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# Master Renewable Energy Certificate Purchase and Sale Agreement

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**NOTICE AND DISCLAIMER:** This Master Renewable Energy Certificate Purchase and Sale Agreement (this “Agreement”) was prepared by an ad hoc working group comprised of members of the Renewable Energy Resources Committee and the Special Committee on Energy and Environmental Finance of the American Bar Association’s Section of Environment, Energy and Resources (“SEER Committees”), the Environmental Markets Association (“EMA”), and the American Council on Renewable Energy (“ACORE”) to facilitate orderly trading in and development of renewable energy certificate (also known as green tags) markets. Neither the American Bar Association, the ABA Section of Environment, Energy and Resources, the SEER Committees, EMA, nor ACORE, nor any member of any of the foregoing, represents that this document is enforceable, and none of the foregoing will be responsible for anything connected with this document’s use, or any damages or other consequences resulting therefrom. By making it available, the foregoing do not offer legal advice, and all users are urged to consult with their own legal counsel to ensure that their commercial objectives will be achieved and legal interests protected. This document is jointly copyrighted 2007 by EMA and ACORE, and all potential users of this Agreement are hereby granted a free and perpetual license to use this document, so long as the source is credited by the user. The working group intends to periodically review and revise this document after publication, to keep it current and responsive to market developments and comments received. This statement of intention in no way should be construed as a warranty or assurance that further revisions will be forthcoming, or of the timeliness or comprehensiveness of such revisions. If you are interested in becoming part of the working group, or have questions or comments (but not requests for legal advice) you may contact the persons indicated at <http://environmentalmarkets.org/>.

**MASTER RENEWABLE ENERGY CERTIFICATE  
PURCHASE AND SALE AGREEMENT**

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## **Introduction for Users**

### **Introduction**

Welcome to the Master Renewable Energy Certificate Purchase and Sale Agreement. Renewable Energy Certificates (RECs) are also known as green tags or tradeable renewable credits, among other names. Trading in RECs is an important market mechanism to promote renewable resource development, and the Renewable Energy Resources Committee and Special Committee on Energy and Environmental Finance of the American Bar Association's Section of Environment, Energy and Resources, the Environmental Markets Association, and the American Council on Renewable Energy are proud to contribute to this goal by presenting this product of their joint development efforts.

This form contract is intended as infrastructure, or a paved road, to help buyers and sellers transact, foster market mechanisms to promote renewable resource development and, perhaps most importantly, stave off potential balkanization of US RECs markets. The contract is technology-neutral, usable in both the voluntary and compliance markets, and legally robust regardless of American jurisdiction. Despite the danger of trying to be all things to all people, the contract tries to do just that, with definitions and contract mechanics carefully crafted to ensure that it not only works both in mandatory compliance and voluntary markets, but also works across different voluntary and compliance markets, each with their different mechanisms for certifying and clearing RECs, with the fundamental working group goal of promoting fungibility of RECs across programs. Accordingly, the contract may be lengthier than others under which RECs are bought and sold, and although some of the definitions and mechanisms made available in this contract for its users are sophisticated, it is actually very simple to use.

When agreeing to buy and sell, parties can fill out a "Product Order," with or without a Disclosure Document (Exhibits A and B, respectively). This is intended to work like a confirmation in a typical trading contract, with the additional wrinkle that by using the optional Disclosure Document, the parties can create a record of the verification and disposition of the environmental attributes of the REC that can travel with further downstream transactions in the particular REC. A party delivers RECs by complying with the requirements of the applicable program. Attestation forms commonly used in voluntary markets for self-certification and delivery of a REC are provided. For compliance programs, the contract seeks to be helpful and flexible, but parties must also independently know and comply with the requirements of the program, which may change from time to time. Title transfer documentation will develop as markets move from voluntary markets to compliance markets. Currently, attestations are the instrument of choice in voluntary markets, and registrations of transfers with generation information systems or system operators are the instrument of choice in compliance markets. Our goal is to provide the tools necessary to enable market participants to decide the most appropriate manner for transacting in a market still in development.

### **Compliance Markets**

The drafters present ideas and mechanisms to promote fungibility of RECs across compliance markets, including the mechanics for representations concerning compliance of a product with

the requirements of multiple programs, as well as optional mechanics that will enable parties to unlock potential further value in RECs through optional verification.

When a REC is indicated as sold in a compliance market, the seller represents that as of the date of the trade, the REC complies with the requirements of the compliance programs so indicated, but the buyer takes the risk of the potential for change in the legal requirements after the trade date. However, the parties can choose to have the seller bear the change-in-law risk between the trade date and delivery by electing to sell the product as “Regulatorily Continuing.” Presence or absence of the “Regulatorily Continuing” designation does not give rise to a right by either Buyer or Seller to cancel delivery or purchase if there is a failure of the Product to comply for a later delivery date if the program is changed; rather it is an allocation of risks of what parties may be required to do so the delivery can, when made, be used for compliance. Additionally, if the compliance program is later cancelled, delivery is still to be made and paid for at the original price, unless the parties have specifically provided otherwise in the original Product Order.

### Cover Sheet

The cover sheet provides spaces for the parties to fill in identity and contact information, and make certain elections concerning certain provisions in the contract for which choices are available. For example, the parties can choose to have regular monthly invoicing, which they may consider appropriate for a back-and-forth, traditional trading relationship in RECs, or to have payment on delivery, which they may consider appropriate for use with a single project entity that is delivering RECs as generated. The parties may also choose to require prepayment in advance of delivery. Finally, the parties can choose semiannual payments, which may be appropriate for small projects generating a long-term stream of RECs. Such elections can be varied for any particular transaction by so stating on the Product Order, or for the whole contract by adding additional terms.

Using the cover sheet, parties can elect to make certain credit terms applicable to their dealings. If that option is selected, turn to the portion of the cover sheet on which credit elections are made and choose which, if any, entity provides financial reports, and whether or not to provide credit assurances or margining during the course of performance of the contract. Since the creditworthiness of a party may change over time, the parties can elect not to provide performance assurance now, but to do so if the party’s financial condition deteriorates later, using the downgrade event option, although the parties will need to specify their own parameters for unrated entities. A collateral threshold would require the parties to post margin (generally this is cash) to each other should the open mark-to-market position from one party to the other reach above a certain level. If the parties do anticipate very active exchange of margin for large positions in volatile markets, they should consider the use of a collateral support annex, which sets forth in much greater detail the rules by which parties would exchange margin on a daily basis, such as those relating to the required timing of demands, transfers, returns and interest on deposits held. Options are also provided to enable margining, if elected, to hook into an existing EEI Master Power Purchase and Sale Agreement or ISDA Master Agreement with Credit Support Annex, if the parties have such an instrument in place between them.

The parties can select the law that governs the contract. Although most trading counterparties elect to have their relationship governed by New York law, which is highly developed when it comes to trading contracts, there may be countervailing considerations, such as regulatory requirements, that would lead the parties to elect the law of a different jurisdiction, such as the State of a particular compliance markets. In such event, please note Article 8.

Several different dispute resolution mechanisms are provided; none need to be selected, but a party that does select any is waiving rights, and so should be quite sure, after consultation with counsel, that the mechanism selected will work in accordance with your expectations.

### Disclosure Document

Although the Disclosure Document may look complicated at first glance, it is actually straightforward and a compact method of presenting and preserving important information. A particular quantity of renewable energy generation includes a variety of avoided emissions and other environmental impacts that are unknown in magnitude until measured. The standard REC product includes all these attributes intact and together. However, one can measure and verify a component, for example avoided carbon dioxide (CO<sub>2</sub>) emissions. The contract when used with the Disclosure Document sets forth optional mechanics permitting component verification and disaggregation. If sticks are identified in the REC bundle and verified to unlock their potential value, different buyers may attribute different values to the various sticks and the bundle, and the agreement is designed to maximize the ability of these components to find their highest bidder through full and accurate disclosure. The parties are free to abstain but, should they choose to disaggregate, they can generate a fully disclosing transaction record by using the Disclosure Document. The Disclosure Document sets forth information about the REC to be passed on to future buyers of the REC; Part A of the Product Order with Disclosure Document (Exhibit A) contains information about the terms of sale of the REC that is not required to be passed on. The example Product Order without Disclosure Document is a form currently widely used in RECs markets; the drafters wanted to be sure to provide the market place tools with which it is familiar, while at the same time providing tools to assist in the development of a unified RECs marketplace.

The contract envisions many moving parts that can interlock, depending on the requirements of Applicable Programs. Since compliance programs are still very much in development, the contract is intended to provide moveable, interlocking parts for future program designers. Certification Authority, Delivery, and Verification Provider are three separate concepts. A Certification Authority certifies the existence of a REC. Verification relates to proof of claims, by a disclosed Verification Methodology used by the Verification Provider, of the characteristics of the Environmental Attributes of the REC. The contract lets parties select those parts they need for what they want to accomplish. Defining a Transaction through a Product Order, certification of a REC, and Delivery are the fundamental requirements for all Applicable Programs. The Certification Authority could be the Generation Information System, program administrator (if there is one), independent third party, or the seller itself through delivery of an Attestation, depending on what is required by the Applicable Program. Delivery transfers ownership of the REC from Seller to Buyer. Delivery of what the Certification Authority has certified is pursuant to the terms of the Applicable Program, and will vary by Applicable

Program. For voluntary Applicable Programs, the parties may appoint the Seller as the Certification Authority, self-certifying the REC through what it states on the Attestation, and Delivering the REC by delivering the Attestation. Many regions have, or are developing, generation information systems that accurately record the generation from the applicable renewable resource and maintain accounts among which ownership of the resultant REC may be transferred. Verification of Environmental Attributes of the REC is an additional step; for example in connection with a future carbon-trading program into which RECs may be convertible upon verification. The Verification Provider applies a methodology to verify the REC or an aspect of the REC as Product, which verification, if required as part of a present or future Applicable Program, would give the Certification Authority what it needs to certify the Product. Absent that, specifying the Verification Provider and Verification Methodology is entirely optional. The parties can just do a simple Product Order without a Disclosure Document and then meet Delivery requirements of the Applicable Program. However, if it is used, the Disclosure Document thereafter “travels with the REC,” to be disclosed by a reseller, or the seller of a retained “stick” from the bundle. The drafters sought to provide flexibility and create a disclosure platform so Verification Methodologies, as they grew to be commonly used, could develop into marketplace standards. The verification option requires disclosing the who and the how, without mandating the who or the how, except to the extent required by the Applicable Program selected by the parties. This promotes disclosure and sets the stage for using market mechanisms to establish optimum verification methodologies as they become part of the landscape of REC markets.

### Moving Forward

To the extent the parties have other specific changes that they wish to make to the contract, they can be set forth on separate pages, which is the practice for other trading contracts. If market practice demonstrates widespread adoption of certain changes, the working group will examine whether to revise the contract accordingly.

This is a dynamic contract, for a dynamic market. We fully expect the market to rapidly develop beyond the contract as currently written, but hope to set forth what parties should keep in mind when they seek to transact in RECs, while at the same time providing a functioning document that enables parties to transact in RECs right now. The drafters recognize that this market is nascent and we hope it will mature on our watch into a robust market mechanism to allocate resources to achieve the goals of renewable resource development.

## ARTICLE 1: DEFINITIONS

1.1 “Administrator” means a state or federal administrator, such as the Clean Air Markets Division of the Environmental Protection Agency, GIS, Certification Authority, if applicable, and any Governmental Authority or other body with jurisdiction over Certification under, or the transfer or transferability of Environmental Attributes in, any particular Applicable Program.

1.2 “Affiliate” means, with respect to any person, any other person (other than an individual) that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, such person, with “control” meaning the direct or indirect ownership of fifty percent (50%) or more of the outstanding capital stock or other equity interests having ordinary voting power.

1.3 “Agreement” is defined on the Cover Sheet.

1.4 “Applicable Law” means all legally binding constitutions, treaties, statutes, laws, ordinances, rules, regulations, orders, interpretations, permits, judgments, decrees, injunctions, writs and orders of any Governmental Authority or arbitrator that apply to the Applicable Program or any one or both of the Parties or the terms hereof.

1.5 “Applicable Program” means a domestic, international or foreign RPS, renewable energy, emissions reduction or Product Reporting Rights program, scheme or organization, adopted by a Governmental Authority or otherwise, or other similar program with respect to which exists a market, registry or reporting for particular Environmental Attributes. An Applicable Program includes any legislation or regulation concerned with renewable energy, oxides of nitrogen, sulfur, or carbon, with particulate matter, soot, or mercury, or implementing the UNFCCC or crediting “early action” with a view thereto, or laws or regulations involving or administered by an Administrator, or under any present or future domestic, international or foreign RECs, Products, Environmental Attributes or emissions trading program. Applicable Programs do not include legislation providing for production tax credits or other direct third-party subsidies for generation by a Renewable Energy Source.

1.6 “Attestation” means a Transfer Certificate or Certification by Seller as the Certification Authority in form and substance as agreed to by the Parties separate and apart from the Product Order, examples of which for voluntary and potentially other Applicable Programs is attached as Exhibit C and D.

1.7 “Bankrupt” means an entity that has (i) filed a petition or otherwise commenced, authorized or acquiesced in the commencement of a proceeding or cause of action under any bankruptcy, insolvency, reorganization or similar law, (ii) had any such petition filed or commenced against it and not dismissed within 30 days, (iii) made an assignment or any general arrangement for the benefit of creditors, (iv) otherwise become bankrupt or insolvent, however evidenced, (v) had a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (vi) become generally unable to pay its debts as they fall due.

1.8 “Business Day” means any day except a Saturday, Sunday, or a Federal Reserve Bank holiday. A Business Day opens at 8:00 a.m. and closes at 5:00 p.m. local time for the relevant Party’s principal place of business. The relevant Party, in each instance unless otherwise specified, is the Party from whom the notice, payment or delivery is sent and by whom the notice or payment or delivery is received.

1.9 “Buyer” means for any particular Transaction, the buyer of the Product.

1.10 “Cancellation of Applicable Program” means that the Applicable Program is discontinued, suspended, canceled, repealed, or otherwise no longer scheduled to proceed.

1.11 “Certification” means, if applicable, the certification by the Certification Authority of the Applicable Program of (i) the creation and characteristics of a REC, (ii) the qualification of a Renewable Energy Facility or a Renewable Energy Source under an Applicable Program, (iii) Delivery of a REC or (iv) other compliance with the requirements of an Applicable Program.

