



**COMMENTS OF DUKE ENERGY GENERATION SERVICES  
HOLDING COMPANY, INC. ON THE  
ILLINOIS POWER AGENCY'S DRAFT 2011 PROCUREMENT PLAN**

Pursuant to Section 16-111.5(d)(2) of the Public Utilities Act (PUA), 220 ILCS 16-111.5(d)(2), Duke Energy Generation Services Holding Company, Inc. (Duke) hereby files its comments on the draft 2011 Power Procurement Plan (Draft Plan) posted by the Illinois Power Agency (IPA) on August 16, 2010. Duke's comments center around the renewable energy resources set forth in the Draft Plan.

In the Draft Plan, the IPA proposes that Ameren and ComEd (collectively, the "Utilities") will meet renewable energy resource portfolio requirements for 2011 only through the acquisition of one year renewable energy credits (RECs). The IPA states as its rationale:

The acquisition of RECs for this period meets the requirements of the IPA Act and are preferable to the direct acquisition of energy from qualifying renewable resources at this time.

Draft Plan at 36, 52.

Aside from making reference to the statutory budget caps for meeting RPS goals, the Draft Plan offers no explanation or analysis as to why REC only renewable energy resources is being proposed. This is particularly puzzling in light of the IPA's reversal of its initial plan to acquire short term RECs acquisition in the 2010 Procurement. Inexplicably, the Draft Plan for the acquisition of one year RECs is the identical approach which the IPA initially proposed in its 2010 draft Plan and subsequently modified, citing legal and policy prescriptions in support of

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long term contracting for the procurement of bundled energy and RECs. In the 2010 Procurement, the IPA determined that the acquisition of long term renewable bundled energy products is an important means of acquiring renewable resources for the Utilities and adoption of long term contracting for the procurement of renewable resources was approved by the Illinois Commerce Commission (Commission).

Duke believes that in order to fulfill the goals of the PUA and the Illinois RPS provisions of the Illinois Power Agency Act (IPA Act), 20 ILCS 385511-75(c), the IPA must conduct a much broader renewable energy resource procurement in 2011, just as it did in 2010. An appropriate renewable energy procurement for Plan Year 2011 must include energy, as well as RECs, to be obtained utilizing long term contracts. Failing to do so would not only result in a renewables procurement that does not include an important asset, but also would deprive Illinois of the considerable economic benefits that accompany the development of wind projects to fulfill the needs of Illinois consumers.

One year REC only as the sole renewable procurement event was determined to be inappropriate and rejected in the 2010 draft Plan and it should be rejected as the only means of acquiring renewable energy in the 2011 Plan. The IPA, as well as commentors, set forth detailed and compelling legal and policy reasons why long term renewable procurement is an additional essential resource for acquiring renewable energy for the Utilities. The IPA should be applauded for its vision in modifying the 2010 Plan to acquire a mixture of renewable resources.

Indeed, all of the reasons why long term contracting for renewable resources was necessary and appropriate in the 2010 Plan are equally valid for the 2011 Plan. Moreover, the 2010 long term renewable procurement process has been fraught with delay, compressed and unreasonable time frames, a shocking lack of transparency and little opportunity for the development of a standard contract which will actually meet procurement objectives.

The 2010 renewables procurement process was not even commenced until a month ago, nearly eight months following Commission approval of the Plan. In addition, the 2011 Plan workshops were scheduled in the same time frame as the 2010 Plan workshops, leaving participants little opportunity to devote sufficient time and resources to managing both processes. The 2010 Procurement standard contracts have been the subject of substantial and divergent points of view which remain unresolved. Although workshops were held, purportedly to consider revisions to the proposed standard contract, those sessions were structured in such a way that no meaningful dialogue took place and there was no opportunity provided to make any significant input into structuring the specifics of the contracts. Duke believes that the 2010 Plan standard contracts which were issued on September 7, 2010, do not reflect standard industry practices and provisions and will not broadly serve the interests of long term renewable development as required by law 220 ILCS 5/16-111.5(e)(2). Use of such a contract will result in higher prices for long term renewable products for Illinois ratepayers than would be the case if a contract was utilized which contained terms and provisions that are compatible with the realities of the renewable energy industry.

Aside from the cogent reasons urged by the IPA in the 2010 Plan itself, *see* pp. 4-65 *infra*, Duke believes that the shortcomings of the 2010 long term renewable procurement process, as well as unresolved issues pertaining to the 2010 standard contracts require that the IPA include long term renewable contracting in the 2011 Plan. This should also entail adoption of a schedule of meaningful workshops and reasonable time frames for the development of ideas in furtherance of development of a useful standard PPA contract. This will permit a more deliberative and fair process for the adoption of a more suitable, commercially reasonable contract and lay the ground work for meaningful procurement of long term renewable for Illinois utilities into the future.

To underscore why the inclusion of short term REC only procurement is misguided in the Draft Plan, it is useful to review in some detail what occurred in the 2010 Plan. Following the initial recommendation in the 2010 draft Plan to acquire short term RECs, various parties filed comments pointing out that one year REC only renewable energy acquisition was inappropriate. Among the reasons cited were:

1. The approach is short-sighted because it suggests that the only role that renewable energy plays in Illinois utility procurement is to satisfy RPS requirements and that RECs bundled with energy have no value.
2. Such an approach ignores the value of renewable energy, with its lack of fuel variability, as a price hedge.
3. The approach fails to recognize the benefits of bundled renewable energy procurement in promoting the development of renewable energy resources in Illinois.

4. The approach fails to recognize the value of renewable resources to protect consumers against carbon risk.
5. The approach results in higher prices for renewable energy than would be the case under long term contracts.
6. The approach does not foster and may discourage the development of renewable energy resources by not providing opportunities to finance project development.
7. By failing to provide a reliable revenue stream, renewable projects for Illinois consumers must be financed at a higher rate, resulting in higher renewable energy prices for Illinois ratepayers.
8. The approach fails to promote the economic development to Illinois which would occur if long term contracts for renewable resources were a part of the procurement effort.

Subsequent to the submission of comments reflecting these concerns, the IPA revised the 2010 Plan to include the procurement of long term renewable energy resources. In the 2010 Plan filed with the Commission on September 30, 2009, the IPA added a new section to the 2010 Draft Plan for a long term portfolio which stated as to both Ameren and ComEd:

The IPA recommends issuing solicitations for longer term power purchase agreements (PPAs) with renewable energy providers. Long Term PPAs can serve as a hedge against potential cap and trade legislation that would serve as an additional tax on fossil fuel costs. Further, grants, loans and credit enhancement available currently from U.S. Department of Energy, Department of Commerce and Economic Opportunity and the Illinois Finance Authority will result in lower cost renewable energy projects that are developed now through the end of 2012 due to the public grants and financing. 2010 Plan at 34, 51.

Subsequently, in response comments criticizing the long term renewable procurement proposal, the IPA took great pains and offered detailed legal and policy rationale to support its decision to include long term renewable energy in the procurement for the Utilities. The IPA

cited numerous statutory provisions that support the proposition that renewable procurement is lawful in Illinois and noted that such procurement has become “standard” and “increasingly common”. *See generally*, “The Illinois Power Agency’s Reply in Support of Its Procurement Plan”, filed on October 26, 2010 in Docket No. 09-0393 (2010 Docket), and at p.3. The IPA made it clear that the acquisition of long term renewables is neither barred by the limits in Section 1-75(c)(2) of the IPA Act, 20 ILCS 3855/1-75(c)(2), *Id.* at p. 5, nor limited to only satisfying RPS requirements. *Id.* at pp.5-6.

Following its vigorous and sound explication of the propriety of including long term renewable resources in the Utilities’ procurement, the IPA concluded:

In summary, the Illinois Power Agency reiterates the following fundamental arguments in support of its Power Procurement Plan:

- Long term renewable contracts are properly included in the proposed mix and selection of “standard wholesale products”, as those products are not limited to the examples given in Section 16-111.5(b), and are also consistent with the legislative findings of the Rate Relief Law of 1997.
- The Commission need not, and should not, rule on the details of the terms and conditions for the long term renewable contracts since the Plan allows for the IPA, in consultation with the Procurement Administrator, the Procurement Monitor, ICC Staff, and interested parties, subject to approval by the Utilities, to develop such terms and conditions pursuant to the process included in Section 16-111.5(e) of the Public Utilities Act.
- Long term power procurement can be conducted outside of the RPS requirements set forth in Section 1-75(c) of the IPA Act.

In the face of additional comments requesting more detail about the long term renewable contracts in the 2010 Docket, on November 9, 2009, the IPA filed “Supplemental

Recommendations for the Procurement Plan” (Plan Supplement). In the Plan Supplement, the IPA announced that it was introducing an Appendix K to the 2010 Plan which was intended to offer additional details of the contract and facilitate implementation of long term procurement of renewable energy in the 2010 Plan.

The Commission approved the 2010 Plan, as supplemented by Appendix K, on December 28, 2009 in the 2010 Docket. Final Order at p. 115 It is unclear how Appendix K was formulated and whether there was consultation with developers, bankers and other non-utility parties because some of the Appendix K principles are not in conformity with the requirement under the PUA that procurement contract provisions reflect generally accepted industry practices and standard credit terms. 220 ILCS 5/16-111.5(e) Appendix K was adopted by the IPA with no explanation as to its origin or the basis for some of its more specific requirements, such as the type of contract to be utilized (*i.e.*, ISDA or EEI). A major concern of Duke was that Appendix K did not appear to have included input from the wind development sector and that some of the requirements might severely limit the type of resources that could be bid. Duke was particularly concerned that certain termination and other provisions highly favorable to the Utilities would render the standard contract problematic. Nevertheless, the Commission’s directive that the procurement event process and workshops would address important concerns, offered the prospect that the procurement process might ultimately yield a long term renewable contract that was even-handed and reasonable.

Unfortunately, the reality of the 2011 long term renewable procurement process was deeply flawed. First, Appendix K was developed with no regard for the practicalities and realities of renewable development. Indeed, Appendix K sets forth requirements for a long term renewable contract that are not prescribed by statute and that are not at all reflective of long term energy contracting principles. As such, Appendix K seems to be the result of a collaboration of parties that have little understanding of the realities of renewable power purchasing and contracting.

Second, the Commission's directive that workshops be conducted held out the prospect that the Appendix K flaws could be improved and that a broadly supported standard contract could be developed with the open and active participation of all stakeholders. Instead, three hurried and tightly scripted sessions were held on short notice over a three day period and participants were allowed to file written comments on a draft contract that was made public a few days before comments were due. Even aside from the Appendix K considerations, the proposed contract had been drafted with little consideration for commercial realities and no reflection of input from the renewables development sector.

The "workshops" amounted to sessions attended by many developers and other interested parties, where IPA Administrators received numerous verbal comments from participants. Little feedback or genuine exchange occurred, aside from the Administrators repeating canned

responses which often seemed to be largely concerned with addressing utility concerns, to the exclusion of all others.

Furthermore, the IPA and its Administrators refused to make public the comments submitted by the parties and refused to offer any detail as to how they arrived at any decision to revise the proposed contracts. Such a shocking lack of transparency left the impression that the process was never intended for the purpose of sincerely considering the input of the participants. Rather, the “workshops” were being conducted to offer the perception of compliance with the Commission’s directive for workshops. The process involved little meaningful exchange and parties with questions or recommendations about the proposed standard contract or the process were largely ignored. The process bore little resemblance to a workshop or other forum designed to elicit ideas or improve upon the proposed contract. Rather, it appeared as though the intent was to present a “take it or leave it” document that would not realistically promote renewable energy development or attract any broad-based participation in the 2010 renewables procurement.

Inclusion of a long term renewable contract procurement in lieu of the short term REC only approach in the Draft Plan would provide an opportunity to adopt a more deliberative, inclusive and transparent standard contract development process. Duke requests that the IPA not only include long term renewable procurement in the 2011 Plan, but that it also expressly adopts

a contract framework that is reflective of long term power purchase agreements for the physical delivery of power and not short term derivative trading.

As earlier noted, Duke also recommends that the IPA agree to conduct workshops in a specified time frame over a reasonable period of time to allow parties to engage in public deliberations in which the IPA will receive and respond to the ideas of all stakeholders and develop a commercially reasonable standard contract that balances risks and contains provisions pertaining to credit and financeability that takes into account utilities, developers and ratepayer interests alike. Only by adopting reasonable and commercially acceptable risk allocation provisions in a standard contract will Illinois ratepayers realize of the lowest possible prices for renewable energy.

The IPA should agree to issue a draft standard contract following the receipt of input from all industry sectors, including the banking sector. The IPA should adopt a review and comment process in which it incorporates the public posting of all comments and issuance of a final contract upon fair and due consideration of the comments. The bid process should incorporate sufficient time for bidders to obtain the corporate approvals and financial support that necessarily accompanies the purchase and sale of long term renewable power. Duke is attaching a proposed schedule which sets forth these processes as Attachment A.

Adoption of the foregoing described procedure described for obtaining long term renewable resources in the 2011 Plan would considerably diminish the perceptions of unfairness and misguided process that attended the 2010 long term energy procurement.<sup>1</sup>

To comply with the requirement that specific revisions be included in its comments on the Draft Plan, Duke proposes that the following language be substituted for the last 2 paragraphs on p. 36 of the Draft Plan:

The IPA recommends issuing solicitations for longer term power purchase agreements (“PPAs”) with renewable energy providers. Long Term PPAs can serve as a hedge against potential cap and trade legislation that would serve as an additional tax on fossil fuel costs. Further, grants, loans and credit enhancement available currently from U.S. Department of Energy, Department of Commerce and Economic Opportunity and the Illinois Finance Authority will result in lower cost renewable energy projects that are developed now through the end of 2012 due to the public grants and financing.

Given these factors, the IPA believes it is prudent to solicit proposals from renewable energy providers to capitalize on available funding and secure a modest level of renewable energy under longer term PPAs if deemed cost effective. As neither the cost liabilities nor the availability of other hedging options associated with cap and trade are unknown, the IPA seeks to limit their use in the Ameren portfolio to 600,000 MWH per annum starting as early as the 2012-2013 planning year. The use of a MWH goal for these contracts is due to the variable output nature of some renewable assets that may be selected through the solicitation process (i.e. hydro, wind, and solar).

The IPA will conduct a collaborative process, including the holding of multiple workshops, to consider input from all stakeholders as to what constitutes

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<sup>1</sup> The PUA, 220 ILCS 5/111.5(c), provides for public comments and recommendations for changes on each year’s procurement. The Commission issued a Public Notice of Informal Hearing to receive such comments and recommendation for the 2010 Plan on May 28, 2010. Commentators reserved comment on the 2010 long term renewables procurement since it had not even commenced as of the date comments were due (June 22 and July 12). Duke intends to reiterate its proposal in the instant comments for conducting a better long term procurement at the appropriate time in year-end comments on the long term renewables procurement.

generally accepted industry terms and conditions, as well as standard credit provisions for a standardized long term contract. The IPA will use this input to formulate and post the comments proposed standardized contract prior to finalization.

