington Agreement is a reference to this same amount and calculation, but will be allocated under the Harrington Agreement based on the Harrington Percentage Share.
- 7.2 **Proration.** If any single payment or credit arises under Sections 7.1(A), (B), or (C), but does not relate solely to coal delivered to Buyer during the month the same arises, and such single payment or credit meets or exceeds Five Hundred Thousand Dollars (U.S. \$500,000), irrespective of whether such payments are made voluntarily or by agreed settlement of a disputed claim, or by determination or judgment of a regulatory body or court, the payment or credit will be prorated over twelve (12) months and paid in monthly installments which will include all costs of financing and Interest calculated as provided in Section 7.1(C).
- 7.3 **Accounting Procedure.** Seller shall use generally accepted accounting principles and per ton weight averaging determined at the close of each calendar month in determining



the amount of the applicable cost components prescribed above for the determination of the price of coal sold under this Agreement. Any accounting procedure employed by Seller, however, may be changed by it so long as such changed accounting procedure is a generally accepted accounting practice.

- 7.4 **Accounting Adjustments.** During the Term of this Agreement, in consultation with Buyer's accounting professionals, Seller will make monthly accounting adjustments for Seller's fiscal year as necessary to reconcile, at Seller's fiscal year end, book inventories to the physical inventories of coal at the Tolk Station determined in accordance with the physical inventory survey at the Tolk Station. This reconciliation of Seller's book inventories to physical inventories will include Seller's book inventory per ton weighted average cost basis and tonnage and will be completed by a credit or payment adjustment to Buyer by Seller to be submitted on or about December 15 of each of Seller's fiscal years during the Term of this Agreement.

Commencing with Seller's 2019 fiscal year pursuant to the March 28, 2006 Lost Coal Letter Agreement between Seller and Buyer, a copy of which is attached as Exhibit E and incorporated by reference, the lost coal adjustment factors under this Agreement may be adjusted with agreement of the Parties as a positive percentage as provided in Section 7.1(E), to be adjusted on an as needed basis by agreement between the Parties, to minimize the payments or credits necessary to annually reconcile Seller's book inventories to the physical coal inventory at the Tolk Station at the end of each of Seller's fiscal years during the Term.

Commencing with Seller's 2019 fiscal year, an annual inventory true up for the Tolk Station will be conducted, to provide for a reconciliation, taking into consideration the lost coal factors set in accordance with the preceding paragraph, at Seller's fiscal year end, of Seller's book inventories to physical inventories determined by survey conducted at Seller's request by qualified third parties and certified to Buyer and Seller. This reconciliation will include Seller's cost basis and tonnage and will be completed by a credit or payment invoice to Buyer by Seller to be submitted on or before forty-five (45) calendar days after the end of each of the Seller's fiscal years during the Term of this Agreement.

In consultation with Buyer, Seller will conduct any additional surveys or GPS volumetric surveys each year as the Parties agree are appropriate to maintain an accurate account of the physical inventory for coal at the Tolk Station. The costs associated with the annual survey and any additional surveys as provided in this Agreement will be reimbursed to Seller through the cost reimbursement provisions of this Agreement.

It is the intent of the Parties, upon the expiration or earlier termination of this Agreement, to the extent there is a disparity between Seller's book inventory and the physical inventory for coal at the Tolk Station, Buyer will purchase and pay for coal in inventory at the Tolk Station in a quantity equal to Seller's book inventory, regardless of the physical inventory, such that Seller will be able to pay in full all debt which financed Seller's coal inventory in accordance with the terms of Seller's approved coal inventory financing agreements. On the payment for Seller's book inventory as provided herein, Buyer will own any coal in inventory without further compensation or obligation to Seller.

8. **BILLINGS AND PAYMENTS.**

8.1 **Billings.** Seller will bill Buyer by the eighth (8<sup>th</sup>) day of the calendar month following the close of the billing month, and Buyer will pay Seller in full by wire transfer of funds by the first business day after the fifteenth day of that calendar month. Buyer shall furnish Seller with the quantity of coal sold to Buyer under Section 7.1(A) in sufficient time to enable Seller to bill Buyer. All statements, billings, and payments shall be subject to correction of any errors until the expiration of two (2) years after the date of invoice of Seller.

8.2 **Examination.** Both Seller and Buyer shall have the right to examine, at reasonable times, books, records, laboratory tests, audits, and charts of the other to the extent necessary to verify the accuracy of any statement, test, chart, or computation made under or pursuant to any of the provisions of this Agreement. Buyer shall also have the right to examine books of Seller, but not more than once per calendar year. Any information or material obtained as a result of such examination shall not be disclosed by the Party receiving the information or material without the prior written consent of the other Party, which consent shall not be unreasonably withheld. Copies of audit information received or generated by Seller relating to the Tolk CHSA shall be provided to Buyer.

8.3 **Interest.** If either Buyer or Seller fails to pay the other an amount that is due and owing, interest shall accrue on the unpaid amount at the rate of one percent over the Prime Rate until paid. For the purposes of this Agreement, "Prime Rate" is defined as the annual rate of interest published and in effect according to The Wall Street Journal on the date the obligation to pay interest on such amount commences. If the Wall Street Journal ceases to publish a Prime Rate, the Parties shall meet in good faith to designate a substitute source of a Prime Rate.

9. **REGULATORY BODIES.** This Agreement shall be subject to all applicable orders, directives, rules and regulations of any governmental agency having jurisdiction over this Agreement, one or more of the Parties, or the matters covered by this Agreement.

10. **FORCE MAJEURE.**

10.1 **Definition.** The term "force majeure" as used herein shall mean acts of God, acts of the public enemy, blockades, insurrections, strikes, or differences with workmen, riots, disorders, civil disturbances, fires, explosions, storms, floods, landslides, washouts, labor and material shortages, boycotts, breakdowns of or damage to plants, equipment or facilities, interruptions or breakdowns of the power system serving either Buyer's or Seller's facilities, interruptions to transportation, default or inability or failure to supply by Seller's coal suppliers for reasons other than Seller's default in its contracts with such suppliers so long as such default is not due to any action or inaction of Buyer, embargoes, acts of military authorities, acts of local, state or federal agencies or regulatory bodies, court actions, arrests and restraints, the failure, inability, or default of Savage Tolk to unload, handle; crush and/or deliver into Buyer's bunkers the quantities of conforming coal required by the terms of the Coal Handling Service Agreement for reasons other than Seller's default thereunder or Seller's failure to furnish sufficient

quantities of conforming coal to permit Savage Tolk's performance, and, without limitation by enumeration, any other cause or causes not reasonably within the control and without the fault or negligence of the Party in default, whether of the kind above enumerated or not, which wholly or partly prevent (i) the supply of coal to Seller or (ii) the receiving, transporting, unloading, handling, crushing, weighing or delivering of the coal by Seller or (iii) the acceptance or the utilizing of the coal by Buyer.

In addition, if either Party is delayed, restricted or prohibited from installing, constructing or operating the equipment or facilities necessary for it to perform its part of this Agreement or is otherwise impaired from operating its property as a result of restrictions upon, delays, in receiving, or failures to receive, any permits, approvals, licenses or other governmental entitlements, such restrictions, delays or failures, regardless of the reason therefore, shall be deemed to be force majeure.

- 10.2 **Obligations Under Force Majeure.** If because of force majeure, either Party is unable to carry out any of its obligations under this Agreement, and if such Party shall promptly give to the other Party written notice of such force majeure, then the obligations of the Party giving such notice shall be suspended to the extent made necessary by such force majeure and during its continuance; provided, however, the Party giving such notice shall use its best efforts to eliminate such force majeure insofar as possible with a minimum of delay. Nothing herein contained shall cause the Party affected by the force majeure to submit to what it considers to be unreasonable conditions or restrictions or to submit to an unfavorable labor agreement, and it is agreed any settlement of labor strikes or differences with workmen shall be entirely within the sole discretion of the affected Party. Buyer shall pay for all coal to which Buyer has obtained title prior to the date of Buyer's notice of force majeure to Seller. Any deficiencies in deliveries or acceptance of coal under this Agreement, caused by force majeure, shall not be made up except by mutual consent. Force majeure shall not relieve any Party of the obligation to make any payments due under this Agreement.
- 10.3 **Suspension.** Either Party shall have the right to elect to suspend the sale or purchase of coal, as the case may be, for the period of time during which such force majeure may exist. Buyer, if it so elects, shall have the right during such period to purchase coal from other sources and Seller, if it so elects, shall have the right during such period to sell coal to others.
- 10.4 **Effect of Prohibition.** It is expressly understood any prohibition to take deliveries of, or to utilize the coal subject to this Agreement, which is imposed upon the Buyer by means of laws, regulations or orders of a court or administrative body, whether or not such event is beyond the control of Buyer, shall not for the purposes of this Agreement negate the agreement set forth in Sections 10.5 and 10.6(C) below.
- 10.5 **Steps to Avoid Restriction.** The Parties recognize, during the term of this Agreement, any treaty, legislative or regulatory bodies or the courts having competent jurisdiction over the subject matter of this Agreement and/or the Parties may change, enact, promulgate, issue, revise, and/or interpret treaties, laws or regulations, rules, orders, enforcement procedures or permits such as, but not limited to, those relating to air quality, global climate change, emissions or other environmental concerns (**Change in Law**), the effect of which may preclude, prevent, materially impede or materially restrict

the utilization of the coal subject to this Agreement in conformance with the Change in Law without material modification or substantially changing or altering the equipment in which it will be utilized, or Buyer's operations, or otherwise result in a material increase in the cost of operation of the Tolk Station, including, but not limited to, costs associated with controlling the amount of carbon, mercury, or other elements and/or substances emitted or discharged from the Tolk Station.

If any such laws, regulations or orders are imposed, Buyer shall immediately notify Seller. Buyer and Seller shall promptly meet to consider what steps can be taken in the handling and combustion of coal at Tolk Station to avoid such restriction; and, if such steps are available and feasible and will not result in unreasonable expense to Buyer, Buyer shall promptly take such steps. Such steps shall include the installation of equipment which is commercially available and which can be reasonably expected to avoid the effect of such restriction or which will result in compliance therewith. If no such steps are available, or if such steps are not feasible or will result in unreasonable expense to Buyer, Buyer shall so advise Seller.

Thereupon, Seller shall promptly consider with its suppliers what steps can be taken in the mining and preparation of coal at its suppliers' mines to avoid such restriction, and if such steps are available at a reasonable expense, such steps will be taken. If the price of coal to Seller is increased to compensate Seller's supplier for any additional reasonable capital and expense incurred by it in taking such steps, upon the approval of Buyer, the price of such coal sold to Buyer under this Agreement will be similarly increased so long as such price increase is reasonable. No expense or price increase contemplated by this Section 10.5 shall be deemed reasonable if it would result in a total cost to Buyer, in using Seller's coal, in excess of One Million Dollars (U.S. \$1,000,000) of capital costs in the aggregate, or in excess of Five Hundred Thousand Dollars (U.S. \$500,000) of annual operation and maintenance costs in the aggregate. If no remedial steps are available for Seller's suppliers, Buyer shall have the right upon one year's notice to Seller, to terminate this Agreement, subject to the obligation to pay amounts due, but unpaid on the date of termination, under Section 7.1 and Exhibit C.

Additionally, and notwithstanding the foregoing, to the extent Supplier Agreements listed on Exhibit D (as Exhibit D may be amended from time to time by the addition of new or modified agreements) contain rights or remedies for Seller to terminate or otherwise modify the obligations of Seller under the Supplier Agreements, including, without limitation, rights and remedies under Section 15 of Seller's coal purchase Supplier Agreements to terminate such agreements in the event of a Change in Law or otherwise, Buyer shall have the right to direct Seller, and if so directed, Seller agrees to exercise such rights and remedies under the Supplier Agreements if the conditions for such exercise are met, and Buyer shall have the right to terminate this Agreement or modify its obligations under this Agreement consistent with the rights and remedies exercised by Seller under the Supplier Agreements.

**10.6 Delivery Failure or Preclusion.**

- A. In the event Seller fails to continue or is unable or precluded from continuing deliveries of coal to Buyer as provided in this Agreement, whether or not such failure is due to force majeure, and the reason therefore would not preclude

Buyer from the operation of Seller's facilities or performance of the contracts required to continue deliveries to Buyer, in addition to any other rights and remedies Buyer may have under this Agreement, at law or in equity, Buyer shall have the right to act in behalf of and in the place and stead of Seller to take whatever steps or actions are necessary to perform that portion of the agreements listed on Exhibit D (including, if deemed necessary by Buyer, to demand and receive from Seller an assignment of such agreements), and the facilities operated under this Agreement, which Seller is not performing until such time as Seller is ready and able to resume the deliveries of coal.