1.12 “Certification Authority” means an entity that certifies the generation, characteristics or Delivery of a REC, or the qualification of a Renewable Energy Facility or Renewable Energy Source under an Applicable Program, may include, as applicable, the Administrator, a GIS, a Governmental Authority, the Verification Provider, one or both of the Parties, an independent auditor, or other third party, and should include (i) if no Applicable Program is specified, the Seller, or the generator of the RECs if the Seller is not the generator, (ii) if the RECs are to be Delivered pursuant to an Applicable Program, the Administrator of the Applicable Program, or such other person or entity specified by the Applicable Program to perform Certification, or (iii) such other person or entity specified by the Parties.

1.13 “Certified Renewable Energy Facility” means a Renewable Energy Facility that is recognized under an Applicable Program as specified by the Parties.

1.14 “Certified Renewable Energy Source” means any energy source that is recognized under an Applicable Program as specified by the Parties.

1.15 “Claiming Party” is defined in Article 6.

1.16 “Confirmation” means a Product Order confirming an oral Transaction.

1.17 “Costs” means, with respect to the Non-Defaulting Party, the present value of brokerage fees, commissions, attorneys fees, and other similar third party transaction costs and expenses reasonably incurred by such Party either in terminating or replacing any arrangement pursuant to which it has hedged its obligations; and any charges, penalties, fines or fees imposed or assessed against the Non-Defaulting Party by an Administrator or Governmental Authority on account of Delivery not occurring on the Delivery Date, as determined by the Non-Defaulting Party in a commercially reasonable manner.

1.18 “Credit Rating” means, with respect to any entity, the rating then assigned to such entity’s unsecured, senior long-term debt obligations (not supported by third party credit enhancements) or if such entity does not have a rating for its senior unsecured long-term debt,

then the rating then assigned to such entity as an issuer rating by S&P, Moody's or any other rating agency agreed by the Parties as set forth in the Cover Sheet.

1.19 "Cross Default Amount" means, for a Party, the cross default amount, if any, set forth in the Cover Sheet for that Party.

1.20 "Defaulting Party" is defined in Section 5.1.

1.21 "Delivered" or "Delivery" means the transfer from Seller to Buyer of the specified amount of the Product, as specified pursuant to a Transaction, including, as specified or required by the Applicable Program, recognition by the Administrator and Certification Authority of the transfer to Buyer, or Seller's delivery to Buyer of a Transfer Certificate. Delivery of Product can be independent of delivery of the electricity with which the Product is associated.

1.22 "Delivery Date" means the dates specified in the Product Order for Delivery of the Product to the Buyer, which date must be on or after the date the Product comes into existence.

1.23 "Disclosure Document" means a part of the Product Order document disclosing certain matters respecting the REC, its Environmental Attributes, and their Verification, in the form of Part B of Exhibit A or as otherwise agreed to by the Parties.

1.24 "Downgrade Event" means, unless otherwise specified on the Cover Sheet, for a Party means that Party's Credit Rating falls below BBB- from S&P or Baa3 from Moody's or becomes no longer rated by either S&P or Moody's.

1.25 "Early Termination Date" is defined in Section 5.2.

1.26 "Effective Date" is defined on the Cover Sheet.

1.27 "Environmental Attribute" means an aspect, claim, characteristic or benefit associated with the generation of a quantity of electricity by a Renewable Energy Facility, other than the electric energy produced, and that is capable of being measured, verified or calculated. An Environmental Attribute may include one or more of the following identified with a particular megawatt hour of generation by a Renewable Energy Facility designated prior to Delivery: the Renewable Energy Facility's use of a particular Renewable Energy Source, avoided NO<sub>x</sub>, SO<sub>x</sub>, CO<sub>2</sub> or greenhouse gas emissions, avoided water use (but not water rights or other rights or credits obtained pursuant to requirements of Applicable Law in order to site and develop the Renewable Energy Facility itself) or as otherwise defined under an Applicable Program, or as agreed by the Parties. Environmental Attributes do not include production tax credits or other direct third-party subsidies for generation of electricity by any specified Renewable Energy Facility.

1.28 "ERCOT" means the Electric Reliability Council of Texas.

1.29 "Event of Default" is defined in Section 5.1.

1.30 “Force Majeure” is defined in Article 6.

1.31 “Gains” means, with respect to any Party, an amount equal to the present value of the economic benefit to it, if any (exclusive of Costs), resulting from the termination of a Terminated Transaction, determined by it in a commercially reasonable manner.

1.32 “GIS” means a generation information system, generation attribute tracking system or other system that records generation from Renewable Energy Facilities in any particular geographical region, such as WREGIS, NEPOOL GIS, ERCOT, PJM EIS GATS, M-RETS, or, if applicable, an Independent System Operator or a Regional Transmission Organization.

1.33 “Government Action” means action by a Governmental Authority, Administrator, Certification Authority, or by the governing body of an Applicable Program to change the eligibility of a Product for an Applicable Program or substantially change the requirements for compliance by persons obligated to comply with the Applicable Program which in either case has a material adverse effect on the value of a Product that is the subject of a particular Transaction, and includes a change in Applicable Law that disqualifies any particular Renewable Energy Facilities (by Renewable Energy Sources, Initial Operating Date, or otherwise) or Product, that is the subject of a Transaction from an existing Applicable Program.

1.34 “Governmental Authority” means any international, national, federal, provincial, state, municipal, county, regional or local government, administrative, judicial or regulatory entity operating under any Applicable Laws and includes any department, commission, bureau, board, administrative agency or regulatory body of any government.

1.35 “Guarantor” means, with respect to a Party, the guarantor, if any, specified for such Party on the Cover Sheet.

1.36 “Independent Amount” means, with respect to a Party, the amount, if any, set forth in the Cover Sheet for such Party, or if no amount is specified, zero, unless specified otherwise in a Product Order for a Transaction.

1.37 “Initial Operating Date” means the date when a particular Renewable Energy Facility first became commercially operational.

1.38 “Losses” means, with respect to any Party, an amount equal to the present value of the economic loss to it, if any (exclusive of Costs), resulting from termination of a Terminated Transaction, determined by it in a commercially reasonable manner.

1.39 “Moody’s” means Moody’s Investor Services, Inc.

1.40 “M-RETS” means the Midwest Renewable Energy Tracking System.

1.41 “NEPOOL GIS” means the New England Power Pool Generation Information System.

1.42 “Non-Defaulting Party” is defined in Section 5.2.

1.43 “NYISO” means the New York Independent System Operator.

1.44 “Performance Assurance” means collateral in the form of cash, letters of credit, or other security acceptable to the requesting Party.

1.45 “PJM EIS GATS” means the PJM Environmental Information Services, Inc. Generation Attribute Tracking System.

1.46 “Potential Event of Default” means an event which, with notice or passage of time or both, would constitute an Event of Default.

1.47 “Potentially Defaulting Party” means a Party that, but for a cure of a Potential Event of Default or failure of performance, would be a Defaulting Party.

1.48 “Potentially Non-Defaulting Party” means a Party that, but for a cure of a Potential Event of Default or failure of performance by the Potentially Non-Defaulting Party, would be a Non-Defaulting Party.

1.49 “Product” means the RECs to be delivered in a particular Transaction, which may include Environmental Attributes, Verifications, Certifications and other characteristics as specified in a Product Order.

1.50 “Product Order” is the form used by the Parties to effect a Transaction in the form of Exhibit A, Exhibit B or as otherwise agreed by the Parties, specifying the terms of such Transaction, including the following: (1) the Product including a description of the Environmental Attributes in the Product, (2) the quantity to be purchased and sold; (3) the Purchase Price; (4) the Delivery Dates; and, (5) if necessary in accordance with the terms of the Transaction, (a) the Vintages; (b) the Renewable Energy Facility or Facilities from which the Product is to be generated; (c) the Certification Authority; and (d) the Verification Provider.

1.51 “Product Reporting Rights” means the exclusive right to report sole ownership of the Product to any Certification Authority, GIS, Administrator, Governmental Authority or other party, including under Section 1605(b) of the Energy Policy Act of 1992, or under any present or future Applicable Program.

1.52 “Purchase Price” means the price to be paid for a particular delivery of Product in a Transaction.

1.53 “Regulatorily Continuing” means, with respect to a Transaction, that if a Product is represented by a Party as complying with the requirements of an Applicable Program and Regulatorily Continuing, such compliance will be as of both the Delivery Date and the Trade Date, and Seller will do what is necessary to cause the Product that is delivered to comply with such requirements, including delivering substitute Product acceptable to Buyer if appropriate.

1.54 “Renewable Energy Certificate” or “REC” means a certificate, credit, allowance, green tag, or other transferable indicia, howsoever entitled, created by an Applicable Program or Certification Authority indicating generation of a particular quantity of energy, or Product associated with the generation of a specified quantity of energy from a Renewable Energy

Source by a Renewable Energy Facility. A REC may include some or all additional Environmental Attributes associated with the generation of electricity, and those Environmental Attributes may, but need not be, Verified or Certified by the same or different Verification Authorities or Certification Authorities, and disaggregated and retained or sold separately, all as the Parties agree in a Product Order. A REC is separate from the energy produced and may be separately transferred or conveyed.

1.55 “Renewable Energy Facility” means an electric generation unit or other facility or installation that produces electric energy using a Renewable Energy Source.

1.56 “Renewable Energy Source” means an energy source that is not fossil carbon-based, non-renewable or radioactive, and may include solar, wind, biomass, geothermal, landfill gas, or wave, tidal and thermal ocean technologies, and includes a Certified Renewable Energy Source.

1.57 “Renewable Portfolio Standard” or “RPS” means a state or federal law, rule or regulation that requires a stated amount or minimum proportion or quantity of electricity that is sold or used by specified persons to be generated from Renewable Energy Sources.

1.58 “Reporting Year” means a twelve-month compliance reporting period required under the Applicable Program.

1.59 “S&P” means the Standard & Poor’s Rating Group.

1.60 “Seller” means for any particular Transaction, the seller of the Product.

1.61 “Settlement Amount” means, with respect to a Transaction and the Non-Defaulting Party, the Losses or Gains, and Costs, including those which such Party incurs as a result of the liquidation of a Terminated Transaction pursuant to Section 5.2.

1.62 “Standard REC” and other Product Order defined terms, such as “Basic REC” and “Specified REC”, are defined in Schedule P.

1.63 “Taxes” mean all national, state, regional, provincial, local, foreign and other net income, gross income, gross receipts, sales, use, ad valorem, transfer, franchise, profits, license, lease, service, service use, withholding, payroll, employment, excise, severance, stamp, occupation, premium, property, windfall profits, fuel, gas import, customs, duties or other taxes, fees, assessments or charges of any kind whatsoever imposed by any Governmental Authority, together with any interest and any penalties, additions to tax or additional amounts with respect thereto.

1.64 “Terminated Transaction” is defined in Section 5.2.

1.65 “Termination Payment” is defined in Section 5.3.

1.66 “Trade Date” means the date a Transaction is entered into by execution of a Product Order or being verbally agreed upon (and confirmed in writing within three Business Days) by both transacting Parties.

1.67 “Transaction” is defined in Article 2.

1.68 “Transfer Certificate” means an Attestation, GIS record of ownership transfer, or other document evidencing Delivery of a REC and otherwise satisfying the requirements of the Parties and any specified Applicable Program.

1.69 “Unit Specific”, and other Product Order terms such as “Unit Non-specific”, “Unit Contingent” and “Generation Contingent”, are defined in Schedule P.

1.70 “UNFCCC” means the United Nations Framework Convention on Climate Change or the Kyoto Protocol thereto.

1.71 “Verification”, if applicable, is the Verification Provider’s report of its application of a Verification Methodology with respect to Environmental Attributes, as set forth by the Parties on the Product Order.

1.72 “Verification Methodology”, if any, means an identified, disclosed, quantitative methodology, capable of being expressed in words and quantitative factors, to measure activity or avoided activity, used by a Verification Provider.

1.73 “Verification Provider”, if any, means an entity that could be an entity other than the Certification Authority, but could also be the Certification Authority, that verifies or audits specified aspects of Products, RECs, or one or more specified Environmental Attributes.

1.74 “Vintage” means the calendar year, Reporting Year, or other calendar period specified by the Parties or the Certification Authority, as applicable, in which the Product is created or first valid for use under an Applicable Program.

1.75 “WREGIS” means the Western Renewable Energy Generation Information System.

1.76 Rules of Interpretation. Unless otherwise required by the context in which any term appears, (a) the singular includes the plural and vice versa; (b) references to “Articles,” “Sections,” “Schedules,” “Annexes,” or “Exhibits” are to articles, sections, schedules, annexes, or exhibits hereof; (c) all references to a particular entity or market price index include a reference to such entity’s or index’s successors and (if applicable) permitted assigns; (d) the words “herein,” “hereof” and “hereunder” refer to this Agreement as a whole and not to any particular Article, Section or subsection hereof; (e) all accounting terms not specifically defined herein will be construed in accordance with generally accepted accounting principles in the United States of America, consistently applied; (f) references to this Agreement include a reference to all appendices, annexes, schedules and exhibits hereto, as the same may be amended, modified, supplemented or replaced from time to time; (g) the masculine includes the feminine and neuter and vice versa; (h) “including” is construed in its broadest sense to mean “including without limitation” or “including, but not limited to”; (i) references to agreements and other legal instruments include all subsequent amendments thereto, and changes to, and restatements or replacements of, such agreements or instruments that are duly entered into and effective against the parties thereto or their permitted successors and assigns; (j) a reference to a statute or to a regulation issued by a Governmental Authority includes the statute or regulation in

force as of the Effective Date or Trade Date, as applicable, or Delivery Date with respect to a Product that is Regulatorily Continuing, together with all amendments and supplements thereto and any statute or regulation substituted for such statute or regulations; and (k) the word “or” is not necessarily exclusive.

## **ARTICLE 2: TRANSACTIONS; PAYMENT, TAXES AND TRANSFER OF TITLE**

2.1 Transactions. The Parties desire to enter into one or more transactions for the purchase and sale of Products under this Agreement (each a “Transaction”). Each such Transaction, unless otherwise agreed in writing, will be governed by this Agreement, including any supplemental terms or conditions contained in any annexes or schedules hereto. Each Transaction will be effected or Confirmed pursuant to a Product Order, unless the Parties otherwise agree in writing. The Parties intend for this Agreement to be a “master netting agreement” under United States Bankruptcy Code §101(38A).

2.2 Payment. Transactions will be settled by payment, in immediately available funds by wire or electronic fund transfer to the account set forth on the Cover Sheet, unless otherwise provided pursuant to the operating terms of the Administrator or other Delivery mechanism of the Applicable Program or agreed by the Parties in a particular Transaction, as follows:

(a) If the Parties have elected Payment on Delivery on the Cover Sheet, payment for any Product or part thereof to be Delivered pursuant to the terms of the Transaction will be due within three Business Days of the Delivery Date.