The IPA recommends that bids be evaluated through a process similar to that used to evaluate bids in the short term portfolio: standard terms and conditions regarding performance guarantees and penalties are agreed to by bidders prior to solicitation, bidders must pre-qualify to be allowed into the bidder pool, application of a cost methodology that considers and ranks proposals on the basis of output, capacity value, financing costs, transmission and capital costs, fixed cost vs. escalators offers, return on equity and other normalizing factors.

Additionally, the following language should be substituted for the last paragraph on p. 52 and the first paragraph on p. 53 of the Draft Plan:

The IPA recommends issuing solicitations for longer term power purchase agreements (“PPAs”) with renewable energy providers. Long Term PPAs can serve as a hedge against potential cap and trade legislation that would serve as an additional tax on fossil fuel costs. Further, grants, loans and credit enhancement available currently from U.S. Department of Energy, Department of Commerce and Economic Opportunity and the Illinois Finance Authority will result in lower cost renewable energy projects that are developed now through the end of 2012 due to the public grants and financing.

Given these factors, the IPA believes it is prudent to solicit proposals from renewable energy providers to capitalize on available funding and secure a modest level of renewable energy under longer term PPAs if deemed cost effective. As neither the cost liabilities nor the availability of other hedging options associated with cap and trade are unknown, the IPA seeks to limit their use in the ComEd portfolio to 1,400,000 MWH per annum starting as early as the 2012-2013 planning year. The use of a MWH goal for these contracts is due to the variable output nature of some renewable assets that may be selected through the solicitation process (i.e. hydro, wind, and solar).

The IPA will conduct a collaborative process, including the holding of multiple workshops, to consider input from all stakeholders as to what constitutes generally accepted industry terms and conditions, as well as standard credit provisions for a standardized long term contract. The IPA will use this input to

formulate and post the comments proposed standardized contract prior to finalization.

The IPA recommends that bids be evaluated through a process similar to that used to evaluate bids in the short term portfolio: standard terms and conditions regarding performance guarantees and penalties are agreed to by bidders prior to solicitation, bidders must pre-qualify to be allowed into the bidder pool, application of a cost methodology that considers and ranks proposals on the basis of output, capacity value, financing costs, transmission and capital costs, fixed cost vs. escalators offers, return on equity and other normalizing factors.

The substituted language will restore the acquisition of long term renewable resources as a component in the Utilities' energy procurement.

As was earlier discussed, the introduction and formulation of Appendix K was extremely problematic in the 2010 Plan. Throughout the "workshop" process, the IPA's response to various concerns was that it was bound by Appendix K and the IPA would not even entertain discussion on matters purported to be covered by Appendix K. In the future, no such arbitrary documents or principles should be allowed to impede the fair exchange of ideas for the development of a standard contract that incorporates generally accepted industry standards. The IPA is lawfully required to formulate a standard contract that reflects generally accepted terms and conditions, as well as standard credit provisions. The development of these specific contract terms and conditions is particularly well-suited for a workshop process. A document, such as Appendix K, which arbitrarily constrains the development of an appropriate long term renewable contract, should not be interjected into the process for any reason.

In order to provide the IPA with guidance and a concrete example of a commercially reasonable long term power purchase contract, Duke is attaching a specimen Power Purchase Agreement that incorporates terms and conditions that are generally acceptable to buyers and sellers of wind power in the energy marketplace. See Attachment B. Duke would hope that IPA would use the specimen contract to familiarize itself with the standard terms and provisions employed by buyers and sellers of long term wind energy in the Illinois market and elsewhere.

Finally, Duke would urge the IPA to implement the maximum degree of transparency into the 2011 Plan and associated proceedings. There is simply no reason for the comment process or any other aspect of the procurement process that does not involve benchmarking or bid comparison to be conducted in camera or developed by select participants. To the extent a party's comments or other information is commercially sensitive, the party could so indicate and such information could be redacted to exclude what is commercially sensitive and any other information could be open to public review.



**ATTACHMENT A**

<b>DATES</b>	<b>COMED AND AMEREN LONG TERM RENEWABLE PROCUREMENT</b>
	<b>WORKSHOP AND COMMENT PROCESS</b>
11-Jan-11	Workshop 1 - Discuss process of workshops, working groups, and comments
13-Jan-11	Workshop 2 - Discuss contract provisions
18-Jan-11	Workshop 3 - Discuss Credit Criteria and conduct Working Groups
4-Feb-11	Proposed Contract issued for comment
18-Feb-11	<b>COMMENTS DUE ON PROPOSED LONG-TERM RENEWABLE PPA</b>
21-Feb-11	Posting of Comments on proposed PPA
27-Feb-11	Workshop 4 - Finalize and discuss proposed revisions to the proposed PPA
4-Mar-11	Final Standard PPA Issued
<b>PROCUREMENT PROCESS</b>	
15-Mar-11	BIDDER INFORMATION CALL
<b>BIDDING PROCESS</b>	
2-May-11	Pre-Qualification Application Deadline
9-May-11	Bidders Notified of Pre-Qualification Results
16-May-11	Bidder Registration and Pre-Bid Deadline
24-May-11	Bidder Practice Session
27-May-11	BID DATE (DUE DATE FOR BIDS)
<b>POST BID PROCESS</b>	
7-Jun-11	Procurement Administrators submits confidential report to the ICC
10-Jun-11	ICC Rules on Procurement Administrators' Recommendations and Winning Bidders Notified
14-Jun-11	<b>CONTRACT EXECUTED and WINNING BIDDERS NOTIFIED</b>
TBA	Service Commences

**ATTACHMENT B**

**POWER PURCHASE AGREEMENT**

**by and between**

[\_\_\_\_\_],  
**as Seller**

**and**

[\_\_\_\_\_],  
**as Buyer**

**Dated as of [\_\_\_\_\_] [\_\_\_\_\_] [\_\_\_\_\_]**

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Exhibit C	Buyer’s Insurance Requirements
Exhibit D	Wind Speed Method
Exhibit E	Actual Production Method
Exhibit F	Notice Addresses

## **POWER PURCHASE AGREEMENT**

This **POWER PURCHASE AGREEMENT** is entered into and effective as of the \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, to be effective for all purposes hereof as of the Effective Date (as hereinafter defined), by and between [\_\_\_\_\_] a [\_\_\_\_\_] [\_\_\_\_\_] (“Seller”), and [\_\_\_\_\_] a [\_\_\_\_\_] [\_\_\_\_\_] (“Buyer”), each of which are herein sometimes referred to individually as a “Party” and collectively as the “Parties.”

### **RECITALS**

A. Seller desires to build a wind generation facility known as the [“\_\_\_\_\_,”] which will include [\_\_\_\_\_] wind turbines, with a total nameplate output capability of [\_\_\_\_\_] MW, to be located on the Premises (as defined herein) (the “Project”).

B. Seller has agreed to commit [\_\_\_\_\_] % of the electric energy output of the Project and the associated Project Capacity (as defined herein) and Credits (as defined herein) to Buyer.

C. Buyer wishes to purchase, and Seller wishes to sell, Net Electric Energy and associated Project Capacity and Credits from the Project in accordance with the terms hereof.

### **AGREEMENT**

NOW THEREFORE, in consideration of the mutual promises contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller and Buyer agree as follows:

#### **ARTICLE 1 DEFINITIONS & INTERPRETATION**

**1.1 Definitions.** As used in this Agreement, the following terms shall have the respective meanings set forth below. Certain other capitalized terms are defined where they appear in this Agreement.

“AAA” shall have the meaning set forth in Section 12.2.

“Actual Production Method” shall mean the calculation methodology for determining the Wind Turbine Lost Production for the duration of a Directed Curtailment, whereby the Wind Turbine Lost Production shall be equal to the quotient obtained by dividing the actual energy production from the Project during the Directed Curtailment by the number of Project Turbines in service. Exhibit E hereto sets forth examples of calculation of Wind Turbine Lost Production using the Actual Production Method.

“Affiliate” means any Person that directly or indirectly Controls, is Controlled by, or is under common Control with another Person.

“Agreement” means this Power Purchase Agreement, together with all exhibits, schedules and attachments hereto.

“Alternate” shall have the meaning set forth in Section 3.10(b).

“Annual Availability” means, for any Contract Year, the ratio, expressed as a percentage, of the difference between (i) 1, and (ii) the quotient of (a) Seller Controllable Hours for all Project Turbines, divided by (b) the product of (X) the total number of hours in such Contract Year, multiplied by (Y) the number of Project Turbines.

“Authorized Representative” shall have the meaning set forth in Section 3.10(b).

“Availability Shortfall” shall have the meaning set forth in Section 3.19(b).

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

“Business Day” means any day on which banks in [\_\_\_\_\_] are open for business, beginning at 8:00 a.m. and ending at 5:00 p.m. local time in [\_\_\_\_\_, \_\_\_\_\_].

“Buyer” shall have the meaning set forth in the preamble to this Agreement.

“Buyer-Directed Curtailment” shall have the meaning set forth in Section 3.4.

“Buyer’s Guaranty” means a guaranty, in form and substance reasonably satisfactory to Seller, from an Affiliate of Buyer, which is a Qualified Guarantor, in favor of Seller, under which the obligations are capped at the Required Security Amount and that guarantees:

(a) Buyer’s payment obligations under this Agreement, as applicable;  
and

(b) the obligations of such Qualified Guarantor under such guaranty.

“Buyer’s Response” shall have the meaning set forth in the definition of “Commercial Operation Date.”

“Buyer’s Security” means, with respect to Buyer:

(a) a letter of credit in form and substance reasonably satisfactory to Seller in a face amount equal to the Required Security Amount;

(b) cash (in immediately available funds) in the Required Security Amount, which cash must be delivered to a Custodian to be held by the Custodian as

security for Seller pursuant to an escrow agreement reasonably satisfactory in form and substance to the Parties;

(c) Buyer's Guaranty; or

(d) a combination of any of the above that provides security to Seller in a total amount equal to the Required Security Amount.

"Capacity Deficiency" means, as of any date of determination, the product of (i) the MW of nameplate capacity per Delayed Turbine not having achieved Commercial Operation as of such date, and (ii) the Project Capacity.

"Close of the Business Day" means 5:00 p.m. local time in [\_\_\_\_\_, \_\_\_\_\_] on a Business Day.

"Commercial Operation" means, with respect to each Project Turbine, that all of the following conditions have been fulfilled:

(a) Seller has successfully completed that testing of such Project Turbine which is required by any Financing Documents, the Project's permits, the Interconnection Agreement, Seller's operating and maintenance agreements for the Project, Seller's construction agreement(s) for the Project, and manufacturers' warranties for the commencement of commercial operations at the Project;

(b) an officer of Seller familiar with the Project has provided a list of the Project Turbines, showing the make, model, serial number and designed maximum output (nameplate capacity) of each Project Turbine;

(c) such Project Turbine has achieved initial synchronization with the Interconnection Facilities, and has demonstrated the reliability of its communications systems;

(d) Seller has executed the Interconnection Agreement and is not in Default (as that term is defined therein), and the interconnection of the Project to the Transmission System has been completed in accordance with the Interconnection Agreement;

(e) the Interconnection Facilities are physically complete and are capable of transmitting, transferring and delivering Net Electric Energy to the Delivery Point, as evidenced by a certificate from an independent professional engineer retained by Seller;

(f) metering devices have been installed in accordance with the Interconnection Agreement;

(g) Seller has secured all material approvals, permits, and licenses required to be obtained by Seller by such date from any Governmental Entity to construct and/or operate the Project;

(h) Seller has made all arrangements and executed or obtained all easements, rights of way, and other real property rights necessary for construction, maintenance and operation of the Project;

(i) all arrangements for the supply of required electric services to the Project, including the supply of turbine unit start-up and shutdown power and energy, house power and maintenance power have been completed by Seller separate from this Agreement, are in effect, and are available for the supply of such electric services to the Project; and

(j) Seller has submitted to Buyer a certificate of an officer of Seller familiar with the Project after due inquiry stating that (i) all permits, consents, licenses, approvals, and authorizations required to be obtained by Seller by such date from any Governmental Entity to construct and/or operate the Project in compliance with Law and this Agreement have been obtained and are in full force and effect, (ii) Seller has made all arrangements and executed and/or obtained all rights of way and other real property rights required to deliver the Net Electric Energy and associated Credits from the Project to the Delivery Point, and (iii) Seller is in compliance with the terms and conditions of this Agreement in all material respects.

“Commercial Operation Date” means (i) in the event that Buyer shall have failed to deliver a Buyer’s Response in the time periods specified in the next paragraph, the date specified in Seller’s Notice of Commercial Operation, or (ii) in the event that Buyer shall have delivered a Buyer’s Response in the time periods specified in the next paragraph, (A) the date specified by the Parties after mutual agreement as set forth in the next paragraph, or (B) the date determined by the Technical Expert as set forth in Section 12.2, as applicable.

Seller may commence testing of any Project Turbine for purposes of determining Commercial Operation upon at least seventy-two (72) hours’ prior notice to Buyer. Upon successful completion of testing of not less than 80% of the Project Turbines, the Commercial Operation Date may be declared by Seller by notice (which notice shall attach the required deliveries to Buyer specified in the definition of “Commercial Operation”) delivered to Buyer (“Seller’s Notice of Commercial Operation”), and in no event earlier than the date that all conditions to Commercial Operation have been fulfilled. If Buyer has a good faith, commercially reasonable belief that Commercial Operation shall not have occurred, Buyer shall, within fifteen (15) Business Days of receipt of Seller’s Notice of Commercial Operation, state in writing such belief, and specify the reasons that it believes Commercial Operation has not occurred (“Buyer’s Response”). If Buyer delivers a Buyer’s Response, then the Parties shall meet and confer, in good faith, in order to attempt to reach mutual agreement on the steps that are reasonably required to demonstrate that Commercial Operation has occurred (including, demonstration that the conditions have been fulfilled); provided, however, that if the Parties shall fail to reach such an agreement, the provisions of Section 12.2 shall govern the determination of Commercial Operation and of the Commercial Operation Date.

“Compensable Transmission-Directed Curtailment” means any Transmission-Directed Curtailment which would not have occurred if Buyer had elected to obtain (i) Firm Point to Point Transmission Service, (ii) Network Integration Transmission Service, with the designation of the Project as Buyer’s Network Resource (as each of the foregoing terms are defined in Transmission System Operator’s Open Access Transmission Tariff), or (iii) such other comparable transmission service, in each case to deliver Net Electric Energy from and after the Delivery Point to Buyer’s load or to such other location Buyer may determine.

“Confidential Business Information” shall have the meaning set forth in Section 9.1.