- B. When Seller is ready and able to resume deliveries of coal, Buyer will reinstate Seller to possession of whatever facilities it had taken, will reassign any agreements which had been assigned to it and will account for its operation of Seller's facilities and its performance of Seller's contracts. Buyer will indemnify and hold Seller harmless against any and all claims and causes of action, of whatsoever nature and description, for damage to property, normal wear and tear excepted, or injury to or death of any person directly caused by Buyer or by a third party acting on Buyer's behalf occurring during or as a consequence of Buyer's takeover of said facilities or performance of said contracts.
- C. Except as otherwise provided in Section 10.6(D) below, in the event Buyer takes over the operation of any facilities or contracts pursuant to Section 10.6(A), it will pay Seller for coal delivered to Buyer in accordance with Sections 7 and 8, except for the Monthly Administrative/Capital Fee under the Exhibit C Margin Agreement, but Seller shall reimburse Buyer for the reasonable costs incurred by Buyer in taking over and operating Seller's facilities or performing Seller's contracts and Seller shall include such reimbursement in the price of coal provided for in Section 7.1(A).
- D. In the event (i) Buyer permanently takes over any facilities or contracts as a consequence of Seller's insolvency, bankruptcy, or abandonment of its obligations to Buyer or to its third party suppliers; or (ii) the inability of Seller to deliver coal to Buyer for six (6) consecutive months for any reason, this Agreement shall automatically terminate and Buyer shall permanently take over all agreements listed in Exhibit D, will purchase and pay for Seller's entire Inventory, as defined in Section 3.3 above, at Seller's cost as calculated in Section 7.1 as of the date of permanent takeover and will reimburse Seller in full for any charges incurred by Seller under Section 7.1 prior to the date of termination, but not yet paid by Buyer as of the date of termination, including, without limitation, all then-outstanding amounts due under the RLOC for payments made on Exhibit D agreements.
- E. In the event Buyer fails to accept deliveries of coal under this Agreement for a period of sixty (60) consecutive calendar days for any reason, including force majeure, and Seller is unwilling to accept the financial risk involved in Buyer's extended failure to accept deliveries of coal under this Agreement, then Seller shall have the right, and without prejudice to any other right of Seller, to demand Buyer assume, and thereupon this Agreement shall terminate and Buyer will (i) assume Seller's obligations under the agreements listed in

Exhibit D; and (ii) purchase and pay for Seller's entire Inventory, as defined in Section 3.3 above, at Seller's cost as calculated in Section 7.1 as of the date of permanent takeover; (iii) reimburse Seller in full for any charges incurred by Seller under Section 7.1 prior to the date of termination, but not yet paid by Buyer as of the date of termination, including, without limitation, all then-outstanding amounts due under the RLOC; and (iv) reimburse Seller for reasonable out of pocket costs, including reasonable attorney fees, incurred in implementing this Section 10.6(E), subject to the terms and conditions provided in the Margin Amendment Agreements attached as Exhibits 1 and 3 to Exhibit C.

- 10.7 **Early Termination**. In addition to the early termination provisions of Sections 10.6(D) and (E), Buyer and Seller reserve the right to terminate this Agreement on at least one (1) year's written notice to the other. On the date that is one (1) year from the date of such notice, or if a date is set forth in the notice for termination that is more than one (1) year from the date of such notice, then on the date set forth in such notice, this Agreement shall terminate and Buyer will (i) assume Seller's obligations under the agreements listed in Exhibit D; (ii) purchase and pay for Seller's entire Inventory, as defined in Section 3.3 above, at Seller's cost as calculated in Section 7.1 as of the date of permanent takeover; (iii) reimburse Seller in full for any charges incurred by Seller under Section 7.1 prior to the date of termination, but not yet paid by Buyer as of the date of termination, including, without limitation, all then-outstanding amounts due under the RLOC for payments made on Exhibit D agreements; (iv) if Seller is not the party giving notice of early termination, reimburse Seller for reasonable out of pocket costs, including reasonable attorney fees incurred in implementing this Section 10.7, subject to the terms and conditions provided in the Margin Amendment Agreements attached as Exhibits 1 and 3 to Exhibit C; and (v) if Seller is not the party giving notice of early termination, pay to Seller an amount equal to the sum of one month of Seller's then current monthly Administrative/Capital Fees and Operating Expenses multiplied by two (2). After notice by either Party, during the period leading up to and on the date of termination, if Buyer instructs Seller in writing on how it wishes Seller to manage the contracts in Exhibit D in accordance with their terms during such period, including, without limitation, exercising any rights under such contracts to provide notice of termination, to terminate, to reduce coal deliveries and inventory, and to reduce rail transportation, Seller shall follow such instructions from Buyer.

## 11. **DEFAULT AND WAIVER**.

- 11.1 **Notice**. It is covenanted and agreed if either Party deems the other Party (**Defaulting Party**) has failed to perform any of the covenants or obligations imposed upon it under this Agreement, the Party asserting default shall deliver to the Defaulting Party written notice stating specifically the claimed default. The Defaulting Party shall have thirty (30) calendar days after receipt of the aforesaid notice in which to remedy or remove the claimed default, and if it fails to do so in such time, the other Party may pursue such remedies as may be available to it.
- 11.2 **March-In Rights**. As noted in Section 2.3 of this Agreement, Seller has entered into the Tolk CHSA under which Savage Tolk agrees to perform coal handling, crushing, processing, facilities and equipment maintenance and repair, railcar maintenance, storage, and transportation leasing, and final delivery of processed coal at the Tolk

Station bunkers, all as provided in the Tolk CHSA. To enable Seller to enter into the Tolk CHSA and in consideration of Seller's obligations assumed in the Tolk CHSA, Buyer and Seller agree as follows:

Under conditions precedent as set forth under Section 10.6 of this Agreement and the Tolk CHSA and Access Agreement attached as Exhibit N to the Tolk CHSA, SPS may during the Term come into possession of the Property, Facilities, and Railcars, as defined in the Tolk CHSA (**March-In**). In the event of a force majeure or other event giving rise to a March-In circumstance, Seller and Savage Tolk agree to provide immediate access to, and the use of, the Facilities and Railcars to SPS or SPS' designated contractor or cause the Railcars and Facilities, respectively, to be restored or leased to SPS or SPS' designated contractor for SPS to perform under the Tolk CSA and the Tolk CHSA. In the event of a default by Savage Tolk or Seller under the Tolk CHSA, or Seller under the Tolk CSA, SPS may, instead of Seller and in satisfaction of its March-In obligations to Seller and Savage Tolk, provide its own employees to perform all Coal handling functions including Operation and Maintenance of Railcars at any and all times Savage Tolk and/or Seller fails, to keep SPS' coal bunkers sufficiently filled to permit continuous operation of SPS' Tolk Station units. While SPS is providing its own employees to perform Coal handling and Railcar Operation and Maintenance services, SPS and Seller are released from Seller's obligation to make the Operating and Maintenance Costs payments to the extent of, but not in excess of, Operating and Maintenance Costs actually paid out by Seller which would otherwise have been payable to Savage Tolk under the Tolk CHSA. SPS shall withdraw its employees and Seller will resume the payment procedures under the Tolk CHSA at such time as Savage Tolk and/or Seller have the capability to meet the requirements of Section 3 of the Tolk CHSA.

- 11.3 **No Waiver.** No waiver by either Party of any one or more default by the other in the performance of any provision of this Agreement shall operate or be construed as a waiver of any future default or defaults, whether of a like or of a different character.
- 11.4 **General Rights.** In the event of an uncured default by either Party, in addition to all remedies provided under this Agreement, the non-defaulting Party shall have all rights and remedies at law or in equity in any litigation or arbitration initiated under this Agreement.

## 12. **DISPUTE RESOLUTION THROUGH BINDING ARBITRATION.**

- 12.1 **Informal Dispute Resolution.** If any dispute arises between Buyer and Seller under this Agreement, the aggrieved Party will promptly notify the other Party, in writing, of its intent to invoke this dispute resolution procedure. The Parties will meet as soon as practicable in good faith to attempt to resolve such dispute. If the Parties fail to resolve the dispute within thirty (30) business days after the delivery of such written notice, then within five (5) business days thereafter, Seller will nominate two (2) senior level managers and Buyer will nominate two (2) senior level managers to meet at a mutually agreed upon location in the Denver metropolitan area, or a location as otherwise agreed, to attempt, in good faith, to resolve the dispute. If the Parties are unable to resolve the dispute to their mutual satisfaction within ten (10) business days after such nomination, the Parties are free to pursue relief under Section 12.2 of this Agreement.

Notice and cure periods provided in Section 11.1 shall run concurrently with the time periods set forth in this Section 12.1, unless the Parties otherwise agree.

- 12.2 **Arbitration.** Any and all disputes, claims, or controversies between the Parties, including any assignees of the Parties, arising out of or relating to this Agreement that are not resolved by their mutual agreement shall be submitted to binding arbitration in the State of Texas before the American Arbitration Association (AAA) under the AAA's commercial arbitration rules then in effect, subject to the provisions of this Section 12.2, except and excluding matters involving a dispute claim or controversy by Buyer or Seller for specific performance, in which case all claims at law or in equity may be filed in a Texas state or federal court having jurisdiction over the dispute, in the Buyer's or Seller's sole discretion as the case may be. The Party calling for arbitration (**Initiating Party**) shall give written notice to the other Party setting forth: (a) a statement of the issue(s) to be arbitrated; (b) a statement of the claim showing that the Initiating Party is entitled to relief; and (c) a statement of the relief to which the Initiating Party claims to be entitled. Within thirty (30) calendar days from the receipt of such notice, the other Party (**Receiving Party**) may submit its written response and give notice in the same manner required above of additional issues to be arbitrated. The Initiating Party shall have twenty (20) calendar days from receipt of said response to respond to any issues submitted for arbitration by the Receiving Party.

Within sixty (60) calendar days of the date of the Initiating Party's written notice requesting arbitration, the Parties shall agree upon a competent and impartial person to act as the arbitrator. In the event the Parties cannot agree on the arbitrator, the arbitrator shall be selected pursuant to the rules of the American Arbitration Association (AAA) and the selection shall be binding and non-appealable.

The Parties will participate in the arbitration in good faith and shall share in its costs in accordance with this Agreement. The Parties shall share equally in the costs of the arbitrator and pay their own attorneys' fees and costs, subject to any attorneys' fees and costs awarded by the arbitrator. The provisions of this Section 12.2 may be enforced by any court of competent jurisdiction, and the Party seeking enforcement shall be entitled to an award of all costs, fees and expenses, including reasonable attorneys' fees, to be paid by the Party against whom enforcement is ordered. The arbitrator shall not award any special, indirect, incidental, consequential, punitive or exemplary damages against either Party. Judgment upon the award rendered by the arbitrator may be entered in any court having competent jurisdiction. Upon the conclusion of any arbitration proceedings under this Agreement, the arbitrator shall render findings of fact and conclusions of law and a final written arbitration award setting forth the basis and reasons for any decision reached (**Final Award**) within thirty (30) calendar days of the conclusion of the arbitration and shall deliver such documents to the Parties, together with a signed copy of the Final Award. Subject to the provisions of this Agreement, the Final Award shall constitute a conclusive determination of all issues in question, binding upon the Parties, and shall include an affirmative statement to such effect. The arbitrator chosen in accordance with these provisions shall not have the power to alter, amend, or otherwise affect the terms of these arbitration provisions or any of the other provisions of this Agreement. Except as specifically otherwise provided in this Agreement, arbitration conducted in accordance with this Agreement shall be the sole and exclusive means of seeking redress of the Parties.



13. **NOTICES.** All notices, statements, demands, requirements, or other communications and documents (**Communications**) required or permitted to be given, served, or delivered by or to either Party or any intended recipient under this Agreement shall be in writing and shall be either delivered by hand, sent by a nationally recognized overnight courier service, or to such other address as either Party may from time to time have notified the other Party as being its address for purposes of this Agreement to the exclusion of all previously applicable addresses. Communications shall be deemed to have been given, served, or delivered upon delivery or, if delivery is refused, upon first attempted delivery, between 9 a.m. and 5 p.m. in the recipient's time zone. The addresses of the Parties are as follows:

**If intended for Seller:** TUCO INC.

*Attention: Vice President*  
6900 I-40 West, Suite 240  
Amarillo, Texas 79106

and

TUCO INC.

*Attention: Vice President*  
5251 DTC Parkway, Suite 800  
Greenwood Village, Colorado 80111-2737

**With a copy, which copy does not constitute notice, to:**

John J. Coates, Esq.  
DILL DILL CARR STONBRAKER & HUTCHINGS, P.C.  
455 Sherman Street, Suite 300  
Denver, Colorado 80203

or such other persons or such other address as Seller shall have designated by due notice to Buyer.

