

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

**IN THE MATTER OF SOUTHWESTERN )  
PUBLIC SERVICE COMPANY'S )  
APPLICATION FOR: (1) AUTHORIZATION )  
TO ESTABLISH THE VOLUNTARY )  
SOLAR\*CONNECT COMMUNITY )  
PROGRAM ("SOLAR\*CONNECT") AND )  
ENTER INTO A PURCHASED POWER )  
AGREEMENT FOR THE PURCHASE OF ) CASE NO. 18 -00\_\_\_\_-UT  
1.98 MW OF NOMINAL SOLAR CAPACITY )  
AND ASSOCIATED ENERGY FOR )  
SOLAR\*CONNECT; (2) APPROVAL OF )  
THE PROPOSED METHODOLOGY FOR )  
CALCULATING AND ANNUALLY )  
ADJUSTING THE SOLAR\*CONNECT )  
RATE; AND (3) AUTHORIZATION TO )  
FLOW THROUGH ALL SOLAR\*CONNECT )  
COSTS AND REVENUES THROUGH THE )  
SOLAR\*CONNECT RIDER AND ITS FUEL )  
AND PURCHASED POWER COST )  
ADJUSTMENT CLAUSE, )  
)  
)  
SOUTHWESTERN PUBLIC SERVICE )  
COMPANY, )  
)  
)  
APPLICANT. )**

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**DIRECT TESTIMONY**

*of*

**TARA R. FOWLER**

*on behalf of*

**SOUTHWESTERN PUBLIC SERVICE COMPANY**

**September 28, 2018**

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

<b><u>Acronym/Defined Term</u></b>	<b><u>Meaning</u></b>
2017 Solar*Connect RFP	December 2017 SPS Request for Proposals seeking solar generation resources
AC	Alternating Current
COY	Commercial Operation Year
Commission	New Mexico Public Regulation Commission
MW	Megawatt
MWh	Megawatt hour
Operating Companies	Northern States Power Company, a Minnesota corporation; Northern States Power Company, a Wisconsin corporation; Public Service Company of Colorado and SPS
PPA	Purchase Power Agreements
PV	Photovoltaic
REC	Renewable Energy Certificate
RFP	Request for Proposal
SoCore	SoCore Clovis 1 LLC
SoCore Solar Facility	1.98 MWac solar powered electric generating facility
Solar*Connect	Solar*Connect Community
SPS	Southwestern Public Service Company, a New Mexico corporation
Xcel Energy	Xcel Energy Inc.

## **LIST OF ATTACHMENTS**

<b><u>Attachment</u></b>	<b><u>Description</u></b>
TRF-1	Solar*Connect PPA (dated June 28, 2018)
TRF-2	Model PPA
TRF-3	First Amendment to Solar*Connect PPA (dated August 24, 2018)
TRF-4	SoCore Solar Facility Monthly and Annual Production Profile (2021-2040)

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Direct Testimony  
of  
Tara R. Fowler

1                   **I. WITNESS IDENTIFICATION AND QUALIFICATIONS**

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

3   A. My name is Tara R. Fowler. My business address is 1800 Larimer Street, Denver,  
4       Colorado 80202.

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 electric utility subsidiary of Xcel  
8       Energy Inc. (“Xcel Energy”).

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

10   A. I am employed by Xcel Energy Services Inc., the service company subsidiary of  
11       Xcel Energy, as Manager, Renewable Energy Power Purchases.

12   **Q. Please briefly outline your responsibilities as Manager, Renewable Energy**  
13       **Power Purchases.**

14   A. I am responsible for managing and coordinating the negotiation and  
15       administration of long-term renewable energy purchased power agreements  
16       (“PPA”) and associated legal documents, including purchases from qualifying  
17       renewable energy facilities across all four of the Xcel Energy Operating  
18       Companies. I am also responsible for the overall management of Xcel Energy’s  
19       Renewable Energy Credits portfolio including managing all activities to meet

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1 corporate compliance objectives for Renewable Energy Portfolio Standards for  
2 each state jurisdiction.

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

4 A. I received a dual bachelor's degree in Management and Marketing from the  
5 University of Iowa in 2001 and a Master of Science in Global Energy  
6 Management from the University of Colorado in 2015.

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

8 A. I began my professional career with Aquila in 2001 as an Energy Trader. In  
9 2003, I accepted a position as a Transmission Accountant with Xcel Energy and  
10 four months later transitioned to an Energy Trader position. In that position, I  
11 was responsible for maximizing revenues, reducing Operating Company system  
12 costs, and ensuring reliable system operations. In 2015, I was promoted to my  
13 current position as Manager, Renewable Energy Power Purchases, where I  
14 manage a team of Purchased Power Analysts, Renewable Portfolio Consultants,  
15 and a Contract Analyst. My group is responsible for the negotiation of renewable  
16 energy purchases and the administration of over 200 long-term PPAs, totaling in  
17 excess of 7,000 megawatts ("MW") of installed capacity from wind, hydro, and  
18 photovoltaic ("PV") solar projects.

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1                   **II.     ASSIGNMENT AND SUMMARY OF TESTIMONY**  
2   **AND RECOMMENDATIONS**

3     **Q.     What is your assignment in this proceeding?**

4     A.     SPS is proposing in this case to replace its existing voluntary renewable energy  
5             purchase program, Windsource, with a new program, Solar\*Connect Community  
6             (“Solar\*Connect”). The Solar\*Connect program affords SPS’s New Mexico  
7             retail customers the option to purchase additional renewable energy at a premium  
8             above SPS’s base cost of energy. To supply the new Solar\*Connect program,  
9             SPS executed the “Solar\*Connect PPA” with SoCore Clovis 1 LLC (“SoCore”),  
10            which involves the purchase of all of the energy purchased from a 1.98 MW  
11            alternating current (“ac”) solar powered electric generating facility (the “SoCore  
12            Solar Facility”) that will be developed by SoCore near Clovis, New Mexico.

13            My assignment in this proceeding is to describe the negotiations with  
14            SoCore, present and describe the key terms and conditions of the Solar\*Connect  
15            PPA, and describe the SoCore Solar Facility.

16     **Q.     Please summarize your testimony and conclusions.**

17     A.     As I discuss below, the terms and conditions of the Solar\*Connect PPA are  
18             reasonable and provide adequate protections for SPS’s customers.

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1    **Q.    Are Attachments TRF-1, TRF-2, and TRF-3 true and correct copies of the**  
2           **Solar\*Connect PPA, Model PPA, and First Amendment to the**  
3           **Solar\*Connect PPA discussed in your testimony?**

4    A.    Yes.

5    **Q.    Was Attachment TRF-4 prepared by you or under your direct supervision**  
6           **and control?**

7    A.    Yes.



### III. SOCORE SOLAR FACILITY

**Q. Please describe the purpose of this section of your testimony.**

A. In this section of my testimony, I provide a general description of the SoCore Solar Facility.

**Q. Please generally describe the SoCore Solar Facility to be built in accordance with the Solar\*Connect PPA.**

A. The SoCore Facility is a new 1.98 MWac (at the Point of Delivery) solar PV power generation facility that will be located in Curry County, New Mexico near the city of Clovis. A description of the SoCore Solar Facility is provided as Appendix C to the Solar\*Connect PPA. Construction is expected to take up to four months, and the facility is expected to be fully operational by the last half of December 2020.

SPS expects the SoCore Solar Facility to produce approximately 5,747 megawatt hours (“MWh”) of solar energy in the first year and average approximately 110,672 MWh of solar energy over the Solar\*Connect PPA’s 20-year term.

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1   **Q.   Please describe the approvals and environmental permits required to**  
2       **construct and operate the SoCore Solar Facility.**

3   A.   Under the Solar\*Connect PPA, SoCore is responsible for obtaining and  
4       maintaining all permits<sup>1</sup> necessary to authorize production and delivery of  
5       one-hundred percent of the Committed Nameplate Capacity of the SoCore Solar  
6       Facility. Specifically, these permits include:

Permit	Authority Having Jurisdiction
Notice of Proposed Construction	Federal Aviation Administration
Construction Stormwater General Permit	U.S. Environmental Protection Agency
Driveway/Access Permit	Curry County
Commercial Building Permit	City of Clovis

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<sup>1</sup> The term “Permits” is defined in the Solar\*Connect PPA, *see* Art. I, § 1.52, to mean “all state, federal and local authorizations, certificates, permits, licenses and approvals required by any Governmental Authority for the construction, operation and maintenance of the Facility.”

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1 **IV. SOLAR\*CONNECT PPA**

2 **Q. Please describe the purpose of this section of your testimony.**

3 A. In this section of my testimony, I describe SPS's solicitation and negotiations  
4 with SoCore and discuss the Solar\*Connect PPA's key terms and conditions.

5 **Q. Has SPS provided a copy of the Solar\*Connect PPA to the New Mexico**  
6 **Public Regulation Commission ("Commission")?**

7 A. Yes. A copy of the Solar\*Connect PPA is provided as Attachment TRF-1.

8 **Q. Please briefly describe the contract negotiation process with SoCore.**

9 A. In December 2017, SPS issued a Request for Proposals ("RFP") seeking solar  
10 generation resources ("2017 Solar\*Connect RFP") for the purpose of supplying  
11 the proposed Solar\*Connect program. Following the bid evaluation and selection  
12 process, SPS entered into contract negotiations with SoCore, in which SPS's  
13 Model PPA (*see* Attachment TRF-2) was used as a template for the negotiations.  
14 Through this process, in-person meetings and conference calls were held to: (1)  
15 discuss SoCore's requested deviations to SPS's Model PPA; and (2) develop a  
16 draft contract for review by both parties. For each requested deviation from the  
17 Model PPA, SPS evaluated the issue or the specific term or condition and, where  
18 appropriate, consulted with SPS subject-matter experts to ensure the change did

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1 not compromise the intent of the provision or unnecessarily shift risks to SPS.  
2 Moreover, all such deviations, as well as the final contract, were subject to  
3 internal management approval. The final Solar\*Connect PPA was executed on  
4 June 28, 2018.

5 **Q. Please generally describe the purpose of the Model PPA.**

6 A. The Model PPA, a copy of which was provided to potential bidders with the 2017  
7 Solar\*Connect RFP, was developed to allow bidders to familiarize themselves  
8 with common terms and conditions under which SPS purchases renewable  
9 energy. The Model PPA provisions include, but are not limited to, the  
10 requirements for: commercial operation of the facility, delivery and metering of  
11 the solar energy produced, terms and conditions related to the price of the solar  
12 energy, and associated renewable energy certificates (“RECs”).<sup>2</sup> In addition, the  
13 Model PPA establishes performance criteria for operating and maintaining the  
14 facility, financial security requirements, contract administrative and notice  
15 requirements, and assignment and other transfer restrictions. Finally, the Model  
16 PPA defines events of default, force majeure, and other representations,  
17 warranties, and covenants.

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<sup>2</sup> The RECs discussed in this testimony are the same as the Renewable Energy Credits referred to in the Solar\*Connect PPA.

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1   **Q.    Please describe the provisions in the Solar\*Connect PPA that differ from the**  
2       **Model PPA.**

3    A.    As a result of negotiations, the executed Solar\*Connect PPA includes four  
4       substantive modifications to the Model PPA.

5               First, the “Conditions Precedent” section in the Model PPA was modified  
6       to allow SoCore to terminate the Solar\*Connect PPA if, prior to August 31, 2018,  
7       SoCore cannot execute an Interconnection Agreement with SPS.<sup>3</sup> It is not  
8       unusual for a PPA to include such a provision, which allows a seller to terminate a  
9       PPA under specific situations for a limited time period. In this instance, the  
10      termination period afforded SoCore under the Solar\*Connect PPA is reasonable  
11      given that the SPS interconnect study requirements may result in upgrade costs  
12      beyond that originally accounted for in SoCore’s bid.

13             Second, the Model PPA’s “Unavailability Provision” was deleted from the  
14      Solar\*Connect PPA.<sup>4</sup> The Model PPA’s Unavailability Provision provided that it  
15      is an “Event of Default” by seller,<sup>5</sup> in this case SoCore, if the SoCore Solar

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<sup>3</sup> See Solar\*Connect PPA at Art. II, § 2.2(b).

<sup>4</sup> See Model PPA at Art. VII, § 7.2(a).

<sup>5</sup> The Solar\*Connect PPA expressly identifies certain events that constitute an “Event of Default” by both SPS and SoCore as well as their right to cure such default.

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1 Facility is unavailable for any reason other than Force Majeure or an Event of  
2 Default by SPS for 90 consecutive days or 180 non-consecutive days in any 365  
3 day period. This provision was removed from the Solar\*Connect PPA because it  
4 was deemed redundant of and less protective of SPS than the Solar\*Connect  
5 PPA's "Mechanical Availability Percentage" Event of Default provision.<sup>6</sup> The  
6 Solar\*Connect PPA's "Mechanical Availability Percentage" Event of Default  
7 provision states that it is an Event of Default by SoCore if, commencing with the  
8 second Commercial Operation Year ("COY"), the SoCore Solar Facility fails to  
9 achieve at least an 85% Mechanical Availability Percentage for any COY.  
10 Mechanical Availability Percentage is defined to mean the weighted average  
11 portion of the Committed Nameplate Capacity<sup>7</sup> of the SoCore Solar Facility that  
12 is mechanically available to produce energy during a designated period,  
13 regardless of insolation during that period.

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<sup>6</sup> See Solar\*Connect PPA at Art. VII, § 7.2(b).

<sup>7</sup> The Solar\*Connect PPA defines "Committed Nameplate Capacity," see Art. I, § 1.14, as the "total maximum designed power output, expressed in MW (AC), of all installed solar panels at the Facility as specified by the equipment manufacturer. Such capacity is capacity that Seller agrees to construct and maintain at the Facility in order to sell and deliver Capacity and Energy to SPS pursuant to this Agreement."

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1 Third, the Model PPA was modified by the Solar\*Connect PPA to permit  
2 SoCore to assign the PPA for collateral purposes to any Financier<sup>8</sup> without the  
3 consent of SPS.<sup>9</sup> The addition of this provision was deemed reasonable given the  
4 small size of the SoCore Solar Facility and the potential difficulties SoCore may  
5 face in securing the financing necessary to complete construction.

6 Fourth, the Solar\*Connect PPA amended the Model PPA to remove  
7 SPS's: (1) option to acquire the SoCore Solar Facility upon default by SoCore;  
8 and (2) Right of First Offer to purchase the SoCore Solar Facility should SoCore  
9 offer it for sale.<sup>10</sup> Although SPS generally prefers retaining these rights, in this  
10 instance they afforded SPS little value. SPS is not interested in acquiring the  
11 SoCore Solar Facility given its small size. Moreover, such a purchase would not  
12 make sense economically. As explained by SPS witness Bennie F. Weeks, SPS  
13 could not immediately flow the benefits of Investment Tax Credits associated

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<sup>8</sup> "Financier" is defined in the Solar\*Connect PPA, *see* Art. I, § 1.29, to mean "any individual or entity providing money or extending credit (including any capital lease, sale, sale-leaseback or power purchase agreement) for (i) the construction, term, ownership or permanent financing of the Facility or (ii) working capital or other ordinary business requirements for the Facility ...."

<sup>9</sup> *See* Solar\*Connect PPA at Art. V, § 5.2.

<sup>10</sup> *See* Model PPA at Art. VII, § 7.4, and Art. IX, § 9.3.

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1 with the SoCore Solar Facility to its customers in the same manner that SoCore  
2 did for its pricing of the Solar\*Connect PPA.

3 **Q. Were there any post-execution amendments to the Solar\*Connect PPA?**

4 A. Yes. On August 24, 2018, SPS and SoCore executed the First Amendment to the  
5 Solar\*Connect PPA. Please refer to Attachment TRF-3 for a copy of the First  
6 Amendment to the Solar\*Connect PPA.

7 **Q. What was the purpose of the First Amendment to the Solar\*Connect PPA?**

8 A. The purpose was to amend two dates in the Solar\*Connect PPA: (1) the date by  
9 which SPS is required to seek regulatory approval; and (2) the date by which  
10 SoCore is required to obtain a signed Interconnection Agreement. To do this,  
11 SPS and SoCore agreed to:

12 (1) extend the date by which SPS is required to request Commission approval  
13 of the Solar\*Connect program from 60 days to 90 days after the effective  
14 date of the Solar\*Connect PPA; and

15 (2) amend the Solar\*Connect PPA's Condition Precedent addressing  
16 SoCore's execution of an Interconnection Agreement by deleting the date  
17 August 31, 2018, and replacing it with the date September 27, 2018.<sup>11</sup>

18 In addition, SPS and SoCore agreed that SoCore shall have the option of selecting  
19 one of two possible locations for the SoCore Solar Facility's point of

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<sup>11</sup> See First Amendment to Solar\*Connect PPA at ¶¶ 1-2.



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1 interconnection to the West Clovis Substation.<sup>12</sup> This amendment affords SoCore  
2 the opportunity to locate the SoCore Solar Facility on a site closer to the West  
3 Clovis Substation. Ms. Weeks discusses this alternative site in her direct  
4 testimony.

5 **Q. What is the term of the Solar\*Connect PPA?**<sup>13</sup>

6 A. The Solar\*Connect PPA has a term of 20 COYs, starting from the first day  
7 following a successful demonstration that the SoCore Solar Facility has reached  
8 Commercial Operation.<sup>14</sup>

9 **Q. Please describe the amount of energy expected to be available for purchase**  
10 **under the Solar\*Connect PPA.**

11 A. The Solar\*Connect PPA provides SPS with all of the net energy generated from  
12 the 1.98 MWac SoCore Solar Facility, which has an expected capacity factor of  
13 31%.<sup>15</sup> Please refer to Attachment TRF-4 for an illustration of the expected  
14 monthly energy available under the Solar\*Connect PPA over its 20-year term.

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<sup>12</sup> See First Amendment to the Solar\*Connect PPA at ¶ 3.

<sup>13</sup> See Solar\*Connect PPA at Art. II, § 2.1.

<sup>14</sup> “Commercial Operation” is defined in Art. I, § 1.10 of the Solar\*Connect PPA.

<sup>15</sup> See Solar\*Connect PPA at Recital ¶ 4, Art. I, §§ 1.4, 1.47, and Art. II, § 2.3.

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1   **Q.   Please describe the pricing under the Solar\*Connect PPA.**

2   A.   The cost of the contracted-for capacity, and energy, including the associated  
3       RECs, for each COY is shown in Appendix E to the Solar\*Connect PPA. The  
4       price for COY one is \$39.00 per megawatt hour (“MWh”), escalating by two  
5       percent annually thereafter. The levelized price is approximately \$45.46 per  
6       MWh over the 20-year term.

7   **Q.   Will the Solar\*Connect PPA require SPS to pay for fixed or variable**  
8       **administrative, transactional, or operation and maintenance costs incurred**  
9       **through operation of the SoCore Solar Facility?**

10  A.   No. All of SPS’s costs under the Solar\*Connect PPA are related to energy  
11       received or compensable curtailment payments.

12  **Q.   Under the Solar\*Connect PPA, is there any obligation for SPS to pay**  
13       **insurance-related costs?**

14  A.   No. However, SoCore is required to maintain certain insurance coverages as set  
15       forth in Appendix D to the Solar\*Connect PPA, and SPS is to be named as an  
16       additional insured.

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1   **Q.    Does the Solar\*Connect PPA contain any security guarantees?**

2    A.    Yes.  No later than 60 days following the effective date of the Solar\*Connect  
3           PPA, SoCore is required to establish, fund, and maintain a Security Fund in the  
4           amount of \$50,000 that is available to pay any amount due SPS under the  
5           Solar\*Connect PPA.  The purpose of the fund is to provide SPS security that  
6           SoCore will satisfy its contractual obligations.  The fund is to be maintained at  
7           SoCore's expense and within 15 days after SPS makes a permissible draw,  
8           SoCore is required to replenish the fund up to the lesser of: (i) \$50,000, or (ii) the  
9           amount remaining under the Damages Cap, which I discuss below.

10   **Q.    Please describe the circumstances under which SPS may draw from the**  
11           **Security Fund.**

12   A.    SPS may draw from the Security Fund such amounts as are necessary to recover  
13           amounts owed to SPS under the Solar\*Connect PPA but that have not been timely  
14           paid, including but not limited to any damages, Liquidated Delay Damages,  
15           termination damages, and any amounts for which SPS is entitled to indemnity  
16           payments.  Moreover, SPS's failure or delay to draw any amount from the  
17           Security Fund in any instance shall not prejudice SPS's rights to subsequently  
18           recover such amount from the Security Fund or in any other manner.

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1   **Q.   Please describe the Solar\*Connect PPA provisions that relate to non-**  
2       **performance.**

3   A.   As with any contract, SPS and SoCore are obliged to comply with the general  
4       terms and conditions of the Solar\*Connect PPA. But, as noted above, the  
5       Solar\*Connect PPA identifies certain Events of Default for SPS and SoCore,  
6       along with remedies for each. For any uncured Event of Default by SoCore, SPS  
7       may initiate any, some, or all of the following actions: (1) seek offset payments;  
8       (2) seek actual damages; (3) draw on the Security Fund for any unpaid damages  
9       or any other required and unpaid amounts; or (4) immediately terminate the  
10      contract (upon notice) and collect all Liquidated Delay Damages<sup>16</sup> in connection  
11      with the Event of Default.

12   **Q.   Please describe the Solar\*Connect PPA's Damages Caps.**

13   A.   The Solar\*Connect PPA provides that SoCore's aggregate financial liability to  
14       SPS for: (i) Liquidated Delay Damages shall not exceed \$180,000, and (ii)  
15       Replacement Energy Costs, RECs, and other damages (excluding Liquidated  
16       Delay Damages) shall not exceed \$200,000. The Liquidated Delay Damages cap

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<sup>16</sup> Liquidated Delay Damages is defined in the Solar\*Connect PPA, *see* Art. I, § 1.41, as "two thousand dollars (\$2,000) per day."

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1 of \$180,000 was determined by multiplying the contractually defined daily  
2 Liquidated Delay Damages amount by the maximum 90-day period afforded  
3 SoCore to cure a failure to achieve the “Target Commercial Operation Date” of  
4 the SoCore Solar Facility. The \$200,000 Damages Cap was developed based on  
5 experience gained from negotiating PPAs of similar sizes for other Xcel Energy  
6 Operating Companies.

7 **Q. Are there any specific performance requirements captured in the**  
8 **Solar\*Connect PPA?**

9 Yes. The Solar\*Connect PPA requires specific performance related to attaining  
10 certain commercial operation milestones and meeting twelve-month Mechanical  
11 Availability Percentage requirements. For example, Liquidated Delay Damages  
12 will be paid to SPS for delays in meeting the Target Commercial Operation Date,  
13 which is defined in the Solar\*Connect PPA as December 15, 2020.

14 **Q. Will SPS accept energy above that currently expected to be generated by the**  
15 **SoCore Solar Facility and purchased under the Solar\*Connect PPA?**

16 A. Yes. SPS will accept and pay for all energy generated by the SoCore Solar  
17 Facility and delivered under the terms of the Solar\*Connect PPA.

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1   **Q.   Describe further SPS's ability to purchase RECs under the Solar\*Connect**  
2       **PPA.**

3   A.   To the full extent allowed by law, SPS shall own or be entitled to claim all RECs  
4       associated with the net energy and capacity purchased by SPS under the  
5       Solar\*Connect PPA.

6   **Q.   Are the terms and conditions of the Solar\*Connect PPA reasonable?**

7   A.   Yes. The Solar\*Connect PPA contains terms and conditions that are similar to  
8       other SPS solar PPAs, and the modifications to the Model PPA generally reflect  
9       the size of the project and provide reasonable protections for SPS's customers.

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

11  A.   Yes.

**VERIFICATION**

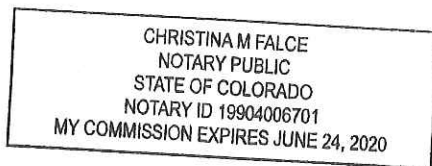
STATE OF COLORADO            )  
  ) ss.  
COUNTY OF DENVER         )


TARA R. FOWLER, being first duly sworn on her oath, states:

I am the witness identified in the preceding testimony. I have read the testimony and the accompanying attachments and am familiar with their contents. Based upon my personal knowledge, the facts stated in the testimony are true. In addition, in my judgment and based upon my professional experience, the opinions and conclusions stated in the testimony are true, valid, and accurate.

  
\_\_\_\_\_  
TARA R. FOWLER

SUBSCRIBED AND SWORN TO before me this 21<sup>st</sup> day of September, 2018 by  
TARA R. FOWLER.



  
\_\_\_\_\_  
Notary Public, State of Colorado  
My Commission Expires: 6/24/2020

**EXECUTION VERSION**

**SOLAR ENERGY PURCHASE AGREEMENT**

This Solar Energy Purchase Agreement ("Agreement") is entered into this 28<sup>th</sup> day of June, 2018 (the "Effective Date") by and between **Southwestern Public Service Company**, a New Mexico corporation ("SPS"), and **SoCore Clovis 1 LLC**, a Delaware LLC ("Seller").

**RECITALS**

1. SPS desires to establish a community solar garden program (generally, the "Program"). The Program would give SPS's retail customers the option to purchase subscriptions to a utility-scale solar powered electric generating facility and receive a monthly bill credit proportional to the output of the facility.
2. SPS conducted a targeted Request for Proposals ("RFP") seeking bids from parties desiring to build a utility-scale solar powered electric generating Facility to support the Program.
3. Seller responded to SPS's RFP with a proposal to construct, own and operate a proposed solar powered electric generating Facility on a site located in Curry County, New Mexico with a nameplate capacity of one point ninety-eight (1.98) MW (AC) to be interconnected to the Distribution Authority's system, and to sell the certain products generated and delivered from the Facility to SPS at the Point of Delivery for a period of twenty (20) Commercial Operation Years.
4. SPS accepted Seller's proposal and desires to purchase and Seller desires to sell, all of the Capacity and Net Energy of the Facility, subject to the terms and conditions and at the prices set forth in this Agreement.