“Contract Price” shall have the meaning set forth in Section 3.3.

“Contract Year” means each year beginning on January 1 and ending on December 31 of such year following the Commercial Operation Date; provided, however, that the first Contract Year shall commence on the Commercial Operation Date and end on December 31 of the year in which the Commercial Operation Date occurs.

“Control” means the possession or ownership, directly or indirectly, of the following: (i) in the case of a corporation, 50% or more of the outstanding voting securities thereof; (ii) in the case of a limited liability company, partnership, limited partnership or venture, 50% or more of the voting rights therein; (iii) in the case of a trust or estate, 50% or more of the beneficial interest therein; (iv) in the case of any other entity, 50% or more of the economic or beneficial interest therein; or (v) in the case of any entity, the power or authority, through the ownership of voting securities, by agreement or otherwise, to direct the management, activities or policies of the entity, and the verb “Control” and the adjective “Controlled” shall have corollary meanings.

“Cost to Cover” means, for any Contract Year, the positive difference, if any, between (1) the sum of (i) the time weighted average of the LMP for the [**specify hub**] for each day of such Contract Year, plus (ii) the market value of the Credits (assuming a vintage of such Contract Year), which market value shall be calculated as the average of two (2) quotes delivered by brokerage firms or third party intermediaries reasonably determined by Seller, and (2) the Contract Price.

“Credits” means any credits, credit certificates, environmental air quality credits, offsets, allowances or similar items such as those for greenhouse gas reduction, or the generation of green power or renewable energy, as well as any renewable energy credits (RECs), tradable generation rights (TGRs), pollution/emission credits or other associated benefits, in each case created and defined by a Governmental Entity and associated with Net Electric Energy, but specifically excluding (i) any and all state tax credits and Production Tax Credits, investment tax credits and any other tax credits or benefits that are or will be generated by or related to the Project, or (ii) any credits otherwise qualifying under this definition that are not transferable by Seller to Buyer, that would require Seller to incur material transaction costs in order to transfer them,

unless Buyer pays or reimburses such costs, or that would require Seller to change the operation of the Project in order to realize such credit.

“Creditworthy” means, with respect to a specified Person, that such Person has a long-term credit rating with respect to its long-term senior unsecured debt of (a) Baa2 or higher by Moody’s at all times, and (b) BBB or higher by S&P at all times (or if only one of Moody’s or S&P has rated such Person, Baa2 or higher by Moody’s at all times or BBB or higher by S&P at all times); provided, however, that if, and for such duration as, no long-term senior unsecured debt rating is available with respect to such Person, the foregoing determination shall be made on the basis of such Person’s issuer rating.

“Curtailment Payment” shall have the meaning set forth in Section 3.4(e).

“Custodian” means an institutional bank or other Person mutually agreeable to the Parties.

“Deficiency Liquidated Damages” shall have the meaning set forth in Section 2.5(a) or Section 2.5(b), as applicable.

“Delay Damages Rate” means, as to each Delayed Turbine: (a) for the period from [\_\_\_\_\_] to [\_\_\_\_\_], [\_\_\_\_\_ **Dollars (\$\_\_\_\_\_)**] per MW of Project Capacity per day, (b) for the period from [\_\_\_\_\_] to [\_\_\_\_\_], [\_\_\_\_\_ **Dollars (\$\_\_\_\_\_)**] per MW of Project Capacity per day, and (c) for the period from [\_\_\_\_\_] to [\_\_\_\_\_], [\_\_\_\_\_ **Dollars (\$\_\_\_\_\_)**] per MW of Project Capacity per day.

“Delayed Turbine” means any Project Turbine failing to achieve Commercial Operation by [\_\_\_\_\_].

“Delivery Point” means the point where the Project is interconnected with the Transmission System at the [\_\_\_\_\_], as set forth in the Interconnection Agreement.

“Directed Curtailment” means a Buyer-Directed Curtailment or Transmission-Directed Curtailment, as the context requires.

“Dispute” shall have the meaning set forth in Section 12.1.

“Dispute Notice” shall have the meaning set forth in Section 12.1.

“Effective Date” shall mean the date set forth in Seller’s written notice thereof to Buyer, which shall be the date on which Seller has entered into power purchase agreements with third parties, which shall, when aggregated with this Agreement, be for not less than one hundred percent (100%) of the electric energy output of the Project and the associated Project Capacity and Credits.

“Emergency” means any circumstance or combination of circumstances or any condition of the Project, the Interconnection Facilities, the Transmission System, or the transmission system of other electric utilities, which is (a) reasonably likely to endanger

life or property and necessitates immediate action to avert injury to persons or serious damage to property, or (b) is reasonably likely to adversely affect, degrade or impair Transmission System reliability or transmission system reliability of the transmission system of other electric utilities.

“Financial Closing” means the closing of construction financing provided to, or for the benefit of, Seller for the Project.

“Financing Documents” means the loan and credit agreements, notes, bonds, indentures, security agreements, lease financing agreements, mortgages, deeds of trust, interest rate exchanges, swap agreements and other documents relating to the development, bridge, construction and/or permanent debt financing to or for the benefit of the Project, Seller or Seller’s Affiliates, including any credit enhancement, credit support, working capital financing, or refinancing documents, or documents for the acquisition of a direct or indirect interest in Seller by a tax investor, 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 Project.

“Force Majeure” shall have the meaning set forth in Section 8.1(a).

“Forced Outage” means any condition at the Project that requires immediate removal of the Project, or some part thereof, from service, another outage state, or a reserve shutdown state. This type of outage results from immediate mechanical/electrical/hydraulic control system trips and operator-initiated trips in response to Project conditions and/or alarms.

“Governmental Entity” means and include any national, state or local government, any political subdivision thereof or any other governmental, judicial, public or statutory instrumentality, authority, board, commission, department, division, body, agency, bureau or entity, or any arbitrator, any of which has the authority to bind a party at Law[; **provided, however, that the term “Governmental Entity” shall exclude Buyer in its capacity as a buyer of the Project Capacity, Net Electric Energy and Credits hereunder**]<sup>2</sup>.

“Guaranty” means (i) with respect to Buyer, a Buyer’s Guaranty, and (ii) with respect to Seller, a Seller’s Guaranty.

“Initial Delivery Date” means the date the first of the Project Turbines is able to generate and deliver Net Electric Energy to the Delivery Point.

“Interconnection Agreement” means the interconnection services agreement between Seller and Transmission System Owner that contains the rights and obligations of those parties with respect to the interconnection of the Project with the Transmission

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<sup>2</sup> Insert the proviso only if the Buyer is a Governmental Entity.

System, and prescribing the methods and procedures to be used for the safe operation and maintenance of the Interconnection Facilities.

“Interconnection Facilities” means all the facilities installed for the purpose of interconnecting the Project to the Delivery Point, including, but not limited to, all transformers and associated equipment, relay and switching equipment, and safety equipment, including Seller’s Interconnection Facilities.

“Interest Rate” means, on any date of determination, the (i) per annum rate of interest equal to the prime lending rate as may from time to time be published in *The Wall Street Journal* under “Money Rates” (the average thereof, if there is a range of such rates) as of such date of determination, plus (ii) 2%; provided, that the Interest Rate shall never exceed the maximum rate permitted by Law.

“Investment Tax Credit” means the investment tax credit available to eligible renewable energy facilities under Section 48 of the Internal Revenue Code of 1986, as amended, extended or replaced from time to time.

“kV” means kilovolt.

“Law” means all applicable laws and treaties, judgments, decrees, injunctions, writs and orders of any court or Governmental Entity, and rules, regulations, orders, ordinances, licenses and permits of any Governmental Entity.

“Liabilities” shall have the meaning set forth in Section 8.4(a).

“LMP” means the hourly integrated market price for energy, including losses and congestion, at the location such energy is delivered or received.

“Maintenance Outage” means the removal of the Project or any portion thereof from service to perform work on specific components, that will result in an interruption in delivery of Net Electric Energy to Buyer, at a time when the Project or any such portion must be removed from service before the next Planned Outage in the interest of safety or the prevention of injury or undue wear and tear on the Project or such portion thereof.

“Material Event” shall have the meaning set forth in Section 10.1(c).

“Minimum Performance Requirement” shall have the meaning set forth in Section 5.1(h).

“Month” means one calendar month.

“Moody’s” means Moody’s Investor Services, Inc., and any successor thereto.

“MW” means megawatt.

“MWh” means megawatt hour.

“Net Electric Energy” means, at any time, [\_\_\_\_\_ **percent** (\_\_\_%)] of the electric energy generated by the Project by means of wind generation, including Test Energy, delivered to the Delivery Point, excluding electric energy used in the operation of the Project and excluding electrical losses up to the Delivery Point.

“NERC” means North American Electric Reliability Corporation.

“Obligee” shall have the meaning set forth in Section 10.1(b).

“Obligor” shall have the meaning set forth in Section 10.1(b).

“Operating Procedures” shall have the meaning set forth in Section 3.10(a).

“Party” shall have the meaning set forth in the preamble to this Agreement.

“Parties’ Representatives” and “Party Representative” shall have the meaning set forth in Section 12.1.

“Person” means any individual, entity, corporation, general or limited partnership, limited liability company, joint venture, estate, trust, association or other entity or Governmental Entity.

“Planned Outage” means the removal of the Project from service to perform work on specific components that will result in an interruption in delivery of Net Electric Energy to Buyer (e.g., for annual overhaul, inspections or testing).

“Premises” means that certain real property located in [\_\_\_\_\_] County, [\_\_\_\_\_] as more particularly described on Exhibit A hereto, on which the Project Turbines will be installed.

“Production Tax Credit” or “PTC” means the per kWh tax credit available to eligible wind generators under Section 45 of the Internal Revenue Code of 1986, as amended, extended or replaced from time to time.

“Project” shall have the meaning set forth in the Recitals hereto.

“Project Capacity” means [\_\_\_\_\_ **percent** (\_\_\_%)] of the total nameplate power output capability of the Project, expressed in MW.

“Project Turbines” means, collectively, the [\_\_\_\_\_] wind turbines to be installed on the Premises.

“Prudent Electric Industry Practice” means the practices, methods, and acts engaged in or approved by a significant portion of the independent electric power generation industry for wind facilities, [**insert relevant reliability authority**] and/or NERC that, at a particular time, in the exercise of reasonable judgment in light of the facts known or that should reasonably have been known at the time a decision was made, would have been expected to accomplish the desired result in a manner consistent

with Law, codes, standards, equipment manufacturers' recommendations, reliability, safety, environmental protection, economy, and expedition. With respect to the Project, Prudent Electric Industry Practice is not intended to be limited to the optimum practice, method or act to the exclusion of all others, but rather to be a spectrum of possible practices, methods or acts, and shall include, but is not limited to, taking reasonable steps to ensure that:

(A) equipment, materials, resources, and supplies, including spare parts inventories, are available to meet the Project's needs;

(B) sufficient operating personnel are available at all times and are adequately experienced and trained and licensed as necessary to operate the Project properly, efficiently, and in coordination with Buyer as contemplated by this Agreement, are capable of responding to reasonably foreseeable emergency conditions whether caused by events on or off the Project site;

(C) personnel capable of starting, operating, and stopping the Project are continuously available, either at the Project, or capable of remotely starting, operating, and stopping the Project within ten (10) minutes, and capable of being at the Project within a commercially reasonable period of time following notice, and in all cases, personnel capable of starting, operating, and stopping the Project shall be continuously reachable by phone or pager;

(D) preventive, routine, and non-routine maintenance and repairs are performed on a basis that ensures reliable, long-term and safe operation, and are performed by knowledgeable, trained, and experienced personnel utilizing proper equipment and tools;

(E) appropriate monitoring and testing are performed to ensure equipment is functioning as designed;

(F) equipment is not operated in a reckless manner, in violation of manufacturers' guidelines or in a manner unsafe to workers, the general public, or the interconnected system or contrary to environmental Laws or without regard to defined limitations such as, flood conditions, safety inspection requirements, operating voltage, current, volt-ampere reactive (VAr) loading, frequency, rotational speed, polarity, synchronization, and/or control system limits; and

(G) equipment and components meet or exceed the standard of durability that is generally used for independent electric generation operations for wind facilities in the region and will function properly over the full range of ambient temperature and weather conditions reasonably expected to occur at the Project site under both normal and emergency conditions.

"PTC Loss Damages" shall have the meaning set forth in Section 3.4(e).

"Qualified Guarantor" means a Person who is Creditworthy.

“Required Annual Availability” means (i) at the end of the second Contract Year, 80%, and (ii) at the end of each Contract Year thereafter until the end of the Term, 85%.

“Required Security Amount” means the following:

(a) From the Effective Date through the Commercial Operation Date, [\_\_\_\_\_] per MW of Project Capacity; and

(b) From the Commercial Operation Date through the end of the Term, [\_\_\_\_\_] per MW of Project Capacity.

“S&P” means Standard & Poor’s Ratings Group (a division of The McGraw-Hill Companies, Inc.), and any successor thereto.

“Security” means, (i) with respect to Buyer, Buyer’s Security, and (ii) with respect to Seller, Seller’s Security.

“Seller” shall have the meaning set forth in the preamble to this Agreement.

“Seller Controllable Hours” means, for each Project Turbine in any Contract Year, the total number of hours (rounded up for any portion of an hour greater than thirty minutes and rounded down for any portion of an hour equal to or less than thirty minutes) during such Contract Year during which such Project Turbine was unavailable to generate electricity due to such Project Turbine being paused or withdrawn from use by Seller for reasons other than those covered in the definition of Seller Uncontrollable Hours.

“Seller Uncontrollable Hours” means, for each Project Turbine in any Contract Year, the total number of hours (rounded up for any portion of an hour greater than thirty minutes and rounded down for any portion of an hour equal to or less than thirty minutes) during such Contract Year during which the relevant Project Turbine was unavailable to generate electricity due to one or more of the following events, each as recorded by Seller’s SCADA and indicated by a fault code in Seller’s operations log(s): (i) an Emergency or Force Majeure event; (ii) a Directed Curtailment; (iii) the electric transmission or distribution system to which the Project is interconnected operating outside the defined voltage, frequency limits, or other operational parameters of the Project Turbines or if such system is otherwise unavailable; (iv) a Planned Outage; and (v) a Weather Event; provided, however, that if any of the events described above in items (i) through (v) occur simultaneously in the same hour, then the relevant hour shall only be counted once in order to prevent double counting.

“Seller’s Guaranty” means a guaranty, in form and substance reasonably satisfactory to Buyer, from an Affiliate of Seller, which is a Qualified Guarantor, in favor of Buyer, under which the obligations are capped at the Required Security Amount and that guarantees:

(a) Seller’s payment obligations under this Agreement, as applicable;  
and

(b) the obligations of such Qualified Guarantor under such guaranty.