**If intended for Buyer:** Xcel Energy

Director, Fuel Supply Operations  
1800 Larimer Street, Suite 1000  
Denver, Colorado 80202

**With a copy, which copy does not constitute notice, to:**

Xcel Energy  
Assistant General Counsel Energy Supply  
1800 Larimer Street, Suite 1100  
Denver, Colorado 80202

or such other persons or such other address as Buyer shall have designated by due notice to Seller.

Rejection or refusal to accept delivery or the inability to deliver because of changed address of which no notice was given shall be deemed to be receipt of notice as of the date such notice was deposited in the mail or delivered to the courier. In the event of a change of address by

Buyer or Seller, Buyer and Seller shall also give notice of such change in address to the other Party.

14. **MISCELLANEOUS.**

- 14.1 **Limitation on Damages.** Under no circumstances shall either Party be liable to the other Party for consequential, indirect, or exemplary damages.
- 14.2 **Assignment.** Each Party shall have the right to assign its rights and delegate its obligations under this Agreement, in whole or in part, to any third party at any time during the Term upon receiving the prior written consent of the other Party, such consent not to be unreasonably conditioned, withheld, or delayed; provided, however, any such assignment shall be expressly made subject to all the terms, conditions, and covenants of this Agreement. For avoidance of doubt, a Party's consent to a proposed assignment shall not be deemed to have been unreasonably withheld if the proposed assignee is not technically and financially capable of performing the assigning Party's obligations under this Agreement, including, without limitation, indemnification obligations. Notwithstanding the foregoing, Buyer consents to Seller's execution of a collateral assignment of Seller's rights under this Agreement to Seller's RLOC lenders, which assignment shall be subordinate in all respects to all rights and obligations of Buyer under this Agreement.
- 14.3 **Taxes and Assessments.** Subject to the terms of this Agreement, the Seller shall pay or cause to be paid all taxes and assessments imposed on Seller with respect to the coal sold under this Agreement prior to its delivery to Buyer, and Buyer shall pay or cause to be paid all taxes and assessments imposed upon Buyer with respect to the coal received by it under this Agreement after its receipt by Buyer. Neither Party shall be responsible or liable for any taxes or other statutory charges levied or assessed against any of the facilities of the other Party used for the purpose of carrying out the provisions of this Agreement.
- 14.4 **Controlling Law.** The terms and conditions of this Agreement and subsequent performance of this Agreement shall be construed and controlled by the laws of the State of Texas. The Parties agree any claim or suit arising out of this Agreement and not subject to arbitration under Section 12.2, shall be brought in a state or federal court in Texas having jurisdiction over the claims at issue.
- 14.5 **Waiver of Jury Trial.** The Parties hereby knowingly, voluntarily, and intentionally waive the right either may have to a trial by jury in respect of any litigation that is not subject to arbitration under Section 12.2, or arising out of, under, or in connection with this Agreement and any document executed in connection with this Agreement, or any course of conduct, course of dealing, statements, whether oral or written, or actions of either Party. This provision is a material inducement for the Parties to enter into this transaction.
- 14.6 **Entire Agreement.** This Agreement constitutes the entire agreement of the Parties and no amendment or modification of this Agreement shall be valid or binding unless reduced to writing and executed by the Parties or their permitted assigns.

- 14.7 **Headings.** The topical headings used herein are inserted for convenience and reference only and shall not be construed as having any substantive significance or meaning whatsoever or as indicating all of the provisions of this Agreement relating to any particular topic are to be found in any particular section. The headings or captions of this Agreement in no way define, describe, extend or limit the scope, meaning or intent of this Agreement.
- 14.8 **Attorneys' Fees; Litigation.** Notwithstanding any provisions in this Agreement to the contrary, in the event of litigation regarding this Agreement, the prevailing Party will be entitled to recover their reasonable attorneys' fees and costs.
- 14.9 **Successors and Assigns.** This Agreement will bind and inure to the benefit of the respective successors and permitted assigns of the Parties.
- 14.10 **Survival.** The Parties' representations and warranties and provisions of this Agreement that contemplate performance after expiration or termination of this Agreement shall survive the expiration or termination of this Agreement.
- 14.11 **Counterparts.** This Agreement may be executed in any number of original counterparts, all of which evidence only one agreement, and only one of which need be produced for any purpose. This Agreement may be executed and delivered by facsimile, portable document format (.pdf), or other electronic delivery, each of which will be as binding and effective as an original signature.
- 14.12 **Not Binding Until Execution.** The submission of this Agreement for examination does not constitute an offer by or to either Party. This Agreement will be effective and binding only after execution and delivery by the Parties.
- 14.13 **Modifications; Waivers.** No amendments or other modifications or changes to this Agreement shall be effective or binding on either Party unless the same shall be in a writing executed by both Parties. No waiver by either Party of any one or more defaults by the other in the performance of this Agreement shall operate or be construed as a waiver of any future default or defaults, whether of a like or different nature.
- 14.14 **Time Periods.** Time is of the essence under this Agreement. In the event the last day permitted for the performance of any act required or permitted under this Agreement falls on a day other than a Business Day, the time for such performance will be extended to the next succeeding Business Day. Each time period under this Agreement will exclude the first day and include the last day of such time period.
- 14.15 **Schedules.** All recitals, schedules, and exhibits referred to in this Agreement are incorporated in this Agreement by reference and will be deemed part of this Agreement for all purposes as if set forth at length in the body of the Agreement.
- 14.16 **Severability.** The invalidation or unenforceability in any particular circumstances of any of the provisions of this Agreement will in no way affect any of the other provisions of this Agreement, which will remain in full force and effect.

- 14.17 **No Joint Venture, Partnership, Agency, Etc.** This Agreement will not be construed as in any way establishing a partnership, joint venture, express or implied agency, or employer employee relationship between Buyer and Seller.
- 14.18 **No Third-Party Beneficiaries.** This Agreement does not create, and shall not be construed as creating, any rights enforceable by any person not a Party, or a successor or assign of a Party, to this Agreement.
- 14.19 **Further Assurances.** After this Agreement is fully signed, Seller and Buyer each will execute and deliver such additional documents, instruments, and assurances, and take such further actions as may be necessary to carry out the provisions of this Agreement or give effect, confirm, assure, or validate any of the transactions contemplated by this Agreement, whenever reasonably requested by the other Party.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the day and year first above written.

**SELLER:**

**TUCO INC.,**  
a Delaware corporation

By: Charles S. McNeil  
Charles S. McNeil  
Its President

**BUYER:**

**SOUTHWESTERN PUBLIC SERVICE COMPANY**  
a New Mexico corporation

By: Thomas A. Imbler  
Thomas A. Imbler  
Vice President, Commercial Operations  
Xcel Energy Services Inc., a Delaware corporation,  
as Authorized Signatory for  
Southwestern Public Service Company

EXHIBIT A

ANNUAL COAL QUANTITIES AND THREE YEAR ESTIMATE NOTICE

2018 BURN FORECAST (TONS)													
	January	February	March	April	May	June	July	August	September	October	November	December	Totals
Harrington 1	93,319	100,660	97,465	72,335	90,445	95,344	96,389	117,939	89,469	102,087	77,502	100,074	1,133,528
Harrington 2	109,660	81,881	97,291	99,177	83,136	95,689	106,339	105,168	76,358	112,665	83,501	95,035	1,147,900
Harrington 3	107,746	100,791	98,511	81,323	107,827	101,040	96,521	0	71,704	89,044	89,204	1,032,773	89,204
Tolk 1	78,840	21,439	19,018	78,463	80,108	143,166	161,111	161,937	154,570	75,382	82,989	78,840	1,335,663
Tolk 2	84,346	76,184	73,349	54,303	84,346	154,226	148,730	153,192	149,757	80,832	73,349	84,346	1,216,960
H & T Totals	474,411	380,955	385,634	385,401	445,862	577,487	613,609	634,757	543,858	370,966	406,385	447,499	5,666,824
Harrington Totals	311,225	283,332	293,267	252,835	281,408	280,095	303,768	319,628	239,531	214,752	250,047	284,313	3,314,201
Tolk Totals	163,186	97,623	92,367	132,566	164,454	297,392	309,841	315,129	304,327	156,214	156,338	163,186	2,352,623
THREE YEAR ESTIMATE													
	2019	2020	2019	2020	2019	2020	2019	2020	2019	2020	2019	2020	Totals
Harrington 1	76,085	87,075	76,349	80,412	17,969	66,949	80,598	94,181	18,196	10,867	0	76,459	489,743
Harrington 2	87,496	97,827	73,131	38,617	53,000	79,840	78,460	85,960	46,851	50,116	51,207	79,359	821,864
Harrington 3	104,728	86,296	79,325	93,591	73,115	82,309	91,982	82,942	77,652	87,251	77,562	82,976	1,019,728
Tolk 1	128,975	118,970	127,758	98,307	115,839	114,501	126,984	129,454	107,307	117,900	100,409	101,006	1,387,411
Tolk 2	124,391	118,866	111,385	107,073	123,920	104,407	124,292	127,182	102,661	124,189	98,941	108,739	1,376,045
H & T Totals	473,674	427,460	467,949	352,177	383,843	448,007	502,316	519,718	352,667	380,322	328,118	446,540	5,094,791
Harrington 1	82,546	87,075	80,412	21,767	28,102	78,447	96,400	92,881	45,169	42,983	22,268	80,212	758,262
Harrington 2	82,585	0	0	35,905	80,238	79,740	77,127	101,879	54,169	74,203	37,490	76,497	699,831
Harrington 3	76,857	76,574	84,124	88,173	57,119	92,848	90,739	93,946	91,115	86,316	84,953	80,815	1,003,577
Tolk 1	113,062	106,637	86,606	98,401	106,880	123,101	120,985	141,350	116,376	126,974	109,372	108,913	1,358,656
Tolk 2	113,708	103,457	102,522	51,930	8,432	114,464	115,811	130,771	110,587	125,020	104,103	110,557	1,191,264
H & T Totals	468,756	373,743	353,664	296,076	280,770	488,600	501,062	560,827	417,416	455,495	358,187	456,994	5,011,590
Harrington 1	81,075	68,575	81,485	18,653	28,375	86,971	99,111	107,893	58,905	92,215	34,746	82,227	840,230
Harrington 2	79,554	76,703	72,422	56,115	48,137	81,017	98,520	88,671	72,340	93,863	46,861	89,382	903,584
Harrington 3	74,978	75,884	69,107	85,930	81,509	85,402	87,519	77,066	53,015	6,972	73,503	76,103	846,987
Tolk 1	109,380	85,607	0	77,918	107,360	126,720	125,609	137,119	113,414	131,551	107,225	113,861	1,235,762
Tolk 2	106,006	96,056	99,985	82,874	102,664	130,399	125,872	143,339	114,726	129,552	109,186	113,496	1,354,155
H & T Totals	450,992	402,825	322,998	321,490	368,045	510,507	536,630	554,087	412,400	454,154	371,520	475,070	5,180,719

**EXHIBIT B**

**TYPICAL COAL QUALITY AND CHARACTERISTICS  
OF SOUTHERN POWDER RIVER BASIN "8800 BTU" COAL**

<b>PROXIMATE ANALYSIS-CALCULATED AS-RECEIVED BASIS</b>	<b>TYPICAL</b>	<b>MIN-MAX</b>
Moisture, %	26.70	24.1-27.9
Ash, %	4.90	3.6-6.8
Volatile Matter, %	31.10	28.4-34.7
Fixed Carbon, %	37.00	33.8-40.8
Btu/Lb.	8877	8500-9100
Sulfur, %	0.25	0.12-0.36
SO <sub>2</sub> Lb/MM Btu	0.55	0.29-0.81
<b>ULTIMATE ANALYSIS-CALCULATED AS-RECEIVED BASIS</b>	<b>TYPICAL</b>	<b>MIN-MAX</b>
Moisture, %	26.70	24.1-27.9
Ash, %	4.90	3.6-6.8
Hydrogen, %	3.50	3.1-4.0
Carbon, %	51.70	51-56
Nitrogen, %	0.70	0.5-1.0
Sulfur, %	0.25	0.12-0.36
Oxygen, % (By Difference)	12.20	10.6-14.3
<b>DRY, WHOLE COAL BASIS</b>	<b>TYPICAL</b>	<b>MIN-MAX</b>
Chlorine (ppm)	8.70	7-14
Mercury (ppm)	0.065	0.050-0.102
<b>MINERAL ANALYSIS OF ASH % IGNITED BASIS</b>	<b>TYPICAL</b>	<b>MIN-MAX</b>
Silicon Dioxide	34.70	36.1-45.2
Aluminum Oxide	17.60	16.1-19.5
Titanium Oxide	1.40	0.90-1.7
Ferric Oxide	6.10	3.3-9.2
Calcium Oxide	21.90	18.1-33.2
Magnesium Oxide	4.90	3.8-7.5
Potassium Oxide	0.50	0.3-0.6
Sodium Oxide	1.50	0.8-2.2
Sulfur Trioxide	9.40	4.2-13.6
Phosphorus Pentoxide	1.10	0.3-3.0
Manganese Oxide	0.04	0.6-1.3
Strontium Oxide	0.30	0.2-0.6
Barium Oxide	0.60	0.4-1.2
Undetermined		
<b>FUSION TEMPERATURE, DEGREES F - REDUCING</b>	<b>TYPICAL</b>	<b>MIN-MAX</b>
Initial Deformation	2153	1998-2362
H = W	2173	2011-2379
H = ½ W	2189	2020-2396
Fluid	2207	2033-2437
<b>FUSION TEMPERATURE, DEGREES F - OXIDIZING</b>	<b>TYPICAL</b>	<b>MIN-MAX</b>
Initial Deformation	2216	2076-2404
H = W	2233	2089-2417
H = ½ W	2246	2094-2442
Fluid	2267	2105-2497

