BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF PUBLIC SERVICE)		
COMPANY OF NEW MEXICO'S)		
CONSOLIDATED APPLICATION FOR)		
APPROVALS FOR THE ABANDONMENT,)	19	UT
FINANCING, AND RESOURCE REPLACEMENT)		
FOR SAN JUAN GENERATING STATION)		
PURSUANT TO THE ENERGY TRANSITION ACT)		

DIRECT TESTIMONY

OF

THOMAS G. FALLGREN

NMPRC CASE NO. 19-____-UT INDEX TO THE DIRECT TESTIMONY OF THOMAS G. FALLGREN

WITNESS FOR PUBLIC SERVICE COMPANY OF NEW MEXICO

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PNM Exhibit TGF-14 Sandia Storage EPC Contract

PNM Exhibit TGF-15 Zamora Storage EPC Contract

PNM Exhibit TGF-16 Pinon Solar EPC Contract

AFFIDAVIT

I. INTRODUCTION AND PURPOSE

2	Q.	PLEASE STATE YOUR NAME, POSITION AND BUSINESS ADDRESS.
3	A.	My name is Thomas G. Fallgren. I am Vice President of Generation for Public
4		Service Company of New Mexico ("PNM"). My business address is Public
5		Service Company of New Mexico, 2401 Aztec Rd, NE, Albuquerque, New
6		Mexico 87107.
7		
8	Q.	WHAT IS THE PURPOSE OF YOUR TESTIMONY?
9	A.	I describe and support the optimum mix of resources to replace Units 1 and 4 of
10		the San Juan coal plant. These include resources 350 MW of new solar resources,
11		130 MW of new battery storage and 280 MW of new natural gas resources,
12		collectively referred to as Scenario 1, which meets the objectives of the recently
13		enacted Energy Transition Act. I describe the competitive bid and evaluation
14		process that led to the selection of Scenario 1 and discuss why it is preferable to
15		the other scenarios that PNM analyzed and presents in this case. My testimony
16		provides factual support for approval of the purchase power agreements ("PPAs")
17		and certificates of public convenience and necessity ("CCNs") for the
18		replacement resources in Scenario 1.
19		
20		I provide factual support for the proposed abandonment of San Juan Units 1 and 4
21		in June of 2022, as well as support for certain abandonment costs related to plant

decommissioning, coal mine reclamation and necessary San Juan capital improvements pending the final plant retirement.

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Finally, I discuss a proposal for the development of up to an additional 20 MW of solar resources at the San Juan coal plant site which we refer to as the Pinon Solar Facility that would be in lieu of the purchase of renewable energy certificates ("RECs") pursuant to the Modified Stipulation in Case No. 13-00390-UT.

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Q. PLEASE SUMMARIZE YOUR EDUCATIONAL BACKGROUND AND PROFESSIONAL QUALIFICATIONS.

I have overseen PNM's Generation since November 2016 in the roles of 11 A. 12 Managing Director, and as of May 2017, as Vice President of Generation. From July 2013 to November 2016, I was the Plant Manager for the San Juan coal 13 plant. Before I came to PNM, I worked for various subsidiaries of Xcel Energy as 14 15 Plant Manager for the Tolk/Plant X Complex, a two site complex consisting of two coal-fired units rated at 1100 MW and four-unit natural gas-fired steam plants 16 rated at 442 MW, and the Black Dog Generating Facility, a now-retired coal-fired 17 generating station and a one-on-one combined cycle gas plant. Prior to that I 18 served in several management positions at the Sherburne County Generating 19 20 Station, a three-unit 2,238 MW coal-fired facility. I also have thirteen years of experience at the Monticello nuclear generating facility, where I was previously 21 qualified as a Senior Reactor Operator. I have been a registered engineer in the 22 23 State of Minnesota since 1994. I graduated with a Bachelor of Mechanical

Engineering degree with High Distinction from the University of Minnesota. A
copy of my Educational and Professional Summary is attached as PNM Exhibit
TGF-1, which includes a list of cases in which I have testified before the New
Mexico Public Regulation Commission ("NMPRC" or "Commission").

A.

Q. PLEASE DESCRIBE YOUR RESPONSIBILITIES AS VICE PRESIDENT FOR GENERATION FOR PNM.

I am responsible for the strategic direction and operation of PNM's generating resources to ensure that they continue to provide safe, reliable and cost-effective electricity to customers within PNM's service territory. The functions I oversee include generation operations, maintenance, engineering, construction, fuel and power procurement, wholesale power marketing, resource planning, and other services related to PNM's generation fleet. I also have executive oversight responsibility for the operation of the San Juan coal plant on behalf of its various owners, in conformity with the San Juan Project Participation Agreement. Likewise, I have executive oversight responsibility with respect to PNM's ownership interests in generation resources where PNM is not the operator, specifically, the Four Corners Power Plant and the Palo Verde Nuclear Generating Station.

II. REPLACEMENT RESOURCES

2	Q.	HAS PNM IDENTIFIED REPLACEMENT RESOURCES TO CONTINUE
3		TO SERVE CUSTOMER NEEDS IF APPROVAL OF THE
4		ABANDONMENT OF THE SAN JUAN COAL PLANT IS GRANTED
5		EFFECTIVE JUNE 2022?
6	A.	Yes. As I discuss in more detail later in my testimony, PNM issued competitive
7		solicitations and conducted extensive analyses to determine the optimum mix of
8		generation resources that will be available by June 2022 to reliably and at low
9		cost serve retail customers following the retirement of Units 1 and 4 of the San
10		Juan coal plant. PNM proposes the resources in Scenario 1 as summarized in
11		PNM Table TGF-1 as the recommended set of replacement resources:

PNM Table TGF-1 - Scenario 1 - Optimized Resources

Name	Resource Type	Nameplate Capacity	Ownership	Location
Arroyo Solar Project	Solar	300 MW	PPA	McKinley
Arroyo Storage Project with Arroyo Solar Above	Battery	40 MW	ESA (PPA)	McKinley
Jicarilla 1 Solar Project	Solar	50 MW	PPA	Rio Arriba
Jicarilla Storage Project with Jicarilla 1 Solar Above	Battery	20 MW	ESA (PPA)	Rio Arriba
Sandia Storage Project	Battery	40 MW	EPC	Bernalillo
Zamora Storage Project	Battery	30 MW	EPC	Bernalillo
Pinon Gas Plant	Natural Gas	280 MW	EPC	San Juan

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1	Q.	PLEASE FURTHER DESCRIBE THE RESOURCES INCLUDED IN
2		SCENARIO 1.
3	A.	The specific resources that make up Scenario 1 are described below. A map
4		showing the location of each of these resources is attached to my testimony as
5		PNM Exhibit TGF-2.
6		• The Arroyo Solar Project is a PPA with Arroyo Solar LLC ("Arroyo
7		Solar") whose parent company is Clenera, LLC. This project is one of the
8		largest solar projects in the western United States at 300 MW and is
9		located in McKinley County, an "affected community" under Section
10		16(L) of the Energy Transition Act because it is within a 100 mile radius
11		of the San Juan coal plant. However, the project is not located within the
12		Central Consolidated School District.
13		• The Arroyo Storage Project is a 40 MW battery project with Arroyo
14		Energy Storage LLC ("Arroyo Storage"), which is also a subsidiary of
15		Clenera, and located in McKinley County that will be operated in
16		conjunction with the Arroyo Solar Project. Capacity from the Arroyo
17		Storage Project will be supplied to PNM pursuant to an Energy Storage
18		Agreement ("ESA") with Arroyo Solar LLC. An ESA is similar in nature
19		to a PPA in that the resource is supplier-owned; however, an ESA
20		provides for resource capacity rather than energy sales.
21		• The Jicarilla I Solar Project is a PPA with Jicarilla Solar 1, LLC ("Jicarilla
22		Solar") for the purchase of 50 MW of solar energy. This project is similar
23		to the Jicarilla 2 Project proposed in PNM's Solar Direct filing in Case

1	No. 19-00158-UT. Hecate Energy NAF, LLC ("Hecate") is the project
2	developer and plans to operate the facility in cooperation with Primary
3	Energy. The project is located in Rio Arriba County on Jicarilla tribal
4	land, and includes a payment from the supplier to the Jicarilla Nation in
5	lieu of property taxes. This project is also located within the 100 mile
6	radius of San Juan but is not located within the Central Consolidated
7	School District.
8	• The Jicarilla Storage Project is a 20 MW battery project pursuant to an
9	ESA with Jicarilla Storage 1 LLC ("Jicarilla Storage"). It is also located
10	in Rio Arriba County and will be developed by Hecate and operated in
11	conjunction with the Jicarilla I Solar Project.
12	• The Sandia Storage Project is a 40 MW Engineering, Procurement and
13	Construction ("EPC") contract with Affordable Solar Installation Inc.
14	("Affordable") who is partnering with Tesla, Inc. ("Tesla") on this project.
15	This project will be located near the PNM Sandia substation within the
16	Albuquerque load center, which minimizes any transmission service
17	requirements as well as supporting transmission system reliability.
18	• The Zamora Storage Project is a 30 MW battery storage project as part of
19	an EPC contract with Affordable again partnering with Tesla. This project
20	is also located near the PNM Zamora substation in the Albuquerque load
21	area, minimizing transmission service needs.
22	• The Pinon Generating Station ("Pinon Gas Plant") is a 280 MW EPC
23	project with ProEnergy Services, LLC ("ProEnergy"). The Pinon Gas

1		Plant consists of seven LM 6000 flexible gas generation units to be located
2		on the San Juan Generating Station site, and as discussed in more detail
3		below, provides tax base for the Central Consolidated School District as
4		well as additional economic benefits associated with natural gas sales from
5		the San Juan basin.
6		
7	Q.	DOES PNM CURRENTLY HAVE ANY PENDING REQUESTS FOR
8		APPROVAL OF ADDITIONAL RENEWABLE RESOURCES OUTSIDE
9		OF THE REPLACEMENT RESOURCES PNM RECOMMENDS?
10	A.	Yes. PNM is seeking approval of a 140 MW wind generation PPA for purposes
11		of Renewable Portfolio Standard ("RPS") compliance in Case No. 19-00159-UT,
12		and a 50 MW PPA for PNM's Solar Direct Project in Case No. 19-00158-UT.
13		The replacement resources under Scenario 1, combined with the proposed RPS
14		wind resource of 140 MW and the 50 MW solar resource, provide great diversity
15		to the PNM generation fleet.
16		
17	A.	Benefits of Scenario 1
18	Q.	WHAT FACTORS ARE TO BE CONSIDERED UNDER THE ENERGY
19	Ų.	TRANSITION ACT WITH RESPECT TO REPLACEMENT
20		RESOURCES?
	A	
21	A.	Section 3(A) of the Energy Transition Act provides that cost, economic
22		development and the ability to provide jobs with comparable pay and benefits to

those lost due to the abandonment of the qualifying generation facility are to be
considered in evaluating replacement resources. Section 3(B) of the Act provides
that replacement resources with the least environmental impacts, and those higher
ratios of capital costs to fuel costs and the ability to reduce the cost of reclamation
and use for lands previously mined within the county of the qualifying generating
facility, are preferred. Section 3(E) of the Act provides for replacement resources
that are subject to local property taxes or a binding commitment to make an
equivalent payment in lieu of taxes. Section 3(F) of the Act provides for up to
450 MW of nameplate capacity included in the definition of "replacement
resources" and specifies that these resources may include energy storage capacity;
provided that such resources are located in the school district. As discussed
below, except for resources that mitigate mine reclamation or use previously
mined lands, Scenario 1 meets all of the relevant policy factors. It should be noted
that none of the RFP bids involved proposals for alternative beneficial use of land
that is or will be subject to mine reclamation activities. It would be difficult for
any proposed project to meet this objective. The reclamation plans call for caps
over the mined area. The construction of new resources in the mine reclamation
area is not conducive to effective caps.

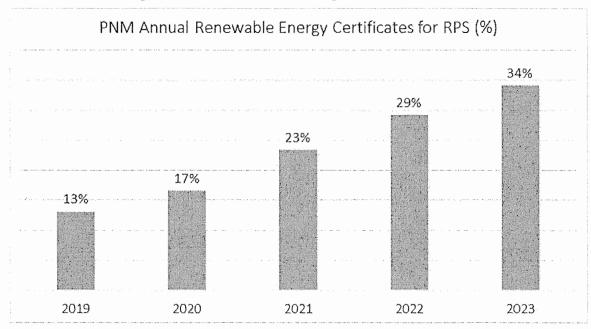
Q. WHAT ARE YOUR OPINIONS ABOUT THE ENVIRONMENTAL

21 BENEFITS OF SCENARIO 1?

A. Scenario 1 is noteworthy in several respects and provides customers significant environmental sustainability benefits. In developing Scenario 1, PNM had the

advantage of choosing among many low cost renewable resources that were
offered in the All Resources Request for Proposals ("All Resources RFP")
discussed below. These renewable resources are backed up with reasonable cost
flexible gas resources, which were also the result of the All Resources RFP and
Supplemental RFP, to ensure system reliability. Scenario 1 includes 350 MW of
solar, including a 300 MW solar facility that is one of the largest built in the
United States. The 130 MW of energy storage represents approximately 5% of
PNM's Balancing Area Authority peak demand, which is one of the highest
percentages of battery capacity of any utility system in the country. Scenario 1,
along with PNM's RPS filing and Solar Direct Project discussed above, will
double the amount of renewable resources on PNM's system in a matter of a
couple of years, with a 34% renewable penetration, which positions PNM very
well toward achieving future RPS standards, as shown in PNM Figure TGF-1.

PNM Figure TGF-1 – RPS Percentage Increases



^{*} potential curtailment hours not included in above chart

The retirement of the San Juan coal plant will reduce PNM's current coal generation resources by 497 MW, or by approximately 70%. The San Juan coal plant is PNM's single largest source of air emissions and its retirement will achieve a considerable reduction in these emissions. The net reduction in system-wide carbon emissions under Scenario 1 is 62% from 2005 levels. Using a 2005 baseline, PNM Table TGF-2 shows the estimated reductions in system-wide carbon emissions for Scenario 1 as well as the other three scenarios that I discuss in Section IV of my testimony.

^{*} RPS percentage calculated per Energy Transition Act methodology

PNM Table TGF-2 - Carbon Emission Reductions

	2005	2023	
San Juan Abandonment and Replacement Alternatives	CO ₂ (sh	ort tons)	CO ₂ Percentage Reduction, 2005 to 2023
2005 System-Wide Generation	7,695,240		
2023 San Juan Continues		5,600,000	27%
2023 Scenario 1 (Recommended)		2,900,000	62%
2023 Scenario 2 (San Juan			
Location Preferred)		3,150,000	59%
2023 Scenario 3 (No Gas)		2,680,000	65%
2023 Scenario 4 (All Renewable)		2,530,000	67%

3 Q. WHAT ARE THE COST BENEFITS ASSOCIATED WITH SCENARIO 1?

A. Scenario 1 achieves this significant transition to more sustainable energy while reducing costs to PNM customers. As discussed by PNM Witnesses Phillips, Wintermantel and Dorris, Scenario 1 results in the lowest Net Present Value (NPV) of costs and therefore the best savings for customers. PNM Witness Settlage calculates the bill impacts for residential and small business customers, which indicates a related savings of approximately \$7.11 per month in the first year versus continued operation of San Juan. Actual savings depend on a given customer's energy usage and will vary over time.

- Q. PLEASE PROVIDE A SUMMARY OF THE ESTIMATED CAPITAL INVESTMENTS, JOB CREATION AND PROPERTY TAX REVENUES ASSOCIATED WITH SCENARIO 1.
- **A.** Scenario 1 will result in economic development and provide good jobs for the 17 Farmington/San Juan County region and other parts of our state. PNM Table

TGF-3 provides estimates for the large capital investments, significant number of construction jobs, and property taxes generated across New Mexico as a result of Scenario 1.

PNM Table TGF-3 – Economic Benefits of Scenario 1

	Project:	Technology	Size (MW)	Capital Investment	Construction	Party To a Victor	2023 Property Taxes 1st full year (thousands)
School District	Pinon Generarating Station	Gæs	280 MW	\$192.8M	225	5:	\$1,483
	New Gas Transmission Line	Gas Trans	NA:	520M	150		\$160
100 Mile Radius	Arroyo Solar	Solar	300 MW	\$360M	FOR	5	\$307 \$150
	Arroyo Storage	Battery	40 MW, 4hr	ויווטמככ	500		
	Jicariila Solar	Solar	50	\$70M	200		
	Jicarilla Storage	Battery	20 MW, 4hr	370111	200	7-10	3130
New Mexico	Sandia Energy Storage	Battery	40MW, 2hr	\$50.5M	70	2	\$509
	Zamora Energy Storage	Battery	30 MW, 2hr	540.3M]	a:	\$411
	Total			\$733M	1145	20-23	\$3,020

PNM Current SJGS Property Tax \$3,200

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Q. DOES SCENARIO 1 MITIGATE THE ECONOMIC IMPACTS TO THE

SAN JUAN COUNTY REGION DUE TO THE PROPOSED

RETIREMENT OF THE SAN JUAN COAL PLANT?

A. Yes. Scenario 1 provides for an approximate 50% replacement of the tax base within the Central Consolidated School District and results in over \$730 million dollars in capital investments and an estimated 1,145 construction jobs across New Mexico in the form of both vendor supplied and utility-owned resources.

1	Q.	WHAT ARE THE BENEFITS OF SCENARIO 1 THAT ARE SPECIFIC
2		TO THE FARMINGTON\SAN JUAN COUNTY REGION?
3	A.	Scenario 1 locates the Pinon Gas Plant on the San Juan coal plant site, which is a
4		significant and valuable generation plant for property tax purposes. As noted in
5		PNM Table TGF-3, the Pinon Gas Plant requires the construction of a gas
6		transmission line which provides construction jobs and additional property tax
7		base. In addition, though not accounted for in PNM Table TGF-3, operation of the
8		Pinon Gas Plant will require the purchase of natural gas produced locally in the
9		San Juan region. Annual purchases of natural gas from the San Juan basin will
10		provide additional economic benefit to the region as part of Scenario 1.
11		
12	Q.	IS SYSTEM RELIABILITY AN IMPORTANT CONSIDERATION IN THE
13		SELECTION OF REPLACEMENT RESOURCES?
14	A.	Yes. System reliability is a critical consideration in choosing replacement and
15		other resources. PNM has obligations to provide safe and reliable service to
16		customers. As a Balancing Authority, PNM must maintain and operate its system
17		in a manner that ensures reliability. PNM Witnesses Phillips and Wintermantel
18		discuss the importance of system reliability.
19		

B. Other Factors Under the Energy Transition Act

2	Q.	DOES SCENARIO 1 PROVIDE HIGHER RATIOS OF CAPITAL COSTS
3		TO FUEL COSTS?
4	A.	Yes. As discussed above, PNM is proposing a very significant increase in its
5		solar resources (350 MW) and a considerable amount of energy storage
6		technology (130 MW). These technologies have a higher ratio of capital cost
7		compared to fuels costs, which are not applicable. The Pinon Gas Plant, even
8		though operated a small percentage of the time as a resource to support system
9		reliability needs, will incur fuel and capital costs but has a relatively favorable
10		ratio of capital costs to fuel costs.
11		
12	Q.	PLEASE RECONCILE THE NAMEPLATE CAPACITY OF SCENARIO 1
12 13	Q.	PLEASE RECONCILE THE NAMEPLATE CAPACITY OF SCENARIO 1 RELATIVE TO THE 497 MW OF CAPACITY FROM SAN JUAN COAL
	Q.	
13	Q.	RELATIVE TO THE 497 MW OF CAPACITY FROM SAN JUAN COAL
13 14		RELATIVE TO THE 497 MW OF CAPACITY FROM SAN JUAN COAL PLANT BEING RETIRED.
131415		RELATIVE TO THE 497 MW OF CAPACITY FROM SAN JUAN COAL PLANT BEING RETIRED. The San Juan coal plant provides 497 MW of firm dispatchable capacity and
13141516		RELATIVE TO THE 497 MW OF CAPACITY FROM SAN JUAN COAL PLANT BEING RETIRED. The San Juan coal plant provides 497 MW of firm dispatchable capacity and associated energy for PNM's system. The replacement portfolio includes 280
1314151617		RELATIVE TO THE 497 MW OF CAPACITY FROM SAN JUAN COAL PLANT BEING RETIRED. The San Juan coal plant provides 497 MW of firm dispatchable capacity and associated energy for PNM's system. The replacement portfolio includes 280 MW of firm dispatchable gas-fired capacity, 130 MW of battery storage capacity
13 14 15 16 17		RELATIVE TO THE 497 MW OF CAPACITY FROM SAN JUAN COAL PLANT BEING RETIRED. The San Juan coal plant provides 497 MW of firm dispatchable capacity and associated energy for PNM's system. The replacement portfolio includes 280 MW of firm dispatchable gas-fired capacity, 130 MW of battery storage capacity and 350 MW of intermittent renewable energy resources. The renewable energy

1	Q.	DOES SCENARIO 1 ACHIEVE THE OBJECTIVES OF THE ENERGY
2		TRANSITION ACT FOR REPLACEMENT RESOURCES?
3	A.	Yes. Scenario 1 fulfills the policy objectives of the Energy Transition Act very
4		well. A key consideration for utility system operation is reliability. While
5		Scenario 1 leans heavily on intermittent renewable resources, these resources are
6		supported by battery storage and gas resources so there is a sufficient confidence
7		level for reliability. Scenario 1 provides substantial cost savings to customers as
8		compared to continued operation of San Juan. It provides economic development
9		opportunities and job creation in the Farmington/San Juan region and elsewhere
10		in the state. It helps preserve property taxes for the affected school district. Also,
11		it greatly enhances PNM's portfolio of environmentally sustainable renewable
12		resources which will help PNM meet the new RPS standards and PNM's goal of
13		100% carbon-free resources by 2040. When all the relevant factors are
14		considered, Scenario 1 best meets the needs of PNM's customers and the Energy
15		Transition Act policies.
16		
17		III. EVALUATION PROCESS FOR REPLACEMENT RESOURCES
18	Q.	PLEASE GENERALLY DESCRIBE THE PROCESS THAT PNM USED
19	•	TO IDENTIFY AND EVALUATE THE REPLACEMENT RESOURCES
20		FOR THE SAN JUAN COAL PLANT.
21	A.	Consistent with the Energy Transition Act and the Modified Stipulation in Case
22	11.	No. 13-00390-UT, PNM used a very robust and competitive resource solicitation
44		140. 15-00570-01, 1 1414 used a very robust and compensive resource soficitation

process to identify, evaluate and select suitable replacement resources for San Juan. PNM enlisted the services of qualified experts to assist and conduct portions of the solicitation and evaluation processes. PNM engaged HDR Engineering Inc. ("HDR") to assist in the development of the All Resources RFP and to screen and qualify the bid responses. PNM hired Astrape Consulting, LLC ("Astrape") to model proposed resource portfolios in their SERVM model to determine system reliability and portfolio economics. Ascend Analytics, LLC ("Ascend") also evaluated the economics and reliability of the potential replacement portfolios, using their PowerSimm modeling tool. Enovation Partners, LLC ("Enovation") evaluated the emerging technology of battery storage to assess how it might best be deployed on PNM's system.

A.

Q. WHAT DID THE MODIFIED STIPULATION REQUIRE WITH RESPECT TO SAN JUAN REPLACEMENT RESOURCES?

Paragraph 19 of the Modified Stipulation called for an RFP to be issued, and PNM consulted with signatories to the Modified Stipulation on October 18, 2017, to discuss the RFP. As a result, PNM modified the RFP instructions to bidders to include proposals for renewable resources that could be in place before 2022 to facilitate utilization of the available tax credits.

1	Q.	PLEASE	DESCRIBE	THE	RFP	THAT	WAS	ISSUED	FOR	THE

2 POTENTIAL SAN JUAN REPLACEMENT RESOURCES.

A. On October 30, 2017, PNM issued an "all resources" RFP for resources for the potential replacement of San Juan capacity from Units 1 and 4, with a deadline for proposals of January 30, 2018. Bidders were encouraged to propose resources consistent with the 2017 Integrated Resource Plan ("2017 IRP") conclusions. PNM Witness Nagel discusses the development and issuance of the RFP in more

A.

detail.

Q. DID PNM ISSUE A SUPPLEMENT TO THE ALL-SOURCE RFP?

Yes. In April 2019, PNM issued a follow-up RFP for utility-owned battery energy storage resources of up to 450 MW of capacity ("April 2019 RFP"). The April 2019 RFP was issued to ensure all options were included to maximize the value of battery energy storage systems as described in the Energy Transition Act with regard to a utility's ability to operate, maintain and control energy storage for a variety of purposes. The responses to the original All Resources RFP initially provided two limitations to this full usage: 1) original PPA proposals initially insisted on restrictive operational parameters for PPA provided batteries, and 2) a majority of the EPC bidders were unaware of the requirement for a New Mexico state contractor license at the time of bid submission and were automatically disqualified. The bid responses received in the April 2019 RFP were considered along with the bid responses received in response to the All Resources RFP and

	the final battery selection chose bids from both of these RFPs. Both RFPs are
	discussed in more detail by PNM Witness Nagel.
Q.	WHY DID PNM ISSUE THE SUPPLEMENTAL RFP?
A.	The Energy Transition Act was signed into law in March 2019 and included
	specific requirements pertaining to battery storage bids which favors significant
	control by utilities. PNM issued the supplemental RFP seeking bids limited to
	utility-owned storage projects to address specific requirements in the Energy
	Transition Act relating to energy storage systems. The additional bids received
	were considered along with, rather than in place of, the energy storage bids that
	were originally received and not disqualified due to contractor licensing
	requirements.
Q.	COULD PNM HAVE REASONABLY STARTED ITS ENTIRE
	COMPETITIVE RFP PROCESS OVER, AFTER ENACTMENT OF THE
	ENERGY TRANSITION ACT?
A.	No. If the San Juan coal plant is to be abandoned when the current operating
	agreement and coal supply agreement terminate, replacement resources must be
	selected and approved by the Commission in advance of June 2022. Given the
	scope and complexity of the bids received and the extensive modeling work
	required to reach a final portfolio that adequately, economically and reliably
	replaces the 497 MW of generation being retired, it would not have been possible
	to reissue the entire RFP after passage of the Act and meet necessary in-service
	A.

1		dates. Additionally, the same degree of favorable pricing associated with
2		renewable investment tax credits may not have remained available from bidders.
3		These tax credits, which are already declining over time, currently have
4		contributed to PNM's selection of extremely low priced solar PPAs in its
5		recommended Scenario 1. Nor was it necessary to reissue the all source RFP to
6		meet the provisions of the law, except is covered by the Supplemental RFP.
7		
8	Q.	HOW DID PNM ENCOURAGE THE USE OF WORKERS RESIDING IN
9		NEW MEXICO CONSISTENT WITH SECTION 3(C) OF THE ENERGY
10		TRANSITION ACT?
11	A.	PNM provided a clarifying requirement to bidders during the bid review process
12		to confirm that responsive bid responses should reflect how bidders intended to
13		utilize workers residing in New Mexico. PNM has received commitments from
14		the successful bidders for the resources included in Scenario 1 of their intent to
15		utilize New Mexico workers to the greatest extent reasonably possible. For the
16		PNM-owned resources, PNM will also be using, and requiring its contractors to
17		use, New Mexico workers to the greatest extent possible.
18		
19	Q.	DID PNM CONDUCT ANY STAKEHOLDER ENGAGEMENT
20		MEETINGS IN CONNECTION WITH THE RFP?
21	A.	Yes. PNM held an Energy Storage Public Listening Session for any interested
22		stakeholders. The listening session focused on the current state of energy storage
23		in the industry and gave the public the opportunity to ask related questions. The

1		presentation and Energy Storage Technology Assessment Report is available on
2		the PNM website at https://www.pnm.com/energy-sources . In light of the current
3		state of energy storage systems, PNM identified that battery storage was the most
4		commercially viable. Although PNM specifically requested battery storage bids,
5		PNM allowed for all energy storage options in the RFP. PNM later held a
6		stakeholder meeting on April 23, 2019, to provide a status update on the RFP
7		evaluation and modeling process.
8		
9	Q.	PLEASE DESCRIBE THE STEPS THAT PNM TOOK WITH RESPECT
10		TO THE RFP EVALUATION AND SELECTION PROCESS.
11	A.	The first step in the process after the RFP was issued was to rely on HDR as the
12		independent owners engineer to evaluate the bid responses. The outcome of this
13		first part of the process was HDR's development of the "Best in Class" bids.
14		
15	Q.	WHAT WAS THE STEP THAT FOLLOWED THE IDENTIFICATION OF
16		THE BEST IN CLASS BIDS?
17	A.	The next step in the process involved the PNM Resource Planning group taking
18		the Best in Class data and inputs, and modeling through their capacity expansion
19		software tool Encompass. PNM Witness Phillips addresses the details on this
20		modeling and evaluation. Based on the results of the PNM Resource Planning
21		modeling, a number of resource portfolios were developed, together with a series
22		of sensitivities around these portfolios. As a result of this analysis, PNM

1		confirmed that there were more economic alternatives to continuing to operate the
2		San Juan coal plant after June 2022.
3		
4	Q.	DID PNM RELY ON MODELING EXPERTS IN THIS PROCESS?
5	A.	Yes, as discussed above and in more detail by PNM Witness Phillips, PNM's
6		Resource Planning Department, in conjunction with two outside modeling experts
7		using different software, conducted both independent and collaborative modeling
8		that resulted in the consensus that Scenario 1 is the recommended set of
9		replacement resources.
10		
11	Q.	DID PNM CONSULT WITH ANY EXPERTS WITH RESPECT TO
12		ENERGY STORAGE?
13	A.	Yes. Enovation provided critical industry expertise for evaluating the evolving
14		technology of battery storage. As a result of Enovation's recommendations,
15		adjustments were made to the modeling assumptions based on appropriate
16		limitations due to the technology risk presented by battery storage. PNM Witness
17		Kemp describes Enovation's analysis and recommendations with respect to
18		battery storage deployment on PNM's system. These recommendations were
19		seconded by independent experts, as well.
20		
21		PNM also engaged Sandia National Laboratory to inform PNM on battery energy
22		storage technology, and comment on bid proposals as they related to energy
23		storage. Sandia Labs provided PNM with a better understanding of the various

1		value streams associated with batteries as well as the lab's knowledge of battery
2		technologies.
3		
4		PNM also engaged The Brattle Group to advise on energy storage issues and
5		Brattle prepared a report on the "Value of Energy Storage on PNM's System"
6		which is attached to my testimony as PNM Exhibit TGF-3.
7		
8	Q.	IN ITS EVALUATION OF ENERGY STORAGE RESOURCES, DID PNM
9		PLACE ANY CONDITIONS ON THE SIZE OF BATTERY STORAGE
10		SYSTEMS?
11	Α.	Not initially. The initial results of the unconstrained modeling are discussed by
12		PNM Witness Wintermantel. The lowest cost battery bid without limits on
13		battery storage was a combined proposal by Arroyo Solar and Arroyo Storage for
14		a joint 300 MW solar project combined with a 150 MW battery storage project.
15		This combined project is lowest cost because the battery storage project takes
16		advantage of investment tax credits when combined with a solar project.
17		
18	Q.	WHY ISN'T THE JOINT PROPOSAL FOR THE 300 MW SOLAR AND
19		150 MW BATTERY STORAGE PROJECT PART OF SCENARIO 1?
20	A.	Based on the advice of Enovation as discussed by PNM Witness Kemp, PNM
21		restricted the size of battery storage systems to no greater than 40 MW at any
22		single location and no more than 130 MW total. Forty MW is the size of the
23		largest battery storage systems currently in operation in the United States

although there have been recent announcements regarding larger systems under development. Enovation recommended battery sizing to allow the utilization of significant amounts of battery storage on PNM's system while mitigating technology risk associated with much larger systems. The 130 MW total of battery storage represents 5% of PNM's peak load, and results in a significant percentage integration while managing the risk associated with this new technology. This recommended strategy also allows for increasing battery installations as the price curve decreases and battery technology continues to improve. Battery storage is a rapidly evolving technology and carries technology risks that could impair system reliability if not properly managed. PNM Witness Wintermantel from Astrape, and PNM Witness Dorris from Ascend concur with this initial approach to adding battery storage on PNM's system.

A.

Q. DID THE 40 MW INDIVIDUAL BATTERY AND 130 MW TOTAL PENETRATION LIMITATION ON BATTERY STORAGE CHANGE THE FINAL SELECTION OF BATTERY STORAGE RESOURCES?

In part. The two previously Best in Class battery storage bids from Arroyo Storage and Jicarilla Storage were still selected, with the total size of the Arroyo Storage project reduced from 150 MW to 40 MW to reduce the risk associated with a large single site with this new technology. The Jicarilla Storage was retained at its originally proposed 20 MW size. Additional diverse battery storage projects were then identified and incorporated into Scenario 1.

1 **Q.**

HOW DID PNM IDENTIFY AND INCORPORATE ADDITIONAL

2		DIVERSE BATTERY STORAGE PROJECTS INTO SCENARIO 1?
3	A.	PNM selected both ownership types in roughly equivalent amounts. PNM
4		selected 60 MW of vendor-owned PPA battery storage from the original RFP
5		bids, and 70 MW of utility-owned battery storage from the supplemental RFP
6		bids. PNM evaluated all bids from both RFPs at the same time to select the best
7		available options for battery storage. PNM Witness Wintermantel determined
8		that for the five best standalone battery options there is a maximum NPV
9		difference of \$2 million, without accounting for other values associated with
10		operational control and optimal siting (Reference PNM Table NW-6). PNM
11		utilized the Brattle Study to identify additional economic benefits due to utility
12		locational preference for transmission purposes, and the recommendations of
13		PNM Witnesses Kemp and Dorris regarding utility learning opportunities to better
14		inform future deployment of battery storage on PNM's system in the future. PNM
15		therefore selected the Sandia and Zamora battery projects due to the essentially
16		equal economics considered with the locational benefits identified in the Brattle
17		study and based on utility learning providing the best value.
18		
19	Q.	DID PNM CONSIDER THE FACTORS FOR REPLACEMENT
20		PORTFOLIOS UNDER THE ENERGY TRANSITION ACT?
21	A.	Yes. As discussed in Section II above, PNM's evaluation of proposed new
22		resources also incorporated the increased renewable portfolio standard and other
23		requirements under the Energy Transition Act.

1	Q.	WHAT DID THE RFP EVALUATION DETERMINE TO BE THE
2		PREFERRED REPLACEMENT RESOURCES?
3	A.	After evaluation of relevant resource planning factors and the other factors under
4		the Energy Transition Act, the preferred replacement resources are those that are
5		included in Scenario 1.
6		
7		IV. ALTERNATIVE SCENARIOS
8	Q.	WHY IS PNM ALSO PRESENTING ALTERNATIVE SCENARIOS TO
9		SCENARIO 1?
10	A.	The Energy Transition Act provides a variety of criteria that can affect planning
11		of resources for PNM's system, and different stakeholders are likely to value
12		some factors more highly than others. Therefore, PNM developed alternative
13		scenarios that demonstrate how weighting these criteria results in different
14		resource selections.
15		
16	Q.	PLEASE DESCRIBE THE ALTERNATIVE SCENARIOS THAT PNM
17		DEVELOPED USING THE CRITERIA FROM THE ENERGY
18		TRANSITION ACT.
19	A.	PNM developed the following three scenarios under the Energy Transition Act:
20		• Scenario 2 gives greater consideration to locating replacement resources in
21		the Central Consolidated School District impacted by the retirement of the

1		San Juan coal plant. Under Scenario 2, at least 450 MW of the
2		replacement resources would be located in the school district.
3		• Scenario 3 gives greater consideration to not adding any fossil fuel
4		resources. Scenario 3 does not have any locational preference.
5		• Scenario 4 gives greater consideration to only renewable resources. It
6		does not utilize battery storage or gas resources. Like Scenario 3, it has no
7		locational preference.
8		
9	Q.	HOW WERE THESE SCENARIOS IMPLEMENTED THROUGH
10		MODELING?
11	A.	Using scenario descriptions as a guideline, PNM Witness Phillips discusses
12		PNM's modeling of the resulting resource portfolios and PNM Witness
13		Wintermantel discusses the resource adequacy analyses of those portfolios.
14		
15	Q.	PLEASE DESCRIBE THE PORTFOLIO OF RESOURCES FOR
16		SCENARIO 2.
17	A.	Scenario 2 provides for at least 450 MW of selected resources located in the
18		Central Consolidated School District. The Scenario 2 resources meet minimum
19		reliability requirements for PNM's system and are shown in PNM Table TGF-4
20		below.
21		

PNM Table TGF-4 – Scenario 2- San Juan Location Preference

Name	Resource Type	Nameplate Capacity	Ownership	Location
Pinon Gas	Gas	280 MW	EPC	San Juan
Heavy Frame #1	Gas	196 MW	EPC	San Juan

Q. WHY ISN'T SCENARIO 2 PNM'S RECOMMENDED REPLACEMENT

PORTFOLIO?

A. Limiting replacement resources to only be located in San Juan County results in elimination of other low cost resources. This eliminates the low-cost renewable resource bids of Arroyo Solar and Jicarilla 1 and the related energy storage projects listed in Scenario 1 and also limits resource diversity as discussed earlier in my testimony. This portfolio of resources results in a higher NPV of \$54 million for Scenario 2.

Q. ARE THERE BENEFITS TO SCENARIO 2?

A. Scenario 2 is the alternative that most mitigates the economic impacts to the
14 Farmington/San Juan regions related to the retirement of the San Juan coal plant.
15 Location of all replacement resources at or near the San Juan site preserves much
16 of the property tax base.

1 Q. IS PNM RECOMMENDING THAT THE COMMISSION APPROVE

2 SCENARIO 2?

A. No. PNM believes Scenario 1 better optimizes the available replacement resource mix for the reasons discussed in Section II of my testimony. Scenario 2 adds significant costs for PNM customers beyond the property tax base provided and

does not select either low cost renewables or battery storage.

7

13

6

8 Q. PLEASE DESCRIBE THE PORTFOLIO OF RESOURCES FOR

9 **SCENARIO 3.**

10 **A.** Scenario 3 eliminates natural gas resources from consideration. This scenario was
11 developed by restricting available fossil fuel resources to be selected. The
12 resources that make up Scenario 3 are shown in PNM Table TGF-5 below:

PNM Table TGF-5 – Scenario 3 – No New Fossil Fuels

Name	Resource Type	Nameplate Capacity	Ownership
Arroyo Solar Project	Solar	300 MW	PPA
Arroyo Storage Project with Arroyo Solar Above	Battery	40 MW	ESA
Jicarilla 1 Solar Project	Solar	50 MW	PPA
Jicarilla Storage Project with Jicarilla 1 Solar Above	Battery	20 MW	ESA
Solar Project #1	Solar	150 MW	ESA
Battery #1	Battery	40 MW	ESA
Battery #2	Battery	40 MW	ESA
Battery #3	Battery	40 MW	ESA
Battery #4	Battery	40 MW	ESA

Battery #5	Battery	40 MW	EPC
Battery #6	Battery	40 MW	EPC
Battery #7	Battery	40 MW	ESA
Sandia Storage Project	Battery	40 MW	EPC
Zamora Storage Project	Battery	30 MW	EPC

A.

Q. DOES SCENARIO 3 SATISFY THE MINIMUM RELIABILITY

REQUIREMENTS FOR PNM'S SYSTEM?

No. PNM Witness Wintermantel and Dorris identified reliability concerns with this scenario to meet the required loss of load probability metrics. In addition, PNM Witness Kemp discusses the technology risk associated with battery storage. This technology obviously will be a critical part of the path to 100% carbon free, although it has not been tested at high penetrations on any system in the country. Scenario 1 already has battery penetration at 5% of the PNM peak load. Increasing this still emerging resource type at high penetrations causes significant concerns for system reliability. As the industry has learned with the introduction of other new technologies, a staged approach to introduction is the most prudent way to progress. Therefore, Scenario 3 is not a viable option for replacement resources for San Juan due to system reliability concerns.

Q. PLEASE DESCRIBE THE PORTFOLIO OF RESOURCES FOR SCENARIO 4.

A. Scenario 4 includes only renewable resources to replace the San Juan coal plant in 2022. This scenario was developed to understand whether an all renewable

- replacement mix in 2022 could be relied on to meet system reliability needs. This scenario is similar to Scenario 3 which provides capacity via battery storage only.
- The Scenario 4 resources are shown in PNM Table TGF-6 below:

PNM Table TGF-6 - Scenario 4 - All Renewables

Name	Resource Type	Nameplate Capacity	Ownership
Arroyo Solar Project	Solar	300 MW	PPA
Jicarilla 1 Solar Project	Solar	50 MW	PPA
Solar #1	Solar	150 MW	PPA
Solar #2	Solar	50 MW	PPA
Solar #3	Solar	150 MW	PPA
Solar #4	Solar	75 MW	PPA
Solar #5	Solar	100 MW	PPA
Solar #6	Solar	100 MW	PPA
Wind #1	Wind	479 MW	PPA
Wind #2	Wind	400 MW	PPA
Wind #3	Wind	180 MW	PPA
Wind #4	Wind	140 MW	PPA

5

4

6 Q. DOES SCENARIO 4 MEET SYSTEM RELIABILITY REQUIREMENTS?

- 7 A. No. Scenario 4 included equal mixes of wind and solar as replacement resources.
- 8 Even though significant amounts of renewables were added, this scenario never
- 9 achieved acceptable system reliability as discussed by PNM Witness
- Wintermantel. Because Scenario 4 is not viable from a reliability standpoint,
- 11 PNM does not support its approval.

1 V. SAN JUAN COAL PLANT ABANDONMENT

2	Q.	WHAT DO YOU ADDRESS IN THIS SECTION OF YOUR TESTIMONY?
3	A.	I support shutting down the San Juan coal plant in June of 2022 when the current
4		coal supply agreement and ownership agreements expire. I provide a narrative of
5		the background and description of the San Juan coal plant in PNM Exhibit TGF-4
6		attached to my testimony.
7		
8	Q.	IS THIS PLANT A KEY COMPONENT OF PNM'S GENERATION
9		PORTFOLIO?
10	A.	Yes. San Juan provides base load generation for PNM's retail customers. San
11		Juan has been and currently is essential for maintaining reliable service to PNM's
12		retail customers. Because it currently serves customers, PNM cannot unilaterally
13		abandon the San Juan coal plant. PNM requires Commission approval for
14		abandonment. PNM also cannot shut down the plant without concurrence with
15		the other San Juan owners. However, retirement of San Juan in 2022 can result in
16		long term savings and other benefits for PNM customers.
. 17		
18	Q.	WHY IS IT REASONABLE AND APPROPRIATE TO RETIRE THE SAN
19		JUAN COAL PLANT IN 2022?
20	A.	There are a confluence of reasons that justify the retirement of the San Juan coal
21		plant in 2022. First, PNM's resource modeling conducted pursuant to the
22		Modified Stipulation in Case No. 13-00390-UT and PNM's 2017 IRP

demonstrated that it results in long term cost savings for customers if the San Juan 1 2 coal plant is retired in 2022 and replaced with a mix of natural gas and renewable resources. The modeling in this case confirms that conclusion. 3 4 5 Second, all of the San Juan owners, with the exception of Farmington, have 6 determined that they do not plan to continue plant operations after June 2022. 7 Although the San Juan coal plant is capable of operating beyond 2022 provided its owners were willing to make the necessary investments and secure the coal 8 9 supply, in light of the intentions of the majority of owners to abandon the plant, 10 any continued operation would have to be under a very different ownership 11 structure than currently exists. The fact that all the other owners, with the 12 exception of Farmington, will not operate the plant beyond June of 2022 only 13 confirms PNM's decision to seek abandonment approval. There is no economic 14 or practical way for the plant to continue to serve PNM customers past 2022. 15 16 Third, the enactment of the Energy Transition Act provides a path for utilities to 17 transition from coal generation resources and replace them with lower emitting 18 resources needed to meet increased RPS standards. The Act also imposes new 19 and costly emissions limitations in 2023 which will render the San Juan coal plant 20 even less economic to operate. The likely prohibitive cost of complying with stringent emissions limits has not been included in PNM's estimated cost of 21 22 keeping the coal plant running.

1	Q.	IS PNM'S DECISION TO SEEK ABANDONMENT OF THE SAN JUAN
2		COAL PLANT EFFECTIVE IN JUNE 2022 BASED ON COMPARATIVE
3		ANALYSES?
4	A.	Yes, as discussed by PNM Witness Phillips, PNM's 2017 IRP demonstrated there
5		would be savings, although the degree of benefits required further understanding
6		of available alternative resources. PNM refreshed that evaluation with updated
7		coal pricing from the San Juan Coal Company in May 2018, and also accounted
8		for changes in federal tax law, natural gas futures forecasts, and updated capital
9		and O&M forecasts for the San Juan coal plant. PNM again analyzed updated
10		coal pricing received in December 2018. PNM Exhibit TGF-5 contains the
11		detailed inputs and their assumptions that were used to model continuation of the
12		plant. As discussed by PNM Witness Phillips, the updated analyses confirmed
13		that PNM's abandonment of the San Juan coal plant in 2022 provides long-term
14		benefits to customers.
15		
16	Q.	YOU MENTION THAT FARMINGTON WISHES TO CONTINUE TO
17		RELY ON THE SAN JUAN COAL PLANT. HAS FARMINGTON
18		REACHED AGREEMENT WITH THE OTHER OWNERS TO ACQUIRE
19		THEIR INTERESTS IN THE SAN JUAN COAL PLANT?
20	A.	No. PNM understands that Farmington is actively seeking other parties to
21		continue plant operations beyond 2022. PNM has been acting in good faith with
22		respect to Farmington's efforts by providing requested information about plant
23		operations, such as capital costs, fixed and variable costs, coal supply and mine

reclamation information, plant design and operational history, personnel information, major contracts, insurance, permits, environmental information, health and safety plans and history and real property documents, among other information. Farmington has identified Acme Equities, LLC as a possible candidate to assist with acquiring the other San Juan owners' interests and continuing plant operations beyond 2022. As of July 1, 2019, no formal negotiations have been initiated regarding extension of plant operations beyond June 2022.

Regardless of Farmington's desire to find a new owner for San Juan, the San Juan owners are contractually required to take steps toward the orderly shutdown of San Juan operations in 2022.

VI. SAN JUAN ABANDONMENT COSTS

Q. WHAT IS THE PURPOSE OF THIS SECTION OF YOUR DIRECT

16 TESTIMONY?

A. In this section of my testimony I support certain abandonments costs referenced in the direct testimony in PNM Witness Monroy that are included in PNM's request for securitization financing. Specifically, I address (1) certain necessary capital expenditures for the San Juan coal plant that will need to be made, but will not be fully recovered by 2022, (2) plant decommissioning costs, and (3) San Juan Coal Mine reclamation costs.

A. Necessary Ongoing Plant Capital Expenses

2	Q.	IS IT NECESSARY FOR PNM AND THE OTHER SAN JUAN OWNERS	
3		TO MAKE CAPITAL INVESTMENTS IN THE PLANT EVEN THOUGH	
4		PLANS NOW CALL FOR RETIREMENT IN JUNE 2022?	
5	A.	Yes. In order to ensure the continued reliable and safe operation of San Juan	
6		through June of 2022 it is necessary for the owners to make certain capital	
7		investments. However, each capital investment is evaluated for whether it is	
8		essential for the safe and reliable operation of San Juan through June 2022. No	
9		capital investments are being made for purposes of extending the life of the plant	
10		beyond June 2022.	
11			
12	Q.	HOW MUCH DOES PNM ESTIMATE IT WILL NEED TO MAKE IN	
13		CAPITAL INVESTMENTS FOR THE PERIOD BETWEEN JANUARY	
14		2018 AND THE PROPOSED RETIREMENT OF THE PLANT IN JUNE	
15		2022?	
16	A.	PNM anticipates that its share of capital costs for continued plant operations from	
17		January 1, 2019, to June 30, 2022 will total approximately \$5.6 million. PNM	
18		Exhibit TGF-6 includes an itemization of the expenses that comprise this amount.	
19			
20	Q.	WHY ARE THESE EXPENSES NECESSARY KNOWING A PLANT	
21		SHUTDOWN MAY OCCUR IN JUNE 2022?	

1	A.	The \$5.6 million in required capital fall within one of three essential categories
2		for plant operations; safety, environmental requirements, or ensuring reliable
3		service through June 2022.
4		Safety: It is critical to ensure the safety of the San Juan employees throughout
5		the operation of the plant.
6		Regulatory compliance: Regulatory compliance is a necessary expense if the
7		San Juan coal plant is to continue to operate through June of 2022. The
8		environmental projects are associated with maintaining compliance with these
9		regulatory requirements while the plant operates.
10		Reliability through June 2022: For all projects that are necessary to continue
11		reliable operations, an economic cost-benefit analysis is performed. These so-
12		called "positive payback projects" are those for which the required investment
13		results in net cost savings. In extending the San Juan Project Participation
14		Agreement for Units 1 and 4 until June 30, 2022, the current owners required that
15		any project not driven by safety or regulatory requirements must be justified
16		based on an economic payback prior to June 2022. These positive payback
17		projects must demonstrate through net present value calculations that they save
18		money. These projects are limited to expenditures during the 2019 spring outage
19		on Unit 4, which is the last of the planned outages before shutdown in June 2022.
20		
21	Q.	ARE THE COSTS YOU JUST DESCRIBED REASONABLE AND
22		NECESSARY FOR THE SAN JUAN COAL PLANT TO SAFELY AND

1		RELIABLY SERVE CUSTOMERS THROUGH THE PROJECTED		
2		RETIREMENT IN JUNE OF 2022?		
3	A.	They are.		
4				
5	Q.	ARE THERE ANY PROJECT INVESTMENTS THAT PNM HAS NOT		
6		INCLUDED IN ITS ABANDONMENT COST ESTIMATES?		
7	A.	Yes. In March 2018 a coal silo failed on San Juan Unit 1. PNM agreed in Case		
8		No. 18-00085-UT to forego recovery for costs associated with the San Juan Unit 1		
9		coal silo failure and these costs are not included in the abandonment		
10		undepreciated investments.		
11				
12	В.	2. San Juan Decommissioning Costs		
13	Q.	WHAT ARE DECOMMISSIONING COSTS AS THEY RELATE TO THE		
14		ABANDONMENT OF SAN JUAN?		
15	A.	In general terms, decommissioning costs are those costs that are necessary to		
16		retire and secure San Juan after it ceases operations.		
17		1		
18	Q.	HOW IS THE DECOMMISSIONING OF SAN JUAN GOVERNED?		
19	A.	Under the terms of the San Juan Decommissioning and Trust Funds Agreement		
20		("Decommissioning Agreement"), the nine San Juan owners (past and present)		
21		established a Decommissioning Committee which consists of one representative		
22		from each of the owners. All nine owners, through the Decommissioning		

1		Committee, are responsible for determining the scope and approving all			
2		decommissioning activities.			
3					
4	Q.	WHAT ARE THE STEPS TO BE TAKEN FOR DECOMMISSIONING			
5		THE PLANT?			
6	A.	An owners' engineer (such as Burns and McDonnell) is used to conduct technical			
7		cost assessment for decommissioning. The owners' engineer develops a range of			
8		decommissioning scenarios that range from meeting industry standards to			
9		complete demolition at the site. Decommissioning activities include initial			
10		demolition, salvage, stabilization and safety and security measures, along with			
11		long term monitoring and maintenance costs. The Decommissioning Committee			
12		must weigh short term initial decommissioning costs with long term site			
13		monitoring and maintenance costs. Typically, a higher initial decommissioning			
14		cost will lead to lower long-term monitoring and maintenance cost. The strategy			
15		is to find the optimal blend of short term and long-term costs which will meet the			
16 .		owners' requirements.			
17					
18	Q.	HAVE THE SAN JUAN OWNERS SET UP ANY MECHANISM TO PAY			
19		FOR THE COSTS ASSOCIATED WITH SAN JUAN			
20		DECOMMISSIONING?			
21	A.	Yes. The Decommissioning Agreement requires all nine owners to execute a			
22		separate trust fund agreement with a financial institution for the establishment of			
23		an irrevocable trust fund for the decommissioning of San Juan			

1		("Decommissioning Trust"). The amount of the Trust Fund requirement is		
2		established by the vote of the Decommissioning Committee upon selecting the		
3		agreed to Decommissioning Plan.		
4				
5	Q.	HAS PNM ESTABLISHED A DECOMMISSIONING TRUST?		
6	A.	Yes. PNM established a Decommissioning Trust in March 2018. PNM Witness		
7		Monroy's testimony contains additional details regarding the accounting		
8		treatment of decommissioning and the associated funding.		
9				
10	Q.	WHO WILL ULTIMATELY DETERMINE THE FINAL		
11		DECOMMISSIONING PLAN FOR SAN JUAN?		
12	A.	The San Juan owners will decide the final decommissioning path for the site.		
13		PNM does not have unilateral authority over decommissioning. The		
14		Decommissioning Committee approves all expenditures from the trust fund for		
15		appropriate decommissioning activities, and is responsible for ensuring that the		
16		Decommissioning Trust fund is fully funded.		
17				
18	Q.	WHEN MUST THE DECOMMISSIONING COMMITTEE MAKE ITS		
19		FINAL DETERMINATION REGARDING THE DECOMMISSIONING OF		
20		THE PLANT?		
21	A.	The Decommissioning Agreement identifies a trigger for this decision after the		
22		final shutdown of the San Juan coal plant has been determined, which would		
23		occur after the Commission approves PNM's abandonment of the plant and		

Farmington determines that continued operation of the plant is not feasible. However, because of the obligation to take steps for an orderly shut down, the Decommissioning Committee has had an updated Decommissioning Study prepared by Burns & McDonnell in June 2019. The study provides various decommissioning scenarios and estimated costs. The owners are currently evaluating the various scenarios.

Q. DID PNM RELY ON THIS MOST RECENT DECOMMISSIONING

STUDY TO DEVELOP THE DECOMMISSIONING COST ESTIMATE IN

THIS CASE?

A. Yes. Section 1.1.1.1 of the Decommissioning Study identifies Option 1—Industry Best. The Industry Best option provides the lowest cost for decommissioning with a retirement in place scenario at a cost of \$58,533,000. A copy of Section 1 and Appendix B of the Decommissioning Study is attached as PNM Exhibit TGF-7. PNM then adjusted this value to reflect PNM's share of these costs, and made certain other adjustment, such as reducing the demolition amounts to account for the likely transfer of the site water diversions facilities (i.e. the lake and river stations) as described below, as well as reducing the Burns & McDonnell contingency adders based on PNM's knowledge as operator of the plant site. These adjustments are shown in PNM Exhibit TGF-8. With these adjustments, PNM's plant decommissioning estimate is \$24.1 million which is utilized in PNM Witness Monroy's testimony.

1	Q.	WHAT FACTORS MAY IMPACT THE FINAL SAN JUAN		
2		DECOMMISSIONING COSTS?		
3	A.	San Juan and the San Juan coal mine require the use of fresh water which is		
4		supplied by means of the San Juan river intake station and related pipeline and		
5		fresh water reservoir ("Diversion Facilities"). PNM is negotiating the potential		
6		transfer of these facilities to a third-party user for purposes other than supplying		
7		water to the plant. If the Diversion Facilities can be transferred, it would reduce		
8		the cost of plant decommissioning because these facilities will not have to be		
9		decommissioned. Any ongoing water needs at the site would be taken into		
10		consideration in determining whether to transfer the diversion infrastructure to a		
11		third-party.		
12				
13		PNM has conditionally adjusted the decommissioning costs associated with the		
14		Diversion Facility based on a possibility that these facilities may beneficially be		
15		transferred rather than demolished or otherwise decommissioned.		
16				
17	Q.	DO THE PROPOSED DECOMMISSIONING COSTS COVER ALL		
18		COSTS TO DEMOLISH THE SAN JUAN PLANT?		
19	A.	No. The cost estimates reflect the most recent Burns & McDonnell Industry Best		
20		Option that includes addressing all regulatory requirements for plant closure as		
21		well as industry prudent best practices for plant closure. The remaining facilities		
22		at the plant will continue to be monitored, and at such a time that additional		

1		demolition is warranted and approved by the Decommissioning Committee, those			
2		activities would be completed.			
3					
4	Q.	WILL THERE BE ANY ON-GOING EXPENSES AFTER SAN JUAN IS			
5		SHUT DOWN AND, IF SO, WHAT DO THESE ON-GOING EXPENSES			
6		COVER?			
7	A.	There will be on-going expenses and they were considered as part of the			
8		determination of the Industry Best Option. It is less costly to continue to monitor			
9		much of the existing plant equipment rather than to demolish it immediately.			
10		Also, there are on-going costs associated with insurance, site security, and			
11		environmental monitoring requirements for the site which would be incurred to a			
12		certain degree regardless of the decommissioning option selected.			
13					
14	Q.	WHAT ARE THE ONGOING DECOMMISSIONING COSTS			
15		ASSOCIATED WITH SAN JUAN?			
16	A.	The Industry Best Option identified in the Decommissioning Study identifies			
17		costs for continued monitoring and on-going liabilities for the site. This option			
18		was selected as it provides the lowest cost option for customers as shown in PNM			
19		Exhibit TGF-7. The Decommissioning Study identifies \$1.45 million in annual			
20		on-going expenses. PNM modified this estimate by removing the on-going			
21		expenses associated with Diversion Facilities discussed above and adjusting for			
22		PNM's share of those on-going expenses to come up with an estimated \$645,555			

1		in annual on-going expenses for the plant site following shutdown. These costs		
2		are included in the Decommissioning Costs utilized by PNM Witness Monroy.		
3				
4	Q.	ARE THE FOREGOING PLANT DECOMMISSIONING COSTS		
5		NECESSARY AND REASONABLE EXPENSES TO SERVE PNM'S		
6		CUSTOMERS?		
7	A.	Yes. The San Juan coal plant has been a long-standing and beneficial resource for		
8		PNM's customers. Decommissioning Costs are a necessary expense in serving		
9		customers. The costs for decommissioning estimated by Burns & McDonnell and		
10		as adjusted as discussed above are reasonable.		
11				
12	С.	San Juan Coal Mine Reclamation		
13	Q.	WILL THE SAN JUAN OWNERS, INCLUDING PNM, HAVE ONGOING		
14		RECLAMATION OBLIGATIONS AFTER THE JUNE 2022 CLOSURE OF		
15		THE PLANT?		
16	A.	Yes. The San Juan owners are contractually required to reimburse the San Juan		
17		Coal Company for all the reclamation work performed at the San Juan surface and		
18		underground mines through mine permit bond release which is currently projected		
19		to be after 2038. These reclamation obligations are acknowledged by PNM in		
20		Section 7.4 of the Coal Supply Agreement and by all the San Juan owners in		
21		Section 3.0 of the Amended and Restated Mine Reclamation Trusts Funds		
22		Agreement.		

1	Q.	GENERALLY, WHAT ARE THE REGULATORY REQUIREMENTS FOR
2		COAL MINE RECLAMATION?
3	A.	Most of the pre-mining land use within the San Juan Mine permit area was for
4		livestock grazing with smaller areas of wildlife habitat. The approved post-mine
5		land use, as stated in the Mine Permit, is for grazing. Therefore, in broad terms,
6		mine reclamation requires the land to be brought to a state to allow for livestock
7		grazing. This includes filling the open pits, providing for at least a ten-foot cap
8		over any ash deposits, grading the surface to allow drainage, contouring the
9		surface to mimic pre-mining topography, seeding with indigenous vegetation, and
10		monitoring for 10 years to assure that the revegetation is successful.
11		
12	Q.	WHAT NEW MEXICO REGULATORY AGENCY OVERSEES THE SAN
13		JUAN MINE PERMIT AND RECLAMATION REQUIREMENTS?
14	A.	The New Mexico Mining and Mineral Division ("MMD") of the Energy, Mineral
15		and Natural Resources Department.
16		
17	Q.	WHO HOLDS THE SAN JUAN MINE PERMIT?
18	A.	Westmoreland San Juan Mining LLC ("WSJM") holds the San Juan Mine permit.
19		
20	Q.	WHAT IS THE HIGH-LEVEL SCHEDULE FOR THE SAN JUAN MINE
21		RECLAMATION EFFORT?
22	A.	While San Juan operates, reclamation work will be performed contemporaneously
23		as part of the disposal process of coal combustible residuals (ash). Starting in

1		July of 2022, reclamation will accelerate with all major earthwork anticipated to	
2		be completed in 2028. After the major earthwork is complete, the final areas will	
3		be seeded for revegetation. To assure that reclaimed areas have been successfully	
4		restored and are viable, the MMD requires a 10-year monitoring period of the	
5		reclaimed areas. The earliest date that the reclamation liability will be completely	
6		released is estimated to be 2038. Any failures in the revegetation efforts in the	
7		reclaimed areas will push the release date further into the future.	
8			
9	Q.	ARE THERE ANY FINANCIAL VEHICLES NOW TO ENSURE	
10		SUCCESSFUL COMPLETION OF THESE RECLAMATION	
11		ACTIVITIES?	
12	A.	Yes, WSJM as the permit holder is required to maintain a \$118 million bond for	
13		these activities. This bond amount was determined by and is held by the MMD as	
14		the beneficiary.	
15			
16	Q.	DOES PNM HAVE AN ESTIMATE OF THE COSTS FOR THE	
17		RECLAMATION OF THE SAN JUAN MINE AFTER SAN JUAN	
18		RETIREMENT?	
19	A.	Yes. In August of 2018, PNM's mining consultant Golder Associates completed	
20		an extensive mine reclamation cost review. From the Golder review, the	
21		projected total cost of reclamation effort from 2018 through 2038 was \$200	
22		million. The projected total cost from the June 2022 shut down through 2038 was	
23		\$169 million. A copy of Tables C12 (Pre 2017 cost liabilities) and C13 (Post	

1		2017 cost liabilities) the Golder cost review are attached PNM Exhibit HEM-4 to				
2		the testimony of PNM Witness Monroy.				
3						
4	Q.	HAS PNM CALCULATED THE ADDITIONAL ASSOCIATED				
5		UNDERGROUND RECLAMATION COSTS DUE TO THE CLOSURE OF				
6		SAN JUAN IN JUNE 2022?				
7	A.	Yes. With the closure of San Juan, the reclamation work associated with the				
8		disposal of the coal combustible residuals will cease. This effort will be replaced				
9		by major earthwork reclamation activities. There will be additional costs				
10		associated with the underground reclamation due to the timing of this work.				
11		Please refer to PNM Witness Monroy for additional details.				
12						
13	Q.	ARE THESE RECLAMATION COSTS REASONABLE AND				
14		NECESSARY COSTS INCURRED TO SERVE PNM'S CUSTOMERS?				
15	A.	Yes. Coal from the San Juan Mine was necessary for the plant to operate for				
16		more than four decades. Mine reclamation is required under applicable law. The				
17		reclamation costs are necessary so that San Juan could serve PNM's customers				
18		during this period. Golder has performed an extensive cost survey and				
19		determined the costs are also reasonable. Therefore, the reclamation costs are				
20		both necessary and reasonable.				
21						

1 VII. REQUESTED APPROVALS FOR REPLACEMENT RESOURCES

2	Q.	PLEASE IDENTIFY THE APPROVALS THAT PNM IS SEEKING FOR	
3		THE RESOURCES THAT MAKE UP SCENARIO 1.	
4	A.	PNM is seeking the following approvals for t	the resources contained in Scenario 1:
5		• The Arroyo Solar Project:	PPA Approval
6		• The Arroyo Storage Project:	ESA (PPA) Approval
7		• The Jicarilla I Solar Project:	PPA Approval
8		• The Jicarilla Storage 1 Project:	ESA (PPA) Approval
9		• The Sandia Storage Project:	CCN Approval
10		• The Zamora Storage Project:	CCN Approval
11		• Pinon Gas Plant:	CCN Approval
12			
13	Q.	ARE THERE TIME SENSITIVITIE	CS ASSOCIATED WITH THE
14		RESOURCES IN SCENARIO 1?	
15	A.	Yes. Each of these projects have approve	al date provisions written into their
16		associated contracts either to ensure the renewable tax credits can be fully	
17		utilized, or in order to ensure project engin	neering and equipment purchases can
18		occur to meet the 2022 installation dates. It	t is important to meet these deadlines
19		because the costs of the projects otherwise	will increase or become unavailable.
20		These specified approval dates are outlined by	pelow:
21		• The Arroyo Solar Project:	April 30, 2020
22		• The Arroyo Storage Project:	April 30, 2020

1		• The Jicarilla Solar 1 Project:	April 30, 2020
2		• The Jicarilla Storage 1 Project:	April 30, 2020
3		• The Sandia Storage Project:	September 30, 2020
4		• The Zamora Storage Project:	September 30, 2020
5		• Pinon Gas Plant:	September 30, 2020
6			
7	Q.	WHY ARE THE REPLACEMENT R	ESOURCES THAT ARE THE
8		SUBJECT OF THE PPAS AND CCNS	S NEEDED TO SERVE PNM'S
9		CUSTOMERS?	
10	A.	These resources are needed to replace the le	ost capacity and energy if the San Juan
11		coal plant is retired in 2022. Units 1 and	4 of the San Juan coal plant represent
12		497 MW of capacity on PNM's system	n. As discussed in detail by PNM
13		Witnesses Phillips and Wintermantel, repla	cement resources are required in order
14		for PNM to continue to reliably serve the en	nergy needs of its customers.
15			
16	Q.	WERE THE REPLACEMENT RESOU	RCES THAT ARE INCLUDED IN
17		SCENARIO 1 DETERMINED BA	ASED ON A COMPETITIVE
18		PROCUREMENT PROCESS?	
19	A.	Yes. These proposed replacement resource	es were identified and evaluated in the
20		context of the All Resource RFP and Sup	plemental RFP allowing bids utilizing
21		any generation technology, with the ex	cception of coal-fired generation, or
22		combination of generating technologies	, and allowing bids under various
23		ownership structures. As addressed in Sect	ion III of my testimony, PNM received

345 bids in response to the initial RFP including wind, solar, energy storage, and natural gas-fueled technologies. An additional 45 bids were received in response to the supplemental April 2019 RFP. As detailed above, PNM, in conjunction with its consultants, conducted a thorough and comprehensive evaluation process, taking into account the criteria under the Energy Transition Act. The proposed replacement resources are the product of this robust selection process. The details of the RFP process and the selection of these specific replacement resources are discussed in detail by PNM Witnesses Phillips, Nagel and Wintermantel. DO THE PROPOSED REPLACEMENT RESOURCES IN SCENARIO 1 MEET THE OBJECTIVES OF THE ENERGY TRANSITION ACT? Yes. As I discuss in more detail in Section II of my testimony, Scenario 1

Q.

essentially doubles the penetration of renewable resources on PNM's system in just a couple of years while maintaining critical system reliability. Because the Pinon Gas Plant is located at the San Juan coal plant site, it also provides jobs and economic development to the San Juan region. All of these attributes of Scenario 1 are consistent with the Energy Transition Act.

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A. Requested PPA Approvals

2	Q.	HOW IS YOUR TESTIMONY ORGANIZED WITH RESPECT TO THE
3		PPA AND ESA PROJECTS FOR WHICH PNM IS SEEKING
4		APPROVAL?
5	A.	The PPAs and ESAs involve two sets of related agreements. The Arroyo Solar
6		Project and the Arroyo Storage Project, while the subject of separate agreements,
7		are linked together. Likewise, the Jicarilla Solar 1 Project and the Jicarilla
8		Storage 1 Project are linked together but are covered in separate agreements.
9		There is a fair amount of standardization to PNM's PPA agreements which have
10		been carried over to the ESAs. As discussed below, the standards under 17.9.551
11		NMAC ("Rule 551") apply to the PPAs and ESAs in this case. Where possible, I
12		discuss the PPAs and ESAs jointly.
13		\cdot
14	Q.	IS RULE 551 APPLICABLE TO THE ESAS?
15	A.	Rule 17.9.551.7(F) NMAC applies to an "agreement for the purchase of energy or
16		capacity, or both" and the two ESAs are long-term agreements for the purchase of
17		capacity.
18		
19	Q.	IS PNM REQUIRED TO OBTAIN COMMISSION APPROVAL FOR THE
20		PROPOSED PPAS AND ESAS?
21	Α.	Yes. Under Rule 551 an electric utility is required to obtain the Commission's
22		written approval before becoming irrevocably bound under a long-term PPA.

1		which is defined as a PPA with a term of five years or more and for which the
2		utility intends to seek rate recovery from New Mexico retail customers. (Rule
3		551.7(E) and 8(A)). Rule 551 also requires that a utility file an application for
4		approval with the Commission within thirty days after the execution of a long-
5		term PPA. (Rule 551.8(B)).
6		
7	Q.	HAS PNM COMPLIED WITH THESE PROVISIONS OF THE PPA RULE
8		WITH RESPECT TO THE PPAS AND ESAS?
9	A.	Yes. All of the agreements were executed on June 27, 2019 so PNM's
10		Application is filed timely. In addition, under Section 6.1 of the each of the
11		agreements, they become effective only after Commission approval.
12		
13	Q.	PLEASE BRIEFLY DESCRIBE THE PPAS AND ESAS.
14	A.	I described the PPAs and ESAs in Section II of my testimony. To summarize:
15		Arroyo Solar PPA - The Arroyo Solar PPA is between PNM, as buyer, and
16		Arroyo Solar as seller, for 300 MW _{AC} of solar energy from the Arroyo Solar
17		Facility ("Arroyo Solar Project"). A copy of the Arroyo Solar PPA is attached as
18		PNM Exhibit TGF-9.
19		Arroyo Storage ESA - The Arroyo Storage ESA is between PNM, as buyer, and
20		Arroyo Storage as seller, for 40 MW _{AC} 4-hour battery storage from the Arroyo
21		Storage battery system ("Arroyo Storage Project"). The Arroyo Storage Project
22		will be charged from the Arroyo Solar Project for the first five years after

1		Commercial Operation Date. A copy of the Arroyo Storage ESA is attached as
2		PNM Exhibit TGF-10.
3		Jicarilla Solar 1 PPA - The Jicarilla Solar 1 PPA is between PNM, as buyer, and
4		Jicarilla Solar as seller, for 50 $MW_{AC}\ of$ solar energy from the Jicarilla Solar 1
5		facility ("Jicarilla Solar 1 Project"). A copy of the Jicarilla Solar 1 PPA is
6		attached as PNM Exhibit TGF-11.
7		Jicarilla Storage 1 ESA - The Jicarilla Storage 1 ESA is between PNM, as buyer,
8		and Jicarilla Storage as seller, for 20 MW _{AC} 4-hour energy storage from the
9		Jicarilla Storage 1 battery system ("Jicarilla Storage 1 Project") which is being
0		charged from the Jicarilla Solar 1 Project for the first 61 months after Commercial
11		Operation Date. A copy of the Jicarilla Storage 1 ESA is attached as PNM
12		Exhibit TGF-12.
13		
14	Q.	PLEASE PROVIDE SOME BACKGROUND ON ARROYO SOLAR AND
15		ARROYO STORAGE.
16	A.	Arroyo Solar and Arroyo Storage are owned by Clenera which is a utility-scale
17		solar developer, construction and asset manager service provider. Clenera is a
18		privately-owned company headquartered in Boise, Idaho.
19		
20	Q.	PLEASE PROVIDE SOME BACKGROUND ON JICARILLA SOLAR
21		AND JICARILLA STORAGE LLC.
22	A.	Jicarilla Solar and Jicarilla Storage are owned by Hecate, which is wholly owned
23		by Hecate Energy LLC. Hecate Energy LLC, is a privately-owned company

1		headquartered in Chicago that has developed 363 MW of operating solar projects
2		with more than 1 GW of solar and energy storage projects under contract. Hecate
3		and Primary Energy have a Joint Development Agreement for the Jicarilla Solar 1
4		Facility and the Jicarilla Storage 1 Facility. Primary Energy is also privately
5		owned and is a developer, owner and operator of generation facilities whose
6		combined fleet capacity is 298 MW's.
7		
8	Q.	DOES PNM HAVE ANY EXISTING AGREEMENTS WITH ANY
9		HECATE COMPANIES FOR SOLAR ENERGY?
10		Yes. PNM has a PPA with Jicarilla Solar 2, LLC for the Jicarilla Solar 2 Project
11		pending before the Commission in Case No. 19-00158-UT for the PNM Solar
12		Direct Project. The size, developer, ownership structure and location for the
13		Jicarilla Solar 1 Project is the same as for the Jicarilla Solar 2 Project.
14		
15	Q.	PLEASE DESCRIBE THE TERMS OF THE PPAS INCLUDING ANY
16		OPTIONS TO EXTEND (RULE 551.8(D)(2)(A)).
17	A.	Arroyo Solar PPA - The Arroyo Solar PPA provides that Arroyo Solar will sell to
18		PNM the energy output from the Arroyo Solar Project over a twenty-year term.
19		There are no options to extend the term beyond twenty years. The twenty-year
20		term begins on the Commercial Operation Date under the PPA, which is expected
21		to be June 30, 2022. The PPA is subject to early termination for Events of
22		Default set forth in Article 12.4 of the PPA and discussed in more detail below.

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Arroyo Storage ESA - The Arroyo Storage ESA provides energy storage capacity for PNM charged from either the co-located Arroyo Solar Project (first 5 years) or from the grid (after 5 years) and deliver the energy output to PNM over a twentyyear term. There are no options to extend the term beyond twenty years. The twenty-year term begins on the Commercial Operation Date under the ESA, which is expected to be June 30, 2022. The ESA is subject to early termination for Events of Default set forth in Article 12.4 of the ESA and discussed in more detail below. Jicarilla Solar 1 PPA - The Jicarilla Solar 1 PPA provides that Jicarilla Solar will sell to PNM the energy output from the Jicarilla Solar 1 Project over a twentyyear term. There are no options to extend the term beyond twenty years. The twenty-year term begins on the Commercial Operation Date under the PPA, which is expected to be November 30, 2021. If Commission approval is not received on the San Juan abandonment and this PPA by April 30, 2020 then the parties shall meet to determine if a potential extension of that date can occur or to terminate this PPA. The PPA is subject to early termination for Events of Default set forth in Article 12 of the PPA. Jicarilla Storage 1 ESA - The Jicarilla Storage 1 ESA provides energy storage capacity for PNM charged from either the co-located Jicarilla Solar facility (for the first 61 months), or from the grid (after 61 months) and deliver the energy output to PNM over a twenty-year term. There are no options to extend the term beyond twenty years. The twenty-year term begins on the Commercial Operation Date under the ESA, which is expected to be November 30, 2021. The ESA is

1		subject to early termination for Events of Default set forth in Article 12.4 of the
2		ESA and discussed in more detail below.
3		
4	Q.	WHAT IS THE NAMEPLATE CAPACITY OF THE PPA AND ESA
5		PROJECTS AND THE AMOUNT OF ENERGY PNM WILL PURCHASE
6		UNDER THE PPAS (RULE 551.8(D)(2)(B))?
7	A.	Arroyo Solar PPA - The nameplate capacity of the Arroyo Solar Project is
8 -		approximately 300 MW and the project is expected to produce 810,000-830,000
9		MWh of energy per year. Under Section 8.1 of the Arroyo Solar PPA, PNM is
10		required to purchase net solar energy generated by the facility and delivered to
11		PNM in 25 MW blocks after successful commissioning of said blocks with the
12		full capacity beginning on the Commercial Operation Date.
13		Arroyo Storage ESA - The nameplate capacity of the Arroyo Storage facility is
14		approximately 40 MW, 4-hour storage, 365 equivalent charge/discharge cycles
15		per year. Under Section 8.1 of the Arroyo Storage ESA, PNM is required to pay
16		a monthly capacity payment beginning on the Commercial Operation Date.
17		Jicarilla Solar 1 PPA - The nameplate capacity of Jicarilla Solar 1 Project is
18		approximately 50 MW and the project is expected to produce 130,000-140,000
19		MWh of energy per year. Under Section 8.1 of the Jicarilla Solar 1 PPA, PNM is
20		required to purchase net solar energy generated by the facility and delivered to
21		PNM beginning on the Commercial Operation Date.
22		Jicarilla Storage 1 ESA - The nameplate capacity of the Jicarilla Storage 1
23		facility is approximately 20 MW, 4-hour storage, 365 equivalent charge/discharge

1		cycles per year. Under Section 8.1 of the Jicarilla Storage 1 ESA, PNM is
2		required to pay a monthly capacity payment beginning on the Commercial
3		Operation Date.
4		
5	Q.	PLEASE DESCRIBE THE INDIVIDUAL PRICING PNM WILL PAY
6		UNDER THE PPAS AND ESAS, INCLUDING WHEN CHARGES BEGIN,
7		ANY PRICE REOPENERS AND ANY PRICE ESCALATION
8		PROVISIONS (RULE 551.8(D)(2)(C)).
9	A.	Arroyo Solar PPA - The Solar Energy Output Payment Rate over the twenty-year
10		term of the PPA is \$18.65/MWh _{AC} , which includes payment for metered energy,
11		capacity, Deemed Delivered Energy, Ancillary Services, Environmental
12		Attributes and RECs. This price will remain fixed over the term of the PPA with
13		no escalations and cannot be reopened once the PPA has been approved by the
14		Commission and is in effect. Charges will begin on the Commercial Operation
15		Date as defined above and PNM will purchase test energy at the Test Energy
16		Payment Rate, which is 50% of the Solar Energy Output Payment Rate.
17		Arroyo Storage ESA - The Arroyo Storage ESA has a monthly capacity payment
18		over the twenty-year term of the ESA of \$7.46/kw-mo, which includes payment
19		for Energy Storage Capacity, Ancillary Services, and Environmental Attributes.
20		This price will remain fixed over the term of the ESA with no escalations and
21		cannot be reopened once the ESA has been approved by the Commission and is in
22		effect. Charges will begin on the Commercial Operation Date and PNM.

1		Jicarilla Solar 1 PPA - The Solar Energy Output Payment Rate over the twenty-
2		year term of the PPA is \$19.73/MWhAC, which includes payment for metered
3		energy, capacity, Deemed Delivered Energy, Ancillary Services, and RECs. This
4		price will remain fixed over the term of the PPA with no escalations and cannot
5		be reopened once the PPA has been approved by the Commission and is in effect.
6		Charges will begin on the Commercial Operation Date and PNM will purchase
7		test energy at the Test Energy Payment Rate, which is 50% of the Solar Energy
8		Output Payment Rate.
9		Jicarilla Storage 1 ESA - The Jicarilla Storage 1 ESA has a monthly capacity
10		payment over the twenty-year term of the ESA of \$9.97/kw-mo, which includes
11		payment for Energy Storage Capacity, Ancillary Services, and Environmental
12		Attributes. This price will remain fixed over the term of the ESA with no
13		escalations and cannot be reopened once the ESA has been approved by the
14		Commission and is in effect. Charges will begin on the Commercial Operation
15		Date.
16		
17	Q.	DO THE PPAS OR ESAS OBLIGATE PNM TO PAY ANY FIXED OR
18		VARIABLE ADMINISTRATIVE COSTS, TRANSACTIONAL,
19		OPERATION AND MAINTENANCE COSTS, OR ANY COSTS OTHER
20		THAN FOR DELIVERED ENERGY (RULE 551.8(D)(2)(D))?
21	Α.	None of the PPAs or ESAs require PNM to pay any administrative costs,
22		transactional, or operation and maintenance costs. For the Arroyo Solar PPA and
23		the Jicarilla 1 PPA, PNM will pay for Deemed Delivered Energy which is energy

that could have been delivered if the facility was not curtailed by PNM for the
purpose of achieving economic savings or due to economic bidding; however,
PNM does not pay for Deemed Delivered Energy due to reliability curtailments,
transmission curtailments or Seller curtailment.

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Q. PLEASE DESCRIBE THE PPA AND ESA PROVISIONS RELATING TO NON-PERFORMANCE (RULE 551.8(D)(2)(E)).

A. Arroyo Solar PPA - Default by Arroyo Solar is addressed in Article 12 of the PPA, including the cure period for each type of default and the remedies. A default becomes an Event of Default if not cured within the applicable cure period, or immediately, if no cure period is specified. Potential Events of Default by Arroyo Solar include but not limited to: (1) the sale, dissolution, or abandonment of the facility; (2) failure to maintain required security; (3) bankruptcy; (4) failure to maintain the interconnection to the PNM system; and (5) failure to make any payment when due. More details are provided in the PPA in Article 12. Upon the occurrence of an Event of Default by Arroyo Solar LLC, PNM may collect damages incurred prior to the termination date as a result of the Event of Default, as well as terminate the PPA and receive a termination payment. Such damages would include the cost of replacement energy for the renewable energy that Arroyo Solar LLC failed to deliver under the terms of the PPA. Article 12 also defines Events of Default related to non-performance of the facility. Performance-related Events of Default include: (1) Arroyo Solar LLC's failure to achieve the Commercial Operation Date on or prior to the Guaranteed

Start Date; ¹ and (2) the failure of the Arroyo facility to maintain, after the
Commercial Operation Date, an availability percentage of at least seventy-five
percent (75%) over any twenty-four (24) consecutive months during the twenty-
year term. Arroyo Solar is liable for liquidated damages for non-performance.
Article 3.7 provides that, if the Commercial Operation Date has not occurred by
the Expected Commercial Operation Date, Arroyo Solar will pay PNM liquidated
damages in an amount equal to two hundred dollars (\$200) per day for each MW
of capacity that is delayed. These delay liquidated damages are capped at thirty-
six thousand dollars (\$36,000) per MW of capacity that is delayed. Arroyo Solar
also must pay liquidated damages if it has not caused all delayed capacity to
achieve Commercial Operation by the Guaranteed Start Date. The amount of
liquidated damages equals five hundred thousand dollars (\$500,000) per MW of
delayed capacity.
Arroyo Storage ESA - Default by Arroyo Storage is addressed in Article 12 of the
ESA, including the cure period for each type of default and the remedies. A
default becomes an Event of Default if not cured within the applicable cure
period, or immediately, if no cure period is specified. Potential Events of Default
by Arroyo Storage LLC under the ESA include: (1) the sale, dissolution, or
abandonment of the facility; (2) failure to maintain required security; (3)
bankruptcy; (4) failure to maintain the interconnection to the PNM system; and
(5) failure to make any payment when due. Upon the occurrence of an Event of

 $^{^{1}}$ "Guaranteed Start Date" in all of the agreements is defined as one hundred fifty days after the Expected Commercial Operation Date.

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Default by Arroyo Storage, PNM may collect damages incurred prior to the
termination date as a result of the Event of Default, as well as terminate the ESA
and receive a termination payment. Such damages would include the cost of
replacement capacity and energy storage services that Arroyo Storage failed to
deliver under the terms of the ESA. Article 12 also defines Events of Default
related to non-performance of the facility. Performance-related Events of Default
include: (1) failure to achieve the Commercial Operation Date on or prior to the
Guaranteed Start Date; and (2) the failure to maintain, after the Commercial
Operation Date, an availability percentage of at least eighty-five percent (85%)
over any twenty-four (24) consecutive months during the twenty-year term.
Arroyo Storage is liable for liquidated damages for non-performance. Article 3.7
provides that, if the Commercial Operation Date has not occurred by the Expected
Commercial Operation Date, Arroyo Storage will pay PNM liquidated damages in
an amount equal to two hundred dollars (\$200) per day for each MW of capacity
that is delayed. These delay liquidated damages are capped at thirty-six thousand
dollars (\$36,000) per MW of capacity that is delayed. Arroyo Storage also must
pay liquidated damages if it has not caused all delayed capacity to achieve
Commercial Operation by the Guaranteed Start Date. The amount of liquidated
damages equals five hundred thousand dollars (\$500,000) per MW of delayed
capacity.
Jicarilla Solar 1 PPA - Default by Jicarilla Solar 1 is addressed in Article 12 of
the PPA, including the cure period for each type of default and the remedies. A
default becomes an Event of Default if not cured within the applicable cure

period, or immediately, if no cure period is specified. Potential Events of Default
by Jicarilla Solar 1 under the PPA include: (1) the sale, dissolution, or
abandonment of the facility; (2) failure to maintain required security; (3)
bankruptcy; (4) failure to maintain the interconnection to the PNM system; and
(5) failure to make any payment when due. Upon the occurrence of an Event of
Default by Jicarilla 1 Solar, PNM may collect damages incurred prior to the
termination date as a result of the Event of Default, as well as terminate the PPA
and receive a termination payment. Such damages would include the cost of
replacement energy for the renewable energy that Jicarilla Solar 1 failed to deliver
under the terms of the PPA. Article 12 also defines Events of Default related to
non-performance of the facility. Performance-related Events of Default include:
(1) failure to achieve the Commercial Operation Date on or prior to the
Guaranteed Start Date; (2) failure to maintain, after the Commercial Operation
Date, an availability percentage of at least eighty percent (80%) over any twenty-
four consecutive months during the twenty-year term; and (3) the failure to obtain
an availability percentage of sixty-five percent (65%) over any twelve consecutive
months during the twenty-year term. Jicarilla Solar 1 is liable for liquidated
damages for non-performance. Article 3.7 provides that, if the Commercial
Operation Date has not occurred by the Expected Commercial Operation Date,
Jicarilla Solar 1 will pay PNM liquidated damages in an amount equal to two
hundred dollars (\$200) per day for each MW of capacity that is delayed. These
delay liquidated damages are capped at thirty-six thousand dollars (\$36,000) per
MW of capacity that is delayed. Jicarilla Solar 1 also must pay liquidated

damages if it has not caused all delayed capacity to achieve Commercial
Operation by the Guaranteed Start Date. The amount of liquidated damages
equals six hundred thousand dollars (\$600,000) per MW of delayed capacity.
Jicarilla Storage 1 ESA - Default by Jicarilla Storage 1 is addressed in Article 12
of the ESA, including the cure period for each type of default and the remedies. A
default becomes an Event of Default if not cured within the applicable cure
period, or immediately, if no cure period is specified. Potential Events of Default
by Jicarilla Storage 1 under the ESA include: (1) the sale, dissolution, or
abandonment of the facility; (2) failure to maintain required security; (3)
bankruptcy; (4) failure by to maintain the interconnection to the PNM system; and
(5) failure to make any payment when due. Upon the occurrence of an Event of
Default, PNM may collect damages incurred prior to the termination date as a
result of the Event of Default, as well as terminate the ESA and receive a
termination payment. Such damages would include the cost of replacement
capacity and energy storage services that Jicarilla Storage 1 failed to deliver under
the terms of the ESA. Article 12 also defines Events of Default related to non-
performance of the facility. Performance-related Events of Default include: (1)
failure to achieve the Commercial Operation Date on or prior to the Guaranteed
Start Date; (2) the failure to maintain, after the Commercial Operation Date, an
availability percentage of at least eighty-five percent (85%) over any twenty-four
consecutive months during the twenty-year term. Jicarilla Solar 1 is liable for
liquidated damages for non-performance. Article 3.7 provides that, if the
Commercial Operation Date has not occurred by the Expected Commercial

1		Operation Date, Jicarilla Solar 1 will pay PNM liquidated damages in an amount
2		equal to two hundred dollars (\$200) per day for each MW of capacity that is
3		delayed. These delay liquidated damages are capped at thirty-six thousand dollars
4		(\$36,000) per MW of capacity that is delayed. Jicarilla Solar 1 also must pay
5		liquidated damages if it has not caused all delayed capacity to achieve
6		Commercial Operation by the Guaranteed Start Date. The amount of liquidated
7		damages equals six hundred thousand dollars (\$600,000) per MW of delayed
8		capacity.
9		
10	Q.	ARE THERE ANY APPROVALS OR PERMITS REQUIRED TO
11		CONSTRUCT AND OPERATE THE PROJECTS THAT ARE THE
12		SUBJECT OF THE PPAS (RULE 551.8(D)(5)(C)(I))?
13		The permits required for each project are listed in Exhibit E of the respective
14		PPAs and the ESAs.
15		
16	Q.	PLEASE DESCRIBE THE FACILITIES THAT ARE THE SUBJECT OF
17		THE PPAS AND ESAS (RULE 551.8(D)(5)(C)(II), (III), AND (IV)).
18	A.	Arroyo Solar PPA - The Arroyo Solar Project is a new 300 MW solar photo
19		voltaic facility that will be located in Pueblo Pintado, McKinley County, New
20		Mexico. A project description is included in Exhibit A to the PPA and additional
21		site descriptions are provided in Exhibit C to the PPA (provided as PNM Exhibit
22		TGF-9). Construction is anticipated to begin upon Commission approval of the

1	PPA and the Ex	pected Commercial Operation Date for the facility is June 30,
2	2022.	
3	Arroyo Storage	ESA - The Arroyo Storage Project is a new 40 MW, 4-hour
4	energy storage fa	cility that will be located in Pueblo Pintado, McKinley County,
5	New Mexico. A	A project description is included in Exhibit A to the ESA and
6	additional site de	escriptions are provided in Exhibit C to the ESA (provided as
7	PNM Exhibit TO	GF-10). Construction is anticipated to begin upon Commission
8	approval of the P	PA and the Expected Commercial Operation Date for the facility
9	is June 30, 2022.	
10	Jicarilla Solar 1	PPA - The Jicarilla Solar 1 Project is a new 50 MW solar photo
. 11	voltaic facility th	nat will be located in the Jicarilla Apache Nation in Rio Arriba
12	County, New Me	exico. A site description is included in Exhibit A and Exhibit C
13	to the PPA (pro-	vided as PNM Exhibit TGF-11). Construction is anticipated to
14	begin upon Con	nmission approval of the PPA and the Expected Commercial
15	Operation Date for	or the facility is November 30, 2021.
16	Jicarilla Storage	1 ESA - The Jicarilla Storage 1 Project is a new 20 MW, 4-hour
17	energy storage fa	acility that will be located in the Jicarilla Apache Nation in Rio
18	Arriba County, N	New Mexico. A project description is included in Exhibit A to the
19	ESA and addition	onal site descriptions are provided in Exhibit C to the ESA
20	(provided as PN	M Exhibit TGF-12). Construction is anticipated to begin upon
21	Commission app	roval of the ESA and the Expected Commercial Operation Date
22	for the facility is	November 30, 2021.

1	Q.	DO THE PPAS AND ESAS PROVIDE FOR PNM ACQUIRING
2		OWNERSHIP OF THEIR RESPECTIVE PROJECTS DURING OR
3		AFTER THE TERM OF THE AGREEMENT (RULE 551.8(D)(5)(C)(V))?
4	Α.	PNM does not have any purchase or acquisition option under the PPAs or ESAs.
5		
6	Q.	HOW WILL THE ENERGY FROM EACH PPA PROJECT BE
7		TRANSMITTED ON PNM'S SYSTEM (RULE 551.8(D)(3))?
8	A.	Arroyo Solar PPA - The Arroyo Solar Project will interconnect to PNM's Four
9		Corners-Rio Puerco 345 kV line. The cost to interconnect the 300 MW plant to
0		the 345 kV transmission system is estimated to be approximately \$20 million
1		based on construction of a new three breaker 345 kV switching station.
12		Arroyo Storage ESA - The Arroyo Storage Project will share the Arroyo Solar
13		Project interconnection to PNM's Four Corners-Rio Puerco 345 kV line. The cost
14		is referenced above.
15		Jicarilla Solar 1 PPA - The Jicarilla Solar 1 Project will interconnect to the
16		Jicarilla Apache Nation Power Authority ("JANPA") 115 kV Substation on a 115
17		kV generation tie line. Power will be delivered to PNM at PNM's Jicarilla 345
18		kV Switching Station via a 345/115 kV transformer that connects PNM's station
19		to the JANPA substation. The project does not require any modifications to PNM
20		interconnection facilities or transmission upgrades beyond the point of
21		interconnection with JANPA other than metering additions to account for the
22		solar facility.

1		Jicarilla Storage 1 ESA - The Jicarilla Storage 1 Project will share the same
2		interconnection as the Jicarilla Solar 1 Project as described above.
3		
4	Q.	PLEASE DESCRIBE THE PROVISIONS IN THE PPAS AND ESAS THAT
5		PROVIDE OPERATIONAL OR OTHER BENEFITS (RULE 551.8(D)(11)).
6	A.	Arroyo Solar PPA - The Arroyo PPA includes a specific ramp rate of not greater
7		than 20 MW per minute and curtailment rights for the solar facility for reasons
8		that include transmission and system management. In addition to the system
9		benefits provided under the PPA, Article 19 requires Arroyo Solar to post
10		security, which increases the monetary incentive to meet its capacity and schedule
11		requirements. Arroyo Solar is required to post development security equal to
12		\$60,000 per MW multiplied by the guaranteed capacity (300 MW) or \$18 million
13		within the earlier of: 1) thirty days after receipt of Commission approval; and 2)
14		the commencement of construction of the project. Additionally, no later than the
15		Commercial Operation Date, Arroyo Solar will be required to post and maintain
16		security equal to \$100,000 per MW multiplied by the guaranteed capacity or \$30
17		million.
18		Arroyo Storage ESA - The Arroyo Storage ESA includes ancillary services
19		including, frequency response black start, load following, contingency reserve,
20		spinning reserve, and 40 MW charge/discharge capability. In addition to the
21		system benefits provided under the ESA, Article 19 requires Arroyo Storage to
22		post security, which increases the monetary incentive to meet its capacity and
23		schedule requirements. Arroyo Storage is required to post development security

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equal to \$60,000 per MW multiplied by the guaranteed capacity (40 MW) or \$2.4 million within the earlier of: 1) thirty days after receipt of Commission approval and 2) the commencement of construction of the project. Additionally, no later than the Commercial Operation Date, Arroyo Storage will be required to post and maintain security equal to \$100,000 per MW multiplied by the guaranteed capacity or \$4 million. Jicarilla Solar 1 PPA - The PPA includes a specific ramp rate of not greater than 10 MW per minute and curtailment rights for the solar facility for reasons that include transmission and system reliability. In addition to the system benefits provided under the PPA, Article 19 requires Jicarilla Solar 1 to post security, which increases the monetary incentive to meet its capacity and schedule requirements. Jicarilla Solar 1 is required to post and maintain development security equal to \$60,000 per MW multiplied by the guaranteed capacity (50 MW) or \$3 million within the earlier of: 1) ninety days after the Execution Date; and 2) the commencement of construction of the project. Additionally, no later than the Commercial Operation Date, Jicarilla Solar 1 will be required to post and maintain security equal to \$100,000 per MW multiplied by the guaranteed capacity or \$5 million. Jicarilla Storage 1 ESA - The Jicarilla Storage 1 ESA includes ancillary services including, frequency response black start load following, contingency reserve, spinning reserve, and 20 MW charge/discharge capability. In addition to the system benefits provided under the ESA, Article 19 requires Jicarilla Storage 1 to post security, which increases the monetary incentive to meet its capacity and

schedule requirements. Jicarilla Storage 1 is required to post and maintain development security equal to \$60,000 per MW multiplied by the guaranteed capacity (20 MW) or \$1.2 million within the earlier of: 1) ninety days after the Execution Date and 2) the commencement of construction of the project. Additionally, no later than the Commercial Operation Date, Jicarilla Storage 1 will be required to post and maintain security equal to \$100,000 per MW multiplied by the guaranteed capacity or \$2 million.

A.

Q. WHAT IMPACT WILL THE PPAS AND ESAS HAVE ON PNM'S FINANCIAL METRICS (RULE 551.8(D)(7))?

The PPAs and ESAs are contingent on Commission approval. PNM proposes that to recover energy costs through its Fuel and Purchase Power Cost Adjustment Clause and that the associated energy storage costs also be recovered through the Adjustment Clause until PNM's next general rate case proceeding so PNM will recover the costs of these resources. Because of the extent of PNM's control over the battery storage projects, under applicable accounting rules PNM will likely be required to include these projects on its consolidated balance sheet as variable interest entities. However, under Section 15.1 of both of the ESAs, after the Commercial Operation Date, no debt can be incurred or carried by the sellers so there should be no material adverse impact on PNM's financials as a result.

1	Q.	COULD PNM-OWNED RESOURCES HAVE BEEN CONSTRUCTED AS
2		ALTERNATIVES THAT WOULD HAVE PROVIDED GREATER
3		BENEFIT TO RATEPAYERS (RULE 551.8(D)(9))?
4	A.	No. Of all of the solar and battery storage bids received, the Arroyo Solar PPA,
5		the Arroyo Storage ESA, the Jicarilla Solar 1 PPA and the Jicarilla Storage 1 ESA
6		were the most competitive. For these particular resources, PNM could not have
7		constructed alternatives that would provide greater benefits to customers.
8		
9	Q.	ARE THE PPAS AND ESAS CONSISTENT WITH THE ELECTRIC
10		UTILITY'S MOST RECENT COMMISSION-ACCEPTED INTEGRATED
11		RESOURCE PLAN (RULE 551.8(D)(8))?
12	A.	Yes. The 2017 IRP Action Plan specifically contemplated the All Resources RFP
13		and that the ultimate replacement resources for the San Juan coal plant would be
14		identified and selected as a result of the RFP. The PPAs and ESAs were selected
15		as a result of the RFP and supplemental RFP and are therefore consistent with
16		PNM's 2017 IRP.
17		
18	Q.	ARE THE PPAS AND ESAS CONSISTENT WITH THE PROVISION OF
19		SAFE AND RELIABLE ELECTRIC UTILITY SERVICE AT THE
20		LOWEST REASONABLE COST, CONSIDERING BOTH SHORT AND
21		LONG-TERM COSTS AND ALL OTHER RELEVANT FACTORS (RULE
22		551.8(D)(6))?
23	A.	Yes, for all the reasons discussed previously.

1	Q.	HAS PNM COMPLIED WITH THE PROVISIONS OF THE PPA RULE?
2	A.	Yes, as detailed above.
3		
4	Q.	DO YOU HAVE ANY FURTHER COMMENTS ABOUT THE TWO PPAS
5		AND TWO ESAS?
6	A.	In general, the terms and conditions in the PPAs are typical in that they are
7		market-based and similar terms and conditions are generally found in any long-
8		term PPA entered into by PNM. The terms of the PPAs should be deemed
9		reasonable, and approval should be granted. The ESAs are the first such
10		agreements that PNM has entered into. However, as detailed above, the ESAs
11		share essentially the same commercially reasonable terms as the PPAs.
12		
13	В.	Requested CCN Approvals
14	Q.	WHAT CCN APPROVALS IS PNM REQUESTING IN THIS CASE?
15	A.	PNM is seeking CCNs for the Pinon Gas Plant, the Sandia Storage Project and the
16		Zamora Storage Project.
17		
18		1. Pinon Gas Plant
19	Q.	PLEASE DESCRIBE THE PROPOSED PINON GAS PLANT.
20	A.	The Pinon Gas plant is a 280 MW gas-fired generating plant built for PNM by
21		ProEnergy under an EPC agreement. A copy of the EPC agreement between
22		PNM and ProEnergy is attached as PNM Exhibit TGF-13. The Pinon Gas Plant

1		will be located in San Juan County on the San Juan coal plant site adjacent to the
2		San Juan switchyard and near natural gas transmission pipelines. The Pinon Gas
3		Plant is comprised of seven 40 MW LM6000 Sprint gas turbines. These are
4		simple-cycle aeroderivative natural gas-fired generating units with quick-start
5		capability allowing the plant to ramp up to full generation capability within ten
6		minutes and are designed to start several times per day and hundreds of times per year.
7		Each LM6000 can be operated from 13 MW to 40 MW to match system needs.
8		This will give the Pinon Gas Plant a range of output from 13 MW up to 280 MW.
9		The plant will have remote operation capability and low maintenance costs.
10		
11	Q.	PLEASE PROVIDE SOME BACKGROUND ON PROENERGY, THE EPO
12		CONTRACTOR.
13	A.	ProEnergy employs over 1,000 professionals with experience in over 40
14		countries. It is headquartered in Sedalia, Missouri with ten global locations. It is
15		a leading third-party solutions provider for the energy industry and has
16		engineered, procured and constructed over 5,600 MWs of generation worldwide.
17		
18	Q.	DOES PNM HAVE EXPERIENCE WITH THE LM6000 UNITS THAT
19		MAKE UP THE PINON GAS PLANT?
20	A.	Yes. The LM6000 technology is familiar to PNM because PNM has one of these
21		units at its La Luz Energy Center and two of these units at its Lordsburg
22		Generating Station. These are reliable and economic gas generation resources.

	1	Q.	ARE THERE ANY OPERATIONAL BENEFITS THAT WILL RESULT
	2		FROM THE ADDITION OF THE PINON GAS PLANT TO PNM'S SYSTEM?
	3	A.	There are several benefits:
	4		• The plant will provide partial replacement capacity following the retirement of
	5		Units 1 and 4 of the San Juan coal plant.
	6		• The Pinon Gas Plant will provide additional quick start, dispatchable capacity
	7		from 13 MW to 280 MW necessary to respond to system disturbances. These
	8		system disturbances could be from outages related to PNM's transmission
	9		system or another generating unit or to respond to variations in renewable
•	10		generation resources.
	11		• The quick start capability of the plant can be called on multiple times a day to
	12		meet PNM's peak capacity needs and can be brought on-line to meet peak
r	13		requirements from 13 MW up to its full capacity of 280 MW.
	14		• The Pinon Gas Plant can be used to meet ancillary services requirements,
	15		including load following, spinning reserve, and contingent reserves.
	16		The Pinon Gas Plant can provide voltage support in the Four Corners region
	17		as discussed by PNM Witness Mechenbier.
	18		
	19	Q.	ARE THERE BENEFITS TO LOCATING THE PINON GAS AT THE SAN
	20		JUAN SITE?
	21	A.	There are numerous reasons for locating the Pinon Gas at San Juan site. As a
	22		result of the retirement of coal units at San Juan, existing transmission system
	23		infrastructure will be available at this location. This available infrastructure

1		avoids significant transmission costs as discussed by PNM Witness Jeff
2		Mechenbier. The San Juan site is also close to a supply of natural gas that can be
3		readily accessed from a nearby main gas transportation pipeline.
4		
5		Additionally, as mentioned earlier in my testimony, the Energy Transition Act
6		includes a preference for replacement resources up to 450 MW located within the
7		affected local school district. The Pinon Gas Plant conforms with this preference.
8		
9	Q.	PLEASE DESCRIBE HOW NATURAL GAS WILL BE SUPPLED TO THE
10		PINON GAS PLANT.
11	A.	The plant will be supplied with natural gas delivered through the interstate
12		pipeline owned and operated by El Paso Natural Gas Company ("EPNG").
13		EPNG's pipeline connects to natural gas supply in both the San Juan Basin in
14		northwestern New Mexico and the Permian Basin in southeastern New Mexico.
15		This provides a reliable fuel supply for the plant due to the number of suppliers
16		operating in each basin and the geographic diversity provided by connection to
17		two supply basins.
18		
19	Q.	WILL ANY GAS PIPELINES NEED TO BE BUILT TO SUPPLY THE
20		PINON GAS PLANT?
21	A.	Two construction projects are required to provide natural gas to the Pinon Gas
22		Plant. First, construction will be required to build a lateral from the main gas
23		pipeline to a metering station located near the project location. The construction

1		costs for the lateral will be borne by the gas transportation provider and will be
2		recovered through gas transportation rates. Included in the EPC contract price is
3		construction of the gas supply line from the metering location to the plant itself.
4		
5	Q.	DOES PNM CURRENTLY OPERATE OTHER NATURAL GAS
6		RESOURCES?
7	A.	PNM currently operates gas-fired generating stations in the middle and southern
8		part of the state. PNM has four natural gas-fired resources in the Albuquerque
9		metropolitan area: Reeves Generating Station ("Reeves"), Rio Bravo Generating
10		Station ("Rio Bravo"), Valencia Energy Facility ("Valencia") and La Luz Energy
11		Center ("La Luz"). Rio Bravo also has the capability to generate using fuel oil
12		stored on-site. La Luz's and Valencia's natural gas supplies are delivered via
13		Transwestern Pipeline Company LLC's system. Reeves and Rio Bravo's natural
14		gas supplies are delivered via New Mexico Gas Company's system. PNM
15		operates the Afton Generation Station, Luna Energy Facility and Lordsburg
16		Generating Station in the southern part of the state which are suppled through
17		EPNG. Adding the Pinon Gas Plant in northern New Mexico provides locational
18		diversity and takes advantage of gas supply diversity.
19		
20	Q.	HOW DOES THE CONSTRUCTION AND OPERATION OF THE PINON
21		GAS PLANT SERVE THE PUBLIC CONVENIENCE AND NECESSITY?
22	A.	The Pinon Gas plant serves the public convenience and necessity and is in the
23		public interest because replacement generation capacity to continue meeting

customer demand will be needed in June 2022 due to the loss of capacity from San Juan Units 1 and 4. Additionally, the increase of intermittent renewable energy supply requires sufficient planning reserves and operating reserves to maintain system reliability. See the direct testimony of PNM Witnesses Phillips and Wintermantel for further discussion on planning and system reliability.

7 Q. WHAT ARE THE ESTIMATED COSTS PNM WILL INCUR FOR THE 8 PINON GAS PLANT BY ITS PROJECTED IN-SERVICE DATE?

A. The projected cost to plan and construct the Pinon Gas Plant are detailed in PNM Table TGF-7 below.

PNI	M Table TGF-7	
Cost Category		Estimated 7 Unit Cost
7 Unit EPC Bid Price (7th unit option include	d)	\$148,666,400
Taxes		\$10,036,892
Spare GSU Transformer		\$1,277,834
Performance Bond		\$2,998,885
Subtotal - Total EPC Price	•	\$162,980,011
Owner's Electrical Interconnection		\$737,000
Offsite Water Supply and Waste Water Lines	3	\$1,525,845
Owner's Costs		\$5,115,638
AFUDC		\$12,011,627
	5% of EPC (Includes 0.8% Owner's Cost	
Total Owner's Contingency	Contingency)	\$8,149,000
Total Project Cost (7 Units)		\$190,519,121

1	Q.	WHAT IS PNM'S O&M COST ESTIMATE FOR THE PINON GAS
2		PLANT?
3	A.	Based on information from HDR, PNM estimates that annualized O&M costs will
4		be \$892,500 for year 2022. PNM uses a 1.5% annual escalation in its modeling
5		process, and when applied to the O&M estimate for 2023 increases to \$905,888
6		which is the estimate used by PNM Witness Monroy in his testimony.
7		
8	Q.	WHAT GENERAL RATEMAKING TREATMENT IS PNM
9		REQUESTING THE COMMISSION APPROVE FOR THE PINON GAS
10		PLANT?
11	A.	PNM is requesting ratemaking treatment for \$190.9 million for the Pinon Gas
12		Plant, which includes the capitalized costs of the RFPs, to be included in PNM's
13		rate base, subject to actual cost and the Commission's cost overrun rule in
14		17.3.580 NMAC as discussed by PNM Witness Fenton.
15		
16	Q.	WHAT IS YOUR OPINION CONCERNING THE REASONABLENESS
17		OF THE COSTS OF THE PINON GAS PLANT?
18	A.	The Pinon Gas Plant was selected as the result of a rigorous competitive
19		procurement process. In my opinion, the estimated cost of the project is
20		reasonable and in accord with industry norms.
21		
22	Q.	WHAT SITING AND PERMITTING ACTIVITIES NEED TO TAKE
23		PLACE IN CONNECTION WITH THE PLANT?

1	A.	The proposed Pinon Gas Plant site is on land jointly owned by PNM and Tucson
2		Electric Power Company ("TEP"). PNM has been in preliminary discussions
3		with TEP and will negotiate a purchase agreement for the site. The specific
4		permits needed for the Pinon Gas Plant are shown in Appendix C of PNM Exhibit
5		TGF-13. The Pinon Gas Plant will be located outside the boundaries of any
6		municipality so no municipal approvals will be required.
7		
8	Q.	WILL THE PINON GAS PLANT BE CONSTRUCTED AND OPERATED
9		TO COMPLY WITH APPLICABLE ENVIRONMENTAL PROTECTION
10		REQUIREMENTS?
11	A.	Yes. The Pinon Generating facility must meet environmental emission
12		parameters identified in Exhibit I of the EPC agreement attached as PNM Exhibit
13		TGF-13. These are "must meet" requirements. If the performance does not satisfy
14		the requirements identified, the contractor must submit remedial plans and make
15		modifications until these requirements are met.
16		
17	Q.	HAS PNM HAD ANY PRELIMINARY MODELING PERFORMED TO
18		EVALUATE PLANT COMPLIANCE WITH APPLICABLE AIR
19		QUALITY REQUIREMENTS?
20	A.	Yes. PNM engaged Montrose Environmental Group, Inc. ("Montrose") to
21		perform preliminary dispersion modeling and a Prevention of Significant
22		Deterioration PSD emissions netting analysis. Montrose was provided the various
23		operating parameters (startup, shutdown and steady state) and calculated emission

1		rates for particulate matter, sulfur dioxide, nitrous oxide, carbon monoxide and
2		volatile organic compounds and then modeled emission rates for various loads.
3		This analysis was done to evaluate whether selective catalytic reduction emission
4		control ("SCR") will be required.
5		
6	Q.	WHAT WAS THE RESULT OF THE PRELIMINARY MODELING
7		ANALYSIS?
8	A	Preliminary modeling and the emissions netting analysis of the emissions at the
9		San Juan site indicate that SCR will not be required for the operation of the Pinon
10		Gas Plant after the retirement of Units 1 and 4 because of the associated emission
11		reductions. With the emissions netting, the Pinon Gas Plant should meet National
12		Ambient Air Quality Standards ("NAAQS") and New Mexico Ambient Air
13		Quality Standards ("NMAAQS") without SCR.
14		
15	Q.	WHAT IS THE SOURCE AND HOW MUCH WATER WILL THE PINON
16		PLANT USE?
17	A.	The Pinon Gas Plant will use potable water for its operations and building use. It
18		is estimated that the Pinon Gas plant will use 525 gallons of potable water per day
19		(191,625 gallon annually). A portion of the existing infrastructure will be used to
20		supply raw water for demineralized water and other miscellaneous uses. It is
21		estimated that the Pinon Gas plant will use 282,199 gallons of raw water during
22		an average operating day (103,005,000 gallons annually).

23

1	Q.	PLEASE SUMMARIZE THE BENEFITS TO PNM AND ITS
2		CUSTOMERS FROM THE ADDITION OF THE PINON GAS PLANT TO
3		PNM'S SYSTEM.
4	A.	The Pinon Gas Plant is comprised of generating units with quick start capability
5		that best meets both the load serving and the reliability requirements needed to serve
6		customers. The competitive RFP process assures that the Pinon Gas Plant is part of the
7		low-cost portfolio to replace the San Juan coal plant and provide flexible generation
8		capabilities needed to serve our customers. In addition, by siting the gas plant at the
9		San Juan site, PNM will minimize the required capital, O&M, transmission and natural
10		gas interconnect costs compared to other potential locations.
11		
12	Q.	IS THE PINON GAS PLANT IN THE PUBLIC INTEREST AND DOES IT
13		RESULT IN A NET PUBLIC BENEFIT?
14	A.	The Pinon Gas Plant is in the public interest and provides a net public benefit for
15		the reasons stated above.
16		
17		2. The Sandia Storage Project and the Zamora Storage Project
10		
18	Q.	WHAT OTHER CCNS IS PNM SEEKING IN THIS CASE?
19	A.	PNM is requesting approvals of CCNs for the Sandia Storage Project and the
20		Zamora Storage Project. I discuss these two projects jointly because of their
21		similarities and because they are both being built by the same EPC contractor.
22		

1	Q.	WHO IS THE EPC CONTRACTOR ON THE SANDIA AND ZAMORA
2		STORAGE PROJECTS?
3	A.	As discussed in Section II of my testimony, Affordable is the EPC contractor on
4		these two projects. The EPC agreement for the Sandia EPC agreement is attached
5		as PNM Exhibit TGF-14, and the EPC agreement for the Zamora EPC agreement
6		is attached as PNM Exhibit TGF-15.
7		
8	Q.	HAS PNM ENGAGED AFFORDABLE TO CONSTRUCT PROJECTS IN
9		THE PAST?
0	A.	Yes. PNM has contracted with Affordable to build prior projects in the past.
1		
2	Q.	WHAT IS TESLA'S INVOLVEMENT IN THE TWO STORAGE
	Q.	WHAT IS TESLA'S INVOLVEMENT IN THE TWO STORAGE PROJECTS?
13	Q.	
13		PROJECTS?
13 14		PROJECTS? PNM's EPC contract is with Affordable, a local New Mexico company. Tesla is
13 14 15		PROJECTS? PNM's EPC contract is with Affordable, a local New Mexico company. Tesla is the equipment provider under contract with Affordable to manufacture, ship to
13 14 15 16		PROJECTS? PNM's EPC contract is with Affordable, a local New Mexico company. Tesla is the equipment provider under contract with Affordable to manufacture, ship to site, commission, and provide technical support for the battery energy storage
13 14 15 16 17		PROJECTS? PNM's EPC contract is with Affordable, a local New Mexico company. Tesla is the equipment provider under contract with Affordable to manufacture, ship to site, commission, and provide technical support for the battery energy storage system. Affordable is responsible to receive the equipment from Tesla, install on
12 13 14 15 16 17 18 19		PROJECTS? PNM's EPC contract is with Affordable, a local New Mexico company. Tesla is the equipment provider under contract with Affordable to manufacture, ship to site, commission, and provide technical support for the battery energy storage system. Affordable is responsible to receive the equipment from Tesla, install on
13 14 15 16 17 18	A.	PNM's EPC contract is with Affordable, a local New Mexico company. Tesla is the equipment provider under contract with Affordable to manufacture, ship to site, commission, and provide technical support for the battery energy storage system. Affordable is responsible to receive the equipment from Tesla, install on foundations, and connect to the PNM transmission interface point.

- 1 Construction is anticipated to begin upon Commission approval and the Expected
 2 Commercial Operation Data for the project is March 21, 2022
- 2 Commercial Operation Date for the project is March 31, 2022.

3

4 Q. WHAT IS THE ESTIMATED COST OF THE SANDIA STORAGE

5 **PROJECT?**

6 A. PNM Table TGF-8 provides a summary itemization for the estimated cost of the

7 Sandia Storage Project.

PNM Table TGF-8		
Cost Category	Estimated 40 MW, 2hr Cost	
EPC Price (Sandia)	\$39,593,820	
Transmission	\$4,000,000	
AFUDC	\$1,639,184	
Owner's Cost	\$3,224,908	
Total - Total Project Cost	\$48,457,912	

8

9

Q. WHAT IS PNM'S O&M COST ESTIMATE FOR THE SANDIA

10 **STORAGE PROJECT?**

11 **A.** Based on information from HDR using the as bid levelized cost of a capacity
12 maintenance agreement, ongoing O&M cost is estimated at \$358,087.

13

14 Q. IS PNM SEEKING RATEMAKING TREATMENT FOR THE SANDIA

15 **STORAGE PROJECT?**

- 16 **A.** Yes. PNM is seeking ratemaking treatment for the Sandia Storage Project in the
 17 amount of \$49.8 million, which includes the capitalized cost of the RFP, subject
 18 to actual cost and the Commission's cost overrun rule.

1 Q. PLEASE DESCRIBE THE ZAMORA ENERGY STORAGE PROJECT.

- 2 A. The Zamora Energy Storage facility is a 30 MW, 2-hour energy storage facility
- 3 that will be located near the Zamora Substation east of Albuquerque, New
- 4 Mexico. Construction is anticipated to begin upon Commission approval. The
- 5 Expected Commercial Operation Date for the facility is May 31, 2022.

6

9

7 Q. WHAT IS THE ESTIMATED COST OF THE ZAMORA STORAGE

8 PROJECT?

A. PNM Table TGF-9 provides a high-level summary of the estimated costs of the

10 Zamora Storage Project.

PNM Table TGF-9			
Cost Category (Zamora)	Estimated 30 MW, 2hr Cost		
EPC Price	\$32,523,781		
Transmission	\$2,000,000		
AFUDC	\$1,346,485		
Owner's Cost	\$2,753,336		
Total - Total Project Cost	\$38,623,602		

11

12 Q. WHAT IS PNM'S O&M COST ESTIMATE FOR THE ZAMORA

13 **STORAGE PROJECT?**

- 14 A. Based on information from HDR using the as bid levelized cost of a capacity
- maintenance agreement, ongoing O&M cost is estimated at \$287,075.

16

17 Q. IS PNM SEEKING RATEMAKING TREATMENT FOR THE ZAMORA

18 STORAGE PROJECT?

1	A.	Yes. PNM is seeking approval to include the Zamora Storage Project in its rate
2		base at an estimated value of \$39.0 million, including the capitalized cost of the
3		RFP, or actual cost, subject to the cost overrun rule.
4		
5	Q.	DOES THE ENERGY TRANSITION ACT INCLUDE REQUIREMENTS
6		RELATING TO CCNS FOR BATTERY STORAGE SYSTEMS?
7	A.	It does, as discussed by PNM Witness Fenton, and the Sandia and Zamora
8		Storage Projects satisfy these requirements as I discuss below.
9		
10	Q.	ARE THE COSTS OF THE SANDIA AND ZAMORA PROJECTS
11		REASONABLE?
12	A.	Yes. The estimated costs for these two projects are reasonable. Again, these
13		projects were selected as a result of a competitive procurement process with
14		proper vetting by experts to ensure the reasonableness of the costs.
15		
16	Q.	WHAT SITING AND PERMITTING ACTIVITIES NEED TO TAKE
17		PLACE IN CONNECTION WITH THE SANDIA AND ZAMORA
18		STORAGE PROJECTS?
19	A.	The specific permits needed for the Sandia Storage Project and Zamora Storage
20		Project in Appendix C of PNM Exhibit TGF-14 and PNM Exhibit TGF-15,
21		respectively. The Sandia Storage Project is located at an existing PNM site
22		adjacent to PNM's Sandia Substation and the Zamora Storage Project is located at
23		a site adjacent to the Zamora Substation. PNM is in the process of securing an

1		option to purchase the site location. To the extent applicable, PNM will work
2		closely with the local municipal authority with respect to the building permit
3		processes during the design, construction, and operational phases of the projects.
4		
5	Q.	WILL THE SANDIA STORAGE PROJECT AND THE ZAMORA
6		STORAGE PROJECTS BE CONSTRUCTED AND OPERATED TO
7		COMPLY WITH APPLICABLE ENVIRONMENTAL PROTECTION
8		REQUIREMENTS?
9	A.	Yes. Traditional environmental permitting requirements do apply and the
10		contractor is responsible for site construction permits during the construction
11		phase of the project. PNM has reviewed requirements specific to energy storage
12		systems during the operational phase and concluded no additional environmental
13		permitting is required.
14		
15	Q	PLEASE DESCRIBE HOW THE SANDIA AND ZAMORA ENERGY
16		STORAGE PROJECTS WILL REDUCE COST TO RATE PAYERS BY
17		AVOIDING OR DEFERRING NEED FOR INVESTMENT IN NEW
18		GENERATION AND FOR UPGRADES TO SYSTEMS FOR THE
19		TRANSMISSION AND DISTRIBUTION OF ENERGY.
20	Α.	The Sandia and Zamora Energy Storage projects are intended to be utilized
21		primarily to provide energy to PNM customers during peak demand periods thus
22		reducing the need to build additional generation capacity or add transmission
23		resources. With utility ownership, the storage projects can be charged during off

1		peak periods, during periods of high renewable penetration, and providing the
2		ability to manage utility curtailment. In addition to providing energy to cover
3		peak demand, the energy storage projects also provide spinning reserve,
4		contingency reserve, and other ancillary services.
5		
6	Q	PLEASE DESCRIBE HOW THE SANDIA AND ZAMORA ENERGY
7		STORAGE PROJECTS WILL REDUCE THE USE OF FOSSIL FUELS
8		FOR MEETING DEMAND PEAK LOAD PERIODS AND FOR
9		PROVIDING ANCILLARY SERVICES.
10	A.	Please reference my response to the question above.
11		
12	Q	PLEASE DESCRIBE HOW THE SANDIA AND ZAMORA ENERGY
13		STORAGE PROJECTS WILL HELP ENSURE GRID RELIABILITY,
14		TRANSMISSION AND DISTRIBUTION SYSTEM STABILITY, WHILE
15		INTEGRATING RENEWABLE ENERGY INTO THE GRID.
16 -	A.	The PNM transmission system was studied by the Brattle Group to understand
17		locational benefits of adding battery storage to PNM's system. Locational
18		benefits identified included integrating a storage project connected to the Sandia
19		Substation to reduce congestion. In addition, the project connected to the Tijeras
20		radial line (Zamora) has a locational benefit targeted at reducing customer outage
21		impacts.

1	Q	PLEASE DESCRIBE HOW THE SANDIA AND ZAMORA ENERGY
2		STORAGE PROJECTS WILL SUPPORT DIVERSIFICATION OF
3		ENERGY RESOURCES AND ENHANCE GRID SECURITY.
4	A.	The Sandia and Zamora energy storage projects are specifically designed as 2-
5		hour systems to meet load ramps, short duration high peak periods, and respond to
6		EIM market demands. This diversification offsets need for additional flexible gas
7		and also complements renewable penetration by providing a tool to manage
8		curtailments, thus helping to integrate renewable energy into the grid.
9		
10	Q	PLEASE DESCRIBE HOW THE SANDIA AND ZAMORA ENERGY
11		STORAGE PROJECTS WILL REDUCE GREENHOUSE GASES AND
12		OTHER AIR POLLUTANTS RESULTING FROM POWER
13		GENERATION.
14	A.	The Sandia and Zamora Energy Storage projects by nature will reduce the need to
15		operate a flexible gas resource during high load periods, during system
16		disturbances, and to offset large changes in load demand.
17		
18	Q	PLEASE DESCRIBE HOW THE SANDIA AND ZAMORA ENERGY
19		STORAGE PROJECTS WILL PROVIDE THE UTILITY DISCRETION
20		TO OPERATE, MAINTAIN AND CONTROL ENERGY STORAGE TO
21		ENSURE RELIABLE AND EFFICIENT SERVICE TO CUSTOMERS.
22	A.	The utility-owned Sandia and Zamora Energy Storage projects allow the utility to
23		charge and discharge on a 24/7 basis. This provides the utility the ability to, by

1		managing grid stability, use the resource for balancing area regulation, improve
2		customer reliability, and effectively manage renewable penetration.
3		
4	Q	PLEASE DESCRIBE HOW THE SANDIA AND ZAMORA ENERGY
5		STORAGE PROJECTS WERE SELECTED AS THE MOST COST
6		EFFECTIVE AMONG FEASIBLE ALTERNATIVES.
7	A.	As discussed in Section II of my testimony, PNM conducted an in-depth analysis
8		of the economics of battery storage which confirmed the benefits of utility
9		locational preference and control flexibility for learning purposes. These
10		resources were selected as a result of PNM's RFP process and evaluated by
11		independent experts. PNM Witnesses Nagel and Wintermantel provide more
12		detail on how these resources were selected.
13		
14	Q.	ARE THE SANDIA AND ZAMORA STORAGE PROJECTS IN THE
15		PUBLIC INTEREST AND DO THEY RESULT IN A NET PUBLIC
16		BENEFIT?
17	A.	Yes, for the reasons stated above.
18		
19	Q.	ARE THE PROPOSED RESOURCES IDENTIFIED IN SCENARIO 1
20		CONSISTENT WITH PNM'S 2017 IRP?
21	A.	Yes. Please see PNM Witness Phillips' direct testimony.
22		

1 VIII. MODIFIED STIPULATION APPROVALS\

2	Q.	WHAT IS PNM REQUESTING WITH RESPECT TO THE REQUIRED
3		PURCHASES OF RECS UNDER THE MODIFIED STIPULATION IN
4		CASE NO. 13-00390-UT?
5	A.	PNM is requesting that consideration be given by signatories to the Modified
6		Stipulation and the Commission to the development of a separate commercial
7		scale solar facility at the San Juan coal plant site as a means of fulfilling the terms
8		of Paragraph 40 of the Modified Stipulation. PNM includes this proposal in this
9		case so that the signatories and the Commission have an opportunity to consider
10		how the Energy Transition Act's focus on increasing renewable energy and
11		assisting impacted communities might influence the best way for PNM to comply
12		with Paragraph 40.
13		
14	Q.	PLEASE DESCRIBE THE TERMS OF THE MODIFIED STIPULATION
15		IN CASE NO. 13-00390-UT RELATING TO THE PURCHASE OF RECS.
16	A.	In Case No 13-00390-UT the stipulating parties agreed, and the Commission
17		approved, the following provision in Section 40 of the Modified Stipulation:
18 19 20 21 22		Beginning January 1, 2020, for every MWhr of 197 MW of SJGS, PNM will acquire one MWh of solar or wind credits or allowances. This acquisition requirement does not require PNM to acquire associated energy.
23		This Modified Stipulation also provides:
24 25		If EPA's CPP or CEIP is not in effect in New Mexico in 2020 or any subsequent year, or if after 2021 PNM demonstrates that it can

1	comply with the emission reductions requirements of EPA's CPP
2	with its own resources on a standalone basis through 2030, then in
3	those years PNM shall be excused from the acquisition of ERCs or
4	allowance but shall nevertheless acquire and retire additional wind
5	or solar RECs as defined by the REA, either in the matching MWh
6	amounts required by this paragraph, or in amounts that allow
7	bundled RECs plus energy (owned or purchased) to be acquired up
8	to the \$7 million per year limit described in sub-paragraph 40e. In
9	the event PNM can demonstrate the compliance set forth above,
10	the Signatories shall convene to determine whether bundled or
11	unbundled RECs provide the best environmental and customer
12	outcome.
1.0	

A.

14 Q. WHY SHOULD AN ALTERNATIVE TO THE PURCHASE OF

UNBUNDLED RECS BE CONSIDERED?

Because the EPA's CPP ("Clean Power Plan") and CEIP ("Clean Energy Incentive Program") are not in effect or applicable as contemplated when the Modified Stipulation was approved, PNM is proposing that the signatories exercise the provision in the Modified Stipulation to convene to determine whether bundled or unbundled RECs provide the best environmental and customer outcome. There is a sentiment, in light of the foregoing, and with the passage of the Energy Transition Act, that better use can be made of the funds that would be used to purchase unbundled RECs under the Modified Stipulation.

Q. WHAT IS PNM PROPOSING IN LIEU OF PURCHASING UNBUNDLED

RECS?

A. PNM is proposing that the funds that would be used to purchase RECs instead be used for locating solar renewable resources on the San Juan site. This would provide for up to 20 MW of additional solar through an EPC contract with

1		Affordable and achieve incremental solar additions that are cost effective for					
2		customers.					
3							
4	Q.	HOW HAS PNM ESTIMATED THE COSTS OF A 20 MW SOLAR					
5		FACILITY?					
6	A.	PNM used the RFP bid evaluations and through bidder negotiations identified the					
7		costs for construction of a 20 MW solar PV facility on the San Juan coal plant					
8		site.					
9							
10		Attached to my testimony is PNM Exhibit TGF-16 which is an EPC agreement					
11		with Affordable to construct a new solar facility of up to 20 MW known as the					
12		Pinon Solar Project, which would be subject to Commission approval. If					
13		approved, this project would be located on the San Juan site and provide for					
14		renewable energy in San Juan County as well as additional tax base for the					
15		Central Consolidated School District.					
16							
17	Q.	IS PNM REQUESTING A CCN FOR THE PROPOSED SOLAR PROJECT					
18		IN THIS CASE?					
19	A.	No. Not at this time. However, if there is sufficient consensus that the Pinon Solar					
20		Project should be pursued in lieu of the purchase of unbundled RECs, PNM					
21		would supplement its filing in this case, or file a separate case, to specially request					
22		for CCN approval.					

1 IX. CONCLUSION

- 2 Q. DOES THIS CONCLUDE YOUR TESTIMONY?
- 3 **A.** Yes.

GCG#525666

Education and Professional Summary of Thomas G. Fallgren

PNM Exhibit TGF-1

Is contained in the following 2 pages.

THOMAS G. FALLGREN

EDUCATIONAL AND PROFESSIONAL SUMMARY

Address:

Public Service Company of New Mexico

Aztec Facility (Z120)

2401 Aztec Road NE, Building A Albuquerque, New Mexico 87107

Position:

Vice President, PNM Generation, May 2017 to present

Previous Positions:

PNM

Managing Director Generation – Nov 2016 to May 2017

PNM

Director – Plant Manager San Juan Generating Station – July 2013 to November 2016

Xcel Energy, Southwestern Public Service (SPS)

Director – Plant Manager Tolk/Plant X Complex - April 2011 to July 2013

Xcel Energy, Northern States Power (NSP)

Director - Plant Manager Black Dog Generating Facility - May 2008 to April 2011

Xcel Energy, Northern States Power (NSP) – Sherburne County Generating Facility 1996-2008 Operations Manager

Engineering & Technical Services Manager

Scheduling Administrator/Outage Manager

Xcel Energy, Northern States Power (NSP) – Monticello Nuclear Generating Plant 1984- 1996

Held Senior Reactor Operator (SRO) license/certification 1989 - 1996

Supt Maintenance Engineering

Maintenance Engineer

Operations Instructor

System Operations Engineer

Professional Affiliation:

Registered Engineer, State of Minnesota since 1994

Education:

University of Minnesota, Bachelor of Mechanical Engineering – High Distinction

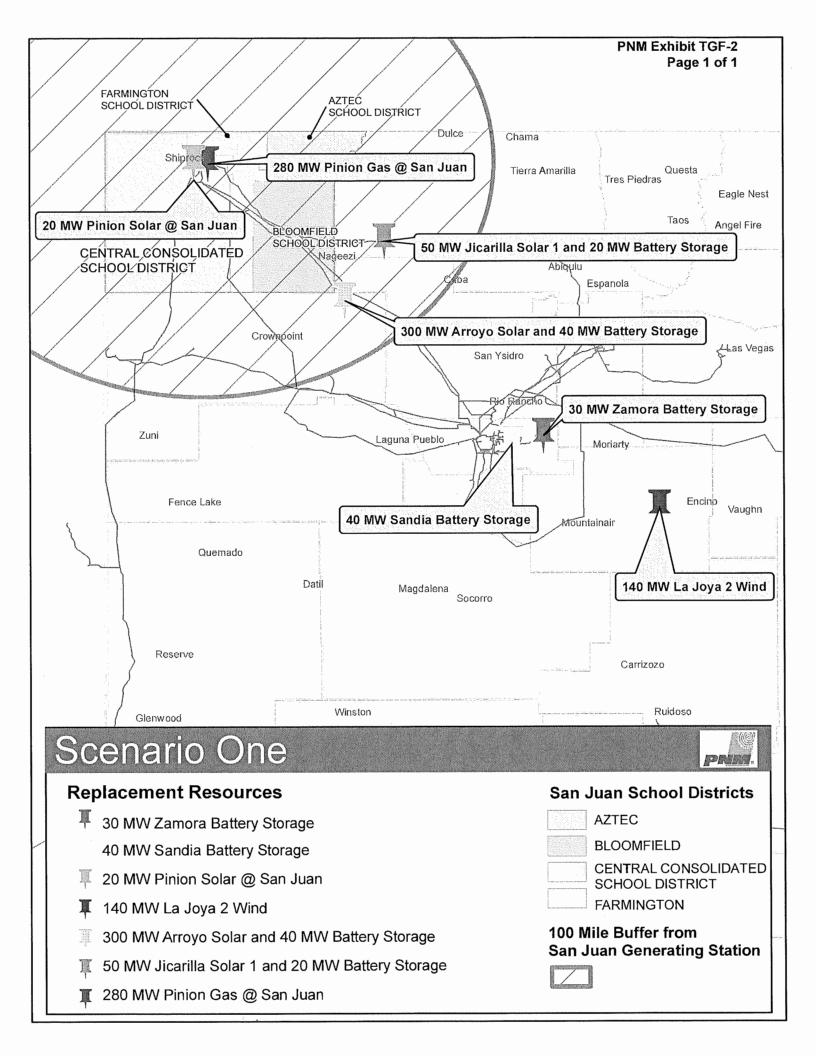
Testimony/Affidavits:

NMPRC Case No. 19-00159-UT
NMPRC Case No. 19-00158-UT
NMPRC Case No. 18-00261-UT
NMPRC Case No. 18-00269-UT
NMPRC Case No. 18-00009-UT
NMPRC Case No. 18-00009-UT
NMPRC Case No. 17-00174-UT
NMPRC Case No. 13-00390-UT
NMPRC Case No. 13-00390-UT
NMPRC Case No. 13-00390-UT
NMPRC Case No. 13-00174-UT
NMPRC Case No. 13-00390-UT
NMPRC Case No. 13-00390-UT
PNM's 2020 Renewable Plan
PNM's 2020 Renewable Plan
PNM's EIM Application
PNM's Application Facebook PPA-2
PNM's Application Facebook PPA
PNM's 2017 Integrated Resource Plan
PNM's BART 2018 Filing

Map of Scenario 1 Resources

PNM Exhibit TGF-2

Is contained in the following 1 page.



Brattle Report

PNM Exhibit TGF-3

Is contained in the following 45pages.

The Value of Energy Storage to the PNM System

PREPARED BY

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Pablo Ruiz

Jesse Cohen

PREPARED FOR



June 6, 2019

THE Brattle GROUP

Introduction

The purpose of this study is to summarize the potential benefits of energy storage additions to the Public Service Company of New Mexico (PNM) system. In particular, PNM is interested in understanding the advantages of a standalone utility-owned energy storage project compared to a PPA (Power Purchase Agreement) contract structure for storage that is co-located with a solar photovoltaic (PV) facility and owned by a third party.

Our assessment identifies two areas in which utility-owned storage provides incremental benefits relative to a contract for storage that is co-located with solar PV. First, PNM's knowledge of its own transmission and distribution (T&D) system would allow the company to site utility-owned storage in the most beneficial locations on the power grid, irrespective of whether that location is suitable for co-location with solar generation. We estimate this locational transmission-related value of storage to be up to \$22/kW-year for a 4-hour (e.g., 1 MW / 4 MWh) battery. Second, storage ownership would give PNM greater operational capabilities, including the flexibility to mitigate off-peak wind curtailments. Specifically, a standalone energy storage system could charge during any hour of the day, rather than being constrained to charging from the output of the solar PV facility. This ability to charge and discharge any time would increase the energy value of the storage system by approximately \$10 to \$25/kW-yr according to our simulations (and more through the provision of ancillary services and possibly other grid services). Direct ownership would also provide PNM with options to modify the use of the storage device as operational experience is gained and market conditions change over time.

This analysis is based on a review of (1) PNM transmission and outage data and (2) energy storage market simulations using Brattle's bSTORE model. The scope of our study focused specifically on the incremental value that the standalone utility-owned storage system could provide relative to the storage portion of a hybrid "solar+storage" contract. Further analysis could estimate the total value of the combined storage+solar facility and produce a holistic assessment of the costs and benefits of each storage application.

System Benefits of Energy Storage 11.

Due to rapidly falling costs and its operational flexibility, energy storage can be a valuable addition to the PNM system. Possible benefits of energy storage include the following:

Reducing the production costs of generating electricity. Energy storage can be charged in off-peak periods, when the cost of providing energy is low. It can then be discharged during peak load hours, reducing the need to operate expensive peaking units. The fast ramping capabilities of storage can help system operators manage rapid changes in load or variable generation, thereby

For more information about the bSTORE model, see https://www.brattle.com/bstore.

reducing the production costs associated with the (up and down) ramping of conventional generators.

Reducing the production cost associated with providing ancillary services. The operational flexibility of storage would allow it to provide regulation and operating reserve services more costeffectively than conventional resources.

Reducing capacity needed from traditional power generation resources. By discharging during peak load hours, storage can reduce the need for peaking capacity that would otherwise be built to maintain resource adequacy.

Avoiding customer outages. If located on the transmission or distribution system, the deployment of storage can be targeted to reduce the frequency and severity of customer outages.

Reducing transmission congestion costs. Energy storage can effectively increase transmission capacity when deployed to congested locations of the system. This reduces the cost of otherwise dispatching more expensive generators to address the transmission congestion constraints.

Reducing emissions and decreasing the curtailment of renewable generation. potentially reduce emissions either by reducing generation from high-emitting generators or by being charged with the output of wind and solar generators that would otherwise be curtailed due to system constraints. Reducing the curtailment of renewable generation will reduce system-wide production costs. The extent to which storage reduces emissions depends on the marginal emissions profile of the resource mix during the charging and discharging of the storage systems.

Deferring transmission and distribution investment costs. To the extent that storage can be used to meet local peak loads, the loading on the transmission and distribution system during those hours would be reduced. In such cases, storage can help defer certain transmission and distribution upgrades. Currently, PNM staff have not identified any opportunities for T&D investment deferral on the PNM system.

Providing additional grid services. Storage can be deployed where additional grid services (such as voltage support) may be needed, thereby deferring other investments needed to provide the same service.

III. Advantages of Utility-Owned Storage

There are two ways in which standalone utility-owned storage can capture greater potential benefits than storage that is part of a contract for a hybrid solar+storage project: (1) locational value and (2) greater operational flexibility.

Locational Value

PNM is in the best position to determine the locations in which storage would provide the greatest value to its system. Owning the storage facility would provide PNM with the control necessary to

capture this value. For example, PNM can deploy energy storage to targeted, high-value locations on the grid. PNM can take advantage of unrestricted site access (e.g., by integrating the storage system into an existing substation), thereby potentially reducing maintenance costs of the storage. With a storage contract, particularly one in which storage must be co-located with solar PV, this ability to site the storage device in specific locations on the grid is diminished.

To develop an estimate of the potential locational value of energy storage, we assessed the transmission value of battery investments in two locations that appear to be the most valuable based on discussions with PNM and our review of the PNM system: The Sandia substation and the Tijeras substation, both of which are located in the Albuquerque area.

A battery storage deployment at the Sandia substation would reduce the local system's congestion management costs. The storage deployment would lessen the need to run higher-cost generation units that would otherwise be required to address transmission constraints in that location of the grid. In 2017 and 2018, congestion management costs in the Sandia area averaged \$3.8 million per year.2 Based on analysis of the timing and size of those transmission congestion events, we identified the portion of the events that could be avoided for various battery sizes and configurations.

Smaller battery deployments mitigate a lower share of the total congestion management costs than larger battery deployments would. For instance, a 100 MW battery with a 2-hour duration (i.e., 200 MWh of energy storage capacity) could mitigate approximately 14 percent of the historical congestion, whereas a 200 MW, 4-hour duration battery could mitigate approximately 34 percent of the congestion. However, the value decreases incrementally with each additional megawatt of storage capacity addition. On a dollars-per-kilowatt basis, batteries with low MW capacity but high energy storage capability provide the most congestion management value. summarizes the congestion management value of a range of battery storage deployments.

Table 1: Congestion Management Benefit of Sandia Storage Deployment, by Battery Size (\$/kW-yr)

	2hr	4hr	6hr	8hr	10hr
50 MW	\$6	\$11	\$15	\$18	\$20
100 MW	\$6	\$9	\$12	\$14	\$15
150 MW	\$5	\$8	\$10	\$11	\$12
200 MW	\$5	\$7	\$8	\$9	\$10
250 MW	\$4	\$6	\$7	\$8	\$8

Congestion management costs were significantly higher in 2018 than in 2017. PNM transmission planning staff have indicated that the higher value in 2018 may be an anomaly.

Additionally, battery storage deployed at the Tijeras substation could be designed and operated to avoid downstream service interruptions. The battery's stored energy could be discharged during local reliability events to provide backup generation to customers who would otherwise experience an outage.3 Between 2011 and 2018, customers in the Tijeras Canyon area experienced an average of 1.5 hours of outages per year. Studies of the value of lost load ("VOLL") have suggested that customers would be willing to pay about \$12,000/MWh to avoid these interruptions, on average.⁴

Load at the Tijeras substation historically has ranged up to approximately 27 MW, suggesting that a maximum battery size of 30 MW would address local reliability conditions. Our assessment of the duration and frequency of the historical outages indicates that a 4-hour battery could fully mitigate these outages, with the customer value of those avoided outages being \$11/kW-yr. Because Tijeras is connected into Sandia, the benefits of storage installed at Tijeras include (and thus are additive to) the congestion management benefits of a battery deployed at the Sandia substation.

Operational Flexibility

By owning a standalone energy storage system, PNM would have complete control over when and how to operate the storage system. This is particularly valuable for managing wind curtailment during overnight hours when load is low. In contrast, a battery that is co-located with solar PV would need to charge from the output of the solar PV facility in order to qualify for the federal Investment Tax Credit. This daytime charging constraint would reduce the ability to otherwise charge during low-cost hours when solar output is low. Additionally, the PPA contract structure could establish contractual requirements that would constrain the utility to a specific storage use case. These contractual limitations would reduce PNM's ability to modify the operations of the storage device as experience is gained and market conditions change over time.

To assess the incremental value of charging at any time of day, we simulated the potential energy revenues of a battery storage system for both daytime-only and 24-hour charging cases.⁵ The simulations used recently-observed prices in the California ISO's Energy Imbalance Market (EIM) at three locations near PNM's service territory: Arizona Public Service (APS), Nevada Energy, and PacifiCorp East (Utah). Since the EIM is not an ancillary services market, we separately assessed spinning reserves and frequency regulation revenues based on experience from the nearby CAISO, ERCOT, and SPP markets.

The battery would need the ability to function in islanded mode ("grid forming" capability), typically not a standard feature of such deployments.

Based on a review of several Value of Lost Load (VOLL) studies. Assumes a VOLL of \$3,000/MWh for residential and \$20,000/MWh for commercial and industrial (C&I) customers, and a weighted average based on approximate PNM customer load shares of 45% residential and 55% C&I.

Energy and ancillary services revenues for standalone battery facilities were simulated for a case where they battery can charge at any time of day, and separately for a case where the battery can only charge between the hours of 8 am and 7 pm (thus approximating a scenario where the battery can only charge from solar PV output).

The ability to charge the battery during any hour increases energy revenues by between 14 and 40 percent, relative to the case where the battery can only charge during daytime hours. This amounts to between \$10 and \$25/kW-year in incremental value, depending on the locational prices used in the analysis. Ancillary services revenues are increased even further (between 70 and 148 percent) when the restriction on daytime charging is lifted.

It is worth noting that the pricing locations (i.e., EIM prices) that were used in the analysis have significant market penetration of solar PV. Therefore, these locations tend to have lower prices during daytime hours, making storage less valuable than at locations where off-peak prices (in the nighttime) are much lower than prices during the day. It is likely that the incremental value of unrestricted battery charging would be greater for PNM's system than our simulations indicate, because PNM is expected to experience development of significant additional wind generation on its system, which will yield more nighttime charging opportunities than offered in the more solardominated EIM pricing points in Arizona and Nevada. Growth in wind adoption may lead to curtailments due to the high wind generation output during off-peak hours, which could be avoided by charging a standalone battery. The need for ancillary services may also be higher during those off-peak times.

Results of the revenue analysis are summarized in Figure 1. As shown in the figure, the proxy energy and ancillary services revenues are estimated to be greater if PNM owns and operates the storage as a standalone facility. Even though PNM is a vertically integrated utility and would not earn revenues" directly from the market, these proxy market revenue estimates represent the type" of value that PNM could realize on behalf of its customers if PNM were to own the energy storage resources. At the lower end, the additional value of standalone storage could be approximately \$10/kW-year greater if the storage had been contracted for from a third party that restricted the charging pattern of storage co-located with the solar PV.6 At the high end, based on the value of providing frequency regulation services under ERCOT-like market conditions, the additional value of standalone storage could be \$71/kW-year. These incremental values of standalone storage systems are in addition to the transmission-related values presented earlier in this paper.

This is the incremental energy value at the nearby APS location in the EIM.

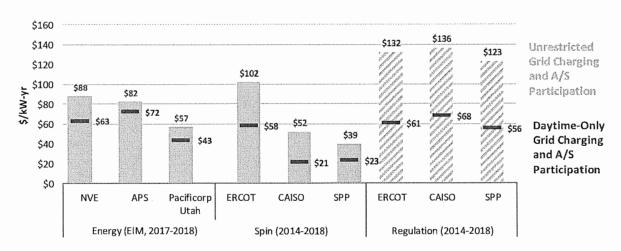
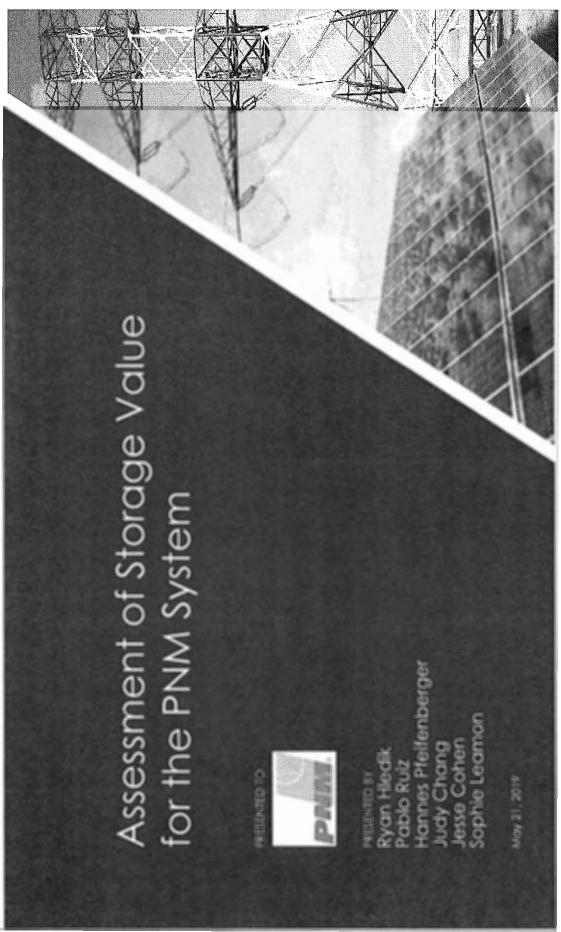


Figure 1: Simulated Energy and Ancillary Services Revenue, with and without Limits on Timing of Charging

Note: Results shown for 100 MW, 4-hour battery. Frequency regulation value is limited to a relatively low overall need for capacity (estimated at 20 to 40 MW for PNM system).



THE Bratile GROUP

Purpose



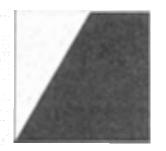
This presentation summarizes Brattle's assessment of the value of standalone, utility-owned battery storage on PNM's system.

The analysis should be considered a screening assessment which provides an indication of the **potential value** and **optimal sizing** of battery storage. More detailed modeling of PNM's system would significantly refine and validate these estimates.

The analysis quantifies additive sources of potential value

- Non-transmission: Capacity, energy, ancillary services
- Transmission: Congestion relief, reliability

Methodology



Non-transmission value

- Capacity value: Analyze historical PNM load and capacity cost data
- Energy value & A/S value: Use Brattle's bSTORE model to dispatch various battery configurations against historical energy and ancillary services prices from nearby markets
- Dispatch accounts for realistic degree of foresight and ability to capture multiple value streams
- Analysis accounts for a broad range of relevant market conditions and battery sizes and configurations

Transmission value

- Assess transmission value of storage additions at two potentially attractive locations, based on input from PNM transmission planning staff
- Reliability value: Review historical outage data and Value of Lost Load (VOLL) studies
- Congestion relief value: Review historical data on congestion events and costs

Summary



Location

- Reliability value of up to \$11/kW-yr for 30 MW of storage at Tijeras substation
- Additional congestion relief value (up to \$11/kW-yr for 4-hr battery) for storage capacity at Sandia substation

Value

- Total value of a 100 MW / 400 MWh battery could exceed \$180/kW-yr
- Energy and/or ancillary services can account for more than half of total value
- Capacity value is also significant; transmission value is relatively small in comparison

Sizing

- System benefits maximized with addition of approximately 200 MW of 2-hr to 4-hr battery storage (10% of PNM system peak)
- Net benefits of optimally sized battery deployment exceed \$8 million per year
- Sizing assessment accounts for non-linear relationships between storage capacity, duration, value, and cost



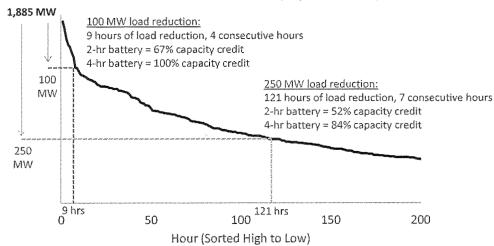
Value Assessment

Capacity value



Capacity value accounts for the degree to which storage can reliably reduce peak capacity need

2018 PNM Load Duration Curve (Top 200 Hours)

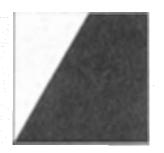


Capacity Credit by Battery Size and Configuration (2012-18 Avg)

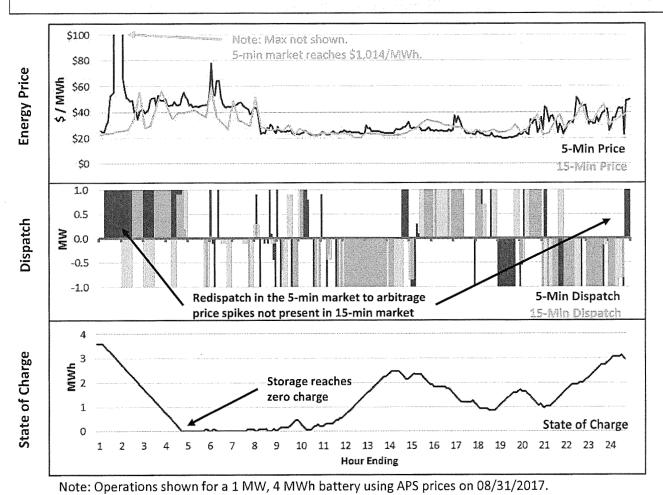
	50 MW	100 MW	150 MW	200 MW	250 MW
2-Hour	75%	58%	53%	46%	42%
4-Hour	100%	90%	86%	78%	72%
6-Hour	100%	100%	97%	93%	90%
8-Hour	100%	100%	100%	99%	98%
10-Hour	100%	100%	100%	100%	100%

- Avoidable capacity cost assumed to be \$87/kW-yr, based on net cost of new entry (CONE) of combustion turbine
- Full value is derated depending on ability of various battery configurations to reduce peak demand (using hourly load data from 2012 2018)
- In the battery's dispatch logic, we assume the battery will be reserved for capacity needs for 2x as many days as needed (due to imperfect foresight) and therefore will be unavailable to provide energy, ancillary services, and congestion relief benefits on those days

Energy value



Energy value is estimated based on observed EIM prices from nearby locations



 Reflects potential value from EIM participation across a range of possible market conditions and timeframes

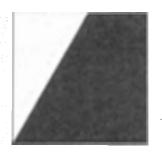
APS: 2017 to 2018

PacifiCorp (Utah): 2018

NVE: 2017 to 2018

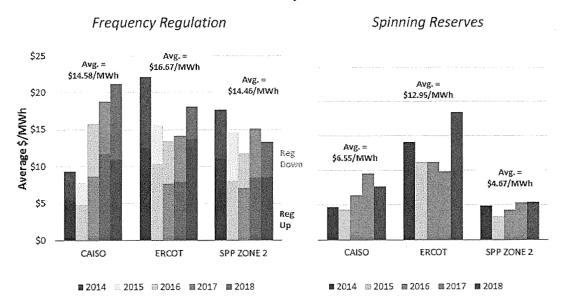
- Accounts for ability of storage to address frequent (5-minute) fluctuations in price/cost
- Dispatch based on realistic degree of foresight into prices and includes benefits of redispatch in RT market
- Separately, energy value based on modeled outlook of PNM system is currently being evaluated by Astrape

Ancillary services (A/S) value



A/S value is based on observed prices in nearby markets

Historical Ancillary Services Prices



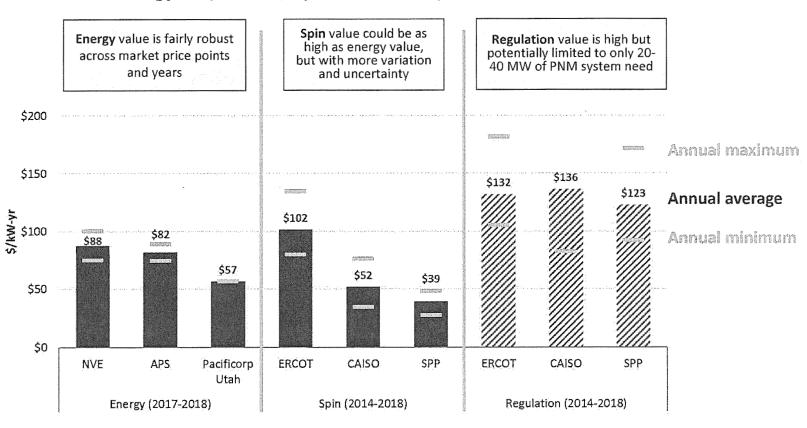
Note: By comparison, Astrape's analysis for the 2017 PNM IRP estimated \$8.50/MWh for Reg Up and \$7/MWh for approximately 300 MW of spin

- As a proxy for A/S costs on the PNM system, frequency regulation and spin prices are analyzed from nearby markets (CAISO, ERCOT, SPP) for 2014-2018
- Frequency regulation need is typically around 1-2% of system peak, and therefore PNM's need is likely addressed by the smallest battery size (50 MW) considered in this analysis
- When accounting for ability to capture multiple value streams, we assume the battery could provide energy or ancillary services, but not both due to battery commitment constraints
- Separately, A/S value based on modeled outlook of PNM system is currently being evaluated by Astrape

Energy and A/S value



Energy & A/S Value, by Market Participation Scenario



Note: Results shown for 100 MW, 4-hour battery. Value is adjusted to account for declining energy and A/S value as amount of storage deployed increases. APS and NVE energy cases modeled for 2017 and 2018; Pacificorp Utah energy case modeled for 2018 only; all A/S cases modeled 2014-2018.

SIDEBAR:

Co-optimization of energy & A/S

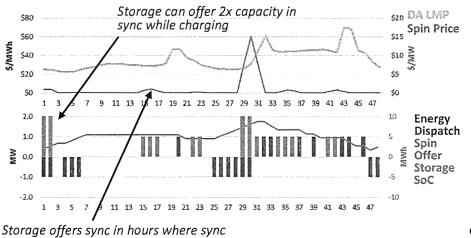


The battery could potentially be dispatched into the EIM and provide reserve value to PNM

- Reserve value may be captured when battery is not dispatched into EIM
- Modeling would require additional time and data; indicative results from prior Brattle modeling for market-based systems are shown below

Average 2015-2018 Historical **Revenues By Dispatch Strategy** The ability to sell A/S when not dispatching energy can be valuable \$300 \$250 Additional Revenues From 5 Minute Dispatch RegDown RegUp Spinning Reserves Redispatch Spin Spin+Reg Foresight Self-Schedule CAISO Scheduled Perfect Foresight Benchmark

Example Dispatch for DA Energy + Spinning Reserve Strategy



torage offers sync in hours where sync price exceeds energy arbitrage opportunity

Transmission value - congestion



A battery at the Sandia substation would reduce congestion-related redispatch costs

Estimated Share of Redispatch MWh Addressed by Storage

	2hr	4hr	6hr	8hr	10hr
50 MW	8%	14%	18%	22%	24%
100 MW	14%	23%	29%	33%	36%
150 MW	19%	29%	36%	40%	42%
200 MW	23%	34%	40%	44%	46%
250 MW	26%	37%	43%	47%	49%

Congestion Management Benefit by Battery Size (\$/kW-yr)

	2hr	4hr	6hr	8hr	10hr
50 MW	\$6	\$11	\$15	\$18	\$20
100 MW	\$6	\$9	\$12	\$14	\$15
150 MW	\$5	\$8	\$10	\$11	\$12
200 MW	\$5	\$7	\$8	\$9	\$10
250 MW	\$4	\$6	\$7	\$8	\$8

Note: Congestion management costs were significantly higher in 2018 than in 2017. PNM transmission planning staff have indicated that the higher value in 2018 may be an anomaly.

- Path 48 congestion management costs averaged \$3.8 million/yr in 2017-2018
- Path 48 congestion events vary significantly in terms of duration, and MWh and MW of redispatch required per event
- We identified the portion of events that could be avoided for various battery sizes and configurations
- Assumed additive to energy value because battery would discharge during peak hours and energy prices do not account for local transmission constraints; this assumption could be refined through a detailed simulation of the PNM system
- Like energy and A/S value, congestion benefits are reduced to account for unavailability of battery during capacity events

Transmission value - reliability



A 30 MW battery at Tijeras substation would avoid downstream interruptions

Forced Outages of Sandia - East Mountain 46 kV ID Line (Radial)

Year	Outages	Days with Outage	Total Duration of Outages (hrs)	Average Outage Duration (hrs/outage)
2011	1	1	0.02	0.02
2012	3	3	8.45	2.82
2013	1	1	2.60	2,60
2014	2	2	1.05	0.52
2015	0	0	0.00	0.00
2016	1	1	0.00	0.00
2017	0	0	0.00	0.00
2018	0	0	0.00	0.00
Average	1	1	1.51	0.74

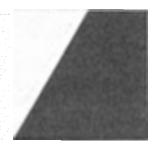
Reliability Benefit for 30 MW Battery by Duration (\$/kW-yr)

	2hr	4hr	6hr	8hr	10hr
30 MW	\$7	\$11	\$11	\$11	\$11

Note: The average VOLL assumption is based on the system-wide mix of customers; the estimate could be refined with data on the customer mix in the Tijeras area

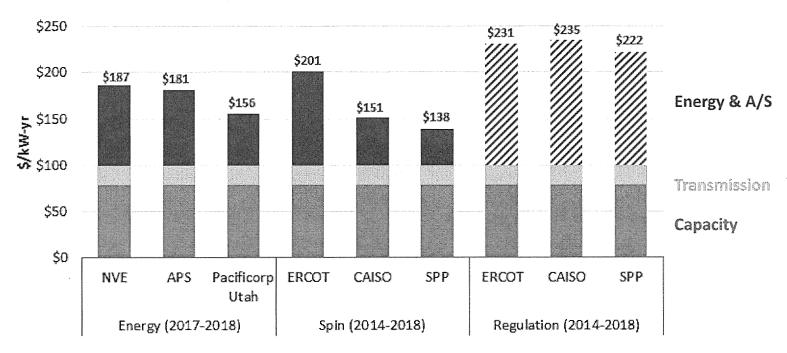
- Average load at Tijeras is about 18 MW, varying up to load of 27 MW
- Reliability benefits based on the average ID line outage hours per year and assume a Value of Lost Load (VOLL) of \$12,350/MWh
- Battery would need ability to function in islanded mode ("grid forming" capability)
- Battery would provide operational benefits, enabling maintenance work on the ID line to be done de-energized if needed (currently all work on that line is conducted live); we did not quantify these operational benefits
- Additionally, we examined reliability value at Sandia, but benefits are minimal (see appendix)

Total value



The total value of a 100 MW / 400 MWh battery deployment could exceed \$180/kW-yr

Total Storage Value, by Market Participation Scenario



Note: Results shown for 100 MW, 4-hour battery. On days when storage is expected to be needed for capacity purposes, the battery is assumed to be held in reserve and energy, A/S, and congestion relief value is assumed to be zero.



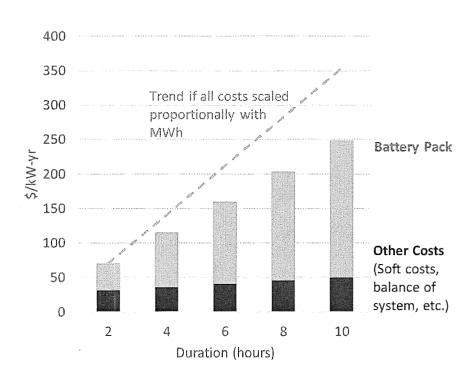
Sizing Assessment

Battery costs



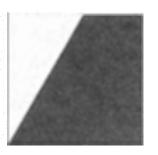
Battery costs are based on recent PPA offers and vary depending on power ratio (duration)

Modeled Battery Cost, by Duration

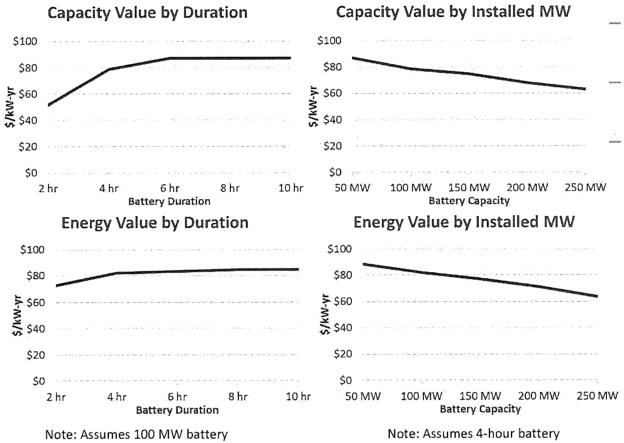


- Assumed costs based on review of recent PNM PPA offers for 4-hr battery storage with Dec 2021 online date
 - Capacity cost: \$110/kW-yr
 - Transmission interconnection: \$5/kW-yr
 - Energy cost (O&M fee): \$8/MWh
- costs other than battery pack costs (soft costs, balance of system, etc) do not increase in 1:1 proportion with battery duration

Relationship between value and size

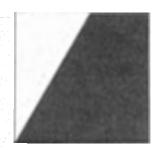


Like costs, battery value streams also do not scale proportionally with battery size



- Both energy and capacity lose most of their marginal value past 4-hr duration
- Marginal capacity value decreases with greater installed MW as system peak is flattened
- Marginal energy value decreases with greater installed MW due to flattening prices and the need to hold energy storage for more capacity events
 - Price effect is approximated from Brattle's system-modeling study of storage in Nevada
 - Assumed capacity is held for 2x days of historical capacity events
 - Same effects are applied to ancillary service market participation case

Optimal battery sizing



System value is maximized with battery deployment of ~200 MW (10% of peak), and 2- to 4-hr duration

Net Value of Storage Additions (\$000's per year)

Market Participation Case: Energy Value based on APS EIM Price Point (2017-18)

	2 hr	4 hr	6 hr	8 hr	10 hr
50 MW	\$4,306	\$4,191	\$2,329	\$387	-\$1,695
100 MW	\$6,545	\$6,585	\$3,474	-\$628	-\$4,915
150 MW	\$8,158	\$8,160	\$3,462	-\$2,388	-\$8,942
200 MW	\$8,410	\$7,899	\$2,148	-\$5,391	-\$13,989
250 MW	\$7,400	\$6,185	-\$435	-\$9,694	-\$20,328

Market Participation Case:

Ancillary Services Value based on CAISO Spinning Reserves (2014-18)

	2 hr	4 hr	6 hr	8 hr	10 hr
50 MW	\$3,206	\$2,593	\$656	-\$1,353	-\$3,428
100 MW	\$4,463	\$3,573	\$337	-\$3,885	-\$8,169
150 MW	\$5,036	\$3,677	-\$1,176	-\$7,217	-\$13,744
200 MW	\$4,388	\$2,142	-\$3,805	-\$11,455	-\$20,018
250 MW	\$3,061	-\$194	-\$7,098	-\$16,348	-\$26,926

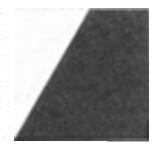
- System value is maximized when the marginal value of the battery equals the marginal cost
- For a market participation strategy based on energy value at the APS EIM price point, value is maximized with a 150 to 200 MW deployment of 2- or 4-hr storage
- A market participation strategy that focuses on ancillary services would be optimized with a lower duration (2 hour) battery
- With additional modeling, this analysis could be refined to identify the optimal mix of battery sizes for a given level of deployment



Appendix A:

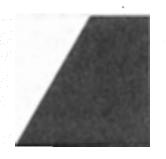
Supporting Detail for Transmission Value Assessment

Transmission Value Assessment



- We assessed the transmission value of battery investments in two locations that appear to be the most promising based on discussions with PNM
 - Tijeras substation
 - Sandia substation
- For these locations, we assessed two value streams based on the characteristics and plans for the PNM system
 - Congestion management benefits
 - Reliability benefits
- Generally, there are other transmission value streams, which did not appear to warrant further study in this initial study
 - Transmission-related renewables curtailment mitigation
 - Investment deferral
 - Voltage support
 - Loss mitigation

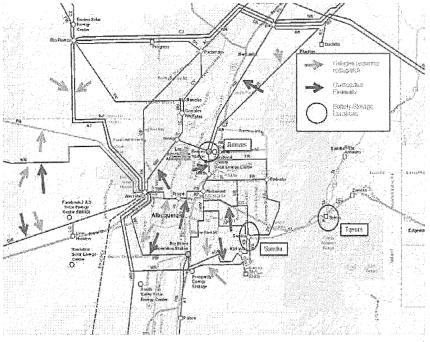
TRANSMISSION VALUE Selected Candidate Locations



Two selected candidate locations based on expected benefits

- Sandia 115 kV substation
 - In Albuquerque area -> expect Path
 48 congestion relief
 - Other congestion and reliability benefits anticipated by PNM under outage conditions
- Tijeras 46 kV substation
 - Radially connected to Sandia substation
 - All Sandia benefits in addition to increased reliability in Tijeras area
 - Maximum battery size ~20-25 MW based on local load levels
- Locations not mutually exclusive

Transmission System Near Albuquerque



Source: PNM

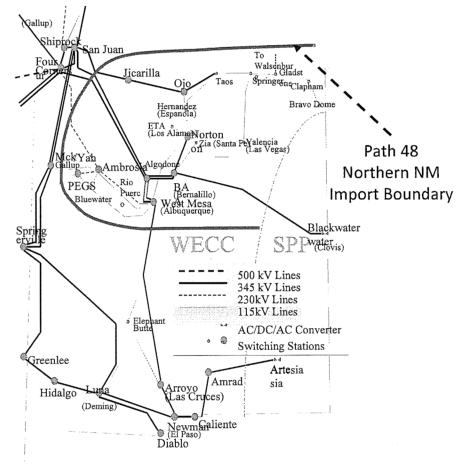
TRANSMISSION VALUE Congestion Analysis: PNM Constraints



Per PNM input, Path 48 is the most costly constraint in the PNM footprint

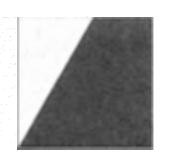
- Path 48 monitors the net imports into northern New Mexico
- PNM manages congestion on other, local constraints that occur mostly during outages

Path 48 Definition



Source: Adapted by Brattle from PNM FERC Form 715 Filing, March 2017 brattle.com § 21

TRANSMISSION VALUE Path 48 Historical Congestion Costs



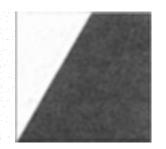
Over the last two years, Path 48 annual congestion management costs have averaged \$3.8 million

- Path 48 congestion is managed by increasing the dispatch of units in or near Albuquerque, and reducing production in other units outside of the Path 48 boundary (e.g., San Juan, Four Corners)
- All generation sites in and near
 Albuquerque are equally effective
 to manage Path 48 flows
- year to year (e.g., due to outages, fuel price differences, renewable developments)

Path 48 Historical Congestion Management Redispatch Cost and Volume

Year	Total Costs of	MWh of	Avg \$/MWh of
	Redispatch	Redispatch	Redispatch
2017	\$1,550,703	37,944	\$40.87
2018	\$5,970,022	189,843	\$31.45
Average	\$3,760,362	113,894	\$33.02

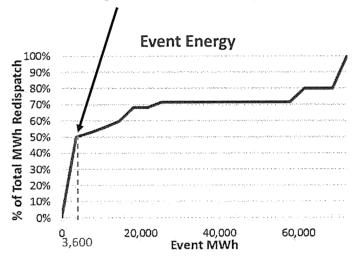
TRANSMISSION VALUE Path 48 Congestion Events Statistics

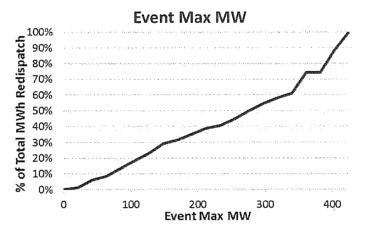


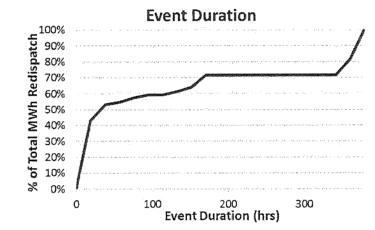
Congestion Event Required Redispatch Cumulative Distributions

Path 48 congestion *events* have varied significantly in duration, MWh of redispatch required and maximum MW of redispatch required per event.

Events with up-to 3,600 MWh of energy redispatch amount for 50% of the total redispatch MWh during the 8-year period analyzed

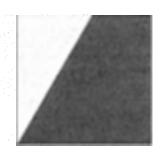






Source: Brattle analysis of historical hourly redispatch required to manage Path 48 flows in Jan 2011 - Apr 2019.

TRANSMISSION VALUE Path 48 Congestion Relief with Batteries

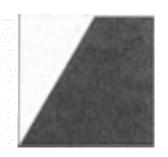


- A battery used to provide P48 congestion relief would charge in anticipation of congestion events when prices are low, and would deliver both MW and MWh during the event
- For events with long duration and/or high MW requirement, a given battery may only provide partial congestion relief, per its MW and MWh rating
- The following table indicates the fraction of Path 48 MWh congestion relief that a battery could provide, under the following simplifying assumptions:
 - There is enough foresight and time between events for the battery to charge
 - The battery can capture 90% of the relief potential (de-rate due to roundtrip efficiency and various uncertainties)

Portion of Path 48 Congestion Management MWh that a Battery Could Provide

	2hr	4hr	6hr	8hr	10hr
50 MW	8%	14%	18%	22%	24%
100 MW	14%	23%	29%	33%	36%
150 MW	19%	29%	36%	40%	42%
200 MW	23%	34%	40%	44%	46%
250 MW	26%	37%	43%	47%	49%

TRANSMISSION VALUE Congestion Management Benefits



- A battery location at the Sandia substation (or radially connected to it)
 provides congestion relief for multiple constraints in addition to Path 48,
 especially under planned or forced outage conditions
- Per PNM, the congestion management costs for constraints asides from Path
 48 are of the same order of magnitude as the Path 48 costs, in aggregate
- The table estimates the battery congestion management benefits assuming:
 - Batteries provide Path 48 redispatch MWh duty as in the previous slide
 - Annual Path 48 congestion costs are \$3.8 million
 - The battery congestion management benefits for Non-Path 48 constraints amounts to 10% of the Path 48 benefits (discount due to potential simultaneous events)

Congestion Management Benefit by Battery Ratings (\$ '000/year)

	2hr	4hr	6hr	8hr	10hr
50 MW	\$316	\$567	\$758	\$901	\$995
100 MW	\$568	\$935	\$1,191	\$1,360	\$1,473
150 MW	\$768	\$1,198	\$1,471	\$1,644	\$1,739
200 MW	\$935	\$1,395	\$1,659	\$1,806	\$1,914
250 MW	\$1,079	\$1,545	\$1,787	\$1,936	\$2,027

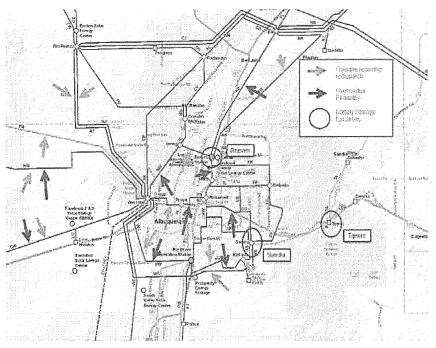
TRANSMISSION VALUE Reliability Value: Tijeras 46 kV



Locating a 30 MW battery at Tijeras would enable the demand connected downstream of Tijeras to not be interrupted under forced outages of the Sandia - East Mountain 46 kV radial line (ID)

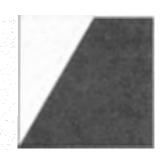
- The battery would need the ability to function in islanded mode ("grid forming" capability), usually not a standard feature. Upon candidate battery selection, detailed technical studies should be conducted to verify the islanded mode capability considering the specifics of the candidate battery and of the local system (load types, protection system characteristics, etc.).
- In addition, the battery would provide operational benefits, enabling maintenance work on the ID line to be done de-energized if needed (currently all work on that line is conducted live); we did not quantify these ops benefits.

Transmission System Near Albuquerque



Source: PNM

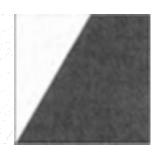
TRANSMISSION VALUE Historical ID Line Outages



Forced Outages of Sandia - East Mountain 46 kV ID Line (Radial)

Year	Outages	Days with Outage	Total Duration of Outages (hrs)	Average Outage Duration (hrs/outage)
2011	1	1	0.02	0.02
2012	3	3	8.45	2.82
2013	1	1	2.60	2.60
2014	2	2	1.05	0.52
2015	.0	0	0.00	0.00
2016	1	1	0.00	0.00
2017	0	0	0.00	0.00
2018	0	0	0.00	0.00
Average	1	1	1.51	0.74

TRANSMISSION VALUE Reliability Benefits at Tijeras 46 kV



- Average load at Tijeras is about 18 MW, and has a range of 9.5-27.4 MW observed in different power flow models.
- Considering the average ID line outage hours per year and assuming a Value of Lost Load of \$12,350/MWh, the benefits of a 30 MW battery are provided in the table for various battery durations

Reliability Benefit at Tijeras for 30 MW Battery by Duration (\$ '000/year)

	2hr	4hr	6hr	8hr	10hr
30 MW	\$196	\$324	\$337	\$337	\$337

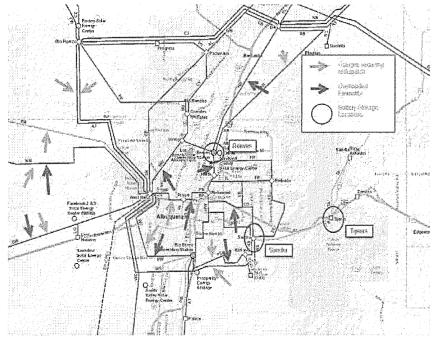
TRANSMISSION VALUE Reliability Value: Sandia 115 kV



During Summer peak conditions, under the outage of West Mesa — Sandia 345 kV there may be post contingency overloads that cannot be resolved with a re-dispatch

- These are N-1-1 overloads, NERC standards do not require system expansion to prevent them
- Should the second contingency occur, load shedding may be needed
- West Mesa outages are never scheduled for summer peak, so these double contingencies would only occur due to forced outages

Transmission System Near Albuquerque



Source: PNM

TRANSMISSION VALUE Reliability Value: Sandia 115 kV



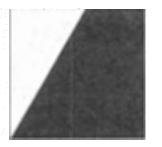
Total outage hours	779.78	779.78	779.78	779.78	779.78
Unique outage facilities	52	52	52	52	52
Outage hours per facility	15.00	15.00	15.00	15.00	15.00
Length of Period (hours)	70,272	70,272	70,272	70,272	70,272
Transmission unavailability	0.02%	0.02%	0.02%	0.02%	0.02%
# Potential critical N-1-1 facilities	6	6	6	6	6
Probability any one of 5 facilities is out	0.11%	0.11%	0.11%	0.11%	0.11%
Probability of the N-1-1 event	2.3E-07	2.3E-07	2.3E-07	2.3E-07	2.3E-07
Heavy summer hours	480	480	480	480	480
Expected hours with N-1-1 event in heavy summer	1.1E-04	1.1E-04	1.1E-04	1.1E-04	1.1E-04
Shift factor	0.2	0.2	0.2	0.2	0.2
Battery capacity (MW)	20	70	120	170	220
Battery relief under N-1-1 event (MW)	4	14	24	34	44
Expected relief-hours (MWh)	0.000	0.002	0.003	0.004	0.005
VOLL (\$/MWh)	\$12,350	\$12,350	\$12,350	\$12,350	\$12,350
Expected value of relief (\$/year)	\$5	\$19	\$32	\$46	\$59



Appendix B:

Supporting Detail for Non-Transmission Value Assessment

EIM Participation

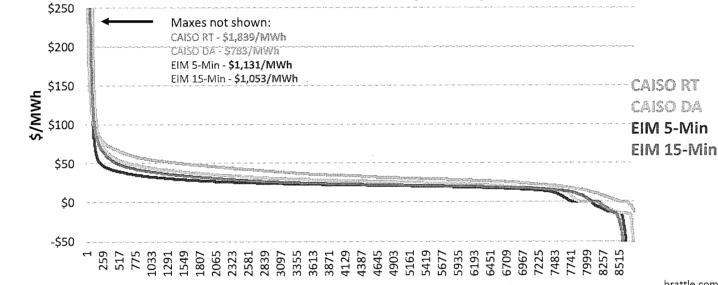


Participation in the EIM offers the opportunity for energy arbitrage in extreme price hours not observed in the CAISO energy markets

2017 Energy Price Comparison, by Percentile (\$/MWh)

_	Market	1st	5th	10th	25th	50th	75th	90th	95th	99th	Max	St.Dev
CAICO	· RT	-\$15	-\$8	\$0	\$21	\$27	\$35	\$47	\$58	\$265	\$1,839	\$85
CAISO	DA	-\$2	\$6	\$16	\$26	\$33	\$45	\$57	\$69	\$116	\$783	\$28
=15.4	5-Min	-\$145	-\$12	\$0	\$18	\$22	\$26	\$34	\$41	\$170	\$1,131	\$79
EIM	15-Min	-\$146	-\$9	\$9	\$19	\$23	\$30	\$41	\$52	\$152	\$1,053	\$61





Source: CAISO Oasis.

Hour of the Year

brattle.com | 32

Historical PNM Load Characteristics 50 MW and 100 MW Capacity Performance



Analysis of PNM's load duration curve identifies the number & frequency of hours during which the battery would need to operate to provide a desired level of capacity avoidance

Historical System Load Characteristics (2014-2018)

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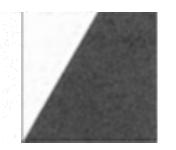
2017 50MW Battery 2014 2015 2016 2018 Max Load (MW) 1,878 1,889 1,908 1,843 1,885 1,839 1,858 1,793 1,835 Max Adjusted Load (Max - 50MW) 1,828 5 12 5 Number of Peak Hours 2 5 Number of Distinct Peak Periods **Duration of Longest Sustained Peak Period** 5 Number of Peak Days 3 Max Peak Hours within a Single Day 3 3 Number of Peak Months 1 2 1

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100MW Battery	2014	2015	2016	2017	2018
Max Load (MW)	1,878	1,889	1,908	1,843	1,885
Max Adjusted Load (Max - 100MW)	1,778	1,789	1,808	1,743	1,785
Number of Peak Hours	18	12	40	18	9
Number of Distinct Peak Periods	6	4	16	6	4
Duration of Longest Sustained Peak Period	6	6	5	5	4
Number of Peak Days	6	4	15	6	4
Max Peak Hours within a Single Day	6	6	5	5	4
Number of Peak Months	2	3	2	2	2

- Number of Peak Hours =
 number of hours during
 which the battery would
 need to discharge to
 provide full capacity value
- Number of Distinct Peak
 Periods = number of nonconsecutive peak hours
- Duration of Longest
 Sustained Peak Period =
 number of consecutive
 peak hours
- Number Peak Days = number of days with at least one peak hour

Historical PNM Load Characteristics 150 MW and 200 MW Capacity Performance



Capacity Characteristics against Historical Load (2014-2018)

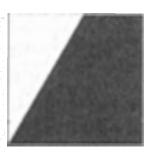
150 MW Capacity Deferral

150MW Battery	2014	2015	2016	2017	2018
Max Load (MW)	1,878	1,889	1,908	1,843	1,885
Max Adjusted Load (Max - 150MW)	1,728	1,739	1,758	1,693	1,735
Number of Peak Hours	44	49	95	42	36
Number of Distinct Peak Periods	.12	16	28	13	11
Duration of Longest Sustained Peak Period	8	8	6	7	5
Number of Peak Days	11	16	28	11	11
Max Peak Hours within a Single Day	8	8	6	7	5
Number of Peak Months	3	3	2	2	3

200 MW Capacity Deferral

200MW Battery	2014	2015	2016	2017	2018
Max Load (MW)	1,878	1,889	1,908	1,843	1,885
Max Adjusted Load (Max - 200MW)	1,678	1,689	1,708	1,643	1,685
Number of Peak Hours	114	111	160	7 5	64
Number of Distinct Peak Periods	29	31	36	19	17
Duration of Longest Sustained Peak Period	9	9	8	8	7
Number of Peak Days	29	30	36	17	17
Max Peak Hours within a Single Day	9	9	8	8	7
Number of Peak Months	4	3	3	3	3

Avoided capacity cost

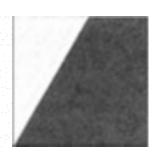


Development of Avoided Capacity Cost Estimate

Installed cost (\$/kW)	\$831
Rate	7.20%
Life (yrs)	18
Salvage @ yr 18 - % of installed cost	50%
Salvage @ yr 18 - undiscounted (\$/kW)	\$416
Salvage @ yr 18 - present value (\$/kW)	\$119
Installed cost minus salvage (\$/kW)	\$712
Installed cost minus salvage (\$/kW-yr)	\$72
FOM (\$/kW-yr)	\$30
Energy margin (\$/kW-yr)	\$15
Net CONE (\$/kW-yr)	\$87

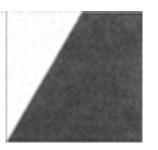
- Full avoided cost of capacity is based on a new combustion turbine (CT)
- Installed cost, discount rate, salvage value, and fixed O&M costs are based on a review of PNM's 2017 IRP and correspondence with PNM staff
- The CT energy margin estimate is based on a review of energy and ancillary services net revenues for new CTs in other markets; the value can vary significantly depending on market conditions

Storage Characteristics & Modeling Assumptions



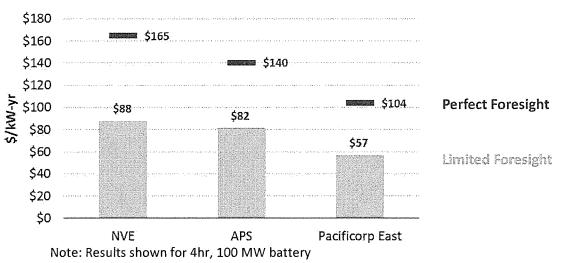
Assumption	Description
Storage Characteristics	 Evaluates 2 hr, 4 hr, 6 hr, 8 hr, and 10 hr duration storage, at capacities of 50 MW, 100 MW, 150 MW, 200 MW, and 250 MW
Losses	90% round-trip efficiency
Max Discharge	Only use 90% of a battery's charge/discharge capability, per recommendation from conversations with developers
Storage Degradation	 No degradation modeled Assumption is that battery will be augmented as cells degrade
Pricing Points	EIM prices at Arizona Public Service (APS), Nevada Power (NVE) and Pacificorp East (PACE) price points
Variable Costs	 Cost of purchasing energy from the grid plus \$8/MWh VOM cost on discharged energy
Energy Market Participation	Energy arbitrage across 15-minute and 5-minute realtime EIM markets
Ancillary Service Participation	Participation in solely regulation or operating reserve markets

Dispatch Logic



- We use a rolling horizon optimization model to dispatch and redispatch the battery against both 15-minute and 5-minute historical real time EIM prices
- To be conservative, we present results from a case with very limited foresight into market prices—the battery operator forecasts future prices using the previous day's market results, and sees realtime prices as they happen
- CAISO can likely forecast prices / market conditions with greater accuracy, though their degree of foresight is uncertain and would need to be characterized through further research
- As a point of comparison, below we show results from a case assuming dispatch is based on perfect foresight. This is an unachievable upper bound on revenues, but it provides an indication of how much price volatility currently exists in the EIM, and the potential upside to more sophisticated price forecasting at recent historical prices (71 to 88% increase in revenues)

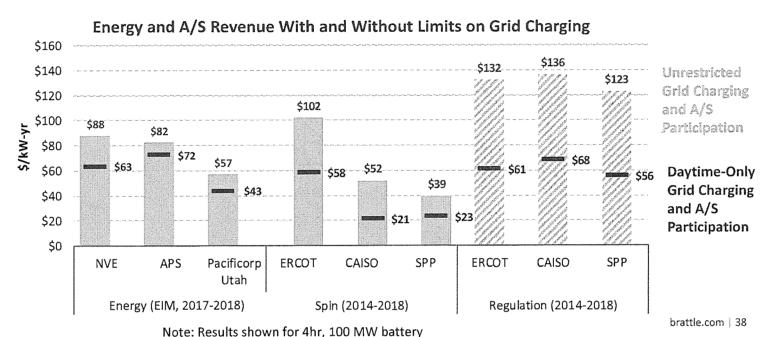
Energy Revenue With Limited and Perfect Foresight (2017-18 avg)



Solar + Storage



- Pairing storage with solar can reduce storage revenues, since the battery is forced to charge only from the solar facility (in order to capture ITC cost savings)
- To approximate the effects of pairing storage with solar, we simulate a case in which charging is restricted to daytime hours
- Results in a 12-28% decrease in potential energy revenues across the analyzed EIM price points
- Reduction in energy revenue is greatest in areas where negative prices are less correlated with solar output. In the Southwest, daytime prices are often lower priced hours due to significant solar PV generation
- A/S revenues decrease by a greater amount (42-59%). This is roughly proportional to the reduction in the number of hours when the battery is operating due to the solar charging constraints, as regulation and spin prices in the analyzed markets generally do not vary dramatically on average between daytime and nighttime hours



San Juan Generating Station Background

PNM Exhibit TGF-4

Is contained in the following 2 pages.

DESCRIPTION AND BACKGROUND ON SAN JUAN GENERATING STATION

San Juan Generating Station ("SJGS") is located in Waterflow, New Mexico, fifteen miles west of Farmington. For nearly four decades before 2017, SJGS operated as a four-unit coal-fired generating station with 1683 net MW of electric generation capacity. Units 2 and 3 were retired in December 2017 as the result of environmental agreements with the U.S. Environmental Protection Agency and the New Mexico Environment Department and pursuant to the Commission's abandonment approval issued in Case No. 13-00390-UT. When Units 2 and 3 were shut down in December 2017, five owners retained ownership interests in Units 1 and 4. SJGS presently operates as a two-unit plant with a total capacity of 847 MW with PNM's utility share of 497 MW. PNM owns an additional 65 MW in SJGS Unit 4 which is not included in retail rates. The net generation capacity for Unit 1 is 340 MW and for Unit 4 is 507 MW.

The current owners of SJGS include, in addition to PNM, who is also the plant operator, Tucson Electric Power Company ("TEP"), Utah Association of Municipal Power Systems ("UAMPS"), the Incorporated County of Los Alamos, New Mexico ("Los Alamos"), and the City of Farmington, New Mexico ("Farmington"). Their respective ownership interests in SJGS Units 1 and 4 are shown in Table 1 below.

TA)	BLE 1 - SJG	S Ownership	Interests	
SJGS Ownership	Unit 1	Unit 1 MW's	Unit 4	Unit 4 MW's
PNM Utility	50%	170 MW	64.482%	327 MW
TEP	50%	170 MW	0%	0
Farmington	0%	0	8.475%	43 MW
Los Alamos	0%	0	7.20%	36 MW
UAMPS	0%	0	7.028%	36 MW
PNM Merchant	0%	0	12.815%	65 MW

Some of the equipment and facilities are common across the SJGS units. Table 2 below shows each owner's respective ownership interest in the SJGS common facilities and equipment.

TABLE 2 - SJGS Ownership Interests – Common Facilities								
SJGS Ownership Percentage								
PNM Utility	58.671%							
TEP	20.068%							
Farmington	5.076%							
Los Alamos	4.309%							
UAMPS 4.203%								
PNM Merchant	7.673%							

As operating agent for the project, PNM is responsible for the day-to-day operations of the power plant. The other owner-participants along with PNM are responsible for policy-making, and review and approval of annual operating and capital budgets. Collectively, the owners (including former owners) are responsible for deciding plant decommissioning objectives and budgets, and for mine reclamation costs.

The employees who work at SJGS are PNM employees. PNM has approximately 200 full time equivalent employees currently employed at the plant.

SJGS is what is known as a "mine mouth" power plant and obtains its fuel from the adjacent San Juan Coal Mine pursuant to a coal supply agreement with the San Juan Coal Company. The mine employs approximately 242 employees.

Inputs to Inputs for Updated Modeling

PNM Exhibit TGF-5

Is contained in the following 5 pages.

PNM EXHIBIT TGF-5 SJGS CAPITAL, DECOMMISSIONING & ARO SUMMARY - DEC 31, 2040 SHUT DOWN SCENARIO

	SAN JUAN UNIT TOTAL	SAN JUAN UNIT TOTAL																	
		Clearings	2019		2020	2	021		2022		2023		2024		2025		2026		2027
			Total		Total	т	otal		Total		Total	ļ	Total		Total		Total		Total
1	761 - SAN JUAN UNIT 1 TOTAL	761 - SAN JUAN UNIT 1 TOTAL	\$ 997	\$	1,500	\$ 3	36,276	\$	1,700	\$	2,025	\$	26,476	\$	1,900	\$	1,500	\$	21,030
3	764 - SAN JUAN UNIT 4 TOTAL	764 - SAN JUAN UNIT 4 TOTAL	\$ 9,196	\$	1,614	\$	1,500	\$	40,406	\$	1,500	\$	1,500	\$	32,705	\$	1,500	\$	1,500
4 5	766 - SAN JUAN - COMMON ALL UNITS	766 - SAN JUAN - COMMON ALL UNITS	\$ 2,000	\$	2,765	\$ -	15,185	\$	7,126	\$	6,630	\$	6,050	\$	14,200	\$	4,400	\$	2,850
6								Ţ											
7 8	779 - SAN JUAN SWITCHYARD TOTAL	779 - SAN JUAN SWITCHYARD	\$ -	\$		\$	1,044	\$	810	\$	205	\$	1,030	\$	210	\$	820	\$	
11	PLANT TOTAL	PLANT TOTAL	\$ 12,228	\$	5,934	\$ 5	54,041	\$	50,097	\$	10,374	\$	35,056	\$	49,015	\$	8,220	\$	25,380
12 13	PLANT CAPITAL & DECOMMISSIONING	PLANT CAPITAL & DECOMMISSIONING						*********											
	PNM		\$ 8.957	S	3.869	\$ 2	29.918	\$	37,252	\$	6.682	\$	18,926	\$	35,756	\$	5.239	\$	13,565
	TEP		\$ 907		1,316		21,715		2,696		2,448			\$	3,905		2,043		11,087
	COF		\$ 883		280	\$	900	\$	3,789		464		434	\$	3,493		350	\$	272
	MSR		\$ -	\$	•			\$	-	\$	-	\$	-	\$	-	\$	-	\$	-
	TRI STATE		\$ -	\$	-			\$		\$	-	\$	-	\$	-	\$	*	\$	-
	LAC		\$ 750		238	\$	764	_	3,219	_	394	<u> </u>	369	\$	2,967	\$	298	\$	231
	ANA		\$ -	\$	-			\$	-	\$	-	\$	-	\$	-	\$	-	\$	-
	SCPPA		\$ -	\$	-			\$		\$		\$	-	\$		\$	-	\$	-
	UAMPS TOTAL	UAMPS TOTAL	\$ 732 \$ 12.228		232		745		3,142 50,097		385 10.374			\$		\$	290 8,220	\$	225 25.380
23	IOIAL	I IOIAL	\$ 12,228	\$	5,934	\$;	54,041	Þ	50,097	Þ	10,374	Þ	35,056	Þ	49,015	Þ	8,220		25,360
	PNM SHARE ESCLATED	PNM SHARE ESCLATED	8,957		3,927	3	30,822		38,953		7,092		20,389		39,097		5,814		15,281
	PNM Retail (w/o 132MW)	PNM Retail (w/o 132MW)	4,897		2,601	2	26,362		20,614		4,786		18,026		21,552		3,843		13,878
	PNM Retail 132MW	PNM Retail 132MW	2,706		864		2,963		12,257		1,535		1,557		11,755		1,291		940
	PNM 65MW	PNM 65MW	1,332		425		1,459		6,036		756		767		5,788		636		463
			8,935		3,890	3	30,784		38,906		7,077		20,350		39,096		5,770		15,282
	PNM SJGS Unit 1 + Common	PNM SJGS Unit 1 + Common	900		1,325	2	21,826		2,384		2,487		15,569		4,155		1,813		12,489
	PNM SJGS Unit 4 + Common (Excluding 132 & 65)	PNM SJGS Unit 4 + Common (Excluding 132	3,997		1,276		4,535		18,229		2,299		2,456		17,397		2,031		1,389
	PNM SJGS Unit 4 + Common (132)	PNM SJGS Unit 4 + Common (132)	2,706		864		2,963		12,257		1,535		1,557		11,755		1,291		940
	Total PNM SJGS Unit 4 (Base Rates)	Total PNM SJGS Unit 4 (Base Rates)	6,703		2,140		7,498		30,486		3,834		4,014		29,152		3,322		2,329
	Total PNM SJGS (Base Rates)	Total PNM SJGS (Base Rates)	7,603		3,465	2	29,325		32,871		6,321		19,583		33,307		5,134		14,819
	PNM SJGS Unit 4 + Common (65)	PNM SJGS Unit 4 + Common (65)	1,332		425		1,459		6,036		756		767		5,788		636		463
	Total PNM SJGS	Total PNM SJGS	8,935		3,890	3	30,784		38,906		7,077		20,350		39,096		5,770		15,282
		TOTAL CHK	-		-		-		-		-		-		-		-		-

PNM EXHIBIT TGF-5 SJGS CAPITAL, DECOMMISSIONING & ARO SUMMARY - DEC 31, 2040 SHUT DOWN SCENARIO

	2028 Total	2029 Total	2030 Total	2031 Total	2032 Total	2033 Total	2034 Total	2035 Total	2036 Total	2037 Total	2038 Total	2039 Total	2040 Total	Foreca: Total
61 - SAN JUAN UNIT 1 TOTAL	\$ 1,500	\$ 1,500	\$ 26,556	\$ 1,725	\$ 1,500	\$ 28,560	\$ 1,500	\$ 1,750	\$ 44,835	\$ 1,500	\$ 1,500	\$ 16,045	\$ 1,500	\$ 223,37
764 - SAN JUAN UNIT 4 TOTAL	\$ 30,821	\$ 1,500	\$ 1,500	\$ 36,770	\$ 1,500	\$ 1,500	\$ 17,771	\$ 1,500	\$ 1,500	\$ 28,650	\$ 1,500	\$ 10,701	\$ 1,500	\$ 228,13
766 - SAN JUAN - COMMON ALL UNITS	\$ 8,000	\$ 4,665	\$ 4,725	\$ 5,200	\$ 5,100	\$ 2,800	\$ 7,750	\$ 5,400	\$ 6,500	\$ 4,650	\$ 3,150	\$ 2,000	\$ 2,000	\$ 123,1
79 - SAN JUAN SWITCHYARD TOTAL	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 4,1
PLANT TOTAL	\$ 46,369	\$ 7,665	\$ 32,781	\$ 43,695	\$ 8,100	\$ 32,860	\$ 27,021	\$ 8,650	\$ 52,835	\$ 34,800	\$ 6,150	\$ 28,746	\$ 5,000	\$ 585,0
PLANT CAPITAL & DECOMMISSIONING	T										<u> </u>			
NM	\$ 32,984	\$ 5.004	\$ 17,572	\$ 32,734	\$ 5,293	\$ 17,297	\$ 19,628	\$ 5,617	\$ 27,889	\$ 25,981	\$ 3,999	\$ 17,621	\$ 3,236	\$ 375,
P	\$ 3,577	\$ 1,686	\$ 14,226	\$ 1,906		\$ 14,842	\$ 2,305	\$ 1,959	\$ 23,722	\$ 1,683	\$ 1,382	\$ 8,424	\$ 1,151	\$ 139
OF	\$ 3,206	\$ 364	\$ 367	\$ 3,380	\$ 386	\$ 269	\$ 1,899	\$ 401	\$ 457	\$ 2,664	\$ 287	\$ 1,008	\$ 229	\$ 25,
SR	\$ 399	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$
RISTATE	\$ 109	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$
AC	\$ 2,727	\$ 309	\$ 312	\$ 2,872	\$ 328	\$ 229	\$ 1,613	\$ 341	\$ 388	\$ 2,263	\$ 244	\$ 857	·\$ 194	\$ 21,
NA	\$ 139	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	1 \$\$	\$	\$ -	\$
CPPA	\$ 568	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$	\$	\$ -	\$ -	\$
AMPS	\$ 2,660	\$ 301	\$ 304	\$ 2,803	\$ 320	\$ 223	\$ 1,575	\$ 332	\$ 379	\$ 2,209		\$ 836	\$ 189	\$ 21,
TOTAL	\$ 46,369	\$ 7,665	\$ 32,781	\$ 43,695	\$ 8,100	\$ 32,860	\$ 27,021	\$ 8,650	\$ 52,835	\$ 34,800	\$ 6,150	\$ 28,746	\$ 5,000	\$ 585,
NM SHARE ESCLATED	37,713	5,808	20,699	39,138	6,423	21,306	24,540	7,128	35,922	33,965	5,307	23,733	4,424	436,
NM Retail (w/o 132MW)	18,353	3,873	18,719	20,619	4,277	19,786	13,658	4,795	33,225	18,006	3,562	17,509	2,992	295.
NM Retail 132MW	10,601	1,297	1,327	12,415	1,438	1,019	7,295	1,564	1,808	10,699	1,170	4,172	960	91
NM 65MW	5.220	639	654	6,113	708	502	3,592	770	890	5,268	576	2,055	473	45
	34,174	5,809	20,700	39,147	6,424	21,306	24,545	7,129	35,923	33,974	5,308	23,736	4,425	432
NM SJGS Unit 1 + Common	2,693	1,957	16,758	2,279	2,152	18,282	2,882	2,486	30,555	2,201	1,834	11,346	1,574	159
NM SJGS Unit 4 + Common (Excluding 132 & 65)	15,660	1,916	1,961	18,340	2,125	1,505	10,776	2,310	2,671	15,805	1,728	6,164	1,418	135
NM SJGS Unit 4 + Common (132)	10,601	1,297	1,327	12,415	1,438	1,019	7,295	1,564	1,808	10,699	1,170	4,172	960	91
otal PNM SJGS Unit 4 (Base Rates)	26,261	3,213	3,288	30,755	3,563	2,523	18,071	3,873	4,478	26,505	2,897	10,336	2,378	227
otal PNM SJGS (Base Rates)	28,954	5,170	20,046	33,034	5,716	20,805	20,953	6,359	35,033	28,705	4,732	21,682	3,952	387
NM SJGS Unit 4 + Common (65)	5,220	639	654	6,113	708	502	3,592	770	890	5,268	576	2,055	473	45
, ,			20,700	39,147	6,424	21,306	24,545	7,129	35,923	33,974	5,308	23,736	4,425	432

	A	В	С	D	E	F	G	Н	1
1	PNM Exhibit TGF-5								
2	San Juan Continued Operations 2040 Ongoing O&M								
3									
4									
5		2019	2020	2021	2022	2023	2024	2025	2026
6	Total SJGS	98,656,069	86,691,944	93,612,259	96,567,274	93,342,722	96,651,763	96,271,551	99,311,684
7	Participant Share	(30,778,639)	(28,059,428)	(31,857,169)	(30,677,954)	(31,234,953)	(33,532,051)	(30,788,571)	(34,113,745)
8	PNM Share	67,877,431	58,632,515	61,755,090	65,889,320	62,107,769	63,119,712	65,482,979	65,197,939
9									
10	PNM Share (excluding 65MW)	60,396,874	52,662,618	55,938,502	58,767,534	56,115,374	57,037,432	57,976,131	58,931,821
11	PNM Share (65MW)	7,480,557	5,969,898	5,816,588	7,121,786	5,992,395	6,082,281	7,506,848	6,266,118
12	Total PNM Share	67,877,431	58,632,515	61,755,090	65,889,320	62,107,769	63,119,712	65,482,979	65,197,939

	A	J	К	L	М	N	0	Р	Q
1	PNM Exhibit TGF-5								
2	San Juan Continued Operations 2040 Ongoing O&M								
3									
4									
5		2027	2028	2029	2030	2031	2032	2033	2034
6	Total SJGS	88,633,223	101,876,063	97,997,089	99,467,046	100,959,051	102,473,437	104,010,539	105,570,697
7	Participant Share	(22,368,256)	(32,563,406)	(31,133,304)	(31,600,303)	(32,074,308)	(32,555,423)	(33,043,754)	(33,539,410)
8	PNM Share	66,264,967	69,312,657	66,863,786	67,866,742	68,884,744	69,918,015	70,966,785	72,031,287
9									
10	PNM Share (excluding 65MW)	59,904,858	60,895,607	59,833,407	60,730,908	61,641,872	62,566,500	63,504,998	64,457,573
11	PNM Share (65MW)	6,360,109	8,417,049	7,030,378	7,135,834	7,242,871	7,351,514	7,461,787	7,573,714
12	Total PNM Share	66,264,967	69,312,657	66,863,786	67,866,742	68,884,744	69,918,015	70,966,785	72,031,287

	A	R	S	Т	U	V	W
1	PNM Exhibit TGF-5						
2	San Juan Continued Operations 2040 Ongoing O&M						
3							
4							
S		2035	2036	2037	2038	2039	2040
6	Total SJGS	107,154,257	108,761,571	110,392,995	112,048,890	113,729,623	115,435,567
7	Participant Share	(34,042,501)	(34,553,139)	(35,071,436)	(35,597,508)	(36,131,470)	(36,673,442)
8	PNM Share .	73,111,756	74,208,432	75,321,559	76,451,382	77,598,153	78,762,125
9							
10	PNM Share (excluding 65MW)	65,424,436	66,405,803	67,401,890	68,412,918	69,439,112	70,480,699
11	PNM Share (65MW)	7,687,320	7,802,630	7,919,669	8,038,464	8,159,041	8,281,427
12	Total PNM Share	73,111,756	74,208,432	75,321,559	76,451,382	77,598,153	78,762,125

San Juan Capital Costs for January 2019-June 2022

PNM Exhibit TGF-6

Is contained in the following 1 page.

PNM Exhibit TGF-6 SJGS Projects Capital January 1, 2019 to June 30, 2022 Clearings & Cost of Removal

	Projected January 2019-June 2022	2019	2020	2021	Grand Total
1	70016108 - Capitalization Policy	263,348	257 <i>,</i> 590	240,606	761,543
2	76117720 - Unit 1 Safety 2019	500,889			500,889
3	76117920 - Unit 1 Safety 2021			500,192	500,192
4	76416018 - Unit 4 Platen Replace Leading Edge	65,048			65,048
5	76416116 - Unit 4 Baghouse Bags - 2018	717,370			717,370
6	76416218 - Unit 4 Boiler Outage 2018	818,033			818,033
7	76416318 - Unit 4 Absorber Demister Pads	173,949			173,949
8	76416520 - Unit 4 Coal Piping Replacement 2021	250,599			250,599
9	76416619 - Unit 4 Circulating Water Piping Car	577,775			577,775
10	76416718 - Unit 4 Crcl Water Motor Rewind/Coat	49,891			49,891
11	76417417 - Unit 4 Hydrogen Gas and Cooling Wat	68,852			68,852
12	76417617 - Unit 4 Auxiliary Transformer 4B Bus	156,879			156,879
13	76417618 - Unit 4 Safety 2019	386,025			386,025
14	76417818 - Unit 4 Safety 2021			385,681	385,681
15	76417919 - Unit 4 Turbine 10th Stage Buckets	231,368			231,368
16	TOTAL PROJECTED	4,260,027	257,590	1,126,479	5,644,096
	TOLOGO TOLIC				

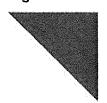
^{*}SJGS capital projects exclude amounts related to 132 MW and 65 MW of Unit 4

Decommissioning Study

PNM Exhibit TGF-7

Is contained in the following 40 pages.





San Juan Generating Station Retirement Scope and Cost Estimate



Public Service Company of New Mexico

PNM SJGS Decommissioning Study Project No. 112523

Revision 1 6/7/2019

1.0 EXECUTIVE SUMMARY

1.1 Summary/Introduction

The San Juan Generating Station (SJGS) is an 1,848-megawatt (MW) coal-fired facility located on North County Rd. 6800, Waterflow, New Mexico. The Units were placed into service between 1973 and 1982. In December of 2017, Units 2 and 3 were retired and Units 1 and 4 have agreements in place that expire on June 30, 2022. A drawing showing the major structures found at the site is included as **Appendix A**. To the extent possible, the names of structures on this drawing have been used within this report.

Public Service Company of New Mexico (PNM) retained Burns & McDonnell Engineering Co., Inc. (Burns & McDonnell) to develop a decommissioning and demolition scope of work (SOW) and associated Class 3 (accuracy of +/- 30%) cost estimate in accordance with the Association for the Advancement of Cost Engineering (AACE) recommended guidance 18R-97 for two possible retirement scenarios for SJGS. For both scenarios, the cost estimates have been broken down into the following plant areas:

- Unit 1
- Unit 2
- Unit 1 and 2 Common
- Unit 3
- Unit 4
- Unit 3 and 4 Common
- Plant Common (including the River Station and Lake Station)

Key assumptions and considerations for each scenario have been identified as a basis for the SOW.

1.1.1 Scenario 1 - Retirement-in-Place (RIP)

Within the RIP scenario, two options have been developed and are described below.

1.1.1.1 Option 1 – Industry Best

This option incorporates utility isolation, decommissioning, cleaning equipment, abatement of environmental constituents, and closure and long-term monitoring of the effluent and evaporation ponds. This option follows standard industry approaches for the RIP of similar facilities. Burns & McDonnell recommends this option should SJGS Ownership choose the RIP scenario for SJGS.

With the exceptions of coal, ash, and gypsum, this option assumes that all material is disposed of at an off-site landfill. Backfill material will come from the San Juan Mine (SJM). Operation, maintenance, and monitoring (OM&M) of the Memorial and Shumway Arroyo groundwater recovery systems is included along with OM&M of the River Station and Raw Water Pumps for SJM irrigation water. This option includes the regulatory requirements noted in Section 1.1.1.3 along with the additional items noted below:

- Plant-wide decommissioning and cleaning; no asbestos-containing material (ACM) or lightbulbs / ballasts will be removed.
- Utility isolation.

- · Cap chimneys.
- Clean out cooling tower sludge and dispose of in onsite evaporation ponds.
- Cooling towers for Units 1 and 4 will be demolished.
- Closure of effluent and evaporation ponds (assumes backfill will be not be available from SJM and will be obtained from another off-site source for South Evaporation Pond #2 [SEP#2] and South Evaporation Pond #3 [SEP #3] closure in 2040).
- Removal of a 50-foot section (28,000 cubic yards [CY]) of the permitted dam for the lake reservoir
 with materials moved to SJM. Riprap will be supplied and installed by the contractor to provide
 erosion protection.

1.1.1.2 Option 2 - Upper Bound

This option includes utility isolation, decommissioning, cleaning equipment, abatement of environmental constituents, and closure and long-term monitoring of the effluent and evaporation ponds. With the exceptions of coal, ash, and gypsum, this option assumes that all material is disposed of at an off-site landfill. Borrow material will come from an off-site source (other than SJM), and flowable fill will be placed in 24-inch and larger abandoned underground piping. Selected structures will be demolished. OM&M of the Memorial and Shumway Arroyo groundwater recovery systems will continue along with the River Station and Raw Water Pumps for SJM irrigation water. This option includes the SOW associated with Option 1 with the additional items noted below:

- Closure, removal, and disposal of underground storage tanks (USTs) and permanent closure of above-ground petroleum storage tanks.
- Demolition of chimneys.
- Unit 3 cooling tower will be demolished.
- Abandonment in place of 24-inch diameter and larger underground piping by filling with flowable
- Closure of effluent and evaporation ponds (assumes backfill will be not be available from SJM and will be obtained from another off-site source for South Evaporation Pond #2 [SEP#2] and South Evaporation Pond #3 [SEP#3] closure in 2040).
- The pond sludge will be characterized by sampling for constituents of concern such as heavy metals
 and petroleum, and the results will be compared to the relevant industrial Soil Screening Levels set
 by the New Mexico Environment Department (NMED). This option presumes that the levels of
 these constituents will allow the solids to be transported off-site and disposed at the San Juan
 County Landfill.
- An estimated 600,000 CY of fill material (for the south ponds only) will be purchased as backfill from a local source (other than SJM).
- Removal of a 50-foot section (28,000 CY) of the permitted dam for the lake reservoir with materials transported off-site and disposed at the San Juan County Landfill. Riprap will be supplied and installed by the contractor to provide erosion protection.

Along with the SOW options listed above, the following equipment and facilities will remain in operation in each RIP scenario. Wherever possible, electrical isolation will be performed with the exception of the following facilities as shown in Table 1-1.

Table 1-1. Equipment and Facilities to Remain Operational - RIP

System
Lab Building
Units 1 through 4 chimney lighting**
Power Block general lighting
Boiler elevators*
Security Building
Shumway and Memorial Recovery Systems
Lake Station and River Station
City Water Booster House
SEP #2 and SEP #3
Radio repeaters*

^{*} To remain operational until RIP - Option 1 Industry Best is complete

These buildings and facilities will remain energized to aid in supporting long-term site security, maintenance, and monitoring, as well as meeting the water requirements of SJM.

The various options have been provided in Scenario 1 to allow SJGS Ownership the ability to make a financial decision as to the best path to pursue for putting SJGS into a RIP condition. It should be noted that the potentially unquantifiable risks associated with each option decrease with the increasing cost for the associated option (see Table 1-3 and **Appendix B** for more detail). A Risk Register (**Appendix C**) has been provided with this study to illustrate the long-term risks based on the scope of work for each RIP option.

The RIP SOW described in Sections 2 through 6 indicates the work to be performed for the Industry Best and Upper Bound options.

1.1.1.3 Regulatory Required RIP Activities

These activities include the decommissioning required by regulation including closure and long-term monitoring of the effluent and evaporation ponds for RIP. It also incorporates OM&M of the Memorial and Shumway Arroyo groundwater recovery systems along with the River Station and Raw Water Pumps for irrigation water for SJM. The cost for these RIP activities is \$31,460,000 (in 2019 dollars) with a Net Present Value (NPV) of \$52,042,000 over a 30-year period. Below is a high-level summary of the SOW associated with these activities:

 Purge generator hydrogen, drain steam systems, and clean out coal, ash, gypsum from power block (all universal waste, oils, greases, lubricants, cooling tower sludge, and transformer oil will remain).

^{**} To remain in RIP - Option 1 Industry Best only

- Closure of effluent and evaporation ponds (assumes backfill will be available from SJM and SEP #2 and #3 closure occurs in 2040).
- Removal of 2 feet of coal / dirt from coal piles and disposal in SJM pits.
- Continued operation of the Lake and River Stations (with retirement in 2040).
- The pond sludge will be characterized by sampling for constituents of concern such as heavy metals and petroleum, and the results will be compared to the relevant industrial Soil Screening Levels set by NMED. This option assumes sludge can remain in place and be capped.
- An estimated 550,000 CY of fill material can be purchased from SJM as backfill for the south ponds only.
- Annual maintenance, security, operations, inspections, permitting, environmental monitoring, and utility expenses.
- Annual Property, Liability and Environmental Insurance premiums in the amount of \$570,000 (starting in 2023) are included in this cost analysis. These costs were provided by SJGS Ownership.

1.1.2 Scenario 2 – Full Demolition

Scenario 2 includes full demolition of Units 1 through 4 turbine hall, baghouses, absorbers, coal handling equipment, out buildings, common facilities, and associated equipment down to existing grade. Within the full demolition scenario, two options have been developed:

1.1.2.1 Option 1 - Base Case

This option incorporates the same activities identified in Scenario 1, Option 1 along with full demolition of structures to existing grade and full site restoration. It also includes OM&M of the Memorial and Shumway Arroyo groundwater recovery systems along with the River Station and Raw Water Pumps for SJM irrigation water. Below is a high-level summary of the SOW associated with this option:

- Plant-wide decommissioning and cleaning (including abatement of ACM and removal of lightbulbs, ballasts, and other regulated materials).
- Utility isolation.
- Removal and disposal of polychlorinated biphenyl- (PCB-) containing materials (concrete and building materials).
- Closure, removal, and disposal of USTs.
- Permanent closure and demolition of all above-ground petroleum storage tanks.
- Demolition of all structures to grade, including removal of elevated concrete pads and pedestals to provide a flat, level site.
- Backfill of all pits, trenches, and basements with crushed concrete; excess concrete will be recycled off-site.
- Abandonment in place of underground piping 24 inches or greater in diameter with flowable fill.
- The pond sediments will be characterized by sampling for constituents of concern such as heavy
 metals and petroleum, and the results will be compared to the relevant industrial Soil Screening
 Levels set by NMED. This option presumes solids from the ponds will be transported and disposed
 at SJM.

- Closure of effluent and evaporation ponds (assumes backfill will be not be available from SJM and will be obtained from another off-site source for South Evaporation Pond #2 [SEP#2] and South Evaporation Pond #3 [SEP#3] closure in 2040).
- An estimated 600,000 CY of fill material will be purchased from SJM as backfill for the south ponds only.
- Continued operation of the Lake Station and River Station (with retirement in 2040); backfill material will be purchased from SJM.
- Annual maintenance, security, operations, inspections, permitting, and utility expenses.
- Annual Property, Liability and Environmental Insurance premiums in the amount of \$225,000 (starting in 2023) are included in this cost analysis. These costs were provided by SJGS Ownership.

1.1.2.2 Option 2 - Upper Bound

This option includes the same activities identified in Scenario 2, Option 1 along with full demolition of structures to existing grade and full site restoration. It also incorporates OM&M of the Memorial and Shumway Arroyo groundwater recovery systems along with the River Station and Raw Water Pumps for SJM irrigation water. Additionally, included in this option is an allowance for the removal and disposal of bulk PCB waste and PCB-impacted concrete. Below is a high-level summary of the changes in the SOW associated with this option:

- The pond sludge will be characterized by sampling for constituents of concern such as heavy metals and petroleum, and the results will be compared to the relevant industrial Soil Screening Levels set by NMED. This option presumes that the levels of these constituents will allow the solids to be transported off-site and disposed at the San Juan County Landfill.
- An estimated 600,000 CY of fill material will be purchased as backfill from a local source instead of SJM for the south ponds only.
- Continued operation of the Lake Station and River Station (with retirement in 2040); backfill material will be purchased from a local source instead of SJM.

1.2 Objective

The primary objective of this study is to provide both general and specific information to be used for the planning, budgeting, and evaluation of the RIP or full demolition options for SJGS. The SOW describes how each Scenario will occur, the sequence it will follow, and what equipment and personnel will be required to perform the work. The specific volumes of waste for each area of the facility have been provided in **Appendix B**, while Table 1-2 below provides the associated costs and disposal or recycling locations for the various waste streams that will be encountered in both Scenarios.

Cost per Material **Disposal Location** Volume Units¹ Unit² 14,000 NT 75.00 Construction and demolition debris San Juan County Landfill \$ Ash, gypsum, and coal SJM 31,000 CY \$ 7.51 12.00 169,000 \$ Concrete Off-site recycler (full demolition only) NT 1,700,000 **GAL** \$ 1.00 Oils and lubricants Disposal company / recycler \$ 1.00 Gasoline and fuel oil Disposal company / recycler 300 GAL GAL \$ 20.00 Disposal company 2,000 RCRA-hazardous oil3 145.00 255 NT \$ Asbestos Painted Desert Landfill 104.00 1,400 NT \$ Cooling tower sludge San Juan County Landfill Wash water San Juan County Landfill 740,000 **GAL** \$ 1.00 2,300 GAL \$ 0.01 Process water Effluent ponds Transformer oil (<50 ppm PCBs) Disposal company/recycler 18,000 GAL 8.00 178,00 3.00 Disposal company/recycler GAL \$ Mineral oil San Juan County Landfill 240 NT \$ 104.00 Petroleum contaminated soil Chemicals, gases, regulated, and universal waste Manufacturer / disposal company / recycler See RMA Various Various 300,000 GAL \$ 1.00 Waste Water Treatment Plant (WWTP) process water Disposal company San Juan County Landfill 135 NT \$ 75.00 Sewage

Table 1-2. Quantity and Disposal Location for Major Waste Streams

Based on the results of this study, a cost breakover point was developed to show at which point in time the RIP scenario will cost the same or more than the full demolition. SJGS Ownership can use this data to make an informed decision on the best retirement scenario for SJGS.

This project will occur in three phases: planning, engineering, and execution. This planning document is the first phase of this multi-phased approach to the eventual retirement of SJGS. The planning phase will help in establishing the most cost effective and risk adverse method for the retirement of the facility. The engineering phase will include the design of documents for utility isolation, specification development, and contractor selection. The execution phase will encompass isolation activities; abatement of regulated materials; and removal of oils, greases, and lubricants to render the plant in an idled condition. Should full demolition be the scenario selected by SJGS Ownership, all structures will be demolished to grade.

1.3 RIP Estimates

The RIP cost estimate summary (in 2019 dollars) based on the scope identified in Sections 2 through 7 is shown in Table 1-3.

^{1.} Units are abbreviated as follows: net tons (NT); cubic yards (CY); gallons (gal)

^{2.} Costs include transportation and disposal (T&D)

^{3.} Oil defined as a hazardous waste under the Resource Conservation and Recovery Act (RCRA)

Table 1-3. Summary of RIP Option Costs

Cost Category*	R	etirement-in- Place	Annual Site Costs		
Industry Best (Option 1)	\$	58,533,000	\$	1,450,500	
Upper Bound (Option 2)	\$	129,193,000	\$	1,106,500	

^{* -} Costs include direct, indirect, contingency and estimated SJGS Ownership costs and scrap metal credit (in 2019 Dollars)

1.4 RIP Key Assumptions

The RIP scenario has been prepared based on key assumptions and considerations generated to put the Units into an idled condition. The list below provides this scenario's key assumptions and considerations:

- All cost estimates are in 2019 dollars.
- The Lake Station, River Station, Shumway Groundwater System and SEP #2 and SEP #3 will be demolished in 2040.
- A 20% contingency has been included on direct costs and a 10% contingency has been included for Owners' costs.
- Labor costs are based on a 40-hour work week.
- A SJGS staff or in-house contractor cost of \$80 per hour has been assumed.
- SJGS staff will run down inventories of chemicals, lubricants, and fuels prior to plant shut down, and a residual amount of these materials will remain for removal and disposal during decommissioning. All waste disposal will occur at PNM-approved disposal facilities.
- Except where specifically identified, environmental costs have not been included to address the cleanup of impacted soils and groundwater at the site. Allowances have not been included for unforeseen environmental remediation activities.
- The estimate assumes that the existing stormwater management plan will be maintained and managed for the RIP scenario.
- Regular maintenance to spray for weeds is included in this estimate.
- SJGS staff will run down the coal pile and force majeure coal pile with only a minimal amount of
 coal to remain for disposal at SJM.
- All underground utilities will be abandoned in place.
- Material needed for filling below-grade structures and ponds will be provided by SJM at a cost of \$8/CY including transportation. This material is assumed to be spoil only and not topsoil.
- In the Upper Bound option, material needed for the filling of below-grade structures and ponds will be provided by an off-site source at a cost of \$25/CY including transportation.

1.5 Full Demolition Estimate

The full demolition cost summary based on the scope identified in Sections 8 through 10 is shown in Table 1-4.

Table 1-4. Summary of Full Demolition Option Costs

Cost Category*	Fı	all Demolition	Annual Site Costs
Base Case (Option 1)	\$	118,490,000	\$ 591,000
Upper Bound (Option 2)	\$	134,380,000	\$ 591,000

^{* -} Costs include direct, indirect, contingency and estimated SJGS Ownership costs and scrap metal credit (in 2019 Dollars)

1.6 Full Demolition Key Assumptions

This full demolition cost estimate has been prepared based on key assumptions and considerations generated to accommodate the anticipated work. The following list provides the key assumptions and considerations for this scenario:

- All cost estimates are in 2019 dollars.
- A 20% contingency has been included on direct cost and a 10% contingency has been included for Owners' costs.
- Labor costs are based on a 40-hour work week.
- The demolition contractor will provide a full-time on-site safety manager during the course of the demolition work.
- Necessary permit fees for the demolition contractor to perform work are included.
- Adequate soil and erosion control measures such as inlet protection, silt fence, and hay bales will be installed.
- With the exception of the existing Memorial and Shumway groundwater recovery systems, environmental costs have not been included to address the cleanup of impacted soils and groundwater at the site. Allowances have not been included for unforeseen environmental remediation activities.
- The estimate assumes that the existing stormwater management plan will be maintained and managed for the full demolition scenario.
- The Lake Station, River Station, Shumway Groundwater System, SEP #2 and SEP #3 will be demolished in 2040.
- In the Base Option, material needed for the filling of below-grade structures and ponds will be provided by SJM at a cost of \$8/CY including transportation (with the exception of material for SEP #2 and #3 that will be obtained from an off-site source at a cost of \$25/CY including transportation).
- In the Upper Bound Option, material needed for the filling of below-grade structures and ponds will be provided by an off-site source at a cost of \$25/CY including transportation.

- SJGS staff will run down the coal pile and force majeure coal pile with only a minimal amount of coal to remain for disposal at SJM.
- All underground utilities will be abandoned in place.

1.7 Asset Recovery

Due to the nature of their construction, power plants have the opportunity to yield high revenues in both equipment resale and scrap metals. There are several ways for SJGS Ownership to maximize revenues from the RIP and full demolition of SJGS. Upon plant shutdown, Burns & McDonnell can work with the SJGS Ownership team to determine the best approach to maximize revenue from the project.

In the RIP scenario, the primary potential asset recovery option is through the salvage and sale of the following six categories. Based on information provided by PNM and values determined from facilities of similar size and vintage, the below are potential asset recovery values for six categories:

Warehouse stock – As of February 2019, warehouse inventory at SJGS totals \$15,000,000. It is anticipated that the sale or salvage of this inventory will garner approximately \$1,500,000.

- Vehicles, trailers, heavy equipment, small tools Current approximate book value is \$74,000. A sale or salvage value of \$10,000 is anticipated.
- Office furniture To be determined.
- Operational equipment To be determined.
- Transformers \$2,900,000.
- Cyber assets Current net book value is \$812,000. Selling cyber assets could bring another \$90,000 in total sales.

Once the quantity of assets for each of these categories of assets is determined, a fair market value will need to be developed to determine what the total asset recovery value will be in the RIP scenario. These values will also serve SJGS Ownership with a baseline recovery value for each category so that they may determine whether the asset sale or scrap recycling revenue is fair and equitable to all parties.

Once the quantity and value of the assets have been determined, time is the key element to maximizing the value of either a plant asset sale or scrap recycling revenue. The highest and best return for the sale of an asset is when a buyer has a direct need and the asset is being sold for immediate re-use. The second option is resale or auction for surplus, liquidation, or speculation, which yields a lower return.

To understand the net salvage value of on-site assets, SJGS Ownership will need to develop a list of all plant equipment and surplus parts by using plant build sheets or other inventory methods. Once this list is developed, Burns & McDonnell can use its network of asset recovery contractors to facilitate and market the sale of these assets.

A common pitfall for most clients is not properly evaluating the lost opportunity cost of selling an asset prior to demolition. This cost includes:

- Removal cost (including impacts to future demolition, if any)
- Environmental cost (after decommissioning) included in purchase price

- Transportation cost included in purchase price
- Coordination and management SJGS Ownership oversight and management
- Lost scrap revenue

Burns & McDonnell's experienced staff has the capability to evaluate these costs and help SJGS Ownership determine if an asset sale is truly a benefit to the project or if leaving the piece of equipment in place for the demolition contractor to sell as scrap will yield the best return.

In the full demolition scenario, the primary asset recovery option is through the scrap sales of the following ferrous and non-ferrous commodities:

- Plate and structural steel
- No. 1 heavy melt
- Sheet iron
- Insulated wire
- Stainless steel
- Brass
- Hastelloy

The value of these commodities varies by location and the weekly / monthly fluctuations in the scrap market. Typically, a demolition contractor will provide a firm, fixed, lump sum scrap credit to the site owner with their bid for the demolition project. The demolition contractor then takes all of the risk and reward associated with their estimates of scrap quantities and the fluctuating scrap market. Burns & McDonnell has estimated the following scrap quantities and values associated with SJGS. These estimates include steel preparation and transportation costs:

Table 1-5. Full Demolition Scrap Values

Material	Approximate Quantity	Quantity Unit	1.0000000	alue / NT ¹	Total Value		
Plate and structural	118,900	NT	\$	82	\$	9,750,000	
No. 1 heavy melt	82,700	NT	\$	68	\$	5,620,000	
Sheet steel	25,000	NT	\$	78	\$	1,950,000	
Insulated wire	6,533,000	LBS	\$	1.44	\$	9,410,000	
Stainless steel 304	2,484,000	LBS	\$	0.31	\$	770,000	
Brass	8,264,000	LBS	\$	1.44	\$	11,900,000	
Hastelloy	80,000	LBS	\$	4.32	\$	350,000	
TOTAL SCRAP VALUE					\$	39,750,000	

^{1.} Includes contractor's preparation and transportation costs

These quantities were determined based on a bottom-up estimate prepared by Burns & McDonnell. On March 7, 2019, Burns & McDonnell contacted Rocky Mountain Recycling and received the commodity market rates shown in Table 1-6.

Table 1-6. Full Demolition 2019 Scrap Values

Material	Quantity Unit	100000	Unit /alue
Plate and structural	NT	\$	290
No. 1 heavy melt	NT	\$	280
Sheet steel	NT	\$	140
Insulated wire	LB	\$	1.90
Stainless steel 316	LB	\$	0.50
Brass	LB	\$	1.90
Hastelloy	LB	\$	5.50

It should be noted that the market values listed above are not the actual value credited to SJGS Ownership. There are additional costs incurred by a demolition contractor to prepare and transport these materials, and these costs are deducted from the overall value. Lastly, demolition contractors may discount the scrap commodities by as much as 20% to account for market fluctuations.

1.8 Net Present Value Analysis

A Net Present Value (NPV) of both the RIP cost options and full demolition cost options was developed in order to "normalize" the costs for evaluation purposes. The NPV was calculated for each option using an annual inflation rate of 2% and an annual discount rate (rate of return) of 4%. Costs for the RIP activities were spread over a 2.5-year period starting in 2023. Full demolition activities were spread over a 3-year period beginning in 2023 as well.

Costs were included for the demolition of the River Station, Lake Station, Shumway Groundwater System, SEP #2 and SEP #3 that will occur in 2040. See Section 10.7 for more information.

Table 1-7 summarizes the NPV for the RIP options based on a total life of 30 years. Table 1-8 summaries the NPV for the full demolition options based on a total life of 30 years. The NPV calculations for the various options are included in **Appendix D**.