(b) If the Parties have elected Monthly Invoicing on the Cover Sheet, all invoices under this Agreement will be due and payable on or before the later of the 20th day of each month, or 10th day after receipt of the invoice or, if such day is not a Business Day, then on the next Business Day.

(c) If the Parties have elected Prepayment on the Cover Sheet, payment for any Product or part thereof to be Delivered pursuant to the terms of a Transaction will be due from Buyer prior to Delivery, and Seller will not be obligated to make Delivery until Seller is in receipt of such payment.

(d) If the Parties have elected Semiannual Invoicing on the Cover Sheet, payment for all Transactions under this Agreement, or any Product or part thereof to be Delivered pursuant to the terms of a Transaction, will be due and payable on or before the later of the second day of each January and each July or, if such day is not a Business Day, then on the next Business Day.

Each Party will make payments in accordance with invoice instructions by electronic funds transfer, or by other mutually agreed methods, to the account designated on the Cover Sheet. Any failure by Buyer to make a payment or prepayment will not excuse Buyer’s performance, and, unless otherwise provided in a Transaction, any failure by Seller to Deliver the quantity agreed to in the Transaction will not excuse Seller’s performance. Any amounts not paid by the due date are delinquent and will accrue interest at the prime rate of interest until an Event of Default has been declared, in which case such amounts will bear interest at the prime lending

rate of interest plus three percent per annum. A Party may, in good faith, dispute the correctness of any invoice within one year. If an invoice or portion thereof is disputed, the undisputed portion of the invoice must be paid when due, with notice of the objection given to the other Party. Any invoice dispute must be in writing and state the basis for the dispute, which must be in good faith. Subject to Section 5.4, a Party may withhold payment of the disputed amount until two Business Days following the resolution of the dispute, and any amounts not paid when originally due will bear interest at the prime lending rate of interest from the due date as originally invoiced. Inadvertent overpayments will be returned upon request or deducted by the Party receiving such overpayment from subsequent payments, with interest at the prime lending rate of interest from and including the date of such overpayment. Any dispute with respect to an invoice is waived unless the other Party is notified in accordance with this Section within one year after the invoice is rendered. The Parties will discharge mutual debts and payment obligations due and owing to each other pursuant to all Transactions through netting, in which case all amounts owed by each Party to the other Party for the purchase and sale of Products, including any related damages calculated, interest, and payments or credits, will be netted so that only the excess amount remaining due shall be paid by the Party who owes it.

2.3 Confirmation. Seller may confirm an oral Transaction by providing Buyer a Product Order within three Business Days after the Trade Date. In such event, Buyer will notify Seller in writing within two Business Days of Buyer's receipt if Buyer objects to any term of the Product Order, failing which Buyer will be deemed to have accepted the terms as sent. If Seller does not send a Product Order within three Business Days after the Trade Date, Buyer may send Seller a Product Order, and in such case Seller will notify Buyer in writing within two Business Days of Seller's receipt if Seller objects to any term of the Product Order, failing which Seller will be deemed to have accepted the terms as sent. If Seller and Buyer each send a Product Order and neither Party objects to the other Party's Product Order within two Business Days of receipt, Seller's Product Order will be deemed accepted and the controlling Product Order, unless Seller's Product Order was sent more than three Business Days after the Trade Date and Buyer's Product Order was sent prior to Seller's Product Order, in which case Buyer's Product Order will be deemed accepted and the controlling Product Order. Failure by either Party to send or return an executed Product Order, or any objection by either Party, will not invalidate the Transaction agreed to by the Parties.

2.4 Taxes and Fees. Seller will be responsible for any Taxes imposed on the creation, ownership, or transfer of Product under this Agreement up to and including the time and place of its Delivery. Buyer will be responsible for any Taxes imposed on the receipt or ownership of Product at or after the time and place of its Delivery. Each Party will be responsible for the payment of any fees, including brokers fees, incurred by it in connection with any Transactions hereunder.

2.5 Transfer of Title. None of Seller's property interest in the Product will pass to Buyer until the Delivery and payment set forth above are complete. Upon such completion, all rights, title and interest in and to the Product, to the full extent the same is property, will transfer to Buyer. To the extent that any Transaction is for Product not yet generated at the time of the Transaction, Seller agrees to make and Buyer agrees to accept actual Delivery of the Product, unless sooner netted out pursuant to opposite purchases and sales between the Parties.

2.6 Effect of Transfer of Environmental Attributes. By transferring a Product in a Transaction, Seller transfers any and all, and the exclusive, right to use that Product in any Applicable Program, whether or not the Product Order specifies that the Product is eligible for a particular Applicable Program, and whether or not the particular Product or any Environmental Attribute therein constitutes property, as well as any and all Product Reporting Rights. Transfer of an Environmental Attribute does not transfer eligibility for production tax credits or other direct third-party subsidies for generation of electricity by any specified Renewable Energy Facility. Delivery of a Product grants the Buyer the right, exclusive to the full extent applicable, to verify, certify, and otherwise take advantage of the rights, claims and ownership in the Product.

2.7 Verifying and Certifying. The type and amount of any Environmental Attribute transferred and Delivered will be measured, calculated, Verified and Certified as agreed by the Parties or as required pursuant to the Applicable Program. Unless otherwise specified in a Product Order or the written rules of the Applicable Program specified by the Parties, Seller will ensure that the Certification Authority, Verification Provider and Verification Methodologies are selected in compliance with this Agreement and the rules of the Applicable Program. A Verification Provider and Verification Methodology may be designated before or after Delivery, but unless required pursuant to the terms of the Applicable Program specified by the Parties, Verification is optional and need not be specified; and unless otherwise specified or required to comply with a representation for a Product sold as Regulatorily Continuing, expenses of Verification are the responsibility of the Seller if Verification is designated on or before the Trade Date, and the responsibility of Buyer if designated thereafter. Unless otherwise specified in the Product Order or the rules of the Applicable Program, the costs of the Verification Authority and Certification Authority are Seller's responsibility.

2.8 Secondary Markets; Exclusion of Warranties. Unless otherwise specified in a Product Order, neither Seller nor Buyer will have any liability to the other for any act, omission, misrepresentation, or breach (other than act or omission due to the failure to have fees, charges or expenses paid by the responsible Party) by a Certification Authority or Verification Provider, nor, unless otherwise specified, does Seller or Buyer warrant or represent that any particular Verification Methodology is the optimum way to calculate generation, emissions, avoidances, or other matters calculated or estimated pursuant thereto. Except with respect to a Product represented as Regulatorily Continuing, to the extent a Product is evidenced or Delivered with a Transfer Certificate, Disclosure Document or other documents executed by or setting forth the findings of third parties, the sole representations of Seller with respect thereto will be that (i) Seller has no actual knowledge that any statement therein is false or intentionally misleading, and (ii) the documents provided by it are true and correct copies of the documentation it has. All representations and warranties made by a Seller to a Buyer with respect to the Environmental Attributes, Renewable Energy Facility, Renewable Energy Source, energy delivery location, or Vintage of a Product are transferable by the Buyer. However, as different Applicable Programs have differing compliance requirements, any representation that a Product is Regulatorily Continuing applies solely to Product Delivery of the Seller to the Buyer and only up to the Delivery Date, and the benefit of such representation is not assignable by Buyer, except as consented to be Seller in writing. Any other representation of compliance with an Applicable

Program applies only up to the Trade Date. A Product Order may provide by its terms that the Renewable Energy Facility will be designated by the Seller after the Trade Date and on or before the Delivery Date, so long as once having been specified, the Delivery complies with the requirements of the Applicable Program, in the manner represented by Seller.

2.9 Scope of Agreement. Any transaction for the purchase and sale of Product which has been or will be entered into between the Parties constitutes a “Transaction” which is subject to, governed by, and construed in accordance with, the terms hereof.

### **ARTICLE 3: REPRESENTATIONS AND WARRANTIES**

3.1 Mutual Representations and Warranties. On the Effective Date and on each Trade Date, each Party represents and warrants to the other that:

(a) it is duly organized and validly existing under the laws of the jurisdiction of its incorporation or organization;

(b) it has the power and authority to enter into this Agreement and to perform its obligations hereunder;

(c) its execution and performance do not violate or conflict with Applicable Law, any provision of its constituent documents, or any contract binding on or affecting it or any of its assets or any order or judgment of any Governmental Authority applicable to it or its assets;

(d) all governmental and other authorizations, approvals, consents, notices and filings that are required to have been obtained or submitted by it with respect to entering into and performing this Agreement have been obtained or submitted and are in full force and effect and all conditions thereof have been complied with;

(e) its obligations hereunder are legal, valid and binding, enforceable in accordance with their respective terms, subject to applicable bankruptcy or similar laws affecting creditors’ rights generally and subject, as to enforceability, to equitable principles of general application regardless of whether enforcement is sought in a proceeding in equity or at law;

(f) no Event of Default, or Potential Event of Default, has occurred and is continuing, and none will occur as a result of its entering into or performing this Agreement or any Transaction;

(g) it is not relying upon any representations of the other Party other than those expressly set forth herein, and it is acting for its own account, and not as agent or in any other capacity, fiduciary or otherwise;

(h) it has entered hereinto with a full understanding of the material terms and risks of the same, and it is capable of assuming those risks;

(i) it is not relying on any communication (written or oral) of the other Party as investment advice or as a recommendation to enter into a transaction, and understands that

information and explanations related to the terms and conditions of any Transaction will not be considered investment advice or a recommendation to enter into that Transaction;

(j) it has made its own independent trading and investment decisions to enter into each transaction and as to whether such transaction is appropriate or proper for it based upon its own judgment and any advice from such advisors as it has deemed necessary and not in reliance upon any view expressed by the other Party;

(k) it has not received from the other Party any assurance, guarantee or promise as to the expected or projected success, profitability, return, performance, result, effect, consequence or benefit (either economic, legal, regulatory, tax, financial, accounting or otherwise) hereunder;

(l) there is no pending or to its knowledge threatened litigation, arbitration or administrative proceeding before any Governmental Authority or any arbitrator that is likely to materially adversely affect the ability of either Party to perform its obligations hereunder;

(m) it is a “forward contract merchant” within the meaning of United States Bankruptcy Code §101(26), and this Agreement and all Transactions hereunder constitute “forward contracts” within the meaning of United States Bankruptcy Code §101(26).

(n) it is an “eligible commercial entity”, and an “eligible contract participant” within the meaning of United States Commodity Exchange Act §§1a(11) and 1a(12), respectively, and all Transactions hereunder have been subject to individual negotiation by the Parties.

(o) all applicable information, documents or statements that have been furnished in writing by or on behalf of it to the other Party in connection with this Agreement are true, accurate and complete in every material respect and do not omit a material fact that would otherwise make the information, document or statement misleading;

3.2 Warranties of Seller. With respect to each Transaction, Seller represents and warrants to Buyer on the Trade Date for each Product that such Product complies with any Applicable Program for which the Product is specified as so complying in the Product Order, and on the Delivery Date for each Product that: (i) Seller has good and marketable title to such Product; (ii) Seller has not sold the Product or any Environmental Attribute of the Product to be transferred to Buyer to any other person or entity; (iii) all right, title and interest in and to such Product are free and clear of any liens, taxes, claims, security interests or other encumbrances except for any right or interest by any entity claiming through Buyer; (iv) each Environmental Attribute and REC meets the specifications set forth in the Product Order; (v) the Product is separate from the electric energy generated by the Renewable Energy Facility, unless otherwise specified by the Parties; (vi) only if specified in the Product Order as Regulatorily Continuing, that such Product complies with any Applicable Program for which the Product is specified as so complying and being Regulatorily Continuing through and up to the Delivery Date, (vii) unless separately disclosed to Buyer, with respect to Seller, the Product is not transferred, and has not been transferred pursuant to a contract filed or required to be filed with or approved by any Governmental Authority having jurisdiction over the sale of electric energy; and (viii) subject to Section 2.8 and unless otherwise specified to the contrary on the Product Order, Seller has

disclosed to Buyer any and all Transfer Certificates, Attestations, Disclosure Documents, all other relevant documentation received by it in connection with its acquisition of the Product sold to Buyer hereunder, and any use by any Environmental Attribute of the Product by Seller or any other person or entity to comply with any Applicable Program. Seller makes no claims respecting Verification that are not set forth in the Product Order.

3.3 LIMITATION OF WARRANTIES. ALL OTHER REPRESENTATIONS OR WARRANTIES, WRITTEN OR ORAL, EXPRESS OR IMPLIED, INCLUDING ANY REPRESENTATION OR WARRANTY OF MERCHANTABILITY OR OF FITNESS FOR ANY PARTICULAR PURPOSE OR WITH RESPECT TO CONFORMITY WITH ANY MODEL OR SAMPLES, ARE DISCLAIMED. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, EXCEPT WITH RESPECT TO A PRODUCT STATED TO BE REGULATORILY CONTINUING, AND IN THAT CASE ONLY TO THE EXTENT SET FORTH HEREIN OR IN A PRODUCT ORDER, NEITHER PARTY MAKES ANY REPRESENTATION OR WARRANTY HEREUNDER WITH RESPECT TO ANY FUTURE ACTION OR FAILURE TO ACT OR APPROVAL OR FAILURE TO APPROVE BY ANY GOVERNMENTAL AUTHORITY OR ADMINISTRATOR.

3.4 Indemnity. Each Party will indemnify, defend and hold harmless the other Party from and against any claims or demands made by others arising from or out of any event, circumstance, act or incident first occurring or existing during the period when control and title to Product is vested in such Party as provided herein, except to the extent arising from such Party's own gross negligence or willful misconduct. Each Party will indemnify, defend and hold harmless the other Party against any Taxes for which such Party is responsible under Section 2.4.

3.5 Cooperation on Delivery; Review of Records. Upon either Party's receipt of notice from an Administrator that the transfer of RECs pursuant to a Transaction will not be recognized or Product Delivery was not made as required pursuant to the terms of a Transaction, that Party will immediately so notify the other Party, providing a copy of such notice, and both Parties will cooperate in taking such action as are necessary and commercially reasonable to cause such transfer to be recognized and Product Delivered. Each Party agrees to provide copies of its records to the extent reasonably necessary for the Verification Provider or Certification Authority to perform the functions designated on the Product Order, and to verify the accuracy of any fact, statement, charge or computation made pursuant hereto if requested by the other Party. If any fact, statement, charge or computation contained any inaccuracy, the necessary adjustments and any resulting payments will be made promptly and the payments will bear interest at the prime lending rate of interest from the date the overpayment or underpayment was made until paid. If Seller is not the owner or operator of the Renewable Energy Facility that generated all of the Product in a Transaction, Seller will cooperate with Buyer in any efforts to review the records of the original Seller of such Product. If Seller is the owner or operator of the Renewable Energy Facility that generated any portion of the Product in a Transaction, it consents to the Buyer's assignment of rights under this Section to any subsequent purchaser of such Product. The obligations set forth in this Section terminate with respect to any particular Transaction on the later of thirty days following the last banking date under the Applicable Program for the Vintage of the Product Delivered, or the third anniversary of the Delivery Date.