**EXHIBIT B**

<b>HARDGROVE GRINDABILITY INDEX</b>	<b>TYPICAL</b>	<b>MIN-MAX</b>
	58	51-74
<b>WATER SOLUBLE ALKALIES - % AS DETERMINED</b>	<b>TYPICAL</b>	<b>MIN-MAX</b>
Potassium Oxide	0.004	0.003-0.010
Sodium Oxide	0.060	0.010-0.110
<b>EQUILIBRIUM MOISTURE - %</b>	<b>TYPICAL</b>	<b>MIN-MAX</b>
	25.73	23.6-26.8
<b>BASE: ACID RATIO</b>	<b>TYPICAL</b>	<b>MIN-MAX</b>
	0.66	0.3-1.2
<b>T250 - DEGREES F</b>	<b>TYPICAL</b>	<b>MIN-MAX</b>
	2245	2067-2459

**EXHIBIT C**

**MARGIN AGREEMENT AND EXAMPLE CALCULATION**

The Tolk Monthly Margin Amount referenced in Section 7.1(F) of this Agreement is calculated as follows: (Tolk Percentage Share x Total Monthly Margin Amount).

“Tolk Percentage Share” means a percentage equal to the quantity of tons of coal delivered to the Tolk Station bunkers during the month divided by the total quantity of tons of coal delivered to the Tolk Station bunkers and to the Harrington Station bunkers during the month.

“Total Monthly Margin Amount” means the sum of (i) the Working Capital Cost incurred by Seller in connection with this Agreement and the Harrington Agreement for that month (Margin Item A); (ii) Inventory interest charges to Seller with respect to this Agreement and the Harrington Agreement for that month (Margin Item B); (iii) the fixed monthly Administrative/Capital Fee of \$72,500 (Margin Item C); (iv) the Tax Adjustment, if any, for that month (Margin Item E); and (v) Operating Expenses of Seller; plus extraordinary expenses, if any, incurred from time to time under the December 14, 2010 Margin Amendment Agreement (Margin Amendment Agreement) attached as Exhibit 1 to this Exhibit C (Margin Item F). Margin Items D, G, H and I are no longer applicable. The methods for calculation and determination of Margin Items A, B, C, E, and F are set forth in Exhibits 1 and 3 of this Exhibit C. Each of the 2010, 1996, and 2001 Margin Amendment Agreements attached as Exhibits 1, 2, and 3 to this Exhibit C, respectively, are provided only as a demonstration of the approach and methodology the Parties intend to use in connection with the determination and calculation of the Tolk Monthly Margin Amount under this Agreement. Each of Exhibits 1, 2, and 3 to this Exhibit C and the April 30, 1979 Coal Supply Agreement or related agreements to which the Exhibits apply, are not incorporated into the terms of this Agreement, nor shall any such terms and conditions be a part of this Agreement. It is the intent of the Parties by the attachment of Exhibits 1, 2, and 3 to this Exhibit C to provide historical context for the method to be used for determining and calculating various items of the Tolk Monthly Margin Amount in this Exhibit C, to the extent each Margin Item is still applicable.

An example Margin Agreement calculation is set forth on the following pages:

**[REMAINDER OF PAGE INTENTIONALLY BLANK.]**



EXHIBIT C

**SAMPLE CALCULATION**

INVENTORY VALUATION		HARRINGTON	TOLK
First of month Inventory Valuation		\$16,341,875.15	\$30,071,036.31
End of month Inventory Valuation		20,341,875.15	34,071,036.31
Average Inventory Valuation		\$18,341,875.15	\$32,071,036.31
Combined Plant Total Average Inventory Valuation		\$50,412,911.46	

	HARRINGTON	TOLK
Monthly Delivered Tons	148,585	132,613

MARGIN COMPONENTS		
	Daily Operating Loan Financing Rate	Harrington / Tolk
1	Operating Loan Facility Cap - effective 01.01.18 <i>[This operating loan facility cap is for informational purposes only. The margin is not calculated on these numbers.]</i>	\$85,000,000.00
	Total Operating Loan Interest for Billing Month	\$132,274.86
	Total Operating Loan Fees and Expenses for Billing Month	\$4,622.03
	Seller's Intangible at Closing <i>[intentionally left blank - N/A]</i>	
	Remaining Billing Months <i>[intentionally left blank - N/A]</i>	
A	<b>Incurred Working Capital Costs</b>	
	Operating Loan Interest, Fees, and Expenses	\$136,896.89
	Less Inventory Interest Charge	\$108,907.55
	Equals Incurred Working Capital Costs	\$27,989.34
B	<b>Inventory Interest Charge</b>	\$ 108,907.55
C	<b>Monthly Administrative/Capital Fee</b>	\$ 72,500.00
D	<b>Return on Unamortized Seller's Intangible for Billing Month</b> <i>[intentionally left blank - N/A]</i>	
E	<b>Tax Adjustment</b> <i>[if any, from time to time]</i>	
F	<b>Operating Expenses</b>	
	Operating Expenses as of 01.01.18	\$ 1,640,000.00
	Increase per Margin Amendment Agreement <i>[to be determined]</i> eff. 01.01.19	
	Operating Expenses for Monthly Margin Calculation [Operating Expenses for 2018/12]-Monthly Installment	136,666.67
G	<b>Seller's Actual Federal Corporate Income Tax Rate</b> <i>[intentionally left blank - N/A]</i>	
H	<b>Amortization of Seller's Intangible</b> <i>[intentionally left blank - N/A]</i>	
I	<b>Income Tax on Return on Unamortized Seller's Intangible</b> <i>[intentionally left blank - N/A]</i>	
MARGIN CALCULATION		
A	Incurred Working Capital Costs	\$ 27,989.34
B	Inventory Interest Charge	108,907.55
C	Administrative/Capital Fee	72,500.00
E	Tax Adjustment <i>[if any, from time to time]</i>	
F	Operating Expenses	136,666.67
	Extraordinary Expenses <i>[if any, from time to time]</i>	
	<b>Total Monthly Margin Amount</b>	<b>\$ 346,063.56</b>

EXHIBIT C

**SAMPLE CALCULATION**

**Tolk Monthly Margin Amount Calculation**

Tolk Percentage Share equals Tolk Monthly Tons/(Tolk Monthly Tons + Harrington Monthly Tons) =  
 $132,613/(132,613+148,585) = 47.16\%$

Total Monthly Margin Amount = \$346,063.56

Tolk Monthly Margin Amount = (Total Percentage Share x Total Monthly Margin Amount) = (.4716 x  
\$346,063.56) = \$163,203.57

	MONTHLY MARGIN CALCULATION	HARRINGTON	TOLK
	Percentage Share of Monthly Margin Amount	\$ 182,859.99	\$ 163,203.57

**EXHIBIT 1 TO EXHIBIT C**  
**2010 MARGIN AMENDMENT AGREEMENT**



1800 Larimer St., Suite 1000  
Denver, CO. 80202

December 14, 2010

TUCO INC.  
Charles S. McNeil, President  
3300 S. Parker Road, Suite 310  
Aurora, Colorado 80014

TUCO INC.  
Attention: Vice President  
6900 I-40 West, Suite 240  
Amarillo, Texas 79106

**Re: Acceptance of TUCO Proposal with respect to Renegotiation of Margin**

Dear Charlie:

Southwestern Public Service Company ("SPS") and TUCO Inc. ("TUCO") entered into discussions in an attempt to renegotiate the Margin, as such term is defined in each of the following (collectively the "Margin Amendments"):

1. Margin Amendment to Coal Supply Agreement – Harrington between TUCO Inc. and Southwestern Public Service Company dated as of September 30, 1996, as amended by the 2001 Margin Amendment to Coal Supply Agreement (Harrington Station) dated as of September 18, 2001; and
2. Margin Amendment to Coal Supply Agreement – Tolk between TUCO Inc. and Southwestern Public Service Company dated as of September 30, 1996, as amended by the 2001 Margin Amendment to Coal Supply Agreement (Tolk Station) dated as of September 18, 2001.

Pursuant to a meeting on December 13, 2010 and subsequent discussions, the proposal with respect to the Margin Amendments is as follows (to be effective as of January 1, 2011):

**EXHIBIT 1 TO EXHIBIT C**

1. Set Margin Item F at a total of \$1,480,000.
2. Margin Item F shall increase each year, beginning on January 1, 2012, by an amount equal to the greater of: (a) two and one half percent (2.5%), or (b) the percentage increase in the Consumer Price Index for the year immediately preceding the increase.
3. Set Margin Item C at a total of \$135,000 per year.
4. The following one-time out-of-pocket costs actually incurred by TUCO shall be outside of Margin Item F and shall be reimbursed through an approved activity letter:
  - a. Legal <sup>and expert CAM</sup> costs of negotiating and documenting a new rail contract
  - b. Cost of the proposed computer software upgrade
  - c. Costs of changing from LIFO to Average Cost coal inventory accounting
  - d. Legal costs of restating the SPS/TUCO agreements
5. TUCO shall follow SPS's coal procurement strategy.

SPS accepts TUCO's proposal. The terms above shall become effective as of January 1, 2011, and the Margin Amendments shall be amended accordingly. All other terms and conditions of the Margin Amendments will remain unchanged and will remain in full force and effect.

SPS appreciates TUCO's efforts to address the concerns raised by SPS and its willingness to renegotiate the Margin at this time.

If you are in agreement with the above, please so indicate by executing this letter in the place provided below.

Sincerely,



Susan Arigoni  
Vice President – Fuels  
Xcel Energy Services Inc., as agent for  
Southwestern Public Service Company

Acknowledged and Agreed:

TUCO INC.

By: Charles S. McNeil  
Name: Charles S. McNeil  
Title: President  
Date: 12-15-10

**EXHIBIT 1 TO EXHIBIT C**

cc: John J. Coates  
DILL DILL CARR STONEBRAKER & HUTCHINGS, P.C.  
455 Sherman Street, Ste. 300  
Denver, Colorado 80203

EXHIBIT 1 to EXHIBIT C

In addition to the terms of the foregoing December 14, 2010 Margin Amendment Agreement, the following provisions apply to the calculation of the Tolk Monthly Margin Amount under Section 7.1.

**Margin Items A and B: Incurred Working Capital Costs and Inventory Interest Charge.** In order to determine the Incurred Working Capital Costs (Margin Item A) Seller will provide Buyer the actual cost to Seller during each month of financing its investment in the Coal Inventory under this Agreement, which includes the interest amount and fees Seller is charged for its RLOC, including, without limitation, interest hedging (subject to the prior written approval of Buyer, which approval shall not be unreasonably withheld, conditioned or delayed) referred to as the Operating Loan Interest, Fees, Expenses. The Inventory Interest Charge (determined below) is subtracted from the Operating Loan, Fees and Expenses resulting in the Incurred Working Capital Costs for that month.

The Inventory Interest Charge (Margin Item B) included as part of the monthly total Operating Loan Interest, Fees and Expenses is the monthly interest amount on the Coal Inventory. The Parties acknowledge the RLOC will be used to finance the Inventory and payments due under the Exhibit D agreements. As to any month in which no coal is delivered to Buyer, such month's cost of financing under the RLOC shall be accrued and included in the price of Coal next delivered to Buyer or paid in association with remedies exercised under Section 10.6 of this Agreement.

**Margin Item C: Administrative/Capital Fee.** The Administrative/Capital Fee is a single fixed payment of \$72,500 per month covering both the Tolk and Harrington Stations. The Administrative/Capital Fee shall not be adjusted during the Initial Term or decreased during any Extended Term. In the event of an Extended Term, Seller reserves the right to seek an increase in the Administrative/Capital Fee to reflect increases in inflation or changes in economic circumstances. Closure of one but not both of the Tolk or Harrington Stations during the Term or Extended Term shall not reduce the amount of the Administrative/Capital Fee due under the surviving Coal Supply Agreement.

