

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

**IN THE MATTER OF SOUTHWESTERN )  
PUBLIC SERVICE COMPANY'S )  
APPLICATION REQUESTING APPROVAL )  
OF TWO LONG TERM PURCHASED )  
POWER AGREEMENTS )  
SOUTHWESTERN PUBLIC SERVICE )  
COMPANY, )  
APPLICANT. )  
\_\_\_\_\_ )**

**CASE NO. 23-00384-UT**

**DIRECT TESTIMONY**

*of*

**JOHN L. BORNHOFEN**

*on behalf of*

**SOUTHWESTERN PUBLIC SERVICE COMPANY**

**TABLE OF CONTENTS**

GLOSSARY OF ACRONYMS AND DEFINED TERMS..... III  
LIST OF ATTACHMENTS ..... V  
I. WITNESS IDENTIFICATION AND QUALIFICATIONS ..... 1  
II. PURPOSE AND SUMMARY OF TESTIMONY AND  
RECOMMENDATIONS..... 4  
III. MODEL LTPPAS AND CONTRACT NEGOTIATION PROCESS..... 8  
IV. BORGER LTPPA TERMS (RULE 551.8(D)(2), (3), (5))..... 13  
V. WILDCAT BESS LTPPA TERMS (RULE 551.8(D)(2), (3), (5)) ..... 23  
IV. CONCLUSION..... 29  
VERIFICATION..... 31

## **GLOSSARY OF ACRONYMS AND DEFINED TERMS**

<b><u>Acronym/Defined Term</u></b>	<b><u>Meaning</u></b>
All-Source RFP	All-Source Request For Proposal
BESS	Battery Energy Storage Systems
Borger	Borger Energy Associates, LLC
Borger Facility	230 MW Cogeneration Facility in Hutchinson County, Texas
Borger LTPPA	15-Year LTPPA with Borger Energy Associates, LLC
Branch	Branch Energy Company
CAF	Capacity Availability Factor
COD	Commercial Operation Date
Dispatchable LTPPAs	Natural Gas Generation and Battery Energy Storage Resource Power Purchase Agreements
ESC	Elevated System Condition
Existing Borger LTPPA	25-Year LTPPA with Borger Executed in 1997
HRSG	Heat recovery steam generator
IACX	IACX Rock Creek, LLC
IRP	Integrated Resource Plan
LTPPAs	Long Term Power Purchase Agreements
MW	Megawatts
NextEra	NextEra Energy, Inc.

<b><u>Acronym/Defined Term</u></b>	<b><u>Meaning</u></b>
NMPRC	New Mexico Public Regulation Commission
O&M	Operations & Maintenance
PPA	Purchase Power Agreement
RFP	Request For Proposals
Recommended Portfolio	SPS's portfolio of resources to meet existing and expected needs through 2027
Refinery	Phillips Petroleum Refinery Complex in Borger, Texas
RTE	Round Trip Efficiency
SPS	Southwestern Public Service Company, a New Mexico corporation
Wildcat	Wildcat Ranch Energy Storage, LLC
Wildcat BESS LTPPA	15-Year Battery Energy Storage Resource LTPPA
Wildcat Wind	Wildcat Wind Facility
Wind LTPPA	150 MW Wildcat Wind Facility
XES	Xcel Energy Services, Inc.
Xcel Energy	Xcel Energy Inc.

## LIST OF ATTACHMENTS

<u>Attachment</u>	<u>Description</u>
JLB-1	SPS Model Dispatchable PPA (Filename: JLB-1.pdf)
JLB-2	SPS Model Standalone Storage PPA (Filename: JLB-2.pdf)
JLB-3	Borger LTPPA (Redacted) (Filename: JLB-3.pdf)
JLB-3(CONF)	Borger LTPPA (Filename: JLB-3(CONF).pdf)
JLB-4	Wildcat BESS LTPPA (Redacted) (Filename: JLB-4.pdf)
JLB-4(CONF)	Wildcat BESS LTPPA (Filename: JLB-4(CONF).pdf)

Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1           **I.       WITNESS IDENTIFICATION AND QUALIFICATIONS**

2       **Q.       Please state your name and business address.**

3       A.       My name is John L. Bornhofen. My business address is 1800 Larimer Street,  
4           Denver, Colorado.

5       **Q.       On whose behalf are you testifying in this proceeding?**

6       A.       I am filing testimony on behalf of Southwestern Public Service Company, a New  
7           Mexico corporation (“SPS”), and wholly-owned subsidiary of Xcel Energy Inc.  
8           (“Xcel Energy”).

9       **Q.       By whom are you employed and in what position?**

10      A.       I am employed by Xcel Energy Services, Inc. (“XES”) as, Director, Purchased  
11           Power. XES is a wholly owned subsidiary of Xcel Energy and provides an array  
12           of support services to SPS and the other utility operating company subsidiaries of  
13           Xcel Energy on a coordinated basis.

14      **Q.       Please briefly outline your responsibilities as Director, Purchased Power.**

15      A.       As Director, Purchased Power, I am responsible for the negotiation of capacity and  
16           energy purchases under Power Purchase Agreements (“PPAs”) for all Xcel Energy  
17           utility operating companies, including SPS. My team is responsible for the  
18           administration of over 230 long-term Power Purchase Agreements (“LTPPAs”),  
19           totaling in excess of 13,000 megawatts (“MWs”) of installed capacity from gas,  
20           wind, hydro, bio-mass, photovoltaic solar, and solar plus storage projects. I also

Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1 lead Xcel Energy's Renewable Energy Credit portfolio team which administers the  
2 corporation's activities to meet corporate compliance objectives for Renewable  
3 Energy Portfolio Standards for each state jurisdiction. SPS serves retail electric  
4 customers in Texas and New Mexico, and serves wholesale electric customers as  
5 well.

6 **Q. Please describe your educational background.**

7 A. I have a Bachelor of Science in Finance from the University of Colorado.

8 **Q. Please describe your professional experience.**

9 A. Eighteen years ago, I began my career with Xcel Energy as a senior energy market  
10 settlement accountant and spent eight years within both the energy markets and  
11 commercial transactions settlements and accounting departments. These  
12 departments managed Xcel Energy's various large scale commercial and wholesale  
13 contract settlement and accounting functions. In 2013, I earned my certification as  
14 a North American Electric Reliability Corporation System Operator and spent six  
15 years within the Xcel Energy's real-time generation dispatch and trading team. In  
16 2014, I transitioned to supervising Xcel Energy's real-time Power System Traders  
17 as the Assistant Manager of Generation Control and Dispatch and was responsible  
18 for the reliable and economic dispatch of the Xcel Energy's fleet of generation  
19 assets across the operating companies. My responsibilities included real-time  
20 balancing of load and generation, market bid and offer submittals, generation

Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1 commitments and dispatch, outage coordination, and real-time trading and  
2 scheduling activities. In 2019, I joined the Purchased Power team.

3 **Q. Have you testified before any regulatory authorities?**

4 A. Yes. I have testified in support of regulatory approval of PPAs before the Colorado  
5 Public Utilities Commission in Proceeding No. 23A-0046E and in Public Utility  
6 Commission of Texas Docket Nos. 55255 and 55849.





Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1 new proposed 15-year Borger LTPPA, the existing Borger LTPPA (“Existing  
2 Borger LTPPA”) was approved in Case No. 19-00315-UT and SPS has recovered  
3 the associated costs through its FPPCAC<sup>1</sup> and base rates.<sup>2</sup> Because the Borger  
4 Facility is already interconnected to the SPS system, the execution of the Borger  
5 LTPPA will not necessitate any large generator interconnection study processes at  
6 the Southwest Power Pool, nor will additional interconnection costs be incurred.  
7 As a currently operating facility, the proposed 15-year Borger LTPPA presents  
8 minimal project deliverability risk and has been effectively negotiated with a  
9 counterparty with which SPS has a longstanding relationship.

10 The 15-year battery energy storage resource LTPPA (“Wildcat BESS  
11 LTPPA”) with Wildcat Ranch Energy Storage, LLC (“Wildcat”) also provides  
12 necessary capacity for SPS’s customers, has been negotiated with a counterparty  
13 who has delivered LTPPA battery storage projects in other Xcel Energy operating  
14 company jurisdictions, is located at an existing wind facility, and will be  
15 interconnected to SPS’s system under beneficial surplus interconnection rights at  
16 its point of interconnection with no additional interconnection cost incurred.

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<sup>1</sup> Approved in Case No. 19-00315-UT.

<sup>2</sup> Approved in Case No. 22-00286-UT.

Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1           The two Dispatchable LTPPAs will provide SPS with approximately 278  
2           MWs of competitively priced, needed system capacity with long-term price  
3           certainty for SPS customers over their respective 15-year terms. Through prudent  
4           contracting, SPS has mitigated and limited risks while also securing guarantees  
5           through commercial terms.

6   **Q. Does your testimony address any particular NMPRC rules?**

7   A. Yes. My testimony addresses a number of the criteria enumerated in 17.9.551.8  
8   NMAC for NMPRC approval of proposed LTPPAs. My testimony:

- 9           • Provides copies of the LTPPAs; NMAC 551.8(D)(1);
- 10          • Discusses the terms of the LTPPAs; NMAC 551.8(D)(2)(a);
- 11          • Discusses the amount of capacity and energy to be purchased under the  
12          LPTTAs; NMAC 551.8(D)(2)(b);
- 13          • Discusses the price or pricing formula under which SPS will pay for the  
14          power and energy under the LTPPAs; NMAC 551.8(D)(2)(c);
- 15          • Discusses SPS's obligations to pay for any fixed or variable administrative,  
16          transactional or operation and maintenance costs incurred through the  
17          operation of the generation facility; NMAC 551.8(D)(2)(d);
- 18          • Discusses provisions relating to non-performance under the LTPPAs;  
19          NMAC 551.8(D)(2)(e);
- 20          • Discusses transmission interconnection costs, if any; NMAC 551.8(D)(3);  
21          and
- 22          • Discusses the Borger and Wildcat facilities and construction timelines for  
23          the Wildcat BESS LTPPA; NMAC 551.8(D)(5).

Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1 **Q. Do you sponsor any attachments to your testimony?**

2 A. Yes. I sponsor Attachments JLB-1, JLB-2, JLB-3, JLB-3(CONF), JLB-4 and JLB-  
3 4(CONF) which are copies of the SPS Model Dispatchable PPA, SPS Model  
4 Standalone Storage PPA, Borger LTPPA (Redacted), Borger LTPPA, Wildcat  
5 BESS LTPPA (Redacted) and the Wildcat BESS LTPPA, respectively.

6 **Q. In your testimony, you have terms that are capitalized, but not included in the**  
7 **glossary of defined terms above. Where can those definitions be found?**

8 A. These terms are defined in Exhibit A of the LTPPAs.

9 **Q. Are Attachments JLB-3(CONF) and JLB-4(CONF) true and correct copies of**  
10 **the executed Borger LTPPA and the Wildcat BESS LTPPA, respectively (Rule**  
11 **551.8(D)(1))?**

12 A. Yes.

1           **III.    MODEL LTPPAS AND CONTRACT NEGOTIATION PROCESS**  
2

3   **Q.    What topic do you address in this section of your direct testimony?**

4   A.    In this section of my testimony, I discuss SPS’s model LTPPAs and the LTPPA  
5           contract negotiation process for which my team is responsible and which I led  
6           associated with SPS’s 2022 RFP.

7   **Q.    What is a model LTPPA?**

8   A.    The term “model LTPPA” refers to the industry-standard commercial terms and  
9           contract provisions that SPS would expect to negotiate when procuring long term  
10          energy capacity. Model LTPPAs are issued as part of resource solicitations so that  
11          bidders can familiarize themselves with common and generally accepted utility  
12          terms and conditions upon which SPS would expect to purchase capacity and  
13          energy.

14   **Q.    Did SPS provide model LTPPAs to bidders when it issued its All-Source RFP?**

15   A.    Yes. The model PPAs included the SPS Model Dispatchable PPA and the SPS  
16          Model Standalone Storage PPA. A copy of the SPS Model Dispatchable PPA is  
17          provided as Attachment JLB-1, and a copy of the SPS Model Standalone Storage  
18          PPA is provided as Attachment JLB-2.

Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1 **Q. Why did SPS attach model LTPPAs to its All-Source RFP?**

2 A. Adopting a standard set of model LTPPAs with stated minimum terms and  
3 conditions, as a part of an RFP solicitation, allows bidders the opportunity to fully  
4 assess the project's development cost and performance risk when submitting its bid.  
5 Similarly, the issuance of model LTPPAs in resource solicitations ensures fair and  
6 equitable treatment, further allowing SPS to score bids consistently and efficiently  
7 in its evaluation and selection process.

8 **Q. Does the new NM IRP ("Integrated Resource Plan") Rule, enacted in 2022,  
9 require utilities to utilize model LTPPAs?**

10 A. Section 17.7.3.12(F) NMAC requires the utility to include in its proposed RFP  
11 "proposed contract(s) for the acquisition of resources." SPS will file the model  
12 LTPPAs with the RFP documents ahead of issuing an RFP. SPS has utilized  
13 model LTPPAs as standard practice prior to the passage of the new NM IRP rule.

14 **Q. Please generally describe SPS's model LTPPAs.**

15 A. Model LTPPA provisions generally include, but are not limited to, the construction  
16 and commercial operation of the facility, the delivery and metering of the energy  
17 produced, as well as terms and conditions related to the price of energy, capacity,  
18 ancillary services and any associated environmental attributes, as applicable. In  
19 addition, the model LTPPAs establish performance criteria for developing,

Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1 operating and maintaining a facility, security and insurance requirements, contract  
2 administrative and notice requirements, and assignment and other transfer  
3 restrictions. The model LTPPAs also define events of default, force majeure,  
4 damages and other representations, warranties, and covenants. Finally, the model  
5 LTPPAs include conditions where the effectiveness of each is dependent on the  
6 sufficient regulatory approval. A separate model LTPPA is developed for natural  
7 gas resources versus standalone storage resources because natural gas resources  
8 typically have different operating characteristics, performance metrics, and  
9 payment mechanisms.

10 **Q. Please describe the goals of SPS's contract negotiation process.**

11 A. Following a project's evaluation and selection in a resource solicitation, the  
12 contract negotiation process is designed to achieve reasonable contract terms  
13 materially similar to those defined in SPS's model LTPPAs and representative of  
14 the terms and conditions under which the bid was selected. Negotiations focus on  
15 securing and supporting viable capacity and energy resource commitments while  
16 guaranteeing the economic and performance promises the successful bidder made  
17 in the competitive bid solicitation process.

Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1 **Q. Is SPS's process reasonable?**

2 A. Yes, SPS's process is reasonable. It is standard industry practice to provide a model  
3 contract to be used as a baseline. It is similarly standard industry practice to then  
4 enter into a period of negotiation over certain terms to arrive at a final LTPPA that  
5 is particular to a bidder's project and proposal. Standardizing this process  
6 streamlines a negotiation process that could otherwise grow lengthy. And as I set  
7 out above, it also supports the integrity of the RFP and safeguards SPS customers'  
8 interests by standardizing parameters within the RFP. Ultimately, the process  
9 allows SPS to develop final LTPPAs that support the provision of necessary and  
10 reliable service to its customers.

11 **Q. Please briefly describe SPS's current contract negotiation process.**

12 A. SPS has concluded contract negotiations with the two sellers for the Dispatchable  
13 LTPPAs after formal negotiations began in June 2023. Through this process,  
14 multiple meetings were held to: (1) discuss necessary and/or requested deviations  
15 from SPS's model LTPPAs as submitted with the two proposals; (2) agree on final  
16 terms and conditions; and (3) draft contracts for review and execution by both  
17 parties. For any requested deviation from the model LTPPAs, SPS evaluated the  
18 issue or the specific term or condition and, where appropriate, consulted with  
19 subject matter experts or legal counsel to receive input and/or acceptance and



Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1           ensure the change would not compromise the intent of the seller's bid or shift risk  
2           unintentionally to SPS.

Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1           **IV. BORGER LTPPA TERMS (RULE 551.8(D)(2), (3), (5))**

2   **Q.    Please generally describe the Borger Facility.**

3    A.    The Borger Facility is a 230 MW natural gas cogeneration facility capable of  
4           providing both capacity and energy to the electrical grid while simultaneously  
5           delivering steam to an adjacent refinery. The Borger Facility is located in  
6           Hutchinson County, Texas, at the Phillips Petroleum Refinery Complex  
7           (“Refinery”) near the city of Borger, in the Texas Panhandle, approximately 50  
8           miles north of Amarillo. Borger’s parent company is ContourGlobal. The Refinery  
9           is jointly owned by Phillips 66 and Cenovus Energy and operated by Phillips 66.  
10          Site maps are provided as Exhibit C to the new Borger LTPPA, which is provided  
11          as Attachment JLB-3(CONF).

12   **Q.    Please further describe the operating characteristics of the Borger Facility.**

13    A.    The Borger Facility includes two Siemens W501D5A gas turbines coupled with a  
14           heat recovery steam generator (“HRSG”). Exhaust from the two Siemens gas  
15           turbines is directed to the HRSG where thermal energy is then recovered and  
16           converted to steam. High pressure steam as well as compressed gas and condensed  
17           water is then exported to the adjoining Refinery to support its day-to-day industrial  
18           operations in producing petroleum products.

Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1 **Q. How does Borger’s obligation to provide steam to the Refinery affect SPS?**

2 A. As a cogeneration facility, Borger is capable of delivering steam while the Facility  
3 is generating electricity. The nearby Refinery demands a steady and constant  
4 delivery of steam at all times in order to facilitate its day-to-day operations. The  
5 terms of Borger’s arrangement with the Refinery are covered under a separate and  
6 unaffiliated agreement to which SPS is not a party. The contractual arrangement  
7 with the Refinery requires that the Borger Facility maintain a minimum generation  
8 of electricity at all times. As a result, the Borger Facility is required to generate at  
9 a minimum level of approximately 67% of its Contract Capacity at all times. This  
10 minimum load generation for operating purposes is considered non-dispatchable  
11 while Borger is delivering continuous steam to the Refinery. In turn, SPS then has  
12 the ability to dispatch the remaining 33% of the Facility’s Contract Capacity based  
13 on SPS’s system needs.

14 **Q. Does SPS have a pre-existing contractual relationship with Borger?**

15 A. Yes. Borger and SPS currently have an existing 25-year LTPPA (“Existing Borger  
16 LTPPA”) that was executed in 1997 and was approved by the NMPRC. The  
17 Existing Borger LTPPA was initially scheduled to expire on June 11, 2024. Earlier  
18 this year, in anticipation of a near-term capacity need, SPS and Borger agreed to  
19 amend the Existing Borger LTPPA in order to extend the existing term through  
20 December 31, 2026. New provisions under the amended Existing Borger LTPPA

Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1 will not be effective until after June 11, 2024. The amendment that extended the  
2 Existing Borger LTPPA includes a provision that the Existing Borger LTPPA will  
3 terminate early if: (1) Borger was selected in the All-Source RFP; and (2) SPS and  
4 Borger successfully executed and received regulatory approval of a new LTPPA  
5 that commences prior to December 31, 2026. The new 15-year Borger LTPPA that  
6 SPS is presenting in this application will commence shortly after approval by the  
7 NMPRC. If NMPRC approval is received on or before April 30, 2024, the  
8 amendment to the Existing Borger LTPPA will not be effectuated and the new  
9 Borger LTPPA will commence on June 1, 2024. If NMPRC approval of the new  
10 Borger LTPPA is received on or after May 1, 2024, the amendment to the Existing  
11 Borger LTPPA will be in effect from June 12, 2024, through the commencement  
12 date of the new 15-year Borger LTPPA, which will commence on the first day of  
13 the second month after NMPRC approval. If the NMPRC does not approve the new  
14 Borger LTPPA, the Existing Borger LTPPA would continue and amended terms  
15 would be in effect from June 12, 2024 through December 31, 2026 when it would  
16 expire.

17 **Q. Are there any conditions that must be met prior to the effectiveness of the new**  
18 **Borger LTPPA?**

19 A. Yes. In addition to SPS's typical condition whereby SPS requires the opportunity  
20 to seek regulatory approval prior to the effectiveness of the new Borger LTPPA,

Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1 the new Borger LTPPA is also conditioned on Borger’s successful extension of its  
2 current contractual arrangements for steam supply with the Refinery as well as  
3 natural gas supply with IACX Rock Creek, LLC (“IACX”), both of which must be  
4 finalized by November 30, 2023. Should Borger fail to execute agreements with  
5 the Refinery and IACX by November 30, 2023, then Borger has the right to  
6 terminate the new Borger LTPPA without further obligations. If Borger fails to  
7 execute the agreement with the Refinery by November 30, 2023, and does not elect  
8 to terminate the new Borger LTPPA, then SPS has the right to terminate the new  
9 Borger LTPPA by December 7, 2023.

10 **Q. What are the essential terms of the new Borger LTPPA?**

11 A. The new Borger LTPPA has a term of 15 years. Under the new Borger LTPPA,  
12 SPS is entitled to the entire nameplate capacity of 230 MWs, like it is under the  
13 Existing Borger LTPPA. SPS will purchase Contract Capacity at a set price during  
14 the first Commercial Operation Year, escalating each Commercial Operation Year  
15 thereafter through Commercial Operation Year 15. The Variable Operations &  
16 Maintenance (“O&M”) Rate in the new Borger LTPPA also escalates similarly.  
17 The Capacity Price and Variable O&M Rate are each detailed in Exhibit M to the  
18 new Borger LTPPA provided as Attachment JLB-3(CONF).

Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1   **Q.    Will SPS pay Borger any other amounts under the new Borger LTPPA?**

2    A.    Yes. SPS will also pay Borger a monthly Energy Payment for the energy generated  
3           by the Facility, similar to the approach in the Existing Borger LTPPA. The Energy  
4           Payment entails paying for the actual cost of the natural gas fuel that is consumed  
5           by the Facility, adjusted to reflect a Guaranteed Heat Rate (described below). The  
6           Energy Payment and its components are detailed in Section 8.4 and Exhibit K to  
7           the new Borger LTPPA provided as Attachment JLB-3(CONF).

8                    In the rare event that SPS requests a unit startup, SPS will also pay a Turbine  
9           Start Payment. These startup charges are expected to be very rare as the Facility is  
10          expected to run continuously. No turbine payment exists in the Existing Borger  
11          LTPPA. The Turbine Startup Payments are detailed in Section 8.8 to the new  
12          Borger LTPPA provided as Attachment JLB-3 (CONF).

13                   The new Borger LTPPA also provides for certain additional payment  
14          adjustments. For example, if the reliability of the transmission grid is declared at-  
15          risk for reliability concerns related to a scarcity of capacity or operating reserves,  
16          or other reliability reasons (“Elevated System Condition” or “ESC”), Borger would  
17          receive a bonus payment, in addition to the Monthly Capacity Payment, as an  
18          incentive for the Facility remaining fully available during such an event. The  
19          amount of the bonus ranges depending upon the severity of the event. Inversely,  
20          Borger would incur a penalty charge lowering the Monthly Capacity Payment if the

Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1 Facility is not fully available during such an event. The amount of the penalty  
2 depends upon the severity of the event. No ESC payment adjustments exist in the  
3 Existing Borger LTPPA because such a term was not negotiated in 1997. However,  
4 it is SPS's position that this term is of material benefit now as all load responsible  
5 entities in the Southwest Power Pool are facing materially different capacity  
6 positions today and in the future compared to those experienced approximately two  
7 decades ago. The ESC payment adjustments are detailed in Section 8.9 to the new  
8 Borger LTPPA provided as Attachment JLB-3 (CONF).

9 Like the Existing Borger LTPPA, SPS will also reimburse Borger for costs  
10 incurred for services to operate and maintain the pipeline servicing the Facility  
11 under the pipeline agreement described below. The reimbursement of these costs  
12 is addressed in Sections 3.2 and 8.7 to the new Borger LTPPA provided as  
13 Attachment JLB-3(CONF).

14 **Q. Please describe the Guaranteed Heat Rate utilized under the new Borger**  
15 **LTPPA.**

16 A. The Energy Payment described above reflects the cost of the natural gas fuel that  
17 is consumed by the Facility to generate energy. However, the Energy Payment  
18 calculation utilizes a Guaranteed Heat Rate in place of a typical actual heat rate.  
19 This is intended to ensure SPS does not incur unintended gas costs or inefficiencies  
20 related to the Facility's obligations to supply steam to the Refinery. SPS remains

Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1 protected throughout the term of the new Borger LTPPA even if the steam supply  
2 becomes irregular or is suspended at any point in the future. The Guaranteed Heat  
3 Rate, which is detailed in Exhibit K to the new Borger LTPPA, is scaled between  
4 7.000 MMBtu/MWh and 7.300 MMBtu/MWh depending on the output of the  
5 Facility.

6 **Q. You mention that there are associated fuel contracts. Please describe those**  
7 **contracts.**

8 A. Borger is supplied natural gas fuel to operate the Facility under two separate natural  
9 gas supply agreements:

- 10 • The first is an agreement between Borger and SPS whereby SPS  
11 supplies approximately fifty percent (50%) of the natural gas used  
12 by the Facility.
- 13 • The second is an agreement between Borger and IACX whereby  
14 Borger is responsible for supplying approximately fifty percent  
15 (50%) of the natural gas used by the Facility.

16 SPS and Borger are also parties to two additional related agreements, both of which  
17 are necessary to facilitate natural gas supply to the Facility:

- 18 • A Fuel Management Agreement, whereby SPS administers the two  
19 agreements above in order to facilitate the daily gas supply and



Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1 scheduling activities necessary to supply natural gas fuel to the  
2 Facility.

- 3 • A Natural Gas Pipeline Construction and Transportation Agreement  
4 which includes a third party, Branch Energy Company (“Branch”).  
5 Branch provides operation and maintenance services with respect to  
6 the gas pipeline that serves the Facility.

7 **Q. Are these agreements similar to the agreements associated with the Existing**  
8 **Borger LTPPA?**

9 A. Yes, and SPS has supported these agreements in all applicable fuel reconciliation  
10 proceedings since the Existing Borger LTPPA was executed in 1997.

11 **Q. What are SPS’s rights as they relate to Borger’s non-performance under the**  
12 **new Borger LTPPA?**

13 A. Certain events, if not cured, may constitute an Event of Default, and are defined in  
14 the new Borger LTPPA. As an example: Borger must maintain a Capacity  
15 Availability Factor of at least 85% on a rolling basis throughout the term of the 15-  
16 year LTPPA. If Borger’s availability falls below 85%, Borger must increase the  
17 Facility’s availability to 90% the following year or otherwise trigger an Event of  
18 Default. In connection with an Event of Default by Borger, SPS may: (1) seek  
19 Actual Damages; (2) offset payments due to Borger for damages; (3) draw on the  
20 Security Fund for any damages; or (4) elect to terminate the LTPPA (upon notice)

Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1 and draw any Actual Damages from the Security Fund. Furthermore, at any time,  
2 if SPS incurs damages in excess of the Damage Cap, then SPS has the right to draw  
3 from the Security Fund and terminate the LTPPA.

4 **Q. You mentioned a “Security Fund.” What are the Security Fund requirements**  
5 **of the new Borger LTPPA?**

6 A. In line with the security requirements in SPS’s Model Dispatchable LTPPA, Borger  
7 must establish and maintain a Security Fund throughout the term equal to the  
8 Damage Cap. The Security Fund provides for surety of Borger’s performance. SPS  
9 may draw from the Security Fund for any obligations or damages arising out of the  
10 new Borger LTPPA. In comparison, SPS currently holds no security under the  
11 Existing Borger LTPPA.

12 **Q. Are there other notable performance requirements captured in the new**  
13 **Borger LTPPA?**

14 A. Yes. Consistent with SPS’s Model Dispatchable LTPPA, Borger is expected to  
15 report the Facility’s availability and hourly dispatch range accurately and timely.  
16 This is a standard expectation that aligns with SPS’s model LTPPAs and inherently  
17 protects SPS from unnecessary market penalties or charges for inaccurate real-time  
18 capacity reporting. In the event SPS attempts to dispatch the Facility to a setpoint  
19 that Borger has reported as achievable, but Borger fails to reach that setpoint either  
20 (1) within at least 97% of the setpoint or (2) within 5 MWs of the setpoint; Borger

Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1 would be subject to various financial penalties. First, in such a circumstance,  
2 Borger's payment for Contract Capacity is reduced on a pro-rata basis by an amount  
3 equal to such deficiency for each impacted hour. Second, if such an event occurs  
4 more than once in a single month, then Borger's payment for Contract Capacity is  
5 reduced on a pro-rata basis by an amount equal to the largest deficiency for the  
6 entire month. Third, if such an event occurs three or more times in any two  
7 consecutive billing periods, then Borger's payment for Contract Capacity is  
8 reduced by 15% applicable to the two subsequent billing months.

9 **Q. What other benefits are provided from the Borger LTPPA?**

10 A. Beyond the benefits I've already identified, the Borger LTPPA provides needed  
11 capacity for SPS's system and customers. As described in more detail by SPS  
12 witness Ben R. Elsey, the new Borger LTPPA was selected as part of SPS's  
13 Recommended Portfolio in its 2022 All-Source RFP and saves customers over \$100  
14 million compared to a portfolio without the new Borger LTPPA. In addition,  
15 because the Borger Facility exists today, there is minimal project deliverability risk  
16 associated with the new Borger LTPPA.

1           **V. WILDCAT BESS LTPPA TERMS (RULE 551.8(D)(2), (3), (5))**

2           **Q. Please generally describe the Wildcat facility.**

3           A. The Wildcat BESS is a 48 MW, four-hour battery storage facility capable of  
4           providing both capacity and energy to the electrical grid. Wildcat is located in  
5           Cochran County, Texas on the site of the existing Wildcat Wind Facility (“Wildcat  
6           Wind”) which has been in operation since 2018. NextEra Energy Inc. (“NextEra”)  
7           is the parent company of both Wildcat and Wildcat Wind. Site maps are provided  
8           as Exhibit C to Attachment JLB-4 (CONF).

9           **Q. How does Wildcat’s location at the Wildcat Wind facility affect SPS?**

10          A. The Wildcat BESS will be located at the Wildcat Wind site, however, the Wildcat  
11          Wind facility is contractually separate and independent of the Wildcat BESS.  
12          Wildcat BESS will interconnect using surplus interconnection, which was studied  
13          by Southwest Power Pool as queue number GEN-2023-SR12 and granted on May  
14          19, 2023. Wildcat expects to execute the Surplus Interconnection Agreement by  
15          November 30, 2023. The surplus interconnection agreement would allow the  
16          project to capitalize on any available capacity under the pre-existing  
17          interconnection agreement to charge or discharge during certain periods like, for  
18          example, when the wind facility is not generating at its full capability. The  
19          proximity to Wildcat Wind offers SPS the ability to locally solve for congestion or  
20          periods of market instability and ultimately lessen curtailments. In addition, the

Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1 performance obligations of the Wildcat BESS are independent of the wind facility  
2 and its individual performance.

3 **Q. Does SPS have a contractual relationship with Wildcat Wind?**

4 A. Yes. NextEra and SPS currently have a pre-existing separate 30-year LTPPA that  
5 was initially executed in March 2017 for the procurement of energy and capacity  
6 from the adjacent 150 MW Wildcat Wind facility (“Wind LTPPA”). The Wind  
7 LTPPA is scheduled to expire on December 14, 2048. The Wind LTPPA will  
8 remain in effect without interruption whether or not the Wildcat BESS LTPPA is  
9 ultimately approved.

10 **Q. Are there any conditions that must be met prior to the effectiveness of the**  
11 **Wildcat BESS LTPPA?**

12 A. In line with SPS’s model LTPPA, SPS requires the opportunity to seek regulatory  
13 approval prior to the effectiveness of the LTPPA. Wildcat also has the opportunity  
14 to seek management approval for 60 days after the LTPPA is executed or terminate  
15 without penalty.

16 **Q. What are the essential terms of Wildcat BESS LTPPA?**

17 A. The Wildcat BESS LTPPA has a term of 15 years. SPS will purchase contract  
18 capacity at a fixed price during the term. SPS is entitled to the entire nameplate  
19 capacity of 48 MWs. The fixed capacity price includes the equivalent of 250 charge  
20 and discharge cycles annually, which equates to 48,000 MWhs of injected energy

Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1 (the “Annual Throughput Limit”) into the SPS system. If SPS’s annual discharges  
2 exceed the Annual Throughput Limit, SPS must pay Wildcat an Excess Throughput  
3 Charge. The charges also include an Excess Throughput Charge for the first 4,800  
4 MWh in excess of the Annual Throughput Limit. There is also a charge for any  
5 excess throughput beyond 4,800 MWh up to 22,080 MWh. Excess throughput  
6 beyond 22,080 MWh is prohibited. If SPS uses less than the Annual Throughput  
7 Limit in any single year, SPS can bank up to 4,800 MWhs of unused throughput  
8 from that year, and inversely if SPS uses more than the limit in a year, SPS can  
9 borrow up to 4,800 MWhs from a subsequent year. SPS is also required to maintain  
10 an average annual State of Charge each year below 50%. If SPS exceeds an average  
11 State of Charge 50.1% upon the conclusion of any year, then SPS is subject to a  
12 charge.

13 The LTPPA also provides for certain adjustments to the Monthly Capacity  
14 Payment. For example, if the Facility’s Round Trip Efficiency (“RTE”) is found  
15 to be less than Wildcat’s Guaranteed RTE as defined in Exhibit M of the attached  
16 JLB-4 (CONF), then the Monthly Capacity Payment shall be reduced by an amount  
17 reflective of SPS’s average cost to offset that inefficiency in the Southwest Power  
18 Pool market. In addition, if, in any single month, the average available storage  
19 capacity is less than 97% of the guaranteed level defined in Exhibit M to the

Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1 Wildcat BESS LTPPA, then the Monthly Capacity Payment may be reduced on a  
2 pro-rata basis.

3 The LTPPA also includes a performance guarantee tied to the average  
4 Capacity Availability Factor (“CAF”) in each commercial operation year. This is a  
5 requirement that Wildcat ensures the project remains available for dispatch when  
6 called upon. The required annual CAF begins at 80% in the first year and steps up  
7 to 90% in 5% increments by the third commercial operation year as described in  
8 Section 12.1 of the Wildcat BESS LTPPA, Attachment JLB-4-(CONF).

9 **Q. What are SPS’s rights as they relate to Wildcat’s non-performance under the**  
10 **LTPPA?**

11 A. Certain events, if not cured, may constitute an Event of Default and are defined in  
12 the Wildcat BESS LTPPA. For example: Failure to reach certain development  
13 milestones on time, achieve Commercial Operation Date (“COD”) on time, failure  
14 to meet the availability requirements, or failure to repair and maintain the facility  
15 in accordance with the LTPPA may trigger an Event of Default. In connection with  
16 an Event of Default by Wildcat, SPS may: (1) seek Actual Damages; (2) offset  
17 payments due to Wildcat for damages; (3) draw on the Security Fund for any  
18 damages; or (4) elect to terminate the contract (upon notice) and draw any Actual  
19 Damages from the Security Fund. Furthermore, at any time, should SPS incur  
20 damages in excess of the Damage Cap that Wildcat does not pay when invoiced

Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1 then SPS shall have the right to draw from the Security Fund and terminate the  
2 LTPPA.

3 Furthermore, SPS has an option to acquire the project if it chooses to  
4 exercise its rights to terminate the LTPPA following an Event of Default.

5 **Q. You mentioned a “Security Fund.” What are the Security Fund requirements**  
6 **of the Wildcat BESS LTPPA?**

7 A. In line with the Security requirements in SPS’s Model Standalone Storage PPA,  
8 Wildcat must establish and maintain a Security Fund throughout the term of the  
9 LTPPA. The Security Fund provides for surety of Wildcat’s performance. The  
10 Security Fund is a vehicle for SPS to recover, or partially recover, any costs owed  
11 to SPS under the. While the project is being developed and constructed, Wildcat  
12 must maintain a certain level of Security. Shortly following COD, Wildcat may  
13 reduce the Security to a level that matches Wildcat’s Damage Cap.

14 **Q. Are there other notable performance requirements captured in the Wildcat**  
15 **BESS LTPPA?**

16 A. Yes. Wildcat is expected to report the Facility’s availability and hourly dispatch  
17 range accurately and timely. This is a standard expectation that aligns with SPS’s  
18 model LTPPAs and protects SPS from unnecessary market penalties or charges for  
19 inaccurate real-time capacity reporting. In the event SPS attempts to dispatch the  
20 Facility to a setpoint that Wildcat has reported as achievable, and as a result, SPS



Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1 is assessed certain related charges by SPP, then SPS may reduce Wildcat's monthly  
2 payment by an amount equal to those charges.

3 **Q. What other benefits are provided by the Wildcat BESS LTPPA?**

4 A. Beyond the benefits I've already identified, the Wildcat BESS LTPPA provides  
5 needed capacity for SPS's system and customers. In addition, the expected COD of  
6 the Wildcat BESS LTPPA is several months before summer of 2026 with a  
7 commercial counterparty, NextEra, who has delivered multiple other BESS LTPPA  
8 projects in other Xcel Energy jurisdictions. These factors reduce portfolio delivery  
9 risk.

**IV. CONCLUSION**

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**Q. In your opinion, are the terms of the Dispatchable LTPPAs reasonable?**

A. Yes. The terms and conditions of the Dispatchable LTPPAs are reasonable because they align with the terms and conditions of SPS’s model LTPPAs and support SPS’s efforts to secure necessary and reliable system capacity as well as low-cost long-term price certainty for our customers. Through prudent contracting SPS has identified, assessed and mitigated major risks while also securing potential and lasting benefits in the commercial terms that have been negotiated. The terms strike a balance with holding our LTPPA counterparties to their obligations and protecting SPS customers, while also supporting a project’s likelihood of success in both development and operation. In addition, the LTPPAs are materially consistent with: (1) the proposals submitted by NextEra and ContourGlobal in response to the All-Source RFP; and (2) the terms and conditions of SPS’s model LTPPAs.

**Q. Should the Dispatchable LTPPAs be approved by the NMPRC?**

A. Yes. The Dispatchable LTPPAs are reasonable and provide needed capacity and energy to SPS’s system and should be approved by the NMPRC. The NMPRC’s pre-approval of the Dispatchable LTPPAs supports reliability and resource adequacy as SPS works through further resource planning and solicitation efforts to address its late-decade resource needs. Pre-approval also benefits developers and increases commercial efficiencies in advance of SPS’s next All-Source RFP in

Case No. 23-00384-UT  
Direct Testimony  
of  
John L. Bornhofen

1           2024 by ensuring SPS issues an RFP that as accurately as possible outlines SPS's  
2           capacity position in 2028 - 2030.

3   **Q.   Does this conclude your pre-filed direct testimony?**

4   A.   Yes.

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

**IN THE MATTER OF SOUTHWESTERN )  
PUBLIC SERVICE COMPANY'S )  
APPLICATION REQUESTING )  
APPROVAL OF TWO LONG TERM )  
PURCHASED POWER AGREEMENTS, ) CASE NO. 23-00384-UT  
SOUTHWESTERN PUBLIC SERVICE )  
COMPANY, )  
 )  
 )  
APPLICANT. )  
\_\_\_\_\_ )**

**VERIFICATION**

On this day, November 21, 2023, I, John L. Bornhofen, swear and affirm under penalty of perjury under the law of the State of New Mexico, that my testimony contained in Direct Testimony of John L. Bornhofen is true and correct.

*/s/ John L. Bornhofen*  
\_\_\_\_\_  
**JOHN L. BORNHOFEN**

SPS Model Dispatchable Power Purchase Agreement

# POWER PURCHASE AGREEMENT

BETWEEN

SOUTHWESTERN PUBLIC SERVICE COMPANY AND

[REDACTED]



- [date] -

## TABLE OF CONTENTS

	<b>PAGE</b>
Article 1 - Rules of Interpretation .....	1
1.1 Interpretation.....	1
1.2 Interpretation with Other Agreements .....	2
1.3 Good Faith and Fair Dealing.....	2
Article 2 – Term and Termination .....	2
Article 3 – Facility Description .....	3
3.1 Description.....	3
3.2 General Design of the Facility.....	3
Article 4 - Implementation.....	3
4.1 Project Development .....	3
4.2 Environmental Matters .....	5
4.3 Permits.....	6
4.4 Governmental Inspections .....	7
4.5 Commercial Operation .....	7
4.6 Pre-COD Testing .....	9
Article 5 - Delivery .....	10
5.1 Arrangements .....	10
5.2 Market Changes .....	11
5.3 Electric Metering Devices .....	11
5.4 Natural Gas Fuel.....	12
5.5 Fuel Oil .....	14
Article 6 – Conditions Precedent .....	15
6.1 PUC Approval .....	15
6.2 Other Company CPs.....	16
6.3 Seller CPs.....	16
6.4 Return of Security Fund.....	16
6.4 Following a termination .....	16
Article 7 – Sale and Purchase .....	16
7.1 General Obligation .....	16
7.2 Dispatch.....	17
7.3 Permit Limitations .....	17
7.4 Environmental Attributes.....	18
7.5 Ancillary Services .....	18
Article 8 – Payment Calculations.....	19
8.1 Payment for Contract Capacity .....	19
8.2 Payment for Dispatchability .....	21
8.3 Payment for Energy .....	22
8.4 Heat Rate Adjustment.....	22

8.5	Payment for Turbine Starts .....	24
8.6	ESC Adjustments.....	24
Article 9 – Billing and Payment.....		25
9.1	Billing .....	25
9.2	Payment.....	26
9.3	Billing Disputes .....	26
Article 10 – Operations and Maintenance .....		26
10.1	Operation and Administration .....	26
10.2	Facility Maintenance .....	27
10.3	Forced Outages .....	27
10.4	Post-COD Testing.....	27
10.5	Forecasting .....	29
10.6	Books and Records .....	29
10.7	Access to Facility .....	30
10.8	Operating Committee and Operating Procedures.....	30
10.9	Availability Reporting: Gas.....	30
10.10	Availability on Fuel Oil.....	31
Article 11 – Security for Performance.....		31
11.1	Security Fund.....	31
11.2	Replenishment.....	32
11.3	Form .....	32
11.4	Replacement.....	34
11.5	Survival .....	34
11.6	Expenses .....	34
Article 12 – Default and Remedies .....		34
12.1	Default by Seller: General.....	34
12.2	Default by Seller: Failure to Achieve Critical Path Development Milestone or COD.....	38
12.3	Default by Company .....	40
12.4	Limitations on Damages .....	42
12.5	Bankruptcy.....	43
12.6	Cumulative Remedies.....	43
12.7	Duty to Mitigate .....	43
Article 13 – Dispute Resolution .....		43
13.1	Negotiation.....	43
13.2	Time Bar .....	44
13.3	No Termination Pending Dispute Resolution .....	44
13.4	Governing Law.....	45
13.5	Venue.....	45
13.6	Waiver of Jury Trial .....	45
Article 14 – Force Majeure .....		45

14.1	Definition.....	45
14.2	Applicability of Force Majeure.....	46
14.3	Limitations on Effect of Force Majeure.....	47
Article 15 – Representations and Warranties.....		47
Article 16 - Insurance.....		49
16.1	Evidence of Insurance.....	49
16.2	Policy Requirements.....	49
16.3	No Implied Limitation.....	49
16.4	Term and Modification of Insurance.....	49
16.5	Application of Proceeds.....	50
Article 17 - Indemnity.....		50
17.1	Indemnification: General.....	50
17.2	Indemnification: Environmental.....	50
17.3	Indemnification: House Power.....	51
17.4	Indemnification: Company Remote Start of Facility.....	51
17.5	Limitations.....	51
17.6	Procedures.....	51
17.7	Amounts Owed.....	52
Article 18 – Lender Provisions.....		52
18.1	Accommodation of Facility Lender.....	52
18.2	Notices.....	52
Article 19 - Assignment.....		53
19.1	Assignment by Seller.....	53
19.2	Assignment by Company.....	54
19.3	ROFO.....	54
19.4	PFT.....	55
19.5	RESERVED.....	59
19.6	Memo of Option.....	59
Article 20 - Miscellaneous.....		59
20.1	Notices.....	59
20.2	Taxes.....	59
20.3	Applicable Laws.....	60
20.4	Change of Law.....	60
20.5	Fines and Penalties.....	61
20.6	Rate Changes.....	61
20.7	Certifications.....	61
20.8	Disclaimer of Third Party Beneficiaries.....	61
20.9	Relationship of the Parties.....	61
20.10	Survival of Obligations.....	62
20.11	Severability.....	62
20.12	Complete Agreement; Amendments.....	62



20.13 Waiver.....	62
20.14 Binding Effect.....	62
20.15 Headings.....	62
20.16 Counterparts .....	62
20.17 Press Release .....	63
20.18 Exhibits .....	63
20.19 Confidentiality .....	63
20.20 Accounting Treatment.....	64

Exhibits:

EXHIBIT A DEFINITIONS

EXHIBIT B CONSTRUCTION MILESTONES

EXHIBIT C FACILITY DESCRIPTION AND SITE MAPS

EXHIBIT D NOTICES AND CONTACT INFORMATION

EXHIBIT E INSURANCE COVERAGE

EXHIBIT F NEEDED PERMITS

EXHIBIT G FORM OF LETTER OF CREDIT

EXHIBIT H FORM OF GUARANTY

EXHIBIT I OPERATING STANDARDS

EXHIBIT J CAPACITY TESTING

EXHIBIT K HEAT RATE TESTING

EXHIBIT L MAINTENANCE

EXHIBIT M PRICING

EXHIBIT N ESC ADJUSTMENTS

EXHIBIT O LENDER CONSENT PROVISIONS

EXHIBIT P-1 EQUITY PURCHASE PRICE FORMULA

EXHIBIT P-2 FACILITY PURCHASE AND SALE AGREEMENT (“PSA”) PROVISIONS

EXHIBIT P-3 MEMBERSHIP INTEREST PURCHASE AND SALE AGREEMENT  
 (“MIPSA”) PROVISIONS

EXHIBIT Q NATURAL GAS FUEL SPECIFICATIONS

EXHIBIT R FUEL OIL *[if applicable]*

EXHIBIT S METER AND COMMUNICATIONS REQUIREMENTS

**SPS Model Dispatchable Power Purchase Agreement**

**POWER PURCHASE AGREEMENT  
BETWEEN  
SOUTHWESTERN PUBLIC SERVICE COMPANY AND  
[REDACTED], LLC**

This Power Purchase Agreement (this “PPA”) is made as of this [REDACTED] day of [REDACTED], 20 [REDACTED] (“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) [REDACTED], [REDACTED] LLC, a [REDACTED] [limited liability company] with a principal place of business at [REDACTED] (“Seller”). Company and Seller are hereinafter referred to individually as a “Party” and collectively as the “Parties.”

WHEREAS Seller desires to develop, design, construct, interconnect, own, operate and maintain the Facility as defined herein; and

WHEREAS Seller desires to sell and deliver, and Company desires to accept and receive, certain products and services, including but limited to the Contract Energy, Contract Capacity and Ancillary Services attributable to and/or delivered from the Facility 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.

## SPS Model Dispatchable Power Purchase Agreement

### 1.2 Interpretation with Other Agreements.

(A) This PPA does not provide authorization for Seller 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 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, then unless another standard is expressly specified in this PPA, 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, then unless another standard is expressly specified in this PPA, 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 last Day of the calendar month during which occurs the [ ]<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 Section 12.1(B)-(E),

## SPS Model Dispatchable Power Purchase Agreement

Section 12.2(C), Section 12.3(B)-(C), 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 the Facility, as further described in Exhibit C - Facility Description and Site Maps. A scaled map that identifies the Site, the location of the Facility, the Interconnection Point and Interconnection Facilities, the Point of Delivery, the Fuel Delivery Point, and other important facilities, is included in Exhibit C - Facility Description and Site Maps.

#### **3.2 General Design of the Facility.**

(A) Seller shall design, construct, operate and maintain the Facility according to Good Utility Practices and the Interconnection Agreement.

(B) The Facility shall include all equipment specified in Exhibit C - Facility Description and Site Maps 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 Contract Energy.

(C) The Net Capability of the Facility shall be [ ] MW.

### Article 4 - Implementation

#### **4.1 Project Development.**

(A) Seller shall enter into and perform at its expense all contracts, including any equipment procurement contracts, required for (i) the engineering, procurement, construction, acquisition, manufacture, delivery and installation of the Facility, and (ii) the generation and delivery of Contract Energy (generally, the "Construction Contracts") with qualified and experienced contractors. Upon written request by Company, Seller shall promptly provide copies of any or all Construction Contracts to Company. All Construction Contracts obtained by Company shall be deemed Confidential Information subject to Section 20.19 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. In addition, Seller shall achieve each Critical Path Development Milestone on or before the applicable deadline for achieving such Critical Path Development Milestone specified below. Seller shall provide to Company, on or before the applicable deadline to achieve each Critical Path Development Milestone, evidence reasonably satisfactory to Company that the Critical Path Development Milestone has been achieved. Seller shall also provide any additional evidence reasonably requested by Company that the Critical Path Development Milestone has been achieved, including certifications from an officer of Seller.

**SPS Model Dispatchable Power Purchase Agreement**

<b>Critical Path Development Milestone</b>	<b>To be completed no later than (completion deadline):</b>
Acquisition of all Seller's Needed Permits required to construct the Facility	<i>[To be based on bid submission and RFP requirements]</i>
Execution of all Construction Contracts	<i>[To be based on bid submission and RFP requirements]</i>
Closing of project financing for the Facility or providing the Company with proof of financial capability to construct the Facility	<i>[To be based on bid submission and RFP requirements]</i>

If Seller anticipates a CPD Delay because it is unable, using Commercially Reasonable Efforts, to achieve any of the Critical Path Development Milestones by the applicable deadline, then Seller may extend the timeframe to achieve such Critical Path Development Milestones as set forth in Section 12.2(A) subject to the payment of Liquidated Delay Damages so long as the following conditions are satisfied:

1. At least [thirty (30)] days prior to the applicable completion deadline set forth above, Seller submits to Company (a) a written description of the reason for the failure; and (b) a Recovery Plan for completing all necessary work to achieve completion of the missed Critical Path Development Milestone by a date certain (which plan may contemplate the payment of Liquidated Delay Damages).
2. Seller shall commence the work contemplated by the Recovery Plan within [five (5)] days after submitting such Recovery Plan to Company.
3. Seller shall be solely responsible for any costs or expenses incurred by Seller as a result of the formulation and implementation of the Recovery Plan.

Nothing in this Section 4.1(B) shall be construed to: (x) relieve Seller of its obligations under this PPA; (y) modify the deadlines for achieving the remaining Critical Path Development Milestones, including the Target COD, as applicable (except for the update to the milestone schedule pursuant to Section 12.2(B) and the missed Critical Path Development Milestone which Seller is attempting to cure under this Section 4.1(B)) or (z) extend the applicable cure period set forth in Section 12.2(B) or impair the Company's right to terminate this Agreement pursuant to Section 12.2(C). For clarity, failure to cure a CPD Delay within the applicable cure period set forth in Section 12.2(B) shall be subject to termination as set forth in Section 12.2(C).

**SPS Model Dispatchable Power Purchase Agreement**

(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 and Critical Path Development 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) 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. Seller shall make all relevant counterparties under the Construction Contracts available to Company, upon request, in order to keep Company fully informed on the status of development.

(D) Upon request, 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 of 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 sixty (60) Days following PUC Approval, Seller shall complete and provide to Company a comprehensive independent "Phase I" environmental site assessment of the Site that is conducted in compliance with ASTM E1527-13 or E1527-16, as applicable (including associated raw data, if requested by Company), which report shall have been prepared as of a reasonably proximate-time such that it reflects the then-current conditions of the site. 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) 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 20.19.

(B) Throughout the Term, Seller promptly shall

1. disclose to Company and remediate, at Seller's sole cost and expense, any Environmental Contamination identified at the Site;
2. provide to Company copies of any further environmental assessments or investigations of the Site (including associated raw data, if requested by Company); 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

### SPS Model Dispatchable Power Purchase Agreement

related to protection of human health, the environment, or natural resources, including 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, contaminant, chemical, material, gas, or particulate matter that is regulated by any Governmental Authority as an environmental pollutant or which is deemed or may be deemed hazardous, dangerous, damaging or toxic 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 Applicable Law; (ii) petroleum, including any fraction, derivative or additive; (iii) asbestos; (iv) polychlorinated biphenyls; (v) per- and polyfluoroalkyl substances (vi) radioactive material; (vii) designated as a “hazardous substance” pursuant to the Clean Water Act, 33 U.S.C. §1251 *et seq.* (33 U.S.C. §1251); (viii) 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); (ix) 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); (x) defined as a “chemical substance” under the Toxic Substances Control Act, 15 U.S.C. §2601 *et seq.* (15 U.S.C. §2601); or (xi) 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 under Applicable Law or advisable pursuant to Good Utility Practice for the construction, ownership, operation and maintenance of the Facility and the generation and delivery of the products and services required by this PPA. Seller shall keep Company informed as to the status of its permitting efforts and shall provide Company the opportunity to review and comment on major applications for draft and final Permits. Seller shall promptly inform Company of (i) any Permits that Seller is unable to obtain, which 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

**SPS Model Dispatchable Power Purchase Agreement**

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 or recommended 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 shall promptly 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 Contract 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) Seller shall cause COD to occur no later than [REDACTED], 20[REDACTED] (the "Target COD"). Company shall not be obligated to accept and establish a Commercial Operation Date earlier than [REDACTED], 20[REDACTED] (*insert date that is 90 Days prior to Target COD*).

(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 ten (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 ten (10) Business Days to review and object to each such notice.

(C) For purposes hereof:



**SPS Model Dispatchable Power Purchase Agreement**

1. the “Commercial Operation Date” or “COD” means 12:01 am on the Day after which Seller’s COD Notice has been accepted by Company or deemed accepted by Company pursuant to Section 4.5(B); and

2. the “COD Conditions” are:

(a) an officer of Seller, authorized to bind Seller and who is familiar with the Facility, has confirmed in writing that (1) all necessary and material Permits have been obtained, are in full force and effect and the entity granting the Permit has not placed any temporary or conditional restrictions or limitations on the Facility or its operation, (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 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 has received no notice of breach thereof from the Transmission Authority, (2) the Facility meets all criteria for [Network/Energy] Resource Interconnection Service, under the Interconnection Agreement and the Transmission Tariff, (3) the Facility is interconnected to the Transmission Authority’s System, and has been fully tested, achieved initial synchronization, and been successfully operated at a generation level acceptable to the Transmission Authority, without experiencing any abnormal or unsafe operating conditions on any interconnected system, (4) Seller has or is capable of declaring commercial operation under the Interconnection Agreement and (5) Seller has made all arrangements necessary to deliver Contract Energy 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 and are not required for the safe operation of the Facility or otherwise affect the Capacity, efficiency, reliability, operability, safety or mechanical or electrical integrity of the Facility;

(d) each Generating Unit has achieved at least two Successful Starts on natural gas [(and two Successful Starts on fuel oil) **if applicable**] [in each possible operating configuration **if applicable**], without experiencing any abnormal operating conditions;

(e) the Facility has generated continuously for a period not less than sixteen (16) consecutive hours, at an output level not less than 95% of Net Capability (adjusted for ambient conditions), without experiencing any abnormal operating conditions;

**SPS Model Dispatchable Power Purchase Agreement**

(f) Seller has demonstrated the functionality and reliability of the Facility's communications systems and AGC interface with Company's EMCC, the capability of the Facility to receive and respond to signals from Company's SCADA System and the accuracy of the Electric Metering Devices and their ability to communicate with the Company in accordance with Exhibit C – Facility Description and Site Maps, Exhibit I - Operating Standards and Exhibit S – Meter and Communications Requirements;

(g) the Facility has demonstrated its capability to meet the Expected Ramp Rates, and meets the Dispatchability Requirements set forth in Exhibit I - Operating Standards;

(h) all fuel supply, fuel storage and fuel delivery arrangements necessary to operate the Facility in compliance with this PPA have been completed, tested and are in effect, and a copy of the executed natural gas interconnection facilities agreement has been provided to Company;

(i) Seller has executed and delivered to Company all documents or instruments required under Article 16; and,

(j) Seller has provided evidence reasonably satisfactory to Company that it is compliant with, and has adopted and implemented the appropriate policies pertaining to, the Forced Labor Laws consistent with Section 15.B(2). Seller shall also provide any additional evidence or certifications reasonably requested by Company that the requirements of this subsection have been met, including certifications from an officer of Seller or third-parties, certificates of origin documentation or importer statements.

(D) Prior to COD, should Seller require Company's assistance in meeting the COD Conditions because the Transmission Authority considers Company to be the market participant for the Facility, Company shall use Commercially Reasonable Efforts to cooperate with and provide assistance to Seller, so long as Seller provides any security the Transmission Authority requires and reimburses Company for all expenses, including fees of counsel, Company may incur in providing such cooperation and assistance.

(E) 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 Pre-COD Testing.**

(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 six

### SPS Model Dispatchable Power Purchase Agreement

months prior to generating any Pre-COD Test Energy. Company shall cooperate reasonably to assist in the registration of the Facility to allow generation of Pre-COD Test Energy.

(B) Seller shall coordinate the production and delivery of Pre-COD Test Energy with Company, upon such Commercially Reasonable prior notice as Company and the Transmission Authority may reasonably request. In particular, (i) upon request, Company shall procure and arrange delivery of natural gas fuel needed for pre-COD testing of the Facility, and (ii) Seller shall reimburse Company for all associated commodity, imbalance, demand charges, transportation and other ancillary costs incurred by Company in connection therewith.

(C) Seller shall invoice and Company shall purchase all Pre-COD Test Energy (whether generated from natural gas fuel or fuel oil *if applicable*) from Seller at the Test Energy Rate. For purposes hereof, "Pre-COD Test Energy" means 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. Seller's interconnection application shall request that the Transmission Authority study the Facility for Network Resource Interconnection Service and Energy Resource Interconnection Service under the Transmission Tariff. The resulting Interconnection Agreement must include Energy Resource Interconnection Service at a minimum. Seller shall cooperate reasonably in any request by Company to assist in Company's efforts to have the Facility approved as a network resource or equivalent classification pursuant to the applicable Transmission Tariff.

(B) Seller hereby authorizes Company to contact, discuss and obtain information concerning the Facility and the 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 required, Company shall arrange and be responsible for scheduling and transmission services beyond the Point of Delivery with respect to the output of the Facility. To the extent applicable, Company shall be the market participant with respect to the output of 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 the Contract Energy. Company shall be responsible for all electrical losses, transmission

### SPS Model Dispatchable Power Purchase Agreement

and ancillary service arrangements and costs required to transmit and deliver Contract 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 cooperate in good faith to facilitate the delivery of Contract Energy, at the least possible cost to the Parties, consistent with this PPA to the extent possible.

(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 cooperate in good faith to change their protocols for operation of the Facility accordingly, at the least possible cost to the Parties, consistent with this PPA to the extent possible. In addition, if as a result of any change in Applicable Law the Company is not able to realize the capacity and ancillary services products that the Facility is able to provide to the Company as of the Effective Date and such capacity and ancillary services products can be provided by the Facility subject to the Seller making capital expenditures to comply with such change in Applicable Law, then Seller agrees that it shall make all such required capital expenditures so that the Facility is able to provide such capacity and ancillary services products to the Company.

#### 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. All Metering Devices shall meet the requirements of Exhibit S - Metering and Communications Devices.

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 via electronic remote communications and via physical access 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.

**SPS Model Dispatchable Power Purchase Agreement**

(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) one hundred eighty (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.

**5.4 Natural Gas Fuel.**

(A) Seller shall be solely responsible for all natural gas interconnection, transportation, delivery and metering arrangements, and all associated costs, required to receive natural gas fuel to operate the Generating Unit(s). Seller shall, at its sole expense, construct, operate and maintain the pipelines, compressors, meters, heaters, filter/separation equipment, electronics, regulation equipment and other necessary equipment, of sufficient capacity and industrial specifications to receive, regulate, meter and transport natural gas fuel from the Fuel Delivery Point to the Generating Unit(s), to allow for full operation of the Generating Unit(s) on natural gas fuel over the Term. Seller shall be responsible for ensuring that the Upstream Pipeline designs and constructs the natural gas interconnection facilities and the upstream delivery system to be of sufficient size and capability to ensure the Facility receives natural gas fuel that meets the minimum pressure requirement needed to run the Facility at one hundred percent (100%) of Net Capability. If requested by Company, Seller shall install (at Company's cost) check metering, in connection with the natural gas custody transfer metering, on Seller's downstream natural gas facilities.

**SPS Model Dispatchable Power Purchase Agreement**

(B) Company may elect at its sole option to interconnect the Facility with one or more additional natural gas delivery systems at or near the Fuel Delivery Point identified in Exhibit C - Facility Description and Site Maps and to designate such additional interconnection(s) as an additional Fuel Delivery Point, *provided, however, that* (i) Company shall be responsible for installing and paying for all pipelines, valves, electronics, metering and other facilities, permits, contracts and construction costs required to establish such additional interconnection, up to Seller's fuel interconnection facilities; (ii) such additional interconnection will not interfere with the operation of the Facility, other than during the time necessary to physically connect the additional interconnecting facilities; and (iii) such additional interconnection will deliver Acceptable Natural Gas Fuel to the new Fuel Delivery Point. Seller shall grant Company or its designee an easement and access to the vicinity of the Fuel Delivery Point for the purpose of constructing and maintaining any such additional natural gas interconnection(s).

(C) Company shall procure and pay for all natural gas fuel for the generation of Contract Energy, from and after COD. Seller shall accept delivery of all natural gas fuel delivered to any Fuel Delivery Point for the purpose of generating the Contract Energy, *provided, however,* that Seller shall not be obligated to accept gas fuel that is not Acceptable Natural Gas Fuel if such nonconformance could reasonably be expected to have a Material Adverse Effect on the Facility ("Non-Conforming Gas"). Company shall have no liability to Seller for the delivery of Non-Conforming Gas to the Facility by any Upstream Pipeline, *provided* that Company shall provide reasonable assistance to Seller in making any consequent claim against the delivering Upstream Pipeline if Seller pays or reimburses Company for any associated legal fees and other out-of-pocket costs incurred by Company.

(D) Company may elect its sole option whether to obtain and utilize firm gas transportation service or non-firm gas transportation service for the delivery of natural gas fuel to the Fuel Delivery Point.

(E) Title to all natural gas fuel shall be retained by Company at and from the Fuel Delivery Point and/or storage tank(s), as applicable, to the burner tips of the Generating Units. As between the Parties, however, Seller shall be deemed to be in exclusive control and possession of all natural gas fuel from and after the Fuel Delivery Point until such fuel has been consumed in the Facility, so Seller shall bear the risk of loss of any fuel beyond the Fuel Delivery Point prior to its consumption in the Facility, and shall be responsible for any costs, damages, fines or penalties associated with leaks, spills, remediation, or other liabilities associated with such fuel. Seller shall promptly report and resolve any natural gas leaks or spills beyond the Fuel Delivery Point, at its sole expense, in accordance with Applicable Laws.

(F) If the Facility includes any natural gas-fired equipment that is not used for the direct conversion of natural gas fuel to electric energy (such as natural gas-fired auxiliary boiler(s), in-line heater(s) used to heat the natural gas fuel, or building heating equipment), Seller shall separately meter and supply, at Seller's expense, the natural gas fuel consumed by such equipment.

**SPS Model Dispatchable Power Purchase Agreement**

(G) Unless otherwise agreed by the Parties, Seller shall be the operator of the Fuel Delivery Point(s). Seller shall be responsible for all volume confirmations, allocations and balancing functions with the Upstream Pipeline, as well as gas regulation and maintenance and testing arrangements for all natural gas metering at such Fuel Delivery Point(s). Seller shall also be responsible for all natural gas physical flow activities, such as flow control, valve operation, and contacting the delivering pipeline to initiate gas flow to the Fuel Delivery Point.

(H) All natural gas custody transfer metering at the Fuel Delivery Point(s) shall be installed, maintained and tested in accordance with accepted natural gas industry standards and shall comply with the Upstream Pipeline's tariff requirements. Seller shall test the natural gas meter prior to COD and at least every two years thereafter (or at such more frequent intervals as may be required by the Upstream Pipeline), and shall provide written meter test results to Company within thirty (30) Days following completion. Company shall have the right to require additional tests at Company's expense. Seller shall provide Company with at least ten (10) Business Days advance notice of each test and a representative of Company shall be permitted to witness such tests, *provided, however, that* such Company representative shall not unreasonably interfere with or disrupt the activities of Seller and shall comply with all of Seller's safety standards. Seller shall provide copies of all test data and testing reports to Company. Disputes regarding the allocation of natural gas volumes and associated billings with the Upstream Pipeline, including meter reading adjustments for prior periods, shall be resolved in accordance with the Upstream Pipeline's tariff.

**5.5 Fuel Oil. [if applicable]**

(A) Seller shall install Fuel Oil Storage Facilities as part of the Facility, consistent with Exhibit R - Fuel Oil. Seller shall maintain and calibrate the fuel oil meter(s) from time to time in accordance with Good Utility Practices. As part of the Facility, Seller shall also purchase, store and have available on the Site all ancillary products necessary to operate the Facility on fuel oil to deliver the products and services required to be delivered to company under this PPA.

(B) Seller shall fill the fuel oil storage tank(s) at the Facility with Acceptable Fuel Oil prior to the Commercial Operation Date, in time to conduct required pre-COD testing, in such volumes as may be directed by Company and at a cost approved by Company in writing. After COD, Seller shall invoice and Company shall reimburse Seller for the costs incurred by Seller for such initial fill of the fuel oil storage tank(s), less the cost of fuel oil consumed by the Facility prior to the Commercial Operation Date.

(C) Following the initial fill of the fuel oil storage tank(s), Company shall arrange and pay for all subsequent fills of such tank(s), as and when desired by Company. Company shall afford Seller the opportunity to test Company's chosen fuel oil prior to its delivery into the fuel oil storage tank(s), and to reject any fuel oil that does not constitute Acceptable Fuel Oil.

### **SPS Model Dispatchable Power Purchase Agreement**

(D) Seller shall be solely responsible for (i) maintenance of the fuel oil in the Fuel Oil Storage Facilities, and (ii) the removal and replacement of any degraded and unusable fuel oil, at its expense. Either Party, at its own expense, may conduct fuel oil tests to determine the extent of degradation, if any. Included in Exhibit R – Fuel Oil is the Fuel Oil Maintenance Plan for the Facility.

(E) Company shall, in its sole discretion, determine when and if the Generating Unit(s) shall be dispatched using fuel oil as the combustion fuel to generate Contract Energy, subject to the Fuel Oil Maintenance Plan and the emissions limitations in Seller's Permits.

(F) Title to fuel oil shall be retained by Company at and from the storage tank(s) to the burner tips of the Generating Units. As between the Parties, however, Seller shall be deemed to be in exclusive control and possession of all fuel oil from and after delivery in into the fuel oil storage tank(s) until such fuel has been consumed in the Facility, so Seller shall bear the risk of loss of fuel oil following its delivery into the oil storage tank(s) and shall be responsible for any costs, damages, fines or penalties associated with leaks, spills, remediation, or other liabilities associated with such fuel oil. Seller shall promptly report and resolve any fuel oil leaks or spills at its sole expense in accordance with Applicable Laws.

(G) At the end of the Term, (i) Seller shall pay to Company the then-current market value of the fuel oil in storage at the Facility, and (ii) such fuel oil shall be and become the property of Seller.

### **Article 6 - Conditions Precedent**

#### **6.1 PUC Approval.**

(A) No later than forty-five (45) Days after the Effective Date, Company may apply to the PUCT/NMPRC for PUC Approval. If Company fails to apply for PUC Approval within forty-five (45) Days following the Effective Date, Company shall be deemed to have waived its right to obtain PUC 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 PUC Approval, Company shall use Commercially Reasonable Efforts to obtain PUC Approval as soon as reasonably practicable, and Seller shall cooperate with Company's efforts to obtain PUC Approval.

(C) If Company applies for PUC 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 thirty (30) Days following issuance of a written order by the PUC rejecting PUC Approval, or granting PUC Approval with conditions unacceptable to Company in its sole discretion;



### SPS Model Dispatchable Power Purchase Agreement

2. at any time between the one hundred eightieth (180<sup>th</sup>) and two hundred tenth (210<sup>th</sup>) Day following Company's application for PUC Approval, if prior to the date of such termination the PUC has not issued a written order granting or rejecting PUC Approval;

3. at any time within thirty (30) Days following timely request for reconsideration (in whole or in any material part) by any third party with standing, of a written PUC order granting PUC Approval; and/or

4. at any time within thirty (30) Days following timely appeal by any party with standing, of a written PUC order granting PUC 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 for that reason, and this PPA shall remain in full force and effect thereafter.

(D) For purposes of this PPA, "PUC Approval" means a written order of the PUCT and or NMPRC which alone or in combination, make an affirmative determination that all costs incurred under this PPA are recoverable from Company's retail customers pursuant to Applicable Law, subject only to the requirement that the PUC retains ongoing prudency review of Company's performance and administration of this PPA, as determined by Company in its sole discretion.

6.2 Other Company CPs. *[if any]*.

6.3 Seller CPs. *[if any - bid specific]*.

6.4 Return of Security Fund. Following a termination pursuant to Section 6.1 *[or Section 6.2]* *[or Section 6.3]*, the Company will return to Seller the initial Security Fund within five (5) Business Days of such termination.

### 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 Contract Capacity, Contract Energy, Ancillary Services and other products and services required by this PPA. Seller shall not curtail or interrupt deliveries of Contract Energy to Company for economic reasons of any type. For purposes of this PPA:

1. the "Contract Capacity" shall mean all of the committed and uncommitted net generating capacity actually available at any time from the Facility at the Point of Delivery, following COD, not to exceed the Net Capability; and

**SPS Model Dispatchable Power Purchase Agreement**

2. the “Contract Energy” shall mean the energy generated by the Contract Capacity as dispatched by Company from time to time, delivered and adjusted for losses to the Point of Delivery, excluding any Post-COD Test Energy that is uneconomically dispatched by Company at Seller’s request pursuant to Section 10.4(C).

(B) Seller shall not be entitled to deliver Contract Capacity and/or Contract Energy from any source other than the Facility.

(C) Seller shall not sell any Contracts Capacity, Contract Energy or any other products or services required under this PPA to any third party.

(D) 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 Dispatch.

(A) EMCC shall control the Facility via AGC, including starts, shutdowns, ramping, and loading levels of the Generating Units associated with the Contract Capacity and Contract Energy, all in accordance with Good Utility Practices and Exhibit I – Operating Standards. Company shall not dispatch any portion of the Facility below Minimum Loading. For any Facility trip, Seller shall restart the Facility in coordination with EMCC in accordance with Good Utility Practices.

7.3 Permit Limitations.

(A) Neither Party shall take any action that would result in or materially contribute to a restriction under any Permit that would preclude or limit the generation or delivery of Contract Energy to Company.

(B) Seller covenants that Seller holds or prior to COD will obtain the necessary authority under Applicable Law to generate and deliver Contract Energy in amounts at least equal to the Planned Permitted Energy. Seller accepts the risk that its Permits or other Applicable Law will preclude or limit its legal authority to generate and deliver all of the Planned Permitted Energy, subject to Section 20.4(C).

(C) If and to the extent that Seller’s Permits or Applicable Law precludes or limits generation and delivery below the Planned Permitted Energy, the “Permit Deficiency” for such year shall mean the deficiency (expressed in MWh) between the Planned Permitted Energy and the maximum amount of Contract Energy that was generated and delivered to Company (or could have been generated and delivered, under Seller’s Permits) for such year.

(D) Upon request by Company from time to time, whether pre- or post-COD, Seller shall provide to Company such detailed data regarding emissions from the Facility, in one or more operating configurations, as Company may reasonably request.

**SPS Model Dispatchable Power Purchase Agreement**

(E) For purposes of this PPA, “Planned Permitted Energy” means [redacted] MWh per calendar year of Contract Energy authorized or expected to be authorized to be generated in accordance with Seller’s Permits.

7.4 Environmental Attributes. The Parties acknowledge that existing and future Applicable Laws create significant value in the ownership, use and allocation of Environmental Attributes. To the full extent allowed by Applicable Law, Seller hereby assigns to Company (and Company shall own and be entitled to claim) all Environmental Attributes existing or created during the Term associated with the Facility and the Contract Capacity and the Contract Energy purchased by Company hereunder, at no additional charge to Company under this PPA.

(A) Seller hereby irrevocably assigns to Company all rights, title and authority for Company to register the Facility and own, hold and manage the Environmental Attributes associated with the Facility in Company’s own name and to Company’s account, including any rights associated with any energy information or tracking system that exists or may be established with regard to monitoring, registering, tracking, certifying, and/or trading such Environmental Attributes. Seller hereby authorizes Company to act as its agent for the purposes of registering the Facility and tracking, certifying, registering and reporting such Environmental Attributes. Seller grants to Company full authority to hold, use, sell and/or trade such Environmental Attributes for Company’s own account in all applicable energy information or tracking systems. Upon the request of Company, at no cost to Company, (i) Seller shall deliver or cause to be delivered to Company appropriate attestations/certifications of such Environmental Attributes, and (ii) Seller shall cooperate with Company’s tracking, registration, reporting and certification of such Environmental Attributes.

(B) For purposes hereof, “Environmental Attributes” includes but is not limited to existing and future, (i) environmental credits, benefits or attributes, (ii) emissions reductions, (iii) avoided emissions and reporting rights for avoided emissions of pollutants to the air, soils or waters, such as sulfur oxides (SO<sub>x</sub>), nitrogen oxides (NO<sub>x</sub>), carbon monoxide (CO), greenhouse gases (such as carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulfur hexafluoride (SF<sub>6</sub>)) that have been or may in the future be determined by the United Nations Intergovernmental Panel on Climate Change or by Applicable Law to contribute to the threat of climate change; (iv) avoidances (including emission rate credits), offsets, allowances and green tags, and (v) zero-emission electricity credits, that are attributable to the Facility during the Term and/or Contract Capacity and Contract Energy sold to Company under this PPA, recognized by Applicable Law, including any rights to compensation therefor.

7.5 Ancillary Services.

(A) During the Term, Seller shall make available to Company and Company shall own, all Ancillary Services associated with the Facility, including but not limited to the sole right to sell the Ancillary Services associated with the Facility and to retain all revenues therefrom. Seller shall use Commercially Reasonable Efforts to maximize the Ancillary Services available from the Facility.

### SPS Model Dispatchable Power Purchase Agreement

(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 Effective Date to meet such requirements, then Seller, after consultation with Company, shall, if requested to do so by Company, install any such additional equipment and 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 (up to the amount of any cap agreed to by the Parties for such work). 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 any service associated, directly or indirectly, with the reliable generation and/or transmission of energy from the Facility from time to time, including but not limited to: operating reserves, ramp capability, reactive supply, reactive supply capability, voltage control, voltage control capability, and any rights to compensation for any of these services. "Ancillary Services" also includes any other identified as an "ancillary service" or "other ancillary service" in the Transmission Tariff. For the avoidance of doubt, "Ancillary Service" includes any service associated, directly or indirectly, with the reliable generation and/or transmission of energy from the Facility, regardless of whether the Facility, the Transmission Authority or the Company is deemed to be the service provider for the service.

### Article 8 - Payment Calculations

8.1 Payment for Contract Capacity. Commencing on the Commercial Operation Date, Company shall pay Seller a monthly Capacity Payment for Contract Capacity, subject to Section 10.9 [and Section 10.10 *if applicable*], based upon the following formula:

Monthly Capacity Payment = NC × CP × CAF, where:

NC = Net Capability

CP = Capacity Price, from Exhibit M - Pricing

CAF (Capacity Availability Factor) = (AEG + SME) ÷ PE, where

AEG = Available Energy - Gas for any period, stated in Megawatt-hours (MWh), means the amount of Contract Energy that is available from the Facility for dispatch on natural gas fuel, regardless of the extent to which Company actually dispatches the Facility, during such period. For purposes of calculating AEG:

**SPS Model Dispatchable Power Purchase Agreement**

- The Facility shall be derated for Forced Outages (regardless of whether caused by Force Majeure) and ambient conditions. By way of example for the month of June, [year], if (I) the Facility is fully mechanically available, (II) no maintenance is scheduled for the month, but (III) due to summer conditions, the average Contract Capacity actually available from the Facility for the month is [ ] MW, then CAF for such month shall be [ ] MWh [AEG] ÷ [ ] MWh [PE] = [ ]%.
- Contract Capacity that is unavailable for dispatch by Company on natural gas fuel nevertheless shall be considered to be available for the purposes of determining Available Energy when (and only when):
  - (i) the Facility is disconnected from the Transmission Authority's System pursuant to the Interconnection Agreement, and the disconnection is not caused by actions of Seller or problems with the Facility;
  - (ii) the Contract Capacity and associated Contract Energy cannot be delivered by Seller or received by Company due to an Emergency or an event of Force Majeure affecting the Transmission Authority's System at or beyond the Point of Delivery;
  - (iii) Company fails or is unable to cause Acceptable Natural Gas Fuel to be delivered to the Fuel Delivery Point, for any reason;
  - (iv) Company has contracted for non-firm transmission service, and the Contract Capacity and associated Contract Energy cannot be received at the Point of Delivery due to transmission constraints affecting the Transmission Authority's System; and/or
  - (v) the Facility cannot operate because its emissions have exhausted the annual limits of its Permits but the Facility has generated the Planned Permitted Energy for such year.

By way of example only, the Contract Capacity shall be deemed unavailable for purposes of this Section 8.1:

- if, to the extent and for so long as the Facility is subject to a Forced Outage, including an outage caused by Force Majeure at the Site or prior to the Point of Delivery;
- if Company has contracted for firm transmission service, but the Contract Capacity and associated Contract Energy cannot be received by Company at the Point of Delivery due to transmission constraints affecting the Transmission Authority's System; and/or

**SPS Model Dispatchable Power Purchase Agreement**

- in a cumulative amount equal to the Permit Deficiency for each year, if any.

SME = Scheduled Maintenance Energy for any period, stated in MWh, means the amount of energy that is not available from the Facility for dispatch by Company on natural gas fuel during such period, due to Scheduled Outages/Deratings that meet the requirements for credited Scheduled Maintenance Energy under Exhibit L - Maintenance.

PE = Period Energy for any period, stated in MWh, means the product of the Net Capability and the total number of hours in such period.

For each of the first 11 monthly billing periods after the Commercial Operation Date, CAF shall be determined on a month-by-month basis, using data from the monthly billing period in question only. For all subsequent monthly billing periods, CAF shall be determined on a 12-month rolling-average basis, using data from the monthly billing period in question and the previous 11 monthly billing periods.

***note: if the Facility is not fuel oil-capable, references to “gas” in this §8.1 can be deleted; “AEG” can become “AE”; etc.***

**8.2 Payment for Dispatchability.** Commencing on the Commercial Operation Date, Company shall pay Seller a monthly Dispatchability Payment (prorated to reflect the actual number of Days of Commercial Operation in the first billing month) based on the following formula:

Dispatchability Payment = NC × DAF × \$0.25 per kW-month, where:

NC = Net Capability

DAF (Dispatch Availability Factor) = RRAF × (Hours on-control ÷ Hours on-line), where:

RRAF = Ramp Rate Availability Factor per the following table, calculated and subject to verification testing by Company as set forth in Exhibit I - Operating Standards:

<b>Tested Contract Capacity Ramp Rate Performance</b> (based upon the most recent ramp rate testing, per Exhibit I)	<b><u>RRAF</u></b>
• Actual Ramp Rate ≥ 100% of the Expected Ramp Rate	1.0
• Actual Ramp Rate ≥ 75% but < 100% of the Expected Ramp Rate	0.75
• Actual Ramp Rate ≥ 50% but < 75% of the Expected Ramp Rate	0.50
• Actual Ramp Rate < 50% of the Expected Ramp Rate	- 0 -

***[Depending on the number, type of Generating Units, a bid may amend the foregoing table to reflect expected ramp rate performance for different Facility configurations (e.g. one Generating Unit dispatched, two Generating Units dispatched, etc.) and/or to reflect different expected increasing vs. decreasing ramp rates]***

### SPS Model Dispatchable Power Purchase Agreement

For the avoidance of doubt RRAF is always determined on a monthly basis, never on a rolling-average basis.

Hours on-control = the total number of hours during a referenced period when the Generating Unit(s) are receiving and responding to dispatch pulses transmitted from Company's EMCC in compliance with Exhibit I – Operating Standards. Any hour for which Company requests that the Contract Capacity be dispatched without AGC by Company will be counted as an Hour on-control, so that the ratio of (Hours on-control/Hours on-line) will be 1.0 for such hour.

Hours on-line = the total number of hours during a referenced period when the Generating Unit(s) are synchronized to Transmission Authority's System and available to generate Contract Energy.

For each of the first 11 monthly billing periods after the Commercial Operation Date, Hours on-control and Hours on-line shall be determined on a month-by-month basis, using data from the monthly billing period in question only. For all subsequent monthly billing periods, Hours on-control and Hours on-line shall be determined on a 12-month rolling-average basis, using data from the monthly billing period in question and the previous 11 monthly billing periods.

**8.3 Payment for Energy.** Commencing upon COD, Company shall pay Seller a monthly Tolling Payment for the Contract Energy that is dispatched by Company and delivered by Seller to Company during the billing month, per the following formula:

Tolling Payment =  $E \times TP$ , where:

$E$  = Contract Energy, stated in MWh, which is dispatched by Company [(on natural gas fuel and/or fuel oil) *if applicable*] and delivered by Seller to Company during the billing month; and

$TP$  = Tolling Payment Rate from Exhibit M – Pricing.

**8.4 Heat Rate Adjustment.** Commencing upon COD, a "Heat Rate Adjustment" (HRA) shall be made to the Tolling Payments due to Seller for each billing month hereunder, based upon the Actual Heat Rate vs. the Predicted Net Heat Rate for the Facility with respect to that month, as follows:

(A) If the Actual Net Heat Rate for the Facility is greater than 102% of the Predicted Net Heat Rate, the Heat Rate Adjustment, for the billing month following the heat rate test until the billing month following the next heat rate test, shall reduce Tolling Payments to Seller per the following formula:

$$HRA = \text{Fuel Delivered} \times \text{Price of Fuel} \times (1 - (P/A)),$$

where for purposes of this Section 8.4:

**SPS Model Dispatchable Power Purchase Agreement**

“Fuel Delivered” is the amount of natural gas energy or fuel oil energy provided by Company and consumed by the Facility to produce the Contract Energy delivered by Seller to Company in the billing month, stated in MMBtu;

“Price of Fuel” means Company’s average total unit cost of the Fuel Delivered for the relevant billing month, stated in \$/MMBtu. The total cost of Fuel Delivered shall include Company’s Commodity Cost; any transportation, handling, storage and ancillary natural gas service costs incurred by Company associated with the Fuel Delivered; and all natural gas demand charges incurred by Company associated with the Fuel Delivered;

“Commodity Cost” means Company’s average actual commodity cost of the Fuel Delivered for the relevant billing month, stated in \$/MMBtu;

“P” is the Predicted Net Heat Rate for that month; and

“A” is the Actual Net Heat Rate for the Facility for that month.

(B) If the Actual Net Heat Rate for the Facility is less than 98% of the Predicted Net Heat Rate, the Heat Rate Adjustment, for the billing month following the heat rate test until the billing month following the next heat rate test, shall be used to increase Tolling Payments to Seller per the following formula:

$$\text{HRA} = \text{Fuel Delivered} \times \text{Commodity Cost} \times (1 - [(P \times 0.98)/A]) \times 0.50$$

(C) If the Actual Net Heat Rate for the Facility is equal to or less than 102% of the Predicted Net Heat Rate, and is equal to or greater than 98% of the Predicted Net Heat Rate, the Heat Rate Adjustment, for the billing month following the heat rate test until the billing month following the next heat rate test, shall be zero for such months.

(D) Seller shall provide Company with reasonable notice of any proposed software changes or any generation equipment tuning, adjustment, repair, replacement or refurbishment that may impact the heat rate performance of the Facility or the accuracy of the correction curves utilized to adjust the results of the most recent heat rate test (“Heat Rate Modifications”).

1. Upon such notice of Heat Rate Modifications, Company may determine, in its sole discretion, whether such Heat Rate Modifications would require any or all of the following:

- a. amendment of this PPA,
- b. PUC Approval and/or
- c. performance of additional heat rate testing of the Facility, at Seller’s sole expense, pursuant to Exhibit K – Heat Rate Testing.



### SPS Model Dispatchable Power Purchase Agreement

2. Should Company determine, in its sole discretion, that either or both amendment of this PPA and/or PUC Approval is/are required, Seller shall be prohibited from making such Heat Rate Modifications until Company and Seller have entered into a written amendment of this PPA pursuant to Section 20.12 to incorporate any changes required as a result of the Heat Rate Modifications and, if required, Company obtains PUC Approval of such amendment of this PPA.

3. Should Company determine that additional heat rate testing is required, Seller shall conduct such testing pursuant to Exhibit K – Heat Rate Testing. Seller shall provide to Company any new correction curves and as a result of such testing which reflect the actual condition of the Facility equipment. In addition, for the purposes of determining the Heat Rate Adjustment pursuant to this Section 8.4, such revised Predicted Net Heat Rate shall apply retroactively from the date of completion of the Heat Rate Modifications that required the revision of the Predicted Net Heat Rate

#### 8.5 Payment for Turbine Starts.

(A) Commencing on the Commercial Operation Date, Company shall pay Seller a monthly Turbine Start Payment per the following formula:

Turbine Start Payment = \$        × number of Successful Starts [in excess of        Successful Starts] [on natural gas or fuel oil *if applicable*] during the month *[bid-specific]*

(B) If a turbine start is initiated but fails to satisfy the criteria for a Successful Start as a result of: (i) the cancellation of the start by Company within the applicable time period, for a Successful Start, (ii) a request from Company, within one hour following the start, to shut down the Generating Unit, or (iii) an Emergency or event of Force Majeure beyond the Point of Delivery on the Transmission Authority's System, then the initiated turbine start shall nevertheless qualify as a Successful Start.

(C) Seller shall not be credited a Successful Start following a turbine trip where Company directs the Seller to restart the Unit after it has tripped out of service even if the restart would otherwise meet the qualifications for a Successful Start.

(D) For the avoidance of doubt, a Successful Start of all [three] Generating Units at the Facility will result in a Turbine Start Payment of \$        × [3] = \$       .  
*[delete this ¶D for single-Unit facilities; edit as needed for multi-Unit facilities]*

#### 8.6 ESC Adjustments.

(A) In connection with each ESC Event during the Term, an adjustment in the payment due to Seller from Company shall be made for the billing period during which the ESC Event occurs (an "ESC Adjustment"), based upon the availability of the Facility [on natural gas fuel and/or fuel oil *if applicable*] during the ESC Event as set forth in Exhibit N - ESC Adjustments. The ESC Adjustment, if any, shall be in addition to (not in

### SPS Model Dispatchable Power Purchase Agreement

lieu of) any adjustment to the Monthly Capacity Payment based upon the Available Energy from the Facility during that billing period under Section 8.1, any adjustment for inaccurate Reported Availability under Section 10.9 **I**, and any adjustment for fuel oil availability under Section 10.10 **if applicable**. An ESC Adjustment may be positive or negative, as provided in Exhibit N - ESC Adjustments.

(B) The Parties shall take such steps as may be necessary from time to time to allow each of Seller and Company to receive prior notice of ESC Events and anticipated ESC Events.

(C) For purposes hereof, an “ESC Event” means any period of time during the Term as to which EMCC, NERC, the ERO or the Transmission Authority formally declares an elevated concern regarding system capacity, reliability or operating reserves with respect to the Transmission Authority’s System or any directly interconnected transmission system. As of the Effective Date, ESC Events include elevated system conditions coded yellow, orange and red;

*provided, however*, that for purposes hereof, system conditions that do not involve a shortage or anticipated shortage of generation or transmission capacity (e.g. geomagnetic events) shall not be deemed ESC Events.

(D) In the event that, from time to time during the Term, the criteria and/or coding of ESC Events are changed by EMCC, the Transmission Authority or any applicable transmission owning utility with authority, the Parties shall amend this PPA to substitute for Exhibit N - ESC Adjustments appropriate covenants reflecting such changed criteria and/or coding, in order to provide payments substantially equivalent to those contemplated by this Section 8.6.

### 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 twenty (20) 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 fifteen (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, billing meter register reads for relevant measurement quantities, total usage in KWH being billed, date and time at which accumulated and billed production was read by the Electric Metering Devices, all billing

### SPS Model Dispatchable Power Purchase Agreement

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 fifteenth (15<sup>th</sup>) Business Day following receipt of the invoice described in Section 9.1(C). 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 fifteenth (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.** Seller shall staff, control, and operate the Facility consistent with Good Utility Practices, Exhibit I – Operating Standards and this PPA. **[add one of the following [no ¶ break] :**

**[simple cycle facilities]**: Seller shall ensure that Company has the capability 24x7 of remotely starting and stopping all Generating Units at the Facility simultaneously, on natural gas [if applicable or fuel oil, as designated by Company] from a single signal from Company's EMCC pursuant to Exhibit I – Operating Standards. Personnel of Seller shall be available 24x7 via telephone or other electronic means with the ability to be physically present at the Site within 30 minutes after the Company remotely starts or attempts to remotely the Facility, or sooner to the extent required in accordance with Good Utility Practices.