3.6 Survival. Articles 1, 2, 3, 5, 8 and 9 survive expiration or termination hereof.

#### **ARTICLE 4: CREDIT AND COLLATERAL REQUIREMENTS**

The applicable credit and collateral requirements are specified on the Cover Sheet.

4.1 Financial Information. If indicated as Applicable on the Cover Sheet, if requested by a Party, the other Party will deliver (i) within 120 days following the end of each fiscal year, a copy of such Party's, or if applicable, the entity's specified on the Cover Sheet, annual report containing audited consolidated financial statements for such fiscal year, (ii) within 60 days after the end of each of its first three fiscal quarters of each fiscal year, a copy of the Party's, or, if applicable, the entity's specified on the Cover Sheet, quarterly report containing unaudited consolidated financial statements for such fiscal quarter, and (iii) such other information as specified in the Cover Sheet. In all cases the statements will be for the most recent accounting period and prepared in accordance with generally accepted accounting principles in the jurisdiction in which the reporting entity is organized; provided, however, that should any such statements not be available on a timely basis due to a delay in preparation or certification, such delay will not be an Event of Default so long as the relevant entity diligently pursues the preparation, certification and delivery of the statements. Timely filing of Form 10-K, Form 10-Q or Form 8-K with the Securities and Exchange Commission satisfies the requirements of this Section.

4.2 Credit Assurances. If stated to be applicable on the Cover Sheet for a Party, if the other Party has commercially reasonable grounds to believe that Party's creditworthiness or performance hereunder has become unsatisfactory, upon written notice requesting Performance Assurance in an amount determined by the other Party in a commercially reasonable manner, that Party will have three Business Days to provide such Performance Assurance. Failure to provide such Performance Assurance, or a guaranty or other credit assurance acceptable to the requesting Party within three Business Days of receipt of notice is an Event of Default.

4.3 Collateral Threshold. If the Parties have in place between them an Edison Electric Institute Master Power Purchase and Sale Agreement, and have selected Collateral Threshold Applicable under EEI on the Cover Sheet, then, notwithstanding whether an Event of Default has occurred, the Termination Payment that would be owed to by a Party hereunder will be included in the calculation of each Party's Termination Payment under (and as defined in) such agreement, and an event of default under such agreement will be an Event of Default hereunder and an Event of Default hereunder will be an event of default under such agreement. If the Parties have in place between them an ISDA Master Agreement with Credit Support Annex, and have selected Collateral Threshold Applicable under ISDA on the Cover Sheet, then, notwithstanding whether an Event of Default has occurred, the Termination Payment that would be owed to by a Party hereunder will be included in the calculation of each Party's Exposure under (and as defined in) such agreement, and an event of default under such agreement will be an Event of Default hereunder and an Event of Default hereunder will be an event of default under such agreement. If the Parties have elected either of the two foregoing options but at any time do not have in effect between them the referenced other agreements, or such referenced agreements do not provide for the exchange of margin or collateral thresholds, or if the Parties have selected Collateral Threshold Applicable Standalone on the Cover Sheet, if at any time and from time to time, notwithstanding whether an Event of Default has occurred, the Termination

Payment that would be owed to by a Party plus that Party's Independent Amount, if any, exceeds the Collateral Threshold specified, then the Party to whom such amount would be owed, on any Business Day, may request that owing Party to provide Performance Assurance in an amount equal to the amount of such excess, less any Performance Assurance already posted. Such Performance Assurance will be provided within three Business Days of the date of request. On any Business Day, but no more frequently than weekly with respect to letters of credit and daily with respect to cash, if there has been a reduction in the amount of such excess, the posting Party may request that such Performance Assurance be reduced correspondingly by the amount of such excess, if any. Failure to provide such Performance Assurance to the requesting Party within three Business Days of request is an Event of Default. For purposes of this Section, the Termination Payment will be calculated pursuant to Article 5 by the requesting Party as if the posting Party had defaulted and all outstanding Transactions had been liquidated, even if that is not actually the case, and in addition thereto, and include the net amount of all amounts owed but not yet paid between the Parties, whether or not such amounts are due, for performance already provided pursuant to any and all Transactions. A Party holding Performance Assurance in the form of cash posted by the other Party will pay the posting Party interest on such cash, monthly, at the Federal Funds rate of interest.

4.4 Downgrade Event. If Downgrade Event is indicated as Applicable on the Cover Sheet, if at any time there occurs a Downgrade Event in respect of a Party, then the other Party may require Performance Assurance in an amount determined by that Party in a commercially reasonable manner. Failure to provide such Performance Assurance to the requesting Party within three Business Days of request is an Event of Default.

4.5 Guarantee. If specified on the Cover Sheet, the Parties will provide, prior to or concurrently with the execution and delivery hereof, a guarantee in an amount not less than the Guarantee Amount specified on the Cover Sheet, in a form reasonably acceptable to the beneficiary Party.

## **ARTICLE 5: EVENTS OF DEFAULT; REMEDIES**

5.1 Events of Default. An "Event of Default" means, with respect to a Party (a "Defaulting Party"), the occurrence of any of the following:

(a) the failure to make, when due, any payment required pursuant hereto if such failure is not remedied within three Business Days after written notice;

(b) failure to Deliver or receive Product when due pursuant to a Transaction, provided that if the Potentially Defaulting Party pays a Settlement Amount to the Potentially Non-Defaulting Party for such Transaction (or the missing components thereof or performance hereunder if partial performance has been rendered) as if a Terminated Transaction as of the Delivery Date within three Business Days after the Potentially Non-Defaulting Party's notice to the Potentially Defaulting Party of the amount thereof, it will not be an Event of Default, unless five such failures have occurred in a consecutive rolling ninety day period.

(c) any representation or warranty made by such Party herein is false or misleading in any material respect when made or when made or repeated;

- (d) such Party becomes Bankrupt;
- (e) the failure of such Party to satisfy the creditworthiness and collateral requirements agreed to pursuant to Article 4 as specified on the Cover Sheet;
- (f) a Party's failure to perform any other material covenant or obligation set forth herein if such failure is not remedied within 20 Business Days after written notice;
- (g) if cross default is indicated for such Party on the Cover Sheet, the occurrence and continuation of (i) a default, event of default or other similar condition or event in respect of such Party or any other Party specified in the Cover Sheet for such Party under one or more agreements or instruments, individually or collectively, relating to indebtedness for borrowed money in an aggregate amount of not less than the applicable Cross Default Amount specified on the Cover Sheet, which results in such indebtedness becoming, or becoming capable at such time of being declared, immediately due and payable or (ii) a default by such Party or other Party specified in the Cover Sheet for such Party in making on the due date therefor one or more payments, individually or collectively, in an aggregate amount of not less than the applicable Cross Default Amount specified on the Cover Sheet;
- (h) with respect to such Party's Guarantor, if any:
  - (i) if any representation or warranty made by a Guarantor in connection with this Agreement is false or misleading in any material respect when made or when deemed made or repeated;
  - (ii) the failure of a Guarantor to make any payment required or to perform any other material covenant or obligation in any guaranty made in connection with this Agreement and such failure is not remedied within three Business Days after written notice;
  - (iii) a Guarantor becomes Bankrupt;
  - (iv) the failure of a Guarantor's guaranty to be in full force and effect for purposes hereof (other than in accordance with its terms) prior to the satisfaction of all obligations of such Party under each Transaction to which such guaranty relates without the written consent of the other Party; or
  - (v) a Guarantor repudiates, disaffirms, disclaims, or rejects or challenges, in whole or in part, the validity of any guaranty.

5.2 Declaration of Early Termination Date and Calculation of Settlement Amounts. If an Event of Default with respect to a Defaulting Party occurs and is continuing, the other Party (the "Non-Defaulting Party") will have the right (i) to designate a day, no earlier than the day such notice is effective and no later than 20 days after such notice is effective, as an early termination date ("Early Termination Date") to accelerate all amounts owing between the Parties and to liquidate and terminate all, but not less than all, Transactions (each referred to as a "Terminated Transaction") between the Parties, (ii) withhold any payments due to the Defaulting Party under this Agreement and (iii) suspend performance. The Non-Defaulting Party will calculate, in a commercially reasonable manner, a Settlement Amount for each such Terminated

Transaction as of the Early Termination Date (or, to the extent that in the reasonable opinion of the Non-Defaulting Party certain of such Terminated Transactions are commercially impracticable to liquidate and terminate or may not be liquidated and terminated under applicable law on the Early Termination Date, as soon thereafter as is reasonably practicable).

5.3 Net Out of Settlement Amounts. The Non-Defaulting Party will aggregate all Settlement Amounts into a single amount by netting out (a) all amounts that are due to the Defaulting Party for Product that has been Delivered and not yet paid for, plus, at the option of the Non-Defaulting Party, any cash, security or other Performance Assurance then available to the Non-Defaulting Party, plus any or all other amounts due to the Defaulting Party under this Agreement against (b) all Settlement Amounts that are due to the Non-Defaulting Party, plus any or all other amounts due to the Non-Defaulting Party under this Agreement, so that all such amounts will be netted out to a single liquidated amount (the “Termination Payment”) payable by the Defaulting Party. The Termination Payment, if any, is due from the Defaulting Party to the Non-Defaulting Party within two Business Days following notice.

5.4 Calculation Disputes. If the Defaulting Party disputes the Non-Defaulting Party’s calculation of the Settlement Amount or Termination Payment, in whole or in part, the Defaulting Party will, within two Business Days of receipt of Non-Defaulting Party’s calculation, provide to the Non-Defaulting Party a detailed written explanation of the basis for such dispute; provided, however, that the Defaulting Party must first transfer Performance Assurance to the Non-Defaulting Party in an amount equal to the full Settlement Amount or Termination Payment, as applicable. References to Defaulting Party and Non-Defaulting Party in this Section include the Potentially Defaulting Party and Potentially Non-Defaulting Party, as applicable.

5.5 Suspension of Performance. Notwithstanding any other provision hereof, if an Event of Default or a Potential Event of Default has occurred and is continuing, the Non-Defaulting Party, upon written notice to the Defaulting Party, has the right (i) to suspend performance under any or all Transactions and (ii) to the extent an Event of Default has occurred and is continuing, to exercise any remedy available at law or in equity, except as limited by Section 5.7.

5.6 Not a Penalty. The Parties intend that no part of this Article Five or any amount due thereunder represents a penalty to the Defaulting Party or Potentially Defaulting Party.

5.7 Limitation of Liability. IN NO EVENT WILL EITHER PARTY BE LIABLE TO THE OTHER FOR PUNITIVE, EXEMPLARY, OR INDIRECT DAMAGES, LOST PROFIT OR BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT, CONTRACT OR OTHERWISE, AND, EXCEPT FOR FAILURE TO DELIVER PRODUCTS PROMISED AS REGULATORY CONTINUING AS SPECIFICALLY SET FORTH HEREIN, NO PARTY WILL BE REQUIRED TO PAY OR BE LIABLE FOR CONSEQUENTIAL DAMAGES.

## **ARTICLE 6: FORCE MAJEURE**

If either Party is rendered unable, wholly or in part, by Force Majeure to carry out its obligations with respect to this Agreement, that upon such Party’s (the “Claiming Party”) giving

notice and full particulars of such Force Majeure as soon as reasonably possible after the occurrence of the cause relied upon, confirmed in writing, the obligations of the Claiming Party will, to the extent they are affected by such Force Majeure, be suspended during the continuance of said inability, but for no longer period, and the Claiming Party will not be in breach hereof or liable to the other Party for, or on account of, any loss, damage, injury or expense resulting from, or arising out of such event of Force Majeure. The Party receiving such notice of Force Majeure will have until the end of the Business Day following such receipt to notify the Claiming Party that it objects to or disputes the existence of Force Majeure. "Force Majeure" means an event or circumstance which materially adversely affects the ability of a Party to perform its obligations under one or more Transactions, which event or circumstance was not reasonably anticipated as of the date such Transaction was entered into and which is not within the reasonable control of, or the result of the negligence of, the Claiming Party, and which the Claiming Party is unable to overcome or avoid or cause to be avoided, by the exercise of due diligence. With respect to Unit Specific RECs, Force Majeure includes events or circumstances described in the previous sentence that disrupt the operation of the specified Renewable Energy Facility. Force Majeure may not be based on (i) the loss or failure of Buyer's markets; (ii) Buyer's inability economically to use or resell the Product purchased hereunder; or (iii) Seller's ability to sell the Product to another at a price greater than the Purchase Price. Force Majeure may include a change in Applicable Law, except for Regulatorily Continuing Transactions, or the failure or disruption in Deliveries of any Certification Authority that is not the Claiming Party. In the case of a Party's obligation to make payments hereunder, Force Majeure will be only an event or act of a Governmental Authority that on any day disables the banking system through which a Party makes such payments.

## **ARTICLE 7: GOVERNMENT ACTION**

The Parties acknowledge that the Applicable Programs, which among other things establish the conditions for a market for certain Products, may be the subject of Government Action (including court challenge) that could adversely affect the eligibility of a Product to meet the requirements of an Applicable Program or otherwise alter the requirements of the Applicable Program, or make a Product unavailable or dramatically diminished or increased in value. With respect to any Transaction, absent a representation by Seller that the Product complies with the requirements of a particular Applicable Program, Buyer bears the risk that the Product is or will be in compliance with any Applicable Program. With respect to any Transaction, if Seller represents that a Product complies with an Applicable Program, such representation is made and effective as of the Trade Date, and Seller will not be in breach of such representation on account of any Government Action occurring after the Trade Date, unless the Product is Regulatorily Continuing, in which case Seller must Deliver Product that complies with the Applicable Program as of the Delivery Date. Unless otherwise specifically specified in a particular Product Order, Government Action that changes in any respect the value of a Product (without rendering the Product out of compliance with the Applicable Program if Regulatorily Continuing), including a Cancellation of Applicable Program, will have no effect on the obligation of the Parties to purchase and sell such Product at the price and on the terms set forth in the Product Order. To the extent that Government Action renders Delivery illegal under Applicable Law, such Transaction will be terminated and that portion of whatever has been paid for Products not yet Delivered will be refunded by Seller, to the extent it is lawful to do so. Notwithstanding the

foregoing, no Transaction will be affected, cancelled, or otherwise impaired by Government Action that is specific to a Party under Applicable Law taken by a Governmental Authority alleging that Party's violation thereof.