**Margin Item E: Costs of Assessments and Taxes.** All assessments and taxes, except federal and state income taxes, levied on Seller for any activity of Seller under this Agreement.

**Margin Item F: Operating Expenses.** The Operating Expense item has an annual base rate of \$1,480,000 as of January 1, 2011 and is adjusted annually as provided in the foregoing December 14, 2010 Margin Amendment Agreement.

The following terms originating from the September 30, 1996 Margin Amendment to the Coal Supply Agreement – Tolk Station, as amended effective January 1, 2002, which amendments are attached as Exhibits 2 and 3 to this Exhibit C, apply for calculation of periodic adjustment to payments due under Item F, Operating Expenses:

Operating Expenses shall be calculated based on the Margin Amendment Agreement providing for a base rate of \$1,640,000 as of January 1, 2018 and escalated at the beginning of each year thereafter commencing January 1, 2019 through the Term of this Agreement by the lesser of 2.5% or the percentage increase in the Consumer Price Index for All Items - Urban Consumers as published by the Bureau of Labor Statistics for the year immediately preceding the increase. The annual Operating Expenses shall be paid in equal monthly installments. These Operating Expenses include, but are not limited to, all in-house and outside legal fees, consulting, or other services reasonably required to

EXHIBIT 1 to EXHIBIT C

administer this Agreement and the Harrington Agreement, to the extent not duplicated elsewhere. However, these Operating Expenses will not include extraordinary expenses which Buyer may agree to pay, which agreement shall not be unreasonably withheld, conditioned, or delayed, in connection with renegotiation or replacement of mine, freight, or handling agreements approved by Buyer as Approved Activities (**Approved Activity**). In addition to Operating Expenses, Buyer will pay to or reimburse Seller for awards of damages against Seller and costs and attorneys' fees incurred by Seller in (1) prosecuting any Approved Activity and (2) defending any non-tortious litigation, administrative proceeding, arbitration, rail rate review, or other activity arising out of Seller's reasonably prudent and good faith performance of its duties in connection with contracts with third parties required by this Agreement and the Harrington Agreement. The expenses paid or reimbursed to Seller in accordance with the preceding two sentences will be accounted for and paid under the category specified in Margin Item F unless otherwise agreed by Seller and Buyer. If Seller receives payment from any settlement or award in any activity specified in the immediately preceding provisions (1) and (2) of this paragraph, such payment will be paid over to Buyer after deduction of unreimbursed fees, costs, and expenses, and Buyer will accept such payment without adjustment of the Margin with respect to such activity. Seller will notify Buyer of any claim with respect to any such activity and Buyer will have the right to participate therein with counsel of Buyer's choosing. Seller will not settle or compromise any such claim as to which Buyer is obligated to pay or reimburse Seller without the prior written consent of Buyer.

**EXHIBIT 2 TO EXHIBIT C**

**1996 MARGIN AMENDMENT AGREEMENT**

**MARGIN AMENDMENT  
TO  
COAL SUPPLY AGREEMENT – TOLK STATION  
BETWEEN TUCO INC., as "Seller" AND SOUTHWESTERN  
PUBLIC SERVICE COMPANY as "Buyer"**

This Margin Amendment to the above referenced Coal Supply Agreement is entered into between TUCO INC. and Southwestern Public Service Company as of this 30th day of September, 1996.

Whereas, TUCO INC. ("Seller") and Southwestern Public Service Company ("Buyer") have agreed to the following terms and conditions in order to fulfill the contractual rights and obligations of each party under the Coal Supply Agreement dated April 30, 1979, for the Tolk Station ("this Agreement").

Now, Therefore, Seller and Buyer agree to amend this Agreement to define the margin amounts due to Seller for coal supplied to Buyer for its native system requirements. In consideration of the benefits to be realized and of their mutual promises, Buyer and Seller agree as follows:

1. Price of Coal. Effective October 1, 1996, Article VIII.1.G of this Agreement shall be deleted in its entirety and replaced by the following for Buyer's native system requirements:

**G. Margin:**

1. Either Seller or Buyer, in its sole discretion, may provide written notice of its desire to renegotiate the margin set forth herein ("Margin") on or before July 1st of each year, commencing July 1, 2001, for a Margin to become effective on January 1st of the following year. The parties shall have 30 days from the date written notice of a desire to redetermine the Margin is delivered to negotiate any changes or replacements for the Margin. If the parties are unable to agree upon a new or revised Margin within thirty days of the notice, then the dispute shall be resolved by arbitration as provided in Article XII of this Agreement. Provided, however, that in all events (a) any renegotiated Margin or Margin Rate will include amounts sufficient to pay the Margin components specified in Article VIII.1.G.3. A, B, D, E, G, H, and I of this Agreement (b) any adjustments in Seller's costs included in any such Margin component may result in a corresponding adjustment to such Margin components (c) if any refinancing of Seller's debt results in a lower interest rate the benefit thereof will correspondingly reduce the Margin, (d) the percentage specified in Article VIII.1.G.3. C may not increase and (e) the Monthly Seller's Amortization payment specified in Exhibit VIII.1.G.1. used to compute the Margin component



**EXHIBIT 2 TO EXHIBIT C**

specified in Article VIII.1.G.3. H may not increase. Seller will use its best efforts to minimize Seller's costs covered by the Margin calculations.

2. Definitions: As used in this Agreement, the following terms shall have the following meanings:

"Operating Loan Facility" is the loan facility, together with all amendments and extensions thereto, entered into by Seller as borrower to provide working capital for mine, freight, handling costs, increases or decreases in deferred tax payments related to inventory, deferral of payments by Buyer in accordance with Article VIII.1.H of this Agreement and financing of inventory (including debt service reserve), and providing for a maximum loan principal limit of \$65,000,000, and all replacement facilities prudently entered into by Seller for the same purpose. Seller agrees to use its best efforts to minimize the costs incurred under the Operating Loan Facility and agrees not to increase the maximum principal amount of the Operating Loan Facility without Buyer's prior written consent.

"Harrington Average Inventory Valuation" is the average of the first and end of the billing month book value of the mine and transportation cost remaining in Seller's inventory at Harrington Station for the billing month net of accrued inventory losses.

"Tolk Average Inventory Valuation" is the average of the first and end of the billing month book value of the mine and transportation cost remaining in Seller's inventory at Tolk station for the billing month net of accrued inventory losses.

"Seller's Investment," "Seller's Intangible," and "Seller's Intangible Interest Rate" as related to this Agreement and the Coal Supply Agreement dated April 30, 1979 between TUCO and SPS ("Harrington Agreement") are set out in Exhibit "VIII.1.G.1" attached to and made a part of this Agreement.

"Approved Activities" are activities receiving prior approval from Buyer relating to litigation, regulatory proceedings, arbitration, and rail rate reviews. Such prior approval will not be unreasonably withheld.

3. Components: The components comprising the margin rate ("MR") are:

**EXHIBIT 2 TO EXHIBIT C**

- A. **Incurred Working Capital Costs** - The actual interest costs plus the fees and expenses (including yield-maintenance amounts and reimbursement of debt service reserve advances) incurred on the Operating Loan Facility for the billing month minus the amount of the actual Inventory Interest Charge in Section VIII.1.G.3.B of this Agreement. Such Incurred Working Capital costs shall be documented by Seller, showing daily balances and interest charges for verification.
- B. **Inventory Interest Charge** - The sum of the values resulting from multiplying the daily financing rate under the Operating Loan Facility by the sum of the Harrington Average Inventory Valuation and the Tolk Average Inventory Valuation.
- C. **Administrative Fee** - 0.5% times the sum of the Harrington Average Inventory Valuation and the Tolk Average Inventory Valuation, the product of which is divided by twelve.
- D. **Return on the unpaid, Unamortized Seller's Intangible** - This value shall be calculated by multiplying Seller's Intangible Interest Rate by the unpaid, unamortized balance of Seller's Intangible for the billing month as shown on Exhibit "VIII.1.G.1".
- E. **Tax Adjustment** - The Tax Adjustment shall be calculated monthly by multiplying the unpaid, unamortized balance of Seller's Intangible for the billing month (as shown in "Exhibit VIII.1.G.1") by the Tax Factor divided by the number of months remaining to pay the Seller's Intangible all as shown in Exhibit VIII.1.G.1. Notwithstanding any other provision hereof appearing to the contrary, the Tax Factor and Effective Tax Rate shall be revised to reflect changes in Tax rates or charges, provided, that should changes in the tax laws or regulations cause the use of this formula to fail to reflect Seller's actual effective tax rates, then the parties will cooperate in revising this factor.

**Tax Factor = [Effective Tax Rate/(1-Effective Tax Rate)] and,  
Effective Tax Rate = [Texas Franchise Tax multiplied by (1-G)] + G**  
Where Texas Franchise Tax is set by Texas Tax Code § 171.001 *et seq.*, or its replacement, such as a Texas income tax or other tax on revenue or net income.

An example of the calculation of the initial Effective Tax Rate and the Tax Factor (which contains assumptions which may not reflect actual amounts) is as follows:

**EXHIBIT 2 TO EXHIBIT C**

**Effective Tax Rate Calculation:**

$$(4.5\% \times (1-34\%)) + 34\% = 36.97\%$$

**Tax Factor calculation**

$$36.97\% / (1-36.97\%) = 58.655\%$$

**Tax Adjustment**

$$(\$41,000,000 \times 58.655\%) / 240 = \$100,202.92$$

- F. Operating Expenses - Operating Expenses are set at \$676,828.70 for the balance of calendar year 1996 and thereafter set at \$1,000,000.00 per calendar year and escalated in each year commencing for the year 1997 by the change in the CPI for all items -Urban Consumers, according to the latest index for the previous year as published by the Bureau of Labor Statistics by January 31st of the current year, as compared to the most recent index published by January 31, 1996. All such payments shall be divided equally for each month of the current year of this Agreement. These Operating Expenses include, but are not limited to, all in-house and outside legal fees, consulting or other services reasonably required to administer this Agreement and the Harrington Agreement. However, these Operating Expenses will not include extraordinary expenses which Buyer may agree to pay (such agreement not to be unreasonably withheld) in connection with renegotiation or replacement of mine, freight, or handling agreements approved by Buyer as Approved Activities. In addition to the Operating Expenses, Buyer will pay to or reimburse Seller for awards of damages against Seller and costs and attorneys' fees incurred by Seller in (1) prosecuting any Approved Activity and (2) defending any non-tortious litigation, administrative proceeding, arbitration, rail rate review, or other activity arising out of Seller's reasonably prudent and good faith performance of its duties in connection with contracts with third-parties required by this Agreement and the Harrington Agreement. The expenses paid or reimbursed to Seller in accordance with the preceding two sentences will be included in the category specified in Article VIII.1.D, unless otherwise agreed by Seller and Buyer. If Seller receives payment from any settlement or award in any activity specified in Subsections (1) and (2) of this Section, such payment will be paid over to Buyer after deduction of unreimbursed fees, costs, and expenses, and Buyer will accept such payment without adjustment of the Margin with respect to such activity. Seller will notify Buyer of any claim with respect to any such activity and Buyer will have the right to participate therein with counsel of Buyer's choosing. Seller will not settle or compromise any such claim, as to which Buyer is obligated to pay or reimburse Seller, without the prior written consent of Buyer. Provided that nothing contained in this paragraph is intended or

EXHIBIT 2 TO EXHIBIT C

will be construed as entitling Buyer to recover costs or attorneys' fees incurred in the defense of any action involving a claim between Buyer and Seller not otherwise recoverable as a matter of applicable law.

- G. Seller's actual federal corporate income tax rate (26 U.S.C. § 11 (b)(1) or its replacement) for the current year, subject to certification by a nationally recognized accounting firm and appropriate adjustment of the tax rate, if required as a result of such certification.
- H. Amortization of the Seller's Intangible - This value shall be the amortization schedule monthly amount as specified in Exhibit "VIII.1.G.1."
- I. Income Tax on Return on unpaid, Unamortized Seller's Intangible - This value shall be the result of Factor D times the Tax Factor, thus:

I = D multiplied by the Tax Factor

- 4. The components shall be applied to the following formula to determine the appropriate monthly margin for all years prior to calendar year 2017:

$$MR = (A + B + C + D + E + F + H + I) / (98,790,000/12)$$

For calendar year 2017, the components shall be applied to the following formula to determine the appropriate monthly margin:

$$MR = (A + B + C + D + E + F + H + I) / (46,590,000/12)$$

Margin = MR multiplied by 46,590,000/12, minus (1) any amounts incurred under Article VIII.1.E., and (2) actual interest earned by Seller on deferral of payments to Buyer by Seller in accordance with Article VIII.1.H.