**NOW THEREFORE**, in consideration of these premises and the mutual promises set forth below, Seller and SPS agree as follows:

**AGREEMENT**

**ARTICLE I - DEFINITIONS**

- 1.1 AC** means alternating electric current.
- 1.2 Acceptance Criteria** means the criteria that will be used to determine whether and when the Facility is capable of producing Energy associated with the Committed Nameplate Capacity and delivering such Energy to the Point of Delivery, as set forth in Appendix B.
- 1.3 Affiliate** means any person or entity that directly or indirectly controls, is under the control of, or is under common control with, the named entity by the power to direct or cause the direction of the management of the policies of named entity, whether through ownership interest, by contract or otherwise.



- 1.4 **Agreement** means this contract, including all appendices, for the purchase of Capacity and Net Energy entered into between Seller and SPS, as amended by the Parties from time to time in accordance with this Agreement.
- 1.5 **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, 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.
- 1.6 **Business Day** means any Day that is not a Saturday, a Sunday, or a NERC recognized holiday.
- 1.7 **Capacity** means the output potential a machine or system can produce or carry under specified conditions. The capacity of generating equipment is generally expressed in MW. Capacity is also referred to as “capability” in the industry and for the purposes of this Agreement the terms are synonymous.
- 1.8 **Change of Control** means the occurrence of any one of the following events with respect to Seller or any direct or indirect owner of a majority of the ownership interests in Seller: (i) a transfer of a majority of the ownership interests in Seller or such owner; or (ii) any consolidation or merger of Seller or such owner in which Seller or such owner, as the case may be, is not the continuing or surviving entity, or (iii) a sale or conveyance of any direct or indirect ownership interest in Seller following which the Ultimate Parent Entity is no longer the direct or indirect owner of at least fifty percent (50%) of the ownership interests of Seller, provided, however, that a change of control shall not be deemed to have occurred as a result of a Permitted Transfer.
- 1.9 **COD Delay** has the meaning set forth in Section 7.5.
- 1.10 **Commercial Operation** means when (a) one-hundred (100%) of the Committed Nameplate Capacity of the Facility is installed, (b) the Facility has operated at a generation level acceptable to the Distribution Authority without experiencing any abnormal or unsafe operating conditions on any interconnected system, (c) Seller has obtained all Permits necessary to authorize that production and delivery, and (d) Seller or the Facility have completed all other Acceptance Criteria as set forth in Appendix B.
- 1.11 **Commercial Operation Date** means the first Day following a successful demonstration that the Facility has reached Commercial Operation and Seller has met the other criteria of Appendix B; provided that such date must not be earlier than ninety (90) Days prior to the Target COD.
- 1.12 **Commercial Operation Year** means the period starting at 12:01 a.m. on the Commercial Operation Date and ending at 11:59 a.m. on the last Day of the calendar month in which the first anniversary of the Commercial Operation Date occurs, and each successive “Commercial Operation Year” shall mean the 12-month period following the prior Commercial Operation Year.

- 1.13 Commission** means New Mexico Public Regulation Commission, or any successor agency as the case may require.
- 1.14 Committed Nameplate Capacity** means the total maximum designed power output, expressed in MW (AC), of all installed solar panels at the Facility as specified by the equipment manufacturer. Such capacity is capacity that Seller agrees to construct and maintain at the Facility in order to sell and deliver Capacity and Energy to SPS pursuant to this Agreement.
- 1.15 Damages Cap** has the meaning set forth in Section 7.6(c).
- 1.16 Day** means a calendar day.
- 1.17 Dispute** has the meaning set forth in Section 8.1.
- 1.18 Distribution Authority** means the business unit within SPS responsible for operating the interconnection facilities, and the Distribution System applicable to Seller.
- 1.19 Distribution System** means the contiguously interconnected electric distribution facilities over which the Distribution Authority has rights (by ownership or contract).
- 1.20 Electric Metering Device** means revenue quality meter, metering equipment and data processing equipment used to measure, record or transmit data relating to the Energy from the Facility, including the metering current transformers and the metering voltage transformers.
- 1.21 Energy** means the amount of electricity either used or generated over a period of time; expressed in terms of MWh.
- 1.22 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 Agreement, and/or (iii) will preclude or interfere with Seller's ability to perform its obligations under this Agreement as and when due.
- 1.23 Environmental Law** means any federal, state and local laws, including statutes, regulations, rulings, orders, administrative interpretations and other governmental restrictions and requirements relating to the discharge of air pollutants, water pollutants, process waste water or otherwise relating to the environment or hazardous substances as amended from time to time.
- 1.24 Escrow Account** has the meaning set forth in Section 10.3(b).
- 1.25 Facility** means the generation facility located on the Site and Seller-owned interconnection facilities between the Site and the Point of Interconnection for the generation of solar powered electricity and delivery of such electricity to SPS. A description of the Facility is set forth in Appendix C and incorporated by reference.

- 1.26 Facility Debt** means the obligations of Seller or its affiliates to any Financier 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.
- 1.27 Financing Documents** mean the documents associated with any tax equity financing and the loan and credit agreements, notes, bonds, indentures, security agreements, lease financing agreements, mortgages, deeds of trust, interest rate exchanges, swap agreements and other documents relating to the development, bridge, construction or permanent debt financing, Tax Equity Financing and/or portfolio financing for the Facility, including any credit enhancement, credit support, working capital financing, or refinancing documents, and any and all amendments, modifications, or supplements to the foregoing that may be entered into from time to time at the discretion of Seller in connection with development, construction, ownership, leasing, operation or maintenance of the Facility.
- 1.28 FERC** means the Federal Energy Regulatory Commission or its successor organization, if any.
- 1.29 Financier** means any individual or entity providing money or extending credit (including any capital lease, sale, sale-leaseback or power purchase agreement) for (i) the construction, term, ownership or permanent financing of the Facility or (ii) working capital or other ordinary business requirements for the Facility, and shall include the Tax Equity Investor(s). "Financier" shall not include common trade creditors of Seller.
- 1.30 Force Majeure** has the meaning set forth in Section 6.1.
- 1.31 Governmental Authority** means any nation, government, state or other political subdivision thereof, whether foreign or domestic, including, without limitation, any municipality, township and county, and any entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government, including, without limitation, any corporation or other entity owned or controlled by any of the foregoing.
- 1.32 Guaranteed Price** means the prices expressed in dollars per MWh set forth in Appendix E and used as the basis for determining payments by SPS to Seller for the Net Energy of the Facility.
- 1.33 Guarantor** has the meaning set forth in Section 10.3(c).
- 1.34 Hazardous Materials** mean any substance, material, gas, or particulate matter that is regulated by any local Governmental Authority, any applicable State, or the United States of America, as an environmental pollutant or dangerous to public health, public welfare, or the natural environment including, without limitation, protection of non-human forms of life, land, water, groundwater, and air, including any material or substance that is (i) defined as "toxic," "polluting," "hazardous waste," "hazardous material," "hazardous substance," "extremely hazardous waste," "Solid waste" or "restricted hazardous waste" under any provision of local, state, or federal law; (ii) petroleum, including any fraction,

derivative or additive; (iii) asbestos; (iv) polychlorinated biphenyls; (v) radioactive material; (vi) designated as a “hazardous substance” pursuant to the Clean Water Act, 33 U.S.C. §1251 *et seq.* (33 U.S.C. §1251); (vii) defined as a “hazardous waste” pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. §6901 *et seq.* (42 U.S.C. §6901); (viii) defined as a “hazardous substance” pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601 *et seq.* (42 U.S.C. §9601); (ix) defined as a “chemical substance” under the Toxic Substances Control Act, 15 U.S.C. §2601 *et seq.* (15 U.S.C. §2601); or (x) defined as a pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §136 *et seq.* (7 U.S.C. §136).

- 1.35 Indemnified Damages** has the meaning set forth in Section 7.7.
- 1.36 Interconnection Agreement** means the separate distributed generation interconnection agreement between Seller and Distribution Authority for the interconnection of the Facility to the Distribution System, as such agreement may be amended from time to time, that is described in Section 4.3.
- 1.37 Interconnection Facilities** mean all the facilities installed for the purpose of interconnecting the Distribution System and the Facility, 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 Distribution Authority or another entity.
- 1.38 Investment Grade Credit Rating** means long-term senior unsecured rating, or long-term issuer rating in the absence of senior unsecured rating, which is (a)(1) “Baa3” or higher by Moody’s or (2) “BBB-” or higher by S&P, or (b) if rated by both Moody’s and S&P, both (a)(1) and (a)(2).
- 1.39 Issuer** has the meaning set forth in Section 10.3.
- 1.40 Letter of Credit** has the meaning set forth in Section 10.3(a).
- 1.41 Liquidated Delay Damages** are two thousand dollars (\$2,000) per Day.
- 1.42 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 Agreement.
- 1.43 Mechanical Availability Percentage** with respect to any designated period of time means the weighted average portion of the Committed Nameplate Capacity of the Facility that is mechanically available to produce energy during such period, regardless of insolation during such period. For example, if (subject to the following sentence) during the third Commercial Operation Year the Facility is completely unavailable for 30 Days; 50% unavailable for 30 Days, and 100% available for 305 Days, the Mechanical Availability Percentage for such Commercial Operation Year would be 87.67%. The Facility will be deemed to be mechanically available even if it cannot produce energy due to the presence

of a Force Majeure event, a Qualifying Loss Production Event, a Non-Compensable Curtailment, or SPS's breach of this Agreement.

- 1.44 **MW** means megawatt.
- 1.45 **MWh** means megawatt hour.
- 1.46 **NERC** means the North American Electric Reliability Corporation or its successor agency, if any.
- 1.47 **Net Energy** means the actual number of MWh generated by the Facility during the period being considered less any generating output in MWh used for Station Auxiliary Power as measured by the meter installed pursuant to Section 3.2.
- 1.48 **Non-Compensable Curtailment** has the meaning set forth in Section 5.3(c).
- 1.49 **Outage** means a physical state in which all or a portion of the Plant is unavailable to provide Energy.
- 1.50 **Party/ies** mean SPS, Seller and their respective permitted successors and assignees.
- 1.51 **Pending Facility Transaction** or **PFT** has the meaning set forth in Section 9.4(c).
- 1.52 **Permits** mean all state, federal and local authorizations, certificates, permits, licenses and approvals required by any Governmental Authority for the construction, operation and maintenance of the Facility.
- 1.53 **Permitted Transfer** means any of the following:
  - (a) transactions among Affiliates of Seller, including any corporate reorganization, merger, combination or similar transaction or transfer of assets or ownership interests involving Seller or its Affiliates, provided, however, that the equity interests in Seller (excluding interests held by tax equity investors) continue to be held, directly or indirectly, no less than fifty percent (50%) by the Ultimate Parent Entity (or such lesser amount resulting from a transaction permitted by clause (b) immediately below),
  - (b) any transaction whereby Seller or its Affiliates directly or indirectly sells or transfers its ownership interests in the Seller or the Facility to a Qualified Investor, provided further that in the case of a transfer to a Qualified Investor, the entity that operates the Facility following such transfer is (or contracts with) a Qualified Operator,
  - (c) any exercise by a Financier of its rights and remedies under the Financing Documents and any transaction involving any Financier with respect to such Financier's disposition of its interest in the Facility, this Agreement or its direct or indirect interests in the Seller,
  - (d) a Change of Control of the Ultimate Parent Entity of Seller,

- (e) any change of economic and voting rights triggered in Seller's direct or indirect 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,
- (f) the direct or indirect transfer of shares of or equity interests in Seller or the Facility to a tax equity investor (including a sale/leaseback transaction); or
- (g) a transfer of the Facility packaged with any of the following:
  - (i) all or substantially all of the assets of Seller's Ultimate Parent Entity;
  - (ii) all or substantially all of the energy generation portfolio of Seller's Ultimate Parent Entity;
  - (iii) if the Seller and the Facility are included in a separate portfolio financing, all or substantially all of the assets of such portfolio; or
  - (iv) all or substantially all of the solar generation portfolio of Seller's Ultimate Parent Entity; provided, however, that in the case of this clause (iv), the Facility does not represent more than fifty percent (50%) of the generation of such solar generation portfolio; and

*provided further* that in the case of each of (f)(i), (ii) and (iii), the entity(ies) to whom the portfolio is transferred is a (are) Qualified Investor(s) and the entity that operates the Facility following such transfer is (or contracts with) a Qualified Operator.

- 1.54 Person** means an individual, partnership, corporation (including a business trust), limited liability company, joint stock company, trusts, unincorporated association, joint venture, Governmental Authority or other entity.
- 1.55 PFT Notice** has the meaning set forth in Section 9.4(a).
- 1.56 PI** has the meaning set forth in Section 11.15.
- 1.57 Point of Delivery** means the point at which SPS accepts title to and risk of loss for the Net Energy and Capacity sold and delivered by Seller to SPS and the amount of Net Energy delivered and purchased is established for purposes of billing. The Point of Delivery shall be at a location within Distribution Authority's system and is shown in Appendix A. For purpose of this Agreement, the Point of Delivery is the Point of Interconnection.
- 1.58 Point of Interconnection** means the point on the electrical system where the Facility is physically interconnected with the Distribution Authority's system. The Point of Interconnection is shown in Appendix A.
- 1.59 Prudent Electric Industry Practice** means those methods, practices and use of certain equipment, as changed from time to time, that are commonly used and accepted in electrical engineering and operations to operate electric equipment lawfully, safely,

dependably and efficiently, including, but not limited to the requirements of the National Electric Safety Code, the National Electrical Code, NERC, standards and procedures and any governmental code or regulations.

- 1.60 Qualified Investor** means an investor that directly or indirectly through its Affiliates has (i) an Investment Grade Rating, or (ii) a tangible net worth of not less than \$250 million.
- 1.61 Qualified Operator** means an operator of solar generation facilities that has with its Affiliates at least three (3) years' experience in the solar energy generation and operation business, and owns, controls or operates a minimum of one hundred (100) MW of solar energy generation capacity.
- 1.62 Qualifying Production Loss Event** has the meaning set forth in Section 5.3(b).
- 1.63 Renewable Energy Credits or REC** means the right to all non-energy and environmental attributes (including economic, carbon and pollutant-related tags and credits, benefits, avoided or reduced emissions reductions, offsets, emission rate reductions, tags and allowances, howsoever titled) attributable to the capacity available and/or energy generated by the facility, including environmental air quality credits, tags and allowances created by Applicable Law by virtue of the facility's environmentally favorable or renewable characteristics or attributes. REC shall include renewable energy certificates within the meaning of Part 572 of Title 17, Chapter 9, New Mexico Administrative Code with respect to one MWh of renewable energy. For the avoidance of doubt, RECs excludes (i) investment tax credits and other local, state or federal tax credits providing a tax benefit to seller based on ownership of the facility or energy production therefrom, including the investment tax credit that may be available to seller with respect to the facility under §48 of the Internal Revenue Code of 1986, as amended; and, (ii) depreciation and other tax benefits arising from ownership or operation of the facility unrelated to its status as a generator of renewable or environmentally clean energy.
- 1.64 Replacement Energy Costs** mean if Seller commits an Event of Default pursuant to Section 7.2, the costs actually and reasonably incurred by SPS to purchase renewable Energy (including Capacity) or non-renewable Energy and Capacity from a third Person, in each case including any actual costs for delivery of such replacement Energy to SPS, and any associated transaction costs, less the amount that SPS would have paid Seller for an equivalent amount of Net Energy pursuant to this Agreement during the applicable period of time given the available solar resource, plus all incremental costs incurred by SPS to replace the Renewable Energy Credits that Seller fails to deliver to SPS under this Agreement with alternative solar Energy that meets the requirements of WREGIS and the Commission, if applicable. In the event that Replacement Energy Costs for any hour are less than the Guaranteed Price for such hour, Replacement Energy Costs shall be deemed to be equal to the Guaranteed Price for such hour.
- 1.65 Seller** has the meaning set forth in the introductory paragraph and includes any of Seller's permitted successors or assignees.
- 1.66 Seller CP** has the meaning set forth in Section 2.2(b).

- 1.67 Seller's Contractual Obligations** means, as to Seller, any provision of any security issued by it or any material agreement, instrument or undertaking to which Seller is a party or by which it or any of its property is bound.
- 1.68 Site** means the real property on which the Facility will be constructed and located, including all related solar easements and on which Seller receives electric service. The legal description of the Site is set forth in Appendix C and incorporated by reference.
- 1.69 SPP** means the Southwest Power Pool, or its successors and assigns.
- 1.70 SPS** has the meaning set forth in the introductory paragraph and includes any of SPS's permitted successors and assignees.
- 1.71 Station Auxiliary Power** means Energy used by Seller to operate the Facility.
- 1.72 Target COD** means December 15, 2020.
- 1.73 Tax Equity Financing** means a transaction or series of transactions involving one or more investors seeking a return that is enhanced by tax credits and/or tax depreciation (each a "Tax Equity Investor") and generally (i) described in Revenue Procedures 2001-28 (sale-leaseback (with or without "leverage")), 2007-65 (flip partnership) or 2014-12 (flip partnership and master tenant partnership) as those revenue procedures are reasonably applied or analogized to a solar project transaction (as opposed to a wind farm or rehabilitated real estate) or (ii) contemplated by Section 50(d)(5) of the Code, as amended (a pass-through lease).
- 1.74 Term** has the meaning set forth below in Section 2.1.
- 1.75 Test Energy** means any Net Energy generated by the Facility and delivered to the Point of Delivery prior to the Commercial Operation Date for the Facility.
- 1.76 Ultimate Parent Entity** means ENGIE Holdings Inc.
- 1.77 WREGIS** means the Western Renewable Energy Generation Information System.

## ARTICLE II - TERM AND SALE AND PURCHASE

**2.1 Term.** This Agreement shall be effective upon the Effective Date and shall continue through the end of the twentieth (20<sup>th</sup>) Commercial Operation Year, unless this Agreement is earlier terminated pursuant to Section 2.2, Article VII or otherwise in accordance with its terms.

### **2.2 Conditions Precedent.**

(a) *SPS Condition Precedent.* No later than sixty (60) Days after the Effective Date of this Agreement, SPS shall request approval of the Program from the Commission. Seller agrees to cooperate with SPS with respect to any such request by providing information reasonably necessary to support the request and to respond to discovery requests by parties to the proceeding



to the extent requested by SPS. SPS shall use commercially reasonable efforts to obtain approval of the Program from the Commission. Within thirty (30) days after the earliest of the following (including in the event of a Commission decision, the decision upon reconsideration if applicable), SPS may terminate this Agreement upon written notice to Seller if: the Commission (i) declines to approve the Program, (ii) fails to approve the Program within one year following the Effective Date hereof, or (iii) approves the Program subject to conditions that are unacceptable to SPS, in its sole discretion, with no further obligations under this Agreement.

If SPS fails to terminate this PPA in the times allowed by this Section 2.2(a), the SPS condition precedent shall be deemed to have been waived and this PPA shall remain in full force and effect thereafter.

(b) Seller Condition Precedent. Seller shall have the right to terminate this PPA, without any further financial or other obligation to SPS as a result of such termination, by notice to SPS within thirty (30) Days following the failure of Seller to satisfy or waive in its sole discretion the following condition precedent (the "Seller CP") by the indicated deadline:

<u>Seller CP</u>	<u>Deadline</u>
Seller and the Transmission Authority shall have executed an Interconnection Agreement per the Transmission Provider's standard form, with such changes as are necessary or appropriate given the location and characteristics of the Facility	August 31, 2018

If Seller fails to terminate this PPA in the times allowed by this Section 2.2(b), the Seller CP shall be deemed to have been waived and this PPA shall remain in full force and effect thereafter.

**2.3 Sale and Purchase.** Seller shall generate from the Facility, deliver to the Point of Delivery, and sell to SPS, and SPS shall receive and purchase at the Point of Delivery, the Capacity and Net Energy required by this PPA.

**2.4 Energy Rate.**

(a) **Guaranteed Price.** From and after the Commercial Operation Date, SPS shall pay Seller the Guaranteed Price set forth in Appendix E for the Net Energy that Seller delivers to SPS at the Point of Delivery. The applicable Guaranteed Price is intended to compensate Seller for both the Net Energy and Capacity delivered to SPS, and Seller is not entitled to a separate price or payment for the Capacity of the Facility to which SPS is entitled.

(b) **Test Energy.** SPS shall purchase all Test Energy produced by the Facility during startup and testing and delivered to SPS at the Point of Delivery at a payment rate equal to \$27.30 per MWh.

(c) **Qualified Production Loss Event.** If delivery of Net Energy is curtailed pursuant to a Qualifying Production Loss Event (as defined in Section 5.3(b)), SPS shall make payment therefor to the extent provided in, and in accordance with, Section 5.3(d).

- 2.5 **Tax Credits and Benefits.** Seller is responsible to apply and qualify for the federal investment tax credit pursuant to 26 U.S.C. § 48 and any other tax credits or payments or other assistance, grants, credits, or other tax benefits (such as accelerated depreciation) that might be available to Seller or the Facility from any Governmental Authority or other source, and SPS agrees that Seller is entitled to receive any such credits, assistance or grants. The Guaranteed Price and other pricing set forth in this Agreement are not subject to adjustment or amendment due to Seller's receipt, or failure to receive, any such credits, assistance, grants, or benefits, in whole or in part, after the date of this Agreement, including without limitation failure of the Facility to qualify to receive any tax credit for any reason.
- 2.6 **Committed Nameplate Capacity.** Seller agrees that the Committed Nameplate Capacity shall be 1.98 MW (AC), and that the Committed Nameplate Capacity shall include only Capacity from the Facility.
- 2.7 **Capacity Accreditation.** As between SPS and Seller, SPS shall be entitled to all of the Capacity of the Facility (if any), for all purposes. SPP places upon the SPS certain planning, operating and reporting requirements. If required by SPP specifically for the Facility, Seller shall complete at Seller's expense all applicable testing and reporting requirements for the Facility, including any required capacity testing.
- 2.8 **Renewable Energy Credits.** To the full extent allowed by Applicable Law, SPS shall own or be entitled to claim all Renewable Energy Credits associated with the Net Energy and Capacity purchased by SPS pursuant to this Agreement and that SPS is entitled to utilize any and all such Renewable Energy Credits for purposes determined by SPS, including without limitation to (i) meet any voluntary, statutory or regulatory mandate to own, construct or contract for the purchase of solar Energy, including but not limited to the terms of any Commission order and any other similar existing or future requirement; (ii) meet the requirements of any green pricing or community solar garden program by which SPS resells the Net Energy to retail customers as solar or renewable Energy; and (iii) offset, avoid, reduce or obtain credit for reduction of pollutants or air emissions created by SPS's electric generating facilities. To the extent necessary, Seller shall assign to SPS all rights, title and authority for SPS to register, own, hold and manage such Renewable Energy Credits in SPS's own name and to SPS's account, including any rights associated with any renewable Energy information or tracking system that may be established with regard to monitoring, tracking, certifying or trading such Renewable Energy Credits. The Guaranteed Price and other pricing set forth in this Agreement are not subject to adjustment or amendment due to SPS's receipt, or failure to receive, any such Renewable Energy Credits, in whole or in part, after the date of this Agreement. For the avoidance of doubt, Renewable Energy Credits do not include state and federal tax credits, including the federal investment tax credit. To the extent necessary, Seller shall provide SPS with reasonable assistance or documentation necessary for SPS to claim such Renewable Energy Credits. Without limiting the foregoing, Seller will upon SPS request, assign to SPS all rights and authority for SPS to hold such credits in SPS own name and to SPS's account, including any rights associated with any renewable energy tracking system that may be established with regard to monitoring or tracking such Renewable Energy Credits.

### ARTICLE III - DELIVERY, METERING AND BILLING

#### 3.1 **Delivery Arrangements.**

(a) Seller shall be solely responsible to deliver the Net Energy and Capacity from the Facility to the Point of Delivery. Net Energy shall be measured by electric metering devices located at the Point of Interconnection (the "Electric Metering Devices").

(b) Seller shall be responsible for all distribution interconnection, electric losses, distribution, transmission, and ancillary service arrangements and costs required to deliver the Net Energy from the Facility to SPS to the Point of Delivery.

(c) SPS shall be responsible for all electric losses, distribution, transmission, imbalance and ancillary service arrangements and costs required to accept Net Energy from the Facility at the Point of Delivery and to transmit and deliver Net Energy from the Point of Delivery to points beyond the Point of Delivery. SPS may elect at SPS's sole option the services and facilities to be utilized for the delivery of Energy from the Point of Delivery.

(d) To the extent required, SPS shall arrange and be responsible for scheduling and transmission services at and beyond the Point of Delivery. To the extent applicable, SPS shall be the market participant for the Facility, as defined by the Distribution Authority and/or SPP.

3.2 **Metering Requirements.** The transfer of Capacity and Energy between Seller and SPS shall be measured by metering equipment installed in accordance with the Interconnection Agreement at no cost to SPS under this Agreement. Seller shall provide SPS access to all metering equipment for all purposes necessary to perform under this Agreement and shall provide SPS the reasonable opportunity to be present at any time the metering equipment is to be inspected and tested or adjusted in accordance with the Interconnection Agreement. Seller shall provide SPS with all authorizations necessary to have access to the metering equipment, including obtaining any consent or other agreement from the Distribution Authority necessary to allow SPS such access. If the metering equipment fails to register, or is found upon testing to be inaccurate by more than one percent (1%) (for a mechanical meter) or three tenths of a percent (0.3%) (for an electronic meter), an adjustment shall be made correcting all measurements by the inaccurate or defective device using the best available information; provided that such correction shall be limited to no more than the preceding one-hundred eighty (180) Days prior to the discovery of the error. Either Party may install back-up metering at its own cost; provided that such back-up metering meets the same technical standards applicable to the metering equipment. To the extent that an adjustment covers a period of deliveries for which payment has already been made by SPS, SPS shall use the corrected measurements as determined in accordance with this Article III to adjust the next regular invoice(s) in accordance with this Article III.