## **ARTICLE 8: GOVERNING LAW; STATUTE OF FRAUDS**

This Agreement is governed by and construed in accordance with the laws of the State as set forth on the Cover Sheet; provided that the internal laws of the state establishing a Product stated to be in compliance with an Applicable Program governed by the laws of that state will govern with respect to such compliance. If this Agreement is said to be governed by New York law or California law, the Parties agree that this Agreement is a "qualified financial contract" within the meaning of New York General Obligations Law §5-701(b) or California Civil Code §1624(b)(2), respectively. The Parties acknowledge that if this Agreement is stated to be governed by the laws of a jurisdiction other than New York or California, that such other jurisdiction may not provide exemptions from the Statute of Frauds similar to those provided under the laws of New York and California, and that therefore in order for such Transaction to be enforceable, the Parties may need to put Transactions that will not be fully performed by a year from the Trade Date, or above a certain dollar amount, in a writing signed by both Parties. Unless a Party expressly objects at the beginning of a telephone conversation, each Party consents to the creation of a tape or electronic recording of all telephone conversations between them, and agrees to retain such recordings in confidence, secured from improper access, and available to be submitted in evidence in any proceeding relating hereto, including as evidence that a contract has been made between them. Each Party waives any further notice of such recording, and agrees to notify and obtain any necessary consents from its officers and employees, and indemnify, defend and hold harmless the other Party from any liability arising from failure to obtain such consents. To the full extent permitted under Applicable Law, if the Parties have agreed on the terms of a Transaction, the Parties agree not to contest, or to enter any defense concerning the validity or enforceability of a Transaction on the grounds that the documentation for such Transaction fails to comply with the requirements of a jurisdiction's Statute of Frauds or other Applicable Law requiring agreements to be written or signed.

## **ARTICLE 9: MISCELLANEOUS**

9.1 Term of Agreement. The term hereof commences on the Effective Date and remains in effect until terminated by either Party upon 30 days' prior written notice; provided, however, that such termination will not affect any Transaction entered into and not yet fully, faithfully, and indefeasibly performed as of such termination, or excuse the performance of either Party under any provision hereof that by its terms survives any such termination and, provided further, that this Agreement and any other documents executed and delivered hereunder will remain in effect with respect to the Transactions entered into prior to the effective date of such termination until both Parties have fulfilled all of their obligations with respect to such Transactions if such Transactions have not been terminated under Article 5 or 7.

9.2 Assignment. Neither Party may assign this Agreement or any Transaction without the prior written consent of the other, which consent will not be unreasonably withheld; provided, however, either Party may, without the consent of the other, (i) transfer, sell, pledge, encumber or assign this Agreement or the accounts, revenues or proceeds hereof in connection

with any financing or other financial arrangements (and without relieving itself from liability hereunder), (ii) transfer or assign this Agreement to an Affiliate of such Party which Affiliate's creditworthiness is equal to or higher than that of such Party on the Effective Date, or (iii) transfer or assign this Agreement to any person or entity succeeding to all or substantially all of the assets whose creditworthiness is equal to or higher than that of such Party on the Effective Date; provided, however, that in each such case, any such assignee must agree in writing to be bound by the terms and conditions hereof and so long as the transferring Party must deliver such tax and enforceability assurance as the non-transferring Party may reasonably request. This Agreement will bind each Party's successors and permitted assigns. Any attempted assignment in violation of this provision will be void ab initio.

9.3 Notices. All notices, requests, statements or payments will be made as specified in the Cover Sheet. Notices, unless otherwise specified herein, must be in writing and delivered by hand delivery, United States mail, overnight courier service or facsimile. Notice by facsimile or hand delivery is effective when actually received, if received before or during business hours on a Business Day, and otherwise will be effective on the next Business Day. Notice by overnight United States mail or courier will be effective on the next Business Day after it was sent. A Party may change its addresses by providing notice of same in accordance herewith.

9.4 Day Conventions. Unless otherwise specifically provided herein or in a Product Order, (i) "day" means a calendar day and includes Saturdays, Sundays and holidays, and (ii) if a payment falls due on a day that is not a Business Day, the payment will be due on the next Business Day thereafter.

9.5 General. (a) This Agreement constitutes the entire agreement between the Parties relating to its subject matter. Any prior agreement or negotiation between the Parties with respect to the subject hereof is superseded. Any Product Order or any collateral, credit support or margin agreement or similar arrangement between the Parties will, upon designation by the Parties, be deemed part hereof and incorporated herein by reference, with this Agreement controlling in the event of a contradiction.

(b) This Agreement will be considered for all purposes as prepared through the joint efforts of the Parties and not be construed against one Party or the other as a result of the preparation, substitution, organizational membership, submission or other event of negotiation, drafting or execution hereof.

(c) No amendment or modification hereto or to any written Product Order is enforceable unless in writing and executed by both Parties.

(d) Headings used herein are for convenience and reference purposes only.

(e) Nothing herein constitutes any Party a partner, agent or legal representative of the other Party or creates any fiduciary relationship between them.

(f) The waiver by either Party of a default or a breach by the other Party will not operate or be construed to operate as a waiver of any subsequent default or breach. The making

or the acceptance of a payment by either Party with knowledge of the existence of a default or breach will not operate as a waiver of any default or breach.

(g) Except as provided in a Product Order or pursuant to Article 7, if any provision hereof is, for any reason, determined to be invalid, illegal, or unenforceable in any respect, the Parties will negotiate in good faith and agree to such amendments, modifications, or supplements of or to this Agreement or such other appropriate actions that will, to the maximum extent practicable in light of such determination, implement and give effect to the intentions of the Parties as reflected herein, and the other provisions hereof will, as so amended, modified, or supplemented, or otherwise affected by such action, remain in full force and effect.

(h) This Agreement may be executed in counterparts, each of which will be deemed an original but all of which taken together will constitute one and the same original instrument.

9.6 Electronic Documents. Any document generated by the Parties with respect to this Agreement, including this Agreement, may be imaged and stored electronically and introduced as evidence in any proceeding as if original business records. Neither Party will object to the admissibility of such images as evidence in any proceeding on account of having been stored electronically.

9.7 Confidentiality. If the Parties have elected on the Cover Sheet to make this Section applicable, neither Party will disclose the terms or conditions of a Transaction or this Agreement to a third party (other than the Party's employees, Guarantor, lenders, counsel, accountants, agents or advisors who have to know such information and have agreed to keep such terms confidential) except: (a) in order to comply with any applicable law or regulation, or request of any regulatory agency having colorable jurisdiction over the Party and requesting the confidential information in the ordinary course of business, (b) rule or requirement of any exchange, Certification Authority, Administrator or Governmental Authority administering an RPS; (c) in connection with any court or regulatory proceeding; (d) Transaction information delivered to a Verification Provider as specified in a Product Order; and (e) to the extent such information is delivered to a third party for the sole purpose of calculating a published index or other published price source; provided, however, each Party will, to the extent practicable, use reasonable efforts to prevent or limit the disclosure. The Parties are entitled to all remedies available at law or in equity to enforce, or seek relief in connection with, this confidentiality obligation.

9.8 Dispute Resolution. Disputes under this Agreement will be resolved in accordance with applicable law, or in accordance with the provisions of the Dispute Resolution Addenda selected on the Cover Sheet.

**Section 9.8**  
**Dispute Resolution Addenda**

**Waiver of Jury Trial**

Waiver of Jury Trial. EACH PARTY KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND IRREVOCABLY WAIVES THE RIGHT TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON THIS AGREEMENT, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT AND ANY AGREEMENT EXECUTED OR CONTEMPLATED TO BE EXECUTED IN CONJUNCTION WITH THIS AGREEMENT, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO EACH OF THE PARTIES FOR ENTERING HEREINTO. EACH PARTY HEREBY WAIVES ANY RIGHT TO CONSOLIDATE ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR ANY OTHER AGREEMENT EXECUTED OR CONTEMPLATED TO BE EXECUTED IN CONJUNCTION WITH THIS AGREEMENT, OR ANY MATTER ARISING HEREUNDER OR THEREUNDER, IN WHICH A JURY TRIAL HAS NOT OR CANNOT BE WAIVED.

**Non-Binding Mediation**

(1) Negotiations. The Parties must attempt in good faith to resolve all disputes arising out of, related to or in connection with this Agreement promptly by negotiation, as follows. Any Party may give the other Party written notice of any dispute not resolved in the normal course of business. Executives of both Parties at levels one level above the personnel who have previously been involved in the dispute must meet at a mutually acceptable time and place within ten days after delivery of such notice, and thereafter as often as they reasonably deem necessary, to exchange relevant information and to attempt to resolve the dispute. If the matter has not been resolved within 30 days after the referral of the dispute to such senior executives, or if no meeting of such senior executives has taken place within 15 days after such referral, either Party may initiate a dispute resolution method as provided hereinafter if neither Party has requested that the dispute be mediated in accordance with Section (2) below. All negotiations pursuant to this clause are confidential.

(2) Mediation. If the dispute is not resolved within 30 days after the referral of the dispute to senior executives, or if no meeting of senior executives has taken place within 15 days after such referral, either Party may request that the matter be submitted to nonbinding mediation. If the other Party agrees, the mediation will be conducted in accordance with the Commercial Arbitration Rules and Mediation Procedures (Including Procedures for Large, Complex Commercial Disputes) of the American Arbitration Association (the "AAA"), as amended and effective on July 1, 2003 (the "AAA Rules"), notwithstanding any dollar amounts or dollar limitations contained therein.

(a) The Party requesting the mediation, may commence the mediation process with AAA by notifying AAA and the other Party in writing ("Mediation Notice") of such Party's desire that the dispute be resolved through mediation, including therewith a copy of the Dispute

Notice and the response thereto, if any, and a copy of the other Party's written agreement to such mediation.

(b) The mediation will be conducted at the place designated on the Cover Sheet by a single mediator. The Parties may select any mutually acceptable mediator. If the Parties cannot agree on a mediator within five days after the date of the Mediation Notice, then the AAA's Administrator will send a list and resumes of three available mediators to the Parties, each of whom will strike one name, and the remaining person will be appointed as the mediator. If more than one name remains, either because one or both Parties have failed to respond to the AAA's Administrator within five 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 Administrator will choose the mediator from the remaining names within five days. If the designated mediator dies, becomes incapable, unwilling, or unable to serve or proceed with the mediation, a substitute mediator will be appointed in accordance with the selection procedure described above, and such substitute mediator will have all such powers as if he or she has been originally appointed herein.

(c) The mediation will consist of one or more informal, nonbinding meetings between the Parties and the mediator, jointly and in separate caucuses, out of which the mediator will seek to guide the Parties to a resolution of the Dispute. The mediation process will continue until the resolution of the dispute, or the termination of the mediation process pursuant to this Section. The costs of the mediation, including fees and expenses, will be borne equally by the Parties.

(d) All verbal and written communications between the Parties and issued or prepared in connection with this Section will be deemed prepared and communicated in furtherance, and in the context, of dispute settlement, and will be exempt from discovery and production, and will not be admissible in evidence (whether as admission or otherwise) in any litigation or other proceedings for the resolution of the dispute.

(e) The initial mediation conference between the Parties and the mediator, which may be held by telephone, will be held within 25 days after the Mediation Notice. Either Party may terminate the mediation process upon or after the earlier to occur of (A) the failure of the initial mediation conference to occur within 25 days after the date of the Mediation Notice, (B) the passage of 45 days after the date of the Mediation Notice without the dispute having been resolved, or (C) such time as the mediator makes a finding that there is no possibility of resolution through mediation.

(f) All deadlines in this Section may be extended by mutual agreement.

(3) Settlement Discussions. No statements of position or offers of settlement made in the course of the dispute process described in this Section will be offered into evidence for any purpose in any litigation between the Parties, nor will any such statements or offers of settlement constitute an admission or waiver of rights by either Party in connection with any such litigation. At the request of either Party, any such statements and offers of settlement, and all copies thereof, will be promptly returned to the Party providing the same.

## **Binding Arbitration**

(1) Any dispute or claim arising out of or related hereto or any breach thereof or any need for interpretation related to any dispute arising out of or related hereto will be settled by binding arbitration administered by the American Arbitration Association at the place designated on the Cover Sheet. Either Party will have the right to commence an arbitration by written notice to the other Party after the expiration of a 30 day negotiation period, or if nonbinding mediation was designated in the Cover Sheet, 10 days after the termination of the mediation. The arbitration will be conducted as follows:

(A) There will be one arbitrator who has not previously been employed by either Party, is qualified by education or experience to decide the matters relating to the questions in dispute, and does not have a direct or indirect interest in either Party or a financial interest in the outcome of the arbitration and who is available within the time frames set forth herein. Such arbitrator will either be selected by mutual agreement by the Parties within 30 days after written notice from the Party requesting arbitration, or failing agreement by such time, the arbitrator will be selected within the following 14 days by the AAA under the AAA Rules.

(B) Such arbitration will be held at the location specified on the Cover Sheet. Absent agreement, the arbitrator shall set the location of the arbitration based on where it is most convenient and cost effective to resolve the dispute, and if it is an international matter, with regard to any special considerations raised by the Parties that may therefore be relevant.

(C) The AAA Rules (including the Optional Rules for Emergency Protection Measures) apply to the extent not inconsistent with the rules herein specified. If the dispute is international in scope as defined in the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, the AAA's Supplementary Procedures for International Commercial Disputes shall apply.

(D) The hearing will be conducted on a confidential basis and except as required by law, neither the Parties nor the arbitrator may disclose the existence, content or results of any arbitration hereunder without the prior written consent of all the parties.

(E) At the request of a Party, the arbitrator will have the discretion to order an examination of witnesses to the extent the arbitrator deems such additional discovery relevant and appropriate. Depositions will be limited to a maximum of two depositions for each Party, may be held by video conferencing to reduce travel expenses, and each deposition limited to a maximum of three hours. All objections are reserved to the hearing except objections based on privilege and proprietary or confidential information.

(F) At the conclusion of the hearing, if Baseball Arbitration is selected on the Cover Sheet, each Party will submit a form of award to the arbitrator setting out its proposed resolution of the dispute or claim and the arbitrator must issue an award in accordance with only one or the other of the forms of award proposed by the Parties (popularly referred to as baseball arbitration); otherwise, the arbitrator will deliver an award consistent with the facts and the law and will not be limited to any forms of award proposed by the Parties; provided, that, the decision must resolve the dispute in a manner consistent with this Agreement.