For any period in which there are no coal deliveries, the accumulation of the unpaid portions of the Margin payment(s), which would otherwise have been paid if coal were being delivered during such period, plus actual interest on components Article VIII.1.G.3.A and B and interest at the Seller's Intangible Interest Rate on components Article VIII.1.G.3.D, F, and H, will be paid in the first month in which coal deliveries commence or, if sooner, the time at which Buyer is obligated to purchase Seller's entire inventory of coal.

- 5. Setoff - Buyer agrees not to setoff against the Margin any claim which Buyer may have against Seller which does not arise out of calculation of the Margin.

**EXHIBIT 2 TO EXHIBIT C**

Margin Rate, Margin Payment, or any component thereof, or Margin payments paid or payable to Seller. Nothing in this Agreement is intended or may be construed as a waiver of any right of Buyer to dispute Buyer's obligation for or the proper calculation of the Margin, Margin Rate, Margin Payment, or any component thereof, or to exercise any right which Buyer has to withhold the disputed amount of any payment with respect to Buyer's obligation for or the proper calculation of the Margin, or any component thereof. Nothing in this Amendment is intended or may be construed to create any limitation on Buyer's right to collect any judgment which may be entered against Seller in favor of Buyer; however, Buyer may not setoff the amount of such judgment against the Margin other than Seller's net profit included in the components specified in Article VIII.1.G.3. C and D.

**EXHIBIT 2 TO EXHIBIT C**

EXECUTED as of the date first appearing above.

TUCO INC.

By: Charles A. McNeil  
Title: PRESIDENT

SOUTHWESTERN PUBLIC SERVICE  
COMPANY

By: Kenneth T. Ladd  
Title: Senior Vice President

EXHIBIT 2 TO EXHIBIT C

EXHIBIT VIII.1.G.1

CALCULATION OF SELLER'S INVESTMENT, ETC.

Seller's Intangible, on September 30, 1996, is \$41,618,937. Seller's Intangible will amortize with the Buyer's payment of the Monthly Intangible Amortization Payment, and Buyer will pay to Seller a Monthly Return on the unpaid, Unamortized Seller's Intangible at a rate of 8.692% per annum on the unpaid, Unamortized Seller's Intangible per the schedule below. The unpaid, Unamortized Seller's Intangible will accrue interest at Seller's Intangible Interest Rate until Seller's Investment is paid in full. The Seller's Investment which is related to this Agreement for purposes of this Agreement will be the unpaid, Unamortized Seller's Intangible plus an amount equal to (a) the "Yield Maintenance Amount" determined in accordance with the Yield Maintenance Amount definition attached hereto plus (b) any accrued and unpaid return on the unpaid, Unamortized Seller's Intangible, plus (c) an amount necessary to fully pay Seller's federal and state taxes, if any, on a grossed up basis which results from payment of Seller's investment, (*i.e.*, unpaid, Unamortized Seller's Intangible multiplied by the Tax Factor), plus (d) any third party costs incurred in connection with prepayment of Seller's Intangible, plus (e) any damages to Seller as a result of prepayment of Seller's Intangible [not recovered under item (a) above].

Seller's Intangible	
Interest Rate	8.692% / year

For sake of clarification, Seller's Investment will be allocated 47% to Tolk Station and 53% to Harrington Station through December 31, 2016. Seller's Investment will be allocated 100% to Tolk after December 31, 2016.

**EXHIBIT 2 TO EXHIBIT C**

<u>Date</u>	<u>Beginning of the Month Unamortized Seller's Intangible</u>	<u>Monthly Seller's Intangible Amortization Payment</u>	<u>Monthly Return on the Unamortized Seller's Intangible</u>	<u>End of the Month Unamortized Seller's Intangible</u>
Sep-96	41,618,937	0	0	41,618,937
Oct-96	41,618,937	173,412	452,190	41,445,525
Nov-96	41,445,525	173,412	300,204	41,272,113
Dec-96	41,272,113	173,412	298,948	41,098,700
Jan-97	41,098,700	173,412	297,692	40,925,288
Feb-97	40,925,288	173,412	296,436	40,751,876
Mar-97	40,751,876	173,412	295,179	40,578,464
Apr-97	40,578,464	173,412	293,923	40,405,051
May-97	40,405,051	173,412	292,667	40,231,639
Jun-97	40,231,639	173,412	291,411	40,058,227
Jul-97	40,058,227	173,412	290,155	39,884,815
Aug-97	39,884,815	173,412	288,899	39,711,402
Sep-97	39,711,402	173,412	287,643	39,537,990
Oct-97	39,537,990	173,412	286,387	39,364,578
Nov-97	39,364,578	173,412	285,131	39,191,166
Dec-97	39,191,166	173,412	283,875	39,017,753
Jan-98	39,017,753	173,412	282,619	38,844,341
Feb-98	38,844,341	173,412	281,363	38,670,929
Mar-98	38,670,929	173,412	280,106	38,497,517
Apr-98	38,497,517	173,412	278,850	38,324,104
May-98	38,324,104	173,412	277,594	38,150,692
Jun-98	38,150,692	173,412	276,338	37,977,280
Jul-98	37,977,280	173,412	275,082	37,803,868
Aug-98	37,803,868	173,412	273,826	37,630,456
Sep-98	37,630,456	173,412	272,570	37,457,043
Oct-98	37,457,043	173,412	271,314	37,283,631
Nov-98	37,283,631	173,412	270,058	37,110,219
Dec-98	37,110,219	173,412	268,802	36,936,807
Jan-99	36,936,807	173,412	267,546	36,763,394
Feb-99	36,763,394	173,412	266,290	36,589,982
Mar-99	36,589,982	173,412	265,033	36,416,570
Apr-99	36,416,570	173,412	263,777	36,243,158
May-99	36,243,158	173,412	262,521	36,069,745
Jun-99	36,069,745	173,412	261,265	35,896,333
Jul-99	35,896,333	173,412	260,009	35,722,921
Aug-99	35,722,921	173,412	258,753	35,549,509
Sep-99	35,549,509	173,412	257,497	35,376,096
Oct-99	35,376,096	173,412	256,241	35,202,684
Nov-99	35,202,684	173,412	254,985	35,029,272
Dec-99	35,029,272	173,412	253,729	34,855,860
Jan-00	34,855,860	173,412	252,473	34,682,448
Feb-00	34,682,448	173,412	251,217	34,509,035
Mar-00	34,509,035	173,412	249,960	34,335,623
Apr-00	34,335,623	173,412	248,704	34,162,211
May-00	34,162,211	173,412	247,448	33,988,799
Jun-00	33,988,799	173,412	246,192	33,815,386
Jul-00	33,815,386	173,412	244,936	33,641,974
Aug-00	33,641,974	173,412	243,680	33,468,562
Sep-00	33,468,562	173,412	242,424	33,295,150
Oct-00	33,295,150	173,412	241,168	33,121,737
Nov-00	33,121,737	173,412	239,912	32,948,325
Dec-00	32,948,325	173,412	238,656	32,774,913
Jan-01	32,774,913	173,412	237,400	32,601,501



EXHIBIT 2 TO EXHIBIT C

Feb-01	32,801,501	173,412	236,144	32,428,088
Mar-01	32,428,088	173,412	234,887	32,254,678
Apr-01	32,254,678	173,412	233,631	32,081,264
May-01	32,081,264	173,412	232,375	31,907,852
Jun-01	31,907,852	173,412	231,119	31,734,439
Jul-01	31,734,439	173,412	229,863	31,561,027
Aug-01	31,561,027	173,412	228,607	31,387,615
Sep-01	31,387,615	173,412	227,351	31,214,203
Oct-01	31,214,203	173,412	226,095	31,040,791
Nov-01	31,040,791	173,412	224,839	30,867,378
Dec-01	30,867,378	173,412	223,583	30,693,966
Jan-02	30,693,966	173,412	222,327	30,520,554
Feb-02	30,520,554	173,412	221,071	30,347,142
Mar-02	30,347,142	173,412	219,814	30,173,729
Apr-02	30,173,729	173,412	218,558	30,000,317
May-02	30,000,317	173,412	217,302	29,826,905
Jun-02	29,826,905	173,412	216,046	29,653,493
Jul-02	29,653,493	173,412	214,790	29,480,080
Aug-02	29,480,080	173,412	213,534	29,306,668
Sep-02	29,306,668	173,412	212,278	29,133,256
Oct-02	29,133,256	173,412	211,022	28,959,844
Nov-02	28,959,844	173,412	209,766	28,786,431
Dec-02	28,786,431	173,412	208,510	28,613,019
Jan-03	28,613,019	173,412	207,254	28,439,607
Feb-03	28,439,607	173,412	206,998	28,266,195
Mar-03	28,266,195	173,412	204,741	28,092,782
Apr-03	28,092,782	173,412	203,485	27,919,370
May-03	27,919,370	173,412	202,229	27,745,958
Jun-03	27,745,958	173,412	200,973	27,572,546
Jul-03	27,572,546	173,412	199,717	27,399,134
Aug-03	27,399,134	173,412	198,461	27,225,721
Sep-03	27,225,721	173,412	197,205	27,052,309
Oct-03	27,052,309	173,412	195,949	26,878,897
Nov-03	26,878,897	173,412	194,693	26,705,485
Dec-03	26,705,485	173,412	193,437	26,532,072
Jan-04	26,532,072	173,412	192,181	26,358,660
Feb-04	26,358,660	173,412	190,925	26,185,248
Mar-04	26,185,248	173,412	189,668	26,011,836
Apr-04	26,011,836	173,412	188,412	25,838,423
May-04	25,838,423	173,412	187,156	25,665,011
Jun-04	25,665,011	173,412	185,900	25,491,599
Jul-04	25,491,599	173,412	184,644	25,318,187
Aug-04	25,318,187	173,412	183,388	25,144,774
Sep-04	25,144,774	173,412	182,132	24,971,362
Oct-04	24,971,362	173,412	180,876	24,797,950
Nov-04	24,797,950	173,412	179,620	24,624,538
Dec-04	24,624,538	173,412	178,364	24,451,125
Jan-05	24,451,125	173,412	177,108	24,277,713
Feb-05	24,277,713	173,412	175,852	24,104,301
Mar-05	24,104,301	173,412	174,595	23,930,889
Apr-05	23,930,889	173,412	173,339	23,757,477
May-05	23,757,477	173,412	172,083	23,584,064
Jun-05	23,584,064	173,412	170,827	23,410,652
Jul-05	23,410,652	173,412	169,571	23,237,240
Aug-05	23,237,240	173,412	168,315	23,063,828
Sep-05	23,063,828	173,412	167,059	22,890,415
Oct-05	22,890,415	173,412	165,803	22,717,003

EXHIBIT 2 TO EXHIBIT C

Nov-05	22,717,003	173,412	164,547	22,543,591
Dec-05	22,543,591	173,412	163,291	22,370,179
Jan-06	22,370,179	173,412	162,036	22,196,766
Feb-06	22,196,766	173,412	160,779	22,023,354
Mar-06	22,023,354	173,412	159,522	21,849,942
Apr-06	21,849,942	173,412	158,266	21,676,530
May-06	21,676,530	173,412	157,010	21,503,117
Jun-06	21,503,117	173,412	155,754	21,329,705
Jul-06	21,329,705	173,412	154,498	21,156,293
Aug-06	21,156,293	173,412	153,242	20,982,881
Sep-06	20,982,881	173,412	151,986	20,809,469
Oct-06	20,809,469	173,412	150,730	20,636,056
Nov-06	20,636,056	173,412	149,474	20,462,644
Dec-06	20,462,644	173,412	148,218	20,289,232
Jan-07	20,289,232	173,412	146,962	20,115,820
Feb-07	20,115,820	173,412	145,706	19,942,407
Mar-07	19,942,407	173,412	144,450	19,768,995
Apr-07	19,768,995	173,412	143,193	19,595,583
May-07	19,595,583	173,412	141,937	19,422,171
Jun-07	19,422,171	173,412	140,681	19,248,758
Jul-07	19,248,758	173,412	139,425	19,075,346
Aug-07	19,075,346	173,412	138,169	18,901,934
Sep-07	18,901,934	173,412	136,913	18,728,522
Oct-07	18,728,522	173,412	135,657	18,555,109
Nov-07	18,555,109	173,412	134,401	18,381,697
Dec-07	18,381,697	173,412	133,145	18,208,285
Jan-08	18,208,285	173,412	131,889	18,034,873
Feb-08	18,034,873	173,412	130,633	17,861,460
Mar-08	17,861,460	173,412	129,377	17,688,048
Apr-08	17,688,048	173,412	128,120	17,514,636
May-08	17,514,636	173,412	126,864	17,341,224
Jun-08	17,341,224	173,412	125,608	17,167,812
Jul-08	17,167,812	173,412	124,352	16,994,399
Aug-08	16,994,399	173,412	123,096	16,820,987
Sep-08	16,820,987	173,412	121,840	16,647,575
Oct-08	16,647,575	173,412	120,584	16,474,163
Nov-08	16,474,163	173,412	119,328	16,300,750
Dec-08	16,300,750	173,412	118,072	16,127,338
Jan-09	16,127,338	173,412	116,816	15,953,926
Feb-09	15,953,926	173,412	115,560	15,780,514
Mar-09	15,780,514	173,412	114,304	15,607,101
Apr-09	15,607,101	173,412	113,047	15,433,689
May-09	15,433,689	173,412	111,791	15,260,277
Jun-09	15,260,277	173,412	110,535	15,086,865
Jul-09	15,086,865	173,412	109,279	14,913,452
Aug-09	14,913,452	173,412	108,023	14,740,040
Sep-09	14,740,040	173,412	106,767	14,566,628
Oct-09	14,566,628	173,412	105,511	14,393,216
Nov-09	14,393,216	173,412	104,255	14,219,803
Dec-09	14,219,803	173,412	102,999	14,046,391
Jan-10	14,046,391	173,412	101,743	13,872,979
Feb-10	13,872,979	173,412	100,487	13,699,567
Mar-10	13,699,567	173,412	99,231	13,526,155
Apr-10	13,526,155	173,412	97,974	13,352,742
May-10	13,352,742	173,412	96,718	13,179,330
Jun-10	13,179,330	173,412	95,462	13,005,918
Jul-10	13,005,918	173,412	94,206	12,832,506