3.3 **Billing.** Seller shall read the meter once a month. Within fifteen (15) Days of the date on which Seller reads the meter, SPS shall send Seller a settlement statement for the previous month that contains data for the computation of payments owed to Seller. Based on such settlement statement, Seller shall send SPS an invoice for Net Energy and Capacity, in accordance with the price terms of this Agreement, within fifteen (15) Days of the date on

which SPS delivered such settlement statement to Seller. Seller shall use the invoice format provided by SPS.

- 3.4 Billing and Payment Records.** To facilitate payment and verification, Seller shall maintain all books and records necessary for billing and payments, including without limitation copies of all invoices and curtailment data with respect to the Facility for a period of at least two (2) years, and Seller shall grant SPS reasonable access to those books, records and data on the premises of the Facility or at the principal place of business of such Seller. SPS may examine such books and records relating to transactions under and administration of this Agreement, at any time during the period the records are required to be maintained, upon request with reasonable prior notice and during normal business hours.
- 3.5 Payment.** SPS's payment to Seller for Net Energy and Capacity delivered shall be delivered to Seller within twenty (20) Days following the date of the bill. If such due date falls on a weekend or legal holiday, such due date shall be the next Business Day. Payments posted after the due date shall be considered late and shall bear interest on the unpaid balance at a rate equal to three percent (3%) plus the average daily prime rate as determined from the "Money Rates" section of the Midwest Edition of the Wall Street Journal for the Days of the late payment period multiplied by the number of Days elapsed from and including the Day after the due date, to and including the payment date. In the event this index is discontinued or its basis is substantially modified, the Parties shall agree on a substitute equivalent index.
- 3.6 Electronic Funds Transfer.** SPS shall make payment of bills via electronic funds transfer if requested in writing by Seller, if the request contains adequate payment information. SPS shall be entitled to presume conclusively, without any liability whatsoever, that the payment information furnished by Seller (for example, name, financial institution, account numbers and payee) is accurate. In no event will SPS be required to pay any bill more than once when the invoice was first paid in accordance with Seller's instructions.

#### ARTICLE IV - SELLER'S OBLIGATIONS

During the Term of this Agreement, Seller hereby agrees to be bound by and to perform the following affirmative obligations:

**4.1 Design, Construction and Operation of the Facility.** Seller shall:

(a) At its sole expense, design and construct the Facility in accordance with Prudent Electric Industry Practice.

(b) In a timely manner, seek, obtain, maintain, comply with and, as necessary, renew and modify, at Seller's sole expense, the Permits and all other permits, certificates or other authorizations that are required by any Requirement of Law or Governmental Authority as prerequisites to engaging in the activities envisioned by this Agreement and to meeting Seller's obligation to operate the Facility consistently with the terms of this Agreement.

(c) At its sole expense, operate, maintain and repair the Facility in accordance with this Agreement, the Interconnection Agreement, all Applicable Laws, Seller's Contractual Obligations, Permits, the practices and requirements of SPP, and in accordance with Prudent Electric Industry Practice.

(d) At its sole expense, obtain and maintain the policies of insurance in the amounts specified in Appendix D during the Term of this Agreement. The insurance policies shall list SPS as an additional insured and shall not be cancelable without sixty (60) Days prior written notice by the insurer to SPS.

(e) Comply with any applicable SPP and NERC procedures and the requirements of any new similar authority, and cooperate with all reasonable requests by SPS relating to SPS's compliance with such entities; provided, however, that Seller shall not be obligated to register as a generator with SPP.

(f) Comply with all current SPS outage reporting requirements, as they may be revised from time to time, and as they apply to the Facility. Seller shall have suitable solar radiation and other meteorological meters of the types necessary to characterize fully the solar resource and ambient conditions to support calculations under this Agreement, including the estimation of the quantity of Energy subject to Qualifying Production Loss Event payments under Section 5.3(d).

(g) No later than sixty (60) Days following the Effective Date of this Agreement, Seller shall conduct a Phase I Environmental Site Assessment ("Phase 1") of the Site and shall provide SPS with a copy of the Phase 1 report, together with any data or information generated as part of the Phase 1. To the extent that Phase 1 discloses any Environmental Contamination impacting the Site, Seller shall confirm that such Environmental Contamination has been remediated or is capable of being remediated such that the Site remains appropriate for its intended use by Seller. If Seller cannot provide such confirmation, Seller shall promptly inform SPS if, due to any Environmental Contamination, Seller is constrained in a way that will limit, reduce, interfere with or preclude Seller's ability to perform its obligations under this Agreement, along with a statement of whether and to what extent this circumstance may limit or preclude Seller's ability to perform under this Agreement. In this event, Seller shall provide SPS with written recommendations to overcome any circumstance(s) that would allow Seller to fully perform under this Agreement. Thereafter, Seller shall promptly disclose to SPS the presence of any Environmental Contamination or the existence of any enforcement, legal, or regulatory action or proceeding relating to Environmental Contamination, impacting the Site.

#### **4.2 General Obligations.**

(a) Seller shall pay all present or future federal, state, municipal or other lawful taxes or fees applicable to Seller, the Site and the Facility or by reason of Seller's ownership or operation of the Site and the Facility and the sale of Net Energy and Capacity under this Agreement (excluding any federal, state, municipal, sales, use, excise or other similar taxes on the sale of electricity). Seller shall receive the benefit of any new tax credits, allowances or other credits related to the Site and the Facility.

(b) Seller shall obtain in its own name and at its own expense any and all pollution or environmental credits or offsets necessary to operate the Facility in compliance with the Environmental Laws.

(c) [Reserved].

(d) The Parties acknowledge that this Agreement does not provide for the supply of any retail electric service by SPS to the Facility. Seller shall provide its own Station Auxiliary Power pursuant to separate arrangements, which may include obtaining Station Auxiliary Power from the gross output of the Facility when it is operating. Seller shall arrange with the Distribution Authority or applicable retail service provider to measure separately such Station Auxiliary to ensure proper computing of Net Energy. This may be accomplished with a single net meter as long as Station Auxiliary Power can be read separately from gross output. If the Facility is ever a net user of electric energy, Seller expressly recognizes that, for purposes of this Agreement, the supplier of retail electric services to the Facility shall be deemed to be a separate entity and separate contracting party whether or not the arrangement for the supply of retail electric services to the Facility is entered into with SPS or an affiliate of SPS.

(e) Seller shall keep complete and accurate operating and other records and all other data for the purposes of proper administration of this Agreement, including such records as may be required by any Governmental Authority, SPS, the Parties and as otherwise required by Prudent Electric Industry Practice. SPS shall provide reasonable prior notice of SPS's specific requirements to Seller.

(f) Seller shall continue to the extent applicable, preserve, renew and keep in full force and effect its organizational existence and good standing, and take all reasonable action to maintain all permits, rights, privileges, licenses and franchises necessary in the ordinary course of its business; and (ii) comply with all Seller's Contractual Obligations (to the extent that they affect Seller's performance hereunder) and all Applicable Laws.

(g) Seller shall provide to SPS such other information regarding the permitting, engineering, construction, condition and operations of Seller or the Facility, financial or otherwise, or other data concerning Seller or the Facility as SPS may, from time to time, reasonably request.

(h) Prior to the Commercial Operation Date, Seller shall (i) submit monthly progress reports to SPS in a form agreed upon by the Parties, advising SPS of the current status of development and construction of the Facility, any significant developments or delays (along with an action plan for making up delays), and Seller's best estimate of the Commercial Operation Date; and (ii) invite SPS to participate in monthly meetings to discuss the progress reports, answer questions, and assess the schedule.

#### **4.3 Interconnection Agreement.**

(a) Seller shall interconnect the Facility into the Distribution Authority's system pursuant to the Interconnection Agreement. Seller shall be responsible for negotiating, entering into and performing its obligations pursuant to the Interconnection Agreement with the Distribution Authority and any other necessary Persons for design, installation and operation of the Interconnection Facilities necessary to permit delivery and transformation of the Net Energy

and Capacity on Seller's side of the Point of Delivery. Seller shall provide the Distribution Authority and any applicable transmission owner's written permission to release transmission study results to SPS.

(b) The Parties acknowledge that this Agreement imposes no responsibilities or obligations on the Distribution Authority. The Parties recognize that Seller will enter into a separate Interconnection Agreement with the Distribution Authority, which will be a separate and free-standing contract. Seller expressly recognizes that, for purposes of this Agreement, the Distribution Authority shall be deemed to be a separate entity and separate contracting party whether or not the Interconnection Agreement is entered into with SPS or an affiliate of SPS. Notwithstanding any other provision in this Agreement, nothing in the Interconnection Agreement shall alter or modify Seller's or SPS's rights, duties and obligations under this Agreement. Furthermore, this Agreement shall not be construed to create any rights between Seller and the Distribution Authority.

(c) The Parties recognize that Seller will be obligated to comply with the terms of the Interconnection Agreement and the rules of the Commission.

**4.4 Provision of Real-Time Data.** Seller shall install equipment at the Point of Interconnect that is capable of providing real-time access to Facility production data directly to SPS or through the Distribution Authority. To the extent such data is not readily available electronically or in real time, Seller agrees to provide such data on a historical basis in a CSV format or Excel spreadsheet upon request by SPS.

## **ARTICLE V - SPS OBLIGATIONS; CURTAILMENT**

**5.1 Cooperation.** SPS shall cooperate with Seller in any applications that Seller is making for tax credits, grants or assistance as described in Section 2.5, at SPS's expense. SPS's obligation shall consist only of providing nonproprietary information in its possession, custody or control necessary to complete any such applications, responding to requests from the relevant Governmental Authorities and similar activities.

**5.2 Collateral Assignments, Accommodation of Financiers.**

(a) Notwithstanding anything to the contrary in Section 9.1 below, Seller may assign this PPA for collateral purposes to any Financier without the consent of SPS. Subject to the terms and conditions of this Agreement, SPS shall, upon prior written request by Seller, execute a commercially reasonable consent and agreement with respect to a collateral assignment hereof in favor of any Financier in a form acceptable to SPS, provided that (i) Seller shall reimburse SPS for all reasonable expenses incurred by SPS in connection therewith, including without limitation reasonable attorneys' fees, (ii) SPS shall have no obligation to alter or modify the terms of this Agreement or provide any consent or enter into any agreement, that has a Material Adverse Effect on any of SPS's rights, benefits, risks, or obligations under this Agreement, and (iii) SPS's duty to make factual statements or representations in such consent shall be contingent upon the truthfulness and accuracy of such statements or representations at the time the consent and agreement is delivered.

(b) SPS acknowledges that the Financier may have other or further requests with respect to the assignment of this Agreement (such as requests for legal opinions or certificates from SPS) and may request that certain terms be incorporated into a consent and agreement or assignment agreement to be executed by SPS. SPS will consider any such requests and, subject to Section 5.2(a), SPS will cooperate and negotiate any such consent and agreement or assignment in good faith. Seller shall reimburse SPS for all reasonable expenses incurred by SPS in connection therewith, including without limitation reasonable attorneys' fees.

(c) Seller shall pay or reimburse SPS for its out-of-pocket costs (including reasonable counsel fees) incurred in connection with SPS's compliance with this Section 5.2.

### **5.3 Curtailment; Production Losses.**

(a) The Parties acknowledge that there may be circumstances in which the Distribution Authority or another Person with authority will direct Seller to curtail deliveries of Net Energy and Capacity from the Facility in accordance with applicable laws, tariffs or agreements. SPS also may direct Seller to curtail deliveries from the Facility, in whole or in part (at any time, for any reason and for any duration), subject to this Section 5.3. Whenever possible, SPS shall give Seller reasonable prior notice of the possibility that SPS, the Distribution Authority or another Person with authority will direct Seller to curtail deliveries of Net Energy and Capacity from the Facility.

(b) For purposes hereof, a "Qualifying Production Loss Event" means

- (i) a directive from SPS to curtail production from the Facility; and/or
- (ii) a directive from the Distribution Authority to curtail the Facility, which directive results from the Distribution Authority's refusal or inability to accept deliveries from the Facility at the Point of Delivery for any reason (including emergencies and Force Majeure beyond the Point of Delivery), other than due to Seller's breach of the Interconnection agreement or other fault of Seller.

In the event of a Qualifying Production Loss Event following COD, Seller shall be entitled to compensation from SPS pursuant to Section 5.3(d)-(f) below.

(c) For purposes hereof, a "Non-Compensable Curtailment" means any curtailment or other event causing a loss of production from the Facility, other than a Qualifying Production Loss Event, including without limitation

- (i) the unavailability of the Facility, including any problems with Seller's Interconnection Facilities;
- (ii) any action by the Distribution Authority arising from Seller's breach of the Interconnection Agreement or other fault of Seller;
- (iii) any action by Governmental Authorities against Seller or the Facility;



- (iv) a failure of Seller to maintain all permits or authorizations necessary to operate the Facility and/or deliver Net Energy to the Point of Delivery; and/or
- (v) the operation of Seller's system protection equipment or any malfunction of Seller's equipment that causes the Facility to be disconnected from the Distribution System.

Seller shall not be entitled to any compensation from SPS for any lost production resulting from Non-Compensable Curtailments; provided that nothing in this Section 5.3(c) or elsewhere in this Agreement shall limit or affect any rights Seller may have against any Person under the Interconnection Agreement or under any other agreement or at law as a result of such events.

(d) Upon the occurrence of a Qualifying Production Loss Event following COD, SPS shall be obligated to pay Seller an amount equal to the Guaranteed Price then in effect that Seller would have received under this Agreement for the energy that was curtailed during such Qualifying Production Loss Event, measured in MWh, that Seller would have otherwise produced and delivered to the Point of Delivery but for the Qualifying Production Loss Event as reasonably determined by Seller subject to Buyer's confirmation, not to be unreasonably withheld, conditioned or delayed. Once such amounts are determined pursuant to this Section 5.3(d), then Seller shall include such amounts on the next invoice sent to SPS pursuant to Section 3.3.

(e) Seller shall invoice SPS for amounts due as a result of Qualifying Production Loss Events together with its regular monthly invoices for the applicable month as set forth in Section 3.3. Seller shall include information with the invoice documenting (i) the nature and duration of the Qualifying Production Loss Event, (ii) irradiation data gathered at the Site during such Qualifying Production Loss Event used to calculate the lost production amounts, and (iii) the computation of amounts due under this Section 5.3 for the invoiced lost production, all in a format provided by SPS. SPS shall notify Seller within thirty (30) Days of receipt if SPS believes that the circumstances described do not constitute a Qualifying Production Loss Event and the reason for that conclusion. If the Parties cannot resolve the difference of opinion by negotiation, either Party may utilize the dispute resolution procedures in this Agreement.

(f) Seller shall install, or arrange for the Distribution Authority to install pursuant to the Interconnection Agreement, equipment necessary to disconnect the Facility from the Distribution Authority's system. Seller and SPS shall each use commercially reasonable efforts to develop a mutually acceptable procedure for SPS to notify Seller, of curtailments.

**5.4 Compliance with Applicable Law.** SPS shall comply with all Applicable Laws, except for any non-compliance that (individually or in the aggregate) could not reasonably be expected to have a Material Adverse Effect on Seller or on SPS's ability to perform this Agreement.

## ARTICLE VI - FORCE MAJEURE

**6.1 Force Majeure.** Except as otherwise provided herein, performance of each Party under this Agreement may be subject to interruptions or reductions due to an event of Force Majeure. The term "Force Majeure" shall mean an event or circumstance beyond the

control of the Party claiming Force Majeure that, by exercise of due diligence and foresight, could not reasonably have been avoided, including but not limited to a Force Majeure event or emergency on the Distribution System as defined in the Interconnection Agreement to the extent it causes the Facility to be physically incapable of delivering Energy or SPS from receiving Energy at the Point of Delivery; a Force Majeure event (or comparable uncontrollable circumstances as may be defined in applicable tariffs or rules) on the Distribution System or the regional transmission system to the extent it causes SPS to be unable to accept delivery of Energy at the Point of Delivery or to transmit such energy from and after the Point of Delivery; flood; earthquake; storm; fire; lightning; epidemic; war; riot; civil disturbance; sabotage; terrorism; labor strike, slowdowns or stoppages or other labor disruptions against Seller or Seller's contractors or subcontractors; act of God or any other cause beyond the control of the Party claiming Force Majeure. However, the obligation to use due diligence shall not be interpreted to require resolution of labor disputes by acceding to demands of the opposition when such course is inadvisable in the discretion of the Party having such difficulty. In no event will the existence of Force Majeure extend this Agreement beyond its stated Term.

**6.2 Remedial Action.** A Party shall not be liable to the other Party in the event it is prevented from performing its obligations hereunder in whole or in part due to an event of Force Majeure. The Party rendered unable to fulfill any obligation by reason of a Force Majeure shall take all action necessary to remove such inability with all due speed and diligence. The nonperforming Party shall be prompt and diligent in attempting to remove the cause of its failure to perform, and nothing herein shall be construed as permitting that Party to continue to fail to perform after said cause has been removed.

**6.3 Exclusions from Force Majeure.** Notwithstanding anything in this Agreement to the contrary, "Force Majeure" shall not mean:

(a) General inclement weather normally experienced within the vicinity of the Site and affecting construction, start-up, operation or decommissioning of the Facility or related facilities excluding events which are listed in Section 6.1.

(b) Changes in market conditions or actions of a Governmental authority unless such action is itself the result of a Force Majeure, in either case that affect Seller's supply of Energy from the Facility.

(c) Unavailability of equipment, repairs or spare parts for the Facility, except to the extent due to a qualifying event of Force Majeure.

(d) Inability to obtain, maintain or renew any Permit or any delay in obtaining, maintaining or renewing any Permit.

(e) Litigation or administrative or judicial action pertaining to this Agreement, the Site, the Facility, the acquisition, maintenance or renewal of financing or any Permits, or the design, construction, maintenance or operation of the Facility.

(f) Any acts or omissions of any third party, including, without limitation, any vendor or supplier of Seller, except to the extent due to a qualifying event of Force Majeure.

(g) Any mechanical or equipment breakdown or other mishap at the Facility or events or conditions attributable to normal wear and tear or flaws or failure to operate or maintain such component in accordance with Prudent Electric Industry Practice, unless such mishap is caused by a qualifying event of Force Majeure.

**6.4 Notice.** In the event of any delay or nonperformance resulting from Force Majeure, the Party suffering the event of Force Majeure shall provide notice to the other Party. The notice shall be in writing and be given ten (10) Business Days after the Party's knowledge of the occurrence of the Force Majeure event or, if such notice is not possible, as soon as practicable thereafter and include the nature, cause, date of commencement thereof and the anticipated extent of any delay or interruption in perform

**6.5 Termination.** In the event of Force Majeure that delays the Commercial Operation Date for more than one hundred eighty (180) Days beyond the outside date for COD set forth in Section 7.5, SPS shall have the right to terminate this Agreement without any further financial or other obligation to Seller as a result of such termination.

## ARTICLE VII - TERMINATION/DEFAULT/REMEDIES

**7.1 Events of Default by SPS.** Any of the following events shall constitute a default by SPS under this Agreement. Such default shall mature into an Event of Default if not cured within the indicated cure period.

(a) SPS breaches any non-monetary material obligation under this Agreement and fails to cure such breach within thirty (30) Days after written notification by Seller of the breach.

(b) SPS fails to make any payment due under this Agreement within ten (10) Business Days after written notice from Seller that such payment is past due, unless such payment is contested by SPS in good faith.

**7.2 Events of Default by Seller.** Any of the following events shall constitute a default by Seller under this Agreement. If a cure period is provided below, including the extended cure period provided in Section 7.3(f), such default shall mature into an Event of Default if not cured within the indicated cure period.

(a) Seller breaches any material obligation under this Agreement and fails to cure the breach within thirty (30) Days after written notification by SPS of the breach, *provided that* for purposes of determining whether Seller has breached a material obligation of Sections 4.1(c), 4.2(f) and/or 4.3(c), only Seller's default of the Interconnection Agreement which (i) materially interferes with Seller's delivery of Net Energy to the Point of Delivery, and (ii) is not cured within the longer of the cure period (if any) provided in the Interconnection Agreement and the thirty (30) Day period provided herein, shall be deemed to violate this Section 7.2(a).

(b) Commencing with the second (2<sup>nd</sup>) Commercial Operation Year, the Facility fails to achieve at least an eighty-five percent (85%) Mechanical Availability Percentage for any Commercial Operation Year; *provided* the cure period for such default shall be the following Commercial Operation Year and Seller shall be deemed to have cured this default if, in the

following Commercial Operation Year, the Facility achieves at least a ninety percent (90%) Mechanical Availability Percentage.

### **7.3 Termination.**

(a) Upon the occurrence of an Event of Default for which there is no cure period or in the event a defaulting Party fails to cure an Event of Default within the applicable cure period, the non-defaulting Party may terminate this Agreement by notifying the defaulting Party in writing of the decision to terminate and the effective date of the termination.

(b) Upon termination of this Agreement by SPS due to an Event of Default by Seller pursuant to Section 7.2, SPS shall have no future or further obligation to purchase the Capacity or Net Energy of the Facility or to make any payment whatsoever under this Agreement, except for payments for obligations arising or accruing prior to the effective date of termination.

(c) Upon termination of this Agreement by Seller due to an Event of Default by SPS pursuant to Section 7.1, Seller shall have no future or further obligation to deliver the Capacity or Net Energy of the Facility to SPS or to satisfy any other obligation of this Agreement, except for payments or other obligations arising or accruing prior to the effective date of termination.

(d) After the effective date of any termination, this Agreement shall not be construed to provide any residual value to either Party or any successor or any other Person, for rights to, use of or benefits from the Facility or the Distribution System.

(e) Notwithstanding any provisions in this Agreement to the contrary, upon the occurrence of an Event of Default by Seller, SPS shall provide notice of the Event of Default to each Financier for which an address or other contact information has been provided to SPS by Seller. Each Financier shall have the right to cure the Event of Default on behalf of Seller within the cure periods set forth in Section 7.2, plus an additional thirty (30) Days beyond Seller's cure period to cure any monetary Event of Default and an additional ninety (90) Days beyond Seller's cure period to cure any non-monetary Event of Default; *provided, however*, that if the Financier requires possession of the Facility in order to cure the Event of Default, and if the Financier diligently seeks possession, the Financier's additional 30-Day or 90-Day, as applicable, 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 Financier. SPS agrees to accept any such cure to the same extent as if made by Seller. If a Financier, or its successor, obtains possession of the Facility and assumes all of the prospective obligations of Seller under this Agreement, and cures any Event of Default capable of cure by performance or the payment of money damages, SPS agrees to recognize the Financier, or its permitted designee, as Seller under this Agreement and to perform its obligations to such Financier or its successor. Seller acknowledges that SPS will not grant to a Financier any additional time to cure an Event of Default.

(f) Except for a COD Delay, if a non-monetary Event of Default by Seller will require more than the prescribed cure period to cure, and Seller is diligently pursuing a cure, as reasonably demonstrated to SPS, then the applicable cure period shall be extended up to an additional ninety (90) Days so long as Seller is diligently pursuing the cure.

(g) If the Parties are engaged in a dispute as to whether an Event of Default has occurred or whether a Party has the right to terminate this Agreement, and the Parties are handling the dispute through the procedures established in Article VIII, the Party claiming the Event of Default or the right to terminate shall not be entitled to terminate this Agreement until the senior management executives have completed their good faith negotiations to resolve the dispute pursuant to Section 8.1.

**7.4 [Reserved.]**

**7.5 Default by Seller; Failure to Achieve COD.**

(a) Seller shall be in Default should the Facility fail to achieve Commercial Operation on or before the Target COD for reasons other than as a result of a Force Majeure or an Event of Default by SPS ("COD Delay"). Seller shall be liable to pay Liquidated Delay Damages to SPS as a liquidated damage, and not a penalty, in lieu of Actual Damages, for any COD Delay.

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

(c) Should Seller fail to achieve Commercial Operation during the extended period set forth in Section 7.5(b), SPS may terminate this Agreement 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.

**7.6 Damages.**

(a) For all claims, causes of action and damages, the Parties shall be entitled to the recovery of actual damages allowed by law unless otherwise limited by this Agreement. Neither the enumeration of Events of Default in Section 7.1 and Section 7.2, nor the termination of this Agreement by a non-defaulting Party pursuant to Section 7.3 and/or Section 7.5, shall limit the right of a non-defaulting Party to rights and remedies available at law, including but not limited to claims for breach of contract or failure to perform by the other Party and for direct damages incurred by the non-defaulting Party as a result of the termination of this Agreement.

(b) Except as otherwise specifically and expressly provided in this Agreement, **NO PARTY SHALL BE LIABLE TO THE OTHER PARTY UNDER THIS AGREEMENT FOR ANY INDIRECT, SPECIAL, PUNITIVE, EXEMPLARY, INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING WITHOUT LIMITATION LOSS OF USE, LOSS OF REVENUES, LOSS OF PROFIT, INTEREST CHARGES, COST OF CAPITAL, OR CLAIMS OF CUSTOMERS TO WHICH SERVICE IS MADE, FROM ANY CAUSE WHETHER ARISING UNDER STATUTE OR IN TORT OR CONTRACT.** Notwithstanding the foregoing:

- (i) In the event that Seller is the defaulting Party, SPS shall be required to use commercially reasonable efforts to mitigate any damages it may incur and SPS's damages shall include Replacement Energy Costs;
- (ii) In the event that SPS is the defaulting Party, Seller shall be required to use commercially reasonable efforts to mitigate any damages it may incur and Seller's damages shall include the difference between the amounts Seller would otherwise have been paid under this Agreement and the price Seller received for such Energy and Capacity sold to a third party, if any; and
- (iii) Actual damages recoverable by Seller hereunder on account of an Event of Default of SPS may include the value of any investment tax credit and investment tax credit recapture amount determined on an after-tax basis, that are lost by Seller or an Affiliate, or are required to be repaid by Seller or an Affiliate due to an Event of Default of SPS that Seller has not been able to mitigate after use of commercially reasonable efforts.