**[combined cycle facilities]**: Seller shall ensure that personnel of Seller capable of starting, operating, and stopping all Generating Units simultaneously on natural gas **[if applicable]**

### SPS Model Dispatchable Power Purchase Agreement

or fuel oil, as designated by Company] within ninety (90) minutes are physically present at the Facility 24x7 during Commercial Operation.

10.2 Facility Maintenance. Seller shall maintain the Facility in accordance with Good Utility Practices.

(A) Scheduled Outages/Deratings shall comply with the requirements of Exhibit L – Maintenance.

(B) Absent the prior written consent of Company, Seller: shall schedule no Outages/Deratings during the months of January, February, June, July, August, September and December.

### 10.3 Forced Outages and Reporting.

(A) When Forced Outages occur, Seller shall notify EMCC of the existence, nature, start time, and expected duration of the Forced Outage as soon as practicable, but in no event later than 30 minutes after the Forced Outage occurs. Thereafter Seller shall immediately inform EMCC of any changes in the expected duration of the Forced Outage except to the extent relieved of this obligation by EMCC with respect thereto.

(B) In addition to the foregoing notification, for any Forced Outage, shutdown or derating of the Facility, Seller shall conduct a root cause analysis and take corrective action to prevent reoccurrences as soon as practicable thereafter, at Seller's sole expense. Such corrective action includes weather protective modifications to the Facility, additional operating or maintenance procedures and other appropriate preventative measures in accordance with Good Utility Practices. Seller shall diligently complete such analysis and corrective actions as soon as possible and provide to Company a written report containing such analysis and a summary of the corrective action taken or to be taken as soon as diligently possible.

(C) Seller shall develop and provide Company with a copy of its Facility cold weather policy. In the event of a Facility Forced Outage or Facility derate, Seller shall conduct a root cause analysis, take corrective actions as are reasonable under the circumstances to prevent reoccurrences and provide a copy of such analyses and corrective action to Company.

### 10.4 Post-COD Testing.

(A) Following the Commercial Operation Date Seller, at its sole expense, shall conduct capacity testing of the Facility as and when contemplated by Exhibit J - Capacity Testing, and heat rate testing of the Facility as and when contemplated by Exhibit K - Heat Rate Testing (each a "Post-COD Test" and collectively "Post-COD Testing"). The capacity test and the heat rate tests shall be conducted simultaneously. With Company's prior written approval, which shall not be unreasonably withheld or delayed, Seller may, at its sole expense, retain a third party to conduct the testing required by this Section 10.4(A).

**SPS Model Dispatchable Power Purchase Agreement**

(B) Seller and Company shall cooperate and use Commercially Reasonable Efforts to conduct all Post-COD Testing of the Facility during periods when Company is otherwise dispatching the Facility hereunder. All energy generated in connection therewith shall be treated and purchased by Company as Contract Energy hereunder. Company shall pay for all natural gas used to conduct such tests.

(C) In the event Post-COD Testing occurs when Company is not otherwise dispatching the Facility, (i) Seller shall invoice and Company shall purchase all Post-COD Test Energy from Seller as Contract Energy, (ii) the Facility shall be deemed unavailable for purposes of Section 8.1, if and to the extent that such testing restricts Company's ability to dispatch the Facility during such testing, and (iii) Seller shall reimburse Company for all fuel commodity costs and any associated fuel imbalance, transportation and other ancillary costs incurred by Company in connection therewith.

(D) Following the Commercial Operation Date Seller, at its sole expense, shall also conduct such other testing of the Facility as may be required by this PPA, Applicable Law (including any accreditation testing mandated by the ERO) and any testing required by Good Utility Practices. Seller shall pay for all natural gas [if applicable and fuel oil] used to conduct such tests. Seller shall fulfill all reporting requirements arising from such testing.

(E) For purposes hereof, "Post-COD Test Energy" means energy generated by the Facility following COD, reasonably required to satisfy the Post-COD Testing of the Facility required by this PPA, not purchased by Company as Contract Energy under paragraph (B) above.

(F) Seller shall submit detailed written Post-COD Testing procedures to Company for review and approval not later than one hundred twenty (120) Days prior to the scheduled start of the first Post-COD Test. Company shall review and approve or disapprove the written performance test procedures, in writing, within sixty (60) Days of receipt. These Post-COD Test procedures as approved by the Company shall be used to conduct Post-COD Testing for the Term. Should Seller desire to materially, alter, change or modify the Company-approved Post-COD Test procedures, Seller shall submit such Post-COD Test procedures to Company for its review and approval no later than one hundred twenty (120) Days prior to the scheduled start of the Post-COD Test Seller desires to use such Post-COD Test procedures. Company shall review and approve or disapprove the written performance test procedures, in writing, within sixty (60) Days of receipt. Post-COD Test procedures shall include the following:

1. instrumentation, test connections, cycle isolation requirements, and any other equipment for the performance test and where they must be located in the system to obtain the necessary test data;
2. administrative procedures;
3. final correction curves and sample calculations, including all base condition corrections to be applied, in both manual and electronic

### SPS Model Dispatchable Power Purchase Agreement

spreadsheet formats. If a thermal model is generated, Company must have access to the model and software;

4. sample data sheets
5. marked-up piping and instrumentation diagrams that show the location of all test instrumentation prior to testing; and,
6. a complete set of test instrument calibration sheets, including those that may have already been provided to Company.

10.5 Forecasting. Seller shall provide such forecasts of available capacity as the EMCC, ERO or Transmission Authority may require from time to time. Seller concurrently shall provide to Company a copy of each such forecast. Seller shall provide Company a forecast of next Day availability and ambient adjusted minimum and maximums by 7:00 AM MPT the Day prior to each Day.

#### 10.6 Books and Records.

(A) Seller shall maintain an accurate and up-to-date hourly operating log for the Facility, in electronic format, that identifies real-time operating information for each Generating Unit, including levels of capacity availability; energy production; changes in operating status; Forced Outages; Scheduled Outages/Deratings; information required by Governmental Authorities in the prescribed format; and other information reasonably requested by Company. Seller shall deliver the operating log to Company electronically when reasonably requested.

(B) Seller shall deliver to Company information on Facility performance during each calendar month within five (5) Business Days after the end of the month. For each Generating Unit, and using definitions provided by (or consistent with) the NERC Generation Availability Data System ("GADS") Manual, or any successor document, the data reported shall include planned and unplanned derated hours [with separate calculations for gas and fuel oil **if applicable**], average derated kW from Net Capability during the derated hours, scheduled maintenance hours, average derated kW during scheduled maintenance hours, the number of successful and unsuccessful turbine starts, hours on-control, hours on-line, and the monthly operating log of the Facility.

(C) 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.

(D) Originals or copies of all Operating Records shall be maintained at the Site or such other **[location of Facility]** location as may be specified by Seller from time to time. Company may examine and make copies of such Operating Records from time to time upon request, during normal business hours.

### SPS Model Dispatchable Power Purchase Agreement

10.7 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 standard safety precautions and shall conduct themselves in a manner that will not interfere with operation of the Facility.

#### 10.8 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 the Contract Energy. The Parties' initial representatives on the Operating Committee are set forth in Exhibit D – Notices and Contact Information.

(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 Effective Date 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.

#### 10.9 Availability Reporting: Gas.

(A) Seller shall provide accurate and timely updates to Company's EMCC on the current availability of the Contract Capacity on natural gas fuel ("Reported Availability: Gas"), adjusted for ambient conditions, via such electronic means as may be reasonably specified by Company. The amount of Contract Capacity available for any individual hour shall be integrated over the hour, on a prorated basis, to reflect any updates in Seller's Reported Availability: Gas made effective during such hour.

(B) Company may verify Seller's then-current Reported Availability: Gas at any time, without prior notice to Seller, by dispatching the Facility to the level of Reported Availability: gas (a "Availability Verification Test"). A "Gas Deficiency" shall be deemed to exist if (i) the tested availability on natural gas is less than 97% of the

### SPS Model Dispatchable Power Purchase Agreement

Reported Availability: Gas, or (ii) such tested availability is more than five (5) MW below the Reported Availability: Gas. Company shall notify Seller as soon as possible by telephone and thereafter in writing whenever Company identifies a Gas Deficiency that has or may have economic consequences under Section 10.9(C) below.

(C) For purposes of Section 8.1, (i) in the event of a Gas Deficiency, the Contract Capacity shall be derated by the amount of the Gas Deficiency, for the then-current hour and all subsequent hours, until Seller posts a revised Reported Availability: Gas, (ii) the occurrence of more than one Gas Deficiency in any billing month shall result in derating the Contract Capacity for that entire month (retroactive to the beginning of such month) to the lowest capacity level achieved in the Availability Verification Test(s) conducted during such month, and (iii) three or more Gas Deficiencies in any two consecutive billing months shall result in a fifteen percent (15%) reduction in the Capacity Price, applicable to the subsequent two billing months.

10.10 Availability on Fuel Oil. [if no fuel oil capability, delete §10.10 and remove references to gas in §10.9]

(A) Seller shall provide accurate and timely updates to Company's EMCC on the current availability of the Contract Capacity for dispatch on fuel oil ("Reported Availability: Fuel Oil"), via such electronic or other means. If operation is not available on fuel oil, Seller shall notify EMCC no later than 30 minutes after the change in status.

(B) If and for so long as the Facility is not fully available for dispatch on fuel oil, but Acceptable Natural Gas Fuel is available at the Fuel Point of Delivery for dispatch of the full Contract Capacity on natural gas, then for purposes of Section 8.1, the Contract Capacity shall be derated by two percent (2%) for the duration of the fuel oil outage.

(C) If and for so long as (1) the Facility is not fully available for dispatch on fuel oil, and (2) despite Commercially Reasonable Efforts by Company, Acceptable Natural Gas Fuel is unavailable at the Fuel Point of Delivery for full dispatch of the Facility on natural gas, *then* for purposes of Section 8.1, notwithstanding clause Section 8.1(iv) to the contrary, the Contract Capacity shall be derated to the level of actual availability on fuel oil for the duration of the fuel oil outage.

(D) If ever (1) Company dispatches the Facility on fuel oil to the then-current level of Reported Availability: Fuel Oil, and (2) the actual availability of the Facility on fuel oil is less than 97% of the most recent Reported Availability: Fuel Oil, *then* for purposes of Section 8.1, the Contract Capacity shall be derated to zero (0) for the entire Day of the dispatch.

### 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.



**SPS Model Dispatchable Power Purchase Agreement**

(B) Seller shall establish and fund the initial Security Fund in the amount of *[insert \$200/kW multiplied by the number of kW of Net Capability]*, no later than thirty (30) Days following the date of the Effective Date. Within five (5) Business Days following COD, the amount of the Security Fund shall be reduced to *[insert \$75/kW multiplied by the number of kW of Net Capability]*.

(C) Without notice to Seller, 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.

(D) Company shall notify Seller within five (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 fifteen (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 fifteen (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 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 three hundred sixty (360) Days. Seller shall give Company at least thirty (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 three hundred sixty (360) Days or more (or, if shorter, through the end of the period required under Section 11.5 below) more than thirty (30) Days prior to each expiration date of the security. If the Letter of Credit is not renewed or extended at least thirty (30) Days prior to its expiration

**SPS Model Dispatchable Power Purchase Agreement**

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, in Company's account until such time as 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 Texas, with net assets of at least \$1 billion (the "Escrow Account").

1. The Escrow Account shall be governed by an escrow and account control 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 PPA), 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. a money-market fund sponsored by the escrow agent;
- b. U.S. treasury obligations with a maturity of ninety (90) Days or less;
- c. commercial paper rated "A" or better, with a maturity of ninety (90) Days or less; and
- d. 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 if at any time the balance in the Escrow Account exceeds the required amount of security, the escrow agent may remit the excess to Seller.

(C) Following COD, the Security Fund may consist of a guaranty substantially in the form of Exhibit H – Form of Guaranty, from a parent or other guarantor ("Guarantor") acceptable to Company in its sole and absolute discretion, and up to an amount within Company's sole and absolute discretion. Subject to Company's sole and absolute discretion, to be eligible to provide a guaranty, the proposed Guarantor must have a minimum tangible net worth of at least \$250,000,000 and an Investment Grade Credit Rating (and if such Credit Rating is exactly equivalent to BBB- (S&P) / Baa3

### SPS Model Dispatchable Power Purchase Agreement

(Moody's), the Guarantor must not be on credit watch by any rating agency). If the Credit Rating of the Guarantor is downgraded below Investment Grade, put on credit watch, or an event occurs that (in the reasonable determination of Company) portends a Material Adverse Effect in the creditworthiness of the Guarantor, then Company may require Seller to convert the guaranty to a Security Fund instrument meeting the criteria set forth in either paragraph (A) or paragraph (B) above no later than ten (10) Days after notice from Company.

(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 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 Replacement. In the event that the Security Fund ever fails to comply with the requirements of this Article 11 or Company determines in a Commercially Reasonable manner that an event has occurred or circumstances have developed that threaten to cause the Security Fund to fail to comply with the requirements of this Article 11 (e.g. a Guarantor is placed on negative credit watch by a rating agency), Seller shall be required to replace the Security Fund with security in compliance with this Article 11 within five (5) Days following notice thereof from Company.

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 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 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

**SPS Model Dispatchable Power Purchase Agreement**

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 sixty (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 sixty (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, the Facility, or any Change of Control, not permitted by Section 19.1.

Cure Period: None.

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

Cure Period: None.

5. Seller's failure to establish and, once established, 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:* Five (5) Business Days after Company provides notice of Seller's failure.

**SPS Model Dispatchable Power Purchase Agreement**

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:* Ten (10) Business Days after Company provides notice that the amount is overdue.

8. Any representation or warranty by Seller in this PPA that has a Material Adverse Effect on Seller's ability to perform this PPA ceases to remain true during the Term, other than due to a change of law.

*Cure Period:* Thirty (30) Days after Company provides notice of such breach.

9. The breach by Seller of the Interconnection Agreement, which breach (i) materially interferes with Seller's production and/or delivery of any product or service to be produced or delivered pursuant to this PPA or Company's ability to accept or receive such product or service, (ii) Company's ability to transmit Contract Energy beyond the Point of Delivery, and/or (iii) otherwise has a Material Adverse Effect on Company.

*Cure Period:* Thirty (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, a failure of the Facility to achieve a CAF of at least 85% during any 12-consecutive month period, on a rolling average basis; *provided, however*, that to the extent such failure of performance is attributable to Force Majeure, the contribution of such Force Majeure shall be eliminated from the CAF calculation for the purposes of, and only for the purposes of, establishing a default of Seller pursuant to this paragraph.

*Cure:* Seller shall be deemed to have cured this default if the Facility achieves a CAF for the following Commercial Operation Year (again with periods of Force Majeure excluded from the calculation) of 90% or more.

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:* Thirty (30) Days after Company provides notice thereof; *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 ninety (90) Days in any

**SPS Model Dispatchable Power Purchase Agreement**

event) as is reasonably necessary for cure, so long as Seller initiates cure within such thirty (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) Option to Acquire Facility upon Termination due to Seller Default. If Company terminates this PPA under this Section 12.1 following COD, then, at any time within ninety (90) Days following such termination, Company may give notice to Seller of Company's intent to purchase the Facility from Seller (a "Default Option Preliminary Exercise Notice").

1. As soon as practicable following delivery of a Default Option Preliminary Exercise Notice, the Parties shall appoint an independent appraiser experienced in appraising utility-scale dispatchable power generation facilities to determine the fair market value ("Default FMV") of the Facility. If the Parties cannot agree on the identity of the appraiser, the appraiser shall be selected by the Arbitration Service. Seller shall provide to the appraiser full access to the Facility and the Site, to Seller's contracts, books and records, and to relevant personnel of Seller, during normal business hours. Such access shall include the right to conduct inspections and tests (including environmental testing of the Site and operating tests on the Facility) necessary or appropriate for the determination of the Default FMV of the Facility. Company shall pay all fees and costs of the appraiser. The Parties shall direct the appraiser to use his/her best efforts to complete and deliver his/her appraisal to the Parties within forty-five (45) Days following his/her appointment and to keep all information obtained by

**SPS Model Dispatchable Power Purchase Agreement**

appraiser from any investigations as Confidential Information subject to the provisions of Section 20.19.

2. Following delivery of a Default Option Preliminary Exercise Notice, Seller shall provide to Company full access to the Facility and the Site, to Seller's contracts, books and records, and to relevant personnel of Seller, during normal business hours. Such access shall include the right to conduct lien searches, surveys, inspections and tests (including environmental testing of the Site and operating tests on the Facility) necessary or appropriate for due diligence review of the Facility. All information obtained by Company from such investigations shall be deemed Confidential Information subject to Section 20.19. All inspections, testing and access to the Facility and the Site by Company and the appraiser shall comport with all of Seller's policies governing the use, operation, and maintenance of the Facility, including health, safety and environmental requirements.

3. Within sixty (60) Days following receipt of an appraisal under this Section 12.1(E), Company may elect to purchase the Facility from Seller (a "Default Option"). If Company fails to notify Seller of Company's election within such 60-Day period, Company shall be deemed to have elected not to exercise the Default Option. If Company exercises the Default Option, the purchase price to be paid by Company for the Facility in connection with any exercise of the Default Option shall be the Default FMV of the Facility, as determined by the appraiser. Seller shall cooperate in all respects reasonably necessary for Company to exercise its Default Option rights

4. If Company exercises the Default Option, the Parties shall negotiate and execute a PSA, subject to clause (iv) below. The PSA shall include the terms and conditions set forth in Exhibit L – 2 – Facility PSA Provisions. In the event that the Parties cannot agree on the final form of PSA, (i) the issue shall be submitted to "baseball" arbitration in Amarillo, Texas before one arbitrator appointed by the Arbitration Service, i.e. each Party shall submit to the arbitrator a form of proposed PSA, and the arbitrator shall be required to select one of the two forms to be used as the PSA in the transaction, without compromise, as the arbitral award, (ii) the period for closing of the transaction shall be extended for the period required to complete arbitration, (iii) the Party whose form PSA is rejected shall pay the fees and costs of the Arbitration Service, and (iv) if Company's form of PSA is rejected, Company shall have thirty (30) Days following such rejection to decide whether to execute and deliver Seller's form of PSA or abandon the transaction.

This Section 12.1(E) shall be specifically enforceable by Company, without bond and without the need to prove irreparable harm.

12.2 Default by Seller: Failure to Achieve Critical Path Development Milestone or COD.

**SPS Model Dispatchable Power Purchase Agreement**

(A) COD Delay. Seller shall be in default under this PPA if the Facility fails to achieve any Critical Path Development Milestone by the date set forth in Section 4.1(B) (“CPD Delay”) or COD by the Target COD (“COD Delay”).

1. Seller shall be liable to pay [insert \$[250]/MW of Facility Nameplate Capacity] (“CPD Liquidated Delay Damages”) to Company as a liquidated damage and not a penalty, in lieu of Actual Damages, for each Day of each CPD Delay. CPD Liquidated Delay Damages shall begin to accrue on the Day after the applicable missed Critical Path Development Milestone (in each case, as it may be extended due to Force Majeure) until the first to occur of the satisfaction of the applicable Critical Path Development Milestone or termination of this PPA pursuant to Section 12.2(C) below. CPD Liquidated Delay Damages shall apply if any Critical Path Development Milestone is missed, and the payment of CPD Liquidated Delay Damages with respect to any given Critical Path Development Milestone shall extend each subsequent Critical Path Development Milestone on a day-for-day basis. In the event Seller incurs CPD Liquidated Delay Damages but subsequently achieves COD by the Target COD, Company shall reimburse Seller all such CPD Liquidated Delay Damages.

2. Seller shall be liable to pay [insert \$[250]/MW of Facility Nameplate Capacity] (“COD Liquidated Delay Damages” and, together with CPD Liquidated Delay Damages, the “Liquidated Delay Damages”) to Company as a liquidated damage and not a penalty, in lieu of Actual Damages, for each Day of a COD Delay. COD Liquidated Delay Damages shall begin to accrue on the Day after the Target COD (in each case, as it may be extended due to Force Majeure), until the first to occur of the COD or termination of this PPA pursuant to Section 12.2(C) below. The payment of CPD Liquidated Delay Damages shall not cure Seller’s failure to achieve COD by the Target COD. For the avoidance of doubt, if Seller is delayed in reaching one or more Critical Path Development Milestones and the Target COD, then Seller may incur both CPD Liquidated Delay Damages and COD Liquidated Delay Damages.

3. 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 CPD Delay or a COD Delay.

(B) Cure. Subject to the obligations in this Section 12.2(B), Seller shall have a cure period of up to ninety (90) Days for its failure to achieve any Critical Path Development Milestone by the date set forth in Section 4.1(B) (subject to compliance with Seller’s obligations in Section 4.1(B)) or COD by the Target COD, as applicable so long as the following conditions are satisfied:

1. Seller’s payment of accrued Liquidated Delay Damages shall be a condition to any such cure. In order to utilize the cure period set forth in this Section 12.2(B), Seller must, at any time prior to, but no later than, 6:00 a.m. on the third Business Day immediately prior to the Critical Path Development Milestone date set forth in Section 4.1(B) or the Target COD, as applicable (as



### SPS Model Dispatchable Power Purchase Agreement

such dates may have been previously extended pursuant to this Section 12.2(B)), provide Company with (a) Notice of its election to extend such Critical Path Development Milestone date or the Target COD, (b) Seller's reasonable estimate of the required duration of the full estimated extension period, and (c) its payment of the applicable Liquidated Delay Damages for each Day of the full estimated extension period; provided, that if the actual delay is less than the full estimated extension period, then Company shall refund to Seller any unused portion of the applicable Liquidated Delay Damages. For the avoidance of doubt, (i) the Security Fund may not be utilized by Seller for the payment of Liquidated Delay Damages and (ii) the payment of CPD Liquidated Delay Damages shall only extend the Critical Path Development Milestones and not the Target COD, and payment of the COD Liquidated Delay Damages shall only extend the Target COD and not the Critical Path Development Milestones.

(C) In addition, for any extensions pursuant to Section 12.2(B) of more than an aggregate total of forty-five (45) Days, Seller must, at any time prior to, but no later than, 6:00 a.m. on the third Business Day immediately prior to the Critical Path Development Milestone date set forth in Section 4.1(B) or the Target COD, as applicable (as such dates may have been previously extended pursuant to this Section 12.2(B)), provide a written opinion from a mutually-agreeable Independent Engineer that such Critical Path Development Milestone or COD, as applicable, can reasonably be achieved within such additional period.

(D) Termination. Failure to cure a CPD Delay or 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 (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 addition to accrued Liquidated Delay Damages but in lieu of Actual Damages for the balance of the Term, collect from Seller liquidated damages therefor in the amount of [insert \$100/kW x Facility Nameplate Capacity].

#### 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 sixty (60) Days from inception.

**SPS Model Dispatchable Power Purchase Agreement**

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 sixty (60) Days from 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 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.

5. 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:* Ten (10) Business Days after Seller provides notice that the amount is overdue.

6. Any representation or warranty by Company in this PPA that has a Material Adverse Effect on Company's ability to perform this PPA ceases to remain true during the Term, other than due to a change of law.

*Cure Period:* Thirty (30) Days after Seller provides notice of such breach.

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

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

**SPS Model Dispatchable Power Purchase Agreement**

(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.

12.4 Limitations on Damages.

(A) Except as otherwise provided in Section 12.4(B), following COD Seller's aggregate financial liability to Company for Actual Damages shall not exceed [insert \$75/kW × Net Capability] (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 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 Contract Capacity, Contract Energy or Ancillary Services 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 indemnification claim under this PPA;
6. any Environmental Contamination caused or exacerbated by Seller; or

### SPS Model Dispatchable Power Purchase Agreement

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.

12.5 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*, §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.

12.6 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

12.7 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.

**SPS Model Dispatchable Power Purchase Agreement**

(A) In the event of any dispute arising under or associated with the Parties' performance of this PPA (a "Dispute"), within ten (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 thirty (30) Days after the first meeting, either Party may request that consideration and resolution of the Dispute be transferred to senior management. Within ten (10) 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 ten (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 Sections 13.3, 19.3 and 19.5.

13.2 Time Bar. If no Dispute Notice has been issued within eighteen (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 ten (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 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, in addition to the Security Fund; and

### SPS Model Dispatchable Power Purchase Agreement

4. the owed amount (if any) is paid by Seller within ten (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 ten (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 **[insert state where Facility is located]**, exclusive of conflict of laws principles.

13.5 Venue. The Parties submit to the exclusive jurisdiction of the state courts of the State of Texas for purposes of resolving any Dispute hereunder, except as provided in Section 19.3. Venue for any court proceedings shall lie exclusively in the Texas District Court for the County of Potter or, if jurisdictionally available, the U.S. District Court for the Northern District of Texas.

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, subject only to Sections 12.1(E), 19.3 and 19.5.

### 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 Effective Date, (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. By way of example, only, "Force Majeure" an act of God, flood, drought,

**SPS Model Dispatchable Power Purchase Agreement**

earthquake, storm, fire, pestilence, lightning and other natural catastrophes, war, riot, civil disturbance or disobedience, terrorism or , sabotage. Force Majeure shall not include:

(A) inability, delays or excess cost, to procure any equipment necessary to perform this PPA, including as a result of the imposition of tariffs or any other changes in law or supply chain disruptions;

(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 to obtain any Permits required for the Facility, including the Permits set forth on Exhibit F – Seller’s Needed Permits hereto;

(D) a restriction in any Permit that precludes or limits the generation or delivery of Contract Energy below the Planned Permitted Energy;

(E) mechanical or equipment breakdown or inability to operate, attributable to circumstances occurring within design criteria and normal operating tolerances of similar equipment;

(F) Environmental Contamination at the Site;

(G) changes in market conditions;

(H) any delay or failure by the Transmission Authority to perform its obligations under the Interconnection Agreement or any Curtailment or reduction in deliveries by the Transmission Authority;

(I) failure of the performance of any other entity, including the failure of vendors or suppliers to deliver any required components to Seller, except to the extent itself caused by Force Majeure;

(J) the delay or effects of the COVID epidemic or pandemic (or any variant of COVID), except to the extent there occurs after the Effective Date: (A) the adoption or taking effect of any Applicable Law in respect of such COVID epidemic or pandemic (or any variant thereof), or (B) a change in any Applicable Law or any health or safety recommendation or guideline of a Governmental Authority in respect of such COVID epidemic or pandemic (or variant thereof);

(K) changes of law; or

(L) labor strikes, slowdowns, work stoppages, or other labor disruptions.

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

### **SPS Model Dispatchable Power Purchase Agreement**

obligation by Force Majeure no later than five (5) Business Days after the occurrence of such Force Majeure, *provided, however*, that: (i) such Party gives 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. Failure to provide such notice within the required time period shall be deemed conclusive evidence that the claimed Force Majeure event either did not occur or did not impact Seller's ability to perform its obligations under this Agreement in any fashion and thus Seller shall not be entitled to relief under this Article 14.

#### **14.2 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, (i) prior to COD, Force Majeure affecting Seller continues for a period of ninety (90) consecutive Days or any one hundred fifty (150) non-consecutive Days or (ii) after COD Force Majeure affecting Seller continues for a period of one hundred eighty (180) consecutive Days or any two hundred seventy (270) non-consecutive Days in any three consecutive Commercial Operation Years, Company may, at any time following the end of such period, 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.

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

(A) 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:

1. 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.

2. 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:

a. require any consent or approval by any governing corporate or management body, other than that which has been obtained



**SPS Model Dispatchable Power Purchase Agreement**

and is in full force and effect (evidence of which shall be delivered to the other Party upon its request);

b. 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;

c. 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

d. 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.

3. This PPA is a valid and binding obligation of the representing Party.

4. 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.

5. 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."

6. Such Party is Such Party is (i) a producer, processor, or commercial user of, or a merchant handling, the commodity which is the subject of this PPA, or the products and/or by products thereof; and (ii) entering into this PPA solely for purposes related to its business as such.

(B) Seller further hereby covenants to Company throughout the Term that in connection with its obligations under this PPA:

### SPS Model Dispatchable Power Purchase Agreement

1. Seller shall deliver to Company the products and services required by this PPA free and clear of all liens, security interests, claims and encumbrances or any interest therein or thereto by any person,

2. Seller (a) is in compliance with, and requires its suppliers, subcontractors, vendors, and other business partners to comply with, the Uyghur Forced Labor Prevention Act, Pub. L. 117-78 (2021) (the "UFLPA"), Section 307 of the Tariff Act of 1930, 19 U.S.C. §1307, and all other Applicable Laws prohibiting any form of convict, indentured, or forced labor, including forced or indentured child labor (collectively, the "Forced Labor Laws"), and (b) has adopted and implemented appropriate policies to ensure that it, and its suppliers, subcontractors, vendors, and other business partners, engage in regular audits or other comparable efforts to monitor ongoing compliance with the Forced Labor Laws and maintain any certifications required thereunder.

### Article 16 - Insurance

16.1 Evidence of Insurance. No later than commencement of construction and thereafter at least five Days 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 Coverage to this PPA. Such certificates shall

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

(B) provide that Company shall receive thirty (30) Days prior written notice of non-renewal, cancellation of, or significant modification to any of the corresponding policies (except that such notice may be ten (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 & Poors 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.

**SPS Model Dispatchable Power Purchase Agreement**

(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 Effective Date 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 Coverage 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 claims, demands, lawsuits (including citizen suits), losses, liabilities, fines, penalties, and expenses (including attorneys’ fees) (generally, Losses”), to the extent proximately caused by

- (A) a default under this PPA by the Indemnifying Party;
- (B) a violation or alleged violation of Applicable Laws by the Indemnifying Party; and
- (C) 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.

**SPS Model Dispatchable Power Purchase Agreement**

17.3 Indemnification: House Power. If Seller obtains House Power from the Facility and/or a self-generation source other than the Facility, Seller shall: (i) provide evidence reasonably satisfactory to Company that it is permitted to do so under Applicable Law, and (ii) shall indemnify, defend and hold Company harmless from and against all claims, demands, lawsuits (including citizen suits), losses, liabilities, fines, penalties, and expenses (including attorneys' fees) that may result therefrom.

17.4 Indemnification: Company Remote Start of Facility. Should Company remotely start the Facility pursuant to Section 10.1, Seller shall indemnify, defend and hold Company harmless from and against all claims, demands, lawsuits (including citizen suits), losses, liabilities, fines, penalties, and expenses (including attorneys' fees) that may result therefrom.

17.5 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.

17.6 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.

### SPS Model Dispatchable Power Purchase Agreement

(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.

17.7 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 Losses 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 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

### SPS Model Dispatchable Power Purchase Agreement

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 ten (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) Seller shall not sell, exchange or otherwise transfer the Facility or any material portion thereof to any third party, nor shall Seller 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 or delayed. Company shall have no obligation to provide any consent under this Article 19 unless:

1. Seller has complied with Sections 19.3, 19.4, and 19.5 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 an operator acceptable to Company;
4. the transferee (together with its parents and affiliates) possesses an Investment Grade Credit Rating or other creditworthiness satisfactory to Company;
5. Seller has provided to Company at least thirty (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) 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.

(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

**SPS Model Dispatchable Power Purchase Agreement**

may assign this PPA for collateral purposes to any Facility Lender, and may subcontract some or all of its duties under this PPA, upon notice to but without the consent of Company

(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) 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 PUCT and/or NMPRC . Any other assignment of this PPA by Company shall require the prior written consent of Seller, not to be unreasonably withheld or delayed.

(B) If an assignee of Company possesses 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) At any time after the Commercial Operation Date,

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 any class of voting and/or non-voting equity interests in Seller (excluding interests owned by tax equity investors) 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 any class of voting and/or non-voting equity interests in Seller's parent (excluding interests owned by tax equity investors) 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

**SPS Model Dispatchable Power Purchase Agreement**

(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 20.19 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 20.19 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 and execute a PSA. If Company elects to purchase the Facility the PSA shall include the price and other terms set forth in the ROFO Notice and such other terms as are set forth in Exhibit P-2 - Facility PSA Provisions. If Company elects to purchase the specified equity interests, the PSA shall include the price and other terms set forth in the ROFO Notice and such other terms as are set forth in EXHIBIT P-3 – MIPSAs Provisions.

(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 twelve (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 ninety (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



**SPS Model Dispatchable Power Purchase Agreement**

Seller. The contents of a PFT Notice shall be deemed Confidential Information for purposes of Section 20.19 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 **[insert \$5 × number of kW of Net Capability]**.

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

1. 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 transmission by Seller or any of its Affiliates of a draft letter of intent, memorandum of understanding, term sheet or similar document (or a revised version thereof) to an 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, term sheet 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, (ii) any transaction among Affiliates of Seller, and/or (iii) any transaction for which Seller offers ROFO rights to Company under Section 19.3.

19.5 Option.

(A) At any time within one hundred eighty (180) Days prior to the end of the Term, Company (or an Affiliate) may give notice to Seller of Company's (or such Affiliate) intent to purchase (i) the Facility from Seller (a "Facility Acquisition") or (ii) all, but not less than all, of Ultimate Parent's direct and indirect right, title and interest in the equity interests of Seller, and including, if applicable, Ultimate Parent's direct and indirect right, title and interest in the tax equity partnership (the "TE Partnership") that owns, directly or indirectly, equity interests in Seller (together, the "Equity Interest") (an

**SPS Model Dispatchable Power Purchase Agreement**

“Equity Interest Acquisition”) with such notice in either case referred to as an “Option Preliminary Exercise Notice”.

(B) As soon as practicable following delivery of an Option Preliminary Exercise Notice for a Facility Acquisition, the Parties shall appoint an independent appraiser experienced in appraising utility-scale power generation facilities (as may be applicable to the bid) to determine the fair market value (“FMV”) of the Facility. If the Parties cannot agree on the identity of the appraiser, the appraiser shall be selected by the Arbitration Service.

1. Seller shall provide to the appraiser full access to the Facility and the Site, to Seller’s contracts, books and records, and to relevant personnel of Seller, during normal business hours. Such access shall include the right to conduct inspections, surveys and tests (including environmental testing of the Site and operating tests on the Facility) necessary or appropriate for the determination of FMV of the Facility.

2. Company shall pay all fees and costs of the appraiser.

3. The Parties shall direct the appraiser to use his/her/its best efforts to complete and deliver his/her/its appraisal to the Parties within two (2) months following his/her/its appointment and to keep all information obtained by appraiser from any investigations as Confidential Information subject to the provisions of Section 20.19.

(C) In the case of an Option Preliminary Exercise Notice for an Equity Interest Acquisition, Company will deliver, together with the Option Preliminary Exercise Notice, its calculation of the purchase price for the Equity Interest Acquisition utilizing the formula for such determination set forth in Exhibit P-1 – Equity Purchase Price Formula. The Parties’ reasonably believe, based on all facts and circumstances at the time of executing this PPA, that the purchase price for the Equity Interest Acquisition so determined by such formula will not be less than the fair market value of the Equity Interest on the relevant date. All information obtained by Company from such investigations shall be deemed Confidential Information subject to Section 20.19.

(D) Following delivery of an Option Preliminary Exercise Notice, Seller shall provide to Company full access to the Facility and the Site, to Seller’s contracts, books and records, and to relevant personnel of Seller, during normal business hours. Such access shall include the right to conduct lien searches, surveys, inspections and tests (including environmental testing of the Site and operating tests on the Facility) necessary or appropriate for due diligence review of the Facility. All information obtained by Company from such investigations shall be deemed Confidential Information subject to Section 20.19.

(E) All inspections, testing and access to the Facility and the Site by Company and the appraiser shall comport with all of Seller’s policies governing the use, operation, and maintenance of the Facility, including health, safety and environmental

**SPS Model Dispatchable Power Purchase Agreement**

requirements, and shall be conducted in a manner so as to minimize disruption in the operation of the Facility and to avoid any adverse economic impacts to Seller under this PPA.

(F) In the case of a Facility Acquisition, within sixty (60) Days following the determination of FMV as described above, Company may elect to purchase the Facility from Seller (an “Option”). If Company fails to notify Seller of Company’s election within such 60-Day period, Company shall be deemed to have elected not to exercise the Option.

(G) In the case of a Facility Acquisition, the purchase price to be paid by Company for the Facility in connection with exercise of the First Option shall be the greater of:

1. the sum of:

a. (x) amount of Facility Debt (if any) as of the date of issuance of the Option Preliminary Exercise Notice, and

b. (y) if the relevant tax equity agreements allow the other members of the TE Partnership the option to purchase, at “fair market value” (as determined in those tax equity agreements) or a pre-determined price, the interest of the tax equity investor that has invested directly or indirectly in the Facility or Seller, then the amount of such purchase option price or, in any other case, the amount necessary to cause the after-tax internal rate of return of such tax equity investor’s investment to equal the targeted rate of return under its tax equity agreements, or

2. the FMV of the Facility, as determined by the appraiser.

(H) If Company exercises the Option, the Parties shall use Commercially Reasonable Efforts to negotiate and sign either:

1. A PSA for the Facility. The PSA shall include the terms and conditions set forth in Exhibit P-2 – Facility PSA Provisions.

2. A PSA for the Equity Interest. The PSA shall include the terms and conditions set forth in Exhibit P-3 – MIPSAs Provisions.

(I) This Section 19.5 shall be specifically enforceable by Company, without bond and without the need to prove irreparable harm.

(J) Seller shall cooperate, and cause its Affiliates to cooperate, in all respects reasonably necessary for Company to exercise its rights under this Section 19.5 and shall operate the Facility in the ordinary course of business following the date of issuance of an Option Preliminary Exercise Notice.

## SPS Model Dispatchable Power Purchase Agreement

19.6 Memo of Option. Within thirty (30) Days following PUC Approval, the Parties shall execute and record a Memorandum of Option, in form reasonably specified by Company memorializing its ROFO rights under Section 19.3 and its Option rights under Section 19.5.

### Article 20 - Miscellaneous

#### 20.1 Notices.

(A) Notices required by this PPA shall be in writing addressed to the other Party at the addresses noted in Exhibit D - Notices and Contact Information, as either Party updates such addresses from time to time by notice to the other Party. A Notice shall be deemed to have been received as follows: (1) if it is delivered by email, when the recipient, by an email sent to the email address for the sender stated in Exhibit D – Notices or by a notice delivered by another method in accordance with this Section 20.1(A), acknowledges having received that email, with an automatic “read receipt” not constituting acknowledgment of an email for purposes of this Section 20.1(A); and, (2) if it is delivered in writing, 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 Contract 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 Contract Energy hereunder are sales for resale.

(B) Company shall be solely responsible for sales, use and value-added taxes imposed with respect to the purchase of fuel by Company for consumption by the Facility to produce the Contract Energy dispatched and received by Company hereunder.

(C) 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 the products and services provided hereunder, and (2) any taxes imposed by Governmental

### SPS Model Dispatchable Power Purchase Agreement

Authorities, whether now in existence or hereafter enacted, on the transmission of the products and services provided hereunder beyond the Point of Delivery.

(D) Subject to Section 20.2(B) and (C) above and Section 20.4 below, 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 at or 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 Effective Date.

(E) 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.

(A) 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.

(B) 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.

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

(D) 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.

(E) 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.

#### 20.4 Change of Law.

Each Party assumes the risk of changes in Applicable Laws following the Effective Date, that affect such Party's costs of ownership and operation of its assets, and its performance of this PPA.

### **SPS Model Dispatchable Power Purchase Agreement**

**20.5 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.

**20.6 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 §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).

**20.7 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 PUCT and/or NMPRC.

**20.8 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.

**20.9 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

**SPS Model Dispatchable Power Purchase Agreement**

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.

20.10 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.

20.11 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.

20.12 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 and delivery of Contract Capacity, Contract Energy and other products and services required by this PPA. Any amendment of this PPA, or any waiver of any provision hereof, shall be evidenced by a writing signed by the Parties to be bound thereby.

20.13 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.

20.14 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.

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

20.16 Counterparts and Electronic Signatures. This PPA may be executed in counterparts, and each executed counterpart shall have the same force and effect as an original instrument. A manually signed copy of this PPA, or a copy of this PPA signed with an electronic or digital signature, delivered by e-mail shall be deemed to have the same legal effect as delivery of an original signed copy of this Agreement. No legally binding obligation shall be created with respect to a Party until such Party has delivered or caused to be delivered a signed copy of this PPA.

**SPS Model Dispatchable Power Purchase Agreement**

20.17 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, and other relevant factual information about the relationship.

20.18 Exhibits. Either Party may change the information in Exhibit D – Notices and Contact Information 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.

20.19 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

a. is publicly available as of the Effective Date, or becomes publicly available during the Term through no fault of the recipient Party;

b. can be documented was independently developed by the recipient Party; and/or

c. 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 20.19 the recipient Party shall be responsible.

(C) In the event that Confidential Information must be disclosed by Applicable Law (e.g. pursuant to subpoena or civil discovery) other than in connection with a PUCT and/or NMPRC proceeding, the Party required to make disclosure shall notify the protected Party sufficiently in advance to allow the protected Party a reasonable



**SPS Model Dispatchable Power Purchase Agreement**

opportunity to obtain a protective order or seek other remedies, prior to disclosure by the recipient Party. For the avoidance of doubt, this Section 20.19(C) shall be inapplicable to any disclosure of Confidential Information to a public utility commission, its staff, intervenors and/or consumer counsel, disclosure of which shall be uninhibited by this PPA.

**20.20 Accounting Treatment.**

(A) If and when Company reasonably determines that Company must consolidate financial information of Seller into Company's financial statements under FASB ASC 810 or other accounting standard applicable to Company:

1. the Parties shall use Commercially Reasonable Efforts to amend this PPA and/or the Parties' protocols for operation of the Facility to avoid such treatment, at the least possible cost to the Parties, consistent with the intent of this PPA to the extent possible; or

2. if such avoidance is not reasonably feasible, Seller shall provide to Company from time to time upon request such quarterly and annual financial information as may be needed for Company to comply with such standard, in such format and within such time frames as Company may reasonably request.

(B) If and when Company reasonably determines that Company must treat this PPA as a "finance lease" under FASB ASC 842 or other accounting standard applicable to Company, the Parties shall use Commercially Reasonable Efforts to amend this PPA and/or the Parties' protocols for operation of the Facility to avoid such treatment, at the least possible cost to the Parties, consistent with the intent of this PPA to the extent possible, if so requested by Company.

*[remainder of this page intentionally left blank]*

**SPS Model Dispatchable Power Purchase Agreement**

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

*Seller:*

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

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

*Company:*

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

By: \_\_\_\_\_  
[ ] as Vice President of Xcel Energy Services, Inc., its authorized agent

**SPS Model Dispatchable Power Purchase Agreement**

**EXHIBIT A  
DEFINITIONS**

The following terms shall have the meanings set forth herein:

“Acceptable Fuel Oil” means fuel oil meeting the quality specifications set forth in Exhibit R – Fuel Oil to this PPA at the time that such fuel oil is delivered to Seller’s Fuel Oil Supply Facilities. *if applicable*

“Acceptable Natural Gas Fuel” means the least restrictive of any of the following:

(i) natural gas fuel procured from the Upstream Pipeline that complies with the tariff of the Upstream Pipeline (as such tariff may be amended from time to time) and the minimum delivery pressures in Exhibit Q – Natural Gas Fuel Specifications;

(ii) other natural gas fuel delivered to a Fuel Delivery Point, the actual quality of which meets or exceeds the natural gas quality specifications, requirements and minimum delivery pressures in Exhibit Q – Natural Gas Fuel Specifications; or

(iii) natural gas fuel that otherwise complies with the turbine manufacturer’s natural gas fuel quality specifications, requirements and delivery pressures of the manufacturer of the Facility’s combustion turbines, the minimum delivery pressures in Exhibit Q – Natural Gas Fuel Specifications, and that would not otherwise void such manufacturer’s warranties.

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

“Actual Net Heat Rate” as of any date means the net heat rate for the Facility, stated in Btu/kWh HHV, adjusted to Reference Conditions, determined by the most recent heat rate test conducted in accordance with Exhibit K - Heat Rate Testing.

“Actual Ramp Rate” has the meaning set forth in Exhibit I – Operating Standards.

“Affiliate” of any designated person or entity means any person or entity that directly or indirectly controls, is under the control of, or is under common control with, the designated person or entity by the power to direct or cause the direction of the management of the policies of designated person or entity, 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 Set-Point” means the Company-generated analog or digital signal sent by the SCADA System to the Facility, representing the quantity of Contract Energy to be

**SPS Model Dispatchable Power Purchase Agreement**

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, 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, including, for the avoidance of doubt, electrical, building, fire, zoning, environmental, and occupational health and safety requirements.

“Arbitration Service” means Judicial Arbitration and Mediation Services, Inc. (aka JAMS).

“Availability Verification Test” shall have the meaning set forth in Section 10.9(B).

“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.

“Btu” means British thermal unit.

“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 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: (a) a transfer of a majority of the ownership interests in Seller or such owner; (b) 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 (c) a sale or conveyance of any direct or indirect ownership interest in Seller following which [REDACTED] (“Ultimate Parent”) 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

- (i) transactions exclusively among Affiliates of Seller,
- (ii) any exercise by the Facility Lender of its rights and remedies under the Financing Documents, *with respect to any Facility Debt secured only by the Facility*,
- (iii) a change of control of Ultimate Parent, or

**SPS Model Dispatchable Power Purchase Agreement**

- (iv) any change of economic and/or voting rights triggered in Seller's organizational documents arising from (a) a tax-equity financing of the Facility, or (b) a transaction in which interests in Seller or any direct or indirect owner are sold to or by a tax equity investor.

"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(C)2.

"COD Delay" shall have the meaning set forth in Section 12.2(A).

"COD Liquidated Delay Damages" shall have the meaning set forth in Section 12.2(A).

"COD Notice" shall have the meaning set forth in Section 4.5(B).

"Commercial Operation" means the period beginning on the Commercial Operation Date and continuing through the balance of the Term.

"Commercial Operation Date" or "COD" shall have the meaning set forth in Section 4.5(C)1.

"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) is consistent with the terms of this PPA and (d) 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.

"Company" shall have the meaning set forth in the introductory paragraph.

"Confidential Information" shall have the meaning set forth in Section 20.19(A).

"Construction Contracts" shall have the meaning set forth in Section 4.1(A).

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

"COVID" means SARS-CoV-2 or COVID-19, and any evolutions or mutations thereof or related or associated epidemics, pandemic, or disease outbreaks.

"CPD Delay" shall have the meaning set forth in Section 12.2(A).

"CPD Liquidated Delay Damages" shall have the meaning set forth in Section 12.2(A).

**SPS Model Dispatchable Power Purchase Agreement**

“Contract Capacity” shall have the meaning set forth in Section 7.1.

“Contract Energy” shall have the meaning set forth in Section 7.1.

“Credit Rating” of any person or entity means the lowest rating assigned to such person or entity’s long-term debt or deposit obligations (unenhanced by third-party support) by Standard & Poors and Moodys. If such person or entity 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 or entity by Standard & Poors or Moodys.

“Critical Path Development Milestone” shall have the meaning set forth in Section 4.1(B).

“Curtailment” shall have the meaning set forth in Section 8.3(A).

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

“Day” means a calendar day.

“Default FMV” shall have the meaning set forth in Section 12.1(E)1.

“Default Option” shall have the meaning set forth in Section 12.1(E)3.

“Default Option Preliminary Exercise Notice” shall have the meaning set forth in Section 12.1(E).

Default FMV” shall have the meaning set forth in Section 12.1(E)1.

“Default Option” shall have the meaning set forth in Section 12.1(E)3.

“Default Option Preliminary Exercise Notice” shall have the meaning set forth in Section 12.1(E).

“Dispute” shall have the meaning set forth in Section 13.1(A).

“Dispute Notice” shall have the meaning set forth in Section 13.1(A).

“Effective Date” shall have the meaning set forth in the introductory paragraph.

“Electric Metering Devices” means revenue quality meters, metering equipment and data processing equipment used to measure, record and transmit data with respect to the Contract Energy, including metering current transformers and metering voltage transformers. The Electric Metering Devices must be capable of storing five-minute revenue quality meter data for transmission to, and retrieval by, Company..

**SPS Model Dispatchable Power Purchase Agreement**

“Emergency” means any event or occurrence 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 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. *if needed*

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

“Equity Interest” shall have the meaning set forth in Section 19.5(A).

“Equity Interest Acquisition” shall have the meaning set forth in Section 19.5(A).

“Equity Interest” shall have the meaning set forth in Section 19.5(A).

“Equity Interest Acquisition” shall have the meaning set forth in Section 19.5(A).

“ERO” means the Electric Reliability Organization certified by FERC pursuant to Section 215 of the Federal Power Act, which as of the Effective Date is NERC, or any successor organization. For purposes of this PPA, ERO also includes the Midwest Reliability Organization (MRO).

“ESC Adjustment” shall have the meaning set forth in Section 8.6.

“ESC Event” shall have the meaning set forth in Section 8.6.

“Escrow Account” shall have the meaning set forth in Section 11.3(B).

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

“Expected Ramp Rate” with respect to the regulating range of the Facility between Minimum Loading and maximum output means [ ] kW/minute (increasing) or [ ] kW/minute (decreasing), as applicable.

“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 as further described in Exhibit C - Facility Description and Site Maps, 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, fuel interconnection facilities, [Fuel Oil Storage Facilities,] above-ground and underground piping, gas compression, heating and filter/separation equipment, control systems, improvements, and other tangible and intangible assets, contract rights,

**SPS Model Dispatchable Power Purchase Agreement**

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 Acquisition” shall have the meaning set forth in Section 19.5(A).

“Facility Debt” means the obligations of Seller or its Affiliates to any lender or tax equity or other equity investor pursuant to the Financing Documents, including 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 or other 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, equity contribution agreements, mortgages, deeds of trust, interest rate exchanges, swap agreements and other documents relating to the development, bridge, construction, back-leverage or permanent debt financing and/or tax equity 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.

“FMV” means the “fair market value.”

“Force Majeure” shall have the meaning set forth in Section 14.1.

“Forced Labor Laws” shall have the meaning set forth in Section 15.B(2).

“FMV” means the “fair market value.”

“Forced Outage” means any condition at the Facility that requires the immediate and unplanned removal of the Facility, or any portion 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.



**SPS Model Dispatchable Power Purchase Agreement**

“Fuel Delivery Point” means the natural gas delivery system point at which Company makes available and delivers to Seller the natural gas fuel consumed by the Facility to produce the Contract Energy dispatched by Company, as described in Section 5.4.

“Fuel Oil Storage Facilities” means Seller’s fuel oil storage tanks and related fuel oil pipelines, interconnection equipment, unloading facilities and metering equipment necessary to receive and store Acceptable Fuel Oil at the Facility and deliver such fuel oil for combustion within the Generating Units as described in Section 5.5. **[if applicable]**

“GADS” means the NERC Generation Availability Data System.

“Gas Deficiency” shall have the meaning set forth in Section 10.9(B).

“Generating Unit” means an individual turbine-generator set at the Facility. For example, a 2x1 combined cycle facility would have three Generating Units.

“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, but are not limited to, NERC, the ERO, the Market Operator (if any), an applicable PUC, the Transmission Authority, FERC, and successor organizations. For the avoidance of doubt, Company is not a Governmental Authority for purposes of this PPA.

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

“Heat Rate Adjustment” or “HRA” shall have the meaning set forth in Section 8.4.

“Heat Rate Modifications” shall have the meaning set forth in Section 8.4(D).

**SPS Model Dispatchable Power Purchase Agreement**

"Higher Heating Value" or "HHV" means the higher heating value stated on Exhibit K - Heat Rate Testing.

"House Power" shall have the meaning set forth in Section 1.2(B).

"Indemnified Party" shall have the meaning set forth in Section 17.1.

"Indemnifying Party" shall have the meaning set forth in Section 17.1.

"Interconnection Agreement" 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 temporary or provisional interconnection agreement or any agreement where the Transmission Provider may limit the operational output of the Facility.

"Interconnection Facilities" means those facilities designated in the Interconnection Agreement for the direct purpose of interconnecting the Facility 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 and Site Maps to this PPA.

"Interconnection Point" means the physical point within the operational authority of the Transmission Authority as specified in the Interconnection Agreement as project [REDACTED], 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 a Credit Rating of both (a) Baa3 or higher by Moody's, and (b) BBB- or higher by Standard & Poors.

"Issuer of Credit" shall have the meaning set forth in Section 11.3(A).

"kW" means kilowatt, and "kWh" means kilowatt hour.

"Lender Consent" shall have the meaning set forth in Section 18.1(A).

"Letter of Credit" shall have the meaning set forth in Section 11.3(A).

"Liquidated Delay Damages" shall have the meaning set forth in Section 12.2(A).

"Local Provider" shall have the meaning set forth in Section 1.2(B).

**SPS Model Dispatchable Power Purchase Agreement**

“Losses” shall have the meaning set forth in Section 17.1.

“Maintenance Schedule” shall have the meaning set forth in Exhibit L - Maintenance.

“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.

“MIPSA” means member interest purchase and sale agreement.

“Minimum Loading” means the minimum capacity of the Facility that can be scheduled for continuous operation consistent with Good Utility Practices, including equipment manufacturer's warranties and performance standards.

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

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

“Network 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 a “Network Resource” as defined by the Transmission Tariff, and be eligible to deliver the Facility's output in a manner comparable to that in which the Transmission Authority integrates its generating facilities to serve native load customers. ***if needed***

“NMPRC” means the New Mexico Public Regulatory Commission or any successor agency.

“Net Capability” or “NC” of the Facility shall have the meaning as set forth in Section 3.2(C).

“Non-Conforming Gas” shall have the meaning set forth in Section 5.4(C).

“Operating Committee” means one representative each from Company and Seller, pursuant to Section 10.8.

**SPS Model Dispatchable Power Purchase Agreement**

“Operating Procedures” means those procedures developed by the Operating Committee pursuant to Section 10.8, 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.

“Option” means Company’s rights to purchase the Facility on the terms and conditions set forth in Section 19.5.

“Option Preliminary Exercise Notice” shall have the meaning set forth in Section 19.5(A).

“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(D).

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

“Permit Deficiency” shall have the meaning set forth in Section 7.3.

“Permitted Lien” means any of the following: (i) liens for the benefit of a Lender, (ii) inchoate liens that arise by operation of law which are associated with obligations that are not yet due and payable; (iii) liens cured or removed within thirty (30) Days after their incurrence; (iv) easements, rights-of-way, licenses, minor imperfections in title, and other non-monetary liens incident to the ordinary course of business that, for all instances, do not materially detract from the value of the Facility; (v) liens incurred in the ordinary course of business in connection with worker’s compensation, unemployment insurance, social security and other employment related laws; (vi) liens, deposits or pledges to secure mandatory statutory obligations or performance of bids, tenders or agreements (including leases), or for similar purposes in the ordinary course of its business; (vii) liens disclosed in any title policy issued in favor of Seller or a Lender or any survey of the Site so long as such liens do not materially impair the construction or operation of the Facility; (viii) purchase money liens secured by the assets so purchased; and (ix) liens arising in connection with shared facilities arrangements for other projects for which Company is, was or is reasonably expected to be an off-taker and that do not materially impair the construction or operation of the Facility; and (x) other liens securing obligations with an aggregate value not exceeding \$1,000,000 so long as such liens do not create an imminent risk of a sale or transfer of the Site, the Facility or a material part thereof or interest therein.

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

“Planned Permitted Energy” shall have the meaning set forth in Section 7.3(D).

### SPS Model Dispatchable Power Purchase Agreement

“Point of Delivery” means the physical point within the operational authority of Transmission Authority at which Seller makes available and delivers to Company the Contract Energy. The Point of Delivery is specified in Exhibit C - Facility Description and Site Maps.

“Post-COD Test” and “Post-COD Testing” shall have the meanings as set forth in Section 10.4(A).

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

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

“Predicted Net Heat Rate” means the predicted net heat rate for the Facility, stated in Btu/kWh, HHV, at Reference Conditions, with (as applicable) cooling of intake air and full supplemental fuel firing, and adjusted to reflect the turbine manufacturer’s estimated degradation in equipment performance over the period of Commercial Operation from new and clean equipment conditions as specified in Exhibit K - Heat Rate Testing. The initial Predicted Net Heat Rate shall be the lesser of (i) [redacted] btu/kWh HHV or (ii) the Actual Net Heat Rate measured by the initial heat rate test of the Facility. **[if applicable]** The Predicted Net Heat Rate degradation adjustment, as specified in Exhibit K - Heat Rate Testing, shall be used to adjust such initial Predicted Net Heat Rate, and thereby establish the Predicted Net Heat Rate, over the Term.]

“PPA” shall have the meaning set forth in the introductory paragraph.

“PSA” means purchase and sale agreement.

“PUC Approval” shall have the meaning set forth in Section 6.1(D).

“PUCT” means the Public Utility Commission of Texas or any successor agency.

“Reference Conditions” means the operating and ambient conditions used to establish the Predicted Net Heat Rate to provide a reference for adjustment in determining the Actual Net Heat Rate from heat rate testing pursuant to Exhibit K – Heat Rate Testing, and to provide a reference for adjustment in determining the Net Capacity for capacity testing purposes pursuant to Exhibit J – Capacity Testing.

- The Reference Conditions for the Facility shall include but not be limited to:
  - ambient temperature of \_\_\_ degrees Fahrenheit (°F), [redacted] %
  - ambient relative humidity, and standard ambient pressure (14.696 psia at mean sea level) adjusted to the Site elevation of [redacted] feet above mean sea level.
  - **[insert applicable winter reference conditions]**
- Operating Reference Conditions for the Facility shall include but not be limited to the following design parameters for the Generating Units, where appropriate:

**SPS Model Dispatchable Power Purchase Agreement**

- Fuel Composition: \_\_\_\_\_
- Intake Pressure Drop: \_\_\_\_\_
- Exhaust Pressure Drop: \_\_\_\_\_
- Firing/Exhaust Temperature: \_\_\_\_\_
- Use of Bleed Air: \_\_\_\_\_
- Water or Steam Injections Rate: \_\_\_\_\_
- Steam Turbine Exhaust Pressure: \_\_\_\_\_
- Cooling Water Temperature: \_\_\_\_\_
- Generator Power Factor: \_\_\_\_\_
- Boiler Blowdown %: \_\_\_\_\_
- Fuel Temperature: \_\_\_\_\_
- Thermal Energy Export: \_\_\_\_\_
- **[For Combined Cycle]**
- Main Steam Flow Rate: \_\_\_\_\_
- Duct Firing Flow Rate: \_\_\_\_\_

“Replacement Power Costs” for any period mean the costs incurred by Company to replace the Contract Capacity, Contract Energy and other 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, 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 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

**SPS Model Dispatchable Power Purchase Agreement**

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

“Reported Availability: Fuel Oil” shall have the meaning set forth in Section 10.10(A). **[if needed]**

“Reported Availability: Gas” shall have the meaning set forth in Section 10.9(A).

“ROFO” means Right of First Offer.

“ROFO Notice” shall have the meanings set forth in Section 19.3(A).

“SCADA” or “SCADA System” means supervisory control and data acquisition.

“Scheduled Outage/Derating” means a planned interruption/reduction of the Facility’s generation that (i) has been coordinated in advance with Company, per Exhibit L - Maintenance, (ii) is required for inspection, or preventive or corrective maintenance, and (iii) complies with the scheduling requirements of the applicable Transmission Authority.

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

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

“Seller” shall have the meaning set forth in introductory paragraph.

“Site” means the parcel of real property on which 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 and Site Maps to this PPA.

SME shall mean “Scheduled Maintenance Energy.”

“Specified Ramp Range” shall have the meaning set forth in Exhibit I – Operating Standards.

“Successful Start” means, in response to a request from Company to start a Generating Unit or, if applicable, all Generating Units simultaneously **[if applicable]** on natural gas or fuel oil, as designated by Company), Seller’s start and operation of such Generating Unit(s) that:

(i) syncs to the grid and achieves the Minimum Loading level for the requested operating configuration within ten (10) minutes for single-cycle starts (ninety (90) minutes for combined cycle starts) after the time Company requests the turbine start to begin, and

**SPS Model Dispatchable Power Purchase Agreement**

(ii) upon achieving such Minimum Loading level, generates continuously for a period of not less than one hour while synchronized to Transmission Authority's System at or above such Minimum Loading level without experiencing any abnormal operating conditions [*if applicable* and,

(iii) continues to operate without interruption when switched from natural gas to fuel oil when ordered to do so by Company's EMCC at any time during operation.]

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

"TE Partnership" shall have the meaning set forth in Section 19.5(A).

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

"Termination LDs" shall have the meaning set forth in Section 12.2(C).

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

"Test Energy Rate" shall be \$[REDACTED]/MWh.

the Dow Jones Four Corners Electricity Price™ (Non-Firm Daily) Index for the Day on which the relevant Test Energy is generated, less \$10.00 per MWh.

"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) Company 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 Tariff" means the applicable Open Access Transmission Tariff of the Transmission Authority, as amended from time to time.

"UFLPA" means the Uyghur Forced Labor Prevention Act, Pub. L. 117-78 (2021).

"Ultimate Parent" shall have the meaning set forth in the definition of Change of Control.



**SPS Model Dispatchable Power Purchase Agreement**

“Upstream Pipeline” means the interstate or intrastate natural gas pipeline [to be] interconnected to the Facility at the Fuel Delivery Point. The initial Upstream Pipeline is

[REDACTED]

\* \* \* \* \*

SPS Model Dispatchable Power Purchase Agreement

**EXHIBIT B  
CONSTRUCTION MILESTONES**

<b>Construction Milestone</b>	<b>Outcome</b>
[Date]	Seller and all required counterparties shall have executed such Construction Contracts as are needed to construct the Facility.
[Date]	Seller and the Transmission Authority shall have executed the Interconnection Agreement.
[Date]	Seller shall have achieved closing on financing for the Facility or provided Company with proof of financial capability to construct the Facility.
[Date]	Seller shall have laid the foundation for all Facility buildings, generating facilities and step-up transformation facilities.
[Date]	The Generating Units and step-up transformer shall have been delivered and installed at the Site.
[Date]	Seller has submitted to Company and obtained Company approval of serialized information for all Electric Metering Devices and Back-Up Metering.
[Date]	All fuel supply and transportation arrangements have been put in place, the fuel interconnection facilities have been constructed and are operational, and a copy of the executed natural gas interconnection facilities agreement has been provided to Company.
[Date]	Seller shall have constructed Seller's Interconnection Facilities and such facilities are capable of being energized.
[Date]	Seller has demonstrated to Company's reasonable satisfaction that all Electric Metering Devices and Back-Up Metering and communications equipment are functional and provide data integrity.
[Date]	Start-up testing of the Facility commences.
[Date]	Target COD.

SPS Model Dispatchable Power Purchase Agreement

EXHIBIT C  
FACILITY DESCRIPTION AND SITE MAPS

**[This Exhibit shall include a description of the Facility and all material components thereof, including map, aerial pictures, one-line diagram, Point of Delivery and (if different) the Interconnection Point.]**

The Facility shall be located on the Site and shall be identified as Seller's [REDACTED] Generation Facility. Maps and one-line diagrams of the Facility and associated equipment are included as part of this Exhibit.

The address of the Facility is [REDACTED], Latitude: [REDACTED], Longitude: [REDACTED].

The Facility must include the following specific components:

- have the panel space and 125VDC battery supplied voltage necessary to accommodate the metering, telemetering and communications equipment required by the PPA;
- have communication circuits from the Facility to the EMCC for the purpose of telemetering, SCADA System, and voice communications as required by Company;
- include equipment and software necessary to receive, accept and react to an AGC signal from Company's SCADA System for each operating configuration, as further specified on Exhibit I - Operating Standards;
- be capable of sending real time data (including fuel flows) and OPC interface to Company's plant information system (OPC is the Object Linking and Embedding for Process Control interface);
- be capable of dispatch at Minimum Loading levels with AGC and without AGC for each Generating Unit and combination of Generating Units [*if applicable* , including 10-minute quick remote start capability];
- be capable of operating, or continuing to operate without interruption in all required operating modes in the event of a planned or unplanned outage of one or more, but not all of the Generating Units.
- be capable of starting and operating on natural gas [*if applicable* and fuel oil, as designated by Company] at an ambient temperature down to [-\_\_°] Celsius ([-\_\_° Fahrenheit).
- [*if applicable* be capable of continuing to operate without interruption when switching from natural gas to fuel oil, as designated by Company.]
- a Point of Delivery located at [REDACTED].

**SPS Model Dispatchable Power Purchase Agreement**

**[Additional Bid Specific requirements to be added]**

SPS Model Dispatchable Power Purchase Agreement

EXHIBIT D  
NOTICES AND CONTACT INFORMATION

Company	Seller
<p><b>Notices:</b></p> <p>Director, Purchased Power  Xcel Energy Services Inc.  1800 Larimer Street, Suite 1000  Denver, CO 80202  Phone: [REDACTED]  E-mail: [REDACTED]dlPurchasedPower@xcelenergy.com</p> <p><i>with a cc to:</i>  Purchased Power Consultant  Xcel Energy Services Inc.  1800 Larimer Street, Suite 1000  Denver, CO 80202  Phone: [REDACTED]  E-mail: [REDACTED]dlPurchasedPower@xcelenergy.com</p>	<p><b>Notices:</b></p> <p>[REDACTED]  [REDACTED]  [REDACTED]  Phone: [REDACTED]  E-mail: [REDACTED]@[REDACTED].com</p> <p><i>with a cc to:</i>  [REDACTED]  [REDACTED]  [REDACTED]  Phone: [REDACTED]  E-mail: [REDACTED]@[REDACTED].com</p>
<p><b>Operating Committee Representative:</b>  [REDACTED]  Director, Purchased Power  Xcel Energy Services Inc.  1800 Larimer Street, Suite 1000  Denver, CO 80202  Phone: [REDACTED]  E-mail: [REDACTED]dlPurchasedPower@xcelenergy.com</p> <p><b>Alternate:</b>  [REDACTED]  Purchased Power Consultant  Xcel Energy Services Inc.  1800 Larimer Street, Suite 1000  Denver, CO 80202  Phone: [REDACTED]  E-mail: [REDACTED]dlPurchasedPower@xcelenergy.com</p>	<p><b>Operating Committee Representative:</b>  [REDACTED]  [REDACTED]  [REDACTED]  Phone: [REDACTED]  E-mail: [REDACTED]@[REDACTED].com</p> <p><b>Alternate:</b>  _____  _____  _____  Phone: [REDACTED]  E-mail: [REDACTED]@[REDACTED].com</p>
<p><b>Real-Time Contact Information</b>  EMCC (24 hour coverage):</p>	<p><b>Real-Time Contact Information</b>  [Operations Command Center]</p>

**SPS Model Dispatchable Power Purchase Agreement**

<p>Phone: 303-571-7426 E-mail: <a href="mailto:dlrtelectricmarketersnsp@xcelenergy.com">dlrtelectricmarketersnsp@xcelenergy.com</a> <a href="http://www.xcelenergy.com">y.com</a></p> <p><u>Transmission Ops:</u> Phone: 303-273-4811 E-mail: <a href="mailto:AGCOpr@xcelenergy.com">AGCOpr@xcelenergy.com</a></p>	<p>(24 hour coverage): Phone: [REDACTED] E-mail: [REDACTED]@[REDACTED].com</p>
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**SPS Model Dispatchable Power Purchase Agreement**

**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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**SPS Model Dispatchable Power Purchase Agreement**

[Exhibit E - continued]

Type of Insurance	Minimum Limits of Coverage
Employers Liability	\$2,000,000 each accident for bodily injury by accident, or \$2,000,000 each employee for bodily injury by disease.

Builder's Risk	Replacement value 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.

Environmental Impairment Liability	\$5,000,000 each occurrence.
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All-Risk Property insurance covering physical loss or damage to the Facility	Full replacement value 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 full replacement value.

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.



**SPS Model Dispatchable Power Purchase Agreement**

**EXHIBIT F  
NEEDED PERMITS**

<u>Permit</u>	<u>Status</u>	<u>Date / Projected Date of Grant</u>

**SPS Model Dispatchable Power Purchase Agreement**

**EXHIBIT G  
FORM OF LETTER OF CREDIT**

[LETTERHEAD OF ISSUING BANK]

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

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

Beneficiary: Southwestern Public Service Company

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" ("Sight Draft"), drawn on Issuer and accompanied by this Letter of Credit. All Sight Drafts must be signed on behalf of Beneficiary, and the signator 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 twenty-four (24) hours after presentment of any Sight Draft. Payment shall be made in U.S. Dollars with Issuer's own funds in immediately available funds.

Issuer will honor any 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 Power 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 mail that it

**SPS Model Dispatchable Power Purchase Agreement**

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." Such transfer will be effected at no cost to Beneficiary. Any transfer fees assessed by Issuer will be payable solely by Applicant, and the payment of any transfer fees will not be a condition to the validity or effectiveness of the transfer of this Letter of Credit.

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

**SPS Model Dispatchable Power Purchase Agreement**

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

**SIGHT DRAFT**

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: \_\_\_\_\_ Southwestern Public Service Company

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

Account: [Applicant to be inserted]

**SPS Model Dispatchable Power Purchase Agreement**

**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: \_\_\_\_\_

Southwestern Public Service Company

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.

**SPS Model Dispatchable Power Purchase Agreement**

**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 Southwestern Public Service Company ("Company"), in connection with the performance by \_\_\_\_\_, a \_\_\_\_\_ [limited liability company] ("Seller") of a Power Purchase Agreement dated \_\_\_\_\_, 20\_\_ between Seller and Company (the "PPA").

- RECITALS -

A. Seller owns and operates a natural gas powered 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 controlled by 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. This Guaranty shall survive termination of the PPA to the extent necessary to enforce and complete the rights, duties and obligations of Company and Seller thereunder.

2. Maximum Liability. Notwithstanding anything herein to the contrary, Guarantor's maximum liability under this Guaranty shall be limited to \_\_\_\_\_ dollars (US\$\_\_\_\_\_) plus costs of collection under Section 10 below.

**SPS Model Dispatchable Power Purchase Agreement**

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 immediately 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 such time as all of the Obligations have irrevocably been discharged in full, 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;

**SPS Model Dispatchable Power Purchase Agreement**

(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;

(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.



**SPS Model Dispatchable Power Purchase Agreement**

10. Collection Costs. Guarantor shall pay to Company, upon demand, and in addition to the maximum liability set forth in Section 2 hereof, all reasonable 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 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 Texas without regard to the principles of conflicts of law thereof. Venue for any dispute hereunder shall be as set forth in Section 13.5 of the PPA.

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

(b) if to Guarantor: \_\_\_\_\_

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

*with a copy to:* \_\_\_\_\_

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

or to such other address (es) as the person to whom notice is given may have previously furnished to the others in writing in the manner set forth above.

**SPS Model Dispatchable Power Purchase Agreement**

IN WITNESS WHEREOF, Guarantor has caused this Guaranty to be duly executed and delivered to Company as of the day and year first above written.

**[Name of Guarantor]**

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

Name:

Title:

STATE OF \_\_\_\_\_ )

) ss.

COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by \_\_\_\_\_, as \_\_\_\_\_ of \_\_\_\_\_.

Witness my hand and official seal.

My commission expires: \_\_\_\_\_.

( S E A L )

\_\_\_\_\_

Notary Public

SPS Model Dispatchable Power Purchase Agreement

EXHIBIT I  
OPERATING STANDARDS

Ramp Rate

(A) Equipment. Each Generating Unit shall be capable of providing:

1. A minimum regulating range 15 MW per Unit or the highest 40% of the capacity available at the time of dispatch, whichever is greater, in automatic load regulation capacity;

2. Continuous response to EMCC pulsing at a minimum increasing rate of five percent of the capacity available at the time per minute over the regulating range, and a minimum decreasing rate of five percent of the capacity available at the time per minute over the regulating range; and

3. A low load point for the regulating range of the Unit, equal to or less than the Minimum Loading level for operation with AGC.

(B) Testing. Company shall have the right to routinely conduct, from the EMCC, verification testing of the Ramp Rate Availability Factor (RRAF) of the Facility, without prior notice to Seller. RRAF verification testing shall be conducted over the minimum regulating range of Unit(s) being tested, beginning at or below the applicable Minimum Loading of such minimum regulating range and ending at the maximum reported available capacity during the hour of the test (the "specified ramp range"), taking into consideration non-standard ambient conditions which exist at the time of the test. The timed portion of the test used to determine the increasing ramp rate shall begin when the output level of the Unit(s) being tested is at the minimum load point of the specified ramp range and shall end when such output is one MW less than the maximum load point of the specified ramp range. The timed portion of the test used to determine the decreasing ramp rate shall begin when the output level of the Unit(s) being tested is at the maximum load point of the specified ramp range and shall end when such output is one (1) MW greater than the minimum load point of the specified ramp range. The calculated "Actual Ramp Rate" for determining RRAF shall be the mean average of the increasing and decreasing ramp rates for the specified ramp range.

AGC AND REMOTE STARTING AND STOPPING

(A) Capability. The Facility will be equipped with a voice phone line for voice communication between the Facility and Company's EMCC, and will have remote start and AGC control capability. When the Facility is staffed, notice of dispatch shall be given directly to the Seller's operator at the Facility via the voice phone line. **if applicable** Company shall have the right to remote start all Generating Units at the Facility simultaneously. Initiation of a remote start will automatically page Seller's \*operator who shall be "on-call" at all times. Such automatic paging feature at the Facility shall be installed at Seller's expense. During periods when the Facility is not staffed and Company has started the Facility remotely, the Facility shall have the

**SPS Model Dispatchable Power Purchase Agreement**

capability for Company to remotely control voltage. If the Facility fails to start remotely on the first attempt, Company will not be permitted to attempt a restart until the Seller's operator arrives on-site to correct the cause of the failed start.]

(B) Equipment. Company shall design, purchase, own, install and test telemetry equipment, generation load control equipment and associated circuits from the Facility demark to the EMCC, suitable for Automatic Generation Control and remoted starting of the Facility by Company. Generation load control equipment is defined as the equipment and associated hardware necessary to interpret the request for a generation load change and provide a signal to the governor of Seller's equipment. Seller shall in no way constrict or modify the generation load change signal path without review and written authorization by Company. The telemetry and generation load equipment is to provide the following: instantaneous net MW and MVAR levels, control status (available for automatic generation control), load regulation range limits, remote pulsing circuit, and any other parameters deemed necessary by Company. Seller shall purchase, own, install and test at the Facility the necessary generation load control equipment to interface and respond to Company's generation load control equipment, including equipment that reflects the identical MW and MVAR values as those telemetered to the EMCC. The Unit(s) will be equipped with a voice phone line for voice communication between the Facility and Company's EMCC..

(C) Testing. Company shall monitor the ability of the Facility to be automatically dispatched. It is the expectation of the Parties that the Facility will be available for automatic generation dispatch during 100% of the Facility's on-line hours (excluding periods of failure of Company's telemetry, during which the Facility will manually be dispatched by Company). Company shall notify Seller of any material non-compliance.

\* \* \* \* \*

**SPS Model Dispatchable Power Purchase Agreement**

**EXHIBIT J  
CAPACITY TESTING**

*General Capacity Testing Criteria:*

For Company's planning, operating and reporting purposes, the seasonal capacity test is the testing procedure to determine the seasonal net dependable capacity of the Facility that can be expected during summer and winter after supplying power to all of the Facility's auxiliary equipment. The expected net dependable capacity for the Facility during the summer is [REDACTED] MW. The expected net dependable capacity for the Facility during the winter is [REDACTED] MW. The seasonal capacity test will be determined and reported as the lowest sustained, seasonally adjusted net kWh for any one clock hour of the two- or four-clock hour seasonal capacity test period. At Company's sole determination, the adjustments required to determine and perform the seasonal capacity test may include such applicable adjustments for ambient air conditions, condensing water availability and temperature, fuels, steam or water injection rates for emission control, steam heating loads, thermal host energy usage, reservoir levels, elevations and scheduled reservoir releases and water flow conditions. The Facility shall be operated in full compliance with Applicable Law during the seasonal capacity test. If the Facility fails to operate during the seasonal capacity test in accordance with any requirements of the seasonal capacity test, Company will require a retest of the Facility.

A seasonal capacity test shall be performed at least once every two years for each of the summer (April 1 to September 30) and winter (October 1 to March 31) seasons to demonstrate and verify that the seasonal capacity test is representative of what can be generated during Company's summer and winter peak load periods. Seller shall perform the initial seasonal capacity test within three months following the Commercial Operation Date. A capacity test performed by or on behalf of Seller, prior to COD, may constitute the initial seasonal capacity test if such test is performed in accordance with all the requirements for capacity testing set forth in this Exhibit.

Seller shall conduct each seasonal capacity test on a date mutually agreed upon by Company and Seller. Company shall conduct the seasonal capacity test as outlined below and may install seasonal capacity test equipment, obtain necessary seasonal capacity test readings, and specify equipment operation mode to ensure seasonal capacity test conditions are met as outlined in this Exhibit.

During the seasonal capacity test all auxiliary equipment used in normal operation of the Facility shall be in service and shall be in typical operating condition and in a normal state of maintenance. This includes equipment associated with any process or thermal host connected to the Facility. It shall be Seller's obligation to ensure that all auxiliary equipment needed for normal operation of the Facility is in typical operating condition for the scheduled seasonal capacity test. Emergency capability shall be excluded during the seasonal capacity test and all equipment, which is not intended to be used on a normal daily basis, which could be used to extend capability, shall be excluded during the seasonal capacity test period. Seller shall be required to provide operational records to be used to substantiate the normal mode of

### SPS Model Dispatchable Power Purchase Agreement

operation. NO<sub>x</sub> and CO emissions must be kept in compliance for the duration of the seasonal capacity test.

Steady state operation is required for the seasonal capacity test. The Facility shall be considered to be at steady state prior to starting a test if the Facility has operated at full capacity for at least thirty minutes with power output maintained at a near constant level. If the Facility is unable to maintain a near constant power output level during the scheduled seasonal capacity test period, Company may, in its sole discretion, require a subsequent seasonal capacity test at Seller's expense. Unless found to be inaccurate, the Electric Metering Device(s) will be utilized to measure the Facility's net power output during the Test period. During the seasonal capacity test and its preparation, Seller shall give Company personnel access to the Facility's equipment and instrumentation for observation and recording of process operating parameters and conditions.

Prior to each seasonal capacity test, Seller shall submit for Company's review a description of the Facility. Such Facility description shall include as appropriate:

- a. A description of the system.
- b. Cycle diagram(s) indicating the design/contract values for power generation and any connected process including mass flow rates, pressures, temperatures and enthalpies of the various process flow paths and heat rates.
- c. Any modifications to the Facility that could impact the Facility's capacity output since the last seasonal capacity test. Modifications include:
  - 1) Installation of new equipment or systems
  - 2) Alterations to existing equipment or systems
  - 3) Changes to any digital control system (DCS) control parameters including firing curves, temperature and pressure limits and steam/water injection schemes.
  - 4) Known damage or limitations of equipment or systems
- d. All relevant generation and process correction data, curves, thermal kits and application methodology.
- e. Cooling tower and/or Air Cooled Condenser performance and correction curves.
- f. Description of how the useful thermal output is applied.
- g. All requested historical operating data, in electronic format. Historic data may be used to identify, analyze and review effects of any changes in the Facility's equipment, DCS control parameters, Facility performance degradation, etc.
- h. The technical support information included in the Facility's state emission permit(s).

**SPS Model Dispatchable Power Purchase Agreement**

- i. Reservoir storage, elevations and water flow data.
- j. All electronic models used by Seller

For the initial seasonal capacity test, this information shall be submitted to Company no later than ninety (90) Days prior to the Commercial Operation Date. For the initial seasonal capacity test, the Facility's generation and process correction values will be calculated based on design or test information, in lieu of historic operational data, where applicable.

For subsequent seasonal capacity tests, this information shall be submitted to Company no later than thirty (30) Days prior to such seasonal capacity test. Seller shall provide to Company historic seasonal operational data from Facility's operation, where applicable. Such data shall include thermal energy supplied to and utilized by industrial or commercial processing loads, and heating and/or cooling processing loads. Prior to the seasonal capacity test, Company shall provide Seller with a comprehensive list of the historic seasonal operational data required.

The seasonal capacity test period will be not less than four continuous hours for the summer season and not less than two continuous hours for the winter season.

Immediately following each seasonal capacity test run and immediately after the seasonal capacity test is completed, Seller shall provide to Company all raw test data. Electronic and paper copies of the raw test data shall be provided to Company at the conclusion of each test run. Within sixty (60) Days following performance of each seasonal capacity test, Seller shall provide to Company for review and approval (i) calculations, fuel analyses and a final test report, in written and electronic format, (ii) all as-built equipment specifications, correction curves, equations and other information necessary for review of the seasonal capacity test results that have not been previously submitted to Company, and (iii) a fully functioning electronic model, in Gates-cycle or a similar program, that Company can use to verify Seller's calculations of, and adjustments to, test data. The final test report shall include clear and complete explanations of the calculations resulting in the test seasonal capacity and the adjustment of the test seasonal capacity to each of the Reference Conditions. Uncertainty, as defined in the ASME power test codes, shall not be used to adjust seasonal capacity test results.

If Seller believes that the tested capacity is not fairly representative of the seasonal net dependable capacity of the Facility, Seller may, in its sole discretion, require a re-test on a date determined by Company.

If Company believes that the tested capacity is not fairly representative of the seasonal net dependable capacity of the Facility, Company may, in its sole discretion, require Seller, at Seller's sole expense, to conduct a re-test on a date determined by Company, *provided* that Company shall pay all fuel commodity costs and any associated fuel imbalance, transportation and other ancillary costs incurred by

**SPS Model Dispatchable Power Purchase Agreement**

Company in connection therewith if the original seasonal capacity test complied with this Exhibit.

*Combustion Turbine, Internal Combustion and Combined Cycle Unit Tests:*

For the summer season, as-tested net capacity at the Facility shall be adjusted to ambient temperature and relative humidity conditions of 95°F and 20%, respectively. For the winter season, as-tested net capacity at the Facility shall be adjusted to ambient temperature and relative humidity conditions of 30°F and 60%, respectively. In both cases, the as-tested net capacity will be adjusted to the barometric pressure corresponding with the Facility's elevation above sea level.

The ambient air temperature measurement for the seasonal capacity test will represent surrounding ambient air temperature and not ambient air temperature which is heated or cooled by nearby equipment. For the purpose of the seasonal capacity test, having all compressor intake air conditioning equipment (i.e., evaporative coolers, humidifiers, heaters, etc.) out of service, shall be considered as the normal mode of operations. Air conditioning equipment may be used during the seasonal capacity test only to the extent that Seller can prove, with historical records, that said equipment is normally in service. The performance of intake air conditioning equipment shall be adjusted to historic or design ambient air conditions. Combustion turbine exhaust temperatures shall not exceed the design operating point established by the turbine manufacturer and specific to the combustion turbine being tested. The seasonal capacity test will be conducted using only an approved DCS control scheme governing operating parameters (i.e., turbine firing curve, etc.) as reflected in actual operating data from the prior twelve months.

Steam or water injection rates for emission control shall not exceed the levels specified in the technical support information in the application for the Facility emission permit(s).

For Combined Cycle Generating Units, the as-tested net capacity is affected by the turbine exhaust pressure and shall be seasonally adjusted to values representative of cooling water conditions at Company's corresponding seasonal maximum system load period. This adjustment may be based on historic cooling water temperature measurements, test data and/or design information.

Steam conditions will correspond to the operating standards established by the turbine manufacturer for the Facility. Duct burners, where applicable, will be operated at normal maximum firing levels during the seasonal capacity test. The normal maximum firing level will be determined based on historical and/or design information.

\* \* \* \* \*



**SPS Model Dispatchable Power Purchase Agreement**

**EXHIBIT K  
HEAT RATE TESTING**

The Actual Net Heat Rate of the Facility shall be determined by heat rate testing by Seller at the full production capacity of the Facility, using Acceptable Natural Gas Fuel, at an ambient temperature of not less than 70° F, with (as applicable) cooling of intake air and full supplemental fuel firing. The Parties may mutually agree to remove the requirement that the ambient temperature be not less than 70° F

For the purposes of heat rate testing and determination of the Actual Net Heat Rate, (i) fuel input shall be measured at the Fuel Delivery Point and (ii) electric output shall be measured at the Point of Delivery. Testing shall be conducted over a continuous period until operation of the Generating Units is held constant for one hour. The Facility will be operated in full compliance with all Permits and Applicable Law throughout the test, with operation of all auxiliary equipment (including thermal export and in-line heaters) used during normal operation of the Facility. Seller may be required to provide operational records to be used to substantiate the normal mode of operation. Testing shall be performed in accordance with the current ASME test codes applicable to the Generating Units, or in accordance with other mutually-agreed test codes/procedures.

Each Party shall have the right to request and schedule a heat rate test on a Business Day, not more often than once every two years (or more frequently if mutually agreed to by the Parties) during any calendar year and upon Notice to the other Party at least thirty (30) Days prior to the Day of such test, pursuant to the procedures set forth in this Exhibit. Seller shall perform the heat rate test under Company observation and concurrence. Observation may be done remotely making use of digital data as recorded in the facility's control system or other equipment. Company shall have the right of access to all areas of the Facility necessary to observe and verify testing activities. Company shall have the right to install, during the heat rate test and at Company's expense, any temporary, redundant test equipment complying with governing test codes, including any digital data either in static or live streaming form, that Company deems necessary for the purpose of verifying test measurements obtained by, or on behalf of, Seller.

Seller's heat rate test procedure shall include (i) specification of the governing test codes, (ii) the extent to which the test codes will be followed, (iii) provisions for testing, including collection of test data, (iv) any deviations from the test code, and (v) the methodology for calculating test results, including the planned method of adjusting the tested net heat rate to each of the Reference Conditions, and (v) the configuration and operation of the plant equipment (i.e. specific firing curve, turbine governor valve position, use of duct burners, foggers, chillers, etc.). Seller shall be responsible for the full scope of heat rate testing, including, furnishing the test instrumentation, instrument calibration, set-up, data gathering, fuel analysis, data analysis and the issuance of a final report.

### SPS Model Dispatchable Power Purchase Agreement

Prior to each heat rate test, Seller shall submit for Company's review a description of the Facility. Such Facility description shall include as appropriate:

- a. A description of the system.
- b. Cycle diagram(s) indicating the design/contract values for power generation and any connected process including mass flow rates, pressures, temperatures and enthalpies of the various process flow paths and heat rates.
- c. Any modifications to the Facility that could impact the Facility's capacity output or heat rate since the last heat rate test. Modifications include:
  - 1) Installation of new equipment or systems
  - 2) Alterations to existing equipment or systems
  - 3) Changes to any digital control system (DCS) control parameters including firing curves, temperature and pressure limits and steam/water injection schemes.
  - 4) Known damage or limitations of equipment or systems
- d. All relevant generation and process correction data, curves, thermal kits and application methodology.
- e. Cooling tower and/or air-cooled condenser performance and correction curves.
- f. Description of how the useful thermal output is applied.
- g. All requested historical operating data, in electronic format. Historic data may be used to identify, analyze and review effects of any changes in the Facility's equipment, DCS control parameters, Facility performance degradation, etc.
- h. The technical support information included in the Facility's state emission permit(s).
- i. Reservoir storage, elevations and water flow data.
- j. All electronic models used by Seller.

For the initial heat rate test, this information shall be submitted to Company no later than ninety (90) Days prior to the Commercial Operation Date. For the initial heat rate test, the Facility's generation and process correction values will be calculated based on design or test information, in lieu of historic operational data, where applicable.

For subsequent heat rate tests, this information shall be submitted to Company no later than [ ] ( ) Days prior to such heat rate test. Seller shall provide to Company historic seasonal operational data from Facility's operation, where applicable. Such data shall include thermal energy supplied to and utilized by industrial or commercial processing loads, and heating and/or cooling processing loads. Prior to the

### **SPS Model Dispatchable Power Purchase Agreement**

heat rate test, Company shall provide Seller with a comprehensive list of the historic seasonal operational data required.

Immediately following each heat rate test run and immediately after the heat rate test is completed, Seller shall provide to Company all raw test data. Within sixty (60) Days following performance of each heat rate test, Seller shall provide to Company for review and approval (i) calculations, fuel analyses and a final test report, in written and electronic format, (ii) all as-built equipment specifications, correction curves, equations and other information necessary for review of the heat rate test results that have not been previously submitted to Company, and (iii) a fully functioning electronic model, in Gates-cycle or a similar program, that Company can use to verify Seller's calculations of, and adjustments to, test data. The final test report shall include clear and complete explanations of the calculations resulting in the test net heat rate and the adjustment of the test net heat rate to each of the Reference Conditions. Uncertainty, as defined in the ASME power test codes, shall not be used to adjust heat rate test results.