EXHIBIT 2 TO EXHIBIT C

Aug-10	12,832,508	173,412		
Sep-10	12,659,093	173,412	92,950	12,659,093
Oct-10	12,485,681	173,412	91,894	12,485,681
Nov-10	12,312,269	173,412	90,438	12,312,269
Dec-10	12,138,857	173,412	89,182	12,138,857
Jan-11	11,965,444	173,412	87,926	11,965,444
Feb-11	11,792,032	173,412	86,670	11,792,032
Mar-11	11,618,620	173,412	85,414	11,618,620
Apr-11	11,445,208	173,412	84,158	11,445,208
May-11	11,271,795	173,412	82,901	11,271,795
Jun-11	11,098,383	173,412	81,645	11,098,383
Jul-11	10,924,971	173,412	80,389	10,924,971
Aug-11	10,751,559	173,412	79,133	10,751,559
Sep-11	10,578,146	173,412	77,877	10,578,146
Oct-11	10,404,734	173,412	76,621	10,404,734
Nov-11	10,231,322	173,412	75,365	10,231,322
Dec-11	10,057,910	173,412	74,109	10,057,910
Jan-12	9,884,498	173,412	72,853	9,884,498
Feb-12	9,711,085	173,412	71,597	9,711,085
Mar-12	9,537,673	173,412	70,341	9,537,673
Apr-12	9,364,261	173,412	89,085	9,364,261
May-12	9,190,849	173,412	87,828	9,190,849
Jun-12	9,017,438	173,412	66,572	9,017,438
Jul-12	8,844,024	173,412	65,316	8,844,024
Aug-12	8,670,612	173,412	64,060	8,670,612
Sep-12	8,497,200	173,412	62,804	8,497,200
Oct-12	8,323,787	173,412	61,548	8,323,787
Nov-12	8,150,375	173,412	60,292	8,150,375
Dec-12	7,976,963	173,412	59,036	7,976,963
Jan-13	7,803,551	173,412	57,780	7,803,551
Feb-13	7,630,138	173,412	56,524	7,630,138
Mar-13	7,456,726	173,412	55,268	7,456,726
Apr-13	7,283,314	173,412	54,012	7,283,314
May-13	7,109,902	173,412	52,755	7,109,902
Jun-13	6,936,490	173,412	51,499	6,936,490
Jul-13	6,763,077	173,412	50,243	6,763,077
Aug-13	6,589,665	173,412	48,987	6,589,665
Sep-13	6,416,253	173,412	47,731	6,416,253
Oct-13	6,242,841	173,412	46,475	6,242,841
Nov-13	6,069,428	173,412	45,219	6,069,428
Dec-13	5,896,016	173,412	43,963	5,896,016
Jan-14	5,722,604	173,412	42,707	5,722,604
Feb-14	5,549,192	173,412	41,451	5,549,192
Mar-14	5,375,779	173,412	40,195	5,375,779
Apr-14	5,202,367	173,412	38,939	5,202,367
May-14	5,028,955	173,412	37,682	5,028,955
Jun-14	4,855,543	173,412	36,426	4,855,543
Jul-14	4,682,130	173,412	35,170	4,682,130
Aug-14	4,508,718	173,412	33,914	4,508,718
Sep-14	4,335,306	173,412	32,658	4,335,306
Oct-14	4,161,894	173,412	31,402	4,161,894
Nov-14	3,988,481	173,412	30,146	3,988,481
Dec-14	3,815,069	173,412	28,890	3,815,069
Jan-15	3,641,657	173,412	27,634	3,641,657
Feb-15	3,468,245	173,412	26,378	3,468,245
Mar-15	3,294,833	173,412	25,122	3,294,833
Apr-15	3,121,420	173,412	23,866	3,121,420
			22,609	2,948,008

**EXHIBIT 2 TO EXHIBIT C**

May-15	2,948,008	173,412	21,363	2,774,596
Jun-15	2,774,596	173,412	20,097	2,601,184
Jul-15	2,601,184	173,412	18,841	2,427,771
Aug-15	2,427,771	173,412	17,585	2,254,359
Sep-15	2,254,359	173,412	16,329	2,080,947
Oct-15	2,080,947	173,412	15,073	1,907,535
Nov-15	1,907,535	173,412	13,817	1,734,122
Dec-15	1,734,122	173,412	12,581	1,560,710
Jan-16	1,560,710	173,412	11,305	1,387,298
Feb-16	1,387,298	173,412	10,049	1,213,888
Mar-16	1,213,888	173,412	8,793	1,040,473
Apr-16	1,040,473	173,412	7,536	867,061
May-16	867,061	173,412	6,280	693,649
Jun-16	693,649	173,412	5,024	520,237
Jul-16	520,237	173,412	3,768	346,824
Aug-16	346,824	173,412	2,512	173,412
Sep-16	173,412	173,412	1,256	0
	<b>Total</b>	<b>41,618,937</b>	<b>36,476,840</b>	

**Note:**

The Monthly Seller's Intangible Amortization Payment and the Monthly Return on the Unamortized Seller's Intangible each month are billed on the 8th of the following month.

Example: Oct-96 will be billed on November 8, 1996

**EXHIBIT 2 TO EXHIBIT C**

**DEFINITION OF "YIELD MAINTENANCE AMOUNT"**

"Yield-Maintenance Amount" shall mean an amount equal to the excess, if any, of the Discounted Value of the Unamortized Seller's Intangible over the Unamortized Seller's Intangible. The Yield-Maintenance Amount shall in no event be less than zero.

"Discounted Value" shall mean the amount obtained by discounting all Remaining Scheduled Payments with respect to such Unamortized Seller's Intangible from their respective scheduled due dates to the Settlement Date in accordance with accepted financial practice and at a discount factor (as converted to reflect the periodic basis on which the Monthly Return on the unpaid Unamortized Seller's Intangible is payable if payable other than on a semi-annual basis) equal to the Reinvestment Yield with respect to the Unamortized Seller's Intangible.

"Reinvestment Yield" shall mean the yield to maturity implied by (1) the yields reported, as of 10:00 am (New York City local time) on the Business Day next preceding the Settlement Date, on the display designated as "Page 678" on the Telerate Service (or such other display designated as "Page 678" on the Telerate Service) for actively traded U.S. Treasury securities having a maturity equal to the Remaining Average Life of the Unamortized Seller's Intangible as of such Settlement Date, or if such yields shall not be reported as of such time or the yields reported as of such time shall not be ascertainable, (ii) the Treasury Constant Maturity Series yields reported, for the latest day for which such yields shall have been so reported as of the Business Day next preceding the Settlement Date, in Federal Reserve Statistical Release H.15(519) (or any comparable successor publication) for actively traded U.S. Treasury securities having a constant maturity equal to the Remaining Average Life of the Unamortized Seller's Intangible as of such Settlement Date. Such implied yield shall be determined, if necessary, by (a) converting U.S. Treasury bill quotations to bond-equivalent yields in accordance with accepted financial practice and (b) interpolating linearly between yields reported for various maturities.

"Business Day" shall mean any day other than a Saturday or a Sunday or a day on which commercial banks in New York City are required or authorized to be closed.

"Remaining Average Life" shall mean the number of years (calculated to the nearest one-twelfth year) obtained by dividing (i) the Unamortized Seller's Intangible into (ii) the products obtained by multiplying (a) each Remaining Scheduled Payment of Unamortized Seller's Intangible (but not of Seller's Monthly Return) by (b) the number of years (calculated to the nearest one-twelfth year) which will elapse between the Settlement Date and the scheduled due date of such Remaining Scheduled Payment and adding the results.

"Remaining Scheduled Payments" shall mean all payments of the Unamortized Seller's Intangible together with the Monthly Return thereon that would be due on or after the Settlement Date (assuming that all payments of Seller's Intangible and the Monthly Return thereon were paid in accordance with the table attached to Exhibit VIII.1.G.1) as if no payment of the

**EXHIBIT 2 TO EXHIBIT C**

**Unamortized Seller's Intangible or Monthly Return thereon were made prior to its scheduled due date.**

**"Settlement Date" shall mean the date upon which Unamortized Seller's Intangible is to be paid.**

**EXHIBIT 3 TO EXHIBIT C**

**2001 MARGIN AMENDMENT  
TO  
COAL SUPPLY AGREEMENT  
(TOLK STATION)  
BETWEEN TUCO INC., and SOUTHWESTERN PUBLIC SERVICE COMPANY**

This **2001 Margin Amendment** to the above referenced Coal Supply Agreement dated April 30, 1979, as amended, is made and entered into between TUCO INC. and Southwestern Public Service Company as of the 18<sup>th</sup> day of September 2001.

**WITNESSETH:**

**Whereas**, TUCO INC. ("Seller") and Southwestern Public Service Company ("Buyer") are parties to that certain Coal Supply Agreement made and entered into as of April 30, 1979, as restated to incorporate all amendments through December 31, 1994 (the "Agreement") and as further amended by the Margin Amendment dated September 30, 1996 ("1996 Margin Amendment"); and

**Whereas**, Buyer and Seller have agreed to a renegotiated Margin as of September 18, 2001 and wish to amend the Agreement and the 1996 Margin Amendment to memorialize the renegotiated Margin.

**Now Therefore**, Seller and Buyer agree to amend the Agreement and the 1996 Margin Amendment effective January 1, 2002, to modify the Margin payable to Seller for coal supplied to Buyer for its native system requirements as follows:

1. Article VIII.1.G.1 shall be deleted in its entirety and replaced by the following:
  1. Either Seller or Buyer, in its sole discretion, may provide written notice of its desire to renegotiate the margin set forth herein ("Margin") on or before July 1<sup>st</sup> of each year, commencing July 1, 2006, for a Margin to become effective on January 1<sup>st</sup> of the following year. The parties shall have thirty (30) days from the date written notice of a desire to renegotiate the Margin is delivered to negotiate any changes or replacements for the Margin. If the parties are unable to agree upon a new or revised Margin within thirty (30) days of the notice, then the dispute shall be resolved by arbitration as provided in Article XII of this Agreement. Provided, however, that in all events: (a) any negotiated Margin or Margin Rate will include amounts sufficient to pay the Margin components specified in Article VIII.1.G.3.A, B, D, E, G, H, and I of this Agreement, (b) any adjustments in Seller's costs included in any such Margin component may result in a corresponding adjustment to such Margin components, (c) if any refinancing of Seller's debt results in a lower interest rate the benefit thereof will correspondingly reduce the Margin, (d) the amount specified in Article VIII.1.G.3 C, may not increase and (e) the Monthly Seller's Amortization payment specified in Exhibit VIII.1.G.1, used to compute the Margin component specified in Article

**EXHIBIT 3 TO EXHIBIT C**

VIII.1.G.3.H. may not increase. Seller will use its best efforts to minimize Seller's costs covered by the Margin calculations.