(G) The arbitrator will issue a confidential award accompanied by a statement regarding the reasons for the decision.

(H) The arbitrator and the Parties will make every attempt to resolve the arbitration within 90 days of appointment. Upon the application of a Party and for good cause shown, the arbitrator may extend this time. Under no circumstances will the arbitration take longer than six months from the appointment of the arbitrator. However, failure to conclude the arbitration within the six month period will not constitute grounds for vacating the award.

(I) Each Party will be responsible for its own filing fees and case service fees in connection with its claim. Other expenses and arbitrator compensation will be borne equally, subject to final apportionment by the arbitrator. Each Party will be responsible for its own expenses and those of its counsel and representatives.

(J) Any offer made or the details of any negotiation regarding the dispute prior to arbitration and the cost to the Parties of their representatives and counsel will not be admissible.

(2) Judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction by the Party in whose favor such award is made.

(3) Regardless of any procedures or rules of the AAA: (i) the arbitrator will have no authority to award punitive damages, or any other form of damages waived by the Parties pursuant to the Agreement, or attorneys' fees; and (ii) the Parties may by written agreement alter any time deadline, locations for meetings, or procedure outlined in this Section or in the AAA Rules, except that the provisions of subsection (1)(H) above will govern with respect to the time frame for the conclusion of the arbitration.

## **SCHEDULE P: PRODUCT ORDER DEFINED TERMS**

“Standard REC” means a REC that includes all Environmental Attributes arising as a result of the generation of electricity associated with the REC, whether or not such Environmental Attributes have been Verified or Certified and whether or not creditable under any existing Applicable Program.

“Basic REC” means a REC that consists solely of a Certification of the generation of electricity by a Renewable Energy Resource, without any additional Environmental Attributes.

“Specified REC” means a REC that includes specified Environmental Attributes in addition to the generation of electricity by a Renewable Resource. Additional Environmental attributes may be specified individually or as the residue after specific Environmental Attributes are removed.

“Unit Specific” when referring to Product means that the Renewable Energy Facility that has generated or is eligible to generate the Product is and must be specified.

“Unit Non-specific” when referring to Product means that the Renewable Energy Facility that has generated or is eligible to generate the Product need not be specified..

“Unit Contingent” means that Seller is excused from any failure to Deliver Product quantity on account of failure of a specified Renewable Energy Facility to generate the amount of RECs necessary in the Vintage or other time period indicated. In such event, Seller shall not be liable to Buyer for any damages, including any amounts determined pursuant to Article 5.

“Generation Contingent” means Seller’s failure to Deliver is excused if the Renewable Energy Facility for any reason does not generate sufficient measured energy in the Vintage or other time period indicated to satisfy all obligations of RECs delivery assigned by Seller to the Renewable Energy Facility. In such event, Seller shall not be liable to Buyer for any damages, including any amounts determined pursuant to Article 5.

“Mid-Year Vintage” or “PJM Reporting Year” means the twelve-month period from June 1<sup>st</sup> through May 31<sup>st</sup>. A reporting year shall be numbered according to the calendar year in which it ends, so that reporting year 2007 runs from June 1, 2006 through May 31, 2007.

**EXHIBIT A: EXAMPLE PRODUCT ORDER WITH DISCLOSURE DOCUMENT**

**Each Product Order is for a single Transaction, which may include multiple deliveries of a single Product and, accordingly, multiple Vintages. A Product includes one or more Environmental Attributes. If the Product is Unit Specific, the Renewable Energy Facilities that generate it must be specified. Part A of this Product Order primarily relates to the specification and Certification of RECs, and Part B, the Disclosure Document, primarily relates to Verification of Environmental Attributes. Seller warrants the accuracy and completeness of the matters set forth herein.**

**Part A. Transaction and its Certification**

The following describes a Transaction between Buyer and Seller for the sale, purchase and delivery of Product pursuant to the terms of the Master Renewable Energy Certificate Purchase and Sale Agreement between them dated [ ] (the "Agreement"). Initially capitalized terms used and not otherwise defined herein are defined in the Agreement and Schedule P.

1. **Deliveries and Quantity.** On each Delivery Date set forth in the table, Seller will deliver the quantity of the Product (as defined below) having Vintages as and if specified, and Buyer will pay the specified Purchase Price, all in accordance with the Agreement.

REC Delivery	Delivery Dates (indicate dates or as generated, as applicable)	Delivery Type (indicate multiple/periodic deliveries, if applicable)	Quantity (in MWhrs, unless otherwise indicated)	Vintage (month/year, as applicable)	Purchase Price (\$ per MWhr unless otherwise indicated)
Delivery 1					
Delivery 2					
Delivery 3					

2. **Environmental Attributes and Verification (Go to Part B as applicable).** The Product is:

- Standard RECs (see Schedule P)
- Basic RECs.
- Specified REC; complete Part B.
- otherwise requires separate Verification as set forth on Part B.
- other: \_\_\_\_\_.

3. **Facility Information.** The Product is:

- Renewable Energy Facility or Unit Specific; if so, complete the following:

Name of Facility	Location of Facility	EIA number	Online Date

- Renewable Energy Source specific; if so, state: \_\_\_\_\_

- Aggregator area specific. Use the following table for generator aggregation programs:

REC Delivery	Unit Specific Generating Renewable Energy Unit / Renewable Energy Source	Generating Renewable Energy Aggregation Program / Renewable Energy Sources	Location of Generator or Area of Aggregation
Delivery 1			
Delivery 2			
Delivery 3			

4. **Certifications.** The Product is:

- RECs GIS serial numbers if applicable: \_\_\_\_\_
- All Certification Authorities for the REC applicable: \_\_\_\_\_
- eligible for the RPS program in the following jurisdictions (by checking this box the Seller warrants, as of the Trade Date, that the Product meets all the requirements of the Applicable Program for compliance as in effect on the Trade Date, including, if applicable, Vintage and where the associated energy has been delivered):

REC Delivery	RPS Program	Compliance Value Bonus or Reduction (if applicable)	Other Characteristics	Certified by [Certification Authority]
Delivery 1				
Delivery 2				
Delivery 3				

5. **Risk Allocation.** The Product is:

- Regulatorily Continuing. Check only if applicable; if checked, “as of the Trade Date” in the proceeding representation is replaced with “as of the Delivery Date”.
- Unit Contingent (only check if applicable)
- Generation Contingent (only check if applicable)

The parties agree to the Transaction set forth herein.

[Seller]

[Buyer]

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

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

**Continue to Part B, as applicable. Use additional sheets as necessary.**

**Exhibit A / Part B – Renewable Energy Certificate Disclosure Document**  
for Delivery number \_\_\_\_\_ (corresponding to Delivery numbers specified in Part A)

*If the transaction entails multiple REC Deliveries, fill out a separate Part B for each Delivery. All specifications and claims described here in Part B refer only to the specified Delivery.*

**1**

**Standard REC, Claims to all Environmental Attributes present, unverified and being Delivered\***

***If checked, stop and proceed to Transfer Certificate***

\* Depending on location unverified Environmental Attributes may approach zero in magnitude or be zero.

**2**

**Basic REC, Generation/Generator diversity attributes only, Claims to all Environmental Attributes are not transferred or Delivered**

***If checked, stop and proceed to Transfer Certificate***

**NOTE: Select only one REC type/track in Boxes 1, 2, or 3 (follow all arrows, check all applicable boxes and fill out all applicable fields to complete track 3)**

**Or**

**3**

**Specified REC**

Check this box, and the appropriate box(es) below, to indicate a verified Environmental Attribute, only checked boxes represent verified Environmental Attributes, all not checked as verified are deemed to be unverified and transferred to Buyer unless noted directly below.

Displaced CO<sub>2</sub>e or other greenhouse gas emissions

Displaced NO<sub>x</sub> emissions

Displaced \_\_\_\_\_

Displaced Hg emissions

Displaced PM emissions

Displaced SO<sub>2</sub> emissions

Displaced or reduced land resource impacts

Displaced or reduced water resource impacts

Direct reduction of \_\_\_\_\_ ◇◇

**B.1.a**

**Environmental Attribute Verification Specifications for Displaced \_\_\_\_\_ Emissions or Impacts\*\*\***

Verification Provider \_\_\_\_\_

Verification Methodology\*\* \_\_\_\_\_

Date of Environmental Attribute Verification/Quantity of Verified Displacement♦♦ \_\_\_\_\_ / \_\_\_\_\_

\*\* Planning models, dispatch models, E-grid, etc.  
\*\*\* See Annex to include verification specifications for additional Environmental Attributes.

**B.1.b**

**Environmental Attribute Verification Specifications for Direct Reduction of \_\_\_\_\_ Emissions or Impacts\*\*\***

Verification Provider \_\_\_\_\_

Verification Methodology – attach separate form to Part B detailing baseline analysis and Verification report \_\_\_\_\_

Date of Verification/Quantity of verified reduction♦♦ \_\_\_\_\_ / \_\_\_\_\_

◇◇ For example landfill gas methane capture or other renewable energy projects that create direct emissions reductions. Note that Displacement refers to indirect emissions reductions.

♦♦ If Environmental Attribute Verification has not occurred, enter planned future date of Verification. This written form must be finalized and sent to both Parties no later than ten days following completion the future Verification. Unless otherwise agreed, Seller is responsible for the costs of Verification up to the REC Delivery Date with the Buyer responsible for Verification post-Delivery, the Seller retains responsibility to offer reasonable assistance to the Buyer as set forth in the Agreement.

**B.2.a**

**Verified Environmental Attribute Status**

Present and being Delivered

**OR**

Present and being retained by Seller

**OR**

Previously retired by Seller on \_\_\_\_\_ [date]

**OR**

Previously transferred on \_\_\_\_\_ [date] to \_\_\_\_\_

**OR**

Exchanged with Applicable Program for other environmental instrument

**B.2.b**

**Verified Environmental Attribute Status**

Present and being Delivered

**OR**

Present and being retained by Seller

**OR**

Previously retired by Seller on \_\_\_\_\_ [date]

**OR**

Previously transferred on \_\_\_\_\_ [date] to \_\_\_\_\_

**OR**

Exchanged with Applicable Program for other environmental instrument

**B.3.a/b**

**Non-RPS Applicable Program assets associated with REC Delivery**  
(leave boxes unchecked if none applicable and this is currently a voluntary market transaction, use Annex 2 for additional non-RPS Applicable Program Asset details)

**Carbon market allocation to specific unit or aggregation program associated with REC Delivery**

Official Federal and/or State/Regional approval by \_\_\_\_\_ for \_\_\_\_\_ [number] of \_\_\_\_\_ [allowances] for the \_\_\_\_\_ [program] on \_\_\_\_\_ [date]. List serial numbers of tradeable instruments/allowances in Annex.

**Carbon market offset credit/offset allowance granted to specific unit or aggregation program associated with REC Delivery**

Official Federal and/or State/Regional approval by \_\_\_\_\_ for \_\_\_\_\_ [number] of \_\_\_\_\_ [offset credits/offset allowances] for the \_\_\_\_\_ [program] on \_\_\_\_\_ [date]. List serial numbers of tradeable instruments/offset credits or allowances in Annex.

**Other Applicable Program instruments (e.g. Clean Air Act SIP credit, nutrient loading/water credits)**

Official Federal and/or State/Regional approval for \_\_\_\_\_ [number] of \_\_\_\_\_ [tradeable instruments] for the \_\_\_\_\_ [program] as displaced and/or reduced \_\_\_\_\_ emissions or impacts on \_\_\_\_\_ [date]. List serial numbers of tradeable instruments in Annex.

**Unverified Environmental Attributes not being Transferred or Delivered by Seller**

Unless indicated above as verified, only the following unverified Environmental Attributes listed below (including all claims, assets and future tradeable instruments, both voluntary and regulatory, related to the unverified attribute) are not being transferred or Delivered by Seller:

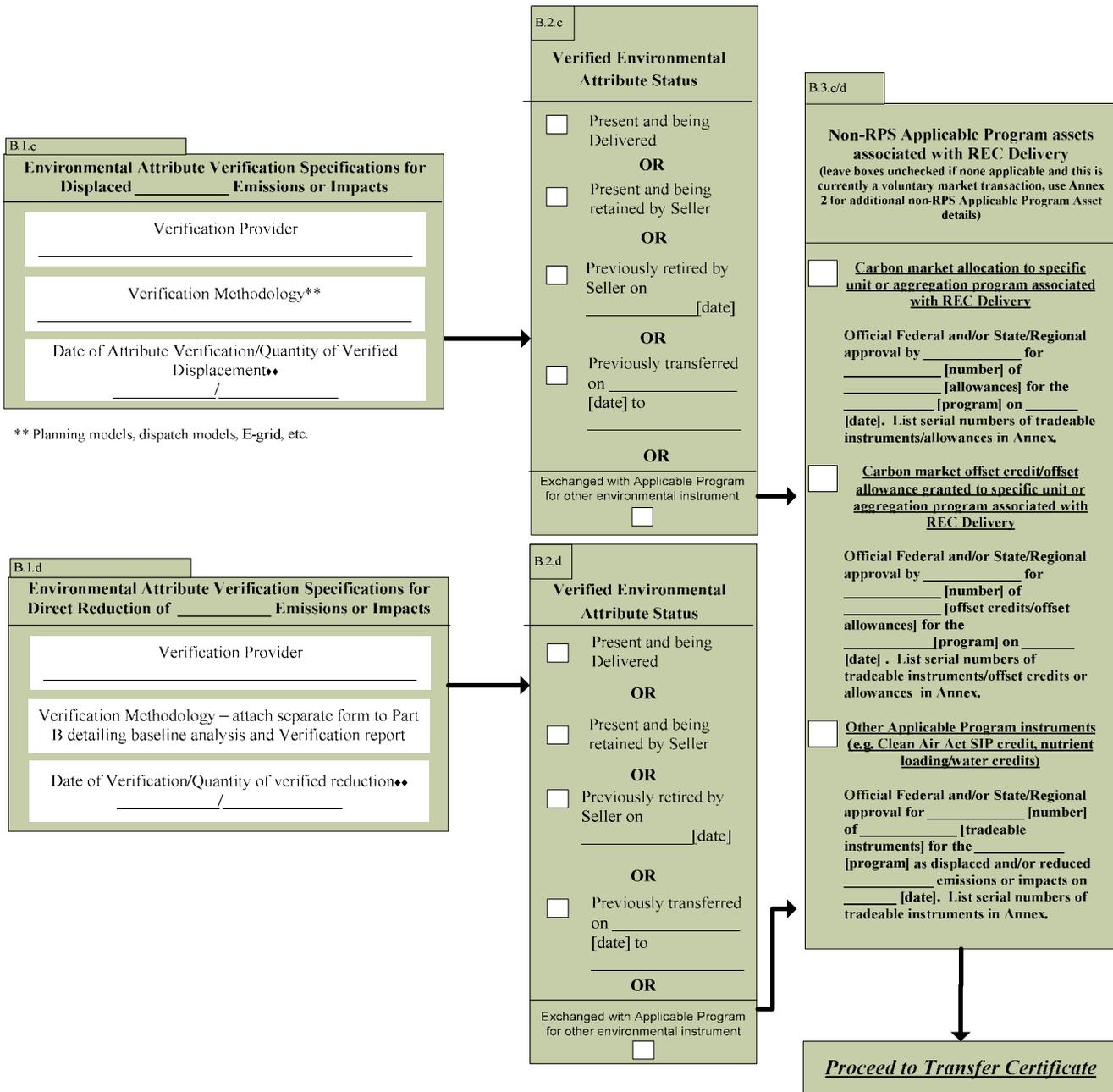
\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

***Proceed to Transfer Certificate***

## Annex to Part B



\*\* Planning models, dispatch models, E-grid, etc.