“Seller’s Interconnection Facilities” shall have the meaning set forth for “Interconnection Customer’s Interconnection Facilities” in the Interconnection Agreement.

“Seller’s Notice of Commercial Operation” shall have the meaning set forth in the definition of “Commercial Operation Date.”

“Seller’s Security” means, with respect to Seller:

(a) a letter of credit in form and substance reasonably satisfactory to Buyer in a face amount equal to the Required Security Amount;

(b) cash (in immediately available funds) in the Required Security Amount, which cash must be delivered to a Custodian to be held by the Custodian as security for Buyer pursuant to an escrow agreement reasonably satisfactory in form and substance to the Parties;

(c) Seller’s Guaranty; or

(d) a combination of any of the above that provides security to Buyer in a total amount equal to the Required Security Amount.

“Shortfall Damages” shall have the meaning set forth in Section 3.19(b).

“Technical Dispute Notice” shall have the meaning set forth in Section 12.2(a).

“Technical Dispute Procedures” shall have the meaning set forth in Section 12.2.

“Technical Expert” shall have the meaning set forth in Section 12.2.

“Term” shall have the meaning set forth in Section 2.1.

“Test Energy” means all of the electric energy generated at the Project by means of wind generation as a result of the (i) initial commissioning of any Project Turbine, or (ii) testing of any Project Turbine.

“Total Lost Production” based on either the Wind Speed Method or the Actual Production Method, as applicable, shall be equal to the arithmetic sum of the Wind Turbine Lost Production for all Project Turbines.

“Transmission-Directed Curtailment” means a curtailment of all or any part of the deliveries of Net Electric Energy required or directed by Transmission System Operator or Transmission System Owner.

“Transmission System” means the electric transmission system to which the Project is connected.

“Transmission System Operator” means [\_\_\_\_\_] or any successor independent system operator, regional transmission operator or other transmission operator from time to time having authority to control the Balancing Authority to which the Project is interconnected.

“Transmission System Owner” means [\_\_\_\_\_].

“Weather Event” means any condition causing icing on Project Turbine blades, lightning strikes, excessive wind speeds in excess of the cut out speed for the Project Turbines (as specified in the manufacturers’ recommendations for such Project Turbines), any period during which a hail warning exists, provided that (a) such Weather Event is not attributable to fault or negligence on the part of Seller, (b) such Weather Event is caused by factors beyond Seller’s reasonable control, and (c) despite taking all reasonable technical and commercial precautions and measures to prevent, avoid, mitigate or overcome such event and the consequences thereof, Seller has been unable to prevent, avoid, mitigate or overcome such event or consequences.

“Wind Speed Method” shall mean the calculation methodology for determining the Wind Turbine Lost Production as set forth in Exhibit D hereto.

“Wind Turbine Lost Production” means, as to each Project Turbine, the amount of energy production lost as a result of Directed Curtailment or Availability Shortfall.

**1.2 Rules of Interpretation.** The following rules of interpretation shall apply:

(a) The masculine shall include the feminine and neuter.

(b) References to “Articles” or “Sections” shall be to articles or sections of this Agreement.

(c) The words “herein,” “hereof” and “hereunder” shall refer to this Agreement as a whole and not to any particular Article or Section; the word “including” shall mean “including, without limitation;” and the word “include” shall mean “include, without limitation;” the word “until” shall mean “until, but not including.”

(d) All references to a particular Person shall include such Person’s successors and permitted assigns.

(e) All references herein to any contract or other agreement shall be to such contract or other agreement as amended, supplemented, or modified to the date of reference.

## **ARTICLE 2**

### **TERM**

**2.1 Term.** The “Term” hereof shall begin on the Effective Date and shall be in force and effect for twenty (20) years after the Commercial Operation Date, unless sooner terminated as provided herein. The Parties may elect to extend the Term on the same terms and conditions set forth herein in a writing mutually agreed to by the Parties setting forth the length of the new term.

**2.2 Progress Reports.** Commencing upon the Effective Date, Seller shall submit to Buyer, on the first Business Day of each calendar month until the Commercial

Operation Date, progress reports in a form reasonably satisfactory to Buyer. These progress reports shall notify Buyer of the current status of each condition specified in the definition of “Commercial Operation.”

**2.3 Buyer’s Rights During Construction.** Buyer shall have the right, at its own expense and after reasonable prior notice to Seller, to monitor the construction, start-up and testing of the Project, and Seller shall comply with all reasonable requests of Buyer with respect to the monitoring of these events. Seller shall cooperate in such physical inspections of the Project as may be reasonably requested by Buyer during and after completion of construction. All persons visiting the Project on behalf of Buyer shall comply with all of Seller’s applicable safety and health rules and requirements. Buyer’s technical review and inspection of the Project shall not be construed as endorsing the design thereof or as any warranty of safety, durability, or reliability of the Project.

**2.4 Commercial Operation Date and Delay Damages.** Seller shall take all steps necessary to ensure that the Commercial Operation Date occurs no later than [\_\_\_\_\_]. Subject to Section 2.5, if Seller fails to achieve the Commercial Operation Date by [\_\_\_\_\_], Seller shall, from and after [\_\_\_\_\_], pay to Buyer delay damages as liquidated damages in an amount equal to the Delay Damages Rate for each Delayed Turbine until the earlier of (a) the date any such Delayed Turbine achieves Commercial Operation, and (b) [\_\_\_\_\_]. Buyer shall present a statement to Seller for any such delay damages within thirty (30) days of the earlier of (i) the date on which the last Delayed Turbine achieved Commercial Operation, and (ii) [\_\_\_\_\_], which Seller shall pay within thirty (30) days of its receipt thereof. Buyer and Seller acknowledge and agree that it is difficult or impossible to determine with precision the amount of damages that would or might be incurred by Buyer as a result of Seller’s failure to achieve the Commercial Operation Date by [\_\_\_\_\_] as provided herein. It is understood and agreed by the Parties that: (1) Buyer shall be damaged by the failure to achieve the Commercial Operation Date by [\_\_\_\_\_], (2) it would be impracticable or extremely difficult to fix the actual damages resulting therefrom, (3) any sums payable in accordance with this Section 2.4 are in the nature of liquidated damages, not a penalty, and are fair and reasonable, and (4) such payment represents a reasonable estimate of fair compensation for the losses that may reasonably be anticipated from such failure. Once payment of such liquidated damages has been made under this Section 2.4, whether by Seller or from any Security posted by Seller in favor of Buyer in accordance with Section 10.1, Seller shall be relieved of any further liability in respect of damages to Buyer solely for failure to achieve the Commercial Operation Date by [\_\_\_\_\_].

**2.5 Deficiency Damages.**

(a) Seller shall continue to use commercially reasonable efforts to achieve Commercial Operation of the Delayed Turbines to achieve Commercial Operation of 100% of Project Capacity. At any time prior to [\_\_\_\_\_], Seller may elect to pay Buyer the positive difference between (i) “Deficiency Liquidated Damages” in the amount of \$[\_\_\_\_\_] per MW or portion thereof of Capacity Deficiency, and (ii) the

amount of delay damages as liquidated damages already paid by Seller and, upon such election and payment, Seller's obligation to install additional Project Turbines pursuant to this Section and pay delay damages as liquidated damages pursuant to Section 2.4 shall terminate. This Agreement shall remain in effect with respect to any Project Turbines that have achieved Commercial Operation as of that date.

(b) In the event that (i) Seller has not elected to pay the amount set forth in Section 2.5(a), and (ii) there is a Capacity Deficiency on [\_\_\_\_\_], Seller shall pay to Buyer, the positive difference between (1) "Deficiency Liquidated Damages" in the amount of \$[\_\_\_\_\_] per MW or portion thereof of Capacity Deficiency, and (ii) the amount of delay damages as liquidated damages already paid by Seller and, upon such payment, Seller's obligation to install additional Project Turbines pursuant to Section 2.5(a) shall terminate.

(c) Each Party agrees and acknowledges that (i) the damages that Buyer would incur due to a Capacity Deficiency would be difficult or impossible to predict with certainty, (ii) the Deficiency Liquidated Damages contemplated by this provision are a fair and reasonable calculation of such damages, and (iii) the required payment by Seller of such Deficiency Liquidated Damages shall be Buyer's sole remedy for such Capacity Deficiency.

(d) A Capacity Deficiency shall not be an Event of Default. This Agreement shall remain in effect with respect to any Project Turbines that have achieved Commercial Operation as of that date.

### **ARTICLE 3** **PURCHASE OF ENERGY BY BUYER**

**3.1 Sale and Purchase Obligations.** During the Term and subject to the provisions hereof, Seller shall sell and deliver, or cause to be delivered, and Buyer shall purchase and receive, or cause to be received, all Net Electric Energy, and concomitant with such sale, Seller shall transfer to Buyer for no additional consideration all Project Capacity and Credits.

**3.2 Deliveries.** Delivery of all Net Electric Energy sold and purchased hereunder shall be made at the Delivery Point.

**3.3 Contract Price.** Buyer shall pay to Seller the Contract Price. "Contract Price" shall mean [\_\_\_\_\_ **Dollars (\$\_\_\_)**] for each MWh of Net Electric Energy actually produced by the Project and delivered by Seller to the Delivery Point and the Credits and Project Capacity associated therewith through the first anniversary of the Commercial Operation Date. The Contract Price shall be increased annually by an escalation factor of 2.25%, with the first escalation occurring on the first anniversary of the Commercial Operation Date, and each subsequent escalation occurring on each anniversary of the Commercial Operation Date, until the end of the Term.

**3.4 Buyer-Directed and Transmission-Directed Curtailments.** Buyer may, at its sole election, direct Seller to curtail all or any part of the deliveries of Net

Electric Energy (“Buyer-Directed Curtailment”) in accordance with this Section. In the event of a Buyer-Directed Curtailment or Transmission-Directed Curtailment, Buyer shall stipulate the curtailment level to a maximum MW output level, and Seller shall cause the Net Electric Energy to be curtailed to the level specified, provided, that if Buyer stipulates to a curtailment level of less than [\_\_\_\_] MW, Seller shall be entitled to curtail all deliveries of Net Electric Energy and deem that the Project produced no (zero) Net Electric Energy during such curtailment. The procedures for curtailment instructions and for determining payments during such curtailments are as follows:

(a) Buyer shall provide notice to Seller of any Buyer-Directed Curtailment or Transmission-Directed Curtailments. Upon receipt of instructions for any such curtailment from Buyer by telephone, facsimile or other electronic means, Seller shall cause the output of the Project to be curtailed (in whole or in part) as required by the Operating Procedures. Buyer shall provide Seller thirty (30) minutes’ notice prior to the end of any period of such curtailment, and Seller shall end the curtailment at the end of such thirty (30) minute period. Curtailment instructions shall state a beginning time and may be superseded by subsequent instructions by Buyer to Seller to return curtailed Project Turbines to normal operation. Additional details regarding curtailment procedures may be included in the Operating Procedures.

(b) During such curtailment, Seller shall keep accurate records of the Project Turbines taken out of service or curtailed due to a Directed Curtailment and those out of service for other reasons such as repairs, Forced Outage and Maintenance Outage. Seller shall collect interval wind data at the appropriate permanent meteorological tower(s) for each Project Turbine curtailed during such curtailment period.

(c) If, during any period of such Buyer-Directed Curtailment or Compensable Transmission-Directed Curtailment, the Project produces no (zero) Net Electric Energy, the Wind Speed Method shall be used to determine the Wind Turbine Lost Production during such period of curtailment.

(d) If, during any period of such Buyer-Directed Curtailment or Compensable Transmission-Directed Curtailment, the Project produces energy, the Actual Production Method shall be used to determine the Wind Turbine Lost Production during such period of curtailment. In the event that Seller is able to curtail the Net Electric Energy generated by the Project Turbines in a manner that does not require that such Project Turbines be entirely shutdown (i.e. the use of blade feathering to control energy output), the Parties agree to use commercially reasonable efforts to amend this Agreement and the Operating Procedures accordingly.

(e) For each Buyer-Directed Curtailment and any Compensable Transmission-Directed Curtailment, Buyer shall pay Seller such amounts that Seller would have received from Buyer under this Agreement had production of the Net Electric Energy not been so curtailed and the cash value of any PTCs to which Seller is entitled but does not receive. In no event shall the payment contemplated herein exceed an amount (the “Curtailment Payment”) equal to the sum of (1) the product of the Total

Lost Production (in MWh) for such curtailment multiplied by the Contract Price, plus (2) an amount equal to the Production Tax Credit to which Seller, its partners, members, Affiliates or tax investors would have been entitled with respect to the amount of energy production lost due to Buyer-Directed Curtailment or Compensable Transmission-Directed Curtailment, as applicable, plus (3) a gross up amount to take into account the federal, state and local income tax to Seller or its partners, members, Affiliates or tax investors on the payment of the amount set forth in the foregoing (2) in lieu of the Production Tax Credit, calculated in accordance with the following formula:

$$\frac{\text{Amount of Payment in lieu of Production Tax Credit}}{1 - \text{aggregate tax rate}}$$

The sum of the foregoing items (2) and (3) shall be hereinafter referred to as the “PTC Loss Damages.”

For purposes of the foregoing calculation, the aggregate tax rate shall be deemed to be the highest marginal corporate income tax rate for the highest income bracket (federal, state or local, as applicable) for Seller, its members, Affiliates or tax investors, as appropriate, that are in effect or scheduled to be in effect with respect to the tax year in which such calculation is made.

For the avoidance of doubt, Seller shall not be deemed to be entitled to any PTCs, and no PTC Loss Damages shall be payable, in the event that Seller elects to obtain, in lieu of PTCs, either Investment Tax Credits or a cash grant pursuant to the American Recovery and Reinvestment Act of 2009.

In the event of a Buyer-Directed Curtailment or Compensable Transmission-Directed Curtailment, as applicable, Seller shall, unless directed otherwise by Buyer, take commercially reasonable steps to mitigate any damages or losses that would result from such curtailment. Any Curtailment Payment under this Section 3.4 shall be equitably adjusted to account for any such damages or losses actually mitigated by Seller.

(f) With any invoice for a Curtailment Payment, Seller shall provide to Buyer detailed calculations of Total Lost Production for each Buyer-Directed Curtailment or Compensable Transmission-Directed Curtailment, as applicable, set forth in Section 3.4(e), and upon Buyer’s request, details of the calculation described in Section 3.4(e), and the records described in Section 3.4(b) above for the applicable period.

(g) Seller acknowledges that Buyer may seek alternative transmission paths to effect sale of energy from Project Turbines that otherwise would have been curtailed. Seller shall use commercially reasonable efforts to assist Buyer in implementing such sale.