Table 1-7. Net Present Value for RIP Options

Cost Category*	Re	etirement-in- Place
Industry Best (Option 1)	\$	73,067,000
Upper Bound (Option 2)	\$	131,430,000

^{* -} Costs include direct, indirect, contingency and estimated SJGS Ownership costs, annual costs and asset recovery credit (using 2 % Annual Inflation, 4% Annual Discount rate)

Table 1-8. Net Present Value for Full Demolition Options

Cost Category*	Fu	II Demolition
Base Case (Option 1)	\$	113,125,000
Upper Bound (Option 2)	\$	127,212,000

^{* -} Costs include direct, indirect, contingency and estimated SJGS Ownership costs, annual costs, and scrap metal credit (using 2 % Annual Inflation, 4% Annual Discount rate)

1.8.1 NPV Analysis with Delay in Conducting Demolition

The NPV costs for the RIP options were used along with calculated NPV costs for the remaining demolition activities should they not be conducted immediately upon shutdown of the plant. The NPV costs for the add-on demolition costs at 10 and 25 years after the RIP is completed were determined. The scrap prices were removed from the cost analyses for the NPV initially since the scrap market does not generally follow the average inflation or discount rate structure. Scrap is considered a commodity, therefore an average per net ton unit value was used based on the trends over the last 5 years. These average unit values were used to recalculate the scrap value and they were added to the delay demolition costs. Table 1-9 summarizes the average scrap unit values used to generate the scrap values.

Table 1-9. Average Unit Scrap Values

Material	Quantity Unit	Unit ⁄alue
Plate and structural	NT	\$ 200
No. 1 heavy melt	NT	\$ 180
Sheet steel	NT	\$ 100
Insulated wire	LBS	\$ 1.25
Stainless steel 316	LBS	\$ 1.00
Brass	LBS	\$ 1.25
Hastelloy	LBS	\$ 5.00

1.8.1.1 NPV Analysis for Demolition 10 years Following RIP

Table 1-10 presents the base NPV RIP costs along with the add-on demolition costs if the demolition activities were conducted 10 years after closure.

Table 1-10. Net Present Value for 10-year Delay for Demolition

Cost Category ¹	Retirement-in- Place (Option 1)	Add-on for Full Demolition (Option 1)	OPTION 1 TOTAL ²	Retirement-in- Place (Option 2)	Add-on for Full Demolition (Option 2)	OPTION 2 TOTAL ²
RIP in 2023 with Demo after 10 years (starting 2031)	\$ 47,177,000	\$ 91,187,000	\$ 138,364,000	\$ 107,751,000	\$ 101,666,000	\$ 209,417,000

^{1.} Costs include direct, indirect, contingency and estimated SJGS Ownership costs, annual costs and asset recovery credit (2 % Annual Inflation, 4% Annual Discount rate)

^{2.} Costs are in Net Present Value

1.8.1.2 NPV Analysis for Demolition 25 years Following RIP

Table 1-11 presents the base NPV RIP costs along with the add-on demolition costs if the demolition activities were conducted 25 years after closure.

Table 1-11. Net Present Value for 25-year Delay for Demolition

Cost Category ¹	Retirement-in- Place (Option 1)	Add-on for Full Demolition (Option 1)	OPTION 1 TOTAL ²	Retirement-in- Place (Option 2)	Add-on for Full Demolition (Option 2)	OPTION 2 TOTAL ²
RIP in 2023 with Demo after 25 years (starting 2046)	\$ 71,866,000	\$ 55,213,000	\$ 127,079,000	\$ 130,513,000	\$ 62,325,000	\$ 192,838,000

^{1.} Costs include direct, indirect, contingency and estimated SJGS Ownership costs, annual costs and asset recovery credit (2 % Annual Inflation, 4% Annual Discount rate)

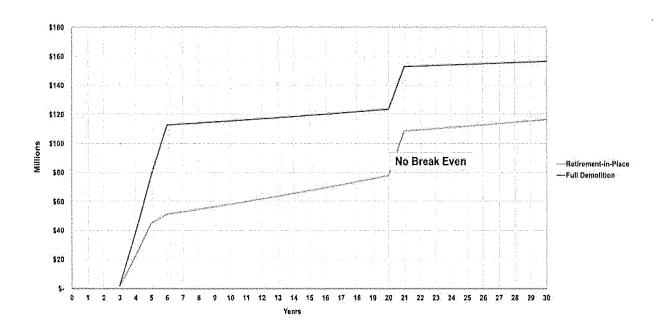
1.9 Break-Even Cost Analysis – RIP versus Full Demolition

A break-even analysis was conducted for each RIP option in comparison to the full demolition options. This analysis was conducted using the NPVs calculated as indicated above. The RIP NPV cumulative costs (one-time RIP costs plus the annual costs) were compared to the NPV cumulative costs (full demolition plus annual site costs after demolition) to determine the number of years until both costs were the same.

1.9.1 Break-Even Cost Analysis – Industry Best RIP vs. Base Full Demolition

Figure 1-1 shows the graphs of both option costs for the comparison. Based on the costs developed, there was no break-even point observed within the 30-year evaluation period. A larger version of this graph is included in **Appendix D**.

Figure 1-1. Industry Best RIP vs. Base Full Demolition



^{2.} Costs are in Net Present Value

1.9.2 Break-Even Cost Analysis – Upper Bound RIP vs. Upper Bound Demo

Figure 1-2 shows the graphs of both option costs and the break-even point for the comparison. The break-even point for these two options was observed at approximately 6 years. A larger version of this graph is included in **Appendix D**.

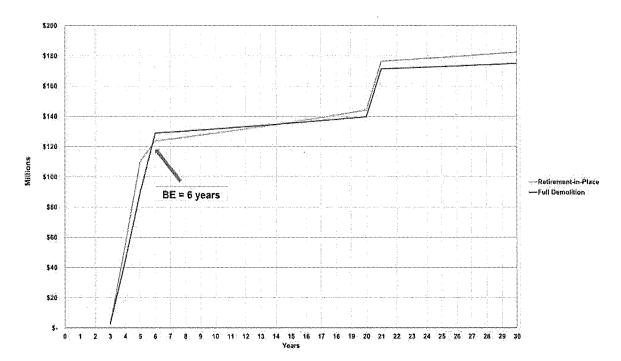


Figure 1-2. Upper Bound RIP vs. Upper Bound Full Demolition

1.10 Estimating Methodology - RIP

Indicative RIP costs were developed using information provided by PNM and data collected by Burns & McDonnell in the San Juan Generating Station Regulated Materials Assessment (RMA), dated March 2019. Additional information was also obtained during site visits conducted by Burns & McDonnell staff. Burns & McDonnell estimated quantities of regulated materials based on a visual inspection of the facilities along with Burns & McDonnell's professional judgment. In the RMA, Burns & McDonnell staff walked the plant and created an inventory of regulated materials identified during the survey. This inventory was used to estimate the quantities of materials and the tasks required to be performed for the RIP effort. An \$80 per hour labor rate for either PNM staff or an in-house contractor was provided by PNM. Along with this labor rate, current equipment rental costs and unit pricing were applied for each task. Unit pricing was developed based on the labor rates, equipment costs, and disposal costs specific to the general area or task in which the work is to be performed.

Decommissioning costs include the removal and disposal of fuels, chemicals, greases, and lubricants drained from equipment along with cleaning of coal and ash from boilers, baghouses, absorbers, and ash handling equipment. It is assumed that the majority of draining and cleaning work will be performed inhouse with PNM staff. Industry-accepted unit rates or built up production rates and crews were applied to

the tasks and quantities of materials to be drained, cleaned, removed, transported, and disposed of to determine the total RIP cost.

Currently there are very few state or federal regulations regarding the requirements when decommissioning a power plant for closure. In an effort to allow SJGS Ownership to make the best financial decision on how to render SJGS cold, dark, dry and safe, two cost options have been developed:

- Option 1: Industry Best performing best practices decommissioning and most common with other utilities Burns & McDonnell has worked with that consider the RIP Option.
- Option 2: Upper Bound best practices decommissioning, selective demolition work, and backfill with off-site material

The costs for both RIP options include environmental abatement and the costs of de-energizing mechanical and electrical equipment (see **Appendix B**) to remove the plant from service. Costs for the closure of the effluent ponds, evaporation ponds, and coal piles are also included in the RIP estimate.

Annual costs for the following have been included for both RIP cost options:

- Property tax
- Pond and facility inspections and monitoring
- Insurance
- Utilities
- Site security
- Operation and maintenance of remaining equipment
- Shumway and Memorial groundwater recovery systems

1.11 Estimating Methodology - Full Demolition

The indicative full demolition estimate was developed using a "bottom-up" approach, where the cost estimate is a result of site-specific quantity estimates. This estimate was based on the review of as-built drawings (showing site layout); equipment general arrangement drawings; plant elevation drawings; and a site visit performed by Burns & McDonnell staff, where Burns & McDonnell developed a comprehensive list of the facilities to be demolished as well as the tasks associated with each of the demolition activities.

Once these tasks were developed, Burns & McDonnell used the information obtained during the site visit, as well as the plant as-built drawings, to quantify the building materials associated with each structure at the site. The materials quantified included construction and demolition debris, concrete, and ferrous and non-ferrous metals. A breakout of the scrap metal quantities and value are provided in **Appendix B**.

Once building materials were quantified, industry standard demolition means and methods were applied to calculate the production rate at which demolition laborers and equipment could safely and efficiently demolish the structures. The means, methods, and production rates were based on the judgments and expertise of Burns & McDonnell's subject matter experts. Most of the structures were assumed to be demolished using conventional labor and heavy equipment to remove structures to grade. As part of this estimate, implosion methods are being proposed to bring the boilers and chimneys down.

Once the production rates and material quantities were established, hourly labor and equipment costs were applied as well as disposal and recycling fees. Current market labor and equipment rates, disposal fees, and scrap quantities were verified through local metal recycling outlets and landfills.

Backfill and topsoil materials are assumed to be readily available, and industry-accepted unit rates were used for grading and seeding of the demolition areas. Plant circulating water lines will be permanently sealed at the plant, along with major water lines from the River Station and Lake Station. All underground lines 24 inches and larger in diameter will be filled with flowable fill, and the remaining utilities will be abandoned in place after capping the ends. Unit rates for flowable fill were used and are based on past experience from similar projects and verified through review of RS Means national average costs for these activities.

Where information was available on quantities of regulated materials, asbestos, and universal waste, a bottom-up estimate was developed for the removal and disposal of these items. Where information was not available, costs were developed using the qualifications, judgment, and industry experience of Burns & McDonnell's staff when performing similar work on facilities of a similar type, size, and vintage.

1.12 Statement of Limitation

Estimates and projections prepared by Burns & McDonnell relating to schedules, performance, construction costs, recovery costs, and operating and maintenance costs are based on our experience, qualifications, and judgment as a professional consultant. Since Burns & McDonnell has no control over weather, cost and availability of labor, materials and equipment, labor productivity, contractor procedures and methods, unavoidable delays, contractor methods of determining prices, economic conditions, government regulations and laws (including the interpretation thereof), competitive bidding, and market conditions or other factors affecting such estimates or projections, Burns & McDonnell does not guarantee that actual rates, costs, performance, schedules, etc., will not vary from the estimates and projections described herein.

APPENDIX B - COST ESTIMATE SUMMARY

PNM San Juan Retirement-in-Place Option Cost Estimates

U		

Cost Category*	De-I	System Energization	Decommissioning and Cleaning	Environmental	Lake Station	River Station	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Dwner Costs	Asset Recovery	TOTAL	Annual Site Costs
Industry Best (Option 1)	s	220,000	\$ 1,700,000	\$ 480,000				1000000	\$ 1,000,000	\$ 400,000		\$ 3,800,000	\$ 60,000
Upper Bound (Option 2)	\$	220,000	\$ 9,750,000	\$ 480,000				1000	\$ 3,800,000	\$ 1,600,000		\$ 15,850,000	\$ 30,000
Hnit 2													

Cost Category [★]	System De-Energization	Decommissioning and Cleaning	Environmental	Lake River Station Station	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Owner Costs	Asset Recovery	TOTAL	Annual Site Costs
Industry Best (Option 1)	\$ 210,000	\$ 810,000	\$ 108,000				\$ 600,000	\$ 200,000		1,928,000	\$ 60,000
Upper Bound (Option 2)	\$ 210,000	\$ 8,970,000	\$ 108,000				\$ 3,400,000	\$ 1,400,000		14,088,000	\$ 30,000

Unit 3

Cost Category*	System De-Energization	Decommissioning and Cleaning	Environmental	Lake River Station Station	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Owner Costs	Asset Recovery	TOTAL	Annual Site Costs
Industry Best (Option 1)	\$ 310,000	\$ 1,430,000	\$ 315,000				\$ 900,000	\$ 400,000		\$ 3,355,000 \$	70,000
Upper Bound (Option 2)	\$ 310,000	\$ 11,150,000	\$ 315,000				\$ 4,300,000	\$ 1,800,000		\$ 17,875,000 \$	30,000

Unit 4

Cost Category*	System De-Energization	Decommissioning and Cleaning	Environmental	Lake Station	River Station	The Court of the Court and the Court of the	poration s Closure	Indirect Costs	Owner Costs	Asset Recovery	TOTAL	Annual Site Costs
Industry Best (Option 1)	\$ 320,000	\$ 2,580,000	\$ 420,000				s	1,300,000 \$	600,000	s	5,220,000 \$	70,000
Upper Bound (Option 2)	\$ 320,000	\$ 11,100,000	\$ 420,000				\$	4,300,000 \$	1,800,000	s	17,940,000 s	30,000

Unit 1 & 2 Common

Cost Category*	System De-Energization	Decommissioning and Cleaning	Environmental	Lake Station	River Station	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Owner Costs	Asset Recovery	TOTAL	Annual Site Costs
Industry Best (Option 1)		\$ 790,000	\$ 100,000					\$ 500,000	\$ 100,000		\$ 1,490,000 \$	40,000
Upper Bound (Option 2)		\$ 800,000	\$ 100,000					\$ 500,000	\$ 100,000		\$ 1,500,000 S	30,000

Unit 3 & 4 Common

Cost Category*	System De-Energization	Decommissioning and Cleaning	Environmental	Lake Station	River Station	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Owner Costs	Asset Recovery	TÖTAL	Annual Site Costs
Industry Best (Option 1)		\$ 1,770,000	\$ 400,000					\$ 900,000	\$ 400,000		\$ 3,470,000 \$	40,000
Upper Bound (Option 2)		\$ 1,780,000	\$ 400,000					\$ 900,000	\$ 400,000		\$ 3,480,000 \$	40,000

Plant Common

Cost Category*	System De-Energization	Decommissioning and Cleaning	Environmental	Lake Station	River Station	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Owner Costs	Asset Recovery	TOTAL	Annual Site Costs
Industry Best (Option 1)	\$ 580,000	\$ 2,300,000	\$ 3,290,000	\$ 1,550,000	\$ 800,000	\$ 1,880,000	\$ 18,970,000	\$ 10,400,000	\$ 4,000,000	\$ (4,500,000)	\$ 39,270,000	\$ 1,110,500
Upper Bound (Option 2)	\$ 580,000	\$ 7,990,000	\$ 3,290,000	\$ 2,050,000	\$ 1,250,000	\$ 3,700,000	\$ 23,400,000	\$ 14,900,000	\$ 5,800,000	\$ (4,500,000)	\$ 58,460,000	\$ 916,500

TOTAL PLANT

Cost Category*	 ystem ergization	Decommissioning and Cleaning	Environmental	Lake Station	River Station	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Owner Costs	Asset Recovery	TOTAL	Annual Site Costs
Industry Best (Option 1)	\$ 1,640,000	\$ 11,380,000	\$ 5,113,000	\$ 1,550,000	\$ 800,000	\$ 1,880,000	\$ 18,970,000	\$ 15,600,000	\$ 6,100,000	\$ (4,500,000)	\$ 58,533,000	\$ 1,450,500
Upper Bound (Option 2)	\$ 1,640,000	\$ 51,540,000	\$ 5,113,000	\$ 2,050,000	\$ 1,250,000	\$ 3,700,000	\$ 23,400,000	\$ 32,100,000	\$ 12,900,000	\$ (4,500,000)	\$ 129,193,000	\$ 1,106,500

^{* -} Costs include direct, indirect, contingency and estimated owners costs

PNM San Juan Generating Station Unit 1 - RIP Cost Estimate Summary

				800000000	Option 1	•	Option 2
Item	Description	Estimated	Unit		ndustry Best		Upper Bound
1	System De-Energization	Quantity					
		I 4	1.0	l e	10.000	•	10.000
1.1	Generator Hydrogen Evacuation Mechanical System Isolation	1	LS LS	\$	10,000 100,000	\$	10,000
$\overline{}$	Electrical System Isolation	1	LS	\$	80,000	\$	80,000
	Electrical System Re-power	1	LS	\$	30,000	\$	30,000
	Mechancial Systems Re-power	1	LS	9	30,000	φ	30,000
-	Subtotal for System De-Energization	<u>'</u>		s	220,000	\$	220,000
	various system as and granted				220,000		220,000
2	Decommissioning and Cleaning						
2.1	Drain Boiler, Condenser, Feedwater Heater, Boiler Feed Pumps	1	LS	\$	10,000	\$	10,000
2.2	Boiler, Precipitator & Absorber, Baghouse, Ash Silo Cleaning	5,200	CY	\$	270,000	\$	270,000
2.3	Remove and Dispose all Tenant Debris, Trash & Combustibles	800	NT	\$	540,000	\$	540,000
2.4	Lubricating & Hydraulic System Draining	15,575	GAL	\$	180,000	\$	180,000
2.5	Unit 1 Emergency Generator Diesel Tank Demolition	6,500	CY			\$	60,000
2.6	Stack Capping (Base), Stack Demolition (Upper)	1	LS ·	\$	110,000		
2.7	Demo Stack to Grade	1	LS			\$	1,900,000
2.8	Clean & Dispose Cooling Tower Sludge	120	NT	\$	290,000	\$	290,000
2.9	Demo Cooling Tower to Grade	1	LS	\$	300,000	\$	300,000
2.10	Demo Absorber to Grade	1	LS			\$\$	6,200,000
	Subtotal for Decommissioning & Cleaning Costs			\$	1,700,000	\$	9,750,000
	Environmental					i i i i i i i i i i i i i i i i i i i	
7,000,000,000	Environmental	Γ		ı			
3.1	Asbestos Abatement	,		diam'r.			
3.2	Universal Waste & Regulated Waste Removal	1	LS	\$	200,000	\$	200,000
	Chemical Removal	1	LS	\$	140,000	\$	140,000
3.4	Oil Filled Transformer Draining Subtotal for Environmental	29,298	GAL	\$ \$	140,000	\$	140,000
	Judous for Environmental			Į P	480,000	P	480,000
		TOTAL	DIRECT COSTS	\$	2,400,000	\$	10,450,000
	Indirect Costs						
	Engineering/Permitting/Construction Management	1	LS	\$	400,000	\$	1,400,000
	Bonds/Insurance	1	LS	\$	100,000	\$	300,000
	Contingency	1	LS	\$	500,000	\$	2,100,000
	- In its desired in the second	L.,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,	DIRECT COSTS		1,000,000	S	3,800,000
				300000000000000000000000000000000000000		100000000000000000000000000000000000000	
	TOTAL	DIRECT AND IN	DIRECT COSTS	\$	3,400,000	\$	14,250,000
	Owner Costs						
	Owner Costs	1	LS	\$	200,000		800,000
TO ALCOHOLD	Owner Contingency	1	LS	\$	200,000	\$	800,000
25,833,835	Subtotal for Owners Cost			\$	400,000	\$	1,600,000
				1			
	TOTAL PROJECT	COST (Including	g Owner Costs)	\$	3,800,000	\$	15,850,000
Α	Annual Site Costs						
A.1	Facility Inspection/Environmental Permit Costs	1	LS	\$	20,000	\$	10,000
A.2	Stack and FFA lighting inspections	1	LS	\$	20,000	Ψ	10,000
A.3	Energy costs to power Unit lighting/FAA lighting/Heat trace/Pumps	1	LS	\$	10,000	\$	10,000
A.4	Other costs	1	LS	\$	10,000		10,000
		An	nual Site Costs	\$	60,000	\$	30,000
			TO SEE SEE SEE SEE SEE SEE SEE SEE SEE SE	- A-12. Photograph		· STA 409090	



PNM San Juan Generating Station Unit 2 - RIP Cost Estimate Summary

•		Estimated	117	200	ption 1 ndustry	(Option 2 Upper
Item	Description	Quantity	Unit		Best		Bound
1	System De-Energization						
1.1	Generator Hydrogen Evacuation	1	LS	\$	-	\$	-
1.2	Mechanical System Isolation	1	LS	\$	100,000	\$	100,000
1.3	Electrical System Isolation	1	LS	\$	80,000	\$	80,000
1.4	Electrical System Re-power	1	LS	\$	30,000	\$	30,000
1.5	Mechanical Systems Re-power	1	LS				
	Subtotal for System De-Energization			\$	210,000	\$	210,000
2	Decommissioning and Cleaning						
2.1	Drain Boiler, Condenser, Feedwater Heater, Boiler Feed Pumps	1 1	LS	\$	-	\$	_
	Boiler, Precipitator & Absorber, Baghouse, Ash Silo Cleaning	2,600	CY	\$	165,000	\$	165,000
	Remove and Dispose all Tenant Debris, Trash & Combustibles	800	NT	\$	540,000	\$	540,000
	Lubricating & Hydraulic System Draining	9,400	GAL	\$	105,000	\$	105,000
2.5	Unit 2 Emergency Generator Diesel Tank Demolition	6,500	CY			\$	60,000
2.6	Demo Stack to Grade	1	LS			\$	1,900,000
2.7	Demo Absorber to Grade	1	LS			\$	6,200,000
	Subtotal for Decommissioning & Cleaning Costs			\$	810,000	\$	8,970,000
3	Environmental						
3.1	Asbestos Abatement	1 1	LS			503,69	
	Universal Waste & Regulated Waste Removal	1	LS	\$	26,000	\$	26,000
	Chemical Removal	1	LS	\$	12,000	\$	12,000
	Oil Filled Transformer Draining	28,204	GAL	\$	70,000	\$	70,000
	Subtotal for Environmental			\$	108,000	\$	108,000
		TOTAL	IRECT COSTS	\$	1,128,000	\$	9,288,000
	Indirect Costs			1524-55		19484546	
			LS	\$	200,000	6	1,300,000
	Engineering/Permitting/Construction Management		LS	\$	100,000		200,000
	Bonds/Insurance	1 1	LS	\$	300,000	\$	1,900,000
	Contingency	1 1					
		TOTAL INC					3 400 000
		TOTAL IND	IRECT COSTS		600,000	\$	3,400,000
		TOTAL IND	IRECT COSTS	\$	600,000	\$	
	Owner Costs		IRECT COSTS	\$	600,000	\$	12,688,000
	Owner Costs Owner Costs		IRECT COSTS	\$	600,000	\$	
		TOTAL DIRECT AND INC	IRECT GOSTS	\$	1,728,000	\$	12,688,000
	Owner Costs	TOTAL DIRECT AND INC	DIRECT COSTS DIRECT COSTS LS	\$ \$	1,728,000	\$ \$	700,000
	Owner Costs Owner Contingency Subtotal for Owners Cost	TOTAL DIRECT AND INC	DIRECT COSTS LS LS	\$ \$ \$ \$ \$	1,728,000 1,000 100,000 100,000 200,000	\$ \$ \$ \$	700,000 700,000 1,400,000
	Owner Costs Owner Contingency Subtotal for Owners Cost	TOTAL DIRECT AND INC	DIRECT COSTS LS LS	\$ \$ \$ \$ \$	1,728,000 1,000 100,000 100,000 200,000	\$ \$ \$ \$	700,000 700,000 1,400,000
	Owner Costs Owner Contingency Subtotal for Owners Cost TOTAL F	TOTAL DIRECT AND INC	DIRECT COSTS LS LS	\$ \$ \$ \$ \$	1,728,000 1,000 100,000 100,000 200,000	\$ \$ \$ \$	700,000 700,000 1,400,000
A	Owner Costs Owner Contingency Subtotal for Owners Cost TOTAL F	TOTAL DIRECT AND INC	URECT COSTS LS LS LS Owner Costs	\$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$	1,728,000 1,728,000 100,000 100,000 200,000 1,928,000	\$ \$ \$ \$ \$	700,000 700,000 1,400,000 14,088,000
A.1	Owner Costs Owner Contingency Subtotal for Owners Cost TOTAL F Annual Site Costs Facility Inspection/Environmental Permit Costs	TOTAL DIRECT AND INC	LS Owner Costs	\$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$	1,728,000 100,000 100,000 200,000 1,928,000	\$ \$ \$ \$ \$	700,000 700,000 1,400,000
A.1 A.2	Owner Costs Owner Contingency Subtotal for Owners Cost TOTAL F Annual Site Costs Facility Inspection/Environmental Permit Costs Stack and FAA lighting inspections	TOTAL DIRECT AND INC	LS Owner Costs LS LS LS	\$ \$ \$ \$ \$	1,728,000 1,728,000 100,000 100,000 200,000 1,928,000 20,000 20,000	\$ \$ \$ \$ \$	700,000 700,000 1,400,000 14,088,000
A.1	Owner Costs Owner Contingency Subtotal for Owners Cost TOTAL F Annual Site Costs Facility Inspection/Environmental Permit Costs	TOTAL DIRECT AND INC	LS Owner Costs	\$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$	1,728,000 100,000 100,000 200,000 1,928,000	\$ \$ \$ \$ \$	700,000 700,000 1,400,000 14,088,000



PNM San Juan Generating Station Unit 3 - RIP Cost Estimate Summary

Item	Description	Estimated Quantity	Unit		Option 1 Industry Best		Option 2 Upper Bound
1	System De-Energization						
1.1	Generator Hydrogen Evacuation	1	LS	\$	-	\$	-
1.2	Electrical System Isolation	1	LS	\$	150,000	\$	150,000
1.3	Mechanical System Isolation	1	LS	\$	120,000	\$	120,000
1.4	Electrical System Re-power	1	LS	\$	40,000	\$	40,000
1,5	Mechancial Systems Re-power	1	LS				
	Subtotal for System De-Energization			\$	310,000	\$	310,000
2	Decommissioning and Cleaning						
2.1	Drain Boiler, Condenser, Feedwater Heater, Boiler Feed Pumps	1	LS	\$	-	\$	-
2.2	Boiler, Precipitator & Absorber, Baghouse, Ash Silo Cleaning	4,000	CY	\$	210,000	\$	210,000
2.3	Remove and Dispose all Tenant Debris, Trash & Combustibles	1,500	NT	\$	1,020,000	\$	1,020,000
2.4	Lubricating & Hydraulic System Draining	12,448	GAL	\$	140,000	\$	140,000
2.5	Demo Stack to Grade	1	LS			\$	1,820,000
2.6	Clean & Dispose Cooling Tower Sludge	512	NT	\$	60,000	\$	60,000
2.7	Demo Cooling Tower to Grade	1	LS	-		\$	1,200,000
2.8	Demo Absorber to Grade	1	LS	73.43		\$	6,700,000
	Subtotal for Decommissioning & Cleaning Costs			\$	1,430,000	\$	11,150,000
3	Environmental						
3.1	Asbestos Abatement						
3.2	Universal Waste & Regulated Waste Removal	1	LS	\$	20,000	\$	20,000
3.3	Chemical Removal	1	LS	\$	15,000	\$	15,000
3.4	Oil Filled Transformer Draining		GAL	\$	280,000	\$	280,000
	Subtotal for Environmental	5.00		\$	315,000		315,000
		TOTAL D	IRECT COST	s \$	2,055,000	\$	11,775,000
	Indirect Costs						
	Engineering/Permitting/Construction Management	1 1	LS	\$	300,000	\$	1,600,000
	Bonds/Insurance	1	LS	\$	100,000	\$	300,000
	Contingency	1	LS	\$	500,000		2,400,000
		TOTAL IND	IRECT COST	-	900,000	\$	4,300,000
		TOTAL DIRECT AND IND	IRECT COST	s \$	2,955,000	\$	16,075,000
	Owner Costs						
	Owner Costs	1 1	LS	\$	200,000	\$	900,000
STATE OF THE PARTY OF	Owner Contingency	1 1	LS	\$	200,000	-	900,000
	Subtotal for Owners Cost		Amount resonant in	\$	400,000	-	1,800,000
	TOTAL PI	ROJECT COST (Including	Owner Cost	s) \$	3,355,000	\$	17,875,000
A	Annual Site Costs			1 70			
A.1	Facility Inspection/Environmental Permit Costs	1	LS	\$	20,000	\$	10,000
A.2	Stack and FFA lighting inspections	1	LS	\$	30,000		
A.3	Energy costs to power Unit lighting/FAA lighting/Heat trace/Pumps	1 1	LS	\$	10,000	-	10,000
A.4	Other costs	1	LS	\$	10,000	\$	10,000
		Anr	nual Site Cos	ts \$	70,000	\$	30,000



PNM San Juan Generating Station Unit 4 - RIP Cost Estimate Summary

Item	Description	Estimated Quantity	Unit	909300 Hotels	ption 1 ndustry Best	C	Option 2 Upper Bound
1	System De-Energization	quantity		Approximately			
1.1	Generator Hydrogen Evacuation	1	LS	\$	10,000	\$	10,000
1.2	Electrical System Isolation	1	LS	\$	150,000	\$	150,000
	Mechanical System Isolation	1	LS	\$	120,000	\$	120,000
	Electrical System Re-power	1	LS	\$	40,000	\$	40,000
	Mechancial Systems Re-power	1	LS				, in the second
	Subtotal for System De-Energization			\$	320,000	\$	320,000
				902000000		i in come	
-0.0323720-0.00C3	Decommissioning and Cleaning			Γ.			
2.1	Drain Boiler, Condenser, Feedwater Heater, Boiler Feed Pumps	1	LS	\$	10,000	\$	10,000
2.2	Boiler, Precipitator & Absorber, Baghouse, Ash Silo Cleaning	8,000	CY	\$	420,000	\$	420,000
-	Remove and Dispose all Tenant Debris, Trash & Combustibles	1,500	NT	\$	1,020,000	\$	1,020,000
2.4	Lubricating & Hydraulic System Draining	15,999	GAL	\$	180,000	\$	180,000
	Stack Capping (Base), Stack Demolition (Upper)	11	LS	\$	110,000	\$	110,000
	Demo Stack to Grade	11	LS	2666		\$	1,820,000
2.7	Clean & Dispose Cooling Tower Sludge	176	NT	\$	20,000	\$	20,000
	Demo Cooling Tower to Grade	1	LS	\$	820,000	\$	820,000
2.9	Demo Absorber to Grade	1 1	LS			\$	6,700,000
	Subtotal for Decommissioning & Cleaning Costs			\$	2,580,000	\$	11,100,000
3	Environmental						
3.1	Asbestos Abatement						
3.2	Universal Waste & Regulated Waste Removal	1	LS	\$	150,000	\$	150,000
3.3	Chemical Removal	1	LS	\$	80,000	\$	80,000
3.4	Oil Filled Transformer Draining	39,490	GAL	\$	190,000	\$	190,000
	Subtotal for Environmental			\$	420,000	\$	420,000
		TOTAL	DIRECT COSTS	\$	3,320,000	\$	11,840,000
				I management		Page 1840	
	Indirect Costs						
	Engineering/Permitting/Construction Management	1	LS	\$	500,000	\$	1,600,000
	Bonds/Insurance	1	LS	\$	100,000	\$	300,000
	Contingency	1 70741 1917	LS	\$	700,000	\$	2,400,000
		IUIALINI	DIRECT COSTS	\$	1,300,000	\$	4,300,000
	TOTA	L DIRECT AND INI	DIRECT COSTS	\$	4,620,000	\$	16,140,000
	Owner Costs						
	Owner Costs	1	LS	\$	300,000	\$	900,000
	Owner Contingency	1	LS	\$	300,000	\$	900,000
	Subtotal for Owners Cost			\$	600,000	\$	1,800,000
				***************************************		pesses	
	TOTAL PROJEC	T COST (Including	g Owner Costs)	\$	5,220,000	\$	17,940,000
A	Annual Site Costs						
A.1	Facility Inspection/Environmental Permit Costs	1	LS	\$	20,000	\$	10,000
	Stack and FFA lighting inspections	1	LS	\$	30,000		
	Maintenance Costs (Labor costs plus \$5,000 added for small tools and supplies to each option)	1	LS				
A.3	Energy costs to power lighting/Heat trace/sump pumps	11	LS	\$	10,000	\$	10,000
A.4	Other costs	11	LS	\$	10,000	122100000	10,000
		<u>An</u>	nual Site Costs	\$	70,000	\$	30,000



PNM San Juan Generating Station U1 & U2 Common - RIP Cost Estimate Summary

Item	Description	Estimated Quantity	Unit	200000000000000000000000000000000000000	Option 1 ndustry Best	•	Option 2 Upper Bound
1	Decommissioning and Cleaning						
1.1	Hydrogen Tank Evacuation	1	LS	\$	20,000	\$	20,000
1.2	Fire Protection Pump	1	LS	\$	10,000	\$	10,000
1.3	Air Compressor & Soot Blower	1	LS	\$	10,000	\$	10,000
1.4	De-Mineralizer Equipment	1	LS	\$	10,000	\$	10,000
1.5	Fuel Oil Tank	400,000	GAL	\$	500,000	\$	500,000
1.6	Fuel Oil Pump House	1	LS	\$	20,000	\$	20,000
1.7	Bearing Cooling Water Pumps	1	LS	\$	10,000	\$	10,000
1.8	Tripper Deck	85	NT	\$	40,000	\$	40,000
1.9	Turbine Lube Oil Residual Disposal	18,000	GAL	\$	40,000	\$	40,000
1,10	Turbine Lube Oil Tank Demolition	1	LS			\$	10,000
1.11	Secure Windows, Doors, Stairs and Ladders	1	LS	\$	130,000	\$	130,000
	Subtotal for Decommissioning and Cleaning			\$	790,000	\$	800,000
2	Environmental						
2,1	Asbestos Abatement	1 1	LS			l de la constant de l	
2,2	Universal Waste Removal	1	LS	\$	52,000	\$	52,000
2.3	Regulated Materials & Chemical Removal	i i	LS	\$	44,000	\$	44,000
2.4	Oil Filled Transformer Draining	9,184	GAL	\$	4,000	\$	4,000
	Subtotal for Environmental			\$	100,000	\$	100,000
		TOTAL	IRECT COST	'S \$	890,000	\$	900,000
	Indirect Costs	TOTAL	IRECT COST	'S \$	890,000	\$	900,000
	Indirect Costs Engineering/Permitting/Construction Management	TOTAL D	DIRECT COST	S \$.	890,000 200,000	\$	900,000
					-		A Carellana
	Engineering/Permitting/Construction Management	1	LS	\$	200,000	\$	200,000
	Engineering/Permitting/Construction Management Bonds/Insurance	1 1 1	LS LS	\$ \$ \$	200,000	\$	200,000 100,000
	Engineering/Permitting/Construction Management Bonds/Insurance Contingency	1 1 1	LS LS LS DIRECT COST	\$ \$ \$ \$	200,000 100,000 200,000	\$ \$ \$	200,000 100,000 200,000
	Engineering/Permitting/Construction Management Bonds/Insurance Contingency TOTAL I	1 1 1 TOTAL IND	LS LS LS DIRECT COST	\$ \$ \$ \$	200,000 100,000 200,000 500,000	\$ \$ \$	200,000 100,000 200,000 500,000
	Engineering/Permitting/Construction Management Bonds/Insurance Contingency TOTAL I	1 1 1 1 TOTAL IND	LS LS LS DIRECT COST		200,000 100,000 200,000 500,000 1,390,000	\$ \$ \$ \$	200,000 100,000 200,000 500,000 1,400,000
	Engineering/Permitting/Construction Management Bonds/Insurance Contingency TOTAL I Owner Costs Owner Costs	1 1 1 1 TOTAL IND	LS LS LS DIRECT COST LS	\$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$	200,000 100,000 200,000 500,000 1,390,000	\$ \$ \$ \$	200,000 100,000 200,000 500,000 1,400,000
	Engineering/Permitting/Construction Management Bonds/Insurance Contingency TOTAL I	1 1 1 1 TOTAL IND	LS LS LS DIRECT COST		200,000 100,000 200,000 500,000 1,390,000	\$ \$ \$ \$	200,000 100,000 200,000 500,000 1,400,000
	Engineering/Permitting/Construction Management Bonds/Insurance Contingency TOTAL I Owner Costs Owner Costs Owner Contingency Subtotal for Owners Cost	1 1 1 TOTAL INDIRECT AND INDIRE	LS LS LS US DIRECT COST LS LS LS		200,000 100,000 200,000 500,000 1,390,000 50,000 50,000 100,000	\$ \$ \$ \$ \$ \$	200,000 100,000 200,000 500,000 1,400,000 50,000 50,000 100,000
	Engineering/Permitting/Construction Management Bonds/Insurance Contingency TOTAL I Owner Costs Owner Costs Owner Contingency Subtotal for Owners Cost TOTAL PROJECT	1 1 1 TOTAL INDIRECT AND INDIRE	LS LS LS US DIRECT COST LS LS LS		200,000 100,000 200,000 500,000 1,390,000 50,000	\$ \$ \$ \$	200,000 100,000 200,000 500,000 1,400,000 50,000 50,000
A	Engineering/Permitting/Construction Management Bonds/Insurance Contingency TOTAL I Owner Costs Owner Costs Owner Contingency Subtotal for Owners Cost TOTAL PROJECT	1 1 1 TOTAL INDIRECT AND INDIRE	LS LS LS DIRECT COST LS LS LS ORECT COST	\$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$	200,000 100,000 200,000 500,000 1,390,000 50,000 50,000 100,000	\$ \$ \$ \$ \$	200,000 100,000 200,000 500,000 1,400,000 50,000 50,000 100,000
A A.1	Engineering/Permitting/Construction Management Bonds/Insurance Contingency TOTAL I Owner Costs Owner Costs Owner Contingency Subtotal for Owners Cost TOTAL PROJECT Annual Site Costs Facility Inspection/Environmental Permit Costs	1 1 1 TOTAL INC	LS LS LS DIRECT COST LS LS LS LS LS Owner Costs		200,000 100,000 200,000 500,000 1,390,000 50,000 50,000 100,000	\$ \$ \$ \$ \$ \$	200,000 100,000 200,000 500,000 1,400,000 50,000 50,000 100,000
A.1	Engineering/Permitting/Construction Management Bonds/Insurance Contingency TOTAL I Owner Costs Owner Costs Owner Contingency Subtotal for Owners Cost TOTAL PROJECT Annual Site Costs Facility Inspection/Environmental Permit Costs Maintenance Costs	1 1 1 TOTAL INDICATE	LS LS LS DIRECT COST LS	\$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$	200,000 100,000 200,000 500,000 1,390,000 50,000 50,000 100,000	\$ \$ \$ \$ \$ \$	200,000 100,000 200,000 500,000 1,400,000 50,000 100,000
And the second second	Engineering/Permitting/Construction Management Bonds/Insurance Contingency TOTAL I Owner Costs Owner Costs Owner Contingency Subtotal for Owners Cost TOTAL PROJECT Annual Site Costs Facility Inspection/Environmental Permit Costs	1 1 1 TOTAL INC	LS LS LS DIRECT COST LS LS LS LS Owner Costs	\$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$ \$	200,000 100,000 200,000 500,000 1,390,000 50,000 50,000 100,000	\$ \$ \$ \$ \$	200,000 100,000 200,000 500,000 1,400,000 50,000 50,000 100,000



PNM San Juan Generating Station U3 & U4 Common - RIP Cost Estimate Summary

Item	Description	Estimated Quantity	Unit	27278	Option 1 Industry Best		Option 2 Upper Bound
1	Decommissioning and Cleaning						
1.1	Hydrogen Tank Evacuation	1	LS	\$	20,000	\$	20,000
1.2	Fire Protection Pump	1	LS	\$	10,000	\$	10,000
1.3	Air Compressor & Soot Blower	1	LS	\$	10,000	\$	10,000
1.4	De-Mineralizer Equipment	1	LS	\$	10,000	\$	10,000
1,5	Fuel Oil Tank	1,054,200	GAL	\$	1,320,000	\$	1,320,000
1.6	Fuel Oil Pump House	1	LS	\$	20,000	\$	20,000
1.7	Bearing Cooling Water Pumps	1	LS	\$	10,000	\$	10,000
1.8	Tripper Deck	85	NT	\$	40,000	\$	40,000
1.9	Turbine Lube Oil	33,000	GAL	\$	80,000	\$	80,000
1.10	Turbine Lube Oil Tank Demolition	1	LS			\$	10,000
1.11	Aux Cooling Tower Sludge Removal	35	NT	\$	10,000	\$	10,000
1.12	Aux Cooling Tower Demolition	1	LS	\$	90,000	\$	90,000
1.13	CO2 Tank (26 & 12 Ton)	1	LS	\$	20,000	\$	20,000
1.14	Secure Windows, Doors, Stairs and Ladders	1	LS	\$	130,000	\$	130,000
	Subtotal for Decommissioning and Cleaning			\$	1,770,000	\$	1,780,000
2	Environmental						
2.1	Asbestos Abatement						
2.2	Universal Waste Removal	1	LS	\$	230,000	\$	230,000
2.3	Regulated Materials & Chemical Removal	1	LS	\$	100,000	\$	100,000
2.4	Oil Filled Transformer Draining	18,651	GAL	\$	70,000	\$	70,000
2.4	Subtotal for Environmental	10,001		\$	400,000	<u> </u>	400,000
		TOTAL I	DIRECT COSTS	\$	2,170,000	\$	2,180,000
,	Indirect Costs					+ (*)	
	Engineering/Permitting/Construction Management	1	LS	\$	300,000	\$	300,000
	Bonds/Insurance	1	LS	\$	100,000	\$	100,000
	Contingency	1	LS	\$	500,000	\$	500,000
		TOTAL IN	DIRECT COSTS		900,000	\$	900,000
314.75	TOTAL	IRECT AND IN	DIRECT COSTS	l s	3,070,000	l s	3,080,000
				I STANFACE			
	Owner Costs Owner Costs	1	LS	\$	200,000	\$	200,000
	Owner Costingency	1	LS	\$	200,000	\$	200,000
	Subtotal for Owners Cost			\$	400,000	\$	400,000
	TOTAL PROJECT	COST (Includin	a Owner Coete)	6	3.470.000	\$	3,480,000
	·	JOGT (MCIUGIN)	y Owner Gusts)	7	0,470,000	۳	3,430,000
A	Annual Site Costs						
A.1	Facility Inspection/Environmental Permit Costs	1	LS	\$	20,000	\$	20,000
	Maintenance Costs (Labor costs plus \$5,000 added for small tools and supplies to each option)	1	LS				
		4	1.0	1	40.000	\$	10,000
A.2	Energy costs to power lighting/Heat trace/sump pumps	1	LS	\$	10,000	Ψ	
A.2 A.3	Energy costs to power lighting/Heat trace/sump pumps Other costs	1	LS	\$	10,000	\$	10,000



PNM San Juan Generating Station Plant Common - RIP Cost Estimate Summary

Item	Description	Estimated	Units	13141	Option 1 Industry Best		Option 2 Upper Bound
	•	Quantity	00		DCGC		Dound
111	System De-Energization						
1.4	Mechanical System Isolation	11	LS	\$	270,000	\$	270,000
1.5	Electrical System Isolation	1	LS	\$	190,000	\$	190,000
1.6	Electrical System Re-power	1	LS	\$	80,000	\$	80,000
1.7	Mechanical System Re-power	1	LS	\$	40,000	\$	40,000
	Subtotal for System De-Energization			\$	580,000	\$	580,000
2	Decommissioning and Cleaning						
2.1	Northside WWTP Facility	1	GAL	\$	380,000	\$	380,000
2.2	Southside WWTP Facility	11,500	GAL	\$	30,000	\$	30,000
2.3	Limestone Prep Bldg.	100	CY	\$	50,000	\$	50,000
2.4	Bulk Used Oil Storage	2,000	GAL	\$	180,000	\$	180,000
2.5	Coal Handling	200	NT	\$	460,000	\$	460,000
2.6	Secure Reclaim Hopper Openings	1	LS	\$	20,000	\$	20,000
2.7	Sewage Treatment	132	NT	\$	20,000	\$	20,000
2.8	Vehicle Fuel Filling Station - Residual Fuel Disposal	3,000	GAL	\$	10,000	\$	10,000
2.9	Remove Vehicle Fueling UST & Backfill	3,700	CY			\$	70,000
2.10	Gypsum Storage Pile	4,000	CY	\$	40,000	\$	40,000
2.11	Flow Fill Pipes > 24" Diameter	50,100	CY			\$	5,620,000
2.12	Remove and Dispose all Tenant Debris, Trash & Combustibles	2,800	CY	\$	980,000	\$	980,000
2.13	Secure Windows, Doors, Stairs and Ladders	1	LS	\$	130,000	\$	130,000
	Subtotal for Decommissioning & Cleaning			\$	2,300,000	\$	7,990,000
3	Environmental						
3.1	Asbestos Abatement	1 1	l nt	s	10,000	S	10,000
3.2	Universal Waste Removal	1	LS	\$	1,340,000		1,340,000
3.3	Regulated Waste & Chemical Removal	1	LS	\$	1,900,000	\$	1,900,000
3.4	Oil Filled Transformer Draining	9,774	GAL	\$	40,000	\$	40,000
	Subtotal for Environmental	0,777	J/L	\$	3,290,000	\$	3,290,000
4	Lake Station and Breaching the Permitted Dam					12	
4.1	Lake Station	1	LS	\$	80.000	\$	80.000
4.2	Permitted Dam Decommissioning	1	LS	\$	1,300,000		1,800,000
4.3	Demolition of Schumway Slurry Wall (to be completed in 2040)	1	LS	\$	170,000	\$	170,000
	Subtotal for Lake Station			\$	1,550,000	\$	2,050,000
5	River Station						
5.1	River Station	1	LS	\$	800,000	\$	1,250,000
	Subtotal for River Station		5.5	\$	800,000	\$	1,250,000



PNM San Juan Generating Station Plant Common - RIP Cost Estimate Summary

6.1 Gerner Conditions	ltem	Description	Estimated Quantity	Units		Option 1 Industry Best		Option 2 Upper Bound
6.2 Mobilization/Demobilization	6	Effluent Pond & Coal Pile Closure						
6.3 Quality Assurance/Quality Control 1	6.1	General Conditions	1	LS	\$	150,000	\$	180,000
6.4 Dewatering & Water Management	6.2	Mobilization/Demobilization	1	LS	\$	130,000	\$	130,000
6.5 Effluent Pond 1A 6.6 Effluent Pond 1B 1 LS \$ 70,000 \$ 6.7 Effluent Pond 2A 1 LS \$ 840,000 \$ 6.8 Effluent Pond 2B 1 LS \$ 80,000 \$ 6.8 Effluent Pond 2B 1 LS \$ 390,000 \$ 6.9 Effluent Pond 3A 1 LS \$ 60,000 \$ 6.10 Effluent Pond 3B 1 LS \$ 160,000 \$ 6.11 Effluent Pond 3B 1 LS \$ 160,000 \$ 6.11 Effluent Pond 3B 1 LS \$ 160,000 \$ 6.12 U1 & U2 Coal Run Off Pond 1 LS \$ 110,000 \$ 6.13 U3 & U4 Coal Run Off Pond 1 LS \$ 100,000 \$ 6.14 Coal Pile 1 LS \$ 710,000 \$ 6.15 Solid Waste Pit 1 LS \$ 710,000 \$ 8 Subtotal for Effluent Pond & Coal Pile Closure 7.1 General Conditions 7.2 Mobilization/Demobilization 1 LS \$ 150,000 \$ 7.3 Quality Assurance/Quality Control 1 LS \$ 110,000 \$ 7.4 Dewatering & Water Management 1 LS \$ 110,000 \$ 7.5 Evaporation Pond 1 LS \$ 110,000 \$ 7.6 Evaporation Pond 1 LS \$ 10,000 \$ 7.7 Evaporation Pond 1 LS \$ 10,000 \$ 7.8 Evaporation Pond 1 LS \$ 10,000 \$ 7.9 Evaporation Pond 1 LS \$ 10,000 \$ 7.1 Dewatering & Water Management 1 LS \$ 10,000 \$ 7.6 Evaporation Pond 1 LS \$ 10,000 \$ 7.7 Evaporation Pond 2 S 1 S 1 S 1 S 1 S 1 S 1 S 1 S 1 S 1 S	6.3	Quality Assurance/Quality Control	1	LS	\$	80,000	\$	80,000
6.6 Effluent Pond 1B	6.4	Dewatering & Water Management	1	LS	\$	50,000	\$	50,000
6.7 Effluent Pond 2A	6.5	Effluent Pond 1A	1	LS		70,000	\$	180,000
6.8 Effluent Pond 2B	6.6	Effluent Pond 1B	1	LS	\$	40,000	\$	100,000
6.90 Effluent Pond 3A	6.7	Effluent Pond 2A	1	LS	\$	80,000	\$	230,000
6.10 Effluent Pond 3B			1	LS	\$	390,000	\$	1,190,000
6.11 Effluent Pond 3C	6.9	Effluent Pond 3A	1		_	60,000	\$	130,000
6.12 U1 & U2 Coal Run Off Pond	6.10	Effluent Pond 3B	11	LS	\$	160,000	\$	360,000
6.13 U3 & U4 Coal Run Off Pond			1	LS	\$	110,000	\$	240,000
6.14 Coal Pile	6.12	U1 & U2 Coal Run Off Pond	1	LS	\$	100,000	\$	180,000
South Evaporation Pond & Coal Pile Closure 1		· · · · · · · · · · · · · · · · · · ·	11	LS	\$	210,000	\$	330,000
Subtotal for Effluent Pond & Coal Pile Closure \$ 1,880,000 \$			1	LS	\$		\$	80,000
7.			1	LS	\$	170,000	\$	240,000
7.1 General Conditions		Subtotal for Effluent Pond & Coal Pile Closure		17	\$	1,880,000	\$	3,700,000
7.1 General Conditions	7	South Evanoration Pond Closure						
7.2 Mobilization/Demobilization 1 LS \$ 150,000 \$ 7.3 Quality Assurance/Quality Control 1 LS \$ 110,000 \$ 7.4 Dewatering & Water Management 1 LS \$ 50,000 \$ 7.5 Permits to breach south evaporation pond dams 1 LS \$ 10,000 \$ 7.6 Evaporation Pond 1 14 ACRES \$ 2,700,000 \$ 7.7 Evaporation Pond 2 12 ACRES \$ 3,900,000 \$ 7.8 Evaporation Pond 3 21 ACRES \$ 6,250,000 \$ 7.9 Evaporation Pond 4 15 ACRES \$ 2,800,000 \$ 7.10 Evaporation Pond 5 13 ACRES \$ 2,850,000 \$ 8 Subtotal for South Evaporation \$ 13,970,000 \$ \$ TOTAL DIRECT COSTS \$ 29,370,000 \$ Bonds/Insurance 1 LS \$ 600,000 \$ Contingency 1 LS \$ 5,900,000 \$ TOTAL DIRECT AND INDIRECT COSTS \$ 39,770,000 \$ TOTAL DIRECT AND INDIRECT COSTS	CONTRACTOR CONTRACTOR		1	I.S.	\$	350,000	\$	500,000
7.3 Quality Assurance/Quality Control 1					-			180,000
7.4 Dewatering & Water Management 1 LS \$ 50,000 \$ 7.5 Permits to breach south evaporation pond dams 1 LS \$ 10,000 \$ 7.6 Evaporation Pond 1 14 ACRES \$ 2,700,000 \$ 7.7 Evaporation Pond 2 12 ACRES \$ 3,900,000 \$ 7.8 Evaporation Pond 3 21 ACRES \$ 6,250,000 \$ 7.9 Evaporation Pond 4 15 ACRES \$ 2,800,000 \$ 7.10 Evaporation Pond 5 13 ACRES \$ 2,650,000 \$ Subtotal for South Evaporation \$ 18,970,000 \$ TOTAL DIRECT COSTS \$ 29,370,000 \$ Bonds/Insurance 1 LS \$ 600,000 \$ Contingency 1 LS \$ 5,900,000 \$ TOTAL INDIRECT COSTS \$ 10,400,000 \$ TOTAL DIRECT AND INDIRECT COSTS \$ 39,770,000 \$ TOTAL DIRECT AND INDIRECT COSTS \$ 39,770,000	1		<u> </u>				<u> </u>	110,000
Total Direct Costs Indirect Costs			1					50,000
Total Direct Costs					 		<u> </u>	10,000
7.7 Evaporation Pond 2 12 ACRES \$ 3,900,000 \$ 7.8 Evaporation Pond 3 21 ACRES \$ 6,250,000 \$ 7.9 Evaporation Pond 4 15 ACRES \$ 2,800,000 \$ 7.10 Evaporation Pond 5 13 ACRES \$ 2,650,000 \$ Subtotal for South Evaporation TOTAL DIRECT COSTS \$ 29,370,000 \$ Indirect Costs Engineering/Permitting/Construction Management 1 LS \$ 3,900,000 \$ Bonds/Insurance 1 LS \$ 600,000 \$ Contingency 1 LS \$ 5,900,000 \$ TOTAL INDIRECT COSTS \$ 10,400,000 \$ TOTAL DIRECT AND INDIRECT COSTS \$ 39,770,000 \$ Cyber Assets 1 LS \$ (1,500,000) \$ TOTAL DIRECT AND INDIRECT COSTS \$ 39,770,000 \$			 		 		<u> </u>	4,100,000
7.8 Evaporation Pond 3 21 ACRES \$ 6,250,000 \$ 7.9 Evaporation Pond 4 15 ACRES \$ 2,800,000 \$ 7.10 Evaporation Pond 5 13 ACRES \$ 2,650,000 \$ Subtotal for South Evaporation TOTAL DIRECT COSTS \$ 29,370,000 \$ Indirect Costs Lengineering/Permitting/Construction Management 1 LS \$ 3,900,000 \$ Engineering/Permitting/Construction Management 1 LS \$ 600,000 \$ Contingency 1 LS \$ 5,900,000 \$ TOTAL INDIRECT COSTS \$ 10,400,000 \$ TOTAL DIRECT AND INDIRECT COSTS \$ 39,770,000 \$ TOTAL DIRECT AND INDIRECT COSTS \$ 39,770,000 \$ Value LS \$ (1,500,000) \$ Value LS \$ (1,500,000) \$ Value LS \$ (1,000) \$ LS \$ (2,900,000) </td <td></td> <td></td> <td> </td> <td></td> <td>+</td> <td></td> <td>i i</td> <td>3,900,000</td>			 		+		i i	3,900,000
Total Direct Costs Subtotal for South Evaporation Substituting Substituti					_		<u> </u>	6,250,000
Total Direct Costs Subtotal for South Evaporation Subtotal f					+			
Subtotal for South Evaporation \$ 18,970,000 \$							-	4,250,000
Indirect Costs			13	ACRES	1000000000		2000	4,050,000
Indirect Costs		Subtotal for South Evaporation			\$	18,970,000	\$	23,400,000
Engineering/Permitting/Construction Management			TOTAL	DIRECT COSTS	\$	29,370,000	\$	42,260,000
Engineering/Permitting/Construction Management					Tools		- Harris	
Bonds/Insurance								
Contingency			<u> </u>				-	5,500,000
TOTAL INDIRECT COSTS \$ 10,400,000 \$ TOTAL DIRECT AND INDIRECT COSTS \$ 39,770,000 \$								900,000
TOTAL DIRECT AND INDIRECT COSTS \$ 39,770,000 \$		Contingency		L			<u> </u>	8,500,000
Scrap Salvage Quantity and Value Warehouse Stock 1 LS \$ (1,500,000) \$ Vehicles & Equipment 1 LS \$ (10,000) \$ Transformers 1 LS \$ (2,900,000) \$ Cyber Assets 1 LS \$ (90,000) \$			TOTAL IN	DIRECT COSTS	\$	10,400,000	\$	14,900,000
Warehouse Stock 1 LS \$ (1,500,000) \$ Vehicles & Equipment 1 LS \$ (10,000) \$ Transformers 1 LS \$ (2,900,000) \$ Cyber Assets 1 LS \$ (90,000) \$		TOTAL	DIRECT AND IN	DIRECT COSTS	\$	39,770,000	\$	57,160,000
Warehouse Stock 1 LS \$ (1,500,000) \$ Vehicles & Equipment 1 LS \$ (10,000) \$ Transformers 1 LS \$ (2,900,000) \$ Cyber Assets 1 LS \$ (90,000) \$					140600			
Vehicles & Equipment 1 LS \$ (10,000) \$ Transformers 1 LS \$ (2,900,000) \$ Cyber Assets 1 LS \$ (90,000) \$			1	10	œ.	(1.500.000)	6	(1,500,000)
Transformers 1 LS \$ (2,900,000) \$ Cyber Assets 1 LS \$ (90,000) \$								(10,000)
Cyber Assets 1 LS \$ (90,000) \$				1				(2,900,000)
Construction of the Constr					+			(90,000)
					-			(4,500,000)
TOTAL NET COST \$ 35,270,000 \$					1920		1 2	52,660,000



PNM San Juan Generating Station Plant Common - RIP Cost Estimate Summary

Item	Description	Estimated Quantity	Units	Option 1 Industry Best	Option 2 Upper Bound
	Owners Costs				
	Owner Costs	1	LS	\$ 2,000,000	\$ 2,900,000
	Owner Contingency	1	LS	\$ 2,000,000	\$ 2,900,000
	Subtotal for Owners Cost			\$ 4,000,000	\$ 5,800,000

TOTAL PROJECT COST		

A	Annual Site Costs				
A.1	Facility Inspection/Environmental Permit Costs	1	LS	\$ 95,000	\$ 85,000
A.2	Site Security	1	LS	\$ 65,000	\$ 65,000
A.3	Insurance Premiums starting in 2023	1	LS	\$ 570,000	\$ 570,000
A.4	Maintenance Costs	1	LS	\$ 350,000	\$ 170,000
A.5	Energy costs to power site lighting/Pumps/Lab Building	1	LS	\$ 16,000	\$ 14,000
A.6	Other costs (trash, water, sewer, etc.)	1	LS	\$ 8,000	\$ 6,000
A.7	Spray for Weeds	1	LS	\$ 6,500	\$ 6,500
A.8	Taxes	1	LS	\$ _	\$ _
	Annual Site Costs			\$ 1,110,500	\$ 916,500



PNM San Juan

Full Demolition Option Cost Estimates

Unit 1

Cost Category*	General Conditions	Decommissioning and Cleaning	Environmental	Structural Demolition	Site Restoration	Effluent Pond & Coal Pile	Evaporation Ponds Closure	Indirect Costs	Scrap Credit	Owner Costs	TOTAL
Base Case (Option 1)		\$ 1,010,000	\$ 670,000	\$ 9,470,000				\$ 4,100,000	\$ (6,160,000)	\$ 1,600,000	\$ 10,690,000
Upper Bound (Option 2)		\$ 1,010,000	\$ 770,000	\$ 9,550,000				\$ 4,100,000	\$ (6,160,000)	\$ 1,600,000	\$ 10,870,000
Unit 2											
Cost Category*	General Conditions	Decommissioning and Cleaning	Environmental	Structural Demolition	Site Restoration	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Scrap Credit	Owner Costs	TOTAL
Base Case (Option 1)		\$ 810,000	\$ 545,000	\$ 9,500,000				\$ 4,000,000	\$ (6,420,000)	\$ 1,600,000	\$ 10,035,000
Upper Bound (Option 2)		\$ 810,000	\$ 645,000	\$ 9,570,000				\$ 4,100,000	\$ (6,420,000)	\$ 1,600,000	\$ 10,305,000
Unit 3											
Cost Category*	General Conditions	Decommissioning and Cleaning	Environmental	Structural Demolition	Site Restoration	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Scrap Credit	Owner Costs	TOTAL
Base Case (Option 1)		\$ 1,370,000	\$ 1,505,000	\$ 17,590,000				\$ 7,300,000	\$ (11,010,000)	\$ 2,800,000	\$ 19,555,000
Upper Bound (Option 2)		\$ 1,370,000	\$ 1,605,000	\$ 17,690,000				\$ 7,400,000	\$ (11,010,000)	\$ 3,000,000	\$ 20,055,000
Unit 4											
Cost Category*	General Conditions	Decommissioning and Cleaning	Environmental	Structural Demolition	Site Restoration	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Scrap Credit	Owner Costs	TOTAL
Base Case (Option 1)		\$ 1,630,000	\$ 910,000	\$ 18,190,000				\$ 7,400,000	\$ (10,990,000)	\$ 3,000,000	\$ 20,140,000
Upper Bound (Option 2)		\$ 1,630,000	\$ 1,010,000	\$ 18,410,000				\$ 7,600,000	\$ (10,990,000)	\$ 3,000,000	\$ 20,660,000
Unit 1 & 2 Common											
Cost Category*	General Conditions	Decommissioning and Cleaning	Environmental	Structural Demolition	Site Restoration	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Scrap Credit	Owner Costs	TOTAL
Base Case (Option 1)		\$ 620,000	\$ 1,090,000	\$ 20,000				\$ 800,000	\$ (10,000)	\$ 400,000	\$ 2,920,000
Upper Bound (Option 2)		\$ 620,000	\$ 1,190,000	\$ 20,000				\$ 800,000	\$ (10,000)	\$ 400,000	\$ 3,020,000
Unit 3 & 4 Common											
Cost Category*	General Conditions	Decommissioning and Cleaning	Environmental	Structural Demolition	Site Restoration	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Scrap Credit	Owner Costs	TOTAL
Base Case (Option 1)		\$ 1,500,000	\$ 100,000	\$ 220,000				\$ 800,000	\$ (50,000)	\$ 400,000	\$ 2,970,000
Upper Bound (Option 2)		\$ 1,500,000	\$ 200,000	\$ 240,000				\$ 800,000	\$ (50,000)	\$ 400,000	\$ 3,090,000
Plant Common											
Cost Category*	General Conditions	Decommissioning and Cleaning	Environmental	Structural Demolition	Site Restoration	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Scrap Credit	Owner Costs	TOTAL
Base Case (Option 1)	\$ 960,000	\$ 1,250,000	\$ 3,470,000	\$ 6,420,000	\$ 5,680,000	\$ 1,880,000	\$ 18,960,000	\$ 13,700,000	\$ (5,540,000)	\$ 5,400,000	\$ 52,180,000
Upper Bound (Option 2)	\$ 960,000	\$ 1,250,000	\$ 3,570,000	\$ 7,720,000	\$ 7,730,000	\$ 3,700,000	\$ 23,390,000	\$ 17,000,000	\$ (5,540,000)	\$ 6,600,000	\$ 66,380,000

Site Restoration

5,680,000

7,730,000

Effluent Pond &

Coal Pile Closure

1,880,000

3,700,000

Evaporation

Ponds Closure

18,960,000

23,390,000

Indirect

Costs

38,100,000

41,800,000 \$

Scrap Credit

(40,180,000)

(40,180,000) \$

Structural

Demolition

61,410,000

63,200,000

Environmental

8,290,000

8,990,000

Upper Bound (Option 2) 960,000 \$ * - Costs include direct, indirect, contingency and estimated owners costs

Decommissioning

and Cleaning

8,190,000 \$

8,190,000 \$

General

Conditions

960,000 \$

Owner

Costs

15,200,000

16,600,000 \$

Annual Site

TOTAL PLANT

Base Case (Option 1)

Cost Category*

PNM San Juan

Full Demolition Option Cost Estimates (without RIP)

U	П	í	t	1

Offici											
Cost Category*	General Conditions	Decommissioning and Cleaning	Environmental	Structural Demolition	Site Restoration	Effluent Pond & Coal Pile	Evaporation Ponds Closure	Indirect Costs	Scrap Credit	Owner Costs	TOTAL
Base Case (Option 1)		\$ -	\$ 360,000	\$ 9,470,000				\$ 3,500,000	\$ (6,160,000)	\$ 1,400,000	\$ 8,570,000
Upper Bound (Option 2)		S -	\$ 490,000	\$ 9,550,000				\$ 3,800,000	\$ (6,160,000)	\$ 1,400,000	\$ 9,080,000
Unit 2											
Cost Category*	General Conditions	Decommissioning and Cleaning	Environmental	Structural Demolition	Site Restoration	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Scrap Credit	Owner Costs	TOTAL
Base Case (Option 1)		s -	\$ 460,000	\$ 9,500,000				\$ 3,500,000	\$ (6,420,000)	\$ 1,400,000	\$ 8,440,000
Upper Bound (Option 2)		\$ -	\$ 560,000	\$ 9,570,000				\$ 3,800,000	\$ (6,420,000)	\$ 1,400,000	\$ 8,910,000
Unit 3											
Cost Category*	General Conditions	Decommissioning and Cleaning	Environmental	Structural Demolition	Site Restoration	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Scrap Credit	Owner Costs	TOTAL
Base Case (Option 1)		\$ -	\$ 1,210,000	s 17,590,000				\$ 6,700,000	\$ (11,010,000)	\$ 2,600,000	\$ 17,090,000
Upper Bound (Option 2)		s -	\$ 1,310,000	\$ 17,690,000				\$ 6,700,000	\$ (11,010,000)	\$ 2,600,000	\$ 17,290,000
Unit 4										•	
Cost Category*	General Conditions	Decommissioning and Cleaning	Environmental	Structural Demolition	Site Restoration	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Scrap Credit	Owner Costs	TOTAL
Base Case (Option 1)		s -	\$ 640,000	\$ 18,190,000				\$ 6,700,000	\$ (10,990,000)	\$ 2,600,000	\$ 17,140,000
Upper Bound (Option 2)		s -	\$ 740,000	\$ 18,410,000				\$ 6,800,000	s (10,990,000)	\$ 2,600,000	\$ 17,560,000
Unit 1 & 2 Common											
Cost Category*	General Conditions	Decommissioning and Cleaning	Environmental	Structural Demolition	Site Restoration	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Scrap Credit	Owner Costs	TOTAL
Base Case (Option 1)		s -	\$ 30,000	\$ 20,000				\$ 300,000	\$ (10,000)	\$ 200,000	\$ 540,000
Upper Bound (Option 2)		\$ -	\$ 130,000	\$ 20,000				\$ 300,000	\$ (10,000)	\$ 200,000	\$ 640,000
Unit 3 & 4 Common											
Cost Category*	General Conditions	Decommissioning and Cleaning	Environmental	Structural Demolition	Site Restoration	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Scrap Credit	Owner Costs	TOTAL
Base Case (Option 1)		s -	\$ -	\$ 220,000				\$ 300,000	\$ (50,000)	\$ 200,000	\$ 670,000
Upper Bound (Option 2)		S -	\$ 100,000	\$ 240,000				\$ 300,000	\$ (50,000)	\$ 200,000	\$ 790,000
Plant Common											
Cost Category*	General Conditions	Decommissioning and Cleaning	Environmental	Structural Demolition	Site Restoration	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Scrap Credit	Owner Costs	TOTAL
Base Case (Option 1)	\$ 500,000	s -	\$ 1,530,000	\$ 6,420,000	\$ 5,680,000	s -	\$ 10,150,000	\$ 8,600,000	\$ (1,040,000)	\$ 5,450,000	\$ 37,290,000
Upper Bound (Option 2)	\$ 500,000	s -	\$ 1,630,000	\$ 7,720,000	\$ 7,730,000	\$ 3,700,000	\$ 10,150,000	\$ 11,100,000	\$ (1,040,000)	\$ 6,450,000	\$ 47,940,000

TOTAL PLANT

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Cost Category*	General Conditions	Decommissioning and Cleaning	Environmental	Structural Demolition	Site Restoration	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Scrap Credit	Owner Costs	TOTAL	Annual Site Costs
Base Case (Option 1)	\$ 500,000	\$ -	\$ 4,230,000	\$ 61,410,000	\$ 5,680,000	s -	\$ 10,150,000	\$ 29,600,000	\$ (35,680,000)	\$ 13,850,000	\$ 89,740,000	\$ 591,000
Upper Bound (Option 2)	\$ 500,000	\$ -	\$ 4,960,000	\$ 63,200,000	\$ 7,730,000	\$ 3,700,000	\$ 10,150,000	\$ 32,800,000	\$ (35,680,000)	\$ 14,850,000	\$ 102,210,000	\$ 591,000

^{* -} Costs include direct, indirect, contingency and estimated owners costs

PNM San Juan

Full Demolition Option Cost Estimates (without RIP) - Average Scrap Prices

Cost Category*	General Conditions	Decommissioning and Cleaning	Environmental	Structural Demolition	Site Restoration	Effluent Pond & Coal Pile	Evaporation Ponds Closure	Indirect Costs	Scrap Credit	Owner Costs	TOTAL
Base Case (Option 1)		\$ -	\$ 360,000	\$ 9,470,000				\$ 3,500,000	\$ (4,629,000)	\$ 1,400,000	\$ 10,101,000
Upper Bound (Option 2)		s -	\$ 490,000	\$ 9,550,000				\$ 3,800,000	\$ (4,629,000)	\$ 1,400,000	\$ 10,611,000
Unit 2											
Cost Category*	General Conditions	Decommissioning and Cleaning	Environmental	Structural Demolition	Site Restoration	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Scrap Credit	Owner Costs	TOTAL
Base Case (Option 1)		\$ -	\$ 460,000	\$ 9,500,000				\$ 3,500,000	\$ (4,725,000)	\$ 1,400,000	\$ 10,135,00
Upper Bound (Option 2)		\$ -	\$ 560,000	\$ 9,570,000				\$ 3,800,000	\$ (4,725,000)	\$ 1,400,000	\$ 10,605,000
Unit 3											
Cost Category*	General Conditions	Decommissioning and Cleaning	Environmental	Structural Demolition	Site Restoration	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Scrap Credit	Owner Costs	TOTAL
Base Case (Option 1)		\$ -	\$ 1,210,000	\$ 17,590,000				\$ 6,700,000	\$ (8,133,000)	\$ 2,600,000	\$ 19,967,00
Upper Bound (Option 2)		\$ -	\$ 1,310,000	\$ 17,690,000				\$ 6,700,000	\$ (8,133,000)	\$ 2,600,000	\$ 20,167,00
Unit 4										•	
Cost Category*	General Conditions	Decommissioning and Cleaning	Environmental	Structural Demolition	Site Restoration	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Scrap Credit	Owner Costs	TOTAL
Base Case (Option 1)		\$ -	\$ 640,000	\$ 18,190,000				\$ 6,700,000	\$ (6,674,000)	\$ 2,600,000	\$ 21,456,000
11 B1 (011 8)	198,80		. 740,000	\$ 18,410,000	444.00			\$ 6,800,000	\$ (6,674,000)	\$ 2,600,000	\$ 21,876,00
Upper Bound (Option 2)		§ -	\$ 740,000	\$ 10,410,000				\$ 6,600,000	\$ (0,074,000)	\$ 2,000,000	
Unit 1 & 2 Common			\$ 740,000	\$ 10,410,000				\$ 6,800,000	\$ (6,674,000)	2,000,000	
	General Conditions	Decommissioning and Cleaning	Environmental	Structural Demolition	Site Restoration	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Scrap Credit	Owner Costs	TOTAL
Unit 1 & 2 Common			Euro. Lucia de secesa soci	Structural	Site Restoration			Indirect		Owner Costs	
Unit 1 & 2 Common		and Cleaning	Environmental	Structural Demolition \$ 20,000	Site Restoration			Indirect Costs	Scrap Credit	Owner Costs \$ 200,000	TOTAL \$ 546,500
Unit 1 & 2 Common Cost Category* Base Case (Option 1)		and Cleaning	Environmental \$ 30,000	Structural Demolition \$ 20,000	Site Restoration			Indirect Costs \$ 300,000	Scrap Credit	Owner Costs \$ 200,000	TOTAL \$ 546,500
Unit 1 & 2 Common Cost Category* Base Case (Option 1) Upper Bound (Option 2)		and Cleaning	Environmental \$ 30,000	Structural Demolition \$ 20,000	Site Restoration			Indirect Costs \$ 300,000	Scrap Credit	Owner Costs \$ 200,000	TOTAL \$ 546,500
Unit 1 & 2 Common Cost Category* Base Case (Option 1) Upper Bound (Option 2) Unit 3 & 4 Common	Conditions	s - \$ - Decommissioning	Environmental \$ 30,000 \$ 130,000	Structural Demolition \$ 20,000 \$ 20,000 Structural		Coal Pile Closure	Ponds Closure Evaporation	\$ 300,000 \$ 300,000	Scrap Credit \$ (3,500) \$ (3,500)	Owner	TOTAL \$ 546,500 \$ 646,500

Cost Category*	General Conditions		Decommissioning and Cleaning	Env	ironmental	Structural emolition	Site	Restoration	Charles	ent Pond & Pile Closure	100000	Evaporation onds Closure	Indirect Costs	Scr	ap Credit	Owner Costs	TOTAL
Base Case (Option 1)	\$ 500,0	00 \$	s -	\$	1,530,000	\$ 6,420,000	\$	5,680,000	\$	-	s	10,150,000	\$ 8,600,000	\$	(5,261,000)	\$ 5,450,000	\$ 33,069,000
Upper Bound (Option 2)	\$ 500,0	00 \$	\$ -	\$	1,630,000	\$ 7,720,000	\$	7,730,000	\$	3,700,000	\$	10,150,000	\$ 11,100,000	\$	(5,261,000)	\$ 6,450,000	\$ 43,719,000

TOTAL PLANT

Cost Category*	General Conditions	Decommissioning and Cleaning	Environmental	Structural Demolition	Site Restoration	Effluent Pond & Coal Pile Closure	Evaporation Ponds Closure	Indirect Costs	Scrap Credit	Owner Costs	TOTAL	Annual Site Costs
Base Case (Option 1)	\$ 500,000	\$	\$ 4,230,000	\$ 61,410,000	\$ 5,680,000	s -	\$ 10,150,000	\$ 29,600,000	\$ (29,459,500) \$	13,850,000	\$ 95,960,500	\$ 591,000
Jpper Bound (Option 2)	\$ 500,000	s -	\$ 4,960,000	\$ 63,200,000	\$ 7,730,000	\$ 3,700,000	\$ 10,150,000	\$ 32,800,000	\$ (29,459,500) \$	14,850,000	\$ 108,430,500	\$ 591,000
3-13											BURNS	MEDONNE

^{* -} Costs include direct, indirect, contingency and estimated owners costs

PNM San Juan Generating Station Unit 1 - Full Demolition Cost Estimate Summary

ltem	Description	Estimated Quantity	Unit		Option 1 Base Case		Option 2 Upper Bound
1	Decommissioning and Cleaning						
1.1	Generator Hydrogen Evacuation	1	LS	\$	10,000	\$	10,000
1.2	Drain Boiler, Condenser, Feedwater Heater, Boiler Feed Pumps	1	LS	\$	10,000	\$	10,000
1,3	Boiler, Precipitator Gypsum & Ash System Cleaning	5,200	CY	\$	270,000	\$	270,000
1.4	Remove and Dispose all Debris, Trash & Combustibles	800	NT	\$	540,000	\$	540,000
1.5	Lubricating & Hydraulic System Draining	18,800	GAL	\$	180,000	\$	180,000
	Subtotal for Decommissioning & Cleaning Costs			\$	1,010,000	\$	1,010,000
2	Environmental Costs						
2.1	Asbestos Removal and Disposal	. 1	LS	\$	30,000	\$	30,000
2.2	PCB Bulk Waste Abatement	1	LS	See		\$	50,000
2.3	Universal Waste Removal and Disposal	1	LS	\$	360,000	\$	360,000
2.4	Regulated Material Removal	1	LS	\$	140,000	\$	140,000
-	Transformer Oil Disposal	29,298	GAL	\$	140,000	\$	140,000
	PCB Impacted Concrete Removal	1	LS			\$	50,000
	Subtotal for all Environmental Costs			\$	670,000	\$	770,000
3	Structure Demolition and Removal						
3.1	Turbine Hall, Boiler House, Precip, Absorber & Baghouse	1	LS	\$	8,100,000	\$	8,100,000
3.2	Cooling Tower	1	LS	\$	630,000	\$	710,000
3.3	Ash Silo Area	1	LS	\$	100,000	\$	100,000
3.4	Chimney Demolition	11	LS	\$	130,000	\$	130,000
3.5	Elevated Concrete Removal	12,581	CY	\$	510,000	2000000000	510,000
	Subtotal for Demolition and Removal			\$	9,470,000	\$	9,550,000
		TOTAL	DIRECT COSTS	\$	11,150,000	\$	11,330,000
	Indirect Costs						
	Engineering/Permitting/Construction Management	1	LS	\$	1,500,000	<u> </u>	1,500,000
	Bonds/Insurance	1	LS	\$	300,000	\$	300,000
	Contingency	1	LS	\$	2,300,000		2,300,000
		TOTAL INC	DIRECT COSTS	\$	4,100,000	\$	4,100,000
		TOTAL DIRECT AND INC	DIRECT COSTS	\$	15,250,000	\$	15,430,000
	Scrap Salvage Quantity and Value						
	Ferrous Metals Quantity	34,000	TONS	\$	(2,010,000)	\$	(2,010,000)
	Non-Ferrous Quantity	3,382,000	LBS	\$	(4,150,000)		(4,150,000)
	Subtotal for all Scrap Salvage Value			\$	(6,160,000)		(6,160,000)
		TO	TAL NET COST	\$	9,090,000	\$	9,270,000
	Owners Costs						
	Owner Costs	1	LS	\$	800,000	\$	800,000
	Owner Contingency	1	LS	\$	800,000		800,000
	Subtotal for Owners Cost			\$	1,600,000	_	1,600,000
	TOTAL P	PROJECT COST (Including	Owner Costs)	\$	10,690,000	\$	10,870,000



PNM San Juan Generating Station Unit 2 - Full Demolition Cost Estimate Summary

Item	Description	Estimated Quantity	Unit		Option 1 Base Case		Option 2 Upper Bound
1	Decommissioning and Cleaning	3.3.00					
1.1	Generator Hydrogen Evacuation	1	LS	\$	-	\$	_
	Drain Boiler, Condenser, Feedwater Heater, Boiler Feed Pumps	1	LS	\$	-	\$	-
	Boiler, Precipitator Gypsum & Ash System Cleaning	2,600	CY	\$	165,000	\$	165,000
	Remove and Dispose all Debris, Trash & Combustibles	800	NT	\$	540,000	\$	540,000
1.5	Lubricating & Hydraulic System Draining	9,400	GAL	\$	105,000	\$	105,000
	Subtotal for Decommissioning & Cleaning Costs			\$	810,000	\$	810,000
2	Environmental Costs		-1.43				
2.1	Asbestos Removal and Disposal	1	LS	\$	40,000	\$	40,000
2.2	PCB Bulk Waste Abatement	1	LS	55		\$	50,000
2.3	Universal Waste Removal and Disposal	1	LS	\$	420,000	\$	420,000
	Regulated Waste & Chemical Removal	1	LS	\$	15,000	\$	15,000
2,5	Transformer Oil Disposal	28,204	GAL	\$	70,000	\$	70,000
2.6	PCB Impacted Concrete Removal	1	LS			\$	50,000
	Subtotal for all Environmental Costs			\$	545,000	\$	645,000
3	Structure Demolition and Removal						
3.1	Turbine Hall, Boiler House, Precip, Absorber & Baghouse	1	LS	\$	8,700,000	\$	8,700,000
	Cooling Tower Backfill	4,500	CY	\$	40,000	\$	110,000
3.3	Ash Silo Area	1	LS	\$	120,000	\$	120,000
3.4	Chimney Demolition	1	LS	\$	130,000	\$	130,000
3.5	Elevated Concrete Removal	12,500	CY	\$	510,000	\$	510,000
	Subtotal for Demolition and Removal			\$	9,500,000	\$	9,570,000
		TOTAL	DIRECT COST	s \$	10,855,000	\$	11,025,000
	Indirect Costs						
	Engineering/Permitting/Construction Management	1	LS	\$	1,500,000	\$	1,500,000
	Bonds/Insurance	1	LS	\$	300,000	\$	300,000
Action	Contingency	1	LS	\$	2,200,000	\$	2,300,000
		TOTAL INC	DIRECT COST	S \$	4,000,000	\$	4,100,000
+	TOTA	L DIRECT AND INC	DIRECT COST	s \$	14,855,000	\$	15,125,000
	Scrap Salvage Quantity and Value	1		1			
	Ferrous Metals Quantity	37,600	TONS	\$	(2,210,000)	\$	(2,210,000
	Non-Ferrous Quantity	3,297,000	LBS	\$	(4,210,000)		(4,210,000
	Subtotal for all Scrap Salvage Value			\$	(6,420,000)		(6,420,000
		TO	TAL NET COS	Tle	8,435,000	l e	8,705,000
		10	IAL NEI CUS	1 P	0,430,000	P	0,100,000
	Owners Costs						
	Owner Costs	1	LS	\$	800,000	\$	800,000
	Owner Contingency	1	LS	\$	800,000	\$	800,000
	Subtotal for Owners Cost			\$	1,600,000	\$	1,600,000
	TOTAL PROJEC	CT COST (Including	g Owner Costs	s) \$	10,035,000	\$	10,305,000



PNM San Juan Generating Station Unit 3 - Full Demolition Cost Estimate Summary

Item	Description	Estimated Quantity	Unit	Option 1 Base Case		Option 2 Upper Bound
1	Decommissioning and Cleaning					
1.1	Generator Hydrogen Evacuation	1	LS	\$ -	\$	-
1.2	Drain Boiler, Condenser, Feedwater Heater, Boiler Feed Pumps	1	LS	\$ -	\$	-
	Boiler, Precipitator Gypsum & Ash System Cleaning	4,000	CY	\$ 210,000	\$	210,000
1.4	Remove and Dispose all Debris, Trash & Combustibles	1,500	NT	\$ 1,020,000	\$	1,020,000
1.5	Lubricating & Hydraulic System Draining	12,448	GAL	\$ 140,000	\$	140,000
	Subtotal for Decommissioning & Cleaning Costs	7		\$ 1,370,000	\$	1,370,000
2	Environmental Costs					
2.1	Asbestos Removal and Disposal	1	LS	\$ 370,000	\$	370,000
2.2	PCB Bulk Waste Abatement	1	LS		\$	50,000
2.3	Universal Waste Removal and Disposal	1	LS	\$ 840,000	\$	840,000
2.4	Regulated Waste & Chemical Removal	1	LS	\$ 15,000	\$	15,000
2.5	Transformer Oil Disposal	58,006	GAL	\$ 280,000	\$	280,000
2.6	PCB Impacted Concrete Removal	1	LS		\$	50,000
	Subtotal for all Environmental Costs		A CONTRACT OF THE CONTRACT OF	\$ 1,505,000	\$	1,605,000
3	Structure Demolition and Removal					
3.1	Turbine Hall, Boiler House, Precip, Absorber & Baghouse	1	LS	\$ 15,820,000	\$	15,820,000
3.2	Cooling Tower	11	LS	\$ 810,000	\$	910,000
3.3	Ash Silo Area	11	LS	\$ 320,000	\$	320,000
3.4	Chimney Demolition	1	LS	\$ 130,000	\$	130,000
3.5	Elevated Concrete Removal	55,133	CY	\$ 510,000	\$	510,000
	Subtotal for Demolition and Removal			\$ 17,590,000	\$	17,690,000
		TOTAL	DIRECT COSTS	\$ 20,465,000	\$	20,665,000
	Indirect Costs					
	Engineering/Permitting/Construction Management	1	LS	\$ 2,700,000	\$	2,700,000
	Bonds/Insurance	1	LS	\$ 500,000	\$	500,000
	Contingency	1	LS	\$ 4,100,000	\$	4,200,000
		TOTAL IN	DIRECT COSTS	\$ 7,300,000	\$	7,400,000
	TOTAL	L DIRECT AND IN	DIRECT COSTS	\$ 27,765,000	\$	28,065,000
	Scrap Salvage Quantity and Value				2111	
	Ferrous Metals Quantity	74,000	TONS	\$ (4,210,000)	\$	(4,210,000)
	Non-Ferrous Quantity	5,127,000	LBS	\$ (6,800,000)	_	(6,800,000)
	Subtotal for all Scrap Salvage Value			\$ (11,010,000)		(11,010,000
		ТО	TAL NET COST	\$ 16,755,000	\$	17,055,000
	Owners Costs					
	Owner Costs	1	LS	\$ 1,400,000	\$	1,500,000
	Owner Contingency	1 1	LS	\$ 1,400,000	\$	1,500,000
100 00 100 00 100 00 00 100 00 00	Subtotal for Owners Cost		The state of the s	\$ 2,800,000	\$	3,000,000
	TOTAL PROJEC	T COST (Includin	g Owner Costs)	\$ 19,555,000	\$	20,055,000



PNM San Juan Generating Station Unit 4 - Full Demolition Cost Estimate Summary

Item	Description	Estimated	Unit		Option 1 Base Case		Option 2 Upper Bound
1	Decommissioning and Cleaning	Quantity					
1.1	Generator Hydrogen Evacuation	1	LS	\$	_	\$	
	Drain Boiler, Condenser, Feedwater Heater, Boiler Feed Pumps	1	LS	\$	10.000	\$	10,000
1.3	Boiler, Precipitator Gypsum & Ash System Cleaning	8,000	CY	\$	420,000	\$	420,000
	Remove and Dispose all Debris, Trash & Combustibles	1,500	NT	\$	1,020,000	\$	1,020,000
			GAL	\$			180,000
1.5	Lubricating & Hydraulic System Draining Subtotal for Decommissioning & Cleaning Costs	15,999	GAL	\$	180,000 1,630,000	Φ \$	1,630,000
	Dubtouil for Decommissioning & Occurring Costs	1		•	1,030,000	Ψ	1,030,000
2	Environmental Costs						
2.1	Asbestos Removal and Disposal	1	LS	\$	40,000	\$	40,000
2.2	PCB Bulk Waste Abatement	1	LS	688		\$	50,000
2.3	Universal Waste Removal and Disposal	1	LS	\$	600,000	\$	600,000
2.4	Regulated Material & Chemical Removal	1	LS	\$	80,000	\$	80,000
2.5	Transformer Oil Disposal	39,490	GAL	\$	190,000	\$	190,000
2,6	PCB Impacted Concrete Removal	1	LS			\$	50,000
2.0	Subtotal for all Environmental Costs			\$	910,000	\$	1,010,000
				o Licitado			
3	Structure Demolition and Removal						
3.1	Turbine Hall, Boiler House, Precip, Absorber & Baghouse	1	LS	\$	15,820,000	\$	15,820,000
3.2	Cooling Tower	1	LS	\$	1,410,000	\$	1,630,000
3.3	Ash Silo Area	1	LS	\$	320,000	\$	320,000
3.4	Chimney Demolition	1	LS	\$	130,000	\$	130,000
3.5	Elevated Concrete Removal	55,069	CY	\$	510,000	\$	510,000
	Subtotal for Structure Demolition and Removal			\$	18,190,000	\$	18,410,000
		TOTAL F	DIRECT COSTS	٠ (ه	20 720 000	e e	21,050,000
		TOTALL	JINECT COST)	20,730,000	Ψ	21,030,000
	Indirect Costs						
	Engineering/Permitting/Construction Management	1	LS	\$	2,700,000	\$	2,800,000
	Bonds/Insurance	1	LS	\$	500,000	\$	500,000
	Contingency	1	LS	\$	4,200,000	\$	4,300,000
		TOTAL INC	DIRECT COSTS		7,400,000	\$	7,600,000
	TOTAL C	IRECT AND INC	DIRECT COSTS	\$ \$	28,130,000	\$	28,650,000
	0						
	Scrap Salvage Quantity and Value Ferrous Metals Quantity 75,000 (tons)	75.000	TONE	6	(4.070.000)	•	/4 070 000
	Non-Ferrous Quantity 5,073,000 (lbs)	75,000	TONS	\$	(4,270,000)		(4,270,000)
	Subtotal for all Scrap Salvage Value	5,073,000	LBS	\$	(6,720,000)	****	(6,720,000)
5-15-16-16				\$	(10,990,000)	Þ	(10,990,000)
		TO	TAL NET COST	Г \$	17,140,000	\$	17,660,000
					was some all of Assistant	- constant	
	Owners Costs						
	Owner Costs	1	LS	\$	1,500,000	\$	1,500,000
	Owner Contingency	1	LS	\$	1,500,000	\$	1,500,000
1757 W. 1257 1984 W. 1857	Subtotal for Owners Cost			\$	3,000,000	\$	3,000,000
	TOTAL UNIT 4 COST (Including Owner Costs)			\$	20,140,000	\$	20,660,000



PNM San Juan Generating Station Unit 1 & 2 Common - Full Demolition Cost Estimate Summary

Item	Description	Estimated Quantity	Units		Option 1 Base Case	(Option 2 Upper Bound
1	Decommissioning and Cleaning						
	Cleaning, Draining & Purging of Plant Common Equipment	1 1	LS	\$	620,000	\$	620,000
	Subtotal for Decommissioning & Cleaning Costs			\$	620,000	\$	620,000
2	Environmental Costs						
2.1	Asbestos Removal and Disposal	1	LS	\$	30,000	\$	30,000
2.2	PCB Bulk Waste Abatement	1	LS			\$	50,000
2.3	Universal Waste Removal and Disposal	1	LS				
2.4	Regulated Material Removal	1	LS	\$	1,060,000	\$	1,060,000
2.5	PCB Impacted Concrete Removal	1	LS			\$	50,000
	Subtotal for all Environmental Costs	61 (A) 10 (A) 10 (A)		\$	1,090,000	\$	1,190,000
3	Structure Demolition and Removal						
3.1	Hydrogen Tanks	1	LS	\$	5,000	\$	5,000
	Fuel Oil Tank	1	LS	\$	14,000	\$	14,000
	Fuel Oil Building	1	LS	\$	1,000	\$	1,000
	Subtotal for Demolition and Removal			\$	20,000	\$	20,000
		TOTALI	DIRECT COST	S \$	1,730,000	\$	1,830,000
	Indirect Costs						
	Engineering/Permitting/Construction Management	1	LS	\$	300,000		300,000
	Bonds/Insurance	1	LS	\$	100,000		100,000
	Contingency	1	LS	\$	400,000		400,000
		TOTAL INI	DIRECT COST	S \$	800,000	\$	800,000
	70	OTAL DIRECT AND INI	DIRECT COST	S \$	2,530,000	\$	2,630,000
	Scrap Salvage Quantity and Value						
	Ferrous Metals Quantity	51	TON	\$	(10,000)	\$	(10,000)
	Non-Ferrous Quantity	0	LBS				
	Subtotal for all Scrap Salvage Value			\$	(10,000)	\$	(10,000
		ТО	L TAL NET COS	T \$	2,520,000	\$	2,620,000
	Owners Costs						
	Owner Costs	1	LS	\$	200,000	\$	200,000
	Owner Contingency	1	LS	\$	200,000	\$	200,000
	Subtotal for Owners Cost			\$	400,000	\$	400,000
	TOTAL UNIT 1 & 2 COM	MON COST (Including	Owner Costs	s) s	2,920,000	s	3,020,000



PNM San Juan Generating Station Unit 3 & 4 Common - Full Demolition Cost Estimate Summary

Item	Description	Estimated Quantity	Units		Option 1 Base Case	(Option 2 Upper Bound
. 1	Decommissioning and Cleaning						
1.1	Cleaning, Draining & Purging of Plant Common Equipment	1 1	LS	\$	1,500,000	\$	1,500,000
	Subtotal for Decommissioning & Cleaning Costs			\$	1,500,000	\$	1,500,000
2	Environmental Costs						
2.1	Asbestos Removal and Disposal	1	LS				
2.2	PCB Bulk Waste Abatement	1	LS			\$	50,000
2.3	Universal Waste Removal and Disposal	1	LS				
2.4	Regulated Material Removal	1	LS	\$	100,000	\$	100,000
2.5	PCB Impacted Concrete Removal	1	LS	1000		\$	50,000
	Subtotal for all Environmental Costs			\$	100,000	\$	200,000
3	Structure Demolition and Removal						
240000000	Hydrogen Tanks	1 1	LS	\$	10,000	\$	10.000
	Fuel Oil Tank	1 1	LS	\$	20,000	\$	20,000
	Fuel Oil Building	1 1	LS	\$	10,000	_	10,000
	Auxiliary Cooling Tower	1	LS	\$	170,000		190,000
	12 Ton & 26 Ton CO2 Tanks	1	LS	\$	10,000	\$	10,000
	Subtotal for Demolition and Removal			\$	220,000	\$	240,000
		TOTAL	IRECT COST	'S \$	1,820,000	\$	1,940,000
	Indirect Costs			T			
(estade	Engineering/Permitting/Construction Management	1 1	LS	\$	300,000	\$	300,000
	Bonds/Insurance	1	LS	\$	100,000	\$	100,000
	Contingency	1	LS	\$	400,000	\$	400,000
		TOTAL INC	IRECT COST	rs \$	800,000	\$	800,000
		TOTAL DIRECT AND INC	IRECT COST	rs \$	2,620,000	\$	2,740,000
	Scrap Salvage Quantity and Value			- I			
	Ferrous Metals Quantity	69	TON	\$	(20,000)	\$	(20,000
	Non-Ferrous Quantity	19,500	LBS	\$	(30,000)		(30,000
	Subtotal for all Scrap Salvage Value	. 13,000	LDO	\$	(50,000)		(50,000
		ТО	TAL NET COS	ST \$	2,570,000	\$	2,690,000
	Owners Costs						
	Owner Costs	1	LS	\$	200,000		200,000
			LS	\$	202 202	\$	200,000
	Owner Contingency Subtotal for Owners Cost	1	LO	- P	200,000	Φ	200,000



PNM San Juan Generating Station Plant Common - Full Demolition Cost Estimate Summary

Item	Description	Estimated Quantity	Unit		Option 1 Base Case		Option 2 Upper Bound
1	General Conditions	Quantity					
1.1	Mobilization and De-Mobilization	1	LS	\$	200,000	\$	200,000
1.2	Erosion Controls	1	LS	\$	250,000		250,000
	Permitting	1	LS	\$	20,000	_	20,000
1.4	Temporary Power	1	LS	\$	30,000		30,000
1.5	Mechanical System Isolation	1	LS	\$	270,000		270,000
1.6	Electrical System Isolation	1	LS	\$	190,000	<u> </u>	190,000
7.0	Subtotal for General Conditions Costs	'		\$	960,000		960,000
							,
2	Decommissioning and Cleaning						
2.1	Northside WWTP Facility	1	GAL	\$	380,000	\$	380,000
2.2	Southside WWTP Facility	11,500	GAL	\$	30,000	\$	30,000
2.3	Limestone Prep Bldg.	100	CY	\$	50,000	\$	50,000
2.4	Bulk Used Oil Storage	2,000	GAL	\$	180,000	\$	180,000
2.5	Coal Handling	200	NT	\$	460,000		460,000
2.6	Secure Reclaim Hopper Openings	1	LS	\$	20,000	\$	20,000
2.7	Sewage Treatment	132	NT	\$	20,000		20,000
2.8	Remove Vehicle Fueling UST & Backfill	3,700	CY	\$	70,000	\$	70,000
2.9	Gypsum Storage Pile	4,000	CY	\$	40,000	\$	40,000
7	Subtotal for Decommissioning & Cleaning Costs			5	1,250,000	\$	1,250,000
						Inchine .	
3	Environmental Costs						
3.1	Asbestos Removal and Disposal	1	LS	\$	290,000	\$	290,000
3.2	PCB Bulk Waste Abatement	1	LS			\$	50,000
3,3	Universal Waste Removal and Disposal	1	LS	\$	1,240,000	\$	1,240,000
3.4	Regulated Material Removal	1	LS	\$	1,900,000	\$	1,900,000
3,5	Transformer Oil Disposal	9,774	GAL	\$	40,000	\$	40,000
3.6	PCB Impacted Concrete Removal	1	LS			\$	50,000
	Subtotal for all Environmental Costs			\$	3,470,000	\$	3,570,000
						-	
4	Structure Demolition and Removal	100					
4.1	Plant Wide Structure Demolition	1	LS	\$	1,550,000		1,550,000
	North & South WWTP	1	LS	\$	300,000		300,000
4.3	Coal Handling	1	LS	\$	1,200,000		1,550,000
4.4	Permitted Dam Decommissioning (to be completed in 2040)	1	LS	\$	1,300,000	\$	1,800,000
4.5	Lake Station Demolition (to be completed in 2040)	1	LS	\$	80,000	\$	80,000
4.6	River & Lake Station Pump Modifications	1	LS	\$	660,000	\$	660,000
4.7	River Station Demolition (to be completed in 2040)	1	LS	\$	800,000	\$	1,250,000
4.8	Demolition of Schumway Slurry Wall (to be completed in 2040)	1	LS	\$	170,000	\$	170,000
4.9	Elevated Concrete Removal	8,347	CY	\$	360,000		360,000
	Subtotal for Demolition and Removal			\$	6,420,000	\$	7,720,000
olendara parane						1000	
5	Site Restoration	F0 400	OV		F 000 000		F 000 011
5.1	Flow Fill Pipes > 24" Diameter	50,100	CY	\$	5,620,000	\$	5,620,000
5.2	Concrete Crushing	9,500	NT	\$	60,000	<u></u>	60,000
5.3	Off-Site Concrete Disposal	169,000	NT			\$	2,050,000
77	Subtotal for Site Restoration			\$	5,680,000	\$	7,730,000



PNM San Juan Generating Station Plant Common - Full Demolition Cost Estimate Summary

Item	Description	Estimated Quantity	Unit		Option 1 Base Case		Option 2 Upper Bound
6	Effluent Pond & Coal Pile Closure						
6.1	General Conditions	1	LS	\$	150,000	\$	180,000
6.2	Mobilization/Demobilization	1	LS	\$	130,000	\$	130,000
6.3	Quality Assurance/Quality Control	1	LS	\$	80,000	\$	80,000
6.4	Dewatering & Water Management	1	LS	\$	50,000	\$	50,000
6.5	Effluent Pond 1A	1	LS	\$	70,000	\$	180,000
	Effluent Pond 1B	1	LS	\$	40,000	\$	100,000
	Effluent Pond 2A	1	LS	\$	80,000	\$	230,000
	Effluent Pond 2B	1 1	LS	\$	390,000	\$	1,190,000
6.9	Effluent Pond 3A	1	LS	\$	60,000	\$	130,000
	Effluent Pond 3B	1	LS	\$	160,000	\$	360,000
	Effluent Pond 3C	1 1	LS	\$	110,000	\$	240,000
	U1 & U2 Coal Run Off Pond	1	LS	\$	100,000	\$	180,000
	U3 & U4 Coal Run Off Pond	1 1	LS	\$	210,000	\$	330,000
	Coal Pile	1 1	LS	\$	80,000	\$	80,000
6,15	Solid Waste Pit Subtotal for Effluent Pond & Coal Pile Closure	1	LS	\$	170,000	\$	240,000
	Subtotal for Emilient Fond & Coal File Closure			\$	1,880,000	\$	3,700,000
7	South Evaporation Pond Closure						
7.1	General Conditions	1	LS	\$	350,000	\$	500,000
	Mobilization/Demobilization	1	LS	\$	150,000	\$	180,000
	Quality Assurance/Quality Control	1 1	LS	\$	110,000	\$	110,000
	Dewatering & Water Management	 	LS	\$	50.000	\$	50,000
7.5	Evaporation Pond 1	1 1	LS	\$	2,700,000	\$	4,100,000
	Evaporation Pond 2 (to be completed in 2040)	1	LS	\$	3,900,000	\$	3,900,000
7.7	Evaporation Pond 3 (to be complete in 2040)	1 1	LS	\$	6,250,000	\$	6,250,000
7.8	Evaporation Pond 4	1 1	LS	\$	2,800,000	\$	4,250,000
7.90	Evaporation Pond 5	1 1	LS	\$	2,650,000	\$	4,050,000
	Subtotal for South Evaporation Ponds Closure	·		\$	18,960,000	\$	23,390,000
		TOTAL D	IRECT COSTS	\$		\$	48,320,000
	Indirect Costs						
	Engineering/Permitting/Construction Management	1	LS	\$	5,100,000	\$	6,300,000
	Bonds/Insurance	1 1	LS	\$	800,000	\$	1,000,000
	Contingency	 	LS	\$	7,800,000	\$	9,700,000
			DIRECT COSTS			000 D 000	17,000,000
		TOTAL INC	JIKLO1 GOG1E	4 2	13,700,000	Ψ	17,000,000
	TOTAL	DIRECT AND INC	DIRECT COSTS	\$	52,320,000	\$	65,320,000
	Scrap Salvage Quantity and Value						
	Ferrous Metals Quantity	5,300	TON	\$	(370,000)	\$	(370,000)
	Non-Ferrous Quantity	460,000	LBS	\$	(670,000)	\$	(670,000)
	Warehouse Stock	1	LS	\$	(1,500,000)	\$	(1,500,000)
	Vehicles & Equipment	1	LS	\$	(10,000)	\$	(10,000
	Transformers	1	LS	\$	(2,900,000)	\$	(2,900,000
	Cyber Assets	1	LS	\$	(90,000)	\$	(90,000
	Subtotal for all Scrap Salvage Value			\$	(5,540,000)	\$	(5,540,000
		TO [*]	TAL NET COST	ls.	46.780.000	s	59.780.000



PNM San Juan Generating Station Plant Common - Full Demolition Cost Estimate Summary

Item	Description	Estimated Quantity	Unit		Option 1 Base Case	(Option 2 Upper Bound
14 Tag 1 Ang	Owners Costs						
	Owner Costs	1	LS	\$	2,700,000	\$	3,300,000
	Owner Contingency	1	LS	\$	2,700,000	\$	3,300,000
	Subtotal for Owners Cost			S	5,400,000	\$	6,600,000

A	Annual Site Costs				
A.1	Lake & River Station Maintenance	1	LS	\$ 180,000	\$ 180,000
A.2	Site Security	1	LS	\$ 6,000	\$ 6,000
A.3	Insurance Premiums starting in 2023	1	LS	\$ 225,000	\$ 225,000
A.4	Tax	1	LS	\$ -	\$ -
A.5	South #2 Pond, Shumway & Memorial Recovery Monitoring	1	LS	\$ 180,000	\$ 180,000
	Annual Site Costs			\$ 591,000	\$ 591,000

All costs are in 2019 Dollars



Calculation of San Juan Decommissioning Costs

PNM Exhibit TGF-8

Is contained in the following 3 pages.

San Juan Generating Station Decommissioning Costs

The SJGS Decommissioning Committee contracted Burns and McDonnell to perform a preliminary update to the SJGS decommissioning costs for a 2022 shutdown (2019 Decommissioning Study). Pursuant to the SJGS Decommissioning agreement, the SJGS Decommissioning Committee will complete a final decommissioning study after the final decision to shut down SJGS is reached. The SJGS owners are waiting until the NMPRC rules on PNM's abandonment filing and the City of Farmington completes its assessment of the potential to continue operation of SJGS to complete the final decommissioning study and make a determination on the scope of decommissioning activities. The 2019 Decommissioning Study is the latest update and will form much of the basis for the final SJGS decommissioning study.

The 2019 Decommissioning Study provides a detailed breakout of the costs of different decommissioning scenarios in the Appendix to allow the SJGS owners a full assessment of these costs and the ability to evaluate different assumptions for these retirement costs.

PNM's estimated SJGS decommissioning costs used in this case are based on the "Industry Best Option" as identified on pages 1-7 which totals \$58,533,000. PNM reviewed the details of this estimate and made the following adjustments:

Description	Amount	Reference/Comments
Option 1 - Industry Best	\$58,533,000	2019 Decommissioning Study Pages 1-7
		Estimate on inventory sale per 2019
		Decommissioning Study Pages 1-9. PNM considers
		. this an offset to inventory balances and not a
		decommissioning expense. This amount was
		removed from decommissioning as it was included
Inventory accounting treatment	\$1,500,000	as a reduction to inventory balances.
		Reference 2019 Decommissioning Study Page B-8.
		PNM anticipates transfer of Lake Station and
Lake Station anticipated transfer		therefore no decommissioning costs. Decrease
(Diversion Facility)	(\$1,380,000)	decommissioning cost by this amount.
		Reference 2019 Decommissioning Study Page B-8.
		PNM anticipates transfer of River Station and
River Station anticipated transfer	1	therefore no decommissioning costs. Decrease
(Diversion Facility)	(\$800,000)	decommissioning by this amount
		Decrease in contingency funding based on PNM's
		experience with similar activities with SJGS Unit 2
		and 3 shutdown and familiarity with the SJGS site.
		Also, removal of Lake and River station which have
Decrease in Contingency	(\$7,700,000)	the greatest uncertainty in project scope.

All Ownership Share Project Estimate	\$50,153,000

		Per Exhibit A of the San Juan Decommissioning and
PNM percentage of Total Project		
PNM Decommissioning Estimate	\$24,073,440	Supplied to PNM Witness Monroy

SJGS On-Going Costs as Part of the Industry Best Decommissioning Study

As identified in the 2019 Decommissioning Study on pages 1-13 a breakeven cost analysis was performed for Industry Best scenario versus the Full Demolition scenario. This shows that the Industry Best option results in the lowest cost to PNM customers. See graph reproduced below.

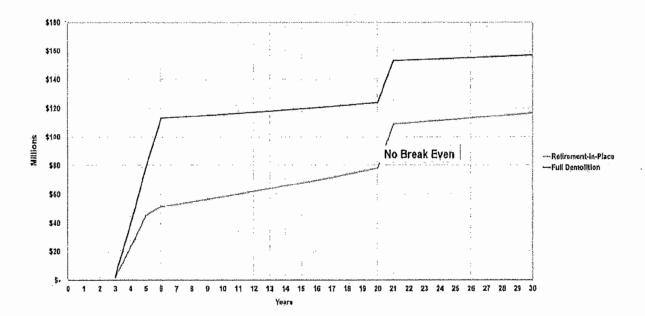


Figure 1-1. Industry Best RIP vs. Base Full Demolition

The Industry Best scenario results in some continuing costs to ensure the site is maintained securely, retains appropriate retired unit insurance, continued required environmental monitoring, and provides for identification and completion of minor repair items to minimize future costs or potential liabilities. These on-going costs for the Industry Best scenario are shown in Table 1-3 on page 1-7 of the 2019 Decommissioning Study. PNM again reviewed these on-going cost estimates for any potential adjustments.

Adjustment to SJGS On-Going Costs for Industry Best Decommissioning Option

Description	Amount	Reference/Comments
Industry Best Scenario	\$1,450,500	2019 Decommissioning Study Pages 1-7
Property Taxes	\$106,237	On-going Property Taxes excluded from 2019 Decommissioning Study
Reduction for Lake and River Station on-		Reference 2019 Decommissioning Study Appendix B. PNM anticipates transfer of Lake and River Station and therefore no on-going decommissioning costs. Decrease decommissioning on-going cost
going costs (Diversion Facilities)	(\$212,040)	by this amount

All Ownership Share Project Estimate	\$1,344,697
--------------------------------------	-------------

		Per Exhibit A of the San Juan
		Decommissioning and Trust Fund
PNM percentage of Total Project	48%	Agreement for a 2022 shutdown
PNM Decommissioning Estimate	\$645,455	Supplied to PNM Witness Monroy

Prepared by	Thomas Fallgren	Date:	6/24/2019

Arroyo Solar PPA

PNM Exhibit TGF-9

Is contained in the following 102 pages.

EXECUTION VERSION PNM Contract No. 1057682

POWER PURCHASE AGREEMENT—ARROYO SOLAR FACILITY

by and between

PUBLIC SERVICE COMPANY OF NEW MEXICO

and

ARROYO SOLAR LLC

Dated as of June 27, 2019

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EXHIBITS

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POWER PURCHASE AGREEMENT—ARROYO SOLAR FACILITY

This Power Purchase Agreement—Arroyo Solar Facility, as may be amended from time to time, is entered into this 27th Day of June, 2019 ("Execution Date"), by and between Public Service Company of New Mexico, a New Mexico corporation ("PNM" or "Buyer"), whose principal place of business is 414 Silver Avenue SW, Albuquerque, NM 87102, and Arroyo Solar LLC, a Delaware limited liability company ("Seller"), whose principal place of business is 1717 West Loop South, Suite 1800, Houston TX 77027. Buyer and Seller may be referred to in this PPA individually as a "Party" and collectively as the "Parties."

WHEREAS, Buyer is a public utility that owns and operates electric generation, transmission, and distribution facilities and is subject to the laws of the State of New Mexico and the rules and regulations of the New Mexico Public Regulation Commission; and

WHEREAS, Seller desires to develop, design, construct, own and operate a solar powered electricity generating facility having a designed net power output capability of 300 MW, as further defined herein and in Exhibit A; and

WHEREAS, Seller desires to generate, sell and deliver to Buyer the Energy generated by the Project and any and all associated or correlative Renewable Energy Certificates and other Environmental Attributes, and Buyer agrees to buy the same from Seller, in accordance with the terms and conditions set forth in this PPA,

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

ARTICLE 1 Definitions and Rules of Interpretation

- 1.1 <u>Definitions</u>. The following terms shall have the meanings set forth herein.
- "Abandonment" means (a) a cessation of work and operations at the Project for more than ninety (90) Days by Seller or Seller's contractors but only if such cessation is not in accordance with Prudent Utility Practices or caused by a Force Majeure, or (b) the relinquishment of possession and control of the Project (or any material portion thereof) by Seller, other than a transfer permitted under this PPA.
 - "AC" means alternating electric current.
 - "Accounting Standards" has the meaning set forth in Section 22.18.
- "Additional Consents" means the approvals, consents, authorizations or other requirements not listed in the definition of Governmental Approvals in this PPA that are required from any Governmental Authority with respect to the Project.

"Affiliate" of any named Person or entity means any other person or entity that controls, is under the control of, or is under common control with, the named entity. The term "control" (including the terms "controls," "under the control of" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person or entity, whether through ownership of fifty percent (50%) or more of the outstanding capital stock or other equity interests of any class of voting securities, by contract, or otherwise.

"After Tax Basis" means, with respect to any payment received or deemed to have been received by a Party, the amount of such payment ("Base Payment") supplemented by a further payment ("Additional Payment") to such Party so that the sum of the Base Payment plus the Additional Payment shall, after deduction of the amount of all Taxes (including any federal, state or local income taxes) required to be paid by such Party in respect of the receipt or accrual of the Base Payment and the Additional Payment (taking into account any current or previous credits or deductions arising from the underlying event giving rise to the Base Payment and the Additional Payment), be equal to the amount required to be received. Such calculations shall be made on the assumption that the recipient is subject to federal income taxation at the highest applicable statutory rate applicable to corporations for the relevant period or periods, and state and local taxes at the highest rates applicable to corporations with respect to such Base Payment and Additional Payment, and shall take into account the deductibility (for federal income tax purposes) of state and local income taxes.

"AGC" stands for "Automatic Generation Control" and means energy management system equipment that automatically adjusts the generation quantity of the Project, including communication circuits to communicate Project operating information to Buyer's representatives on a real-time basis for the purpose of telemetering, supervisory control/data acquisition and voice communications.

"Ancillary Services" means operating reserves, regulation, reactive supply, voltage control, frequency response, other products associated with electric generation and Energy that the Project is capable of providing and all other beneficial outputs of the Project not required for the operation of the Project.

"Annual Performance Test Guarantee Damages" has the meaning set forth in Section 10.9(C).

"Annual Solar Capacity Guarantee Damages Cap" has the meaning set forth in Section 10.9(E).

"Applicable Law" means all applicable laws, statutes, treaties, codes, ordinances, regulations, certificates, orders, licenses and permits of any Governmental Authority, now in effect or hereafter enacted, amendments to any of the foregoing, interpretations of any of the foregoing by a Governmental Authority having jurisdiction over this PPA and matters related thereto, the Parties or the Project, and all applicable judicial, administrative, arbitration and regulatory decrees, judgments, injunctions, writs, orders, awards or like actions (including those relating to human health, safety, the natural environment or otherwise).

"Attestation and Bill of Sale" has the meaning set forth in Section 9.1(C).

"Average Market Price" means the five minute, real time average price of energy as determined at the Palo Verde Trading Hub and for RECs means the average price of unbundled solar RECs sold for projects in the WECC region as determined by Karbone Inc. or other broker mutually agreed by the parties during the time in question.

"Back-Up Metering" has the meaning set forth in Section 5.3(D).

"Balancing Area" or "BA" has the meaning given by NERC in its Glossary of Terms Used in NERC Reliability Standards, as may be amended from time to time.

"Balancing Area Authority" or "BAA" has the meaning given by NERC in its Glossary of Terms Used in NERC Reliability Standards, as may be amended from time to time.

"Bankruptcy Code" means the United States Bankruptcy Code, 11 U.S.C. § 101 et seq., as amended from time to time.

"Business Day" means any calendar Day that is not a Saturday, a Sunday, or a state and/or federal recognized holiday where banks in Albuquerque, New Mexico, are permitted or authorized to close.

"Buyer" has the meaning set forth in the Preamble.

"Buyer Costs" means brokerage fees, commissions and other similar third party transaction costs and expenses reasonably incurred and documented by Buyer either in terminating any arrangement pursuant to which it has hedged its obligations under this PPA or entering into new arrangements which replace this PPA; and all reasonable attorneys' fees and expenses incurred by Buyer in connection with the termination of this PPA, to the extent such costs are not already accounted for under Replacement Energy Costs.

"Buyer Curtailment" has the meaning set forth in Section 4.1(B).

"Buyer Termination Payment" means the sum of (a) the aggregate of all amounts then owed from Seller to Buyer less any amounts owed from Buyer to Seller, plus (b) the positive difference, if any, between (i) the net present value of the Replacement Energy Costs and (ii) the Contract Value, plus (c) Buyer Costs all using a discount factor equal to the latest weighted average cost of capital as reported in the then-most recent NMPRC Rule 510 Annual Reporting filing. Any such calculations will be based on reasonable assumptions as to future Project operations, differences between a replacement contract and this PPA, and similar considerations. The Buyer Termination Payment does not include consequential incidental, punitive, exemplary or indirect or business interruption damages.

"Capacity Shortfall Damages" has the meaning set forth in Section 3.8.

"Change of Control" means any circumstance in which Ultimate Parent ceases to own, directly or indirectly through one or more intermediate entities, at least fifty percent (50%) of the outstanding equity or voting interests in Seller.

"Code" means the U.S. Internal Revenue Code of 1986, including applicable rules and regulations promulgated thereunder, as amended from time to time.

"Commercial Operation" means that (a) Solar Units with an aggregate capacity of at least ninety percent (90%) of the Guaranteed Solar Capacity have been constructed, commissioned, tested and proven capable of delivering Energy on a sustained basis without experiencing any abnormal or unsafe operating conditions on any interconnected system, (b) all Seller required permits, required consents, and Governmental Approvals are in full force and effect; (c) Seller has obtained all necessary rights under a separate Interconnection Agreement between Seller and the Transmission Provider for interconnection and delivery of Energy to the Point of Delivery and is not in breach of its Interconnection Agreement, (d) Seller has satisfactorily completed other testing in accordance with Interconnection Agreement requirements; (e) Seller has obtained required insurance coverage as set forth in this PPA; (f) Seller has provided to Buyer an officer's certificate that the Project has been completed in all material respects; and (g) Seller has delivered to Buyer the Delivery Term Security.

"Commercial Operation Date" means the date on which Seller submits to Buyer (a) a written notification to Buyer that the Commercial Operation has commenced, (b) a certification from a Licensed Professional Engineer, substantially in the form attached hereto as Exhibit K, and all fees and costs associated with the Licensed Professional Engineer shall be borne by Seller, and (c) Seller shall have delivered the Delivery Term Security to Buyer in accordance with the relevant provisions of Article 19, all as accepted by Buyer in Buyer's reasonable discretion.

"Commercial Operation Year" means a period of twelve (12) consecutive Months; provided that the first Commercial Operation Year shall commence on the Commercial Operation Date and end on the last Day of the Month that is twelve (12) full Months after the Commercial Operation Date, and each subsequent Commercial Operation Year shall be the twelve (12) Month period commencing at the end of the prior Commercial Operation Year.

"Confidential Information" has the meaning set forth in Section 22.14(C).

"Contract Value" means the present values of the Energy Output, for each Commercial Operation Year (or portion thereof) in the then remaining term, determined without reference to the early termination, of (a) the quantity of Energy expected to be produced during such Commercial Operation Year (or portion thereof) times (b) the Solar Energy Output Payment Rate for such Commercial Operation Year. All elements of the foregoing calculations shall be determined in a commercially reasonable manner. The present values of the monthly payments from their payment dates in the foregoing calculations shall be determined using a discount factor equal to the latest weighted average cost of capital as reported in the then-most recent NMPRC Rule 510 Annual Reporting filing.

"Day" means a calendar day and includes Saturdays, Sundays and holidays; 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.

"DC" means direct current.

"Deemed Delivered Energy" has the meaning set forth in Section 4.1(B).

"Default Rate" has the meaning set forth in Section 9.4.

"Defaulting Party" means the Party with respect to which an Event of Default under Article 12 has occurred.

"Deficiency Period" has the meaning set forth in Section 10.10(B).

"Delay Damages" has the meaning set forth in Section 3.7.

"Delayed Capacity" has the meaning set forth in Section 3.7.

"Delivery Term" has the meaning set forth in Section 7.1.

"Delivery Term Security" has the meaning set forth in Section 19.1.

"Development Security" has the meaning set forth in Section 19.1.

"Disclosing Party" has the meaning set forth in Section 22.14(A).

"Dispute Notice" has the meaning set forth in Section 13.8.

"Disputing Party" has the meaning set forth in Section 9.5(A).

"Dollars" means the lawful currency of the United States of America.

"Downgrade Event" shall mean that the long-term credit rating of a Person's long-term senior unsecured debt is not "Baa2" or higher by Moody's or "BBB" or higher by S&P.

"Early Project Blocks" has the meaning set forth in Section 3.9.

"Early Termination Date" has the meaning set forth in Section 12.4.

"Electric Interconnection Point" means the physical point at which electrical interconnection is made between the Project and the Transmission Provider's Transmission System.

"Electric Metering Device(s)" means all metering and data processing equipment used to measure, record, or transmit data relating to the Energy Output generated by the Project. Electric Metering Devices include the metering current transformers and the metering voltage transformers.

"Emergency Condition" means (a) a condition or situation that presents an imminent physical threat of danger to life, health or property, and/or could reasonably be expected in the opinion of the Transmission Provider to cause a significant disruption to the Transmission Provider's Transmission System or otherwise be required in accordance with the requirements of the Peak Reliability Organization and/or NERC/WECC, or (b) any system condition not consistent with Prudent Utility Practices; provided that an Emergency Condition shall not include any emergency caused by Seller's breach of its Interconnection Agreement with the Transmission Provider.

"Energy" means three-phase, 60-cycle alternating current electric energy, expressed in units of kWh or MWh, generated by the Project and delivered to Buyer at a nominal voltage at the Point of Delivery, as measured by Electric Metering Devices.

"Energy Output" means Metered Output, Environmental Attributes (including RECs), Ancillary Services and associated electrical capacity rights generated by the Project.

"Energy Shortfall" has the meaning set forth in Section 10.9(B).

"Environmental Attributes" means all attributes, aspects, characteristics, claims, credits, benefits, reductions, offsets or allowances of an environmental nature that are created or otherwise arise from the Project's generation of electricity from renewable energy resources in contrast with the generation of electricity using nuclear or fossil fuels or other traditional resources. Forms of such attributes include any and all environmental air quality credits, green credits, including carbon credits, emissions reduction credits, certificates, tags, offsets, allowances, or similar products or rights, howsoever entitled, (i) resulting from the avoidance of the emission of any gas, chemical, or other substance, including mercury, nitrogen oxide, sulfur dioxide, carbon dioxide, carbon monoxide, particulate matter or similar pollutants or contaminants of air, water or soil, gas, chemical, or other substance, and (ii) attributable to the generation, purchase, sale or use of Energy. Environmental Attributes include those currently existing or arising during the Term under local, state, regional, federal, or international legislation or regulation relevant to the avoidance of any emission described above under any governmental, regulatory or voluntary program, including the United Nations Framework Convention on Climate Change and related Kyoto Protocol or other programs, laws or regulations. Environmental Attributes include the reporting rights related to any such attributes, aspects, characteristics, claims, credits, benefits, reductions, offsets or allowances, including the right of a Person to report the ownership thereof in compliance with federal or state law, if applicable, or otherwise to a federal or state agency or any other Person. Environmental Attributes specifically exclude (i) Tax Benefits, (ii) depreciation deductions and depreciation benefits, and other tax benefits arising from ownership or operation of the Project; and (iii) any Energy, reliability or other power attributes from the Project.

"Environmental Contamination" means the introduction or presence of Hazardous Materials at such levels, quantities or location, or of such form or character, as to constitute a violation of federal, state or local laws or regulations, and present a material risk under federal, state or local laws and regulations that a Site will not be available or usable, whether in whole or in part, for the purposes contemplated by this PPA.

"Event of Default" means a Seller Event of Default as set forth in Section 12.1 or a Buyer Event of Default as set forth in Section 12.2.

"Execution Date" has the meaning set forth in the Preamble.

"Expected Commercial Operation Date" has the meaning set forth in Section 3.1.

"Federal Power Act" means the Federal Power Act, as amended, 16 U.S.C. § 791a et seq.

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

"Force Majeure Event" has the meaning set forth in Section 14.1(A).

"GAAP" has the meaning set forth in Section 22.18.

"Governmental Approval" means any authorization, consent, permission, approval (including an NMPRC Approval), license, ruling, permit, exemption, variance, order, judgment, instruction, condition, direction, directive, decree, declaration of or regulation by any Governmental Authority relating to the construction, development, ownership, occupation, startup, testing, operation or maintenance of the Project or to the execution, delivery or performance of this PPA or the procurement pursuant to this PPA of renewable energy and Renewable Energy Certificates and shall also mean, where and as applicable and the context so dictates, any and all authorization, consent, permission, approval, license, ruling, permit, exemption, variance, order, judgment, instruction, condition, direction, directive, decree, declaration of or regulation with regard to any Non-Governmental Compliance Obligations.

"Governmental Authority" means any federal, state, local or municipal governmental body; any governmental, quasi-governmental, regulatory or administrative agency, commission, body or other authority exercising or entitled to exercise any administrative, executive, judicial, legislative, policy, regulatory or taxing authority or power; or any court or governmental tribunal.

"Governmental Charges" means any Taxes, charges or costs that are assessed or levied by any Governmental Authority or other Person, including local, state or federal regulatory or taxing authorities that would affect the sale and purchase of Energy Output contemplated by this PPA, either directly or indirectly.

"Guaranteed Solar Capacity" has the meaning set forth in Section 3.1.

"Guaranteed Start Date" has the meaning set forth in Section 3.1.

"Hazardous Materials" means any substance, material, gas, or particulate matter that is regulated by any local Governmental Authority, any applicable state, or the United States of America as an environmental pollutant or dangerous to public health, public welfare, or the natural environment including, without limitation, protection of non-human forms of life, land, water, groundwater, and air, including any material or substance that is (i) defined as "toxic," "polluting," "hazardous waste," "hazardous material," "hazardous substance," "extremely hazardous waste," "solid waste" or "restricted hazardous waste" under any provision of local, state, or federal law; (ii) petroleum, including any fraction, derivative or additive; (iii) asbestos; (iv) polychlorinated

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

"House Energy" has the meaning set forth in Section 1.4.

"Installed Solar Capacity" means, as of a given point in time, the aggregate nameplate capacity of all Solar Units installed, commissioned and operating at the Project.

"Interconnection Agreement" means the separate agreement between Seller and the Transmission Provider for interconnection of the Project to the Transmission Provider's Transmission System, as such agreement may be amended from time to time.

"Interconnection Facilities" means the Transmission Provider's Interconnection Facilities and Seller's Interconnection Facilities.

"ITC(s)" means the investment tax credits established pursuant to Section 48 of the Internal Revenue Code, as such law may be amended or superseded.

"Issuer Minimum Requirements" has the meaning set forth in Section 19.2.

"kW" means one or more kilowatts AC of electricity, as the context requires.

"kWh" means kilowatt hour AC.

"Lender(s)" means any and all Persons, including Affiliates of Seller, (a) lending money or extending credit (including any financing lease, monetization of tax benefits, back-leverage or paygo financing, Tax Equity Financing or credit derivative arrangement) to Seller or to an Affiliate of Seller: (i) for the construction, interim or permanent financing or refinancing of the Project; (ii) for working capital or other ordinary business requirements of the Project (including the maintenance, repair, replacement or improvement of the Project); (iii) for any development financing, bridge financing, credit support, credit enhancement or interest rate protection in connection with the Project; (iv) for any capital improvement or replacement related to the Project; or (v) for the purchase of the Project and the related rights from Seller; (b) participating as a Tax Equity Investor in the Project; or (c) any lessor under a lease finance arrangement relating to the Project.

"Letter of Credit" means an irrevocable, unconditional, transferable standby letter of credit for the benefit of the receiving Party, issued by an entity meeting the Issuer Minimum Requirements.

"Licensed Professional Engineer" means an independent, professional engineer reasonably acceptable to Buyer, licensed in the State of New Mexico, and otherwise qualified to perform the work required hereunder.

"Local Provider" has the meaning set forth in Section 1.4.

"Losses" has the meaning set forth in Section 20.1(A).

"Metered Output" means the Energy produced by the Project and delivered to the Point of Delivery, as measured by the Electric Metering Devices, net of any estimated AC losses, based on methodology agreed to by the Parties, between the Electric Metering Devices and the Point of Delivery that are not already reflected in the metered data.

"Month" means a calendar month.

"Monthly Billing Period" means the period during any particular Month in which Energy Output has been generated by Seller for Buyer and delivered to the Point of Delivery for sale to Buyer, whether or not occurring prior to or subsequent to the Commercial Operation Date.

"Moody's" means Moody's Investor Services, Inc. and any successor thereto.

"Mountain Prevailing Time" or "MPT" means the time in effect in the Mountain Time Zone of the United States of America, whether Mountain Standard Time or Mountain Daylight Saving Time.

"MW" means megawatt or one thousand (1,000) kW AC.

"MWh" means megawatt hours AC.

"NERC" means the North American Electric Reliability Corporation or any successor organization.

"NMPRC" means the New Mexico Public Regulation Commission or any successor agency.

"NMPRC Approval" has the meaning set forth in Section 17.3(B).

"NMPTC Payment Amount" has the meaning set forth in Section 8.1(C).

"NMPTC Recipients" has the meaning set forth in Section 8.1(C).

"NMPTC Statute" has the meaning set forth in Section 8.1(C).

"NMPTCs" means any state or local production tax credit or investment tax credit determined by reference to renewable electric energy produced from renewable energy resources in effect in the state of New Mexico.

"Non-Defaulting Party" means the Party other than the Defaulting Party with respect to an Event of Default that has occurred under Article 12.

"Non-Governmental Compliance Obligations" means all necessary filings, applications, accreditations, registrations and/or other requirements including deposits, fees, accounts, and/or other obligations with WREGIS, WECC, and all other applicable agencies, self-

regulatory organizations and industry committees to which the Party is required to have membership and/or submit to jurisdiction in the performance of this PPA.

"O&M Records" has the meaning set forth in Section 13.4(A).

"OATT" means Open Access Transmission Tariff.

"Operating Instruction" has the meaning given by NERC in its Glossary of Terms Used in NERC Reliability Standards, as may be amended from time to time.

"Operating Parameters" has the meaning set forth in Section 10.4(A).

"Operating Procedures" means those procedures, if any, developed pursuant to Section 10.5.

"Operating Records" means all operating logs, blueprints for construction, operating manuals, warranties on equipment, and other documents related to the manufacture and installation of the generating equipment and generator step-up transformer, material engineering drawings, and environmental permits, plans, and studies, whether in printed or electronic format, that Seller uses or maintains for the operation of the Project.

"Outage Notice" has the meaning set forth in Section 7.5(A).

"Party" or "Parties" has the meaning set forth in the Preamble and includes any permitted assignee of a Party.

"Peak Reliability Organization" means the entity that fulfills the duties of the Reliability Coordinator, as defined by NERC, and as delegated by WECC, for its Reliability Coordinator Area in the Western Interconnection.

"Performance Test Guarantee Ratio" has the meaning set forth in Section 10.9(A).

"Person" means any natural person, corporation, limited liability company, general partnership, limited partnership, proprietorship, other business organization, trust, union, association or Governmental Authority.

"PNM" has the meaning set forth in the Preamble.

"Point of Delivery" means the electric system point at which Seller makes available to Buyer and delivers to Buyer the Energy Output being provided by Seller to Buyer under this PPA as specified in Section 3.1 and Exhibit B to this PPA.

"PPA" or "Power Purchase Agreement" means this Power Purchase Agreement between Seller and Buyer, including the Exhibits and Schedules attached hereto, as the same may be amended from time to time in accordance with the provisions hereof.

"Project" means Seller's solar generation facility, located in McKinley County, New Mexico, with an expected total maximum solar power output of approximately three hundred (300)

MW which will produce the Energy Output made available to Buyer under this PPA, including one or more of Seller's Solar Units, and Seller's Interconnection Facilities, as identified and described in Article 3 and Exhibit A to this PPA, including all of the following (and any additions, modifications or replacements), the purpose of which is to produce electricity and deliver such electricity to the Electric Interconnection Point: Seller's equipment, buildings, all of the conversion and/or generation facilities, including the Solar Units, step-up transformers, output breakers, facilities necessary to connect to the Electric Interconnection Point, protective and associated equipment, improvements, and other tangible assets, contract rights, easements, rights of way, surface use agreements and other interests or rights in real estate reasonably necessary for the construction, operation, and maintenance of the electric generating facilities that produce the Energy Output subject to this PPA. The maximum export capability of the Project will be three hundred (300) MW.

"Project Manager" has the meaning set forth in Section 10.1(D).

"Projected Schedule" has the meaning set forth in Section 7.4(A).

"Promotional Materials" has the meaning set forth in Section 22.15(A).

"Prudent Utility Practice(s)" means the practices, methods, and acts (including the practices, methods, and acts engaged in or approved by a significant portion of the electric power generation industry, WECC and/or NERC) that, at a particular time, in the exercise of reasonable judgment in light of the facts known or that should reasonably have been known at the time a decision was made, would have been expected to accomplish the desired result in a manner consistent with law, regulation, permits, codes, standards, reliability, safety, environmental protection, economy, and expedition. With respect to the Project, Prudent Utility Practice(s) includes taking reasonable steps to ensure that:

- (A) equipment, materials, resources, and supplies, including spare parts inventories, are available to meet the Project's needs;
- (B) sufficient operating personnel are available at all times and are adequately experienced and trained and licensed as necessary to operate the Project properly, efficiently, and in coordination with Buyer and are capable of responding to reasonably foreseeable Emergency Conditions whether caused by events on or off the Sites;
- (C) preventive, routine, and non-routine maintenance and repairs are performed on a basis that ensures reliable, long-term and safe operation, and are performed by knowledgeable, trained, and experienced personnel utilizing proper equipment and tools;
- (D) appropriate monitoring and testing are performed to ensure equipment is functioning as designed;
- (E) equipment is not operated in a reckless manner, or in a manner unsafe to workers, the general public, or the interconnected system or contrary to environmental laws, permits or regulations or without regard to defined limitations, such as flood conditions, safety inspection requirements, operating voltage, current, volt-ampere reactive ("VAr") loading, frequency, rotational speed, polarity, synchronization, and/or control system limits;

- (F) equipment and components meet or exceed the standard of durability that is generally used for similar electric generation facilities in the region and will function properly over the full range of ambient temperature and weather conditions reasonably expected to occur at the Sites and under both normal and Emergency Conditions; and
- (G) equipment, components, and processes are appropriately permitted with any local, state, or federal Governmental Authority and are operated and maintained in accordance with applicable permit and regulatory requirements.

"Qualified Operator" is (a) a Person that has at least three (3) years' experience with operating at least three hundred (300) MW, in the aggregate, of solar generation, or (b) any other Person reasonably acceptable to Buyer.

"Receiving Party" has the meaning set forth in Section 22.14(A).

"Receiving Party's Representatives" has the meaning set forth in Section 22.14(B).

"Recording" has the meaning set forth in Section 22.19.

"Regulatory End Date" has the meaning set forth in Section 17.3(B)(3).

"Reliability Curtailment" means any curtailment of the Project due to any of the following reasons: (a) the Transmission Provider and/or BAA direct a general curtailment, reduction or redispatch of generation in the area for any reason (other than as a result of Buyer Curtailment), even if such curtailment or redispatch Operating Instruction is carried out by the BAA, and (b) the BAA curtails or otherwise reduces the Metered Output in order to meet NERC/WECC standards criteria in regard to compliance obligations to the PNM Balancing Area and/or PNM Transmission Provider system to operate within system limitations or other operating areas as directed by the Peak Reliability Organization, and (c) for safety or equipment failure situations. For the avoidance of doubt, a Reliability Curtailment includes curtailments associated with an oversupply of generation on Buyer or the Transmission Provider's Transmission System during a period of time when generating facilities connected to the Transmission Provider's Transmission System are interrupted or reduced in an equitable and non-discriminatory manner. If any of the conditions set forth in this definition subparts (a) through (c) are applicable, Buyer shall be rebuttably presumed not to be curtailing for economic reasons. Buyer, upon reasonable notice will provide reasonable documentation relating to any Reliability Curtailments pursuant to this definition.

"Renewable Energy Certificate" or "REC" means a document evidencing that the amount of renewable energy shown on the document has been generated from the Project and certified as such by WREGIS. For purposes of this PPA and registration with WREGIS, RECs are accumulated on a MWh basis with one (1) REC for each MWh of renewable energy generated. RECs include all Environmental Attributes associated with the generated energy. "RECs" excludes (i) any local, state or federal investment tax credit, production tax credit, depreciation deductions or other tax benefit to Seller based on ownership of, or Energy production from, any portion of the Project, including the Tax Benefits, and (ii) depreciation and other tax benefits arising from ownership or operation of the Project unrelated to its status as a generator of renewable or environmentally clean energy.

"Replacement Energy Costs" means the actual costs incurred by Buyer following an Event of Default that are reasonable and necessary to replace Energy Output (which includes RECs, Environmental Attributes and Ancillary Services as defined herein) which Seller, in accordance with this PPA, would have generated at the Project and delivered to Buyer, but failed to so provide pursuant to this PPA. Buyer shall not have to enter into a replacement contract to establish the Replacement Energy Costs. If Buyer does not enter into a replacement contract, then the Replacement Energy Costs will be based on the market price for Energy, Environmental Attributes (including RECs) and Ancillary Services delivered to Buyer's system, as reasonably determined by Buyer. In calculating such amounts, Buyer will comply with the requirements set forth in Section 12.4(A) in establishing the market price. Replacement Energy Costs for an Event of Default also include (i) the reasonable amounts paid or incurred by Buyer for transmission or distribution costs, (ii) the reasonable amounts paid or incurred by Buyer for the purchase of RECs associated with the replacement Energy Output, and (iii) Buyer's expenses, including reasonable outside attorneys' fees, suffered as a result of Seller's failure to perform under this PPA.

"Requested Actions" has the meaning set forth in Section 17.3.

"S&P" means Standard & Poor's Corporation and any successor thereto.

"Scheduled Maintenance Outage" means a time during which a Solar Unit is shut down or its output reduced to undergo scheduled maintenance in accordance with this PPA, or as otherwise agreed by Seller and Buyer.

"SEC" has the meaning set forth in Section 22.18.

"Security" means Development Security or Delivery Term Security, as applicable.

"Seller" has the meaning set forth in the Preamble.

"Seller Curtailment" has the meaning set forth in Section 4.2.

"Seller Excused Hours" means those hours during which Seller is unable to schedule or deliver Energy to Buyer, as a result of: (a) a Scheduled Maintenance Outage, (b) a Transmission Provider Curtailment, (c) a Reliability Curtailment, (d) a Buyer Curtailment, (e) a Force Majeure Event, or (f) any failure by Buyer to perform a material obligation under this PPA (other than due to a breach by Seller of its obligations under this PPA).

"Seller Forced Outage" means an unplanned reduction, interruption or suspension of all or a portion of Energy deliveries from the Project to the Point of Delivery in an amount of at least five (5) MWs not associated with Seller Excuse Hours.

"Seller Guarantor" means Forethought Life Insurance Company or any other Person having a credit rating on such Person's long-term senior unsecured debt that is "Baa3" or higher by Moody's or "BBB-" or higher by S&P or insurance rating AM Best A- or better.

"Seller Guaranty" means a guaranty in substantially the form attached as Exhibit J.

"Seller Permitted Transfer" means any of the following: (a) a Change of Control of Seller; (b) the direct or indirect transfer of shares of, or equity interests in, Seller to a Tax Equity Investor; (c) a transfer of: (i) all or substantially all of the assets of Centaurus Renewable Energy LLC ("Centaurus") or Seller's Ultimate Parent in a single transaction; or (ii) all or substantially all of Centaurus's or Seller's Ultimate Parent's solar generation portfolio in a single transaction; or (d) in connection with a Lender's exercise of remedies under its financing agreements for the Project, the direct or indirect transfer of shares of, or equity interests in, Seller (including a Change of Control), or assignment of this PPA or any of Seller's rights or obligations hereunder; provided, that in the case of each of clauses (a), (b), (c) or (d) of this definition, following such transfer (A) the entity that operates the Project is a Qualified Operator or retains, prior to the date of such transfer, a Qualified Operator to operate the Project (or otherwise agrees not to interfere with the existing Qualified Operator for the Project), (B) such transfer does not have a material adverse effect on the Seller's creditworthiness and (C) Seller continues to comply with the obligations to provide Development Security or Delivery Term Security, as applicable, in accordance with Article 19 of this PPA.

"Seller Termination Payment" means the sum of (a) aggregate of all amounts then owed from Buyer to Seller, less any amounts owed from Seller to Buyer, plus (b) the positive difference, if any, between (i) the Contract Value, and (ii) the net present value of the payments that can reasonably be expected to be applicable in the market under a replacement contract covering the same products (i.e., Energy Output), plus (c) Seller's reasonable transactional costs of entering into a new supply or sales arrangement all using a discount factor equal to the latest weighted average cost of capital as reported in the then-most recent NMPRC Rule 510 Annual Reporting filing. Any such calculations will be based on reasonable assumptions as to future Project operations, differences between a replacement contract and this PPA, and similar considerations. The Seller Termination Payment does not include consequential incidental, punitive, exemplary or indirect or business interruption damages.

"Seller's Financial Statements" has the meaning set forth in Section 22.18(B).

"Seller's Interconnection Facilities" means the equipment between the high side disconnect of the step-up transformer and the Electric Interconnection Point, including all related relaying protection and physical structures as well as all transmission facilities required to access the Transmission Provider's Transmission System at the Electric Interconnection Point, along with any easements, rights of way, surface use agreements and other interests or rights in real estate reasonably necessary for the construction, operation and maintenance of such facilities. On the low side of the step-up transformer, "Seller's Interconnection Facilities" includes Seller's metering, relays, and load control equipment as provided for in the Interconnection Agreement. This equipment is located within the Project and is conceptually depicted in Exhibit B to this PPA.

"Site" means the parcel or parcels of real property on which the Project will be constructed and located, including any easements, rights of way, surface use agreements and other interests or rights in real estate reasonably necessary for the construction, operation and maintenance of the Project. The Site for the Project is more specifically described in Section 3.3 and Exhibit C to this PPA. For the avoidance of doubt, this PPA is Site specific.

"Solar Energy Output" means the Energy (in MWh) generated by the Solar Units and delivered to the Point of Delivery, net of AC losses.

"Solar Energy Output Payment Rate" means the price to be paid by Buyer to Seller for the Solar Energy Output, as set forth in this PPA.

"Solar Period Hours" has the meaning set forth in Exhibit I.

"Solar Unit(s)" means the photovoltaic arrays, tracking devices, inverters, transformers, and other equipment necessary for the Project to collect sunlight at the Site and convert it into electricity. One Solar Unit includes all equipment associated with each inverter.

"System Control Center" or "SCC" means Buyer's representative(s) responsible for dispatch of generating units, including the Solar Units.

"Tax Benefits" means (a) federal and state investment and/or production tax credits (including ITCs but excluding NMPTCs), and any other tax credits which are or will be generated by the Project and (b) any cash payments or outright grants of money relating directly to such tax credits.

"Tax Equity Financing" means, with respect to Seller or an upstream equity owner of Seller, any transaction or series of transactions (including, without limitation, any transaction of the type described in this definition that utilizes a lease or inverted lease structure) resulting in a portion of the membership interests in Seller or an upstream equity owner, as applicable, being issued or otherwise provided to another Person (a "Tax Equity Investor") in exchange for capital contributions to Seller or such upstream equity owner, as applicable, or the Project being sold to and leased by Seller from a Tax Equity Investor, in either case for the purpose of raising a portion of the funds needed to finance the construction of the Project by monetizing the Tax credits, depreciation and other Tax Benefits associated with the Project.

"Tax Equity Investor" has the meaning set forth in the definition of Tax Equity Financing.

"Taxes" means all taxes, fees, levies, licenses or charges imposed by any Governmental Authority, other than taxes, levies, licenses or charges based upon net income or net worth as set forth in more detail in Section 9.7.

"Term" means the period during which this PPA shall remain in full force and effect, and which is further defined in Article 2.

"Termination Payment" means the Buyer Termination Payment or the Seller Termination Payment, as applicable.

"Test Energy" means any and all Energy Output generated by the Project and delivered to Buyer during the Test Period other than Energy Output generated an Early Project Block after all commissioning testing is accepted by Buyer in its reasonable discretion for said Early Project Block.

- "**Test Period**" means the period commencing on the day the Project is energized, operates in parallel with the Transmission Provider's Transmission System and delivers metered Energy to the Point of Delivery and ending on the Commercial Operation Date.
- "TP Forced Outage" means an unplanned component failure or other condition that requires all or a substantial portion of the Transmission Provider's Interconnection Facilities or Transmission Provider's Transmission System to be removed from service immediately.
- "TP Maintenance Outage" means the removal of all or a substantial portion of the Transmission Provider's Interconnection Facilities or Transmission Provider's Transmission System from service to perform work on specific components that can be deferred, but that nevertheless requires all or a substantial portion of the Transmission Provider's Interconnection Facilities or Transmission Provider's Transmission System to be removed from service before the next TP Planned Outage. TP Maintenance Outages may occur anytime during the Commercial Operation Year, have flexible start dates, and may or may not have predetermined durations.
- "TP Planned Outage" means the removal of the Transmission Provider's Interconnection Facilities or Transmission Provider's Transmission System from service to perform repairs that are scheduled in advance and have a predetermined duration.
- "TP Reliability Curtailment" means any curtailment by the Transmission Provider in accordance with WECC operating policies and criteria and the OATT of Energy Output deliveries for reliability reasons, but not including any Buyer Curtailment.
- "Transmission Provider" means Buyer, Buyer's designated agent, or a third party acting in its capacity owning, controlling, or operating facilities used for the transmission of electric energy in interstate commerce and providing transmission service under the OATT and any successor entity, if applicable.
- "Transmission Provider Curtailment" means curtailments of Energy from the Project directed by the Transmission Provider in accordance with Transmission Provider's OATT and the Interconnection Agreement resulting from (a) a TP Forced Outage that is not the result of a Force Majeure Event, (b) a TP Maintenance Outage, (c) a TP Planned Outage, (d) a TP Reliability Curtailment, or (e) an Emergency Condition.
- "Transmission Provider's Interconnection Facilities" means the facilities necessary to connect the Transmission Provider's Transmission System to the Electric Interconnection Point, including breakers, bus work, bus relays, and associated equipment installed by the Transmission Provider for the direct purpose of physically and electrically interconnecting the Project, along with any easements, rights of way, surface use agreements and other interests or rights in real estate reasonably necessary for the construction, operation and maintenance of such facilities. Arrangements for the installation and operation of the Transmission Provider's Interconnection Facilities shall be governed by the Interconnection Agreement.
- "Transmission Provider's Transmission System" means the contiguously interconnected electric transmission and sub-transmission facilities over which the Transmission Provider has rights (by ownership or contract) to provide bulk transmission of capacity and energy from the Electric Interconnection Point.

"Ultimate Parent" means the parent company (or if there is more than one parent company, the ultimate parent company) that owns, directly or indirectly through one or more intermediate entities, at least fifty percent (50%) of the outstanding equity or voting interests in Seller.

"Weather Station(s)" has the meaning set forth in Section 10.10(A).

"WECC" means the Western Electricity Coordinating Council, a NERC regional electric reliability council, or any successor organization.

"WREGIS" means the Western Renewable Energy Generation Information System or any successor system.

"WREGIS Certificates" has the same meaning as "Certificate" as defined by WREGIS in the WREGIS Operating Rules.

"WREGIS Operating Rules" means the rules that describe the operations of WREGIS, as may be amended, which are currently available at www.wregis.org.

"WREGIS Qualified Reporting Entity" as defined by WREGIS Operating Rules means an individual or organization providing renewable generation data to create WREGIS certificates that has met the established WREGIS guidelines provided in WREGIS Operating Rules.

1.2 Rules of Construction.

- (A) The masculine shall include the feminine and neuter.
- (B) References to "Articles," "Sections," "Exhibits" or "Schedules" shall be to articles, sections, exhibits, or schedules of this PPA unless otherwise stated.
- (C) The Exhibits and Schedules attached hereto are incorporated in and are intended to be a part of this PPA; provided, that in the event of a conflict between the terms of any Exhibit or Schedule and the terms of this PPA, the terms of this PPA shall take precedence.
- (D) This PPA was negotiated and prepared by both Parties with the advice and participation of counsel. The Parties have agreed to the wording of this PPA and none of the provisions hereof shall be construed against one Party on the ground that such Party is the author of this PPA or any part hereof.
- (E) The Parties shall act reasonably and in accordance with the principles of good faith and fair dealing in the performance of this PPA. Unless expressly provided otherwise in this PPA, (i) where the PPA requires the consent, approval, or similar action by a Party, such consent, approval or similar action shall not be unreasonably withheld, conditioned or delayed, and (ii) wherever the PPA gives a Party a right to determine, require, specify or take similar action with respect to a matter, such determination, requirement, specification or similar action shall be reasonable.

- (F) Use of the words "include" or "including" or similar words shall be interpreted as "including but not limited to" or "including, without limitation."
- (G) Use of the words "tax" or "taxes" shall be interpreted to include taxes, fees, surcharges, and the like.
- 1.3 <u>Interpretation with Interconnection Agreement</u>. Each Party conducts its operations in a manner intended to comply with FERC Standards of Conduct for Transmission Providers, requiring the separation of its transmission and merchant functions, as applicable.
- (A) The Parties acknowledge and agree that the Interconnection Agreement shall be a separate and free-standing contract and that the terms of this PPA are not binding upon the Transmission Provider.
- (B) Notwithstanding any other provision in this PPA, nothing in the Interconnection Agreement shall alter or modify Seller's or Buyer's rights, duties and obligations under this PPA. This PPA shall not be construed to create any rights between Seller and the Transmission Provider.
- (C) Seller expressly recognizes that, for purposes of this PPA, the Transmission Provider shall be deemed to be a separate entity and separate contracting party whether or not the Interconnection Agreement is entered into with Buyer, an Affiliate of Buyer, or a third-party entity.
- 1.4 <u>Interpretation of Arrangements for Electric Supply to the Project</u>. This PPA does not provide for the supply of retail electric power or natural gas to the Project, for any purpose ("**House Energy**"). Seller shall contract with the local utility in whose retail service territory the Project is located ("**Local Provider**") for the supply of House Energy.
- (A) Seller's arrangements for the supply of House Energy to the Project shall be separate and free-standing arrangements. The terms of this PPA are not binding upon the Local Provider. For purposes of this PPA, the Local Provider shall be deemed to be a separate entity and separate contracting party, whether or not the Local Provider is Buyer or an Affiliate of Buyer.
- (B) Notwithstanding any other provision in this PPA, nothing in Seller's arrangements for the supply of House Energy to the Project shall alter or modify Seller's or Buyer's rights, duties and obligations under this PPA. This PPA shall not be construed to create any rights between Seller and Buyer in Buyer's capacity as the Local Provider.
- (C) Seller shall have the right to consume energy concurrently generated by the Facilities for House Energy and to co-locate additional facilities designed to supply House Energy; provided, however, that excess energy produced from such additional facility shall not be delivered by Seller to Buyer under this PPA. House Energy shall be real time measured by either (i) separate Electric Metering Devices for Metered Output and House Energy or (ii) a single Electric Metering Device that separately measures Metered Output and House Energy. Each meter will have bidirectional kWh pulse accumulators and will be recorded separately for delivered and received power.

ARTICLE 2 Term and Termination

Execution Date and Term. This PPA shall become effective on the Execution Date, 2.1 subject to conditions precedent set forth herein, and shall end at 11:59 p.m. Mountain Prevailing Time on the date that is the last Day of the twentieth (20th) Commercial Operation Year, subject to the early termination provisions set forth herein. Applicable provisions of this PPA shall continue in effect after termination, including early termination, to the extent necessary to enforce or complete the duties, obligations or responsibilities of the Parties arising prior to termination. If Seller receives a Definitive System Impact Study from the Transmission Provider with interconnection and non-reimbursable network upgrade costs that exceed Nine Million Dollars (\$9,000,000 or an interconnection facilities completion date later than January 1, 2022, then the Parties shall meet and confer no later than fifteen (15) Days after Seller receives the Definitive System Impact Study, or longer period as mutually agreed by the Parties, regarding appropriate amendments, if any, to this PPA. If the Parties are unable to agree on such amendments within sixty (60) days after receipt of the Definitive System Impact Study, or longer period as mutually agreed by the Parties, then Seller may terminate this PPA without liability of either Party, except that Buyer shall return the Development Security less any amounts due from Seller to Buyer, provided that Seller gives Buyer notice of termination no later than ninety (90) Days after receipt of the Definitive System Impact Study.

ARTICLE 3 Project Description

3.1 <u>Commercial Terms</u>. The following commercial terms apply to the transaction contemplated by this PPA, each term is as more fully set forth in this PPA:

COMMERCIAL TERMS

Buyer: Public Service Company of New Mexico	Seller: Arroyo Solar LLC
Project: Arroyo Solar	
Point of Delivery: The point within WECC Path 48 where Seller makes available to Buyer and delivers to Buyer the Energy Output being provided under this PPA, as further described in Exhibit B.	
Contract Term: 20 Commercial Operation Years	Product Type: Bundled Energy, Ancillary Services, RECs and associated electrical capacity rights
Solar Energy Output Payment Rate: \$18.65 per MWh _{AC}	Guaranteed Solar Capacity: 300 MW _{AC} , as may be adjusted in accordance with Section 3.8.
Day(s) of week: Monday through Sunday, including NERC holidays	Hours: Hour Ending 0100 – Hour Ending 2400, Monday through Sunday Mountain Prevailing Time ("MPT")

Guaranteed Start Date: One hundred fifty (150) Days after the Expected Commercial Operation Date

Expected Commercial Operation Date: June 30, 2022, subject to extensions as set forth in Section 3.6

- 3.2 <u>Project</u>. <u>Exhibit A</u> provides a detailed description of the Project, including identification of the major equipment and components that will make up the Project. Seller shall provide advance written notice to Buyer at the earliest practicable time of any proposed material changes in the Project.
- 3.3 <u>Location</u>. A scaled map that identifies the Site, the location of the Electric Interconnection Point and the location of the Interconnection Facilities is included in <u>Exhibit A</u> to this PPA. <u>Exhibit A</u> also contains a preliminary indication of the location of the Solar Units at the Site. Seller will provide notice to Buyer of the final proposed location of the Solar Units at the Site no later than thirty (30) Days prior to the initial Site construction mobilization and commencement of civil infrastructure work by Seller's contractors at the Site. Seller shall provide advance written notice to Buyer at the earliest practicable time of any other proposed location changes.
- 3.4 <u>General Design of the Project</u>. Seller shall construct the Project in accordance with Prudent Utility Practices and in accordance with the terms and conditions of the Interconnection Agreement. Seller shall maintain the Project according to Prudent Utility Practice(s) and the Interconnection Agreement. The Project shall at all times:
- (A) Have the required panel space and 125V DC battery-supplied voltage to accommodate metering, generator telemetering equipment and communications equipment;
 - (B) be equipped for and capable of AGC by Buyer;
- (C) use communication circuits from the Project to Buyer's System Control Center for the purpose of telemetering, supervisory control/data acquisition, and voice and other communications as required for AGC by Buyer;
- (D) supply Energy with minimal harmonic distortion in compliance with the requirements of the Interconnection Agreement and Prudent Utility Practices;
 - (E) deliver Energy to Buyer, at the frequency specified by Buyer;
- (F) be capable of being remotely started and stopped by Buyer's System Control Center; and
- (G) be capable of immediate disconnection from the Buyer's system in the event of an Emergency Condition.

- 3.5 <u>Expected Commercial Operation Date</u>. Subject to the extensions as specifically set forth herein, the Commercial Operation Date shall occur no later than the Expected Commercial Operation Date.
- 3.6 Extension. The Expected Commercial Operation Date and related damages provisions under Section 3.7 shall be extended by a number of Days, on a day-for-day basis up to a maximum of (a) one hundred eighty (180) Days, equal to the duration of any Force Majeure Event, or (b) one hundred eighty (180) Days, in the event of delay associated with the interconnection of the Project in either case that delays construction or commencement of operation of the Project, except to the extent caused by the fault or negligence of Seller. Seller will give written notice to Buyer describing any such Force Majeure Event or interconnection delay within five (5) Business Days after the occurrence of the Force Majeure Event or interconnection delay. The number of Days of such extension is calculated from the date on which the Force Majeure Event or interconnection delay begins. If a Force Majeure Event will delay the Commercial Operation Date for more than one hundred eighty (180) Days, or if an interconnection delay will delay the Commercial Operation Date for more than one hundred eighty (180) Days, then Buyer will have the right to terminate this PPA without liability of either Party, and Buyer shall return the Development Security less any amounts due from Seller to Buyer.
- 3.7 <u>Delay Damages</u>. If the Commercial Operation Date has not occurred by the Expected Commercial Operation Date as such date may be extended pursuant to Section 3.6, Seller will use commercially reasonable efforts to continue construction of the Project and shall pay liquidated damages to Buyer in an amount equal to Two Hundred Dollars (\$200) per Day per each MW of Delayed Capacity ("**Delay Damages**") for each Day after the Expected Commercial Operation Date until the earlier of (i) the Commercial Operation Date, and (ii) the Guaranteed Start Date. "**Delayed Capacity**" means the difference between the Guaranteed Solar Capacity and the Installed Solar Capacity. In no event shall the aggregate Delay Damages paid pursuant to Section 3.7(A)-(B) exceed Thirty-Six Thousand Dollars (\$36,000) per MW of Delayed Capacity.
- Guaranteed Solar Capacity has been constructed, commissioned and tested, Seller shall use commercially reasonable efforts to cause the remaining portion of the Guaranteed Solar Capacity to achieve Commercial Operation. If Seller has not caused all Delayed Capacity to achieve Commercial Operation on or before the Guaranteed Start Date, then no later than twenty (20) Days after the Guaranteed Start Date, Seller shall pay to Buyer liquidated damages in the amount of Five Hundred Thousand Dollars (\$500,000) per MW of Delayed Capacity ("Capacity Shortfall Damages"), in which case the respective Guaranteed Solar Capacity will be reduced in an amount equal to the Delayed Capacity for which Capacity Shortfall Damages were timely paid pursuant to this Section 3.8.
- 3.9 Test Energy and Early Project Blocks. Not less than thirty (30) Days prior to the date upon which Seller expects to begin delivering Test Energy, Seller shall give written notice to Buyer of such expected deliveries. During the Test Period, Buyer agrees to accept and purchase all Test Energy generated at the Project and delivered by Seller to Buyer at the Point of Delivery at a rate equal to fifty percent (50%) of the Solar Energy Output Payment Rate. Seller shall notify Buyer, to the extent practicable, fifteen (15) Days prior to the initial delivery of Test Energy to Buyer. Notwithstanding the prior sentence, prior to declaring the Commercial Operation Date for

the Project, but no earlier than March 1, 2022, Seller may, from time to time, commence delivery of Energy Output on a sustained basis from Solar Units with an aggregate capacity of at least 25 MW (each an "Early Project Block"), after all commissioning testing is accepted by Buyer in its reasonable discretion for said Early Project Block. Buyer will pay for Energy Output generated from Early Project Blocks at a rate equal to the Solar Energy Output Payment Rate; provided that Deemed Delivered Energy resulting from a Buyer Curtailment shall not apply.

3.10 Notice of Commercial Operation. Not less than sixty (60) days prior to the date upon which Seller expects to achieve the Commercial Operation Date, Seller shall give written notice to Buyer of such expected Commercial Operation Date; provided that such Commercial Operation Date shall not occur more than ninety (90) Days prior to the Expected Commercial Operation Date. In the event that Seller should determine that the Expected Commercial Operation Date for the Project is not feasible or is impossible to achieve, Seller shall promptly notify Buyer and shall advise Buyer of the new proposed Commercial Operation Date; provided, however, such new Commercial Operation Date shall not be later than the Guaranteed Start Date.

ARTICLE 4

AGC; Buyer Curtailment; Reliability Curtailment; Seller Curtailment

- 4.1 AGC; Buyer Curtailment and Reliability Curtailment.
- (A) Prior to the Commercial Operation Date or, if applicable, prior to the Test Period, Seller, at its sole cost and expense, shall install AGC at the Project and shall maintain such AGC throughout the Delivery Term. Beginning on the Commercial Operation Date, Buyer shall have the right to curtail the Project by use of the AGC system to effect its curtailment rights pursuant to Section 4.1(B) for a Buyer Curtailment and 4.1(C) for a Reliability Curtailment. Seller shall ensure that, throughout the Delivery Term, the SCADA signal is capable of functioning within the margin of error specified in the control system manufacturer's energy set point margin of error. Seller shall ensure that the Project's AGC Remote/Local status is in "Remote" set-point control during normal operations.
- Seller shall reduce Energy Output from the Project during and to the extent (B) of any Buyer Curtailment, which shall include any curtailment (a) requested by Buyer with the intended purpose of achieving economic savings by not purchasing energy from the Project and (b) any curtailment resulting from Buyer's economic bidding, which includes the submission of output forecasts or schedules for less than the forecasted generation of the Project (each of (a), and (b) a "Buyer Curtailment"), but does not include reduced forecasts or reductions in scheduled generation due to a Reliability Curtailment). Such Buyer Curtailment rights do not provide the Buyer with any rights to direct the operation of the Project. For a Buyer Curtailment, Buyer shall pay Seller for Deemed Delivered Energy in accordance with Section 8.1(A). For purposes of this Section 4.1(B), "Deemed Delivered Energy" shall mean the amount of Energy that was not delivered to Buyer by Seller but would have been so delivered but for the Buyer Curtailment as follows: Deemed Delivered Energy (MWh) shall be reasonably calculated by Seller taking into account weather and pyranometer data from the meteorological station(s) at the Site for all or a portion of the Solar Units taken out of service due to the Buyer Curtailment but excluding any Solar Unit(s) taken out of service or operating at a reduced capacity for other reasons, and adjusted

to account for electrical losses in delivering Energy to the Point of Delivery. Buyer shall have the right to review and approve Seller's calculations of Deemed Delivered Energy.

- (C) Seller shall reduce Energy Output from the Project during and to the extent of any Reliability Curtailment, Transmission Provider Curtailment, Seller Curtailment or Buyer Curtailment. With the exception of a Buyer Curtailment, Buyer shall not be required to pay Seller for any curtailed Energy during any Reliability Curtailment, Seller Curtailment or Transmission Provider Curtailment.
- 4.2 <u>Seller Curtailment</u>. A Seller Curtailment occurs any time the Project is unable to deliver otherwise available Energy to Buyer as a result of transmission limitations other than the result of a Buyer Curtailment, Reliability Curtailment or Transmission Provider Curtailment ("Seller Curtailment").

ARTICLE 5 Delivery and Metering

5.1 Delivery Arrangements.

- (A) Seller shall secure transmission necessary to deliver the Energy to the Point of Delivery, including diligently negotiating and executing an Interconnection Agreement with the Transmission Provider, or, in the alternative, diligently negotiating and executing any such changes to an executed Interconnection Agreement as are necessary to accommodate the characteristics of the Project. As between Buyer and Seller under this PPA, Seller shall be responsible for the costs of interconnection and costs required to deliver the Energy Output from the Project to Buyer at the Point of Delivery at the required voltage, including the costs of any associated network upgrades. As between Buyer and Seller under this PPA, Seller shall also be responsible for all transmission charges, ancillary service charges, electrical losses and any other transfer-related charges applicable to the Project's output up to the Point of Delivery.
- (B) Buyer shall be responsible for costs required to deliver the Energy Output from and beyond the Point of Delivery.
- (C) On a Day-ahead basis and no later than 4:00 a.m. MPT, Seller, or Seller's agent, shall make available to Buyer a 24-hour forecast of the Metered Output to be delivered to Buyer. In addition, Seller, or Seller's agent, shall establish and maintain (including any future technological improvements developed by Seller, or an agent of Seller) an interface with Buyer via a web-based file transfer protocol for the purpose of transferring to Buyer real-time forecasting data related to the Project (or any alternative transfer mechanism mutually agreed to by the Parties).
- (D) Buyer shall be responsible for all necessary transmission service arrangements, including scheduling arrangements, if any, to take Metered Output at the Point of Delivery and deliver it to points beyond.
- (E) Seller shall be responsible for separately sourcing, metering and payment for an electrical power supply and associated power consumption for the Project auxiliary loads.

5.2 <u>Availability Reporting</u>. Seller shall be responsible for providing accurate and timely updates on the current availability of the Project to Buyer's SCC.

5.3 <u>Electric Metering Devices</u>.

- (A) Seller shall ensure that the Energy sold and delivered pursuant to this PPA shall be metered and accounted for separately from any electric generation facility that utilizes the same Electric Interconnection Point. Seller shall ensure that Electric Metering Devices are installed at or near the Electric Interconnection Point that measures the output of the Project before such Energy is commingled with the energy from any other project.
- (B) The following provisions of this Section shall govern Electric Metering Devices except to the extent the Interconnection Agreement modifies or otherwise conflicts with these provisions, in which case, the Interconnection Agreement shall govern.
- All Electric Metering Devices used to measure the Energy made available to Buyer by Seller under this PPA and to monitor and coordinate operation of the Project shall be owned, installed, and maintained in accordance with the Interconnection Agreement at no cost to Buyer under this PPA. The design of the Electric Metering Device system shall be subject to Buyer approval prior to commencement of construction of the Project. If Electric Metering Devices are not installed at the Point of Delivery, meters or meter readings will be adjusted to reflect losses from the Electric Metering Devices to the Point of Delivery based initially on the amount specified by the manufacturer for expected losses, provided that the Parties may revise this loss adjustment based on actual experience. Seller shall provide or arrange with the Transmission Provider to provide Buyer reasonable access to all Electric Metering Devices for all purposes necessary to perform under this PPA and shall provide Buyer the reasonable opportunity to be present at any time when such Electric Metering Devices are to be inspected and tested or adjusted. Buyer shall also have the right to conduct its own tests of the Electric Metering Devices in Buyer's reasonable discretion. Seller shall provide Buyer with all authorizations necessary to have access to the Electric Metering Devices, including obtaining any consent or other agreement from the Transmission Provider necessary to allow Buyer such access. Energy shall be metered using solid state, high precision, digital display meters of ANSI 0.1 accuracy class or better, with the specific model approved by the Buyer.
- (D) Provisions shall be made for Buyer to install and maintain, at its own expense, backup metering devices ("Back-Up Metering") in addition to the Electric Metering Devices, which installation and maintenance shall be performed in a manner acceptable to the Parties. The installing Party, at its own expense, shall inspect and test Back-Up Metering upon installation and at least annually thereafter. The installing Party shall provide the other Party with reasonable advance notice of, and permit a representative of the other Party to witness and verify, such inspections and tests, provided, however, that such Party shall not unreasonably interfere with or disrupt the activities of the installing Party and shall comply with all applicable safety standards. Upon written request, the installing Party shall perform additional inspections or tests of Back-Up Metering and shall permit a qualified representative of the requesting Party to inspect or witness the testing of Back-Up Metering, provided, however, that the requesting Party shall not unreasonably interfere with or disrupt the activities of the installing Party and shall comply with all applicable safety standards. The actual expense of any such requested additional inspection or

testing shall be borne by the Party requesting the test, unless, upon such inspection or testing, Back-Up Metering is found to register inaccurately by more than the allowable limits established in this Article, in which event the expense of the requested additional inspection or testing shall be borne by the installing Party. If requested in writing, the installing Party shall provide copies of any inspection or testing reports to the requesting Party.

- (E) If any Electric Metering Devices, or Back-Up Metering, are found to be defective or inaccurate outside the bounds of the selected device's manufacturer's performance standards, they shall be adjusted, repaired, replaced, and/or recalibrated as near as practicable to a condition of one-half percent (0.5%) error by the Party owning such defective or inaccurate device and at that Party's expense.
- 5.4 Adjustment for Inaccurate Meters. If an Electric Metering Device, or Back-Up Metering, fails to register, or if the measurement made by an Electric Metering Device, or Back-Up Metering, is found upon testing to be inaccurate by more than one-half percent (05%), an adjustment shall be made correcting all measurements by the inaccurate or defective Electric Metering Device, or Back-Up Metering, for both the amount of the inaccuracy and the period of the inaccuracy, in the following manner:
- (A) In the event that the Electric Metering Device is found to be defective or inaccurate, the Parties shall use Back-up Metering, if installed, to determine the amount of such inaccuracy, provided, however, that Back-Up Metering has been tested and maintained in accordance with the provisions of this Article. If Back-Up Metering is installed on the low side of Seller's step-up transformer, the Back-Up Metering data shall be adjusted for losses in the same manner as for the Electric Metering Devices. In the event that Back-Up Metering is not installed, or Back-Up Metering is also found to be inaccurate by more than one-half percent (0.5%), the Parties shall estimate the amount of the necessary adjustment on the basis of deliveries of Metered Output from the Project to the Point of Delivery during periods of similar operating conditions when the Electric Metering Device was registering accurately. The adjustment shall be made for the period during which inaccurate measurements were made.
- (B) In the event that the Parties cannot agree on the actual period during which the inaccurate measurements were made, the period during which the measurements are to be adjusted shall be the shorter of (i) the last one-half of the period from the last previous test of the Electric Metering Device to the test that found the Electric Metering Device to be defective or inaccurate, or (ii) the one hundred eighty (180) Days immediately preceding the test that found the Electric Metering Device to be defective or inaccurate.
- (C) To the extent that the adjustment period covers a period of deliveries for which payment has already been made by Buyer, Buyer shall use the corrected measurements as determined in accordance with this Article to recompute the amount due for the period of the inaccuracy and shall subtract the previous payments by Buyer for this period from such recomputed amount. If the difference is a positive number, the difference shall be paid by Buyer to Seller; if the difference is a negative number, that difference shall be paid by Seller to Buyer, or at the discretion of Buyer, may take the form of an offset to payments due Seller by Buyer. Payment of such difference by the owing Party shall be made not later than thirty (30) Days after the owing Party receives notice of the amount due.

ARTICLE 6 Conditions Precedent

- 6.1 <u>Conditions Precedent</u>. The obligations of the Parties under this PPA are subject to satisfaction of the following conditions precedent:
 - (A) Subject to Section 17.3, receipt of NMPRC Approval;
- (B) Receipt of approval of the Boards of Directors of Buyer and its parent company, as required by July 31, 2019, unless otherwise agreed to by both parties; and
 - (C) FERC approval, if applicable.

ARTICLE 7 Sale and Purchase of Energy Output

- Sale and Purchase of Energy Output. In accordance with and subject to the terms and conditions of this PPA, commencing on the first day of the Test Period and continuing through the end of the Term ("Delivery Term"), Seller shall sell and deliver to Buyer, and Buyer shall purchase and receive from Seller, all right, title and interest in and to the Energy Output made available by Seller at the Point of Delivery in accordance with Article 5; provided, however, that Buyer shall not be required to receive and purchase Energy Output when and to the extent that (a) a Party's performance is excused by a Force Majeure Event, (b) a Transmission Provider Curtailment is continuing, (c) a Reliability Curtailment is continuing, (d) a Seller Forced Outage is continuing, (e) a Seller Curtailment is continuing, provided further, that Buyer shall pay Seller for Deemed Delivered Energy in accordance with Section 8.1(A) in the event of a Buyer Curtailment.
- 7.2 <u>Title and Risk of Loss</u>. As between Seller and Buyer, Seller shall be deemed to be in control of the Energy Output from the Project up to delivery and receipt at the Point of Delivery and Buyer shall be deemed to be in control of such Energy Output from and after delivery and receipt at the Point of Delivery. Title and risk of loss related to the Energy Output shall transfer from Seller to Buyer at the Point of Delivery.
- (a) additional Environmental Attributes may be recognized by a Governmental Authority after the Execution Date; (b) in accordance with the terms of this PPA all right and title to such additional Environmental Attributes is included in the Solar Energy Output Payment Rate as Energy Output and (c) such additional Environmental Attributes shall pass to Buyer in accordance with Section 7.2 of this PPA. If in order for Buyer to receive the benefit of any additional Environmental Attributes Seller must incur any third-party costs not otherwise provided for in this PPA. Seller shall deliver a good faith estimate of such additional costs to Buyer prior to incurring such costs, and following receipt of such estimate, Buyer shall notify Seller of (i) its continued election to have Seller incur such costs, and in such case Buyer shall promptly reimburse Seller for such costs, or (ii) of its election to have Seller cease incurring the additional costs, in which case Buyer acknowledges that it may not receive the benefits of such additional Environmental Attributes; provided that, if the additional costs exceed Seller's good faith estimate by more than ten percent

(10%), Buyer shall have the right to notify Seller to change its election to have Seller cease incurring the additional costs, in which case Buyer acknowledges that it may not receive the benefits of such additional Environmental Attributes. For the avoidance of doubt, Buyer shall remain liable to Seller for all costs incurred prior to Seller's receipt of Buyer's notice. The Parties agree to negotiate in good faith further agreements and documentation necessary to effectuate the transfer of such additional Environmental Attributes.

7.4 Scheduling.

- Seller and Buyer shall work together to arrange all scheduling services (A) necessary to ensure compliance with WECC operating policies and criteria, Transmission Provider OATT requirements, including CAISO EIM requirements, and any other applicable guidelines. Prior to the implementation and applicability to the Project of any energy market, to the extent scheduling is required now or in the future, Buyer shall schedule all Metered Output in accordance with WECC operating polices and criteria, Transmission Provider OATT requirements and any other applicable guidelines in a manner maximizing Metered Output from the Project based on the then-most-current forecast of energy provided by Seller, except for Transmission Provider Curtailments, Reliability Curtailments, Seller Forced Outages, Scheduled Maintenance Outages, Force Majeure Events, Buyer Curtailments, and Seller Curtailments. At least thirty (30) Days prior to the anticipated Commercial Operation Date, Seller shall provide Buyer with a good faith estimate of the quantity of Metered Output it expects to generate for the remainder of that Commercial Operation Year. By July 1 of each succeeding Commercial Operation Year, Seller shall provide Buyer with a good faith estimate of the hourly quantities of Energy Output that Seller expects to generate in the following Commercial Operation Year ("Projected Schedule"). Seller shall also provide good faith estimates of the daily quantity of Energy to be delivered to Buyer. Seller shall configure the ramp rate for the Project such that it will not generate energy at a rate that increases greater than twenty (20) MW per minute; provided if any Energy in excess of the ramp rate limit can be utilized to charge the ESS, Buyer shall receive and purchase such Energy at the Solar Energy Output Payment Rate.
- (B) If at any point during the Delivery Term, (i) an alternative market design is implemented in which the Project will or can participate in an energy market, or (ii) if either the Project, the Electric Interconnection Point or Buyer no longer reside in the same market ((i) and (ii) a "Market Event") and such Market Event materially changes the interconnection and delivery requirements in this PPA, the Parties shall cooperate in good faith to facilitate the delivery of Energy Output from the Point of Delivery to Buyer, at the least possible cost to the Parties, consistent with this PPA to the extent possible.
- (C) Seller shall provide, or cause its operation and maintenance contractor to provide, to Buyer its good faith, non-binding estimates of the daily quantity of Energy Output to be delivered by Seller to the Point of Delivery for each week (Sunday through Saturday) by 4:00 p.m. MPT on the date falling at least three (3) Days prior to the beginning of that week.
- (D) Unless otherwise specified by superseding policies or procedures of WECC, including the WECC pre-scheduling calendar, and SCC as applicable, Seller shall, by 6:00 a.m. MPT on each Day, submit a good faith estimate of the hourly quantities of Energy Output to be delivered for Buyer at the Point of Delivery for the next six (6) subsequent Days.

(E) If, at any time following submission of a good faith estimate as described in Section 7.4(C) and (D) above, Seller becomes aware of any change that alters the values previously provided to Buyer, Seller shall promptly notify Buyer of such change or predicted change.

7.5 Forced Outages.

- (A) Buyer and Seller shall promptly advise one another of events that may form the basis for a declaration of the existence or termination of Buyer Curtailment, Transmission Provider Curtailment, Reliability Curtailments, Seller Excused Hours or a Seller Forced Outage. Buyer or Seller (as appropriate) shall at the earliest practicable date provide the other Party written notice ("Outage Notice") of the declaration of the existence of a Buyer Curtailment, Transmission Provider Curtailment, Reliability Curtailment, Seller Excused Hours or a Seller Forced Outage. Seller shall provide such notice to Buyer's System Control Center. An Outage Notice provided by either Party shall contain information regarding the beginning date and time of the event, the expected end date and time of such event, and the expected Metered Output, if any, that would be available for delivery and purchase at the Point of Delivery during such event. Buyer or Seller (as appropriate) shall keep the other Party informed of any developments that will affect either the duration of such event or the availability of the Project during or after the end of such event. In addition, Seller shall comply with all then-current Buyer, NERC and WECC generating unit outage reporting requirements, as they may be revised from time-to-time.
- (B) Within five (5) business Days after the end of the Month, Seller shall prepare, maintain and deliver to Buyer a schedule that identifies all Scheduled Maintenance Outages, deratings and Seller Forced Outages that occurred during the Month. The data reported must meet all requirements specified in the NERC Generating Availability Data System (GADS) manual. In the event of any disagreement between Buyer and Seller concerning the schedule prepared by Seller, the Parties shall promptly confer to resolve the disagreement.
- 7.6 <u>Availability Guarantee</u>. Seller guarantees that the Project shall be available to produce Energy Output, and shall pay Availability Damages, if any, in accordance with Seller's obligations under the provisions of <u>Exhibit I</u>.

ARTICLE 8 Payment Calculations

- 8.1 <u>Billing Components</u>. The total due from Buyer to Seller for each Monthly Billing Period during the Term shall be paid in accordance with the invoicing procedures set forth in Section 9.1. Charges will consist of the following, and will begin on the first day of the Test Period:
- (A) Monthly Solar Energy Output Payment. Subject to the provisions of this PPA, Buyer shall accept and pay for Solar Energy Output generated at the Project and delivered by Seller to Buyer. Buyer shall pay Seller in accordance with Section 3.9 for all Test Energy, and in respect of all other Solar Energy Output an amount equal to the product of (a) the aggregate amount of Solar Energy Output (excluding any Test Energy) delivered for Buyer to the Point of Delivery from the Project plus the Deemed Delivered Energy resulting from any Buyer

Curtailment multiplied by (b) the Solar Energy Output Payment Rate. For the avoidance of doubt, the Solar Energy Output Payment Rate also compensates Seller for the associated Environmental Attributes, RECs and Ancillary Services, in any Monthly Billing Period. The Solar Energy Output Payment does not include any amounts Buyer is responsible for paying or reimbursing Seller for under Section 9.7. Nothing herein confers on Buyer the right to, and Buyer may not, direct Seller to reduce the Energy Output of the Project for the provision of Ancillary Services or other financial consideration.

- (B) If NMPTCs become available in connection with the Energy Output, Seller shall use commercially reasonable efforts to become eligible for and to obtain any such credits.
- (C) The Project is expected to qualify for New Mexico production tax credits ("NMPTCs") under New Mexico statute 7-2-18.18 NMSA 1978 ("NMPTC Statute") that may be used to satisfy a New Mexico taxpayer's New Mexico state income tax obligation or, to the extent in excess of a New Mexico taxpayer's New Mexico state income tax obligation, refunded to such taxpayer pursuant to Section 7-2-18.18L(2) NMSA 1978. Accordingly, in the event that (i) the Project results in the creation of NMPTCs pursuant to the NMPTC Statute that may be used by the Seller and/or its owners (directly or indirectly) to whom such NMPTCs are allocated for tax purposes (such persons to whom allocated referred to as "NMPTC Recipients") to reduce their New Mexico state income tax obligations for the taxable year for which the NMPTCs are claimed and (ii) to the extent that such claimed NMPTCs exceed the NMPTC Recipient's New Mexico state income tax liability for such taxable year, such excess would be required to be refunded to such NMPTC Recipient pursuant to the NMPTC Statute, Seller shall pay sixty percent (60%) of the amount of such NMPTCs allocated to NMPRC Recipients (such amount the "NMPTC Payment Amount") to Buyer within 180-days of the date that the New Mexico state income tax return must be filed (without benefit of extension) by such NMPTC Recipient entitled to utilize such NMPTCs. If the New Mexico Taxation and Revenue Department subsequently denies or reduces any NMPTC Payment Amount with regard to an NMPTC Recipient, Buyer shall, no later than thirty (30) days after notice from Seller, refund to Seller the amount Buyer previously received on the denied or reduced amount.
- 8.2 <u>Payment Support Requirement</u>. Each Party shall use commercially reasonable efforts to defend, before any Governmental Authority, all terms and conditions of this PPA consistent with Applicable Law.
- 8.3 <u>Survival on Termination</u>. The provisions of this Article 8 shall survive the repudiation, termination or expiration of this PPA for so long as may be necessary to give effect to any outstanding payment obligations of the Parties due and payable prior to any such repudiation, termination or expiration.

ARTICLE 9 Billing and Payment Procedures

9.1 Statements and Payment of Electricity Payments.

- (A) Seller shall read or have read on its behalf the Electric Metering Devices at the Point(s) of Delivery at 11:59 p.m. MPT on the last Day of each Month, unless otherwise mutually agreed by the Parties.
- (B) Payments due shall be determined and adjusted in accordance with Article 8 and Section 4.1(B). From and after the start of the Test Period, Buyer shall pay to Seller, monthly in arrears, payments in accordance with the provisions of clause (C) below.
- (C) On or before the tenth (10th) Day of each Month following the Month in which the Test Period commences, Seller shall prepare an invoice showing the amount payable by Buyer pursuant to Article 8 of this PPA (in Dollars) payable to Seller for the preceding Month. Each such invoice shall show information and calculations, in reasonable detail, including an Attestation and Bill of Sale verifying the associated RECs and Environmental Attributes, if applicable, in the form of Exhibit H ("Attestation and Bill of Sale").
- (D) Buyer shall, subject to Sections 9.5 and 9.9, pay all invoices within thirty (30) Days after the date Buyer receives Seller's invoice. If Buyer should dispute a portion of the charges set forth on any invoice, it shall nonetheless pay all amounts not in dispute by the applicable due date.
- (E) If banks in the state of New Mexico are permitted to close on any date on which any payment by Buyer would otherwise have been due, then Buyer shall make such payment on the Business Day that immediately follows such payment date.
- (F) All payments specified in this Section 9.1 shall be made to an account designated by Seller and notified to Buyer.
- 9.2 <u>Miscellaneous Payments</u>. Any amounts due to either Seller or Buyer under this PPA, other than those specified in Section 9.1 above, shall be paid within thirty (30) Days following receipt by the other Party of an itemized invoice from the Party to whom such amounts are due setting forth, in reasonable detail, the basis for such payment.
- 9.3 <u>Currency and Method of Payment</u>. Notwithstanding anything contained in this PPA, all payments to be made by either Seller or Buyer under this PPA shall be made in Dollars in immediately available cleared funds by wire transfer into the relevant account specified in this PPA or, if no account is specified, into the account designated by the receiving Party.
- 9.4 <u>Default Interest</u>. Except where payment is the subject of a bona fide dispute (in which case it shall be treated under Section 9.5 below), or where otherwise waived by the Party entitled to interest, if any payment due from Buyer to Seller or from Seller to Buyer under this PPA is not paid when due, then, in addition to such unpaid amount, interest shall be due and payable thereon. Applicable interest shall be calculated at a rate equal to the lower of (i) the "prime" rate as published in *The Wall Street Journal* on the first business Day of each Month plus 2% and (ii) the maximum interest rate allowed by Applicable Law ("**Default Rate**"), as in effect from time to time and shall continue to accrue from the date on which such payment became overdue to and until the date such payment is made in full (both dates inclusive).

9.5 Disputed Items.

- (A) Either Party ("**Disputing Party**") may dispute in good faith the accuracy of a reading of the Electric Metering Devices and/or the accuracy of an invoice. Where a reading or bill is the subject of a dispute in good faith, the Disputing Party shall give written notice to the other Party within ten (10) Days after the delivery of the invoice or statement by the other Party, together with details of its reasons for such dispute. The Disputing Party shall make payment of any undisputed amounts to the other Party by the due date for payment specified in such invoice. The Parties shall use all reasonable efforts to resolve the dispute in accordance with Section 13.8. Any amount or adjustment with respect to a meter reading subsequently agreed to by the Parties or determined to be due shall be made (in each case in settlement of a dispute) by a credit or additional charge on the next bill rendered (as the case may be).
- (B) All amounts paid as a result of the settlement of a dispute shall be paid with interest thereon at the Default Rate from the Day on which such payment originally fell due to and until the date such payment is made in full (both dates inclusive), unless otherwise waived by the Party entitled to such interest.
- 9.6 <u>Statement Errors</u>. In the event that either Party becomes aware of any error in any statement, such Party shall, immediately upon discovery of the error, notify in writing the other Party of the error and shall rectify such error (whether such error was in the form of an underpayment or overpayment) within thirty (30) Days of such notification. A Party must notify the other Party of any error within 365 Days of such error.

9.7 Taxes.

- (A) All Energy delivered by Seller to Buyer hereunder shall be sales for resale, with Buyer reselling such Energy. Buyer shall obtain and provide Seller an appropriate New Mexico Nontaxable Transaction Certificate prior to the date any sales under this PPA occur. Since the Energy delivered by Seller to Buyer hereunder should qualify as sales for resale, the Parties further acknowledge their understanding that no gross receipts Tax should be applicable to the sale or delivery of Energy Output hereunder; however, in the event any such Tax is or becomes applicable, Buyer shall reimburse Seller for such Tax. During the Delivery Term, Seller and Buyer each covenant that it will take all actions required to qualify the Energy delivered to Buyer hereunder, and refrain from taking any actions that would cause the Energy delivered hereunder to Buyer to not qualify, for a New Mexico Type 2 Nontaxable Transaction Certificate.
- (B) Seller shall be responsible and shall pay when due all income, gross receipts, compensating, use, valued added, employment, ad valorem, personal real property or other similar Taxes, including any associated interest and penalty assessments and any and all franchise fees or similar fees assessed against Seller or the Project due to the construction, ownership, leasing, operation or maintenance of the Project, or any components or appurtenances thereof, including all Taxes, fees, allowances, trading credits and other offsets and impositions for wastes and emissions (including carbon-based compounds, oxides of nitrogen and sulfur, mercury and other Hazardous Materials) produced by the Project. If Buyer is assessed any Taxes or associated fees as a result of the improvement of a Site due to the existence of the Project on the Site, Buyer shall immediately notify Seller. Buyer and Seller shall cooperate in contesting such assessment. If, after resolution of the matter, Taxes are imposed on Buyer as a result of the improvement of the Site due to the existence of the Project on the Site, Seller shall reimburse Buyer

for such Taxes. Seller shall not be obligated to pay or reimburse Buyer for Taxes imposed on or measured by the Buyer's overall revenues or income. Seller's prices under Section 8 are inclusive of such Taxes, allowances and credits during the Term.

- (C) If a Party is required to remit or pay Taxes that are the other Party's responsibility hereunder, such Party shall promptly reimburse the other for such Taxes. Consistent with Applicable Law, the Parties shall use all reasonable efforts to administer this PPA and implement the provisions in this PPA in a manner that will minimize Taxes due and payable by all Parties.
- (D) The Parties shall provide each other, upon written request, with copies of any documentation respecting this PPA or the Project that may be reasonably necessary in the ordinary course of any inter-governmental, state, local, municipal or other political subdivision tax audit inquiry or investigation.
- (E) Consistent with Applicable Law, the Parties shall cooperate to minimize Taxes; however, no Party shall be obligated to incur any extraordinary financial burden to reduce Taxes for which the other Party is responsible hereunder.
- 9.8 <u>Setoff and Payment Adjustments</u>. Except as otherwise expressly provided for in this PPA, including Section 9.9 below, all payments between the Parties under this PPA shall be made free of any restriction or condition and without deduction or withholding on account of any other amount, whether by way of setoff or otherwise.

9.9 Netting.

- (A) A Party at any time may offset against any and all amounts that may be due and owed to the other Party under this PPA, including damages and other payments that are owed by a Party to the other Party pursuant to this PPA. Undisputed and non-offset portions of amounts invoiced under this PPA shall be paid on or before the due date or shall be subject to the late payment interest charges set forth in Section 9.4.
- (B) If Seller and Buyer net their obligations to each other under this PPA, then such amounts will be aggregated, and Seller and Buyer will discharge their obligations to pay through netting of payments on a current accounting basis. If the amounts owed by Buyer or Seller to the other are equal on a current accounting basis, neither shall be required to make payment under this PPA.
- 9.10 <u>Survival on Termination</u>. The provisions of this Article 9 shall survive the repudiation, termination or expiration of this PPA for so long as may be necessary to give effect to any outstanding payment obligations of the Parties that became due and payable prior to any such repudiation, termination or expiration.

ARTICLE 10 Operations and Maintenance

10.1 Construction of the Project.

- (A) Seller will diligently pursue the development and construction of the Project using commercially reasonable efforts consistent with Prudent Utility Practices and in compliance with the terms and conditions of the Interconnection Agreement and the PPA. Seller will be solely responsible for, and the Solar Energy Output Payment Rate will not be adjusted to accommodate, increased costs or any failure to obtain any Tax Benefits. On and after the Execution Date through the start of construction, Seller will provide Buyer monthly development and construction updates.
- (B) On and after the start of construction and through the Commercial Operation Date, Seller will provide Buyer monthly construction updates. If Seller becomes aware of any critical milestone that will not be achieved by the required date, Seller must provide Buyer written notice and a recovery plan to eliminate any delay in the construction schedule. In no event will Seller's failure to complete one or more critical milestones by the established dates change, delay or otherwise affect the requirement to achieve Commercial Operation by the Guaranteed Start Date. Buyer shall have the right to monitor the construction, commissioning, start-up, testing and operations of the Project and to be present during the commissioning, start-up and testing of the Project; provided, however, that Buyer shall comply with all of Seller's applicable safety and health rules and requirements and shall conduct itself in a manner that will not unreasonably interfere with the Project's operations.
- (C) Seller may not modify, alter or otherwise change the Project without the prior written consent of Buyer, except (i) as required by Prudent Utility Practices or Applicable Law; or (ii) for modifications, alterations, expansions or other changes that would not be expected to materially alter the Guaranteed Solar Capacity, Annual Performance Ratio or availability of the Project or materially and adversely impact the capabilities of the Project; or (iii) in connection with maintenance on the Project, including repairs and replacement of equipment, as determined to be reasonable or necessary by Seller.
- (D) Seller shall designate (by a written notice delivered to Buyer by the Execution Date, a Project Manager reasonably acceptable to Buyer who shall have full responsibility for the performance of the construction, commissioning, start-up and testing by Seller and shall act as a single point of contact in all matters on behalf of Seller ("Project Manager"). Seller may designate a new Project Manager from time to time by a written notice delivered to Buyer, subject to Buyer's consent, which consent shall not be unreasonably denied or delayed. Seller's Project Manager shall be deemed to have full authority to act on behalf of Seller, and notices given by Buyer to the Project Manager shall be deemed as having been given to Seller.
- (E) Other than the rights and obligations of Buyer specified in this PPA and any documents ancillary hereto, neither this PPA nor any such ancillary document shall be interpreted to create in favor of Buyer, and Buyer specifically disclaims, any right, title or interest in any part of the Project.

10.2 <u>Commissioning Tests.</u>

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Seller shall give Buyer at least sixty (60) Days' prior notice of the approximate test date and of the proposed tests scheduled relating to the commissioning of the Project ("Commissioning Tests") as described in Exhibit F. Representatives of Buyer shall have the right to be present at all such testing. Seller shall promptly notify Buyer of any changes to the test date or the date of any

Commissioning Tests relating to the Project in order that Buyer may arrange for its respective representatives to attend.

10.3 Access to and Inspection of the Project.

- (A) Seller shall provide Buyer and its authorized agents, employees and inspectors reasonable access to the Project, including the control room and Seller's Interconnection Facilities, for the purposes set forth herein. Buyer acknowledges that such access does not provide Buyer with the right to direct or modify the operation of the Project in any way and further acknowledges that any exercise by Buyer of its rights under this Section 10.3(A) shall be at its own risk and expense; provided, however, that Buyer shall comply with all of Seller's applicable safety and health rules and requirements and shall conduct itself in a manner that will not unreasonably interfere with the Project's operations.
- (B) No inspections of the Project, whether by Buyer or otherwise, and no acceptance or approval given under this PPA, shall relieve Seller of or reduce its obligation to maintain the Project and operate the same in accordance with this PPA and Prudent Utility Practices. In no event shall any statement, representation, or lack thereof by Buyer, either express or implied, relieve Seller of its exclusive responsibility for the Project. Any inspection of Seller's property or equipment by Buyer, or any review by Buyer or consent by Buyer to Seller's plans, shall not be construed as endorsing the design, fitness or operation of the Project equipment nor as a warranty or guarantee.

10.4 Operating Parameters.

- (A) Seller shall operate or procure the operation of the Project in accordance with Prudent Utility Practices ("Operating Parameters"), subject only to Emergency Conditions and Force Majeure Events; provided that, during the Term of this PPA, Seller shall: (i) have the sole responsibility to, and shall at its sole expense, operate and maintain the Project in accordance with all requirements set forth in this PPA, and (ii) comply with reasonable requirements of Buyer regarding day-to-day or hour-by-hour communications with Buyer. Subject to compliance with the Operating Parameters, Seller agrees to operate the Project in such a manner that Energy Output delivered by Seller will meet all requirements for voltage level, harmonics, power factor, VArs, Ancillary Services and other electrical specifications required by the Transmission Provider and will have the capabilities to be dispatched manually by Seller as is necessary to comply with the provisions of this PPA.
- (B) Seller shall operate the Project such that all system protective equipment is in service whenever the Project is connected to, or is operated in parallel with, the Transmission Provider's Transmission System, except for normal testing and repair. Seller shall provide adequate system protection and control devices to ensure safe and protected operation of all energized equipment during normal testing and repair. The Project's protective equipment shall meet Institute of Electrical and Electronic Engineers and all other industry standards. Seller shall have qualified independent, third party personnel test, calibrate and certify in writing the proper functioning of all protective equipment at least once every twelve (12) Months. Seller shall perform a unit functional trip test after each overhaul of the Project's major equipment and shall

provide results to Buyer in writing prior to returning the equipment to service. All of the foregoing shall be conducted in accordance with Prudent Utility Practices.

10.5 Operating Procedures.

- Not later than thirty (30) days before the Commercial Operation Date, an (A) operating committee consisting of Seller and Buyer representatives shall develop mutually agreeable written Operating Procedures for integration of the Project into Buyer's system. Operating Procedures shall include, but not be limited to, methods of day-to-day communications; metering, telemetering, telecommunications, and data acquisition procedures; key personnel lists for Seller and Buyer, including an appointed authorized representative for each Party; clearances and switching practices; operations and maintenance scheduling and reporting; scheduling and forecasting practices; daily capacity and Energy Output reports; unit operations log; Seller Forced Outage and planned outage reporting, and such other matters as may be mutually agreed upon by the Parties. Seller must staff, operate, maintain and control the Project at all times consistent with the Operating Procedures, the PPA, Prudent Utility Practice, Applicable Laws and required permits. The Operating Procedures also will require Seller to take all measures necessary to remediate or otherwise correct any breach of environmental protection regulations as required under Applicable Law. Personnel of Seller capable of starting, running, and stopping the Project must be continuously available, either at the Project or capable of being at the Project on ninety (90) minutes' notice, and must be continuously available by phone. Seller will make qualified personnel available twenty-four (24) hours per day, seven (7) days per week to perform scheduling and receive and give communications relating to the operation and dispatch of the Project. Buyer will use commercially reasonable efforts to notify Seller twenty-four (24) hours in advance of potentially critical start-ups.
- (B) Seller will prepare detailed test protocols and procedures for any tests to be performed in connection with achieving Commercial Operation and for periodic tests as required within this PPA. The protocols and procedures will be developed by Seller in accordance with the requirements of the PPA and the appropriate power test code standards. Draft protocols and procedures must be submitted to Buyer for review and approval, which approval will not be withheld unreasonably.

10.6 Project Maintenance.

(A) Seller shall maintain all Project equipment or cause the same to be maintained at all times in accordance with Prudent Utility Practices and otherwise in accordance with this PPA. At least sixty (60) days before the Commercial Operation Date, Seller will provide Buyer a notice of Scheduled Maintenance Outages for the Project for the first Commercial Operation Year within the Term. Thereafter, no later than September 1 of each Commercial Operation Year, Seller shall provide Buyer with a non-binding notice of the annual Scheduled Maintenance Outages for the following Commercial Operation Year and a notice of estimated long-term Scheduled Maintenance Outages for the next four (4) Commercial Operation Years. Each notice of Scheduled Maintenance Outages must identify each planned interruption and/or reduction of the Plant's generation, including the duration of such event. Each annual Scheduled Maintenance Outage for the Commercial Operation Year will be subject to approval by Buyer, not to be unreasonably withheld. Buyer may, within fifteen (15) Days after receipt of the schedule,

request reasonable modifications to the schedule. Seller may not schedule any interruption or reduction to the Plant's generation for any reason at any time during May 1st through September 1st, December, or January without the prior written approval of Buyer, which approval may be withheld or granted in Buyer's sole discretion. Buyer may request Seller to defer or reschedule any Scheduled Maintenance Outage up to forty-eight (48) hours before commencement of the outage. Seller must give Buyer no less than ninety (90) days' advance notice of any proposed change in the annual maintenance schedule. Such requested changes in the schedule shall not materially adversely impact Buyer, and Seller agrees to compensate Buyer for any costs incurred by Buyer as a result of such change.

- (B) Seller shall be responsible (at its own cost and expense) for timely obtaining, maintaining, and complying with all agreements, arrangements and permits necessary for delivery of the Energy Output to the Point of Delivery. Upon the reasonable, written request of Buyer, Seller shall make available to Buyer copies of any environmental permits, plans, and/or studies related to the Project.
- 10.7 <u>Sales to Third Parties</u>. As of the start of the Test Period, Seller shall not sell or divert Energy Output to a third Person.
- 10.8 <u>Performance Tests</u>. Performance Tests include any of First Year Performance Test, Annual Performance Tests, and Buyer-Requested Performance Tests as described in this Section 10.8.
- (A) Seller shall conduct a performance test within the first three (3) calendar months of the first Commercial Operation Year (the "First Year Performance Test").
- (B) Seller shall conduct a performance test in each Commercial Operation Year beyond the first year (the "Annual Performance Tests"). Annual Performance Tests shall be performed within the first three (3) calendar months of each Commercial Operation Year.
- (C) An annual degradation rate of seven-tenths of one percent (0.70%) per year will be used in the Annual Performance Test PVSYST Model for the purpose of performance testing described in this Section 10.8.
- (D) First Year Performance Tests, Annual Performance Tests, and Buyer-Requested Performance Tests shall be conducted in accordance with ASTM E2848-13, except where deviations are provided in this Section 10.8 (D).
 - (1) The reporting conditions ("RC") will be developed in accordance with ASTM E2939-13 and will utilize site measured irradiance, ambient temperature, and wind speed data collected during the test. The same RC will be used for computing the Model Rated Power and Test Rated Power using their respective regression equations.
 - (2) The primary result from an Annual Performance Test or Buyer-Requested Performance Test is the ratio of Test Rated Power to Model Rated Power (the "Performance Test Rating").

- (3) Test Rated Power shall be the value produced by the regression of filtered site measured power and site measured weather data evaluated at the reporting conditions (RC), adjusted by Seller for any unavailable equipment during the test.
- (4) Model Rated Power shall be the value produced by the regression of filtered PVSYST model power and filtered model weather data evaluated at the reporting conditions (RC), adjusted by Seller for any unavailable equipment during the test.
- (5) The Model Rated Power will be calculated using the Annual Performance Test PVSYST Model. Site measured GHI irradiance will be used as the irradiance input to the PVSYST model rather than site measured POA irradiance.
- (6) The PVSYST model prepared by the independent engineer during project financing will be used as the PVSYST model for initial comparison to the actual site performance during the First Year Performance Test. Seller shall provide to Buyer the modifications to the PVSYST model after completion of the First Year Performance Test necessary to arrive at a set of regression coefficients that closely match those derived from test data as well as to achieve a Performance Test Rating of 1.000. The resulting modified PVSYST model together with a schedule of annual degradation will be the Annual Performance Test PVSYST Model.
- (7) The Annual Performance Test PVSYST Model and a listing of model input assumptions shall be prepared by Seller and furnished to Buyer within one (1) month of the completion of the First Year Performance Test. The model will include annual degradation previously agreed to by the Parties. This mutually accepted model will be utilized without modification, unless agreed to by both Parties, in all Annual Performance Tests and Buyer-Requested Performance Tests as well as determination of any Annual Performance Test Guarantee Damages as defined in Section 10.9.
- (E) Within thirty (30) days of the completion of a Performance Test, Seller may elect to conduct a single re-test. Upon completion of the single re-test, Seller must choose for the results of either test to be used as the Annual Performance Test.
- (F) For all Performance Tests and re-tests, Seller shall notify Buyer at least ten (10) Days prior to the initiation of the Performance Test and Buyer shall have the option to inspect the Project during such Performance Test.
- (G) For all Performance Tests and re-tests, Seller shall provide a Performance Test Report including all performance data, model simulations, calculations, and test reports to the Buyer for analysis and approval.
 - 10.9 Annual Performance Test Guarantee Damages.

- (A) Seller guarantees that Annual Performance Tests shall meet or exceed the Annual Performance Test Guarantee. The Annual Performance Test Guarantee is met when the average of the Performance Test Ratio for the Annual Performance Test and the Performance Test Ratio for the previous Annual Performance Test, or the First Year Performance Test (i.e. 1.000) as applicable, results in a value greater than or equal to 0.950 (the "Performance Test Guarantee Ratio") without the application of any commercial test tolerance or adjustment to the results for test measurement uncertainty.
- (B) The calculated energy shortfall (the "Energy Shortfall") shall be the total energy delivered in the most recently completed Commercial Operation Year multiplied by the Shortfall Factor. The Shortfall Factor is one (1) minus the ratio of the average of the Performance Test Ratios of the most recently completed Commercial Operation Year and the Commercial Operation Year immediately preceding the most recently completed Commercial Operation Year and the Performance Test Guarantee Ratio.

$$ES = E_n \times SF$$

$$SF = 1 - \frac{\frac{1}{2}(PTR_n + PTR_{n-1})}{PTGR}$$

Where,

ES = Energy Shortfall

 E_n = Energy delivered in the most recently completed Commercial Operation Year

SF = Shortfall Factor

 $PTR_n = Performance Test Ratio for the most recently completed Commercial Operation Year$

 $PTR_{n-1} = Performance Test Ratio for the Commercial Operation Year immediately preceding the most recently completed Commercial Operation Year$

PTGR = Performance Test Guarantee Ratio

(C) If the Energy Shortfall calculation results in a positive number, Seller shall pay Annual Performance Test Guarantee Damages in accordance with Seller's obligations under the provisions of this Section 10.9. Liquidated damages associated with failure to meet the Annual Performance Test Guarantee shall be paid in the amount equal to (x) the positive difference between the Average Market Price for energy and stand-alone RECs during Solar Period Hours during the Commercial Operation Year and the Solar Energy Output Payment Rate, multiplied by (y) the Energy Shortfall as determined by the Annual Performance Test Guarantee ("Annual Performance Test Guarantee Damages"), but in no event in excess of the Annual Solar Capacity Guarantee Damages Cap and the Aggregate Solar Capacity Guarantee Damages Cap. In the event that Buyer-Requested Performance Test Guaranty Damages are due for an overlapping time period, the value for E_n in the above equation shall be reduced by any Energy delivered during the Deficiency Period (E_d) as outlined in Section 10.10(B).

- (D) Example energy shortfall calculation: A performance test is conducted and results in an average Performance Test Ratio of 0.930 (average of the Performance Test Ratios of the most recently completed Commercial Operation Year and the Commercial Operation Year immediately preceding the most recently completed Commercial Operation Year). The difference between the Average Market Price for energy and RECs during Solar Period Hours and the Solar Energy Output Payment Rate in the most recently completed Commercial Operation Year is 10.00 \$/MWh and the total annual energy delivered by the project in the most recently completed Commercial Operation Year is 500,000 MWh. Damages shall be paid as a result of the Performance Test Ratio being less than the guaranteed value of 0.950. The amount of liquidated damages is calculated to be [500,000 MWh] X [1 0.930 / 0.950] X [10.00 \$/MWh] = \$105,263.16.
- (E) The aggregate Annual Performance Test Guarantee Damages payable by Seller for failure to meet the Annual Performance Test Guarantee in any Commercial Operation Year, plus the Buyer-Requested Performance Test Guarantee Damages, shall be capped annually at a value equivalent to Eleven Thousand Dollars (\$11,000) per MW of Guaranteed Solar Capacity ("Annual Solar Capacity Guarantee Damages Cap") and in the aggregate over the term of the PPA at a value equal to Thirty-Three Thousand Dollars (\$33,000) per MW of Guaranteed Solar Capacity ("Aggregate Solar Capacity Guarantee Damages Cap"). Amounts payable pursuant to this Section 10.9(E) shall constitute Buyer's sole and exclusive remedy, and Seller's sole and exclusive liability, in connection with any deficiency in connection with Annual Performance Tests or Buyer-Requested Performance Tests.
- 10.10 <u>Buyer-Requested Performance Tests.</u> Seller shall perform additional Buyer-Requested Performance Tests as requested by Buyer, limited to the conditions described in this Section 10.10. Buyer-Requested Performance Tests will be conducted as described in Section 10.8, for tests performed within the second and subsequent Commercial Operation years.
- (A) Seller guarantees that Performance Test Ratio for Buyer-Requested Performance Tests shall meet or exceed the Performance Test Guarantee Ratio without the application of any commercial test tolerance or adjustment to the results for test measurement uncertainty.
- (B) The calculated energy shortfall (the "Energy Shortfall") shall be the product of (i) total energy delivered from the date of a failed Buyer-Requested Performance Test until the date a subsequent retest confirms a Performance Test Ratio equal to or greater than the Performance Test Guarantee Ratio (a "Deficiency Period"), multiplied by (ii) the Shortfall Factor. The Shortfall Factor is one (1) minus the ratio of the Performance Test Ratio and the Performance Test Guarantee Ratio.

$$ES = E_d x SF$$

$$SF = 1 - \frac{PTR}{PTGR}$$

Where,

ES = Energy Shortfall

 E_d = energy delivered during the Deficiency Period

SF = Shortfall Factor

PTR = Performance Test Ratio for the current Buyer-Requested Performance Test

PTGR = Performance Test Guarantee Ratio

- (C) If the Energy Shortfall calculation results in a positive number, Seller shall pay Buyer-Requested Performance Test Guarantee Damages in accordance with Seller's obligations under the provisions of this Section 10.10. Liquidated damages associated with failure to meet the Buyer-Requested Performance Test Guarantee shall be paid in the amount equal to (x) the positive difference between the Average Market Price for energy and RECs during Solar Period Hours during the Deficiency Period and the Solar Energy Output Payment Rate, multiplied by (y) the Energy Shortfall as determined by the Buyer-Requested Performance Test Guarantee ("Buyer-Requested Performance Test Guarantee Damages"), but in no event in excess of the Annual Solar Capacity Guarantee Damages Cap and the Aggregate Solar Capacity Guarantee Damages Cap.
- (D) Example energy shortfall calculation: A performance test is conducted and results in Performance Test Ratio of 0.930. The difference between the Average Market Price for energy and RECs during Solar Period Hours and the Solar Energy Output Payment Rate during the Deficiency Period is 10.00 \$/MWh and the total energy delivered by the project during the Deficiency Period is 500,000 MWh. Damages shall be paid as a result of the Performance Test Ratio being less than the guaranteed value of 0.950. The amount of liquidated damages is calculated to be [500,000 MWh] X [1 0.930 / 0.950] X [10.00 \$/MWh] = \$105,263.16.
- (E) Only one (1) Buyer-Requested Performance Test may be requested per operating year.
- (F) Buyer-Requested Performance Test may not be requested within three months of a previous performance test.
- (G) Buyer-Requested Performance Test will be performed at a time mutually agreeable between parties.

10.11 Weather Stations.

(A) Seller shall, at Seller's cost and no later than six (6) months prior to the Commercial Operation Date, provide, install, own, operate and maintain a minimum of four (4) stand-alone meteorological stations ("Weather Stations") at the Project to monitor and report weather data, for use by both Buyer and Seller. The Weather Stations shall be equally spaced around the perimeter of the solar array to provide representative conditions for the whole of the Project and to provide information on changing weather conditions for short-term (e.g. 5 to 15 minute) generation forecasting. The Weather Stations shall include the capability for measuring, indicating, and recording PV cell temperature, wind speed and direction (instantaneous and

average), barometric pressure, solar radiation, rainfall (daily and monthly plus rate), ambient temperature and humidity. Seller shall submit to PNM for review and approval, Seller's technical specifications for the Weather Stations along with a site plan showing the location of the station(s) (GPS coordinates), the location of all solar generating units, photovoltaic modules, current inverters, and other prominent features, as applicable. The system shall be interconnected via a web-based file transfer protocol, or other mutually-agreeable protocol, to provide indication of all measured parameters to PNM and the data shall be available to PNM via a PI historian interface.

- (B) Seller shall not select the type of Weather Station without the prior written consent of PNM, which shall not be unreasonably withheld. No later than twelve (12) months prior to the Commercial Operation Date, the Parties shall agree on the locations of the Weather Stations and any applicable protocols for testing, accuracy, failure or other relevant characteristics of the Weather Stations.
- (C) Data collected from the Weather Stations shall be utilized for determination of the Solar Performance Ratio, minimum solar irradiance for determination of system availability, and lost output due to curtailment or outages.

ARTICLE 11 RECs and Environmental Attributes

11.1 Sale of RECs and Environmental Attributes.

- (A) Other than as specified in Sections 11.1(D) and 11.1(E) below, effective from the date on which the Project first delivers Energy for sale to Buyer at the Point of Delivery, Seller shall transfer to Buyer, free and clear of all claims, liens, security interests and encumbrances, of any kind, nature and description, all right, title and interest in and to RECs and Environmental Attributes associated with the generation of Energy. Seller shall make the RECs available to Buyer no later than five (5) Business Days after the RECs are created in WREGIS, subject to a day-for-day extension based on availability of the WREGIS website. Seller shall be liable for Buyer's costs to replace the RECs if Seller fails to deliver RECs within ten (10) Days after notice from Buyer. The RECs and Environmental Attributes transferred under this PPA shall be bundled with the associated Energy, and Buyer shall pay Seller for the bundled RECs and Environmental Attributes and Energy as set forth in this PPA.
- (B) Seller and Buyer shall execute all documents and instruments necessary to effect transfer of the RECs and Environmental Attributes to Buyer or its respective designee(s).
- (C) Ownership by Buyer of Environmental Attributes and RECs shall include any Environmental Attributes and RECs that are reserved or "banked" throughout the Term of this PPA, but not used, sold, assigned or otherwise transferred during the Term of this PPA. Buyer may, to the extent permitted by Applicable Law and this PPA, assign its rights, title and interest in and to any RECs and Environmental Attributes associated with the Project to one or more third parties under any transaction permitted by Applicable Law.
- (D) Except as otherwise provided in Section 8.1, Tax Benefits in effect on the Execution Date of this PPA or any successor or other provision providing for a federal, state and/or

local tax credit determined by reference to renewable electric energy produced from renewable energy resources shall be owned by Seller.

- (E) Seller shall, at its sole expense and prior to commencement of the Test Period, take all actions and execute all documents or instruments necessary to ensure that the Project is registered as a generating unit in WREGIS for the purpose of tracking all Renewable Energy Certificates corresponding to all Metered Output, and that all associated WREGIS Certificates are issued and tracked and transferred in a timely manner to Buyer. Seller shall comply with all Applicable Laws, including the WREGIS Operating Rules, regarding the certification and transfer of such WREGIS Certificates to Buyer and Buyer shall be given sole title to all such WREGIS Certificates. Seller shall promptly provide written documentation to Buyer evidencing that the Project has been registered in WREGIS. Seller shall be responsible for all expenses associated with registering the Project with WREGIS, establishing and maintaining Seller's WREGIS account, paying WREGIS Certificate issuance and transfer fees, and transferring WREGIS Certificates from Seller's WREGIS account to Buyer's WREGIS account.
- (F) Seller shall register the Project, as necessary, so that the Project is compliant with reporting requirements related to RECs and Environmental Attributes and certification requirements under any applicable federal, state or regional program or Applicable Law. Notwithstanding the foregoing, Seller shall not be required to expend more than Five Thousand Dollars (\$5,000) per MW annually and Ten Thousand Dollars (\$10,000) per MW in the aggregate to maintain compliance due to regulatory changes relating to RECs.
- (G) Prior to commencement of the Test Period, Seller shall provide written documentation to Buyer evidencing that the RECs generated by the Project will be reported to WREGIS using a WREGIS Qualified Reporting Entity, as that term is defined by WREGIS.
- (H) Neither Seller nor Buyer will have any liability to the other for any act, omission, misrepresentation, or breach (other than an act or omission due to the failure to pay fees, charges or expenses by the responsible Party), by an entity that certifies the characteristics or delivery of a REC, or the qualification of the Project as a renewable energy facility, under Applicable Law. The certifying entity may include a Governmental Authority, WREGIS or other generation information system, an independent auditor or other third party.

ARTICLE 12 Default and Remedies

12.1 Events of Default of Seller.

- (A) Any of the following events shall constitute an Event of Default of Seller upon its occurrence and no cure period shall be applicable:
 - (1) Seller's dissolution or liquidation;
 - (2) Seller's assignment of this PPA (or any of its rights hereunder) for the benefit of creditors, except as permitted pursuant to Article 18;

- (3) Seller's filing of a petition in voluntary bankruptcy or insolvency or for reorganization or arrangement under the bankruptcy laws of the United States or under any insolvency law of any state, or Seller voluntarily taking advantage of any such law by answer or otherwise:
- (4) The sale by Seller to a third party, or diversion by Seller for any use, of Energy, RECs or Ancillary Services committed to Buyer by Seller, except for Energy, RECs or Ancillary Services, as applicable, that Buyer fails to accept or pay for;
- (5) Seller's actual fraud, material misrepresentation or willful misconduct in connection with this PPA;
- (6) The failure of Seller to maintain Security in accordance with Article 19, unless remedied within ten (10) Business Days of receipt by Seller of written notice of such failure from Buyer or the entity providing such Security;
- (7) The failure of Seller Guarantor to make, when due, any payment required, unless remedied within 10 Business Days of receipt of notice of such failure;
- (8) Seller's failure to achieve the Commercial Operation Date for the Project on or prior to the Guaranteed Start Date, except as a result of a Force Majeure Event in accordance with Section 3.6; or
- (9) Seller's failure to deliver RECs in accordance with the terms of this PPA, unless remedied within ten (10) Business Days of receipt of notice of such failure.
- (B) Any of the following events shall constitute an Event of Default of Seller upon the failure of Seller to cure within thirty (30) Days after the date of written notice from Buyer to Seller:
 - (1) Seller's Abandonment of construction or operation of the Project;
 - (2) Except to the extent arising from the acts or omissions of the Transmission Provider or Buyer, Seller is not able to deliver Energy to the Point of Delivery as a result of the Project not maintaining its interconnection with the Transmission Provider's Interconnection Facilities or otherwise fails to maintain in effect any agreements required to deliver Energy to the Point of Delivery;
 - (3) Seller's failure to make any payment due to Buyer under or in connection with this PPA (subject to Seller's rights with respect to disputed payments under Article 9 and net of outstanding damages and any other rights of offset that Seller may have pursuant to this PPA);
 - (4) Seller's failure to comply with any other material obligation under this PPA, which would result in a material adverse impact on Buyer; or

- (5) The Project fails, after the Commercial Operation Date, to maintain an Actual Solar Availability Percentage of at least seventy-five percent (75%) over any twenty-four (24) consecutive months during the Term.
- (6) Seller fails to register the Project within WREGIS in accordance with the terms of this Agreement.
- (C) Any of the following events shall constitute an Event of Default of Seller upon the failure of Seller to cure within sixty (60) Days after the date of written notice from Buyer to Seller:
 - (1) Seller's assignment of this PPA, or any Change of Control of Seller, or Seller's sale or transfer of its interest, or any part thereof, in the Project, except as permitted in accordance with Article 18;
 - (2) Any representation or warranty made by Seller in this PPA shall prove to have been false or misleading in any material respect when made or ceases to remain true during the Term if such cessation would reasonably be expected to result in a material adverse impact on Buyer; or
 - (3) The filing of an involuntary case in bankruptcy or any proceeding under any other insolvency law against Seller as debtor or its parent or any Affiliate that could materially impact Seller's ability to perform its obligations hereunder; provided, however, that Seller does not obtain a stay or dismissal of the filing within the cure period.

12.2 Events of Default of Buyer.

- (A) Any of the following shall constitute an Event of Default of Buyer upon its occurrence, and no cure period shall be applicable:
 - (1) Buyer's dissolution or liquidation provided that division of Buyer into multiple entities shall not constitute dissolution or liquidation;
 - (2) Buyer's assignment of this PPA (or any of its rights hereunder) for the benefit of creditors; or
 - (3) Buyer's filing of a voluntary petition in bankruptcy or insolvency or for reorganization or arrangement under the bankruptcy laws of the United States or under any insolvency law of any State, or Buyer voluntarily taking advantage of any such law by answer or otherwise.
- (B) Any of the following shall constitute an Event of Default of Buyer upon the failure of Buyer to cure within thirty (30) Days after the date of written notice from Seller to Buyer:
 - (1) Buyer's failure to make any payment due hereunder (subject to Buyer's rights with respect to disputed payments under Article 9 and net of outstanding damages and any other rights of offset that Buyer may have pursuant to this PPA); or

- (2) Buyer's failure to comply with any other material obligation under this PPA, which would result in a material adverse impact on Seller.
- (C) Any of the following shall constitute an Event of Default of Buyer upon the failure of Buyer to cure within sixty (60) Days after the date of written notice from Seller to Buyer:
 - (1) The filing of an involuntary case in bankruptcy or any proceeding under any other insolvency law against Buyer; provided, however, that Buyer does not obtain a stay or dismissal of the filing within the cure period;
 - (2) Buyer's assignment of this PPA, except as permitted in accordance with Article 18; or
 - (3) Any representation or warranty made by Buyer in this PPA shall prove to have been false or misleading in any material respect when made or ceases to remain true during the Term if such cessation would reasonably be expected to result in a material adverse impact on Seller.

12.3 Damages Prior to Termination.

- (A) Upon the occurrence of an Event of Default, and subject in each case to the limitation on damages set forth in Section 12.7, the Non-Defaulting Party shall have the right to (i) collect damages accruing prior to the Early Termination Date of this PPA from the Defaulting Party as set forth in Section 12.3(B), (ii) exercise its rights pursuant to Section 12.5, (iii) suspend performance, (iv) with respect to a Seller Event of Default, exercise its rights pursuant to Section 12.10 with respect to any Security, and (v) exercise its rights to terminate this PPA pursuant to Section 12.4.
- (B) For all Events of Default, the Non-Defaulting Party shall be entitled to receive from the Defaulting Party all of the damages incurred by the Non-Defaulting Party in connection with such Event of Default prior to the Early Termination Date; provided, that if an Event of Default has occurred and has continued uncured for a period of one hundred eighty (180) Days, the Non-Defaulting Party shall be required to either waive its right to collect further damages on account of such Event of Default or elect to terminate this PPA as provided for in Section 12.4. If Seller is the Defaulting Party, the Parties agree that the damages recoverable by Buyer hereunder on account of an Event of Default of Seller shall include an amount of cover damages equal to Replacement Energy Costs minus the product of (x) the quantity of Energy Output so replaced and (y) the Solar Energy Output Payment Rate. Further, Seller acknowledges and agrees that in addition to the foregoing, Seller shall be obligated to pay Buyer any such damages associated with replacement of Energy Output notwithstanding the availability or prices of electric energy from other fuel sources, such as natural gas. Seller also shall be obligated to pay Buyer any penalties levied by any Governmental Authority in connection with Seller's failure to deliver to Buyer any RECs and any Environmental Attributes pursuant to this PPA, provided that Buyer has used commercially reasonable efforts to avoid, minimize or mitigate the same. Seller acknowledges that Buyer entered into this PPA for the procurement of Energy Output, which includes RECs and Environmental Attributes. If Buyer is the Defaulting Party, the Parties agree that damages recoverable by Seller hereunder on account of an Event of Default of Buyer shall include costs

and losses incurred by Seller due to such Event of Default, including, to the extent applicable, an amount of cover damages equal to the quantity of Energy Output produced by Seller following such Event of Default, plus, to the extent that Seller is unable to produce Energy Output due to the Event of Default of Buyer, an additional quantity equal to the amount of Energy Output that would have been produced by Seller absent such Event of Default of Buyer, each multiplied by the Energy Output Payment Rate; provided that the foregoing amount shall be reduced by an amount equal to (A) the amount of any revenues that Seller, using commercially reasonable efforts, is able to obtain by selling Energy Output to a third party or into the market, less (B) Seller's costs and expenses incurred to effectuate any such sales.

- Termination. Upon the occurrence of an Event of Default, the Non-Defaulting Party shall have the right to declare a date, which shall be between fifteen (15) and sixty (60) Days after the notice thereof, upon which this PPA shall terminate ("Early Termination Date"). Upon the effective designation of an Early Termination Date, the Non-Defaulting Party will have the right to immediately suspend performance under this PPA, except that Seller may not suspend performance of its obligation to post and maintain Development Security and Delivery Term Security in accordance with Article 19. Neither Party shall have the right to terminate this PPA except as provided for upon the occurrence of an Event of Default as described above or as may be otherwise explicitly provided for in this PPA. Upon the termination of this PPA under this Section 12.4 for an Event of Default, the Non-Defaulting Party shall be entitled to receive the Termination Payment from the Defaulting Party. As soon as practicable after the Early Termination Date, the Non-Defaulting Party shall (a) calculate the Termination Payment, and (b) give notice to the Defaulting Party of the amount of the Termination Payment. The notice shall include a written statement explaining in reasonable detail the calculation of such amount and the sources for such calculation. The Termination Payment shall be made to the Non-Defaulting Party, as applicable, within ten (10) Business Days after such notice is effective. If Seller is the Defaulting Party, the Termination Payment will equal the Buyer Termination Payment, and if Buyer is the Defaulting Party, the Termination Payment will equal the Seller Termination Payment. Notwithstanding the foregoing, if the Commercial Operation Date has not occurred by the Guaranteed Start Date, Buyer may terminate this PPA in accordance with this Section 12.4, and the Buyer Termination Payment will be an amount equal to the Development Security less any Delay Damages already paid to Buyer. Neither Party shall have liability for damages or failure to deliver or purchase Energy Output after the effective date of such termination, including Replacement Energy Costs.
- (A) In the event that Seller is the Defaulting Party, as soon as practicable after notice of the Early Termination Date, Buyer shall calculate the Buyer Termination Payment in a commercially reasonable manner as of the Early Termination Date in accordance with this Section 12.4(A). The notice shall include a written statement explaining in reasonable detail the calculation of such amount. In calculating such amount, Buyer shall use information from third parties who may include dealers in the relevant markets, end-users of the relevant product, information vendors and other sources of market information. Buyer shall not have to enter into a replacement contract to establish a Buyer Termination Payment.
- (B) In the event that Buyer is the Defaulting Party, as soon as practicable after notice of the Early Termination Date, Seller shall deliver written notice to Buyer of the amount of the Seller Termination Payment. The notice shall include a written statement explaining in

reasonable detail the calculation of such amount. In calculating such amount, Seller shall use information from third parties who may include dealers in the relevant markets, end-users of the relevant product, information vendors and other sources of market information. Seller shall not have to enter into a replacement contract to establish a Seller Termination Payment.

- 12.5 <u>Specific Performance</u>. In addition to the other remedies specified in this Article 12, each Party shall be entitled to seek a decree compelling specific performance with respect to, and shall be entitled, without the necessity of filing any bond, to seek the restraint by injunction of, any actual or threatened breach of any material performance obligation of the other Party under this PPA.
- 12.6 Remedies Cumulative. Subject to limitations on damages set forth in Section 12.7, each right or remedy of the Parties provided for in this PPA shall be cumulative of and shall be in addition to every other right or remedy provided for in this PPA, and the exercise, or the beginning of the exercise, by a Party of any one or more of the rights or remedies provided for herein shall not preclude the simultaneous or later exercise by such Party of any or all other rights or remedies provided for herein.
- 12.7 <u>Waiver and Exclusion of Other Damages</u>. The Parties confirm that the express remedies and measures of damages provided in this PPA satisfy its essential purposes. If no remedy or measure of damages is expressly herein provided, the obligor's liability shall be limited to direct, actual damages only. Neither Party shall be liable to the other Party for consequential, incidental, punitive, exemplary or indirect damages, lost profits or other business interruption damages by statute, in tort or contract (except to the extent expressly provided herein). To the extent any damages are required to be paid hereunder are deemed liquidated, the Parties acknowledge that the damages are difficult or impossible to determine, that otherwise obtaining an adequate remedy is inconvenient, and that the liquidated damages constitute a reasonable approximation of the harm or loss.
- 12.8 Payment of Amounts Due to Buyer. Without limiting any other provisions of this Article 12 and at any time before or after termination of this PPA, Buyer may send Seller an invoice for such damages or other amounts as are due to Buyer at such time from Seller under this PPA, and such invoice shall be payable in the manner, and in accordance with the applicable provisions, set forth in Article 9, including the provision for late payment charges.
- 12.9 <u>Duty to Mitigate</u>. Each Party agrees that it has a duty to mitigate damages and covenants that it will use commercially reasonable efforts to minimize any damages it may incur as a result of the other Party's performance or non-performance of this PPA.
- 12.10 <u>Security Rights</u>. Upon or at any time after the occurrence and during the continuation of an Event of Default enumerated in Section 12.1 or an Early Termination Date affecting Seller, Buyer may exercise any of the rights and remedies with respect to any Security, including any ancillary rights and remedies under Applicable Law then in effect. Buyer shall apply the proceeds of the Security realized upon the exercise of any such rights or remedies to reduce Seller's obligations under this PPA, subject to Buyer's obligation to return any surplus proceeds remaining after such obligations are satisfied in full.

ARTICLE 13 Contract Administration and Notices

- Party at the addresses noted in Exhibit D as either Party updates them from time to time by written notice to the other Party. Any notice, request, consent, or other communication required or authorized under this PPA to be given by one Party to the other Party shall be in writing. It shall either be hand delivered or mailed via overnight service with signature required upon receipt, to the representative of said other Party. If hand delivered, the notice, request, consent or other communication shall be simultaneously sent by facsimile or other electronic means. Any such notice, request, consent, or other communication shall be deemed to have been received by the close of the Business Day on which it was hand delivered or transmitted electronically (unless hand delivered or transmitted after such close in which case it shall be deemed received at the close of the next Business Day). Real-time or routine communications concerning operation of the Project shall be exempt from this Section.
- 13.2 <u>Representative for Notices</u>. Each Party shall maintain a designated representative to receive notices, who shall be identified on <u>Exhibit D</u> to this PPA. Either Party may, by written notice to the other Party, change the representative or the address to which such notices and communications are to be sent.
- 13.3 <u>Authority of Representatives</u>. The Parties' representatives designated above shall have authority to act for their respective principals in all technical matters relating to performance of this PPA and to attempt to resolve disputes or potential disputes. However, in their capacity as representatives, they shall not have the authority to amend or modify any provision of this PPA.
- Records. Seller and Buyer shall each keep and maintain complete and accurate records and all other data required by each of them for the purposes of proper administration of this PPA, including but not limited to books and records necessary for billing and payments and such records as may be required by any Governmental Authority or pursuant to Applicable Law. All records of Seller and Buyer pertaining to the operation of the Project or this PPA as specified herein or otherwise shall be maintained at the Project or in an office of Seller or Buyer, as applicable, in such format as may be required by Applicable Law and/or any Governmental Approval. Each Party shall have the right at its sole cost and expense, upon reasonable prior written notice to the other Party, during normal business hours, to examine and/or make copies of the records and data of such other Party relating to this PPA (including all records and data relating to or substantiating any charges paid by or to such other Party, MWh generated, Seller's operating procedures, the Project equipment manuals and Operating Records). All records required hereunder shall be maintained in accordance with, and for the applicable time periods required by, Applicable Law and the Party's retention policies, but in no event less than five (5) years after the final payment is made under this PPA. Seller shall provide Buyer copies of Operating Records upon Buyer's request.
- (A) Operating and Maintenance Records. Seller shall maintain an accurate and up-to-date operating log, in electronic format, at the Project that will include, without limitation, power production records for each hour; dispatch and scheduled Energy production; changes in operating status; planned outages, deratings and curtailments; any unusual conditions found during

inspections; environmental records including environmental permits, plans, and/or studies; meteorological data; maintenance; any other operating or maintenance records as may be required by state or federal regulatory authorities and WECC and any other information required under Prudent Utility Practice or any Project agreement (in the prescribed format); and Buyer and Seller Forced Outages ("O&M Records").

- (B) Billing and Payment Records. To facilitate payment and verification, Seller and Buyer shall keep all books and records necessary for billing and payments in accordance with the provisions of Article 9 and grant the other Party reasonable access to those records.
- (C) Project Development Records and Data Submissions. Seller shall submit or cause to be submitted to Buyer the following documents on or before the dates specified below:
 - (1) No later than thirty (30) Days after the Execution Date and ending on the Commercial Operation Date, (i) monthly construction progress reports in such form as may be agreed to by Buyer in accordance with Section 10.1(A) and 10.1(B), and (ii) reports, when and as Seller becomes aware, of any new condition or event that may have a material adverse effect on the timely completion of the Project.
 - (2) No later than thirty (30) Days prior to the start of the Test Period, (i) evidence demonstrating that Seller has obtained all Governmental Approvals then required to be obtained for the ownership, operation and maintenance of, and the supply of Energy Output from, the Project in accordance with this PPA, and (ii) a list identifying the remaining Governmental Approvals for which Seller is responsible under the terms of this PPA, which Governmental Approvals are not yet required for the operation and maintenance of, and the supply of Energy Output from, the Project, together with a plan for obtaining such Governmental Approvals and an estimate of the time within which such Governmental Approvals will be obtained by Seller; provided, however, that the plan for obtaining any outstanding Governmental Approvals from any Governmental Authority which address environmental, health and safety matters shall be reasonably acceptable to Buyer.
 - (3) As soon as available, but not later than sixty (60) Days following the Commercial Operation Date for the Project, two (2) copies of all results of Commissioning Tests performed on the Solar Units.
 - (4) Upon request by Buyer, one (1) signed and sealed copy of all asbuilt drawings for the Project, including the civil and architectural works.
 - (5) The receipt of the above schedules, data, certificates and reports by Buyer shall not be construed as an endorsement by Buyer of the design of the Project, does not constitute a warranty by Buyer as to the safety, durability or reliability of the Project, otherwise relieve Seller of any of its obligations or potential liabilities under the Project contracts or, except with respect to the obligations of Buyer to maintain the confidentiality of documents and information received by it, impose any obligation or liability on Buyer.