In connection with any heat rate test, Company may also require Seller to perform heat rate testing at up to seven Company-specified load points for each possible Facility operating configuration (e.g. with and without supplemental fuel firing, and each simple cycle and combined cycle Unit operating mode) for the sole purpose of developing an accurate dispatch heat rate curve for each possible Facility operating configuration. Seller shall prepare and submit to Company for review and approval, at least thirty (30) Days prior to each heat rate test, the proposed part load heat rate test procedure. Such test procedure shall include (i) specification of the governing test codes, (ii) the extent to which the test codes will be followed, (iii) provisions for testing, including collection of test data, (iv) any deviations from the test code, and (v) the methodology for calculating test results, including the planned method of adjusting the tested net heat rate to each of the Reference Conditions, and (v) the configuration and operation of the plant equipment (i.e. specific firing curve, turbine governor valve position, use of duct burners, foggers, chillers, etc.). Seller shall be responsible for the full scope of heat rate testing, including, furnishing the test instrumentation, instrument calibration, set-up, data gathering, fuel analysis, data analysis and the issuance of a final report.

Seller shall notify Company of any generation equipment tuning and adjustment that may impact the heat rate performance of the Facility or the accuracy of the correction curves utilized to adjust the results of the most recent heat rate test. Upon such notification, Company may require Seller to perform additional heat rate testing of the Facility and provide new correction curves, that reflect the actual post-tuning condition of the Facility equipment.

The results of such testing shall be adjusted to applicable Company standards for ambient temperature, relative humidity, and barometric pressure using the final design correction curves reflecting expected Facility equipment

**SPS Model Dispatchable Power Purchase Agreement**

performance, after all equipment tuning and adjustments have been completed, to determine the Actual Net Heat Rate.

The ambient air temperature measurement for the Test will represent surrounding ambient air temperature and not ambient air temperature which is heated or cooled by nearby equipment. For the purpose of the Test, having all compressor intake air conditioning equipment (i.e., evaporative coolers, humidifiers, heaters, etc.) out of service, shall be considered as the normal mode of operations. Air conditioning equipment may be used during the Test only to the extent that Seller can prove, with historical records, that said equipment is normally in service. The performance of intake air conditioning equipment shall be adjusted to historic ambient air conditions. Combustion turbine exhaust temperatures shall not exceed the design operating point established by the turbine manufacturer and specific to the combustion turbine being tested. The Test will be conducted using only an approved DCS control scheme governing operating parameters (i.e., turbine firing curve, etc.) as specified in the turbine manufacturer's requirements and consistent with Good Utility Practices. Steam or water injection rates for emission control shall not exceed the levels specified in the technical support information in the application for the Facility emission permit(s).

For Combined Cycle Generating Units, the as-tested net capacity is affected by the turbine exhaust pressure and shall be seasonally adjusted to values representative of cooling water conditions at Company's corresponding seasonal maximum system load period. This adjustment may be based on historic cooling water temperature measurements, test data and/or design information.

Steam conditions will correspond to the operating standards established by the turbine manufacturer for the Facility. Duct burners, where applicable, will be operated at normal maximum firing levels during the Test. The normal maximum firing level will be determined based on historical and/or design information.

Seller shall perform the initial heat rate test within three months following the Commercial Operation Date. If the initial heat rate test is performed after COD, the Actual Net Heat Rate resulting from such test shall apply retroactively from the Commercial Operation Date for the purposes of determining the Heat Rate Adjustment pursuant to Section 8.4. The heat rate test performed by or on behalf of Seller, prior to COD, may constitute the initial heat rate test if such test is performed in accordance with all the requirements for heat rate testing set forth in this Exhibit (except that in such case, Company shall waive the requirement that the heat rate test be performed at an ambient temperature of not less than 70° F).

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**SPS Model Dispatchable Power Purchase Agreement**

**EXHIBIT L  
MAINTENANCE**

A. Schedules. At least three months prior to COD, Seller shall provide to Company a schedule of the expected Scheduled Outages/Deratings for the Facility ("Maintenance Schedule") for the balance of the calendar year in which COD is projected to occur. Thereafter, on or before February 1 of each successive year, Seller shall submit to Company (i) an annual Maintenance Schedule for such calendar year (including the date, start time and expected duration of the outage), and (ii) a projected long-term Maintenance Schedule encompassing the following four calendar years. All Maintenance Schedules, including any changes, shall be subject to Company's Commercially Reasonable approval and are also subject to the approval of the ERO and subject to the ERO's then current operating criteria.

B. Advance Changes. Either Seller or Company may change an annual Maintenance Schedule from time to time, upon prior notice to the other Party, as follows based on the original total duration:

<u>Scheduled Duration of Outage</u>	<u>Minimum Required Advance Notice if Changed by Seller</u>
• Fewer than 2 Days	at least 48 hours
• 2 to 5 Days	at least 7 Days
• Major overhauls (over 5 Days)	at least 90 Days

Maintenance changes requested by Company shall be scheduled by the Parties consistent with Good Utility Practices. Seller shall comply with all maintenance changes directed by the ERO.

C. Company Late Changes. Not less than 12 hours prior to commencement of any Scheduled Outage/Derating, Company may request verbally or in writing, that Seller defer or reschedule such Scheduled Outage/Derating. Subject to Good Utility Practice, Seller shall comply with any such request and reschedule such Scheduled Outage/Derating to a subsequent mutually agreed date if Company agrees to pay Seller the actual incremental direct costs incurred by Seller in such deferral or rescheduling. Seller shall provide to Company, in advance, a non-binding good faith estimate of such costs, and Company shall promptly advise Seller whether Company is willing to reimburse Seller to implement such deferral or rescheduling.

D. ERO Late Changes. Prior to commencement of any Scheduled Outage/Derating the ERO may, either verbally or in writing, direct Seller (either itself or through the Company), to defer such Scheduled Outage/Derating. Seller shall comply with any such request and reschedule such Scheduled Outage/Derating to a subsequent date mutually agreed to by Company and

**SPS Model Dispatchable Power Purchase Agreement**

Seller. Should ERO's rules, tariffs or procedures entitle Seller to compensation for such deferral or rescheduling, Company shall provide reasonable cooperation and assistance to Seller to recover such compensation from the ERO.

**[Choose one of the following, as appropriate]:**

**[for simple cycle facilities:]**

E. SME. Seller shall be entitled to 360 MWh of Scheduled Maintenance Energy ("SME") per MW of Net Capability during each Commercial Operation Year as a credit towards Seller's CAF under Section 8.1, *provided, however*, that such SME is scheduled in advance with Company pursuant to paragraph (A) above and approved in writing by Company prior to Seller's use of such SME. If Seller uses fewer than 360 MWh of SME per MW of Net Capability in a Commercial Operation Year, Seller may carry over unused SME for use in the next Commercial Operation Year as additional credit towards Seller's CAF during the next Commercial Operation Year, *provided, however*, that the total SME per MW of Net Capability that may be accumulated by Seller for use in any Commercial Operation Year, including carry over SME, shall not exceed 672 MWh per MW of Net Capability. SME may not be advanced from future Commercial Operation Years.

**[for combined cycle facilities:]**

E. SME. Seller shall be entitled to 456 MWh of Scheduled Maintenance Energy ("SME") per MW of Net Capability during each Commercial Operation Year as a credit towards Seller's CAF under Section 8.1, *provided, however*, that such SME is scheduled in advance with Company pursuant to paragraph (A) above and approved in writing by Company prior to Seller's use of such SME. If Seller uses fewer than 456 MWh of SME per MW of Net Capability in a Commercial Operation Year, Seller may carry over unused SME for use in the next Commercial Operation Year as additional credit towards Seller's CAF during the next Commercial Operation Year, *provided, however*, that the total SME per MW of Net Capability that may be accumulated by Seller for use in any Commercial Operation Year, including carry over SME, shall not exceed 720 MWh per MW of Net Capability. SME may not be advanced from future Commercial Operation Years.

\* \* \* \* \*

**SPS Model Dispatchable Power Purchase Agreement**

**EXHIBIT M**

**PRICING**

*This entire Exhibit shall be deemed Confidential Information subject to Section 20.19.*

Commercial Operation Year	Capacity Price (\$/MW)	Tolling Payment Rate (\$/MWh)	Commercial Operation Year	Capacity Price (\$/MW)	Tolling Payment Rate (\$/MWh)
1	\$ _____	\$ _____	12	\$ _____	\$ _____
2	\$ _____	\$ _____	13	\$ _____	\$ _____
3	\$ _____	\$ _____	14	\$ _____	\$ _____
4	\$ _____	\$ _____	15	\$ _____	\$ _____
5	\$ _____	\$ _____	16	\$ _____	\$ _____
6	\$ _____	\$ _____		\$ _____	\$ _____
7	\$ _____	\$ _____		\$ _____	\$ _____
8	\$ _____	\$ _____		\$ _____	\$ _____
9	\$ _____	\$ _____		\$ _____	\$ _____
10	\$ _____	\$ _____		\$ _____	\$ _____
11	\$ _____	\$ _____		\$ _____	\$ _____

**SPS Model Dispatchable Power Purchase Agreement**

**EXHIBIT N  
ESC EVENT ADJUSTMENTS**

a. ESC Bonuses. If during some or all of an ESC Event the entire Facility is fully mechanically available (or is deemed fully available pursuant to Section 8.1) [on natural gas and/or fuel oil.] Seller shall be entitled to an ESC Bonus with respect to such ESC Event in an amount equal to

$NC \times DE \times ABF$ , where:

NC = the available Net Capability of the Facility, expressed in kW;

DE = the number of hours during the ESC Event, during which the Facility is or is deemed fully available (excluding the number of hours, if any, during the ESC Event when the Facility was subject to an SME Outage); and

ABF = the applicable Availability Bonus Factor (ABF):

Yellow:	\$0.005
Orange:	\$0.015
Red:	\$0.050

The Facility shall not be de-rated for adverse ambient conditions, for purposes of calculations under this Exhibit.

b. ESC Penalties. If some or all of the Facility is unavailable mechanically (other than due to Scheduled Outages/Deratings eligible for SME under Exhibit L - Maintenance -- "SME Outages") during some or all of an ESC Event, Seller shall be subject to an ESC Penalty with respect to such ESC Event equal to

$ANC \times DO \times ARF$ , where:

ANC = the Affected Net Capability of the Facility (i.e. the portion of the capacity of the Facility subject to the outage), expressed in kW;

DO = the hours during which the Facility is not fully available due to causes other than SME Outages; and

ARF = the applicable Availability Reduction Factor (ARF):

Yellow:	(\$0.025)
Orange:	(\$0.075)
Red:	(\$0.250)

c. Netting. In the event that Seller is subject to both an ESC Bonus and an ESC Penalty with respect to an ESC Event, the two adjustments shall be netted against each other, to determine the actual ESC Adjustment to be paid / charged to Seller with respect to such ESC Event.



**SPS Model Dispatchable Power Purchase Agreement**

d. Limits on Seller's Liability. With respect to each Commercial Operation Year:

1. With respect to Yellow ESC Events during such Commercial Operation Year, in no event shall Seller be subject to aggregate negative ESC Adjustments in excess of an amount equal to  $200 \text{ hours} \times \text{Yellow ARF} \times \text{NC}$ ;

2. With respect to Orange ESC Events during such Commercial Operation Year, in no event shall Seller be subject to aggregate negative ESC Adjustments in excess of an amount equal to  $75 \text{ hours} \times \text{Orange ARF} \times \text{NC}$ ; and

3. With respect to Red ESC Events during such Commercial Operation Year, in no event shall Seller be subject to aggregate negative ESC Adjustments in excess of an amount equal to  $40 \text{ hours} \times \text{Red ARF} \times \text{NC}$ .

**[Choose one of the following, as appropriate]:**

**[for gas-only facilities]**

(E) No De-Rating. In determining whether the Facility is “fully available” for purposes of an ESC Event, the Facility will not be de-rated for ambient conditions (notwithstanding Section 8.1 to the contrary).

**or**

**[for dual-fuel facilities]**

(E) No De-Rating / Dual Fuel. In determining whether the Facility is “fully available” during an ESC Event:

1. the Facility will not be de-rated for ambient conditions (notwithstanding Section 8.1 to the contrary);

2. if Acceptable Natural Gas Fuel is available on an interruptible basis at the Fuel Delivery Point, the Facility must be available on Acceptable Natural Gas Fuel; and

3. if Acceptable Natural Gas Fuel is not available on an interruptible basis at the Fuel Delivery Point, the Facility must be available on Acceptable Fuel Oil. **if applicable**

\* \* \* \* \*

**SPS Model Dispatchable Power Purchase Agreement**

**EXHIBIT O  
LENDER CONSENT PROVISIONS**

In the event Seller 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 in any material respect, 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 Event of Default by Seller, Company shall not terminate the PPA unless it has first given notice of such Event of Default to the Facility Lender and has given the Facility Lender the same cure period afforded to Seller under Article 12 of the PPA, plus an additional thirty (30) Days beyond Seller's cure period to cure such 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 thirty (30) 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; *provided,* that the total cure period shall in no event exceed one-hundred eighty (180) Days.
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. Upon any foreclosure, deed-in-lieu or other exercise of the rights and remedies of the Facility Lender that results in a successor owner or operator of the Facility, the Facility Lender shall require and cause the successor (i) to assume all of Seller's prospective obligations under the PPA, (ii) to cure any then-existing defaults by Seller that are capable of cure by performance or the payment of money damages, (iii) to have substantial experience in the operation of power generation facilities akin to the Facility, either directly, through its affiliates or through an operator acceptable to Company, and (iv) to enjoy (together with its parents and affiliates) an Investment Grade Credit Rating or other creditworthiness satisfactory to Company. Except for the foregoing, the Facility Lender shall not be obligated to perform or be liable for any obligation of Seller under the PPA.
6. Upon any rejection or other termination of the PPA in connection with any bankruptcy or insolvency of Seller, 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.

\* \* \* \* \*

**SPS Model Dispatchable Power Purchase Agreement**

**EXHIBIT P-1 – EQUITY PURCHASE PRICE FORMULA**

*[To be mutually agreed between the parties prior to executing the PPA]*

**SPS Model Dispatchable Power Purchase Agreement**

**EXHIBIT P-2  
FACILITY PURCHASE AND SALE AGREEMENT (“PSA”) PROVISIONS**

Any PSA executed to implement exercise of Company’s Option or ROFO rights will include provisions substantially as follows:

**Type of Transaction**

The transaction will be structured as an asset acquisition. Company (“Buyer”) shall purchase and Seller shall sell 100% of the assets (“Assets”) of a completed, commercially operational, integrated natural gas powered electricity generating plant with nameplate capacity of [XX] MW and all facilities and all other assets and rights relating to the project (the “Project”), free and clear of all encumbrances and liabilities, except for permitted encumbrances and assumed liabilities as defined in the PSA.

**Purchase Price and Payment Terms**

Buyer shall pay Seller the “Purchase Price,” which is determined pursuant to Section 19.5(C) of this PPA.

Buyer shall be entitled to withhold from the payment of the Purchase Price up to [\$XXX] in the event of certain breaches of Seller’s representations, warranties or covenants pending Seller’s cure of any such breach, with Buyer’s aggregate holdback amount not to exceed 20% of the Purchase Price.

Seller shall be responsible for all taxes relating to the pre-closing period and all transfer taxes and any sales, use or other taxes related to the purchase and sale of the Assets and any purchase or conveyance of real or personal property to be used in the Project.

**Seller’s Closing Deliverables:**

Upon the terms and conditions to be defined within the PSA, the obligations of Buyer to consummate the transactions contemplated are subject to the satisfaction by Seller of certain closing conditions, including:

- Transfer of all of the Assets of the Project, which include all rights and title to assets necessary for the commercial operation of the Project, to Buyer or its designated affiliate.
- An opinion of legal counsel that each material discretionary permit required for the Project has been obtained and is valid, binding, in full force and effect and non-appealable.
- Evidence that any liens on the Project, real property or any other assets or interests of the Project have been removed as of the closing other than permitted liens which have been scheduled or liens which have been scheduled and bonded to Buyer’s reasonable satisfaction.
- Certain conditions do not exist at the time of closing including, but not limited to, the existence of a material adverse effect. A material adverse effect would be defined in the PSA and would include, in addition to other terms, a change in tax

### **SPS Model Dispatchable Power Purchase Agreement**

law that could have a negative impact on Buyer's business or the economic viability of the Project.

- All certifications, affidavits, approvals and permits required to demonstrate satisfaction of all representations, warranties, and covenants made by Seller pertaining to the closing.

#### **Buyer's Closing Deliverables:**

Upon the terms and conditions to be defined within the PSA, the obligations of Seller to consummate the transactions contemplated are subject to the satisfaction by Buyer of certain closing conditions, including:

- Delivery of the Purchase Price.
- All certifications, affidavits, approvals and permits required to demonstrate satisfaction of all representations, warranties, and covenants made by Buyer pertaining to the closing.

#### **Required Approvals**

The transaction is subject to obtaining specified approvals, authorizations, or orders, including but not limited to the following (to the extent necessary):

- Approval of the board of directors of Buyer and the board of directors or similar governing body of Seller shall be obtained prior to execution of the PSA.
- Third party consents.
- Applicable governmental and regulatory approvals prior to closing, including to the extent necessary, any applicable state agencies or commissions regulating utility activities and any government agencies having approval, consent or authority over the transactions contemplated by the PSA, including but not limited to the PUCT, the NMPRC, the IRS, the FERC, the Department of Justice, the US Fish and Wildlife Service and the FAA.

#### **Representations and Warranties**

The transaction is subject to customary representations and warranties to be made by Buyer and Seller as of the execution date or the effective date of the PSA and the closing thereunder, including the following:

- Corporate existence and powers – Seller is a limited liability company validly existing and in good standing and has the power and authority to conduct its business as now conducted.
- Authority (execution and delivery)
- No conflicts - the transaction does not create any conflicts.
- Consents and approvals – no consent, approval or authorization is required in connection with the execution and performance of the PSA.
- Legal proceedings of Buyer– there are no legal proceedings pending, or to Buyer's knowledge, threatened in writing, against Buyer, that affect the consummation of the transaction contemplated by the PSA.

**SPS Model Dispatchable Power Purchase Agreement**

- Legal proceedings of Seller and the Project – there are no legal proceedings pending, or to Seller’s knowledge, threatened in writing, against the Seller or the Project or affecting Seller’s ability to sell the Project.
- Sufficient funds – Buyer has available, or will maintain sufficient sources of, funds to complete the transaction.
- Compliance with Laws – Seller is in compliance with all laws applicable to the Seller, Project and the transactions contemplated by the PSA.
- Environmental – Seller and its affiliates have no environmental liabilities and are in compliance with environmental requirements. Seller and its affiliates have not received any notice of an alleged violation of environmental law pertaining to the Project from any governmental entity. There are no facts, circumstances, conditions or occurrences relating to the Project that could reasonably be expected to form the basis of a claim, requirement or obligation imposed by any governmental entity under any environmental law on Seller or its affiliates.
- Contracts – Schedule of material contracts binding on the Seller or to which the Project is subject and Seller has furnished to Buyer true, correct and complete copies of all material contracts. Each scheduled contract, including but not limited to the Generator Interconnection Agreement, is in full force and effect and neither Seller nor the Project is in material violation or default under such contracts.
- Land Contracts – The land contracts and real property owned by the Project are in full force and effect, and shall comprise all of the real property interests necessary in connection with the interconnection, operation and maintenance of the Project, all in accordance with all laws, and are sufficient to enable the Project to be commercially operable as contemplated in the PSA, including legal and physical ingress and egress rights to and from public right-of-way for operation, and maintenance of the Project.
- Data – Seller has delivered to buyer true, correct and complete copies of all data related to the Project.
- Permits - All permits required to own, operate and maintain the Project are held by Seller or an affiliate, are final and non-appealable, are scheduled, and Seller has obtained and furnished to Buyer true, correct and complete copies of such permits. Such permits are in full force and effect and are legal, valid, binding and enforceable in accordance with their respective terms.
- Title – Seller or an affiliate is in possession of and has good and marketable title to the Project free and clear of all encumbrances, except for Permitted Encumbrances. Seller and its affiliates have no legal obligation or non-binding agreement in principle with any other person to sell or affect a sale of all, or any portion of, the Project.
- Other representation and warranties customary in a transaction of this nature, including those pertaining to taxes, title, finders, intellectual property, brokers and insurance.

## SPS Model Dispatchable Power Purchase Agreement

### **Termination Provisions**

The PSA may be terminated prior to the closing upon written notice by the terminating party (as described below) in the event of certain occurrences, including:

- By either party, in the event the closing has not occurred by [TBD], regardless of the reason for such termination, provided that the terminating party is not in breach of the PSA.
- By either party in the event regulatory approvals for the transaction are not obtained on terms reasonably acceptable to Buyer.
- By Buyer in the event any authority has issued an order or taken any other action that restrains, enjoins, or otherwise prohibits the consummation of the transactions contemplated by the PSA, and such order or action is nonappealable.
- By Buyer in the event of material breach of the PSA by Seller.
- Security: Seller shall fund and maintain security in favor of Buyer, or a parent guaranty acceptable to Buyer, to secure Seller's obligations under the PSA including the indemnification provision below.

### **Indemnification**

Each party shall indemnify and hold harmless the other party and its respective employees, representatives, officers, directors and agents from and against any and all damages arising out of the result of any breach or violation of any representation, warranty, covenant, inaccuracy within the PSA, or any liability not assumed as part of the PSA, or any fraud, willful misconduct, or negligence in performance of this PSA. Seller shall indemnify Buyer for any environmental (including hazardous material) claims arising prior to the closing date other than environmental claims resulting from Buyer's negligence. No claim for indemnification shall be brought against the indemnifying party until the total damages for which such party is liable exceeds in the aggregate a threshold amount of [\$XXX], at which point indemnification may be sought for the full aggregate amount of damages, including those amounts that do not exceed the threshold. The aggregate damages to which the indemnified parties are entitled shall not exceed the indemnity cap, which shall be at least 30% of the purchase price. Such threshold and indemnity cap shall not apply to damages to the extent they arise from a breach of covenants required to be performed after the closing or from breach of certain "fundamental" representations (as applicable to each party) such as corporate existence, power, authority, conflicts, title, land contracts, real property, environmental, intellectual property or tax matters and shall not apply to liabilities arising prior to the closing date, which shall be the responsibility of Seller.

**SPS Model Dispatchable Power Purchase Agreement**

**EXHIBIT P-3 –MEMBERSHIP INTEREST PURCHASE AND SALE AGREEMENT  
 (“MIPSA”) PROVISIONS**

Any PSA executed to implement exercise of Company’s Option or ROFO rights will include provisions substantially as follows:

**Type of Transaction**

The transaction will be structured as an entity acquisition. Company (“Buyer”) shall purchase and Seller shall sell 100% of its direct and indirect equity ownership interests of the project company (“Project Company”) (including, if applicable, Seller’s (or its affiliates) direct and indirect equity ownership interest in any tax equity partnership (the “TE Partnership”) that owns, directly or indirectly, equity ownership interests of the Project Company, together, the “Equity Interests”), which owns a completed, commercially operational, integrated natural gas powered electricity generating plant with nameplate capacity of [XX] MW and all facilities and all other assets and rights relating to the project (the “Project”), free and clear of all encumbrances and liabilities, except for permitted encumbrances and assumed liabilities as defined in the PSA.

**Purchase Price and Payment Terms**

Buyer shall pay Seller the “Purchase Price,” which is determined pursuant to Section 19.5(C) of this PPA.

Buyer shall be entitled to withhold from the payment of the Purchase Price up to [\$XXX] in the event of certain breaches of Seller’s representations, warranties or covenants pending Seller’s cure of any such breach, with Buyer’s aggregate holdback amount not to exceed 20% of the Purchase Price.

Seller shall be responsible for all taxes relating to the pre-closing period and all transfer taxes and any sales, use or other taxes related to the purchase and sale of the Equity Interests and any purchase or conveyance of real or personal property to the Project Company to be used in the Project.

**Seller’s Closing Deliverables:**

Upon the terms and conditions to be defined within the PSA, the obligations of Buyer to consummate the transactions contemplated are subject to the satisfaction by Seller of certain closing conditions, including:

Transfer of the Equity Interests, which include all rights and title to assets necessary for the commercial operation of the Project, to Buyer or its designated affiliate.

An opinion of legal counsel that each material discretionary permit required for the Project has been obtained and is valid, binding, in full force and effect and non-appealable.



### **SPS Model Dispatchable Power Purchase Agreement**

Evidence that any liens on the Equity Interests, Project Company, Project, real property or any other assets or interests of the Project Company have been removed as of the closing other than permitted liens which have been scheduled or liens which have been scheduled and bonded to Buyer's reasonable satisfaction.

Certain conditions do not exist at the time of closing including, but not limited to, the existence of a material adverse effect. A material adverse effect would be defined in the PSA and would include, in addition to other terms, a change in tax law that could have a negative impact on Buyer's business, the Equity Interests, or the economic viability of the Project.

All certifications, affidavits, approvals and permits required to demonstrate satisfaction of all representations, warranties, and covenants made by Seller pertaining to the closing.

#### **Buyer's Closing Deliverables:**

Upon the terms and conditions to be defined within the PSA, the obligations of Seller to consummate the transactions contemplated are subject to the satisfaction by Buyer of certain closing conditions, including:

Delivery of the Purchase Price.

All certifications, affidavits, approvals and permits required to demonstrate satisfaction of all representations, warranties, and covenants made by Buyer pertaining to the closing.

#### **Required Approvals**

The transaction is subject to obtaining specified approvals, authorizations, or orders, including but not limited to the following (to the extent necessary):

Approval of the board of directors of Buyer and the board of directors or similar governing body of Seller shall be obtained prior to execution of the PSA.

Third party consents.

Applicable governmental and regulatory approvals prior to closing, including to the extent necessary, any applicable state agencies or commissions regulating utility activities and any government agencies having approval, consent or authority over the transactions contemplated by the PSA, including the PUCT, the NMPRC, the IRS, the FERC, the Department of Justice, the US Fish and Wildlife Service and the FAA.

#### **Representations and Warranties**

The transaction is subject to customary representations and warranties to be made by Buyer and Seller as of the execution date or the effective date of the PSA and the closing thereunder, including the following:

### **SPS Model Dispatchable Power Purchase Agreement**

Corporate existence and powers – Seller is a [corporation] validly existing and in good standing and has the power and authority to conduct its business as now conducted.

Project Company existence and powers – the Project Company is a limited liability company validly existing and in good standing and has the power and authority to operate and own the Project and has been engaged in no other business since its formation.

(If applicable) The TE Partnership existence and powers – the TE Partnership is a limited liability company validly existing and in good standing and has the power and authority to own and manage the Project Company and the Project and has been engaged in no other business since its formation.

Authority (execution and delivery)

No conflicts - the transaction does not create any conflicts.

Consents and approvals – no consent, approval or authorization is required in connection with the execution and performance of the PSA.

Legal proceedings of Buyer– there are no legal proceedings pending, or to Buyer's knowledge, threatened in writing, against Buyer, that affect the consummation of the transaction contemplated by the PSA.

Legal proceedings of Seller, TE Partnership (if applicable) and Project Company – there are no legal proceedings pending, or to Seller's knowledge, threatened in writing, against the Seller relating to the Project or affecting Seller's ability to sell the Equity Interests and there are no legal proceedings pending, or to Seller's knowledge, threatened in writing, against the Project Company or the TE Partnership (if applicable).

Sufficient funds – Buyer has available, or will maintain sufficient sources of, funds to complete the transaction.

Compliance with Laws – Seller, the TE Partnership (if applicable) and the Project Company are in compliance with all laws applicable to such entity and the transactions contemplated by the PSA.

Environmental – Seller, the TE Partnership (if applicable), the Project Company and their respective affiliates have no environmental liabilities (solely in the case of Seller relating to the Project) and are in compliance with environmental requirements (solely in the case of Seller relating to the Project). Seller and its affiliates (including the TE Partnership, if applicable, and the Project Company) have not received any notice of an alleged violation of environmental law pertaining to the Project from any governmental entity. There are no facts, circumstances, conditions or occurrences relating to the Project, the TE Partnership, if applicable, or the Project Company that could reasonably be expected to form the basis of a claim, requirement or obligation imposed by any governmental entity under any environmental law on Seller or its affiliates (including the TE Partnership, if applicable, and the Project Company) or Buyer.

Contracts – Schedule of material contracts binding on the (x) Seller relating to the TE Partnership, if applicable, the Project Company or the Project), (y) TE Partnership, if applicable, the Project Company or the Project, or the assets of any of the TE Partnership, if applicable, or the Project Company, has been provided and Seller has

### **SPS Model Dispatchable Power Purchase Agreement**

furnished to Buyer true, correct and complete copies of all such contracts. Each scheduled contract, including but not limited to the Generator Interconnection Agreement, is in full force and effect and neither Seller, the TE Partnership, if applicable, nor the Project Company, nor to the knowledge of Seller any other counterparty thereto, is in material violation or default under such contracts.

Land Contracts – The land contracts and real property owned by the Project Company are in full force and effect, and shall comprise all of the real property interests necessary in connection with the interconnection operation and maintenance of the Project, all in accordance with all laws, and are sufficient to enable the Project to be commercially operable as contemplated in the PSA, including legal and physical ingress and egress rights to and from public right-of-way for operation, and maintenance of the Project.

Data – Seller has delivered to buyer true, correct and complete copies of all data related to the Project.

Permits - All permits required to own, operate and maintain the Project are held by the Project Company, are scheduled, and Seller has obtained and furnished to Buyer true, correct and complete copies of such permits. Such permits are non-appealable, in full force and effect and are legal, valid, binding and enforceable in accordance with their respective terms.

Title – The Project Company is in possession of and has good and marketable title to the Project free and clear of all encumbrances, except for Permitted Encumbrances. Seller has good and marketable title to the Project Company's equity interests, free and clear of all encumbrances. Seller and its affiliates have no legal obligation or non-binding agreement in principle with any other person to sell or affect a sale of all, or any portion of, the Project or the Project Company.

Other representation and warranties customary in a transaction of this nature, including those pertaining to taxes, title, finders, intellectual property, brokers and insurance.

#### **Termination Provisions**

The PSA may be terminated prior to the closing upon written notice by the terminating party (as described below) in the event of certain occurrences, including:

By either party, in the event the closing has not occurred by **TBD**, regardless of the reason for such termination, provided that the terminating party is not in breach of the PSA.

By either party in the event regulatory approvals for the transaction are not obtained on terms reasonably acceptable to Buyer.

By Buyer in the event any authority has issued an order or taken any other action that restrains, enjoins, or otherwise prohibits the consummation of the transactions contemplated by the PSA, and such order or action is nonappealable.

By Buyer in the event of material breach of the PSA by Seller.

**SPS Model Dispatchable Power Purchase Agreement**

Security: Seller shall fund and maintain security in favor of Buyer, or a parent guaranty acceptable to Buyer, to secure Seller's obligations under the PSA including the indemnification provision below.

**Indemnification**

Each party shall indemnify and hold harmless the other party and its respective employees, representatives, officers, directors and agents from and against any and all damages arising out of the result of any breach or violation of any representation, warranty, covenant, inaccuracy within the PSA, or any liability not assumed as part of the PSA, or any fraud, willful misconduct, or negligence in performance of this PSA. Seller shall indemnify Buyer for any environmental (including hazardous material) claims arising prior to the closing date other than environmental claims resulting from Buyer's negligence. No claim for indemnification shall be brought against the indemnifying party until the total damages for which such party is liable exceeds in the aggregate a threshold amount of [\$XXX], at which point indemnification may be sought for the full aggregate amount of damages, including those amounts that do not exceed the threshold. The aggregate damages to which the indemnified parties are entitled shall not exceed the indemnity cap, which shall be at least 30% of the purchase price. Such threshold and indemnity cap shall not apply to damages to the extent they arise from a breach of covenants required to be performed after the closing or from breach of certain "fundamental" representations (as applicable to each party) such as corporate existence, power, authority, conflicts, title, land contracts, real property, environmental, intellectual property or tax matters and shall not apply to liabilities arising prior to the closing date, which shall be the responsibility of Seller.\*

\*

**SPS Model Dispatchable Energy Purchase Agreement**

**EXHIBIT Q  
NATURAL GAS FUEL SPECIFICATIONS**

Specifications:

O<sub>2</sub>: ≤ \_\_\_ % by volume  
H<sub>2</sub>S: ≤ \_\_\_ grains / Ccf  
Total Sulphur: ≤ \_\_\_ grains / Ccf  
CO<sub>2</sub>: ≤ \_\_\_ % by volume  
H<sub>2</sub>O: ≤ \_\_\_ lbs / MMcf  
Heating Value: ≥ \_\_\_ Btu / ft<sup>3</sup>  
Temperature: ≤ \_\_\_ ° F

Pressure:

Minimum: \_\_\_ psi  
Maximum: \_\_\_ psi

**SPS Model Dispatchable Energy Purchase Agreement**

**EXHIBIT R  
FUEL OIL**

*[if applicable]*

Fuel Oil Storage Facilities. The Fuel Oil Storage Facilities included in the Facility shall include one or more active storage tanks for Fuel Oil sufficient to operate the Facility at its full capacity exclusively on Fuel Oil for a period of 72 consecutive hours.

Fuel Oil Management Plan. *[insert manufacturer's requirements for periodic testing of the Facility on fuel oil, and for use of fuel oil sufficiently frequently to avoid degradation below Acceptable Fuel Oil standards]*

Specifications for Acceptable Fuel Oil. *[insert manufacturer's requirements for Acceptable Fuel Oil – e.g. ASTM D975-10C Low Sulfur fuel oil; or list specs]*

**SPS Model Dispatchable Energy Purchase Agreement**

**EXHIBIT S**

**METER AND COMMUNICATIONS REQUIREMENTS**

These meter requirements shall apply to all Electric Metering Devices.

- Electric Metering Devices shall meet requirements set forth in American National Standards Institute (ANSI) C12.1 and 12.20. Current transformers and voltage transformers supplying this meter should meet requirements of IEEE/ANSI C57.13 and ANSI C57.13.6. In addition to meeting these requirements the current transformers should be high accuracy extended range transformers with at least .15% accuracy from 1% to full rating factor. Prior to the purchase of Electric Metering Devices, current transformers, and potential transformers and associated communication equipment, Seller must submit relevant information such that Company can review and verify that the equipment meets Company requirements.
- No later than ninety (90) Days prior to generating any Test Energy, Seller shall provide to Company in mutually agreeable format all necessary specifications related to the Electric Metering Devices and/or communication therewith including, but not limited to, the make, model, port configuration, connection assignments, and physical locations.
- Company may inspect and verify that the equipment was approved and properly installed. In addition, Company may elect to test the Electric Metering devices for accuracy, current transformers and potential transformers and verify that the communication circuits to Company Xcel are operational.
- Upon prior written notice sufficiently in advance, Company shall have the right to make requests in regard to reasonable modifications to Seller's metering equipment and configurations in order to ensure accurate telemetering and communication.
- Company shall have the right to install any telemetering and communication equipment Company deems reasonably necessary for purposes related to this PPA. Seller shall, upon prior written notice sufficiently in advance, cooperate with any such installation.
- Electric Metering Devices shall be programmed to, at any time of remote electronic communications and access, provide a time and date stamp of downloaded delivery information.
- Electric Metering Devices shall be programmed to, at any time of manual read of the meter's display, provide the time and date of the information gathered. The Seller shall provide the communication channels for the Company's remote terminal unit and the Company's Itron Enterprise Edition Meter Data Management Agent. The implementation of these communication paths and

**SPS Model Dispatchable Energy Purchase Agreement**

RTU shall follow Company's latest standard. The Seller must have these communication paths installed, tested, and functional prior to generating Test Energy.

- Company shall have the right, via read-only access, and upon prior reasonable written notice to Seller, to independently audit Seller's meters and any records pertaining to the amount of energy generated by the Facility and any associated losses. Any audit shall be performed at the Facility or if applicable, other location within the same state as the Facility which is mutually agreed upon by both Company and Seller. Records related to such audits, inspections, testing or adjustments shall be maintained and subject to audit by Company for a period of 24 months. Company shall further have the right to request and receive in physical or electronic form any and all records or data files related to such audits, inspections, testing or adjustments.
- Seller shall provide secure and reliable communication from the Electric Metering Devices as follows:
  - DNP output from the meter to Company's EMCC via a remote terminal unit located near the Electric Metering Devices and hardwired from the meter to the remote terminal unit.
  - Time stamped meter register and interval data from the meter to Company's Itron Enterprise Edition Meter Data Management Agent with servers located in Denver, CO. Electric Metering Devices must have an Itron approved Translation Interface Module to facilitate correct data transmission over this communication path.
  - Prior to generating Test Energy, Seller shall provide to Company one-line electrical drawings of the Facility showing the electrical location of the Electric Metering Devices for Company's review and approval.



**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

**[BATTERY]<sup>1</sup> STORAGE**

**ENERGY PURCHASE AGREEMENT**

**BETWEEN**

**SOUTHWESTERN PUBLIC SERVICE COMPANY**

**AND**

**[REDACTED]**



**- [date] -**

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<sup>1</sup> **Note to Seller:** This form has been designed primarily for battery energy storage, but can be adapted to accommodate other storage technologies.

**TABLE OF CONTENTS**

	<b>PAGE</b>
<b>Article 1 - Rules of Interpretation.....</b>	<b>1</b>
1.1 Interpretation.....	1
1.2 Interpretation with Other Agreements .....	2
1.3 Good Faith and Fair Dealing.....	2
<b>Article 2 – Term and Termination.....</b>	<b>2</b>
<b>Article 3 – Facility Description .....</b>	<b>3</b>
3.1 Description.....	3
3.2 General Design of the Facility.....	3
<b>Article 4 - Implementation .....</b>	<b>3</b>
4.1 Project Development .....	3
4.2 Environmental Matters.....	5
4.3 Permits.....	6
4.4 Safety Requirements; Governmental Inspections.....	7
4.5 Commercial Operation .....	7
4.6 Pre-COD Testing .....	9
<b>Article 5 – Delivery and Testing .....</b>	<b>10</b>
5.1 Arrangements .....	10
5.2 Charging Requirements .....	10
5.3 Market Changes .....	11
5.4 Communication Protocols.....	11
5.5 Electric Metering Devices .....	11
5.6 Battery Storage System Testing .....	13
<b>Article 6 – Conditions Precedent .....</b>	<b>14</b>
6.1 PUC Approval .....	14
6.2 Other Company CPs.....	14
6.3 Seller CPs.....	15
6.4 Return of Security Fund .....	15
<b>Article 7 – Sale and Purchase .....</b>	<b>15</b>
7.1 General Obligation.....	15
7.2 Dispatch.....	15
7.3 Battery Storage System Dispatch .....	15
7.4 Reserved .....	16
7.5 Ancillary Services .....	16
<b>Article 8 – Payment Calculations .....</b>	<b>16</b>
8.1 Variable O&M Payment .....	16
8.2 Payment for Contract Capacity .....	17
8.3 Reserved .....	17
8.4 Monthly Payment Reduction .....	17

8.5	Excess Throughput Charge .....	21
8.6	Annual Throughput Limit Banking and Borrowing .....	21
<b>Article 9 – Billing and Payment .....</b>		<b>21</b>
9.1	Billing .....	21
9.2	Payment.....	22
9.3	Billing Disputes .....	22
<b>Article 10 – Operations and Maintenance .....</b>		<b>22</b>
10.1	Operation and Administration .....	22
10.2	Facility Maintenance .....	23
10.3	Repair Obligations .....	23
10.4	Books and Records .....	24
10.5	Access to Facility .....	25
10.6	Real Time Data .....	25
10.7	Accreditation .....	25
10.8	Operating Committee and Operating Procedures .....	25
<b>Article 11 – Security for Performance .....</b>		<b>26</b>
11.1	Security Fund.....	26
11.2	Replenishment.....	27
11.3	Form .....	27
11.4	Replacement.....	28
11.5	Survival .....	28
11.6	Expenses .....	29
<b>Article 12 – Default and Remedies .....</b>		<b>29</b>
12.1	Default by Seller: General .....	29
12.2	Default by Seller: Failure to Achieve Critical Path Development Milestone or COD .....	33
12.3	Default by Company .....	35
12.4	Limitations on Damages .....	37
12.5	Bankruptcy .....	38
12.6	Cumulative Remedies .....	38
12.7	Duty to Mitigate .....	38
<b>Article 13 – Dispute Resolution .....</b>		<b>38</b>
13.1	Negotiation.....	38
13.2	Time Bar .....	39
13.3	No Termination Pending Dispute Resolution .....	39
13.4	Governing Law.....	40
13.5	Venue .....	40
13.6	Waiver of Jury Trial .....	40
<b>Article 14 – Force Majeure .....</b>		<b>40</b>
14.1	Definition.....	40
14.2	Applicability of Force Majeure .....	41

14.3	Limitations on Effect of Force Majeure.....	42
<b>Article 15 – Representations, Warranties and Covenants .....</b>		<b>42</b>
<b>Article 16 - Insurance .....</b>		<b>43</b>
16.1	Evidence of Insurance .....	43
16.2	Policy Requirements .....	44
16.3	No Implied Limitation .....	44
16.4	Term and Modification of Insurance.....	44
16.5	Application of Proceeds .....	45
<b>Article 17 - Indemnity .....</b>		<b>45</b>
17.1	Indemnification: General .....	45
17.2	Indemnification: Environmental .....	45
17.4	Limitations.....	45
17.5	Procedures .....	45
17.6	Amounts Owed .....	46
<b>Article 18 – Lender Provisions .....</b>		<b>46</b>
18.1	Accommodation of Facility Lender .....	46
18.2	Notices.....	47
<b>Article 19 - Assignment .....</b>		<b>47</b>
19.1	Assignment by Seller .....	47
19.2	Assignment by Company .....	48
19.3	Right of First Offer (ROFO).....	48
19.4	PFT .....	49
19.5	Option .....	50
19.5	Memo of Option .....	52
<b>Article 20 - Miscellaneous .....</b>		<b>52</b>
20.1	Notices.....	52
20.2	Taxes and Tax Incentives .....	53
20.3	Applicable Laws .....	54
20.4	Fines and Penalties .....	54
20.5	Rate Changes.....	54
20.6	Certifications .....	54
20.7	Disclaimer of Third Party Beneficiaries .....	55
20.8	Relationship of the Parties .....	55
20.9	Survival of Obligations .....	55
20.10	Severability .....	55
20.11	Complete Agreement; Amendments .....	55
20.12	Waiver.....	56
20.13	Binding Effect.....	56
20.14	Headings.....	56
20.15	Counterparts and Electronic Signatures .....	56
20.16	Press Release .....	56

20.17 Exhibits .....	56
20.18 Confidentiality .....	56
20.19 Accounting Treatment.....	57

- EXHIBIT A DEFINITIONS**
- EXHIBIT B CONSTRUCTION MILESTONES**
- EXHIBIT C FACILITY DESCRIPTION AND SITE MAPS**
- EXHIBIT D NOTICES AND CONTACT INFORMATION**
- EXHIBIT E INSURANCE COVERAGE**
- EXHIBIT F SELLER’S NEEDED PERMITS**
- EXHIBIT G FORM OF LETTER OF CREDIT**
- EXHIBIT H FORM OF GUARANTY**
- EXHIBIT I AGC PROTOCOLS; DISPATCH AND AVAILABILITY REPORTING;  
DATA COLLECTION**
- EXHIBIT J BATTERY PAYMENT RATE AND CAPACITY PAYMENT RATE**
- EXHIBIT K LENDER CONSENT PROVISIONS**
- EXHIBIT L-1 EQUITY PURCHASE PRICE FORMULA**
- EXHIBIT L-2 FACILITY PURCHASE AND SALE AGREEMENT (“PSA”) PROVISIONS**
- EXHIBIT L-3 MEMBERSHIP INTEREST PURCHASE AND SALE AGREEMENT  
 (“MIPSA”) PROVISIONS**
- EXHIBIT M BATTERY STORAGE SYSTEM TESTING PROTOCOLS**
- EXHIBIT M-1 BATTERY STORAGE SYSTEM GUARANTEED PERFORMANCE  
 LEVELS**
- EXHIBIT N RESERVED**
- EXHIBIT O BATTERY STORAGE SYSTEM OPERATING PROCEDURES**
- EXHIBIT P SAFETY REQUIREMENTS**
- EXHIBIT Q EXAMPLE ADJUSTMENT CALCULATIONS**
- EXHIBIT R METER AND COMMUNICATIONS REQUIREMENTS**

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

**BATTERY STORAGE  
ENERGY PURCHASE AGREEMENT  
BETWEEN  
SOUTHWESTERN PUBLIC SERVICE COMPANY  
AND  
[REDACTED], LLC**

This Battery Storage Energy Purchase Agreement (this “PPA”) is made as of this [REDACTED] day of [REDACTED], 20 [REDACTED] (“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) [REDACTED], LLC, a [REDACTED] [limited liability company] with a principal place of business at [REDACTED] (“Seller”). Company and Seller are hereinafter referred to individually as a “Party” and collectively as the “Parties.”

WHEREAS Seller desires to develop, design, construct, interconnect, own, operate and maintain the Facility as defined herein; and

WHEREAS Seller desires to sell and deliver, and Company desires to accept and receive, certain products and services, including but not limited to the Energy and Ancillary Services delivered from the Facility 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.

## Southwestern Public Service Company Model Storage Energy Purchase Agreement

(D) Unless specifically designated as DC, each reference to “MW” or “kW” herein shall be AC MW or AC kW, as applicable. “AC” means alternating electric current; “DC” means direct electric current.

### 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, lighting, HVAC or any other purpose (“House Power”). For the avoidance of doubt, House Power expressly excludes any Charging Energy. 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 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.

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 then unless another standard is expressly specified in this PPA, 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 then unless another standard is expressly specified in this PPA, 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 last Day of the calendar month during which occurs the [ ]<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 Section 12.1(B)-(E), Section

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

12.2(C), Section 12.3(B)-(C), 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 the Facility, as further described in Exhibit C – Facility Description and Site Maps. A scaled map that identifies the Site, the location of the Facility, the Battery Units, the Interconnection Point and Interconnection Facilities, the Point of Delivery, the Battery Storage system Metering Point and other important facilities, is included in Exhibit C – Facility Description and Site Maps.

3.2 General Design of the Facility.

(A) Seller shall design, construct, operate and maintain the Facility according to Good Utility Practices and the Interconnection Agreement.

(B) The Facility shall include all equipment specified in Exhibit C - Facility Description and Site Maps and otherwise necessary to fulfill Seller's obligations under this PPA, including all equipment necessary (i) to meet the requirements of Exhibit I - AGC Protocols; Dispatch and Availability Reporting; Data Collection and Exhibit O – Battery Storage System Operating Procedures, and (ii) to interconnect successfully with the Transmission Authority's System for the delivery of Energy to the Point of Delivery.

(C) The Battery Storage System Nameplate Capacity shall be [ ] MW AC and [ ] MWh. Seller shall certify to Company the final actual Battery Storage System Nameplate Capacity 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, including any equipment procurement contracts, and (ii) the storage and delivery of Energy from the Facility (generally, the "Construction Contracts") with qualified and experienced contractors. Upon written request by Company, Seller shall promptly provide copies of any or all Construction Contracts to Company. All 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. In addition, Seller shall achieve each Critical Path Development Milestone on or before the applicable deadline for achieving such Critical Path Development Milestone specified below. Seller shall provide to Company, on or before the applicable deadline to achieve each Critical Path Development Milestone, evidence reasonably satisfactory to Company that the Critical Path Development Milestone has been achieved. Seller shall also provide any additional evidence reasonably requested by Company that the Critical



**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

Path Development Milestone has been achieved, including certifications from an officer of Seller.

<b>Critical Path Development Milestone</b>	<b>To be completed no later than (completion deadline):</b>
Acquisition of all Seller's Needed Permits required to construct the Facility	<i>[To be based on bid submission and RFP requirements]</i>
Execution of all Construction Contracts	<i>[To be based on bid submission and RFP requirements]</i>
Closing of project financing for the Facility	<i>[To be based on bid submission and RFP requirements]</i>

If Seller anticipates a CPD Delay because it is unable, using Commercially Reasonable Efforts, to achieve any of the Critical Path Development Milestones by the applicable deadline, then Seller may extend the timeframe to achieve such Critical Path Development Milestones as set forth in Section 12.2(A) subject to the payment of Liquidated Delay Damages so long as the following conditions are satisfied:

(C) At least [thirty (30)] days prior to the applicable completion deadline set forth above, Seller submits to Company (a) a written description of the reason for the failure; and (b) a Recovery Plan for completing all necessary work to achieve completion of the missed Critical Path Development Milestone by a date certain (which plan may contemplate the payment of Liquidated Delay Damages).

(D) Seller shall commence the work contemplated by the Recovery Plan within [five (5)] days after submitting such Recovery Plan to Company.

(E) Seller shall be solely responsible for any costs or expenses incurred by Seller as a result of the formulation and implementation of the Recovery Plan.

Nothing in this Section 4.1(B) shall be construed to: (x) relieve Seller of its obligations under this PPA; (y) modify the deadlines for achieving the remaining Critical Path Development Milestones, including the Target COD, as applicable (except for the update to the milestone schedule pursuant to Section 12.2(B) and the missed Critical Path Development Milestone which Seller is attempting to cure under this Section 4.1(B)) or (z) extend the applicable cure period set forth in Section 12.2(B) or impair the Company's right to terminate this Agreement pursuant to Section 12.2(C). For clarity, failure to cure a CPD Delay within the applicable cure period set forth in Section 12.2(B) shall be subject to termination as set forth in Section 12.2(C).

(F) 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

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

current status of each Construction Milestone and Critical Path Development 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) 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. Seller shall make all relevant counterparties under the Construction Contracts available to Company, upon request, in order to keep Company fully informed on the status of development.

(G) Upon request, 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.

(H) 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 of the Facility, shall be construed as an 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 sixty (60) Days following PUC Approval, Seller shall complete and provide to Company a comprehensive independent "Phase I" environmental site assessment of the Site that is conducted in compliance with ASTM E1527-13 or E1527-16, as applicable (including associated raw data, if requested by Company), which report shall have been prepared as of a reasonably proximate time such that it reflects the then-current conditions of the site. 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) 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 and remediate, at Seller's sole cost and expense, any Environmental Contamination identified at the Site;

2. provide to Company copies of any further environmental assessments or investigations of the Site (including associated raw data, if requested by Company); 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 protection of human health, the environment, or natural resources, including protected species.

(C) For purposes hereof:

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

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, contaminant, chemical, material, gas, or particulate matter that is regulated by any Governmental Authority as an environmental pollutant or which is deemed or may be deemed hazardous, dangerous, damaging or toxic 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 Applicable Law; (ii) petroleum, including any fraction, derivative or additive; (iii) asbestos; (iv) polychlorinated biphenyls; (v) per- and polyfluoroalky substances; (vi) radioactive material; (vii) designated as a “hazardous substance” pursuant to the Clean Water Act, 33 U.S.C. §1251 *et seq.* (33 U.S.C. §1251); (viii) 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); (ix) 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); (x) defined as a “chemical substance” under the Toxic Substances Control Act, 15 U.S.C. §2601 *et seq.* (15 U.S.C. §2601); or (xi) 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 under Applicable Law or advisable pursuant to Good Utility Practice for the construction, ownership, operation and maintenance of the Facility and the charging and delivery of the products and services required by this PPA. Seller shall keep Company informed as to the status of its permitting efforts and shall provide Company the opportunity to review and comment on major applications for draft and final Permits. Seller shall promptly inform Company of (i) any Permits that Seller is unable to obtain, which 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 or recommended 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.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

(C) Throughout the Term, Seller shall promptly 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 charging and delivery of Energy therefrom.

4.4 Safety Requirements; Governmental Inspections. Seller shall, and shall cause its Affiliates and contractors to, design and construct the Facility and conduct all work or cause all work in connection therewith to be conducted in accordance with the Safety Requirements. Seller shall, and shall cause its Affiliates and contractors to, take all actions to comply with the Safety Requirements. 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) Seller shall cause COD to occur no later than [REDACTED], 20[REDACTED] (the "Target COD"). Company shall not be obligated to accept and establish a Commercial Operation Date earlier than [REDACTED], 20[REDACTED] (*insert date that is [90] days prior to Target COD*).

(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 ten (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 ten (10) Business Days to review and object to each such notice.

(C) For purposes hereof, the "Commercial Operation Date" or "COD" means 12:01 am on the Day after which Seller's COD Notice has been accepted by Company or deemed accepted by Company pursuant to Section 4.5(B); and

1. the "COD Conditions" are:

a. an officer of Seller, authorized to bind Seller and who is familiar with the Facility, has confirmed in writing that (1) all necessary and material Permits have been obtained, are in full force and effect, and the entity granting the Permit has not placed any temporary or conditional restrictions or limitations on the Facility or its operation (2) Seller is in compliance with this PPA in all material respects, (3) Seller has

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

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 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 has received no notice of breach thereof from the Transmission Authority, (2) the Facility is interconnected to the Transmission Authority's System, and has been fully tested, achieved initial synchronization, and been successfully operated at charging and dispatch levels acceptable to the Transmission Authority, without experiencing any abnormal or unsafe operating conditions on any interconnected system, (3) Seller has or is capable of declaring commercial operation under the Interconnection Agreement and (4) Seller has made all other arrangements necessary to deliver Energy 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 and are not required for the safe operation of the Facility or otherwise affect the capacity, efficiency, reliability, operability, safety or mechanical or electrical integrity of the Facility;

d. Seller has demonstrated the functionality and reliability of the Facility's communications systems and AGC interface with Company's EMCC, the capability of the Facility to receive and respond to signals from Company's SCADA System, the accuracy of Electric Metering Devices and their ability to communicate with the Company;

e. Seller has successfully completed a Commercial Operation Test in accordance with Section 5.6(A) and Exhibit M – Battery Storage System Testing Protocols.

f. Battery Units comprising one hundred percent (100%) of the Battery Storage System Nameplate Capacity planned for the Facility, and associated equipment sufficient to allow such Battery Units to store Charging Energy and deliver Discharging Energy to the Point of Delivery, have been installed and become operable.

g. Seller has demonstrated the accuracy and reliability of the Real Time Data required by Section 10.6 and the AGC Set-Point and related data points to be sent from Seller to Company via the SCADA System, all in accordance with Exhibit I - AGC Protocols; Dispatch and Availability Reporting; Data Collection;

h. Seller has demonstrated the ability to fulfill the forecasting requirements including the usage of the availability forecast system as described in Exhibit O – Battery Storage System Operating Procedures;

i. Seller has executed and delivered to Company all documents or instruments required under Article 16;

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

j. Seller has provided evidence reasonably satisfactory to Company that it is compliant with and has adopted and implemented the appropriate policies pertaining to, the Forced Labor Laws consistent with Section 15.B(2). Seller shall also provide any additional evidence or certifications reasonably requested by Company that the requirements of this subsection have been met, including certifications from an officer of Seller or third-parties, certificates of origin documentation or importer statements.

(D) Prior to COD, should Seller require Company's assistance in meeting the COD Conditions because the Transmission Authority considers Company to be the market participant for the Facility, Company shall use Commercially Reasonable Efforts to cooperate with and provide assistance to Seller, so long as Seller provides any security the Transmission Authority requires and reimburses Company for all expenses, including fees of counsel, Company may incur in providing such cooperation and assistance.

(E) 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. The Annual Throughput Limit [**bid-specific -- may be n/a**] for the first Commercial Operation Year shall be prorated to reflect the number of Days by which the first Commercial Operation Year exceeds three hundred sixty-five (365) Days.

4.6 Pre-COD Testing.

(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 and energy storage 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 dispatching any Pre-COD Test Energy. Company shall cooperate reasonably to assist in the registration of the Facility to allow dispatch of Test Energy.

(B) Seller shall coordinate the receipt and delivery of Test Energy with Company, with not less than seven (7) Business Days' prior notice, or such other Commercially Reasonable prior notice as Company may reasonably request. Company shall provide all Test Energy required to charge the Battery Storage System, and Discharging Energy from the Facility derived from such Test Energy shall be treated as dispatched by the Company hereunder. Company shall reasonably cooperate with Seller to provide such Test Energy at a time that will mitigate the costs of such Energy (including, if requested by Seller, by providing Seller with projections of the Charging Energy Price for periods during which such price is determined by Company in its sole discretion pursuant to its cost calculator), and Seller shall reimburse Company for the cost of the Test Energy (based on the Charging Energy Price at the time of charging) to the extent that it exceeds the cost of the Discharging Energy discharged by the Battery Storage System derived from such Test Energy (based on the Discharging Energy Price at the time of discharging).

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

(C) For purposes hereof, "Test Energy" means all Charging Energy stored by the Facility prior to COD, required to satisfy the COD Conditions.

**Article 5 - Delivery and Testing**

**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. Seller's interconnection application shall request that the Transmission Authority study the Facility for Network Resource Interconnection Service and Energy Resource Interconnection Service under the Transmission Tariff. The resulting Interconnection Agreement must include Energy Resource Interconnection Service at a minimum. Seller shall cooperate reasonably in any request by Company to assist in Company's efforts to have the Facility approved as a network resource or equivalent classification pursuant to the applicable Transmission Tariff.

(B) Seller hereby authorizes Company to contact, discuss and obtain information concerning the Facility and the 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 required, Company shall arrange and be responsible for scheduling and transmission services beyond the Point of Delivery with respect to the output of the Facility. To the extent applicable, Company shall be the market participant with respect to the output of 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 Discharging Energy. Company shall be responsible for all electrical losses, transmission and ancillary service arrangements and costs required to transmit and deliver Discharging Energy beyond the Point of Delivery.

**5.2 Charging Requirements**

(A) Company shall be responsible for arranging, managing, purchasing, and scheduling all of the Charging Energy for the Battery Storage System in accordance with the terms of Sections 7.2 and 7.3 and Exhibit O – Battery Storage System Operating Procedures. Company will be responsible for delivering Charging Energy at the Point of Delivery, and Seller shall be responsible for accepting and transferring Charging Energy from the Point of Delivery to the Battery Storage System. Seller shall be responsible for delivering all Discharging Energy up to the Point of Delivery. Company shall be responsible for accepting and transferring all Discharging Energy at and from the Point of Delivery.

(B) Seller shall take any and all action necessary to allow the delivery of Charging Energy to the Battery Storage System in accordance with the terms of this PPA,

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

including maintenance, repair or replacement of equipment in Seller's possession or control used to deliver the Charging Energy from the Point of Delivery to the Battery Storage System and receive any such Charging Energy at the Point of Delivery.

(C) Except with respect to the establishment of the ability to deliver Charging Energy to the Battery Storage System, Company shall be responsible for the costs associated with supplying any Charging Energy to the Point of Delivery; provided, that Seller shall be responsible for certain costs arising out of a Seller Initiated Test as set forth in Section 5.6.

(D) The Battery Storage System may not be, and Company shall not issue any instruction, order, Dispatch Notice or other communication requesting or requiring the Battery Storage System to be, charged, discharged or operated in any manner which results in an amount of Energy discharged by the Battery Storage System in any given Commercial Operation Year which exceeds the Annual Throughput Limit, except to the extent provided in accordance with Section 8.5.

**5.3 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 cooperate in good faith to facilitate the delivery of Energy, at the least possible cost to the Parties, consistent with this PPA to the extent possible.

(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 cooperate in good faith to change their protocols for operation of the Facility accordingly, at the least possible cost to the Parties, consistent with this PPA to the extent possible. In addition, if as a result of any change in Applicable Law the Company is not able to realize the capacity and ancillary services products that the Facility is able to provide to the Company as of the Effective Date and such capacity and ancillary services products can be provided by the Facility subject to the Seller making capital expenditures to comply with such change in Applicable Law, then Seller agrees that it shall make all such required capital expenditures so that the Facility is able to provide such capacity and ancillary services products to the Company.

**5.4 Communication Protocols.** The Parties shall agree to the communication protocols outlined in Exhibit I - AGC Protocols; Dispatch and Availability Reporting; Data Collection to facilitate the exchange of information between the Parties. Each Party may update its contact information set forth in Exhibit D – Notices and Contact Information from time to time by notifying the other Party in writing.

**5.5 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. All Electric Metering Devices shall meet the requirements of Exhibit R - Meter and Communications Requirements.



**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

1. Seller shall configure Electric Metering Devices via electronic remote communications and via physical access in a manner that enables separate, bi-directional (as applicable) meter readings for all Energy transmitted at the Point of Delivery as set forth in Exhibit C - Facility Description and Site Maps.

2. Seller shall separately configure Electric Metering Devices, installed in accordance with and conforming to the Local Provider's electrical service and tariff requirements, as necessary, to separately account for all House Power.

3. 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 (1%), 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 (1%), 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) one hundred eighty (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 or add the previous payments made by Company for this period from such re-computed amount.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

The net difference shall be reflected as an adjustment on the next regular invoice in accordance with Article 9.

**5.6 Battery Storage System Testing.**

(A) Prior to the Commercial Operation Date, Seller shall schedule and successfully complete a "Commercial Operation Test" in accordance with Exhibit M – Battery Storage System Testing Protocols.

(B) On an annual basis, no earlier than 180 days and no later than 30 days prior to each Commercial Operation Year during the Delivery Period, upon seven (7) days prior notice to Company, Seller shall schedule and complete a "Periodic Test" in accordance with Exhibit M – Battery Storage System Testing Protocols. Company has the right to not permit a Periodic Test if it conflicts with the requirement of the ERO. In addition, either Party shall have the right to require a retest at any time if such Party reasonably believes that the actual Performance Criteria has varied materially from the results of the most recent Tests. Such retest shall be scheduled as soon as is reasonably practicable for the Parties consistent with Good Utility Practice. Any such retest shall be deemed a Seller Initiated Test, as defined in Section 5.6(D), except to the extent that such discretionary testing can be conducted during a period in which Company is already charging or discharging the Battery Storage System in a manner which can allow accommodation of such testing, in which case such Test may be deemed to be a Company Dispatched Test, as defined in Section 5.6(D).

(C) If Seller fails any Periodic Test, then Seller shall be required to commence repairs in accordance with Section 10.3.

(D) Seller may also conduct other discretionary tests, at times and for durations reasonably agreed to by Company, that Seller deems necessary for purposes of reliably operating the Facility or for re-performing a required Test. If such discretionary testing is conducted during a period in which Company is already charging or discharging the Battery Storage system in a manner which can allow accommodation of such testing ("Company Dispatched Test"), Seller shall not be obligated to pay for the electricity required to charge the Battery Storage System relating to such Company Dispatched Test of the Battery Storage System, and Discharging Energy from the Facility shall be treated as dispatched by Company hereunder. If discretionary testing is conducted during a period in which Company is not charging or discharging the Battery Storage System in a manner which can allow accommodation of such testing ("Seller Initiated Test"), then Company shall provide all electricity required to charge the Battery Storage System; provided that Company shall reasonably cooperate with Seller in its efforts to perform the Seller Initiated Test at a time that will mitigate the costs of such Energy (including, if requested by Seller, by providing Seller with projections of the Charging Energy Price for periods during which such price is determined by Company in its sole discretion pursuant to its cost calculator), and Seller shall reimburse Company for the cost of such Charging Energy used to charge the Battery Storage System to the extent that it exceeds the cost of the Discharging Energy discharged by the Battery Storage System during such Seller Initiated Test (based on the Charging Energy Price at the time of charging and the Discharging Energy Price at the time of discharging). Company shall reasonably cooperate with Seller to schedule testing during periods when Company is dispatching

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

the Facility so that such testing will be deemed to be a Company Dispatched Test; provided that Company is not required to use or change its utilization of its owned or controlled assets or market positions to facilitate the characterization of such testing as a Company Dispatched Test.

**Article 6 - Conditions Precedent**

**6.1 PUC Approval.**

(A) No later than forty-five (45) Days after the date of this PPA, Company may apply to the PUCT/NMPRC for PUC Approval. If Company fails to apply for PUC Approval within forty-five (45) Days following the Effective Date, Company shall be deemed to have waived its right to obtain PUC 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 PUC Approval, Company shall use Commercially Reasonable Efforts to obtain PUC Approval as soon as reasonably practicable, and Seller shall cooperate with such efforts.

(C) If Company applies for PUC 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 thirty (30) Days following issuance of a written order by the PUC rejecting PUC Approval, or granting PUC Approval with conditions unacceptable to Company in its sole discretion;

2. at any time between the one hundred eightieth (180<sup>th</sup>) and two hundred tenth (210<sup>th</sup>) Day following Company's application for PUC Approval, if prior to the date of such termination the PUC has not issued a written order granting or rejecting PUC Approval;

3. at any time within thirty (30) Days following timely request for reconsideration (in whole or in any material part) by any third party with standing, of a written PUC order granting PUC Approval; and/or

4. at any time within 30 Days following timely appeal by any party with standing, of a written PUC order granting PUC 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.

(D) For purposes of this PPA, "PUC Approval" means a written order of the PUCT/NMPRC which alone or in combination make an affirmative determination that all costs incurred under this PPA are recoverable from Company's retail customers pursuant to Applicable Law, subject only to the requirement that the PUCT and NMPRC (as applicable) retain ongoing prudency review of Company's performance and administration of this PPA, as determined by Company in its sole discretion.

**6.2 Other Company CPs. *[if any]*.**

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

6.3 Seller CPs. *[if any - bid specific]*.

6.4 Return of Security Fund. Following a termination pursuant to Section 6.1 *[or Section 6.2/Section 6.3]*, the Company will return to Seller the initial Security Fund within five (5) Business Days of such termination.

**Article 7 - Sale and Purchase**

7.1 General Obligation.

(A) Beginning on the Commercial Operation Date, Seller shall receive at the Point of Delivery, store in the Battery Storage System, and deliver to the Point of Delivery, and Company shall receive at the Point of Delivery, the Energy and other products and services required by this PPA. Seller shall not curtail or interrupt deliveries of Energy to Company for economic reasons of any type.

(B) Seller shall not sell any products and services required by this PPA to any third party.

(C) 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 Dispatch. Beginning on the Commercial Operation Date, Company shall dispatch the Facility through the EMCC AGC system in accordance with Exhibit I – AGC Protocols; Dispatch and Availability Reporting; Data Collection. Seller shall ensure that, throughout the Term, the SCADA System 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.

7.3 Battery Storage System Dispatch.

(A) During each Operating Day, Company's EMCC will have the exclusive right to dispatch the Battery Storage System, seven (7) days per week and twenty-four (24) hours per day (including holidays), by providing Dispatch Notices to Seller in accordance with the Battery Storage System Operating Procedures and subject to the requirements and limitations set forth in this PPA. Seller shall abide with all directives from Company's EMCC, subject only to Good Utility Practices.

(B) For each Operating Day, Seller shall provide to Company (in accordance with the protocols outlined in Exhibit O – Battery Storage System Operating Procedures and as may be updated by written agreement of the Operating Committee pursuant to Section 10.8) an hourly schedule of the expected availability of the Battery Storage System for such Operating Day, no later than two (2) Business Days before such Operating Day (the "Availability Notice"). Seller must update Company immediately, unless an event or circumstance makes it unsafe to do so, then as soon as practicable, in accordance with the protocols outlined in Exhibit O – Battery Storage System Operating Procedures if the availability of the Battery Storage System for dispatch by Company changes or is likely to change after the Availability Notice is submitted. Seller shall accommodate Company's reasonable requests for changes in the time or form of delivery of the Availability Notices.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

7.4 Reserved.

7.5 Ancillary Services.

(A) During the Term, Seller shall make available to Company and Company shall own, all Ancillary Services associated with the Facility, including but not limited to the sole right to sell the Ancillary Services associated with the Facility and to retain all revenues therefrom. Seller shall use Commercially Reasonable Efforts to maximize the Ancillary Services available from the Facility.

(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 and/or energy storage resources to create, modify, or supply Ancillary Services, requiring Seller to install additional equipment after the Effective Date to meet such requirements, then Seller, after consultation with Company, shall, if requested to do so by Company, install any such additional equipment and 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 (up to the amount of any cap agreed to by the Parties for such work). 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 any service associated, directly or indirectly, with the reliable storage and/or transmission of energy from the Facility from time to time, including but not limited to: operating reserves, ramp capability, reactive supply, reactive supply capability, voltage control, voltage control capability, and any rights to compensation for any of these services. "Ancillary Services" also includes any other identified as an "ancillary service" or "other ancillary service" in the Transmission Tariff. For the avoidance of doubt, "Ancillary Service" includes any service associated, directly or indirectly, with the reliable generation and/or transmission of energy from the Facility, regardless of whether the Facility, the Transmission Authority or the Company is deemed to be the service provider for the service.

**Article 8 - Payment Calculations**

8.1 Variable O&M Payment.

(A) [Reserved].

(B) Commencing on the Commercial Operation Date, Company shall pay Seller a variable monthly charge (such payment in any given month, the "Variable O&M Payment") based upon the following formula:

Variable O&M Payment = BPR x E<sub>MWh</sub>, where:

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

BPR = Battery Payment Rate, as set forth in Exhibit J – Battery Payment Rate and Capacity Payment Rate

$E_{MWh}$  = all Discharging Energy delivered by the Facility to the Point of Delivery, expressed in MWh, in any given month

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

(D) Compensation to Seller may also be subject to a reduction to the Variable O&M Payment in accordance with Section 8.4.

**8.2 Payment for Contract Capacity.**

(A) Subject to reduction as set forth in Section 8.4(B) and Section 8.4(C), Company shall pay Seller a monthly payment for capacity (the "Monthly Capacity Payment") based upon the following formula:

Monthly Capacity Payment =  $(SC \times CP) - RTE_{Adj} - AA - DA$ , where:

SC = Storage Capacity, as determined by the most recently completed Test

CP = Capacity Payment Rate, as set forth in Exhibit J – Battery Payment Rate and Capacity Payment Rate

$RTE_{Adj}$  = Round Trip Efficiency Adjustment to Monthly Capacity Payment, as set forth in Section 8.4(B).

AA = Availability Adjustment to Monthly Capacity Payment, as set forth in Section 8.4(C).

DA = Dispatchability Adjustment to Monthly Capacity Payment, as set forth in Section 8.4(D).

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

(C) For clarity, compensation to Seller may also be subject to a reduction to the Monthly Capacity Payment in accordance with Section 8.4(B), Section 8.4(C) and Section 8.4(D).

**8.3 Reserved.**

**8.4 Monthly Payment Reduction.**

(A) For each month of the Delivery Period, the Monthly Capacity Payment may be reduced by (i) the Round Trip Efficiency Adjustment based on Section 8.4(B), the Guaranteed Storage Availability Payment Adjustment based on Section 8.4(C) and the Dispatchability Adjustment based on Section 8.4(D).

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

(B) If the Round Trip Efficiency as determined by the most recently completed Test is less than the then-applicable Guaranteed Round Trip Efficiency, then the Monthly Capacity Payment shall be reduced by the Round Trip Efficiency Adjustment, which shall be calculated as follows:

1. The "Round Trip Efficiency Adjustment" or "RTE<sub>Adj</sub>" for each month is given by:

If  $[RTE_{test} < RTE_G]$ , then  $RTE_{Adj} =$

$[1 - (RTE_{test} / RTE_G)] \times [(Discharging\ MWh_{Actual} * Discharging\ LMP) - (Charging\ MWh_{Actual} * Charging\ LMP)]$

where:

$RTE_{test}$  = the Round Trip Efficiency as determined by the most recently completed Test.

$RTE_G$  = the then-applicable Guaranteed Round Trip Efficiency, as identified in Exhibit M-1 – Battery Storage System Guaranteed Performance Levels

$Discharging\ MWh_{Actual}$  = the Discharging Energy delivered to Company at the Point of Delivery for the affected month expressed in MWh.

$Discharging\ LMP$  = the average of the Discharging Energy Price for each  $Discharging\ MWh_{Actual}$  for the affected month expressed in Dollars per MWh; *provided*, that the Discharging LMP may not, in any event, be less than \$[0] for any given month.

$Charging\ MWh_{Actual}$  = the Charging Energy delivered to Seller at the Point of Delivery for the affected month expressed in MWh.

$Charging\ LMP$  = the average of the Charging Energy Price for each  $Charging\ MWh_{Actual}$  for the affected month expressed in Dollars per MWh.

*Provided*, that in no event shall the Round Trip Efficiency Adjustment be less than \$0.

Exhibit Q – Example Adjustment Calculations sets forth the sample calculations for the Round Trip Efficiency Adjustment.

(C) For each month of the Delivery Period, Seller shall either (i) achieve an Equivalent Availability Factor of not less than 97% ("Guaranteed Storage Availability")

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

or (ii) pay, or incur a reduction in the Monthly Capacity Payments for such month equal to, the Guaranteed Storage Availability Payment Adjustment, as calculated below. Any Guaranteed Storage Availability Payment Adjustment, if applicable, shall be reflected in the Monthly Capacity Payment for such month; *provided*, that if the Monthly Capacity Payment is less than the Guaranteed Storage Availability Payment Adjustment for such month, the difference shall be due and payable no later than thirty (30) Business Days after receipt by Seller of Company's billing statement for such month, pursuant to Section 9.1(B).

"Availability Percentage" means, during any given Outage, the factor obtained by dividing the maximum power output that could be provided during the Guaranteed Minimum Discharging Time (assuming that the Battery Storage System was charged up to its maximum available Storage Capacity during such Outage) as reported by the SCADA System in accordance with Exhibit O – Battery Storage System Operating Procedures, by the Guaranteed Maximum Discharging Rate.

"Equivalent Availability Factor" of the Battery Storage System shall be calculated as follows:  $(\text{Hours} - \text{Total Equivalent Forced Outage Hours} - \text{Total Equivalent Planned Outage Hours}) / (\text{Hours} - \text{Total Equivalent Planned Outage Hours})$ .

"Equivalent Outage Hours" (Planned or Forced) means, for any Outage, the product of (x) the number of hours during such Outage multiplied by (y) one minus the Availability Factor during such Outage.

"Guaranteed Storage Availability Payment Adjustment" means, for each month during the Delivery Period, an amount equal to the following:

*Guaranteed Storage Availability Payment Adjustment* = Capacity Payment Rate x Storage Capacity x (the Guaranteed Storage Availability (as a percentage) minus the Equivalent Availability Factor (as a percentage));

*provided*, that in any given month, the Guaranteed Storage Availability Payment Adjustment shall not exceed the Guaranteed Storage Availability Payment Adjustment Cap. For avoidance of doubt the Storage Capacity in the above calculation is the capacity determined by the most recently completed Test.

"Guaranteed Storage Availability Payment Adjustment Cap" = Storage Capacity x Capacity Payment Rate for the applicable month.

"Hours" means, for each month during the Delivery Period, the total number of hours in such month.

"Total Equivalent Forced Outage Hours" means the sum of the number of



**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

Equivalent Outage Hours during Battery Storage System Forced Outages during the applicable month.

“Total Equivalent Planned Outage Hours” means the sum of the number of Equivalent Outage Hours during Battery Storage System Planned Outages during the applicable month.

Exhibit Q – Example Adjustment Calculations sets forth the sample calculations for the Guaranteed Storage Availability Payment Adjustment.

(D) If in any given month during the Delivery Period the Facility does not operate in compliance with one or more Dispatch Notices, then the Monthly Capacity Payment shall be reduced for such month by an amount equal to the Dispatchability Adjustment, as determined according to the following formula:

“Dispatchability Adjustment<sub>m</sub>” = SC x CP x DAF<sub>m</sub>, where:

SC = Storage Capacity, as determined by the most recently completed Test

CP = Capacity Payment Rate, as set forth in Exhibit J – Battery Payment Rate and Capacity Payment Rate

m = a given month

DAF<sub>m</sub> (Dispatch Availability Factor) = Shortfall Hours<sub>m</sub> / On-Control Hours<sub>m</sub>, where:

Shortfall Hours<sub>m</sub> = the total number of hours that the Facility was unable to operate in compliance with a Dispatch Notice. The Facility will be deemed to be unable to operate in compliance with a Dispatch Notice for any hour for which the following calculation is greater than 0.02:

Sum of the absolute value of the 5- minute deviations in the Facility Output/sum of the absolute value of the 5- minute Dispatch Notices for the Facility Output.

Where:

Dispatch Notice: Dispatch Notice in MW during the each 5- minute interval in the respective dispatch hour.

Facility Output: Average output in MW of the Facility during each 5-minute interval in the respective dispatch hour as measured by the BESS Meter.

On-Control Hours<sub>m</sub> = the total number of hours during for which the Company has dispatched the Facility.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

Exhibit Q – Example Adjustment Calculations sets forth the sample calculations for the Dispatchability Adjustment.

8.5 Excess Throughput Charge. Company shall pay Seller a payment equal to [ ] for each MWh of Energy discharged by the Battery Storage System above the Annual Throughput Limit in any given Commercial Operation Year and, if the Energy discharged by the Battery Storage System exceeds the Annual Throughput Limit by more than [ ]%, then the company shall pay Seller an additional payment equal to [ ] for each MWh of Energy discharged by the Battery Storage System above [ ]% more than the Annual Throughput Limit. For purposes of determining the amount of Energy discharged by the Battery Storage System in any given Commercial Operation Year, any Energy discharged by the Battery Storage System during a Seller Initiated Test or a Periodic Test shall be excluded.

8.6 Annual Throughput Limit Banking and Borrowing.

(A) If, in any Commercial Operation Year, Company has not used all of the Annual Throughput Limit for such Commercial Operation Year, then [ ] MWh of the unused Annual Throughput Limit for such Commercial Operation Year shall be added to the Annual Throughput Limit for the subsequent Commercial Operation Year.

(B) If, in any Commercial Operation Year, Company has used all of the Annual Throughput Limit for such Commercial Operation Year, then, for such Commercial Operation year, Company may add up to [ ] MWh of the Annual Throughput Limit allocated to the subsequent Commercial Operation Year, which use shall reduce the Annual Throughput Limit for the subsequent Commercial Operation Year.

**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 twenty (20) 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 5.5.

(C) No later than fifteen (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, billing meter register reads for relevant measurement quantities, total usage in kWh being billed, date and time at which accumulated and billed production was read by the Electric Metering Devices, 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.

## Southwestern Public Service Company Model Storage Energy Purchase Agreement

9.2 Payment. All payments shall be remitted via check or electronic funds transfer, as designated by the owed Party, on or before the fifteenth (15<sup>th</sup>) Business Day following receipt of the invoice described in Section 9.1(C). 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 fifteenth (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 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; Dispatch and Availability Reporting; Data Collection, Exhibit O – Battery Storage System Operating Procedures, and this PPA. Personnel of Seller shall be available 24x7 via telephone or other electronic means with (i) the capability of remotely starting, operating and stopping the Facility within ten (10) minutes, and (ii) the ability to be present at the Site within 30 minutes, or sooner, to the extent required in accordance with Good Utility Practices and subject to the Safety Requirements.

(B) Seller shall comply with Good Utility Practices, its obligations under this PPA, 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. Any such testing shall be deemed to be a Seller Initiated Test.

(C) Seller shall provide to Company a day-ahead availability schedule in accordance with Exhibit I - AGC Protocols; Dispatch and Availability Reporting; Data Collection, Exhibit O – Battery Storage System Operating Procedures, and any other

### Southwestern Public Service Company Model Storage Energy Purchase Agreement

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 schedule 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.

(D) Seller shall, and shall cause its Affiliates and contractors to operate, and maintain the Facility and conduct all work or cause all work in connection therewith to be conducted in accordance with the Safety Requirements. Seller shall, and shall cause its Affiliates and contractors to, take all actions to comply with the Safety Requirements.

#### 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"). Seller shall provide Maintenance Schedules, including planned outages of the Facility (including any Battery Storage System Planned Outages), to Company in writing and sufficiently in advance for Commercially Reasonable review, and shall be subject to Company's Commercially Reasonable approval. Seller shall coordinate with Company and the Transmission Authority on the timing and duration of planned outages. Company has the right to not permit a planned outage if it conflicts with the requirements of the ERO or if the ERO rejects the planned outage request.

(B) Seller shall minimize the amount of scheduled maintenance during the months of January, February, June, July, August, September and December to the maximum extent consistent with Good Utility Practices. Seller shall coordinate with Company and the Transmission Authority on the timing and duration of planned outages of the Facility (including any Battery Storage System 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 (1) 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.

(D) Seller shall develop and provide Company with a copy of its Facility cold weather policy. In the event of a Facility Forced Outage or derate, Seller shall conduct a root cause analysis, take corrective actions as are reasonable under the circumstances to prevent reoccurrences and provide a copy of such analyses and corrective action to Company.

#### 10.3 Repair Obligations.

(A) In the event that:

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

1. an equipment failure (regardless of when such equipment failure occurs, but excluding any equipment failure for which a Successful Repair has already been demonstrated) with respect to the Battery Storage System results in the Battery Storage System failing the Test set forth in Exhibit M – Battery Storage System Testing Protocols for Grid Charging Capability or being otherwise incapable of charging from the grid, or results in (i) the Minimum Charging Time in excess of 115% of the Guaranteed Minimum Charging Time, (ii) the Maximum Charging Rate less than 85% of the Guaranteed Maximum Charging Rate, (iii) the Minimum Discharging Time in excess of 115% of the Guaranteed Minimum Discharging Time, (iv) the Maximum Discharging Rate less than 85% of the Guaranteed Maximum Discharging Rate, (v) the Response Time in excess of 115% of the Guaranteed Response Time, or (vi) the Storage Capacity less than 85% of the Guaranteed Storage Capacity, respectively; ***bracketed material bid-specific – may be n/a***

2. a Test demonstrates that any of the Performance Criteria do not meet the levels required to pass such Test in accordance with Exhibit M – Battery Storage System Testing Protocols;

then Seller shall repair the Battery Storage System in accordance with Good Utility Practice and the procedure set forth in this Section 10.3. Within fourteen (14) days of any such failure, Seller shall demonstrate such remedy to the reasonable satisfaction of Company (a “Successful Repair”) or present to Company a description of the reason for the failure and a plan and schedule for a Successful Repair (the “Repair Plan”).

(B) If Company reasonably disagrees with Seller’s Repair Plan, Company may, at its expense, hire an Independent Engineer approved by Seller (such approval not to be unreasonably withheld) to perform an on-site assessment of the situation and make recommendations for completing a Successful Repair. Upon two (2) Business Days’ notice by Company, Seller shall grant the Independent Engineer and Company personnel access to the Battery Storage System and all relevant information including log books, maintenance records and reports, and other applicable materials. If, after seven (7) days of the delivery to Seller of such engineering report, Seller fails, in any material respect to meet the recommendations set forth in such report (as such recommendations may be updated from time to time by the Independent Engineer) for the Successful Repair, or make sufficient progress in effecting same consistent with Good Utility Practice, in each case as determined and reported by the Independent Engineer, Seller shall be in breach of this Section 10.3.

**10.4 Books and Records.**

(A) Seller shall maintain an accurate and up-to-date hourly operating log for 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. Seller shall deliver the operating log to Company electronically when reasonably requested.

(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

## Southwestern Public Service Company Model Storage Energy Purchase Agreement

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 the Site or such other [Texas/New Mexico] location as may be specified by Seller from time to time. Company may examine and make copies of such Operating Records from time to time upon request, during normal business hours.

10.5 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 standard safety precautions and shall conduct themselves in a manner that will not interfere with operation of the Facility.

### 10.6 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; Dispatch and Availability Reporting; Data Collection, and subject to Exhibit O – Battery Storage System Operating Procedures. Seller shall maintain the Facility's SCADA System and communications system so that they are capable of interfacing with and reacting to Company's AGC Set-Point and responding to signals from Company's EMCC in accordance with the AGC Protocols, subject to Exhibit O – Battery Storage System Operating Procedures.

(B) From and after the Commercial Operation Date, Seller shall provide Company, at Seller's expense, real time performance data in accordance with Exhibit I - AGC Protocols; Dispatch and Availability Reporting; Data Collection for the Term of this PPA. Seller shall maintain Seller-owned 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. Company shall have the right to disclose data gathered through 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, except as otherwise provided in Section 20.18.

10.7 Accreditation. Seller shall perform from time to time, at its expense, any reporting and testing (including capacity testing) of the Facility required by Governmental Authorities.

### 10.8 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 charging, discharging, delivery, dispatch, and receipt of Energy from the Facility. The Parties' initial representatives on the Operating Committee are set forth in Exhibit D – Notices and Contact Information.

(B) If requested by Company, the Operating Committee shall develop mutually agreeable written Battery Storage System Operating Procedures for the Battery

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

Storage System that are consistent with the requirements of this PPA, including Section 5.2 and Exhibit O – Battery Storage System Operating Procedures in order to address administrative 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. For the avoidance of doubt, Company (or its representative on the Operating Committee) shall have no obligation to agree to operational limitations except for those set forth in Part I of Exhibit O – Battery Storage System Operating Procedures.

(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, including any provision included within Exhibit O – Battery Storage System Operating Procedures.

**Security for Performance**

10.9 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.

(B) Seller shall establish and fund the Security Fund in the amount of [insert \$[200]/kW x Battery Storage System Nameplate Capacity kW], no later than thirty (30) Days following the Effective Date. Within five (5) Business Days following COD, the amount of the Security Fund shall be reduced to [insert \$[75]/kW x Battery Storage System Nameplate Capacity kW].

(C) Without notice to Seller, 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.

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

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

10.10 Replenishment. Seller shall replenish the Security Fund to the applicable levels set forth in Section 11.1(B) within fifteen (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 fifteen (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.

10.11 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 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 three hundred sixty (360) Days. Seller shall give Company at least thirty (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 three hundred sixty (360) Days or more (or, if shorter, through the end of the period required under Section 11.5 below) more than thirty (30) Days prior to each expiration date of the security. If the Letter of Credit is not renewed or extended at least thirty (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, in Company's account until such time as 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 [Texas/New Mexico], with net assets of at least \$1 billion (the “Escrow Account”).

1. The Escrow Account shall be governed by an escrow and account control agreement in a 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 PPA), 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. a money-market fund sponsored by the escrow agent;



**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

- Days or less;
- b. U.S. treasury obligations with a maturity of ninety (90)
  - c. commercial paper rated "A" or better, with a maturity of ninety (90) Days or less; and
  - d. 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 the excess to Seller.

(C) Following COD, the Security Fund may consist of a guaranty substantially in the form of Exhibit H – Form of Guaranty, from a parent or other guarantor ("Guarantor") acceptable to Company in its sole and absolute discretion, and up to an amount within Company's sole and absolute discretion. Subject to Company's sole and absolute discretion, to be eligible to provide a guaranty, the proposed Guarantor must have a minimum tangible net worth of at least \$250,000,000 and an Investment Grade Credit Rating (and if such Credit Rating is exactly equivalent to BBB- (S&P) / Baa3 (Moody's), the Guarantor must not be on credit watch by any rating agency). If the Credit Rating of the Guarantor is downgraded below Investment Grade, put on credit watch, or an event occurs that (in the reasonable determination of Company) portends a Material Adverse Effect in the creditworthiness of the Guarantor, then Company may require Seller to convert the guaranty to a Security Fund instrument meeting the criteria set forth in either paragraph (A) or paragraph (B) above no later than ten (10) Days after notice from Company.

(D) Company shall negotiate in good faith any 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 direct expenses (including the fees and expenses of counsel) incurred by Company 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.

10.12 Replacement. In the event that the Security Fund ever fails to comply with the requirements of this Article 11 or Company determines in a Commercially Reasonable manner that an event has occurred or circumstances have developed that threaten to cause the Security Fund to fail to comply with the requirements of this Article 11 (e.g. a Guarantor is placed on negative credit watch by a rating agency), Seller shall be required to replace the Security Fund with security in compliance with Article 11 within five (5) Days following notice thereof from Company.

10.13 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.

## Southwestern Public Service Company Model Storage Energy Purchase Agreement

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 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.

10.14 Expenses. Seller shall reimburse Company for its direct expenses (including the fees and expenses of counsel) incurred by Company 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 11 - Default and Remedies

#### 11.1 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 sixty (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 sixty (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 by Seller in this PPA that has a Material Adverse Effect on Seller's ability to perform this PPA is proven to have been false in any material respect when made.

Cure Period: None.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

5. Seller's failure to establish and, once established, 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:* Five (5) 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:* Ten (10) Business Days after Company provides notice that the amount is overdue.

8. Any representation or warranty by Seller in this PPA that has a Material Adverse Effect on Seller's ability to perform this PPA ceases to remain true during the Term, other than due to a change of law.

*Cure Period:* Thirty (30) Days after Company provides notice of such breach.

9. The breach by Seller of the Interconnection Agreement, which breach (i) materially interferes with Seller's production and/or delivery of any product or service to be produced or delivered pursuant to this PPA or Company's ability to accept or receive such product or service, (ii) Company's ability to transmit Energy beyond the Point of Delivery, and/or (iii) otherwise has a Material Adverse Effect on Company.

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

10. Seller starts-up, operates, charges, or discharges or permits or causes any third party (including Seller's designated operator) to start-up, operate, charge or discharge any Battery Storage System other than as specifically permitted under this PPA.