(c) Except as otherwise provided in this Section 7.6, (i) Seller's aggregate financial liability to SPS for Liquidated Delay Damages shall not exceed \$180,000, and (ii) Seller's aggregate financial liability to SPS for Replacement Energy Costs, Renewable Energy Credits, and other damages (excluding Liquidated Delay Damages) shall not exceed \$200,000 ("Damages Cap").

(d) The limitations on damages set forth in Section 7.6(c) shall not apply to damages arising out of any of the following events:

- (i) Actual fraud or other material intentional misrepresentation or material misconduct sanctioned by, or at the direction of, Seller in connection with this Agreement or the operation of the Facility;
- (ii) The sale by Seller to a third party, or unauthorized diversion by Seller, of Energy committed to SPS under this Agreement, except during an Event of Default by SPS;
- (iii) Seller's failure to apply any property insurance proceeds to reconstruction of the Facility following a casualty to the Facility that occurs more than thirty-six (36) months prior to the end of the Term; provided that Seller's obligation to apply insurance proceeds to reconstruction of the Facility shall only apply if the insurance proceeds are sufficient to rebuild the Facility and a mutually-agreeable independent engineer determines that a rebuild is feasible.
- (iv) Damages incurred by SPS pursuant to Section 7.7 and/or Section 7.8;
- (v) Any Environmental Contamination caused by Seller in connection with this Agreement; or

- (vi) The filing of an involuntary bankruptcy petition against Seller (other than by SPS), which petition is not dismissed within sixty (60) Days of its filing, or the filing of a voluntary petition in bankruptcy by Seller.

**7.7 Indemnification - General.** Seller and SPS agree to defend, indemnify and hold each other, and their respective officers, directors, employees and agents, harmless from and against all claims, demands, losses, liabilities and expenses (including reasonable attorneys' fees) (collectively "Indemnified Damages") for personal injury or death to Persons and damage to each other's physical property or facilities or the property of any other Person to the extent arising out of, resulting from or caused by the negligent or intentional acts, errors or omissions of the indemnifying Party. Furthermore, each Party shall defend, indemnify and hold the other harmless from and against all damages that are or were incurred or suffered by the indemnified Party and that relate to the indemnifying Party's breach or failure to perform any of the covenants, agreements, obligations, representations or warranties contained in this Agreement. Nothing in this Section 7.7 shall relieve Seller or SPS of any liability to the other for any breach of this Agreement.

**7.8 Indemnification – Environmental.**

(a) As of the Commercial Operation Date (and not as of the date hereof) Seller represents and warrants to SPS as follows:

- (i) To the best of Seller's knowledge based solely on the Phase I environmental assessment performed on the Site, no portion of the Site or the improvements thereon has been used by previous or current owners or operators or Seller to generate, manufacture, refine, transport, treat, store, handle or dispose of toxic material, hazardous substances or hazardous wastes, as such terms are defined in any applicable Environmental Law, and Seller does not intend to use any of the Site for such purposes, and Seller is not aware of any spills, leaks or discharges of any such hazardous or toxic materials on the Site;
- (ii) To the best of Seller's knowledge, based solely on the Phase I environmental assessment performed on the Site, the Site does not contain, through the action or inaction of previous owners or operators or Seller, asbestos, urea formaldehyde foam insulation, PCBs, other toxic materials, hazardous substances or any other chemical, material or substance, exposure to which may or could pose a health hazard, whether or not the substance is prohibited, limited or regulated by any Governmental Authority, whether used in the Facility or stored on the Site;
- (iii) Seller has not received a written summons, citation, directive, letter or other written communication from any Governmental Authority concerning the existence of any condition on or affecting the Site that currently violates or that, with the passage of time, will violate any applicable Environmental Law or that otherwise indicates that Seller may be subject to any potential Environmental Contamination with respect to the Site or the Facility; and

- (iv) Neither Seller, the Facility nor the Site is subject to any existing or pending investigation or inquiry by any Governmental Authority or to any remedial obligations under any applicable Environmental Law (which representations and warranties would continue to be true and correct following disclosure to the applicable Governmental Authority of all relevant facts, conditions and circumstances pertaining to Seller, the Facility and the Site).

(b) Seller agrees to defend, indemnify and hold SPS and its officers, directors, employees, agents and representatives, and their respective permitted successors and assigns, harmless from and against all Indemnified Damages arising under any Environmental Law concerning Seller, the Facility or the Site, including but not limited to (i) any claim for personal injury or property damage by any Person arising out of, resulting from or caused by any violation of any applicable Environmental Law by Seller or concerning the Facility or the Site; (ii) any assessment, fine, penalty, lien or other imposition by any Governmental Authority; (iii) any breach of the foregoing representations and warranties; and (iv) any liability, losses or remedial costs suffered because a Governmental Authority finds SPS to be a responsible party, owner or operator of the Facility or Site, except in each case to the extent that the claim, assessment, fine penalty, lien, imposition, liability, loss or remedial costs are due to SPS's negligence, fraud or intentional misconduct.

#### ARTICLE VIII - DISPUTE RESOLUTION

- 8.1 In the event of any dispute arising under this Agreement (a "Dispute"), within ten (10) Business Days following notice issued by either Party pursuant (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. In the event the 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 a designated representative of each Party's 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 senior management representatives for both Parties shall negotiate in good faith to resolve the Dispute. If such senior management representatives are unable to resolve the Dispute thereafter, either Party may seek available legal remedies.
- 8.2 If no Dispute notice has been issued within twenty-four (24) months following the occurrence of events or circumstances giving rise to the Dispute (regardless of the knowledge or potential knowledge of either Party of such events and circumstances), the Dispute and all claims related thereto shall be deemed waived and the aggrieved Party shall thereafter be barred from proceeding thereon.
- 8.3 SELLER AND SPS 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 AGREEMENT OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER ORAL OR



WRITTEN) OR ACTIONS OF SELLER AND SPS RELATED HERETO AND EXPRESSLY AGREE TO HAVE ANY DISPUTES ARISING UNDER OR IN CONNECTION WITH THIS AGREEMENT BE ADJUDICATED BY A JUDGE OF THE COURT HAVING JURISDICTION WITHOUT A JURY.

#### ARTICLE IX - ASSIGNMENT

##### 9.1 Assignment by Seller.

(a) Except for any Permitted Transfer, which shall not require the consent of SPS, 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 SPS, which shall not be unreasonably withheld, conditioned or delayed. SPS shall have no obligation to provide any consent under this Section 9.1 unless:

- (i) Seller has complied with Section 9.4, if and as applicable;
- (ii) Seller has provided to SPS such information concerning the transferee's direct and indirect ownership as SPS reasonably requests;
- (iii) the transferee is (or contracts with) a Qualified Operator;
- (iv) the transferee (together with its parents and affiliates) is a Qualified Investor or other creditworthiness satisfactory to SPS;
- (v) Seller has provided to SPS at least thirty (30) Days' prior notice of the transaction; and
- (vi) Seller pays or reimburses SPS for the direct expenses (including the fees and expenses of counsel) incurred by SPS in connection with the transaction.

(b) Any Change of Control, sale, transfer, or assignment of any interest in the Facility (other than a Permitted Transfer) effected without fulfilling the requirements of this Agreement shall be null, void, and shall be a breach of this Agreement.

(c) Seller shall assign this Agreement 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 SPS. No assignment shall impair any security given by Seller hereunder. Seller may subcontract some or all of its duties under this Agreement without the consent of SPS, provided that no such subcontract shall relieve Seller of any of its obligations hereunder.

(d) Except as permitted in this Section 9.1, Seller may not assign this Agreement or any portion hereof. No assignment shall relieve Seller of its obligations under this Agreement. Before this Agreement is assigned by Seller, the assignee must first obtain such approvals as may be required by all applicable Governmental Authorities.

**9.2 Assignment by SPS.**

(a) SPS may assign this Agreement to any Affiliate or to any successor, in either case, that provides retail electric service in all or substantially all of SPS's service territory and is subject to rate and quality service regulation under the jurisdiction of the Commission. Any other assignment of this Agreement by SPS shall require the prior written consent of Seller, not to be unreasonably withheld, or delayed.

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

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

**9.3 [Reserved.]**

**9.4 PFT.**

(a) Seller shall give SPS at least sixty (60) Days' prior notice (a "PFT Notice") of any Pending Facility Transaction, in order to provide SPS with an opportunity to discuss and negotiate with Seller the possible sale of the Facility to SPS. 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 11.17 below.

(b) Seller shall have no obligation to sell nor shall SPS have any obligation to purchase the Facility, following any PFT Notice. 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) For purposes hereof, a "Pending Facility Transaction" or "PFT" means:

- (i) any Change of Control of Seller;
- (ii) 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;
- (iii) the commencement by Seller or any of its Affiliates of substantive negotiations with any unaffiliated third party with respect to the sale of any equity interests in Seller or the Facility, or any group(s) of assets or equity interests that includes the Facility; or

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

*provided, however,* that a PFT does not include (i) any Permitted Transfer, or (ii) any financing or refinancing of the Facility Debt.

#### ARTICLE X - SECURITY

- 10.1** No later than sixty (60) Days following the Effective Date hereof, Seller shall establish a Security Fund in the amount of fifty thousand dollars (\$50,000) that is available to pay any amount due to SPS pursuant to this Agreement, and to provide SPS security that Seller will satisfy its obligations under this Agreement.

Within fifteen (15) business days after SPS makes a draw on the Security Fund as authorized by this Agreement, Seller shall replenish the Security Fund up to the lesser of (i) \$50,000, or (ii) the amount remaining under the Damages Cap. Notwithstanding the foregoing, Seller shall replenish all amounts drawn from the Security Fund drawn in respect of damages described in Section 7.6(d).

- 10.2** SPS may draw from the Security Fund such amounts as are necessary to recover amounts owing to SPS pursuant to this Agreement that have not been timely paid, including but not limited to any damages, Liquidated Delay Damages, termination damages and any amounts for which SPS is entitled to indemnity payments under this Agreement. SPS may, in its sole discretion, draw all or any part of such amounts due to it from any form of security to the extent available pursuant to this Article and in any sequence SPS may select. SPS's failure or delay to draw any amount from the Security Fund in any instance shall not prejudice SPS's rights to subsequently recover such amount from the Security Fund or in any other manner.

- 10.3** The Security Fund shall be maintained at Seller's expense, shall be originated by or deposited in a financial institution or company ("Issuer") satisfying the requirements of this Article, and shall be in the form of one or more of the following instruments.

(a) The Security Fund may be in the form of an irrevocable, non-transferrable standby letter of credit substantially in the form and substance of Appendix F -Letter of Credit, and any material changes to such Appendix shall be subject to review and approval by SPS at its sole discretion (a "Letter of Credit").

- (i) The Issuer for the Letter of Credit shall have and maintain an unsecured bond rating (unenhanced by third-party support) equivalent to A- or better as determined by all rating agencies that have provided such a rating, and if ratings from either Standard & Poor's and Moody's are not available, equivalent ratings from alternate rating sources reasonably acceptable to SPS.

If such rating is equivalent to A-, the Issuer must not be on credit watch or have a negative outlook by any rating agency.

- (ii) The Letter of Credit must be for a minimum term of three-hundred and sixty (360) Days. Seller shall give SPS 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 or other authorized security for additional consecutive terms of three-hundred and sixty (360) Days or more (or, if shorter, the remainder of the Term) more than thirty (30) Days prior to each expiration date of the security. If the Letter of Credit or other security is not renewed or extended at least thirty (30) Days prior to its expiration date or otherwise is terminated early, SPS shall have the right to draw immediately upon the security and to place the amounts so drawn, at Seller's cost and with Seller's funds, in an interest bearing escrow account in accordance with sub-paragraph (2) below, until and unless Seller provides a substitute form of such security meeting the requirements of this Article.

(b) The Security Fund may be in the form of United States currency, in which SPS holds a first and exclusive perfected security interest, deposited with an Issuer who is a state or federally-chartered commercial bank with operations in the State in which the Facility is located in an account under which SPS is designated as beneficiary with sole authority to draft from the account or otherwise access the security (the "Escrow Account"). Funds held in the Escrow Account may be deposited in a money-market fund, short-term treasury obligations, commercial paper and other liquid investments rated "A" or better with maturities of three months or less, with all investment income thereon to be taxable to, and to accrue for the benefit of, Seller. After the Commercial Operation Date, periodic sweeps by Seller for recovery of interest earned by the escrowed funds shall be allowed, and, at any time the balance in the escrow account exceeds the required amount of security, the escrow agent may remit any excess to Seller.

(c) Following COD, the Security Fund may consist of a guaranty substantially in the form of Appendix G – Form of Guaranty, from a parent or other guarantor ("Guarantor") with a minimum of 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 an Investment Grade Credit Rating or put on credit watch, then SPS 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 SPS.

(d) Seller may change the form of the Security Fund at any time and from time to time upon commercially reasonable prior notice to SPS, *provided, however, that* the Security Fund must at all times satisfy the requirements of this Article X.

(e) The Security Fund shall survive termination of this Agreement to be available to pay any amounts owed to SPS arising prior to or upon termination. SPS shall return the unused portion of the Security Fund to Seller within thirty (30) Days following (i) the end of the Term and the completion of all of Seller's obligations under this Agreement, or (ii) termination of this Agreement for any reason prior to the end of the Term. SPS shall determine the amount, if any,

owed by Seller for any obligations or damages arising out of this Agreement. SPS may draw such amount and shall release the balance of the Security Fund (including any accumulated interest, if applicable) to Seller.

(f) Seller shall reimburse SPS for the incremental direct expenses (including the fees and expenses of counsel) incurred by SPS in connection with the preparation, negotiation, execution and/or release (including making a draw of funds) of any security instruments, and other related documents, used by Seller to establish and maintain the Security Fund pursuant to Seller's obligations under this Article X.

#### ARTICLE XI - MISCELLANEOUS

**11.1 Notices.** Any notice, demand, request or communication required or authorized by this Agreement shall be delivered either by hand, facsimile, overnight courier or mailed by certified mail, return receipt requested, with postage prepaid, to:

If to SPS, to:

Tara Fowler  
Manager, Renewable Purchased Power  
Xcel Energy Services Inc.  
1800 Larimer Street, Suite 1100  
Denver, CO 80202

*with a copy to:*

Legal Services  
Xcel Energy Services Inc.  
1800 Larimer Street, Suite 1100  
Denver, CO 80202

If to Seller, to:

SoCore Energy  
Attn: General Counsel  
225 W Hubbard Street, Suite 200  
Chicago, IL 60654

The designation and titles of the person to be notified or the address of such person may be changed at any time by written notice. Any such notice, demand, request or communication shall be deemed delivered on receipt if delivered by hand or facsimile, on the next Business day if delivered by overnight courier and on the fifth (5<sup>th</sup>) Business Day after deposit by the sending party if delivered by U.S. mail.

**11.2 Captions.** All titles, subject headings, section titles and similar items are provided for the purpose of reference and convenience and are not intended to be inclusive or definitive or to affect the meaning of the contents or scope of this Agreement.

- 11.3 No Third-Party Beneficiary.** No provision of this Agreement is intended to nor shall it in any way inure to the benefit of any customer, property owner or any other third party, so as to constitute any such Person a third-party beneficiary under this Agreement, or of any one or more of the terms hereof, or otherwise give rise to any cause of action in any Person not a Party hereto.
- 11.4 No Dedication.** No undertaking by one Party to the other under any provision of this Agreement shall constitute the dedication of that Party's system or any portion thereof to the other Party or to the public or affect the status of SPS as an independent public utility corporation or Seller as an independent individual or entity and not a public utility.
- 11.5 Integration; Amendment.** This Agreement, together with all Appendices attached hereto, constitutes the entire agreement between the Parties relating to the transaction described herein and supersedes any and all prior oral or written understandings. No amendment, addition to or modification of any provision hereof shall be binding upon the Parties, and neither Party shall be deemed to have waived any provision or any remedy available to it unless such amendment, addition, modification or waiver is in writing and signed by a duly authorized officer or representative of the applicable Party or Parties.
- 11.6 Governing Law.** This Agreement is made in the state of New Mexico and shall be interpreted and governed by the laws of the state of New Mexico without regard to the principles of conflicts of law thereof, and/or the laws of the United States, as applicable.
- 11.7 Relationship of Parties.**
- (a) The duties, obligations and liabilities of the Parties are intended to be several and not joint or collective. This Agreement shall not be interpreted or construed to create an association, joint venture, fiduciary relationship or partnership between Seller and SPS or to impose any partnership obligation or liability or any trust or agency obligation or relationship upon either Party. Except as specifically provided for in this Agreement to the contrary, Seller and SPS shall not have any right, power or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as or be an agent or representative of, or to otherwise bind, the other Party.
- (b) The relationship between SPS and Seller shall be that of contracting party to independent contractor. Accordingly, subject to the specific terms of this Agreement, SPS shall have no general right to prescribe the means by which Seller shall meet its obligations under this Agreement.
- (c) Seller shall be solely liable for the payment of all wages, taxes and other costs related to the employment of persons to perform Seller's obligations under this Agreement, 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 SPS for any purpose, nor shall Seller represent to any Person that it is or shall become an SPS employee or agent.
- 11.8 Good Faith and Fair Dealing; Reasonableness.** The Parties agree to act reasonably and in accordance with the principles of good faith and fair dealing in the performance of this Agreement. Unless expressly provided otherwise in this Agreement, (i) whenever this

Agreement requires the consent, approval or similar action by a Party, such consent, approval or similar action shall not be unreasonably withheld, conditioned or delayed, and (ii) whenever this Agreement gives a Party a right to determine, require, specify or take similar action with respect to matters, such determination, requirement, specification or similar action shall be reasonable.

- 11.9 Severability.** Should any provision of this Agreement be or become void, illegal or unenforceable, the validity or enforceability of the other provisions of this Agreement shall not be affected and shall continue in force. The Parties will, however, use their reasonable best endeavors to agree on the replacement of the void, illegal or unenforceable provision with legally acceptable clauses that correspond as closely as possible to the sense and purpose of the affected provision and this Agreement as a whole.
- 11.10 Cooperation.** The Parties agree to cooperate reasonably with each other in the implementation and performance of this Agreement. Such duty to cooperate shall not require either Party to act in a manner inconsistent with its rights under this Agreement.
- 11.11 Counterparts.** This Agreement may be executed in two (2) or more counterparts and by different parties on separate counterparts, all of which shall be considered one and the same agreement and each of which shall be deemed an original.
- 11.12 Standard of Review.** This Agreement is contingent upon appropriate authorization from FERC under Section 205 of the Federal Power Act. The terms and conditions and the rates for service specified in this Agreement shall remain in effect for the term of the transaction described in this Agreement. Absent the Parties' written agreement, this Agreement shall not be subject to change by application of either Party pursuant to Section 205 or 206 of the Federal Power Act. Absent the agreement of Seller and SPS to a proposed change, the standard of review for changes to the Guaranteed Price or any other terms and conditions under this Agreement proposed by SPS, Seller, a non-party or FERC acting sua sponte shall be the "public interest" standard of review set forth in United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956), as interpreted in Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1, 128 S. Ct. 2733 (2008).
- 11.13 Use of SPS's Name.** Seller shall not use SPS's (or any of its affiliates') name, logos or other marks in connection with this Agreement or otherwise without the prior written consent of SPS.
- 11.14 Press Releases and Media Contact.** Upon the request of either Party, the Parties shall develop a mutually agreed upon joint press release to be issued as of the Effective Date describing the location, size, type and timing of the Facility, the long-term nature of this Agreement and other relevant factual information about the relationship of the Parties; provided, however, that at Seller's request, the Parties will delay the issuance of the press release until a date mutually agreeable to the Parties. In the event during the Term either Party is contacted by the media concerning this Agreement or the Facility, the contacted Party shall inform the other Party of the existence of the inquiry, any questions asked and the substance of any information provided to the media.

**11.15 Solar Panel Performance and Meteorological Data.** Seller shall provide SPS at Seller's expense, with real time generation performance and meteorological data for the solar Facility for the Term of this Agreement. Seller shall undertake at Seller's expense, to install, operate and maintain a Plant Information System ("PI") at the Facility. Seller shall provide SPS real time access to all data gathered from PI and shall ensure that real time communications capabilities are available and maintained for the transmission of all PI data.

**11.16 Forward Contract Merchant.** The Parties acknowledge and agree that this Agreement constitutes a "forward contract" within the meaning of the U.S. Bankruptcy Code, and SPS and Seller are "forward contract merchants" within the meaning of the U.S. Bankruptcy Code.

**11.17 Confidentiality.**

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

- (i) information specifically designated as Confidential Information in this Agreement; and
- (ii) 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 Agreement, provided, however, that Confidential Information shall not include information that
  - is publicly available as of the date hereof, or becomes publicly available during the Term through no fault of the recipient Party;
  - can be documented was independently developed by the recipient Party; and/or
  - is disclosed to the recipient Party from an ultimate source other than the protected Party, without breach of this Agreement 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 Agreement. 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 11.17 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 Commission 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 11.17(c) shall be inapplicable to any disclosure of Confidential Information to a Commission, its staff, intervenors and/or consumer counsel, disclosure of which shall be uninhibited by this Agreement

(d) Each Party acknowledges that this entire Agreement will be made available to the public by the Commission, per applicable rules of the Commission.

(e) Notwithstanding anything to the contrary in this Section 11.17, SPS may disclose Confidential Information to Xcel Energy Services Inc. and its employees without the consent of Seller, and Confidential Information may be disclosed by the recipient Party to its agents, employees, directors, officers, consultants, auditors, lenders and equity investors, and prospective lenders and equity investors, subject to their acceptance of the obligations of confidentiality imposed hereby and for whose violations of this Section 11.17 the original recipient Party shall be responsible.

*[the next page is the signature page]*

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

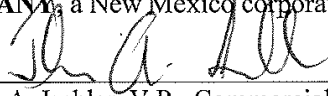
Dated: \_\_\_\_\_, 2018

**SOCORE CLOVIS 1 LLC**, a Delaware limited liability company

By: \_\_\_\_\_  
Name:  
Its:

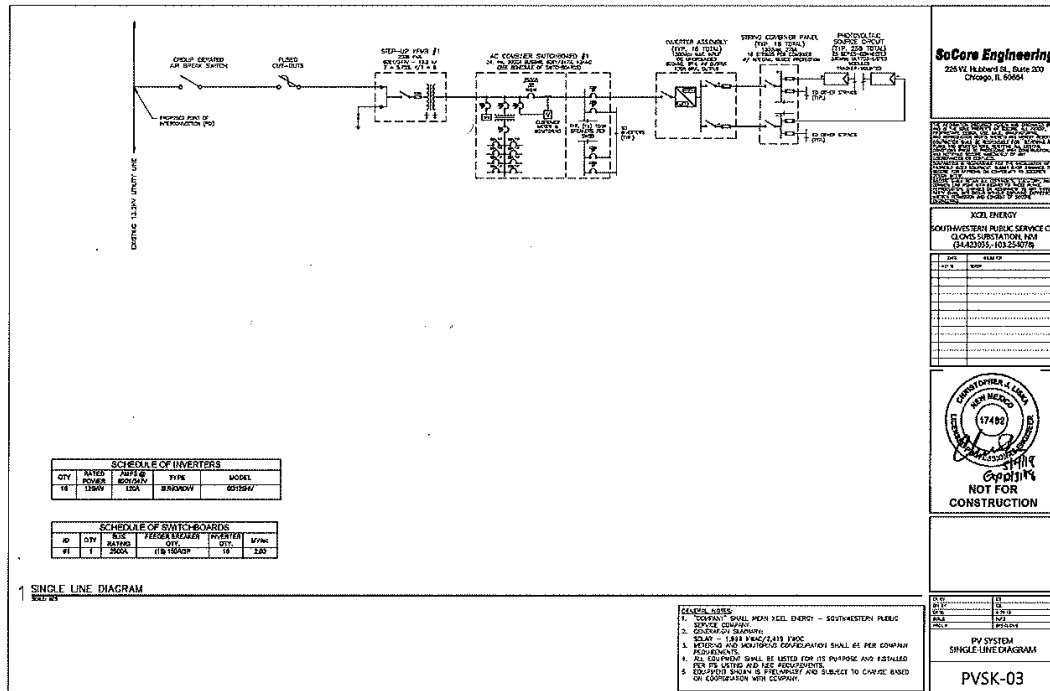
Dated: June 29, 2018

**SOUTHWESTERN PUBLIC SERVICE COMPANY**, a New Mexico corporation

By:   
Thomas A. Imbler, V.P., Commercial Operations  
Xcel Energy Services Inc., as agent for  
Southwestern Public Service Company

## APPENDIX A

### Points of Interconnection and Delivery

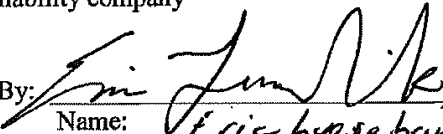


This description may be updated pending final equipment selection.

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

Dated: June 27, 2018

**SOCORE CLOVIS 1 LLC**, a Delaware limited  
liability company

By:   
Name: Eric Huerebrink  
Its: SVP Development

Dated: \_\_\_\_\_, 2018

**SOUTHWESTERN PUBLIC SERVICE  
COMPANY**, a New Mexico corporation

By: \_\_\_\_\_  
[Name] as [Title] of Xcel Energy Services Inc.,  
as agent for Southwestern Public Service  
Company



## APPENDIX B

### Acceptance Criteria

Seller and the Facility shall be deemed to have reached Commercial Operation when each of the following has occurred:

1. The Facility and Interconnection Facilities are physically complete as required by this Agreement and the Interconnection Agreement and are capable of transmitting, transforming and delivering the Net Energy and Capacity to the Point of Delivery in accordance with the Interconnection Agreement, and Seller is both obligated under, and in compliance with, the Interconnection Agreement and the rules of the Commission.