- 13.5 <u>Provision of Real-Time Data</u>. Upon request by Buyer, Seller shall provide real-time electronic access to Buyer of all meteorological and other related data collected at the Project and corresponding unit availability data.
- 13.6 Examination of Records. Buyer may review operating procedures, equipment manuals, Operating Records and data kept by Seller relating to transactions under and administration of this PPA, at any time during the period the records are required to be maintained, from time to time upon request and during normal business hours. Buyer shall have the right, upon reasonable notice and at its sole expense (unless Seller has defaulted under this PPA, in which case Seller will bear the expense), to examine the records of Seller to the extent reasonably necessary to verify the accuracy of any statement, charge or computation made pursuant to this PPA. If any such examination reveals any inaccuracy in any invoice, the necessary adjustments in such invoice and any underpayment by Buyer will be paid, and any overpayment by Buyer will be reimbursed by Seller, promptly in accordance with payment provisions in this PPA.
- 13.7 <u>Exhibits.</u> Either Party may change the information for its notice addresses in <u>Exhibit D</u> at any time without the approval of the other Party. <u>Exhibit A</u>, <u>Exhibit B</u>, and <u>Exhibit E</u> may be changed at any time with the mutual consent of both Parties.
- Resolution of Issues. The Parties agree that it is in the best interest of both Parties 13.8 to attempt to resolve disputes that arise under this PPA in a quick and inexpensive manner. To that end, the Parties commit to use commercially reasonable efforts to resolve disputes informally. For all disputes that arise under this PPA, the Parties immediately, through their designated representatives, shall negotiate with one another in good faith in order to reach resolution of the dispute. Such negotiation shall commence within five (5) Days of the date of the letter from one Party representative to the other Party representative notifying that Party of the nature of the dispute. In the event that the Parties' representatives cannot agree to a resolution of the dispute within thirty (30) Days after the commencement of negotiations, written notice of the dispute ("Dispute Notice"), together with a statement describing the issues or claims, shall be delivered, within five (5) Business Days after the expiration of such thirty (30) Day period, by each of the Parties' representatives to its respective senior officer or official (such senior officer or official to be selected by each of the Party representatives in his or her sole discretion, provided such senior officer or official has authority to bind the respective Party). Within five (5) Business Days after receipt of the Dispute Notice, the senior officers or officials for both Parties shall negotiate in good faith to resolve the dispute, provided that the failure to deliver such Dispute Notice shall not prejudice either Party's right to submit such dispute to litigation. In the event that the senior officers or officials cannot resolve such dispute within thirty (30) Days after the matter was submitted to them, either Party may seek legal and equitable remedies.

ARTICLE 14 Force Majeure

14.1 Definition.

(A) Neither Party will be considered to be in default in respect to any obligation hereunder if delays in or failure of performance is due to a Force Majeure Event, except for the obligation to pay monies due. A "Force Majeure Event" shall mean an event or circumstance that

arises after the Execution Date that is beyond the reasonable control of and is not caused by the negligence or lack of due diligence of the affected Party or its contractors or suppliers and adversely affects the performance by that Party of its obligations under or pursuant to this PPA. Such events or circumstances may include, but are not limited to: actions or inactions of civil or military authority (including courts and governmental or administrative agencies), acts of God, war, riot or insurrection, terrorism, blockades, embargoes, sabotage (including arson and vandalism), epidemics, explosions and fires not originating in the Project and those not caused by its failure to operate the Project in accordance with Prudent Utility Practices, hurricanes, floods, strikes, lockouts or other labor disputes (not caused by the failure of the affected Party to comply with the terms of a collective bargaining agreement).

- (B) Equipment breakdown or the inability of Seller to use equipment due to its design, construction, operation, maintenance, the inability of Seller to meet regulatory standards, or failure by Seller to obtain on a timely basis and maintain a necessary permit or other regulatory approval shall not be considered a Force Majeure Event, unless Seller can demonstrate that the event was beyond Seller's reasonable control, and was not caused by the negligence or lack of due diligence by Seller or its agents.
- Notwithstanding the foregoing, the term Force Majeure Event does not include (i) inability by Seller to procure equipment for the Project or any component parts therefor, for any reason (the risk of which is assumed by Seller); (ii) any other acts or omissions of any third party acting on behalf of Seller, including any vendor, materialman, customer, or supplier of Seller, or any full or partial curtailment in the Energy Output of the Project caused by or arising from the acts or omissions of such third parties, unless such acts or omissions are themselves excused by reason of a Force Majeure Event, as the definition is applied to such third party, and such event constitutes a Force Majeure Event, as the definition is applied to Seller; (iii) any delay caused by the processing of Buyer's interconnection request; (iv) any full or partial curtailment in the electric output of the Project that is caused by or arises from a mechanical or equipment breakdown, or other mishaps, events or conditions, attributable to normal wear and tear; (v) failure to abide by Prudent Utility Practices; (vi) changes in market conditions, actions of Governmental Authorities or other events or circumstances that affect the cost of equipment, labor, materials or supplies, or that affect demand for power or price for any of Seller's or Buyer's products; (vii) except as set forth in (A) above, any labor strikes, slowdowns or stoppages, or other labor disruptions against a Party or its contractors or subcontractors; or (viii) weather events or sudden actions of the natural elements within twenty (20) year normal weather patterns, including lightning strikes, but excluding unusually severe events, such as tornadoes, intense lightning strikes and floods.
- (D) In no event will any delay or failure of performance caused by a Force Majeure Event extend this PPA beyond its stated Term. Notwithstanding any other provision in this PPA to the contrary, in the event that any delay or failure of performance caused by a Force Majeure Event affecting Seller continues for an uninterrupted period of three hundred sixty (360) Days from its inception, either Party (or Buyer as provided in Section 3.6) may, at any time following the end of such period, terminate this PPA upon written notice to the affected Party, without further obligation by either Party except as to costs and balances incurred prior to the effective date of such termination.

- (E) Except as otherwise provided in this PPA, each Party shall be excused from performance when non-performance was caused, directly or indirectly, by a Force Majeure Event but only and to the extent thereof, and existence of a condition of Force Majeure Event shall not relieve the Parties of certain obligations under this PPA (including payment obligations) to the extent that such performance of such obligations is not precluded by the condition of Force Majeure Event.
- 14.2 <u>Notification Obligations</u>. In the event of any delay or nonperformance resulting from a Force Majeure Event, the Party claiming that a Force Majeure Event has occurred shall notify the other Party as soon as reasonably practicable by telephone and/or email, and in writing as soon as reasonably practicable but in no case later than ten (10) Business Days thereafter; provided that failure to provide notice within ten (10) Business Days only waives the Force Majeure Event as to periods prior to when the notice is given of such occurrence, of the nature, cause, date of commencement thereof and the anticipated duration, and shall indicate whether any deadlines or date(s) imposed hereunder may be affected thereby. The suspension of performance shall be of no greater scope and of no greater duration than is necessary. A Party claiming that a Force Majeure Event has occurred shall not be entitled to relief therefor unless and until it has delivered a notice therefor as required in this Section. The Party claiming that a Force Majeure Event has occurred shall notify the other Party of the cessation of the Force Majeure Event or of the conclusion of the affected Party's cure for the Force Majeure Event, in either case as soon as reasonably practicable.
- 14.3 <u>Duty to Mitigate</u>. The Party claiming that a Force Majeure Event has occurred shall use its commercially reasonable efforts to cure the cause(s) preventing its performance of this PPA and shall provide to the other Party weekly progress reports describing actions taken to end the Force Majeure Event; *provided, however*, that the settlement of strikes, lockouts and other labor disputes shall be entirely within the discretion of the affected Party, and such Party shall not be required to settle such strikes, lockouts or other labor disputes by acceding to demands which such Party deems to be unreasonable.
- 14.4 <u>Delay Caused by Force Majeure Event</u>. Upon the occurrence and during the continuance of a Force Majeure Event and the effects thereof, to the extent that a Force Majeure Event affects the ability of either Buyer or the Transmission Provider to accept Energy Output from the Project or to deliver Energy Output from the Project, then the hours during which the Force Majeure Event occurs shall be excluded from the payment calculations as set forth in Section 8.1.

ARTICLE 15 Representations, Warranties and Covenants

- 15.1 <u>Seller's Representations, Warranties and Covenants</u>. Seller hereby represents and warrants as follows:
- (A) Seller is a limited liability company duly organized, validly existing and in good standing under the laws of the state of Delaware. Seller is qualified to do business in each other jurisdiction where the failure to so qualify would have a material adverse effect on the business or financial condition of Seller; and Seller has all requisite power and authority to conduct

its business, to own its properties, and to execute, deliver, and perform its obligations under this PPA.

- (B) The execution, delivery, and performance of its obligations under this PPA by Seller have been duly authorized by all necessary limited liability company action, and do not and will not:
 - (1) require any consent or approval by any governing body of Seller, other than that which has been obtained and is in full force and effect;
 - (2) violate any Applicable Law, or violate any provision in any formation documents of Seller, the violation of which could have a material adverse effect on the ability of Seller to perform its obligations under this PPA;
 - (3) result in a breach or constitute a default under Seller's formation documents or bylaws, or under any agreement relating to the management or affairs of Seller or any indenture or loan or credit agreement, or any other agreement, lease, or instrument to which Seller is a party or by which Seller or its properties or assets may be bound or affected, the breach or default of which could reasonably be expected to have a material adverse effect on the ability of Seller to perform its obligations under this PPA; or
 - (4) result in, or require the creation or imposition of any mortgage, deed of trust, pledge, lien, security interest, or other charge or encumbrance of any nature (other than as may be contemplated by this PPA) upon or with respect to any of the assets or properties of Seller now owned or hereafter acquired, the creation or imposition of which could reasonably be expected to have a material adverse effect on the ability of Seller to perform its obligations under this PPA.
- (C) The obligations of Seller under this PPA are valid and binding obligations of Seller.
- (D) The execution and performance of this PPA will not conflict with or constitute a breach or default under any contract or agreement of any kind to which Seller is a party or any judgment, order, statute, or regulation that is applicable to Seller or the Project.
- (E) To the knowledge of Seller, and except for those permits, consents, approvals, licenses and authorizations identified in Exhibit E, which Seller anticipates will be obtained by Seller in the ordinary course of business, all Governmental Approvals necessary for Seller's execution, delivery and performance of this PPA have been duly obtained and are in full force and effect.
- (F) Seller shall comply with all Applicable Laws in effect or that may be enacted during the Term.
- (G) Seller shall disclose to Buyer the extent of, and as soon as it is known to Seller, any violation of any Applicable Laws arising out of the construction of the Project, the presence of Environmental Contamination at the Project (actual or alleged), or the existence of any

past or present enforcement, legal, or regulatory action or proceeding relating to such Environmental Contamination.

- (H) To the full extent authorized by FERC regulations and the FERC standards of conduct, Seller hereby authorizes Buyer to contact and obtain information concerning the Project and Interconnection Facilities directly from the Transmission Provider.
- (I) Seller has and/or will have upon the generation of Energy Output good and marketable title to the RECs and Environmental Attributes:
- (J) Seller has not sold, delivered or transferred the RECs or Environmental Attributes to any other Person, in whole or in part;
- (K) All right, title and interest in and to the RECs and Environmental Attributes 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;
- (L) Each REC and Environmental Attribute complies with the requirements set forth in the New Mexico Renewable Energy Act, NMSA 1978, § 62-16-1 *et seq.*, and Title 17.9.572 NMAC; and
- (M) Upon the execution thereof, Seller shall provide a true and correct copy of the Interconnection Agreement to Buyer. On and after the execution of the Interconnection Agreement, Seller shall provide copies of any material amendments to the Interconnection Agreement to Buyer.
- 15.2 <u>Buyer's Representations, Warranties and Covenants</u>. Buyer hereby represents and warrants as follows:
- (A) Buyer is a corporation duly organized, validly existing and in good standing under the laws of the State of New Mexico and is qualified in each other jurisdiction where the failure to so qualify would have a material adverse effect upon the business or financial condition of Buyer. Buyer has all requisite power and authority to conduct its business, to own its properties, and to execute, deliver, and perform its obligations under this PPA.
- (B) The execution, delivery, and performance of its obligations under this PPA by Buyer have been duly authorized by all necessary corporate action, and do not and will not:
 - (1) require any consent or approval of Buyer's shareholders, members, managers and/or directors;
 - (2) violate any Applicable Law, or violate any provision in any corporate documents of Buyer, the violation of which could have a material adverse effect on the ability of Buyer to perform its obligations under this PPA;
 - (3) result in a breach or constitute a default under Buyer's corporate charter or bylaws, or under any agreement relating to the management or affairs of Buyer, or any indenture or loan or credit agreement, or any other agreement, lease, or instrument

to which Buyer is a party or by which Buyer or its properties or assets may be bound or affected, the breach or default of which could reasonably be expected to have a material adverse effect on the ability of Buyer to perform its obligations under this PPA; or

- (4) result in, or require the creation or imposition of, any mortgage, deed of trust, pledge, lien, security interest, or other charge or encumbrance of any nature (other than as may be contemplated by this PPA) upon or with respect to any of the assets or properties of Buyer now owned or hereafter acquired, the creation or imposition of which could reasonably be expected to have a material adverse effect on the ability of Buyer to perform its obligations under this PPA.
- (C) This PPA is a valid and binding obligation of Buyer, subject to the contingencies identified in Article 6.
- (D) The execution and performance of this PPA will not conflict with or constitute a breach or default under any contract or agreement of any kind to which Buyer is a party or any judgment, order, statute, or regulation that is applicable to Buyer.
- (E) To the knowledge of Buyer, and except for the NMPRC Approval(s) identified in Sections 6.1 and 17.3, all required Governmental Approvals necessary for Buyer's execution, delivery and performance of this PPA have been duly obtained and are in full force and effect.

ARTICLE 16 Insurance

16.1 Evidence of Insurance.

(A) Seller shall, at least thirty (30) Days prior to the commencement of any work on the Project, and thereafter within thirty (30) Days after the annual insurance policy renewal or update or change of the insurance policy, provide Buyer with two (2) copies of insurance certificates evidencing the insurance coverages required to be maintained by Seller in accordance with Exhibit G and this Article 16 along with endorsements required below in Section 16.3, and a list of any other endorsements to the policy that limit the coverage provided by the ISO form with regard to this Project. All such insurance shall be primary insurance. All policies shall be written with insurers rated at least A- VII by A.M. Best or that Buyer, in its reasonable discretion, deems acceptable (such acceptance shall not be unreasonably withheld or delayed by Buyer). Seller's liability under this PPA shall not be limited to the amount of insurance coverage required herein.

16.2 Term and Modification of Insurance.

(A) All liability insurance required under this PPA shall cover occurrences during the Term of this PPA. In the event that any insurance as required herein is commercially available only on a "claims-made" basis, such insurance shall provide for a retroactive date that is the earlier of the start of construction at the Site or June 1, 2021, and such insurance shall be maintained by Seller, with a retroactive date not later than the retroactive date required above, for a minimum of five (5) calendar years after the Term.

- (B) Seller may self-insure either all or any portion of the foregoing coverages so long as there is no material decrease in its net worth or means that renders the same insufficient for purposes of self-insurance. If at any time during the Term Buyer, in its reasonable discretion, determines that it will no longer accept self-insurance from Seller, Buyer shall provide notice to Seller and Seller shall obtain the insurance coverages required by Exhibit G within sixty (60) Days.
- (C) Buyer shall have the right, at times deemed appropriate to Buyer during the Term of this PPA, to request Seller to modify the insurance minimum limits specified in Exhibit G in order to maintain reasonable coverage amounts. Seller shall make commercially reasonable efforts to comply with such request.

16.3 Endorsements and Other Requirements.

- (A) Seller shall provide endorsements evidencing that the insurers shall provide Buyer thirty (30) Days' prior written notice of non-renewal or cancellation of insurance (except that such notice shall be ten (10) Days for non-payment of premiums) and endorsements that waive all rights of subrogation against Buyer and its Affiliates, officers, directors, agents, subcontractors and employees.
- (B) Seller shall provide endorsements providing that the insurance required under this PPA is primary and non-contributory with respect to other insurance carried by Buyer.
- (C) Seller shall provide endorsements providing that the liability insurance required pursuant to paragraphs (B), (C) and (D) of Exhibit G names Buyer and its Affiliates, officers, directors, and employees as additional insureds for both ongoing and completed operations but only to the extent Buyer (or other additional insured) is vicariously liable for the negligence, acts or omissions of Seller. The liability insurance required pursuant to paragraphs (B) and (D) of Exhibit G shall include a standard ISO or an equivalent separation of insureds clause and will not include a cross-suit exclusion applicable to claims brought by or against an additional insured.

ARTICLE 17 Legal and Regulatory Compliance and NMPRC Approval

Each Party shall promptly notify the other Party of any material investigations, notices of alleged violations or findings of violation of Applicable Law from any Governmental Authority, including any audit, notification, inspection or inquiry that has been commenced by any Governmental Authority in respect of a potential violation of Applicable Law with regard to the Project or the PPA. Seller shall give all required notices, shall timely procure and maintain all Seller required permits, and shall timely pay all charges and fees in connection therewith. Seller shall make available to Buyer, upon reasonable request and at Buyer's cost (other than the normal, customary and reasonable costs of Seller), any personnel or records relating to the Project or this PPA to the extent Buyer requires the same to fulfill any regulatory reporting requirements, or for purposes of litigation or regulatory proceedings, including but not limited to, litigation or proceedings before the NMPRC, FERC, or other regulatory bodies. The Parties shall treat information disclosed

pursuant to this Section 17.1 in confidence in accordance with Section 22.14, unless such information is public information.

- 17.2 <u>Governmental Approvals.</u> Each Party shall timely and lawfully procure and maintain in good standing, at its own cost and expense, all Governmental Approvals and Additional Consents and shall timely and properly pay its respective charges and fees in connection therewith.
- 17.3 NMPRC Approval. The obligations of the Parties hereunder, including Buyer's obligation to purchase Energy Output at the rates specified in Article 8, shall be conditioned upon receipt of FERC approval of this PPA, if applicable, and receipt of NMPRC Approval in connection with (i) the execution and performance of this PPA, and a final order or other regulatory determination from the NMPRC that Buyer may procure renewable energy and associated RECs pursuant to this PPA and may recover the cost of such procurement; (ii) abandonment of PNM's ownership interests in San Juan Generating Station, including any requested financing or other cost recovery method, and any waivers as set forth in Buyer's request for approval of this PPA or an associated abandonment filing; and (iii) the location approval for large capacity plant (collectively, "Requested Actions"). In particular:
- (A) Buyer agrees to use commercially reasonable efforts to request and obtain NMPRC Approval of the Requested Actions in clauses (i) and (ii) of Section 17.3, and Seller agrees to cooperate with and assist Buyer in these efforts as Buyer may reasonably request. Seller agrees to use commercially reasonable efforts to request and obtain NMPRC Approval of the Requested Actions in clause (iii) of Section 17.3, and Buyer agrees to cooperate with and assist Seller in these efforts as Seller may reasonably request.
- (B) NMPRC Approval shall be considered received when the NMPRC issues a final written order that is no longer subject to appeal or further proceedings on remand (i) approving the Requested Actions, including authorization to recover the costs of procurement of the Renewable Energy Output; or (ii) approving the Requested Actions in part or subject to conditions or substantial modifications, *provided* that each of Seller and Buyer agrees, subject to its reasonable discretion, to accept those conditions, modifications or such partial approval as sufficient (collectively, "NMPRC Approval").
 - (1) If the NMPRC disapproves any of the Requested Actions, then this PPA shall automatically terminate ten (10) Days after the date of such action by the NMPRC and be of no further force or effect, with no further obligation or liability of either Party to the other Party or to any other Person, except that Buyer shall return the Development Security to Seller, less any amounts due from Seller to Buyer.
 - (2) If any NMPRC Approval is issued as described in clause (B)(ii) above, then the Parties shall meet and confer no later than fifteen (15) Days after the date of the NMPRC Approval order regarding whether Buyer or Seller to amend this PPA to address any conditions or substantial modifications or not to accept any partial or conditioned approval or substantial modification of this PPA. If the Parties are unable to mutually agree on any amendments to this PPA to address such NMPRC Approval order, then this PPA shall automatically terminate ten (10) Days after the date on which the

Parties conferred and be of no further force or effect, with no further obligation or liability of either Party to the other Party or to any other Person, unless Buyer and Seller mutually agree in writing within such ten (10) Day period that this PPA remain in effect.

- (3) If the NMPRC has not, for any reason, entered an order upon the request for approval of all Requested Actions by April 30, 2020 ("Regulatory End Date"), then the Parties shall meet and confer no later than fifteen (15) Days after the Regulatory End Date regarding a potential extension of the Regulatory End Date. If the Parties are unable to mutually agree to an extension of the Regulatory End Date, then this PPA shall automatically terminate ten (10) Days after the date on which the Parties conferred and be of no further force or effect, with no further obligation or liability of either Party to the other Party or to any other Person, unless Buyer and Seller mutually agree in writing within such ten (10) Day period that this PPA remain in effect.
- 17.4 <u>Compliance with Reliability Standards</u>. To the extent that new reliability standards applicable to the operation and maintenance of the Project are promulgated by the WECC, NERC, FERC, or NMPRC, or any successor agencies, any and all costs incurred as a result of actions required for compliance with the new reliability standards shall be borne by Seller. If Seller fails, through negligent action, inaction or misconduct, to comply with reliability standards related to the operation and maintenance of the Project, and the lack of compliance results in monetary penalties being assessed to Buyer by WECC, NERC, FERC or any successor agency, then Seller shall reimburse Buyer for Seller's share of such monetary penalties.
- 17.5 <u>Compliance Information</u>. Each Party shall, for the purpose of gathering information and/or providing oral or written reports, testimony, affidavits or other submissions relevant to any Governmental Approvals, Non-Governmental Compliance Obligations, Additional Consents, Applicable Laws or in connection with any litigation, arbitration or administrative proceeding before any authority of competent jurisdiction: (i) deliver or cause to be delivered to the other Party any necessary or required certificates of its officers, accountants, engineers or agents; and/or (ii) make available necessary personnel with knowledge as to such matters.

ARTICLE 18 Assignment and Other Transfer Restrictions

- 18.1 No Assignment Without Consent. Except as permitted in this Article 18, neither Party shall sell, transfer, or assign this PPA, in whole or in part, and Seller shall not sell, transfer or assign the Project, in whole or in part, without the prior written consent of the other Party, which consent shall not be unreasonably withheld, delayed or conditioned and so long as any proposed assignee satisfies the conditions set forth in this Article 18.
- (A) Buyer's consent shall not be required for: (i) any assignment or transfer of this PPA by Seller to an Affiliate of Seller; or (ii) any assignment or transfer of this PPA by Seller to a Person succeeding to all or substantially all of the assets of Seller, *provided* that in the case of any assignment or transfer pursuant to clauses (i) or (ii) above, such assignee (a) shall have agreed in writing to be bound by the terms and conditions hereof and furnished a copy of the assignment or transfer document to Buyer; (b) is a Qualified Operator or retains, prior to the date of such transfer, a Qualified Operator to operate the Project (or otherwise agrees not to interfere with the

existing Qualified Operator for the Project); (c) delivers evidence reasonably satisfactory to Buyer that such assignee's creditworthiness is equal to or better than that of Seller; and (d) shall have complied with the obligations of the assigning Party to provide Development Security or Delivery Term Security, as applicable, in accordance with Article 19 of this PPA.

- (B) Seller's consent shall not be required for any assignment of this PPA by Buyer to any Affiliate or in connection with the acquisition, merger, reorganization, or consolidation of Buyer or its parent corporation, *provided* that such assignee delivers evidence reasonably satisfactory to Seller that such assignee's creditworthiness is equal to or better than that of Buyer; and *further provided* that such assignee delivers evidence reasonably satisfactory to Seller that such assignee has NMPRC Approval of this PPA as and if required by NMPRC regulations and will resell the Energy purchased hereunder.
- 18.2 Conditions on Transfers. If the rights and interests of a Party in this PPA shall be sold, transferred or assigned to an Affiliate, upon satisfaction of the conditions set forth in this Article 18, and upon the Affiliate's agreement in writing to be bound by and to assume the terms and conditions hereof and any and all obligations to the non-assigning Party arising or accruing hereunder from and after the date of such assumption, and provided that the assigning Party is not then in default of its obligations under this PPA or that any then-existing default is cured no later than the date of assignment, then the assigning Party shall be released and discharged from the terms and conditions hereof and each such obligation hereunder from and after such date, and non-assigning Party shall continue this PPA with the Affiliate as if such Person had been named under this PPA; provided, however, that the assigning Party shall not be released and discharged from and shall remain liable for any and all obligations to the other Party arising or accruing hereunder prior to such assumption.
- 18.3 <u>Change of Control</u>. Except for a Seller Permitted Transfer, any Change of Control of Seller, whether voluntary or by operation of law, shall require the prior written consent of Buyer, which shall not be unreasonably withheld, conditioned or delayed.
- 18.4 <u>Transfer Without Consent Is Null and Void.</u> Any Change of Control or sale, transfer, or assignment of any interest in the Project or in this PPA made without fulfilling the requirements of this PPA shall be null and void and shall constitute an Event of Default pursuant to Article 12.
- 18.5 <u>Subcontracting</u>. Seller may subcontract its duties or obligations under this PPA without the prior written consent of Buyer; *provided*, that no such subcontract shall relieve Seller of any of its duties or obligations hereunder. All subcontractors required by law to be qualified to do business in the State of New Mexico shall be so qualified. Seller shall be solely responsible for the engagement, supervision, management, satisfactory performance of the subcontractors or unsatisfactory performance.

18.6 Assignment to Lenders.

(A) <u>Cooperation</u>. In connection with any assignment of this PPA by Seller to its Lenders, as soon as reasonably practicable after reasonable request from Seller or any Lender, Buyer will cooperate reasonably with Seller and Lender to agree upon and enter into a consent and

agreement, or, if applicable, an estoppel certificate, an estoppel and consent agreement, or similar instrument, all in a form acceptable to Buyer including exclusions, assumptions and caveats typical for such documents or necessary for the accuracy or delivery thereof, providing for, among other things, (i) an option, but not an obligation, for the Lenders to cure any monetary Event of Default of Seller within thirty (30) Days of the expiration of the cure period provided therefor in Section 12.1, and cure any non-monetary Event of Default of Seller within sixty (60) Days of the expiration of the cure period provided therefor in Section 12.1, prior to Buyer terminating this PPA; (ii) Buyer providing written notice to Lenders of any Events of Default of Seller; and (iii) Buyer not terminating this PPA if Lenders need to foreclose on the Project prior to curing any Event of Default of Seller giving rise to such termination, but only to the extent that the period required for such foreclosure and cure does not exceed one hundred eighty (180) Days from receipt by Lenders of written notice of such Event of Default of Seller; provided that, in all cases, (a) Buyer will have no obligation to alter or modify the terms of this PPA or provide any consent or enter into any agreement that has a material adverse effect on Buyer, and (b) Seller will be responsible for Buyer's reasonable costs (including, but not limited to, attorneys' fees) associated with Buyer's review, negotiation, execution and delivery of any documents in connection with such assignment. Nothing in this Section 18.6 shall impair Buyer's right to receive all of the damages arising out of or relating to Seller's default, including damages accruing prior to termination as set forth in Section 12.3 of this PPA.

(B) <u>Financing Liens</u>. Either Party may, without the other Party's consent, transfer, sell, pledge, encumber or assign this PPA or the revenues or proceeds therefrom in connection with any financing, *provided* that such a collateral assignment by Seller does not place any limitation on Buyer's rights or expand Buyer's liability, risks or obligations under this PPA; and *further provided* that Seller shall not be relieved of any of its obligations or liability under this PPA and that the Lender in any such collateral assignment acknowledges and agrees that the Project shall be operated and maintained by a Qualified Operator. Promptly after making any such encumbrance, Seller shall notify Buyer in writing of the name, address, and telephone and facsimile numbers of each Lender, collateral agent or trustee, as applicable, to which Seller's interest under this PPA has been encumbered. Such notice shall include the names of the account managers or other representatives of the Lenders to whom all written and telephonic communications may be addressed. After giving Buyer such initial notice, Seller shall promptly give Buyer notice of any change in the information provided in the initial notice or any revised notice.

ARTICLE 19 Credit and Security Requirements

19.1 <u>Security</u>. Seller shall post, at its sole cost and expense, security equal to Sixty Thousand Dollars (\$60,000) per MW multiplied by the Guaranteed Solar Capacity ("**Development Security**") within the earlier of (i) thirty (30) Days after receipt of NMPRC Approval and (ii) the commencement of construction of the Project. Not later than the Commercial Operation Date, and as a condition thereto, Seller shall post and maintain, at its sole cost and expense, security equal to One Hundred Thousand Dollars (\$100,000) per MW multiplied by the Guaranteed Solar Capacity (the "**Delivery Term Security**"). Seller shall replenish the Delivery Term Security, to such required amount within fifteen (15) Days after any draw by Buyer. Upon achievement of the Commercial Operation Date or promptly after Buyer terminates this PPA as a result of Seller's

failure to achieve Commercial Operation on or before the Guaranteed Start Date, Buyer will return the Development Security to Seller, less any amounts drawn against the Development Security pursuant to Section 12.10. In the event that no amounts are due and owing by Seller to Buyer under this PPA and provided no claims are then outstanding, Seller's Delivery Term Security shall be released to Seller upon the earlier of (i) termination of this PPA in accordance with its terms; and (ii) on the fifteenth (15th) Business Day after the expiration of the Term.

- Form of Security. The following are deemed acceptable methods for posting Security, which methods may be used in any combination, in the reasonable discretion of Buyer: (a) cash, (b) a Letter of Credit in form reasonably acceptable to the Buyer issued by a U.S. bank or a U.S. branch of a foreign bank with credit ratings by both S&P and Moody's of at least A- and A3, respectively and at least Ten Billion Dollars (\$10,000,000,000) in U.S.-based assets ("Issuer Minimum Requirements"), (c) a Seller Guaranty from Seller Guarantor, or (d) other security as may be reasonably acceptable to Buyer. If at any time there shall occur a Downgrade Event with respect to Seller Guarantor, then Buyer may require Seller to post a Letter of Credit or cash in a pledged collateral account in an amount equal to the then-applicable amount of any outstanding Seller Guaranty comprising the Seller Security. Upon receipt of the Letter of Credit or cash, the Seller Guaranty shall be returned promptly to Seller. Notwithstanding the foregoing, Seller's obligation to provide a Letter of Credit in lieu of a Seller Guaranty under this Section 19.2 shall be suspended during any period that (x) Seller Guarantor is no longer experiencing a Downgrade Event and (y) the Seller Guaranty is reinstated by Seller Guarantor in accordance with the requirements of this Section 19.2. Any Letter of Credit provided hereunder shall be renewed by Seller for successive one-year or shorter periods. If Buyer receives notice from the issuing bank that the Letter of Credit will not be extended, Seller must provide a substitute Letter of Credit from an alternative bank satisfying the Issuer Minimum Requirements or alternative acceptable Security. The receipt of the substitute Letter of Credit or other acceptable Security must be effective on or before the expiration date of the expiring Letter of Credit and delivered to Buyer at least thirty (30) Days before the expiration date of the original Letter of Credit. If Seller fails to supply a substitute Letter of Credit or other acceptable Security as required, then Buyer will have the right to draw on the total amount of the expiring Letter of Credit. If (a) the credit rating of the issuer bank of a Letter of Credit falls below the Issuer Minimum Requirements, (b) the issuer bank fails to honor a properly documented request to draw on such Letter of Credit or disaffirms, disclaims, repudiates or rejects, in whole or in part, or challenges the validity of, such Letter of Credit, or (c) the issuer of the outstanding Letter of Credit fails to comply with or perform its obligations under such Letter of Credit and such failure shall be continuing after the lapse of any applicable grace period permitted under such Letter of Credit, then Seller shall have fifteen (15) Days (or such longer period as Buyer in its sole discretion may permit in writing) following written notice from Buyer to obtain a suitable Letter of Credit from another bank that meets the Issuer Minimum Requirements. Buyer shall not be required to post security.
- 19.3 Grant of Security Interest. To the extent that Seller posts cash to secure its obligations under this PPA, Seller hereby grants to Buyer a present and continuing security interest in, and lien on (and right of setoff against), and collateral assignment of, all cash collateral provided by Seller to Buyer as collateral and any and all proceeds resulting therefrom or the liquidation thereof, whether now or hereafter held by, on behalf of, or for the benefit of Buyer. Seller agrees to take such action as reasonably required to perfect in favor of Buyer a first priority security

interest in, and lien on (and right of setoff against), such collateral and any and all proceeds resulting therefrom or from the liquidation thereof.

19.4 <u>Use of Security</u>. In addition to any other remedy available to it, Buyer in its sole discretion may draw from, offset against or make demand under such security to recover any amounts owing to it arising out of this PPA, including any damages due to Buyer and any amount for which Buyer is entitled to indemnification under this PPA. Buyer may draw from, offset against or make demand under all or any part of the amounts due to it from any form of Security provided to Buyer and from all such forms, in any sequence and at any time before or after termination of the PPA, as Buyer may select until such time as the Security is exhausted.

ARTICLE 20 Indemnity; Insurance Proceeds

20.1 Indemnification.

- (A) Subject to the provisions of Article 12, and to the fullest extent permitted by law, Seller shall defend, save harmless and indemnify on an After Tax Basis the Buyer, its Affiliates, and their respective directors, officers, employees, agents, subcontractors, or anyone directly or indirectly employed by any of them or anyone for whose acts any one of them may be liable, from and against all third-party claims, demands, losses, liabilities and expenses, including reasonable attorneys' fees, for personal injury, death or damage to real property and tangible personal property of any third party (collectively, "Losses") to the extent arising out of, resulting from, or caused by the negligence or willful misconduct of Seller, its Affiliates, directors, officers, employees, agents, subcontractors, or anyone directly or indirectly employed by any of them or anyone for whose acts any one of them may be liable; *provided* that, the waiver of consequential damages set forth in Section 12.7 shall not apply with respect to claims made by third parties.
- (B) Subject to the provisions of Article 12, and to the fullest extent permitted by law, Buyer shall defend, save harmless and indemnify on an After Tax Basis the Seller, its Affiliates, and their respective directors, officers, employees, agents, subcontractors, or anyone directly or indirectly employed by any of them or anyone for whose acts any one of them may be liable, from and against all Losses to the extent arising out of, resulting from, or caused by the negligence or willful misconduct of Buyer, its Affiliates, directors, officers, employees, agents, subcontractors, or anyone directly or indirectly employed by any of them or anyone for whose acts any one of them may be liable; *provided* that, the waiver of consequential damages set forth in Section 12.7 shall not apply with respect to claims made by third parties.
- 20.2 <u>Notice of Claims; Procedure</u>. The indemnitee shall, with reasonable promptness after obtaining knowledge thereof, provide the indemnitor with written notice of the proceedings, claims, demands or assessments that may be subject to indemnification, which notice shall include a statement of the basis of the claim for indemnification, including a summary of the facts or circumstances that form the basis for the claim, a good faith estimate of the amount of Losses and copies of any pleadings or demands from the third party. Indemnitor shall have thirty (30) Days after its receipt of the claim notice to notify indemnitee in writing whether or not indemnitor agrees that the claim is subject to this Article 20 and, if so, whether indemnitor elects to undertake, conduct and control, through counsel of its choosing acceptable to indemnitee and at indemnitor's

sole risk and expense, the settlement or defense of the claim. If within thirty (30) Days after its receipt of the claim notice, indemnitor notifies indemnitee that it elects to undertake the settlement or defense of the claim, indemnitee shall cooperate with indemnitor in connection therewith including by making available to indemnitor all relevant information and the testimony of employees and agents material to the defense of the claim. Indemnitor shall reimburse indemnitee for reasonable out-of-pocket costs incurred in connection with such cooperation. So long as indemnitor is contesting the claim in good faith and with diligence, indemnitee shall not pay or settle the claim. Notwithstanding the foregoing, indemnitee shall have the right to pay or settle any claim at any time without the consent of indemnitor; provided that, in such event it waives any right to indemnification therefor. If indemnitor does not provide a responsive notice within the thirty (30) Day period set forth in this Section 20.2, or otherwise fails to assume or diligently prosecute the defense of any claim in accordance with this Section 20.2, the indemnitee shall have the absolute right to control the defense of such claim, and the fees and expenses of such defense, including reasonable attorneys' fees of the indemnitee's counsel and any amount determined to be owed by the indemnitee pursuant to such claim shall be borne by the indemnitor; provided that, the indemnitor shall be entitled, at its sole expense, to participate in (but not control) such defense. Subject to the foregoing, (a) the indemnitor shall control the settlement of all claims as required under the insurance policies set forth in Article 16, as applicable, as to which it has assured the defense; provided, however, that (i) such settlement shall include dismissal with prejudice of the claim and an explicit and unconditional release from all indemnitees; and (ii) the indemnitor shall not conclude any settlement without the prior approval of the indemnitee, which approval shall not be unreasonably withheld, conditioned or delayed; and (b) except as provided in the preceding sentence concerning the indemnitor's failure to assume or to diligently prosecute the defense of any claim, no indemnitee seeking reimbursement pursuant to the foregoing indemnity shall, without the prior written consent of the indemnitor, settle, compromise, consent to the entry of any judgment or otherwise seek to terminate any action, claim suit, investigation or proceeding for which indemnity is afforded hereunder unless the indemnitee waives any right to indemnification therefor or reasonably believes that the matter in question involves potential criminal liability.

- 20.3 <u>Survival of Obligations</u>. Cancellation, expiration, or earlier termination of this PPA shall not relieve the Parties of obligations that by their nature should survive such cancellation, expiration, or termination, prior to the term of the applicable statute of limitations, including warranties, and remedies which obligation shall survive for the period of the applicable statute(s) of limitation.
- 20.4 <u>Insurance Proceeds</u>. In the event that an indemnifying Party is obligated to indemnify the indemnified Party under this Article 20, the amount owing to the indemnified Party will be the amount of the indemnified Party's Loss net of any insurance proceeds received by the indemnified Party following a reasonable effort by such Party to obtain such insurance proceeds.

ARTICLE 21 Governmental Charges

21.1 <u>Allocation of Governmental Charges</u>. Seller shall pay or cause to be paid to the applicable Governmental Authority all Governmental Charges on or with respect to the Project or on or with respect to the sale and making available to Buyer of Energy Output that are imposed on the making available of Energy Output arising prior to the Point of Delivery or prior to the transfer

of the Environmental Attributes pursuant to Article 11. Buyer shall pay or cause to be paid to the applicable Governmental Authority all Governmental Charges (other than any Governmental Charges for which Seller is liable under this Section 21.1) on or with respect to the taking and purchase by Buyer of Energy Output that are imposed at and from the taking of Energy Output by Buyer at the Point of Delivery or at and after the transfer of the Environmental Attributes pursuant to Article 11. If a Party is required under Applicable Law to remit or pay Governmental Charges that are the other Party's responsibility hereunder, such Party shall promptly reimburse the other for such Governmental Charges. Both Parties shall use reasonable efforts to administer this PPA and implement the provisions in accordance with their intent to minimize Governmental Charges, so long as no Party is materially adversely affected by such efforts. Nothing herein shall obligate or cause a Party to pay or be liable to pay any Governmental Charge for which it is exempt under Applicable Law. In the event any sale of Energy Output hereunder is exempt from or not subject to any particular Governmental Charge, Buyer shall provide Seller with all reasonably requested documentation within thirty (30) Days after requested by Seller to evidence such exemption or exclusion.

ARTICLE 22 Miscellaneous

- 22.1 <u>Waiver</u>. Subject to the provisions of Section 13.8, the failure of either Party to enforce or insist upon compliance with or strict performance of any of the terms or conditions of this PPA, or to take advantage of any of its rights thereunder, shall not constitute a waiver or relinquishment of any such terms, conditions, or rights, but the same shall be and remain at all times in full force and effect.
- 22.2 <u>Fines and Penalties</u>. Seller shall pay when due all fees, fines, penalties or costs incurred by Seller or its agents, employees or contractors for noncompliance by Seller, its employees, or subcontractors with any provision of this PPA, or any contractual obligation, permit or requirements of law except for such fines, penalties and costs that are being actively contested in good faith and with due diligence by Seller and for which adequate financial reserves have been set aside to pay such fines, penalties or costs in the event of an adverse determination. Buyer shall pay when due all fees, fines, penalties or costs incurred by Buyer or its agents, employees or contractors for noncompliance by Buyer, its employees, or subcontractors with any provision of this PPA, or any contractual obligation, permit or requirements of law except for such fines, penalties and costs that are being actively contested in good faith and with due diligence by Buyer.

22.3 Rate Changes.

- (A) The terms and conditions and the rates for service specified in this PPA shall remain in effect for the term of the transaction described herein. Absent the Parties' written agreement, this PPA shall not be subject to change by application of either Party pursuant to Section 205 or 206 of the Federal Power Act.
- (B) Absent the agreement of all Parties to the proposed change, the standard of review for changes to this PPA whether proposed by a Party, a non-party, or the Federal Energy Regulatory Commission acting sua sponte shall be the "public interest" standard of review set forth

in United Gas Pipe Line v. Mobile Gas Service Corp., 350 U.S. 332 (1956) and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

22.4 <u>Disclaimer of Certain Third Party Beneficiary Rights</u>. In executing this PPA, Buyer does not, nor should it be construed to, extend its credit or financial support for the benefit of any third parties lending money to or having other transactions with Seller. Nothing in this PPA shall be construed to create any duty to, or standard of care with reference to, or any liability to, any Person not a party to this PPA.

22.5 Relationship of the Parties.

- (A) This PPA shall not be interpreted to create an association, joint venture, or partnership between the Parties nor to impose any partnership obligation or liability upon either Party. Neither Party shall have any right, power, or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as an agent or representative of, the other Party.
- (B) Seller shall be solely liable for the payment of all wages, Taxes, and other costs related to the employment of Persons to perform services for Seller, including all federal, state, and local income, social security, payroll, and employment taxes and statutorily mandated workers' compensation coverage. None of the Persons employed by Seller shall be considered employees of Buyer for any purpose; nor shall Seller represent to any Person that he or she is or shall become a Buyer employee.
- 22.6 Equal Employment Opportunity Compliance Certification. Seller acknowledges that, as a government contractor, Buyer is subject to various federal laws, executive orders, and regulations regarding equal employment opportunity and affirmative action. These laws may also be applicable to Seller as a subcontractor to Buyer. To the extent such laws are applicable to Seller, all applicable equal opportunity and affirmative action clauses shall be deemed to be incorporated herein as required by federal laws, executive orders, and regulations, including 41 C.F.R. § 60-1.4(a)(1)-(7).
- 22.7 <u>Survival of Obligations</u>. Cancellation, expiration, or earlier termination of this PPA shall not relieve the Parties of obligations that by their nature should survive such cancellation, expiration, or termination, prior to the term of the applicable statute of limitations, including warranties, and remedies which obligation shall survive for the period of the applicable statute(s) of limitation.
- 22.8 <u>Severability</u>. In the event any of the terms, covenants, or conditions of this PPA, its Exhibits or Schedules, or the application of any such terms, covenants, or conditions, shall be held invalid, illegal, or unenforceable by any court or administrative body having jurisdiction, all other terms, covenants, and conditions of the PPA and their application not adversely affected thereby shall remain in force and effect; *provided, however*, that Buyer and Seller shall negotiate in good faith to attempt to implement an equitable adjustment in the provisions of this PPA with a view toward effecting the purposes of this PPA by replacing the provision that is held invalid, illegal, or unenforceable with a valid provision the economic effect of which comes as close as possible to that of the provision that has been found to be invalid, illegal or unenforceable.

- 22.9 <u>Complete Agreement; Amendments</u>. The terms and provisions contained in this PPA constitute the entire agreement between Buyer and Seller with respect to the Project and shall supersede all previous communications, representations, or agreements, either oral or written, between Buyer and Seller with respect to the sale of Energy Output from the Project. Subject to approval by any Governmental Authority with jurisdiction over this PPA, this PPA may be amended, changed, modified, or altered, *provided* that such amendment, change, modification, or alteration shall be in writing and signed by both Parties hereto, and *provided*, *further*, that the Exhibits and Schedules attached hereto may be changed according to the provisions of Section 13.7.
- 22.10 <u>Binding Effect</u>. This PPA, as it may be amended from time to time pursuant to this Article, shall be binding upon and inure to the benefit of the Parties hereto and their respective successors-in-interest, legal representatives, and assigns permitted hereunder.
- 22.11 <u>Headings</u>. Captions and headings used in this PPA are for ease of reference only and do not constitute a part of this PPA.
- 22.12 <u>Counterparts</u>. This PPA or any supplement, modification, amendment or restatement hereof may be executed in two or more counterpart copies of the entire document or of signature pages to the document, each of which may have been executed by one or more of the signatories hereto and thereto and deliveries by mail, courier, telecopy or other electronic means, but all of which taken together shall constitute a single agreement, and each executed counterpart shall have the same force and effect as an original instrument.
- 22.13 Governing Law. The interpretation and performance of this PPA and each of its provisions shall be governed and construed in accordance with the laws of the State of New Mexico notwithstanding its conflict of laws rules or any principles that would trigger the application of any other law. All disputes arising out of or related to this PPA shall be brought in the United States District Court for the District of New Mexico.

22.14 Confidentiality.

- (A) For purposes of this Section 22.14, "Disclosing Party" refers to the Party disclosing information to the other Party, and the term "Receiving Party" refers to the Party receiving information from the other Party.
- (B) Other than in connection with this PPA, the Receiving Party will not use the Confidential Information (as defined in clause (C) below) and will keep the Confidential Information confidential. The Confidential Information may be disclosed to the Receiving Party or its Affiliates and any of their directors, officers, employees, financial advisers, Lenders, potential Lenders, legal counsel and accountants (collectively, "Receiving Party's Representatives"), but only if such Receiving Party's Representatives need to know the Confidential Information in connection with this PPA. The Receiving Party shall not disclose the Confidential Information to any Person other than as permitted hereby, and shall safeguard the Confidential Information from unauthorized disclosure using the same degree of care as it takes to preserve its own confidential information (but in any event no less than a reasonable degree of care). To the extent the Disclosing Party is required to submit Confidential Information to a

Governmental Authority or is required to submit Confidential Information pursuant to any other legal process, the Disclosing Party shall use all available means to ensure that such Confidential Information is not made public.

- (C) As used in this Section 22.14, "Confidential Information" means all information that is furnished in connection with this PPA to the Receiving Party or its Receiving Party's Representatives by the Disclosing Party, or to which the Receiving Party or its Receiving Party's Representatives have access by virtue of this PPA (in each case, whether such information is furnished or made accessible in writing, orally, visually or by any other (including electronic) means), or which concerns this PPA, the Disclosing Party or the Disclosing Party's stockholders, members, affiliates or subsidiaries, and which is designated by the Disclosing Party at the time of its disclosure, or promptly thereafter, as "confidential" (whether by stamping any such written material or by memorializing in writing the confidential nature of any such oral or visual information). Any such information furnished to the Receiving Party or its Receiving Party's Representatives by a director, officer, employee, Affiliate, stockholder, consultant, agent or representative of the Disclosing Party will be deemed furnished by the Disclosing Party for the purpose of this PPA. Notwithstanding the foregoing, the following will not constitute Confidential Information for purposes of this PPA:
 - (1) information that is or becomes generally available to the public other than as a result of a disclosure or other act by the Receiving Party or its Receiving Party's Representatives;
 - (2) information that can be shown by the Receiving Party to have been already known to the Receiving Party on a non-confidential basis before being furnished to the Receiving Party by the Disclosing Party;
 - (3) information that becomes available to the Receiving Party on a nonconfidential basis from a source other than the Disclosing Party or a representative of the Disclosing Party if to the knowledge of the Receiving Party such source was not subject to any prohibition against transmitting the information to the Receiving Party; and
 - (4) information developed by the Parties during the negotiation of this PPA that relates solely to this PPA (as opposed to confidential business or operating information of either Party), which information shall be deemed proprietary to both Parties, each of whom shall be free to use such information, as they would any information already known to the Parties before negotiation of this PPA.
- (D) The Confidential Information will remain the property of the Disclosing Party. Any Confidential Information that is reduced to writing, except for that portion of the Confidential Information that may be found in analyses, compilations, studies or other documents prepared by or for the Receiving Party in connection with this PPA, will be returned to the Disclosing Party immediately upon its request after expiration or termination of this PPA, unless such Confidential Information has been destroyed by the Receiving Party, and no copies will be retained by the Receiving Party or its Receiving Party's Representatives, unless the Parties agree otherwise. That portion of the Confidential Information that may be found in analyses, compilations, studies or other documents prepared by or for the Receiving Party, oral or visual

Confidential Information, and written Confidential Information not so required to be returned will be held by the Receiving Party and kept subject to the terms of this PPA, or destroyed.

(E) In any proceeding before any applicable Governmental Authority, or pursuant to any other legal or regulatory process, each Party shall be entitled to disclose Confidential Information. In such event, the Party making the disclosure in the proceeding shall take all reasonable steps to limit the scope of any disclosure of Confidential Information and shall use its best efforts to make such disclosure of Confidential Information subject to a protective order or other similar procedure.

22.15 Marketing Rights; Press Releases and Media Contact; Access.

- (A) Subject to Section 22.15(B), Seller hereby grants to Buyer the right to advertise, market, and promote to the general public the benefits of this PPA and the RECs that are generated under this PPA and delivered to Buyer during the Term, including, but not limited to, the exclusive right, in any such advertising, marketing or promotional material, to associate itself with any claimed or actual environmental or sociological benefits arising from this PPA and the creation, sale or retirement of such RECs (all such materials, in whatever media, whether print, electronic, broadcast or otherwise, that are associated with such advertising, marketing or promotional purposes are the "Promotional Materials"). Seller shall obtain and grant to Buyer an irrevocable, royalty free, worldwide license to use and distribute its Promotional Materials, including using the name, description and images of the Project. Seller will make available to Buyer a basic description of the Project, and any press releases or statements that Seller produces regarding the Project. Upon sufficient advance written notice, Seller will grant to Buyer or its designee reasonable access to the Project for the purposes of furthering the creation, production and dissemination of Promotional Materials. Notwithstanding the foregoing, either Party shall be permitted to disclose the following terms with respect to this PPA:
 - (1) Party names;
 - (2) Renewable resource type;
 - (3) Term;
 - (4) Project location;
 - (5) Guaranteed Capacity;
 - (6) Commercial Operation Date; and
 - (7) Point of Delivery
- (B) Except as otherwise provided herein, neither Party shall issue any press or publicity release or otherwise release, distribute or disseminate any information to the public, or respond to any inquiry from the media, concerning this PPA or the participation of the other Party in the transactions contemplated hereby without the prior written approval of the other Party, which approval shall not be unreasonably withheld, delayed or conditioned. This provision shall not prevent the Parties from releasing information (i) which is required to be disclosed in order to

obtain permits, licenses, releases and other approvals relating to the Project; (ii) as necessary to fulfill such Party's obligations under this PPA or as otherwise required by Applicable Law; or (iii) if the Party seeking approval makes prompt and commercially reasonable efforts to obtain such approval but the other Party fails to give a definitive response within twenty (20) Business Days.

- 22.16 <u>Right to Mortgage</u>. Buyer shall have the right to mortgage, create or provide for a security interest, or convey in trust, all or a part of its interest in this PPA, under deeds of trust, mortgages, indentures or security agreements, as security for its present or future bonds or other obligations or securities, without consent of Seller; *provided*, that Buyer shall not be relieved of any of its obligations or liability under this PPA. Seller shall cooperate reasonably with Buyer to execute, or arrange for the delivery of, those normal, reasonable and customary documents, and to provide such other normal, reasonable and customary representations or warranties, all in a form reasonably acceptable to Seller, as may be necessary to assist Buyer in consummating such transactions.
- 22.17 Forward Contract and Master Netting Agreement. Notwithstanding any other provision of this PPA, the Parties acknowledge that this PPA is a forward contract and master netting agreement within the meaning of the safe harbor provisions of the Bankruptcy Code. Accordingly, the Parties agree, notwithstanding any other provision in this PPA, that this PPA may be terminated and remedies exercised hereunder by either Party upon the commencement of a proceeding by the other Party under any chapter of the Bankruptcy Code, and that the automatic stay of Section 362(a) of the Bankruptcy Code shall not apply to such termination or to the exercise of the remedies set forth herein.
- The Parties agree that Generally Accepted Accounting 22.18 Accounting Matters. Principles in the United States of America ("GAAP") and the rules of the United States Securities and Exchange Commission ("SEC") require Buyer to evaluate if Buyer must consolidate Seller's financial information. The Parties shall determine, through consultation with their respective independent registered public accounting firms, whether this PPA (i) will be considered a lease under Accounting Standards Codification 842 - Leases, or (ii) require consolidation of Seller's financial information with Buyer's financial statements pursuant to Accounting Standards Codification 810 - Consolidation (including any subsequent amendments to these sections or future guidance issued by accounting profession governance bodies or SEC that affects Buyer's accounting treatment for the PPA, jointly the "Accounting Standards"). Seller agrees to provide Buyer with information Buyer reasonably believes is necessary for Buyer to make the foregoing determinations. If, as a result of the Parties' review (or subsequent reviews as Buyer deems necessary), and consultations with their respective independent registered public accounting firms, Buyer, in its reasonable discretion, determines that such consolidation is required for a given period, then the Parties agree to the following provisions for such period:
- (A) Within fifteen (15) Days following the end of each calendar quarter, including the fourth quarter of the calendar year, Seller shall deliver to Buyer: (i) an unaudited year-to-date statement of income, (ii) an unaudited year-to-date statement of cash flows, (iii) an unaudited balance sheet as of the end of such calendar quarter, and (iv) related supporting schedules that are prepared by the Seller's Guarantor, or if Seller has not provided a Seller Guaranty to satisfy its Security requirements pursuant to Article 19, then Seller, in order to allow the Seller's parent to complete its quarterly filings with the SEC, shall deliver to Buyer any other

information reasonably requested by Buyer to comply with the consolidation requirements of GAAP. If audited financial statements are deemed necessary by Buyers external auditors to complete an audit of Buyer's consolidated financial statements, Buyer agrees to provide notice to Seller no later than sixty (60) Days before the end of the calendar year, and Seller agrees to provide audited financial statements within forty-five (45) Days of each calendar year end thereafter.

- (B) The financial statements to be delivered by Seller in accordance with Section 22.18(A) ("Seller's Financial Statements") shall be prepared in accordance with GAAP and fairly present in all material respects the consolidated financial position, results of operations, and cash flows of Seller Guarantor, or Seller, as applicable. Seller shall maintain a system of internal accounting controls sufficient to provide reasonable assurance that the financial statements of Seller or Seller Guarantor, as applicable, are prepared in conformity with GAAP. If audited financial statements are prepared for the Seller, other than to satisfy the requirements for financial statements set forth in Section 22.18(A), Seller shall provide such statements to Buyer within five (5) Business Days after those statements are issued.
- (C) Upon reasonable notice from Buyer, during normal business hours and mutually agreed terms and dates, Seller shall allow Buyer access to Seller's records and personnel, so that Buyer and Buyer's independent registered public accounting firm can conduct financial statement reviews and audits in accordance with the standards of the Public Company Accounting Oversight Board (United States). All reasonable expenses for the foregoing that are incremental to Seller's normal operating expenses shall be borne by Buyer.
- (D) Once during each calendar quarter, Buyer and Seller shall meet (either in person or by conference call) at a mutually agreed upon date and time to conduct due diligence and Form 8K disclosure review and discuss Seller's internal control over financial reporting.
- Buyer shall treat Seller's Financial Statements or other financial **(E)** information provided under the terms of this Section in confidence in accordance with Section 22.14 and, accordingly, shall: (i) utilize such Seller financial information only for purposes of preparing, reviewing, auditing or certifying Buyer's or any Affiliate's financial statements (including any required disclosures in the financial statement presentation and notes), for making regulatory, tax or other filings required by Applicable Law in which Buyer is required to demonstrate or certify its or any Affiliate's financial condition or to obtain credit ratings; (ii) make such Seller financial information available only to its or its Affiliates' officers, directors, employees or auditors who are responsible for preparing, reviewing, auditing or certifying Buyer's or any Affiliate's financial statements, to the SEC and the Public Company Accounting Oversight Board (United States) in connection with any oversight of Buyer's or any Affiliate's financial statements and to those Persons who are entitled to receive Confidential Information in accordance with Section 22.14; (iii) not disclose any of Seller's financial information provided under the terms of this Section 22.18 to the extent that such information is not required by the Accounting Standards or Applicable Law; (iv) limit submission of Seller's financial information provided under the terms of this Section 22.18 to that information that reflects Seller's operations of the Project; provided, such limited submission is not contrary to the Accounting Standards or other Applicable Law; and (v) use reasonable efforts to disclose to and consult with Seller with respect to any information respecting Seller or the Project that Buyer intends to submit pursuant to this Section 22.18 and use good faith efforts to incorporate any of Seller's comments thereto in any

such submission. Notwithstanding the foregoing, if Buyer discloses information, based on the advice of its counsel that it is legally required to be disclosed, Buyer may make such disclosure without being in violation of this Section.

22.19 <u>Telephone Recording</u>. Each Party to this PPA acknowledges and agrees to the taping or electronic recording ("**Recording**") of conversations between the Parties with respect to all scheduling and dispatch issues, whether by one or the other or both Parties, and that the Recordings will be retained in confidence, secured from improper access, and may be submitted in evidence in any suit, action or proceedings relating to this PPA. Each Party waives any further notice of that monitoring or Recording and agrees to notify its personnel of the monitoring or Recording and to obtain any necessary consent of those personnel. In the event of a dispute between the Parties, each Party with a Recording relating to such dispute shall provide a copy of such Recording to the other Party upon request.

[Signature page(s) follow]

IN WITNESS WHEREOF, the Parties have caused this PPA to be duly executed as of the date first above written. This PPA shall not become effective as to either Party unless and until executed by both Parties.

By: Name:	Thomas Fallgren 16A45E858C2C4B9 Thomas Fallgren	
Title:	Vice President, PNM Generation	
Date:	June 27, 2019	
ARRO	YO SOLAR LLC	
By CR Its Mar	E-Arroyo New Mexico LLC, nager	
By Centaurus Renewable Energy LLC, Its Manager		
Ву:	bocusigned by: twith Holst 55886A3F629D455	
Name:	Keith Holst	
Title: Date:	Manager 6/26/2019	
By: Name: Title: Date:	Stephen BD7A949D2172432 Stephen BD7A949D2172432 Manager 6/26/2019	

PUBLIC SERVICE COMPANY OF NEW MEXICO

EXHIBIT A

(to Power Purchase Agreement)

DESCRIPTION OF SELLER'S GENERATION FACILITIES AND SITE MAP

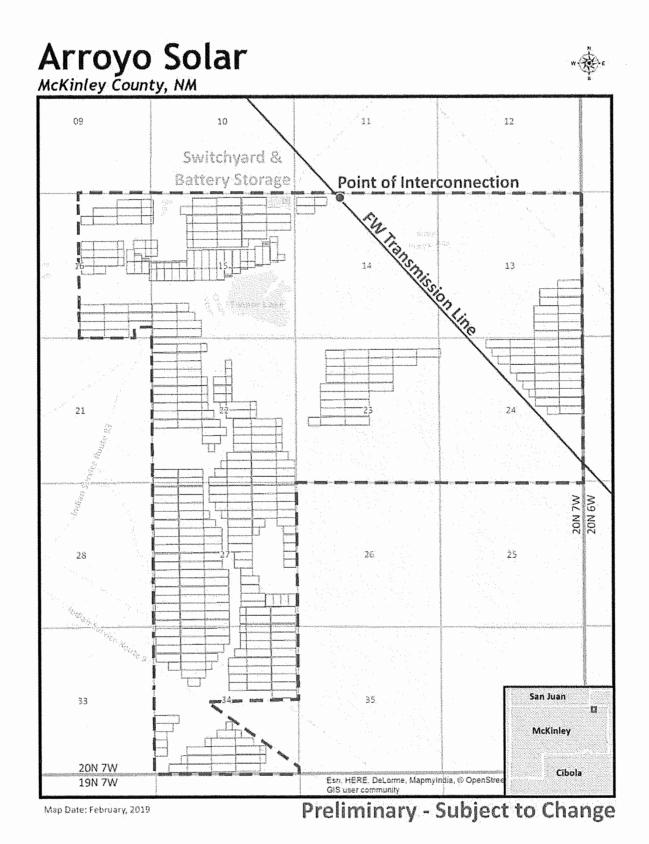
1. Name of Seller's Project: Arroyo Solar

Location: Pueblo Pintado, McKinley County, New Mexico

2. Owner: Arroyo Solar LLC

3. Operator: Clenera, LLC

- 4. Equipment/Fuel:
 - a. Type of facility and conversion equipment (e.g., Solar PV; Solar Thermal; Wind; Energy Storage; Biomass (including Fuel)): Solar PV
 - b. Total approximate solar units at the Project: 125
 - c. Total nameplate capacity (MW_{AC}): 300
 - d. Total capacity at point of delivery: 300
 - e. Additional technology-specific information: Single axis trackers
- 5. Site Map: Attach a scaled map that complies with the requirements of Section 3.3 of the PPA.



A-2

EXHIBIT B

(to Power Purchase Agreement)

ONE-LINE DIAGRAM OF PROJECT AND INTERCONNECTION FACILITIES

See attached one-line diagram of the Project, which indicates the Interconnection Facilities, the network upgrades, the Point of Delivery into WECC Path 48 and ownership and location of meters. Seller shall provide any necessary updates upon execution of the Interconnection Agreement.

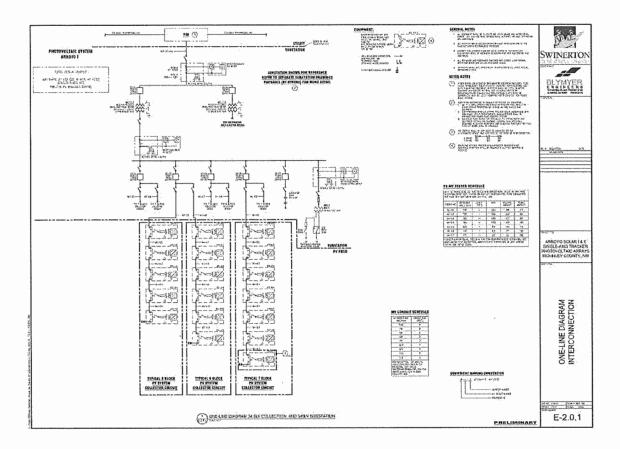


EXHIBIT C

(to Power Purchase Agreement)

DESCRIPTION OF SITE

The Project Site is located on approximately +/- 2,665 acres of land commonly described as McKinley County Tax Assessor's tax parcel numbers 2-039-117-300-264 and 2-039-117-132-264 described as follows:

In Township 20 North, Range 7 West, of the New Mexico Meridian:

- All of Section 15;
- East half of Section 16, Excluding the South half of the Southeast quarter of the Southeast quarter of the Southeast quarter containing 5 acres more or less;
- All of Section 22;
- All of Section 27;
- In Section 34, the Northwest quarter North of Indian Service Route 9, the Northeast corner, the West half of the Southeast quarter North of Indian Service Route 9, and the East half of the West half of the Southeast quarter North of Indian Service Route 9.

EXHIBIT D

(to Power Purchase Agreement)

NOTICE ADDRESSES

PUBLIC SERVICE COMPANY OF NEW MEXICO

ARROYO SOLAR LLC

Notices:

Delivery Address:

Public Service Company of New Mexico

414 Silver Ave. SW

Albuquerque, NM 87102

Invoices:

Attn: Energy Analysis Phone: (505) 541-2585

Fax: (505) 241-2434

Email:

PNMEAM@pnmresources.com

Scheduling:

Attn: Traders

Phone: (505) 855-6226 day-ahead Fax: (505) 855-6216 real time

Email: zz-WPMTraders@pnm.com

Payments:

Public Service Company of New Mexico

2401 Aztec NE, MS Z-160 Albuquerque, NM 87107

Attn: Albuquerque Division Cash

Wire Transfer:

Wells Fargo Bank ABA# 121000248

Albuquerque, New Mexico

ME Whsle Pwr Depository: 651-537-7916

Attn: EA-Wholesale Power Marketing

Notices:

Delivery Address:

Arroyo Solar LLC

c/o Centaurus Renewable Energy LLC

Attn: Keith Holst

Attn: Stephen H Douglas

1717 West Loop South, Suite 1800

Houston, TX 77027

Email: kholst@centcap.net

Email: sdouglas@centaurusenergy.com

Telephone: (713) 554-1952

With a copy to:

Arroyo Solar LLC

c/o Clenera, LLC

Attn: Admin. Dept.

PO Box 2576

Boise, Idaho 83701

Email: cre.notices@clenera.com

Telephone: (208) 639-3232

Invoices:

Arroyo Solar LLC

c/o Clenera, LLC

Attn: Admin. Dept.

PO Box 2576

Boise, Idaho 83701

Email: cre.notices@clenera.com

Telephone: (208) 639-3232

Contract Manager:

Public Service Company of New Mexico

Attention: Kevin Mataczynski

2401 Aztec Rd. NE Albuquerque, NM 87107

Telephone: (505) 241-4147

Fax: (505) 241-2375

With additional Notice of an Event of Default to:

Public Service Company of New Mexico

Attention: Tom Fallgren 2401 Aztec Rd. NE Albuquerque, NM 87107 Telephone: (505) 241-4148

Fax: (505) 241-2375

With a copy to:

Public Service Company of New Mexico

Attention: Madonna N. Bixby, Senior

Corporate Counsel

414 Silver Ave. SW, MS0805 Albuquerque, NM 87102

Telephone: (505) 241-4929

Fax: (505) 241-4318

Mailing Address (if different from above):

Arroyo Solar LLC

c/o Clenera, LLC

Attn: Admin. Dept.

PO Box 2576

Boise, Idaho 83701

Email: cre.notices@clenera.com

Telephone: (208) 639-3232

Wire Transfer: To Be Provided

With additional Notice of an Event of Default, termination and other legal notices to:

Arroyo Solar LLC

c/o Centaurus Renewable Energy LLC

Attn: Keith Holst

Attn: Stephen H Douglas

1717 West Loop South, Suite 1800

Houston, TX 77027

Email: kholst@centcap.net

Email: sdouglas@centaurusenergy.com

Telephone: (713) 554-1952

With a copy to (which shall not constitute

legal notice):

Baker Botts L.L.P.

910 Louisiana Street #3000

Houston, TX 77002

Attn: Peter del Vecchio

Email: peter.delvecchio@bakerbotts.com

Telephone: (713) 229-1746

EXHIBIT E

(to Power Purchase Agreement)

SELLER'S REQUIRED GOVERNMENTAL AUTHORITY PERMITS, CONSENTS, APPROVALS, LICENSES AND AUTHORIZATIONS TO BE OBTAINED

PERMIT, CONSENT, APPROVAL,	
LICENSE AND/OR AUTHORIZATION	GOVERNMENTAL ENTITY
Construction Permit	State of New Mexico
Electrical Permit	State of New Mexico
EE 98 License	State of New Mexico
EL 1 License	State of New Mexico
Modular Building Permit	State of New Mexico
Plumbing Permit	State of New Mexico
Operations & Maintenance General	State of New Mexico
Contractor	
Certificate of Occupancy	McKinley County
NPDES	State of New Mexico
NMED Air Quality Permit	State of New Mexico
NMED General Permit	State of New Mexico
Nationwide 14	US Army Corps of Engineers
Nationwide 51	US Army Corps of Engineers

EXHIBIT F

(to Power Purchase Agreement)

COMMISSIONING TESTS

- String Insulation Resistance and Continuity Tests
- String Voc measurements
- String Current Checks
- DC Feeder Insulation Resistance and Continuity Tests
- Inverter OEM Commissioning Procedures
- MW Control Tuning/Testing
- V/MVAR/pf Control Tuning/Testing
- Curtailment Control (If applicable)
- Initial Performance Ratio Test

EXHIBIT G

(to Power Purchase Agreement)

INSURANCE COVERAGES

Seller shall obtain and maintain the following insurance coverages, at a minimum:

- A. Workers' Compensation Insurance that complies with statutory limits under workers' compensation laws of any applicable jurisdiction and employer's liability coverage with limits of One Million Dollars (\$1,000,000) per accident, One Million (\$1,000,000) for disease, and One Million (\$1,000,000) for each employee, covering all of Seller's employees, whether full-time, leased, temporary, or casual.
- **B.** Commercial General Liability Insurance, written on a standard ISO occurrence form, or the equivalent, with a combined single limit of One Million Dollars (\$1,000,000) per occurrence. This policy will include coverage for bodily injury liability, broad form property damage liability, blanket contractual, owner's protective, products liability and completed operations.
- C. Business Automobile Liability Insurance, or the equivalent, with a limit of One Million Dollars (\$1,000,000) combined single limit per occurrence for bodily injury and property damage with respect to Seller's vehicles whether owned, hired, or non-owned.
- **D.** Excess or Umbrella Liability. Excess or Umbrella Liability Insurance on a following form basis covering claims in excess of the underlying insurance described in paragraphs (A) (with respect to only Employer's Liability Insurance), (B) and (C) with a limit per occurrence of Twenty Million dollars (\$20,000,000) written on a per project basis

The amounts of insurance required in the foregoing paragraphs (A), (B), (C) and (D) may be satisfied by purchasing coverage in the amounts specified or by any combination of primary and excess insurance, so long as the total amount of insurance meets the requirements specified above.

E. Property Insurance. During construction and operation, Seller shall provide standard form "All Risk" insurance covering one hundred percent (100%) of the Project cost. For the avoidance of doubt, builders' risk insurance shall qualify as "All Risk" insurance during the construction period. The All-Risk Property insurance shall cover physical loss or damage to the Project including the period during testing and startup. A deductible may be carried, which deductible shall be the absolute responsibility of Seller. All-Risk Property insurance shall include: (i) coverage for fire, flood, wind and storm, tornado and earthquake with respect to facilities similar in construction, location and occupancy to the Project; and (ii) Boiler and Machinery insurance covering all objects customarily subject to such insurance, including boilers and engines, in an amount equal to their probable maximum loss.

EXHIBIT H

(to Power Purchase Agreement)

FORM OF ATTESTATION AND BILL OF SALE

Pursuant to WREGIS, ("Seller") hereby sells, transfers and delivers to Buyer the RECs and Environmental Attributes associated with the generation of Energy at the Project, as detailed in the Power Purchase Agreement between the Parties dated (the "Agreement"). Terms used, but not defined herein, shall have the meaning set forth in the Agreement.					
Market	Name of Renewable Energy Facility				
	Fuel Type	Maximum Power Output (MW)	Operation Date		
Date:		_ MWh generated: _			
Projec	et.	reporting rights associated with one (1) MV	Wh generated from the		
i)		owledge, the information provided herein is t	rue and correct;		
ii)	its sale to Buyer is its one and only sale of the RECS and Environmental Attributes with respect to the energy referenced herein and no third party has claimed nor can claim an interest in such RECS and Environmental Attributes;				
iii)	the Project identified indicated above;	d above produced the number of MWh abov	e during the period		
iv)	Seller has title to an hereunder; and	d ownership of the RECs and Environmenta	l Attributes sold		
v)	Seller owns the	Name of the Renewable Energy Facility	·•		

This serves as a bill of sale, transferring from Seller to Buyer all of Seller's right, title and interest in and to the RECs and Environmental Attributes associated with the generation of the above referenced Energy.

Contact Person:		_
Phone:	; Fax:	
	[Seller]	
Signed: Name: Title:		www.see.ee
Date:		

EXHIBIT I

(to Power Purchase Agreement)

AVAILABILITY GUARANTEES

Section 1. Definitions.

Capitalized terms used in this <u>Exhibit I</u> and not defined herein shall have the meaning assigned in Article 1 of PPA.

- "Actual Solar Availability Percentage" means a percentage calculated as (a) one hundred (100), multiplied by (b) the result of (i) the sum of all Solar Available Hours for all Solar Units that were part of the Project at the beginning of the relevant Commercial Operation Year for all Daylight Intervals, divided by (ii) the sum of all Solar Period Hours in the relevant Commercial Operation Year for all Solar Units that were part of the Project on the Commercial Operation Date.
- "Actual Solar Energy Output" means the Energy (in MWh) generated by the Project and delivered to the Point of Delivery.
- "Aggregate Solar Availability Damages Cap" has the meaning set forth in Section 2.1(C) of this Exhibit.
- "Annual Solar Availability Damages Cap" has the meaning set forth in Section 2.1(C) of this Exhibit.
 - "Annual Report" has the meaning set forth in Section 2.4 of this Exhibit.
- "Daylight Interval" means each hour where plane of array irradiance conditions are 50 W/m2 or greater. Data will be collected as hourly averages for all installed plane of array sensors at the Site.
- "Effective Solar Guaranteed Availability Percentage" has the meaning set forth in Section 2.1(A) of this Exhibit.
 - "Solar Availability Damages" has the meaning set forth in Section 2.1(B) of this Exhibit.
- "Solar Available Hours" means for each Solar Unit, for a relevant Commercial Operation Year, an amount of hours equal to (a) the number of Solar Period Hours in such Commercial Operation Year, minus (b) the aggregate Solar Unavailable Hours for such Solar Unit in such Commercial Operation Year, plus (c) the aggregate Solar Excused Hours for such Solar Unit in such Commercial Operation Year.
- "Solar Excused Hours" means, in any Commercial Operation Year, (a) the aggregate Seller Excused Hours during Daylight Intervals for such Commercial Operation Year; provided that, for purposes of the Effective Solar Guaranteed Availability Percentage, only the first fifty (50) hours of Scheduled Maintenance Outages in the aggregate for the Project per Commercial

Operation Year shall be treated as Excused Hours, and (b) all hours during which a Seller Curtailment occurs in such Commercial Operation Year.

"Solar Period Hours" means the number of Daylight Intervals within any given Commercial Operation Year, as may be adjusted for any partial Commercial Operation Year.

"Solar Unavailable Hours" means those hours a Solar Unit is not available during Daylight Intervals to operate because it is (a) in an emergency, stop, service mode or pause state (except to the extent that such emergency, stop, service mode or pause state also constitutes an Emergency Condition); (b) in "run" status and faulted; or (c) otherwise not operational or capable of delivering Energy to the Point of Delivery (not including any Solar Excused Hours).

Section 2. Availability Guarantees.

- 1. <u>Solar Availability Guarantee</u>.
- (A) Seller guarantees that the Solar Units shall achieve an Actual Solar Availability Percentage equal to or greater than ninety percent (90%) in each two consecutive Commercial Operation Years after the Commercial Operation Date ("Effective Solar Guaranteed Availability Percentage").
- (B) The availability shortfall (the "Availability Shortfall") shall be calculated as follows:

$$AS = \left(ESGAP - \frac{1}{2}(A_n + A_{n-1})\right) \times \frac{1}{2} \left(\frac{E_n}{A_n} + \frac{E_{n-1}}{A_{n-1}}\right) \times ESGAP$$

Where,

AS = Availability Shortfall

ESGAP = Effective Solar Guaranteed Availability Percentage

 E_n = energy delivered in the current year

 E_{n-1} = energy delivered in the previous year

 A_n = availability during the current year

 A_{n-1} = availability during the previous year

(C) <u>Solar Availability Damages</u>. For any Commercial Operation Year during which Seller fails to meet the Effective Solar Guaranteed Availability Percentage, Seller shall pay Buyer liquidated damages in the amount equal to (x) the positive difference between the Average Market Price for energy and RECs during Solar Period Hours for the applicable Commercial Operation Year and the Solar Energy Output Payment Rate, multiplied by (y) the Availability Shortfall (the "Solar Availability Damages"), but in no event in excess of the Annual Solar Availability Damages Cap and the Aggregate Solar Availability Damages Cap. A sample

calculation of the Solar Availability Damages that would be owed by Seller under certain stated assumptions is provided as Attachment 1 to this Exhibit I.

- (D) Solar Availability Damages Cap, Termination and Cure Rights. The total Solar Availability Damages payable by Seller for failure to meet the Effective Solar Guaranteed Availability Percentage in any Commercial Operation Year shall be capped annually at a value equivalent to Twenty-Six Thousand Dollars (\$26,000) per MW of Guaranteed Solar Capacity ("Annual Solar Availability Damages Cap") and in the aggregate at a value equivalent to Seventy-Eight Thousand (\$78,000) per MW of Guaranteed Solar Capacity ("Aggregate Solar Availability Damages Cap") over the Term of the PPA.
- Sole Remedy. The Parties agree that Buyer's sole and exclusive remedy, and Seller's sole and exclusive liability, for any deficiency in the performance of the Project (including any failure to meet the Effective Solar Guaranteed Availability Percentage) shall be the payment of damages up to the Annual Solar Availability Damages Cap and Aggregate Solar Availability Damages Cap, as applicable, and the right to declare an Event of Default pursuant to Section 12.1(B)(5) of the PPA, and shall not be subject to the collection of any other damages or any other remedies, including specific performance, and shall not be an Event of Default giving rise to a termination payment obligation except pursuant to Section 12.1(B)(5) of the PPA, as applicable. Notwithstanding the foregoing, the limitations set forth herein shall not be applicable to any indemnification claims pursuant to Article 20 of the PPA and Seller's material breach of its obligation to operate and maintain the Project in accordance with Prudent Utility Practice or Seller's failure to pay Solar Availability Damages when due if not timely cured pursuant to the provisions of Article 12 of the PPA are an Event of Default of Seller for which Buyer may terminate the PPA and seek damages in accordance with Section 12.4 of the PPA.
- 3. <u>Annual Report</u>. No later than the thirtieth (30th) Day of such Commercial Operation Year (or thirty (30) Days after the end of the last Commercial Operation Year), Seller shall deliver to Buyer a calculation showing Seller's computation of the Actual Solar Availability Percentage for the previous Commercial Operation Year and the Solar Availability Damages, if any, due to Buyer (the "Annual Report"). Such Annual Report shall include the total amount of Solar Availability Damages paid to Buyer under the PPA and shall provide notice that the Aggregate Solar Availability Damages Cap has been reached, if applicable. If Solar Availability Damages are due from Seller, Seller shall pay such damages no later than fifteen (15) Business Days after providing the Annual Report.
- 5. <u>Disputes</u>. Disputes as to any calculations under this <u>Exhibit I</u> shall be addressed as provided in Section 13.8 of the PPA.

ATTACHMENT 1 TO EXHIBIT I

EXAMPLE CALCULATION OF SOLAR AVAILABILITY DAMAGES

I. Example of Actual Solar Availability Percentage Calculation

The sample calculation set forth below is based on the following assumed facts:

During the Commercial Operation Year in question, 50 Solar Units were part of the Project.

The Solar Units had the following operating characteristics:

	Hours	Solar Units Affected	Solar Unit Hours
Solar Period Hours ("SPH")	4,000	50	200,000
Solar Unavailable Hours ("SUH")			5,000
Solar Excused Hours ("SEH")			1,000

Given these assumed facts, the Available Hours for the Solar Units during the Commercial Operation Year would be calculated as follows:

Sum of Available Hours = SPH - SUH + SEH: 196,000 = 200,000 - 5,000 + 1,000

Actual Solar Availability Percentage

Given these assumed facts, the Actual Solar Availability Percentage for the Project during the Commercial Operation Year in question would be calculated as follows:

- (a) Sum of Solar Available Hours: 196,000 hours
- (b) Sum of Solar Period Hours: 200,000 hours
- (c) Actual Solar Availability Percentage: (Sum of Solar Available Hours/Sum of Solar Period Hours) x 100 = (196,000/200,000) x 100 = 98.0%

II. Example of Solar Availability Damages

Example of Solar Availability Damages based on the following assumed facts:

- (a) Seller's Effective Solar Guaranteed Availability Percentage in Commercial Operation Years 4 and 5 = 90%.
- (b) Seller's Actual Solar Availability Percentage in Commercial Operation Year 4 = 84%.
- (c) Seller's Actual Solar Availability Percentage in Commercial Operation Year 5 = 86%.
- (d) Solar Energy Output Payment Rate = \$29.98

- (e) Actual Solar Energy Output in Commercial Operation Year 4 = 128,000 MWh
- (e) Actual Solar Energy Output in Commercial Operation Year 5 = 132,000 MWh
- (f) Average Market Price for energy and RECs = \$31.00

Given these assumed facts, Seller calculates the Solar Availability Damages due to Buyer as follows:

The positive difference between the Average Market Price for energy and RECs during the Commercial Operation Year and the Solar Energy Output Payment Rate x [Effective Solar Guaranteed Availability Percentage in Commercial Operation Years 4 and 5 — ½ x (Actual Solar Availability Percentage for Commercial Operation Year 4 + Actual Solar Availability Percentage for Commercial Operation Year 5) (each expressed as a decimal)] x ½ x (Actual Solar Energy Output for Commercial Operation Year 4 + Actual Solar Availability Percentage for Commercial Operation Year 5 + Actual Solar Availability Percentage for Commercial Operation Year 5) x Effective Solar Guaranteed Availability Percentage for Commercial Operation Years 4 and 5 = Solar Availability Damage:

$$(\$31.00 - \$29.98) \times [.90 - \frac{1}{2} \times (.84 + .86)] \times \frac{1}{2} \times (128,000 \div .84 + 132,000 \div .86) * .90 = \$7,019.70$$

EXHIBIT J

(to Power Purchase Agreement)

FORM OF SELLER GUARANTY

GUARANTY]

THIS GUARANTY (this "Guaranty"), dated as of, (th made by FORETHOUGHT LIFE INSURANCE COMPANY, Inc., as ("Guarantor"), in favor of PUBLIC SERVICE COMPANY OF NEW ME corporation ("Counterparty").	n Indiana corporation
RECITALS:	
A. WHEREAS, Counterparty and Guarantor's indirect, wh ARRROYO SOLAR LLC ("Obligor") have entered into, or concurrently herewicertain Power Purchase Agreement - Arroyo Solar Facility dated into/effect (the "Agreement"); and	th are entering into, that
B. WHEREAS, Guarantor will directly or indirectly benefit from Obligor and Counterparty;	the Agreement between
NOW THEREFORE, in consideration of the foregoing premises and Counterparty's execution, delivery and performance of the Agreement, and for consideration, the receipt and sufficiency of which is hereby acknowledged, C for the benefit of Counterparty as follows:	other good and valuable
* * *	
1. <u>GUARANTY</u> . Subject to the terms and provisions hereof, Guaranto irrevocably guarantees the timely payment when due of all obligations Counterparty arising pursuant to the Agreement, including with respect to an owes to Counterparty for failing to perform under the Agreement (collective This Guaranty shall constitute a guarantee of payment and not of collection. The under this Guaranty shall be subject to the following limitations:	owing by Obligor to y damages that Obligor ely, the " Obligations ").
(a) Notwithstanding anything herein or in the Agreement to the contrary, to obligation and liability of Guarantor under this Guaranty, and the m Guarantor under this Guaranty, shall in no event exceed	aximum recovery from [spell out the covery Amount"), plus (including reasonable on finally declares that
(b) The obligation and liability of Guarantor under this Guaranty is payments expressly required to be made under the Agreement (ever	

deemed to be damages), as well as costs of collection and enforcement of this Guaranty (including attorneys' fees) to the extent reasonably and actually incurred by Counterparty (subject, in all instances, to the limitations imposed by the Maximum Recovery Amount as specified in <u>Section 1(a)</u> above). Except as expressly payable by Obligor pursuant to the Agreement, Guarantor shall not be liable for or obligated to pay any consequential, indirect, incidental, lost profit, special, exemplary, punitive, equitable or tort damages.

2. DEMANDS AND PAYMENT.

- (a) If Obligor fails to pay any Obligation to Counterparty when such Obligation is due and owing under the Agreement (an "Overdue Obligation"), Counterparty may present a written demand to Guarantor calling for Guarantor's payment of such Overdue Obligation pursuant to this Guaranty (a "Payment Demand"). Delay or failure by Counterparty in making a Payment Demand shall in no event affect Guarantor's obligations under this Guaranty.
- (b) A Payment Demand shall be in writing and shall reasonably and briefly specify in what manner and what amount Obligor has failed to pay and explain why such payment is due, with a specific statement that Counterparty is calling upon Guarantor to pay under this Guaranty. Such Payment Demand must be delivered to Guarantor in accordance with <u>Section 9</u> below; and the specific Overdue Obligation(s) addressed by such Payment Demand must remain due and unpaid at the time of such delivery to Guarantor.
- (c) After issuing a Payment Demand in accordance with the requirements specified in <u>Section 2(b)</u> above, Counterparty shall not be required to issue any further notices or make any further demands with respect to the Overdue Obligation(s) specified in that Payment Demand, and Guarantor shall be required to make payment with respect to the Overdue Obligation(s) specified in that Payment Demand within five (5) Business Days after Guarantor receives such demand. As used herein, the term "Business Day" shall mean all weekdays (*i.e.*, Monday through Friday) other than any weekdays during which commercial banks or financial institutions are authorized to be closed to the public in the State of New Mexico.

3. **REPRESENTATIONS AND WARRANTIES.** Guarantor represents and warrants that:

- (a) it is a LIMITED LIABILITY COMPANY duly formed and validly existing under the laws of the State of Delaware and has the limited liability company power and authority to execute, deliver and carry out the terms and provisions of the Guaranty;
- (b) no authorization, approval, consent or order of, or registration or filing with, any court or other governmental body having jurisdiction over Guarantor is required on the part of Guarantor for the execution, delivery and performance of this Guaranty; and
- the execution, delivery and performance of this Guaranty has been duly and validly authorized by all limited liability company proceedings of Guarantor, and this Guaranty constitutes a valid and legally binding agreement of Guarantor, enforceable against Guarantor in accordance with the terms hereof, except as the enforceability thereof may be limited by the effect of any applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors' rights generally and by general principles of equity.

4. RESERVATION OF CERTAIN DEFENSES; SUBROGATION.

- a) Without limiting Guarantor's own defenses hereunder, Guarantor reserves to itself and may assert as a defense to enforcement of this Guaranty any defense to enforcement of the Agreement that Obligor may assert that is based on Counterparty's breach of the Agreement or the failure of a material condition precedent to Obligor's performance obligations. Notwithstanding the foregoing, Guarantor agrees that it will remain bound upon this Guaranty notwithstanding any defenses that, pursuant to the laws of suretyship or guaranty, would otherwise relieve a guarantor of its obligations. In furtherance and not limitation of the foregoing, Guarantor expressly waives (if any) based upon the bankruptcy, insolvency, dissolution or liquidation of Obligor or any lack of power or authority of Obligor to enter into and/or perform the Agreement or the lack of validity or enforceability of Obligor's obligations under the Agreement. Guarantor further reserves to itself any rights, setoffs or counterclaims that Guarantor may have against Obligor, *provided, however*, that Guarantor agrees such rights, setoffs or counterclaims may only be asserted against Obligor in an independent action, and not as a defense to Guarantor's obligations under this Guaranty.
- b) The Guarantor shall be subrogated to all rights of the Counterparty against the Obligor in respect of any amounts paid by the Guarantor pursuant to this Guaranty; provided, however, that the Guarantor hereby postpones all rights of subrogation, reimbursement, indemnity and recourse (including, without limitation, any statutory rights of subrogation under Section 509 of the United States Bankruptcy Code, 11 U.S.C. § 509, or otherwise) until such time as all amounts due under the Agreement are paid in full and fully, finally and indefeasibly performed. If (i) the Guarantor shall perform and shall make payment to the Counterparty of all or any part of the Obligations and (ii) all the then outstanding obligations under the Agreement have been paid in full, Counterparty shall, at the Guarantor's request, execute and deliver to the Guarantor documents to evidence the transfer by subrogation to the Guarantor of any interest in the Obligations under the Agreement resulting from such payment by the Guarantor. Notwithstanding the foregoing, if any amount is paid to Guarantor in violation of this provision, Guarantor shall hold such amount for the benefit of, and promptly pay such amount to, Counterparty.
- **5. AMENDMENT OF GUARANTY.** No term or provision of this Guaranty shall be amended, modified, altered, waived or supplemented except in a writing signed by Guarantor and Counterparty.
- 6. <u>WAIVERS AND CONSENTS</u>. Guarantor agrees that its obligations under this Guaranty are irrevocable, absolute, independent, unconditional and continuing (subject only to the defenses to enforcement of this Guaranty reserved by Guarantor in *Section 4*) and shall not be affected by any circumstance that constitutes a legal or equitable discharge of a guarantor or surety other than payment in full of the Obligations. In furtherance of the foregoing and without limiting the generality thereof, Guarantor agrees, subject to and in accordance with the other terms and provisions of this Guaranty:
- (a) Except for the Payment Demand as required in <u>Section 2</u> above, Guarantor hereby waives, to the maximum extent permitted by applicable law, (i) notice of acceptance of this Guaranty; (ii) promptness, diligence, presentment, demand, protest, setoff and counterclaim concerning the liabilities of Guarantor; (iii) any right to require that any action or proceeding be brought against Obligor or any other person, or to require that Counterparty seek enforcement of any performance against Obligor or any other person, prior to any action against Guarantor under the terms hereof; (iv) any defense arising by reason of the incapacity, lack of authority or disability of Obligor or based on any illegality, lack of validity or unenforceability of any Obligation; (v) any duty of Counterparty to protect or not impair any security for the Obligations; (vi) any defense based upon an election of remedies by Counterparty; (vii) any

defense of waiver, release, res judicata, statute of frauds, fraud (with respect to Obligor), incapacity (with respect to Obligor), minority or usury; and (viii) any other circumstance or any existence of or reliance on any representation by Counterparty that might otherwise constitute a defense available to, or a legal or equitable discharge of, Guarantor or any other guarantor or surety.

- (b) No delay by Counterparty in the exercise of (or failure by Counterparty to exercise) any rights hereunder shall operate as a waiver of such rights, a waiver of any other rights or a release of Guarantor from its obligations hereunder (with the understanding, however, that the foregoing shall not be deemed to constitute a waiver by Guarantor of any rights or defenses to which Guarantor may at any time have pursuant to or in connection with any applicable statutes of limitation).
- (c) Without notice to or the consent of Guarantor, and without impairing or releasing Guarantor's obligations under this Guaranty, Counterparty may: (i) change the manner, place or terms for payment of all or any of the Obligations (including renewals, extensions or other alterations of the Obligations); (ii) release Obligor or any person (other than Guarantor) from liability for payment of all or any of the Obligations; (iii) receive, substitute, surrender, exchange or release any collateral or other security for this Guaranty or any or all of the Obligations and apply any such collateral or security and direct the order or manner of sale thereof, or exercise any other right or remedy that Counterparty may have against any such collateral or security; or (iv) exercise any other rights available to Counterparty under the Agreement, at law or in equity.
- 7. **REINSTATEMENT.** Guarantor agrees that this Guaranty shall continue to be effective or shall be reinstated, as the case may be, if all or any part of any payment made hereunder or under the Agreement while this Guaranty is in effect is at any time avoided or rescinded or must otherwise be restored or repaid by Counterparty as a result of the bankruptcy or insolvency of Obligor or Guarantor, or similar proceeding, all as though such payments had not been made.
- **8.** <u>TERMINATION.</u> Subject to reinstatement under <u>Section 7</u>, this Guaranty and the Guarantor's obligations hereunder will terminate automatically and immediately upon the earlier of (i) the termination or expiration of the Agreement, and (ii) 11:59:59 Eastern Prevailing Time of [insert date [__] years plus six (6) months after expected COD]; provided, however, Guarantor agrees that the obligations and liabilities hereunder shall continue in full force and effect with respect to any Obligations under any Agreement entered into on or prior to the date of such termination.
- 9. <u>NOTICE</u>. Any Payment Demand, notice, request, instruction, correspondence or other document to be given hereunder (herein collectively called "Notice") by Counterparty to Guarantor, or by Guarantor to Counterparty, as applicable, shall be in writing and may be delivered either by (i) U.S. certified mail with postage prepaid and return receipt requested, or (ii) recognized nationwide courier service with delivery receipt requested, in either case to be delivered to the following address (or to such other U.S. address as may be specified via Notice provided by Guarantor or Counterparty, as applicable, to the other in accordance with the requirements of this <u>Section 9</u>):

TO GUARANTOR: *	TO COUNTERPARTY:
Forethought Life Insurance Company	[●] <u>Attn</u> :

250 Greenwich Street New York, NY 10007 Attn: Keith Holst and Stephen H	
Douglas	
with a copy to:	
[Obligor's name]	
c/o Clenera, LLC Attn: Admin. Dept.	
P.O. Box 2576	
Boise, ID 83701	
[Telephone: 713-554-1952 for use in connection with courier deliveries]	[Tel: [•] for use in connection with courier deliveries]

Any Notice given in accordance with this <u>Section 9</u> will (i) if delivered during the recipient's normal business hours on any given Business Day, be deemed received by the designated recipient on such date, and (ii) if not delivered during the recipient's normal business hours on any given Business Day, be deemed received by the designated recipient at the start of the recipient's normal business hours on the next Business Day after such delivery.

10. MISCELLANEOUS.

- (a) This Guaranty shall in all respects be governed by, and construed in accordance with, the law of the State of New Mexico, without regard to principles of conflicts of laws thereunder.
- (b) This Guaranty shall be binding upon Guarantor and its successors and permitted assigns and inure to the benefit of and be enforceable by Counterparty and its successors and permitted assigns. Guarantor may not assign this Guaranty in part or in whole without the prior written consent of Counterparty, except that the Guarantor may make such an assignment without such consent if the assignee meets the requirements of a Seller Guarantor as defined in the Agreement and Guarantor's obligations hereunder are expressly assumed in writing by such assignee in a form reasonably acceptable to the Counterparty; provided that such assumption shall be deemed to release the Guarantor from all of its obligations under this Guaranty automatically and without further action by the Guarantor or the Counterparty. Counterparty may not assign this Guaranty in part or in whole except (i) with the prior written consent of Guarantor, or (ii) to an assignee of the Agreement in conjunction with an assignment of the Agreement in its entirety accomplished in accordance with the terms thereof.
- (c) This Guaranty embodies the entire agreement and understanding between Guarantor and Counterparty and supersedes all prior agreements and understandings relating to the subject matter hereof.
- (d) The headings in this Guaranty are for purposes of reference only, and shall not affect the meaning hereof. Words importing the singular number hereunder shall include the plural number and vice versa, and any pronouns used herein shall be deemed to cover all genders.

The term "person" as used herein means any individual, corporation, partnership, joint venture, association, joint-stock company, trust, unincorporated association, or government (or any agency or political subdivision thereof).

- (e) Wherever possible, any provision in this Guaranty which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective only to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any one jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.
- (f) Counterparty (by its acceptance of this Guaranty) and Guarantor each hereby irrevocably: (i) consents and submits to the exclusive jurisdiction of the United States District Court for the District of New Mexico for the purposes of any suit, action or other proceeding arising out of this Guaranty or the subject matter hereof or any of the transactions contemplated hereby brought by Counterparty, Guarantor or their respective successors or assigns; and (ii) waives (to the fullest extent permitted by applicable law) and agrees not to assert any claim that it is not personally subject to the jurisdiction of the above-named courts, that the suit, action or proceeding is brought in an inconvenient forum, that the venue of the suit, action or proceeding is improper or that this Guaranty or the subject matter hereof may not be enforced in or by such court.
- COUNTERPARTY (BY ITS ACCEPTANCE OF THIS GUARANTY) AND GUARANTOR EACH HEREBY IRREVOCABLY, INTENTIONALLY AND VOLUNTARILY WAIVES THE RIGHT TO TRIAL BY JURY WITH RESPECT TO ANY LEGAL PROCEEDING BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH, THIS GUARANTY, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PERSON RELATING HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO GUARANTOR'S EXECUTION AND DELIVERY OF THIS GUARANTY.

*

EXHIBIT K

(to Power Purchase Agreement)

COMMERCIAL OPERATION FORM OF CERTIFICATION

This certification ("Certification") of Commercial Public Service Company of New Mexico ("Buyer Power Purchase Agreement dated ("Agree capitalized terms used in this Certification but respective meanings assigned to such terms in the	r") in accordance with the terms of that certain element") by and between Seller and Buyer. All not otherwise defined herein shall have the		
Seller hereby certifies and represents to Bu	yer the following:		
(1) Solar Units with an aggregate capacity commissioned and tested and are capable of delive with the Solar Unit manufacturer's requirements a			
Seller has obtained all necessary rights under the Interconnection Agreement for the interconnection and delivery of Energy to the Point of Delivery and is not in breach of the interconnection Agreement; and			
(3) the Project has been completed in all material respects (except for Delayed Capacity and punch list items that do not materially and adversely affect the ability of the Project to operate as intended).			
A certified statement of the Licensed Professional Engineer, attached hereto, has been provided as evidence of Commercial Operation of the Project to provide Energy Output and meet, at a minimum, the requirements indicated herein.			
EXECUTED by SELLER this day of _	, 20		
[•] Signature:	[Licensed Professional Engineer] Signature:		
Name:	Name:		
Title:	Title:		
T	Date:		
License Number and Ll	PE Stamp:		

Arroyo ESA

PNM Exhibit TGF-10

Is contained in the following 100 pages.

EXECUTION VERSION PNM Contract No. 1057683

ENERGY STORAGE AGREEMENT—ARROYO ENERGY STORAGE

by and between

PUBLIC SERVICE COMPANY OF NEW MEXICO

and

ARROYO ENERGY STORAGE LLC

Dated as of June 27, 2019

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ENERGY STORAGE AGREEMENT

This Energy Storage Agreement, as may be amended from time to time, is entered into this 27th Day of June, 2019 ("Execution Date"), by and between Public Service Company of New Mexico, a New Mexico corporation ("PNM" or "Buyer"), whose principal place of business is 414 Silver Avenue SW, Albuquerque, NM 87102, and Arroyo Energy Storage LLC, a Delaware limited liability company ("Seller"), whose principal place of business is 1717 West Loop South, Suite 1800, Houston, TX 77027. Buyer and Seller may be referred to in this ESA individually as a "Party" and collectively as the "Parties."

WHEREAS, Buyer is a public utility that owns and operates electric generation, transmission, and distribution facilities and is subject to the laws of the State of New Mexico and the rules and regulations of the New Mexico Public Regulation Commission; and

WHEREAS, Seller desires to develop, design, construct, own and operate a battery energy storage facility, as further defined herein and in Exhibit A; and

WHEREAS, Seller desires to sell and deliver to Buyer the Product generated by the Project, and Buyer agrees to buy the same from Seller, in accordance with the terms and conditions set forth in this ESA,

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

ARTICLE 1 Definitions and Rules of Interpretation

- 1.1 <u>Definitions.</u> The following terms shall have the meanings set forth herein.
- "Abandonment" means (a) a cessation of work and operations at the Project for more than ninety (90) Days by Seller or Seller's contractors but only if such cessation is not in accordance with Prudent Utility Practices or caused by a Force Majeure, or (b) the relinquishment of possession and control of the Project (or any material portion thereof) by Seller, other than a transfer permitted under this ESA.
 - "AC" means alternating electric current.
 - "Accounting Standards" has the meaning set forth in Section 22.18.
- "Additional Consents" means the approvals, consents, authorizations or other requirements not listed in the definition of Governmental Approvals in this ESA that are required from any Governmental Authority with respect to the Project.
- "Affiliate" of any named Person or entity means any other person or entity that controls, is under the control of, or is under common control with, the named entity. The term "control" (including the terms "controls," "under the control of" and "under common control with") means

the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person or entity, whether through ownership of fifty percent (50%) or more of the outstanding capital stock or other equity interests of any class of voting securities, by contract, or otherwise.

"After Tax Basis" means, with respect to any payment received or deemed to have been received by a Party, the amount of such payment ("Base Payment") supplemented by a further payment ("Additional Payment") to such Party so that the sum of the Base Payment plus the Additional Payment shall, after deduction of the amount of all Taxes (including any federal, state or local income taxes) required to be paid by such Party in respect of the receipt or accrual of the Base Payment and the Additional Payment (taking into account any current or previous credits or deductions arising from the underlying event giving rise to the Base Payment and the Additional Payment), be equal to the amount required to be received. Such calculations shall be made on the assumption that the recipient is subject to federal income taxation at the highest applicable statutory rate applicable to corporations for the relevant period or periods, and state and local taxes at the highest rates applicable to corporations with respect to such Base Payment and Additional Payment, and shall take into account the deductibility (for federal income tax purposes) of state and local income taxes.

"AGC" stands for "Automatic Generation Control" and means energy management system equipment that automatically adjusts the quantity of Charging Energy and Discharging Energy of the Project, including communication circuits to communicate Project operating information to Buyer's representatives on a real-time basis for the purpose of telemetering, supervisory control/data acquisition and voice communications.

"Ancillary Services" means operating reserves, regulation, black-start capability, reactive supply, voltage control, frequency response, contingency reserves, and other products associated with the storage of Energy, that the Project is capable of providing.

"Applicable Law" means all applicable laws, statutes, treaties, codes, ordinances, regulations, certificates, orders, licenses and permits of any Governmental Authority, now in effect or hereafter enacted, amendments to any of the foregoing, interpretations of any of the foregoing by a Governmental Authority having jurisdiction over this ESA and matters related thereto, the Parties or the Project, and all applicable judicial, administrative, arbitration and regulatory decrees, judgments, injunctions, writs, orders, awards or like actions (including those relating to human health, safety, the natural environment or otherwise).

"Arroyo Solar" means Arroyo Solar LLC, a Delaware limited liability company.

"Back-Up Metering" has the meaning set forth in Section 5.3(D).

"Bankruptcy Code" means the United States Bankruptcy Code, 11 U.S.C. § 101 et seq., as amended from time to time.

"Business Day" means any calendar Day that is not a Saturday, a Sunday, or a state and/or federal recognized holiday where banks in Albuquerque, New Mexico, are permitted or authorized to close.

"Buyer" has the meaning set forth in the Preamble.

"Buyer Costs" means brokerage fees, commissions and other similar third party transaction costs and expenses reasonably incurred and documented by Buyer either in terminating any arrangement pursuant to which it has hedged its obligations under this ESA or entering into new arrangements which replace this ESA; and all reasonable attorneys' fees and expenses incurred by Buyer in connection with the termination of this ESA, to the extent such costs are not already accounted for under Replacement ESS Costs.

"Buyer Termination Payment" means the sum of (a) the aggregate of all amounts then owed from Seller to Buyer less any amounts owed from Buyer to Seller, plus (b) the positive difference, if any, between (i) the net present value of the Replacement ESS Costs and (ii) the Contract Value, plus (c) Buyer Costs all using a discount factor equal to the latest weighted average cost of capital as reported in the then-most recent NMPRC Rule 510 Annual Reporting filing. Any such calculations will be based on reasonable assumptions as to future Project operations, differences between a replacement contract and this ESA, and similar considerations. The Buyer Termination Payment does not include consequential incidental, punitive, exemplary or indirect or business interruption damages.

"CCN" means an application for a Certificate of Public Convenience and Necessity filed with the NMPRC relating to the Project.

"Change of Control" means any circumstance in which Ultimate Parent ceases to own, directly or indirectly through one or more intermediate entities, at least fifty percent (50%) of the outstanding equity or voting interests in Seller.

"Charging Energy" means the amount of Energy supplied by Buyer at Buyer's cost and in accordance with Prudent Utility Practices, and delivered to Seller at the Point of Delivery to be stored at the Project for the purpose of charging the ESS and discharge at a later time, as measured by the Electric Metering Devices, net of any estimated AC losses, based on methodology agreed to by the Parties, between the Electric Metering Devices and the Point of Delivery that are not already reflected in the metered data.

"Code" means the U.S. Internal Revenue Code of 1986, including applicable rules and regulations promulgated thereunder, as amended from time to time.

"Commercial Operation" means that (a) the ESS has been constructed, commissioned, tested, and proven capable of delivering a minimum of ninety-five percent (95%) of the Guaranteed ESS Capacity on a sustained basis without experiencing any abnormal or unsafe operating conditions on any interconnected system; (b) Seller has completed three successful start-ups of the ESS without experiencing any abnormal operating conditions and has been available to dispatch continuously for a period of twenty-four (24) hours with controls in auto and synchronized to the Buyer's system; (c) all Seller required permits, required consents, and Governmental Approvals are in full force and effect; (d) the ESS Unit Capabilities have been demonstrated through testing in accordance with applicable test protocols and procedures set forth in Exhibit F or by another method acceptable to Buyer; (e) Seller has obtained all necessary rights under a separate Shared Facilities Agreement between Seller and Arroyo Solar for interconnection and delivery of Discharge Energy

to the Point of Delivery and is not in breach of the Shared Facilities Agreement, (f) Arroyo Solar has obtained all necessary rights under a separate Interconnection Agreement between Arroyo Solar and the Transmission Provider for interconnection and delivery of Discharge Energy to the Point of Delivery and is not in breach of its Interconnection Agreement, (g) Arroyo Solar has satisfactorily completed other testing in accordance with Interconnection Agreement requirements; (h) Seller has obtained required insurance coverage as set forth in this ESA; (i) Seller has provided to Buyer an officer's certificate that the Project has been completed in all material respects; and (j) Seller has delivered to Buyer the Delivery Term Security.

"Commercial Operation Date" means the date on which Seller submits to Buyer (a) a written notification to Buyer that the Commercial Operation has commenced, (b) a certification from a Licensed Professional Engineer, substantially in the form attached hereto as Exhibit K, and all fees and costs associated with the Licensed Professional Engineer shall be borne by Seller, and (c) Seller shall have delivered the Delivery Term Security to Buyer in accordance with the relevant provisions of Article 19., all as accepted by Buyer in Buyer's reasonable discretion.

"Commercial Operation Year" means a period of twelve (12) consecutive Months; provided that the first Commercial Operation Year shall commence on the Commercial Operation Date and end on the last Day of the Month that is twelve (12) full Months after the Commercial Operation Date, and each subsequent Commercial Operation Year shall be the twelve (12) Month period commencing at the end of the prior Commercial Operation Year.

"Confidential Information" has the meaning set forth in Section 22.14(C).

"Contract Value" means the present values of the ESS Capacity Payments for each Commercial Operation Year (or portion thereof) in the then remaining term, determined without reference to the early termination, of (a) the quantity of ESS Capacity expected to be made available during such Commercial Operation Year (or portion thereof) times (b) the ESS Capacity Payment Rate for such Commercial Operation Year. All elements of the foregoing calculations shall be determined in a commercially reasonable manner. The present values of the monthly payments from their payment dates in the foregoing calculations shall be determined using a discount factor equal to the latest weighted average cost of capital as reported in the then-most recent NMPRC Rule 510 Annual Reporting filing.

"Day" means a calendar day and includes Saturdays, Sundays and holidays; 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.

"DC" means direct current.

"Debt" of any Person at any date means, without duplication, (i) all obligations of such Person for borrowed money, (ii) all obligations of such Person evidenced by bonds, debentures, notes or other similar instruments, (iii) all obligations of such Person to pay the deferred purchase price of property or services, except trade account payable and other accrued expenses arising in the ordinary course of business, (iv) all deferred obligations of such Person to reimburse any bank or other Person in respect of amounts paid or advanced under a letter of credit, line of credit or other instrument, (v) all Debt of others secured by a lien on any asset of such Person, whether or

not such Debt is assumed by such Person, (vi) all Debt of others guaranteed directly or indirectly by such Person as to which such Person has an obligation substantially the economic equivalent of a guarantee, and (vii) obligations in respect of interest rate swap agreements, caps, collars, or other interest rate hedging mechanisms.

"Default Rate" has the meaning set forth in Section 9.4.

"Defaulting Party" means the Party with respect to which an Event of Default under Article 12 has occurred.

"Definitive System Impact Study" means an engineering study that evaluates the impact of the proposed interconnection on the Transmission Provider's Transmission System.

"Delay Damages" has the meaning set forth in Section 3.7.

"Delayed ESS Capacity" has the meaning set forth in Section 3.7.

"Delivery Term" has the meaning set forth in Section 7.1.

"Discharge Energy" means Energy discharged from the ESS and delivered to Buyer at the Point of Delivery, as measured by the Electric Metering Devices, corrected for any estimated AC losses to the Point of Delivery, based on methodology agreed to by the Parties.

"Disclosing Party" has the meaning set forth in Section 22.14(A).

"Dispute Notice" has the meaning set forth in Section 13.8.

"Disputing Party" has the meaning set forth in Section 9.5(A).

"Dollars" means the lawful currency of the United States of America.

"Downgrade Event" shall mean that the long-term credit rating of a Person's long-term senior unsecured debt is not "Baa2" or higher by Moody's or "BBB" or higher by S&P.

"Early Termination Date" has the meaning set forth in Section 12.4.

"Electric Interconnection Point" means the physical point at which electrical interconnection is made between the Project and the Transmission Provider's Transmission System.

"Electric Metering Device(s)" means all metering and data processing equipment used to measure, record, or transmit data relating to Charging Energy and Discharge Energy. Electric Metering Devices include the metering current transformers and the metering voltage transformers.

"Emergency Condition" means (a) a condition or situation that presents an imminent physical threat of danger to life, health or property, and/or could reasonably be expected in the opinion of the Transmission Provider to cause a significant disruption to the Transmission Provider's Transmission System or otherwise be required in accordance with the requirements of the Peak Reliability Organization and/or NERC/WECC, or (b) any system condition not consistent

with Prudent Utility Practices; provided that an Emergency Condition shall not include any emergency caused by Seller's breach of its Shared Facilities Agreement which in turn caused Arroyo Solar to breach its Interconnection Agreement with the Transmission Provider.

"Energy" means three-phase, 60-cycle alternating current electric energy, expressed in units of kWh or MWh, delivered to or received from the Project, in each case at a nominal voltage at the Point of Delivery, as measured by Electric Metering Devices.

"Energy Storage Services" means the acceptance of Charging Energy at the Project, the storing of Energy in the Project, and the delivery of Discharge Energy from the Project at the Point of Delivery, all in accordance with Buyer's dispatch instructions, in compliance with the ESS Unit Capabilities, and subject to the terms and conditions of this ESA.

"Energy Storage System" or "ESS" means the battery arrays, battery system controller, inverters, transformers, thermal management system, and other equipment necessary to charge, store, and subsequently deliver electricity from the Project to the Point of Delivery.

"Environmental Attributes" means all attributes, aspects, characteristics, claims, credits, benefits, reductions, offsets or allowances of an environmental nature that are created or otherwise arise from the Project's delivery of electricity from renewable energy resources in contrast with the generation of electricity using nuclear or fossil fuels or other traditional resources. Forms of such attributes include any and all environmental air quality credits, green credits, including carbon credits, emissions reduction credits, certificates, tags, offsets, allowances, or similar products or rights, howsoever entitled, (i) resulting from the avoidance of the emission of any gas, chemical, or other substance, including mercury, nitrogen oxide, sulfur dioxide, carbon dioxide, carbon monoxide, particulate matter or similar pollutants or contaminants of air, water or soil, gas, chemical, or other substance, and (ii) attributable to the generation, purchase, sale or use of Energy. Environmental Attributes include those currently existing or arising during the Term under local, state, regional, federal, or international legislation or regulation relevant to the avoidance of any emission described above under any governmental, regulatory or voluntary program, including the United Nations Framework Convention on Climate Change and related Kyoto Protocol or other programs, laws or regulations. Environmental Attributes include the reporting rights related to any such attributes, aspects, characteristics, claims, credits, benefits, reductions, offsets or allowances, including the right of a Person to report the ownership thereof in compliance with federal or state law, if applicable, or otherwise to a federal or state agency or any other Person. Environmental Attributes specifically exclude (i) Tax Benefits, (ii) depreciation deductions and depreciation benefits, and other tax benefits arising from ownership or operation of the Project; and (iii) any Energy, reliability or other power attributes from the Project.

"Environmental Contamination" means the introduction or presence of Hazardous Materials at such levels, quantities or location, or of such form or character, as to constitute a violation of federal, state or local laws or regulations, and present a material risk under federal, state or local laws and regulations that a Site will not be available or usable, whether in whole or in part, for the purposes contemplated by this ESA.

"ESA" or "Energy Storage Agreement" means this Energy Storage Agreement between Seller and Buyer, including the Exhibits and Schedules attached hereto, as the same may be amended from time to time in accordance with the provisions hereof.

"ESS Capacity" means the power (expressed in MW as measured at the Point of Delivery) that can be discharged from the ESS for four (4) consecutive hours when starting from 100% state of charge, as determined periodically in accordance with applicable test protocols and procedures set forth in Exhibit F.

"ESS Capacity Payment" has the meaning set forth in Section 8.1.

"ESS Capacity Payment Rate" means the price to be paid by Buyer to Seller for Product made available by the Energy Storage System, as set forth in this ESA.

"ESS Capacity Shortfall Damages" has the meaning set forth in Section 3.8.

"ESS Roundtrip Efficiency" means the ratio of the delivered discharge Energy to the delivered charge Energy, in each case as measured at the PCS input/output terminals and determined periodically in accordance with applicable test protocols and procedures set forth in Exhibit F.

"ESS Unit Capabilities" has the meaning set forth in Section 3.12.

"Event of Default" means a Seller Event of Default as set forth in Section 12.1 or a Buyer Event of Default as set forth in Section 12.2.

"Execution Date" has the meaning set forth in the Preamble.

"Expected Commercial Operation Date" has the meaning set forth in Section 3.1.

"Federal Power Act" means the Federal Power Act, as amended, 16 U.S.C. § 791a et seq.

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

"Force Majeure Event" has the meaning set forth in Section 14.1.

"Frequency Response Capability" means the ability of the ESS to maintain frequency within predefined bounds, measured in MW per 0.1 Hz, by arresting frequency deviations and supporting frequency as required by NERC Reliability Standard BAL-003-1.

"GAAP" has the meaning set forth in Section 22.18.

"Governmental Approval" means any authorization, consent, permission, approval (including an NMPRC Approval), license, ruling, permit, exemption, variance, order, judgment, instruction, condition, direction, directive, decree, declaration of or regulation by any Governmental Authority relating to the construction, development, ownership, occupation, startup, testing, operation or maintenance of the Project or to the execution, delivery or performance of this ESA or the procurement pursuant to this ESA of renewable energy and Renewable Energy Certificates and shall also mean, where and as applicable and the context so dictates, any and all authorization, consent, permission, approval, license, ruling, permit, exemption, variance, order, judgment,

instruction, condition, direction, directive, decree, declaration of or regulation with regard to any Non-Governmental Compliance Obligations.

"Governmental Authority" means any federal, state, local or municipal governmental body; any governmental, quasi-governmental, regulatory or administrative agency, commission, body or other authority exercising or entitled to exercise any administrative, executive, judicial, legislative, policy, regulatory or taxing authority or power; or any court or governmental tribunal.

"Governmental Charges" means any Taxes, charges or costs that are assessed or levied by any Governmental Authority or other Person, including local, state or federal regulatory or taxing authorities that would affect the sale and purchase of the Product contemplated by this ESA, either directly or indirectly.

"Guaranteed Charge Ramp Rate" has the meaning set forth in Section 3.12.

"Guaranteed ESS Capacity" has the meaning set forth in Section 3.12 and shall be valid for the full duration of the ESA with no allowance for degradation.

"Guaranteed Discharge Ramp Rate" has the meaning set forth in Section 3.12.

"Guaranteed ESS Roundtrip Efficiency" has the meaning set forth in Section 3.12.

"Guaranteed PMAX" has the meaning set forth in Section 3.12.

"Guaranteed Start Date" has the meaning set forth in Section 3.1.

"Guaranteed System Latency" means the guaranteed time measured between when the control signal is sent and the ESS responds to the signal by changing the discharge or charge power value by more than 1% of the change in the control setpoint, as specified in Section 3.12.

"Hazardous Materials" means any substance, material, gas, or particulate matter that is regulated by any local Governmental Authority, any applicable state, or the United States of America as an environmental pollutant or dangerous to public health, public welfare, or the natural environment including, without limitation, protection of non-human forms of life, land, water, groundwater, and air, including any material or substance that is (i) defined as "toxic," "polluting," "hazardous waste," "hazardous material," "hazardous substance," "extremely hazardous waste," "solid waste" or "restricted hazardous waste" under any provision of local, state, or federal law; (ii) petroleum, including any fraction, derivative or additive; (iii) asbestos; (iv) polychlorinated biphenyls; (v) radioactive material; (vi) designated as a "hazardous substance" pursuant to the Clean Water Act, 33 U.S.C. § 1251 et seq.; (vii) defined as a "hazardous waste" pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq.; (viii) defined as a "hazardous substance" pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq.; (ix) defined as a "chemical substance" under the Toxic Substances Control Act, 15 U.S.C. § 2601 et seq.; or (x) defined as a "pesticide" under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq.

"House Energy" has the meaning set forth in Section 1.4.

"Interconnection Agreement" means the separate agreement between Arroyo Solar and the Transmission Provider for interconnection of the Solar Facility to the Transmission Provider's Transmission System, with an aggregate capacity of 300 MW_{AC}, as such agreement may be amended from time to time.

"Interconnection Facilities" means the Transmission Provider's Interconnection Facilities and Seller's Interconnection Facilities.

"ITC(s)" means the investment tax credits established pursuant to Section 48 of the Internal Revenue Code, as such law may be amended or superseded.

"Issuer Minimum Requirements" has the meaning set forth in Section 19.2.

"kW" means one or more kilowatts AC of electricity, as the context requires.

"kWh" means kilowatt hour AC.

"Lender(s)" means any and all Persons, including Affiliates of Seller, (a) lending money or extending credit (including any financing lease, monetization of tax benefits, back-leverage or paygo financing, Tax Equity Financing or credit derivative arrangement) to Seller or to an Affiliate of Seller: (i) for the construction, interim or permanent financing or refinancing of the Project; (ii) for working capital or other ordinary business requirements of the Project (including the maintenance, repair, replacement or improvement of the Project); (iii) for any development financing, bridge financing, credit support, credit enhancement or interest rate protection in connection with the Project; (iv) for any capital improvement or replacement related to the Project; or (v) for the purchase of the Project and the related rights from Seller; (b) participating as a Tax Equity Investor in the Project; or (c) any lessor under a lease finance arrangement relating to the Project.

"Letter of Credit" means an irrevocable, unconditional, transferable standby letter of credit for the benefit of the receiving Party, issued by an entity meeting the Issuer Minimum Requirements.

"Licensed Professional Engineer" means an independent, professional engineer reasonably acceptable to Buyer, licensed in the State of New Mexico, and otherwise qualified to perform the work required hereunder.

"Local Provider" has the meaning set forth in Section 1.4.

"Losses" has the meaning set forth in Section 20.1(A).

"Month" means a calendar month.

"Monthly Billing Period" means the period during any particular Month in which Product has been made available at the Point of Delivery for sale to Buyer, whether or not occurring prior to or subsequent to the Commercial Operation Date.

"Monthly Electricity Cost" means, for a month, the sum of (i) (a) the quantity of Charging

Energy sourced from the Solar Facility during such month times (b) the Solar Energy Output Payment Rate (as such term is defined in the PPA), plus (ii) (a) the quantity of Charging Energy sourced from the grid during such month times (b) the five-minute, real time price of energy as determined at the Palo Verde Trading Hub for the corresponding delivery periods.

"Moody's" means Moody's Investor Services, Inc. and any successor thereto.

"Mountain Prevailing Time" or "MPT" means the time in effect in the Mountain Time Zone of the United States of America, whether Mountain Standard Time or Mountain Daylight Saving Time.

"MW" means megawatt or one thousand (1,000) kW AC.

"MWh" means megawatt hours AC.

"NERC" means the North American Electric Reliability Corporation or any successor organization.

"NMPRC" means the New Mexico Public Regulation Commission or any successor agency.

"NMPRC Approval" has the meaning set forth in Section 17.3(B).

"NMPTC Payment Amount" has the meaning set forth in Section 8.1(C).

"NMPTC Recipients" has the meaning set forth in Section 8.1(C).

"NMPTC Statute" has the meaning set forth in Section 8.1(C).

"NMPTCs" means any state or local production tax credit or investment tax credit determined by reference to renewable electric energy produced from renewable energy resources in effect in the state of New Mexico.

"Non-Defaulting Party" means the Party other than the Defaulting Party with respect to an Event of Default that has occurred under Article 12.

"Non-Governmental Compliance Obligations" means all necessary filings, applications, accreditations, registrations and/or other requirements including deposits, fees, accounts, and/or other obligations with WREGIS, NERC, WECC, and all other applicable agencies, self-regulatory organizations and industry committees to which the Party is required to have membership and/or submit to jurisdiction in the performance of this ESA.

"O&M Records" has the meaning set forth in Section 13.4(A).

"OATT" means Open Access Transmission Tariff.

"Operating Parameters" has the meaning set forth in Section 10.4(A).

"Operating Procedures" means those procedures, if any, developed pursuant to

Section 10.5.

"Operating Records" means all operating logs, blueprints for construction, operating manuals, warranties on equipment, and other documents related to the manufacture and installation of the ESS and generator step-up transformer, material engineering drawings, and environmental permits, plans, and studies, whether in printed or electronic format, that Seller uses or maintains for the operation of the Project.

"Outage Notice" has the meaning set forth in Section 7.5(A).

"Party" or "Parties" has the meaning set forth in the Preamble and includes any permitted assignee of a Party.

"PCS" or "Power Conditioning System" means the Energy Storage System power conditioning system utilized to convert electric power from one form to another (AC to DC, DC to AC, and/or between different voltage levels), and to condition the power quality to what is needed by the interconnected systems.

"Peak Reliability Organization" means the entity that fulfills the duties of the Reliability Coordinator, as defined by NERC, and as delegated by WECC, for its Reliability Coordinator Area in the Western Interconnection.

"Person" means any natural person, corporation, limited liability company, general partnership, limited partnership, proprietorship, other business organization, trust, union, association or Governmental Authority.

"PNM" has the meaning set forth in the Preamble.

"Point of Delivery" means the electric system point at which (i) Buyer delivers Charging Energy to Seller, (ii) Seller delivers Discharge Energy to Buyer and (iii) Seller makes the Ancillary Services available to Buyer. The Point of Delivery shall be specified in Section 3.1 and Exhibit B to this ESA.

"PPA" means the Power Purchase Agreement dated as of June 27, 2019 between Arroyo Solar and Buyer relating to the Solar Facility, including the Exhibits and Schedules attached thereto, as the same may be amended from time to time in accordance with the provisions thereof.

"Product" means all Energy Storage Services, Environmental Attributes, Ancillary Services and ESS Capacity, all as made available by the Project and delivered for Buyer's exclusive use pursuant to the terms of this ESA.

"Project" means Seller's energy storage facility, located in McKinley County, New Mexico, with a designed maximum power discharge capability of Guaranteed PMAX, as identified and described in Article 3 and Exhibit A to this ESA, including all of the following (and any additions, modifications or replacements), the purpose of which is to store electricity and deliver such electricity to the Buyer at the Point of Delivery: Seller's equipment, buildings, all of the conversion facilities, including the Energy Storage Systems, step-up transformers, output breakers, rights to access and use Seller's Interconnection Facilities pursuant to the Shared Facilities Agreement

necessary to connect the ESS to the Electric Interconnection Point, protective and associated equipment, improvements, and other tangible assets, contract rights, easements, rights of way, surface use agreements and other interests or rights in real estate reasonably necessary for the construction, operation, and maintenance of the energy storage facilities that make the Product available subject to this ESA.

"Project Manager" has the meaning set forth in Section 10.1(D).

"Promotional Materials" has the meaning set forth in Section 22.15(A).

"Prudent Utility Practice(s)" means the practices, methods, and acts (including the practices, methods, and acts engaged in or approved by a significant portion of the electric power generation industry, WECC and/or NERC) that, at a particular time, in the exercise of reasonable judgment in light of the facts known or that should reasonably have been known at the time a decision was made, would have been expected to accomplish the desired result in a manner consistent with law, regulation, permits, codes, standards, reliability, safety, environmental protection, economy, and expedition. With respect to the Project, Prudent Utility Practice(s) includes taking reasonable steps to ensure that:

- (A) equipment, materials, resources, and supplies, including spare parts inventories, are available to meet the Project's needs;
- (B) sufficient operating personnel are available at all times and are adequately experienced and trained and licensed as necessary to operate the Project properly, efficiently, and in coordination with Buyer and are capable of responding to reasonably foreseeable Emergency Conditions whether caused by events on or off the Sites;
- (C) preventive, routine, and non-routine maintenance and repairs are performed on a basis that ensures reliable, long-term and safe operation, and are performed by knowledgeable, trained, and experienced personnel utilizing proper equipment and tools;
- (D) appropriate monitoring and testing are performed to ensure equipment is functioning as designed;
- (E) equipment is not operated in a reckless manner, or in a manner unsafe to workers, the general public, or the interconnected system or contrary to environmental laws, permits or regulations or without regard to defined limitations, such as flood conditions, safety inspection requirements, operating voltage, current, volt-ampere reactive ("VAr") loading, frequency, rotational speed, polarity, synchronization, and/or control system limits;
- (F) equipment and components meet or exceed the standard of durability that is generally used for battery storage systems in the region and will function properly over the full range of ambient temperature and weather conditions reasonably expected to occur at the Sites and under both normal and Emergency Conditions; and
- (G) equipment, components, and processes are appropriately permitted with any local, state, or federal Governmental Authority and are operated and maintained in accordance with applicable permit and regulatory requirements.

"Qualified Operator" is (a) a Person that has at least three (3) years' experience with operating battery energy storage systems to the extent reasonably available in the market and that is trained on the functionality and operation of the ESS technology, or (b) any other Person reasonably acceptable to Buyer.

"Recapture Period" means the first five (5) years following the Commercial Operation Date within which the ESS must be charged exclusively from Energy generated by the Solar Facility.

"Receiving Party" has the meaning set forth in Section 22.14(A).

"Receiving Party's Representatives" has the meaning set forth in Section 22.14(B).

"Recording" has the meaning set forth in Section 22.19.

"Regulatory End Date" has the meaning set forth in Section 17.3(B)(3).

"Replacement ESS Costs" means the actual costs incurred by Buyer following an Event of Default that are reasonable and necessary to replace the Product which Seller, in accordance with this ESA, would have made available to Buyer, but failed to so provide pursuant to this ESA. Buyer shall not have to enter into a replacement contract to establish the Replacement ESS Costs. If Buyer does not enter into a replacement contract, then the Replacement ESS Costs will be based on the market price for comparable ESS Unit Capabilities, Environmental Attributes and Ancillary Services delivered to Buyer's system, as reasonably determined by Buyer. In calculating such amounts, Buyer will comply with the requirements set forth in Section 12.4(A) in establishing the market price. Replacement ESS Costs for an Event of Default also include (i) the reasonable amounts paid or incurred by Buyer for transmission of replacement Discharge Energy to the Point of Delivery and any associated transmission or distribution costs, and (ii) Buyer's expenses, including reasonable outside attorneys' fees, suffered as a result of Seller's failure to perform under this ESA.

"Requested Actions" has the meaning set forth in Section 17.3.

"S&P" means Standard & Poor's Corporation and any successor thereto.

"Scheduled Maintenance Outage" means a time during which the ESS is shut down or its output reduced to undergo scheduled maintenance in accordance with this ESA, or as otherwise agreed by Seller and Buyer.

"SEC" has the meaning set forth in Section 22.18.

"Security" means Development Security or Delivery Term Security, as applicable.

"Seller" has the meaning set forth in the Preamble.

"Seller Curtailment" has the meaning set forth in Section 4.2.

"Seller Excused Hours" means those hours during which Seller is unable to make

available Product as a result of: (a) a Scheduled Maintenance Outage, (b) a Force Majeure Event, (c) a Seller Curtailment, (d) failure of Buyer to provide Charging Energy, (e) any failure by Buyer to perform a material obligation under this ESA (other than due to a breach by Seller of its obligations under this ESA) or (f) insufficient state of charge.

"Seller Forced Outage" means an unplanned reduction, interruption or suspension of all or a portion of Product that would otherwise be made available from the Project at the Point of Delivery not associated with Seller Excused Hours.

"Seller Guarantor" means Forethought Life Insurance Company or any other Person having a credit rating on such Person's long-term senior unsecured debt that is "Baa3" or higher by Moody's or "BBB-" or higher by S&P or insurance rating AM Best A- or better.

"Seller Guaranty" means a guaranty in substantially the form attached as Exhibit J.

"Seller Permitted Transfer" means any of the following: (a) a Change of Control of Seller; (b) the direct or indirect transfer of shares of, or equity interests in, Seller to a Tax Equity Investor; (c) a transfer of: (i) all or substantially all of the assets of Centaurus Renewable Energy LLC ("Centaurus") or Seller's Ultimate Parent Company in a single transaction; or (ii) all or substantially all of Centaurus' or Seller's Ultimate Parent's solar generation portfolio in a single transaction; or (d) in connection with a Lender's exercise of remedies under its financing agreements for the Project, the direct or indirect transfer of shares of, or equity interests in, Seller (including a Change of Control), or assignment of this ESA or any of Seller's rights or obligations hereunder; provided, that in the case of each of (a), (b), (c) or (d) of this definition, following such transfer (A) the entity that operates the Project is) a Qualified Operator or retains, prior to the date of such transfer, a Qualified Operator to operate the Project (or otherwise agrees not to interfere with the existing Qualified Operator for the Project), (B) such transfer does not have a material adverse effect on the Seller's creditworthiness and (C) Seller continues to comply with the obligations to provide Development Security or Delivery Term Security, as applicable, in accordance with Article 19 of this ESA.

"Seller Termination Payment" means the sum of (a) aggregate of all amounts then owed from Buyer to Seller, less any amounts owed from Seller to Buyer, plus (b) the positive difference, if any, between (i) the Contract Value, and (ii) the net present value of the payments that can reasonably be expected to be applicable in the market under a replacement contract covering the same products (i.e., Product), plus (c) Seller's reasonable transactional costs of entering into a new supply or sales arrangement all using a discount factor equal to the latest weighted average cost of capital as reported in the then-most recent NMPRC Rule 510 Annual Reporting filing. Any such calculations will be based on reasonable assumptions as to future Project operations, differences between a replacement contract and this ESA and similar considerations. The Seller Termination Payment does not include consequential incidental, punitive, exemplary or indirect or business interruption damages.

"Seller's Financial Statements" has the meaning set forth in Section 22.18(B).

"Seller's Interconnection Facilities" means the equipment owned and operated by Arroyo Solar between the high side disconnect of the step-up transformer and the Electric Interconnection

Point, including all related relaying protection and physical structures as well as all transmission facilities required to access the Transmission Provider's Transmission System at the Electric Interconnection Point, along with any easements, rights of way, surface use agreements and other interests or rights in real estate reasonably necessary for the construction, operation and maintenance of such facilities. On the low side of the step-up transformer, "Seller's Interconnection Facilities" includes Arroyo Solar's metering, relays, and load control equipment as provided for in the Interconnection Agreement. This equipment is located within the Solar Facility and is conceptually depicted in Exhibit B to this ESA.

"Shared Facilities Agreement" means the separate agreement between Seller and Arroyo Solar granting Seller the right to access and use the Seller's Interconnection Facilities for interconnection of the Project to the Transmission Provider's Transmission System, as such agreement may be amended from time to time.

"Site" means the parcel or parcels of real property on which the Project will be constructed and located, including any easements, rights of way, surface use agreements and other interests or rights in real estate reasonably necessary for the construction, operation and maintenance of the Project. The Site for the Project is more specifically described in Section 3.3 and Exhibit C to this ESA. For the avoidance of doubt, this ESA is Site specific.

"Solar Facility" means the co-located 300 MW_{AC} solar generating plant consisting of photovoltaic arrays, tracking devices, inverters, transformers, and other equipment necessary to collect sunlight and convert it into electricity which, among other things, will be used to charge the ESS per Buyer's dispatch elections.

"System Control Center" or "SCC" means Buyer's representative(s) responsible for dispatch of the ESS.

"Tax Benefits" means (a) federal and state investment and/or production tax credits (including ITCs but excluding NMPTC(s), and any other tax credits which are or will be generated by the Project and (b) any cash payments or outright grants of money relating directly to such tax credits.

"Tax Equity Financing" means, with respect to Seller or an upstream equity owner of Seller, any transaction or series of transactions (including, without limitation, any transaction of the type described in this definition that utilizes a lease or inverted lease structure) resulting in a portion of the membership interests in Seller or an upstream equity owner, as applicable, being issued or otherwise provided to another Person (a "Tax Equity Investor") in exchange for capital contributions to Seller or such upstream equity owner, as applicable, or the Project being sold to and leased by Seller from a Tax Equity Investor, in either case for the purpose of raising a portion of the funds needed to finance the construction of the Project by monetizing the Tax credits, depreciation and other Tax Benefits associated with the Project.

"Tax Equity Investor" has the meaning set forth in the definition of Tax Equity Financing.

"Taxes" means all taxes, fees, levies, licenses or charges imposed by any Governmental Authority, other than taxes, levies, licenses or charges based upon net income or net worth as set forth in more detail in Section 9.7.

"Term" means the period during which this ESA shall remain in full force and effect, and which is further defined in Article 2.

"**Termination Payment**" means the Buyer Termination Payment or the Seller Termination Payment, as applicable.

"Test Period" means the period commencing on the day the Project is energized, operates in parallel with the Transmission Provider's Transmission System and is available to receive Charging Energy from and deliver Discharge Energy to the Point of Delivery, and ending on the Commercial Operation Date.

"Transmission Provider" means Buyer, Buyer's designated agent, or a third party acting in its capacity owning, controlling, or operating facilities used for the transmission of electric energy in interstate commerce and providing transmission service under the OATT and any successor entity, if applicable.

"Transmission Provider's Interconnection Facilities" means the facilities necessary to connect the Transmission Provider's Transmission System to the Electric Interconnection Point, including breakers, bus work, bus relays, and associated equipment installed by the Transmission Provider for the direct purpose of physically and electrically interconnecting the Project, along with any easements, rights of way, surface use agreements and other interests or rights in real estate reasonably necessary for the construction, operation and maintenance of such facilities. Arrangements for the installation and operation of the Transmission Provider's Interconnection Facilities shall be governed by the Interconnection Agreement.

"Transmission Provider's Transmission System" means the contiguously interconnected electric transmission and sub-transmission facilities over which the Transmission Provider has rights (by ownership or contract) to provide bulk transmission of capacity and energy from the Electric Interconnection Point.

"Ultimate Parent" means the parent company (or if there is more than one parent company, the ultimate parent company) that owns, directly or indirectly through one or more intermediate entities, at least fifty percent (50%) of the outstanding equity or voting interests in Seller.

"WECC" means the Western Electricity Coordinating Council, a NERC regional electric reliability council, or any successor organization.

"WREGIS" means the Western Renewable Energy Generation Information System or any successor system.

1.2 Rules of Construction.

- (A) The masculine shall include the feminine and neuter.
- (B) References to "Articles," "Sections," "Exhibits" or "Schedules" shall be to articles, sections, exhibits, or schedules of this ESA unless otherwise stated.

- (C) The Exhibits and Schedules attached hereto are incorporated in and are intended to be a part of this ESA; *provided*, that in the event of a conflict between the terms of any Exhibit or Schedule and the terms of this ESA, the terms of this ESA shall take precedence.
- (D) This ESA was negotiated and prepared by both Parties with the advice and participation of counsel. The Parties have agreed to the wording of this ESA and none of the provisions hereof shall be construed against one Party on the ground that such Party is the author of this ESA or any part hereof.
- (E) The Parties shall act reasonably and in accordance with the principles of good faith and fair dealing in the performance of this ESA. Unless expressly provided otherwise in this ESA, (i) where the ESA requires the consent, approval, or similar action by a Party, such consent, approval or similar action shall not be unreasonably withheld, conditioned or delayed, and (ii) wherever the ESA gives a Party a right to determine, require, specify or take similar action with respect to a matter, such determination, requirement, specification or similar action shall be reasonable.
- (F) Use of the words "include" or "including" or similar words shall be interpreted as "including but not limited to" or "including, without limitation."
- (G) Use of the words "tax" or "taxes" shall be interpreted to include taxes, fees, surcharges, and the like.
- 1.3 <u>Interpretation with Interconnection Agreement</u>. Each Party conducts its operations in a manner intended to comply with FERC Standards of Conduct for Transmission Providers, requiring the separation of its transmission and merchant functions, as applicable.
 - (A) The Parties acknowledge and agree that the Interconnection Agreement shall be a separate and free-standing contract and that the terms of this ESA are not binding upon the Transmission Provider.
- (B) Notwithstanding any other provision in this ESA, nothing in the Interconnection Agreement shall alter or modify Seller's or Buyer's rights, duties and obligations under this ESA. This ESA shall not be construed to create any rights between Seller and the Transmission Provider.
- (C) Seller expressly recognizes that, for purposes of this ESA, the Transmission Provider shall be deemed to be a separate entity and separate contracting party whether or not the Interconnection Agreement is entered into with Buyer, an Affiliate of Buyer, or a third-party entity.
- 1.4 <u>Interpretation of Arrangements for Electric Supply to the Project</u>. This ESA does not provide for the supply of retail electric power or natural gas to the Project, for any purpose ("**House Energy**"). Seller shall contract with the local utility in whose retail service territory the Project is located ("**Local Provider**") for the supply of House Energy.
- (A) Seller's arrangements for the supply of House Energy to the Project shall be separate and free-standing arrangements. The terms of this ESA are not binding upon the Local Provider. For purposes of this ESA, the Local Provider shall be deemed to be a separate entity and

separate contracting party, whether or not the Local Provider is Buyer or an Affiliate of Buyer.

- (B) Notwithstanding any other provision in this ESA, nothing in Seller's arrangements for the supply of House Energy to the Project shall alter or modify Seller's or Buyer's rights, duties and obligations under this ESA. This ESA shall not be construed to create any rights between Seller and Buyer in Buyer's capacity as the Local Provider.
- (C) Seller shall have the right to consume energy concurrently generated by the Solar Facility for House Energy and to co-locate additional facilities designed to supply House Energy; provided, however, that excess energy produced from such additional facility shall not be delivered by Seller to Buyer under this ESA. House Energy shall be real time measured by a dedicated Electric Metering Device.

ARTICLE 2 Term and Termination

2.1 Execution Date and Term. This ESA shall become effective on the Execution Date, subject to conditions precedent set forth herein, and shall end at 11:59 p.m. Mountain Prevailing Time on the date that is the last Day of the twentieth (20th) Commercial Operation Year, subject to the early termination provisions set forth herein. Applicable provisions of this ESA shall continue in effect after termination, including early termination, to the extent necessary to enforce or complete the duties, obligations or responsibilities of the Parties arising prior to termination. If Seller receives a Definitive System Impact Study from the Transmission Provider with interconnection and non-reimbursable network upgrade costs that exceed Nine Million Dollars (\$9,000,000 or an interconnection facilities completion date later than January 1, 2022, then the Parties shall meet and confer no later than fifteen (15) Days after Seller receives the Definitive System Impact Study, or longer period as mutually agreed by the Parties, regarding appropriate amendments, if any, to this ESA. If the Parties are unable to agree on such amendments within sixty (60) Days after receipt of the Definitive System Impact Study, or longer period as mutually agreed by the Parties, then Seller may terminate this ESA without liability of either Party, except that Buyer shall return the Development Security less any amounts due from Seller to Buyer, provided that Seller gives Buyer notice of termination no later than ninety (90) Days after receipt of the Definitive System Impact Study.

ARTICLE 3 Project Description

3.1 <u>Commercial Terms</u>. The following commercial terms apply to the transaction contemplated by this ESA, each term is as more fully set forth in this ESA:

COMMERCIAL TERMS

Buyer: Public Service Company of New Mexico	Seller: Arroyo Energy Storage LLC
Project: Arroyo Energy Storage	

Point of Delivery: The point within WECC Path 48 where Seller makes available to Buyer	
Product being provided under this ESA, as further described in Exhibit B.	
Contract Term: 20 Commercial Operation Years	Product Type: Bundled Energy Storage Services, Ancillary Services, Environmental Attributes and ESS Capacity
ESS Capacity Payment Rate: \$7.46 per kW per month	
Day(s) of week: Monday through	Hours: Hour Ending 0100 – Hour Ending
Sunday, including NERC holidays	2400, Monday through Sunday Mountain
	Prevailing Time ("MPT")
Guaranteed Start Date: One hundred fifty (150) Days after the Expected Commercial	
Operation Date	
Expected Commercial Operation Date: June 30, 2022, subject to extensions as set forth in	
Section 3.6	

- 3.2 <u>Project</u>. <u>Exhibit A</u> provides a detailed description of the Project, including identification of the major equipment and components that will make up the Project. Seller shall provide advance written notice to Buyer at the earliest practicable time of any proposed material changes in the Project.
- 3.3 <u>Location</u>. A scaled map that identifies the Site, the location of the Electric Interconnection Point and the location of the Interconnection Facilities is included in <u>Exhibit A</u> to this ESA. <u>Exhibit A</u> also contains a preliminary indication of the location of the ESS at the Site. Seller will provide notice to Buyer of the final proposed location of the ESS at the Site no later than thirty (30) Days prior to the initial Site construction mobilization and commencement of civil infrastructure work by Seller's contractors at the Site. Seller shall provide advance written notice to Buyer at the earliest practicable time of any other proposed location changes.
- 3.4 <u>General Design of the Project</u>. Seller shall construct the Project in accordance with Prudent Utility Practices and in accordance with the terms and conditions of the Interconnection Agreement. Seller shall maintain the Project according to Prudent Utility Practice(s) and the Interconnection Agreement. The Project shall at all times:
- (A) have the required panel space and 125V DC battery-supplied voltage to accommodate metering, system telemetering equipment and communications equipment;
 - (B) be equipped for and capable of AGC by Buyer;
- (C) use communication circuits from the Project to Buyer's System Control Center for the purpose of telemetering, supervisory control/data acquisition, and voice and other communications as required for AGC by Buyer;
- (D) supply Discharge Energy with minimal harmonic distortion in compliance with the requirements of the Interconnection Agreement and Prudent Utility Practices;
- (E) receive Charging Energy from Buyer and deliver Discharge Energy to Buyer, each at the frequency specified by Buyer;

- (F) be capable of being remotely started and stopped by Buyer's System Control Center;
- (G) be capable of immediate disconnection from the Buyer's system in the event of an Emergency Condition
 - (H) meet voltage and reactive/active power control performance for a Category B system as defined in IEEE 1547-2018 for a Distributed Energy Resource (DER) at the Point of Delivery;
 - (I) meet the normal and abnormal performance category as defined in IEEE 1547-2018 for a Distributed Energy Resource (DER) at the Point of Delivery shall be Category II minimum; and
 - (J) meet or exceed the recommended performance specifications defined in Appendix A of the September 2018 NERC Reliability Guideline for BPS-Connected Inverter-Based Resource Performance at the Point of Delivery.
- 3.5 <u>Expected Commercial Operation Date.</u> Subject to the extensions as specifically set forth herein, the Commercial Operation Date shall occur no later than the Expected Commercial Operation Date.
- 3.6 Extension. The Expected Commercial Operation Date and related damages provisions under Section 3.7 shall be extended by a number of Days, on a day-for-day basis up to a maximum of one hundred eighty (180) Days, equal to the duration of any Force Majeure Event, or in the event of delay associated with the interconnection of the Project, in either case that delays construction or commencement of operation of the Project, except to the extent caused by the fault or negligence of Seller. Seller will give written notice to Buyer describing any such Force Majeure Event or interconnection delay within five (5) Business Days after the occurrence of the Force Majeure Event or interconnection delay. The number of Days of such extension is calculated from the date on which the Force Majeure Event or interconnection delay begins. If a Force Majeure Event will delay the Commercial Operation Date for more than one hundred eighty (180) Days, or if an interconnection delay will delay the Commercial Operation Date for more than one hundred eighty (180) Days, then Buyer will have the right to terminate this ESA without liability of either Party, and Buyer shall return the Development Security less any amounts due from Seller to Buyer.

- 3.7 <u>Delay Damages</u>. If the Commercial Operation Date has not occurred by the Expected Commercial Operation Date as such date may be extended pursuant to Section 3.6, Seller will use commercially reasonable efforts to continue construction of the Project and shall pay liquidated damages ("**Delay Damages**") to Buyer in an amount equal to Two Hundred Dollars (\$200) per Day per each MW of Delayed ESS Capacity for each Day after the Expected Commercial Operation Date until the earlier of (i) the Commercial Operation Date, and (ii) the Guaranteed Start Date. "**Delayed ESS Capacity**" means the Guaranteed ESS Capacity minus the ESS Capacity as of the determination date. In no event shall the aggregate Delay Damages exceed Thirty-Six Thousand Dollars (\$36,000) per MW of Delayed ESS Capacity.
- 3.8 ESS Capacity Shortfall. If the Commercial Operation Date is declared before the full Guaranteed ESS Capacity of the Project has been constructed, commissioned and tested, Seller shall use commercially reasonable efforts to cause the remaining portion of the Guaranteed ESS Capacity to achieve Commercial Operation. If Seller has not caused all Delayed ESS Capacity to achieve Commercial Operation on or before the Guaranteed Start Date, then no later than twenty (20) Days after the Guaranteed Start Date, Seller shall pay to Buyer liquidated damages in the amount of Five Hundred Thousand Dollars (\$500,000) per MW of Delayed ESS Capacity (as of the Guaranteed Start Date) ("ESS Capacity Shortfall Damages"), in which case the Guaranteed PMAX will be reduced in an amount equal to the Delayed ESS Capacity for which ESS Capacity Shortfall Damages were timely paid pursuant to this Section 3.8.
- 3.9 <u>Test Period</u>. During the Test Period, Seller shall have the right to deliver Energy generated by the Solar Facility, such Energy purchased by the Buyer pursuant to the terms of the PPA, to the Delivery Point as Charging Energy as reasonably required for purposes of testing and commissioning the Project. Seller shall subsequently redeliver such Charging Energy to Buyer at the Point of Delivery as Discharge Energy. In accordance with Section 7.2, Buyer shall retain title of such Charging Energy and Discharging Energy. Seller shall notify Buyer, to the extent practicable, fifteen (15) Days prior to commencement of such Test Period.
- 3.10 Notice of Commercial Operation. Not less than sixty (60) Days prior to the date upon which Seller expects to achieve the Commercial Operation Date, Seller shall give written notice to Buyer of such expected Commercial Operation Date; provided that such Commercial Operation Date shall not be more than ninety (90) Days prior to the Expected Commercial Operation Date. In the event that Seller should determine that the Expected Commercial Operation Date for the Project is not feasible or is impossible to achieve, Seller shall promptly notify Buyer and shall advise Buyer of the new proposed Commercial Operation Date; provided, however, such new Commercial Operation Date shall not be later than the Guaranteed Start Date.
- 3.11 <u>Grid Charging</u>. During the Recapture Period, the ESS shall be configured to charge exclusively using Energy produced by the Solar Facility. Within six (6) Months following expiration of the Recapture Period, Seller shall, in cooperation with the Solar Facility owner, at Buyer's cost, cause the ESS, to be reconfigured, as necessary to accept Charging Energy from the electrical grid and Solar Facility.
- 3.12 <u>ESS Unit Capabilities</u>. "ESS Unit Capabilities" means all of the following for the ESS:

- (A) Guaranteed PMAX of 40 MW of charging and discharging capability as measured at the Point of Delivery, and as may be adjusted pursuant to Section 3.8;
- (B) Guaranteed ESS Capacity: discharge ESS at Guaranteed PMAX for four (4) consecutive hours;
- (C) Guaranteed ESS Roundtrip Efficiency of 87.1% at the Commercial Operation Date with an annual degradation of -0.5% per Commercial Operation Year;
 - (D) Guaranteed Discharge Ramp Rate of Guaranteed PMAX in MW per second measured between 85% state of charge and 15% state of charge representing the maximum rate that the ESS can change its output power
- (E) Guaranteed Charge Ramp Rate of Guaranteed PMAX in MW per second measured between 15% state of charge to 85% state of charge representing the maximum rate that the ESS can change its input power;
 - (F) Guaranteed System Latency: 5 seconds
 - (G) Guaranteed Frequency Response Capability of 28.8 MW/0.1Hz; and
- (H) Capability to support Ancillary Services in accordance with the system design or as otherwise agreed by the Parties in writing.
 - (I) Ten (10) MW for twenty (20) minutes blackstart capability.
- 3.13 <u>ESS Non-Performance Liquidated Damages</u>. In addition to any other amounts due from Seller to Buyer under this ESA, Seller will pay Buyer the following liquidated damages as the sole and exclusive remedy for ESS unit non-performance (in each case other than as excused due to ESS Excused Hours):
- (A) Ten Thousand Dollars (\$10,000) per event for inability to comply with the Guaranteed Charge Ramp Rate, Guaranteed Discharge Ramp Rate, Guaranteed System Latency or the Guaranteed Frequency Response Capability; provided, however, under no circumstances will ESS Non-Performance Liquidated Damages exceed Five Hundred Thousand Dollars (\$500,000) in any Commercial Operation Year and an aggregate of One and One-Half Million Dollars (\$1.5 million) over the Term of this ESA. As used in this Section 3.13(A), "event" means an occurrence causing a failure to comply by Seller lasting no more than seventy-two (72) hours; each exceedance of the seventy-two (72) hour cap by the same occurrence will be deemed a separate event. If multiple failures occur during the same 72-hour period, they will be treated as a single event if arising out of a common root cause.
- 3.14 <u>Availability Guarantee</u>. Seller guarantees that the Project shall be available to deliver Discharge Energy, store Energy or accept Charging Energy, and shall pay Availability Damages, if any, in accordance with Seller's obligations under the provisions of <u>Exhibit I</u>.
 - 3.15 Guaranteed ESS Roundtrip Efficiency Payment.

- (A) if the ESS Roundtrip Efficiency is greater than one (1) percentage point above the Guaranteed ESS Roundtrip Efficiency, Buyer shall pay to Seller, in addition to other amounts due under this ESA, an amount equal to the Monthly Electricity Cost multiplied by (ESS Roundtrip Efficiency Guaranteed ESS Roundtrip Efficiency 1%).
- (B) if the ESS Roundtrip Efficiency is more than one (1) percentage point below the Guaranteed ESS Roundtrip Efficiency, Seller will pay to Buyer an amount equal to the Monthly Electricity Cost multiplied by (Guaranteed ESS Roundtrip Efficiency ESS Roundtrip Efficiency 1%).

ARTICLE 4 AGC; Seller Curtailment

4.1 <u>AGC</u>.

- (A) Prior to the Commercial Operation Date or, if applicable, prior to the Test Period, Seller, at its sole cost and expense, shall install AGC at the Project and shall maintain such AGC throughout the Delivery Term. Seller shall ensure that, throughout the Delivery Term, the SCADA signal is capable of functioning within the margin of error specified in the control system manufacturer's energy set point margin of error. Seller shall ensure that the Project's AGC Remote/Local status is in "Remote" set-point control during normal operations
- (B) Beginning on Commercial Operation Date, PNM shall have the right to control the ESS, via AGC control, to its fullest capability including but not limited to those items identified in the ESS use case in Exhibit H, provided that notwithstanding any provision in this ESA to the contrary, during the Recapture Period, the ESS shall be charged exclusively from the Solar Facility; and provided, further that, notwithstanding anything to the contrary in this ESA, total cycles shall not exceed 365 equivalent full cycles in any calendar year, or pro rata portion thereof for any partial year. If Buyer desires to exceed 365 equivalent full cycles in a calendar year, then the Parties shall meet and confer within fifteen (15) Days of such notice from Buyer to Seller regarding any mutually agreed amendments to this ESA with regard to such additional equivalent full cycles.
- (C) Buyer shall reduce power dispatch to and from the Project, as applicable, during and to the extent of any Seller Curtailment.
- 4.2 <u>Seller Curtailment</u>. A Seller Curtailment occurs any time the Project is unable to receive otherwise available Charging Energy and deliver otherwise available Discharge Energy to Buyer as a result of transmission limitations regardless of whether such curtailment is affected directly by Seller or Buyer, including as a result of its scheduling practices, or indirectly, by the Transmission Provider pursuant to the OATT or transmission service arrangements ("Seller Curtailment").

ARTICLE 5 Delivery and Metering

5.1 Delivery Arrangements.

- Seller shall take all actions required in accordance with the terms and (A) conditions of this ESA to accept the Charging Energy at and from the Point of Delivery as part of providing the Energy Storage Services, including maintenance, repair or replacement of equipment in Seller's possession or control used to deliver the Charging Energy to the Energy Storage Facility. Seller shall only use the Charging Energy for Buyer's benefit in accordance with the terms and conditions of this ESA, Seller shall secure transmission necessary (i) to deliver the Discharge Energy to the Point of Delivery, (ii) receive Charging Energy from the Solar Facility at the Point of Delivery to the ESS, and (iii) after the Recapture Period, in the event Buyer elects to charge from the grid pursuant to Section 3.11, receive Charging Energy from the grid at the Point of Delivery to the ESS, including diligently negotiating and executing a Shared Facilities Agreement with Arroyo Solar, or, in the alternative, diligently negotiating and executing any such changes to an executed Shared Facilities Agreement as are necessary to accommodate the characteristics of the Project. Buyer acknowledges and agrees that the Interconnection Agreement is expected to provide an aggregate interconnection capacity of three hundred (300) MW_{AC}, such capacity to be jointly used by the Project and the Solar Facility pursuant to the Shared Facilities Agreement, provided that delivery of Energy from the Solar Facility to the Transmission Provider's Transmission System shall take priority over Discharge Energy; provided, however, when Buyer dispatches the ESS for the provision of Ancillary Services in response to an Emergency Condition, Discharge Energy shall take priority over delivery of Energy from the Solar Facility.
- (B) As between Buyer and Seller under this ESA, Seller shall be responsible for the costs of interconnection and costs required to receive and deliver Energy at the Point of Delivery for the Project at the required voltage, including the costs of any associated network upgrades. As between Buyer and Seller under this ESA, Seller shall also be responsible for all transmission charges, ancillary service charges, electrical losses and any other transfer-related charges applicable (i) to Discharge Energy up to the Point of Delivery and (ii) for Charging Energy after the Point of Delivery.
- (C) Buyer shall be responsible for all transmission charges, ancillary service charges, electrical losses and any other transfer-related charges required to deliver Discharge Energy from and beyond the Point of Delivery. After the Recapture Period, in the event Buyer elects to charge from the grid pursuant to Section 3.11, Buyer shall be responsible for all transmission charges, ancillary service charges, electrical losses and any other transfer-related charges for delivery of Charging Energy to the Point of Delivery.
- (D) Buyer shall secure all necessary transmission service arrangements, including scheduling arrangements, if any, to (i) take Discharge Energy at the Point of Delivery and deliver it to points beyond, and (ii) after the Recapture Period, in the event Buyer elects to charge from the grid pursuant to Section 3.11, deliver Charging Energy to the Point of Delivery.
- 5.2 <u>Availability Reporting</u>. Seller shall be responsible for providing accurate and timely updates on the current availability of the Project to Buyer's SCC.

5.3 Electric Metering Devices.

(A) Seller shall ensure that the Charging Energy and Discharge Energy delivered pursuant to this ESA shall be metered and accounted for separately from any electric generation

facility, including the Solar Facility, that utilizes the same Electric Interconnection Point. Seller shall install Electric Metering Devices, and Buyer may install Back-Up Metering, each in an arrangement consistent with the configuration depicted in Exhibit B, or as otherwise agreed between the Parties.

- (B) The following provisions of this Section shall govern Electric Metering Devices except to the extent the Interconnection Agreement modifies or otherwise conflicts with these provisions, in which case, the Interconnection Agreement shall govern.
- (C) All Electric Metering Devices used to measure the Charging Energy and Discharge Energy made available to Buyer by Seller under this ESA and to monitor and coordinate operation of the Project shall be owned, installed, and maintained in accordance with the Interconnection Agreement at no cost to Buyer under this ESA. The design of the Electric Metering Device system shall be subject to Buyer approval prior to commencement of construction of the Project. Electric Metering Devices shall be bi-directional and shall be capable of measuring and reading instantaneous and hourly real and reactive Energy and capacity, if supplied by either the solar generation system or ESS system. If Electric Metering Devices are not installed at the Point of Delivery, meters or meter readings will be adjusted to reflect losses from the Electric Metering Devices to the Point of Delivery based initially on the amount specified by the manufacturer for expected losses, provided that the Parties may revise this loss adjustment based on actual experience. Seller shall provide or arrange with the Transmission Provider to provide Buyer reasonable access to all Electric Metering Devices for all purposes necessary to perform under this ESA and shall provide Buyer the reasonable opportunity to be present at any time when such Electric Metering Devices are to be inspected and tested or adjusted. Buyer shall also have the right to conduct its own tests of the Electric Metering Devices in Buyer's reasonable discretion. Seller shall provide Buyer with all authorizations necessary to have access to the Electric Metering Devices, including obtaining any consent or other agreement from the Transmission Provider necessary to allow Buyer such access. Energy shall be metered using solid state, high precision, digital display meters of ANSI 0.1 accuracy class or better, with the specific model approved by the Buyer in its reasonable discretion.
- Provisions shall be made for Buyer to install and maintain, at its own expense, backup metering devices ("Back-Up Metering") in addition to the Electric Metering Devices, which installation and maintenance shall be performed in a manner acceptable to the Parties. The installing Party, at its own expense, shall inspect and test Back-Up Metering upon installation and at least annually thereafter. The installing Party shall provide the other Party with reasonable advance notice of, and permit a representative of the other Party to witness and verify, such inspections and tests, provided, however, that such Party shall not unreasonably interfere with or disrupt the activities of the installing Party and shall comply with all applicable safety standards. Upon written request, the installing Party shall perform additional inspections or tests of Back-Up Metering and shall permit a qualified representative of the requesting Party to inspect or witness the testing of Back-Up Metering, provided, however, that the requesting Party shall not unreasonably interfere with or disrupt the activities of the installing Party and shall comply with all applicable safety standards. The actual expense of any such requested additional inspection or testing shall be borne by the Party requesting the test, unless, upon such inspection or testing, Back-Up Metering is found to register inaccurately by more than the allowable limits established in this Article, in which event the expense of the requested additional inspection or testing shall be borne

by the installing Party. If requested in writing, the installing Party shall provide copies of any inspection or testing reports to the requesting Party.

- (E) If any Electric Metering Devices, or Back-Up Metering, are found to be defective or inaccurate outside the bounds of the selected device's manufacturer's performance standards, they shall be adjusted, repaired, replaced, and/or recalibrated as near as practicable to a condition of one-half percent (0.5%) error by the Party owning such defective or inaccurate device and at that Party's expense.
- 5.4 <u>Adjustment for Inaccurate Meters</u>. If an Electric Metering Device, or Back-Up Metering, fails to register, or if the measurement made by an Electric Metering Device, or Back-Up Metering, is found upon testing to be inaccurate by more than one-half percent (0.5%), an adjustment shall be made correcting all measurements by the inaccurate or defective Electric Metering Device, or Back-Up Metering, for both the amount of the inaccuracy and the period of the inaccuracy, in the following manner:
- (A) In the event that the Electric Metering Device is found to be defective or inaccurate, the Parties shall use Back-up Metering, if installed, to determine the amount of such inaccuracy, *provided*, *however*, that Back-Up Metering has been tested and maintained in accordance with the provisions of this Article. In the event that Back-Up Metering is not installed, or Back-Up Metering is also found to be inaccurate by more than one-half percent (0.5%), the Parties shall estimate the amount of the necessary adjustment on the basis of deliveries of Charging Energy to the Project at the Point of Delivery and Discharge Energy from the Project to the Point of Delivery, in each case during periods of similar operating conditions when the Electric Metering Device was registering accurately. The adjustment shall be made for the period during which inaccurate measurements were made.
- (B) In the event that the Parties cannot agree on the actual period during which the inaccurate measurements were made, the period during which the measurements are to be adjusted shall be the shorter of (i) the last one-half of the period from the last previous test of the Electric Metering Device to the test that found the Electric Metering Device to be defective or inaccurate, or (ii) the one hundred eighty (180) Days immediately preceding the test that found the Electric Metering Device to be defective or inaccurate.

ARTICLE 6 Conditions Precedent

- 6.1 <u>Conditions Precedent</u>. The obligations of the Parties under this ESA are subject to satisfaction of the following conditions precedent:
 - (A) Subject to Section 17.3, receipt of NMPRC Approval;
 - (B) NMPRC Approval of the PPA;
- (C) Receipt of approval of the Boards of Directors of Buyer and its parent company, as required, by July 31, 2019, unless otherwise agreed to by both parties; and

(D) FERC approval, if applicable.

ARTICLE 7 Sale and Purchase of Product

- Sale and Purchase of Product. In accordance with and subject to the terms and conditions of this ESA, commencing on the Commercial Operation Date and continuing through the end of the Term ("Delivery Term"), Seller shall sell and deliver to Buyer, and Buyer shall purchase and receive from Seller, all right, title and interest in and to the Product made available by Seller at the Point of Delivery in accordance with Article 5; provided, however, that Buyer shall not be required to receive and Seller shall not be required to make available, Product when and to the extent that (a) a Seller Forced Outage is continuing, or (b) Seller's performance is excused during Seller Excused Hours. At its sole discretion, Buyer may resell or use for another purpose all or a portion of the Product. Buyer will have exclusive rights to offer, bid, or otherwise submit the Product for resale in the market and retain and receive any and all related revenues. In no event shall Seller have the right to procure any element of the Product from sources other than the Project for sale or delivery to Buyer under this ESA.
- 7.2 <u>Title and Risk of Loss</u>. Buyer shall be deemed to be in control of all Charging Energy up to delivery at the Point of Delivery, Seller shall be deemed to be in control of such Charging Energy from and after such delivery until such Charging Energy is redelivered (less AC losses and ESS Roundtrip Efficiency losses) to Buyer as Discharge Energy at the Point of Delivery, and Buyer shall be deemed to be in control of such Discharge Energy from and after delivery and receipt at the Point of Delivery. Buyer shall retain title and risk of loss for Charging Energy, Energy stored in the ESS, and Discharge Energy at all times. Title and risk of loss related to the Environmental Attributes shall transfer from Seller to Buyer at the Point of Delivery.
- 7.3 Future Environmental Attributes. The Parties acknowledge and agree that (a) additional Environmental Attributes may be recognized by a Governmental Authority after the Execution Date; (b) in accordance with the terms of this ESA all right and title to such additional Environmental Attributes is included in the ESS Capacity Payment Rate and (c) such additional Environmental Attributes shall pass to Buyer in accordance with Section 7.2 of this ESA. If in order for Buyer to receive the benefit of any additional Environmental Attributes Seller must incur any third-party costs not otherwise provided for in this ESA, such costs shall, if Seller incurs such costs at Buyer's request, be reimbursed promptly to Seller by Buyer. Seller shall deliver a good faith estimate of such additional costs to Buyer prior to incurring such costs, and following receipt of such estimate, Buyer shall notify Seller of its continued election to have Seller incur such costs; provided that, if the additional costs exceed Seller's good faith estimate by more than ten percent (10%), Buyer shall have the right to notify Seller of its election to have Seller cease incurring the additional costs, in which case Buyer acknowledges that it may not receive the benefits of such additional Environmental Attributes. For the avoidance of doubt, Buyer shall remain liable to Seller for all costs incurred prior to Seller's receipt of Buyer's notice. The Parties agree to negotiate in good faith further agreements and documentation necessary to effectuate the transfer of such additional Environmental Attributes.

7.4 Scheduling.

- (A) Buyer shall arrange all scheduling services necessary to ensure compliance with NERC/WECC operating policies and criteria, Transmission Provider OATT requirements, including CAISO EIM requirements, and any other applicable guidelines. Prior to the implementation and applicability to the Project of any energy market, to the extent scheduling is required now or in the future, Buyer shall schedule all Discharge Energy and Charging Energy in accordance with NERC/WECC operating polices and criteria, Transmission Provider OATT requirements and any other applicable guidelines, except that Buyer shall not schedule any (i) Discharge Energy, Charging Energy or Ancillary Services during Seller Forced Outages, Scheduled Maintenance Outages, Force Majeure Events, and Seller Curtailments, or (ii) Discharge Energy that would reduce the quantity of Energy that the Solar Facility would otherwise be capable of delivering to the grid.
- (B) If at any point during the Delivery Term, (i) an alternative market design is implemented in which the Project will or can participate in an energy market, or (ii) if either the Project, the Electric Interconnection Point or Buyer no longer reside in the same market ((i) and (ii) a "Market Event") and such Market Event materially changes the interconnection and delivery requirements in this ESA, the Parties shall cooperate in good faith to facilitate the delivery of Product from the Point of Delivery to Buyer, at the least possible cost to the Parties, consistent with this ESA to the extent possible.
- (C) Seller shall provide, or cause its operation and maintenance contractor to provide, to Buyer its good faith, non-binding estimates of the daily ESS availability for each week (Sunday through Saturday) by 4:00 p.m. MPT on the date falling at least three (3) Days prior to the beginning of that week.
- (D) If, at any time following submission of a good faith estimate as described in Section 7.4(C) above, Seller becomes aware of any change that alters the values previously provided to Buyer, Seller shall promptly notify Buyer of such change or predicted change.

7.5 Forced Outages.

- (A) Buyer and Seller shall promptly advise one another of events that may form the basis for a declaration of the existence or termination of Seller Excused Hours or a Seller Forced Outage. Buyer or Seller (as appropriate) shall at the earliest practicable date provide the other Party written notice ("Outage Notice") of the declaration of the existence of Seller Excused Hours or a Seller Forced Outage. Seller shall provide such notice to Buyer's System Control Center. An Outage Notice provided by either Party shall contain information regarding the beginning date and time of the event, the expected end date and time of such event, and the expected Product, if any, that would be available for delivery at the Point of Delivery during such event. Buyer or Seller (as appropriate) shall keep the other Party informed of any developments that will affect either the duration of such event or the availability of the Project during or after the end of such event. In addition, Seller shall comply with all then-current Buyer, NERC and WECC generating unit outage reporting requirements, as they may be revised from time-to-time.
- (B) Within five (5) Business Days after the end of the Month, Seller shall prepare, maintain and deliver to Buyer a schedule that identifies all Scheduled Maintenance Outages, deratings and Seller Forced Outages that occurred during the Month. The data reported

must meet all requirements specified in the NERC Generating Availability Data System (GADS) manual. In the event of any disagreement between Buyer and Seller concerning the schedule prepared by Seller, the Parties shall promptly confer to resolve the disagreement.

ARTICLE 8 Payment Calculations

- 8.1 <u>Billing Components</u>. The total due from Buyer to Seller for each Monthly Billing Period during the Term shall be paid in accordance with the invoicing procedures set forth in Section 9.1. Charges will consist of the following, and will begin on the Commercial Operation Date:
- (A) Monthly ESS Capacity Payment. Subject to Section 14.4, Buyer shall pay Seller an amount equal to the ESS Capacity as determined pursuant to tests described in Section 10.5(C), not to exceed Guaranteed ESS Capacity multiplied by the ESS Capacity Payment Rate (the "ESS Capacity Payment"). For the avoidance of doubt, the ESS Capacity Payment also compensates Seller for the associated Environmental Attributes and Ancillary Services delivered to Buyer. The ESS Capacity Payment does not include any amounts Buyer is responsible for under Section 9.7.
- (B) If NMPTCs become available in connection with the Product, Seller shall use commercially reasonable efforts to become eligible for and to obtain any such credits.
- (C) The Project may qualify for New Mexico production tax credits ("NMPTCs") under New Mexico statute 7-2-18.18 NMSA 1978 ("NMPTC Statute") that may be used to satisfy a New Mexico taxpayer's New Mexico state income tax obligation or, to the extent in excess of a New Mexico taxpayer's New Mexico state income tax obligation, refunded to such taxpayer pursuant to Section 7-2-18.18L(2) NMSA 1978. Accordingly, in the event that (i) the Project results in the creation of NMPTCs pursuant to the NMPTC Statute that may be used by the Seller and/or its owners (directly or indirectly) to whom such NMPTCs are allocated for tax purposes (such persons to whom allocated referred to as "NMPTC Recipients") to reduce their New Mexico state income tax obligations for the taxable year for which the NMPTCs are claimed and (ii) to the extent that such claimed NMPTCs exceed the NMPTC Recipient's New Mexico state income tax liability for such taxable year, such excess would be required to be refunded to such NMPTC Recipient pursuant to the NMPTC Statute, Seller shall pay sixty percent (60%) of the amount of such NMPTCs allocated to NMPTC Recipients (such amount the "NMPTC Payment Amount") to Buyer within 180 Days of the date that the New Mexico state income tax return must be filed (without benefit of extension) by such NMPTC Recipient entitled to utilize such NMPTCs. If the New Mexico Taxation and Revenue Department subsequently denies or reduces any NMPTC Payment Amount with regard to an NMPTC Recipient, Buyer shall, no later than thirty (30) Days after notice from Seller, refund to Seller the amount Buyer previously received on the denied or reduced amount.
- 8.2 <u>Payment Support Requirement</u>. Each Party shall use commercially reasonable efforts to defend, before any Governmental Authority, all terms and conditions of this ESA consistent with Applicable Law.

8.3 <u>Survival on Termination</u>. The provisions of this Article 8 shall survive the repudiation, termination or expiration of this ESA for so long as may be necessary to give effect to any outstanding payment obligations of the Parties due and payable prior to any such repudiation, termination or expiration.

ARTICLE 9 Billing and Payment Procedures

9.1 Statements and Payment of Electricity Payments.

- (A) Seller shall read or have read on its behalf the Electric Metering Devices at the Point(s) of Delivery at 11:59 p.m. MPT on the last Day of each Month, unless otherwise mutually agreed by the Parties.
- (B) Payments due shall be determined and adjusted in accordance with Article 8 and Section 3.15. From and after the Commercial Operation Date, Buyer shall pay to Seller, monthly in arrears, payments in accordance with the provisions of clause (C) below.
- (C) On or before the tenth (10th) Day of each Month following the Month in which the Commercial Operation Date occurs, Seller shall prepare an invoice showing the amount payable by Buyer pursuant to Article 8 of this ESA (in Dollars) payable to Seller for the preceding Month. Each such invoice shall show the ESS Capacity Payment, information and calculations, in reasonable detail.
- (D) Buyer shall, subject to Sections 9.5 and 9.9, pay all invoices within thirty (30) Days after the date Buyer receives Seller's invoice. If Buyer should dispute a portion of the charges set forth on any invoice, it shall nonetheless pay all amounts not in dispute by the applicable due date.
- (E) If banks in the state of New Mexico are permitted to close on any date on which any payment by Buyer would otherwise have been due, then Buyer shall make such payment on the Business Day that immediately follows such payment date.
- (F) All payments specified in this Section 9.1 shall be made to an account designated by Seller and notified to Buyer.
- 9.2 <u>Miscellaneous Payments</u>. Any amounts due to either Seller or Buyer under this ESA, other than those specified in Section 9.1 above, shall be paid within thirty (30) Days following receipt by the other Party of an itemized invoice from the Party to whom such amounts are due setting forth, in reasonable detail, the basis for such payment.
- 9.3 <u>Currency and Method of Payment</u>. Notwithstanding anything contained in this ESA, all payments to be made by either Seller or Buyer under this ESA shall be made in Dollars in immediately available cleared funds by wire transfer into the relevant account specified in this ESA or, if no account is specified, into the account designated by the receiving Party.
 - 9.4 Default Interest. Except where payment is the subject of a bona fide dispute (in

which case it shall be treated under Section 9.5 below), or where otherwise waived by the Party entitled to interest, if any payment due from Buyer to Seller or from Seller to Buyer under this ESA is not paid when due, then, in addition to such unpaid amount, interest shall be due and payable thereon. Applicable interest shall be calculated at a rate equal to the lower of (i) the "prime" rate as published in *The Wall Street Journal* on the first business Day of each Month plus 2% and (ii) the maximum interest rate allowed by Applicable Law ("**Default Rate**"), as in effect from time to time and shall continue to accrue from the date on which such payment became overdue to and until the date such payment is made in full (both dates inclusive).

9.5 <u>Disputed Items</u>.

- (A) Either Party ("Disputing Party") may dispute in good faith the accuracy of a reading of the Electric Metering Devices and/or the accuracy of an invoice. Where a reading or bill is the subject of a dispute in good faith, the Disputing Party shall give written notice to the other Party within ten (10) Days after the delivery of the invoice or statement by the other Party, together with details of its reasons for such dispute. The Disputing Party shall make payment of any undisputed amounts to the other Party by the due date for payment specified in such invoice. The Parties shall use all reasonable efforts to resolve the dispute in accordance with Section 13.8. Any amount or adjustment with respect to a meter reading subsequently agreed to by the Parties or determined to be due shall be made (in each case in settlement of a dispute) by a credit or additional charge on the next bill rendered (as the case may be).
- (B) All amounts paid as a result of the settlement of a dispute shall be paid with interest thereon at the Default Rate from the Day on which such payment originally fell due to and until the date such payment is made in full (both dates inclusive), unless otherwise waived by the Party entitled to such interest.
- 9.6 <u>Statement Errors</u>. In the event that either Party becomes aware of any error in any statement, such Party shall, immediately upon discovery of the error, notify in writing the other Party of the error and shall rectify such error (whether such error was in the form of an underpayment or overpayment) within thirty (30) Days of such notification. A Party must notify the other Party of any error within 365 Days of such error.

9.7 Taxes.

- (A) On all invoices, Seller shall separately show all New Mexico gross receipts, compensating, sales, and other similar taxes charged to Buyer provided that in no event will interest or penalties on such taxes be reimbursable by Buyer. If the sale of Product takes place on tribal land, Seller will comply with applicable state and tribal laws governing the reporting and payment of gross receipts taxes on those transactions.
- (B) Seller shall be responsible and shall pay when due all income, gross receipts, compensating, use, valued added, employment, ad valorem, personal real property or other similar Taxes, including any associated interest and penalty assessments and any and all franchise fees or similar fees assessed against Seller or the Project due to the construction, ownership, leasing, operation or maintenance of the Project, or any components or appurtenances thereof, including all Taxes, fees, allowances, trading credits and other offsets and impositions for wastes and emissions

(including carbon-based compounds, oxides of nitrogen and sulfur, mercury and other Hazardous Materials) produced by the Project. If Buyer is assessed any Taxes or associated fees as a result of the improvement of a Site due to the existence of the Project on the Site, Buyer shall immediately notify Seller. Buyer and Seller shall cooperate in contesting such assessment. If, after resolution of the matter, Taxes are imposed on Buyer as a result of the improvement of the Site due to the existence of the Project on the Site, Seller shall reimburse Buyer for such Taxes. Seller shall not be obligated to pay or reimburse Buyer for Taxes imposed on or measured by the Buyer's overall revenues or income. Seller's prices under Section 8 are inclusive of such Taxes, allowances and credits during the Term.

- (C) If a Party is required to remit or pay Taxes that are the other Party's responsibility hereunder, such Party shall promptly reimburse the other for such Taxes. Consistent with Applicable Law, the Parties shall use all reasonable efforts to administer this ESA and implement the provisions in this ESA in a manner that will minimize Taxes due and payable by all Parties. Notwithstanding Section 21.1 and Section 9.7(B), Buyer shall reimburse Seller for all gross receipts, compensating, or similar taxes payable by Seller to a Governmental Authority arising from or related to ESS Capacity Payments or the sale of Product under this ESA.
- (D) The Parties shall provide each other, upon written request, with copies of any documentation respecting this ESA or the Project that may be reasonably necessary in the ordinary course of any inter-governmental, state, local, municipal or other political subdivision tax audit inquiry or investigation.
- (E) Consistent with Applicable Law, the Parties shall cooperate to minimize Taxes; however, no Party shall be obligated to incur any extraordinary financial burden to reduce Taxes for which the other Party is responsible hereunder.
- 9.8 <u>Setoff and Payment Adjustments</u>. Except as otherwise expressly provided for in this ESA, including Section 9.9 below, all payments between the Parties under this ESA shall be made free of any restriction or condition and without deduction or withholding on account of any other amount, whether by way of setoff or otherwise.

9.9 Netting.

- (A) A Party at any time may offset against any and all amounts that may be due and owed to the other Party under this ESA, including damages and other payments that are owed by a Party to the other Party pursuant to this ESA. Undisputed and non-offset portions of amounts invoiced under this ESA shall be paid on or before the due date or shall be subject to the late payment interest charges set forth in Section 9.4.
- (B) If Seller and Buyer net their obligations to each other under this ESA, then such amounts will be aggregated, and Seller and Buyer will discharge their obligations to pay through netting of payments on a current accounting basis. If the amounts owed by Buyer or Seller to the other are equal on a current accounting basis, neither shall be required to make payment under this ESA.
- 9.10 <u>Survival on Termination</u>. The provisions of this Article 9 shall survive the repudiation, termination or expiration of this ESA for so long as may be necessary to give effect to

any outstanding payment obligations of the Parties that became due and payable prior to any such repudiation, termination or expiration.

ARTICLE 10 Operations and Maintenance

10.1 Construction of the Project.

- (A) Seller will diligently pursue the development and construction of the Project using commercially reasonable efforts consistent with Prudent Utility Practices and in compliance with the terms and conditions of the Interconnection Agreement and the ESA. Seller will be solely responsible for, and the ESS Capacity Payment Rate will not be adjusted to accommodate increased costs or any failure to obtain any Tax Benefits. On and after the Execution Date through the start of construction, Seller will provide Buyer monthly development and construction updates.
- (B) On and after the start of construction and through the Commercial Operation Date, Seller will provide Buyer monthly construction updates. If Seller becomes aware of any critical milestone that will not be achieved by the required date, Seller must provide Buyer written notice and a recovery plan to eliminate any delay in the construction schedule. In no event will Seller's failure to complete one or more critical milestones by the established dates change, delay or otherwise affect the requirement to achieve Commercial Operation by the Guaranteed Start Date. Buyer shall have the right to monitor the construction, commissioning, start-up, testing and operations of the Project and to be present during the commissioning, start-up and testing of the Project; provided, however, that Buyer shall comply with all of Seller's applicable safety and health rules and requirements and shall conduct itself in a manner that will not unreasonably interfere with the Project's operations.
- (C) Seller may not modify, alter or otherwise change the Project without the prior written consent of Buyer, except (i) as required by Prudent Utility Practices or Applicable Law; or (ii) for modifications, alterations, expansions or other changes that would not be expected to materially alter the Guaranteed ESS Capacity or availability of the Project or materially and adversely impact the capabilities of the Project; or (iii) in connection with maintenance on the Project, including repairs and replacement of equipment, as determined to be reasonable or necessary by Seller.
- (D) Seller shall designate (by a written notice delivered to Buyer by the Execution Date, a Project Manager reasonably acceptable to Buyer who shall have full responsibility for the performance of the construction, commissioning, start-up and testing by Seller and shall act as a single point of contact in all matters on behalf of Seller ("Project Manager"). Seller may designate a new Project Manager from time to time by a written notice delivered to Buyer, subject to Buyer's consent, which consent shall not be unreasonably denied or delayed. Seller's Project Manager shall be deemed to have full authority to act on behalf of Seller, and notices given by Buyer to the Project Manager shall be deemed as having been given to Seller.
- (E) Other than the rights and obligations of Buyer specified in this ESA and any documents ancillary hereto, neither this ESA nor any such ancillary document shall be interpreted to create in favor of Buyer, and Buyer specifically disclaims, any right, title or interest in any part

of the Project.

10.2 Commissioning Tests.

(A) Seller shall give Buyer at least sixty (60) Days' prior notice of the approximate test date and of the proposed tests scheduled relating to the commissioning of the Project ("Commissioning Tests") as described in Exhibit F. Representatives of Buyer shall have the right to be present at all such testing. Seller shall promptly notify Buyer of any changes to the test date or the date of any Commissioning Tests relating to the Project in order that Buyer may arrange for its respective representatives to attend.

10.3 Access to and Inspection of the Project.

- (A) Seller shall provide Buyer and its authorized agents, employees and inspectors reasonable access to the Project, including the control room and Seller's Interconnection Facilities, for the purposes set forth herein. Buyer acknowledges that such access does not provide Buyer with the right to direct or modify the operation of the Project in any way and further acknowledges that any exercise by Buyer of its rights under this Section 10.3(A) shall be at its own risk and expense; provided, however, that Buyer shall comply with all of Seller's applicable safety and health rules and requirements and shall conduct itself in a manner that will not unreasonably interfere with the Project's operations.
- (B) No inspections of the Project, whether by Buyer or otherwise, and no acceptance or approval given under this ESA, shall relieve Seller of or reduce its obligation to maintain the Project and operate the same in accordance with this ESA and Prudent Utility Practices. In no event shall any statement, representation, or lack thereof by Buyer, either express or implied, relieve Seller of its exclusive responsibility for the Project. Any inspection of Seller's property or equipment by Buyer, or any review by Buyer or consent by Buyer to Seller's plans, shall not be construed as endorsing the design, fitness or operation of the Project equipment nor as a warranty or guarantee.

10.4 Operating Parameters.

- (A) Seller shall operate or procure the operation of the Project in accordance with Prudent Utility Practices ("Operating Parameters"), subject only to Emergency Conditions and Force Majeure Events; provided that, during the Term of this ESA, Seller shall: (i) have the sole responsibility to, and shall at its sole expense, operate and maintain the Project in accordance with all requirements set forth in this ESA, and (ii) comply with reasonable requirements of Buyer regarding day-to-day or hour-by-hour communications with Buyer. Subject to compliance with the Operating Parameters, Seller agrees to operate the Project in such a manner that Discharge Energy delivered by Seller will meet all requirements for voltage level, harmonics, power factor, VArs, Ancillary Services and other electrical specifications required by the Transmission Provider and will have the capabilities to be dispatched manually by Seller as is necessary to comply with the provisions of this ESA.
- (B) Seller shall operate the Project such that all system protective equipment is in service whenever the Project is connected to, or is operated in parallel with, the Transmission Provider's Transmission System, except for normal testing and repair. Seller shall provide adequate

system protection and control devices to ensure safe and protected operation of all energized equipment during normal testing and repair. The Project's protective equipment shall meet Institute of Electrical and Electronic Engineers and all other industry standards. Seller shall have qualified independent, third party personnel test, calibrate and certify in writing the proper functioning of all protective equipment, in accordance with NERC PRC standards and Prudent Utility Practices, at least once every twelve (12) Months. Seller shall perform a unit functional trip test after each overhaul of the Project's major equipment and shall provide results to Buyer in writing prior to returning the equipment to service. All of the foregoing shall be conducted in accordance with Prudent Utility Practices.

10.5 Operating Procedures.

- Not later than thirty (30) Days before the Commercial Operation Date, an operating committee consisting of Seller and Buyer representatives shall develop mutually agreeable written Operating Procedures for integration of the Project into Buyer's system. Operating Procedures shall include, but not be limited to, methods of day-to-day communications; metering, telemetering, telecommunications, and data acquisition procedures; key personnel lists for Seller and Buyer, including an appointed authorized representative for each Party; clearances and switching practices; operations and maintenance scheduling and reporting; scheduling and forecasting practices; daily capacity, Charging Energy, and Discharge Energy reports; unit operations log; Seller Forced Outage and planned outage reporting, and such other matters as may be mutually agreed upon by the Parties. Seller must staff, operate, maintain and control the Project at all times consistent with the Operating Procedures, the ESA, Prudent Utility Practice, Applicable Laws and required permits. The Operating Procedures also will require Seller to take all measures necessary to remediate or otherwise correct any breach of environmental protection regulations as required under Applicable Law. Personnel of Seller capable of starting, running, and stopping the Project must be continuously available, either at the Project or capable of being at the Project on ninety (90) minutes' notice, and must be continuously available by phone. Seller will make qualified personnel available twenty-four (24) hours per day, seven (7) days per week to perform scheduling and receive and give communications relating to the operation and dispatch of the Project. Buyer will use commercially reasonable efforts to notify Seller twenty-four (24) hours in advance of potentially critical start-ups.
- (B) Seller will prepare detailed test protocols and procedures for any tests to be performed in connection with achieving Commercial Operation and for periodic tests as required within this ESA. The protocols and procedures will be developed by Seller in accordance with the requirements of the ESA and the appropriate power test code standards for energy storage facilities. Draft protocols and procedures must be submitted to Buyer for review and approval, which approval will not be withheld unreasonably.
 - (C) Not later than one hundred eighty (180) Days before the Commercial Operation Date, Seller and Buyer shall develop mutually agreeable written test protocol to quantify the ESS Unit Capabilities. Seller will perform, annual ESS Unit Capabilities test in accordance with those test protocols and procedures and promptly provide the results to Buyer. With the exception of the cost for Charging Energy provided by Buyer, the annual ESS Unit Capabilities tests will be performed at Seller's expense. Annual testing for Guaranteed ESS Capacity and Guaranteed ESS Roundtrip Efficiency shall consist of two semi-annual tests. Each

of Buyer and Seller may elect up to two additional tests to be performed at a mutually agreed time. Within thirty (30) Days of the completion of an ESS Capacity or ESS Roundtrip Efficiency test, Seller may elect to conduct a single re-test. Upon completion of the single re-test, Seller must choose for the results of either test to be used as the basis of compliance with the applicable guarantee and the basis of applicable liquidated damages in Section 3.13, adjustment to the ESS Roundtrip Efficiency payment as outlined in Section 3.15, or adjustment to the ESS Capacity Payment as outlined in Section 8.1(A).

- (D) Testing for all remaining ESS Unit Capabilities, including Guaranteed Charge Ramp Rate, Guaranteed Discharge Ramp Rate, Guaranteed System Latency, Guaranteed Frequency Response Capability, Capability to support Ancillary Services, and Blackstart Capability shall be performed once per Commercial Operation Year. Upon failure to pass any of these ESS Unit Capabilities tests, Seller will have ninety (90) Days from the test date to cure any deficiencies in the test.
- (E) For all ESS Unit Capabilities tests and re-tests, Seller shall notify Buyer at least ten (10) Days prior to the initiation of the test and Buyer shall have the option to inspect the Project during such test.
- (F) For all ESS Unit Capabilities tests and re-tests, Seller shall provide a test report including all performance data, model simulations, calculations, and test reports to the Buyer for analysis and approval.

10.6 Project Maintenance.

- Seller shall maintain all Project equipment or cause the same to be maintained at all times in accordance with Prudent Utility Practices and otherwise in accordance with this ESA. At least sixty (60) Days before the Commercial Operation Date, Seller will provide Buyer a notice of Scheduled Maintenance Outages for the Project for the first Commercial Operation Year within the Term. Thereafter, no later than September 1 of each Commercial Operation Year, Seller shall provide Buyer with a non-binding notice of the annual Scheduled Maintenance Outages for the following Commercial Operation Year and a notice of estimated longterm Scheduled Maintenance Outages for the next four (4) Commercial Operation Years. Each notice of Scheduled Maintenance Outages must identify each planned interruption and/or reduction of the Project's capacity, including the duration of such event. Each annual Scheduled Maintenance Outage for the Commercial Operation Year will be subject to approval by Buyer, not to be unreasonably withheld. Buyer may, within fifteen (15) Days after receipt of the schedule, request reasonable modifications to the schedule. Seller may not schedule any interruption or reduction to the Product for any reason at any time during May 1st through September 1st, December, or January without the prior written approval of Buyer, which approval may be withheld or granted in Buyer's sole discretion. Buyer may request Seller to defer or reschedule any Scheduled Maintenance Outage up to forty-eight (48) hours before commencement of the outage. Seller must give Buyer no less than ninety (90) Days' advance notice of any proposed change in the annual maintenance schedule. Such requested changes in the schedule shall not materially adversely impact Buyer, and Seller agrees to compensate Buyer for any costs incurred by Buyer as a result of such change.
 - (B) Seller shall be responsible (at its own cost and expense) for timely obtaining,

maintaining, and complying with all agreements, arrangements and permits necessary for delivery of the Product to the Point of Delivery. Upon the reasonable, written request of Buyer, Seller shall make available to Buyer copies of any environmental permits, plans, and/or studies related to the Project.

10.7 <u>Sales to Third Parties</u>. As of the start of the Test Period, Seller shall not sell or divert Product to a third Person.

ARTICLE 11 Environmental Attributes

- 11.1 <u>Sale of Environmental Attributes</u>. If future Environmental Attributes become available, this Article 11 shall apply.
- (A) Other than as specified in Sections 11.1(D) and 11.1(E) below, effective from the date on which the Project first makes Product available to Buyer at the Point of Delivery, Seller shall transfer to Buyer, free and clear of all claims, liens, security interests and encumbrances, of any kind, nature and description, all right, title and interest in and to Environmental Attributes associated with the Project. Upon generation and documentation of Environmental Attributes, Seller shall make the Environmental Attributes available to Buyer no later than five (5) Business Days after creation. The value of the Environmental Attributes transferred under this ESA shall be included in the ESS Capacity Payment Rate.
- (B) Seller and Buyer shall execute all documents and instruments necessary to effect transfer of the Environmental Attributes to Buyer or its respective designee(s).
- (C) Ownership by Buyer of Environmental Attributes shall include any Environmental Attributes that are reserved or "banked" throughout the Term of this ESA, but not used, sold, assigned or otherwise transferred during the Term of this ESA. Buyer may, to the extent permitted by Applicable Law and this ESA, assign its rights, title and interest in and to any Environmental Attributes associated with the Project to one or more third parties under any transaction permitted by Applicable Law.
- (D) Except as otherwise provided in Section 8.1, Tax Benefits in effect on the Execution Date of this ESA or any successor or other provision providing for a federal, state and/or local tax credit determined by reference to renewable electric energy produced from renewable energy resources shall be owned by Seller.
 - (E) Seller shall register the Project, as necessary, no later than thirty (30) Days after Buyer notifies Seller of the availability of such Environmental Attributes, so that the Project is compliant with reporting requirements related to Environmental Attributes and certification requirements under any applicable federal, state or regional program or Applicable Law. Notwithstanding the foregoing, Seller shall not be required to expend more than Five Thousand Dollars (\$5,000) per MW annually and Ten Thousand Dollars (\$10,000) per MW in the aggregate to maintain compliance due to regulatory changes relating to Environmental Attributes.

ARTICLE 12 Default and Remedies

12.1 Events of Default of Seller.

- (A) Any of the following events shall constitute an Event of Default of Seller upon its occurrence and no cure period shall be applicable:
 - (1) Seller's dissolution or liquidation;
 - (2) Seller's assignment of this ESA (or any of its rights hereunder) for the benefit of creditors, except as permitted pursuant to Article 18;
 - (3) Seller's filing of a petition in voluntary bankruptcy or insolvency or for reorganization or arrangement under the bankruptcy laws of the United States or under any insolvency law of any state, or Seller voluntarily taking advantage of any such law by answer or otherwise;
 - (4) The sale by Seller to a third party, or diversion by Seller for any use, of Product committed to Buyer by Seller except for Product that Buyer fails to accept or pay for;
 - (5) Seller's actual fraud, material misrepresentation or willful misconduct in connection with this ESA or the operation of the Project;
 - (6) The failure of Seller to maintain Security in accordance with Article 19, unless remedied within ten (10) Business Days of receipt by Seller of written notice of such failure from Buyer or the entity providing such Security; or
 - (7) Seller's failure to achieve the Commercial Operation Date for the Project on or prior to the Guaranteed Start Date, except as a result of a Force Majeure Event in accordance with Section 3.6.
- (B) Any of the following events shall constitute an Event of Default of Seller upon the failure of Seller to cure within thirty (30) Days after the date of written notice from Buyer to Seller:
 - (1) Seller's Abandonment of construction or operation of the Project;
 - (2) Except to the extent arising from the acts or omissions of the Transmission Provider or Buyer, Seller is not able to make Product available at the Point of Delivery as a result of the Project not maintaining its interconnection with the Transmission Provider's Interconnection Facilities or otherwise fails to maintain in effect any agreements required to make Product available at the Point of Delivery;
 - (3) Seller's failure to make any payment due to Buyer under or in connection with this ESA (subject to Seller's rights with respect to disputed payments under Article 9 and net of outstanding damages and any other rights of offset that Seller

may have pursuant to this ESA);

- (4) Seller's failure to comply with any other material obligation under this ESA, which would result in a material adverse impact on Buyer;
- (5) The Project fails, after the Commercial Operation Date, to obtain an Actual ESS Availability Percentage of at least eighty-five percent (85%) over any twenty-four (24) consecutive Months during the Term, such ESS Availability Percentage determined by excluding times during a main transformer outage;
- (6) Should RECs from Environmental Attributes become available and Seller fails to register the Project or ensure registration of the RECs in accordance with the terms of this Agreement; or
- (7) The Project fails, after the Commercial Operation Date, to achieve ninety percent (90%) of Guaranteed ESS Capacity during semi-annual testing pursuant to Section 10.5(C), provided in no case shall tests be performed when major equipment is not operational.
- (C) Any of the following events shall constitute an Event of Default of Seller upon the failure of Seller to cure within sixty (60) Days after the date of written notice from Buyer to Seller:
 - (1) Seller's assignment of this ESA, or any Change of Control of Seller, or Seller's sale or transfer of its interest, or any part thereof, in the Project, except as permitted in accordance with Article 18;
 - (2) Any representation or warranty made by Seller in this ESA shall prove to have been false or misleading in any material respect when made or ceases to remain true during the Term if such cessation would reasonably be expected to result in a material adverse impact on Buyer; or
 - (3) The filing of an involuntary case in bankruptcy or any proceeding under any other insolvency law against Seller as debtor or its parent or any Affiliate that could materially impact Seller's ability to perform its obligations hereunder; provided, however, that Seller does not obtain a stay or dismissal of the filing within the cure period.
 - (D) With respect to any Guaranty provided by Seller for the benefit of Buyer, the failure by Seller to provide for the benefit of Buyer either (i) cash, (ii) a replacement Guaranty from a different Seller Guarantor meeting the criteria set forth in the definition of Seller Guarantor or (iii) a replacement Letter of Credit from an issuer meeting the criteria set forth in the definition of Letter of Credit, in each case, in the amount required under this ESA within ten (10) Business Days after the later to occur of (x) Seller's receipt of Notice of the occurrence of any of the following events and (y) the expiration of any cure or remedy period provided for any any of the following events, shall constitute an Event of Default of Seller:
 - (1) If any representation or warranty made by the Seller Guarantor in any Guaranty is false or misleading in any material respect when made or when deemed

made or repeated, and such default is not remedied within thirty (30) Days after receipt of notice of such failure;

- (2) the failure of Seller Guarantor to make, when due, any payment required or to perform any other material covenant or obligation in any Guaranty, unless remedied within ten 10 Business Days of receipt of notice of such failure;
- (3) Seller Guarantor files a voluntary petition in bankruptcy or insolvency or for reorganization or arrangement under the bankruptcy laws of the United States or under any insolvency law of any State, or Seller Guarantor voluntarily takes advantage of any such law by answer or otherwise;
- (4) Seller Guarantor fails to meet the criteria for an acceptable Guarantor as set forth it the definition of Seller Guarantor, unless remedied within five (5) Business Days of receipt of notice of such failure;
- (5) The failure of the Guaranty to be in full force and effect prior to the indefeasible satisfaction of all obligation of Seller under this ESA; or
- (6) Seller Guarantor repudiates, disaffirms, disclaims, or rejects, in whole or in part, or challenges, the validity of any Guaranty.

12.2 Events of Default of Buyer.

- (A) Any of the following shall constitute an Event of Default of Buyer upon its occurrence, and no cure period shall be applicable:
 - (1) Buyer's dissolution or liquidation provided that division of Buyer into multiple entities shall not constitute dissolution or liquidation;
 - (2) Buyer's assignment of this ESA (or any of its rights hereunder) for the benefit of creditors; or
 - (3) Buyer's filing of a voluntary petition in bankruptcy or insolvency or for reorganization or arrangement under the bankruptcy laws of the United States or under any insolvency law of any State, or Buyer voluntarily taking advantage of any such law by answer or otherwise.
- (B) Any of the following shall constitute an Event of Default of Buyer upon the failure of Buyer to cure within thirty (30) Days after the date of written notice from Seller to Buyer:
 - (1) Buyer's failure to make any payment due hereunder (subject to Buyer's rights with respect to disputed payments under Article 9 and net of outstanding damages and any other rights of offset that Buyer may have pursuant to this ESA); or
 - (2) Buyer's failure to comply with any other material obligation under this ESA, which would result in a material adverse impact on Seller.

- (C) Any of the following shall constitute an Event of Default of Buyer upon the failure of Buyer to cure within sixty (60) Days after the date of written notice from Seller to Buyer:
 - (1) The filing of an involuntary case in bankruptcy or any proceeding under any other insolvency law against Buyer; provided, however, that Buyer does not obtain a stay or dismissal of the filing within the cure period;
 - (2) Buyer's assignment of this ESA, except as permitted in accordance with Article 18; or
 - (3) Any representation or warranty made by Buyer in this ESA shall prove to have been false or misleading in any material respect when made or ceases to remain true during the Term if such cessation would reasonably be expected to result in a material adverse impact on Seller.

12.3 Damages Prior to Termination.

- (A) Upon the occurrence of an Event of Default, and subject in each case to the limitation on damages set forth in Section 12.7, the Non-Defaulting Party shall have the right to (i) collect damages accruing prior to the Early Termination Date of this ESA from the Defaulting Party as set forth in Section 12.3(B), (ii) exercise its rights pursuant to Section 12.5, (iii) suspend performance, (iv) with respect to a Seller Event of Default, exercise its rights pursuant to Section 12.10 with respect to any Security, and (v) exercise its rights to terminate this ESA pursuant to Section 12.4.
- For all Events of Default, the Non-Defaulting Party shall be entitled to receive from the Defaulting Party all of the damages incurred by the Non-Defaulting Party in connection with such Event of Default prior to the Early Termination Date; provided, that if an Event of Default has occurred and has continued uncured for a period of one hundred eighty (180) Days, the Non-Defaulting Party shall be required to either waive its right to collect further damages on account of such Event of Default or elect to terminate this ESA as provided for in Section 12.4. If Seller is the Defaulting Party, the Parties agree that the damages recoverable by Buyer hereunder on account of an Event of Default of Seller shall include an amount of cover damages equal to Replacement ESS Costs minus the product of (x) the quantity of Product so replaced and (y) the ESS Capacity Payment Rate. Further, Seller acknowledges and agrees that in addition to the foregoing, Seller shall be obligated to pay Buyer any such damages associated with replacement of Product notwithstanding the availability or prices of electric energy and capacity from other fuel sources, such as natural gas. Seller also shall be obligated to pay Buyer any penalties levied by any Governmental Authority in connection with Seller's failure to deliver to Buyer any Environmental Attributes that may become available pursuant to this ESA, to the extent such failure arises out of Seller's negligence or willful misconduct, provided that Buyer has used commercially reasonable efforts to avoid, minimize or mitigate the same. Seller acknowledges that Buyer entered into this ESA for the procurement of Product, which includes Environmental Attributes. If Buyer is the Defaulting Party, the Parties agree that damages recoverable by Seller hereunder on account of an Event of Default of Buyer shall include costs and losses incurred by Seller due to such Event of Default, including, to the extent applicable, an amount of cover damages equal to the quantity of Product produced by Seller following such Event of Default, plus, to the extent that Seller is unable

to produce Product due to the Event of Default of Buyer, an additional quantity equal to the amount of Product that would have been produced by Seller absent such Event of Default of Buyer, each multiplied by the ESS Capacity Payment Rate; provided that the foregoing amount shall be reduced by an amount equal to (A) the amount of any revenues that Seller, using commercially reasonable efforts, is able to obtain by selling Product to a third party or into the market, less (B) Seller's costs and expenses incurred to effectuate any such sales.

- 12.4 Termination. Upon the occurrence of an Event of Default, the Non-Defaulting Party shall have the right to declare a date, which shall be between fifteen (15) and sixty (60) Days after the notice thereof, upon which this ESA shall terminate ("Early Termination Date"). Upon the effective designation of an Early Termination Date, the Non-Defaulting Party will have the right to immediately suspend performance under this ESA, except that Seller may not suspend performance of its obligation to post and maintain Development Security and Delivery Term Security in accordance with Article 19. Neither Party shall have the right to terminate this ESA except as provided for upon the occurrence of an Event of Default as described above or as may be otherwise explicitly provided for in this ESA. Upon the termination of this ESA under this Section 12.4 for an Event of Default, the Non-Defaulting Party shall be entitled to receive the Termination Payment from the Defaulting Party. As soon as practicable after the Early Termination Date, the Non-Defaulting Party shall (a) calculate the Termination Payment, and (b) give notice to the Defaulting Party of the amount of the Termination Payment. The notice shall include a written statement explaining in reasonable detail the calculation of such amount and the sources for such calculation. The Termination Payment shall be made to the Non-Defaulting Party, as applicable, within ten (10) Business Days after such notice is effective. If Seller is the Defaulting Party, the Termination Payment will equal the Buyer Termination Payment, and if Buyer is the Defaulting Party, the Termination Payment will equal the Seller Termination Payment. Notwithstanding the foregoing, if the Commercial Operation Date has not occurred by the Guaranteed Start Date, Buyer may terminate this ESA in accordance with this Section 12.4, and the Buyer Termination Payment will be an amount equal to the Development Security less any Delay Damages already paid to Buyer. Neither Party shall have liability for damages or failure to deliver or purchase Product after the effective date of such termination, including Replacement ESS Costs.
- (A) In the event that Seller is the Defaulting Party, as soon as practicable after notice of the Early Termination Date, Buyer shall calculate the Buyer Termination Payment in a commercially reasonable manner as of the Early Termination Date in accordance with this Section 12.4(A). The notice shall include a written statement explaining in reasonable detail the calculation of such amount. In calculating such amount, Buyer shall use information from third parties who may include dealers in the relevant markets, end-users of the relevant product, information vendors and other sources of market information. Buyer shall not have to enter into a replacement contract to establish a Buyer Termination Payment.
- (B) In the event that Buyer is the Defaulting Party, as soon as practicable after notice of the Early Termination Date, Seller shall deliver written notice to Buyer of the amount of the Seller Termination Payment. The notice shall include a written statement explaining in reasonable detail the calculation of such amount. In calculating such amount, Seller shall use information from third parties who may include dealers in the relevant markets, end-users of the relevant product, information vendors and other sources of market information. Seller shall not have to enter into a replacement contract to establish a Seller Termination Payment.

- 12.5 <u>Specific Performance</u>. In addition to the other remedies specified in this Article 12, each Party shall be entitled to seek a decree compelling specific performance with respect to, and shall be entitled, without the necessity of filing any bond, to seek the restraint by injunction of, any actual or threatened breach of any material performance obligation of the other Party under this ESA.
- 12.6 <u>Remedies Cumulative</u>. Subject to limitations on damages set forth in Section 12.7, each right or remedy of the Parties provided for in this ESA shall be cumulative of and shall be in addition to every other right or remedy provided for in this ESA, and the exercise, or the beginning of the exercise, by a Party of any one or more of the rights or remedies provided for herein shall not preclude the simultaneous or later exercise by such Party of any or all other rights or remedies provided for herein.
- Waiver and Exclusion of Other Damages. The Parties confirm that the express remedies and measures of damages provided in this ESA satisfy its essential purposes. If no remedy or measure of damages is expressly herein provided, the obligor's liability shall be limited to direct, actual damages only. Neither Party shall be liable to the other Party for consequential, incidental, punitive, exemplary or indirect damages, lost profits or other business interruption damages by statute, in tort or contract (except to the extent expressly provided herein). To the extent any damages are required to be paid hereunder are deemed liquidated, the Parties acknowledge that the damages are difficult or impossible to determine, that otherwise obtaining an adequate remedy is inconvenient, and that the liquidated damages constitute a reasonable approximation of the harm or loss.
- 12.8 Payment of Amounts Due to Buyer. Without limiting any other provisions of this Article 12 and at any time before or after termination of this ESA, Buyer may send Seller an invoice for such damages or other amounts as are due to Buyer at such time from Seller under this ESA, and such invoice shall be payable in the manner, and in accordance with the applicable provisions, set forth in Article 9, including the provision for late payment charges.
- 12.9 <u>Duty to Mitigate</u>. Each Party agrees that it has a duty to mitigate damages and covenants that it will use commercially reasonable efforts to minimize any damages it may incur as a result of the other Party's performance or non-performance of this ESA.
- 12.10 <u>Security Rights</u>. Upon or at any time after the occurrence and during the continuation of an Event of Default enumerated in Section 12.1 or an Early Termination Date affecting Seller, Buyer may exercise any of the rights and remedies with respect to any Security, including any ancillary rights and remedies under Applicable Law then in effect. Buyer shall apply the proceeds of the Security realized upon the exercise of any such rights or remedies to reduce Seller's obligations under this ESA, subject to Buyer's obligation to return any surplus proceeds remaining after such obligations are satisfied in full.

ARTICLE 13 Contract Administration and Notices

13.1 <u>Notices in Writing</u>. Notices required by this ESA shall be addressed to the other Party at the addresses noted in <u>Exhibit D</u> as either Party updates them from time to time by written notice to the other Party. Any notice, request, consent, or other communication required or

authorized under this ESA to be given by one Party to the other Party shall be in writing. It shall either be hand delivered or mailed via overnight service with signature required upon receipt, to the representative of said other Party. If hand delivered, the notice, request, consent or other communication shall be simultaneously sent by facsimile or other electronic means. Any such notice, request, consent, or other communication shall be deemed to have been received by the close of the Business Day on which it was hand delivered or transmitted electronically (unless hand delivered or transmitted after such close in which case it shall be deemed received at the close of the next Business Day). Real-time or routine communications concerning operation of the Project shall be exempt from this Section.

- 13.2 <u>Representative for Notices</u>. Each Party shall maintain a designated representative to receive notices, who shall be identified on <u>Exhibit D</u> to this ESA. Either Party may, by written notice to the other Party, change the representative or the address to which such notices and communications are to be sent.
- 13.3 <u>Authority of Representatives</u>. The Parties' representatives designated above shall have authority to act for their respective principals in all technical matters relating to performance of this ESA and to attempt to resolve disputes or potential disputes. However, in their capacity as representatives, they shall not have the authority to amend or modify any provision of this ESA.
- Records. Seller and Buyer shall each keep and maintain complete and accurate 13.4 records and all other data required by each of them for the purposes of proper administration of this ESA, including but not limited to books and records necessary for billing and payments and such records as may be required by any Governmental Authority or pursuant to Applicable Law. All records of Seller and Buyer pertaining to the operation of the Project or this ESA as specified herein or otherwise shall be maintained at the Project or in an office of Seller or Buyer, as applicable, in such format as may be required by Applicable Law and/or any Governmental Approval. Each Party shall have the right at its sole cost and expense, upon reasonable prior written notice to the other Party, during normal business hours, to examine and/or make copies of the records and data of such other Party relating to this ESA (including all records and data relating to or substantiating any charges paid by or to such other Party, MWh of delivered Discharge Energy, MWh of delivered Charging Energy, Seller's operating procedures, the Project equipment manuals and Operating Records). All records required hereunder shall be maintained in accordance with, and for the applicable time periods required by, Applicable Law and the Party's retention policies, but in no event less than five (5) years after the final payment is made under this ESA. Seller shall provide Buyer copies of Operating Records upon Buyer's request.
- (A) Operating and Maintenance Records. Seller shall maintain an accurate and up-to-date operating log, in electronic format, at the Project that will include, without limitation, dispatch and scheduled Discharge Energy delivered, Charging Energy received, and House Energy consumption; changes in operating status; planned outages, deratings and curtailments; any unusual conditions found during inspections; environmental records including environmental permits, plans, and/or studies; meteorological data; maintenance; any other operating or maintenance records as may be required by state or federal regulatory authorities and WECC and any other information required under Prudent Utility Practice or any Project agreement (in the prescribed format); and Buyer and Seller Forced Outages ("O&M Records").

- (B) Billing and Payment Records. To facilitate payment and verification, Seller and Buyer shall keep all books and records necessary for billing and payments in accordance with the provisions of Article 9 and grant the other Party reasonable access to those records.
- (C) Project Development Records and Data Submissions. Seller shall submit or cause to be submitted to Buyer the following documents on or before the dates specified below:
 - (1) No later than thirty (30) Days after the Execution Date and ending on the Commercial Operation Date, (i) monthly construction progress reports in such form as may be agreed to by Buyer in accordance with Section 10.1(A) and 10.1(B), and (ii) reports, when and as Seller becomes aware, of any new condition or event that may have a material adverse effect on the timely completion of the Project.
 - (2) No later than thirty (30) Days prior to the start of the Test Period, (i) evidence demonstrating that Seller has obtained all Governmental Approvals then required to be obtained for the ownership, operation and maintenance of, and the supply of Product from, the Project in accordance with this ESA, and (ii) a list identifying the remaining Governmental Approvals for which Seller is responsible under the terms of this ESA, which Governmental Approvals are not yet required for the operation and maintenance of, and the supply of Product from, the Project, together with a plan for obtaining such Governmental Approvals and an estimate of the time within which such Governmental Approvals will be obtained by Seller; provided, however, that the plan for obtaining any outstanding Governmental Approvals from any Governmental Authority which address environmental, health and safety matters shall be reasonably acceptable to Buyer.
 - (3) As soon as available, but not later than sixty (60) Days following the Commercial Operation Date for the Project, two (2) copies of all results of Commissioning Tests performed on the ESS.
 - (4) Upon request by Buyer, one (1) signed and sealed copy of all as-built drawings for the Project, including the civil and architectural works.
 - Buyer shall not be construed as an endorsement by Buyer of the design of the Project, does not constitute a warranty by Buyer as to the safety, durability or reliability of the Project, otherwise relieve Seller of any of its obligations or potential liabilities under the Project contracts or, except with respect to the obligations of Buyer to maintain the confidentiality of documents and information received by it, impose any obligation or liability on Buyer.
- 13.5 <u>Provision of Real-Time Data</u>. Upon request by Buyer, Seller shall provide real-time electronic access to Buyer of all meteorological and other related data collected at the Project and corresponding unit availability data.
- 13.6 <u>Examination of Records</u>. Buyer may review operating procedures, equipment manuals, Operating Records and data kept by Seller relating to transactions under and administration of this ESA, at any time during the period the records are required to be maintained, from time to time upon request and during normal business hours. Buyer shall have the right, upon reasonable notice and at its sole expense (unless Seller has defaulted under this ESA, in which case Seller will

bear the expense), to examine the records of Seller to the extent reasonably necessary to verify the accuracy of any statement, charge or computation made pursuant to this ESA. If any such examination reveals any inaccuracy in any invoice, the necessary adjustments in such invoice and any underpayment by Buyer will be paid, and any overpayment by Buyer will be reimbursed by Seller, promptly in accordance with payment provisions in this ESA.

- 13.7 <u>Exhibits</u>. Either Party may change the information for its notice addresses in <u>Exhibit</u> <u>D</u> at any time without the approval of the other Party. <u>Exhibit A</u>, <u>Exhibit B</u>, and <u>Exhibit E</u> may be changed at any time with the mutual consent of both Parties.
- Resolution of Issues. The Parties agree that it is in the best interest of both Parties 13.8 to attempt to resolve disputes that arise under this ESA in a quick and inexpensive manner. To that end, the Parties commit to use commercially reasonable efforts to resolve disputes informally. For all disputes that arise under this ESA, the Parties immediately, through their designated representatives, shall negotiate with one another in good faith in order to reach resolution of the dispute. Such negotiation shall commence within five (5) Days of the date of the letter from one Party representative to the other Party representative notifying that Party of the nature of the dispute. In the event that the Parties' representatives cannot agree to a resolution of the dispute within thirty (30) Days after the commencement of negotiations, written notice of the dispute ("Dispute Notice"), together with a statement describing the issues or claims, shall be delivered, within five (5) Business Days after the expiration of such thirty (30) Day period, by each of the Parties' representatives to its respective senior officer or official (such senior officer or official to be selected by each of the Party representatives in his or her sole discretion, provided such senior officer or official has authority to bind the respective Party). Within five (5) Business Days after receipt of the Dispute Notice, the senior officers or officials for both Parties

shall negotiate in good faith to resolve the dispute, *provided* that the failure to deliver such Dispute Notice shall not prejudice either Party's right to submit such dispute to litigation. In the event that the senior officers or officials cannot resolve such dispute within thirty (30) Days after the matter was submitted to them, either Party may seek legal and equitable remedies.

ARTICLE 14 Force Majeure

14.1 Definition.

(A) Neither Party will be considered to be in default in respect to any obligation hereunder if delays in or failure of performance is due to a Force Majeure Event, except for the obligation to pay monies due. A "Force Majeure Event" shall mean an event or circumstance that arises after the Execution Date that is beyond the reasonable control of and is not caused by the negligence or lack of due diligence of the affected Party or its contractors or suppliers and adversely affects the performance by that Party of its obligations under or pursuant to this ESA. Such events or circumstances may include, but are not limited to: actions or inactions of civil or military authority (including courts and governmental or administrative agencies), acts of God, war, riot or insurrection, terrorism, blockades, embargoes, sabotage (including arson and vandalism), epidemics, explosions and fires not originating in the Project and those not caused by its failure to operate the Project in accordance with Prudent Utility Practices, hurricanes, floods, strikes, lockouts

or other labor disputes (not caused by the failure of the affected Party to comply with the terms of a collective bargaining agreement).

- (B) Equipment breakdown or the inability of Seller to use equipment due to its design, construction, operation, maintenance, the inability of Seller to meet regulatory standards, or failure by Seller to obtain on a timely basis and maintain a necessary permit or other regulatory approval shall not be considered a Force Majeure Event, unless Seller can demonstrate that the event was beyond Seller's reasonable control, and was not caused by the negligence or lack of due diligence by Seller or its agents.
- Notwithstanding the foregoing, the term Force Majeure Event does not include (i) inability by Seller to procure equipment for the Project or any component parts therefor, for any reason (the risk of which is assumed by Seller); (ii) any other acts or omissions of any third party acting on behalf of Seller, including any vendor, materialman, customer, or supplier of Seller, or any full or partial curtailment in the Product of the Project caused by or arising from the acts or omissions of such third parties, unless such acts or omissions are themselves excused by reason of a Force Majeure Event, as the definition is applied to such third party, and such event constitutes a Force Majeure Event, as the definition is applied to Seller; (iii) any delay caused by the processing of Buyer's interconnection request; (iv) any full or partial curtailment in the electric output of the Project that is caused by or arises from a mechanical or equipment breakdown, or other mishaps, events or conditions, attributable to normal wear and tear; (v) failure to abide by Prudent Utility Practices; (vi) changes in market conditions, actions of Governmental Authorities or other events or circumstances that affect the cost of equipment, labor, materials or supplies, or that affect demand for power or price for any of Seller's or Buyer's products; (vii) except as set forth in (A) above, any labor strikes, slowdowns or stoppages, or other labor disruptions against a Party or its contractors or subcontractors.
- (D) In no event will any delay or failure of performance caused by a Force Majeure Event extend this ESA beyond its stated Term. Notwithstanding any other provision in this ESA to the contrary, in the event that any delay or failure of performance caused by a Force Majeure Event affecting Seller continues for an uninterrupted period of three hundred sixty (360) Days from its inception, either Party (or Buyer as provided in Section 3.6) may, at any time following the end of such period, terminate this ESA upon written notice to the affected Party, without further obligation by either Party except as to costs and balances incurred prior to the effective date of such termination.
- (E) Except as otherwise provided in this ESA, each Party shall be excused from performance when non-performance was caused, directly or indirectly, by a Force Majeure Event but only and to the extent thereof, and existence of a condition of Force Majeure Event shall not relieve the Parties of certain obligations under this ESA (including payment obligations) to the extent that such performance of such obligations is not precluded by the condition of Force Majeure Event.
- 14.2 <u>Notification Obligations</u>. In the event of any delay or nonperformance resulting from a Force Majeure Event, the Party claiming that a Force Majeure Event has occurred shall notify the other Party as soon as reasonably practicable by telephone and/or email, and in writing as soon as reasonably practicable but in no case later than ten (10) Business Days thereafter; provided that

failure to provide notice within ten (10) Business Days only waives the Force Majeure Event as to periods prior to when the notice is given of such occurrence, of the nature, cause, date of commencement thereof and the anticipated duration, and shall indicate whether any deadlines or date(s) imposed hereunder may be affected thereby. The suspension of performance shall be of no greater scope and of no greater duration than is necessary. A Party claiming that a Force Majeure Event has occurred shall not be entitled to relief therefor unless and until it has delivered a notice therefor as required in this Section. The Party claiming that a Force Majeure Event has occurred shall notify the other Party of the cessation of the Force Majeure Event or of the conclusion of the affected Party's cure for the Force Majeure Event, in either case as soon as reasonably practicable.

- 14.3 <u>Duty to Mitigate</u>. The Party claiming that a Force Majeure Event has occurred shall use its commercially reasonable efforts to cure the cause(s) preventing its performance of this ESA and shall provide to the other Party weekly progress reports describing actions taken to end the Force Majeure Event; *provided, however*, that the settlement of strikes, lockouts and other labor disputes shall be entirely within the discretion of the affected Party, and such Party shall not be required to settle such strikes, lockouts or other labor disputes by acceding to demands which such Party deems to be unreasonable.
- 14.4 <u>Force Majeure Event Occurring After Commercial Operation</u>. Upon the occurrence and during the continuance of a Force Majeure Event and the effects thereof, to the extent that a Force Majeure Event affects the ability of either Buyer or the Transmission Provider to accept Discharge Energy from the Project or to deliver Charging Energy to the Project, then the hours during which the Force Majeure Event occurs shall be excluded from the payment calculations as set forth in Section 8.1.

ARTICLE 15 Representations, Warranties and Covenants

- 15.1 <u>Seller's Representations, Warranties and Covenants</u>. Seller hereby represents and warrants as follows:
- (A) Seller is a limited liability company duly organized, validly existing and in good standing under the laws of the state of Delaware. Seller is qualified to do business in each other jurisdiction where the failure to so qualify would have a material adverse effect on the business or financial condition of Seller; and Seller has all requisite power and authority to conduct its business, to own its properties, and to execute, deliver, and perform its obligations under this ESA.
- (B) The execution, delivery, and performance of its obligations under this ESA by Seller have been duly authorized by all necessary limited liability company action, and do not and will not:
 - (1) require any consent or approval by any governing body of Seller, other than that which has been obtained and is in full force and effect;
 - (2) violate any Applicable Law, or violate any provision in any

formation documents of Seller, the violation of which could have a material adverse effect on the ability of Seller to perform its obligations under this ESA;

- (3) result in a breach or constitute a default under Seller's formation documents or bylaws, or under any agreement relating to the management or affairs of Seller or any indenture or loan or credit agreement, or any other agreement, lease, or instrument to which Seller is a party or by which Seller or its properties or assets may be bound or affected, the breach or default of which could reasonably be expected to have a material adverse effect on the ability of Seller to perform its obligations under this ESA; or
- (4) result in, or require the creation or imposition of any mortgage, deed of trust, pledge, lien, security interest, or other charge or encumbrance of any nature (other than as may be contemplated by this ESA) upon or with respect to any of the assets or properties of Seller now owned or hereafter acquired, the creation or imposition of which could reasonably be expected to have a material adverse effect on the ability of Seller to perform its obligations under this ESA.
- (C) The obligations of Seller under this ESA are valid and binding obligations of Seller.
- (D) The execution and performance of this ESA will not conflict with or constitute a breach or default under any contract or agreement of any kind to which Seller is a party or any judgment, order, statute, or regulation that is applicable to Seller or the Project.
- (E) To the knowledge of Seller, and except for those permits, consents, approvals, licenses and authorizations identified in Exhibit E, which Seller anticipates will be obtained by Seller in the ordinary course of business, all Governmental Approvals necessary for Seller's execution, delivery and performance of this ESA have been duly obtained and are in full force and effect.
- (F) Seller shall comply with all Applicable Laws in effect or that may be enacted during the Term.
- (G) Seller shall disclose to Buyer the extent of, and as soon as it is known to Seller, any violation of any Applicable Laws arising out of the construction of the Project, the presence of Environmental Contamination at the Project (actual or alleged), or the existence of any past or present enforcement, legal, or regulatory action or proceeding relating to such Environmental Contamination.
- (H) To the full extent authorized by FERC regulations and the FERC standards of conduct, Seller hereby authorizes Buyer to contact and obtain information concerning the Project and Interconnection Facilities directly from the Transmission Provider.
- (I) Seller has and/or will have good and marketable title to the Environmental Attributes immediately prior to delivery to Buyer;
 - (J) Seller has not sold, delivered or transferred the Environmental Attributes to

any other Person, in whole or in part;

- (K) All right, title and interest in and to the Environmental Attributes 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;
- (L) Each Environmental Attribute complies with the requirements set forth in the New Mexico Renewable Energy Act, NMSA 1978, § 62-16-1 et seq., and Title 17.9.572 NMAC;
- (M) Upon the execution thereof, Seller shall provide a true and correct copy of the Interconnection Agreement to Buyer. On and after the execution of the Interconnection Agreement, Seller shall provide copies of any material amendments to the Interconnection Agreement to Buyer;
- (N) Upon the execution thereof, Seller shall provide a true and correct copy of the Shared Facilities Agreement to Buyer. On and after the execution of the Shared Facilities Agreement, Seller shall provide copies of any material amendments to the Shared Facilities Agreement to Buyer; and
- (O) Seller has not incurred and will not incur, assume or carry any Debt at any time after the Commercial Operation Date.
- 15.2 <u>Buyer's Representations, Warranties and Covenants</u>. Buyer hereby represents and warrants as follows:
- (A) Buyer is a corporation duly organized, validly existing and in good standing under the laws of the State of New Mexico and is qualified in each other jurisdiction where the failure to so qualify would have a material adverse effect upon the business or financial condition of Buyer. Buyer has all requisite power and authority to conduct its business, to own its properties, and to execute, deliver, and perform its obligations under this ESA.
- (B) The execution, delivery, and performance of its obligations under this ESA by Buyer have been duly authorized by all necessary corporate action, and do not and will not:
 - (1) require any consent or approval of Buyer's shareholders, members, managers and/or directors, except as set forth in Section 6.1;
 - (2) violate any Applicable Law, or violate any provision in any corporate documents of Buyer, the violation of which could have a material adverse effect on the ability of Buyer to perform its obligations under this ESA;
 - (3) result in a breach or constitute a default under Buyer's corporate charter or bylaws, or under any agreement relating to the management or affairs of Buyer, or any indenture or loan or credit agreement, or any other agreement, lease, or instrument to which Buyer is a party or by which Buyer or its properties or assets may be bound or affected, the breach or default of which could reasonably be expected to have a material adverse effect on the ability of Buyer to perform its obligations under this ESA; or

- (4) result in, or require the creation or imposition of, any mortgage, deed of trust, pledge, lien, security interest, or other charge or encumbrance of any nature (other than as may be contemplated by this ESA) upon or with respect to any of the assets or properties of Buyer now owned or hereafter acquired, the creation or imposition of which could reasonably be expected to have a material adverse effect on the ability of Buyer to perform its obligations under this ESA.
- (C) This ESA is a valid and binding obligation of Buyer, subject to the contingencies identified in Article 6.
- (D) The execution and performance of this ESA will not conflict with or constitute a breach or default under any contract or agreement of any kind to which Buyer is a party or any judgment, order, statute, or regulation that is applicable to Buyer.
- (E) To the knowledge of Buyer, and except for the NMPRC Approval(s) identified in Sections 6.1 and 17.3, all required Governmental Approvals necessary for Buyer's execution, delivery and performance of this ESA have been duly obtained and are in full force and effect.

ARTICLE 16 Insurance

16.1 Evidence of Insurance.

(A) Seller shall, at least thirty (30) Days prior to the commencement of any work on the Project, and thereafter within thirty (30) Days of the annual insurance policy renewal or update or change of the insurance policy, provide Buyer with two (2) copies of insurance certificates evidencing the insurance coverages required to be maintained by Seller in accordance with Exhibit G and this Article 16 along with endorsements required below in Section 16.3, and a list of any other endorsements to the policy that limit the coverage provided by the ISO form with regard to this Project. All such insurance shall be primary insurance. All policies shall be written with insurers rated at least A- VII by A.M. Best or that Buyer, in its reasonable discretion, deems acceptable (such acceptance shall not be unreasonably withheld or delayed by Buyer). Seller's liability under this ESA shall not be limited to the amount of insurance coverage required herein.

16.2 Term and Modification of Insurance.

- (A) All liability insurance required under this ESA shall cover occurrences during the Term of this ESA. In the event that any insurance as required herein is commercially available only on a "claims-made" basis, such insurance shall provide for a retroactive date not later than the Execution Date and such insurance shall be maintained by Seller, with a retroactive date not later than the retroactive date required above, for a minimum of five (5) calendar years after the Term.
- (B) Seller may self-insure either all or any portion of the foregoing coverages so long as there is no material decrease in its net worth or means that renders the same insufficient for purposes of self-insurance. If at any time during the Term Buyer, in its reasonable discretion, determines that it will no longer accept self-insurance from Seller, Buyer shall provide notice to

Seller and Seller shall obtain the insurance coverages required by Exhibit G within sixty (60) Days.

(C) Buyer shall have the right, at times deemed appropriate to Buyer during the Term of this ESA, to request Seller to modify the insurance minimum limits specified in Exhibit G in order to maintain reasonable coverage amounts. Seller shall make commercially reasonable efforts to comply with such request.

16.3 Endorsements and Other Requirements.

- (A) Seller shall provide endorsements evidencing that the insurers shall provide Buyer thirty (30) Days' prior written notice of non-renewal or cancellation of insurance (except that such notice shall be ten (10) Days for non-payment of premiums) and endorsements that waive all rights of subrogation against Buyer and its Affiliates, officers, directors, agents, subcontractors and employees.
- (B) Seller shall provide endorsements providing that the insurance required under this ESA is primary and non-contributory with respect to other insurance carried by Buyer.
- (C) Seller shall provide endorsements providing that the liability insurance required pursuant to paragraphs (B), (C) and (D) of Exhibit G names Buyer and its Affiliates, officers, directors, and employees as additional insureds for both ongoing and completed operations but only to the extent Buyer (or other additional insured) is vicariously liable for the negligence, acts or omissions of Seller. The liability insurance required pursuant to paragraphs (B) and (D) of Exhibit G shall include a standard ISO or an equivalent separation of insureds clause and will not include a cross-suit exclusion applicable to claims brought by or against an additional insured.