\*\* Planning models, dispatch models, E-grid, etc.

♦♦ For example landfill gas methane capture or other Renewable Energy Source that creates direct emissions reductions.

♦♦ If Environmental Attribute Verification has not occurred, enter planned future date of Verification. This written form must be finalized and sent to both Parties no later than ten days following completion the future Verification. Unless otherwise agreed, Seller is responsible for the costs of Verification up to the REC Delivery Date with the Buyer responsible for Verification post-Delivery, the Seller retains responsibility to offer reasonable assistance to the Buyer as set forth in the Agreement.

**B.3 Extra**

If applicable, specify generating renewable energy aggregation program, with location of generator or areas of aggregation, and Certification Authority:

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**B.3.Extra**

Non-RPS Applicable Program or environmental regulatory market additional details

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Schedule B.3 Serial Numbers			
	Tradeable environmental instrument type	Set aside or other source of tradeable environmental instrument	Serial Number
Tradeable environmental instrument # 1			
Tradeable environmental instrument # 2			
Tradeable environmental instrument # 3			
Tradeable environmental instrument # 4			

**B.3 SIP Credit - Clean Air Act State Implementation Plan (SIP) Credit for Renewable Energy Emission Reduction Measures** ♦

No emissions trading system present for Verified as displaced \_\_\_\_\_ emissions

Official approval of renewable energy emissions reduction measure by EPA and the State of \_\_\_\_\_, on \_\_\_\_\_ [date].

OR

Emissions trading system present for Verified as displaced \_\_\_\_\_ emissions

Official approval of renewable energy emissions reduction measure by EPA and the State of \_\_\_\_\_, on \_\_\_\_\_ [date], with commensurate retirement of \_\_\_\_\_ [number] of relevant emissions allowances from \_\_\_\_\_ [set aside or other allowance source], with allowance serial numbers listed in B.3.

♦ For SIP Credit, the Renewable Energy Facility producing RECs may not already be accounted for in the SIP attainment demonstration and the emissions that are being displaced must be included in the inventory used for the attainment demonstration and the emissions being displaced must be shown to impact the non-attainment area.



**EXHIBIT C  
EXAMPLE ATTESTATION**

I, \_\_\_\_\_, as the authorized representative of [Company Name] (“Seller”) declare that Seller hereby sells, transfers and delivers to Buyer the Product (including, unless otherwise specified, all Environmental Attributes and Product Reporting Rights) associated with the generation and delivery of energy to Buyer from the Renewable Energy Facility as described below, in the amount of one REC for each megawatt hour generated as Delivery of [Product], as said term is defined in the Product Order with a Trade Date of \_\_\_\_\_, 20\_\_ with Buyer pursuant to a Master Renewable Energy Certificate Purchase and Sale Agreement (the “Agreement”) with Buyer dated \_\_\_\_\_ (initially capitalized terms defined in the Agreement and Schedule P thereto), and that the RECs sold hereunder:

1. were generated by the following Renewable Energy Facilities and sold, subject to receipt of payment, to Buyer;
2. qualify as [Product] as of the Trade Date;
3. are solely and exclusively owned by Seller;
4. The have not been used by Seller or any third party to meet the RPS or other Applicable Program requirements in another state or jurisdiction;
5. were delivered into the [Delivery Area (e.g. PJM Control Area (as defined by PJM))] and complied with [PJM] energy delivery rules;
6. were not sold to any end-use customer or other wholesale provider other than Buyer during the calendar/Reporting Year; and,
7. were not used on-site for generation.

Generator Name or Designation	Technology Type	Fuel Type	Generator Location	EIA #	[Product]	Start and End Dates

\* must conform to the Product Order

As an authorized representative of Seller, I state that the above statements are true and correct to the best of my knowledge. This Attestation may serve as a Bill of Sale to confirm, in accordance with the Agreement, the transfer from Seller to Buyer all of Seller’s right, title and interest in and to the Product as set forth above.

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

Date \_\_\_\_\_  
[notarize if required]

This Attestation may be disclosed by Seller and Buyer to others, including the Administrator, Verification Provider, Certification Authority and the public utility commissions having jurisdiction over Buyer, to substantiate and verify the accuracy of the Parties’ compliance, advertising and public claims.

**EXHIBIT D  
EXAMPLE ATTESTATION**

I, (print name and title) \_\_\_\_\_, declare that the (indicate with “x”)<sup>1</sup> \_\_\_ electricity/ \_\_\_ renewable attributes listed below were sold exclusively from: (name of Wholesale Provider) \_\_\_\_\_ to: (name of REC provider, utility, or electric service provider [“Purchaser”]) \_\_\_\_\_. Further, I declare that:

- 1) all the Environmental Attributes, including any emissions reduction credits or emissions allowances, represented by the renewable electricity generation listed below are transferred to the Purchaser above,
- 2) to the best of my knowledge, the Environmental Attributes were not sold, marketed or otherwise claimed by a third party;
- 3) (Wholesale Provider) \_\_\_\_\_ sold the renewable attributes only once;
- 4) the Environmental Attributes or the electricity that was generated with the attributes was not used to meet any federal, state or local renewable energy requirement, renewable energy procurement, renewable portfolio standard, or other renewable energy mandate by (Wholesale Provider), \_\_\_\_\_ nor, to the best of my knowledge, any other entity; and
- 5) the electrical energy that was generated with the attributes was not separately sold, separately marketed or otherwise separately represented as renewable energy by (Wholesale Provider), \_\_\_\_\_ or, to the best of my knowledge, any other entity.

Further, I declare that the facilities that generated all of the (indicate with “x”) \_\_\_ electricity/ \_\_\_ renewable attributes sold to (Purchaser) \_\_\_\_\_ are listed below by fuel type. NO<sub>x</sub>, SO<sub>2</sub>, and CO<sub>2</sub> emissions information is provided for all fossil-fueled generation, and NO<sub>x</sub> emission information is also provided for biomass, landfill gas, and digester gas generation as required.<sup>2</sup>

Generator Name	Generator ID Number	Fuel Type (if biomass, list fuel)	# MWhs TRCs / Power Sold	1 <sup>st</sup> Date of Generator Operation (mm/yy) <sup>3</sup>	NO <sub>x</sub> Emissions (Lbs/MWh)	SO <sub>2</sub> Emissions (Lbs/MWh)	CO <sub>2</sub> Emissions (Lbs/MWh)	Period of Generation (Q#/yy or mm/yy) <sup>4</sup>
Jane’s Wind Farm		Wind	10	1/1/1997	None			Q1/2004

As an authorized agent of (Wholesale Provider) \_\_\_\_\_, I attest that the above statements are true and correct.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Place of Execution

**Additional statement required of provider selling electricity.**

**I declare that the electricity listed above was delivered into the regional grid as follows:**

- **PJM, PA, OH, IL, MI, or VA for sales in PA, NJ, MD, DC, DE, and VA;**
- **ECAR for sales in OH;**
- **ISO New England for sales in CT, VT, NH, ME, RI, and MA;**
- **WECC for sales in CA, OR, WA and ID; and**
- **NY ISO for sales in NY.**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Place of Execution

<sup>1</sup> Use separate forms to report electricity and TRC sales.

<sup>2</sup> Annual energy weighted average NOx Emissions data is required for Landfill Gas generation resources located in Maine, Vermont, New Hampshire, Massachusetts, Connecticut, Rhode Island, New York, Minnesota, Georgia and North Carolina. Annual energy weighted average NOx Emissions data is required for digester Gas generation resources located in New York, Minnesota, Georgia and North Carolina. Annual energy weighted average NOx emissions data is required for all other eligible biomass resources located in: Maine, Vermont, New Hampshire, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Maryland, District of Columbia, Pennsylvania, Delaware, Virginia, Minnesota, Georgia and North Carolina.

<sup>3</sup> For facilities that have added new renewable capacity, please indicate the amount and operational date of the new capacity and the existing capacity.

<sup>4</sup> List as separate line items MWh generated in each quarter.

## GUIDANCE NOTES

### Applicable Programs

Parties should satisfy themselves that the Product that they are buying and selling, and the manner of transacting, meets the definition, delivery and other requirements of the Applicable Program. The drafters of this contract make no warranty or representation either way. For your convenience, a list of some Applicable Program websites with information concerning compliance is posted at <http://environmentalmarkets.org/>. Note that these programs are constantly under revision and development; this very contract is offered with the hope of assisting these Applicable Programs in developing consistent and acceptable definitions. Accordingly, parties should review the statutory and regulatory language of the Applicable Program to ensure that the Product delivered complies with the requirements. For example, the defined term “Standard RECs” as used in this contract is intended (but not guaranteed) to meet the definitional requirements of California programs for Renewable Energy Facilities that are certified as complying with the California Energy Commission requirements, once RECs trading is implemented pursuant to recent amendments to the statute authorizing the RPS, because Standard RECs means all Environmental Attributes, whether or not verified. Here is the current standard contract term in California:

“Environmental Attributes or Green Tags” means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the generation from the Unit(s), and its displacement of conventional energy generation. Environmental Attributes include but are not limited to: (1) any avoided emissions of pollutants to the air, soil or water such as sulfur oxides (SOx), nitrogen oxides (NOx), carbon monoxide (CO) and other pollutants; (2) any avoided emissions of carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>) and other greenhouse gases (GHGs) that have been determined by the United Nations Intergovernmental Panel on Climate Change to contribute to the actual or potential threat of altering the Earth’s climate by trapping heat in the atmosphere; and (3) the reporting rights to these avoided emissions such as Green Tag Reporting Rights. Green Tag Reporting Rights are the right of a Green Tag Purchaser to report the ownership of accumulated Green Tags in compliance with federal or state law, if applicable, and to a federal or state agency or any other Party at the Green Tag Purchaser’s discretion, and include without limitation those Green Tag Reporting Rights accruing under Section 1605(b) of The Energy Policy Act of 1992 and any present or future federal, state, or local law, regulation or bill, and international or foreign emissions trading program. Green Tags are accumulated on kWh basis and one Green Tag represents the Environmental Attributes associated with one (1) MWh of energy. Environmental Attributes do not include (i) any energy, capacity, reliability or other power attributes from the Unit(s), (ii) production tax credits associated with the construction or operation of the energy projects and other financial incentives in the form of credits, reductions, or allowances associated with the project that are applicable to a state or federal income taxation obligation, (iii) fuel-related subsidies or “tipping fees” that may be paid to Seller to accept certain fuels, or local subsidies received by the generator for the destruction of particular pre-existing pollutants or the promotion of local environmental benefits, or (iv) emission reduction credits encumbered or used by the Unit(s) for compliance with local, state, or federal operating and/or air quality permits. If Seller’s Unit(s) is a biomass or landfill gas facility and Seller receives any tradable Environmental Attributes based on the greenhouse gas reduction benefits or other emission offsets attributed to its fuel usage, it shall provide Buyer with sufficient Environmental Attributes to ensure that there are zero net emissions associated with the production of electricity from such facility.

As this definition is used in the Master Renewable Energy Certificate Purchase and Sale Agreement, “Units” means Renewable Energy Facilities, and “Green Tag Reporting Rights” mean Product Reporting Rights. Note also California Public Utilities Code §399.12(g):

(1) “Renewable energy credit” means a certificate of proof, issued through WREGIS, that one unit of electricity was generated and delivered by an eligible renewable energy resource. (2) “Renewable energy credit” includes all renewable and environmental attributes associated with the production of electricity from the eligible renewable

energy resource, except for an emissions reduction credit issued pursuant to Section 40709 of the California Health and Safety Code and any credits or payments associated with the reduction of solid waste and treatment benefits created by the utilization of biomass or biogas fuels.

The working group considered but rejected the concept of adding to this contract the definitions of each state, choosing instead to pursue the approach of defining the Product, and allowing the Parties to make a representation that the Product complies with the requirement of an Applicable Program (and hence the controlling State law). The risks of fostering Balkanization with too many disparate definitions was overwhelming, and the working group instead chose to draft definitions that emphasize commonalities of the Products and Environmental Attributes, and under which RPS programs they qualify.

The Parties should also comply with the Delivery requirements of the Applicable Program. For example in NEPOOL-GIS delivery contracts for REC purchases, the delivery could be either a non-revocable forward delivery, a revocable forward delivery, or trading period delivery, as these are all permitted by the NEPOOL-GIS Operating Rules. This should be worked out in contract negotiations and expressed in the Product Order by selection of the “Delivery Type”. A voluntary credits transaction is mainly a financial transaction that may employ Green-e verification or attestations if required, which can also be worked out as a “delivery type” as well. Here is example language parties have used in contracts that either use NEPOOL or PJM facilitate a REC transfer, to illustrate.

**Transactions within NEPOOL:**

Title Transfer; Delivery. The Parties have chosen a Delivery Schedule of either Trading Period, Forward Certificate Delivery, or Non-revocable Forward Certificate Delivery, as stated in Delivery Schedule. In addition, the Parties agree to follow the specific Delivery rules applicable to the chosen Delivery Schedule, pursuant to Part 3 Transfer of Certificates of the NEPOOL GIS Operating Rules. The Delivery rules for Trading Period, Forward Certificate Delivery, or Non-revocable Forward Certificate Delivery:

Trading Period: Quarterly within five business days of the close of the applicable quarterly trading period, Seller shall Deliver Designated RECs into the NE-GIS account of the Buyer. As pursuant to Part 2 Rule 2.1 (b) of the NEPOOL-GIS Operating Rules, Certificates are created quarterly on the 15<sup>th</sup> day of the calendar quarter (the Creation Date) that is the second calendar quarter following the calendar quarter in which the Energy associated with the Certificate was generated. Each Certificate shall be eligible for transfer from its Creation Date; such Certificate shall cease to be eligible for transfer 15 days prior to the end of the calendar quarter in which such Creation Date occurs.