2. The metering devices pursuant to Section 3.1 of this Agreement have been installed and identified by SPS.

3. The Facility is capable of producing electricity at ninety-five percent (95%) or better of the Committed Nameplate Capacity (actual energy produced/expected energy equals 95% based on weather conditions such as irradiance, temperature and windspeed), and has produced and delivered such Energy for no less than seventy-two (72) hours during which solar irradiation is available at sufficient intensity to operate the panels at expected power output levels based on weather adjusted conditions.

4. Seller has provided SPS with written notice that the preceding three criteria have been met and a certificate of insurance reflecting compliance with Section 4.1(e) and Appendix D of this Agreement. SPS shall confirm or dispute that the Facility has reached Commercial Operation within ten (10) Business Days of receipt of Seller's notice. SPS's failure to provide confirmation or other response to Seller's notice within ten (10) Business Days after receipt of Seller's notice shall constitute confirmation of Commercial Operation. If SPS does not dispute Seller's notice, then SPS's confirmation (regardless of whether it is provided within the ten (10) Business Day timeframe set forth above or deemed provided) shall be deemed to have been given as of the date of Seller's written notice.

\* \* \* \* \*

## **APPENDIX C**

### **Legal Description of the Site**

#### **Description of Premises**

Township 2 North, Range 35 East, N.M.P.M. Section 3, SE1, except a tract of land, being that part of the quarter section outside of an irrigation circle whose effective radius is 1310 feet and being more fully described in Book 525, Page 2564 and Document No. 130001065 in the deed records of Curry County, New Mexico.

#### **Description of the Facility**

Seller's Facility consists of UL-listed photovoltaic modules with a DC system size of 2,580 kWdc, UL-listed DC-to-AC solar inverters with an AC system size of 1,999 kWac, and UL-listed single-axis tracking system. A driven post or screw foundation will be utilized for the tracking system. A single step-up transformer will increase the inverter AC-output voltage to match the 13.2kV line voltage of the distribution line adjacent to the facility. AC system protective devices and metering will be provided as required by the applicable code, this Agreement, and the Interconnection Agreement. Wiring, conduit, disconnect switches, equipment panels, equipment foundations, plant controls, and communication equipment will be provided as Seller deems necessary for the facility design. Electrical equipment will be locked and identified by signage as required by applicable code. The facility will be surrounded by a security fence and accessed via a new driveway from the public right of way. This description may be updated pending final equipment selection.

## APPENDIX D

### Insurance Requirements

- 1.0 Seller shall procure and maintain throughout the Term, at its own expense, the following policies of insurance:
  - A. If the Seller has employees, a Workers' Compensation and Employer's Liability insurance that complies with the laws of New Mexico to the extent of statutory limits;
  - B. Comprehensive or Commercial General Liability insurance with bodily injury and property damage combined single limits of at least \$1,000,000 per occurrence.
  - C. The Seller shall provide proof of Completed Operations Coverage from the General Contractor providing installation or repairs of or to the Facility;
  - D. In the event that Seller hires vehicles, Hired Non-Owned Automobile Liability Insurance is required to the extent applicable with bodily injury and property damage combined single limits of at least \$1,000,000 per occurrence covering vehicles hired; and
  - E. All other insurance required by Applicable Laws.
- 2.0 The amounts of insurance required above may be satisfied by Seller buying primary coverage in the amounts specified or by buying a separate excess umbrella liability policy together with the lower limit primary underlying coverage. The structure of the coverage is Seller's option, as long as the total amount of insurance meets the requirements of this Agreement.
- 3.0 The policies required of Seller shall be "occurrence" form policies. Seller may not use "claims-made" form coverage to meet its obligations without the prior written consent of each such policy from SPS.
- 4.0 Seller's Comprehensive or Commercial General Liability policies and Umbrella or Excess Liability policies shall include each of the following endorsements, and its Workers' Compensation and automobile liability policies, if required, shall include the last endorsement listed below:
  - a. SPS and its directors, officers, employees and agents shall be additional insureds under all policies;
  - b. The policies are to be primary with respect to the interest of SPS and its directors, officers, employees and agents, and any other insurance maintained by any of them shall be excess and not contributory with Seller's insurance;
  - c. Each insurer shall waive all rights of subrogation against SPS and its directors, officers, employees and agents;



- d. Notwithstanding any other provision of a policy, no policy shall be cancelled, expire or changed in a material way by the insurer without thirty (30) Days prior written notice to SPS.
- 5.0 Seller shall provide SPS with certificates of insurance evidencing the policies and endorsements described herein within thirty (30) Days of the Commercial Operation Date. Failure to obtain the insurance coverage required shall in no way relieve or limit Seller's obligations and liabilities under other provisions of this Agreement.

\* \* \* \* \*

## APPENDIX E

### Guaranteed Price

For the Net Energy that Seller delivers to SPS at the Point of Delivery, beginning on the Commercial Operation Date, SPS shall pay Seller \$39.00/MWh for the first Commercial Operation Year, and thereafter escalating by two percent (2%) per Commercial Operation Year, which such escalation will take effect beginning on the first day of each Commercial Operation Year.

\* \* \* \* \*

## APPENDIX F

### Form of Letter of Credit

#### [LETTERHEAD OF ISSUING BANK]

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

Date of Issuance: \_\_\_\_\_

Beneficiary:

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\$ \_\_\_\_\_ ( \_\_\_\_\_ 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 "Agreement"). Notwithstanding any reference in this Letter of Credit to the Agreement or any other documents, instruments or agreements, or references in the Agreement 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. Issuer shall effect any such transfer 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.

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: \_\_\_\_\_ [OpCo]

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

Account: [Applicant to be inserted]

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

**FORM OF TRANSFER REQUEST**

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

Current Beneficiary:

Applicant:

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

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

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

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

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

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

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

[OpCo]

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

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

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

[Notary Acknowledgement]

To be signed by a person purporting to be an authorized representative of Beneficiary and indicating his or her title or other official capacity, and acknowledged by a notary public.

## APPENDIX G

### 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 Solar Energy Purchase Agreement dated \_\_\_\_\_, 2018 between Seller and Company (the "Agreement").

#### - RECITALS -

A. Seller owns and operates a solar power electric generation facility having total nameplate capacity of 1.98 MW located in Curry County, New Mexico (the "Facility").

B. Seller and Company have entered into the Agreement 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, directly or indirectly by Guarantor. Guarantor expects to derive substantial benefits from the performance of the Agreement by Seller and Company. To induce Company to enter into and continue the Agreement and to consummate the purchase and sale of electrical energy contemplated by the Agreement, 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. Defined Terms. Capitalized terms not defined herein shall have the respective meanings given them in the Agreement.

2. 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 following COD under the Agreement (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 Agreement to the extent necessary to enforce and complete the rights, duties and obligations of Company and Seller thereunder.

3. Maximum Liability. Notwithstanding anything herein to the contrary, Guarantor's maximum liability under this Guaranty shall be limited to fifty thousand dollars (US\$50,000) plus costs of collection under Section 11 below.

4. 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 solely in accordance with the Agreement;

(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.

5. Performance. If any of the Obligations are not performed according to the Agreement (as the same may be modified by any indulgences, forbearances, and waivers granted by the Company to Seller), and any applicable notice and cure period provided by the Agreement has expired ("Default"), Guarantor shall within ten (10) business days of 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, provided, however, that notwithstanding any other provision of this Guaranty, Guarantor shall be entitled to exercise any right that Seller could have exercised under the Agreement to cure any default in respect of its obligations under the Agreement or to setoff, counterclaim or withhold payment in respect of any event of default of Company, but only to the extent such right is provided to Seller under the Agreement.

6. 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 and to the extent of the rescinded or voided 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.

7. Notice of Acceptance. Guarantor waives and acknowledges notice of acceptance of this Guaranty by Company.

8. 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 Agreement 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.

9. 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 Agreement. 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.

10. 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.

11. Collection Costs. Guarantor shall pay to Company, upon demand, and in addition to the maximum liability set forth in Section 3 hereof, all reasonable attorneys' fees and 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 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.

12. Severability. Should any one or more provisions of this Guaranty be determined to be illegal or unenforceable, all other provisions nevertheless shall be effective, so long as this Guaranty as so modified continues to express, without material change, the original intentions of the parties as to the subject matter of this Guaranty and the deletion of such portion of this Guaranty will not substantially impair the respective benefits or expectations of the parties to this Guaranty and provided however that in the event Section 2 of this Guaranty or any portion thereof shall be determined to be illegal or unenforceable, the parties shall endeavor in good faith negotiations to replace the illegal, invalid or unenforceable provisions with valid provisions, the economic effect of which come as close as possible to that of the illegal, invalid or unenforceable provision of Section 2.

13. 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 and Guarantor.

14. Successors and Assigns. This Guaranty shall inure to the benefit of and bind the successors and assigns of Company and Guarantor.

15. Governing Law. This Guaranty shall be governed by and construed in accordance with the law of the State of New Mexico without regard to the principles of conflicts of law thereof.

16. Notices. All notices, requests, claims, demands, and other communications hereunder shall be in writing and shall be given by delivery in the manner contemplated by the Agreement, addressed as follows:

(a) if to Company: as provided in the Agreement

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

with a copy to: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn:

All notices and other communications given in accordance herewith shall be deemed received (i) on the date of delivery, if hand delivered, (ii) three business days after the date of mailing, if mailed by registered or certified mail, return receipt requested, and (iii) one business day after the date of sending, if sent by a nationally recognized overnight commercial carrier; provided, that a notice given in accordance with this Section 16 but received on any day other than a business day or after business hours in the place of receipt, will be deemed given on the next business day in that place. By giving to the other party hereto at least fifteen (15) business days' written notice thereof in accordance with the provisions hereof, the parties hereto shall have the right from time to time to change their respective addresses and each shall have the right to specify as its address any other address within the United States of America.

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

## **SOLAR ENERGY PURCHASE AGREEMENT**

This Solar Energy Purchase Agreement (“Agreement”) is entered into this \_\_\_\_ day of \_\_\_\_\_, 201\_\_ (the "Effective Date") by and between Southwestern Public Service Company, a New Mexico corporation ("SPS" or “Company”), and \_\_\_\_\_ ("Seller") a \_\_\_\_\_ LLC .

### **RECITALS**

1. SPS desires to establish a community solar garden program (generally, the “Program”). The Program would give SPS’s retail customers the option to purchase subscriptions to a utility-scale solar powered electric generating facility and receive a monthly bill credit proportional to the output of the facility.
2. SPS conducted a targeted Request for Proposals (“RFP”) seeking bids from parties desiring to build a utility-scale solar powered electric generating Facility to support the Program.
3. Seller responded to SPS’s RFP with a proposal to construct, own and operate a proposed solar powered electric generating Facility on a site located in \_\_\_\_\_, County, with a nameplate capacity of \_\_\_\_ MW (AC) to be interconnected to the Distribution Authority's system, and to sell the output from the plant to SPS for a period of \_\_\_\_\_ (\_\_) years.
4. SPS accepted Seller’s proposal and desires to purchase and Seller desires to sell, all of the Capacity and Net Energy of the Facility, subject to the terms and conditions and at the prices set forth in this Agreement.

**NOW THEREFORE**, in consideration of these premises and the mutual promises set forth below, Seller and SPS agree as follows:

### **AGREEMENT**

#### **ARTICLE I - DEFINITIONS**

- 1.1 AC.** Alternating electric current.
- 1.2 Acceptance Criteria.** The criteria that will be used to determine whether and when the Facility is capable of producing Energy associated with the Committed Nameplate Capacity and delivering such Energy to the Point of Delivery, as set forth in Appendix A.
- 1.3 Affiliate.** Any person or entity that directly or indirectly controls, is under the control of, or is under common control with, the named entity by the power to direct or cause the direction of the management of the policies of named entity, whether through ownership interest, by contract or otherwise.

- 1.4 Agreement.** This contract, including all appendices, for the purchase of Capacity and Net Energy entered into between Seller and SPS, as amended by the Parties from time to time in accordance with this Agreement.
- 1.5 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, 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 or like actions.
- 1.6 Arbitration Service.** Judicial Arbitration and Mediation Services, Inc. (aka JAMS).
- 1.7 Capacity:** The output potential a machine or system can produce or carry under specified conditions. The capacity of generating equipment is generally expressed in MW. Capacity is also referred to as "capability" in the industry and for the purposes of this Agreement the terms are synonymous.
- 1.8 Capacity Resource.** The amount of net generating Capacity associated with the Facility for which Capacity credit may be obtained under applicable planning reserve procedures and requirements.
- 1.9 Change of Control.** The occurrence of any one of the following events with respect to Seller or any direct or indirect owner of a majority of the ownership interests in Seller: (i) a transfer of a majority of the ownership interests in Seller or such owner; or (ii) any consolidation or merger of Seller or such owner in which Seller or such owner, as the case may be, is not the continuing or surviving entity, or (iii) a sale or conveyance of any direct or indirect ownership interest in Seller following which \_\_\_\_\_, is no longer the direct or indirect owner of at least fifty percent (50%) of the ownership interests of Seller, provided, however, that a change of control shall not be deemed to have occurred as a result of a Permitted Transferr.
- 1.10 Commercial Operation.** When (a) one hundred percent (100%) of the Committed Nameplate Capacity of the Facility is installed, (b) the Facility has operated at a generation level acceptable to the Distribution Authority without experiencing any abnormal or unsafe operating conditions on any interconnected system, (c) Seller has obtained all Permits necessary to authorize that production and delivery, and (d) Seller or the Facility have completed all other Acceptance Criteria as set forth in Appendix B.
- 1.11 Commercial Operation Date.** The first Day following a successful demonstration that the Facility has reached Commercial Operation and Seller has met the other criteria of Appendix B; provided that such date must not be earlier than \_\_\_\_\_ or later than \_\_\_\_\_.
- 1.12 Commission.** The Public Utility Commission of Texas or the New Mexico Public Regulation Commission, or any successor agency as the case may require.

- 1.13 Committed Nameplate Capacity.** The total maximum designed power output, expressed in MW (AC), of all installed solar panels at the Facility as specified by the equipment manufacturer. Such capacity is capacity that Seller agrees to construct and maintain at the Facility in order to sell and deliver Capacity and Energy to SPS pursuant to this Agreement.
- 1.14 Day.** A calendar day.
- 1.15 Distribution Authority.** The business unit within SPS responsible for operating the interconnection facilities, and the Distribution System applicable to Seller.
- 1.16 Distribution System.** The contiguously interconnected electric distribution facilities over which the Distribution Authority has rights (by ownership or contract).
- 1.17 Eligible Renewable Energy Resource.** Any resource that qualifies as a Renewable Energy resource eligible to be certified to receive, claim, own or use Renewable Energy Credits pursuant to the protocols and procedures developed and approved by WREGIS.
- 1.18 Electric Metering Devices.** Revenue quality meters, metering equipment and data processing equipment used to measure, record or transmit data relating to the Energy from the Facility, including the metering current transformers and the metering voltage transformers.
- 1.19 Energy.** The amount of electricity either used or generated over a period of time; expressed in terms of MWh.
- 1.20 Environmental Contamination.** 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 Agreement, and/or (iii) will preclude or interfere with Seller's ability to perform its obligations under this Agreement as and when due..
- 1.21 Environmental Law.** Any federal, state and local laws, including statutes, regulations, rulings, orders, administrative interpretations and other governmental restrictions and requirements relating to the discharge of air pollutants, water pollutants, process waste water or otherwise relating to the environment or hazardous substances as amended from time to time
- 1.22 Facility.** The generation and distribution facilities located on the Site and between the Site and the Point of Interconnection for the generation of solar powered electricity and delivery of such electricity to SPS. A description of the Facility is set forth in Appendix C and incorporated by reference.
- 1.23 Facility Debt.** The obligations of Seller or its affiliates to any Financier 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

- 1.24 Financing Documents.** The documents associated with any tax equity financing and the loan and credit agreements, notes, bonds, indentures, security agreements, lease financing agreements, mortgages, deeds of trust, interest rate exchanges, swap agreements and other documents relating to the development, bridge, construction or permanent debt financing 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.
- 1.25 FERC.** Federal Energy Regulatory Commission or its successor organization, if any.
- 1.26 Financier.** Any individual or entity providing money or extending credit (including any capital lease, sale, sale-leaseback or power purchase agreement) for (i) the construction, term, ownership or permanent financing of the Facility or (ii) working capital or other ordinary business requirements for the Facility. "Financier" shall not include common trade creditors of Seller.
- 1.27 Force Majeure.** This term is defined in Section 6.1.
- 1.28 Governmental Authority.** Any nation, government, state or other political subdivision thereof, whether foreign or domestic, including, without limitation, any municipality, township and county, and any entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government, including, without limitation, any corporation or other entity owned or controlled by any of the foregoing.
- 1.29 Guaranteed Price.** The prices expressed in dollars per MWh set forth in Exhibit E and used as the basis for determining payments by SPS to Seller for the Net Energy of the Facility.
- 1.30 Hazardous Materials** Any substance, material, gas, or particulate matter that is regulated by any local Governmental Authority, any applicable State, or the United States of America, as an environmental pollutant or dangerous to public health, public welfare, or the natural environment including, without limitation, protection of non-human forms of life, land, water, groundwater, and air, including any material or substance that is (i) defined as "toxic," "polluting," "hazardous waste," "hazardous material," "hazardous substance," "extremely hazardous waste," "solid waste" or "restricted hazardous waste" under any provision of local, state, or federal law; (ii) petroleum, including any fraction, derivative or additive; (iii) asbestos; (iv) polychlorinated biphenyls; (v) radioactive material; (vi) designated as a "hazardous substance" pursuant to the Clean Water Act, 33 U.S.C. §1251 *et seq.* (33 U.S.C. §1251); (vii) defined as a "hazardous waste" pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. §6901 *et seq.* (42 U.S.C. §6901); (viii) defined as a "hazardous substance" pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601 *et seq.* (42 U.S.C. §9601);

(ix) defined as a “chemical substance” under the Toxic Substances Control Act, 15 U.S.C. §2601 *et seq.* (15 U.S.C. §2601); or (x) defined as a pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §136 *et seq.* (7 U.S.C. §136).

- 1.31 Indemnified Damages.** This term is defined in Section 7.7.
- 1.32 Interconnection Agreement.** The separate distributed generation interconnection agreement between Seller and Distribution Authority for the interconnection of the Facility to the Distribution System, as such agreement may be amended from time to time, that is described in Section 4.3.
- 1.33 Interconnection Facilities.** All the facilities installed for the purpose of interconnecting the Distribution System and the Facility, 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 Distribution Authority or another entity..
- 1.34 kW.** Kilowatt.
- 1.35 kWh.** Kilowatt hour
- 1.36 Liquidated Delay Damages.** Liquidated Delay Damages are \$\_\_\_\_ per Day.
- 1.37 Material Adverse Effect.** 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 Agreement.
- 1.38 Mechanical Availability Percentage.** The amount of time the Facility is able to produce energy divided by the amount of time in each Commercial Operation Year. For the avoidance of doubt the Mechanical Availability Percentage shall be calculated beginning the second Commercial Operation Year.
- 1.39 MW.** Megawatt.
- 1.40 MWh.** Megawatt hour.
- 1.41 NERC.** North American Electric Reliability Corporation or its successor agency, if any.
- 1.42 Net Energy.** The actual number of MWh generated by the Facility during the period being considered less any generating output in MWh used for the Station Auxiliary Power as measured by the meter installed pursuant to Section 3.2.
- 1.43 SPS.** This term is defined in the introductory paragraph and includes SPS's successors and assignees.
- 1.44 OATT.** Any Open Access Transmission Tariff on file with FERC, including SPP's Open Access Transmission Tariff, as amended from time to time.



- 1.45 Option.** The term is as defined in Section 9.5.
- 1.46 Outage.** A physical state in which all or a portion of the Plant is Unavailable to provide Energy.
- 1.47 Party/ies.** SPS, Seller and their respective permitted successors and assignees.
- 1.48 Permits.** All state, federal and local authorizations, certificates, permits, licenses and approvals required by any Governmental Authority for the construction, operation and maintenance of the Facility.
- 1.49 Permitted Transfer** means any of the following:
- (i) transactions among Affiliates of Seller, including any corporate reorganization, merger, combination or similar transaction or transfer of assets or ownership interests involving Seller or its Affiliates, provided, however, that the equity interests in Seller (excluding interests held by tax equity investors) continue to be held, directly or indirectly, no less than fifty percent (50%) by \_\_\_\_\_,
  - (ii) any exercise by a Financier of its rights and remedies under the Financing Documents,
  - (iii) a Change of Control of the Ultimate Parent Entity of Seller,
  - (iv) any change of economic and voting rights triggered in Seller's organization documents arising from the financing of the Facility and which does not result in the transfer of ownership, economic or voting rights in any entity that had no such rights immediately prior to the change,
  - (v) the direct or indirect transfer of shares of or equity interests in Seller to a tax equity investor; or
  - (vi) a transfer of the Facility packaged with any of the following:
    - a. all or substantially all of the assets of Seller's Ultimate Parent Entity;
    - b. all or substantially all of the renewable energy generation portfolio of Seller's Ultimate Parent Entity; or
    - c. all or substantially all of the solar generation portfolio of Seller's Ultimate Parent Entity; provided, however, that in the case of (c), the Facility does not represent more than fifty percent (50%) of the generation of such solar generation portfolio; and
- provided further that in the case of each of (a), (b) and (c), the entity that operates the Facility following such transfer is (or contracts with) a Qualified Operator.

- 1.50 Person.** An individual, partnership, corporation (including a business trust), limited liability company, joint stock company, trusts, unincorporated association, joint venture, Governmental Authority or other entity.
- 1.51 Point of Delivery.** The point at which SPS accepts title to and risk of loss for the Net Energy and Capacity sold and delivered by Seller to SPS and the amount of Net Energy delivered and purchased is established for purposes of billing. The Point of Delivery shall be at a location within Distribution Authority's system and is shown in Appendix A. For purpose of this Agreement, the Point of Delivery is the Point of Interconnection.
- 1.52 Point of Interconnection.** The point on the electrical system where the Facility is physically interconnected with the Distribution Authority's system. The Point of Interconnection is shown in Appendix A.
- 1.53 Prudent Electric Industry Practice.** Those methods, practices and use of certain equipment, as changed from time to time, that are commonly used and accepted in electrical engineering and operations to operate electric equipment lawfully, safely, dependably and efficiently, including, but not limited to, the requirements of the National Electric Safety Code, the National Electrical Code, NERC, standards and procedures and any governmental code or regulations.
- 1.54 Qualified Operator.** An operator of solar generation facilities that demonstrates to SPS's reasonable satisfaction that it has sufficient experience to successfully operate the facility, including a minimum of three (3) years' experience in the solar energy generation and operation business, and owns, controls or operates a minimum of 100 MW of solar energy generation capacity.
- 1.55 Qualifying Production Loss Event.** This term is defined in Section 5.3(b).
- 1.56 Renewable Energy Credits or REC.** The right to all non-energy and environmental attributes (including economic, carbon and pollutant-related tags and credits, benefits, avoided or reduced emissions reductions, offsets, emission rate reductions, tags and allowances, howsoever titled) attributable to the capacity available and/or energy generated by the facility, including environmental air quality credits, tags and allowances created by Applicable Law by virtue of the facility's environmentally favorable or renewable characteristics or attributes. REC shall include renewable energy certificates within the meaning of Part 572 of Title 17, Chapter 9, New Mexico Administrative Code with respect to one MWh of renewable energy, and one MWh of renewable energy that is physically metered, verified in Texas and meets the requirements of subsection (a) of Public Utility Commission of Texas Substantive Rule 25.173, as applicable. For the avoidance of doubt, RECs excludes (i) Investment tax credits and other local, state or federal tax credits providing a tax benefit to seller based on ownership of the facility or energy production therefrom, including the investment tax credit that may be available to seller with respect to the facility under §48 of the Internal Revenue Code of 1986, as amended; and, (ii) depreciation and other tax benefits arising from ownership or operation of the facility unrelated to its status as a generator of renewable or environmentally clean energy.

- 1.57 Replacement Energy Costs.** If Seller commits an Event of Default pursuant to Section 7.2, the costs actually and reasonably incurred by SPS to purchase renewable Energy (including Capacity) or non-renewable Energy and Capacity from a third Person, in each case including any actual costs for delivery of such replacement Energy to SPS, and any associated transaction costs, less the amount that SPS would have paid Seller for an equivalent amount of Net Energy pursuant to this Agreement during the applicable period of time given the available solar resource, plus all incremental costs incurred by SPS to replace the Renewable Energy Credits that Seller fails to deliver to SPS under this Agreement with alternative solar Energy that meets the requirements of WREGIS and the Commission, if applicable. In the event that Replacement Energy Costs for any hour are less than the Guaranteed Price for such hour, Replacement Energy Costs shall be deemed to be equal to the Guaranteed Price for such hour
- 1.58 Right of First Offer or ROFO.** This term is as defined in Section 9.3
- 1.59 ROFO Notice.** This term is as defined in Section 9.3.
- 1.60 Seller.** This term is defined in the introductory paragraph and includes any of Seller's permitted successors or assignees.
- 1.61 Seller's Contractual Obligations.** As to Seller, any provision of any security issued by it or any material agreement, instrument or undertaking to which Seller is a party or by which it or any of its property is bound.
- 1.62 Site.** The real property on which the Facility will be constructed and located, including all related solar easements and on which Seller receives electric service. The legal description of the Site is set forth in Appendix C and incorporated by reference
- 1.63 SPP.** The Southwest Power Pool.
- 1.64 Station Auxiliary Power.** Energy used by Seller to operate the Facility.
- 1.65 Target COD.** The Target COD date is \_\_\_\_\_.
- 1.66 Term.** This term is as defined in Section 2.1.
- 1.67 Test Energy.** Any Net Energy generated by the Facility and delivered to the Point of Delivery prior to the Commercial Operation Date for the Facility
- 1.68 Ultimate Parent Entity** shall have the meaning set forth under §7A of the Clayton Act, 15 U.S.C. §18a, also known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976.
- 1.69 Unavailable.** A physical state in which the Facility is not capable of providing Net Energy or Capacity to the Point of Delivery, or in which any other equipment or facility is not capable of performing its intended purposes
- 1.70 WREGIS.** The Western Renewable Energy Generation Information System.