ARTICLE 17 Legal and Regulatory Compliance and NMPRC Approval

- 17.1 Applicable Laws. Each Party shall at all times comply with all Applicable Laws. Each Party shall promptly notify the other Party of any material investigations, notices of alleged violations or findings of violation of Applicable Law from any Governmental Authority, including any audit, notification, inspection or inquiry that has been commenced by any Governmental Authority in respect of a potential violation of Applicable Law with regard to the Project or the ESA. Seller shall give all required notices, shall timely procure and maintain all Seller required permits, and shall timely pay all charges and fees in connection therewith. Seller shall make available to Buyer, upon reasonable request and at Buyer's cost (other than the normal, customary and reasonable costs of Seller), any personnel or records relating to the Project or this ESA to the extent Buyer requires the same to fulfill any regulatory reporting requirements, or for purposes of litigation or regulatory proceedings, including but not limited to, litigation or proceedings before the NMPRC, FERC, or other regulatory bodies. The Parties shall treat information disclosed pursuant to this Section 17.1 in confidence in accordance with Section 22.14, unless such information is public information.
- 17.2 <u>Governmental Approvals</u>. Each Party shall timely and lawfully procure and maintain in good standing, at its own cost and expense, all Governmental Approvals and Additional Consents and shall timely and properly pay its respective charges and fees in connection therewith.

- 17.3 NMPRC Approval. The obligations of the Parties hereunder, including Buyer's obligation to purchase Product at the rates specified in Article 8, shall be conditioned upon NMPRC Approval in connection with (i) the execution and performance of this ESA, either as a purchased power agreement or through approval of a CCN, including authorization to recover the costs of ESS Capacity Payments; (ii) the execution and performance of the PPA, and a final order or other regulatory determination from the NMPRC that Buyer may procure renewable energy and associated RECs pursuant to the PPA and may recover the cost of such procurement; and (iii) abandonment of Buyer's ownership interests in San Juan Generating Station, including any requested financing or other cost recovery method, and any waivers as set forth in Buyer's request for approval of this ESA or an associated abandonment filing (collectively, "Requested Actions"). In particular:
- (A) Buyer agrees to use commercially reasonable efforts to request and obtain NMPRC Approval of the Requested Actions, and Seller agrees to cooperate with and assist Buyer in these efforts as Buyer may reasonably request.
- (B) NMPRC Approval shall be considered received when the NMPRC issues a final written order that is no longer subject to appeal or further proceedings on remand (i) approving the Requested Actions, including authorization to recover the costs of procurement of the Renewable Energy Output, as that term is defined in the PPA, and the ESS Capacity Payments; or (ii) approving the Requested Actions in part or subject to conditions or substantial modifications, provided that each of Seller and Buyer agrees, subject to its reasonable discretion, to accept those conditions, modifications or such partial approval as sufficient (collectively, "NMPRC Approval").
 - (1) If the NMPRC disapproves any of the Requested Actions, then this ESA shall automatically terminate ten (10) Days after the date of such action by the NMPRC and be of no further force or effect, with no further obligation or liability of either Party to the other Party or to any other Person, except that Buyer shall return the Development Security to Seller, less any amounts due from Seller to Buyer.
 - (2) If any NMPRC Approval is issued as described in clause (B)(ii) above, then the Parties shall meet and confer no later than fifteen (15) Days after the date of the NMPRC Approval order regarding whether Buyer or Seller to amend this ESA to address any conditions or substantial modifications or not to accept any partial or conditioned approval or substantial modification of this ESA. If the Parties are unable to mutually agree on any amendments to this ESA to address such NMPRC Approval order, then this ESA shall automatically terminate ten (10) Days after the date on which the Parties conferred and be of no further force or effect, with no further obligation or liability of either Party to the other Party or to any other Person, unless Buyer and Seller mutually agree in writing within such ten (10) Day period that this ESA remain in effect.
 - (3) If the NMPRC has not, for any reason, entered an order upon the request for approval by April 30, 2020 ("Regulatory End Date"), then the Parties shall meet and confer no later than fifteen (15) Days after the Regulatory End Date regarding a potential extension of the Regulatory End Date. If the Parties are unable to mutually agree to an extension of the Regulatory End Date, then this ESA shall automatically terminate ten (10) Days after the date on which the Parties conferred and be of no further force or

effect, with no further obligation or liability of either Party to the other Party or to any other Person, unless Buyer and Seller mutually agree in writing within such ten (10) Day period that this ESA remain in effect.

- 17.4 <u>Compliance with Reliability Standards</u>. To the extent that new reliability standards applicable to the operation and maintenance of the Project are promulgated by the WECC, NERC, FERC, or NMPRC, or any successor agencies, any and all costs incurred as a result of actions required for compliance with the new reliability standards shall be borne by Seller. If Seller fails, through negligent action, inaction or misconduct, to comply with reliability standards related to the operation and maintenance of the Project, and the lack of compliance results in monetary penalties being assessed to Buyer by WECC, NERC, FERC or any successor agency, then Seller shall reimburse Buyer for Seller's share of such monetary penalties.
- 17.5 <u>Compliance Information</u>. Each Party shall, for the purpose of gathering information and/or providing oral or written reports, testimony, affidavits or other submissions relevant to any Governmental Approvals, Non-Governmental Compliance Obligations, Additional Consents, Applicable Laws or in connection with any litigation, arbitration or administrative proceeding before any authority of competent jurisdiction: (i) deliver or cause to be delivered to the other Party any necessary or required certificates of its officers, accountants, engineers or agents; and/or (ii) make available necessary personnel with knowledge as to such matters.

ARTICLE 18 Assignment and Other Transfer Restrictions

- 18.1 <u>No Assignment Without Consent.</u> Except as permitted in this Article 18, neither Party shall sell, transfer, or assign this ESA, in whole or in part, and Seller shall not sell, transfer or assign the Project, in whole or in part, without the prior written consent of the other Party, which consent shall not be unreasonably withheld, delayed or conditioned and so long as any proposed assignee satisfies the conditions set forth in this Article 18.
- (A) Buyer's consent shall not be required for: (i) any assignment or transfer of this ESA by Seller to an Affiliate of Seller; or (ii) any assignment or transfer of this ESA by Seller to a Person succeeding to all or substantially all of the assets of Seller, *provided* that in the case of any assignment or transfer pursuant to clauses (i) or (ii) above, such assignee (a) shall have agreed in writing to be bound by the terms and conditions hereof and furnished a copy of the assignment or transfer document to Buyer; (b) is a Qualified Operator or retains, prior to the date of such transfer, a Qualified Operator to operate the Project (or otherwise agrees not to interfere with the existing Qualified Operator for the Project); (c) delivers evidence reasonably satisfactory to Buyer that such assignee's creditworthiness is equal to or better than that of Seller; and (d) shall have complied with the obligations of the assigning Party to provide Development Security or Delivery Term Security, as applicable, in accordance with Article 19 of this ESA.
- (B) Seller's consent shall not be required for any assignment of this ESA by Buyer to any Affiliate or in connection with the acquisition, merger, reorganization, or consolidation of Buyer or its parent corporation, , *provided* that such assignee delivers evidence reasonably satisfactory to Seller that such assignee's creditworthiness is equal to or better than that of Buyer; and *further provided* that such assignee delivers evidence reasonably satisfactory to Seller

that such assignee has NMPRC Approval of this ESA as and if required by NMPRC regulations and will resell the Product purchased hereunder.

- 18.2 <u>Conditions on Transfers</u>. If the rights and interests of a Party in this ESA shall be sold, transferred or assigned to an Affiliate, upon satisfaction of the conditions set forth in this Article 18, and upon the Affiliate's agreement in writing to be bound by and to assume the terms and conditions hereof and any and all obligations to the non-assigning Party arising or accruing hereunder from and after the date of such assumption, and provided that the assigning Party is not then in default of its obligations under this ESA or that any then-existing default is cured no later than the date of assignment, then the assigning Party shall be released and discharged from the terms and conditions hereof and each such obligation hereunder from and after such date, and non-assigning Party shall continue this ESA with the Affiliate as if such Person had been named under this ESA; *provided, however*, that the assigning Party shall not be released and discharged from and shall remain liable for any and all obligations to the other Party arising or accruing hereunder prior to such assumption.
- 18.3 <u>Change of Control</u>. Except for a Seller Permitted Transfer, any Change of Control of Seller, whether voluntary or by operation of law, shall require the prior written consent of Buyer, which shall not be unreasonably withheld, conditioned or delayed.
- 18.4 <u>Transfer Without Consent Is Null and Void</u>. Any Change of Control or sale, transfer, or assignment of any interest in the Project or in this ESA made without fulfilling the requirements of this ESA shall be null and void and shall constitute an Event of Default pursuant to Article 12.
- 18.5 <u>Subcontracting</u>. Seller may subcontract its duties or obligations under this ESA without the prior written consent of Buyer; *provided*, that no such subcontract shall relieve Seller of any of its duties or obligations hereunder. All subcontractors required by law to be qualified to do business in the State of New Mexico shall be so qualified. Seller shall be solely responsible for the engagement, supervision, management, satisfactory performance of the subcontractors or unsatisfactory performance.

18.6 Assignment to Lenders.

(A) <u>Cooperation</u>. In connection with any assignment of this ESA by Seller to its Lenders, as soon as reasonably practicable after reasonable request from Seller or any Lender, Buyer will cooperate reasonably with Seller and Lender to agree upon and enter into a consent and agreement, or, if applicable, an estoppel certificate, an estoppel and consent agreement, or similar instrument, all in a form acceptable to Buyer including exclusions, assumptions and caveats typical for such documents or necessary for the accuracy or delivery thereof, providing for, among other things, (i) an option, but not an obligation, for the Lenders to cure any monetary Event of Default of Seller within thirty (30) Days of the expiration of the cure period provided therefor in Section 12.1, and cure any non-monetary Event of Default of Seller within sixty (60) Days of the expiration of the cure period provided therefor in Section 12.1, prior to Buyer terminating this ESA; (ii) Buyer providing written notice to Lenders of any Events of Default of Seller; and (iii) Buyer not terminating this ESA if Lenders need to foreclose on the Project prior to curing any Event of Default of Seller giving rise to such termination, but only to the extent that the period required for such foreclosure and cure does not exceed one hundred eighty (180) Days from receipt by Lenders

of written notice of such Event of Default of Seller; provided that, in all cases, (a) Buyer will have no obligation to alter or modify the terms of this ESA or provide any consent or enter into any agreement that has a material adverse effect on Buyer, and (b) Seller will be responsible for Buyer's reasonable costs (including, but not limited to, attorneys' fees) associated with Buyer's review, negotiation, execution and delivery of any documents in connection with such assignment. Nothing in this Section 18.6 shall impair Buyer's right to receive all of the damages arising out of or relating to Seller's default, including damages accruing prior to termination as set forth in Section 12.3 of this ESA.

(B) Financing Liens. Either Party may, without the other Party's consent, transfer, sell, pledge, encumber or assign this ESA or the revenues or proceeds therefrom in connection with any financing, provided that such a collateral assignment by Seller does not place any limitation on Buyer's rights or expand Buyer's liability, risks or obligations under this ESA; and further provided that Seller shall not be relieved of any of its obligations or liability under this ESA and that the Lender in any such collateral assignment acknowledges and agrees that the Project shall be operated and maintained by a Qualified Operator. Promptly after making any such encumbrance, Seller shall notify Buyer in writing of the name, address, and telephone and facsimile numbers of each Lender, collateral agent or trustee, as applicable, to which Seller's interest under this ESA has been encumbered. Such notice shall include the names of the account managers or other representatives of the Lenders to whom all written and telephonic communications may be addressed. After giving Buyer such initial notice, Seller shall promptly give Buyer notice of any change in the information provided in the initial notice or any revised notice.

ARTICLE 19 Credit and Security Requirements

- 19.1 Security. Seller shall post, at its sole cost and expense, security equal to Sixty Thousand Dollars (\$60,000) per MW multiplied by the Guaranteed ESS Capacity ("Development Security") within the earlier of (i) thirty (30) Days after receipt of NMPRC Approval and (ii) the commencement of construction of the Project. Not later than the Commercial Operation Date, and as a condition thereto, Seller shall post and maintain, at its sole cost and expense, security equal to One Hundred Thousand Dollars (\$100,000) per MW multiplied by the Guaranteed ESS Capacity (the "Delivery Term Security"). Seller shall replenish the Delivery Term Security to such required amount within fifteen (15) Days after any draw by Buyer. Upon achievement of the Commercial Operation Date or promptly after Buyer terminates this ESA as a result of Seller's failure to achieve Commercial Operation on or before the Guaranteed Start Date, Buyer will return the Development Security to Seller, less any amounts drawn against the Development Security pursuant to Section 12.10. In the event that no amounts are due and owing by Seller to Buyer under this ESA and provided no claims are then outstanding, Seller's Delivery Term Security shall be released to Seller upon the earlier of (i) termination of this ESA in accordance with its terms; and (ii) on the fifteenth (15th) Business Day after the expiration of the Term.
- 19.2 Form of Security. The following are deemed acceptable methods for posting Security, which methods may be used in any combination, in the reasonable discretion of Buyer: (a) cash, (b) a Letter of Credit in form reasonably acceptable to the Buyer issued by a U.S. bank or a U.S. branch of a foreign bank with credit ratings by both S&P and Moody's of at least A- and A3, respectively and at least Ten Billion Dollars (\$10,000,000,000) in U.S.-based assets ("Issuer

Minimum Requirements"), (c) a Seller Guaranty from Seller Guarantor, or (d) other security as may be reasonably acceptable to Buyer. If at any time there shall occur a Downgrade Event with respect to Seller Guarantor, then Buyer may require Seller to post a Letter of Credit or cash in a pledged collateral account in an amount equal to the then-applicable amount of any outstanding Seller Guaranty comprising the Seller Security. Upon receipt of the Letter of Credit or cash, the Seller Guaranty shall be returned promptly to Seller. Notwithstanding the foregoing, Seller's obligation to provide a Letter of Credit in lieu of a Seller Guaranty under this Section 19.2 shall be suspended during any period that (x) Seller Guarantor is no longer experiencing a Downgrade Event and (y) the Seller Guaranty is reinstated by Seller Guarantor in accordance with the requirements of this Section 19.2. Any Letter of Credit provided hereunder shall be renewed by Seller for successive one-year or shorter periods. If Buyer receives notice from the issuing bank that the Letter of Credit will not be extended, Seller must provide a substitute Letter of Credit from an alternative bank satisfying the Issuer Minimum Requirements or alternative acceptable Security. The receipt of the substitute Letter of Credit or other acceptable Security must be effective on or before the expiration date of the expiring Letter of Credit and delivered to Buyer at least thirty (30) Days before the expiration date of the original Letter of Credit. If Seller fails to supply a substitute Letter of Credit or other acceptable Security as required, then Buyer will have the right to draw on the total amount of the expiring Letter of Credit. If (a) the credit rating of the issuer bank of a Letter of Credit falls below the Issuer Minimum Requirements, (b) the issuer bank fails to honor a properly documented request to draw on such Letter of Credit or disaffirms, disclaims, repudiates or rejects, in whole or in part, or challenges the validity of, such Letter of Credit, or (c) the issuer of the outstanding Letter of Credit fails to comply with or perform its obligations under such Letter of Credit and such failure shall be continuing after the lapse of any applicable grace period permitted under such Letter of Credit, then Seller shall have fifteen (15) Days (or such longer period as Buyer in its sole discretion may permit in writing) following written notice from Buyer to obtain a suitable Letter of Credit from another bank that meets the Issuer Minimum Requirements. Buyer shall not be required to post security.

- 19.3 Grant of Security Interest. To the extent that Seller posts cash to secure its obligations under this ESA, Seller hereby grants to Buyer a present and continuing security interest in, and lien on (and right of setoff against), and collateral assignment of, all cash collateral provided by Seller to Buyer as collateral and any and all proceeds resulting therefrom or the liquidation thereof, whether now or hereafter held by, on behalf of, or for the benefit of Buyer. Seller agrees to take such action as reasonably required to perfect in favor of Buyer a first priority security interest in, and lien on (and right of setoff against), such collateral and any and all proceeds resulting therefrom or from the liquidation thereof.
- 19.4 <u>Use of Security</u>. In addition to any other remedy available to it, Buyer in its sole discretion may draw from, offset against or make demand under such security to recover any amounts owing to it arising out of this ESA, including any damages due to Buyer and any amount for which Buyer is entitled to indemnification under this ESA. Buyer may draw from, offset against or make demand under all or any part of the amounts due to it from any form of Security provided to Buyer and from all such forms, in any sequence and at any time before or after termination of the ESA, as Buyer may select until such time as the Security is exhausted.

ARTICLE 20 Indemnity; Insurance Proceeds

20.1 <u>Indemnification</u>.

- (A) Subject to the provisions of Article 12, and to the fullest extent permitted by law, Seller shall defend, save harmless and indemnify on an After Tax Basis the Buyer, its Affiliates, and their respective directors, officers, employees, agents, subcontractors, or anyone directly or indirectly employed by any of them or anyone for whose acts any one of them may be liable, from and against all third-party claims, demands, losses, liabilities and expenses, including reasonable attorneys' fees, for personal injury, death or damage to real property and tangible personal property of any third party (collectively, "Losses") to the extent arising out of, resulting from, or caused by the negligence or willful misconduct of Seller, its Affiliates, directors, officers, employees, agents, subcontractors, or anyone directly or indirectly employed by any of them or anyone for whose acts any one of them may be liable; *provided* that, the waiver of consequential damages set forth in Section 12.7 shall not apply with respect to claims made by third parties.
- (B) Subject to the provisions of Article 12, and to the fullest extent permitted by law, Buyer shall defend, save harmless and indemnify on an After Tax Basis the Seller, its Affiliates, and their respective directors, officers, employees, agents, subcontractors, or anyone directly or indirectly employed by any of them or anyone for whose acts any one of them may be liable, from and against all Losses to the extent arising out of, resulting from, or caused by the negligence or willful misconduct of Buyer, its Affiliates, directors, officers, employees, agents, subcontractors, or anyone directly or indirectly employed by any of them or anyone for whose acts any one of them may be liable; *provided* that, the waiver of consequential damages set forth in the third paragraph of Section 12.7 shall not apply with respect to claims made by third parties.
- 20.2 Notice of Claims; Procedure. The indemnitee shall, with reasonable promptness after obtaining knowledge thereof, provide the indemnitor with written notice of the proceedings, claims, demands or assessments that may be subject to indemnification, which notice shall include a statement of the basis of the claim for indemnification, including a summary of the facts or circumstances that form the basis for the claim, a good faith estimate of the amount of Losses and copies of any pleadings or demands from the third party. Indemnitor shall have thirty (30) Days after its receipt of the claim notice to notify indemnitee in writing whether or not indemnitor agrees that the claim is subject to this Article 20 and, if so, whether indemnitor elects to undertake, conduct and control, through counsel of its choosing acceptable to indemnitee and at indemnitor's sole risk and expense, the settlement or defense of the claim. If within thirty (30) Days after its receipt of the claim notice, indemnitor notifies indemnitee that it elects to undertake the settlement or defense of the claim, indemnitee shall cooperate with indemnitor in connection therewith including by making available to indemnitor all relevant information and the testimony of employees and agents material to the defense of the claim. Indemnitor shall reimburse indemnitee for reasonable out-of-pocket costs incurred in connection with such cooperation. So long as indemnitor is contesting the claim in good faith and with diligence, indemnitee shall not pay or settle the claim. Notwithstanding the foregoing, indemnitee shall have the right to pay or settle any claim at any time without the consent of indemnitor; provided that, in such event it waives any right to indemnification therefor. If indemnitor does not provide a responsive notice within the thirty (30) Day period set forth in this Section 20.2, or otherwise fails to assume or diligently prosecute the defense of any claim in accordance with this

Section 20.2, the indemnitee shall have the absolute right to control the defense of such claim, and the fees and expenses of such defense, including reasonable attorneys' fees of the indemnitee's counsel and any amount determined to be owed by the indemnitee pursuant to such claim shall be borne by the indemnitor; provided that, the indemnitor shall be entitled, at its sole expense, to participate in (but not control) such defense. Subject to the foregoing, (a) the indemnitor shall control the settlement of all claims as required under the insurance policies set forth in Article 16, as applicable, as to which it has assured the defense; provided, however, that (i) such settlement shall include dismissal with prejudice of the claim and an explicit and unconditional release from all indemnitees; and (ii) the indemnitor shall not conclude any settlement without the prior approval of the indemnitee, which approval shall not be unreasonably withheld, conditioned or delayed; and (b) except as provided in the preceding sentence concerning the indemnitor's failure to assume or to diligently prosecute the defense of any claim, no indemnitee seeking reimbursement pursuant to the foregoing indemnity shall, without the prior written consent of the indemnitor, settle, compromise, consent to the entry of any judgment or otherwise seek to terminate any action, claim suit, investigation or proceeding for which indemnity is afforded hereunder unless the indemnitee waives any right to indemnification therefor or reasonably believes that the matter in question involves potential criminal liability.

- 20.3 <u>Survival of Obligations</u>. Cancellation, expiration, or earlier termination of this ESA shall not relieve the Parties of obligations that by their nature should survive such cancellation, expiration, or termination, prior to the term of the applicable statute of limitations, including warranties, and remedies which obligation shall survive for the period of the applicable statute(s) of limitation.
- 20.4 <u>Insurance Proceeds</u>. In the event that an indemnifying Party is obligated to indemnify the indemnified Party under this Article 20, the amount owing to the indemnified Party will be the amount of the indemnified Party's Loss net of any insurance proceeds received by the indemnified Party following a reasonable effort by such Party to obtain such insurance proceeds.

ARTICLE 21 Governmental Charges

Allocation of Governmental Charges. Seller shall pay or cause to be paid to the 21.1 applicable Governmental Authority all Governmental Charges on or with respect to the Project or on or with respect to the sale and making available to Buyer the Product that are imposed on the making available of Product arising prior to the Point of Delivery or prior to the transfer of the Environmental Attributes pursuant to Article 11. Buyer shall pay or cause to be paid to the applicable Governmental Authority all Governmental Charges (other than any Governmental Charges for which Seller is liable under this Section 21.1) on or with respect to the taking and purchase by Buyer of the Product that are imposed at and from the taking of the Product by Buyer at the Point of Delivery or at and after the transfer of the Environmental Attributes pursuant to Article 11. If a Party is required under Applicable Law to remit or pay Governmental Charges that are the other Party's responsibility hereunder, such Party shall promptly reimburse the other for such Governmental Charges. Both Parties shall use reasonable efforts to administer this ESA and implement the provisions in accordance with their intent to minimize Governmental Charges, so long as no Party is materially adversely affected by such efforts. Nothing herein shall obligate or cause a Party to pay or be liable to pay any Governmental Charge for which it is exempt under Applicable Law. In the

event any sale of Product hereunder is exempt from or not subject to any particular Governmental Charge, Buyer shall provide Seller with all reasonably requested documentation within thirty (30) Days after requested by Seller to evidence such exemption or exclusion.

ARTICLE 22 Miscellaneous

- 22.1 <u>Waiver</u>. Subject to the provisions of Section 13.8, the failure of either Party to enforce or insist upon compliance with or strict performance of any of the terms or conditions of this ESA, or to take advantage of any of its rights thereunder, shall not constitute a waiver or relinquishment of any such terms, conditions, or rights, but the same shall be and remain at all times in full force and effect.
- 22.2 <u>Fines and Penalties</u>. Seller shall pay when due all fees, fines, penalties or costs incurred by Seller or its agents, employees or contractors for noncompliance by Seller, its employees, or subcontractors with any provision of this ESA, or any contractual obligation, permit or requirements of law except for such fines, penalties and costs that are being actively contested in good faith and with due diligence by Seller and for which adequate financial reserves have been set aside to pay such fines, penalties or costs in the event of an adverse determination. Buyer shall pay when due all fees, fines, penalties or costs incurred by Buyer or its agents, employees or contractors for noncompliance by Buyer, its employees, or subcontractors with any provision of this ESA, or any contractual obligation, permit or requirements of law except for such fines, penalties and costs that are being actively contested in good faith and with due diligence by Buyer.

22.3 Rate Changes.

- (A) The terms and conditions and the rates for service specified in this ESA shall remain in effect for the term of the transaction described herein. Absent the Parties' written agreement, this ESA shall not be subject to change by application of either Party pursuant to Section 205 or 206 of the Federal Power Act.
- (B) Absent the agreement of all Parties to the proposed change, the standard of review for changes to this ESA whether proposed by a Party, a non-party, or the Federal Energy Regulatory Commission acting sua sponte shall be the "public interest" standard of review set forth in *United Gas Pipe Line v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).
- 22.4 <u>Disclaimer of Certain Third Party Beneficiary Rights</u>. In executing this ESA, Buyer does not, nor should it be construed to, extend its credit or financial support for the benefit of any third parties lending money to or having other transactions with Seller. Nothing in this ESA shall be construed to create any duty to, or standard of care with reference to, or any liability to, any Person not a party to this ESA.

22.5 Relationship of the Parties.

(A) This ESA shall not be interpreted to create an association, joint venture, or partnership between the Parties nor to impose any partnership obligation or liability upon either Party. Neither Party shall have any right, power, or authority to enter into any agreement or

undertaking for, or act on behalf of, or to act as an agent or representative of, the other Party.

- (B) Seller shall be solely liable for the payment of all wages, Taxes, and other costs related to the employment of Persons to perform services for Seller, including all federal, state, and local income, social security, payroll, and employment taxes and statutorily mandated workers' compensation coverage. None of the Persons employed by Seller shall be considered employees of Buyer for any purpose; nor shall Seller represent to any Person that he or she is or shall become a Buyer employee.
- 22.6 Equal Employment Opportunity Compliance Certification. Seller acknowledges that, as a government contractor, Buyer is subject to various federal laws, executive orders, and regulations regarding equal employment opportunity and affirmative action. These laws may also be applicable to Seller as a subcontractor to Buyer. To the extent such laws are applicable to Seller, all applicable equal opportunity and affirmative action clauses shall be deemed to be incorporated herein as required by federal laws, executive orders, and regulations, including 41 C.F.R. § 60-1.4(a)(1)-(7).
- 22.7 <u>Survival of Obligations</u>. Cancellation, expiration, or earlier termination of this ESA shall not relieve the Parties of obligations that by their nature should survive such cancellation, expiration, or termination, prior to the term of the applicable statute of limitations, including warranties, and remedies which obligation shall survive for the period of the applicable statute(s) of limitation.
- 22.8 <u>Severability</u>. In the event any of the terms, covenants, or conditions of this ESA, its Exhibits or Schedules, or the application of any such terms, covenants, or conditions, shall be held invalid, illegal, or unenforceable by any court or administrative body having jurisdiction, all other terms, covenants, and conditions of the ESA and their application not adversely affected thereby shall remain in force and effect; *provided*, *however*, that Buyer and Seller shall negotiate in good faith to attempt to implement an equitable adjustment in the provisions of this ESA with a view toward effecting the purposes of this ESA by replacing the provision that is held invalid, illegal, or unenforceable with a valid provision the economic effect of which comes as close as possible to that of the provision that has been found to be invalid, illegal or unenforceable.
- 22.9 <u>Complete Agreement; Amendments.</u> The terms and provisions contained in this ESA constitute the entire agreement between Buyer and Seller with respect to the Project and shall supersede all previous communications, representations, or agreements, either oral or written, between Buyer and Seller with respect to the sale of Product from the Project. Subject to approval by any Governmental Authority with jurisdiction over this ESA, this ESA may be amended, changed, modified, or altered, *provided* that such amendment, change, modification, or alteration shall be in writing and signed by both Parties hereto, and *provided*, *further*, that the Exhibits and Schedules attached hereto may be changed according to the provisions of Section 13.7.
- 22.10 <u>Binding Effect</u>. This ESA, as it may be amended from time to time pursuant to this Article, shall be binding upon and inure to the benefit of the Parties hereto and their respective successors-in-interest, legal representatives, and assigns permitted hereunder.
 - 22.11 Headings. Captions and headings used in this ESA are for ease of reference only

and do not constitute a part of this ESA.

- 22.12 <u>Counterparts</u>. This ESA or any supplement, modification, amendment or restatement hereof may be executed in two or more counterpart copies of the entire document or of signature pages to the document, each of which may have been executed by one or more of the signatories hereto and thereto and deliveries by mail, courier, telecopy or other electronic means, but all of which taken together shall constitute a single agreement, and each executed counterpart shall have the same force and effect as an original instrument.
- 22.13 Governing Law. The interpretation and performance of this ESA and each of its provisions shall be governed and construed in accordance with the laws of the State of New Mexico notwithstanding its conflict of laws rules or any principles that would trigger the application of any other law. All disputes arising out of or related to this ESA shall be brought in the United States District Court for the District of New Mexico.

22.14 Confidentiality.

- (A) For purposes of this Section 22.14, "Disclosing Party" refers to the Party disclosing information to the other Party, and the term "Receiving Party" refers to the Party receiving information from the other Party.
- (B) Other than in connection with this ESA, the Receiving Party will not use the Confidential Information (as defined in clause (C) below) and will keep the Confidential Information confidential. The Confidential Information may be disclosed to the Receiving Party or its Affiliates and any of their directors, officers, employees, financial advisers, Lenders, potential Lenders, legal counsel and accountants (collectively, "Receiving Party's Representatives"), but only if such Receiving Party's Representatives need to know the Confidential Information in connection with this ESA. The Receiving Party shall not disclose the Confidential Information to any Person other than as permitted hereby, and shall safeguard the Confidential Information from unauthorized disclosure using the same degree of care as it takes to preserve its own Confidential Information (but in any event no less than a reasonable degree of care). To the extent the Disclosing Party is required to submit Confidential Information to a Governmental Authority or is required to submit Confidential Information pursuant to any other legal process, the Disclosing Party shall use all available means to ensure that such Confidential Information is not made public.
- (C) As used in this Section 22.14, "Confidential Information" means all information that is furnished in connection with this ESA to the Receiving Party or its Receiving Party's Representatives by the Disclosing Party, or to which the Receiving Party or its Receiving Party's Representatives have access by virtue of this ESA (in each case, whether such information is furnished or made accessible in writing, orally, visually or by any other (including electronic) means), or which concerns this ESA, the Disclosing Party or the Disclosing Party's stockholders, members, affiliates or subsidiaries, and which is designated by the Disclosing Party at the time of its disclosure, or promptly thereafter, as "confidential" (whether by stamping any such written material or by memorializing in writing the confidential nature of any such oral or visual information). Any such information furnished to the Receiving Party or its Receiving Party's Representatives by a director, officer, employee, Affiliate, stockholder, consultant, agent or representative of the Disclosing Party will be deemed furnished by the Disclosing Party for the

purpose of this ESA. Notwithstanding the foregoing, the following will not constitute Confidential Information for purposes of this ESA:

- (1) information that is or becomes generally available to the public other than as a result of a disclosure or other act by the Receiving Party or its Receiving Party's Representatives;
- (2) information that can be shown by the Receiving Party to have been already known to the Receiving Party on a non-confidential basis before being furnished to the Receiving Party by the Disclosing Party;
- (3) information that becomes available to the Receiving Party on a non-confidential basis from a source other than the Disclosing Party or a representative of the Disclosing Party if to the knowledge of the Receiving Party such source was not subject to any prohibition against transmitting the information to the Receiving Party; and
- (4) information developed by the Parties during the negotiation of this ESA that relates solely to this ESA (as opposed to confidential business or operating information of either Party), which information shall be deemed proprietary to both Parties, each of whom shall be free to use such information, as they would any information already known to the Parties before negotiation of this ESA.
- (D) The Confidential Information will remain the property of the Disclosing Party. Any Confidential Information that is reduced to writing, except for that portion of the Confidential Information that may be found in analyses, compilations, studies or other documents prepared by or for the Receiving Party in connection with this ESA, will be returned to the Disclosing Party immediately upon its request after expiration or termination of this ESA, unless such Confidential Information has been destroyed by the Receiving Party, and no copies will be retained by the Receiving Party or its Receiving Party's Representatives, unless the Parties agree otherwise. That portion of the Confidential Information that may be found in analyses, compilations, studies or other documents prepared by or for the Receiving Party, oral or visual Confidential Information, and written Confidential Information not so required to be returned will be held by the Receiving Party and kept subject to the terms of this ESA, or destroyed.
- (E) In any proceeding before any applicable Governmental Authority, or pursuant to any other legal or regulatory process, each Party shall be entitled to disclose Confidential Information. In such event, the Party making the disclosure in the proceeding shall take all reasonable steps to limit the scope of any disclosure of Confidential Information and shall use its best efforts to make such disclosure of Confidential Information subject to a protective order or other similar procedure; provided, however, Seller acknowledges and agrees that Buyer may disclose this ESA and related documents, without seeking a protective order or similar process, in any proceeding before the NMPRC or pursuant to any other regulatory process under NMPRC jurisdiction, provided that the ESS Capacity Payment Rate shall be redacted to the extent allowed by Applicable Law.
 - 22.15 Marketing Rights; Press Releases and Media Contact; Access.
 - (A) Subject to Section 22.15(B), Seller hereby grants to Buyer the right to

advertise, market, and promote to the general public the benefits of this ESA, including, but not limited to, the exclusive right, in any such advertising, marketing or promotional material, to associate itself with any claimed or actual environmental or sociological benefits arising from this ESA (all such materials, in whatever media, whether print, electronic, broadcast or otherwise, that are associated with such advertising, marketing or promotional purposes are the "Promotional Materials"). Seller shall obtain and grant to Buyer an irrevocable, royalty free, worldwide license to use and distribute its Promotional Materials, including using the name, description and images of the Project. Seller will make available to Buyer a basic description of the Project, and any press releases or statements that Seller produces regarding the Project. Upon sufficient advance written notice, Seller will grant to Buyer or its designee reasonable access to the Project for the purposes of furthering the creation, production and dissemination of Promotional Materials. Notwithstanding the foregoing, either Party shall be permitted to disclose the following terms with respect to this ESA:

- (1) Party names;
- (2) Renewable resource type;
- (3) Term;
- (4) Project location;
- (5) Guaranteed ESS Capacity;
- (6) Commercial Operation Date; and
- (7) Point of Delivery.
- (B) Except as otherwise provided herein, neither Party shall issue any press or publicity release or otherwise release, distribute or disseminate any information to the public, or respond to any inquiry from the media, concerning this ESA or the participation of the other Party in the transactions contemplated hereby without the prior written approval of the other Party, which approval shall not be unreasonably withheld, delayed or conditioned. This provision shall not prevent the Parties from releasing information (i) which is required to be disclosed in order to obtain permits, licenses, releases and other approvals relating to the Project; (ii) as necessary to fulfill such Party's obligations under this ESA or as otherwise required by Applicable Law; or (iii) if the Party seeking approval makes prompt and commercially reasonable efforts to obtain such approval but the other Party fails to give a definitive response within twenty (20) Business Days.
- 22.16 Right to Mortgage. Buyer shall have the right to mortgage, create or provide for a security interest, or convey in trust, all or a part of its interest in this ESA, under deeds of trust, mortgages, indentures or security agreements, as security for its present or future bonds or other obligations or securities, without consent of Seller; *provided*, that Buyer shall not be relieved of any of its obligations or liability under this ESA. Seller shall cooperate reasonably with Buyer to execute, or arrange for the delivery of, those normal, reasonable and customary documents, and to provide such other normal, reasonable and customary representations or warranties, all in a form reasonably acceptable to Seller, as may be necessary to assist Buyer in consummating such transactions.

- 22.17 Forward Contract and Master Netting Agreement. Notwithstanding any other provision of this ESA, the Parties acknowledge that this ESA is a forward contract and master netting agreement within the meaning of the safe harbor provisions of the Bankruptcy Code. Accordingly, the Parties agree, notwithstanding any other provision in this ESA, that this ESA may be terminated and remedies exercised hereunder by either Party upon the commencement of a proceeding by the other Party under any chapter of the Bankruptcy Code, and that the automatic stay of Section 362(a) of the Bankruptcy Code shall not apply to such termination or to the exercise of the remedies set forth herein.
- Accounting Matters. The Parties agree that Generally Accepted Accounting Principles in the United States of America ("GAAP") and the rules of the United States Securities and Exchange Commission ("SEC") require Buyer to evaluate if Buyer must consolidate Seller's financial information. The Parties shall determine, through consultation with their respective independent registered public accounting firms, whether this ESA (i) will be considered a lease under Accounting Standards Codification 842 - Leases, or (ii) require consolidation of Seller's financial information with Buyer's financial statements pursuant to Accounting Standards Codification 840 - Consolidation (including any subsequent amendments to these sections or future guidance issued by accounting profession governance bodies or SEC that affects Buyer's accounting treatment for the ESA, jointly the "Accounting Standards"). Seller agrees to provide Buyer with information Buyer reasonably believes is necessary for Buyer to make the foregoing determinations. If, as a result of the Parties' review (or subsequent reviews as Buyer deems necessary), and consultations with their respective independent registered public accounting firms, Buyer, in its reasonable discretion, determines that such consolidation is required for a given period, then the Parties agree to the following provisions for such period:
 - (A) Within fifteen (15) Days following the end of each calendar quarter, including the fourth quarter of the calendar year, Seller shall deliver to Buyer: (i) an unaudited year-to-date statement of income, (ii) an unaudited year-to-date statement of cash flows, (iii) an unaudited balance sheet as of the end of such calendar quarter, and (iv) related supporting schedules that are prepared by the Seller's Guarantor, or if Seller has not provided a Seller Guaranty to satisfy its Security requirements pursuant to Article 19, then Seller, in order to allow the Seller's parent to complete its quarterly filings with the SEC, shall deliver to Buyer any other information reasonably requested by Buyer to comply with the consolidation requirements of GAAP. If audited financial statements are deemed necessary by Buyers external auditors to complete an audit of Buyer's consolidated financial statements, Buyer agrees to provide notice to Seller no later than sixty (60) Days before the end of the calendar year, and Seller agrees to provide audited financial statements within forty-five (45) Days of each calendar year end thereafter.
- (B) The financial statements to be delivered by Seller in accordance with Section 22.18(A) ("Seller's Financial Statements") shall be prepared in accordance with GAAP and fairly present in all material respects the consolidated financial position, results of operations, and cash flows of Seller Guarantor, or Seller, as applicable. Seller shall maintain a system of internal accounting controls sufficient to provide reasonable assurance that the financial statements of Seller or Seller Guarantor, as applicable, are prepared in conformity with GAAP. If audited financial statements are prepared for the Seller, other than to satisfy the requirements for financial statements set forth in Section 22.18(A), Seller shall provide such statements to Buyer within five (5) Business

Days after those statements are issued.

- (C) Upon reasonable notice from Buyer, during normal business hours and mutually agreed terms and dates, Seller shall allow Buyer access to Seller's records and personnel, so that Buyer and Buyer's independent registered public accounting firm can conduct financial statement reviews and audits in accordance with the standards of the Public Company Accounting Oversight Board (United States). All reasonable expenses for the foregoing that are incremental to Seller's normal operating expenses shall be borne by Buyer.
- (D) Once during each calendar quarter, Buyer and Seller shall meet (either in person or by conference call) at a mutually agreed upon date and time to conduct due diligence and Form 8K disclosure review and discuss Seller's internal control over financial reporting.
- Buyer shall treat Seller's financial statements or other financial information (E) provided under the terms of this Section in confidence in accordance with Section 22.14 and, accordingly, shall: (i) utilize such Seller financial information only for purposes of preparing, reviewing, auditing or certifying Buyer's or any Affiliate's financial statements (including any required disclosures in the financial statement presentation and notes), for making regulatory, tax or other filings required by Applicable Law in which Buyer is required to demonstrate or certify its or any Affiliate's financial condition or to obtain credit ratings; (ii) make such Seller financial information available only to its or its Affiliates' officers, directors, employees or auditors who are responsible for preparing, reviewing, auditing or certifying Buyer's or any Affiliate's financial statements, to the SEC and the Public Company Accounting Oversight Board (United States) in connection with any oversight of Buyer's or any Affiliate's financial statements and to those Persons who are entitled to receive Confidential Information in accordance with Section 22.14; (iii) not disclose any of Seller's financial information provided under the terms of this Section 22.18 to the extent that such information is not required by the Accounting Standards or Applicable Law; (iv) limit submission of Seller's financial information provided under the terms of this Section 22.18 to that information that reflects Seller's operations of the Project; provided, such limited submission is not contrary to the Accounting Standards or other Applicable Law; and (v) use reasonable efforts to disclose to and consult with Seller with respect to any information respecting Seller or the Project that Buyer intends to submit pursuant to this Section 22.18 and use good faith efforts to incorporate any of Seller's comments thereto in any such submission. Notwithstanding the foregoing, if Buyer discloses information, based on the advice of its counsel that it is legally required to be disclosed, Buyer may make such disclosure without being in violation of this Section.
- 22.19 <u>Telephone Recording</u>. Each Party to this ESA acknowledges and agrees to the taping or electronic recording ("**Recording**") of conversations between the Parties with respect to all scheduling and dispatch issues, whether by one or the other or both Parties, and that the Recordings will be retained in confidence, secured from improper access, and may be submitted in evidence in any suit, action or proceedings relating to this ESA. Each Party waives any further notice of that monitoring or Recording and agrees to notify its personnel of the monitoring or Recording and to obtain any necessary consent of those personnel. In the event of a dispute between the Parties, each Party with a Recording relating to such dispute shall provide a copy of such Recording to the other Party upon request.

IN WITNESS WHEREOF, the Parties have caused this ESA to be duly executed as of the date first above written. This ESA shall not become effective as to either Party unless and until executed by both Parties.

PUBLIC S	ERVICE (COMPAN	Y OF	NEW	MEXICO
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Name: Thomas Fallgren

Title: Vice President, PNM Generation

Date: June 27, 2019

ARROYO ENERGY STORAGE LLC

By CRE-Arroyo New Mexico LLC, Its Manager

By Centaurus Renewable Energy LLC, Its Manager

By: FERBASEGEPD455

Name: Keith Holst
Title: Manager
Date: 6/26/2019

By: Stew Douglas
Name: St. BD7A949D2172432....

Title: Manager
Date: 6/26/2019

EXHIBIT A

(to Energy Storage Agreement)

DESCRIPTION OF SELLER'S ENERGY STORAGE FACILITIES AND SITE MAP

1. Name of Seller's Project: Arroyo Energy Storage Project

Location: Pueblo Pintado, McKinley County, New Mexico

- 2. Owner (if different from Seller): Arroyo Energy Storage LLC
- 3. Operator: Arroyo Energy Storage LLC
- 4. Equipment/Fuel:
 - a. Type of facility and conversion equipment (e.g., Solar PV; Solar Thermal; Wind; Energy Storage; Biomass (including Fuel)): Energy Storage
 - c. Total nameplate capacity (AC): 40 MW
 - d. Total capacity at point of delivery: 40 MW
 - e. Additional technology-specific information: AC-connected battery energy storage system
- 5. Site Map: Attach a scaled map that complies with the requirements of Section 3.3 of the ESA.

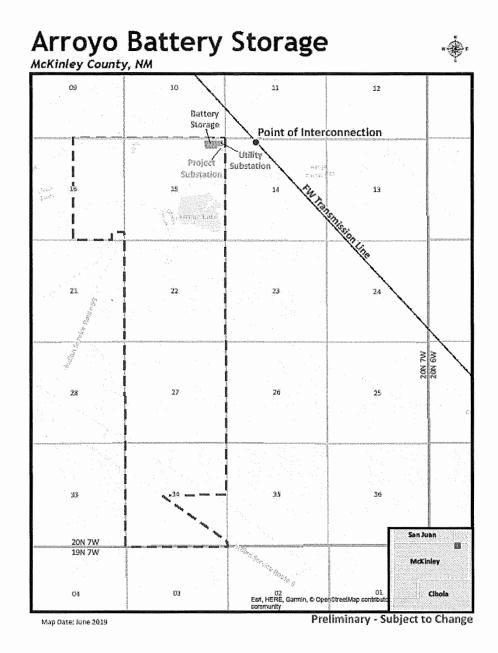
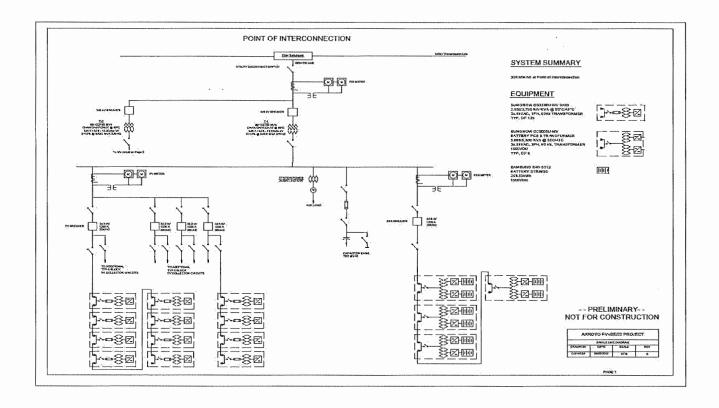


EXHIBIT B

(to Energy Storage Agreement)

ONE-LINE DIAGRAM OF PROJECT AND INTERCONNECTION FACILITIES

See attached one-line diagram of the Project, which indicates the Interconnection Facilities, the network upgrades, the Point of Delivery into WECC Path 48 and ownership and location of meters. Seller shall provide any necessary updates upon execution of the Interconnection Agreement.



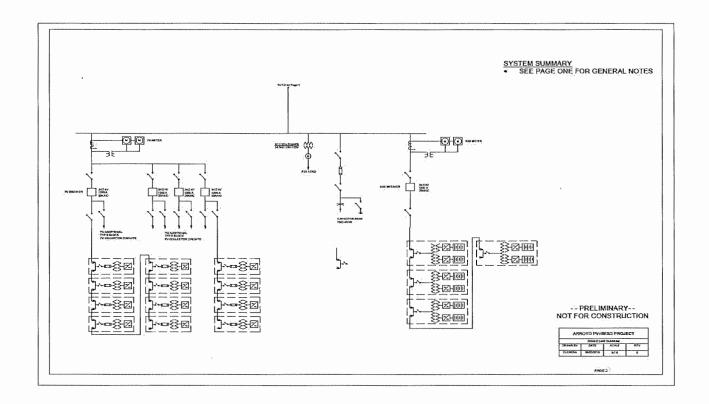


EXHIBIT C

(to Energy Storage Agreement)

DESCRIPTION OF SITE

The Project Site is located on approximately +/- 2,665 acres of land commonly described as McKinley County Tax Assessor's tax parcel numbers 2-039-117-300-264 and 2-039-117-132-264 described as follows:

In Township 20 North, Range 7 West, of the New Mexico Meridian:

- All of Section 15;
- East half of Section 16, Excluding the South half of the Southeast quarter of the Southeast quarter of the Southeast quarter containing 5 acres more or less;
- All of Section 22;
- All of Section 27;
- In Section 34, the Northwest quarter North of Indian Service Route 9, the Northeast corner, the West half of the Southeast quarter North of Indian Service Route 9, and the East half of the West half of the Southeast quarter North of Indian Service Route 9.

EXHIBIT D

(to Energy Storage Agreement)

NOTICE ADDRESSES

PUBLIC SERVICE COMPANY OF NEW MEXICO

ARROYO ENERGY STORAGE LLC

Notices:

Delivery Address:

Public Service Company of New Mexico

414 Silver Ave. SW

Albuquerque, NM 87102

Invoices:

Attn: Energy Analysis Phone: (505) 541-2585

Fax: (505) 241-2434

Email:

PNMEAM@pnmresources.com

Scheduling:

Attn: Traders

Phone: (505) 855-6226 day-ahead Fax: (505) 855-6216 real time

Email: zz-WPMTraders@pnm.com

Payments:

Public Service Company of New Mexico

2401 Aztec NE, MS Z-160 Albuquerque, NM 87107

Attn: Albuquerque Division Cash

Wire Transfer:

Wells Fargo Bank ABA# 121000248

Albuquerque, New Mexico

ME Whsle Pwr Depository: 651-537-7916 Attn: EA-Wholesale Power Marketing

All Notices/Invoices:

Delivery Address:

Arroyo Energy Storage LLC

c/o Centaurus Renewable Energy LLC

Attn: Keith Holst

Attn: Stephen H Douglas

1717 West Loop South, Suite 1800

Houston, TX 77027

Email: kholst@centcap.net

Email: sdouglas@centaurusenergy.com

Telephone: (713) 554-1952

With a copy to:

Arroyo Energy Storage LLC

c/o Clenera, LLC Attn: Admin. Dept. PO Box 2576

Boise, Idaho 83701

Email: cre.notices@clenera.com

Telephone: (208) 639-3232

Mailing Address (if different from above):

Arroyo Solar LLC c/o Clenera, LLC

Attn: Admin. Dept.

PO Box 2576

Boise, Idaho 83701

Email: cre.notices@clenera.com Telephone: (208) 639-3232

Contract Manager:

Public Service Company of New Mexico

Attention: Kevin Mataczynski

2401 Aztec Rd. NE Albuquerque, NM 87107 Telephone: (505) 241-4147

Fax: (505) 241-2375

With additional Notice of an Event of Default to:

Public Service Company of New Mexico

Attention: Tom Fallgren 2401 Aztec Rd. NE Albuquerque, NM 87107 Telephone: (505) 241-4148

Fax: (505) 241-2375

With a copy to:

Public Service Company of New Mexico

Attention: Madonna N. Bixby, Senior

Corporate Counsel

414 Silver Ave. SW, MS0805 Albuquerque, NM 87102 Telephone: (505) 241-4929

Fax: (505) 241-4318

Wire Transfer: To Be Provided

With additional Notice of an Event of Default, termination and other legal notices to:

Arroyo Energy Storage LLC

c/o Centaurus Renewable Energy LLC

Attn: Keith Holst

Attn: Stephen H Douglas

1717 West Loop South, Suite 1800

Houston, TX 77027

Email: kholst@centcap.net

Email: sdouglas@centaurusenergy.com

Telephone: (713) 554-1952

With a copy to (which shall not constitute

legal notice):

Baker Botts L.L.P.

910 Louisiana Street #3000

Houston, TX 77002

Attn: Peter del Vecchio

Email: peter.delvecchio@bakerbotts.com

Telephone: (713) 229-1746

EXHIBIT E

(to Energy Storage Agreement)

SELLER'S REQUIRED GOVERNMENTAL AUTHORITY PERMITS, CONSENTS, APPROVALS, LICENSES AND AUTHORIZATIONS TO BE OBTAINED

PERMIT, CONSENT, APPROVAL,			
LICENSE AND/OR AUTHORIZATION	GOVERNMENTAL ENTITY		
Construction Permit	State of New Mexico		
Electrical Permit	State of New Mexico		
EE 98 License	State of New Mexico		
EL 1 License	State of New Mexico		
Modular Building Permit	State of New Mexico		
Plumbing Permit	State of New Mexico		
Operations & Maintenance General Contractor	State of New Mexico		
Certificate of Occupancy	McKinley County		
NPDES	State of New Mexico		
NMED Air Quality Permit	State of New Mexico		
NMED General Permit	State of New Mexico		
Nationwide 14	US Army Corps of Engineers		
Nationwide 51	US Army Corps of Engineers		

EXHIBIT F

(to Energy Storage Agreement)

COMMISSIONING AND ANNUAL TESTING

Commissioning Tests

- DC Feeder Insulation Resistance and Continuity Tests
- Inverter OEM Commissioning Procedures
- MW Control Tuning/Testing
- V/MVAR/pf Control Tuning/Testing
- AGC Control
- ESS Unit Capabilities Testing

Annual Testing

ESS Unit Capabilities Testing

Energy Storage Plant testing and commissioning. This is a high-level overview and is not to be used for actual plant testing and commissioning. Develop the final energy storage plant testing and commissioning process based on as-built design and plant configuration, and confirm approach with all equipment suppliers to ensure a safe process.

PHASE 1 – Battery to PCS

- 1. Battery Module
 - a. Prior to installing each battery module:
 - i. Test and confirm battery module voltage
- 2. Battery String
 - a. Once the battery modules are installed in the battery rack with the necessary electrical and communication connections with the battery switchgear and Rack BMS:
 - i. Confirm battery modules have auxiliary power supply
 - ii. Confirm battery modules communicate with rack BMS
 - 1. Read the System BMS and check whether the battery banks are operable, or not.
 - iii. Repeat steps i through ii for all battery strings connected to the PCS.
 - iv. Once communication is confirmed between the battery string and the System BMS, test and confirm battery string voltage on input terminals of Switchgear, one string at a time.
 - v. Once complete, send all DC contactor "on" command to the System BMS and check the DC contactor's status via the System BMS.
 - vi. Initiate the pre-charge circuit to balance the battery strings prior per the battery vendor specifications.

3. Battery Bank

- a. Once all of the battery strings within a bank are connected to the input on the PCS and the System BMS, and each input on the PCS is complete with the necessary battery bank connections.
 - i. Confirm communication between the System BMS and the PCS (via the EMS, or direct)
 - ii. Confirm voltage on the PCS terminals is within the battery manufacturer requirements to connect the strings in parallel.

4. PCS

- a. Connect a temporary power supply such as a generator to the PCS to charge the battery bank.
- b. Turn on the PCS.
- c. Charge the battery bank.
- d. Disconnect the temporary power supply.
- e. Connect the PCS to a load bank.
- f. Discharge the battery bank into the load bank.
 - i. Confirm the battery bank capacity (kWh) based on power for duration.
- 5. Repeat steps 1 through 4 for every PCS in the Energy Storage Plant.
- 6. End of Phase 1

PHASE 2 - PCS to MV Bus in Substation

- 1. Medium Voltage Block
 - a. Disconnect / isolate the battery bank voltage from the PCS
 - b. Connect the PCS to the medium voltage transformer.
 - c. Connect the Medium Voltage Blocks to the Medium Voltage Feeder
 - d. Connect the Medium Voltage Feeder to the Medium Voltage bus in the substation via the MV circuit breaker.
 - e. With all blocks connected to the Medium Voltage Feeder (approximately 8-10 blocks per MV Feeder), test and commission each MV block, one at a time. (This assumes the substation is energized and capable of charging and discharging.)
 - i. Charge each block to 100% SOC.
 - ii. Let the battery rest as recommended by the battery vendor.
 - iii. Discharge each block to 0% SOC.
 - iv. Open the MV Feeder circuit breaker upon completion.
- 2. Repeat steps 1 through 2 for all Medium Voltage Feeders
- 3. End of Phase 2

PHASE 3 – MV bus to POI

- 1. One MV Feeder at a time, close the MV Feeder Breaker, and energize all of the blocks on the feeder.
- 2. Allow the MV Feeder to charge and then discharge. Once complete, repeat step 1 for all MV Feeders.

EXHIBIT G INSURANCE COVERAGES

Seller shall obtain and maintain the following insurance coverages, at a minimum:

- **A.** Workers' Compensation Insurance that complies with statutory limits under workers' compensation laws of any applicable jurisdiction and employer's liability coverage with limits of One Million Dollars (\$1,000,000) per accident, One Million (\$1,000,000) for disease, and One Million (\$1,000,000) for each employee, covering all of Seller's employees, whether full-time, leased, temporary, or casual.
- **B.** Commercial General Liability Insurance, written on a standard ISO occurrence form, or the equivalent, with a combined single limit of One Million Dollars (\$1,000,000) per occurrence. This policy will include coverage for bodily injury liability, broad form property damage liability, blanket contractual, owner's protective, products liability and completed operations.
- C. Business Automobile Liability Insurance, or the equivalent, with a limit of One Million Dollars (\$1,000,000) combined single limit per occurrence for bodily injury and property damage with respect to Seller's vehicles whether owned, hired, or non-owned.
- **D.** Excess or Umbrella Liability. Excess or Umbrella Liability Insurance on a following form basis covering claims in excess of the underlying insurance described in paragraphs (A) (with respect to only Employer's Liability Insurance), (B) and (C) with a limit per occurrence of Twenty Million Dollars (\$20,000,000) written on a per project basis

The amounts of insurance required in the foregoing paragraphs (A), (B), (C) and (D) may be satisfied by purchasing coverage in the amounts specified or by any combination of primary and excess insurance, so long as the total amount of insurance meets the requirements specified above.

E. Property Insurance. During construction and operation, Seller shall provide standard form "All Risk" insurance covering one hundred percent (100%) of the Project cost. For the avoidance of doubt, builders' risk insurance shall qualify as "All Risk" insurance during the construction period. The All-Risk Property insurance shall cover physical loss or damage to the Project including the period during testing and startup. A deductible may be carried, which deductible shall be the absolute responsibility of Seller. All-Risk Property insurance shall include: (i) coverage for fire, flood, wind and storm, tornado and earthquake with respect to facilities similar in construction, location and occupancy to the Project; and (ii) Boiler and Machinery insurance covering all objects customarily subject to such insurance, including boilers and engines, in an amount equal to their probable maximum loss.

EXHIBIT H

ESS USE CASE

Typical ESS dispatch (subject to Buyer operation and weather conditions) Subject to manufacturers' operating recommendations

When charged from Solar, the BESS shall be available to:

- 1) Be available for contingency reserve upon the occurrence of a unit outage (requires minimum 8.3% SOC)(40 MW for 20 minutes 13.33 MWH)
- 2) Be available for reg-up and reg-down (requires maximum 96% SOC and minimum 12.5% SOC also considering contingency reserve requirement)(40 MW for 10 minutes 6.67 MWH) (Reg down only as can be diverted from Solar generation)
- 3) Respond to frequency events (BAL-003-1)(Response time in 20 to 50 seconds)(Currently have need for 28.8 MW per 0.1 Hz, but expect need for improved capability in future)(2-3 minute event)
- 4) Provide black start capability (10 MW for 20 minutes)(consider capacity to be held as part of the contingency reserve capacity identified in Item (1) above)
- 5) Charge to control the Solar generation ramp in the morning as the sun rises
- 6) Discharge during the morning peak, as available, to offset peak demand
- 7) Generally charge during the mid-day hours with intermittent partial charge/discharge cycles during the day to manage load and renewable energy variability (load stabilization) (generally operating between 12.5 and 96% SOC)
- 8) Be fully charged prior to the evening peak for peak load management (fully charged by 2 hours before sunset)
- 9) Be available to charge to avoid economic curtailment of PNM's system (Need to identify typical times, capacities, and durations)(Likely shoulder months during solar peaks)(Charging can only be as can be diverted from Solar generation)

Cycles shall not exceed 365 equivalent full cycles over the duration of a year.

When charged from the Grid, the BESS shall be available to:

- 1) Be available for contingency reserve upon the occurrence of a unit outage (requires minimum 8.3% SOC)(40 MW for 20 minutes 13.33 MWH)
- Be available for reg-up and reg-down (requires maximum 96% SOC and minimum 12.5% SOC also considering contingency reserve requirement)(40 MW for 10 minutes – 6.67 MWH)
- 3) Respond to frequency events (BAL-003-1)(Response time in 20 to 50 seconds)(Currently have need for 28.8 MW per 0.1 Hz, but expect need for improved capability in future)(2-3 minute event)
- 4) Provide black start capability (10 MW for 20 minutes)(consider capacity to be held as part of the contingency reserve capacity identified in Item (1) above)
- 5) Charge to control the Solar generation ramp in the morning as the sun rises
- 6) Discharge during the morning peak, as available, to offset peak demand

- 7) Generally charge during the mid-day hours with intermittent partial charge/discharge cycles during the day to manage load and renewable energy variability (load stabilization) (generally operating between 12.5 and 95% SOC)
- 8) Be fully charged prior to the evening peak for peak load management (fully charged by 2 hours before sunset)
- 9) Be charged from excess wind or other generation during night-time hours to be available for the morning peak and to avoid curtailment (discharge to minimum 12.5% SOC at end of evening peak)
- 10) Be available to charge to avoid economic curtailment of PNM's system (Need to identify typical times, capacities, and durations)(Charging can be at any time)

Cycles shall not exceed 365 equivalent full cycles over the duration of a year.

EXHIBIT I

(to Energy Storage Agreement)

AVAILABILITY GUARANTEES

Section 1. Definitions.

Capitalized terms used in this <u>Exhibit I</u> and not defined herein shall have the meaning assigned in Article 1 of the ESA.

- "Actual ESS Availability Percentage" means a percentage calculated as (a) one hundred (100), multiplied by (b) the result of (i) the sum of all ESS Available Hours divided by (ii) the sum of all ESS Period Hours in the relevant Commercial Operation Year.
- "Aggregate ESS Availability Damages Cap" has the meaning set forth in Section 2.1(C) of this Exhibit.
 - "Annual ESS Availability Damages Cap" has the meaning set forth in Section 2.1(C).
 - "Annual Report" has the meaning set forth in Section 2.3 of this Exhibit.
 - "ESS Availability Damages" has the meaning set forth in Section 2.1(B) of this Exhibit.
- "ESS Available Hours" means for a relevant Commercial Operation Year, an amount of hours equal to (a) the number of ESS Period Hours in such Commercial Operation Year, minus (b) the aggregate ESS Unavailable Hours in such Commercial Operation Year.
- "ESS Excused Hours" means, in any Commercial Operation Year, the aggregate Seller Excused Hours for such Commercial Operation Year to the extent that the ESS is affected during such hours; provided that, for purposes of the Guaranteed ESS Availability Percentage, only the first fifty (50) hours of Scheduled Maintenance Outages in the aggregate for the Project per Commercial Operation Year shall be treated as ESS Excused Hours.
- "ESS Period Hours" means eight thousand seven hundred sixty (8,760) hours for any given Commercial Operation Year, as may be prorated for any partial Commercial Operation Year.
- "ESS Unavailable Hours" means, in any Commercial Operation Year, those hours, other than ESS Excused Hours, that the ESS is not available to operate because it is (a) in an emergency, stop, service mode or pause state (except to the extent that such emergency, stop, service mode or pause state also constitutes an Emergency Condition); (b) in "run" status and faulted; (c) included in Scheduled Maintenance Outages in excess of fifty (50) hours in aggregate for the Project in any Commercial Operation Year; or (d) otherwise not operational or capable of delivering Discharge Energy or accepting Charging Energy .
- "Guaranteed ESS Availability Percentage" has the meaning set forth in Section 2.1(A) of this Exhibit.

Section 2. Availability Guarantees.

1. ESS Availability Guarantee.

- (A) <u>ESS Availability Guarantee</u>. Seller guarantees that the ESS shall achieve an Actual ESS Availability Percentage equal to or greater than ninety-five percent (95%) in each Commercial Operation Year after the Commercial Operation Date ("Guaranteed ESS Availability Percentage").
- (B) ESS Availability Damages. For any Commercial Operation Year during which Seller fails to meet the Guaranteed ESS Availability Percentage, Seller shall pay Buyer liquidated damages in the amount equal to One Thousand Dollars (\$1,000) per MW of Guaranteed ESS Capacity per one percent (1%) shortfall in the Guaranteed ESS Availability Percentage, calculated annually and prorated for any portion of a Commercial Operation Year ("ESS Availability Damages"), but in no event in excess of the Annual ESS Availability Damages Cap and the Aggregate ESS Availability Damages Cap. A sample calculation of the ESS Availability Damages that would be owed by Seller under certain stated assumptions is provided as Attachment 2 to this Exhibit I.
- (C) ESS Availability Damages Cap, Termination and Cure Rights. The total ESS Availability Damages payable by Seller for failure to meet the Guaranteed ESS Availability Percentage in any Commercial Operation Year shall be capped annually at a value equivalent to Fifteen Thousand Dollars (\$15,000) per MW of Guaranteed ESS Capacity ("Annual ESS Availability Damages Cap") and in the aggregate at a value equivalent to Forty-Five Thousand (\$45,000) per MW of Guaranteed ESS Capacity ("Aggregate ESS Availability Damages Cap") over the Term of the ESA.
- Sole Remedy. The Parties agree that Buyer's sole and exclusive remedy, and Seller's sole and exclusive liability, for any deficiency in the performance of the Project (including any failure to meet the Effective Guaranteed ESS Availability Percentage) shall be the payment of damages up to the Annual ESS Availability Damages Cap and the Aggregate ESS Availability Damages Cap, as applicable, and the right to declare an Event of Default pursuant to Section 12.1(B)(5) of the ESA, and shall not be subject to the collection of any other damages or any other remedies, including specific performance, and shall not be an Event of Default giving rise to a termination payment obligation except pursuant to Section 12.1(B)(5) of the ESA, as applicable. Notwithstanding the foregoing, the limitations set forth herein shall not be applicable to any indemnification claims pursuant to Article 20 of the ESA and Seller's material breach of its obligation to operate and maintain the Project in accordance with Prudent Utility Practice or Seller's failure to pay ESS Availability Damages when due if not timely cured pursuant to the provisions of Article 12 of the ESA are an Event of Default of Seller for which Buyer may terminate the ESA and seek damages in accordance with Section 12.4 of the ESA.
- 3. Annual Report. No later than the thirtieth (30th) Day of such Commercial Operation Year (or thirty (30) Days after the end of the last Commercial Operation Year), Seller shall deliver to Buyer a calculation showing Seller's computation of Actual ESS Availability Percentage for the previous Commercial Operation Year and the ESS Availability Damages, if any, due to Buyer (the "Annual Report"). Such Annual Report shall include the total amount of ESS Availability Damages paid to Buyer under the ESA and shall provide notice that the Aggregate ESS Availability Damages Cap has been reached, if applicable. If ESS Availability

Damages are due from Seller, Seller shall pay such damages no later than fifteen (15) Business Days after providing the Annual Report.

5. <u>Disputes</u>. Disputes as to any calculations under this <u>Exhibit I</u> shall be addressed as provided in Section 13.8 of the ESA.

ATTACHMENT 1 TO EXHIBIT I

EXAMPLE CALCULATION OF ESS AVAILABILITY DAMAGES

I. Example of Actual ESS Availability Percentage Calculation

The sample calculation set forth below is based on the following assumed facts:

The ESS had the following operating characteristics:

	Hours
ESS Period Hours ("EPH")	8,760
ESS Unavailable Hours ("EUH")	425

Given these assumed facts, the ESS Available Hours for the ESS during the Commercial Operation Year would be calculated as follows:

Sum of ESS Available Hours = EPH – EUH : 8,335 = 8,760 - 425

Actual ESS Availability Percentage

Given these assumed facts, the Actual ESS Availability Percentage for the Project during the Commercial Operation Year in question would be calculated as follows:

- (a) Sum of ESS Available Hours: 8,335 hours
- (b) Sum of ESS Period Hours: 8,760 hours
- (c) Actual ESS Availability Percentage: (Sum of ESS Available Hours/Sum of ESS Period Hours) x 100 = (8,335/8,760) x 100 = 95.1%

II. Example of ESS Availability Damages

Example of ESS Availability Damages based on the following assumed facts:

- (a) Seller's Guaranteed ESS Availability Percentage in Commercial Operation Year 4 = 95%.
- (b) Seller's Actual ESS Availability Percentage in Commercial Operation Year 4 = 93%.
- (c) Seller's Guaranteed ESS Capacity = 40 MW.

Given these assumed facts, Seller calculates the ESS Availability Damages due to Buyer as follows:

(Seller's Guaranteed ESS Availability Percentage in Commercial Operation Year 4 – Seller's Actual ESS Availability Percentage in Commercial Operation Year 4) (the latter two expressed as a decimal) x (100) x Liquidated Damage Value x Seller's Guaranteed ESS Capacity = ESS Availability Damage

$$(0.95 - 0.93) \times 100 \times 1,000 \times 40 = $80,000$$

EXHIBIT J

(to Energy Storage Agreement)

FORM OF SELLER GUARANTY

GUARANTY

THIS GUARANTY (this "Guaranty"), dated as of, (the "Effective Date"), is made by FORETHOUGHT LIFE INSURANCE COMPANY, Inc., an Indiana corporation. ("Guarantor"), in favor of PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation ("Counterparty").			
RECITALS:			
A. WHEREAS, Counterparty and Guarantor's indirect, wholly-owned subsidiar [INSERT OBLIGOR'S NAME IN ALL CAPS] (" Obligor ") have entered into, or concurrently herewith are entering into, that certain Energy Storage Agreement dated/made/enterestinto/effective as of, 20 (the " Agreement "); and			
B. WHEREAS, Guarantor will directly or indirectly benefit from the Agreement between Obligor and Counterparty;			
NOW THEREFORE, in consideration of the foregoing premises and as an inducement for Counterparty's execution, delivery and performance of the Agreement, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Guaranton hereby agrees for the benefit of Counterparty as follows:			
* * *			
1. <u>GUARANTY</u> . Subject to the terms and provisions hereof, Guarantor hereby absolutely and irrevocably guarantees the timely payment when due of all obligations owing by Obligor to Counterparty arising pursuant to the Agreement, including with respect to any damages that Obligor owes to Counterparty for failing to perform under the Agreement (collectively, the "Obligations"). This Guaranty shall constitute a guarantee of payment and not of collection. The liability of Guarantor under this Guaranty shall be subject to the following limitations:			
Notwithstanding anything herein or in the Agreement to the contrary, the maximum aggregate obligation and liability of Guarantor under this Guaranty, and the maximum recovery from Guarantor under this Guaranty, shall in no event exceed [spell out the dollar amount] U.S. Dollars (U.S. \$) (the "Maximum Recovery Amount"), plus reasonable costs of collection and/or enforcement of this Guaranty (including reasonable attorneys' fees), to the extent that a court of competent jurisdiction finally declares that amounts are due and payable hereunder, but in no event shall such costs exceed [].			

(b) The obligation and liability of Guarantor under this Guaranty is specifically limited to payments expressly required to be made under the Agreement (even if such payments are deemed to be damages), as well as costs of collection and enforcement of this Guaranty (including attorneys' fees) to the extent reasonably and actually incurred by Counterparty (subject, in all instances, to the limitations imposed by the Maximum Recovery Amount as specified in <u>Section 1(a)</u> above). Except as expressly payable by Obligor pursuant to the Agreement, Guarantor shall not be liable for or obligated to pay any consequential, indirect, incidental, lost profit, special, exemplary, punitive, equitable or tort damages.

2. DEMANDS AND PAYMENT.

- (a) If Obligor fails to pay any Obligation to Counterparty when such Obligation is due and owing under the Agreement (an "Overdue Obligation"), Counterparty may present a written demand to Guarantor calling for Guarantor's payment of such Overdue Obligation pursuant to this Guaranty (a "Payment Demand"). Delay or failure by Counterparty in making a Payment Demand shall in no event affect Guarantor's obligations under this Guaranty.
- (b) A Payment Demand shall be in writing and shall reasonably and briefly specify in what manner and what amount Obligor has failed to pay and explain why such payment is due, with a specific statement that Counterparty is calling upon Guarantor to pay under this Guaranty. Such Payment Demand must be delivered to Guarantor in accordance with Section 9 below; and the specific Overdue Obligation(s) addressed by such Payment Demand must remain due and unpaid at the time of such delivery to Guarantor.
- After issuing a Payment Demand in accordance with the requirements specified in <u>Section 2(b)</u> above, Counterparty shall not be required to issue any further notices or make any further demands with respect to the Overdue Obligation(s) specified in that Payment Demand, and Guarantor shall be required to make payment with respect to the Overdue Obligation(s) specified in that Payment Demand within five (5) Business Days after Guarantor receives such demand. As used herein, the term "Business Day" shall mean all weekdays (i.e., Monday through Friday) other than any weekdays during which commercial banks or financial institutions are authorized to be closed to the public in the State of New Mexico.

3. **REPRESENTATIONS AND WARRANTIES.** Guarantor represents and warrants that:

- (a) it is a LIMITED LIABILITY COMPANY duly organized and validly existing under the laws of the State of Delaware and has the limited liability company power and authority to execute, deliver and carry out the terms and provisions of the Guaranty;
- (b) no authorization, approval, consent or order of, or registration or filing with, any court or other governmental body having jurisdiction over Guarantor is required on the part of Guarantor for the execution, delivery and performance of this Guaranty; and
- (c) the execution, delivery and performance of this Guaranty has been duly and validly authorized by all limited liability company proceedings of Guarantor, and this Guaranty constitutes a valid and legally binding agreement of Guarantor, enforceable against

Guarantor in accordance with the terms hereof, except as the enforceability thereof may be limited by the effect of any applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors' rights generally and by general principles of equity.

4. RESERVATION OF CERTAIN DEFENSES; SUBROGATION.

- a) Without limiting Guarantor's own defenses hereunder, Guarantor reserves to itself and may assert as a defense to enforcement of this Guaranty any defense to enforcement of the Agreement that Obligor may assert that is based on Counterparty's breach of the Agreement or the failure of a material condition precedent to Obligor's performance obligations. Notwithstanding the foregoing, Guarantor agrees that it will remain bound upon this Guaranty notwithstanding any defenses that, pursuant to the laws of suretyship or guaranty, would otherwise relieve a guarantor of its obligations. In furtherance and not limitation of the foregoing, Guarantor expressly waives (if any) based upon the bankruptcy, insolvency, dissolution or liquidation of Obligor or any lack of power or authority of Obligor to enter into and/or perform the Agreement or the lack of validity or enforceability of Obligor's obligations under the Agreement. Guarantor further reserves to itself any rights, setoffs or counterclaims that Guarantor may have against Obligor, provided, however, that Guarantor agrees such rights, setoffs or counterclaims may only be asserted against Obligor in an independent action, and not as a defense to Guarantor's obligations under this Guaranty.
- b) The Guarantor shall be subrogated to all rights of the Counterparty against the Obligor in respect of any amounts paid by the Guarantor pursuant to this Guaranty; provided, however, that the Guarantor hereby postpones all rights of subrogation, reimbursement, indemnity and recourse (including, without limitation, any statutory rights of subrogation under Section 509 of the United States Bankruptcy Code, 11 U.S.C. § 509, or otherwise) until such time as all amounts due under the Agreement are paid in full and fully, finally and indefeasibly performed. If (i) the Guarantor shall perform and shall make payment to the Counterparty of all or any part of the Obligations and (ii) all the then outstanding obligations under the Agreement have been paid in full, Counterparty shall, at the Guarantor's request, execute and deliver to the Guarantor documents to evidence the transfer by subrogation to the Guarantor of any interest in the Obligations under the Agreement resulting from such payment by the Guarantor. Notwithstanding the foregoing, if any amount is paid to Guarantor in violation of this provision, Guarantor shall hold such amount for the benefit of, and promptly pay such amount to, Counterparty.
- 5. <u>AMENDMENT OF GUARANTY</u>. No term or provision of this Guaranty shall be amended, modified, altered, waived or supplemented except in a writing signed by Guarantor and Counterparty.
- **WAIVERS AND CONSENTS.** Guarantor agrees that its obligations under this Guaranty are irrevocable, absolute, independent, unconditional and continuing (subject only to the defenses to enforcement of this Guaranty reserved by Guarantor in *Section 4*) and shall not be affected by any circumstance that constitutes a legal or equitable discharge of a guarantor or surety other than payment in full of the Obligations. In furtherance of the foregoing and without limiting the

generality thereof, Guarantor agrees, subject to and in accordance with the other terms and provisions of this Guaranty:

- Except for the Payment Demand as required in <u>Section 2</u> above, Guarantor hereby waives, (a) to the maximum extent permitted by applicable law, (i) notice of acceptance of this Guaranty; (ii) promptness, diligence, presentment, demand, protest, setoff and counterclaim concerning the liabilities of Guarantor; (iii) any right to require that any action or proceeding be brought against Obligor or any other person, or to require that Counterparty seek enforcement of any performance against Obligor or any other person, prior to any action against Guarantor under the terms hereof; (iv) any defense arising by reason of the incapacity, lack of authority or disability of Obligor or based on any illegality, lack of validity or unenforceability of any Obligation; (v) any duty of Counterparty to protect or not impair any security for the Obligations; (vi) any defense based upon an election of remedies by Counterparty; (vii) any defense of waiver, release, res judicata, statute of frauds, fraud (with respect to Obligor), incapacity (with respect to Obligor), minority or usury; and (viii) any other circumstance or any existence of or reliance on any representation by Counterparty that might otherwise constitute a defense available to, or a legal or equitable discharge of, Guarantor or any other guarantor or surety.
- (b) No delay by Counterparty in the exercise of (or failure by Counterparty to exercise) any rights hereunder shall operate as a waiver of such rights, a waiver of any other rights or a release of Guarantor from its obligations hereunder (with the understanding, however, that the foregoing shall not be deemed to constitute a waiver by Guarantor of any rights or defenses to which Guarantor may at any time have pursuant to or in connection with any applicable statutes of limitation).
- (c) Without notice to or the consent of Guarantor, and without impairing or releasing Guarantor's obligations under this Guaranty, Counterparty may: (i) change the manner, place or terms for payment of all or any of the Obligations (including renewals, extensions or other alterations of the Obligations); (ii) release Obligor or any person (other than Guarantor) from liability for payment of all or any of the Obligations; (iii) receive, substitute, surrender, exchange or release any collateral or other security for this Guaranty or any or all of the Obligations and apply any such collateral or security and direct the order or manner of sale thereof, or exercise any other right or remedy that Counterparty may have against any such collateral or security; or (iv) exercise any other rights available to Counterparty under the Agreement, at law or in equity.
- 7. <u>REINSTATEMENT</u>. Guarantor agrees that this Guaranty shall continue to be effective or shall be reinstated, as the case may be, if all or any part of any payment made hereunder or under the Agreement while this Guaranty is in effect is at any time avoided or rescinded or must otherwise be restored or repaid by Counterparty as a result of the bankruptcy or insolvency of Obligor or Guarantor, or similar proceeding, all as though such payments had not been made.
- **8.** <u>TERMINATION</u>. Subject to reinstatement under <u>Section 7</u>, this Guaranty and the Guarantor's obligations hereunder will terminate automatically and immediately upon the earlier of (i) the termination or expiration of the Agreement, and (ii) 11:59:59 Eastern Prevailing Time of [insert date ___] years plus six (6) months after expected COD]; provided, however, Guarantor

agrees that the obligations and liabilities hereunder shall continue in full force and effect with respect to any Obligations under any Agreement entered into on or prior to the date of such termination.

9. NOTICE. Any Payment Demand, notice, request, instruction, correspondence or other document to be given hereunder (herein collectively called "Notice") by Counterparty to Guarantor, or by Guarantor to Counterparty, as applicable, shall be in writing and may be delivered either by (i) U.S. certified mail with postage prepaid and return receipt requested, or (ii) recognized nationwide courier service with delivery receipt requested, in either case to be delivered to the following address (or to such other U.S. address as may be specified via Notice provided by Guarantor or Counterparty, as applicable, to the other in accordance with the requirements of this Section 9:

TO GUARANTOR: *	TO COUNTERPARTY:
Forethought Life Insurance Company, Inc. 250 Greenwich Street New York, NY 10007 Attn: Keith Holst and Stephen H Douglas	[•] <u>Attn</u> :
with a copy to: [Obligor's name] c/o Clenera, LLC Attn: Admin. Dept. P.O. Box 2576 Boise, ID 83701	
[Tel: 713-554-1952 for use in connection with courier deliveries]	[Tel: [•] for use in connection with courier deliveries]

Any Notice given in accordance with this <u>Section 9</u> will (i) if delivered during the recipient's normal business hours on any given Business Day, be deemed received by the designated recipient on such date, and (ii) if not delivered during the recipient's normal business hours on any given Business Day, be deemed received by the designated recipient at the start of the recipient's normal business hours on the next Business Day after such delivery.

10. MISCELLANEOUS.

(a) This Guaranty shall in all respects be governed by, and construed in accordance with, the law of the State of New Mexico, without regard to principles of conflicts of laws thereunder.

- (b) This Guaranty shall be binding upon Guarantor and its successors and permitted assigns and inure to the benefit of and be enforceable by Counterparty and its successors and permitted assigns. Guarantor may not assign this Guaranty in part or in whole without the prior written consent of Counterparty, except that the Guarantor may make such an assignment without such consent if the assignee meets the requirements of a Seller Guarantor as defined in the Agreement and Guarantor's obligations hereunder are expressly assumed in writing by such assignee in a form reasonably acceptable to the Counterparty; provided that such assumption shall be deemed to release the Guarantor from all of its obligations under this Guaranty automatically and without further action by the Guarantor or the Counterparty. Counterparty may not assign this Guaranty in part or in whole except (i) with the prior written consent of Guarantor, or (ii) to an assignee of the Agreement in conjunction with an assignment of the Agreement in its entirety accomplished in accordance with the terms thereof.
- (c) This Guaranty embodies the entire agreement and understanding between Guarantor and Counterparty and supersedes all prior agreements and understandings relating to the subject matter hereof.
- (d) The headings in this Guaranty are for purposes of reference only, and shall not affect the meaning hereof. Words importing the singular number hereunder shall include the plural number and vice versa, and any pronouns used herein shall be deemed to cover all genders. The term "person" as used herein means any individual, corporation, partnership, joint venture, association, joint-stock company, trust, unincorporated association, or government (or any agency or political subdivision thereof).
- (e) Wherever possible, any provision in this Guaranty which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective only to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any one jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.
- (f) Counterparty (by its acceptance of this Guaranty) and Guarantor each hereby irrevocably:
 (i) consents and submits to the exclusive jurisdiction of the United States District Court for the District of New Mexico for the purposes of any suit, action or other proceeding arising out of this Guaranty or the subject matter hereof or any of the transactions contemplated hereby brought by Counterparty, Guarantor or their respective successors or assigns; and (ii) waives (to the fullest extent permitted by applicable law) and agrees not to assert any claim that it is not personally subject to the jurisdiction of the above-named courts, that the suit, action or proceeding is brought in an inconvenient forum, that the venue of the suit, action or proceeding is improper or that this Guaranty or the subject matter hereof may not be enforced in or by such court.
- (g) COUNTERPARTY (BY ITS ACCEPTANCE OF THIS GUARANTY) AND GUARANTOR EACH HEREBY IRREVOCABLY, INTENTIONALLY AND VOLUNTARILY WAIVES THE RIGHT TO TRIAL BY JURY WITH RESPECT TO ANY LEGAL PROCEEDING BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH, THIS GUARANTY, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR

ACTIONS OF ANY PERSON RELATING HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO GUARANTOR'S EXECUTION AND DELIVERY OF THIS GUARANTY.

IN WITNESS WHEREOF, the Guaranto but it is effective as of the Effective Date	r has executed this Guaranty on, 20
	[•] By:
	Name:
	Title:

EXHIBIT K

(to Energy Storage Agreement)

COMMERCIAL OPERATION FORM OF CERTIFICATION

This certification ("Certification") of Commercial Operation is delivered by ("Seller") to Public Service Company of New Mexico ("Buyer") in accordance with the terms of that certain Energy Storage Agreement dated ("Agreement") by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.		
Seller hereby certifies and represents to Buyer the following:		
(1) An Energy Storage System with a designed power output capability of 40 MW for four (4) consecutive hours has been constructed, commissioned and tested and is capable of delivering Discharge Energy on a sustained basis (in accordance with the ESS manufacturer's requirements and the Commissioning Tests);		
Arroyo Solar has obtained all necessary rights under the Interconnection Agreement for the interconnection and delivery of Discharge Energy to the Point of Delivery and is not in breach of the Interconnection Agreement; and		
(3) Seller has obtained all necessary rights under the Shared Facilities Agreement and is not in breach of the Shared Facilities Agreement; and		
the Project has been completed in all material respects (except for Delayed ESS Capacity and punch list items that do not materially and adversely affect the ability of the Project to operate as intended).		
A certified statement of the Licensed Professional Engineer, attached hereto, has been provided as evidence of Commercial Operation of the Project to provide Product and meet, at a minimum, the requirements indicated herein.		
EXECUTED by SELLER this day of, 20		
[•] [Licensed Professional Engineer] Signature: Signature:		
Name: Name:		
Title:		
Date:		
License Number and I PF Stamp:		

Jicarilla 1 Solar PPA

PNM Exhibit TGF-11

Is contained in the following 108 pages.

POWER PURCHASE AGREEMENT—JICARILLA SOLAR 1 FACILITY

by and between

PUBLIC SERVICE COMPANY OF NEW MEXICO

and

JICARILLA SOLAR 1 LLC

Dated as of June 27, 2019

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EXHIBITS

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POWER PURCHASE AGREEMENT—JICARILLA SOLAR 1 FACILITY

This Power Purchase Agreement—Jicarilla Solar 1 Facility, as may be amended from time to time, is entered into this 27th Day of June, 2019 ("Execution Date"), by and between Public Service Company of New Mexico, a New Mexico corporation ("PNM" or "Buyer"), whose principal place of business is 414 Silver Avenue SW, Albuquerque, NM 87102, and Jicarilla Solar 1 LLC ("Seller"), whose principal place of business is 621 W. Randolph, Chicago, IL 60661. Buyer and Seller may be referred to in this PPA individually as a "Party" and collectively as the "Parties."

WHEREAS, Buyer is a public utility that owns and operates electric generation, transmission, and distribution facilities and is subject to the laws of the State of New Mexico and the rules and regulations of the New Mexico Public Regulation Commission; and

WHEREAS, Seller desires to develop, design, construct, own and operate a solar energy electric generating facility with an expected total maximum power output of approximately fifty (50) MW ("**Project**"), as further defined herein and in <u>Exhibit A</u>; and

WHEREAS, Seller desires to generate, sell and deliver to Buyer the Energy generated by the Project and any and all associated or correlative Renewable Energy Certificates and other Environmental Attributes, and Buyer agrees to buy the same from Seller, in accordance with the terms and conditions set forth in this PPA,

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

ARTICLE 1 Definitions and Rules of Interpretation

- 1.1 <u>Definitions</u>. The following terms shall have the meanings set forth herein.
- "Abandonment" means (a) a cessation of work and operations at the Project for more than sixty (60) Days by Seller or Seller's contractors but only if such cessation is not caused by a Force Majeure; or (b) the relinquishment of possession and control of the Project (or any material portion thereof) by Seller, other than a transfer permitted under this PPA, or in accordance with any consent executed by Buyer and a Lender.
 - "AC" means alternating electric current.
 - "Accounting Standards" has the meaning set forth in Section 22.18.
- "Additional Consents" means the approvals, consents, authorizations or other requirements not listed in the definition of Governmental Approvals in this PPA that are required from any Governmental Authority with respect to the Project.
 - "Affiliate" of any named Person or entity means any other person or entity that controls,

is under the control of, or is under common control with, the named entity. For purposes of this definition, the term "control" (including the terms "controls," "under the control of" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person or entity, whether through ownership of fifty percent (50%) or more of the outstanding capital stock or other equity interests of any class of voting securities, by contract, or otherwise.

"After Tax Basis" means, with respect to any payment received or deemed to have been received by a Party, the amount of such payment ("Base Payment") supplemented by a further payment ("Additional Payment") to such Party so that the sum of the Base Payment plus the Additional Payment shall, after deduction of the amount of all Taxes (including any federal, state or local income taxes) required to be paid by such Party in respect of the receipt or accrual of the Base Payment and the Additional Payment (taking into account any current or previous credits or deductions arising from the underlying event giving rise to the Base Payment and the Additional Payment), be equal to the amount required to be received. Such calculations shall be made on the assumption that the recipient is subject to federal income taxation at the highest statutory rate applicable to corporations for the relevant period or periods, and state and local taxes at the highest rates applicable to corporations with respect to such Base Payment and Additional Payment, and shall take into account the deductibility (for federal income tax purposes) of state and local income taxes.

"AGC" stands for "Automatic Generation Control" and means energy management system equipment that automatically adjusts the generation quantity of the Project, including communication circuits to communicate Project operating information to Buyer's representatives on a real-time basis for the purpose of telemetering, supervisory control/data acquisition and voice communications.

"Aggregate Annual Solar Capacity Guarantee Damages Cap" has the meaning set forth in Section 10.9(E).

"Ancillary Services" means operating reserves, regulation, black-start capability, reactive supply, voltage control, frequency response, other products associated with electric generation and Energy that the Project is capable of providing, and all other beneficial outputs of the Project not required for the operation of the Project.

"Annual Performance Test" has the meaning set forth in Section 10.8(B).

"Annual Performance Test Guarantee" has the meaning set forth in Section 10.9(A).

"Annual Performance Test Guarantee Damages" has the meaning set forth in Section 10.9(C).

"Annual Performance Test Guarantee Ratio" has the meaning set forth in Section 10.9(A).

"Annual Performance Test PVSYST Model" has the meaning set forth in Section 10.8(D)(8).

"Annual Solar Capacity Guarantee Damages Cap" has the meaning set forth in Section 10.9(E).

"Applicable Law" means all applicable laws, statutes, treaties, codes, ordinances, regulations, certificates, orders, licenses and permits of any Governmental Authority, now in effect or hereafter enacted, amendments to any of the foregoing, interpretations of any of the foregoing by a Governmental Authority having jurisdiction over this PPA and matters related thereto, the Parties or the Project, and all applicable judicial, administrative, arbitration and regulatory decrees, judgments, injunctions, writs, orders, awards or like actions (including those relating to human health, safety, the natural environment or otherwise).

"Attestation and Bill of Sale" has the meaning set forth in Section 9.1(C).

"Back-Up Metering" has the meaning set forth in Section 5.3(D).

"Balancing Area" or "BA" has the meaning given by NERC in its Glossary of Terms Used in NERC Reliability Standards, as may be amended from time to time.

"Balancing Area Authority" or "BAA" has the meaning given by NERC in its Glossary of Terms Used in NERC Reliability Standards, as may be amended from time to time.

"Bankruptcy Code" means the United States Bankruptcy Code, 11 U.S.C. § 101 et seq., as amended from time to time.

"Business Day" means any calendar Day that is not a Saturday, a Sunday, or a state and/or federal recognized holiday where banks in Albuquerque, New Mexico, are permitted or authorized to close.

"Buver" has the meaning set forth in the Preamble.

"Buyer Costs" means brokerage fees, commissions and other similar third party transaction costs and expenses reasonably incurred and documented by Buyer either in terminating any arrangement pursuant to which it has hedged its obligations under this PPA or entering into new arrangements which replace this PPA; and all reasonable attorneys' fees and expenses incurred by Buyer in connection with the termination of this PPA, to the extent such costs are not already accounted for under Replacement Energy Costs.

"Buyer Curtailment" has the meaning set forth in Section 4.1(B).

"Buyer Economic Curtailment" has the meaning set forth in Section 4.1(B).

"Buyer-Requested Performance Tests" has the meaning set forth in Section 10.10.

"Buyer Termination Payment" means the sum of (a) the difference between (i) the net present value of the Replacement Energy Costs, calculated using a discount factor equal to the latest weighted average cost of capital as reported in the then-most recent NMPRC Rule 510 Annual Reporting filing, and (ii) the Contract Value, plus (b) Buyer Costs. Any such calculations will be based on reasonable assumptions as to future Project operations, differences

between a replacement contract and this PPA, and similar considerations. To the extent the total value of the calculation in subpart (a) above is negative, the valued used in such subpart (a) will be zero. The Buyer Termination Payment does not include consequential incidental, punitive, exemplary or indirect or business interruption damages.

"Capacity Shortfall Damages" has the meaning set forth in Section 3.8.

"Change of Control" means any circumstance in which Ultimate Parent ceases to own, directly or indirectly through one or more intermediate entities, at least fifty percent (50%) of the outstanding equity or voting interests in Seller.

"Code" means the U.S. Internal Revenue Code of 1986, including applicable rules and regulations promulgated thereunder, as amended from time to time.

"Commercial Operation" means that (a) Solar Units with an aggregate capacity of at least ninety-five percent (95%) of the Guaranteed Capacity have been constructed, commissioned, tested and proven capable of delivering Energy on a sustained basis without experiencing any abnormal or unsafe operating conditions on any interconnected system, (b) Seller has obtained all required consents and Governmental Approvals, (c) Seller has obtained all necessary rights under the Interconnection Agreement for the interconnection and delivery of Energy to the Point of Delivery and is not in breach of the Interconnection Agreement, (d) Seller has satisfactorily completed other testing as reasonably directed by Buyer or otherwise in accordance with Interconnection Agreement requirements and industry standards, (e) Seller has obtained required insurance coverage, (f) Buyer has received an officer's certificate from Seller that the Project has been completed in all material respects (except for Delayed Capacity and punch list items that do not materially and adversely affect the ability of the Project to operate as intended), and (g) Seller has delivered to Buyer the Delivery Term Security.

"Commercial Operation Date" means the date on which (a) Buyer accepts from Seller a written notification to Buyer that the Commercial Operation has commenced, (b) Seller provides to Buyer a certification from a Licensed Professional Engineer, substantially in the form attached hereto as Exhibit K, with all fees and costs associated with the Licensed Professional Engineer having been borne by Seller, and (c) Seller shall have delivered the Delivery Term Security to Buyer in accordance with the relevant provisions of Article 19.

"Commercial Operation Year" means a period of twelve (12) consecutive Months. The first Commercial Operation Year shall commence on the Commercial Operation Date and end on the last Day of the Month that is twelve (12) full Months after the Commercial Operation Date, and each subsequent Commercial Operation Year shall be each twelve (12) Month period thereafter.

"Commissioning Performance Test" has the meaning set forth in Section 10.8(A).

"Confidential Information" has the meaning set forth in Section 22.14(C).

"Contract Value" means the present values of the Energy Output, for each Commercial Operation Year (or portion thereof) in the then remaining term, determined without reference to the early termination, of (a) the quantity of Energy and RECs expected to be produced during

such Commercial Operation Year (or portion thereof) times (b) the Energy Output Payment Rate for such Commercial Operation Year. All elements of the foregoing calculations shall be determined in a commercially reasonable manner. The present values of the monthly payments from their payment dates in the foregoing calculations shall be determined using a discount factor equal to the latest weighted average cost of capital as reported in the then-most recent NMPRC Rule 510 Annual Reporting filing.

"Day" means a calendar day and includes Saturdays, Sundays and holidays; 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.

"DC" means direct current.

"Default Rate" has the meaning set forth in Section 9.4.

"Defaulting Party" means the Party with respect to which an Event of Default under Article 12 has occurred.

"Delay Damages" has the meaning set forth in Section 3.7.

"Delayed Capacity" has the meaning set forth in Section 3.7.

"Delivery Term" has the meaning set forth in Section 7.1.

"Disclosing Party" has the meaning set forth in Section 22.14(A).

"Dispute Notice" has the meaning set forth in Section 13.8(A).

"Disputing Party" has the meaning set forth in Section 9.5(A).

"Dollars" means the lawful currency of the United States of America.

"Downgrade Event" shall mean that the long-term credit rating of a Person's long-term senior unsecured debt is not "Baa2" or higher by Moody's or "BBB" or higher by S&P.

"Early Termination Date" has the meaning set forth in Section 12.4.

"Electric Interconnection Point" means the physical point at which electrical interconnection is made between the Project and the Transmission Provider's Transmission System.

"Electric Metering Device(s)" means all metering and data processing equipment used to measure, record, or transmit data relating to the Energy Output generated by the Project. Electric Metering Devices include the metering current transformers and the metering voltage transformers.

"Emergency Condition" means (a) a condition or situation that presents an imminent physical threat of danger to life, health or property, and/or could reasonably be expected in the opinion of the Transmission Provider to cause a significant disruption to the Transmission

Provider's Transmission System or otherwise be required in accordance with the requirements of the Peak Reliability Organization and/or WECC, or (b) any system condition not consistent with Prudent Utility Practices; provided that an Emergency Condition shall not include any emergency caused by Seller's breach of its Interconnection Agreement with the Transmission Provider.

"Energy" means three-phase, 60-cycle alternating current electric energy, expressed in units of kWh or MWh, generated by the Project and delivered to Buyer at a nominal voltage at the Point of Delivery, as measured by Electric Metering Devices, net of auxiliary loads, station electrical uses and appropriate line losses.

"Energy Output" means Metered Output, Environmental Attributes (including RECs) and Ancillary Services generated by the Project.

"Energy Output Payment Rate" means the price to be paid by Buyer to Seller for the Energy Output, as set forth in this PPA.

"Energy Shortfall" has the meaning set forth in Section 10.9(B).

"Environmental Attributes" means all attributes, aspects, characteristics, claims, credits, benefits, reductions, offsets or allowances of an environmental or other nature that are created or otherwise arise from the Project's generation of electricity from renewable energy resources in contrast with the generation of electricity using nuclear or fossil fuels or other traditional resources. Forms of such attributes include any and all environmental air quality credits, green credits, including carbon credits, emissions reduction credits, certificates, tags, offsets, allowances, or similar products or rights, howsoever entitled, (i) resulting from the avoidance of the emission of any gas, chemical, or other substance, including mercury, nitrogen oxide, sulfur dioxide, carbon dioxide, carbon monoxide, particulate matter or similar pollutants or contaminants of air, water, or soil, gas, chemical, or other substance, and (ii) attributable to the generation, purchase, sale or use of Energy. Environmental Attributes include those currently existing or arising during the Term under local, state, regional, federal, or international legislation or regulation relevant to the avoidance of any emission described above under any governmental, regulatory or voluntary program, including the United Nations Framework Convention on Climate Change and related Kyoto Protocol or other programs, laws or regulations. Environmental Attributes include the reporting rights related to any such attributes, aspects, characteristics, claims, credits, benefits, reductions, offsets or allowances, including the right of a Person to report the ownership thereof in compliance with federal or state law, if applicable, or otherwise to a federal or state agency or any other Person. Environmental Attributes specifically exclude (i) Tax Benefits, (ii) depreciation deductions and depreciation benefits, and other tax benefits arising from ownership or operation of the Project; and (iii) any Energy, reliability or other power attributes from the Project.

"Environmental Contamination" means the introduction or presence of Hazardous Materials at such levels, quantities or location, or of such form or character, as to constitute a violation of federal, state or local laws or regulations, and as to present a material risk under federal, state or local laws and regulations that a Site will not be available or usable, whether in whole or in part, for the purposes contemplated by this PPA.

"Event of Default" means an Event of Default of Seller as set forth in Section 12.1 or an Event of Default of Buyer as set forth in Section 12.2.

"Execution Date" has the meaning set forth in the Preamble.

"Expected Commercial Operation Date" has the meaning set forth in Section 3.1.

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

"Force Majeure Event" has the meaning set forth in Section 14.1.

"GAAP" has the meaning set forth in Section 22.18.

"Governmental Approval" means any authorization, consent, permission, approval (including an NMPRC Approval), license, ruling, permit, exemption, variance, order, judgment, instruction, condition, direction, directive, decree, declaration of, or regulation by, any Governmental Authority relating to the construction, development, ownership, occupation, startup, testing, operation or maintenance of the Project or to the execution, delivery or performance of this PPA or the procurement pursuant to this PPA of renewable energy and Renewable Energy Certificates and shall also mean, where and as applicable and the context so dictates, any and all authorization, consent, permission, approval, license, ruling, permit, exemption, variance, order, judgment, instruction, condition, direction, directive, decree, declaration of, or regulation with regard to any, Non-Governmental Compliance Obligations.

"Governmental Authority" means any federal, tribal, state, local or municipal governmental body; any governmental, quasi-governmental, regulatory or administrative agency, commission, body or other authority exercising or entitled to exercise any administrative, executive, judicial, legislative, policy, regulatory or taxing authority or power; or any court or governmental tribunal.

"Governmental Charges" means any Taxes, charges or costs that are assessed or levied by any Governmental Authority or other Person, including local, state or federal regulatory or taxing authorities that would affect the sale and purchase of Energy Output contemplated by this PPA, either directly or indirectly.

"Guaranteed Capacity" has the meaning set forth in Section 3.1.

"Guaranteed Start Date" has the meaning set forth in Section 3.1.

"Hazardous Materials" means any substance, material, gas, or particulate matter that is regulated by any local Governmental Authority, any applicable state, or the United States of America as an environmental pollutant or as dangerous to public health, public welfare, or the natural environment including, without limitation, protection of non-human forms of life, land, water, groundwater, and air, including any material or substance that is (i) defined as "toxic," "polluting," "hazardous waste," "hazardous material," "hazardous substance," "extremely hazardous waste," "solid waste" or "restricted hazardous waste" under any provision of local, state, or federal law; (ii) petroleum, including any fraction, derivative or additive; (iii) asbestos; (iv) polychlorinated biphenyls; (v) radioactive material; (vi) designated as a "hazardous

substance" pursuant to the Clean Water Act, 33 U.S.C. § 1251 et seq.; (vii) defined as a "hazardous waste" pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq.; (viii) defined as a "hazardous substance" pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq.; (ix) defined as a "chemical substance" under the Toxic Substances Control Act, 15 U.S.C. § 2601 et seq.; or (x) defined as a "pesticide" under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq.

"House Energy" has the meaning set forth in Section 1.4.

"Installed Capacity" means, as of a given point in time, the aggregate nameplate capacity of all Solar Units installed and commissioned at the Project.

"Interconnection Agreement" means the separate agreement between Seller and the Transmission Provider for interconnection of the Project to the Transmission Provider's Transmission System, as such agreement may be amended from time to time.

"Interconnection Facilities" means the Transmission Provider's Interconnection Facilities and Seller's Interconnection Facilities.

"ITC(s)" means the investment tax credits established pursuant to Section 48 of the Internal Revenue Code, as such law may be amended or superseded.

"Issuer Minimum Requirements" has the meaning set forth in Section 19.2.

"kW" means one or more kilowatts AC of electricity, as the context requires.

"kWh" means kilowatt hour AC.

"Lender(s)" means any and all Persons, including Affiliates of Seller: (a) lending money or extending credit (including any financing lease, monetization of tax benefits, back-leverage or paygo financing, Tax Equity Financing or credit derivative arrangement) to Seller or to an Affiliate of Seller: (i) for the development, construction, interim or permanent financing or refinancing of the Project; (ii) for working capital or other ordinary business requirements of the Project (including the maintenance, repair, replacement or improvement of the Project); (iii) for any development financing, bridge financing, credit support, credit enhancement or interest rate protection in connection with the Project; (iv) for any capital improvement or replacement related to the Project; or (v) for the purchase of the Project and the related rights from Seller; (b) participating as a Tax Equity Investor in the Project; or (c) acting as any lessor under a lease finance arrangement relating to the Project.

"Letter of Credit" means an irrevocable, unconditional, transferable standby letter of credit for the benefit of the receiving Party, issued by an entity meeting the Issuer Minimum Requirements.

"Licensed Professional Engineer" means an independent, professional engineer reasonably acceptable to Buyer, licensed in the State of New Mexico, and otherwise qualified to perform the work required hereunder.

- "Local Provider" has the meaning set forth in Section 1.4.
- "Losses" has the meaning set forth in Section 20.1(A).
- "Metered Output" means the Energy made available from the Project at the Point of Delivery, as measured by the Electric Metering Devices.
 - "Model Rated Power" has the meaning set forth in Section 10.8(D)(6).
 - "Month" means a calendar month.
- "Monthly Billing Period" means the period during any particular Month in which Energy Output has been generated by Seller for Buyer and delivered to the Point of Delivery for sale to Buyer, whether or not occurring prior to or subsequent to the Commercial Operation Date.
 - "Moody's" means Moody's Investor Services, Inc. and any successor thereto.
- "Mountain Prevailing Time" or "MPT" means the time in effect in the Mountain Time Zone of the United States of America, whether Mountain Standard Time or Mountain Daylight Saving Time.
 - "MW" means megawatt or one thousand (1,000) kW AC.
 - "MWh" means megawatt hours AC.
- "NERC" means the North American Electric Reliability Corporation or any successor organization.
- "NMPRC" means the New Mexico Public Regulation Commission or any successor agency.
 - "NMPRC Approval" has the meaning set forth in Section 17.3(B).
- "NMPTCs" means any state or local production tax credit or investment tax credit determined by reference to renewable electric energy produced from renewable energy resources in effect in the state of New Mexico.
- "Non-Defaulting Party" means the Party other than the Defaulting Party with respect to an Event of Default that has occurred under Article 12.
- "Non-Governmental Compliance Obligations" means all necessary filings, applications, accreditations, registrations and/or other requirements including deposits, fees, accounts, and/or other obligations with WREGIS, WECC, and all other applicable agencies, self-regulatory organizations and industry committees to which the Party is required to have membership and/or submit to jurisdiction in the performance of this PPA.
 - "O&M Records" has the meaning set forth in Section 13.4(A).

"OATT" means Open Access Transmission Tariff.

"Operating Instruction" has the meaning given by NERC in its Glossary of Terms Used in NERC Reliability Standards, as may be amended from time to time.

"Operating Parameters" has the meaning set forth in Section 10.4(A).

"Operating Procedures" means those procedures, if any, developed pursuant to Section 10.5.

"Operating Records" means all agreements associated with the Project, operating logs, blueprints for construction, operating manuals, all warranties on equipment, and all documents, including but not limited to supply contracts, contracts for the manufacture and installation of the generating equipment and generator step-up transformer, material engineering drawings and construction contracts, and environmental permits, plans, and studies, whether in printed or electronic format, that Seller uses or maintains for the operation of the Project.

"Outage Notice" has the meaning set forth in Section 7.5(A).

"Party" or "Parties" has the meaning set forth in the Preamble and includes any permitted assignee of a Party.

"Peak Reliability Organization" means the entity that fulfills the duties of the Reliability Coordinator, as defined by NERC, and as delegated by WECC, for its Reliability Coordinator Area in the Western Interconnection.

"Performance Test Ratio" has the meaning set forth in Section 10.8(D)(4).

"Performance Test Report" has the meaning set forth in Section 10.8(G).

"Performance Tests" has the meaning set forth in Section 10.8.

"Person" means any natural person, corporation, limited liability company, general partnership, limited partnership, proprietorship, other business organization, trust, union, association or Governmental Authority.

"PNM" has the meaning set forth in the Preamble.

"Point of Delivery" means the electric system point within WECC Path 48 at which Seller makes available to Buyer and delivers to Buyer the Energy Output being provided by Seller to Buyer under this PPA. The Point of Delivery shall be specified in Section 3.1 and Exhibit B to this PPA.

"PPA" or "Power Purchase Agreement" means this Power Purchase Agreement between Seller and Buyer, including the Exhibits and Schedules attached hereto, as the same may be amended from time to time in accordance with the provisions hereof.

"Project" means Seller's solar energy generation facility with a nameplate capacity of

fifty (50) MW located in Rio Arriba County, New Mexico which will produce the Energy Output made available to Buyer under this PPA, including one or more of Seller's Solar Units and Seller's Interconnection Facilities, as identified and described in Article 3 and Exhibit A to this PPA, including all of the following (and any additions, modifications or replacements), the purpose of which is to produce and/or store electricity and deliver such electricity to the Electric Interconnection Point: Seller's equipment, buildings, all of the conversion and/or generation facilities, including the Solar Units, step-up transformers, output breakers, facilities necessary to connect to the Electric Interconnection Point, protective and associated equipment, improvements, and other tangible assets, contract rights, easements, rights of way, surface use agreements and other interests or rights in real estate reasonably necessary for the construction, operation, and maintenance of the electric generating facilities that produce the Energy Output subject to this PPA.

"Project Manager" has the meaning set forth in Section 10.1(D).

"Projected Schedule" has the meaning set forth in Section 7.4(A).

"Promotional Materials" has the meaning set forth in Section 22.15.

"Prudent Utility Practice(s)" means the practices, methods, and acts (including the practices, methods, and acts engaged in or approved by a significant portion of the electric power generation industry, WECC and/or NERC) for similar facilities that, at a particular time, in the exercise of reasonable judgment in light of the facts known or that should reasonably have been known at the time a decision was made, would have been expected to accomplish the desired result in a manner consistent with law, regulation, permits, codes, standards, reliability, safety, environmental protection, economy, and expedition. Prudent Utility Practice(s) are not necessarily defined as the optimal standard practice method or act to the exclusion of others, but rather refer to a range of actions reasonable under the circumstances. Subject to the foregoing, with respect to the Project, Prudent Utility Practice(s) includes taking reasonable steps to ensure that:

- (A) equipment, materials, resources, and supplies, including spare parts inventories, are available to meet the Project's needs;
- (B) sufficient operating personnel are available at all times and are adequately experienced and trained and licensed as necessary to operate the Project properly, efficiently, and in coordination with Buyer and are capable of responding to reasonably foreseeable Emergency Conditions whether caused by events on or off the Sites;
- (C) preventive, routine, and non-routine maintenance and repairs are performed on a basis that ensures reliable, long-term and safe operation, and are performed by knowledgeable, trained, and experienced personnel utilizing proper equipment and tools;
- (D) appropriate monitoring and testing are performed to ensure equipment is functioning as designed;
- (E) equipment is not operated in a reckless manner, or in a manner unsafe to workers, the general public, or the interconnected system, or contrary to environmental laws, permits or

regulations or without regard to defined limitations, such as flood conditions, safety inspection requirements, operating voltage, current, volt-ampere reactive ("VAr") loading, frequency, rotational speed, polarity, synchronization, and/or control system limits;

- (F) equipment and components meet or exceed the standard of durability that is generally used for electric generation operations in the region and will function properly over the full range of ambient temperature and weather conditions reasonably expected to occur at the Sites and under both normal and Emergency Conditions; and
- (G) equipment, components, and processes are appropriately permitted with any local, state, or federal Governmental Authority and are operated and maintained in accordance with applicable permit and regulatory requirements.

"Qualified Operator" is (a) a Person that has at least three (3) years' experience with operating at least three hundred (300) MW of solar generation, or (b) any other Person reasonably acceptable to Buyer.

"RC" has the meaning set forth in Section 10.8(D)(1).

"Receiving Party" has the meaning set forth in Section 22.14(A).

"Receiving Party's Representatives" has the meaning set forth in Section 22.14(B).

"Recording" has the meaning set forth in Section 22.19.

"Regulatory End Date" has the meaning set forth in Section 17.3(B)(3).

"Reliability Curtailment" means any curtailment of the Project by the BAA or Transmission Provider due to any of the following reasons: (a) the Transmission Provider and/or BAA directs a general curtailment, reduction or redispatch of generation in the area for any reason other than any economic purpose or to accomplish least cost dispatch; (b) the BAA curtails or otherwise reduces the Metered Output in order to meet NERC/WECC standards criteria in regard to compliance obligations to the PNM Balancing Area and/or Transmission Provider's Transmission System to operate within system limitations or other operating areas as directed by the Peak Reliability Organization; or (c) for safety or equipment failure situations. For the avoidance of doubt, a Reliability Curtailment includes curtailments associated with an oversupply of generation on Buyer or the Transmission Provider's Transmission System during a period of time when generating facilities connected to the Transmission Provider's Transmission System are interrupted or reduced in an equitable and non-discriminatory manner, but shall not include any curtailment for any economic purpose or to accomplish least cost dispatch, which curtailment shall be deemed a Buyer Economic Curtailment. If any of the conditions set forth in this definition subparts (a) through (c) are applicable, Buyer shall be rebuttably presumed not to be curtailing for economic reasons. Buyer, upon reasonable notice, will provide reasonable documentation relating to any Reliability Curtailments to confirm compliance with this definition.

"Renewable Energy Certificate" or "REC" means a document evidencing that the amount of renewable energy shown on the document has been generated from the Project and

certified as such by WREGIS. For purposes of this PPA and registration with WREGIS, RECs are accumulated on a MWh basis with one (1) REC for each MWh of renewable energy generated. RECs include all Environmental Attributes associated with the generated energy. "RECs" excludes (i) any local, state or federal investment tax credit, production tax credit, depreciation deductions or other tax benefit to Seller based on ownership of, or Energy production from, any portion of the Project, including the Tax Benefits, (ii) depreciation and other tax benefits arising from ownership or operation of the Project unrelated to its status as a generator of renewable or environmentally clean energy, and (iii) any Energy, reliability or other power attributes from the Project.

"Replacement Energy Costs" means the actual costs incurred by Buyer following an Event of Default by Seller that are reasonable and necessary to replace Energy Output (which includes RECs, Environmental Attributes and Ancillary Services as defined herein) which Seller, in accordance with this PPA, would have generated at the Project and delivered to Buyer, but failed to so provide pursuant to this PPA. Buyer shall not have to enter into a replacement contract to establish the Replacement Energy Costs. If Buyer does not enter into a replacement contract, then the Replacement Energy Costs will be based on the market price for Energy, Environmental Attributes (including RECs) and Ancillary Services delivered to Buyer's system, as reasonably determined by Buyer. In calculating such amounts, Buyer will comply with the requirements set forth in Section 12.4(A) in establishing the market price. Replacement Energy Costs for an Event of Default also include (i) the reasonable amounts paid or incurred by Buyer for transmission or distribution costs, (ii) the reasonable amounts paid or incurred by Buyer for the purchase of RECs associated with the replacement Energy Output, and (iii) Buyer's expenses, including reasonable attorneys' fees, suffered as a result of Seller's failure to perform under this PPA.

"Requested Actions" has the meaning set forth in Section 17.3(B).

"S&P" means Standard & Poor's Corporation and any successor thereto.

"Scheduled Maintenance Outage" means a time during which a Solar Unit is shut down or its output reduced to undergo scheduled maintenance in accordance with this PPA, or as otherwise agreed by Seller and Buyer.

"SEC" or United States Securities and Exchange Commission has the meaning set forth in Section 22.18.

"Security" means Development Security or Delivery Term Security, as applicable.

"Seller" has the meaning set forth in the Preamble.

"Seller Curtailment" has the meaning set forth in Section 4.2.

"Seller Excused Hours" means those hours during which Seller is unable to schedule or deliver Energy to Buyer as a result of: (a) a Scheduled Maintenance Outage, (b) a Transmission Provider Curtailment, (c) a Reliability Curtailment, (d) a Buyer Curtailment, (e) a Force Majeure Event, or (f) any breach or failure by Buyer to perform any of its obligations under this PPA (other than due to a breach by Seller of its obligations under this PPA).

"Seller Forced Outage" means an unplanned reduction, interruption or suspension of all or a portion of Energy deliveries from the Project to the Electric Interconnection Point in an amount of at least five (5) MWs not associated with Seller Excused Hours.

"Seller Guarantor" means an entity with a long-term senior unsecured debt credit rating of "Baa2" or higher by Moody's and "BBB" or higher by S&P that has made a Seller Guaranty for the benefit of Buyer.

"Seller Guaranty" means a guaranty in substantially the form attached as Exhibit J.

"Seller Permitted Transfer" means any of the following: (a) a Change of Control of Seller's Ultimate Parent or a Change of Control of Seller where Seller's Ultimate Parent is the same entity after such Change of Control; (b) the direct or indirect transfer of shares of, or equity interests in, Seller to a Tax Equity Investor; or (c) a transfer of: (i) all or substantially all of the assets of Hecate Energy NAF LLC ("Hecate") or Seller's Ultimate Parent in a single transaction; (ii) all or substantially all of Hecate's or Seller's Ultimate Parent's renewable energy generation portfolio in a single transaction; or (iii) all or substantially all of Hecate's or Seller's Ultimate Parent's solar generation portfolio in a single transaction; provided, that in the case of each of (b) or (c), following such transfer (A) the entity that operates the Project is (or contracts with) a Qualified Operator, and (B) that such transfer does not have a material adverse effect on the Seller's credit characteristics and Seller maintains the applicable Seller Security requirements.

"Seller Termination Payment" means the sum of (a) the difference between (i) the Contract Value and (ii) the net present value of the payments that can reasonably be expected to be applicable in the market under a replacement contract covering the same products (i.e., Energy Output) calculated using a discount factor equal to the latest weighted average cost of capital as reported in the then-most recent NMPRC Rule 510 Annual Reporting filing, plus (b) Seller's Costs. Any such calculations will be based on reasonable assumptions as to future Project operations, differences between a replacement contract and this PPA, and similar considerations. Seller shall not have to enter into a replacement contract to establish the foregoing calculations. The Seller Termination Payment does not include consequential incidental, punitive, exemplary or indirect or business interruption damages. To the extent the total value of the calculation in subpart (a) above is negative, the resulting value to be used in subpart (a) will be zero.

"Seller's Costs" means brokerage fees, commissions and other similar third-party transaction costs and expenses reasonably incurred and documented by Seller either in terminating any arrangement pursuant to which it has hedged its obligations under this PPA or in entering into new arrangements which replace this PPA; and all reasonable attorneys' fees and expenses incurred by Seller in connection with the termination of this PPA.

"Seller's Financial Statements" has the meaning set forth in Section 22.18(B).

"Seller's Interconnection Facilities" means the equipment between the high side disconnect of the step-up transformer and the Electric Interconnection Point, including all related relaying protection and physical structures as well as all transmission facilities required to access

the Transmission Provider's Transmission System at the Electric Interconnection Point, along with any easements, rights of way, surface use agreements and other interests or rights in real estate reasonably necessary for the construction, operation and maintenance of such facilities. On the low side of the step-up transformer, "Seller's Interconnection Facilities" includes Seller's metering, relays, and load control equipment as provided for in the Interconnection Agreement. This equipment is located within the Project and is conceptually depicted in Exhibit B to this PPA.

"Shortfall Factor" has the meaning set forth in Section 10.9(B).

"Site" means the parcel or parcels of real property on which the Project will be constructed and located, including any easements, rights of way, surface use agreements and other interests or rights in real estate reasonably necessary for the construction, operation and maintenance of the Project. The Site for the Project is more specifically described in Section 3.3 and Exhibit C to this PPA. For the avoidance of doubt, this PPA is Site specific.

"Solar Unit(s)" means the photovoltaic arrays, tracking devices, inverters, transformers, and other equipment necessary for the Project to collect sunlight at the Site and convert it into electricity. One Solar Unit includes all equipment associated with each inverter.

"System Control Center" or "SCC" means Buyer's representative(s) responsible for dispatch of generating units, including the Solar Units.

"Tax Benefits" means (a) federal and state investment and/or production tax credits (including ITCs but excluding NMPTCs), and any other tax credits which are or will be generated by the Project and (b) any cash payments or outright grants of money relating in any way to such tax credits or the Project.

"Tax Equity Financing" means, with respect to Seller or an upstream equity owner of Seller, any transaction or series of transactions (including, without limitation, any transaction of the type described in this definition that utilizes a lease or inverted lease structure) resulting in a portion of the membership interests in Seller or an upstream equity owner, as applicable, being issued or otherwise provided to another Person (a "Tax Equity Investor") in exchange for capital contributions to Seller or such upstream equity owner, as applicable, or the Project being sold to and leased by Seller from a Tax Equity Investor, in either case for the purpose of raising a portion of the funds needed to finance the construction of the Project by monetizing the Tax credits, depreciation and other Tax Benefits associated with the Project.

"Tax Equity Investor" has the meaning set forth in the definition of Tax Equity Financing.

"Taxes" means all taxes, fees, levies, licenses or charges imposed by any Governmental Authority, other than taxes, levies, licenses or charges based upon net income or net worth as set forth in more detail in Section 9.7.

"Term" means the period during which this PPA shall remain in full force and effect, and which is further defined in Article 2.

"Termination Payment" means the Buyer Termination Payment or the Seller Termination Payment, as applicable.

"Test Energy" means any and all Energy Output generated by the Project and delivered to Buyer during the Test Period.

"Test Period" means the period commencing on the day the Project is energized, operates in parallel with the Transmission Provider's Transmission System and delivers metered Energy to the Point of Delivery and ending on the Commercial Operation Date; provided, however, in no event shall the Test Period be longer than ninety (90) Days.

"Test Rated Power" has the meaning set forth in Section 10.8(D)(5).

- "TP Forced Outage" means an unplanned component failure or other condition that requires all or a substantial portion of the Transmission Provider's Interconnection Facilities or Transmission Provider's Transmission System to be removed from service immediately.
- "TP Maintenance Outage" means the removal of all or a substantial portion of the Transmission Provider's Interconnection Facilities or Transmission Provider's Transmission System from service to perform work on specific components that can be deferred, but that nevertheless requires all or a substantial portion of the Transmission Provider's Interconnection Facilities or Transmission Provider's Transmission System to be removed from service before the next TP Planned Outage. TP Maintenance Outages may occur anytime during the Commercial Operation Year, have flexible start dates, and may or may not have predetermined durations.
- "TP Planned Outage" means the removal of the Transmission Provider's Interconnection Facilities or Transmission Provider's Transmission System from service to perform repairs that are scheduled in advance and have a predetermined duration.
- "TP Reliability Curtailment" means any curtailment by the Transmission Provider in accordance with WECC operating policies and criteria and the OATT of Energy Output deliveries for reliability reasons but does not include any Buyer Curtailment.
- "Transmission Provider" means Buyer, Buyer's designated agent, or a third party acting in its capacity owning, controlling, or operating facilities used for the transmission of electric energy in interstate commerce and providing transmission service under the OATT and any successor entity, if applicable.
- "Transmission Provider Curtailment" means curtailments of Energy from the Project directed by the Transmission Provider resulting from (a) a TP Forced Outage that is not the result of a Force Majeure Event, (b) a TP Maintenance Outage, (c) a TP Planned Outage, (d) a TP Reliability Curtailment, or (e) an Emergency Condition.
- "Transmission Provider's Interconnection Facilities" means the facilities necessary to connect the Transmission Provider's Transmission System to the Electric Interconnection Point, including breakers, bus work, bus relays, and associated equipment installed by the Transmission Provider for the direct purpose of physically and electrically interconnecting the

Project, along with any easements, rights of way, surface use agreements and other interests or rights in real estate reasonably necessary for the construction, operation and maintenance of such facilities. Arrangements for the installation and operation of the Transmission Provider's Interconnection Facilities shall be governed by the Interconnection Agreement.

"Transmission Provider's Transmission System" means the contiguously interconnected electric transmission and sub-transmission facilities over which the Transmission Provider has rights (by ownership or contract) to provide bulk transmission of capacity and energy from the Electric Interconnection Point.

"Ultimate Parent" means Hecate Energy NAF LLC.

"Weather Stations" has the meaning set forth in Section 10.11(A).

"WECC" means the Western Electricity Coordinating Council, a NERC regional electric reliability council, or any successor organization.

"WREGIS" means the Western Renewable Energy Generation Information System or any successor system.

"WREGIS Certificates" has the same meaning as "Certificate" as defined by WREGIS in the WREGIS Operating Rules.

"WREGIS Operating Rules" means the rules that describe the operations of WREGIS, as may be amended, which are currently available at www.wregis.org.

"WREGIS Qualified Reporting Entity" as defined by WREGIS Operating Rules means an individual or organization providing renewable generation data to create WREGIS certificates that has met the established WREGIS guidelines provided in WREGIS Operating Rules.

1.2 Rules of Construction.

- (A) The masculine shall include the feminine and neuter.
- (B) References to "Articles," "Sections," "Exhibits" or "Schedules" shall be to articles, sections, exhibits, or schedules of this PPA unless otherwise stated.
- (C) The Exhibits and Schedules attached hereto are incorporated in and are intended to be a part of this PPA; *provided*, that in the event of a conflict between the terms of any Exhibit or Schedule and the terms of this PPA, the terms of this PPA shall take precedence.
- (D) This PPA was negotiated and prepared by both Parties with the advice and participation of counsel. The Parties have agreed to the wording of this PPA and none of the provisions hereof shall be construed against one Party on the ground that such Party is the author of this PPA or any part hereof.
 - (E) The Parties shall act reasonably and in accordance with the principles of

good faith and fair dealing in the performance of this PPA. Unless expressly provided otherwise in this PPA, (i) where the PPA requires the consent, approval, acceptance, agreement or similar action by a Party, such consent, approval, acceptance, agreement or similar action shall not be unreasonably withheld, conditioned or delayed, and (ii) wherever the PPA gives a Party a right to determine, require, specify or take similar action with respect to a matter, such determination, requirement, specification or similar action shall be reasonable.

- (F) Use of the words "include" or "including" or similar words shall be interpreted as "including but not limited to" or "including, without limitation."
- (G) Use of the words "tax" or "taxes" shall be interpreted to include taxes, fees, surcharges, and the like.

1.3 <u>Interpretation with Interconnection Agreement.</u>

Each Party conducts its operations in a manner intended to comply with FERC Standards of Conduct for Transmission Providers, requiring the separation of its transmission and merchant functions.

- (A) The Parties acknowledge and agree that the Interconnection Agreement shall be a separate and free-standing contract and that the terms of this PPA are not binding upon the Transmission Provider.
- (B) Notwithstanding any other provision in this PPA, nothing in the Interconnection Agreement shall alter or modify Seller's or Buyer's rights, duties and obligations under this PPA. This PPA shall not be construed to create any rights between Seller and the Transmission Provider.
- (C) Seller expressly recognizes that, for purposes of this PPA, the Transmission Provider shall be deemed to be a separate entity and separate contracting party whether or not the Interconnection Agreement is entered into with Buyer, an Affiliate of Buyer, or a third party entity.
- 1.4 <u>Interpretation of Arrangements for Electric Supply to the Project.</u> This PPA does not provide for the supply of retail electric power or natural gas to the Project, for any purpose ("**House Energy**"). Seller shall contract with the local utility in whose retail service territory the Project is located ("**Local Provider**") for the supply of House Energy.
- (A) Seller's arrangements for the supply of House Energy to the Project shall be separate and free-standing arrangements. The terms of this PPA are not binding upon the Local Provider. For purposes of this PPA, the Local Provider shall be deemed to be a separate entity and separate contracting party, whether or not the Local Provider is Buyer or an Affiliate of Buyer.
- (B) Notwithstanding any other provision in this PPA, nothing in Seller's arrangements for the supply of House Energy to the Project shall alter or modify Seller's or Buyer's rights, duties and obligations under this PPA. This PPA shall not be construed to create any rights between Seller and Buyer in Buyer's capacity as the Local Provider.

(C) Seller shall have the right to consume energy concurrently generated by the Project for House Energy and to co-locate additional facilities designed to supply House Energy; provided, however, that excess energy produced from such facility shall not be delivered by Seller to Buyer under this PPA. House Energy shall be real time measured by either (i) separate Electric Metering Devices for Metered Output and House Energy or (ii) a single Electric Metering Device that separately measures Metered Output and House Energy. Each meter will have bi-directional kWh pulse accumulators and will be recorded separately for delivered and received power.

ARTICLE 2 Term and Termination

2.1 Execution Date and Term. This PPA shall become effective on the Execution Date, subject to conditions precedent set forth herein, and shall end at 11:59 p.m. Mountain Prevailing Time on the date that is the last Day of the twentieth (20th) Commercial Operation Year, subject to the early termination provisions set forth herein. Applicable provisions of this PPA shall continue in effect after termination, including early termination, to the extent necessary to enforce or complete the duties, obligations or responsibilities of the Parties arising prior to termination.

ARTICLE 3 Project Description

3.1 <u>Commercial Terms.</u> The following commercial terms apply to the transaction contemplated by this PPA, each term as more fully set forth in this PPA:

COMMERCIAL TERMS

Buyer: Public Service Company of New Mexico	Seller: Jicarilla Solar 1 LLC	
Project: Jicarilla Solar 1		
Point of Delivery: The point within WECC Path 48 where Seller makes available to Buyer and delivers to Buyer the Energy Output being provided under this PPA.		
Contract Term: 20 Commercial Operation Years	Guaranteed Capacity (MWs): 50 MW _{AC}	
Product Type: Bundled Energy, Ancillary Services and RECs	Energy Output Payment Rate: \$19.73/MWh	
Day(s) of week: Monday through Sunday, including NERC holidays	Hours: Hour Ending 0100 – Hour Ending 2400, Monday through Sunday Mountain Prevailing Time ("MPT")	

Guaranteed Start Date: One hundred eighty (180) Days after the Expected Commercial Operation Date

Expected Commercial Operation Date: November 30, 2021, subject to extensions as set forth in Section 3.6

- 3.2 <u>Project. Exhibit A</u> provides a detailed description of the Project, including identification of the major equipment and components that will make up the Project. Seller shall provide advance written notice to Buyer at the earliest practicable time of any proposed material changes in the Project.
- 3.3 <u>Location</u>. A scaled map that identifies the Site, the location of the Electric Interconnection Point, the location of the Point of Delivery and the location of the Interconnection Facilities is included in Exhibit A to this PPA. Exhibit A also contains a preliminary indication of the location of the Solar Units at the Site. Seller will provide notice to Buyer of the final proposed location of the Solar Units at the Site no later than thirty (30) Days prior to the initial Site construction mobilization and commencement of civil infrastructure work by Seller's contractors at the Site. Seller shall provide advance written notice to Buyer at the earliest practicable time of any other proposed location changes.
- 3.4 <u>General Design of the Project</u>. Seller shall construct the Project in accordance with Prudent Utility Practices and in accordance with the terms and conditions of the Interconnection Agreement. Seller shall maintain the Project according to Prudent Utility Practice(s), the Agreement and the Interconnection Agreement. The Project shall at all times:
- (A) have the required panel space and 125V DC battery-supplied voltage to accommodate metering, generator telemetering equipment and communications equipment;
 - (B) be equipped for and capable of AGC by Buyer;
- (C) use communication circuits from the Project to Buyer's System Control Center for the purpose of telemetering, supervisory control/data acquisition, and voice and other communications as required for AGC by Buyer;
- (D) supply Energy with minimal harmonic distortion in compliance with the requirements of the Interconnection Agreement and Prudent Utility Practices;
 - (E) deliver Energy to Buyer, at the frequency specified by Buyer;
- (F) be capable of being remotely started and stopped by Buyer's System Control Center; and
- (G) be capable of immediate disconnection from the Buyer's system in the event of an Emergency Condition.
- 3.5 <u>Expected Commercial Operation Date</u>. Subject to the extensions as specifically set forth herein, the Commercial Operation Date shall occur no later than the Expected Commercial Operation Date.

- 3.6 Extension Due to Force Majeure. The Expected Commercial Operation Date and related damages provisions under Section 3.7 shall be extended by a number of Days, up to a maximum of one hundred eighty (180) Days, or longer period agreed to by the Parties, equal to the duration of any Force Majeure Event that delays construction or commencement of operation of the Project. Seller will give written notice to Buyer describing any such Force Majeure Event within five (5) Business Days after the occurrence of the Force Majeure Event. The number of Days of such extension is calculated from the date on which the Force Majeure Event begins. If a Force Majeure Event will delay the Commercial Operation Date for more than one hundred eighty (180) Days, then Buyer will have the right to terminate this PPA without liability of either Party.
- 3.7 <u>Delay Damages</u>. If the Commercial Operation Date has not occurred by the Expected Commercial Operation Date as such date may be extended pursuant to Section 3.6, Seller will use commercially reasonable efforts to continue construction of the Project and shall pay liquidated damages ("**Delay Damages**") to Buyer in an amount equal to Two Hundred Dollars (\$200) per Day per each MW of Delayed Capacity for each Day after the Expected Commercial Operation Date until the earlier of (i) the Commercial Operation Date, and (ii) the Guaranteed Start Date. "**Delayed Capacity**" is an amount equal to the difference between the Guaranteed Capacity and the Installed Capacity. In no event shall the aggregate Delay Damages exceed Thirty-Six Thousand Dollars (\$36,000) per MW of Delayed Capacity.
- Guaranteed Capacity Shortfall. If the Commercial Operation Date is declared before the full Guaranteed Capacity of the Project has been constructed, commissioned and tested, Seller shall use commercially reasonable efforts to cause the remaining portion of the Guaranteed Capacity to achieve Commercial Operation. If Seller has not caused all Delayed Capacity to achieve Commercial Operation on or before the Guaranteed Start Date, then no later than twenty (20) Days after the Guaranteed Start Date, Seller shall pay to Buyer liquidated damages in the amount of Six Hundred Thousand Dollars (\$600,000) per MW of Delayed Capacity ("Capacity Shortfall Damages"), in which case the Guaranteed Capacity will be reduced in an amount equal to the Delayed Capacity for which Capacity Shortfall Damages were timely paid pursuant to this Section 3.8.
- 3.9 <u>Test Energy</u>. Not less than thirty (30) Days prior to the date upon which Seller expects to begin delivering Test Energy, Seller shall give written notice to Buyer of such expected deliveries. During the Test Period, Buyer agrees to accept and purchase all Test Energy generated at the Project and delivered by Seller to Buyer at the Point of Delivery at a rate equal to fifty percent (50%) of the Energy Output Payment Rate. Seller shall notify Buyer, to the extent practicable, fifteen (15) Days prior to the initial delivery of Test Energy to Buyer.
- 3.10 Notice of Commercial Operation. Not less than sixty (60) days prior to the date upon which Seller expects to achieve the Commercial Operation Date, Seller shall give written notice to Buyer of such expected Commercial Operation Date; provided that such Commercial Operation Date shall not be more than ninety (90) Days prior to the Expected Commercial Operation Date. In the event that Seller should determine that the Expected Commercial Operation Date for the Project is not feasible or is impossible to achieve, Seller shall promptly notify Buyer and shall advise Buyer of the new proposed Commercial Operation Date; provided, however, such new Commercial Operation Date shall not be later than the Guaranteed Start Date.

ARTICLE 4 AGC; Buyer Curtailment; Seller Curtailment

4.1 AGC; Buyer Curtailment.

- (A) Prior to the Commercial Operation Date or, if applicable, prior to the Test Period, Seller, at its sole cost and expense, shall install AGC at the Project and shall maintain such AGC throughout the Delivery Term.
- Beginning on the Commercial Operation Date, Buyer shall have the right (B) to curtail the Project by use of the AGC system to effect its curtailment rights pursuant to this Section 4.1(B) ("Buyer Curtailment"). Seller shall ensure that, throughout the Delivery Term, the SCADA signal is capable of functioning within the margin of error specified in the control system manufacturer's energy set point margin of error. Seller shall ensure that the Project's AGC Remote/Local status is in "Remote" set-point control during normal operations. Buyer Curtailment shall be allowed for (i) any curtailment requested by Buyer with the intended purpose of achieving economic savings by not purchasing energy from the Project ("Buyer Economic Curtailment") or (ii) any other curtailment as required for the protection of the Buyer's systems that is effectuated in a non-discriminatory manner given the operational circumstances at the time. Such Buyer Curtailment rights do not provide the Buyer with any rights to direct the operation of the Project. For a Buyer Economic Curtailment only, Buyer shall: (i) pay Seller an amount equal to the sum of the Energy Output Payment Rate multiplied by the Deemed Energy associated with the number of Buyer Economic Curtailment MWh. For purposes of this Section 4.1(B), "Deemed Energy" shall mean the amount of Energy that was not delivered to Buyer by Seller but would have been so delivered but for the Buyer Economic Curtailment as follows: Deemed Energy (MWh) shall be reasonably calculated by Seller taking into account weather and pyranometer data from the meteorological station(s), via a mutually agreed upon method, at the Site for all or a portion of the Solar Units taken out of service due to the Buyer Economic Curtailment but excluding any Solar Unit(s) taken out of service or operating at a reduced capacity for other reasons, and adjusted to account for electrical losses in delivering Energy to the Point of Delivery. Buyer shall have the right to review and approve Seller's calculations of Deemed Energy.
- (C) Seller shall reduce Energy Output from the Project during and to the extent of any Reliability Curtailment, Transmission Provider Curtailment, Seller Curtailment or Buyer Curtailment. Buyer shall pay for Deemed Energy during a Buyer Economic Curtailment as specified above, but Buyer shall not be required to pay Seller for any curtailed Energy during any Reliability Curtailment, Buyer Curtailment, Seller Curtailment or Transmission Provider Curtailment.
- 4.2 <u>Seller Curtailment</u>. A Seller Curtailment occurs any time the Project is unable to deliver otherwise available Energy to the Point of Delivery as a result of transmission limitations prior to the Point of Delivery, including as a result of Seller's scheduling practices, or indirectly, by the Transmission Provider pursuant to the OATT or transmission service arrangements ("Seller Curtailment").

ARTICLE 5 Delivery and Metering

5.1 <u>Delivery Arrangements</u>.

- (A) Seller shall secure transmission necessary to deliver the Energy to Point of Delivery, including diligently negotiating and executing an Interconnection Agreement with the Transmission Provider, or, in the alternative, diligently negotiating and executing any such changes to an executed Interconnection Agreement as are necessary to accommodate the characteristics of the Project. Seller shall be responsible for the costs of interconnection and costs required to deliver the Energy Output from the Project to Buyer at the Point of Delivery at the required voltage, including the costs of any associated network upgrades. Seller shall also be responsible for all transmission charges, ancillary service charges, electrical losses and any other transfer-related charges applicable to the Project's output up to the Point of Delivery.
- (B) Buyer shall be responsible for costs required to deliver the Energy Output from and beyond the Point of Delivery.
- (C) On a Day-ahead basis, and no later than 4:00 a.m. MPT, Seller, or Seller's agent, shall make available to Buyer a 24-hour forecast of the Metered Output to be delivered to Buyer. In addition, Seller, or Seller's agent, shall establish and maintain (including any future technological improvements developed by Seller, or an agent of Seller) an interface with Buyer via a web-based file transfer protocol for the purpose of transferring to Buyer real-time forecasting data related to the Project (or any alternative transfer mechanism mutually agreed to by the Parties).
- (D) Buyer shall be responsible for all necessary transmission service arrangements, including scheduling arrangements, if any, to take Metered Output at the Point of Delivery and deliver it to points beyond.
- 5.2 <u>Availability Reporting</u>. Seller shall be responsible for providing accurate and timely updates on the current availability of the Project to Buyer's SCC.

5.3 Electric Metering Devices.

- (A) Seller shall ensure that the Energy sold and delivered pursuant to this PPA shall be metered and accounted for separately from any electric generation facility that utilizes the same Electric Interconnection Point. Seller shall ensure that Electric Metering Devices are installed at or near the Electric Interconnection Point that measures the output of the Project before such Energy is commingled with the energy from any other project.
- (B) The following provisions of this Section shall govern Electric Metering Devices except to the extent the Interconnection Agreement modifies or otherwise conflicts with these provisions, in which case, the Interconnection Agreement shall govern.
- (C) All Electric Metering Devices used to measure the Energy made available to Buyer by Seller under this PPA and to monitor and coordinate operation of the Project shall be owned, installed, and maintained in accordance with the Interconnection Agreement at no cost to

Buyer under this PPA. If Electric Metering Devices are not installed at the Point of Delivery, meters or meter readings will be adjusted to reflect losses from the Electric Metering Devices to the Point of Delivery based initially on the amount specified by the manufacturer for expected losses, provided that the Parties may revise this loss adjustment based on actual experience. Seller shall provide or arrange with the Transmission Provider to provide Buyer reasonable access to all Electric Metering Devices for all purposes necessary to perform under this PPA and shall provide Buyer the reasonable opportunity to be present at any time when such Electric Metering Devices are to be inspected and tested or adjusted. Buyer shall also have the right to conduct its own tests of the Electric Metering Devices in Buyer's reasonable discretion. Seller shall provide Buyer with all authorizations necessary to have access to the Electric Metering Devices, including obtaining any consent or other agreement from the Transmission Provider necessary to allow Buyer such access. Energy shall be metered using solid state, high precision, digital display meters of ANSI 0.1 accuracy class or better, with the specific model approved by the Buyer.

- Either Buyer or Seller may elect to install and maintain, at its own (D) expense, backup metering devices ("Back-Up Metering") in addition to the Electric Metering Devices, which installation and maintenance shall be performed in a manner acceptable to the Parties. The installing Party, at its own expense, shall inspect and test Back-Up Metering upon installation and at least annually thereafter. The installing Party shall provide the other Party with reasonable advance notice of, and permit a representative of the other Party to witness and verify, such inspections and tests, provided, however, that such Party shall not unreasonably interfere with or disrupt the activities of the installing Party and shall comply with all applicable safety standards. Upon written request, the installing Party shall perform additional inspections or tests of Back-Up Metering and shall permit a qualified representative of the requesting Party to inspect or witness the testing of Back-Up Metering, provided, however, that the requesting Party shall not unreasonably interfere with or disrupt the activities of the installing Party and shall comply with all applicable safety standards. The actual expense of any such requested additional inspection or testing shall be borne by the Party requesting the test, unless, upon such inspection or testing, Back-Up Metering is found to register inaccurately by more than the allowable limits established in this Article, in which event the expense of the requested additional inspection or testing shall be borne by the installing Party. If requested in writing, the installing Party shall provide copies of any inspection or testing reports to the requesting Party.
- (E) If any Electric Metering Devices, or Back-Up Metering, are found to be defective or inaccurate outside the bounds of the selected device's manufacturer's performance standards, they shall be adjusted, repaired, replaced, and/or recalibrated as near as practicable to a condition of one-half percent (0.5%) error by the Party owning such defective or inaccurate device and at that Party's expense.
- 5.4 Adjustment for Inaccurate Meters. If an Electric Metering Device, or Back-Up Metering, fails to register, or if the measurement made by an Electric Metering Device, or Back-Up Metering, is found upon testing to be inaccurate by more than one-half percent (0.5%), an adjustment shall be made correcting all measurements by the inaccurate or defective Electric Metering Device, or Back-Up Metering, for both the amount of the inaccuracy and the period of the inaccuracy, in the following manner:

- (A) In the event that the Electric Metering Device is found to be defective or inaccurate, the Parties shall use Back-up Metering, if installed, to determine the amount of such inaccuracy, provided, however, that Back-Up Metering has been tested and maintained in accordance with the provisions of this Article. If Back-Up Metering is installed on the low side of Seller's step-up transformer, the Back-Up Metering data shall be adjusted for losses in the same manner as for the Electric Metering Devices. In the event that Back-Up Metering is not installed, or Back-Up Metering is also found to be inaccurate by more than one-half percent (0.5%), the Parties shall estimate the amount of the necessary adjustment on the basis of deliveries of Metered Output from the Project to the Point of Delivery during periods of similar operating conditions when the Electric Metering Device was registering accurately. The adjustment shall be made for the period during which inaccurate measurements were made.
- (B) In the event that the Parties cannot agree on the actual period during which the inaccurate measurements were made, the period during which the measurements are to be adjusted shall be the shorter of (i) the last one-half of the period from the last previous test of the Electric Metering Device to the test that found the Electric Metering Device to be defective or inaccurate, or (ii) the one hundred eighty (180) Days immediately preceding the test that found the Electric Metering Device to be defective or inaccurate.
- (C) To the extent that the adjustment period covers a period of deliveries for which payment has already been made by Buyer, Buyer shall use the corrected measurements as determined in accordance with this Article to recompute the amount due for the period of the inaccuracy and shall subtract the previous payments by Buyer for this period from such recomputed amount. If the difference is a positive number, the difference shall be paid by Buyer to Seller; if the difference is a negative number, that difference shall be paid by Seller to Buyer, or at the discretion of Buyer, may take the form of an offset to payments due Seller by Buyer. Payment of such difference by the owing Party shall be made not later than thirty (30) Days after the owing Party receives notice of the amount due.

ARTICLE 6 Conditions Precedent

- 6.1 <u>Conditions Precedent.</u> The obligations of the Parties under this PPA are subject to satisfaction of the following conditions precedent:
 - (A) Subject to Section 17.3, receipt of NMPRC Approval; and
- (B) Receipt of approval of the Boards of Directors of Buyer and its parent company, as required.
- 6.2 <u>Notice</u>. As soon as reasonably practicable after satisfaction of a condition precedent specified in Section 6.1 or after confirmation that a specified approval is not required, Buyer shall provide Seller written notice of such satisfaction or confirmation as applicable.

ARTICLE 7 Sale and Purchase of Energy Output

- 7.1 Sale and Purchase of Energy Output. In accordance with and subject to the terms and conditions of this PPA, commencing on the Commercial Operation Date and continuing through the end of the Term ("**Delivery Term**"), Seller shall sell and deliver to Buyer, and Buyer shall purchase and receive from Seller, all right, title and interest in and to the Energy Output made available by Seller at the Point of Delivery in accordance with Article 5; *provided, however*, that Buyer shall not be required to receive and purchase Energy Output when and to the extent that (a) a Party's performance is excused by a Force Majeure Event, (b) a Transmission Provider Curtailment is continuing, (c) a Reliability Curtailment is continuing, (d) a Seller Forced Outage is continuing, (e) a Seller Curtailment is continuing, (f) a Buyer Curtailment is continuing, or (g) Seller's performance is excused during Seller Excused Hours.
- 7.2 <u>Title and Risk of Loss</u>. As between Seller and Buyer, Seller shall be deemed to be in control of the Energy Output from the Project up to delivery and receipt at the Point of Delivery and Buyer shall be deemed to be in control of such Energy Output from and after delivery and receipt at the Point of Delivery. Title and risk of loss related to the Energy Output shall transfer from Seller to Buyer at the Point of Delivery.
- Future Environmental Attributes and Changes in Law. The Parties acknowledge and agree that (a) additional Environmental Attributes may be recognized by a Governmental Authority after the Execution Date; (b) in accordance with the terms of this PPA all right and title to such additional Environmental Attributes is included in the Energy Output Payment Rate as Energy Output and (c) such additional Environmental Attributes shall pass to Buyer in accordance with Section 7.2 of this PPA. If in order for Buyer to receive the benefit of any additional Environmental Attributes Seller must incur any third-party costs not otherwise provided for in this PPA, or if any change in law or regulation relating to such future Environmental Attributes occurs after the Execution Date that causes Seller to incur any thirdparty costs not otherwise provided for in this PPA in order to deliver the additional Environmental Attributes, then such costs shall, if Seller incurs such costs at Buyer's request, be reimbursed promptly to Seller by Buyer. Seller shall deliver a good faith estimate of such additional costs to Buyer prior to incurring such costs, and following receipt of such estimate, Buyer shall notify Seller of its continued election to have Seller incur such costs; provided that, if the additional costs exceed Seller's good faith estimate by more than ten percent (10%), Buyer shall have the right to notify Seller of its election to have Seller cease incurring the additional costs, and Seller shall be excused thereafter from any obligation hereunder to deliver such additional Environmental Attributes. For the avoidance of doubt, Buyer shall remain liable to Seller for all costs incurred prior to Seller's receipt of Buyer's notice. The Parties agree to negotiate in good faith further agreements and documentation necessary to effectuate the transfer of such additional Environmental Attributes.

7.4 Scheduling.

(A) Seller shall arrange all scheduling services necessary to ensure compliance with WECC operating policies and criteria, Transmission Provider OATT requirements, and any other applicable guidelines. Prior to the implementation and applicability to the Project of any

energy market, to the extent scheduling is required now or in the future, Buyer shall schedule all Metered Output in accordance with WECC operating polices and criteria, Transmission Provider OATT requirements and any other applicable guidelines in a manner maximizing Metered Output from the Project based on the then-most-current forecast of energy provided by Seller, except for Transmission Provider Curtailments, Reliability Curtailments, Seller Forced Outages, Scheduled Maintenance Outages, Force Majeure Events, Buyer Curtailments, and Seller Curtailments. At least thirty (30) Days prior to the anticipated Commercial Operation Date, Seller shall provide Buyer with a good faith estimate of the quantity of Energy Output it expects to generate for the remainder of that Commercial Operation Year. By July 1 of each succeeding Commercial Operation Year, Seller shall provide Buyer with a good faith estimate of the hourly quantities of Energy Output that Seller expects to generate in the following Commercial Operation Year ("Projected Schedule"). Seller shall also provide estimates of the daily quantity of Energy to be delivered to Buyer. Seller shall configure the ramp rate for the Project such that it will not generate energy at a rate that increases greater than ten (10) MW per minute.

- (B) If at any point during the Delivery Term, (i) an alternative market design is implemented in which the Project will or can participate in an energy market, or (ii) if either the Project, the Electric Interconnection Point or Buyer no longer reside in the same market (each of (i) and (ii) is a "Market Event") and such Market Event materially changes the interconnection and delivery requirements in this PPA, the Parties shall cooperate in good faith to facilitate the delivery of Energy Output from the Point of Delivery to Buyer, at the least possible cost to the Parties, consistent with this PPA to the extent possible.
- (C) Seller shall provide, or cause its operation and maintenance contractor to provide, to Buyer its good faith, non-binding estimates of the daily quantity of Energy Output to be delivered by Seller to the Point of Delivery for each week (Sunday through Saturday) by 4:00 p.m. MPT on the date falling at least three (3) Days prior to the beginning of that week.
- (D) Unless otherwise specified by superseding policies or procedures of WECC, including the WECC pre-scheduling calendar, and SCC as applicable, Seller shall, by 6:00 a.m. MPT on each Day, submit a good faith estimate of the hourly quantities of Energy Output to be delivered for Buyer at the Point of Delivery for the next six (6) subsequent Days.
- (E) If, at any time following submission of a good faith estimate as described in Section 7.4(C) and (D) above, Seller becomes aware of any change that alters the values previously provided to Buyer, Seller shall promptly notify Buyer of such change or predicted change.

7.5 Forced Outages.

(A) Buyer and Seller shall promptly advise one another of events that may form the basis for a declaration of the existence or termination of Buyer Curtailment, Transmission Provider Curtailment, Reliability Curtailments, Seller Excused Hours or a Seller Forced Outage. Buyer or Seller (as appropriate) shall at the earliest practicable date provide the other Party written notice ("Outage Notice") of the declaration of the existence of a Buyer Curtailment, Transmission Provider Curtailment, Reliability Curtailment, Seller Excused Hours or a Seller Forced Outage. Seller shall provide such notice to Buyer's System Control Center.

An Outage Notice provided by either Party shall contain information regarding the beginning date and time of the event, the expected end date and time of such event, and the expected Metered Output, if any, that would be available for delivery and purchase at the Point of Delivery during such event. Buyer or Seller (as appropriate) shall keep the other Party informed of any developments that will affect either the duration of such event or the availability of the Project during or after the end of such event. In addition, Seller shall comply with all then-current Buyer, NERC and WECC generating unit outage reporting requirements, as they may be revised from time-to-time.

- (B) Within five (5) business Days after the end of the Month, Seller shall prepare, maintain and deliver to Buyer a schedule that identifies all Scheduled Maintenance Outages, deratings and Seller Forced Outages that occurred during the Month. The data reported must meet all requirements specified in the NERC Generating Availability Data System (GADS) manual. In the event of any disagreement between Buyer and Seller concerning the schedule prepared by Seller, the Parties shall promptly confer to resolve the disagreement.
- 7.6 <u>Availability Guarantee</u>. Seller guarantees that the Project shall be available to produce Energy Output and shall pay Availability Damages, if any, in accordance with Seller's obligations under the provisions of Exhibit I.

ARTICLE 8 Payment Calculations

- 8.1 <u>Billing Components</u>. The total due from Buyer to Seller for each Monthly Billing Period during the Term shall be paid in accordance with the invoicing procedures set forth in Section 9.1. Charges will consist of the following, and, other than charges for Test Energy, will begin on the Commercial Operation Date:
- (A) Monthly Energy Output Payment. Subject to the provisions of this PPA, Buyer shall accept and pay for Energy Output generated at the Project and delivered by Seller to Buyer. Buyer shall pay Seller an amount equal to the product of (a) the aggregate amount of Energy Output (MWh) delivered for Buyer to the Point of Delivery from the Project plus the Deemed Energy resulting from any Buyer Economic Curtailment multiplied by (b) the Energy Output Payment Rate. As used herein, the "Energy Output Payment Rate" is the rate of \$19.73 per MWh for the Energy Output delivered for Buyer to the Point of Delivery from the Project. For the avoidance of doubt, the Energy Output Payment Rate also compensates Seller for the associated Environmental Attributes, RECs and Ancillary Services, in any Monthly Billing Period. The Energy Output Payment Rate includes all Taxes. Nothing herein confers on Buyer the right to, and Buyer may not, direct Seller to reduce the Energy Output of the Project for the provision of Ancillary Services or other financial consideration.
- (B) If NMPTCs become available in connection with the Energy Output, Seller shall use commercially reasonable efforts to become eligible for and to obtain any such credits.
- (C) In the event that Seller, Affiliate of Seller or Tax Equity Investor becomes eligible to receive any NMPTCs with respect to the Project, the value of such NMPTCs will be

shared between the Parties. No later than thirty (30) Days after receipt or utilization of any NMPTCs by Seller, Affiliate of Seller, or Tax Equity Investor, Seller will remit to Buyer a payment equal to fifty percent (50%) of the value of such NMPTCs.

- 8.2 <u>Payment Support Requirement</u>. Each Party shall use commercially reasonable efforts to defend, before any Governmental Authority, all terms and conditions of this PPA consistent with Applicable Law.
- 8.3 <u>Survival on Termination</u>. The provisions of this Article 8 shall survive the repudiation, termination or expiration of this PPA for so long as may be necessary to give effect to any outstanding payment obligations of the Parties due and payable prior to any such repudiation, termination or expiration.

ARTICLE 9 Billing and Payment Procedures

9.1 Statements and Payment of Electricity Payments.

- (A) Seller shall read or have read on its behalf the Electric Metering Devices at the Point(s) of Delivery at 11:59 p.m. MPT on the last Day of each Month, unless otherwise mutually agreed by the Parties.
- (B) Payments due shall be determined and adjusted in accordance with Article 8. From and after the start of the Test Period, Buyer shall pay to Seller, monthly in arrears, payments in accordance with the provisions of clause (C) below.
- (C) On or before the tenth (10th) Day of each Month following the Month in which the Commercial Operation Date occurs, Seller shall prepare an invoice showing the amount payable by Buyer pursuant to Article 8 of this PPA (in Dollars) payable to Seller for the preceding Month (and with respect to the first billing Month, any preceding Month including and following the Test Period). Each such invoice shall show information and calculations, in reasonable detail, including an Attestation and Bill of Sale verifying the associated RECs and Environmental Attributes, if applicable, in the form of Exhibit H ("Attestation and Bill of Sale").
- (D) Beginning with the first Month in the Test Period, until an invoice is required to be prepared pursuant to clause (C) above, Seller shall prepare an invoice showing the charges for Test Energy payable to Seller for the preceding Month.
- (E) Buyer shall, subject to Sections 9.5 and 9.9, pay all invoices within thirty (30) Days after the date Buyer receives Seller's invoice. If Buyer should dispute a portion of the charges set forth on any invoice, it shall nonetheless pay all amounts not in dispute by the applicable due date.
- (F) If banks in the State of New Mexico are permitted to close on any date on which any payment by Buyer would otherwise have been due, then Buyer shall make such

payment on the Business Day that immediately follows such payment date.

- (G) All payments specified in this Section 9.1 shall be made to an account designated by Seller and notified to Buyer.
- 9.2 <u>Miscellaneous Payments</u>. Any amounts due to either Seller or Buyer under this PPA, other than those specified in Section 9.1 above, shall be paid within thirty (30) Days following receipt by the other Party of an itemized invoice from the Party to whom such amounts are due setting forth, in reasonable detail, the basis for such payment.
- 9.3 <u>Currency and Method of Payment</u>. Notwithstanding anything contained in this PPA, all payments to be made by either Seller or Buyer under this PPA shall be made in Dollars in immediately available cleared funds by wire transfer into the relevant account specified in this PPA or, if no account is specified, into the account designated by the receiving Party.
- 9.4 <u>Default Interest</u>. Except where payment is the subject of a bona fide dispute (in which case it shall be treated under Section 9.5 below), or where otherwise waived by the Party entitled to interest, if any payment due from Buyer to Seller or from Seller to Buyer under this PPA is not paid when due, then, in addition to such unpaid amount, interest shall be due and payable thereon. Applicable interest shall be calculated at a rate equal to the thirty (30) Day highest grade commercial paper rate as published in The Wall Street Journal on the first business Day of each Month ("**Default Rate**"), as in effect from time to time and shall continue to accrue from the date on which such payment became overdue to and until the date such payment is made in full (both dates inclusive).

9.5 <u>Disputed Items</u>.

- (A) Either Party ("**Disputing Party**") may dispute in good faith the accuracy of a reading of the Electric Metering Devices and/or the accuracy of an invoice. Where a reading or bill is the subject of a dispute in good faith, the Disputing Party shall give written notice to the other Party within ten (10) Days after the delivery of the invoice or statement by the other Party, together with details of its reasons for such dispute. The Disputing Party shall make payment of any undisputed amounts to the other Party by the due date for payment specified in such invoice. The Parties shall use all reasonable efforts to resolve the dispute in accordance with Section 13.8. Any amount or adjustment with respect to a meter reading subsequently agreed to by the Parties or determined to be due shall be made (in each case in settlement of a dispute) by a credit or additional charge on the next bill rendered (as the case may be).
- (B) All amounts paid as a result of the settlement of a dispute shall be paid with interest thereon at the Default Rate from the Day on which such payment originally fell due to and until the date such payment is made in full (both dates inclusive), unless otherwise waived by the Party entitled to such interest.
- 9.6 <u>Statement Errors</u>. In the event that either Party becomes aware of any error in any statement, such Party shall, immediately upon discovery of the error, notify in writing the other Party of the error and shall rectify such error (whether such error was in the form of an underpayment or overpayment) within thirty (30) Days of such notification. Provided that the other Party is satisfied (in its sole and reasonable discretion) that the aforementioned notification

requirements have been complied with in good faith by the Party who has made the error, no interest shall be payable in respect of any amount that was erroneously overpaid or underpaid.

9.7 Taxes.

- (A) All Energy delivered by Seller to Buyer hereunder shall be sales for resale, with Buyer reselling such Energy. Buyer shall obtain and provide Seller an appropriate New Mexico Nontaxable Transaction Certificate prior to the date any sales under this PPA occur. The Parties further acknowledge their understanding that no gross receipts Tax is applicable to the sale or delivery of Energy Output hereunder; however, in the event any such Tax is or becomes applicable, Buyer shall reimburse Seller for such Tax. During the Delivery Term, Seller and Buyer each covenant that it will take all actions required and refrain from taking any actions which are prohibited, which such action or inaction would cause the Energy delivered hereunder to Buyer to not qualify for a New Mexico Type 2 Nontaxable Transaction Certificate.
- (B) Seller shall be responsible and shall pay when due all income, gross receipts, compensating, use, valued added, employment, ad valorem, personal real property or other similar Taxes, including any associated interest and penalty assessments and any and all franchise fees or similar fees assessed against Seller or the Project due to the construction, ownership, leasing, operation or maintenance of the Project, or any components or appurtenances thereof, including all Taxes, fees, allowances, trading credits and other offsets and impositions for wastes and emissions (including carbon-based compounds, oxides of nitrogen and sulfur, mercury and other Hazardous Materials) produced by the Project. If Buyer is assessed any Taxes or associated fees as a result of the improvement of a Site due to the existence of the Project on the Site, Buyer shall immediately notify Seller. Buyer and Seller shall cooperate in contesting such assessment. If, after resolution of the matter, Taxes are imposed on Buyer as a result of the improvement of the Site due to the existence of the Project on the Site, Seller shall reimburse Buyer for such Taxes. Seller shall not be obligated to pay or reimburse Buyer for Taxes imposed on or measured by the Buyer's overall revenues or income. Seller's prices under Section 8 are inclusive of such Taxes, allowances and credits during the Term.
- (C) If a Party is required to remit or pay Taxes that are the other Party's responsibility hereunder, such Party shall promptly reimburse the other for such Taxes. Consistent with Applicable Law, the Parties shall use all reasonable efforts to administer this PPA and implement the provisions in this PPA in a manner that will minimize Taxes due and payable by all Parties.
- (D) The Parties shall provide each other, upon written request, with copies of any documentation respecting this PPA or the Project that may be reasonably necessary in the ordinary course of any inter-governmental, state, local, municipal or other political subdivision tax audit inquiry or investigation.
- (E) Consistent with Applicable Law, the Parties shall cooperate to minimize Taxes; however, no Party shall be obligated to incur any extraordinary financial burden to reduce Taxes for which the other Party is responsible hereunder.
 - 9.8 Setoff and Payment Adjustments. Except as otherwise expressly provided for in

this PPA, including Section 9.9 below, all payments between the Parties under this PPA shall be made free of any restriction or condition and without deduction or withholding on account of any other amount, whether by way of setoff or otherwise.

9.9 Netting.

- (A) A Party at any time may offset against any and all amounts that may be due and owed to the other Party under this PPA, including damages and other payments that are owed by a party to the other Party pursuant to this PPA. Undisputed and non-offset portions of amounts invoiced under this PPA shall be paid on or before the due date or shall be subject to the late payment interest charges set forth in Section 9.4.
- (B) If Seller and Buyer net their obligations to each other under this PPA, then such amounts will be aggregated, and Seller and Buyer will discharge their obligations to pay through netting of payments on a current accounting basis. If the amounts owed by Buyer or Seller to the other are equal on a current accounting basis, neither shall be required to make payment under this PPA.
- 9.10 <u>Survival on Termination</u>. The provisions of this Article 9 shall survive the repudiation, termination or expiration of this PPA for so long as may be necessary to give effect to any outstanding payment obligations of the Parties that became due and payable prior to any such repudiation, termination or expiration.

ARTICLE 10 Operations and Maintenance

10.1 Construction of the Project.

- (A) Seller will diligently pursue the development and construction of the Project using commercially reasonable efforts consistent with Prudent Utility Practices and in compliance with the terms and conditions of the Interconnection Agreement, the PPA and other applicable requirements and standards. Seller will be solely responsible for, and the Energy Output Payment Rate will not be adjusted to accommodate, increased costs or any failure to obtain any Tax Benefits. On and after the Execution Date through the start of construction, Seller will provide Buyer monthly development and construction updates.
- (B) On and after the start of construction and through the Commercial Operation Date, Seller will provide Buyer monthly construction updates. If Seller becomes aware of any critical milestone that will not be achieved by the required date, Seller must provide Buyer written notice and a recovery plan to eliminate any delay in the construction schedule. In no event will Seller's failure to complete one or more critical milestones by the established dates change, delay or otherwise affect the requirement to achieve Commercial Operation by the Guaranteed Start Date. Buyer shall have the right to monitor the construction, commissioning, start-up, testing and operations of the Project and to be present during the commissioning, start-up and testing of the Project.
- (C) Seller may not materially modify, alter or otherwise change the Project without the prior written consent of Buyer, except (i) as required by Prudent Utility Practices or

Applicable Law; or (b) for modifications, alterations, expansions or other changes that would not be expected to materially alter the Guaranteed Capacity, annual performance, or availability of the Project or to materially and adversely impact the capabilities of the Project.

- (D) Seller shall designate (by a written notice delivered to Buyer by the Execution Date) a Project Manager reasonably acceptable to Buyer who shall have full responsibility for the performance of the construction, commissioning, start-up and testing by Seller and shall act as a single point of contact in all matters on behalf of Seller ("Project Manager"). Seller may designate a new Project Manager from time to time by a written notice delivered to Buyer, subject to Buyer's consent, which consent shall not be unreasonably denied or delayed. Seller's Project Manager shall be deemed to have full authority to act on behalf of Seller, and notices given by Buyer to the Project Manager shall be deemed as having been given to Seller.
- (E) Other than the rights and obligations of Buyer specified in this PPA and any documents ancillary hereto, neither this PPA nor any such ancillary document shall be interpreted to create in favor of Buyer, and Buyer specifically disclaims, any right, title or interest in any part of the Project.

10.2 Commissioning Tests.

(A) Seller shall give Buyer at least sixty (60) Days' prior notice of the approximate test date and of the proposed tests scheduled relating to the commissioning of the Project ("Commissioning Tests") as described in Exhibit F. Representatives of Buyer shall have the right to be present at all such testing. Seller shall promptly notify Buyer of any changes to the test date or the date of any Commissioning Tests relating to the Project in order that Buyer may arrange for its respective representatives to attend.

10.3 Access to and Inspection of the Project.

- (A) Seller shall provide Buyer and its authorized agents, employees and inspectors reasonable access to the Project, including the control room and Seller's Interconnection Facilities, for the purposes set forth herein. Buyer acknowledges that such access does not provide Buyer with the right to direct or modify the operation of the Project in any way and further acknowledges that any exercise by Buyer of its rights under this Section 10.3(A) shall be at its own risk and expense; provided, however, that Buyer shall comply with all of Seller's applicable safety and health rules and requirements and shall conduct itself in a manner that will not unreasonably interfere with the Project's operations.
- (B) No inspections of the Project, whether by Buyer or otherwise, and no acceptance or approval given under this PPA, shall relieve Seller of or reduce its obligation to maintain the Project and operate the same in accordance with this PPA and Prudent Utility Practices. In no event shall any statement, representation, or lack thereof by Buyer, either express or implied, relieve Seller of its exclusive responsibility for the Project. Any inspection of Seller's property or equipment by Buyer, or any review by Buyer or consent by Buyer to Seller's plans, shall not be construed as endorsing the design, fitness or operation of the Project equipment nor as a warranty or guarantee.

10.4 Operating Parameters.

- (A) Seller shall operate or procure the operation of the Project in accordance with Prudent Utility Practices ("Operating Parameters"), subject only to Emergency Conditions and Force Majeure Events; provided that, during the Term of this PPA, Seller shall: (i) have the sole responsibility to, and shall at its sole expense, operate and maintain the Project in accordance with all requirements set forth in this PPA, and (ii) comply with reasonable requirements of Buyer regarding day-to-day or hour-by-hour communications with Buyer. Subject to compliance with the Operating Parameters, Seller agrees to operate the Project in such a manner that Energy Output delivered by Seller will meet all requirements for voltage level, harmonics, power factor, VArs, Ancillary Services and other electrical specifications required by the Transmission Provider and will have the capabilities to be dispatched manually by Seller as is necessary to comply with the provisions of this PPA.
- (B) Seller shall operate the Project such that all system protective equipment is in service whenever the Project is connected to, or is operated in parallel with, the Transmission Provider's Transmission System, except for normal testing and repair. Seller shall provide adequate system protection and control devices to ensure safe and protected operation of all energized equipment during normal testing and repair. The Project's protective equipment shall meet Institute of Electrical and Electronic Engineers and all other industry standards. Seller shall have qualified independent, third party personnel test, calibrate and certify in writing the proper functioning of all protective equipment at least once every twelve (12) Months. Seller shall perform a unit functional trip test after each overhaul of the Project's major equipment and shall provide results to Buyer in writing prior to returning the equipment to service. All of the foregoing shall be conducted in accordance with Prudent Utility Practices.
- Operating Procedures. Not later than thirty (30) days before the Commercial Operation Date, an operating committee consisting of Seller and Buyer representatives shall develop mutually agreeable written Operating Procedures for integration of the Project into Buyer's system. Operating Procedures shall include, but not be limited to, methods of day-today communications; metering, telemetering, telecommunications, and data acquisition procedures; key personnel lists for Seller and Buyer, including an appointed authorized representative for each Party; clearances and switching practices; operations and maintenance scheduling and reporting; scheduling and forecasting practices; daily capacity and Energy Output reports; unit operations log; Seller Forced Outage and planned outage reporting, and such other matters as may be mutually agreed upon by the Parties. Seller must staff, operate, maintain and control the Project at all times consistent with the Operating Procedures, this PPA, Prudent Utility Practice, Applicable Laws and required permits. The Operating Procedures also will require Seller to take all measures necessary to remediate or otherwise correct any breach of environmental protection regulations as required under Applicable Law. Personnel of Seller capable of starting, running, and stopping the Project must be continuously available, either at the Project or capable of being at the Project on ninety (90) minutes' notice, and must be continuously available by phone. Seller will make qualified personnel available twenty-four (24) hours per day, seven (7) days per week to perform scheduling and receive and give communications relating to the operation and dispatch of the Project. Buyer will use commercially reasonable efforts to notify Seller twenty-four (24) hours in advance of potentially critical start-ups.

10.6 Project Maintenance.

- Seller shall maintain all Project equipment or cause the same to be maintained at all times in accordance with Prudent Utility Practices and otherwise in accordance with this PPA. At least sixty (60) days before the Commercial Operation Date, Seller will provide Buyer a notice of Scheduled Maintenance Outages for the Project for the first Commercial Operation Year within the Term. Thereafter, no later than September 1 of each Commercial Operation Year, Seller shall provide Buyer with a non-binding notice of the annual Scheduled Maintenance Outages for the following Commercial Operation Year and a notice of estimated long-term Scheduled Maintenance Outages for the next four (4) Commercial Operation Years. Each notice of Scheduled Maintenance Outages must identify each planned interruption and/or reduction of the Project's generation, including the duration of such event. Each annual Scheduled Maintenance Outage for the Commercial Operation Year will be subject to approval by Buyer. Buyer may, within fifteen (15) Days after receipt of the schedule, request reasonable modifications to the schedule. Seller may not schedule any interruption or reduction to the Project's generation for any reason at any time during May 1st through September 1st, December, or January without the prior written approval of Buyer, which approval may be withheld or granted in Buyer's sole discretion. Buyer may request Seller to defer or reschedule any Scheduled Maintenance Outage up to forty-eight (48) hours before commencement of the outage. Seller may not make any changes to any annual maintenance schedule approved by Buyer without Buyer's prior written approval. Seller must give Buyer no less than ninety (90) days' advance notice of any proposed change in the annual maintenance schedule. Such requested changes in the schedule shall not materially adversely impact Buyer, and Seller agrees to compensate Buyer for any costs incurred by Buyer as a result of such change.
- (B) Seller shall be responsible (at its own cost and expense) for timely obtaining, maintaining, and complying with all agreements, arrangements and permits necessary for delivery of the Metered Output to the Point of Delivery. Seller shall also obtain and maintain an appropriate water supply for the Project during the Term to maintain reliability of the Project. Upon the reasonable, written request of Buyer, Seller shall make available to Buyer copies of any environmental permits, plans, and/or studies related to the Project.
- 10.7 <u>Sales to Third Parties</u>. As of the start of the Test Period, Seller shall not sell or divert Energy Output to a third Person.
- 10.8 <u>Performance Tests</u>. "**Performance Tests**" means the Commissioning Performance Test, the Annual Performance Tests, and Buyer-Requested Performance Tests as described in this Section 10.8 and in Sections 10.9, and 10.10. Performance Tests shall be performed to verify compliance of the solar photovoltaic plant net AC capacity at the Point of Delivery with the Guaranteed Capacity.
- (A) Seller shall conduct a performance test prior to the Commercial Operation Date in accordance with applicable provisions of this Section 10.8 (the "Commissioning Performance Test").
- (B) Seller shall conduct a performance test in accordance with this Section 10.8 in each Commercial Operation Year after the Commercial Operation Date (each, an

- "Annual Performance Test"). Each Annual Performance Test shall be performed no earlier than nine (9) months and no later than fifteen (15) months from the completion of the previous Annual Performance Test or Commissioning Performance Test as mutually agreed by the Parties.
- (C) Annual degradation rates included in Exhibit L will be used in the Annual Performance Test PVSYST Model for the purpose of Annual Performance Tests described in this Section 10.8. Annual degradation rates identified in Exhibit L shall be applied as incremental to the actual degradation experienced and measured through the prior Commercial Operation Year's Performance Test.
- (D) The Commissioning Performance Test, Annual Performance Tests, and Buyer-Requested Performance Tests shall be conducted in accordance with ASTM E2848-13, except where deviations are provided in this Section 10.8 (D).
 - (1) The reporting conditions ("RC") will be developed in accordance with ASTM E2939-13 and will utilize site measured irradiance and ambient temperature data collected during the Performance Test. The same RC will be used for computing the Model Rated Power and Test Rated Power using their respective regression equations.
 - (2) The Performance Test period will include at least five (5) days of data and at least fifty (50) filtered data points.
 - (3) Model Rated Power and Test Rated Power shall account for losses to the Point of Delivery.
 - (4) The result from an Annual Performance Test or Buyer-Requested Performance Test is the ratio of Test Rated Power to Model Rated Power (the "Performance Test Ratio").
 - (5) "**Test Rated Power**" shall be the value produced by the regression of filtered site measured power and site measured weather data evaluated at the RC, adjusted by Seller for any unavailable equipment during the Performance Test.
 - (6) "Model Rated Power" shall be the value produced by the regression of filtered Annual Performance Test PVSYST Model power and filtered model weather data evaluated at the RC, adjusted by Seller for any unavailable equipment during the Performance Test.
 - (7) The Model Rated Power will be calculated using the Annual Performance Test PVSYST Model. Site measured POA irradiance will be used as the irradiance input to the Annual Performance Test PVSYST Model.
 - (8) The PVSYST model utilized by Seller to predict the annual generation forecasts included in Exhibit M will be used as the PVSYST model for initial comparison to the actual site performance during the Commissioning

Performance Test. Such PVSYST model and a listing of model input assumptions shall be prepared by Seller and furnished to Buyer at least two (2) months prior to initiation of the Commissioning Performance Test. Should any modifications to this PVSYST model be proposed by Seller after completion of the Commissioning Performance Test, Seller shall provide to Buyer the proposed modifications to the draft PVSYST model for review and approval. Any modifications to the PVSYST model mutually accepted by the Parties will be incorporated and the resulting modified PVSYST model together with a schedule of annual degradation will be the "Annual Performance Test PVSYST Model".

- (9) The Annual Performance Test PVSYST Model and a listing of model input assumptions shall be prepared by Seller and furnished to Buyer within one (1) month of the completion of the Commissioning Performance Test. The Annual Performance Test PVSYST Model will annually account for actual degradation through the prior Performance Test with incremental annual degradation added as previously agreed to by the Parties. This mutually accepted Annual Performance Test PVSYST Model will be utilized without modification, unless agreed to by both Parties, in all Annual Performance Tests and Buyer-Requested Performance Tests as well as determination of any Annual Performance Test Guarantee Damages as defined in Section 10.9.
- (E) Within thirty (30) days of the completion of a Performance Test, Seller may elect to conduct a single re-test. Upon completion of the single re-test, Seller must choose for the results of either test to be used as the Annual Performance Test.
- (F) For all Performance Tests and re-tests, Seller shall notify Buyer at least ten (10) Days prior to the initiation of the Performance Test or re-test, and Buyer shall have the option to inspect the Project during such Performance Test or re-test.
- (G) For all Performance Tests and re-tests, Seller shall provide a "Performance Test Report" that includes all performance data, model simulations, calculations, and test reports to the Buyer for analysis and review.
- (H) Proposed terms associated with the guarantee, the required irradiance conditions, degradation allowances, modeling software inputs, and the methodology to be utilized for validation of the Guaranteed Capacity shall be provided by the Seller and subject to mutual agreement of the Parties.

10.9 Annual Performance Test Guarantee Damages.

(A) Seller guarantees that Annual Performance Tests shall meet or exceed the Annual Performance Test Guarantee. The "Annual Performance Test Guarantee" is met when the average of the Performance Test Ratio for the Annual Performance Test and the Performance Test Ratio for the previous Annual Performance Test, or the Commissioning Performance Test (i.e. 1.000) as applicable, results in a value greater than or equal to 0.960 (the "Annual Performance Test Guarantee Ratio") without the application of any commercial test tolerance or adjustment to the results for test measurement uncertainty. If an Annual Performance Test

shows that the Annual Performance Guarantee was met, then Seller shall not owe Annual Performance Test Guarantee Damages.

(B) If any Annual Performance Test shows that the Annual Performance Guarantee was not met, then Seller shall owe Annual Performance Test Guarantee Damages calculated in accordance with this Section 10.9. The calculated Energy shortfall (the "Energy Shortfall") shall be the total Energy delivered by Seller in the most recently completed Commercial Operation Year multiplied by the Shortfall Factor. The "Shortfall Factor" is one (1) minus the ratio of the average of the Performance Test Ratios of the most recently completed Commercial Operation Year and the Commercial Operation Year immediately preceding the most recently completed Commercial Operation Year and the Annual Performance Test Guarantee Ratio. These calculations shall be performed using the following formulas:

$$ES = E_n \times SF$$

$$SF = 1 - \frac{\frac{1}{2}(PTR_n + PTR_{n-1})}{APTGR}$$

Where,

ES = Energy Shortfall

 E_n = Energy delivered by Seller in the most recently completed Commercial Operation Year

SF = Shortfall Factor

 PTR_n = Performance Test Ratio for the most recently completed Commercial Operation Year

 PTR_{n-1} = Performance Test Ratio for the Commercial Operation Year immediately preceding the most recently completed Commercial Operation Year

APTGR = Annual Performance Test Guarantee Ratio

- (C) Seller shall pay Annual Performance Test Guarantee Damages in accordance with this Section 10.9. Liquidated damages associated with failure to meet the Annual Performance Test Guarantee shall be paid in the amount equal to (x) the Solar Energy Output Payment Rate multiplied by (y) the Energy Shortfall as determined using the above calculation (the resulting amount is the "Annual Performance Test Guarantee Damages"), but in no event in excess of the Annual Solar Capacity Guarantee Damages Cap and the Aggregate Solar Capacity Guarantee Damages Cap.
- (D) The following is an example (for illustrative purposes only) of the Energy Shortfall calculation: A Performance Test is conducted and results in an average Performance Test Ratio of 0.930 (the average of the Performance Test Ratios of the most recently completed Commercial Operation Year and the Commercial Operation Year immediately preceding the most recently completed Commercial Operation Year). The Solar Energy Output Payment Rate

- is \$19.73/MWh and the total annual Energy delivered by the Project in the most recently completed Commercial Operation Year is 130,000 MWh. Annual Performance Test Guarantee Damages shall be paid as a result of the Performance Test Ratio being less than the Annual Performance Test Guarantee Ratio of 0.960. The amount of Annual Performance Test Guarantee Damages is calculated to be [\$19.73/MWh] X [130,000 X (1 0.930 / 0.960)] = \$80,153.13.
- (E) The total Annual Performance Test Guarantee Damages payable by Seller for failure to meet the Annual Performance Test Guarantee in any Commercial Operation Year shall be capped annually at a value equivalent to Sixteen Thousand Dollars (\$16,000) per MW of Guaranteed Solar Capacity ("Annual Solar Capacity Guarantee Damages Cap"). The total Annual Performance Test Guarantee Damages payable by Seller shall be capped in the aggregate at a value equal to Forty-Eight Thousand Dollars (\$48,000) per MW of Guaranteed Solar Capacity ("Aggregate Annual Solar Capacity Guarantee Damages Cap") over the Term of the PPA.
- (F) Notwithstanding anything to the contrary in this PPA, the Parties agree that Buyer's sole and exclusive remedy, and Seller's sole and exclusive liability, for any failure of Seller to meet the Annual Performance Test Guarantee or the Annual Performance Test Guarantee Ratio (including in the event of any Buyer-Requested Performance Tests), shall be the payment of Annual Performance Test Guarantee Damages as and when required in this Section 10.9, up to the Annual Solar Capacity Guarantee Damages Cap and the Aggregate Annual Solar Capacity Guarantee Damages Cap. Any such failures shall not be subject to the collection of any other damages or any other remedies, including specific performance, and shall not be an Event of Default under this PPA.
- 10.10 <u>Buyer-Requested Performance Tests.</u> In the event of a material adverse change in expected Energy Output based on monthly billing, Seller shall perform additional tests as requested by Buyer ("**Buyer-Requested Performance Tests**"), limited to the conditions described in this Section 10.10. Buyer-Requested Performance Tests will be conducted as described in Section 10.8, for Buyer-Requested Performance Tests performed within the second and subsequent Commercial Operation Years.
- (A) If the results of a Buyer-Requested Performance Test fail to meet the Annual Performance Test Guarantee Ratio, Annual Performance Test Guarantee Damages would apply for the time period following the Buyer-Requested Performance Test until such time as a subsequent retest confirms that corrective actions have resolved deficiencies.
- (B) Only one (1) Buyer-Requested Performance Test may be requested per Commercial Operation Year.
- (C) Buyer-Requested Performance Test may not be requested within three months of a previous Performance Test.
- (D) Buyer-Requested Performance Test will be performed at a time mutually agreeable to both Parties.

10.11 Weather Stations.

- (A) Seller shall, at Seller's cost and no later than thirty (30) days prior to the estimated Commercial Operation Date, provide, install, own, operate and maintain a minimum of four (4) stand-alone meteorological stations ("Weather Stations") at the Project Site to monitor and report weather data. The Weather Stations shall be appropriately spaced on the Site as determined by the engineer in order to provide representative conditions for the Project and to provide real time information on changing weather conditions. The Weather Stations shall include the capability for measuring, indicating, and recording ambient temperature, barometric pressure, solar radiation, and relative humidity. Seller shall submit to PNM for review and approval, Seller's technical specifications for the Weather Stations along with a site plan showing the location of the station(s) (GPS coordinates), the location of all solar generating units, photovoltaic modules, current inverters, and other prominent features, as applicable. The system shall be interconnected via a web-based file transfer protocol, or other mutually-agreed protocol, to provide indication of all measured parameters to PNM and the data shall be available to PNM via a PI historian interface.
- (B) Seller shall not select the type of Weather Station without the prior written consent of PNM, which shall not be unreasonably withheld. No later than three (3) months prior to the estimated Commercial Operation Date, the Parties shall agree on the locations of the Weather Stations and any applicable protocols for testing, accuracy, failure or other relevant characteristics of the Weather Stations.
- (C) Data collected from the Weather Stations shall be utilized for determination of the Solar Performance Ratio, minimum solar irradiance for determination of system availability, and lost output due to curtailment or outages.

ARTICLE 11 RECs and Environmental Attributes

11.1 Sale of RECs and Environmental Attributes.

- (A) Other than as specified in Sections 11.1(D) and 11.1(E) below, effective from the date on which the Project first delivers Energy for sale to Buyer at the Point of Delivery, Seller shall transfer to Buyer, free and clear of all claims, liens, security interests and encumbrances, of any kind, nature and description, all right, title and interest in and to RECs and Environmental Attributes associated with the generation of Energy. Seller shall make the RECs available to Buyer no later than five (5) Business Days after the RECs are created in WREGIS, subject to a day-for-day extension based on availability of the WREGIS website. Seller shall be liable for Buyer's costs to replace the RECs if Seller fails to deliver RECs within ten (10) Days after notice from Buyer of such failure. The RECs and Environmental Attributes transferred under this PPA shall be bundled with the associated Energy, and Buyer shall pay Seller for the bundled RECs and Environmental Attributes and Energy as set forth in this PPA.
- (B) Seller and Buyer shall execute all documents and instruments necessary to effect transfer of the RECs and Environmental Attributes to Buyer or its respective designee(s).
 - (C) Ownership by Buyer of Environmental Attributes and RECs shall include

any Environmental Attributes and RECs that are reserved or "banked" throughout the Term of this PPA, but not used, sold, assigned or otherwise transferred during the Term of this PPA. Buyer may, to the extent permitted by Applicable Law and this PPA, assign its rights, title and interest in and to any RECs and Environmental Attributes associated with the Project to one or more third parties under any transaction permitted by Applicable Law.

- (D) Except as otherwise provided in Section 8.1, Tax Benefits in effect on the Execution Date of this PPA or any successor or other provision providing for a federal, state and/or local tax credit determined by reference to renewable electric energy produced from renewable energy resources shall be owned by Seller.
- (E) Seller shall, at its sole expense and before commencement of the Test Period, take all actions and execute all documents or instruments necessary to ensure that the Project is registered as a generating unit in WREGIS for the purpose of tracking all Renewable Energy Certificates corresponding to all Metered Output, and that all associated WREGIS Certificates are issued and tracked and transferred in a timely manner to Buyer. Seller shall comply with all Applicable Laws, including the WREGIS Operating Rules, regarding the certification and transfer of such WREGIS Certificates to Buyer and Buyer shall be given sole title to all such WREGIS Certificates. Seller shall be responsible for all expenses associated with registering the Project with WREGIS, establishing and maintaining Seller's WREGIS account, paying WREGIS Certificate issuance and transfer fees, and transferring WREGIS Certificates from Seller's WREGIS account to Buyer's WREGIS account.
- (F) Seller shall register the Project, as necessary, so that the Project is compliant with reporting requirements related to RECs and Environmental Attributes and certification requirements under any applicable federal, state or regional program or Applicable Law.
- (G) Prior to commencement of the Test Period, Seller shall provide written documentation to Buyer evidencing that the RECs generated by the Project will be reported to WREGIS using a WREGIS Qualified Reporting Entity, as that term is defined by WREGIS.
- (H) Neither Seller nor Buyer will have any liability to the other for any act, omission, misrepresentation, or breach (other than an act or omission due to the failure to pay fees, charges or expenses by the responsible Party), by an entity that certifies the characteristics or delivery of a REC, or the qualification of the Project as a renewable energy facility, under Applicable Law. The certifying entity may include a Governmental Authority, WREGIS or other generation information system, an independent auditor or other third party.

ARTICLE 12 Default and Remedies

12.1 Events of Default of Seller.

- (A) Any of the following events shall constitute an Event of Default of Seller upon its occurrence and no cure period shall be applicable other than as set forth below:
 - (1) Seller's dissolution or liquidation;

- (2) Seller's assignment of this PPA (or any of its rights hereunder) for the benefit of creditors, except as permitted pursuant to Article 18 and in any consent to collateral assignment with any Lender;
- (3) Seller's filing of a petition in voluntary bankruptcy or insolvency or for reorganization or arrangement under the bankruptcy laws of the United States or under any insolvency law of any state, or Seller voluntarily taking advantage of any such law by answer or otherwise;
- (4) The sale by Seller to a third party, or diversion by Seller for any use, of Energy, RECs or Ancillary Services committed to Buyer by Seller;
- (5) Seller's actual fraud, waste, tampering with Buyer-owned facilities or other material misrepresentation or misconduct in connection with this PPA or the operation of the Project;
- (6) The failure of Seller to maintain Security in accordance with Article 19, unless remedied within ten (10) Days of receipt by Seller of written notice of such failure from Buyer or the entity providing such Security;
- (7) The failure of Seller Guarantor to make, when due, any payment required, unless remedied within 10 Business Days of receipt of notice of such failure:
- (8) Seller's failure to achieve the Commercial Operation Date for the Project on or prior to the Guaranteed Start Date or other date mutually agreed to by the Parties;
- (9) Seller's failure to make any payment due to Buyer under or in connection with this PPA (subject to Seller's rights with respect to disputed payments under Article 9 and net of outstanding damages and any other rights of offset that Seller may have pursuant to this PPA) shall constitute an Event of Default upon the failure of Seller to cure within ten (10) Days of written notice from Buyer to Seller; or
- (10) Seller's failure to deliver RECs in accordance with the terms of this PPA, unless remedied within ten (10) Business Days of receipt of notice of such failure.
- (B) Any of the following events shall constitute an Event of Default of Seller upon the failure of Seller to cure within thirty (30) Days after the date of written notice from Buyer to Seller, or such longer period as may be necessary to effectuate a cure provided that Seller has commenced and diligently continues its efforts to effectuate a cure, not to exceed an additional thirty (30) Days:
 - (1) Seller's Abandonment of construction or operation of the Project;

- (2) Except to the extent arising from the acts or omissions of the Transmission Provider or Buyer, Seller is not able to deliver Energy to the Point of Delivery as a result of the Project not maintaining its interconnection with the Transmission Provider's Interconnection Facilities or otherwise fails to maintain in effect any agreements required to deliver Energy to the Point of Delivery;
- (3) Seller's failure to register the Project or ensure registration of the RECs in accordance with the terms of this PPA;
- (4) Seller's failure to maintain in effect any agreements required to deliver Energy Output to the Point of Delivery;
- (5) Seller's failure to comply with any other material obligation under this PPA, which would result in a material adverse impact on Buyer;
- (6) The Project fails, after the Commercial Operation Date, to maintain an Actual Availability Percentage of at least eighty percent (80%) over any twenty-four (24) consecutive months during the Term; or
- (7) The Project fails, after the Commercial Operation Date, to obtain an Actual Availability Percentage of at least sixty-five percent (65%) over any twelve (12) consecutive months during the Term.
- (C) Any of the following events shall constitute an Event of Default of Seller upon the failure of Seller to cure within sixty (60) Days after the date of written notice from Buyer to Seller, or such longer period as may be necessary to effectuate a cure provided that Seller has commenced and diligently continues its efforts to effectuate a cure, not to exceed an additional thirty (30) Days:
 - (1) Seller's assignment of this PPA, or any Change of Control of Seller, or Seller's sale or transfer of its interest, or any part thereof, in the Project, except as permitted in accordance with Article 18;
 - (2) Any representation or warranty made by Seller in this PPA shall prove to have been false or misleading in any material respect when made or ceases to remain true during the Term if such cessation would reasonably be expected to result in a material adverse impact on Buyer; or
 - (3) The filing of an involuntary case in bankruptcy or any proceeding under any other insolvency law against Seller as debtor or its parent or any Affiliate that could materially impact Seller's ability to perform its obligations hereunder; *provided*, *however*, that Seller does not obtain a stay or dismissal of the filing within the cure period.

12.2 Events of Default of Buyer.

- (A) Any of the following shall constitute an Event of Default of Buyer upon its occurrence, and no cure period shall be applicable:
 - (1) Buyer's dissolution or liquidation provided that division of Buyer into multiple entities shall not constitute dissolution or liquidation;
 - (2) Buyer's assignment of this PPA (or any of its rights hereunder) for the benefit of creditors; or
 - (3) Buyer's filing of a voluntary petition in bankruptcy or insolvency or for reorganization or arrangement under the bankruptcy laws of the United States or under any insolvency law of any State, or Buyer voluntarily taking advantage of any such law by answer or otherwise.
- (B) Buyer's failure to make any payment due hereunder (subject to Buyer's rights with respect to disputed payments under Article 9 and net of outstanding damages and any other rights of offset that Buyer may have pursuant to this PPA) shall constitute an Event of Default upon the failure of Buyer to cure within ten (10) Days of written notice from Seller to Buyer.
- (C) Any of the following shall constitute an Event of Default of Buyer upon the failure of Buyer to cure within thirty (30) Days after the date of written notice from Seller to Buyer, or such longer period as may be necessary to effectuate a cure provided that Buyer has commenced and diligently continues its efforts to effectuate a cure, not to exceed an additional thirty (30) Days:
 - (1) Buyer's actual fraud, waste, tampering with Seller-owned facilities or other material misrepresentation or misconduct in connection with this PPA or the operation of the Project.
 - (2) Buyer's failure to comply with any other material obligation under this PPA, which would result in a material adverse impact on Seller.
- (D) Any of the following shall constitute an Event of Default of Buyer upon the failure of Buyer to cure within sixty (60) Days after the date of written notice from Seller to Buyer. or such longer period as may be necessary to effectuate a cure provided that Buyer has commenced and diligently continues its efforts to effectuate a cure, not to exceed an additional thirty (30) Days:
 - (1) The filing of an involuntary case in bankruptcy or any proceeding under any other insolvency law against Buyer; *provided*, *however*, that Buyer does not obtain a stay or dismissal of the filing within the cure period;
 - (2) Buyer's assignment of this PPA, except as permitted in accordance with Article 18; or
 - (3) Any representation or warranty made by Buyer in this PPA

shall prove to have been false or misleading in any material respect when made or ceases to remain true during the Term if such cessation would reasonably be expected to result in a material adverse impact on Seller.

12.3 Damages Prior to Termination.

- (A) Upon the occurrence of an Event of Default, and subject in each case to the limitation on damages set forth in Section 12.7, and the duty to mitigate damages set forth in Section 12.9, the Non-Defaulting Party shall have the right to (i) collect damages accruing prior to the Early Termination Date of this PPA from the Defaulting Party as set forth in Section 12.3(B), (ii) exercise its rights pursuant to Section 12.5, (iii) suspend performance, (iv) with respect to an Event of Default of Seller, exercise its rights pursuant to Section 12.10 with respect to any Security, and (v) exercise its rights to terminate this PPA pursuant to Section 12.4.
- For all Events of Default, the Non-Defaulting Party shall be entitled to receive from the Defaulting Party all of the damages incurred by the Non-Defaulting Party in connection with such Event of Default prior to the Early Termination Date; provided, that if an Event of Default has occurred and has continued uncured for a period of one hundred eighty (180) Days, the Non-Defaulting Party shall be required to either waive its right to collect further damages on account of such Event of Default or elect to terminate this PPA as provided for in Section 12.4. If Seller is the Defaulting Party, the Parties agree that the damages recoverable by Buyer hereunder on account of an Event of Default of Seller shall include an amount of cover damages equal to Replacement Energy Costs minus the product of (x) the quantity of Energy Output so replaced and (y) the Energy Output Payment Rate. Further, Seller acknowledges and agrees that in addition to the foregoing, Seller shall be obligated to pay Buyer any such damages associated with replacement of Energy Output notwithstanding the availability or prices of electric energy from other fuel sources, such as natural gas. Seller also shall be obligated to pay Buyer any penalties levied by any Governmental Authority in connection with Seller's failure to deliver to Buyer any RECs and any Environmental Attributes pursuant to this PPA, provided that Buyer has used commercially reasonable efforts to avoid, minimize or mitigate the same. Seller acknowledges that Buyer entered into this PPA for the procurement of Energy Output, which includes RECs and Environmental Attributes. If Buyer is the Defaulting Party, the Parties agree that damages recoverable by Seller hereunder on account of an Event of Default of Buyer shall include costs and losses incurred by Seller due to such Event of Default, including, to the extent applicable, an amount of cover damages equal to the quantity of Energy Output produced by Seller following such Event of Default, plus, to the extent that Seller is unable to produce Energy Output due to the Event of Default of Buyer, an additional quantity equal to the amount of Energy Output that would have been produced by Seller absent such Event of Default of Buyer, each multiplied by the Energy Output Payment Rate; provided that the foregoing amount shall be reduced by an amount equal to (A) the amount of any revenues that Seller, using commercially reasonable efforts, is able to obtain by selling Energy Output to a third party or into the market, less (B) Seller's costs and expenses incurred to effectuate any such sales.
- 12.4 <u>Termination</u>. Upon the occurrence of an Event of Default, the Non-Defaulting Party shall have the right to declare a date, which shall be between fifteen (15) and sixty (60) Days after the notice thereof, upon which this PPA shall terminate ("Early Termination Date"). Upon the effective designation of an Early Termination Date, the Non-Defaulting Party will have

the right to immediately suspend performance under this PPA, except that Seller may not suspend performance of its obligation to post and maintain Development Security and Delivery Term Security in accordance with Article 19. Neither Party shall have the right to terminate this PPA except as provided for upon the occurrence of an Event of Default as described above or as may be otherwise explicitly provided for in this PPA. Upon the termination of this PPA under this Section 12.4 for an Event of Default, the Non-Defaulting Party shall be entitled to receive the Termination Payment from the Defaulting Party, subject to the limitation on damages set forth in Section 12.7. As soon as practicable after the Early Termination Date, the Non-Defaulting Party shall (a) calculate the Termination Payment, and (b) give notice to the Defaulting Party of the amount of the Termination Payment. The notice shall include a written statement explaining in reasonable detail the calculation of such amount and the sources for such calculation. The Termination Payment shall be made to the Non-Defaulting Party, as applicable, within ten (10) Business Days after such notice is effective. If Seller is the Defaulting Party, the Termination Payment will equal the Buyer Termination Payment less any amounts due from Buyer (net of any amounts due from Seller), and if Buyer is the Defaulting Party, the Termination Payment will equal the Seller Termination Payment plus any amounts due from Buyer (net of any amounts due from Seller).

- (A) In the event that Seller is the Defaulting Party, as soon as practicable after notice of the Early Termination Date, Buyer shall calculate the Buyer Termination Payment in a commercially reasonable manner as of the Early Termination Date in accordance with this Section 12.4(A). The notice shall include a written statement explaining in reasonable detail the calculation of such amount. In calculating such amount, Buyer shall use information from third parties who may include dealers in the relevant markets, end-users of the relevant product, information vendors and other sources of market information. Buyer shall not have to enter into a replacement contract to establish a Buyer Termination Payment. Any dispute between the Parties with respect to the Buyer Termination Payment calculation shall be subject to the dispute resolution provisions set forth in Section 13.8.
- (B) In the event that Buyer is the Defaulting Party, as soon as practicable after notice of the Early Termination Date, Seller shall deliver written notice to Buyer of the amount of the Seller Termination Payment. The notice shall include a written statement explaining in reasonable detail the calculation of such amount. In calculating such amount, Seller shall use information from third parties who may include dealers in the relevant markets, end-users of the relevant product, information vendors and other sources of market information. Seller shall not have to enter into a replacement contract to establish a Seller Termination Payment. Any dispute between the Parties with respect to the Seller Termination Payment calculation shall be subject to the dispute resolution provisions set forth in Section 13.8.
- 12.5 <u>Specific Performance</u>. In addition to the other remedies specified in this Article 12, each Party shall be entitled to seek a decree compelling specific performance with respect to, and shall be entitled, without the necessity of filing any bond, to seek the restraint by injunction of, any actual or threatened breach of any material performance obligation of the other Party under this PPA.
- 12.6 <u>Remedies Cumulative</u>. Subject to limitations on damages set forth in Section 12.7, each right or remedy of the Parties provided for in this PPA shall be cumulative of

and shall be in addition to every other right or remedy provided for in this PPA, and the exercise, or the beginning of the exercise, by a Party of any one or more of the rights or remedies provided for herein shall not preclude the simultaneous or later exercise by such Party of any or all other rights or remedies provided for herein.

- 12.7 <u>Waiver and Exclusion of Other Damages</u>. The Parties confirm that the express remedies and measures of damages provided in this PPA satisfy its essential purposes. If no remedy or measure of damages is expressly herein provided, the obligor's liability shall be limited to direct, actual damages only. Neither Party shall be liable to the other Party for consequential, incidental, punitive, exemplary or indirect damages, lost profits or other business interruption damages by statute, in tort or contract (except to the extent expressly provided herein). To the extent any damages are required to be paid hereunder are deemed liquidated, the Parties acknowledge that the damages are difficult or impossible to determine, that otherwise obtaining an adequate remedy is inconvenient, and that the liquidated damages constitute a reasonable approximation of the harm or loss.
- 12.8 Payment of Amounts Due to Buyer. Without limiting any other provisions of this Article 12 and at any time before or after termination of this PPA, Buyer may send Seller an invoice for such damages or other amounts as are due to Buyer at such time from Seller under this PPA, and such invoice shall be payable in the manner, and in accordance with the applicable provisions, set forth in Article 9, including the provision for late payment charges.
- 12.9 <u>Duty to Mitigate</u>. Each Party agrees that it has a duty to mitigate damages and covenants that it will use commercially reasonable efforts to minimize any damages it may incur as a result of the other Party's performance or non-performance of this PPA.
- 12.10 <u>Security Rights</u>. Upon or at any time after the occurrence and during the continuation of an Event of Default enumerated in Section 12.1 or an Early Termination Date affecting Seller, Buyer may exercise any of the rights and remedies with respect to any Security, including any ancillary rights and remedies under Applicable Law then in effect. Buyer shall apply the proceeds of the Security realized upon the exercise of any such rights or remedies to reduce Seller's obligations under this PPA, subject to Buyer's obligation to return any surplus proceeds remaining after such obligations are satisfied in full.

ARTICLE 13 Contract Administration and Notices

Party at the addresses noted in Exhibit D as either Party updates them from time to time by written notice to the other Party. Any notice, request, consent, or other communication required or authorized under this PPA to be given by one Party to the other Party shall be in writing. It shall either be hand delivered or mailed via overnight service with signature required upon receipt, to the representative of said other Party. If delivered, the notice, request, consent or other communication shall be simultaneously sent by facsimile or other electronic means. Any such notice, request, consent, or other communication shall be deemed to have been received by the close of the Business Day on which it was hand delivered or transmitted electronically (unless hand delivered or transmitted after such close in which case it shall be deemed received at the

close of the next Business Day). Real-time or routine communications concerning operation of the Project shall be exempt from this Section.

- 13.2 <u>Representative for Notices</u>. Each Party shall maintain a designated representative to receive notices, who shall be identified on <u>Exhibit D</u> to this PPA. Either Party may, by written notice to the other Party, change the representative or the address to which such notices and communications are to be sent.
- 13.3 <u>Authority of Representatives</u>. The Parties' representatives designated above shall have authority to act for their respective principals in all technical matters relating to performance of this PPA and to attempt to resolve disputes or potential disputes. However, in their capacity as representatives, they shall not have the authority to amend or modify any provision of this PPA.
- Records. Seller and Buyer shall each keep and maintain complete and accurate records and all other data required by each of them for the purposes of proper administration of this PPA, including but not limited to books and records necessary for billing and payments and such records as may be required by any Governmental Authority or pursuant to Applicable Law. All records of Seller and Buyer pertaining to the operation of the Project or this PPA as specified herein or otherwise shall be maintained at the Project or in an office of Seller or Buyer, as applicable, in such format as may be required by Applicable Law and/or any Governmental Approval. Each Party shall have the right at its sole cost and expense, upon reasonable prior written notice to the other Party, during normal business hours, to examine and/or make copies of the records and data of such other Party relating to this PPA (including all records and data relating to or substantiating any charges paid by or to such other Party, MWh generated, Seller's operating procedures, the Project equipment manuals and Operating Records). All records required hereunder shall be maintained in accordance with, and for the applicable time periods required by, Applicable Law and the Party's retention policies, but in no event less than five (5) years after the final payment is made under this PPA. Seller shall provide Buyer copies of Operating Records upon Buyer's request.
- (A) Operating and Maintenance Records. Seller shall maintain an accurate and up-to-date operating log, in electronic format, at the Project that will include, without limitation, power production records for each hour; dispatch and scheduled Energy production; changes in operating status; planned outages, deratings and curtailments; any unusual conditions found during inspections; environmental records; meteorological data; maintenance; any other operating or maintenance records as may be required by state or federal regulatory authorities and WECC and any other information required under Prudent Utility Practice or any Project agreement (in the prescribed format); and Buyer and Seller Forced Outages ("O&M Records").
- (B) Billing and Payment Records. To facilitate payment and verification, Seller and Buyer shall keep all books and records necessary for billing and payments in accordance with the provisions of Article 9 and grant the other Party reasonable access to those records.
- (C) Project Development Records and Data Submissions. Seller shall submit or cause to be submitted to Buyer the following documents on or before the dates specified

below:

- (1) No later than thirty (30) Days after the Execution Date and ending on the Commercial Operation Date, (i) monthly construction progress reports in such form as may be agreed to by Buyer in accordance with Section 10.1(A) and 10.1(B), and (ii) reports, when and as Seller becomes aware, of any new condition or event that may have a material adverse effect on the timely completion of the Project.
- (2) No later than thirty (30) Days prior to the start of the Test Period, (i) evidence demonstrating that Seller has obtained all Governmental Approvals then required to be obtained for the ownership, operation and maintenance of, and the supply of Energy Output from, the Project in accordance with this PPA, and (ii) a list identifying the remaining Governmental Approvals for which Seller is responsible under the terms of this PPA, which Governmental Approvals are not yet required for the operation and maintenance of, and the supply of Energy Output from, the Project, together with a plan for obtaining such Governmental Approvals and an estimate of the time within which such Governmental Approvals will be obtained by Seller; provided, however, that the plan for obtaining any outstanding Governmental Approvals from any Governmental Authority which address environmental, health and safety matters shall be reasonably acceptable to Buyer.
- (3) As soon as available, but not later than sixty (60) Days following the Commercial Operation Date for the Project, two (2) copies of all results of Commissioning Tests performed on the Solar Units.
- (4) Upon request by Buyer, one (1) signed and sealed copy of all as-built drawings for the Project, including the civil and architectural works.
- (5) The receipt of the above schedules, data, certificates and reports by Buyer shall not be construed as an endorsement by Buyer of the design of the Project, does not constitute a warranty by Buyer as to the safety, durability or reliability of the Project, otherwise relieve Seller of any of its obligations or potential liabilities under the Project contracts or, except with respect to the obligations of Buyer to maintain the confidentiality of documents and information received by it, impose any obligation or liability on Buyer.
- 13.5 <u>Provision of Real-Time Data</u>. Upon request by Buyer, Seller shall provide real-time electronic access to Buyer of all meteorological and other related data collected at the Project and corresponding unit availability data.
- 13.6 <u>Examination of Records</u>. Buyer may review operating procedures, equipment manuals, Operating Records and data kept by Seller relating to transactions under and administration of this PPA, at any time during the period the records are required to be maintained, from time to time upon request and during normal business hours. Buyer shall have the right, upon reasonable notice and at its sole expense (unless Seller has defaulted under this

PPA, in which case Seller will bear the reasonably incurred expense), to examine the records of Seller to the extent reasonably necessary to verify the accuracy of any statement, charge or computation made pursuant to this PPA. If any such examination reveals any inaccuracy in any invoice, the necessary adjustments in such invoice and any underpayment by Buyer will be paid, and any overpayment by Buyer will be reimbursed by Seller, promptly in accordance with payment provisions in this PPA.

13.7 <u>Exhibits</u>. Either Party may change the information for its notice addresses in <u>Exhibit D</u> at any time without the approval of the other Party. <u>Exhibit A</u>, <u>Exhibit B</u>, <u>Exhibit C</u>, and <u>Exhibit E</u> may be changed at any time with the mutual consent of both Parties.

13.8 Resolution of Issues.

(A) Negotiations. The Parties agree that it is in the best interest of both Parties to attempt to resolve disputes that arise under this PPA in a quick and inexpensive manner. To that end, the Parties commit to use commercially reasonable efforts to resolve disputes informally. For all disputes that arise under this PPA, the Parties immediately, through their designated representatives, shall negotiate with one another in good faith in order to reach resolution of the dispute. Such negotiation shall commence within five (5) Days of the date of the letter from one Party representative to the other Party representative notifying that Party of the nature of the dispute. In the event that the Parties' representatives cannot agree to a resolution of the dispute within thirty (30) Days after the commencement of negotiations, written notice of the dispute ("Dispute Notice"), together with a statement describing the issues or claims, shall be delivered, within five (5) Business Days after the expiration of such thirty (30) Day period, by each of the Parties' representatives to its respective senior officer or official (such senior officer or official to be selected by each of the Party representatives in his or her sole discretion, provided such senior officer or official has authority to bind the respective Party). Within five (5) Business Days after receipt of the Dispute Notice, the senior officers or officials for both Parties shall negotiate in good faith to resolve the dispute, provided that the failure to deliver such Dispute Notice shall not prejudice either Party's right to submit such dispute to litigation. In the event that the senior officers or officials cannot resolve such dispute within thirty (30) Days after the matter was submitted to them, then either Party may submit the matter to mediation under the New Mexico Mediation Procedures Act. If mediation does not resolve the dispute within thirty (30) Days of the submission to mediation, then either Party may seek legal and equitable remedies. If a Party receiving notice of a demand for mediation does not agree in writing within ten (10) Days to participate in mediation, then the Party demanding mediation may, after giving three (3) Business Days written notice, declare the mediation process unsuccessful and initiate legal and equitable remedies.

ARTICLE 14 Force Majeure

14.1 Definition.

(A) Neither Party will be considered to be in default in respect to any obligation hereunder if delays in or failure of performance is due to a Force Majeure Event, except for the obligation to pay monies due. A "Force Majeure Event" shall mean an event or

circumstance that arises, after the commencement of construction at the Site, that is not reasonably foreseeable, is beyond the reasonable control of and is not caused by the negligence or lack of due diligence of the affected Party or its contractors or suppliers and adversely affects the performance by that Party of its obligations under or pursuant to this PPA. Such events or circumstances may include, but are not limited to: actions or inactions of civil, tribal, or military authority (including courts and governmental or administrative agencies), acts of God, war, riot or insurrection, terrorism, blockades, embargoes, sabotage (including arson and vandalism), epidemics, explosions and fires not caused by a failure to operate the Project in accordance with Prudent Utility Practices, hurricanes, floods, unusually severe weather events not excluded in subpart (C)(viii) below, strikes, lockouts or other labor disputes (not caused by the failure of the affected Party to comply with the terms of a collective bargaining agreement).

- (B) Equipment breakdown or the inability of Seller to use equipment due to its design, construction, operation, or maintenance, the inability of Seller to meet regulatory standards, or failure by Seller to obtain on a timely basis and maintain a necessary permit or other regulatory approval shall not be considered a Force Majeure Event, unless Seller can demonstrate that the event was not reasonably foreseeable, was beyond Seller's reasonable control, and was not caused by the negligence or lack of due diligence by Seller or its agents.
- Notwithstanding the foregoing, the term Force Majeure Event does not (C) include (i) inability by Seller to procure equipment for the Project or any component parts therefor, for any reason (the risk of which is assumed by Seller); (ii) any other acts or omissions of any third party, including any vendor, materialman, customer, or supplier of Seller, or any full or partial curtailment in the Energy Output of the Project caused by or arising from the acts or omissions of such third parties, unless such acts or omissions are themselves excused by reason of a Force Majeure Event, as the definition is applied to such third party, and such event constitutes a Force Majeure Event, as the definition is applied to Seller; (iii) any delay caused by the processing of Buyer's interconnection request; (iv) any full or partial curtailment in the electric output of the Project that is caused by or arises from a mechanical or equipment breakdown, or other mishaps, events or conditions, attributable to normal wear and tear; (v) failure to abide by Prudent Utility Practices; (vi) changes in market conditions, actions of Governmental Authorities or other events or circumstances that affect the cost of equipment, labor, materials or supplies, or that affect demand for power or price for any of Seller's or Buyer's products; (vii) except as set forth in (A) above, any labor strikes, slowdowns or stoppages, or other labor disruptions against Seller or Seller's contractors or subcontractors; or (viii) weather events or sudden actions of the natural elements within twenty (20) year normal weather patterns, including normal lightning strikes, but excluding unusually severe events, such as tornadoes and floods.
- (D) In no event will any delay or failure of performance caused by a Force Majeure Event extend this PPA beyond its stated Term. Notwithstanding any other provision in this PPA to the contrary, in the event that any delay or failure of performance caused by a Force Majeure Event affecting Seller continues for an uninterrupted period of one hundred eighty (180) Days from its inception, either Party (or Buyer as provided in Section 3.6) may, at any time following the end of such period, terminate this PPA upon written notice to the affected Party, without further obligation by either Party except as to costs and balances incurred prior to the effective date of such termination.

- (E) Except as otherwise provided in this PPA, each Party shall be excused from performance when non-performance was caused, directly or indirectly, by a Force Majeure Event but only and to the extent thereof, and existence of a condition of Force Majeure Event shall not relieve the Parties of certain obligations under this PPA (including payment obligations) to the extent that such performance of such obligations is not precluded by the condition of Force Majeure Event.
- 14.2 <u>Notification Obligations</u>. In the event of any delay or nonperformance resulting from a Force Majeure Event, the Party claiming that a Force Majeure Event has occurred shall notify the other Party as soon as reasonably practicable by telephone and/or email, and in writing as soon as reasonably practicable but in no case later than ten (10) Business Days thereafter; provided that failure to provide notice within ten (10) Business Days only waives the Force Majeure Event as to periods prior to when the notice is given of such occurrence, of the nature, cause, date of commencement thereof and the anticipated duration, and shall indicate whether any deadlines or date(s) imposed hereunder may be affected thereby. The suspension of performance shall be of no greater scope and of no greater duration than is necessary. A Party claiming that a Force Majeure Event has occurred shall not be entitled to relief therefor unless and until it has delivered a notice therefor as required in this Section. The Party claiming that a Force Majeure Event has occurred shall notify the other Party of the cessation of the Force Majeure Event or of the conclusion of the affected Party's cure for the Force Majeure Event, in either case as soon as reasonably practicable.
- 14.3 <u>Duty to Mitigate</u>. The Party claiming that a Force Majeure Event has occurred shall use its commercially reasonable efforts to cure the cause(s) preventing its performance of this PPA and shall provide to the other Party weekly progress reports describing actions taken to end the Force Majeure Event; *provided, however*, that the settlement of strikes, lockouts and other labor disputes shall be entirely within the discretion of the affected Party, and such Party shall not be required to settle such strikes, lockouts or other labor disputes by acceding to demands which such Party deems to be unreasonable.
- 14.4 <u>Delay Caused by Force Majeure Event</u>. Upon the occurrence and during the continuance of a Force Majeure Event and the effects thereof, to the extent that a Force Majeure Event affects the ability of either Buyer or the Transmission Provider to accept Energy Output from the Project or to deliver Energy Output from the Project, then the hours during which the Force Majeure Event occurs shall be excluded from the payment calculations as set forth in Section 8.1.

ARTICLE 15 Representations, Warranties and Covenants

- 15.1 <u>Seller's Representations, Warranties and Covenants</u>. Seller hereby represents and warrants as follows:
- (A) Seller is a limited liability company duly organized, validly existing and in good standing under the laws of the state of Delaware. Seller is qualified to do business in each other jurisdiction where the failure to so qualify would have a material adverse effect on the business or financial condition of Seller; and Seller has all requisite power and authority to

conduct its business, to own its properties, and to execute, deliver, and perform its obligations under this PPA.

- (B) The execution, delivery, and performance of its obligations under this PPA by Seller have been duly authorized by all necessary limited liability company action, and do not and will not:
 - (1) require any consent or approval by any governing body of Seller, other than that which has been obtained and is in full force and effect;
 - (2) violate any Applicable Law, or violate any provision in any formation documents of Seller, the violation of which could have a material adverse effect on the ability of Seller to perform its obligations under this PPA;
 - (3) result in a breach or constitute a default under Seller's formation documents or bylaws, or under any agreement relating to the management or affairs of Seller or any indenture or loan or credit agreement, or any other agreement, lease, or instrument to which Seller is a party or by which Seller or its properties or assets may be bound or affected, the breach or default of which could reasonably be expected to have a material adverse effect on the ability of Seller to perform its obligations under this PPA; or
 - (4) result in, or require the creation or imposition of any mortgage, deed of trust, pledge, lien, security interest, or other charge or encumbrance of any nature (other than in favor of a Lender or as otherwise may be contemplated by this PPA) upon or with respect to any of the assets or properties of Seller now owned or hereafter acquired, the creation or imposition of which could reasonably be expected to have a material adverse effect on the ability of Seller to perform its obligations under this PPA.
- (C) The obligations of Seller under this PPA are valid and binding obligations of Seller.
- (D) The execution and performance of this PPA will not conflict with or constitute a breach or default under any contract or agreement of any kind to which Seller is a party or any judgment, order, statute, or regulation that is applicable to Seller or the Project.
- (E) To the knowledge of Seller, and except for those permits, consents, approvals, licenses and authorizations identified in Exhibit E, which Seller anticipates will be obtained by Seller in the ordinary course of business, all Governmental Approvals necessary for Seller's execution, delivery and performance of this PPA have been duly obtained and are in full force and effect.
- (F) Seller shall comply with all Applicable Laws in effect or that may be enacted during the Term.
- (G) Seller shall disclose to Buyer the extent of, and as soon as it is known to Seller, any violation of any Applicable Laws arising out of the construction of the Project, the

presence of Environmental Contamination at the Project (actual or alleged), or the existence of any past or present enforcement, legal, or regulatory action or proceeding relating to such Environmental Contamination.

- (H) To the full extent authorized by FERC regulations and the FERC standards of conduct, Seller hereby authorizes Buyer to contact and obtain information concerning the Project and Interconnection Facilities directly from the Transmission Provider.
- (I) Seller has or shall obtain sufficient water necessary for operation of the Project in accordance with Prudent Utility Practices.
- (J) Seller has and/or will have upon the generation of Energy Output good and marketable title to the RECs and Environmental Attributes;
- (K) Seller has not sold, delivered or transferred the RECs or Environmental Attributes to any other Person, in whole or in part;
- (L) All right, title and interest in and to the RECs and Environmental Attributes 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; and
- (M) Each REC and Environmental Attribute complies with the requirements set forth in the New Mexico Renewable Energy Act, NMSA 1978, § 62-16-1 et seq., and Title 17.9.572 NMAC.
- (N) As soon as practical but in no event longer than fifteen (15) days after the execution thereof, Seller shall provide a true and correct copy of the Interconnection Agreement to Buyer. On and after the execution of the Interconnection Agreement, Seller shall provide copies of any material amendments to the Interconnection Agreement to Buyer.
- (O) Except as expressly set forth in this PPA, Seller makes no warranty, express or implied, including but not limited to any warranty of merchantability or fitness for a particular purpose, or warranty arising from any course of dealing, performance, or usage of trade. Buyer expressly disclaims and waives any warranty not expressly included in this PPA.
- 15.2 <u>Buyer's Representations, Warranties and Covenants</u>. Buyer hereby represents and warrants as follows:
- (A) Buyer is a corporation duly organized, validly existing and in good standing under the laws of the State of New Mexico and is qualified in each other jurisdiction where the failure to so qualify would have a material adverse effect upon the business or financial condition of Buyer. Buyer has all requisite power and authority to conduct its business, to own its properties, and to execute, deliver, and perform its obligations under this PPA.
- (B) The execution, delivery, and performance of its obligations under this PPA by Buyer have been duly authorized by all necessary corporate action, and do not and will not:
 - (1) require any consent or approval of Buyer's shareholders,

members, managers and/or directors, except as set forth in Section 6.1;

- (2) violate any Applicable Law, or violate any provision in any corporate documents of Buyer, the violation of which could have a material adverse effect on the ability of Buyer to perform its obligations under this PPA;
- (3) result in a breach or constitute a default under Buyer's corporate charter or bylaws, or under any agreement relating to the management or affairs of Buyer, or any indenture or loan or credit agreement, or any other agreement, lease, or instrument to which Buyer is a party or by which Buyer or its properties or assets may be bound or affected, the breach or default of which could reasonably be expected to have a material adverse effect on the ability of Buyer to perform its obligations under this PPA; or
- (4) result in, or require the creation or imposition of, any mortgage, deed of trust, pledge, lien, security interest, or other charge or encumbrance of any nature (other than as may be contemplated by this PPA) upon or with respect to any of the assets or properties of Buyer now owned or hereafter acquired, the creation or imposition of which could reasonably be expected to have a material adverse effect on the ability of Buyer to perform its obligations under this PPA.
- (C) This PPA is a valid and binding obligation of Buyer, subject to the contingencies identified in Article 6.
- (D) The execution and performance of this PPA will not conflict with or constitute a breach or default under any contract or agreement of any kind to which Buyer is a party or any judgment, order, statute, or regulation that is applicable to Buyer.
- (E) To the knowledge of Buyer, and except for the NMPRC Approval(s) identified in Sections 6.1, and 17.3, all required Governmental Approvals necessary for Buyer's execution, delivery and performance of this PPA have been duly obtained and are in full force and effect.

ARTICLE 16 Insurance

16.1 Evidence of Insurance.

(A) Seller shall, at least thirty (30) Days prior to the commencement of any work on the Project, and thereafter, on or before June 1 of each Commercial Operation Year, provide Buyer with two (2) copies of insurance certificates evidencing the insurance coverages required to be maintained by Seller in accordance with Exhibit G and this Article 16 along with endorsements required below in Section 16.3, and a list of any other endorsements to the policy that limit the coverage provided by the ISO form with regard to this Project. All such insurance shall be primary insurance. All policies shall be written with insurers rated at least A- VII by A.M. Best or that Buyer, in its reasonable discretion, deems acceptable (such acceptance shall not be unreasonably withheld or delayed by Buyer). Seller's liability under this PPA shall not be

limited to the amount of insurance coverage required herein.

16.2 Term and Modification of Insurance.

- (A) All liability insurance required under this PPA shall cover occurrences during the Term of this PPA. In the event that any insurance as required herein is commercially available only on a "claims-made" basis, such insurance shall provide for a retroactive date not later than the Execution Date and such insurance shall be maintained by Seller, with a retroactive date not later than the retroactive date required above, for a minimum of five (5) calendar years after the Term.
- (B) Seller may self-insure either all or any portion of the foregoing coverages so long as there is no material decrease in its net worth or means that renders the same insufficient for purposes of self-insurance. If at any time during the Term Buyer, in its reasonable discretion, determines that it will no longer accept self-insurance from Seller, Buyer shall provide notice to Seller and Seller shall obtain the insurance coverages required by Exhibit G within sixty (60) Days.
- (C) Buyer shall have the right, at times deemed appropriate to Buyer during the Term of this PPA, to request Seller to modify the insurance minimum limits specified in Exhibit G in order to maintain reasonable coverage amounts. Seller shall make commercially reasonable efforts to comply with such request.

16.3 Endorsements and Other Requirements.

- (A) Seller shall provide endorsements evidencing that the insurers shall provide Buyer thirty (30) Days' prior written notice of non-renewal or cancellation of insurance (except that such notice shall be ten (10) Days for non-payment of premiums) and endorsements that waive all rights of subrogation against Buyer and its Affiliates, officers, directors, agents, subcontractors and employees.
- (B) Seller shall provide endorsements providing that the insurance required under this PPA is primary and non-contributory with respect to other insurance carried by Buyer.
- (C) Seller shall provide endorsements providing that the liability insurance required pursuant to paragraphs (B), (C) and (D) of Exhibit G names Buyer and its Affiliates, officers, directors, and employees as additional insureds for both ongoing and completed operations but only to the extent Buyer (or other additional insured) is vicariously liable for the negligence, acts or omissions of Seller. The liability insurance required pursuant to paragraphs (B) and (D) of Exhibit G shall include a standard ISO or an equivalent separation of insureds clause and will not include a cross-suit exclusion applicable to claims brought by or against an additional insured.

ARTICLE 17

Legal and Regulatory Compliance and Governmental Approval

17.1 <u>Applicable Laws</u>. Each Party shall at all times comply with all Applicable Laws. Each Party shall promptly notify the other Party of any material investigations, notices of alleged

violations or findings of violation of Applicable Law from any Governmental Authority, including any audit, notification, inspection or inquiry that has been commenced by any Governmental Authority in respect of a potential violation of Applicable Law with regard to the Project or the PPA. Seller shall give all required notices, shall timely procure and maintain all Seller required permits, and shall timely pay all charges and fees in connection therewith. Seller shall make available to Buyer, upon reasonable request, any personnel or records relating to the Project or this PPA to the extent Buyer requires the same to fulfill any regulatory reporting requirements, or for purposes of litigation or regulatory proceedings, including but not limited to, litigation or proceedings before the NMPRC, FERC, or other regulatory bodies. The Parties shall treat information disclosed pursuant to this Section 17.1 in confidence in accordance with Section 22.14, unless such information is public information.

- 17.2 <u>Governmental Approvals</u>. Each Party shall timely and lawfully procure and maintain in good standing, at its own cost and expense, all Governmental Approvals and Additional Consents and shall timely and properly pay its respective charges and fees in connection therewith.
- 17.3 NMPRC Approval. The obligations of the Parties hereunder, including Buyer's obligation to purchase Energy Output at the rates specified in Article 8, shall be conditioned upon the receipt of any Governmental Approvals required by Applicable Law in connection with (i) the execution and performance of this PPA, and a final order or other regulatory determination from the NMPRC that Buyer may procure renewable energy and associated RECs pursuant to this PPA and may recover the cost of such procurement; and (ii) abandonment of PNM's ownership interests in San Juan Generating Station, including any requested financing or other cost recovery method, and any waivers as set forth in Buyer's request for approval of this PPA or an associated abandonment filing (collectively, "Requested Actions"). In particular, but without limitation:
- (A) Buyer agrees to use commercially reasonable efforts to request and obtain NMPRC Approval of the Requested Actions, and Seller agrees to cooperate with and assist Buyer in these efforts as Buyer may reasonably request.
- (B) NMPRC Approval shall be considered received when the NMPRC issues a final written order that is not contested or is no longer subject to appeal or further proceedings on remand (i) approving the Requested Actions, or (ii) approving the Requested Actions in part or subject to conditions or substantial modifications, provided that each of Seller and Buyer agrees, subject to its reasonable discretion, to accept those conditions, modifications or such partial approval as sufficient (collectively, "NMPRC Approval").
 - (1) If the NMPRC disapproves any of the Requested Actions, then this PPA shall automatically terminate ten (10) Days after the date of such action by the NMPRC and be of no further force or effect, with no further obligation or liability of either Party to the other Party or to any other Person.
 - (2) If any NMPRC Approval is issued as described in clause (B)(ii) above, then the Parties shall meet and confer no later than fifteen (15) Days after the date of the NMPRC Approval order regarding whether Buyer or

Seller will elect to amend this PPA to address any conditions or substantial modifications or not to accept any partial or conditioned approval or substantial modification of this PPA, including a potential extension to the Expected Commercial Operation Date. If the Parties are unable to mutually agree on any amendments to this PPA to address such NMPRC Approval order, then this PPA shall automatically terminate ten (10) Days after the date on which the parties conferred and be of no further force or effect, with no further obligation or liability of either Party to the other Party or to any other Person, unless Buyer and Seller mutually agree in writing within such ten (10) Day period that this PPA remain in effect.

- (3) If the NMPRC has not, for any reason, entered an order upon the request for approval of all Requested Actions by April 30, 2020 ("Regulatory End Date"), then the Parties shall meet and confer no later than fifteen (15) Days after the Regulatory End Date regarding a potential extension of the Regulatory End Date. If the Parties are unable to mutually agree to an extension of the Regulatory End Date, including a potential extension to the Expected Commercial Operation Date, then this PPA shall automatically terminate ten (10) Days after the date on which the Parties conferred and be of no further force or effect, with no further obligation or liability of either Party to the other Party or to any other Person, unless Buyer and Seller mutually agree in writing within such ten (10) Day period that this PPA remain in effect.
- 17.4 <u>Compliance with Reliability Standards</u>. To the extent that new reliability standards applicable to the operation and maintenance of the Project are promulgated by the WECC, NERC, FERC, or NMPRC, or any successor agencies, any and all costs incurred as a result of actions required for compliance with the new reliability standards shall be borne by Seller. To the extent that Seller contributes in whole or in part to actions that result in monetary penalties being assessed to Buyer by WECC, NERC, FERC or any successor agency, for lack of compliance with reliability standards related to the operation and maintenance of the Project, Seller shall reimburse Buyer for its share of monetary penalties.
- 17.5 <u>Compliance Information</u>. Each Party shall, for the purpose of gathering information and/or providing oral or written reports, testimony, affidavits or other submissions relevant to any Governmental Approvals, Non-Governmental Compliance Obligations, Additional Consents, Applicable Laws or in connection with any litigation, arbitration or administrative proceeding before any authority of competent jurisdiction: (i) deliver or cause to be delivered to the other Party any necessary or required certificates of its officers, accountants, engineers or agents; and/or (ii) make available necessary personnel with knowledge as to such matters.

ARTICLE 18 Assignment and Other Transfer Restrictions

18.1 No Assignment Without Consent. Except as permitted in this Article 18, neither Party shall sell, transfer, or assign this PPA, in whole or in part, and Seller shall not sell, transfer or assign the Project, in whole or in part, without the prior written consent of the other Party,

which consent shall not be unreasonably withheld, delayed or conditioned and so long as any proposed assignee satisfies the conditions set forth in this Article 18.

- (A) Buyer's consent shall not be required for: (i) any assignment or transfer of this PPA by Seller to an Affiliate of Seller; or (ii) any assignment or transfer of this PPA by Seller to a Person succeeding to all or substantially all of the assets of Seller, *provided* that in the case of any assignment or transfer pursuant to clauses (i) or (ii) above, such assignee (a) shall have agreed in writing to be bound by the terms and conditions hereof and furnished a copy of the assignment or transfer document to Buyer; (b) is a Qualified Operator or retains, prior to the date of such transfer, a Qualified Operator to operate the Project (or otherwise agrees not to interfere with the existing Qualified Operator for the Project); (c) delivers evidence reasonably satisfactory to Buyer that such assignee's creditworthiness is equal to or better than that of Seller; and (d) shall have complied with the obligations of the assigning Party to provide Development Security or Delivery Term Security, as applicable, in accordance with Article 19 of this PPA.
- (B) Seller's consent shall not be required for any assignment of this PPA by Buyer to any Affiliate or in connection with certain corporate events involving Buyer or its parent corporation, including, but not limited to, mergers, reorganizations, consolidations, and asset and/or stock sales, *provided* that such assignee delivers evidence reasonably satisfactory to Seller that such assignee's creditworthiness is equal to or better than that of Buyer; and *further provided* that any such assignee delivers evidence reasonably satisfactory to Seller that such assignee has NMPRC Approval of this PPA as and if required by NMPRC regulations.
- 18.2 <u>Conditions on Transfers</u>. If the rights and interests of a Party in this PPA shall be sold, transferred or assigned to an Affiliate, upon satisfaction of the conditions set forth in this Article 18, and upon the Affiliate's agreement in writing to be bound by and to assume the terms and conditions hereof and any and all obligations to the non-assigning Party arising or accruing hereunder from and after the date of such assumption, and provided that the assigning Party is not then in default of its obligations under this PPA or that any then-existing default is cured no later than the date of assignment, then the assigning Party shall be released and discharged from the terms and conditions hereof and each such obligation hereunder from and after such date, and non-assigning Party shall continue this PPA with the Affiliate as if such Person had been named under this PPA; provided, however, that the assigning Party shall not be released and discharged from and shall remain liable for any and all obligations to the other Party arising or accruing hereunder prior to such assumption.
- 18.3 <u>Change of Control</u>. Except for a Seller Permitted Transfer, any Change of Control of Seller, whether voluntary or by operation of law, shall require the prior written consent of Buyer, which shall not be unreasonably withheld, conditioned or delayed.
- 18.4 <u>Transfer Without Consent Is Null and Void</u>. Any Change of Control or sale, transfer, or assignment of any interest in the Project or in this PPA made without fulfilling the requirements of this PPA shall be null and void and shall constitute an Event of Default pursuant to Article 12.