(h) Notwithstanding anything herein to the contrary, and for the avoidance of doubt, no payment shall be due Seller under this Section 3.4 for Buyer-Directed Curtailments or Compensable Transmission-Directed Curtailment resulting

from: (i) an Emergency; or (ii) any order or written demand from a Governmental Entity requiring Seller to curtail deliveries of Net Electric Energy and associated Credits as a result of Seller's failure to maintain in full force and effect any permit, consent, license, approval, or authorization from any Governmental Entity required by Law to construct and/or operate the Project.

**3.5 Prices Not Subject to Review.** Except as specifically set forth in Section 3.4, the prices for energy specified in this Article 3, and the other terms and conditions specified in this Agreement, shall remain in effect for the Term, and shall not be subject to change by Buyer or Seller for any other reason, including regulatory review. Absent the Parties' written agreement, (a) this Agreement shall not be subject to change by application of either Party pursuant to Section 205 or 206 of the Federal Power Act, and (b) the standard of review for any changes to this Agreement, whether proposed by a Party, a non-party, or the Federal Energy Regulatory Commission acting sua sponte, shall be the "public interest" standard of review set forth in *United Gas Pipe Line v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

**3.6 Power and Energy.** All Net Electric Energy delivered by Seller to the Delivery Point (a) shall be in the form of three (3)-phase alternating current having a nominal frequency of sixty (60) cycles per second, and (b) shall meet all requirements in the Interconnection Agreement.

**3.7 Costs and Charges.** Seller shall be responsible for all costs or charges imposed in connection with the delivery of Net Electric Energy to the Delivery Point, including, but not limited to, transmission and congestion costs. Buyer shall be responsible for all costs or charges imposed in connection with Net Electric Energy at, on and after Buyer's side of the Delivery Point, including, but not limited to, transmission and congestion costs.

**3.8 Title and Risk of Loss.** As between Buyer and Seller, Seller shall be deemed to be in exclusive control of, and responsible for, any damage or injury caused by Net Electric Energy prior to delivery at the Delivery Point, and Buyer shall be deemed to be in exclusive control of, and responsible for, any damages or injury caused by Net Electric Energy delivered hereunder at, on and after Buyer's side of the Delivery Point. Seller warrants that it will deliver Net Electric Energy to Buyer under this Article 3 free and clear of all liens, claims and encumbrances arising prior to the time Net Electric Energy is delivered to the Delivery Point. Title to, and risk of loss of, all Net Electric Energy delivered under this Article 3 shall transfer from Seller to Buyer upon delivery of such Net Electric Energy to the Delivery Point.

**3.9 Standard of Operation.** Seller shall operate the Project in accordance with Prudent Electric Industry Practice. Seller will obtain all certifications, permits, licenses and approvals necessary to construct, operate and maintain the Project and to perform its obligations under this Agreement during the Term. Seller will be responsible for the coordination and synchronization of the Project's equipment with the Transmission System, and shall be solely responsible for any damage that may

occur as a direct result of Seller's improper coordination or synchronization of such equipment with the Transmission System.

### **3.10 Operating Procedures.**

(a) Seller and Buyer will endeavor to develop written operating procedures ("Operating Procedures") for the Project before the Initial Delivery Date, which Operating Procedures will only be effective if made by mutual written agreement of the Parties. The Parties agree that the Operating Procedures will set forth the protocol under which the Parties will perform their respective obligations under this Agreement, and will include, but will not be limited to, procedures concerning the following: (1) the Parties' method(s) of day-to-day communications; (2) key personnel lists for Seller and Buyer; (3) communications with metering equipment for monitoring Project Turbine generation level; (4) forecasting of Project Turbine generation; (5) access to the Project by Buyer and its representatives; (6) Forced Outage and Planned Outage reporting; and (7) procedures governing Transmission-Directed Curtailment.

(b) As a means of securing effective cooperation and interchanges of information and of providing consultation on a prompt and orderly basis between the Parties in connection with the various administrative, commercial and technical issues that may arise during the performance of this Agreement, the Operating Procedures will also provide that the Parties will each appoint an authorized representative (with respect to each Party, its "Authorized Representative") and may each appoint an alternate (with respect to each Party, its "Alternate") to act in its Authorized Representative's absence. The Authorized Representatives and Alternates shall be well-experienced with regard to matters relating to the implementation of the Parties' rights and obligations under this Agreement, with full authority to act for and on behalf of the Parties appointing them. Each Party's initial Authorized Representative and its Alternate are set forth in Exhibit F hereto. Each Party will notify the other in writing of any change to its Authorized Representative and Alternate (including any change to its Authorized Representative or Alternate set forth on Exhibit F hereto), with such change to be effective after deliver of such notice.

**3.11 Interconnection.** During the Term, Seller will operate, maintain and control Seller's Interconnection Facilities in accordance with the Interconnection Agreement.

**3.12 Scheduling, Transmission and Ancillary Services.** Buyer shall be responsible for the receipt of all Net Electric Energy at the Delivery Point. Buyer shall arrange and pay all costs for transmission and ancillary services necessary to take the Net Electric Energy, at and from the Delivery Point to Buyer's load or to such other location Buyer may determine, including all transmission service costs, scheduling costs and congestion management costs.

### **3.13 Outages.**

(a) Planned Outages. On or before December 1 of each year, Seller will provide to Buyer a non-binding Planned Outage schedule for the forthcoming calendar year. To the extent possible, Seller will provide Buyer with reasonable advance notice of any material change in the Planned Outage schedule. Seller shall be excused from providing Net Electric Energy during any Planned Outage.

(b) Maintenance Outages. If, during the Term, Seller needs to schedule a Maintenance Outage, Seller shall notify Buyer, as far in advance as is practicable under the circumstances, of such proposed Maintenance Outage, and the Parties shall plan such outage of capacity to mutually accommodate the reasonable requirements of Seller and service obligations of Buyer; provided, however, Buyer's requirements shall not unduly prejudice or jeopardize the operation and maintenance of the Project. Notice of a proposed Maintenance Outage shall include the expected start date of the outage, the amount of Project Capacity that will be affected by the outage, and the expected completion date of the outage. Buyer shall promptly respond to such notice and may request reasonable modifications in the schedule for the outage. Subject to its operational and maintenance needs, Seller shall use reasonable efforts to comply with Buyer's request to reschedule a Maintenance Outage. Seller shall notify Buyer of any subsequent changes in such capacity not available to Buyer or any subsequent changes in such Maintenance Outage completion date. As soon as reasonably practical, any such notifications given orally shall be confirmed in writing.

(c) Forced Outages. Seller shall promptly provide to Buyer an oral report of any Forced Outage of the Project, which report shall include the amount of the Project Capacity affected by such Forced Outage and the expected end date and/or time of the outage. Seller shall update such report as necessary to advise Buyer of any changed circumstances with respect to such Forced Outage. As soon as reasonably practical, all such oral reports shall be confirmed in writing.

### **3.14 Metering.**

(a) Seller shall design, construct, install, operate, calibrate and maintain the metering devices located at the Delivery Point needed to measure the Net Electric Energy from the Project, at Seller's cost and expense. As necessary for purposes of scheduling delivery of the Net Electric Energy from the Delivery Point, such metering facilities shall include communication equipment that allows Buyer to read the meter devices from a remote location. Metering shall be compatible with MV-90 interrogation software and both Parties shall have unlimited rights to interrogate the meter for the Project. The metering devices shall provide Buyer and Transmission System Owner the ability to continuously monitor generation and unit status from the Project. Seller shall test the metering devices annually at Seller's sole expense. Seller shall notify Buyer prior to performing such tests and Buyer shall be allowed to have a representative present to witness such tests. Metering equipment that fails to register, or is found upon testing to be inaccurate by more than 1%, shall be repaired, adjusted or replaced by Seller, at Seller's sole expense. Any correction in the billing resulting from

such repairs, adjustments or replacements shall be made in the accounting rendered for the next Month; and such correction, when made, shall constitute full resolution of any claim between the Parties arising out of such inaccuracy of metering equipment.

(b) Buyer may, at its own expense, install and maintain additional metering equipment for purposes of monitoring, recording or transmitting data relating to its purchase of Net Electric Energy from the Project. Upon Buyer's reasonable request, Seller will arrange for a location at the Delivery Point for such additional Buyer equipment.

**3.15 Transfer of Credits.** Buyer and Seller shall take such action as is required by Transmission Operator or any applicable Governmental Entity (or any entity designated by a Governmental Entity for such purpose), including establishing and maintaining a REC or other credit account therewith, so that Seller may transfer such Credits to Buyer, so long as this Agreement remains in effect. Seller shall transfer the Credits to Buyer within thirty (30) days after such Credits are generated or awarded to Seller.

**3.16 Taxes.** Seller shall be responsible for all existing sales, use, excise, ad valorem or other similar tax, imposed or levied by any Governmental Entity on Net Electric Energy up to the Delivery Point. Buyer shall be responsible for (i) all existing and any new sales, use, excise, ad valorem or other similar tax, imposed or levied by any Governmental Entity on Net Electric Energy delivered at and from the Delivery Point, and (ii) any new sales, use, excise, ad valorem or other similar tax, imposed or levied by any Governmental Entity on Net Electric Energy up to the Delivery Point. To the extent permitted by Law, each Party shall indemnify, release, defend and hold harmless the other Party from and against any and all liability for taxes imposed or assessed by any taxing authority with respect to Net Electric Energy sold, delivered and received hereunder that are its responsibility pursuant to this Section 3.16.

**3.17 System Supply Energy.** At all times when the Project is not operating or is otherwise not providing energy for the Project's internal use, Seller shall be solely responsible, at its own expense, for obtaining any and all energy that may be required for the Project, including energy for starting up the Project Turbines and for the Project's internal use. In addition, Seller shall provide, or arrange and pay for, any and all reactive power and other ancillary services as may be required for supply of energy for the Project's internal use at any time, and Buyer shall have no obligation to provide or pay for any such ancillary services.

**3.18 Forecasts.**

(a) **Long-Range Forecasts.** For Buyer's planning purposes, Seller shall, by December 1 of each Contract Year (except for the last year of the Term), provide a forecast of each month's average-day energy production from the Project, by hour, for the following calendar year. This forecast shall include an expected range of uncertainty based on historical operating experience. Seller shall update the forecast

for each month by notice to Buyer at least six (6) Business Days before the first (1st) Business Day of such month.

(b) Day-Ahead Forecasts and Updates. By such time as mutually agreed to by the Parties on the Business Day immediately preceding the day on which the Net Electric Energy, Project Capacity and Credits are delivered, Seller shall provide Buyer with an hourly forecast of deliveries for each hour of the next day; provided, however, that a forecast provided on a day before any non-Business Day shall include forecasts for each day to and including the next Business Day. The Parties shall cooperate to implement and use automatic forecast updates. Seller shall communicate forecasts under this Section 3.18(b) in an efficient manner, including electronic mail or other such media as determined by Buyer (which, at Buyer's discretion, may be in lieu of or in addition to notice to Buyer). The Parties agree that the forecasting obligations of Seller under this Section 3.18(b) may be met by a wind forecast service provider designated by Seller.

(c) Hourly Forecasts. As needed, Seller shall provide Buyer with an updated hourly good faith forecast of the expected hourly Net Electric Energy output for the Project for the next day. When submitted this forecast will be provided by the top of the hour for any changes affecting the next operating hour (i.e. a forecast change shall be submitted by 08:00 for the generating period H.E. 10:00). This forecast will include all assumptions made for calculating the Net Electric Energy output such as expected wind speeds, Project Turbines online, etc.

(d) Basis of Forecasts. The forecasts called for by this Agreement shall be non-binding, good faith estimates only, and Buyer expressly releases and holds harmless Seller from any liability for forecasting errors. Seller shall prepare such forecasts and updates by utilizing a wind speed and direction prediction model of service that is (a) commercially available or proprietary to Seller or an Affiliate of Seller, and (b) comparable in accuracy to models or services commonly used in the wind energy industry and that reflect turbine availability, so long as such model or service is available at a commercially reasonable cost. On or prior to May 1 of each Contract Year, Seller shall determine in good faith which such model or service to utilize after consultation with Buyer.

### **3.19 Required Annual Availability and Shortfall Damages.**

(a) Required Annual Availability. Seller guarantees that the Annual Availability shall be equal to the Required Annual Availability.

(b) Shortfall Damages. If the Annual Availability falls below the Required Annual Availability (an "Availability Shortfall"), Seller shall pay Buyer "Shortfall Damages" calculated in accordance with the following formula:

Shortfall Damages = (Total Lost Production calculated for the Availability Shortfall) x (Cost to Cover); and

Availability Shortfall = (Required Annual Availability-Annual Availability) x (total number of hours in the Contract Year) x (Project Capacity/total nameplate power output capability of the Project, expressed in MW)

Each Party agrees and acknowledges that (i) the damages that Buyer would incur due to an Availability Shortfall would be difficult or impossible to predict with certainty, (ii) the Shortfall Damages contemplated by this provision are a fair and reasonable calculation of such damages, and (iii) the required payment by Seller of such Shortfall Damages shall be Buyer's sole remedy for such Availability Shortfall.

(c) Invoicing. No later than the sixtieth (60th) day following the end of each Contract Year, Seller pay Buyer Shortfall Damages, if any, for such Contract Year, and together with such payment submit a written calculation of such Shortfall Damages, including the component calculations set forth above, to Buyer. All disputes regarding such invoices shall be subject to Section 6.3.

#### **ARTICLE 4** **REPRESENTATIONS AND WARRANTIES**

**4.1 Representations and Warranties.** As a material inducement to execution of this Agreement, each Party hereby represents and warrants to the other Party that:

(a) It is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation, and is qualified to conduct its business in all jurisdictions necessary to perform its obligations hereunder;

(b) The execution, delivery and performance of this Agreement are within its powers, have been duly authorized by all necessary action of its governing body, and do not violate any of the terms or conditions in its governing documents or any agreement to which it is a Party, or any Law applicable to such Party;

(c) This Agreement constitutes a legal, valid and binding obligation of such Party, enforceable against it in accordance with its terms, subject to bankruptcy, insolvency, reorganization and other laws affecting creditors' rights generally, and with regard to equitable remedies, to the discretion of the court before which proceedings to obtain the same may be pending;

(d) There are no bankruptcy, insolvency, reorganization, receivership or other arrangement proceedings pending or being contemplated by it, or to its knowledge, threatened against it;

(e) To such Party's knowledge, there are no actions, proceedings, judgments, rulings or orders, issued by or pending before any Governmental Entity that would materially adversely affect its ability to perform under and in accordance with this Agreement; and

(f) No consent, approval or authorization of, or registration, filing or declaration with, any Governmental Entity or any other Person that has not been

received, waived by such Governmental Entity or other Person or satisfied as of the date hereof, is required for the valid execution and delivery of this Agreement, the consummation and performance of the transactions contemplated hereby or compliance with the terms and provisions hereof.

**4.2 No Other Representations and Warranties.** Each Party acknowledges that it has entered into this Agreement in reliance upon only the representations and warranties set forth in this Agreement.