## ARTICLE II - TERM AND SALE AND PURCHASE

- 2.1 Term.** This Agreement shall be effective upon the Effective Date and shall continue through the end of the calendar month in which occurs the twenty-fifth (25<sup>th</sup>) anniversary of the Commercial Operation Date, unless this Agreement is earlier terminated pursuant to Section 2.2, Section 4.2 or otherwise in accordance with its terms.
- 2.2 SPS Condition Precedent.** SPS shall request approval of the Program from the Commission. Seller agrees to cooperate with SPS with respect to any such request by providing information reasonably necessary to support the request and to respond to discovery requests by parties to the proceeding to the extent requested by SPS. If the Commission declines to approve the Program or approves the Program subject to conditions that are unacceptable to SPS, in its sole discretion, then SPS may terminate this Agreement upon written notice to Seller within thirty (30) Days after the Commission decision (including any decision upon reconsideration), with no further obligations under this Agreement.
- 2.3 Sale and Purchase.** SPS agrees to purchase the entire Capacity and Net Energy of the Facility and to accept delivery of the Capacity and Net Energy at the Point of Delivery, subject to the terms of this Agreement. Seller agrees to deliver and sell the entire Capacity and Net Energy from the Facility to SPS at the Point of Delivery for the Term. Seller shall not contract to sell any Energy or Capacity from the Facility to any Person other than SPS for the Term.
- 2.4 Energy Rate.**
- (a) **Guaranteed Price.** From and after the Commercial Operation Date, SPS shall pay Seller the Guaranteed Price set forth in Exhibit E for the Net Energy that Seller delivers to SPS at the Point of Delivery. SPS and Seller agree that the applicable Guaranteed Price is intended to compensate Seller for both the Net Energy and Capacity delivered to SPS, and that Seller is not entitled to a separate price or payment for the Capacity of the Facility to which SPS is entitled.
  - (b) **Test Energy.** SPS shall purchase all Test Energy produced by the Facility during startup and testing and delivered to SPS at the Point of Delivery at a payment rate equal to \$\_\_\_\_/ MWh.
  - (c) **Qualified Production Loss Event.** If delivery of Net Energy is curtailed pursuant to a Qualifying Production Loss Event (as defined in Section 5.3(c)), SPS shall make payment therefor to the extent provided in, and in accordance with, Section 5.3(d).
- 2.5 Tax Credits and Benefits.** Seller is responsible to apply and qualify for the federal investment tax credit pursuant to 26 U.S.C. § 48 and any other tax credits or payments or other assistance, grants, credits, or other tax benefits (such as accelerated depreciation) that might be available to Seller or the Facility from any Governmental Authority or other source, and SPS agrees that Seller is entitled to receive any such credits, assistance or

grants. Seller and SPS agree that the Guaranteed Price and other pricing set forth in this Agreement are not subject to adjustment or amendment due to Seller's receipt, or failure to receive, any such credits, assistance, grants, or benefits, in whole or in part, after the date of this Agreement, including without limitation failure of the Facility to qualify to receive any tax credit for any reason.

- 2.6 Committed Nameplate Capacity.** Seller agrees that the Committed Nameplate Capacity shall be \_\_\_\_ MW (AC), and that the Committed Nameplate Capacity shall include only Capacity from the Facility.
- 2.7 Capacity Accreditation.** SPP places upon the Company certain planning, operating and reporting requirements. If required by SPP specifically for the Facility, Seller shall complete at its own expense all applicable testing and reporting requirements for the Facility, including any required capacity testing.
- 2.8 Renewable Energy Credits.** To the full extent allowed by Applicable Law, SPS shall own or be entitled to claim all Renewable Energy Credits associated with the Net Energy and Capacity purchased by SPS pursuant to this Agreement and that SPS is entitled to utilize any and all such Renewable Energy Credits for purposes determined by SPS, including without limitation to (i) meet any voluntary, statutory or regulatory mandate to own, construct or contract for the purchase of solar Energy, including but not limited to the terms of any Commission order and any other similar existing or future requirement; (ii) meet the requirements of any green pricing or community solar garden program by which SPS resells the Net Energy to retail customers as solar or renewable Energy; and (iii) offset, avoid, reduce or obtain credit for reduction of pollutants or air emissions created by SPS's electric generating facilities. To the extent necessary, Seller shall assign to SPS all rights, title and authority for SPS to register, own, hold and manage such credits in SPS's own name and to SPS's account, including any rights associated with any renewable Energy information or tracking system that may be established with regard to monitoring, tracking, certifying or trading such credits. SPS and Seller agree that the Guaranteed Price and other pricing set forth in this Agreement are not subject to adjustment or amendment due to SPS's receipt, or failure to receive, any such Renewable Energy Credits, in whole or in part, after the date of this Agreement. For the avoidance of doubt, Renewable Energy Credits do not include State and Federal Cash Incentive Payments or Tax Credits. To the extent necessary, Seller shall provide SPS with reasonable assistance or documentation necessary for SPS to claim such Renewable Energy Credits. Without limiting the foregoing, Seller will upon SPS request, assign to SPS all rights and authority for SPS to hold such credits in SPS own name and to SPS's account, including any rights associated with any renewable energy tracking system that may be established with regard to monitoring or tracking such credits.

### **ARTICLE III - DELIVERY, METERING AND BILLING**

- 3.1 Delivery Arrangements.**

(a) Seller shall be solely responsible to deliver the Net Energy and Capacity from the Facility to the Point of Delivery. Net Energy shall be measured by electric metering devices located at the Point of Interconnection (the "Electric Metering Devices").

(b) Seller shall be responsible for all distribution interconnection, electric losses, distribution, transmission, and ancillary service arrangements and costs required to deliver the Net Energy from the Facility to SPS at the Point of Delivery.

(c) SPS shall be responsible for all electric losses, distribution, transmission and ancillary service arrangements and costs from the Point of Delivery to points beyond the Point of Delivery. SPS may elect at SPS's sole option the services and facilities to be utilized for the delivery of Energy from the Point of Delivery.

**3.2 Metering Requirements.** The transfer of electric Capacity and Energy between Seller and SPS shall be measured by metering equipment installed in accordance with the Interconnection Agreement at no cost to SPS under this Agreement. Seller shall provide SPS access to all metering equipment for all purposes necessary to perform under this Agreement and shall provide SPS the reasonable opportunity to be present at any time the metering equipment is to be inspected and tested or adjusted in accordance with the Interconnection Agreement. Seller shall provide SPS with all authorizations necessary to have access to the metering equipment, including obtaining any consent or other agreement from the Distribution Authority necessary to allow SPS such access. If the metering equipment fails to register, or is found upon testing to be inaccurate by more than one percent (1%) (for a mechanical meter) or three tenths of a percent (.3%) (for an electronic meter), an adjustment shall be made correcting all measurements by the inaccurate or defective device using the best available information; provided that such correction shall be limited to no more than the preceding one-hundred eighty (180) Days prior to the discovery of the error. Either Party may install back-up metering at its own cost; provided that such back-up metering meets the same technical standards applicable to the metering equipment.

**3.3 Billing.** SPS shall read the meter approximately once a month. Within fifteen (15) Days of the date on which SPS reads the meter, SPS shall send Seller a settlement statement for the previous month that contains data for the computation of payments owed to Seller. Based on such settlement statement, Seller shall send SPS an invoice for Net Energy and Capacity, in accordance with the price terms of this Agreement, within fifteen (15) Days of the date on which SPS delivered such settlement statement to Seller. Seller shall use the invoice format provided by SPS. In the event that SPS is unable or fails to read the meter, if available and upon request, Seller shall provide to SPS data related to back-up metering.

**3.4 Billing and Payment Records.** To facilitate payment and verification, Seller shall maintain all books and records necessary for billing and payments, including without limitation copies of all invoices and curtailment data with respect to the Facility for a period of at least two (2) years, and Seller shall grant SPS reasonable access to those books, records and data on the premises of the Facility or at the principal place of business of Seller. SPS may examine such books and records relating to transactions under and

administration of this Agreement, at any time during the period the records are required to be maintained, upon request with reasonable notice and during normal business hours.

- 3.5 Payment.** SPS's payment to Seller for Net Energy and Capacity delivered shall be posted, if by mail, twenty (20) Days following the date of the bill. If such due date falls on a weekend or legal holiday, such due date shall be the next business day. Payments posted after the due date shall be considered late and shall bear interest on the unpaid balance at a rate equal to three percent (3%) plus the average daily prime rate as determined from the "Money Rates" section of the Midwest Edition of the Wall Street Journal for the Days of the late payment period multiplied by the number of Days elapsed from and including the Day after the due date, to and including the payment date. In the event this index is discontinued or its basis is substantially modified, the Parties shall agree on a substitute equivalent index.
- 3.6 Wire Transfer.** SPS shall make payment of bills via wire transfer of funds if requested in writing by Seller, at Seller's sole expense, and if the request contains adequate payment information. SPS shall be entitled to presume conclusively, without any liability whatsoever, that the payment information furnished by Seller (for example, name, financial institution, account numbers and payee) is accurate. In no event will SPS be required to pay any bill more than once when the invoice was first paid in accordance with Seller's instructions.

#### **ARTICLE IV - SELLER'S OBLIGATIONS**

During the Term of this Agreement, Seller hereby agrees to be bound by and to perform the following affirmative obligations:

**4.1 Design, Construction and Operation of the Facility.**

Seller shall:

- (a) At its sole expense, design and construct the Facility and any related facilities in accordance with Prudent Electric Industry Practice.
- (b) In a timely manner, seek, obtain, maintain, comply with and, as necessary, renew and modify, at Seller's sole expense, the Permits and all other permits, certificates or other authorizations that are required by any Requirement of Law or Governmental Authority as prerequisites to engaging in the activities envisioned by this Agreement and to meeting Seller's obligation to operate the Facility consistently with the terms of this Agreement.
- (c) At its sole expense, operate, maintain and repair the Facility in accordance with this Agreement, all Applicable Laws, Seller's Contractual Obligations, Permits, the practices and requirements of SPS and SPP, and in accordance with Prudent Electric Industry Practice.
- (d) At its sole expense, obtain and maintain the policies of insurance in the amounts specified in Appendix D during the Term of this Agreement. The

insurance policies shall list SPS as an additional insured and shall not be cancelable without sixty (60) Days prior written notice by the insurer to SPS.

- (e) Comply with SPP and NERC procedures and the requirements of any new similar authority, and cooperate with all reasonable requests by SPS relating to SPS's compliance with such entities; provided, however, that Seller shall not be obligated to register as a generator with SPP.
- (f) Comply with all current SPS outage reporting requirements, as they may be revised from time to time, and as they apply to the Facility. Seller shall have suitable solar radiation and other meteorological meters of the types necessary to characterize fully the solar resource and ambient conditions to support calculations under this Agreement, including the estimation of the quantity of Energy subject to Qualifying Production Loss Event payments under Section 5.3(d).
- (g) No later than sixty (60) Days following the Effective Date of this Agreement, Seller shall conduct a Phase I environmental investigation of the Site and shall provide Company with a copy of the report summarizing the Phase I environmental investigation of the Site, together with any data or information generated pursuant to such investigation. The report shall include disclosure of any Environmental Contamination identified in the investigation and confirm that such Environmental Contamination has been remediated or is capable of being remediated and that the Site remains appropriate for its intended use by Seller. Seller shall promptly inform Company if due to any Environmental Contamination Seller is constrained in a way that will limit, reduce, interfere with or preclude Seller's ability to perform its obligations under this Agreement, along with a statement of whether and to what extent this circumstance may limit or preclude Seller's ability to perform under this Agreement. Seller shall provide Company with written recommendations to overcome any such issue(s) that would allow Seller to fully perform under this Agreement. Seller shall promptly disclose to Company the presence of any such Environmental Contamination or the existence of any enforcement, legal, or regulatory action or proceeding relating to such alleged violation or alleged presence of Environmental Contamination.



#### **4.2 General Obligations.**

- (a) Seller shall pay all present or future federal, state, municipal or other lawful taxes or fees applicable to Seller, the Site and the Facility or by reason of Seller's ownership or operation of the Site and the Facility and the sale of Energy or Capacity under this Agreement (excluding any federal, state, municipal, sales, use, excise or other similar taxes on the sale of electricity). Seller shall receive the benefit of any new tax credits, allowances or other credits related to the Site and the Facility.
- (b) Seller shall obtain in its own name and at its own expense any and all pollution or environmental credits or offsets necessary to operate the Facility in compliance with the Environmental Laws.
- (c) To the best of Seller's knowledge, the Site does not contain any hazardous material or wastes (as defined by any applicable Environmental Law), whether or not the substance is prohibited, limited or regulated by any Governmental Authority. Seller agrees to defend, indemnify and hold SPS and its officers, directors, employees, agents and representatives, and their respective successors and assigns, harmless from and against all claims, actions, demands, losses, liabilities, damages, judgments, penalties, injuries and expenses arising from or related to any Environmental Contamination concerning Seller, the Facility or the Site, including but not limited to (a) any claim for personal injury or property damage by any Person arising out of, resulting from or caused by any violation of any applicable Environmental Law by Seller or concerning the Facility or the Site; (b) any assessment, fine, penalty, lien or other imposition by any Governmental Authority; and (c) any liability, losses or remedial costs suffered because a Governmental Authority finds SPS to be a responsible party, owner or operator of the Facility or Site.
- (d) The Parties acknowledge that this Agreement does not provide for the supply of any retail electric service by SPS to the Facility. Seller shall provide its own Station Auxiliary Power pursuant to separate arrangements, which may include obtaining Station Auxiliary Power from the gross output of the Facility when it is operating. Seller shall arrange with the Distribution Authority or applicable retail service provider to measure separately such Station Auxiliary to ensure proper computing of Net Energy. This may be accomplished with a single net meter as long as Station Auxiliary Power can be read separately from gross output. If the Facility is ever a net user of electric energy, Seller expressly recognizes that, for purposes of this Agreement, the supplier of retail electric services to the Facility shall be deemed to be a separate entity and separate contracting party whether or not the arrangement for the supply of retail electric services to the Facility is entered into with SPS or an affiliate of SPS.
- (e) Seller shall keep complete and accurate operating and other records and all other data for the purposes of proper administration of this Agreement,

including such records as may be required by any Governmental Authority, SPS, the Parties and as otherwise required by Prudent Electric Industry Practice. SPS shall provide reasonable notice of SPS's specific requirements of Seller.

- (f) Seller shall continue to (i) to the extent applicable, preserve, renew and keep in full force and effect its organizational existence and good standing, and take all reasonable action to maintain all permits, rights, privileges, licenses and franchises necessary or desirable in the ordinary course of its business; and (ii) comply with all Seller's Contractual Obligations and Applicable Laws.
- (g) Seller shall provide to SPS such other information regarding the permitting, engineering, construction, condition and operations of Seller or the Facility, financial or otherwise, or other data concerning Seller or the Facility as SPS may, from time to time, reasonably request.

#### **4.3 Interconnection Agreement.**

- (a) Seller shall interconnect the Facility into the Distribution Authority's system pursuant to the Interconnection Agreement. Seller shall be responsible for negotiating, entering into and performing the Interconnection Agreement with the Distribution Authority and any other necessary Persons for design, installation and operation of the Interconnection Facilities necessary to permit delivery and transformation of the Net Energy and Capacity on Seller's side of the Point of Delivery. Seller shall provide the Distribution Authority and any applicable transmission owner's written permission to release transmission study results to SPS.
- (b) The Parties acknowledge that this Agreement imposes no responsibilities or obligations on the Distribution Authority. The Parties recognize that Seller will enter into a separate Interconnection Agreement with the Distribution Authority, which will be a separate and free-standing contract. Seller expressly recognizes that, for purposes of this Agreement, the Distribution Authority shall be deemed to be a separate entity and separate contracting party whether or not the Interconnection Agreement is entered into with SPS or an affiliate of SPS. Notwithstanding any other provision in this Agreement, nothing in the Interconnection Agreement shall alter or modify Seller's or SPS's rights, duties and obligations under this Agreement. Furthermore, this Agreement shall not be construed to create any rights between Seller and the Distribution Authority.
- (c) The Parties recognize that Seller will be obligated to comply with the terms of the Interconnection Agreement and the rules of the Commission.

#### **4.4 Provision of Real-Time Data.** Seller shall install equipment at the Point of Interconnect that is capable of providing real-time access to Facility production data directly to SPS or through the Distribution Authority. To the extent such data is not readily available

electronically or in real time, Seller agrees to provide such data on a historical basis in a CSV format or Excel spreadsheet upon request by SPS.

## **ARTICLE V - SPS OBLIGATIONS; CURTAILMENT**

**5.1 Cooperation.** SPS shall cooperate with Seller in any applications that Seller is making for tax credits, grants or assistance as described in Section 2.4, at SPS's expense. SPS's obligation shall consist only of providing nonproprietary information in its possession, custody or control necessary to complete any such applications, responding to requests from the relevant Governmental Authorities and similar activities.

**5.2 Collateral Assignments.**

- (a) Subject to the terms and conditions of this Agreement, SPS shall, upon prior written request by Seller, execute a commercially reasonable consent and agreement with respect to a collateral assignment hereof in favor of any Financier in a form acceptable to SPS, provided that (i) Seller shall reimburse SPS for all reasonable expenses incurred by SPS in connection therewith, including without limitation reasonable attorneys' fees, (ii) SPS shall have no obligation to alter or modify the terms of this Agreement or provide any consent or enter into any agreement, that has a Material Adverse Effect on any of SPS's rights, benefits, risks, or obligations under this Agreement, and (iii) SPS's duty to make factual statements or representations in such consent and agreement shall be contingent upon the truthfulness and accuracy of such statements or representations at the time the consent and agreement is delivered.
- (b) SPS acknowledges that the Financier may have other or further requests with respect to the assignment of this Agreement (such as requests for legal opinions or certificates from SPS) and may request that certain terms be incorporated into a consent and agreement or assignment agreement to be executed by SPS. SPS will consider any such requests and will cooperate and negotiate any such consent and agreement or assignment in good faith. Seller shall reimburse SPS for all reasonable expenses incurred by SPS in connection therewith, including without limitation reasonable attorneys' fees.
- (c) Seller shall pay or reimburse SPS for its out-of-pocket costs (including reasonable counsel fees) incurred in connection with SPS's compliance with this Section 5.2.

**5.3 Curtailement; Production Losses.**

(a) The Parties acknowledge that there may be circumstances in which the Distribution Authority or another Person with authority will direct Seller to curtail deliveries of Energy and Capacity from the Facility in accordance with applicable laws, tariffs or agreements. SPS also may direct Seller to curtail deliveries from the Facility, in whole or in part (at any time, for any reason and for any duration), subject to this Section 5.3. Whenever possible, SPS shall give Seller reasonable prior notice of the possibility that SPS, the Distribution Authority or another

Person with authority will direct Seller to curtail deliveries of Energy and Capacity from the Facility.

- (b) For purposes hereof, a “Qualifying Production Loss Event” means
  - (i) a directive from SPS to curtail production from the Facility; and/or
  - (ii) a refusal or inability of the Distribution Authority to accept deliveries from the Facility at the Point of Delivery for any reason (including emergencies and Force Majeure beyond the Point of Delivery), other than due to Seller’s breach of the Interconnection Agreement or other fault of Seller.

In the event of a Qualifying Production Loss Event following COD, Seller shall be entitled to compensation from SPS pursuant to Section 5.3(d)-(f) below.

- (c) For purposes hereof, a “Non-Compensable Curtailment” means any curtailment or other event causing a loss of production from the Facility, other than a Qualifying Production Loss Event, including without limitation
  - (i) the Unavailability of the Facility for any reason, including any problems with Seller’s Interconnection Facilities;
  - (ii) any action by the Distribution Authority arising from Seller’s breach of the Interconnection Agreement or other fault of Seller;
  - (iii) any action by Governmental Authorities against Seller or the Facility;
  - (iv) a failure of Seller to maintain all permits or authorizations necessary to operate the Facility and/or deliver Net Energy to the Point of Delivery; and/or
  - (v) the operation of Seller's system protection equipment or any malfunction of Seller's equipment that causes the Facility to be disconnected from the Distribution System.

Seller shall not be entitled to any compensation from SPS for any lost production resulting from Non-Compensable Curtailments; provided that nothing in this Section 5.3(c) or elsewhere in this Agreement shall limit or affect any rights Seller may have against any Person under the Interconnection Agreement or under any other agreement or at law as a result of such events.

- (d) Upon the occurrence of a Qualifying Production Loss Event following COD, SPS shall be obligated to pay Seller an amount equal to the Guaranteed Price then in effect that Seller would have received under this Agreement for the Net Energy, measured in MWh, that Seller would have otherwise produced and delivered to the Point of Delivery but for the Qualifying Production Loss Event.

(e) Seller shall invoice SPS for amounts due as a result of Qualifying Production Loss Events together with its regular monthly invoices for the applicable month as set forth in Section 3.3. Seller shall include information with the invoice documenting (i) the nature and duration of the Qualifying Production Loss Event, (ii) irradiation data gathered at the Site during such Qualifying Production Loss Event used to calculate the lost production amounts, and (iii) the computation of amounts due under this Section 5.3 for the invoiced lost production, all in a format provided by SPS. SPS shall notify Seller within thirty (30) Days of receipt if SPS believes that the circumstances described do not constitute a Qualifying Production Loss Event and the reason for that conclusion. If the Parties cannot resolve the difference of opinion by negotiation, either Party may utilize the dispute resolution procedures in this Agreement.

(f) Seller shall install, or arrange for the Distribution Authority to install pursuant to the Interconnection Agreement, equipment necessary to disconnect the Facility from the Distribution Authority's system. Seller and SPS shall each use commercially reasonable efforts to develop a mutually acceptable procedure for SPS to notify Seller, of curtailments.

## ARTICLE VI - FORCE MAJEURE

**6.1 Force Majeure.** The performance of each Party under this Agreement may be subject to interruptions or reductions due to an event of Force Majeure. The term "Force Majeure" shall mean an event or circumstance beyond the control of the Party claiming Force Majeure that, by exercise of due diligence and foresight, could not reasonably have been avoided, including but not limited to a Force Majeure event or emergency on the Distribution System as defined in the Interconnection Agreement to the extent it causes the Facility to be physically incapable of delivering Energy or SPS from receiving Energy at the Point of Delivery; a Force Majeure event (or comparable uncontrollable circumstances as may be defined in applicable tariffs or rules) on the Distribution System or the regional transmission system to the extent it causes SPS to be unable to accept delivery of Energy at the Point of Delivery or to transmit such energy from and after the Point of Delivery; flood; earthquake; storm; fire; lightning; epidemic; war; riot; civil disturbance; sabotage; terrorism; labor strike, slowdowns or stopages or other labor disruptions against Seller or Seller's contractors or subcontractors; act of God or any other cause beyond the control of the Party claiming Force Majeure. However, the obligation to use due diligence shall not be interpreted to require resolution of labor disputes by acceding to demands of the opposition when such course is inadvisable in the discretion of the Party having such difficulty. In no event will the existence of Force Majeure extend this Agreement beyond its stated Term.

**6.2 Remedial Action.** A Party shall not be liable to the other Party in the event it is prevented from performing its obligations hereunder in whole or in part due to an event of Force Majeure. The Party rendered unable to fulfill any obligation by reason of a Force Majeure shall take all action necessary to remove such inability with all due speed and diligence. The nonperforming Party shall be prompt and diligent in attempting to remove the cause of its failure to perform, and nothing herein shall be construed as permitting that Party to continue to fail to perform after said cause has been removed.

**6.3 Exclusions from Force Majeure.** Notwithstanding anything in this Agreement to the contrary, "Force Majeure" shall not mean:

- (a) General inclement weather normally experienced within the vicinity of the Site and affecting construction, start-up, operation or decommissioning of the Facility or related facilities.
- (b) Changes in market conditions, governmental action or weather conditions that affect Seller's supply of Energy from the Facility.
- (c) Unavailability of equipment, repairs or spare parts for the Facility, except to the extent due to a qualifying event of Force Majeure.
- (d) Inability to obtain, maintain or renew any Permit or any delay in obtaining, maintaining or renewing any Permit.
- (e) Litigation or administrative or judicial action pertaining to this Agreement, the Site, the Facility, the acquisition, maintenance or renewal of financing or any Permits, or the design, construction, maintenance or operation of the Facility.
- (f) Any acts or omissions of any third party, including, without limitation, any vendor or supplier of Seller, except to the extent due to a qualifying event of Force Majeure.
- (g) Any mechanical or equipment breakdown or other mishap at the Facility or events or conditions attributable to normal wear and tear or flaws or failure to operate or maintain such component in accordance with Prudent Electric Industry Practice, unless such mishap is caused by a qualifying event of Force Majeure.