18.5 <u>Subcontracting.</u> Seller may subcontract its duties or obligations under this PPA without the prior written consent of Buyer; *provided*, that no such subcontract shall relieve Seller of any of its duties or obligations hereunder. All subcontractors required by law to be qualified to do business in the State of New Mexico or licensed in accordance with New Mexico law shall be so qualified or licensed. Seller shall be solely responsible for the engagement, supervision, management, satisfactory performance of the subcontractors or unsatisfactory performance.

18.6 Assignment to Lenders.

- (A) Cooperation. In connection with any assignment of this PPA by Seller to its Lenders, as soon as reasonably practicable after reasonable request from Seller or any Lender, Buyer will cooperate reasonably with Seller and Lender to agree upon and enter into a consent and agreement, or, if applicable, an estoppel certificate, an estoppel and consent agreement, or similar instrument, all in a form acceptable to Buyer including exclusions, assumptions and caveats typical for such documents or necessary for the accuracy or delivery thereof, providing for, among other things, provisions containing at least the following: (i) an option, but not an obligation, for the Lenders to cure any monetary Event of Default of Seller within thirty (30) Days of the expiration of the cure period provided therefor in Section 12.1, and cure any nonmonetary Event of Default of Seller within sixty (60) Days of the expiration of the cure period provided therefor in Section 12.1, prior to Buyer terminating this PPA; (ii) Buyer providing written notice to Lenders of any Events of Default of Seller; and (iii) Buyer not terminating this PPA if Lenders need to foreclose on the Project prior to curing any Event of Default of Seller giving rise to such termination, but only to the extent that the period required for such foreclosure and cure does not exceed one hundred eighty (180) Days from receipt by Lenders of written notice of such Event of Default of Seller; provided that, in all cases, (a) Buyer will have no obligation to alter or modify the terms of this PPA or provide any consent or enter into any agreement that has a material adverse effect on Buyer, and (b) Seller will be responsible for Buyer's reasonable costs (including, but not limited to, attorneys' fees) associated with Buyer's review, negotiation, execution and delivery of any documents in connection with such assignment. Nothing in this Section 18.6 shall impair Buyer's right to receive all of the damages arising out of or relating to Seller's default, including damages accruing prior to termination as set forth in Section 12.3 of this PPA.
- (B) Financing Liens. Either Party may, without the other Party's consent, transfer, sell, pledge, encumber or assign this PPA or the revenues or proceeds therefrom in connection with any financing, provided that such a collateral assignment by Seller does not place any limitation on Buyer's rights or expand Buyer's liability, risks or obligations under this PPA; and further provided that Seller shall not be relieved of any of its obligations or liability under this PPA and that the Lender in any such collateral assignment acknowledges and agrees that the Project shall be operated and maintained by a Qualified Operator. Promptly after making any such encumbrance, Seller shall notify Buyer in writing of the name, address, and telephone and facsimile numbers of each Lender, collateral agent or trustee, as applicable, to which Seller's interest under this PPA has been encumbered. Such notice shall include the names of the account managers or other representatives of the Lenders to whom all written and telephonic communications may be addressed. After giving Buyer such initial notice, Seller shall promptly give Buyer notice of any change in the information provided in the initial notice or any revised notice.

ARTICLE 19 Credit and Security Requirements

- 19.1 Security. Seller shall post and maintain, at its sole cost and expense, security equal to Sixty Thousand Dollars (\$60,000) per MW multiplied by the Guaranteed Capacity ("Development Security") within the earlier of (i) ninety (90) Days after the Execution Date and (ii) the commencement of construction of the Project. Not later than the Commercial Operation Date, and as a condition thereto, Seller shall post and maintain, at its sole cost and expense, security equal to One Hundred Thousand Dollars (\$100,000) per MW multiplied by the Guaranteed Capacity (the "Delivery Term Security"). Seller shall replenish the Development Security and Delivery Term Security, as applicable, to such required amount within fifteen (15) Days after any draw by Buyer. Buyer will return the Development Security to Seller in full if Commercial Operation occurs on or before the Guaranteed Start Date, provided Seller has paid in full any Delay Damages or Capacity Shortfall Damages. In the event that no amounts are due and owing by Seller to Buyer under this PPA and provided no claims are then outstanding, Seller's Delivery Term Security shall be released to Seller upon the earlier of (i) termination of this PPA in accordance with its terms; and (ii) on the fifteenth (15th) Business Day after the expiration of the Term.
- Form of Security. The following are deemed acceptable methods for posting Security, which methods may be used in any combination, in the discretion of Buyer: (a) cash, (b) a Letter of Credit in form reasonably acceptable to the Buyer issued by a U.S. bank or a U.S. branch of a foreign bank with credit ratings by both S&P and Moody's of at least A- and A3, respectively and at least Ten Billion Dollars (\$10,000,000,000) in U.S.-based assets ("Issuer Minimum Requirements"), (c) a Seller Guaranty from Seller Guarantor, or (d) other security as may be reasonably acceptable to Buyer. If at any time there shall occur a Downgrade Event with respect to Seller Guarantor, then Buyer may require Seller to post a Letter of Credit or cash in a pledged collateral account in an amount equal to the then-applicable amount of any outstanding Seller Guaranty comprising the Seller Security. Upon receipt of the Letter of Credit or cash, the Seller Guaranty shall be returned promptly to Seller. Notwithstanding the foregoing, Seller's obligation to provide a Letter of Credit in lieu of a Seller Guaranty under this Section 19.2 shall be suspended during any period that (x) Seller Guarantor is no longer experiencing a Downgrade Event and (y) the Seller Guaranty is reinstated by Seller Guarantor in accordance with the requirements of this Section 19.2. Any Letter of Credit provided hereunder shall state that it shall renew automatically for successive one-year or shorter periods unless Buyer receives written notice from the issuing bank at least sixty (60) Days prior to the expiration date stated in the Letter of Credit that the issuing bank elects not to extend the Letter of Credit. If Buyer receives notice from the issuing bank that the Letter of Credit will not be extended, Seller must provide a substitute Letter of Credit from an alternative bank satisfying the Issuer Minimum Requirements or alternative acceptable Security. The receipt of the substitute Letter of Credit or other acceptable Security must be effective on or before the expiration date of the expiring Letter of Credit and delivered to Buyer at least thirty (30) Days before the expiration date of the original Letter of Credit. If Seller fails to supply a substitute Letter of Credit or other acceptable Security as required, then Buyer will have the right to draw on the total amount of the expiring Letter of Credit. If (a) the credit rating of the issuer bank of a Letter of Credit falls below the Issuer Minimum Requirements, (b) the issuer bank fails to honor a properly documented request to draw on such Letter of Credit or disaffirms, disclaims, repudiates or rejects, in whole or in

part, or challenges the validity of, such Letter of Credit, or (c) the issuer of the outstanding Letter of Credit fails to comply with or perform its obligations under such Letter of Credit and such failure shall be continuing after the lapse of any applicable grace period permitted under such Letter of Credit, then Seller shall have fifteen (15) Days (or such longer period as Buyer in its sole discretion may permit in writing) following written notice from Buyer to obtain a suitable Letter of Credit from another bank that meets the Issuer Minimum Requirements. Buyer shall not be required to post security.

- 19.3 Grant of Security Interest. To the extent that Seller posts cash to secure its obligations under this PPA, Seller hereby grants to Buyer a present and continuing security interest in, and lien on (and right of setoff against), and collateral assignment of, all cash collateral provided by Seller to Buyer as collateral and any and all proceeds resulting therefrom or the liquidation thereof, whether now or hereafter held by, on behalf of, or for the benefit of Buyer. Seller agrees to take such action as reasonably required to perfect in favor of Buyer a first priority security interest in, and lien on (and right of setoff against), such collateral and any and all proceeds resulting therefrom or from the liquidation thereof.
- 19.4 <u>Use of Security</u>. In addition to any other remedy available to it, Buyer in its sole discretion may draw from, offset against or make demand under such security to recover any amounts owing to it arising out of this PPA, including any damages due to Buyer and any amount for which Buyer is entitled to indemnification under this PPA. Buyer may draw from, offset against or make demand under all or any part of the amounts due to it from any form of Security provided to Buyer and from all such forms, in any sequence and at any time before or after termination of this PPA, as Buyer may select until such time as the Security is exhausted.

ARTICLE 20 Indemnity; Insurance Proceeds

20.1 Indemnification.

- (A) Subject to the provisions of Article 12, and to the fullest extent permitted by law, Seller shall defend, save harmless and indemnify on an After Tax Basis the Buyer, its Affiliates, and their respective directors, officers, employees, agents, subcontractors, or anyone directly or indirectly employed by any of them, or anyone for whose acts any one of them may be liable, from and against all third-party claims, demands, losses, liabilities and expenses, including reasonable attorneys' fees, for personal injury, death or damage to real property and tangible personal property of any third party (collectively, "Losses") to the extent arising out of, resulting from, or caused by the negligence or willful misconduct of Seller, its Affiliates, directors, officers, employees, agents, subcontractors, or anyone directly or indirectly employed by any of them or anyone for whose acts any one of them may be liable; provided that, the waiver of consequential damages set forth in Section 12.7 shall not apply with respect to claims made by third parties.
- (B) Subject to the provisions of Article 12, and to the fullest extent permitted by law, Buyer shall defend, save harmless and indemnify on an After Tax Basis the Seller, its Affiliates, and their respective directors, officers, employees, agents, subcontractors, or anyone directly or indirectly employed by any of them or anyone for whose acts any one of them may be

liable, from and against all Losses (as defined in Section 20.1(A)) to the extent arising out of, resulting from, or caused by the negligence or willful misconduct of Buyer, its Affiliates, directors, officers, employees, agents, subcontractors, or anyone directly or indirectly employed by any of them or anyone for whose acts any one of them may be liable; *provided* that, the waiver of consequential damages set forth in Section 12.7 shall not apply with respect to claims made by third parties.

Notice of Claims; Procedure. The indemnitee shall, with reasonable promptness after obtaining knowledge thereof, provide the indemnitor with written notice of the proceedings, claims, demands or assessments that may be subject to indemnification, which notice shall include a statement of the basis of the claim for indemnification, including a summary of the facts or circumstances that form the basis for the claim, a good faith estimate of the amount of Losses, and copies of any pleadings or demands from the third party. Indemnitor shall have thirty (30) Days after its receipt of the claim notice to notify indemnitee in writing whether or not indemnitor agrees that the claim is subject to this Article 20 and, if so, whether indemnitor elects to undertake, conduct and control, through counsel of its choosing acceptable to indemnitee and at indemnitor's sole risk and expense, the settlement or defense of the claim. If within thirty (30) Days after its receipt of the claim notice, indemnitor notifies indemnitee that it elects to undertake the settlement or defense of the claim, indemnitee shall cooperate with indemnitor in connection therewith including by making available to indemnitor all relevant information and the testimony of employees and agents material to the defense of the claim. Indemnitor shall reimburse indemnitee for reasonable out-of-pocket costs incurred in connection with such cooperation. So long as indemnitor is contesting the claim in good faith and with diligence, indemnitee shall not pay or settle the claim. Notwithstanding the foregoing, indemnitee shall have the right to pay or settle any claim at any time without the consent of indemnitor; provided that, in such event it waives any right to indemnification therefor. If indemnitor does not provide a responsive notice within the thirty (30) Day period set forth in this Section 20.2, or otherwise fails to assume or diligently prosecute the defense of any claim in accordance with this Section 20.2, the indemnitee shall have the absolute right to control the defense of such claim, and the fees and expenses of such defense, including reasonable attorneys' fees of the indemnitee's counsel and any amount determined to be owed by the indemnitee pursuant to such claim shall be borne by the indemnitor; provided that, the indemnitor shall be entitled, at its sole expense, to participate in (but not control) such defense. Subject to the foregoing, (a) the indemnitor shall control the settlement of all claims as required under the insurance policies set forth in Article 16, as applicable, as to which it has assured the defense; provided, however, that (i) such settlement shall include dismissal with prejudice of the claim and an explicit and unconditional release from all indemnitees; and (ii) the indemnitor shall not conclude any settlement without the prior approval of the indemnitee, which approval shall not be unreasonably withheld, conditioned or delayed; and (b) except as provided in the preceding sentence concerning the indemnitor's failure to assume or to diligently prosecute the defense of any claim, no indemnite seeking reimbursement pursuant to the foregoing indemnity shall, without the prior written consent of the indemnitor, settle, compromise, consent to the entry of any judgment or otherwise seek to terminate any action, claim, suit, investigation or proceeding for which indemnity is afforded hereunder unless the indemnitee waives any right to indemnification therefor or reasonably believes that the matter in question involves potential criminal liability.

- 20.3 <u>Survival of Obligations</u>. Cancellation, expiration, or earlier termination of this PPA shall not relieve the Parties of obligations that by their nature should survive such cancellation, expiration, or termination, prior to the term of the applicable statute of limitations, including warranties, and remedies which obligation shall survive for the period of the applicable statute(s) of limitation.
- 20.4 <u>Insurance Proceeds</u>. In the event that an indemnifying Party is obligated to indemnify the indemnified Party under this Article 20, the amount owing to the indemnified Party will be the amount of the indemnified Party's Loss net of any insurance proceeds received by the indemnified Party following a reasonable effort by such Party to obtain such insurance proceeds.

ARTICLE 21 Governmental Charges

Allocation of Governmental Charges. Seller shall pay or cause to be paid all Governmental Charges on or with respect to the Project or on or with respect to the sale and making available to Buyer of Energy Output that are imposed on the making available of Energy Output arising prior to the Point of Delivery or prior to the transfer of the Environmental Attributes pursuant to Article 11. Buyer shall pay or cause to be paid all Governmental Charges (other than any Governmental Charges for which Seller is liable under this Section 21.1) on or with respect to the taking and purchase by Buyer of Energy Output that are imposed at and from the taking of Energy Output by Buyer at the Point of Delivery or at and after the transfer of the Environmental Attributes pursuant to Article 11. If a Party is required to remit or pay Governmental Charges that are the other Party's responsibility hereunder, such Party shall promptly reimburse the other for such Governmental Charges. Both Parties shall use reasonable efforts to administer this PPA and implement the provisions in accordance with their intent to minimize Governmental Charges, so long as no Party is materially adversely affected by such efforts. Nothing herein shall obligate or cause a Party to pay or be liable to pay any Governmental Charge for which it is exempt under Applicable Law. In the event any sale of Energy Output hereunder is exempt from or not subject to any particular Governmental Charge, Buyer shall provide Seller with all reasonably requested documentation within thirty (30) Days after requested by Seller to evidence such exemption or exclusion.

ARTICLE 22 Miscellaneous

- 22.1 <u>Waiver</u>. Subject to the provisions of Section 13.8, the failure of either Party to enforce or insist upon compliance with or strict performance of any of the terms or conditions of this PPA, or to take advantage of any of its rights thereunder, shall not constitute a waiver or relinquishment of any such terms, conditions, or rights, but the same shall be and remain at all times in full force and effect.
- 22.2 <u>Fines and Penalties</u>. Seller shall pay when due all fees, fines, penalties or costs incurred by Seller or its agents, employees or contractors for noncompliance by Seller, its employees, or subcontractors with any provision of this PPA, or any contractual obligation, permit or requirements of law except for such fines, penalties and costs that are being actively

contested in good faith and with due diligence by Seller and for which adequate financial reserves have been set aside to pay such fines, penalties or costs in the event of an adverse determination. Buyer shall pay when due all fees, fines, penalties or costs incurred by Buyer or its agents, employees or contractors for noncompliance by Buyer, its employees, or subcontractors with any provision of this PPA, or any contractual obligation, permit or requirements of law except for such fines, penalties and costs that are being actively contested in good faith and with due diligence by Buyer.

- 22.3 <u>Standard of Review</u>. Absent the agreement of all Parties to the proposed change, the standard of review for changes to this PPA whether proposed by a Party, a non-party, or the Federal Energy Regulatory Commission acting sua sponte shall be the "public interest" standard of review set forth in United Gas Pipe Line v. Mobile Gas Service Corp., 350 U.S. 332 (1956) and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956).
- 22.4 <u>Disclaimer of Certain Third Party Beneficiary Rights</u>. In executing this PPA, Buyer does not, nor should it be construed to, extend its credit or financial support for the benefit of any third parties lending money to or having other transactions with Seller. Nothing in this PPA shall be construed to create any duty to, or standard of care with reference to, or any liability to, any Person not a party to this PPA.

22.5 Relationship of the Parties.

- (A) This PPA shall not be interpreted to create an association, joint venture, or partnership between the Parties or to impose any partnership obligation or liability upon either Party. Neither Party shall have any right, power, or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as an agent or representative of, the other Party.
- (B) Seller shall be solely liable for the payment of all wages, Taxes, and other costs related to the employment of Persons to perform such services, including all federal, state, and local income, social security, payroll, and employment taxes and statutorily mandated workers' compensation coverage. None of the Persons employed by Seller shall be considered employees of Buyer for any purpose; nor shall Seller represent to any Person that he or she is or shall become a Buyer employee.
- 22.6 Equal Employment Opportunity Compliance Certification. Seller acknowledges that, as a government contractor, Buyer is subject to various federal laws, executive orders, and regulations regarding equal employment opportunity and affirmative action. These laws may also be applicable to Seller as a subcontractor to Buyer. To the extent such laws are applicable to Seller, all applicable equal opportunity and affirmative action clauses shall be deemed to be incorporated herein as required by federal laws, executive orders, and regulations, including 41 C.F.R. § 60-1.4(a)(1)-(7).
- 22.7 <u>Survival of Obligations</u>. Cancellation, expiration, or earlier termination of this PPA shall not relieve the Parties of obligations that by their nature should survive such cancellation, expiration, or termination, prior to the term of the applicable statute of limitations, including warranties, and remedies which obligation shall survive for the period of the applicable statute(s) of limitation.

- 22.8 Severability. In the event any of the terms, covenants, or conditions of this PPA, its Exhibits or Schedules, or the application of any such terms, covenants, or conditions, shall be held invalid, illegal, or unenforceable by any court or administrative body having jurisdiction, all other terms, covenants, and conditions of the PPA and their application not adversely affected thereby shall remain in force and effect; *provided*, *however*, that Buyer and Seller shall negotiate in good faith to attempt to implement an equitable adjustment in the provisions of this PPA with a view toward effecting the purposes of this PPA by replacing the provision that is held invalid, illegal, or unenforceable with a valid provision the economic effect of which comes as close as possible to that of the provision that has been found to be invalid, illegal or unenforceable.
- 22.9 <u>Complete Agreement; Amendments</u>. The terms and provisions contained in this PPA constitute the entire agreement between Buyer and Seller with respect to the Project and shall supersede all previous communications, representations, or agreements, either oral or written, between Buyer and Seller with respect to the sale of Energy Output from the Project. Subject to approval by any Governmental Authority with jurisdiction over this PPA, this PPA may be amended, changed, modified, or altered, *provided* that such amendment, change, modification, or alteration shall be in writing and signed by both Parties hereto, and *provided*, *further*, that the Exhibits and Schedules attached hereto may be changed according to the provisions of Section 13.7.
- 22.10 <u>Binding Effect</u>. This PPA, as it may be amended from time to time pursuant to this Article, shall be binding upon and inure to the benefit of the Parties hereto and their respective successors-in-interest, legal representatives, and assigns permitted hereunder.
- 22.11 <u>Headings</u>. Captions and headings used in this PPA are for ease of reference only and do not constitute a part of this PPA.
- 22.12 <u>Counterparts</u>. This PPA or any supplement, modification, amendment or restatement hereof may be executed in two or more counterpart copies of the entire document or of signature pages to the document, each of which may have been executed by one or more of the signatories hereto and thereto and deliveries by mail, courier, telecopy or other electronic means, but all of which taken together shall constitute a single agreement, and each executed counterpart shall have the same force and effect as an original instrument.
- 22.13 Governing Law and Choice of Forum. The interpretation and performance of this PPA and each of its provisions shall be governed and construed in accordance with the laws of the State of New Mexico notwithstanding its conflict of laws rules or any principles that would trigger the application of any other law. All disputes arising out of or related to this PPA shall be brought in the United States District Court for the District of New Mexico.

22.14 Confidentiality.

- (A) For purposes of this Section 22.14, "Disclosing Party" refers to the Party disclosing information to the other Party, and the term "Receiving Party" refers to the Party receiving information from the other Party.
 - (B) Other than in connection with this PPA, the Receiving Party will not use

the Confidential Information (as defined in clause (C) below) and will keep the Confidential Information confidential. The Confidential Information may be disclosed to the Receiving Party or its Affiliates and any of their directors, officers, employees, financial advisers, potential lenders, legal counsel and accountants (collectively, "Receiving Party's Representatives"), but only if such Receiving Party's Representatives need to know the Confidential Information in connection with this PPA. The Receiving Party shall not disclose the Confidential Information to any Person other than as permitted hereby, and shall safeguard the Confidential Information from unauthorized disclosure using the same degree of care as it takes to preserve its own confidential information (but in any event no less than a reasonable degree of care). Subject to Section 22.14(E), to the extent the Disclosing Party is required to submit Confidential Information to a Governmental Authority, or is required to submit Confidential Information pursuant to any other legal process, the Disclosing Party shall use commercially reasonable efforts means to ensure that such Confidential Information is not made public.

- (C) As used in this Section 22.14, "Confidential Information" means all information that is furnished in connection with this PPA to the Receiving Party or its Receiving Party's Representatives by the Disclosing Party, or to which the Receiving Party or its Receiving Party's Representatives have access by virtue of this PPA (in each case, whether such information is furnished or made accessible in writing, orally, visually or by any other means (including electronic means and any information processed or stored on computers or other electronic media by PNM or on PNM's behalf)), or which concerns this PPA, the Disclosing Party or the Disclosing Party's stockholders, members, affiliates or subsidiaries, other than as excluded below. Any such information furnished to the Receiving Party or its Receiving Party's Representatives by a director, officer, employee, Affiliate, stockholder, consultant, agent or representative of the Disclosing Party will be deemed furnished by the Disclosing Party for the purpose of this PPA. Notwithstanding the foregoing, the following will not constitute Confidential Information for purposes of this PPA:
 - (1) information that is or becomes generally available to the public other than as a result of a disclosure or other act by the Receiving Party or its Receiving Party's Representatives;
 - (2) information that can be shown by the Receiving Party to have been already known to the Receiving Party on a non-confidential basis before being furnished to the Receiving Party by the Disclosing Party;
 - (3) information that becomes available to the Receiving Party on a non-confidential basis from a source other than the Disclosing Party or a representative of the Disclosing Party if to the knowledge of the Receiving Party such source was not subject to any prohibition against transmitting the information to the Receiving Party; and
 - (4) information developed by the Parties during the negotiation of this PPA that relates solely to this PPA (as opposed to confidential business or operating information of either Party), which information shall be deemed proprietary to both Parties, each of whom shall be free to use such information, as they would any information already known to the Parties before negotiation of

this PPA.

- (D) The Confidential Information will remain the property of the Disclosing Party. Any Confidential Information that is reduced to writing, except for that portion of the Confidential Information that may be found in analyses, compilations, studies or other documents prepared by or for the Receiving Party in connection with this PPA, will be returned to the Disclosing Party immediately upon its request after expiration or termination of this PPA, unless such Confidential Information has been destroyed by the Receiving Party, and no copies will be retained by the Receiving Party or its Receiving Party's Representatives, unless the Parties agree otherwise. That portion of the Confidential Information that may be found in analyses, compilations, studies or other documents prepared by or for the Receiving Party, oral or visual Confidential Information, and written Confidential Information not so required to be returned will be held by the Receiving Party and kept subject to the terms of this PPA, or destroyed.
- (E) In any proceeding before any applicable Governmental Authority, or pursuant to any other legal or regulatory process, each Party shall be entitled to disclose Confidential Information. In such event, the Party making the disclosure in the proceeding shall use commercially reasonable efforts to limit the scope of any disclosure of Confidential Information to make such disclosure of Confidential Information subject to a protective order or other similar procedure; *provided, however*, Seller acknowledges and agrees that Buyer may disclose this PPA and related documents, without seeking a protective order or similar process, in any proceeding before the NMPRC or pursuant to any other regulatory process under NMPRC jurisdiction.

22.15 Marketing Rights; Press Releases and Media Contact; Access.

Seller hereby grants to Buyer the right to advertise, market, and promote to the general public the benefits of this PPA and the RECs that are generated under this PPA and delivered to Buyer during the Term, including, but not limited to, the exclusive right, in any such advertising, marketing or promotional material, to associate itself with any claimed or actual environmental or sociological benefits arising from this PPA and the creation, sale or retirement of such RECs (all such materials, in whatever media, whether print, electronic, broadcast or otherwise, that are associated with such advertising, marketing or promotional purposes are the "Promotional Materials"). Seller shall obtain and grant to Buyer an irrevocable, royalty free, worldwide license to use and distribute its Promotional Materials, including using the name, description and images of the Project. Seller will make available to Buyer a basic description of the Project, and any press releases or statements that Seller produces regarding the Project. Upon sufficient advance written notice, Seller will grant to Buyer or its designee reasonable access to the Project for the purposes of furthering the creation, production and dissemination of Promotional Materials. Notwithstanding the foregoing, either Party shall be permitted to disclose the following terms with respect to this PPA:

- (1) Party names;
- (2) Renewable resource type;

- (3) Term;
- (4) Project location;
- (5) Guaranteed Capacity;
- (6) Commercial Operation Date; and
- (7) Point of Delivery.
- 22.16 Right to Mortgage. Buyer shall have the right to mortgage, create or provide for a security interest, or convey in trust, all or a part of its interest in this PPA, under deeds of trust, mortgages, indentures or security agreements, as security for its present or future bonds or other obligations or securities, without consent of Seller; *provided*, that Buyer shall not be relieved of any of its obligations or liability under this PPA. Seller shall cooperate reasonably with Buyer to execute, or arrange for the delivery of, those normal, reasonable and customary documents, and to provide such other normal, reasonable and customary representations or warranties, all in a form reasonably acceptable to Seller, as may be necessary to assist Buyer in consummating such transactions.
- 22.17 Forward Contract and Master Netting Agreement. Notwithstanding any other provision of this PPA, the Parties acknowledge that this PPA is a forward contract and master netting agreement within the meaning of the safe harbor provisions of the Bankruptcy Code. Accordingly, the Parties agree, notwithstanding any other provision in this PPA, that this PPA may be terminated and remedies exercised hereunder by either Party upon the commencement of a proceeding by the other Party under any chapter of the Bankruptcy Code, and that the automatic stay of Section 362(a) of the Bankruptcy Code shall not apply to such termination or to the exercise of the remedies set forth herein.
- 22.18 Accounting Matters. The Parties agree that Generally Accepted Accounting Principles in the United States of America ("GAAP") and the rules of the United States Securities and Exchange Commission ("SEC") require Buyer to evaluate if Buyer must consolidate Seller's financial information. The Parties shall determine, through consultation with their respective independent registered public accounting firms, whether this PPA (i) will be considered a lease under Accounting Standards Codification 842 - Leases, or (ii) require consolidation of Seller's financial information with Buyer's financial statements pursuant to Accounting Standards Codification 810 - Consolidation (including any subsequent amendments to these sections or future guidance issued by accounting profession governance bodies or SEC that affects Buyer's accounting treatment for the PPA, jointly the "Accounting Standards"). Seller agrees to provide Buyer with information Buyer reasonably believes is necessary for Buyer to make the foregoing determinations. If, as a result of the Parties' review (or subsequent reviews as Buyer deems necessary), and consultations with their respective independent registered public accounting firms, Buyer, in its reasonable discretion, determines that such consolidation is required for a given period, then the Parties agree to the following provisions for such period:
- (A) Within fifteen (15) Days following the end of each calendar quarter, including the fourth quarter of the calendar year, Seller shall deliver to Buyer: (i) an unaudited

year-to-date statement of income, (ii) an unaudited year-to-date statement of cash flows, (iii) an unaudited balance sheet as of the end of such calendar quarter, and (iv) related supporting schedules that are prepared by the Seller's Guarantor, or if Seller has not provided a Seller Guaranty to satisfy its Security requirements pursuant to Article 19, then Seller, in order to allow the Seller's parent to complete its quarterly filings with the SEC, shall deliver to Buyer any other information reasonably requested by Buyer to comply with the consolidation requirements of GAAP. If audited financial statements are deemed necessary by Buyers external auditors to complete an audit of Buyer's consolidated financial statements, Buyer agrees to provide notice to Seller no later than sixty (60) Days before the end of the calendar year, and Seller agrees to provide audited financial statements within thirty (30) Days of each calendar year end thereafter.

- (B) The financial statements to be delivered by Seller in accordance with Section 22.18(A) ("Seller's Financial Statements") shall be prepared in accordance with GAAP and fairly present in all material respects the consolidated financial position, results of operations, and cash flows of Seller Guarantor, or Seller, as applicable. Seller shall maintain a system of internal accounting controls sufficient to provide reasonable assurance that the financial statements of Seller or Seller Guarantor, as applicable, are prepared in conformity with GAAP. If audited financial statements are prepared for the Seller, other than to satisfy the requirements for financial statements set forth in Section 22.18(A), Seller shall provide such statements to Buyer within five (5) Business Days after those statements are issued.
- (C) Upon reasonable notice from Buyer, during normal business hours and mutually agreed terms and dates, Seller shall allow Buyer access to Seller's records and personnel, so that Buyer and Buyer's independent registered public accounting firm can conduct financial statement reviews and audits in accordance with the standards of the Public Company Accounting Oversight Board (United States). All reasonable expenses for the foregoing that are incremental to Seller's normal operating expenses shall be borne by Buyer.
- (D) Once during each calendar quarter, Buyer and Seller shall meet (either in person or by conference call) at a mutually agreed upon date and time to conduct due diligence and Form 8K disclosure review and discuss Seller's internal control over financial reporting.
- (E) Buyer shall treat Seller's Financial Statements or other financial information provided under the terms of this Section in confidence in accordance with Section 22.14 and, accordingly, shall: (i) utilize such Seller financial information only for purposes of preparing, reviewing, auditing or certifying Buyer's or any Affiliate's financial statements (including any required disclosures in the financial statement presentation and notes), for making regulatory, tax or other filings required by Applicable Law in which Buyer is required to demonstrate or certify its or any Affiliate's financial condition or to obtain credit ratings; (ii) make such Seller financial information available only to its or its Affiliates' officers, directors, employees or auditors who are responsible for preparing, reviewing, auditing or certifying Buyer's or any Affiliate's financial statements, to the SEC and the Public Company Accounting Oversight Board (United States) in connection with any oversight of Buyer's or any Affiliate's financial statements and to those Persons who are entitled to receive Confidential Information in accordance with Section 22.14; (iii) not disclose any of Seller's financial information provided under the terms of this Section 22.18 to the extent that such information is not required by the Accounting Standards or Applicable Law; (iv) limit submission of Seller's

financial information provided under the terms of this Section 22.18 to that information that reflects Seller's operations of the Project; *provided*, such limited submission is not contrary to the Accounting Standards or other Applicable Law; and (v) use reasonable efforts to disclose to and consult with Seller with respect to any information respecting Seller or the Project that Buyer intends to submit pursuant to this Section 22.18 and use good faith efforts to incorporate any of Seller's comments thereto in any such submission. Notwithstanding the foregoing, if Buyer discloses information, based on the advice of its counsel that it is legally required to be disclosed, Buyer may make such disclosure without being in violation of this Section.

22.19 <u>Telephone Recording</u>. Each Party to this PPA acknowledges and agrees to the taping or electronic recording ("**Recording**") of conversations between the Parties with respect to all scheduling and dispatch issues, whether by one or the other or both Parties, and that the Recordings will be retained in confidence, secured from improper access, and may be submitted in evidence in any suit, action or proceedings relating to this PPA. Each Party waives any further notice of that monitoring or Recording and agrees to notify its personnel of the monitoring or Recording and to obtain any necessary consent of those personnel.

[Signature page(s) follow]

IN WITNESS WHEREOF, the Parties have caused this PPA to be duly executed as of the date first above written. This PPA shall not become effective as to either Party unless and until executed by both Parties.

PUBLIC SERVICE COMPANY OF NEW MEXICO

By _______Thomas Fallgrin _

Name Thomas Fallgren

Title Vice President, PNM Generation

JICARILLA SOLAR 1 LLC

Name: Chris Bullinger

Title: President, Hecate Energy NAF LLC

Sole Member of, Jicarilla Solar 1 LLC

EXHIBIT A

(to Power Purchase Agreement)

DESCRIPTION OF SELLER'S GENERATION FACILITIES AND SITE MAP

1. Name of Seller's Project: Jicarilla Solar 1 Facility

Location: 36.316748, -107.316393, where PNM 345 line intersects NM State

Highway 537

2. Owner (if different from Seller): Jicarilla Solar 1 LLC

3. Operator: Seller or Affiliate thereof

- 4. Equipment/Fuel:
 - a. Type of facility and conversion equipment (e.g., Solar PV; Solar Thermal; Wind; Biomass (including Fuel)): Solar PV
 - b. Total number of units at the Project: 20
 - c. Total nameplate capacity (MWp): 61.8 MWdc
 - d. Total capacity at point of delivery: 50 MWac
 - e. Additional technology-specific information: NA
- 5. Site Map: Attach a scaled map that complies with the requirements of Section 3.3 of the PPA.

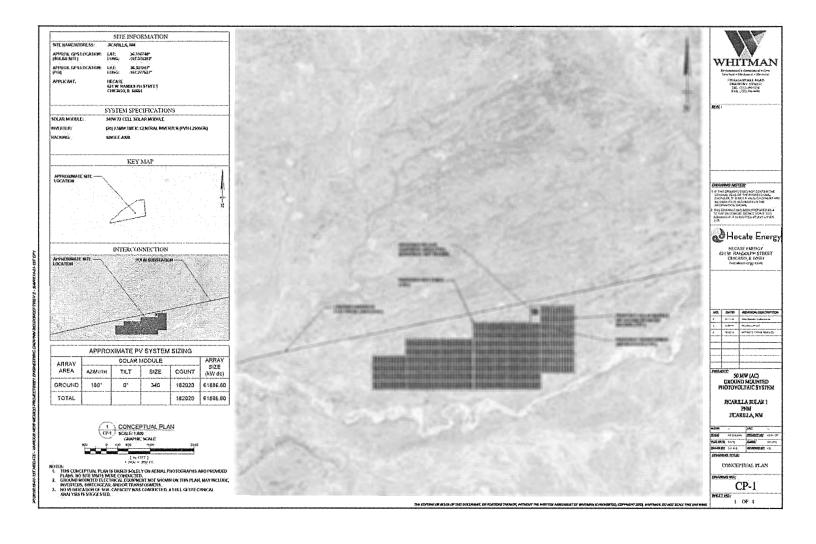
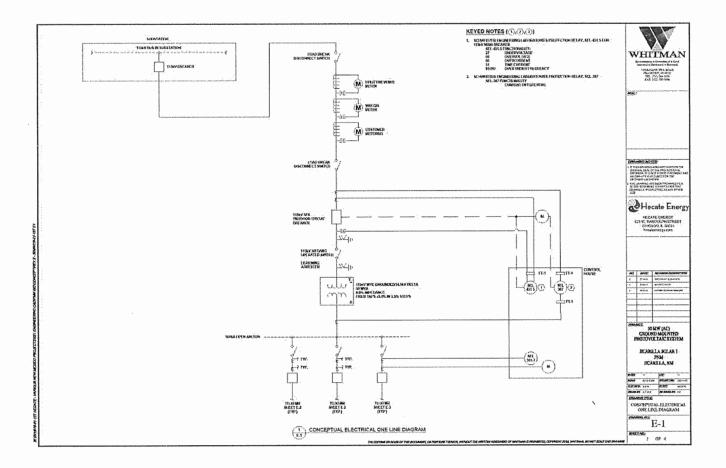


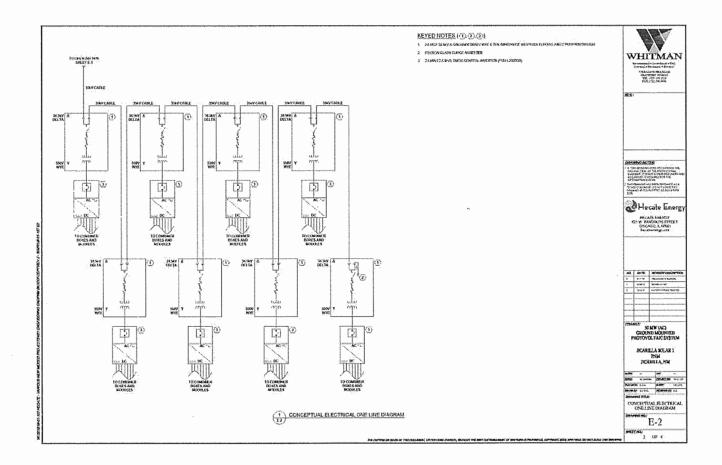
EXHIBIT B

(to Power Purchase Agreement)

ONE-LINE DIAGRAMS OF PROJECT AND INTERCONNECTION FACILITIES

See attached one-line diagram of the Project, which indicates the Interconnection Facilities, the network upgrades, the Electric Interconnection Point, the Point of Delivery into WECC Path 48 (if different than the Electric Interconnection Point) and ownership and location of meters. Seller shall provide any necessary updates upon execution of the Interconnection Agreement.





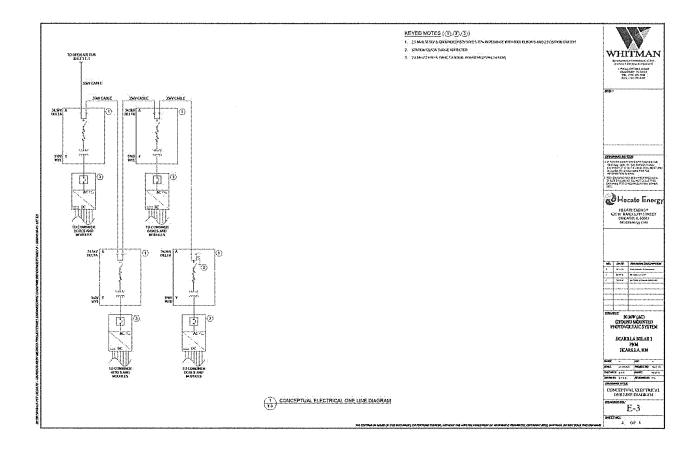


EXHIBIT C

(to Power Purchase Agreement)

DESCRIPTION OF SITE JICARILLA SOLAR SITE I AND SOLAR SITE II PROJECTS TRACT A RIO ARRIBA COUNTY, NEW MEXICO

SURVEYOR'S DESCRIPTION of: A certain tract of land, hereby designated as Tract A, a Solar Generation site for Energy Southwest, Inc., situated within protracted sections 7 & 18, Township 24 North, Range 4 West, and sections 11, 12, 13, 14 & 15, Township 24 North, Range 5 West, New Mexico Principal Meridian, Lindrith, Rio Arriba County, State of New Mexico, and being more particularly described as follows:

Beginning at the Northeastern corner of said Tract A, from which point the found marked original stone monument marking the northeast corner of section 12, T24N, R5W, NMPM, bears N19°23'43"W a distance of 4,093.93 feet. and from which point the found marked pipe marking the southeast corner of section 12, T24N, R5W, NMPM, bears S41°06'44"W a distance of 2,164.53 feet, and from which point the set Base Station, having the True New Mexico State Plane Central, NAD83(2011), US Survey Feet coordinates of N 1938811.14, E 1329685.04, Latitude 36°19'25.5", Longitude -107°18'17.5", bears N70°57'17"W a distance of 1,552.67 feet,

Thence S06°46'29"E a distance of 1,821.59 feet to a point where the tract boundary enters protracted section 18, T24N, R4W, NMPM,

Thence continuing S06°46'29"E a distance of 1,104.01 feet to Corner 1 of Tract A, from which point the found marked pipe marking the southeast corner of section 12, T24N, R5W, NMPM, bears N54°13'19"W a distance of 2,179.72 feet,

Thence S68°25'34"W a distance of 1,925.06 feet to a point where the tract boundary enters section 13, T24N, R5W, NMPM,

Thence continuing S68°25'34"W a distance of 939.91 feet to a Corner 2 of Tract A,

Thence S87°44'15"W a distance of 4,314.88 feet to a point where the tract boundary enters section 14, T24N, R5W, NMPM,

Thence continuing S87°44'15"W a distance of 2,318.22 feet to Corner 3 of Tract A,

Thence N73°03'54"W a distance of 2,965.76 feet to a point where the tract boundary enters section 15, T24N, R5W, NMPM,

Thence continuing N73°03'54"W a distance of 1,366.12 feet to Corner 4 of Tract A,

Thence S13°11'52"W a distance of 414.53 feet to Corner 5 of Tract A,

Thence N63°59'48"W a distance of 1,381.82 feet to Corner 6 of Tract A, from which point the found marked original stone monument marking the northeast corner of section 12, T24N, R5W, NMPM, bears N63°08'28"E a distance of 14,648.38 feet,

Thence N79°11'02"E a distance of 2,709.94 feet to a point where the tract boundary enters section 14, T24N, R5W, NMPM,

Thence continuing N79°11'02"E a distance of 5,270.96 feet to a point where the tract boundary enters section 11, T24N, R5W, NMPM,

Thence continuing N79°11'02"E a distance of 26.12 feet to a point where the tract boundary enters section 12, T24N, R5W, NMPM,

Thence continuing N79°11'02"E a distance of 5,247.71 feet to a point where the tract boundary enters protracted section 7, T24N, R4W, NMPM,

Thence continuing N79°11'02"E a distance of 1,433.90 feet to the Northeastern Corner of Tract A, and the Point of Beginning.

The above described Tract of Land contains 799.75 Acres more or less in area.

EXHIBIT D

(to Power Purchase Agreement)

NOTICE ADDRESSES

PUBLIC SERVICE COMPANY OF NEW MEXICO

JICARILLA SOLAR 1, LLC

Notices:

Delivery Address:

Public Service Company of New Mexico

414 Silver Ave. SW

Albuquerque, NM 87102

Invoices:

Attn: Energy Analysis

Phone: (505)541-2585 Fax: (505) 241-2434

Email:

PNMEAM@pnmresources.com

Scheduling:

Attn: Traders

Phone: (505) 855-6226 day-ahead

(505)855-6216 real time

Fax: (505) 241-4188

Email: zz-WPMTraders@pnm.com

Payments:

Public Service Company of New Mexico

2401 Aztec Rd. NE, MS Z-160

Albuquerque, NM 87107

Attn: Albuquerque Division Cash

Wire Transfer:

Wells Fargo Bank

ABA# 121000248

Albuquerque, New Mexico

ME Whsle Pwr Depository: 651-537-7916

Attn: EA-Wholesale Power Marketing

All Notices/Invoices:

Delivery Address:

621 W. Randolph St

Chicago, IL 60661

Attn: Alex Pugh

Phone: 310.659.0936

With copy to:

2215 So. York Road Suite 202

Oak Brook, IL 60523

Attn: Mo Klefeker

Phone: 630.560.4223

Mailing Address (if different from above):

Wire Transfer: To Be Provided

With additional Notice of an Event of Default, termination and other legal notices

to:

Chris Bullinger

Address:

Attn:

621 W. Randolph St

Chicago IL, 60661

Phone:

480.239.5617

Attn:

Mo Klefeker

Address:

2215 So. York Road Suite 202

Oak Brook, IL 60523

Phone:

630.560.4223

Contract Manager:

Public Service Company of New Mexico

Attention: Kevin Mataczynski

2401 Aztec Rd. NE Albuquerque, NM 87107

Telephone: (505) 241-4147

Fax: (505) 241-2375

Project Manager:

Jicarilla Solar 1 LLC Attn: Alex Pugh 621 W. Randolph St Chicago, IL 60661

With additional Notice of an Event of Default, termination and other legal notices to:

Public Service Company of New Mexico

Attention: Tom Fallgren 2401 Aztec Rd. NE

Albuquerque, NM 87107 Telephone: (505) 241-4148

Fax: (505) 241-2375

With a copy to:

Public Service Company of New Mexico Attention: Madonna N. Bixby, Senior Corporate Counsel 414 Silver Ave. SW, MS0805

Albuquerque, NM 87102 Telephone: (505) 241-4929

Fax: (505) 241-4318

EXHIBIT E

(to Power Purchase Agreement)

SELLER'S REQUIRED GOVERNMENTAL AUTHORITY PERMITS, CONSENTS, APPROVALS, LICENSES AND AUTHORIZATIONS TO BE OBTAINED

PERMIT, CONSENT, APPROVAL, LICENSE AND/OR AUTHORIZATION	GOVERNMENTAL ENTITY

FEDERAL

Sec 10 Rivers/H Act Navigable Waters N/A U S Army Corps of Engineers (USACE) No

navigable waters obstructed on-site

Temporary construction discharge permit USACE Section 404 CWA as required

EPA Spill Prevention N/A Assume no hazardous chemicals on-site

Notice of Proposed construction FAA Courtesy Notice

LGIA FERC-to be completed by PNM/JANPA as

required

Grants of Easement on Indian Lands BIA

Environmental Assessment/ FONSI BIA NEPA process for gen site/interconnection

National Historic Preservation Act Jicarilla Apache - Lead Agency Waiver

National Discharge Elimination System EPA

(NPDES)

Construction General Permit CWA

Section 402 (site > 1 acre)

EPA

STATE

NM Gross Receipts Tax Waiver PNM Issues Non-Taxable Transaction Certificate

For Wholesale Sale for Resale – NMTRD

JICARILLA APACHE NATION

Development Plan Jicarilla Tribal Land Office - JOGA

Limited Authorized Access Permit Jicarilla Tribal Land Office – JOGA

Water well permit to drill- if required

Jicarilla Tribal Land Office - JOGA

Work Permit for all vendor employees

Jicarilla Department of Labor

Cultural Permit-construction activities Gross Receipts Tax Reporting for Construction Activity Tribal Historic Preservation Office Jicarilla Taxation & Revenue

- ----*y*

Commercial Construction Permit per tribal Code Title 13.4 & 13.5

Jicarilla Nation as required

NOTE: Final actual permit requirements may vary from the above listings due to Code and Regulatory requirements as needed for project completion, as is customary for commercial scale power generation facilities. This list is considered inclusive at the time of development of the Agreement.

EXHIBIT F

(to Power Purchase Agreement)

COMMISSIONING TESTS

- String Insulation Resistance and Continuity Tests
- String Voc measurements
- String Current Checks
- DC Feeder Insulation Resistance and Continuity Tests
- Inverter OEM Commissioning Procedures
- MW Control Tuning/Testing
- V/MVAR/pf Control Tuning/Testing
- Curtailment Control (If applicable)
- Initial Performance Ratio Test

EXHIBIT G

(to Power Purchase Agreement)

INSURANCE COVERAGES

Seller shall obtain and maintain the following insurance coverages, at a minimum:

- A. Workers' Compensation Insurance that complies with statutory limits under workers' compensation laws of any applicable jurisdiction and employer's liability coverage with limits of One Million Dollars (\$1,000,000) per accident, One Million (\$1,000,000) for disease, and One Million (\$1,000,000) for each employee, covering all of Seller's employees, whether full-time, leased, temporary, or casual.
- **B.** Commercial General Liability Insurance, written on a standard ISO occurrence form, or the equivalent, with a combined single limit of One Million Dollars (\$1,000,000) per occurrence. This policy will include coverage for bodily injury liability, broad form property damage liability, blanket contractual, owner's protective, products liability and completed operations.
- C. Business Automobile Liability Insurance, or the equivalent, with a limit of One Million Dollars (\$1,000,000) combined single limit per occurrence for bodily injury and property damage with respect to Seller's vehicles whether owned, hired, or non-owned.
- **D.** Excess or Umbrella Liability. Excess or Umbrella Liability Insurance on a following form basis covering claims in excess of the underlying insurance described in paragraphs (A) (with respect to only Employer's Liability Insurance), (B) and (C) with a limit per occurrence of Twenty Million dollars (\$20,000,000) written on a per project basis

The amounts of insurance required in the foregoing paragraphs (A), (B), (C) and (D) may be satisfied by purchasing coverage in the amounts specified or by any combination of primary and excess insurance, so long as the total amount of insurance meets the requirements specified above.

E. Property Insurance. During construction and operation, Seller shall provide or arrange for the provision of standard form "All Risk" insurance covering one hundred percent (100%) of the Project cost. For the avoidance of doubt, builders' risk insurance shall qualify as "All Risk" insurance during the construction period. The All-Risk Property insurance shall cover physical loss or damage to the Project including the period during testing and startup. A deductible may be carried, which deductible shall be the absolute responsibility of Seller. All-Risk Property insurance shall include: (i) coverage for fire, flood, wind and storm, tornado and earthquake with respect to facilities similar in construction, location and occupancy to the Project; and (ii) Boiler and Machinery insurance covering all objects customarily subject to such insurance, including boilers and engines, in an amount equal to their probable maximum loss.

EXHIBIT H

(to Power Purchase Agreement)

[RESERVED]

EXHIBIT I

(to Power Purchase Agreement)

AVAILABILITY GUARANTEE

Section 1. Definitions.

Capitalized terms used in this <u>Exhibit I</u> and not defined herein shall have the meaning assigned in Article 1 of the PPA.

- "Actual Availability Percentage" means a percentage calculated as (a) one hundred (100), multiplied by (b) the result of (i) the sum of all Available Hours for all Solar Units that were part of the Project at the beginning of the relevant Commercial Operation Year for all Daylight Intervals, divided by (ii) the sum of all Period Hours in the relevant Commercial Operation Year for all Solar Units that were part of the Project on the Commercial Operation Date.
- "Actual Energy Output" means the Energy (in MWh) generated by the Project and delivered to the Point of Delivery.
- "Aggregate Availability Damages Cap" has the meaning set forth in Section 2(3) of this Exhibit.
- "Annual Availability Damages Cap" has the meaning set forth in Section 2(3) of this Exhibit.
 - "Annual Report" has the meaning set forth in Section 2(5) of this Exhibit.
 - "Availability Damages" has the meaning set forth in Section 2(2) of this Exhibit.
- "Available Hours" means for each Solar Unit, for a relevant Commercial Operation Year, an amount of hours equal to (a) the number of Period Hours in such Commercial Operation Year, minus (b) the aggregate Unavailable Hours for such Solar Unit in such Commercial Operation Year, plus (c) the aggregate Excused Hours for such Solar Unit in such Commercial Operation Year.
- "Daylight Interval" means each hour where plane of array irradiance conditions are 50 W/m2 or greater. Data will be collected as hourly averages for all installed plane of array sensors at the Site.
- "Excused Hours" means, in any Commercial Operation Year, (a) the aggregate Seller Excused Hours during Daylight Intervals for such Commercial Operation Year; provided that for purposes of the Availability Guaranty only the first fifty (50) hours of Scheduled Maintenance Outages in the aggregate for the Project per Commercial Operation Year shall be treated as Excused Hours, and (b) all hours during which a Seller Curtailment occurs in such Commercial Operation Year.
 - "Guaranteed Availability Percentage" has the meaning set forth in Section 2(1) of

this Exhibit.

"Period Hours" means the number of Daylight Intervals within any given Commercial Operation Year, as may be prorated for any partial Commercial Operation Year.

"Unavailable Hours" means those hours a Solar Unit is not available during Daylight Intervals to operate because it is (a) in an emergency, stop, service mode or pause state (except to the extent that such emergency, stop, service mode or pause state also constitutes an Emergency Condition, in which case the hours when an Emergency Condition occurs shall be deemed a Transmission Provider Curtailment and included in Seller Excused Hours); (b) in "run" status and faulted; (c) included in Scheduled Maintenance Outages in excess of fifty (50) hours in aggregate for the Project in any Commercial Operation Year; or (d) otherwise not operational or capable of delivering Energy to the Point of Delivery.

Section 2. Availability Guarantee.

- 1. <u>Availability Guarantee</u>. Seller guarantees that the Project shall achieve an Actual Availability Percentage equal to or greater than ninety-five percent (95%) in each Commercial Operation Year after the Commercial Operation Date ("Guaranteed Availability Percentage").
- Availability Damages. For any Commercial Operation Year during which Seller fails to meet the Guaranteed Availability Percentage, Seller shall pay Buyer liquidated damages in the amount equal to (x) the Energy Output Payment Rate, multiplied by (y) the Guaranteed Availability Percentage minus the Actual Availability Percentage for such Commercial Operation Year (both expressed as a decimal), multiplied by (z) the Actual Energy Output for such Commercial Operation Year divided by the Actual Availability Percentage (expressed as a decimal), multiplied by the Guaranteed Availability Percentage (expressed as a decimal) (the "Availability Damages"), but in no event in excess of the Annual Availability Damages Cap and the Aggregate Availability Damages Cap. A sample calculation of the Availability Damages that would be owed by Seller under certain stated assumptions is provided as Attachment 1 to this Exhibit I.
- 3. <u>Damages Cap, Termination and Cure Rights</u>. The total Availability Damages payable by Seller for failure to meet the Guaranteed Availability Percentage in any Commercial Operation Year shall be capped annually at a value equivalent to Seventeen Thousand Dollars (\$17,000) per MW of Guaranteed Capacity ("Annual Availability Damages Cap") and in the aggregate at a value equivalent to Fifty-One Thousand (\$51,000) per MW of Guaranteed Capacity ("Aggregate Availability Damages Cap") over the Term of the PPA.
- 4. <u>Sole Remedy.</u> The Parties agree that Buyer's sole and exclusive remedy, and Seller's sole and exclusive liability, for any deficiency in the performance of the Project (including any failure to meet the Guaranteed Availability Percentage) shall be the payment of damages up to the Annual Availability Damages Cap and Aggregate Availability Damages Cap, and the right to declare an Event of Default pursuant to Section 12.1(B)(6) and (7) of the PPA, if and to the extent applicable, and shall not be subject to the collection of any other damages or any other remedies, including specific performance, and shall not be an Event of

Default giving rise to a termination payment obligation except pursuant to Section 12.1(B)(6) and (7) of the PPA, as and to the extent applicable. Notwithstanding the foregoing, the limitations set forth herein shall not be applicable to any indemnification claims pursuant to Article 20 of the PPA and Seller's material breach of its obligation to operate and maintain the Project in accordance with Prudent Utility Practice or Seller's failure to pay Availability Damages when due if not timely cured pursuant to the provisions of Article 12 of the PPA are an Event of Default of Seller for which Buyer may terminate the PPA and seek damages in accordance with Section 12.4 of the PPA.

- 5. <u>Annual Report</u>. No later than the thirtieth (30th) Day of such Commercial Operation Year (or thirty (30) Days after the end of the last Commercial Operation Year), Seller shall deliver to Buyer a calculation showing Seller's computation of the Actual Availability Percentage for the previous Commercial Operation Year and the Availability Damages, if any, due to Buyer (the "Annual Report"). Such Annual Report shall include the total amount of Availability Damages paid to Buyer under the PPA and shall provide notice that the Aggregate Availability Damages Cap has been reached, if applicable. If Availability Damages are due from Seller, Seller shall pay such damages no later than fifteen (15) Business Days after providing the Annual Report.
- 6. <u>Disputes</u>. Disputes as to any calculations under this <u>Exhibit I</u> shall be addressed as provided in Section 13.8 of the PPA.

ATTACHMENT 1 TO EXHIBIT I

EXAMPLE CALCULATION OF AVAILABILITY DAMAGES

I. Example of Actual Availability Percentage Calculation

The sample calculation set forth below is based on the following assumed facts:

During the Commercial Operation Year in question, 50 Solar Units were part of the Project.

The Solar Units had the following operating characteristics:

	Hours	Solar Units Affected	Solar Unit Hours
Period Hours ("PH")	4,000	50	200,000
Unavailable Hours ("UH")			5,000
Excused Hours ("EH")			1,000

Given these assumed facts, the Available Hours for the Solar Units during the Commercial Operation Year would be calculated as follows:

Sum of Available Hours = PH - UH + EH: 196,000 = 200,000 - 5,000 + 1,000

Actual Energy Availability Percentage

Given these assumed facts, the Actual Availability Percentage for the Project during the Commercial Operation Year in question would be calculated as follows:

- (a) Sum of Available Hours: 196,000 hours
- (b) Sum of Period Hours: 200,000 hours
- (c) Actual Availability Percentage: (Sum of Available Hours/Sum of Period Hours) x 100 = (196,000/200,000) x 100 = 98.0%

II. Example of Availability Damages

Example of Availability Damages based on the following assumed facts:

- (a) Seller's Guaranteed Availability in Commercial Operation Year 4 = 90%.
- (b) Seller's Actual Availability in Commercial Operation Year 4 = 85%.
- (c) Energy Output Payment Rate = \$19.73
- (d) Actual Energy Output = 130,000 MWh

Given these assumed facts, Seller calculates the Availability Damages due to Buyer as follows:

Energy Output Payment Rate x (Guaranteed Availability Percentage in Commercial Operation Year 4 — Actual Availability Percentage for Commercial Operation Year 4 (each expressed as a decimal)) x (Actual Energy Output for Commercial Operation Year 4 ÷ Actual Availability Percentage for Commercial Operation Year 4 x Guaranteed Availability Percentage for Commercial Operation Year 4 (the latter two expressed as a decimal)) = Availability Damage:

$$19.73 \times (.90 - .85) \times (130,000 \div .85 * .90) = 135,788.82$$

EXHIBIT J

(to Power Purchase Agreement)

FORM OF SELLER GUARANTY

GUARANTY

	THIS GUARANTY (this "Guaranty"), dated as of, (the "Effective is made by [•]. ("Guarantor"), in favor of [INSERT COUNTERPARTY'S NAME IN APS] ("Counterparty").
RECIT	ALS:
[INSER herewit into/eff	A. WHEREAS, Counterparty and Guarantor's indirect, wholly-owned subsidiary RT OBLIGOR'S NAME IN ALL CAPSI ("Obligor") have entered into, or concurrently the are entering into, that certain Agreement dated/made/entered fective as of, 20_ (the "Agreement"); and
betwee	B. WHEREAS, Guarantor will directly or indirectly benefit from the Agreement n Obligor and Counterparty;
for Cor and va	NOW THEREFORE, in consideration of the foregoing premises and as an inducement unterparty's execution, delivery and performance of the Agreement, and for other good luable consideration, the receipt and sufficiency of which is hereby acknowledged tor hereby agrees for the benefit of Counterparty as follows:
	* * *
and irre Counte Obligor "Oblig	GUARANTY. Subject to the terms and provisions hereof, Guarantor hereby absolutely evocably guarantees the timely payment when due of all obligations owing by Obligor to rparty arising pursuant to the Agreement, including with respect to any damages that rowes to Counterparty for failing to perform under the Agreement (collectively, the ations"). This Guaranty shall constitute a guarantee of payment and not of collection bility of Guarantor under this Guaranty shall be subject to the following limitations:
	Notwithstanding anything herein or in the Agreement to the contrary, the maximum aggregate obligation and liability of Guarantor under this Guaranty, and the maximum recovery from Guarantor under this Guaranty, shall in no event exceed [spell out the dollar amount] U.S. Dollars (U.S. \$) (the "Maximum Recovery Amount"), plus reasonable costs of collection and/or enforcement of this Guaranty (including reasonable attorneys' fees), to the extent that a court of competent jurisdiction finally declares that amounts are due and payable hereunder, but in no event shall such costs exceed [].
(b)	The obligation and liability of Guarantor under this Guaranty is specifically limited to payments expressly required to be made under the Agreement (even if such payments are

deemed to be damages), as well as costs of collection and enforcement of this Guaranty (including attorneys' fees) to the extent reasonably and actually incurred by Counterparty (subject, in all instances, to the limitations imposed by the Maximum Recovery Amount as specified in <u>Section 1(a)</u> above). Except as expressly payable by Obligor pursuant to the Agreement, Guarantor shall not be liable for or obligated to pay any consequential, indirect, incidental, lost profit, special, exemplary, punitive, equitable or tort damages.

2. DEMANDS AND PAYMENT.

- (a) If Obligor fails to pay any Obligation to Counterparty when such Obligation is due and owing under the Agreement (an "Overdue Obligation"), Counterparty may present a written demand to Guarantor calling for Guarantor's payment of such Overdue Obligation pursuant to this Guaranty (a "Payment Demand"). Delay or failure by Counterparty in making a Payment Demand shall in no event affect Guarantor's obligations under this Guaranty.
- (b) A Payment Demand shall be in writing and shall reasonably and briefly specify in what manner and what amount Obligor has failed to pay and explain why such payment is due, with a specific statement that Counterparty is calling upon Guarantor to pay under this Guaranty. Such Payment Demand must be delivered to Guarantor in accordance with Section 9 below; and the specific Overdue Obligation(s) addressed by such Payment Demand must remain due and unpaid at the time of such delivery to Guarantor.
- (c) After issuing a Payment Demand in accordance with the requirements specified in <u>Section 2(b)</u> above, Counterparty shall not be required to issue any further notices or make any further demands with respect to the Overdue Obligation(s) specified in that Payment Demand, and Guarantor shall be required to make payment with respect to the Overdue Obligation(s) specified in that Payment Demand within five (5) Business Days after Guarantor receives such demand. As used herein, the term "Business Day" shall mean all weekdays (i.e., Monday through Friday) other than any weekdays during which commercial banks or financial institutions are authorized to be closed to the public in the State of New Mexico.

3. REPRESENTATIONS AND WARRANTIES. Guarantor represents and warrants that:

- (a) it is a corporation duly organized and validly existing under the laws of the State of _____ and has the corporate power and authority to execute, deliver and carry out the terms and provisions of the Guaranty;
- (b) no authorization, approval, consent or order of, or registration or filing with, any court or other governmental body having jurisdiction over Guarantor is required on the part of Guarantor for the execution, delivery and performance of this Guaranty; and
- (c) the execution, delivery and performance of this Guaranty has been duly and validly authorized by all corporate proceedings of Guarantor, and this Guaranty constitutes a valid and legally binding agreement of Guarantor, enforceable against Guarantor in accordance with the terms hereof, except as the enforceability thereof may be limited by the effect of any applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors' rights generally and by general principles of equity.

- 4. RESERVATION OF CERTAIN DEFENSES. Without limiting Guarantor's own defenses hereunder, Guarantor reserves to itself and may assert as a defense to enforcement of this Guaranty any defense to enforcement of the Agreement that Obligor may assert that is based on Counterparty's breach of the Agreement or the failure of a material condition precedent to Obligor's performance obligations. Notwithstanding the foregoing, Guarantor agrees that it will remain bound upon this Guaranty notwithstanding any defenses that, pursuant to the laws of suretyship or guaranty, would otherwise relieve a guarantor of its obligations. In furtherance and not limitation of the foregoing, Guarantor expressly waives (if any) based upon the bankruptcy, insolvency, dissolution or liquidation of Obligor or any lack of power or authority of Obligor to enter into and/or perform the Agreement or the lack of validity or enforceability of Obligor's obligations under the Agreement. Guarantor further reserves to itself any rights, setoffs or counterclaims that Guarantor may have against Obligor, provided, however, that Guarantor agrees such rights, setoffs or counterclaims may only be asserted against Obligor in an independent action, and not as a defense to Guarantor's obligations under this Guaranty.
- 5. <u>AMENDMENT OF GUARANTY</u>. No term or provision of this Guaranty shall be amended, modified, altered, waived or supplemented except in a writing signed by Guarantor and Counterparty.
- 6. WAIVERS AND CONSENTS. Guarantor agrees that its obligations under this Guaranty are irrevocable, absolute, independent, unconditional and continuing (subject only to the defenses to enforcement of this Guaranty reserved by Guarantor in Section 4) and shall not be affected by any circumstance that constitutes a legal or equitable discharge of a guarantor or surety other than payment in full of the Obligations. In furtherance of the foregoing and without limiting the generality thereof, Guarantor agrees, subject to and in accordance with the other terms and provisions of this Guaranty:
- Except for the Payment Demand as required in Section 2 above, Guarantor hereby (a) waives, to the maximum extent permitted by applicable law, (i) notice of acceptance of this Guaranty; (ii) promptness, diligence, presentment, demand, protest, setoff and counterclaim concerning the liabilities of Guarantor; (iii) any right to require that any action or proceeding be brought against Obligor or any other person, or to require that Counterparty seek enforcement of any performance against Obligor or any other person, prior to any action against Guarantor under the terms hereof; (iv) any defense arising by reason of the incapacity, lack of authority or disability of Obligor or based on any illegality, lack of validity or unenforceability of any Obligation; (v) any duty of Counterparty to protect or not impair any security for the Obligations; (vi) any defense based upon an election of remedies by Counterparty; (vii) any rights of subrogation, contribution, reimbursement, indemnification, or other rights of payment or recovery for any payment or performance by it hereunder (and, for the avoidance of doubt, if any amount is paid to Guarantor in violation of this provision, Guarantor shall hold such amount for the benefit of, and promptly pay such amount to, Counterparty); (viii) any defense of waiver, release, res judicata, statute of frauds, fraud (with respect to Obligor), incapacity (with respect to Obligor), minority or usury; and (ix) any other circumstance or any existence of or reliance on any representation by Counterparty that might otherwise constitute a defense available to, or a legal or equitable discharge of, Guarantor or any other guarantor or surety.
- (b) No delay by Counterparty in the exercise of (or failure by Counterparty to exercise) any

- rights hereunder shall operate as a waiver of such rights, a waiver of any other rights or a release of Guarantor from its obligations hereunder (with the understanding, however, that the foregoing shall not be deemed to constitute a waiver by Guarantor of any rights or defenses to which Guarantor may at any time have pursuant to or in connection with any applicable statutes of limitation).
- Without notice to or the consent of Guarantor, and without impairing or releasing Guarantor's obligations under this Guaranty, Counterparty may: (i) change the manner, place or terms for payment of all or any of the Obligations (including renewals, extensions or other alterations of the Obligations); (ii) release Obligor or any person (other than Guarantor) from liability for payment of all or any of the Obligations; (iii) receive, substitute, surrender, exchange or release any collateral or other security for this Guaranty or any or all of the Obligations and apply any such collateral or security and direct the order or manner of sale thereof, or exercise any other right or remedy that Counterparty may have against any such collateral or security; or (iv) exercise any other rights available to Counterparty under the Agreement, at law or in equity.
- 7. <u>REINSTATEMENT</u>. Guarantor agrees that this Guaranty shall continue to be effective or shall be reinstated, as the case may be, if all or any part of any payment made hereunder or under the Agreement while this Guaranty is in effect is at any time avoided or rescinded or must otherwise be restored or repaid by Counterparty as a result of the bankruptcy or insolvency of Obligor or Guarantor, or similar proceeding, all as though such payments had not been made.
- 8. <u>TERMINATION</u>. Subject to reinstatement under <u>Section 7</u>, this Guaranty and the Guarantor's obligations hereunder will terminate automatically and immediately upon the earlier of (i) the termination or expiration of the Agreement, and (ii) 11:59:59 Eastern Prevailing Time of [insert date [_] years plus six (6) months after expected COD]; provided, however, Guarantor agrees that the obligations and liabilities hereunder shall continue in full force and effect with respect to any Obligations under any Agreement entered into on or prior to the date of such termination.
- 9. NOTICE. Any Payment Demand, notice, request, instruction, correspondence or other document to be given hereunder (herein collectively called "Notice") by Counterparty to Guarantor, or by Guarantor to Counterparty, as applicable, shall be in writing and may be delivered either by (i) U.S. certified mail with postage prepaid and return receipt requested, or (ii) recognized nationwide courier service with delivery receipt requested, in either case to be delivered to the following address (or to such other U.S. address as may be specified via Notice provided by Guarantor or Counterparty, as applicable, to the other in accordance with the requirements of this <u>Section 9</u>):

TO GUARANTOR: *	TO COUNTERPARTY:
[●] <i>Attn</i> : Treasurer	<u>Attn</u> : [●]
[Tel: [•] for use in connection with	[Tel: [•] for use in connection with courier

- 1
- 1
- 1
- 1

Any Notice given in accordance with this <u>Section 9</u> will (i) if delivered during the recipient's normal business hours on any given Business Day, be deemed received by the designated recipient on such date, and (ii) if not delivered during the recipient's normal business hours on any given Business Day, be deemed received by the designated recipient at the start of the recipient's normal business hours on the next Business Day after such delivery.

10. MISCELLANEOUS.

- (a) This Guaranty shall in all respects be governed by, and construed in accordance with, the law of the State of New Mexico, without regard to principles of conflicts of laws thereunder.
- (b) This Guaranty shall be binding upon Guarantor and its successors and permitted assigns and inure to the benefit of and be enforceable by Counterparty and its successors and permitted assigns. Guarantor may not assign this Guaranty in part or in whole without the prior written consent of Counterparty. Counterparty may not assign this Guaranty in part or in whole except (i) with the prior written consent of Guarantor, or (ii) to an assignee of the Agreement in conjunction with an assignment of the Agreement in its entirety accomplished in accordance with the terms thereof.
- (c) This Guaranty embodies the entire agreement and understanding between Guarantor and Counterparty and supersedes all prior agreements and understandings relating to the subject matter hereof.
- (d) The headings in this Guaranty are for purposes of reference only, and shall not affect the meaning hereof. Words importing the singular number hereunder shall include the plural number and vice versa, and any pronouns used herein shall be deemed to cover all genders. The term "person" as used herein means any individual, corporation, partnership, joint venture, association, joint-stock company, trust, unincorporated association, or government (or any agency or political subdivision thereof).
- (e) Wherever possible, any provision in this Guaranty which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective only to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any one jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.
- (f) Counterparty (by its acceptance of this Guaranty) and Guarantor each hereby irrevocably: (i) consents and submits to the exclusive jurisdiction of the United States District Court for the District of New Mexico for the purposes of any suit, action or other proceeding arising out of this Guaranty or the subject matter hereof or any of the transactions contemplated hereby brought by Counterparty, Guarantor or their respective successors or assigns; and (ii) waives (to the fullest extent permitted by applicable law) and agrees not to assert any claim that it is not personally subject to the jurisdiction of the above-

named courts, that the suit, action or proceeding is brought in an inconvenient forum, that the venue of the suit, action or proceeding is improper or that this Guaranty or the subject matter hereof may not be enforced in or by such court.

GUARANTY (BY ITS ACCEPTANCE OF THIS GUARANTY) AND GUARANTOR EACH HEREBY IRREVOCABLY, INTENTIONALLY AND VOLUNTARILY WAIVES THE RIGHT TO TRIAL BY JURY WITH RESPECT TO ANY LEGAL PROCEEDING BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH, THIS GUARANTY, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PERSON RELATING HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO GUARANTOR'S EXECUTION AND DELIVERY OF THIS GUARANTY.

* * *

IN WITNESS WHEREOF, the Guarantor has executed this Guaranty on	,	20
but it is effective as of the Effective Date		

[●]		
[•] By:	 	
Name:		
Title:		

EXHIBIT K

(to Power Purchase Agreement)

COMMERCIAL OPERATION FORM OF CERTIFICATION

This certification ("Certification") of Commercial Operation is delivered by("Seller") to Public Service Company of New Mexico ("Buyer") in accordance with the terms of that certain Power Purchase Agreement dated ("Agreement") by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.
Seller hereby certifies and represents to Buyer the following:
(1) Solar Units with an aggregate capacity of at least [•] MW have been constructed, commissioned and tested and are capable of delivering Energy on a sustained basis (in accordance with the Solar Unit manufacturer's requirements and the Commissioning Tests);
(2) Seller has obtained all necessary rights under the Interconnection Agreement for the interconnection and delivery of Energy to the Point of Delivery and is not in breach of the Interconnection Agreement; and
(3) the Project has been completed in all material respects (except for Delayed Capacity and punch list items that do not materially and adversely affect the ability of the Project to operate as intended).
A certified statement of the Licensed Professional Engineer, attached hereto, has been provided as evidence of Commercial Operation of the Project to provide Energy Output and meet, at a minimum, the requirements indicated herein.
EXECUTED by SELLER this day of, 20
[b] [Licensed Professional Engineer]
Signature: Signature:
Name: Name:
Title:
Date:
License Number and LPE Stamp:

EXHIBIT L

(to Power Purchase Agreement)

ANNUAL DEGRADATION GUARANTEES

Test at Beginning of Commercial Operation Year	Degradation-Adjusted Annual Guaranteed Capacity (% of Guaranteed Capacity)	Maximum % Degradation from Prior Year Actual Degradation
1 - Commissioning Test	100.00%	0.00%
2	97.00%	3.00%
3	The greater of (i) 100% less the sum of the prior year's measured cumulative degradation (not to exceed 3%) and 0.70% or (ii) 96.3%	0.70%
4	The greater of (i) 100% less the sum of the prior year's measured cumulative degradation (not to exceed 3.7%) and 0.70% or (ii) 95.6%	0.70%
5	The greater of (i) 100% less the sum of the prior year's measured cumulative degradation (not to exceed 4.4%) and 0.70% or (ii) 94.9%	0.70%
6	The greater of (i) 100% less the sum of the prior year's measured cumulative degradation (not to exceed 5.1%) and 0.70% or (ii) 94.2%	0.70%
7	The greater of (i) 100% less the sum of the prior year's measured cumulative degradation (not to exceed 5.8%) and 0.70% or (ii) 93.5%	0.70%
8	The greater of (i) 100% less the sum of the prior year's measured cumulative degradation (not to exceed 6.5%) and 0.70% or (ii) 92.8%	0.70%
9	The greater of (i) 100% less the sum of the prior year's measured cumulative degradation (not to exceed 7.2%) and 0.70% or (ii) 92.1%	0.70%
10	The greater of (i) 100% less the sum of the prior year's measured cumulative degradation (not to exceed 7.9%) and 0.70% or (ii) 91.4%	0.70%
11	The greater of (i) 100% less the sum of the prior year's measured cumulative degradation (not to exceed 8.6%) and 0.70% or (ii) 90.7%	0.70%
12	The greater of (i) 100% less the sum of the prior year's measured cumulative degradation (not to exceed 9.3%) and 0.70% or (ii) 90.0%	0.70%
13	The greater of (i) 100% less the sum of the prior year's measured cumulative degradation (not to exceed 10.0%) and 0.70% or (ii) 89.3%	0.70%

Test at Beginning of Commercial Operation Year	Degradation-Adjusted Annual Guaranteed Capacity (% of Guaranteed Capacity)	Maximum % Degradation from Prior Year Actual Degradation
14	The greater of (i) 100% less the sum of the prior year's measured cumulative degradation (not to exceed 10.7%) and 0.70% or (ii) 88.6%	0.70%
15	The greater of (i) 100% less the sum of the prior year's measured cumulative degradation (not to exceed 11.4%) and 0.70% or (ii) 87.9%	0.70%
16	The greater of (i) 100% less the sum of the prior year's measured cumulative degradation (not to exceed 12.1%) and 0.70% or (ii) 87.2%	0.70%
17	The greater of (i) 100% less the sum of the prior year's measured cumulative degradation (not to exceed 12.8%) and 0.70% or (ii) 86.5%	0.70%
18	The greater of (i) 100% less the sum of the prior year's measured cumulative degradation (not to exceed 13.5%) and 0.70% or (ii) 85.8%	0.70%
19	The greater of (i) 100% less the sum of the prior year's measured cumulative degradation (not to exceed 14.2%) and 0.70% or (ii) 85.1%	0.70%
20	The greater of (i) 100% less the sum of the prior year's measured cumulative degradation (not to exceed 14.9%) and 0.70% or (ii) 84.4%	0.70%

EXHIBIT M

(to Power Purchase Agreement)

ANNUAL GENERATION FORECAST

The following represents the annual forecast of net, AC generation delivered to the Point of Delivery.

On-Peak Hours are considered to be hour ending 0700 through and including 2200 Pacific prevailing time which is 16 hours, Monday through Saturday excluding any NERC holidays which are the major holidays. All other hours and all day Sundays are off-peak.

Month	On-Peak Energy Delivered (MWh)	Off-Peak Energy Delivered (MWh)
January	7,360	0
February	8,384	0
March	11,938	0
April	13,733	3
May	15,294	166
June	15,719	287
July	14,276	105
August	12,856	4
September	12,260	0
October	10,858	0
November	8,305	0
December	6,679	0
Total Annual	137,662	564
Total Combined Annual	138,226	
Annual Capacity Factor	31.65%	

Jicarilla 1 ESA

PNM Exhibit TGF-12

Is contained in the following 103 pages.

EXECUTION VERSION PNM Contract No. 1057679

ENERGY STORAGE AGREEMENT—JICARILLA STORAGE 1

by and between

PUBLIC SERVICE COMPANY OF NEW MEXICO

and

JICARILLA STORAGE 1 LLC

Dated as of June 27, 2019

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ENERGY STORAGE AGREEMENT

This Energy Storage Agreement, as may be amended from time to time, is entered into this 27th Day of June, 2019 ("Execution Date"), by and between Public Service Company of New Mexico, a New Mexico corporation ("PNM" or "Buyer"), whose principal place of business is 414 Silver Avenue SW, Albuquerque, NM 87102, and Jicarilla Storage 1 LLC, a Delaware limited liability company ("Seller"), whose principal place of business is 621 W. Randolph, Chicago, IL 60661. Buyer and Seller may be referred to in this Energy Storage Agreement individually as a "Party" and collectively as the "Parties."

WHEREAS, Buyer is a public utility that owns and operates electric generation, transmission, and distribution facilities and is subject to the laws of the State of New Mexico and the rules and regulations of the New Mexico Public Regulation Commission; and

WHEREAS, Seller desires to develop, design, construct, own and operate a battery energy storage facility, as further defined herein and in <u>Exhibit A</u>; and

WHEREAS, Seller desires to sell and deliver to Buyer the Product generated by the Project, and Buyer agrees to buy the same from Seller, in accordance with the terms and conditions set forth in this ESA,

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

ARTICLE 1 Definitions and Rules of Interpretation

- 1.1 <u>Definitions</u>. The following terms shall have the meanings set forth herein.
- "Abandonment" means (a) a cessation of work and operations at the Project for more than sixty (60) Days by Seller or Seller's contractors but only if such cessation is not caused by a Force Majeure, or (b) the relinquishment of possession and control of the Project (or any material portion thereof) by Seller, other than a transfer permitted under this ESA or in accordance with any consent executed by Buyer and a Lender.
 - "AC" means alternating electric current.
 - "Accounting Standards" has the meaning set forth in Section 22.18.
- "Additional Consents" means the approvals, consents, authorizations or other requirements not listed in the definition of Governmental Approvals in this ESA that are required from any Governmental Authority with respect to the Project.
- "Affiliate" of any named Person or entity means any other person or entity that controls, is under the control of, or is under common control with, the named entity; provided, however, in the case of Seller, "Affiliate" includes Hecate Grid, LLC. For purposes of this definition, the

term "control" (including the terms "controls," "under the control of" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a Person or entity, whether through ownership of fifty percent (50%) or more of the outstanding capital stock or other equity interests of any class of voting securities, by contract, or otherwise.

"After Tax Basis" means, with respect to any payment received or deemed to have been received by a Party, the amount of such payment ("Base Payment") supplemented by a further payment ("Additional Payment") to such Party so that the sum of the Base Payment plus the Additional Payment shall, after deduction of the amount of all Taxes (including any federal, state or local income taxes) required to be paid by such Party in respect of the receipt or accrual of the Base Payment and the Additional Payment (taking into account any current or previous credits or deductions arising from the underlying event giving rise to the Base Payment and the Additional Payment), be equal to the amount required to be received. Such calculations shall be made on the assumption that the recipient is subject to federal income taxation at the highest statutory rate applicable to corporations for the relevant period or periods, and state and local taxes at the highest rates applicable to corporations with respect to such Base Payment and Additional Payment, and shall take into account the deductibility (for federal income tax purposes) of state and local income taxes.

"AGC" stands for "Automatic Generation Control" and means energy management system equipment that automatically adjusts the quantity of Charging Energy and Discharging Energy of the Project, including communication circuits to communicate Project operating information to Buyer's representatives on a real-time basis for the purpose of telemetering, supervisory control/data acquisition and voice communications.

"Ancillary Services" means operating reserves, regulation, black-start capability, reactive supply, voltage control, frequency response, contingency reserves, other products associated with electric generation and Energy that the Project is capable of providing and all other beneficial outputs of the Project not required for the operation of the Project.

"Applicable Law" means all applicable laws, statutes, treaties, codes, ordinances, regulations, certificates, orders, licenses and permits of any Governmental Authority, now in effect or hereafter enacted, amendments to any of the foregoing, interpretations of any of the foregoing by a Governmental Authority having jurisdiction over this ESA and matters related thereto, the Parties or the Project, and all applicable judicial, administrative, arbitration and regulatory decrees, judgments, injunctions, writs, orders, awards or like actions (including those relating to human health, safety, the natural environment or otherwise).

"Attestation and Bill of Sale" has the meaning set forth in Section 9.1(C).

"Back-Up Metering" has the meaning set forth in Section 5.3(D).

"Bankruptcy Code" means the United States Bankruptcy Code, 11 U.S.C. § 101 et seq., as amended from time to time.

"Business Day" means any calendar Day that is not a Saturday, a Sunday, or a state and/or federal recognized holiday where banks in Albuquerque, New Mexico, are permitted or authorized to close.

"Buyer" has the meaning set forth in the Preamble.

"Buyer Costs" means brokerage fees, commissions and other similar third party transaction costs and expenses reasonably incurred and documented by Buyer either in terminating any arrangement pursuant to which it has hedged its obligations under this ESA or entering into new arrangements which replace this ESA; and all reasonable attorneys' fees and expenses incurred by Buyer in connection with the termination of this ESA, to the extent such costs are not already accounted for under Replacement ESS Costs.

"Buyer Termination Payment" means the sum of (a) the difference between (i) the net present value of the Replacement Energy Costs, calculated using a discount factor equal to the latest weighted average cost of capital as reported in the then-most recent NMPRC Rule 510 Annual Reporting filing, and (ii) the Contract Value, plus (b) Buyer Costs. Any such calculations will be based on reasonable assumptions as to future Project operations, differences between a replacement contract and this ESA, and similar considerations. To the extent the total value of the calculation in subpart (a) above is negative, the value used in such subpart (a) will be zero. The Buyer Termination Payment does not include consequential incidental, punitive, exemplary or indirect or business interruption damages.

"CCN" means an application for a Certificate of Public Convenience and Necessity filed with the NMPRC relating to the Project.

"Change of Control" means any circumstance in which Ultimate Parent ceases to own, directly or indirectly through one or more intermediate entities, at least fifty percent (50%) of the outstanding equity or voting interests in Seller.

"Charging Energy" means the amount of Energy supplied by Buyer at Buyer's cost and in accordance with Prudent Utility Practices, and delivered to Seller at the Point of Delivery to be stored at the Project for the purpose of charging the ESS and discharge at a later time, as measured by the Electric Metering Devices, net of any estimated AC losses, based on methodology agreed to by the Parties, between the Electric Metering Devices and the Point of Delivery that are not already reflected in the metered data.

"Code" means the U.S. Internal Revenue Code of 1986, including applicable rules and regulations promulgated thereunder, as amended from time to time.

"Commercial Operation" means that (a) the ESS has been constructed, commissioned, tested, and proven capable of delivering a minimum of ninety-five percent (95%) of the Guaranteed ESS Capacity on a sustained basis without experiencing any abnormal or unsafe operating conditions on any interconnected system; (b) Seller has completed three successful start-ups of the ESS without experiencing any abnormal operating conditions and has been available to dispatch continuously for a period of twenty-four (24) hours with controls in auto and synchronized to the Buyer's system; (c) all Seller required permits, required consents, and Governmental Approvals are in full force and effect; (d) the ESS Unit Capabilities have been

demonstrated through testing in accordance with applicable test protocols and procedures set forth in Exhibit F or by another method acceptable to Buyer; (e) Seller has obtained all necessary rights under a separate Interconnection Agreement between Seller and the Transmission Provider for interconnection and delivery of Discharge Energy to the Point of Delivery and is not in breach of its Interconnection Agreement, (f) Seller has satisfactorily completed other testing in accordance with Interconnection Agreement requirements; and (g) Seller has obtained required insurance coverage as set forth in this ESA; and (h) Seller has provided to Buyer an officer's certificate that the Project has been completed in all material respects; (i) Seller has delivered to Buyer the Delivery Term Security.

"Commercial Operation Date" means the date on which (a) Buyer accepts from Seller a written notification to Buyer that the Commercial Operation has commenced, (b) Seller provides to Buyer a certification from a Licensed Professional Engineer, substantially in the form attached hereto as Exhibit K, with all fees and costs associated with the Licensed Professional Engineer having been borne by Seller, and (c) Seller shall have delivered the Delivery Term Security to Buyer in accordance with the relevant provisions of Article 19.

"Commercial Operation Year" means a period of twelve (12) consecutive Months. The first Commercial Operation Year shall commence on the Commercial Operation Date and end on the last Day of the Month that is twelve (12) full Months after the Commercial Operation Date, and each subsequent Commercial Operation Year shall be each twelve (12) Month period thereafter.

"Confidential Information" has the meaning set forth in Section 22.14(C).

"Contract Value" means the present values of the ESS Capacity Payments for each Commercial Operation Year (or portion thereof) in the then remaining term, determined without reference to the early termination, of (a) the quantity of ESS Capacity expected to be made available during such Commercial Operation Year (or portion thereof) times (b) the ESS Capacity Payment Rate for such Commercial Operation Year. All elements of the foregoing calculations shall be determined in a commercially reasonable manner. The present values of the monthly payments from their payment dates in the foregoing calculations shall be determined using a discount factor equal to the latest weighted average cost of capital as reported in the thenmost recent NMPRC Rule 510 Annual Reporting filing.

"Day" means a calendar day and includes Saturdays, Sundays and holidays; 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.

"DC" means direct current.

"Debt" means solely with respect to Seller after the Commercial Operation Date, without duplication, (i) all obligations of Seller for borrowed money, (ii) all obligations of Seller evidenced by bonds, debentures, notes or other similar instruments, (iii) all obligations of Seller to pay the deferred purchase price of property or services, except trade account payable and other accrued expenses arising in the ordinary course of business, (iv) all deferred obligations of Seller to reimburse any bank or other Person in respect of amounts paid or advanced under a letter of

credit, line of credit or other instrument, and (v) obligations of Seller in respect of interest rate swap agreements, caps, collars, or other interest rate hedging mechanisms.

"Default Rate" has the meaning set forth in Section 9.4.

"Defaulting Party" means the Party with respect to which an Event of Default under Article 12 has occurred.

"Delay Damages" has the meaning set forth in Section 3.7.

"Delayed ESS Capacity" has the meaning set forth in Section 3.7.

"Delivery Term" has the meaning set forth in Section 7.1.

"Discharge Energy" means Energy discharged from the ESS and delivered to Buyer at the Point of Delivery, as measured by the Electric Metering Devices, corrected for any estimated AC losses to the Point of Delivery, based on methodology agreed to by the Parties.

"Disclosing Party" has the meaning set forth in Section 22.14(A).

"Dispute Notice" has the meaning set forth in Section 13.8(A).

"Disputing Party" has the meaning set forth in Section 9.5(A).

"Dollars" means the lawful currency of the United States of America.

"Downgrade Event" shall mean that the long-term credit rating of a Person's long-term senior unsecured debt is not "Baa2" or higher by Moody's or "BBB" or higher by S&P.

"Early Termination Date" has the meaning set forth in Section 12.4.

"Electric Interconnection Point" means the physical point at which electrical interconnection is made between the Project and the Transmission Provider's Transmission System.

"Electric Metering Device(s)" means all metering and data processing equipment used to measure, record, or transmit data relating to Charging Energy and Discharge Energy. Electric Metering Devices include the metering current transformers and the metering voltage transformers.

"Emergency Condition" means (a) a condition or situation that presents an imminent physical threat of danger to life, health or property, and/or could reasonably be expected in the opinion of the Transmission Provider to cause a significant disruption to the Transmission Provider's Transmission System or otherwise be required in accordance with the requirements of the Peak Reliability Organization and/or NERC/WECC, or (b) any system condition not consistent with Prudent Utility Practices; provided that an Emergency Condition shall not include any emergency caused by Seller's breach of its Interconnection Agreement with the Transmission Provider.

"Energy" means three-phase, 60-cycle alternating current electric energy, expressed in units of kWh or MWh, delivered to or received from the Project, in each case at a nominal voltage at the Point of Delivery, as measured by Electric Metering Devices, net of auxiliary loads, station electrical uses and appropriate line losses.

"Energy Storage Services" means the acceptance of Charging Energy at the Project, the storing of Energy in the Project, and the delivery of Discharge Energy from the Project at the Point of Delivery, all in accordance with Buyer's dispatch instructions and subject to the terms and conditions of this ESA.

"Energy Storage System" or "ESS" means the battery arrays, battery system controller, inverters, transformers, thermal management system, and other equipment necessary to charge, store, and subsequently deliver electricity from the Project to the Point of Delivery.

"Environmental Attributes" means all attributes, aspects, characteristics, claims, credits, benefits, reductions, offsets or allowances of an environmental nature that are created or otherwise arise from the Project's delivery of electricity from renewable energy resources in contrast with the generation of electricity using nuclear or fossil fuels or other traditional resources. Forms of such attributes include any and all environmental air quality credits, green credits, including carbon credits, emissions reduction credits, certificates, tags, offsets, allowances, or similar products or rights, howsoever entitled, (i) resulting from the avoidance of the emission of any gas, chemical, or other substance, including mercury, nitrogen oxide, sulfur dioxide, carbon dioxide, carbon monoxide, particulate matter or similar pollutants or contaminants of air, water or soil, gas, chemical, or other substance, and (ii) attributable to the generation, purchase, sale or use of Energy. Environmental Attributes include those currently existing or arising during the Term under local, state, regional, federal, or international legislation or regulation relevant to the avoidance of any emission described above under any governmental, regulatory or voluntary program, including the United Nations Framework Convention on Climate Change and related Kyoto Protocol or other programs, laws or regulations. Environmental Attributes include the reporting rights related to any such attributes, aspects, characteristics, claims, credits, benefits, reductions, offsets or allowances, including the right of a Person to report the ownership thereof in compliance with federal or state law, if applicable, or otherwise to a federal or state agency or any other Person. Environmental Attributes specifically exclude (i) Tax Benefits, (ii) depreciation deductions and depreciation benefits, and other tax benefits arising from ownership or operation of the Project; and (iii) any Energy, reliability or other power attributes from the Project.

"Environmental Contamination" means the introduction or presence of Hazardous Materials at such levels, quantities or location, or of such form or character, as to constitute a violation of federal, state or local laws or regulations, and present a material risk under federal, state or local laws and regulations that a Site will not be available or usable, whether in whole or in part, for the purposes contemplated by this ESA.

"ESA" or "Energy Storage Agreement" means this Energy Storage Agreement between Seller and Buyer, including the Exhibits and Schedules attached hereto, as the same may be amended from time to time in accordance with the provisions hereof.

"ESS Capacity" means the power (expressed in MW as measured at the Point of Delivery) that can be discharged from the ESS for four (4) consecutive hours when starting from 100% state of charge, as determined periodically in accordance with applicable test protocols and procedures set forth in Exhibit F.

"ESS Capacity Payment" has the meaning set forth in Section 8.1.

"ESS Capacity Payment Rate" means the price to be paid by Buyer to Seller for Product made available by the Energy Storage System, as set forth in this ESA.

"ESS Capacity Shortfall Damages" has the meaning set forth in Section 3.8.

"ESS Roundtrip Efficiency" means the ratio of the delivered discharge Energy to the delivered charge Energy, in each case as measured at the PCS input/output terminals and determined periodically in accordance with applicable test protocols and procedures set forth in Exhibit F.

"ESS Unit Capabilities" has the meaning set forth in Section 3.12.

"Event of Default" means a Seller Event of Default as set forth in Section 12.1 or a Buyer Event of Default as set forth in Section 12.2.

"Execution Date" has the meaning set forth in the Preamble.

"Expected Commercial Operation Date" has the meaning set forth in Section 3.1.

"Federal Power Act" means the Federal Power Act, as amended, 16 U.S.C. § 791a et seq.

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

"Force Majeure Event" has the meaning set forth in Section 14.1.

"Frequency Response Capability" means the ability of the ESS to maintain frequency within predefined bounds as specified in Section 3.12(G), measured in MW per 0.1 Hz, by arresting frequency deviations and supporting frequency as required by NERC Reliability Standard BAL-003-1.

"GAAP" has the meaning set forth in Section 22.18.

"Governmental Approval" means any authorization, consent, permission, approval (including an NMPRC Approval), license, ruling, permit, exemption, variance, order, judgment, instruction, condition, direction, directive, decree, declaration of or regulation by any Governmental Authority relating to the construction, development, ownership, occupation, startup, testing, operation or maintenance of the Project or to the execution, delivery or performance of this ESA or the procurement pursuant to this ESA of renewable energy and Renewable Energy Certificates and shall also mean, where and as applicable and the context so dictates, any and all authorization, consent, permission, approval, license, ruling, permit,

exemption, variance, order, judgment, instruction, condition, direction, directive, decree, declaration of or regulation with regard to any Non-Governmental Compliance Obligations.

"Governmental Authority" means any federal, tribal, state, local or municipal governmental body; any governmental, quasi-governmental, regulatory or administrative agency, commission, body or other authority exercising or entitled to exercise any administrative, executive, judicial, legislative, policy, regulatory or taxing authority or power; or any court or governmental tribunal.

"Governmental Charges" means any Taxes, charges or costs that are assessed or levied by any Governmental Authority or other Person, including local, state or federal regulatory or taxing authorities that would affect the sale and purchase of the Product contemplated by this ESA, either directly or indirectly.

"Guaranteed Charge Ramp Rate" has the meaning set forth in Section 3.12.

"Guaranteed ESS Capacity" has the meaning set forth in Section 3.12 and shall be valid for the full duration of the ESA with no allowance for degradation.

"Guaranteed Discharge Ramp Rate" has the meaning set forth in Section 3.12.

"Guaranteed ESS Roundtrip Efficiency" has the meaning set forth in Section 3.12.

"Guaranteed PMAX" has the meaning set forth in Section 3.12.

"Guaranteed Start Date" has the meaning set forth in Section 3.1.

"Guaranteed System Latency" means the guaranteed time measured between when the control signal is sent and the ESS responds to the signal by changing the discharge or charge power value by more than 1% of the control setpoint, as specified in Section 3.12.

"Hazardous Materials" means any substance, material, gas, or particulate matter that is regulated by any local Governmental Authority, any applicable state, or the United States of America as an environmental pollutant or dangerous to public health, public welfare, or the natural environment including, without limitation, protection of non-human forms of life, land, water, groundwater, and air, including any material or substance that is (i) defined as "toxic," "polluting," "hazardous waste," "hazardous material," "hazardous substance," "extremely hazardous waste," "solid waste" or "restricted hazardous waste" under any provision of local, state, or federal law; (ii) petroleum, including any fraction, derivative or additive; (iii) asbestos; (iv) polychlorinated biphenyls; (v) radioactive material; (vi) designated as a "hazardous substance" pursuant to the Clean Water Act, 33 U.S.C. § 1251 et seq.; (vii) defined as a "hazardous waste" pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq.; (viii) defined as a "hazardous substance" pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq.; (ix) defined as a "chemical substance" under the Toxic Substances Control Act, 15 U.S.C. § 2601 et seq.; or (x) defined as a "pesticide" under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq.

"House Energy" has the meaning set forth in Section 1.4.

"Interconnection Agreement" means the separate agreement between Seller and the Transmission Provider for interconnection of the Project to the Transmission Provider's Transmission System, as such agreement may be amended from time to time.

"Interconnection Facilities" means the Transmission Provider's Interconnection Facilities and Seller's Interconnection Facilities.

"ITC(s)" means the investment tax credits established pursuant to Section 48 of the Internal Revenue Code, as such law may be amended or superseded.

"Issuer Minimum Requirements" has the meaning set forth in Section 19.2.

"kW" means one or more kilowatts AC of electricity, as the context requires.

"kWh" means kilowatt hour AC.

"Lender(s)" means any and all Persons, including Affiliates of Seller, (a) lending money or extending credit (including any financing lease, monetization of tax benefits, back-leverage or paygo financing, Tax Equity Financing or credit derivative arrangement) to Seller or to an Affiliate of Seller: (i) for the development, construction, interim or permanent financing or refinancing of the Project; (ii) for working capital or other ordinary business requirements of the Project (including the maintenance, repair, replacement or improvement of the Project); (iii) for any development financing, bridge financing, credit support, credit enhancement or interest rate protection in connection with the Project; (iv) for any capital improvement or replacement related to the Project; or (v) for the purchase of the Project and the related rights from Seller; (b) participating as a Tax Equity Investor in the Project; or (c) acting as any lessor under a lease finance arrangement relating to the Project.

"Letter of Credit" means an irrevocable, unconditional, transferable standby letter of credit for the benefit of the receiving Party, issued by an entity meeting the Issuer Minimum Requirements.

"Licensed Professional Engineer" means an independent, professional engineer reasonably acceptable to Buyer, licensed in the State of New Mexico, and otherwise qualified to perform the work required hereunder.

"Local Provider" has the meaning set forth in Section 1.4.

"Losses" has the meaning set forth in Section 20.1(A).

"Month" means a calendar month.

"Monthly Billing Period" means the period during any particular Month in which Product has been made available at the Point of Delivery for sale to Buyer, whether or not occurring prior to or subsequent to the Commercial Operation Date.

"Monthly Electricity Cost" means, for a month, all costs and expenses incurred by Buyer to purchase and deliver electricity to the ESS during such month, including, without limitation,

the purchase price of the electricity, transmission charges, penalties to the extent directly caused by Seller and other charges.

"Moody's" means Moody's Investor Services, Inc. and any successor thereto.

"Mountain Prevailing Time" or "MPT" means the time in effect in the Mountain Time Zone of the United States of America, whether Mountain Standard Time or Mountain Daylight Saving Time.

"MW" means megawatt or one thousand (1,000) kW AC.

"MWh" means megawatt hours AC.

"NERC" means the North American Electric Reliability Corporation or any successor organization.

"NMPRC" means the New Mexico Public Regulation Commission or any successor agency.

"NMPRC Approval" has the meaning set forth in Section 17.3(B).

"NMPTC Payment Amount" has the meaning set forth in Section 8.1(C).

"NMPTC Recipients" has the meaning set forth in Section 8.1(C).

"NMPTC Statute" has the meaning set forth in Section 8.1(C).

"NMPTCs" means any state or local production tax credit or investment tax credit determined by reference to renewable electric energy produced from renewable energy resources in effect in the state of New Mexico.

"Non-Defaulting Party" means the Party other than the Defaulting Party with respect to an Event of Default that has occurred under Article 12.

"Non-Governmental Compliance Obligations" means all necessary filings, applications, accreditations, registrations and/or other requirements including deposits, fees, accounts, and/or other obligations with WREGIS, NERC, WECC, and all other applicable agencies, self-regulatory organizations and industry committees to which the Party is required to have membership and/or submit to jurisdiction in the performance of this ESA.

"O&M Records" has the meaning set forth in Section 13.4(A).

"OATT" means Open Access Transmission Tariff.

"Operating Instruction" has the meaning given by NERC in its Glossary of Terms Used in NERC Reliability Standards, as may be amended from time to time.

"Operating Parameters" has the meaning set forth in Section 10.4(A).

"Operating Procedures" means those procedures, if any, developed pursuant to Section 10.5.

"Operating Records" means all agreements associated with the Project, operating logs, blueprints for construction, operating manuals, all warranties on equipment, and all documents, including but not limited to supply contracts, contracts for the manufacture and installation of the ESS and generator step-up transformer, material engineering drawings and construction contracts, and environmental permits, plans, and studies, whether in printed or electronic format, that Seller uses or maintains for the operation of the Project.

"Outage Notice" has the meaning set forth in Section 7.5(A).

"Party" or "Parties" has the meaning set forth in the Preamble and includes any permitted assignee of a Party.

"PCS" or "Power Conditioning System" means the Energy Storage System power conditioning system utilized to convert electric power from one form to another (AC to DC, DC to AC, and/or between different voltage levels), and to condition the power quality to what is needed by the interconnected systems.

"Peak Reliability Organization" means the entity that fulfills the duties of the Reliability Coordinator, as defined by NERC, and as delegated by WECC, for its Reliability Coordinator Area in the Western Interconnection.

"Person" means any natural person, corporation, limited liability company, general partnership, limited partnership, proprietorship, other business organization, trust, union, association or Governmental Authority.

"PNM" has the meaning set forth in the Preamble.

"PPA" or "Power Purchase Agreement" means the Power Purchase Agreement dated as of June 27, 2019, between Jicarilla Solar 1 LLC and Buyer, including the Exhibits and Schedules attached hereto, as the same may be amended from time to time in accordance with the provisions of the PPA.

"Point of Delivery" means: (i) during the Recapture Period, the electric system point at which (a) Buyer delivers Charging Energy to Seller exclusively from the Solar Facility, (b) Seller delivers Discharge Energy to Buyer, and (c) Seller makes the Ancillary Services available to Buyer; and (ii) after the Recapture Period, if Buyer elects to deliver Charging Energy to Seller from the grid, the electric system point at which (a) Buyer delivers Charging Energy to Seller from the grid, (b) Seller delivers Discharge Energy to Buyer, and (iii) Seller makes the Ancillary Services available to Buyer. The Point of Delivery during the Recapture Period shall be specified in Section 3.1 and Exhibit B to this ESA.

"Product" means all delivered Discharge Energy, Environmental Attributes, Ancillary Services, ESS Capacity and other ESS Unit Capabilities, and other products, all as made available by the Project, and the Energy Storage Services, all of which shall be delivered for Buyer's exclusive use pursuant to the terms of this ESA.

"Project" means Seller's energy storage facility, located in Rio Arriba County, New Mexico, with a designed maximum power discharge capability of 20 MW for four (4) hours (80 MWh), as identified and described in Article 3 and Exhibit A to this ESA, including all of the following (and any additions, modifications or replacements), the purpose of which is to store electricity and deliver such electricity to the Buyer at the Point of Delivery: Seller's equipment, buildings, all of the conversion facilities, including the Energy Storage Systems, step-up transformers, output breakers, Seller's Interconnection Facilities necessary to connect the ESS to the Electric Interconnection Point, protective and associated equipment, improvements, and other tangible assets, contract rights, easements, rights of way, surface use agreements and other interests or rights in real estate reasonably necessary for the construction, operation, and maintenance of the energy storage facilities that make the Product available subject to this ESA.

"Project Manager" has the meaning set forth in Section 10.1(D).

"Projected Schedule" has the meaning set forth in Section 7.4(A).

"Promotional Materials" has the meaning set forth in Section 22.15(A).

"Prudent Utility Practice(s)" means the practices, methods, and acts (including the practices, methods, and acts engaged in or approved by a significant portion of the electric power generation industry, WECC and/or NERC) for similar facilities that, at a particular time, in the exercise of reasonable judgment in light of the facts known or that should reasonably have been known at the time a decision was made, would have been expected to accomplish the desired result in a manner consistent with law, regulation, permits, codes, standards, reliability, safety, environmental protection, economy, and expedition. Prudent Utility Practice(s) are not necessarily defined as the optimal standard practice method or act to the exclusion of others, but rather refer to a range of actions reasonable under the circumstances. Subject to the foregoing, with respect to the Project, Prudent Utility Practice(s) includes taking reasonable steps to ensure that:

- (A) equipment, materials, resources, and supplies, including spare parts inventories, are available to meet the Project's needs;
- (B) sufficient operating personnel are available at all times and are adequately experienced and trained and licensed as necessary to operate the Project properly, efficiently, and in coordination with Buyer and are capable of responding to reasonably foreseeable Emergency Conditions whether caused by events on or off the Sites;
- (C) preventive, routine, and non-routine maintenance and repairs are performed on a basis that ensures reliable, long-term and safe operation, and are performed by knowledgeable, trained, and experienced personnel utilizing proper equipment and tools;
- (D) appropriate monitoring and testing are performed to ensure equipment is functioning as designed;
- (E) equipment is not operated in a reckless manner, or in a manner unsafe to workers, the general public, or the interconnected system or contrary to environmental laws, permits or regulations or without regard to defined limitations, such as flood conditions, safety inspection

requirements, operating voltage, current, volt-ampere reactive ("VAr") loading, frequency, rotational speed, polarity, synchronization, and/or control system limits;

- (F) equipment and components meet or exceed the standard of durability that is generally used for battery storage systems in the region and will function properly over the full range of ambient temperature and weather conditions reasonably expected to occur at the Sites and under both normal and Emergency Conditions; and
- (G) equipment, components, and processes are appropriately permitted with any local, state, or federal Governmental Authority and are operated and maintained in accordance with applicable permit and regulatory requirements.
- "Qualified Operator" is (a) a Person that has at least three (3) years' experience with operating battery energy storage systems to the extent reasonably available in the market and that is trained on the functionality and operation of the ESS technology, or (b) any other Person reasonably acceptable to Buyer.
 - "Rating Agency" shall mean S&P or Moody's.
- "Recapture Period" means the first sixty-one (61) months following the Commercial Operation Date within which the ESS must be charged exclusively from Energy generated by the Solar Facility.
 - "Receiving Party" has the meaning set forth in Section 22.14(A).
 - "Receiving Party's Representatives" has the meaning set forth in Section 22.14(B).
 - "Recording" has the meaning set forth in Section 22.19.
 - "Regulatory End Date" has the meaning set forth in Section 17.3(B)(3).
- "Replacement ESS Costs" means the actual costs incurred by Buyer following an Event of Default that are reasonable and necessary to replace the Product which Seller, in accordance with this ESA, would have made available to Buyer, but failed to so provide pursuant to this ESA. Buyer shall not have to enter into a replacement contract to establish the Replacement ESS Costs. If Buyer does not enter into a replacement contract, then the Replacement ESS Costs will be based on the market price for comparable ESS Unit Capabilities, Environmental Attributes and Ancillary Services delivered to Buyer's system, as reasonably determined by a third party acceptable to both Parties. In calculating such amounts, Buyer will comply with the requirements set forth in Section 12.4(A) in establishing the market price. Replacement ESS Costs for an Event of Default also include (i) the reasonable amounts paid or incurred by Buyer for transmission of replacement Discharge Energy to the Point of Delivery and any associated transmission or distribution costs, and (ii) Buyer's expenses, including reasonable outside attorneys' fees, suffered as a result of Seller's failure to perform under this ESA.
 - "Requested Actions" has the meaning set forth in Section 17.3.
 - "S&P" means Standard & Poor's Corporation and any successor thereto.

"Scheduled Maintenance Outage" means a time during which the ESS is shut down or its output reduced to undergo scheduled maintenance in accordance with this ESA, or as otherwise agreed by Seller and Buyer.

"SEC" or United States Securities and Exchange Commission has the meaning set forth in Section 22.18.

"Security" means Development Security or Delivery Term Security, as applicable.

"Seller" has the meaning set forth in the Preamble.

"Seller Curtailment" has the meaning set forth in Section 4.2.

"Seller Excused Hours" means those hours during which Seller is unable to schedule or receive Charging Energy, or deliver Discharge Energy as a result of: (a) a Scheduled Maintenance Outage, (b) a Force Majeure Event, or (c) a Seller Curtailment.

"Seller Forced Outage" means an unplanned reduction, interruption or suspension of all or a portion of Charging Energy receipts or Discharge Energy deliveries from the Project, in each case at the Point of Delivery in an amount of at least five (5) MWs not associated with Seller Excused Hours.

"Seller Guarantor" means an entity with a long-term senior unsecured debt credit rating of "Baa2" or higher by Moody's and "BBB" or higher by S&P that has made a Seller Guaranty for the benefit of Buyer.

"Seller Guaranty" means a guaranty in substantially the form attached as Exhibit J.

"Seller Permitted Transfer" means any of the following: (a) a Change of Control of Seller's Ultimate Parent or a Change of Control of Seller where Seller's Ultimate Parent is the same entity after such Change of Control; (b) the direct or indirect transfer of shares of, or equity interests in, Seller to a Tax Equity Investor; or (c) a transfer of: (i) all or substantially all of the assets of Hecate Energy NAF LLC ("Hecate") or Seller's Ultimate Parent in a single transaction; (ii) all or substantially all of Hecate's or Seller's Ultimate Parent's renewable energy generation portfolio in a single transaction; or (iii) all or substantially all of Hecate's or Seller's Ultimate Parent's solar generation portfolio in a single transaction; provided, that in the case of each of (b) or (c), following such transfer (A) the entity that operates the Project is (or contracts with) a Qualified Operator, and (B) that such transfer does not have a material adverse effect on the Seller's credit characteristics and Seller maintains the applicable Seller Security requirements.

"Seller Termination Payment" means the sum of (a) the difference between (i) the Contract Value and (ii) the net present value of the payments that can reasonably be expected to be applicable in the market under a replacement contract covering the same products (i.e., Energy Output) calculated using a discount factor equal to the latest weighted average cost of capital as reported in the then-most recent NMPRC Rule 510 Annual Reporting filing, plus (b) Seller's Costs. Any such calculations will be based on reasonable assumptions as to future Project operations, differences between a replacement contract and this ESA, and similar considerations. Seller shall not have to enter into a replacement contract to establish the foregoing calculations.

The Seller Termination Payment does not include consequential incidental, punitive, exemplary or indirect or business interruption damages. To the extent the total value of the calculation in subpart (a) above is negative, the resulting value to be used in subpart (a) will be zero.

"Seller's Costs" means brokerage fees, commissions and other similar third-party transaction costs and expenses reasonably incurred and documented by Seller either in terminating any arrangement pursuant to which it has hedged its obligations under this ESA or in entering into new arrangements which replace this ESA; and all reasonable attorneys' fees and expenses incurred by Seller in connection with the termination of this ESA.

"Seller's Financial Statements" has the meaning set forth in Section 22.18(B).

"Seller's Interconnection Facilities" means the equipment between the high side disconnect of the step-up transformer and the Electric Interconnection Point, including all related relaying protection and physical structures as well as all transmission facilities required to access the Transmission Provider's Transmission System at the Electric Interconnection Point, along with any easements, rights of way, surface use agreements and other interests or rights in real estate reasonably necessary for the construction, operation and maintenance of such facilities. On the low side of the step-up transformer, "Seller's Interconnection Facilities" includes Seller's metering, relays, and load control equipment as provided for in the Interconnection Agreement. This equipment is located within the Project and is conceptually depicted in Exhibit B to this ESA.

"Site" means the parcel or parcels of real property on which the Project will be constructed and located, including any easements, rights of way, surface use agreements and other interests or rights in real estate reasonably necessary for the construction, operation and maintenance of the Project. The Site for the Project is more specifically described in Section 3.3 and Exhibit C to this ESA. For the avoidance of doubt, this ESA is Site specific.

"Solar Facility" means the co-located 50 MW_{AC} solar generating plant consisting of photovoltaic arrays, tracking devices, inverters, transformers, and other equipment necessary to collect sunlight and convert it into electricity which, among other things, will be used to charge the ESS per Buyer's dispatch elections.

"System Control Center" or "SCC" means Buyer's representative(s) responsible for dispatch of the ESS.

"Tax Benefits" means (a) federal and state investment and/or production tax credits (including ITCs but excluding NMPTC(s), and any other tax credits which are or will be generated by the Project and (b) any cash payments or outright grants of money relating directly to such tax credits.

"Tax Equity Financing" means, with respect to Seller or an upstream equity owner of Seller, any transaction or series of transactions (including, without limitation, any transaction of the type described in this definition that utilizes a lease or inverted lease structure) resulting in a portion of the membership interests in Seller or an upstream equity owner, as applicable, being issued or otherwise provided to another Person (a "Tax Equity Investor") in exchange for capital contributions to Seller or such upstream equity owner, as applicable, or the Project being

sold to and leased by Seller from a Tax Equity Investor, in either case for the purpose of raising a portion of the funds needed to finance the construction of the Project by monetizing the Tax credits, depreciation and other Tax Benefits associated with the Project.

"Tax Equity Investor" has the meaning set forth in the definition of Tax Equity Financing.

"Taxes" means all taxes, fees, levies, licenses or charges imposed by any Governmental Authority, other than taxes, levies, licenses or charges based upon net income or net worth as set forth in more detail in Section 9.7.

"**Term**" means the period during which this ESA shall remain in full force and effect, and which is further defined in Article 2.

"Termination Payment" means the Buyer Termination Payment or the Seller Termination Payment, as applicable.

"Test Period" means the period commencing on the day the Project is energized, operates in parallel with the Transmission Provider's Transmission System and is available to receive Charging Energy from and deliver Discharge Energy to the Point of Delivery, and ending on the Commercial Operation Date.

"Transmission Provider" means Buyer, Buyer's designated agent, or a third party acting in its capacity owning, controlling, or operating facilities used for the transmission of electric energy in interstate commerce and providing transmission service under the OATT and any successor entity, if applicable.

"Transmission Provider's Interconnection Facilities" means the facilities necessary to connect the Transmission Provider's Transmission System to the Electric Interconnection Point, including breakers, bus work, bus relays, and associated equipment installed by the Transmission Provider for the direct purpose of physically and electrically interconnecting the Project, along with any easements, rights of way, surface use agreements and other interests or rights in real estate reasonably necessary for the construction, operation and maintenance of such facilities. Arrangements for the installation and operation of the Transmission Provider's Interconnection Facilities shall be governed by the Interconnection Agreement.

"Transmission Provider's Transmission System" means the contiguously interconnected electric transmission and sub-transmission facilities over which the Transmission Provider has rights (by ownership or contract) to provide bulk transmission of capacity and energy from the Electric Interconnection Point.

"Ultimate Parent" means Hecate Energy NAF LLC.

"WECC" means the Western Electricity Coordinating Council, a NERC regional electric reliability council, or any successor organization.

"WREGIS" means the Western Renewable Energy Generation Information System or any successor system.

1.2 Rules of Construction.

- (A) The masculine shall include the feminine and neuter.
- (B) References to "Articles," "Sections," "Exhibits" or "Schedules" shall be to articles, sections, exhibits, or schedules of this ESA unless otherwise stated.
- (C) The Exhibits and Schedules attached hereto are incorporated in and are intended to be a part of this ESA; *provided*, that in the event of a conflict between the terms of any Exhibit or Schedule and the terms of this ESA, the terms of this ESA shall take precedence.
- (D) This ESA was negotiated and prepared by both Parties with the advice and participation of counsel. The Parties have agreed to the wording of this ESA and none of the provisions hereof shall be construed against one Party on the ground that such Party is the author of this ESA or any part hereof.
- (E) The Parties shall act reasonably and in accordance with the principles of good faith and fair dealing in the performance of this ESA. Unless expressly provided otherwise in this ESA, (i) where the ESA requires the consent, approval, acceptance, agreement or similar action by a Party, such consent, approval, agreement or or similar action shall not be unreasonably withheld, conditioned or delayed, and (ii) wherever the ESA gives a Party a right to determine, require, specify or take similar action with respect to a matter, such determination, requirement, specification or similar action shall be reasonable.
- (F) Use of the words "include" or "including" or similar words shall be interpreted as "including but not limited to" or "including, without limitation."
- (G) Use of the words "tax" or "taxes" shall be interpreted to include taxes, fees, surcharges, and the like.
- 1.3 <u>Interpretation with Interconnection Agreement</u>. Each Party conducts its operations in a manner intended to comply with FERC Standards of Conduct for Transmission Providers, requiring the separation of its transmission and merchant functions.
- (A) The Parties acknowledge and agree that the Interconnection Agreement shall be a separate and free-standing contract and that the terms of this ESA are not binding upon the Transmission Provider.
- (B) Notwithstanding any other provision in this ESA, nothing in the Interconnection Agreement shall alter or modify Seller's or Buyer's rights, duties and obligations under this ESA. This ESA shall not be construed to create any rights between Seller and the Transmission Provider.
- (C) Seller expressly recognizes that, for purposes of this ESA, the Transmission Provider shall be deemed to be a separate entity and separate contracting party whether or not the Interconnection Agreement is entered into with Buyer, an Affiliate of Buyer, or a third-party entity.

- 1.4 Interpretation of Arrangements for Electric Supply to the Project. This ESA does not provide for the supply of retail electric power or natural gas to the Project, for any purpose ("House Energy"). Seller shall contract with the local utility in whose retail service territory the Project is located ("Local Provider") for the supply of House Energy.
- (A) Seller's arrangements for the supply of House Energy to the Project shall be separate and free-standing arrangements. The terms of this ESA are not binding upon the Local Provider. For purposes of this ESA, the Local Provider shall be deemed to be a separate entity and separate contracting party, whether or not the Local Provider is Buyer or an Affiliate of Buyer.
- (B) Notwithstanding any other provision in this ESA, nothing in Seller's arrangements for the supply of House Energy to the Project shall alter or modify Seller's or Buyer's rights, duties and obligations under this ESA. This ESA shall not be construed to create any rights between Seller and Buyer in Buyer's capacity as the Local Provider.
- (C) Seller shall have the right to consume energy concurrently generated by the Solar Facility for House Energy and to co-locate additional facilities designed to supply House Energy; provided, however, that excess energy produced from such additional facility shall not be delivered by Seller to Buyer under this ESA. House Energy shall be real time measured by a dedicated Electric Metering Device.

ARTICLE 2 Term and Termination

2.1 Execution Date and Term. This ESA shall become effective on the Execution Date, subject to conditions precedent set forth herein, and shall end at 11:59 p.m. Mountain Prevailing Time on the date that is the last Day of the twentieth (20th) Commercial Operation Year, subject to the early termination provisions set forth herein. Applicable provisions of this ESA shall continue in effect after termination, including early termination, to the extent necessary to enforce or complete the duties, obligations or responsibilities of the Parties arising prior to termination.

ARTICLE 3 Project Description

3.1 <u>Commercial Terms</u>. The following commercial terms apply to the transaction contemplated by this ESA, each term is as more fully set forth in this ESA:

COMMERCIAL TERMS

Buyer: Public Service Company of New Mexico	Seller: Jicarilla Storage 1 LLC			
Project: Jicarilla Storage 1				
Point of Delivery: The point within WECC Path 48 where Seller makes available to Buyer				
Product being provided under this ESA, as further specified in the definition of "Point of				

Delivery." The Point of Delivery during the Recapture Period is described in Exhibit B.	
	Product Type: Bundled Discharge Energy,
Contract Term: 20 Commercial	Environmental Attributes, Ancillary Services,
Operation Years	ESS Capacity and other ESS Unit Capabilities,
	other products, and Energy Storage Services
ESS Capacity Payment Rate: \$9.97per kW per month	
Day(s) of week: Monday through	Hours: Hour Ending 0100 – Hour Ending
Sunday, including NERC holidays	2400, Monday through Sunday Mountain
	Prevailing Time ("MPT")
Guaranteed Start Date: One hundred fifty (150) Days after the Expected Commercial	
Operation Date	_
Expected Commercial Operation Date: November 30, 2021, subject to extensions as set	
forth in Section 3.6	

- 3.2 <u>Project. Exhibit A</u> provides a detailed description of the Project, including identification of the major equipment and components that will make up the Project. Seller shall provide advance written notice to Buyer at the earliest practicable time of any proposed material changes in the Project.
- 3.3 <u>Location</u>. A scaled map that identifies the Site, the location of the Electric Interconnection Point and the location of the Interconnection Facilities is included in <u>Exhibit A</u> to this ESA. <u>Exhibit A</u> also contains a preliminary indication of the location of the ESS at the Site. Seller will provide notice to Buyer of the final proposed location of the ESS at the Site no later than thirty (30) Days prior to the initial Site construction mobilization and commencement of civil infrastructure work by Seller's contractors at the Site. Seller shall provide advance written notice to Buyer at the earliest practicable time of any other proposed location changes.
- 3.4 <u>General Design of the Project</u>. Seller shall construct the Project in accordance with Prudent Utility Practices and in accordance with the terms and conditions of the Interconnection Agreement. Seller shall maintain the Project according to Prudent Utility Practice(s) and the Interconnection Agreement. The Project shall at all times:
- (A) have the required panel space and 125V DC battery-supplied voltage to accommodate metering, system telemetering equipment and communications equipment;
 - (B) be equipped for and capable of AGC by Buyer;
- (C) use communication circuits from the Project to Buyer's System Control Center for the purpose of telemetering, supervisory control/data acquisition, and voice and other communications as required for AGC by Buyer;
- (D) supply Discharge Energy with minimal harmonic distortion in compliance with the requirements of the Interconnection Agreement and Prudent Utility Practices;
- (E) receive Charging Energy from Buyer and deliver Discharge Energy to Buyer, each at the frequency specified by Buyer; provided, however, that total cycles shall not

exceed three hundred sixty-five (365) equivalent full cycles in any calendar year. If Buyer desires to exceed three hundred sixty-five (365) equivalent full cycles in a calendar year, then Buyer shall notify Seller, and the Parties shall meet and confer within fifteen (15) days of such notice from Buyer to Seller regarding any mutually agreed amendments to this ESA with regard to such additional equivalent full cycles;

- (F) be capable of being remotely started and stopped by Buyer's System Control Center;
- (G) be capable of immediate disconnection from the Buyer's system in the event of an Emergency Condition
- (H) meet voltage and reactive/active power control performance for a Category B system as defined in IEEE 1547-2018 for a Distributed Energy Resource (DER) at the Point of Delivery;
- (I) meet the normal and abnormal performance category as defined in IEEE 1547-2018 for a Distributed Energy Resource (DER) at the Point of Delivery shall be Category II minimum; and
- (J) meet or exceed the recommended performance specifications defined in Appendix A of the September 2018 NERC Reliability Guideline for BPS-Connected Inverter-Based Resource Performance at the Point of Delivery.
- 3.5 <u>Expected Commercial Operation Date</u>. Subject to the extensions as specifically set forth herein, the Commercial Operation Date shall occur no later than the Expected Commercial Operation Date.
- 3.6 Extension Due to Force Majeure. The Expected Commercial Operation Date and related damages provisions under Section 3.7 shall be extended by a number of Days, up to a maximum of one hundred eighty (180) Days, or longer period agreed to by the Parties, equal to the duration of any Force Majeure Event that delays construction or commencement of operation of the Project. Seller will give written notice to Buyer describing any such Force Majeure Event within five (5) Business Days after the occurrence of the Force Majeure Event. The number of Days of such extension is calculated from the date on which the Force Majeure Event begins. If a Force Majeure Event will delay the Commercial Operation Date for more than one hundred eighty (180) Days, then Buyer will have the right to terminate this ESA without liability of either Party.
- 3.7 <u>Delay Damages</u>. If the Commercial Operation Date has not occurred by the Expected Commercial Operation Date as such date may be extended pursuant to Section 3.6, Seller will use commercially reasonable efforts to continue construction of the Project and shall pay liquidated damages ("**Delay Damages**") to Buyer in an amount equal to Two Hundred Dollars (\$200) per Day per each MW of Delayed ESS Capacity for each Day after the Expected Commercial Operation Date until the earlier of (i) the Commercial Operation Date, and (ii) the Guaranteed Start Date. "**Delayed ESS Capacity**" means the Guaranteed ESS Capacity minus the ESS Capacity as of the determination date. In no event shall the aggregate Delay Damages exceed Thirty-Six Thousand Dollars (\$36,000) per MW of Delayed Capacity.

- 3.8 ESS Capacity Shortfall. If the Commercial Operation Date is declared before the full Guaranteed ESS Capacity of the Project has been constructed, commissioned and tested, Seller shall use commercially reasonable efforts to cause the remaining portion of the Guaranteed ESS Capacity to achieve Commercial Operation. If Seller has not caused all Delayed ESS Capacity to achieve Commercial Operation on or before the Guaranteed Start Date, then no later than twenty (20) Days after the Guaranteed Start Date, Seller shall pay to Buyer liquidated damages in the amount of Six Hundred Thousand Dollars (\$600,000) per MW of Delayed ESS Capacity (as of the Guaranteed Start Date) ("ESS Capacity Shortfall Damages"), in which case the Guaranteed PMAX will be reduced in an amount equal to the Delayed ESS Capacity for which ESS Capacity Shortfall Damages were timely paid pursuant to this Section 3.8.
- 3.9 <u>Test Period</u>. During the Test Period, Seller shall have the right to deliver Energy generated by the Solar Facility, such Energy purchased by the Buyer pursuant to the terms of the PPA, to the Delivery Point as Charging Energy as reasonably required for purposes of testing and commissioning the Project. Seller shall subsequently redeliver such Charging Energy to Buyer at the Point of Delivery as Discharge Energy. In accordance with Section 7.2, Buyer shall retain title of such Charging Energy and Discharging Energy. Seller shall notify Buyer, to the extent practicable, fifteen (15) Days prior to commencement of such Test Period.
- 3.10 Notice of Commercial Operation. Not less than sixty (60) days prior to the date upon which Seller expects to achieve the Commercial Operation Date, Seller shall give written notice to Buyer of such expected Commercial Operation Date; provided that such Commercial Operation Date shall not be more than ninety (90) Days prior to the Expected Commercial Operation Date. In the event that Seller should determine that the Expected Commercial Operation Date for the Project is not feasible or is impossible to achieve, Seller shall promptly notify Buyer and shall advise Buyer of the new proposed Commercial Operation Date; provided, however, such new Commercial Operation Date shall not be later than the Guaranteed Start Date.
- 3.11 <u>Charging</u>. During the Recapture Period, the ESS shall be configured to charge exclusively using Energy produced by the Solar Facility. Within six (6) months following expiration of the Recapture Period, Seller shall, in cooperation with the Solar Facility owner and at Buyer's cost, cause the ESS, to be reconfigured, as necessary to accept Charging Energy from the electrical grid and Solar Facility.
- 3.12 ESS Unit Capabilities. "ESS Unit Capabilities" means all of the following for the ESS:
- (A) Guaranteed PMAX of 20 MW of charging and discharging capability as measured at the Point of Delivery, and as may be adjusted pursuant to Section 3.8;
- (B) Guaranteed ESS Capacity: discharge ESS at Guaranteed PMAX for four (4) consecutive hours;
- (C) Guaranteed ESS Roundtrip Efficiency as shown in Exhibit L; Seller shall provide any applicable degradation forecasts applicable to this guarantee;

- (D) Guaranteed Discharge Ramp Rate of 20 MW per second measured between 85% state of charge and 15% state of charge representing the maximum rate that the ESS can change its output power
- (E) Guaranteed Charge Ramp Rate of 20 MW per second measured between 15% state of charge to 85% state of charge representing the maximum rate that the ESS can change its input power;
 - (F) Guaranteed System Latency: 5 seconds
 - (G) Guaranteed Frequency Response Capability of 20 MW/0.1Hz; and
- (H) Capability to support Ancillary Services in accordance with the system design or as otherwise agreed by the Parties in writing.
 - (I) Five (5) MW for twenty (20) minutes blackstart capability.
- 3.13 ESS Non-Performance Liquidated Damages. Seller will pay Buyer the following liquidated damages as the sole and exclusive remedy for ESS unit non-performance, including any failure to meet he ESS Unit Capabilities (in each case other than as excused due to (a) a Force Majeure Event, (b) a Seller Curtailment, or (c) failure of Buyer to deliver Charging Energy) or to comply with the requirements of Section 7.4(a):
- (A) If Seller is unable to achieve the Guaranteed ESS Capacity (as may be adjusted pursuant to Section 3.8), Seller shall pay Buyer One Hundred Thousand Dollars (\$100,000) for each MW (prorated for any portion thereof) of ESS Capacity shortfall annually (prorated for any portion of a year) until such deficiency is cured; and
- (B) Ten Thousand Dollars (\$10,000) per event (each event shall last no longer than three (3) Days) for inability to comply with the Guaranteed Charge Ramp Rate, Guaranteed Discharge Ramp Rate, Guaranteed System Latency or the Guaranteed Frequency Response Capability.
- 3.14 <u>Availability Guarantee</u>. Seller guarantees that the Project shall be available to deliver Discharge Energy, store Energy or accept Charging Energy, and shall pay Availability Damages, if any, in accordance with Seller's obligations under the provisions of <u>Exhibit I</u>.

3.15 Guaranteed ESS Roundtrip Efficiency Payment.

- (A) If the ESS Roundtrip Efficiency is greater than one (1) percentage point above the Guaranteed ESS Roundtrip Efficiency, Buyer shall pay to Seller, in addition to other amounts due under this ESA, an amount equal to the Monthly Electricity Cost multiplied by (ESS Roundtrip Efficiency Guaranteed ESS Roundtrip Efficiency 1%).
- (B) If the ESS Roundtrip Efficiency is more than one (1) percentage point below the Guaranteed ESS Roundtrip Efficiency, Seller will pay to Buyer an amount equal to the

Monthly Electricity Cost multiplied by (Guaranteed ESS Roundtrip Efficiency – ESS Roundtrip Efficiency – 1%).

ARTICLE 4 AGC; Seller Curtailment

4.1 AGC; Seller Curtailment.

- (A) Prior to the Commercial Operation Date or, if applicable, prior to the Test Period, Seller, at its sole cost and expense, shall install AGC at the Project and shall maintain such AGC throughout the Delivery Term. Seller shall ensure that, throughout the Delivery Term, the SCADA signal is capable of functioning within the margin of error specified in the control system manufacturer's energy set point margin of error. Seller shall ensure that the Project's AGC Remote/Local status is in "Remote" set-point control during normal operations
- (B) Beginning on Commercial Operation Date, PNM shall have the right to control the ESS, via AGC control, to its fullest capability including but not limited to those items identified in the ESS use case in <u>Exhibit H</u> (subject to manufacturers' operating recommendations), provided that notwithstanding any provision in this ESA to the contrary, during the Recapture Period, the ESS shall be charged exclusively from the Solar Facility.
- (C) Buyer shall reduce power dispatch to and from the Project, as applicable, during and to the extent of any Seller Curtailment.
- 4.2 <u>Seller Curtailment</u>. A Seller Curtailment occurs any time the Project is unable to receive otherwise available Charging Energy and deliver otherwise available Discharge Energy to Buyer as a result of transmission limitations regardless of whether such curtailment is affected directly by Seller or Buyer, including as a result of its scheduling practices, or indirectly, by the Transmission Provider pursuant to the OATT or transmission service arrangements ("Seller Curtailment").

ARTICLE 5 Delivery and Metering

5.1 <u>Delivery Arrangements</u>.

(A) Seller shall take all actions required in accordance with the terms and conditions of this ESA to accept the Charging Energy at and from the Point of Delivery as part of providing the Energy Storage Services, including maintenance, repair or replacement of equipment in Seller's possession or control used to deliver the Charging Energy to the Energy Storage Facility. Seller shall only use the Charging Energy for Buyer's benefit in accordance with the terms and conditions of this ESA, Seller shall secure transmission necessary (i) to deliver the Discharge Energy to the Point of Delivery, (ii) receive Charging Energy from the Solar Facility at the Point of Delivery to the ESS, and (iii) after the Recapture Period, in the event Buyer elects to charge from the grid pursuant to Section 3.11, receive Charging Energy from the grid at the Point of Delivery to the ESS, including diligently negotiating and executing an Interconnection

Agreement with the Transmission Provider, or, in the alternative, diligently negotiating and executing any such changes to an executed Interconnection Agreement as are necessary to accommodate the characteristics of the Project.

- (B) Seller shall be responsible for the costs of interconnection and costs required to receive and deliver Energy at the Point of Delivery for the Project at the required voltage, including the costs of any associated network upgrades. As between Buyer and Seller under this ESA, Seller shall also be responsible for all transmission charges, ancillary service charges, electrical losses and any other transfer-related charges applicable (i) to Discharge Energy up to the Point of Delivery and (ii) for Charging Energy after the Point of Delivery.
- (C) Buyer shall be responsible for all transmission charges, ancillary service charges, electrical losses and any other transfer-related charges required to deliver Discharge Energy from and beyond the Point of Delivery. After the Recapture Period, in the event Buyer elects to charge from the grid pursuant to Section 3.11, Buyer shall be responsible for all transmission charges, ancillary service charges, electrical losses and any other transfer-related charges for delivery of Charging Energy to the Point of Delivery.
- (D) Buyer shall secure all necessary transmission service arrangements, including scheduling arrangements, if any, to (i) take Discharge Energy at the Point of Delivery and deliver it to points beyond, and (ii) after the Recapture Period, in the event Buyer elects to charge from the grid pursuant to Section 3.11, deliver Charging Energy to the Point of Delivery.
- 5.2 <u>Availability Reporting</u>. Seller shall be responsible for providing accurate and timely updates on the current availability of the Project to Buyer's SCC.

5.3 Electric Metering Devices.

- (A) Seller shall ensure that the Charging Energy and Discharge Energy delivered pursuant to this ESA shall be metered and accounted for separately from any electric generation facility, including the Solar Facility, that utilizes the same Electric Interconnection Point. Seller shall install Electric Metering Devices, and Buyer may install Back-Up Metering, each in an arrangement consistent with the configuration depicted in Exhibit B, or as otherwise agreed between the Parties.
- (B) The following provisions of this Section shall govern Electric Metering Devices except to the extent the Interconnection Agreement modifies or otherwise conflicts with these provisions, in which case, the Interconnection Agreement shall govern.
- (C) All Electric Metering Devices used to measure the Charging Energy and Discharge Energy and to monitor and coordinate operation of the Project shall be owned, installed, and maintained in accordance with the Interconnection Agreement at no cost to Buyer under this ESA. The design of the Electric Metering Device system shall be subject to Buyer approval prior to commencement of construction of the Project. Electric Metering Devices shall be bi-directional and shall be capable of measuring and reading instantaneous and hourly real and reactive Energy and capacity, if supplied by either the solar generation system or ESS system. If Electric Metering Devices are not installed at the Point of Delivery, meters or meter readings will be adjusted to reflect losses from the Electric Metering Devices to the Point of Delivery based

initially on the amount specified by the manufacturer for expected losses, provided that the Parties may revise this loss adjustment based on actual experience. Seller shall provide or arrange with the Transmission Provider to provide Buyer reasonable access to all Electric Metering Devices for all purposes necessary to perform under this ESA and shall provide Buyer the reasonable opportunity to be present at any time when such Electric Metering Devices are to be inspected and tested or adjusted. Buyer shall also have the right to conduct its own tests of the Electric Metering Devices in Buyer's reasonable discretion. Seller shall provide Buyer with all authorizations necessary to have access to the Electric Metering Devices, including obtaining any consent or other agreement from the Transmission Provider necessary to allow Buyer such access. Energy shall be metered using solid state, high precision, digital display meters of ANSI 0.1 accuracy class or better, with the specific model approved by the Buyer.

- Provisions shall be made for Buyer to install and maintain, at its own expense, backup metering devices ("Back-Up Metering") in addition to the Electric Metering Devices, which installation and maintenance shall be performed in a manner acceptable to the Parties. The installing Party, at its own expense, shall inspect and test Back-Up Metering upon installation and at least annually thereafter. The installing Party shall provide the other Party with reasonable advance notice of, and permit a representative of the other Party to witness and verify, such inspections and tests, provided, however, that such Party shall not unreasonably interfere with or disrupt the activities of the installing Party and shall comply with all applicable safety standards. Upon written request, the installing Party shall perform additional inspections or tests of Back-Up Metering and shall permit a qualified representative of the requesting Party to inspect or witness the testing of Back-Up Metering, provided, however, that the requesting Party shall not unreasonably interfere with or disrupt the activities of the installing Party and shall comply with all applicable safety standards. The actual expense of any such requested additional inspection or testing shall be borne by the Party requesting the test, unless, upon such inspection or testing, Back-Up Metering is found to register inaccurately by more than the allowable limits established in this Article, in which event the expense of the requested additional inspection or testing shall be borne by the installing Party. If requested in writing, the installing Party shall provide copies of any inspection or testing reports to the requesting Party.
- (E) If any Electric Metering Devices, or Back-Up Metering, are found to be defective or inaccurate outside the bounds of the selected device's manufacturer's performance standards, they shall be adjusted, repaired, replaced, and/or recalibrated as near as practicable to a condition of one-half percent (0.5%) error by the Party owning such defective or inaccurate device and at that Party's expense.
- 5.4 Adjustment for Inaccurate Meters. If an Electric Metering Device, or Back-Up Metering, fails to register, or if the measurement made by an Electric Metering Device, or Back-Up Metering, is found upon testing to be inaccurate by more than one-half percent 0.5%), an adjustment shall be made correcting all measurements by the inaccurate or defective Electric Metering Device, or Back-Up Metering, for both the amount of the inaccuracy and the period of the inaccuracy, in the following manner:
- (A) In the event that the Electric Metering Device is found to be defective or inaccurate, the Parties shall use Back-up Metering, if installed, to determine the amount of such inaccuracy, provided, however, that Back-Up Metering has been tested and maintained in

accordance with the provisions of this Article. In the event that Back-Up Metering is not installed, or Back-Up Metering is also found to be inaccurate by more than one-half percent (0.5%), the Parties shall estimate the amount of the necessary adjustment on the basis of deliveries of Charging Energy to the Project at the Point of Delivery and Discharge Energy from the Project to the Point of Delivery, in each case during periods of similar operating conditions when the Electric Metering Device was registering accurately. The adjustment shall be made for the period during which inaccurate measurements were made.

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

ARTICLE 6 Conditions Precedent

- 6.1 <u>Conditions Precedent</u>. The obligations of the Parties under this ESA are subject to satisfaction of the following conditions precedent:
 - (A) Subject to Section 17.3, receipt of NMPRC Approval; and
- (B) Receipt of approval of the Boards of Directors of Buyer and its parent company.
- 6.2 <u>Notice</u>. As soon as reasonably practicable after satisfaction of a condition precedent specified in Section 6.1 or after confirmation that a specified approval is not required, Buyer shall provide Seller written notice of such satisfaction or confirmation as applicable.

ARTICLE 7 Sale and Purchase of Product

7.1 <u>Sale and Purchase of Product</u>. In accordance with and subject to the terms and conditions of this ESA, commencing on the Commercial Operation Date and continuing through the end of the Term ("**Delivery Term**"), Seller shall sell and deliver to Buyer, and Buyer shall purchase and receive from Seller, all right, title and interest in and to the Product made available by Seller at the Point of Delivery in accordance with Article 5; *provided, however*, that Buyer shall not be required to receive and Seller shall not be required to make available, Product when and to the extent that (a) a Party's performance is excused by a Force Majeure Event, (b) a Seller Forced Outage is continuing, (c) a Seller Scheduled Maintenance Outage is continuing, (d) a Seller Curtailment is continuing, or (e) Seller's performance is excused during Seller Excused Hours. At its sole discretion, Buyer may resell or use for another purpose all or a portion of the Product. Buyer will have exclusive rights to offer, bid, or otherwise submit the Product for resale

in the market and retain and receive any and all related revenues. In no event shall Seller have the right to procure any element of the Product from sources other than the Project for sale or delivery to Buyer under this ESA.

- 7.2 <u>Title and Risk of Loss</u>. Buyer shall be deemed to be in control of all Charging Energy up to delivery at the Point of Delivery, Seller shall be deemed to be in control of such Charging Energy from and after such delivery until such Charging Energy is redelivered (less AC losses and ESS Roundtrip Efficiency losses) to Buyer as Discharge Energy at the Point of Delivery, and Buyer shall be deemed to be in control of such Discharge Energy from and after delivery and receipt at the Point of Delivery. Buyer shall retain title and risk of loss for Charging Energy, Energy stored in the ESS, and Discharge Energy at all times. Title and risk of loss related to the Environmental Attributes shall transfer from Seller to Buyer at the Point of Delivery.
- Future Environmental Attributes and Changes in Law. The Parties acknowledge 7.3 and agree that (a) additional Environmental Attributes may be recognized by a Governmental Authority after the Execution Date; (b) in accordance with the terms of this ESA all right and title to such additional Environmental Attributes is included in the ESS Capacity Payment Rate and (c) such additional Environmental Attributes shall pass to Buyer in accordance with Section 7.2 of this ESA. If in order for Buyer to receive the benefit of any additional Environmental Attributes Seller must incur any third-party costs not otherwise provided for in this ESA, or if any change in law or regulation relating to such future Environmental Attributes occurs after the Execution Date that causes Seller to incur any third-party costs not otherwise provided for in this ESA in order to deliver the additional Environmental Attributes, then such costs shall, if Seller incurs such costs at Buyer's request, be reimbursed promptly to Seller by Buyer. Seller shall deliver a good faith estimate of such additional costs to Buyer prior to incurring such costs, and following receipt of such estimate, Buyer shall notify Seller of its continued election to have Seller incur such costs; provided that, if the additional costs exceed Seller's good faith estimate by more than ten percent (10%), Buyer shall have the right to notify Seller of its election to have Seller cease incurring the additional costs, and Seller shall be excused thereafter from any obligation hereunder to deliver such additional Environmental Attributes. For the avoidance of doubt, Buyer shall remain liable to Seller for all costs incurred prior to Seller's receipt of Buyer's notice. The Parties agree to negotiate in good faith further agreements and documentation necessary to effectuate the transfer of such additional Environmental Attributes.

7.4 Scheduling.

(A) Buyer shall arrange all scheduling services necessary to ensure compliance with NERC/WECC operating policies and criteria, Transmission Provider OATT requirements, including CAISO EIM requirements, and any other applicable guidelines. Prior to the implementation and applicability to the Project of any energy market, to the extent scheduling is required now or in the future, Buyer shall schedule all Discharge Energy and Charging Energy in accordance with NERC/WECC operating polices and criteria, Transmission Provider OATT requirements and any other applicable guidelines, except that Buyer shall not schedule any Discharge Energy or Charging Energy during Seller Forced Outages, Scheduled Maintenance Outages, Force Majeure Events, and Seller Curtailments.

- (B) If at any point during the Delivery Term, (i) an alternative market design is implemented in which the Project will or can participate in an energy market, or (ii) if either the Project, the Electric Interconnection Point or Buyer no longer reside in the same market ((i) and (ii) a "Market Event") and such Market Event materially changes the interconnection and delivery requirements in this ESA, the Parties shall cooperate in good faith to facilitate the delivery of Product from the Point of Delivery to Buyer, at the least possible cost to the Parties, consistent with this ESA to the extent possible.
- (C) Seller shall provide, or cause its operation and maintenance contractor to provide, to Buyer its good faith, non-binding estimates of the daily ESS availability for each week (Sunday through Saturday) by 4:00 p.m. MPT on the date falling at least three (3) Days prior to the beginning of that week.
- (D) Unless otherwise specified by superseding policies or procedures of WECC, including the WECC pre-scheduling calendar, and SCC as applicable, Seller shall, by 6:00 a.m. MPT on each Day, submit a good faith estimate of the hourly quantities of Product to be delivered for Buyer at the Point of Delivery for the next six (6) subsequent Days.
- (E) If, at any time following submission of a good faith estimate as described in Section 7.4(C) above, Seller becomes aware of any change that alters the values previously provided to Buyer, Seller shall promptly notify Buyer of such change or predicted change.

7.5 Forced Outages.

- (A) Buyer and Seller shall promptly advise one another of events that may form the basis for a declaration of the existence or termination of Seller Excused Hours or a Seller Forced Outage. Buyer or Seller (as appropriate) shall at the earliest practicable date provide the other Party written notice ("Outage Notice") of the declaration of the existence of Seller Excused Hours or a Seller Forced Outage. Seller shall provide such notice to Buyer's System Control Center. An Outage Notice provided by either Party shall contain information regarding the beginning date and time of the event, the expected end date and time of such event, and the expected Product, if any, that would be available for delivery and purchase at the Point of Delivery during such event. Buyer or Seller (as appropriate) shall keep the other Party informed of any developments that will affect either the duration of such event or the availability of the Project during or after the end of such event. In addition, Seller shall comply with all then-current Buyer, NERC and WECC generating unit outage reporting requirements, as they may be revised from time-to-time.
- (B) Within five (5) business Days after the end of the Month, Seller shall prepare, maintain and deliver to Buyer a schedule that identifies all Scheduled Maintenance Outages, deratings and Seller Forced Outages that occurred during the Month. The data reported must meet all requirements specified in the NERC Generating Availability Data System (GADS) manual. In the event of any disagreement between Buyer and Seller concerning the schedule prepared by Seller, the Parties shall promptly confer to resolve the disagreement.

ARTICLE 8 Payment Calculations

- 8.1 <u>Billing Components</u>. The total due from Buyer to Seller for each Monthly Billing Period during the Term shall be paid in accordance with the invoicing procedures set forth in Section 9.1. Charges will consist of the following, and will begin on the Commercial Operation Date:
- (A) Monthly ESS Capacity Payment. Subject to Section 14.4, Buyer shall pay Seller an amount equal to the ESS Capacity not to exceed Guaranteed ESS Capacity multiplied by the ESS Capacity Payment Rate (the "ESS Capacity Payment"). For the avoidance of doubt, the ESS Capacity Payment also compensates Seller for the associated Environmental Attributes and Ancillary Services delivered to Buyer.
- (B) If NMPTCs become available in connection with the Product, Seller shall use commercially reasonable efforts to become eligible for and to obtain any such credits.
- The Project may qualify for New Mexico production tax credits ("NMPTCs") under New Mexico statute 7-2-18.18 NMSA 1978 ("NMPTC Statute") that may be used to satisfy a New Mexico taxpayer's New Mexico state income tax obligation or, to the extent in excess of a New Mexico taxpayer's New Mexico state income tax obligation, refunded to such taxpayer pursuant to Section 7-2-18.18L(2) NMSA 1978. Accordingly, in the event that (i) the Project results in the creation of NMPTCs pursuant to the NMPTC Statute that may be used by the Seller and/or its owners (directly or indirectly) to whom such NMPTCs are allocated for tax purposes (such persons to whom allocated referred to as "NMPTC Recipients") to reduce their New Mexico state income tax obligations for the taxable year for which the NMPTCs are claimed and (ii) to the extent that such claimed NMPTCs exceed the NMPTC Recipient's New Mexico state income tax liability for such taxable year, such excess would be required to be refunded to such NMPTC Recipient pursuant to the NMPTC Statute, Seller shall pay sixty percent (60%) of the amount of such NMPTCs allocated to NMPRC Recipients (such amount the "NMPTC Payment Amount") to Buyer within 180-days of the date that the New Mexico state income tax return must be filed (without benefit of extension) by such NMPTC Recipient entitled to utilize such NMPTCs. If the New Mexico Taxation and Revenue Department subsequently denies or reduces any NMPTC Payment Amount with regard to an NMPTC Recipient, Buyer shall, no later than thirty (30) days after notice from Seller, refund to Seller the amount Buyer previously received on the denied or reduced amount.
- (D) Buyer shall reimburse Seller for the taxes identified in Section 9.7(A), which shall be included in the monthly invoices in compliance with Section 9.7(A).

- 8.2 <u>Payment Support Requirement</u>. Each Party shall use commercially reasonable efforts to defend, before any Governmental Authority, all terms and conditions of this ESA consistent with Applicable Law.
- 8.3 <u>Survival on Termination</u>. The provisions of this Article 8 shall survive the repudiation, termination or expiration of this ESA for so long as may be necessary to give effect to any outstanding payment obligations of the Parties due and payable prior to any such repudiation, termination or expiration.

ARTICLE 9 Billing and Payment Procedures

9.1 Statements and Payment of Electricity Payments.

- (A) Seller shall read or have read on its behalf the Electric Metering Devices at the Point(s) of Delivery at 11:59 p.m. MPT on the last Day of each Month, unless otherwise mutually agreed by the Parties.
- (B) Payments due shall be determined and adjusted in accordance with Article 8 and Section 3.15. From and after the Commercial Operation Date, Buyer shall pay to Seller, monthly in arrears, payments in accordance with the provisions of clause (C) below.
- (C) On or before the tenth (10th) Day of each Month following the Month in which the Commercial Operation Date occurs, Seller shall prepare an invoice showing the amount payable by Buyer pursuant to Article 8 of this ESA (in Dollars) payable to Seller for the preceding Month. Each such invoice shall show the ESS Capacity Payment, information and calculations, in reasonable detail, including an Attestation and Bill of Sale verifying the associated Environmental Attributes, if applicable.
- (D) Buyer shall, subject to Sections 9.5 and 9.9, pay all invoices within thirty (30) Days after the date Buyer receives Seller's invoice. If Buyer should dispute a portion of the charges set forth on any invoice, it shall nonetheless pay all amounts not in dispute by the applicable due date.
- (E) If banks in the State of New Mexico are permitted to close on any date on which any payment by Buyer would otherwise have been due, then Buyer shall make such payment on the Business Day that immediately follows such payment date.
- (F) All payments specified in this Section 9.1 shall be made to an account designated by Seller and notified to Buyer.

- 9.2 <u>Miscellaneous Payments</u>. Any amounts due to either Seller or Buyer under this ESA, other than those specified in Section 9.1 above, shall be paid within thirty (30) Days following receipt by the other Party of an itemized invoice from the Party to whom such amounts are due setting forth, in reasonable detail, the basis for such payment.
- 9.3 <u>Currency and Method of Payment</u>. Notwithstanding anything contained in this ESA, all payments to be made by either Seller or Buyer under this ESA shall be made in Dollars in immediately available cleared funds by wire transfer into the relevant account specified in this ESA or, if no account is specified, into the account designated by the receiving Party.
- 9.4 <u>Default Interest</u>. Except where payment is the subject of a bona fide dispute (in which case it shall be treated under Section 9.5 below), or where otherwise waived by the Party entitled to interest, if any payment due from Buyer to Seller or from Seller to Buyer under this ESA is not paid when due, then, in addition to such unpaid amount, interest shall be due and payable thereon. Applicable interest shall be calculated at a rate equal to the lower of (i) the "prime" rate as published in *The Wall Street Journal* on the first business Day of each Month plus 2% and (ii) the maximum interest rate allowed by Applicable Law ("**Default Rate**"), as in effect from time to time and shall continue to accrue from the date on which such payment became overdue to and until the date such payment is made in full (both dates inclusive).

9.5 <u>Disputed Items</u>.

- (A) Either Party ("Disputing Party") may dispute in good faith the accuracy of a reading of the Electric Metering Devices and/or the accuracy of an invoice. Where a reading or bill is the subject of a dispute in good faith, the Disputing Party shall give written notice to the other Party within ten (10) Days after the delivery of the invoice or statement by the other Party, together with details of its reasons for such dispute. The Disputing Party shall make payment of any undisputed amounts to the other Party by the due date for payment specified in such invoice. The Parties shall use all reasonable efforts to resolve the dispute in accordance with Section 13.8. Any amount or adjustment with respect to a meter reading subsequently agreed to by the Parties or determined to be due shall be made (in each case in settlement of a dispute) by a credit or additional charge on the next bill rendered (as the case may be).
- (B) All amounts paid as a result of the settlement of a dispute shall be paid with interest thereon at the Default Rate from the Day on which such payment originally fell due to and until the date such payment is made in full (both dates inclusive), unless otherwise waived by the Party entitled to such interest.
- 9.6 <u>Statement Errors</u>. In the event that either Party becomes aware of any error in any statement, such Party shall, immediately upon discovery of the error, notify in writing the other Party of the error and shall rectify such error (whether such error was in the form of an underpayment or overpayment) within thirty (30) Days of such notification. Provided that the other Party is satisfied (in its sole and reasonable discretion) that the aforementioned notification

requirements have been complied with in good faith by the Party who has made the error, no interest shall be payable in respect of any amount that was erroneously overpaid or underpaid.

9.7 <u>Taxes</u>.

- (A) On all invoices, Seller shall separately show all New Mexico gross receipts, compensating, sales, and other similar taxes charged to Buyer provided that in no event will interest or penalties on such taxes be reimbursable by Buyer. If the sale of Product takes place on tribal land, Seller will comply with applicable state and tribal laws governing the reporting and payment of gross receipts taxes on those transactions.
- Seller shall be responsible and shall pay when due all income, gross (B) receipts, compensating, use, valued added, employment, ad valorem, personal real property or other similar Taxes, including any associated interest and penalty assessments and any and all franchise fees or similar fees assessed against Seller or the Project due to the construction, ownership, leasing, operation or maintenance of the Project, or any components or appurtenances thereof, including all Taxes, fees, allowances, trading credits and other offsets and impositions for wastes and emissions (including carbon-based compounds, oxides of nitrogen and sulfur, mercury and other Hazardous Materials) produced by the Project. If Buyer is assessed any Taxes or associated fees as a result of the improvement of a Site due to the existence of the Project on the Site, Buyer shall immediately notify Seller. Buyer and Seller shall cooperate in contesting such assessment. If, after resolution of the matter, Taxes are imposed on Buyer as a result of the improvement of the Site due to the existence of the Project on the Site, Seller shall reimburse Buyer for such Taxes. Seller shall not be obligated to pay or reimburse Buyer for Taxes imposed on or measured by the Buyer's overall revenues or income. Seller's prices under Section 8 are inclusive of such Taxes, allowances and credits during the Term.
- (C) If a Party is required to remit or pay Taxes that are the other Party's responsibility hereunder, such Party shall promptly reimburse the other for such Taxes. Consistent with Applicable Law, the Parties shall use all reasonable efforts to administer this ESA and implement the provisions in this ESA in a manner that will minimize Taxes due and payable by all Parties.
- (D) The Parties shall provide each other, upon written request, with copies of any documentation respecting this ESA or the Project that may be reasonably necessary in the ordinary course of any inter-governmental, state, local, municipal or other political subdivision tax audit inquiry or investigation.
- (E) Consistent with Applicable Law, the Parties shall cooperate to minimize Taxes; however, no Party shall be obligated to incur any extraordinary financial burden to reduce Taxes for which the other Party is responsible hereunder.
- 9.8 <u>Setoff and Payment Adjustments</u>. Except as otherwise expressly provided for in this ESA, including Section 9.9 below, all payments between the Parties under this ESA shall be made free of any restriction or condition and without deduction or withholding on account of any other amount, whether by way of setoff or otherwise.

9.9 Netting.

- (A) A Party at any time may offset against any and all amounts that may be due and owed to the other Party under this ESA, including damages and other payments that are owed by a Party to the other Party pursuant to this ESA. Undisputed and non-offset portions of amounts invoiced under this ESA shall be paid on or before the due date or shall be subject to the late payment interest charges set forth in Section 9.4.
- (B) If Seller and Buyer net their obligations to each other under this ESA, then such amounts will be aggregated, and Seller and Buyer will discharge their obligations to pay through netting of payments on a current accounting basis. If the amounts owed by Buyer or Seller to the other are equal on a current accounting basis, neither shall be required to make payment under this ESA.
- 9.10 <u>Survival on Termination</u>. The provisions of this Article 9 shall survive the repudiation, termination or expiration of this ESA for so long as may be necessary to give effect to any outstanding payment obligations of the Parties that became due and payable prior to any such repudiation, termination or expiration.

ARTICLE 10 Operations and Maintenance

10.1 Construction of the Project.

- (A) Seller will diligently pursue the development and construction of the Project using commercially reasonable efforts consistent with Prudent Utility Practices and in compliance with the terms and conditions of the Interconnection Agreement and the ESA. Seller will be solely responsible for, and the ESS Capacity Payment Rate will not be adjusted to accommodate increased costs or any failure to obtain any Tax Benefits. On and after the Execution Date through the start of construction, Seller will provide Buyer monthly development and construction updates.
- (B) On and after the start of construction and through the Commercial Operation Date, Seller will provide Buyer monthly construction updates. If Seller becomes aware of any critical milestone that will not be achieved by the required date, Seller must provide Buyer written notice and a recovery plan to eliminate any delay in the construction schedule. In no event will Seller's failure to complete one or more critical milestones by the established dates change, delay or otherwise affect the requirement to achieve Commercial Operation by the Guaranteed Start Date. Buyer shall have the right to monitor the construction, commissioning, start-up, testing and operations of the Project and to be present during the commissioning, start-up and testing of the Project.
- (C) Seller may not materially modify, alter or otherwise change the Project without the prior written consent of Buyer, except (i) as required by Prudent Utility Practices or Applicable Law; or (ii) for modifications, alterations, expansions or other changes that would not be expected to materially alter the Guaranteed ESS Capacity or availability of the Project or materially and adversely impact the capabilities of the Project.
- (D) Seller shall designate (by a written notice delivered to Buyer by the Execution Date, a Project Manager reasonably acceptable to Buyer who shall have full

responsibility for the performance of the construction, commissioning, start-up and testing by Seller and shall act as a single point of contact in all matters on behalf of Seller ("Project Manager"). Seller may designate a new Project Manager from time to time by a written notice delivered to Buyer, subject to Buyer's consent, which consent shall not be unreasonably denied or delayed. Seller's Project Manager shall be deemed to have full authority to act on behalf of Seller, and notices given by Buyer to the Project Manager shall be deemed as having been given to Seller.

(E) Other than the rights and obligations of Buyer specified in this ESA and any documents ancillary hereto, neither this ESA nor any such ancillary document shall be interpreted to create in favor of Buyer, and Buyer specifically disclaims, any right, title or interest in any part of the Project.

10.2 Commissioning Tests.

(A) Seller shall give Buyer at least sixty (60) Days' prior notice of the approximate test date and of the proposed tests scheduled relating to the commissioning of the Project ("Commissioning Tests") as described in Exhibit F. Representatives of Buyer shall have the right to be present at all such testing. Seller shall promptly notify Buyer of any changes to the test date or the date of any Commissioning Tests relating to the Project in order that Buyer may arrange for its respective representatives to attend.

10.3 Access to and Inspection of the Project.

- (A) Seller shall provide Buyer and its authorized agents, employees and inspectors reasonable access to the Project, including the control room and Seller's Interconnection Facilities, for the purposes set forth herein. Buyer acknowledges that such access does not provide Buyer with the right to direct or modify the operation of the Project in any way and further acknowledges that any exercise by Buyer of its rights under this Section 10.3(A) shall be at its own risk and expense; provided, however, that Buyer shall comply with all of Seller's applicable safety and health rules and requirements and shall conduct itself in a manner that will not unreasonably interfere with the Project's operations.
- (B) No inspections of the Project, whether by Buyer or otherwise, and no acceptance or approval given under this ESA, shall relieve Seller of or reduce its obligation to maintain the Project and operate the same in accordance with this ESA and Prudent Utility Practices. In no event shall any statement, representation, or lack thereof by Buyer, either express or implied, relieve Seller of its exclusive responsibility for the Project. Any inspection of Seller's property or equipment by Buyer, or any review by Buyer or consent by Buyer to Seller's plans, shall not be construed as endorsing the design, fitness or operation of the Project equipment nor as a warranty or guarantee.

10.4 Operating Parameters.

(A) Seller shall operate or procure the operation of the Project in accordance with Prudent Utility Practices ("Operating Parameters"), subject only to Emergency Conditions

and Force Majeure Events; provided that, during the Term of this ESA, Seller shall: (i) have the sole responsibility to, and shall at its sole expense, operate and maintain the Project in accordance with all requirements set forth in this ESA, and (ii) comply with reasonable requirements of Buyer regarding day-to-day or hour-by-hour communications with Buyer. Subject to compliance with the Operating Parameters, Seller agrees to operate the Project in such a manner that Discharge Energy delivered by Seller will meet all requirements for voltage level, harmonics, power factor, VArs, Ancillary Services and other electrical specifications required by the Transmission Provider and will have the capabilities to be dispatched manually by Seller as is necessary to comply with the provisions of this ESA.

(B) Seller shall operate the Project such that all system protective equipment is in service whenever the Project is connected to, or is operated in parallel with, the Transmission Provider's Transmission System, except for normal testing and repair. Seller shall provide adequate system protection and control devices to ensure safe and protected operation of all energized equipment during normal testing and repair. The Project's protective equipment shall meet Institute of Electrical and Electronic Engineers and all other industry standards. Seller shall have qualified independent, third party personnel test, calibrate and certify in writing the proper functioning of all protective equipment, in accordance with NERC PRC standards and Prudent Utility Practices, at least once every twelve (12) Months. Seller shall perform a unit functional trip test after each overhaul of the Project's major equipment and shall provide results to Buyer in writing prior to returning the equipment to service. All of the foregoing shall be conducted in accordance with Prudent Utility Practices.

10.5 Operating Procedures.

Not later than thirty (30) days before the Commercial Operation Date, an operating committee consisting of Seller and Buyer representatives shall develop mutually agreeable written Operating Procedures for integration of the Project into Buyer's system. Operating Procedures shall include, but not be limited to, methods of day-to-day communications; metering, telemetering, telecommunications, and data acquisition procedures; key personnel lists for Seller and Buyer, including an appointed authorized representative for each Party; clearances and switching practices; operations and maintenance scheduling and reporting; scheduling and forecasting practices; daily capacity, Charging Energy, and Discharge Energy reports; unit operations log; Seller Forced Outage and planned outage reporting, and such other matters as may be mutually agreed upon by the Parties. Seller must staff, operate, maintain and control the Project at all times consistent with the Operating Procedures, the ESA, Prudent Utility Practice, Applicable Laws and required permits. The Operating Procedures also will require Seller to take all measures necessary to remediate or otherwise correct any breach of environmental protection regulations as required under Applicable Law. Personnel of Seller capable of starting, running, and stopping the Project must be continuously available, either at the Project or capable of being at the Project on ninety (90) minutes' notice, and must be continuously available by phone. Seller will make qualified personnel available twenty-four (24) hours per day, seven (7) days per week to perform scheduling and receive and give communications relating to the operation and dispatch of the Project. Buyer will use commercially reasonable efforts to notify Seller twenty-four (24) hours in advance of potentially critical start-ups.

- (B) Seller will prepare detailed test protocols and procedures for any tests to be performed in connection with achieving Commercial Operation and for periodic tests as required within this ESA. The protocols and procedures will be developed by Seller in accordance with the requirements of the ESA and the appropriate power test code standards for energy storage facilities. Draft protocols and procedures must be submitted to Buyer for review and approval, which approval will not be withheld unreasonably.
- (C) Seller will perform, at Seller's expense, an annual ESS Unit Capabilities test in accordance with applicable test protocols and procedures set forth in Exhibit F and promptly provide the results to Buyer. Seller will have ninety (90) days from the test date to cure any deficiencies in the test.

10.6 Project Maintenance.

- Seller shall maintain all Project equipment or cause the same to be maintained at all times in accordance with Prudent Utility Practices and otherwise in accordance with this ESA. At least sixty (60) days before the Commercial Operation Date, Seller will provide Buyer a notice of Scheduled Maintenance Outages for the Project for the first Commercial Operation Year within the Term. Thereafter, no later than September 1 of each Commercial Operation Year, Seller shall provide Buyer with a non-binding notice of the annual Scheduled Maintenance Outages for the following Commercial Operation Year and a notice of estimated long-term Scheduled Maintenance Outages for the next four (4) Commercial Operation Years. Each notice of Scheduled Maintenance Outages must identify each planned interruption and/or reduction of the Project's capacity, including the duration of such event. Each annual Scheduled Maintenance Outage for the Commercial Operation Year will be subject to approval by Buyer. Buyer may, within fifteen (15) Days after receipt of the schedule, request reasonable modifications to the schedule. Seller may not schedule any interruption or reduction to the Product for any reason at any time during May 1st through September 1st, December, or January without the prior written approval of Buyer, which approval may be withheld or granted in Buyer's sole discretion. Buyer may request Seller to defer or reschedule any Scheduled Maintenance Outage up to forty-eight (48) hours before commencement of the outage. Seller may not make any changes to any annual maintenance schedule approved by Buyer without Buyer's prior written approval. Seller must give Buyer no less than ninety (90) days' advance notice of any proposed change in the annual maintenance schedule. Such requested changes in the schedule shall not materially adversely impact Buyer, and Seller agrees to compensate Buyer for any costs incurred by Buyer as a result of such change.
- (B) Seller shall be responsible (at its own cost and expense) for timely obtaining, maintaining, and complying with all agreements, arrangements and permits necessary for delivery of the Product to the Point of Delivery. Upon the reasonable, written request of Buyer, Seller shall make available to Buyer copies of any environmental permits, plans, and/or studies related to the Project.
- 10.7 <u>Sales to Third Parties</u>. As of the start of the Test Period, Seller shall not sell or divert Product to a third Person.

ARTICLE 11 Environmental Attributes

- 11.1 <u>Sale of Environmental Attributes</u>. If future Environmental Attributes become available, this Article 11 shall apply.
- (A) Other than as specified in Sections 11.1(D) and 11.1(E) below, effective from the date on which the Project first makes Product available to Buyer at the Point of Delivery, Seller shall transfer to Buyer, free and clear of all claims, liens, security interests and encumbrances, of any kind, nature and description, all right, title and interest in and to Environmental Attributes associated with the Project. Upon generation and documentation of Environmental Attributes, Seller shall make the Environmental Attributes available to Buyer no later than five (5) Business Days after creation. The value of the Environmental Attributes transferred under this ESA shall be included in the ESS Capacity Payment Rate.
- (B) Seller and Buyer shall execute all documents and instruments necessary to effect transfer of the Environmental Attributes to Buyer or its respective designee(s).
- (C) Ownership by Buyer of Environmental Attributes shall include any Environmental Attributes that are reserved or "banked" throughout the Term of this ESA, but not used, sold, assigned or otherwise transferred during the Term of this ESA. Buyer may, to the extent permitted by Applicable Law and this ESA, assign its rights, title and interest in and to any Environmental Attributes associated with the Project to one or more third parties under any transaction permitted by Applicable Law.
- (D) Except as otherwise provided in Section 8.1, Tax Benefits in effect on the Execution Date of this ESA or any successor or other provision providing for a federal, state and/or local tax credit determined by reference to renewable electric energy produced from renewable energy resources shall be owned by Seller.
- (E) Seller shall register the Project, as necessary, so that the Project is compliant with reporting requirements related to Environmental Attributes and certification requirements under any applicable federal, state or regional program or Applicable Law.

ARTICLE 12 Default and Remedies

12.1 Events of Default of Seller.

- (A) Any of the following events shall constitute an Event of Default of Seller upon its occurrence and no cure period shall be applicable other than as set forth below:
 - (1) Seller's dissolution or liquidation;
 - (2) Seller's assignment of this ESA (or any of its rights hereunder) for the benefit of creditors, except as permitted pursuant to Article 18 and in any consent to collateral assignment with and Lender;

- (3) Seller's filing of a petition in voluntary bankruptcy or insolvency or for reorganization or arrangement under the bankruptcy laws of the United States or under any insolvency law of any state, or Seller voluntarily taking advantage of any such law by answer or otherwise;
- (4) The sale by Seller to a third party, or diversion by Seller for any use, of Product committed to Buyer by Seller;
- (5) Seller's actual fraud, waste, tampering with Buyer-owned facilities or other material misrepresentation or misconduct in connection with this ESA or the operation of the Project;
- (6) The failure of Seller to maintain Security in accordance with Article 19, unless remedied within ten (10) Days of receipt by Seller of written notice of such failure from Buyer or the entity providing such Security; or
- (7) Seller's failure to achieve the Commercial Operation Date for the Project on or prior to the Guaranteed Start Date or other date mutually agreed to by the Parties.
- (B) Any of the following events shall constitute an Event of Default of Seller upon the failure of Seller to cure within thirty (30) Days after the date of written notice from Buyer to Seller, or such longer period as may be necessary to effectuate a cure provided that Seller has commenced and diligently continues its efforts to effectuate a cure, not to exceed an additional thirty (30) Days:
 - (1) Seller's Abandonment of construction or operation of the Project;
 - (2) Except to the extent arising from the acts or omissions of the Transmission Provider or Buyer, Seller is not able to make Product available at the Point of Delivery as a result of the Project not maintaining its interconnection with the Transmission Provider's Interconnection Facilities or otherwise fails to maintain in effect any agreements required to make Product available at the Point of Delivery;
 - (3) Seller's failure to make any payment due to Buyer under or in connection with this ESA (subject to Seller's rights with respect to disputed payments under Article 9 and net of outstanding damages and any other rights of offset that Seller may have pursuant to this ESA);
 - (4) Seller's failure to comply with any other material obligation under this ESA, which would result in a material adverse impact on Buyer;
 - (5) The Project fails, after the Commercial Operation Date, to obtain an Actual ESS Availability Percentage of at least eighty-five percent (85%) over any twenty-four (24) consecutive months during the Term;

- (6) Should RECs from Environmental Attributes become available and Seller fails to register the Project or ensure registration of the RECs in accordance with the terms of this Agreement, subject to cost limitations set forth in Section 11.1(F); or
- (7) The Project fails, after the Commercial Operation Date, to achieve Guaranteed ESS Capabilities referenced in Section 3.12.
- (C) Any of the following events shall constitute an Event of Default of Seller upon the failure of Seller to cure within sixty (60) Days after the date of written notice from Buyer to Seller, or such longer period as may be necessary to effectuate a cure provided that Seller has commenced and diligently continues its efforts to effectuate a cure, not to exceed an additional thirty (30) Days:
 - (1) Seller's assignment of this ESA, or any Change of Control of Seller, or Seller's sale or transfer of its interest, or any part thereof, in the Project, except as permitted in accordance with Article 18;
 - (2) Any representation or warranty made by Seller in this ESA shall prove to have been false or misleading in any material respect when made or ceases to remain true during the Term if such cessation would reasonably be expected to result in a material adverse impact on Buyer; or
 - (3) The filing of an involuntary case in bankruptcy or any proceeding under any other insolvency law against Seller as debtor or its parent or any Affiliate that could materially impact Seller's ability to perform its obligations hereunder; provided, however, that Seller does not obtain a stay or dismissal of the filing within the cure period.
- (D) With respect to any Guaranty provided for the benefit of Buyer, the failure by Seller to provide for the benefit of Buyer either (i) cash, (ii) a replacement Guaranty from a different Seller Guarantor meeting the criteria set forth in the definition of Seller Guarantor or a replacement Letter of Credit from an issuer meeting the criteria set forth in the definition of Letter of Credit, in each case, in the amount required under this ESA within five (5) Business Days after Seller receives Notice of the occurrence of any of the following events:
 - (1) If any representation or warranty made by the Seller Guarantor in connection with this ESA is false or misleading in any material respect when made or when deemed made or repeated, and such default is not remedied within thirty (30) Days after notice thereof;
 - (2) the failure of Seller Guarantor to make, when due, any payment required or to perform any other material covenant or obligation in any Guaranty, unless remedied within 10 Business Days of receipt of notice of such failure;
 - (3) Seller Guarantor files a voluntary petition in bankruptcy or insolvency or for reorganization or arrangement under the bankruptcy laws of the United States or under any insolvency law of any State, or Seller Guarantor voluntarily taking advantage of any such law by answer or otherwise;

- (4) Seller Guarantor fails to meet the criteria for an acceptable Guarantor as set forth it the definition of Seller Guarantor;
- (5) The failure of the Guaranty to be in full force and effect prior to the indefeasible satisfaction of all obligation of Seller under this ESA; or
- (6) Seller Guarantor repudiates, disaffirms, disclaims, or rejects, in whole or in part, or challenges, the validity of any Guaranty.

12.2 Events of Default of Buyer.

- (A) Any of the following shall constitute an Event of Default of Buyer upon its occurrence, and no cure period shall be applicable:
 - (1) Buyer's dissolution or liquidation provided that division of Buyer into multiple entities shall not constitute dissolution or liquidation;
 - (2) Buyer's assignment of this ESA (or any of its rights hereunder) for the benefit of creditors; or
 - (3) Buyer's filing of a voluntary petition in bankruptcy or insolvency or for reorganization or arrangement under the bankruptcy laws of the United States or under any insolvency law of any State, or Buyer voluntarily taking advantage of any such law by answer or otherwise.
- (B) Buyer's failure to make any payment due hereunder (subject to Buyer's rights with respect to disputed payments under Article 9 and net of outstanding damages and any other rights of offset that Buyer may have pursuant to this ESA) shall constitute an Event of Default upon the failure of Buyer to cure within ten (10) Days of written notice from Seller to Buyer.
- (C) Any of the following shall constitute an Event of Default of Buyer upon the failure of Buyer to cure within thirty (30) Days after the date of written notice from Seller to Buyer, or such longer period as may be necessary to effectuate a cure provided that Buyer has commenced and diligently continues its efforts to effectuate a cure, not to exceed an additional thirty (30) Days:
 - (1) Buyer's actual fraud, waste, tampering with Seller-owned facilities or other material misrepresentation or misconduct in connection with this ESA or the operation of the Project.
 - (2) Buyer's failure to comply with any other material obligation under this ESA, which would result in a material adverse impact on Seller.
- (D) Any of the following shall constitute an Event of Default of Buyer upon the failure of Buyer to cure within sixty (60) Days after the date of written notice from Seller to Buyer, or such longer period as may be necessary to effectuate a cure provided that Buyer has

commenced and diligently continues its efforts to effectuate a cure, not to exceed an additional thirty (30) Days:

- (1) The filing of an involuntary case in bankruptcy or any proceeding under any other insolvency law against Buyer; *provided, however*, that Buyer does not obtain a stay or dismissal of the filing within the cure period;
- (2) Buyer's assignment of this ESA, except as permitted in accordance with Article 18; or
- (3) Any representation or warranty made by Buyer in this ESA shall prove to have been false or misleading in any material respect when made or ceases to remain true during the Term if such cessation would reasonably be expected to result in a material adverse impact on Seller.

12.3 Damages Prior to Termination.

- (A) Upon the occurrence of an Event of Default, and subject in each case to the limitation on damages set forth in Section 12.7, the Non-Defaulting Party shall have the right to (i) collect damages accruing prior to the Early Termination Date of this ESA from the Defaulting Party as set forth in Section 12.3(B), (ii) exercise its rights pursuant to Section 12.5, (iii) suspend performance, (iv) with respect to a Seller Event of Default, exercise its rights pursuant to Section 12.10 with respect to any Security, and (v) exercise its rights to terminate this ESA pursuant to Section 12.4.
- For all Events of Default, the Non-Defaulting Party shall be entitled to receive from the Defaulting Party all of the damages incurred by the Non-Defaulting Party in connection with such Event of Default prior to the Early Termination Date; provided, that if an Event of Default has occurred and has continued uncured for a period of one hundred eighty (180) Days, the Non-Defaulting Party shall be required to either waive its right to collect further damages on account of such Event of Default or elect to terminate this ESA as provided for in Section 12.4. If Seller is the Defaulting Party, the Parties agree that the damages recoverable by Buyer hereunder on account of an Event of Default of Seller shall include an amount of cover damages equal to Replacement ESS Costs minus the product of (x) the quantity of Product so replaced and (y) the ESS Capacity Payment Rate. Further, Seller acknowledges and agrees that in addition to the foregoing, Seller shall be obligated to pay Buyer any such damages associated with replacement of Product notwithstanding the availability or prices of electric energy and capacity from other fuel sources, such as natural gas. Seller also shall be obligated to pay Buyer any penalties levied by any Governmental Authority in connection with Seller's failure to deliver to Buyer any Environmental Attributes that may become available pursuant to this ESA, provided that Buyer has used commercially reasonable efforts to avoid, minimize or mitigate the same. Seller also shall be obligated to pay Buyer any penalties levied by any Governmental Authority in connection with Seller's failure to deliver to Buyer any Environmental Attributes pursuant to this ESA, to the extent such failure arises out of Seller's negligence or willful misconduct. Seller acknowledges that Buyer entered into this ESA for the procurement of Product, which includes Environmental Attributes. If Buyer is the Defaulting Party, the Parties agree that damages recoverable by Seller hereunder on account of an Event of Default of Buyer shall include costs

and losses incurred by Seller due to such Event of Default, including, to the extent applicable, an amount of cover damages equal to the quantity of Product produced by Seller following such Event of Default, plus, to the extent that Seller is unable to produce Product due to the Event of Default of Buyer, an additional quantity equal to the amount of Product that would have been produced by Seller absent such Event of Default of Buyer, each multiplied by the ESS Capacity Payment Rate; provided that the foregoing amount shall be reduced by an amount equal to (A) the amount of any revenues that Seller, using commercially reasonable efforts, is able to obtain by selling Product to a third party or into the market, less (B) Seller's costs and expenses incurred to effectuate any such sales.

- Termination. Upon the occurrence of an Event of Default, the Non-Defaulting 12.4 Party shall have the right to declare a date, which shall be between fifteen (15) and sixty (60) Days after the notice thereof, upon which this ESA shall terminate ("Early Termination Date"). Upon the effective designation of an Early Termination Date, the Non-Defaulting Party will have the right to immediately suspend performance under this ESA, except that Seller may not suspend performance of its obligation to post and maintain Development Security and Delivery Term Security in accordance with Article 19. Neither Party shall have the right to terminate this ESA except as provided for upon the occurrence of an Event of Default as described above or as may be otherwise explicitly provided for in this ESA. Upon the termination of this ESA under this Section 12.4 for an Event of Default, the Non-Defaulting Party shall be entitled to receive the Termination Payment from the Defaulting Party, subject to the limitation on damages set forth in Section 12.7. As soon as practicable after the Early Termination Date, the Non-Defaulting Party shall (a) calculate the Termination Payment, and (b) give notice to the Defaulting Party of the amount of the Termination Payment. The notice shall include a written statement explaining in reasonable detail the calculation of such amount and the sources for such calculation. Termination Payment shall be made to the Non-Defaulting Party, as applicable, within ten (10) Business Days after such notice is effective. If Seller is the Defaulting Party, the Termination Payment will equal the Buyer Termination Payment less any amounts due from Buyer (net of any amounts due from Seller), and if Buyer is the Defaulting Party, the Termination Payment will equal the Seller Termination Payment plus any amounts due from Buyer (net of any amounts due from Seller).
- (A) In the event that Seller is the Defaulting Party, as soon as practicable after notice of the Early Termination Date, Buyer shall calculate the Buyer Termination Payment in a commercially reasonable manner as of the Early Termination Date in accordance with this Section 12.4(A). The notice shall include a written statement explaining in reasonable detail the calculation of such amount. In calculating such amount, Buyer shall use information from third parties who may include dealers in the relevant markets, end-users of the relevant product, information vendors and other sources of market information. Buyer shall not have to enter into a replacement contract to establish a Buyer Termination Payment. Any dispute between the Parties with respect to the Buyer Termination Payment calculation shall be subject to the dispute resolution provisions set forth in Section 13.8.
- (B) In the event that Buyer is the Defaulting Party, as soon as practicable after notice of the Early Termination Date, Seller shall deliver written notice to Buyer of the amount of the Seller Termination Payment. The notice shall include a written statement explaining in reasonable detail the calculation of such amount. In calculating such amount, Seller shall use

information from third parties who may include dealers in the relevant markets, end-users of the relevant product, information vendors and other sources of market information. Seller shall not have to enter into a replacement contract to establish a Seller Termination Payment. Any dispute between the Parties with respect to the Seller Termination Payment calculation shall be subject to the dispute resolution provisions set forth in Section 13.8.

- 12.5 <u>Specific Performance</u>. In addition to the other remedies specified in this Article 12, each Party shall be entitled to seek a decree compelling specific performance with respect to, and shall be entitled, without the necessity of filing any bond, to seek the restraint by injunction of, any actual or threatened breach of any material performance obligation of the other Party under this ESA.
- 12.6 <u>Remedies Cumulative</u>. Subject to limitations on damages set forth in Section 12.7, each right or remedy of the Parties provided for in this ESA shall be cumulative of and shall be in addition to every other right or remedy provided for in this ESA, and the exercise, or the beginning of the exercise, by a Party of any one or more of the rights or remedies provided for herein shall not preclude the simultaneous or later exercise by such Party of any or all other rights or remedies provided for herein.
- 12.7 <u>Waiver and Exclusion of Other Damages</u>. The Parties confirm that the express remedies and measures of damages provided in this ESA satisfy its essential purposes. If no remedy or measure of damages is expressly herein provided, the obligor's liability shall be limited to direct, actual damages only. Neither Party shall be liable to the other Party for consequential, incidental, punitive, exemplary or indirect damages, lost profits or other business interruption damages by statute, in tort or contract (except to the extent expressly provided herein). To the extent any damages are required to be paid hereunder are deemed liquidated, the Parties acknowledge that the damages are difficult or impossible to determine, that otherwise obtaining an adequate remedy is inconvenient, and that the liquidated damages constitute a reasonable approximation of the harm or loss.
- 12.8 Payment of Amounts Due to Buyer. Without limiting any other provisions of this Article 12 and at any time before or after termination of this ESA, Buyer may send Seller an invoice for such damages or other amounts as are due to Buyer at such time from Seller under this ESA, and such invoice shall be payable in the manner, and in accordance with the applicable provisions, set forth in Article 9, including the provision for late payment charges.
- 12.9 <u>Duty to Mitigate</u>. Each Party agrees that it has a duty to mitigate damages and covenants that it will use commercially reasonable efforts to minimize any damages it may incur as a result of the other Party's performance or non-performance of this ESA.

12.10 <u>Security Rights</u>. Upon or at any time after the occurrence and during the continuation of an Event of Default enumerated in Section 12.1 or an Early Termination Date affecting Seller, Buyer may exercise any of the rights and remedies with respect to any Security, including any ancillary rights and remedies under Applicable Law then in effect. Buyer shall apply the proceeds of the Security realized upon the exercise of any such rights or remedies to reduce Seller's obligations under this ESA, subject to Buyer's obligation to return any surplus proceeds remaining after such obligations are satisfied in full.

ARTICLE 13 Contract Administration and Notices

- Party at the addresses noted in Exhibit D as either Party updates them from time to time by written notice to the other Party. Any notice, request, consent, or other communication required or authorized under this ESA to be given by one Party to the other Party shall be in writing. It shall either be hand delivered or mailed via overnight service with signature required upon receipt, to the representative of said other Party. If hand delivered, the notice, request, consent or other communication shall be simultaneously sent by facsimile or other electronic means. Any such notice, request, consent, or other communication shall be deemed to have been received by the close of the Business Day on which it was hand delivered or transmitted electronically (unless hand delivered or transmitted after such close in which case it shall be deemed received at the close of the next Business Day). Real-time or routine communications concerning operation of the Project shall be exempt from this Section.
- 13.2 <u>Representative for Notices</u>. Each Party shall maintain a designated representative to receive notices, who shall be identified on <u>Exhibit D</u> to this ESA. Either Party may, by written notice to the other Party, change the representative or the address to which such notices and communications are to be sent.
- 13.3 <u>Authority of Representatives</u>. The Parties' representatives designated above shall have authority to act for their respective principals in all technical matters relating to performance of this ESA and to attempt to resolve disputes or potential disputes. However, in their capacity as representatives, they shall not have the authority to amend or modify any provision of this ESA.
- 13.4 Records. Seller and Buyer shall each keep and maintain complete and accurate records and all other data required by each of them for the purposes of proper administration of this ESA, including but not limited to books and records necessary for billing and payments and such records as may be required by any Governmental Authority or pursuant to Applicable Law. All records of Seller and Buyer pertaining to the operation of the Project or this ESA as specified herein or otherwise shall be maintained at the Project or in an office of Seller or Buyer, as applicable, in such format as may be required by Applicable Law and/or any Governmental Approval. Each Party shall have the right at its sole cost and expense, upon reasonable prior written notice to the other Party, during normal business hours, to examine and/or make copies of the records and data of such other Party relating to this ESA (including all records and data relating to or substantiating any charges paid by or to such other Party, MWh of delivered Discharge Energy, MWh of delivered Charging Energy, Seller's operating procedures, the Project equipment manuals and Operating Records). All records required hereunder shall be maintained

in accordance with, and for the applicable time periods required by, Applicable Law and the Party's retention policies, but in no event less than five (5) years after the final payment is made under this ESA. Seller shall provide Buyer copies of Operating Records upon Buyer's request.

- (A) Operating and Maintenance Records. Seller shall maintain an accurate and up-to-date operating log, in electronic format, at the Project that will include, without limitation, dispatch and scheduled Discharge Energy delivered, Charging Energy received, and House Energy consumption; changes in operating status; planned outages, deratings and curtailments; any unusual conditions found during inspections; environmental records including environmental permits, plans, and/or studies; meteorological data; maintenance; any other operating or maintenance records as may be required by state or federal regulatory authorities and WECC and any other information required under Prudent Utility Practice or any Project agreement (in the prescribed format); and Buyer and Seller Forced Outages ("O&M Records").
- (B) Billing and Payment Records. To facilitate payment and verification, Seller and Buyer shall keep all books and records necessary for billing and payments in accordance with the provisions of Article 9 and grant the other Party reasonable access to those records.
- (C) Project Development Records and Data Submissions. Seller shall submit or cause to be submitted to Buyer the following documents on or before the dates specified below:
 - (1) No later than thirty (30) Days after the Execution Date and ending on the Commercial Operation Date, (i) monthly construction progress reports in such form as may be agreed to by Buyer in accordance with Section 10.1(A) and 10.1(B), and (ii) reports, when and as Seller becomes aware, of any new condition or event that may have a material adverse effect on the timely completion of the Project.
 - (2) No later than thirty (30) Days prior to the start of the Test Period, (i) evidence demonstrating that Seller has obtained all Governmental Approvals then required to be obtained for the ownership, operation and maintenance of, and the supply of Product from, the Project in accordance with this ESA, and (ii) a list identifying the remaining Governmental Approvals for which Seller is responsible under the terms of this ESA, which Governmental Approvals are not yet required for the operation and maintenance of, and the supply of Product from, the Project, together with a plan for obtaining such Governmental Approvals and an estimate of the time within which such Governmental Approvals will be obtained by Seller; provided, however, that the plan for obtaining any outstanding Governmental Approvals from any Governmental Authority which address environmental, health and safety matters shall be reasonably acceptable to Buyer.
 - (3) As soon as available, but not later than sixty (60) Days following the Commercial Operation Date for the Project, two (2) copies of all results of Commissioning Tests performed on the ESS.
 - (4) Upon request by Buyer, one (1) signed and sealed copy of all asbuilt drawings for the Project, including the civil and architectural works.

- (5) The receipt of the above schedules, data, certificates and reports by Buyer shall not be construed as an endorsement by Buyer of the design of the Project, does not constitute a warranty by Buyer as to the safety, durability or reliability of the Project, otherwise relieve Seller of any of its obligations or potential liabilities under the Project contracts or, except with respect to the obligations of Buyer to maintain the confidentiality of documents and information received by it, impose any obligation or liability on Buyer.
- 13.5 <u>Provision of Real-Time Data</u>. Upon request by Buyer, Seller shall provide real-time electronic access to Buyer of all meteorological and other related data collected at the Project and corresponding unit availability data.
- 13.6 Examination of Records. Buyer may review operating procedures, equipment manuals, Operating Records and data kept by Seller relating to transactions under and administration of this ESA, at any time during the period the records are required to be maintained, from time to time upon request and during normal business hours. Buyer shall have the right, upon reasonable notice and at its sole expense (unless Seller has defaulted under this ESA, in which case Seller will bear the expense), to examine the records of Seller to the extent reasonably necessary to verify the accuracy of any statement, charge or computation made pursuant to this ESA. If any such examination reveals any inaccuracy in any invoice, the necessary adjustments in such invoice and any underpayment by Buyer will be paid, and any overpayment by Buyer will be reimbursed by Seller, promptly in accordance with payment provisions in this ESA.
- 13.7 <u>Exhibits.</u> Either Party may change the information for its notice addresses in <u>Exhibit D</u> at any time without the approval of the other Party. <u>Exhibit A</u>, <u>Exhibit B</u>, and <u>Exhibit E</u> may be changed at any time with the mutual consent of both Parties.
- Resolution of Issues. The Parties agree that it is in the best interest of both Parties to attempt to resolve disputes that arise under this ESA in a quick and inexpensive manner. To that end, the Parties commit to use commercially reasonable efforts to resolve disputes informally. For all disputes that arise under this ESA, the Parties immediately, through their designated representatives, shall negotiate with one another in good faith in order to reach resolution of the dispute. Such negotiation shall commence within five (5) Days of the date of the letter from one Party representative to the other Party representative notifying that Party of the nature of the dispute. In the event that the Parties' representatives cannot agree to a resolution of the dispute within thirty (30) Days after the commencement of negotiations, written notice of the dispute ("Dispute Notice"), together with a statement describing the issues or claims, shall be delivered, within five (5) Business Days after the expiration of such thirty (30) Day period, by each of the Parties' representatives to its respective senior officer or official (such senior officer or official to be selected by each of the Party representatives in his or her sole discretion, provided such senior officer or official has authority to bind the respective Party). Within five (5) Business Days after receipt of the Dispute Notice, the senior officers or officials for both Parties shall negotiate in good faith to resolve the dispute, provided that the failure to deliver such Dispute Notice shall not prejudice either Party's right to submit such dispute to litigation. In the event that the senior officers or officials cannot resolve such dispute within thirty (30) Days after the matter was submitted to them, then either Party may submit the matter to mediation under the New Mexico

Mediation Procedures Act. If mediation does not resolve the dispute within thirty (30) Days of the submission to mediation, then either Party may seek legal and equitable remedies. If a Party receiving notice of a demand for mediation does not agree in writing within ten (10) Days to participate in mediation, then the Party demanding mediation may, after giving three (3) Business Days written notice, declare the mediation process unsuccessful and initiate legal and equitable remedies..

ARTICLE 14 Force Majeure

14.1 Definition.

- (A) Neither Party will be considered to be in default in respect to any obligation hereunder if delays in or failure of performance is due to a Force Majeure Event, except for the obligation to pay monies due. A "Force Majeure Event" shall mean an event or circumstance that arises, after the commencement of construction at the Site, that is not reasonably foreseeable, is beyond the reasonable control of and is not caused by the negligence or lack of due diligence of the affected Party or its contractors or suppliers and adversely affects the performance by that Party of its obligations under or pursuant to this ESA. Such events or circumstances may include, but are not limited to: actions or inactions of civil, tribal, or military authority (including courts and governmental or administrative agencies), acts of God, war, riot or insurrection, terrorism, blockades, embargoes, sabotage (including arson and vandalism), epidemics, explosions and fires not caused by a failure to operate the Project in accordance with Prudent Utility Practices, hurricanes, floods, unusually severe weather events not excluded in subpart (C)(viii) below, strikes, lockouts or other labor disputes (not caused by the failure of the affected Party to comply with the terms of a collective bargaining agreement).
- (B) Equipment breakdown or the inability of Seller to use equipment due to its design, construction, operation, or maintenance, the inability of Seller to meet regulatory standards, or failure by Seller to obtain on a timely basis and maintain a necessary permit or other regulatory approval shall not be considered a Force Majeure Event, unless Seller can demonstrate that the event was not reasonably foreseeable, was beyond Seller's reasonable control, and was not caused by the negligence or lack of due diligence by Seller or its agents.
- (C) Notwithstanding the foregoing, the term Force Majeure Event does <u>not</u> include (i) inability by Seller to procure equipment for the Project or any component parts therefor, for any reason (the risk of which is assumed by Seller); (ii) any other acts or omissions of any third party, including any vendor, materialman, customer, or supplier of Seller, or any full or partial curtailment in the Product of the Project caused by or arising from the acts or omissions of such third parties, unless such acts or omissions are themselves excused by reason of a Force Majeure Event, as the definition is applied to such third party, and such event constitutes a Force Majeure Event, as the definition is applied to Seller; (iii) any delay caused by the processing of Buyer's interconnection request; (iv) any full or partial curtailment in the electric output of the Project that is caused by or arises from a mechanical or equipment breakdown, or other mishaps, events or conditions, attributable to normal wear and tear; (v) failure to abide by Prudent Utility Practices; (vi) changes in market conditions, actions of Governmental Authorities or other events or circumstances that affect the cost of equipment, labor, materials or supplies, or that affect

demand for power or price for any of Seller's or Buyer's products; (vii) except as set forth in (A) above, any labor strikes, slowdowns or stoppages, or other labor disruptions against a Party or its contractors or subcontractors; or (viii) weather events or sudden actions of the natural elements within twenty (20) year normal weather patterns, including normal lightning strikes, but excluding unusually severe events, such as tornadoes and floods.

- (D) In no event will any delay or failure of performance caused by a Force Majeure Event extend this ESA beyond its stated Term. Notwithstanding any other provision in this ESA to the contrary, in the event that any delay or failure of performance caused by a Force Majeure Event affecting Seller continues for an uninterrupted period of one hundred eighty (180) Days from its inception, either Party (or Buyer as provided in Section 3.6) may, at any time following the end of such period, terminate this ESA upon written notice to the affected Party, without further obligation by either Party except as to costs and balances incurred prior to the effective date of such termination.
- (E) Except as otherwise provided in this ESA, each Party shall be excused from performance when non-performance was caused, directly or indirectly, by a Force Majeure Event but only and to the extent thereof, and existence of a condition of Force Majeure Event shall not relieve the Parties of certain obligations under this ESA (including payment obligations) to the extent that such performance of such obligations is not precluded by the condition of Force Majeure Event.
- 14.2 Notification Obligations. In the event of any delay or nonperformance resulting from a Force Majeure Event, the Party claiming that a Force Majeure Event has occurred shall notify the other Party as soon as reasonably practicable by telephone and/or email, and in writing as soon as reasonably practicable but in no case later than ten (10) Business Days thereafter; provided that failure to provide notice within ten (10) Business Days only waives the Force Majeure Event as to periods prior to when the notice is given of such occurrence, of the nature, cause, date of commencement thereof and the anticipated duration, and shall indicate whether any deadlines or date(s) imposed hereunder may be affected thereby. The suspension of performance shall be of no greater scope and of no greater duration than is necessary. A Party claiming that a Force Majeure Event has occurred shall not be entitled to relief therefor unless and until it has delivered a notice therefor as required in this Section. The Party claiming that a Force Majeure Event has occurred shall notify the other Party of the cessation of the Force Majeure Event or of the conclusion of the affected Party's cure for the Force Majeure Event, in either case as soon as reasonably practicable.
- 14.3 <u>Duty to Mitigate</u>. The Party claiming that a Force Majeure Event has occurred shall use its commercially reasonable efforts to cure the cause(s) preventing its performance of this ESA and shall provide to the other Party weekly progress reports describing actions taken to end the Force Majeure Event; *provided, however*, that the settlement of strikes, lockouts and other labor disputes shall be entirely within the discretion of the affected Party, and such Party shall not be required to settle such strikes, lockouts or other labor disputes by acceding to demands which such Party deems to be unreasonable.
- 14.4 Force Majeure Event Occurring After Commercial Operation. Upon the occurrence and during the continuance of a Force Majeure Event and the effects thereof, to the

extent that a Force Majeure Event affects the ability of either Buyer or the Transmission Provider to accept Discharge Energy from the Project or to deliver Charging Energy to the Project, then the hours during which the Force Majeure Event occurs shall be excluded from the payment calculations as set forth in Section 8.1.

ARTICLE 15 Representations, Warranties and Covenants

- 15.1 <u>Seller's Representations, Warranties and Covenants</u>. Seller hereby represents and warrants as follows:
- (A) Seller is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware. Seller is qualified to do business in each other jurisdiction where the failure to so qualify would have a material adverse effect on the business or financial condition of Seller; and Seller has all requisite power and authority to conduct its business, to own its properties, and to execute, deliver, and perform its obligations under this ESA.
- (B) The execution, delivery, and performance of its obligations under this ESA by Seller have been duly authorized by all necessary limited liability company action, and do not and will not:
 - (1) require any consent or approval by any governing body of Seller, other than that which has been obtained and is in full force and effect;
 - (2) violate any Applicable Law, or violate any provision in any formation documents of Seller, the violation of which could have a material adverse effect on the ability of Seller to perform its obligations under this ESA;
 - (3) result in a breach or constitute a default under Seller's formation documents or bylaws, or under any agreement relating to the management or affairs of Seller or any indenture or loan or credit agreement, or any other agreement, lease, or instrument to which Seller is a party or by which Seller or its properties or assets may be bound or affected, the breach or default of which could reasonably be expected to have a material adverse effect on the ability of Seller to perform its obligations under this ESA; or
 - (4) result in, or require the creation or imposition of any mortgage, deed of trust, pledge, lien, security interest, or other charge or encumbrance of any nature (other than in favor of a Lender or as otherwise may be contemplated by this ESA) upon or with respect to any of the assets or properties of Seller now owned or hereafter acquired, the creation or imposition of which could reasonably be expected to have a material adverse effect on the ability of Seller to perform its obligations under this ESA.
- (C) The obligations of Seller under this ESA are valid and binding obligations of Seller.

- (D) The execution and performance of this ESA will not conflict with or constitute a breach or default under any contract or agreement of any kind to which Seller is a party or any judgment, order, statute, or regulation that is applicable to Seller or the Project.
- (E) To the knowledge of Seller, and except for those permits, consents, approvals, licenses and authorizations identified in Exhibit E, which Seller anticipates will be obtained by Seller in the ordinary course of business, all Governmental Approvals necessary for Seller's execution, delivery and performance of this ESA have been duly obtained and are in full force and effect.
- (F) Seller shall comply with all Applicable Laws in effect or that may be enacted during the Term.
- (G) Seller shall disclose to Buyer the extent of, and as soon as it is known to Seller, any violation of any Applicable Laws arising out of the construction of the Project, the presence of Environmental Contamination at the Project (actual or alleged), or the existence of any past or present enforcement, legal, or regulatory action or proceeding relating to such Environmental Contamination.
- (H) To the full extent authorized by FERC regulations and the FERC standards of conduct, Seller hereby authorizes Buyer to contact and obtain information concerning the Project and Interconnection Facilities directly from the Transmission Provider.
- (I) Seller has and/or will have good and marketable title to the Environmental Attributes immediately prior to delivery to Buyer;
- (J) Seller has not sold, delivered or transferred the Environmental Attributes to any other Person, in whole or in part;
- (K) All right, title and interest in and to the Environmental Attributes 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;
- (L) Each Environmental Attribute complies with the requirements set forth in the New Mexico Renewable Energy Act, NMSA 1978, § 62-16-1 et seq., and Title 17.9.572 NMAC;
- (M) As soon as practical but in no event longer than fifteen (15) Days after the execution thereof, Seller shall provide a true and correct copy of the Interconnection Agreement to Buyer. On and after the execution of the Interconnection Agreement, Seller shall provide copies of any material amendments to the Interconnection Agreement to Buyer;
- (N) After the Commercial Operation Date, Seller will not incur, assume or carry any Debt in connection with the Project; and
- (O) Except as expressly set forth in this ESA, Seller makes no warranty, express or implied, including but not limited to any warranty of merchantability or fitness for a particular

purpose, or warranty arising from any course of dealing, performance, or usage of trade. Buyer expressly disclaims and waives any warranty not expressly included in this ESA.

- 15.2 <u>Buyer's Representations, Warranties and Covenants</u>. Buyer hereby represents and warrants as follows:
- (A) Buyer is a corporation duly organized, validly existing and in good standing under the laws of the State of New Mexico and is qualified in each other jurisdiction where the failure to so qualify would have a material adverse effect upon the business or financial condition of Buyer. Buyer has all requisite power and authority to conduct its business, to own its properties, and to execute, deliver, and perform its obligations under this ESA.
- (B) The execution, delivery, and performance of its obligations under this ESA by Buyer have been duly authorized by all necessary corporate action, and do not and will not:
 - (1) require any consent or approval of Buyer's shareholders, members, managers and/or directors, except as set forth in Section 6.1;
 - (2) violate any Applicable Law, or violate any provision in any corporate documents of Buyer, the violation of which could have a material adverse effect on the ability of Buyer to perform its obligations under this ESA;
 - (3) result in a breach or constitute a default under Buyer's corporate charter or bylaws, or under any agreement relating to the management or affairs of Buyer, or any indenture or loan or credit agreement, or any other agreement, lease, or instrument to which Buyer is a party or by which Buyer or its properties or assets may be bound or affected, the breach or default of which could reasonably be expected to have a material adverse effect on the ability of Buyer to perform its obligations under this ESA; or
 - (4) result in, or require the creation or imposition of, any mortgage, deed of trust, pledge, lien, security interest, or other charge or encumbrance of any nature (other than as may be contemplated by this ESA) upon or with respect to any of the assets or properties of Buyer now owned or hereafter acquired, the creation or imposition of which could reasonably be expected to have a material adverse effect on the ability of Buyer to perform its obligations under this ESA.
- (C) This ESA is a valid and binding obligation of Buyer, subject to the contingencies identified in Article 6.
- (D) The execution and performance of this ESA will not conflict with or constitute a breach or default under any contract or agreement of any kind to which Buyer is a party or any judgment, order, statute, or regulation that is applicable to Buyer.
- (E) To the knowledge of Buyer, and except for the NMPRC Approval(s) identified in Sections 6.1 and 17.3, all required Governmental Approvals necessary for Buyer's execution, delivery and performance of this ESA have been duly obtained and are in full force and effect.

ARTICLE 16 Insurance

16.1 Evidence of Insurance.

(A) Seller shall, at least thirty (30) Days prior to the commencement of any work on the Project, and thereafter, on or before June 1 of each Commercial Operation Year, provide Buyer with two (2) copies of insurance certificates evidencing the insurance coverages required to be maintained by Seller in accordance with Exhibit G and this Article 16 along with endorsements required below in Section 16.3, and a list of any other endorsements to the policy that limit the coverage provided by the ISO form with regard to this Project. All such insurance shall be primary insurance. All policies shall be written with insurers rated at least A- VII by A.M. Best or that Buyer, in its reasonable discretion, deems acceptable (such acceptance shall not be unreasonably withheld or delayed by Buyer). Seller's liability under this ESA shall not be limited to the amount of insurance coverage required herein.

16.2 Term and Modification of Insurance.

- (A) All liability insurance required under this ESA shall cover occurrences during the Term of this ESA. In the event that any insurance as required herein is commercially available only on a "claims-made" basis, such insurance shall provide for a retroactive date not later than the Execution Date and such insurance shall be maintained by Seller, with a retroactive date not later than the retroactive date required above, for a minimum of five (5) calendar years after the Term.
- (B) Seller may self-insure either all or any portion of the foregoing coverages so long as there is no material decrease in its net worth or means that renders the same insufficient for purposes of self-insurance. If at any time during the Term Buyer, in its reasonable discretion, determines that it will no longer accept self-insurance from Seller, Buyer shall provide notice to Seller and Seller shall obtain the insurance coverages required by Exhibit G within sixty (60) Days.
- (C) Buyer shall have the right, at times deemed appropriate to Buyer during the Term of this ESA, to request Seller to modify the insurance minimum limits specified in Exhibit G in order to maintain reasonable coverage amounts. Seller shall make commercially reasonable efforts to comply with such request.

16.3 Endorsements and Other Requirements.

- (A) Seller shall provide endorsements evidencing that the insurers shall provide Buyer thirty (30) Days' prior written notice of non-renewal or cancellation of insurance (except that such notice shall be ten (10) Days for non-payment of premiums) and endorsements that waive all rights of subrogation against Buyer and its Affiliates, officers, directors, agents, subcontractors and employees.
- (B) Seller shall provide endorsements providing that the insurance required under this ESA is primary and non-contributory with respect to other insurance carried by Buyer.

(C) Seller shall provide endorsements providing that the liability insurance required pursuant to paragraphs (B), (C) and (D) of Exhibit G names Buyer and its Affiliates, officers, directors, and employees as additional insureds for both ongoing and completed operations but only to the extent Buyer (or other additional insured) is vicariously liable for the negligence, acts or omissions of Seller. The liability insurance required pursuant to paragraphs (B) and (D) of Exhibit G shall include a standard ISO or an equivalent separation of insureds clause and will not include a cross-suit exclusion applicable to claims brought by or against an additional insured.

ARTICLE 17

Legal and Regulatory Compliance and Governmental Approval

- Each Party shall promptly notify the other Party of any material investigations, notices of alleged violations or findings of violation of Applicable Law from any Governmental Authority, including any audit, notification, inspection or inquiry that has been commenced by any Governmental Authority in respect of a potential violation of Applicable Law with regard to the Project or the ESA. Seller shall give all required notices, shall timely procure and maintain all Seller required permits, and shall timely pay all charges and fees in connection therewith. Seller shall make available to Buyer, upon reasonable request, any personnel or records relating to the Project or this ESA to the extent Buyer requires the same to fulfill any regulatory reporting requirements, or for purposes of litigation or regulatory proceedings, including but not limited to, litigation or proceedings before the NMPRC, FERC, or other regulatory bodies. The Parties shall treat information disclosed pursuant to this Section 17.1 in confidence in accordance with Section 22.14, unless such information is public information.
- 17.2 <u>Governmental Approvals</u>. Each Party shall timely and lawfully procure and maintain in good standing, at its own cost and expense, all Governmental Approvals and Additional Consents and shall timely and properly pay its respective charges and fees in connection therewith.
- 17.3 NMPRC Approval. The obligations of the Parties hereunder, including Buyer's obligation to purchase Product at the rates specified in Article 8, shall be conditioned upon the receipt of any Governmental Approvals required by Applicable Law in connection with (i) the execution and performance of the PPA, and a final order or other regulatory determination from the NMPRC that Buyer may procure renewable energy and associated RECs pursuant to the PPA and may recover the cost of such procurement; (ii) the execution and performance of this ESA, either as a purchased power agreement or through approval of a CCN, including authorization to recover the costs of ESS Capacity Payments, and (iii) abandonment of PNM's ownership interests in San Juan Generating Station, including any requested financing or other cost recovery method, and any waivers as set forth in Buyer's request for approval of this ESA or an associated abandonment filing (collectively, "Requested Actions"). In particular, but without limitation:
- (A) Buyer agrees to use commercially reasonable efforts to request and obtain NMPRC Approval of the Requested Actions, and Seller agrees to cooperate with and assist Buyer in these efforts as Buyer may reasonably request.

- (B) NMPRC Approval shall be considered received when the NMPRC issues a final written order that is not contested or is no longer subject to appeal or further proceedings on remand (i) approving the Requested Actions, or (ii) approving the Requested Actions in part or subject to conditions or substantial modifications, provided that each of Seller and Buyer agrees, subject to its reasonable discretion, to accept those conditions, modifications or such partial approval as sufficient (collectively, "NMPRC Approval").
 - (1) If the NMPRC disapproves any of the Requested Actions, then this ESA shall automatically terminate ten (10) Days after the date of such action by the NMPRC and be of no further force or effect, with no further obligation or liability of either Party to the other Party or to any other Person.
 - (B)(ii) above, then the Parties shall meet and confer no later than fifteen (15) Days after the date of the NMPRC Approval order regarding whether Buyer or Seller will elect to amend this ESA to address any conditions or substantial modifications or not to accept any partial or conditioned approval or substantial modification of this ESA, including a potential extension to the Expected Commercial Operation Date. If the Parties are unable to mutually agree on any amendments to this ESA to address such NMPRC Approval order, then this ESA shall automatically terminate ten (10) Days after the date on which the parties conferred and be of no further force or effect, with no further obligation or liability of either Party to the other Party or to any other Person, unless Buyer and Seller mutually agree in writing within such ten (10) Day period that this ESA remain in effect.
 - (3) If the NMPRC has not, for any reason, entered an order upon the request for approval of all Requested Actions by April 30, 2020 ("Regulatory End Date"), then the Parties shall meet and confer no later than fifteen (15) Days after the Regulatory End Date regarding a potential extension of the Regulatory End Date. If the Parties are unable to mutually agree to an extension of the Regulatory End Date, including a potential extension to the Expected Commercial Operation Date, then this ESA shall automatically terminate ten (10) Days after the date on which the Parties conferred and be of no further force or effect, with no further obligation or liability of either Party to the other Party or to any other Person, unless Buyer and Seller mutually agree in writing within such ten (10) Day period that this ESA remain in effect.
- 17.4 Compliance with Reliability Standards. To the extent that new reliability standards applicable to the operation and maintenance of the Project are promulgated by the WECC, NERC, FERC, or NMPRC, or any successor agencies, any and all costs incurred as a result of actions required for compliance with the new reliability standards shall be borne by Seller. To the extent that Seller contributes in whole or in part to actions that result in monetary penalties being assessed to Buyer by WECC, NERC, FERC or any successor agency, for lack of compliance with reliability standards related to the operation and maintenance of the Project, Seller shall reimburse Buyer for its share of monetary penalties

17.5 <u>Compliance Information</u>. Each Party shall, for the purpose of gathering information and/or providing oral or written reports, testimony, affidavits or other submissions relevant to any Governmental Approvals, Non-Governmental Compliance Obligations, Additional Consents, Applicable Laws or in connection with any litigation, arbitration or administrative proceeding before any authority of competent jurisdiction: (i) deliver or cause to be delivered to the other Party any necessary or required certificates of its officers, accountants, engineers or agents; and/or (ii) make available necessary personnel with knowledge as to such matters.

ARTICLE 18 Assignment and Other Transfer Restrictions

- 18.1 No Assignment Without Consent. Except as permitted in this Article 18, neither Party shall sell, transfer, or assign this ESA, in whole or in part, and Seller shall not sell, transfer or assign the Project, in whole or in part, without the prior written consent of the other Party, which consent shall not be unreasonably withheld, delayed or conditioned and so long as any proposed assignee satisfies the conditions set forth in this Article 18.
- (A) Buyer's consent shall not be required for: (i) any assignment or transfer of this ESA by Seller to an Affiliate of Seller; or (ii) any assignment or transfer of this ESA by Seller to a Person succeeding to all or substantially all of the assets of Seller, *provided* that in the case of any assignment or transfer pursuant to clauses (i) or (ii) above, such assignee (a) shall have agreed in writing to be bound by the terms and conditions hereof and furnished a copy of the assignment or transfer document to Buyer; (b) is a Qualified Operator or retains, prior to the date of such transfer, a Qualified Operator to operate the Project (or otherwise agrees not to interfere with the existing Qualified Operator for the Project); (c) delivers evidence reasonably satisfactory to Buyer that such assignee's creditworthiness is equal to or better than that of Seller; and (d) shall have complied with the obligations of the assigning Party to provide Development Security or Delivery Term Security, as applicable, in accordance with Article 19 of this ESA.
- (B) Seller's consent shall not be required for any assignment of this ESA by Buyer to any Affiliate or in connection with certain corporate events involving Buyer or its parent corporation, including, but not limited to, mergers, reorganizations, consolidations, and asset and/or stock sales, provided that such assignee delivers evidence reasonably satisfactory to Seller that such assignee's creditworthiness is equal to or better than that of Buyer; and further provided that any such assignee delivers evidence reasonably satisfactory to Seller that such assignee has NMPRC Approval of this ESA as and if required by NMPRC regulations.
- 18.2 <u>Conditions on Transfers</u>. If the rights and interests of a Party in this ESA shall be sold, transferred or assigned to an Affiliate, upon satisfaction of the conditions set forth in this Article 18, and upon the Affiliate's agreement in writing to be bound by and to assume the terms and conditions hereof and any and all obligations to the non-assigning Party arising or accruing hereunder from and after the date of such assumption, and provided that the assigning Party is not then in default of its obligations under this ESA or that any then-existing default is cured no later than the date of assignment, then the assigning Party shall be released and discharged from the terms and conditions hereof and each such obligation hereunder from and after such date, and non-assigning Party shall continue this ESA with the Affiliate as if such Person had been named

under this ESA; provided, however, that the assigning Party shall not be released and discharged from and shall remain liable for any and all obligations to the other Party arising or accruing hereunder prior to such assumption.

- 18.3 <u>Change of Control</u>. Except for a Seller Permitted Transfer, any Change of Control of Seller, whether voluntary or by operation of law, shall require the prior written consent of Buyer, which shall not be unreasonably withheld, conditioned or delayed.
- 18.4 <u>Transfer Without Consent Is Null and Void</u>. Any Change of Control or sale, transfer, or assignment of any interest in the Project or in this ESA made without fulfilling the requirements of this ESA shall be null and void and shall constitute an Event of Default pursuant to Article 12.
- 18.5 <u>Subcontracting</u>. Seller may subcontract its duties or obligations under this ESA without the prior written consent of Buyer; *provided*, that no such subcontract shall relieve Seller of any of its duties or obligations hereunder. All subcontractors required by law to be qualified to do business in the State of New Mexico or licensed in accordance with New Mexico law shall be so qualified or licensed. Seller shall be solely responsible for the engagement, supervision, management, satisfactory performance of the subcontractors or unsatisfactory performance.

18.6 Assignment to Lenders.

Cooperation. In connection with any assignment of this ESA by Seller to its Lenders, as soon as reasonably practicable after reasonable request from Seller or any Lender, Buyer will cooperate reasonably with Seller and Lender to agree upon and enter into a consent and agreement, or, if applicable, an estoppel certificate, an estoppel and consent agreement, or similar instrument, all in a form acceptable to Buyer including exclusions, assumptions and caveats typical for such documents or necessary for the accuracy or delivery thereof, providing for, among other things, provisions containing at least the following: (i) an option, but not an obligation, for the Lenders to cure any monetary Event of Default of Seller within thirty (30) Days of the expiration of the cure period provided therefor in Section 12.1, and cure any nonmonetary Event of Default of Seller within sixty (60) Days of the expiration of the cure period provided therefor in Section 12.1, prior to Buyer terminating this ESA; (ii) Buyer providing written notice to Lenders of any Events of Default of Seller; and (iii) Buyer not terminating this ESA if Lenders need to foreclose on the Project prior to curing any Event of Default of Seller giving rise to such termination, but only to the extent that the period required for such foreclosure and cure does not exceed one hundred eighty (180) Days from receipt by Lenders of written notice of such Event of Default of Seller; provided that, in all cases, (a) Buyer will have no obligation to alter or modify the terms of this ESA or provide any consent or enter into any agreement that has a material adverse effect on Buyer, and (b) Seller will be responsible for Buyer's reasonable costs (including, but not limited to, attorneys' fees) associated with Buyer's review, negotiation, execution and delivery of any documents in connection with such assignment. Nothing in this Section 18.6 shall impair Buyer's right to receive all of the damages arising out of or relating to Seller's default, including damages accruing prior to termination as set forth in Section 12.3 of this ESA.

(B) Financing Liens. Either Party may, without the other Party's consent, transfer, sell, pledge, encumber or assign this ESA or the revenues or proceeds therefrom in connection with any financing, provided that such a collateral assignment by Seller does not place any limitation on Buyer's rights or expand Buyer's liability, risks or obligations under this ESA; and further provided that Seller shall not be relieved of any of its obligations or liability under this ESA and that the Lender in any such collateral assignment acknowledges and agrees that the Project shall be operated and maintained by a Qualified Operator. Promptly after making any such encumbrance, Seller shall notify Buyer in writing of the name, address, and telephone and facsimile numbers of each Lender, collateral agent or trustee, as applicable, to which Seller's interest under this ESA has been encumbered. Such notice shall include the names of the account managers or other representatives of the Lenders to whom all written and telephonic communications may be addressed. After giving Buyer such initial notice, Seller shall promptly give Buyer notice of any change in the information provided in the initial notice or any revised notice.

ARTICLE 19 Credit and Security Requirements

- 19.1 <u>Security.</u> Seller shall post and maintain, at its sole cost and expense, security equal to Sixty Thousand Dollars (\$60,000) per MW multiplied by the Guaranteed Capacity ("**Development Security**") within the earlier of (i) ninety (90) Days after the Execution Date and (ii) the commencement of construction of the Project. Not later than the Commercial Operation Date, and as a condition thereto, Seller shall post and maintain, at its sole cost and expense, security equal to One Hundred Thousand Dollars (\$100,000) per MW multiplied by the Guaranteed Capacity (the "**Delivery Term Security**"). Seller shall replenish the Development Security and Delivery Term Security, as applicable, to such required amount within fifteen (15) Days after any draw by Buyer. Buyer will return the Development Security to Seller in full if Commercial Operation occurs on or before the Guaranteed Start Date, provided Seller has paid in full any Delay Damages or Capacity Shortfall Damages. In the event that no amounts are due and owing under this ESA and provided no claims are then outstanding, Seller's Delivery Term Security shall be released to Seller upon the
- earlier of (i) termination of this ESA in accordance with its terms; and (ii) on the fifteenth (15th) Business Day after the expiration of the Term.
- 19.2 Form of Security. The following are deemed acceptable methods for posting Security, which methods may be used in any combination, in the discretion of Buyer: (a) cash, (b) a Letter of Credit in form reasonably acceptable to the Buyer issued by a U.S. bank or a U.S. branch of a foreign bank with credit ratings by both S&P and Moody's of at least A- and A3, respectively and at least Ten Billion Dollars (\$10,000,000,000) in U.S.-based assets ("Issuer Minimum Requirements"), (c) a Seller Guaranty from Seller Guarantor, or (d) other security as may be reasonably acceptable to Buyer. If at any time there shall occur a Downgrade Event with respect to Seller Guarantor, then Buyer may require Seller to post a Letter of Credit or cash in a pledged collateral account in an amount equal to the then-applicable amount of any outstanding Seller Guaranty comprising the Seller Security. Upon receipt of the Letter of Credit or cash, the Seller Guaranty shall be returned promptly to Seller. Notwithstanding the foregoing, Seller's obligation to provide a Letter of Credit in lieu of a Seller Guaranty under this Section 19.2 shall

be suspended during any period that (x) Seller Guarantor is no longer experiencing a Downgrade Event and (y) the Seller Guaranty is reinstated by Seller Guarantor in accordance with the requirements of this Section 19.2. Any Letter of Credit provided hereunder shall state that it shall renew automatically for successive one-year or shorter periods unless Buyer receives written notice from the issuing bank at least sixty (60) Days prior to the expiration date stated in the Letter of Credit that the issuing bank elects not to extend the Letter of Credit. If Buyer receives notice from the issuing bank that the Letter of Credit will not be extended, Seller must provide a substitute Letter of Credit from an alternative bank satisfying the Issuer Minimum Requirements or alternative acceptable Security. The receipt of the substitute Letter of Credit or other acceptable Security must be effective on or before the expiration date of the expiring Letter of Credit and delivered to Buyer at least thirty (30) Days before the expiration date of the original Letter of Credit. If Seller fails to supply a substitute Letter of Credit or other acceptable Security as required, then Buyer will have the right to draw on the total amount of the expiring Letter of Credit. If (a) the credit rating of the issuer bank of a Letter of Credit falls below the Issuer Minimum Requirements, (b) the issuer bank fails to honor a properly documented request to draw on such Letter of Credit or disaffirms, disclaims, repudiates or rejects, in whole or in part, or challenges the validity of, such Letter of Credit, or (c) the issuer of the outstanding Letter of Credit fails to comply with or perform its obligations under such Letter of Credit and such failure shall be continuing after the lapse of any applicable grace period permitted under such Letter of Credit, then Seller shall have fifteen (15) Days (or such longer period as Buyer in its sole discretion may permit in writing) following written notice from Buyer to obtain a suitable Letter of Credit from another bank that meets the Issuer Minimum Requirements. Buyer shall not be required to post security.

- 19.3 <u>Grant of Security Interest</u>. To the extent that Seller posts cash to secure its obligations under this ESA, Seller hereby grants to Buyer a present and continuing security interest in, and lien on (and right of setoff against), and collateral assignment of, all cash collateral provided by Seller to Buyer as collateral and any and all proceeds resulting therefrom or the liquidation thereof, whether now or hereafter held by, on behalf of, or for the benefit of Buyer. Seller agrees to take such action as reasonably required to perfect in favor of Buyer a first priority security interest in, and lien on (and right of setoff against), such collateral and any and all proceeds resulting therefrom or from the liquidation thereof.
- 19.4 <u>Use of Security</u>. In addition to any other remedy available to it, Buyer in its sole discretion may draw from, offset against or make demand under such security to recover any amounts owing to it arising out of this ESA, including any damages due to Buyer and any amount for which Buyer is entitled to indemnification under this ESA. Buyer may draw from, offset against or make demand under all or any part of the amounts due to it from any form of Security provided to Buyer and from all such forms, in any sequence and at any time before or after termination of the ESA, as Buyer may select until such time as the Security is exhausted.

ARTICLE 20 Indemnity; Insurance Proceeds

20.1 Indemnification.

- (A) Subject to the provisions of Article 12, and to the fullest extent permitted by law, Seller shall defend, save harmless and indemnify on an After Tax Basis the Buyer, its Affiliates, and their respective directors, officers, employees, agents, subcontractors, or anyone directly or indirectly employed by any of them or anyone for whose acts any one of them may be liable, from and against all third-party claims, demands, losses, liabilities and expenses, including reasonable attorneys' fees, for personal injury, death or damage to real property and tangible personal property of any third party (collectively, "Losses") to the extent arising out of, resulting from, or caused by the negligence or willful misconduct of Seller, its Affiliates, directors, officers, employees, agents, subcontractors, or anyone directly or indirectly employed by any of them or anyone for whose acts any one of them may be liable; *provided* that, the waiver of consequential damages set forth in Section 12.7 shall not apply with respect to claims made by third parties.
- (B) Subject to the provisions of Article 12, and to the fullest extent permitted by law, Buyer shall defend, save harmless and indemnify on an After Tax Basis the Seller, its Affiliates, and their respective directors, officers, employees, agents, subcontractors, or anyone directly or indirectly employed by any of them or anyone for whose acts any one of them may be liable, from and against all Losses to the extent arising out of, resulting from, or caused by the negligence or willful misconduct of Buyer, its Affiliates, directors, officers, employees, agents, subcontractors, or anyone directly or indirectly employed by any of them or anyone for whose acts any one of them may be liable; *provided* that, the waiver of consequential damages set forth in the third paragraph of Section 12.7 shall not apply with respect to claims made by third parties.
- Notice of Claims; Procedure. The indemnitee shall, with reasonable promptness 20.2 after obtaining knowledge thereof, provide the indemnitor with written notice of the proceedings, claims, demands or assessments that may be subject to indemnification, which notice shall include a statement of the basis of the claim for indemnification, including a summary of the facts or circumstances that form the basis for the claim, a good faith estimate of the amount of Losses and copies of any pleadings or demands from the third party. Indemnitor shall have thirty (30) Days after its receipt of the claim notice to notify indemnitee in writing whether or not indemnitor agrees that the claim is subject to this Article 20 and, if so, whether indemnitor elects to undertake, conduct and control, through counsel of its choosing acceptable to indemnitee and at indemnitor's sole risk and expense, the settlement or defense of the claim. If within thirty (30) Days after its receipt of the claim notice, indemnitor notifies indemnitee that it elects to undertake the settlement or defense of the claim, indemnitee shall cooperate with indemnitor in connection therewith including by making available to indemnitor all relevant information and the testimony of employees and agents material to the defense of the claim. Indemnitor shall reimburse indemnitee for reasonable out-of-pocket costs incurred in connection with such cooperation. So long as indemnitor is contesting the claim in good faith and with diligence, indemnitee shall not pay or settle the claim. Notwithstanding the foregoing, indemnitee shall have the right to pay or settle any claim at any time without the consent of indemnitor; provided that, in such event it waives any right to indemnification therefor. If indemnitor does not provide a responsive notice within the thirty (30) Day period set forth in this Section 20.2, or otherwise

fails to assume or diligently prosecute the defense of any claim in accordance with this Section 20.2, the indemnitee shall have the absolute right to control the defense of such claim, and the fees and expenses of such defense, including reasonable attorneys' fees of the indemnitee's counsel and any amount determined to be owed by the indemnitee pursuant to such claim shall be borne by the indemnitor; provided that, the indemnitor shall be entitled, at its sole expense, to participate in (but not control) such defense. Subject to the foregoing, (a) the indemnitor shall control the settlement of all claims as required under the insurance policies set forth in Article 16, as applicable, as to which it has assured the defense; provided, however, that (i) such settlement shall include dismissal with prejudice of the claim and an explicit and unconditional release from all indemnitees; and (ii) the indemnitor shall not conclude any settlement without the prior approval of the indemnitee, which approval shall not be unreasonably withheld, conditioned or delayed; and (b) except as provided in the preceding sentence concerning the indemnitor's failure to assume or to diligently prosecute the defense of any claim, no indemnite seeking reimbursement pursuant to the foregoing indemnity shall, without the prior written consent of the indemnitor, settle, compromise, consent to the entry of any judgment or otherwise seek to terminate any action, claim suit, investigation or proceeding for which indemnity is afforded hereunder unless the indemnitee waives any right to indemnification therefor or reasonably believes that the matter in question involves potential criminal liability.

- 20.3 <u>Survival of Obligations</u>. Cancellation, expiration, or earlier termination of this ESA shall not relieve the Parties of obligations that by their nature should survive such cancellation, expiration, or termination, prior to the term of the applicable statute of limitations, including warranties, and remedies which obligation shall survive for the period of the applicable statute(s) of limitation.
- 20.4 <u>Insurance Proceeds</u>. In the event that an indemnifying Party is obligated to indemnify the indemnified Party under this Article 20, the amount owing to the indemnified Party will be the amount of the indemnified Party's Loss net of any insurance proceeds received by the indemnified Party following a reasonable effort by such Party to obtain such insurance proceeds.

ARTICLE 21 Governmental Charges

Governmental Charges on or with respect to the Project or on or with respect to the sale and making available to Buyer the Product that are imposed on the making available of Product arising prior to the Point of Delivery or prior to the transfer of the Environmental Attributes pursuant to Article 11. Buyer shall pay or cause to be paid all Governmental Charges (other than any Governmental Charges for which Seller is liable under this Section 21.1) on or with respect to the taking and purchase by Buyer of the Product that are imposed at and from the taking of the Product by Buyer at the Point of Delivery or at and after the transfer of the Environmental Attributes pursuant to Article 11. If a Party is required to remit or pay Governmental Charges that are the other Party's responsibility hereunder, such Party shall promptly reimburse the other for such Governmental Charges. Both Parties shall use reasonable efforts to administer this ESA and implement the provisions in accordance with their intent to minimize Governmental Charges, so

long as no Party is materially adversely affected by such efforts. Nothing herein shall obligate or cause a Party to pay or be liable to pay any Governmental Charge for which it is exempt under Applicable Law. In the event any sale of Product hereunder is exempt from or not subject to any particular Governmental Charge, Buyer shall provide Seller with all reasonably requested documentation within thirty (30) Days after requested by Seller to evidence such exemption or exclusion.

ARTICLE 22 Miscellaneous

- 22.1 <u>Waiver</u>. Subject to the provisions of Section 13.8, the failure of either Party to enforce or insist upon compliance with or strict performance of any of the terms or conditions of this ESA, or to take advantage of any of its rights thereunder, shall not constitute a waiver or relinquishment of any such terms, conditions, or rights, but the same shall be and remain at all times in full force and effect.
- 22.2 <u>Fines and Penalties</u>. Seller shall pay when due all fees, fines, penalties or costs incurred by Seller or its agents, employees or contractors for noncompliance by Seller, its employees, or subcontractors with any provision of this ESA, or any contractual obligation, permit or requirements of law except for such fines, penalties and costs that are being actively contested in good faith and with due diligence by Seller and for which adequate financial reserves have been set aside to pay such fines, penalties or costs in the event of an adverse determination. Buyer shall pay when due all fees, fines, penalties or costs incurred by Buyer or its agents, employees or contractors for noncompliance by Buyer, its employees, or subcontractors with any provision of this ESA, or any contractual obligation, permit or requirements of law except for such fines, penalties and costs that are being actively contested in good faith and with due diligence by Buyer.
- 22.3 <u>Rate Changes</u>. Absent the agreement of all Parties to the proposed change, the standard of review for changes to this ESA whether proposed by a Party, a non-party, or the Federal Energy Regulatory Commission acting sua sponte shall be the "public interest" standard of review set forth in *United Gas Pipe Line v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).
- 22.4 <u>Disclaimer of Certain Third Party Beneficiary Rights</u>. In executing this ESA, Buyer does not, nor should it be construed to, extend its credit or financial support for the benefit of any third parties lending money to or having other transactions with Seller. Nothing in this ESA shall be construed to create any duty to, or standard of care with reference to, or any liability to, any Person not a party to this ESA.