*Cure Period:* None.

11. Seller intentionally or knowingly delivers, or attempts to deliver, Energy for sale under this PPA that was not associated with or stored by the Facility.

*Cure Period:* None.

12. The average Equivalent Availability Factor of the Battery Storage System is less than ninety percent (90%) on average for a Commercial Operation Year.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

*Cure Period:* Seller shall be deemed to have cured this default if the average Equivalent Availability Factor of the Battery Storage System is at least ninety percent (90%) for the subsequent Commercial Operation Year.

13. The Round Trip Efficiency derived from a Test is less than 90% of the then-applicable Guaranteed Round Trip Efficiency.

*Cure Period:* Seller shall be deemed to have cured this default if, within thirty (30) Days, Seller completes a Test demonstrating that the Round Trip Efficiency is at least equal to 90% of the then-applicable Guaranteed Round Trip Efficiency.

14. Seller's failure to complete a Successful Repair in accordance with Section 10.3.

*Cure Period:* Seller shall be deemed to have cured this default if, within thirty (30) Days, Seller completes a Successful Repair.

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

16. Seller removes from the Site equipment upon which the Commercial Operation Test has been based, except for the purposes of replacement, refurbishment, repair or maintenance, and the equipment is not returned within five (5) days after notice from Company.

*Cure Period:* None

17. Seller makes any material misrepresentation or omission in any report (including any status report, logs, and reports required under Section 4.1, Section 5.5, Section 10.4, Exhibit I - AGC Protocols; Dispatch and Availability Reporting; Data Collection, and Exhibit M – Battery Storage System Testing Protocols) required to be made or furnished by Seller pursuant to this PPA.

*Cure Period:* Five (5) Days after Company provides notice.

18. Subject to Section 7.3, Seller makes any material misrepresentation or omission in any Availability Notice.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

*Cure Period:* Such Event of Default may be cured if (i) the default was caused solely by an inadvertent error or omission of an administrative or clerical nature and (ii) such default is cured within one (1) Business Day after knowledge of such inadvertent error or omission in the Availability Notice.

(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) *Option to Acquire Facility upon Termination due to Seller Default.* If Company terminates this PPA under this Section 12.1 following COD, then, at any time within ninety (90) Days following such termination, Company may give notice to Seller of Company's intent to purchase the Facility from Seller (a "Default Option Preliminary Exercise Notice").

1. As soon as practicable following delivery of a Default Option Preliminary Exercise Notice, the Parties shall appoint an independent appraiser experienced in appraising utility-scale battery storage facilities to determine the fair market value ("Default FMV") of the Facility. If the Parties cannot agree on the identity of the appraiser, the appraiser shall be selected by the Arbitration Service. Seller shall provide to the appraiser full access to the Facility and the Site, to Seller's contracts, books and records, and to relevant personnel of Seller, during normal business hours. Such access shall include the right to conduct inspections and tests (including environmental testing of the Site and operating tests on the Facility) necessary or appropriate for the determination of the Default FMV of the Facility. Company shall pay all fees and costs of the appraiser. The Parties shall direct the appraiser to use his/her best efforts to complete and deliver his/her appraisal to the Parties within forty-five (45) Days following his/her

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

appointment and to keep all information obtained by appraiser from any investigations as Confidential Information subject to the provisions of Section 20.18.

2. Following delivery of a Default Option Preliminary Exercise Notice, Seller shall provide to Company full access to the Facility and the Site, to Seller's contracts, books and records, and to relevant personnel of Seller, during normal business hours. Such access shall include the right to conduct lien searches, surveys, inspections and tests (including environmental testing of the Site and operating tests on the Facility) necessary or appropriate for due diligence review of the Facility. All information obtained by Company from such investigations shall be deemed Confidential Information subject to Section 20.18. All inspections, testing and access to the Facility and the Site by Company and the appraiser shall comport with all of Seller's policies governing the use, operation, and maintenance of the Facility, including health, safety and environmental requirements.

3. Within sixty (60) Days following receipt of an appraisal under this Section 12.1(E), Company may elect to purchase the Facility from Seller (a "Default Option"). If Company fails to notify Seller of Company's election within such 60-Day period, Company shall be deemed to have elected not to exercise the Default Option. If Company exercises the Default Option, the purchase price to be paid by Company for the Facility in connection with any exercise of the Default Option shall be the Default FMV of the Facility, as determined by the appraiser. Seller shall cooperate in all respects reasonably necessary for Company to exercise its Default Option rights

4. If Company exercises the Default Option, the Parties shall negotiate and execute a PSA, subject to clause (iv) below. The PSA shall include the terms and conditions set forth in Exhibit L-2 – Facility PSA Provisions. In the event that the Parties cannot agree on the final form of PSA, (i) the issue shall be submitted to "baseball" arbitration in Amarillo, Texas before one arbitrator appointed by the Arbitration Service, i.e. each Party shall submit to the arbitrator a form of proposed PSA, and the arbitrator shall be required to select one of the two forms to be used as the PSA in the transaction, without compromise, as the arbitral award, (ii) the period for closing of the transaction shall be extended for the period required to complete arbitration, (iii) the Party whose form PSA is rejected shall pay the fees and costs of the Arbitration Service, and (iv) if Company's form of PSA is rejected, Company shall have thirty (30) Days following such rejection to decide whether to execute and deliver Seller's form of PSA or abandon the transaction.

5. This Section 12.1(E) shall be specifically enforceable by Company, without bond and without the need to prove irreparable harm.

11.2 Default by Seller: Failure to Achieve Critical Path Development Milestone or COD.

(A) Delay. Seller shall be in default under this PPA if the Facility fails to achieve any Critical Path Development Milestone by the date set forth in Section 4.1(B) ("CPD Delay") or COD by the Target COD ("COD Delay").

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

(B) Seller shall be liable to pay *[insert \$[250]/MW x Battery Storage System Nameplate Capacity MW]* (“CPD Liquidated Delay Damages”) to Company as a liquidated damage and not a penalty, in lieu of Actual Damages, for each Day of each CPD Delay. CPD Liquidated Delay Damages shall begin to accrue on the Day after the applicable missed Critical Path Development Milestone (in each case, as it may be extended due to Force Majeure) until the first to occur of the satisfaction of the applicable Critical Path Development Milestone or termination of this PPA pursuant to Section 12.2(C) below. CPD Liquidated Delay Damages shall apply if any Critical Path Development Milestone is missed, and the payment of CPD Liquidated Delay Damages with respect to any given Critical Path Development Milestone shall extend each subsequent Critical Path Development Milestone on a day-for-day basis. In the event Seller incurs CPD Liquidated Delay Damages but subsequently achieves the Target COD, Company shall reimburse Seller all such CPD Liquidated Delay Damages.

(C) Seller shall be liable to pay *[insert \$[250]/MW Battery Storage System Nameplate Capacity MW]* (“COD Liquidated Delay Damages” and, together with CPD Liquidated Delay Damages, the “Liquidated Delay Damages”) to Company as a liquidated damage and not a penalty, in lieu of Actual Damages, for each Day of a COD Delay. COD Liquidated Delay Damages shall begin to accrue on the Day after the Target COD (in each case, as it may be extended due to Force Majeure), until the first to occur of the COD or termination of this PPA pursuant to Section 12.2(C) below. The payment of CPD Liquidated Delay Damages shall not cure Seller’s failure to achieve COD by the Target COD. For the avoidance of doubt, if Seller is delayed in reaching one or more Critical Path Development Milestones and the Target COD, then Seller may incur both CPD Liquidated Delay Damages and COD Liquidated Delay Damages.

(D) 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 CPD Delay or COD Delay.

(E) Cure. Subject to the obligations in this Section 12.2(B), Seller shall have a cure period of up to ninety (90) Days for its failure to achieve any Critical Path Development Milestone by the date set forth in Section 4.1(B) (subject to compliance with Seller’s obligations in Section 4.1(B)) or Commercial Operation by the Target COD, as applicable so long as the following conditions are satisfied:

(F) Seller’s payment of accrued Liquidated Delay Damages shall be a condition to any such cure. In order to utilize the cure period set forth in this Section 12.2(B), Seller must, at any time prior to, but no later than, 6:00 a.m. on the third Business Day immediately prior to the Critical Path Development Milestone date set forth in Section 4.1(B) or the Target COD, as applicable (as such dates may have been previously extended pursuant to this Section 12.2(B)), provide Company with (a) Notice of its election to extend such Critical Path Development Milestone date or the Target COD, (b) Seller’s reasonable estimate of the required duration of the full estimated extension period, and (c) its payment of Liquidated Delay Damages for each Day of the full estimated extension period. For the avoidance of doubt, the Security Fund may not be utilized by Seller for the payment of Liquidated Delay Damages.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

(G) In addition, for any extensions pursuant to Section 12.2(B) of more than an aggregate total of forty-five (45) Days, Seller must, at any time prior to, but no later than, 6:00 a.m. on the third Business Day immediately prior to the Critical Path Development Milestone date set forth in Section 4.1(B) or the Target COD, as applicable (as such dates may have been previously extended pursuant to this Section 12.2(B)), provide a written opinion from a mutually-agreeable Independent Engineer that such Critical Path Development Milestone or COD, as applicable, can reasonably be achieved within such additional period.

(H) [In the event Seller's CPD Delay or COD Delay extends beyond the date estimated under Section 12.2(B)(1)(b) above, Company shall invoice Seller on a weekly basis for additional Liquidated Delay Damages for each day the CPD Delay or COD Delay extends beyond the estimated completion date. Seller shall pay such invoices within five (5) Business Days of their receipt. If any such CPD Delay or COD Delay extends the actual delay beyond a total of forty-five (45) Days, Seller must provide the written opinion required under Section 12.2(B)(2) at least three Business Days prior to the forty-fifth (45) day of the delay. In no event shall any such extension of realized delays exceed the ninety (90) Day cure period permitted under Section 12.2(B).]

(I) Termination. Failure to cure a CPD Delay or 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 (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 addition to accrued Liquidated Delay Damages but in lieu of Actual Damages for the balance of the Term, collect from Seller liquidated damages therefor in the amount of [insert \$100/kW x Battery Storage System Nameplate Capacity kW].

**11.3 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 sixty (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



**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

of such proceedings against Company without such authorization, application or consent, which proceedings remain undismissed or unstayed for sixty (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 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.

5. 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:* Ten (10) Business Days after Seller provides notice that the amount is overdue.

6. Any representation or warranty by Company in this PPA that has a Material Adverse Effect on Company's ability to perform this PPA ceases to remain true during the Term, other than due to a change of law.

*Cure Period:* Thirty (30) Days after Seller provides notice of such breach.

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

*Cure Period:* Thirty (30) Days after Seller provides notice; *provided*, that if such default is not reasonably capable of cure within such thirty (30) Day period, Company shall have such additional period of time (not to exceed ninety (90) Days in any event) as is reasonably necessary for cure, so long as Company initiates cure within such thirty (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

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

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.

11.4 Limitations on Damages.

(A) Except as otherwise provided in Section 12.4(B), following COD Seller's aggregate financial liability to Company for Actual Damages shall not exceed [insert \$[75]/kW x Battery Storage System Nameplate Capacity] (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 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 Energy, capacity, or Ancillary Services 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 16.5;

5. any indemnification claim under this PPA;

6. any Environmental Contamination caused or exacerbated 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**

## Southwestern Public Service Company Model Storage Energy Purchase Agreement

**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.

11.5 **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.

11.6 **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

11.7 **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 12 - Dispute Resolution

### 12.1 **Negotiation.**

(A) In the event of any dispute arising under or associated with the Parties’ performance of this PPA (a “**Dispute**”), within ten (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. Any Dispute that is mutually agreed by the Parties (each acting in its sole and complete discretion) to involve engineering, construction or technical matters as the sole or primary area of disagreement between the Parties shall be deemed to be a “**Technical Dispute**” (each, a “**Technical Dispute**”). The Parties agree that the technical expert for purposes of resolving any Technical Disputes shall be a mutually-agreeable Independent Engineer, the costs and expenses for which will be shared equally by the Parties. The Independent Engineer may, if he or she deems it appropriate, hold a hearing on the subject of the Technical Dispute and shall, upon the request of either Party, meet with the Parties or their representatives with respect to such

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

Technical Dispute within three (3) Business Days of the request for such meeting. The Independent Engineer shall render a decision solely resolving the Technical Dispute within five (5) Business Days of the meeting with the Parties or their representatives or hearing (if any), or such longer period as the Parties and the Independent Engineer may agree. The decision of the Independent Engineer shall be advisory rather than final and binding on the Parties.

(B) In the event the Parties' representatives cannot resolve the Dispute, or if either Party is not satisfied with the resolution of the Technical Dispute by the Independent Engineer, within thirty (30) Days after the first meeting, either Party may request that consideration and resolution of the Dispute be transferred to senior management. Within ten (10) 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 ten (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 Sections 13.3, 19.3 and 19.5.

12.2 Time Bar. If no Dispute Notice has been issued within eighteen (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.

12.3 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 ten (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 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, in addition to the Security Fund; and

### Southwestern Public Service Company Model Storage Energy Purchase Agreement

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

12.4 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 **[insert state where Facility is located]**, exclusive of conflict of laws principles.

12.5 Venue. The Parties submit to the exclusive jurisdiction of the state courts of the State of Texas for purposes of resolving any Dispute hereunder, except as provided in Sections 12.1 (E), 19.3 and 19.5. Venue for any court proceedings shall lie exclusively in the Texas District Court for the County of Potter or, if jurisdictionally available, the U.S. District Court for the Northern District of Texas.

12.6 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, subject only to Section 19.5.

### Article 13 - Force Majeure

13.1 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 Effective Date, (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; By way of example only, "Force Majeure" includes an act of God, flood, drought, earthquake, storm, fire, pestilence, lightning and other natural catastrophes, war, riot, civil disturbance or disobedience, terrorism or sabotage. Force Majeure shall not include:

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

(A) inability, delays or excess cost, to procure any equipment necessary to perform this PPA, including as a result of the imposition of tariffs or any other changes in law or supply chain disruptions;

(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 to obtain any Permits required for the Facility, including 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;

(F) changes in market conditions;

(G) any delay or failure by the Transmission Authority to perform its obligations under the Interconnection Agreement or any Curtailment or reduction in deliveries by the Transmission Authority;

(H) failure of the performance of any other entity, including the failure of vendors or suppliers to deliver any required components to Seller, except to the extent itself caused by Force Majeure;

(I) the delay or effects of the COVID epidemic or pandemic (or any variant of COVID), except to the extent there occurs after the Effective Date: (A) the adoption or taking effect of any Applicable Law in respect of such COVID epidemic or pandemic (or any variant thereof), or (B) a change in any Applicable Law or any health or safety recommendation or guideline of a Governmental Authority in respect of such COVID epidemic or pandemic (or variant thereof);

(J) changes of Applicable Law; or

(K) labor strikes, slowdowns, work stoppages, or other labor disruptions.

13.2 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 notice describing the circumstances and impact of the Force Majeure no later than five (5) Business Days after the occurrence 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. Failure to provide such notice within the required time period shall be deemed conclusive evidence that the claimed Force Majeure event either did not occur or did not impact Seller’s ability

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

to perform its obligations under this Agreement in any fashion and thus Seller shall not be entitled to relief under this Article 14.

**13.3 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, (i) prior to COD, Force Majeure affecting Seller continues for a period of ninety (90) consecutive Days or any one-hundred fifty (150) non-consecutive Days, or (ii) after COD Force Majeure affecting Seller continues for a period of one-hundred eighty (180) consecutive Days or any two-hundred seventy (270) non-consecutive Days in any three consecutive Commercial Operation Years, Company may, at any time following the end of such period, 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.

**Article 14 - Representations, Warranties and Covenants**

(A) 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:

1. 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.

2. 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:

a. 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);

b. 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;

c. 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

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

expected to have a Material Adverse Effect on the representing Party's ability to perform its obligations under this PPA;

d. 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.

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

1. 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.

2. 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."

3. Such Party is (i) 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 (ii) entering into this PPA solely for purposes related to its business as such.

(C) Seller further hereby covenants to Company throughout the Term that, in connection with its obligations under this PPA:

1. Seller shall deliver to Company the products and services required by this PPA free and clear of all liens, security interests, claims and encumbrances or any interest therein or thereto by any person.

2. Seller (a) is in compliance with, and requires its suppliers, subcontractors, vendors, and other business partners to comply with, the Uyghur Forced Labor Prevention Act, Pub. L. 117-78 (2021) (the "UFLPA"), Section 307 of the Tariff Act of 1930, 19 U.S.C. §1307, and all other Applicable Laws prohibiting any form of convict, indentured, or forced labor, including forced or indentured child labor (collectively, the "Forced Labor Laws"), and (b) has adopted and implemented appropriate policies to ensure that it, and its suppliers, subcontractors, vendors, and other business partners, engage in regular audits or other comparable efforts to monitor ongoing compliance with the Forced Labor Laws and maintain any certifications required thereunder.

**Article 15 - Insurance**

15.1 Evidence of Insurance. No later than commencement of construction and thereafter at least five Days prior to each applicable expiration date, Seller shall provide Company with two copies of insurance certificates acceptable to Company evidencing



**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

that insurance coverages for the Facility are in force and in compliance with the specifications for insurance coverage set forth in Exhibit E – Insurance Coverage to this PPA. Such certificates shall

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

(B) provide that Company shall receive thirty (30) Days prior written notice of non-renewal, cancellation of, or significant modification to any of the corresponding policies (except that such notice may be ten (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.

15.2 Policy Requirements. All policies shall be written with insurers with an AM Best rating of at least A-VII or a Standard & Poors 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.

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

15.4 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 Effective Date 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 Coverage 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 energy storage plants of similar type, geographic location and capacity (or, if not enough data is available for energy storage plants, such advisor may use utilize data regarding electric generation projects as a proxy for energy storage). 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.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

15.5 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 16 - Indemnity**

16.1 Indemnification: General. Each Party (the "Indemnifying Party") shall indemnify, defend and hold the other Party (the "Indemnified Party") harmless from and against all claims, demands, lawsuits (including citizen suits), losses, liabilities, fines, penalties, and expenses (including attorneys' fees) (generally, "Losses"), to the extent proximately caused by

(A) a default under this PPA (including any breach by Seller of the Safety Requirements) by the Indemnifying Party;

(B) a violation or alleged violation of Applicable Laws by the Indemnifying Party; and

(C) the negligence, intentional acts and other misconduct of the directors, officers, employees, or agents of the Indemnifying Party.

16.2 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.

16.3 Indemnification: Company Remote Start of Facility. Should Company remotely start the Facility, Seller shall indemnify, defend and hold Company harmless from and against all claims, demands, lawsuits (including citizen suits), losses, liabilities, fines, penalties, and expenses (including attorneys' fees) that may result therefrom.

16.4 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.

16.5 Procedures.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

(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.

16.6 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 Losses 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 17 - Lender Provisions**

17.1 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 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

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

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.

**17.2 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 ten (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 18 - Assignment**

**18.1 Assignment by Seller.**

(A) Seller shall not sell, exchange or otherwise transfer the Facility or any material portion thereof to any third party, nor shall Seller 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 or delayed. Company shall have no obligation to provide any consent under this Article 19 unless:

1. Seller has complied with Sections 19.3, 19.4 and 19.5 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 energy storage facilities akin to the Facility, either directly, through its affiliates or through a Qualified Operator;
4. the transferee (together with its parents and affiliates) possesses an Investment Grade Credit Rating or other creditworthiness satisfactory to Company;
5. Seller has provided to Company at least thirty (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.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

(B) 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.

(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, and may subcontract some or all of its duties under this PPA, upon notice to but without the consent of Company

(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.

**18.2 Assignment by Company.**

(A) 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 PUCT and/or the NMPRC. Any other assignment of this PPA by Company shall require the prior written consent of Seller, not to be unreasonably withheld or delayed.

(B) If an assignee of Company possesses 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.

**18.3 Right of First Offer ("ROFO").**

- (A) At any time after the Commercial Operation Date,
1. (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. (2) if Seller's parent proposes to sell a majority of any class of voting and/or non-voting equity interests in Seller (excluding interests owned by tax equity investors) 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. (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 any class of voting and/or non-voting equity interests in Seller's parent (excluding interests owned

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

by tax equity investors) 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 sixty (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 and execute a PSA. If Company elects to purchase the Facility the PSA shall include the price and other terms set forth in the ROFO Notice and such other terms as are set forth in Exhibit L-2 - Facility PSA Provisions. If Company elects to purchase the specified equity interests, the PSA shall include the price and other terms set forth in the ROFO Notice and such other terms as are set forth in Exhibit L-3 – MIPSAs Provisions.

(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 twelve (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.

**18.4 PFT.**

(A) Seller shall give Company at least ninety (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

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

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 (12) 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 [insert \$[5]/kW x Battery Storage System Nameplate Capacity kW].

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

1. 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 transmission by Seller or any of its Affiliates of a draft letter of intent, memorandum of understanding, term sheet or similar document (or a revised version thereof) to an 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, term sheet 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, (ii) any transaction among Affiliates of Seller, and/or (iii) any transaction for which Seller offers ROFO rights to Company under Section 19.3.

**18.5 Option.**

(A) At any time during each of the periods that is within one hundred eighty (180) Days following any of (i) the sixth (6<sup>th</sup>) anniversary of COD, (ii) the tenth (10<sup>th</sup>) anniversary of COD, (iii) the fourteenth (14<sup>th</sup>) anniversary of COD and (iv) the end of the Term, Company (or an Affiliate) may give notice to Seller of Company's (or such Affiliate) intent to purchase (i) the Facility from Seller (a "Facility Acquisition") or (ii) all, but not less than all, of Ultimate Parent's direct and indirect right, title and interest in the equity interests of Seller, and including, if applicable, Ultimate Parent's direct and indirect right, title and interest in the tax equity partnership (the "TE Partnership") that owns, directly or indirectly, equity interests in Seller (together, the "Equity Interest") (an "Equity Interest

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

Acquisition”) with such notice in either case referred to as an “Option Preliminary Exercise Notice”.

(B) As soon as practicable following delivery of an Option Preliminary Exercise Notice for a Facility Acquisition, the Parties shall appoint an independent appraiser experienced in appraising utility-scale battery storage facilities (as may be applicable to the bid) to determine the fair market value (“FMV”) of the Facility. If the Parties cannot agree on the identity of the appraiser, the appraiser shall be selected by the Arbitration Service.

1. Seller shall provide to the appraiser full access to the Facility and the Site, to Seller’s contracts, books and records, and to relevant personnel of Seller, during normal business hours. Such access shall include the right to conduct inspections, surveys and tests (including environmental testing of the Site and operating tests on the Facility) necessary or appropriate for the determination of FMV of the Facility.

2. Company shall pay all fees and costs of the appraiser.

3. The Parties shall direct the appraiser to use his/her/its best efforts to complete and deliver his/her/its appraisal to the Parties within two (2) months following his/her/its appointment and to keep all information obtained by appraiser from any investigations as Confidential Information subject to the provisions of Section 20.18.

(C) In the case of an Option Preliminary Exercise Notice for an Equity Interest Acquisition, Company will deliver, together with the Option Preliminary Exercise Notice, its calculation of the purchase price for the Equity Interest Acquisition utilizing the formula for such determination set forth in Exhibit L-1 – Equity Purchase Price Formula. The Parties’ reasonably believe, based on all facts and circumstances at the time of executing this PPA, that the purchase price for the Equity Interest Acquisition so determined by such formula will not be less than the fair market value of the Equity Interest on the relevant date. All information obtained by Company from such investigations shall be deemed Confidential Information subject to Section 20.18.

(D) Following delivery of an Option Preliminary Exercise Notice, Seller shall provide to Company full access to the Facility and the Site, to Seller’s contracts, books and records, and to relevant personnel of Seller, during normal business hours. Such access shall include the right to conduct lien searches, surveys, inspections and tests (including environmental testing of the Site and operating tests on the Facility) necessary or appropriate for due diligence review of the Facility. All information obtained by Company from such investigations shall be deemed Confidential Information subject to Section 20.18.

(E) All inspections, testing and access to the Facility and the Site by Company and the appraiser shall comport with all of Seller’s policies governing the use, operation, and maintenance of the Facility, including health, safety and environmental requirements, and shall be conducted in a manner so as to minimize disruption in the operation of the Facility and to avoid any adverse economic impacts to Seller under this PPA.



**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

(F) In the case of a Facility Acquisition, within sixty (60) Days following the determination of FMV as described above, Company may elect to purchase the Facility from Seller (an “Option”). If Company fails to notify Seller of Company’s election within such 60-Day period, Company shall be deemed to have elected not to exercise the Option.

(G) In the case of a Facility Acquisition, the purchase price to be paid by Company for the Facility in connection with exercise of the First Option shall be the greater of:

(H) the sum of:

1. (x) amount of Facility Debt (if any) as of the date of issuance of the Option Preliminary Exercise Notice, and

2. (y) if the relevant tax equity agreements allow the other members of the TE Partnership the option to purchase, at “fair market value” (as determined in those tax equity agreements) or a pre-determined price, the interest of the tax equity investor that has invested directly or indirectly in the Facility or Seller, then the amount of such purchase option price or, in any other case, the amount necessary to cause the after-tax internal rate of return of such tax equity investor’s investment to equal the targeted rate of return under its tax equity agreements, or

3. the FMV of the Facility, as determined by the appraiser.

(I) If Company exercises the Option, the Parties shall use Commercially Reasonable Efforts to negotiate and sign either:

(J) A PSA for the Facility. The PSA shall include the terms and conditions set forth in Exhibit L-2 – Facility PSA Provisions.

(K) A PSA for the Equity Interest. The PSA shall include the terms and conditions set forth in Exhibit L-3 – MIPSAs Provisions.

(L) This Section 19.5 shall be specifically enforceable by Company, without bond and without the need to prove irreparable harm.

Seller shall cooperate, and cause its Affiliates to cooperate, in all respects reasonably necessary for Company to exercise its rights under this Section 19.5, and shall operate the Facility in the ordinary course of business following the date of issuance of an Option Preliminary Exercise Notice.

18.6 Memo of Option. In connection with the Parties’ execution and delivery of this PPA, the Parties are executing and Company is recording a “Memorandum of Option” memorializing its Default Option rights under Section 12.1(E), its ROFO rights under Section 19.3 and its Option rights under Section 19.5.

**Article 19 - Miscellaneous**

19.1 Notices.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

(A) Notices required by this PPA shall be in writing addressed to the other Party at the addresses noted in Exhibit D – Notices and Contact Information, as either Party updates such addresses from time to time by notice to the other Party. A Notice shall be deemed to have been received as follows: (1) if it is delivered by email, when the recipient, by an email sent to the email address for the sender stated in Exhibit D – Notices and Contact Information or by a notice delivered by another method in accordance with this Section 20.1(A), acknowledges having received that email, with an automatic “read receipt” not constituting acknowledgment of an email for purposes of this Section 20.1(A); and, (2) If it is delivered in writing, 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.

**19.2 Taxes and Tax Incentives.**

(A) Company shall purchase all 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 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 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 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 Effective Date.

(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.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

19.3 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 performance of this PPA.

(C) Upon permanent cessation of energy storage by 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.

19.4 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

19.5 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).

19.6 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

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

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 PUCT/NMPRC.

19.7 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.

19.8 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.

19.9 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.

19.10 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.

19.11 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 and delivery of the products and services required by this PPA. Any amendment of

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

this PPA, or any waiver of any provision hereof, shall be evidenced by a writing signed by the Parties to be bound thereby.

19.12 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.

19.13 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.

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

19.15 Counterparts and Electronic Signatures. This PPA may be executed in counterparts, and each executed counterpart shall have the same force and effect as an original instrument. A manually signed copy of this PPA, or a copy of this PPA signed with an electronic or digital signature, delivered by e-mail shall be deemed to have the same legal effect as delivery of an original signed copy of this Agreement. No legally binding obligation shall be created with respect to a Party until such Party has delivered or caused to be delivered a signed copy of this PPA.

19.16 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, and other relevant factual information about the relationship.

19.17 Exhibits. Either Party may change the information in Exhibit D – Notices and Contact Information 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.

19.18 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:

a. is publicly available as of the Effective Date, or becomes publicly available during the Term through no fault of the recipient Party;

b. can be documented was independently developed by the recipient Party; and/or

c. is disclosed to the recipient Party from an ultimate source other than the protected Party, without breach of this PPA by the recipient Party.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

(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 must be disclosed by Applicable Law (e.g. pursuant to subpoena or civil discovery) other than in connection with a PUCT/NMPRC proceeding, 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. For the avoidance of doubt, this Section 20.18(C) shall be inapplicable to any disclosure of Confidential Information to a PUC, its staff, intervenors and/or consumer counsel, disclosure of which shall be uninhibited by this PPA.

(D) In the event that Confidential Information is disclosed to the PUCT and/or the NMPRC, their staff, parties, intervenors, participants or consumer counsel in any regulatory or administrative proceedings before the PUCT and/or the NMPRC, the disclosing Party shall submit such Confidential information in accordance with applicable PUCT and/or the NMPRC confidentiality rules and procedures, the PUCT and/or the NMPRC protective order or signed non-disclosure agreement. 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.

**19.19 Accounting Treatment.**

(A) If and when Company reasonably determines that Company must consolidate financial information of Seller into Company's financial statements under FASB ASC 810 or other accounting standard applicable to Company:

1. the Parties shall use Commercially Reasonable Efforts to amend this PPA and/or the Parties' protocols for operation of the Facility to avoid such treatment, at the least possible cost to the Parties, consistent with the intent of this PPA to the extent possible; or

2. if such avoidance is not reasonably feasible, Seller shall provide to Company from time to time upon request such quarterly and annual financial information as may be needed for Company to comply with such standard, in such format and within such time frames as Company may reasonably request.

(B) If and when Company reasonably determines that Company must treat this PPA as a "finance lease" under FASB ASC 840 or other accounting standard

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

applicable to Company, the Parties shall use Commercially Reasonable Efforts to amend this PPA and/or the Parties' protocols for operation of the Facility to avoid such treatment, at the least possible cost to the Parties, consistent with the intent of this PPA to the extent possible, if so requested by Company.

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**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

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

*Seller:*

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

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

[NAME]

[TITLE]

*Company:*

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

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

[NAME]

[TITLE]

Authorized signatory for Southwestern Public Service Company



**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

**EXHIBIT A  
DEFINITIONS**

The following terms shall have the meanings set forth herein:

"AC" shall have the meaning set forth in Section 1.1(D).

"Actual Damages" shall have the meaning set forth in Section 12.4(C).

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

"AGC" or "Automatic Generation Control" means the equipment and capability of an electric energy storage facility automatically to adjust the charging and discharging 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; Dispatch and Availability Reporting; Data Collection, as such protocols may be modified from time to time in accordance with Section 10.8.

"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 Energy to be stored by the Battery Storage System. The AGC Set-Point is calculated by the EMCC AGC system and communicated electronically to the Facility via the SCADA System.

"Annual Throughput Limit" means [ \_\_\_\_\_ ] MWh.

"Applicable Law" means all laws, statutes, treaties, codes, ordinances, regulations, standards, 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, including, for the avoidance of doubt, electrical, building, fire, zoning, environmental, and occupational health and safety requirements.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

“Arbitration Service” means Judicial Arbitration and Mediation Services, Inc. (aka JAMS).

“Availability” shall have the meaning set forth in Exhibit M – Battery Storage System Testing Protocols.

“Availability Notice” shall have the meaning set forth in Section 7.3(B).

“Back-Up Metering” shall have the meaning set forth in Section 5.5(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.

“Battery Payment Rate” is as set forth on Exhibit J – Battery Payment Rate and Capacity Payment Rate.

“Battery Storage System” means that portion of the Facility that is required to store energy using the Battery Units, including, without limitation, 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 and delivery of the foregoing.

“Battery Storage System Forced Outage” means any Outage of the Battery Storage System that is not an Excused Outage.

“Battery Storage System Nameplate Capacity” means the designed maximum capacity of the Battery Storage System expressed in MWs and calculated by dividing the MWhs of energy the Battery Storage System is designed to store, divided by the number of hours the Battery Storage System is designed to discharge at full output, as designated by the manufacturer, as measured at the Interconnection Point, as set forth in Section 3.2. For the avoidance of doubt, the Battery Storage System Nameplate Capacity may not be greater than the interconnection capacity specified in the Interconnection Agreement.

“Battery Storage System Operating Procedures” means those procedures applicable to the operation of the Battery Storage System, as developed by the Operating Committee in accordance with the procedure, and subject to the requirements, set forth in Exhibit O – Battery Storage System Operating Procedures.

“Battery Storage System Planned Outage” means a planned removal from service of the Battery Storage System, or some part thereof constituting not less than ten percent (10%) of the Battery Storage System Nameplate Capacity, that is required for inspection, or routine, preventive or corrective maintenance; provided that Battery Storage System Planned Outages during any Commercial Operation Year may not exceed ninety-six (96) hours.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

“Battery Units” means the batteries, power electronic systems, enclosures and other equipment necessary for the Battery Storage System to store electricity at the Site and transmit such electricity upon command. The manufacturer and model number of the Battery Units will be identified on Exhibit C – Facility Description and Site Maps.

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

“Capacity Payment Rate” shall have the meaning set forth in Exhibit J – Battery Payment Rate and Capacity Payment Rate

“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: (a) a transfer of a majority of the ownership interests in Seller or such owner; (b) 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 (c) a sale or conveyance of any direct or indirect ownership interest in Seller following which [REDACTED] (“Ultimate Parent”) 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:

- (i) transactions exclusively among Affiliates of Seller;
- (ii) any exercise by the Facility Lender of its rights and remedies under the Financing Documents, with respect to any Facility Debt secured only by the Facility,;
- (iii) a change of control of Ultimate Parent; or
- (iv) any change of economic and/or voting rights triggered in Seller’s organizational documents arising from (a) a tax-equity financing of the Facility, or (b) a transaction in which interests in Seller or any direct or indirect owner are sold to or by a tax equity investor.

“Charging Energy” means energy withdrawn from the Transmission Authority’s electrical system and delivered at the Point of Delivery used to charge the Battery Storage System and discharged at a later time.

“Charging Energy Price” means, if Company has joined a regional transmission organization or is participating in an organized market for which nodal prices can be determined, then the applicable nodal price per MWh in the day-ahead market as determined by Company in its sole discretion, or, if not, then the applicable price per MWh as determined by Company in its sole discretion pursuant to its cost calculator.

“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.

“COD Delay” shall have the meaning set forth in Section 12.2.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

"COD Liquidated Delay Damages" shall have the meaning set forth in Section 12.2(A).

"COD Notice" shall have the meaning set forth in Section 4.5.

"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 Test" means the commercial operation test described in Exhibit M – Battery Storage System Testing Protocols.

"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; (c) is consistent with the terms in this PPA; and (d) 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.

"Company" shall have the meaning set forth in the introductory paragraph.

"Company Dispatched Test" shall have the meaning set forth in Section 5.6(D).

"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(A).

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

"COVID" means SARS-CoV-2 or COVID-19, and any evolutions or mutations thereof or related or associated epidemics, pandemic or disease outbreaks.

"CPD Delay" shall have the meaning set forth in Section 12.2(A).

"COD Liquidated Delay Damages" shall have the meaning set forth in Section 12.2(A).

"CPD Liquidated Delay Damages" shall have the meaning set forth in Section 12.2(A).

"Credit Rating" of any person or entity means the lowest rating assigned to such person or entity's long-term debt or deposit obligations (unenhanced by third-party

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

support) by Standard & Poor's and Moody's. If such person or entity 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 or entity by Standard & Poor's or Moody's.

"Critical Path Development Milestone" shall have the meaning set forth in Section 4.1(B).

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

"Day" means a calendar day.

"DC" shall have the meaning set forth in Section 1.1(D).

"Default FMV" shall have the meaning set forth in Section 12.1(E)1.

"Default Option" shall have the meaning set forth in Section 12.1(E)3.

"Default Option Preliminary Exercise Notice" shall have the meaning set forth in Section 12.1(E).

"Delivery Period" shall be the period during which the Facility is available to receive Charging Energy from, or deliver Discharging Energy to, Company, commencing at 12:01 am on the Commercial Operation Date and continuing until midnight on the Scheduled Termination Date, subject to early termination as provided in this PPA.

"Discharging Energy" means all Energy discharged by the Battery Storage System and delivered to the Point of Delivery.

"Discharging Energy Price" means, if Company has joined a regional transmission organization or is participating in an organized market for which nodal prices can be determined, then the applicable nodal price per MWh in the day-ahead market as determined by Company in its sole discretion, or, if not, then the applicable price per MWh as determined by Company in its sole discretion pursuant to its cost calculator.

"Dispatchability Adjustment" shall have the meaning set forth in Section 8.4(D).

"Dispatch Availability Factor" shall have the meaning set forth in Section 8.4(D).

"Dispatch Notice" means the operating instruction, and any subsequent updates, given by Company to Seller, directing the Battery Storage System to (i) charge at a specified megawatt input or discharge at a specified megawatt output, and (ii) at a specified Ramp Rate. Dispatch Notices may be communicated electronically, via SCADA System signal, facsimile, telephonically or other verbal means. Telephonic or other verbal communications shall be documented (either recorded by tape,

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

electronically or in writing) and such recordings shall be made available to both Company and Seller upon request.

“Dispatch Parameter” means, as applicable, the (i) the megawatt input for charging specified in a Dispatch Notice; and (ii) the megawatt output for discharging specified in a Dispatch Notice.

“Dispute” shall have the meaning set forth in Section 13.1(A).

“Dispute Notice” shall have the meaning set forth in Section 13.1(A).

“Effective Date” shall have the meaning set forth in the introductory paragraph.

“Electric Metering Devices” means revenue quality meters, metering equipment and/or data processing equipment used to measure, record and transmit data with respect to the to the Charging Energy delivered to and the Discharging Energy delivered from the Battery Storage System, including metering current transformers and metering voltage transformers. The Electric Metering Devices must transmit to Company five-minute revenue quality meter data.

“Emergency” means any event or occurrence during the Term that results in the declaration of an Emergency Condition under and as defined in the Interconnection Agreement.

“Energy” means all electrical energy stored and discharged by the Battery Storage System during the Term.

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

“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. *if needed*

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

“Equity Interest” shall have the meaning set forth in Section 19.5(A).

“Equity Interest Acquisition” shall have the meaning set forth in Section 19.5(A).

“Equivalent Availability Factor” shall have the meaning set forth in Section 8.4(C).

“Equivalent Outage Hours” shall have the meaning set forth in Section 8.4(C).

“ERO” means the Electric Reliability Organization certified by FERC pursuant to Section 215 of the Federal Power Act, which as of the Effective Date is NERC, or any

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

successor organization. For purposes of this PPA, ERO also includes the Midwest Reliability Organization (MRO).

“Escrow Account” shall have the meaning set forth in Section 11.3(B).

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

“Excess Throughput Limit” means [ ] MWh.

“Excused Outage” means any Outage of the Battery Storage System resulting from: (i) a Battery Storage System Planned Outage; (ii) Force Majeure or Emergency; (iii) a breach of this Agreement by Company; (iv) insufficient stored energy not caused by any act or omission of Seller; (v) an Outage resulting from a request by Company; (vii) any Outage where Seller failed to comply with a dispatch that was not in accordance with the Battery Storage System Operating Procedures.

“Facility” means the Battery Storage System, and all equipment necessary to interconnect to the Transmission Authority’s System, all as further described in Exhibit C – Facility Description and Site Maps, including Seller’s rights to the Site and all of the following: the Battery Units, buildings, 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 and delivery of the capacity and energy subject to this PPA.

“Facility Acquisition” shall have the meaning set forth in Section 19.5(A).

“Facility Debt” means the obligations of Seller or its Affiliates to any lender or tax equity investor pursuant to the Financing Documents, including 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, equity contribution agreements, mortgages, deeds of trust, interest rate exchanges, swap agreements and other documents relating to the development, bridge, construction, back-leverage or permanent debt financing and/or tax equity financing for the Facility, including any credit enhancement, credit support, working capital financing, or refinancing documents, and

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

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.

“FMV” means the “fair market value.”

“Force Majeure” shall have the meaning set forth in Section 14.1.

“Forced Labor Laws” shall have the meaning set forth in Section 15.B(2).

“Forced Outage” means any condition at the Facility that requires the immediate and unplanned removal of at least ten percent of the capacity of the Battery Storage System from service, or that results in a material deviation from the Guaranteed Performance identified in Exhibit M-1 – Battery Storage System Guaranteed Performance Levels, 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.

“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 and storage 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 and storage 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 but are not limited to NERC, the ERO, the Market Operator (if any), an applicable PUC, the Transmission Authority, FERC, and successor organizations. For the avoidance of doubt, Company is not a Governmental Authority for purposes of this PPA.

“Grid Charging Capability” shall have the meaning set forth in Exhibit M – Battery Storage System Testing Protocols.

“Guaranteed Maximum Charging Rate” shall have the meaning set forth in Exhibit M-1 – Battery Storage System Guaranteed Performance Levels.



**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

“Guaranteed Maximum Discharging Rate” shall have the meaning set forth in Exhibit M-1 – Battery Storage System Guaranteed Performance Levels.

“Guaranteed Minimum Charging Time” shall have the meaning set forth in Exhibit M-1 – Battery Storage System Guaranteed Performance Levels.

“Guaranteed Minimum Discharging Time” shall have the meaning set forth in Exhibit M-1 – Battery Storage System Guaranteed Performance Levels.

“Guaranteed Performance” shall have the meaning set forth in Exhibit M-1 – Battery Storage System Guaranteed Performance Levels.

“Guaranteed Response Time” shall have the meaning set forth in Exhibit M-1 – Battery Storage System Guaranteed Performance Levels.

“Guaranteed Round Trip Efficiency” shall have the meaning set forth in Exhibit M-1 – Battery Storage System Guaranteed Performance Levels.

“Guaranteed Storage Availability” shall have the meaning set forth in Section 8.4(C).

“Guaranteed Storage Availability Payment Adjustment” shall have the meaning set forth in Section 8.4(C).

“Guaranteed Storage Availability Payment Adjustment Cap” shall have the meaning set forth in Section 8.4(C).

“Guaranteed Storage Capacity” shall have the meaning set forth in Exhibit M-1 – Battery Storage System Guaranteed Performance Levels.

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

“Hours” shall have the meaning set forth in Section 8.4(C).

“House Power” shall have the meaning set forth in Section 1.2(B).

“Indemnified Party” shall have the meaning set forth in Section 17.1.

“Indemnifying Party” shall have the meaning set forth in Section 17.1.

“Independent Engineer” means a qualified and independent third-party engineering firm.

“Interconnection Agreement” 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

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

Agreement” excludes any temporary or provisional interconnection agreement or any agreement where the Transmission Provider may limit the operational output of the Facility.

“Indemnified Party” shall have the meaning set forth in Section 17.1.

“Indemnifying Party” shall have the meaning set forth in Section 17.1.

“Interconnection Facilities” means those facilities designated in the Interconnection Agreement for the direct purpose of interconnecting the Facility 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 and Site Maps to this PPA.

“Interconnection Point” means the physical point within the operational authority of the Transmission Authority as specified in the Interconnection Agreement as project [REDACTED], 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 a Credit Rating of both (a) Baa3 or higher by Moodys, and (b) BBB- or higher by Standard & Poors.

“Issuer” shall have the meaning set forth in Section 11.3(A).

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

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

“Letter of Credit” shall have the meaning set forth in Section 11.3(A).

“Liquidated Delay Damages” shall have the meaning set forth in Section 12.2.

“Local Provider” shall have the meaning set forth in Section 1.2(B).

“Losses” shall have the meaning set forth in Section 17.1.

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

“Market Operator” means the entity that instructs market participants and/or generators to regulate generation and energy storage 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.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

“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.

“Maximum Charging Rate” shall have the meaning set forth in Exhibit M – Battery Storage System Testing Protocols.

“Maximum Discharging Rate” shall have the meaning set forth in Exhibit M – Battery Storage System Testing Protocols.

“Minimum Charging Time” shall have the meaning set forth in Exhibit M – Battery Storage System Testing Protocols.

“Minimum Discharging Time” shall have the meaning set forth in Exhibit M – Battery Storage System Testing Protocols.

“MIPSA” means “member interest purchase and sale agreement.”

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

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

“Network 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 a network resource as defined by the Transmission Tariff, and be eligible to deliver the Facility’s output in a manner comparable to that in which the Transmission Authority integrates its generating facilities to serve native load customers. *if needed*

“NMPRC” means the New Mexico Public Regulatory Commission or any successor agency.

“Operating Committee” means representative(s) each from Company and Seller, pursuant to Section 10.8.

“Operating Day” means a day within the Delivery Period on which the Battery Storage System operates.

“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.

“Option” means Company’s rights to purchase the Facility on the terms and conditions set forth in Section 19.5.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

“Option Preliminary Exercise Notice” shall have the meaning set forth in Section 19.5(A).

“Outage” means any period during which the capacity of the Battery Storage System is unavailable for any reason as reported by the SCADA system in accordance with Exhibit O – Battery Storage System Operating Procedures.

“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.

“Performance Criteria” means the performance test elements set forth in Exhibit M – Battery Storage System Testing Protocols.

“Performance Tolerance Band” shall have the meaning set forth in Section 8.4(D).

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

“Periodic Test” shall have the meaning set forth in Section 5.6(B).

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

“PI System” means the “plant information” system for the Facility or other data collection systems, as described and implemented in Exhibit I - AGC Protocols; Dispatch and Availability Notices; Data Collection; Technical Specifications.

“Point of Delivery” means the physical point within the operational authority of Transmission Authority at which (i) Seller makes available and delivers to Company the Energy being provided by Seller to Company under this PPA and (ii) Company makes available and delivers to Seller the Charging Energy being provided by Company to Seller under this PPA. The Point of Delivery is specified in Exhibit C – Facility Description and Site Maps to this PPA.

“PPA” shall have the meaning set forth in the introductory paragraph.

“PSA” means purchase and sale agreement.

“PUC Approval” shall have the meaning set forth in Section 6.1(D).

“PUCT” means the Public Utility Commission of Texas or any successor agency.

“Qualified Operator” means an operator of battery energy storage systems that has sufficient experience to successfully operate the Facility, including a minimum of one (1) year of experience in the battery energy storage business, and owns, controls or operates a minimum of 20 MW and 40 MWh of battery energy storage capacity in

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

aggregate with at least one facility that has at least 5 MW and 10 MWh of battery energy storage capacity.

“Ramp Rate” shall have the meaning set forth in Exhibit M – Battery Storage System Testing Protocols.

“Recovery Plan” means, with respect to Seller’s failure to achieve a Critical Path Development Milestone under Section 4.1(B), a recovery plan (confirmed by a qualified consultant, vendor or expert reasonably acceptable to Company) indicating in sufficient detail, to Company’s reasonable satisfaction, the steps to be taken by Seller to achieve the missed Critical Path Development Milestone by a date certain, which date shall be the earliest reasonable date for achievement of the Critical Path Development Milestone, but shall not exceed [ninety (90)] days following the completion deadline set forth in Section 4.1(B) for such Critical Path Development Milestone. If the date certain identified in a Recovery Plan is later than the completion deadline(s) for any other Critical Path Development Milestone(s) (as those deadlines are set forth in Section 4.1(B)), then such Recovery Plan shall also describe the impacts, if any, to such other Critical Path Development Milestone(s); *provided, however*, that Seller shall remain responsible for achieving such other Critical Path Development Milestone(s), as set forth in Section 4.1(B), Section 12.2(A), and Section 12.2(B).

“Repair Plan” shall have the meaning set forth in Section 10.3(A).

“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, 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 Energy that was not delivered under this PPA during such hour;
- “C” = 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

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

reasonably available energy to Company in amounts equal to the number of MWh for which Replacement Power Costs are owed; and

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

“Response Time” shall have the meaning set forth in Exhibit M – Battery Storage System Testing Protocols.

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

“Round Trip Efficiency” or “RTE” shall have the meaning set forth in Exhibit M – Battery Storage System Testing Protocols.

“Round Trip Efficiency Adjustment” shall have the meaning set forth in Section 8.4.

“Safety Requirements” means those requirements set forth in Exhibit P – Safety Requirements, in addition to any other safety-related practices required by Applicable Law and Good Utility Practice.

“SCADA System” or “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” shall have the meaning set forth in the introductory paragraph.

“Seller Initiated Test” shall have the meaning set forth in Section 5.6(A).

“Site” means the parcel of real property on which 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 and Site Maps to this PPA.

“State of Charge” or “SOC” means the amount of electric energy in a Battery Unit expressed as a percent of the Storage Capacity.

“Storage Capacity” shall have the meaning set forth in Exhibit M – Battery Storage System Testing Protocols.

“Successful Repair” shall have the meaning set forth in Section 10.3(A).

“Tax Credit Legislation” means any federal or state legislation enacted into law that provides federal or state income tax credits, direct payment or other monetary incentives, for owners of facilities that utilize equipment which receives, stores, and delivers electric energy using batteries or other energy storage technologies.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

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

“TE Partnership” shall have the meaning set forth in Section 19.5(A).

“Technical Dispute” shall have the meaning set forth in Section 13.1(A).

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

“Test” shall have the meaning set forth in the first paragraph of Exhibit M – Battery Storage System Testing Protocols.

“Total Equivalent Forced Outage Hours” shall have the meaning set forth in Section 8.4(C).

“Total Equivalent Planned Outage Hours” shall have the meaning set forth in Section 8.4(C).

“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) Southwestern Public Service Company operating under and in accordance with its Transmission Tariff, and (ii) all entity(ies) 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 Tariff” means the applicable Open Access Transmission Tariff of the Transmission Authority, as amended from time to time.

“UFLPA” means the Uyghur Forced Labor Prevention Act, Pub. L. 117-78 (2021).

“Ultimate Parent” shall have the meaning set forth in the definition of Change of Control.

“Variable O&M Payment” shall have the meaning set forth in Section 8.1(B).

\* \* \* \* \*

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

**EXHIBIT B**

**CONSTRUCTION MILESTONES**

**Construction**

<u>Milestone</u>	<u>Outcome</u>
<i>[Date]</i>	Seller and all required counterparties shall have executed such Construction Contracts as are needed to construct the Facility.
<i>[Date]</i>	Seller and the Transmission Authority shall have executed the Interconnection Agreement.
<i>[Date]</i>	Seller shall have achieved closing on financing for the Facility or provided Company with proof of financial capability to construct the Facility.
<i>[Date]</i>	Commencement of construction of the Facility.
<i>[Date]</i>	Procurement of Battery Units.
<i>[Date]</i>	Seller shall have laid the foundation for all Facility buildings, energy storage facilities and step-up transformation facilities.
<i>[Date]</i>	The step-up transformer and Battery Units shall have been delivered and installed at the Site.
<i>[Date]</i>	Seller's Interconnection Facilities shall have been constructed, and such facilities are capable of being energized.
<i>[Date]</i>	Start-up testing of the Facility commences.



**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

**EXHIBIT C**

**FACILITY DESCRIPTION AND SITE MAPS**

***[This Exhibit shall include a description of the Facility and all material components thereof, including map, aerial pictures, one-line diagram, Point of Delivery and (if different) the Interconnection Point as well as the manufacturer and model numbers of the Battery Units.]***

The Facility shall be located on the Site and shall be identified as Seller's [REDACTED] Energy Storage Facility. Maps and one-line diagrams of the Facility and associated equipment are included as part of this Exhibit, as may be updated from time to time.

The address of the Facility is [REDACTED].

The Facility and the Battery Storage System must include the following specific components:

- \* major equipment including batteries and inverters;
- \* 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; Dispatch and Availability Reporting; Data Collection;
- \* ramping capability, voltage control (on and off peak) and frequency control. pursuant to NERC guidelines/requirements.
- \* capability of sending real time data and OPC interface to Company's PI System;
- \* DC and AC capacity of the Facility
- \* a Point of Delivery located at [REDACTED];

The proposed Facility includes the components that are equivalent to, or better than, the following:

- [Additional Bid Specific information to be added]

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

**EXHIBIT D**

**NOTICES AND CONTACT INFORMATION**

<u><b>Company</b></u>	<u><b>Seller</b></u>
<p><b>Notices:</b> [Redacted] Director, Purchased Power Xcel Energy Services Inc. 1800 Larimer Street, Suite 1000 Denver, CO 80202 Phone: [Redacted] E-mail: [Redacted]@xcelenergy.com</p> <p><i>with a cc to:</i> [Redacted] Purchased Power Consultant Xcel Energy Services Inc. 1800 Larimer Street, Suite 1000 Denver, CO 80202 Phone: [Redacted] E-mail: [Redacted]@xcelenergy.com</p>	<p><b>Notices:</b> [Redacted] [Redacted] Phone: [Redacted] E-mail: [Redacted]@[Redacted].com</p> <p><i>with a cc to:</i> [Redacted] [Redacted] Phone: [Redacted] E-mail: [Redacted]@[Redacted].com</p>
<p><b>Operating Committee Representative:</b> [Redacted] Director, Purchased Power Xcel Energy Services Inc. 1800 Larimer Street, Suite 1000 Denver, CO 80202 Phone: [Redacted] E-mail: [Redacted]@xcelenergy.com</p> <p><b>Alternate:</b> [Redacted] Purchased Power Consultant Xcel Energy Services Inc. 1800 Larimer Street, Suite 1000 Denver, CO 80202 Phone: [Redacted] E-mail: [Redacted]@xcelenergy.com</p>	<p><b>Operating Committee Representative:</b> [Redacted] [Redacted] Phone: [Redacted] E-mail: [Redacted]@[Redacted].com</p> <p><b>Alternate:</b> _____ _____ _____ Phone: [Redacted] E-mail: [Redacted]@[Redacted].com</p>
<p><b>Real-Time Contact Information</b> EMCC (24 hour coverage): Phone: 303-571-7426</p>	<p><b>Real-Time Contact Information</b> [Operations Command Center] (24 hour coverage): Phone: [Redacted]</p>

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

<p>E-mail: <a href="mailto:dlrtelectricmarketernsp@xcelenergy.com">dlrtelectricmarketernsp@xcelenergy.com</a></p> <p><u>Transmission Ops:</u> Phone: 303-273-4811 E-mail: <a href="mailto:AGCOpr@xcelenergy.com">AGCOpr@xcelenergy.com</a></p>	<p>E-mail: [REDACTED]@[REDACTED].com</p>
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**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

**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.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

Workers Compensation	Statutory Requirements. Seller may comply with these requirements through the use of a qualified self-insurance plan.
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<b>Type of Insurance</b>	<b>Minimum Limits of Coverage</b>
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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	Replacement value 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.

Environmental Liability	Impairment \$5,000,000 each occurrence.
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All-Risk Property insurance covering physical loss or damage to the Facility	Full replacement value 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 full replacement value.

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.

**Southwestern Public Service Company Model Storage Energy Purchase  
Agreement**

**EXHIBIT F**

**SELLER'S NEEDED PERMITS**

Bid Specific

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

**EXHIBIT G**

**FORM OF LETTER OF CREDIT**

[LETTERHEAD OF ISSUING BANK]

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

Beneficiary: Southwestern Public Service Company 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" ("Sight Draft"), drawn on Issuer and accompanied by this Letter of Credit. All Sight Drafts must be signed on behalf of Beneficiary, and the signator 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 twenty-four (24) hours after presentment of any Sight Draft. Payment shall be made in U.S. Dollars with Issuer's own funds in immediately available funds.

Issuer will honor any 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 Battery Storage 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

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

(30) days prior to the expiration date, Issuer notifies Beneficiary by registered 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." Such transfer will be effected at no cost to Beneficiary. Any transfer fees assessed by Issuer will be payable solely by Applicant, and the payment of any transfer fees will not be a condition to the validity or effectiveness of the transfer of this Letter of Credit.

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



**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

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

**SIGHT DRAFT**

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: \_\_\_\_\_

Southwestern Public Service Company, a  
New Mexico corporation

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

Account: [Applicant to be inserted]

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

**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: \_\_\_\_\_

Southwestern Public Service Company, a New Mexico corporation

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.

Southwestern Public Service Company Model Storage Energy Purchase Agreement

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 Southwestern Public Service Company ("Company"), in connection with the performance by \_\_\_\_\_, a \_\_\_\_\_ [limited liability company] ("Seller") of a Battery Storage Energy Purchase Agreement dated \_\_\_\_\_, 20\_\_\_\_ between Seller and Company (the "PPA").

- RECITALS -

A. Seller proposes to construct, own and operate Battery Storage System having a Battery Storage System 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 electrical energy from the Facility on the terms and conditions set forth therein.

C. Seller is controlled by 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. This Guaranty shall survive termination of the PPA to the extent necessary to enforce and complete the rights, duties and obligations of Company and Seller thereunder.

2. Maximum Liability. Notwithstanding anything herein to the contrary, Guarantor's maximum liability under this Guaranty shall be limited to \_\_\_\_\_ dollars (US\$ \_\_\_\_\_) plus costs of collection under Section 10 below.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

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 immediately 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 such time as all of the Obligations have irrevocably been discharged in full, 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;

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

(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;

(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.

10. Collection Costs. Guarantor shall pay to Company, upon demand, and in addition to the maximum liability set forth in Section 2 hereof, all reasonable attorneys'

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

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 [*insert home state of Company*] without regard to the principles of conflicts of law thereof. Venue for any dispute hereunder shall be as set forth in Section 13.5 of the PPA.

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

(b) if to Guarantor: \_\_\_\_\_

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

*with a copy to:* \_\_\_\_\_

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

or to such other address (es) as the person to whom notice is given may have previously furnished to the others in writing in the manner set forth above.

IN WITNESS WHEREOF, Guarantor has caused this Guaranty to be duly executed and delivered to Company as of the day and year first above written.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

**[Name of Guarantor]**

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

Name:

Title:

STATE OF \_\_\_\_\_ )  
  ) ss.  
COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by \_\_\_\_\_, as \_\_\_\_\_ of \_\_\_\_\_.

Witness my hand and official seal.

My commission expires: \_\_\_\_\_.

( S E A L )

\_\_\_\_\_  
Notary Public

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

**EXHIBIT I**

**AGC PROTOCOLS; DISPATCH AND AVAILABILITY REPORTING; DATA COLLECTION**

**AGC**

1. **AGC Communications between Company and Seller.** Company will receive and send AGC Set-Point and related data over a secure 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.

<u>Facility</u>			
<u>Description</u>	<u>Units</u>	<u>Description</u>	<u>Units</u>
Actual Real Power	MW	AGC Set-Point (echo)	MW
Actual Reactive Power	MVar	Actual Real Power	MW
Average Voltage (at high voltage interconnection)	kV	Actual Reactive Power	MVar
		AGC Status	Remote/Local

2. **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 changes, these protocols will be generally bound by the manufacturers’ specifications for the equipment that Seller has chosen for the Battery Energy Storage Facility.

a. Allowable Variances in Excess of AGC Set-Point. Once the Battery Energy Storage Facility has reached the AGC Set-Point, the Battery Energy Storage Facility output may not vary from the AGC Set-Point by more than 2% on average as measured during a 5-minute period.

b. Range of AGC Set-Point. The range of set-point values can be between 0% and 100% of Park Potential.

3. **Backup Communications.** In the event of an AGC failure, Company and Seller shall communicate via telephone in order to correct the failure.

\* \* \* \* \*



**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

**EXHIBIT J**

**BATTERY PAYMENT RATE AND CAPACITY PAYMENT RATE**

This Exhibit J sets forth the applicable rates for energy and capacity.

*This entire Exhibit shall be deemed Confidential Information subject to Section 20.18.*

<b>Commercial Operation Year</b>  (Year)	<b>Battery Payment Rate</b>  (\$/MWh)	<b>Capacity Payment Rate</b>  (\$/kW-month)
1		
2		
3		
4		
5		
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

**EXHIBIT K  
LENDER CONSENT PROVISIONS**

In the event Seller 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 in any material respect, 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 Event of Default by Seller, Company shall not terminate the PPA unless it has first given notice of such Event of Default to the Facility Lender and has given the Facility Lender the same cure period afforded to Seller under Article 12 of the PPA, plus an additional 30 Days beyond Seller's cure period to cure such 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 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; provided, that the total cure period shall in no event exceed one-hundred eighty (180) Days.
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. Upon any foreclosure, deed-in-lieu or other exercise of the rights and remedies of the Facility Lender that results in a successor owner or operator of the Facility, the Facility Lender shall require and cause the successor (i) to assume all of Seller's prospective obligations under the PPA, (ii) to cure any then-existing defaults by Seller that are capable of cure by performance or the payment of money damages, (iii) to have substantial experience in the operation of power energy storage facilities akin to the Facility, either directly, through its affiliates or through an operator acceptable to Company, and (iv) to enjoy (together with its parents and affiliates) an Investment Grade Credit Rating or other creditworthiness satisfactory to Company. Except for the foregoing, the Facility Lender shall not be obligated to perform or be liable for any obligation of Seller under the PPA.
6. Upon any rejection or other termination of the PPA in connection with any bankruptcy or insolvency of Seller, 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.

\* \* \* \* \*

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

**EXHIBIT L-1 – EQUITY PURCHASE PRICE FORMULA**

*[To be mutually agreed between the parties prior to executing the Battery Storage Energy Purchase Agreement]*

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

**EXHIBIT L-2**

**FACILITY PURCHASE AND SALE AGREEMENT (“PSA”) PROVISIONS**

Any PSA executed to implement exercise of Company’s ROFO or Option rights will include provisions substantially as follows:

**Type of Transaction**

The transaction will be structured as an asset acquisition. Company (“Buyer”) shall purchase and Seller shall sell 100% of the assets (“Assets”) of a completed, commercially operational [battery] storage with nameplate capacity of [XX] MW AC and all facilities and other assets and rights relating to the project (the “Project”), free and clear of all encumbrances and liabilities, except for permitted encumbrances and assumed liabilities as defined in the PSA.

**Purchase Price and Payment Terms**

Buyer shall pay Seller the “Purchase Price,” or ROFO] which is determined pursuant to Section 19.5(C) of this PPA.

Buyer shall be entitled to withhold from the payment of the Purchase Price up to [\$XXX] in the event of certain breaches of Seller’s representations, warranties or covenants pending Seller’s cure of any such breach, with Buyer’s aggregate holdback amount not to exceed 20% of the Purchase Price.

Seller shall be responsible for all taxes relating to the pre-closing period and all transfer taxes and any sales, use or other taxes related to the purchase and sale of the Assets and any purchase or conveyance of real or personal property to be used in the Project.

**Seller’s Closing Deliverables:**

Upon the terms and conditions to be defined within the PSA, the obligations of Buyer to consummate the transactions contemplated are subject to the satisfaction by Seller of certain closing conditions, including:

- Transfer of all of the Assets of the Project, which include all rights and title to assets necessary for the commercial operation of the Project, to Buyer or its designated affiliate.
- An opinion of legal counsel that each material discretionary permit required for the Project has been obtained and is valid, binding, in full force and effect and non-appealable.
- Evidence that any liens on the Project, real property or any other assets or interests of the Project have been removed as of the closing other than permitted liens which have been scheduled or liens which have been scheduled and bonded to Buyer’s reasonable satisfaction.
- Certain conditions do not exist at the time of closing including, but not limited to, the existence of a material adverse effect. A material adverse effect would be defined in the PSA and would include, in addition to other terms, a change in tax

## **Southwestern Public Service Company Model Storage Energy Purchase Agreement**

law that could have a negative impact on Buyer's business or the economic viability of the Project.

- All certifications, affidavits, approvals and permits required to demonstrate satisfaction of all representations, warranties, and covenants made by Seller pertaining to the closing.

### **Buyer's Closing Deliverables:**

Upon the terms and conditions to be defined within the PSA, the obligations of Seller to consummate the transactions contemplated are subject to the satisfaction by Buyer of certain closing conditions, including:

- Delivery of the Purchase Price.
- All certifications, affidavits, approvals and permits required to demonstrate satisfaction of all representations, warranties, and covenants made by Buyer pertaining to the closing.

### *Section 1.01 Required Approvals*

The transaction is subject to obtaining specified approvals, authorizations, or orders, including but not limited to the following (to the extent necessary):

- Approval of the board of directors of Buyer and the board of directors or similar governing body of Seller shall be obtained prior to execution of the PSA.
- Third party consents.
- Applicable governmental and regulatory approvals prior to closing, including to the extent necessary, any applicable state agencies or commissions regulating utility activities and any government agencies having approval, consent or authority over the transactions contemplated by the PSA, including but not limited to the PUCT, the NMPRC, the IRS, the FERC, the Department of Justice, the US Fish and Wildlife Service and the FAA.

### **Representations and Warranties**

The transaction is subject to customary representations and warranties to be made by Buyer and Seller as of the execution date or the effective date of the PSA and the closing thereunder, including the following:

- Corporate existence and powers – Seller is a limited liability company validly existing and in good standing and has the power and authority to conduct its business as now conducted.
- Authority (execution and delivery)
- No conflicts - the transaction does not create any conflicts.
- Consents and approvals – no consent, approval or authorization is required in connection with the execution and performance of the PSA.
- Legal proceedings of Buyer– there are no legal proceedings pending, or to Buyer's knowledge, threatened in writing, against Buyer, that affect the consummation of the transaction contemplated by the PSA.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

- Legal proceedings of Seller and the Project – there are no legal proceedings pending, or to Seller’s knowledge, threatened in writing, against the Seller or the Project or affecting Seller’s ability to sell the Project.
- Sufficient funds – Buyer has available, or will maintain sufficient sources of, funds to complete the transaction.
- Compliance with Laws – Seller is in compliance with all laws applicable to the Seller, Project and the transactions contemplated by the PSA.
- Environmental – Seller and its affiliates have no environmental liabilities and are in compliance with environmental requirements. Seller and its affiliates have not received any notice of an alleged violation of environmental law pertaining to the Project from any governmental entity. There are no facts, circumstances, conditions or occurrences relating to the Project that could reasonably be expected to form the basis of a claim, requirement or obligation imposed by any governmental entity under any environmental law on Seller or its affiliates.
- Contracts – Schedule of material contracts binding on the Seller or to which the Project is subject and Seller has furnished to Buyer true, correct and complete copies of all material contracts. Each scheduled contract, including but not limited to the Generator Interconnection Agreement, is in full force and effect and neither Seller nor the Project is in material violation or default under such contracts.
- Land Contracts – The land contracts and real property owned by the Project are in full force and effect, and shall comprise all of the real property interests necessary in connection with the interconnection, operation and maintenance of the Project, all in accordance with all laws, and are sufficient to enable the Project to be commercially operable as contemplated in the PSA, including legal and physical ingress and egress rights to and from public right-of-way for operation, and maintenance of the Project.
- Data – Seller has delivered to Buyer true, correct and complete copies of all battery data related to the Project.
- Permits - All permits required to own, operate and maintain the Project are held by Seller or an Affiliate, are final and non-appealable, are scheduled, and Seller has obtained and furnished to Buyer true, correct and complete copies of such permits. Such permits are in full force and effect and are legal, valid, binding and enforceable in accordance with their respective terms.
- Title – Seller or an Affiliate is in possession of and has good and marketable title to the Project free and clear of all encumbrances, except for permitted encumbrances. Seller and its Affiliates have no legal obligation or non-binding agreement in principle with any other person to sell or affect a sale of all, or any portion of, the Project.
- Other representation and warranties customary in a transaction of this nature, including those pertaining to taxes, title, finders, intellectual property, brokers and insurance.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

**Termination Provisions**

The PSA may be terminated prior to the closing upon written notice by the terminating party (as described below) in the event of certain occurrences, including:

- By either party, in the event the closing has not occurred by [TBD], regardless of the reason for such termination, provided that the terminating party is not in breach of the PSA.
- By either party in the event regulatory approvals for the transaction are not obtained on terms reasonably acceptable to Buyer.
- By Buyer in the event any authority has issued an order or taken any other action that restrains, enjoins, or otherwise prohibits the consummation of the transactions contemplated by the PSA, and such order or action is nonappealable.
- By Buyer in the event of material breach of the PSA by Seller.
- Security: Seller shall fund and maintain security in favor of Buyer, or a parent guaranty acceptable to Buyer, to secure Seller's obligations under the PSA including the indemnification provision below.

**Indemnification**

Each party shall indemnify and hold harmless the other party and its respective employees, representatives, officers, directors and agents from and against any and all damages arising out of the result of any breach or violation of any representation, warranty, covenant, inaccuracy within the PSA, or any liability not assumed as part of the PSA, or any fraud, willful misconduct, or negligence in performance of this PSA. Seller shall indemnify Buyer for any environmental (including hazardous material) claims arising prior to the closing date other than environmental claims resulting from Buyer's negligence. No claim for indemnification shall be brought against the indemnifying party until the total damages for which such party is liable exceeds in the aggregate a threshold amount of [\$XXX], at which point indemnification may be sought for the full aggregate amount of damages, including those amounts that do not exceed the threshold. The aggregate damages to which the indemnified parties are entitled shall not exceed the indemnity cap, which shall be at least 30% of the purchase price. Such threshold and indemnity cap shall not apply to damages to the extent they arise from a breach of covenants required to be performed after the closing or from breach of certain "fundamental" representations (as applicable to each party) such as corporate existence, power, authority, conflicts, title, land contracts, real property, environmental, intellectual property or tax matters and shall not apply to liabilities arising prior to the closing date, which shall be the responsibility of Seller.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

**EXHIBIT L-3 – MEMBERSHIP INTEREST PURCHASE AND SALE AGREEMENT  
 (“MIPSA”) PROVISIONS**

Any MIPSA executed to implement exercise of Company’s ROFO or Option rights will include provisions substantially as follows:

**Type of Transaction**

The transaction will be structured as an entity acquisition. Company (“Buyer”) shall purchase and Seller shall sell 100% of its direct and indirect equity ownership interests of the project company (“Project Company”) (including, if applicable, Seller’s (or its affiliates) direct and indirect equity ownership interest in any tax equity partnership (the “TE Partnership”) that owns, directly or indirectly, equity ownership interests of the Project Company, together, the “Equity Interests”), which owns a completed, commercially operational [battery] storage with nameplate capacity of [XX] MW AC and all facilities and other assets and rights relating to the project (the “Project”), free and clear of all encumbrances and liabilities, except for permitted encumbrances and assumed liabilities as defined in the PSA.

**Purchase Price and Payment Terms**

Buyer shall pay Seller the “Purchase Price,” which is determined pursuant to Section 19.5(C) of this PPA.

Buyer shall be entitled to withhold from the payment of the Purchase Price up to [\$\$\$] in the event of certain breaches of Seller’s representations, warranties or covenants pending Seller’s cure of any such breach, with Buyer’s aggregate holdback amount not to exceed 20% of the Purchase Price.

Seller shall be responsible for all taxes relating to the pre-closing period and all transfer taxes and any sales, use or other taxes related to the purchase and sale of the Equity Interests and any purchase or conveyance of real or personal property to the Project Company to be used in the Project.

**Seller’s Closing Deliverables:**

Upon the terms and conditions to be defined within the PSA, the obligations of Buyer to consummate the transactions contemplated are subject to the satisfaction by Seller of certain closing conditions, including:

- Transfer of the Equity Interests, which include all rights and title to assets necessary for the commercial operation of the Project, to Buyer or its designated affiliate.
- An opinion of legal counsel that each material discretionary permit required for the Project has been obtained and is valid, binding, in full force and effect and non-appealable.
- Evidence that any liens on the Equity Interests, Project Company, Project, real property or any other assets or interests of the Project Company have been removed as of the closing other than permitted liens which have been scheduled



## **Southwestern Public Service Company Model Storage Energy Purchase Agreement**

or liens which have been scheduled and bonded to Buyer's reasonable satisfaction.

- Certain conditions do not exist at the time of closing including, but not limited to, the existence of a material adverse effect. A material adverse effect would be defined in the PSA and would include, in addition to other terms, a change in tax law that could have a negative impact on Buyer's business, the Equity Interests, or the economic viability of the Project.
- All certifications, affidavits, approvals and permits required to demonstrate satisfaction of all representations, warranties, and covenants made by Seller pertaining to the closing.

### **Buyer's Closing Deliverables:**

Upon the terms and conditions to be defined within the PSA, the obligations of Seller to consummate the transactions contemplated are subject to the satisfaction by Buyer of certain closing conditions, including:

- Delivery of the Purchase Price.
- All certifications, affidavits, approvals and permits required to demonstrate satisfaction of all representations, warranties, and covenants made by Buyer pertaining to the closing.

### **Required Approvals**

The transaction is subject to obtaining specified approvals, authorizations, or orders, including but not limited to the following (to the extent necessary):

- Approval of the board of directors of Buyer and the board of directors or similar governing body of Seller shall be obtained prior to execution of the PSA.
- Third party consents.
- Applicable governmental and regulatory approvals prior to closing, including to the extent necessary, any applicable state agencies or commissions regulating utility activities and any government agencies having approval, consent or authority over the transactions contemplated by the PSA, including the PUCT, the NMPRC, the IRS, the FERC, the Department of Justice, the US Fish and Wildlife Service and the FAA.

### **Representations and Warranties**

The transaction is subject to customary representations and warranties to be made by Buyer and Seller as of the execution date or the effective date of the PSA and the closing thereunder, including the following:

- Corporate existence and powers – Seller is a [corporation] validly existing and in good standing and has the power and authority to conduct its business as now conducted.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

- Project Company existence and powers – the Project Company is a limited liability company validly existing and in good standing and has the power and authority to operate and own the Project and has been engaged in no other business since its formation.
- (If applicable) The TE Partnership existence and powers – the TE Partnership is a limited liability company validly existing and in good standing and has the power and authority to own and manage the Project Company and the Project and has been engaged in no other business since its formation.
- Authority (execution and delivery)
- No conflicts - the transaction does not create any conflicts.
- Consents and approvals – no consent, approval or authorization is required in connection with the execution and performance of the PSA.
- Legal proceedings of Buyer– there are no legal proceedings pending, or to Buyer’s knowledge, threatened in writing, against Buyer, that affect the consummation of the transaction contemplated by the PSA.
- Legal proceedings of Seller, TE Partnership (if applicable) and Project Company – there are no legal proceedings pending, or to Seller’s knowledge, threatened in writing, against the Seller relating to the Project or affecting Seller’s ability to sell the Equity Interests and there are no legal proceedings pending, or to Seller’s knowledge, threatened in writing, against the Project Company or the TE Partnership (if applicable).
- Sufficient funds – Buyer has available, or will maintain sufficient sources of, funds to complete the transaction.
- Compliance with Laws – Seller, the TE Partnership (if applicable) and the Project Company are in compliance with all laws applicable to such entity and the transactions contemplated by the PSA.
- Environmental – Seller, the TE Partnership (if applicable), the Project Company and their respective affiliates have no environmental liabilities (solely in the case of Seller relating to the Project) and are in compliance with environmental requirements (solely in the case of Seller relating to the Project). Seller and its affiliates (including the TE Partnership, if applicable, and the Project Company) have not received any notice of an alleged violation of environmental law pertaining to the Project from any governmental entity. There are no facts, circumstances, conditions or occurrences relating to the Project, the TE Partnership, if applicable, or the Project Company that could reasonably be expected to form the basis of a claim, requirement or obligation imposed by any governmental entity under any environmental law on Seller or its affiliates (including the TE Partnership, if applicable, and the Project Company) or Buyer.

### **Southwestern Public Service Company Model Storage Energy Purchase Agreement**

- Contracts – Schedule of material contracts binding on the (x) Seller relating to the TE Partnership, if applicable, the Project Company or the Project), (y) TE Partnership, if applicable, the Project Company or the Project, or the assets of any of the TE Partnership, if applicable, or the Project Company, has been provided and Seller has furnished to Buyer true, correct and complete copies of all such contracts. Each scheduled contract, including but not limited to the Generator Interconnection Agreement, is in full force and effect and neither Seller, the TE Partnership, if applicable, nor the Project Company, nor to the knowledge of Seller any other counterparty thereto, is in material violation or default under such contracts.
- Land Contracts – The land contracts and real property owned by the Project Company are in full force and effect, and shall comprise all of the real property interests necessary in connection with the interconnection operation and maintenance of the Project, all in accordance with all laws, and are sufficient to enable the Project to be commercially operable as contemplated in the PSA, including legal and physical ingress and egress rights to and from public right-of-way for operation, and maintenance of the Project.
- Data – Seller has delivered to Buyer true, correct and complete copies of all battery data related to the Project.
- Permits - All permits required to own, operate and maintain the Project are held by the Project Company, are scheduled, and Seller has obtained and furnished to Buyer true, correct and complete copies of such permits. Such permits are non-appealable, in full force and effect and are legal, valid, binding and enforceable in accordance with their respective terms.
- Title – The Project Company is in possession of and has good and marketable title to the Project free and clear of all encumbrances, except for permitted encumbrances. Seller has good and marketable title to the Project Company's equity interests, free and clear of all encumbrances. Seller and its affiliates have no legal obligation or non-binding agreement in principle with any other person to sell or affect a sale of all, or any portion of, the Project or the Project Company.
- Other representation and warranties customary in a transaction of this nature, including those pertaining to taxes, title, finders, intellectual property, brokers and insurance.

### **Termination Provisions**

The PSA may be terminated prior to the closing upon written notice by the terminating party (as described below) in the event of certain occurrences, including:

- By either party, in the event the closing has not occurred by [TBD], regardless of the reason for such termination, provided that the terminating party is not in breach of the PSA.
- By either party in the event regulatory approvals for the transaction are not obtained on terms reasonably acceptable to Buyer.
- By Buyer in the event any authority has issued an order or taken any other action that restrains, enjoins, or otherwise prohibits the consummation of the transactions contemplated by the PSA, and such order or action is nonappealable.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

- By Buyer in the event of material breach of the PSA by Seller.
- Security: Seller shall fund and maintain security in favor of Buyer, or a parent guaranty acceptable to Buyer, to secure Seller's obligations under the PSA including the indemnification provision below.

**Indemnification**

Each party shall indemnify and hold harmless the other party and its respective employees, representatives, officers, directors and agents from and against any and all damages arising out of the result of any breach or violation of any representation, warranty, covenant, inaccuracy within the PSA, or any liability not assumed as part of the PSA, or any fraud, willful misconduct, or negligence in performance of this PSA. Seller shall indemnify Buyer for any environmental (including hazardous material) claims arising prior to the closing date other than environmental claims resulting from Buyer's negligence. No claim for indemnification shall be brought against the indemnifying party until the total damages for which such party is liable exceeds in the aggregate a threshold amount of [\$XXX], at which point indemnification may be sought for the full aggregate amount of damages, including those amounts that do not exceed the threshold. The aggregate damages to which the indemnified parties are entitled shall not exceed the indemnity cap, which shall be at least 30% of the purchase price. Such threshold and indemnity cap shall not apply to damages to the extent they arise from a breach of covenants required to be performed after the closing or from breach of certain "fundamental" representations (as applicable to each party) such as corporate existence, power, authority, conflicts, title, land contracts, real property, environmental, intellectual property or tax matters and shall not apply to liabilities arising prior to the closing date, which shall be the responsibility of Seller.

Southwestern Public Service Company Model Storage Energy Purchase Agreement

**EXHIBIT M**  
**BATTERY STORAGE SYSTEM TESTING PROTOCOLS**

This Exhibit M sets forth the Performance Criteria and protocols for any testing of the Battery Storage System under this PPA. The Commercial Operation Test, Periodic Test, and other discretionary testing identified in Section 5.6 are sometimes referred to in this Exhibit individually as a “Test” and jointly as the “Tests.”

PART I. GENERAL.

The Tests shall be conducted in accordance with Good Utility Practices and the provisions of this Exhibit M.

PART II. REQUIREMENTS APPLICABLE TO THE TESTS.

A. Required Performance Criteria.

Tests conducted pursuant to this Exhibit M shall include the following elements (unless Company otherwise agrees in writing in its sole discretion):

- “Availability” is defined as the ability of the system to receive and respond to signals from the EMCC. This value is calculated as the ratio of time the system can function as described to total time within the annual measured period, calculated as a percentage. Availability is not negatively impacted by outages beyond the control of the vendor, including:
  - i. any Outage where Seller failed to comply with a Dispatch Notice that was not in accordance with the Battery Storage System Operating Procedures;
  - ii. Force Majeure; or
  - iii. a breach of this Agreement by Company that prohibits the ability of the system to receive and respond to signals from the EMCC.
- “Enterprise Wide Information System” (“EWIS”) means the Company supplied OSI/PI Servers and software used by the Battery Storage System to record historical operations parameters or compatible replacement.
- “Battery Management System” or “BMS” is defined as the electronic control and communication system that manages and protects the Battery Storage System.
- “Grid Charging Capability” means the ability for the Battery Storage System to charge and store Charging Energy delivered from an offsite source by the Transmission Authority’s electrical system.
- “Storage Capacity” is defined as the rated amount of energy that the Battery Storage System can hold, measured in MWh or MW, as applicable and measured at the Point of Delivery.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

- “Self-Discharge Rate” is defined as the loss of charge of the Battery Storage System while idle.
- “Minimum Charging Time” is defined as the amount of time between a measurement of 0% State of Charge (SOC) to reaching full Storage Capacity (expressed in units of time).
- “Minimum Discharging Time” is defined as the amount of time between full Storage Capacity to reaching a measurement of 0% SOC (expressed in units of time).
- “Maximum Charging Rate” is defined as the maximum rate of charging (expressed in MW).
- “Maximum Discharging Rate” is defined as the maximum rate of discharging (expressed in MW).
- “Performance Test” means the Maximum Charging Rate, Maximum Discharging Rate, Minimum Discharging Time, Minimum Charging Time, Storage Capacity, and Round Trip Efficiency of the Battery Storage System tests.
- “Round Trip Efficiency” is defined as the amount of Discharging Energy discharged by the Battery Storage System relative to the amount of Charging Energy, measured at the Point of Delivery, calculated as shown below
$$\text{Round Trip Efficiency (RTE)} = \frac{\text{Battery Energy (WhD)}}{\text{Charging Energy (WhI)}}$$
- “Ramp Rate” shall have the meaning set forth in the Transmission Tariff.
- “Response Time” is defined as the amount of time for the Battery Storage System to respond to dispatch instructions from Company’s SCADA.

**B. Test Parameters.**

During any Performance Test, at a minimum, the following parameters shall be measured and recorded simultaneously for the Battery Storage System at the level of granularity necessary to assess the measured criteria and at least every four (4) seconds:

- (i) Time;
- (ii) Net electrical energy output to the Point of Delivery (kWh);
- (iii) Net electrical energy input from the Point of Delivery (kWh);

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

- (iv) Reactive power (VARs);
- (v) State of Charge (%);

During any Performance Test, at a minimum, the following parameters shall be measured and recorded simultaneously for the Battery Storage System at least every thirty (30) minutes:

- (i) Relative humidity (%);
- (ii) Ambient temperature (°F); and
- (iii) Average battery temperature (°F).

C. Performance Test Showing. Seller must demonstrate to Company's reasonable satisfaction, that the Battery Storage System:

- (i) is capable of storing and delivering the MW and MWh amount identified by Seller as the maximum rated power and energy;
- (ii) can deliver full rated power (MW) to the Point of Delivery for two (2) consecutive hours, totalling to the Storage Capacity, inclusive of identified Round Trip Efficiency losses.

APPENDIX A: All identified Exhibit M-1 required performance levels are met.

D. Performance Test Conditions.

- (i) At all times during a Test, the Battery Storage System, including all auxiliary equipment, shall be operated in compliance with the Test Plan, Good Utility Practices and all operating protocols and conditions recommended, required, or established by the manufacturer.
- (ii) Company in its sole discretion may elect to shorten the run periods or waive a particular portion of a Test at any time. Such election or waiver during one Test does not shorten any run period or waive any portion of any subsequent Test.
- (iii) [Reserved].
- (iv) Abnormal Conditions. If abnormal operating conditions occur during a Test, Company may postpone or reschedule all or part of such Test in its reasonable discretion in accordance with PART II.F. or PART II.G., below.
- (v) Applicable Laws. The Battery Storage System shall be operated in compliance with all Applicable Laws, including those governing safety, noise, air, and water emissions during any Test.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

(vi) Instrumentation and Metering. Seller shall provide all instrumentation, metering, and data collection equipment required to perform the Test. Class 0.2S or Class 0.5S meters should be used to verify performance of the Battery Storage System during any Test. Seller shall calibrate or cause to be calibrated all such instrumentation, metering, and data collection equipment no more than three (3) months prior to the date of the Test, if appropriate to the tool type. Copies of all calibration sheets shall be provided to Company at least five (5) Business Days prior to the Test.

Permanently installed instruments shall include but not be limited to revenue metering devices located in the switchyard where the Facility is located.

- E. Test Records. Seller shall provide all records associated with PART II.A. through PART II.D. with the Final Report described below in PART II.H. The records shall include copies of the raw data taken during the Test. This information will be provided in a format reasonably acceptable to Company. Collectively, the records and data provided with the Final Report shall be "Test Records".
- F. Incomplete Test. If any Test is not completed in accordance herewith, Company may in its sole discretion: (i) accept the Test results up to the time the Test stopped (other than in the case such Test is a Commercial Operation Test); (ii) require that the portion of the Test not completed, be completed within a reasonable specified time period; or (iii) require that the Test be entirely repeated. Notwithstanding the above, if Seller is unable to complete a Test due to a Seller's Force Majeure or the actions or inactions of Company, Seller shall be permitted to reconduct such Test as a Seller Initiated Test under Section 5.6(D) on dates and at times reasonably acceptable to Company.
- G. Retest. After the successful completion of a Test, Seller has the right, for any reason, to conduct a retest at Seller's sole expense, including the cost of charging the Battery Storage System. If the Test Records provided by Seller to Company in accordance with PART II.E. are not in accord with the records and notes of the Company representative who attended such Test on Company's behalf, Company may require the Test to be repeated or conducted by Company or a testing firm of Company's choice and attended by Seller's representatives. If the retest determines that the Test Records provided by Seller to Company are correct, then such retest will be deemed to be a Company Dispatched Test. If the retest determines that the Test Records provided by Seller to Company are incorrect, then such retest will be deemed to be a Seller Initiated Test. The records from any retest shall be used to determine Battery Storage System performance as of the date of the original Test being repeated.
- H. Final Report. Within fifteen (15) Business Days after the completion of a Test (including a retest), Seller shall prepare and submit to Company a



**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

written report of the Test in a format reasonably acceptable to Company. At a minimum, the report shall include:

- (i) a record of the personnel present during all or any part of the Test, whether serving in an operating, testing, monitoring or other such participatory role;
- (ii) a record verifying that inspections took place and the results were acceptable prior to testing initiation;
- (iii) a record of the test conditions (e.g. weather conditions) and test set up (e.g. equipment type and placement used);
- (iv) a record of any unusual or abnormal conditions or events that occurred during the Test and any actions taken in response thereto;
- (v) the Test Records;
- (vi) the system performance in relation to the Performance Criteria identified in Exhibit M-1, either by direct measurement or via agreed to calculation; and
- (vii) Seller's statement of either Seller's acceptance of the Test or Seller's rejection of the Test results and reason(s) therefore.

Within ten (10) Business Days after receipt of such report, Company shall notify Seller in writing of either Company's acceptance of the Test results or Company's rejection of the Test and reason(s) therefore.

If Company rejects the results of any Test or retest, or Seller rejects the results of the initial Commercial Operation Test, such Test shall be repeated in accordance with PART II.G.

- I. Company Representative. Company shall be entitled to have at least two (2) representatives from Company and one (1) independent third party witness reasonably acceptable to Seller present to witness each Test and shall be allowed reasonable access to the area from where the plant is being controlled (e.g., plant control room), and reasonable access to inspect the instrumentation necessary for Test data acquisition prior to commencement of any Test, subject to providing reasonable advance notice to Seller and adhering to Seller's safety protocols that have been communicated to Company. Company shall be responsible for all costs, expenses and fees payable or reimbursable to the representative and the third party, if any.

**PART III. COMMERCIAL OPERATION TEST.**

- A. Test Plan. The Test Plan is provided in PART V Section F and G of this Exhibit M.
- B. Test Dates. Seller shall provide Company with at least seven (7) Business Days' notice of Seller's proposed dates for the Commercial Operation Test. Company shall confirm the dates in writing prior to the first date of the Test.
- C. Costs. Costs for testing are as set forth in Section 5.6. The Commercial Operation Test is a Company Initiated Test.