**6.4 Notice.** In the event of any delay or nonperformance resulting from Force Majeure, the Party suffering the event of Force Majeure shall provide notice to the other Party. The notice shall be in writing and be given twenty-four (24) hours after the occurrence or the Party's knowledge of the occurrence of the Force Majeure event or, if such notice is not possible, as soon as practicable thereafter and include the nature, cause, date of commencement thereof and the anticipated extent of any delay or interruption in perform

**6.5 Termination.** In the event of Force Majeure that delays the Commercial Operation Date for more than one hundred twenty (120) Days beyond the outside date for COD set forth in Section 7.2, SPS shall have the right to terminate this Agreement without any further financial or other obligation to Seller as a result of such termination.ance.

## **ARTICLE VII - TERMINATION/DEFAULT/REMEDIES**

**7.1 Events of Default by SPS.** The following shall each constitute an Event of Default by SPS:

- (a) SPS breaches any curable non-monetary material obligation under this Agreement and fails to cure such breach within thirty (30) Days after written notification by Seller of the breach.
- (b) SPS fails to make any material payment due under this Agreement within thirty (30) Days after written notice from Seller that such payment is past due, unless such payment is contested or a right of set-off has been claimed by SPS in good faith.
- (c) Any other material breach of this Agreement by SPS not specifically enumerated that is not cured within thirty (30) Days after SPS receives written notification of default from Seller.

**7.2 Events of Default by Seller.** The following shall each constitute an Event of Default by Seller:

- (a) For any reason other than an event of Force Majeure or an Event of Default by SPS, the Facility being Unavailable to provide Energy for ninety (90) consecutive Days or any one hundred eighty (180) non-consecutive Days in any three hundred sixty-five (365) Day period commencing on the Commercial Operation Date and prior to expiration of the Term of this Agreement.
- (b) Seller breaches any curable material obligation under this Agreement and fails to cure the breach within thirty (30) Days after written notification by SPS of the breach.
- (c) Commencing with the second (2<sup>nd</sup>) commercial operation year, the facility fails to achieve a 85% mechanical availability percentage.
- (d) A material breach of this Agreement not specifically enumerated that is not cured within thirty (30) Days after Seller receives written notification of default from SPS.

**7.3 Termination.**

- (a) In the event the defaulting Party fails to cure the Event of Default within the period for curative action under Section 7.1 or Section 7.2, as applicable, or upon the occurrence of an incurable Event of Default, the non-defaulting Party may terminate this Agreement by notifying the defaulting Party in writing of the decision to terminate and the effective date of the termination.
- (b) Upon termination of this Agreement by SPS due to an Event of Default by Seller pursuant to Section 7.2, SPS shall have no future or further obligation to purchase the Capacity or Net Energy of the Facility or to make any payment whatsoever under this Agreement, except for payments for obligations arising or accruing prior to the effective date of termination.

- (c) Upon termination of this Agreement by Seller due to an Event of Default by SPS pursuant to Section 7.1 Seller shall have no future or further obligation to deliver the Capacity or Net Energy of the Facility to SPS or to satisfy any other obligation of this Agreement, except for payments or other obligations arising or accruing prior to the effective date of termination.
- (d) After the effective date of any termination, this Agreement shall not be construed to provide any residual value to either Party or any successor or any other Person, for rights to, use of or benefits from the Facility or the Distribution System.
- (e) Notwithstanding any provisions in this Agreement to the contrary, upon the occurrence of an Event of Default by Seller, SPS shall provide notice of the Event of Default to each Financier for which an address or other contact information has been provided to SPS by Seller. Each Financier shall have the right to cure the Event of Default on behalf of Seller within the cure periods set forth in Section 7.2, and SPS agrees to accept any such cure to the same extent as if made by Seller. If a Financier needs to foreclose on the Facility or otherwise take legal action to gain possession of the Facility in order to cure the applicable Event of Default, the applicable cure period shall be extended by the amount of time necessary for the Financier, using all reasonable due diligence, to obtain possession of the Facility. If a Financier, or its successor, obtains possession of the Facility and assumes all of the obligations of Seller under this Agreement, and cures any Event of Default, SPS agrees to recognize the Financier, or its permitted designee, as Seller under this Agreement and to perform its obligations to such Financier or its successor.
- (f) Except for a COD Delay, if a non-monetary Event of Default by Seller will require more than the prescribed cure period to cure, and Seller is diligently pursuing a cure, as reasonably demonstrated to SPS, then the applicable cure period shall be extended up to an additional ninety (90) Days so long as Seller is diligently pursuing the cure.
- (g) If the Parties are engaged in a dispute as to whether an Event of Default has occurred or whether a Party has the right to terminate this Agreement, and the Parties are handling the dispute through the procedures established in Article VIII, the Party claiming the Event of Default or the right to terminate shall not be entitled to terminate this Agreement until the senior management executives have completed their good faith negotiations to resolve the dispute. pursuant to Section 8.1

**7.4 Option to Acquire Facility upon Termination due to Seller Default.** If Company terminates this Agreement under Section 7.1 following COD, then, at any time within 90 Days following such termination, SPS may give notice to Seller of SPS's intent to purchase the Facility from Seller (a "Preliminary Exercise Notice").



- (i) As soon as practicable following delivery of a Preliminary Exercise Notice, the Parties shall appoint an independent appraiser experienced in appraising utility-scale solar photovoltaic generation facilities 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. 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 FMV of the Facility. SPS 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 45 Days following his/her appointment.
- (ii) Following delivery of a Preliminary Exercise Notice, Seller shall provide to SPS 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 SPS from such investigations shall be deemed Confidential Information subject to Section 11.16. All inspections, testing and access to the Facility and the Site by SPS 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.
- (iii) Within sixty (60) Days following receipt of an appraisal under this Section 12.1(E), SPS may elect to purchase the Facility from Seller (a “Default Option”). If SPS fails to notify Seller of SPS’s election within such 60-Day period, SPS shall be deemed to have elected not to exercise the Default Option. If SPS exercises the Default Option, the purchase price to be paid by SPS for the Facility in connection with any exercise of the Option shall be the FMV of the Facility, as determined by the appraiser. Seller shall cooperate in all respects reasonably necessary for SPS to exercise its Default Option rights
- (iv) If SPS exercises the Default Option, the Parties shall negotiate and execute a definitive contract for the transaction (the “PSA”), subject to clause (iv) below. The PSA shall include the terms and conditions set forth in Exhibit F – 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 Austin, 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 SPS's form of PSA is rejected, SPS shall have thirty (30) Days following such rejection to decide whether to execute and deliver Seller's form of PSA or abandon the transaction.

- (v) This Section 7.4 shall be specifically enforceable by SPS, without bond and without the need to prove irreparable harm.

## **7.5 Default By Seller; Failure to Achieve COD.**

- (a) Seller shall be in Default should the Facility fail to achieve Commercial Operation on or before the Target COD for reasons other than as a result of a Force Majeure or an Event of Default by SPS ("COD Delay"). Seller shall be liable to pay Liquidated Delay Damages to Company as a liquidated damage, and not a penalty, in lieu of Actual Damages, for any COD Delay. Except as provided in Section 7.5(c) below, the payment of Liquidated Delay Damages shall be SPS's sole and exclusive remedy for a COD Delay. Liquidated Delay Damages shall begin to accrue on the Day after the missed Target COD and shall continue to accrue until the Commercial Operation Date is achieved or this Agreement is terminated.
- (b) **Cure.** Seller shall have a cure period of forty-five (45) days for its failure to achieve Commercial Operation by the Target COD, *provided, however*, that if during such period Seller provides a written opinion from a mutually-agreeable independent engineer that COD can reasonably be achieved within an additional 45 Day period, then the cure period shall be ninety (90) Days after the Target COD to achieve Commercial Operation. The payment of accrued Liquidated Delay Damages shall be a condition to any such cure.
- (c) **Termination.** Failure to cure a COD Delay within the applicable cure period set forth in Section 7.5(b) shall be an Event of Default by Seller. Upon such an Event of Default, SPS may terminate this Agreement 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.

## **7.6 Damages**

- (a) For all claims, causes of action and damages, the Parties shall be entitled to the recovery of actual damages allowed by law unless otherwise limited by this Agreement. Neither the enumeration of Events of Default in Section 7.1 and Section 7.2, nor the termination of this Agreement by a non-defaulting Party pursuant to Section 7.3, shall limit the right of a non-defaulting Party to rights and remedies available at law, including but not limited to claims for breach of

contract or failure to perform by the other Party and for direct damages incurred by the non-defaulting Party as a result of the termination of this Agreement.

- (b) Except as otherwise specifically and expressly provided in this Agreement, no Party shall be liable to the other Party under this Agreement for any indirect, special, punitive, exemplary, incidental or consequential damages, including without limitation loss of use, loss of revenues, loss of profit, interest charges, cost of capital, or claims of customers to which service is made, from any cause whether arising under statute or in tort or contract. Notwithstanding the foregoing:
  - (i) In the event that Seller is the breaching Party, SPS's damages shall include Replacement Energy Costs; and
  - (ii) In the event that SPS breaches this Agreement by failing to purchase or accept delivery of Energy and Capacity (except as contemplated for Non-Compensable Curtailments allowed pursuant to Section 5.3 or as otherwise excused pursuant to the terms of this Agreement), Seller shall be entitled to damages equal to (i) the amounts Seller would otherwise have been paid under this Agreement for such Energy and Capacity if it had been purchased or accepted for delivery by SPS or (ii) in the event Seller sells such Energy and Capacity to a third party for less than the amount Seller would have been paid by SPS under this Agreement, the difference between the amounts Seller would otherwise have been paid under this Agreement and the price Seller received for such Energy and Capacity sold to a third party. In no event shall one Party's liability to the other exceed any limit of liability established for either Party under any Requirements of Law.
- (c) Except as otherwise provided in this Section 7.6, Seller's aggregate financial liability to SPS for SPS Replacement Energy Costs, Renewable Energy Credits, and other damages shall not exceed \$\_\_\_\_\_. The limitations on damages set forth in this Section 7.6(c) shall not apply to damages arising out of any of the following events:
  - (i) Actual fraud or other material intentional misrepresentation or material misconduct sanctioned by, or at the direction of, Seller in connection with this Agreement or the operation of the Facility;
  - (ii) The sale by Seller to a third party, or unauthorized diversion by Seller, of Energy committed to SPS under this Agreement, except during an Event of Default by SPS;
  - (iii) Seller's failure to apply any property insurance proceeds to reconstruction of the Facility following a casualty to the extent required by this Agreement;
  - (iv) Damages incurred by SPS pursuant to Section 7.7 and/or Section 7.8;

- (v) Any Environmental Contamination caused by Seller in connection with this Agreement; or
- (vi) The filing of an involuntary bankruptcy petition against Seller (other than by SPS), which petition is not dismissed within sixty (60) Days of its filing, or the filing of a voluntary petition in bankruptcy by Seller.

**7.7 Indemnification - General.** Seller and SPS agree to defend, indemnify and hold each other, and their respective officers, directors, employees and agents, harmless from and against all claims, demands, losses, liabilities and expenses (including reasonable attorneys' fees) (collectively "Indemnified Damages") for personal injury or death to Persons and damage to each other's physical property or facilities or the property of any other Person to the extent arising out of, resulting from or caused by the negligent or intentional acts, errors or omissions of the indemnifying Party. Furthermore, each Party shall defend, indemnify and hold the other harmless from and against all damages that are or were incurred or suffered by the indemnified Party and that relate to the indemnifying Party's breach or failure to perform any of the covenants, agreements, obligations, representations or warranties contained in this Agreement. Nothing in this Section 7.7 shall relieve Seller or SPS of any liability to the other for any breach of this Agreement. This indemnification obligation shall apply notwithstanding any negligent or intentional acts, errors or omissions of the indemnitees but the indemnifying Party's liability to pay Indemnified Damages to the indemnified Party shall be reduced in proportion to the percentage by which the indemnitees' negligent or intentional acts, errors or omissions caused the Indemnified Damages. Neither Party shall be indemnified for its Indemnified Damages resulting from its sole negligence or intentional misconduct. 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.

**7.8 Indemnification – Environmental.**

- (a) As of the Commerical Operation Date (and not as of the date hereof) Seller represents and warrants to SPS as follows:
  - (i) To the best of its knowledge based solely on the Phase I environmental assessment performed on the Site, no portion of the Site or the improvements thereon has been used by previous or current owners or operators or Seller to generate, manufacture, refine, transport, treat, store, handle or dispose of toxic material, hazardous substances, solid waste or hazardous wastes, as such terms are defined in any applicable Environmental Law, and Seller does not intend to use any of the Site for such purposes, and Seller is not aware of any spills, leaks or discharges of any such hazardous or toxic materials on the Site;
  - (ii) To the best of its knowledge, based solely on the Phase I environmental assessment performed on the Site, the Site does not contain, through the action or inaction of previous owners or operators or Seller, asbestos, urea formaldehyde foam insulation, PCBs, other toxic materials, hazardous

substances or any other chemical, material or substance, exposure to which may or could pose a health hazard, whether or not the substance is prohibited, limited or regulated by any Governmental Authority, whether used in the Facility or stored on the Site;

- (iii) Seller has not received a written summons, citation, directive, letter or other written communication from any Governmental Authority concerning the existence of any condition on or affecting the Site that currently violates or that, with the passage of time, will violate any applicable Environmental Law or that otherwise indicates that Seller may be subject to any potential Environmental Contamination with respect to the Site or the Facility; and
  - (iv) Neither Seller, the Facility nor the Site is subject to any existing or pending investigation or inquiry by any Governmental Authority or to any remedial obligations under any applicable Environmental Law (which representations and warranties would continue to be true and correct following disclosure to the applicable Governmental Authority of all relevant facts, conditions and circumstances pertaining to Seller, the Facility and the Site).
- (b) Seller agrees to defend, indemnify and hold SPS and its officers, directors, employees, agents and representatives, and their respective permitted successors and assigns, harmless from and against all Indemnified Damages arising under any Environmental Law concerning Seller, the Facility or the Site, including but not limited to (i) any claim for personal injury or property damage by any Person arising out of, resulting from or caused by any violation of any applicable Environmental Law by Seller or concerning the Facility or the Site; (ii) any assessment, fine, penalty, lien or other imposition by any Governmental Authority; any breach of the foregoing representations and warranties; and (iv) any liability, losses or remedial costs suffered because a Governmental Authority finds SPS to be a responsible party, owner or operator of the Facility or Site, except in each case to the extent that the claim, assessment, fine penalty, lien, imposition, liability, loss or remedial costs are due to SPS's negligence, fraud or intentional misconduct.

## **ARTICLE VIII - DISPUTE RESOLUTION.**

- 8.1** In the event of any dispute arising under this Agreement (a "Dispute"), within ten (10) business days following notice issued by either Party pursuant (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. In the event the 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 a designated representative of each Party's 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 senior management

representatives for both Parties shall negotiate in good faith to resolve the Dispute. If such senior management representatives are unable to resolve the Dispute thereafter, either Party may seek available legal remedies.

- 8.2** If no Dispute notice has been issued within twenty-four (24) months following the occurrence of events or circumstances giving rise to the Dispute (regardless of the knowledge or potential knowledge of either Party of such events and circumstances), the Dispute and all claims related thereto shall be deemed waived and the aggrieved Party shall thereafter be barred from proceeding thereon.
- 8.3** SELLER AND SPS 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 AGREEMENT 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 ARISING UNDER OR IN CONNECTION WITH THIS AGREEMENT BE ADJUDICATED BY A JUDGE OF THE COURT HAVING JURISDICTION WITHOUT A JURY.

## ARTICLE IX - ASSIGNMENT

### 9.1 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 SPS, which shall not be unreasonably withheld or delayed. SPS shall have no obligation to provide any consent under this Section 9.1 unless:
  - (i) Seller has complied with Sections 9.3 and 9.4, if and as applicable;
  - (ii) Seller has provided to SPS such information concerning the transferee's direct and indirect ownership as SPS reasonably requests;
  - (iii) the transferee is a Qualified Operator;
  - (iv) the transferee (together with its parents and affiliates) enjoys an investment grade credit rating or other creditworthiness satisfactory to SPS;
  - (v) Seller has provided to SPS at least thirty (30) Days' prior notice of the transaction; and
  - (vi) Seller pays or reimburses SPS for the direct expenses (including the fees and expenses of counsel) incurred by SPS 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 Agreement shall be null, void and a breach of this Agreement.
- (c) Seller shall assign this Agreement 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 SPS. Seller also may assign this Agreement for collateral purposes to any Facility Lender, and may subcontract some or all of its duties under this Agreement, upon notice to but without the consent of SPS.
- (d) Except as permitted in this Section 9.1, Seller may not assign this Agreement or any portion hereof. No assignment shall relieve Seller of its obligations under this Agreement. Before this Agreement is assigned by Seller, the assignee must first obtain such approvals as may be required by all applicable Governmental Authorities.

### 9.2 Assignment by SPS.

- (a) SPS may assign this Agreement to any Affiliate, or to any successor that provides retail electric service in all or substantially all of SPS's service territory and is subject to rate and quality service regulation under the

jurisdiction of the Commission. Any other assignment of this Agreement by SPS shall require the prior written consent of Seller, not to be unreasonably withheld or delayed.

- (b) If an assignee of SPS enjoys a credit rating equal to or better than investment grade or SPS's credit rating as of the date of assignment (whichever is higher), Seller shall release SPS from its obligations hereunder if so requested by SPS. Except for the foregoing, no assignment shall relieve SPS of its obligations under this Agreement.
- (c) Any assignee of SPS shall assume all obligations of SPS (accrued and prospective) hereunder via a writing reasonably satisfactory to Seller. Before this Agreement is assigned by SPS, the assignee must first obtain such approvals as may be required by all applicable Governmental Authorities.

### **9.3 ROFO**

- (a) If at any time after the Commercial Operation Date, (1) Seller proposes to sell the Facility to an unaffiliated third party, Seller shall first offer to sell the Facility to SPS via notice to SPS, or (2) Seller's parent proposes to sell a majority of the equity interests in Seller to an unaffiliated third party, Seller shall cause its parent first to offer to sell such equity interests to SPS via notice to SPS (either, 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 Seller's 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 11.16 below
- (b) Following issuance of a ROFO Notice, Seller shall allow SPS 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 SPS may reasonably request. All information obtained by SPS from such investigations shall be deemed Confidential Information subject to Section 11.16 below. Within such sixty (60) Day period, SPS may elect to purchase the Facility or the equity interests of Seller (as applicable) on substantially the same terms as set forth in the ROFO Notice. If SPS fails to notify Seller of SPS's election within such sixty (60) Day period, SPS shall be deemed to have rejected the transaction.
- (c) If SPS elects to purchase the Facility or the specified equity interests of Seller (as applicable), the Parties shall negotiate and execute a definitive contract for the transaction (a "PSA"). The PSA shall include the price and other terms set forth in the ROFO Notice and such other terms as are set forth in Appendix F. In the event that the Parties cannot agree on the final form of PSA, (i) the issue shall be submitted to "baseball" arbitration in Minneapolis, Minnesota 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, and (iii) the Party whose form PSA is rejected shall pay the fees and costs of the Arbitration Service.

- (d) If SPS rejects the transaction described in a ROFO Notice, Seller shall have the right to sell the Facility (or Seller's parent shall have the right to sell the specified equity interests in Seller, 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 parent fails to close a transaction on such terms within such 12-month period, any sale of the Facility or equity interests in Seller shall again be subject to this Section 9.3.
- (e) This Section 9.3 shall be specifically enforceable by SPS, without bond and without the need to prove irreparable harm.
- (f) Seller shall cooperate in all respects reasonably necessary for SPS 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.

#### **9.4 PFT.**

- (a) Seller shall give SPS at least ninety (90) Days' prior notice (a "PFT Notice") of any Pending Facility Transaction that does not otherwise trigger SPS's ROFO rights under Section 9.3, in order to provide SPS with an opportunity to discuss and negotiate with Seller the possible sale of the Facility to SPS. 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 11.16 below.
- (b) Seller shall have no obligation to sell nor shall SPS 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 SPS if and when applicable pursuant to Section 9.3. 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) For purposes hereof, a "Pending Facility Transaction" or "PFT" means:
  - (i) any Change of Control of Seller;

- (ii) 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;
- (iii) the commencement by Seller or any of its Affiliates of substantive negotiations with any unaffiliated third party with respect to the sale of any equity interests in Seller or the Facility, or any group(s) of assets or equity interests that includes the Facility; or
- (iv) the execution by Seller or any of its Affiliates of any letter of intent, memorandum of understanding or similar document, whether or not legally binding, which contemplates the sale or lease to an unaffiliated third party of any equity interests in Seller or the Facility or any group(s) of assets or equity interests that includes the Facility;

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

**9.5 Option.**

- (a) At any time between the 8<sup>th</sup> and 9<sup>th</sup> anniversaries of COD, and at any time between the 16<sup>th</sup> and 17<sup>th</sup> anniversaries of COD, SPS may give notice to Seller of SPS's intent to purchase the Facility from Seller (a "Preliminary Exercise Notice"). For purposes hereof, the "Facility" includes all property rights necessary for the use of the Facility for its intended purpose, including (i) the Site; (ii) Seller's interconnection facilities; (iii) the Facility collection facilities and substation; (iv) Seller's rights and obligations under the Interconnection Agreement; (v) permits, and all material contracts; and (vi) all Facility fixtures, equipment and personal property.
- (b) As soon as practicable following delivery of a Preliminary Exercise Notice, the Parties shall appoint an independent appraiser experienced in appraising utility-scale wind power generation facilities 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.
  - (i) 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.
  - (ii) SPS shall pay all fees and costs of the appraiser.
  - (iii) The Parties shall direct the appraiser to use his/her best efforts to complete and deliver his/her appraisal to the Parties within two (2) months following his/her appointment.
- (c) Following delivery of a Preliminary Exercise Notice, Seller shall provide to SPS 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 SPS from such investigations shall be deemed Confidential Information subject to Section 10.16.
- (d) All inspections, testing and access to the Facility and the Site by SPS 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 Agreement.
- (e) Within sixty (60) Days following receipt of an appraisal under Section 9.4(B), SPS may elect to purchase the Facility from Seller (an "Option"). If SPS fails

to notify Seller of SPS's election within such sixty (60) Day period, SPS shall be deemed to have elected not to exercise the Option.

- (f) If the Facility is subject to Facility Debt secured only by the Facility, the purchase price to be paid by SPS for the Facility in connection with any exercise of the Option shall be the greater of
  - (i) the amount of Facility Debt as of the date of issuance of the Preliminary Exercise Notice, or
  - (ii) the FMV of the Facility, as determined by the appraiser.

Otherwise the purchase price to be paid by SPS for the Facility in connection with any exercise of the Option shall be the FMV of the Facility, as determined by the appraiser.

- (g) If SPS exercises the Option, the Parties shall negotiate and execute a definitive contract for the transaction (the "PSA"). The PSA shall include the terms and conditions set forth in Appendix F. In the event that the Parties cannot agree on the final form of the PSA, (i) the issue shall be submitted to "baseball" arbitration in Minneapolis, Minnesota 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, and (iii) the Party whose form PSA is rejected shall pay the fees and costs of the Arbitration Service.
- (h) This Section 9.4 shall be specifically enforceable by SPS, without bond and without the need to prove irreparable harm.
- (i) Seller shall cooperate in all respects reasonably necessary for SPS to exercise its Option rights, and shall operate the Facility in the ordinary course of business following the date of issuance of a Preliminary Exercise Notice
- (j) Memo of Option. In connection with the Parties' execution and delivery of this Agreement, the Parties are executing and Company is recording a Memorandum of Option memorializing Company's Default Option under Section 7.4, its ROFO rights under Section 9.3, and its Option rights under Section 9.5.

## ARTICLE X - SECURITY

- 10.1** No later than sixty (60) Days following the execution of this Agreement, Seller shall establish, and maintain a Security Fund that is available to pay any amount due to SPS pursuant to this Agreement, and to provide SPS security that Seller will satisfy its obligations under this Agreement.

- (a) The Security Fund shall equal \$\_\_\_\_\_ per MW (AC) throughout the Term.