## **ARTICLE 5**

### **EVENTS OF DEFAULT AND REMEDIES; TERMINATION**

**5.1 Events of Default.** The following occurrences shall constitute Events of Default:

(a) Failure by a Party to make any payment required hereunder when due if such failure is not remedied within ten (10) days after such failure, provided that the payment in question is not the subject of a good faith dispute pursuant to Section 6.3.

(b) Failure of a Party to perform any of its respective obligations under Section 10.1 and such failure continues for a period of ten (10) Business Days after receipt by the defaulting Party of written notice of such failure.

(c) Failure by a Party to perform any other material obligation hereunder, and such failure is not remedied within thirty (30) days after receipt by the defaulting Party of written notice of such failure, provided that so long as a defaulting Party has initiated and is diligently attempting to effect a cure, the defaulting Party's cure period shall extend for an additional sixty (60) days or such longer period as is reasonably necessary to effect such cure.

(d) Any representation or warranty made by a Party pursuant to Article 4 shall have been false in any material respect when made, has materially and adversely affected the relying Party, and has not been remedied within thirty (30) days after receipt by the defaulting Party of written notice of such falsity, provided that so long as a Party has initiated and is diligently attempting to effect a cure, the Party's cure period shall extend for an additional sixty (60) days.

(e) A Party or any Qualified Guarantor under a Guaranty provided by a Party as Security hereunder (i) makes an assignment for the benefit of its creditors, (ii) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy or similar Law for the protection of creditors, (iii) has such petition filed against it and such petition is not withdrawn or dismissed for sixty (60) days after such filing, (iv) becomes insolvent or, (v) is unable to pay its debts when due.

(f) A Party assigns this Agreement in violation of Section 7.1.

(g) Failure by a Qualified Guarantor to make any payment when due under its guaranty provided as Security hereunder, provided that the payment in question is not the subject of a good faith dispute pursuant to Section 6.3.

(h) Seller's failure as of the end of the second Contract Year and at the end of each Contract Year thereafter until the end of the Term, to achieve Annual Availability of fifty percent (50%) (the "Minimum Performance Requirement"). If Seller fails to meet the Minimum Performance Requirement, and, prior to the expiration of the cure period for this Event of Default, Seller uses commercially reasonable efforts to diagnose and correct mechanical problems and performance issues (or causes a third-party operations and maintenance contractor to diagnose and correct the same) to remove any impediments to increased availability, such Event of Default will be suspended until the earlier of (x) the date on which the Minimum Performance Requirement has been achieved, or (y) the expiration of twelve (12) months from the initial notice of default.

(i) Seller's failure to maintain in effect the Interconnection Agreement or any easements, rights of way or other real property rights required for the delivery of Committed Net Electric Energy to the Delivery Point, the failure of which would have a material adverse effect on Buyer.

(j) Seller's violation of any environmental laws or regulations arising out of (1) the construction or operation of the Project, or (2) the presence of environmental contamination at the Project alleged to exist by any Governmental Entity having jurisdiction over the Project, or the existence of any past or present enforcement, legal, or regulatory action or proceeding relating to such violation or alleged presence of environmental contamination, and Seller fails to take actions to remedy such violation, which failure is not remedied within thirty (30) days after Seller has obtained knowledge of such violation, except to the extent that such violation will not have either: (x) a material adverse effect on Buyer, or (y) a material adverse effect on Seller's ability to perform its obligations under this Agreement.

## **5.2 Termination Upon an Event of Default.**

(a) Upon the occurrence of, and during the continuation of, an Event of Default, the non-defaulting Party may terminate this Agreement by notice to the other Party, designating the date of termination, delivered to the defaulting Party no less than ten (10) Business Days before such termination date.

(b) In the event of a termination of this Agreement in its entirety, (i) the Parties' respective obligations under this Agreement shall terminate (other than those obligations that are to be performed after termination by their express terms), and (ii) each Party shall pay the amounts described in Section 5.2(c); provided, however, that termination under the circumstances specified in Section 8.1 shall not give rise to any obligation to pay damages under Section 5.2(c).

(c) Termination payments.

(i) In the event of a termination of this Agreement upon an Event of Default, each Party shall pay to the other all amounts due the other under this Agreement for all periods prior to termination.

(1) In the case of an Event of Default by Buyer, Buyer shall pay to Seller the net present value of costs to cover direct actual damages incurred by Seller in not being able to sell to Buyer, for the remainder of the Term, Net Electric Energy and Credits contracted for under this Agreement. Such costs shall include, for the applicable period, an amount equal to the PTC Loss Damages, if applicable.

(2) In the case of an Event of Default by Seller, Seller shall pay to Buyer the net present value of costs to cover direct actual damages incurred by Buyer in not being able to purchase from Seller, for the remainder of the Term, Net Electric Energy and Credits contracted for under this Agreement.

(3) In no event shall the non-defaulting Party owe damages provided for in this Section 5.2 to the defaulting Party. In the event of a termination by either Party under this Section 5.2, the non-defaulting Party will use commercially reasonable efforts to mitigate its damages resulting from the other Party's Event of Default.

(ii) The amounts due pursuant to subsection (i) above shall be paid within thirty (30) days of the applicable termination date of this Agreement notified to the defaulting Party, plus interest thereon from such date of termination until the date paid. Interest shall be calculated at the Interest Rate.

(d) Except for any damages that may be incurred due to a breach of or the application of the provisions specified in Section 5.2(e), the amounts payable under this Section 5.2 shall constitute the only amounts due upon the termination of this Agreement by either Party, and no Party shall be required to pay any amounts upon termination in excess of the amounts specified in this Section 5.2.

(e) The provisions of Sections 3.16 {Taxes} (with respect to all periods prior to termination), 6.4 {Records}, 6.5 {Audit}, 8.4 {Indemnification}, 8.5 {Limitations of Remedies, Liability and Damages}, 8.6 {Duty to Mitigate}, and 13.2 {Choice of Law and Forum} and Article 9 {Confidentiality} and Article 12 {Disputes} shall survive the termination of this Agreement.

**ARTICLE 6**  
**BILLING AND PAYMENT; RECORDS**

**6.1 Billing and Payment.** For each Month during the Term, Seller shall send to Buyer, within the first ten (10) Business Days of the following Month, a statement setting forth (a) the quantity of Net Electric Energy that was delivered to the Delivery Point in the immediately preceding Month, (b) the total amount due for Net Electric Energy, associated Credits and Project Capacity during the immediately preceding

Month (which amount shall be the product of the Net Electric Energy delivered to the Delivery Point and the applicable Contract Price), and (c) any other amounts due to Seller or credited to Buyer under this Agreement. No later than twenty (20) days after the date such statement is received, or if such day is not a Business Day, the immediately following Business Day, Buyer shall remit to Seller, by check or wire transfer in accordance with Section 11.1, the amount due pursuant to such statement.

**6.2 Interest on Late Payments.** Undisputed amounts not paid when due shall accrue interest from and including the due date, to and excluding the date of payment, at the Interest Rate.

**6.3 Disputed Amounts.** If either Party, in good faith, disputes any amount due pursuant to a statement rendered hereunder, such Party shall notify the other Party of the specific basis for the dispute and shall pay that portion of the statement that is undisputed, on or before the due date. Any such notice shall be provided within one calendar year of the date of the statement in which the disputed amount first appeared. If any amount disputed by a Party is determined to be due the other Party, or if the Parties otherwise resolve the payment dispute, the amount due shall be paid within five (5) Business Days of such determination or resolution, along with interest accrued at the Interest Rate from the original date due until (but excluding) the date paid.

**6.4 Records.** Each Party shall keep and maintain all records as may be necessary or useful in performing or verifying any calculations made pursuant to this Agreement, or in verifying such Party's performance hereunder. All such records shall be retained by each Party for at least three (3) calendar years (or such longer period as may be required by applicable Law) following the calendar year in which such records were created.

**6.5 Audit.**

(a) Each Party, through its employees, authorized agents and/or professional advisors, shall have the right, at its sole expense and upon reasonable advance notice to the other Party, during normal business hours of the other Party, to examine and copy the records of the other Party to the extent reasonably necessary to verify the accuracy of any statement, charge or computation made hereunder or to verify the other Party's performance of its obligations hereunder. Upon request, each Party shall provide to the other Party statements evidencing the quantities of energy delivered at the Delivery Point. If any statement is found to be inaccurate, a corrected statement shall be issued and any amount due thereunder will be promptly paid and shall bear interest calculated at the Interest Rate from the date of the overpayment or underpayment to the date of receipt of the reconciling payment. Notwithstanding the above, no adjustment shall be made with respect to any statement or payment hereunder unless a Party asserts its challenge to the accuracy of such payment or statement within one year after the date of such statement or payment.

(b) In addition, Seller will provide to Buyer the following information with respect to the Project:

(i) Upon Buyer's written request therefor, the manufacturers' guidelines and recommendations for maintenance of the Project equipment, to the extent not confidential or proprietary, no more frequently than every five (5) years;

(ii) A quarterly report summarizing the results of maintenance performed during each Planned Outage, Maintenance Outage or Forced Outage occurring during such quarter, and upon Buyer's written request thereof, any of the technical data obtained in connection with such maintenance;

(iii) Before the Commercial Operation Date, on or before the tenth (10th) Business Day of each Month, a monthly progress report stating the percentage completion of the Project and a brief summary of construction activity during the prior Month, as well as the construction activity contemplated for the current Month.

(c) Upon reasonable prior notice (in light of the circumstances) and subject to the safety rules and regulations of Seller, Seller will provide Buyer and its authorized agents, employees and inspectors with reasonable access to the Premises and the Project: (i) for the purpose of reading or testing metering equipment in accordance with Section 3.14, (ii) as necessary to witness any required capacity tests necessary to determine the amount of capacity associated with the Project, (iii) in connection with the operation and maintenance of the Interconnection Facilities, (iv) to provide tours of the Project to customers and other guests of Buyer, and (v) for other reasonable purposes requested by Buyer.

## **ARTICLE 7**

### **ASSIGNMENT; BINDING EFFECT**

**7.1 Assignment.** Neither Party shall assign this Agreement or any of its rights or obligations hereunder without the prior written consent of the other Party, which consent shall not be unreasonably withheld or delayed; provided that:

(a) Seller may transfer, sell, pledge, encumber or assign this Agreement or the accounts, revenues or proceeds hereof in connection with any financing or other financial arrangements in accordance with Section 7.2; and

(b) either Party may, without the need for consent from the other Party, (i) transfer or assign this Agreement to an Affiliate of such Party; and (ii) transfer or assign this Agreement to any Person or entity succeeding to all or substantially all of the assets or generating assets of such Party;

provided further that the assignee shall (A) agree in writing to be bound by the terms and conditions hereof and furnish a copy of the assignment document to the non-assigning Party, and (B) possess the same or similar experience, and possess the same or better credit rating, as the assigning Party, or if it does not have such credit rating, have provided evidence of credit support for such assignee's obligations hereunder in form and substance acceptable to the non-assigning Party, in its sole discretion.

**7.2 Mortgages.** Seller may, without Buyer's consent, collaterally assign, encumber, pledge or mortgage its rights hereunder for security of any indebtedness or

obligation in favor of any party providing debt financing or other financial accommodations to or for the benefit of the Project, Seller, or Seller's Affiliates.

(a) Upon Seller's giving notice to Buyer of such pledge and mortgage: (i) the pledgee or mortgagee shall be entitled, as between Buyer and such party, to exercise all rights and remedies it may have with respect to this Agreement without the further consent of Buyer, to receive a copy of any notice given by Buyer or Seller to the other hereunder pursuant to the terms hereof, and to deliver any notice permitted under this Agreement on Seller's behalf, and (ii) Buyer shall be entitled to assume the due authority of the pledgee or mortgagee in taking any action or authorizing any notice without the necessity of independently reviewing the pledge, mortgage or other security instrument delivered by Seller to the pledgee or mortgagee and to accept performance by the pledgee or mortgagee of any duty or obligation of Seller hereunder.

(b) Upon Buyer's receipt of a copy of a trustee's deed, deed in lieu of foreclosure, or other instrument pursuant to which the pledgee, mortgagee or other Person acquires legal title to this Agreement: (i) the pledgee, mortgagee or other Person shall assume Seller's duties and obligations hereunder, provided that the liability of any such pledgee or mortgagee under this Agreement following such assumption shall be limited to its interests in the Project and this Agreement; and (ii) Buyer shall accept the pledgee, mortgagee or other Person as the successor to Seller under this Agreement. Upon Seller's request from time to time in connection with its financing of the Project or other financial accommodation for Seller, Buyer agrees to execute and deliver promptly a consent or other agreements with debt or equity financing parties requested by such financing parties, containing customary terms and conditions, and otherwise to cooperate in a timely manner with the due diligence efforts of such financing parties.

**7.3 Binding Effect.** This Agreement shall inure to the benefit of, and be binding upon, the Parties and their respective successors and permitted assigns.

## **ARTICLE 8**

### **FORCE MAJEURE; INDEMNITY; LIMITATION OF LIABILITY**

#### **8.1 Force Majeure.**

(a) The term "Force Majeure," as used in this Agreement, means causes or events beyond the reasonable control of, and without the fault or negligence of the Party claiming Force Majeure, including acts of God, sudden actions of the elements such as floods, earthquakes, hurricanes, or tornadoes; high winds of sufficient strength or duration to materially damage a Project Turbine or significantly impair its operation for a period of time longer than normally encountered in similar businesses under comparable circumstances; long-term material changes in renewable energy flows across the Project caused by climactic change; lightning; ice storms; sabotage; vandalism beyond that which could reasonably be prevented by Seller; terrorism; war; riots; fire; explosion; blockades; insurrection; strike; slow down or labor disruptions (even if such difficulties could be resolved by conceding to the demands of a labor

group); serial defects caused by Project Turbines' designs; and actions or inactions by any Governmental Entity taken after the date hereof but only if such actions, or inactions prevent or delay performance of a Party hereunder; and inability, despite due diligence, to obtain any licenses, permits, or approvals required by any Governmental Entity and the issuance of any order, injunction, or other legal or equitable decree interfering with the performance of a Party's obligations hereunder.

(b) The term Force Majeure does not include (i) any acts or omissions of any third party, including, any vendor, materialman, customer, or supplier of Seller, unless such acts or omissions are themselves excused by reason of Force Majeure or are in and of themselves events of Force Majeure; (ii) any full or partial curtailment in the electric output of the Project that is caused by or arises from (1) a mechanical or equipment breakdown unless such mechanical or equipment breakdown is caused by an event of Force Majeure, or (2) conditions attributable to normal wear and tear; or (iii) changes in market conditions that affect the cost of Buyer's or Seller's supplies, or that affect demand or price for any of Buyer's or Seller's products.