**PART IV. PERIODIC TESTS.**

- A. Test Plan. The Test Plan is provided in PART V - Section F of this Exhibit M, unless specified below or the Parties agree otherwise in writing.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

- B. Instrumentation and Metering. The Parties shall use the same instrumentation and metering as was used in the Commercial Operation Test, unless the Parties otherwise agree in writing. Company reserves the right, in its sole discretion and at its expense, to install its own back-up instrumentation and metering to verify the results of the periodic tests. If requested in writing, Company shall provide copies of any inspection or testing reports to Seller.
- C. Test Dates. Seller is responsible for scheduling each Periodic Test. The date of any such Test shall be confirmed in writing by Company to Seller prior to the date of the Test. The Parties should attempt but are not required to schedule such Test on days that Company will or is likely to dispatch the Battery Storage System.
- D. Costs. Costs for testing are as set forth in Section 5.6.
- PART V. TEST PLAN.  
Any Test shall be performed according to the provisions of this Exhibit M, and the Test Plan below.
- A. **GENERAL:**
- (i) This document provides the procedure for Performance Test and evaluation of the Battery Storage System for the Facility. This document shall be the template to develop the final Performance Test procedures as mutually agreed to between the Parties. The complete final Performance Test procedure shall be submitted sixty (60) Days prior to the test.
  - (ii) The sole purpose of the Performance Test will be the determination of Maximum Charging Rate, Maximum Discharging Rate, Minimum Discharging Time, Minimum Charging Time, Storage Capacity, and Round Trip Efficiency of the Battery Storage System for comparison to the Guaranteed Performance values provided in Exhibit M-1. Uncertainties and test tolerance of 0.5% will be applied to any guarantee.
  - (iii) Prior to each test, a pre-test meeting shall be held and recorded. The meeting shall review the applicable approved performance test procedure, the applicable requirements of such Performance Test, as well as all instrumentation locations, calibration sheets, and other relevant topics including Safety Requirements.
  - (iv) Data shall be recorded by the SCADA/EWIS system data logging functions. The use of alternative means for data acquisition shall be used only with prior written consent of Seller. Company shall supply all raw data from the SCADA/EWIS system, daily during pre-test activities and during testing phase.
  - (v) Prior to the start of testing the Battery Storage System, the control settings (tuning and constants) shall be verified.
  - (vi) Any alteration or modifications to test measurement devices, or to the Battery Storage System, which could reasonably be expected to influence the outcome of the applicable Performance Test, shall not be permitted, without prior written consent of Company, and if

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

accepted by Company, shall be fully documented by Seller and Company.

**B. RESPONSIBILITIES:**

(i) Specific responsibilities for this Performance Test program are as follows:

a. Seller:

- i. Perform commissioning.
- ii. Manage the application of proper commissioning procedures until the Performance Tests have been completed.
- iii. Support Company with testing and interface with the Utility/ISO as required to schedule and perform testing.

b. Company:

- i. Support Seller with testing and interface with the Utility/ISO as required to schedule and perform testing.
- ii. Witness energy testing and/or review test documentation.
- iii. Provide energy for the Performance Test program.

**C. EQUIPMENT DEFINITION:**

The test configuration will consist of the Battery Storage System and its associated equipment.

**D. MEASUREMENTS & INSTRUMENTATION:**

- (i) Instrumentation for the Performance Test will consist of Battery Storage System instruments. Calibration certificates will be provided with the instruments.
- (ii) The State of Charge during all tests shall be read from the Battery Management System.
- (iii) The charge rate and discharge rates shall be measured using the Electric Metering Devices.
- (iv) For purposes of testing the Round Trip Efficiency and notwithstanding the last sentence of the definition of Electric Metering Devices, the Charging Energy and Discharging Energy shall be measured by the Electric Metering Devices without normalizing for electrical losses between the Electric Metering Devices and the Point of Delivery.

**E. DATA COLLECTION:**

- (i) All measurements of charge rate, discharge rate, input current and voltage, output current and voltage, thermal output, system temperatures, ambient conditions, and other parameters that must be measured shall be collected simultaneously at a temporal resolution applicable to the function of the system application and system metrics to which they are being applied and in accordance with recognized standards applicable to the measurements being taken.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

- (ii) Data scan rate shall be 4 seconds or faster for all tests.
- (iii) CANCELLATION OR CESSATION OF TESTING UNDER CERTAIN CIRCUMSTANCES
  - a. In connection with any of the acceptance and other testing pursuant to this Agreement, including the Performance Tests, Seller shall each have the unilateral right to cease such tests if Seller determines that a matter or event is occurring that may damage or adversely affect the equipment or system. Seller shall promptly remedy such condition and shall thereafter promptly reschedule the testing.

F. Test to measure Maximum Charging Rate, Maximum Discharging Rate, Minimum Discharging Time, Minimum Charging Time, Storage Capacity, and Round Trip Efficiency:

- (i) A capacity test shall be performed to determine Maximum Charging Rate, Maximum Discharging Rate, Minimum Discharging Time, Minimum Charging Time, Storage Capacity, and Round Trip Efficiency of the Battery Storage System.
- (ii) The Battery Storage System shall be discharged to 5% SOC and held for a period of 30 minutes.
- (iii) The Battery Storage System shall be discharged to 0% SOC level or to the minimum SOC as quickly as practical.
- (iv) The system shall be left at rest in an active standby state for 120 minutes or time adjusted by Seller based on battery technology.
- (v) The Battery Storage System shall be charged as close to the Guaranteed Maximum Charging Rate specified in Exhibit M-1 as possible (“Maximum Charging Rate”) until the BMS causes the allowable charging rate to be derated to prevent overvoltage. The maximum AC power during this charge cycle shall be recorded and used for satisfaction of the Guaranteed Maximum Charging Rate. The AC energy input **Wh<sub>li</sub>**, into the system during system charging and the time until the system begins to limit charging below the Maximum Charging Rate shall be measured and recorded.
- (vi) The Battery Storage System shall be charged to 100% SOC as close to the Maximum Charging Rate as possible subject to the limitation of the BMS. The total AC energy input **Wh<sub>l</sub>** (includes the energy at both the Maximum Charging Rate and derated charge rates), into the system during system charging, shall be measured and recorded. The total charging time period until Battery Storage System has charged or taken the Storage Capacity (including the time at both the Maximum Charging Rate and derated charge rates) will be used to determine the Minimum Charging Time.
- (vii) The system shall be left at rest in an active standby state for 120 minutes or time adjusted by Seller based on battery technology.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

- (viii) The Battery Storage System shall be discharged as close to the Guaranteed Maximum Discharging Rate specified in Exhibit M-1. The maximum AC power during this discharge cycle shall be recorded and used for satisfaction of the Guaranteed Maximum Discharging Rate. AC energy output **WhDi** out of the system during system discharging, and the time until the system begins to limit discharge below the Guaranteed Maximum Discharging Rate shall be measured and recorded. The time period until the system has supplied the Guaranteed Storage Capacity will be used for satisfaction of Guaranteed Minimum Discharging Time.
  - (ix) The system shall be discharged from the prior level to 0% SOC (or its warranted limits) at a current/voltage limited by the BMS. The total AC energy output from the system **WhD** (includes the energy at both the rated and derated discharge rates) shall be measured and recorded during discharge.
  - (x) The system shall be left at rest in an active standby state for 120 minutes or time adjusted by Seller based on battery technology.
  - (xi) The reference capacity test value (Storage Capacity) shall be **WhDi** as measured in F.(viii).
  - (xii) The power and times (hours/minutes/seconds) recorded in steps F.(v), F.(vi), and F.(viii) shall be the value used to verify conformance to the Guaranteed Maximum Charging Rate, Guaranteed Maximum Discharging Rate, Guaranteed Minimum Charging Time, and Guaranteed Minimum Discharging Time.
  - (xiii) The total AC energy input **WhI** and the total AC energy output from the system **WhD** recorded in steps F.(vi) and F.(ix) shall be used to determine Round Trip Efficiency for conformance to the Guaranteed Round Trip Efficiency. The Guaranteed Round Trip Efficiency shall be as defined in Part II of this Exhibit M.
- G. Grid Charging Capability Test (During COD Test):
- (i) Modify control system to disable code that prevents grid charging. Note this step must be performed by Seller's qualified controls programmer.
  - (ii) If SOC is above 80% discharge at a rate specified by Seller until Battery Storage Systems is below 80% SOC.
  - (iii) Record the SOC of the Battery Storage System.
  - (iv) The Battery Storage System shall be charged at the Maximum Charging Rate for 10 minutes.
  - (v) Following the 10-minute charging period, record the final SOC of the Battery Storage System.
  - (vi) The initial and final SOC of the Battery Storage System recorded in steps G.(iii) and G.(v), and achieved charging rate shall be used to verify conformance to Grid Charging Capability.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

- (vii) Modify control system to enable code that prevents grid charging. Note this step must be performed by Seller's qualified controls programmer.

\* \* \* \*

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

**EXHIBIT M-1**

**BATTERY STORAGE SYSTEM GUARANTEED PERFORMANCE LEVELS**

This Exhibit M-1 sets forth the guaranteed performance levels ("Guaranteed Performance") for certain Performance Criteria.

Guaranteed Round Trip Efficiency:

The Guaranteed Round Trip Efficiency shall be as set forth in the table below:

Year	RTE
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

<b><u>Performance Metric</u></b>	<b><u>Guaranteed Level</u></b>	<b><u>Point of Measurement</u></b>
Guaranteed Storage Capacity	[ ] MWh	Point of Delivery
Self-Discharge Rate	[ ]/month	Point of Delivery
Guaranteed Minimum Charging Time	Storage Capacity in MWh/ [ ] MW /RTE plus [ ] minutes (At Maximum Charging Rate)	Point of Delivery
Guaranteed Maximum Charging Rate	[ ] MW	Point of Delivery
Guaranteed Minimum Discharging Time	Storage Capacity in [ ] MWh plus [ ] minutes	Point of Delivery
Guaranteed Maximum Discharging Rate	[ ] MW	Point of Delivery
Maximum Ramp Rate	[ ] MW/second	Point of Delivery
Guaranteed Response Time	[ ] seconds	Point of Delivery
Grid Charging Capability (During COD Test)	Pass	Point of Delivery



**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

**EXHIBIT N  
RESERVED**

\* \* \* \* \*

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

**EXHIBIT O**

**BATTERY STORAGE SYSTEM OPERATING PROCEDURES**

The Battery Storage System Operating Procedures will include the provisions set forth in this Exhibit O – Battery Storage System Operating Procedures. If requested by Company, then no later than 90 days prior to the Commercial Operation Date, the Operating Committee shall develop the Battery Storage System Operating Procedures in accordance with Section 10.8. The Battery Storage System Operating Procedures can be reviewed annually (date and time to be mutually agreed) to optimize operations for both Parties. Parties shall cooperate to integrate the systems and controls necessary to implement the Battery Storage System Operating Procedures.

I. Operational limitations:

The operation of the Battery Storage System shall be subject to the following limitations:

(a) If the year-to-date average State of Charge exceeds [50]% at any time during the second half of a Commercial Operation Year, then the maximum allowed State of Charge shall be limited to the State of Charge that, if held for the rest of the Commercial Operation Year, would equal an annual averaged State of Charge of [50]%. If the allowable State of Charge has been limited, the State of Charge limitation will be released once the year-to-date State of Charge is less than [45]%.

[(b) The requirements and limitations set forth in Section 5.2(D).]

II. 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 energy storage level data:

Table 1

<u>Energy Storage</u>	
<u>Description</u>	<u>Units</u>
Real Power Set-Point (echo)	MW
Actual Real Power	MW
Actual Reactive Power	MVar
Battery State of Charge	% & MWh
Remaining Throughput (Commercial Operation Year)	MWh

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

YTD Average SOC (Commercial Operation Year)	%
Maximum Allowable SOC	MWh
Additional Data Points Reserved for Future Use	

The following data points will be transmitted via SCADA from Company to Seller and represent energy storage level data:

Table 2

<u>Energy Storage</u>	
<u>Description</u>	<u>Units</u>
Charge Power Set-Point*	MW
Discharge Power Set-Point*	MW
Duration of Charge/Discharge Set-Point**	minutes
Target State of Charge*	%
Ramp Rate	MW/s
Control Mode (target time or target SOC)	Boolean
Additional Data Points Reserved for Future Use	

\* Parties will resolve any conflicts in priority of signal in the Battery Storage System Operating Procedures

\*\*System will observe either time entry or SOC target depending on Control Mode

Data points transmitted via SCADA from Seller to Company are subject to Battery Storage Operating Procedures.

1. **Response times of Battery Storage System.** The Battery Storage System Operating Procedures will include protocols that outline the expectations for responding to the Company's set points.

2. **Backup communications.** In the event of a communications failure, Company and Seller shall communicate via telephone in order to correct the failure.

III. Availability Scheduling Requirements

- a. The Battery Storage System availability schedule shall be posted at 4:00 AM two (2) Business Days prior to the applicable Day, and shall be applicable through the end of such Day. For example, on Monday, an availability schedule is required for Wednesday (midnight to midnight). On Tuesday, the schedule for Thursday. On Wednesday, the schedule for Friday, and so on. The schedule shall be submitted through an availability scheduling system as specified by Company to Seller. Prior to the Commercial Operation Date,

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

Company shall provide Seller with the information necessary for Seller to access the chosen availability scheduling system.

- b. If any events or circumstances reduce the scheduled availability of the Battery Storage System by 10% or more (or the current requirements of the applicable ERO if less than 10%), such reduction shall be (1) communicated to the real-time operator via telephone with (2) an immediate update to the availability schedule in the availability scheduling system.

\* \* \* \* \*

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

**EXHIBIT P**

**SAFETY REQUIREMENTS**

Seller shall design and construct the Facility in compliance with all Applicable Laws and shall ensure the Facility is operated in compliance with Good Utility Practice. Seller shall identify codes and standards that are applicable to the design of the Facility and ensure that upon substantial completion the Facility meets applicable codes and standards. Only non-occupiable Battery Storage System enclosures shall be considered and seller shall have the Battery Storage System enclosures certified to UL 9540. Seller shall design, construct, and install the Facility under the guidance of NFPA 855 and shall comply with all applicable portions of that standard. Seller is solely responsible for maintaining the Facility in compliance with all Applicable Laws. Seller will provide Company with an independent registered professional engineer's certification stating that the Facility has been completed in all material respects (including compliance with all Applicable Laws) prior to COD.

Prior to COD, Seller will provide documentation submitted as part of the Adams County permitting process and, if not otherwise submitted as part of such permitting process, the following additional documents:

1. Operations and maintenance documentation, including an operations manual and maintenance manual, and schedule for planned maintenance;
2. Safety procedures for personnel (may be included within the operations or maintenance manual), and supplier safety manual;
3. Training materials for local first responders, identifying known hazards and failure modes, and methods for approach and action, if appropriate;
4. Emergency management plan, including instructions on how to interpret alarms and faults, location of emergency stops, egress pathways, known hazards, and emergency contact information for a subject matter expert who can be available on site within 2 hours; and
5. System drawings and documentation, including all physical, electrical, mechanical, and communications diagrams for all Facility sub-components, to allow for confirmation of claimed safety features including but not limited to, respectively, sufficient spacing, security, and signage; appropriate electrical ratings, grounding, and interconnections; foundations and construction materials; awareness of system operation and alarms; and fault ranges and emergency stops, but excluding any vendor proprietary drawings. As applicable, certifications for all claimed standards compliance should be provided.

\* \* \* \* \*

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

**EXHIBIT Q**

**EXAMPLE ADJUSTMENT CALCULATIONS**

**Example of Roundtrip Efficiency Adjustment**

Example of Roundtrip Efficiency Adjustment based on the following assumed facts:

- (a) Seller's actual roundtrip efficiency as determined by latest test (RTE) = 85%.
- (b) Seller's Guaranteed Roundtrip Efficiency (RTE<sub>G</sub>) = 87%.
- (c) Amount of Discharging Energy delivered to the Point of Delivery for the affected month (Discharging MWh<sub>Actual</sub>) = 9,180 MWh.
- (d) Discharging LMP = \$13.50
- (e) Amount of Charging Energy delivered to the Point of Delivery for the affected month (Charging MWh<sub>Actual</sub>) = 10,800 MWh.
- (f) Charging LMP = \$1.50

Given these assumed facts, the Round Trip Efficiency Adjustment is calculated as follows:

Round Trip Efficiency Adjustment

$$\begin{aligned} &= [1 - (\text{RTE}_{\text{test}} / \text{RTE}_G)] \times [(\text{Discharging } MWh_{\text{Actual}} * \text{Discharging LMP}) - (\text{Charging } MWh_{\text{Actual}} * \text{Charging LMP})] \\ &= [1 - (85\% / 87\%)] \times ((9,180 \text{ MWh} \times \$13.50/\text{MWh}) - 10,800 \text{ MWh} \times \$1.50/\text{MWh}) \\ &= 2.2989\% \times (\$123,930 - \$16,200) \\ &= \$2,476.55 \end{aligned}$$

**Example of Guaranteed Storage Availability Payment Adjustment**

Example of Guaranteed Storage Availability Payment Adjustment based on the following assumed facts:

- (a) Seller operates a 100 MW, 4-hour Battery Energy Storage System.
- (b) There are 720 Hours in the given month (based on an assumed 30-day month).

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

- (c) The Capacity Payment Rate in the given Commercial Operation Year is \$15/kW-month.
- (d) The Storage Capacity determined by the most recent Test is 100 MW (100,000 kW).
- (e) The Guaranteed Storage Availability is 97%.
- (f) Seller experiences four (4) outage events in the applicable month.
  - a. Outage Event #1 is a Planned Outage Event which persists for 12 Hours during which 0 MW of capacity is available for 4 Hours.
  - b. Outage Event #2 is an unplanned outage which persists for 16 hours during which only 50 MW of capacity is available for 4 Hours.
  - c. Outage Event #3 is an unplanned outage which persists for 30 hours during which 0 MW of capacity is available for 4 Hours.
  - d. Outage Event #4 is an unplanned outage which persists for 20 hours during which 25 MW of capacity is available for 4 hours.

Given these assumed facts, the monthly Guaranteed Storage Availability Payment Adjustment due to Company is calculated as follows:

- (a) The Availability Percentage and resulting Equivalent Planned Outage Hours and Equivalent Forced Outage Hours are calculated for each outage as follows:

Outage Event #1:

$$\text{Availability Percentage} = 0 \text{ MW} / 100 \text{ MW} = 0$$

$$\text{Equivalent Planned Outage Hours} = 12 \times (1 - 0) = 12 \text{ Hours}$$

$$\text{Equivalent Forced Outage Hours} = 0 \text{ Hours}$$

Outage Event #2:

$$\text{Availability Percentage} = 50 \text{ MW} / 100 \text{ MW} = 0.5$$

$$\text{Equivalent Planned Outage Hours} = 0 \text{ Hours}$$

$$\text{Equivalent Forced Outage Hours} = 16 \times (1 - 0.5) = 8 \text{ Hours}$$

Outage Event #3:

$$\text{Availability Percentage} = 0 \text{ MW} / 100 \text{ MW} = 0$$

$$\text{Equivalent Planned Outage Hours} = 0 \text{ Hours}$$

$$\text{Equivalent Forced Outage Hours} = 30 \times (1 - 0) = 30 \text{ Hours}$$

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

Outage Event #4:

$$\text{Availability Percentage} = 25 \text{ MW} / 100 \text{ MW} = 0.25$$

$$\text{Equivalent Planned Outage Hours} = 0 \text{ Hours}$$

$$\text{Equivalent Forced Outage Hours} = 20 \times (1 - 0.25) = 15 \text{ Hours}$$

- (b) The Total Equivalent Planned Outage Hours and Total Equivalent Forced Outage Hours are calculated as follow:

$$\text{Total Equivalent Planned Outage Hours} = 12 + 0 + 0 + 0 = 12 \text{ Hours}$$

$$\text{Total Equivalent Forced Outage Hours} = 0 + 8 + 30 + 15 = 53 \text{ Hours}$$

- (c) The Equivalent Availability Factor is calculated as follows:

$$\text{Equivalent Availability Factor} = (\text{Hours} - \text{Total Equivalent Forced Outage Hours} - \text{Total Equivalent Planned Outage Hours}) / (\text{Hours} - \text{Total Equivalent Planned Outage Hours})$$

$$\text{Equivalent Availability Factor} = (720 - 53 - 12) / (720 - 12) = 0.925$$

- (d) The Guaranteed Storage Availability Payment Adjustment for the applicable month is then calculated as follows:

$$\text{Guaranteed Storage Availability Payment Adjustment} = \text{Capacity Payment Rate} \times \text{Storage Capacity} \times (\text{the Guaranteed Storage Availability (as a percentage) minus the Equivalent Availability Factor (as a percentage)});$$

$$\text{Guaranteed Storage Availability Payment Adjustment} = \\ \$15/\text{kW-month} \times 100,000 \text{ kW} \times (.97 - .925) = \$67,500$$

**Example of Dispatch Availability Factor**

Example of Dispatch Availability Factor for a month  $m$  ( $\text{DAF}_m$ ) based on the following assumed facts:

The total number of hours during such month for which the Company provided a Dispatch Notice ( $\text{On-Control Hours}_m$ ): 40

The total number of hours during such month that the Facility was unable to operate in compliance with a Dispatch Notice ( $\text{Shortfall Hours}$ ): 1

$$\text{DAF}_m = 1 / 40 = 0.025$$



**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

Sample Calculation for Non-Shortfall Hour:

Hour i	5 minute Interval	Dispatch Notice (MW)	Energy Storage System Output (MW)	Absolute Value of the 5-Minute Deviation in the Facility Output (MW)	Absolute Value of the Dispatch Notice for the Facility Output (MW)
i	1	-90	-90	0	90
i	2	-90	-89	1	90
i	3	-90	-88	2	90
i	4	-90	-89	1	90
i	5	0	0	0	0
i	6	0	0	0	0
i	7	0	0	0	0
i	8	0	0	0	0
i	9	90	88	2	90
i	10	90	89	1	90
i	11	90	90	0	90
i	12	90	89	1	90

The Shortfall Calculation is: The sum of the absolute value of the 5- minute deviations in the Facility Output/The sum of the absolute value of the 5- minute Dispatch Notices for the Facility Output =Sum of column 5 in the table above/Sum of column 6 in the table above=8/720=0.011

Since the Shortfall Calculation is less than 0.02 the hour is counted as a Non- Shortfall Hour.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

Sample Calculation for Shortfall Hour:

Hour i	5 minute Interval	Dispatch Notice (MW)	Energy Storage System Output (MW)	Absolute Value of the 5-Minute Deviation in the Facility Output (MW)	Absolute Value of the Dispatch Notice for the Facility Output (MW)
i	1	-90	-90	0	90
i	2	-90	-89	1	90
i	3	-90	-75	15	90
i	4	-90	-75	15	90
i	5	0	0	0	0
i	6	0	0	0	0
i	7	0	0	0	0
i	8	0	0	0	0
i	9	90	88	2	90
i	10	90	75	15	90
i	11	90	90	0	90
i	12	90	89	1	90

The Shortfall Calculation is: The sum of the absolute value of the 5- minute deviations in the Facility Output/The sum of the absolute value of the 5- minute Dispatch Notices for the Facility Output =Sum of column 5 in the table above/Sum of column 6 in the table above=49/720=0.068

Since the Shortfall Calculation is more than 0.02 the hour is counted as a Shortfall Hour.

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

**EXHIBIT R**

**METER AND COMMUNICATIONS REQUIREMENTS**

These meter requirements shall apply to all Electric Metering Devices.

- Electric Metering Devices shall meet requirements set forth in American National Standards Institute (ANSI) C12.1 and 12.20. Current transformers and voltage transformers supplying this meter should meet requirements of IEEE/ANSI C57.13 and ANSI C57.13.6. In addition to meeting these requirements the current transformers should be high accuracy extended range transformers with at least .15% accuracy from 1% to full rating factor. Prior to the purchase of Electric Metering Devices, current transformers and potential transformers and associated communication equipment, Seller must submit relevant information such that Company can review and verify that the equipment meets Company requirements.
- No later than ninety (90) Days prior to generating any Test Energy, Seller shall provide to Company in mutually agreeable format all necessary specifications related to the Electric Metering Devices and/or communication therewith including, but not limited to, the make, model, port configuration, connection assignments, and physical locations.
- Company may inspect and verify that the equipment was approved and properly installed. In addition, Company may elect to test the Electric Metering devices for accuracy, current transformers and potential transformers and verify that the communication circuits to Company Xcel are operational.
- Upon prior written notice sufficiently in advance, Company shall have the right to make requests in regard to reasonable modifications to Seller's metering equipment and configurations in order to ensure accurate telemetering and communication.
- Company shall have the right to install any telemetering and communication equipment Company deems reasonably necessary for purposes related to this PPA. Seller shall, upon prior written notice sufficiently in advance, cooperate with any such installation.
- Electric Metering Devices shall be programmed to, at any time of remote electronic communications and access, provide a time and date stamp of downloaded delivery information.
- Electric Metering Devices shall be programmed to, at any time of manual read of the meter's display, provide the time and date of the information gathered. The Seller shall provide the communication channels for the Company's remote terminal unit and the Company's Itron Enterprise Edition Meter Data Management Agent. The implementation of these communication paths and RTU shall follow

**Southwestern Public Service Company Model Storage Energy Purchase Agreement**

Company's latest standard. The Seller must have these communication paths installed, tested, and functional prior to generating Test Energy.

- Company shall have the right, via read-only access, and upon prior reasonable written notice to Seller, to independently audit Seller's meters and any records pertaining to the amount of energy generated by the Facility and any associated losses. Any audit shall be performed at the Facility or if applicable, other location within the same state as the Facility which is mutually agreed upon by both Company and Seller. Records related to such audits, inspections, testing or adjustments shall be maintained and subject to audit by Company for a period of 24 months. Company shall further have the right to request and receive in physical or electronic form any and all records or data files related to such audits, inspections, testing or adjustments.
- Seller shall provide secure and reliable communication from the Electric Metering Devices as follows:
  - DNP output from the meter to Company's EMCC via a remote terminal unit located near the Electric Metering Devices and hardwired from the meter to the remote terminal unit.
  - Time stamped meter register and interval data from the meter to Company's Itron Enterprise Edition Meter Data Management Agent with servers located in Denver, CO. Electric Metering Devices must have an Itron approved Translation Interface Module to facilitate correct data transmission over this communication path.
  - Prior to generating Test Energy, Seller shall provide to Company one-line electrical drawings of the Facility showing the electrical location of the Electric Metering Devices for Company's review and approval.

**Attachment JLB-3(CONF) is Confidential and will be provided  
under the provisions of the Protective Order**

# **POWER PURCHASE AGREEMENT**

**BETWEEN**

**SOUTHWESTERN PUBLIC SERVICE COMPANY**

**AND**

**BORGER ENERGY ASSOCIATES LLC**



**November 10, 2023**

## TABLE OF CONTENTS

<b>Article 1 - Rules of Interpretation</b> .....	<b>2</b>
1.1. Interpretation .....	2
1.2. Interpretation with Transmission Tariff and Tariffs of Retail Provider for House Power .....	2
1.3. Good Faith and Fair Dealing .....	3
<b>Article 2 - Term and Termination</b> .....	<b>3</b>
<b>Article 3 - Facility Description and Related Agreements.</b> .....	<b>3</b>
3.1. Description .....	3
3.2. Related Agreements.....	4
3.3. Payment Timing and Netting Arrangements.....	5
3.4. General Operation and Maintenance of the Facility .....	5
<b>Article 4 - Contracts, Environmental Matters, Permits and Governmental Inspections</b> .....	<b>5</b>
4.1. Contracts.....	5
4.2. Environmental Matters.....	6
4.3. Permits .....	7
4.4. Governmental Inspections.....	8
4.5. Reserved.....	8
<b>Article 5 - Delivery</b> .....	<b>8</b>
5.1. Arrangements.....	8
5.2. Market Changes .....	9
5.3. Electric Metering Devices .....	9
5.4. Natural Gas Fuel .....	10
5.5. Reserved.....	11
<b>Article 6 - Conditions Precedent</b> .....	<b>11</b>
6.1. PUC Approval.....	11
6.2. Seller Condition Precedent.....	12
6.3. Additional Company Condition Precedent.....	12
6.4. Return of Security Fund .....	13
<b>Article 7 - Sale and Purchase</b> .....	<b>13</b>
7.1. General Obligation .....	13
7.2. Dispatch .....	13
7.3. Permit Limitations.....	14
7.4. Environmental Attributes .....	14
7.5. Ancillary Services .....	16
<b>Article 8 - Payment Calculations</b> .....	<b>16</b>
8.1. Payment for Contract Capacity.....	16
8.2. Reserved.....	18
8.3. Variable O&M Payment.....	18

8.4. Payment for Energy.....	19
8.5. Company Credit for Gas Contract Costs.....	19
8.6. Company Credit for Services under FMA.....	20
8.7. Payment for Pipeline Agreement Services.....	20
8.8. Payment for Turbine Starts.....	20
8.9. ESC Adjustments.....	20
<b>Article 9 - Billing and Payment.....</b>	<b>21</b>
9.1. Billing.....	21
9.2. Payment.....	22
9.3. Billing Disputes.....	23
<b>Article 10 - Operations and Maintenance.....</b>	<b>23</b>
10.1. Operation and Administration.....	23
10.2. Facility Maintenance.....	23
10.3. Forced Outages and Reporting.....	24
10.4. Testing.....	24
10.5. Forecasting.....	25
10.6. Books and Records.....	25
10.7. Access to Facility.....	26
10.8. Operating Committee and Operating Procedures.....	26
10.9. Availability Reporting: Gas.....	27
10.10. Reserved.....	27
<b>Article 11 - Security for Performance.....</b>	<b>27</b>
11.1. Security Fund.....	27
11.2. Form.....	28
11.3. Replacement.....	30
11.4. Survival.....	30
11.5. Expenses.....	30
<b>Article 12 - Default and Remedies.....</b>	<b>30</b>
12.1. Default by Seller: General.....	30
12.2. Reserved.....	32
12.3. Default by Company.....	33
12.4. Limitations on Damages.....	34
12.5. Bankruptcy.....	35
12.6. Cumulative Remedies.....	36
12.7. Duty to Mitigate.....	36
<b>Article 13 - Dispute Resolution.....</b>	<b>36</b>
13.1. Negotiation.....	36
13.2. Time Bar.....	36
13.3. No Termination Pending Dispute Resolution.....	36
13.4. Governing Law.....	37
13.5. Venue.....	37
13.6. Waiver of Jury Trial.....	38



<b>Article 14 - Force Majeure</b> .....	<b>38</b>
14.1. Definition.....	38
14.2. Applicability of Force Majeure.....	39
14.3. Limitations on Effect of Force Majeure .....	39
<b>Article 15 - Representations, Warranties and Covenants</b> .....	<b>40</b>
<b>Article 16 - Insurance</b> .....	<b>41</b>
16.1. Evidence of Insurance .....	41
16.2. Policy Requirements.....	42
16.3. No Implied Limitation .....	42
16.4. Term and Modification of Insurance.....	42
16.5. Application of Proceeds .....	42
<b>Article 17 - Indemnity</b> .....	<b>43</b>
17.1. Indemnification: General.....	43
17.2. Indemnification: Environmental.....	43
17.3. Indemnification: House Power .....	43
17.4. Reserved .....	43
17.5. Limitations.....	43
17.6. Procedures .....	43
17.7. Amounts Owed .....	44
<b>Article 18 - Lender Provisions</b> .....	<b>44</b>
18.1. Accommodation of Facility Lender.....	44
18.2. Notices.....	45
<b>Article 19 - Assignment</b> .....	<b>45</b>
19.1. Assignment by Seller .....	45
19.2. Assignment by Company.....	46
19.3. ROFO .....	47
19.4. PFT.....	48
19.5. Option .....	49
19.6. Memo of Option .....	51
19.7. Transfer and Release .....	51
<b>Article 20 - Miscellaneous</b> .....	<b>51</b>
20.1. Notices.....	51
20.2. Taxes.....	52
20.3. Applicable Laws.....	53
20.4. Change of Law.....	53
20.5. Fines and Penalties .....	53
20.6. Rate Changes.....	53
20.7. Certifications .....	54
20.8. Disclaimer of Third Party Beneficiaries .....	54
20.9. Relationship of the Parties .....	54
20.10. Survival of Obligations .....	54

20.11.	Severability .....	54
20.12.	Complete Agreement; Amendments .....	55
20.13.	Waiver.....	55
20.14.	Binding Effect.....	55
20.15.	Headings.....	55
20.16.	Counterparts and Electronic Signatures .....	55
20.17.	Press Release .....	55
20.18.	Exhibits .....	55
20.19.	Confidentiality .....	56
20.20.	Accounting Treatment.....	57

**EXHIBITS:**

**EXHIBIT A DEFINITIONS**

**EXHIBIT B RESERVED**

**EXHIBIT C FACILITY DESCRIPTION AND SITE MAPS**

**EXHIBIT D NOTICES AND CONTACT INFORMATION**

**EXHIBIT E INSURANCE COVERAGE**

**EXHIBIT F RESERVED**

**EXHIBIT G FORM OF LETTER OF CREDIT**

**EXHIBIT H FORM OF GUARANTY**

**EXHIBIT I RAMP RATE**

**EXHIBIT J CAPACITY TESTING**

**EXHIBIT K HEAT RATE**

**EXHIBIT L MAINTENANCE**

**EXHIBIT M PRICING**

**EXHIBIT N ESC ADJUSTMENTS**

**EXHIBIT O LENDER CONSENT PROVISIONS**

**EXHIBIT P-1 RESERVED**

**EXHIBIT P-2 FACILITY PURCHASE AND SALE AGREEMENT (“PSA”) PROVISIONS**

**EXHIBIT P-3 MEMBERSHIP INTEREST PURCHASE AND SALE AGREEMENT  
("MIPSA") PROVISIONS**

**EXHIBIT Q ENERGY PAYMENT CALCULATION EXAMPLE**

**EXHIBIT R OPERATING PROCEDURES**

**EXHIBIT S METER AND COMMUNICATIONS REQUIREMENTS**

**POWER PURCHASE AGREEMENT**  
**BETWEEN**  
**SOUTHWESTERN PUBLIC SERVICE COMPANY AND**  
**BORGER ENERGY ASSOCIATES LLC**

This Power Purchase Agreement (this “PPA”) is made as of this 10th day of November, 2023 (“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) Borger Energy Associates LLC, a Delaware limited liability company with a principal place of business at 888 Westheimer Road, Suite 300, Houston, TX 77006 (“Seller”). Company and Seller are hereinafter referred to individually as a “Party” and collectively as the “Parties.”

Company currently has an agreement with Seller to acquire capacity, associated energy and other products and services from Seller's Facility ("Original PPA"). The Original PPA is scheduled to terminate on December 31, 2026;

Company issued an All-Source Request for Proposals on November 28, 2022 (“2022 All-Source RFP”), seeking bids for future generation resources;

In response to the 2022 All-Source RFP Seller submitted to Company two bids associated with the Facility;

In response to Seller’s bids, Company chose to negotiate a new power purchase agreement with Seller to acquire the capacity, associated energy and other products and services from Seller's Facility for a period of fifteen (15) years; and,

The Parties desire to enter into this PPA for Company to acquire capacity, associated energy and other products and services from Seller's Facility on the Energy Delivery Commencement Date, as defined below. For this PPA the Parties intend that the Fuel Agreements, the FMA and the Pipeline Agreement, all as defined below, created to facilitate the delivery of natural gas to the Facility under the Original PPA will continue. The Parties also intend for the terms of this PPA to replace the payment timing and netting arrangements established in the First Multi-Agreement Amendment and the Second Multi-Agreement Amendment, as defined below.

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 Transmission Tariff and Tariffs of Retail Provider for House Power.

A) This PPA does not provide authorization for Seller to interconnect the Facility or inject power into the Transmission Authority’s System. Seller shall arrange for interconnection services in accordance with the applicable Transmission Tariff. Seller acknowledges that the Transmission Tariff is separate from this PPA 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 Transmission Tariff 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 of 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 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 of 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, then unless another standard is expressly specified in this PPA, 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, then unless another standard is expressly specified in this PPA, such determination, requirement, specification or similar action shall be Commercially Reasonable.

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

Subject to the conditions set forth below, 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 last Day of the calendar month during which occurs the 15th anniversary of the Energy Delivery Commencement 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 Section 12.1(B) and (C), Section 12.3(B) and (C), Article 13 and Article 17 below), and (iii) address any remedies or indemnifications arising prior to termination.

## **Article 3 - Facility Description and Related Agreements.**

### **3.1. Description.**

A) The Facility is a gas-fired, simple-cycle with waste heat recovery electric generation facility designed to generate electricity on a partially-dispatchable basis, as further described in Exhibit C - Facility Description and Site Maps. A scaled map that identifies the Site, the location of the Facility, the Interconnection Point and Interconnection Facilities, the Point of Delivery, the Fuel Delivery Point, and other important facilities, is included in Exhibit C - Facility Description and Site Maps.

B) The Facility operates primarily as a baseload facility and must provide adequate single-pressure steam to the Steam Off-taker. Pursuant to the Steam Agreement, Seller is required to run the Facility at a Minimum Load Level to provide adequate Thermal Energy, steam and compressed gas for the Steam Off-taker's industrial processes. Subject to Section 7.2(B), the Non-Dispatchable Capacity and Energy from the Facility is sixty-seven percent (67%) of the Contract Capacity.

1. Seller shall provide Company with a copy of any amendments to the Steam Agreement (or, if applicable, any agreement with a Subsequent Steam Host or amendments thereto).

2. Seller shall not enter into any amendment to the Steam Agreement or any agreement with a Subsequent Steam Host that would materially adversely affect Company's rights and obligations under this PPA.

3.2. Related Agreements. The Related Agreements have been executed to facilitate the Seller's ability to meet its obligations to the Steam Off-taker and to the Company under the Original PPA and this PPA. The Related Agreements are:

1. Two natural gas supply agreements:

(a) "NAESB Base Contract for Sale and Purchase of Natural Gas" between Company and Seller dated October 17, 2005, including the Special Provisions attached thereto. Pursuant to this agreement Company supplies approximately fifty percent (50%) or more of the required natural gas supply for use by the Facility. The NAESB Base Contract for Sale and Purchase of Natural Gas dated October 17, 2005 as amended is hereinafter referred to as the "Gas Contract";

(b) "Second Amended and Restated Gas Supply Agreement" dated March 13, 2019 between Seller and IACX Rock Creek LLC ("IACX", f/k/a DCP Operating Company, LP) ("IACX Gas Contract"). Pursuant to the IACX Gas Contract Seller supplies approximately fifty percent (50%) of the required natural gas supply for use by the Facility. The Gas Contract and the IACX Gas Contract, as amended from time to time, as well as any other successor or replacement agreements are hereinafter referred to as the "Fuel Agreements."

2. Fuel Management Agreement dated as of February 25, 1998 ("FMA"). Under the FMA, Company administers the Fuel Agreements which supply and transport the natural gas used to fuel the Facility. The Parties agree that the FMA will continue under this PPA unless otherwise terminated under the terms of the FMA. The exact amount of gas supplied to the Facility under the Fuel Agreements will be determined by SPS in accordance with the FMA.

3. Company, Seller and Branch Energy Companies ("Branch Energy"), by assignment from Pinnacle Pipeline Company, entered into a Natural Gas Pipeline Construction and Transportation Agreement dated May 1, 1998, as amended May 31, 2006, December 28, 2006, December 6, 2007 and December 17, 2008 (the "Pipeline Agreement"). Pursuant to the Pipeline Agreement, Branch Energy provides, among other things, certain construction, operation and maintenance services with respect to the Pinnacle gas pipeline ("Pinnacle Pipeline") that serves the Facility. Under the Pipeline Agreement, Seller pays Branch Energy [REDACTED] per month to

provide pipeline maintenance and operational assistance services for the gas pipeline that serves the Facility. Company then reimburses Seller for such payments. Seller and Company agree that this payment and reimbursement approach will continue and that the reimbursements to Seller under the Pipeline Agreement will be made pursuant to the payment provisions of Section 9.1 of this PPA. The Parties also agree that the Pipeline Agreement will continue unless otherwise terminated pursuant to the terms of the Pipeline Agreement.

### 3.3. Payment Timing and Netting Arrangements.

A) The Gas Contract and FMA were amended twice: "Amendment to Power Purchase Agreement, NAESB Base Contract for Sale and Purchase of Natural Gas, and Fuel Management Agreement dated May 20, 2019 ("First Multi Agreement Amendment"); and, "Amendment No. 2 to Power Purchase Agreement, Fuel Management Agreement and Gas Contract, dated March 9, 2023 ("Second Multi Agreement Amendment").

B) Certain provisions of the First Multi Agreement Amendment and the Second Multi Agreement Amendment amended Sections 5.9(B) and (C) of the Original PPA to address certain matters related to the payments to be made pursuant to the Original PPA. The first matter addressed was the calculation and timing of the payments to be made pursuant to the Original PPA. The second matter addressed was the netting of payments to be made pursuant to certain Related Agreements as part of calculating the payments to be made pursuant to the Original PPA. The Parties intend for the payment provisions of Section 9.1 of this PPA to replace the payment calculation, timing and netting arrangements set forth in Sections 5.9(B) and (C) of the Original PPA as amended by the First Multi-Agreement Amendment and the Second Multi-Agreement Amendment.

### 3.4. General Operation and Maintenance of the Facility.

A) Seller shall operate and maintain the Facility according to Good Utility Practices and the Interconnection Agreement.

B) The Facility shall include all equipment specified in Exhibit C - Facility Description and Site Maps and otherwise necessary (i) to meet the requirements of Exhibit I - Ramp Rate, and (ii) to fulfill Seller's obligations under this PPA, including all equipment necessary to interconnect successfully with the Transmission Authority's System for the delivery of Contract Energy.

C) The Net Capability of the Facility shall be 230 MW.

## **Article 4 - Contracts, Environmental Matters, Permits and Governmental Inspections**

### 4.1. Contracts.

A) Seller shall enter into and perform at its expense the contracts, including any equipment procurement contracts, required for the generation and delivery of the products and services required under this PPA (generally, the "Contracts") with qualified



and experienced contractors. Upon reasonable written request by Company, Seller shall promptly provide copies of Contracts to Company that can materially affect Seller's obligations under the PPA. All Contracts obtained by Company shall be deemed Confidential Information subject to Section 20.19 below.

4.2. Environmental Matters.

A) No later than sixty (60) Days following PUC Approval, Seller shall complete and provide to Company a comprehensive independent "Phase I" environmental site assessment of the Site that is conducted in compliance with ASTM E1527-21 or E2247-16, as applicable (including associated raw data, if requested by Company), which report shall have been prepared as of a reasonably proximate-time such that it reflects the then-current conditions of the Site. 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) Seller's plan for remediation thereof that would allow Seller to perform this PPA as and when due. The Phase I report and items delivered to Company under this paragraph 4.2 shall be deemed Confidential Information for purposes of Section 20.19.

B) Throughout the Term, Seller shall promptly:

1. disclose to Company any Environmental Contamination identified at the Site;
2. remediate any Environmental Contamination, at Seller's sole cost and expense, caused by Seller or that Seller is legally obligated to remediate;
3. at Company's written request, provide to Company copies of environmental assessments or investigations of the Site (including associated raw data); and
4. 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 protection of human health, the environment, or natural resources, including 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, contaminant, chemical, material, gas, or particulate matter that is regulated by any

Governmental Authority as an environmental pollutant or which is deemed or may be deemed hazardous, dangerous, damaging or toxic 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 Applicable Law; (ii) petroleum, including any fraction, derivative or additive; (iii) asbestos; (iv) polychlorinated biphenyls; (v) per- and polyfluoroalkyl substances (vi) radioactive material; (vii) designated as a “hazardous substance” pursuant to the Clean Water Act, 33 U.S.C. §1251 et seq. (33 U.S.C. §1251); (viii) 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); (ix) 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); (x) defined as a “chemical substance” under the Toxic Substances Control Act, 15 U.S.C. §2601 et seq. (15 U.S.C. §2601); or (xi) 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 under Applicable Law for the construction, ownership, operation and maintenance of the Facility and the generation and delivery of the products and services required by this PPA. If reasonably requested by Company, Seller shall provide an update to Company as to the status of its permitting efforts. Seller shall promptly inform Company of (i) any Permits that Seller is unable to obtain, which 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. Upon reasonable written notice to Seller, Company shall have the right to inspect and/or obtain copies from Seller Permits held by Seller directly related to Seller’s ability to perform under this PPA.

B) Seller represents and warrants to Company that at the time this PPA is signed, all Permits and other actions required or recommended 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 shall promptly 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 Contract Energy therefrom.

4.4. Governmental Inspections. Seller shall promptly provide Company with a description of any inspections performed by a Governmental Authority during the period of time in question. This description shall include the Governmental Authority that performed the inspection, date of inspection and outcome of inspection, including any actions taken to resolve findings.

4.5. Reserved.

## **Article 5 - Delivery**

5.1. Arrangements.

A) Seller shall be responsible for maintaining and paying the costs associated with Seller's Interconnection Facilities required for Company to receive Contract Capacity and Contract Energy from the Facility in accordance with Good Utility Practice and this PPA. Company shall be responsible for arranging, maintaining and paying the costs associated with Company's Interconnection Facilities as required for the Company to receive Contract Capacity and Contract Energy from the Facility in accordance with Applicable Law, Good Utility Practice, and this PPA. Seller shall comply with the Transmission Authority's requirements for interconnection and shall comply with all requirements set forth in the applicable Transmission Tariff. Seller shall cooperate reasonably in any request by Company to assist in Company's efforts to have the Facility approved as a network resource or equivalent classification pursuant to the applicable Transmission Tariff. Seller hereby authorizes Company to contact, discuss and obtain information concerning the Facility and the 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.

B) To the extent required, Company shall arrange and be responsible for scheduling and transmission services beyond the Point of Delivery with respect to the output of the Facility. To the extent applicable, Company shall be the market participant with respect to the output of the Facility, as defined by the Transmission Authority.

C) Seller shall be responsible for all interconnection, electric losses, transmission and Ancillary Service arrangements and costs required to deliver the Contract Energy. Company shall be responsible for all electrical losses, transmission and Ancillary Service arrangements and costs required to transmit and deliver Contract 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 cooperate in good faith to facilitate the delivery of Contract Energy, at the least possible cost to the Parties, consistent with this PPA to the extent possible.

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 cooperate in good faith to change their protocols for operation of the Facility accordingly, at the least possible cost to the Parties, consistent with this PPA to the extent possible. In addition, if as a result of any change in Applicable Law the Company is not able to realize the capacity and ancillary services products that the Facility is able to provide to the Company as of the Effective Date and such capacity and ancillary services products can be provided by the Facility subject to the Seller making Commercially Reasonable capital expenditures to comply with such change in Applicable Law, then Seller agrees that it shall make all such capital expenditures so that the Facility is able to provide such capacity and ancillary services products to the Company.

5.3. Electric Metering Devices.

A) All Electric Metering Devices used to measure the Contract Capacity and Contract Energy are to be owned, installed, and maintained by Company except for Seller's Back-Up Metering as defined in Section 5.3(D). Electric Metering Devices have been installed at the Point of Delivery. At least annually, Company shall inspect and test all Electric Metering Devices (except for Seller's Back-Up Metering) at its own expense. Upon installation, all Electric Metering Devices and Back-up Metering shall meet the requirements of Exhibit S - Meter and Communications Requirements.

B) 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.

C) Seller shall arrange any necessary authorization to provide Company access to all Electric Metering Devices via electronic remote communications and via physical access 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.

D) The Parties acknowledge and agree that Seller has installed and maintains, at its own expense, backup metering devices ("Back-Up Metering"). The specifications, installation and testing of 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.

E) 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) one hundred eighty (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.

#### 5.4. Natural Gas Fuel.

A) For the generation of Contract Capacity, Contract Energy and other products and services required by this PPA, Seller shall accept at the Fuel Delivery Point all natural gas fuel Company procures and pays for under the Gas Contract and Seller shall procure and pay for natural gas fuel under the IACX Gas Contract. Seller shall, at its sole expense, construct, operate and maintain the pipelines, compressors, meters, heaters, filter/separation equipment, electronics, regulation equipment and other necessary equipment, of sufficient capacity and industrial specifications to receive, regulate, meter and transport natural gas fuel from the Fuel Delivery Point to the Generating Unit(s), to allow for full operation of the Generating Unit(s) on natural gas fuel over the Term. If requested by Company, Seller shall install (at Company's cost) check metering, in connection with the natural gas custody transfer metering, on Seller's downstream natural gas facilities.

B) If the Facility includes any natural gas-fired equipment that is not used for the direct conversion of natural gas fuel to electric energy (such as natural gas-fired auxiliary boiler(s), in-line heater(s) used to heat the natural gas fuel, or building heating equipment), Seller shall separately meter and supply, at Seller's expense, the natural gas fuel consumed by such equipment.

C) Unless otherwise agreed by the Parties, Seller shall be the operator of the Fuel Delivery Point(s). All volume confirmations, allocations and balancing functions with the pipeline related to gas procured by Seller under the IACX Gas Contract ("IACX Pipeline") are the responsibility of Seller, as well as gas regulation and maintenance and testing arrangements for all natural gas metering at such Fuel Delivery Point(s). Seller shall also be responsible for all natural gas physical flow activities, such as flow control, valve operation, and contacting the IACX Pipeline to initiate gas flow to the Fuel Delivery Point. Responsibilities related to the flow of gas on the Pinnacle Pipeline are defined by the FMA.

D) All natural gas custody transfer metering at the Fuel Delivery Point(s) shall be installed, maintained and tested in accordance with accepted natural gas industry standards and shall comply with the applicable Upstream Pipeline tariff requirements. Unless otherwise provided for under the FMA related to the Pinnacle Pipeline, Seller shall test or cause to be tested the natural gas meter at least every two years after the Energy Delivery Commencement Date (or at such more frequent intervals as may be required by the Upstream Pipeline), and shall provide written meter test results to Company within thirty (30) Days of Company's reasonable written request. Company shall have the right to require additional tests at Company's expense. Seller shall provide Company with at least ten (10) Business Days advance notice of each test and a representative of Company shall be permitted to witness such tests, *provided, however, that* such Company representative shall not unreasonably interfere with or disrupt the activities of Seller and shall comply with all of Seller's safety standards. Seller shall provide copies of all test data and testing reports to Company. Disputes regarding the allocation of natural gas volumes and associated billings with the Upstream Pipeline, including meter reading adjustments for prior periods, shall be resolved in accordance with the Upstream Pipeline's tariff.

5.5. Reserved.

## **Article 6 - Conditions Precedent**

6.1. PUC Approval.

A) No later than forty-five (45) Days after the Effective Date, Company may apply to the PUCT/NMPRC for PUC Approval. If Company fails to apply for PUC Approval within forty-five (45) Days following the Effective Date, Company shall be deemed to have waived its right to obtain PUC 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 PUC Approval, Company shall use Commercially Reasonable Efforts to obtain PUC Approval as soon as reasonably practicable, and Seller shall cooperate with Company's efforts to obtain PUC Approval.

C) If Company applies for PUC 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 thirty (30) Days following issuance of a written order by the PUC rejecting PUC Approval, or granting PUC Approval with conditions unacceptable to Company in its sole discretion;

2. at any time between the three-hundred sixty-fifth (365th) and three-hundred ninety-fifth (395th) Day following Company's application for PUC Approval, if prior to the date of such termination the PUC has not issued a written order granting or rejecting PUC Approval.

3. at any time within twenty (20) Days following timely request for reconsideration (in whole or in any material part) by any third party with standing, of a written PUC order granting PUC Approval; and/or.

4. at any time within twenty (20) Days following timely appeal by any party with standing, of a written PUC order granting PUC 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 for that reason, and this PPA shall remain in full force and effect thereafter.

D) For purposes of this PPA, "PUC Approval" means a written order of the PUCT and/or NMPRC which alone or in combination, make an affirmative determination that all costs incurred under this PPA are recoverable from Company's retail customers pursuant to Applicable Law, subject only to the requirement that the PUC retains ongoing prudence review of Company's performance and administration of this PPA, as determined by Company in its sole discretion.

6.2. Seller Condition Precedent. Seller shall have the right, but not the obligation, to terminate this PPA, without any further financial or other obligation to Company as a result of such termination, by written notice to Company delivered no later than November 30, 2023, should Seller fail to execute amendments to the Steam Agreement and the IACX Gas Contract on terms and conditions consistent with Seller's commitments under this PPA. If Seller is eligible to terminate this Agreement but fails to terminate this PPA by the applicable date, then Seller shall be deemed to have waived its right to terminate this PPA under this Section 6.2, and this PPA shall remain in full force and effect thereafter.

6.3. Additional Company Condition Precedent. In the event that Seller fails to execute an amendment to the Steam Agreement and does not exercise its right to terminate the PPA pursuant to Section 6.2, Company shall have the right to terminate this

PPA by written notice to Seller delivered no later than December 7, 2023 without any further financial or other obligation to Seller as a result of such termination. If Company is eligible to terminate this PPA but fails to terminate this PPA pursuant to this Section 6.3, then Company 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.

6.4. Return of Security Fund. Following a termination pursuant to Section 6.1 or 6.2, the Company will return to Seller the initial Security Fund within five (5) Business Days of such termination.

## **Article 7 - Sale and Purchase**

### **7.1. General Obligation.**

A) Beginning on the Energy Delivery Commencement 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 Contract Capacity, Contract Energy, Ancillary Services and other products and services specified in this PPA. Seller shall not curtail or interrupt deliveries of Contract Energy to Company for economic reasons of any type. Seller shall operate the Facility to meet the requirements of this PPA, which incorporates provisions that permit Seller to meet the requirements of the Steam Agreement. For purposes of this PPA:

1. the “Contract Capacity” shall mean all of the committed and uncommitted net generating capacity actually available at any time from the Facility at the Point of Delivery, not to exceed the Net Capability; and

2. the “Contract Energy” shall mean the energy generated by the Contract Capacity as dispatched by Company from time to time, delivered and adjusted for losses to the Point of Delivery, excluding any Test Energy that is uneconomically dispatched by Company at Seller’s request.

B) Seller shall not be entitled to deliver Contract Capacity and/or Contract Energy from any source other than the Facility.

C) Seller shall not sell any Contract Capacity, Contract Energy or any other products or services required under this PPA to any third party. For the avoidance of doubt, Thermal Energy, steam and gas compression services delivered to the Steam Off-taker pursuant to the Steam Agreement, and the Environmental Attributes subject to Section 7.4, are not products or services required to be sold to Company under this PPA.

D) 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. Dispatch.**

A) EMCC may dispatch and ramp the Facility between its Minimum Load Level and the Contract Capacity, all in accordance with Applicable Law and Good Utility



Practices, Exhibit I – Ramp Rate and Exhibit R-Operating Procedures. Company shall not dispatch any portion of the Facility below Minimum Load Level. For any Facility trip or shutdown caused by Seller, Seller shall restart the Facility in coordination with EMCC and in accordance with Good Utility Practices

B) In the event the Steam Off-taker ceases operations, or the Steam Agreement is terminated for any reason, Seller shall immediately notify Company. Upon the occurrence of either event, the Non-Dispatchable Capacity and Energy of the Facility shall be zero percent (0%). In such event, Company will be free to shut down, start up and dispatch the Facility as otherwise allowed under this PPA; *provided however*, Company will dispatch the Facility to a minimum load of 67% unless otherwise agreed to by the Parties.

C) In the event the Steam Off-taker fails to take at least the Minimum Steam Quantity from the Facility for any reason, Seller shall immediately notify Company of the expected duration of the reduction of the Minimum Steam Quantity and the corresponding revised Minimum Load Level of the Facility and Non-Dispatchable Capacity and Energy.

### 7.3. Permit Limitations.

A) Neither Party shall take any action that would result in or materially contribute to a restriction under any Permit that would preclude or limit the generation or delivery of Contract Energy to Company.

B) Seller covenants that Seller holds or prior to the Energy Delivery Commencement Date will obtain the necessary authority under Applicable Law to generate and deliver Contract Energy in amounts at least equal to the Planned Permitted Energy. Seller accepts the risk that its Permits or other Applicable Law will preclude or limit its legal authority to generate and deliver all of the Planned Permitted Energy, subject to Section 20.4.

C) If and to the extent that Seller's Permits or Applicable Law precludes or limits generation and delivery below the Planned Permitted Energy, the "Permit Deficiency" for such year shall mean the deficiency (expressed in MWh) between the Planned Permitted Energy and the maximum amount of Contract Energy that was generated and delivered to Company (or could have been generated and delivered, under Seller's Permits) for such year.

D) Upon written request by Company from time to time, Seller shall provide to Company such detailed data regarding emissions from the Facility, in one or more operating configurations, as Company may reasonably request.

E) For purposes of this PPA, "Planned Permitted Energy" means 1,719,825 MWh per calendar year of Contract Energy authorized or expected to be authorized to be generated in accordance with Seller's Permits.

7.4. Environmental Attributes. The Parties acknowledge that existing and future Applicable Laws create significant value in the ownership, use and allocation of

Environmental Attributes. The Parties agree that Seller shall own and be entitled to claim all Environmental Attributes existing or created during the Term associated with the Facility including all rights, title and authority for Seller to register the Facility and own, hold, use, sell, trade, and/or manage the Environmental Attributes associated with the Facility in Seller's own name and to Seller's account, including any rights associated with any energy information or tracking system that exists or may be established with regard to monitoring, registering, tracking, certifying, and/or trading such Environmental Attributes; provided however that Seller shall first use and apply all such Environment Attributes, to the extent applicable and permitted by Applicable Law, to ensure Seller meets all of its obligations under this PPA .

A) For purposes hereof, "Environmental Attributes" includes existing and future:

1. environmental credits, benefits or attributes;
2. emissions reductions;
3. avoided emissions and reporting rights for avoided emissions of pollutants to the air, soils or waters, such as sulfur oxides (SOx), nitrogen oxides (NOx), carbon monoxide (CO), greenhouse gases (such as carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs) and sulfur hexafluoride (SF<sub>6</sub>)) that have been or may in the future be determined by the United Nations Intergovernmental Panel on Climate Change or by Applicable Law to contribute to the threat of climate change;
4. avoidances (including emission rate credits), offsets, allowances and green tags; and,
5. zero-emission electricity credits,

so long as they are: (i) recognized by Applicable Law, including any rights to compensation therefor; (ii) attributable to the Facility during the Term; and, (iii) in excess of those necessary to continue to operate the Facility at as required to deliver the products and services specified in this PPA. For the avoidance of doubt, Seller shall have the right, but not the obligation, to make capital expenditures with respect to any carbon capture project, equipment, and/or facilities at the Site and shall own all interests, rights, title and authority in same, provided however, that such carbon capture project, equipment, and/or facilities shall not affect the capability of the Facility to deliver to Company the products and services specified under this PPA. The Parties agree that Company shall not be responsible for the payment of any costs associated with such capital expenditures and further agree that any such capital expenditures related to any carbon capture project, equipment, and/or facilities will not change either the products and services to be delivered to Company as specified in this PPA or the pricing for such products and services. The Parties further agree that the Seller will be entitled to any and all revenues, credits, subsidies, benefits or tax credits that can be sold in the private commercial

markets and tax credits issued by federal government for which the Facility and/or Seller may qualify as the result of such carbon capture project, equipment, and/or facilities.

7.5. Ancillary Services.

A) During the Term, Seller shall make available to Company and Company shall own, all Ancillary Services associated with the Facility, including but not limited to the sole right to sell the Ancillary Services associated with the Facility and to retain all revenues therefrom. Seller shall use Commercially Reasonable Efforts to maximize the Ancillary Services available from the Facility. Nothing in this Section shall be interpreted in a manner that prevents Seller from meeting its obligations to provide service to the Steam Off-taker as required pursuant to the Steam Agreement.

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 Effective Date to meet such requirements, then Seller, after consultation with Company, shall, if requested to do so by Company, install any such additional equipment (subject to required approvals of third parties such as the Facility lessor, any applicable lenders and regulatory agencies) and 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 any service associated, directly or indirectly, with the reliable generation and/or transmission of energy from the Facility from time to time, including but not limited to: operating reserves, ramp capability, reactive supply, reactive supply capability, voltage control, voltage control capability, and any rights to compensation for any of these services. "Ancillary Services" also includes any other identified as an "ancillary service" or "other ancillary service" in the Transmission Tariff. For the avoidance of doubt, "Ancillary Service" includes any service associated, directly or indirectly, with the reliable generation and/or transmission of energy from the Facility, regardless of whether the Facility, the Transmission Authority or the Company is deemed to be the service provider for the service, but excludes services Seller provides to the Steam Off-taker pursuant to the Steam Agreement.

**Article 8 - Payment Calculations**

8.1. Payment for Contract Capacity. Commencing on the Energy Delivery Commencement Date, Company shall pay Seller a Monthly Capacity Payment for Contract Capacity, subject to Section 10.9, based upon the following formula:

Monthly Capacity Payment =  $NC \times CP \times CAF$ , where:

NC=Net Capability

CP=Capacity Price, from Exhibit M - Pricing

CAF = 12 month rolling average Capacity Availability Factor. For all monthly billing periods for the first Commercial Operation Year, CAF shall be determined on a 12-month rolling-average basis, using data from the monthly billing period in question and the previous 11 monthly billing periods under the Original PPA.

For each month  $CAF = (AE + SME) \div PE$  where:

AE = Available Energy for any month, stated in Megawatt-hours (MWh), means the amount of Contract Energy that is available from the Facility for dispatch on natural gas fuel, regardless of the extent to which Company actually dispatches the Facility, during such period. For purposes of calculating AE:

(a) The Facility shall be derated for Forced Outages (regardless of whether caused by Force Majeure) and ambient conditions. By way of example for the month of June, 2025, if (I) the Facility is fully mechanically available, (II) no maintenance is scheduled for the month, but (III) due to summer conditions, the average Contract Capacity actually available from the Facility for the month is 220 MW, then CAF for such month shall be  $158,400 \text{ MWh [AE]} \div 165,600 \text{ MWh [PE]} = 95.65\%$ .

(b) Contract Capacity that is unavailable for dispatch by Company on natural gas fuel nevertheless shall be considered to be available for the purposes of determining Available Energy when (and only when):

(i) the Facility is disconnected from the Transmission Authority's System pursuant to the Interconnection Agreement, and the disconnection is not caused by actions of Seller or problems with the Facility;

(ii) the Contract Capacity and associated Contract Energy cannot be delivered by Seller or received by Company due to an Emergency or an event of Force Majeure affecting the Transmission Authority's System at or beyond the Point of Delivery;

(iii) For natural gas fuel delivered pursuant to the Gas Contract, Company fails or is unable to cause Acceptable Natural Gas Fuel to be delivered to the Fuel Delivery Point for any reason;

(iv) Company has contracted for non-firm transmission service, and the Contract Capacity and associated Contract Energy cannot be received at the Point of Delivery due to transmission constraints affecting the Transmission Authority's System; and/or

(v) the Facility cannot operate because its emissions have exhausted the annual limits of its Permits but the Facility has generated the Planned Permitted Energy for such year.

(c) By way of example only, the Contract Capacity shall be deemed unavailable for purposes of this Section 8.1:

(i) if, to the extent and for so long as the Facility is subject to a Forced Outage, including an outage caused by Force Majeure at the Site or prior to the Point of Delivery;

(ii) if Company has contracted for firm transmission service, but the Contract Capacity and associated Contract Energy cannot be received by Company at the Point of Delivery due to transmission constraints affecting the Transmission Authority's System; and/or

(iii) in a cumulative amount equal to the Permit Deficiency for each year, if any.

SME = Scheduled Maintenance Energy for any month, stated in MWh, means the amount of energy that is not available from the Facility for dispatch by Company on natural gas fuel during such month, due to Scheduled Outages/Deratings that meet the requirements for credited Scheduled Maintenance Energy under Exhibit L - Maintenance.

PE = Period Energy for any month, stated in MWh, means the product of the Net Capability and the total number of hours in such period.

8.2. Reserved.

8.3. Variable O&M Payment. Commencing upon the Energy Delivery Commencement Date, Company shall pay Seller a monthly Variable O&M Payment in accordance with the following formula:

Variable O&M Payment = E x VOM Rate, where:

E = Contract Energy, stated in MWh, delivered by Seller to Company during the billing month; and

VOM Rate = VOM Rate from Exhibit M – Pricing.

8.4. Payment for Energy. Commencing upon the Energy Delivery Commencement Date, Company shall pay Seller a monthly payment for the Contract Energy that reflects the cost of the natural gas fuel that is consumed by the Facility for the generation of the Contract Energy that is delivered by Seller to Company during the billing month. The Energy Payment calculation will be performed on an hourly basis for each Generating Unit and aggregated for the month, in accordance with the following formula:

Energy Payment = Fuel Price x Guaranteed Heat Rate x E, where:

Fuel Price = The hourly price for natural gas under the Fuel Agreements, expressed in dollars per MMBtu. The Fuel Price shall encompass all actual costs for delivered fuel, including without limitation fixed fuel transportation cost, variable fuel transportation cost, variable fuel cost, reservation charges, taxes, and scheduling fees. Fixed charges under the Fuel Agreements shall be allocated to the Fuel Price in such a manner as to accomplish complete recovery of all fixed charges in the month through the Fuel Payment for the month. The cost of gas provided under the IACX Gas Contract shall be at Panhandle Eastern, Texas, Oklahoma (mainline) Index less \$0.05/MMBtu. The IACX Gas Contract also provides for the payment of a \$0.11/MMBtu compression fee by IACX to Seller with respect to fuel delivered thereunder shared between the Parties. The Parties intend that these payments (subject to the compression fee being shared 50/50 between the Parties) should be taken into account in the Fuel Price calculation to reduce the amount of the applicable Energy Payments under this PPA (or that the benefit otherwise be shared with Company) in order to accurately reflect the actual fuel costs to Seller and/or benefits to Seller in respect of the fuel costs under this PPA;

E = Contract Energy, stated in MWh, which is delivered by Seller to Company on an hourly basis during the billing month for each respective Generating Unit;

Guaranteed Heat Rate = as defined in Exhibit K - Guaranteed Heat Rates on an hourly basis during the billing month for each respective Generating Unit

An example of the Energy Payment calculation is provided in Exhibit Q - Energy Payment Calculation Example.

8.5. Company Credit for Gas Contract Costs. Commencing upon the Energy Delivery Commencement Date, the monthly invoice shall include a credit to Company for the costs Company incurs under the Gas Contract to supply natural gas fuel to the Facility. Such credit to Company shall include without limitation fixed fuel transportation costs, variable fuel transportation costs, variable fuel costs, fixed fuel costs, taxes and scheduling fees.

8.6. Company Credit for Services under FMA. Commencing upon the Energy Delivery Commencement Date, the monthly invoice shall include a credit to Company for compensation due Company under Article 5 of the FMA.

8.7. Payment for Pipeline Agreement Services. Commencing upon the Energy Delivery Commencement Date, Company shall reimburse Seller for the payment made by Seller to Branch Energy for services provided by Branch Energy for pipeline maintenance and operational assistance services in accordance with Paragraph 3 of the Pipeline Agreement, which is currently fifteen thousand five hundred dollars (\$15,500) per month.

8.8. Payment for Turbine Starts.

A) Commencing on the Energy Delivery Commencement Date, Company shall pay Seller a monthly Turbine Start Payment for any starts initiated by Company per the following formula. The Parties recognize that the Facility is intended to run continuously except for scheduled maintenance or Forced Outages. For the avoidance of doubt, Company shall not incur a Turbine Start Payment for such scheduled maintenance or Forced Outages:

Turbine Start Payment = \$750 x number of Successful Starts.

B) If a turbine start is initiated but fails to satisfy the criteria for a Successful Start as a result of an Emergency or event of Force Majeure beyond the Point of Delivery on the Transmission Authority's System, then the initiated turbine start shall nevertheless qualify as a Successful Start.

C) Seller shall not be credited a Successful Start where Seller restarts the Unit(s) following a turbine trip or other Forced Outage, even if the restart(s) would otherwise meet the requirement of a Successful Start.

D) For the avoidance of doubt, a Successful Start of both Units at the Facility will result in a Turbine Start Payment of  $\$750.00 \times 2 = \$1,500.00$ .

8.9. ESC Adjustments.

A) In connection with each ESC Event during the Term, an adjustment in the payment due to Seller from Company shall be made for the billing period during which the ESC Event occurs (an "ESC Adjustment"), based upon the availability of the Facility on natural gas fuel during the ESC Event as set forth in Exhibit N - ESC Adjustments. The ESC Adjustment, if any, shall be in addition to (not in lieu of) any adjustment to the Monthly Capacity Payment based upon the Available Energy from the Facility during that billing period under Section 8.1, any adjustment for inaccurate Reported Availability under Section 10.9. An ESC Adjustment may be positive or negative, as provided in Exhibit N - ESC Adjustments.

B) The Parties shall take such steps as may be necessary from time to time to allow each of Seller and Company to receive prior notice of ESC Events and anticipated ESC Events.

C) For purposes hereof, an “ESC Event” means any period of time during the Term as to which EMCC, NERC, the ERO or the Transmission Authority formally declares an elevated concern regarding system capacity, reliability or operating reserves with respect to the Transmission Authority’s System or any directly interconnected transmission system. As of the Effective Date, ESC Events include elevated system conditions coded yellow, orange and red; provided, however, that for purposes hereof, system conditions that do not involve a shortage or anticipated shortage of generation or transmission capacity (e.g. geomagnetic events) shall not be deemed ESC Events.

D) In the event that, from time to time during the Term, the criteria and/or coding of ESC Events are changed by EMCC, the Transmission Authority or any applicable transmission owning utility with authority, the Parties shall amend this PPA to substitute for Exhibit N - ESC Adjustments appropriate covenants reflecting such changed criteria and/or coding, in order to provide payments substantially equivalent to those contemplated by this Section 8.9.

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

### **9.1. Billing.**

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

B) Statement. Company shall prepare a statement each month showing purchases by Company from the Facility and associated payments, and any charges to Seller, including any damages or other payments from Seller to Company under the terms of this PPA, in each case for the preceding month, and shall provide the statement to Seller no later than the fifteenth (15th) calendar day of the month.

C) Monthly Payment Due Date; Late Charges; Monthly Billing and Payment Procedures.

1. Any amounts due Seller or Company, as the case may be, shall be due and payable on or before the later of the twenty-fifth (25th) calendar day of the month in which the statement setting forth such amount is received or ten (10) days after receipt of such statement; provided that if the date payment is due hereunder is not a Business Day, payment is due on the next Business Day following that date. If the amount due is not paid by the due date, a late payment charge shall be applied to the unpaid balance and shall be added to the next billing. Such late payment charge shall be calculated based on the 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).

2. In order to streamline the Parties' ordinary course billing and payment processes and facilitate administrative efficiencies and cost savings,



unless otherwise agreed by the Parties, any undisputed amounts due in any month to a Party by the other Party under this PPA shall be netted or set off by Company against or with any other undisputed amounts owed during the same month and on the same day (or on the next Business Day) to the other Party by such Party pursuant to the Gas Contract, FMA, and the Pipeline Agreement, which netting or set off shall result in a single net amount to be paid by one Party to the other Party in order to meet the payment obligations for that month of each of the Parties under this PPA and under the Gas Contract, FMA, and the Pipeline Agreement; provided, that all invoiced amounts shall remain subject to the applicable dispute resolution procedures set forth in this PPA and the Gas Contract, FMA, and the Pipeline Agreement, whether or not any particular disputed amount is included in any netting or set off calculation pursuant to this Section. In furtherance of the foregoing, unless otherwise agreed by the Parties, Company shall deliver the following to Seller on or before the monthly statement due date set forth in this Section.

(a) a summary statement setting forth in separate line items the amounts due to or owed by Seller for the applicable month pursuant to this PPA and each of the Gas Contract, FMA, and the Pipeline Agreement, together with the netting or set off calculations used by Company to determine the single net amount to be paid by one Party to the other Party pursuant to this Section, and

(b) attached thereto, the monthly statement required to be prepared and delivered under this Section and the monthly statement or invoice required to be delivered under each of the Gas Contract, FMA, and the Pipeline Agreement, each of which shall contain all of the information required to be set forth in such statement or invoice under this PPA and the Gas Contract, FMA, and the Pipeline Agreement, as applicable. For avoidance of doubt, each of the foregoing documents shall be separately presented but assembled and delivered to Seller as a single package. The Parties will cooperate in preparing, delivering and reviewing such preliminary statements, invoices and other documentation as may be reasonably requested by either Party in order to timely satisfy its monthly invoicing, billing and payment obligations under this PPA, the Gas Contract, FMA, and the Pipeline Agreement and any other contracts related to the Facility and its operations.

9.2. Payment. All payments shall be remitted via check or electronic funds transfer, as designated by the owed Party, on or before the fifteenth (15th) Business Day following receipt of the statement described in Section 9.1(C). 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 fifteenth (15th) 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 in good faith 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. Seller shall staff, control, and operate the Facility consistent with Good Utility Practices, Exhibit I - Ramp Rate, Exhibit L - Maintenance, Exhibit R - Operating Procedures and this PPA. Seller shall ensure that personnel of Seller capable of starting, operating, and stopping all Generating Units simultaneously on natural gas within ninety (90) minutes are physically present at the Facility 24x7 during Commercial Operation.

10.2. Facility Maintenance. Seller shall maintain the Facility in accordance with Good Utility Practices.

A) Scheduled Outages/Deratings shall comply with the requirements of Exhibit L – Maintenance.

B) Absent the prior written consent of Company, which shall not be unreasonably withheld, Seller shall schedule no Outages/Deratings during the months of January, February, June, July, August, September and December.

### 10.3. Forced Outages and Reporting.

A) When Forced Outages occur, Seller shall notify EMCC of the existence, nature, start time, and expected duration of the Forced Outage as soon as practicable, but in no event later than thirty (30) minutes after the Forced Outage occurs. Thereafter Seller shall immediately inform EMCC of any changes in the expected duration of the Forced Outage except to the extent relieved of this obligation by EMCC with respect thereto.

B) In addition to the foregoing notification, for any Forced Outage, shutdown or derating of the Facility, Seller shall, at Company's written reasonable request, conduct a root cause analysis and evaluate corrective actions to prevent reoccurrences as soon as practicable thereafter, at Seller's sole expense. Seller shall diligently complete such analysis and corrective actions as soon as possible and provide to Company a written report containing such analysis as soon as diligently possible.

C) Seller shall develop and provide Company with a copy of its Facility cold weather policy.

### 10.4. Testing.

A) Following the Energy Delivery Commencement Date Seller, at its sole expense, shall conduct capacity testing of the Facility as and when contemplated by Exhibit J - Capacity Testing. With Company's prior written approval, which shall not be unreasonably withheld or delayed, Seller may, at its sole expense, retain a third party to conduct the testing required by this Section 10.4(A).

B) All energy generated in connection with such capacity testing shall be treated and purchased by Company as Contract Energy hereunder.

C) Reserved.

D) Seller, at its sole expense, shall also conduct such other testing of the Facility as may be required by this PPA, Applicable Law (including any accreditation testing mandated by the ERO) and any testing required by Good Utility Practices. Seller shall pay for all natural gas used to conduct such tests. Seller shall fulfill all reporting requirements arising from such testing.

E) For purposes hereof, "Test Energy" means energy generated by the Facility following the Energy Delivery Commencement Date, reasonably required to satisfy the Testing of the Facility required by this PPA, not purchased by Company as Contract Energy under paragraph (B) above.

F) Seller shall submit detailed written testing procedures for capacity testing to Company for review and approval not later than one hundred twenty (120) Days prior to the scheduled start of the first Test. Company shall review and approve or disapprove the written performance test procedures, in writing, within sixty (60) Days of receipt. These Test procedures as approved by the Company shall be used to conduct Testing for the

Term. Should Seller desire to materially, alter, change or modify the Company-approved Test procedures, Seller shall submit such Test procedures to Company for its review and approval no later than one hundred twenty (120) Days prior to the scheduled start of the Test at which Seller desires to use such Test procedures. Company shall review and approve or disapprove the written performance test procedures, in writing, within sixty (60) Days of receipt. Test procedures shall include the following:

1. instrumentation, test connections, cycle isolation requirements, and any other equipment for the performance test and where they must be located in the system to obtain the necessary test data;
2. administrative procedures;
3. final correction curves and sample calculations, including all base condition corrections to be applied, in both manual and electronic spreadsheet formats. If a thermal model is generated, Company must have access to the model and software;
4. sample data sheets;
5. marked-up piping and instrumentation diagrams that show the location of all test instrumentation prior to testing; and,
6. a complete set of test instrument calibration sheets, including those that may have already been provided to Company.

10.5. Forecasting. Seller shall provide such forecasts of available capacity as the EMCC, ERO or Transmission Authority may require from time to time. Seller concurrently shall provide to Company a copy of each such forecast. Seller shall provide Company a forecast of next Day availability and ambient adjusted minimum and maximums by 7:00 AM MPT the Day prior to each Day.

10.6. Books and Records.

A) Seller shall maintain an accurate and up-to-date hourly operating log for the Facility, in electronic format, that identifies real-time operating information for each Generating Unit, including levels of capacity availability; energy production; changes in operating status; Forced Outages; Scheduled Outages/Deratings; information required by Governmental Authorities in the prescribed format; and other information reasonably requested by Company. Seller shall deliver the operating log to Company electronically when reasonably requested.

B) Seller shall deliver to Company information on Facility performance during each calendar month within five (5) Business Days after the end of such calendar month. For each Generating Unit, and using definitions provided by (or consistent with) the NERC Generation Availability Data System ("GADS") Manual, or any successor document, the data reported shall include planned and unplanned derated hours, average derated kW from Net Capability during the derated hours, scheduled maintenance hours, average

derated kW during scheduled maintenance hours, the number of successful turbine starts, the monthly operating log of the Facility, and any other data necessary to be provided or confirmed by Seller for billing and payment purposes under this PPA.

C) 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.

D) Originals or copies of all Operating Records shall be maintained at the Site or such other Texas location as may be specified by Seller from time to time. Company may examine and make copies of such Operating Records from time to time upon request, during normal business hours.

10.7. 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 as permitted and required by Applicable Law. While at the Facility, such representatives shall observe Seller's standard safety precautions and shall conduct themselves in a manner that will not interfere with operation of the Facility.

10.8. 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 the Contract Energy. The Parties' initial representatives on the Operating Committee are set forth in Exhibit D – Notices and Contact Information.

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 data collection from time to time after the Effective Date 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.

E) The Operating Procedures as of the date of execution of this PPA are attached as Exhibit R - Operating Procedures.

10.9. Availability Reporting: Gas.

A) Seller shall provide accurate and timely updates to Company's EMCC on the current availability of the Contract Capacity on natural gas fuel ("Reported Availability: Gas"), adjusted for ambient conditions, via such electronic means as may be reasonably specified by Company. The amount of Contract Capacity available for any individual hour shall be integrated over the hour, on a prorated basis, to reflect any updates in Seller's Reported Availability: Gas made effective during such hour.

B) Company may verify Seller's then-current Reported Availability: Gas at any time, without prior notice to Seller, by dispatching the Facility to the level of Reported Availability: Gas (an "Availability Verification Test"). A "Gas Deficiency" shall be deemed to exist if (i) the tested availability on natural gas is less than 97% of the Reported Availability: Gas, or (ii) such tested availability is more than five (5) MW below the Reported Availability: Gas. Company shall notify Seller as soon as possible by telephone and thereafter in writing whenever Company identifies a Gas Deficiency that has or may have economic consequences under Section 10.9(C) below.

C) For purposes of Section 8.1, (i) in the event of a Gas Deficiency, the Contract Capacity shall be derated by the amount of the Gas Deficiency, for the then-current hour and all subsequent hours, until Seller posts a revised Reported Availability: Gas, (ii) the occurrence of more than one Gas Deficiency in any billing month shall result in derating the Contract Capacity for that entire month (retroactive to the beginning of such month) to the lowest capacity level achieved in the Availability Verification Test(s) conducted during such month, and (iii) three or more Gas Deficiencies in any two consecutive billing months shall result in a fifteen percent (15%) reduction in the Capacity Price, applicable to the subsequent two billing months.

10.10. Reserved.

**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.

B) Seller shall establish and fund the Security Fund in the amount of \$17,250,000.00 no later than December 1, 2023. .

C) Without notice to Seller, Company may draw from the Security Fund such amounts as are necessary to recover amounts owing to Company pursuant to this PPA, including Actual Damages, 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 an 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.

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

Replenishment. Seller shall replenish the Security Fund to the applicable levels set forth in Section 11.1(B) within fifteen (15) Business Days after Company makes a draw on the Security Fund; provided, such replenishment shall not exceed the amount remaining under the Damage Cap (as provided in Section 12.4(A)). Notwithstanding the foregoing, within fifteen (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.

#### 11.2. 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 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 three hundred sixty (360) Days. Seller shall give Company at least thirty (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 three hundred sixty (360) Days or more (or, if shorter, through the end of the period required under Section 11.4 below) more than thirty (30) Days prior to each expiration date of the security. If the Letter of Credit is not renewed or extended at least thirty (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, in Company's account until such time as Seller provides a substitute form of security meeting the requirements of this Section 11.2.

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 Texas, with net assets of at least \$1 billion (the "Escrow Account").

1. The Escrow Account shall be governed by an escrow and account control 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 as provided under this PPA, 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 PPA), and (c) Seller shall pay all documented 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) a money-market fund sponsored by the escrow agent;
- (b) U.S. treasury obligations with a maturity of ninety (90) Days or less;
- (c) commercial paper rated "A" or better, with a maturity of ninety (90) Days or less; and
- (d) 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 Energy Delivery Commencement Date, periodic sweeps by Seller for recovery of interest earned by the escrowed funds shall be allowed, and if at any time the balance in the Escrow Account exceeds the required amount of security, the escrow agent shall remit the excess to Seller.

C) The Security Fund may consist of a guaranty substantially in the form of Exhibit H – Form of Guaranty, from a parent or other guarantor ("Guarantor") acceptable to Company in its sole and absolute discretion, and up to an amount within Company's sole and absolute discretion. Subject to Company's sole and absolute discretion, to be eligible to provide a guaranty, the proposed Guarantor must have a minimum tangible net worth of at least \$250,000,000 and an Investment Grade Credit Rating (and if such Credit Rating is exactly equivalent to BBB- (S&P) / Baa3 (Moody's), the Guarantor must not be on credit watch by any rating agency). If the Credit Rating of the Guarantor is downgraded below Investment Grade, put on credit watch, or an event occurs that (in the reasonable determination of Company) portends a Material Adverse Effect in the creditworthiness of the Guarantor, then Company may require Seller to convert the guaranty to a Security Fund instrument meeting the criteria set forth in either paragraph (A) or paragraph (B) above no later than ten (10) Business Days after Notice from Company.

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 reasonable fees and expenses of counsel) incurred by Company 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.

11.3. Replacement. In the event that the Security Fund ever fails to comply with the requirements of this Article 11 or Company determines in a Commercially Reasonable manner that an event has occurred or circumstances have developed that threaten to cause the Security Fund to fail to comply with the requirements of this Article 11 (e.g. a Guarantor is placed on negative credit watch by a rating agency), Seller shall be required to replace the Security Fund with security in compliance with this Article 11 within five (5) Business Days following notice thereof from Company.

11.4. 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 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.

11.5. Expenses. Seller shall reimburse Company for its reasonable, direct and documented expenses (including the fees and expenses of counsel) incurred by Company 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 sixty (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 sixty (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, the Facility, or any Change of Control not permitted by Section 19.1.

Cure Period: None.

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

Cure Period: None.

5. Seller's failure to establish and, once established, 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: Five (5) 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 Actual Damages, and any required indemnification.

Cure Period: Ten (10) Business Days after Company provides notice that the amount is overdue.

8. Any representation or warranty by Seller in this PPA that has a Material Adverse Effect on Seller's ability to perform this PPA ceases to remain true during the Term, other than due to a change of law.

Cure Period: Thirty (30) Days after Company provides notice of such breach.

9. The breach by Seller of the Interconnection Agreement, which breach (i) materially interferes with Seller's production and/or delivery of any product or service to be produced or delivered pursuant to this PPA or Company's

ability to accept or receive such product or service, (ii) materially interferes with Company's ability to transmit Contract Energy beyond the Point of Delivery, and/or (iii) otherwise has a Material Adverse Effect on Company.

Cure Period: Thirty (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, a failure of the Facility to achieve a CAF of at least 85% during any 12-consecutive month period, on a rolling average basis; provided, however, that to the extent such failure of performance is attributable to Force Majeure, the contribution of such Force Majeure shall be eliminated from the CAF calculation for the purposes of, and only for the purposes of, establishing a default of Seller pursuant to this paragraph.

Cure: Seller shall be deemed to have cured this default if the Facility achieves a CAF for the following Commercial Operation Year (again with periods of Force Majeure excluded from the calculation) of 90% or more.

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

Cure Period: Thirty (30) Days after Company provides notice thereof; 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 ninety (90) Days in any event) as is reasonably necessary for cure, so long as Seller initiates cure within such thirty (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.

12.2. Reserved.

### 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 sixty (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 sixty (60) Days from 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 by Company in this PPA that has a Material Adverse Effect on Company's ability to perform under this PPA is proven to have been false in any material respect when made.

Cure Period: None.

5. 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: Ten (10) Business Days after Seller provides notice that the amount is overdue.

6. Any representation or warranty by Company in this PPA that has a Material Adverse Effect on Company's ability to perform this PPA ceases to remain true during the Term, other than due to a change of law.

Cure Period: Thirty (30) Days after Seller provides notice of such breach.

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

Cure Period: Thirty (30) Days after Seller provides notice; provided, that if such default is not reasonably capable of cure within such thirty (30) Day period, Company shall have such additional period of time (not to exceed ninety (90) Days in any event) as is reasonably necessary for cure, so long as Company initiates cure within such thirty (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.

#### 12.4. Limitations on Damages.

A) Except as otherwise provided in Section 12.4(B), following the Energy Delivery Commencement Date, Seller's aggregate financial liability to Company for Actual Damages shall not exceed seventeen million two hundred-fifty thousand dollars (\$17,250,000) (the "Damage Cap"). Subject to Section 13.3 which precludes termination of the PPA for failure to pay amounts due less than one-hundred thousand dollars (\$100,000), if at any time following the Energy Delivery Commencement Date, 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 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 Contract Capacity, Contract Energy or Ancillary Services 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 indemnification claim under this PPA;
  6. any Environmental Contamination caused or exacerbated 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 direct and documented 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; 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. 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.

12.5. 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, §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.

12.6. 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

12.7. 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 ten (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 thirty (30) Days after the first meeting, either Party may request that consideration and resolution of the Dispute be transferred to senior management. Within ten (10) 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 ten (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 within sixty (60) days after their first meeting, either Party may seek available legal remedies, subject to Sections 13.3, 19.3 and 19.5.

13.2. Time Bar. If no Dispute Notice has been issued within eighteen (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 ten (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 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, in addition to the Security Fund; and
4. the owed amount (if any) is paid by Seller within ten (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 ten (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 of the State of Texas for purposes of resolving any Dispute hereunder, except as provided in Section 19.3. Venue for any court proceedings shall lie exclusively in the Texas District



Court for the County of Potter or, if jurisdictionally available, the U.S. District Court for the Northern District of Texas.

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, subject only to Sections 12.1(E), 19.3 and 19.5.

#### **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 Effective Date, (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. By way of example, only, "Force Majeure" may include an act of God, flood, drought, earthquake, storm, fire, pestilence, lightning and other natural catastrophes, war, riot, civil disturbance or disobedience, pandemic, terrorism or sabotage. Force Majeure shall not include:

- A) inability, delays or excess cost, to procure any equipment necessary to perform this PPA, including as a result of the imposition of tariffs or any other changes in law or supply chain disruptions;
- 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 to obtain any Permits required for the Facility;
- D) a restriction in any Permit that precludes or limits the generation or delivery of Contract Energy below the Planned Permitted Energy;
- E) mechanical or equipment breakdown or inability to operate, directly attributable to circumstances occurring within design criteria and normal operating tolerances of similar equipment;
- F) Environmental Contamination at the Site unless such Environmental Contamination is itself due to Force Majeure and prevents Seller from performing its obligations under this PPA;
- G) changes in market conditions;

H) any delay or failure by the Transmission Authority to perform its obligations under the Interconnection Agreement or any curtailment or reduction in deliveries by the Transmission Authority;

I) failure of the performance of any other entity, including the failure of vendors or suppliers to deliver any required components to Seller, except to the extent itself caused by Force Majeure;

J) the delay or effects of the COVID epidemic or pandemic (or any variant of COVID), except to the extent there occurs after the Effective Date: (A) the adoption or taking effect of any Applicable Law in respect of such COVID epidemic or pandemic (or any variant thereof), or (B) a change in any Applicable Law or any health or safety recommendation or guideline of a Governmental Authority in respect of such COVID epidemic or pandemic (or variant thereof);

K) changes of law; or

L) labor strikes, slowdowns, work stoppages, or other labor disruptions.

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 notice describing the circumstances and impact of the Force Majeure within five (5) Business Days; (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 within five (5) Business Days after the conclusion of the Force Majeure. Failure to provide such notice within the required time period shall be deemed conclusive evidence that the claimed Force Majeure event either did not occur or did not impact Seller's ability to perform its obligations under this Agreement in any fashion and thus Seller shall not be entitled to relief under this Article 14.

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 claimed by a party continues for a period of one hundred eighty (180) consecutive Days or any two hundred seventy (270) non-consecutive Days in any three consecutive Commercial Operation Years, the other party may, at any time following the end of such period, terminate this PPA upon notice to the claiming party, without further obligation by either Party except as to costs and balances incurred prior to the effective date of such termination.