2. Article VIII.1.G.3.C shall be deleted in its entirety and replaced by the following:  
C. Administrative Fee – A fixed payment of \$120,000.00 per calendar year divided equally into twelve (12) monthly installments.
3. Article VIII.1.G.3.F shall be deleted in its entirety and replaced by the following:  
F. Operating Expenses – Operating Expenses shall be set at \$1,050,000.00 per calendar year and this amount shall be escalated at the beginning of each year commencing with the year 2003 by the greater of 5% or the change in the CPI for all items – Urban Consumers, according to the latest index for the previous year as published by the Bureau of Labor Statistics prior to January 31<sup>st</sup> of the current year, as compared to the most recent index published by January 31, 2002. The annual Operating Expenses shall be paid in equal monthly installments. These Operating Expenses include, but are not limited to, all in-house and outside legal fees, consulting or other services reasonably required to administer this Agreement and the Harrington Agreement. However, these Operating Expenses will not include extraordinary expenses, which Buyer may agree to pay (such agreement not to be unreasonably withheld) in connection with renegotiation or replacement of mine, freight, or handling agreements approved by Buyer as Approved Activities. In addition to Operating Expenses, Buyer will pay to or reimburse Seller for awards of damages against Seller and costs and attorney's fees incurred by Seller in (1) prosecuting any Approved Activity and (2) defending any non-tortious litigation, administrative proceeding, arbitration, rail rate review, or other activity arising out of Seller's reasonably prudent and good faith performance of its duties in connection with contracts with third-parties required by this Agreement and the Harrington Agreement. The expenses paid or reimbursed to Seller in accordance with the preceding two sentences will be included in the category specified in Article VIII.1.D. unless otherwise agreed by Seller and Buyer. If Seller receives payment from any settlement or award in any activity specified in Subsections (1) and (2) of this Section, such payment will be paid over to Buyer after deduction of unreimbursed fees, costs, and expenses, and Buyer will accept such payment without adjustment of the Margin with respect to such activity. Seller will notify Buyer of any claim with respect to any such activity and Buyer will have the right to participate therein with counsel of Buyer's choosing. Seller will not settle or compromise any such claim, as to which Buyer is obligated to pay or reimburse Seller, without the prior written consent of Buyer. Provided that nothing contained in this paragraph is intended to or will be construed as entitling Buyer to recover costs or attorney's fees incurred in the defense of any action involving a claim between Buyer and Seller not otherwise recoverable as a matter of applicable law.

All other terms and conditions of the Agreement and the 1996 Margin Amendment not modified hereby shall remain in full force and effect.



**EXHIBIT 3 TO EXHIBIT C**

**In Witness Whereof**, the parties have caused this 2001 Margin Amendment to be executed by their duly authorized representatives as of the date first written above.

TUCO INC.

By: Charles D. Mudd

Title: PRESIDENT

Date: 12-27-01

SOUTHWESTERN PUBLIC SERVICE COMPANY

By: Kelly Krattenmaker

Title: V.P. TRADING, MARKETING & SUPPLY

Date: 1/29/02

EXHIBIT D

**SELLER'S CONTRACTS CONCERNING COAL SUPPLIED TO THE TOLK STATION**

1. November 1, 2010 Coal Purchase and Sale Agreement between TUCO INC. (TUCO) and Cloud Peak Energy Resources LLC (Cloud Peak) (Cloud Peak Contract).
2. January 1, 2017 Second Amended and Restated Confirmation Notice 2304 between TUCO and Cloud Peak, and January 2, 2018 Letter Agreement between TUCO and Cloud Peak confirming carryover of 2017 contract tons into 2018, all in accordance with and supplementing the Cloud Peak Contract.
3. October 30, 2017 Confirmation Notice 2521 between TUCO and Cloud Peak, in accordance with and supplementing the Cloud Peak Contract.
4. December 15, 2010 Master Coal Supply Agreement between TUCO and Peabody COALSALES, LLC (Peabody) (Peabody Coal Contract).
5. January 1, 2018 Confirmation Notice 2018-1 between TUCO and Peabody in accordance with and supplementing the Peabody Coal Contract. *[pending]*
6. December 31, 2010 Coal Purchase and Sale Agreement between TUCO and Arch Coal Sales Company, Inc. (Arch) (Arch Coal Contract).
7. December 31, 2010 Guaranty by Arch Coal Inc. in favor of TUCO.
8. October 30, 2017 Confirmation Notice MO 5513 between TUCO and Arch in accordance with and supplementing the Arch Coal Contract.
9. June 28, 2016 Letter Agreement between TUCO and Southwestern Public Service Company (SPS) re Carryover of Coal Supply Agreement Vendors into 2018.
10. January 1, 2018 Coal Handling Service Agreement between TUCO and Savage Tolk Corporation concerning coal handling at the Tolk Station.
11. January 1, 2018 Access Agreement for the Tolk Station.
12. October 15, 2017 BNSF Railway Company's Coal Unit Train Commitment Certificate Numbers BNSF 90068-0081 and 90068-0082.
13. February 28, 2003 Railroad Car Net Lease Agreement between TUCO INC., as Lessee, and Trinity Industries Leasing Company, as Lessor, including Exhibits A, B, and C, and Schedule 1, as amended effective January 1, 2018.
  - a. Riders 1 dated January 17, 2003 and January 29, 2003, as amended April 1, 2003 and January 1, 2018;

EXHIBIT D

- b. Rider 2 dated January 29, 2003, as amended April 4, 2003, March 23, 2007, and January 1, 2018;
  - c. Rider 3 dated May 22, 2003, as amended March 23, 2007 and January 1, 2018;
  - d. Rider 4 dated June 19, 2003, as amended effective January 1, 2018;
  - e. Rider 7 dated July 10, 2003, as amended March 23, 2007 and January 1, 2018;
  - f. Rider 8 dated July 10, 2003, as amended effective January 1, 2018;
  - g. Rider 10 dated January 10, 2008, as amended June 12, 2013 and January 1, 2018; and
  - h. Rider 11 dated October 31, 2008, as amended May 5, 2014 and January 1, 2018.
14. March 17, 2003 Train Set Sublease between TUCO and Savage Tolk Corporation and Savage Harrington Corporation relating to Railcars and its First Amendment, as amended January 1, 2018.
  15. May 1, 2013 Railroad Car Maintenance Agreement and its Riders 1.1 and 2.0, as amended effective January 1, 2017, between Trinity Rail Management, Inc., Savage-Tolk Energy Services, and Savage-Harrington Energy Services, as amended from time to time.
  16. January 1, 2018 Rail Operation Services, Switching, and Handling Agreement between TUCO and BNSF Railway Company.
  17. January 1, 2018 Services Agreement between TUCO and Midland Railway Services, Inc.
  18. November 8, 2016 Railcar Storage Track Lease Agreement between TUCO and Texas Northwestern Railroad, as amended from time to time.
  19. October 24, 2017 Railcar Storage Agreement between TUCO and Thunder Basin Coal Company, L.L.C.
  20. November 3, 2017 Railcar Storage Agreement between TUCO and Nebraska Northwestern Railroad, Inc.
  21. TUCO's contractual retention of FIS Energy Systems Inc. (FIS), including, without limitation, FIS Order No. 0347940 L01196224 as provided in the August 15, 2017 Letter Agreement between TUCO and SPS.
  22. January 1, 2018 Rail Services Agreement between TUCO and Savage Tolk Corporation.

EXHIBIT E

LOST COAL LETTER AGREEMENT

**TUCO INC.**

TUCO INC.  
500 S. Taylor St., Suite 1050  
Amarillo, Texas 79103-2446  
Telephone: 806-371-7341  
Fax: 806-371-7528

March 28, 2006

Patrick Panzarino  
Director of Coal Supply  
Xcel Energy  
1099 18<sup>th</sup> Street  
Denver, CO 80202

Re: April 30, 1979 Coal Supply Agreement between TUCO INC. ("Seller") and Southwestern Public Service Company ("Buyer") relating to the Harrington Station, as amended ("Harrington Agreement"); and April 30, 1979 Coal Supply Agreement between TUCO INC. ("Seller") and Southwestern Public Service Company ("Buyer") relating to the Tolk Station, as amended ("Tolk Agreement") (collectively, the "Coal Supply Agreements")

Dear Mr. Panzarino:

This letter is submitted by TUCO INC. ("TUCO") to confirm its agreement with Southwestern Public Service Company ("SPS") concerning amendments to the lost coal factor provisions under Article VIII, Section F of the Coal Supply Agreements.

Effective for TUCO's 2005 fiscal year ending September 30, 2006, TUCO and SPS agree that the provisions of Article VIII, Section F in each of the Harrington and Tolk Agreements will no longer be the mechanisms for accounting for lost coal under the Coal Supply Agreements.

For TUCO's 2005 fiscal year, in consultation with SPS's accounting professionals and commencing March 2006, TUCO will make monthly accounting adjustments for TUCO's 2005 fiscal year as necessary to reconcile, at TUCO's fiscal year end, TUCO's LIFO book inventories to the physical inventories of coal at the Tolk and Harrington Stations determined in accordance with the July 2005 physical inventory surveys at the Tolk and Harrington Stations performed in accordance with the American Society for Testing and Materials standards ("ASTM Surveys"). This reconciliation of TUCO's LIFO book inventories to physical inventories will include TUCO's book inventory cost basis, tonnage, and Btu quality, and will be completed by a credit or payment invoice to SPS by TUCO to be submitted on or before November 15, 2006. TUCO's obligation to continue the monthly adjustments

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Patrick Pabzarino  
March 28, 2006  
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provided for in this paragraph after April 2006 is contingent upon TUCO successfully increasing its credit facility effective May 2006 by Twenty Five Million Dollars (U.S. \$25,000,000)

Commencing with TUCO's 2006 fiscal year, the lost coal adjustment factors under each of the Coal Supply Agreements will be set as a positive percentage, to be adjusted on an as needed basis by agreement between the parties, to minimize the payments or credits necessary to annually reconcile TUCO's LIFO book inventories to the physical coal inventories at the Tolk and Harrington Stations at the end of each of TUCO's fiscal years during the term of each Coal Supply Agreement.

Commencing with TUCO's 2006 fiscal year, an annual inventory true up for each of the Tolk Station and the Harrington Station will be conducted, to provide for a reconciliation, taking into consideration the lost coal factors set in accordance with the preceding paragraph; at TUCO's fiscal year end, of TUCO's LIFO book inventories to physical inventories determined by ASTM Survey, conducted at TUCO's request by qualified third parties and certified to TUCO and SPS. This reconciliation will include TUCO's cost basis, tonnage, and Btu quality and will be completed by a credit or payment invoice to SPS by TUCO to be submitted on or before forty five (45) days after the end of each of TUCO's fiscal years during the term of this agreement.

In consultation with SPS, TUCO will conduct any additional ASTM Surveys or GPS volumetric surveys each year as the parties agree are appropriate to maintain an accurate account of the physical inventories for coal at the Tolk and Harrington Stations. The costs associated with the annual ASTM Survey and any additional surveys as provided herein will be reimbursed to TUCO through the cost reimbursement provisions of the Coal Supply Agreements.

TUCO also will cause its LIFO book inventory computer software to be modified as necessary to accomplish the annual true up of LIFO book inventory to physical inventory contemplated herein and that the costs of such modifications will be reimbursed to TUCO through the cost reimbursement provisions of the Coal Supply Agreements.

It is the intent of the parties that upon the expiration or earlier termination of each of the Coal Supply Agreements, to the extent there is a disparity between TUCO's LIFO book inventory and the physical inventory for coal at the Tolk or Harrington Station, SPS will purchase and pay for coal in inventory at the applicable Station in a quantity equal to TUCO's LIFO book inventory, regardless of the physical inventory, such that TUCO will be able to pay in full all debt which financed TUCO's coal inventories in accordance with the terms of TUCO's approved coal inventory financing agreements. Upon the payment for TUCO's LIFO book inventory as provided herein, SPS will own any coal in inventory without further compensation or obligation to TUCO.

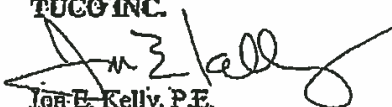
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Patrick Panzarino  
March 28, 2006  
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Except as amended herein, all other provisions of the Agreements remain in full force and effect.

If the foregoing meets with your approval, please sign a duplicate original of this letter and return it to me as soon as practicable.

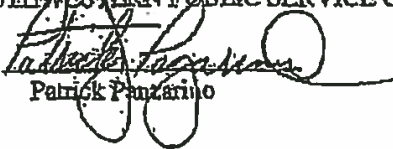
Sincerely,

TUCO INC.  
  
Jon E. Kelly, P.E.  
Vice President

cc: Charles McNeil  
George Davies, Esq.  
Ray Gardner, Esq.

ACCEPTED AND AGREED TO:

SOUTHWESTERN PUBLIC SERVICE COMPANY

By:   
Patrick Panzarino

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