## **8.2 Applicability of Force Majeure.**

(a) Neither Party shall be responsible or liable for any delay or failure in its performance under this Agreement, nor shall any delay, failure, or other occurrence or event become an Event of Default, to the extent such delay, failure, occurrence or event is substantially caused by conditions or events of Force Majeure, provided that:

(i) the non-performing Party gives the other Party prompt written notice describing the particulars of the occurrence of the Force Majeure;

(ii) the suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure;

(iii) the non-performing Party proceeds with reasonable diligence to remedy its inability to perform and provides weekly progress reports to the other Party describing actions taken to end the Force Majeure; and

(iv) when the non-performing Party is able to resume performance of its obligations under this Agreement, that Party shall give the other Party written notice to that effect.

(b) Except as otherwise expressly provided for in this Agreement, the existence of a condition or event of Force Majeure shall not relieve the Parties of their obligations under this Agreement (including, but not limited to, payment obligations) to the extent that performance of such obligations is not precluded by the condition or event of Force Majeure.

**8.3 Limitations on Effect of Force Majeure.** In no event will any delay or failure of performance caused by any conditions or events of Force Majeure extend this Agreement beyond its stated Term. In the event that any delay or failure of performance caused by conditions or events of Force Majeure continues for an

uninterrupted period of three hundred sixty-five (365) days from its occurrence or inception, as noticed pursuant to Section 8.2(a), the Party not claiming Force Majeure may, at any time following the end of such three hundred sixty-five (365) day period, terminate this Agreement upon written notice to the affected Party, without further obligation by either Party except as to costs and balances incurred prior to the effective date of such termination. The Party not claiming Force Majeure may, but shall not be obligated to, extend such three hundred sixty-five (365) day period, for such additional time as it, at its sole discretion, deems appropriate, if the affected Party is exercising due diligence in its efforts to cure the conditions or events of Force Majeure.

#### **8.4 Indemnification.**

(a) To the extent permitted by Law, each Party shall indemnify and hold harmless the other Party and its Affiliates, and each of their respective officers, directors, agents, employees, members, managers, shareholders, partners and other equity holders from and against any and all claims, demands, actions, losses, liabilities, expenses (including reasonable legal fees and expenses), suits and proceedings of any nature whatsoever for personal injury, death or property damage to the other Party's property or facilities, or personal injury, death or property damage to third parties (collectively "Liabilities") that arise out of or are in any manner connected with the performance of this Agreement by the indemnifying Party, except to the extent such injury or damage is attributable to the negligence or willful misconduct or breach of this Agreement by the Party (or any of its Affiliates) seeking indemnification hereunder.

(b) Without limiting the foregoing and to the extent permitted by Law, Buyer shall indemnify Seller for all Liabilities related to Project Capacity, Net Electric Energy and associated Credits, once sold and delivered to Buyer at the Delivery Point, and Seller shall indemnify Buyer for all Liabilities related to Project Capacity, Net Electric Energy and associated Credits prior to its delivery by Seller at the Delivery Point, except to the extent such injury or damage is attributable to the negligence or willful misconduct or breach of this Agreement by the Party (or any of its Affiliates) seeking indemnification hereunder.

(c) Notwithstanding any other provision of this Article 8 to the contrary, any fines, penalties or other costs incurred by either Party, or such Party's agents, employees or subcontractors for non-compliance by such Party, its Affiliates or any of their agents, employees or subcontractors with Laws shall not be reimbursable by the other Party, but will be the sole responsibility of the non-complying Party.

**8.5 Limitations of Remedies, Liability and Damages.** The Parties agree that the remedies and measures of damages provided in this Agreement satisfy the essential purposes hereof. **IF NO MEASURE OF DAMAGES OR OTHER REMEDY IS EXPRESSLY PROVIDED HEREIN, A PARTY'S LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY, WHICH DIRECT ACTUAL DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY OF THE INJURED PARTY, AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR**

IN EQUITY ARE HEREBY EXPRESSLY WAIVED. NEITHER PARTY SHALL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, WHETHER SUCH DAMAGES ARE ALLOWED OR PROVIDED BY STATUTE, IN TORT, UNDER ANY INDEMNITY PROVISION OR OTHERWISE, EXCEPT THAT ANY DAMAGES SPECIFICALLY PROVIDED IN THIS AGREEMENT SHALL BE VALID NOTWITHSTANDING THE FOREGOING PROVISION, AND EXCEPTING SUCH TYPES OF DAMAGES THAT MAY BE DUE BY A PARTY TO A THIRD PARTY FOR AN OBLIGATION THE NATURE OF WHICH THE OWING PARTY IS ENTITLED TO INDEMNIFICATION UNDER THIS AGREEMENT. NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED HEREIN, THE TOTAL CUMULATIVE LIABILITY OF SELLER TO BUYER FOR ANY AND ALL CLAIMS OR DAMAGES UNDER OR IN CONNECTION WITH THIS AGREEMENT (WHETHER STATED IN CONTRACT, TORT, STRICT LIABILITY OR ANY OTHER THEORY OF LAW OR EQUITY) AT ANY TIME SHALL NOT EXCEED [\_\_\_\_\_], PROVIDED THAT THE LIMITATION SET FORTH IN THIS SECTION SHALL NOT APPLY TO ANY DIRECT DAMAGES SUSTAINED BY BUYER AS A RESULT OF THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF SELLER OR ITS EMPLOYEES OR AUTHORIZED AGENTS.

**8.6 Duty to Mitigate.** Each Party agrees that it has a duty to mitigate damages and covenants that it will use commercially reasonable efforts to minimize any damages that it may incur as a result of the other Party's default or non-performance of this Agreement.

## **ARTICLE 9** **CONFIDENTIALITY**

**9.1 Confidentiality.** The Parties agree that the Parties' proposals and negotiations prior to the date hereof concerning this Agreement, the terms of this Agreement, the actual charges billed to Buyer under this Agreement and technical and other information regarding the Project provided by Seller to Buyer marked, or otherwise clearly communicated to the receiving Party as, "Confidential," constitute the "Confidential Business Information" of the disclosing Party. Seller and Buyer each agree to hold such Confidential Business Information wholly confidential. Such Confidential Business Information may only be used by the Parties for purposes related to the approval, administration or enforcement of this Agreement, and Seller's financing and construction of the Project, or its obtaining any other financial accommodation, and for no other purposes. "Confidential Business Information" shall not include basic information released in a press release or otherwise disclosed by Seller identifying Buyer as the purchaser of Project Capacity, Net Electric Energy and associated Credits, and the duration of this Agreement. Other information about the Project may be disclosed by Seller with Buyer's consent, not to be unreasonably withheld.

**9.2 Disclosure.** Each Party agrees not to disclose Confidential Business Information of the other Party to any other Person (other than its Affiliates, counsel, consultants, lenders, partners, members, employees, officers and directors, and then only to Persons subject to similar confidentiality restrictions as those set forth herein), without the prior written consent of the other Party, provided that either Party may disclose Confidential Business Information, if such disclosure is required by Law, including, pursuant to an order of a court or regulatory agency or in order to enforce this Agreement or to seek approval of this Agreement. In the event a Party is required by Law or by a Governmental Entity to disclose Confidential Business Information, such Party, prior to such disclosure, shall provide reasonable advance notice to the other Party of the time and scope of the intended disclosure in order to permit such disclosing Party the opportunity to obtain a protective order or otherwise seek to prevent or limit the scope or otherwise impose conditions upon such disclosure.

**9.3 Injunctive Relief.** Each Party agrees that violation of the terms of this Article 9 constitutes irreparable harm to the other, and that the harmed Party may seek any and all remedies available to it at law or in equity, including but not limited to injunctive relief.

## **ARTICLE 10** **SECURITY**

### **10.1 Security.**

(a) Each of Seller and Buyer shall provide Seller's Security and Buyer's Security, respectively, to the other in accordance with the provisions of this Article 10. Such Security shall be available to pay any unpaid and overdue amount due to the Party beneficiary to such Security pursuant to this Agreement, provided that any such amount is not the subject of a good faith dispute pursuant to Section 6.3. Seller shall procure and/or deliver Seller's Security in the then-applicable Required Security Amount to Buyer within ten (10) Business Days of the execution by both Parties of this Agreement. Buyer shall procure and/or deliver Buyer's Security in the then-applicable Required Security Amount to Seller within ten (10) Business Days of the execution by both Parties of this Agreement. As of Financial Closing, each Party shall have amended, replaced or increased, as appropriate, the Security to reflect the then-applicable Required Security Amount at Financial Closing. Each Party shall maintain Security in the applicable Required Security Amount for the benefit of the other Party throughout the Term, provided that neither Party shall have the obligation to replenish Security provided by such Party if drawn by the beneficiary Party during the Term.

(b) In addition to any other remedy available to it, a Party ("Obligee") may, before or after termination of this Agreement, draw on the Security in such amounts as are necessary to recover amounts owing to it by the other Party ("Obligor") pursuant to this Agreement, including any damages due to Obligee and/or any amounts for which Obligee is entitled to indemnification hereunder, provided that any such amounts have been invoiced to Obligor, are past due and are not the subject of a good faith dispute pursuant to Section 6.3. Obligee may, in its sole discretion, draw all or

any part of such invoiced and overdue amounts due to it from any form of Security to the extent available to Obligee pursuant to this Section, and from all such forms and in any sequence that Obligee may select.

(c) Security shall be maintained at the expense of the Party providing such Security. A Party may change the form of Security provided by it to the other Party hereunder at any time and from time to time upon reasonable prior notice. If a Guaranty is provided as Security to a Party hereunder, and, thereafter, the Qualified Guarantor under such Guaranty is no longer Creditworthy or takes any action to terminate, cancel or repudiate such guaranty (each, a “Material Event”), then the Party providing such Guaranty as Security shall be required to convert such Guaranty to another type of Security no later than thirty (30) days after the occurrence of such Material Event.

(d) Promptly following the end of the Term and the satisfaction of all of the Parties’ obligations under this Agreement, or upon the earlier termination of this Agreement pursuant to Section 8.1, each Party shall release any remaining Security held by it to the other Party.

## **ARTICLE 11**

### **NOTICES AND ADDRESSES FOR PAYMENT**

#### **11.1 Notices.**

(a) All notices, requests, statements or invoices shall be made to the addresses set forth in, and all payments shall be made in accordance with the wire transfer instructions provided for in Exhibit F hereto. Any notice, request, consent, or other communication required or authorized under this Agreement to be given by one Party to the other Party shall be in writing. It shall be either be hand delivered or mailed first-class or by overnight delivery, postage prepaid, to the other Party. If mailed, the notice request, consent or other communication shall be simultaneously sent by facsimile or other electronic means. Any such notice, request, consent, or other communication shall be deemed to have been received by the Close of the Business Day on which it was hand delivered or transmitted electronically (unless hand delivered or transmitted after such close in which case it shall be deemed received as of the Close of the next Business Day). Real-time or routine communications concerning Project operations shall be exempt from this Section.

(b) All amounts due Seller under this Agreement must be paid in accordance with Section 6.1.

(c) A Party’s address or addressee to which notices or invoices shall be delivered, or amounts paid, may be changed from time to time by such Party by notice served as hereinabove provided.

## **ARTICLE 12**

### **DISPUTES**

**12.1 Negotiations.** In the event of any dispute arising under this Agreement (a “Dispute”), within ten (10) days following the delivered date of a written request by either Party (a “Dispute Notice”), (i) each Party shall appoint a representative (individually, a “Party Representative,” and together, the “Parties’ Representatives”), and (ii) the Parties’ Representatives shall meet, negotiate and attempt in good faith to resolve the Dispute quickly, informally and inexpensively. In the event the Parties’ Representatives cannot resolve the Dispute within thirty (30) days after commencement of negotiations, within ten (10) days following any request by either Party at any time thereafter, each Party Representative (I) shall independently prepare a written summary of the Dispute describing the issues and claims, (II) shall exchange its summary with the summary of the Dispute prepared by the other Party Representative, and (III) shall submit a copy of both summaries to a senior officer of the Party Representative’s Party with authority to irrevocably bind the Party to a resolution of the Dispute. Within ten (10) Business Days after receipt of the Dispute summaries, the senior officers for both Parties shall negotiate in good faith to resolve the Dispute. If the Parties are unable to resolve the Dispute within fourteen (14) days following receipt of the Dispute summaries by the senior officers, either Party may, subject to Section 12.2, seek available legal remedies.

Notwithstanding any provision in this Agreement to the contrary, if no Dispute Notice has been issued within twenty-four (24) months following the occurrence of all events and the existence of all 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.

**12.2 Technical Disputes Regarding Commercial Operation.** If the Parties are unable to determine whether or not Commercial Operation has been achieved by mutual agreement as set forth in the definition of “Commercial Operation,” the Parties shall submit such determination to an independent technical expert, who shall be a mutually acceptable third party with training and experience in the disciplines relevant to the matters with respect to which such person is called upon to provide a certification, evaluation or opinion (the “Technical Expert”), which determination shall be (X) made in accordance with the Construction Industry Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Construction Disputes) of the American Arbitration Association (the “AAA”), as amended and effective on July 1, 2003 (the “Technical Dispute Procedures”), notwithstanding any Dollar amounts or Dollar limitations contained therein, and (Y) binding upon the Parties.

(a) Either Party may commence the technical dispute process with AAA by notifying AAA and the other Party in writing (a “Technical Dispute Notice”) of such Party’s desire that the dispute be resolved through a determination by a technical expert.

(b) The determination shall be conducted by a sole Technical Expert. The Parties may select any mutually acceptable Technical Expert. If the Parties cannot agree on a Technical Expert within five (5) days after the date of the Technical Dispute Notice, then the AAA's Arbitration Administrator shall send a list and resumes of three (3) available technical experts meeting the qualifications set forth in this Section 12.2(b) to the Parties, each of whom shall strike one name, and the remaining person shall be appointed as the Technical Expert. If more than one name remains, either because one or both Parties have failed to respond to the AAA's Arbitration Administrator within five (5) days after receiving the list or because one or both Parties have failed to strike a name from the list or because both Parties strike the same name, the AAA's Arbitration Administrator will choose the Technical Expert from the remaining names. If the designated Technical Expert shall die, become incapable or, unwilling to, or unable to serve or proceed with the determination, a substitute technical expert shall be appointed in accordance with the selection procedure described above, and such substitute Technical Expert shall have all such powers as if he or she has been originally appointed herein.

(c) Within ninety (90) days of the appointment of the Technical Expert pursuant to the foregoing subsection, the Technical Expert shall determine whether Commercial Operation has been achieved and, if such determination of the achievement of Commercial Operation has been made, the date thereof, whereupon such determination shall be a binding determination upon the Parties for all purposes hereof. The costs of the determination by the Technical Expert of such issue, including fees and expenses, shall be borne equally by the Parties. If the Technical Expert fails to make a determination within ninety (90) days from receipt of each Party's submissions, either Party may initiate litigation in accordance with the provisions herein.