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

A) 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:

1. 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.

2. 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:

(a) 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);

(b) 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;

(c) 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

(d) 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.

3. This PPA is a valid and binding obligation of the representing Party.

4. 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.

5. 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.”

6. Such Party is (i) a producer, processor, or commercial user of, or a merchant handling, the commodity which is the subject of this PPA, or the products and/or by products thereof; and (ii) entering into this PPA solely for purposes related to its business as such.

B) Seller further hereby covenants to Company throughout the Term that in connection with its obligations under this PPA:

1. Seller shall deliver to Company the products and services required by this PPA free and clear of all liens, security interests, claims and encumbrances or any interest therein or thereto by any person,

2. Seller

(a) is in compliance with, and requires its suppliers, subcontractors, vendors, and other business partners to comply with, the Uyghur Forced Labor Prevention Act, Pub. L. 117-78 (2021) (the “UFLPA”), Section 307 of the Tariff Act of 1930, 19 U.S.C. §1307, and all other Applicable Laws prohibiting any form of convict, indentured, or forced labor, including forced or indentured child labor (collectively, the “Forced Labor Laws”), and

(b) has adopted and implemented appropriate policies designed to ensure that it, and its suppliers, subcontractors, vendors, and other business partners, engage in regular audits or other comparable efforts to monitor ongoing compliance with the Forced Labor Laws and maintain any certifications required thereunder.

## **Article 16 - Insurance**

16.1. Evidence of Insurance. No later than five (5) Business Days after each applicable expiration date, Seller shall provide Company with a copy 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 Coverage to this PPA. Such certificates shall

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

B) provide that Company shall receive thirty (30) Days prior written notice of nonrenewal, cancellation of, or significant modification to any of the corresponding policies (except that such notice may be ten (10) Days for nonpayment 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 & Poors 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 for occurrences taking place during 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 Effective Date 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 Coverage 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 property 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 claims, demands, lawsuits (including citizen suits), losses, liabilities, fines, penalties, and expenses (including reasonable attorneys' fees) (generally, "Losses"), to the extent proximately caused by

- A) A default under this PPA by the Indemnifying Party;
  - B) a violation or alleged violation of Applicable Laws by the Indemnifying Party;
- and
- C) the negligence, fraud, 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. Indemnification: House Power. If Seller obtains House Power from the Facility and/or a self-generation source other than the Facility, Seller shall: (i) provide evidence reasonably satisfactory to Company that it is permitted to do so under Applicable Law, and (ii) shall indemnify, defend and hold Company harmless from and against all claims, demands, lawsuits (including citizen suits), losses, liabilities, fines, penalties, and expenses (including reasonable attorneys' fees) that may result therefrom.

17.4. Reserved.

17.5. 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.

17.6. 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 reasonably 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 acting reasonably at reasonable cost, 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.

17.7. 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 Losses 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) The Parties recognize that Seller may enter into a financing arrangement for the Facility that allows the lender or collateral agent to have step-in rights for all facility agreements, including this PPA. The Parties may agree to enter into a step-in rights agreement similar to prior agreements for this Facility. 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 consistent with the terms set forth in Exhibit O – 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 reasonable 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 ten (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) Seller shall not sell, exchange or otherwise transfer the Facility or any material portion thereof to any unaffiliated third party, nor shall Seller 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 Article 19 unless:

1. Seller has complied with Sections 19.3, 19.4, and 19.5 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 an operator acceptable to Company;

4. the transferee (together with its parents and/or affiliates) possesses an Investment Grade Credit Rating or other creditworthiness satisfactory to Company in the reasonable exercise of its discretion; and

5. Seller has provided to Company at least thirty (30) Days' prior notice of the transaction; and

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

B) 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.

C) Notwithstanding anything to the contrary contained herein, 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, and may subcontract some or all of its duties under this PPA, upon notice to but without the consent of Company

D) Except as permitted in this Section 19.1, Seller may not assign this PPA or any portion hereof. No assignment shall 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) 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 PUCT and/or NMPRC. Any other assignment of this PPA by Company shall require the prior written consent of Seller, not to be unreasonably withheld or delayed.

B) If an assignee of Company possesses 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) At any time after the Energy Delivery Commencement Date through the end of the Term,

1. if Seller proposes to sell the Facility or proposes any transaction that includes sale of 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 any class of voting and/or non-voting equity interests in Seller (excluding interests owned by tax equity investors) 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 any class of voting and/or non-voting equity interests in Seller's parent (excluding interests owned by tax equity investors) 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 20.19 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 conducted under normal operating standards 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 20.19 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 in Seller (as applicable) the Parties shall use Commercially Reasonable Efforts to negotiate and execute a PSA in a substantially similar form to Exhibit P-2 - Facility PSA Provisions. Notwithstanding the foregoing, the Parties agree that the form of Exhibit P-2 is not binding on the Parties and the Parties may agree to draft, negotiate, and use any such forms to effectuate any potential sale under this Section 19.3. If Company elects to

purchase the specified equity interests, the Parties shall use Commercially Reasonable Efforts to negotiate and execute a PSA in a substantially similar form to EXHIBIT P-3 – MIPSAs Provisions. Notwithstanding the foregoing, the Parties agree that the form of Exhibit P-3 is not binding on the Parties and the Parties may agree to draft, negotiate, and use any such forms to effectuate any potential sale under this Section 19.3. Any ROFO sale will be subject to the same consents and approvals of lenders, site lessors, the Steam Off-taker and Governmental Authorities required in any sale to any third party.

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 twelve (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 sixty (60) 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 20.19 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 one million one-hundred fifty thousand dollars (\$1,150,000).

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

1. 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 the majority of equity interests in Seller or the Facility, or any group(s) of assets or equity interests that includes the Facility;
3. the transmission by Seller or any of its Affiliates of a draft letter of intent, memorandum of understanding, term sheet or similar document (or a revised version thereof) to an unaffiliated third party with respect to the sale of the majority of 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, term sheet or similar document, whether or not legally binding, which contemplates the sale or lease to an unaffiliated third party of the majority of 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, (ii) any transaction among Affiliates of Seller, and/or (iii) any transaction for which Seller offers ROFO rights to Company under Section 19.3.

#### 19.5. Option.

A) At any time within one hundred eighty (180) Days prior to the end of the Term, Company (or an Affiliate) may give notice to Seller of Company's (or such Affiliate) intent to purchase (i) the Facility from Seller (a "Facility Acquisition") or (ii) all, but not less than all, of Ultimate Parent's direct and indirect right, title and interest in the equity interests of Seller, and including, if applicable, Ultimate Parent's direct and indirect right, title and interest in the tax equity partnership (the "TE Partnership") that owns, directly or indirectly, equity interests in Seller (together, the "Equity Interest") (an "Equity Interest Acquisition") with such notice in either case referred to as an "Option Preliminary Exercise Notice".

B) As soon as practicable following delivery of an Option Preliminary Exercise Notice for a Facility Acquisition, the Parties shall appoint an independent appraiser experienced in appraising utility-scale power generation facilities (as may be applicable to the bid) to determine the fair market value ("FMV") of the Facility. If the Parties cannot agree on the identity of the appraiser, the appraiser shall be selected by the Arbitration Service.

1. Seller shall provide to the appraiser full access to the Facility and the Site, to Seller's contracts, books and records, and to relevant personnel of Seller, during normal business hours. Such access shall include the right to conduct inspections, surveys and tests (including environmental testing of the Site and operating tests on the Facility) necessary or appropriate for the determination of

FMV of the Facility; provided however that such inspections, surveys, and tests shall be nondestructive and shall not interfere with the operations of the Facility.

2. Company shall pay all fees and costs of the appraiser.

3. The Parties shall direct the appraiser to use his/her/its best efforts to complete and deliver his/her/its appraisal to the Parties within two (2) months following his/her/its appointment and to keep all information obtained by appraiser from any investigations as Confidential Information subject to the provisions of Section 20.19.

C) Following delivery of an Option Preliminary Exercise Notice, Seller shall provide to Company full access to the Facility and the Site, to Seller's contracts, books and records, and to relevant personnel of Seller, during normal business hours. Such access shall include the right to conduct lien searches, surveys, inspections and tests (including environmental testing of the Site and operating tests on the Facility) necessary or appropriate for due diligence review of the Facility. All information obtained by Company from such investigations shall be deemed Confidential Information subject to Section 20.19.

D) All inspections, testing and access to the Facility and the Site by Company and the appraiser shall comport with all Applicable Laws and Seller's policies governing the use, operation, and maintenance of the Facility, including health, safety and environmental requirements, and shall be conducted in a manner so as to minimize disruption in the operation of the Facility and to avoid any adverse economic impacts to Seller under this PPA and reimburse Seller for Seller's Commercially Reasonable and documented costs directly associated with Company's inspections, testing, and access to the Facility and Site under this Section.

E) In the case of a Facility Acquisition, within ninety (90) Days following the determination of FMV as described above, Company may elect to purchase the Facility from Seller (an "Option") subject to the same consents and approvals of lenders, site lessors, the Steam Off-taker and Governmental Authorities required in any sale to any third party. If Company fails to notify Seller of Company's election within such 60-Day period, Company shall be deemed to have elected not to exercise the Option and the Option shall terminate permanently.

F) In the case of a Facility Acquisition, the purchase price to be paid by Company for the Facility in connection with exercise of the First Option shall be the greater of:

1. the sum of:

(a) (x) amount of Facility Debt (if any) as of the date of issuance of the Option Preliminary Exercise Notice, and

(b) (y) if the relevant tax equity agreements allow the other members of the TE Partnership the option to purchase, at "fair market value"

(as determined in those tax equity agreements) or a pre-determined price, the interest of the tax equity investor that has invested directly or indirectly in the Facility or Seller, then the amount of such purchase option price or, in any other case, the amount necessary to cause the after-tax internal rate of return of such tax equity investor's investment to equal the targeted rate of return under its tax equity agreements, or

2. the FMV of the Facility, as determined by the appraiser.

G) If Company exercises the Option, the Parties shall use Commercially Reasonable Efforts to negotiate and sign either:

1. A PSA for the Facility in a substantially similar form to Exhibit P-2 – Facility PSA Provisions. The Parties agree that the form of Exhibit P-2 is not binding on the Parties and the Parties may agree to draft, negotiate, and use any such forms to effectuate any potential sale under this Section 19.5.

2. A PSA for the Equity Interest in a substantially similar form to Exhibit P-3 – MIPSAs Provisions. The Parties agree that the form of Exhibit P-3 is not binding on the Parties and the Parties may agree to draft, negotiate, and use any such forms to effectuate any potential sale under this Section 19.5.

(E) This Section 19.5 shall be specifically enforceable by Company, without bond and without the need to prove irreparable harm.

H) Seller shall cooperate, and use reasonable efforts to cause its Affiliates to cooperate, in all respects reasonably necessary for Company to exercise its rights under this Section 19.5 and shall operate the Facility in the ordinary course of business following the date of issuance of an Option Preliminary Exercise Notice.

19.6. Memo of Option. Within thirty (30) Days following the Day PUC Approval is either obtained or waived, the Parties shall execute and record a Memorandum of Option, in form reasonably specified by Company memorializing its ROFO rights under Section 19.3 and its Option rights under Section 19.5.

19.7. Transfer and Release. Subject to the provisions of Article 2, any sale or transfer of the Facility or the entity owning the Facility to Company under this Agreement (whether on an asset or equity basis) shall release Seller from any obligations or liabilities to Company under this Agreement or any related agreements.

## **Article 20 - Miscellaneous**

### 20.1. Notices.

A) Notices required by this PPA shall be in writing addressed to the other Party at the addresses noted in Exhibit D – Notices and Contact Information, as either Party updates such addresses from time to time by notice to the other Party. A notice shall be deemed to have been received as follows: (1) if it is delivered by email when receipt is

acknowledged by reply email by the counterparty or (2) If it is delivered in writing, 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 or by any other class of US mail with confirmation of delivery). 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) Each Party consents to the recording of telephone conversations with Company operations personnel related to the performance and administration of this PPA.

## 20.2. Taxes.

A) Company shall purchase all Contract 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 Contract Energy hereunder are sales for resale.

B) Company shall be solely responsible for sales, use and value-added taxes imposed with respect to the purchase of fuel by Company for consumption by the Facility to produce the Contract Energy dispatched and received by Company hereunder.

C) 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 the products and services provided hereunder, and (2) any taxes imposed by Governmental Authorities, whether now in existence or hereafter enacted, on the transmission of the products and services provided hereunder beyond the Point of Delivery.

D) Subject to Section 20.2(B) and (C) above and Section 20.4 below, Seller shall be solely responsible for any and all present and future taxes and other impositions of Governmental Authorities relating to the ownership, leasing, operation or maintenance of the Facility and the Site (including ad valorem taxes on the Facility and the Site), and any taxes imposed at or 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, Environmental 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 Effective Date.

E) 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.

A) 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.

B) 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.

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

D) Upon permanent cessation of operations of the Facility, Seller shall decommission and remove the Facility and remediate the Site, if and when required by Applicable Laws.

E) 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.

### 20.4. Change of Law.

Except as expressly set forth herein, each Party assumes the risk of changes in Applicable Laws following the Effective Date, that affect such Party's costs of ownership and operation of its assets, and its performance of this PPA.

20.5. 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. Company shall pay when due all fees, fines, penalties and costs incurred by Seller, Company and/or their agents, employees or contractors arising from noncompliance by Company, its employees, or subcontractors with any provision of this PPA except for such fines, penalties and costs that are being actively contested in good faith and with due diligence by Company and for which adequate financial reserves have been set aside to pay such fines, penalties or costs in the event of an adverse determination.

### 20.6. 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 §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).

20.7. 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 PUCT and/or NMPRC.

20.8. 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.

20.9. 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.

20.10. 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.

20.11. 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.

20.12. 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 and delivery of Contract Capacity, Contract Energy and other products and services required by this PPA. Any amendment of this PPA, or any waiver of any provision hereof, shall be evidenced by a writing signed by the Parties to be bound thereby.

20.13. 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.

20.14. 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.

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

20.16. Counterparts and Electronic Signatures. This PPA may be executed in counterparts, and each executed counterpart shall have the same force and effect as an original instrument. A manually signed copy of this PPA, or a copy of this PPA signed with an electronic or digital signature, delivered by e-mail shall be deemed to have the same legal effect as delivery of an original signed copy of this Agreement. No legally binding obligation shall be created with respect to a Party until such Party has delivered or caused to be delivered a signed copy of this PPA.

20.17. 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, and other relevant factual information about the relationship.

20.18. Exhibits. Either Party may change the information in Exhibit D – Notices and Contact Information 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 written consent of both Parties.

20.19. 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

- (a) is publicly available as of the Effective Date, or becomes publicly available during the Term through no fault of the recipient Party;
- (b) can be documented was independently developed by the recipient Party; and/or
- (c) is disclosed to the recipient Party from an ultimate source other than the protected Party, without breach of this PPA by the recipient Party, *provided however*, that if recipient has actual knowledge that disclosure of the information to the recipient is a breach of a confidentiality agreement, such information shall be considered "Confidential Information."

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, attorneys, employees, directors, officers, consultants and advisors, insurers, auditors, lenders and equity investors, subject to their acceptance of the obligations of confidentiality imposed hereby and for whose violations of this Section 20.19 the recipient Party shall be responsible.

C) In the event that Confidential Information must be disclosed by Applicable Law (e.g., pursuant to subpoena or civil discovery) other than in connection with a PUCT and/or NMPRC proceeding, 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. For the avoidance of doubt, this Section 20.19(C) shall be inapplicable to any disclosure of Confidential Information to a public utility commission, its staff, intervenors and/or consumer counsel that are subject to confidentiality obligations arising out of, including but not limited to, statute, public utility commission order or rule.

D) This PPA does not grant or license any rights to information under any license, patent, patent application, know-how, copyright, trademark, trade secret, or other

intellectual property or proprietary right of the disclosing Party, nor shall this Agreement grant the recipient Party any rights in or to the Confidential Information.

20.20. Accounting Treatment.

A) If and when Company reasonably determines that Company must consolidate financial information of Seller into Company's financial statements under FASB ASC 810 or other accounting standard applicable to Company:

1. the Parties shall use Commercially Reasonable Efforts to amend this PPA and/or the Parties' protocols for operation of the Facility to avoid such treatment, at the least possible cost to the Parties, consistent with the intent of this PPA to the extent possible; or

2. if such avoidance is not reasonably feasible, Seller shall provide to Company from time to time upon request such quarterly and annual financial information as may be needed for Company to comply with such standard, in such format and within such time frames as Company may reasonably request.

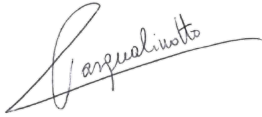
B) If and when Company reasonably determines that Company must treat this PPA as a "finance lease" under FASB ASC 842 or other accounting standard applicable to Company, the Parties shall use Commercially Reasonable Efforts to amend this PPA and/or the Parties' protocols for operation of the Facility to avoid such treatment, at the least possible cost to the Parties, consistent with the intent of this PPA to the extent possible, if so requested by Company.

*[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:

Borger Energy Associates LLC



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

Name: Ludovic Pasqualinotto

Title: SVP CFO Americas and authorized signatory

Company:

Southwestern Public Service Company, a New Mexico corporation



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

Name: Adrian Rodriguez

Title: President, Southwestern Public Service Company

Xcel Energy Services, Inc., its authorized signatory

## EXHIBIT A DEFINITIONS

The following terms shall have the meanings set forth herein:

"Acceptable Natural Gas Fuel" means the natural gas fuel procured from El Paso Natural Gas that complies with the tariff of El Paso Natural Gas (as such tariff may be amended from time to time).

"Actual Damages" shall have the meaning set forth in Section 12.4(C).

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

"Ancillary Services" shall have the meaning set forth in Section 7.5(C).

"Applicable Law" means all laws, statutes, treaties, codes, ordinances, regulations, 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, including, for the avoidance of doubt, electrical, building, fire, zoning, environmental, and occupational health and safety requirements.

"Arbitration Service" means AAA Commercial with rank and strike process on choice of lead arbitrator .

"Availability Verification Test" shall have the meaning set forth in Section 10.9(B).

"Back-Up Metering" shall have the meaning set forth in Section 5.3(D).

"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.

"Btu" means British thermal unit.

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

"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: (a) a transfer of a majority of the ownership interests in Seller such that Ultimate Parent no longer directly or indirectly owns or controls Seller; (b) any consolidation or

merger of Seller such that Ultimate Parent no longer directly or indirectly owns or controls Seller; or (c) a sale or conveyance of any direct or indirect ownership interest in Seller following which Contour Global Hummingbird US Holdco Inc. ("Ultimate Parent") 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

- (i) transactions exclusively among Affiliates of Seller,
- (ii) any exercise by the Facility Lender of its rights and remedies under the Financing Documents, with respect to any Facility Debt secured only by the Facility,
- (iii) a change of control of Ultimate Parent, or
- (iv) any change of economic and/or voting rights triggered in Seller's organizational documents arising from (a) a tax-equity financing of the Facility, or (b) a transaction in which interests in Seller or any direct or indirect owner are sold to or by a tax equity investor.

"Commercial Operation Year" means the period starting at 12:01 a.m. on the Energy Delivery Commencement Date and ending at 11:59 pm on the last Day of the calendar month in which the first anniversary of the Energy Delivery Commencement Date occurs, and each successive "Commercial Operation Year" shall mean the 12-month period following the prior Commercial Operation Year.

"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) is consistent with the terms of this PPA and (d) 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.

"Company" shall have the meaning set forth in the introductory paragraph.

"Company's Interconnection Facilities" means all interconnection facilities on Company's side of the Interconnection Point.

"Confidential Information" shall have the meaning set forth in Section 20.19(A).

"Contracts" shall have the meaning set forth in Section 4.1(A).

"COVID" means SARS-CoV-2 or COVID-19, and any evolutions or mutations thereof or related or associated epidemics, pandemic, or disease outbreaks.

"Contract Capacity" shall have the meaning set forth in Section 7.1.

“Contract Energy” shall have the meaning set forth in Section 7.1.

“Credit Rating” of any person or entity means the lowest rating assigned to such person or entity’s long-term debt or deposit obligations (unenhanced by third-party support) by Standard & Poors and Moodys. If such person or entity 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 or entity by Standard & Poors or Moodys.

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

“Day” means a calendar day.

“Dispute” shall have the meaning set forth in Section 13.1(A).

“Dispute Notice” shall have the meaning set forth in Section 13.1(A).

“Effective Date” shall have the meaning set forth in the introductory paragraph.

“Electric Metering Devices” means revenue quality meters, metering equipment and data processing equipment used to measure, record and transmit data with respect to the Contract Energy, including metering current transformers and metering voltage transformers. The Electric Metering Devices must be capable of storing five-minute revenue quality meter data for transmission to, and retrieval by, Company.

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

“Energy Delivery Commencement Date” shall be the first Day of the second full calendar month after PUC Approval under Section 6.1 is either obtained or waived. By way of example only, if PUC Approval is either obtained or waived on April 15, 2024, then the Energy Delivery Commencement Date would be June 1, 2024.

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

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

“Equity Interest” shall have the meaning set forth in Section 19.5(A).

“Equity Interest Acquisition” shall have the meaning set forth in Section 19.5(A).

“ERO” means the Electric Reliability Organization certified by FERC pursuant to Section 215 of the Federal Power Act, which as of the Effective Date is NERC, or any successor organization. For purposes of this PPA, ERO also includes the Midwest Reliability Organization (MRO).

“ESC Adjustment” shall have the meaning set forth in Section 8.9.



“ESC Event” shall have the meaning set forth in Section 8.9.

“Escrow Account” shall have the meaning set forth in Section 11.2(B).

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

“Expected Ramp Rate” with respect to the regulating range of the Facility between the Minimum Load Level and maximum output means 4.5 MW/minute (increasing) or 4.5 MW/minute (decreasing), as applicable.

“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 as further described in Exhibit C - Facility Description and Site Maps, 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, fuel interconnection facilities, above-ground and underground piping, gas compression, heating and filter/separation equipment, control systems, 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 Acquisition” shall have the meaning set forth in Section 19.5(A).

“Facility Debt” means the obligations of Seller or its Affiliates to any lender or tax equity or other equity investor pursuant to the Financing Documents, including 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 or other 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, equity contribution agreements, estoppels, mortgages, deeds of trust, interest rate exchanges, swap agreements and other documents relating to the development, bridge, construction, back-leverage or permanent debt financing and/or tax equity 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.

“FMV” shall have the meaning set forth in Section 19.5(B).

“Force Majeure” shall have the meaning set forth in Section 14.1.

“Forced Labor Laws” shall have the meaning set forth in Section 15.B(2).

“Forced Outage” means any condition at the Facility that requires the immediate and unplanned removal of the Facility, or any portion 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.

“Fuel Agreements” shall have the meaning set forth in Section 3.2(2).

“Fuel Delivery Point” means the natural gas delivery system point(s) at which Company or IACX makes available and delivers to Seller the natural gas fuel consumed by the Facility to produce the Contract Energy dispatched by Company, as described in Section 5.4.

“Fuel Management Agreement” or “FMA” shall have the meaning set forth in the Recitals.

“Fuel Price” shall have the meaning set forth in Section 8.4.

“Gas Contract” shall have the meaning set forth in the Recitals.

“GADS” means the NERC Generation Availability Data System.

“Gas Deficiency” shall have the meaning set forth in Section 10.9(B).

“Generating Unit” means an individual turbine-generator set at the Facility. The Facility has two (2) Generating Units.

“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, characteristics, 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, but are not limited to, NERC, the ERO, the Market Operator (if any), an applicable PUC, the Transmission Authority, FERC, and successor organizations. For the avoidance of doubt, Company is not a Governmental Authority for purposes of this PPA.

“Guarantor” shall have the meaning set forth in Section 11.2(C).

“House Power” shall have the meaning set forth in Section 1.2(B).

“Indemnified Party” shall have the meaning set forth in Section 17.1.

“Indemnifying Party” shall have the meaning set forth in Section 17.1.

“Interconnection Agreement” means the Transmission Tariff and a separate contract for interconnection of the Facility to the Transmission Authority’s System, if any, as such contract 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 temporary or provisional interconnection agreement or any agreement where the Transmission Provider may limit the operational output of the Facility.

“Interconnection Facilities” means those facilities designated in the Interconnection Agreement for the direct purpose of interconnecting the Facility 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 and Site Maps to this PPA.

“Interconnection Point” means 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. The Interconnection Point is located at the 115 KV bus of the step-up transformer for each of the Facility’s two Generating Units.

“Investment Grade” means a Credit Rating of both (a) Baa3 or higher by Moody’s, and (b) BBB- or higher by Standard & Poors.

“Issuer of Credit” shall have the meaning set forth in Section 11.2(A).

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

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

“Letter of Credit” shall have the meaning set forth in Section 11.2(A).

“Local Provider” shall have the meaning set forth in Section 1.2(B).

“Losses” shall have the meaning set forth in Section 17.

“Maintenance Schedule” shall have the meaning set forth in Exhibit-L - Maintenance.

“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, results in operations or condition (financial or otherwise), prospects or property of a Party, its business, or this PPA.

“MIPSA” means member interest purchase and sale agreement.

“Minimum Load Level” means, subject to the provisions of Section 7.2(B), sixty-seven percent (67%) of Contract Energy on a per Generating Unit basis (equivalent to the Non-Dispatchable Capacity and Energy).

“Minimum Steam Quantity” means 700 klbs/hour of steam produced by the Facility and supplied to the refinery.

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

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

“NMPRC” means the New Mexico Public Regulatory Commission or any successor agency.

“Net Capability” or “NC” of the Facility shall have the meaning as set forth in Section 3.4(C).

“Non-Dispatchable Capacity and Energy” means that portion of the Facility’s capacity and energy that is not subject to scheduling or control by Company. The Non-

Dispatchable Capacity and Energy of the Facility is sixty-seven percent (67%) of the Contract Capacity of the Facility subject to Sections 7.2 (B) and (C).

“Operating Committee” means one representative each from Company and Seller, pursuant to Section 10.8.

“Operating Procedures” means those procedures set forth in Exhibit R - Operating Procedures and any subsequent Operating Procedures developed by the Operating Committee pursuant to Section 10.8, if any.

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

“Option” means Company’s rights to purchase the Facility on the terms and conditions set forth in Section 19.5.

“Option Preliminary Exercise Notice” shall have the meaning set forth in Section 19.5(A).

“Original PPA” shall have the meaning set forth in the Recitals.

“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(D).

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

“Permit Deficiency” shall have the meaning set forth in Section 7.3.

“Permitted Lien” means any of the following: (i) liens for the benefit of a Lender, (ii) inchoate liens that arise by operation of law which are associated with obligations that are not yet due and payable; (iii) liens cured or removed (or bonded over) within thirty (30) Days after their incurrence; (iv) easements, rights-of-way, licenses, minor imperfections in title, and other non-monetary liens incident to the ordinary course of business that, for all instances, do not materially detract from the value of the Facility; (v) liens incurred in the ordinary course of business in connection with worker’s compensation, unemployment insurance, social security and other employment related laws; (vi) liens, deposits or pledges to secure mandatory statutory obligations or performance of bids, tenders or agreements (including leases), or for similar purposes in the ordinary course of its business; (vii) liens disclosed in any title policy issued in favor of Seller or a Lender or any survey of the Site so long as such liens do not materially impair the construction or operation of the Facility; (viii) purchase money liens secured by the assets so purchased; (ix) leaseholds of land or goods, and (x) liens arising in connection with shared facilities arrangements for other projects for which Company is, was or is reasonably

expected to be an off-taker and that do not materially impair the construction or operation of the Facility; and (x) other liens securing obligations with an aggregate value not exceeding \$1,000,000 so long as such liens do not create an imminent risk of a sale or transfer of the Site, the Facility or a material part thereof or interest therein.

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

“Planned Permitted Energy” shall have the meaning set forth in Section 7.3(E).

“Point of Delivery” means the physical point within the operational authority of Transmission Authority at which Seller makes available and delivers to Company the Contract Energy. The Point of Delivery is the Interconnection Point and is further specified in Exhibit C - Facility Description and Site Maps.

“PPA” shall have the meaning set forth in the introductory paragraph.

“PSA” means purchase and sale agreement.

“PUC Approval” shall have the meaning set forth in Section 6.1(D).

“PUCT” means the Public Utility Commission of Texas or any successor agency.

“Ramp Rate” has the meaning set forth in Exhibit I – Ramp Rate.

“Reference Conditions” means the operating and ambient conditions used to provide a reference for determining the net capacity for capacity testing purposes pursuant to Exhibit J – Capacity Testing.

- The Reference Conditions for the Facility shall include but not be limited to:
  - ambient temperature (dry bulb) of 98.4 degrees Fahrenheit (°F), 22.23%
  - ambient relative humidity, and standard ambient pressure (13.15 psia). Operating Reference Conditions for the Facility shall include but not be limited to the following design parameters for the Generating Units, where appropriate:
    - Fuel Composition: CH<sub>4</sub> >=80%, C<sub>2</sub>H<sub>6</sub> <=20%, C<sub>3</sub>H<sub>8</sub> <=18%, Hydrocarbons of C<sub>4</sub>+ <=5%, O<sub>2</sub> =1.5%, Hydrogen <=8.5%, N<sub>2</sub>+CO<sub>2</sub> <=18%, H<sub>2</sub>S 1 grain/100scf, Total Sulfur 2000 ppm
    - Intake Pressure Drop: <=5 INWC
    - Exhaust Pressure Drop: <25 INWC
    - Firing/Exhaust Temperature: 1050 ° Fahrenheit
    - Use of Bleed Air: NA
    - Water or Steam Injections Rate: 100 KPPH
    - Steam Turbine Exhaust Pressure: NA
    - Cooling Water Temperature: NA
    - Generator Power Factor: Unit 1 = .90, Unit 2 = .99822

- Boiler Blowdown %: 1%
- Fuel Temperature: 260° Fahrenheit

"Related Agreements" means the Gas Contract, IACX Gas Contract, FMA, and the Pipeline Agreement.

"Replacement Power Costs" for any period mean the direct and documented costs, incurred by Company to replace the Contract Capacity, Contract Energy and other 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, 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 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
- "D" = the sum of all payments avoided by Company as a result of Seller's breach, for such hour, including avoided payments under Article 8 and avoided fuel costs.

"Reported Availability: Gas" shall have the meaning set forth in Section 10.9(A).

"ROFO" means Right of First Offer.

"ROFO Notice" shall have the meanings set forth in Section 19.3(A).

"SCADA" or "SCADA System" means supervisory control and data acquisition.

“Scheduled Outage/Derating” means a planned interruption/reduction of the Facility’s generation that (i) has been coordinated in advance with Company, per Exhibit L - Maintenance, (ii) is required for inspection, or preventive or corrective maintenance, and (iii) complies with the scheduling requirements of the applicable Transmission Authority.

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

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

“Seller” shall have the meaning set forth in introductory paragraph.

“Seller’s Interconnection Facilities” means all interconnection facilities on Seller’s side of the Interconnection Point.

“Site” means the parcel of real property on which 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 and Site Maps to this PPA.

“SME” means “Scheduled Maintenance Energy.”

“SPP” means the Southwest Power Pool or any successor thereto.

“Steam Agreement” means the Amended and Restated Steam Sales and Operating Agreement between Seller and the Steam Off-taker dated June 10, 2019 as amended pursuant to Section 6.2, or similar agreement with a Subsequent Steam Host.

“Steam Off-taker” means Wood River Borger Refining, LLC, the entity to whom Seller provides Thermal Energy, steam and compressed gas pursuant to the Steam Agreement, or a Subsequent Steam Host.

“Subsequent Steam Host” means a subsequent agreement to sell Thermal Energy, steam and compressed gas that Sellers enters into with another entity if for any reason the Steam Agreement with the Refinery is terminated or not extended or renewed.

“Successful Start” means, in response to a request from Company to start a Generating Unit or, if applicable, all Generating Units simultaneously, Seller’s start and operation of such Generating Unit(s) that:

(i) syncs to the grid and achieves the Minimum Load Level for the requested operating configuration within twenty (20) minutes for single-cycle starts after the time Company requests the turbine start to begin, and

(ii) upon achieving such Minimum Load Level, generates continuously for a period of not less than one hour while synchronized to Transmission Authority’s System



at or above such Minimum Load Level without experiencing any abnormal operating conditions.

“TE Partnership” shall have the meaning set forth in Section 19.5(A).

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

“Test” and “Testing” shall have the meanings as set forth in Section 10.4(A).

“Test Energy” shall have the meaning set forth in Section 10.4(E).

“Thermal Energy” means any form of direct or indirect heat transfer (including through exchangers) between Seller and Steam Off-taker including but not limited to the exchange of steam, water, and/or condensate.

“Total Ambient Correction Factor” means turbine correction factors to 99 DegF and 18% Relative humidity.

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

“UFLPA” means the Uyghur Forced Labor Prevention Act, Pub. L. 117-78 (2021).

“Ultimate Parent” shall have the meaning set forth in the definition of Change of Control.

“Upstream Pipeline” means the interstate or intrastate natural gas pipelines interconnected to the Facility at the Fuel Delivery Point(s). The Upstream Pipelines are the Pinnacle Pipeline and the IACX Pipeline.

\* \* \* \* \*

**EXHIBIT B**  
**RESERVED**

## EXHIBIT C

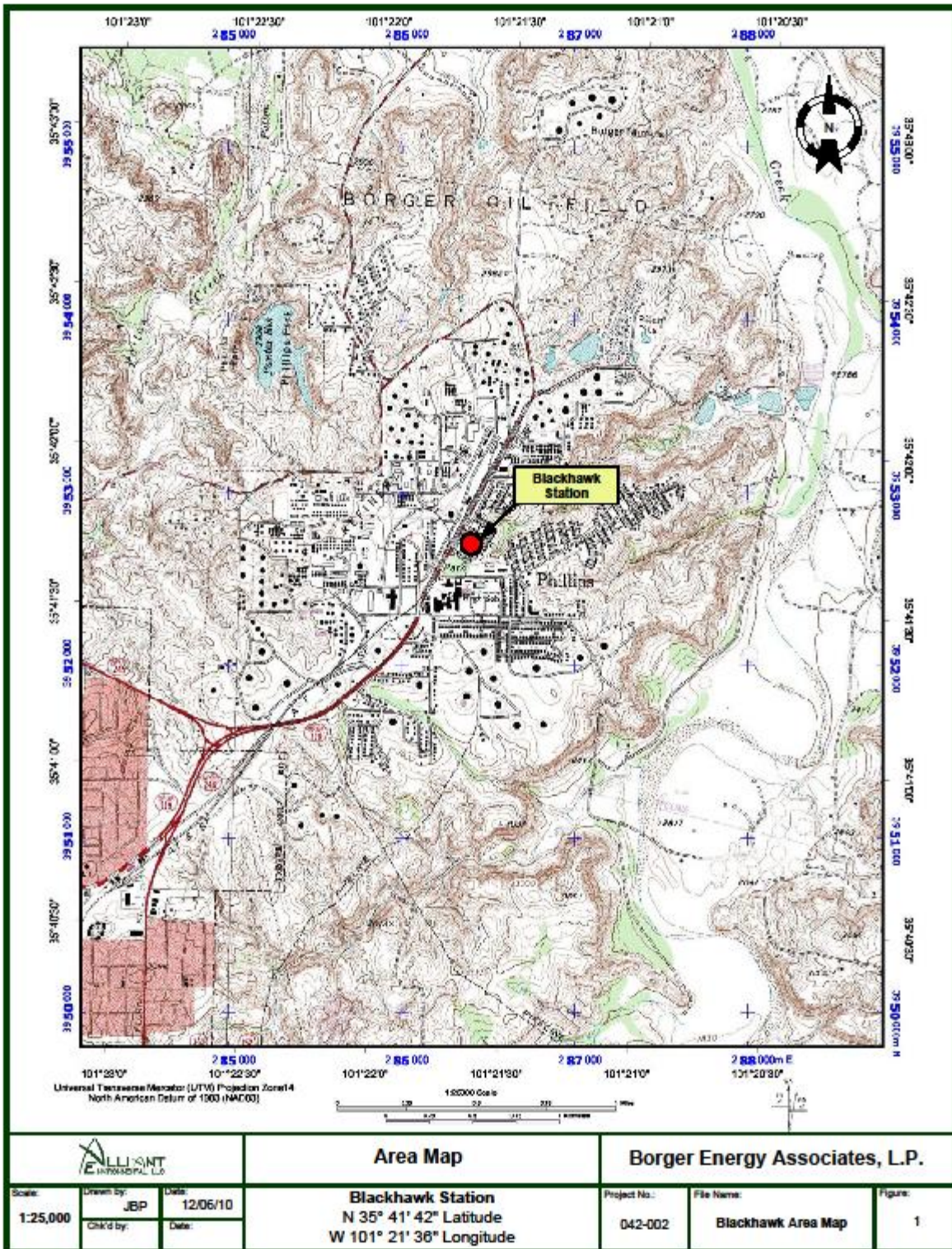
### FACILITY DESCRIPTION AND SITE MAPS

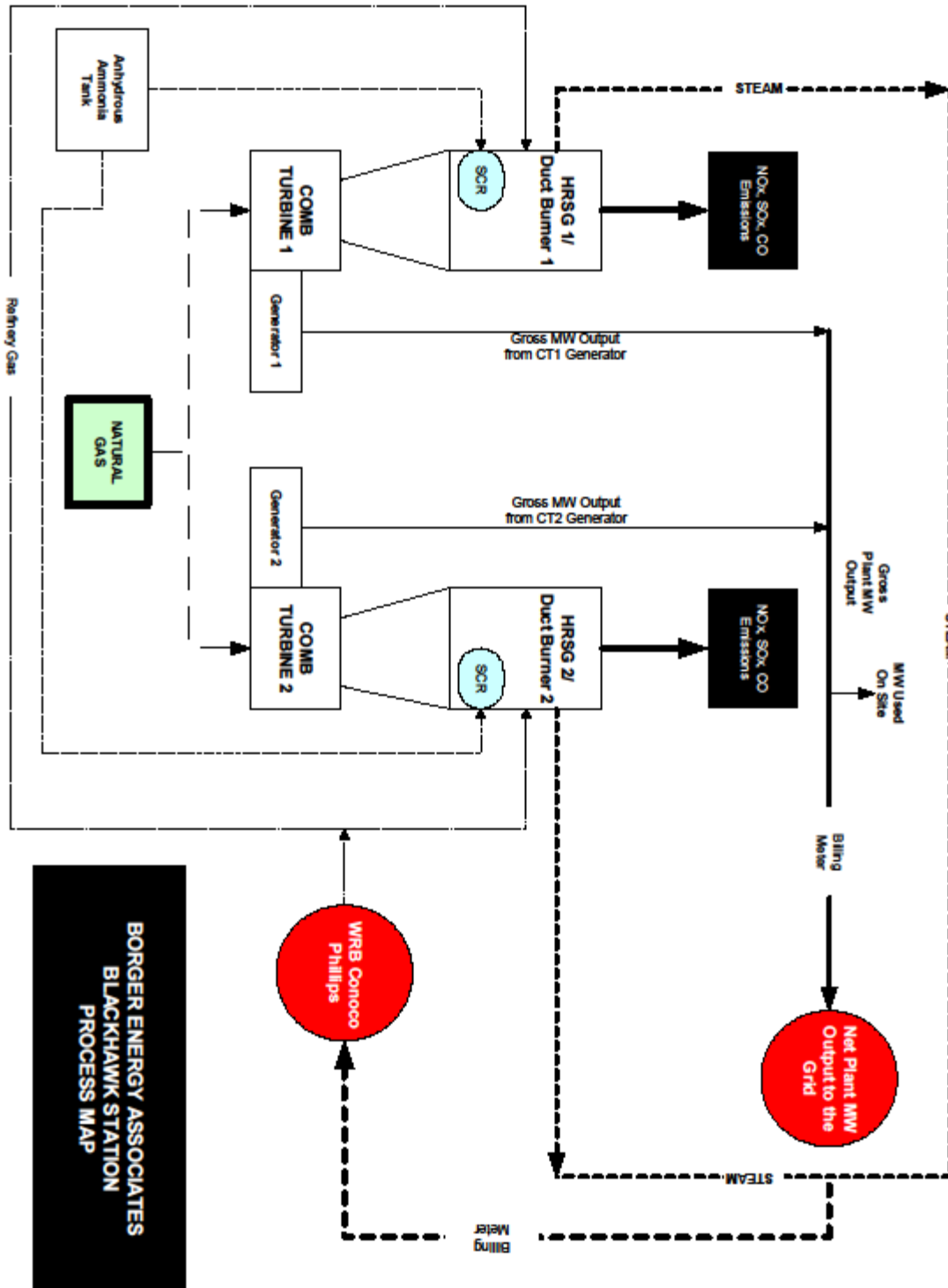
The Facility shall be located on the Site and shall be identified as Seller's Borger Generation Facility. Maps and one-line diagrams of the Facility and associated equipment are included as part of this Exhibit.

The address of the Facility is 888 Westheimer, Suite 300, Houston TX 77006, Latitude: 35.69697, Longitude: -101.359.

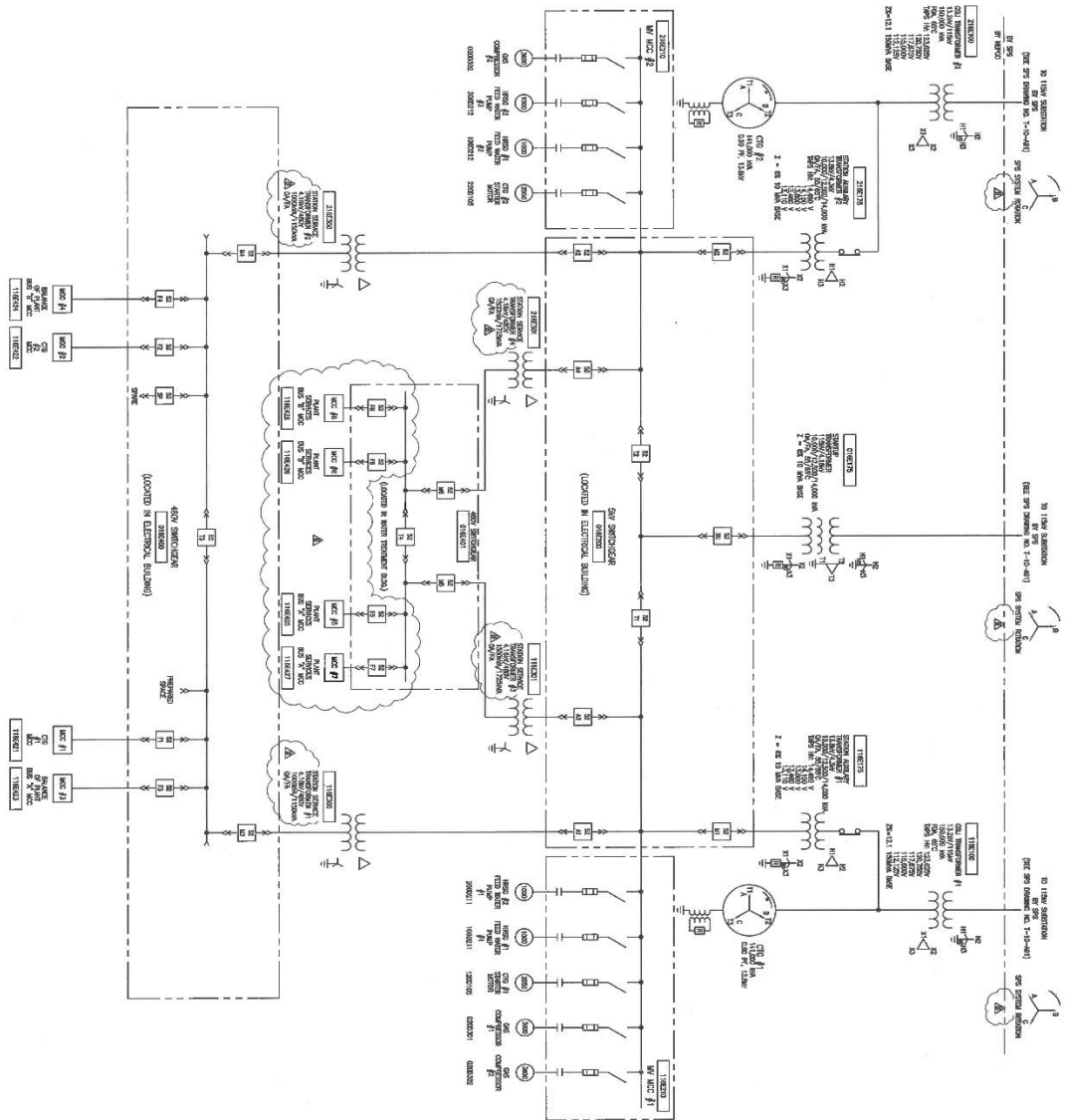
The Facility must include the following specific components:

- have the panel space and 125VDC battery supplied voltage necessary to accommodate the metering, telemetering and communications equipment required by the PPA;
- have communication circuits from the Facility to the EMCC for the purpose of telemetering, SCADA System, and voice communications as required by Company;
- be capable of sending real time data (including fuel flows) and OPC interface to Company's plant information system (OPC is the Object Linking and Embedding for Process Control interface);
- be capable of dispatch at Minimum Load Levels for each Generating Unit and combination of Generating Units;
- be capable of operating, or continuing to operate without interruption in all required operating modes in the event of a planned or unplanned outage of one or more, but not all of the Generating Units;
- be capable of starting and operating on natural gas at an ambient temperature down to -20° Fahrenheit; and
- a Point of Delivery located at the 115 kv bus of each generating unit's step-up transformer (the point at which deliveries of capacity and energy are made and measured).





**BORGER ENERGY ASSOCIATES  
 BLACKHAWK STATION  
 PROCESS MAP**



**GENERAL NOTES:**

- 1. ALL WORK SHALL BE IN ACCORDANCE WITH THE NATIONAL ELECTRICAL CODE (NEC) AND THE NATIONAL FIRE ALARM AND SIGNAL CODE (NFPA 72).
- 2. ALL MATERIALS SHALL BE OF THE HIGHEST QUALITY AND SHALL BE APPROVED BY THE ENGINEER.
- 3. ALL WORK SHALL BE SUBJECT TO INSPECTION AND APPROVAL BY THE ENGINEER.
- 4. ALL WORK SHALL BE COMPLETED WITHIN THE SPECIFIED TIME FRAME.
- 5. ALL WORK SHALL BE COMPLETED WITHIN THE SPECIFIED BUDGET.

**REFERENCE DRAWING**

- 1. ELECTRICAL SYMBOLS AND ABBREVIATIONS - NATIONAL ELECTRICAL CODE (NEC)
- 2. ELECTRICAL SYMBOLS AND ABBREVIATIONS - NATIONAL FIRE ALARM AND SIGNAL CODE (NFPA 72)
- 3. ELECTRICAL SYMBOLS AND ABBREVIATIONS - IEEE STANDARD 315-1975
- 4. ELECTRICAL SYMBOLS AND ABBREVIATIONS - IEEE STANDARD 100-1988
- 5. ELECTRICAL SYMBOLS AND ABBREVIATIONS - IEEE STANDARD 100-1998

NO.	REVISION	DATE	BY	CHKD.
1	ISSUED FOR CONSTRUCTION	12/11/21	CI WPT 1	TSB

PLANT ONE-LINE DIAGRAM  
 2081 E002

**EXHIBIT D**  
**NOTICES AND CONTACT INFORMATION**

<b>Company</b>	<b>Seller</b>
<p><b>Notices:</b></p> <p>Director, Purchased Power  Xcel Energy Services Inc.  1800 Larimer Street, Suite 1000  Denver, CO 80202  E-mail:  purchasedpowernotices@xcelenergy.com</p> <p><i>with a cc to:</i>  Purchased Power Consultant  Xcel Energy Services Inc.  1800 Larimer Street, Suite 1000  Denver, CO 80202  E-mail:  purchasedpowernotices@xcelenergy.com</p>	<p><b>Notices:</b></p> <p>Borger Energy Associates LLC  888 Westheimer, Suite 300  Houston, TX 77006  Phone: +55 11 9909-5557  E-mail:  Alessandra.Marinheiro@contourglobal.com</p> <p><i>with a cc to:</i>  General.counsel@contourglobal.com</p>
<p><b>Operating Committee Representative:</b></p> <p>Director, Purchased Power  Xcel Energy Services Inc.  1800 Larimer Street, Suite 1000  Denver, CO 80202  E-mail:  purchasedpowernotices@xcelenergy.com</p> <p><b>Alternate:</b></p> <p>Purchased Power Consultant  Xcel Energy Services Inc.  1800 Larimer Street, Suite 1000  Denver, CO 80202  E-mail:  purchasedpowernotices@xcelenergy.com</p>	<p><b>Operating Committee Representative:</b></p> <p>Rocky Lovato  888 Westheimer, Suite 300  Houston, TX 77006  Phone: 806 274 0581  E-mail: rocky.lovato@contourglobal.com</p> <p><b>Alternate:</b></p> <p>Jeffrey Sweeney  888 Westheimer, Suite 300  Houston, TX 77006  Phone: 806 681 5367  E-mail:  jeffrey.sweeney@contourglobal.com</p>
<p><b>Real-Time Contact Information</b>  <u>EMCC (24 hour coverage):</u>  Phone: 303-571-7426  E-mail:  dlrtelectricmarketersnsp@xcelenergy.com</p>	<p><b>Real-Time Contact Information</b>  <u>[Operations Command Center]</u>  (24 hour coverage):  Phone: 806 274 0581  E-mail: rocky.lovato@contourglobal.com</p>

<u>Transmission Ops:</u> Phone: 303-273-4811 E-mail: AGCOpr@xcelenergy.com	
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**EXHIBIT E  
INSURANCE COVERAGE**

Type of Insurance	Minimum Limits of Coverage
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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.
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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. 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
Employers Liability	\$2,000,000 each accident for bodily injury by accident, or \$2,000,000 each employee for bodily injury by disease.
Environmental Impairment Liability	\$5,000,000 each occurrence.

All-Risk Property insurance covering physical loss or damage to the Facility	Full replacement value 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 full replacement value.

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 Energy Delivery Commencement Date.

**EXHIBIT F**  
**RESERVED**

**EXHIBIT G  
FORM OF LETTER OF CREDIT**

[LETTERHEAD OF ISSUING BANK]

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

Beneficiary: Southwestern Public Service Company 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" ("Sight Draft"), drawn on Issuer and accompanied by this Letter of Credit. All Sight Drafts must be signed on behalf of Beneficiary, and the signator 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 twenty-four (24) hours after presentment of any Sight Draft. Payment shall be made in U.S. Dollars with Issuer's own funds in immediately available funds.

Issuer will honor any 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 Power 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 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." Such transfer will be effected at no cost to Beneficiary. Any transfer fees assessed by Issuer will be payable solely by Applicant, and the payment of any transfer fees will not be a condition to the validity or effectiveness of the transfer of this Letter of Credit.

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

**SIGHT DRAFT**

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: \_\_\_\_\_

Southwestern Public Service Company

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: \_\_\_\_\_

Southwestern Public Service Company

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 Southwestern Public Service Company ("Company"), in connection with the performance by \_\_\_\_\_, a \_\_\_\_\_ [limited liability company] ("Seller") of a Power Purchase Agreement dated \_\_\_\_\_, 20\_\_ between Seller and Company (the "PPA").

- RECITALS -

A. Seller owns and operates a natural gas powered 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 controlled by 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. This Guaranty shall survive termination of the PPA to the extent necessary to enforce and complete the rights, duties and obligations of Company and Seller thereunder.

2. Maximum Liability. Notwithstanding anything herein to the contrary, Guarantor's maximum liability under this Guaranty shall be limited to \_\_\_\_\_ dollars (US\$\_\_\_\_\_) plus costs of collection under Section 10 below.

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 immediately 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 reasonable attorneys' fees) incurred by Company as a result thereof, all in such manner and at such times as Company may reasonably direct in accordance with the PPA.

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 such time as all of the Obligations have irrevocably been discharged in full, 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;

(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.

10. Collection Costs. Guarantor shall pay to Company, upon demand, and in addition to the maximum liability set forth in Section 2 hereof, all reasonable 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 all reasonable 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 Texas without regard to the principles of conflicts of law thereof. Venue for any dispute hereunder shall be as set forth in Section 13.5 of the PPA.

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

(b) if to Guarantor: \_\_\_\_\_

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

*with a copy to:* \_\_\_\_\_

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

*Attn:*

or to such other address (es) as the person to whom notice is given may have previously furnished to the others in writing in the manner set forth above.

IN WITNESS WHEREOF, Guarantor has caused this Guaranty to be duly executed and delivered to Company as of the day and year first above written.

**[Name of Guarantor]**

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

Name:

Title:

STATE OF \_\_\_\_\_ )

) ss.

COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by \_\_\_\_\_, as \_\_\_\_\_ of \_\_\_\_\_.

Witness my hand and official seal.

My commission expires: \_\_\_\_\_.

( S E A L )

\_\_\_\_\_

Notary Public

**EXHIBIT I**  
**RAMP RATE**

The Ramp Rate of the Facility is 4.5 MW/min in the dispatch range of 67% to 85%.

Testing. Company shall have the right to routinely conduct, from the EMCC, verification testing of the Ramp Rate of the Facility, without prior notice to Seller. Ramp Rate verification testing shall be conducted over the minimum regulating range of Unit(s) being tested, beginning at or below the applicable Minimum Load Level of such minimum regulating range and ending at the maximum reported available capacity during the hour of the test (the “specified ramp range”), taking into consideration non-standard ambient conditions which exist at the time of the test. The timed portion of the test used to determine the increasing ramp rate shall begin when the output level of the Unit(s) being tested is at the minimum load point of the specified ramp range and shall end when such output is one MW less than the maximum load point of the specified ramp range. The timed portion of the test used to determine the decreasing ramp rate shall begin when the output level of the Unit(s) being tested is at the maximum load point of the specified ramp range and shall end when such output is one (1) MW greater than the minimum load point of the specified ramp range. In the event that the Ramp Rate of the Facility tests at less than 4.5 MW/min, Seller will use Commercially Reasonable efforts to restore the ramp rate of the Facility to 4.5 MW/min.

\* \* \* \* \*

## EXHIBIT J

### CAPACITY TESTING

#### General Capacity Testing Criteria:

For Company's planning, operating and reporting purposes, the seasonal capacity test is the testing procedure to determine the seasonal net dependable capacity of the Facility that can be expected during summer after supplying power to all of the Facility's auxiliary equipment. The expected net dependable capacity for the Facility during the summer is between 219 MW and 228 MW. The expected net dependable capacity for the Facility during the winter is 221 MW. The seasonal capacity test will be determined and reported as the lowest sustained, seasonally adjusted net kWh for any one clock hour of the two- or four-clock hour seasonal capacity test period. The results of the Capacity Test shall be adjusted to reflect ambient temperature based on the highest one percent (1%) of summer temperatures at the Site as stated in the SPP Procedures for Testing and Rating of Generating Equipment. At Company's sole determination, the adjustments required to determine and perform the seasonal capacity test may include such applicable adjustments for ambient air conditions, condensing water availability and temperature, fuels, steam or water injection rates for emission control, steam heating loads, thermal host energy usage, reservoir levels, elevations and scheduled reservoir releases and water flow conditions. The Facility shall be operated in full compliance with Applicable Law during the seasonal capacity test. If the Facility fails to operate during the seasonal capacity test in accordance with any requirements of the seasonal capacity test, Company will require a retest of the Facility.

A seasonal capacity test shall be performed at least once every two years for each of the summer (June 1 to September 30) and winter (December 1 to March 31) seasons to demonstrate and verify that the seasonal capacity test is representative of what can be generated during Company's summer and winter peak load periods.

Seller shall conduct each seasonal capacity test on a date mutually agreed upon by Company and Seller. Seller shall conduct the seasonal capacity test as outlined below and may install seasonal capacity test equipment at Seller's expense, obtain necessary seasonal capacity test readings, and specify equipment operation mode to ensure seasonal capacity test conditions are met as outlined in this Exhibit.

During the seasonal capacity test all auxiliary equipment used in normal operation of the Facility shall be in service and shall be in typical operating condition and in a normal state of maintenance. This includes equipment associated with any process or thermal host connected to the Facility. It shall be Seller's obligation to ensure that all auxiliary equipment needed for normal operation of the Facility is in typical operating condition for the scheduled seasonal capacity test. Emergency capability shall be excluded during the seasonal capacity test and all equipment, which is not intended to be used on a normal daily basis, which could be used to extend capability, shall be excluded during the seasonal capacity test period. Seller shall be required to provide operational records to be used to substantiate the normal mode of operation. NO<sub>x</sub> and CO emissions must be kept in compliance for the duration of the seasonal capacity test.

Steady state operation is required for the seasonal capacity test. The Facility shall be considered to be at steady state prior to starting a test if the Facility has operated at full capacity for at least thirty minutes with power output maintained at a near constant level. The Facility requires one hour to achieve load stabilization on power augmentation to steady state. If the Facility is unable to maintain a near constant power output level during the scheduled seasonal capacity test period, Company may, in its sole discretion, require a subsequent seasonal capacity test at Seller's expense. Unless found to be inaccurate, the Electric Metering Device(s) will be utilized to measure the Facility's net power output during the Test period. During the seasonal capacity test and its preparation, Seller shall give Company personnel access to the Facility's equipment and instrumentation for observation and recording of process operating parameters and conditions.

Prior to each seasonal capacity test, Seller shall submit for Company's review a description of the Facility that shall include as appropriate:

- a. Any modifications to the Facility that could impact the Facility's capacity output since the last seasonal capacity test. Modifications include:
  - 1) Installation of new equipment or systems.
  - 2) Alterations to existing equipment or systems.
  - 3) Changes to any digital control system (DCS) control parameters including firing curves, temperature and pressure limits and steam/water injection schemes.
  - 4) Known damage or limitations of equipment or systems.
- b. All relevant generation and process correction data, curves, thermal kits and application methodology.
- c. All requested historical operating data, in electronic format. Historic data may be used to identify, analyze and review effects of any changes in the Facility's equipment, DCS control parameters, Facility performance degradation, etc.

Prior to the seasonal capacity test, Company shall provide Seller with a comprehensive list of the historic seasonal operational data required.

The seasonal capacity test period will be not less than four continuous hours for the summer season and not less than two continuous hours for the winter season.

Immediately following each seasonal capacity test run and immediately after the seasonal capacity test is completed, Seller shall provide to Company all raw test data. Electronic copies of the raw test data shall be provided to Company at the conclusion of each test run. Within sixty (60) Days following performance of each seasonal capacity test, Seller shall provide to Company for review and approval (i) calculations, fuel analyses and a final test report, in written and electronic format, (ii) all as-built equipment specifications, correction curves, equations and other information necessary for review of the seasonal capacity test results that have not been previously submitted to Company,



and (iii) a fully functioning electronic model, in Gates-cycle or a similar program, that Company can use to verify Seller's calculations of, and adjustments to, test data. The final test report shall include clear and complete explanations of the calculations resulting in the test seasonal capacity and the adjustment of the test seasonal capacity to each of the Reference Conditions. Uncertainty, as defined in the ASME power test codes, shall not be used to adjust seasonal capacity test results.

If Seller believes that the tested capacity is not fairly representative of the seasonal net dependable capacity of the Facility, Seller may, in its sole discretion, require a re-test on a date determined by the Parties.

If Company believes that the tested capacity is not fairly representative of the seasonal net dependable capacity of the Facility, Company may, in its sole discretion, require Seller, at Seller's sole expense, to conduct a re-test on a date determined by Company, *provided* that Company shall pay all fuel commodity costs and any associated fuel imbalance, transportation and other ancillary costs incurred by Company in connection therewith if the original seasonal capacity test complied with this Exhibit.

*Combustion Turbine, Internal Combustion and Combined Cycle Unit Tests:*

For the summer season, as-tested net capacity at the Facility shall be adjusted to ambient temperature and relative humidity conditions of 98.4°F and 22.23%, respectively. For the winter season, as-tested net capacity at the Facility shall be adjusted to ambient temperature and relative humidity conditions of 30°F and 60%, respectively. In both cases, the as-tested net capacity will be adjusted to the barometric pressure corresponding with the Facility's elevation above sea level.

The ambient air temperature measurement for the seasonal capacity test will represent surrounding ambient air temperature and not ambient air temperature which is heated or cooled by nearby equipment. Air inlet evaporator conditioning equipment may be used during the seasonal capacity test only to the extent that Seller can prove, with historical records, that said equipment is normally in service. The performance of intake air conditioning equipment shall be adjusted to historic or design ambient air conditions. Combustion turbine exhaust temperatures shall not exceed the design operating point established by the turbine manufacturer and specific to the combustion turbine being tested. The seasonal capacity test will be conducted using only an approved DCS control scheme governing operating parameters (i.e., turbine firing curve, etc.) as reflected in actual operating data from the prior twelve months.

Steam or water injection rates for emission control shall not exceed the levels specified in the technical support information in the application for the Facility emission permit(s).

\* \* \* \* \*

**EXHIBIT K**  
**GUARANTEED HEAT RATES**

The Guaranteed Net Heat Rate of the Facility shall be as follows:

Plant Loading as a Percentage of Contract Capacity

<b>Greater Than</b>	<b>Less Than or Equal To</b>	<b>Heat Rate (MMBtu/MWh (net), HHV)</b>
0%	67%	7.000
67%	85%	7.000
85%	88%	7.075
88%	90%	7.150
90%	93%	7.229
93%	100%	7.300

- 85% output is 100% baseload on the combustion turbine
- 95% is 100% baseload with power augmentation
- 100% is 100% peak load with power augmentation
- Peak firing hours will be limited to 210 hours per year and power augmentation will be limited to 210 hours on an annual rolling average.

\* \* \* \* \*

**EXHIBIT L**  
**MAINTENANCE**

A. Schedules. At least three months prior to Energy Delivery Commencement Date, Seller shall provide to Company a schedule of the expected Scheduled Outages/Deratings for the Facility ("Maintenance Schedule") for the balance of the calendar year. Thereafter, on or before February 1 of each successive year, Seller shall submit to Company (i) an annual Maintenance Schedule for such calendar year (including the date, start time and expected duration of the outage), and (ii) a projected long-term Maintenance Schedule encompassing the following four calendar years. All Maintenance Schedules, including any changes, shall be subject to Company's Commercially Reasonable approval and are also subject to the approval of the ERO and subject to the ERO's then current operating criteria.

B. Advance Changes. Either Seller or Company may change an annual Maintenance Schedule from time to time, upon prior notice to the other Party, as follows based on the original total duration:

<u>Scheduled Duration of Outage</u>	<u>Minimum Required Advance Notice if Changed by Seller</u>
• Fewer than 2 Days	at least 48 hours
• 2 to 5 Days	at least 7 Days
• Major overhauls (over 5 Days)	at least 90 Days

Maintenance changes requested by Company shall be scheduled by the Parties consistent with Good Utility Practices and Applicable Law. Seller shall comply with all maintenance changes directed by the ERO.

C. Company Late Changes. Not less than 7 days prior to commencement of any Scheduled Outage/Derating, Company may request verbally or in writing, that Seller defer or reschedule such Scheduled Outage/Derating. Subject to Good Utility Practice and Applicable Law Seller shall comply with any such request and reschedule such Scheduled Outage/Derating to a subsequent mutually agreed date if Company agrees to pay Seller the actual incremental direct costs incurred by Seller in such deferral or rescheduling. Seller shall provide to Company, in advance, a non-binding good faith estimate of such costs, and Company shall promptly advise Seller whether Company is willing to reimburse Seller to implement such deferral or rescheduling.

D. ERO Late Changes. Prior to commencement of any Scheduled Outage/Derating the ERO may, either verbally or in writing, direct Seller (either itself or through the Company), to defer such Scheduled Outage/Derating. Seller shall comply with any such request and reschedule such Scheduled Outage/Derating to a subsequent date mutually agreed to by Company and Seller.

Should ERO's rules, tariffs or procedures entitle Seller to compensation for such deferral or rescheduling, Company shall provide reasonable cooperation and assistance to Seller to recover such compensation from the ERO.

E. SME. Seller shall be entitled to 360 MWh of Scheduled Maintenance Energy ("SME") per MW of Net Capability during each Commercial Operation Year as a credit towards Seller's CAF under Section 8.1, *provided, however*, that such SME is scheduled in advance with Company pursuant to paragraph (A) above and approved in writing by Company prior to Seller's use of such SME. If Seller uses fewer than 360 MWh of SME per MW of Net Capability in a Commercial Operation Year, Seller may carry over unused SME for use in the next Commercial Operation Year as additional credit towards Seller's CAF during the next Commercial Operation Year, *provided, however*, that the total SME per MW of Net Capability that may be accumulated by Seller for use in any Commercial Operation Year, including carry over SME, shall not exceed 672 MWh per MW of Net Capability. SME may not be advanced from future Commercial Operation Years.

\* \* \* \* \*

**EXHIBIT M**

**PRICING**

*This entire Exhibit shall be deemed Confidential Information subject to Section 20.19.*

Commercial Operation Year	Capacity Price (\$/kW-mo)	Variable O&M Rate (\$/MWh)	Commercial Operation Year	Capacity Price (\$/kW-mo)	Variable O&M Rate (\$/MWh)
1	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

## EXHIBIT N

### ESC ADJUSTMENTS

a. ESC Bonuses. If during some or all of an ESC Event the entire Facility is fully mechanically available (or is deemed fully available pursuant to Section 8.1) on natural gas Seller shall be entitled to an ESC Bonus with respect to such ESC Event in an amount equal to

$NC \times DE \times ABF$ , where:

NC = the available Net Capability of the Facility, expressed in kW;

DE = the number of hours during the ESC Event, during which the Facility is or is deemed fully available (excluding the number of hours, if any, during the ESC Event when the Facility was subject to an SME Outage); and

ABF = the applicable Availability Bonus Factor (ABF):

Yellow: \$0.005

Orange: \$0.015

Red: \$0.050

The Facility shall not be de-rated for adverse ambient conditions, for purposes of calculations under this Exhibit.

b. ESC Penalties. If some or all of the Facility is unavailable mechanically (other than due to Scheduled Outages/Deratings eligible for SME under Exhibit L - Maintenance -- "SME Outages") during some or all of an ESC Event, Seller shall be subject to an ESC Penalty with respect to such ESC Event equal to

$ANC \times DO \times ARF$ , where:

ANC = the Affected Net Capability of the Facility (i.e. the portion of the capacity of the Facility subject to the outage), expressed in kW;

DO = the hours during which the Facility is not fully available due to causes other than SME Outages; and

ARF = the applicable Availability Reduction Factor (ARF):

Yellow: (\$0.025)

Orange: (\$0.075)

Red: (\$0.250)

c. Netting. In the event that Seller is subject to both an ESC Bonus and an ESC Penalty with respect to an ESC Event, the two adjustments shall be netted against each other, to determine the actual ESC Adjustment to be paid / charged to Seller with respect to such ESC Event.

d. Limits on Seller's Liability. With respect to each Commercial Operation Year:

1. With respect to Yellow ESC Events during such Commercial Operation Year, in no event shall Seller be subject to aggregate negative ESC Adjustments in excess of an amount equal to  $200 \text{ hours} \times \text{Yellow ARF} \times \text{NC}$ ;

2. With respect to Orange ESC Events during such Commercial Operation Year, in no event shall Seller be subject to aggregate negative ESC Adjustments in excess of an amount equal to  $75 \text{ hours} \times \text{Orange ARF} \times \text{NC}$ ; and

3. With respect to Red ESC Events during such Commercial Operation Year, in no event shall Seller be subject to aggregate negative ESC Adjustments in excess of an amount equal to  $40 \text{ hours} \times \text{Red ARF} \times \text{NC}$ .

(E) No De-Rating. In determining whether the Facility is "fully available" for purposes of an ESC Event, the Facility will not be de-rated for ambient conditions (notwithstanding Section 8.1 to the contrary).

\* \* \* \* \*

## EXHIBIT O

### LENDER CONSENT PROVISIONS

In the event Seller 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 in any material respect, 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 Event of Default by Seller, Company shall not terminate the PPA unless it has first given notice of such Event of Default to the Facility Lender and has given the Facility Lender the same cure period afforded to Seller under Article 12 of the PPA, plus an additional thirty (30) Days beyond Seller's cure period to cure such 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 thirty (30) 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; provided, that the total cure period shall in no event exceed one-hundred eighty (180) Days.
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. Upon any foreclosure, deed-in-lieu or other exercise of the rights and remedies of the Facility Lender that results in a successor owner or operator of the Facility, the Facility Lender shall require and cause the successor (i) to assume all of Seller's prospective obligations under the PPA, (ii) to cure any then-existing defaults by Seller that are capable of cure by performance or the payment of money damages, (iii) to have substantial experience in the operation of power generation facilities akin to the Facility, either directly, through its affiliates or through an operator acceptable to Company, and (iv) to enjoy (together with its parents and affiliates) an Investment Grade Credit Rating or other creditworthiness satisfactory to Company. Except for the foregoing, the Facility Lender shall not be obligated to perform or be liable for any obligation of Seller under the PPA.
6. Upon any rejection or other termination of the PPA in connection with any bankruptcy or insolvency of Seller, 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 P-1 – RESERVED**

## EXHIBIT P-2

### FACILITY PURCHASE AND SALE AGREEMENT (“PSA”) PROVISIONS

#### **Type of Transaction**

The transaction will be structured as an asset acquisition. Company (“Buyer”) shall purchase and Seller shall sell 100% of the assets (“Assets”) of a completed, commercially operational, integrated natural gas powered electricity generating plant with nameplate capacity of 230 MW and all facilities and all other assets and rights relating to the project (the “Project”), free and clear of all encumbrances and liabilities, except for permitted encumbrances and assumed liabilities as defined in the PSA.

#### **Purchase Price and Payment Terms**

Buyer shall pay Seller the “Purchase Price,” which is determined pursuant to Section 19.5(C) of this PPA.

Buyer shall be entitled to withhold in the aggregate up twenty percent (20%) from the payment of the Purchase Price in the event of certain breaches of Seller’s representations, warranties or covenants pending Seller’s cure of any such breach. The Parties shall agree on the purchase price allocation for purposes of federal, state and local tax law.

Seller shall be responsible for all property and other taxes relating to the pre-closing period. All transfer taxes and any sales, use or other taxes related to the purchase and sale of the Assets and any purchase or conveyance of real or personal property to be used in the Project shall be borne by Company irrespective of whether such taxes are paid by Seller or Company.

#### **Seller’s Closing Deliverables:**

Upon the terms and conditions to be defined within the PSA, the obligations of Buyer to consummate the transactions contemplated are subject to the satisfaction by Seller of certain closing conditions, including:

- Transfer of all of the Assets of the Project, which include all rights and title to assets necessary for the commercial operation of the Project, to Buyer or its designated affiliate.
- An opinion of legal counsel that each material discretionary permit required for the Project has been obtained and is valid, binding, in full force and effect and non-appealable.
- Evidence that any liens on the Project, real property or any other assets or interests of the Project have been removed as of the closing other than permitted liens which have been scheduled or liens which have been scheduled and bonded to Buyer’s reasonable satisfaction.

- Certain conditions do not exist at the time of closing including, but not limited to, the existence of a material adverse effect. A material adverse effect would be defined in the PSA and would include, in addition to other terms, a change in tax law that could have a negative impact on Buyer's business or the economic viability of the Project.
- All certifications, affidavits, approvals and permits required to demonstrate satisfaction of all representations, warranties, and covenants made by Seller pertaining to the closing.

### **Buyer's Closing Deliverables:**

Upon the terms and conditions to be defined within the PSA, the obligations of Seller to consummate the transactions contemplated are subject to the satisfaction by Buyer of certain closing conditions, including:

- Delivery of the Purchase Price.
- All certifications, affidavits, approvals and permits required to demonstrate satisfaction of all representations, warranties, and covenants made by Buyer pertaining to the closing.

### **Required Approvals**

The transaction is subject to obtaining specified approvals, authorizations, or orders, including but not limited to the following (to the extent necessary):

- Approval of the board of directors of Buyer and the board of directors or similar governing body of Seller shall be obtained prior to execution of the PSA.
- Third party consents.
- Applicable governmental and regulatory approvals prior to closing, including to the extent necessary, any applicable state agencies or commissions regulating utility activities and any government agencies having approval, consent or authority over the transactions contemplated by the PSA, including but not limited to the PUCT, the NMPRC, the IRS, the FERC, the Department of Justice, the US Fish and Wildlife Service and the FAA.

### **Representations and Warranties**

The transaction is subject to customary representations and warranties to be made by Buyer and Seller as of the execution date or the effective date of the PSA and the closing thereunder, including the following:

- Corporate existence and powers – Seller is a limited liability company validly existing and in good standing and has the power and authority to conduct its business as now conducted.
- Authority (execution and delivery)
- No conflicts - the transaction does not create any conflicts.
- Consents and approvals – no consent, approval or authorization is required in connection with the execution and performance of the PSA.

- Legal proceedings of Buyer– there are no legal proceedings pending, or to Buyer’s knowledge, threatened in writing, against Buyer, that affect the consummation of the transaction contemplated by the PSA.
- Legal proceedings of Seller and the Project – there are no legal proceedings pending, or to the best of Seller’s knowledge, threatened in writing, except as scheduled against the Seller or the Project affecting Seller’s ability to sell the Project.
- Sufficient funds – Buyer has available, or will maintain sufficient sources of, funds to complete the transaction.
- Compliance with Laws – Seller is in compliance with all laws applicable to the Seller, Project and the transactions contemplated by the PSA.
- Environmental – Seller and its affiliates have no environmental liabilities and are in compliance with environmental requirements. Seller and its affiliates have not received any notice of an alleged violation of environmental law pertaining to the Project from any governmental entity. There are no facts, circumstances, conditions or occurrences relating to the Project that could reasonably be expected to form the basis of a claim, requirement or obligation imposed by any governmental entity under any environmental law on Seller or its affiliates.
- Contracts – Schedule of material contracts binding on the Seller or to which the Project is subject and Seller has furnished to Buyer true, correct and complete copies of all material contracts. Each scheduled contract, including but not limited to the Interconnection Agreement, if applicable, is in full force and effect and neither Seller nor the Project is in material violation or default under such contracts.
- Land Contracts – The land contracts and real property owned by the Project are in full force and effect, and shall comprise all of the real property interests necessary in connection with the interconnection, operation and maintenance of the Project, all in accordance with all laws, and are sufficient to enable the Project to be commercially operable as contemplated in the PSA, including legal and physical ingress and egress rights to and from public right-of-way for operation, and maintenance of the Project.
- Data – Seller has delivered to Buyer true, correct and complete copies of all requested data related to the Project.
- Permits - All permits required to own, operate and maintain the Project are held by Seller or an affiliate, are final and non-appealable, are scheduled, and Seller has obtained and furnished to Buyer true, correct and complete copies of such permits. Such permits are in full force and effect and are legal, valid, binding and enforceable in accordance with their respective terms.
- Title – Seller or an affiliate is in possession of and has good and marketable title or a leasehold interest to the Project free and clear of all encumbrances, except for Permitted Encumbrances. Seller and its affiliates have no legal obligation or non-binding agreement in principle with any other person to sell or affect a sale of all, or any portion of, the Project.

- Other representation and warranties customary in a transaction of this nature, including those pertaining to taxes, title, finders, intellectual property, brokers and insurance.

### **Termination Provisions**

The PSA may be terminated prior to the closing upon written notice by the terminating party (as described below) in the event of certain occurrences, including:

- By either party, in the event the closing has not occurred by [\_\_\_\_\_], regardless of the reason for such termination, provided that the terminating party is not in breach of the PSA.
- By Buyer in the event regulatory approvals for the transaction are not obtained by Buyer.
- By Buyer or Seller in the event any authority has issued an order or taken any other action that restrains, enjoins, or otherwise prohibits the consummation of the transactions contemplated by the PSA, and such order or action is nonappealable.
- By Buyer in the event of material breach of the PSA by Seller or by Seller in the event of material breach of the PSA by Buyer.
- Security: Seller shall fund and maintain security in favor of Buyer, or a parent guaranty acceptable to Buyer, to secure Seller's obligations under the PSA including the indemnification provision below.

### **Indemnification**

Each party shall indemnify and hold harmless the other party and its respective employees, representatives, officers, directors and agents from and against any and all damages arising out of the result of any breach or violation of any representation, warranty, covenant, inaccuracy within the PSA, or any liability not assumed by the other party as part of the PSA, or any fraud, willful misconduct, or negligence of the indemnifying party in performance of this PSA. Seller shall indemnify Buyer for any environmental (including hazardous material) claims arising prior to the closing date other than environmental claims resulting from Buyer's negligence. No claim for indemnification shall be brought against the indemnifying party until the total damages for which such party is liable exceeds in the aggregate a threshold amount of \$200,000, at which point indemnification may be sought for the full aggregate amount of damages, including those amounts that do not exceed the threshold. The aggregate damages to which the indemnified parties are entitled shall not exceed the indemnity cap, which shall be at least 30% of the purchase price. Such threshold and indemnity cap shall not apply to damages to the extent they arise from a breach of covenants required to be performed after the closing or from breach of certain "fundamental" representations (as applicable to each party) such as corporate existence, power, authority, conflicts, title, land contracts, real property, environmental, intellectual property or tax matters and shall not apply to liabilities (excluding liabilities held by Buyer under the PPA) arising prior to the closing date, which shall be the responsibility of Seller.

## **EXHIBIT P-3 –MEMBERSHIP INTEREST PURCHASE AND SALE AGREEMENT ("MIPSA") PROVISIONS**

### **Type of Transaction**

The transaction will be structured as an entity acquisition. Company ("Buyer") shall purchase and Seller shall sell 100% of its direct and indirect equity ownership interests of the project company ("Project Company") (including, if applicable, Seller's (or its affiliates) direct and indirect equity ownership interest in any tax equity partnership (the "TE Partnership") that owns, directly or indirectly, equity ownership interests of the Project Company, together, the "Equity Interests"), which owns a completed, commercially operational, integrated natural gas powered electricity generating plant with nameplate capacity of 230 MW and all facilities and all other assets and rights relating to the project (the "Project"), free and clear of all encumbrances and liabilities, except for permitted encumbrances and assumed liabilities as defined in the PSA.

### **Purchase Price and Payment Terms**

Buyer shall pay Seller the "Purchase Price," which is determined pursuant to Section 19.5(C) of this PPA.

Buyer shall be entitled to withhold in the aggregate up twenty percent (20%) from the payment of the Purchase Price in the event of certain breaches of Seller's representations, warranties or covenants pending Seller's cure of any such breach.

Seller shall be responsible for all taxes relating to the pre-closing period and all transfer taxes and any sales, use or other taxes related to the purchase and sale of the Equity Interests and any purchase or conveyance of real or personal property to the Project Company to be used in the Project.

### **Seller's Closing Deliverables:**

Upon the terms and conditions to be defined within the PSA, the obligations of Buyer to consummate the transactions contemplated are subject to the satisfaction by Seller of certain closing conditions, including:

Transfer of the Equity Interests, which include all rights and title to assets necessary for the commercial operation of the Project, to Buyer or its designated affiliate.

An opinion of legal counsel that each material discretionary permit required for the Project has been obtained and is valid, binding, in full force and effect and non-appealable.

Evidence that any liens on the Equity Interests, Project Company, Project, real property or any other assets or interests of the Project Company have been removed as of the closing other than Permitted Liens which have been scheduled or liens which have been scheduled and bonded to Buyer's reasonable satisfaction.

Certain conditions do not exist at the time of closing including, but not limited to, the existence of a material adverse effect. A material adverse effect would be defined in the PSA.

All certifications, affidavits, approvals and permits required to demonstrate satisfaction of all representations, warranties, and covenants made by Seller pertaining to the closing.

**Buyer's Closing Deliverables:**

Upon the terms and conditions to be defined within the PSA, the obligations of Seller to consummate the transactions contemplated are subject to the satisfaction by Buyer of certain closing conditions, including:

Delivery of the Purchase Price.

All certifications, affidavits, approvals and permits required to demonstrate satisfaction of all representations, warranties, and covenants made by Buyer pertaining to the closing.

No default of Buyer shall be continuing under the PPA.

**Required Approvals**

The transaction is subject to obtaining specified approvals, authorizations, or orders, including but not limited to the following (to the extent necessary):

Approval of the board of directors of Buyer and the board of directors or similar governing body of Seller shall be obtained prior to execution of the PSA.

Third party consents.

Applicable governmental and regulatory approvals prior to closing, including to the extent necessary, any applicable state agencies or commissions regulating utility activities and any government agencies having approval, consent or authority over the transactions contemplated by the PSA, including the PUCT, the NMPRC, the IRS, the FERC, the Department of Justice, the Federal Communications Commission, the US Fish and Wildlife Service and the FAA.

**Representations and Warranties**

The transaction is subject to customary representations and warranties to be made by Buyer and Seller as of the execution date or the effective date of the PSA and the closing thereunder, including the following:

Corporate existence and powers – Seller is a limited liability company validly existing and in good standing and has the power and authority to conduct its business as now conducted.

Project Company existence and powers – If different than Seller, the Project Company is a limited liability company validly existing and in good standing and has the power and authority to operate and own the Project and has been engaged in no other business since its formation.

(If applicable) The TE Partnership existence and powers – the TE Partnership is a limited liability company validly existing and in good standing and has the power and authority to

own and manage the Project Company and the Project and has been engaged in no other business since-its formation.

Authority (execution and delivery)

No conflicts - the transaction does not create any conflicts.

Consents and approvals – no consent, approval or authorization is required in connection with the execution and performance of the PSA.

Legal proceedings of Buyer– there are no legal proceedings pending, or to Buyer’s knowledge, threatened in writing, against Buyer, that affect the consummation of the transaction contemplated by the PSA.

Legal proceedings of Seller, TE Partnership (if applicable) and Project Company – there are no legal proceedings pending, or to the best of Seller’s knowledge, except as scheduled, threatened in writing, against the Seller relating to the Project affecting Seller’s ability to sell the Equity Interests, and there are no legal proceedings pending, or to Seller’s knowledge, threatened in writing, against the Project Company or the TE Partnership (if applicable).

Sufficient funds – Buyer has available, or will maintain sufficient sources of, funds to complete the transaction.

Compliance with Laws – Seller, the TE Partnership (if applicable) and the Project Company are in compliance with all laws applicable to such entity and the transactions contemplated by the PSA.

Environmental – Seller, the TE Partnership (if applicable), the Project Company and their respective affiliates have no environmental liabilities (solely in the case of Seller relating to the Project) and are in compliance with environmental requirements (solely in the case of Seller relating to the Project). Seller and its affiliates (including the TE Partnership, if applicable, and the Project Company) have not received any notice of an alleged violation of environmental law pertaining to the Project from any governmental entity. There are no facts, circumstances, conditions or occurrences relating to the Project, the TE Partnership, if applicable, or the Project Company that could reasonably be expected to form the basis of a claim, requirement or obligation imposed by any governmental entity under any environmental law on Seller or its affiliates (including the TE Partnership, if applicable, and the Project Company) or Buyer.

Contracts – Schedule of material contracts binding on the (x) Seller relating to the TE Partnership, if applicable, the Project Company or the Project), (y) TE Partnership, if applicable, the Project Company or the Project, or the assets of any of the TE Partnership, if applicable, or the Project Company, has been provided and Seller has furnished to Buyer true, correct and complete copies of all such contracts. Each scheduled contract, including but not limited to the Generator Interconnection Agreement, is in full force and effect and neither Seller, the TE Partnership, if applicable, nor the Project Company, nor to the knowledge of Seller any other counterparty thereto, is in material violation or default under such contracts.

Land Contracts – The land contracts and real property owned by the Project Company are in full force and effect, and shall comprise all of the real property interests necessary



in connection with the interconnection operation and maintenance of the Project, all in accordance with all laws, and are sufficient to enable the Project to be commercially operable as contemplated in the PSA, including legal and physical ingress and egress rights to and from public right-of-way for operation, and maintenance of the Project.

Data – Seller has delivered to buyer true, correct and complete copies of all requested data related to the Project.

Permits - All permits required to own, operate and maintain the Project are held by the Project Company, are scheduled, and Seller has obtained and furnished to Buyer true, correct and complete copies of such permits. Such permits are non-appealable, in full force and effect and are legal, valid, binding and enforceable in accordance with their respective terms.

Title – The Project Company is in possession of and has good and marketable title to the Project free and clear of all encumbrances, except for Permitted Encumbrances. Seller has good and marketable title to the Project Company's equity interests, free and clear of all encumbrances except Permitted Liens and the Step-In Rights of the Steam Off-taker as set forth in the Step-In-Rights agreement dated May 1, 1998 between Company, Phillips 66 and Borger and any Facility Lender. Seller and its affiliates have no legal obligation or non-binding agreement in principle with any other person to sell or affect a sale of all, or any portion of, the Project or the Project Company.

Other representation and warranties customary in a transaction of this nature, including those pertaining to taxes, title, finders, intellectual property, brokers and insurance.

### **Termination Provisions**

The PSA may be terminated prior to the closing upon written notice by the terminating party (as described below) in the event of certain occurrences, including:

By either party, in the event the closing has not occurred by [\_\_\_\_], regardless of the reason for such termination, provided that the terminating party is not in breach of the PSA.

By Buyer in the event regulatory approvals for the transaction are not obtained by Buyer.

By Buyer or Seller in the event any authority has issued an order or taken any other action that restrains, enjoins, or otherwise prohibits the consummation of the transactions contemplated by the PSA, and such order or action is nonappealable.

By Buyer in the event of material breach of the PSA by Seller. By Seller in the event of material breach of the PSA by Buyer.

Security: Seller shall fund and maintain security in favor of Buyer, or a parent guaranty acceptable to Buyer, to secure Seller's obligations under the PSA including the indemnification provision below.

### **Indemnification**

Each party shall indemnify and hold harmless the other party and its respective employees, representatives, officers, directors and agents from and against any and all damages arising out of the result of its breach or violation of any representation, warranty, covenant, inaccuracy within the PSA, or any liability not assumed as part of the PSA, or any fraud, willful misconduct, or negligence in performance of this PSA. Seller shall indemnify Buyer for any environmental (including hazardous material) claims arising prior to the closing date other than environmental claims resulting from Buyer's negligence. No claim for indemnification shall be brought against the indemnifying party until the total damages for which such party is liable exceeds in the aggregate a threshold amount of \$200,000, at which point indemnification may be sought for the full aggregate amount of damages, including those amounts that do not exceed the threshold. The aggregate damages to which the indemnified parties are entitled shall not exceed the indemnity cap, which shall be at least 30% of the purchase price. Such threshold and indemnity cap shall not apply to damages to the extent they arise from a breach of covenants required to be performed after the closing or from breach of certain "fundamental" representations (as applicable to each party) such as corporate existence, power, authority, conflicts, title, land contracts, real property, environmental, intellectual property or tax matters and shall not apply to liabilities arising prior to the closing date, which shall be the responsibility of Seller.\*

**EXHIBIT Q**

**ENERGY PAYMENT CALCULATION EXAMPLE**

The Energy Payment calculation for a given billing month is to be performed utilizing the hourly data for the Fuel Price, Guaranteed Heat Rate, and Contract Energy for each respective Generating Unit. The hourly calculation of the Energy Payment for each Generating Unit will then be aggregated for the billing month to generate one total Energy Payment for that billing month to be included in Seller’s invoice to Company. For the purposes of the example calculation of the Energy Payment, assume the calculation is being performed for the first hour of the billing month. Additionally, assume the following operational data has been reported for each Generating Unit for the first hour of the billing month:

Generating Unit 1

Current Tested Capacity from most recent summer capacity test	110,103.5 kW
Total Ambient Correction Factor for billing month hour one (reported by Seller)	0.966389
Contract Energy delivered during billing month hour one (reported by Company’s Electric Metering Devices)	82,339 kW

Generating Unit 2

Current Tested Capacity from most recent summer capacity test	110,103.5 kW
Total Ambient Correction Factor for billing month hour one (reported by Seller)	0.966389
Contract Energy delivered during billing month hour one (reported by Company’s Electric Metering Devices)	85,430 kW

The Contract Energy delivered by Seller to Company for each hour of the billing month will be reported by Company’s Electric Metering Devices. The tested capacity for each Generating Unit will come from the most recent summer capacity test and will remain fixed until the next summer capacity test is performed in accordance with Section 10.4 and Exhibit J of this PPA. The hourly Total Ambient Correction Factor, which is provided by Seller to Company for each billing month, is used in selecting the applicable

Guaranteed Heat Rate for the purposes of calculating the hourly Energy Payment pursuant to Section 8.4 of the PPA.