Forward Certificate: Monthly within 25 business days after the close of each generation month, the Seller shall Deliver Designated RECS by initiating a forward transfers to the NE-GIS account of the Buyer. The forward transfer of the Designated RECs shall represent a transfer of and valid title to such Designated RECs free and clear of any lien or other encumbrance. Forward Certificates can be rescinded up to five calendar days prior to the corresponding Creation Date of the Forward Certificate

Non-revocable Forward Certificate: Monthly within 25 business days after the close of each generation month, the Seller shall Deliver Designated RECS by initiating non-revocable forward transfers to the NE-GIS account of the Buyer. The non-revocable forward transfer of the Designated RECs shall represent a transfer of and valid title to such Designated RECs free and clear of any lien or other encumbrance.

**Transactions within PJM-GATS**

Title Transfer; Delivery The Parties agree to follow the specific delivery rules pursuant to Section 9 Transfer of Certificates of the PJM GATS Operating Rules. Monthly within 45 business days of certificate creation date, the Seller shall Deliver Designated GATS Certificates by initiating transfer to the PJM-GATS account of the Buyer, as pursuant to Section 9.1 entitled *Transferring Certificates between Account Holders* of the PJM-GATS Operating Rules. Certificates are created monthly on the last business day of the calendar month following the month of generation (the Creation Date). Each Certificate shall be eligible for transfer from its initial deposit into a GATS

Account; such Certificate shall cease to be eligible for transfer at the end of the Trading Period of the corresponding Reporting Period in which the Creation Date occurs. The transfer of the Designated GATS Certificates shall represent a transfer of and valid title to such Designated GATS Certificates free and clear of any lien or other encumbrance. All GATS Certificate transfers will be complete by the close of the applicable PJM-GATS Trading Period

### **Change in Law Risks**

The concept of “Regulatorily Continuing” as a representation is discussed in the Introduction for Users and figures prominently in Section 3.2 and Article 7. Additionally, the Parties are required to continue with the delivery of Product at the purchase price agreed to in the Transaction, even if the RPS is cancelled, and there is no “price majeure” if a voluntary program’s RECs suddenly become more valuable due to a promulgation of a new RPS. Parties might want to vary this in one of two ways. Those active in compliance markets might wish for an out (akin to the “Change in Scheme” concept sometimes seen in documentation for the European Emissions Trading Scheme). Here is an example provided by a working group member, which is New Jersey specific; “Product” in this clause refers to “S-RECs”, which would be the specified Product in the particular Transaction:

**Change in Law and Termination.** The Parties recognize and understand that the trading of [the Product] is dependent upon Applicable Law existing as of the Effective Date. If, after the Effective Date, (1) the Administrator issues an order discontinuing Certification of [the Product]; or (2) there occurs any material change (including promulgation, enactment, repeal and amendment) in the application of, Applicable Law, including any material change by any state governmental authority or PJM regarding a Party’s authority to sell or purchase [the Product] (both (1) and (2) being a “Change in Applicable Law”) and such Change in Applicable Law either (i) renders this Transaction illegal or unenforceable, (ii) would render performance by a Party illegal or unenforceable, (iii) eliminates, abolishes or makes illegal the trading or transferring of [the Product], or (iv) eliminates the RPS requirement as separate and apart from, or [the Product] no longer qualifies as meeting, [the Class I requirement in New Jersey], then promptly after such Change in Applicable Law occurs, the Parties will use their commercially reasonable efforts to reform the Transactions in order to give effect to the original intention of the Parties. Prior to termination of the applicable Transactions, if [the Product] is (i) deliverable to any other jurisdiction with a [Product] requirement, (ii) and qualifies to meet such state’s requirements, the Parties will reform the Transactions to reflect such deliverability. If, in the Buyer’s sole discretion, the Parties are unable to reform the Transactions as described above, Buyer may, at its sole option and at any time following the Change in Applicable Law, terminate the applicable Transactions without terminating the remainder of this Agreement and calculate a Termination Payment, which for the purposes of this Section only will be calculated as the amount of Quantity remaining to be delivered in the then-current Compliance Year, multiplied by [\$175]. If the Buyer elects to terminate the Applicable Transactions, the Termination Payment hereunder will supersede any termination payment specified under Article 5 and no such termination payment will be due and owing under such article for such Transactions.

And, parties transacting in a voluntary market may wish to cancel the Transaction should the RECs market suddenly become a compliance market, which could have a substantial impact on the value of the RECs. Here is an example clause.

If, prior to the delivery of RECs sold hereunder, any Applicable Law is promulgated that has the effect of substantially alters the value of RECs, by making them newly capable of compliance with any particular Applicable Program, Seller may terminate said Transactions without penalty on thirty days’ prior written notice to Buyer. In such event, Seller will not deliver, and Buyer will not pay for, RECs that have not been delivered on or before the date of such termination, but Buyer will pay for RECs that have been delivered.

Parties considering use of either clause or the concepts therein should be sure to effectively further amend applicable provisions of the Agreement, with particular attention to Articles 6, 7 and 8.

## **Future Allowances**

Parties are transacting in a milieu in which rules are often not yet fully set and likely to change mid-stream. The only thing certain about change in law risks is that there will be change in law risks that the drafters did not anticipate. One possible change in law risk that the parties may wish to consider is the potential for future programs providing allowances to renewable energy facilities based on facility capacity, but not generation. This is distinct from credits (or allowances) provided on account of actual renewable resource generation. A “Standard REC,” which is “all” Environmental Attributes, includes within it any future allowances (or credits) that are awarded based on the measured quantity of generation with which the Standard REC was associated. If the parties do not wish to transfer future potential allowances or credits, they should elect to trade a “Specified REC” and use the Disclosure Document to carve those out.

The working group included all such future allowances or benefits associated with generation with a Standard REC, viewing the sale of the Standard REC as a derivative of the energy, with the Standard REC buyer being the fixed price payor. Although the Standard REC seller is not paying a floating price, it is receiving a steady and fixed, defined cash flow that it can use to ensure the economics of its project, and foregoing the floating price (which the buyer is receiving), which is the fluctuation in any future value inherent in what was sold for that fixed price. That floating value may increase if there is a new program, or decline if an existing program is cancelled. Meanwhile, the seller continues to receive the fixed price from the seller. This illustration is, of course, subject to the further elections and decisions of the parties in how they allocate change in law risk. So if, for example, under the new California greenhouse gas emissions law, an allowance-based compliance regime is created and initial allowances are allocated to all existing generation, fossil and non-fossil fueled generation, and these allowances are allocated in an aggregate amount, and for example a wind facility is given in a table 100 Carbon Allowances, which it does not need for compliance, has the wind facility which sold a Standard REC sold any of its carbon allowances? If the allowances were for identifiable prior generation, and a buyer paid for them, they were transferred. If the allocation of allowances is made on an on-going future basis, as electricity is generated, and the amount of allowances is keyed to actual energy production, the allowances are part of the Standard REC. But the allocation of allowances is *based on* historic output of the unit does not result in the transfer of the allowances to those to whom the past performance was sold. A system which allocates allowances based on some formula other than on-going actual generation of energy is very different from a system that gives credit for displacing emissions based on actual generation of energy from a renewable resource. The drafters have sought to be as clear as possible under the circumstances, but the parties are advised to remain informed about the potential for future allowance and credit-based programs which might apply to their units and draft their transactions accordingly. Parties may consider adding the following language to the definition of Environmental Attributes:

Environmental Attributes do not include, unless the parties have expressly agreed otherwise, tradable emission allowances or other entitlements to produce emissions issued by a Governmental Authority and allocated to a Renewable Energy Facility on a basis other than actual generation of avoided emissions associated with the generation of electricity by the Renewable Energy Facility. For example, any CO2 emission allowances that may be allocated to a Renewable Energy Facility by a Governmental Authority on a basis other than a calculation of such Facility’s actual avoided emissions would not be included as an Environmental Attribute.

## **Vintage True-Up**

When specifying Vintages, parties should be aware of the true-up, banking and borrowing periods provided under the Applicable Program. Parties transacting in voluntary markets, or with entities whose compliance in RPS programs is quasi-voluntary, may wish to provide in the applicable Product Order under Vintage:

; provided, however, that pursuant to Green-e requirements that provide for out-of-year true-up periods under certain circumstances, all Environmental Attributes will be derived from the energy that is or was generated and delivered to the electricity grid by the Renewable Energy Facility during the calendar year indicated as the Vintage, the last six months of the preceding calendar year, or the first three months of the following calendar year, or such other delivery period as may be set forth in standards made applicable by the parties by mutual agreement.

## **Unit Generation Definitions**

Two defined terms in Schedule P refer to the generating unit's performance. Some types of renewable resource generators, such as wind turbines or solar cells, are intermittent, and only generate electricity when the wind blows or the sun shines. Therefore, these units may not be able to generate to a fully contracted quantity. In a "Unit Contingent" sale, Seller is excused from underdelivery if the unit does not generate the full amount contracted for with Buyer in the period indicated, and puts Buyer at the top of the stack from which the Seller may be making sales from the unit over the period indicated. In a "Generation Contingent" sale, Seller is excused if the unit does not generate the full amount contracted with Buyer and all the other parties to whom Seller has contracted for sale from the unit, and puts Buyer within the stack from which Seller may be making sales from the unit over the period indicated. Buyers of a Generation Contingent Product may consider asking the seller about those other sale commitments. A seller with a 20MW unit entering into two 10MW Unit Contingent transactions runs the risk of breaching both contracts by making both sales Unit Contingent, since both buyers could claim a first entitlement to generation from the unit. A seller in such case may wish to indicate the Product is Generation Contingent, and that each buyer receives half of the RECs as generated.

## **Liquidated Damages**

Some parties may wish to add language, common to liquidated damages sections in trading contracts, such as the following to Section 5.7. The language is not in the body of the contract itself, as the working group did not consider it sufficiently effective across the many jurisdictions from which the parties could elect to govern the contract, because in some jurisdictions, the recitation might be construed as an inadvertent admission that damages may not be recoverable at all as being insufficiently capable of being liquidated:

TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, OR OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT AND THE DAMAGES CALCULATED HEREUNDER CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS.

## **California Judicial Reference**

Current California case law brings into questions the enforceability of jury trial waivers, although waivers of jury trial in the context of an agreement to arbitrate are enforceable. One effective way to waive jury trial without an agreement to arbitrate is by agreeing to judicial

reference. Here is an example clause. If using this clause, Parties should specify in advance the applicable County Superior Court.

1) Each controversy, dispute or claim between the Parties arising out of or relating hereto, which controversy, dispute or claim is not settled in writing within 30 days after the “Claim Date” (defined as the date on which a Party gives written notice to the other Party that a controversy, dispute or claim exists), will be adjudicated by a reference proceeding in California in accordance with the provisions of Sections 638 et seq. of the California Code of Civil Procedure (“CCP”), which will constitute the exclusively remedy for the adjudication of any controversy, dispute or claim concerning this Agreement, including whether such controversy, dispute or claim is subject to the reference proceeding and except as set forth herein, the Parties waive their rights to initiate any legal proceedings against each other in any court or jurisdiction other than the Superior Court in the County specified on the Cover Sheet (the “Court”). The referee will be a retired Judge of the Court selected by mutual agreement of the Parties, and if they cannot so agree within forth-five days after the Claim Date, the referee will be promptly selected by the Presiding Judge of the Court (or his representative). If the Presiding Judge selects the referee, each Party will have one peremptory challenge pursuant to CCP §170.6. The referee will be appointed to sit as a temporary judge, with all of the powers for a temporary judge, as authorized by law, and upon selection should take and subscribe to the oath of office as provided for in Rule 244 of the California Rules of the Court (or any subsequently enacted Rule). The referee will (a) set the matter for hearing within sixty days after the date of his or her selection and (b) try any and all issues of law or fact and report a statement of decision upon them, if possible, within ninety days of the Claim Date. Any decision rendered by the referee will be final, and judgment will be entered thereon pursuant to CCP §644 in any court in the State of California having jurisdiction. All discovery will be completed no later than 15 days before the first hearing date established by the referee. The referee may extend such period in the event of a Party’s refusal to provide requested discovery or unavailability of a witness due to absence or illness. No Party will be entitled to “priority” in conducting discovery. Depositions may be taken by either Party upon seven days written notice, and disputes regarding depositions and request for production or inspection of documents which cannot be resolved by the Parties will be submitted to the referee as provided herein. The Superior Court is empowered to issue temporary and/or provisional remedies, as appropriate.

2) Except as expressly set forth herein, the referee will determine the manner in which the reference proceeding is conducted including the time and place of all hearings, the order of presentation of evidence, and all other questions that arise with respect to the course of the reference proceeding. All proceedings and hearings conducted before the referee, except for trial, will be conducted without a court reporter except that when any Party so requests, a court reporter will be used at any hearing conducted before the referee. The Party making such a request will be the obligation to arrange for and pay for the court reporters. The costs of the court reporter at the trial will be borne equally by the Parties.

3) The referee will be required to determine all issues in accordance with the laws of the State of California and those specified in the Agreement. The rules of evidence applicable to proceedings at law in the State of California will apply to the reference proceeding. The referee will be empowered to enter equitable as well as legal relief, to provide all temporary and/or provisional remedies and to enter equitable orders that will be final. The referee will issue a single judgment at the close of the reference proceeding which will dispose of all of the claims of the Parties that are the subject of the reference. The Parties expressly reserve the right to contest or appeal from the final judgment or any appealable order or appealable judgment entered by the referee. The Parties expressly reserve the right to findings of fact, conclusions of law, a written statement of decision, and the right to move for a new trial or a different judgment, which new trial, if granted, will also be a reference proceeding hereunder.

Introduction for Users and Guidance Notes prepared by EMA representative co-chair, Jeremy D. Weinstein, with the invaluable assistance of co-chairs Christopher Berendt and Baird Brown, and Claire Broido Johnson, Stephanie Hamilton, Mark Perlis, Michele Richardson, and William W. Westerfield. The contributions to all aspects of this contract by the full working group, listed at <http://environmentalmarkets.org/>, too numerous to cite here, are very gratefully acknowledged.