**12.3 Settlement Discussions.** The Parties agree that no statements of position or offers of settlement made in the course of the Dispute process described in this Article 12 above will be offered into evidence for any purpose in any litigation or arbitration between the Parties, nor will any such statements or offers of settlement be used in any manner against either Party in any such litigation or arbitration. Further, no such statements or offers of settlement shall constitute an admission or waiver of rights by either Party in connection with any such litigation or arbitration. At the request of either Party, any such statements and offers of settlement, and all copies thereof, shall be promptly returned to the Party providing the same.

**12.4 Preliminary Injunctive Relief.** Nothing in this Article 12 shall preclude, or be construed to preclude, the resort by either Party to a court of competent jurisdiction solely for the purposes of securing a temporary or preliminary injunction to preserve the status quo or avoid irreparable harm pending arbitration pursuant to this Article 12.

**12.5 Confidential Proceedings.** The fact that either Party has invoked the provisions of this Article 12, the arbitration proceedings and related communications, and the decision of the arbitrators shall all be considered Confidential Business

Information subject to Article 9, and the arbitrators shall make no disclosure of any confidential information that would not be permitted by a Party under Article 9.

### **ARTICLE 13** **MISCELLANEOUS**

**13.1 Entirety.** This Agreement and the Exhibits hereto constitute the entire agreement between the Parties and supersede any prior or contemporaneous agreements, proposal, solicitation, terms and conditions, or representations of the Parties affecting the same subject matter.

**13.2 Choice of Law and Forum.** This Agreement shall be governed, construed and interpreted in accordance with the laws of the State of [\_\_\_\_\_], without regard to principles of conflicts of law. EACH OF THE PARTIES HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES THE RIGHT EITHER OF THEM MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED UPON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH, THIS AGREEMENT. THIS PROVISION IS A MATERIAL INDUCEMENT FOR THE PARTIES ENTERING INTO THIS AGREEMENT.

**13.3 Non-Waiver.** No consent or waiver, either expressed or implied, by any Party to or of any breach or default by any other Party in the performance by such other Party of the obligations thereof under this Agreement shall be deemed or construed to be a consent or waiver to or of any other breach or default in the performance by such other Party of the same or any other obligations of such other Party under this Agreement. The failure of either Party to this Agreement to enforce or insist upon compliance with or strict performance of any of the terms or conditions hereof, or to take advantage of any of its rights hereunder, shall not constitute a waiver or relinquishment of any such terms, conditions or rights, but the same shall be and remain at all times in full force and effect

**13.4 Headings; Attachments.** The headings used for the sections and articles herein are for convenience and reference purposes only, and shall in no way affect the meaning or interpretation of the provisions of this Agreement. Any and all exhibits and attachments referred to in this Agreement are, by such reference, incorporated herein and made a part hereof for all purposes.

**13.5 Counterparts.** This Agreement may be executed in several counterparts, each of which is an original and all of which constitute one and the same instrument.

**13.6 Other.** This Agreement (i) shall not be altered or amended except by an instrument in writing executed by authorized officers of the Parties; (ii) does not confer any rights upon any Person other than the Parties and their respective successors and permitted assigns; and (iii) may be performed by the Parties through the use of agents and subcontractors (but such use shall not relieve a Party of any of its obligations hereunder). Any provision of this Agreement that is prohibited or unenforceable in a specific situation in any jurisdiction shall not affect the validity or enforceability of:

(a) that provision in another situation or in any other jurisdiction, or (b) the other provisions of this Agreement if such other provisions could then continue to conform with the purposes of this Agreement and the terms and requirements of Law. The Parties shall execute and deliver all documents and perform all further acts that may be reasonably necessary to effectuate the provisions of this Agreement. This Agreement was prepared jointly by the Parties, each Party having had access to advice of its own counsel, and not by either Party to the exclusion of the other Party, and shall not be construed against one Party or the other as a result of the manner in which this Agreement was prepared, negotiated or executed.

**13.7 Insurance.**

(a) Seller, at its own cost and expense, shall maintain the property and general liability insurance on and with respect to the Project set forth in Exhibit B hereto. Seller shall promptly (but in no event later than three (3) Business Days) after receipt of certificates of insurance evidencing the coverages required under this Agreement, deliver them to Buyer.

(b) Buyer, at its own cost and expense, shall maintain the worker's compensation, general liability and other insurance set forth in Exhibit C hereto.

**13.8 Relationship of the Parties.** This Agreement shall not be interpreted or construed to (a) create an association, joint venture or partnership between the Parties or impose any partnership obligation or liability on either Party, (b) create any agency relationship between the Parties or impose any fiduciary duty of any kind on either Party, (c) create a trust or impose any trust obligations of any kind on either Party, or (d) constitute a lease of property of any kind. Other than as expressly set forth herein, neither Party shall have any right, power or authority to enter into any agreement or undertaking for, or act on behalf of, or act as or be an agent or representative of, or otherwise bind, the other Party.

**13.9 Duty to Mitigate.** Each Party agrees that it has a duty to mitigate damages and covenants that it shall use commercially reasonable efforts to minimize any damages it may incur as a result of the other Party's performance or non-performance of this Agreement.

*[signatures on following page]*

The Parties have executed this Power Purchase Agreement as of the date first set out above, to be effective for all purposes hereof as of the Effective Date.

**Seller:**

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

**Buyer:**

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

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

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

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

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

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

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

**EXHIBIT A**  
**PROJECT DESCRIPTION**

**EXHIBIT B**

**SELLER'S INSURANCE REQUIREMENTS**

Seller shall secure and maintain insurance of such types and in such minimum amounts as specified below. The providing of insurance by Seller of such types and in such minimum amounts as specified below does not limit Seller's contractual responsibilities or obligations under this Agreement. Seller shall include Buyer as "additional insureds" under all of its policies required herein, except for Workers' Compensation and Employers Liability. Seller shall submit a certificate for each of the insurance policies to Buyer not less than thirty (30) days after the Effective Date. Each certificate shall state that thirty (30) days advanced written notice will be given Buyer before any policy covered thereby is changed or cancelled. With respect to all required policies of insurance Seller shall cause its insurer to waive the insurer's right of subrogation with respect to Buyer and its insurers.

**WORKERS' COMPENSATION AND EMPLOYERS LIABILITY**

This insurance shall protect against all claims under applicable state Workers' Compensation laws. Seller shall also be protected against claims for injury, disease, or death of employees, which, for any reason, may not fall within the provisions of Workers' Compensation law. The liability limits shall not be less than:

Workers' Compensation employer's liability Statutory Employers Liability	\$1,000,000 each accident or disease
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**COMPREHENSIVE AUTOMOBILE LIABILITY**

This insurance shall be written in comprehensive form and in compliance with state statute and shall protect Seller, and the additional insureds, against all claims for injuries to members of the public and damage to property of others arising from the use of motor vehicles, and shall cover operation on or off the Premises of all motor vehicles licensed for highway use, whether they are owned, non-owned, or hired. The liability limits shall not be less than a One Million Dollar (\$1,000,000) combined single limit each occurrence for bodily injury and property damage.

**COMMERCIAL GENERAL LIABILITY**

This insurance shall be written in comprehensive form and shall protect Seller, and the additional insureds, against all claims arising from injuries to members of the public or damage to property of others arising out of any act or omission of Seller or Seller's agents, employees, or subcontractors. This policy shall also include protection against claims insured by usual personal injury liability coverage, a broad form property coverage endorsement, and insure the contractual liability assumed by Seller in this Agreement. The liability limits shall not be less than One Million Dollars (\$1,000,000) combined single limit each occurrence for bodily injury and property damage.

SUBCONTRACTOR INSURANCE.

Seller shall include the insurance requirements set forth in this Agreement in all subcontracts. Buyer shall hold Seller responsible in the event any subcontractor fails to have insurance meeting the requirements set forth herein. Buyer reserves the right to approve variations in the insurance requirements applicable to subcontractors upon joint written request of the subcontractor and Seller if, in Buyer's opinion, such variations do not substantially affect Buyer's interests.

**EXHIBIT C**

**BUYER'S INSURANCE REQUIREMENTS**

Buyer shall secure and maintain insurance of such types and in such minimum amounts as specified below. The providing of insurance by Buyer of such types and in such minimum amounts as specified below does not limit Buyer's contractual responsibilities or obligations under this Agreement. Buyer shall include Seller as "additional insureds" under all of its policies required herein, except for Workers' Compensation and Employers Liability. Buyer shall submit a certificate for each of the insurance policies to Seller not less than thirty (30) days after the Effective Date. Each certificate shall state that thirty (30) days advanced written notice will be given Seller before any policy covered thereby is changed or cancelled. With respect to all required policies of insurance Buyer shall cause its insurer to waive the insurer's right of subrogation with respect to Seller and its insurers.

**WORKERS COMPENSATION AND EMPLOYERS LIABILITY**

This insurance shall protect Buyer against all claims under applicable state Workers' Compensation laws. Buyer shall also be protected against claims for injury, disease, or death of employees, which, for any reason, may not fall within the provisions of Workers' Compensation law. The liability limits shall not be less than:

Workers' Compensation employer's liability	Statutory
Employers Liability	\$1,000,000 each accident or disease

**COMPREHENSIVE AUTOMOBILE LIABILITY**

This insurance shall be written in comprehensive form and in compliance with state statute and shall protect Buyer, and the additional insureds, against all claims for injuries to members of the public and damage to property of others arising from the use of motor vehicles, and shall cover operation on or off the Premises of all motor vehicles licensed for highway use, whether they are owned, non-owned, or hired. The liability limits shall not be less than a One Million Dollar (\$1,000,000) combined single limit each occurrence for bodily injury and property damage.

**COMMERCIAL GENERAL LIABILITY**

This insurance shall be written in comprehensive form and shall protect Buyer, and the additional insureds, against all claims arising from injuries to members of the public or damage to property of others arising out of any act or omission of Buyer or Buyer's agents, employees, or subcontractors. This policy shall also include protection against claims insured by usual personal injury liability coverage, a broad form property coverage endorsement, and insure the contractual liability assumed by Buyer in this Agreement. The liability limits shall not be less than One Million Dollars (\$1,000,000) combined single limit each occurrence for bodily injury and property damage.

SUBCONTRACTOR INSURANCE.

Buyer shall include the insurance requirements set forth in this Agreement in all subcontracts associated with this Agreement. Seller shall hold Buyer responsible in the event any subcontractor fails to have insurance meeting the requirements set forth herein. Seller reserves the right to approve variations in the insurance requirements applicable to subcontractors upon joint written request of the subcontractor and Buyer if, in Seller's opinion, such variations do not substantially affect Seller's interests.

## **EXHIBIT D**

### **WIND SPEED METHOD**

In the event that the Wind Turbine Lost Production is calculated using the Wind Speed Method, the following factors will be considered:

1. Wind data will be taken from each of the two (2) permanent met towers located on the Premises for the period of the Directed Curtailment or a Contract Year (for purposes of calculating Shortfall Damages), as applicable. The wind speed and direction of both towers will be used, if available. If both towers are used, the estimated energy from each tower will be averaged to calculate the Wind Turbine Lost Production. If only one tower is available, wind speed and direction from such tower alone will be used.

2. Appropriate consideration will be given to selection and/or correction of the wind speed data to minimize the aerodynamic impact of the met tower(s) on the wind speed readings.

3. Prior to implementing the Wind Speed Method, appropriate consideration will be given to data collection criteria. IEC 61400-12-1 standards will likely be used to address any questions.

4. The Wind Turbine Lost Production calculated during a Directed Curtailment or during a Contract Year (for purposes of calculating Shortfall Damages) will be obtained using one of two models to measure the output from the Project. During the first twelve (12) months following the Commercial Operation Date, the model will be based on computer modeling, using WindFarmer, of the relationship between met tower wind speed and the electric output from the Project. Thereafter, once sufficient operational data has been collected, such model will be updated to reflect actual operational conditions.

5. Appropriate losses will be assessed. In the case of the first model using WindFarmer, sufficient information will be obtained from the manufacturer to enable calculation of the losses, including calculation of cut-out/re-cut-in losses; standard loss methodologies will then apply.

6. Twelve (12) months after the Project achieves Commercial Operation, and after sufficient operational data has been collected, the model will be updated to produce a wind farm power curve that will be used to calculate the Wind Turbine Lost Production. Because losses are intrinsic within a wind farm power curve that is based on operational data, no additional loss calculations will be necessary.

**EXHIBIT E**  
**ACTUAL PRODUCTION METHOD**

See attached.

**EXHIBIT F**

**NOTICE ADDRESSES**

To Buyer:

[ \_\_\_\_\_ ]  
Attention: [ \_\_\_\_\_ ]  
Telephone: [ \_\_\_\_\_ ]  
Fax: [ \_\_\_\_\_ ]

With a copy to:

[ \_\_\_\_\_ ]  
Attention: [ \_\_\_\_\_ ]  
Telephone: [ \_\_\_\_\_ ]  
Fax: [ \_\_\_\_\_ ]

**Wire Transfer Information:**

Account Name: [ \_\_\_\_\_ ]  
Account No.: [ \_\_\_\_\_ ]  
ABA No.: [ \_\_\_\_\_ ]  
Bank Name: [ \_\_\_\_\_ ]  
Bank Address: [ \_\_\_\_\_ ]  
[ \_\_\_\_\_ ]

Buyer's Authorized  
Representative

[ \_\_\_\_\_ ]  
[ \_\_\_\_\_ ]  
Telephone: [ \_\_\_\_\_ ]  
Fax: [ \_\_\_\_\_ ]

Buyer's Alternate

[ \_\_\_\_\_ ]  
[ \_\_\_\_\_ ]  
Telephone: [ \_\_\_\_\_ ]  
Fax: [ \_\_\_\_\_ ]

To Seller: [\_\_\_\_\_]
Attention: [\_\_\_\_\_]
Telephone: [\_\_\_\_\_]
Fax: [\_\_\_\_\_]

With a copy to:

[\_\_\_\_\_]
Attention: [\_\_\_\_\_]
Telephone: [\_\_\_\_\_]
Fax: [\_\_\_\_\_]

Wire Transfer Information:

Account Name: [\_\_\_\_\_]
Account No.: [\_\_\_\_\_]
ABA No.: [\_\_\_\_\_]
Bank Name: [\_\_\_\_\_]
Bank Address: [\_\_\_\_\_]

Seller's Authorized Representative

[\_\_\_\_\_]
[\_\_\_\_\_]
Telephone: [\_\_\_\_\_]
Fax: [\_\_\_\_\_]

Seller's Alternate

[\_\_\_\_\_]
[\_\_\_\_\_]
Telephone: [\_\_\_\_\_]
Fax: [\_\_\_\_\_]