Company and Seller acknowledge that the hourly Total Ambient Correction Factor defaults to a value of 1.000000 under certain ambient conditions. In order to correct the incorrect default ambient values to values that better represent the actual Total Ambient Correction Factor, Company shall correct the Total Ambient Correction Factor value according to the following procedures:

a. If the default Total Ambient Correction Factor value occurred over a continuous period of less than five (5) hours, the hourly Total Ambient Correction Factor shall be calculated based on the average of four (4) hours of valid ambient correction data covering the two (2) hours before and the two (2) hours after the incorrect Total Ambient Correction Factor value.

b. If the default Total Ambient Correction Factor value occurred over a continuous period of greater than five (5) hours, the hourly Total Ambient Correction Factor shall be calculated based on the average of six (6) hours of valid ambient correction data covering the three (3) hours before and the three (3) hours after the incorrect Total Ambient Correction Factor value.

c. If the ambient conditions data (i.e. dry bulb temperature, barometric pressure, and relative humidity) is unavailable for a continuous period of greater than five (5) hours, then the ambient conditions data for the Borger, TX Zip Code 79007 shall be obtained from [www.weatherunderground.com](http://www.weatherunderground.com). Such ambient data values shall be inserted into the Blackhawk Capacity Calculator - the calculator which is used during the annual capacity tests - to obtain the applicable hourly Total Ambient Correction Factor.

After the Total Ambient Correction Factor file has been corrected pursuant to this Exhibit Q of the PPA, Company shall e-mail the corrected file to Seller.

To calculate the Guaranteed Heat Rate for each Generating Unit for billing month hour one, the following formula is used:

Capacity Fraction = Contract Energy ÷ (Current Tested Capacity ÷ Total Ambient Correction Factor)

The Capacity Fraction for each Generating Unit is then used to determine the Guaranteed Heat Rate for that hour for each unit using the reference table in Exhibit K – Guaranteed Heat Rates. The calculation of the hourly Guaranteed Heat Rate for each Generating Unit for billing month hour one is performed below:

Capacity Fraction (Unit 1) = 82,339 kW ÷ (110,103.5 kW ÷ 0.966389)

Capacity Fraction (Unit 1) = 0.722697 or 72.2697%

Guaranteed Heat Rate (Unit 1) = 7.000 MMBtu/MWh

Capacity Fraction (Unit 2) =  $85,430 \text{ kW} \div (110,103.5 \text{ kW} \div 0.966389)$

Capacity Fraction (Unit 2) = 0.749827 or 74.9827%

Guaranteed Heat Rate (Unit 2) = 7.000 MMBtu/MWh

The Guaranteed Heat Rate for each Generating Unit for billing month hour one has now been determined through the calculation of the Capacity Fraction. The Contract Energy delivered by Seller to Company during billing month hour one for each Generating Unit has been reported by Company’s Electric Metering Devices. The only component left to compute before the Energy Payment for billing month hour one can be calculated is the Fuel Price for that hour. The Fuel Price for a given hour is the calculated weighted average delivered price for fuel for both the IACX Gas Contract and the Gas Contract for the Gas Day. Gas Day means the 24- hour period beginning at 9:00 AM Central Time one calendar day and ending at 9:00 AM Central Time on the next calendar day. For the purposes of the current example, billing month hour one belongs to the Gas Day of the last day of the previous month, so if the billing month were April, hour one of the billing month would belong to the March 31<sup>st</sup> Gas Day for the purposes of the Fuel Price calculation. To determine the Fuel Price for a given Gas Day, the weighted average cost of delivered fuel for both the IACX Gas Contract and the Gas Contract combined is calculated. The costs to be included in the total delivered cost of fuel for both the IACX Gas Contract and the Gas Contract are outlined in Section 8.4 – Payment for Energy under the definition of “Fuel Price”. For the example calculation (April billing month), assume the following gas purchase data for the March 31<sup>st</sup> Gas Day:

Gas Day 3/31	Volume (MMBtu)	Total Delivered Cost
IACX Gas Contract	23,490	\$44,044.44
Gas Contract	24,815	\$58,702.83

The weighted average cost of delivered fuel calculation for the March 31<sup>st</sup> Gas Day would then be performed as follows:

$$\text{Fuel Price} = (\$44,044.44 + \$58,702.83) \div (23,490 \text{ MMBtu} + 24,815 \text{ MMBtu})$$

$$\text{Fuel Price} = \$2.1271/\text{MMBtu}$$

The Fuel Price for each Generating Unit for billing month hour one (assuming an April billing month) for the purposes of the Energy Payment would be \$2.1271/MMBtu. The

Energy Payment for billing month hour one for each Generating Unit would then be calculated as follows:

Energy Payment = Fuel Price (\$/MMBtu) × Guaranteed Heat Rate (MMBtu/MWh) × Contract Energy (MWh)

Energy Payment (Unit 1) = \$2.1271 × 7.000 × 82.339

Energy Payment (Unit 1) = \$1,226.01

Energy Payment (Unit 2) = \$2.1271 × 7.000 × 85.430

Energy Payment (Unit 2) = \$1,272.03

The total Energy Payment for billing month hour one would then be:

Total Energy Payment = \$1,226.01 + \$1,272.03 = \$2,498.04

This calculation would then be repeated for each hour in the billing month, and then the total Energy Payment for each hour would be aggregated to arrive at one total Energy Payment for the billing month that is included in Seller's monthly invoice to Company.

## EXHIBIT R

### OPERATING PROCEDURES

These Operating Procedures are established in accordance with Section 10.8 of the PPA. Capitalized terms used but undefined in these Operating Procedures shall have the same meaning given to such terms under the PPA.

#### 1. Day-to-Day Communications

Notices required by the PPA shall be provided by the Parties in accordance with the procedures set forth in Section 20.1 of the PPA. However, Real-Time Communications (defined below) or routine (day-to-day) communications concerning Facility operations or performance of the PPA and required communications under these Operating Procedures (together with Real-Time Communications, "Day-to-Day Communications") are exempt from notice provisions in accordance with Section 20.1(A) of the PPA. These Operating Procedures (as the same may be amended, restated or modified from time to time), establish the method for such Day-to-Day Communications. Except as otherwise specified in these Operating Procedures, Day-to-Day Communications shall be conducted by phone or electronic mail. For purposes of these Operating Procedures, "Real-Time Communications" shall (1) include all communications between the Company's Real-Time Generation Dispatch Desk and the Primary Contact or On-Duty Operator for Seller that takes place during the Day of the applicable electric delivery or during periods outside of normal business hours and (2) be conducted by recorded phone with no electronic mail confirmation required. The applicable contact information for each of the Parties for Day-to-Day Communications is set forth in Exhibit D to the PPA. Either Party may, by written or electronic notice to the other Party, change the contact information in Exhibit D to the PPA applicable to that Party.

#### 2. Dispatch of the Facility Turbine(s)

(A) The Parties shall control and dispatch the Facility turbines in accordance with the terms of the PPA. Company's dispatch of the Facility will be controlled by Company's Real-Time Generation Dispatch Desk located in Denver, Colorado. Buyer may dispatch the Facility between its Minimum Load Level and Actual Capacity in accordance with the terms of the PPA.

(B) Company's Real-Time Generation Dispatch Desk shall submit requests to increase the Facility output during any hour greater than base load through utilization of the Facility's peak firing or power augmentation capabilities to Seller's On-Duty Operator contact via phone.

#### 3. Air Permit Emission Limit Reporting

On a daily basis, Seller shall report to Company's Real-Time Generation Dispatch Desk by electronic mail the number of hours, on a 12- month rolling average, of power

augmentation and peak firing that has been used and is available, as permitted in Seller's air emission permit.



## EXHIBIT S

### METER AND COMMUNICATIONS REQUIREMENTS

These meter requirements shall apply to all Electric Metering Devices.

- Electric Metering Devices shall meet requirements set forth in American National Standards Institute (ANSI) C12.1 and 12.20. Current transformers and voltage transformers supplying this meter should meet requirements of IEEE/ANSI C57.13 and ANSI C57.13.6. Prior to the purchase of Electric Metering Devices, current transformers, and potential transformers and associated communication equipment, the party responsible for such Electric Metering Devices must submit applicable information such that the other Party can review and verify that the equipment meets Company requirements.
- Company may inspect and verify that equipment was approved and properly installed. In addition, Company may elect to test the Electric Metering devices for accuracy. Company may also elect to verify communications circuits from current transformers and potential transformers to Company Xcel are operational.
- Upon prior written notice sufficiently in advance, Company shall have the right to make requests in regard to reasonable modifications to Seller's metering equipment and configurations in order to ensure accurate telemetering and communication.
- Company shall have the right to install any telemetering and communication equipment Company deems reasonably necessary for purposes related to this PPA. Seller shall, upon prior written notice sufficiently in advance, cooperate with any such installation.
- Electric Metering Devices shall be programmed to, at any time of remote electronic communications and access, provide a time and date stamp of downloaded delivery information.
- Electric Metering Devices shall be programmed to, at any time of manual read of the meter's display, provide the time and date of the information gathered. The Seller shall provide the communication channels for the Company's remote terminal unit and the Company's Itron Enterprise Edition Meter Data Management Agent. The implementation of these communication paths and RTU shall follow Company's latest standard. The Seller must have these communication paths installed, tested, and functional prior to generating Test Energy.
- Company shall have the right, via read-only access, and upon prior reasonable written notice to Seller, to independently audit Seller's meters and any records pertaining to the amount of energy generated by the Facility and any associated losses. Any audit shall be performed at the Facility or if applicable, other location within the same state as the Facility which is mutually agreed upon by both

Company and Seller. Records related to such audits, inspections, testing or adjustments shall be maintained and subject to audit by Company for a period of 24 months. Company shall further have the right to request and receive in physical or electronic form any and all records or data files related to such audits, inspections, testing or adjustments.

- Seller shall provide secure and reliable communication from the Electric Metering Devices as follows:
  - DNP output from the meter to Company's EMCC via a remote terminal unit located near the Electric Metering Devices and hardwired from the meter to the remote terminal unit.
  - Time stamped meter register and interval data from the meter to Company's Itron Enterprise Edition Meter Data Management Agent with servers located in Denver, CO, or successor meter data management system at an . Electric Metering Devices must have an Itron approved Translation Interface Module to facilitate correct data transmission over this communication path.

**Attachment JLB-4(CONF) is Confidential and will be provided  
under the provisions of the Protective Order**

**BATTERY STORAGE**

**ENERGY PURCHASE AGREEMENT**

**BETWEEN**

**SOUTHWESTERN PUBLIC SERVICE COMPANY**

**AND**

**WILDCAT RANCH ENERGY STORAGE, LLC**



**November 10, 2023**

## TABLE OF CONTENTS

	<b>PAGE</b>
<b>ARTICLE 1 - RULES OF INTERPRETATION .....</b>	<b>1</b>
1.1 Interpretation.....	1
1.2 Interpretation with Other Agreements.....	2
1.3 Good Faith and Fair Dealing.....	2
<b>ARTICLE 2 - TERM AND TERMINATION .....</b>	<b>2</b>
<b>ARTICLE 3 - FACILITY DESCRIPTION .....</b>	<b>3</b>
3.1 Description.....	3
3.2 General Design of the Facility.....	3
<b>ARTICLE 4 - IMPLEMENTATION .....</b>	<b>3</b>
4.1 Project Development .....	3
4.2 Environmental Matters .....	6
4.3 Permits.....	7
4.4 Safety Requirements; Governmental Inspections.....	7
4.5 Commercial Operation.....	8
4.6 Pre-COD Testing .....	10
<b>ARTICLE 5 - DELIVERY AND TESTING .....</b>	<b>10</b>
5.1 Arrangements .....	10
5.2 Charging Requirements.....	11
5.3 Market Changes .....	12
5.4 Communication Protocols.....	12
5.5 Electric Metering Devices .....	12
5.6 Battery Storage System Testing .....	14
<b>ARTICLE 6 - CONDITIONS PRECEDENT .....</b>	<b>15</b>
6.1 PUC Approval.....	15
6.2 Seller Condition Precedent .....	15
6.3 Reserved .....	16
6.4 Return of Security Fund.....	16
<b>ARTICLE 7 - SALE AND PURCHASE .....</b>	<b>16</b>
7.1 General Obligation .....	16
7.2 Dispatch.....	16
7.3 Battery Storage System Dispatch .....	16
7.4 Reserved .....	17
7.5 Ancillary Services .....	17
<b>ARTICLE 8 - PAYMENT CALCULATIONS.....</b>	<b>18</b>
8.1 Reserved .....	18
8.2 Payment for Contract Capacity .....	18
8.3 Reserved .....	19

8.4	Monthly Payment Reduction .....	19
8.5	Excess Throughput Charge .....	20
8.6	Annual Throughput Limit Banking and Borrowing.....	21
<b>ARTICLE 9 - BILLING AND PAYMENT .....</b>		<b>21</b>
9.1	Billing .....	21
9.2	Payment.....	21
9.3	Billing Disputes .....	22
<b>ARTICLE 10 - OPERATIONS AND MAINTENANCE.....</b>		<b>22</b>
10.1	Operation and Administration .....	22
10.2	Facility Maintenance .....	23
10.3	Repair Obligations .....	23
10.4	Books and Records .....	24
10.5	Access to Facility .....	25
10.6	Real Time Data.....	25
10.7	Accreditation .....	25
10.8	Operating Committee and Operating Procedures.....	25
<b>ARTICLE 11 - SECURITY FOR PERFORMANCE.....</b>		<b>26</b>
11.1	Security Fund.....	26
11.2	Replenishment.....	27
11.3	Form .....	27
11.4	Replacement.....	28
11.5	Survival .....	29
11.6	Expenses.....	29
<b>ARTICLE 12 - DEFAULT AND REMEDIES .....</b>		<b>29</b>
12.1	Default by Seller: General.....	29
12.2	Default by Seller: Failure to Achieve Critical Path Development Milestone or COD	34
12.3	Default by Company .....	36
12.4	Limitations on Damages .....	38
12.5	Bankruptcy.....	39
12.6	Cumulative Remedies.....	39
12.7	Duty to Mitigate.....	39
<b>ARTICLE 13 - DISPUTE RESOLUTION.....</b>		<b>39</b>
13.1	Negotiation.....	39
13.2	Time Bar .....	40
13.3	No Termination Pending Dispute Resolution .....	40
13.4	Governing Law.....	41
13.5	Venue .....	41
13.6	Waiver of Jury Trial .....	41
<b>ARTICLE 14 - FORCE MAJEURE.....</b>		<b>41</b>
14.1	Definition.....	41

14.2	Applicability of Force Majeure .....	42
14.3	Limitations on Effect of Force Majeure.....	43
<b>ARTICLE 15 - REPRESENTATIONS, WARRANTIES AND COVENANTS.....</b>		<b>43</b>
<b>ARTICLE 16 - INSURANCE .....</b>		<b>45</b>
16.1	Evidence of Insurance .....	45
16.2	Policy Requirements.....	45
16.3	No Implied Limitation .....	45
16.4	Term and Modification of Insurance.....	45
16.5	Application of Proceeds .....	46
<b>ARTICLE 17 - INDEMNITY .....</b>		<b>46</b>
17.1	Indemnification: General .....	46
17.2	Indemnification: Environmental.....	46
17.3	Indemnification; Company Remote Start of Facility .....	46
17.4	Limitations.....	47
17.5	Procedures .....	47
17.6	Amounts Owed .....	47
<b>ARTICLE 18 - LENDER PROVISIONS.....</b>		<b>48</b>
18.1	Accommodation of Facility Lender .....	48
18.2	Notices.....	48
<b>ARTICLE 19 - ASSIGNMENT.....</b>		<b>48</b>
19.1	Assignment by Seller .....	48
19.2	Assignment by Company .....	49
19.3	Right of First Offer (“ROFO”) .....	50
19.4	PFT .....	51
19.5	Option .....	52
19.6	Memo of Option .....	54
<b>ARTICLE 20 - MISCELLANEOUS.....</b>		<b>54</b>
20.1	Notices.....	54
20.2	Taxes and Tax Incentives .....	55
20.3	Applicable Laws.....	55
20.4	Fines and Penalties .....	56
20.5	Rate Changes.....	56
20.6	Certifications .....	56
20.7	Disclaimer of Third Party Beneficiaries .....	57
20.8	Relationship of the Parties .....	57
20.9	Survival of Obligations .....	57
20.10	Severability .....	57
20.11	Complete Agreement; Amendments .....	57
20.12	Waiver.....	58
20.13	Binding.....	58
20.14	Headings.....	58

20.15	Counterparts and Electronic Signatures .....	58
20.16	Press Release .....	58
20.17	Exhibits .....	58
20.18	Confidentiality .....	58
20.19	Accounting Treatment.....	59

<b>EXHIBIT A</b>	<b>DEFINITIONS</b>	
<b>EXHIBIT B</b>	<b>CONSTRUCTION MILESTONES</b>	
<b>EXHIBIT C</b>	<b>FACILITY DESCRIPTION AND SITE MAPS</b>	
<b>EXHIBIT D</b>	<b>NOTICES AND CONTACT INFORMATION</b>	
<b>EXHIBIT E</b>	<b>INSURANCE COVERAGE</b>	
<b>EXHIBIT F</b>	<b>SELLER'S NEEDED PERMITS</b>	
<b>EXHIBIT G</b>	<b>FORM OF LETTER OF CREDIT</b>	
<b>EXHIBIT H</b>	<b>FORM OF GUARANTY</b>	
<b>EXHIBIT I</b>	<b>AGC PROTOCOLS; DISPATCH AND AVAILABILITY REPORTING; DATA COLLECTION</b>	
<b>EXHIBIT J</b>	<b>CAPACITY PAYMENT RATE</b>	
<b>EXHIBIT K</b>	<b>LENDER CONSENT PROVISIONS</b>	
<b>EXHIBIT L-1</b>	<b>EQUITY PURCHASE PRICE FORMULA</b>	
<b>EXHIBIT L-2</b>	<b>FACILITY PURCHASE AND SALE AGREEMENT ("PSA") PROVISIONS</b>	
<b>EXHIBIT L-3</b>	<b>MEMBERSHIP INTEREST PURCHASE AND SALE AGREEMENT ("MIPSA") PROVISIONS</b>	
<b>EXHIBIT M</b>	<b>BATTERY STORAGE SYSTEM TESTING PROTOCOLS</b>	
<b>EXHIBIT M-1</b>	<b>BATTERY STORAGE SYSTEM GUARANTEED PERFORMANCE LEVELS</b>	
<b>EXHIBIT N</b>	<b>RESERVED</b>	
<b>EXHIBIT O</b>	<b>BATTERY STORAGE SYSTEM OPERATING PROCEDURES</b>	
<b>EXHIBIT P</b>	<b>SAFETY REQUIREMENTS</b>	
<b>EXHIBIT Q</b>	<b>EXAMPLE ADJUSTMENT CALCULATIONS</b>	
<b>EXHIBIT R</b>	<b>METER AND COMMUNICATIONS REQUIREMENTS</b>	



**BATTERY STORAGE  
ENERGY PURCHASE AGREEMENT  
BETWEEN  
SOUTHWESTERN PUBLIC SERVICE COMPANY  
AND  
WILDCAT RANCH ENERGY STORAGE, LLC**

This Battery Storage Energy Purchase Agreement (this “PPA”) is made as of this 10th day of November, 2023 (“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) Wildcat Ranch Energy Storage, LLC, a Delaware limited liability company with a principal place of business at 700 Universe Boulevard, Jung Beach, FL 33408 (“Seller”). Company and Seller are hereinafter referred to individually as a “Party” and collectively as the “Parties.”

WHEREAS Seller desires to develop, design, construct, interconnect, own, operate and maintain the Facility as defined herein; and

WHEREAS Seller desires to sell and deliver, and Company desires to accept and receive, certain products and services, including but not limited to the Energy and Ancillary Services delivered from the Facility 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.

(D) Unless specifically designated as DC, each reference to “MW” or “kW” herein shall be AC MW or AC kW, as applicable. “AC” means alternating electric current; “DC” means direct electric current.

### 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 of 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, lighting, HVAC or any other purpose (“House Power”); provided that, notwithstanding anything to the contrary in this PPA, when the Facility is charging or discharging, then Seller may use the Facility to provide House Power. For the avoidance of doubt, House Power expressly excludes any Charging Energy. 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 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.

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 then unless another standard is expressly specified in this PPA, 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 then unless another standard is expressly specified in this PPA, 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 last Day of the calendar month during which

occurs the fifteenth (15<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 Section 12.1(B)-(E), Section 12.2(C), Section 12.3(B)-(C), 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 the Facility, as further described in Exhibit C – Facility Description and Site Maps. A scaled map that identifies the Site, the location of the Facility, the Battery Units, the Interconnection Point and Interconnection Facilities, the Point of Delivery, the Battery Storage system Metering Point and other important facilities, is included in Exhibit C – Facility Description and Site Maps.

#### 3.2 General Design of the Facility.

(A) Seller shall design, construct, operate and maintain the Facility according to Good Utility Practices and the Interconnection Agreement.

(B) The Facility shall include all equipment specified in Exhibit C - Facility Description and Site Maps and otherwise necessary to fulfill Seller’s obligations under this PPA, including all equipment necessary (i) to meet the requirements of Exhibit I - AGC Protocols; Dispatch and Availability Reporting; Data Collection and Exhibit O – Battery Storage System Operating Procedures, and (ii) to interconnect successfully with the Transmission Authority’s System for the delivery of Energy to the Point of Delivery.

(C) The Battery Storage System Nameplate Capacity shall be 48 MW AC and 192 MWh. Seller shall certify to Company the final actual Battery Storage System Nameplate Capacity 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, including any equipment procurement contracts, and (ii) the storage and delivery of Energy from the Facility (generally, the “Construction Contracts”) with qualified and experienced contractors. Upon written request by Company, Seller shall promptly 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 memoranda 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. In addition, Seller shall achieve each Critical Path Development Milestone on or before the applicable deadline for achieving such Critical Path Development Milestone specified below. Seller shall provide to Company, on or before the applicable deadline to achieve each Critical Path Development Milestone, evidence reasonably satisfactory to Company that the Critical Path Development Milestone has been achieved. Seller shall also provide any additional evidence reasonably requested by Company that the Critical Path Development Milestone has been achieved, including certifications from an officer of Seller.

<b>“Critical Path Development Milestones”</b>	<b>To be completed no later than (completion deadline):</b>
Acquisition of all Seller’s Needed Permits required to construct the Facility	March 31, 2025
Execution of all Construction Contracts	June 1, 2025
Order all Battery Units	December 31, 2024

1. If Seller anticipates a CPD Delay because it is unable, using Commercially Reasonable Efforts, to achieve any of the Critical Path Development Milestones by the applicable deadline, then Seller may extend the timeframe to achieve such Critical Path Development Milestones as set forth in Section 12.2(E) subject to the payment of Liquidated Delay Damages so long as the following conditions are satisfied:

2. If Seller reasonably expects that it will miss a completion deadline set forth above, then upon the later of Seller’s expectation of the same and the day that is thirty (30) days prior to the applicable completion deadline set forth above, Seller shall submit to Company (a) a written description of the reason for the expected failure; and (b) a Recovery Plan for completing all necessary work to achieve completion

of the missed Critical Path Development Milestone by a date certain (which plan may contemplate the payment of Liquidated Delay Damages).

3. Seller shall commence the work contemplated by the Recovery Plan within five (5) days after submitting such Recovery Plan to Company.

4. Seller shall be solely responsible for any costs or expenses incurred by Seller as a result of the formulation and implementation of the Recovery Plan.

(C) Nothing in Section 4.1(B) shall be construed to:

1. relieve Seller of its obligations under this PPA;

2. modify the deadlines for achieving the remaining Critical Path Development Milestones, including the Target COD, as applicable (except for the update to the milestone schedule pursuant to Section 12.2(E) and the missed Critical Path Development Milestone which Seller is attempting to cure under Section 4.1(B));

3. extend the applicable cure period set forth in Section 12.2(E);  
or,

4. impair the Company's right to terminate this PPA pursuant to Section 12.2(l). For clarity, failure to cure a CPD Delay within the applicable cure period set forth in Section 12.2(E) shall be subject to termination as set forth in Section 12.2(l).

(D) Prior to the Commercial Operation Date, Seller shall:

1. submit monthly progress reports to Company in a form agreed by the Parties, advising Company of the current status of each Construction Milestone and Critical Path Development 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;

2. provide copies of reports submitted to the Facility Lender relating to status, progress and development of the Facility, and,

3. invite Company to participate in monthly meetings to discuss the progress reports, answer questions, and assess the schedule. Seller shall make all relevant counterparties under the Construction Contracts available to Company, upon request, in order to keep Company fully informed on the status of development.

(E) Upon request, 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.

(F) Neither Company's review of any Construction Contracts, memoranda thereof and Seller's reports, nor its discussions with Seller and its contractors, nor its monitoring of development and construction of the Facility, shall be construed as an 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.

(G) Notwithstanding anything to the contrary in this PPA, if Company has either not received PUC Approval or has not exercised its right to terminate this PPA pursuant to Section 6.1 by December 31, 2024, then Seller shall be given a day-for-day extension of each of the Critical Path Development Milestones, Construction Milestones, and the Target COD for each day beyond such date, and such day-for-day extension shall conclude on the later of (i) the date PUC Approval is obtained and (ii) the date that Company notifies Seller that Company has so-obtained the PUC Approval.

#### 4.2 Environmental Matters.

(A) No later than sixty (60) Days following PUC Approval, Seller shall complete and provide to Company a comprehensive independent "Phase I" environmental site assessment of the Site that is conducted in compliance with ASTM E1527-13 or E1527-16, as applicable (including associated raw data, if requested by Company), which report shall have been prepared as of a reasonably proximate time such that it reflects the then-current conditions of the site. 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) 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 and remediate, at Seller's sole cost and expense, any Environmental Contamination identified at the Site;
2. provide to Company copies of any further environmental assessments or investigations of the Site (including associated raw data, if requested by Company); 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 protection of human health, the environment, or natural resources, including 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, contaminant, chemical, material, gas, or particulate matter that is regulated by any Governmental Authority as an environmental pollutant or which is deemed or may be deemed hazardous, dangerous, damaging or toxic 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 Applicable 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), or proposed under or pursuant to EPA-HQ-OLEM-2019-0341 or EPA-HQ-OLEM-2022-0922 to be defined as a “hazardous waste”; (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 under Applicable Law or advisable pursuant to Good Utility Practice for the construction, ownership, operation and maintenance of the Facility and the charging and delivery of the products and services required by this PPA. Seller shall keep Company informed as to the status of its permitting efforts and shall provide Company the opportunity to review and comment on major applications for draft and final Permits. Seller shall promptly inform Company of (i) any Permits that Seller is unable to obtain, which 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 or recommended 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 shall promptly 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 charging and delivery of Energy therefrom.

4.4 Safety Requirements; Governmental Inspections. Seller shall, and shall cause its Affiliates and contractors to, design and construct the Facility and conduct all

work or cause all work in connection therewith to be conducted in accordance with the Safety Requirements. Seller shall, and shall cause its Affiliates and contractors to, take all actions to comply with the Safety Requirements. 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) Seller shall cause COD to occur no later than December 31, 2025 (the "Target COD") (as may be extended pursuant to this PPA). Company shall not be obligated to accept and establish a Commercial Operation Date earlier than September 30, 2025.

(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 ten (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 ten (10) Business Days to review and object to each such notice.

(C) For purposes hereof, the "Commercial Operation Date" or "COD" means 12:01 am on the Day after which Seller's COD Notice has been accepted by Company or deemed accepted by Company pursuant to Section 4.5(B); and

1. the "COD Conditions" are:

a. an officer of Seller, authorized to bind Seller and who is familiar with the Facility, has confirmed in writing that (1) all necessary and material Permits have been obtained, are in full force and effect, and the entity granting the Permit has not placed any temporary or conditional restrictions or limitations on the Facility or its operation (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 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 has received no notice of breach thereof from the Transmission Authority, (2) the Facility is interconnected to the Transmission Authority's System, and has been fully tested, achieved initial synchronization, and been successfully operated at charging and dispatch levels acceptable to the Transmission Authority, without experiencing any abnormal or unsafe operating conditions on any interconnected system, (3) Seller has or is capable of declaring commercial operation under the



Interconnection Agreement and (4) Seller has made all other arrangements necessary to deliver Energy 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 and are not required for the safe operation of the Facility or otherwise affect the capacity, efficiency, reliability, operability, safety or mechanical or electrical integrity of the Facility;

d. Seller has demonstrated the functionality and reliability of the Facility's communications systems and AGC interface with Company's EMCC, the capability of the Facility to receive and respond to signals from Company's SCADA System, the accuracy of Electric Metering Devices and their ability to communicate with the Company;

e. Seller has successfully completed a Commercial Operation Test in accordance with Section 5.6(A) and Exhibit M – Battery Storage System Testing Protocols and the results of the Commercial Operation Test have been demonstrated through the Company's EMCC.

f. Battery Units comprising one hundred percent (100%) of the Battery Storage System Nameplate Capacity planned for the Facility, and associated equipment sufficient to allow such Battery Units to store Charging Energy and deliver Discharging Energy to the Point of Delivery, have been installed and become operable.

g. Seller has demonstrated the accuracy and reliability of the Real Time Data required by Section 10.6 and the AGC Set-Point and related data points to be sent from Seller to Company via the SCADA System, all in accordance with Exhibit I - AGC Protocols; Dispatch and Availability Reporting; Data Collection;

h. Seller has demonstrated the ability to fulfill the forecasting requirements including the usage of the availability forecast system as described in Exhibit O – Battery Storage System Operating Procedures;

i. Seller has executed and delivered to Company all documents or instruments required under Article 16;

j. Seller has provided evidence reasonably satisfactory to Company that it is compliant with and has adopted and implemented the appropriate policies pertaining to, the Forced Labor Laws consistent with Section 15.B(2). Seller shall also provide any additional evidence or certifications reasonably requested by Company that the requirements of this subsection have been met, including certifications from an officer of Seller or third-parties, certificates of origin documentation or importer statements.

(D) Prior to COD, should Seller require Company's assistance in meeting the COD Conditions because the Transmission Authority considers Company to be the market participant for the Facility, Company shall use Commercially Reasonable Efforts to cooperate

with and provide assistance to Seller, so long as Seller provides any security the Transmission Authority requires and reimburses Company for all expenses, including fees of counsel, Company may incur in providing such cooperation and assistance.

(E) 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. The Annual Throughput Limit for the first Commercial Operation Year shall be prorated to reflect the number of Days by which the first Commercial Operation Year exceeds three hundred sixty-five (365) Days.

#### 4.6 Pre-COD Testing.

(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 and energy storage 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 dispatching any Pre-COD Test Energy. Company shall cooperate reasonably to assist in the registration of the Facility to allow dispatch of Test Energy.

(B) Seller shall coordinate the receipt and delivery of Test Energy with Company, with not less than seven (7) Business Days' prior notice, or such other Commercially Reasonable prior notice as Company may reasonably request. Company shall provide all Test Energy required to charge the Battery Storage System, and Discharging Energy from the Facility derived from such Test Energy shall be treated as dispatched by the Company hereunder. Company shall reasonably cooperate with Seller to provide such Test Energy at a time that will mitigate the costs of such Energy (including, if requested by Seller, by providing Seller with projections of the Charging Energy Price for periods during which such price is determined by Company in its sole discretion pursuant to its cost calculator), and Seller shall reimburse Company for the cost of the Test Energy (based on the Charging Energy Price at the time of charging) to the extent that it exceeds the cost of the Discharging Energy discharged by the Battery Storage System derived from such Test Energy (based on the Discharging Energy Price at the time of discharging).

(C) For purposes hereof, "Test Energy" means all Charging Energy stored by the Facility prior to COD, required to satisfy the COD Conditions.

### **Article 5 - Delivery and Testing**

#### 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. Seller's interconnection application shall request that the Transmission Authority study the Facility for Network Resource Interconnection Service and Energy Resource Interconnection Service under the Transmission Tariff. The resulting Interconnection Agreement must include Energy Resource Interconnection Service at a minimum. Seller shall cooperate reasonably in any

request by Company to assist in Company's efforts to have the Facility approved as a network resource or equivalent classification pursuant to the applicable Transmission Tariff.

(B) Seller hereby authorizes Company to contact, discuss and obtain information concerning the Facility and the 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 required, Company shall arrange and be responsible for scheduling and transmission services beyond the Point of Delivery with respect to the output of the Facility. To the extent applicable, Company shall be the market participant with respect to the output of 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 Discharging Energy. Company shall be responsible for all electrical losses, transmission and ancillary service arrangements and costs required to transmit and deliver Discharging Energy beyond the Point of Delivery.

## 5.2 Charging Requirements.

(A) Company shall be responsible for arranging, managing, purchasing, and scheduling all of the Charging Energy for the Battery Storage System in accordance with the terms of Sections 7.2 and 7.3 and Exhibit O – Battery Storage System Operating Procedures. Company will be responsible for delivering Charging Energy at the Point of Delivery, and Seller shall be responsible for accepting and transferring Charging Energy from the Point of Delivery to the Battery Storage System. Seller shall be responsible for delivering all Discharging Energy up to the Point of Delivery. Company shall be responsible for accepting and transferring all Discharging Energy at and from the Point of Delivery.

(B) Seller shall take any and all action necessary to allow the delivery of Charging Energy to the Battery Storage System in accordance with the terms of this PPA, including maintenance, repair or replacement of equipment in Seller's possession or control used to deliver the Charging Energy from the Point of Delivery to the Battery Storage System and receive any such Charging Energy at the Point of Delivery.

(C) Except with respect to the establishment of the ability to deliver Charging Energy to the Battery Storage System, Company shall be responsible for the costs associated with supplying any Charging Energy to the Point of Delivery; provided, that Seller shall be responsible for certain costs arising out of a Seller Initiated Test as set forth in Section 5.6.

(D) The Battery Storage System may not be, and Company shall not issue any instruction, order, Dispatch Notice or other communication requesting or requiring the Battery Storage System to be, charged, discharged or operated in any manner which results in an amount of Energy discharged by the Battery Storage System in any given Commercial

Operation Year which exceeds the Annual Throughput Limit, except to the extent provided in accordance with Section 8.5.

### 5.3 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 cooperate in good faith to facilitate the delivery of Energy, at the least possible cost to the Parties, consistent with this PPA to the extent possible.

(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 cooperate in good faith to change their protocols for operation of the Facility accordingly, at the least possible cost to the Parties, consistent with this PPA to the extent possible. In addition, if as a result of any change in Applicable Law the Company is not able to realize the capacity and ancillary services products that the Facility is able to provide to the Company as of the Effective Date and such capacity and ancillary services products can be provided by the Facility subject to the Seller making capital expenditures to comply with such change in Applicable Law, then, at Company's written request, Seller agrees that it shall make all such required capital expenditures so that the Facility is able to provide such capacity and ancillary services products to the Company ("Change of Law Expenditures"); provided, however, that Seller's aggregate costs and expenses related to Change of Law Expenditures shall be limited to one million dollars (\$1,000,000) in the aggregate for the Term, and Company shall reimburse Seller one percent (1%) of such expenditures above such limit per month, beginning with the first month following Seller's substantial completion of each such expenditure and ending upon the earlier to occur of (i) the 100<sup>th</sup> month following the start of such reimbursements, and (ii) the end of the Term of this PPA; *provided however*, notwithstanding anything to the contrary in this PPA if, in connection with an Event of Default by Company, this PPA is terminated prior to the fifteenth (15<sup>th</sup>) anniversary of COD, then any remaining Change of Law Expenditures not yet recovered by Seller pursuant to this Section 5.3(B) shall be due and payable as a one-time lump sum payment by Company within thirty (30) days of such termination.

5.4 Communication Protocols. The Parties shall agree to the communication protocols outlined in Exhibit I - AGC Protocols; Dispatch and Availability Reporting; Data Collection to facilitate the exchange of information between the Parties. Each Party may update its contact information set forth in Exhibit D – Notices and Contact Information from time to time by notifying the other Party in writing.

### 5.5 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. All Electric Metering Devices shall meet the requirements of Exhibit R - Meter and Communications Requirements.

1. Seller shall configure Electric Metering Devices via electronic remote communications and via physical access in a manner that enables separate, bi-

directional (as applicable) meter readings for all Energy transmitted at the Point of Delivery as set forth in Exhibit C - Facility Description and Site Maps.

2. Seller shall separately configure Electric Metering Devices, installed in accordance with and conforming to the Local Provider's electrical service and tariff requirements, as necessary, to separately account for all House Power.

3. 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 (1%), 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 (1%), 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) one hundred eighty (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 or add 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.

## 5.6 Battery Storage System Testing.

(A) Prior to the Commercial Operation Date, Seller shall schedule and successfully complete a “Commercial Operation Test” in accordance with Exhibit M – Battery Storage System Testing Protocols.

(B) On an annual basis, no earlier than one hundred eighty (180) Days and no later than thirty (30) Days prior to each Commercial Operation Year during the Delivery Period, upon seven (7) Days prior notice to Company, Seller shall schedule and complete a “Periodic Test” in accordance with Exhibit M – Battery Storage System Testing Protocols. Company has the right to not permit a Periodic Test if it conflicts with the requirement of the ERO. In addition, either Party shall have the right to require a retest at any time if such Party reasonably believes that the actual Performance Criteria has varied materially from the results of the most recent Tests. Such retest shall be scheduled as soon as is reasonably practicable for the Parties consistent with Good Utility Practices. Any such retest shall be deemed a Seller Initiated Test, as defined in Section 5.6(D), except to the extent that such discretionary testing can be conducted during a period in which Company is already charging or discharging the Battery Storage System in a manner which can allow accommodation of such testing, in which case such Test may be deemed to be a Company Dispatched Test, as defined in Section 5.6(D).

(C) If Seller fails any Periodic Test, then Seller shall be required to commence repairs in accordance with Section 10.3.

(D) Seller may also conduct other discretionary tests, at times and for durations reasonably agreed to by Company, that Seller deems necessary for purposes of reliably operating the Facility or for re-performing a required Test. If such discretionary testing is conducted during a period in which Company is already charging or discharging the Battery Storage System in a manner which can allow accommodation of such testing (“Company Dispatched Test”), Seller shall not be obligated to pay for the electricity required to charge the Battery Storage System relating to such Company Dispatched Test of the Battery Storage System, and Discharging Energy from the Facility shall be treated as dispatched by Company hereunder. If discretionary testing is conducted during a period in which Company is not charging or discharging the Battery Storage System in a manner which can allow accommodation of such testing (“Seller Initiated Test”), then Company shall provide all electricity required to charge the Battery Storage System; provided that Company shall reasonably cooperate with Seller in its efforts to perform the Seller Initiated Test at a time that will mitigate the costs of such Energy (including, if requested by Seller, by providing Seller with projections of the Charging Energy Price for periods during which such price is determined by Company in its sole discretion pursuant to its cost calculator), and Seller shall reimburse Company for the cost of such Charging Energy used to charge the Battery Storage System to the extent that it exceeds the cost of the Discharging Energy discharged by the Battery Storage System during such Seller Initiated Test (based on the Charging Energy Price at the time of charging and the Discharging Energy Price at the time of discharging). Company shall reasonably cooperate with Seller to schedule testing during periods when Company is dispatching the Facility so that such testing will be deemed to be a Company Dispatched Test; provided that Company is not required to use or change its utilization of its

owned or controlled assets or market positions to facilitate the characterization of such testing as a Company Dispatched Test.

## **Article 6 - Conditions Precedent**

### **6.1 PUC Approval.**

(A) No later than forty-five (45) Days after the date of this PPA, Company may apply to the PUCT/NMPRC for PUC Approval. If Company fails to apply for PUC Approval within forty-five (45) Days following the Effective Date, Company shall be deemed to have waived its right to obtain PUC 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 PUC Approval, Company shall use Commercially Reasonable Efforts to obtain PUC Approval as soon as reasonably practicable, and Seller shall cooperate with such efforts.

(C) If Company applies for PUC 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 thirty (30) Days following issuance of a written order by the PUC rejecting PUC Approval, or granting PUC Approval with conditions unacceptable to Company in its sole discretion;

2. at any time between the three hundred sixty-fifth (365<sup>th</sup>) and three hundred ninety-fifth (395<sup>th</sup>) Day following Company's application for PUC Approval, if prior to the date of such termination the PUC has not issued a written order granting or rejecting PUC Approval;

3. at any time within thirty (30) Days following timely request for reconsideration (in whole or in any material part) by any third party with standing, of a written PUC order granting PUC Approval; and/or

4. at any time within 30 Days following timely appeal by any party with standing, of a written PUC order granting PUC 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.

(D) For purposes of this PPA, "PUC Approval" means a written order of the PUCT/NMPRC which alone or in combination make an affirmative determination that all costs incurred under this PPA are recoverable from Company's retail customers pursuant to Applicable Law, subject only to the requirement that the PUCT and NMPRC (as applicable) retain ongoing prudency review of Company's performance and administration of this PPA, as determined by Company in its sole discretion.

6.2 Seller Condition Precedent. Seller shall have the right, but not the obligation, to terminate this PPA, without any further financial or other obligation to Company as a result of such termination, by written notice to the other Party delivered within fourteen (14) Days following the failure of Seller to obtain approvals of Seller's

management and board of directors (or equivalent governing body) required for the performance of this PPA on or before the date that is sixty (60) Days after the execution date of this PPA. If Seller is eligible but fails to terminate this PPA by the applicable date, then Seller shall be deemed to have waived its right to terminate this PPA under this Section 6.2, and this PPA shall remain in full force and effect thereafter.

6.3 Reserved.

6.4 Return of Security Fund. Following a termination pursuant to Section 6.1 or Section 6.2, the Company will return to Seller the initial Security Fund within five (5) Business Days of such termination.

## **Article 7 - Sale and Purchase**

7.1 General Obligation.

(A) Beginning on the Commercial Operation Date, Seller shall receive at the Point of Delivery, store in the Battery Storage System, and deliver to the Point of Delivery, and Company shall receive at the Point of Delivery, the Energy and other products and services required by this PPA. Seller shall not curtail or interrupt deliveries of Energy to Company for economic reasons of any type.

(B) Seller shall not sell any products and services required by this PPA to any third party.

(C) 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 Dispatch. Beginning on the Commercial Operation Date, Company shall dispatch the Facility through the EMCC AGC system in accordance with Exhibit I – AGC Protocols; Dispatch and Availability Reporting; Data Collection. Seller shall ensure that, throughout the Term, the SCADA System 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.

7.3 Battery Storage System Dispatch.

(A) During each Operating Day, Company's EMCC will have the exclusive right to dispatch the Battery Storage System, seven (7) Days per week and twenty-four (24) hours per Day (including holidays), by providing Dispatch Notices to Seller in accordance with the Battery Storage System Operating Procedures and subject to the requirements and limitations set forth in this PPA. Seller shall abide with all directives from Company's EMCC, subject only to Good Utility Practices.

(B) For each Operating Day, Seller shall provide to Company (in accordance with the protocols outlined in Exhibit O – Battery Storage System Operating Procedures and as may be updated by written agreement of the Operating Committee pursuant to Section 10.8) an hourly schedule of the expected availability of the Battery Storage System for such Operating Day, no later than two (2) Business Days before such Operating Day (the "Availability Notice"). Seller must update Company immediately, unless an event or circumstance makes it unsafe to do so, then as soon as practicable, in accordance with the



protocols outlined in Exhibit O – Battery Storage System Operating Procedures if the availability of the Battery Storage System for dispatch by Company changes or is likely to change after the Availability Notice is submitted. Seller shall accommodate Company's reasonable requests for changes in the time or form of delivery of the Availability Notices.

7.4 Reserved.

7.5 Ancillary Services.

(A) During the Term, Seller shall make available to Company and Company shall own, all Ancillary Services associated with the Facility, including but not limited to the sole right to sell the Ancillary Services associated with the Facility and to retain all revenues therefrom. Seller shall use Commercially Reasonable Efforts to maximize the Ancillary Services available from the Facility.

(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 and/or energy storage resources to create, modify, or supply Ancillary Services, requiring Seller to install additional equipment after the Effective Date to meet such requirements, then Seller, after consultation with Company, shall, if requested to do so by Company, install any such additional equipment and 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 (up to the amount of any cap agreed to by the Parties for such work). 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. Notwithstanding anything to the contrary in this PPA, upon the termination or expiration of the Term, any remaining costs not yet recovered by Seller pursuant to this Section 7.5(B) shall be due and payable to Seller as a one-time lump sum payment by Company within sixty (60) Days after such termination or expiration of the Term.

(C) For purposes hereof, "Ancillary Services" means any service associated, directly or indirectly, with the reliable storage and/or transmission of energy from the Facility from time to time, including but not limited to: operating reserves, ramp capability, reactive supply, reactive supply capability, voltage control, voltage control capability, and any rights to compensation for any of these services. "Ancillary Services" also includes any other identified as an "ancillary service" or "other ancillary service" in the Transmission Tariff. For the avoidance of doubt, "Ancillary Service" includes any service associated, directly or indirectly, with the reliable generation and/or transmission of energy from the Facility, regardless of whether the Facility, the Transmission Authority or the Company is deemed to be the service provider for the service.

## Article 8 - Payment Calculations

8.1 Reserved.

8.2 Payment for Contract Capacity.

(A) Company shall pay Seller a monthly payment for capacity (the "Monthly Capacity Payment") based upon the following formula:

Monthly Capacity Payment =  $(C \times CP \times CAF)$ , where:

C = Capacity, as determined by the most recently completed Test and equal to the lesser of the Maximum Charging Rate or Maximum Discharging Rate. For avoidance of doubt, the Capacity shall not be greater than the Battery Storage System Nameplate Capacity.

CP = Capacity Payment Rate, as set forth in Exhibit J – Capacity Payment Rate

CAF (Capacity Availability Factor) =  $(AC + SME) \div PE$ , where

AC = Available Capacity for any period, stated in Megawatt-hours (MWh-hour), means the maximum amount of Storage Capacity that is available from the Facility. For purposes of calculating Available Capacity:

- Storage Capacity that is unavailable for dispatch by Company shall be considered to be available for the purposes of determining Available Capacity when (and only when):
  - (i) the Facility is disconnected from the Transmission Authority's System pursuant to the Interconnection Agreement, and the disconnection is not caused by actions of Seller or problems with the Facility; and/or
  - (ii) the Discharging Energy cannot be delivered by Seller or received by Company due to an Emergency or an event of Force Majeure affecting the Transmission Authority's System at or beyond the Point of Delivery; and/or
  - (iii) Company has contracted for non-firm transmission service, and the Discharging Energy cannot be received at the Point of Delivery due to transmission constraints affecting the Transmission Authority's System.

By way of example only, the Available Capacity shall be deemed unavailable for purposes of this Section 8.2 if:

- to the extent and for so long as the Facility is subject to a Forced Outage, including an outage caused by Force Majeure at the Site or prior to the Point of Delivery.
- Company has contracted for firm transmission service, but the Discharging Energy cannot be received by Company at the Point

of Delivery due to transmission constraints affecting the Transmission Authority's System ("Interruption of Firm Transmission Service").

SME = Scheduled Maintenance Energy for any period, stated in MWh-hour, means the amount of energy that is not available from the Facility during such period, due to Scheduled Outages/Deratings that meet the requirements for Battery Storage System Planned Outages under Section 10.2(A).

PE = Period Energy for any period, stated in MWh-hour, means the product of the Guaranteed Storage Capacity and the total number of hours in such period.

$RTE_{Adj}$  = Round Trip Efficiency Adjustment to Monthly Capacity Payment, as set forth in Section 8.4(B).

If the Capacity Availability Factor is greater than or equal to 97% then CAF for purposes of the Monthly Capacity Payment formula shall be deemed to be 1.

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

(C) For clarity, monthly payments to Seller may be subject to reduction in accordance with Section 8.4.

8.3 Reserved.

8.4 Monthly Payment Reduction.

(A) For each month of the Delivery Period, the monthly payments to Seller may be reduced by (i) the Round Trip Efficiency Adjustment set forth in Section 8.4(B), and/or, (ii) the adjustment set forth in Section 8.4(C).

(B) If the Round Trip Efficiency as determined by the most recently completed Test is less than the then-applicable Guaranteed Round Trip Efficiency, then the Monthly Capacity Payment shall be reduced by the Round Trip Efficiency Adjustment, which shall be calculated as follows:

1. The "Round Trip Efficiency Adjustment" or " $RTE_{Adj}$ " for each month is given by:

If  $[RTE_{test} < RTE_G]$ , then  $RTE_{Adj} =$

$$[1 - (RTE_{test} / RTE_G)] \times [(Discharging MWh_{Actual} * Discharging LMP) - (Charging MWh_{Actual} * Charging LMP)]$$

where:

$RTE_{test}$  = the Round Trip Efficiency as determined by the most recently completed Test.

$RTE_G$  = the then-applicable Guaranteed Round Trip Efficiency, as identified in Exhibit M-1 – Battery Storage System Guaranteed Performance Levels

$Discharging\ MWh_{Actual}$  = the Discharging Energy delivered to Company at the Point of Delivery for the affected month expressed in MWh.

$Discharging\ LMP$  = the average of the Discharging Energy Price for each  $Discharging\ MWh_{Actual}$  for the affected month expressed in Dollars per MWh; *provided*, that the Discharging LMP may not, in any event, be less than \$0.00 for any given month.

$Charging\ MWh_{Actual}$  = the Charging Energy delivered to Seller at the Point of Delivery for the affected month expressed in MWh.

$Charging\ LMP$  = the average of the Charging Energy Price for each  $Charging\ MWh_{Actual}$  for the affected month expressed in Dollars per MWh.

*Provided*, that in no event shall the Round Trip Efficiency Adjustment be less than \$0.

Exhibit Q – Example Adjustment Calculations sets forth the sample calculations for the Round Trip Efficiency Adjustment.

(C) If Seller fails to accurately or timely respond to a Company Dispatch Notice, then, unless such failure is excused by this PPA (including due to a Force Majeure or Excused Outage), if the Market Operator assesses a penalty or similar charge (including, as applicable, an excessive or deficient energy charges referenced in the protocols of the Market Operator) on the Company due to and arising out of such failure and Company provides documentation of the same to Seller along with any other details and documentation as reasonably requested by Seller, then Company shall provide and pass through to Seller such penalty or charge. Company shall reduce Seller's next monthly invoice payment by an amount equal to such market operator charges, in accordance with Section 8.4(A).

8.5 Excess Throughput Charge. Company shall pay Seller a payment equal to [REDACTED] for each MWh of Energy discharged by the Battery Storage System above the Annual Throughput Limit in any given Commercial Operation Year and, if the Energy discharged by the Battery Storage System exceeds the Annual Throughput Limit by more than 110%, up to 146%, then the company shall pay Seller a payment equal to [REDACTED] for each MWh of Energy discharged by the Battery Storage System above 110% more than the Annual Throughput Limit. The Annual Throughput Limit shall not exceed

146% in any given Commercial Operation Year. For purposes of determining the amount of Energy discharged by the Battery Storage System in any given Commercial Operation Year, any Energy discharged by the Battery Storage System during a Seller Initiated Test or a Periodic Test shall be excluded.

8.6 Annual Throughput Limit Banking and Borrowing.

(A) If, in any Commercial Operation Year, Company has not used all of the Annual Throughput Limit for such Commercial Operation Year, then four thousand eight hundred (4,800) MWh of the unused Annual Throughput Limit for such Commercial Operation Year shall be added to the Annual Throughput Limit for the subsequent Commercial Operation Year.

(B) If, in any Commercial Operation Year, Company has used all of the Annual Throughput Limit for such Commercial Operation Year, then, for such Commercial Operation year, Company may add up to four thousand eight hundred (4,800) MWh of the Annual Throughput Limit allocated to the subsequent Commercial Operation Year, which use shall reduce the Annual Throughput Limit for the subsequent Commercial Operation Year by such amount.

**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 twenty (20) Days after the end of each month, or (ii) ten (10) Days after receipt by Company of the monthly report required from Seller under Section 10.4(B), 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 5.5.

(C) No later than fifteen (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, billing meter register reads for relevant measurement quantities, total usage in kWh being billed, date and time at which accumulated and billed production was read by the Electric Metering Devices, 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 fifteenth (15<sup>th</sup>) Business Day following receipt of the invoice described in Section 9.1(C). 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 fifteenth (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 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; Dispatch and Availability Reporting; Data Collection, Exhibit O – Battery Storage System Operating Procedures, and this PPA. Personnel of Seller shall be available 24x7 via telephone or other electronic means with (i) the capability of remotely starting, operating and stopping the Facility within ten (10) minutes, and (ii) the ability to be present at the Site within 30 minutes, or sooner, to the extent required in accordance with Good Utility Practices and subject to the Safety Requirements.

(B) Seller shall comply with Good Utility Practices, its obligations under this PPA, 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. Any such testing shall be deemed to be a Seller Initiated Test.

(C) Seller shall provide to Company a day-ahead availability schedule in accordance with Exhibit I - AGC Protocols; Dispatch and Availability Reporting; Data Collection, Exhibit O – Battery Storage System Operating Procedures, 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 schedule 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.

(D) Seller shall, and shall cause its Affiliates and contractors to operate, and maintain the Facility and conduct all work or cause all work in connection therewith to be conducted in accordance with the Safety Requirements. Seller shall, and shall cause its Affiliates and contractors to, take all actions to comply with the Safety Requirements.

#### 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"). Seller shall provide Maintenance Schedules, including planned outages of the Facility (including any Battery Storage System Planned Outages), to Company in writing and sufficiently in advance for Commercially Reasonable review, and shall be subject to Company's Commercially Reasonable approval. Seller shall coordinate with Company and the Transmission Authority on the timing and duration of planned outages. Company has the right to not permit a planned outage if it conflicts with the requirements of the ERO or if the ERO rejects the planned outage request.

(B) Seller shall minimize the amount of scheduled maintenance during the months of January, February, June, July, August, September and December to the maximum extent consistent with Good Utility Practices. Seller shall coordinate with Company and the Transmission Authority on the timing and duration of planned outages of the Facility (including any Battery Storage System 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 (1) 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.

(D) Seller shall develop and provide Company with a copy of its Facility cold weather policy. In the event of a Facility Forced Outage or derate of more than ten percent (10%) of the Battery Storage System Nameplate Capacity, Company may request that Seller shall conduct a root cause analysis, take corrective actions as are reasonable under the circumstances to prevent reoccurrences and provide a copy of such analyses and corrective action to Company.

#### 10.3 Repair Obligations.

(A) In the event that; (1) an equipment failure (regardless of when such equipment failure occurs, but excluding any equipment failure for which a Successful Repair has already been demonstrated) with respect to the Battery Storage System results in a) the Battery Storage System failing the Test set forth in Exhibit M – Battery Storage System Testing Protocols for Grid Charging Capability or being otherwise incapable of charging from the grid, b) the Minimum Charging Time in excess of 110% of the Guaranteed Minimum Charging Time, c) the Maximum Charging Rate less than 90% of the Guaranteed Maximum Charging Rate, d) the Minimum Discharging Time in excess of 110% of the Guaranteed

Minimum Discharging Time, e) the Maximum Discharging Rate less than 90% of the Guaranteed Maximum Discharging Rate, f) the Response Time in excess of 110% of the Guaranteed Response Time, or g) the Storage Capacity less than 90% of the Guaranteed Storage Capacity, respectively, or (2) a Test demonstrates that any of the Performance Criteria do not measure within 1.0% of the levels required to pass such Test in accordance with Exhibit M – Battery Storage System Testing Protocols then Seller shall repair the Battery Storage System in accordance with Good Utility Practice and the procedures set forth in this Section 10.3. Seller must notify Company of such event under Section 10.3(A)1 within ten (10) Days of such occurrence and support such notice with evidence reasonably satisfactory to Company. Within fourteen (14) days of any such event, Seller shall either (1) (a) demonstrate such remedy to the reasonable satisfaction of Company, or (b) provide to Company the results of a Test performed subsequent to the event that demonstrated that the Performance Criteria measured within 1.0% of the levels required to pass such Test in accordance with Exhibit M – Battery Storage System Testing Protocols. Such Test results shall be auditable by the Company and Company shall be able to replicate the results of such Test through the Company's EMCC, (each, a "Successful Repair"), or (2) present to Company a description of the reason for the failure and a plan and schedule to complete a Successful Repair (the "Repair Plan").

(B) If Company reasonably disagrees with Seller's Repair Plan, Company may, at its expense, hire an Independent Engineer approved by Seller (such approval not to be unreasonably withheld) to perform an on-site assessment of the situation and issue an engineering report setting forth specific recommendations for completing a Successful Repair consistent with Good Utility Practice. Such engineering report shall include a plan and schedule for completion of a Successful Repair. Upon six (6) Business Days' notice by Company, Seller shall grant the Independent Engineer and Company personnel access to the Battery Storage System and all relevant information including log books, maintenance records and reports, and other applicable materials. If, after seven (7) days of the delivery to Seller of such engineering report, Seller fails, in any material respect to meet the plan and schedule set forth in such engineering report (as such plan and schedule may be updated from time to time by the Independent Engineer) then, unless Seller has otherwise made sufficient progress in effecting the Successful Repair consistent with Good Utility Practice, in each case as determined and reported by the Independent Engineer, Seller shall be in breach of this Section 10.3 and such breach shall be an Event of Default under Section 12.1(A)14.

#### 10.4 Books and Records.

(A) Seller shall maintain an accurate and up-to-date hourly operating log for 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. Seller shall deliver the operating log to Company electronically when reasonably requested.

(B) Seller shall deliver to Company information on Facility performance during each calendar month within five (5) Business Days after the end of each month using definitions provided by (or consistent with) the NERC Generation Availability Data System ("GADS") Manual, or any successor document, the data reported shall include planned and unplanned derated hours, average derated kW during the derated hours, scheduled



maintenance hours, average derated kW during scheduled maintenance hours, the operating log referenced in Section 10.4(A) above, and any other additional supporting documentation as reasonably requested by Company.

(C) 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 the Site or such other Texas location as may be specified by Seller from time to time. Company may examine and make copies of such Operating Records from time to time upon request, during normal business hours.

10.5 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 standard safety precautions and shall conduct themselves in a manner that will not interfere with operation of the Facility.

10.6 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; Dispatch and Availability Reporting; Data Collection, and subject to Exhibit O – Battery Storage System Operating Procedures. Seller shall maintain the Facility's SCADA System and communications system so that they are capable of interfacing with and reacting to Company's AGC Set-Point and responding to signals from Company's EMCC in accordance with the AGC Protocols, subject to Exhibit O – Battery Storage System Operating Procedures.

(B) From and after the Commercial Operation Date, Seller shall provide Company, at Seller's expense, real time performance data in accordance with Exhibit I - AGC Protocols; Dispatch and Availability Reporting; Data Collection for the Term of this PPA. Seller shall maintain Seller-owned 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. Company shall have the right to disclose data gathered through 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, except as otherwise provided in Section 20.18.

10.7 Accreditation. Seller shall perform from time to time, at its expense, any reporting and testing (including capacity testing) of the Facility required by Governmental Authorities.

10.8 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

charging, discharging, delivery, dispatch, and receipt of Energy from the Facility. The Parties' initial representatives on the Operating Committee are set forth in Exhibit D – Notices and Contact Information.

(B) If requested by Company, the Operating Committee shall develop mutually agreeable written Battery Storage System Operating Procedures for the Battery Storage System that are consistent with the requirements of this PPA, including Section 5.2 and Exhibit O – Battery Storage System Operating Procedures in order to address administrative 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. For the avoidance of doubt, Company (or its representative on the Operating Committee) shall have no obligation to agree to operational limitations except for those set forth in Part I of Exhibit O – Battery Storage System Operating Procedures.

(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, including any provision included within Exhibit O – Battery Storage System Operating Procedures.

### **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.

(B) Seller shall establish and fund the Security Fund in the amount of nine million six-hundred thousand dollars (\$9,600,000), no later than thirty (30) Days following the Effective Date. Within five (5) Business Days following COD, the amount of the Security Fund shall be reduced to three million six-hundred thousand dollars (\$3,600,000).

(C) Without notice to Seller, 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.

(D) Company shall notify Seller within five (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 fifteen (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 fifteen (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 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 three hundred sixty (360) Days. Seller shall give Company at least thirty (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 three hundred sixty (360) Days or more (or, if shorter, through the end of the period required under Section 11.5 below) more than thirty (30) Days prior to each expiration date of the security. If the Letter of Credit is not renewed or extended at least thirty (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, in Company's account until such time as 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 Texas, with net assets of at least \$1 billion (the "Escrow Account").

1. The Escrow Account shall be governed by an escrow and account control agreement in a 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 PPA), 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. a money-market fund sponsored by the escrow agent;
- b. U.S. treasury obligations with a maturity of ninety (90) Days or less;
- c. commercial paper rated "A" or better, with a maturity of ninety (90) Days or less; and
- d. 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 the excess to Seller.

(C) Following COD, the Security Fund may consist of a guaranty substantially in the form of Exhibit H – Form of Guaranty, from a parent or other guarantor ("Guarantor") acceptable to Company in its sole and absolute discretion, and up to an amount within Company's sole and absolute discretion. Subject to Company's sole and absolute discretion, to be eligible to provide a guaranty, the proposed Guarantor must have a minimum tangible net worth of at least \$250,000,000 and an Investment Grade Credit Rating (and if such Credit Rating is exactly equivalent to BBB- (S&P) / Baa3 (Moody's), the Guarantor must not be on credit watch by any rating agency). If the Credit Rating of the Guarantor is downgraded below Investment Grade, put on credit watch, or an event occurs that (in the reasonable determination of Company) portends a Material Adverse Effect in the creditworthiness of the Guarantor, then Company may require Seller to convert the guaranty to a Security Fund instrument meeting the criteria set forth in either paragraph (A) or paragraph (B) above no later than ten (10) Days after notice from Company.

(D) Company shall negotiate in good faith any 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 direct expenses (including the fees and expenses of counsel) incurred by Company 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 Replacement. In the event that the Security Fund ever fails to comply with the requirements of this Article 11 or Company determines in a Commercially Reasonable manner that an event has occurred or circumstances have developed that threaten to cause the Security Fund to fail to comply with the requirements of this Article 11 (e.g. a

Guarantor is placed on negative credit watch by a rating agency), Seller shall be required to replace the Security Fund with security in compliance with Article 11 within five (5) Days following notice thereof from Company.

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 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 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 sixty (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 sixty (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 by Seller in this PPA that has a Material Adverse Effect on Seller's ability to perform this PPA is proven to have been false in any material respect when made.

Cure Period: Thirty (30) Days after Company provides notice of such breach.

5. Seller's failure to establish and, once established, 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:* Five (5) 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:* Ten (10) Business Days after Company provides notice that the amount is overdue.

8. Any representation or warranty by Seller in this PPA that has a Material Adverse Effect on Seller's ability to perform this PPA ceases to remain true during the Term.

*Cure Period:* Thirty (30) Days after Company provides notice of such breach; provided, notwithstanding anything to the contrary in this PPA, if such representation or warranty ceases to remain true during the Term due to a change in Applicable Law that occurs during the Term, then 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 Applicable Law in order to make the representation or warranty no longer false or misleading.

9. The breach by Seller of the Interconnection Agreement, which breach (i) materially interferes with Seller's production and/or delivery of any product or

service to be produced or delivered pursuant to this PPA or Company's ability to accept or receive such product or service, (ii) Company's ability to transmit Energy beyond the Point of Delivery, and/or (iii) otherwise has a Material Adverse Effect on Company.

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

10. Seller intentionally or knowingly starts-up, operates, charges, or discharges or permits or causes any third party (including Seller's designated operator) to start-up, operate, charge or discharge any Battery Storage System other than as specifically permitted under this PPA.

*Cure Period:* None.

11. Seller intentionally or knowingly delivers, or attempts to deliver, Energy for sale under this PPA that was not associated with or stored by the Facility.

*Cure Period:* None.

12. The monthly Capacity Availability Factor of the Battery Storage System is less than a) eighty percent (80%) on average for the first Commercial Operation Year; b) eighty-five percent (85%) on average for the second Commercial Operation Year; and c) ninety percent (90%) on average beginning with the third Commercial Operation Year and continuing for the duration of the term, *provided however*, that for purposes of this Event of Default only, if Seller's failure to meet the Capacity Availability Factor during any Commercial Operation Year is attributable, in part or in whole, to (i) a GSU Transformer Failure, or (ii) an Interruption of Firm Transmission Service, then the number of Days that such GSU Transformer Failure or Interruption of Firm Transmission Service occurred or continued shall be deducted from the calculation of the Capacity Availability Factor of the Battery Storage System for the Commercial Operation Year(s) in which the GSU Transformer Failure or Interruption of Firm Transmission Service occurred or continued. Seller may only claim one (1) GSU Transformer Failure during the Term, and may so-deduct no more than one hundred eighty consecutive (180) Days in the aggregate for such GSU Transformer Failure. For the avoidance of doubt, a GSU Transformer Failure shall not be considered in the calculation of the Capacity Availability Factor set forth in Section 8.2.

*Cure Period:* Seller shall be deemed to have cured this default if the average Capacity Availability Factor of the Battery Storage System, as may be adjusted for an applicable GSU Transformer Failure, Interruption of Firm Transmission Service,

or otherwise in accordance with this PPA, is at least ninety percent (90%) for the subsequent Commercial Operation Year.

13. The Round Trip Efficiency derived from a Test is less than 90% of the then-applicable Guaranteed Round Trip Efficiency.

*Cure Period:* Seller shall be deemed to have cured this default if, within thirty (30) Days, Seller completes a Test demonstrating that the Round Trip Efficiency is at least equal to 90% of the then-applicable Guaranteed Round Trip Efficiency.

Section 10.3.  
14. Seller fails to complete a Successful Repair pursuant to

*Cure Period:* Seller shall be deemed to have cured this default if, within thirty (30) Days, Seller completes the Successful Repair.

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

16. Seller removes from the Site equipment upon which the Commercial Operation Test has been based, except for the purposes of replacement, refurbishment, repair or maintenance, and the equipment is not returned within five (5) days after notice from Company.

*Cure Period:* None

17. Seller makes any material misrepresentation or omission in any report (including any status report, logs, and reports required under Section 4.1, Section 5.5, Section 10.4, Exhibit I - AGC Protocols; Dispatch and Availability Reporting; Data Collection, and Exhibit M – Battery Storage System Testing Protocols) required to be made or furnished by Seller pursuant to this PPA.

*Cure Period:* Five (5) Days after Company provides notice.

18. Subject to Section 7.3, Seller makes any material misrepresentation or omission in any Availability Notice.

*Cure Period:* Such Event of Default may be cured if (i) the default was caused solely by an inadvertent error or omission of an administrative or clerical nature and (ii) such default is cured within



one (1) Business Day after knowledge of such inadvertent error or omission in the Availability Notice.

(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) Option to Acquire Facility upon Termination due to Seller Default. If Company terminates this PPA under this Section 12.1 following COD, then, at any time within ninety (90) Days following such termination, Company may give notice to Seller of Company's intent to purchase the Facility from Seller (a "Default Option Preliminary Exercise Notice").

1. As soon as practicable following delivery of a Default Option Preliminary Exercise Notice, the Parties shall appoint an independent appraiser experienced in appraising utility-scale battery storage facilities to determine the FMV of the Facility. If the Parties cannot agree on the identity of the appraiser, the appraiser shall be selected by the Arbitration Service. Seller shall provide to the appraiser full access to the Facility and the Site, to Seller's contracts, books and records, and to relevant personnel of Seller, during normal business hours. Such access shall include the right to conduct inspections and tests (including environmental testing of the Site and operating tests on the Facility) necessary or appropriate for the determination of the FMV of the Facility. Company shall pay all fees and costs of the appraiser. The Parties shall direct the appraiser to use his/her best efforts to complete and deliver his/her appraisal to the Parties within forty-five (45) Days following his/her appointment and to keep all information obtained by appraiser from any investigations as Confidential Information subject to the provisions of Section 20.18.

2. Following delivery of a Default Option Preliminary Exercise Notice, Seller shall provide to Company full access to the Facility and the Site, to Seller's

contracts, books and records, and to relevant personnel of Seller, during normal business hours. Such access shall include the right to conduct lien searches, surveys, inspections and tests (including environmental testing of the Site and operating tests on the Facility) necessary or appropriate for due diligence review of the Facility. All information obtained by Company from such investigations shall be deemed Confidential Information subject to Section 20.18. All inspections, testing and access to the Facility and the Site by Company and the appraiser shall comport with all of Seller's policies governing the use, operation, and maintenance of the Facility, including health, safety and environmental requirements.

3. Within sixty (60) Days following receipt of an appraisal under this Section 12.1(E), Company may elect to purchase the Facility from Seller (a "Default Option"). If Company fails to notify Seller of Company's election within such 60-Day period, Company shall be deemed to have elected not to exercise the Default Option. If Company exercises the Default Option, by notice to Seller pursuant to this Section 12.1(E)3, the purchase price to be paid by Company for the Facility in connection with any exercise of the Default Option shall be the greater of the FMV of the Facility, as determined by the appraiser, and the Book Value of the Facility, as of the date Company exercises its Option. Seller shall cooperate in all respects reasonably necessary for Company to exercise its Default Option rights.

4. If Company exercises the Default Option, the Parties shall negotiate and execute a PSA, subject to clause (iv) below. The PSA shall include the terms and conditions set forth in Exhibit L-2 – Facility PSA Provisions. In the event that the Parties cannot agree on the final form of PSA, (i) the issue shall be submitted to "baseball" arbitration in Amarillo, Texas before one arbitrator appointed by the Arbitration Service, i.e. each Party shall submit to the arbitrator a form of proposed PSA, and the arbitrator shall be required to select one of the two forms to be used as the PSA in the transaction, without compromise, as the arbitral award, (ii) the period for closing of the transaction shall be extended for the period required to complete arbitration, (iii) the Party whose form PSA is rejected shall pay the fees and costs of the Arbitration Service, and (iv) if Company's form of PSA is rejected, Company shall have thirty (30) Days following such rejection to decide whether to execute and deliver Seller's form of PSA or abandon the transaction.

5. This Section 12.1(E) shall be specifically enforceable by Company, without bond and without the need to prove irreparable harm.

12.2 Default by Seller: Failure to Achieve Critical Path Development Milestone or COD.

(A) Delay. Seller shall be in default under this PPA if the Facility fails to achieve any Critical Path Development Milestone by the date set forth in Section 4.1(B) ("CPD Delay") or COD by the Target COD ("COD Delay") (as, for the avoidance of doubt, such dates may be extended pursuant to this PPA).

(B) Seller shall be liable to pay twelve thousand dollars (\$12,000) ("CPD Liquidated Delay Damages") to Company as a liquidated damage and not a penalty, in lieu of Actual Damages, for each Day of each CPD Delay. CPD Liquidated Delay Damages shall

begin to accrue on the Day after the applicable missed Critical Path Development Milestone (in each case, as may be extended pursuant to this PPA) until the first to occur of the satisfaction of the applicable Critical Path Development Milestone or termination of this PPA pursuant to Section 12.2(I) below. CPD Liquidated Delay Damages shall apply if any Critical Path Development Milestone is missed, and the payment of CPD Liquidated Delay Damages with respect to any given Critical Path Development Milestone shall extend each subsequent Critical Path Development Milestone on a day-for-day basis. In the event Seller incurs CPD Liquidated Delay Damages but subsequently achieves the Target COD (as, for the avoidance of doubt, such dates may be extended pursuant to this PPA), Company shall reimburse Seller all such CPD Liquidated Delay Damages.

(C) Seller shall be liable to pay twelve thousand dollars (\$12,000) ("COD Liquidated Delay Damages") and, together with CPD Liquidated Delay Damages, the "Liquidated Delay Damages") to Company as a liquidated damage and not a penalty, in lieu of Actual Damages, for each Day of a COD Delay. COD Liquidated Delay Damages shall begin to accrue on the Day after the Target COD (as may be extended pursuant to this PPA), until the first to occur of the COD or termination of this PPA pursuant to Section 12.2(I) below. The payment of CPD Liquidated Delay Damages shall not cure Seller's failure to achieve COD by the Target COD. For the avoidance of doubt, if Seller is delayed in reaching one or more Critical Path Development Milestones and the Target COD, then Seller may incur both CPD Liquidated Delay Damages and COD Liquidated Delay Damages.

(D) Except as provided in Section 12.2(I) below, the payment of Liquidated Delay Damages shall be Company's sole and exclusive remedy for a CPD Delay or COD Delay.

(E) Cure. Subject to the obligations in Section 12.2(B), Seller shall have a cure period of up to ninety (90) Days for its failure to achieve any Critical Path Development Milestone by the date set forth in Section 4.1(B) (subject to compliance with Seller's obligations in Section 4.1(B)) or Commercial Operation by the Target COD, as applicable so long as the following conditions are satisfied:

1. Seller's payment of accrued Liquidated Delay Damages shall be a condition to any such cure. In order to utilize the cure period set forth in Section 12.2(E), Seller must, at any time prior to, but no later than, 6:00 a.m. on the third Business Day immediately prior to the Critical Path Development Milestone date set forth in Section 4.1(B) or the Target COD, as applicable (as such dates may have been previously extended pursuant to this PPA), provide Company with (a) Notice of its election to extend such Critical Path Development Milestone date or the Target COD, (b) Seller's reasonable estimate of the required duration of the full estimated extension period, and (c) its payment of Liquidated Delay Damages for each Day of the full estimated extension period. For the avoidance of doubt, the Security Fund may not be utilized by Seller for the payment of Liquidated Delay Damages.

2. In addition, for any extensions pursuant to Section 12.2(E) of more than an aggregate total of forty-five (45) Days, Seller must, at any time prior to, but no later than, 6:00 a.m. on the third Business Day immediately prior to the Critical Path Development Milestone date set forth in Section 4.1(B) or the Target COD, as applicable (as such dates may have been previously extended pursuant to Section 12.2(E)), provide

a written opinion from a mutually agreeable Independent Engineer that such Critical Path Development Milestone or COD, as applicable, can reasonably be achieved within such additional period.

(F) In the event Seller's CPD Delay or COD Delay extends beyond the date estimated under Section 12.2(E) above, Company shall invoice Seller on a weekly basis for additional Liquidated Delay Damages for each day the CPD Delay or COD Delay extends beyond the estimated completion date. Seller shall pay such invoices within five (5) Business Days of their receipt. If any such CPD Delay or COD Delay extends the actual delay beyond a total of forty-five (45) Days, Seller must provide the written opinion required under Section 12.2(E)2 at least three Business Days prior to the forty-fifth (45) day of the delay. In no event shall any such extension of realized delays exceed the ninety (90) Day cure period permitted under Section 12.2(E).

(G) Termination. Failure to cure a CPD Delay or COD Delay within the applicable cure period set forth in Section 12.2(E) shall be an Event of Default by Seller. Upon such an Event of Default, Company may (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 addition to accrued Liquidated Delay Damages but in lieu of Actual Damages for the balance of the Term, collect from Seller liquidated damages therefor in the amount of four million eight hundred thousand dollars (\$4,800,000).

### 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 sixty (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 sixty (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 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.

5. 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:* Ten (10) Business Days after Seller provides notice that the amount is overdue.

6. Any representation or warranty by Company in this PPA that has a Material Adverse Effect on Company's ability to perform this PPA ceases to remain true during the Term, other than due to a change of law.

*Cure Period:* Thirty (30) Days after Seller provides notice of such breach.

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

*Cure Period:* Thirty (30) Days after Seller provides notice; *provided*, that if such default is not reasonably capable of cure within such thirty (30) Day period, Company shall have such additional period of time (not to exceed ninety (90) Days in any event) as is reasonably necessary for cure, so long as Company initiates cure within such thirty (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.

#### 12.4 Limitations on Damages.

(A) Except as otherwise provided in Section 12.4(B), following COD Seller's aggregate financial liability to Company for Actual Damages shall not exceed three million six-hundred thousand dollars (\$3,600,000) (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 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 Energy, capacity, or Ancillary Services 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 16.5;
5. any indemnification claim under this PPA;
6. any Environmental Contamination caused or exacerbated 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.

12.5 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.

12.6 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

12.7 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 ten (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. Any Dispute that is mutually agreed by the Parties (each acting in its sole and complete discretion) to involve engineering, construction or technical matters as the sole or primary area of disagreement between the Parties shall be deemed to be a “Technical Dispute” (each, a “Technical Dispute”). The Parties agree that the technical expert for purposes of resolving any Technical Disputes shall be a mutually-agreeable Independent Engineer, the costs and expenses for which will be shared equally by the Parties. The Independent Engineer may, if he or she deems it appropriate, hold a hearing on the subject of the Technical Dispute and shall, upon the request of either Party, meet with the Parties or their representatives with respect to such Technical Dispute within three (3) Business Days of the request for such meeting. The Independent Engineer shall render a decision solely resolving the Technical Dispute within five (5) Business Days of the meeting with the Parties or their representatives or hearing (if any), or such longer period as the

Parties and the Independent Engineer may agree. The decision of the Independent Engineer shall be advisory rather than final and binding on the Parties.

(B) In the event the Parties' representatives cannot resolve the Dispute, or if either Party is not satisfied with the resolution of the Technical Dispute by the Independent Engineer, within thirty (30) Days after the first meeting, either Party may request that consideration and resolution of the Dispute be transferred to senior management. Within ten (10) 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 ten (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 Sections 13.3, 19.3 and 19.5.

13.2 Time Bar. If no Dispute Notice has been issued within eighteen (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 ten (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 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, in addition to the Security Fund; and

4. the owed amount (if any) is paid by Seller within ten (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 ten (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 of the State of Texas for purposes of resolving any Dispute hereunder, except as provided in Sections 12.1 (E), 19.3 and 19.5. Venue for any court proceedings shall lie exclusively in the Texas District Court for the County of Potter or, if jurisdictionally available, the U.S. District Court for the Northern District of Texas.

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, subject only to Section 19.5.

#### **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 Effective Date, (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;

By way of example only, “Force Majeure” includes an act of God, flood, drought, earthquake, storm, fire, pestilence, lightning and other natural catastrophes, war, riot, civil disturbance or disobedience, terrorism or sabotage. Force Majeure shall not include:

(A) inability, delays or excess cost, result in Seller’s failure to contract for and/or order any equipment necessary to perform this PPA;

(B) acts or omissions of a third party (including vendors, suppliers and contractors to Seller), unless such acts or omissions are themselves excused by reason of Force Majeure;

(C) failure to obtain any Permits required for the Facility, including 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;

(F) changes in market conditions;

(G) any delay or failure by the Transmission Authority to perform its obligations under the Interconnection Agreement or any Curtailment or reduction in deliveries by the Transmission Authority;

(H) failure of the performance of any other entity, including the failure or delay of vendors or suppliers to deliver any required equipment or components to Seller, except to the extent itself caused by Force Majeure;

(I) the delay or effects of the COVID epidemic or pandemic (or any variant of COVID), except to the extent there occurs after the Effective Date: (A) the adoption or taking effect of any Applicable Law in respect of such COVID epidemic or pandemic (or any variant thereof), or (B) a change in any Applicable Law or any health or safety recommendation or guideline of a Governmental Authority in respect of such COVID epidemic or pandemic (or variant thereof);

(J) except as provided in Section 14.1(A)(I), changes of Applicable Law, or

(K) labor strikes, slowdowns, work stoppages, or other labor disruptions.

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 notice describing the circumstances and impact of the Force Majeure no later than (a) thirty (30) Days after the occurrence of the Force Majeure, if the Force Majeure occurred prior to COD or (b) ten (10) Business Days after the occurrence of the Force Majeure, if the Force Majeure occurred on or after COD; (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. Failure to provide such notice within the required time period shall be deemed conclusive evidence that the claimed Force Majeure event either did not occur or did not impact Seller's ability to perform its obligations under this PPA in any fashion and this Seller shall not be entitled to relief under this Article 14.

#### 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, (i) prior to COD, Force Majeure affecting Seller continues for a period of ninety (90) consecutive Days or any one-hundred fifty (150) non-consecutive Days, or (ii) after COD, Force Majeure affecting Seller continues for a period of one-hundred eighty (180) consecutive Days or any two-hundred seventy (270) non-consecutive Days in any three consecutive Commercial Operation Years, Company may, at any time following the end of such period, 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, or (iii) after COD Force Majeure affecting Company continues for a period of three hundred and sixty-five (365) consecutive Days or any four hundred fifty-five (455) non-consecutive Days in any three consecutive Commercial Operation Years, Seller may, at any time following the end of such period, terminate this PPA upon notice to Company, without further obligation by either Party except as to costs and balances incurred prior to the effective date of such termination.

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

(A) 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:

1. 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.

2. 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:

a. subject to the satisfaction or waiver of the condition precedent set forth in Section 6.2, 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);;

b. 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;

c. 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;

d. 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.

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

1. 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.

2. 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."

3. Such Party is (i) 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 (ii) entering into this PPA solely for purposes related to its business as such.

(C) Seller further hereby covenants to Company throughout the Term that, in connection with its obligations under this PPA:

1. Seller shall deliver to Company the products and services required by this PPA free and clear of all liens, security interests, claims and encumbrances or any interest therein or thereto by any person.

2. Seller (a) is in compliance with, and requires its suppliers, subcontractors, vendors, and other business partners to comply with, the Uyghur Forced Labor Prevention Act, Pub. L. 117-78 (2021) (the "UFLPA"), Section 307 of the Tariff Act

of 1930, 19 U.S.C. §1307, and all other Applicable Laws prohibiting any form of convict, indentured, or forced labor, including forced or indentured child labor (collectively, the “Forced Labor Laws”), and (b) has adopted and implemented appropriate policies to ensure that it, and its suppliers, subcontractors, vendors, and other business partners, engage in regular audits or other comparable efforts to monitor ongoing compliance with the Forced Labor Laws and maintain any certifications required thereunder.

## **Article 16 - Insurance**

16.1 Evidence of Insurance. No later than commencement of construction and thereafter at least five (5) Days 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 Coverage to this PPA. Such certificates shall

- (A) name Company as an additional insured (except workers' compensation);
- (B) provide that Company shall receive thirty (30) Days prior written notice of non-renewal, cancellation of, or significant modification to any of the corresponding policies (except that such notice may be ten (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 & Poors 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 Effective Date 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 Coverage 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 energy storage plants of similar type, geographic location and capacity (or, if not enough data is available for energy storage plants, such advisor may use utilize data regarding electric generation projects as a proxy for energy storage). 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 proximately caused by

(A) a default under this PPA (including any breach by Seller of the Safety Requirements) by the Indemnifying Party;

(B) a violation or alleged violation of Applicable Laws by the Indemnifying Party; and

(C) 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 Indemnification; Company Remote Start of Facility. Should Company remotely start the Facility in accordance with this PPA, Seller shall indemnify, defend and hold Company harmless from and against all third-party claims, demands, lawsuits

(including citizen suits), losses, liabilities, fines, penalties, and expenses (including attorneys' fees) that proximately result therefrom.

#### 17.4 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.

#### 17.5 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.

17.6 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 Losses 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 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 ten (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 in connection with a Permitted Transfer, Seller shall not sell, exchange or otherwise transfer the Facility or any material portion thereof to any third party, nor shall Seller 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 or



delayed. Company shall have no obligation to provide any consent under this Article 19 unless:

1. Seller has complied with Sections 19.3, 19.4 and 19.5 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 energy storage facilities akin to the Facility, either directly, through its affiliates or through a Qualified Operator;
4. the transferee (together with its parents and affiliates) possesses an Investment Grade Credit Rating or other creditworthiness satisfactory to Company;
5. Seller has provided to Company at least thirty (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 the avoidance of doubt, in connection with 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.

(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, and may subcontract some or all of its duties under this PPA, upon notice to but without the consent of Company. Notwithstanding anything to the contrary in this PPA, Seller may also sell, exchange or otherwise transfer the Facility or any material portion thereof, and/or assign or otherwise transfer this PPA, to any person, without the consent of Company in connection with any Permitted Transfer, provided that Seller shall provide Company Notice of such Permitted Transfer no later than five (5) Business Days after the date of same.

(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) 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 PUCT and/or the

NMPRC. Any other assignment of this PPA by Company shall require the prior written consent of Seller, not to be unreasonably withheld or delayed.

(B) If an assignee of Company possesses 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 Right of First Offer ("ROFO").

(A) Except in connection with a Permitted Transfer, at any time after the Commercial Operation Date but before the end of 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 any class of voting and/or non-voting equity interests in Seller (excluding interests owned by tax equity investors) 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 any class of voting and/or non-voting equity interests in Seller's parent (excluding interests owned by tax equity investors) 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 sixty (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 and execute a PSA. If Company elects to purchase the Facility the PSA shall include the price and other terms set forth in the ROFO Notice and such other terms as are set forth in Exhibit L-2 - Facility PSA Provisions. If Company elects to purchase the specified equity interests, the PSA shall include the price and other terms set forth in the ROFO Notice and such other terms as are set forth in Exhibit L-3 – MIPSAs Provisions.

(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) to another buyer on terms that are not more favorable to such buyer than the terms offered to the Company 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 twelve (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 ninety (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 (12) 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 two hundred forty thousand dollars (\$240,000).

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

1. 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 transmission by Seller or any of its Affiliates of a draft letter of intent, memorandum of understanding, term sheet or similar document (or a revised version thereof) to an 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, term sheet 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, (ii) any transaction among Affiliates of Seller, (iii) any other Permitted Transfer, and/or (iv) any transaction for which Seller offers ROFO rights to Company under Section 19.3.

#### 19.5 Option.

(A) At any time during each of the periods that is within one hundred eighty (180) Days following any of (i) the sixth (6<sup>th</sup>) anniversary of COD, (ii) the tenth (10<sup>th</sup>) anniversary of COD, (iii) the fourteenth (14<sup>th</sup>) anniversary of COD and (iv) Scheduled Termination Date, Company (or an Affiliate) may give notice to Seller of Company’s (or such Affiliate) intent to purchase (i) the Facility from Seller (a “Facility Acquisition”) or (ii) all, but not less than all, of Ultimate Parent’s direct and indirect right, title and interest in the equity interests of Seller, and including, if applicable, Ultimate Parent’s direct and indirect right, title and interest in the tax equity partnership (the “TE Partnership”) that owns, directly or indirectly, equity interests in Seller (together, the “Equity Interest”) (an “Equity Interest Acquisition”) with such notice in either case referred to as an “Option Preliminary Exercise Notice”.

(B) As soon as practicable following delivery of an Option Preliminary Exercise Notice for a Facility Acquisition, the Parties shall appoint an independent appraiser experienced in appraising utility-scale battery storage facilities to determine the FMV of the

Facility. If the Parties cannot agree on the identity of the appraiser, the appraiser shall be selected by the Arbitration Service.

1. Seller shall provide to the appraiser full access to the Facility and the Site, to Seller's contracts, books and records, and to relevant personnel of Seller, during normal business hours. Such access shall include the right to conduct inspections, surveys and tests (including environmental testing of the Site and operating tests on the Facility) necessary or appropriate for the determination of FMV of the Facility.

2. Company shall pay all fees and costs of the appraiser.

3. The Parties shall direct the appraiser to use his/her/its best efforts to complete and deliver his/her/its appraisal to the Parties within two (2) months following his/her/its appointment and to keep all information obtained by appraiser from any investigations as Confidential Information subject to the provisions of Section 20.18.

(C) In the case of an Option Preliminary Exercise Notice for an Equity Interest Acquisition, Company will deliver, together with the Option Preliminary Exercise Notice, its calculation of the purchase price for the Equity Interest Acquisition utilizing the formula for such determination set forth in Exhibit L-1 – Equity Purchase Price Formula. The Parties' reasonably believe, based on all facts and circumstances at the time of executing this PPA, that the purchase price for the Equity Interest Acquisition so determined by such formula will not be less than the fair market value of the Equity Interest on the relevant date. All information obtained by Company from such investigations shall be deemed Confidential Information subject to Section 20.18.

(D) Following delivery of an Option Preliminary Exercise Notice, Seller shall provide to Company full access to the Facility and the Site, to Seller's contracts, books and records, and to relevant personnel of Seller, during normal business hours. Such access shall include the right to conduct lien searches, surveys, inspections and tests (including environmental testing of the Site and operating tests on the Facility) necessary or appropriate for due diligence review of the Facility. All information obtained by Company from such investigations shall be deemed Confidential Information subject to Section 20.18.

(E) All inspections, testing and access to the Facility and the Site by Company and the appraiser shall comport with all of Seller's policies governing the use, operation, and maintenance of the Facility, including health, safety and environmental requirements, and shall be conducted in a manner so as to minimize disruption in the operation of the Facility and to avoid any adverse economic impacts to Seller under this PPA.

(F) In the case of a Facility Acquisition or Equity Interest Acquisition, within sixty (60) Days following the determination of FMV as described above, Company may elect to purchase the Facility or Equity Interest (as applicable) from Seller (an "Option"). If

Company fails to notify Seller of Company's election within such 60-Day period, Company shall be deemed to have elected not to exercise the Option.