- (b) Seller shall replenish the Security Fund within fifteen (15) business days after Company makes a draw on the Security Fund as authorized by this Agreement, up to the required amount. Notwithstanding the foregoing, Seller shall replenish all amounts drawn from the Security Fund drawn in respect of damages described in Sections 7.1, 7.3 and 7.5

**10.2** SPS may draw from the Security Fund such amounts as are necessary to recover amounts owing to SPS pursuant to this Agreement, including but not limited to any damages, Liquidated Delay Damages, Termination Damages and Indemnified Damages due to SPS under this Agreement. SPS may, in its sole discretion, draw all or any part of such amounts due to it from any form of security to the extent available pursuant to this Article and in any sequence SPS may select. SPS's failure or delay to draw any amount from the Security Fund in any instance shall not prejudice SPS's rights to subsequently recover such amount from the Security Fund or in any other manner

**10.3** The Security Fund shall be maintained at Seller's expense, shall be originated by or deposited in a financial institution or company ("Issuer") satisfying the requirements of this Article, and shall be in the form of one or more of the following instruments

- (a) The Security Fund may be in the form of an irrevocable standby letter of credit in the form and substance of Exhibit G-1-Letter of Credit, and any material changes to such Exhibit shall be subject to review and approval by SPS at its sole discretion (the "Letter of Credit").
  - (i) The Issuer for the Letter of Credit shall have and maintain an unsecured bond rating (unenhanced by third-party support) equivalent to A- or better as determined by all rating agencies that have provided such a rating, and if ratings from either Standard & Poor's and Moody's are not available, equivalent ratings from alternate rating sources reasonably acceptable to SPS. If such rating is equivalent to A-, the Issuer must not be on credit watch or have a negative outlook by any rating agency.
  - (ii) The Letter of Credit must be for a minimum term of three-hundred and sixty (360) Days. Seller shall give SPS 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 or other authorized security for additional consecutive terms of three-hundred and sixty (360) Days or more (or, if shorter, the remainder of the Term) more than thirty (30) Days prior to each expiration date of the security. If the Letter of Credit or other security is not renewed or extended at least thirty (30) Days prior to its expiration date or otherwise is terminated early, SPS shall have the right to draw immediately upon the security and to place the amounts so drawn, at Seller's cost and with Seller's funds, in an interest bearing escrow account in accordance with sub-paragraph (2) below, until and unless Seller provides a substitute form of such security meeting the requirements of this Article

- (b) The Security Fund may be in the form of United States currency, in which SPS holds a first and exclusive perfected security interest, deposited with an Issuer who is a state or federally-chartered commercial bank with operations in the State in which the Facility is located (or such other escrow agent acceptable to SPS in its sole discretion) in an account under which SPS is designated as beneficiary with sole authority to draft from the account or otherwise access the security (the “Escrow Account”). Funds held in the Escrow Account may be deposited in a money-market fund, short-term treasury obligations, investment-grade commercial paper and other liquid investment-grade investments with maturities of three months or less, with all investment income thereon to be taxable to, and to accrue for the benefit of, Seller. After the Commercial Operation Date, periodic sweeps by Seller for recovery of interest earned by the escrowed funds shall be allowed, and, at any time the balance in the escrow account exceeds the required amount of security, the escrow agent may remit any excess to Seller.
- (c) 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”) with a minimum of 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 SPS) portends a Material Adverse Effect in the creditworthiness of the Guarantor, then SPS 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 SPS.
- (d) Seller may change the form of the Security Fund at any time and from time to time upon commercially reasonable prior notice to SPS, *provided, however, that* the Security Fund must at all times satisfy the requirements of this Article
- (e) SPS may reevaluate from time to time the value of any Security posted by Seller to determine, in a Commercially Reasonable manner, whether (i) it continues to satisfy the requirements in this Agreement or (ii) there has been a change that has a Material Adverse Effect in the creditworthiness of the Issuer or guarantor, such that it does not or with the passage of time, it will no longer satisfy the requirements of this Agreement. If SPS determines, in a Commercially Reasonable manner, that there has been an event that has caused, or will cause, with the passage of time, Seller’s Security to no longer satisfy the requirements of this Agreement, then SPS shall provide prompt Notice to Seller of such event and after receipt of such Notice, Seller shall be required to provide alternative Security that satisfies the terms of this Agreement.

- (f) The Security Fund shall survive termination of this Agreement 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 Agreement, or (ii) termination of this Agreement for any reason prior to the end of the Term. SPS shall determine the amount, if any, owed by Seller for any obligations or damages arising out of this Agreement. SPS may draw such amount and shall release the balance of the Security Fund (including any accumulated interest, if applicable) to Seller
- (g) Seller shall reimburse SPS for the incremental direct expenses (including the fees and expenses of counsel) incurred by SPS in connection with the preparation, negotiation, execution and/or release (including making a draw of funds) of any security instruments, and other related documents, used by Seller to establish and maintain the Security Fund pursuant to Seller's obligations under this Article.

## ARTICLE XI - MISCELLANEOUS

**11.1 Notices.** Any notice, demand, request or communication required or authorized by this Agreement shall be delivered either by hand, facsimile, overnight courier or mailed by certified mail, return receipt requested, with postage prepaid, to:

If to SPS, to:

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

*with a copy to::*

Legal Services  
Xcel Energy Services Inc.  
1800 Larimer Street, Suite 1100  
Denver, CO 80202 \_\_\_\_\_

If to Seller, to:.

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

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The designation and titles of the person to be notified or the address of such person may be changed at any time by written notice. Any such notice, demand, request or communication shall be deemed delivered on receipt if delivered by hand or facsimile, on the next business day if delivered by overnight courier and on the fifth (5<sup>th</sup>) business day after deposit by the sending party if delivered by U.S. mail.

- 11.2 Captions.** All titles, subject headings, section titles and similar items are provided for the purpose of reference and convenience and are not intended to be inclusive or definitive or to affect the meaning of the contents or scope of this Agreement.
- 11.3 No Third-Party Beneficiary.** No provision of this Agreement is intended to nor shall it in any way inure to the benefit of any customer, property owner or any other third party, so as to constitute any such Person a third-party beneficiary under this Agreement, or of any one or more of the terms hereof, or otherwise give rise to any cause of action in any Person not a Party hereto.
- 11.4 No Dedication.** No undertaking by one Party to the other under any provision of this Agreement shall constitute the dedication of that Party's system or any portion thereof to the other Party or to the public or affect the status of SPS as an independent public utility corporation or Seller as an independent individual or entity and not a public utility.
- 11.5 Integration; Amendment.** This Agreement, together with all Appendices attached hereto, constitutes the entire agreement between the Parties relating to the transaction described herein and supersedes any and all prior oral or written understandings. No amendment, addition to or modification of any provision hereof shall be binding upon the Parties, and neither Party shall be deemed to have waived any provision or any remedy available to it unless such amendment, addition, modification or waiver is in writing and signed by a duly authorized officer or representative of the applicable Party or Parties.
- 11.6 Governing Law.** This Agreement is made in the state of \_\_\_\_\_[state where facility is located] and shall be interpreted and governed by the laws of the state of \_\_\_\_\_[state where facility is located] and/or the laws of the United States, as applicable.
- 11.7 Relationship of Parties.**
- (a) The duties, obligations and liabilities of the Parties are intended to be several and not joint or collective. This Agreement shall not be interpreted or construed to create an association, joint venture, fiduciary relationship or partnership between Seller and SPS or to impose any partnership obligation or liability or any trust or agency obligation or relationship upon either Party. Seller and SPS shall not have any right, power or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as or be an agent or representative of, or to otherwise bind, the other Party.
  - (b) The relationship between SPS and Seller shall be that of contracting party to independent contractor. Accordingly, subject to the specific terms of this



Agreement, SPS shall have no general right to prescribe the means by which Seller shall meet its obligations under this Agreement.

- (c) Seller shall be solely liable for the payment of all wages, taxes and other costs related to the employment of persons to perform Seller's obligations under this Agreement, 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 SPS for any purpose, nor shall Seller represent to any Person that it is or shall become an SPS employee or agent.

- 11.8 **Good Faith and Fair Dealing; Reasonableness.** The Parties agree to act reasonably and in accordance with the principles of good faith and fair dealing in the performance of this Agreement. Unless expressly provided otherwise in this Agreement, (i) whenever this Agreement requires the consent, approval or similar action by a Party, such consent, approval or similar action shall not be unreasonably withheld or delayed, and (ii) whenever this Agreement gives a Party a right to determine, require, specify or take similar action with respect to matters, such determination, requirement, specification or similar action shall be reasonable.
- 11.9 **Severability.** Should any provision of this Agreement be or become void, illegal or unenforceable, the validity or enforceability of the other provisions of this Agreement shall not be affected and shall continue in force. The Parties will, however, use their reasonable best endeavors to agree on the replacement of the void, illegal or unenforceable provision with legally acceptable clauses that correspond as closely as possible to the sense and purpose of the affected provision and this Agreement as a whole.
- 11.10 **Cooperation.** The Parties agree to cooperate reasonably with each other in the implementation and performance of this Agreement. Such duty to cooperate shall not require either Party to act in a manner inconsistent with its rights under this Agreement.
- 11.11 **Counterparts.** This Agreement may be executed in two (2) or more counterparts and by different parties on separate counterparts, all of which shall be considered one and the same agreement and each of which shall be deemed an original.
- 11.12 **Standard of Review.** This Agreement is contingent upon appropriate authorization from FERC under Section 205 of the Federal Power Act. The terms and conditions and the rates for service specified in this Agreement shall remain in effect for the term of the transaction described in this Agreement. Absent the Parties' written agreement, this Agreement shall not be subject to change by application of either Party pursuant to Section 205 or 206 of the Federal Power Act. Absent the agreement of Seller and SPS to a proposed change, the standard of review for changes to the Guaranteed Price under this Agreement proposed by SPS, Seller, a non-party or FERC acting *sua sponte* shall be the "public interest" standard of review set forth in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

**11.13 Use of SPS's Name.** Seller shall not use SPS's (or any of its affiliates') name, logos or other marks in connection with this Agreement or otherwise without the prior written consent of SPS, which consent shall be within SPS's sole discretion.

**11.14 Press Releases and Media Contact.** Upon the request of either Party, the Parties shall develop a mutually agreed upon joint press release to be issued as of the Effective Date describing the location, size, type and timing of the Facility, the long-term nature of this Agreement and other relevant factual information about the relationship of the Parties; provided, however, that at Seller's request, the Parties will delay the issuance of the press release until a date mutually agreeable to the Parties. In the event during the Term either Party is contacted by the media concerning this Agreement or the Facility, the contacted Party shall inform the other Party of the existence of the inquiry, any questions asked and the substance of any information provided to the media

**11.15 Solar Panel Performance and Meteorological Data.** Seller shall provide SPS at Seller's expense, with real time generation performance and meteorological data for the solar Facility for the Term of this Agreement. Seller shall undertake at Seller's expense, to install, operate and maintain a Plant Information System ("PI") at the Facility. Seller shall provide SPS real time access to all data gathered from PI and shall ensure that real time communications capabilities are available and maintained for the transmission of all PI data.

**11.16 Confidentiality**

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

- (i) information specifically designated as Confidential Information in this Agreement; and
- (ii) 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 Agreement, provided, however, that confidential Informaiton shall not include information that

(a) is publicly available as of the date hereof, 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 Agreement 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 Agreement.

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 11.16 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 Commission 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 11.16(C) shall be inapplicable to any disclosure of Confidential Information to a Commission, its staff, intervenors and/or consumer counsel, disclosure of which shall be uninhibited by this Agreement
- (d) Notwithstanding anything to the contrary in this Section 11.16, SPS may disclose Proprietary Data to Xcel Energy Services Inc. and its employees without the consent of Seller.

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

**Dated:** \_\_\_\_\_, LLC,

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_

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

**SOUTHWESTERN PUBLIC SERVICE  
COMPANY, a New Mexico corporation**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_,  
Xcel Energy Services Inc., as agent for Southwestern  
Public Service Company

## APPENDIX A

### Points of Interconnection and Delivery

## APPENDIX B

### Acceptance Criteria

Seller and the Facility shall be deemed to have reached Commercial Operation when each of the following has occurred:

1. The Facility and Interconnection Facilities are physically complete as required by this Agreement and the Interconnection Agreement and are capable of transmitting, transforming and delivering the Net Energy and Capacity to the Point of Delivery in accordance with the Interconnection Agreement, and Seller is both obligated under, and in compliance with, the Interconnection Agreement and the rules of the Commission.
2. The metering devices pursuant to Section 3.1 of this Agreement have been installed and identified by SPS, as confirmed by SPS in the confirmation notice and procedure described in Item 4 below.
3. The Facility is capable of producing electricity substantially in accordance with the manufacturer's power curve to the full extent of the Committed Nameplate Capacity, and has produced and delivered such Energy for no less than seventy-two (72) hours during which solar irradiation is available at sufficient intensity to operate the panels.
4. Seller has provided SPS with written notice that the preceding three criteria have been met and a certificate of insurance reflecting compliance with Section 4.1(e) and Appendix D of this Agreement, and SPS has confirmed in writing to Seller that the Facility has reached Commercial Operation. SPS shall confirm or dispute that the Facility has reached Commercial Operation within ten (10) business days of receipt of Seller's notice. SPS's failure to provide confirmation or other response to Seller's notice within ten (10) business days after receipt of Seller's notice shall constitute confirmation of Commercial Operation.

## APPENDIX C

### Legal Description of the Site

#### DESCRIPTION OF PREMISES

<b>Parcel ID</b>	<b>Sec/Twp/Rng</b>	<b>Description</b>
------------------	--------------------	--------------------

### Description of the Facility

1.

## APPENDIX D

### Insurance Requirements

- 1.0 Seller shall procure and maintain throughout the Term, at its own expense, the following policies of insurance:
  - A. If the Seller has employees, a Workers' Compensation and Employer's Liability insurance that complies with the laws of \_\_\_\_\_[state where facility is located] to the extent of statutory limits;
  - B. Comprehensive or Commercial General Liability insurance with bodily injury and property damage combined single limits of at least \$1,000,000 per occurrence.
  - C. The Seller shall provide proof of Completed Operations Coverage from the General Contractor providing installation or repairs of or to the facility. Such insurance shall include, but not necessarily be limited to, specific coverage for contractual liability encompassing the indemnification provisions in this Agreement, broad form property damage liability, personal injury liability, explosion and collapse hazard coverage and products/completed operations liability coverage;
  - D. In the event that Seller owns or hires vehicles, Comprehensive Automobile Liability Insurance to the extent applicable with bodily injury and property damage combined single limits of at least \$1,000,000 per occurrence covering vehicles owned, hired or non-owned; and
  - E. All other insurance required by regulation or law as deemed appropriate by Seller.
- 2.0 The amounts of insurance required above may be satisfied by Seller buying primary coverage in the amounts specified or by buying a separate excess umbrella liability policy together with the lower limit primary underlying coverage. The structure of the coverage is Seller's option, as long as the total amount of insurance meets the requirements of this Agreement.
- 3.0 The policies required of Seller shall be "occurrence" form policies. Seller may not use "claims-made" form coverage to meet its obligations without the prior written consent of each such policy from SPS.
- 4.0 Seller's Comprehensive or Commercial General Liability policies and Umbrella or Excess Liability policies shall include each of the following endorsements, and its Workers' Compensation and automobile liability policies, if required, shall include the last endorsement listed below:
  - a. SPS and its directors, officers, employees and agents shall be additional insureds under all policies;
  - b. The policies are to be primary with respect to the interest of SPS and its directors, officers, employees and agents, and any other insurance maintained by any of them shall be excess and not contributory with Seller's insurance;

- c. Each insurer shall waive all rights of subrogation against SPS and its directors, officers, employees and agents;
  - d. Notwithstanding any other provision of a policy, no policy shall be cancelled, expire or changed in a material way by the insurer without thirty (30) Days prior written notice to SPS.
- 5.0 Seller or its insurers or agents shall provide SPS with certificates of insurance evidencing the policies and endorsements described herein within thirty (30) Days of the Commercial Operation Date. Failure to obtain the insurance coverage required shall in no way relieve or limit Seller's obligations and liabilities under other provisions of this Agreement.



## APPENDIX E

### Guaranteed Price

For the Net Energy that Seller delivers to SPS at the Point of Delivery, SPS shall pay Seller \$\_\_\_\_/MWh escalating at 1% annually on the anniversary of the Commercial Operation Date.

## APPENDIX F

### PSA Provisions

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

1. The PSA shall close on such Business Day as may be specified by SPS, not more than one-hundred eighty (180) Days following execution of the PSA (or such longer period as may be required for the Commission to act thereon).

2. Seller shall operate the Facility, and both Parties shall perform the Agreement, in the ordinary course of business pending closing of the PSA.

3. Seller shall convey the Facility to SPS via special warranty deed, free and clear of all mortgages, deeds of trust, UCC-1s, and other liens materially adverse to SPS's ownership and operation thereof.

4. All revenues and expenses of the Facility shall be prorated as of the date of closing.

5. Seller shall provide customary comprehensive representations and warranties to SPS regarding its legal right to execute and perform the PSA, and regarding title, physical condition, vendors, employees, operations, finances, contracts, maintenance and other relevant matters pertaining to the Facility, unqualified by its knowledge but subject to such factual exceptions as Seller may disclose. Seller's liability for breach of such reps and warranties shall not exceed 20% of the purchase price.

6. SPS shall provide customary representations and warranties to Seller regarding its capacity and legal right to execute and perform the PSA, unqualified by its knowledge.

7. SPS shall assume all material contracts of Seller related to the Facility that are reviewed and approved by SPS (such approval not to be unreasonably withheld) during the due diligence period.

8. SPS's obligation to close shall be conditioned upon (i) approval by the PUC, (ii) counterparty consent under all material contracts requiring such consent, (iii) receipt by SPS of all Permits needed to own and operate the Facility, and (iv) no material casualty or condemnation of the Facility prior to closing.

9. SPS shall have the right of specific performance, without the need to post bond or prove irreparable harm from Seller's failure to close. Venue for any dispute under the PSA shall be the Texas District Court for the County of Potter or, if jurisdictionally available, the U.S. District Court for the Northern District of Texas.

10. Such other terms as may then be standard in the market.

\* \* \* \* \*

EXHIBIT G  
(to Agreement)  
FORM OF LETTER OF CREDIT

[LETTERHEAD OF ISSUING BANK]

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

Date of Issuance: \_\_\_\_\_

Beneficiary: \_\_\_\_\_ [OpCo ]

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

Applicant:

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

Beneficiary may draw all or any portion of this Letter of Credit at any time and from time to time, and Issuer will make funds immediately available to Beneficiary upon presentation of Beneficiary's draft(s) at sight in substantially the form attached hereto as Exhibit "A" ("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 "Agreement"). Notwithstanding any reference in this Letter of Credit to the Agreement or any other documents, instruments or agreements, or references in the Agreement 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: \_\_\_\_\_ [OpCo]

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

Account: [Applicant to be inserted]

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

**FORM OF TRANSFER REQUEST**

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

Current Beneficiary:

Applicant:

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

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

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

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

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

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

Dated: \_\_\_\_\_ [OpCo]

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

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

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

[Notary Acknowledgement]

To be signed by a person purporting to be an authorized representative of Beneficiary and indicating his or her title or other official capacity, and acknowledged by a notary public.

**EXHIBIT H**  
(to Agreement)  
**FORM OF GUARANTY**

**GUARANTY**

This Guaranty is executed and delivered as of this \_\_\_\_ day of \_\_\_\_\_, 20\_\_ by \_\_\_\_\_, a \_\_\_\_\_ [corporation] ("Guarantor"), in favor of [**OpCo**] ("Company"), in connection with the performance by \_\_\_\_\_, a \_\_\_\_\_ [limited liability company] ("Seller") of a Power Purchase Agreement dated \_\_\_\_\_, 20\_\_\_\_ between Seller and Company (the "Agreement").

- RECITALS -

A. Seller owns and operates a [wind] [solar] power electric generation facility having total nameplate capacity of approximately \_\_\_\_ MW located in \_\_\_\_\_ County, \_\_\_\_\_ (the "Facility").

B. Seller and Company have entered into the Agreement 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 Agreement by Seller and Company. To induce Company to enter into and continue the Agreement and to consummate the purchase and sale of electrical energy contemplated by the Agreement, 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 Agreement, 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 Agreement 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 Agreement;

(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 Agreement 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 or 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 Agreement 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 Agreement. 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 Agreement.

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 Agreement, addressed as follows:

(a) if to Company: as provided in the Agreement

(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

**Execution Version**

**FIRST AMENDMENT  
TO  
SOLAR ENERGY PURCHASE AGREEMENT  
BETWEEN  
SOCORE CLOVIS 1 LLC  
AND  
SOUTHWESTERN PUBLIC SERVICE COMPANY**

This First Amendment to Solar Energy Purchase Agreement (this "First Amendment") is entered into as of this **24<sup>th</sup>** day of August, 2018 (the "Effective Date"), by and between **SoCore Clovis 1 LLC**, a Delaware LLC ("Seller"), and **Southwestern Public Service Company** a New Mexico corporation ("SPS"). Seller and SPS are hereinafter referred to individually as a "Party" and collectively as the "Parties". Unless otherwise defined herein, capitalized terms shall be given their respective meanings as set forth in the PPA.

**Recitals:**

**WHEREAS**, Seller and SPS are parties to that certain Solar Energy Purchase Agreement dated as of June 28, 2018 (the "Agreement" or "PPA");

**WHEREAS** Seller desires to modify the Agreement to extend the date for it to obtain a signed Interconnection Agreement;

**WHEREAS** Appendix A of the Agreement currently provides that the Point of Interconnection is at a point on a new overhead 13.2 kV line running along Wheaton St., on the east side of the solar Facility, and Seller desires to modify the Agreement to permit is the flexibility to choose a point on a new overhead 13.2 kV line directly to the west of the West Clovis substation as the Point of Interconnection; and,

**WHEREAS**, SPS desires to extend the date by which it must seek Regulatory Approval of the Agreement;

**NOW, THEREFORE**, in consideration of the premises, covenants and agreements hereinafter set forth, the Parties hereby agree as follows:

**Agreement**

1. The first sentence of Section 2.2(a) of the Agreement is amended to replace "sixty (60)" with "ninety-one (91)";
2. The Seller Condition Precedent in Section 2.2(b) of the Agreement is amended by deleting the date "August 31, 2018" and replacing it with the date "September 27, 2018".
3. The Parties agree that Seller shall have the option of selecting either at a point on a new overhead 13.2 kV line running along Wheaton St., on the east side of the solar Facility, or a point on a new overhead 13.2 kV line directly to the west of the West Clovis substation as the Point of Interconnection. Within ten (10) days from the date

Seller executes the Interconnection Agreement, Seller shall provide an amended Appendix A in a form that is mutually agreeable to both Parties, and that the amended Appendix A shall be substituted for the Appendix A included with the Agreement at the time of its execution.

3. **Representations Regarding This Amendment.** By their execution of this First Amendment, each Party represents and warrants that it is authorized to enter into this First Amendment, that this First Amendment does not conflict with any contract, lease, instrument or other obligation to which it is a party or by which it is bound, and that this First Amendment represents its valid and binding obligation, enforceable against such Party in accordance with its terms.

4. **No Other Amendments.** Except as specifically provided in this First Amendment, no other amendments, revisions or changes are made or have been made to the Agreement. All other terms and conditions of the PPA remain in full force and effect, and the Parties hereby ratify and confirm their rights and obligations under the PPA, as amended hereby.

5. **Effectiveness of Amendment.** This First Amendment shall become effective upon the date first written above.

6. **Governing Law:** This First Amendment shall be governed by and interpreted in accordance with the laws of the State of New Mexico applicable to contracts made and to be performed in the State of New Mexico.

7. **Counterparts.** This First Amendment may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument.

*[THIS SPACE LEFT INTENTIONALLY BLANK]*

**IN WITNESS WHEREOF**, the Parties have executed this First Amendment as of the date first written above.

**SoCore Clovis 1 LLC**

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

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

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

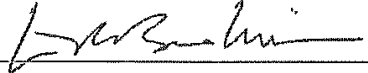
**Southwestern Public Service Company,  
a New Mexico Corporation**

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

Thomas A. Imbler  
V.P. Commercial Operations, Xcel Energy Services  
Inc., as agent for Southwestern Public Service  
Company, a New Mexico corporation

IN WITNESS WHEREOF, the Parties have executed this First Amendment as of the date first written above.

**SoCore Clovis 1 LLC**

By: 

Name: WIS F. BIROLINI

Title: PRESIDENT

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

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

Thomas A. Imbler  
V.P. Commercial Operations, Xcel Energy Services  
Inc., as agent for Southwestern Public Service  
Company, a New Mexico corporation

Southwestern Public Service Company

Clovis 1.98 MW ac Solar<sup>®</sup>Connect Community  
Preliminary System Output Profile in MWh

PPA Year	Calendar Year	January	February	March	April	May	June	July	August	September	October	November	December	Annual Total
1	2021	351.8	375.7	499.3	552.8	588.4	610.6	608.0	571.2	492.0	432.0	351.5	313.5	5746.8
2	2022	350.4	374.2	497.3	550.6	586.0	608.2	605.6	568.9	490.0	430.3	350.1	312.2	5723.8
3	2023	349.0	372.7	495.3	548.4	583.7	605.7	603.1	566.6	488.1	428.6	348.7	311.0	5700.9
4	2024	347.6	371.2	493.3	546.2	581.4	603.3	600.7	564.4	486.1	426.8	347.3	309.8	5678.1
5	2025	346.2	369.7	491.4	544.0	579.0	600.9	598.3	562.1	484.2	425.1	345.9	308.5	5655.4
6	2026	344.8	368.2	489.4	541.8	576.7	598.5	595.9	559.9	482.2	423.4	344.5	307.3	5632.8
7	2027	343.4	366.8	487.4	539.7	574.4	596.1	593.6	557.6	480.3	421.7	343.1	306.1	5610.2
8	2028	342.1	365.3	485.5	537.5	572.1	593.7	591.2	555.4	478.4	420.0	341.8	304.8	5587.8
9	2029	340.7	363.8	483.5	535.4	569.8	591.3	588.8	553.2	476.5	418.4	340.4	303.6	5565.5
10	2030	339.3	362.4	481.6	533.2	567.6	589.0	586.5	551.0	474.6	416.7	339.0	302.4	5543.2
11	2031	338.0	360.9	479.7	531.1	565.3	586.6	584.1	548.8	472.7	415.0	337.7	301.2	5521.0
12	2032	336.6	359.5	477.8	529.0	563.0	584.3	581.8	546.6	470.8	413.4	336.3	300.0	5498.9
13	2033	335.3	358.1	475.9	526.8	560.8	581.9	579.4	544.4	468.9	411.7	335.0	298.8	5476.9
14	2034	333.9	356.6	474.0	524.7	558.5	579.6	577.1	542.2	467.0	410.1	333.7	297.6	5455.0
15	2035	332.6	355.2	472.1	522.6	556.3	577.3	574.8	540.0	465.2	408.4	332.3	296.4	5433.2
16	2036	331.3	353.8	470.2	520.5	554.1	575.0	572.5	537.9	463.3	406.8	331.0	295.2	5411.5
17	2037	329.9	352.4	468.3	518.5	551.9	572.7	570.2	535.7	461.4	405.2	329.7	294.0	5389.8
18	2038	328.6	351.0	466.4	516.4	549.6	570.4	568.0	533.6	459.6	403.5	328.3	292.9	5368.3
19	2039	327.3	349.5	464.5	514.3	547.4	568.1	565.7	531.4	457.8	401.9	327.0	291.7	5346.8
20	2040	326.0	348.2	462.7	512.3	545.3	565.8	563.4	529.3	455.9	400.3	325.7	290.5	5325.4