22.5 Relationship of the Parties.

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

- (B) Seller shall be solely liable for the payment of all wages, Taxes, and other costs related to the employment of Persons to perform services for Seller, including all federal, state, and local income, social security, payroll, and employment taxes and statutorily mandated workers' compensation coverage. None of the Persons employed by Seller shall be considered employees of Buyer for any purpose; nor shall Seller represent to any Person that he or she is or shall become a Buyer employee.
- 22.6 Equal Employment Opportunity Compliance Certification. Seller acknowledges that, as a government contractor, Buyer is subject to various federal laws, executive orders, and regulations regarding equal employment opportunity and affirmative action. These laws may also be applicable to Seller as a subcontractor to Buyer. To the extent such laws are applicable to Seller, all applicable equal opportunity and affirmative action clauses shall be deemed to be incorporated herein as required by federal laws, executive orders, and regulations, including 41 C.F.R. § 60-1.4(a)(1)-(7).
- 22.7 <u>Survival of Obligations</u>. Cancellation, expiration, or earlier termination of this ESA shall not relieve the Parties of obligations that by their nature should survive such cancellation, expiration, or termination, prior to the term of the applicable statute of limitations, including warranties, and remedies which obligation shall survive for the period of the applicable statute(s) of limitation.
- 22.8 Severability. In the event any of the terms, covenants, or conditions of this ESA, its Exhibits or Schedules, or the application of any such terms, covenants, or conditions, shall be held invalid, illegal, or unenforceable by any court or administrative body having jurisdiction, all other terms, covenants, and conditions of the ESA and their application not adversely affected thereby shall remain in force and effect; *provided, however*, that Buyer and Seller shall negotiate in good faith to attempt to implement an equitable adjustment in the provisions of this ESA with a view toward effecting the purposes of this ESA by replacing the provision that is held invalid, illegal, or unenforceable with a valid provision the economic effect of which comes as close as possible to that of the provision that has been found to be invalid, illegal or unenforceable.
- 22.9 <u>Complete Agreement; Amendments</u>. The terms and provisions contained in this ESA constitute the entire agreement between Buyer and Seller with respect to the Project and shall supersede all previous communications, representations, or agreements, either oral or written, between Buyer and Seller with respect to the sale of Product from the Project. Subject to approval by any Governmental Authority with jurisdiction over this ESA, this ESA may be amended, changed, modified, or altered, *provided* that such amendment, change, modification, or alteration shall be in writing and signed by both Parties hereto, and *provided*, *further*, that the Exhibits and Schedules attached hereto may be changed according to the provisions of Section 13.7.
- 22.10 <u>Binding Effect</u>. This ESA, as it may be amended from time to time pursuant to this Article, shall be binding upon and inure to the benefit of the Parties hereto and their respective successors-in-interest, legal representatives, and assigns permitted hereunder.
- 22.11 <u>Headings</u>. Captions and headings used in this ESA are for ease of reference only and do not constitute a part of this ESA.

- 22.12 <u>Counterparts</u>. This ESA or any supplement, modification, amendment or restatement hereof may be executed in two or more counterpart copies of the entire document or of signature pages to the document, each of which may have been executed by one or more of the signatories hereto and thereto and deliveries by mail, courier, telecopy or other electronic means, but all of which taken together shall constitute a single agreement, and each executed counterpart shall have the same force and effect as an original instrument.
- 22.13 Governing Law and Choice of Forum. The interpretation and performance of this ESA and each of its provisions shall be governed and construed in accordance with the laws of the State of New Mexico notwithstanding its conflict of laws rules or any principles that would trigger the application of any other law. All disputes arising out of or related to this ESA shall be brought in the United States District Court for the District of New Mexico.

22.14 Confidentiality.

- (A) For purposes of this Section 22.14, "Disclosing Party" refers to the Party disclosing information to the other Party, and the term "Receiving Party" refers to the Party receiving information from the other Party.
- (B) Other than in connection with this ESA, the Receiving Party will not use the Confidential Information (as defined in clause (C) below) and will keep the Confidential Information confidential. The Confidential Information may be disclosed to the Receiving Party or its Affiliates and any of their directors, officers, employees, financial advisers, legal counsel and accountants (collectively, "Receiving Party's Representatives"), but only if such Receiving Party's Representatives need to know the Confidential Information in connection with this ESA. The Receiving Party shall not disclose the Confidential Information to any Person other than as permitted hereby, and shall safeguard the Confidential Information from unauthorized disclosure using the same degree of care as it takes to preserve its own confidential information (but in any event no less than a reasonable degree of care). Subject to Section 22.14(E), to the extent the Disclosing Party is required to submit Confidential Information to a Governmental Authority or is required to submit Confidential Information pursuant to any other legal process, the Disclosing Party shall use commercially reasonable efforts to ensure that such Confidential Information is not made public.
- (C) As used in this Section 22.14, "Confidential Information" means all information that is furnished in connection with this ESA to the Receiving Party or its Receiving Party's Representatives by the Disclosing Party, or to which the Receiving Party or its Receiving Party's Representatives have access by virtue of this ESA (in each case, whether such information is furnished or made accessible in writing, orally, visually or by any other means (including electronic means and any information processed or stored on computers or other electronic media by PNM or on PNM's behalf)), or which concerns this ESA, the Disclosing Party or the Disclosing Party's stockholders, members, affiliates or subsidiaries, other than as excluded below. Any such information furnished to the Receiving Party or its Receiving Party's Representatives by a director, officer, employee, Affiliate, stockholder, consultant, agent or representative of the Disclosing Party will be deemed furnished by the Disclosing Party for the purpose of this ESA. Notwithstanding the foregoing, the following will not constitute Confidential Information for purposes of this ESA:

- (1) information that is or becomes generally available to the public other than as a result of a disclosure or other act by the Receiving Party or its Receiving Party's Representatives;
- (2) information that can be shown by the Receiving Party to have been already known to the Receiving Party on a non-confidential basis before being furnished to the Receiving Party by the Disclosing Party;
- (3) information that becomes available to the Receiving Party on a non-confidential basis from a source other than the Disclosing Party or a representative of the Disclosing Party if to the knowledge of the Receiving Party such source was not subject to any prohibition against transmitting the information to the Receiving Party; and
- (4) information developed by the Parties during the negotiation of this ESA that relates solely to this ESA (as opposed to confidential business or operating information of either Party), which information shall be deemed proprietary to both Parties, each of whom shall be free to use such information, as they would any information already known to the Parties before negotiation of this ESA.
- (D) The Confidential Information will remain the property of the Disclosing Party. Any Confidential Information that is reduced to writing, except for that portion of the Confidential Information that may be found in analyses, compilations, studies or other documents prepared by or for the Receiving Party in connection with this ESA, will be returned to the Disclosing Party immediately upon its request after expiration or termination of this ESA, unless such Confidential Information has been destroyed by the Receiving Party, and no copies will be retained by the Receiving Party or its Receiving Party's Representatives, unless the Parties agree otherwise. That portion of the Confidential Information that may be found in analyses, compilations, studies or other documents prepared by or for the Receiving Party, oral or visual Confidential Information, and written Confidential Information not so required to be returned will be held by the Receiving Party and kept subject to the terms of this ESA, or destroyed.
- (E) In any proceeding before any applicable Governmental Authority, or pursuant to any other legal or regulatory process, each Party shall be entitled to disclose Confidential Information. In such event, the Party making the disclosure in the proceeding shall use commercially reasonable efforts to limit the scope of any disclosure of Confidential Information to make such disclosure of Confidential Information subject to a protective order or other similar procedure; provided, however, Seller acknowledges and agrees that Buyer may disclose this ESA and related documents, without seeking a protective order or similar process, in any proceeding before the NMPRC or pursuant to any other regulatory process under NMPRC jurisdiction.

22.15 Marketing Rights; Press Releases and Media Contact; Access.

(A) Seller hereby grants to Buyer the right to advertise, market, and promote to the general public the benefits of this ESA, including, but not limited to, the exclusive right, in any such advertising, marketing or promotional material, to associate itself with any claimed or actual environmental or sociological benefits arising from this ESA (all such materials, in

whatever media, whether print, electronic, broadcast or otherwise, that are associated with such advertising, marketing or promotional purposes are the "Promotional Materials"). Seller shall obtain and grant to Buyer an irrevocable, royalty free, worldwide license to use and distribute its Promotional Materials, including using the name, description and images of the Project. Seller will make available to Buyer a basic description of the Project, and any press releases or statements that Seller produces regarding the Project. Upon sufficient advance written notice, Seller will grant to Buyer or its designee reasonable access to the Project for the purposes of furthering the creation, production and dissemination of Promotional Materials. Notwithstanding the foregoing, either Party shall be permitted to disclose the following terms with respect to this ESA:

- (1) Party names;
- (2) Renewable resource type;
- (3) Term;
- (4) Project location;
- (5) Guaranteed ESS Capacity;
- (6) Commercial Operation Date; and
- (7) Point of Delivery.
- (B) Except as otherwise provided herein, neither Party shall issue any press or publicity release or otherwise release, distribute or disseminate any information to the public, or respond to any inquiry from the media, concerning this ESA or the participation of the other Party in the transactions contemplated hereby without the prior written approval of the other Party, which approval shall not be unreasonably withheld, delayed or conditioned. This provision shall not prevent the Parties from releasing information (i) which is required to be disclosed in order to obtain permits, licenses, releases and other approvals relating to the Project; (ii) as necessary to fulfill such Party's obligations under this ESA or as otherwise required by Applicable Law; or (iii) if the Party seeking approval makes prompt and commercially reasonable efforts to obtain such approval but the other Party fails to give a definitive response within twenty (20) Business Days.
- 22.16 Right to Mortgage. Buyer shall have the right to mortgage, create or provide for a security interest, or convey in trust, all or a part of its interest in this ESA, under deeds of trust, mortgages, indentures or security agreements, as security for its present or future bonds or other obligations or securities, without consent of Seller; *provided*, that Buyer shall not be relieved of any of its obligations or liability under this ESA. Seller shall cooperate reasonably with Buyer to execute, or arrange for the delivery of, those normal, reasonable and customary documents, and to provide such other normal, reasonable and customary representations or warranties, all in a form reasonably acceptable to Seller, as may be necessary to assist Buyer in consummating such transactions.

- 22.17 Forward Contract and Master Netting Agreement. Notwithstanding any other provision of this ESA, the Parties acknowledge that this ESA is a forward contract and master netting agreement within the meaning of the safe harbor provisions of the Bankruptcy Code. Accordingly, the Parties agree, notwithstanding any other provision in this ESA, that this ESA may be terminated and remedies exercised hereunder by either Party upon the commencement of a proceeding by the other Party under any chapter of the Bankruptcy Code, and that the automatic stay of Section 362(a) of the Bankruptcy Code shall not apply to such termination or to the exercise of the remedies set forth herein.
- 22.18 Accounting Matters. The Parties agree that Generally Accepted Accounting Principles in the United States of America ("GAAP") and the rules of the United States Securities and Exchange Commission ("SEC") require Buyer to evaluate if Buyer must consolidate Seller's financial information. The Parties shall determine, through consultation with their respective independent registered public accounting firms, whether this ESA (i) will be considered a lease under Accounting Standards Codification 842 - Leases, or (ii) require consolidation of Seller's financial information with Buyer's financial statements pursuant to Accounting Standards Codification 840 - Consolidation (including any subsequent amendments to these sections or future guidance issued by accounting profession governance bodies or SEC that affects Buyer's accounting treatment for the ESA, jointly the "Accounting Standards"). Seller agrees to provide Buyer with information Buyer reasonably believes is necessary for Buyer to make the foregoing determinations. If, as a result of the Parties' review (or subsequent reviews as Buyer deems necessary), and consultations with their respective independent registered public accounting firms, Buyer, in its reasonable discretion, determines that such consolidation is required for a given period, then the Parties agree to the following provisions for such period:
- (A) Within fifteen (15) Days following the end of each calendar quarter, including the fourth quarter of the calendar year, Seller shall deliver to Buyer: (i) an unaudited year-to-date statement of income, (ii) an unaudited year-to-date statement of cash flows, (iii) an unaudited balance sheet as of the end of such calendar quarter, and (iv) related supporting schedules that are prepared by the Seller's Guarantor, or if Seller has not provided a Seller Guaranty to satisfy its Security requirements pursuant to Article 19, then Seller, in order to allow the Seller's parent to complete its quarterly filings with the SEC, shall deliver to Buyer any other information reasonably requested by Buyer to comply with the consolidation requirements of GAAP. If audited financial statements are deemed necessary by Buyers external auditors to complete an audit of Buyer's consolidated financial statements, Buyer agrees to provide notice to Seller no later than sixty (60) Days before the end of the calendar year, and Seller agrees to provide audited financial statements within thirty (30) Days of each calendar year end thereafter.
- (B) The financial statements to be delivered by Seller in accordance with Section 22.18(A) ("Seller's Financial Statements") shall be prepared in accordance with GAAP and fairly present in all material respects the consolidated financial position, results of operations, and cash flows of Seller Guarantor, or Seller, as applicable. Seller shall maintain a system of internal accounting controls sufficient to provide reasonable assurance that the financial statements of Seller or Seller Guarantor, as applicable, are prepared in conformity with GAAP. If audited financial statements are prepared for the Seller, other than to satisfy the requirements for

financial statements set forth in Section 22.18(A), Seller shall provide such statements to Buyer within five (5) Business Days after those statements are issued.

- (C) Upon reasonable notice from Buyer, during normal business hours and mutually agreed terms and dates, Seller shall allow Buyer access to Seller's records and personnel, so that Buyer and Buyer's independent registered public accounting firm can conduct financial statement reviews and audits in accordance with the standards of the Public Company Accounting Oversight Board (United States). All reasonable expenses for the foregoing that are incremental to Seller's normal operating expenses shall be borne by Buyer.
- (D) Once during each calendar quarter, Buyer and Seller shall meet (either in person or by conference call) at a mutually agreed upon date and time to conduct due diligence and Form 8K disclosure review and discuss Seller's internal control over financial reporting.
- Buyer shall treat Seller's Financial Statements or other financial information provided under the terms of this Section in confidence in accordance with Section 22.14 and, accordingly, shall: (i) utilize such Seller financial information only for purposes of preparing, reviewing, auditing or certifying Buyer's or any Affiliate's financial statements (including any required disclosures in the financial statement presentation and notes), for making regulatory, tax or other filings required by Applicable Law in which Buyer is required to demonstrate or certify its or any Affiliate's financial condition or to obtain credit ratings; (ii) make such Seller financial information available only to its or its Affiliates' officers, directors, employees or auditors who are responsible for preparing, reviewing, auditing or certifying Buyer's or any Affiliate's financial statements, to the SEC and the Public Company Accounting Oversight Board (United States) in connection with any oversight of Buyer's or any Affiliate's financial statements and to those Persons who are entitled to receive Confidential Information in accordance with Section 22.14; (iii) not disclose any of Seller's financial information provided under the terms of this Section 22.18 to the extent that such information is not required by the Accounting Standards or Applicable Law; (iv) limit submission of Seller's financial information provided under the terms of this Section 22.18 to that information that reflects Seller's operations of the Project; provided, such limited submission is not contrary to the Accounting Standards or other Applicable Law; and (v) use reasonable efforts to disclose to and consult with Seller with respect to any information respecting Seller or the Project that Buyer intends to submit pursuant to this Section 22.18 and use good faith efforts to incorporate any of Seller's comments thereto in any such submission. Notwithstanding the foregoing, if Buyer discloses information, based on the advice of its counsel that it is legally required to be disclosed, Buyer may make such disclosure without being in violation of this Section.
- 22.19 <u>Telephone Recording</u>. Each Party to this ESA acknowledges and agrees to the taping or electronic recording ("**Recording**") of conversations between the Parties with respect to all scheduling and dispatch issues, whether by one or the other or both Parties, and that the Recordings will be retained in confidence, secured from improper access, and may be submitted in evidence in any suit, action or proceedings relating to this ESA. Each Party waives any further notice of that monitoring or Recording and agrees to notify its personnel of the monitoring or Recording and to obtain any necessary consent of those personnel. In the event of a dispute between the Parties, each Party with a Recording relating to such dispute shall provide a copy of such Recording to the other Party upon request.

[Signature page(s) follow]

IN WITNESS WHEREOF, the Parties have caused this ESA to be duly executed as of the date first above written. This ESA shall not become effective as to either Party unless and until executed by both Parties.

PUBLIC S	ERVICE COMPANY OF NEW MEXICO
ву	— Docusigned by: Thomas Fallgren —16A45E858C2C4B9
Name Tho	omas Fallgren
Title Vice	e President, PNM Generation
JICARILLA	A STORAGE 1 LLC DocuSigned by:
Ву	_ Chris Bullinger _
Name	Chris Bullinger
Title	President, Hecate Energy NAF LLC, sole member of Jicarilla Storage $f 1$ LLC

EXHIBIT A

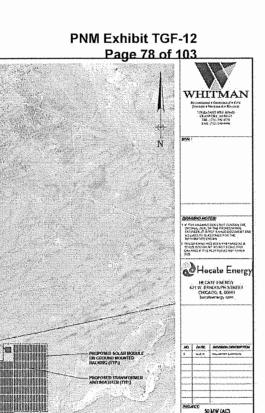
(to Energy Storage Agreement)

DESCRIPTION OF SELLER'S GENERATION FACILITIES AND SITE MAP

1. Name of Seller's Project: Jicarilla Storage 1

Location: Jicarilla Nation, NM [36°19'0.32"N, 107°18'59.02"W]

- 2. Owner (if different from Seller):
- 3. Operator: Seller or Affiliate thereof
- 4. Equipment/Fuel:
 - a. Type of facility and conversion equipment (e.g., Solar PV; Solar Thermal; Wind; Energy Storage; Biomass (including Fuel)): Energy Storage
 - b. Total number of units at the Project: 10
 - c. Total nameplate capacity (AC): 20 MW
 - d. Total capacity at point of delivery: 20 MW
 - e. Additional technology-specific information:
- 5. Site Map: Attach a scaled map that complies with the requirements of Section 3.3 of the ESA.



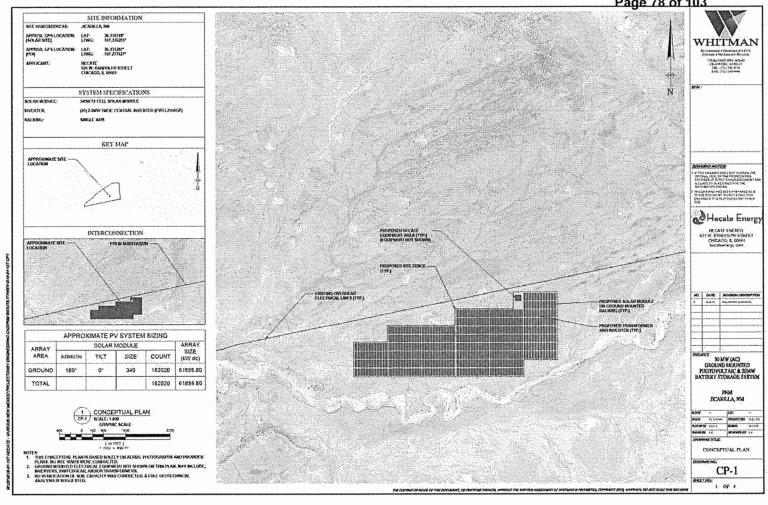
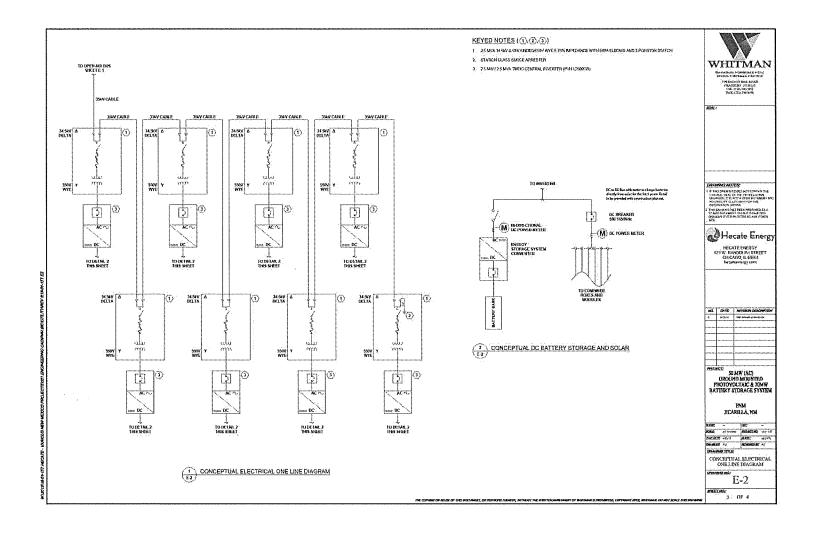


EXHIBIT B

(to Energy Storage Agreement)

ONE-LINE DIAGRAM OF PROJECT AND INTERCONNECTION FACILITIES

See attached one-line diagram of the Project, which indicates the Interconnection Facilities, the network upgrades, the Point of Delivery into WECC Path 48 and ownership and location of meters. Seller shall provide any necessary updates upon execution of the Interconnection Agreement.



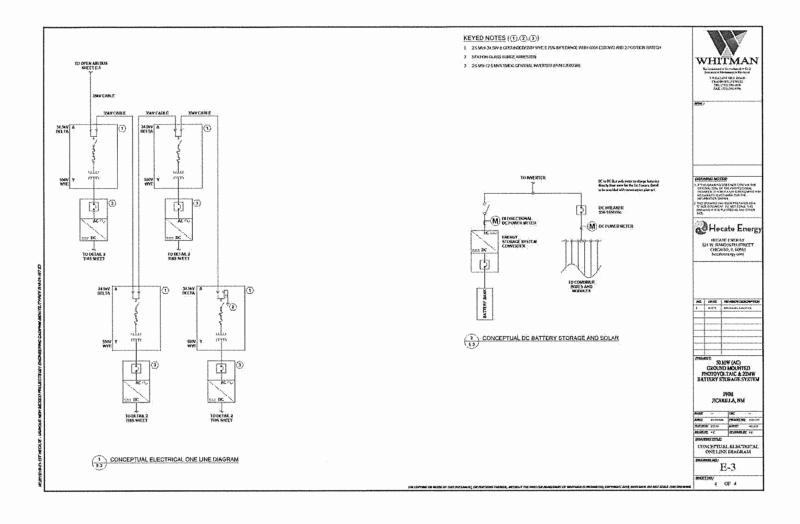


EXHIBIT C

(to Energy Storage Agreement)

DESCRIPTION OF SITE

PARCEL SURVEY FOR JICARILLA SOLAR SITE I AND SOLAR SITE II PROJECTS TRACT A RIO ARRIBA COUNTY, NEW MEXICO

SURVEYOR'S DESCRIPTION of: A certain tract of land, hereby designated as Tract A, a Solar Generation site for Energy Southwest, Inc., situated within protracted sections 7 & 18, Township 24 North, Range 4 West, and sections 11, 12, 13, 14 & 15, Township 24 North, Range 5 West, New Mexico Principal Meridian, Lindrith, Rio Arriba County, State of New Mexico, and being more particularly described as follows:

Beginning at the Northeastern corner of said Tract A, from which point the found marked original stone monument marking the northeast corner of section 12, T24N, R5W, NMPM, bears N19°23'43"W a distance of 4,093.93 feet. and from which point the found marked pipe marking the southeast corner of section 12, T24N, R5W, NMPM, bears S41°06'44"W a distance of 2,164.53 feet, and from which point the set Base Station, having the True New Mexico State Plane Central, NAD83(2011), US Survey Feet coordinates of N 1938811.14, E 1329685.04, Latitude 36°19'25.5", Longitude -107°18'17.5", bears N70°57'17"W a distance of 1,552.67 feet,

Thence S06°46'29"E a distance of 1,821.59 feet to a point where the tract boundary enters protracted section 18, T24N, R4W, NMPM,

Thence continuing S06°46'29"E a distance of 1,104.01 feet to Corner 1 of Tract A, from which point the found marked pipe marking the southeast corner of section 12, T24N, R5W, NMPM, bears N54°13'19"W a distance of 2,179.72 feet,

Thence S68°25'34"W a distance of 1,925.06 feet to a point where the tract boundary enters section 13, T24N, R5W, NMPM,

Thence continuing S68°25'34"W a distance of 939.91 feet to a Corner 2 of Tract A,

Thence S87°44'15"W a distance of 4,314.88 feet to a point where the tract boundary enters section 14, T24N, R5W, NMPM,

Thence continuing S87°44'15"W a distance of 2,318.22 feet to Corner 3 of Tract A,

Thence N73°03'54"W a distance of 2,965.76 feet to a point where the tract boundary enters section 15, T24N, R5W, NMPM,

Thence continuing N73°03'54"W a distance of 1,366.12 feet to Corner 4 of Tract A,

Thence S13°11'52"W a distance of 414.53 feet to Corner 5 of Tract A,

Thence continuing S87°44'15"W a distance of 2,318.22 feet to Corner 3 of Tract A,

Thence N73°03'54"W a distance of 2,965.76 feet to a point where the tract boundary enters section 15, T24N, R5W, NMPM,

Thence continuing N73°03'54"W a distance of 1,366.12 feet to Corner 4 of Tract A,

Thence S13°11'52"W a distance of 414.53 feet to Corner 5 of Tract A,

Thence N63°59'48"W a distance of 1,381.82 feet to Corner 6 of Tract A, from which point the found marked original stone monument marking the northeast corner of section 12, T24N, R5W, NMPM, bears N63°08'28"E a distance of 14,648.38 feet,

Thence N79°11'02"E a distance of 2,709.94 feet to a point where the tract boundary enters section 14, T24N, R5W, NMPM,

Thence continuing N79°11'02"E a distance of 5,270.96 feet to a point where the tract boundary enters section 11, T24N, R5W, NMPM,

Thence continuing N79°11'02"E a distance of 26.12 feet to a point where the tract boundary enters section 12, T24N, R5W, NMPM,

Thence continuing N79°11'02"E a distance of 5,247.71 feet to a point where the tract boundary enters protracted section 7, T24N, R4W, NMPM,

Thence continuing N79°11'02"E a distance of 1,433.90 feet to the Northeastern Corner of Tract A, and the Point of Beginning.

The above described Tract of Land contains 799.75 Acres more or less in area.

EXHIBIT D

(to Energy Storage Agreement)

NOTICE ADDRESSES

PUBLIC SERVICE COMPANY OF NEW MEXICO

JICARILLA STORAGE 1, LLC

Notices:

Delivery Address:

Public Service Company of New Mexico

414 Silver Ave. SW

Albuquerque, NM 87102

Invoices:

Attn: Energy Analysis Phone: (505)541-2585

Fax: (505) 241-2434

Email:

PNMEAM@pnmresources.com

Scheduling:

Attn: Traders

Phone: (505) 855-6226 day-ahead

(505)855-6216 real time

Fax: (505) 241-4188

Email: zz-WPMTraders@pnm.com

Payments:

Public Service Company of New Mexico

2401 Aztec Rd. NE, MS Z-160

Albuquerque, NM 87107

Attn: Albuquerque Division Cash

Wire Transfer:

Wells Fargo Bank

ABA# 121000248

Albuquerque, New Mexico

ME Whsle Pwr Depository: 651-537-7916

Attn: EA-Wholesale Power Marketing

All Notices/Invoices:

Delivery Address:

621 W. Randolph St

Chicago, IL 60661

Attn: Alex Pugh

Phone: 310.659.0936

With copy to:

2215 So. York Road Suite 202

Oak Brook, IL 60523

Attn: 1

Mo Klefeker

Phone: 630.560.4223

Mailing Address (if different from above):

Wire Transfer: To Be Provided

With additional Notice of an Event of Default, termination and other legal notices to:

Attn:

Chris Bullinger

Address:

621 W. Randolph St

Chicago IL, 60661

Phone:

480.239.5617

Attn:

Mo Klefeker

Address:

2215 So. York Road Suite 202

Oak Brook, IL 60523

Phone:

630.560.4223

Contract Manager:

Public Service Company of New Mexico

Attention: Kevin Mataczynski

2401 Aztec Rd. NE Albuquerque, NM 87107

Telephone: (505) 241-4147

Fax: (505) 241-2375

Project Manager:

Jicarilla Storage 1 LLC Attn: Alex Pugh 621 W. Randolph St Chicago, IL 60661

With additional Notice of an Event of Default, termination and other legal notices to:

Public Service Company of New Mexico

Attention: Tom Fallgren 2401 Aztec Rd. NE Albuquerque, NM 87107 Telephone: (505) 241-4148

Fax: (505) 241-2375

With a copy to:

Public Service Company of New Mexico Attention: Madonna N. Bixby, Senior Corporate Counsel 414 Silver Ave. SW, MS0805 Albuquerque, NM 87102 Telephone: (505) 241-4929

Fax: (505) 241-4318

EXHIBIT E

(to Energy Storage Agreement)

SELLER'S REQUIRED GOVERNMENTAL AUTHORITY PERMITS, CONSENTS, APPROVALS, LICENSES AND AUTHORIZATIONS TO BE OBTAINED

FEDERAL

Sec 10 Rivers/H Act Navigable Waters N/A U S Army Corps of Engineers

(USACE) No navigable waters obstructed on-site

Temporary construction discharge permit USACE Section 404 CWA as required

EPA Spill Prevention N/A Assume no hazardous chemicals on-site

Notice of Proposed construction FAA Courtesy Notice

LGIA FERC-to be completed by PNM/JANPA as required

Grants of Easement on Indian Lands BIA

Environmental Assessment/ FONSI BIA NEPA process for gen site/interconnection

National Historic Preservation Act Jicarilla Apache - Lead Agency Waiver

STATE

NM Gross Receipts Tax Waiver PNM Issues Non-Taxable Transaction Certificate

For Wholesale Sale for Resale - NMTRD

JICARILLA APACHE NATION

Development Plan Jicarilla Tribal Land Office-JOGA

Limited Authorized Access Permit Jicarilla Tribal Land Office-JOGA

Work Permit for all vendor employees

Jicarilla Department of Labor

Cultural Permit-construction activities Tribal Historic Preservation Office

Gross Receipts Tax Reporting for Jicarilla Taxation & Revenue Construction Activity

Commercial Construction Permit Jicarilla Nation as required per tribal Code

Title 13.4 & 13.5

NOTE: Final actual permit requirements may vary from the above listings due to Code and Regulatory requirements as needed for project completion, as is customary for commercial scale power generation facilities. This list is considered inclusive at the time of development of the Agreement.

EXHIBIT F

(to Energy Storage Agreement)

COMMISSIONING AND ANNUAL TESTS

Commissioning Tests

- DC Feeder Insulation Resistance and Continuity Tests
- Inverter OEM Commissioning Procedures
- MW Control Tuning/Testing
- V/MVAR/pf Control Tuning/Testing
- AGC Control
- ESS Unit Capabilities Testing

Annual Tests

• ESS Unit Capabilities Testing

EXHIBIT G

(to Energy Storage Agreement)

INSURANCE COVERAGES

Seller shall obtain and maintain the following insurance coverages, at a minimum:

- **A.** Workers' Compensation Insurance that complies with statutory limits under workers' compensation laws of any applicable jurisdiction and employer's liability coverage with limits of One Million Dollars (\$1,000,000) per accident, One Million (\$1,000,000) for disease, and One Million (\$1,000,000) for each employee, covering all of Seller's employees, whether full-time, leased, temporary, or casual.
- **B.** Commercial General Liability Insurance, written on a standard ISO occurrence form, or the equivalent, with a combined single limit of One Million Dollars (\$1,000,000) per occurrence. This policy will include coverage for bodily injury liability, broad form property damage liability, blanket contractual, owner's protective, products liability and completed operations.
- C. Business Automobile Liability Insurance, or the equivalent, with a limit of One Million Dollars (\$1,000,000) combined single limit per occurrence for bodily injury and property damage with respect to Seller's vehicles whether owned, hired, or non-owned.
- **D.** Excess or Umbrella Liability. Excess or Umbrella Liability Insurance on a following form basis covering claims in excess of the underlying insurance described in paragraphs (A) (with respect to only Employer's Liability Insurance), (B) and (C) with a limit per occurrence of Twenty Million dollars (\$20,000,000) written on a per project basis

The amounts of insurance required in the foregoing paragraphs (A), (B), (C) and (D) may be satisfied by purchasing coverage in the amounts specified or by any combination of primary and excess insurance, so long as the total amount of insurance meets the requirements specified above.

E. Property Insurance. During construction and operation, Seller shall provide or arrange the provision of standard form "All Risk" insurance covering one hundred percent (100%) of the Project cost. For the avoidance of doubt, builders' risk insurance shall qualify as "All Risk" insurance during the construction period. The All-Risk Property insurance shall cover physical loss or damage to the Project including the period during testing and startup. A deductible may be carried, which deductible shall be the absolute responsibility of Seller. All-Risk Property insurance shall include: (i) coverage for fire, flood, wind and storm, tornado and earthquake with respect to facilities similar in construction, location and occupancy to the Project; and (ii) Boiler and Machinery insurance covering all objects customarily subject to such insurance, including boilers and engines, in an amount equal to their probable maximum loss.

EXHIBIT H

(to Energy Storage Agreement)

ESS USE CASE

Typical ESS Dispatch (subject to Buyer operation and weather conditions) Subject to Manufacturer's Operating Recommendations

When charged from Solar, the BESS shall be available to:

- 1) Be available for contingency reserve upon the occurrence of a unit outage (requires minimum 8.3% SOC)(20 MW for 20 minutes 6.7 MWH)
- 2) Be available for reg-up and reg-down (requires maximum 96% SOC and minimum 12.5% SOC also considering contingency reserve requirement)(20 MW for 10 minutes 3.3 MWH) (Reg down only as can be diverted from Solar generation)
- 3) Respond to frequency events (BAL-003-1)(Response time in 20 to 50 seconds)(Currently have need for 28.8 MW per 0.1 Hz, but expect need for improved capability in future)(2-3 minute event)
- 4) Provide black start capability (10 MW for 20 minutes)(consider capacity to be held as part of the contingency reserve capacity identified in Item (1) above)
- 5) Charge to control the Solar generation ramp in the morning as the sun rises
- 6) Discharge during the morning peak, as available, to offset peak demand
- 7) Generally charge during the mid-day hours with intermittent partial charge/discharge cycles during the day to manage load and renewable energy variability (load stabilization) (generally operating between 12.5 and 96% SOC)
- 8) Be fully charged prior to the evening peak for peak load management (fully charged by 2 hours before sunset)
- 9) Be available to charge to avoid economic curtailment of PNM's system (Need to identify typical times, capacities, and durations)(Likely shoulder months during solar peaks)(Charging can only be as can be diverted from Solar generation)

Cycles expected to not exceed 365 equivalent full cycles over the duration of a year.

When charged from the Grid, the BESS shall be available to:

- 1) Be available for contingency reserve upon the occurrence of a unit outage (requires minimum 8.3% SOC)(20 MW for 20 minutes 6.7 MWH)
- 2) Be available for reg-up and reg-down (requires maximum 96% SOC and minimum 12.5% SOC also considering contingency reserve requirement)(20 MW for 10 minutes 3.3 MWH)
- 3) Respond to frequency events (BAL-003-1)(Response time in 20 to 50 seconds)(Currently have need for 28.8 MW per 0.1 Hz, but expect need for improved capability in future)(2-3 minute event)
- 4) Provide black start capability (10 MW for 20 minutes)(consider capacity to be held as part of the contingency reserve capacity identified in Item (1) above)
- 5) Charge to control the Solar generation ramp in the morning as the sun rises

- 6) Discharge during the morning peak, as available, to offset peak demand
- 7) Generally charge during the mid-day hours with intermittent partial charge/discharge cycles during the day to manage load and renewable energy variability (load stabilization) (generally operating between 12.5 and 95% SOC)
- 8) Be fully charged prior to the evening peak for peak load management (fully charged by 2 hours before sunset)
- 9) Be charged from excess generation during night-time hours to be available for the morning peak and to avoid curtailment (discharge to minimum 12.5% SOC at end of evening peak)

Cycles expected to not exceed 365 equivalent full cycles over the duration of a year.

EXHIBIT I

(to Energy Storage Agreement)

AVAILABILITY GUARANTEES

Section 1. Definitions.

Capitalized terms used in this <u>Exhibit I</u> and not defined herein shall have the meaning assigned in Article 1 of the ESA.

- "Actual ESS Availability Percentage" means a percentage calculated as (a) one hundred (100), multiplied by (b) the result of (i) the sum of all ESS Available Hours divided by (ii) the sum of all ESS Period Hours in the relevant Commercial Operation Year.
- "Aggregate ESS Availability Damages Cap" has the meaning set forth in Section 2.1(C) of this Exhibit.
- "Annual ESS Availability Damages Cap" has the meaning set forth in Section 2.1(C).
 - "Annual Report" has the meaning set forth in Section 2.3 of this Exhibit.
 - "ESS Availability Damages" has the meaning set forth in Section 2.1(B) of this Exhibit.
- "ESS Available Hours" means for a relevant Commercial Operation Year, an amount of hours equal to (a) the number of ESS Period Hours in such Commercial Operation Year, minus (b) the aggregate ESS Unavailable Hours in such Commercial Operation Year.
- "ESS Excused Hours" means, in any Commercial Operation Year, (a) the aggregate Seller Excused Hours for such Commercial Operation Year to the extent that the ESS is affected during such hours; provided that, for purposes of the Guaranteed ESS Availability Percentage, only the first fifty (50) hours of Scheduled Maintenance Outages in the aggregate for the Project per Commercial Operation Year shall be treated as ESS Excused Hours, provided further that a Scheduled Maintenance Outage affecting part of the Project will count as an equivalent percentage of the applicable hour(s) for the calculation of Scheduled Maintenance Outage hours, (b) all hours during which a Seller Curtailment occurs in such Commercial Operation Year, (c) any outage which is the result of "off-specification" delivery of Charging Energy by Buyer, and (d) failure of Buyer to provide Charging Energy from the grid.
- "ESS Period Hours" means eight thousand seven hundred sixty (8,760) hours for any given Commercial Operation Year, as may be prorated for any partial Commercial Operation Year.
- "ESS Unavailable Hours" means those hours, other than ESS Excused Hours, that the ESS is not available to operate because it is (a) in an emergency, stop, service mode or pause state (except to the extent that such emergency, stop, service mode or pause state also constitutes an Emergency Condition); (b) in "run" status and faulted; (c) included in Scheduled Maintenance Outages in excess of fifty (50) hours in aggregate for the Project in any Commercial Operation

Year; or (d) otherwise not operational or capable of delivering Discharge Energy or accepting Charging Energy.

"Guaranteed ESS Availability Percentage" has the meaning set forth in Section 2.1(A) of this Exhibit.

Section 2. Availability Guarantees.

1. ESS Availability Guarantee.

- (A) <u>ESS Availability Guarantee</u>. Seller guarantees that the ESS shall achieve an Actual ESS Availability Percentage equal to or greater than ninety-five percent (95%) in each Commercial Operation Year after the Commercial Operation Date ("Guaranteed ESS Availability Percentage").
- (B) ESS Availability Damages. For any Commercial Operation Year during which Seller fails to meet the Guaranteed ESS Availability Percentage, Seller shall pay Buyer liquidated damages in the amount equal to One Thousand Five Hundred Dollars (\$1,500) per MW of Guaranteed ESS Capacity per one percent (1%) shortfall in the Guaranteed ESS Availability Percentage, calculated annually and prorated for any portion of a Commercial Operation Year ("ESS Availability Damages"), but in no event in excess of the Annual ESS Availability Damages Cap and the Aggregate ESS Availability Damages Cap. A sample calculation of the ESS Availability Damages that would be owed by Seller under certain stated assumptions is provided as Attachment 2 to this Exhibit I.
- (C) ESS Availability Damages Cap, Termination and Cure Rights. The total ESS Availability Damages payable by Seller for failure to meet the Guaranteed ESS Availability Percentage in any Commercial Operation Year shall be capped annually at a value equivalent to Fifteen Thousand Dollars (\$15,000) per MW of Guaranteed ESS Capacity ("Annual ESS Availability Damages Cap") and in the aggregate at a value equivalent to Forty-Five Thousand (\$45,000) per MW of Guaranteed ESS Capacity ("Aggregate ESS Availability Damages Cap") over the Term of the ESA.
- Sole Remedy. The Parties agree that Buyer's sole and exclusive remedy, and Seller's sole and exclusive liability, for any deficiency in the performance of the Project (including any failure to meet the Guaranteed ESS Availability Percentage) shall be the payment of damages up to the Annual ESS Availability Damages Cap and the Aggregate ESS Availability Damages Cap, as applicable, and the right to declare an Event of Default pursuant to Section 12.1(B)(5) of the ESA, and shall not be subject to the collection of any other damages or any other remedies, including specific performance, and shall not be an Event of Default giving rise to a termination payment obligation except pursuant to Section 12.1(B)(5) of the ESA, as applicable. Notwithstanding the foregoing, the limitations set forth herein shall not be applicable to any indemnification claims pursuant to Article 20 of the ESA and Seller's material breach of its obligation to operate and maintain the Project in accordance with Prudent Utility Practice or Seller's failure to pay ESS Availability Damages when due if not timely cured pursuant to the provisions of Article 12 of the ESA are an Event of Default of Seller for

which Buyer may terminate the ESA and seek damages in accordance with Section 12.4 of the ESA.

- 3. <u>Annual Report.</u> No later than the thirtieth (30th) Day of such Commercial Operation Year (or thirty (30) Days after the end of the last Commercial Operation Year), Seller shall deliver to Buyer a calculation showing Seller's computation of Actual ESS Availability Percentage for the previous Commercial Operation Year and the ESS Availability Damages, if any, due to Buyer (the "Annual Report"). Such Annual Report shall include the total amount of ESS Availability Damages paid to Buyer under the ESA and shall provide notice that the Aggregate ESS Availability Damages Cap has been reached, if applicable. If ESS Availability Damages are due from Seller, Seller shall pay such damages no later than fifteen (15) Business Days after providing the Annual Report.
- 5. <u>Disputes</u>. Disputes as to any calculations under this <u>Exhibit I</u> shall be addressed as provided in Section 13.8 of the ESA.

ATTACHMENT 1 TO EXHIBIT I

EXAMPLE CALCULATION OF ESS AVAILABILITY DAMAGES

I. Example of Actual ESS Availability Percentage Calculation

The sample calculation set forth below is based on the following assumed facts:

The ESS had the following operating characteristics:

	Hours
ESS Period Hours ("EPH")	8,760
ESS Unavailable Hours ("EUH")	700

Given these assumed facts, the ESS Available Hours for the ESS during the Commercial Operation Year would be calculated as follows:

Sum of ESS Available Hours = EPH – EUH: 8,060 = 8,760 - 700

Actual ESS Availability Percentage

Given these assumed facts, the Actual ESS Availability Percentage for the Project during the Commercial Operation Year in question would be calculated as follows:

- (a) Sum of ESS Available Hours: 8,060 hours
- (b) Sum of ESS Period Hours: 8,760 hours
- (c) Actual ESS Availability Percentage: (Sum of ESS Available Hours/Sum of ESS Period Hours) x 100 = (8,060/8,760) x 100 = 92.0%

II. Example of ESS Availability Damages

Example of ESS Availability Damages based on the following assumed facts:

- (a) Seller's Guaranteed ESS Availability Percentage in Commercial Operation Year 4 = 95%.
- (b) Seller's Actual ESS Availability Percentage in Commercial Operation Year 4 = 92%.
- (c) Seller's Guaranteed ESS Capacity = 20 MW.

Given these assumed facts, Seller calculates the ESS Availability Damages due to Buyer as follows:

(Seller's Guaranteed ESS Availability Percentage in Commercial Operation Year 4 – Seller's Actual ESS Availability Percentage in Commercial Operation Year 4) (the latter two expressed as a decimal) x (100) x Liquidated Damage Value x Seller's Guaranteed ESS Capacity = ESS Availability Damage

$$(0.95 - 0.92) \times 100 \times \$1,500 \times 20 = \$90,000$$

As specified in the definition of "ESS Unavailable Hours," all ESS Excused Hours are excluded from the calculation of ESS Unavailable Hours. Thus, in the example above, the 700 hours of ESS Unavailable Hours does not include any hours that are ESS Excused Hours.

EXHIBIT J

(to Energy Storage Agreement)

FORM OF SELLER GUARANTY

GUARANTY

is made	e by [•]. ("Gua	ANTY (tl rantor"	his " Gu '), in fav	aranty") or of <i>[IN</i>	, dated a	as of OUNTA	ERPAR	(the <i>TY'S NA</i>	" Effect I <i>ME IN .</i>	ive Date"), ALL CAPS]
RECIT	ALS:										
[INSE] herewindated/n	RT OBA	LIGOR'.	S NAME	E IN \widehat{AL}	L CAPS	7 ("Obli	gor") l	have en	tered in	nto, or c	subsidiary oncurrently Agreement
betwee	B. n Oblig		EAS, G Counterp		r will di	rectly o	r indire	ectly be	enefit fr	om the	Agreement
NOW THEREFORE, in consideration of the foregoing premises and as an inducement for Counterparty's execution, delivery and performance of the Agreement, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Guarantor hereby agrees for the benefit of Counterparty as follows:											
				*		*		*			
1. <u>GUARANTY</u> . Subject to the terms and provisions hereof, Guarantor hereby absolutely and irrevocably guarantees the timely payment when due of all obligations owing by Obligor to Counterparty arising pursuant to the Agreement, including with respect to any damages that Obligor owes to Counterparty for failing to perform under the Agreement (collectively, the "Obligations"). This Guaranty shall constitute a guarantee of payment and not of collection. The liability of Guarantor under this Guaranty shall be subject to the following limitations:											
(a)	aggreg recover (the "enforce court	gate oblivery from Maximum ement of com	gation a m Gua um Rec f this G petent j	nd liabi trantor [spell ocovery uaranty urisdicti	lity of G under out the a Amount (includin	this G this G tollar and the color of the color of the color of the color of the color of the color of the color	r under uaranty nount] s reasonable ares that	this G , shal U.S. D mable of ttorneys	uaranty, l in collars (costs of	and the no even U.S. \$ f collector the e	e maximum e maximum ent exceed tion and/or extent that a nd payable
(b)											y limited to ayments are

deemed to be damages), as well as costs of collection and enforcement of this Guaranty (including attorneys' fees) to the extent reasonably and actually incurred by Counterparty (subject, in all instances, to the limitations imposed by the Maximum Recovery Amount as specified in <u>Section 1(a)</u> above). Except as expressly payable by Obligor pursuant to the Agreement, Guarantor shall not be liable for or obligated to pay any consequential, indirect, incidental, lost profit, special, exemplary, punitive, equitable or tort damages.

2. <u>DEMANDS AND PAYMENT</u>.

- (a) If Obligor fails to pay any Obligation to Counterparty when such Obligation is due and owing under the Agreement (an "Overdue Obligation"), Counterparty may present a written demand to Guarantor calling for Guarantor's payment of such Overdue Obligation pursuant to this Guaranty (a "Payment Demand"). Delay or failure by Counterparty in making a Payment Demand shall in no event affect Guarantor's obligations under this Guaranty.
- (b) A Payment Demand shall be in writing and shall reasonably and briefly specify in what manner and what amount Obligor has failed to pay and explain why such payment is due, with a specific statement that Counterparty is calling upon Guarantor to pay under this Guaranty. Such Payment Demand must be delivered to Guarantor in accordance with Section 9 below; and the specific Overdue Obligation(s) addressed by such Payment Demand must remain due and unpaid at the time of such delivery to Guarantor.
- (c) After issuing a Payment Demand in accordance with the requirements specified in <u>Section 2(b)</u> above, Counterparty shall not be required to issue any further notices or make any further demands with respect to the Overdue Obligation(s) specified in that Payment Demand, and Guarantor shall be required to make payment with respect to the Overdue Obligation(s) specified in that Payment Demand within five (5) Business Days after Guarantor receives such demand. As used herein, the term "Business Day" shall mean all weekdays (i.e., Monday through Friday) other than any weekdays during which commercial banks or financial institutions are authorized to be closed to the public in the State of New Mexico.

REPRESENTATIONS AND WARRANTIES. Guarantor represents and warrants that:

- (a) it is a limited liability company duly organized and validly existing under the laws of the State of _____ and has the corporate power and authority to execute, deliver and carry out the terms and provisions of the Guaranty;
- (b) no authorization, approval, consent or order of, or registration or filing with, any court or other governmental body having jurisdiction over Guarantor is required on the part of Guarantor for the execution, delivery and performance of this Guaranty; and
- (c) the execution, delivery and performance of this Guaranty has been duly and validly authorized by all corporate proceedings of Guarantor, and this Guaranty constitutes a valid and legally binding agreement of Guarantor, enforceable against Guarantor in accordance with the terms hereof, except as the enforceability thereof may be limited by

the effect of any applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors' rights generally and by general principles of equity.

- 4. RESERVATION OF CERTAIN DEFENSES. Without limiting Guarantor's own defenses hereunder, Guarantor reserves to itself and may assert as a defense to enforcement of this Guaranty any defense to enforcement of the Agreement that Obligor may assert that is based on Counterparty's breach of the Agreement or the failure of a material condition precedent to Obligor's performance obligations. Notwithstanding the foregoing, Guarantor agrees that it will remain bound upon this Guaranty notwithstanding any defenses that, pursuant to the laws of suretyship or guaranty, would otherwise relieve a guarantor of its obligations. In furtherance and not limitation of the foregoing, Guarantor expressly waives (if any) based upon the bankruptcy, insolvency, dissolution or liquidation of Obligor or any lack of power or authority of Obligor to enter into and/or perform the Agreement or the lack of validity or enforceability of Obligor's obligations under the Agreement. Guarantor further reserves to itself any rights, setoffs or counterclaims that Guarantor may have against Obligor, provided, however, that Guarantor agrees such rights, setoffs or counterclaims may only be asserted against Obligor in an independent action, and not as a defense to Guarantor's obligations under this Guaranty.
- **5. AMENDMENT OF GUARANTY.** No term or provision of this Guaranty shall be amended, modified, altered, waived or supplemented except in a writing signed by Guarantor and Counterparty.
- 6. WAIVERS AND CONSENTS. Guarantor agrees that its obligations under this Guaranty are irrevocable, absolute, independent, unconditional and continuing (subject only to the defenses to enforcement of this Guaranty reserved by Guarantor in Section 4) and shall not be affected by any circumstance that constitutes a legal or equitable discharge of a guarantor or surety other than payment in full of the Obligations. In furtherance of the foregoing and without limiting the generality thereof, Guarantor agrees, subject to and in accordance with the other terms and provisions of this Guaranty:
- Except for the Payment Demand as required in Section 2 above, Guarantor hereby (a) waives, to the maximum extent permitted by applicable law, (i) notice of acceptance of this Guaranty; (ii) promptness, diligence, presentment, demand, protest, setoff and counterclaim concerning the liabilities of Guarantor; (iii) any right to require that any action or proceeding be brought against Obligor or any other person, or to require that Counterparty seek enforcement of any performance against Obligor or any other person, prior to any action against Guarantor under the terms hereof; (iv) any defense arising by reason of the incapacity, lack of authority or disability of Obligor or based on any illegality, lack of validity or unenforceability of any Obligation; (v) any duty of Counterparty to protect or not impair any security for the Obligations; (vi) any defense based upon an election of remedies by Counterparty; (vii) any rights of subrogation, contribution, reimbursement, indemnification, or other rights of payment or recovery for any payment or performance by it hereunder (and, for the avoidance of doubt, if any amount is paid to Guarantor in violation of this provision, Guarantor shall hold such amount for the benefit of, and promptly pay such amount to, Counterparty); (viii) any defense of waiver, release, res judicata, statute of frauds, fraud (with respect to Obligor), incapacity (with respect to Obligor), minority or usury; and (ix) any other circumstance or any existence of or reliance on any representation by Counterparty that might

- otherwise constitute a defense available to, or a legal or equitable discharge of, Guarantor or any other guarantor or surety.
- (b) No delay by Counterparty in the exercise of (or failure by Counterparty to exercise) any rights hereunder shall operate as a waiver of such rights, a waiver of any other rights or a release of Guarantor from its obligations hereunder (with the understanding, however, that the foregoing shall not be deemed to constitute a waiver by Guarantor of any rights or defenses to which Guarantor may at any time have pursuant to or in connection with any applicable statutes of limitation).
- (c) Without notice to or the consent of Guarantor, and without impairing or releasing Guarantor's obligations under this Guaranty, Counterparty may: (i) change the manner, place or terms for payment of all or any of the Obligations (including renewals, extensions or other alterations of the Obligations); (ii) release Obligor or any person (other than Guarantor) from liability for payment of all or any of the Obligations; (iii) receive, substitute, surrender, exchange or release any collateral or other security for this Guaranty or any or all of the Obligations and apply any such collateral or security and direct the order or manner of sale thereof, or exercise any other right or remedy that Counterparty may have against any such collateral or security; or (iv) exercise any other rights available to Counterparty under the Agreement, at law or in equity.
- 7. <u>REINSTATEMENT</u>. Guarantor agrees that this Guaranty shall continue to be effective or shall be reinstated, as the case may be, if all or any part of any payment made hereunder or under the Agreement while this Guaranty is in effect is at any time avoided or rescinded or must otherwise be restored or repaid by Counterparty as a result of the bankruptcy or insolvency of Obligor or Guarantor, or similar proceeding, all as though such payments had not been made.
- **8. TERMINATION.** Subject to reinstatement under <u>Section 7</u>, this Guaranty and the Guarantor's obligations hereunder will terminate automatically and immediately upon the earlier of (i) the termination or expiration of the Agreement, and (ii) 11:59:59 Eastern Prevailing Time of [insert date [__] years plus six (6) months after expected COD]; provided, however, Guarantor agrees that the obligations and liabilities hereunder shall continue in full force and effect with respect to any Obligations under any Agreement entered into on or prior to the date of such termination.
- 9. <u>NOTICE</u>. Any Payment Demand, notice, request, instruction, correspondence or other document to be given hereunder (herein collectively called "Notice") by Counterparty to Guarantor, or by Guarantor to Counterparty, as applicable, shall be in writing and may be delivered either by (i) U.S. certified mail with postage prepaid and return receipt requested, or (ii) recognized nationwide courier service with delivery receipt requested, in either case to be delivered to the following address (or to such other U.S. address as may be specified via Notice provided by Guarantor or Counterparty, as applicable, to the other in accordance with the requirements of this *Section 9*):

TO COUNTERPARTY:
[●] <u>Attn</u> :

[Tel: [•] for use in connection with courier deliveries]	[Tel: [•] for use in connection with courier deliveries]
--	--

Any Notice given in accordance with this <u>Section 9</u> will (i) if delivered during the recipient's normal business hours on any given Business Day, be deemed received by the designated recipient on such date, and (ii) if not delivered during the recipient's normal business hours on any given Business Day, be deemed received by the designated recipient at the start of the recipient's normal business hours on the next Business Day after such delivery.

10. MISCELLANEOUS.

- (a) This Guaranty shall in all respects be governed by, and construed in accordance with, the law of the State of New Mexico, without regard to principles of conflicts of laws thereunder.
- (b) This Guaranty shall be binding upon Guarantor and its successors and permitted assigns and inure to the benefit of and be enforceable by Counterparty and its successors and permitted assigns. Guarantor may not assign this Guaranty in part or in whole without the prior written consent of Counterparty. Counterparty may not assign this Guaranty in part or in whole except (i) with the prior written consent of Guarantor, or (ii) to an assignee of the Agreement in conjunction with an assignment of the Agreement in its entirety accomplished in accordance with the terms thereof.
- (c) This Guaranty embodies the entire agreement and understanding between Guarantor and Counterparty and supersedes all prior agreements and understandings relating to the subject matter hereof.
- (d) The headings in this Guaranty are for purposes of reference only, and shall not affect the meaning hereof. Words importing the singular number hereunder shall include the plural number and vice versa, and any pronouns used herein shall be deemed to cover all genders. The term "person" as used herein means any individual, corporation, partnership, joint venture, association, joint-stock company, trust, unincorporated association, or government (or any agency or political subdivision thereof).
- (e) Wherever possible, any provision in this Guaranty which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective only to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any one jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.
- (f) Counterparty (by its acceptance of this Guaranty) and Guarantor each hereby irrevocably: (i) consents and submits to the exclusive jurisdiction of the United States District Court for the District of New Mexico for the purposes of any suit, action or other proceeding arising out of this Guaranty or the subject matter hereof or any of the transactions contemplated hereby brought by Counterparty, Guarantor or their respective successors or assigns; and (ii) waives (to the fullest extent permitted by applicable law) and agrees

not to assert any claim that it is not personally subject to the jurisdiction of the abovenamed courts, that the suit, action or proceeding is brought in an inconvenient forum, that the venue of the suit, action or proceeding is improper or that this Guaranty or the subject matter hereof may not be enforced in or by such court.

(g) COUNTERPARTY (BY ITS ACCEPTANCE OF THIS GUARANTY) AND GUARANTOR EACH HEREBY IRREVOCABLY, INTENTIONALLY AND VOLUNTARILY WAIVES THE RIGHT TO TRIAL BY JURY WITH RESPECT TO ANY LEGAL PROCEEDING BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH, THIS GUARANTY, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PERSON RELATING HERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO GUARANTOR'S EXECUTION AND DELIVERY OF THIS GUARANTY.

EXHIBIT K

(to Energy Storage Agreement)

COMMERCIAL OPERATION FORM OF CERTIFICATION

This certification ("Certification") of Commercial Operation is delivered by("Seller") to Public Service Company of New Mexico ("Buyer") in accordance with the terms of that certain Energy Storage Agreement dated ("Agreement") by and between Seller and Buyer. All capitalized terms used in this Certification but not otherwise defined herein shall have the respective meanings assigned to such terms in the Agreement.
Seller hereby certifies and represents to Buyer the following:
(1) An Energy Storage System with a designed power output capability of 20 MW for four (4) consecutive hours has been constructed, commissioned and tested and is capable of delivering Discharge Energy on a sustained basis (in accordance with the ESS manufacturer's requirements and the Commissioning Tests);
(2) Seller has obtained all necessary rights under the Interconnection Agreement for the interconnection and delivery of Discharge Energy to the Point of Delivery and is not in breach of the Interconnection Agreement; and
(3) the Project has been completed in all material respects (except for Delayed ESS Capacity and punch list items that do not materially and adversely affect the ability of the Project to operate as intended).
A certified statement of the Licensed Professional Engineer, attached hereto, has been provided as evidence of Commercial Operation of the Project to provide Product and meet, at a minimum, the requirements indicated herein.
EXECUTED by SELLER this day of, 20
[•] [Licensed Professional Engineer] Signature: Signature: Name: Name:
Title: Title:
Date:
License Number and LPE Stamp:

EXHIBIT L

(to Energy Storage Agreement)

ROUNDTRIP EFFICIENCY GUARANTEE

	0/2-11
Year	R/T Eff
1	86.70%
2	86.47%
3	86.25%
4	86.03%
5	85.80%
6	85.58%
7	85.36%
8	85.13%
9	84.91%
10	84.69%
11	84.47%
12	84.25%
13	84.03%
14	83.81%
15	83.60%
16	83.38%
17	83.16%
18	82.95%
19	82.73%
20	82.52%

Pinon Gas EPC Contract

PNM Exhibit TGF-13

Is contained in the following 195 pages.

ENGINEERING, PROCUREMENT, AND CONSTRUCTION CONTRACT

by and between

PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation

and

PROENERGY SERVICES, LLC, a Missouri limited liability company

for the

PIÑON GAS PLANT

Dated as of June 27, 2019

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ENGINEERING, PROCUREMENT, AND CONSTRUCTION CONTRACT

THIS ENGINEERING, PROCUREMENT, AND CONSTRUCTION CONTRACT (this "Contract") is made and entered into as of this 27th day of June 2019, (the "Effective Date"), by and between PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation (hereinafter "Owner" or "PNM"), and PROENERGY SERVICES, LLC, a Missouri limited liability company (hereinafter, "Contractor"). Each entity is sometimes individually referred to herein as a "Party" and are sometimes collectively referred to herein as the "Parties".

RECITALS

- A. Owner desires to develop a multiple Unit electricity generating facility fueled with natural gas with a combined nameplate rating of approximately Two Hundred Forty (240) megawatts to be constructed in and located near Waterflow, New Mexico ("Project").
- B. Owner desires to engage Contractor to permit, design, engineer, procure, construct, test and start up the Project and to train the persons who will operate and maintain the Project, all on a fixed price, date certain to complete, basis, and Contractor desires to provide such services, all in accordance with the terms and conditions set forth in this Contract.

C. Contractor has:

- (1) provided preliminary conceptual drawings for the Project,
- (2) inspected the real property on which the Project shall be constructed, and
- (3) performed or reviewed such other investigations, studies, and analyses which Contractor has determined to be necessary or prudent in connection with entering into this Contract.
- D. Contractor is willing to guarantee (a) the timely completion of the Project, and (b) operating performance of the Project in accordance with the terms and conditions of this Contract.

AGREEMENT

NOW, THEREFORE, in consideration of the sums to be paid to Contractor by Owner and of the covenants, premises and agreements set forth herein (including those set forth above that are hereby incorporated by reference), the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. DEFINITIONS AND RULES OF INTERPRETATION

1.1 For the purposes of this Contract, except as otherwise expressly provided or unless the context otherwise requires, the following terms shall have the following meanings.

"Acceptance Tests" means the Performance Tests and each other test and activity to be performed prior to, and as a condition to, Substantial Completion, as such tests and activities are set forth in Exhibit I.

"Acceptance Tests Procedures" means the written test procedures, standards, protective settings, and the testing program for the Acceptance Tests as set forth in Exhibit I.

"Affiliate" means, with respect to any Person, another Person that is controlled by, that controls, or is under common control with, such Person; and, for this purpose, "control" with respect to any Person shall mean the ability to effectively control, directly or indirectly, the operations and business decisions of such Person whether by voting of securities or partnership interests or any other method.

"Applicable Laws" means and includes all of the following:

- (a) any applicable statute, license, law, rule, treaties, regulation, code, ordinance, certificates, orders, judgment, decree, writ, legal requirement, order or the like, of any national, federal, provincial, state, tribal or local court or other Governmental Authority, and the written interpretations thereof, including, without limitation, any statute, license, law, rule, treaties, regulation, code, ordinance, certificates, orders, judgment, decree, writ, legal requirement, order or the like, regulating, relating to or imposing liability or standards of conduct concerning:
- (i) Contractor, the Site or the performance of any portion of the Work or the Work taken as a whole, or the operation of the Project; or
- (ii) safety and the prevention of injury to persons and the damage to property on, about or adjacent to the Site or any other location where any other portion of the Work shall be performed; or
- (iii) protection of human health or the environment or emissions, discharges, releases or threatened releases of pollutants, contaminants, chemicals or industrial, toxic or hazardous substances or wastes into the environment including, without limitation, ambient air, surface water, ground water, or land, or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport, or handling of pollutants, contaminants, chemicals, Hazardous Materials or other industrial, toxic materials or wastes, as now or may at any time hereafter be in effect; and

(b) any Permit Requirement.

"Applicable Permits" means each and every national, state, local or other license, consent, appraisal, authorization, ruling, exemption, variance, order, judgment, decree, declaration, regulation, certification, filing, recording, environmental plans and/or studies, permit

or other approval with, from or of any Governmental Authority, including, without limitation, each and every environmental, construction, operating or occupancy permit and any agreement, consent or approval from or with any other Person, that is required by any Applicable Law or that is otherwise necessary for the performance of the Work or operation of the Project, including without limitation, the Owner Acquired Permits and Contractor Acquired Permits.

"Business Day" means a Day, other than a Saturday or Sunday, on which banks are generally open for business in the State of New Mexico, or the Friday following Thanksgiving. A Business Day shall begin at 8:00 a.m. and end at 5:00 p.m. local time for the Party sending the Notice or payment or performing a specified action hereunder.

"Buy-Down Amount" means the amount to be paid by Contractor to Owner in accordance with the provisions of <u>Section 16.2</u> and calculated in accordance with <u>Exhibit H</u> for the failure of each Unit to achieve the Performance Guarantees.

"CCN" means Owner's application for a Certificate of Public Convenience and Necessity filed with the NMRPC relating to the Project.

"Change in Law" means the enactment, adoption, promulgation, material modification, or repeal after the date of this Contract of any Applicable Law of any Governmental Authority including, but not limited to, a change in any requirement or condition on or with respect to the application for, or issuance, maintenance, renewal or transfer of, any Applicable Permit; provided, however, any of the following shall not be a Change in Law: (a) the enactment, adoption, promulgation, modification or repeal after the Notice to Proceed Date of any national, federal, provincial or any other law imposing a tax, duty, levy, impost, fee, royalty, or similar charge based on the importation or exportation of any item or service for which Contractor is responsible hereunder; and (c) the enactment, adoption, promulgation, modification or repeal of any national, federal, provincial or any other income tax law; provided, further, that "Change in Law" shall include any such enactment, adoption, promulgation, modification, amendment, repeal, change in interpretation by Governmental Authority, administrative decision, regulation or judicial decision that affects an increase in the rate, or broadens the applicability of any sales, use, gross receipts or compensating tax imposed by any Governmental Authority on the purchase, sale, use or lease of any Equipment and Materials, labor or services.

"Change in Work" means an authorized modification to the Work for the reasons set forth in Section 17.1.

"Change in Work Form" means the form documenting a Change in Work attached hereto as Exhibit E.

"Chronic Failure" has the meaning set forth in Section 18.8.

"Claim Notice" has the meaning set forth in <u>Section 25.5</u>.

"Conditional Waiver and Release Upon Final Payment" means a written statement, the form of which is attached hereto as Exhibit F-3, containing a waiver and release of liens pursuant to which a Person conditionally waives and releases all Contractor Liens, stop notices

and bond rights with respect to all Work conditioned only upon final payment.

"Conditional Waiver and Release Upon Progress Payment" means a written statement, the form of which is attached hereto as Exhibit F-1, containing a waiver and release of liens pursuant to which a Person conditionally waives and releases all Contractor Liens, stop notices and bond rights with respect to all Work through the last day of the calendar month for which Contractor requested payment in the current Contractor's Invoice conditioned only upon payment of the amount set forth therein.

"Confidential Information" means any and all non-public proprietary written information, data, analyses, documents, and materials furnished or made available by a Party or its Representatives to the other Party or its Representatives in connection with this Contract, including any information processed or stored on computers or other electronic media by PNM, on PNM's behalf, or by Contractor for PNM, and any and all analyses, compilations, studies, documents, or other material prepared by the receiving Party or its Representatives to the extent containing or based upon such information, data, analyses, documents, and materials; provided, however, Confidential Information of Owner shall also mean information, ideas or materials related to the Work or Project that is or are:

- (a) obtained, developed or created by or for Contractor exclusively in connection with the Work; or
 - (b) disclosed by Owner or any of its Affiliates.

Confidential Information shall not include any information that: (w) is already in the public knowledge or which becomes public knowledge absent any violation of the terms of this Contract; (x) was already in the possession of a Party prior to disclosure by the other Party; (y) a Party obtains from another Person which such Party reasonably believes was not under an obligation of confidentiality; or (z) is or becomes generally available to, or is independently known to or has been or is developed by, any Party or any of its Affiliates other than materially as a result of any disclosure of proprietary information by the transferor to the transferee.

"Construction Tests" means the construction tests, pre-start-up checkout tests, and system walkdowns to be performed prior to, and as a condition to, Mechanical Completion, as such tests and activities are set forth in Exhibit A.

"Contract" means this Engineering, Procurement, and Construction Contract, including all Exhibits hereto, as the same may be modified, amended, or supplemented from time to time in accordance with the terms hereof.

"Contract Price" means the fixed amount for performing the Work that is payable to Contractor as set forth in <u>Section 6.1</u>, as the same may be modified from time to time in accordance with the terms hereof.

"Contractor" means ProEnergy Services, LLC, and its permitted successors and assigns under this Contract.

"Contractor Acquired Permits" means and includes the following permits:

- (a) building permits and New Mexico Construction Industries License required for the construction of the Project;
- (b) labor or health standard permits and approvals reasonably related to Work assigned to Contractor with respect to the construction of the Project;
- (c) business permits reasonably related to the conduct of the operations of Contractor and all Subcontractors in the State of New Mexico and any other location where such permits may be required (including all contractors' licenses and related documents);
- (d) permits, approvals, consents or agreements from or with any Person necessary for the performance and completion by Contractor of the Work or its warranty obligations hereunder, for the transportation or importation of Equipment and Materials or for the transportation or importation of equipment, tools, machinery and other items used by Contractor in performance of the Work; and
- (e) permits, visas, approvals and certifications necessary for Contractor's employees to legally perform the Work in the State of New Mexico (including documentation of citizenship or legal residency in the United States).; and
- (f) all Applicable Permits required for the implementation of the Work to be assigned to Contractor with respect to the project other than those listed as Owner Acquired Permits in Exhibit C.

Without limiting the foregoing, Contractor Acquired Permits include permits for temporary construction utilities and temporary sanitary facilities, dump permits, road use permits, NPDES Construction General Stormwater Permit, Storm Water Protection Plan ("SWPP") Development, Spill Prevention, Control and Countermeasure Plan, permits related to the use, storage and disposal of Hazardous Materials that the Contractor or its Subcontractors or Vendors brings to the Site or are used under Contractor's supervision during the construction, start-up, and commissioning of the Project, the Construction Tests and the Acceptance Tests, and permits issued pursuant to any building, mechanical, electrical, plumbing or similar codes in connection with the performance of the Work; provided, that Contractor Acquired Permits do not include Owner Acquired Permits.

"Contractor Deliverables" means each of the design criteria, system descriptions, Required Manuals, Drawings and Specifications, design calculations, quality assurance reports and all other material documents relating to the Project to be delivered to Owner in accordance with the requirements of this Contract.

"Contractor Event of Default" has the meaning set forth in Section 20.1.

"Contractor Inchoate Default" means any occurrence, circumstance or event, or any combination thereof, which with the lapse of time or the giving of Notice, or both, would constitute a Contractor Event of Default.

- "Contractor Lien" has the meaning set forth in Article 30.
- "Contractor Indemnitee" has the meaning set forth in <u>Section 25.2</u>.
- "Contractor's Invoice(s)" means an invoice from Contractor to Owner in the form of Exhibit F hereto.
- "Corrective Action" means all the materials, tasks and Work necessary to make the Project meet each Performance Guarantee.
- "Critical Path Item(s)" means the items identified as critical path items on the Project Schedule (including, without limitation, Mechanical Completion, Substantial Completion and Final Completion).
 - "Day" or "day" means a calendar day, unless otherwise specified.
- "Defect" means and includes, without limitation, any design, engineering or installation of the Work, Equipment and Materials, or other Work which in any of the foregoing cases:
- (a) does not conform to the Contract or the Drawings and Specifications either as contained in this Contract or issued by Contractor for the Project;
 - (b) is of improper or inferior workmanship or material;
- (c) is not suitable or does not operate suitably for the Project's intended purpose as a power plant;
 - (d) is inconsistent with Industry Standards; or
- (e) materially and adversely affects the mechanical, electrical, or structural integrity, or the continuous efficient, effective or safe operation or reliability of the Project.
- **"Delay Liquidated Damages"** means Substantial Completion Delay Liquidated Damages as set forth in <u>Section 16.1</u>.
 - "Delay Notice" means a notice of delay as set forth in Section 9.2.
- "Direct Costs" means, as it relates to any Work or Change in Work, the cost of labor, support labor, material, equipment, services, tools, supplies, Subcontracts, jobsite facilities, utilities, and jobsite staffing necessary to perform such Work or Change in Work.
 - "Dollars" or "\$" means the lawful currency of the United States of America.
- "Drawings and Specification Table" means table of Drawings and Specifications to be delivered by Contractor, which must satisfy the requirements of Exhibit A and be prepared by Contractor and accepted by Owner in accordance with Section 12.3 of the Contract.
- "Drawings and Specifications" means the drawings, specifications, drawing logs, conformed technical specifications, manufacturers' drawings and data, plans and designs that are

part of the Statement of Work or that have been prepared by Contractor or any Subcontractor or Vendor with respect to the Work (including those drawings and specifications identified in Exhibit A).

"Effective Date" has the meaning set forth in the preamble.

"Electrical Interconnection Facilities" means the facilities and equipment necessary to connect the Project to the San Juan substation from the Energy Delivery Point.

"Eligible Issuer" means a surety licensed to do business in the State of New Mexico, listed in the latest issue of the U.S. Treasury Circular 570, with an AM Best rating of A- or better, and on the New York State Insurance Department's website listing insurers and their authorized coverages, or any other issuer reasonably acceptable to Owner.

"Energy Delivery Point" means the connections at the high side of the motor operated disconnect (MOD) of the Project Substation dead end termination structure within the Project Substation.

"Engineer" means any engineering firm or firms or other engineer or engineers (which may be employees of Owner) selected and designated by Owner.

"Equipment and Materials" means all Units, Major Components, materials, supplies, apparatuses, devices, machinery, equipment, parts, tools, special tools, components, construction aids, construction utilities to the extent provided in Exhibit A, instruments, appliances, spare parts and appurtenances thereto that are:

- (a) required for the design, installation, construction or operation of the Project in accordance with Industry Standards and this Contract; or
- (b) described in, required by, reasonably inferable from or incidental to the Statement of Work or the Drawings and Specifications;

<u>provided</u>, that Equipment and Materials shall not include Electrical Interconnection Facilities or Production Inputs.

"Essential Contractor Deliverables" means those Contractor Deliverables, as provided in Exhibit P, the absence or incomplete nature of which after the Substantial Completion Date could adversely and materially affect the continuous efficient, effective or safe operation or reliability of the Project, or any portion thereof, for the delivery of power through the San Juan substation to Owner's customers.

"Excusable Condition" means any of the following:

- (a) Owner Caused Delay; or
- (b) a Change in Law, the direct effect of which is to prevent Contractor from completing a Major Milestone by the scheduled completion date set forth in Exhibit O; or

(c) an Unforeseen Subsurface Site Condition.

"Exhibits" means each Exhibit listed in the table of contents and attached hereto as incorporated herein in its entirety by this reference.

"Final Completion" means satisfaction by Contractor or waiver by Owner of all of the conditions for Final Completion set forth in <u>Section 15.3</u>.

"Final Completion Date" means the date on which Final Completion of the Project occurs.

"Final Completion Expected Date" means the date that is one hundred eighty (180) days after the earlier of the Substantial Completion Date or the Substantial Completion Guaranteed Date, as such date may be modified in accordance with the terms hereof.

"Final Completion Payment" means the Milestone Payment made by Owner to Contractor in connection with Final Completion pursuant to Section 7.2.

"First Fire" means the first time the rotor of a Unit is turned and fuel is ignited in the combustion chamber.

"Force Majeure" means, except as qualified in the proviso below, any act, event or circumstance demonstrably beyond the reasonable control of Owner (in the case of an event of Force Majeure claimed by Owner) or Contractor or any Subcontractor (in the case of an event of Force Majeure claimed by Contractor) and which would not have been avoided had Owner (in the case of an event of Force Majeure claimed by Owner) or Contractor or any Subcontractor (in the case of an event of Force Majeure claimed by Contractor) used reasonable care or acted in compliance with Industry Standards, including, without limitation, the following (to the extent the following satisfy the foregoing requirements of this sentence): (a) acts of God such as droughts, floods, unusually severe weather, and earthquakes; (b) fires, explosions, and accidents; (c) war (declared or undeclared), riots, hostilities, belligerence, revolution, public disorder, insurrection, rebellion, acts of the public enemy, acts of terrorism and sabotage, blockades and embargoes; (d) loss of or damage to Equipment and Materials during transportation, but only if Contractor has otherwise complied with the provisions of Section 4.9; (e) strikes or labor disturbances; (f) expropriation, requisition, confiscation, or nationalization; (g) export or import restrictions by any Governmental Authority; (h) closing or accidents to harbors, docks, canals, or other assistances to or adjuncts of the shipping or transportation industry; (i) rationing or allocation imposed by law, decree, or regulation of any Governmental Authority; (j) volcano, tide, tidal wave, or perils of the sea; (k) epidemic or quarantine; and (l) unreasonable delay or denial of any Applicable Permit by a Governmental Authority after timely application therefor; provided, however that the following events, matters or things shall not constitute an event of Force Majeure:

- (a) the absence of sufficient financial means to perform obligations;
- (b) any labor disturbance, strike or dispute specific to Contractor's workers or personnel or specific to the Project;

- (c) any labor disturbance, strike or dispute specific to any Subcontractor's workers or personnel performing Work at the Site or otherwise specific to the Project;
- (d) mechanical or equipment failures unless caused by an event of Force Majeure;
- (e) failure to timely apply and diligently pursue the application for any Applicable Permit; and
- (f) the unavailability or shortages of labor or Equipment and Materials unless otherwise caused by an event of Force Majeure.

"Functional Guarantees" means those guarantees defined in $\underline{\text{Exhibit I}}$ as Functional Guarantees.

"Functional Guarantee Tests" means those tests defined in <u>Exhibit I</u> to be completed in conjunction with the Performance Tests for evaluating guarantee compliance with the Functional Guarantees.

"Governmental Authorities" means applicable national, federal, state, provincial, tribal and local governments of the United States and all agencies, authorities, departments, instrumentalities, courts, corporations, securities exchange, other authorities lawfully exercising or entitled to exercise any administrative, executive, judicial, legislative, police, regulatory or taxing authority or power, or other subdivisions of any of the foregoing having or claiming a regulatory interest in or jurisdiction over all or any portion of the Site, the Project, the Work or the Parties to this Contract, but for the avoidance of doubt, does not include the Owner.

"Hazardous Materials" means any substance, material, gas, or particulate matter that is regulated by any local Governmental Authority, any applicable state, or the United States of America as an environmental pollutant or dangerous to public health, public welfare, or the natural environment including, without limitation, protection of non-human forms of life, land, water, groundwater, and air, including any material or substance that is (i) defined as "toxic," "polluting," "hazardous waste," "hazardous material," "hazardous substance," "extremely hazardous waste," "solid waste" or "restricted hazardous waste" under any provision of local, state, or federal law; (ii) petroleum, including any fraction, derivative or additive; (iii) asbestos; (iv) polychlorinated biphenyls; (v) radioactive material; (vi) designated as a "hazardous substance" pursuant to the Clean Water Act, 33 U.S.C. § 1251 et seq.; (vii) defined as a "hazardous waste" pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq.; (viii) defined as a "hazardous substance" pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq.; (ix) defined as a "chemical substance" under the Toxic Substances Control Act, 15 U.S.C. § 2601 et seq.; or (x) defined as a "pesticide" under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq.

"Industry Standards or Industry Grade" means those standards of design, engineering, construction, operation, maintenance, workmanship, Equipment and Materials, and components specified in Exhibit A; provided, however, if the relevant standard is not so specified or is ambiguous therein, then "Industry Standard" or "Industry Grade" shall mean the relevant practices, procedures and methods generally applied in or approved by a significant

portion of the electric generation industry of the United States (including utilities and independent power producers) for similar newly constructed power plants that, at any particular time, in the exercise of reasonable judgment in light of the facts which are known or which reasonably could have been known at the time a decision is made, would be expected to accomplish the desired result in a manner consistent with good engineering design practices, Applicable Laws, Applicable Permits, safety, reliability, environmental protection, geographical considerations, economy, expedition, and other standards established for such work. "Industry Standards" or "Industry Grade" are not intended to be limited to the optimum standards, practices, procedures, methods or acts to the exclusion of all others, but rather to be any of the good and proper standards, practices, procedures, methods and acts as described above.

"Intellectual Property Claim" means a claim or legal action for unauthorized disclosure or use of any trade secret, patent, copyright, or trademark protected by Applicable Law arising from Contractor's performance (or that of its Affiliates or Subcontractors) under this Contract that:

- (a) concerns any Equipment and Materials or other items or services, in all cases, that are provided by Contractor, any of its Affiliates, or any Subcontractor under this Contract;
- (b) is based upon or arises out of the performance of the Work by Contractor, any of its Affiliates, or any Subcontractor, including the use of any tools or other implements of construction by Contractor, any of its Affiliates, or any Subcontractor; or
- (c) is based upon or arises out of the design or construction of any item by Contractor under this Contract or the operation of any item according to directions embodied in Contractor's final process design, or any revision thereof, prepared or approved by Contractor.
- "Intellectual Property Rights" means all licenses, trade secrets, copyrights, patents, trademarks, proprietary information and other ownership rights protected by Applicable Law related to the Work or otherwise necessary for the ownership and maintenance of the Project, including, but not limited to, all Project-related documents, models, computer drawings and other electronic expressions, photographs and other expressions.
- "Key Personnel" means the natural persons named and assigned to the identified positions set forth on Exhibit J.
- "Liability Cap" means an amount equal to one hundred percent (100%) of the Contract Price (as the same may increase or decrease from time to time in accordance with the terms of this Contract).
- **"LIBOR"** means the London inter-bank offered rate for one-year United States Dollar deposits, as published in The Financial Times, or other replacement rate agreed to by the Parties.
 - "Lien Indemnitees" has the meaning set forth in Article 30.
- "Limited Notice to Proceed" means a notice signed by an authorized representative of Owner and sent to Contractor pursuant to Section 8.1.2 which authorizes Contractor to perform

the Preliminary Work.

"Limited Release" has the meaning set forth in Section 8.1.2.

"Loss(es)" means any and all liabilities (including but not limited to liabilities arising out of the application of the doctrine of strict liability), obligations, losses, damages, penalties, claims, actions, suits, judgments, costs, expenses and disbursements (including reasonable legal fees and expenses), and whether arising in equity, at common law, or by statute, or under the law of contracts, torts or property, of whatsoever kind and nature, including without limitation claims for property damage, and personal injury (including emotional distress), and whether or not involving damages to the Project or the Site.

"Major Component" means, for each Unit, the LM6000 gas turbine, the generator, the ECM system, and the GSU transformer.

"Major Milestone" means the milestone activities identified in Exhibit O.

"Materials Warranty" means the warranty of Contractor under Section 18.2.

"Maximum Contractor Aggregate Liquidated Damages" means twenty percent (20%) of the Contract Price.

"Mechanical Completion" means satisfaction of the following requirements for each Unit:

- (a) the Unit is mechanically, electrically, and structurally constructed in accordance with the requirements of this Contract, the Statement of Work and Industry Standards, except for Non-Critical Deficiencies;
- (b) the Unit and each sub-system thereof is mechanically, electrically and functionally complete and ready for initial operations, adjustment and testing, except for Non-Critical Deficiencies;
- (c) each of the Construction Tests was successfully completed in the most recently run test; and
 - (d) all initial fills are complete;
 - (e) all relays have been set and ground checks made;
 - (f) all piping has been hydro tested and flushed/cleaned as appropriate;
 - (g) all motor rotational checks are complete;
 - (h) all instrumentation calibrations are complete;
- (i) all electrical circuits have been point-to-point checked to verify correct installation and response to simulated test signals;

- (j) individual and/or integrated balance of plant systems and associated equipment have been tested successfully and verified to comply with support service needs of the Unit; and
- (k) the Unit is ready to support First Fire in accordance with the Scope of Work and ready for start-up and commissioning activities.

Mechanical Completion of sequential Units will require that the above requirements be satisfied for all Equipment and systems required to support full load operation of that Unit as well as simultaneous full load operation of all other Units previously deemed as having satisfied Mechanical Completion.

"Mechanical Completion Date" means the date on which Mechanical Completion actually occurs for each Unit.

"Milestone Payment" means a "Milestone Payment" amount set forth in the Milestone Payment Schedule in respect of a corresponding Project Milestone, as the same may be modified from time to time in connection with a modification in the Contract Price hereunder.

"Milestone Payment Schedule" means the list and schedule of the Milestone Payments and corresponding Project Milestones set forth in Exhibit B.

"Minimum Performance Criteria" means satisfaction of each of the following:

- (a) the most recently run Performance Test was successfully completed;
- (b) during the most recently run Performance Test, each Unit and the Project shall have achieved the Must Meet Performance Guarantees (other than PM10 and VOC emissions which shall be tested pursuant to Exhibit I); and
- (c) during the most recently run Performance Test, each Unit shall have achieved at least ninety-seven percent (97%) of the Net Electrical Output Guarantee and not more than one hundred three percent (103%) of the Net Heat Rate Guarantee.
- "Monthly Progress Report" means a written monthly progress report prepared by Contractor in form and content generally in accordance with Exhibit L.
- "Must Meet Performance Guarantees" means the Emissions Guarantees, Noise Performance Guarantees, Functional Guarantees and Facility Reliability Guarantees identified in Exhibit I.
- "Net Electrical Output Guarantee" means that guarantee for the Net Electrical Output for each Unit which shall not be less than 38,441 kilowatts on a corrected basis, when corrected in accordance with the correction methodology of the American Society of Mechanical Engineers, and when corrected to the Reference Conditions identified in Exhibit I.
- "Net Heat Rate Guarantee" means that guarantee for Net Heat Rate for each Unit which shall not be higher than 9,833 Btu/kilowatt-hour (higher heating value) on a corrected

basis, when corrected in accordance with the correction methodology of the American Society of Mechanical Engineers, and when corrected to the Reference Conditions identified in Exhibit I.

"Net Electrical Output" means the electrical output for each Unit expressed in kilowatts measured at the high-side bushing of the GSU transformer including all operating auxiliary loads and losses.

"Net Heat Rate" means the natural gas energy expressed in Btu/kWh based on the higher heating value input at the Unit gas meter divided by the Net Electrical Output for each Unit.

"NMPRC" means the New Mexico Public Regulation Commission or any successor agency having jurisdiction over Owner and the Project.

"NMPRC Approval" has the meaning set forth in Section 34.2(b).

"Non-Critical Deficiencies" means Each item of Work that Owner, the Engineer, or Contractor identifies as requiring completion or containing Defects; provided that such completion or Defects:

- (a) are not material to the safe operation of the Project for the delivery of power through Owner's transmission system to Owner's customers;
- (b) do not impair the operability, safety or mechanical or electrical integrity of the Project; and
- (c) would not reasonably be expected to cost more than One Million Dollars (\$1,000,000) in the aggregate to complete or remedy.

"Non-Essential Contractor Deliverables" means all Contractor Deliverables other than the Essential Contractor Deliverables.

"Notice of Final Completion" means a Notice from Contractor to Owner in accordance with Section 15.3 certifying that Contractor believes the Project has satisfied the requirements for Final Completion.

"Notice of Mechanical Completion" means a Notice from Contractor to Owner in accordance with Section 14.3(a) certifying that Contractor believes that a Unit or the Project has satisfied the requirements for Mechanical Completion.

"Notice of Substantial Completion" means a Notice from Contractor to Owner in accordance with <u>Section 15.2</u> certifying that Contractor believes the Project has satisfied the requirements for Substantial Completion.

"Notice" or "notice" means a written communication between the Parties required or permitted by this Contract and conforming to the requirements of <u>Article 31</u>.

"Notice to Proceed" or "NTP" means the notice given from Owner to Contractor

directing Contractor to commence performance of the entire Work.

- "Operating Consumables" means consumable items, such as lubricants, calibration gases, chemicals, filters, lamps, light bulbs, and other consumable equipment and materials, necessary for the operation and maintenance of the Project (excluding Production Inputs).
- "Operating Personnel" means individuals employed by or acting at the request of Owner in connection with the operation of the Project from time to time.
- "Outstanding Balance" means the aggregate unpaid amount of the Contract Price, calculated at any given time.
- "Owner" means Public Service Company of New Mexico ("PNM"), a New Mexico corporation, and its successors and permitted assigns.
- "Owner Acquired Permits" means all Applicable Permits necessary for the ownership, operation and maintenance of the Project, including those permits listed as Owner Acquired Permits in Exhibit C.
- "Owner Caused Delay" means a delay in Contractor's performance of any Critical Path Item to the extent actually and demonstrably caused by any of the following:
 - (a) material breach of this Contract by Owner;
- (b) any unreasonable active interference by Owner with Contractor's performance of the Work;
- (c) Owner's failure to cause the Electrical Interconnection Facilities to be substantially complete and ready for interconnection at least forty-five (45) days before the First Fire of the first Unit or failure to timely provide any Production Inputs as required under the Contract;
- (d) Owner's failure to remove or remediate Hazardous Materials at the Site for which Owner is responsible hereunder or under Applicable Law;
- (e) Owner's failure to obtain any Owner Acquired Permit (1) in final form by the applicable milestone or milestone date specified in Exhibit C or (2) in full force and effect on or prior to the date on which it is required, under this Contract and Applicable Law, to be in full force and effect, so as to permit Contractor to perform its obligations under this Contract;
- (f) an act or omission of Operating Personnel that is negligent or reckless or constitutes willful misconduct of the Operating Personnel;
- (g) Owner's removal of an approved Subcontractor or Vendor from the Work after such approved Subcontractor or Vendor has started performing its obligations pursuant to an executed contract with Contractor (excluding removal by Owner for a Subcontractor or Vendor's negligence or for a material violation by such approved Subcontractor or Vendor of

Owner's safety or environmental rules or procedures);

- (h) Owner's failure to timely comply with any of its obligations under Sections 3.2, 3.4 and 3.5;
- (i) Owner's failure to provide natural gas or electrical backfeed to the Site by the applicable date set forth in Exhibit O; and
- (j) Owner's failure to timely comply with any of its obligations under Sections 12.3, 12.4 or 12.5.
 - "Owner Directive" has the meaning set forth in Section 17.5.
 - "Owner Event of Default" has the meaning set forth in Section 20.4.
 - "Owner Indemnitee" has the meaning set forth in Section 25.1.
- "Owner's Separate Contractors" means each contractor or other Person that is in direct or indirect contractual privity with Owner and that performs any work in respect of the Project excluding Contractor and each person in direct or indirect contractual privity with Contractor, including in such exclusion each Subcontractor, and Owner's Separate Contracts has a like meaning.
- "PNM Grid" means all property and other assets other than the Project, now or hereafter existing, which are owned by the Public Service Company of New Mexico and under the operational control of Owner, and used for or directly associated with the transmission of electric power, including all additions, extensions, expansions, and improvements thereto.
- "Performance Bond" means a performance and payment bond provided by Contractor to Owner under the terms of Section 4.24 in the form of Exhibit M and issued by an Eligible Issuer.
- "Performance Guarantees" means the Must Meet Performance Guarantees, the Net Electrical Output Guarantee, and the Net Heat Rate Guarantee.
- "Performance Tests" means the tests for measuring the Net Electrical Output and Net Heat Rate of each Unit at full load, the Minimum Performance Criteria, and other parameters as described in Exhibit I.
- "Performance Tests Procedures" means the written test procedures, standards, protective settings, and the testing program produced by Contractor and agreed to by Owner for the Performance Tests as set forth in Exhibit I.
- "Permit Requirement" means any requirements or conditions on or with respect to the issuance, maintenance, renewal or transfer of any Applicable Permit or any application therefor.
- "Person" means any individual, corporation, company, voluntary association, partnership, incorporated organization, trust, limited liability company, or any other entity or

organization, including any Governmental Authority.

- "Point of Interconnection" means the San Juan substation.
- "Post Test Modifications" has the meaning set forth in Section 14.7.
- "Preliminary Work" has the meaning set forth in <u>Section 8.1.2</u>.
- "Production Inputs" means potable water for operation (but not hydros or flushing), natural gas, and back feed power for the start-up, testing and operation of the Project, as referenced in Exhibit A to the extent Exhibit A specifies that Owner is responsible for providing such item.
- "Project" means the complete six (6) Unit LM6000 natural gas power generation facility project and Project Substation to be designed, procured, constructed, tested and commissioned under this Contract, together with all ancillary equipment and subsystems, all equipment, supplies and materials necessary to produce electric energy (including the Equipment and Materials), together with all supporting improvements and interconnections (whether inside or outside the Project limits) to be furnished by Contractor, as generally described in, and including all items described, in or inferable from, this Contract and Exhibit A.
- "Project Guaranteed Dates" means the Project Mechanical Completion Guaranteed Date, Substantial Completion Guaranteed Date, the Substantial Completion Deadline Date and the Final Completion Expected Date.
- "Project Manager" means the Project Manager designated by Contractor and approved by Owner pursuant to Section 11.6.
- "Project Mechanical Completion Date" means the date on which Mechanical Completion actually occurs for the last Unit. This shall require that all Units and supporting common systems have achieved Mechanical Completion.
- "Project Mechanical Completion Guaranteed Date" means March 15, 2022, as such date may be modified in accordance with the terms hereof.
- "Project Milestone" means one of the discrete divisions of the Work identified as a "Milestone" in the Milestone Payment Schedule.
- "Project Representative" means the Project Representative designated by Owner pursuant to Section 3.1.
- "Project Schedule" means a project schedule prepared by Contractor and approved by Owner pursuant to Section 8.4 describing the time of completion by Contractor of the Critical Path Items and completion of the Work by Contractor, as such schedule may be modified in accordance with Section 8.4.
- "Project Substation" means those protection devices, substation, metering, dead end termination structure with hand operated disconnect (HOD) switch and other facilities

(including, without limitation, protective relays, cables, radio lines and all appurtenant electrical interconnection facilities and all equipment and hardware downstream of the high voltage side of the step-up transformers) that are required to permit an electrical interface to be established between the Project and the Energy Delivery Point, as further detailed in <u>Exhibit A</u>. The construction and installation of the Project Substation is included in the Contract Price and is a part of the Work to be performed by Contractor.

"Punchlist" means a schedule of Non-Critical Deficiencies developed pursuant to Section 15.1.2.

"Reference Conditions" means the ambient and operating conditions to which the Net Electrical Output Guarantee and Net Heat Rate Guarantee Performance Test results will be corrected as further defined in Exhibit I.

"Regulatory End Date" has the meaning set forth in Section 34.2(e).

"Remedial Plan" means a plan of Corrective Action, submitted by Contractor pursuant to Section 8.5 or Section 14.4.2 that:

- (a) if delivered prior to initial Acceptance Testing, specifies in reasonable detail the actions (including acceleration of the Work, for example, by using additional shifts, overtime, additional crews or resequencing of the Work, as applicable) the Contractor will take so that Substantial Completion may be achieved no later than the Substantial Completion Guaranteed Date (or the Substantial Completion Deadline Date if the Substantial Completion Guaranteed Date has passed at the time of submission of the Remedial Plan). For the avoidance of doubt, Contractor shall cause the Remedial Plan to be prepared so that, if the Remedial Plan is followed, it will be reasonably likely that Substantial Completion will occur by the Substantial Completion Guaranteed Date (or the Substantial Completion Deadline Date if the Substantial Completion Guaranteed Date has passed at the time of submission of the Remedial Plan).
 - (b) if delivered after initial Acceptance Testing:
- (i) specifies in reasonable detail the actions Contractor proposes to undertake to cause each Unit and the Project to satisfy the Performance Guarantees; and
- (ii) specifies in reasonable detail the period of time during which Contractor proposes to undertake such actions (including any time required to re-run any applicable Acceptance Test), which period of time shall neither: (A) end after the Substantial Completion Guaranteed Date (or the Substantial Completion Deadline Date if the Substantial Completion Guaranteed Date has passed at the time of submission of the Remedial Plan); nor (B) exceed thirty (30) days after Contractor delivers such plan to Owner (or such longer period not to exceed sixty (60) days if the Corrective Action is not reasonably capable of being completed within such thirty (30) days, which period, including the sixty (60) day limitation, shall be extended by the period of time, if any, that Contractor is actually and demonstrably delayed in the performance of such Remedial Plan only to the extent of an Excusable Condition or Force Majeure); and
 - (iii) demonstrates that completing such Corrective Action is reasonably

likely to cause each Unit and the Project to satisfy the Performance Guarantees by root cause analysis of deficiencies identified by previous testing.

"Representatives" means the officers, directors, members, employees, legal counsel, accountants, lenders, potential lenders or equity participants, advisors, or ratings agencies and other agents or representatives of a Party or of its Affiliates and in the case of Owner, includes Owner's Separate Contractors, and in the case of Contractor, includes its Subcontractors.

"Requested Actions" has the meaning set forth in Section 34.2.

"Required Manuals" means all operating data and manuals, spare parts manuals, integrated and coordinated operation and maintenance manuals and instructions, and training aids, whether created by Contractor or any Subcontractor or Vendor which are reasonably necessary to safely and efficiently commission, test, start up, operate, maintain and shut down the Project.

"Schedule Recovery Plan" means a plan of Corrective Action submitted by Contractor pursuant to Section 8.4.2 that sets forth, in reasonable detail, the actions (including but not limited to acceleration of the Work, for example, by using additional shifts, overtime, additional crews or resequencing of the Work, as applicable) Contractor will take so that the milestone identified by Owner may be achieved no later than the scheduled completion date set forth in Exhibit O. For the avoidance of doubt, Contractor shall cause the Schedule Recovery Plan to be prepared so that, if the Schedule Recovery Plan is followed, it will be reasonably likely that the milestone will be achieved by the scheduled completion date set forth in Exhibit O.

"Scheduling Coordinator" means an entity identified by PNM as a "Scheduling Coordinator."

"Site" means the location of the Work described in Exhibit A.

"Site Conditions" means the physical and other conditions at the Site and the surrounding area as a whole, including conditions relating to the environment, transportation, access, waste disposal, handling and storage of materials, the availability and quality of electric power, the availability and quality of water, the availability and quality of roads, the availability and quality of labor personnel, and local work and labor rules in effect as of the Effective Date, climatic conditions and seasons, topography, air, and water quality conditions, potable water conditions, ground surface conditions, surface soil conditions, sound attenuation, subsurface geology, general nature and quantity of surface and subsurface materials to be encountered, the geological and general subsurface conditions of the Site, all other local and other conditions which may be material to Contractor's performance of its obligations under this Contract, and the location of underground utilities, equipment and facilities needed before and during performance of Contractor's obligations under this Contract.

"Statement of Work" means the requirements regarding the Work set forth in this Contract or in Exhibit A.

"Subcontractor" means any Person, including any Vendor, other than Contractor, or Owner, that performs any portion of the Work (including any subcontractor of any tier) in

furtherance of Contractor's obligations under this Contract, and "Subcontract" has a like meaning.

"Substantial Completion" means satisfaction or waiver of all of the conditions set forth in Section 15.2.

"Substantial Completion Date" means the date on which Substantial Completion actually occurs.

"Substantial Completion Deadline Date" means the date that is one hundred fifty (150) days after the Substantial Completion Guaranteed Date, as such date may be modified in accordance with the terms hereof.

"Substantial Completion Guaranteed Date" means the date that is Seventy-Seven (77) days after the Project Mechanical Completion Guaranteed Date, as such date may be modified in accordance with the terms hereof.

"Substantial Completion Delay Liquidated Damages" has the meaning set forth in Section 16.1.

"Supplier" means any Person who will supply Production Inputs to the Project.

"Suspensions for Cause" means any suspension under <u>Article 22</u> by Owner as a result of:

- (a) A Contractor Event of Default;
- (b) A Contractor Inchoate Default if such Contractor Inchoate Default creates imminent danger to persons or property; provided, however that such suspension shall not prevent Contractor from curing such Contractor Inchoate Default during the applicable cure period associated with the Contractor Event of Default that would result if such Contractor Inchoate Default were not cured; or
 - (c) Contractor's gross negligence or willful misconduct.

"Temporary Work" means supplies or services required for the performance of the Work but which do not form a permanent part of the completed Work, including without limitation, all temporary structures and other facilities required for the proper and safe performance and completion of the Work or that Contractor must provide for the use of Contractor or other parties, and that do not form part of the Work, including but not limited to office trailers, hoarding, fences, covered ways, temporary footways and stairs, protection for workers such as guardrails, fences, notices, temporary lights, power, water, steam, and other consumables, utilities and services, erection structures and equipment including any shoring, falsework, forming materials, scaffolding, temporary stairs, staging, and all sanitary, safety, and first aid and fire prevention facilities of a temporary nature.

"Termination Value" means the documented and aggregate value of all Work completed prior to the date of termination of this Contract (including in respect of partially completed

Milestones).

"Unconditional Waiver and Release Upon Final Payment" means a written statement, the current form of which is attached hereto as to Exhibit F-4, containing a waiver and release of liens pursuant to which a Person unconditionally waives and releases all Contractor Liens, stop notices and bond rights with respect to all Work.

"Unconditional Waiver and Release Upon Progress Payment" means a written statement, the current form of which is attached hereto as to Exhibit F-2, containing a waiver and release of liens pursuant to which a Person unconditionally waives and releases all Contractor Liens, stop notices and bond rights with respect to all Work for which Contractor requested payment in the Contractor's Invoice that immediately preceded the current Contractor's Invoice.

"Unforeseen Subsurface Site Condition" has the meaning set forth in Section 13.3.

"Unit" means a single generating unit, together with its associated balance of plant accessories and equipment.

"U.S. Customary System" means the primary system of weights and measures (other than the metric system) used in the United States today, which system was inherited from, but is now different from, the British Imperial System of weights and measures.

"Vendor(s)" means persons, other than the Owner, that supply Equipment and Materials to Contractor or any Subcontractor in connection with the performance of the Work.

"Warranty Period" means the twenty-four (24) month period commencing on the Substantial Completion Date with respect to the Work and, in each case, as deemed extended with respect to any given item of Equipment and Materials, as specified in <u>Section 18.3</u>.

"Warranty Bond Amount" means ten percent (10%) of the Contract Price.

"Water" means potable which meets the quality, flow rate and related specifications necessary to complete the Work.

"Work" means all obligations, duties, and responsibilities assigned to or undertaken by Contractor under this Contract with respect to the Project, including all engineering, design and construction of the Project (including the Preliminary Work), all procurement and provision of Equipment and Materials, all erection and installation of Equipment and Materials, and all training, start-up (including calibration, inspection, and start-up operation), and testing included in or required for the Project (including coordinated testing of the Project with the Vendors), all as generally described in, and including all items and services described in or reasonably inferable from, Exhibit A. Where this Contract describes a portion of the Work in general, but not in complete detail, the Parties acknowledge and agree that the Work includes any work required: (a) for the design or construction of the Project in accordance with Industry Standards; or (b) for the Project to be capable of being operated in accordance with Industry Standards. Notwithstanding the foregoing, Work shall not include Electrical Interconnection Facilities or Production Inputs.

"Work Warranties" means the warranties of Contractor under Section 18.1.

- 1.2 Rules of Interpretation.
 - (a) The masculine shall include the feminine and neuter.
- (b) References to "Articles," "Sections," "Exhibits" or "Schedules" shall be to articles, sections, exhibits, or schedules of this Contract unless otherwise stated.
- (c) The Exhibits and Schedules attached hereto are incorporated in and are intended to be a part of this Contract; provided, that in the event of a conflict between the terms of any Exhibit or Schedule and the terms of this Contract, the terms of this Contract shall take precedence.
- (d) This Contract was negotiated and prepared by both Parties with the advice and participation of counsel. The Parties have agreed to the wording of this Contract and none of the provisions hereof shall be construed against one Party on the ground that such Party is the author of this Contract or any part hereof.
- (e) The Parties shall act reasonably and in accordance with the principles of good faith and fair dealing in the performance of this Contract. Unless expressly provided otherwise in this Contract, (i) where the Contract requires the consent, approval, or similar action by a Party, such consent, approval or similar action shall not be unreasonably withheld, conditioned or delayed, and (ii) wherever the Contract gives a Party a right to determine, require, specify or take similar action with respect to a matter, such determination, requirement, specification or similar action shall be reasonable.
- (f) Use of the words "include" or "including" or similar words shall be interpreted as "including but not limited to" or "including, without limitation."
- (g) Use of the words "tax" or "taxes" shall be interpreted to include taxes, fees, surcharges, and the like.

2. AGREEMENT, EXHIBITS AND CONFLICTS

- 2.1 <u>Exhibits</u>. This Contract includes the Exhibits and any schedules annexed hereto, as the same may be amended from time to time. Any reference in this Contract to an "Exhibit" by letter designation or title shall mean one of the Exhibits identified in the table of contents and such reference shall indicate such Exhibit herein.
- 2.2 <u>Terms; References</u>. Terms defined in a given number, tense, or form shall have the corresponding meaning when used in this Contract with initial capitals in another number, tense, or form. Except as otherwise expressly noted, reference to specific Articles, Sections, Subsections, and Exhibits are references to such provisions of or attachments to this Contract. References containing terms such as "hereof," "herein," "hereto," "hereinafter," and other terms of like import are not limited in applicability to the specific provision within which such

references are set forth but instead refer to this Contract taken as a whole. "Includes" or "including" shall not be deemed limited by the specific enumeration of items, but shall be deemed without limitation. The term "or" is not exclusive. Reference to a Governmental Authority shall include an entity succeeding to its functions. All documents required to be provided under this Contract shall be in English.

- 2.3 <u>Conflicts in Documentation</u>. In the event of any conflict in interpretation or inconsistencies in the Contract documents, the following precedence of interpretation shall prevail: (a) any mutually agreed Change in Work or other Contract amendment duly authorized and executed by both Parties in accordance herewith, solely with regard to the subject matter of any such Change in Work or Contract amendment; (b) <u>Articles 1</u> through <u>35</u> of this Contract, as the same may be amended from time to time; (c) <u>Exhibit A</u>; (d) <u>Exhibits B</u> and <u>N</u>; (e) the remaining Exhibits, which Exhibits shall be read to be consistent and complementary to the greatest extent possible.
- 2.4 <u>Documentation Format</u>. This Contract and all documentation to be supplied hereunder shall be in the English language and all units of measurement in the design process, specifications, drawings and other documents shall be specified in U.S. Customary System dimensions.

3. RESPONSIBILITIES OF OWNER

Owner shall, at Owner's cost and expense:

- 3.1 <u>Project Representative</u>. Designate (by a Notice delivered to Contractor) a Project Representative, who shall act as a single point of contact for Contractor with respect to the prosecution of the Work (but who shall not be authorized to execute or make any amendments to, or provide waivers under, this Contract, except that such Project Representative shall be authorized to execute Change in Work Forms under <u>Article 17</u>). Until delivery of Notice to Contractor of a new Project Representative, the Project Representative for Owner shall be Kevin Mataczynski.
- 3.2 <u>Operating Personnel</u>. No later than thirty (30) days prior to the anticipated Mechanical Completion Date for the first Unit (as determined by Owner in consultation with Contractor based on the circumstances existing at the time of determination), Owner shall provide Operating Personnel:
- (a) for training by Contractor as provided pursuant to Section 4.17; and
- (b) to provide ordinary operating and maintenance support to Contractor for testing, start-up and commissioning of the Project.

Until Substantial Completion, the Operating Personnel made available pursuant to this Section 3.2 shall (x) provide normal operating and maintenance support (including during the Construction Tests) under the management, supervision, and direction of Contractor, but shall

not be required to provide any services that would not be required for normal operation of the Project; and (y) during the Acceptance Tests, shall operate the Project, in each case (x) and (y) under the supervision and control of Contractor. The number of Operating Personnel to be provided by Owner during such periods shall be the amount reasonably determined by Owner as necessary to support the above tasks. Notwithstanding the foregoing:

- (i) such Operating Personnel shall not be deemed employees or Subcontractors of Contractor;
- (ii) Contractor shall not direct or otherwise permit the Operating Personnel to undertake any unusual or extraordinary operating or maintenance activities for the purposes of successfully completing any Acceptance Test; and
- (iii) Contractor shall remain solely responsible for performing the Work in accordance with this Contract, including Contractor's obligation to achieve Substantial Completion and Final Completion by the applicable Project Guaranteed Dates in accordance with the terms of this Contract.
 - 3.3 <u>Ministerial Assistance</u>; <u>Project Information and Documents</u>; <u>Approvals</u>. Execute applications required to be signed by Owner and provide assistance (to be provided at no cost to Contractor) as Contractor may reasonably request in connection with obtaining any Contractor Acquired Permit. Keep Contractor informed of progress regarding the anticipated NTP effective date, and all technical aspects relating to transmission interconnection, and the fuel supply agreement. Provide all approvals of Contractor Deliverables within the time periods specified pursuant to <u>Section 12.4</u>, provided such Contractor Deliverables are timely submitted to Owner by Contractor.
 - 3.4 Owner Acquired Permits. Obtain, with Contractor's assistance (to be provided at no additional cost to Owner), and pay for all Owner Acquired Permits. Owner will obtain all Owner Acquired Permits in final form by the applicable milestones or milestone dates specified in Exhibit C.
 - 3.5 Access to Site. Subject to Sections 4.9 and 4.15, make the Site, including a suitable staging area, laydown area and an area for site groundwater discharge containment, all of which will be shown on Exhibit A, Appendix 1, available to Contractor and assure reasonable right of ingress and egress to and from the Site for Contractor to perform site testing work as may reasonably be necessary in connection with preparation for or performance of the Work. Following Owner's issuance of the Notice to Proceed, and subject to Sections 4.9 and 4.15 and consistent with the terms of the Applicable Permits, make the Site available to Contractor and assure reasonable rights of ingress and egress to and from the Site for Contractor for performance of the Work, including, without limitation, sufficient rights of ingress and egress to and from the Site for heavy equipment; provided, however, that Contractor shall coordinate with Owner regarding initial entry onto the Site or any part thereof and contact with the persons who own

property on or near, or have granted license or easement rights in and to, the Site.

- 3.6 <u>Production Inputs</u>. Provide the Production Inputs as more fully set forth in <u>Exhibit A</u>. Notwithstanding anything in this Contract to the contrary, Contractor's sole remedy for the failure of Owner to provide or cause to be provided any of the Production Inputs in accordance with the terms of this Contract is the relief granted in <u>Section 9.4.2</u>. Without limiting the terms of this Contract, any such failure shall not be considered a breach of any covenant, condition, representation or warranty of Owner, and shall not be construed as an Owner Event of Default.
- 3.7 <u>Electrical Interconnection Facilities</u>. Cause to be provided the Electrical Interconnection Facilities as specified in <u>Exhibit A</u>. Owner shall be responsible for coordinating and contracting for all metering and interconnection requirements necessary to connect the Project to the Point of Interconnection.
- 3.8 <u>Cooperation with Owner's Separate Contractors</u>. Cause Owner's Separate Contractors to cooperate with Contractor and the Subcontractors who may be working at or near the Site in order to assure that neither Owner nor any of Owner's Separate Contractors unreasonably hinders or increases the work being performed by Contractor and the Subcontractors.
- 3.9 <u>Scheduling Coordinator</u>. Owner, as owner of the Project, shall take all necessary actions and enter into all arrangements and agreements required to deliver power produced by the Project (as a generating facility) to the Point of Interconnection in the balancing area. Owner shall also become the Scheduling Coordinator for the Project in order to schedule energy deliveries for testing, start-up and commissioning of the Project; provided, however, that Contractor shall provide thirty (30) Days advance written notice to Owner as to when Owner's obligations as Scheduling Coordinator are expected to commence.

4. RESPONSIBILITIES OF CONTRACTOR.

In order for Contractor to complete the Work, Contractor shall:

- 4.1 <u>General Obligations</u>. Contractor shall perform, furnish, be responsible for, and pay the cost of, all of the Work, including all services, labor, Equipment and Materials (excluding the Production Inputs, and the Electrical Interconnection Facilities) and supervision necessary to provide an operable Project in accordance with the provisions of this Contract.
- 4.2 <u>Performance of Work.</u> Perform and complete all of the Work, and cause each Subcontractor to perform and complete each such Subcontractor's respective work in accordance with the terms of the Contract and in compliance with Industry Standards, Applicable Laws and Applicable Permits.
- 4.3 <u>Design and Construction of Project</u>. Engineer, design and construct the Project so that it is capable of operation, at the design levels specified in this

Contract and the Statement of Work, and in compliance with Industry Standards, Applicable Laws and Applicable Permits. Contractor shall provide all necessary engineering and design services necessary to set forth in detail the specifications, drawings and requirements for the procurement of Equipment and Materials and for the construction and installation of the entire Project in a manner which satisfies the requirements of this Contract. Contractor shall preserve all permanent survey construction monuments and benchmarks during its performance of the Work.

- 4.4 <u>Temporary Facilities and Utilities</u>. Provide all temporary communication facilities, Water, electricity and sanitary utilities to be used by Contractor and Subcontractors and their respective employees through Substantial Completion as specified in the Statement of Work. Electricity, telephone, data lines and sanitary services for the trailers shall be provided by the Contractor. All office furniture and office equipment for the trailers shall be provided by Contractor. Contractor is responsible for providing all necessary parking to support construction vehicles, Owner and Vendor vehicles and Project worker vehicles.
- 4.5 <u>Organization</u>. Maintain a qualified and competent organization at the Site with adequate capacity and numbers of construction and start-up personnel, equipment, and facilities to execute the Work in a safe, efficient, environmentally sound, and professional manner at a rate of progress in accordance with the Project Schedule.
- 4.6 <u>Permits Acquired by Contractor</u>. Obtain all Contractor Acquired Permits so that the Project can be designed, constructed, owned, operated, and maintained at the design levels specified in this Contract and the Statement of Work and in compliance with Industry Standards, Applicable Laws and the schedules set forth in this Contract.
- 4.7 <u>Maintenance of Site</u>. Maintain the Site clear of debris, waste material, and rubbish. Contractor shall dispose of such debris, waste material, and rubbish in accordance with Applicable Law.
- 4.8 <u>Price Allocation Schedule</u>. No later than sixty (60) Days prior to the anticipated achievement of Substantial Completion, provide a price allocation schedule for the Work and other information reasonably necessary for Owner to maintain segregated accounts for its tax records and fixed asset records (including any FERC accounting requirements). Contractor shall provide an updated price allocation schedule for the Project prior to Final Completion.
- 4.9 <u>Safeguards</u>. Comply with the requirements of <u>Exhibit A</u> and provide, and cause its Subcontractors (as applicable) and Vendors (as applicable) to provide, all necessary and adequate safeguards at the Site for the protection of the Work, the Project, the Vendors and their personnel, other work installed by Owner and all other persons and other property (including existing structures) located on the Site including that owned by Contractor, Owner, and others connected to the

Work, including an unmanned security fence pursuant to a safety and security assurance program reasonably acceptable to Owner, or otherwise reasonably required to prevent physical loss and damage including vandalism, theft, malicious mischief, and danger to the Project or personnel. Within thirty (30) days after the Notice to Proceed Date, Contractor shall provide a Notice to Owner describing the safety and security assurance program to be used by Contractor in the performance of the Work. Owner shall have the right to promptly review and comment on such program as described in such Notice from Contractor; provided, however, that Contractor shall remain solely responsible for performing such Work in accordance with this Contract. If Owner provides any comments with respect to such safety and security assurance program to Contractor, then Contractor shall incorporate changes into the safety and security assurance program addressing such comments, and resubmit the safety and security assurance program to Owner. Such resubmission of the safety and security assurance program shall not be considered a Change in Work. Contractor shall perform the Work in accordance with the approved safety and security assurance program. Contractor shall promptly provide Owner with:

- (a) written accident reports for lost time accidents that occur at the Site prepared in accordance with the safety and security assurance program approved by Owner pursuant to this Section 4.9; and
- (b) copies of all written communications with Governmental Authorities and insurance companies (including any notices) with respect to accidents that occur at the Site, and thereafter provide such written reports relating thereto as Owner may reasonably request.

Owner shall provide site-specific training information for Contractor to incorporate into its safety and security assurance program. Contractor and its Subcontractors shall abide by Owner's security procedures, rules and regulations and properly display identification badges at all times while on Owner's premises. In addition, Contractor and its Subcontractors shall comply with reasonable health and safety requirements established from time to time by Owner at the Site.

- 4.10 Expediting. Arrange for complete handling of all Equipment and Materials to the extent required under Article 32, and construction equipment, including inspection, expediting, shipping, loading, unloading, customs clearance, receiving, storage, and claims. All Equipment and Materials and, to the extent required by Article 32, shall be stored and maintained in storage in accordance with the applicable manufacturer's recommendations. Contractor shall be responsible for loading and customs clearance of Equipment at any of the Vendor facilities and shipping it to the Site.
- 4.11 <u>Temporary Work.</u> Provide all Temporary Work, supplies, construction utilities and facilities, special tools, consumable materials, fuels (except for the Production Inputs) and commissioning supplies reasonably necessary or appropriate for the construction, start-up, testing, commissioning, and operation and maintenance of the Project until achievement of Substantial Completion. By delivery of a Notice to Owner prior to the disposition of any surplus construction materials, or supplies remaining on the Site on the Substantial Completion Date

(other than materials and supplies necessary to achieve Final Completion), Contractor shall give Owner the option to purchase each such item at a price not exceeding Contractor's cost therefor, less the reduction in the reasonable value of such item as a result of Contractor's use of such item. Owner shall exercise such right, if it so elects, within thirty (30) days after receipt of such Notice.

- 4.12 Operating Consumables. (a) Provide all Operating Consumables necessary or appropriate for the construction, start-up, testing, commissioning, operation or maintenance of the Project until Contractor achieves Substantial Completion; (b) at Substantial Completion, replace any inventory of Operating Consumables used by Contractor; and (c) provide to Owner, at least ninety (90) days prior to the Substantial Completion Date, a detailed list of potential suppliers of all Operating Consumables.
- 4.13 Applicable Laws/Permits. Upon request from time to time by Owner, promptly provide all technical support and information, and other reasonably requested information, to enable Owner to apply for and obtain Owner Acquired Permits. Comply in all respects with all Applicable Laws and Applicable Permits relating to the Project, the Site, and the performance of the Work, and perform the Work so that, upon Substantial Completion, the Project shall meet, and will be capable of being operated in compliance with, all requirements of Applicable Laws and Applicable Permits and using methods and Equipment and Materials that satisfy Industry Standards.
- 4.14 <u>Quality Assurance Meetings</u>. To supplement Monthly Progress Reports, allow Owner and the Engineer to participate in construction status meetings. Contractor shall have such meetings no less than one per week with its Subcontractors.
- 4.15 Access. Use only the entrance(s) to the Site specified by Owner for ingress and egress of all personnel, Equipment and Materials and vehicles. Contractor shall perform the Work consistent and in accordance with Owner's ownership, license and easement rights in and to the Site that are disclosed to Contractor in writing by Owner. Contractor shall observe access routes, entrance gates or doors, parking and temporary storage areas as designated by Owner. Under no circumstances shall Contractor's or its Subcontractors' personnel cause their respective vehicles or equipment to enter, be moved, handled, maintained or stored upon any area not authorized by Owner.
- 4.16 <u>Data; Drawings</u>. Provide all operating data and preliminary, construction and final as-built drawings necessary to safely and efficiently start up, test, operate, shut down, and maintain the Project (including those set forth in <u>Exhibit A</u>). Contractor shall furnish or cause its Subcontractors to furnish, the services of all personnel, including supervisors, engineers, designers and draftsmen necessary for the preparation of all Contractor Deliverables. The design services shall include all architectural, civil, structural, mechanical, electrical, instrumentation and control work. All Contractor Deliverables shall be

prepared in a form and level of completion necessary to operate the Project in accordance with Applicable Laws, Industry Standards and in accordance with the provisions of this Contract. Contractor shall accurately prepare "as-built" drawings of the Project and deliver to Owner such as-built drawings no later than ninety (90) days after Substantial Completion, which as-built drawings shall be in form and substance usual and customary for such documents. Such "as-built" drawings shall show the location of the Project and shall show all related easements, improvements, utilities and rights-of-way above and below ground, on and off the Site, as of the date of delivery of such documents. Such "as-built" drawings shall also show the dimensions and the distances to the nearest benchmarks. All drawings provided to Owner pursuant to this Contract shall be provided in hard-copy "Size E," AutoCAD, and "Adobe pdf" formats. Contractor hereby assigns to Owner without reservation, all Intellectual Property Rights that are prepared specifically for Owner or in connection with the Work and required to be delivered to Owner pursuant to the terms of this Contract, including all Contractor shall, prior to directing any Drawings and Specifications. Subcontractor to produce any design or engineering work in connection with the Project, obtain a valid written assignment of any necessary Intellectual Property Rights from such Subcontractor in terms substantially similar to those that obligate Contractor to Owner as expressed in this Section 4.16, which Intellectual Property Rights Contractor hereby assigns to Owner. In order to facilitate observations and inspections, Contractor shall maintain at the Site in a safe place one working copy of all Project Schedules, drawings, specifications, addenda, executed Changes in Work, graphic or written instructions, interpretations and clarifications, and all other documents related to the Work, in good order and marked currently to record all changes made during construction, together with blueprints, general arrangements, manufacturing and shop drawings, product data and samples, and copies of all electrical plumbing and public safety codes applicable to the Work. Such documents shall be available to Owner (and the Engineer) for such parties' reference, copying and use.

4.17 Training of Operating Personnel.

4.17.1 <u>Design and Review of Training Program</u>. Contractor shall design, and prepare a written narrative description of, the training program (in accordance with the provisions of <u>Exhibit A</u>) and the proposed written materials to be used in the training program, including coordination of training to be provided by Vendors. Contractor shall submit such description to Owner by no later than the date that is ninety (90) days before the anticipated Mechanical Completion Date of the first Unit (as determined by Owner based on the circumstances existing at the time of determination). Owner will review, comment on, and approve or disapprove such program in writing within thirty (30) days after such submission by Contractor. If Owner conditions its approval on reasonable changes in the program submitted by Contractor, then Contractor will effect such changes at no additional cost to Owner and resubmit the program to Owner within ten (10) days after Contractor receives Owner's conditional approval. If Owner fails to respond within the period specified above, Owner shall be deemed to have approved the program submitted by

Contractor.

- 4.17.2 Commencement of Training. Not later than the date that is one hundred twenty (120) days following the Notice to Proceed Date, Contractor shall advise Owner of the estimated date that Contractor will commence the Acceptance Tests. Contractor shall keep Owner continuously apprised of any change to such estimated commencement date. Commencing at the time specified in Section 3.2, Contractor shall train the designated Operating Personnel in the requirements for the start-up, shut-down, operation and maintenance of, and safety, general process understanding and emergency procedures for, the Project and all of its sub-systems all in accordance with the training program approved by Owner pursuant to Section 4.17.1. Contractor shall coordinate with the applicable Vendors so that an integrated training curriculum is presented to such Operating Personnel. Contractor shall also train or cause the applicable Subcontractor to train the Operating Personnel on all of the major items of the equipment installed under this Contract at the Project. In particular, without limiting the generality of the foregoing, the Contractor or Subcontractor, as the case may be, which provides the plant control system shall train the Operating Personnel on the operation and maintenance of such equipment.
- 4.17.3 <u>Operating and Maintenance Manuals</u>. Contractor shall provide operating and maintenance procedures and manuals for all equipment, components, systems and subsystems in the form set forth in <u>Exhibit A</u>.

4.18 Spare Parts.

- 4.18.1 Construction and Commissioning Spare Parts. Contractor shall provide all spare parts and special tools necessary for the performance of the Work, the costs of which are included in the Contract Price. Owner may make available to Contractor for Contractor's use any spare parts owned by Owner, but in no event shall Owner be liable or shall Contractor be entitled to a Change in Work in the event that the absence of any particular spare part(s) impacts the critical path of the Project. Notwithstanding the foregoing, at Substantial Completion, Contractor shall pay for or replace any spare parts used by Contractor that were originally owned by Owner with new parts identical to those parts used by Contractor pursuant to this Section.
- 4.18.2 Operating Spare Parts. No later than one hundred eighty (180) days before the date Contractor anticipates it will achieve Substantial Completion, Contractor shall be responsible for identifying an initial stock of spare parts reasonably necessary for the operation and maintenance of the Project after Substantial Completion.

Contractor shall provide Owner with the option to cause Contractor to procure all or a portion of such spare parts for delivery prior to Substantial Completion. Owner shall provide written notice to Contractor of its election to cause Contractor to procure such spare parts prior to a deadline date reasonably determined by Contractor that would assure delivery at or prior to Substantial Completion. The costs of such spare parts are

not included in the Contract Price and shall be addressed as a Change in Work.

- 4.19 <u>Start-up Personnel</u>. Contractor shall provide or cause to be provided appropriate installation and start-up representatives from Vendors or Subcontractors of major equipment and control systems, all necessary supervising personnel, all equipment, tools, construction and temporary material and all other labor necessary for all Construction Tests and startup tests.
- 4.20 <u>PNM Grid</u>. Design and construct the Project to operate in parallel with the PNM Grid such that the maximum net electrical energy from the Project can be delivered to the Point of Interconnection by means of the Electrical Interconnection Facilities. Contractor shall coordinate with Owner in respect of the interconnection of the Project with the Electrical Interconnection Facilities to provide for proper operation of the Project and to allow delivery of electricity to the Point of Interconnection in the capacities required under this Contract. Contractor shall also provide all assistance related to the Work or the Project as is reasonably requested by Owner in coordinating with the construction of the Electrical Interconnection Facilities.
- 4.21 <u>Non-Interference With Adjacent Properties</u>. Subject to the other terms of this Contract, Contractor shall be responsible for mitigating or correcting any damage away from the Site caused by performing the Work under this Contract. Contractor shall also be responsible for off-site lay-down areas and improvements necessary to mitigate construction impacts to owners and users of property adjacent to the Site. Contractor will utilize its own clearance/lock-out-tag-out system to establish redundant clearance points.
- 4.22 <u>Production Outputs</u>. Provide week-ahead and day-ahead expected generation during the commissioning phase of the Project.
- Information and Support. Contractor shall provide to Owner at no 4.23 additional cost to Owner Confidential Information (with any required supporting statements, affidavits, and other documents) required to be disclosed, and shall also provide and agree to the release of unredacted versions of Confidential Information including this Contract when (i) required under any order or subpoena of a Governmental Authority; (ii) pursuant to a confidentiality agreement entered into under a protective order of a Governmental Authority; (iii) necessary in Owner's sole discretion in connection with any Governmental Authority approval sought or filing required to be made by Owner; or (iv) required by any of Owner's lenders. Contractor shall also provide to Owner, such lenders, and insurers of the Work, at no additional cost to Owner, all information and support that may be reasonably necessary to/for Owner to: obtain approvals or Permits from any Governmental Authority; demonstrate compliance of the Work with applicable requirements of this Contract; respond to any information request or demand from any or Governmental Authority; or make any required disclosure or respond to any discovery request in any administrative or legal proceeding of any Governmental Authority.
 - 4.24 Performance Bond. No later than five (5) Business Days following the

date on which Owner issues the Notice to Proceed, Contractor shall furnish to Owner a Performance Bond in an amount equal to the Contract Price. Contractor shall obtain and maintain the Performance Bond at its sole cost and expense. The Performance Bond shall be in the form attached herein as Exhibit M. Upon Substantial Completion, the value of the Performance Bond shall be reduced to ten percent (10%) of the Contract Price. PNM must release the Performance Bond, returning it to Contractor upon the later of (i) Final Completion or (ii) the payment by Contractor of all Buy-Down Amounts and Delay Liquidated Damages (or, if applicable, the resolution of disputes regarding Buy-Down Amounts or Delay Liquidated Damages and the payment by Contractor of any amounts due to PNM pursuant to such resolution); provided, however, that notwithstanding such a release of Performance Bond, PNM will retain a Performance Bond equal to Two Hundred Percent (200%) of the Punchlist value until Final Completion.

5. COVENANTS, WARRANTIES AND REPRESENTATIONS

- 5.1 <u>Of Contractor</u>. Contractor covenants, represents, and warrants to Owner, during the term of this Contract, that:
 - 5.1.1 Organization, Standing and Qualification. Contractor is a limited liability company, duly organized, validly existing, and in good standing under the laws of Missouri, and has full power and authority to execute, deliver and perform its obligations hereunder and to engage in the business it presently conducts and contemplates conducting, and is and will be duly licensed or qualified to do business and in good standing under the laws of the State of New Mexico and in each other jurisdiction wherein the nature of the business transacted by it makes such licensing or qualification necessary and where the failure to be licensed or qualified would have a material adverse effect on its ability to perform its obligations hereunder.
 - 5.1.2 <u>Professional Skills.</u> Contractor has all the required authority, ability, skills, experience and capacity necessary to perform and shall diligently perform the Work in a timely and professional manner, utilizing sound engineering principles, project management procedures, construction procedures and supervisory procedures, all in accordance with Industry Standards. Contractor has the experience and skills necessary to determine, and Contractor has reasonably determined, that Contractor can perform the Work for the Contract Price.
 - 5.1.3 Enforceable Contract. This Contract has been duly authorized, executed, and delivered by or on behalf of Contractor and is, upon execution and delivery, the legal, valid, and binding obligation of Contractor, enforceable against Contractor in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency or similar laws affecting creditors' rights generally and by general equitable principles.
 - 5.1.4 <u>No Conflict</u>. The execution, delivery and performance by Contractor of this Contract will not conflict with or cause any default under: (a) its organizational documents; (b) any indenture, mortgage, chattel mortgage, deed of

trust, lease, conditional sales contract, loan or credit arrangement or other agreement or instrument to which Contractor is a party or by which it or its properties may be bound or affected; or (c) any Applicable Laws; and will not subject the Project or any component part thereof or the Site or any portion thereof to any lien other than as contemplated or permitted by this Contract.

- 5.1.5 Government Approvals. The Contractor Acquired Permits either have been obtained by Contractor and are in full force and effect on the Effective Date or Contractor will use commercially reasonable efforts to obtain such Contractor Acquired Permits so that they will be in full force and effect on or prior to the date on which they are required, under this Contract and Applicable Law, to be in full force and effect, so as to permit Contractor to commence and prosecute the Work to completion in accordance with the Project Schedule. Other than with respect to the Contractor Acquired Permits, neither the execution nor delivery by Contractor of this Contract requires the consent or approval of, or the giving of notice to or registration with, or the taking of any other action in respect of, any Governmental Authority.
- 5.1.6 No Suits, Proceedings. There are no material actions, suits, proceedings, patent or license infringements, or investigations pending or, to Contractor's knowledge, threatened against it at law or in equity before any court (United States or otherwise) or before any Governmental Authority (whether or not covered by insurance) that individually or in the aggregate could result in any materially adverse effect on the business, properties, or assets or the condition, financial or otherwise, of Contractor or in any impairment of its ability to perform its obligations under this Contract. Contractor has no knowledge of any violation or default with respect to any order, writ, injunction, or decree of any court or any Governmental Authority that may result in any such materially adverse effect or such impairment.
- 5.1.7 <u>Patents</u>. Contractor owns or has, or will have on or prior to the date on which it is required, the right to use all patents, trademarks, service marks, trade names, copyrights, licenses, franchises, and permits necessary to perform the Work without conflict with the rights of others.
- 5.1.8 <u>Business Practices</u>. Contractor and its representatives have not made any payment or given anything of value, and Contractor will not, and Contractor will direct its employees, agents, and Subcontractors directly contracting with Contractor, and their employees or agents to not, make any payment or give anything of value, in either case to any government official (including any officer or employee of any Governmental Authority) to influence his, her, or its decision or to gain any other advantage for Owner or Contractor in connection with the Work to be performed hereunder. None of Contractor, its Subcontractors, nor any of their employees or agents shall take any action that in any way violates the United States Foreign Corrupt Practices Act or any similar Applicable Law. Contractor shall immediately notify Owner of any violation of this covenant.
 - 5.1.9 Fixed Price Obligation. Contractor acknowledges that this

Contract constitutes a fixed price obligation to permit, engineer, design, procure, construct, test and start up through Final Completion the Project (including the training of the Operating Personnel), complete in every detail, within the time and for the purpose designated herein. Contractor is obligated to supply all of the Equipment and Materials (excluding the Production Inputs and the Electrical Interconnection Facilities), labor and design services and to supply and perform all of the Work, in each case as may reasonably be required, necessary, incidental, or appropriate (whether or not specifically set forth in this Contract) to complete the Work such that the Project satisfies the applicable terms, conditions, Performance Guarantees and other guarantees and requirements set forth in this Contract and Exhibit I, all for the Contract Price.

- 5.1.10 Owner Provided Information. Owner may provide or may have provided Contractor with copies of certain studies, reports or other information (including oral statements) and Contractor acknowledges that all such documents or information have been or will be provided as background information and as an accommodation to Contractor. Contractor further acknowledges that Owner does not make any representation or warranty with respect to the accuracy of such documents or the information (including oral statements) or opinions therein contained or expressed. Subject to Section 13.3, Contractor further represents and warrants that it is not relying on Owner for any information, data, inferences, conclusions, or other information with respect to Site Conditions, including the surface or sub-surface conditions of the Site and the surrounding areas.
- 5.1.11 <u>Financial Condition</u>. Contractor is financially solvent, able to pay its debts as they mature, and possessed of sufficient working capital to complete its obligations under this Contract.
- 5.1.12 <u>Licenses</u>. All Persons who have been authorized by Contractor to perform, and who do perform, any portion of the Work have and will have all business and professional certifications required by Applicable Law to perform the services under this Contract.
- 5.1.13 <u>Licensing Requirement</u>. Contractor (a) is, and through completion of the Project will be, licensed by the Contractor's State License Board in Missouri, and (b) is licensed by the Construction and Industries Division of the New Mexico Regulation and Licensing Department, or any successor entity.
- 5.2 <u>Of Owner</u>. Owner covenants, represents, and warrants to Contractor, during the term of the Contract, that:
- 5.2.1 <u>Organization, Standing and Qualification</u>. Owner is a corporation, duly formed, validly existing, and in good standing under the laws of the State of New Mexico, and has full power and authority to execute, deliver and perform its obligations hereunder and to engage in the business Owner presently conducts and contemplates conducting, and is and will be duly licensed or qualified to do business and in good standing in each jurisdiction wherein the nature of the business transacted

by it makes such licensing or qualification necessary and where the failure to be licensed or qualified would have a material adverse effect on its ability to perform its obligations hereunder.

- 5.2.2 <u>Enforceable Contract</u>. This Contract has been duly authorized, executed, and delivered by or on behalf of Owner and is, upon execution and delivery, the legal, valid, and binding obligation of Owner, enforceable against Owner in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency or similar laws affecting creditors' rights generally and by general equitable principles.
- 5.2.3 <u>No Conflict</u>. The execution, delivery and performance by Owner of this Contract will not conflict with or cause any default under: (a) its organizational documents; (b) any indenture, mortgage, chattel mortgage, deed of trust, lease, conditional sales contract, loan or credit arrangement or other agreement or instrument to which Owner is a party or by which it or its properties may be bound or affected; or (c) any Applicable Laws.
- 5.2.4 Governmental Approvals. The Owner Acquired Permits, other than NMPRC Approval, either have been obtained by Owner and are in full force and effect on the Effective Date or Owner will use its good faith efforts to obtain such Owner Acquired Permits so that they will be in full force and effect on or prior to the date on which they are required, under this Contract and Applicable Law, to be in full force and effect, so as to permit Contractor to perform its obligations under this Contract. Other than with respect to the Owner Acquired Permits, neither the execution nor delivery by Owner of this Contract requires the consent or approval of, or the giving of notice to or registration with, or the taking of any other action in respect of, any Governmental Authority.
- 5.2.5 No Suits, Proceedings. There are no material actions, suits, proceedings, or investigations pending or, to Owner's knowledge, threatened against it at law or in equity before any court (United States or otherwise) or before any Governmental Authority (whether or not covered by insurance) that individually or in the aggregate could result in any materially adverse effect on the business, properties, or assets or the condition, financial or otherwise, of Owner or in any impairment of its ability to perform its obligations under this Contract. Owner has no knowledge of any violation or default with respect to any order, writ, injunction, or any decree of any court or any Governmental Authority that may result in any such materially adverse effect or such impairment.
- 5.2.6 <u>Business Practices</u>. Owner will not, and Owner will direct its employees, agents, and subcontractors, and their employees and agents not to, make any payment or give anything of value to any government official (including any officer or employee of any Governmental Authority) to influence his, her, or its decision or to gain any other advantage for Owner or Contractor in connection with the Work to be performed hereunder. Neither Owner nor any of its employees or agents shall take any action that violates the United States Foreign Corrupt Practices

Act or any similar Applicable Law. Owner shall immediately notify Contractor of any violation of this covenant.

5.2.7 <u>Financial Condition</u>. Owner is financially solvent, able to pay its debts as they mature, and possessed of sufficient working capital to complete its obligations under this Contract.

6. COST OF WORK

- 6.1 <u>Contract Price</u>. As full compensation for the Work and all of Contractor's obligations, hereunder Owner shall pay to Contractor a fixed price amount of One Hundred Thirty Million Four Hundred Thirty-Nine Thousand Three Hundred Twelve Dollars and Fifty-Eight Cents (\$130,439,312.58) (the "Contract Price"), plus applicable gross receipts taxes. The Contract Price shall be changed only by the express terms set forth in this Contract including Changes in Work approved in accordance with Article 17, and the terms of Article 22, Suspension. The Contract Price shall be paid in accordance with Article 7.
- 6.2 All Items of Work Included. The Contract Price includes payment for: (a) all costs of Equipment and Materials (excluding the costs of Production Inputs, and the Electrical Interconnection Facilities, which costs are the exclusive responsibility of Owner), temporary equipment, labor, transportation, engineering, design and other services relating to Contractor's performance of its obligations under this Contract and the Work (including any intellectual property rights licensed under this Contract, expressly or by implication) provided by Contractor or such Subcontractors; (b) except as provided below, all United States federal, state, regional, and local taxes, goods and services taxes, and other sales taxes effective or enacted as of the Effective Date or thereafter, each as imposed on Contractor or its Subcontractors or the Work; (c) except as provided below, all other taxes, duties, levies, imposts, fees, or charges of any kind (whether in the United States or elsewhere and including, without limitation, any of the foregoing related to the importation of any items into the United States) arising out of Contractor's or any such Subcontractor's performance of the Work, including any increases thereof that may occur during the term of this Contract; and (d) any duties, levies, imposts, fees, charges, and royalties (and including, without limitation, any of the foregoing related to the importation of any items into the United States) imposed on Contractor or its Subcontractors with respect to any Equipment and Materials, labor, or services provided under this Contract. The taxes covered hereby include occupational, excise, unemployment, FICA, sales, use, ownership, value-added, compensating and income taxes, state and federal gasoline and fuel taxes, property taxes on Contractor's equipment, tools and supplies and any and all other taxes and duties on any item, Equipment and Materials, lease or service that is part of the Work, whether such tax is normally included in the price of such item or service or is normally stated separately, all of which shall be for the account of Contractor unless a Change in Law occurs. The Contract Price shall not be increased with respect to any of the foregoing or with respect to any withholdings that Owner may be required to make in respect of any of the foregoing items unless a Change in Law occurs, in which event, the Contract Price shall be adjusted in accordance with Section 9.4.2. Notwithstanding anything to the

contrary in the foregoing, (i) each Party shall be responsible for payment of its own income taxes, and (ii) Contractor shall be responsible for property taxes on all materials and equipment used and owned by Contractor.

7. TERMS OF PAYMENT

- 7.1 <u>Method of Compensation</u>. Owner shall compensate Contractor for performance of the Work in accordance with the Milestone Payment Schedule and the terms of this Article 7.
 - 7.1.1 <u>Invoice</u>. Other than with respect to payment for completion of the Final Completion Project Milestone (which shall be governed by <u>Section 7.2</u>), Contractor may submit a Contractor's Invoice based on the Project Milestone completed in the amount equal to the applicable Milestone Payment and any other amounts then payable by Owner to Contractor under <u>Article 17</u> or any other provision hereof (without limiting Owner's right to dispute in good faith any amounts requested for payment). Contractor's Invoice:
- (a) shall include information reasonably required for Owner to assess the completion of the applicable Project Milestone for which Contractor is seeking a Milestone Payment, including if applicable the delivery of the Notice of Mechanical Completion in accordance with Section 14.3(a) or Notice of Substantial Completion in accordance with Section 15.2(m);
- (b) shall include an Unconditional Waiver and Release Upon Progress Payment of Contractor for payments previously made by Owner, if any, pursuant to this Contract and a Conditional Waiver and Release Upon Progress Payment of Contractor for the current payment made by Owner pursuant to this Contract; and
- (c) shall include, with respect to each Subcontractor contracting directly with Contractor and performing services at the Site, either:
- (i) an Unconditional Waiver and Release Upon Progress Payment of Subcontractor or, if such Subcontractor has completed all Work that such Subcontractor is to perform, an Unconditional Waiver and Release Upon Final Payment; or
- (ii) a bond in form and substance reasonably acceptable to Owner, which bond shall name Owner as "obligee" thereof, and which bond shall be in an amount greater than the difference of: (x) one hundred fifty percent (150%) of the total amount of such Subcontractor's subcontract or purchase order (which subcontract or purchase order Contractor shall deliver to Owner to verify the amount of such subcontract or purchase order), less (y) the amounts that such Subcontractor has previously been paid by Contractor as certified by such Subcontractor.

Contractor understands and agrees that, if any Contractor's Invoice is inaccurate or incomplete or lacks reasonable detail, specificity, or supporting documentation required by this <u>Article 7</u>, then, to the extent of such deficiency, such Contractor's Invoice shall not constitute a valid request for payment and Owner shall so notify Contractor of the same no later than ten (10) business days

after receipt of said invoice.

- 7.1.2 Payments. Within twenty-one (21) days after Owner receives a Contractor's Invoice under Section 7.1.1, Owner shall pay all amounts invoiced therein that are then payable and not subject to a good faith dispute, subject, however, to any right of Owner to offset against such payment any amount then due from Contractor to Owner pursuant to any provision of this Contract and not otherwise subject to a good faith dispute. Contractor agrees to pay each of its Subcontractors in accordance with the payment terms set forth in each of its subcontracts and in full compliance with Applicable Laws, including the New Mexico Prompt Payment Act. The Project Guaranteed Dates and dates on the Project Schedule for performance of Critical Path Items shall be extended on a day-for-day basis for each day a Contractor's Invoice is paid late, beginning on the third (3rd) day after the last day of the 21 day pay period set forth above up to a maximum of ten (10) days per each late payment;
- 7.1.3 <u>Payment for Partial Project Milestones</u>. Other than payments due under, or made in accordance with, <u>Articles 20</u> or <u>21</u>, or <u>Section 9.4.2</u>, there shall be no payment for partial completion of a Project Milestone.
- 7.2 <u>Final Completion Payment</u>. Subject to the provisions of Sections 7.7, 7.9, 15.1.3, 15.3, Article 16, and Section 18.7, upon the delivery of the Notice of Final Completion in accordance with Section 15.3(p), Contractor shall submit a Contractor's Invoice which shall set forth all amounts due to Contractor that remain unpaid (including the Final Completion Payment), and upon approval thereof by Owner, Owner shall pay to Contractor the Final Completion Payment and any such unpaid amounts. Owner shall make the Final Completion Payment and payment of any such unpaid amounts within twenty-one (21) days after receipt of such Contractor's Invoice if and only if Contractor has delivered the following items to Owner:
- (a) with respect to each Subcontractor contracting directly with Contractor and performing services at the Site, either:
- (i) an Unconditional Waiver and Release Upon Final Payment of Subcontractor; or
- (ii) a bond in form and substance reasonably acceptable to Owner, which bond shall name Owner as "obligee" thereof, and which bond shall indemnify and fully protect Owner against any claim by such Subcontractor with respect to its right to be paid in connection with the Project or the performance of the Work; and
- (b) with respect to Contractor, an Unconditional Waiver and Release Upon Progress Payment of Contractor for payments previously made by Owner pursuant to this Contract and a Conditional Waiver and Release Upon Progress Payment of Contractor for the current payment made by Owner pursuant to this Contract.
 - 7.3 <u>Warranty Security</u>. Subject to the provisions of Sections 7.7, 7.9 and 18.7, upon the expiration of the Warranty Period, Contractor shall submit a

Contractor's Invoice which shall set forth the value of the outstanding warranty claims under Article 18 which Contractor has not corrected in accordance with this Contract and are still due to Owner, and upon approval thereof by Owner (such approval not to be unreasonably withheld, conditioned or delayed), Contractor may reduce the stated value of the Warranty Bond in accordance with Section 7.9 to an amount equal to the stated value of the Warranty Bond less the amount set forth in the Contractor's paid Invoice under this Section 7.3 if and only if Contractor has delivered the following items to Owner:

- (a) with respect to each Subcontractor that contracted directly with Contractor and performed any Work at the Site during the Warranty Period, either:
- (i) an Unconditional Waiver and Release Upon Final Payment of Subcontractor; or
- (ii) a bond in form and substance reasonably acceptable to Owner, which bond shall name Owner as "obligee" thereof, and which bond shall indemnify and fully protect Owner against any claim by such Subcontractor with respect to its right to be paid in connection with the Project or the performance of the Work; and
 - (b) with respect to Contractor:
 - (i) a certification to the effect that:
- A. Contractor has been paid in full all amounts owing or that may become owing to Contractor with respect to the Project and the performance of the Work, and except for amounts requested in any outstanding Contractor Invoices;
- B. Contractor has paid all amounts that Contractor is required to pay in connection with the performance of the Work, including all amounts to be paid to any Subcontractor with respect to the Project and the performance of the Work; and
- (ii) an Unconditional Waiver and Release Upon Progress Payment of Contractor for payments previously made by Owner pursuant to this Contract and a Conditional Waiver and Release Upon Final Payment of Contractor for the current payment made by Owner pursuant to this Contract.
 - 7.4 Method of Payment. All payments to be made to Contractor under this Contract shall be paid in Dollars and may, at Owner's option, be made in immediately available funds on the due date by Automated Clearing House or wire transfer to such bank account as is designated by Contractor to Owner or, if such date is not a Business Day, on the immediately succeeding Business Day to such account as may be designated by Contractor from time to time by Notice to Owner in accordance with Article 31. All bonds to be returned by Owner under this Contract shall be returned on the date required to be returned or, if such date is not a Business Day, on the immediately succeeding Business Day, to Contractor or the Eligible Issuer for cancellation as Contractor may direct.

7.5 <u>Disputes</u>. Subject to Section 33.4, Failure by Owner to pay any amount subject to a good faith dispute until resolution of such dispute in accordance with this Contract shall neither in any respect alleviate, diminish, modify nor excuse the performance of, Contractor's obligations to perform hereunder, including Contractor's obligation to meet the Project Guaranteed Dates. Contractor's acceptance of any payment shall not be deemed to constitute a waiver of amounts that are then in dispute. Contractor and Owner shall use their reasonable efforts to resolve all disputed amounts reasonably expeditiously and in accordance with the provisions of Section 33.4. No payment made hereunder shall be construed to be acceptance or approval of that part of the Work to which such payment relates or to relieve Contractor of any of its obligations hereunder.

7.6 [Not Used]

7.7 <u>Contract Interest Rate</u>. Overdue payment obligations of the Owner and the Contractor hereunder shall bear interest from the date due until the date paid at a rate the lesser of LIBOR in effect from time to time plus four percent (4.0%) per annum and the highest rate permitted by Applicable Law.

7.8 [Not Used]

- 7.9 <u>Warranty Bond</u>. Upon Final Completion of the Project, and in order to secure, in part, Contractor's performance and Warranty obligations, Contractor must deliver to Owner a performance bond (or renewal of the existing Performance Bond) for the benefit of Owner in an initial amount equal to the Warranty Bond Amount ("Warranty Bond"). Contractor shall obtain and maintain the Warranty Bond at its sole cost and expense. The Warranty Bond shall be in the form set forth in Exhibit M.
 - 7.9.1 Term of Warranty Bond. The Warranty Bond must be maintained in full force and effect at all times until One Hundred Eighty (180) days after the expiration of the defect warranty period, subject to the adjustments provided for herein. At the conclusion of the initial Warranty Period, the Warranty Bond will be reduced to an amount equal to actual and projected costs of unremedied defects and warranty work, and an amount equal to the value of any re-performance, repair, correction, or replacement of any Work.
- 7.9.2 <u>Draw on Warranty Bond</u>. Owner may draw upon the Warranty Bond pursuant to this <u>Section 7.9</u> in the following situations:
- (a) If the Contractor fails to perform any obligations pursuant to Section 18.7 or 18.8, then Owner shall be entitled to draw upon the Warranty Bond for the amount due by Contractor.
- (b) If Contractor fails to deliver to Owner an extended, or replacement Warranty Bond if required by this Contract not less than thirty (30) Days prior to the expiration of any then current Warranty Bond then Owner shall be entitled to draw upon the Warranty Bond for the full amount.

In addition to any other remedy available to it, Owner may draw from, offset against or make demand under such security to recover any amounts owing to it arising out of the Contract, including any damages due to Owner and any amount for which Owner is entitled to indemnification under the Contract. Owner may draw from, offset against or make demand under all or any part of the amounts due to it from any form of security provided to Owner and from all such forms, in any sequence, as Owner may select.

7.9.3 Release of Warranty Bond. Owner shall have no obligation to release the Warranty Bond until the end of the Warranty Period. Upon the end of the Warranty Period, Owner may draw upon the Warranty Bond for the value of any unperformed obligations of Contractor under Section 18.7 or 18.8, and shall return the Warranty Bond to Contractor if it has not been fully drawn down no later than fifteen (15) business days following the end of the Warranty Period.

8. COMMENCEMENT AND SCHEDULING OF THE WORK

8.1 Notice to Proceed.

- 8.1.1 Commencement and Notice to Proceed. Owner shall cooperate with Contractor to provide as much advance notice as reasonably possible to Contractor, and shall endeavor to provide no less than thirty (30) days written notice of the date it intends to issue the Notice to Proceed. Subject to Section 8.1.3, Owner shall issue the Notice to Proceed upon the date of NMPRC Approval. The Business Day after Owner provides Contractor with a Notice to Proceed shall be the "Notice to Proceed Date". On the Notice to Proceed Date, Contractor shall continue with the performance of the Work (including any remaining Preliminary Work) in accordance with the Project Schedule and shall thereafter diligently pursue the Work assigning to it a priority that should permit the attainment of Project Mechanical Completion on or before the Project Mechanical Completion Guaranteed Date, Substantial Completion on or before the Final Completion Expected Date.
- 8.1.2 Preliminary Work to Proceed. Owner shall issue a limited release to commence engineering work to support certain air permit application requirements no later than November 15, 2019 ("Limited Release"), and a Limited Notice to Proceed in connection with providing certain engineering services and other project support services no later than March 31, 2020. The Limited Notice to Proceed shall incorporate and comply with the applicable terms for such Limited Notice to Proceed set forth in Exhibit Q. Other than as expressly set forth in the Limited Release and the Limited Notice to Proceed, Contractor shall not be obligated to commence any Work prior to the issuance of a Notice to Proceed by Owner. Any Work performed by or on behalf of Contractor under a Limited Release or a Limited Notice to Proceed ("Preliminary Work") shall comply with the terms of this Contract to the extent not modified by the express terms of the Limited Release or Limited Notice to Proceed. Contractor and Owner agree that the Limited Release and the Limited Notice to Proceed, when issued, are hereby assumed by and incorporated into this Contract and (a) the Preliminary Work performed thereunder shall be deemed to be in

part satisfaction of Contractor's obligations hereunder, (b) all amounts paid to Contractor in accordance with the Limited Release and the Limited Notice to Proceed shall be credited towards the Contract Price hereunder, and (c) the terms of this Contract apply to the Preliminary Work performed under the Limited Release and the Limited Notice to Proceed. Any delay in issuing a Limited Notice to Proceed by March 31, 2020 shall result in a day-for-day extension to the Project Schedule, Project Guaranteed Mechanical Completion Date, Substantial Completion Guaranteed Date, and Final Completion Expected Date.

- 8.1.3 Right to Terminate. If the Notice to Proceed has not been issued by September 30, 2020 (or such other date as may be agreed in writing by the Parties), Contractor and Owner shall each have the right to terminate this Contract upon Notice to the other Party (which termination right shall terminate upon the issuance of the Notice to Proceed). If this Contract is terminated pursuant to this Section 8.1.3 or Section 21.1, then neither Party shall have any further rights or obligations hereunder (other than such rights and obligations set forth in the aforesaid sections of the Contract or that by the express terms of this Contract survive the expiration or earlier termination of this Contract including the obligation of Owner to pay Contractor for the Preliminary Work, if any, performed prior to termination of this Contract), and Contractor shall not be entitled to any compensation for work performed by, or costs incurred by, Contractor.
- 8.2 <u>Contractor's Acknowledgment</u>. Contractor expressly agrees that the period of time specified to complete all Work and the timely achievement of the Project Guaranteed Dates includes allowance for reasonable coordination with Owner, the Engineer, and Owner's Separate Contractors. No claim shall be made by Contractor for hindrances or delays for any cause during the progress of the Work, except as provided under Articles 9 and 17.
- 8.3 <u>Prosecution of Work.</u> Contractor shall prosecute the Work in accordance with the Project Schedule. Contractor shall cause Project Mechanical Completion, Substantial Completion and Final Completion to occur on or before the applicable Project Guaranteed Date in accordance with the terms of this Contract.

8.4 Project Schedule.

8.4.1 Project Schedule Updates. The Project Schedule is as set forth in Exhibit O. Until Final Completion, Contractor shall update its Project Schedule to reflect the current status of the Work. At a minimum, the updates shall be performed and provided to Owner (in digital and hard-copy form) on a monthly basis as part of the Monthly Progress Report. Contractor shall advise Owner of any proposed Project Schedule changes of more than fifteen (15) days and the reasons therefor. Contractor shall employ a project management system satisfactory to Owner that is capable of providing schedule monitoring and analysis which shall include a comparison of the Project Schedule with the actual progress for each time period with all variances noted and shall provide such analysis and Project Schedule to Owner in a native file format, capable of manipulation by Owner, on a monthly basis. Schedule analysis

shall include a determination of the impact of such variance, if material, on the Project Schedule and any action necessary to correct the variance. Utilizing the critical path method, Contractor shall continually be aware of factors that are delaying or that could delay completion of Critical Path Items by the applicable date on the Project Schedule, and Contractor shall take reasonable remedial actions within its control to eliminate or minimize schedule delays including, without limitation, overtime for the employees of Contractor and Subcontractors and the assignment of additional personnel and/or other resources.

- Schedule Recovery Plan. If Owner reasonably believes Contractor 8.4.2 will not complete a Major Milestone by the scheduled completion date set forth in Exhibit O and which shall have a material impact on the Substantial Completion Guaranteed Date, for any reason that is not an Excusable Condition, Owner may notify Contractor in writing, and Contractor shall, within five (5) days of receipt of Owner's notice, provide to Owner a written Schedule Recovery Plan as necessary to minimize delay of the Project Schedule. Within five (5) days after Owner's receipt of such Schedule Recovery Plan, Owner shall deliver written comments to the Schedule Recovery Plan to Contractor. Contractor shall then resubmit a revised Schedule Recovery Plan after taking into consideration such comments as shall have been provided by Owner, as the case may be, within three (3) additional days. Upon acceptance of the Schedule Recovery Plan by Owner, Contractor shall promptly proceed with implementing the Schedule Recovery Plan and continue to diligently pursue implementation of the Schedule Recovery Plan thereafter. Approval by Owner of such Schedule Recovery Plan shall not (a) be deemed in any way to have relieved Contractor of its obligations under this Contract relating to the failure to perform the Work in accordance with the Project Schedule, (b) be a basis for an increase in the Contract Price or (c) limit the rights of Owner under Section 16. Further, Contractor acknowledges that the implementation of any such Schedule Recovery Plan may result in material additional costs and expenditures for Contractor (including by way of overtime, additional crews and/or additional shifts). Contractor agrees that it shall not be entitled to a Change in Work or any other compensation or increase in the Contract Price or any adjustment to the Project Schedule in connection with the implementation of any such Schedule Recovery Plan.
- 8.5 Remedial Plan. Contractor shall achieve Project Mechanical Completion by the Project Mechanical Completion Guaranteed Date and Substantial Completion by the Substantial Completion Guaranteed Date. Contractor shall, within five (5) days after Contractor becomes aware of actual or potential delays in the performance, progress, or completion of the Work (other than by reason of Force Majeure or Excusable Condition) that would jeopardize the achievement of a Critical Path Item in accordance with the Project Schedule, submit for approval by Owner, a Remedial Plan. Within five (5) days after receipt of the Remedial Plan, Owner shall deliver written approval or disapproval of the Remedial Plan to Contractor, the approval thereof not to be unreasonably withheld. If Owner disapproves all or any portion of the Remedial Plan, Owner shall approve those portions of the Remedial Plan that are acceptable and provide comments to those portions of the Remedial Plan that have been disapproved. Contractor shall then revise the Remedial Plan to address such comments as shall have

been provided by Owner and resubmit the revised Remedial Plan for Owner's and the Engineer's further comments within five (5) additional days. Upon approval by Owner, Contractor shall promptly proceed with completing the Work in the manner specified by the Remedial Plan and with any additional work as may be required under the Remedial Plan. Contractor shall be responsible for all costs and expenses of implementing the Remedial Plan without any increase to the Contract Price. Approval by Owner of a Remedial Plan shall not be deemed in any way to relieve Contractor of its obligations under this Contract relating to the failure to achieve Project Mechanical Completion, Substantial Completion or Final Completion by the applicable Project Guaranteed Dates, shall not be a basis for an increase in the Contract Price, and shall not limit the rights of Owner under Section 16.1 or 16.2.

- 8.6 Progress Reporting. Following the Notice to Proceed, Contractor shall prepare true and correct Monthly Progress Reports satisfying the requirements of Exhibit L and submit them to Owner within ten (10) days after the end of each calendar month through and until completion of the calendar month immediately following the Final Completion Date. In addition, Contractor shall keep, and furnish to Owner at Owner's request, such information as Owner or the Engineer may reasonably require. Contractor also shall keep daily logs at the Site and shall provide to Owner weekly reports of actual construction progress as compared with scheduled progress.
- 8.7 Meetings. Contractor shall schedule and conduct monthly meetings with Owner and (at Owner's option) the Engineer in accordance with the requirements of Exhibit A, before mobilization, at Owner's office or such other location as the Parties may agree, and after mobilization, at the Site, or such other location as the Parties may agree, for the purpose of reviewing the progress of the Work and adherence to the Project Schedule. The frequency of such meetings shall be established and modified, from time to time, by mutual agreement of the Parties; provided, however, such meetings shall occur no less frequently than monthly; provided, further, if Owner reasonably believes that Contractor will complete fewer than all of the Critical Path Items within ten (10) days after the date scheduled in the Project Schedule for such Critical Path Items to be achieved, then Owner shall be entitled to require that meetings occur as frequently as weekly. If Owner so requests, Contractor shall cause a representative of any Subcontractor to attend such meeting. After commencement of the on-site Work, Owner, Contractor, and any Subcontractor then performing Work on the Site shall each designate a representative to attend weekly meetings to review and discuss the progress of the Work. Contractor's representative at such weekly meeting shall provide a rolling two-week look ahead schedule outlining the Work to be performed at the Site during the three calendar weeks following such meeting.

8.8 Acceleration of Work.

8.8.1 Owner Directive. In accordance with the Change in Work procedure set forth in Section 17.4.1, Owner shall have the right to direct that the Work be accelerated by means of overtime, additional crews or additional shifts or resequencing of the Work notwithstanding that the Work may be progressing with or without delay in accordance with the established Project Schedule. In such an event,

Contractor shall use commercially reasonable efforts to accelerate the Work as directed, and the Contract Price shall be increased by the sum of (a) the actual, demonstrable and reasonable Direct Costs (without profit, overhead or contingency) expected to be incurred by Contractor because of such acceleration, plus (b) a five percent (5%) allowance for profit, overhead and contingency, minus any savings expected to be incurred because of such acceleration. Contractor expressly waives any other compensation therefor unless otherwise agreed by Owner in writing in advance of performing the accelerated Work.

8.8.2 <u>General Provisions</u>. Owner shall have the right reasonably to audit Contractor's calculated savings incurred due to Owner's acceleration. In the event of any acceleration requested pursuant to this Section, Contractor shall promptly provide a plan for such acceleration, including Contractor's recommendations for the most effective and economical acceleration. Any acceleration of the Work not specifically requested by Owner in writing shall be at Contractor's sole cost and expense.

9. FORCE MAJEURE AND EXCUSABLE CONDITION

- 9.1 Force Majeure. No delay, failure or omission to carry out or observe any of the terms, provisions, or conditions of this Contract shall give rise to any claim by either Party against any other Party hereto, or be deemed to be a breach or default of this Contract if such delay, failure or omission shall be caused by or arise out of an event of Force Majeure. No obligations of either Party that arose before the occurrence of an event of Force Majeure causing the suspension of performance shall be excused as a result of such occurrence. If Owner or Contractor is prevented, wholly or partially, from performing its obligations under this Contract by a Force Majeure Event or a Change in Law, said Party will be excused to the extent such performance is prevented by the Force Majeure Event or Change in Law. The obligation to pay money in a timely manner for obligations and liabilities that matured prior to the occurrence of an event of Force Majeure, however, shall not be subject to the Force Majeure provisions.
- Notice. If either Party's ability to perform its obligations under this 9.2 Contract is affected by an event of Force Majeure or if Contractor's ability to perform its obligations under this Contract is affected by an Excusable Condition, such Party (in the case of Force Majeure) or the Contractor (in the case of an Excusable Condition) shall, promptly, but in all cases within ten (10) Business Days after such Party becomes aware of such delay, give Notice (a "Delay Notice") to the other Party of the occurrence of such event. For the avoidance of doubt, only Contractor may issue a Delay Notice in respect of or arising out of an Excusable Condition. Within ten (10) days after delivery of such Notice, the Party claiming an event of Force Majeure or Excusable Condition shall provide reasonable evidence to the extent practicable to the other Party of the nature of the event, its anticipated duration and effect upon the performance of such Party's obligations, and any action being taken to avoid or minimize its effect. The Party claiming an event of Force Majeure or Excusable Condition shall have a continuing obligation to deliver to the other Party additional documentation and/or analysis supporting its claim regarding an event of Force Majeure or Excusable Condition promptly after such information is available to the

Party claiming such event of Force Majeure or Excusable Condition. The burden of proof shall be on the Party claiming to be affected pursuant to this Section 9.2. Any delay in providing a Delay Notice or in providing supporting documentation as and when required pursuant to this Section 9.2 (other than any such delay which itself arises out of Force Majeure or an Excusable Condition) shall be deemed a waiver and release of the delayed Party's right to claim the occurrence as an event of Force Majeure or Excusable Condition, but only to the extent that such failure or delay actually prejudices the non-claiming Party. Each of the Parties acknowledges that a delay in issuing its claim may prejudice the non-claiming Party's ability to reasonably determine whether the cost or schedule extension claimed were actually and demonstrably incurred as a result of such Force Majeure and/or Excusable Condition. Within ten (10) days after an event of Force Majeure or Excusable Condition has ended, the Party that was affected by such event of Force Majeure, or Contractor (if the Contractor was affected by an Excusable Condition), shall give Notice to the other Party of: (i) the length of time such event of Force Majeure or Excusable Condition was in effect; (ii) in the case of an Excusable Condition, the effect Contractor claims the Excusable Condition had on the Contract Price; and (iii) the effect such Party claims such event of Force Majeure or Excusable Condition had on the applicable Project Guaranteed Dates.

- 9.3 <u>Force Majeure: Scope of Suspension; Duty to Mitigate</u>. The suspension of performance due to an event of Force Majeure shall be of no greater scope and no longer duration than is required by such event. The excused Party shall use its reasonable efforts:
- (a) to mitigate the duration of, and costs arising from, any suspension or delay in the performance of its obligations under this Contract;
 - (b) to continue to perform its obligations hereunder; and
 - (c) to remedy its inability to perform.

When the affected Party is able to resume performance of its obligation under this Contract, such affected Party shall give the other Party Notice to that effect.

9.4 Contractor's Remedies.

9.4.1 Force Majeure. If an event of Force Majeure occurs that is claimed by Contractor and affects Contractor's ability to perform under this Contract to which Contractor is entitled to relief pursuant to this Article 9, then the Project Guaranteed Dates and all other relevant dates hereunder (including dates on the Project Schedule for performance of Critical Path Items) shall be extended by the period of time sufficient for Contractor to overcome the impact of such Force Majeure if Contractor is actually and demonstrably delayed in the performance of Critical Path Item(s), and the Project Schedule shall be correspondingly adjusted, provided Contractor is working diligently to mitigate the impact of the event of Force Majeure.

- 9.4.1.1 If either (a) any Force Majeure Event exceeds fifteen (15) days in the aggregate and results in a demonstrable and reasonable cost increase to Contractor, or (b) any Force Majeure Event resulting from a Change in Law directly causes a cost increase to Contractor exceeding Two Hundred Fifty Thousand Dollars (\$250,000), then Contractor may request a change in the Contract Price pursuant to this Section 9.4.1.1. Contractor's proposed change in the Contract Price for such Change in Work shall not exceed the sum of: (i) the Direct Costs expected to be actually, demonstrably and reasonably incurred by Contractor because of such Change in Work (minus \$250,000 for Change in Law, if applicable), plus (ii) a ten percent (10%) allowance for profit, overhead and contingency, minus any savings expected to be incurred because of such Change in Work.
 - 9.4.2 <u>Excusable Condition</u>. If an Excusable Condition occurs that affects Contractor's ability to perform under this Contract to which Contractor is entitled to relief pursuant to this Article 9, then:
- (a) the Project Guaranteed Dates and all other relevant dates hereunder (including dates on the Project Schedule for performance of Critical Path Items) shall be extended by the period of time reasonably required for Contractor to overcome the impact of such Excusable Condition if Contractor is actually and demonstrably delayed in the performance of Critical Path Item(s), and the Project Schedule shall be correspondingly adjusted;
- (b) the Contract Price shall be increased by an amount equal to the sum of: (i) the Direct Costs actually, demonstrably and reasonably incurred by Contractor because of such Excusable Condition plus a ten percent (10%) allowance for profit, overhead and contingency, minus any savings incurred because of such Excusable Condition; and
- (c) for any Work performed relating to a specific Milestone Payment partially completed at the time of the Excusable Condition, Owner agrees to pay Contractor the pro rata portion of such Milestone Payment reflecting the percentage of Work actually and demonstrably completed thereunder at the time of the Excusable Condition as mutually agreed by the Parties. The balance of any such Milestone Payment shall be paid once the remaining Work thereunder is completed by Contractor. Contractor expressly waives any other compensation as a result of such Excusable Condition.

10. SUBCONTRACTORS AND VENDORS

10.1 <u>Use of Certain Subcontractors</u>. Attached hereto as Exhibit G is a list of services and equipment anticipated for the execution of the Work along with Owner approved Subcontractors and Vendors. Contractor shall be required to source the noted services and equipment for the Project from this list. Should Contractor propose to add a Subcontractor or Vendor to Exhibit G during the term of this Contract, Contractor shall provide Notice to Owner of such proposed Subcontractor and the specific Work that such Subcontractor will provide. Within ten (10) Days of receipt of such Notice, Owner shall notify Contractor whether it approves (such approval not to be unreasonably withheld) or rejects such proposed Subcontractor. If Owner approves such proposed Subcontractor, the proposed Subcontractor shall be added to Exhibit G pursuant to a Change in Work.

- 10.2 No Approvals; Contractor Responsible for Work. The review by Owner of any Subcontractor under this Article 10 shall not: (a) constitute any approval of the Work undertaken by any such Person; (b) cause Owner to have any responsibility for the actions, the Work, or payment of such Person or to be deemed to be in an employer-employee relationship with any such Subcontractor; or (c) in any way relieve Contractor of its responsibilities and obligations under this Contract.
- 10.3 <u>Information; Access</u>. Contractor shall furnish such information and access relative to its Subcontractors as Owner may reasonably request.
- 10.4 <u>Terms in Subcontracts</u>. All subcontracts shall conform to the requirements of this Contract, insofar as applicable. All Work performed for Contractor by a Subcontractor shall be pursuant to an appropriate written agreement between Contractor and the Subcontractor which shall with respect to either (i) a Subcontractor performing Work on the Site or (ii) a Subcontractor with a Subcontract having a price of more than \$1,000,000, contain provisions that:
- (a) require such Subcontractor to make available a representative with whom the Owner may discuss questions regarding the progress of the Work being performed by the Subcontractor;
- (b) require such Subcontractor to notify Contractor and Owner in the event such Subcontractor intends to discontinue supplying any functional spare parts and permit Owner to order any quantity of any of such parts at the prices therefor prevailing prior to such discontinuance of supply;
- (c) require such Subcontractor to provide and maintain adequate insurance consistent with Subcontractor's obligations related to this Contract;
- (d) require such Subcontractor to enter into a new contract directly with the Owner on the same terms and conditions as such subcontract in the event that any trustee in bankruptcy for Contractor rejects the subcontract, or the Subcontractor terminates such subcontract as a result of the bankruptcy of Contractor;
- (e) subject to Applicable Laws and the terms and conditions of any applicable collective bargaining agreement, require such Subcontractor to remove any employee or independent contractor of such Subcontractor used in the Work or in such Subcontractor's warranty obligations within ten (10) days after receiving notice from Owner to remove such employee or independent contractor;
- (f) require such Subcontractor to provide Owner with reasonable access for purposes of inspection consistent with <u>Section 12.2</u>; and
- (g) contain a provision in the form of Exhibit K permitting its assignment to Owner, upon Owner's written request, following default by Contractor or termination or expiration of this Contract.

Contractor shall otherwise cause (x) all such subcontracts to reasonably preserve and protect all

the rights of Owner under this Contract and to the Work to be performed under the applicable subcontract, so that the subcontracting thereof will not prejudice such rights; and (y) all Work performed under any subcontract to be performed in accordance with the applicable requirements of this Contract. No subcontract or purchase order shall bind or purport to bind Owner.

Cooperation With Other Contractors. Contractor shall cooperate and cause its Subcontractors to cooperate with Owner and other Owner's Separate Contractors who may be working at or near the Site in order to assure that neither Contractor nor any of its Subcontractors unreasonably hinders or increases, or makes more difficult than necessary, the work being performed by Owner or Owner's Separate Contractors. Owner shall cooperate and cause Owner's Separate Contractors to cooperate with Contractor and the Subcontractors who may be working at or near the Site in order to assure that neither Owner nor any of Owner's Separate Contractors unreasonably hinders or increases, or makes more difficult than necessary, the work being performed by Contractor and the Subcontractors. Without limiting the foregoing, Contractor acknowledges that Owner's Separate Contractors will be constructing, installing and completing the Electrical Interconnection Facilities at the Site while Contractor is performing the Work, and both Parties covenant to cooperate in connection therewith and to provide access to the Site, to such Subcontractors and Owner's Separate Contractors.

11. LABOR RELATIONS

- 11.1 <u>General Management of Employees</u>. Subject to Section 11.5, and notwithstanding the provisions of Section 11.2, Contractor shall preserve its rights to exercise, and shall exercise, its management rights in performing the Work.
- 11.2 <u>Labor Disputes</u>. Contractor shall use reasonable efforts to adopt policies and practices designed to avoid work stoppages, slowdowns, disputes and strikes, and to minimize the risk of labor-related delays or disruption of the progress of the Work. Contractor shall advise Owner promptly, in writing, of any actual or threatened labor dispute of which Contractor has knowledge that might materially affect the performance of the Work by Contractor or by any of its Subcontractors. Notwithstanding the foregoing, the settlement of strikes, walkouts, lockouts or other labor disputes shall be at the discretion of the Party having the difficulty.
- 11.3 <u>Personnel Documents</u>. Contractor shall ensure that all its personnel and personnel of any Subcontractors performing the Work are, and at all times shall be, in possession of all such documents (including, without limitation, visas, driver's licenses and work permits) as may be required by any and all Applicable Laws.
- 11.4 <u>Key Personnel</u>. Contractor shall provide staff to supervise and coordinate the work of Contractor and Subcontractors on the Site. The Key Personnel of Contractor shall at all times hold the positions and be dedicated to the performance of the duties described in Exhibit J. Any replacement of the Key Personnel of Contractor shall be subject to the prior written consent of Owner, which consent shall not be unreasonably withheld. If Owner fails to respond to a request for consent within

- five (5) Business Days after Contractor's request, Owner shall be deemed to have consented to the proposed individual.
- 11.5 Replacement at Owner's Request; Site Access. Promptly (and no later than one (1) Business Day) after request by Owner (such reason for the request to be in Owner's reasonable determination), Contractor shall deny access to or remove from the Site and performance of the Work, and cause any Subcontractor to deny access to or to remove from the Site and performance of the Work, and as soon as reasonably practicable, any natural person performing the Work (including any of the Key Personnel). To the extent Contractor has actual knowledge thereof, Contractor may not bring former employees of Owner (or Affiliates thereof) onto the Site in any capacity without prior written approval from Owner (such approval not to be unreasonably withheld, conditioned or delayed).
- 11.6 <u>Project Manager</u>. Contractor's Project Manager designated on Exhibit J has full responsibility for the prosecution of the Work and shall act as a single point of contact in all matters on behalf of Contractor (but who shall not be authorized to execute or make any amendments to, or provide waivers under, this Contract, except that such Project Manager shall be authorized to execute Change in Work Forms under Article 17).
- 11.7 <u>Labor Relations</u>. Contractor shall be responsible for all labor relations matters relating to the Work.

12. INSPECTION; EFFECT OF REVIEW AND COMMENT

12.1 Right to Reject Work. Regardless of whether payment has been made therefor, Owner shall have the right to reject, at any time prior to Substantial Completion, any portion of the Work completed before Substantial Completion that contains any Defect. Upon such rejection, Contractor shall promptly remedy, at its sole cost and expense, any Defect that is identified by Owner as giving rise to such rejection; provided, however, that if such Defect is a Non-Critical Deficiency, it may be included on the Punchlist and remedied by Contractor in accordance with Section 15.1. If such Defect is something for which Contractor or any of its Subcontractors or Vendors is not responsible, then the work involved in the remedy of such Defect will be considered a Change in Work resulting from an Owner Directive and will be subject to the terms of Section 17.5.

12.2 Inspection.

12.2.1 Contractor understands that Owner and any other person authorized in writing by Owner and their respective representatives and consultants (including the Engineer) have the right to observe and inspect the Work, which will include periodic environmental compliance audits, any item of Equipment and Materials (including Equipment and Materials), design, engineering, service, or workmanship to be provided hereunder and to observe all tests of the Work and the Project (including factory or other tests performed at a location other than the Site). Such persons shall have reasonable access to, by way of

example, and not limitation, all drawings, calculations, procurement specifications, purchase orders (but only the non-commercial portions thereof), test procedures, measurements, laboratory analyses, quality control reports and test reports and data, including all equipment adjustment, installation, and alignment data to the extent reasonably available to Contractor. Upon reasonable Notice to Contractor by Owner, Contractor shall allow Owner and its representatives (including the Engineer) reasonable access to the Work (including Equipment and Materials under fabrication) and the Project. Contractor shall use commercially reasonable efforts to arrange reasonable access for Owner and its representatives (including the Engineer) to inspect Equipment and Materials at the location of fabrication and any factory or other off-Site tests conducted with respect to such Equipment and Materials. Owner also shall be entitled to inspect, review, and (as applicable) approve the Contractor Deliverables or technical details, and inspection and testing reports pertaining thereto as reasonably requested by Owner or its representatives (including the Engineer). Contractor shall comply with all inspection and testing requirements. In addition to the foregoing, upon prior written notice, Contractor agrees to permit any Governmental Authority reasonable access to the Site to inspect the Project if such inspection is reasonably required under the applicable tariff or Applicable Law. Any party arriving on Site to observe and inspect the Work shall abide by all of Contractor's safety programs and procedures, and in any case, such inspections shall not delay or interfere with the performance of the Work. In no case, however, shall Owner be responsible for any delay or interference in Contractor performing the Work due to (i) an inspection conducted by Governmental Authorities or (ii) an inspection conducted by or on behalf of Owner where Owner has a reasonable basis to believe a safety violation has or may occur with respect to the Work or the Project.

- Drawings and Specification Table. Within thirty (30) days after the date Limited Notice to Proceed is issued by Owner to Contractor, Contractor shall provide a Notice to Owner attaching the Drawings and Specification Table identifying all Contractor Deliverables to be delivered to Owner for review, comment, and if applicable approval, in accordance with Table 5-1 in Exhibit A, the deadline for delivery thereof, and Owner's time period for review and comment with respect thereto. The parties acknowledge and agree that such Drawings and Specification Table shall also differentiate between those Contractor Deliverables which are noted as design basis for Owner review and comment and those others which are not considered design basis. Owner shall have the right to promptly review and comment on such Drawings and Specification Table. If Owner provides any comments with respect to the Drawings and Specification Table to Contractor, then Contractor shall incorporate changes into such Drawings and Specification Table addressing such comments, and resubmit the same to Owner. Such resubmission to address Owner's comments shall not be considered a Change in Work. If Owner fails to comment within fifteen (15) days after receipt of such Notice, then Owner (as applicable) shall be deemed to have accepted such Drawings and Specification Table.
- 12.4 Owner Review of Documents. Contractor shall submit to Owner for review soft copies (in normal construction formats) of all Contractor Deliverables, and if requested by Owner, a hard (printed) copy of any Contractor Deliverables, in

accordance with the requirements of Exhibit A and the Drawings and Specification Table. Owner shall have the right to make all such materials available to the Engineer. Contractor shall ensure that all such items undergo a comprehensive review and approval process before submission of such items to Owner. After receipt of any Contractor Deliverable, Owner shall have the right, during the time period for Owner's review specified in the Drawings and Specification Table, to describe errors or omissions in the design identified in such Contractor Deliverable. Notwithstanding anything in Article 7 to the contrary, until Owner has completed its review, which in any case shall not exceed the time specified in Exhibit A, Section 5 for such Contractor Deliverable noted as design basis for Owner review and comment as set forth in Table 5-1 in Exhibit A, Contractor shall neither: (a) issue any purchase order based on such Contractor Deliverable; nor (b) release such Contractor Deliverable for use in connection with the Work; nor (c) submit any Contractor's Invoice with respect to such Contractor Deliverable.

- 12.5 Remedy of Flaws. If Owner identifies any errors or omissions in the design with respect to any Contractor Deliverables noted as design basis for Owner review and comment as set forth in Table 5-1 in Exhibit A, Owner shall provide Contractor comments in written form or as marked on return documents for each error or omission, and, if applicable, reference to the relevant section of the Contract to which Contractor is not compliant, then Contractor shall incorporate changes into such Contractor Deliverables addressing and remedying the errors and omissions and resubmit the same to Owner. Such incorporation of changes resulting from Contractor's non-compliance to this Contract to address Owner's comments shall not be considered a Change in Work. Contractor may request a Change Order if a change requested by Owner is not the result of Contractor's non-compliance with the Contract.
- 12.6 <u>Limitation on Owner's Obligations</u>. Inspection, review, approval or comment by Owner with respect to any Subcontract or any Drawings and Specifications, samples, and other documents, or any other work or services performed by Contractor or any Subcontractor or Vendor, is solely at the discretion of Owner and shall neither in any way affect or reduce Contractor's obligations to complete the Work in accordance with the provisions of this Contract nor be deemed to be a warranty, approval or acceptance by Owner with respect thereto.
- 12.7 <u>Inspection by Contractor</u>. Contractor shall perform all inspection, expediting, quality surveillance, and other like services required for performance of the Work, including inspecting all Equipment and Materials that comprise the Project or that are to be used in the performance of the Work.

13. SITE CONDITIONS

13.1 <u>Site Conditions</u>. Contractor represents and warrants that it has inspected and is familiar with the Site Conditions. Solely for the purposes of Contractor's performance of the Work, and, based on Contractor's investigations, Contractor represents and warrants that it has correlated its findings and observations regarding the Site Conditions with the requirements of the Contract and, except as set forth in

- Section 13.3, the Site constitutes an acceptable and suitable site for the construction and operation of the Project in accordance with the requirements of this Contract. Contractor will provide immediate notice to Owner of the existence of any conditions at the Site that might create a safety hazard or pose a risk of harm to Owner or any of Owner's Separate Contractors' operations. Contractor subsequently will cause the Work to be performed in a manner that accounts for such conditions and as necessary to assure the safety of all persons at or near the site and to prevent damage to property and bodily injury
- 13.2 <u>Differing Site Conditions</u>. Contractor specifically acknowledges and accepts the Site Conditions and agrees that, except as set forth in Section 13.3, no Project Guaranteed Date shall be extended, the Contract Price shall not be modified, and Contractor shall not be entitled to request or be granted any Change in Work, as a result of any Site Conditions or any variance between the condition of the Site indicated by this Contract or expected to exist by Contractor, and the Site Conditions, including any unknown physical conditions above the surface of the ground.
- 13.3 <u>Subsurface Site Conditions</u>. Subject to the second sentence in this Section 13.3, Contractor shall be entitled to a Change in Work in respect of, and Owner accepts the risk for, unexpected subsurface conditions, (i) resulting from the presence of any Hazardous Materials (unless Contractor or any Subcontractor is responsible for the placement of or discharge of such Hazardous Materials), (ii) those described in Section 13.5, or (iii) any Condition substantially outside the initial GeoTech survey at the Site (each such condition, an "Unforeseen Subsurface Site Condition"). If the Unforeseen Subsurface Site Condition adversely affects a Critical Path Item or causes a demonstrable cost increase to Contractor that exceeds Fifty Thousand Dollars (\$50,000) in the aggregate, then Contractor may request a Change in Work pursuant to Section 17.4.2.
- 13.4 <u>Signs</u>. Contractor shall not place or maintain, or permit to be placed or maintained, any sign, bill, or poster on or about the Site without the prior consent of Owner; provided, however, such approval is not required to place any signs, bills or posters related to Contractor's safety and quality program or required by Applicable Law or related to Contractor's standard work protocols.
- 13.5 <u>Archeological or Historical Finds</u>. In the event that any relics or items with archeological or historical value or other valuable materials are discovered on the Site by Contractor or any Subcontractor or Vendor, Contractor shall immediately notify Owner and await the decision of Owner before proceeding with any further Work that might adversely impact such relics, items, or materials. Neither Contractor, nor any Subcontractor or Vendor shall have any property rights to such relics, items, or materials.
- 13.6 <u>Security</u>. Contractor shall construct a suitable fence around the Site. Contractor shall provide security for the Site, as well as any off-Site security reasonably necessary to protect the Work in accordance with Applicable Laws and any other reasonable requirements imposed by Owner or any Governmental Authority.

The admission of Persons to the Site shall be strictly controlled by Contractor at all times, and no Person who is not required for the performance or supervision of the Work shall be admitted. Contractor agrees to comply and to require all Personnel of Contractor, Subcontractors and Vendors to comply with all Site security procedures and policies of Owner which have been notified to Contractor in writing.

14. PERFORMANCE GUARANTEES AND TESTS.

- 14.1 Performance Guarantees and Other Requirements. Contractor shall perform the Work so that each Unit and the Project satisfies the Performance Guarantees and other testing requirements and guarantees set forth in Exhibit I. Subject to Section 16.2, Contractor shall demonstrate that each Unit and the Project satisfies the Performance Guarantees and other testing requirements and guarantees set forth in Exhibit I prior to Substantial Completion by satisfactorily running and completing the Acceptance Tests as set forth in Exhibit I. Pursuant to the provisions of Section 14.3(b), Contractor shall monitor, observe and collect the data produced during the Acceptance Tests. Except for the costs that Contractor can reasonably demonstrate were the responsibility of Owner under the terms of this Contract, Contractor shall be responsible for all costs and expenses (except the Production Inputs) for any Acceptance Tests conducted.
- 14.2 <u>Acceptance Test Schedules</u>. Contractor shall agree on Acceptance Test schedules with Owner and the Engineer at least 60 days in advance of the initiation of any Acceptance Test. When Contractor establishes the final scheduled date(s) for the Acceptance Tests required pursuant to this Contract, it shall give Owner at least ten (10) Business Days' prior Notice thereof. Contractor shall keep the Project Representative continuously apprised of the specified schedule, and changes therein, for the commencement and performance of Acceptance Tests, and shall give the Project Representative at least two (2) Business Days' prior Notice of the reperformance of any Acceptance Test.
- 14.3 <u>Mechanical Completion; Acceptance Tests</u>. After satisfaction by Contractor or waiver by Owner of the requirements to Mechanical Completion for any Unit or for Project Mechanical Completion,
- (a) Contractor shall issue to Owner a Notice of Mechanical Completion stating that Contractor believes it has satisfied the requirements to Mechanical Completion, and a report of the Work completed with sufficient detail to enable Owner and the Engineer to determine whether Mechanical Completion has been achieved. Owner shall execute and acknowledge Contractor's Notice of Mechanical Completion confirming that Mechanical Completion has occurred as soon as possible, and in no event more than ten (10) Business Days after satisfaction in full by Contractor of all of the requirements to Mechanical Completion; provided, however, that the Mechanical Completion Date shall be the date of actual satisfaction or waiver of the requirements for Mechanical Completion, not the date Owner executes and acknowledges Contractor's Notice of Mechanical Completion.
 - (b) Contractor shall achieve Mechanical Completion for each Unit and the

Project, start up each Unit and the Project and shall satisfy all of its other obligations under this Contract to ensure that the Project has been completed and that all components have been properly adjusted and tested prior to conducting the Acceptance Tests. Contractor shall conduct the Acceptance Tests for each Unit and the Project in accordance with the Acceptance Test Procedures and Exhibit I. Contractor shall have overall control over the Project during the performance of the Acceptance Tests and shall direct the operation of each Unit and of the Project during the Acceptance Tests in accordance with the Acceptance Tests Procedures and Exhibit I. The representatives of Owner and the Engineer shall have the right to be present during any Acceptance Tests performed by Contractor under this Article 14.

14.4 Non-Conforming Work/Remedial Plan.

- 14.4.1 At any time during and promptly after completion (whether or not successful) of the Acceptance Tests (or any re-performance of any Acceptance Test or pursuant to any Remedial Plan), Owner shall advise Contractor, and Contractor shall advise Owner, in writing of any Defect that was discovered during an Acceptance Test. Except as provided in Section 14.4.2, if Contractor is notified of or discovers any such Defect, Contractor shall, at Contractor's sole cost and expense, correct such Defect and promptly provide Notice to Owner in writing that such corrective measures have been completed. Any dispute regarding the existence or correction of any such Defect shall be resolved pursuant to Article 33.
- 14.4.2 If, at any time following the Substantial Completion Guaranteed Date, Contractor's results from the most recent Acceptance Tests shall have failed to satisfy the Minimum Performance Criteria, then Contractor shall (i) submit to Owner a Remedial Plan that is reasonably acceptable to Owner within ten (10) days after the date when Contractor shall have completed its initial Acceptance Tests or the expiration of the applicable grace period under any previously implemented Remedial Plan, and (ii) continuously and diligently pursue completion of the Remedial Plan at Contractor's sole cost. Contractor's delivery of a Remedial Plan shall not relieve Contractor of its obligations to pay Delay Liquidated Damages under Section 16.1.
- 14.5 <u>Certificate of Completion of Acceptance Test</u>. Upon successful completion of any Acceptance Test as demonstrated by a test report delivered to Owner by Contractor, Contractor and Owner shall jointly issue a certificate that such test has been successfully completed.
- 14.6 Revenues and Costs. Any revenues generated by the Project during start-up and commissioning or the initial performance of any Construction Test or Acceptance Test shall be paid to and for the benefit of Owner. If a re-test is required and to the extent the Contractor or any Subcontractor was the cause of such re-test, the actual cost of the retest will be borne by Contractor. The actual cost of the re-test shall include (i) the cost of special instrumentation and equipment (including rental cost) including required calibration of the instrumentation, and (ii) personnel cost of Contractor, Subcontractor and the applicable Vendors, but shall not include the cost of any Production Inputs.

14.7 Post Test Modifications. If:

- (a) an Acceptance Test has been completed;
- (b) a certificate of completion of such Acceptance Test has been issued pursuant to Section 14.5;
- (c) Contractor or any Subcontractor makes any modification to a Unit or the Project following such Acceptance Test (any such modification, a "<u>Post Test Modification</u>");
- (d) Contractor cannot reasonably demonstrate that such modification would not have compromised the outcome of such Acceptance Test if it had been made before the completion of such Acceptance Test;
- (e) then the Acceptance Test shall be re-run, as a condition to achieving Substantial Completion, all previous runs of such Acceptance Tests shall be void, and, if Contractor achieved Substantial Completion as a result of said prior Acceptance Tests, then Substantial Completion shall be deemed not to have occurred unless Contractor reasonably demonstrates by analysis or by performing a component test or tests that the Post Test Modification would not have had a material effect on the outcome of the prior Acceptance Test.

15. SUBSTANTIAL COMPLETION AND FINAL COMPLETION OF THE PROJECT

15.1 Punchlist.

- 15.1.1 At all times during performance of the Work, Contractor shall maintain a list setting forth parts of the Work which remain to be performed in order to confirm that the Work fully complies with the terms of the Contract. Contractor shall promptly provide a copy of such list to Owner upon request. Contractor shall make such revisions to such list as and when requested by Owner from time to time.
- 15.1.2 No later than thirty (30) days before the Substantial Completion of the Plant, Contractor shall prepare and submit to Owner a comprehensive list (the "Punchlist") of minor items of Work to be completed for the Project to reach Final Completion, but which will not individually or in the aggregate, affect the safe, continuous and reliable operation of the Project or the Work, as the case may be, in accordance with Prudent Utility Practices and in compliance with all Applicable Laws. Contractor shall make such revisions to the Punchlist as and when requested by Owner from time to time.
- 15.1.3 Completion of Punchlist. Contractor shall proceed promptly to complete and correct all items on the Punchlist. Failure to include an item on the Punchlist does not alter Contractor's responsibility to complete all Work in accordance with this Contract. On a bi-weekly basis after Substantial Completion, Contractor shall revise and update the Punchlist to include the date(s) that Non-Critical Deficiencies listed on such Punchlist are completed by Contractor and

accepted by Owner. Notwithstanding any of the foregoing, the Non-Critical Deficiencies listed on such Punchlist shall not be considered complete until Owner shall have inspected such Non-Critical Deficiencies and acknowledged, by notation on the updated Punchlist, that such item of Work is complete.

- 15.1.4 The Parties agree that with respect to Punchlist items that remain uncompleted and which are preventing Final Completion, it may be more expedient for Owner to complete such Punchlist items, at its election and option. If the Parties agree, Owner may, in lieu of requiring Contractor to complete the Punchlist items, require Contractor to pay to Owner an amount equal to two hundred percent (200%) of the commercial value of the remaining Punchlist items as reasonably determined by the Parties. Owner shall have the right to offset such amount owed by Contractor against any amounts owed by Owner to Contractor at Final Completion, or otherwise under the Contract Documents.
- 15.2 <u>Substantial Completion</u>. Substantial Completion shall occur upon satisfaction by Contractor or waiver by Owner of the following conditions:
- (a) Contractor has paid (or credited against the Contract Price) all Delay Liquidated Damages due under this Contract and not otherwise disputed in good faith by Contractor;
- (b) Owner has received copies of all Contractor Acquired Permits required to be obtained by Contractor pursuant to Section 4.6 (other than such permits as the failure to obtain could not reasonably be expected to have a material adverse effect on Owner's ability to own, operate and maintain the Project at the design levels specified in this Contract and the Statement of Work), which Contractor Acquired Permits shall be in full force and effect and neither (i) subject to any legal proceeding or any unsatisfied condition that could reasonably be expected to result in material modification or revocation to any such Contractor Acquired Permit, nor (ii) under appeal, nor (iii) subject to any appeal period available under Applicable Law;
 - (c) Owner has received all Essential Contractor Deliverables;
- (d) Contractor has certified by a Notice to Owner that all training of Operating Personnel assigned to Contractor under this Contract is complete;
 - (e) Contractor has achieved Project Mechanical Completion;
- (f) all Work other than Non-Essential Contractor Deliverables and other Non-Critical Deficiencies has been completed;
- (g) all Acceptance Tests have been successfully completed, each Unit and the Project shall have fully satisfied the Minimum Performance Criteria, Must Meet Performance Guarantees, and either:
- (i) all Units have achieved the Net Electrical Output Guarantee and not exceeded the Net Heat Rate Guarantee in a Performance Test, or

- (ii) all Buy-Down Amounts due pursuant to <u>Section 16.2</u> and not otherwise disputed in good faith by Contractor have been paid (or credited against the Contract Price) and all of the other requirements set forth in <u>Section 16.2</u> have been satisfied, as applicable;
- (h) Contractor has delivered to Owner the Acceptance Test results indicating that each Unit and the Project has successfully completed each such Acceptance Test pursuant to the applicable Acceptance Test Procedures;
- (i) Contractor has delivered a certification to Owner stating that all major items of Equipment and Materials within Contractor's scope of Work have been properly installed and tested in accordance with the applicable manufacturers' recommendations and requirements in all material respects;
- (j) Substantial Completion of the Project will require that all balance of plant Equipment and systems required to support simultaneous full load operation of all Units be proven capable of supporting the total cumulative plant load. Substantial Completion of the Project shall additionally require that with all Units in operation, the Project satisfies the Must Meet Performance Guarantees for the Project as further set forth in Exhibit I;
- (k) other than Non-Essential Contractor Deliverables, all spare parts to be purchased by Contractor pursuant to Section 4.18 have been delivered or purchased for delivery to Owner free and clear of liens and all special tools included as part of the Equipment and Materials have been turned over to Owner;
- (l) Contractor has delivered to Owner the Warranty Bond in accordance with Section 7.9; and
- (m) Contractor has delivered to Owner a Notice of Substantial Completion stating that Contractor believes it has satisfied the conditions set forth in Section 15.2(a) through (1), and a report of the Work completed with sufficient detail to enable Owner and the Engineer to determine whether Substantial Completion has been achieved.

After satisfaction by Contractor or waiver by Owner of the conditions set forth in this Section 15.2, Owner shall execute and acknowledge Contractor's Notice of Substantial Completion confirming that Substantial Completion has occurred; provided, however, that the Substantial Completion Date shall be the date of actual satisfaction or waiver of the conditions set forth in this Section 15.2, not the date Owner executes and acknowledges Contractor's Notice of Substantial Completion. Owner shall execute and acknowledge Contractor's Notice of Substantial Completion as soon as possible, and in no event more than ten (10) Business Days after satisfaction in full by Contractor of all of the conditions set forth in this Section 15.2; provided, however, it being understood and acknowledged by Owner that, notwithstanding any election by Owner to so delay executing and acknowledging such Notice of Substantial Completion or paying Contractor for achievement of Substantial Completion, (i) the Substantial Completion Date shall be the date of actual satisfaction or waiver of the conditions set forth in this Section 15.2 and (ii) Contractor shall not be obligated to pay, or otherwise be liable for, Substantial Completion Delay Liquidated Damages in respect of any day, time or period following the date of actual satisfaction or waiver of the conditions

set forth in this <u>Section 15.2</u>. Owner agrees that it will not temporarily or permanently take over and operate the Facility prior to Contractor satisfying each of the requirements necessary for Substantial Completion other than as provided for in Section 20.1 and Article 21.

- 15.3 <u>Final Completion</u>. Final Completion shall be deemed to have occurred upon satisfaction by Contractor or waiver by Owner of the following conditions precedent:
- (a) Substantial Completion, including payment of all Delay Liquidated Damages and Buy-Down Amounts;
- (b) Owner has received copies of all Contractor Acquired Permits required to be obtained by Contractor pursuant to Section 4.6, which Contractor Acquired Permits shall be in full force and effect and neither subject to (i) any legal proceeding or any unsatisfied condition that could reasonably be expected to result in material modification or revocation to any such Contractor Acquired Permit, nor (ii) under appeal, nor (iii) subject to any appeal period available under Applicable Law;
- (c) Contractor has completed all items on the Punchlist except with respect to any item for which Owner has deducted from the Final Payment under Section 15.1.4;
- (d) Owner has received all Non-Essential Contractor Deliverables, Spare Parts lists, and other technical information each as required hereunder for Owner to operate and maintain the Project;
- (e) All Contractor's and Subcontractors' personnel, Equipment and Materials, surplus materials, waste materials, rubbish, and other Temporary Work other than those to which Owner holds title have been removed from the Site as required by Exhibit A, and any permanent facilities used by Contractor and the Site have been restored to the same condition that such permanent facilities and the Site were in on the Notice to Proceed Date, taking into account the construction of the Project, ordinary wear and tear excepted. All cleanup and disposal shall be conducted in accordance with all Applicable Laws;
- (f) Owner has received from Contractor all information requested by Owner and required for Owner's final fixed asset records (including any FERC accounting requirements) with respect to the Project in accordance with Section 4.8;
- (g) Contractor has delivered to Owner a certification identifying all outstanding claims of Contractor under this Contract with documentation sufficient to support such claims;
- (h) Contractor has assigned to Owner, or provided Owner, with all warranties or guarantees that Contractor received from Subcontractors to the extent Contractor is obligated to do so pursuant to <u>Article 18</u>;
- (i) Contractor has delivered the certifications, the lien releases from Contractor, the lien releases from Subcontractors or the bonds, all in accordance with <u>Section 7.2</u>, and has delivered such other documents and certificates as Owner has reasonably requested

to ensure compliance with all applicable labor laws and regulations of United States;

- (j) any Defects found in the Work have been corrected other than any such Defects for which Contractor is actively and diligently pursuing a correction under a Work Warranty;
- (k) the Project has been constructed in accordance with the Contract and the Drawings and Specifications;
- (l) the final as-built documentation accurately reflects the Project as constructed:
- (m) the Project is capable of being operated in a safe and proper manner in accordance with Applicable Laws and Applicable Permits;
- (n) Contractor shall have delivered to Owner all operation and maintenance manuals and final documentation in accordance with the Contract;
- (o) Contractor has delivered true and correct copies of all Intellectual Property Rights and otherwise assigned such Intellectual Property Rights to Owner to the extent Contractor is obligated to do so pursuant to Article 27; and
- (p) Contractor has delivered to Owner a Notice of Final Completion stating that Contractor believes it has satisfied the provisions of <u>Sections 15.3(a)</u> through <u>(o)</u>.

After satisfaction by Contractor or waiver by Owner of the conditions set forth in this Section 15.3, Owner shall execute and acknowledge Contractor's Notice of Final Completion confirming that Final Completion has occurred; provided, however, that the Final Completion Date shall be the date of actual satisfaction or waiver of the conditions set forth in this Section 15.3, not the date Owner executes and acknowledges Contractor's Notice of Final Completion. Owner shall execute and acknowledge Contractor's Notice of Final Completion as soon as possible, and in no event more than ten (10) Business Days after satisfaction in full by Contractor of all of the conditions set forth in this Section 15.3.

If Final Completion does not occur on or before the Final Completion Expected Date, in addition to any other remedy under this Contract, Owner may avail itself of any remedy available to it in law or equity.

- 15.4 <u>Contractor's Access After Substantial Completion</u>. Following Substantial Completion, Contractor shall be responsible for coordinating remedial work with the Owner and Owner shall provide Contractor with reasonable and timely access to complete all items on the Punchlist and to satisfy the other requirements for Final Completion. The Parties expect that Contractor shall accomplish any necessary modification, repairs or additional work with minimal interference to commercial operation of the Project and that reductions in and shut-downs of the Project's operations will be required only when necessary, taking into consideration:
 - (a) the length of the proposed reduction or shut-down, and
 - (b) Owner's obligations and liabilities to Suppliers, customers or others.

Notwithstanding the foregoing, should a reduction in or shut-down of the Project's operations be required to complete any items on the Punchlist, then such reduction or shut-down shall be scheduled solely at the discretion of Owner, and Contractor shall use all reasonable efforts to complete such Work during such Owner scheduled reduction or shut-down. Contractor acknowledges that Owner may schedule such reduction or shut-down at any time including off-peak hours, nights, weekends and holidays.

15.5 <u>Changes in Project Guaranteed Dates</u>. Except as otherwise set forth in this Contract, no action by either Party (unless Owner and Contractor mutually agree in writing to the contrary) required or permitted under this Article 15 shall modify the Project Guaranteed Dates.

16. DELAY DAMAGES; BUY-DOWN AMOUNTS

- Delay Liquidated Damages. Contractor understands that if the 16.1 Substantial Completion Date does not occur on or before the Substantial Completion Guaranteed Date, Owner will suffer substantial damages, reduction of return on Owner's equity investment in the Project and other operating and construction costs and charges. Therefore, Contractor agrees that if Substantial Completion is not achieved by the Substantial Completion Guaranteed Date, then (subject to the terms of Sections 15.2 and 32.2.2) Contractor shall pay liquidated damages to Owner in the amount of Three Hundred Dollars (\$300) per MW of guaranteed net capacity ("Substantial Completion Delay Liquidated Damages") for each day (or portion thereof) by which the Substantial Completion Date is delayed beyond the Substantial Completion Guaranteed Date. Substantial Completion Delay Liquidated Damages will be capped at a value equivalent to Fifty-Five Thousand Dollars (\$55,000) per MW of guaranteed net capacity. Any amount Contractor is obligated to pay to Owner under this Section 16.1 not otherwise disputed in good faith by Contractor shall be due and payable ten (10) days after receipt of a request therefor from Owner.
- 16.2 <u>Buy-Down for Performance Tests</u>. If Contractor has completed the Acceptance Tests on or before the Substantial Completion Deadline Date, and Contractor has successfully satisfied the Performance Guarantees, then the remaining provisions of this Section 16.2 shall no longer apply. If, on or before the Substantial

Completion Deadline Date:

- (a) Contractor has achieved Project Mechanical Completion;
- (b) Contractor has provided Owner with Notice that it will not perform any further Acceptance Tests;
- (c) Contractor's results from the most recent Acceptance Tests shall have satisfied the Minimum Performance Criteria for each Unit; and
- (d) either the Net Electrical Output Guarantee or the Net Heat Rate Guarantee for any Unit has not been satisfied;

then (subject to the terms of Section 32.2.2) Contractor shall pay the Buy-Down Amount set forth on Exhibit H based on Contractor's most recent attempted Performance Test for the applicable Unit(s). Any such payment shall be made as a credit against the Contract Price. Upon the credit of the Buy-Down Amount to the Contract Price, the applicable Performance Guarantees shall be deemed amended to reflect the actual performance levels used in calculation of the Buy-Down Amount for all other Acceptance Tests.

Sole Remedy. With the exception of Contractor's absolute obligation to 16.3 satisfy the Minimum Performance Criteria during the Acceptance Tests, Owner's sole remedies for delays in achieving Substantial Completion and for the failure of any Unit or the Project to meet the Performance Guarantees during the Acceptance Tests shall be the amounts payable under Sections 16.1 and 16.2 as limited by Article 32, the other remedies expressly provided for in this Article 16, and, if such delays or failure constitute a Contractor Event of Default, the remedies provided for in Sections 20.2(a)-(g). The Parties agree that Owner's actual damages, as applicable, in the event of such delays and failures would be extremely difficult or impracticable to determine and that, after negotiation, the Parties have agreed that the Delay Liquidated Damages and the Buy-Down Amount are a reasonable estimate of the damages that Owner would incur as a result of such delays or failures and are in the nature of liquidated damages, and not a penalty. For the avoidance of doubt, nothing in this Section 16.3 shall limit Contractor's obligations under Article 18 and Contractor shall have an absolute obligation (subject to Sections 32.1 and 32.2) to satisfy (a) Project Mechanical Completion; (b) the Minimum Performance Criteria; and (c) the Must Meet Performance Guarantees.

17. CHANGES IN THE WORK

- 17.1 <u>Change in Work.</u> A change in Work may result only from any of the following ("Change in Work"):
 - (a) Changes in the Work required by Owner in writing, not to include adding additional Units to the Project but including an acceleration of Work, in accordance with Section 8.8 or Section 17.2;

- (b) The occurrence of an Excusable Condition (as and only to the extent permitted by Section 9.4.2);
- (c) The occurrence of an event of Force Majeure (as and only to the extent permitted by <u>Section 9.4.1</u>);
- (d) An Owner Directive (as and only to the extent permitted by <u>Section 17.5</u>);
- (e) A Change in Law (including any law related to taxes); or
- (f) A Change in Work to which Contractor is otherwise expressly entitled under this Contract.

For the avoidance of doubt, a Change in Work shall not include additional Units.

17.2 By Owner.

- 17.2.1 <u>General</u>. Owner shall have the right to make changes in the Work, within the general scope thereof, whether such changes are modifications, accelerations, alterations, additions, or deletions. All such changes shall be made in accordance with this <u>Article 17</u>, be documented in accordance with <u>Section 17.4.1</u> and shall be considered, for all purposes of this Contract, as part of the Work. Notwithstanding the foregoing, and except as set forth in <u>Section 8.8</u>, <u>Section 17.2.2</u>, and <u>Section 17.5</u>, unless Contractor and Owner shall have agreed upon a Change in Work Form in accordance with the provisions of <u>Section 17.4</u> or Owner shall have issued an Owner Directive, Contractor shall have no obligation to, and shall not, perform or comply with any modification, acceleration, alteration, addition, or deletion by Owner to the Work after execution of this Contract that:
 - (a) conflicts, or could conflict, with this Contract;
 - (b) accelerates, or could accelerate, the Project Schedule;
- (c) affects, or could affect, the performance of the Project under the Performance Guarantees and those other requirements and guarantees set forth in Exhibit I; or
 - (d) increases, or could increase, the costs of the Contractor.
 - 17.2.2 <u>Change in Work for Optional Spare Parts</u>. In the event that Owner elects to cause Contractor to procure operating spare parts pursuant to <u>Section 4.18.2</u>, then the Contract Price shall be adjusted as provided in <u>Section 17.4.1.1</u> and Contractor expressly waives any other compensation as a result of such Change in Work (including, but not limited to, any adjustment to the Project Schedule (and the Substantial Completion Guaranteed Date and Final Completion Expected Date referenced therein).

17.3 [Not Used]

17.4 Procedures.

17.4.1 <u>Preparation of Change in Work Form Due to Acceleration, Owner Initiated Change in Work.</u>

- 17.4.1.1 <u>Contractor's Estimate</u>. If Owner provides Notice to Contractor that Owner is considering a Change in Work permitted pursuant to <u>Sections 4.18.2</u>, <u>8.8</u> or <u>17.2</u>, then Contractor shall, as soon as practicable, prepare a Change in Work Form, which shall include, subject to the remaining provisions of this <u>Section 17.4.1</u>, a detailed proposal for such Change in Work, together with a detailed explanation and basis thereof:
 - (a) the change, if any, to the Project Schedule and the Project Guaranteed Dates associated with such Change in Work; and
 - (b) the increase, if any, in the cost and time required to complete the Work on the Change in Work Form.

Contractor's proposed change in the Contract Price for such Change in Work shall not exceed the sum of: (i) the Direct Costs expected to be actually, demonstrably and reasonably incurred by Contractor because of such Change in Work <u>plus</u> (ii) a five percent (5%) contingency for profit, overhead and contingency, <u>minus</u> any savings expected to be incurred because of acceleration of the Work pursuant to <u>Section 8.8</u> or, for a Change in Work for any other reason, a ten percent (10%) allowance for profit, overhead and contingency, <u>minus</u> any savings expected to be incurred because of such Change in Work. The adjustment in the Contract Price specified in this <u>Section 17.4.1.1</u> and the Project Schedule shall be the sole adjustment related to a specific Change in Work unless stated otherwise therein.

17.4.1.2 Execution of Change in Work Form.

If Contractor and Owner reach agreement on the matters listed in the Change in Work Form submitted by Contractor pursuant to this <u>Section 17.4.1</u>, then Contractor shall execute such Change in Work Form and Owner shall sign "Accepted by Owner" on such Change in Work Form and execute such Change in Work Form (indicating any amendments necessary to reflect the agreement of the Parties).

- 17.4.2 <u>Preparation of Change in Work Form Due to an Excusable Condition, Event of Force Majeure or Other Entitlement.</u>
- 17.4.2.1 <u>Contractor's Estimate</u>. If Contractor provides Notice of, becomes aware of, or is entitled to, a Change in Work permitted pursuant to <u>Sections 17.1(b)</u>, (c) or (e), then Contractor shall as soon as practicable serve Notice thereof to Owner, and Contractor shall, as soon as practicable, prepare a Change in Work Form, which form shall include, subject to the remaining provisions of this <u>Section 17.4.2</u>, a detailed estimate for such Change in Work, together with a detailed explanation thereof, of:
- (a) the change, if any, to the Project Schedule and the Project Guaranteed Dates associated with such Change in Work; and
 - (b) other than in respect of a Change in Work under Section 17.1(c) only

which shall be governed by the terms of Section 9.4.1, Contractor's proposed change in the Contract Price for such Change in Work which change shall not exceed the sum of: (i) the Direct Costs expected to be actually, demonstrably and reasonably incurred by Contractor because of such Change in Work <u>plus</u> (ii) a ten percent (10%) allowance for profit, overhead and contingency, <u>minus</u> any savings expected to be incurred because of such Change in Work;

The adjustment in the Contract Price specified in this <u>Section 17.4.2.1</u> and the Project Schedule and the Project Guaranteed Dates shall be the sole adjustment related to a specific Change in Work unless stated otherwise therein.

The Contractor's estimate for the Change in Work shall utilize the Contractor's rate schedule in Exhibit D.

- 17.4.2.2 Execution of Change in Work Form. If Contractor and Owner reach agreement on the matters listed in the Change in Work Form submitted by Contractor pursuant to this Section 17.4.2, then Contractor shall execute such Change in Work Form and Owner shall sign "Accepted by Owner" on such Change in Work Form and execute such Change in Work Form (indicating any amendments necessary to reflect the agreement of the Parties). If the Parties cannot reach agreement on the matters listed in the Change in Work Form submitted pursuant to this Section 17.4.2, then such matter shall be referred to dispute resolution under Article 33 unless an Owner Directive is issued under Section 17.5.
 - 17.4.3 No Obligation or Payment Without Executed Change in Work Form. IN NO EVENT SHALL CONTRACTOR BE ENTITLED TO UNDERTAKE OR BE OBLIGATED TO UNDERTAKE A CHANGE IN WORK UNTIL CONTRACTOR HAS RECEIVED A CHANGE IN WORK FORM SUBMITTED BY CONTRACTOR AND ACCEPTED BY OWNER AND, EXCEPT AS SET FORTH IN SECTION 17.5 OR IN ORDER TO RESPOND TO ANY EMERGENCY, IN THE ABSENCE OF SUCH SIGNED CHANGE IN WORK FORM, IF CONTRACTOR UNDERTAKES ANY CHANGES IN THE WORK, CONTRACTOR SHALL MAKE ANY SUCH **CHANGES** THEN CONTRACTOR'S SOLE RISK AND EXPENSE AND SHALL NOT BE ENTITLED TO ANY PAYMENT HEREUNDER FOR UNDERTAKING SUCH CHANGES.
 - 17.5 Owner Directives. If Contractor and Owner are unable to agree on the matters described in the Change in Work Form submitted by Contractor pursuant to Section 17.4.1, then Contractor shall perform the Work as modified by the contemplated change if Owner so directs in writing and such change is not illegal, does not affect the safe performance of the Work, does not require or cause the Contractor to otherwise be in breach of this Contract, and is not inconsistent with the fundamental nature of this Project as a simple cycle power generation facility (an "Owner Directive"). In such an event:
- (a) the Contract Price shall be increased by the sum of: (i) the Direct Costs actually, demonstrably and reasonably incurred by Contractor because of such Change in Work

<u>plus</u> (ii) a ten percent (10%) allowance for profit, overhead and contingency, <u>minus</u> any savings expected to be incurred because of such Change in Work, and Owner shall pay such amount net 21 days from invoice as said costs are incurred; and

(b) the Critical Path Items on the Project Schedule and the Project Guaranteed Dates shall be equitably adjusted to allow Contractor to overcome the impact, if any, of such Owner Directive.

Contractor expressly waives any other compensation as a result of such Owner Directive unless otherwise stated therein.

- 17.6 <u>Express Waiver</u>. Except as may be expressly set forth in Sections 6.1, 8.1.2, 9.4.1, 17.4 and 17.5, Contractor expressly waives any compensation for any Change in Work executed pursuant to the provisions of Article 17, including any other change in the Project Schedule, the Project Guaranteed Dates and the Contract Price.
- 17.7 No Suspension. Contractor shall not suspend the Work pending resolution of any proposed Change in Work unless directed by Owner in writing in accordance with Article 22, except (i) as specifically provided for in Section 20.5(a) herein or (ii) with respect to a Change in Work that (A) is a prohibited Owner Directive under the first sentence of Section 17.5 or (B) Contractor cannot reasonably perform any other Work until such prohibited Owner Directive is resolved.

18. WARRANTIES CONCERNING THE WORK

- 18.1 <u>Work Warranties</u>. Contractor warrants to Owner with respect to the Project (the "Work Warranties") that all Work (other than Work covered by the Materials Warranty), including the construction and design of the Project and the installation of the Equipment and Materials:
 - (a) shall be in accordance with Industry Standards;
 - (b) shall be free from Defects;
- (c) shall conform to all applicable requirements of the Contract, <u>Exhibit A</u>, any Applicable Law and the Applicable Permits; and
 - (d) shall be fit for use as a power production facility.
 - 18.2 <u>Materials Warranty</u>. Contractor further warrants that all Equipment and Materials and other items furnished by Contractor and any Subcontractors and Vendors hereunder (the "Materials Warranty"):
- (a) shall be new (other than the LM6000 engines) and of good and suitable quality when installed;
- (b) shall conform to the requirements of the Contract, <u>Exhibit A</u>, any Applicable Law and the Applicable Permits;

- (c) shall be free from any charge, lien, security interest or other encumbrance; and
- (d) shall be free of any Defects including Defects in design, materials or fabrication.
 - 18.3 Warranty Period. Contractor shall have no liability under Sections 18.1 or 18.2 with respect to any matter with respect to which Owner first notifies Contractor after the end of the Warranty Period (as such period may be extended in accordance with the terms hereof); provided, however, that the Warranty Period for any item or part required to be repaired, corrected or replaced following a warranty claim that is made during the original Warranty Period shall be extended from the time such repair, correction or replacement is complete for a period equal to the original Warranty Period exceed twelve (12) months after expiration of the original Warranty Period. Subject to the terms hereof, Contractor shall perform all warranty work so that the respective repair or replacement parts are complete and reasonably expected to perform satisfactorily for a reasonable period of time after the date of repair, correction or replacement.
 - 18.4 Enforcement After Expiration. Commencing on the expiration of the Warranty Period, or such later date as is provided in Section 18.3, Contractor shall provide reasonable assistance to Owner, on a reimbursable basis, in enforcing representations, warranties, and guarantees made by a Subcontractor or Vendor, when and as reasonably requested by Owner. In addition, prior to the expiration of the Warranty Period, or such later date as is provided in Section 18.3 with respect to Work required to be re-performed, Owner, at its option and upon prior written Notice to Contractor, may enforce the particular warranty, the Work Warranty or the Materials Warranty against any Subcontractor or Vendor if:
- (a) Owner determines that Contractor has not enforced such warranty against the Subcontractor or Vendor in a timely and diligent manner or performed the warranty work itself, or
 - (b) a Contractor Event of Default exists.
 - 18.5 <u>Exclusions</u>. The Work Warranty and Materials Warranty shall not apply to:
- (a) Damage to or Defects in any Work, or Equipment and Materials to the extent such damage or Defect is caused by:
 - (i) Owner's failure to operate and maintain such Equipment and Materials or the Work in accordance with the recommendations set forth in the Required Manuals but only if such failure occurs after Substantial Completion;
 - (ii) operation of such Equipment and Materials or the Work materially in excess of operating specifications for such Equipment and Materials or Work as set

forth in the Required Manuals but only if such failure occurs after Substantial Completion;

- (iii) the use of spare parts and normal consumables in the repair or maintenance of such Equipment and Materials or Work that are not in accordance with specifications and recommendations set forth in the Required Manuals but only if such failure occurs after Substantial Completion;
- (iv) normal wear and tear, but only if such failure occurs after Substantial Completion,
- (v) material deposits from fluids, lubrication oil or support water systems but only if such failure occurs after Substantial Completion;
- (vi) an event of Force Majeure (which excludes warranty failure hereunder);
- (vii) the negligence or willful misconduct of Owner or Operating Personnel;
- (viii) repair or modification of such Equipment and Materials or Work contrary to Contractor's expressly provided recommendations;
- (ix) failure by Owner to keep records of operation and maintenance of such Equipment and Materials or Work in accordance with its customary procedures; or
- (x) operating with fuel not meeting specifications set forth in Exhibit A, Appendix 05, Section 1.2 or under conditions involving more than 800 starts on a gas turbine in any one (1) year period.
- (b) Normal Operating Consumables or items that require replacement due to casualty loss (other than as a result of any failure of the Work Warranty or the Materials Warranty).

Notwithstanding the foregoing, damage caused by Contractor or Operating Personnel while under the direction of Contractor shall be the responsibility of Contractor, unless such damage is due to or arises out of the Operating Personnel's negligence or willful misconduct.

18.6 <u>Subcontractor and Vendor Warranties</u>. Without in any way derogating from Contractor's own representations and warranties and its Performance Guarantees and other testing requirements and guarantees set forth in Exhibit I with respect to all of the Work, Contractor shall use commercially reasonable efforts to obtain warranties for all Work performed by each Subcontractor or Vendor on similar terms as this Article 18, use commercially reasonable efforts to obtain from all Subcontractors and Vendors any representations, warranties, guarantees, and obligations offered by such Subcontractors and Vendors and to negotiate the longest practical warranty periods at no additional cost with respect to design, workmanship, Equipment and Materials, and other items furnished by such Subcontractors and Vendors. Contractor hereby assigns

to Owner all representations, warranties, guarantees, and obligations of all Subcontractors and Vendors, without recourse to Contractor, effective upon the earlier of the end of the Warranty Period, any Contractor Event of Default or termination or expiration of this Contract. In addition, Contractor hereby assigns to Owner, effective as of the end of the Warranty Period, all representations, warranties, guarantees and obligations of all Subcontractors and Vendors. Contractor shall deliver to Owner promptly following execution thereof duly executed copies of all contracts containing such representations, warranties, guarantees, and obligations; provided, however, that pricing terms may be redacted.

18.7 Correction of Defects.

Generally. Owner shall promptly provide Notice to Contractor 18.7.1 upon discovery that any of the Work fails to satisfy the Work Warranty or the Materials Warranty prior to the end of the applicable Warranty Period, including any extensions of the Warranty Period pursuant to Section 18.3. Contractor shall, at its own cost and expense (including overtime but excluding any taxes), re-perform any necessary engineering and purchasing relating to such Work, and shall pay the cost of removing any Defect and the cost of replacement thereof, including, without limitation, necessary disassembly, transportation, reassembly and retesting, as well as reworking, repair or replacement of such Work, disassembly and reassembly of piping, ducts, machinery, Equipment or other Work as necessary to give access to improper, defective or non-conforming Work and correction, removal or repair of any damage to other work or property that is included as part of the Work and that arises from the Defect as shall be necessary to cause the Work and the Project to conform to the Work Warranty or Materials Warranty. Notwithstanding the foregoing, Owner shall be responsible for any removal, installation, testing, and transportation costs incurred by Contractor in performing its warranty obligations hereunder with respect to any Major Component beyond the first warranty claim for said Major Component. Within five (5) days after receipt by Contractor of a Notice from Owner specifying a failure of any of the Work to satisfy Contractor's Work Warranty or the Materials Warranty and requesting Contractor to correct the failure, Contractor and Owner shall reasonably agree when and how Contractor shall remedy such failure. Notwithstanding the foregoing and subject to Section 18.7.2.2, if any of the Work shall fail to satisfy Contractor's Work Warranty or the Materials Warranty, and such failure endangers human health or property or materially and adversely affects the operation of the Project, then Contractor shall correct the failure as soon as is reasonably practicable.

18.7.2 Owner Performance.

18.7.2.1. <u>Upon Contractor's Request.</u> Notwithstanding the foregoing, Contractor may request Owner to perform all or any portion of Contractor's obligations with respect to any warranty claim, and, if Owner desires (in its sole discretion) to perform such obligations, Owner shall perform such obligations for Contractor's account (including, without limitation, drawing from Warranty Bond provided pursuant to <u>Section 7.9</u> to pay for costs and expenses incurred in performing such obligations). Owner shall have no liability to Contractor

in respect of the performance of such obligations and (subject to <u>Section 18.5</u>) such performance by Owner shall in no way limit Contractor's continuing warranty obligations hereunder.

18.7.2.2. Failure of Contractor to Perform Warranty Work. If Contractor does not use commercially reasonable efforts to proceed to complete warranty work approved by Owner pursuant to Section 18.7.1 within the agreed time, or if Contractor and Owner fail to reach such an agreement within such five (5) day period set forth in Section 18.7.1, then Owner shall have the right to perform the necessary remedy, or have third parties perform the necessary remedy, and Contractor shall bear the Direct Costs demonstrably and reasonably incurred by Owner for reasons attributable to Contractor (which may include, without limitation, Owner drawing from the Warranty Bond provided pursuant to Section 7.9 to pay for these costs incurred in performing such remedy). In the event any of the Work fails to satisfy the Work Warranty or the Materials Warranty during the applicable Warranty Period and any such failure occurs under circumstances in which there is an imminent and material threat to human health, the environment, or property and Contractor is not immediately available, then Owner may perform such warranty work and Contractor shall bear the Direct Costs demonstrably and reasonably incurred by Owner (including, without limitation, drawing from the Warranty Bond provided pursuant to Section 7.9 to pay for these costs incurred in performing such obligations). Neither Owner nor any such third parties shall have any liability to Contractor in respect of their performance of such obligations and (subject to Section 18.5) such performance by Owner shall in no way limit Contractor's continuing warranty obligations hereunder. In the event Owner performs any of the warranty work pursuant to this Section 18.7.2.2 then within sixty (60) days of completing the Work, and prior to drawing from the Warranty Bond, Owner shall provide Contractor with an invoice and supporting documentation evidencing the Direct Costs in performing the Work. Nothing in this Section 18.7.2.2 is intended or shall be deemed to be a waiver or modification of Owner's rights relating to the Warranty Bond.

> 18.7.3 Acceptance Tests. If, during the Warranty Period, Contractor shall change, repair or replace any Work or Equipment and Materials, Owner, in its reasonable discretion, may require Contractor to conduct and satisfactorily complete any Acceptance Test with respect to the affected Equipment and Materials; provided, however, in connection with any re-performance of an Acceptance Test pursuant to this Section 18.7.3, an appropriate degradation allowance with respect to the performance of such Equipment and Materials shall be made for the fact that such Equipment and Materials may have operated prior thereto. If after running a Performance Test pursuant to this Section, the results of such Performance Test indicate a degradation in the performance (as measured against the test results used to satisfy the Performance Guarantees prior to Substantial Completion and adjusted consistent with the degradation allowed) or fails to satisfy any other Acceptance Test, then Contractor shall repair, correct or replace such affected Work or Equipment and Materials and re-run such Acceptance Test until the performance is at a level consistent with the performance on the Substantial Completion Date (as adjusted consistent with the degradation allowed). Owner shall be responsible for all costs incurred by Contractor in conducting any Acceptance Test required by Owner under this Section 18.7.3, unless the results of such test indicate said degradation or failure in the Equipment, in which case Contractor will be responsible for all costs of

conducting the Acceptance Test.

Chronic Failure Repairs/Root Cause Analysis. If the Work (or any portion thereof) experiences two (2) or more of the same or substantially similar failures of the Work Warranty or the Materials Warranty within any one hundred eighty (180) consecutive day period during the Warranty Period or if any Remedial Plan determines the existence of a design-based failure in the Work (or any portion thereof) (any such set of failures, a "Chronic Failure"), Contractor shall: (i) investigate the cause of such Chronic Failure by conducting a rigorous process (including a root cause analysis) of evaluating the evidence and the physical sequence of events involving the Contractor, Owner, and/or (at the Contractor's sole discretion) any third party expert(s) to determine the underlying reason for such Chronic Failure or the factor(s) the absence of which would have avoided the such Chronic Failure, and Contractor shall provide the results of such investigation and process to Owner upon their completion; and (ii) make such reperformance, repairs, replacements, or adjustments necessary to correct the cause of the Chronic Failure as shall be necessary to cause the Work and the Project to conform to the Work Warranty or Materials Warranty.

18.9 Limitations on Warranties.

EXCEPT FOR THE **EXPRESS** WARRANTIES AND REPRESENTATIONS SET FORTH IN THIS CONTRACT (INCLUDING IN ANY EXHIBIT HERETO), CONTRACTOR DOES NOT MAKE ANY OTHER EXPRESS OR ORAL WARRANTIES OR REPRESENTATIONS, OR ANY WARRANTIES OR REPRESENTATIONS, OF ANY IMPLIED WHATEVER, AND NO IMPLIED, STATUTORY, OR COMMON LAW WARRANTY OF ANY KIND, INCLUDING MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, SHALL APPLY.

19. EQUIPMENT IMPORTATION; TITLE

19.1 <u>Importation of Equipment and Materials</u>. Contractor, at its own cost and expense, shall make all arrangements, including the processing of all documentation, necessary to import into the United States, Equipment and Materials to be incorporated into the Project, and any other equipment and other items necessary to perform the Work, and shall coordinate with the applicable Governmental Authority in achieving clearance of United States customs for all such Equipment and Materials and other items. In no event shall Owner be responsible for any delays in customs clearance or any resulting delays in performance of the Work.

19.2 Title.

19.2.1 Subject to Article 30, Contractor warrants good title, free and clear of all liens, claims, charges, security interests, and encumbrances whatsoever, to all Equipment and Materials and other items furnished by it or any of its Subcontractors that become part of the Project or that are to be used for the operation,

maintenance, or repair thereof.

- 19.2.2 Title to each of the Major Components shall pass to Owner free and clear of all liens, claims, charges, security interests, and encumbrances whatsoever, upon final payment for such Major Component, which final payment shall be the amount that corresponds to the Ready to Ship Payment milestone for such Major Component as set forth in Exhibit B. Title to all other Equipment and Materials and other items shall pass to Owner free and clear of all liens, claims, charges, security interests, and encumbrances whatsoever, upon delivery of such Equipment and Materials or such other items to the Site.
- 19.2.3 The transfer of title shall in no way affect Owner's rights as set forth in any other provision of this Contract. Contractor shall have care, custody, and control of all Equipment and Materials and other items and exercise due care with respect thereto until the time set forth in Section 19.4 below.
- 19.3 <u>Protection</u>. For the purpose of protecting Owner's interest in all Equipment and Materials and other items with respect to which title has passed to Owner pursuant to Section 19.2 but that remain in possession of another party, Contractor shall take or cause to be taken all steps reasonably necessary under the laws of the appropriate jurisdiction(s) to protect Owner's title and to protect Owner against claims by other parties with respect thereto; provided, however, that Contractor shall assist Owner when any filing with any security interest registry is necessary to protect Owner's title or to protect Owner against claims by other parties; and provided, further, that it shall be Owner's responsibility to make any such filings.
- 19.4 <u>Owner Possession</u>. Owner shall take care, custody and control, and otherwise take complete possession of the Project at 12:01 a.m. of the day after the Substantial Completion Date.