(G) In the case of a Facility Acquisition, the "Purchase Price" to be paid by Company for the Facility in connection with exercise of the Option shall be the greater of:

1. the sum of: (x) amount of Facility Debt (if any) as of the date of issuance of the Option Preliminary Exercise Notice, plus (y) if the relevant tax equity agreements allow the other members of the TE Partnership the option to purchase, at "fair market value" (as determined in those tax equity agreements) or a pre-determined price, the interest of the tax equity investor that has invested directly or indirectly in the Facility or Seller, then the amount of such purchase option price or, in any other case, the amount necessary to cause the after-tax internal rate of return of such tax equity investor's investment to equal the targeted rate of return under its tax equity agreements, or

2. the FMV of the Facility, as determined by the appraiser, *provided however*, if the resulting Purchase Price is materially lower or higher than the Facility's Book Value, then the Parties' shall negotiate in good faith an equitable adjustment to the Purchase Price.

(H) If Company exercises the Option, the Parties shall use Commercially Reasonable Efforts to negotiate and sign either:

1. A PSA for the Facility. The PSA shall include the terms and conditions set forth in Exhibit L-2 – Facility PSA Provisions, or

2. A PSA for the Equity Interest. The PSA shall include the terms and conditions set forth in Exhibit L-3 – MIPSAs Provisions.

(I) This Section 19.5 shall be specifically enforceable by Company, without bond and without the need to prove irreparable harm.

Seller shall cooperate, and cause its Affiliates to cooperate, in all respects reasonably necessary for Company to exercise its rights under this Section 19.5, and shall operate the Facility in the ordinary course of business following the date of issuance of an Option Preliminary Exercise Notice.

19.6 Memo of Option. In connection with the Parties' execution and delivery of this PPA, the Parties are executing and Company is recording a "Memorandum of Option" memorializing its Default Option rights under Section 12.1(E), its ROFO rights under Section 19.3 and its Option rights under Section 19.5.

## **Article 20 - Miscellaneous**

### **20.1 Notices**

(A) Notices required by this PPA shall be in writing addressed to the other Party at the addresses noted in Exhibit D – Notices and Contact Information, as either Party updates such addresses from time to time by notice to the other Party. A Notice shall be deemed to have been received as follows: (1) if it is delivered by email, when the recipient,

by an email sent to the email address for the sender stated in Exhibit D – Notices and Contact Information or by a notice delivered by another method in accordance with this Section 20.1(A), acknowledges having received that email, with an automatic “read receipt” not constituting acknowledgment of an email for purposes of this Section 20.1(A); and, (2) If it is delivered in writing, 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 and Tax Incentives.

(A) Company shall purchase all 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 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 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 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 Effective Date.

(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 performance of this PPA.

(C) Upon permanent cessation of energy storage by 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 PUCT/NMPRC.

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 and delivery of the products and services required by this PPA. Any amendment of

this PPA, or any waiver of any provision hereof, shall be evidenced by a writing signed by the Parties 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. 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 and Electronic Signatures. This PPA may be executed in counterparts, and each executed counterpart shall have the same force and effect as an original instrument. A manually signed copy of this PPA, or a copy of this PPA signed with an electronic or digital signature, delivered by e-mail shall be deemed to have the same legal effect as delivery of an original signed copy of this PPA. No legally binding obligation shall be created with respect to a Party until such Party has delivered or caused to be delivered a signed copy of this PPA.

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, and other relevant factual information about the relationship.

20.17 Exhibits. Either Party may change the information in Exhibit D – Notices and Contact Information 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:

- a. is publicly available as of the Effective Date, or becomes publicly available during the Term through no fault of the recipient Party;
- b. can be documented was independently developed by the recipient Party; and/or
- c. 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 the PUCT and/or the NMPRC, their staff, parties, intervenors, participants or consumer counsel in any regulatory or administrative proceedings before the PUCT and/or the NMPRC, or Confidential Information is disclosed to the PUCT and/or the NMPRC, their staff, or consumer counsel outside of any regulatory or administrative proceedings before the PUCT and/or the NMPRC, the disclosing Party shall submit such Confidential information in accordance with applicable PUCT and/or the NMPRC confidentiality rules and procedures, the PUCT and/or the NMPRC protective order or signed non-disclosure agreement.

(D) 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.

#### 20.19 Accounting Treatment.

(A) If and when Company reasonably determines that Company must consolidate financial information of Seller into Company’s financial statements under FASB ASC 810 or other accounting standard applicable to Company:

1. the Parties shall use Commercially Reasonable Efforts to amend this PPA and/or the Parties’ protocols for operation of the Facility to avoid such treatment, at the least possible cost to the Parties, consistent with the intent of this PPA to the extent possible; or
2. if such avoidance is not reasonably feasible, Seller shall provide to Company from time to time upon request such quarterly and annual financial information as may be needed for Company to comply with such standard, in such format and within such time frames as Company may reasonably request.

(B) If and when Company reasonably determines that Company must treat this PPA as a “finance lease” under FASB ASC 840 or other accounting standard applicable to Company, the Parties shall use Commercially Reasonable Efforts to amend this PPA and/or the Parties’ protocols for operation of the Facility to avoid such treatment, at the least possible cost to the Parties, consistent with the intent of this PPA to the extent possible, if so requested by Company.

*[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:*


**Wildcat Ranch Energy Storage, LLC**

By:   
\_\_\_\_\_  
Petter Skantze  
Vice-President



*Company:*

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

By:   
\_\_\_\_\_  
Adrian J. Rodriguez

President, Southwestern Public Service Company ;  
Xcel Energy Services, Inc., authorized signatory  
for Southwestern Public Service Company

## EXHIBIT A DEFINITIONS

The following terms shall have the meanings set forth herein:

"AC" shall have the meaning set forth in Section 1.1(D).

"Actual Damages" shall have the meaning set forth in Section 12.4(C).

"Affiliate" of any designated person or entity means any person or entity that directly or indirectly controls, is under the control of, or is under common control with, the designated person or entity by the power to direct or cause the direction of the management of the policies of designated person or entity, whether through ownership interest, by contract or otherwise. For the avoidance of doubt, NEP and NEOP and their respective subsidiaries shall at all times be deemed an Affiliate of the Seller, except in the event Seller or the Facility is sold or otherwise transferred to a third-party unaffiliated with NEE, NEP, or NEOP.

"AGC" or "Automatic Generation Control" means the equipment and capability of an electric energy storage facility automatically to adjust the charging and discharging 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; Dispatch and Availability Reporting; Data Collection, as such protocols may be modified from time to time in accordance with Section 10.8.

"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 Energy to be stored by the Battery Storage System. The AGC Set-Point is calculated by the EMCC AGC system and communicated electronically to the Facility via the SCADA System.

"Annual Throughput Limit" means 48,000 MWh.

"Applicable Law" means all laws, statutes, treaties, codes, ordinances, regulations, standards, 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, including, for the avoidance of doubt, electrical, building, fire, zoning, environmental, and occupational health and safety requirements.

“Arbitration Service” means Judicial Arbitration and Mediation Services, Inc. (aka JAMS).

“Availability” shall have the meaning set forth in Exhibit M – Battery Storage System Testing Protocols.

“Availability Notice” shall have the meaning set forth in Section 7.3(B).

“Back-Up Metering” shall have the meaning set forth in Section 5.5(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.

“Battery Storage System” means that portion of the Facility that is required to store energy using the Battery Units, including, without limitation, 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 and delivery of the foregoing.

“Battery Storage System Forced Outage” means any Outage of the Battery Storage System that is not an Excused Outage.

“Battery Storage System Nameplate Capacity” is as set forth in Section 3.2.

“Battery Storage System Operating Procedures” means those procedures applicable to the operation of the Battery Storage System, as developed by the Operating Committee in accordance with the procedure, and subject to the requirements, set forth in Exhibit O – Battery Storage System Operating Procedures.

“Battery Storage System Planned Outage” means a planned removal from service of the Battery Storage System, or some part thereof constituting not less than ten percent (10%) of the Battery Storage System Nameplate Capacity, that is required for inspection, or routine, preventive or corrective maintenance; provided that Battery Storage System Planned Outages during any Commercial Operation Year may not exceed ninety-six (96) hours.

“Battery Units” means the batteries, power electronic systems, enclosures and other equipment necessary for the Battery Storage System to store electricity at the Site and transmit such electricity upon command. The manufacturer and model number of the Battery Units will be identified on Exhibit C – Facility Description and Site Maps.

“Book Value” means *net book value*, determined in accordance with GAAP.

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

“Capacity Availability Factor” shall have the meaning set forth in Section 8.2(A).

“Capacity Payment Rate” shall have the meaning set forth in Exhibit J – Capacity Payment Rate

“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: (a) a transfer of a majority of the ownership interests in Seller or such owner; (b) 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 (c) a sale or conveyance of any direct or indirect ownership interest in Seller following which NEE (the “Ultimate Parent”) 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 any of the following, each a “Permitted Transfer”:

- (i) transactions exclusively 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 that, if Seller is already controlled by an Affiliate of NEE then
  - a. the authority, directly or indirectly, to control the Seller, remains with NEE (or its Affiliate, as applicable); and
  - b. a wholly-owned, indirect subsidiary of NEE or an Affiliate operates the Facility;
- (ii) any exercise by the Facility Lender of its rights and remedies under the Financing Documents;
- (iii) a change of control of NEE, NEECH or NEER;
- (iv) any change of economic and/or 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;
- (v) the direct or indirect transfer of shares of, or equity interests in, the Seller to or by a Facility Lender; or
- (vi) a transfer packaged with any of the following: (a) all or substantially all of the assets of NEE, NEECH, or NEER; (b) all or substantially all of NEER’s renewable energy generation portfolio; or (c) all or substantially all of NEER’s battery storage portfolio; provided, following any such transfer, (x) the entity that operates the Facility is (or contracts with) a Qualified Operator, and (y) Seller (or such Person) satisfies the applicable Security Fund requirements.

“Change of Law Expenditures” shall have the meaning set forth in Section 5.3(B).



“Charging Energy” means energy withdrawn from the Transmission Authority’s electrical system and delivered at the Point of Delivery used to charge the Battery Storage System and discharged at a later time.

“Charging Energy Price” means, if Company has joined a regional transmission organization or is participating in an organized market for which nodal prices can be determined, then the applicable nodal price per MWh in the day-ahead market as determined by Company in its sole discretion, or, if not, then the applicable price per MWh as determined by Company in its sole discretion pursuant to its cost calculator.

“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.

“COD Delay” shall have the meaning set forth in Section 12.2.

“COD Liquidated Delay Damages” shall have the meaning set forth in Section 12.2.

“COD Notice” shall have the meaning set forth in Section 4.5.

“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 Test” means the commercial operation test described in Exhibit M – Battery Storage System Testing Protocols.

“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; (c) is consistent with the terms in this PPA; and (d) 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.

“Company” shall have the meaning set forth in the introductory paragraph.

“Company Dispatched Test” shall have the meaning set forth in Section 5.6(D).

“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(A).

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

“COVID” means SARS-CoV-2 or COVID-19, and any evolutions or mutations thereof or related or associated epidemics, pandemic or disease outbreaks.

“CPD Delay” shall have the meaning set forth in Section 12.2.

“COD Liquidated Delay Damages” shall have the meaning set forth in Section 12.2.

“CPD Liquidated Delay Damages” shall have the meaning set forth in Section 12.2.

“Credit Rating” of any person or entity means the lowest rating assigned to such person or entity’s long-term debt or deposit obligations (unenhanced by third-party support) by Standard & Poor’s and Moody’s. If such person or entity 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 or entity by Standard & Poor’s or Moody’s.

“Critical Path Development Milestone” shall have the meaning set forth in Section 4.1(B).

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

“Day” means a calendar day.

“DC” shall have the meaning set forth in Section 1.1(D).

“Default Option” shall have the meaning set forth in Section 12.1(E)3.

“Default Option Preliminary Exercise Notice” shall have the meaning set forth in Section 12.1(E).

“Delivery Period” shall be the period during which the Facility is available to receive Charging Energy from, or deliver Discharging Energy to, Company, commencing at 12:01 am on the Commercial Operation Date and continuing until midnight on the Scheduled Termination Date, subject to early termination as provided in this PPA.

“Discharging Energy” means all Energy discharged by the Battery Storage System and delivered to the Point of Delivery.

“Discharging Energy Price” means, if Company has joined a regional transmission organization or is participating in an organized market for which nodal prices can be determined, then the applicable nodal price per MWh in the day-ahead market as determined by Company in its sole discretion, or, if not, then the applicable

price per MWh as determined by Company in its sole discretion pursuant to its cost calculator.

“Dispatch Notice” means the operating instruction, and any subsequent updates, given by Company to Seller, directing the Battery Storage System to (i) charge at a specified megawatt input or discharge at a specified megawatt output, and (ii) at a specified Ramp Rate. Dispatch Notices may be communicated electronically, via SCADA System signal, facsimile, telephonically or other verbal means. Telephonic or other verbal communications shall be documented (either recorded by tape, electronically or in writing) and such recordings shall be made available to both Company and Seller upon request. For the avoidance of doubt, a Dispatch Notice shall not exceed the Facility capabilities as set out in the most recent reported availability of the Battery Storage System as reported by Seller pursuant to Section III of Exhibit O – Battery Storage System Operating Procedures, *provided however* that the Dispatch Notice shall ultimately be subject to the scheduling limitations of the Market Operator.

“Dispatch Parameter” means, as applicable, the (i) the megawatt input for charging specified in a Dispatch Notice; and (ii) the megawatt output for discharging specified in a Dispatch Notice.

“Dispute” shall have the meaning set forth in Section 13.1(A).

“Dispute Notice” shall have the meaning set forth in Section 13.1(A).

“Effective Date” shall have the meaning set forth in the introductory paragraph.

“Electric Metering Devices” means revenue quality meters, metering equipment and/or data processing equipment used to measure, record and transmit data with respect to the to the Charging Energy delivered to and the Discharging Energy delivered from the Battery Storage System, including metering current transformers and metering voltage transformers. The Electric Metering Devices must transmit to Company five-minute revenue quality meter data.

“Emergency” means any event or occurrence during the Term that results in the declaration of an Emergency Condition under and as defined in the Interconnection Agreement.

“Energy” means all electrical energy stored and discharged by the Battery Storage System during the Term.

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

“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.

“Equity Interest” shall have the meaning set forth in Section 19.5(A).

“Equity Interest Acquisition” shall have the meaning set forth in Section 19.5(A).

“Equity Purchase Price” shall have the meaning set forth in Exhibit L-1.

“ERO” means the Electric Reliability Organization certified by FERC pursuant to Section 215 of the Federal Power Act, which as of the Effective Date is NERC, or any successor organization. For purposes of this PPA, ERO also includes the Midwest Reliability Organization (MRO).

“Escrow Account” shall have the meaning set forth in Section 11.3(B).

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

“Excused Outage” means any Outage of the Battery Storage System resulting from: (i) a Battery Storage System Planned Outage; (ii) Force Majeure or Emergency; (iii) a breach of this PPA by Company; (iv) insufficient stored energy not caused by any act or omission of Seller; (v) an Outage resulting from a request by Company; (vii) any Outage where Seller failed to comply with a dispatch that was not in accordance with the Battery Storage System Operating Procedures.

“Facility” means the Battery Storage System, and all equipment necessary to interconnect to the Transmission Authority’s System, all as further described in Exhibit C – Facility Description and Site Maps, including Seller’s rights to the Site and all of the following: the Battery Units, buildings, 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 and delivery of the capacity and energy subject to this PPA.

“Facility Acquisition” shall have the meaning set forth in Section 19.5(A).

“Facility Debt” means the obligations of Seller or its Affiliates to any lender or tax equity investor pursuant to the Financing Documents, including 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, equity contribution agreements, mortgages, deeds of trust, interest rate exchanges, swap agreements and other documents relating to the development, bridge, construction, back-leverage or permanent debt financing and/or tax equity 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.

“FMV” means the “fair market value.”

“Force Majeure” shall have the meaning set forth in Section 14.1.

“Forced Labor Laws” shall have the meaning set forth in Section 15.B(2).

“Forced Outage” means any condition at the Facility that requires the immediate and unplanned removal of at least ten percent of the capacity of the Battery Storage System from service, or that results in a material deviation from the Guaranteed Performance identified in Exhibit M-1 – Battery Storage System Guaranteed Performance Levels, 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.

“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 and storage 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 and storage 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 but are not limited to NERC, the ERO, the Market

Operator (if any), an applicable PUC, the Transmission Authority, FERC, and successor organizations. For the avoidance of doubt, Company is not a Governmental Authority for purposes of this PPA.

“Grid Charging Capability” shall have the meaning set forth in Exhibit M – Battery Storage System Testing Protocols.

“GSU Transformer” means a power transformer that increases the AC voltage of the electrical energy produced by the Facility to the AC voltage at which such electrical energy is delivered to Company at the Interconnection Point.

“GSU Transformer Failure” means the failure of a GSU Transformer that requires the replacement or substantial remanufacturing of such GSU Transformer to return to service.

“Guaranteed Maximum Charging Rate” shall have the meaning set forth in Exhibit M-1 – Battery Storage System Guaranteed Performance Levels.

“Guaranteed Maximum Discharging Rate” shall have the meaning set forth in Exhibit M-1 – Battery Storage System Guaranteed Performance Levels.

“Guaranteed Minimum Charging Time” shall have the meaning set forth in Exhibit M-1 – Battery Storage System Guaranteed Performance Levels.

“Guaranteed Minimum Discharging Time” shall have the meaning set forth in Exhibit M-1 – Battery Storage System Guaranteed Performance Levels.

“Guaranteed Performance” shall have the meaning set forth in Exhibit M-1 – Battery Storage System Guaranteed Performance Levels.

“Guaranteed Response Time” shall have the meaning set forth in Exhibit M-1 – Battery Storage System Guaranteed Performance Levels.

“Guaranteed Round Trip Efficiency” shall have the meaning set forth in Exhibit M-1 – Battery Storage System Guaranteed Performance Levels.

“Guaranteed Storage Capacity” shall have the meaning set forth in Exhibit M-1 – Battery Storage System Guaranteed Performance Levels.

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

“House Power” shall have the meaning set forth in Section 1.2(B).

“Indemnified Party” shall have the meaning set forth in Section 17.1.

“Indemnifying Party” shall have the meaning set forth in Section 17.1.

“Independent Engineer” means a qualified and independent third-party engineering firm.

“Interconnection Agreement” 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 temporary or provisional interconnection agreement or any agreement where the Transmission Provider may limit the operational output of the Facility.

“Interruption of Firm Transmission Service” shall have the meaning set forth in Section 8.2(A).

“Indemnified Party” shall have the meaning set forth in Section 17.1.

“Indemnifying Party” shall have the meaning set forth in Section 17.1.

“Interconnection Facilities” means those facilities designated in the Interconnection Agreement for the direct purpose of interconnecting the Facility 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 and Site Maps to this PPA.

“Interconnection Point” means the physical point within the operational authority of the Transmission Authority as specified in the Interconnection Agreement as project Lost Draw Substation (115 kv), 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 a Credit Rating of both (a) Baa3 or higher by Moodys, and (b) BBB- or higher by Standard & Poors.

“Issuer” shall have the meaning set forth in Section 11.3(A).

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

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

“Letter of Credit” shall have the meaning set forth in Section 11.3(A).

“Liquidated Delay Damages” shall have the meaning set forth in Section 12.2.

“Local Provider” shall have the meaning set forth in Section 1.2(B).

“Losses” shall have the meaning set forth in Section 17.1.

"Maintenance Schedule" shall have the meaning set forth in Section 10.2.

"Market Operator" means the entity that instructs market participants and/or generators to regulate generation and energy storage 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.

"Maximum Charging Rate" shall have the meaning set forth in Exhibit M – Battery Storage System Testing Protocols.

"Maximum Discharging Rate" shall have the meaning set forth in Exhibit M – Battery Storage System Testing Protocols.

"Minimum Charging Time" shall have the meaning set forth in Exhibit M – Battery Storage System Testing Protocols.

"Minimum Discharging Time" shall have the meaning set forth in Exhibit M – Battery Storage System Testing Protocols.

"MIPSA" means "member interest purchase and sale agreement."

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

"NEE" means NextEra Energy, Inc., a Florida corporation.

"NEECH" means NextEra Energy Capital Holdings, Inc., a Florida corporation.

"NEER" means NextEra Energy Resources, LLC, a Delaware limited liability company.

"NEOP" means NextEra Energy Operating Partners, LP.

"NEP" means NextEra Energy Partners, LP.

"NERC" means the North American Electric Reliability Corporation or any successor organization.

"Network 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 a network resource as defined by the Transmission Tariff, and



be eligible to deliver the Facility's output in a manner comparable to that in which the Transmission Authority integrates its generating facilities to serve native load customers.

"NMPRC" means the New Mexico Public Regulatory Commission or any successor agency.

"Operating Committee" means representative(s) each from Company and Seller, pursuant to Section 10.8.

"Operating Day" means a day within the Delivery Period on which the Battery Storage System operates.

"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.

"Option" means Company's rights to purchase the Facility on the terms and conditions set forth in Section 19.5.

"Option Preliminary Exercise Notice" shall have the meaning set forth in Section 19.5(A).

"Outage" means any period during which the capacity of the Battery Storage System is unavailable for any reason as reported by the SCADA system in accordance with Exhibit O – Battery Storage System Operating Procedures.

"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.

"Performance Criteria" means the performance test elements set forth in Exhibit M – Battery Storage System Testing Protocols.

"Permit" shall have the meaning set forth in Section 4.3.

"Permitted Transfer" is defined in the definition of "Change of Control."

"Periodic Test" shall have the meaning set forth in Section 5.6(B).

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

"PI System" means the "plant information" system for the Facility or other data collection systems, as described and implemented in Exhibit I - AGC Protocols; Dispatch and Availability Notices; Data Collection; Technical Specifications.

“Point of Delivery” means the physical point within the operational authority of Transmission Authority at which (i) Seller makes available and delivers to Company the Energy being provided by Seller to Company under this PPA and (ii) Company makes available and delivers to Seller the Charging Energy being provided by Company to Seller under this PPA. The Point of Delivery is specified in Exhibit C – Facility Description and Site Maps to this PPA.

“PPA” shall have the meaning set forth in the introductory paragraph.

“PSA” means purchase and sale agreement.

“PUC Approval” shall have the meaning set forth in Section 6.1(D).

“PUCT” means the Public Utility Commission of Texas or any successor agency.

“Purchase Price” shall have the meaning set forth in Section 19.5(G).

“Qualified Operator” means an operator of battery energy storage systems that has sufficient experience to successfully operate the Facility, including a minimum of one (1) year of experience in the battery energy storage business, and owns, controls or operates a minimum of 20 MW and 40 MWh of battery energy storage capacity in aggregate with at least one facility that has at least 5 MW and 10 MWh of battery energy storage capacity.

“Ramp Rate” shall have the meaning set forth in Exhibit M – Battery Storage System Testing Protocols.

“Recovery Plan” means, with respect to Seller’s failure to achieve a Critical Path Development Milestone under Section 4.1(B), a recovery plan (confirmed by a qualified consultant, vendor or expert reasonably acceptable to Company) indicating in sufficient detail, to Company’s reasonable satisfaction, the steps to be taken by Seller to achieve the missed Critical Path Development Milestone by a date certain, which date shall be the earliest reasonable date for achievement of the Critical Path Development Milestone, but shall not exceed ninety (90) days following the completion deadline set forth in Section 4.1(B) for such Critical Path Development Milestone. If the date certain identified in a Recovery Plan is later than the completion deadline(s) for any other Critical Path Development Milestone(s) (as those deadlines are set forth in Section 4.1(B)), then such Recovery Plan shall also describe the impacts, if any, to such other Critical Path Development Milestone(s); *provided, however*, that Seller shall remain responsible for achieving such other Critical Path Development Milestone(s), as set forth in Section 4.1(B), Section 12.2(A), and Section 12.2(B).

“Repair Plan” shall have the meaning set forth in Section 10.3(A).

“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, 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 Energy that was not delivered under this PPA during such hour;
- “C” = 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
- “D” = the sum of all payments avoided by Company as a result of Seller’s breach, for such hour, including avoided payments under Article 8.

“Response Time” shall have the meaning set forth in Exhibit M – Battery Storage System Testing Protocols.

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

“Round Trip Efficiency” or “RTE” shall have the meaning set forth in Exhibit M – Battery Storage System Testing Protocols.

“Round Trip Efficiency Adjustment” shall have the meaning set forth in Section 8.4.

“Safety Requirements” means those requirements set forth in Exhibit P – Safety Requirements, in addition to any other safety-related practices required by Applicable Law and Good Utility Practice.

“SCADA System” or “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” shall have the meaning set forth in the introductory paragraph.

“Seller Initiated Test” shall have the meaning set forth in Section 5.6(A).

“Site” means the parcel of real property on which 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 and Site Maps to this PPA.

“State of Charge” or “SOC” means the amount of electric energy in a Battery Unit expressed as a percent of the Storage Capacity.

“Storage Capacity” shall have the meaning set forth in Exhibit M – Battery Storage System Testing Protocols.

“Successful Repair” shall have the meaning set forth in Section 10.3(A).

“Tax Credit Legislation” means any federal or state legislation enacted into law that provides federal or state income tax credits, direct payment or other monetary incentives, for owners of facilities that utilize equipment which receives, stores, and delivers electric energy using batteries or other energy storage technologies.

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

“TE Partnership” shall have the meaning set forth in Section 19.5(A).

“Technical Dispute” shall have the meaning set forth in Section 13.1(A).

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

“Test” shall have the meaning set forth in the first paragraph of Exhibit M – Battery Storage System Testing Protocols.

“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) Southwestern Public Service Company operating under and in accordance with its Transmission Tariff, and (ii) all entity(ies) 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 Tariff” means the applicable Open Access Transmission Tariff of the Transmission Authority, as amended from time to time.

“UFLPA” means the Uyghur Forced Labor Prevention Act, Pub. L. 117-78 (2021).

“Ultimate Parent” shall have the meaning set forth in the definition of Change of Control.

\* \* \* \* \*

**EXHIBIT B**  
**CONSTRUCTION MILESTONES**

**Construction**

<u>Milestone</u>	<u>Outcome</u>
6/1/2024	Seller and all required counterparties shall have executed such Construction Contracts as are needed to construct the Facility
10/31/2025	Seller and the Transmission Authority shall have executed the Interconnection Agreement.
1/31/2025	Commencement of construction of the Facility.
12/31/2024	Ordering of Battery Units.
5/30/2024	Seller shall have laid the foundation for all Facility buildings, energy storage facilities and step-up transformation facilities.
10/31/2025	The step-up transformer and Battery Units shall have been delivered and installed at the Site.
10/31/2025	Seller's Interconnection Facilities shall have been constructed, and such facilities are capable of being energized.
10/31/2025	Start-up testing of the Facility commences.

## EXHIBIT C

### FACILITY DESCRIPTION AND SITE MAPS

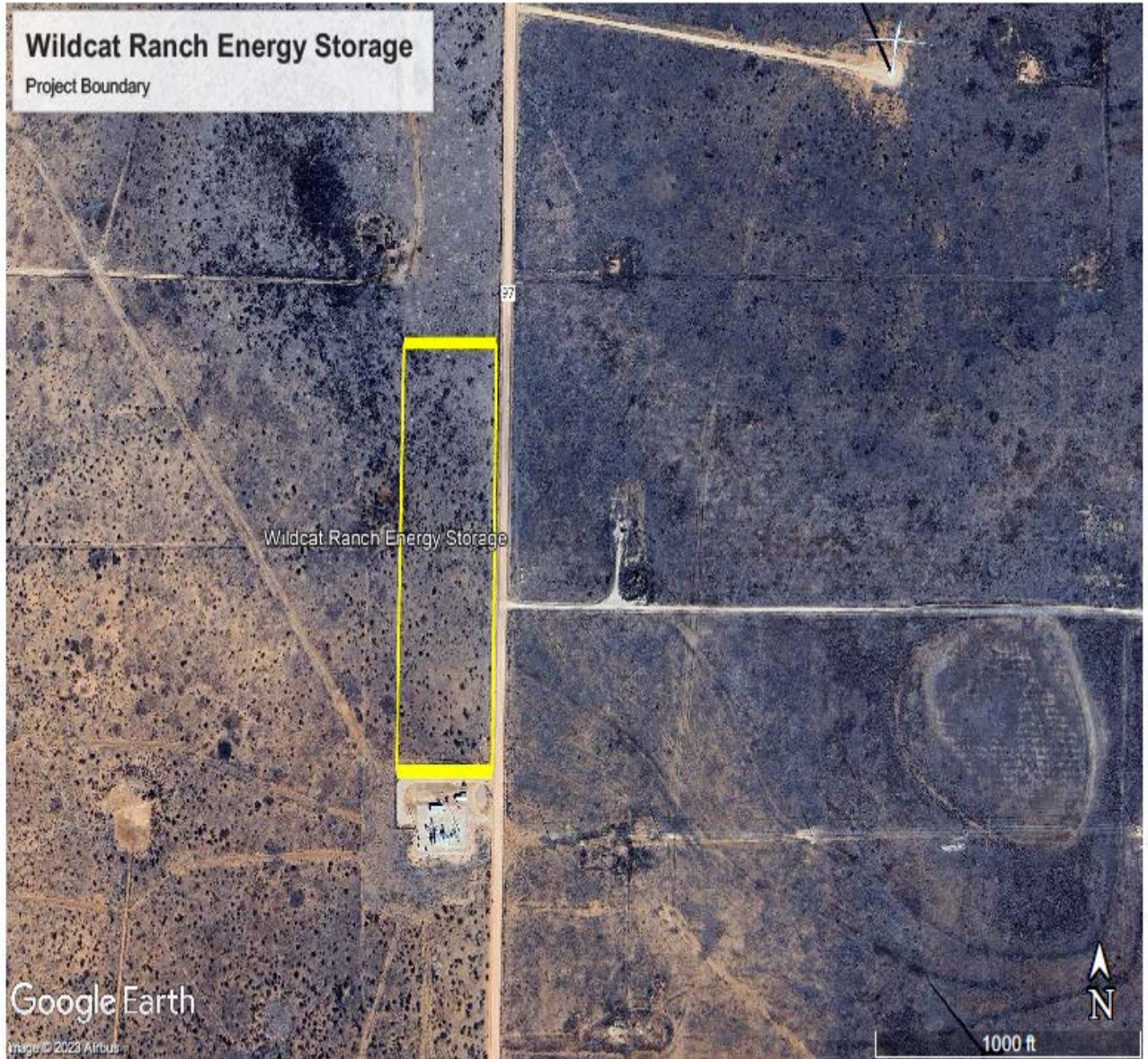
The Facility shall be located on the Site and shall be identified as Seller's Wildcat Ranch Energy Storage Facility. Maps and one-line diagrams of the Facility and associated equipment are included as part of this Exhibit, as may be updated from time to time.

The address of the Facility is Cochran County, TX (33,523328, -102.878164).

The Facility and the Battery Storage System must include the following specific components:

- \* major equipment including batteries and inverters;
- \* 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; Dispatch and Availability Reporting; Data Collection;
- \* ramping capability, voltage control (on and off peak) and frequency control. pursuant to NERC guidelines/requirements.
- \* capability of sending real time data and OPC interface to Company's PI System;
- \* 48 MW AC / 192 MWh (4-hour) battery.
- \* a Point of Delivery located at Lost Draw Substation (115 kv);

The proposed Facility includes the components that are equivalent to, or better than, the following: Samsung, CATL, Tesla, Panasonic, BYD, Lishen, Kore, Saft, SK, LG, Gotion, Freyer, or Hithium.





**EXHIBIT D**  
**NOTICES AND CONTACT INFORMATION**

<u><b>Company</b></u>	<u><b>Seller</b></u>
<p><b>Notices:</b>  Director, Purchased Power  Xcel Energy Services Inc.  1800 Larimer Street, Suite 1000  Denver, CO 80202  E-mail:  PurchasedPowerNotices@xcelenergy.com</p> <p><i>with a cc to:</i>  Purchased Power Consultant  Xcel Energy Services Inc.  1800 Larimer Street, Suite 1000  Denver, CO 80202  E-mail:  PurchasedPowerNotices@xcelenergy.com</p>	<p><b>Notices:</b>  Director, Business Management  Wildcat Ranch Energy Storage, LLC  700 Universe Blvd.  Juno Beach, FL 33408  Email: <a href="mailto:dl-nextera-southregion@nexteraenergy.com">dl-nextera-southregion@nexteraenergy.com</a></p> <p><i>with a cc to:</i>  Vice President &amp; General Counsel Wildcat  Ranch Energy Storage, LLC  700 Universe Blvd.  Juno Beach, FL 33408  Email: <a href="mailto:Mitch.Ross@nee.com">Mitch.Ross@nee.com</a>; <a href="mailto:NEER-General-Counsel@nexteraenergy.com">NEER-General-Counsel@nexteraenergy.com</a></p>
<p><b>Operating Committee Representative:</b>  Director, Purchased Power  Xcel Energy Services Inc.  1800 Larimer Street, Suite 1000  Denver, CO 80202  E-mail:  PurchasedPowerNotices@xcelenergy.com</p> <p><b>Alternate:</b>  Purchased Power Consultant  Xcel Energy Services Inc.  1800 Larimer Street, Suite 1000  Denver, CO 80202  E-mail:  PurchasedPowerNotices@xcelenergy.com</p>	<p><b>Operating Committee Representative:</b>  George Schureck, Director  Wildcat Ranch Energy Storage, LLC  700 Universe Boulevard  Juno Beach, FL 33408  Phone: (561) 694-4532  Email:  <a href="mailto:george.schureck@nexteraenergy.com">george.schureck@nexteraenergy.com</a></p> <p><b>Alternate:</b>  Tricia Hale, Director  Wildcat Ranch Energy Storage, LLC  700 Universe Boulevard  Juno Beach, FL 33408  Phone: (561) 304-5229  Email: <a href="mailto:tricia.hale@nee.com">tricia.hale@nee.com</a></p>
<p><b>Real-Time Contact Information</b>  <u>EMCC</u> (24 hour coverage):  Phone: 303-571-7426  E-mail:  <a href="mailto:dlrtelectricmarketerssps@xcelenergy.com">dlrtelectricmarketerssps@xcelenergy.com</a></p>	<p><b>Real-Time Contact Information</b>  Renewable Operations Control Center  (ROCC) (24-hour coverage):  Phone: (561) 694-3636  Alternate: (866) 375-3737</p>

<p><u>Transmission Ops:</u> Phone: 303-273-4811 E-mail: <a href="mailto:AGCOpr@xcelenergy.com">AGCOpr@xcelenergy.com</a></p>	
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**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
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	with these requirements through the use of a qualified self-insurance plan.
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<b>Type of Insurance</b>	<b>Minimum Limits of Coverage</b>
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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	Replacement value 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.

Environmental Liability	Impairment \$5,000,000 each occurrence.
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All-Risk Property insurance covering physical loss or damage to the Facility	Full replacement value 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 full replacement value.

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**

Federal Energy Regulatory Commission (FERC) Market-based rate authority  
Federal Energy Regulatory Commission (FERC) Exempt Wholesale Generator  
Status under Public Utility Holding Company Act of 2005 (PUHCA)  
Texas Commission on Environmental Quality General Construction Stormwater  
Permit  
Texas Department of Transportation- Utility Installation and Access Driveway  
Permit  
Texas Commission on Environmental Quality Air Quality Standard Permit  
Texas Department of Transportation- Oversize/Overweight Permit  
Building Permits  
Cochran County Road Use Agreement

**EXHIBIT G**  
**FORM OF LETTER OF CREDIT**

[LETTERHEAD OF ISSUING BANK]

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

Beneficiary: Southwestern Public Service Company  
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" ("Sight Draft"), drawn on Issuer and accompanied by this Letter of Credit. All Sight Drafts must be signed on behalf of Beneficiary, and the signator 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 twenty-four (24) hours after presentment of any Sight Draft. Payment shall be made in U.S. Dollars with Issuer's own funds in immediately available funds.

Issuer will honor any 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 Battery Storage 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 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." Such transfer will be effected at no cost to Beneficiary. Any transfer fees assessed by Issuer will be payable solely by Applicant, and the payment of any transfer fees will not be a condition to the validity or effectiveness of the transfer of this Letter of Credit.

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**

**SIGHT DRAFT**

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: \_\_\_\_\_

Southwestern Public Service Company, a  
New Mexico corporation

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: \_\_\_\_\_

Southwestern Public Service Company, a New Mexico corporation

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 Southwestern Public Service Company ("Company"), in connection with the performance by \_\_\_\_\_, a \_\_\_\_\_ [limited liability company] ("Seller") of a Battery Storage Energy Purchase Agreement dated \_\_\_\_\_, 20\_\_ between Seller and Company (the "PPA").

- RECITALS -

A. Seller proposes to construct, own and operate Battery Storage System having a Battery Storage System 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 electrical energy from the Facility on the terms and conditions set forth therein.

C. Seller is controlled by 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. This Guaranty shall survive termination of the PPA to the extent necessary to enforce and complete the rights, duties and obligations of Company and Seller thereunder.

2. Maximum Liability. Notwithstanding anything herein to the contrary, Guarantor's maximum liability under this Guaranty shall be limited to \_\_\_\_\_ dollars (US\$ \_\_\_\_\_) plus costs of collection under Section 10 below.

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 immediately 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 such time as all of the Obligations have irrevocably been discharged in full, 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;

(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.

10. Collection Costs. Guarantor shall pay to Company, upon demand, and in addition to the maximum liability set forth in Section 2 hereof, all reasonable 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 [*insert home state of Company*] without regard to the principles of conflicts of law thereof. Venue for any dispute hereunder shall be as set forth in Section 13.5 of the PPA.

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

(b) if to Guarantor: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

*Attn:*

*with a copy to:* \_\_\_\_\_

*Attn:*

or to such other address (es) as the person to whom notice is given may have previously furnished to the others in writing in the manner set forth above.

IN WITNESS WHEREOF, Guarantor has caused this Guaranty to be duly executed and delivered to Company as of the day and year first above written.

**[Name of Guarantor]**

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

Name:

Title:

STATE OF \_\_\_\_\_ )

) ss.

COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_, by \_\_\_\_\_, as \_\_\_\_\_ of \_\_\_\_\_.

Witness my hand and official seal.

My commission expires: \_\_\_\_\_.

( S E A L )

\_\_\_\_\_

Notary Public

**EXHIBIT I**  
**AGC PROTOCOLS; DISPATCH AND AVAILABILITY REPORTING; DATA  
COLLECTION**

**AGC**

1. **AGC Communications between Company and Seller.** Company will receive and send AGC Set-Point and related data over a secure 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.

<u>Facility</u>			
<u>Description</u>	<u>Units</u>	<u>Description</u>	<u>Units</u>
Actual Real Power	MW	AGC Set-Point (echo)	MW
Actual Reactive Power	MVar	Actual Real Power	MW
Average Voltage (at high voltage interconnection)	kV	Actual Reactive Power	MVar
		AGC Status	Remote/Local

2. **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 changes, these protocols will be generally bound by the manufacturers’ specifications for the equipment that Seller has chosen for the Facility. Once the Facility has reached the AGC Set-Point, the Facility output may not vary from the AGC Set-Point by more than 2% on average as measured during a 5-minute period.
3. **Backup Communications.** In the event of an AGC failure, Company and Seller shall communicate via telephone in order to correct the failure.

\* \* \* \* \*

### EXHIBIT J

#### CAPACITY PAYMENT RATE

This Exhibit J sets forth the applicable rates for energy and capacity.

*This entire Exhibit shall be deemed Confidential Information subject to Section 20.18.*

Commercial Operation Year (Year)	Capacity Payment Rate (\$/kW-month)
[REDACTED]	SECRET BEGINS
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
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[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]



## EXHIBIT K

### LENDER CONSENT PROVISIONS

In the event Seller 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 in any material respect, 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 Event of Default by Seller, Company shall not terminate the PPA unless it has first given notice of such Event of Default to the Facility Lender and has given the Facility Lender the same cure period afforded to Seller under Article 12 of the PPA, plus an additional 30 Days beyond Seller's cure period to cure such 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 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; *provided*, that the total cure period shall in no event exceed one-hundred eighty (180) Days.
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. Upon any foreclosure, deed-in-lieu or other exercise of the rights and remedies of the Facility Lender that results in a successor owner or operator of the Facility, the Facility Lender shall require and cause the successor (i) to assume all of Seller's prospective obligations under the PPA, (ii) to cure any then-existing defaults by Seller that are capable of cure by performance or the payment of money damages, (iii) to have substantial experience in the operation of power energy storage facilities akin to the Facility, either directly, through its affiliates or through an operator acceptable to Company, and (iv) to enjoy (together with its parents and affiliates) an Investment Grade Credit Rating or other creditworthiness satisfactory to Company. Except for the foregoing, the Facility Lender shall not be obligated to perform or be liable for any obligation of Seller under the PPA.
6. Upon any rejection or other termination of the PPA in connection with any bankruptcy or insolvency of Seller, 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-1 – EQUITY PURCHASE PRICE FORMULA**

The “Equity Purchase Price” shall be determined in a manner substantially similar to the determination of the Purchase Price in Section 19.5(G), modified as required to take into account the structure of the sale as an equity purchase.

## **EXHIBIT L-2 FACILITY PURCHASE AND SALE AGREEMENT (“PSA”) PROVISIONS**

Any PSA executed to implement exercise of Company’s ROFO or Option rights will include provisions substantially as follows:

### **Type of Transaction**

The transaction will be structured as an asset acquisition. Company (“Buyer”) shall purchase and Seller shall sell 100% of the assets (“Assets”) of a completed, commercially operational battery storage facility with nameplate capacity of [XX] MW AC and all facilities and other assets and rights relating to the project (the “Project”), free and clear of all encumbrances and liabilities, except for permitted encumbrances and assumed liabilities as defined in the PSA.

### **Purchase Price and Payment Terms**

Buyer shall pay Seller the Purchase Price, as determined pursuant to Section 19.5(G) of this PPA.

Buyer shall be entitled to withhold from the payment of the Purchase Price up to [\$XXX] in the event of certain breaches of Seller’s representations, warranties or covenants pending Seller’s cure of any such breach, with Buyer’s aggregate holdback amount not to exceed 20% of the Purchase Price. The Parties shall negotiate the holdback period.

Seller shall be responsible for all taxes relating to the pre-closing period and all transfer taxes and any sales, use or other taxes related to the purchase and sale of the Assets and any purchase or conveyance of real or personal property to be used in the Project.

### **Seller’s Closing Deliverables:**

Upon the terms and conditions to be defined within the PSA, the obligations of Buyer to consummate the transactions contemplated are subject to the satisfaction by Seller of certain closing conditions, including:

- Transfer of all of the Assets of the Project, which include all rights and title to assets necessary for the commercial operation of the Project, to Buyer or its designated affiliate.
- An opinion of legal counsel that each material discretionary permit required for the Project has been obtained and is valid, binding, in full force and effect and non-appealable.
- Evidence that any liens on the Project, real property or any other assets or interests of the Project have been removed as of the closing other than permitted liens which have been scheduled or liens which have been scheduled and bonded to Buyer’s reasonable satisfaction.
- Certain conditions do not exist at the time of closing including, but not limited to, the existence of a material adverse effect. A material adverse effect would be defined in the PSA and would include, in addition to other terms, a change in tax

law that could have a negative impact on Buyer's business or the economic viability of the Project.

- All certifications, affidavits, approvals and permits required to demonstrate satisfaction of all representations, warranties, and covenants made by Seller pertaining to the closing.

### **Buyer's Closing Deliverables:**

Upon the terms and conditions to be defined within the PSA, the obligations of Seller to consummate the transactions contemplated are subject to the satisfaction by Buyer of certain closing conditions, including:

- Delivery of the Purchase Price.
- All certifications, affidavits, approvals and permits required to demonstrate satisfaction of all representations, warranties, and covenants made by Buyer pertaining to the closing.

### *Section 1.01 Required Approvals*

The transaction is subject to obtaining specified approvals, authorizations, or orders, including but not limited to the following (to the extent necessary):

- Approval of the board of directors of Buyer and the board of directors or similar governing body of Seller shall be obtained prior to execution of the PSA.
- Third party consents.
- Applicable governmental and regulatory approvals prior to closing, including to the extent necessary, any applicable state agencies or commissions regulating utility activities and any government agencies having approval, consent or authority over the transactions contemplated by the PSA, including but not limited to the PUCT, the NMPRC, the IRS, the FERC, the Department of Justice, the US Fish and Wildlife Service and the FAA.

### **Representations and Warranties**

The transaction is subject to customary representations and warranties to be made by Buyer and Seller as of the execution date or the effective date of the PSA and the closing thereunder, including the following:

- Corporate existence and powers – Seller is a [limited liability company] validly existing and in good standing and has the power and authority to conduct its business as now conducted.
- Authority (execution and delivery)
- No conflicts - the transaction does not create any conflicts.
- Consents and approvals – no consent, approval or authorization is required in connection with the execution and performance of the PSA.
- Legal proceedings of Buyer– there are no legal proceedings pending, or to Buyer's knowledge, threatened in writing, against Buyer, that affect the consummation of the transaction contemplated by the PSA.

- Legal proceedings of Seller and the Project – there are no legal proceedings pending, or to Seller’s knowledge, threatened in writing, against the Seller or the Project or affecting Seller’s ability to sell the Project.
- Sufficient funds – Buyer has available, or will maintain sufficient sources of, funds to complete the transaction.
- Compliance with Laws – Seller is in compliance with all laws applicable to the Seller, Project and the transactions contemplated by the PSA.
- Environmental – Seller and its affiliates have no environmental liabilities and are in compliance with environmental requirements. Seller and its affiliates have not received any notice of an alleged violation of environmental law pertaining to the Project from any governmental entity. There are no facts, circumstances, conditions or occurrences relating to the Project that could reasonably be expected to form the basis of a claim, requirement or obligation imposed by any governmental entity under any environmental law on Seller or its affiliates.
- Contracts – Schedule of material contracts binding on the Seller or to which the Project is subject and Seller has furnished to Buyer true, correct and complete copies of all material contracts. Each scheduled contract, including but not limited to the Generator Interconnection Agreement, is in full force and effect and neither Seller nor the Project is in material violation or default under such contracts.
- Land Contracts – The land contracts and real property owned by the Project are in full force and effect, and shall comprise all of the real property interests necessary in connection with the interconnection, operation and maintenance of the Project, all in accordance with all laws, and are sufficient to enable the Project to be commercially operable as contemplated in the PSA, including legal and physical ingress and egress rights to and from public right-of-way for operation, and maintenance of the Project.
- Data – Seller has delivered to Buyer true, correct and complete copies of all battery data related to the Project.
- Permits - All permits required to own, operate and maintain the Project are held by Seller or an Affiliate, are final and non-appealable, are scheduled, and Seller has obtained and furnished to Buyer true, correct and complete copies of such permits. Such permits are in full force and effect and are legal, valid, binding and enforceable in accordance with their respective terms.
- Title – Seller or an Affiliate is in possession of and has good and marketable title to the Project free and clear of all encumbrances, except for permitted encumbrances. Seller and its Affiliates have no legal obligation or non-binding agreement in principle with any other person to sell or affect a sale of all, or any portion of, the Project.
- Other representation and warranties customary in a transaction of this nature, including those pertaining to taxes, title, finders, intellectual property, brokers and insurance.

### **Termination Provisions**

The PSA may be terminated prior to the closing upon written notice by the terminating party (as described below) in the event of certain occurrences, including:

- By either party, in the event the closing has not occurred by [TBD], regardless of the reason for such termination, provided that the terminating party is not in breach of the PSA.
- By either party in the event regulatory approvals for the transaction are not obtained on terms reasonably acceptable to Buyer.
- By Buyer in the event any authority has issued an order or taken any other action that restrains, enjoins, or otherwise prohibits the consummation of the transactions contemplated by the PSA, and such order or action is nonappealable.
- By Buyer in the event of material breach of the PSA by Seller.
- Security: Seller shall fund and maintain security in favor of Buyer, or a parent guaranty acceptable to Buyer, to secure Seller's obligations under the PSA including the indemnification provision below. The Parties shall negotiate the security period and amount.

### **Indemnification**

Each party shall indemnify and hold harmless the other party and its respective employees, representatives, officers, directors and agents from and against any and all damages arising out of the result of any breach or violation of any representation, warranty, covenant, inaccuracy within the PSA, or any liability not assumed as part of the PSA, or any fraud, willful misconduct, or negligence in performance of this PSA. Seller shall indemnify Buyer for any environmental (including hazardous material) claims arising prior to the closing date other than environmental claims resulting from Buyer's negligence. No claim for indemnification shall be brought against the indemnifying party until the total damages for which such party is liable exceeds in the aggregate a threshold amount of [\$XXX], at which point indemnification may be sought for the full aggregate amount of damages, including those amounts that do not exceed the threshold. The aggregate damages to which the indemnified parties are entitled shall not exceed the indemnity cap, which shall be at least 30% of the Purchase Price. Such threshold and indemnity cap shall not apply to damages to the extent they arise from a breach of fundamental representations and warranties (as applicable to each party). The Parties shall agree to an appropriate period for indemnification.

## **EXHIBIT L-3 – MEMBERSHIP INTEREST PURCHASE AND SALE AGREEMENT ("MIPSA") PROVISIONS**

Any MIPSA executed to implement exercise of Company's ROFO or Option rights will include provisions substantially as follows:

### **Type of Transaction**

The transaction will be structured as an entity acquisition. Company ("Buyer") shall purchase and Seller shall sell 100% of its direct and indirect equity ownership interests of the project company ("Project Company") (including, if applicable, Seller's (or its affiliates) direct and indirect equity ownership interest in any tax equity partnership (the "TE Partnership") that owns, directly or indirectly, equity ownership interests of the Project Company, together, the "Equity Interests"), which owns a completed, commercially operational battery storage facility with nameplate capacity of [XX] MW AC and all facilities and other assets and rights relating to the project (the "Project"), free and clear of all encumbrances and liabilities, except for permitted encumbrances and assumed liabilities as defined in the PSA.

### **Equity Purchase Price and Payment Terms**

Buyer shall pay Seller the Equity Purchase Price, which is determined pursuant to Exhibit L-1 of this PPA.

Buyer shall be entitled to withhold from the payment of the Equity Purchase Price up to [\$XXX] in the event of certain breaches of Seller's representations, warranties or covenants pending Seller's cure of any such breach, with Buyer's aggregate holdback amount not to exceed 20% of the Equity Purchase Price. Parties to discuss appropriate holdback period.

Seller shall be responsible for all taxes relating to the pre-closing period and all transfer taxes and any sales, use or other taxes related to the purchase and sale of the Equity Interests and any purchase or conveyance of real or personal property to the Project Company to be used in the Project.

### **Seller's Closing Deliverables:**

Upon the terms and conditions to be defined within the PSA, the obligations of Buyer to consummate the transactions contemplated are subject to the satisfaction by Seller of certain closing conditions, including:

- Transfer of the Equity Interests, which include all rights and title to assets necessary for the commercial operation of the Project, to Buyer or its designated affiliate.
- An opinion of legal counsel that each material discretionary permit required for the Project has been obtained and is valid, binding, in full force and effect and non-appealable.
- Evidence that any liens on the Equity Interests, Project Company, Project, real property or any other assets or interests of the Project Company have been

removed as of the closing other than permitted liens which have been scheduled or liens which have been scheduled and bonded to Buyer's reasonable satisfaction.

- Certain conditions do not exist at the time of closing including, but not limited to, the existence of a material adverse effect. A material adverse effect would be defined in the PSA and would include, in addition to other terms, a change in tax law that could have a negative impact on Buyer's business, the Equity Interests, or the economic viability of the Project.
- All certifications, affidavits, approvals and permits required to demonstrate satisfaction of all representations, warranties, and covenants made by Seller pertaining to the closing.

### **Buyer's Closing Deliverables:**

Upon the terms and conditions to be defined within the PSA, the obligations of Seller to consummate the transactions contemplated are subject to the satisfaction by Buyer of certain closing conditions, including:

- Delivery of the Equity Purchase Price.
- All certifications, affidavits, approvals and permits required to demonstrate satisfaction of all representations, warranties, and covenants made by Buyer pertaining to the closing.

### **Required Approvals**

The transaction is subject to obtaining specified approvals, authorizations, or orders, including but not limited to the following (to the extent necessary):

- Approval of the board of directors of Buyer and the board of directors or similar governing body of Seller shall be obtained prior to execution of the PSA.
- Third party consents.
- Applicable governmental and regulatory approvals prior to closing, including to the extent necessary, any applicable state agencies or commissions regulating utility activities and any government agencies having approval, consent or authority over the transactions contemplated by the PSA, including the PUCT, the NMPRC, the IRS, the FERC, the Department of Justice, the US Fish and Wildlife Service and the FAA.

### **Representations and Warranties**

The transaction is subject to customary representations and warranties to be made by Buyer and Seller as of the execution date or the effective date of the PSA and the closing thereunder, including the following:

- Corporate existence and powers – Seller is a [e.g. **corporation/limited liability company**] validly existing and in good standing and has the power and authority to conduct its business as now conducted.



- Project Company existence and powers – the Project Company is a limited liability company validly existing and in good standing and has the power and authority to operate and own the Project and has been engaged in no other business since its formation.
- (If applicable) The TE Partnership existence and powers – the TE Partnership is a limited liability company validly existing and in good standing and has the power and authority to own and manage the Project Company and the Project and has been engaged in no other business since its formation.
- Authority (execution and delivery)
- No conflicts - the transaction does not create any conflicts.
- Consents and approvals – no consent, approval or authorization is required in connection with the execution and performance of the PSA.
- Legal proceedings of Buyer– there are no legal proceedings pending, or to Buyer’s knowledge, threatened in writing, against Buyer, that affect the consummation of the transaction contemplated by the PSA.
- Legal proceedings of Seller, TE Partnership (if applicable) and Project Company – there are no legal proceedings pending, or to Seller’s knowledge, threatened in writing, against the Seller relating to the Project or affecting Seller’s ability to sell the Equity Interests and there are no legal proceedings pending, or to Seller’s knowledge, threatened in writing, against the Project Company or the TE Partnership (if applicable).
- Sufficient funds – Buyer has available, or will maintain sufficient sources of, funds to complete the transaction.
- Compliance with Laws – Seller, the TE Partnership (if applicable) and the Project Company are in compliance with all laws applicable to such entity and the transactions contemplated by the PSA.
- Environmental – Seller, the TE Partnership (if applicable), the Project Company and their respective affiliates have no environmental liabilities (solely in the case of Seller relating to the Project) and are in compliance with environmental requirements (solely in the case of Seller relating to the Project). Seller and its affiliates (including the TE Partnership, if applicable, and the Project Company) have not received any notice of an alleged violation of environmental law pertaining to the Project from any governmental entity. There are no facts, circumstances, conditions or occurrences relating to the Project, the TE Partnership, if applicable, or the Project Company that could reasonably be expected to form the basis of a claim, requirement or obligation imposed by any governmental entity under any environmental law on Seller or its affiliates (including the TE Partnership, if applicable, and the Project Company) or Buyer.

- Contracts – Schedule of material contracts binding on the (x) Seller relating to the TE Partnership, if applicable, the Project Company or the Project), (y) TE Partnership, if applicable, the Project Company or the Project, or the assets of any of the TE Partnership, if applicable, or the Project Company, has been provided and Seller has furnished to Buyer true, correct and complete copies of all such contracts. Each scheduled contract, including but not limited to the Generator Interconnection Agreement, is in full force and effect and neither Seller, the TE Partnership, if applicable, nor the Project Company, nor to the knowledge of Seller any other counterparty thereto, is in material violation or default under such contracts.
- Land Contracts – The land contracts and real property owned by the Project Company are in full force and effect, and shall comprise all of the real property interests necessary in connection with the interconnection operation and maintenance of the Project, all in accordance with all laws, and are sufficient to enable the Project to be commercially operable as contemplated in the PSA, including legal and physical ingress and egress rights to and from public right-of-way for operation, and maintenance of the Project.
- Data – Seller has delivered to Buyer true, correct and complete copies of all battery data related to the Project.
- Permits - All permits required to own, operate and maintain the Project are held by the Project Company, are scheduled, and Seller has obtained and furnished to Buyer true, correct and complete copies of such permits. Such permits are non-appealable, in full force and effect and are legal, valid, binding and enforceable in accordance with their respective terms.
- Title – The Project Company is in possession of and has good and marketable title to the Project free and clear of all encumbrances, except for permitted encumbrances. Seller has good and marketable title to the Project Company's equity interests, free and clear of all encumbrances. Seller and its affiliates have no legal obligation or non-binding agreement in principle with any other person to sell or affect a sale of all, or any portion of, the Project or the Project Company.
- Other representation and warranties customary in a transaction of this nature, including those pertaining to taxes, title, finders, intellectual property, brokers and insurance.

### **Termination Provisions**

The PSA may be terminated prior to the closing upon written notice by the terminating party (as described below) in the event of certain occurrences, including:

- By either party, in the event the closing has not occurred by [TBD], regardless of the reason for such termination, provided that the terminating party is not in breach of the PSA.
- By either party in the event regulatory approvals for the transaction are not obtained on terms reasonably acceptable to Buyer.
- By Buyer in the event any authority has issued an order or taken any other action that restrains, enjoins, or otherwise prohibits the consummation of the transactions contemplated by the PSA, and such order or action is nonappealable.

- By Buyer in the event of material breach of the PSA by Seller.
- Security: Seller shall fund and maintain security in favor of Buyer, or a parent guaranty acceptable to Buyer, to secure Seller's obligations under the PSA including the indemnification provision below. Parties to discuss appropriate security period and amount.

### **Indemnification**

Each party shall indemnify and hold harmless the other party and its respective employees, representatives, officers, directors and agents from and against any and all damages arising out of the result of any breach or violation of any representation, warranty, covenant, inaccuracy within the PSA, or any liability not assumed as part of the PSA, or any fraud, willful misconduct, or negligence in performance of this PSA. Seller shall indemnify Buyer for any environmental (including hazardous material) claims arising prior to the closing date other than environmental claims resulting from Buyer's negligence. No claim for indemnification shall be brought against the indemnifying party until the total damages for which such party is liable exceeds in the aggregate a threshold amount of [XXX], at which point indemnification may be sought for the full aggregate amount of damages, including those amounts that do not exceed the threshold. The aggregate damages to which the indemnified parties are entitled shall not exceed the indemnity cap, which shall be at least 30% of the Equity Purchase Price. Such threshold and indemnity cap shall not apply to damages to the extent they arise from a breach of fundamental representations and warranties (as applicable to each party). The Parties shall agree to an appropriate period for indemnification.

## EXHIBIT M

### BATTERY STORAGE SYSTEM TESTING PROTOCOLS

This Exhibit M sets forth the Performance Criteria and protocols for any testing of the Battery Storage System under this PPA. The Commercial Operation Test, Periodic Test, and other discretionary testing identified in Section 5.6 are sometimes referred to in this Exhibit individually as a “Test” and jointly as the “Tests.”

#### PART I. GENERAL.

The Tests shall be conducted in accordance with Good Utility Practices and the provisions of this Exhibit M.

#### PART II. REQUIREMENTS APPLICABLE TO THE TESTS.

##### A. Required Performance Criteria.

Tests conducted pursuant to this Exhibit M shall include the following elements (unless Company otherwise agrees in writing in its sole discretion):

- “Availability” is defined as the ability of the system to receive and respond to signals from the EMCC. This value is calculated as the ratio of time the system can function as described to total time within the annual measured period, calculated as a percentage. Availability is not negatively impacted by outages beyond the control of the vendor, including:
  - i. any Outage where Seller failed to comply with a Dispatch Notice that was not in accordance with the Battery Storage System Operating Procedures;
  - ii. Force Majeure; or
  - iii. a breach of this PPA by Company that prohibits the ability of the system to receive and respond to signals from the EMCC.
- “Enterprise Wide Information System” (“EWIS”) means the Company supplied OSI/PI Servers and software used by the Battery Storage System to record historical operations parameters or compatible replacement.
- “Battery Management System” or “BMS” is defined as the electronic control and communication system that manages and protects the Battery Storage System.
- “Grid Charging Capability” means the ability for the Battery Storage System to charge and store Charging Energy delivered from an offsite source by the Transmission Authority’s electrical system.
- “Storage Capacity” is defined as the rated amount of energy that the Battery Storage System can hold, measured in MWh or MW, as applicable and measured at the Point of Delivery.

- “Self-Discharge Rate” is defined as the loss of charge of the Battery Storage System while idle.
- “Minimum Charging Time” is defined as the amount of time between a measurement of 0% State of Charge (SOC) to reaching full Storage Capacity (expressed in units of time).
- “Minimum Discharging Time” is defined as the amount of time between full Storage Capacity to reaching a measurement of 0% SOC (expressed in units of time).
- “Maximum Charging Rate” is defined as the maximum rate of charging (expressed in MW).
- “Maximum Discharging Rate” is defined as the maximum rate of discharging (expressed in MW).
- “Performance Test” means the Maximum Charging Rate, Maximum Discharging Rate, Minimum Discharging Time, Minimum Charging Time, Storage Capacity, and Round Trip Efficiency of the Battery Storage System tests.
- “Round Trip Efficiency” is defined as the amount of Discharging Energy discharged by the Battery Storage System relative to the amount of Charging Energy, measured at the Point of Delivery, calculated as shown below
$$\text{Round Trip Efficiency (RTE)} = \frac{\text{Battery Energy (WhD)}}{\text{Charging Energy (WhI)}}$$
- “Ramp Rate” shall have the meaning set forth in the Transmission Tariff.
- “Response Time” is defined as the amount of time for the Battery Storage System to respond to dispatch instructions from Company’s SCADA, once the instructions are received.

B. Test Parameters.

During any Performance Test, at a minimum, the following parameters shall be measured and recorded simultaneously for the Battery Storage System at the level of granularity necessary to assess the measured criteria and at least every four (4) seconds:

- (i) Time;
- (ii) Net electrical energy output to the Point of Delivery (kWh);
- (iii) Net electrical energy input from the Point of Delivery (kWh);

- (iv) Reactive power (VARs);
- (v) State of Charge (%);

During any Performance Test, at a minimum, the following parameters shall be measured and recorded simultaneously for the Battery Storage System at least every thirty (30) minutes:

- (i) Relative humidity (%);
- (ii) Ambient temperature (°F); and
- (iii) Average battery temperature (°F).

C. Performance Test Showing. Seller must demonstrate to Company's reasonable satisfaction, that the Battery Storage System:

- (i) is capable of storing and delivering the MW and MWh amount identified by Seller as the maximum rated power and energy;
- (ii) can deliver full rated power (MW) to the Point of Delivery for two (2) consecutive hours, totalling to the Storage Capacity, inclusive of identified Round Trip Efficiency losses.

**APPENDIX A:** All identified Exhibit M-1 required performance levels are met.

D. Performance Test Conditions.

- (i) At all times during a Test, the Battery Storage System, including all auxiliary equipment, shall be operated in compliance with the Test Plan, Good Utility Practices and all operating protocols and conditions recommended, required, or established by the manufacturer.
- (ii) Company in its sole discretion may elect to shorten the run periods or waive a particular portion of a Test at any time. Such election or waiver during one Test does not shorten any run period or waive any portion of any subsequent Test.
- (iii) [Reserved].
- (iv) Abnormal Conditions. If abnormal operating conditions occur during a Test, Company may postpone or reschedule all or part of such Test in its reasonable discretion in accordance with PART II.F. or PART II.G., below.
- (v) Applicable Laws. The Battery Storage System shall be operated in compliance with all Applicable Laws, including those governing safety, noise, air, and water emissions during any Test.

- (vi) Instrumentation and Metering. Seller shall provide all instrumentation, metering, and data collection equipment required to perform the Test. Class 0.2S or Class 0.5S meters should be used to verify performance of the Battery Storage System during any Test. Seller shall calibrate or cause to be calibrated all such instrumentation, metering, and data collection equipment no more than three (3) months prior to the date of the Test, if appropriate to the tool type. Copies of all calibration sheets shall be provided to Company at least five (5) Business Days prior to the Test.

Permanently installed instruments shall include but not be limited to revenue metering devices located in the switchyard where the Facility is located.

- E. Test Records. Seller shall provide all records associated with PART II.A. through PART II.D. with the Final Report described below in PART II.H. The records shall include copies of the raw data taken during the Test. This information will be provided in a format reasonably acceptable to Company. Collectively, the records and data provided with the Final Report shall be "Test Records".
- F. Incomplete Test. If any Test is not completed in accordance herewith, Company may in its sole discretion: (i) accept the Test results up to the time the Test stopped (other than in the case such Test is a Commercial Operation Test); (ii) require that the portion of the Test not completed, be completed within a reasonable specified time period; or (iii) require that the Test be entirely repeated. Notwithstanding the above, if Seller is unable to complete a Test due to a Seller's Force Majeure or the actions or inactions of Company, Seller shall be permitted to reconduct such Test as a Seller Initiated Test under Section 5.6(D) on dates and at times reasonably acceptable to Company.
- G. Retest. After the successful completion of a Test, Seller has the right, for any reason, to conduct a retest at Seller's sole expense, including the cost of charging the Battery Storage System. If the Test Records provided by Seller to Company in accordance with PART II.E. are not in accord with the records and notes of the Company representative who attended such Test on Company's behalf, Company may require the Test to be repeated or conducted by Company or a testing firm of Company's choice and attended by Seller's representatives. If the retest determines that the Test Records provided by Seller to Company are correct, then such retest will be deemed to be a Company Dispatched Test. If the retest determines that the Test Records provided by Seller to Company are incorrect, then such retest will be deemed to be a Seller Initiated Test. The records from any retest shall be used to determine Battery Storage System performance as of the date of the original Test being repeated.
- H. Final Report. Within fifteen (15) Business Days after the completion of a Test (including a retest), Seller shall prepare and submit to Company a

written report of the Test in a format reasonably acceptable to Company. At a minimum, the report shall include:

- (i) a record of the personnel present during all or any part of the Test, whether serving in an operating, testing, monitoring or other such participatory role;
- (ii) a record verifying that inspections took place and the results were acceptable prior to testing initiation;
- (iii) a record of the test conditions (e.g. weather conditions) and test set up (e.g. equipment type and placement used);
- (iv) a record of any unusual or abnormal conditions or events that occurred during the Test and any actions taken in response thereto;
- (v) the Test Records;
- (vi) the system performance in relation to the Performance Criteria identified in Exhibit M-1, either by direct measurement or via agreed to calculation; and
- (vii) Seller's statement of either Seller's acceptance of the Test or Seller's rejection of the Test results and reason(s) therefore.

Within ten (10) Business Days after receipt of such report, Company shall notify Seller in writing of either Company's acceptance of the Test results or Company's rejection of the Test and reason(s) therefore.

If Company rejects the results of any Test or retest, or Seller rejects the results of the initial Commercial Operation Test, such Test shall be repeated in accordance with PART II.G.

- I. Company Representative. Company shall be entitled to have at least two (2) representatives from Company and one (1) independent third party witness reasonably acceptable to Seller present to witness each Test and shall be allowed reasonable access to the area from where the plant is being controlled (e.g., plant control room), and reasonable access to inspect the instrumentation necessary for Test data acquisition prior to commencement of any Test, subject to providing reasonable advance notice to Seller and adhering to Seller's safety protocols that have been communicated to Company. Company shall be responsible for all costs, expenses and fees payable or reimbursable to the representative and the third party, if any.

PART III. COMMERCIAL OPERATION TEST.

- A. Test Plan. The Test Plan is provided in PART V Section F and G of this Exhibit M.
- B. Test Dates. Seller shall provide Company with at least seven (7) Business Days' notice of Seller's proposed dates for the Commercial Operation Test. Company shall confirm the dates in writing prior to the first date of the Test.
- C. Costs. Costs for testing are as set forth in Section 5.6. The Commercial Operation Test is a Company Initiated Test.

PART IV. PERIODIC TESTS.

- A. Test Plan. The Test Plan is provided in PART V - Section F of this Exhibit M, unless specified below or the Parties agree otherwise in writing.



- B. Instrumentation and Metering. The Parties shall use the same instrumentation and metering as was used in the Commercial Operation Test, unless the Parties otherwise agree in writing. Company reserves the right, in its sole discretion and at its expense, to install its own back-up instrumentation and metering to verify the results of the periodic tests. If requested in writing, Company shall provide copies of any inspection or testing reports to Seller.
- C. Test Dates. Seller is responsible for scheduling each Periodic Test. The date of any such Test shall be confirmed in writing by Company to Seller prior to the date of the Test. The Parties should attempt but are not required to schedule such Test on days that Company will or is likely to dispatch the Battery Storage System.
- D. Costs. Costs for testing are as set forth in Section 5.6.
- PART V. TEST PLAN.  
Any Test shall be performed according to the provisions of this Exhibit M, and the Test Plan below.
- A. **GENERAL:**
- (i) This document provides the procedure for Performance Test and evaluation of the Battery Storage System for the Facility. This document shall be the template to develop the final Performance Test procedures as mutually agreed to between the Parties. The complete final Performance Test procedure shall be submitted sixty (60) Days prior to the test.
  - (ii) The sole purpose of the Performance Test will be the determination of Maximum Charging Rate, Maximum Discharging Rate, Minimum Discharging Time, Minimum Charging Time, Storage Capacity, and Round Trip Efficiency of the Battery Storage System for comparison to the Guaranteed Performance values provided in Exhibit M-1. Uncertainties and test tolerance of 0.5% will be applied to any guarantee.
  - (iii) Prior to each test, a pre-test meeting shall be held and recorded. The meeting shall review the applicable approved performance test procedure, the applicable requirements of such Performance Test, as well as all instrumentation locations, calibration sheets, and other relevant topics including Safety Requirements.
  - (iv) Data shall be recorded by the SCADA/EWIS system data logging functions. The use of alternative means for data acquisition shall be used only with prior written consent of Seller. Company shall supply all raw data from the SCADA/EWIS system, daily during pre-test activities and during testing phase.
  - (v) Prior to the start of testing the Battery Storage System, the control settings (tuning and constants) shall be verified.
  - (vi) Any alteration or modifications to test measurement devices, or to the Battery Storage System, which could reasonably be expected to influence the outcome of the applicable Performance Test, shall not be permitted, without prior written consent of Company, and if

accepted by Company, shall be fully documented by Seller and Company.

**B. RESPONSIBILITIES:**

(i) Specific responsibilities for this Performance Test program are as follows:

a. Seller:

- i. Perform commissioning.
- ii. Manage the application of proper commissioning procedures until the Performance Tests have been completed.
- iii. Support Company with testing and interface with the Utility/ISO as required to schedule and perform testing.

b. Company:

- i. Support Seller with testing and interface with the Utility/ISO as required to schedule and perform testing.
- ii. Witness energy testing and/or review test documentation.
- iii. Provide energy for the Performance Test program.

**C. EQUIPMENT DEFINITION:**

The test configuration will consist of the Battery Storage System and its associated equipment.

**D. MEASUREMENTS & INSTRUMENTATION:**

- (i) Instrumentation for the Performance Test will consist of Battery Storage System instruments. Calibration certificates will be provided with the instruments.
- (ii) The State of Charge during all tests shall be read from the Battery Management System.
- (iii) The charge rate and discharge rates shall be measured using the Electric Metering Devices.
- (iv) For purposes of testing the Round Trip Efficiency and notwithstanding the last sentence of the definition of Electric Metering Devices, the Charging Energy and Discharging Energy shall be measured by the Electric Metering Devices without normalizing for electrical losses between the Electric Metering Devices and the Point of Delivery.

**E. DATA COLLECTION:**

- (i) All measurements of charge rate, discharge rate, input current and voltage, output current and voltage, thermal output, system temperatures, ambient conditions, and other parameters that must be measured shall be collected simultaneously at a temporal resolution applicable to the function of the system application and system metrics to which they are being applied and in accordance with recognized standards applicable to the measurements being taken.

- (ii) Data scan rate shall be 4 seconds or faster for all tests.
- (iii) CANCELLATION OR CESSATION OF TESTING UNDER CERTAIN CIRCUMSTANCES

a. In connection with any of the acceptance and other testing pursuant to this PPA, including the Performance Tests, Seller shall each have the unilateral right to cease such tests if Seller determines that a matter or event is occurring that may damage or adversely affect the equipment or system. Seller shall promptly remedy such condition and shall thereafter promptly reschedule the testing.

F. Test to measure Maximum Charging Rate, Maximum Discharging Rate, Minimum Discharging Time, Minimum Charging Time, Storage Capacity, and Round Trip Efficiency:

- (i) A capacity test shall be performed to determine Maximum Charging Rate, Maximum Discharging Rate, Minimum Discharging Time, Minimum Charging Time, Storage Capacity, and Round Trip Efficiency of the Battery Storage System.
- (ii) The Battery Storage System shall be discharged to 5% SOC and held for a period of 30 minutes.
- (iii) The Battery Storage System shall be discharged to 0% SOC level or to the minimum SOC as quickly as practical.
- (iv) The system shall be left at rest in an active standby state for 120 minutes or time adjusted by Seller based on battery technology.
- (v) The Battery Storage System shall be charged as close to the Guaranteed Maximum Charging Rate specified in Exhibit M-1 as possible (“Maximum Charging Rate”) until the BMS causes the allowable charging rate to be derated to prevent overvoltage. The maximum AC power during this charge cycle shall be recorded and used for satisfaction of the Guaranteed Maximum Charging Rate. The AC energy input **Wh<sub>li</sub>**, into the system during system charging and the time until the system begins to limit charging below the Maximum Charging Rate shall be measured and recorded.
- (vi) The Battery Storage System shall be charged to 100% SOC as close to the Maximum Charging Rate as possible subject to the limitation of the BMS. The total AC energy input **Wh<sub>l</sub>** (includes the energy at both the Maximum Charging Rate and derated charge rates), into the system during system charging, shall be measured and recorded. The total charging time period until Battery Storage System has charged or taken the Storage Capacity (including the time at both the Maximum Charging Rate and derated charge rates) will be used to determine the Minimum Charging Time.
- (vii) The system shall be left at rest in an active standby state for 120 minutes or time adjusted by Seller based on battery technology.

- (viii) The Battery Storage System shall be discharged as close to the Guaranteed Maximum Discharging Rate specified in Exhibit M-1. The maximum AC power during this discharge cycle shall be recorded and used for satisfaction of the Guaranteed Maximum Discharging Rate. AC energy output **WhDi** out of the system during system discharging, and the time until the system begins to limit discharge below the Guaranteed Maximum Discharging Rate shall be measured and recorded. The time period until the system has supplied the Guaranteed Storage Capacity will be used for satisfaction of Guaranteed Minimum Discharging Time.
  - (ix) The system shall be discharged from the prior level to 0% SOC (or its warranted limits) at a current/voltage limited by the BMS. The total AC energy output from the system **WhD** (includes the energy at both the rated and derated discharge rates) shall be measured and recorded during discharge.
  - (x) The system shall be left at rest in an active standby state for 120 minutes or time adjusted by Seller based on battery technology.
  - (xi) The reference capacity test value (Storage Capacity) shall be **WhDi** as measured in F.(viii).
  - (xii) The power and times (hours/minutes/seconds) recorded in steps F.(v), F.(vi), and F.(viii) shall be the value used to verify conformance to the Guaranteed Maximum Charging Rate, Guaranteed Maximum Discharging Rate, Guaranteed Minimum Charging Time, and Guaranteed Minimum Discharging Time.
  - (xiii) The total AC energy input **WhI** and the total AC energy output from the system **WhD** recorded in steps F.(vi) and F.(ix) shall be used to determine Round Trip Efficiency for conformance to the Guaranteed Round Trip Efficiency. The Guaranteed Round Trip Efficiency shall be as defined in Part II of this Exhibit M.
- G. Grid Charging Capability Test (During COD Test):
- (i) Modify control system to disable code that prevents grid charging. Note this step must be performed by Seller's qualified controls programmer.
  - (ii) If SOC is above 80% discharge at a rate specified by Seller until Battery Storage Systems is below 80% SOC.
  - (iii) Record the SOC of the Battery Storage System.
  - (iv) The Battery Storage System shall be charged at the Maximum Charging Rate for 10 minutes.
  - (v) Following the 10-minute charging period, record the final SOC of the Battery Storage System.
  - (vi) The initial and final SOC of the Battery Storage System recorded in steps G.(iii) and G.(v), and achieved charging rate shall be used to verify conformance to Grid Charging Capability.

- (vii) Modify control system to enable code that prevents grid charging. Note this step must be performed by Seller's qualified controls programmer.

\* \* \* \*

## EXHIBIT M-1

### BATTERY STORAGE SYSTEM GUARANTEED PERFORMANCE LEVELS

This Exhibit M-1 sets forth the guaranteed performance levels ("Guaranteed Performance") for certain Performance Criteria.

#### Guaranteed Round Trip Efficiency:

The Guaranteed Round Trip Efficiency shall be as set forth in the table below:

Year	RTE
1	84.94%
2	84.64%
3	84.34%
4	84.04%
5	83.74%
6	83.44%
7	83.14%
8	82.84%
9	82.54%
10	82.24%
11	81.94%
12	81.64%
13	81.34%
14	81.04%
15	80.74%
16	80.44%
17	80.14%
18	79.84%
19	79.54%
20	79.24%

<b><u>Performance Metric</u></b>	<b><u>Guaranteed Level</u></b>	<b><u>Point of Measurement</u></b>
Guaranteed Storage Capacity	192 MWh	Point of Delivery
Self-Discharge Rate	1.9 MWh / month	Point of Delivery
Guaranteed Minimum Charging Time	Storage Capacity in MWh/ 48 MW /RTE plus 30 minutes (At Maximum Charging Rate)	Point of Delivery
Guaranteed Maximum Charging Rate	48 MW	Point of Delivery
Guaranteed Minimum Discharging Time	4 hours	Point of Delivery
Guaranteed Maximum Discharging Rate	48 MW	Point of Delivery
Maximum Ramp Rate	4 MW/second	Point of Delivery
Guaranteed Response Time	24 seconds	Point of Delivery
Grid Charging Capability (During COD Test)	Pass	Point of Delivery

**EXHIBIT N  
RESERVED**

\* \* \* \* \*



**EXHIBIT O**

**BATTERY STORAGE SYSTEM OPERATING PROCEDURES**

The Battery Storage System Operating Procedures will include the provisions set forth in this Exhibit O – Battery Storage System Operating Procedures. If requested by Company, then no later than 90 days prior to the Commercial Operation Date, the Operating Committee shall develop the Battery Storage System Operating Procedures in accordance with Section 10.8. The Battery Storage System Operating Procedures can be reviewed annually (date and time to be mutually agreed) to optimize operations for both Parties. Parties shall cooperate to integrate the systems and controls necessary to implement the Battery Storage System Operating Procedures.

I. Operational limitations:

The operation of the Battery Storage System shall be subject to the following limitations:

(a) If the year-to-date average State of Charge exceeds 60% at any time during the second half of a Commercial Operation Year, then the maximum allowed State of Charge shall be limited to 60. If the allowable State of Charge has been limited, the State of Charge limitation will be released once the year-to-date State of Charge is less than 57%. If at the end of any Commercial Operations Year the average State of Charge for that Commercial Operations Year exceeds 50%, rounded to the nearest 0.1%, then Seller shall invoice Buyer for liquidated damages of \$ [REDACTED] for each 0.1% that the average State of Charge exceeds 50.1%.

Sample calculation: Annual average State of charge is 52.48%. Rounded to 52.5%. 50.1% is exceeded by 2.4%, requiring a liquidated damage payment of \$84,000.

(b) The requirements and limitations set forth in Section 5.2(D).

II. 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 energy storage level data:

Table 1

<u>Energy Storage</u>	
<u>Description</u>	<u>Units</u>
Real Power Set-Point (echo)	MW
Actual Real Power	MW
Actual Reactive Power	MVar

Battery State of Charge	% & MWh
Charge Availability for Dispatch Notice	MW
Discharge Availability for Dispatch Notice	MW
Charge Ramp Rate	MW/min
Discharge Ramp Rate	MW/min
Remaining Throughput (Commercial Operation Year)	MWh
YTD Average SOC (Commercial Operation Year)	%
Maximum Allowable SOC	MWh
Additional Data Points Reserved for Future Use	
Available Inverters	Integer

The following data points will be transmitted via SCADA from Company to Seller and represent energy storage level data:

Table 2

<u>Energy Storage</u>	
<u>Description</u>	<u>Units</u>
Charge Power Set-Point*	MW
Discharge Power Set-Point*	MW
Duration of Charge/Discharge Set-Point**	minutes
Target State of Charge*	%
Ramp Rate	MW/s
Control Mode (target time or target SOC)	Boolean
Additional Data Points Reserved for Future Use	

\* Parties will resolve any conflicts in priority of signal in the Battery Storage System Operating Procedures

\*\*System will observe either time entry or SOC target depending on Control Mode

Data points transmitted via SCADA from Seller to Company are subject to Battery Storage Operating Procedures.

1. **Response times of Battery Storage System.** The Battery Storage System Operating Procedures will include protocols that outline the expectations for responding to the Company's set points.

2. **Backup communications.** In the event of a communications failure, Company and Seller shall communicate via telephone in order to correct the failure.

III. Availability Scheduling Requirements

- a. The Battery Storage System availability schedule shall be posted at 4:00 AM two (2) Business Days prior to the applicable Day, and shall be applicable through the end of such Day. For example, on Monday, an availability schedule is required for Wednesday (midnight to midnight). On Tuesday, the schedule for Thursday. On Wednesday, the schedule for Friday, and so on. The schedule shall be submitted through an availability scheduling system as specified by Company to Seller. Prior to the Commercial Operation Date, Company shall provide Seller with the information necessary for Seller to access the chosen availability scheduling system.
- b. If any events or circumstances reduce the scheduled availability of the Battery Storage System by 10% or more (or the current requirements of the applicable ERO if less than 10%), such reduction shall be (1) communicated to the real-time operator via telephone with (2) an immediate update to the availability schedule in the availability scheduling system.

\* \* \* \* \*

## EXHIBIT P

### SAFETY REQUIREMENTS

Seller shall design and construct the Facility in compliance with all Applicable Laws and shall ensure the Facility is operated in compliance with Good Utility Practice. Seller shall identify codes and standards that are applicable to the design of the Facility and ensure that upon substantial completion the Facility meets applicable codes and standards. Only non-occupiable Battery Storage System enclosures shall be considered and Seller shall have the Battery Storage System enclosures certified to UL 9540. Seller shall design, construct, and install the Facility under the guidance of NFPA 855 and shall comply with all applicable portions of that standard. Seller is solely responsible for maintaining the Facility in compliance with all Applicable Laws. Seller will provide Company with an independent registered professional engineer's certification stating that the Facility has been completed in all material respects (including compliance with all Applicable Laws) prior to COD.

Prior to COD, Seller will provide documentation submitted as part of the Cochran County, TX permitting process and, if not otherwise submitted as part of such permitting process, the following additional documents:

1. Operations and maintenance documentation, including an operations manual and maintenance manual, and schedule for planned maintenance;
2. Safety procedures for personnel (may be included within the operations or maintenance manual), and supplier safety manual;
3. Training materials for local first responders, identifying known hazards and failure modes, and methods for approach and action, if appropriate;
4. Emergency management plan, including instructions on how to interpret alarms and faults, location of emergency stops, egress pathways, known hazards, and emergency contact information for a subject matter expert who can be available on site within 2 hours; and
5. System drawings and documentation, including all physical, electrical, mechanical, and communications diagrams for all Facility sub-components, to allow for confirmation of claimed safety features including but not limited to, respectively, sufficient spacing, security, and signage; appropriate electrical ratings, grounding, and interconnections; foundations and construction materials; awareness of system operation and alarms; and fault ranges and emergency stops, but excluding any vendor proprietary drawings. As applicable, certifications for all claimed standards compliance should be provided.

\* \* \* \* \*

## EXHIBIT Q

### EXAMPLE ADJUSTMENT CALCULATIONS

#### Example of Roundtrip Efficiency Adjustment

Example of Roundtrip Efficiency Adjustment based on the following assumed facts:

- (a) Seller's actual roundtrip efficiency as determined by latest test (RTE) = 85%.
- (b) Seller's Guaranteed Roundtrip Efficiency (RTE<sub>G</sub>) = 87%.
- (c) Amount of Discharging Energy delivered to the Point of Delivery for the affected month (Discharging MWh<sub>Actual</sub>) = 9,180 MWh.
- (d) Discharging LMP = \$13.50
- (e) Amount of Charging Energy delivered to the Point of Delivery for the affected month (Charging MWh<sub>Actual</sub>) = 10,800 MWh.
- (f) Charging LMP = \$1.50

Given these assumed facts, the Round Trip Efficiency Adjustment is calculated as follows:

#### Round Trip Efficiency Adjustment

$$\begin{aligned} &= [1 - (\text{RTE}_{\text{test}} / \text{RTE}_G)] \times [(\text{Discharging MWh}_{\text{Actual}} * \text{Discharging LMP}) - (\text{Charging MWh}_{\text{Actual}} * \text{Charging LMP})] \\ &= [1 - (85\% / 87\%)] \times ((9,180 \text{ MWh} \times \$13.50/\text{MWh}) - 10,800 \text{ MWh} \times \$1.50/\text{MWh}) \\ &= 2.2989\% \times (\$123,930 - \$16,200) \\ &= \$2,476.55 \end{aligned}$$

#### Example of CAF Calculation

Example of Capacity Availability Factor calculation based on the following assumed facts:

- (a) Seller's Guaranteed Storage Capacity = 400 MWh.
- (b) Seller's Scheduled Maintenance Energy = 9,600 MWh-hour.
- (c) Seller's Available Capacity = 238,080 MWh-hour.

(d) Period Energy = 31 Days

Given these assumed facts, the Capacity Availability Factor is calculated as follows:

Capacity Availability Factor

$$\begin{aligned} &= (AC + SME) / PE \\ &= [238,080 \text{ MWh} + 9,600] / [31 \text{ Days} * 24 \text{ Hours} / \text{Day} * 400 \text{ MWh}] \\ &= 247,680 \text{ MWh-hour} / 297,600 \text{ MWh-hour} \\ &= 0.8323 \end{aligned}$$

## EXHIBIT R

### METER AND COMMUNICATIONS REQUIREMENTS

These meter requirements shall apply to all Electric Metering Devices.

- Electric Metering Devices shall meet requirements set forth in American National Standards Institute (ANSI) C12.1 and 12.20. Current transformers and voltage transformers supplying this meter should meet requirements of IEEE/ANSI C57.13 and ANSI C57.13.6. In addition to meeting these requirements the current transformers should be high accuracy extended range transformers with at least .15% accuracy from 1% to full rating factor. Prior to the purchase of Electric Metering Devices, current transformers and potential transformers and associated communication equipment, Seller must submit relevant information such that Company can review and verify that the equipment meets Company requirements.
- No later than ninety (90) Days prior to generating any Test Energy, Seller shall provide to Company in mutually agreeable format all necessary specifications related to the Electric Metering Devices and/or communication therewith including, but not limited to, the make, model, port configuration, connection assignments, and physical locations.
- Company may inspect and verify that the equipment was approved and properly installed. In addition, Company may elect to test the Electric Metering devices for accuracy, current transformers and potential transformers and verify that the communication circuits to Company Xcel are operational.
- Upon prior written notice sufficiently in advance, Company shall have the right to make requests in regard to reasonable modifications to Seller's metering equipment and configurations in order to ensure accurate telemetering and communication.
- Company shall have the right to install any telemetering and communication equipment Company deems reasonably necessary for purposes related to this PPA. Seller shall, upon prior written notice sufficiently in advance, cooperate with any such installation.
- Electric Metering Devices shall be programmed to, at any time of remote electronic communications and access, provide a time and date stamp of downloaded delivery information.
- Electric Metering Devices shall be programmed to, at any time of manual read of the meter's display, provide the time and date of the information gathered. The Seller shall provide the communication channels for the Company's remote terminal unit and the Company's Itron Enterprise Edition Meter Data Management

Agent. The implementation of these communication paths and RTU shall follow Company's latest standard. The Seller must have these communication paths installed, tested, and functional prior to generating Test Energy.

- Company shall have the right, via read-only access, and upon prior reasonable written notice to Seller, to independently audit Seller's meters and any records pertaining to the amount of energy generated by the Facility and any associated losses. Any audit shall be performed at the Facility or if applicable, other location within the same state as the Facility which is mutually agreed upon by both Company and Seller. Records related to such audits, inspections, testing or adjustments shall be maintained and subject to audit by Company for a period of 24 months. Company shall further have the right to request and receive in physical or electronic form any and all records or data files related to such audits, inspections, testing or adjustments.
- Seller shall provide secure and reliable communication from the Electric Metering Devices as follows:
  - DNP output from the meter to Company's EMCC via a remote terminal unit located near the Electric Metering Devices and hardwired from the meter to the remote terminal unit.
  - Time stamped meter register and interval data from the meter to Company's Itron Enterprise Edition Meter Data Management Agent with servers located in Denver, CO. Electric Metering Devices must have an Itron approved Translation Interface Module to facilitate correct data transmission over this communication path.
  - Prior to generating Test Energy, Seller shall provide to Company one-line electrical drawings of the Facility showing the electrical location of the Electric Metering Devices for Company's review and approval.





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