20. DEFAULT

- 20.1 <u>Contractor Events of Default</u>. Contractor shall be in material default of its obligations pursuant to this Contract upon the occurrence of any one or more events of default set forth below (each, a "Contractor Event of Default"):
- (a) Contractor or its parent corporation or guarantor makes an assignment for the benefit of creditors, admits in writing its inability to pay its debts as they become due, files a voluntary petition in bankruptcy, is adjudicated as bankrupt or insolvent; files a petition or answer seeking for Contractor any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any present or future statute, law, or regulation; Contractor files any answer admitting or not contesting the material allegations of a petition filed against Contractor (as applicable) in any such proceeding, or Contractor seeks, consents to, or acquiesces in, the appointment of any trustee, receiver, custodian, or liquidator of Contractor or of all or any substantial part of Contractor's properties; or Contractor's directors, or shareholders take action to dissolve or liquidate the Contractor;
 - (b) involuntary petitions in bankruptcy are brought against Contractor or an

answer proposing the adjudication of Contractor as a debtor or bankrupt or proposing Contractor's liquidation or reorganization pursuant to any applicable bankruptcy law is filed in any court and Contractor consents to or acquiesces in the filing thereof or such petition or answer is not dismissed within sixty (60) days after the filing thereof;

- (c) any material representation or warranty made by Contractor herein was materially false or misleading when made and Contractor fails to remedy such false or misleading representation or warranty, and to make Owner whole for any consequences thereof, within thirty (30) days after Contractor receives a Notice from Owner with respect thereto;
- (d) Contractor assigns or transfers this Contract or any right or interest herein, except as expressly permitted under Article 28;
- (e) (i) Contractor fails to maintain any insurance coverages required of it in accordance with Article 23 and (ii) (A) Contractor fails to remedy such failure within five (5) Days after Contractor receives a Notice from Owner with respect thereto, or (B) if such failure is not capable of being cured within such five (5) Day period but Contractor has commenced the cure within such period, is diligently pursuing it and has stopped the affected portion of the Work, Contractor fails to remedy such failure within an additional twenty-five (25) days. Contractor's stoppage of the Work pursuant to this Section 20.1(e) shall not entitle it to any adjustments to the Contract Price or the Project Guaranteed Dates unless otherwise specified in this Contract;
- (f) Contractor fails to perform or observe in any respect any provision of this Contract providing for the payment of money that is owed to Owner under this Contract (other than payments of money subject to good faith disputes), or any other material provision of this Contract not otherwise addressed in this Section 20.1, and such failure continues for ten (10) days in the case of a payment obligation or thirty (30) days in the case of any other obligation, except such thirty (30) day period shall be extended if (i) curing such failure reasonably requires more than thirty (30) days, (ii) Contractor commences such cure within such thirty (30) day period and diligently prosecutes such cure, and (iii) such cure is accomplished within seventy-five (75) days, in each case after Contractor receives a Notice from Owner with respect thereto;
- (g) (i) Contractor fails to timely deliver a Remedial Plan pursuant to Section 8.5 or, following approval of a Remedial Plan pursuant to Section 8.5, Contractor fails, other than for an Excusable Condition or an event of Force Majeure or Change in Work, to meet the schedule set forth in the Remedial Plan (as determined from the revised Project Schedule established by the Remedial Plan), or (ii) Contractor fails to timely deliver a Schedule Recovery Plan pursuant to Section 8.4.2 or, following approval of a Schedule Recovery Plan pursuant to Section 8.4.2, Contractor fails, other than for an Excusable Condition or an event of Force Majeure or Change in Work, to meet the schedule set forth in the Schedule Recovery Plan, and (iii) in the case of either (i) or (ii), Contractor fails to remedy such failure within thirty (30) days after Contractor receives a Notice from Owner with respect thereto;
- (h) the Minimum Performance Criteria for any Unit or the Project has not been achieved by the Substantial Completion Deadline Date;

- (i) Contractor suspends or abandons (except for a suspension or Abandonment under Section 20.5(a) herein or due to an Excusable Condition or an event of Force Majeure or Change in Work) the Work and Contractor fails to cure such suspension or Abandonment within ten (10) days after Contractor receives a Notice from Owner with respect thereto. "Suspension" for the purposes of this Section 20.1(i) shall mean that Contractor has not accomplished any material progress toward any of the Critical Path Items for a period of thirty (30) or more days except for a suspension under Section 20.5(a) herein or due to an Excusable Condition or an event of Force Majeure or Change in Work. "Abandonment" for the purposes of this Section 20.1(i) shall mean that Contractor, except to the extent caused by an event described under Section 20.5(a) herein or due to Force Majeure or Excusable Condition or Change in Work, has substantially reduced personnel at the Site or removed further required equipment from the Site such that, in the reasonable opinion of the Engineer, Contractor would not be capable of maintaining progress in accordance with the Project Schedule, as adjusted pursuant to the terms of this Contract for any Excusable Condition, Change in Work or event of Force Majeure.
- (j) with respect to a Performance Bond or Warranty Bond, the failure by Contractor to provide for the benefit of Owner (1) a substitute Performance Bond or Warranty Bond, as applicable; or (2) cash, in either case, in the amount required hereunder within five (5) Business Days after Contractor receives notice of the occurrence of any of the following events:
- (i) the issuer of the outstanding Performance Bond or Warranty Bond shall fail to meet the conditions of an "Eligible Issuer";
- (ii) the issuer of such Performance Bond or Warranty Bond (A) files a petition or otherwise commences, authorizes, or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy, insolvency, reorganization or similar law, or has any such petition filed or commenced against it, (B) makes an assignment or any general arrangement for the benefit or creditors, (C) otherwise becomes bankrupt or insolvent (however evidenced), (D) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (E) is generally unable to pay its debts as they fall due;
- (iii) the issuer of the Performance Bond or Warranty Bond shall fail to comply with or perform its obligations under such bond and such failure shall be continuing after the lapse of any applicable grace period permitted under such bond;
- (iv) the issuer of the Performance Bond or Warranty Bond shall fail to honor a properly documented demand for payment or performance thereunder;
- (v) the issuer of the outstanding Performance Bond or Warranty Bond shall disaffirm, disclaim, repudiate or reject, in whole or in part, or challenge the validity of, such bond; or
- (vi) Contractor shall fail to renew or cause the renewal of the Performance Bond or Warranty Bond on a timely basis as provided in such bond and as provided in accordance with this Contract, and in no such event less than thirty (30) days prior to the

expiration of the outstanding Performance Bond or Warranty Bond.

- (k) Contractor fails to comply with the Owner-approved safety plan and such failure continues for five (5) business days after Contractor receives Notice from Owner; or
- (l) The Substantial Completion Date has not occurred by the Substantial Completion Deadline Date, as the date may be extended pursuant to this Contract.
 - 20.2 Owner's Rights and Remedies. In the event of a Contractor Event of Default, subject to Article 32, Owner or its assignees shall have the following rights and remedies, in addition to any other rights and remedies that may be available to Owner or its assignees under this Contract and Applicable Law, and Contractor shall have the following obligations:
- (a) Owner, without prejudice to any of its other rights or remedies, may terminate this Contract by delivery of written notice to Contractor;
- (b) Owner may, without prejudice to any of its other rights or remedies, seek performance by enforcing any security given by or for the benefit of Contractor for its obligations hereunder;
- (c) Owner may require Contractor to, and Contractor shall, (i) withdraw from the Site, (ii) assign to Owner (without recourse to Contractor) such of Contractor's Subcontracts as Owner may request, and (iii) (to the extent permitted by Contractor's contracts with third parties) deliver or and make available to Owner all information, patents, and licenses of Contractor or an applicable third party (including Subcontractors or Vendors) related to the Work reasonably necessary to permit Owner (or Owner's designee) to complete or cause the completion of the Work, and in connection therewith Contractor authorizes Owner and its respective agents to use such information in completing the Work, shall remove such materials, equipment, tools, and instruments used by and any debris or waste materials generated by Contractor in the performance of the Work as Owner (or Owner's designee) may direct, and Owner may take possession of any or all Contractor Deliverables and Site facilities of Contractor related to the Work necessary for completion of the Work (whether or not such Contractor Deliverable and Site facilities are complete);
- (d) Owner, without incurring any liability to Contractor, shall have the right (either with or without the use of Contractor's equipment) to have the Work finished, whether by enforcing any security given by or for the benefit of Contractor for its performance under this Contract or otherwise, in which case Owner shall have the right to take possession of and use all equipment of Contractor necessary for completion of the Work, and Contractor shall have no right to remove such items from the Site until such completion;
- (e) Owner may seek equitable relief to cause Contractor to take action or to refrain from taking action pursuant to this Contract, or to make restitution of amounts improperly received under this Contract;
- (f) Owner may make such payments or perform such obligations as are reasonably required to cure any Contractor Event of Default and offset the cost of such payment

or performance against payments otherwise due to Contractor under this Contract; and

- (g) Owner may seek damages as provided in <u>Section 20.3</u>, including proceeding against any bond or other security given by or for the benefit of Contractor for its performance under this Contract.
 - 20.3 <u>Damages for Termination Due to Contractor Default</u>. In the event Owner terminates this Contract in accordance with Section 20.2(a), and subject to Article 32:
- If the Completion Costs (defined below) exceed the Outstanding Balance at the time of Owner's termination, then subject to Article 32, Contractor shall be liable and pay to Owner within sixty (60) days following completion of the Project and the Work the amount, not otherwise disputed in good faith by Contractor, equal to the difference between (i) Owner's aggregate actual, direct and documented costs of completing the Project and the Work (including out-of-pocket compensation for obtaining a replacement contractor or for obtaining additional professional services required as a consequence of Contractor's Event of Default) incurred by Owner in a commercially reasonable manner (but excluding any liquidated damages (including Delay Liquidated Damages or any Buy-Down Amount) that Contractor would have been otherwise liable for on or following the effective date of Owner's termination, had Owner not terminated the Contract) (the "Completion Costs") and (ii) the Outstanding Balance (calculated at the time of Contractor's default). If the Outstanding Balance so calculated exceeds the Completion Costs, then (X) Contractor shall not be liable for any such difference and the Contractor shall not be liable to pay Owner any damages under this Section 20.3, and (Y) Owner shall, within the earlier of seven hundred twenty (720) Days after the date of such termination or thirty (30) Days after Final Completion of the Work by Owner hereunder, pay Contractor an amount equal to the sum of (i) any unpaid portion of the Contract Price attributable to the Work performed by Contractor prior to the date of such termination plus (ii) the value of any unused or partially used equipment, parts or materials furnished by Contractor which are used by Owner and have not already been paid for as part of the Contract Price paid to Contractor. In the event of a Contractor Event of Default, and subject to Article 32, Owner shall be entitled to withhold further payments to Contractor for the Work performed prior to termination of this Contract until Owner determines the liability of Contractor, if any, under this Section 20.3. determination of the Completion Costs and the Outstanding Balance, Owner shall notify Contractor in writing of the amount, if any, that Contractor shall pay Owner, subject to Contractor's right to audit and review in accordance with the terms hereof. acknowledges that in the event of such a termination, Owner may enter into a turn-key contract for the completion of the Project with the same performance guarantees, completion deadlines and liquidated damages as are provided for in this Contract and that the cost to complete the Project in such event may greatly exceed the cost hereunder.
 - 20.4 Owner Event of Default. Owner shall be immediately in default of its obligations pursuant to this Contract upon the occurrence of any one or more events of default below (each, an "Owner Event of Default"):
- (a) Owner makes an assignment for the benefit of creditors, admits in writing its inability to pay its debts as they become due, files a voluntary petition in bankruptcy, is adjudicated as bankrupt or insolvent; files a petition or answer seeking for Owner any

reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any present or future statute, law, or regulation; Owner files any answer admitting or not contesting the material allegations of a petition filed against Owner (as applicable) in any such proceeding, or Owner seeks, consents to, or acquiesces in, the appointment of any trustee, receiver, custodian, or liquidator of Owner or of all or any substantial part of Owner's properties; or Owner's directors, or shareholders take action to dissolve or liquidate the Owner;

- (b) involuntary petitions in bankruptcy are brought against either Owner or an answer proposing the adjudication of Owner as a debtor or bankrupt or proposing Owner's liquidation or reorganization pursuant to any applicable bankruptcy law is filed in any court and Owner consents to or acquiesces in the filing thereof or such petition or answer is not dismissed within sixty (60) days after the filing thereof;
- (c) any material representation or warranty made by Owner herein was materially false or misleading when made and Owner fails to remedy such false or misleading representation or warranty, and to make Contractor whole for any consequences thereof, within thirty (30) days after Owner receives a Notice from the Contractor with respect thereto;
- (d) Owner fails to perform or observe in any respect any provision of this Contract providing for the payment of money that is owed to Contractor under the terms of this Contract (other than payments of money subject to good faith disputes) or any other material provision of this Contract not otherwise addressed in this Section 20.4, and such failure continues for ten (10) days in the case of such a payment obligation or thirty (30) days in the case of any other obligation, except such thirty (30) day period shall be extended if: (i) curing such failure reasonably requires more than thirty (30) days, (ii) Owner commences such cure within such thirty (30) day period and diligently prosecutes such cure, and (iii) such cure is accomplished within seventy-five (75) days, in each case after Owner receives a Notice from Contractor with respect thereto; or
- (e) Owner assigns or transfers this Contract or any right or interest herein, except as expressly permitted under Article 28.
 - 20.5 <u>Contractor's Remedies</u>. In the event of an Owner Event of Default and subject to Article 32, Contractor shall only have the following remedies:
- (a) suspend performance of the Work until Owner cures such Owner Event of Default (in which event, Contractor shall be compensated in the manner specified in Section 22.3), it being understood that Contractor may at any time it sees fit rescind a suspension under this Section 20.5(a);
- (b) if the Owner Event of Default is not cured within 30 days of Notice of the default, Contractor may give Owner notice of Contractor's intent to terminate the Contract, which termination will be deemed a termination for Owner's convenience; or
- (c) avail itself of any other rights and remedies that may be available to Contractor or its assignees under this Contract and Applicable Law including any legal or equitable remedy to enforce the obligations of Owner under this Contract, subject to the

limitations in Article 32.

21. EARLY TERMINATION

- 21.1 General. Owner may in its sole discretion terminate this Contract with or without cause at any time by giving Notice of termination to Contractor, to be effective upon the receipt of such Notice by Contractor or upon such other termination date specifically identified by Owner therein. If Owner terminates the Work without cause or for any cause other than a Contractor Event of Default specified in Section 20.1, or if this Contract is terminated pursuant to any of Sections 20.5(b), 21.4 or 22.2, then Owner and Contractor shall have the following rights, obligations and duties:
- 21.1.1 <u>Termination Value</u>. If this Contract is terminated pursuant to <u>Section 21.1</u> following Owner's issuance of the Notice to Proceed, then as compensation for the Work performed through the effective date of termination pursuant to <u>Section 21.1</u>, Owner shall pay to Contractor the Termination Value. For the purposes of calculating the Termination Value, the Termination Value shall be the cumulative sum of the termination amounts for (a) the most recently completed CTG Packages milestone and (b) the most recently completed EPC milestone, as listed on <u>Exhibit N</u>, and (c) the pro-rata portion of the subsequent CTG Package milestone or the subsequent EPC milestone that has not been completed as of the Termination Date, less any amounts already paid excluding any gross receipt taxes.

21.1.2 [Not Used]

- 21.1.3 <u>Assumption of Contractor Contracts</u>. Owner shall have the right, but only following the Notice to Proceed Date, at its sole option, to assume and become liable for any obligations that Contractor may have in good faith incurred for its Site personnel and for any written obligations and commitments that Contractor may have in good faith undertaken with third parties in connection with the Work to be performed at the Site. If Owner elects to assume any obligation of Contractor as described in this <u>Section 21.1.3</u>, then (a) Contractor shall execute all documents and take all other reasonable steps requested by Owner which may be required to vest in Owner all rights, set-offs, benefits and titles necessary to such assumption by Owner of such obligations described in this <u>Article 21</u>, and (b) Owner shall simultaneously agree to indemnify Contractor against liabilities thereafter arising under the assumed obligations or commitments.
- 21.1.4 <u>Completion of Work.</u> Upon a termination of this Contract pursuant to <u>Section 8.1.4</u> or this <u>Article 21</u>, Owner may require Contractor to, and Contractor shall (if so required), (a) withdraw from the Site, (b) deliver to Owner all Work completed as of the effective date of such termination, for which title has transferred in accordance with Section 19.2, (c) assign to Owner (without recourse to Contractor) such of Contractor's subcontracts as Owner may request, and (d) (to the extent permitted by Contractor's contracts with third parties) deliver or make available to Owner all information, patents, and licenses of Contractor or an

applicable third party (including Subcontractors or Vendors) related to the Work reasonably necessary to permit Owner (or Owner's designee) to complete or cause the completion of the Work, and in connection therewith Contractor authorizes Owner and its respective agents to use such information in completing the Work, shall remove such materials, equipment, tools, and instruments used by and any debris or waste materials generated by Contractor in the performance of the Work as Owner (or Owner's designee) may direct, and Owner may take possession of any or all Contractor Deliverables and Site facilities of Contractor related to the Work necessary for completion of the Work (whether or not such Contractor Deliverable and Site facilities are complete).

- 21.2 <u>Claims for Payment</u>. All claims for payment by Contractor under this Article 21 must be made within one hundred eighty (180) days after the effective date of a termination hereunder. Owner shall make payments under this Article 21 in accordance with Article 7.
- Nature of Termination Payments. The payments described in Section 21.3 21.1.1 are intended to constitute Contractor's sole compensation for: (a) all costs of Equipment and Materials, temporary equipment, labor, transportation, engineering, design and other services relating to Contractor's performance of its obligations under this Contract (including any intellectual property rights licensed under this Contract, expressly or by implication) provided by Contractor or such Subcontractors or Vendors, (b) all national, state, regional and local taxes, and other sales taxes effective or enacted as of the date of execution of this Contract or thereafter, each as imposed on Contractor or its Subcontractors or Vendors, (c) all other taxes, duties, levies, imposts, fees, or charges of any kind (whether in the United States or elsewhere) arising out of Contractor's or any such Subcontractor's or Vendor's performance, including any increases thereof that may occur during the term of this Contract, and (d) any duties, levies, imposts, fees, charges, and royalties imposed on Contractor or its Subcontractors or Vendors with respect to any such Equipment and Materials, labor, or services provided under this Contract. The taxes covered hereby include occupational, excise, unemployment, ownership, value-added, sales and income taxes and any and all other taxes and duties on any item or service that is part, whether such tax is normally included in the price of such item or service or is normally stated separately, all of which shall be for the account of Contractor. The above-described payments shall not be increased with respect to any of the foregoing items or with respect to any withholdings relating to any of the foregoing items that Owner may be required to make.
- 21.4 <u>Failure to Obtain Permits</u>. If, within three hundred sixty (360) Days following Owner's issuance of the Notice to Proceed, Owner is unable to obtain all of the Owner Acquired Permits necessary for Contractor to perform the Work, either Party may, upon thirty (30) Days' notice to the other Party, terminate this Contract. Such termination shall, for all purposes hereof, be deemed a termination pursuant to Article 21.

22. SUSPENSION

- 22.1 General. Owner may suspend performance of the Work at any time by giving Notice thereof to Contractor. Such suspension shall continue for the period specified in the suspension Notice. The Project Guaranteed Dates and Contract Price shall be adjusted as provided in Section 22.3 (other than for a Suspension for Cause). At any time after the effective date of the suspension, Owner may require Contractor to resume performance of the Work on five (5) days' Notice.
- 22.2 <u>Contractor's Termination Right</u>. If, at the end of the specified suspension period, Owner has not requested a resumption of the Work or has not notified Contractor of any extension of the suspension period (but in no event beyond one

hundred eighty (180) days for all such suspensions, other than Suspensions for Cause) at Contractor's option this Contract shall be deemed terminated as of the commencement date of the suspension period.

- 22.3 <u>Extension of Time and Compensation Rights</u>. In the case of any suspension under this Article 22 or any suspension by Contractor under Section 20.5(a), other than a Suspension for Cause:
- (a) the Project Guaranteed Dates shall be extended by a period equal to the suspension period, plus a reasonable period for demobilization and remobilization;
- (b) The Contract Price shall be increased by the sum of those Direct Costs (without profit, overhead or contingency) actually, demonstrably and reasonably incurred during the suspension period, to the extent attributable to the suspension, and that are:
- (i) for the purpose of safeguarding and/or storing the Work and the Equipment and Materials at the point of fabrication, in transit, or at the Site;
- (ii) for personnel, Subcontractors, or rented Equipment and Materials, the payments for which, with Owner's prior written concurrence, are continued during the suspension period;
 - (iii) for reasonable costs of demobilization and remobilization;
- (iv) for rescheduling the Work (including escalation for suspension, and penalties or additional payments to Subcontractors for the same); or
- (v) other reasonable Direct Costs related to such suspension including escalation of pricing for Equipment and Materials not ordered at the time of suspension;

less any savings incurred because of such suspension;

- (c) the Project Schedule and the Critical Path Items on the Project Schedule shall be adjusted to account for same; and
- (d) Owner shall pay Contractor the corresponding percentage of a Milestone Payment for the portion of Work relating to the Milestone Payment that was actually and demonstrably completed by Contractor at the time of the suspension, as mutually agreed by the Parties. The balance of any such Milestone Payment shall be paid once the remaining Work thereunder is completed by Contractor.

22.4 <u>Claims for Payment</u>. All claims by Contractor for compensation or extension of time under this Article 22 must be made within ninety (90) days after the suspension period has ended and the Work has been either terminated or resumed. Failure of Contractor to make such claim within said period shall be deemed a waiver by Contractor of any such claims.

23. INSURANCE

23.1 General.

- (a) Contractor shall procure at its own expense and maintain in full force and effect the minimum insurance coverages and limits as required under Section 23.2, with insurance companies authorized to do business in the State of New Mexico, throughout the performance of the Work under this Contract, commencing with any and all Work performed on Site or off Site in preparation for the Notice to Proceed and Contractor's mobilization at the Site (with the exception that the umbrella/excess liability insurance set forth in Section 23.2.4 and extended completed operations coverage of the commercial general liability coverage set forth in Section 23.2.2 need not commence until Contractor's mobilization at the Site in connection with the Notice to Proceed) and shall be maintained in force until Final Completion. All policies shall be on an occurrence basis with the exception that the Professional Liability Insurance described in Section 23.2.6 may be written on a claims made form; provided that the policy (a) has a retroactive date prior to the date of the commencement of the Work, and (b) is maintained by Contractor throughout the performance of the Work and for at least three (3) years after Final Completion either through policy renewal or an extended reporting period.
- (b) Owner shall procure at its own expense and maintain in full force and effect as required under this Contract, with insurance companies authorized to do business in the State of New Mexico, the types and limits of insurance as set forth in Section 23.3 and 23.4 and maintained by Owner throughout the performance of the Work and for at least three (3) years after Final Completion either through policy renewal or an extended reporting period.
- (c) Such insurance companies shall be rated by A.M. Best Company as having a financial strength rating of "A-" or better and a financial size category of "VIII" or greater.
- (d) Capitalized terms used in this <u>Article 23</u> and not otherwise defined in this Contract shall have the meanings generally ascribed to them in the commercial insurance industry in the United States.
- (e) Each Party, at its own cost, may purchase any additional insurance it believes necessary to protect its interests.
- (f) Any insurance coverages required below may be satisfied through a combination of primary and excess liability policies.
- (g) To the extent permitted by law, Contractor shall waive on behalf of itself and its insurers all rights to assert claims for any losses, damages, liabilities, and expenses, such expenses to include but not be limited to attorney's fees, against Owner, Owner's subsidiaries

and Affiliates along with their respective directors, officers, and employees, to the extent proceeds realized from policies of insurance maintained or required to be maintained in connection with services or products provided under this Contract are applied to such losses, damages, liabilities, and expenses. Each policy of insurance required herein, with the exception of the professional liability insurance required under Section 23.2.6, shall include an endorsement acknowledging such waiver of subrogation. To the extent permitted by law, Owner shall waive on behalf of itself and its insurers all rights to assert claims for any losses, damages, liabilities, and expenses, such expenses to include but not be limited to attorney's fees, against Contractor and its Subcontractors, Contractor's subsidiaries and Affiliates along with their respective directors, officers, and employees, to the extent proceeds realized from policies of insurance maintained or required to be maintained under this Contract by Owner are applied to such losses, damages, liabilities, and expenses. Each policy of insurance required herein shall include an endorsement acknowledging such waiver of subrogation.

- 23.2 <u>Contractor's Insurance</u>. Contractor shall obtain and maintain in full force and effect the insurance policies specified in this Section 23.2. Any and all deductibles and premiums associated with the policies specified in this Section 23.2 shall be assumed by, for the account of, and at the sole risk of Contractor. Each policy of insurance, as allowed by statute and with the exception of the insurance required under Section 23.2.6, shall waive all of the insurer's rights of recovery under subrogation or otherwise, against Owner and its Affiliates and their respective directors, officers, managers, representatives, agents and employees and any other parties as the Owner may designate.
- 23.2.1 Workers' Compensation and Employer's Liability Insurance. Contractor shall maintain workers' compensation insurance and such other forms of insurance which Contractor is required to maintain in order to comply with statutory limits in the State of New Mexico or under workers' compensation laws of any applicable jurisdiction in the United States (and any other location in which the Work is to be performed) including USL&H coverage (if any exposure exists), where applicable, and employer's liability (including occupational disease) coverage with limits of at least One Million Dollars (\$1,000,000) per accident for bodily injury by accident and, One Million Dollars for each employee and policy limit for bodily injury by disease. Such insurance shall cover all of Contractor's employees, whether full-time, leased, temporary or casual, who are engaged in the Work.
- 23.2.2 Commercial General Liability Insurance. Contractor shall maintain commercial general liability insurance written on an occurrence basis and with a combined single limit of at least One Million Dollars (\$1,000,000) per occurrence, Two Million Dollars (\$2,000,000) general aggregate, Two Million Dollars (\$2,000,000) products and completed operations aggregate. Aggregate limits shall reinstate annually, be on a per project basis, dedicated entirely to the project or location for which Work is to be provided under this Contract, and shall not be shared with any other obligations of Contractor. Such insurance shall include coverage for premises/operations liability, products and completed operations liability, personal and advertising injury liability, broad form contractual liability, and independent contractor's liability for Work performed on Site and off Site. With respect to the performance of construction

activities, Contractor shall maintain extended completed operations coverage, for at least ten (10) years after Final Completion through an extended reporting period endorsement. Such insurance shall provide severability of interests or cross liability provisions permitting one insured to bring a claim against another insured, and shall be endorsed to include Owner and its Affiliates and their respective directors, officers, managers, representatives, agents and employees or any other parties that Owner may be contractually obligated to include as additional insureds prior to a loss. Owner shall be added as an additional insured with respect to Contractor's ongoing operations through CG 20 10 07 04 or a substitute equivalent form and with respect to Contractor's completed operations through CG 20 37 07 04 or a substitute equivalent form, limited only to the extent required, if applicable, by NMSA 1978 § 56-7-1, as amended. Such additional insured status shall apply regardless of the enforceability of the indemnity provisions in this Contract. Such insurance maintained by Contractor shall be primary with respect to the interest of Owner, and any other insurance or self-insurance maintained by Owner or its Affiliates is in excess and not contributory to Contractor's insurance in all instances regardless of any like insurance that Owner or any of its Affiliates may have.

23.2.3 Automobile Liability Insurance. Contractor shall maintain automobile liability insurance (including coverage for owned, non-owned and hired automobiles) covering vehicles used by Contractor in connection with the Work in an amount of at least One Million Dollars (\$1,000,000) combined single limit per occurrence for bodily injury and property damage. Contractor's automobile liability insurance coverage shall contain appropriate no-fault insurance provisions or other endorsements in accordance with Applicable Laws. Such insurance shall be endorsed to include Owner and its Affiliates and their respective directors, officers, managers, representatives, agents, employees or any other parties that Owner may be contractually obligated to include as additional insureds. Owner shall be added as additional insured prior to a loss, limited only to the extent required, if applicable, by NMSA 1978 § 56-7-1, as amended. Such additional insured status shall apply regardless of the enforceability of the indemnity provisions in this Contract. Such insurance maintained by Contractor shall be primary with respect to the interest of Owner, and any other insurance or self-insurance maintained by Owner or its Affiliates is in excess and not contributory to Contractor's insurance policies in all instances regardless of any like insurance coverage that Owner or any of its Affiliates may have.

23.2.4 <u>Umbrella or Excess Liability Insurance</u>. Contractor shall maintain up until Final Completion umbrella/excess insurance on an occurrence basis covering itself and its Subcontractors and Vendors against claims in excess of the underlying insurance described in <u>Section 23.2.2</u> in the amount of at least Twenty-Five Million Dollars (\$25,000,000) per occurrence, Twenty-Five Million Dollars (\$25,000,000) general aggregate, and Twenty-Five Million Dollars (\$25,000,000) products and completed operations aggregate (with coverage for completed operations to be in place throughout the performance of the Work and for ten (10) years after Final Completion through an extended reporting period endorsement). Aggregate limits shall be on a per project basis, dedicated entirely to the project or location for which Work is to be provided under this Contract, and shall not be shared with any other obligations of Contractor. Insurance

coverages and limits required herein should not in any way limit the extent of Contractor's responsibilities and liabilities specified elsewhere in this Contract. Such insurance shall be written as follow-form or with an insurance coverage form that provides coverage that is at least as broad as the primary insurance policies, and shall satisfy the maintenance of the required limits through a combination of umbrella liability and/or excess liability insurance policies.

- 23.2.5 Contractor shall maintain umbrella/excess liability insurance for liabilities not covered under Section 23.2.4, including but not limited to coverage in excess of the automobile liability coverage set forth in Section 23.2.3, the employers liability coverage set forth in Section 23.2.1, and commercial general liability coverage set forth in Section 23.2.2 with respect to the Work performed in connection with the Project before mobilization at the Site in connection with the Notice to Proceed and after Final Completion, with limits of not less than Ten Million Dollars (\$10,000,000) each occurrence, Ten Million Dollars (\$10,000,000) general aggregate, and Ten Million Dollars (\$10,000,000) products and completed operations aggregate. Such insurance shall be written as follow-form or with an insurance coverage form that provides coverage that is at least as broad as the primary insurance policies, and shall satisfy the maintenance of the required limits through a combination of umbrella liability and/or excess liability insurance policies.
- 23.2.6 <u>Professional Liability Insurance</u>. Contractor shall secure and maintain, professional liability insurance (errors and omissions) covering financial loss arising from engineering, architectural, construction management, and other design build professional services rendered, required or reasonably inferable from the Statement of Work, with a minimum single limit of Five Million Dollars (\$5,000,000) each claim and Five Million Dollars (\$5,000,000) annual aggregate. Such insurance shall be extended to cover with no sublimit bodily injury and property damage arising from the performance of professional services in connection with the Work where such claims are excluded under the commercial general liability insurance required under <u>Section 23.2.2</u>. This insurance shall include coverage for professional services provided in connection with the Work performed by Contractor, its Subcontractors, and anyone directly or indirectly employed by any of them in connection with the Project unless Contractor can evidence pursuant to <u>Sections 23.5</u> and <u>23.6</u> that insurance in compliance with this <u>Section 23.2.6</u> and <u>Section 23.1</u> is being maintained by each Subcontractor performing such Work.
- 23.2.7 Pollution Liability Insurance. Contractor shall maintain on behalf of itself and its Subcontractors contractors pollution liability insurance or the equivalent, with a minimum limit of Five Million Dollars (\$5,000,000) per occurrence and Ten Million Dollars (\$10,000,000) annual aggregate. Such insurance shall include coverage for pollution losses, including but not limited to bodily injury, property damage (including but not limited to clean-up costs), and financial loss arising out of pollution conditions resulting from Contractor's and its Subcontractors' and Vendors' operations and completed operations under this Contract. Such insurance shall define pollution conditions at a minimum as the discharge, dispersal, release, or escape of any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, medical waste and waste materials into or upon land, or

any structure on land, the atmosphere or any watercourse or body of water, including groundwater, provided such conditions are not naturally present in the environment in the concentration or amounts discovered. Such insurance shall add Owner and its Affiliates and their respective directors, officers, managers, representatives, agents and employees as an additional insured with respect to Work performed under this Contract (but limited only to the extent required, if applicable, by NMSA 1978 § 56-7-1, as amended). In lieu of Contractor maintaining the insurance for pollution losses arising from the Work on behalf of itself, its Subcontractors and Vendors, and anyone directly or indirectly employed by any of them, Contractor shall evidence pursuant to Section 23.5 and 23.6 that insurance in compliance with this Section 23.2.7 and Section 23.1 is being maintained by each Subcontractor for which the Work involves exposure to pollutions conditions as described above or invasive testing.

- 23.2.8 Property Insurance. Consistent with its obligations pursuant to Section 24.1(a), Contractor shall assume the risk of loss for Temporary Work, equipment and materials (stationary or mobile), supplies, tools, and other personal property (including employee tools) (a) belonging to Contractor or to any of its Subcontractors or (b) used by or on behalf of Contractor or any of its Subcontractors for its performance hereunder which is not intended to become a permanent part of the completed Work. Such Temporary Work, equipment and materials, supplies and other personal property shall be brought to and kept at the Site at the sole cost, risk and expense of Contractor or such Subcontractor, and Owner shall not be liable for loss or damage thereto. It is agreed that Owner shall be held harmless by Contractor and its Subcontractors for any loss or damage to such property and that any property insurance maintained by Contractor and its Subcontractors covering such equipment, supplies and materials shall include a waiver of subrogation precluding any claims being made against the Owner and its Affiliates and their respective directors, officers, managers, representatives, agents and employees and any other parties Owner may be contractually obligated to do so.
 - 23.3 Owner's Insurance. Owner shall obtain and maintain in full force and effect the insurance policies specified in this Section 23.3 with respect to Owner's employees.
- 23.3.1 Workers' Compensation Insurance and Employers' Liability Insurance. In accordance with the laws of the State of New Mexico, Owner shall maintain in force workers' compensation insurance for all of its employees. Owner shall also maintain employer's liability coverage in an amount of not less than One Million Dollars (\$1,000,000) per accident and per employee for disease. In lieu of such insurance, Owner may maintain a self-insurance program meeting the requirements of the State of New Mexico along with the required employer's liability insurance.
 - 23.4 <u>Builder's Risk Insurance</u>. Contractor shall provide standard form "All Risk" Builders Risk or Installation insurance covering One Hundred Percent (100%) replacement value of property built or installed on a completed value basis covering the Project against loss or damage during the period of construction commencing at the latest of the Notice to Proceed Date or Contractor's mobilization at the Site and expiring upon Substantial Completion of the Project. The insurance shall be endorsed

- to include (a) replacement cost coverage; (b) delayed completion coverage: (c) property in transit coverage for materials and equipment to be incorporated into the project; (d) permission for partial occupancy or use of the premises; (e) ordinance or law coverage, including (i) coverage for loss to the undamaged portion of the project, (ii) demolition cost coverage, and (iii) increased cost of construction: and (f) a loss payable endorsement naming PNM as a loss payee as their interests may appear. The delayed completion coverage endorsement shall provide on an actual loss sustained basis indemnification for scheduled soft costs, loss of rental income, and loss of gross earnings arising from any delay in the completion of the insured project due to direct physical loss or damage to the insured structures or materials. Insurance proceeds shall be paid to and used by the Party having risk of loss at the time of the claim pursuant to Article 24 and any disputes between Owner and Contractor regarding the application of insurance proceeds shall be addressed in accordance with Article 33.
- 23.5 Subcontractor Insurance. Contractor shall require each of its Subcontractors and Vendors performing work at the Site, to obtain, maintain and keep in force during the time during which they are involved in performance of the Work, insurance coverage in accordance with the insurance requirements of Contractor set forth in Sections 23.2.1, 23.2.2, and 23.2.3. To the extent Subcontractor and Vendor is performing engineering, architectural, construction management, or other design build professional services, Subcontractors and Vendors shall maintain coverages and limits set forth in Section 23.2.6. To the extent permitted by law, Contractor shall determine the appropriate levels of insurance to be maintained by its Subcontractors and Vendors in Sections 23.2.4, 23.2.5 and 23.2.7 and shall cause said Subcontractors and Vendors to waive on behalf of themselves and its insurers all rights to assert claims for any losses, damages, liabilities, and expenses, such expenses to include but not be limited to attorney's fees, against Owner, Owner's subsidiaries and Affiliates along with their respective directors, officers, and employees, to the extent proceeds realized from policies of insurance maintained or required to be maintained in connection with services or products provided under their respective Subcontracts are applied to such losses, damages, liabilities, and expenses. Each policy of said Subcontractor and Vendor required herein shall include an endorsement acknowledging such waiver of subrogation.
- 23.6 Contractor Certificates. No later than (i) thirty (30) Days prior to the commencement of performance of the Work, including any and all Work performed on Site or off Site in preparation for the Notice to Proceed, and (ii) thirty (30) Days prior to Contractor's mobilization at the Site in connection with the Notice to Proceed, and thereafter prior to the renewal of any policy required herein, Contractor shall furnish to Owner certificates of insurance from each insurance carrier showing that the above required insurance for the Project is in full force and effect, the amount of any deductibles and retentions, and all limits of liability including sublimits. Each policy shall provide that it will not be canceled or non-renewed until the expiration of at least thirty (30) days (or ten (10) days in the case of cancellation due to non-payment of premiums) after Notice of such cancellation or non-renewal has been furnished to Owner. Contractor shall also be responsible for obtaining certificates of insurance for the insurances required to be maintained by such Subcontractors and Vendors in

accordance with Section 23.5 from each of the Subcontractors and Vendors before such Subcontractor or Vendor is allowed to commence Work and provide such certificates to the Owner upon request. Contractor and its Subcontractors and Vendors shall evidence all insurance required in Section 23.2 on the Accord 25 Certificate of Liability Insurance form.

23.7 <u>No Limitation of Liability</u>. Subject in all respects to the terms of Article 32, the insurance coverages required of Contractor set forth in Section 23.2 shall in no way affect, nor are they intended as a limitation of, Contractor's liability with respect to its performance of the Work.

24. RISK OF LOSS OR DAMAGE

- 24.1 Risk of Loss for Project Before Substantial Completion.
- (a) Prior to Substantial Completion Contractor assumes risk of loss for, and full responsibility for the cost of replacing or repairing any damage to, the Project and all Equipment and Materials, and maintenance equipment (including temporary materials, equipment and supplies) which are purchased by Contractor for permanent installation in or for use during construction of the Project or otherwise supplied or to be supplied by Contractor or its Subcontractors, regardless of whether Owner has title thereto under this Contract;
- (b) If prior to Substantial Completion any portion of the Project is lost or damaged, then Contractor shall replace or repair any such loss or damage and complete the Work.
- (c) However, if any portion of the Project is lost or damaged before Substantial Completion of the Project due to any negligent or intentional act or omission of Owner, any Affiliate of Owner or any Owner's Separate Contractor, or anyone employed by any of them, or anyone for whose acts such Person may be liable, then Owner shall bear the cost and expense of replacing or repairing such loss or damage.
 - 24.2 Risk of Loss for Project After Substantial Completion. Generally, but subject to and without limiting Contractor's obligations expressly set forth in this Contract arising from and after Substantial Completion, Owner shall bear the risk of loss for, and full responsibility for, the cost of replacing or repairing any damage to the Project from and after Substantial Completion of the Project. However, if any portion of the Project is lost or damaged after Substantial Completion of the Project due to any negligent or intentional act or omission of Contractor, any Affiliate of Contractor or any Subcontractor or Vendor, or anyone directly or indirectly employed by any of them, or anyone for whose acts such Person may be liable, then Contractor shall bear all of the cost and expense of replacing or repairing such loss or damage.

25. INDEMNIFICATION

25.1 <u>By Contractor</u>. Contractor shall defend, indemnify, and hold harmless Owner and any Person acting for or on behalf of Owner, and each of their respective employees, agents, partners, Affiliates, shareholders, directors, officers, and assigns

(each an "Owner Indemnitee"), from and against all Losses directly or indirectly arise out of or result from the following:

- (a) any negligent, reckless, or otherwise tortious act or omission (including strict liability) during the performance of its obligations under this Contract, or any curative action under any warranty following performance of the Work, of Contractor or any Affiliate thereof, any Subcontractor, or anyone directly or indirectly employed by any of them, or anyone for whose acts such Person may be liable, but only to the extent not caused or resulting from the negligence, act or omission of the Owner Indemnitees, Owner's Separate Contractors, or any other third party for which Contractor is not responsible;
- (b) personal injury or death of a third party, but only to the extent not caused or resulting from the negligence, act or omission of the Owner Indemnitees or any other third party for which Contractor is not responsible;
 - (c) physical damage to property on or off the Site owned by a third party;
- (d) Contractor Liens filed by Contractor, Subcontractors, Vendors or any other Person performing any Work;
- (e) any fines or penalties imposed on Owner Indemnitees by a Governmental Authority related to the failure of Contractor or any of its Subcontractors to comply with, or the failure of the Project, as designed, constructed and completed by Contractor, to comply with, or be capable of operating in compliance with, the terms and conditions of Applicable Laws or the conditions or provisions of Applicable Permits;
- (f) the use, presence, or existence of Hazardous Materials at the Site that were brought onto, released, disturbed or generated at the Site by Contractor or any Subcontractor (other than Hazardous Materials, such as lubricants, intended to be used in or to comprise a portion of the Project in accordance with Applicable Law), including, without limitation:
- (i) the storage, transportation, processing or disposal of Hazardous Materials for which Contractor is responsible;
- (ii) any environmental condition caused by Hazardous Materials for which Contractor is responsible that is actionable under any Applicable Law;
- (g) the breach or default of any obligation, representation or warranty of Contractor under this Contract to the extent such Losses arise out of or result from any demand, claim, litigation, action, suit or proceeding by a Person other than either of the Parties or Owner Indemnitees; and
- (h) the failure of Contractor to pay, as and when due, all lawfully imposed taxes, duties, levies, assessments, tariffs, imposts, fees or charges or any kind (together with any and all interest, penalties, additions to tax and additional amounts imposed with respect thereto) imposed by any Governmental Authority for which Contractor is obligated to pay pursuant to the terms of this Contract.

- 25.2 By Owner. Owner shall defend, indemnify, and hold harmless Contractor and any Person acting for or on behalf of Contractor and each of their respective employees, agents, partners, Affiliates, shareholders, directors, officers, and assigns (each a "Contractor Indemnitee") from and against all Losses that directly or indirectly arise out of or result from:
- (a) any negligent, reckless, or otherwise tortious act or omission (including strict liability) by Owner or any of Owner's Separate Contractors during the performance of Owner's obligations under the Contract or any Affiliate thereof, including the performance of any Owner's Separate Contractor, but only to the extent not caused or resulting from the negligence, act or omission of the Contractor Indemnitees or any other third party for which Owner is not responsible;
- (b) personal injury or death of a third party, but only to the extent not caused or resulting from the negligence, act or omission of the Contractor Indemnitees or any other third party for which Owner is not responsible;
- (c) any fines or penalties imposed on Contractor Indemnitees by a Governmental Authority related to the failure of Owner or any of its Owner's Separate Contractors to comply with the terms and conditions of Applicable Laws or the conditions or provisions of Applicable Permits;
- (d) the use, presence, or existence of Hazardous Materials at the Site that were either at the Site prior to the date Contractor commences Work at the Site or brought onto or released or generated at the Site by Owner or any Owner's Separate Contractor (other than Hazardous Materials, such as lubricants, intended to be used in or to comprise a portion of the Project in accordance with Applicable Law), including, without limitation:
- (i) the storage, transportation, processing or disposal of Hazardous Materials for which Owner is responsible;
- (ii) any environmental condition caused by Hazardous Materials for which Owner is responsible that is actionable under any Applicable Law;
- (e) the breach or default of any obligation, representation or warranty of Owner under this Contract to the extent such Losses arise out of or result from any demand, claim, litigation, action, suit or proceeding by a Person other than either of the Parties or Contractor Indemnitees; and
- (f) the failure of Owner to pay, as and when due, all taxes, duties, levies, assessments, tariffs, imposts, fees or charges or any kind (together with any and all interest, penalties, additions to tax and additional amounts imposed with respect thereto) imposed by any Governmental Authority for which Owner is obligated to pay pursuant to the terms of this Contract.
 - 25.3 <u>Actions by Governmental Authorities</u>. Contractor shall defend, indemnify, and hold the Owner Indemnitees harmless from and against all claims by any Governmental Authority claiming taxes based on gross receipts or on income of

Contractor, any of its Subcontractors, or any of their respective agents or employees with respect to any payment for the Work made to or earned by Contractor, any of its Subcontractors, or any of their respective agents or employees under this Contract and any fines imposed by a Governmental Authority due to Contractor's performance under this Contract. Owner shall defend, indemnify, and hold the Contractor Indemnitees harmless from and against all claims by any Governmental Authority claiming taxes based on gross receipts or on income of Owner, any Owner's Separate Contractors, or any of their respective agents or employees with respect to any payment made to or earned by Owner, any Owner's Separate Contractors, or any of their respective agents or employees under this Contract and any fines imposed by a Governmental Authority other than due to Contractor's or Subcontractors' performance under this Contract.

Patent Infringement and Other Indemnification Rights. Contractor shall defend, indemnify, and hold harmless the Owner Indemnitees against all Losses arising from any Intellectual Property Claim (subject, however, to Section 25.6). Without limiting the provisions of Section 25.5, if Owner provides Notice to Contractor of the receipt of any such claim, Contractor shall, at its own expense, settle or defend any such Intellectual Property Claim and pay all damages and costs awarded in such Intellectual Property Claim against Owner and (a) procure for Owner, or reimburse Owner for procuring, the permanent right to continue using the infringing service, Equipment and Materials, or other Work, as the case may be: (b) modify the infringing service, Equipment and Materials, or other Work, as the case may be, so that the same becomes non-infringing; or (c) replace the infringing service, Equipment and Materials, or other Work, as the case may be, with noninfringing service, Equipment and Materials, or other Work, as the case may be. If Owner is enjoined from completing the Project or any part thereof, or from the use, operation, or enjoyment of the Project or any part thereof, as a result of such claim or legal action or any litigation based thereon, then Contractor shall promptly use commercially reasonable efforts to have such injunction removed and to take one or more of the actions under the preceding clauses (a), (b) or (c), provided, that in no case shall Contractor take any action which adversely affects Owner's continued use and enjoyment of the applicable service, Equipment and Materials, or other Work, as the case may be, without the prior written consent of Owner. Owner's acceptance of the Contractor Deliverables or supplied Equipment and Materials shall not be construed to relieve Contractor of any obligation hereunder. Notwithstanding anything in this Contract to the contrary, Contractor's obligation to indemnify, defend and hold Owner harmless against infringement of Intellectual Property Claims does not apply to: (i) Equipment, Materials or other Work is provided according to Owner's or Owner's Separate Contractors design or instructions, and (ii) the Equipment, Materials or other Work being used for the Project for which this Contract is executed where such Equipment, Materials or other Work is not being used by the Owner for its intended use. Any Equipment, Materials or other Work not manufactured or developed by Contractor or its Affiliates will be limited to the indemnity, if any, of the manufacturer, supplier or vendor of said Equipment, Materials or other Work.

25.5 <u>Claim Notice</u>. An indemnitee hereunder shall provide Notice to the indemnifying party, within ten (10) Days after receiving written notice of the

commencement of any legal action or of any claims or threatened claims against such indemnitee in respect of which indemnification may be sought pursuant to the foregoing provisions of this Article 25 or any other provision of this Contract providing for an indemnity (such notice, a "Claim Notice"). The indemnitee's failure to give, or tardiness in giving, such Claim Notice will reduce the liability of the indemnifying party by the amount of damages attributable to such failure or tardiness, or to the extent the indemnifying Party is prejudiced by such failure or late notice, but shall not otherwise relieve the indemnifying party from any liability that it may have under this Contract. In case any such claim or legal action shall be made or brought against an indemnitee hereunder and such indemnitee shall notify (by sending a Claim Notice) the indemnifying party thereof, the indemnifying party shall have the right, by Notice given to the indemnitee within ten (10) Days after the date of the applicable Claim Notice, and if applicable, after notifying and consulting with any insurers who may provide claims coverage for the claim subject to such Claim Notice, to assume and control the defense of the claim that is the subject of such Claim Notice, including the employment of counsel selected by the indemnifying party after consultation with the indemnitee and the indemnifying party shall pay all expenses of the conduct of such defense. The indemnitee shall have the right to employ separate counsel in any such proceeding and to participate in (but not control) the defense of such claim, but the fees and expenses of such counsel shall be borne by the indemnitee unless the indemnifying party shall agree otherwise; provided, however, if the named parties to any such proceeding (including any impleaded parties) include both the indemnitee and the indemnifying party, the indemnifying party requires that the same counsel represent both the indemnitee and the indemnifying party, and representation of both parties by the same counsel would be inappropriate due to actual or potential differing interests between them, then the indemnitee shall have the right to retain its own counsel at the reasonable cost and expense of the indemnifying party. If the indemnifying party shall have failed to assume or diligently prosecute the defense of any claim in accordance with the provisions hereof, then the indemnitee shall have the absolute right to control the defense of such claim and the fees and expenses of such defense, including reasonable attorneys' fees of the indemnitee's counsel and any amount determined to be owed by the indemnitee pursuant to such claim shall be borne by the indemnifying party, provided that the indemnifying party shall be entitled, at its expense, to participate in (but not control) such defense. Subject to the foregoing, (a) the indemnifying party shall control the settlement of all claims, in coordination with any insurer as required under the applicable insurance policies set forth in Article 23, as to which it has assumed the defense; provided, however, that (i) such settlement shall include a dismissal with prejudice of the claim and an explicit and unconditional release from the party bringing such claim or other proceedings of all indemnitees; and (ii) the indemnifying party shall not conclude any settlement without the prior approval of the indemnitee, which approval shall not be unreasonably withheld; and (b) except as provided in the preceding sentence concerning the indemnifying party's failure to assume or to diligently prosecute the defense of any claim, no indemnitee seeking reimbursement pursuant to the foregoing indemnity shall, without the prior written consent of the indemnifying party, settle, compromise, consent to the entry of any judgment in or otherwise seek to terminate any action, claim, suit, investigation or proceeding for which indemnity is afforded hereunder unless such indemnitee reasonably believes based on written opinion of legal counsel that the matter in question involves potential criminal liability. The indemnitee shall provide reasonable assistance to the indemnifying party when the indemnifying party so requests in connection with such legal action or claim, including executing any powers-of-attorney or other documents required by the indemnifying party with regard to the defense or indemnity obligations, and any expenses in connection therewith in excess of the indemnifying party's expense.

25.6 <u>Limitations</u>. With respect to Section 25.1, Section 25.2 and Section 25.3 the Parties intend that principles of comparative negligence will apply, and each Party shall bear the proportionate cost of any loss, damage, expense, and liability attributable to that Party's negligence, recklessness or otherwise tortious conduct.

26. TREATMENT OF CONFIDENTIAL INFORMATION

- 26.1 Confidentiality Obligation. Except as otherwise expressly agreed in writing by the other Party, and except as otherwise agreed in Section 26.2, each receiving Party shall (a) keep strictly confidential and take reasonable precautions to protect against the disclosure of (i) the terms and conditions and other facts with respect to this Contract and (ii) all Confidential Information, and (b) use all Confidential Information solely for the purposes of performing its obligations under this Contract and not for any other purpose; provided that a Party may disclose facts, terms and conditions referred to in clause (a) above and Confidential Information to those of its Representatives who need to know such information for the purposes of performing the receiving Party's obligations under this Contract if, but only if, prior to being told of such matters or being given access to Confidential Information, such Representatives are informed of the confidentiality thereof and the requirements of this Contract and are directed to comply with the requirements of this Contract. Each Party will be responsible for any breach of this Contract by its Representatives.
- 26.2 <u>Disclosures to Governmental Authorities</u>. Provided that Owner complies with the notice requirements set forth in Section 26.3.1, Owner may disclose the terms, conditions or other matters relating to this Contract and all Confidential Information furnished or made available by either Party pursuant to this Contract:
 - (a) to duly authorized Governmental Authorities, including without limitation the Federal Energy Regulatory Commission, the NMPRC and the Securities and Exchange Commission; and
 - (b) to the extent necessary to comply with any Applicable Law or any discovery or data request of a party to any proceeding pending before any of the foregoing.

Owner shall have no liability whatsoever to Contractor in the event of any unauthorized use or disclosure by a Governmental Authority of any Confidential Information or other information disclosed to any of them by Owner.

26.3 <u>Compelled Disclosure.</u>

- 26.3.1 Notice of Disclosure Requirement. If any Party or its respective Representatives become subject to a requirement of an Applicable Law or other request of a Governmental Authority to disclose any Confidential Information, or any part thereof, or any other matter required by Section 26.1 to be kept confidential, such Party will promptly notify the other Party of the existence, terms, and circumstances of such requirements so that such other Party may seek an appropriate protective order or waive compliance with the provisions of this Contract.
- 26.3.2 <u>Limitation of Disclosure</u>. If Contractor complies with <u>Section 26.3.1</u> but it or its Representatives are compelled, in the opinion of its legal counsel, to make disclosure in response to a requirement described in <u>Section 26.3.1</u> or else stand liable for contempt or suffer other penalty, the compelled person may disclose only that portion of the Confidential Information which is legally required and will exercise commercially reasonable efforts to obtain reliable assurance that confidential treatment will be accorded to the disclosed Confidential Information or other matter.
- Ownership and Return of Information. All Confidential Information shall 26.4 be and remain the property of the Party providing it; provided, however, that all Confidential Information obtained, developed or created by or for Contractor exclusively for the Project, including copies thereof, is the exclusive property of Owner, without any further consideration to be provided therefor, whether delivered to Owner or not. No right or license is granted to Contractor or any third party respecting the use of such Confidential Information by virtue of this Contract, except to the extent required for Contractor's performance of its obligations hereunder. Upon the request of a Party, all Confidential Information, including all written or recorded copies thereof, shall be promptly returned to the requesting Party or destroyed, and if destroyed, such destruction shall be certified in writing to the requesting Party by a responsible officer of the other Party; provided, however, the receiving Party may retain one copy of the disclosing Party's Confidential Information solely for audit compliance purposes and the receiving party shall (i) notify the requesting Party in writing promptly following any disclosure of such Confidential Information and (ii) return such copy to the requesting Party promptly following the conclusion of the applicable audit compliance procedures.
- 26.5 <u>Enforcement</u>. The Parties agree that irreparable damage would occur if the confidentiality obligations under this Contract were not performed in accordance with its terms or were otherwise breached. Accordingly, a Party will be entitled to seek an injunction or injunctions to prevent breaches of this Article 26 and to enforce specifically its provisions in any court of competent jurisdiction, in addition to any other remedy to which the Party may be entitled by law or equity.

27. INVENTIONS AND LICENSES

27.1 <u>Work Product</u>. Any and all material and information prepared, accumulated or developed by Contractor, any Subcontractor or their respective

employees or representatives, including, without limitation, documents, drawings, designs, calculations, maps, plans, workplans, text, filings, estimates, manifests, certificates, books, specifications, sketches, notes, reports, summaries, analyses, data models and samples, including summaries, extracts, analyses and preliminary or draft materials developed in connection therewith, prepared, or to be prepared, exclusively in connection with the Work (hereinafter, collectively "Work Product") shall become the sole property of Owner without any further consideration to be provided therefor, whether or not delivered by Contractor. Contractor shall deliver the Work Product, or any portion thereof, to Owner on request (or pursuant to the Project Schedule, if delivery of such Work Product is provided therein), together with any other requested materials and/or equipment furnished to Contractor by Owner hereunder.

- 27.2 <u>Contractor Patents and Proprietary Licenses</u>. Contractor further agrees to grant and hereby grants to Owner an irrevocable, perpetual, fully-paid, non-exclusive, royalty-free license under all patents, copyrights and other proprietary information of Contractor related to or incorporated into the Work now or hereafter owned or controlled by Contractor to the extent reasonably necessary:
- (a) for the operation, maintenance, repair, or alteration of the Project or any subsystem or component thereof designed, specified, or constructed by Contractor under this Contract; or
- (b) to the extent such patents, copyrights and other proprietary information of Contractor are related to any specific design concepts developed primarily for the Project.

Contractor shall cause each Subcontractor to grant a corresponding license to Owner.

No other license in such patents and proprietary information is granted pursuant to this Contract.

27.3 <u>Software Licenses</u>. To the extent Contractor purchases any software that is necessary for the continued operation of the Project after Substantial Completion, Contractor shall register the Owner as the licensee of such software with the applicable Vendor, and Contractor shall be responsible for any registration, renewal or transfer costs incurred through the Warranty Period. If any of the licenses for required software are not transferable from Contractor to Owner, then Contractor shall obtain fully functional versions of the applicable software for Owner. Such software shall be licensed to Owner, and any costs incurred to obtain the software license shall be at Contractor's sole expense.

28. ASSIGNMENT

Contractor understands that this Contract is personal to Contractor. Subject to the other terms of this Section 28, Contractor shall have no right, power, or authority to assign or delegate this Contract or any portion thereof, either voluntarily or involuntarily, or by operation of law. Contractor's attempted assignment or delegation of any of its Work hereunder in contravention of the terms of this Section 28 shall be null and void and shall be ineffective to relieve Contractor of its responsibility for the Work assigned or delegated. Notwithstanding the

foregoing, (i) prior to the issuance by Owner of the Notice to Proceed, subject to Owner's written approval (such approval to be in Owner's sole discretion), Contractor may assign its rights and obligations under this Contract to any of Contractor's qualified Affiliates under a form of assignment acceptable to Owner. Contractor may employ Subcontractors on the terms and conditions set forth herein to perform the Work; <u>provided</u>, however, that the use of Subcontractors shall not in any way relieve Contractor of its responsibilities and obligations under this Contract. Owner may, without Contractor's consent, assign all (but not part) of this Contract to an Affiliate of Owner subject to a customary assignment and assumption agreement under which such assignee shall agree to be bound by the terms and conditions of this Contract.

29. HAZARDOUS MATERIALS

Contractor shall not and shall not permit any of its Subcontractors, directly or indirectly to, permit the manufacture, storage, transmission or presence of any Hazardous Materials on the Site except in accordance with Applicable Laws. Contractor shall not and shall not permit any of its Subcontractors to release, disturb, discharge or otherwise dispose of any Hazardous Materials on the Site. Contractor shall conduct and complete all investigations, studies, sampling and testing of the Site in connection with the potential presence of Hazardous Materials at the Site to the extent required under any Applicable Laws, and Contractor shall promptly comply with all lawful orders and directives of all Governmental Authorities regarding Applicable Laws. If Contractor discovers, encounters or is notified of the existence of any contaminated materials or Hazardous Materials at the Site, then:

- (a) Contractor shall promptly notify Owner thereof and cordon off the area containing such contaminated materials or Hazardous Materials;
- (b) if Contractor or any Subcontractor is responsible for the placement of or discharge of such Hazardous Materials, then Contractor shall remove such Hazardous Materials from the Site and remediate the Site at Contractor's sole cost and expense; and
- (c) if Contractor or any Subcontractor is responsible for the placement of or discharge of such Hazardous Materials, then Contractor shall not be entitled to any extension of time or additional compensation hereunder for any delay or costs incurred by Contractor as a result of the existence of such Hazardous Materials.

If neither Contractor nor any Subcontractor is responsible for the placement or discharge of such Hazardous Materials, then Contractor shall be entitled to an appropriate Change in Work which will entitle Contractor to an adjustment to the Contract Price and/or Project Guaranteed Dates as a result of the original scope of Work being delayed or made more difficult by the existence of such Hazardous Materials as if such an event constituted an Excusable Condition in accordance with Article 17.

30. NON-PAYMENT CLAIMS

Provided Owner is current with its payment obligations under this Contract, Contractor shall not directly or indirectly create, incur, assume or suffer to be created by it or any Subcontractor, employee, laborer, materialman or other supplier of goods or services any right of retention, mortgage, pledge, assessment, security interest, lease, advance claim, levy, claim, lien,

charge or encumbrance on the Work, the Site, the Project or any part thereof or interest therein (each a "Contractor Lien"), and Contractor hereby waives any such Contractor Lien to the extent allowed by Applicable Laws and Contractor shall keep the Site, the Work and all Subcontractor equipment and materials free of Contractor Liens. Contractor shall promptly pay or discharge, and discharge of record, any such Contractor Lien or other charges which, if unpaid, might be or become a Contractor Lien. Contractor shall promptly notify the Owner of the assertion of any Contractor shall indemnify and hold harmless Owner and its Affiliates Contractor Lien. (collectively, the "Lien Indemnitees") and defend each of them from and against any and all Losses arising out of any and all claims for payment, whether or not reduced to a lien or mechanics lien, filed by Contractor or any Subcontractors, or other persons performing any portion of the Work, including reasonable attorneys' fees and expenses incurred by any Lien Indemnitee in discharging any Contractor Lien. If any Lien Indemnitee becomes aware of any Contractor Lien, then such Lien Indemnitee may so notify Contractor in writing, and Contractor shall then (a) satisfy such Contractor Lien, or (b) defend the Lien Indemnitees against any such Contractor Lien and provide assurances of payment as described in the last sentence of this Article 30. If Contractor does not promptly, and in any event within fifteen (15) days after such Notice, satisfy such Contractor Lien, give such Lien Indemnitee reasons in writing that are reasonably satisfactory to such Lien Indemnitee for not causing the release of such Contractor Lien, or contest such Contractor Lien in accordance with the provisions of the last sentence of this Article 30, then any Lien Indemnitee shall have the right, at its option, after written notification to Contractor, to cause the release of, pay, or settle such Contractor Lien, and Owner at its sole option may (i) require Contractor to pay, within five (5) days after request by Owner, or (ii) offset against any amount due or to become due to Contractor (in which case Owner shall, if it is not the applicable Lien Indemnitee, pay such amounts directly to the Lien Indemnitee causing the release, payment, or settlement of such liens or claims), all costs and expenses incurred by the Lien Indemnitee in causing the release of, paying, or settling such Contractor Lien, including reasonable attorneys' fees, and other expenses. Contractor shall have the right to contest any such Contractor Lien, provided it first provides to Owner a bond or other assurances of payment reasonably satisfactory to Owner in the amount of such Contractor Lien and in form and substance reasonably satisfactory to Owner.

31. NOTICES AND COMMUNICATIONS

31.1 Requirements. Any Notice pursuant to the terms and conditions of this Contract shall be in writing and deemed effective as follows: (a) delivered personally, upon delivery; (b) sent by certified mail, return receipt requested, upon certified receipt; (c) sent by a recognized overnight mail or courier service, with delivery receipt requested, upon receipt; or (d) sent by confirmed facsimile transmission or electronic mail, when acknowledged by recipient as having been received in full, to the following addresses:

If to Contractor:

ProEnergy Services, LLC 2001 ProEnergy Blvd.

Sedalia, MO 65301

Facsimile: (660) 829-1160

Attn: Jeff Canon and Scott Dieball

If to Owner:

Public Service Company of New Mexico

2401 Aztec Rd, NE Albuquerque, NM 87107 Facsimile: (505) 241-4147 Attn: Kevin Mataczynski

With a copy to:

PNM Resources, Inc. Alvarado Square, MS 0805 Albuquerque, NM 87158 Facsimile: (505) 241-2338

Attn: Madonna Bixby, Corporate Counsel

- 31.2 Effective Time. Notices shall be effective as set forth in Section 31.1.
- 31.3 <u>Representatives</u>. Any technical or other communications pertaining to the Work shall be with the Parties' designated representative. Each Party shall notify the other in writing of the name of such representatives. The Project Manager and the Project Representative each shall have knowledge of the Work and be available at all reasonable times for consultation. Each Party's representative shall be authorized on behalf of such Party to administer this Contract, agree upon procedures for coordinating the efforts of the Parties, and, when appropriate, to furnish information to or receive information from the other Party in matters concerning the Work.

32. LIMITATIONS OF LIABILITY AND REMEDIES

32.1 <u>Limitations on Damages</u>. Except for the liquidated damages specified under Sections 16.1, 16.2 and 21.1, and notwithstanding anything else in this Contract to the contrary, no Party shall be liable to the other Party (or any of its Affiliates or any of its or their respective employees, agents, shareholders,

members, directors, or officers) for any loss of profits, loss of revenue, or loss of use of the Project or any indirect, incidental consequential, exemplary, special or punitive damages arising out of this Contract, regardless of whether any such damages arise out of breach of contract, guaranty or warranty, tort, product liability, indemnity, contribution, strict liability or any other legal theory; provided, however, that the foregoing shall not limit a Party's obligation to pay damages that may be awarded to a third party in connection with any Loss to the extent that such Party is obligated to indemnify the other Party for such Loss under this Contract.

32.2 Limitations on Contractor's Liability.

- 32.2.1 Liability Under Contract. In no event shall Contractor's aggregate liability to Owner or any of Owner's Affiliates in connection with this Contract, the Work and the Project, whether arising in contract, warranty or guaranty, tort, product liability, indemnity, contribution, strict liability or otherwise, be greater in the aggregate than an amount equal to the Liability Cap which shall be reduced to 10% of the Liability Cap once Substantial Completion is achieved; provided, however, that nothing contained in this Section 32.2 or in any other provision of this Contract shall be construed to limit Contractor's liability (a) with respect to vitiation of any insurance policy required to be maintained by Contractor under Article 23 that results from the gross negligence, willful misconduct or fraud on the part of Contractor or any Subcontractor, (b) with respect to any gross negligence, willful misconduct or fraud on the part of Contractor or any Subcontractor, (c) with respect to any of Contractor's indemnity obligations under Article 25 to the extent any such obligation is covered and paid by Contractor's insurance required to be carried under this Contract, or (d) disputed Liquidated Damages.
- 32.2.2 <u>Liquidated Damages</u>. In no event shall Contractor's liability for Delay Liquidated Damages and the Buy-Down Amount exceed, in the aggregate, the Maximum Contractor Aggregate Liquidated Damages. Notwithstanding any of the foregoing, the limitations of this <u>Section 32.2.2</u> shall not limit Owner's remedies for any other breach of this Contract other than a failure to achieve Substantial Completion on or before the Substantial Completion Guaranteed Date, or the failure to satisfy the Performance Guarantees.

32.3 Limitation on Owner's Liability.

32.3.1 <u>Liability Under Contract</u>. In no event shall Owner's liability in connection with this Contract, the Work and the Project, whether arising in contract, warranty or guaranty, tort, product liability, indemnity, contribution, strict liability or otherwise, be greater in the aggregate than one hundred percent (100%) of the Contract Price (as the same may increase from time to time in accordance with the terms of this Contract); provided, however, that nothing contained in this Section 32.3 or in any other provision of this Contract shall be construed to limit Owner's liability (a) with respect to vitiation of any insurance policy required to be maintained by Owner that results from the gross negligence, willful misconduct or fraud on the part of Owner, or (b) with respect to any gross negligence, willful

misconduct or fraud on the part of Owner.

- 32.3.2 <u>Exclusions from Limitation on Liability</u>. Notwithstanding anything herein to the contrary, for purposes of determining whether the limit on Owner's liability pursuant to this Contract has been exceeded, liabilities of Owner to Contractor covered by insurance required to be carried by Owner pursuant to <u>Article 23</u> (except deductibles paid by Owner) shall be excluded from the calculation of Owner's aggregate liability.
- 32.4 <u>Releases, Indemnities and Limitations</u>. Except as expressly set forth herein, releases, assumptions of and limitations on liabilities and limitations on remedies expressed in this Contract as well as waivers of subrogation rights shall apply even in the event of fault, negligence, or strict liability of the Party released or whose liability is limited or assumed or against whom the right of subrogation is waived and shall extend to the officers, directors, employees, licensees, agents, partners, or entities of such partners such as partners and related entities.
- 32.5 <u>Representations</u>. Each Party makes no representations, covenants, warranties, or guarantees, express or implied, other than those expressly set forth herein and in the Exhibits hereto.

33. DISPUTES

- 33.1 <u>Referral to Senior Management</u>. Any and all controversies, disputes or differences between the Parties to this Contract, if not amicably settled by the Parties within thirty (30) days following written notice of dispute, shall be referred to executive officers (senior vice president or higher) of the Parties for resolution. In the event the dispute has not been resolved within thirty (30) days following referral to senior management, or such longer period as the Parties may mutually agree, then either Party, upon ten (10) days' notice to the other Party, may submit the dispute to arbitration pursuant to Section 33.2.
- 33.2 <u>Arbitration</u>. In the event the Parties are unable to resolve the dispute pursuant to Section 33.1 and the aggregate amount of the claim (including counterclaims) is equal to or less than Two Million Dollars (\$2,000,000), then the dispute shall be resolved by binding arbitration. Such arbitration shall be governed by the then-prevailing Construction Rules of the American Arbitration Association. A Party electing to submit a dispute to arbitration shall give the other Party a timely demand for arbitration and shall file the demand and the requisite fee with the American Arbitration Association. Such demand for arbitration shall describe the nature of the dispute and the amount in controversy. The Parties shall then jointly select a single arbitrator in accordance with the Construction Arbitration Rules of the American Arbitration Association. The arbitration shall be held in Albuquerque, New Mexico. Discovery shall be by agreement of the Parties or as ordered by the arbitrator, provided that the Parties shall comply with the following minimum discovery requirements: at least ninety (90) calendar days prior to the arbitration, the Parties shall exchange copies of all exhibits to be used at the arbitration, all Contract documents in

any way related to the dispute, a list of witnesses and a summary of the matters as to which each witness is expected to testify. A reasonable number of depositions may be taken. The arbitrator shall decide the dispute in strict accordance with the Contract and by providing a reasoned award within thirty (30) days of the conclusion of the hearings. The award entered by the arbitrator shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. All costs of arbitration (including the fees of the arbitrator) shall be split equally by the Parties, except that the Parties shall be responsible for payment of their own attorney fees, expert fees, preparation fees, travel costs, witness fees, photocopying and similar costs. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law of the State of New Mexico. Indemnity claims are not subject to mandatory arbitration.

- 33.3 Other Matters. If the aggregate amount of the claims in dispute exceeds Two Million Dollars (\$2,000,000), then the Parties may agree in writing to submit the matter to binding arbitration before three arbitrators appointed in accordance with the Construction Arbitration Rules of the American Arbitration Association; however, failing such an agreement to arbitrate within thirty (30) days of a Party submitting the claim in writing to the other Party, either Party may bring an action only in the federal or state courts of New Mexico. This Section 33.3 shall have no application to claims, or requests for additional compensation or time, if those requests have not been properly submitted to the applicable Party pursuant to the terms of this Contract. An arbitration demand shall include all claims and disputes then ripe for the dispute.
- Work to Continue. Unless otherwise agreed in writing, Contractor shall 33.4 diligently carry on the Work during the pendency of any dispute proceeding so long as all undisputed amounts payable to Contractor hereunder have been paid. If it shall be determined, either by agreement of the Parties or through any dispute proceeding, that any payment of the Contract Price or any other amount payable to Contractor hereunder shall have been unduly paid by Owner to Contractor, Contractor shall within twenty-one (21) days after the final decision is made refund the amount of such excess payment together with interest thereon at the lesser of LIBOR in effect from time to time plus four percent (4.0%) per annum and the highest rate permitted by Applicable Law, from the day following the date of such payment (as so determined) until the date of full refund to Owner. If it shall be determined, either by agreement of the Parties or through any dispute proceeding, that any payment of the Contract Price or other amount payable to Contractor hereunder shall have been withheld by Owner, Owner shall pay or cause to be paid to Contractor within twenty-one (21) days after the final decision is made such withheld amount together with interest thereon at the lesser of the LIBOR in effect from time to time plus four percent (4.0%) per annum and the highest rate permitted by Applicable Law, from the day following the date on which such payment is determined to have been withheld (as so determined) until the date of payment in full to Contractor. As a condition precedent to Contractor's agreement under this Section 33.4 to continue to perform its Work in the case where Owner is disputing any amount, Owner agrees to escrow with a third party reasonably acceptable to Contractor said amounts or otherwise provide another form of payment security reasonably acceptable to Contractor until such time as the dispute concerning payment

is resolved.

33.5 <u>Claims</u>. Each Party shall grant reasonable audit rights to the other Party with respect to all relevant documentation pertaining to any claim under this Contract.

34. LEGAL AND REGULATORY COMPLIANCE AND NMPRC APPROVAL

- 34.1 <u>Governmental Approvals</u>. Each Party shall timely and lawfully procure and maintain in good standing, at its own cost and expense, all Governmental Approvals relative to their respective obligations under this Contract and shall timely and properly pay its respective charges and fees in connection therewith.
- 34.2 <u>NMPRC Approval</u>. The obligations of the Parties hereunder shall be conditioned upon NMPRC Approval in connection with (i) the execution and performance of this Contract; (ii) the execution and performance of the CCN; and (iii) abandonment of Owner's ownership interests in San Juan Generating Station, including any requested financing or other cost recovery method, and any waivers as set forth in Owner's request for approval of this Contract, the CCN or the abandonment filing (collectively, "Requested Actions"). In particular:
- (a) Owner agrees to use commercially reasonable efforts to request and obtain NMPRC Approval of the Requested Actions, and Contractor agrees to cooperate with and assist Owner in these efforts as Owner may reasonably request.
- (b) NMPRC Approval shall be considered received when the NMPRC issues a final written order that is no longer subject to appeal or further proceedings on remand (i) approving this Contract, including authorization to recover the costs of the Requested Actions; or (ii) approving the Requested Actions in part or subject to conditions or substantial modifications, provided that each of Contractor and Owner agrees, subject to its reasonable discretion, to accept those conditions, modifications or such partial approval as sufficient (collectively, "NMPRC Approval").
- (c) If the NMPRC disapproves any of the Requested Actions, then this Contract shall automatically terminate ten (10) Days after the date of such action by the NMPRC and be of no further force or effect, with no further obligation or liability of either Party to the other Party or to any other Person, except obligations incurred prior to termination.
- (d) If any NMPRC Approval is issued as described in Section 34.2(b)(ii) above, then the Parties shall meet and confer no later than fifteen (15) Days after the date of the NMPRC Approval order regarding whether Owner or Contractor wish to amend this Contract to address any conditions or substantial modifications or not to accept any partial or conditioned approval or substantial modification of this Contract. If the Parties are unable to mutually agree on any amendments to this Contract to address such NMPRC Approval order, then this Contract shall automatically terminate ten (10) Days after the date on which the Parties conferred and be

of no further force or effect, with no further obligation or liability of either Party to the other Party or to any other Person, except obligations incurred prior to termination, unless Owner and Contractor mutually agree in writing within such ten (10) Day period that this Contract remain in effect.

(e) If the NMPRC has not, for any reason, entered an order upon the request for approval by September 30, 2020 ("Regulatory End Date"), then the Parties shall meet and confer no later than fifteen (15) Days after the Regulatory End Date regarding a potential extension of the Regulatory End Date. If the Parties are unable to mutually agree to an extension of the Regulatory End Date, then this Contract shall automatically terminate ten (10) Days after the date on which the Parties conferred and be of no further force or effect, with no further obligation or liability of either Party to the other Party or to any other Person, unless Owner and Contractor mutually agree in writing within such ten (10) Day period that this Contract remain in effect.

35. MISCELLANEOUS

- 35.1 <u>Severability</u>. The invalidity or unenforceability of any portion or provision of this Contract shall in no way affect the validity or enforceability of any other portion or provision hereof. Any invalid or unenforceable portion or provision shall be deemed severed from this Contract and the balance of the Contract shall be construed and enforced as if the Contract did not contain such invalid or unenforceable portion or provision. If any such provision of this Contract is so declared invalid, the Parties shall promptly negotiate in good faith new provisions to eliminate such invalidity and to restore this Contract as near as possible to its original intent and effect.
- 35.2 <u>Governing Law</u>. This Contract shall be governed by the internal laws of the State of New Mexico, excluding its conflict of laws provisions.
- 35.3 <u>Survival of Termination</u>. The provisions of this Contract which by their nature are intended to survive the termination, cancellation, completion or expiration of the Contract including, but not limited to, any express limitations of or releases from liability shall continue as a valid and enforceable obligation of the Party notwithstanding any such termination, cancellation, completion or expiration.
- 35.4 No Oral Modification. No oral or written amendment or modification of this Contract (including a Change in Work Form accepted under Article 17) by any officer, agent, or employee of Contractor or Owner, either before or after execution of this Contract, shall be of any force or effect unless such amendment or modification is in writing and is signed by any officer of the Party (or of the managing member or managing partner of the Party on behalf of the Party) to be bound thereby; provided, however, that neither Party shall have any duty to confirm the identity, title or office of any signatory of the other Party, and each Party may rely on the signature of a natural person whom such Party reasonably believes to have the authority to sign on behalf of the other Party.

- 35.5 No Waiver. Either Party's waiver of any breach or failure to enforce any of the terms, covenants, conditions, or other provisions of this Contract at any time shall not in any way affect, limit, modify, or waive that Party's right thereafter to enforce or compel strict compliance with every term, covenant, condition, or other provision hereof, any course of dealing or custom of the trade notwithstanding. All waivers must be in writing and signed on behalf of Owner and Contractor in accordance with Section 35.4.
- 35.6 <u>Headings for Convenience Only</u>. The headings contained herein are not part of this Contract and are included solely for the convenience of the Parties.
- 35.7 <u>Third Party Beneficiaries</u>. The provisions of this Contract are intended for the sole benefit of Owner and Contractor and there are no third party beneficiaries hereof, other than assignees contemplated by the terms herein.
- 35.8 Other Assistance. Contractor shall to the extent reasonably requested by Owner, assist Owner in dealing with Suppliers, customers, and Governmental Authorities in any and all matters relating to the Work (including any interconnection facilities).
- 35.9 <u>Further Assurances</u>. Owner and Contractor will each use commercially reasonable efforts to implement the provisions of this Contract, and for such purpose each, at the request of the other, will, without further consideration, promptly execute and deliver or cause to be executed and delivered to the other such assistance, or assignments, consents or other instruments in addition to those required by this Contract, in form and substance satisfactory to the other, as the other may reasonably deem necessary or desirable to implement any provision of this Contract.
- 35.10 Record Retention and Audit Rights. Contractor will maintain complete and accurate records concerning the Work and all related transactions for at least three (3) years from the Final Completion Date. Contractor's obligation to maintain complete and accurate records will include, but is not limited to, records relating to compliance with Applicable Laws relating to employee certifications and qualifications, drug and alcohol use, environmental, and, if applicable, United States Department of Transportation requirements. At any time, but not later than three (3) years after final payment under the EPC Contract, PNM may make such audit of Contractor's records and substantiating material as deemed necessary by PNM. Each payment made will be subject to reduction and refund to PNM, or offset on future payments due Contractor, to the extent of amounts which are found by PNM, and not otherwise disputed by Contractor, not to have been properly payable or to have been overpaid, and will also be subject to increase and payment to Contractor for underpayments not otherwise disputed by PNM to the extent of any amounts which are found by PNM to have been underpaid. Upon request by PNM, Contractor will use commercially reasonable efforts to require its Subcontractors to insert a clause containing all the provisions of this Section in all subcontracts to permit PNM to make identical audits and inspections of the records of all Subcontractors involved in

performance of the work.

- 35.11 <u>Binding on Successors, Etc.</u>. Subject to Article 28, this Contract shall be binding on the Parties hereto and on their respective successors, heirs and assigns.
- 35.12 Merger of Prior Contracts. This Contract supersedes any other agreement, whether written or oral, that may have been made or entered into between Owner and Contractor or by any office or officer of such Party relating to the Project or the Work. This Contract and Exhibits hereto constitute the entire agreement between the Parties with respect to the Project, and there are no other agreements or commitments with respect to the Project except as set forth herein.
- 35.13 <u>Counterpart Execution</u>. This Contract may be executed by the Parties hereto in any number of counterparts (and by each of the Parties hereto on separate counterparts), each of which when so executed and delivered shall be an original, but all such counterparts shall together constitute but one and the same instrument.
- 35.14 <u>Set-Off</u>. Either Party may at any time, but shall be under no obligation to, set off any and all sums due from the other Party under this Contract against sums due to such Party hereunder.
- 35.15 <u>Independent Contractor</u>. Contractor is an independent contractor, and nothing contained herein shall be construed as constituting any relationship with Owner other than that of owner and independent contractor, or as creating any relationship whatsoever between Owner and Contractor's employees. Neither Contractor nor any of its employees is or shall be deemed to be an employee of Owner.

35.16 Public Statements.

- (a) Without the prior written consent of Owner not to be unreasonably withheld, (i) Contractor shall make no public announcement or release any information concerning Owner, the Project, this Contract or its business relationship with Owner, to any member of the public, press, business entity or any Governmental Authority (except as required by Applicable Laws); and (ii) Contractor shall not, and shall cause its Subcontractors, Vendors, suppliers and agents not to, engage in advertising, promotion or publicity containing non-public information concerning this Contract or the Work, or make public use of any Owner identification in any circumstances related to this Contract or otherwise. "Identification" means any corporate name, trade name, trademark, service mark, insignia, symbol, logo or any other product, service or organization designation, or any specification or drawing owned by Owner or its Affiliates or any representation thereof.
- (b) Without limiting the generality of the foregoing, Contractor acknowledges and agrees that Owner shall have the right to control media access to the Site and responses to media inquiries regarding the Project or any emergency or other incident at the Site, including without limitation, incidents involving personal injury, property damage or operational events.
 - 35.17 <u>Gratuities, Anti-Kickback and False Claims Provisions</u>. Contractor shall not, under any circumstances, extend any gratuity or special favor to employees of

PNM that might be reasonably constructed as an attempt to influence the recipients in the conduct of their official duties. Contractor agrees to abide by the Anti-Kickback Act of 1986, 41 U.S.C.A. § 51, et seq., which prohibits any person from (1) providing, attempting to provide or offering to provide any kickback; (2) soliciting, accepting, or attempting to accept any kickback; or (3) including, directly or indirectly, the amount of any kickback in the cost of work charged to PNM by the Contractor. It is also agreed that Contractor will not engage the services of any individual who has been convicted after September 29, 1988, or for a period of five (5) years after the date of conviction, of fraud or any other felony arising out of a contract with the Federal Government. Such person(s) is (are) prohibited from working in a management or supervisory capacity, serving as a consultant, or serving on the board of directors.

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IN WITNESS WHEREOF, the Parties hereto have caused this Engineering, Procurement, and Construction Contract to be executed as of the date and the year first above written.

EXHIBIT A

STATEMENT OF WORK AND SPECIFICATIONS

Exhibit A consists of technical specifications for the Project, including technical design requirements and interface to the existing site, requirements for procurement of site equipment, and requirements relating to commissioning, testing and placing the Project in service. This exhibit is not included in the record as it is voluminous and burdensome to produce. Exhibit A is available for inspection subject to any restrictions on disclosure of certain information due to NERC Critical Electric Infrastructure Information requirements.

EXHIBIT B

MILESTONE PAYMENT SCHEDULE

Milestone No.	Description	Estimated Major Milestone Date	Estimated Weeks after NTP	% Price	Amount w/o Taxes	Cumulative Amount w/o Taxes	Amount w/Taxes	Cumulative Amount w/Taxes
1	NTP	30-Sep-20	0	20.00%	\$12,300,000.00	\$12,300,000.00	\$13,107,187.50	\$13,107,187.50
2	Progress	30-Oct-20	4	10.00%	\$6,150,000.00	\$18,450,000.00	\$6,553,593.75	\$19,660,781.25
3	Progress	30-Nov-20	9	10.00%	\$6,150,000.00	\$24,600,000.00	\$6,553,593.75	\$26,214,375.00
4	Progress	31-Dec-20	13	10.00%	\$6,150,000,00	\$30,750,000.00	\$6,553,593,75	\$32,767,968.75
5	Progress	29-Jan-21	17	10.00%	\$6,150,000,00	\$36,900,000,00	\$6,553,593.75	\$39,321,562,50
6	Progress	26-Feb-21	21	10.00%	\$6,150,000,00	\$43,050,000.00	\$6,553,593.75	\$45,875,156.25
7	Progress	30-Mar-21	26	10.00%	\$6,150,000.00	\$49,200,000.00	\$6,553,593.75	\$52,428,750.00
8	Progress	30-Apr-21	30	10.00%	\$6,150,000.00	\$55,350,000.00	\$6,553,593.75	\$58,982,343.75
9	RTS Payment	17-May-21	33	10.00%	\$6,150,000.00	\$61,500,000.00	\$6,553,593.75	\$65,535,937.50
PC	1.00							
Milestone No.	Description	Estimated Major Milestone Date	Estimated Weeks after NTP	% Price	Amount w/o Taxes	Cumulative Amount w/o Taxes	Amount w/Taxes	Cumulative Amount w/Taxes
							p	
1	Air Permit Engineering	2-Jan-20	NA NA	0.00%	\$0.00	\$0.00	\$0.00	\$0.00
2	LNTP - Engineering Kick-off	31-M ar-20	NA NA	0.00%	\$0.00	\$0.00	\$0.00	\$0.00
3	Engineering Deliverable, Milestone 1 - Initial IFC Rev 0	30-Apr-20	NA NA	0.00%	\$0.00	\$0.00	\$0.00	\$0.00
4	Engineering Deliverable, Milestone 2 - Initial IFC Rev 0	29-May-20	NA	0.00%	\$0.00	\$0.00	\$0.00	\$0.00
5	Engineering Deliverable, Milestone 3 - Initial IFC Rev 0	30-Jun-20	NA	0.00%	\$0.00	\$0.00	\$0.00	\$0.00
6	Engineering Deliverable, Milestone 4 - Initial IFC Rev 0	31-Jul-20	NA	0.00%	\$0.00	\$0.00	\$0.00	\$0.00
7	Engineering Deliverable, Milestone 5 - Initial IFC Rev 0	31-Aug-20	NA	0.00%	\$0.00	\$0.00	\$0.00	\$0.00
8	NTP	30-Sep-20	NA	5.50%	\$3,791,662.19	\$3,791,662.19	\$3,791,662.19	\$3,791,662.19
9	ECM PO Issued	1-Oc‡-20	0	3.00%	\$2,068,179.38	\$5,859,841.57	\$2,203,903.65	\$5,995,565.84
10	GSU Transformer PO Issued	1-Oct-20	0	2.00%	\$1,378,786.25	\$7,238,627.82	\$1,469,269.10	\$7,464,834.94
11	M obilization	1-Mar-21	22	5.00%	\$3,446,965.63	\$10,685,593.45	\$3,673,172.75	\$11,138,007.69
12	Civil Works Complete-CTG 1	21-Apr-21	29	1.50%	\$1,034,089.69	\$11,719,683.14	\$1,101,951.82	\$12,239,959.51
13	Civil Works Complete-CTG 2	21-Apr-21	29	1.50%	\$1,034,089.69	\$12,753,772.83	\$1,101,951.82	\$13,341,911.34
14	Civil Works Complete-ECM 1	21-Apr-21	29	1.00%	\$689,393.13	\$13,443,165.95	\$734,634.55	\$14,076,545.89
15	Civil Works Complete-ECM 2	21-Apr-21	29	1.00%	\$689,393.13	\$14,132,559.08	\$734,634.55	\$14,811,180.44
16	Civil Works Complete-CTG 3	4-May-21	31	1,50%	\$1,034,089.69	\$15,166,648.77	\$1,101,951.82	\$15,913,132.26
17	Civil Works Complete-CTG 4	4-May-21	31	1.50%	\$1,034,089.69	\$16,200,738.46	\$1,101,951.82	\$17,015,084.09
18	Civil Works Complete-ECM 3	4-May-21	31	1.00%	\$689,393,13	\$16,890,131.58	\$734,634.55	\$17,749,718.64
19	Civil Works Complete-ECM 4	4-May-21	31	1.00%	\$689,393.13	\$17,579,524.71	\$734,634.55	\$18,484,353.19
20	ECM 1 Ready to Ship	17-May-21	33	1.50%	\$1,034,089.69	\$18,613,614.40	\$1,101,951.82	\$19.586.305.01

21	ECM 2 Ready to Ship	17-May-21	33	1.50%	\$1,034,089.69	\$19,647,704.09	\$1,101,951.82	\$20,688,256.83
22	Civil Works Complete-CTG 5	18-May-21	33	1.50%	\$1,034,089.69	\$20,681,793.77	\$1,101,951.82	\$21,790,208.66
23	Civil Works Complete-CTG 6	18-May-21	33	1.50%	\$1,034,089.69	\$21,715,883.46	\$1,101,951.82	\$22,892,160.48
24	Civil Works Complete-ECM 5	18-May-21	33	1.00%	\$689,393.13	\$22,405,276.59	\$734,634.55	\$23,626,795.03
25	Civil Works Complete-ECM 6	18-May-21	33	1.00%	\$689,393.13	\$23,094,669.71	\$734,634.55	\$24,361,429.58
26	ECM 3 Ready to Ship	24-May-21	34	1.50%	\$1,034,089.69	\$24,128,759.40	\$1,101,951.82	\$25,463,381.41
27	ECM 4 Ready to Ship	24-May-21	34	1.50%	\$1,034,089.69	\$25,162,849.09	\$1,101,951.82	\$26,565,333.23
28	Major Equipment Rough Set on Foundation-CTG 1	28-M ay-21	34	1.00%	\$689,393.13	\$25,852,242.22	\$734,634.55	\$27,299,967.78
29	Major Equipment Rough Set on Foundation-CTG 2	28-May-21	34	1.00%	\$689,393.13	\$26,541,635.34	\$734,634.55	\$28,034,602,33
30	Civil Works Complete-GSU 1	31-May-21	35	1.00%	\$689,393.13	\$27,231,028.47	\$734,634.55	\$28,769,236.88
31	Civil Works Complete-GSU 2	31-May-21	35	1.00%	\$689,393.13	\$27,920,421.59	\$734,634.55	\$29,503,871.43
32	Civil Works Complete-GSU 3	31-May-21	35	1.00%	\$689,393.13	\$28,609,814.72	\$734,634.55	\$30,238,505.98
33	ECM 5 Ready to Ship	31-May-21	35	1.50%	\$1,034,089.69	\$29,643,904.41	\$1,101,951.82	\$31,340,457.80
34	ECM 6 Ready to Ship	31-May-21	35	1.50%	\$1,034,089.69	\$30,677,994.10	\$1,101,951.82	\$32,442,409.63
35	Major EquipmentRough Set on Foundation-ECM 1	3-Jun-21	35	1.00%	\$689,393.13	\$31,367,387.22	\$734,634.55	\$33,177,044.18
36	Major Equipment Rough Set on Foundation-ECM 2	3-Jun-21	35	1.00%	\$689,393.13	\$32,056,780.35	\$734,634.55	\$33,911,678.73
37	Major Equipment Rough Set on Foundation-CTG 3	9-Jun-21	36	1.00%	\$689,393.13	\$32,746,173.48	\$734,634.55	\$34,646,313.28
38	Major Equipment Rough Set on Foundation-CTG 4	9-Jun-21	36	1.00%	\$689,393.13	\$33,435,566.60	\$734,634.55	\$35,380,947.83
39	Assembly of Major Equipment-CTG 1	11-Jun-21	36	0.75%	\$517,044.84	\$33,952,611.45	\$550,975.91	\$35,931,923.74
40	Assembly of Major Equipment-CTG 2	11-Jun-21	36	0.75%	\$517,044.84	\$34,469,656.29	\$550,975.91	\$36,482,899.65
41	Major Equipment Rough Set on Foundation-ECM 3	14-Jun-21	37	1.00%	\$689,393.13	\$35,159,049.42	\$734,634.55	\$37,217,534.20
42	Major Equipment Rough Set on Foundation-ECM 4	14-Jun-21	37	1.00%	\$689,393.13	\$35,848,442.54	\$734,634.55	\$37,952,168.75
43	GSU 1 Transformer Ready to Ship from Factory	15-Jun-21	37	1.00%	\$689,393.13	\$36,537,835.67	\$734,634.55	\$38,686,803.30
44	GSU 2 Transformer Ready to Ship from Factory	15-Jun-21	37	1.00%	\$689,393.13	\$37,227,228.79	\$734,634.55	\$39,421,437.85
45	Major Equipment Rough Set on Foundation-CTG 5	22-Jun-21	38	1.00%	\$689,393.13	\$37,916,621.92	\$734,634.55	\$40,156,072.40
46	Major EquipmentRough Set on Foundation-CTG 6	22-Jun-21	38	0.75%	\$517,044.84	\$38,433,666.76	\$550,975.91	\$40,707,048.31
47	GSU 3 Transformer Ready to Ship from Factory	23-Jun-21	38	1.00%	\$689,393.13	\$39,123,059.89	\$734,634.55	\$41,441,682.86
48	Assembly of Major Equipment-CTG 3	23-Jun-21	38	0.75%	\$517,044.84	\$39,640,104.73	\$550,975.91	\$41,992,658.78
49	Assembly of Major Equipment-CTG 4	23-Jun-21	38	0.75%	\$517,044.84	\$40,157,149.58	\$550,975.91	\$42,543,634.69
50	Assembly of Major Equipment ECM 1	23-Jun-21	38	1.00%	\$689,393.13	\$40,846,542.70	\$734,634.55	\$43,278,269.24
51	Assembly of Major Equipment-ECM 2	23-Jun-21	38	1.00%	\$689,393.13	\$41,535,935.83	\$734,634.55	\$44,012,903.79
52	Major Equipment Rough Set on Foundation-ECM 5	28-Jun-21	39	1.00%	\$689,393.13	\$42,225,328.96	\$734,634.55	\$44,747,538.34
53	Major Equipment Rough Set on Foundation-ECM 6	28-Jun-21	39	1.00%	\$689,393.13	\$42,914,722.08	\$734,634.55	\$45,482,172.89
54	Major Equipment Rough Set on Foundation-GSU 1	30-Jun-21	39	1.50%	\$1,034,089.69	\$43,948,811.77	\$1,101,951.82	\$46,584,124.71
55	Major Equipment Rough Set on Foundation-GSU 2	30-Jun-21	39	1,50%	\$1,034,089.69	\$44,982,901.46	\$1,101,951.82	\$47,686,076.54

74 75	CTG 3 First Fire	7-Mar-22 7-Mar-22	75 75	1.00%	\$689,393.13 \$680,303.13	\$59,287,808.82 \$59,977,201.04	\$734,634.55 \$734,634.55	\$62,929,743.44 \$63,664,377.99
75	CTG 4 FirstFire	7-M ar-22	75	1.00%	\$689,393.13	\$59,977,201.94	\$734,634.55	\$63,664,377.99
76	CTG 5 FirstFire	15-M ar-22	76	1.00%	\$689,393.13	\$60,666,595.07	\$734,634.55	\$64,399,012.54
77	CTG 6 FirstFire	15-M ar-22	76	1.00%	\$689,393.13	\$61,355,988.20	\$734,634.55	\$65,133,647.09
78	Substantial Completion	15-Apr-22	80	10.00%	\$6,893,931.26	\$68,249,919.45	\$7,346,345.50	\$72,479,992.59
79	Final Completion	1-Jun-22	87	1.00%	\$689,393.13	\$68,939,312.58	\$734,634.55	\$73,214,627.14
Notes:	In no event shall the cumulative amount of Milestone Paym two months as set forth in this Exhibit B.	ents payable by Owner for a	ny month exceed	100.00%		\$130,439,312.58 Milestone Payments shown a	as payable for th	\$138,750,564.64 e immediately subsequent
1)		Price Including					Underta de Carres de Carres	
1)	Price excluding Taxes	Taxes			ery process are stored and another many transfer to the			
TOTAL	Price excluding Taxes \$130,439,312.58	Taxes \$138,750,564.64						1 2
TOTAL CTG			***************************************					
TOTAL CTG Packages	\$130,439,312.58 \$61,500,000.00	\$138,750,564.64 \$65,535,937.50						
TOTAL CTG	\$130,439,312.58	\$138,750,564,64						

EXHIBIT C

OWNER ACQUIRED PERMITS

Area of Regulation	Applicable Permit	Reference	Responsible Agency	Regulated Activity	Duration of Task (approx.)	Required? (Yes/TBD)	Support provided by Contractor	Timing of Deliverable	Notes
Air Quality	Acid Rain Permit	40 CFR Part 72	NMED AQB/EPA	Required for electric utility plants	12 months	Yes	Yes	Preconstruction	Contractor shall provide information as needed to prepare draft and final application for revision, exhibits, and all necessary analysis supporting application
Air Quality	Authority to Construct Air Permit	20 NMAC 2.72, 2.74	NMED AQB	Construction of sources of emissions	15 months	Yes	Yes	Preconstruction	Contractor shall provide information as needed to prepare draft and final application for revision, exhibits, and all necessary analysis supporting application
Air Quality	Title V Operating Permit	40 CFR 70 and NMED	NMED AQB/EPA	Required operating permit for a facility requiring a Title IV Acid Rain Permit	12 months	Yes	Yes	12 months after the commercial operation	Title V Permit Application for Revision and Permit. Contractor will have no obligations to assist PNM after Final Completion
Water Qualit y	NPDES Construction General Permit for Storm Water Permit Discharge Notice of Intent (NOI)	USEPA National Pollution Discharge Elimination System Regulations	EPA Region 6	Storm Water Runoff from construction sites disturbing 1 or more acres.	2 months	Yes	Yes	Preconstruction	Contractor and Owner will each submit an NOI using a single SWPPP for all construction activity
Water Quality	NPDES Construction General Permit for Storm Water Permit, Notice of Termination (NOT)	USEPA National Pollution Discharge Elimination System Regulations	EPA Region 6	Storm Water Runoff from construction sites disturbing 1 or more acres.	2 months	Yes	Yes	Post Construction	Contractor and Owner will each submit a NOT
Water Quality	Groundwater Discharge Permit	20.6.2 NMAC	NMED GWQB	Evaporative Ponds and Process Water Discharges	9 months	Yes	Yes	Pre-Commercial Operation	Contractor to provide information as needed to prepare draft and final forms, reports, exhibits, and all necessary analysis supporting application to modify existing discharge permit
Hazmat/ Safety	Spill Prevention Control & Countermeasure (SPCC) Plan	40 CFR 112	EPA Region 6	Storage of 1,320 gallons or more of petroleum product	2 months	Yes	Yes	Preconstruction and /Pre- Commercial Operation	Modify existing SPCC plan for construction, if needed, and operation

EXHIBIT D

CONTRACTOR RATE SCHEDULE

The rates included in this Exhibit D are applicable to work performed for the Owner on a Time and Material basis or under a Change Order. All rates and expenses shall be billed as identified within this Exhibit D plus any amount for profit, overhead, and contingency, as outlined in the Engineering, Procurement, and Construction Contract.

The rate noted in Table 1 will be invoiced for every hour worked for each ProEnergy employee. The straight time rate will be invoiced for the first eight hours per day on Monday through Friday. The over-time rate (time and ½ OR 1.5x) will be invoiced for all hours in excess of eight hours Monday through Friday and all hours on Saturday, Sunday, and Holidays.

*NOTE – the rates expressed below are current as of 2019 and are subject to annual wage escalation and published equipment rate adjustments.

Table 1 - Hourly Labor Rates

Position	Straight Time Cost/Hour			erTime st/Hour
Project Manager	Ş	120.00	Š	180.00
Field Supervisor	\$	100.00	\$	150.00
Procurement	Ş.	72.00	Ş	108.00
Logistics	\$	72.00	\$	108.00
QA/QC	Ş	81.00	Š	121.50
Safety Representative	\$	81.00	Ś	121.50
Finance	\$	74.00	Ŝ.	111.00
Clerk/Admin	Š	40.00	Ś	60.00
Electrical and I&C				
Electrical Field & Specialized Labor	Š	97.00	Š	145.50
i&C Technician	\$	72.50	\$	108.75
Electrician	Ş	56.50	Š	84.75
Fire Protection	\$.	56.50	\$	84.75
Fire Protection Engineering	\$	68.00	Ŝ	102.00
<u>Mechanical</u>				
Foreman	\$	81.00	Ŝ	121.50
Millwright/Mechanic	Ş	56.50	\$	84.75
Welder - non code	\$	58.00	\$	87.00
Welder - Code/pressure	Ş	61.00	Ş	91.50
Pipe Fitter	\$	48.00	\$	72.00
Helper	\$	39.00	Ş	58.50
Civil				
Civil Foreman	\$	84.00	Ŝ	126.00
Civil Craftsman	Š	42.00	\$	63.00
Controls Engineer				
Controls Engineer	Š	97.00	Š	145.50
Aero TA				
Aero TA	Ş	120.00	Š	180.00
High Voltage				
High Voltage Engineer	\$	120.00	\$	180,00
High Voltage Technician	Š	48.00	Š	72.00

Travel Expenses

Reasonable travel expenses associated with a work scope include:

- Air Transportation:

 - o Round-trip coach-class airfare for flights under eight (8) hours in duration.
 o Business-class airfare for flights with one (1) leg over eight (8) hours in duration.
- **Land Transportation:**
 - o Use of a personal or a ProEnergy vehicle will be invoiced at the Standard IRS Business Mileage Rate.
 - o Use of a rental car (includes associated rental car charges and fuel).

- Travel Incidentals: Tolls, ferries, taxis, and meals incurred during transit.
- <u>Travel Time</u>: Travel time each way at straight-time from each ProEnergy
 employee's original point of origin to the project site and return to point of origin upon
 assignment completion or Owner requested delay of completion schedule.

All travel related expenses incurred for the work scope and not provided by Owner will be invoiced at cost.

Labor Assumptions

The following labor assumptions will apply to manpower working under this agreement:

- 1) For multi-craft personnel, the hourly labor rate will be determined by the highest skill required for that day and will apply for the whole day.
- 2) If only one Craftsman is assigned to the project (site) and only if such Craftsman is qualified as a Field Supervisor, he will be invoiced at the Field Supervisor rate. If there is more than one Craftsman assigned to the project (site), one person will be a Field Supervisor [for small crew sizes, he will be a working Supervisor].
- 3) A Field Supervisor will be required for every fourteen craftsmen assigned to the project (site).
- 4) A Safety Representative will be required after thirty craftsmen are assigned to the project (site).
- 5) Per Diem will be per GSA rates in the area.

Standby Policy

In the event any ProEnergy employee is in a stand-by support role as a result of a delay not caused by ProEnergy, the Hourly Billing Rate and daily expenses remain in effect. The presence on-site of any ProEnergy employee in a stand-by support role shall be coordinated with and preapproved by the Owner's designated representative.

Expenses and Time Sheets

All time and expense sheets shall be submitted by ProEnergy at the end of each business day and shall be approved and signed by the Owner's designated representative at the site within two (2) business days of submittal by a ProEnergy employee.

Invoice and Payment Terms

- All site labor and expenses shall be billed weekly. Parts and other expenses will be billed in full upon approval to proceed, unless there are otherwise specified payment terms.
- Payment Term shall be as defined in the Engineering, Procurement, and Construction Contract.

1. Tools and Equipment Billing Rate

ProEnergy will supply any type of tools or equipment required to perform the work. Below are the rates for several pieces of equipment. All equipment supplied for a project will be invoiced on a cost plus basis. Any fuel costs will be additional. The maintenance on this equipment is included in the rental rates. Mobilization and demobilization costs will apply to some equipment not able to be towed or brought onto site with pick-up truck or small trailer.

Table 2 - Tools & Equipment

Table 2 – To Tools & Equipment	Daily	Weekly	Other Cost
The state of the s	Rate	Rate	various metallic castle conductors to
1/2 Ton Pickup, Standard Bed	\$125.00	\$400.00	\$0.65/Mile
3/4 Ton Crew Cab, Standard Bed	\$145.00	\$450.00	\$.65/Mile
1 Ton or Larger Crew Cab, Flat Bed	\$195.00	\$800.00	\$.65/Mile
Tron or Emiger City, The Bee	4170.00		\$.65/Mile,
1 Ton Weld Truck and Basic Hand Tools	\$195.00	\$850.00	Consumables
	7 20 21 3		Delivery,
Boiler Trailer (53')	\$700.00	\$4,550.00	Consumables
			Delivery,
Boiler Trailer (20')	\$400.00	\$2,800.00	Consumables
		,	Delivery,
Mechanical Tool Trailer	\$175.00	\$700.00	Consumables
Rigging Connex	\$200.00	\$725.00	Mob/Demob
40ft Office Connex	N/A	\$400.00	Mob/Demob
Plasma Cutter	\$100.00	\$400.00	Consumables
Welding Machine (Single 480Volt)	\$85.00	\$350.00	Consumables
Welding Machine (4 Pack, 480Volt)	\$195.00	\$775.00	Consumables
			Consumables,
Welding Machine (Gas-Diesel-Propane)	\$100.00	\$425.00	Fuel
Welding Machine (Small Inverter)	\$70.00	\$295.00	Consumables
Welding Machine (Push/Pull System)	\$125.00	\$600.00	Consumables
Power Distribution Panel	\$85.00	\$350.00	None
EscoTool Millhog (Ground Hog .50" ID to			
2.25" OD)	\$65.00	\$250.00	Consumables
EscoTool Millhog (Wart Hog .75" ID to			
4.5" OD)	\$85.00	\$350.00	Consumables
EscoTool Millhog (Prepzilla 1.575" ID to			
8.625" OD)	\$105.00	\$450.00	Consumables
Drill, Mag	\$90.00	\$400.00	Consumables
Drill, Hougen	\$90.00	\$400.00	Consumables
	\$150.00	\$150.00	Port to Port
38 Ton Portable Crane and Operator	HOUR	HOUR	Licensing Fees
Manbasket	\$120.00	\$450.00	None
Rotalign - Equipment Alignment Tool	\$150.00	\$550.00	None
Portable Air Compressor (185 CFM)	\$195.00	\$600.00	Fuel
			Mob/Demob,
5,000LB Forklift (Pneaumatic Tire)	\$175.00	\$750.00	Fuel
			Mob/Demob,
10,000LB Extended Boom Forklift	\$375.00	\$1,450.00	Fuel
Forklift Boom Extension	\$50.00	\$225.00	None
HILMAN ROLLERS 30 TON	\$50.00	\$225.00	None
HILMAN ROLLERS 60 TON	\$90.00	\$400.00	None
HOT TAP MACHINE (SMALL)	\$195.00	\$600.00	Consumables
HOT TAP MACHINE (LARGE)	\$290.00	\$925.00	Consumables
RADIO, BASE	\$30.00	\$135.00	None
RADIO W/CHARGER,HOLSTER			
MONITOR, AIR	\$75.00	\$325.00	None
•			

^{*} Consumables include items such as drill bits, port-a-band blades, grinding wheels, cutting gases, welding rod& filler metal, purge gases, etc.

^{*} The tools and equipment rates are subject to availability of ProEnergy owned equipment. If equipment is not available, it will be rented.

^{*}Any required rentals will be invoiced at cost.

Attachment D-1

EPC ATTACHMENT D Table D-1: PRICING INFORMATION FORM BREAKDOWN OF RESPONDENT'S EPC PRICE

ProEnergy

PROJECT LOCATION:

San Juan

PROJECT TECHNOLOGY: 6xLM6000 PC Sprint

PROJECT IN-SERVICE DATE: June 31, 2022

Description of Work	Manhours		Labor	Equip	ment and Materials	Subcontracts	Total
Direct Costs:		1					
Site Development and Civil Works	10880	\$	687,533.00	\$	1,815,697.00	\$ 50,000.00	\$ 2,553,230.00
Deep Foundations						\$ -	\$ -
Foundations and Concrete	14235	\$	779,625.00	\$	2,253,825.00	\$ -	\$ 3,033,450.00
Structural Steel				\$	472,500.00	\$ -	\$ 472,500.00
Architectural	4680	\$	275,625.00	\$	1,264,875.00		\$ 1,540,500.00
Generating Unit(s) and Auxiliaries				\$	45,000,000.00	\$ -	\$ 45,000,000.00
Solar Panel Infrastructure (if applicable)		\$	-	\$	-		
Battery Energy Storage System (if applicable)		\$	-	\$	-		
Heat Rejection System		\$		\$	300,000.00	\$ -	\$ 300,000.00
Balance of Plant Mechanical Equipment	25574	\$	801,685.82	\$	19,992,017.40	\$ -	\$ 20,793,703.22
Mechanical Commodities	9640	\$	1,043,825.00	\$	957,000.00	\$ -	\$ 2,000,825.00
Insulation and Painting	2040	\$	111,825.00	\$	948,775.00	\$ -	\$ 1,060,600.00
Balance of Plant Electrical Equipment	13577	\$	1,082,925.00	\$	12,157,030.00	\$ -	\$ 13,239,955.00
Electrical Commodities	16320	\$	691,425.00	\$	1,363,100.00	\$ -	\$ 2,054,525.00
Plant Control System	7350	\$	537,075.00	\$	2,784,500.00	\$ -	\$ 3,321,575.00
Instrumentation	3708	\$	236,900.00	\$	2,043,150.00	\$ -	\$ 2,280,050.00
Subtotal Direct Costs	108,004	\$	6,248,443.82	\$	91,352,469.40	\$ 50,000.00	\$ 97,650,913.22
Indirect Costs:							
Construction Field Staff (Including Expenses and Related staff Expense)	Included above						有名的特殊的 网络
Construction Equipment & Associated Operating Expenses		\$	-	\$	-	\$ 1,308,000.00	\$ 1,308,000.00
Small Tools & Consumables	Included above					2000/1900 (Sept. 1909)	
Temporary Facilities (Contractor and Owner Trailers and Furnishings)						\$ 285,900.00	\$ 285,900.00

Support Craft and Site Services (Infrastructure, Utilities, Maintain)				Т		\$	85,500,00	\$ 85,500,00
Temporary Utilities Cost						\$	135,000.00	135,000.00
Site Safety						\$	112,500.00	\$ 112,500.00
Start-up Craft Labor Support		\$	337,500.00	4	562,500.00	\$	409,500.00	\$ 1,309,500.00
Start-up Subcontracts (Chem Clean, Steam Blow, Flushing/Fills)	Perform in house							
Start-up Management (Services/Supervision)		\$	150,000.00			\$	-	\$ 150,000.00
Subtotal Indirect Costs	0	\$	487,500.00	\$	562,500.00	\$	2,336,400.00	\$ 3,386,400.00
Other Costs:								
Project Engineering, Home Office Support, Procurement, Project Management		\$	3,500,320.00	\$	-	\$	90,000.00	\$ 3,590,320.00
Insurance (CGL and BAR)		\$	-	\$	-	\$	310,500.00	310,500.00
Misc. Costs, Warranties, etc.		\$	-	\$	-	\$	2,000,000.00	\$ 2,000,000:00
Subtotal Other Costs	0	\$	3,500,320.00	\$	-	\$	2,400,500.00	\$ 5,900,820.00
					,,,,			
Total Cost (Direct, Indirect, and Other Costs)	108004	\$_	10,236,263.82	\$	91,914,969.40	\$	4,786,900.00	\$ 106,938,133.22
				1				
Escalation (Direct, Indirect and Other)			,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,,	:				\$ 2,072,500.00
Contingency				:				\$ 4,464,396.00
Fee and G & A Expense				:				\$ 14,406,649.78
Allowances and Adjustments (provide detail if used)				1				\$ -
	1			<u>:</u>				
			Tota	1 - E	PC Contract Price Exclu	ıding	Bonding and Taxes	\$ 127,881,679.00
			**************************************	i				
	1				luding Tax	\$	127,881,679.00	
				Bon		\$	2,557,633.58	
					tract Price (excluding taxes)	\$	130,439,312.58	
				Tax		\$	8,311,252.06	
. I					tract Price	\$	138,750,564.64	
	DPTION PRICING	(ne	ot incl. Taxes)				ĺ
Option 1 - One (1) Additional requested LM6000 Package	Requires execution of	`						\$ 20,427,168.50
	Option 2							
Option 2 - Spare GSU w/ Pad and Oil				:				\$ 1,277,834.40
Option 3 - Waste Water Sump Capacity Increase to 10,000 Gallons				:				\$ 105,200.00
Option 4 - Blackstart Capability				:				\$ 417,000.00
Option 5 - 13.8kV GSU tie-in of 25MW Solar Power Feed				:				\$ 695,000.00

EXHIBIT E

CHANGE IN WORK FORM

Project Number: Location: RT CONTRACT REFERENCE AND DATE>
RT CONTRACT REFERENCE AND DATE>
RT. CONTRACT REFERENCE AND DATE>
RT CONTRACT REFERENCE AND DATE>
RT CONTRACT REFERENCE AND DATE>
RT CONTRACT REFERENCE AND DATE>
agini sebangan digitat bah kulamata kai damper katah yan berketan ang baharan digitar berkada yan berkada baha Baharan
2,625

☐ Time and Material		
Time and Material Estimate: Estimated USD	d T&M Amount:	
[]%		
Administration:		
Extra Work Requested by:		74-
Owner Approval Signature:	Date	Title
	Date	Title
Contractor Approval Signature:	Date	Title
Company of the compan	Date	nde
ProFnergy Comments:		
ProEnergy Comments:		
ProEnergy Comments:		
ProEnergy Comments:		
**Owner agrees to the increase in Scope of Work and Turnkey Price for the work as described a		

EXHIBIT F

FORM OF CONTRACTOR'S INVOICE

[Date]		
[Name of Contractor] [Address]		
Attention:		
Gentlemen:		
payment ("Certificate") purs Contract (as amended, supp between Contractor and Pub ("Owner"), dated as of [uant to Article 7 of the Engineering plemented or modified from time to blic Service Company of New Mex	o time, the "Contract") by and ico, a New Mexico corporation
1. The undersigned is a and deliver this Certificate or	duly authorized representative of C n behalf of Contractor.	Contractor, authorized to execute
2. The following is a su	mmary of the current status of the C	ontract account:
	Original Contract Price: Adjustments to Contract Price: Contract Price to Date: Amount of Payments that Contractor Has Received to Date:	\$ \$ \$
Contractor or any of its offic	Ill material documents and supporting or employees and submitted to Cond in connection with the Work, taken pupilete.	Owner and Engineer and in direct
4. The Work is being po	erformed in accordance with the Cor	ntract, except

That portion of the Work, as particularly set forth in Exhibit F-5 hereto [Exhibit F-5

shall include all necessary documentary evidence], was completed through the end of the

month of _____, 20__. The aggregate amount of the Milestone Payments for such Work is ___.

The aggregate amount of the Milestone Payments for which Contractor has previously received payments is \$ The aggregate amount of Milestone Payments for which Contractor is entitled to be paid is \$
6. The amount of this Contractor's Invoice set forth above, is not (in part or otherwise) attributable to Work which has been rejected by Owner or Contractor or which otherwise constitutes or relates to a Subcontractor's application for payment, billings or invoices which Contractor disputes or for any other reason does not intend to pay.
7. There are no known mechanics' or materialmen's liens outstanding at the date of this Contractor's Invoice, all due and payable bills with respect to the Work have been paid to date or are included in the amount requested in the current application, and, except for such bills not paid but so included, there is no known basis for the filing of any mechanics' or materialmen's liens on the Project or the Work except as described below, and all required releases required to be obtained pursuant to the terms of the Contract have been obtained in such form as to constitute an effective release of lien (corresponding to payments received by them) under the laws of the State of New Mexico (copies of which are attached hereto and incorporated herein by this reference). Contractor, or a Subcontractor, has actually performed and Contractor has not been paid for the Work covered by this Contractor's Invoice.
8. Contractor has paid all sales and use taxes due and owing to any Governmental Authority related to all Equipment and Materials incorporated into the Project.
9. Attached as Exhibit F-1 through F-4 hereto are all applicable Conditional Waivers and Releases Upon Progress Payment and Unconditional Waivers and Releases Upon Progress Payment prepared by Contractor and all applicable Unconditional Waivers and Releases Upon Progress Payment and all Conditional Waivers and Releases Upon Progress Payment from each Subcontractor in accordance with Sections 7.1-7.4, as applicable.
10. Work uncertified from the Contractor's Invoice dated, 20 has been completed (except as set forth in the last sentence of this paragraph), and any disputes concerning less than full certification have been resolved by written agreement among Owner, Contractor and the Engineer, a copy of which resolution is attached as Exhibit F-6 hereto, and Contractor is entitled to a payment which includes:
11. Contractor has delivered the Monthly Progress Report prepared pursuant to <u>Section 8.6</u> of the Contract.
IN WITNESS WHEREOF, the undersigned has executed this Certificate on the date first above written.
By: Project Manager

EXHIBIT F-1

STATE OF NEW MEXICO
COUNTY OF
Conditional Waiver and Release Upon Progress Payment
WHEREAS, Public Service Company of New Mexico ("Owner") and ProEnergy Services, LLC ("Contractor") have entered into that certain Engineering, Procurement and Construction Contract, dated as of [], 20[] (the "Contract");
WHEREAS, the undersigned is required to provide this Conditional Waiver and Release Upon Progress Payment pursuant to the terms of Article 7 of the Contract.
Capitalized terms used but not defined herein shall have the meanings given to them in the Contract.
By executing and submitting its interim payment application and the lien waiver below, in consideration for the payment described in the lien waiver below, and for the purpose of inducing the Owner to make this interim payment, the undersigned, for itself, its employees, subcontractors, sub-subcontractors, mechanics, materialmen and laborers, does hereby represent and warrant as follows:
1. All Parties Paid. The undersigned has been paid all amounts owed for all labor, Equipment and Materials, and services furnished to the Project through the effective date of the date of the undersigned's previous application for payment), and that all parties supplying labor, services, Equipment and Materials, to it in connection with the Project have been paid, or will be paid in accordance with the terms of the applicable subcontracts and/or purchase orders, and Applicable Law, including the New Mexico Prompt Payment Act, for all labor, services, Equipment and Materials furnished with relation to the Project.
2. <u>Waiver Of Claims</u> . Conditioned only on the receipt of the sum reflected in Paragraph 5 below, the undersigned waives and releases any and all claims, causes of action, suits, damages, judgments, demands of any kind, character and description, whether known or unknown, against [the Contractor, the Contractor's surety] [delete if Contractor is executing this lien waiver], the Owner, any construction lender or funds, and their respective directors, officers, principals, partners, employees, agents, subsidiaries, parent and related firms, successors and assigns, arising out of work performed, labor furnished, Equipment and Materials, or services provided, and acts or omissions occurring, prior to the effective date of the interim lien waiver below, with the exception of those claims described below in an amount not to exceed the stated amount:
\$ \$
\$

Sworn and subscribed before me this _____

day of ______, 201____.

My Commission Expires:

Notary Public

materialmen's liens, or any other type of lien of the Property, the Site or the improvements there or by those supplying labor, Equipment and Mand Vendors. The undersigned acknowledges decision to fund the interim progress payment action to cancel and discharge any such lien in the Property or the improvements thereon.	reon by it or any of its Subcontracto Materials, or services through such S that this representation is material to described herein, that it will take p	rs or Vendors, Subcontractors o the Owner's rompt and full
4. <u>Conditional Waiver Of Lien Rights.</u> The Materials, or services (permitting, engineering with the permitting, engineering, procurent Equipment and Materials for the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico, and more particularly described in the Piñon General New Mexico	ng, procurement and construction) nent, construction, and the instal erating Station in Waterflow,	in connection lation of the
	(the "Pi	operty")
(Add property legal description or street address	ss)	
Conditionally only upon the receipt of the sum undersigned waives and releases any and all m through the date of (the date upon the foregoing described Property on a Materials, or services (permitting, engineering undersigned, or furnished to or at the requimprovement of the Property or the performant for the Work through the date of application for payment).	e of the undersigned's application account of any labor, materials, Eg, procurement and construction) fullest of the undersigned, in connectice of the Work described herein or interpretation (the date of the	for payment) quipment and rnished by the ction with the n the Contract undersigned's
Given under hand and seal thisd	lay of	201
Contractor, Subcontractor, or Vendor		
By:		
Printed Name:		
Its:		

No Pending Liens. The undersigned represents and warrants that no mechanic's and

EXHIBIT F-2

STATE OF NEW MEXICO
COUNTY OF
Unconditional Waiver and Release Upon Progress Payment
WHEREAS, Public Service Company of New Mexico ("Owner") and ProEnergy Services, LLC ("Contractor") have entered into that certain Engineering, Procurement and Construction Contract, dated as of [], 20[] (the "Contract");
WHEREAS, the undersigned is required to provide this Unconditional Waiver and Release Upon Progress Payment pursuant to the terms of Article 7 of the Contract.
Capitalized terms used but not defined herein shall have the meanings given to them in the Contract.
By executing and submitting its interim payment application and the waiver below, in consideration for the payment described in the lien waiver below, and for the purpose of inducing Owner to make this interim payment, the undersigned, for itself, its employees, subcontractors, sub-subcontractors, mechanics, materialmen and laborers, does hereby represent and warrant as follows:
1. All Parties Paid. The undersigned has been paid all amounts owed for all labor, Equipment and Materials, and services furnished to the Project through the effective date of (the date of the undersigned's previous application for payment), and that all parties supplying labor, services, Equipment and Materials to it in connection with the Project have been paid, or will be paid in accordance with the terms of the applicable subcontracts and/or purchase orders, and Applicable Law, including the New Mexico Prompt Payment Act, for all labor, services, Equipment and Materials furnished with respect to the Project.
2. <u>Waiver Of Claims</u> . The undersigned waives and releases any and all claims, causes of action, suits, damages, judgments, demands of any kind, character and description, whether known or unknown, against [the Contractor, the Contractor's surety] [delete if Contractor is executing this lien waiver], the Owner, any construction lender or funds, and the Project, and their respective directors, officers, principals, partners, employees, agents, subsidiaries, parent and related firms, successors and assigns, arising out of Work performed, labor furnished, Equipment and Materials or services provided, and acts or omissions occurring, prior to the effective date of the interim waiver below, with the exception of those claims described below in an amount not to exceed the stated amount:
\$ \$
3. No Pending Liens. The undersigned represents and warrants that no mechanic's and materialmen's lien, or any other type of lien claim, has been filed

against the Project, the Work, the Site or the improvements thereon by it or any of its Subcontractors or Vendors, or by those supplying labor, Equipment and Materials, or services through such Subcontractors and Vendors. The undersigned acknowledges that this representation is material to the Owner's decision to fund the interim progress payment described herein, that it will take prompt and full action to cancel and discharge any such lien now unknown to it and filed, or to be filed, against the Property or the improvements thereon, and that it will continue to hold harmless the Owner on account of any Losses, expenses or reasonable attorneys' fees incurred as a result of its failure to do so.

4. <u>Unconditional Waiver Of Lien Righ</u> and Materials, or services (permitting, engine with the permitting, engineering, procure Equipment and Materials for the Piñon Genew Mexico, and more particularly describe	neering, procurement and const rement, construction, and the enerating Station in Waterflow	truction) in connection e installation of the
new inexico, and more particularly describe	d as follows.	
· .		(the "Property")
(Add property legal description or street add	ress)	
The undersigned waives and releases any asclaims through the date of	the date of the undersigned' ed Property and Project on a neering, procurement and cons request of the undersigned, in ance of the Work described he	's previous application account of any labor, struction) furnished by a connection with the crein or in the Contract
Given under hand and seal this	_ day of	, 201
Contractor, Subcontractor, or Vendor By:	-	
Printed Name:	<u>-</u>	
Its:	-	
Sworn and subscribed before me this day of, 201	_	
Notary Public My Commission Expires:	-	

EXHIBIT F-3

STATE OF NE	W MEXICO
COUNTY OF	

Conditional Waiver and Release Upon Final Payment

WHEREAS, Public Service Company of New Mexico ("Owner") and ProEnergy Services, LLC ("Contractor") have entered into that certain Engineering, Procurement and Construction Contract, dated as of [], 20[] (the "Contract");

WHEREAS, the undersigned is required to provide this Conditional Waiver and Release Upon Final Payment pursuant to the terms of Article 7 of the Contract.

Capitalized terms used but not defined herein shall have the meanings given to them in the Contract.

In consideration for the final payment described in the lien waiver below, and with the knowledge that the representations herein will be relied on by Owner to make final payment, the undersigned, for itself, its employees, subcontractors, sub-subcontractors, mechanics, materialmen and laborers, does hereby represent and warrant as follows:

- 1. All Parties Paid. The undersigned has been paid all amounts owed for all Equipment and Materials, services or labor furnished to the Project through the effective date of _______ (the date of the undersigned's previous application for payment), and that all parties supplying labor, Equipment and Materials, services to it in connection with the Project have been paid, or will be paid in accordance with the terms of the applicable subcontracts and/or purchase orders and Applicable Law, including the New Mexico Prompt Payment Act, for all labor, services, Equipment and Materials furnished with respect to the Project.
- 2. <u>No Pending Lien Claims.</u> The undersigned represents that it has not filed or allowed to be filed, or that it has fully and effectively cancelled of record, mechanic's and materialmen's liens against the Site, the Project, or the Property identified below. The undersigned waives and releases any and all mechanic's and materialmen's claims of lien filed against the Site, the Project, or the Property identified below, and authorizes the Owner to file and pursue, in the undersigned's name, any and all documents or actions necessary to discharge and cancel any such lien of record. To the extent that the Owner takes any reasonable action in order to cancel or discharge any lien filed by the undersigned, the undersigned agrees that it shall be fully responsible for all Losses, reasonable attorneys' fees and other costs incurred in so doing.
- 3. <u>Waiver Of Claims</u>. Conditioned only on the receipt of the sum reflected in Paragraph 5 below, the undersigned waives and releases any and all claims, causes of action, suits, damages,

for the Work.

judgments, demands of any kind, character and description, whether known or unknown, against [the Contractor, the Contractor's surety] [delete if Contractor is executing this lien waiver], the Owner, any construction lender or funds, and their respective directors, officers, principals, partners, employees, agents, subsidiaries, parent and related firms, successors and assigns, arising out of work performed, labor furnished, Equipment and Materials, or services provided, with the exception of those claims described below in an amount not to exceed the stated amount:			
•			
\$ \$			
4. <u>Authorization</u> . The undersigned warrants that it is the sole owner of the claims released herein, that it has not sold, assigned or conveyed such claims to any other party, and that the individual whose signature appears below has personal knowledge of these matters and is fully authorized and qualified to make these representations on behalf of the undersigned. 5. <u>Scope Of Release</u> . The representations and release contained herein are independent covenants and operate, and are effective with respect to, all labor, services, or Equipment and Materials provided by or through the undersigned, under any agreement, whether oral or written, whether extra or additional to any such agreement, and with respect to any further labor, Equipment and Materials, or services to be furnished with respect to the Contract, the Work, the Project or the Property.			
6. <u>Conditional Waiver And Release Of Lien Rights.</u> The undersigned has provided labor, Equipment and Materials, or services (permitting, engineering, procurement and construction) in connection with the permitting, engineering, procurement, construction, and the installation of the Equipment and Materials for the Piñon Generating Station in Waterflow, County, New Mexico, and more particularly described as follows:			
(the "Property")			
(Add property legal description or street address)			
Conditionally only upon the receipt of the sum of \$			

undersigned, or furnished to or at the request of the undersigned, in connection with the improvement of the Property or the performance of the Work described herein or in the Contract

Given under hand and seal this	day of	, 201
Contractor, Subcontractor, or Vendor		
Ву:		
Printed Name:		
Its:		
Sworn and subscribed before me this day of, 201		
Notary Public My Commission Expires:		

EXHIBIT F-4

STATE OF NEW MEXICO	
COUNTY OF	

Unconditional Waiver and Release Upon Final Payment

WHEREAS, Public Service Company of New Mexico ("Owner") and ProEnergy Services, LLC ("Contractor") have entered into that certain Engineering, Procurement and Construction Contract, dated as of [], 20[] (the "Contract");

WHEREAS, the undersigned is required to provide this Unconditional Waiver and Release Upon Final Payment pursuant to the terms of Article 7 of the Contract.

Capitalized terms used but not defined herein shall have the meanings given to them in the Contract.

By executing and submitting its payment application and the waiver below, in consideration for the payment described in the lien waiver below, and for the purpose of inducing Owner to make final payment, the undersigned, for itself, its employees, subcontractors, sub-subcontractors, mechanics, materialmen and laborers, does hereby represent and warrant as follows:

- 1. All Parties Paid. The undersigned has been paid all amounts owed for all labor, Equipment and Materials, and services furnished to the Project through the effective date of the date of the undersigned's previous application for payment), and that all parties supplying labor, services, Equipment and Materials to it in connection with the Project have been paid, or will be paid in accordance with the terms of the applicable subcontracts and/or purchase order and Applicable Law, including the New Mexico Prompt Payment Act, for all labor, services, Equipment and Materials furnished with respect to the Project.
- 2. No Pending Lien Claims. The undersigned represents that it has not filed or allowed to be filed, or that it has fully and effectively cancelled of record, mechanic's and materialmen's liens against the Site or the Property identified below. The undersigned waives and releases any and all mechanic's and materialmen's claims of lien filed against the Site or the Property identified below, and authorizes the Owner to file and pursue, in the undersigned's name, any and all documents or actions necessary to discharge and cancel of record any such lien. To the extent that the Owner takes any reasonable action in order to cancel or discharge any lien filed by the undersigned, the undersigned agrees that it shall be fully responsible for all Losses, reasonable attorneys' fees and other costs incurred by the Owner in so doing.
- 3. <u>Waiver Of Claims</u>. The undersigned waives and releases any and all claims, causes of action, suits, damages, judgments, demands of any kind, character and description, whether known or unknown, against [the Contractor, the Contractor's surety] [delete if Contractor is executing this lien waiver], the Owner, the Project, any construction lender or funds, and their

respective directors, officers, principals, partners, employees, agents, subsidiaries, parent and affiliates, successors and assigns, arising out of work performed, labor furnished, Equipment and Materials, or services provided, with the exception of those claims described below in an amount not to exceed the amount stated in this paragraph 3:
4. <u>Authorization.</u> The undersigned warrants that it is the sole owner of the claims released herein, that it has not sold, assigned or conveyed such claims to any other party, and that the individual whose signature appears below has personal knowledge of these matters and is fully authorized and qualified to make these representations on behalf of the undersigned.
Scope Of Release. The representations and releases contained herein are independent covenants and operate, and are effective with respect to, all labor, services, materials of Equipment and Materials provided by or through the undersigned under any agreement, whether oral or written, whether extra or additional to any such agreement, and with respect to any further labor, materials, equipment or services to be furnished with respect to the Contract, the Project or the Property.
6. <u>Waiver And Release Of Lien Rights.</u> The undersigned has provided labor, Equipment and Materials, or services (permitting, engineering, procurement and construction) in connection with the permitting, engineering, procurement, construction, and the installation of the Equipment and Materials for the Piñon Generating Station in Waterflow, County, New Mexico, and more particularly described as follows:
(Add property legal description or street address) (the "Property")
The undersigned waives and releases any and all mechanic's and materialmen's lien rights and claims through the date of (the date of the undersigned's previous application for payment) upon the foregoing described Property and the Project on account of any labor. Equipment and Materials, or services (permitting, engineering, procurement and construction) furnished by the undersigned, or furnished to or at the request of the undersigned, in connection with the improvement of the Property or the performance of the Work described herein or in the Contract for the Work through the date of (the date of the undersigned's previous application for payment).
Given under hand and seal this day of, 201
Contractor, Subcontractor, or Vendor
D _{vv}

Printed Name:
Its:
Sworn and subscribed before me this day of, 201
Notary Public My Commission Expires:

EXHIBIT F-5

DOCUMENTARY EVIDENCE OF COMPLETED WORK

1.	Contractor to describe the completion of the Project Milestones accomplished under the Contract through the applicable month as described in the Contract.
2.	Contractor to set forth other amounts payable by Owner under Article 17 of the Contract or any other provision thereof.
3.	Contractor to attach to this Exhibit documentary evidence of the completion of each milestone set forth in Paragraph 1 of this Exhibit F-5.

EXHIBIT F-6

DOCUMENTARY RESOLUTION OF PREVIOUSLY UNCERTIFIED WORK

Attached hereto are resolutions of disputes (if any) regarding previous Contractor's invoices.

EXHIBIT H

DETERMINATION OF BUY-DOWN AMOUNT

- A. If Contractor has run the Acceptance Tests but the results of such Acceptance Tests fail to satisfy all of the Performance Guarantees, the Buy-Down Amount to be determined by Owner pursuant to Section 16.2 of the Contract shall be the sum of the amount calculated under Paragraphs B and C below for all of the Units.
- B. For each Unit, if the Net Electrical Output (without application of uncertainty) is equal to or greater than the Net Electrical Output Guarantee, then the Buy-Down Amount related to the Net Electrical Output shall be zero. If the Net Electrical Output (without application of uncertainty) is less than the Net Electrical Output Guarantee and is equal or greater than 37,288 kW as determined by the Minimum Performance Criteria, then the Buy-Down Amount related to the Net Electrical Output shall be equal to the product of \$800,000/MW times such Net Electrical Output deficiency.
- C. For each Unit, if the Net Heat Rate (without application of uncertainty) is equal to or less than the Net Heat Rate Guarantee, then the Buy-Down Amount related to the Net Heat Rate shall be zero. If the Net Heat Rate (without application of uncertainty) is greater than the Net Heat Rate Guarantee but is equal or less than 10,128 Btu/kWhr (higher heating value basis, "HHV") as determined by the Minimum Performance Criteria, then the Buy-Down Amount related to the Net Heat Rate shall be equal to the product of \$120/Btu/kWhr times such Net Heat Rate excess.

EXHIBIT I

ACCEPTANCE TESTS AND TESTING

1.0 GENERAL

This Exhibit I provides the overall requirements and responsibilities for the conduct of Acceptance Tests.

1.1 PERFORMANCE GUARANTEES

Performance Guarantees shall apply to each Unit or the Project, as outlined herein and shall be achieved during Tests conducted in accordance with this Exhibit I. Unit specific and Project specific guarantees must be satisfied as required in this Exhibit to achieve Substantial Completion or Final Completion, as appropriate and as further defined herein.

"Performance Guarantees" shall mean each of the performance requirements as set forth below:

Parameter	Unit	Performance Requirement	Conditions for Guarantee
Unit Performance Gua	rantees at Perfori	nance Guarante	ee Conditions
"Net Electrical Output Guarantee"	kW	38,441	92.9 degrees Farenheit 14.88% Relative Humidity 5300 feet ASL
"Net Heat Rate Guarantee"	Btu/kWH (HHV)	9,833	92.9 degrees Farenheit 14.88% Relative Humidity 5300 feet ASL
Performance Guarantees over Full Range of Site and Operating Conditions			
Project Reliability	%	100	Over the duration of the Reliability Test
Noise Performance Gu	Noise Performance Guarantees		
Total Project far-field noise level	dBA	80	At property boundary
Equipment near-field noise limit, at 3 feet from any item of Equipment	dBA	85	Applicable to total Project Operation. Guarantee is for each single piece of equipment in free field environment.
Unit Emissions Guarantees (over full range of fuel quality and ambient conditions)			
Parameter	Performance Requirement		Conditions for Guarantee
	Combustion Turbine		

Stack NOx	ppmvd @ 15% O2	25	Maximum from MECL to 100% load
Stack CO	ppmvd @ 15% O2	6.0	Maximum from MECL to 100% load
Stack VOC	ppmvd @ 15% O2	2.0	Maximum from MECL to 100% load
Stack Particulate Matter, PM10	lb/MMBtu	0.0063	Maximum from MECL to 100% load, Note 3

Note 1: MECL means the minimum emissions compliance load of the generating unit.

Note 2: Emissions Guarantees shall be applicable over the full range of ambient conditions and fuel compositions defined in Appendix 03 – Project Data and Terminal Points and Appendix 05 – Natural Gas Analysis of Exhibit A. Guaranteed emissions shall be satisfied over a one (1) hour averaging period.

Note 3: PM10 stack emissions shall be met based on natural gas with a maximum limit of 0.5 grain of total sulfur compounds per 100 SCF.

1.2 MINIMUM PERFORMANCE CRITERIA

Minimum Performance Criteria shall apply to each Unit or the Project, as outlined herein and shall be achieved during Tests conducted in accordance with this Exhibit I. Unit specific and Project specific guarantees must be satisfied as required in this Exhibit I to achieve Substantial Completion or Final Completion, as appropriate and as further defined herein. "Minimum Performance Criteria" for Substantial Completion shall mean each of the guaranteed performance requirements as set forth below:

Parameter	Unit	Performance Requirement	Conditions for Guarantee
Unit Minimum	Performance Cr	iteria at Performance Guara	ntee Conditions
"Net Electrical Output Guarantee"	kW	> 97 percent of the Guarantee Value	92.9 degrees Farenheit 14.88% Relative Humidity 5300 feet ASL
"Net Heat Rate Guarantee"	Btu/kWH (HHV)	< 103 percent of the Guarantee Value	92.9 degrees Farenheit 14.88% Relative Humidity 5300 feet ASL
Minimum Performance Criteria over Full Range of Site and Operating Conditions			
Project Reliability	%	100	Over the duration of the Reliability Test
Minimum Performance Criteria – Functional Guarantees			

Maximum Start-up Duration	minutes	10	Applicable to single Unit and total Project operation
Starting Reliability	%	100% of 5 consecutive starts	Applicable to single Unit and total Project operation
Unit Maximum Ramp Rate	MW per minute	15	
Project Maximum Ramp Rate	MW per minute	90	Applicable to all Units operating and ramping in parallel
Unit Minimum Emissions Compliance Load (MECL)	kW	13,454	
Unit Minimum Evaporative Cooler Effectiveness	%	90	

Unit Emissions Minimum Performance Criteria (over full range of fuel quality and ambient conditions)

Parameter	Performance	Requirement	Conditions for Guarantee
	Combusti	on Turbine	
Stack NOx	ppmvd @ 15% O2	25	Maximum from MECL to 100% load
Stack CO	ppmvd @ 15% O2	6.0	Maximum from MECL to 100% load
Stack VOC	ppmvd @ 15% O2	2.0	Maximum from MECL to 100% load
Stack Particulate Matter, PM10	lb/MMBtu	0.0063	Maximum from MECL to 100% load, Note 3

Note 1: MECL means the minimum emissions compliance load of the generating unit.

Note 2: Emissions Guarantees shall be applicable over the full range of ambient conditions and fuel compositions defined in Appendix 03 – Project Data and Terminal Points and Appendix 05 – Natural Gas Analysis of Exhibit A. Guaranteed emissions shall be satisfied over a one (1) hour averaging period.

Note 3: PM10 stack emissions shall be met based on natural gas with a maximum limit of 0.5 grain of total sulfur compounds per 100 SCF.

"Minimum Performance Criteria" for Final Completion shall mean each of the guaranteed performance requirements as set forth below:

Noise Minimum Performance Criteria			
Total Project far-field noise level	dBA	80	At property boundary
Equipment near-field noise limit, at 3 feet from any item of Equipment	dBA	85	Applicable to total Project Operation. Guarantee is for each single piece of equipment in free field environment.

The Unit or Project must maintain emissions compliance throughout demonstration of all Minimum Performance Criteria for all loads greater than the Minimum Emissions Compliance Load on a one (1) hour rolling average basis.

1.3 TESTING

1.3.1 General

The Contractor shall be responsible for carrying out the Tests for Substantial Completion of the Work as well as for Final Completion of the Work. Performance Tests and Functional Guarantee Tests are those Tests defined herein. These Tests shall be completed as appropriate, but in no event until after Unit Mechanical Completion has been achieved for applicable Unit-specific Tests or until after Project Mechanical Completion has been achieved for applicable Project-specific Tests.

For the purpose of evaluating guarantee compliance, the Equipment shall be deemed "new and clean" for any and all tests with no allowances for degradation to be considered.

Tests shall be conducted in accordance with the test conditions set forth herein.

Contractor shall perform a pre-test uncertainty analysis and shall provide such analysis to Owner at least 30 days prior to the performance of the associated Performance Tests. No test tolerance will be applied to the test results. Corrections required to adjust for test conditions that differ from the Reference Conditions defined herein will be allowed.

All Performance Guarantees and Minimum Performance Criteria shall be met during the same test, if practical, and in accordance with the requirements set forth herein and in the Agreement. These Performance Tests shall be the sole determination of whether the Performance Guarantees and Minimum Performance Criteria have been met and shall be binding on the Contractor to determine compliance with the Performance Guarantees and Minimum Performance Criteria.

All Tests shall be completed by the Contractor or a mutually agreeable third party testing contractor under contract to the Contractor. The Contractor shall be responsible for the supply of all personnel, testing equipment, and testing instrumentation.

The Tests shall be performed in general accordance with the ASME PTC Codes (when applicable) or generating unit Supplier test procedures, and in strict accordance with the performance test requirements in the Agreement, provided that the Parties may mutually agree upon deviations from the ASME PTC Codes (or other applicable codes). In the event of a conflict, the order of precedence shall be:

• The Agreement

- The Test Procedures developed in accordance with this Agreement
- The applicable Performance Test Codes

During all Tests, the Units, Project, and common facilities equipment shall be operated in a manner consistent with and within the design limits established by the Contractor and equipment manufacturers. Equipment shall be operated in a manner that is suitable for continuous operation of the equipment and in a manner that is consistent with Prudent Industry Practices.

During Tests, the Units and Project shall be operated by or on behalf of Owner under the direction of Contractor.

Prior to the Tests being conducted, Contractor may make minor adjustments to the equipment to ensure it is suitable for testing. Such adjustments shall exclude modifications intended to temporarily improve the performance of the Equipment for any Test.

Repair of any part or replacement of any item of equipment that could materially alter the performance of the Equipment being tested or the results of a Test will not be permitted during a Test. If the Contractor or an equipment manufacturer performs any repair or alterations after a Test that could materially affect the results of a previously conducted Test, the Contractor shall repeat such Test subject to the terms of the Agreement. In no event will Substantial Completion be revoked as the result of such retest, but verification of required Performance Guarantees associated with such retest shall be a condition for Final Completion.

Contractor may not operate redundant components to obtain acceptable Test results unless such use is defined for a normal operating scenario as described herein.

If a test interruption occurs for any reason, Contractor and Owner shall mutually agree to either: (a) resume the Test after the cause of the test interruption has been rectified, or (b) restart the Test.

Owner may waive the requirement to perform any one or all of the Tests if the Owner is not able to schedule for the dispatch of the Project or is otherwise satisfied that the generating unit is fully functional and capable of supporting Project load.

Component and Project tests performed by the Owner, in addition to the Contractor Tests, shall be allowed.

1.3.2 Test Conditions

The conditions upon which the Contractor shall base the Performance Tests for performance guarantees ("Reference Conditions") are listed below:

Parameter	Reference Conditions
Ambient Dry-Bulb Temperature	92.9 °F
Ambient Wet-Bulb Temperature	60.0 °F
Barometric Pressure	12.09 psi
Generating Unit Steady State Load	100%
Generator Power Factor	0.85

Parameter	Reference Conditions
Equipment Cooling Water Supply Temperature	105.0 °F
Evaporative Cooler Status	On
Anti-Icing System Status	Off
Compressor Water Injection (as applicable)	In-Service
Natural Gas higher Heating Value (Dry Basis)	22,580 Btu/lb
Natural Gas Supply Temperature	60
Natural Gas Pressure at Tie-in Point	825 psig
Performance Fuel Analysis	Per Appendix 05 of Exhibit A
New and Clean Condition	Less than 200 fired hours

The conditions upon which the Contractor shall base the Air Emissions Tests and the Functional Guarantee Tests are as listed below:

Unit Conditions:			
Site Ambient Conditions	Within the full range per Appendix 03 – Project Data and Terminal Points of Exhibit A		
Fuel Quality	Within the full range per Appendix 05 – Natural Gas Analysis of Exhibit A		
Equipment Operation	per Test Procedures		

At all times during the Tests, the applicable Unit(s) and the Project as a whole, must comply with all Applicable Laws and Applicable Permits to be considered a successful Test. If all or any portion of the Unit or Project fails to comply with the Applicable Laws or Applicable Permits, then the Unit shall have failed such Test. Contractor shall evaluate and remedy the cause of such failure before attempting the same Test.

All Tests shall be accomplished with the Unit and Project operating wholly within its design ratings. In particular, none of the following shall occur:

- Overheating of components
- Excessive power consumption
- Exceeding of sound limits
- Operation of tripping or limiting devices, except where the test is intended to demonstrate such operation

- Rubbing, chaffing, or other mechanism of accelerated wear
- Manual intervention or assistance in automatic or unmanned functions and processes
- Exceeding of airborne dust level limits within or outside enclosures and buildings
- Dangerous occurrences due to Project operation or malfunction
- Leaks from or into pipework systems or vessels that present a situation that could result in damage to generating unit or BOP Equipment

1.3.3 Test Procedures

Contractor shall coordinate with the Unit suppliers to develop test procedures including detailed test procedures for the Performance Tests and the Functional Guarantee Tests based on the Project and common facilities design.

Test procedures, correction curves, and proposed results calculation methodologies (the "Test Procedures") shall be submitted to the Owner one hundred twenty (120) Days prior to the commencement of the first Test and shall be subject to the review and comment of Owner and Owner's Engineer. Owner will review and provide comments to the draft Test Procedures within twenty (20) Business Days after submission by Contractor. Contractor shall effect any changes to reflect the comments and resubmit the draft Test Procedures to Owner, whereupon Owner will review and provide comments to such draft Test Procedures within fifteen (15) Business Days after re-submission by Contractor.

Tests shall be completed with the Project programmable control system (PCS) in automatic control and no manual adjustment or manual control of equipment operation except that which is customary for similar power plants as mutually agreed.

The Test Procedures shall include as a minimum:

- The purpose of the Performance Test or Functional Guarantee Test, as applicable
- Personnel responsibilities
- Applicable performance corrections and correction curves
- Codes and standards to be utilized and any mutually agreed upon exceptions to these codes and standards to be taken by the Contractor
- Data collection procedures
- Instrument list including both permanent Project and temporary Performance Test instrumentation to be utilized
- Cycle isolation check list
- Performance Test operating procedures
- Allowable variation in measured parameters
- Valve line-up list
- Instrument accuracy requirements / Uncertainty Analysis
- Sample data log sheets
- Notification procedures

Correction curves shall be included in the Test Procedures. These curves shall accurately correlate to the curve of the suppliers of the applicable Equipment to correct the performance of the Work for variations from the specified design conditions. Each of the correction curves shall have a range to suit the specified conditions. Each curve shall be provided in both graphical and numerical format.

The curves will be utilized on-Site as a preliminary indication of test results. Final test acceptance shall be based upon the final test report.

1.4 FUNCTIONAL GUARANTEE TESTS

Contractor shall be responsible for successfully completing the following Functional Guarantee Tests for the Work. These Functional Guarantee Tests must be performed and satisfied to achieve Substantial Completion or for Final Completion as identified herein. The Functional Guarantee Tests shall be completed in conjunction with the Performance Tests.

The "Functional Guarantee Tests" to be performed for achievement of Substantial Completion are as follows and as further defined in the following Articles:

- Start-up Duration Tests (Article 1.4.1)
- Starting Reliability Test (Article 1.4.2)
- Ramp Rate Tests (Article 1.4.3)
- Minimum Emissions Compliance Load Test (Article 1.4.4)
- Shutdown Test (Article 1.4.5)
- Evaporative Cooler Effectiveness Test (Article 1.4.8)
- Generating Unit Fire Protection System Functional Test (Article 1.4.9)

The "Functional Guarantee Tests" to be performed for achievement of Final Completion are as follows and as further defined in the following Articles:

- Workplace Sound Survey (Article 1.4.6)
- System Back-up and Restoration (Article 1.4.7.1)
- Control System Start-up Test (Article 1.4.7.2)

1.4.1 Start-up Duration

Contractor shall perform a series of Functional Guarantee Tests to demonstrate that each Unit and the Project can satisfactorily achieve the specified start-up time. The start-up time will commence upon the initiation of the Unit's start-up procedure and is considered complete upon the Project achieving full load operation per the generating unit manufacturer controls.

1.4.2 Starting Reliability

The Starting Reliability Test shall demonstrate that the generating unit and the supporting Equipment can satisfactorily demonstrate the starting reliability set forth in the Functional Guarantees.

Each Starting Reliability Functional Guarantee shall be satisfied and the Starting Reliability Test shall be completed upon demonstration of at least five of five consecutive successful starts without intervention for tuning or adjustments of the generating Unit or Equipment.

A successful start shall be defined as an operator initiating a start from the control system, which results in the generating Unit going from unfired operation to minimum emissions compliance load.

1.4.3 Ramp Rates

Contractor shall perform a series of Functional Guarantee Tests to demonstrate that the Unit can satisfactorily achieve the guaranteed ramp rates during normal operation between minimum emissions compliance load and 100 percent load subject to the limitations of the grid to accept the additional power at that rate. Compliance with the Functional Guarantee Tests requires that the stack emissions remain in compliance with the Air Permit requirements at all loads and conditions greater than Minimum Emissions Compliance Load, including these ramp rate tests.

Ramp rate testing shall be in general accordance with ASME PTC-70.

The start point of the Ramp Rate Test is defined as the point when the operator initiates the ramp. The end point of the Ramp Rate Test is defined as the first data point when the target electrical output has been achieved.

1.4.4 Minimum Emissions Compliance Load

Contractor shall demonstrate that each generating Unit and its associated auxiliary equipment can successfully maintain the minimum emissions compliance load while satisfying the Air Emissions Guarantees.

The Minimum Emissions Compliance Load Test shall require that the Unit operate at minimum emissions compliance load for a minimum three consecutive one hour time periods.

1.4.5 Shutdown Test

Contractor shall demonstrate that each generating Unit with its associated auxiliary equipment can successfully shutdown without resorting to practices or procedures which do not comply with defined system operating procedures or the equipment Operations and Maintenance Manuals.

1.4.6 Workplace Sound Survey

Sound measurements, dB(A), shall be made during full load Project operation (i.e., after Substantial Completion of the Project).

A sound level meter conforming to the appropriate ANSI specifications shall be utilized. The measurement positions shall normally be at a height of five feet above grade, foundation, platform, or floor and at a minimum distance of three feet from the system/equipment surface. The number of measurement positions and their precise location shall be agreed by Contractor and Owner. The A-weighted rms sound level using the slow response of the sound level meter shall be recorded at each position.

Alternatively, the direct measurement of the equivalent continuous A-weighted sound pressure level may be made at each measurement position using an instrument complying with the appropriate ANSI specifications.

Instrument, calibration, and measurement details where not specified herein shall be determined from information given in the ANSI specifications.

Measurements shall be made during full load conditions. Sound levels greater than 80 dB(A) shall be reported to the nearest 1dB(A).

For indoor spaces, the level shall also be measured at three feet from the walls at all column lines, and in all occupied spaces such as control rooms, offices, shops, and lockers. Roof top equipment shall also be measured. For these locations, octave or 1/3 octave spectra are required in addition to "A" weighted overall values.

The Contractor shall conduct an in-Project noise survey to identify the in-Project areas that may be exposed to A-weighted sound pressure levels exceeding the near-field noise guarantee during normal operation. To the extent such areas are identified, these areas shall be identified with warning signs prescribing hearing protection. The in-Project noise survey shall be conducted in accordance with the Test Procedures.

1.4.7 Control Systems

The Contractor shall perform control system testing to demonstrate the following:

- Ability to restore control systems from back-up medium
- Ability of the instrumentation and control systems to function as specified in a real operating environment
- Ability of the instrumentation and control system to function in automatic from minimum, stable load to full load

1.4.7.1 System Back-up and Restoration

After Substantial Completion of the Project, Contractor shall make a back-up of all system and program files and then demonstrate to Owner the restoration of the system from the back-up medium. This shall include the PCS and all other auxiliary and proprietary equipment supplied by the Contractor.

1.4.7.2 Control System Start-up Test

The Contractor shall demonstrate that the Project control systems are capable of control from minimum stable load to full load of each Unit and of the Project while all controllers are in automatic, all permissives are met, and redundant equipment are in a standby mode ready for service.

The Control System Start-up Test shall begin with the Unit or Project, as applicable, at minimum stable load. The Project operator shall then manually enter the full load setpoint into the control system to begin the ramping process. Following this step, the Unit or Project shall be automatically ramped to full load.

After initiation of the Control System Start-up Test, no controllers shall be placed in manual operation except when loading requirements require startup of a major piece of equipment or unless otherwise approved by the Owner prior to initiation of the Control System Start-up Test.

1.4.8 Evaporative Cooler Effectiveness Validation

For combustion turbine applications, should the Thermal Performance Test be performed with the combustion turbine inlet air evaporative cooler out of service due to ambient conditions, the Contractor will be allowed to pass the Thermal Performance Test and achieve Substantial Completion based upon combustion turbine performance corrected to the Reference Conditions, pursuant to the following clarifications.

If, during the Reliability Test or subsequent to Substantial Completion, based upon Owner's assessment of operating data and Project performance, Owner believes that the combustion turbine performance with the evaporative cooler in-service does not comply with the Performance Guarantees, Owner will require and Contractor shall support and shall be suitably reimbursed for the completion of a subsequent Thermal Performance Test to validate the turbine performance with the evaporative cooler in-service.

If the combustion turbine performance shortfall is identified during the Reliability Test, the retest and remedial actions shall be required to be completed to achieve Substantial Completion pursuant to the Agreement terms. If the shortfall is identified after Substantial Completion is achieved, remedial actions shall be the responsibility of the Contractor.

1.4.9 Generating Unit Fire Protection System Functional Test

The Contractor shall perform a full "functional test" of the generating Unit compartment fire protection equipment prior to start up. This test will be witnessed by the insurance carrier, equipment provider, and Owner.

1.5 PERFORMANCE TESTS

Contractor shall be responsible for carrying out the Performance Tests which are conducted to demonstrate that the required Minimum Performance Criteria and Performance Guarantees have been achieved.

The "Performance Tests" to be performed for achievement of Substantial Completion shall be as follows and as further defined in the following Articles:

- Thermal Performance Test (Article 1.5.4)
- Air Emissions Tests (Article 1.5.5)
- Reliability Test (Article 1.5.7)

The "Performance Tests" to be performed for achievement of Final Completion shall be as follows:

Sound Emissions Tests (Article 1.5.6)

Contractor shall make every effort to run the Performance Tests at a condition as close to the Reference Conditions as feasibly possible to minimize the application of Performance Test corrections. For conditions that vary from the Reference Conditions, the Contractor shall

analytically adjust Performance Test results through the application of corrections to asmeasured test results in accordance with the Test Procedures.

Unless the Test Procedures state otherwise, three samples of the fuel used during each Performance Test shall be taken at thirty minute intervals during the Performance Test. One of each set of three samples shall be fully analyzed by an independent authority. The other two samples of each set of three shall be properly labeled and one handed over to the Owner.

Sampling of the fuel shall be in accordance with ASME Power Test Code PTC 22 ("PTC 22"), Subsection 4-4.4 with fuel composition determined as set forth in ASTM D 1945 and heating value determined in accordance with ASTM D 3588. The necessary apparatus for taking samples, the sample containers, fuel testing, and test results shall be by, and the duty of, the Contractor.

1.5.1 Performance Test Points and Instrumentation

The Contractor shall specify a list of key instruments to be used during a Performance Test in the applicable Test Procedures.

All permanent and temporary Performance Test points shall be provided by Contractor in order to demonstrate fully that the Unit and Project performance is in compliance with the Agreement.

Contractor shall provide drawings indicating the points of measurement together with necessary isolation during Performance Tests. Contractor shall describe the means of measurement of the necessary parameters together with the anticipated standard and accuracy of the instruments.

Test instruments shall be calibrated in accordance with the standards of a recognized national organization such as American Society of Testing and Materials (ASTM), Instrument Society of America (ISA), or the Performance Test Codes of the American Society of Mechanical Engineers (ASME). Contractor shall calibrate and install special test equipment or instrumentation used in testing as necessary. Stack testing instrumentation required for emissions compliance tests shall be calibrated to the applicable EPA Test Method for the constituent being measured.

Calibration procedures and records shall be submitted to the Owner as part of the Contractor's written Performance Test reports. Calibration of all Performance Test instrumentation shall be verified for and prior to the applicable Performance Test.

Performance Test data shall be monitored and recorded by permanent Project instrumentation using the Project PCS to the greatest extent possible. The Contractor shall ensure that the use of permanent Project instrumentation shall in no way adversely impact the intended Performance Test accuracy and shall provide a pre-test uncertainty analysis based upon the intended instrumentation with the Test Procedure.

Additional precision grade test instruments and signal sources shall be supplied by the Contractor where necessary to comply with and to be used in accordance with the requirements of the appropriate test codes and must meet the accuracy requirements for carrying out the various Performance Tests as specified in the Test Procedures.

Flow measuring devices (for fuel, water, etc.) and thermocouples with their indicators that are used as test instruments shall be calibrated.

Contractor shall be responsible for all required testing and notifications for EPA certification of the CEMS including preparation of an initial monitoring plan, preparation of a QA/QC manual, preparing testing notifications and protocols, conducting certification testing, and preparing CEMS certification testing report.

1.5.2 Contractor's Preliminary Performance Testing

During commissioning, Contractor shall carry out and complete its own preliminary testing as determined necessary by the Contractor, as well as make and complete such adjustments to the Equipment as may be necessary.

Contractor shall furnish Owner with a description of its proposed preliminary performance testing program, together with calibration certificates for the test equipment, in advance of any such preliminary testing. Owner shall have full access to witness all calibrating and checking of instruments and other apparatus and all preliminary testing performed. Owner shall receive copies of all preliminary test reports as well as all raw test data for the preliminary tests collected within 48 hours of any such tests.

1.5.3 Performance Test Measurements

The method and the number and location of measurements, and the provision of and duties of observers, shall be mutually agreed by Contractor and Owner before the Performance Test.

The values used in performance calculations shall be the arithmetical average of the observations made and recorded during the Performance Tests adjusted for obvious errors which shall be excluded from the data set and shall be limited to no more than 5 percent of the available data. As much as practical, the Performance Test data shall be logged automatically on a data logger or in the Project PCS at a rate in excess of one reading per minute. For parameters where this is not practical, data shall be taken during each Performance Test at regular intervals not exceeding five minutes.

The gross electrical power output shall be measured at the terminals of the generator.

Fuel calorific value measurements shall meet the requirements of the ASME Power Test Code 22 or Owner approved equivalent.

1.5.4 Thermal Performance Test

The thermal performance of the generating Units and Project shall be tested with appropriate allowances for corrected conditions. Generating Unit performance shall be determined for the performance guarantees set forth in the Agreement which include:

- Net Heat Rate
- Net Electrical Output

Performance Test results shall be corrected in accordance with the Contractor developed test procedures and generating unit supplier's performance correction curves for deviations from the Reference Conditions. Corrections shall be applied to the measured data to get corrected data for the performance calculations.

For one hour preceding the Performance Test period, the Unit shall operate at a stable load to ensure the Unit has reached equilibrium and not undergone abnormal variations in operating parameters in excess of those identified in the Test Procedures. All other conditions shall be in

accordance with the Test Procedures requirements and all necessary readings shall be taken during a four hour Performance Test period.

During the Performance Test period, the conditions shall be held at steady state conditions, compatible with safe and effective operation of the Unit. The generating unit generator support systems shall be in operation and held stable for the duration of the Performance Test period. The Contractor shall furnish all temporary instrumentation for the Thermal Performance Test, including its installation and removal after satisfactory completion of the Thermal Performance Test, with guarantees documented and accepted by Owner. The Contractor shall assume responsibility for calibration/field calibration checks of the test instruments. Owner will supply a normal contingent of operators during the Thermal Performance Test. The Contractor shall provide manpower, including subcontractors' representatives, for testing and collection of required data and samples.

1.5.4.1 Calculation of Net Heat Rate

On completion of thermal performance testing of the generating Unit or Project and the recording of the associated auxiliary systems/equipment electrical consumption, the overall net heat rate of the generating Unit or Project shall be determined (taking into account the agreed correction curves) using the following relationships, unless otherwise agreed:

$$NHR = GHR / ((NEO/GEO))$$

Where:

NHR = Net Heat Rate, Btu/kWH (HHV)

GHR = Gross Generating Unit Heat Rate, Btu/kWH (HHV)

NEO = Net Electrical Output (GEO –Auxiliary Power Consumption), kW

GEO = Gross Electrical Output at Generator Terminals, kW (adjusted)

1.5.5 Air Emissions Tests

Contractor shall conduct the Air Emissions Tests. Air emissions shall be tested in the presence of all required regulatory agency representatives and shall be measured by an Owner approved, independent testing service. Air emissions testing shall be performed during conditions and at output levels that will satisfy the testing requirements of the applicable portions of the Project Air Permit.

Within twenty-eight (28) days of the Performance Tests, the Contractor shall prepare an emission compliance test report for submittal to the appropriate governmental authorities by the Owner. Contractor shall provide a draft of the emission compliance test report to the owner within 20 days of test completion. Eight copies of the final report must be provided to the Owner.

Verifications of compliance with the guaranteed air emissions during the Performance Tests shall be accomplished through the use of the validated permanent or temporary CEMS equipment as required by the regulatory agencies.

The Contractor shall develop a detailed air permit emissions compliance test protocol for submission to the appropriate regulating agencies by the Owner. The protocol shall be submitted to the Owner for approval at least 90 days prior to the first scheduled Air Emissions Test or such

longer period of time necessary to obtain regulatory approval of the protocol. Contractor shall make all changes in the protocol that may be required to obtain approval from each appropriate regulating agency. Contractor shall have the protocol ready for submittal to agency under Owner's signature at least 30 days prior to testing.

1.5.5.1 Startup and Shutdown Emissions Test

Contractor shall perform a series of functional tests prior to Substantial Completion to demonstrate that the Unit can satisfactorily achieve the startup and shutdown emissions set forth in the Agreement. The startup and shutdown emissions shall be determined based on a cold startup period from Unit initialization (push of the button) to full emissions compliance.

1.5.6 Sound Emissions Tests

1.5.6.1 Near Field Noise Tests

Contractor shall perform acoustical noise testing in general accordance with ISO 10494 and ASME PTC-36.

No tolerance or margin in measurement instrumentation will be allowed in determining conformance to Noise Performance Guarantees. Only measurement uncertainty will be allowed.

The near field noise test shall validate that the near-field A-weighted sound pressure levels at a distance of three feet in the horizontal plane from the outermost surface of equipment, including piping, conduit, framework, barriers, mitigation measures, personnel protection devices, curbs, and fluid retainer basins, and five feet above grade shall be limited to sound emissions set forth in the Noise Performance Guarantees.

Corrections for background noise, building effects, and free-field conditions may be applied in determining the sound pressure level. Near field levels shall be measured while equipment is operating at base load, steady-state conditions, exclusive of transient events (including but not limited to startup and shutdown) and off-normal operating conditions (including but not limited to safety and relief valve operations).

1.5.6.2 Far Field Noise Tests

Contractor shall verify through testing performed in accordance with the Test Procedures that the full load noise emissions associated with the Project as a whole are less than or equal to the sound emissions set forth in the Performance Guarantees. Sound emissions from safety/relief valves and during start up and shutdown shall be excluded from the sound compliance requirements.

No field measurement tolerances are allowed, and they cannot be subtracted from the direct measurements.

Far-field sound measurements shall be determined as equivalent continuous A-weighted sound pressure levels at outdoor locations agreed between the Contractor and Owner. Each measurement position shall be at a height of four to five feet from the ground surface and at a distance of at least three feet from any additional reflecting surface.

The measurements shall be made using a sound level meter conforming to ANSI S1.4 or better. The sound level meter shall be equipped with integrating capabilities to determine the average

sound levels over a specified duration. For all measurements, the microphone shall be equipped with a windscreen provided by or recommended by the sound level meter manufacturer. If necessary, the microphone shall be mounted on a tripod to maintain stability.

The sound level meter shall be field calibrated immediately before and after each measurement series and after any major change in equipment conditions such as rough handling, becoming wet, etc. Field calibration shall be conducted using a precision calibrator and each calibration level shall be recorded. A change in calibration level exceeding +/- 1.0 dB may require that the measurement series be repeated.

The sound level meter equipment and calibrator shall have been laboratory calibrated within the 12 months prior to the Sound Emissions Test. All equipment calibration certificates shall be available during the survey, and copies shall be included with the final survey report.

Instrument, calibration, and measurement details where not specified herein shall be determined from information given in the appropriate ANSI specifications.

Measurements of the existing background noise levels shall be performed over several days without any of the generating Unit or Equipment in operation. The measurements shall be conducted at mutually agreed upon far-field locations. The background noise levels and any sound sources from equipment not furnished by Contractor shall be subtracted from the Sound Emissions Test measurements to remove any area ambient sound not associated with the respective equipment. Corrections for other sources may be made according to standard practice, as given in the ANSI specifications.

Far-field sound measurements shall be made during the four quietest hours of the night time. All measurements shall be taken under quiescent conditions to minimize ambient noise levels and shall be repeated three times to demonstrate reproducibility. Measurements shall be made during operating conditions that are at full load.

Measurements shall be reported as dBA unless due to contamination from intermittent noise sources not associated with the supplied equipment, then an appropriate statistical parameter, such as L90(a) shall be used. A map showing each measurement position shall be produced by the Contractor and included in the test report.

The Sound Emissions Tests and measurement locations for the generating unit and Project will depend on the operational status of the existing facilities. If equipment continues to operate that is not generating Unit or Equipment furnished by Contractor, then near-field measurements around such equipment shall be required. Subsequent subtraction of these pieces of equipment's sound contribution from the measured sound level at the property boundary shall be performed to estimate the sound contribution solely from the equipment being tested. In the event that these facilities cannot be shut down for the Sound Emission Tests, then one of the two methodologies below shall be followed to demonstrate compliance:

Measure sound levels at mutually agreed intermediate locations between the equipment
and the property boundary. These intermediate sound levels, after correcting for sound
contributions from sources other than the respective equipment being tested, shall be used
to calculate the property line values by using extrapolation methodologies based on ISO
9613 Part 2 standards.

 Measure the sound close to each significant sound source and calculate the total sound level at the property line by using an analytical model and extrapolation methodology based on ISO 9613 Part 2.

1.5.7 Reliability Test

Following satisfactory completion of all other Performance Guarantee Tests and prior to achieving Substantial Completion, the generating Unit, and Project shall be available for a 7 day continuous reliability test ("Reliability Test") during which time the Project shall be operated by Owner's operations staff under the supervision of Contractor, to demonstrate the Project Reliability. This Reliability Test shall be performed to validate the reliability of the generating Unit and Project.

The duration of reliability testing shall continue until the Contractor can satisfy their Reliability guarantee.

Contractor shall conduct the testing and shall notify the Owner at least fourteen (14) Days in advance of starting the Reliability Test. Owner's operating Staff, under the supervision of Contractor, shall operate the Project with normal operating staff levels during the Reliability Test. The Project shall operate during the Reliability Test with dispatch determined by Owner within the Equipment's design capability and shall start, stop, ramp, cycle, etc. as determined by Owner. Owner, in its sole discretion, may elect to waive any particular Test and or shorten the duration of any test. The applicable parameters shall be recorded for the Reliability Test.

During the Reliability Test, Contractor shall have reasonable access to the Equipment and be allowed to make minor adjustments which may be necessary, provided that such adjustments do not in any way interfere with or prevent the commercial use of the Equipment by Owner or result in a reduction in output, decrease of efficiency or exceedance of the Guaranteed Emissions. All adjustments made by Contractor shall be recorded in a manner to be agreed with Owner.

Performance Test measurements during the Reliability Test shall be measured using permanent Project instrumentation. Air emissions during the Reliability Test shall be measured using the calibrated permanent Project CEMS. Operation may involve part load operation as may be convenient for the working of the Project, and shall be without failure or interruption of any kind during the entire Reliability Test period. Contractor shall be responsible for all outages and load restrictions caused by Contractor's scope of Work during the test period, and all such outages and load restrictions shall result in a failure of the Reliability Test. Load restrictions that do not have any impact on dispatch requirements shall not be calculated as unavailability.

Periods where Guaranteed Emissions are exceeded by the Contractor's equipment and load restrictions that impact dispatch requirements shall also be considered as a period of unavailability and shall result in a failure of the Reliability Test.

Reliability Test Interruption by Others shall mean any period of time the Equipment is out of service because of factors external to Contractor's scope of supply including Force Majeure; unavailability of fuel; faults of the electrical grid; outages, either planned or forced, on the part of Owner; and failure of Owner to operate the Equipment in accordance with the O&M Manuals. Reliability Test Interruptions by Others will be excluded from the Reliability Test period for test data analysis and the Reliability Test shall continue when the interruption is corrected. Reliability Test Interruptions by Others will extend the test period by an amount of time equal to

the interruption. Performance Test data collected before the Reliability Test Interruption by others may be included in the Reliability Calculation for those parties not at fault for the Reliability Test Interruption.

Reliability Test Interruption by Contractor shall mean any Reliability Test interruption by Contractor and/or requirement of Contractor to restart the Reliability Test. In the event of a Test Interruption by Contractor, Contractor shall be required to identify the root cause of the interruption. Once the cause of the interruption has been identified and, as applicable, issues have been remedied, Contractor shall notify Owner of the issue and the associated remedy. If the remedy is acceptable to the Owner, the Reliability Test shall be restarted and previous days, or portions thereof, where Units were available shall be void and Contractor must initiate a new Reliability Test and must meet the full Reliability requirement within this Test. Contractor shall declare the start of each Reliability Test upon the initiation of the test and may not "look back" to determine an appropriate Reliability test period. Contractor is obligated to achieve the Guaranteed Reliability at any cost or duration pursuant to the terms of the Agreement. It shall be Contractor's responsibility to alter or re-design the Equipment until the Equipment is capable of achieving the Guaranteed Reliability. Any proposed changes shall be formally discussed and agreed with Owner before implementation. Owner reserves the right to call for further Performance Tests until all Performance Test requirements are satisfied.

The Project shall operate in automatic control as a base control method with normal operating staff levels. The Project shall operate for the assigned Reliability Test duration in cooperation with the dispatch loads requested by the dispatch authority within the Project's design capability. The applicable parameters shall be recorded for the Performance Test period.

If a failure or interruption occurs in any portion of the Work arising from Performance Test instrument malfunctions; failure of equipment to meet operating requirements; faulty design; materials; workmanship; omissions; incorrect erection; operating practices which are inconsistent with Prudent Utility Practice, manufacturer's recommendations, or the Performance Test procedures; or inadequate instruction by Contractor's supervisors sufficient to prevent safe and full commercial use of the Work, then the Reliability Test shall be considered void and the Reliability Test shall be recommenced after Contractor has remedied the cause of the failure or interruption.

Upon a Project trip caused by the Work, the Project shall not be returned to service unless the root cause of the trip has been identified and the problem has been corrected.

Contractor shall collect the data required in order to determine the Reliability during the Reliability Test for the Contractor's Equipment.

During the Reliability Test, the time to ramp up or down to meet a new dispatch level shall be deemed to be available hours for the purposes of calculating test results.

Contractor shall have the right during the Reliability Test to inspect the Project and all ancillary parts thereof. If as a result of such an inspection, Contractor becomes aware of abnormal operating conditions or an impending failure the Project shall be shut down in order to permit a detailed inspection over such period as the Owner and the Contractor shall agree to be reasonable in the circumstances.

Upon the occurrence of a forced outage or derating, the Reliability Test will be void and the Contractor shall, following making good of any defect or damage to the Unit resulting from an Contractor's Cause, ensure that the Project is returned to the required operating condition as soon as reasonably practicable. For the avoidance of doubt for any period during which the Project is not at the required operating condition then only that part of the reduction which is due to reasons other than a Test Interruption by Contractor shall be disregarded for the purpose of calculating the Project Reliability.

1.6 FUNCTIONAL GUARANTEE AND PERFORMANCE TEST RESULTS

Contractor shall submit the methodology by which it proposes to calculate the results based on the measured data to Owner.

Prior to the calculation of the test results, Owner's agreement will be required to the fundamental data obtained from the trials which shall not be unreasonably withheld.

Preliminary corrected performance figures shall be calculated at the completion of each test using the Performance Fuel to allow the Owner and Contractor, as applicable, to judge if the test completed was satisfactory or whether it should be repeated.

A preliminary report of all Performance Tests shall be produced and three copies issued to Owner for approval within ten (10) business days of the completion of each Performance Test.

The form of calculation sheets and diagrams, which shall conform to the format agreed with Owner, shall clearly identify the values measured in the Performance Test.

A final and complete report of the Tests shall be produced and three copies issued to Owner for approval within ten (10) business days of receipt of the gas analysis.

The official test reports shall include, as a minimum, the following details:

- Date and time of each test start and finish
- Full procedure adopted
- Instrumentation details and calibration data including signed and approved instrument calibration forms
- Full schematic of the Work systems together with instrument locations
- The standard to which the test was carried out and the Code of Practice followed, plus other reference data used
- The operating conditions prior to the test
- Variations in system frequency/generating unit speed
- Summary of test readings, results and conclusions
- Full heat balance calculation data sheets and heat balance diagrams for the 'As-Run' and 'Corrected As-Run' conditions, and the 'Fully Corrected As-Run' conditions for the Performance Test
- Laboratory analyses and calculations
- Pre-test uncertainty calculations

- Copies of test data sheets or other raw data
- Notes on any unusual observations, data or conclusions
- Attendance
- Results of the test

EXHIBIT J

KEY PERSONNEL

Individual

Title and Duties

To be Identified

Contractor Project Manager: Single-point-of-contact for all engineering and constructions issues.

Contractor and Owner to agree on additional Key Personnel to identify for Contractor, Subcontractors, and Vendors no later than thirty (30) Days after the issuance of the NTP.

EXHIBIT K

FORM OF ASSIGNMENT CLAUSE FOR SUBCONTRACTS

[SUBCONTRACTOR] under this [DESCRIPTION OF SUBCONTRACT] with [CONTRACTOR] ("Contractor") hereby, in the event of a Contractor Event of Default (as such term is defined under the Engineering, Procurement, and Construction Contract, dated [], 20[] (the "Prime Contract"), between Public Service Company of New Mexico, a New Mexico corporation ("Owner"), and ProEnergy Services, LLC ("Contractor"), consents to the assignment of [CONTRACTOR]'s rights in this [SUBCONTRACT] by [CONTRACTOR] to Owner, its permitted assigns and/or its lenders. Such assignment shall not take effect until the occurrence of, and written notice by Owner of, the termination of the Prime Contract and Owner's request for an assignment to [SUBCONTRACTOR].

EXHIBIT L

FORM OF MONTHLY PROGRESS REPORT

Each Monthly Progress Report shall be a written statement of Project status prepared by Contractor for review by Owner. The following items shall be included in monthly reports to be submitted by Contractor.

TABLE OF CONTENTS FOR MONTHLY PROGRESS REPORT

1.0 EXECUTIVE SUMMARY – (CURRENT MONTH)

The executive summary shall provide a brief and general overview of the projects progress during the previous month. Include progress graphs by permitting, engineering, procurement, construction, start-up, and for the total project.

- 2.0 SUMMARY OF PROGRESS AND STATUS OF PERMITTING, ENGINEERING, PROCUREMENT AND CONSTRUCTION
 - 2.1 Current Month
 - 2.1.1 Engineering work activities:

Include a listing of work activities completed during the previous month and those planned for the next month sorted by engineering discipline. Include an overall summary of the engineering progress.

2.1.2 Procurement work activities:

Include a listing of work activities completed during the previous month and those planned for the next month sorted by equipment, bulk materials, and subcontracts. Include an overall summary of the procurement progress.

2.1.3 Construction work activities:

Include a listing of work activities completed during the previous month and those planned for the next month sorted by major WBS area. Include an overall summary of the construction progress.

2.1.4 Startup & Commissioning work activities:

Include a listing of work activities completed during the previous month and those planned for the next month sorted by turnover package. Include an overall summary of the startup & commissioning progress.

Reporting format shall be based on completion of Project Milestones and construction, permitting, engineering (organized by discipline), procurement (issuance of purchase orders), shipment of materials and equipment to the Site, training and start-up.

2.2 Next Month

The expected progress for the Project in the next thirty (30) Days shall be provided in outline form based on permitting, construction, engineering, procurement, shipment, training and start-up.

3.0 MEETING STATUS

A summary of major meetings for the current month identifying the date and the attendees, and a schedule of meeting dates for the next month, including a one or two-sentence summary of anticipated topics of discussion for the next month and schedule for next month meeting date.

4.0 PRIORITIES/ISSUES/CONCERNS

Identification and evaluation of problem areas that are anticipated to have a material effect on either Project Schedule or that may, in the opinion of Contractor, require a modification of Exhibit A to the Contract. Issues identified would include, but not be limited to, risks to satisfactory completion of the Contract, possible change orders, QA/QC concerns, potential subcontractor performance problems, etc. The monthly report will provide a narrative description of the resolution plans for the key issues.

5.0 SAFETY

Provide a statement concerning the safety aspects of the work including a report of accidents, near misses, OSHA incident rate, etc. The report shall include a summary of all written accident reports for lost time accidents that occur at the Site during such month, prepared in accordance with the safety and security assurance program.

6.0 SCHEDULE UPDATE

Report important items and events, such as date of arrival of major equipment components, and completion of milestones and Critical Path Items in the Project Schedule.

The reports shall be presented in a format used by the Contractor and reasonably acceptable to Owner. An updated copy of the Level 1 working schedule shall be attached to the Monthly Progress Report with a written analysis of schedule status, including actual versus planned progress, with reference to the Critical Path Items and Project Schedule. The schedule shall indicate early, late, and actual curves. A functional version of the Level 1 schedule shall be submitted with the Monthly Progress Report.

The schedule update shall include a listing of milestones which display the baseline milestones, milestones completed and forecasted completion of the milestones still to complete. The analysis shall include a written definition of the critical path with reasons for it being on the

critical path plus anticipated work around and actions to keep it from becoming more critical and impacting the project completion. Secondary critical paths shall also be identified.

7.0 CHANGE IN WORK

This Section shall describe each event including events of Force Majeure that provides the basis on which Contractor can claim that the Contract Price should be increased (except for an event of Force Majeure) or that either of the Project Guaranteed Dates should be extended and with respect to each such event, specifies the amount of such proposed increase in the Contract Price (except for an event of Force Majeure) and the duration of each such proposed extension. A detailed change order log listing all agreed and potential change orders shall be maintained and included.

8.0 PERMIT STATUS

Provide listing of all Contractor Acquired Permits and Contractor Acquired Operating Permits including current status and the date the permit is to be obtained.

9.0 DRAWING AND PROCUREMENT STATUS

Provide the updated engineering drawing list, engineering and procurement schedule, and current status as compared to overall schedule.

10.0 PROJECT FINANCIAL STATUS

The Section shall include the billing breakdown for the current month, a comparison of the Milestone Payment Schedule with the actual progress payments to date, and financial review of the Project to date.

The Section shall also include a forecast of all milestone payments in the month it is expected to occur. Each month, the milestone achieved and actual payment amount shall be recorded and included in the progress report.

11.0 PROGRESS PHOTOGRAPHS

Contractor shall supply color photographs to document progress and to record significant completed elements of work. Electronic format is acceptable.

Also provide photographs of fabrication of major equipment and Site progress. Photographs should be chosen carefully to illustrate progress.

EXHIBIT M

FORM OF PERFORMANCE AND PAYMENT BOND

The Performance Bond to be provided to Owner by Contractor pursuant to <u>Section 4.24</u> under the Contract shall be a performance and payment bond prepared by an Eligible Issuer based on the attached form of AIA Document A312-2010-Performance Bond format without modification.

AIA Document A312™ – 2010

Performance Bond

CONTRACTOR: (Name, legal status and address)	SURETY: (Name, legal status and principal place of business)
OWNER: (Name, legal status and address)	
CONSTRUCTION CONTRACT Date:	
Amount:	
Description: (Name and location)	
BOND Date: (Not earlier than Construction Contract Date)	<i>;</i>)
Amount:	
Modifications to this Bond: \Box None	☐ See Section 16
CONTRACTOR AS PRINCIPAL Company: (Corporate Seal)	SURETY Company: (Corporate Seal)
Signature:	Signature:
Name and Title: (Any additional signatures appear on the last	Name and Title: page of this Performance Bond.)
(FOR INFORMATION ONLY — Name, address AGENT or BROKER:	ess and telephone) OWNER'S REPRESENTATIVE: (Architect, Engineer or other party:)

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

Any singular reference to Contractor, Surety, Owner or other party shall be considered plural where applicable.

AlA Document A312–2010 combines two separate bonds, a Performance Bond and a Payment Bond, into one form. This is not a single combined Performance and Payment Bond.

- § 1 The Contractor and Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the Owner for the performance of the Construction Contract, which is incorporated herein by reference.
- § 2 If the Contractor performs the Construction Contract, the Surety and the Contractor shall have no obligation under this Bond, except when applicable to participate in a conference as provided in Section 3.
- § 3 If there is no Owner Default under the Construction Contract, the Surety's obligation under this Bond shall arise after
 - .1 the Owner first provides notice to the Contractor and the Surety that the Owner is considering declaring a Contractor Default. Such notice shall indicate whether the Owner is requesting a conference among the Owner, Contractor and Surety to discuss the Contractor's performance. If the Owner does not request a conference, the Surety may, within five (5) business days after receipt of the Owner's notice, request such a conference. If the Surety timely requests a conference, the Owner shall attend. Unless the Owner agrees otherwise, any conference requested under this Section 3.1 shall be held within ten (10) business days of the Surety's receipt of the Owner's notice. If the Owner, the Contractor and the Surety agree, the Contractor shall be allowed a reasonable time to perform the Construction Contract, but such an agreement shall not waive the Owner's right, if any, subsequently to declare a Contractor Default;
 - .2 the Owner declares a Contractor Default, terminates the Construction Contract and notifies the Surety; and
 - .3 the Owner has agreed to pay the Balance of the Contract Price in accordance with the terms of the Construction Contract to the Surety or to a contractor selected to perform the Construction Contract.
- § 4 Failure on the part of the Owner to comply with the notice requirement in Section 3.1 shall not constitute a failure to comply with a condition precedent to the Surety's obligations, or release the Surety from its obligations, except to the extent the Surety demonstrates actual prejudice.
- § 5 When the Owner has satisfied the conditions of Section 3, the Surety shall promptly and at the Surety's expense take one of the following actions:
- § 5.1 Arrange for the Contractor, with the consent of the Owner, to perform and complete the Construction Contract;
- § 5.2 Undertake to perform and complete the Construction Contract itself, through its agents or independent contractors;
- § 5.3 Obtain bids or negotiated proposals from qualified contractors acceptable to the Owner for a contract for performance and completion of the Construction Contract, arrange for a contract to be prepared for execution by the Owner and a contractor selected with the Owner's concurrence, to be secured with performance and payment bonds executed by a qualified surety equivalent to the bonds issued on the Construction Contract, and pay to the Owner the amount of damages as described in Section 7 in excess of the Balance of the Contract Price incurred by the Owner as a result of the Contractor Default; or
- § 5.4 Waive its right to perform and complete, arrange for completion, or obtain a new contractor and with reasonable promptness under the circumstances:
 - .1 After investigation, determine the amount for which it may be liable to the Owner and, as soon as practicable after the amount is determined, make payment to the Owner; or
 - .2 Deny liability in whole or in part and notify the Owner, citing the reasons for denial.
- § 6 If the Surety does not proceed as provided in Section 5 with reasonable promptness, the Surety shall be deemed to be in default on this Bond seven days after receipt of an additional written notice from the Owner to the Surety demanding that the Surety perform its obligations under this Bond, and the Owner shall be entitled to enforce any remedy available to the Owner. If the Surety proceeds as provided in Section 5.4, and the Owner refuses the payment or the Surety has denied liability, in whole or in part, without further notice the Owner shall be entitled to enforce any remedy available to the Owner.

- § 7 If the Surety elects to act under Section 5.1, 5.2 or 5.3, then the responsibilities of the Surety to the Owner shall not be greater than those of the Contractor under the Construction Contract, and the responsibilities of the Owner to the Surety shall not be greater than those of the Owner under the Construction Contract. Subject to the commitment by the Owner to pay the Balance of the Contract Price, the Surety is obligated, without duplication, for
 - .1 the responsibilities of the Contractor for correction of defective work and completion of the Construction Contract;
 - .2 additional legal, design professional and delay costs resulting from the Contractor's Default, and resulting from the actions or failure to act of the Surety under Section 5; and
 - .3 liquidated damages, or if no liquidated damages are specified in the Construction Contract, actual damages caused by delayed performance or non-performance of the Contractor.
- § 8 If the Surety elects to act under Section 5.1, 5.3 or 5.4, the Surety's liability is limited to the amount of this Bond.
- § 9 The Surety shall not be liable to the Owner or others for obligations of the Contractor that are unrelated to the Construction Contract, and the Balance of the Contract Price shall not be reduced or set off on account of any such unrelated obligations. No right of action shall accrue on this Bond to any person or entity other than the Owner or its heirs, executors, administrators, successors and assigns.
- § 10 The Surety hereby waives notice of any change, including changes of time, to the Construction Contract or to related subcontracts, purchase orders and other obligations.
- § 11 Any proceeding, legal or equitable, under this Bond may be instituted in any court of competent jurisdiction in the location in which the work or part of the work is located and shall be instituted within two years after a declaration of Contractor Default or within two years after the Contractor ceased working or within two years after the Surety refuses or fails to perform its obligations under this Bond, whichever occurs first. If the provisions of this Paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable.
- § 12 Notice to the Surety, the Owner or the Contractor shall be mailed or delivered to the address shown on the page on which their signature appears.
- § 13 When this Bond has been furnished to comply with a statutory or other legal requirement in the location where the construction was to be performed, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. When so furnished, the intent is that this Bond shall be construed as a statutory bond and not as a common law bond.

§ 14 Definitions

- § 14.1 Balance of the Contract Price. The total amount payable by the Owner to the Contractor under the Construction Contract after all proper adjustments have been made, including allowance to the Contractor of any amounts received or to be received by the Owner in settlement of insurance or other claims for damages to which the Contractor is entitled, reduced by all valid and proper payments made to or on behalf of the Contractor under the Construction Contract.
- § 14.2 Construction Contract. The agreement between the Owner and Contractor identified on the cover page, including all Contract Documents and changes made to the agreement and the Contract Documents.
- § 14.3 Contractor Default. Failure of the Contractor, which has not been remedied or waived, to perform or otherwise to comply with a material term of the Construction Contract.
- § 14.4 Owner Default. Failure of the Owner, which has not been remedied or waived, to pay the Contractor as required under the Construction Contract or to perform and complete or comply with the other material terms of the Construction Contract.
- § 14.5 Contract Documents. All the documents that comprise the agreement between the Owner and Contractor.
- § 15 If this Bond is issued for an agreement between a Contractor and subcontractor, the term Contractor in this Bond shall be deemed to be Subcontractor and the term Owner shall be deemed to be Contractor.

§ 16 Modifications to this bond are as follows:

(Space is provided below for additional signatures of added CONTRACTOR AS PRINCIPAL		d parties, other than those appearing on the cover page.) SURETY			
Company:	(Corporate Seal)	Company:	(Corporate Seal)		
Signature:		Signature:			
Name and Title;		Name and Title:			
Address		Address			
CAUTION: You should sign an original AIA Contract Document, on which this text appears in RED. An original assures that changes will not be obscured.					
AIA Document A3421M - 2010. The American Institute of Architects					

EXHIBIT N – Cancellation Schedule

Combution Turbine Generator (CTG) Packages						
Milestone No.	Milestone Description	Termination Amount				
1	NTP	\$18,450,000.00				
2	Progress	\$24,600,000.00				
3	Progress	\$49,200,000.00				
4	Progress	\$49,200,000.00				
5	Progress	\$49,200,000.00				
6	Progress	\$49,200,000.00				
7	Progress	\$49,200,000.00				
8	Progress	\$55,350,000.00				
9	RTS Payment	N/A-Title Transfers				

	EPC					
Milestone No.	Milestone Description	Termination Amount				
1	Air Permit Engineering	\$172,348.28				
2	LNTP - Engineering Kick-off	\$775,567.27				
3	Engineering Deliverable, Milestone 1 - Initial IFC Rev 0	\$1,378,786.26				
4	Engineering Deliverable, Milestone 2 - Initial IFC Rev 0	\$1,982,005.25				
5	Engineering Deliverable, Milestone 3 - Initial IFC Rev 0	\$2,585,224.24				
6	Engineering Deliverable, Milestone 4 - Initial IFC Rev 0	\$3,188,443.23				
7	Engineering Deliverable, Milestone 5 - Initial IFC Rev 0	\$3,791,662.22				
8	NTP	\$10,685,593.45				
9	ECM PO Issued	\$19,647,704.09				
10	GSU Transformer PO Issued	\$26,541,635.34				
11	Mobilization	\$34,814,352.85				
12	Civil Works Complete-CTG 1	\$35,848,442.54				
13	Civil Works Complete-CTG 2	\$36,882,532.23				
14	Civil Works Complete-ECM 1	\$37,571,925.36				
15	Civil Works Complete-ECM 2	\$38,261,318.48				
16	Civil Works Complete-CTG 3	\$39,295,408.17				
17	Civil Works Complete-CTG 4	\$40,329,497.86				
18	Civil Works Complete-ECM 3	\$41,018,890.99				
19	Civil Works Complete-ECM 4	\$41,708,284.11				
20	ECM 1 Ready to Ship	\$42,052,980.67				
21	ECM 2 Ready to Ship	\$42,397,677.24				
22	Civil Works Complete-CTG 5	\$43,431,766.93				
23	Civil Works Complete-CTG 6	\$44,465,856.61				
24	Civil Works Complete-ECM 5	\$45,155,249.74				
25	Civil Works Complete-ECM 6	\$45,844,642.87				
26	ECM 3 Ready to Ship	\$46,189,339.43				
27	ECM 4 Ready to Ship	\$46,534,035.99				
28	Major Equipment Rough Set on Foundation-CTG 1	\$47,223,429.12				
29	Major Equipment Rough Set on Foundation-CTG 2	\$47,912,822.24				
30	Civil Works Complete-GSU 1	\$48,602,215.37				
31	Civil Works Complete-GSU 2	\$49,291,608.49				
32	Civil Works Complete-GSU 3	\$49,981,001.62				
33	ECM 5 Ready to Ship	\$50,325,698.18				
34	ECM 6 Ready to Ship	\$50,670,394.75				
35	Major Equipment Rough Set on Foundation-ECM 1	\$51,359,787.87				
36	Major Equipment Rough Set on Foundation-ECM 2	\$52,049,181.00				
37	Major Equipment Rough Set on Foundation-CTG 3	\$52,738,574.12				
38	Major Equipment Rough Set on Foundation-CTG 4	\$53,427,967.25				
39	Assembly of Major Equipment-CTG 1	\$53,945,012.09				
40	Assembly of Major Equipment-CTG 2	\$54,462,056.94				

41	Major Equipment Rough Set on Foundation-ECM 3	\$55,151,450.06
42	Major Equipment Rough Set on Foundation-ECM 4	\$55,840,843.19
43	GSU 1 Transformer Ready to Ship from Factory	\$55,840,843.19
44	GSU 2 Transformer Ready to Ship from Factory	\$55,840,843.19
45	Major Equipment Rough Set on Foundation-CTG 5	\$56,530,236.32
46	Major Equipment Rough Set on Foundation-CTG 6	\$57,047,281.16
47	GSU 3 Transformer Ready to Ship from Factory	\$57,047,281.16
48	Assembly of Major Equipment-CTG 3	\$57,564,326.00
49	Assembly of Major Equipment-CTG 4	\$58,081,370.85
50	Assembly of Major Equipment-ECM 1	\$58,770,763.97
51	Assembly of Major Equipment-ECM 2	\$59,460,157.10
52	Major Equipment Rough Set on Foundation-ECM 5	\$59,460,157.10
53	Major Equipment Rough Set on Foundation-ECM 6	\$60,149,550.23
54	Major Equipment Rough Set on Foundation-GSU 1	\$60,494,246.79
55	Major Equipment Rough Set on Foundation-GSU 2	\$60,838,943.35
56	Major Equipment Rough Set on Foundation-GSU 3	\$61,183,639.91
57	Assembly of Major Equipment-ECM 3	\$61,183,639.91
58	Assembly of Major Equipment-ECM 4	\$61,183,639.91
59	Assembly of Major Equipment-CTG 5	\$61,700,684.76
60	Assembly of Major Equipment-CTG 6	\$62,217,729.60
61	Assembly of Major Equipment-GSU 1	\$62,562,426.17
62	Assembly of Major Equipment-ECM 5	\$62,562,426.17
63	Assembly of Major Equipment-ECM 6	\$62,562,426.17
64	Assembly of Major Equipment-GSU 2	\$62,907,122.73
65	Assembly of Major Equipment-GSU 3	\$63,251,819.29
66	Mechanical Completion Unit 1	\$64,314,633.69
67	Mechanical Completion Unit 2	\$65,377,448.10
68	Mechanical Completion Unit 3	\$66,440,262.50
69	Mechanical Completion Unit 4	\$67,503,076.90
70	Mechanical Completion Unit 5	\$68,565,891.30
71	Mechanical Completion Unit 6	\$68,939,312.58
72	CTG 1 First Fire	\$68,939,312.58
73	CTG 2 First Fire	\$68,939,312.58
74	CTG 3 First Fire	\$68,939,312.58
75	CTG 4 First Fire	\$68,939,312.58
76	CTG 5 First Fire	\$68,939,312.58
77	CTG 6 First Fire	\$68,939,312.58
78	Substantial Completion	\$68,939,312.58
79	Final Completion	N/A - Work Complete

EXHIBIT O

INITIAL PROJECT SCHEDULE

Definitions for the purposes of Exhibit O,

"Equipment Ready to Ship" means that the related Equipment, in its entirety, has been fabricated, painted, protected, inspected with all associated quality control forms completed, so that all that remains is to package the Equipment for shipment once a date for transport has been determined. Note that not all items shipped will be in a single enclosure, and may be shipped loose. These items while considered "Ready to Ship" may remain on-site at Sedalia until an appropriate time in accordance with Contractor's construction plan and the Project Schedule.

"Equipment" for the related Ready to Ship definition shall include:

- For the CTG: Turbine Package, GT engine, Generator Package, including all associated Auxiliary Skids.
- For the GSU: Main Tank, Radiator, including all required accessories
- For the ECM: SCR/CO Catalyst frame, Ducting Assembly, Expansion Joints, Exhaust Stack. This milestone is not applicable to any CEMS equipment/structures.

"Site Mobilization" means the first instance when any of Contractor or its Subcontractors or other representatives is present on the Site for construction related activities after Owner has issued the Notice to Proceed.

"Civil Works Complete" means all required clearing, excavation, and foundation work has been performed for the rough set of the respective Equipment. Civil Works Complete shall require that the applicable foundations are cured, set, inspected, and available for rough set of the respective Equipment.

"Equipment Rough Set on Foundation" means the related Equipment is delivered to the site and set on its anchor bolts and on its final foundation which has been fully cured. "Equipment" for this definition shall include:

- For the CTG: Turbine Package and Generator Package. Note that the GT engine for each Turbine Package may be shipped separately and/or at a later time in accordance with Contractor's construction plan and the Project Schedule.
- For the GSU: Main Tank
- For the ECM: SCR/CO Catalyst frame, Ducting Assembly, Exhaust Stack. This milestone is not applicable to any CEMS equipment/structures.

"Assembly of Equipment Complete" means the Equipment is mechanically and structurally constructed in accordance with the requirements of this Contract, the Statement of Work and Industry Standards, except for Non-Critical Deficiencies, in advance of fulfilling the requirements for Mechanical Completion.

"Equipment" for this definition shall include:

- For the CTG: Turbine Package, GT Engine, Generator Package, including all associated Auxiliary Skids. Note that in the event of an Owner Caused Delay or other Excusable Condition delaying the date of First Fire, the GT Engine will remain in preservation at ProEnergy's facilities until such time as shipment to the site is required to satisfy the delayed First Fire date. In this case, placement of the GT Engine will not be a requirement of this milestone, however, the Agreement terms regarding Excusable Conditions shall apply.
- For the GSU: Main Tank, Radiator, including all required accessories
- For the ECM: SCR/CO Catalyst frame, Ducting Assembly, Expansion Joints, Exhaust Stack. This milestone is not applicable to any CEMS equipment/structures.

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EXHIBIT P

ESSENTIAL CONTRACTOR DELIVERABLES

The most recent versions of the following Essential Contractor Deliverables, excluding any asbuilt modifications, shall have been submitted for achievement of Substantial Completion as defined in Section 15.2 of the Contract.

SUBMITTAL DESCRIPTION
PROJECT MANAGEMENT
Master Document List
FACILITY LAYOUT
Site arrangement drawings (Site Plan)
Central control room layout drawings
Facility equipment layout and location drawings (general arrangement drawings)
BD Model CAD file
PROCUREMENT DOCUMENTS
Equipment warranties (Copies Only until completion of PES warranty period then original copies issued to PNM)
CIVIL/STRUCTURAL
Station Site grading and drainage drawings
Underground piping drawings including elevations
Sanitary drainage system installation documentation, perinits, and related data
MECHANICAL/CHEMICAL
Water balance diagrams
Heat balance diagrams
P&ID's
Mechanical equipment list
Pipe line list
Piping specialty list
Valve list
Underground piping drawings including elevations
Embedded piping drawings
Fire protection drawings including any fire protection requirements for temporary facilities
Fire Protection Design Basis Document (in accordance with NFPA 850)
Plumbing drawings
System descriptions
ELECTRICAL
Electrical one-line and three-line diagrams
Electrical equipment list

SUBMITTAL DESCRIPTION
Cable and raceway list
Electrical panels layout and details
Electrical schematic/block diagrams
Electrical termination drawings
Underground ductbank and conduit drawings including elevations
Embedded conduit plans, elevation, and details
Conduit and raceway schedule
Fire alarm and annunciator system drawings
Facility freeze protection drawings and details
Motor data sheets
System descriptions
Electrical hazardous area classification drawings
INSTRUMENTATION & CONTROLS
Control architecture drawings (PCS block diagram)
Instrument loop diagrams
Facility control logic diagrams
Digital Logic/Functional Block diagrams
PCS I/O list
Instrument list
Instrument data sheets
Control valve data sheets
Facility HVAC system controls
CONSTRUCTION
Punch Lists
QUALITY ASSURANCE
Initial emissions compliance testing results
CEMS QA/QC Manual
CEMS Monitoring Plan
CTG Fuel Gas Flow Meter Certification
TRAINING
EPC Contractor O&M and Facility Manuals
CTG Package O&M Manuals

EXHIBIT Q LIMITED NOTICE TO PROCEED (LNTP)

This document outlines the basis of ProEnergy's Limited Notice To Proceed (LNTP) Scope of Work ahead of a Full Notice to Proceed (FNTP) for the engineering, procurement and construction of a 6xLM6000 PC Sprint natural gas-fired power generation facility at the Piñon Generating Station, New Mexico. The intent of the LNTP phase is to initiate major plant engineering activities as noted below prior to FNTP to facilitate the intended project execution schedule.

Scope of Work

The following deliverables shall be developed and submitted in accordance with Exhibit B – Milestone Payment Schedule, Exhibit A – Statement of Work and Specifications, and Section 05 - Submittals, prior to FNTP.

Engineering Milestone Number	Deliverable*
Air Permit (Limited Release)	All work required from PES to successfully obtain a Project Air Permit, including, but not limited to: • Information needed to complete Equipment Emissions Modelling • Equipment Engineering, Specification & Selection • Process Plans, Descriptions and Diagrams Engineering Deliverable, Milestone 1
	 Engineering Drawing Package: Civil Foundation-Structural Level 3 Project Schedule Environmental Assessment and Storm Water Pollution Prevention Plan (SWPPP) Design Basis Documents Plant Design Criteria Smart P&IDs Equipment List 3D Plant Model Controls
2	Engineering Deliverable, Milestone 2 • Engineering Drawing Package: o Mechanical o Piping
3	Engineering Deliverable, Milestone 3 • Engineering Drawing Package: o Electrical & Instrumentation

4 .	 Engineering Deliverable, Milestone 4 Engineering Drawing Package: Substation
5	Engineering Deliverable, Milestone 5 • Engineering Drawing Package: • Controls • Asset Management Coordination • Control System Architecture Design • Project Execution Plan

^{*} Please refer to Attachment 1 – ProEnergy Drawing List for a complete list of engineering drawings and documents to be delivered during LNTP for each of the associated Engineering Milestones noted above.

ATTACHMENT 1 ProEnergy Drawing list

Milestone	Discipline	Description
Number		
1	Civil	Coversheet
1	Civil	Area Key Plan
1	Civil	Civil Notes
1	Civil	Overall Site Plan
1	Civil	Overall Site Entrance Details
1	Civil	Overall Site Pavement and Fencing Plan
1	Civil	Overall Site Grading and Drainage Plan
1	Civil	Overall Site Erosion and Sedimentation Control Plan
1	Civil	Overall Site Details
1	Civil	Overall Site Oil Water Separator Details
1	Civil	Overall Site Details
1	Civil	Overall Site Emergency Drain Tank Details
1	Civil	Overall Site General Arrangement
1	Foundation -	General Structural Notes
•	Structural	General Structural Process
1	Foundation -	Site Work Notes
_	Structural	
1	Foundation -	Concrete Notes Sheet 1
	Structural	
1	Foundation -	Concrete Notes Sheet 2
	Structural	
1	Foundation -	Pile Types and Schedule
	Structural	
1	Foundation -	Footing Types and Schedule
	Structural	
1	Foundation -	Typical Anchor Bolt Details
	Structural	
1	Foundation -	Anchor Bolt Plans
	Structural	
1	Foundation -	Anchor Bolt Schedule
	Structural	
1	Foundation -	Foundation Plan Turbine Generator LM6000 - Units 1 - 6
	Structural	
1	Foundation -	Anchor Bolt Location Plan Turbine Generator LM6000
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1	Foundation -	Foundation Sections and Details Turbine Generator LM6000
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1	Foundation -	Foundation Plan ECM & Exhaust Stack Units 1-6
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1	Foundation -	Anchor Bolt Location Plan ECM & Exhaust Stack

	Structural	
1	Foundation - Structural	Foundation Sections and Details ECM & Exhaust Stack
1	Foundation - Structural	Foundation Plan and Details Demin Water Tank
1	Foundation - Structural	Foundation Plan GSUs
1	Foundation - Structural	Foundation Details GSUs
1	Foundation - Structural	Foundation Plan and Details Service/Fire Water
1	Foundation - Structural	Foundation Plan and Details CEMS Shelter
1	Foundation - Structural	Foundation Plan and Details PDC Foundation
1	Foundation - Structural	Foundation Plan and Details Fin Fan Lube Oil Cooler
1	Foundation - Structural	Foundation Plan and Details Auxiliary Transformer
1	Foundation - Structural	Foundation Plan and Details 480V Switchgear
1	Foundation - Structural	Foundation Plan and Details Demineralized Water Forwarding Pumps
1	Foundation - Structural	Foundation Plan and Details Service/Fire Water Forwarding Pumps
1	Foundation - Structural	Foundation Plan and Details Water treatment Shed
1	Foundation - Structural	Area Foundation Layouts
1	Foundation - Structural	Structural General Notes
1	Foundation - Structural	Standard Concrete Details
1	Foundation - Structural	Steel Notes Sheet 1
1	Foundation - Structural	Steel Notes Sheet 2
1	Foundation - Structural	Typical Steel Connection Details
1	Foundation - Structural	Typical Steel Details
1	Foundation - Structural	Framing Plan and Details PDC Platforms and Stairs
1	Foundation - Structural	Framing Details PDC Platforms and Stairs

1	Foundation -	Area Utility Racks Steel Framing Layout
	Structural	
1	Foundation -	Unit 1 - 6 Utility Rack Steel Framing Plan
	Structural	
1	Foundation -	Area Cable Tray Supports Steel Framing Details
	Structural	
1	Foundation -	Area CTG Access Platforms Steel Framing Layout
	Structural	
1	Foundation -	Area CTG Access Platforms Steel Framing Plan
	Structural	
2	Mechanical	Instrument List
2	Mechanical	Line List
2	Mechanical	Specialty Items List
2	Mechanical	Valve List
2	Mechanical	Mechanical General Notes
2	Mechanical	Mechanical Details
2	Mechanical	Piping Specifications
2	Mechanical	Valve Specifications
2	Mechanical	Overall Site Aboveground Piping Key plan
2	Mechanical	Overall Site Aboveground Piping Plan
2	Mechanical	Area Aboveground Piping Plan
2	Mechanical	Area Aboveground Piping Detail
2	Mechanical	Overall Site Belowground Piping Key plan
2	Mechanical	Overall Site Belowground Piping Plan
2	Mechanical	Area Belowground Piping Plan
2	Mechanical	Area Belowground Piping Detail
2	Mechanical	Insulation General Notes
2	Mechanical	Insulation Details
2	Mechanical	CEMS Umbilical Details
2	Mechanical	Pipe Support General Notes and Details
2	Mechanical	Mechanical Piping Pipe Support Details
2	Mechanical	Piping and Instrumentation Diagram Legend
2	Mechanical	Fuel Gas System Regulating Piping and Instrumentation
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2	Mechanical	Fuel Gas System Unit 4 Piping and Instrumentation Diagram
2	Mechanical	Fuel Gas System Unit 5 Piping and Instrumentation Diagram
2	Mechanical	Fuel Gas System Unit 6 Piping and Instrumentation Diagram
2	Mechanical	Lube Oil System Unit 1 Piping and Instrumentation Diagram
2	Mechanical	Lube Oil System Unit 2 Piping and Instrumentation Diagram
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2	Mechanical	Lube Oil System Unit 3 Piping and Instrumentation Diagram
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2	Mechanical	Lube Oil System Unit 5 Piping and Instrumentation Diagram
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2	Mechanical	Demineralized Water System Unit 5 Piping and
		Instrumentation Diagram
2	Mechanical	Demineralized Water System Unit 6 Piping and
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2	Mechanical	Instrument Air System Supply Equipment Piping and
		Instrumentation Diagram
2	Mechanical	Instrument Air System Unit 1 Piping and Instrumentation
		Diagram
2	Mechanical	Instrument Air System Unit 2 Piping and Instrumentation
		Diagram
2	Mechanical	Instrument Air System Unit 3 Piping and Instrumentation
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2	Mechanical	Diagram
2	Mechanical	Service Water System Piping and Instrumentation Diagram
2	Mechanical	Fire Water System Piping and Instrumentation Diagram
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Sandia Storage EPC Contract

PNM Exhibit TGF-14

Is contained in the following $\,$ 183 pages.

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EXECUTION VERSION

PNM Contract No: 1057680

ENGINEERING, PROCUREMENT, AND CONSTRUCTION CONTRACT

by and between

PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation

and

AFFORDABLE SOLAR INSTALLATION INC.

for

SANDIA ENERGY STORAGE FACILITY

Dated as of June 27, 2019

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ENGINEERING, PROCUREMENT, AND CONSTRUCTION CONTRACT

THIS ENGINEERING, PROCUREMENT, AND CONSTRUCTION CONTRACT (this "Contract") is made and entered into as of this 27th day of June, (the "Effective Date"), by and between PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation (hereinafter "Owner" or "PNM"), and Affordable Solar Installation, Inc., a New Mexico corporation (hereinafter, "Contractor"). Each entity is sometimes individually referred to herein as a "Party" and are sometimes collectively referred to herein as the "Parties".

RECITALS

- A. Owner desires to develop a battery energy storage facility to be constructed in and located near Sandia Substation, as more specifically described herein (the "Project" as defined herein).
- B. Owner desires to engage Contractor to permit, design, engineer, procure, construct, test and commission the Project and to train the persons who will operate and maintain the Project, all on a fixed price, date certain to complete, turnkey basis, and Contractor desires to provide such work, all in accordance with the terms and conditions set forth in this Contract.

C. Contractor has:

- (1) provided preliminary conceptual drawings for the Project,
- (2) inspected the real property on which the Project shall be constructed, and
- (3) performed or reviewed such other investigations, studies, and analyses which Contractor has determined to be necessary or prudent in connection with entering into this Contract.
- D. Contractor is willing to guarantee (a) the timely completion of the Project, and (b) operating performance of the Project in accordance with the terms and conditions of this Contract.

AGREEMENT

NOW, THEREFORE, in consideration of the sums to be paid to Contractor by Owner and of the covenants, premises and agreements set forth herein (including those set forth above that are hereby incorporated by reference), the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. DEFINITIONS AND RULES OF INTERPRETATION

- 1.1 For the purposes of this Contract, except as otherwise expressly provided or unless the context otherwise requires, the following terms shall have the following meanings.
- "Acceptance Tests" means the Performance Tests, Functional Guarantee Tests, and each other test and activity to be performed prior to, and as a condition to, Substantial Completion and Final Completion, as applicable, as such tests and activities are set forth in Exhibit I.
- "Acceptance Tests Procedures" means the written test procedures, standards, protective settings, and the testing program for the Acceptance Tests as set forth in Exhibit I.
- "Affiliate" means, with respect to any Person, another Person that is controlled by, that controls, or is under common control with, such Person; and, for this purpose, "control" with respect to any Person shall mean the ability to effectively control, directly or indirectly, the operations and business decisions of such Person whether by voting of securities or partnership interests or any other method.

"Applicable Laws" means and includes all of the following:

- (a) any applicable statute, license, law, rule, treaties, regulation, code, ordinance, certificates, orders, judgment, decree, writ, legal requirement, order or the like, of any national, federal, provincial, state, tribal or local court or other Governmental Authority, and the written interpretations thereof, including, without limitation, any statute, license, law, rule, treaties, regulation, code, ordinance, certificates, orders, judgment, decree, writ, legal requirement, order or the like, regulating, relating to or imposing liability or standards of conduct concerning:
- (i) Contractor, the Site or the performance of any portion of the Work or the Work taken as a whole, or the operation of the Project; or
- (ii) safety and the prevention of injury to persons and the damage to property on, about or adjacent to the Site or any other location where any other portion of the Work shall be performed; or
- (iii) protection of human health or the environment or emissions, discharges, releases or threatened releases of pollutants, contaminants, chemicals or industrial, toxic or hazardous substances or wastes into the environment including, without limitation, ambient air, surface water, ground water, or land, or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport, or handling of pollutants, contaminants, chemicals, Hazardous Materials or other industrial, toxic materials or wastes, as now or may at any time hereafter be in effect; and

(b) any Permit Requirement.

"Applicable Permits" means each and every national, state, local or other license, consent, appraisal, authorization, ruling, exemption, variance, order, judgment, decree, declaration, regulation, certification, filing, recording, environmental plans and/or studies, permit

or other approval with, from or of any Governmental Authority, including, without limitation, each and every environmental, construction, operating or occupancy permit and any agreement, consent or approval from or with any other Person, that is required by any Applicable Law or that is otherwise necessary for the performance of the Work or operation of the Project, including without limitation, the Owner Acquired Permits and Contractor Acquired Permits.

"Approval" has the meaning given in Section 1.2(e).

"Balance of Plant Activities" means all Work other than that portion of the Work performed or to be performed by the BESS Vendor.

"Battery Energy Storage System" or "BESS" means the battery arrays, battery system controller, inverters, transformers, thermal management system, and other equipment necessary to charge, store, and subsequently deliver electricity from the Project to the Energy Delivery Point as described in Exhibit A.

"BESS Capacity" means the capacity of the System as measured by Contractor as required in Exhibit I.

"BESS Plant Auxiliary Loads" "BESS Plant Auxiliary Loads" means loads for ancillary equipment separately metered from the energy storage system on the high side of the UAT transformers as adjusted by Contractor to environmental conditions using correction curves and pre-test uncertainty analysis,

"BESS Roundtrip Efficiency" means the ratio of energy discharged by the System to the energy required to charge the System to effect that same energy discharge (expressed as a percentage) as measured by Contractor as required in Exhibit I.

"BESS Vendor" means Tesla, Inc.

"Business Day" means a Day, other than a Saturday or Sunday, on which banks are generally open for business in the State of New Mexico, or the Friday following Thanksgiving. A Business Day shall begin at 8:00 a.m. and end at 5:00 p.m. local time for the Party sending the Notice or payment or performing a specified action hereunder.

"Buy-Down Amount" means the amount to be paid by Contractor to Owner in accordance with the provisions of <u>Section 16.2</u> and calculated in accordance with <u>Exhibit H</u> for the failure of the Project to achieve the Performance Guarantees.

"CCN" means Owner's application for a Certificate of Public Convenience and Necessity filed with the NMRPC relating to the Project.

"Change in Law" means the enactment, adoption, promulgation, material modification, or repeal after the Effective Date of any Applicable Law of any Governmental Authority including, but not limited to, a change in any requirement or condition on or with respect to the application for, or issuance, maintenance, renewal or transfer of, any Applicable Permit; provided, however, any of the following shall not be a Change in Law: (a) the enactment, adoption, promulgation, modification or repeal after the Effective Date of any national, federal,

provincial or any other law imposing a tax, duty, levy, impost, fee, royalty, or similar charge based on the importation or exportation of any item or service for which Contractor is responsible hereunder; and (b) the enactment, adoption, promulgation, modification or repeal after the Effective Date of any national, federal, provincial or any other income tax law.

"Change in Work" means an authorized modification to the Work for the reasons set forth in Section 17.1.

"Change in Work Form" means the form documenting a Change in Work attached hereto as $\underline{\text{Exhibit } E}$.

"Charging Energy" means Energy supplied by Owner at Owner's cost and in accordance with Industry Standards and delivered to Contractor at the Energy Delivery Point for the purpose of charging the BESS, as measured by the Electric Metering Devices.

"Chronic Failure" has the meaning set forth in Section 18.8.

"Claim Notice" has the meaning set forth in Section 25.5.

"Completion Costs" has the meaning set forth in Section 20.3(a).

"Conditional Waiver and Release Upon Final Payment" means a written statement, the form of which is attached hereto as Exhibit F-3, containing a waiver and release of liens pursuant to which a Person conditionally waives and releases all Contractor Liens, stop notices and bond rights with respect to all Work conditioned only upon final payment.

"Conditional Waiver and Release Upon Progress Payment" means a written statement, the form of which is attached hereto as Exhibit F-1, containing a waiver and release of liens pursuant to which a Person conditionally waives and releases all Contractor Liens, stop notices and bond rights with respect to all Work through the last day of the calendar month for which Contractor requested payment in the current Contractor's Invoice conditioned only upon payment of the amount set forth therein.

"Confidential Information" means any and all non-public proprietary written information, data, analyses, documents, and materials furnished or made available by a Party or its Representatives to the other Party or its Representatives in connection with this Contract, including any information processed or stored on computers or other electronic media by PNM, on PNM's behalf, or by Contractor for PNM, and any and all analyses, compilations, studies, documents, or other material prepared by the receiving Party or its Representatives to the extent containing or based upon such information, data, analyses, documents, and materials; provided, however, Confidential Information of Owner shall also mean information, ideas or materials related to the Work or Project that is or are:

- (a) obtained, developed or created by or for Contractor exclusively in connection with the Work; or
 - (b) disclosed by Owner or any of its Affiliates.

Confidential Information shall not include any information that: (w) is already in the public knowledge or which becomes public knowledge absent any violation of the terms of this Contract; (x) was already in the possession of a Party prior to disclosure by the other Party; (y) a Party obtains from another Person which such Party reasonably believes was not under an obligation of confidentiality; or (z) is or becomes generally available to, or is independently known to or has been or is developed by, any Party or any of its Affiliates other than materially as a result of any disclosure of proprietary information by the transferor to the transferee.

"Construction Tests" means the construction tests, equipment checks, commissioning activities and system walkdowns to be performed prior to, and as a condition to, Mechanical Completion, as such tests and activities are set forth in Section 23 of Exhibit A.

"Contract" means this Engineering, Procurement, and Construction Contract, including all Exhibits hereto, as the same may be modified, amended, or supplemented from time to time in accordance with the terms hereof.

"Contract Price" means the fixed amount for performing the Work that is payable to Contractor as set forth in Section 6.1, as the same may be modified from time to time in accordance with the terms hereof.

"Contractor" means Affordable Solar Installation, Inc., and its permitted successors and assigns under this Contract.

"Contractor Acquired Permits" means and includes the following permits:

- (a) building permits and New Mexico Construction Industries License required for the construction of the Project;
- (b) labor or health standard permits and approvals reasonably related to Work assigned to Contractor with respect to the construction of the Project;
- (c) business permits reasonably related to the conduct of the operations of Contractor and all Subcontractors in the State of New Mexico and any other location where such permits may be required (including all contractors' licenses and related documents);
- (d) permits, approvals, consents or agreements from or with any Person necessary for the performance and completion by Contractor of the Work or its warranty obligations hereunder, for the transportation or importation of Equipment and Materials or for the transportation or importation of equipment, tools, machinery and other items used by Contractor in performance of the Work;
- (e) permits, visas, approvals and certifications necessary for Contractor's employees to legally perform the Work in the State of New Mexico (including documentation of citizenship or legal residency in the United States); and
- (f) all Applicable Permits required for the Work other than those listed as Owner Acquired Permits in Exhibit C.

Without limiting the foregoing, Contractor Acquired Permits include permits for temporary construction utilities and temporary sanitary facilities, dump permits, road use permits, NPDES Construction General Stormwater Permit, Storm Water Protection Plan ("SWPP") Development, Spill Prevention, Control and Countermeasure Plan, permits related to the use, storage and disposal of Hazardous Materials that the Contractor or its Subcontractors or Vendors brings to the Site or are used under Contractor's supervision during the construction and commissioning of the Project, the Construction Tests and the Acceptance Tests, and permits issued pursuant to any building, mechanical, electrical, plumbing or similar codes in connection with the performance of the Work; provided, that Contractor Acquired Permits do not include Owner Acquired Permits.

"Contractor Caused Delay" means a material delay in Contractor's performance of any Critical Path Item to the extent actually and demonstrably caused by any of the following:

- (a) the failure of the Work to (1) pass any performance or functional test required by the Contract; (2) substantially conform to a certified drawing that Contractor shall have delivered to Owner; (3) substantially conform to the specifications for such Work set forth in the Contract; or (4) perform in accordance with the terms of any Contract; or
- (b) (1) any Defect (including any Defect in design, manufacture or workmanship) in the Work; or (2) the failure by Contractor to perform or deliver services, goods or Work, as required by the terms, conditions and schedules of the Contracts;
- (c) Contractor's failure to obtain any Contractor Acquired Permit (1) in final form by the applicable milestone or milestone date specified in Exhibit B or (2) in full force and effect on or prior to the date on which it is required, under this Contract and Applicable Law, to be in full force and effect, so as to permit Contractor to perform its obligations under this Contract.

Contractor Caused Delays shall not include delays to the extent caused by Force Majeure or Excusable Conditions.

"Contractor Deliverables" means each of the design criteria, system descriptions, Required Manuals, Drawings and Specifications, design calculations, quality assurance reports and all other material documents relating to the Project to be delivered to Owner in accordance with the requirements of this Contract.

"Contractor Event of Default" has the meaning set forth in Section 20.1.

"Contractor Inchoate Default" means any occurrence, circumstance or event, or any combination thereof, which with the lapse of time or the giving of Notice, or both, would constitute a Contractor Event of Default.

"Contractor Lien" has the meaning set forth in Article 30.

"Contractor Indemnitee" has the meaning set forth in Section 25.2.

- "Contractor's Invoice" means an invoice from Contractor to Owner in the form of Exhibit F hereto.
- "Corrective Action"" means all the materials, tasks and Work necessary to make the Project meet each Performance Guarantee.
- "Critical Path Item(s)" means the items identified as critical path items on the Project Schedule (including, without limitation, Mechanical Completion, Substantial Completion and Final Completion).
 - "Day" or "day" means a calendar day, unless otherwise specified.
- "Defect" means and includes, without limitation, any design, engineering or installation of the Work, Equipment and Materials, or other Work which in any of the foregoing cases:
- (a) does not conform to the Contract or the Drawings and Specifications either as contained in this Contract or issued by Contractor for the Project;
 - (b) is of improper or inferior workmanship or material;
- (c) is not suitable or does not operate suitably for the Project's intended purpose as described in Exhibit A;
 - (d) is inconsistent with Industry Standards; or
- (e) materially and adversely affects the mechanical, electrical, or structural integrity, or the continuous efficient, effective or safe operation or reliability of the Project.
 - "Delay Notice" means a notice of delay as set forth in Section 9.2.
- "Direct Costs" means, as it relates to any Work or Change in Work, the cost of labor, support labor, material, equipment, services, tools, supplies, Subcontracts, jobsite facilities, utilities, and jobsite staffing necessary to perform such Work or Change in Work.
 - "Dollars" or "\$" means the lawful currency of the United States of America.
- "Drawings and Specification Table" means table of Drawings and Specifications to be delivered by Contractor, which must satisfy the requirements of Exhibit A and be prepared by Contractor and accepted by Owner in accordance with Section 12.3 of the Contract.
- "Drawings and Specifications" means the drawings, specifications, drawing logs, conformed technical specifications, manufacturers' drawings and data, plans and designs that are part of the Statement of Work or that have been prepared by Contractor or any Subcontractor or Vendor with respect to the Work (including those drawings and specifications identified in Exhibit A).
 - "Effective Date" has the meaning set forth in the preamble.

- "Electric Metering Device(s)" means all metering and data processing equipment used to measure, record, or transmit data relating to Energy delivered by the Project or Charging Energy delivered to the Project. Electric Metering Devices include the metering current transformers and the metering voltage transformers.
- "Electrical Interconnection Facilities" means the facilities and equipment necessary to connect the Project to the Project Substation from the Energy Delivery Point.
- "Eligible Issuer" means a surety licensed to do business in the State of New Mexico, listed in the latest issue of the U.S. Treasury Circular 570, with an AM Best rating of A- or better, and on the New York State Insurance Department's website listing insurers and their authorized coverages, or any other issuer reasonably acceptable to Owner.
- "Energy" means three-phase, 60-cycle alternating current electric energy, expressed in units of kWh or MWh, as measured by the Electric Metering Devices.
- "Energy Delivery Point" means the Contractor furnished outgoing dead-end termination structure located on the high voltage side of the Project step-up transformers.
- "Engineer" means any engineering firm or firms or other engineer or engineers (which may be employees of Owner) selected and designated by Owner.
- "Equipment and Materials" means the BESS and all other equipment, materials, supplies, apparatuses, devices, machinery, parts, tools, special tools, components, construction aids, construction utilities to the extent provided in Exhibit A, instruments, appliances, spare parts and appurtenances thereto that are:
- (a) required for the design, installation, construction or operation of the Project in accordance with Industry Standards and this Contract; or
- (b) described in, required by, reasonably inferable from or incidental to the Statement of Work or the Drawings and Specifications;

<u>provided</u>, that Equipment and Materials shall not include Electrical Interconnection Facilities or Production Inputs.

"Essential Contractor Deliverables" means those Contractor Deliverables, as provided in Exhibit P, the absence or incomplete nature of which after the Substantial Completion Date could adversely and materially affect the continuous efficient, effective or safe operation or reliability of the Project, or any portion thereof, for the delivery of power through the Project Substation to Owner's customers.

"Excusable Condition" means any of the following:

- (a) Owner Caused Delay; or
- (b) a Change in Law, the direct effect of which is to prevent Contractor from completing a Major Milestone by the scheduled completion date set forth in Exhibit O; or

(c) solely for purposes of resetting the Contract Price and/or Project Schedule under Section 8.1.2 for a Notice to Proceed delivered after September 30, 2020, extraordinary circumstances that are beyond the reasonable control of Contractor, other than failure to obtain NMPRC Approval, that occur after the Effective Date but prior to the Notice to Proceed Date.

"Exhibits" means each Exhibit listed in the table of contents and attached hereto as incorporated herein in its entirety by this reference.

"Final Completion" means satisfaction by Contractor or waiver by Owner of all of the conditions for Final Completion set forth in Section 15.3.

"Final Completion Date" means the date on which Final Completion of the Project occurs.

"Final Completion Expected Date" means the date that is ninety (90) days after the earlier of the Substantial Completion Date or the Substantial Completion Guaranteed Date, as such date may be modified in accordance with the terms hereof.

"Final Completion Payment" means the Milestone Payment made by Owner to Contractor in connection with Final Completion pursuant to Section 7.2.

"Force Majeure" means, except as qualified in the proviso below, any act, event or circumstance demonstrably beyond the reasonable control of, and not caused by a breach of this Contract by, Owner (in the case of an event of Force Majeure claimed by Owner) or Contractor or any Subcontractor (in the case of an event of Force Majeure claimed by Contractor) and which would not have been avoided had Owner (in the case of an event of Force Majeure claimed by Owner) or Contractor or any Subcontractor (in the case of an event of Force Majeure claimed by Contractor) used reasonable care or acted in compliance with Industry Standards, including, without limitation, the following (to the extent the following satisfy the foregoing requirements of this sentence): (a) acts of God such as droughts, floods, tornados, hurricanes, and earthquakes; (b) war (declared or undeclared), riots, hostilities, belligerence, revolution, public disorder, insurrection, rebellion, acts of the public enemy, acts of terrorism and sabotage, blockades and embargoes; (c) strikes or labor disturbances; (d) expropriation, requisition, confiscation, or nationalization; (e) export or import restrictions by any Governmental Authority; (f) closing or accidents to harbors, docks, or canals; (g) rationing or allocation imposed by law, decree, or regulation of any Governmental Authority; (h) volcano, tide, or tidal wave; (i) epidemic or quarantine; and (i) unreasonable delay or denial of any Applicable Permit by a Governmental Authority after timely application therefor; provided, however that the following events, matters or things shall not constitute an event of Force Majeure:

- (i) the absence of sufficient financial means to perform obligations;
- (ii) any labor disturbance, strike or dispute specific to Contractor's workers or personnel or specific to the Project;
- (iii) any labor disturbance, strike or dispute specific to any Subcontractor's workers or personnel performing Work at the Site or otherwise specific to the Project;

- (iv) mechanical or equipment failures unless caused by an event of Force Majeure;
- (v) failure to timely apply and diligently pursue the application for any Applicable Permit;
- (vi) the unavailability or shortages of labor or Equipment and Materials unless otherwise caused by an event of Force Majeure; and
- (vii) weather events that do not exceed the applicable NOAA 100 year average for the Site.
- "Functional Guarantees" means those guarantees defined in Exhibit I as Functional Guarantees.
- "Functional Guarantee Tests" means those tests defined in <u>Exhibit I</u> as Functional Guarantee Tests to be completed in conjunction with the Performance Tests for determining compliance with the Functional Guarantees.
- **"Functional Guarantee Tests Procedures"** means the written test procedures, standards, protective settings, and the testing program produced by Contractor and agreed to by Owner for the Functional Guarantee Tests as set forth in **Exhibit I**.
 - "Governmental Action" has the meaning set forth in Section 21.1.2.
- "Governmental Approval" means any authorization, consent, permission, approval (including an NMPRC Approval), license, ruling, permit, exemption, variance, order, judgment, instruction, condition, direction, directive, decree, declaration of or regulation by any Governmental Authority relating to the construction, development, ownership, occupation, startup, testing, operation or maintenance of the Project.
- "Governmental Authorities" means applicable national, federal, state, provincial, tribal and local governments of the United States and all agencies, authorities, departments, instrumentalities, courts, corporations, securities exchange, other authorities lawfully exercising or entitled to exercise any administrative, executive, judicial, legislative, police, regulatory or taxing authority or power, or other subdivisions of any of the foregoing having or claiming a regulatory interest in or jurisdiction over all or any portion of the Site, the Project, the Work or the Parties to this Contract, but for the avoidance of doubt, does not include the Owner.
 - "Guaranteed BESS Capacity" has the meaning given in Exhibit I, Section 1.2.
 - "Guaranteed BESS Plant Auxiliary Loads" has the meaning set forth in Exhibit I.
- "Guaranteed BESS Roundtrip Efficiency" has the meaning given in Exhibit I, Section 1.2.
 - "Guaranteed Storage Hours" has the meaning set forth in Exhibit I.

"Hazardous Materials" means any substance, material, gas, or particulate matter that is regulated by any local Governmental Authority, any applicable state, or the United States of America as an environmental pollutant or dangerous to public health, public welfare, or the natural environment including, without limitation, protection of non-human forms of life, land, water, groundwater, and air, including any material or substance that is (i) defined as "toxic," "polluting," "hazardous waste," "hazardous material," "hazardous substance," "extremely hazardous waste," "solid waste" or "restricted hazardous waste" under any provision of local, state, or federal law; (ii) petroleum, including any fraction, derivative or additive; (iii) asbestos; (iv) polychlorinated biphenyls; (v) radioactive material; (vi) designated as a "hazardous substance" pursuant to the Clean Water Act, 33 U.S.C. § 1251 et seq.; (vii) defined as a "hazardous waste" pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq.; (viii) defined as a "hazardous substance" pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq.; (ix) defined as a "chemical substance" under the Toxic Substances Control Act, 15 U.S.C. § 2601 et seq.; or (x) defined as a "pesticide" under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq.

"Industry Standards" or Industry Grade" means those standards of design, engineering, construction, operation, maintenance, workmanship, Equipment and Materials, and components specified in Exhibit A; provided, however, if the relevant standard is not so specified or is ambiguous therein, then "Industry Standard" or "Industry Grade" shall mean the relevant practices, procedures and methods generally applied in or approved by a significant portion of the electric generation industry of the United States (including utilities and independent power producers) for similar newly constructed power plants that, at any particular time, in the exercise of reasonable judgment in light of the facts which are known or which reasonably could have been known at the time a decision is made, would be expected to accomplish the desired result in a manner consistent with good engineering design practices, Applicable Laws, Applicable Permits, safety, reliability, environmental protection, geographical considerations, economy, expedition, and other standards established for such work. "Industry Standards" or "Industry Grade" is not intended to be limited to the optimum standards, practices, procedures, methods or acts to the exclusion of all others, but rather to be any of the good and proper standards, practices, procedures, methods and acts as described above.

"Intellectual Property Claim" means a claim or legal action for unauthorized disclosure or use of any trade secret, patent, copyright, or trademark protected by Applicable Law arising from Contractor's performance (or that of its Affiliates or Subcontractors) under this Contract that:

- (a) concerns any Equipment and Materials or other items or services, in all cases, that are provided by Contractor, any of its Affiliates, or any Subcontractor under this Contract;
- (b) is based upon or arises out of the performance of the Work by Contractor, any of its Affiliates, or any Subcontractor, including the use of any tools or other implements of construction by Contractor, any of its Affiliates, or any Subcontractor; or

- (c) is based upon or arises out of the design or construction of any item by Contractor under this Contract or the operation of any item according to directions embodied in Contractor's final process design, or any revision thereof, prepared or approved by Contractor.
- "Intellectual Property Rights" means all licenses, trade secrets, copyrights, patents, trademarks, proprietary information and other ownership rights protected by Applicable Law related to the Work or otherwise necessary for the ownership and maintenance of the Project, including, but not limited to, all Project-related documents, models, computer drawings and other electronic expressions, photographs and other expressions.
- "Key Personnel" means the natural persons named and assigned to the identified positions set forth on Exhibit J.
- "Liability Cap" means an amount equal to one hundred percent (100%) of the Contract Price (as the same may increase or decrease from time to time in accordance with the terms of this Contract).
- "LIBOR" means the London inter-bank offered rate for one-year United States Dollar deposits, as published in The Financial Times, or other replacement rate agreed to by the Parties.
 - "Lien Indemnitees" has the meaning set forth in Article 30.
- "Limited Notice to Proceed" means a notice signed by an authorized representative of Owner to Contractor authorizing Contractor to perform the Preliminary Work.
- "Loss(es)" means any and all liabilities (including but not limited to liabilities arising out of the application of the doctrine of strict liability), obligations, losses, damages, penalties, claims, actions, suits, judgments, costs, expenses and disbursements (including reasonable legal fees and expenses), and whether arising in equity, at common law, or by statute, or under the law of contracts, torts or property, of whatsoever kind and nature, including without limitation claims for property damage, and personal injury (including emotional distress), and whether or not involving damages to the Project or the Site.
 - "Major Milestone" means the milestone activities identified in Exhibit O.
 - "Materials Warranty" means the warranty of Contractor under Section 18.2.
- "Maximum Contractor Aggregate Liquidated Damages" means fifteen percent (15%) of the Contract Price.
- "Mechanical Completion" means satisfaction of the following requirements for the Project:
- (a) the Project is mechanically, electrically, and structurally constructed in accordance with the requirements of this Contract, the Statement of Work and Industry Standards, except for Non-Critical Deficiencies;

- (b) the Project and each sub-system thereof is mechanically, electrically and functionally complete and ready for initial operations, adjustment and testing, except for Non-Critical Deficiencies;
- (c) each of the Construction Tests was successfully completed in the most recently run test; and
 - (d) all initial fills are complete;
 - (e) all relays have been set and ground checks made;
 - (f) all piping has been hydro tested and flushed/cleaned as appropriate;
 - (g) all motor rotational checks are complete;
 - (h) all instrumentation calibrations are complete;
- (i) all electrical circuits have been point-to-point checked to verify correct installation and response to simulated test signals;
- (j) individual and/or integrated balance of systems and associated equipment have been tested successfully and verified to comply with support service needs of the Project; and
 - (k) the Project is ready to support commissioning activities.
- "Mechanical Completion Date" means the date on which Mechanical Completion actually occurs for the Project.
- "Milestone Payment" means a "Milestone Payment" amount set forth in the Milestone Payment Schedule in respect of a corresponding Project Milestone, as the same may be modified from time to time in connection with a modification in the Contract Price hereunder.
- "Milestone Payment Schedule" means the list and schedule of the Milestone Payments and corresponding Project Milestones set forth in Exhibit B.
 - "Minimum Performance Criteria" has the meaning given in Exhibit I, Section 1.3.
- "Minimum Performance Criteria for Final Completion" means the Noise Minimum Performance Guarantees.
- "Minimum Performance Criteria for Substantial Completion" means those minimum performance guarantees defined in $\underline{\text{Exhibit I}}$ as Minimum Performance Criteria for Substantial Completion.
- "Monthly Progress Report" means a written monthly progress report prepared by Contractor in form and content generally in accordance with Exhibit L.

- "NMPRC" means the New Mexico Public Regulation Commission or any successor agency having jurisdiction over Owner and the Project.
 - "NMPRC Approval" has the meaning set forth in Section 34.2(b).
- **"Noise Minimum Performance Guarantees"** means those performance guarantees defined in Exhibit I as Noise Minimum Performance Guarantees.
- "Non-Critical Deficiencies" means Each item of Work that Owner, the Engineer, or Contractor identifies as requiring completion or containing Defects; provided that such completion or Defects:
- (a) are not material to the safe operation of the Project for the delivery of power through Owner's transmission system to Owner's customers;
- (b) do not impair the operability, safety or mechanical or electrical integrity of the Project; and
- (c) would not reasonably be expected to cost more than One Hundred Thousand Dollars (\$100,000) in the aggregate to complete or remedy.
- "Non-Essential Contractor Deliverables" means all Contractor Deliverables other than the Essential Contractor Deliverables.
- "Notice of Final Completion" means a Notice from Contractor to Owner in accordance with Section 15.3(q) certifying that Contractor believes the Project has satisfied the requirements for Final Completion.
- "Notice of Mechanical Completion" means a Notice from Contractor to Owner in accordance with <u>Section 14.3(a)</u> certifying that Contractor believes that the Project has satisfied the requirements for Mechanical Completion.
- "Notice of Substantial Completion" means a Notice from Contractor to Owner in accordance with Section 15.2(m) certifying that Contractor believes the Project has satisfied the requirements for Substantial Completion.
- "Notice" or "notice" means a written communication between the Parties required or permitted by this Contract and conforming to the requirements of <u>Article 31</u>.
- "Notice to Proceed" or "NTP" means the notice given from Owner to Contractor directing Contractor to commence performance of the entire Work.
- "Operating Consumables" means consumable items, such as lubricants, filters, lamps, light bulbs, and other consumable equipment and materials, necessary for the operation and maintenance of the Project (excluding Production Inputs).

"Operating Personnel" means individuals trained under an Equipment manufacturer's training program and employed by or acting at the request of Owner in connection with the operation of the Project from time to time.

"Original Performance Bond Amount" has the meaning set forth in Section 4.24.1(b).

"Outstanding Balance" means the aggregate unpaid amount of the Contract Price, calculated at any given time.

"Owner" means Public Service Company of New Mexico ("PNM"), a New Mexico corporation, and its successors and permitted assigns.

"Owner Acquired Permits" means all Applicable Permits necessary for the ownership, operation and maintenance of the Project, including those permits listed as Owner Acquired Permits in Exhibit C.

"Owner Caused Delay" means a delay in Contractor's performance of any Critical Path Item to the extent actually and demonstrably caused by any of the following:

- (a) material breach of this Contract by Owner;
- (b) any unreasonable active interference by Owner with Contractor's performance of the Work;
- (c) Owner's failure to cause the Electrical Interconnection Facilities to be substantially complete and ready for interconnection by January 1, 2022, as certified by thee Transmission Provider, or failure to timely provide any Production Inputs as required under the Contract;
- (d) Owner's failure to obtain any Owner Acquired Permit (1) in final form by the applicable milestone or milestone date specified in Exhibit C or (2) in full force and effect on or prior to the date on which it is required, under this Contract and Applicable Law, to be in full force and effect, so as to permit Contractor to perform its obligations under this Contract;
- (e) an act or omission of Owner's Separate Contractors or Operating Personnel that is negligent or reckless or constitutes willful misconduct of the Owner's Separate Contractors or Operating Personnel;
- (f) Owner's failure to timely comply with any of its obligations under Sections 3.2, 3.4 and 3.5; and
- (g) Owner's failure to provide Charging Energy to the Site by the applicable date set forth in Exhibit O.

"Owner Directive" has the meaning set forth in Section 17.5.

"Owner Event of Default" has the meaning set forth in Section 20.4.

"Owner Indemnitee" has the meaning set forth in Section 25.1.

"Owner's Separate Contractors" means each contractor or other Person that is in direct or indirect contractual privity with Owner and that performs any work in respect of the Project excluding Contractor and each person in direct or indirect contractual privity with Contractor, including in such exclusion each Subcontractor, and Owner's Separate Contracts has a like meaning.

"PCS" or "Power Conditioning System" means the BESS power conditioning system utilized to convert electric power from one form to another (AC to DC, DC to AC, and/or between different voltage levels), and to condition the power quality to what is needed by the interconnected systems.

"Performance Bond" means a performance and payment bond corresponding to the Balance of Plant Activities to be provided by Contractor to Owner under the terms of Section 4.24 in the form of Exhibit M and issued by an Eligible Issuer.

"Performance Guarantees" means those performance guarantees defined in $\underline{\text{Exhibit I}}$ as Performance Guarantees.

"Performance Tests" means the BESS performance tests described in <u>Exhibit I</u> and required to determine whether the Performance Guarantees and Minimum Performance Criteria have been achieved.

"Performance Tests Procedures" means the written test procedures, standards, protective settings, and the testing program produced by Contractor and agreed to by Owner for the Performance Tests as set forth in Exhibit I.

"Permit Requirement" means any requirements or conditions on or with respect to the issuance, maintenance, renewal or transfer of any Applicable Permit or any application therefor.

"Person" means any individual, corporation, company, voluntary association, partnership, incorporated organization, trust, limited liability company, or any other entity or organization, including any Governmental Authority.

"PNM Grid" means all property and other assets other than the Project, now or hereafter existing, which are owned by the Public Service Company of New Mexico and under the operational control of Owner, and used for or directly associated with the transmission of electric power, including all additions, extensions, expansions, and improvements thereto.

"Point of Interconnection" means the Project Substation.

"Post Test Modifications" has the meaning set forth in Section 14.7.

"Preliminary Work" has the meaning set forth in Section 8.1.2.

- "Production Inputs" means Charging Energy for the testing and commissioning of the Project, as referenced in Exhibit A to the extent Exhibit A specifies that Owner is responsible for providing such item.
- "Project" means the Sandia BESS, 40 MW 2-hour storage, to be designed, procured, constructed, tested and commissioned under this Contract, together with all ancillary equipment and subsystems, including all equipment, supplies and materials required for the facility (including the Equipment and Materials), as generally described in, and including all items described, in or inferable from, this Contract and Exhibit A.
- "Project Guaranteed Dates" means the Substantial Completion Guaranteed Date, the Substantial Completion Deadline Date and the Final Completion Expected Date.
- "Project Manager" means the Project Manager designated by Contractor and approved by Owner pursuant to Section 11.6.
- "Project Mechanical Completion Date" means the date on which Mechanical Completion actually occurs for the Project.
- "Project Milestone" means one of the discrete divisions of the Work identified as a "Milestone" in the Milestone Payment Schedule.
- "Project Representative" means the Project Representative designated by Owner pursuant to Section 3.1.
- "Project Schedule" means a project schedule prepared by Contractor and approved by Owner pursuant to Section 8.4 describing the time of completion by Contractor of the Critical Path Items and completion of the Work by Contractor, as such schedule may be modified in accordance with Section 8.4.
- "Project Substation" means the existing 115 kV substation located at Sandia Substation.
 - "Punchlist" has the meaning set forth in <u>Section 15.1.2</u>.
 - "Regulatory End Date" has the meaning set forth in Section 34.2(e).
- "Remedial Plan" means a plan of Corrective Action, submitted by Contractor pursuant to Section 8.5 or Section 14.4.2 that:
- (a) if delivered prior to initial Acceptance Testing, specifies in reasonable detail the actions (including acceleration of the Work, for example, by using additional shifts, overtime, additional crews or resequencing of the Work, as applicable) the Contractor will take so that Substantial Completion may be achieved no later than the Substantial Completion Guaranteed Date (or the Substantial Completion Deadline Date if the Substantial Completion Guaranteed Date has passed at the time of submission of the Remedial Plan). For the avoidance of doubt, Contractor shall cause the Remedial Plan to be prepared so that, if the Remedial Plan is followed, it will be reasonably likely that Substantial Completion will occur by the Substantial

Completion Guaranteed Date (or the Substantial Completion Deadline Date if the Substantial Completion Guaranteed Date has passed at the time of submission of the Remedial Plan).

- (b) if delivered after initial Acceptance Testing:
- (i) specifies in reasonable detail the actions Contractor proposes to undertake to cause the Project to satisfy the Performance Guarantees; and
- (ii) specifies in reasonable detail the period of time during which Contractor proposes to undertake such actions (including any time required to re-run any applicable Acceptance Test), which period of time shall neither: (A) end after the Substantial Completion Guaranteed Date (or the Substantial Completion Deadline Date if the Substantial Completion Guaranteed Date has passed at the time of submission of the Remedial Plan); nor (B) exceed thirty (30) days after Contractor delivers such plan to Owner (or such longer period not to exceed sixty (60) days if the Corrective Action is not reasonably capable of being completed within such thirty (30) days, which period, including the sixty (60) day limitation, shall be extended by the period of time, if any, that Contractor is actually and demonstrably delayed in the performance of such Remedial Plan only to the extent of an Excusable Condition or Force Majeure); and
- (iii) demonstrates that completing such Corrective Action is reasonably likely to cause the Project to satisfy the Performance Guarantees by root cause analysis of deficiencies identified by previous testing.
- "Representatives" means the officers, directors, members, employees, legal counsel, accountants, lenders, potential lenders or equity participants, advisors, or ratings agencies and other agents or representatives of a Party or of its Affiliates and in the case of Owner, includes Owner's Separate Contractors, and in the case of Contractor, includes its Subcontractors.
 - "Requested Actions" has the meaning set forth in Section 34.2.
- "Required Manuals" means all operating data and manuals, spare parts manuals, integrated and coordinated operation and maintenance manuals and instructions, and training aids, whether created by Contractor or any Subcontractor or Vendor which are reasonably necessary to safely and efficiently commission, test, start up, operate, maintain and shut down the Project.
- "Schedule Recovery Plan" means a plan of Corrective Action submitted by Contractor pursuant to Section 8.4.2 that sets forth, in reasonable detail, the actions (including but not limited to acceleration of the Work, for example, by using additional shifts, overtime, additional crews or resequencing of the Work, as applicable) Contractor will take so that the milestone identified by Owner may be achieved no later than the scheduled completion date set forth in Exhibit O. For the avoidance of doubt, Contractor shall cause the Schedule Recovery Plan to be prepared so that, if the Schedule Recovery Plan is followed, it will be reasonably likely that the milestone will be achieved by the scheduled completion date set forth in Exhibit O.
- **"Scheduling Coordinator"** means an entity identified by PNM as a "Scheduling Coordinator."

"Site" means the location of the Work described in Exhibit A.

"Site Conditions" means the physical and other conditions at the Site and the surrounding area as a whole as of the Effective Date, including conditions relating to the environment, transportation, access, waste disposal, handling and storage of materials, the availability and quality of electric power, the availability and quality of water, the availability and quality of roads, the availability and quality of labor personnel, and local work and labor rules in effect as of the Effective Date, climatic conditions and seasons, topography, air, and water quality conditions, potable water conditions, ground surface conditions, surface soil conditions, sound attenuation, subsurface geology, general nature and quantity of surface and subsurface materials to be encountered, the geological and general subsurface conditions of the Site, all other local and other conditions which may be material to Contractor's performance of its obligations under this Contract, and the location of underground utilities, equipment and facilities needed before and during performance of Contractor's obligations under this Contract.

"Statement of Work" means the requirements regarding the Work set forth in this Contract or in Exhibit A.

"Subcontractor" means any Person, including any Vendor, other than Contractor, or Owner, that performs any portion of the Work (including any subcontractor of any tier when performing Work for the Project) in furtherance of Contractor's obligations under this Contract, and "Subcontract" has a like meaning.

"Substantial Completion" means satisfaction or waiver of all of the conditions set forth in Section 15.2.

"Substantial Completion Date" means the date on which Substantial Completion actually occurs.

"Substantial Completion Deadline Date" means the date that is ninety (90) days after the Substantial Completion Guaranteed Date, as such date may be modified in accordance with the terms hereof.

"Substantial Completion Guaranteed Date" means March 31, 2022, as such date may be modified in accordance with the terms hereof.

"Substantial Completion Delay Liquidated Damages" has the meaning set forth in Section 16.1.

"Supplier" means any Person who will supply Production Inputs to the Project.

"Supply Bond" means a performance and payment bond corresponding to the Work other than the Balance of Plant Activities, to be procured by Contractor from the BESS Vendor, but issued in favor of Owner, and provided by Contractor to Owner under the terms of Section 4.24 in the form of Exhibit M and issued by an Eligible Issuer.

"Suspensions for Cause" means any suspension under <u>Article 22</u> by Owner as a result of:

- (a) A Contractor Event of Default;
- (b) A Contractor Inchoate Default if such Contractor Inchoate Default creates imminent danger to persons or property; provided, however that such suspension shall not prevent Contractor from curing such Contractor Inchoate Default during the applicable cure period associated with the Contractor Event of Default that would result if such Contractor Inchoate Default were not cured; or
 - (c) Contractor's gross negligence or willful misconduct.

"Temporary Work" means supplies or services required for the performance of the Work but which do not form a permanent part of the completed Work, including without limitation, all temporary structures and other facilities required for the proper and safe performance and completion of the Work or that Contractor must provide for the use of Contractor or other parties, and that do not form part of the Work, including but not limited to office trailers, hoarding, fences, covered ways, temporary footways and stairs, protection for workers such as guardrails, fences, notices, temporary lights, power, water, and other consumables, utilities and services, erection structures and equipment including any shoring, falsework, forming materials, scaffolding, temporary stairs, staging, and all sanitary, safety, and first aid and fire prevention facilities of a temporary nature.

"Termination Value" means (a) the documented and aggregate value of all Work completed prior to the date of termination of this Contract (including in respect of partially completed Project Milestones and Major Milestones), (b) after the effective date of termination, an amount equal to Contractor's actual, demonstrable and reasonable direct costs (exclusive of overhead and profit) incurred in terminating the remaining Work and demobilization relating thereto, but less salvage value of materials or Equipment which Owner elects not to accept.

"Transmission Provider" means Owner, Owner's designated agent, or a third party acting in its capacity owning, controlling, or operating facilities used for the transmission of electric energy in interstate commerce and providing transmission service under the OATT and any successor entity, if applicable.

"Unconditional Waiver and Release Upon Final Payment" means a written statement, the current form of which is attached hereto as to Exhibit F-4, containing a waiver and release of liens pursuant to which a Person unconditionally waives and releases all Contractor Liens, stop notices and bond rights with respect to all Work.

"Unconditional Waiver and Release Upon Progress Payment" means a written statement, the current form of which is attached hereto as to Exhibit F-2, containing a waiver and release of liens pursuant to which a Person unconditionally waives and releases all Contractor Liens, stop notices and bond rights with respect to all Work for which Contractor requested payment in the Contractor's Invoice that immediately preceded the current Contractor's Invoice.

"Unforeseen Subsurface Site Conditions" has the meaning set forth in Section 13.3.

- "U.S. Customary System" means the primary system of weights and measures (other than the metric system) used in the United States today, which system was inherited from, but is now different from, the British Imperial System of weights and measures.
- "Vendor(s)" means persons, other than the Owner, that supply Equipment and Materials to Contractor or any Subcontractor in connection with the performance of the Work.
 - "Warranty Bond" has the meaning set forth in Section 7.9.
- "Warranty Bond Amount" means an amount equal to ten percent (10%) of the amount of the original Supply Bond.
- "Warranty Period" means the sixty (60) month period commencing on the Substantial Completion Date and, in each case, as deemed extended with respect to any given item of Work and Equipment and Materials, as specified in <u>Section 18.3</u>.
- "Water" means potable which meets the quality, flow rate and related specifications necessary to complete the Work.
- "Work" means all obligations, duties, and responsibilities assigned to or undertaken by Contractor under this Contract with respect to the Project, including all engineering, design and construction of the Project (including the Preliminary Work), all procurement and provision of Equipment and Materials, all erection and installation of Equipment and Materials, and all training, calibration, inspection, and testing included in or required for the Project (including coordinated testing of the Project with the Vendors), all as generally described in, and including all items and services described in or reasonably inferable from, Exhibit A. Where this Contract describes a portion of the Work in general, but not in complete detail, the Parties acknowledge and agree that the Work includes any work required: (a) for the design or construction of the Project in accordance with Industry Standards; or (b) for the Project to be capable of being operated in accordance with Industry Standards. Notwithstanding the foregoing, Work shall not include Electrical Interconnection Facilities or Production Inputs.

"Work Warranties" means the warranties of Contractor under Section 18.1.

- 1.2 Rules of Interpretation.
 - (a) The masculine shall include the feminine and neuter.
- (b) References to "Articles," "Sections," "Exhibits" or "Schedules" shall be to articles, sections, exhibits, or schedules of this Contract unless otherwise stated.
- (c) The Exhibits and Schedules attached hereto are incorporated in and are intended to be a part of this Contract; provided, that in the event of a conflict between the terms of any Exhibit or Schedule and the terms of this Contract, the terms of this Contract shall take precedence.
- (d) This Contract was negotiated and prepared by both Parties with the advice and participation of counsel. The Parties have agreed to the wording of this Contract and none of

the provisions hereof shall be construed against one Party on the ground that such Party is the author of this Contract or any part hereof.

- The Parties shall act reasonably and in accordance with the principles of (e) good faith and fair dealing in the performance of this Contract. Unless expressly provided otherwise in this Contract, (i) where the Contract requires the consent, approval, or similar action by a Party, such consent, approval or similar action shall not be unreasonably withheld, conditioned or delayed, and (ii) wherever the Contract gives a Party a right to determine, require, specify or take similar action with respect to a matter, such determination, requirement, specification or similar action shall be reasonable. In addition, where Contractor must obtain Owner approval, review, consent or other, similar outcome (collectively, "Approval"), the following shall apply unless a different Approval process is specifically set forth in this Agreement: when Contractor believes that the conditions for Approval have been met or Owner's Approval is otherwise required by this Agreement, Contractor shall deliver to Owner the information or other deliverable for which Approval is required. Within fifteen (15) Business Days after Owner's receipt of such information or deliverable, Owner shall either (i) Approve the same, or (ii) if the work or matter is not in accordance with the requirements of this Agreement, disapprove (or equivalent) the same and provide a detailed explanation of the reasons therefor. If Owner disapproves (or equivalent) such information or deliverable, Contractor shall correct the Defects or deficiencies identified by Owner in its disapproval (or equivalent) notice and the review procedure shall be repeated until Approval is granted. If Owner fails to disapprove (or equivalent) within fifteen (15) Business Days of receipt of Contractor delivery of the affected information or deliverable for Owner review, then same shall be deemed Approved by Owner. Notwithstanding any pending review, comment, Approval or disapproval of Owner hereunder, Contractor may proceed with the Work at its own risk unless this Agreement expressly provides otherwise.
- (f) Use of the words "include" or "including" or similar words shall be interpreted as "including but not limited to" or "including, without limitation."
- (g) Use of the words "tax" or "taxes" shall be interpreted to include taxes, fees, surcharges, and the like.

2. AGREEMENT, EXHIBITS AND CONFLICTS

- 2.1 <u>Exhibits</u>. This Contract includes the Exhibits and any schedules annexed hereto, as the same may be amended from time to time. Any reference in this Contract to an "Exhibit" by letter designation or title shall mean one of the Exhibits identified in the table of contents and such reference shall indicate such Exhibit herein.
- 2.2 <u>Terms; References</u>. Terms defined in a given number, tense, or form shall have the corresponding meaning when used in this Contract with initial capitals in another number, tense, or form. Except as otherwise expressly noted, reference to specific Articles, Sections, Subsections, and Exhibits are references to such provisions of or attachments to this Contract. References containing terms such as "hereof," "herein," "hereto," "hereinafter," and other terms of like import are not limited in applicability to the specific provision within which such references are set forth but instead refer to this Contract taken as a whole. "Includes" or

"including" shall not be deemed limited by the specific enumeration of items, but shall be deemed without limitation. The term "or" is not exclusive. Reference to a Governmental Authority shall include an entity succeeding to its functions. All documents required to be provided under this Contract shall be in English.

- 2.3 <u>Conflicts in Documentation</u>. In the event of any conflict in interpretation or inconsistencies in the Contract documents, the following precedence of interpretation shall prevail: (a) any mutually agreed Change in Work or other Contract amendment duly authorized and executed by both Parties in accordance herewith, solely with regard to the subject matter of any such Change in Work or Contract amendment; (b) <u>Articles 1</u> through <u>34</u> of this Contract, as the same may be amended from time to time; (c) <u>Exhibit A</u>; (d) <u>Exhibits B</u> and N; (e) the remaining Exhibits, which Exhibits shall be read to be consistent and complementary to the greatest extent possible.
- 2.4 <u>Documentation Format</u>. This Contract and all documentation to be supplied hereunder shall be in the English language and all units of measurement in the design process, specifications, drawings and other documents shall be specified in U.S. Customary System dimensions.

3. RESPONSIBILITIES OF OWNER

Owner shall, at Owner's cost and expense:

- 3.1 <u>Project Representative</u>. Designate (by a Notice delivered to Contractor) a Project Representative, who shall act as a single point of contact for Contractor with respect to the prosecution of the Work (but who shall not be authorized to execute or make any amendments to, or provide waivers under, this Contract, except that such Project Representative shall be authorized to execute Change in Work Forms under <u>Article 17</u>). Until delivery of Notice to Contractor of a new Project Representative, the Project Representative for Owner shall be Kevin Mataczynski.
- 3.2 <u>Operating Personnel</u>. No later than thirty (30) days prior to the anticipated Mechanical Completion Date for the Project (as determined by Owner in consultation with Contractor based on the circumstances existing at the time of determination), Owner shall provide Operating Personnel:
 - (a) for training by Contractor as provided pursuant to Section 4.17; and
- (b) to provide ordinary operating and maintenance support to Contractor for testing and commissioning of the Project.

Until Substantial Completion, the Operating Personnel made available pursuant to this Section 3.2 shall (x) provide normal operating and maintenance support (including during the Construction Tests) under the management, supervision, and direction of Contractor, but shall not be required to provide any services that would not be required for normal operation of the Project; and (y) during the Acceptance Tests, shall operate the Project, in each case (x) and (y) under the supervision and control of Contractor. The number of Operating Personnel to be

provided by Owner during such periods shall be the amount reasonably determined by Owner as necessary to support the above tasks. Notwithstanding the foregoing:

- (i) such Operating Personnel shall not be deemed employees or Subcontractors of Contractor;
- (ii) Contractor shall not direct the Operating Personnel to undertake any unusual or extraordinary operating or maintenance activities for the purposes of successfully completing any Acceptance Test; and
- (iii) Contractor shall remain solely responsible for performing the Work in accordance with this Contract, including Contractor's obligation to achieve Substantial Completion and Final Completion by the applicable Project Guaranteed Dates in accordance with the terms of this Contract.
- 3.3 <u>Ministerial Assistance; Project Information and Documents; Approvals.</u> Execute applications required to be signed by Owner and provide assistance (to be provided at no cost to Contractor) as Contractor may reasonably request in connection with obtaining any Contractor Acquired Permit. Keep Contractor informed of progress regarding the anticipated NTP effective date, and all technical aspects relating to transmission interconnection, and the fuel supply agreement. Provide all approvals of Contractor Deliverables within the time periods specified pursuant to <u>Section 12.4</u>, provided such Contractor Deliverables are timely submitted to Owner by Contractor.
- 3.4 <u>Owner Acquired Permits</u>. Obtain, with Contractor's assistance (to be provided at no additional cost to Owner), and pay for all Owner Acquired Permits. Owner will obtain all Owner Acquired Permits in final form by the applicable milestones or milestone dates specified in <u>Exhibit C</u>.
- 3.5 Access to Site. Subject to Sections 4.9 and 4.15, make the Site, including a suitable staging area, laydown area and an area for site stormwater discharge containment, all of which will be shown on Exhibit A, Appendix 1, available to Contractor and assure reasonable right of ingress and egress to and from the Site for Contractor to perform site testing work as may reasonably be necessary in connection with preparation for or performance of the Work. Following Owner's issuance of the Notice to Proceed, and subject to Sections 4.9 and 4.15 and consistent with the terms of the Applicable Permits, make the Site available to Contractor and assure reasonable rights of ingress and egress to and from the Site for Contractor for performance of the Work, including, without limitation, sufficient rights of ingress and egress to and from the Site for heavy equipment; provided, however, that Contractor shall coordinate with Owner regarding initial entry onto the Site or any part thereof and contact with the persons who own property on or near, or have granted license or easement rights in and to, the Site.
- 3.6 <u>Production Inputs.</u> Provide the Production Inputs as more fully set forth in <u>Exhibit A</u>. Notwithstanding anything in this Contract to the contrary, Contractor's sole remedy for the failure of Owner to provide or cause to be provided any of the Production Inputs in accordance with the terms of this Contract is the relief granted in <u>Section 9.4.2</u>. Without limiting the terms of this Contract, any such failure shall not be considered a breach of any

covenant, condition, representation or warranty of Owner, and shall not be construed as an Owner Event of Default.

- 3.7 <u>Electrical Interconnection Facilities</u>. Cause to be provided the Electrical Interconnection Facilities as specified in <u>Exhibit A</u>. Owner shall be responsible for coordinating and contracting for all metering and interconnection requirements necessary to connect the Project to the Point of Interconnection.
- 3.8 <u>Cooperation with Owner's Separate Contractors</u>. Cause Owner's Separate Contractors to cooperate with Contractor and the Subcontractors who may be working at or near the Site in order to assure that neither Owner nor any of Owner's Separate Contractors unreasonably hinders or increases the work being performed by Contractor and the Subcontractors.
- 3.9 <u>Scheduling Coordinator</u>. Owner, as owner of the Project, shall take all necessary actions and enter into all arrangements and agreements required to deliver power produced by the Project to the Point of Interconnection in the balancing area. Owner shall also become the Scheduling Coordinator for the Project in order to schedule energy deliveries for testing and commissioning of the Project; provided, however, that Contractor shall provide thirty (30) Days advance written notice to Owner as to when Owner's obligations as Scheduling Coordinator are expected to commence.

4. RESPONSIBILITIES OF CONTRACTOR.

In order for Contractor to complete the Work, Contractor shall:

- 4.1 <u>General Obligations</u>. Contractor shall perform, furnish, be responsible for, and pay the cost of, all of the Work, including all services, labor, Equipment and Materials (excluding the Production Inputs, and the Electrical Interconnection Facilities) and supervision necessary to provide an operable Project in accordance with the provisions of this Contract.
- 4.2 <u>Performance of Work.</u> Perform and complete all of the Work, and cause each Subcontractor to perform and complete each such Subcontractor's respective work in accordance with the terms of the Contract and in compliance with Industry Standards, Applicable Laws and Applicable Permits.
- 4.3 <u>Design and Construction of Project</u>. Engineer, design and construct the Project so that it is capable of operation, at the design levels specified in this Contract and the Statement of Work, and in compliance with Industry Standards, Applicable Laws and Applicable Permits. Contractor shall provide all necessary engineering and design services necessary to set forth in detail the specifications, drawings and requirements for the procurement of Equipment and Materials and for the construction and installation of the entire Project in a manner which satisfies the requirements of this Contract. Contractor shall preserve all permanent survey construction monuments and benchmarks during its performance of the Work.
- 4.4 <u>Temporary Facilities and Utilities</u>. Provide all temporary communication facilities, Water, electricity and sanitary utilities to be used by Contractor and Subcontractors and their respective employees through Substantial Completion as specified in the Statement of

Work. Electricity, telephone, data lines and sanitary services for the trailers shall be provided by the Contractor. All office furniture and office equipment for the trailers shall be provided by Contractor. Contractor is responsible for providing all necessary parking to support construction vehicles, Owner and Vendor vehicles and Project worker vehicles.

- 4.5 <u>Organization</u>. Maintain a qualified and competent organization at the Site with adequate capacity and numbers of construction, commissioning and testing personnel, equipment, and facilities to execute the Work in a safe, efficient, environmentally sound, and professional manner at a rate of progress in accordance with the Project Schedule.
- 4.6 <u>Permits Acquired by Contractor</u>. Obtain all Contractor Acquired Permits so that the Project can be designed, constructed, owned, operated, and maintained at the design levels specified in this Contract and the Statement of Work and in compliance with Industry Standards, Applicable Laws and the schedules set forth in this Contract.
- 4.7 <u>Maintenance of Site</u>. Maintain the Site clear of debris, waste material, and rubbish. Contractor shall dispose of such debris, waste material, and rubbish in accordance with Applicable Law.
- 4.8 <u>Price Allocation Schedule</u>. No later than sixty (60) Days prior to the anticipated achievement of Substantial Completion, provide a price allocation schedule for the Work and other information reasonably necessary for Owner to maintain segregated accounts for its tax records and fixed asset records (including any FERC accounting requirements). Contractor shall provide an updated price allocation schedule for the Project prior to Final Completion.
- 4.9 Safeguards. Comply with the requirements of Exhibit A and provide, and cause its Subcontractors (as applicable) and Vendors (as applicable) to provide, all necessary and adequate safeguards at the Site for the protection of the Work, the Project, the Vendors and their personnel, other work installed by Owner and all other persons and other property (including existing structures) located on the Site including that owned by Contractor, Owner, and others connected to the Work, including an unmanned security fence pursuant to a safety and security assurance program reasonably acceptable to Owner, or otherwise reasonably required to prevent physical loss and damage including vandalism, theft, malicious mischief, and danger to the Project or personnel. Within thirty (30) days after the Notice to Proceed Date, Contractor shall provide a Notice to Owner describing the safety and security assurance program to be used by Contractor in the performance of the Work. Owner shall have the right to promptly review and comment on such program as described in such Notice from Contractor; provided, however, that Contractor shall remain solely responsible for performing such Work in accordance with this Contract. If Owner provides any comments with respect to such safety and security assurance program to Contractor, then Contractor shall incorporate changes into the safety and security assurance program addressing such comments, and resubmit the safety and security assurance program to Owner. Such resubmission of the safety and security assurance program shall not be considered a Change in Work. Contractor shall perform the Work in accordance with Contractor's approved safety and security assurance program. Contractor shall promptly provide Owner with:

- (a) written accident reports for lost time accidents that occur at the Site prepared in accordance with the safety and security assurance program approved by Owner pursuant to this <u>Section 4.9</u>; and
- (b) copies of all written communications with Governmental Authorities and insurance companies (including any notices) with respect to accidents that occur at the Site, and thereafter provide such written reports relating thereto as Owner may reasonably request.

Owner shall provide site-specific training information for Contractor to incorporate into its safety and security assurance program. Contractor and its Subcontractors shall abide by Owner's security procedures, rules and regulations and properly display identification badges at all times while on Owner's premises. In addition, Contractor and its Subcontractors shall comply with reasonable health and safety requirements established from time to time by Owner at the Site.

- 4.10 Expediting. Arrange for complete handling of all Equipment and Materials to the extent required under Article 32, and construction equipment, including inspection, expediting, shipping, loading, unloading, customs clearance, receiving, storage, and claims. All Equipment and Materials and, to the extent required by Article 32, shall be stored and maintained in storage in accordance with the applicable manufacturer's recommendations. Contractor shall be responsible for loading and customs clearance of Equipment at any of the Vendor facilities and shipping Equipment to the Site.
- 4.11 <u>Temporary Work.</u> Provide all Temporary Work, supplies, construction utilities and facilities, special tools, consumable materials, fuels and commissioning supplies reasonably necessary or appropriate for the construction, testing, commissioning, and operation and maintenance of the Project until achievement of Substantial Completion. By delivery of a Notice to Owner prior to the disposition of any surplus, used construction materials, or supplies remaining on the Site after the Substantial Completion Date (other than materials and supplies necessary to achieve Final Completion), Contractor shall give Owner the option to purchase each such item at a price not exceeding Contractor's cost therefor, less the reduction in the reasonable value of such item as a result of Contractor's use of such item. Owner shall exercise such right, if it so elects, within thirty (30) days after receipt of such Notice.
- 4.12 Operating Consumables. (a) Provide all Operating Consumables necessary or appropriate for the construction, testing, commissioning, operation or maintenance of the Project until Contractor achieves Substantial Completion; (b) at Substantial Completion, replace any inventory of Operating Consumables used by Contractor; and (c) provide to Owner, at least ninety (90) days prior to the Substantial Completion Date, a detailed list of potential suppliers of all Operating Consumables.
- 4.13 Applicable Laws/Permits. Upon request from time to time by Owner, promptly provide all technical support and information, and other reasonably requested information, to enable Owner to apply for and obtain Owner Acquired Permits. Comply in all respects with all Applicable Laws and Applicable Permits relating to the Project, the Site, and the performance of the Work, and perform the Work so that, upon Substantial Completion, the Project shall meet, and will be capable of being operated in compliance with, all requirements of Applicable Laws and Applicable Permits and using methods and Equipment and Materials that satisfy Industry Standards.
- 4.14 <u>Quality Assurance Meetings</u>. To supplement Monthly Progress Reports, allow Owner and the Engineer to participate in construction status meetings. Contractor shall have such meetings no less than one per week with its Subcontractors.
- 4.15 Access. Use only the entrance(s) to the Site specified by Owner for ingress and egress of all personnel, Equipment and Materials and vehicles. Contractor shall perform the Work consistent and in accordance with Owner's ownership, license and easement rights in and to the Site that are disclosed to Contractor in writing by Owner. Contractor shall observe access routes, entrance gates or doors, parking and temporary storage areas as designated by Owner. Under no circumstances shall Contractor's or its Subcontractors' personnel cause their respective vehicles or equipment to enter, be moved, handled, maintained or stored upon any area not authorized by Owner.

4.16 Data; Drawings. Provide all operating data and preliminary, construction and final as-built drawings necessary to safely and efficiently start up, test, operate, shut down, and maintain the Project (including those set forth in Exhibit A). Contractor shall furnish or cause its Subcontractors to furnish, the services of all personnel, including supervisors, engineers, designers and draftsmen necessary for the preparation of all Contractor Deliverables. The design services shall include all architectural, civil, structural, mechanical, electrical, instrumentation and control work. All Contractor Deliverables shall be prepared in a form and level of completion necessary to operate the Project in accordance with Applicable Laws, Industry Standards and in accordance with the provisions of this Contract. Contractor shall accurately prepare "as-built" drawings of the Project and deliver to Owner such as-built drawings no later than ninety (90) days after Substantial Completion, which as-built drawings shall be in form and substance usual and customary for such documents. Such "as-built" drawings shall show the location of the Project and shall show all related easements, improvements, utilities and rights-of-way above and below ground, on and off the Site, as of the date of delivery of such documents. Such "as-built" drawings shall also show the dimensions and the distances to the nearest benchmarks. All drawings provided to Owner pursuant to this Contract shall be provided in hard-copy "Size E," AutoCAD, and "Adobe pdf" formats. Subject to Section 27.1, Contractor hereby assigns to Owner without reservation, all Intellectual Property Rights that are prepared specifically for Owner or in connection with the Work and required to be delivered to Owner pursuant to the terms of this Contract, including all Drawings and Specifications. Subject to Section 27.1, Contractor shall, prior to directing any Subcontractor to produce any design or engineering work in connection with the Project, obtain a valid written assignment of any necessary Intellectual Property Rights from such Subcontractor in terms substantially similar to those that obligate Contractor to Owner as expressed in this Section 4.16, which Intellectual Property Rights Contractor hereby assigns to Owner. In order to facilitate observations and inspections, Contractor shall maintain at the Site in a safe place one working copy of all Project Schedules, drawings, specifications, addenda, executed Changes in Work, graphic or written instructions, interpretations and clarifications, and all other documents related to the Work, in good order and marked currently to record all changes made during construction, together with blueprints, general arrangements, manufacturing and shop drawings, product data and samples, and copies of all electrical plumbing and public safety codes applicable to the Such documents shall be available to Owner (and the Engineer) for such parties' reference, copying and use.

4.17 <u>Training of Operating Personnel.Design and Review of Training Program</u>. Contractor shall design, and prepare a written narrative description of, the training program (in accordance with the provisions of <u>Exhibit A</u>) and the proposed written materials to be used in the training program, including coordination of training to be provided by Vendors. Contractor shall submit such description to Owner by no later than the date that is ninety (90) days before the anticipated Mechanical Completion Date of the Project (as determined by Owner based on the circumstances existing at the time of determination). Owner will review, comment on, and approve or disapprove such program in writing within thirty (30) days after such submission by Contractor. If Owner conditions its approval on reasonable changes in the program submitted by Contractor, then Contractor will effect such changes at no additional cost to Owner and resubmit the program to Owner within ten (10) days after Contractor receives Owner's

conditional approval. If Owner fails to respond within the period specified above, Owner shall be deemed to have approved the program submitted by Contractor.

- 4.17.2 Commencement of Training. Not later than the date that is one hundred twenty (120) days following the Notice to Proceed Date, Contractor shall advise Owner of the estimated date that Contractor will commence the Acceptance Tests. Contractor shall keep Owner continuously apprised of any change to such estimated commencement date. Commencing at the time specified in Section 3.2, Contractor shall train the designated Operating Personnel in the requirements for the operation and maintenance of, and safety, general process understanding and emergency procedures for, the Project and all of its sub-systems all in accordance with the training program approved by Owner pursuant to Section 4.17.1. Contractor shall coordinate with the applicable Vendors so that an integrated training curriculum is presented to such Operating Personnel. Contractor shall also train or cause the applicable Subcontractor to train the Operating Personnel on all of the major items of the equipment installed under this Contract at the Project. In particular, without limiting the generality of the foregoing, the Contractor or Subcontractor, as the case may be, which provides the control system shall train the Operating Personnel on the operation and maintenance of such equipment.
- 4.17.3 Operating and Maintenance Manuals. Contractor shall provide operating and maintenance procedures and manuals for all equipment, components, systems and subsystems in the form set forth in Exhibit A.
- 4.18 Spare Parts. Construction and Commissioning Spare Parts. Contractor shall provide all spare parts required in connection with installation, commissioning and testing of the Project and shall provide all special tools necessary for the performance of the Work and to maintain the Project, the costs of which are included in the Contract Price. Owner may make available to Contractor for Contractor's use any spare parts owned by Owner, but in no event shall Owner be liable or shall Contractor be entitled to a Change in Work in the event that the absence of any particular spare part(s) impacts the critical path of the Project. Notwithstanding the foregoing, at Substantial Completion, Contractor shall pay for or replace any spare parts used by Contractor that were originally owned by Owner with new parts identical to those parts used by Contractor pursuant to this Section.
- 4.18.2 Operating Spare Parts. No later than one hundred eighty (180) days before the date Contractor anticipates it will achieve Substantial Completion, Contractor shall be responsible for identifying an initial stock of spare parts reasonably necessary for the operation and maintenance of the Project after Substantial Completion.

Owner may procure all or a portion of such spare parts for delivery prior to Substantial Completion. Owner shall provide written notice to Contractor of its election to so procure such spare parts prior to a deadline date reasonably determined by Contractor that would assure delivery at or prior to Substantial Completion. The costs of such spare parts are not included in the Contract Price and shall be addressed as a Change in Work.

- 4.19 <u>Commissioning and Testing Personnel</u>. Contractor shall provide or cause to be provided appropriate installation, commissioning, and testing representatives from Vendors or Subcontractors of major equipment and control systems, all necessary supervising personnel, all equipment, tools, construction and temporary material and all other labor necessary for all Construction Tests, Performance Tests, Functional Guarantee Tests, and commissioning.
- 4.20 <u>PNM Grid</u>. Design and construct the Project to operate in parallel with the PNM Grid such that the maximum net electrical energy from the Project can be delivered to the Point of Interconnection and the maximum net electrical Charging Energy can be delivered to the Project by means of the Electrical Interconnection Facilities. Contractor shall coordinate with Owner in respect of the interconnection of the Project with the Electrical Interconnection Facilities to provide for proper operation of the Project and to allow delivery of electricity to the Point of Interconnection and delivery of Charging Energy from the Point of Interconnection in the capacities required under this Contract. Contractor shall also provide all assistance related to the Work or the Project as is reasonably requested by Owner in coordinating with the construction of the Electrical Interconnection Facilities.
- 4.21 <u>Non-Interference With Adjacent Properties</u>. Subject to the other terms of this Contract, Contractor shall be responsible for mitigating or correcting any damage away from the Site caused by performing the Work under this Contract. Contractor shall also be responsible for off-site lay-down areas and improvements necessary to mitigate construction impacts to owners and users of property adjacent to the Site. Contractor will utilize its own clearance/lock-out-tag-out system to establish redundant clearance points.
- 4.22 <u>Production Outputs</u>. Provide week-ahead and day-ahead expected Energy export and Charging Energy consumption during the commissioning phase of the Project.
- 4.23 <u>Information and Support.</u> Contractor shall provide to Owner at no additional cost to Owner Confidential Information (with any required supporting statements, affidavits, and other documents) required to be disclosed, and shall also provide and agree to the release of unredacted versions of Confidential Information including this Contract when (i) required under any order or subpoena of a Governmental Authority; (ii) pursuant to a confidentiality agreement entered into under a protective order of a Governmental Authority; (iii) necessary in Owner's sole discretion in connection with any Governmental Authority approval sought or filing required to be made by Owner; or (iv) required by any of Owner's lenders. Contractor shall also provide to Owner, such lenders, and insurers of the Work, at no additional cost to Owner, all information and support that may be reasonably necessary to/for Owner to: obtain approvals or Permits from any Governmental Authority; demonstrate compliance of the Work with applicable requirements of this Contract; respond to any information request or demand from any or Governmental Authority; or make any required disclosure or respond to any discovery request in any administrative or legal proceeding of any Governmental Authority.
 - 4.24 <u>Performance Bond.</u> No later than five (5) Business Days following the date on which Owner issues the Notice to Proceed Date, Contractor shall furnish to Owner (a) a Supply Bond, and (b) a Performance Bond in an amount equal to (i) the Contract Price *less* (ii) the value of the Supply Bond (the value of the Performance

Bond being "Original Performance Bond Amount"). Contractor shall obtain and maintain the Performance Bond and Supply Bond at its sole cost and expense. The Performance Bond and Supply Bond shall be in the form attached herein as <u>Exhibit</u> M.

4.24.2 Upon Substantial Completion:

(a) the value of the Performance Bond shall be reduced to ten percent (10%) of the Original Performance Bond Amount. PNM must release the Performance Bond, returning it to Contractor upon the later of (i) Final Completion or (ii) the payment by Contractor of all Buy-Down Amounts and Substantial Completion Delay Liquidated Damages (or, if applicable, the resolution of disputes regarding Buy-Down Amounts or Substantial Completion Delay Liquidated Damages and the payment by Contractor of any amounts due to PNM pursuant to such resolution); and

(b) PNM shall release the Supply Bond, returning it to Contractor or Contractor's designee.

5. COVENANTS, WARRANTIES AND REPRESENTATIONS

- 5.1 <u>Of Contractor</u>. Contractor covenants, represents, and warrants to Owner, during the term of this Contract, that:
 - 5.1.1 Organization, Standing and Qualification. Contractor is a corporation, duly organized, validly existing, and in good standing under the laws of the State of New Mexico, and has full power and authority to execute, deliver and perform its obligations hereunder and to engage in the business it presently conducts and contemplates conducting, and is and will be duly licensed or qualified to do business and in good standing under the laws of the State of New Mexico and in each other jurisdiction wherein the nature of the business transacted by it makes such licensing or qualification necessary and where the failure to be licensed or qualified would have a material adverse effect on its ability to perform its obligations hereunder.
 - 5.1.2 <u>Professional Skills</u>. Contractor has all the required authority, ability, skills, experience and capacity necessary to perform and shall diligently perform the Work in a timely and professional manner, utilizing sound engineering principles, project management procedures, construction procedures and supervisory procedures, all in accordance with Industry Standards. Contractor has the experience and skills necessary to determine, and Contractor has reasonably determined, that Contractor can perform the Work for the Contract Price.
 - 5.1.3 Enforceable Contract. This Contract has been duly authorized, executed, and delivered by or on behalf of Contractor and is, upon execution and delivery, the legal, valid, and binding obligation of Contractor, enforceable against Contractor in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency or similar laws affecting creditors' rights generally and by general equitable principles.

- 5.1.4 No Conflict. The execution, delivery and performance by Contractor of this Contract will not conflict with or cause any default under: (a) its organizational documents; (b) any indenture, mortgage, chattel mortgage, deed of trust, lease, conditional sales contract, loan or credit arrangement or other agreement or instrument to which Contractor is a party or by which it or its properties may be bound or affected; or (c) any Applicable Laws; and will not subject the Project or any component part thereof or the Site or any portion thereof to any lien other than as contemplated or permitted by this Contract.
- 5.1.5 Government Approvals. The Contractor Acquired Permits either have been obtained by Contractor and are in full force and effect on the Effective Date or Contractor will use commercially reasonable efforts to obtain such Contractor Acquired Permits so that they will be in full force and effect on or prior to the date on which they are required, under this Contract and Applicable Law, to be in full force and effect, so as to permit Contractor to commence and prosecute the Work to completion in accordance with the Project Schedule. Other than with respect to the Contractor Acquired Permits, neither the execution nor delivery by Contractor of this Contract requires the consent or approval of, or the giving of notice to or registration with, or the taking of any other action in respect of, any Governmental Authority.
- 5.1.6 No Suits, Proceedings. There are no material actions, suits, proceedings, patent or license infringements, or investigations pending or, to Contractor's knowledge, threatened against it at law or in equity before any court (United States or otherwise) or before any Governmental Authority (whether or not covered by insurance) that individually or in the aggregate could result in any materially adverse effect on the business, properties, or assets or the condition, financial or otherwise, of Contractor or in any impairment of its ability to perform its obligations under this Contract. Contractor has no knowledge of any violation or default with respect to any order, writ, injunction, or decree of any court or any Governmental Authority that may result in any such materially adverse effect or such impairment.
- 5.1.7 <u>Patents</u>. Contractor owns or has, or will have on or prior to the date on which it is required, the right to use all patents, trademarks, service marks, trade names, copyrights, licenses, franchises, and permits necessary to perform the Work without conflict with the rights of others.
- 5.1.8 Business Practices. Contractor and its representatives have not made any payment or given anything of value, and Contractor will not, and Contractor will direct its employees, agents, and Subcontractors directly contracting with Contractor, and their employees or agents to not, make any payment or give anything of value, in either case to any government official (including any officer or employee of any Governmental Authority) to influence his, her, or its decision or to gain any other advantage for Owner or Contractor in connection with the Work to be performed hereunder. None of Contractor, its Subcontractors, nor any of their employees or agents shall take any action that in any way violates the United States Foreign Corrupt Practices Act or any similar Applicable Law. Contractor shall immediately notify Owner of any violation of this covenant.

- 5.1.9 Fixed Price Obligation. Contractor acknowledges that this Contract constitutes a fixed price obligation to permit, engineer, design, procure, construct, test and commission through Final Completion the Project (including the training of the Operating Personnel), complete in every detail, within the time and for the purpose designated herein. Contractor is obligated to supply all of the Equipment and Materials (excluding the Production Inputs and the Electrical Interconnection Facilities), labor and design services and to supply and perform all of the Work, in each case as may reasonably be required, necessary, incidental, or appropriate (whether or not specifically set forth in this Contract) to complete the Work such that the Project satisfies the applicable terms, conditions, Performance Guarantees, Functional Guarantees, and other guarantees and requirements set forth in this Contract and Exhibit I, all for the Contract Price.
- 5.1.10 Owner Provided Information. Owner may provide or may have provided Contractor with copies of certain studies, reports or other information (including oral statements) and Contractor acknowledges that all such documents or information have been or will be provided as background information and as an accommodation to Contractor. Contractor further acknowledges that Owner does not make any representation or warranty with respect to the accuracy of such documents or the information (including oral statements) or opinions therein contained or expressed. Subject to Section 13.3, Contractor further represents and warrants that it is not relying on Owner for any information, data, inferences, conclusions, or other information with respect to Site Conditions, including the surface or sub-surface conditions of the Site and the surrounding areas.
- 5.1.11 Financial Condition. Contractor is financially solvent, able to pay its debts as they mature, and possessed of sufficient working capital to complete its obligations under this Contract.
- 5.1.12 <u>Licenses</u>. All Persons who have been authorized by Contractor to perform, and who do perform, any portion of the Work have and will have all business and professional certifications required by Applicable Law to perform the services under this Contract.
- 5.1.13 <u>Licensing Requirement</u>. Contractor (a) is, and through completion of the Project will be, licensed by the Contractor's State License Board in New Mexico, and (b) is licensed by the Construction and Industries Division of the New Mexico Regulation and Licensing Department, or any successor entity.
- 5.2 <u>Of Owner</u>. Owner covenants, represents, and warrants to Contractor, during the term of the Contract, that:
 - 5.2.1 <u>Organization</u>, <u>Standing and Qualification</u>. Owner is a corporation, duly formed, validly existing, and in good standing under the laws of the State of New Mexico, and has full power and authority to execute, deliver and perform its obligations hereunder and to engage in the business Owner presently conducts and contemplates conducting, and is and will be duly licensed or qualified to do business and in good

standing in each jurisdiction wherein the nature of the business transacted by it makes such licensing or qualification necessary and where the failure to be licensed or qualified would have a material adverse effect on its ability to perform its obligations hereunder.

- 5.2.2 <u>Enforceable Contract</u>. This Contract has been duly authorized, executed, and delivered by or on behalf of Owner and is, upon execution and delivery, the legal, valid, and binding obligation of Owner, enforceable against Owner in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency or similar laws affecting creditors' rights generally and by general equitable principles.
- 5.2.3 No Conflict. The execution, delivery and performance by Owner of this Contract will not conflict with or cause any default under: (a) its organizational documents; (b) any indenture, mortgage, chattel mortgage, deed of trust, lease, conditional sales contract, loan or credit arrangement or other agreement or instrument to which Owner is a party or by which it or its properties may be bound or affected; or (c) any Applicable Laws.
- 5.2.4 Governmental Approvals. The Owner Acquired Permits, other than NMPRC Approval, either have been obtained by Owner and are in full force and effect on the Effective Date or Owner will use its good faith efforts to obtain such Owner Acquired Permits so that they will be in full force and effect on or prior to the date on which they are required, under this Contract and Applicable Law, to be in full force and effect, so as to permit Contractor to perform its obligations under this Contract. Other than with respect to the Owner Acquired Permits, neither the execution nor delivery by Owner of this Contract requires the consent or approval of, or the giving of notice to or registration with, or the taking of any other action in respect of, any Governmental Authority.
- 5.2.5 No Suits, Proceedings. There are no material actions, suits, proceedings, or investigations pending or, to Owner's knowledge, threatened against it at law or in equity before any court (United States or otherwise) or before any Governmental Authority (whether or not covered by insurance) that individually or in the aggregate could result in any materially adverse effect on the business, properties, or assets or the condition, financial or otherwise, of Owner or in any impairment of its ability to perform its obligations under this Contract. Owner has no knowledge of any violation or default with respect to any order, writ, injunction, or any decree of any court or any Governmental Authority that may result in any such materially adverse effect or such impairment.
- 5.2.6 <u>Business Practices</u>. Owner will not, and Owner will direct its employees, agents, and subcontractors, and their employees and agents not to, make any payment or give anything of value to any government official (including any officer or employee of any Governmental Authority) to influence his, her, or its decision or to gain any other advantage for Owner or Contractor in connection with the Work to be performed hereunder. Neither Owner nor any of its employees or agents shall take any action that

violates the United States Foreign Corrupt Practices Act or any similar Applicable Law. Owner shall immediately notify Contractor of any violation of this covenant.

5.2.7 <u>Financial Condition</u>. Owner is financially solvent, able to pay its debts as they mature, and possessed of sufficient working capital to complete its obligations under this Contract.

6. COST OF WORK

- 6.1 <u>Contract Price</u>. As full compensation for the Work and all of Contractor's obligations hereunder, Owner shall pay to Contractor a fixed price amount of Thirty-Seven Million One Hundred Ninety-Nine Thousand One Hundred Twenty-Six Dollars (\$37,199,126) (the "<u>Contract Price</u>"), plus applicable gross receipts taxes. The Contract Price shall be changed only by the express terms set forth in this Contract including Changes in Work approved in accordance with <u>Article 17</u>, and the terms of <u>Article 22</u>, Suspension. The Contract Price shall be paid in accordance with <u>Article 7</u>.
- 6.2 All Items of Work Included. The Contract Price includes payment for: (a) all costs of Equipment and Materials (excluding the costs of Production Inputs, and the Electrical Interconnection Facilities, which costs are the exclusive responsibility of Owner), temporary equipment, labor, transportation, engineering, design and other services relating to Contractor's performance of its obligations under this Contract and the Work (including any intellectual property rights licensed under this Contract, expressly or by implication) provided by Contractor or such Subcontractors; (b) all United States federal, state, regional, and local taxes, goods and services taxes, and other sales taxes effective or enacted as of the Effective Date or thereafter, each as imposed on Contractor or its Subcontractors or the Work; (c) all other taxes, duties, levies, imposts, fees, or charges of any kind (whether in the United States or elsewhere and including, without limitation, any of the foregoing related to the importation of any items into the United States) arising out of Contractor's or any such Subcontractor's performance of the Work, including any increases thereof that may occur during the term of this Contract; and (d) any duties, levies, imposts, fees, charges, and royalties (and including, without limitation, any of the foregoing related to the importation of any items into the United States) imposed on Contractor or its Subcontractors with respect to any Equipment and Materials, labor, or services provided under this Contract. The taxes covered hereby include occupational, excise, unemployment, FICA, sales, use, ownership, value-added, gross receipts, compensating and income taxes, state and federal gasoline and fuel taxes, property taxes on Contractor's equipment, tools and supplies and any and all other taxes and duties on any item, Equipment and Materials, lease or service that is part of the Work, whether such tax is normally included in the price of such item or service or is normally stated separately, all of which shall be for the account of Contractor. The Contract Price shall not be increased with respect to any of the foregoing taxes. Notwithstanding anything to the contrary in the foregoing, each Party shall be responsible for payment of its own income taxes. Contractor shall be responsible for property taxes on all materials and equipment used and owned by Contractor.

7. TERMS OF PAYMENT

- 7.1 <u>Method of Compensation</u>. Owner shall compensate Contractor for performance of the Work in accordance with the Milestone Payment Schedule and the terms of this <u>Article 7</u>.
 - 7.1.1 <u>Invoice</u>. Other than with respect to payment for completion of the Final Completion Project Milestone (which shall be governed by <u>Section 7.2</u>), Contractor may submit a Contractor's Invoice for the completion of a Project Milestone(s) in the amount equal to the applicable Milestone Payment set forth in the Milestone Payment Schedule

and any other amounts then payable by Owner to Contractor under <u>Article 17</u> or any other provision hereof (without limiting Owner's right to dispute in good faith any amounts requested for payment). However, in the case of Contractor's completion of any Project Milestone(s) in advance of the scheduled completion date for the Project Milestone as set forth in the Milestone Payment Schedule, Contractor shall not include in a Contractor's Invoice any amounts for Milestone Payment(s) more than two (2) months in advance of the scheduled completion date for the corresponding Project Milestone set forth in the Milestone Payment Schedule. Contractor's Invoice:

- (a) shall include information reasonably required for Owner to assess the completion of the applicable Project Milestone for which Contractor is seeking a Milestone Payment, including if applicable the delivery of the Notice of Mechanical Completion in accordance with Section 14.3(a) or Notice of Substantial Completion in accordance with Section 15.2(m);
- (b) shall include an Unconditional Waiver and Release Upon Progress Payment of Contractor for payments previously made by Owner, if any, pursuant to this Contract and a Conditional Waiver and Release Upon Progress Payment of Contractor for the current payment made by Owner pursuant to this Contract; and
- (c) shall include, with respect to each Subcontractor contracting directly with Contractor and performing services at the Site, either:
- (i) an Unconditional Waiver and Release Upon Progress Payment of Subcontractor or, if such Subcontractor has completed all Work that such Subcontractor is to perform, an Unconditional Waiver and Release Upon Final Payment; or
- (ii) a bond in form and substance reasonably acceptable to Owner, which bond shall name Owner as "obligee" thereof, and which bond shall be in an amount greater than the difference of: (x) one hundred fifty percent (150%) of the total amount of such Subcontractor's subcontract or purchase order (which subcontract or purchase order Contractor shall deliver to Owner to verify the amount of such subcontract or purchase order), less (y) the amounts that such Subcontractor has previously been paid by Contractor as certified by such Subcontractor.

Contractor understands and agrees that, if any Contractor's Invoice is inaccurate or incomplete or lacks reasonable detail, specificity, or supporting documentation required by or otherwise fails to conform to this Article 7, then, to the extent of such deficiency, such Contractor's Invoice shall not constitute a valid request for payment and Owner shall so notify Contractor of the same no later than ten (10) Business Days after receipt of said invoice.

7.1.2 Payments. Within twenty-one (21) days after Owner receives a Contractor's Invoice under Section 7.1.1, Owner shall pay all amounts invoiced therein that are then owed by Owner under this Contract and not subject to a good faith dispute (where Owner has notified Contractor of such dispute within five (5) Business Days of receipt of invoice), subject, however, to any right of Owner to offset against such payment any amount then due from Contractor to Owner pursuant to Section 35.14. All payments shall be made by wire transfer to an escrow account designated by the Parties (the "Escrow Account"). However, notwithstanding anything herein to the contrary,

Owner shall not be obligated to make any Milestone Payment included in a Contractor's Invoice for a completed Milestone with a scheduled completion date set forth in the Milestone Payment Schedule that is more than two (2) months after the date of such Contractor's Invoice. Contractor agrees to pay each of its Subcontractors in accordance with the payment terms set forth in each of its subcontracts and in full compliance with Applicable Laws, including the New Mexico Prompt Payment Act.

- 7.1.3 <u>Payment for Partial Project Milestones</u>. Other than payments due under, or made in accordance with, <u>Articles 20</u> or <u>21</u>, there shall be no payment for partial completion of a Project Milestone.
- 7.2 Final Completion Payment. Subject to the provisions of Sections 7.7, 7.9, 15.1.3, 15.3, Article 16, and Section 18.7, upon the delivery of the Notice of Final Completion in accordance with Section 15.3(k), Contractor shall submit a Contractor's Invoice which shall set forth all amounts due to Contractor that remain unpaid (including the Final Completion Payment), and provided Contractor has achieved Final Completion and upon Contractor's approval of such Contractor's Invoice, Owner shall pay to the Escrow Account the Final Completion Payment and any such unpaid amounts. In such case, Owner shall make the Final Completion Payment and payment of any such unpaid amounts within twenty-one (21) days after receipt of such Contractor's Invoice if and only if Contractor has delivered the following items to Owner:
- (a) with respect to each Subcontractor contracting directly with Contractor and performing services at the Site, either:
- (i) an Unconditional Waiver and Release Upon Final Payment of Subcontractor; or
- (ii) a bond in form and substance reasonably acceptable to Owner, which bond shall name Owner as "obligee" thereof, and which bond shall indemnify and fully protect Owner against any claim by such Subcontractor with respect to its right to be paid in connection with the Project or the performance of the Work; and
- (b) with respect to Contractor, an Unconditional Waiver and Release Upon Progress Payment of Contractor for payments previously made by Owner pursuant to this Contract and a Conditional Waiver and Release Upon Progress Payment of Contractor for the current payment made by Owner pursuant to this Contract.

- 7.3 <u>Warranty Security</u>. Subject to the provisions of <u>Sections 7.7</u>, <u>7.9</u> and <u>18.7</u>, upon the expiration of the Warranty Period, Contractor shall submit a Contractor's Invoice which shall set forth the value of the outstanding warranty claims under <u>Article 18</u> which Contractor has not corrected in accordance with this Contract and are still due to Owner, and upon approval thereof by Owner (such approval not to be unreasonably withheld, conditioned or delayed), Contractor may reduce the stated value of the Warranty Bond in accordance with <u>Section 7.9</u> to an amount equal to the stated value of the Warranty Bond less the amount set forth in the Contractor's paid Invoice under this <u>Section 7.3</u> if and only if Contractor has delivered the following items to Owner:
- (a) with respect to each Subcontractor that contracted directly with Contractor and performed any Work at the Site during the Warranty Period, either:
- (i) an Unconditional Waiver and Release Upon Final Payment of Subcontractor; or
- (ii) a bond in form and substance reasonably acceptable to Owner, which bond shall name Owner as "obligee" thereof, and which bond shall indemnify and fully protect Owner against any claim by such Subcontractor with respect to its right to be paid in connection with the Project or the performance of the Work; and
 - (b) with respect to Contractor:
 - (i) a certification to the effect that:
- A. Contractor has been paid in full all amounts owing or that may become owing to Contractor with respect to the Project and the performance of the Work, and except for amounts requested in any outstanding Contractor Invoices;
- B. Contractor has paid all amounts that Contractor is required to pay in connection with the performance of the Work, including all amounts to be paid to any Subcontractor with respect to the Project and the performance of the Work; and
- (ii) an Unconditional Waiver and Release Upon Progress Payment of Contractor for payments previously made by Owner pursuant to this Contract and a Conditional Waiver and Release Upon Final Payment of Contractor for the current payment made by Owner pursuant to this Contract.

- 7.4 Method of Payment. All payments to be made to Contractor under this Contract shall be paid in Dollars and may, at Owner's option, be made in immediately available funds on the due date by Automated Clearing House or wire transfer to the Escrow Account such bank account as is designated by Contractor to Owner or, if such date is not a Business Day, on the immediately succeeding Business Day to such account as may be designated by Contractor from time to time by Notice to Owner in accordance with Article 31. All bonds to be returned by Owner under this Contract shall be returned on the date required to be returned or, if such date is not a Business Day, on the immediately succeeding Business Day, to Contractor or the Eligible Issuer for cancellation as Contractor may direct.
- 7.5 <u>Disputes.</u> Subject to <u>Section 33.4</u>, Failure by Owner to pay any amount subject to a good faith dispute (where Owner has notified Contractor of such dispute) until resolution of such dispute in accordance with this Contract shall neither in any respect alleviate, diminish, modify nor excuse the performance of, Contractor's obligations to perform hereunder, including Contractor's obligation to meet the Project Guaranteed Dates. Contractor's acceptance of any payment shall not be deemed to constitute a waiver of amounts that are then in dispute. Contractor and Owner shall use their reasonable efforts to resolve all disputed amounts reasonably expeditiously and in accordance with the provisions of <u>Section 33.4</u>. No payment made hereunder shall be construed to be acceptance or approval of that part of the Work to which such payment relates or to relieve Contractor of any of its obligations hereunder.

7.6 [Not used]

7.7 <u>Contract Interest Rate</u>. Overdue payment obligations of the Owner and the Contractor hereunder shall bear interest from the date due until the date paid at a rate the lesser of LIBOR in effect from time to time plus two percent (2.0%) per annum and the highest rate permitted by Applicable Law.

7.8 [Not Used].

- 7.9 <u>Warranty Bond</u>. Upon Final Completion of the Project, and in order to secure, in part, Contractor's performance and Warranty obligations, Contractor must deliver to Owner a performance bond (or renewal of the existing Performance Bond) for the benefit of Owner in an initial amount equal to the Warranty Bond Amount ("<u>Warranty Bond</u>"). Contractor shall obtain and maintain the Warranty Bond at its sole cost and expense. The Warranty Bond shall be in the form set forth in <u>Exhibit M</u>.
 - 7.9.1 Term of Warranty Bond. The Warranty Bond must be maintained in full force and effect at all times until One Hundred Eighty (180) days after the expiration of the Warranty Period (as the Warranty Period may be extended under Section 18.3), subject to the adjustments provided for herein. At the conclusion of the initial Warranty Period, the Warranty Bond will be reduced to an amount equal to actual and projected costs of unremedied Defects and warranty work, and an amount equal to the value of any re-performance, repair, correction, or replacement of any Work.
 - 7.9.2 <u>Draw on Warranty Bond</u>. Owner may draw upon the Warranty Bond pursuant to this Section 7.9 in the following situations:

- (a) If the Contractor fails to perform any obligations pursuant to Section 18.7 or 18.8, then Owner shall be entitled to draw upon the Warranty Bond for the amount due by Contractor.
- (b) If Contractor fails to deliver to Owner an extended, or replacement Warranty Bond if required by this Contract not less than thirty (30) Days prior to the expiration of any then current Warranty Bond then Owner shall be entitled to draw upon the Warranty Bond for the full amount.

In addition to any other remedy available to it, Owner may draw from, offset against or make demand under such security to recover any amounts owing to it arising out of the Contract, including any damages due to Owner and any amount for which Owner is entitled to indemnification under the Contract. Owner may draw from, offset against or make demand under all or any part of the amounts due to it from any form of security provided to Owner and from all such forms, in any sequence, as Owner may select

7.9.3 Release of Warranty Bond. Owner shall have no obligation to release the Warranty Bond until the end of the Warranty Period (as the Warranty Period may be extended under Section 18.3). Upon the end of the Warranty Period, Owner may draw upon the Warranty Bond for the value of any unperformed obligations of Contractor under Section 18.7 or 18.8, and shall return the Warranty Bond to Contractor if it has not been fully drawn down no later than fifteen (15) Business Days following the end of the Warranty Period.

8. COMMENCEMENT AND SCHEDULING OF THE WORK

8.1 Notice to Proceed.

- 8.1.1 Commencement and Notice to Proceed. Owner shall cooperate with Contractor to provide as much advance notice as reasonably possible to Contractor, and shall endeavor to provide no less than thirty (30) days written notice of the date it intends to issue the Notice to Proceed. The Business Day after Owner provides Contractor with a Notice to Proceed shall be the "Notice to Proceed Date". On the Notice to Proceed Date, Contractor shall continue with the performance of the Work (including any remaining Preliminary Work) in accordance with the Project Schedule and shall thereafter diligently pursue the Work assigning to it a priority that should permit the attainment of Substantial Completion on or before the Substantial Completion Guaranteed Date, and Final Completion on or before the Final Completion Expected Date.
- 8.1.2 <u>Preliminary Work to Proceed</u>. Other than as expressly set forth in the <u>Limited Notice to Proceed</u>, Contractor shall not be obligated to commence any Work prior to the issuance of a Notice to Proceed by Owner. Any Work performed by or on behalf of Contractor under a Limited Notice to Proceed ("<u>Preliminary Work</u>") shall comply with the terms of this Contract to the extent not modified by the express terms of the Limited Notice to Proceed. On the Notice to Proceed Date, Contractor and Owner agree that the Limited Notice to Proceed is hereby assumed by and incorporated into this Contract and (a) the Preliminary Work performed thereunder shall be deemed to be in

part satisfaction of Contractor's obligations hereunder, (b) all amounts paid to Contractor in accordance with the Limited Notice to Proceed shall be credited towards the Contract Price hereunder, and (c) the terms of this Contract apply to the Preliminary Work performed under the Limited Notice to Proceed.

- 8.1.3 Right to Terminate. If the Notice to Proceed has not been issued by September 30, 2020 (or such other date as may be agreed in writing by the Parties), Contractor and Owner shall each have the right to terminate this Contract upon Notice to the other Party (which termination right shall terminate upon the issuance of the Notice to Proceed). If this Contract is terminated pursuant to this Section 8.1.3 or Section 21.1, then neither Party shall have any further rights or obligations hereunder (other than such rights and obligations set forth in the aforesaid sections of the Contract or that by the express terms of this Contract survive the expiration or earlier termination of this Contract including the obligation of Owner to pay Contractor for the Preliminary Work, if any, performed prior to termination of this Contract and Termination Value resulting from such early termination, as applicable), and Contractor shall not be entitled to any other compensation for additional work performed by, or costs incurred by, Contractor.
- 8.2 <u>Contractor's Acknowledgment</u>. Contractor expressly agrees that the period of time specified to complete all Work and the timely achievement of the Project Guaranteed Dates includes allowance for reasonable coordination with Owner, the Engineer, and Owner's Separate Contractors. No claim shall be made by Contractor for hindrances or delays for any cause during the progress of the Work, except as provided under <u>Articles 9</u> and <u>17</u>.
- 8.3 <u>Prosecution of Work.</u> Contractor shall prosecute the Work in accordance with the Project Schedule. Contractor shall cause Project Mechanical Completion, Substantial Completion and Final Completion to occur on or before the applicable Project Guaranteed Date in accordance with the terms of this Contract.

8.4 Project Schedule.

8.4.1 Project Schedule Updates. The Project Schedule is as set forth in Exhibit O. Until Final Completion, Contractor shall update its Project Schedule to reflect the current status of the Work. At a minimum, the updates shall be performed and provided to Owner (in digital and hard-copy form) on a monthly basis as part of the Monthly Progress Report. Contractor shall advise Owner of any proposed Project Schedule changes of more than fifteen (15) days and the reasons therefor. Contractor shall employ a project management system satisfactory to Owner that is capable of providing schedule monitoring and analysis which shall include a comparison of the Project Schedule with the actual progress for each time period with all variances noted and shall provide such analysis and Project Schedule to Owner in a native file format, capable of manipulation by Owner, on a monthly basis. Schedule analysis shall include a determination of the impact of such variance, if material, on the Project Schedule and any action necessary to correct the variance. Utilizing the critical path method, Contractor shall continually be aware of factors that are delaying or that could delay completion of Critical Path Items by the applicable date on the Project Schedule, and Contractor shall take reasonable remedial actions within its control to eliminate or

minimize schedule delays including, without limitation, over-time for the employees of Contractor and Subcontractors and the assignment of additional personnel and/or other resources.

8.4.2 Schedule Recovery Plan. If Owner reasonably believes Contractor will not complete a Major Milestone by the scheduled completion date set forth in Exhibit O and which shall have a material impact on the Substantial Completion Guaranteed Date, for any reason that is not an Excusable Condition, Owner may notify Contractor in writing, and Contractor shall, within five (5) days of receipt of Owner's notice, provide to Owner a written Schedule Recovery Plan as necessary to minimize delay of the Project Schedule. Within five (5) days after Owner's receipt of such Schedule Recovery Plan, Owner shall deliver written comments to the Schedule Recovery Plan to Contractor. Contractor shall then resubmit a revised Schedule Recovery Plan after taking into consideration such comments as shall have been provided by Owner, as the case may be, within three (3) additional days. Upon acceptance of the Schedule Recovery Plan by Owner, Contractor shall promptly proceed with implementing the Schedule Recovery Plan and continue to diligently pursue implementation of the Schedule Recovery Plan thereafter. Approval by Owner of such Schedule Recovery Plan shall not (a) be deemed in any way to have relieved Contractor of its obligations under this Contract relating to the failure to perform the Work in accordance with the Project Schedule, (b) be a basis for an increase in the Contract Price or (c) otherwise limit the rights and remedies of Owner under this Contract. Further, Contractor acknowledges that the implementation of any such Schedule Recovery Plan may result in material additional costs and expenditures for Contractor (including by way of overtime, additional crews and/or additional shifts). Contractor agrees that it shall not be entitled to a Change in Work or any other compensation or increase in the Contract Price or any adjustment to the Project Schedule in connection with the implementation of any such Schedule Recovery Plan.

Remedial Plan. Contractor shall achieve Substantial Completion by the 8.5 Substantial Completion Guaranteed Date. Contractor shall, within five (5) days after Contractor becomes aware of actual or potential delays in the performance, progress, or completion of the Work (other than by reason of Force Majeure or Excusable Condition) that would jeopardize the achievement of a Critical Path Item in accordance with the Project Schedule, submit for approval by Owner, a Remedial Plan. Within five (5) days after receipt of the Remedial Plan, Owner shall deliver written approval or disapproval of the Remedial Plan to Contractor, the approval thereof not to be unreasonably withheld. If Owner disapproves all or any portion of the Remedial Plan, Owner shall approve those portions of the Remedial Plan that are acceptable and provide comments to those portions of the Remedial Plan that have been disapproved. Contractor shall then revise the Remedial Plan to address such comments as shall have been provided by Owner and resubmit the revised Remedial Plan for Owner's and the Engineer's further comments within five (5) additional days. Upon approval by Owner, Contractor shall promptly proceed with completing the Work in the manner specified by the Remedial Plan and with any additional work as may be required under the Remedial Plan. Contractor shall be responsible for all costs and expenses of implementing the Remedial Plan without any increase to the Contract Price. Approval by Owner of a Remedial Plan shall not be deemed in any way to relieve Contractor of its obligations under this Contract relating to the failure to achieve Substantial Completion or Final Completion by the applicable Project Guaranteed Dates, shall not be a basis for an increase in the Contract Price, and shall not limit the rights of Owner under Section 16.1 or 16.2.

- 8.6 <u>Progress Reporting</u>. Following the Notice to Proceed, Contractor shall prepare true and correct Monthly Progress Reports satisfying the requirements of <u>Exhibit L</u> and submit them to Owner within ten (10) days after the end of each calendar month through and until completion of the calendar month immediately following the Final Completion Date. In addition, Contractor shall keep, and furnish to Owner at Owner's request, such information as Owner or the Engineer may reasonably require. Contractor also shall keep daily logs at the Site and shall provide to Owner weekly reports of actual construction progress as compared with scheduled progress.
- 8.7 Meetings. Contractor shall schedule and conduct monthly meetings with Owner and (at Owner's option) the Engineer in accordance with the requirements of Exhibit A, before mobilization, at Owner's office or such other location as the Parties may agree, and after mobilization, at the Site, or such other location as the Parties may agree, for the purpose of reviewing the progress of the Work and adherence to the Project Schedule. The frequency of such meetings shall be established and modified, from time to time, by mutual agreement of the provided, however, such meetings shall occur no less frequently than monthly; provided, further, if Owner reasonably believes that Contractor will complete fewer than all of the Critical Path Items within ten (10) days after the date scheduled in the Project Schedule for such Critical Path Items to be achieved, then Owner shall be entitled to require that meetings occur as frequently as weekly. If Owner so requests, Contractor shall cause a representative of any Subcontractor to attend such meeting. After commencement of the on-site Work, Owner, Contractor, and any Subcontractor then performing Work on the Site shall each designate a representative to attend weekly meetings to review and discuss the progress of the Work. Contractor's representative at such weekly meeting shall provide a rolling two-week look ahead schedule outlining the Work to be performed at the Site during the three calendar weeks following such meeting.

8.8 Acceleration of Work.

8.8.1 Owner Directive. In accordance with the Change in Work procedure set forth in Section 17.4.1, Owner shall have the right to direct that the Work be accelerated by means of overtime, additional crews or additional shifts or resequencing of the Work notwithstanding that the Work may be progressing with or without delay in accordance with the established Project Schedule. In such an event, and subject to the last sentence of this Section 8.8.1, Contractor shall use commercially reasonable efforts to accelerate the Work as directed, and the Contract Price shall be increased by the sum of (a) the actual, demonstrable and reasonable Direct Costs (without profit, overhead or contingency) expected to be incurred by Contractor because of such acceleration, plus (b) a ten percent (10%) allowance for profit, overhead and contingency, minus any savings expected to be incurred because of such acceleration. Contractor expressly waives any other compensation therefor unless otherwise agreed by Owner in writing in advance of performing the accelerated Work; provided, that Contractor shall not be obligated to perform any accelerated Work unless and until Owner has so agreed.

8.8.2 <u>General Provisions</u>. Owner shall have the right reasonably to audit Contractor's calculated savings incurred due to Owner's acceleration. In the event of any acceleration requested pursuant to this Section, Contractor shall promptly provide a plan for such acceleration, including Contractor's recommendations for the most effective and economical acceleration. Any acceleration of the Work not specifically requested by Owner in writing shall be at Contractor's sole cost and expense.

9. FORCE MAJEURE AND EXCUSABLE CONDITION

- 9.1 Force Majeure. No delay, failure or omission to carry out or observe any of the terms, provisions, or conditions of this Contract shall give rise to any claim by either Party against any other Party hereto, or be deemed to be a breach or default of this Contract if such delay, failure or omission shall be caused by or arise out of an event of Force Majeure. No obligations of either Party that arose before the occurrence of an event of Force Majeure causing the suspension of performance shall be excused as a result of such occurrence. If Owner or Contractor is prevented, wholly or partially, from performing its obligations under this Contract by a Force Majeure Event or a Change in Law, said Party will be excused to the extent such performance is prevented by the Force Majeure Event or Change in Law. The obligation to pay money in a timely manner for obligations and liabilities that matured prior to the occurrence of an event of Force Majeure, however, shall not be subject to the Force Majeure provisions.
- Notice. If either Party's ability to perform its obligations under this 9.2 Contract is affected by an event of Force Majeure or if Contractor's ability to perform its obligations under this Contract is affected by an Excusable Condition, such Party (in the case of Force Majeure) or the Contractor (in the case of an Excusable Condition) shall, promptly, but in all cases within ten (10) Business Days after such Party becomes aware of such delay, give Notice (a "Delay Notice") to the other Party of the occurrence of such event. For the avoidance of doubt, only Contractor may issue a Delay Notice in respect of or arising out of an Excusable Condition. Within ten (10) days after delivery of such Notice, the Party claiming an event of Force Majeure or Excusable Condition shall provide reasonable evidence to the extent practicable to the other Party of the nature of the event, its anticipated duration and effect upon the performance of such Party's obligations, and any action being taken to avoid or minimize its effect. The Party claiming an event of Force Majeure or Excusable Condition shall have a continuing obligation to deliver to the other Party additional documentation and/or analysis supporting its claim regarding an event of Force Majeure or Excusable Condition promptly after such information is available to the Party claiming such event of Force Majeure or Excusable Condition. The burden of proof shall be on the Party claiming to be affected pursuant to this Section 9.2. Any delay in providing a Delay Notice or in providing supporting documentation as and when required pursuant to this Section 9.2 (other than any such delay which itself arises out of Force Majeure or an Excusable Condition) shall be deemed a waiver and release of the delayed Party's right to claim the occurrence as an event of Force Majeure or Excusable Condition, but only to the extent that such failure or delay actually prejudices the non-claiming Party. Each of the Parties acknowledges that a delay in issuing its claim may prejudice the nonclaiming Party's ability to reasonably determine whether the cost or schedule extension claimed were actually and demonstrably incurred as a result of such Force Majeure and/or Excusable Condition. Within ten (10) days after an event of Force Majeure or Excusable Condition has ended, the Party that was affected by such event of Force Majeure, or Contractor (if the

Contractor was affected by an Excusable Condition), shall give Notice to the other Party of: (i) the length of time such event of Force Majeure or Excusable Condition was in effect; (ii) in the case of an Excusable Condition or Force Majeure, the effect Contractor claims the Excusable Condition or Force Majeurehad on the Contract Price; and (iii) the effect such Party claims such event of Force Majeure or Excusable Condition had on the applicable Project Guaranteed Dates.

- 9.3 <u>Force Majeure: Scope of Suspension; Duty to Mitigate</u>. The suspension of performance due to an event of Force Majeure shall be of no greater scope and no longer duration than is required by such event. The excused Party shall use its reasonable efforts:
- (a) to mitigate the duration of, and costs arising from, any suspension or delay in the performance of its obligations under this Contract;
 - (b) to continue to perform its obligations hereunder; and
 - (c) to remedy its inability to perform.

When the affected Party is able to resume performance of its obligation under this Contract, such affected Party shall give the other Party Notice to that effect.

9.4 Contractor's Remedies.

- 9.4.1 Force Majeure. If an event of Force Majeure occurs that is claimed by Contractor and affects Contractor's ability to perform under this Contract to which Contractor is entitled to relief pursuant to this Article 9, then: (a) the Project Guaranteed Dates and all other relevant dates hereunder (including dates on the Project Schedule for performance of Critical Path Items) shall be extended by the period of time sufficient for Contractor to overcome the impact of such Force Majeure if Contractor is actually and demonstrably delayed in the performance of Critical Path Item(s), and the Project Schedule shall be correspondingly adjusted; and (b) if Contractor's costs increase despite Contractor's efforts to mitigate any such increases pursuant to the Contract, the Contract Price shall be increased by the actual and reasonably substantiated costs incurred by Contractor (including any reasonable costs incurred by Contractor in connection with the mitigation measures implemented by Contractor pursuant to the Contract); provided, in each case, that Contractor is working diligently to mitigate the impact of the event of Force Majeure.
- 9.4.2 Excusable Condition. If an Excusable Condition occurs that affects Contractor's ability to perform under this Contract to which Contractor is entitled to relief pursuant to this <u>Article 9</u>, then:
- (a) the Project Guaranteed Dates and all other relevant dates hereunder (including dates on the Project Schedule for performance of Critical Path Items) shall be extended by the period of time reasonably required for Contractor to overcome the impact of such Excusable Condition if Contractor is actually and demonstrably delayed in the performance of Critical Path Item(s), and the Project Schedule shall be correspondingly adjusted; and

(b) the Contract Price shall be increased by an amount equal to the sum of: (i) the Direct Costs actually, demonstrably and reasonably incurred by Contractor because of such Excusable Condition plus a five percent (5%) allowance for profit, overhead and contingency, minus any savings incurred because of such Excusable Condition.

Contractor expressly waives any other compensation as a result of such Excusable Condition.

10. SUBCONTRACTORS AND VENDORS

- 10.1 <u>Use of Certain Subcontractors</u>. Attached hereto as <u>Exhibit G</u> is a list of services and equipment anticipated for the execution of the Work along with Owner approved Subcontractors and Vendors. Contractor shall be required to source the noted services and equipment for the Project from this list. Should Contractor propose to add a Subcontractor or Vendor to <u>Exhibit G</u> during the term of this Contract, Contractor shall provide Notice to Owner of such proposed Subcontractor and the specific Work that such Subcontractor will provide. Within ten (10) Days of receipt of such Notice, Owner shall notify Contractor whether it approves (such approval not to be unreasonably withheld) or rejects such proposed Subcontractor. If Owner approves such proposed Subcontractor, the proposed Subcontractor shall be added to <u>Exhibit G</u> pursuant to a Change in Work.
- 10.2 No Approvals; Contractor Responsible for Work. The review by Owner of any Subcontractor under this Article 10 shall not: (a) constitute any approval of the Work undertaken by any such Person; (b) cause Owner to have any responsibility for the actions, the Work, or payment of such Person or to be deemed to be in an employer-employee relationship with any such Subcontractor; or (c) in any way relieve Contractor of its responsibilities and obligations under this Contract.
- 10.3 <u>Information; Access.</u> Contractor shall furnish such information and access relative to its Subcontractors as Owner may reasonably request.
- 10.4 <u>Terms in Subcontracts</u>. All subcontracts shall conform to the requirements of this Contract, insofar as applicable to such Subcontractor's performance of Work at the Site. All Work performed for Contractor by a Subcontractor shall be pursuant to an appropriate written agreement between Contractor and the Subcontractor which shall with respect to either (i) a Subcontractor performing Work on the Site or (ii) a Subcontractor with a Subcontract having a price of more than One Million Dollars (\$1,000,000), contain provisions that (or flowdown to such Subcontractor the following provisions that):
- (a) require such Subcontractor to make available a representative with whom the Owner may discuss questions regarding the progress of the Work being performed by the Subcontractor;
- (b) to the extent Contractor is providing spare parts prior to Final Completion as required in Exhibit A, require the affected Subcontractor to notify Contractor and Owner in the event such Subcontractor intends to discontinue supplying any functional spare parts and permit Owner to order any quantity of any of such parts at the prices therefor prevailing prior to such discontinuance of supply;

- (c) require such Subcontractor to provide and maintain adequate insurance consistent with Subcontractor's obligations related to this Contract;
- (d) subject to Applicable Laws and the terms and conditions of any applicable collective bargaining agreement, require such Subcontractor to remove any employee or independent contractor of such Subcontractor used in the Work or in such Subcontractor's warranty obligations within ten (10) days after receiving notice from Owner to remove such employee or independent contractor;
- (e) require such Subcontractor to provide Owner with reasonable access to the Work for purposes of inspection consistent with Section 12.2; and
- (f) contain a provision in the form of Exhibit K permitting its assignment to Owner, upon Owner's written request, following upon a Contractor Event of Default or termination of this Contract pursuant to 21.1.2 (Governmental Action).
- (g) Notwithstanding anything to the contrary, with respect to the BESS Vendor the provisions of this Section 10.4 regarding the flow-down of Agreement terms shall apply only to the BESS Vendor's Work performed at the Project Site or to BESS Vendor's personnel when performing Work at the Project Site. To the extent that Owner desires to inspect portions of the Work being performed off of the Project Site or the BESS Vendor's records pertaining to the Work pursuant to this Agreement, such inspection shall be on terms and at such times as are agreeable to Owner and the BESS Vendor and in the case of records shall not include any information subject to the attorney-client privilege, work product doctrine or similar concepts.

Contractor shall otherwise cause (x) all such subcontracts to reasonably preserve and protect all the rights of Owner under this Contract and to the Work to be performed under the applicable subcontract, so that the subcontracting thereof will not prejudice such rights; and (y) all Work performed under any subcontract to be performed in accordance with the applicable requirements of this Contract. No subcontract or purchase order shall bind or purport to bind Owner.

ause its Subcontractors to cooperate with Owner and other Owner's Separate Contractors who may be working at or near the Site in order to assure that neither Contractor nor any of its Subcontractors unreasonably hinders or increases, or makes more difficult than necessary, the work being performed by Owner or Owner's Separate Contractors. Owner shall cooperate and cause Owner's Separate Contractors to cooperate with Contractor and the Subcontractors who may be working at or near the Site in order to assure that neither Owner nor any of Owner's Separate Contractors unreasonably hinders or increases, or makes more difficult than necessary, the work being performed by Contractor and the Subcontractors. Without limiting the foregoing, Contractor acknowledges that Owner's Separate Contractors will be constructing, installing and completing the Electrical Interconnection Facilities at the Site while Contractor is performing the Work, and both Parties covenant to cooperate in connection therewith and to provide access to the Site, to such Subcontractors and Owner's Separate Contractors.

11. LABOR RELATIONS

- 11.1 <u>General Management of Employees</u>. Subject to <u>Section 11.5</u>, and notwithstanding the provisions of <u>Section 11.2</u>, Contractor shall preserve its rights to exercise, and shall exercise, its management rights in performing the Work.
- 11.2 <u>Labor Disputes</u>. Contractor shall use reasonable efforts to adopt policies and practices designed to avoid work stoppages, slowdowns, disputes and strikes, and to minimize the risk of labor-related delays or disruption of the progress of the Work. Contractor shall advise Owner promptly, in writing, of any actual or threatened labor dispute of which Contractor has knowledge that might materially affect the performance of the Work by Contractor or by any of its Subcontractors. Notwithstanding the foregoing, the settlement of strikes, walkouts, lockouts or other labor disputes shall be at the discretion of the Party having the difficulty.
- 11.3 <u>Personnel Documents</u>. Contractor shall ensure that all its personnel and personnel of any Subcontractors performing the Work are, and at all times shall be, in possession of all such documents (including, without limitation, visas, driver's licenses and work permits) as may be required by any and all Applicable Laws.
- 11.4 <u>Key Personnel</u>. Contractor shall provide staff to supervise and coordinate the work of Contractor and Subcontractors on the Site. The Key Personnel of Contractor shall at all times hold the positions and be dedicated to the performance of the duties described in <u>Exhibit J</u>. Any replacement of the Key Personnel of Contractor shall be subject to the prior written consent of Owner, which consent shall not be unreasonably withheld. If Owner fails to respond to a request for consent within five (5) Business Days after Contractor's request, Owner shall be deemed to have consented to the proposed individual.
- 11.5 Replacement at Owner's Request; Site Access. Promptly (and no later than one (1) Business Day) after request by Owner (such reason for the request to be in Owner's reasonable determination), Contractor shall deny access to or remove from the Site and performance of the Work, and cause any Subcontractor to deny access to or to remove from the Site and performance of the Work, and as soon as reasonably practicable, any natural person performing the Work (including any of the Key Personnel). To the extent Contractor has actual knowledge thereof, Contractor may not bring former employees of Owner (or Affiliates thereof) onto the Site in any capacity without prior written approval from Owner (such approval not to be unreasonably withheld, conditioned or delayed).
- 11.6 <u>Project Manager</u>. Contractor's Project Manager designated on Exhibit J has full responsibility for the prosecution of the Work and shall act as a single point of contact in all matters on behalf of Contractor (but who shall not be authorized to execute or make any amendments to, or provide waivers under, this Contract, except that such Project Manager shall be authorized to execute Change in Work Forms under <u>Article 17</u>).
- 11.7 <u>Labor Relations</u>. Contractor shall be responsible for all labor relations matters relating to the Work.

12. INSPECTION; EFFECT OF REVIEW AND COMMENT

12.1 Right to Reject Work. Regardless of whether payment has been made therefor, Owner shall have the right to reject, at any time prior to Substantial Completion, any portion of the Work completed before Substantial Completion that contains any Defect. Upon such rejection, Contractor shall promptly remedy, at its sole cost and expense, any Defect that is identified by Owner as giving rise to such rejection; provided, however, that if such Defect is a Non-Critical Deficiency, it may be included on the Punchlist and remedied by Contractor in accordance with Section 15.1. If such Defect is something for which Contractor or any of its Subcontractors or Vendors is not responsible, then the work involved in the remedy of such Defect will be considered a Change in Work resulting from an Owner Directive and will be subject to the terms of Section 17.5.

12.2 Inspection.

12.2.1 Contractor understands that Owner and any other person authorized in writing by Owner and their respective representatives and consultants (including the Engineer) have the right to observe and inspect the Work, which will include periodic environmental compliance audits at the Site, any item of Equipment and Materials, design, engineering, service, or workmanship to be provided hereunder and to observe all tests of the Work and the Project (including factory or other tests performed at a location other than the Site) upon mutually agreeable terms. Such persons shall have reasonable access to, by way of example, and not limitation, all drawings, calculations, procurement specifications, purchase orders (but only the non-commercial portions thereof), test procedures, measurements, laboratory analyses, quality control reports and test reports and data, including all equipment adjustment, installation, and alignment data to the extent reasonably available to Contractor and located at the Site. Upon reasonable Notice to Contractor by Owner, Contractor shall allow Owner and its representatives (including the Engineer) reasonable access at the Site to the Work (including Equipment and Materials under fabrication) and the Project. Contractor shall use commercially reasonable efforts to arrange reasonable access for Owner and its representatives (including the Engineer) to inspect Equipment and Materials at the location of fabrication and any factory or other off-Site tests conducted with respect to such Equipment and Materials. Owner also shall be entitled to inspect, review, and (as applicable) approve the Contractor Deliverables or technical details, and inspection and testing reports pertaining thereto as reasonably requested by Owner or its representatives (including the Engineer). Contractor shall comply with all inspection and testing requirements. In addition to the foregoing, upon prior written notice, Contractor agrees to permit any Governmental Authority reasonable access to the Site to inspect the Project if such inspection is reasonably required under the applicable tariff or Applicable Law. Any party arriving on Site to observe and inspect the Work shall abide by all of Contractor's safety programs and procedures, and in any case, such inspections shall not delay or interfere with the performance of the Work. In no case, however, shall Owner be responsible for any delay or interference in Contractor performing the Work due to (i) an inspection of the Work conducted by Governmental Authorities or (ii) an inspection of the Site conducted by or on behalf of Owner where Owner has a reasonable basis to believe a safety violation for which Contractor is responsible has or reasonably likely to occur with respect to the Work or the Project.

- 12.3 <u>Drawings and Specification Table</u>. Within thirty (30) days after the Notice to Proceed Date, Contractor shall provide a Notice to Owner attaching the Drawings and Specification Table identifying all Contractor Deliverables to be delivered to Owner for review, comment, and if applicable approval, in accordance with <u>Exhibit A</u>, the deadline for delivery thereof, and Owner's time period for review and comment with respect thereto. Owner shall have the right to promptly review and comment on such Drawings and Specification Table. If Owner provides any comments with respect to the Drawings and Specification Table to Contractor, then Contractor shall incorporate changes into such Drawings and Specification Table addressing such comments, and resubmit the same to Owner. Such incorporation of changes to address Owner's comments shall not be considered a Change in Work; provided, such changes are ministerial and not substantive and do not impact Contractor's cost to perform or schedule for performing the Work. If Owner fails to comment within fifteen (15) days after receipt of such Notice, then Owner (as applicable) shall be deemed to have accepted such Drawings and Specification Table.
- 12.4 Owner Review of Documents. Contractor shall submit to Owner for review hard (printed) copies and soft copies (in normal construction formats) of all Contractor Deliverables in accordance with the requirements of Exhibit A and the Drawings and Specification Table. Owner shall have the right to make all such materials available to the Engineer. Contractor shall ensure that all such items undergo a comprehensive review and approval process before submission of such items to Owner. After receipt of any Contractor Deliverable, Owner shall have the right, during the time period for Owner's review specified in the Drawings and Specification Table, to describe errors or omissions in the design identified in such Contractor Deliverable. Notwithstanding anything in Article 7 to the contrary, until Owner has completed its review, which in any case shall not exceed the time specified in Exhibit A, Section 5 for such Contractor Deliverable, Contractor shall neither: (a) issue any purchase order based on any Contractor Deliverable; nor (b) release any Contractor Deliverable for use in connection with the Work; nor (c) submit any Contractor's Invoice with respect to any Contractor Deliverable.
- 12.5 <u>Remedy of Flaws</u>. If Owner identifies any errors or omissions in the design with respect to any Contractor Deliverables submitted for review, then Contractor shall incorporate changes into such Contractor Deliverables addressing and remedying the errors and omissions and resubmit the same to Owner, and such incorporation of changes to address Owner's comments shall not be considered a Change in Work.
- 12.6 <u>Limitation on Owner's Obligations</u>. Inspection, review, approval or comment by Owner with respect to any Subcontract or any Drawings and Specifications, samples, and other documents, or any other work or services performed by Contractor or any Subcontractor or Vendor, is solely at the discretion of Owner and shall neither in any way affect or reduce Contractor's obligations to complete the Work in accordance with the provisions of this Contract nor be deemed to be a warranty, approval or acceptance by Owner with respect thereto.
- 12.7 <u>Inspection by Contractor</u>. Contractor shall perform all inspection, expediting, quality surveillance, and other like services required for performance of the Work,

including inspecting all Equipment and Materials that comprise the Project or that are to be used in the performance of the Work.

13. SITE CONDITIONS

- 13.1 <u>Site Conditions</u>. Contractor represents and warrants that it has inspected and is familiar with the Site Conditions. Solely for the purposes of Contractor's performance of the Work, and, based on Contractor's investigations, Contractor represents and warrants that it has correlated its findings and observations regarding the Site Conditions with the requirements of the Contract and, except as set forth in <u>Section 13.3</u>, the Site constitutes an acceptable and suitable site for the construction and operation of the Project in accordance with the requirements of this Contract. Contractor will provide immediate notice to Owner of the existence of any conditions at the Site that might create a safety hazard or pose a risk of harm to Owner or any of Owner's Separate Contractors' operations. Contractor subsequently will cause the Work to be performed in a manner that accounts for such conditions and as necessary to assure the safety of all persons at or near the site and to prevent damage to property and bodily injury
- 13.2 <u>Differing Site Conditions</u>. Contractor specifically acknowledges and accepts the Site Conditions and agrees that, except as set forth in <u>Section 13.3</u>, no Project Guaranteed Date shall be extended, the Contract Price shall not be modified, and Contractor shall not be entitled to request or be granted any Change in Work, as a result of any Site Conditions or any variance between the condition of the Site indicated by this Contract or expected to exist by Contractor, and the Site Conditions, including any unknown physical conditions above the surface of the ground.
- Subsurface Site Conditions. Subject to, and only if authorized under, the 13.3 second and third sentences in this Section 13.3, Contractor shall be entitled to a Change in Work for the following unexpected subsurface Site Conditions (each, an "Unforeseen Subsurface Site Condition"): (i) the presence of any Hazardous Materials at the Site (unless Contractor or any Subcontractor is responsible for the placement of or discharge of such Hazardous Materials), (ii) those Site Conditions described in Section 13.5, or (iii) any Site Condition substantially outside the initial GeoTech survey at the Site. If Contractor is actually and demonstrably delayed in the performance of Critical Path Item(s) as a result of an Unforeseen Subsurface Site Condition, the Project Guaranteed Dates and all other relevant dates hereunder (including dates on the Project Schedule for performance of Critical Path Items) shall be extended by the period of time reasonably required for Contractor to overcome the impact of such Unforeseen Subsurface Site Condition, and the Project Schedule shall be correspondingly adjusted. If the Unforeseen Subsurface Site Condition causes a demonstrable cost increase to Contractor that exceeds Ten Thousand Dollars (\$10,000) in the aggregate, then Contractor may request a Change in the Contract Price pursuant to Section 17.4.2 which shall not exceed the sum of: (i) the Direct Costs expected to be actually, demonstrably and reasonably incurred by Contractor because of such Unforeseen Subsurface Site Condition, plus (ii) a five percent (5%) allowance for profit, overhead and contingency, minus any savings expected to be incurred because of such Unforeseen Subsurface Site Condition.
- 13.4 <u>Signs</u>. Contractor shall not place or maintain, or permit to be placed or maintained, any sign, bill, or poster on or about the Site without the prior consent of Owner;

provided, however, such approval is not required to place any signs, bills or posters related to Contractor's safety and quality program or required by Applicable Law or related to Contractor's standard work protocols.

- 13.5 Archeological or Historical Finds. In the event that any relics or items with archeological or historical value or other valuable materials are discovered on the Site by Contractor or any Subcontractor or Vendor, Contractor shall immediately notify Owner and await the decision of Owner before proceeding with any further Work that might adversely impact such relics, items, or materials. Neither Contractor, nor any Subcontractor or Vendor shall have any property rights to such relics, items, or materials.
- 13.6 Security. Contractor shall construct a suitable fence around the Site. Contractor shall provide security for the Site, as well as any off-Site security reasonably necessary to protect the Work in accordance with Applicable Laws and any other reasonable requirements imposed by Owner or any Governmental Authority. The admission of Persons to the Site shall be strictly controlled by Contractor at all times, and no Person who is not required for the performance or supervision of the Work shall be admitted. Contractor agrees to comply and to require all Personnel of Contractor, Subcontractors and Vendors to comply with all Site security procedures and policies of Owner which have been notified to Contractor in writing.

14. PERFORMANCE GUARANTEES AND TESTS.

- 14.1 Performance Guarantees, Functional Guarantees, and Other Requirements. Contractor shall perform the Work so that the Project satisfies the Performance Guarantees and Functional Guarantees and other Acceptance Testing requirements set forth in Exhibit I. Subject to Section 16.2, Contractor shall demonstrate that the Project satisfies the Performance Guarantees and Functional Guarantees prior to Substantial Completion by satisfactorily running and completing the Performance Tests and Functional Guarantee Tests pursuant to the respective Performance Tests Procedures and Functional Guarantee Tests Procedures and otherwise in accordance with Exhibit I; provided, however, that Contractor shall be required to achieve the Minimum Performance Criteria for Final Completion prior to Final Completion. Pursuant to the provisions of Section 14.3(b), Contractor shall monitor, observe and collect the data produced during the Acceptance Tests. Contractor shall be responsible for all costs and expenses (except the Production Inputs) for all Acceptance Tests.
- 14.2 Acceptance Test Schedules. Contractor shall agree on Acceptance Test schedules with Owner and the Engineer at least 60 days in advance of the initiation of any Acceptance Test. When Contractor establishes the final scheduled date(s) for the Acceptance Tests required pursuant to this Contract, it shall give Owner at least ten (10) Business Days' prior Notice thereof. Contractor shall keep the Project Representative continuously apprised of the specified schedule, and changes therein, for the commencement and performance of Acceptance Tests, and shall give the Project Representative at least two (2) Business Days' prior Notice of the re-performance of any Acceptance Test.
- 14.3 <u>Mechanical Completion; Acceptance Tests</u>. After satisfaction by Contractor or waiver by Owner of the requirements to Mechanical Completion,

- (a) Contractor shall issue to Owner a Notice of Mechanical Completion stating that Contractor believes it has satisfied the requirements to Mechanical Completion, and a report of the Work completed with sufficient detail to enable Owner and the Engineer to determine whether Mechanical Completion has been achieved. Owner shall execute and acknowledge Contractor's Notice of Mechanical Completion confirming that Mechanical Completion has occurred as soon as possible, and in no event more than ten (10) Business Days after satisfaction in full by Contractor of all of the requirements to Mechanical Completion; provided, however, that the Mechanical Completion Date shall be the earlier of the date of actual satisfaction or waiver of the requirements for Mechanical Completion, not the date Owner executes and acknowledges Contractor's Notice of Mechanical Completion.
- (b) Contractor shall achieve Mechanical Completion for the Project, and shall satisfy all of its other obligations under this Contract to ensure that the Project has been completed and that all components have been properly adjusted and tested prior to conducting the Acceptance Tests. Contractor shall conduct the Acceptance Tests for the Project in accordance with the Acceptance Test Procedures and Exhibit I. Prior to Substantial Completion, Contractor shall have overall control over the Project during the performance of the Acceptance Tests and shall direct the operation of the Project during the Acceptance Tests in accordance with the Acceptance Tests Procedures and Exhibit I. The representatives of Owner and the Engineer shall have the right to be present during any Acceptance Tests performed by Contractor under this Article 14.

14.4 Non-Conforming Work/Remedial Plan.

14.4.1 At any time during and promptly after completion (whether or not successful) of the Acceptance Tests (or any re-performance of any Acceptance Test or pursuant to any Remedial Plan), Owner shall advise Contractor, and Contractor shall advise Owner, in writing of any Defect that was discovered during an Acceptance Test. Except as provided in Section 14.4.2, if Contractor is notified of or discovers any such Defect, Contractor shall, at Contractor's sole cost and expense, correct such Defect and promptly provide Notice to Owner in writing that such corrective measures have been completed. Any dispute regarding the existence or correction of any such Defect shall be resolved pursuant to Article 33.

14.4.2 If, at any time following the Substantial Completion Guaranteed Date, Contractor's results from the most recent Acceptance Tests shall have failed to satisfy the Minimum Performance Criteria, then Contractor shall (i) submit to Owner a Remedial Plan that is reasonably acceptable to Owner within ten (10) days after the date when Contractor shall have completed its initial Acceptance Tests and (ii) continuously and diligently pursue completion of the Remedial Plan at Contractor's sole cost. Contractor's delivery of a Remedial Plan shall not relieve Contractor of its obligations to pay Substantial Completion Delay Liquidated Damages under Section 16.1.

- 14.5 <u>Certificate of Completion of Acceptance Test.</u> Upon successful completion of any Acceptance Test as demonstrated by a test report delivered to Owner by Contractor, Contractor and Owner shall jointly issue a certificate that such test has been successfully completed.
- 14.6 Revenues and Costs. Any revenues generated by the Project during commissioning or the performance of any Construction Test or Acceptance Test shall be paid to and for the benefit of Owner. If a re-test is required and to the extent the Contractor or any Subcontractor was the cause of such re-test, the actual cost of the retest will be borne by Contractor. The actual cost of the re-test shall include (i) the cost of special instrumentation and equipment (including rental cost) including required calibration of the instrumentation, and (ii) personnel cost of Contractor, Subcontractor and the applicable Vendors, but shall not include the cost of any Production Inputs.

14.7 Post Test Modifications. If:

- (a) an Acceptance Test has been completed;
- (b) a certificate of completion of such Acceptance Test has been issued pursuant to Section 14.5;
- (c) Contractor or any Subcontractor makes any modification to the Project following such Acceptance Test (any such modification, a "Post Test Modification");
- (d) Contractor cannot reasonably demonstrate that such modification would not have compromised the outcome of such Acceptance Test if it had been made before the completion of such Acceptance Test;
- (e) then the Acceptance Test shall be re-run, as a condition to achieving Substantial Completion, all previous runs of such Acceptance Tests shall be void, and, if Contractor achieved Substantial Completion as a result of said prior Acceptance Tests, then Substantial Completion shall be deemed not to have occurred unless Contractor reasonably demonstrates by analysis or by performing a component test or tests that the Post Test Modification would not have had a material effect on the outcome of the prior Acceptance Test.

15. SUBSTANTIAL COMPLETION AND FINAL COMPLETION OF THE PROJECT

15.1 Punchlist.

- 15.1.1 At all times during performance of the Work, Contractor shall maintain a list setting forth parts of the Work which remain to be performed in order to confirm that the Work fully complies with the terms of the Contract. Contractor shall promptly provide a copy of such list to Owner upon request. Contractor shall make such revisions to such list as and when requested by Owner from time to time.
- 15.1.2 No later than thirty (30) days before the expected Substantial Completion of the Plant, Contractor shall prepare and submit to Owner a comprehensive

list (the "Punchlist") of minor items of Work to be completed for the Project to reach Final Completion, but which will not individually or in the aggregate, affect the safe, continuous and reliable operation of the Project or the Work, as the case may be, in accordance with Industry Standards and in compliance with all Applicable Laws. For the avoidance of doubt, the Punchlist may include only Non-Critical Deficiencies. Contractor shall make such revisions to the Punchlist as and when requested by Owner from time to time.

- 15.1.3 <u>Completion of Punchlist</u>. Contractor shall proceed promptly to complete and correct all items on the Punchlist. Failure to include an item on the Punchlist does not alter Contractor's responsibility to complete all Work in accordance with this Contract. On a bi-weekly basis after Substantial Completion, Contractor shall revise and update the Punchlist to include the date(s) that Non-Critical Deficiencies listed on such Punchlist are completed by Contractor and accepted by Owner. Notwithstanding any of the foregoing, the Non-Critical Deficiencies listed on such Punchlist shall not be considered complete until Owner shall have inspected such Non-Critical Deficiencies and acknowledged, by notation on the updated Punchlist, that such item of Work is complete.
- 15.1.4 The Parties agree that with respect to Punchlist items that remain uncompleted and which are preventing Final Completion, it may be more expedient for Owner to complete such Punchlist items, at its election and option. If the Parties agree, Owner may, in lieu of requiring Contractor to complete the Punchlist items, require Contractor to pay to Owner an amount equal to two hundred percent (200%) of the commercial value of the remaining Punchlist items as reasonably determined by the Parties. Owner shall have the right to offset such amount owed by Contractor against any amounts owed by Owner to Contractor at Final Completion, or otherwise under the Contract Documents.
- 15.2 <u>Substantial Completion</u>. Substantial Completion shall occur upon satisfaction by Contractor or waiver by Owner of the following conditions:
- (a) Contractor has paid (or credited against the Contract Price) all Substantial Completion Delay Liquidated Damages due under this Contract due and owing as of Substantial Completion;
- (b) Owner has received copies of all Contractor Acquired Permits required to be obtained by Contractor pursuant to Section 4.6 (other than such permits as the failure to obtain could not reasonably be expected to have a material adverse effect on Owner's ability to own, operate and maintain the Project at the design levels specified in this Contract and the Statement of Work), which Contractor Acquired Permits shall be in full force and effect and neither (i) subject to any legal proceeding or any unsatisfied condition that could reasonably be expected to result in material modification or revocation to any such Contractor Acquired Permit, nor (ii) under appeal, nor (iii) subject to any appeal period available under Applicable Law;
 - (c) Owner has received all Essential Contractor Deliverables;

- (d) Contractor has completed all training of Operating Personnel required under this Contract, and has certified by a Notice to Owner that such training is complete;
 - (e) Contractor has achieved Project Mechanical Completion;
- (f) all Work other than Non-Essential Contractor Deliverables and other Non-Critical Deficiencies has been completed;
- (g) all Performance Tests have been successfully completed pursuant to the Performance Tests Procedures and otherwise in accordance with Exhibit I, and either (i) the Project shall have fully satisfied the Performance Guarantees, or (ii) the Project shall have fully satisfied the Minimum Performance Criteria for Substantial Completion and Contractor shall have paid all Buy-Down Amounts due pursuant to Section 16.2 (or such Buy-Down Amounts have been credited against the Contract Price due and owing as of Substantial Completion) and all of the other requirements set forth in Section 16.2 have been satisfied, as applicable;
- (h) all Functional Guarantee Tests have been successfully completed pursuant to the Functional Guarantee Tests Procedures and otherwise in accordance with <u>Exhibit I</u>, and the Project shall have fully satisfied the Functional Guarantees;
- (i) Contractor has delivered to Owner the Acceptance Test results indicating that the Project has successfully completed each such Acceptance Test pursuant to the applicable Acceptance Test Procedures;
- (j) Contractor has delivered a certification to Owner stating that all major items of Equipment and Materials within Contractor's scope of Work have been properly installed and tested in accordance with the applicable manufacturers' recommendations and requirements in all material respects;
- (k) other than Non-Essential Contractor Deliverables, all spare parts to be purchased by Contractor pursuant to Section 4.18 have been delivered or purchased for delivery to Owner free and clear of liens (other than liens related to Owner non-payment) and all special tools included as part of the Equipment and Materials and otherwise required by Section 4.18.1 have been turned over to Owner;
- (l) Contractor has delivered to Owner the Warranty Bond in accordance with Section 7.9; and
- (m) Contractor has delivered to Owner a Notice of Substantial Completion stating that Contractor believes it has satisfied the conditions set forth in Section 15.2(a) through (1), and a report of the Work completed with sufficient detail to enable Owner and the Engineer to determine whether Substantial Completion has been achieved.

After satisfaction by Contractor or waiver by Owner of the conditions set forth in this Section 15.2, Owner shall execute and acknowledge Contractor's Notice of Substantial Completion confirming that Substantial Completion has occurred; provided, however, that the Substantial Completion Date shall be the date of actual satisfaction or waiver of the conditions set forth in this Section 15.2, not the date Owner executes and acknowledges Contractor's Notice

of Substantial Completion. Owner shall execute and acknowledge Contractor's Notice of Substantial Completion as soon as possible, and in no event more than ten (10) Business Days after satisfaction in full by Contractor of all of the conditions set forth in this Section 15.2; provided, however, it being understood and acknowledged by Owner that, notwithstanding any election by Owner to so delay executing and acknowledging such Notice of Substantial Completion or paying Contractor for achievement of Substantial Completion, (i) the Substantial Completion Date shall be the date of actual satisfaction or waiver of the conditions set forth in this Section 15.2 and (ii) Contractor shall not be obligated to pay, or otherwise be liable for, Substantial Completion Delay Liquidated Damages in respect of any day, time or period following the date of actual satisfaction or waiver of the conditions set forth in this Section 15.2. Owner agrees that it will not temporarily or permanently take over and operate the Facility prior to Contractor satisfying each of the requirements necessary for Substantial Completion other than as provided for in Section 20.1 and Article 21.

- 15.3 <u>Final Completion</u>. Final Completion shall be deemed to have occurred upon satisfaction by Contractor or waiver by Owner of the following conditions precedent:
- (a) Substantial Completion, including payment of all Substantial Completion Delay Liquidated Damages and Buy-Down Amounts;
- (b) all Performance Tests for the Minimum Performance Criteria for Final Completion have been successfully completed pursuant to the Performance Tests Procedures and otherwise in accordance with <u>Exhibit I</u>, and the Project shall have fully satisfied the Minimum Performance Criteria for Final Completion;
- (c) Owner has received copies of all Contractor Acquired Permits required to be obtained by Contractor pursuant to Section 4.6, which Contractor Acquired Permits shall be in full force and effect and neither subject to (i) any legal proceeding or any unsatisfied condition that could reasonably be expected to result in material modification or revocation to any such Contractor Acquired Permit, nor (ii) under appeal, nor (iii) subject to any appeal period available under Applicable Law;
- (d) Contractor has completed all items on the Punchlist except with respect to any item for which Owner has deducted from the Final Payment under Section 15.1.4;
- (e) Owner has received all Non-Essential Contractor Deliverables, Spare Parts lists, and other technical information each as required hereunder for Owner to operate and maintain the Project;
- (f) All Contractor's and Subcontractors' personnel, Equipment and Materials, surplus materials, waste materials, rubbish, and other Temporary Work other than those to which Owner holds title have been removed from the Site as required by Exhibit A, and any permanent facilities used by Contractor and the Site have been restored to the same condition that such permanent facilities and the Site were in on the Notice to Proceed Date, taking into account the construction of the Project, ordinary wear and tear excepted. All cleanup and disposal shall be conducted in accordance with all Applicable Laws;

- (g) Owner has received from Contractor all information requested by Owner and required for Owner's final fixed asset records (including any FERC accounting requirements) with respect to the Project in accordance with <u>Section 4.8</u>;
- (h) Contractor has delivered to Owner a certification identifying all outstanding claims of Contractor under this Contract with documentation sufficient to support such claims;
- (i) Contractor has assigned to Owner, or provided Owner, with all warranties or guarantees that Contractor received from Subcontractors to the extent Contractor is obligated to do so pursuant to Article 18;
- (j) Contractor has delivered the certifications, the lien releases from Contractor, the lien releases from Subcontractors or the bonds, all in accordance with <u>Section 7.2</u>, and has delivered such other documents and certificates as Owner has reasonably requested to ensure compliance with all applicable labor laws and regulations of United States;
- (k) any Defects found in the Work have been corrected other than any such Defects for which Contractor is actively and diligently pursuing a correction under a Work Warranty;
- (l) the Project has been constructed in accordance with the Contract and the Drawings and Specifications;
- (m) the final as-built documentation accurately reflects the Project as constructed;
- (n) the Project is capable of being operated in a safe and proper manner in accordance with Applicable Laws and Applicable Permits;
- (o) Contractor shall have delivered to Owner all operation and maintenance manuals and final documentation in accordance with the Contract;
- (p) Contractor has delivered true and correct copies of all Intellectual Property Rights and otherwise assigned such Intellectual Property Rights to Owner to the extent Contractor is obligated to do so pursuant to Article 27; and
- (q) Contractor has delivered to Owner a Notice of Final Completion stating that Contractor believes it has satisfied the provisions of Sections 15.3(a) through (p).

After satisfaction by Contractor or waiver by Owner of the conditions set forth in this Section 15.3, Owner shall execute and acknowledge Contractor's Notice of Final Completion confirming that Final Completion has occurred; provided, however, that the Final Completion Date shall be the date of actual satisfaction or waiver of the conditions set forth in this Section 15.3, not the date Owner executes and acknowledges Contractor's Notice of Final Completion. Owner shall execute and acknowledge Contractor's Notice of Final Completion as soon as possible, and in no event more than ten (10) Business Days after satisfaction in full by Contractor of all of the conditions set forth in this Section 15.3.

If Final Completion does not occur on or before the Final Completion Expected Date, in addition to any other remedy under this Contract, Owner may avail itself of any remedy available to it in law or equity.

- Substantial Completion, Contractor's Access After Substantial Completion. Following Substantial Completion, Contractor shall be responsible for coordinating remedial work with the Owner and Owner shall provide Contractor with reasonable and timely access to complete all items on the Punchlist and to satisfy the other requirements for Final Completion. The Parties expect that Contractor shall accomplish any necessary modification, repairs or additional Work with minimal interference to commercial operation of the Project and that reductions in and shutdowns of the Project's operations will be required only when necessary, taking into consideration:
 - (a) the length of the proposed reduction or shut-down, and
 - (b) Owner's obligations and liabilities to Suppliers, customers or others.

Notwithstanding the foregoing, should a reduction in or shut-down of the Project's operations be required to complete any items on the Punchlist or to satisfy the other requirements for Final Completion, then such reduction or shut-down shall be scheduled solely at the discretion of Owner, and Contractor shall use all reasonable efforts to complete such Work during such Owner scheduled reduction or shut-down. Contractor acknowledges that Owner may schedule such reduction or shut-down at any time including off-peak hours, nights, weekends and holidays.

15.5 <u>Changes in Project Guaranteed Dates</u>. Except as otherwise set forth in this Contract, no action by either Party (unless Owner and Contractor mutually agree in writing to the contrary) required or permitted under this <u>Article 15</u> shall modify the Project Guaranteed Dates.

16. DELAY DAMAGES; BUY-DOWN AMOUNTS

- 16.1 <u>Substantial Completion Delay Liquidated Damages</u>. Contractor understands that if the Substantial Completion Date does not occur on or before the Substantial Completion Guaranteed Date, Owner will suffer substantial damages, reduction of return on Owner's equity investment in the Project and other operating and construction costs and charges. Therefore, Contractor agrees that if Substantial Completion is not achieved by the Substantial Completion Guaranteed Date, then (subject to the terms of <u>Sections 15.2</u> and <u>32.2.2</u>) Contractor shall pay liquidated damages to Owner in the amount of Three Hundred Dollars (\$300) per MW of Guaranteed BESS Capacity ("<u>Substantial Completion Delay Liquidated Damages</u>") for each day (or portion thereof) by which the Substantial Completion Date is delayed beyond the Substantial Completion Guaranteed Date. Substantial Completion Delay Liquidated Damages will be capped at a value equivalent to Fifty-Five Thousand Dollars (\$55,000) per MW of Guaranteed BESS Capacity. Any amount Contractor is obligated to pay to Owner under this <u>Section 16.1</u> shall be due and payable ten (10) days after receipt of a request therefor from Owner.
- 16.2 <u>Buy-Down for Performance Tests</u>. If Contractor has completed the Acceptance Tests on or before the Substantial Completion Deadline Date, and Contractor has successfully satisfied the Performance Guarantees, then the remaining provisions of this <u>Section 16.2</u> shall no longer apply. If, on or before the Substantial Completion Deadline Date:
 - (a) Contractor has achieved Project Mechanical Completion;
- (b) Contractor has provided Owner with Notice that it will not perform any further Acceptance Tests;
- (c) Contractor's results from the most recent Acceptance Tests shall have satisfied the Minimum Performance Criteria for Substantial Completion and the Functional Guarantees; and
 - (d) one or more of the Performance Guarantees has not been satisfied;

then (subject to the terms of Section 32.2.2) Contractor shall pay the Buy-Down Amount set forth on Exhibit H based on Contractor's most recent attempted Performance Test. Owner may elect to have such payment made as a credit against the Contract Price. Upon payment of the Buy-Down Amount, the applicable Performance Guarantees shall be deemed amended to reflect the actual performance levels used in calculation of the Buy-Down Amount for all other Acceptance Tests.

16.3 <u>Sole Remedy</u>. With the exception of Contractor's absolute obligation to satisfy the Minimum Performance Criteria and Functional Guarantees during the Acceptance Tests, Owner's sole remedies for delays in achieving Substantial Completion and for the failure

of the Project to meet the Performance Guarantees during the Acceptance Tests shall be the amounts payable under Sections 16.1 and 16.2, respectively, the other remedies expressly provided for in this Article 16, and, if such delays or failure constitute a Contractor Event of Default, the remedies provided for in Sections 20.2(a)-(g). The Parties agree that Owner's actual damages, as applicable, in the event of such delays and failures would be extremely difficult or impracticable to determine and that, after negotiation, the Parties have agreed that the Substantial Completion Delay Liquidated Damages and the Buy-Down Amount are a reasonable estimate of the damages that Owner would incur as a result of such delays or failures and are in the nature of liquidated damages, and not a penalty. For the avoidance of doubt, nothing in this Section 16.3 shall limit Contractor's obligations under Article 18 and Contractor shall have an absolute obligation to satisfy (a) Project Mechanical Completion; (b) the Minimum Performance Criteria; and (c) the Functional Guarantees.

17. CHANGES IN THE WORK

- 17.1 <u>Change in Work.</u> A change in Work may result only from any of the following ("<u>Change in Work</u>"):
- (a) Changes in the Work required by Owner in writing, including an acceleration of Work in accordance with <u>Section 8.8</u> or <u>Section 17.2</u>;
- (b) The occurrence of an Excusable Condition (as and only to the extent permitted by Section 9.4.2);
- (c) The occurrence of an event of Force Majeure (as and only to the extent permitted by <u>Section 9.4.1</u>);
- (d) An Owner Directive (as and only to the extent permitted by <u>Section 17.5</u>); or
- (e) Unforeseen Subsurface Site Conditions (as and only to the extent permitted by Section 13.3); or
- (f) A Change in Work to which Contractor is otherwise expressly entitled under this Contract.

17.2 By Owner.

17.2.1 General. Owner shall have the right to make changes in the Work, within the general scope thereof, whether such changes are modifications, accelerations, alterations, additions, or deletions. All such changes shall be made in accordance with this Article 17, be documented in accordance with Section 17.4.1 and shall be considered, for all purposes of this Contract, as part of the Work. Notwithstanding the foregoing, and except as set forth in Section 8.8, Section 17.2.2, and Section 17.5, unless Contractor and Owner shall have agreed upon a Change in Work Form in accordance with the provisions of Section 17.4 or Owner shall have issued an Owner Directive, Contractor shall have no obligation to, and shall not, perform or comply with any

modification, acceleration, alteration, addition, or deletion by Owner to the Work after execution of this Contract that:

- (a) conflicts, or could conflict, with this Contract;
- (b) accelerates, or could accelerate, the Project Schedule;
- (c) affects, or could affect, the performance of the Project under the Performance Guarantees and those other requirements and guarantees set forth in Exhibit I; or
 - (d) increases, or could increase, the costs of the Contractor.
 - 17.2.2 <u>Change in Work for Optional Spare Parts</u>. In the event that Owner elects to cause Contractor to procure operating spare parts pursuant to <u>Section 4.18.2(b)</u>, then the Contract Price shall be adjusted as provided in <u>Section 17.4.1.1</u> and Contractor expressly waives any other compensation as a result of such Change in Work (including, but not limited to, any adjustment to the Project Schedule (and the Substantial Completion Guaranteed Date and Final Completion Expected Date referenced therein)).
 - 17.3 Not Used.
 - 17.4 Procedures.
 - 17.4.1 <u>Preparation of Change in Work Form Due to Acceleration, Owner Initiated Change in Work.</u>
 - 17.4.1.1 <u>Contractor's Estimate</u>. If Owner provides Notice to Contractor that Owner is considering a Change in Work permitted pursuant to <u>Sections 4.18.2</u>, <u>8.8</u> or <u>17.2</u>, then Contractor shall, as soon as practicable, prepare a Change in Work Form, which shall include, subject to the remaining provisions of this <u>Section 17.4.1</u>, a detailed proposal for such Change in Work, together with a detailed explanation and basis thereof, of:
- (a) the change, if any, to the Project Schedule and the Project Guaranteed Dates associated with such Change in Work (subject to Section 17.2.2); and
- (b) the increase, if any, in the cost and time required to complete the Work on the Change in Work Form.

Contractor's proposed change in the Contract Price for such Change in Work shall not exceed the sum of: (i) the Direct Costs expected to be actually, demonstrably and reasonably incurred by Contractor because of such Change in Work <u>plus</u> (ii) a five percent (5%) contingency for profit, overhead and contingency, <u>minus</u> any savings expected to be incurred because of such Change in Work. The adjustment in the Contract Price and Project Schedule and the Project Guaranteed Dates specified in this <u>Section 17.4.1.1</u> shall be the sole adjustment related to such Change in Work unless stated otherwise therein.

17.4.1.2 <u>Execution of Change in Work Form</u>. If Contractor and Owner reach agreement on the matters listed in the Change in Work Form submitted by

Contractor pursuant to this <u>Section 17.4.1</u>, then Contractor shall execute such Change in Work Form and Owner shall sign "Accepted by Owner" on such Change in Work Form and execute such Change in Work Form (indicating any amendments necessary to reflect the agreement of the Parties).

17.4.2 <u>Preparation of Change in Work Form Due to an Excusable Condition</u>, Event of Force Majeure, Unforeseen Subsurface Site Conditions or Other Entitlement.

17.4.2.1 <u>Contractor's Estimate</u>. If Contractor provides Notice of, becomes aware of, or is entitled to, a Change in Work permitted pursuant to <u>Sections 17.1(b)</u>, (c) or (e), then Contractor shall as soon as practicable serve Notice thereof to Owner, and Contractor shall, as soon as practicable, prepare a Change in Work Form, which form shall include, subject to the remaining provisions of this <u>Section 17.4.2</u>, a detailed estimate for such Change in Work, together with a detailed explanation thereof, of:

- (a) (i) with respect to a Change in Work under <u>Section 17.1(c)</u>, <u>Section 17.1(e)</u>, the change, if any, to the Project Schedule and the Project Guaranteed Dates to which Contractor is entitled under <u>Section 9.4.1</u>, <u>Section 9.4.2</u>, or <u>Section 13.3</u>, respectively, or (ii) with respect to a Change in Work under <u>Section 17.1(f)</u>, if Contractor is actually and demonstrably delayed in the performance of Critical Path Item(s) by such Change in Work, the extension of the Project Schedule and Project Guaranteed Dates sufficient for Contractor to overcome the impact of such Change in Work, provided Contractor is working diligently to mitigate the impact of such Change in Work; and
- (b) Contractor's proposed change in the Contract Price for such Change in Work, which change shall not exceed the sum allowed under Section 9.4.1, Section 9.4.2, or Section 13.3 with respect to a Change in Work under Section 17.1(c), Section 17.1(b) or Section 17.1(e), respectively, or the sum of the following with respect to any Change in Work under Section 17.1(f): (i) the Direct Costs expected to be actually, demonstrably and reasonably incurred by Contractor because of such Change in Work plus (ii) a five percent (5%) allowance for profit, overhead and contingency, minus any savings expected to be incurred because of such Change in Work.

The adjustment in the Contract Price and the Project Schedule and the Project Guaranteed Dates specified in this <u>Section 17.4.2.1</u> shall be the sole adjustment related to such Change in Work unless stated otherwise therein. The Contractor's estimate for the Change in Work shall utilize the Contractor's rate schedule in <u>Exhibit D</u>.

17.4.2.2 Execution of Change in Work Form. If Contractor and Owner reach agreement on the matters listed in the Change in Work Form submitted by Contractor pursuant to this Section 17.4.2, then Contractor shall execute such Change in Work Form and Owner shall sign "Accepted by Owner" on such Change in Work Form and execute such Change in Work Form (indicating any amendments necessary to reflect the agreement of the Parties). If the Parties cannot reach agreement on the matters listed in the Change in Work Form submitted pursuant to this Section 17.4.2, then such matter shall be referred to dispute resolution under Article 33 unless an Owner Directive is issued under Section 17.5.

17.4.3 No Obligation or Payment Without Executed Change in Work Form. IN NO EVENT SHALL CONTRACTOR BE ENTITLED TO UNDERTAKE OR BE OBLIGATED TO UNDERTAKE A CHANGE IN WORK UNTIL CONTRACTOR HAS RECEIVED A CHANGE IN WORK FORM SUBMITTED BY CONTRACTOR AND ACCEPTED BY OWNER AND, EXCEPT AS SET FORTH IN SECTION 17.5 OR IN ORDER TO RESPOND TO ANY EMERGENCY, IN THE ABSENCE OF SUCH SIGNED CHANGE IN WORK FORM, IF CONTRACTOR UNDERTAKES ANY CHANGES IN THE WORK, THEN CONTRACTOR SHALL MAKE ANY SUCH CHANGES AT CONTRACTOR'S SOLE RISK AND EXPENSE AND SHALL NOT BE ENTITLED TO ANY PAYMENT HEREUNDER FOR UNDERTAKING SUCH CHANGES.

- 17.5 Owner Directives. If Contractor and Owner are unable to agree on the matters described in the Change in Work Form submitted by Contractor pursuant to Section 17.4.1, then Contractor shall perform the Work as modified by the contemplated change if Owner so directs in writing and such change is not illegal, does not affect the safe performance of the Work, does not require or cause the Contractor to otherwise be in breach of this Contract, and is not inconsistent with the fundamental nature of this Project as a battery energy storage facility (an "Owner Directive"). In such an event:
- (a) the Contract Price shall be increased by the sum of: (i) the Direct Costs actually, demonstrably and reasonably incurred by Contractor because of such Change in Work plus (ii) a five percent (5%) allowance for profit, overhead and contingency, minus any savings expected to be incurred because of such Change in Work, and Owner shall pay such amount net 21 days from invoice as said costs are incurred; and
- (b) the Critical Path Items on the Project Schedule and the Project Guaranteed Dates shall be equitably adjusted to allow Contractor to overcome the impact, if any, of such Owner Directive.

Contractor expressly waives any other compensation as a result of such Owner Directive unless otherwise stated therein.

- 17.6 <u>Express Waiver</u>. Except as may be expressly set forth in <u>Sections 8.8</u>, 9.4.1, 9.4.2, 13.3, 17.4 and 17.5, Contractor expressly waives any other change in the Project Schedule, the Project Guaranteed Dates and the Contract Price or any other compensation for any Change in Work executed pursuant to the provisions of <u>Article 17</u>.
- 17.7 No Suspension. Contractor shall not suspend the Work pending resolution of any proposed Change in Work unless directed by Owner in writing in accordance with Article 22, except (i) as specifically provided for in Section 20.5(a) herein or (ii) with respect to a Change in Work that (A) is a prohibited Owner Directive under the first sentence of Section 17.5 or (B) Contractor cannot reasonably perform any other Work until such prohibited Owner Directive is resolved.

18. WARRANTIES CONCERNING THE WORK

- 18.1 <u>Work Warranties</u>. Contractor warrants to Owner with respect to the Project (the "<u>Work Warranties</u>") that all Work (other than Work covered by the Materials Warranty), including the construction and design of the Project and the installation of the Equipment and Materials:
 - (a) shall be in accordance with Industry Standards;
 - (b) shall be free from Defects;
- (c) shall conform to all applicable requirements of the Contract, <u>Exhibit A</u>, any Applicable Law and the Applicable Permits; and
 - (d) shall be fit for use as a battery energy storage facility.
- 18.2 <u>Materials Warranty</u>. Contractor further warrants that all Equipment and Materials and other items furnished by Contractor and any Subcontractors and Vendors hereunder (the "Materials Warranty"):
 - (a) shall be new and of good and suitable quality when installed;
- (b) shall conform to the requirements of the Contract, <u>Exhibit A</u>, any Applicable Law and the Applicable Permits;
- (c) once paid for in full by Owner, shall be free from any charge, lien, security interest or other encumbrance imposed by Contractor or any Subcontractor, except for items in dispute; and
- (d) shall be free of any Defects including Defects in design, materials or fabrication.
- 18.3 <u>Warranty Period</u>. Contractor shall have no liability under <u>Sections 18.1</u> or <u>18.2</u> with respect to any matter with respect to which Owner first notifies Contractor after the end of the Warranty Period (as such period may be extended in accordance with the terms hereof); provided, however, that the Warranty Period for any item or part required to be repaired,

corrected or replaced following a warranty claim that is made during the original Warranty Period shall be extended from the time such repair, correction or replacement is complete for a period equal to the original Warranty Period for such item or part, but in no event shall such extended Warranty Period exceed twelve (12) months after expiration of the original Warranty Period. Subject to the terms hereof, Contractor shall perform all warranty work so that the respective repair or replacement parts are complete and reasonably expected to perform satisfactorily for a reasonable period of time after the date of repair, correction or replacement.

- 18.4 <u>Enforcement After Expiration</u>. Commencing on the expiration of the Warranty Period, or such later date as is provided in <u>Section 18.3</u>, Contractor shall provide reasonable assistance to Owner, on a reimbursable basis, in enforcing representations, warranties, and guarantees made by a Subcontractor or Vendor, when and as reasonably requested by Owner. In addition, prior to the expiration of the Warranty Period, or such later date as is provided in <u>Section 18.3</u>, Owner, at its option and upon prior written Notice to Contractor, may enforce the particular warranty, the Work Warranty or the Materials Warranty against any Subcontractor or Vendor if
 - (a) a Contractor Event of Default exists.
- 18.5 <u>Exclusions</u>. The Work Warranties and Materials Warranty shall not apply to:
- (a) Damage to or Defects in any Work, or Equipment and Materials, to the extent such damage or Defect is caused by:
 - (i) Owner's failure to operate and maintain such Equipment and Materials or the Work in accordance with the recommendations set forth in the Required Manuals but only if such failure occurs after Substantial Completion;
 - (ii) operation of such Equipment and Materials or the Work in a manner inconsistent with the operating specifications for such Equipment and Materials or Work as set forth in the Required Manuals but only if such failure occurs after Substantial Completion;
 - (iii) the use of spare parts and normal consumables in the repair or maintenance of such Equipment and Materials or Work that are not in accordance with specifications and recommendations set forth in the Required Manuals but only if such failure occurs after Substantial Completion;
 - (iv) normal wear and tear, but only if such failure occurs after Substantial Completion,
 - (v) an event of Force Majeure (which excludes warranty failure hereunder);
 - (vi) the negligence or willful misconduct of Owner, Owner's Separate Contractors or Operating Personnel; or

(vii) repair or modification of such Equipment and Materials or Work contrary to Contractor's expressly provided recommendations, which is performed by someone other than Contractor or its Subcontractors.

Notwithstanding the foregoing, damage caused by Contractor or Operating Personnel while under the direction of Contractor shall be the responsibility of Contractor, unless such damage is due to or arises out of the Operating Personnel's negligence or willful misconduct.

18.6 <u>Subcontractor and Vendor Warranties.</u>

18.6.1 Without in any way derogating from Contractor's own representations and warranties and its Performance Guarantees and Functional Guarantees and other testing requirements and guarantees set forth in Exhibit I with respect to all of the Work, Contractor shall obtain warranties in the form of Exhibit Q with a warranty period of no less than five (5) years from the Vendor(s) for the BESS (the "Manufacturer's Limited Warranty,") and Contractor shall use commercially reasonable efforts to obtain warranties for all other Work (including Equipment and Materials) furnished or performed by each Subcontractor or Vendor on similar terms as this Article 18, use commercially reasonable efforts to obtain from all Subcontractors and Vendors any representations, warranties, guarantees, and obligations offered by such Subcontractors and Vendors and to negotiate the longest practical warranty periods at no additional cost with respect to design, workmanship, Equipment and Materials, and other items furnished by such Subcontractors and Vendors. Contractor hereby assigns to Owner all representations, warranties, guarantees, and obligations of all Subcontractors and Vendors, effective upon the earlier of the end of the Warranty Period or termination or expiration of this Contract. Contractor shall deliver to Owner promptly following execution thereof duly executed copies of all contracts containing such representations, warranties, guarantees, and obligations; provided, however, that pricing terms may be redacted.

18.6.2 Remote Monitoring; Use of Monitoring Data. In order to provide the Manufacturer's Limited Warranty, the BESS Vendor requires the ability to (a) remotely monitor performance of the BESS, and (b) provide remote firmware and software upgrades to the BESS. Owner hereby consents to the BESS Vendor performing such remote monitoring and providing such firmware and software upgrades as such Vendor reasonably deems appropriate. Any information obtained by the BESS Vendor through remote monitoring of the BESS that falls within the parameters stated to be made available to customers as set forth in Exhibit R shall be owned by Owner, shall be Confidential Information of Owner for purposes of this Agreement, and shall be made available by the BESS Vendor to Owner on request, in a reasonably accessible format. Owner hereby grants to the BESS Vendor an irrevocable, perpetual worldwide, royalty-free license to use of all data obtained via the remote monitoring of the Project and the BESS (i) to perform its obligations under the Manufacturer's Limited Warranty, (ii) to improve the BESS Vendor's products and services generally (including by performing analyses on such information), and (iii) to aggregate with other data. Notwithstanding anything to the contrary in this Agreement, public disclosure of such information by the BESS Vendor is permitted if Owner could not reasonably be identified from the publicly disclosed information. Any information obtained by the BESS Vendor through remote monitoring of the BESS that falls outside the parameters stated to be made available to customers in the Communication Interface Manual shall be owned by BESS Vendor, shall be Confidential Information of the BESS Vendor, and shall not be required to be made available by the BESS Vendor to Owner.

18.7 Correction of Defects.

18.7.1 Generally. Owner shall promptly provide Notice to Contractor upon discovery that any of the Work fails to satisfy the Work Warranty or the Materials Warranty prior to the end of the applicable Warranty Period, including any extensions of the Warranty Period pursuant to Section 18.3. Contractor shall, at its own cost and expense (including overtime), re-perform any necessary engineering and purchasing relating to such Work, and shall pay the cost of removing any Defect and the cost of replacement thereof, including, without limitation, necessary disassembly, transportation, reassembly and retesting, as well as reworking, repair or replacement of such Work, disassembly and reassembly of piping, ducts, machinery, Equipment or other Work as necessary to give access to improper, defective or non-conforming Work and correction, removal or repair of any damage to other work or property that is included as part of the Work and that arises from the Defect as shall be necessary to cause the Work and the Project to conform to the Work Warranty or Materials Warranty. Within five (5) days after receipt by Contractor of a Notice from Owner specifying a failure of any of the Work to satisfy Contractor's Work Warranty or the Materials Warranty and requesting Contractor to correct the failure, Contractor and Owner shall reasonably agree when and how Contractor shall remedy such failure. Notwithstanding the foregoing and subject to Section 18.7.2.2, if any of the Work shall fail to satisfy Contractor's Work Warranty or the Materials Warranty, and such failure endangers human health or property or materially and adversely affects the operation of the Project, then Contractor shall correct the failure as soon as is reasonably practicable.

18.7.2 Owner Performance.

18.7.2.1. <u>Upon Contractor's Request.</u> Notwithstanding the foregoing, Contractor may request Owner to perform all or any portion of Contractor's obligations with respect to any warranty claim, and, if Owner desires (in its sole discretion) to perform such obligations, Owner shall perform such obligations for Contractor's account (including, without limitation, drawing from Warranty Bond provided pursuant to <u>Section 7.9</u> to pay for costs and expenses incurred in performing such obligations). Owner shall have no liability to Contractor in respect of the performance of such obligations and (subject to <u>Section 18.5</u>) such performance by Owner shall in no way limit Contractor's continuing warranty obligations hereunder.

18.7.2.2. Failure of Contractor to Perform Warranty Work. If Contractor does not use commercially reasonable efforts to proceed to complete warranty work approved by Owner pursuant to Section 18.7.1 within the agreed time, or if Contractor and Owner fail to reach such an agreement within such five (5) day period set forth in Section 18.7.1, then Owner shall have the right to perform the necessary remedy, or have third parties perform the necessary remedy, and Contractor shall bear the Direct Costs demonstrably and reasonably incurred by

Owner for reasons attributable to Contractor (which may include, without limitation, Owner drawing from the Warranty Bond provided pursuant to Section 7.9 to pay for these costs incurred in performing such remedy). In the event any of the Work fails to satisfy the Work Warranty or the Materials Warranty during the applicable Warranty Period and any such failure occurs under circumstances in which there is an imminent and material threat to human health, the environment, or property and Contractor is not immediately available, then Owner may perform such warranty work and Contractor shall bear the Direct Costs demonstrably and reasonably incurred by Owner (including, without limitation, drawing from the Warranty Bond provided pursuant to Section 7.9 to pay for these costs incurred in performing such obligations). Neither Owner nor any such third parties shall have any liability to Contractor in respect of their performance of such obligations and (subject to Section 18.5) such performance by Owner shall in no way limit Contractor's continuing warranty obligations hereunder. In the event Owner performs any of the warranty work pursuant to this Section 18.7.2.2 then within sixty (60) days of completing the Work, and prior to drawing from the Warranty Bond, Owner shall provide Contractor with an invoice and supporting documentation evidencing the Direct Costs in performing the Work. Nothing in this Section 18.7.2.2 is intended or shall be deemed to be a waiver or modification of Owner's rights relating to the Warranty Bond.

18.7.3 Acceptance Tests. If, during the Warranty Period, Contractor shall change, repair or replace any Work or Equipment and Materials, Owner, in its reasonable discretion, may require Contractor to conduct and satisfactorily complete any Acceptance Test with respect to the affected Equipment and Materials; provided, however, in connection with any re-performance of an Acceptance Test pursuant to this Section 18.7.3, an appropriate degradation allowance with respect to the performance of such Equipment and Materials shall be made for the fact that such Equipment and Materials may have operated prior thereto. If after running a Performance Test or Functional Guarantee Test pursuant to this Section, the results of such Performance Test or Functional Guarantee Test indicate a degradation in the performance (as measured against the test results used to satisfy the Performance Guarantees or Functional Guarantees prior to Substantial Completion or Final Completion, as applicable, and adjusted consistent with the degradation allowed) or fails to satisfy any other Acceptance Test, then Contractor shall repair, correct or replace such affected Work or Equipment and Materials and re-run such Acceptance Test until the performance is at a level consistent with the performance on the Substantial Completion Date or Final Completion Date, as applicable (as adjusted consistent with the degradation allowed). Owner shall be responsible for all costs incurred by Contractor in conducting any Acceptance Test required by Owner under this Section 18.7.3, unless the results of such Acceptance Test indicate said degradation or failure in the Equipment, in which case Contractor will be responsible for all costs of conducting the Acceptance Test.

18.8 Chronic Failure Repairs/Root Cause Analysis. If the Work (or any portion thereof) experiences two (2) or more of the same failures of the Work Warranty or the Materials Warranty for the same type of Work or Materials, as applicable, within any one hundred eighty (180) consecutive day period during the Warranty Period or if any Remedial Plan determines the existence of a design-based failure in the Work (or any portion thereof) (any such set of failures, a "Chronic Failure"), Contractor shall: (i) investigate the cause of such Chronic Failure by conducting a rigorous process (including a root cause analysis) of evaluating the

evidence and the physical sequence of events involving the Contractor, Owner, and/or (at the Contractor's sole discretion) any third party expert(s) to determine the underlying reason for such Chronic Failure or the factor(s) the absence of which would have avoided the such Chronic Failure, and Contractor shall provide the results of such investigation and process to Owner upon their completion; and (ii) make such reperformance, repairs, replacements, or adjustments necessary to correct the cause of the Chronic Failure as shall be necessary to cause the Work and the Project to conform to the Work Warranty or Materials Warranty.

18.9 Limitations on Warranties.

FOR WARRANTIES EXCEPT THE **EXPRESS** AND REPRESENTATIONS SET FORTH IN THIS CONTRACT (INCLUDING IN ANY EXHIBIT HERETO), CONTRACTOR DOES NOT MAKE ANY OTHER EXPRESS OR ORAL WARRANTIES OR REPRESENTATIONS, OR ANY REPRESENTATIONS, OF ANY KIND **IMPLIED** WARRANTIES OR WHATEVER, AND NO IMPLIED, STATUTORY, OR COMMON LAW WARRANTY OF ANY KIND, INCLUDING MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, SHALL APPLY.

19. EQUIPMENT IMPORTATION; TITLE

19.1 <u>Importation of Equipment and Materials</u>. Contractor, at its own cost and expense, shall make all arrangements, including the processing of all documentation, necessary to import into the United States, Equipment and Materials to be incorporated into the Project, and any other equipment and other items necessary to perform the Work, and shall coordinate with the applicable Governmental Authority in achieving clearance of United States customs for all such Equipment and Materials and other items. In no event shall Owner be responsible for any delays in customs clearance or any resulting delays in performance of the Work.

19.2 Title.

- 19.2.1 Subject to <u>Article 30</u>, upon the achievement of Substantial Completion Contractor warrants good title, free and clear of all liens, claims, charges, security interests, and encumbrances whatsoever, to all Equipment and Materials and other items furnished by it or any of its Subcontractors that become part of the Project.
- 19.2.2 Subject to Article 30, upon the achievement of Substantial Completion, title to all Equipment and Materials and other items that become part of the Project shall pass to Owner free and clear of all liens, claims, charges, security interests, and encumbrances.
- 19.2.3 The transfer of title shall in no way affect Owner's rights as set forth in any other provision of this Contract. Contractor shall have care, custody, and control of all Equipment and Materials and other items and exercise due care with respect thereto until the time set forth in Section 19.4 below.
- 19.3 <u>Protection</u>. For the purpose of protecting Owner's interest in all Equipment and Materials and other items with respect to which title has passed to Owner

pursuant to Section 19.2 but that remain in possession of another party, Contractor shall take or cause to be taken all steps reasonably necessary under the laws of the appropriate jurisdiction(s) to protect Owner's title and to protect Owner against claims by other parties with respect thereto; provided, however, that Contractor shall assist Owner when any filing with any security interest registry is necessary to protect Owner's title or to protect Owner against claims by other parties; and provided, further, that it shall be Owner's responsibility to make any such filings.

19.4 <u>Owner Possession</u>. Owner shall take care, custody and control, and otherwise take complete possession of the Project (including taking on all risk of loss therefor) at Substantial Completion.

20. DEFAULT

- 20.1 <u>Contractor Events of Default</u>. Contractor shall be in material default of its obligations pursuant to this Contract upon the occurrence of any one or more events of default set forth below (each, a "<u>Contractor Event of Default</u>"):
- (a) Contractor or its parent corporation or guarantor makes an assignment for the benefit of creditors, admits in writing its inability to pay its debts as they become due, files a voluntary petition in bankruptcy, is adjudicated as bankrupt or insolvent; files a petition or answer seeking for Contractor any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any present or future statute, law, or regulation; Contractor files any answer admitting or not contesting the material allegations of a petition filed against Contractor (as applicable) in any such proceeding, or Contractor seeks, consents to, or acquiesces in, the appointment of any trustee, receiver, custodian, or liquidator of Contractor or of all or any substantial part of Contractor's properties; or Contractor's directors, or shareholders take action to dissolve or liquidate the Contractor;
- (b) involuntary petitions in bankruptcy are brought against Contractor or an answer proposing the adjudication of Contractor as a debtor or bankrupt or proposing Contractor's liquidation or reorganization pursuant to any applicable bankruptcy law is filed in any court and Contractor consents to or acquiesces in the filing thereof or such petition or answer is not dismissed within sixty (60) days after the filing thereof;
- (c) any material representation or warranty made by Contractor herein was materially false or misleading when made and Contractor fails to remedy such false or misleading representation or warranty, and to make Owner whole for any consequences thereof, within thirty (30) days after Contractor receives a Notice from Owner with respect thereto;
- (d) Contractor assigns or transfers this Contract or any right or interest herein, except as expressly permitted under Article 28;
- (e) (i) Contractor fails to maintain any insurance coverages required of it in accordance with Article 23 and (ii) (A) Contractor fails to remedy such failure within five (5) Days after Contractor receives a Notice from Owner with respect thereto, or (B) if such failure is not capable of being cured within such five (5) Day period but Contractor has commenced the cure within such period, is diligently pursuing it and has stopped the affected portion of the Work, Contractor fails to remedy such failure within an additional twenty-five (25) days.

Contractor's stoppage of the Work pursuant to this <u>Section 20.1(e)</u> shall not entitle it to any adjustments to the Contract Price or the Project Guaranteed Dates unless otherwise specified in this Contract;

- (f) Contractor fails to perform or observe in any respect any provision of this Contract providing for the payment of money that is owed to Owner under this Contract (other than payments of money subject to good faith disputes), or any other material provision of this Contract not otherwise addressed in this Section 20.1, and such failure continues for ten (10) days in the case of a payment obligation or thirty (30) days in the case of any other obligation, except such thirty (30) day period shall be extended if (i) curing such failure reasonably requires more than thirty (30) days, (ii) Contractor commences such cure within such thirty (30) day period and diligently prosecutes such cure, and (iii) such cure is accomplished within seventy-five (75) days, in each case after Contractor receives a Notice from Owner with respect thereto;
- (g) (i) Contractor fails to timely deliver a Remedial Plan pursuant to Section 8.5 or, following approval of a Remedial Plan pursuant to Section 8.5, Contractor fails, other than for an Excusable Condition or an event of Force Majeure or Change in Work, to meet the schedule set forth in the Remedial Plan (as determined from the revised Project Schedule established by the Remedial Plan), or (ii) Contractor fails to timely deliver a Schedule Recovery Plan pursuant to Section 8.4.2 or, following approval of a Schedule Recovery Plan pursuant to Section 8.4.2, Contractor fails, other than for an Excusable Condition or an event of Force Majeure or Change in Work, to meet the schedule set forth in the Schedule Recovery Plan, and (iii) in the case of either (i) or (ii), Contractor fails to remedy such failure within thirty (30) days after Contractor receives a Notice from Owner with respect thereto;
- (h) the Minimum Performance Criteria for Substantial Completion and Functional Guarantees have not been achieved by the Substantial Completion Deadline Date;
- (i) Contractor suspends or Abandons (except for a suspension or Abandonment under Section 20.5(a) herein or due to an Excusable Condition or an event of Force Majeure or Change in Work) the Work and Contractor fails to cure such suspension or Abandonment within ten (10) days after Contractor receives a Notice from Owner with respect thereto. "Suspension" for the purposes of this Section 20.1(i) shall mean that Contractor has not accomplished any material progress toward any of the Critical Path Items for a period of thirty (30) or more days except for a suspension under Section 20.5(a) herein or due to an Excusable Condition or an event of Force Majeure or Change in Work. "Abandonment" for the purposes of this Section 20.1(i) shall mean that Contractor, except to the extent caused by an event described under Section 20.5(a) herein or due to Force Majeure or Excusable Condition or Change in Work, has substantially reduced personnel at the Site or removed further required equipment from the Site such that, in the reasonable opinion of the Engineer, Contractor would not be capable of maintaining progress in accordance with the Project Schedule, as adjusted pursuant to the terms of this Contract for any Excusable Condition, Change in Work or event of Force Majeure;
- (j) with respect to a Performance Bond or Warranty Bond, the failure by Contractor to provide for the benefit of Owner (1) a substitute Performance Bond or Warranty

Bond, as applicable; or (2) cash, in either case, in the amount required hereunder within five (5) Business Days after Contractor receives notice of the occurrence of any of the following events:

- (i) the issuer of the outstanding Performance Bond or Warranty Bond shall fail to meet the conditions of an "Eligible Issuer";
- (ii) the issuer of such Performance Bond or Warranty Bond (A) files a petition or otherwise commences, authorizes, or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy, insolvency, reorganization or similar law, or has any such petition filed or commenced against it, (B) makes an assignment or any general arrangement for the benefit or creditors, (C) otherwise becomes bankrupt or insolvent (however evidenced), (D) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (E) is generally unable to pay its debts as they fall due;
- (iii) the issuer of the Performance Bond or Warranty Bond shall fail to comply with or perform its obligations under such bond and such failure shall be continuing after the lapse of any applicable grace period permitted under such bond;
- (iv) the issuer of the Performance Bond or Warranty Bond shall fail to honor a properly documented demand for payment or performance thereunder;
- (v) the issuer of the outstanding Performance Bond or Warranty Bond shall disaffirm, disclaim, repudiate or reject, in whole or in part, or challenge the validity of, such bond; or
- (vi) Contractor shall fail to renew or cause the renewal of the Performance Bond or Warranty Bond on a timely basis as provided in such bond and as provided in accordance with this Contract, and in no such event less than thirty (30) days prior to the expiration of the outstanding Performance Bond or Warranty Bond.
- (k) Contractor fails to comply with the Owner-approved safety plan and such failure continues for five (5) Business Days after Contractor receives Notice from Owner; or
- (l) The Substantial Completion Date has not occurred by the Substantial Completion Deadline Date, as the date may be extended pursuant to this Contract.
- 20.2 Owner's Rights and Remedies. In the event of a Contractor Event of Default, subject to Article 32, Owner or its assignees shall have the following rights and remedies, in addition to any other rights and remedies that may be available to Owner or its assignees under this Contract and Applicable Law, and Contractor shall have the following obligations:
- (a) Owner, without prejudice to any of its other rights or remedies, may terminate this Contract by delivery of written notice to Contractor delivered within ninety (90) days after the date of the Contractor Event of Default, specifying a date not more than sixty (60) days after the date of such notice on which the termination shall occur;

- (b) Owner may, without prejudice to any of its other rights or remedies, seek performance by enforcing any security given by or for the benefit of Contractor for its obligations hereunder;
- (c) Owner may require Contractor to, and Contractor shall, (i) withdraw from the Site, (ii) assign to Owner (without recourse to Contractor) such of Contractor's Subcontracts as Owner may request, and (iii) (to the extent permitted by Contractor's contracts with third parties) deliver or and make available to Owner all information, patents, and licenses of Contractor or an applicable third party (including Subcontractors or Vendors) related to the Work reasonably necessary to permit Owner (or Owner's designee) to complete or cause the completion of the Work, and in connection therewith Contractor authorizes Owner and its respective agents to use such information in completing the Work, shall remove such materials, equipment, tools, and instruments used by and any debris or waste materials generated by Contractor in the performance of the Work as Owner (or Owner's designee) may direct, and Owner may take possession of any or all Contractor Deliverables and Site facilities of Contractor Deliverable and Site facilities are complete);
- (d) Owner, without incurring any liability to Contractor, shall have the right (either with or without the use of Contractor's equipment) to have the Work finished, whether by enforcing any security given by or for the benefit of Contractor for its performance under this Contract or otherwise, in which case Owner shall have the right to take possession of and use all equipment of Contractor necessary for completion of the Work, and Contractor shall have no right to remove such items from the Site until such completion;
- (e) Owner may seek equitable relief to cause Contractor to take action or to refrain from taking action pursuant to this Contract, or to make restitution of amounts improperly received under this Contract;
- (f) Owner may make such payments or perform such obligations as are reasonably required to cure any Contractor Event of Default and offset the cost of such payment or performance against payments otherwise due to Contractor under this Contract; and
- (g) Owner may seek damages as provided in <u>Section 20.3</u>, including proceeding against any bond or other security given by or for the benefit of Contractor for its performance under this Contract.
- 20.3 <u>Damages for Termination Due to Contractor Default</u>. In the event Owner terminates this Contract in accordance with <u>Section 20.2(a)</u>, and subject to <u>Article 32</u>:
- (a) If the Completion Costs (defined below) exceed the Outstanding Balance at the time of Owner's termination, then subject to <u>Article 32</u>, Contractor shall be liable and pay to Owner within sixty (60) days following completion of the Project and the Work the amount equal to the difference between (i) Owner's aggregate actual, direct and documented costs of completing the Project and the Work (including out-of-pocket compensation for obtaining a replacement contractor or for obtaining additional professional services required as a consequence of Contractor's Event of Default) incurred by Owner in a commercially reasonable manner (but excluding any liquidated damages (including Substantial Completion Delay

Liquidated Damages or any Buy-Down Amount) that Contractor would have been otherwise liable for on or following the effective date of Owner's termination, had Owner not terminated the Contract) (the "Completion Costs") and (ii) the Outstanding Balance (calculated at the time of Contractor's default). If the Outstanding Balance so calculated exceeds the Completion Costs, then (X) Contractor shall not be liable for any such difference and the Contractor shall not be liable to pay Owner any damages under this Section 20.3, and (Y) Owner shall, within the earlier of seven hundred twenty (720) Days after the date of such termination or thirty (30) Days after Final Completion of the Work by Owner hereunder, pay Contractor an amount equal to the sum of (i) any unpaid portion of the Contract Price attributable to the Work performed by Contractor prior to the date of such termination plus (ii) the value of any unused or partially used equipment. parts or materials furnished by Contractor which are used by Owner and have not already been paid for as part of the Contract Price paid to Contractor. In the event of a Contractor Event of Default, and subject to Article 32, Owner shall be entitled to withhold further payments to Contractor for the Work performed prior to termination of this Contract until Owner determines the liability of Contractor, if any, under this Section 20.3. Upon determination of the Completion Costs and the Outstanding Balance, Owner shall notify Contractor in writing of the amount, if any, that Contractor shall pay Owner, subject to Contractor's right to audit and review in accordance with the terms hereof. Contractor acknowledges that in the event of such a termination, Owner may enter into a turn-key contract for the completion of the Project with the same performance guarantees, completion deadlines and liquidated damages as are provided for in this Contract and that the cost to complete the Project in such event may greatly exceed the cost hereunder.

- 20.4 Owner Event of Default. Owner shall be immediately in default of its obligations pursuant to this Contract upon the occurrence of any one or more events of default below (each, an "Owner Event of Default"):
- (a) Owner makes an assignment for the benefit of creditors, admits in writing its inability to pay its debts as they become due, files a voluntary petition in bankruptcy, is adjudicated as bankrupt or insolvent; files a petition or answer seeking for Owner any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any present or future statute, law, or regulation; Owner files any answer admitting or not contesting the material allegations of a petition filed against Owner (as applicable) in any such proceeding, or Owner seeks, consents to, or acquiesces in, the appointment of any trustee, receiver, custodian, or liquidator of Owner or of all or any substantial part of Owner's properties; or Owner's directors, or shareholders take action to dissolve or liquidate the Owner;
- (b) involuntary petitions in bankruptcy are brought against either Owner or an answer proposing the adjudication of Owner as a debtor or bankrupt or proposing Owner's liquidation or reorganization pursuant to any applicable bankruptcy law is filed in any court and Owner consents to or acquiesces in the filing thereof or such petition or answer is not dismissed within sixty (60) days after the filing thereof;
- (c) any material representation or warranty made by Owner herein was materially false or misleading when made and Owner fails to remedy such false or misleading representation or warranty, and to make Contractor whole for any consequences thereof, within thirty (30) days after Owner receives a Notice from the Contractor with respect thereto;

- (d) Owner fails to perform or observe in any respect any provision of this Contract providing for the payment of money that is owed to Contractor under the terms of this Contract (other than payments of money subject to good faith disputes) or any other material provision of this Contract not otherwise addressed in this Section 20.4, and such failure continues for ten (10) days in the case of such a payment obligation or thirty (30) days in the case of any other obligation, except such thirty (30) day period shall be extended if: (i) curing such failure reasonably requires more than thirty (30) days, (ii) Owner commences such cure within such thirty (30) day period and diligently prosecutes such cure, and (iii) such cure is accomplished within seventy-five (75) days, in each case after Owner receives a Notice from Contractor with respect thereto; or
- (e) Owner assigns or transfers this Contract or any right or interest herein, except as expressly permitted under Article 28.
- 20.5 <u>Contractor's Remedies</u>. In the event of an Owner Event of Default and subject to <u>Article 32</u>, Contractor shall only have the following remedies:
- (a) suspend performance of the Work until Owner cures such Owner Event of Default (in which event, Contractor shall be compensated in the manner specified in Section 22.3), it being understood that Contractor may at any time it sees fit rescind a suspension under this Section 20.5(a);
- (b) give Owner notice of Contractor's intent to terminate the Contract delivered within ninety (90) days after the date of the Owner Event of Default, specifying a date not more than sixty (60) days after the date of such notice on which the termination shall occur, which termination will be deemed a termination for Owner's convenience; or
- (c) avail itself of any other rights and remedies that may be available to Contractor or its assignees under this Contract and Applicable Law including any legal or equitable remedy to enforce the obligations of Owner under this Contract, subject to the limitations in Section 32.
 - 20.5.1.2 <u>Mitigation of Damages</u>. Each Party shall use reasonable efforts to mitigate its damages in connection with a breach of this Contract by the other Party.

21. EARLY TERMINATION

21.1 General.

- 21.1.1 Owner may in its sole discretion terminate this Contract with or without cause at any time prior to the issuance of NMPRC Approval by giving Notice of termination to Contractor, to be effective upon the receipt of such Notice by Contractor or upon such other termination date specifically identified by Owner therein.
- 21.1.2 Notwithstanding anything to the contrary in this Contract, Owner may terminate this Contract at any time if the action of any Governmental Authority or change in Applicable Law prevents performance by Owner of its obligations hereunder

or materially and adversely impacts the economic benefit of this Contract to Owner ("Governmental Action"); provided, however, that Owner shall not be entitled to terminate this Contract pursuant to this Section 21.1. 2 if the applicable Governmental Action is due to a breach by Owner of the terms of this Contract or Applicable Law.

- 21.1.3 If Owner terminates the Work without cause or for any cause other than a Contractor Event of Default specified in Section 20.1, or if this Contract is terminated pursuant to any of Sections 20.5(b), 21.1 or 22.2, then Owner and Contractor shall have the following rights, obligations and duties:
- 21.2 <u>Termination Value</u>. If this Contract is terminated pursuant to Section 21.1, then as compensation for the Work performed through the effective date of termination pursuant to Section 21.1, Owner shall pay to Contractor the Termination Value. In no event shall the amount paid to Contractor exceed the unpaid balance of the Contract Price. Contractor hereby waives and forfeits all other claims for payment and all other damages, including anticipated profits on Work not performed.
 - 21.2.1 Cooperation regarding Termination Value. Contractor shall cooperate with Owner reasonably and in good faith to minimize Contractor's expenses associated with a termination under this Section 21, including taking reasonable action requested by Owner to reduce Subcontractors' cancellation charges in connection with such termination.
 - 21.2.2 Assumption of Contractor Contracts following Contractor Event of Default or Governmental Action. Owner shall have the right, but only following the Notice to Proceed Date, at its sole option, to assume and become liable for any obligations that Contractor may have in good faith incurred for its Site personnel and for any written obligations and commitments that Contractor may have in good faith undertaken with third parties in connection with the Work to be performed at the Site; provided, however, that such right shall only apply with respect to a termination for Contractor Event of Default or Governmental Action. If Owner elects to assume any obligation of Contractor as described in this Section 21.1.3, then (a) Contractor shall execute all documents and take all other reasonable steps requested by Owner which may be required to vest in Owner all rights, set-offs, benefits and titles necessary to such assumption by Owner of such obligations described in this Article 21, and (b) Owner shall simultaneously agree to indemnify Contractor against liabilities thereafter arising under the assumed obligations or commitments.
 - 21.2.3 Completion of Work. Upon a termination of this Contract by Owner following a Contractor Event of Default or Governmental Action, Owner may require Contractor to, and Contractor shall (if so required), (a) withdraw from the Site, (b) deliver to Owner all Work completed as of the effective date of such termination, (c) assign to Owner (without recourse to Contractor) such of Contractor's subcontracts as Owner may request (if permitted pursuant to Section 21.2.2), and (d) (to the extent permitted by Contractor's contracts with third parties) deliver or make available to Owner all information, patents, and licenses of Contractor or an applicable third party (including Subcontractors or Vendors) related to the Work reasonably necessary to

permit Owner (or Owner's designee) to complete or cause the completion of the Work, and in connection therewith Contractor authorizes Owner and its respective agents to use such information in completing the Work, shall remove such materials, equipment, tools, and instruments used by and any debris or waste materials generated by Contractor in the performance of the Work as Owner (or Owner's designee) may direct, and Owner may take possession of any or all Contractor Deliverables and Site facilities of Contractor related to the Work necessary for completion of the Work (whether or not such Contractor Deliverable and Site facilities are complete).

- 21.3 <u>Claims for Payment</u>. All claims for payment by Contractor under this <u>Article 21</u> must be made within one hundred eighty (180) days after the effective date of a termination hereunder. Owner shall make payments under this <u>Article 21</u> in accordance with Article 7.
- 21.4 Nature of Termination Payments. The payments described in Section 21.1.1 are intended to constitute Contractor's sole compensation for: (a) all costs of Equipment and Materials, temporary equipment, labor, transportation, engineering, design and other services relating to Contractor's performance of its obligations under this Contract (including any intellectual property rights licensed under this Contract, expressly or by implication) provided by Contractor or such Subcontractors or Vendors, (b) all national, state, regional and local taxes, and other sales taxes effective or enacted as of the date of execution of this Contract or thereafter, each as imposed on Contractor or its Subcontractors or Vendors, (c) all other taxes, duties, levies, imposts, fees, or charges of any kind (whether in the United States or elsewhere) arising out of Contractor's or any such Subcontractor's or Vendor's performance, including any increases thereof that may occur during the term of this Contract, and (d) any duties, levies, imposts, fees, charges, and royalties imposed on Contractor or its Subcontractors or Vendors with respect to any such Equipment and Materials, labor, or services provided under this Contract. The taxes covered hereby include occupational, excise, unemployment, ownership, value-added, gross receipts, sales and income taxes and any and all other taxes and duties on any item or service that is part, whether such tax is normally included in the price of such item or service or is normally stated separately, all of which shall be for the account of Contractor. The above-described payments shall not be increased with respect to any of the foregoing items or with respect to any withholdings relating to any of the foregoing items that Owner may be required to make.
- 21.5 <u>Failure to Obtain Permits</u>. If, within three hundred sixty (360) Days following Owner's issuance of the Notice to Proceed, Owner is unable to obtain all of the Owner Acquired Permits necessary for Contractor to perform the Work, either Party may, upon thirty (30) Days' notice to the other Party, terminate this Contract. Such termination shall, for all purposes hereof, be deemed a termination pursuant to <u>Section 21</u>.

22. SUSPENSION

22.1 <u>General</u>. Owner may suspend performance of the Work at any time by giving Notice thereof to Contractor. Such suspension shall continue for the period specified in the suspension Notice. The Project Guaranteed Dates and Contract Price shall be adjusted as provided in <u>Section 22.3</u> (other than for a Suspension for Cause). At any time after the effective

date of the suspension, Owner may require Contractor to resume performance of the Work on five (5) days' Notice.

- 22.2 <u>Contractor's Termination Right</u>. If, at the end of the specified suspension period, Owner has not requested a resumption of the Work or has not notified Contractor of any extension of the suspension period (but in no event beyond one hundred eighty (180) days for all such suspensions, other than Suspensions for Cause) Contractor's shall have the right to terminate this Contract as of the expiration of the suspension period and such termination shall, for all purposes hereof, be deemed a termination pursuant to Section 21.
- 22.3 <u>Extension of Time and Compensation Rights</u>. In the case of any suspension under this <u>Article 22</u> or any suspension by Contractor under <u>Section 20.5(a)</u>, other than a Suspension for Cause:
- (a) the Project Guaranteed Dates shall be extended by a period equal to the suspension period, plus a reasonable period for demobilization and remobilization;
- (b) The Contract Price shall be increased by the sum of those Direct Costs (without profit, overhead or contingency) actually, demonstrably and reasonably incurred during the suspension period, to the extent attributable to the suspension, and that are:
- (i) for the purpose of safeguarding and/or storing the Work and the Equipment and Materials at the point of fabrication, in transit, or at the Site;
- (ii) for personnel, Subcontractors, or rented Equipment and Materials, the payments for which, with Owner's prior written concurrence, are continued during the suspension period;
 - (iii) for reasonable costs of demobilization and remobilization:
- (iv) for rescheduling the Work (including escalation for suspension, and penalties or additional payments to Subcontractors for the same); or
- (v) other reasonable Direct Costs related to such suspension including escalation of pricing for Equipment and Materials not ordered at the time of suspension;

less any savings incurred because of such suspension;

- (c) the Project Schedule and the Critical Path Items on the Project Schedule shall be adjusted to account for same; and
- (d) Owner shall pay Contractor the corresponding percentage of a Milestone Payment for the portion of Work relating to the Milestone Payment that was actually and demonstrably completed by Contractor at the time of the suspension, as mutually agreed by the Parties. The balance of any such Milestone Payment shall be paid once the remaining Work thereunder is completed by Contractor.

22.4 <u>Claims for Payment</u>. All claims by Contractor for compensation or extension of time under this <u>Article 22</u> must be made within ninety (90) days after the suspension period has ended and the Work has been either terminated or resumed. Failure of Contractor to make such claim within said period shall be deemed a waiver by Contractor of any such claims.

23. INSURANCE

23.1 General.

- (a) Contractor shall procure at its own expense and maintain in full force and effect the minimum insurance coverages and limits as required under Section 23.2, with insurance companies authorized to do business in the State of New Mexico, throughout the performance of the Work under this Contract, commencing with any and all Work performed on Site or off Site in preparation for the Notice to Proceed and Contractor's mobilization at the Site (with the exception that the umbrella/excess liability insurance set forth in Section 23.2.4 and extended completed operations coverage of the commercial general liability coverage set forth in Section 23.2.2 need not commence until Contractor's mobilization at the Site in connection with the Notice to Proceed) and shall be maintained in force until Final Completion. All policies shall be on an occurrence basis with the exception that the Professional Liability Insurance described in Section 23.2.6 may be written on a claims made form; provided that the policy (a) has a retroactive date prior to the date of the commencement of the Work, and (b) is maintained by Contractor throughout the performance of the Work and for at least three (3) years after Final Completion either through policy renewal or an extended reporting period.
- (b) Owner shall procure at its own expense and maintain in full force and effect as required under this Contract, with insurance companies authorized to do business in the State of New Mexico, the types and limits of insurance as set forth in Section 23.3 and 23.4 and maintained by Owner throughout the performance of the Work and for at least three (3) years after Final Completion either through policy renewal or an extended reporting period.
- (c) Such insurance companies shall be rated by A.M. Best Company as having a financial strength rating of "A-" or better and a financial size category of "VIII" or greater.
- (d) Capitalized terms used in this <u>Article 23</u> and not otherwise defined in this Contract shall have the meanings generally ascribed to them in the commercial insurance industry in the United States.
- (e) Each Party, at its own cost, may purchase any additional insurance it believes necessary to protect its interests.
- (f) Any insurance coverages required below may be satisfied through a combination of primary and excess liability policies.
- (g) To the extent permitted by law, Contractor shall waive on behalf of itself and its insurers all rights to assert claims for any losses, damages, liabilities, and expenses, such expenses to include but not be limited to attorney's fees, against Owner, Owner's subsidiaries and Affiliates along with their respective directors, officers, and employees, to the extent

proceeds realized from policies of insurance maintained or required to be maintained in connection with services or products provided under this Contract are applied to such losses, damages, liabilities, and expenses. Each policy of insurance required herein, with the exception of the professional liability insurance required under Section 23.2.6, shall include an endorsement acknowledging such waiver of subrogation. To the extent permitted by law, Owner shall waive on behalf of itself and its insurers all rights to assert claims for any losses, damages, liabilities, and expenses, such expenses to include but not be limited to attorney's fees, against Contractor and its Subcontractors, Contractor's subsidiaries and Affiliates along with their respective directors, officers, and employees, to the extent proceeds realized from policies of insurance maintained or required to be maintained under this Contract by Owner are applied to such losses, damages, liabilities, and expenses. Each policy of insurance required herein shall include an endorsement acknowledging such waiver of subrogation.

- 23.2 <u>Contractor's Insurance</u>. Contractor shall obtain and maintain in full force and effect the insurance policies specified in this <u>Section 23.2</u>. Any and all deductibles and premiums associated with the policies specified in this <u>Section 23.2</u> shall be assumed by, for the account of, and at the sole risk of Contractor. Each policy of insurance, as allowed by statute and with the exception of the insurance required under <u>Section 23.2.6</u>, shall waive all of the insurer's rights of recovery under subrogation or otherwise, against Owner and its Affiliates and their respective directors, officers, managers, representatives, agents and employees and any other parties as the Owner may designate.
 - 23.2.1 Workers' Compensation and Employer's Liability Insurance. Contractor shall maintain workers' compensation insurance and such other forms of insurance which Contractor is required to maintain in order to comply with statutory limits in the State of New Mexico or under workers' compensation laws of any applicable jurisdiction in the United States (and any other location in which the Work is to be performed) including USL&H coverage (if any exposure exists), where applicable, and employer's liability (including occupational disease) coverage with limits of at least One Million Dollars (\$1,000,000) per accident for bodily injury by accident and, One Million Dollars for each employee and policy limit for bodily injury by disease. Such insurance shall cover all of Contractor's employees, whether full-time, leased, temporary or casual, who are engaged in the Work.
 - 23.2.2 Commercial General Liability Insurance. Contractor shall maintain commercial general liability insurance written on an occurrence basis and with a combined single limit of at least One Million Dollars (\$1,000,000) per occurrence, Two Million Dollars (\$2,000,000) general aggregate, Two Million Dollars (\$2,000,000) products and completed operations aggregate. Aggregate limits shall reinstate annually, be on a per project basis, dedicated entirely to the project or location for which Work is to be provided under this Contract, and shall not be shared with any other obligations of Contractor. Such insurance shall include coverage for premises/operations liability, products and completed operations liability, personal and advertising injury liability, broad form contractual liability, and independent contractor's liability for Work performed on Site and off Site. With respect to the performance of construction activities, Contractor shall maintain extended completed operations coverage, for at least ten (10) years after Final Completion through an extended reporting period endorsement.

Such insurance shall provide severability of interests or cross liability provisions permitting one insured to bring a claim against another insured, and shall be endorsed to include Owner and its Affiliates and their respective directors, officers, managers, representatives, agents and employees or any other parties that Owner may be contractually obligated to include as additional insureds prior to a loss. Owner shall be added as an additional insured with respect to Contractor's ongoing operations through CG 20 10 07 04 or a substitute equivalent form and with respect to Contractor's completed operations through CG 20 37 07 04 or a substitute equivalent form, limited only to the extent required, if applicable, by NMSA 1978 § 56-7-1, as amended. Such additional insured status shall apply regardless of the enforceability of the indemnity provisions in this Contract. Such insurance maintained by Contractor shall be primary with respect to the interest of Owner, and any other insurance or self-insurance maintained by Owner or its Affiliates is in excess and not contributory to Contractor's insurance in all instances regardless of any like insurance that Owner or any of its Affiliates may have.

23.2.3 Automobile Liability Insurance. Contractor shall maintain automobile liability insurance (including coverage for owned, non-owned and hired automobiles) covering vehicles used by Contractor in connection with the Work in an amount of at least One Million Dollars (\$1,000,000) combined single limit per occurrence for bodily injury and property damage. Contractor's automobile liability insurance coverage shall contain appropriate no-fault insurance provisions or other endorsements in accordance with Applicable Laws. Such insurance shall be endorsed to include Owner and its Affiliates and their respective directors, officers, managers, representatives, agents, employees or any other parties that Owner may be contractually obligated to include as additional insureds. Owner shall be added as additional insured prior to a loss, limited only to the extent required, if applicable, by NMSA 1978 § 56-7-1, as amended. Such additional insured status shall apply regardless of the enforceability of the indemnity provisions in this Contract. Such insurance maintained by Contractor shall be primary with respect to the interest of Owner, and any other insurance or self-insurance maintained by Owner or its Affiliates is in excess and not contributory to Contractor's insurance policies in all instances regardless of any like insurance coverage that Owner or any of its Affiliates may have.

23.2.4 Umbrella or Excess Liability Insurance. Contractor shall maintain up until Final Completion umbrella/excess insurance on an occurrence basis covering itself and its Subcontractors and Vendors against claims in excess of the underlying insurance described in Sections 23.2.2 in the amount of at least Twenty Million Dollars (\$20,000,000) per occurrence, Twenty Million Dollars (\$20,000,000) general aggregate, and Twenty Million Dollars (\$20,000,000) products and completed operations aggregate (with coverage for completed operations to be in place throughout the performance of the Work and for ten (10) years after Final Completion through an extended reporting period endorsement). Aggregate limits shall be on a per project basis, dedicated entirely to the project or location for which Work is to be provided under this Contract, and shall not be shared with any other obligations of Contractor. Insurance coverages and limits required herein should not in any way limit the extent of Contractor's responsibilities and liabilities specified elsewhere in this Contract. Such insurance shall

be written as follow-form or with an insurance coverage form that provides coverage that is at least as broad as the primary insurance policies, and shall satisfy the maintenance of the required limits through a combination of umbrella liability and/or excess liability insurance policies.

- 23.2.5 Contractor shall maintain umbrella/excess liability insurance for liabilities not covered under Section 23.2.4, including but not limited to coverage in excess of the automobile liability coverage set forth in Section 23.2.3, the employers liability coverage set forth in Section 23.2.1, and commercial general liability coverage set forth in Section 23.2.2 with respect to the Work performed in connection with the Project before mobilization at the Site in connection with the Notice to Proceed and after Final Completion, with limits of not less than Ten Million Dollars (\$10,000,000) each occurrence, Ten Million Dollars (\$10,000,000) general aggregate, and Ten Million Dollars (\$10,000,000) products and completed operations aggregate. Such insurance shall be written as follow-form or with an insurance coverage form that provides coverage that is at least as broad as the primary insurance policies, and shall satisfy the maintenance of the required limits through a combination of umbrella liability and/or excess liability insurance policies.
- 23.2.6 <u>Professional Liability Insurance</u>. Contractor shall secure and maintain, professional liability insurance (errors and omissions) covering financial loss arising from engineering, architectural, construction management, and other design build professional services rendered, required or reasonably inferable from the Statement of Work, with a minimum single limit of Five Million Dollars (\$5,000,000) each claim and Five Million Dollars (\$5,000,000) annual aggregate. Such insurance shall be extended to cover with no sublimit bodily injury and property damage arising from the performance of professional services in connection with the Work where such claims are excluded under the commercial general liability insurance required under <u>Section 23.2.2</u>. This insurance shall include coverage for professional services provided in connection with the Work performed by Contractor, its Subcontractors, and anyone directly or indirectly employed by any of them in connection with the Project unless Contractor can evidence pursuant to <u>Sections 23.5</u> and <u>23.6</u> that insurance in compliance with this <u>Section 23.2.6</u> and <u>Section 23.1</u> is being maintained by each Subcontractor performing such Work.
- 23.2.7 Pollution Liability Insurance. Contractor shall maintain on behalf of itself and its Subcontractors contractors pollution liability insurance or the equivalent, with a minimum limit of One Million Dollars (\$1,000,000) per occurrence and Two Million Dollars (\$2,000,000) annual aggregate. Such insurance shall include coverage for pollution losses, including but not limited to bodily injury, property damage (including but not limited to clean-up costs), and financial loss arising out of pollution conditions resulting from Contractor's and its Subcontractors' and Vendors' operations and completed operations under this Contract. Such insurance shall define pollution conditions at a minimum as the discharge, dispersal, release, or escape of any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, medical waste and waste materials into or upon land, or any structure on land, the atmosphere or any watercourse or body of water, including

groundwater, provided such conditions are not naturally present in the environment in the concentration or amounts discovered. Such insurance shall add Owner and its Affiliates and their respective directors, officers, managers, representatives, agents and employees as an additional insured with respect to Work performed under this Contract (but limited only to the extent required, if applicable, by NMSA 1978 § 56-7-1, as amended). In lieu of Contractor maintaining the insurance for pollution losses arising from the Work on behalf of itself, its Subcontractors and Vendors, and anyone directly or indirectly employed by any of them, Contractor shall evidence pursuant to Section 23.5 and 23.6 that insurance in compliance with this Section 23.2.7 and Section 23.1 is being maintained by each Subcontractor for which the Work involves exposure to pollutions conditions as described above or invasive testing.

- 23.2.8 Property Insurance. Consistent with its obligations pursuant to Section 24.1(a), Contractor shall assume the risk of loss for Temporary Work, equipment and materials (stationary or mobile), supplies, tools, and other personal property (including employee tools) (a) belonging to Contractor or to any of its Subcontractors or (b) used by or on behalf of Contractor or any of its Subcontractors for its performance hereunder which is not intended to become a permanent part of the completed Work. Such Temporary Work, equipment and materials, supplies and other personal property shall be brought to and kept at the Site at the sole cost, risk and expense of Contractor or such Subcontractor, and Owner shall not be liable for loss or damage thereto. It is agreed that Owner shall be held harmless by Contractor and its Subcontractors for any loss or damage to such property and that any property insurance maintained by Contractor and its Subcontractors covering such equipment, supplies and materials shall include a waiver of subrogation precluding any claims being made against the Owner and its Affiliates and their respective directors, officers, managers, representatives, agents and employees and any other parties Owner may be contractually obligated to do so.
- 23.3 Owner's Insurance. Owner shall obtain and maintain in full force and effect the insurance policies specified in this Section 23.3 with respect to Owner's employees.
 - 23.3.1 Workers' Compensation Insurance and Employers' Liability Insurance. In accordance with the laws of the State of New Mexico, Owner shall maintain in force workers' compensation insurance for all of its employees. Owner shall also maintain employer's liability coverage in an amount of not less than One Million Dollars (\$1,000,000) per accident and per employee for disease. In lieu of such insurance, Owner may maintain a self-insurance program meeting the requirements of the State of New Mexico along with the required employer's liability insurance.
- 23.4 <u>Builder's Risk Insurance</u>. Contractor shall provide standard form "All Risk" Builders Risk or Installation insurance covering One Hundred Percent (100%) replacement value of property built or installed on a completed value basis covering the Project against loss or damage during the period of construction commencing at the latest of the Notice to Proceed Date or Contractor's mobilization at the Site and expiring upon Substantial Completion of the Project. The insurance shall be endorsed to include (a) replacement cost coverage; (b) delayed completion coverage: (c) property in transit coverage for materials and equipment to be incorporated into the project; (d) permission for partial occupancy or use of the premises; (e)

ordinance or law coverage, including (i) coverage for loss to the undamaged portion of the project, (ii) demolition cost coverage, and (iii) increased cost of construction: and (f) a loss payable endorsement naming PNM as a loss payee as their interests may appear. The delayed completion coverage endorsement shall provide on an actual loss sustained basis indemnification for scheduled soft costs, loss of rental income, and loss of gross earnings arising from any delay in the completion of the insured project due to direct physical loss or damage to the insured structures or materials. Insurance proceeds shall be paid to and used by the Party having risk of loss at the time of the claim pursuant to Article 24 and any disputes between Owner and Contractor regarding the application of insurance proceeds shall be addressed in accordance with Article 33.

Subcontractor Insurance. 23.5 Contractor shall require each of its Subcontractors and Vendors performing work at the Site, to obtain, maintain and keep in force during the time during which they are involved in performance of the Work, insurance coverage in accordance with the insurance requirements of Contractor set forth in Sections 23.2.1, 23.2.2, and 23.2.3. To the extent Subcontractor and Vendor is performing engineering, architectural, construction management, or other design build professional services, Subcontractors and Vendors shall maintain coverages and limits set forth in <u>Section 23.2.6</u>. To the extent permitted by law, Contractor shall determine the appropriate levels of insurance to be maintained by its Subcontractors and Vendors and, with the exception of the professional liability insurance required under Section 23.2.6, shall cause said Subcontractors and Vendors to waive on behalf of themselves and its insurers all rights to assert claims for any losses, damages, liabilities, and expenses, such expenses to include but not be limited to attorneys fees, against Owner, Owner's subsidiaries and Affiliates along with their respective directors, officers, and employees, to the extent proceeds realized from policies of insurance maintained or required to be maintained in connection with services or products provided under their respective Subcontracts are applied to such losses, damages, liabilities, and expenses. Each policy of said Subcontractor and Vendor required herein shall include an endorsement acknowledging such waiver of subrogation.

23.6 Contractor Certificates. No later than (i) thirty (30) Days prior to the commencement of performance of the Work, including any and all Work performed on Site or off Site in preparation for the Notice to Proceed, and (ii) thirty (30) Days prior to Contractor's mobilization at the Site in connection with the Notice to Proceed, and thereafter prior to the renewal of any policy required herein, Contractor shall furnish to Owner certificates of insurance from each insurance carrier showing that the above required insurance for the Project is in full force and effect, the amount of any deductibles and retentions, and all limits of liability including sublimits. Each policy shall provide that it will not be canceled or non-renewed until the expiration of at least thirty (30) days (or ten (10) days in the case of cancellation due to nonpayment of premiums) after Notice of such cancellation or non-renewal has been furnished to Owner. Contractor shall also be responsible for obtaining certificates of insurance for the insurances required to be maintained by such Subcontractors and Vendors in accordance with Section 23.5 from each of the Subcontractors and Vendors before such Subcontractor or Vendor is allowed to commence Work at the Site and provide such certificates to the Owner upon request. Contractor and its Subcontractors and Vendors shall evidence all insurance required in <u>Section 23.2</u> on the Accord 25 Certificate of Liability Insurance form.

23.7 <u>No Limitation of Liability</u>. Subject in all respects to the terms of <u>Article 32</u>, the insurance coverages required of Contractor set forth in <u>Section 23.2</u> shall in no way affect, nor are they intended as a limitation of, Contractor's liability with respect to its performance of the Work.

24. RISK OF LOSS OR DAMAGE

24.1 Risk of Loss for Project Before Substantial Completion.

- (a) Prior to Substantial Completion (and subject to Section 24.1(c)), Contractor assumes risk of loss for, and full responsibility for the cost of replacing or repairing any damage to, the Project and all Equipment and Materials, and maintenance equipment (including temporary materials, equipment and supplies) which are purchased by Contractor for permanent installation in or for use during construction of the Project or otherwise supplied or to be supplied by Contractor or its Subcontractors, regardless of whether Owner has title thereto under this Contract;
- (b) If prior to Substantial Completion any portion of the Project is lost or damaged, then Contractor shall replace or repair any such loss or damage and complete the Work.
- (c) However, if any portion of the Project is lost or damaged before Substantial Completion of the Project due to any negligent or intentional act or omission of Owner, any Affiliate of Owner or any Operating Personnel or Owner's Separate Contractor, or anyone employed by any of them, or anyone for whose acts such Person may be liable, then Owner shall bear the cost and expense of replacing or repairing such loss or damage.
- 24.2 Risk of Loss for Project After Substantial Completion. Generally, but subject to and without limiting Contractor's obligations expressly set forth in this Contract arising from and after Substantial Completion, Owner shall bear the risk of loss for, and full responsibility for, the cost of replacing or repairing any damage to the Project from and after Substantial Completion of the Project. However, if any portion of the Project is lost or damaged after Substantial Completion of the Project due to any negligent or intentional act or omission of Contractor, any Affiliate of Contractor or any Subcontractor or Vendor, or anyone directly or indirectly employed by any of them, or anyone for whose acts such Person may be liable, then Contractor shall bear all of the cost and expense of replacing or repairing such loss or damage.

25. INDEMNIFICATION

- 25.1 <u>By Contractor</u>. Contractor shall defend, indemnify, and hold harmless Owner and any Person acting for or on behalf of Owner, and each of their respective employees, agents, partners, Affiliates, shareholders, directors, officers, and assigns (each an "Owner Indemnitee"), from and against all Losses directly or indirectly arise out of or result from third party claims for the following:
- (a) any negligent, reckless, or otherwise tortious act or omission (including strict liability) during the performance of its obligations under this Contract, or any curative action under any warranty following performance of the Work, of Contractor or any Affiliate

thereof, any Subcontractor, or anyone directly or indirectly employed by any of them, or anyone for whose acts such Person may be liable, but only to the extent not caused or resulting from the negligence, act or omission of the Owner Indemnitees, Operating Personnel, Owner's Separate Contractors, or any other third party for which Contractor is not responsible;

- (b) personal injury or death of a third party, but only to the extent not caused or resulting from the negligence, act or omission of the Owner Indemnitees, the Operating Personnel, Owner's Separate Contractors or any other third party for which Contractor is not responsible;
- (c) physical damage to property on or off the Site owned by a third party but only to the extent not caused or resulting from the negligent act or omission of the Owner Indemnitees, the Operating Personnel, Owner's Separate Contractors or any other third party for which Contractor is not responsible;
- (d) Contractor Liens filed by Contractor, Subcontractors, Vendors or any other Person performing any Work;
- (e) any fines or penalties imposed on Owner Indemnitees by a Governmental Authority to the extent involving the failure of Contractor or any of its Subcontractors to comply with, or the failure of the Project, as designed, constructed and completed by Contractor, to comply with, or be capable of operating in compliance with, the terms and conditions of Applicable Laws or the conditions or provisions of Applicable Permits but only to the extent not caused or resulting from the negligent act or omission of the Owner Indemnitees, the Operating Personnel, Owner's Separate Contractors or any other third party for which Contractor is not responsible;
- (f) the use, presence, or existence of Hazardous Materials at the Site that were brought onto, released, disturbed or generated at the Site by Contractor or any Subcontractor (other than Hazardous Materials, such as lubricants, intended to be used in or to comprise a portion of the Project in accordance with Applicable Law), including, without limitation:
- (i) the storage, transportation, processing or disposal of Hazardous Materials for which Contractor is responsible;
- (ii) any environmental condition caused by Hazardous Materials for which Contractor is responsible that is actionable under any Applicable Law;

provided, that Contractor shall not have any liability for the discharge, release or migration of Hazardous Materials located at the Site on the Effective Date unless Contractor actually knew such Hazardous Materials were located on the Site where discharged or released or where Contractor's acts or omissions caused the discharge, release or migration of same.

(g) the breach or default of any obligation, representation or warranty of Contractor under this Contract to the extent such Losses arise out of or result from any demand, claim, litigation, action, suit or proceeding by a Person other than either of the Parties or Owner Indemnitees; and

- (h) the failure of Contractor to pay, as and when due, all lawfully imposed taxes, duties, levies, assessments, tariffs, imposts, fees or charges or any kind (together with any and all interest, penalties, additions to tax and additional amounts imposed with respect thereto) imposed by any Governmental Authority for which Contractor is obligated to pay pursuant to the terms of this Contract.
- 25.2 <u>By Owner.</u> Owner shall defend, indemnify, and hold harmless Contractor and any Person acting for or on behalf of Contractor and each of their respective employees, agents, partners, Affiliates, shareholders, directors, officers, and assigns (each a "<u>Contractor Indemnitee</u>") from and against all Losses that directly or indirectly arise out of or result from third party claims for the following:
- (a) any negligent, reckless, or otherwise tortious act or omission (including strict liability) by Owner or any of Owner's Separate Contractors during the performance of Owner's obligations under the Contract or any Affiliate thereof, including the performance of any Owner's Separate Contractor, but only to the extent not caused or resulting from the negligent act or omission of the Contractor Indemnitees or any other third party for which Owner is not responsible;
- (b) personal injury or death of a third party, but only to the extent not caused or resulting from the negligent act or omission of the Contractor Indemnitees or any other third party for which Owner is not responsible;
- (c) any fines or penalties imposed on Contractor Indemnitees by a Governmental Authority to the extent involving the failure of Owner or any of its Owner's Separate Contractors to comply with the terms and conditions of Applicable Laws or the conditions or provisions of Applicable Permits but only to the extent not caused or resulting from the negligent act or omission of the Contractor Indemnitees, Subcontractors or any other third party for which Owner is not responsible;
- (d) the use, presence, or existence of Hazardous Materials at the Site that were either at the Site prior to the date Contractor commences Work at the Site or brought onto or released or generated at the Site by Owner or any Owner's Separate Contractor (other than Hazardous Materials, such as lubricants, intended to be used in or to comprise a portion of the Project in accordance with Applicable Law), including, without limitation:
- (i) the storage, transportation, processing or disposal of Hazardous Materials for which Owner is responsible;
- (ii) any environmental condition caused by Hazardous Materials for which Owner is responsible that is actionable under any Applicable Law;
- (e) the breach or default of any obligation, representation or warranty of Owner under this Contract to the extent such Losses arise out of or result from any demand, claim, litigation, action, suit or proceeding by a Person other than either of the Parties or Contractor Indemnitees; and

- (f) the failure of Owner to pay, as and when due, all taxes, duties, levies, assessments, tariffs, imposts, fees or charges or any kind (together with any and all interest, penalties, additions to tax and additional amounts imposed with respect thereto) imposed by any Governmental Authority for which Owner is obligated to pay pursuant to the terms of this Contract.
- 25.3 Actions by Governmental Authorities. Contractor shall defend, indemnify, and hold the Owner Indemnitees harmless from and against all claims by any Governmental Authority claiming taxes based on gross receipts or on income of Contractor, any of its Subcontractors, or any of their respective agents or employees with respect to any payment for the Work made to or earned by Contractor, any of its Subcontractors, or any of their respective agents or employees under this Contract and any fines imposed by a Governmental Authority due to Contractor's performance under this Contract. Owner shall defend, indemnify, and hold the Contractor Indemnitees harmless from and against all claims by any Governmental Authority claiming taxes based on gross receipts or on income of Owner, any Owner's Separate Contractors, or any of their respective agents or employees with respect to any payment made to or earned by Owner, any Owner's Separate Contractors, or any of their respective agents or employees under this Contract and any fines imposed by a Governmental Authority other than due to Contractor's or Subcontractors' performance under this Contract.
- 25.4 Patent Infringement and Other Indemnification Rights. Contractor shall defend, indemnify, and hold harmless the Owner Indemnitees against all Losses arising from any Intellectual Property Claim (subject, however, to Section 25.6 and 25.7); provided, Contractor shall not be responsible for indemnifying or holding harmless the Owner Indemnitees to the extent that a particular design, process or product of a particular manufacturer or manufacturers is required or specified by Owner or where the copyright violations are contained in drawings, specifications or other documents prepared or provided by Owner or others for whom Owner is responsible. Without limiting the provisions of Section 25.5, if Owner provides Notice to Contractor of the receipt of any such claim, Contractor shall, at its own expense, settle or defend any such Intellectual Property Claim and pay all damages and costs awarded in such Intellectual Property Claim against Owner and (a) procure for Owner, or reimburse Owner for procuring, the permanent right to continue using the infringing service, Equipment and Materials, or other Work, as the case may be: (b) modify the infringing service, Equipment and Materials, or other Work, as the case may be, so that the same becomes non-infringing; or (c) replace the infringing service, Equipment and Materials, or other Work, as the case may be, with noninfringing service, Equipment and Materials, or other Work, as the case may be. If Owner is enjoined from completing the Project or any part thereof, or from the use, operation, or enjoyment of the Project or any part thereof, as a result of such claim or legal action or any litigation based thereon, then Contractor shall promptly use commercially reasonable efforts to have such injunction removed and to take one or more of the actions under the preceding clauses (a), (b) or (c), provided, that in no case shall Contractor take any action which adversely affects Owner's continued use and enjoyment of the applicable service, Equipment and Materials, or other Work, as the case may be, without the prior written consent of Owner. Owner's acceptance of the Contractor Deliverables or supplied Equipment and Materials shall not be construed to relieve Contractor of any obligation hereunder. Notwithstanding anything in this Contract to the contrary, Contractor's obligation to indemnify, defend and hold Owner harmless against infringement of Intellectual Property Claims does not apply to: (i) Equipment, Materials or other

Work is provided according to Owner's or Owner's Separate Contractors design or instructions, and (ii) the Equipment, Materials or other Work being used for the Project for which this Contract is executed where such Equipment, Materials or other Work is not being used by the Owner for its intended use. Any Equipment, Materials or other Work not manufactured or developed by Contractor or its Affiliates will be limited to the indemnity, if any, of the manufacturer, supplier or vendor of said Equipment, Materials or other Work.

25.5 Claim Notice. An indemnite hereunder shall provide Notice to the indemnifying party, within ten (10) Days after receiving written notice of the commencement of any legal action or of any claims or threatened claims against such indemnitee in respect of which indemnification may be sought pursuant to the foregoing provisions of this Article 25 or any other provision of this Contract providing for an indemnity (such notice, a "Claim Notice"). The indemnitee's failure to give, or tardiness in giving, such Claim Notice will reduce the liability of the indemnifying party by the amount of damages attributable to such failure or tardiness, or to the extent the indemnifying Party is prejudiced by such failure or late notice, but shall not otherwise relieve the indemnifying party from any liability that it may have under this Contract. In case any such claim or legal action shall be made or brought against an indemnitee hereunder and such indemnitee shall notify (by sending a Claim Notice) the indemnifying party thereof, the indemnifying party shall have the right, by Notice given to the indemnitee within ten (10) Days after the date of the applicable Claim Notice, and if applicable, after notifying and consulting with any insurers who may provide claims coverage for the claim subject to such Claim Notice, to assume and control the defense of the claim that is the subject of such Claim Notice, including the employment of counsel selected by the indemnifying party after consultation with the indemnitee and the indemnifying party shall pay all expenses of the conduct of such defense. The indemnitee shall have the right to employ separate counsel in any such proceeding and to participate in (but not control) the defense of such claim, but the fees and expenses of such counsel shall be borne by the indemnitee unless the indemnifying party shall agree otherwise; provided, however, if the named parties to any such proceeding (including any impleaded parties) include both the indemnitee and the indemnifying party, the indemnifying party requires that the same counsel represent both the indemnitee and the indemnifying party, and representation of both parties by the same counsel would be inappropriate due to actual or potential differing interests between them, then the indemnitee shall have the right to retain its own counsel at the reasonable cost and expense of the indemnifying party. If the indemnifying party shall have failed to assume or diligently prosecute the defense of any claim in accordance with the provisions hereof, then the indemnitee shall have the absolute right to control the defense of such claim and the fees and expenses of such defense, including reasonable attorneys' fees of the indemnitee's counsel and any amount determined to be owed by the indemnitee pursuant to such claim shall be borne by the indemnifying party, provided that the indemnifying party shall be entitled, at its expense, to participate in (but not control) such defense. Subject to the foregoing, (a) the indemnifying party shall control the settlement of all claims, in coordination with any insurer as required under the applicable insurance policies set forth in Article 23, as to which it has assumed the defense; provided, however, that (i) such settlement shall include a dismissal with prejudice of the claim and an explicit and unconditional release from the party bringing such claim or other proceedings of all indemnitees; and (ii) the

indemnifying party shall not conclude any settlement without the prior approval of the indemnitee, which approval shall not be unreasonably withheld; and (b) except as provided in the preceding sentence concerning the indemnifying party's failure to assume or to diligently prosecute the defense of any claim, no indemnitee seeking reimbursement pursuant to the foregoing indemnity shall, without the prior written consent of the indemnifying party, settle, compromise, consent to the entry of any judgment in or otherwise seek to terminate any action, claim, suit, investigation or proceeding for which indemnity is afforded hereunder unless such indemnitee reasonably believes based on written opinion of legal counsel that the matter in question involves potential criminal liability. The indemnitee shall provide reasonable assistance to the indemnifying party when the indemnifying party so requests in connection with such legal action or claim, including executing any powers-of-attorney or other documents required by the indemnifying party with regard to the defense or indemnity obligations, and any expenses in connection therewith in excess of the indemnifee's ordinary administrative costs and de minimus expenses shall be at the indemnifying party's expense.

- 25.6 <u>Limitations</u>. With respect to <u>Section 25.1</u>, <u>Section 25.2</u> and <u>Section 25.3</u> the Parties intend that principles of comparative negligence will apply, and each Party shall bear the proportionate cost of any loss, damage, expense, and liability attributable to that Party's negligence, recklessness or otherwise tortious conduct.
- 25.7 Owner's Intellectual Property Indemnity. Owner shall indemnify and hold harmless Contractor from and against any and all Claims, (involving (i) any Owner modification, use or reuse of the Work or any Contractor Deliverable other than as permitted under this Contract, (ii) use of the BESS in combination with any other products, materials or equipment not expressly authorized by the Contractor in circumstances where the infringement would have been avoided by the use of the BESS not so combined; or (iii) any modifications or changes made to the BESS other than by the BESS Vendor in circumstances where the infringement would have been avoided without such modifications or changes.

26. TREATMENT OF CONFIDENTIAL INFORMATION

- 26.1 Confidentiality Obligation. Except as otherwise expressly agreed in writing by the other Party, and except as otherwise agreed in Section 26.2, each receiving Party shall (a) keep strictly confidential and take reasonable precautions to protect against the disclosure of (i) the terms and conditions and other facts with respect to this Contract and (ii) all Confidential Information, and (b) use all Confidential Information solely for the purposes of performing its obligations under this Contract and not for any other purpose; provided that a Party may disclose facts, terms and conditions referred to in clause (a) above and Confidential Information to those of its Representatives who need to know such information for the purposes of performing the receiving Party's obligations under this Contract if, but only if, prior to being told of such matters or being given access to Confidential Information, such Representatives are informed of the confidentiality thereof and the requirements of this Contract and are directed to comply with the requirements of this Contract. Each Party will be responsible for any breach of this Contract by its Representatives.
- 26.2 <u>Disclosures to Governmental Authorities</u>. Provided that the disclosing Party complies with the notice requirements set forth in <u>Section 26.3.1</u>, the disclosing Party may disclose the terms, conditions or other matters relating to this Contract and all Confidential Information furnished or made available by the other Party pursuant to or in connection with this Contract:
 - (a) to duly authorized Governmental Authorities, including without limitation the Federal Energy Regulatory Commission, the NMPRC and the Securities and Exchange Commission; and
 - (b) to the extent necessary to comply with any Applicable Law or any discovery or data request of a party to any proceeding pending before any of the foregoing.

Neither Party shall have no liability whatsoever to the other Party in the event of any unauthorized use or disclosure by a Governmental Authority of any Confidential Information or other information disclosed to any of them by the disclosing Party.

26.3 <u>Compelled Disclosure.</u>

- 26.3.1 Notice of Disclosure Requirement. If any Party or its respective Representatives become subject to a requirement of an Applicable Law or other request of a Governmental Authority to disclose any Confidential Information, or any part thereof, or any other matter required by Section 26.1 to be kept confidential, such Party will promptly notify the other Party of the existence, terms, and circumstances of such requirements so that such other Party may seek an appropriate protective order or waive compliance with the provisions of this Contract.
- 26.3.2 <u>Limitation of Disclosure</u>. If Contractor complies with <u>Section 26.3.1</u> but it or its Representatives are compelled, in the opinion of its legal counsel, to make disclosure in response to a requirement described in <u>Section 26.3.1</u> or else stand liable for contempt or suffer other penalty, the compelled person may disclose only that portion of the Confidential Information which is legally required and will exercise commercially reasonable efforts to obtain reliable assurance that confidential treatment will be accorded to the disclosed Confidential Information or other matter.
- 26.4 Ownership and Return of Information. All Confidential Information shall be and remain the property of the Party providing it. No right or license is granted to Contractor or any third party respecting the use of such Confidential Information by virtue of this Contract, except to the extent required for Contractor's performance of its obligations hereunder. Upon the request of a Party, all Confidential Information, including all written or recorded copies thereof, shall be promptly returned to the requesting Party or destroyed, and if destroyed, such destruction shall be certified in writing to the requesting Party by a responsible officer of the other Party; provided, however, the receiving Party may retain one copy of the disclosing Party's Confidential Information solely for audit compliance purposes and the receiving party shall (i) notify the requesting Party in writing promptly following any disclosure of such Confidential Information and (ii) return such copy to the requesting Party promptly following the conclusion of the applicable audit compliance procedures.
- 26.5 <u>Enforcement</u>. The Parties agree that irreparable damage could occur if the confidentiality obligations under this Contract were not performed in accordance with its terms or were otherwise breached. Accordingly, a Party will be entitled to seek an injunction or injunctions to prevent breaches of this <u>Article 26</u> and to enforce specifically its provisions in any court of competent jurisdiction, in addition to any other remedy to which the Party may be entitled by law or equity.

27. INVENTIONS AND LICENSES

27.1 <u>Work Product</u>. Any and all material and information prepared, accumulated or developed by Contractor, any Subcontractor or their respective employees or representatives, including, without limitation, documents, drawings, designs, calculations, maps, plans, workplans, text, filings, estimates, manifests, certificates, books, specifications, sketches, notes, reports, summaries, analyses, data models and samples, including summaries, extracts, analyses and preliminary or draft materials developed in connection therewith, prepared, or to be prepared, exclusively in connection with the Work (hereinafter, collectively "<u>Work Product</u>")

shall become the sole property of Owner without any further consideration to be provided therefor, whether or not delivered by Contractor; provided, that notwithstanding anything to the contrary the BESS Vendor shall remain the sole and exclusive owner of any and all patents, trademarks, copyrights, mask work rights, trade secrets and any other intellectual or proprietary rights associated with the BESS or any parts or derivations thereof as well as of all drawings, specifications, documents, software and engineering and other data furnished or to be furnished by the BESS Vendor in connection with the Work (which drawings, specifications, documents, software and engineering constitute "instruments of service" in connection with the Work). Contractor shall deliver the Work Product, or any portion thereof, to Owner on request (or pursuant to the Project Schedule, if delivery of such Work Product is provided therein), together with any other requested materials and/or equipment furnished to Contractor by Owner hereunder.

- 27.2 <u>Contractor Patents and Proprietary Licenses</u>. Contractor further agrees to grant and hereby grants to Owner an irrevocable, perpetual, fully-paid, non-exclusive, royalty-free license under all patents, copyrights and other proprietary information of Contractor related to or incorporated into the Work now or hereafter owned or controlled by Contractor to the extent reasonably necessary:
- (a) for the operation, maintenance, repair, or alteration of the Project or any subsystem or component thereof designed, specified, or constructed by Contractor under this Contract; or
- (b) to the extent such patents, copyrights and other proprietary information of Contractor are related to any specific design concepts developed primarily for the Project;

provided, that with respect to the the BESS Vendor none of the foregoing is intended or represented to be suitable for reuse on extensions of the Project or any other project. Any such reuse and any modification will be at Owner's sole risk and without liability or legal exposure to the Contractor and Owner shall indemnify Contractor for same pursuant to Section 25.7.

Contractor shall cause each Subcontractor to grant a corresponding license to Owner. No other license in such patents and proprietary information is granted pursuant to this Contract.

27.3 <u>Software Licenses</u>. To the extent Contractor purchases any software that is necessary for the continued operation of the Project after Substantial Completion, Contractor shall register the Owner as the licensee of such software with the applicable Vendor, and Contractor shall be responsible for any registration, renewal or transfer costs. If any of the licenses for required software are not transferable from Contractor to Owner, then Contractor shall obtain fully functional versions of the applicable software for Owner. Such software shall be licensed to Owner, and any costs incurred to obtain the software license shall be at Contractor's sole expense. In addition, if the BESS includes any embedded software (i.e., firmware), Contractor shall procure for Owner a limited, non-exclusive, non-sublicensable, non-transferable (except to subsequent owners of the BESS) license to use such software solely in the operation of the BESS. Except for the foregoing, no license or other right to the intellectual property rights related to such software is granted or implied hereby. For the avoidance of doubt, Owner is not granted any license to modify the BESS or such software.

28. ASSIGNMENT

Contractor understands that this Contract is personal to Contractor. Subject to the other terms of this Section 28, Contractor shall have no right, power, or authority to assign or delegate this Contract or any portion thereof, either voluntarily or involuntarily, or by operation of law. Contractor's attempted assignment or delegation of any of its Work hereunder in contravention of the terms of this Section 28 shall be null and void and shall be ineffective to relieve Contractor of its responsibility for the Work assigned or delegated. Notwithstanding the foregoing, (i) prior to the issuance by Owner of the Notice to Proceed, subject to Owner's written approval (such approval to be in Owner's sole discretion), Contractor may assign its rights and obligations under this Contract to any of Contractor's qualified Affiliates under a form of assignment acceptable to Owner. Contractor may employ Subcontractors on the terms and conditions set forth herein to perform the Work; provided, however, that the use of Subcontractors shall not in any way relieve Contractor of its responsibilities and obligations under this Contract. Owner may, without Contractor's consent, assign all (but not part) of this Contract to an Affiliate of Owner subject to a customary assignment and assumption agreement under which such assignee shall agree to be bound by the terms and conditions of this Contract.

29. HAZARDOUS MATERIALS

Contractor shall not and shall not permit any of its Subcontractors, directly or indirectly to, permit the manufacture, storage, transmission, use or presence of any Hazardous Materials on the Site except in accordance with Applicable Laws and as required to complete the Work. Contractor shall not and shall not permit any of its Subcontractors to release, disturb, discharge or otherwise dispose of any Hazardous Materials on the Site. Contractor shall conduct and complete all investigations, studies, sampling and testing of the Site in connection with the potential presence of Hazardous Materials at the Site in connection with the Work to the extent required under any Applicable Laws, and Contractor shall promptly comply with all lawful orders and directives of all Governmental Authorities regarding Applicable Laws. If Contractor discovers, encounters or is notified of the existence of any contaminated materials or Hazardous Materials at the Site, then:

- (a) Contractor shall promptly notify Owner thereof and cordon off the area containing such contaminated materials or Hazardous Materials;
- (b) if Contractor or any Subcontractor is responsible for the placement of or discharge of such Hazardous Materials, then Contractor shall remove such Hazardous Materials from the Site and remediate the Site as required by Applicable Law at Contractor's sole cost and expense; and
- (c) to the extent Contractor or any Subcontractor is responsible for the placement of or discharge of such Hazardous Materials, then Contractor shall not be entitled to any extension of time or additional compensation hereunder for any delay or costs incurred by Contractor as a result of the existence of such Hazardous Materials.

To the extent neither Contractor nor any Subcontractor is responsible for the placement or discharge of such Hazardous Materials, then Contractor shall be entitled to an appropriate Change in Work which will entitle Contractor to an adjustment to the Contract Price and/or Project Guaranteed Dates as a result of the original scope of Work being delayed or made more difficult by the existence of such Hazardous Materials as if such an event constituted an Excusable Condition in accordance with Article 17.

30. NON-PAYMENT CLAIMS

Provided Owner is current with its payment obligations under this Contract, (x) Contractor shall not directly or indirectly create, incur, assume or suffer to be created by it or any Subcontractor, employee, laborer, materialman or other supplier of goods or services any right of retention, mortgage, pledge, assessment, security interest, lease, advance claim, levy, claim, lien, charge or encumbrance on the Work, the Site, the Project or any part thereof or interest therein (each a "Contractor Lien"), and (y) Contractor hereby waives any such Contractor Lien to the extent allowed by Applicable Laws and Contractor shall keep the Site, the Work and all Subcontractor equipment and materials free of Contractor Liens. Provided Owner is current with its payment obligations under this Contract, excluding payment for any disputed items, Contractor shall promptly pay or discharge, and discharge of record, any such Contractor Lien or other charges which, if unpaid, might be or become a Contractor Lien. Contractor shall promptly notify the Owner of the assertion of any Contractor Lien. Provided Owner is current with its payment obligations under this Contract, excluding payment for any disputed items, Contractor shall indemnify and hold harmless Owner and its Affiliates (collectively, the "Lien Indemnitees") and defend each of them from and against any and all Losses arising out of any and all claims for payment, whether or not reduced to a lien or mechanics lien, filed by Contractor or any Subcontractors, or other persons performing any portion of the Work, including reasonable attorneys' fees and expenses incurred by any Lien Indemnitee in discharging any Contractor Lien. If any Lien Indemnitee becomes aware of any Contractor Lien, then such Lien Indemnitee may so notify Contractor in writing, and provided Owner is current with its payment obligations under this Contract, excluding payment for any disputed items Contractor shall then (a) satisfy such Contractor Lien, or (b) defend the Lien Indemnitees against any such Contractor Lien and provide assurances of payment as described in the last sentence of this Article 30. If Contractor does not promptly, and in any event within ,thirty (30) days after such Notice, satisfy such Contractor Lien, give such Lien Indemnitee reasons in writing that are reasonably satisfactory to such Lien Indemnitee for not causing the release of such Contractor Lien, or contest such Contractor Lien in accordance with the provisions of the last sentence of this Article 30, and Owner is current with its payment obligations under this Contract, excluding payment for any disputed items, then any Lien Indemnitee shall have the right, at its option, after written notification to Contractor, to cause the release of, pay, or settle such Contractor Lien, and Owner at its sole option may (i) require Contractor to pay, within thirty (30) days after invoice by Owner, or (ii) offset against any amount due or to become due to Contractor (in which case Owner shall, if it is not the applicable Lien Indemnitee, pay such amounts directly to the Lien Indemnitee causing the release, payment, or settlement of such liens or claims), all reasonable, and documented costs and expenses incurred by the Lien Indemnitee in causing the release of, paying, or settling such Contractor Lien, including reasonable attorneys' fees, and other expenses. Contractor shall have the right to contest any such Contractor Lien, provided it first provides to Owner a bond or other assurances of payment reasonably satisfactory to Owner in the amount of such Contractor Lien and in form and substance reasonably satisfactory to Owner.

31. NOTICES AND COMMUNICATIONS

31.1 <u>Requirements</u>. Any Notice pursuant to the terms and conditions of this Contract shall be in writing and deemed effective as follows: (a) delivered personally, upon delivery; (b) sent by certified mail, return receipt requested, upon certified receipt; (c) sent by a recognized overnight mail or courier service, with delivery receipt requested, upon receipt; or (d) sent by confirmed facsimile transmission or electronic mail, when acknowledged by recipient as having been received in full, to the following addresses:

If to Contractor:

Affordable Solar Installation, Inc. 4840 Pan American Fwy NE Albuquerque, NM 87109 Attn: Kevin Bassalleck

If to Owner:

Public Service Company of New Mexico 2401 Aztec Rd, NE Albuquerque, NM 87107 Facsimile: (505) 241-4147 Attn: Kevin Mataczynski

With a copy to:

PNM Resources, Inc. Alvarado Square, MS 0805 Albuquerque, NM 87158 Facsimile: (505) 241-2338

Attn: Madonna Bixby, Corporate Counsel

- 31.2 Effective Time. Notices shall be effective as set forth in Section 31.1.
- 31.3 <u>Representatives</u>. Any technical or other communications pertaining to the Work shall be with the Parties' designated representative. Each Party shall notify the other in

writing of the name of such representatives. The Project Manager and the Project Representative each shall have knowledge of the Work and be available at all reasonable times for consultation. Each Party's representative shall be authorized on behalf of such Party to administer this Contract, agree upon procedures for coordinating the efforts of the Parties, and, when appropriate, to furnish information to or receive information from the other Party in matters concerning the Work.

32. LIMITATIONS OF LIABILITY AND REMEDIES

32.1 <u>Limitations on Damages</u>. Except for the liquidated damages specified under <u>Sections 16.1</u>, <u>16.2</u> and <u>21.1</u>, and notwithstanding anything else in this Contract to the contrary, no Party shall be liable to the other Party (or any of its Affiliates or any of its or their respective employees, agents, shareholders, members, directors, or officers) for any loss of profits, loss of revenue, or loss of use of the Project or any indirect, incidental consequential, exemplary, special or punitive damages arising out of this Contract, regardless of whether any such damages arise out of breach of contract, guaranty or warranty, tort, product liability, indemnity, contribution, strict liability or any other legal theory; provided, however, that the foregoing shall not limit a Party's obligation to pay damages that may be awarded to a third party in connection with any Loss to the extent that such Party is obligated to indemnify the other Party for such Loss under this Contract.

32.2 Limitations on Contractor's Liability.

- 32.2.1 Liability Under Contract. In no event shall Contractor's aggregate liability to Owner or any of Owner's Affiliates in connection with this Contract, the Work and the Project, whether arising in contract, warranty or guaranty, tort, product liability, indemnity, contribution, strict liability or otherwise, be greater in the aggregate than an amount equal to the Liability Cap; provided, however, that nothing contained in this Section 32.2 or in any other provision of this Contract shall be construed to limit Contractor's liability (a) with respect to vitiation of any insurance policy required to be maintained by Contractor under Article 23 that results from the gross negligence, willful misconduct or fraud on the part of Contractor or any Subcontractor, (b) with respect to any gross negligence, willful misconduct or fraud on the part of Contractor or any Subcontractor, (c) with respect to any of Contractor's indemnity obligations under Article 25 to the extent any such obligation is covered and paid by Contractor's insurance required to be carried under this Contract, or (d) for failure to satisfy the Minimum Performance Criteria and Functional Guarantees.
- 32.2.2 <u>Liquidated Damages</u>. In no event shall Contractor's liability for Substantial Completion Delay Liquidated Damages and the Buy-Down Amount exceed, in the aggregate, the Maximum Contractor Aggregate Liquidated Damages. Notwithstanding any of the foregoing, the limitations of this <u>Section 32.2.2</u> shall not limit Owner's remedies for any other breach of this Contract other than a failure to achieve Substantial Completion on or before the Substantial Completion Guaranteed Date, or the failure to satisfy the Performance Guarantees.

32.3 <u>Limitation on Owner's Liability.</u>

- 32.3.1 <u>Liability Under Contract</u>. In no event shall Owner's liability in connection with this Contract, the Work and the Project, whether arising in contract, warranty or guaranty, tort, product liability, indemnity, contribution, strict liability or otherwise, be greater in the aggregate than one hundred percent (100%) of the Contract Price (as the same may increase from time to time in accordance with the terms of this Contract); provided, however, that nothing contained in this Section 32.3 or in any other provision of this Contract shall be construed to limit Owner's liability (a) with respect to vitiation of any insurance policy required to be maintained by Owner that results from the gross negligence, willful misconduct or fraud on the part of Owner, or (b) with respect to any gross negligence, willful misconduct or fraud on the part of Owner, any Operating Personnel or Owner's Other Contractors.
- 32.3.2 <u>Exclusions from Limitation on Liability</u>. Notwithstanding anything herein to the contrary, for purposes of determining whether the limit on Owner's liability pursuant to this Contract has been exceeded, liabilities of Owner to Contractor covered by insurance required to be carried by Owner pursuant to <u>Article 23</u> (except deductibles paid by Owner) shall be excluded from the calculation of Owner's aggregate liability.
- 32.4 <u>Releases, Indemnities and Limitations</u>. Except as expressly set forth herein, releases, assumptions of and limitations on liabilities and limitations on remedies expressed in this Contract as well as waivers of subrogation rights shall apply even in the event of fault, negligence, or strict liability of the Party released or whose liability is limited or assumed or against whom the right of subrogation is waived and shall extend to the officers, directors, employees, licensees, agents, partners, or entities of such partners such as partners and related entities.
- 32.5 <u>Representations</u>. Each Party makes no representations, covenants, warranties, or guarantees, express or implied, other than those expressly set forth herein and in the Exhibits hereto.

33. DISPUTES

- 33.1 <u>Referral to Senior Management</u>. Any and all controversies, disputes or differences between the Parties to this Contract, if not amicably settled by the Parties within thirty (30) days following written notice of dispute, shall be referred to executive officers (senior vice president or higher) of the Parties for resolution. In the event the dispute has not been resolved within thirty (30) days following referral to senior management, or such longer period as the Parties may mutually agree, then either Party, upon ten (10) days' notice to the other Party, may submit the dispute to arbitration pursuant to <u>Section 33.2</u>.
- 33.2 <u>Arbitration</u>. In the event the Parties are unable to resolve the dispute pursuant to <u>Section 33.1</u> and the aggregate amount of the claim (including counterclaims) is equal to or less than Two Million Dollars (\$2,000,000), then the dispute shall be resolved by binding arbitration. Such arbitration shall be governed by the then-prevailing Construction Rules

of the American Arbitration Association. A Party electing to submit a dispute to arbitration shall give the other Party a timely demand for arbitration and shall file the demand and the requisite fee with the American Arbitration Association. Such demand for arbitration shall describe the nature of the dispute and the amount in controversy. The Parties shall then jointly select a single arbitrator in accordance with the Construction Arbitration Rules of the American Arbitration Association. The arbitration shall be held in Albuquerque, New Mexico. Discovery shall be by agreement of the Parties or as ordered by the arbitrator, provided that the Parties shall comply with the following minimum discovery requirements: at least ninety (90) calendar days prior to the arbitration, the Parties shall exchange copies of all exhibits to be used at the arbitration, all Contract documents in any way related to the dispute, a list of witnesses and a summary of the matters as to which each witness is expected to testify. A reasonable number of depositions may be taken. The arbitrator shall decide the dispute in strict accordance with the Contract and by providing a reasoned award within thirty (30) days of the conclusion of the hearings. The award entered by the arbitrator shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. All costs of arbitration (including the fees of the arbitrator) shall be split equally by the Parties, except that the Parties shall be responsible for payment of their own attorney fees, expert fees, preparation fees, travel costs, witness fees, photocopying and similar costs. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law of the State of New Mexico. Indemnity claims are not subject to mandatory arbitration.

- 33.3 Other Matters. If the aggregate amount of the claims in dispute exceeds Two Million Dollars (\$2,000,000), then the Parties may agree in writing to submit the matter to binding arbitration before three arbitrators appointed in accordance with the Construction Arbitration Rules of the American Arbitration Association; however, failing such an agreement to arbitrate within thirty (30) days of a Party submitting the claim in writing to the other Party, either Party may bring an action only in the federal or state courts of New Mexico. This Section 33.3 shall have no application to claims, or requests for additional compensation or time, if those requests have not been properly submitted to the applicable Party pursuant to the terms of this Contract. An arbitration demand shall include all claims and disputes then ripe for the dispute.
- Work to Continue. Unless otherwise agreed in writing, Contractor shall diligently carry on the Work during the pendency of any dispute proceeding so long as all undisputed amounts payable to Contractor hereunder have been paid. If it shall be determined, either by agreement of the Parties or through any dispute proceeding, that any payment of the Contract Price or any other amount payable to Contractor hereunder shall have been unduly paid by Owner to Contractor, Contractor shall within twenty-one (21) days after the final decision is made refund the amount of such excess payment together with interest thereon at the lesser of LIBOR in effect from time to time plus four percent (4.0%) per annum and the highest rate permitted by Applicable Law, from the day following the date of such payment (as so determined) until the date of full refund to Owner. If it shall be determined, either by agreement of the Parties or through any dispute proceeding, that any payment of the Contract Price or other amount payable to Contractor hereunder shall have been withheld by Owner, Owner shall pay or cause to be paid to Contractor within twenty-one (21) days after the final decision is made such withheld amount together with interest thereon at the lesser of the LIBOR in effect from time to time plus four percent (4.0%) per annum and the highest rate permitted by Applicable Law, from the day following the date on which such payment is determined to have been withheld (as

so determined) until the date of payment in full to Contractor. As a condition precedent to Contractor's agreement under this <u>Section 33.4</u> to continue to perform its Work in the case where Owner is disputing any amount, Owner agrees to escrow with a third party reasonably acceptable to Contractor said amounts or otherwise provide another form of payment security reasonably acceptable to Contractor until such time as the dispute concerning payment is resolved.

33.5 <u>Claims</u>. Each Party shall grant reasonable audit rights to the other Party with respect to all relevant documentation pertaining to any claim under this Contract.

34. LEGAL AND REGULATORY COMPLIANCE AND NMPRC APPROVAL

- 34.1 <u>Governmental Approvals</u>. Each Party shall timely and lawfully procure and maintain in good standing, at its own cost and expense, all Governmental Approvals relative to their respective obligations under this Contract and shall timely and properly pay its respective charges and fees in connection therewith.
- 34.2 <u>NMPRC Approval</u>. The obligations of the Parties hereunder shall be conditioned upon NMPRC Approval in connection with (i) the execution and performance of this Contract; (ii) the execution and performance of the CCN; and (iii) abandonment of Owner's ownership interests in San Juan Generating Station, including any requested financing or other cost recovery method, and any waivers as set forth in Owner's request for approval of this Contract, the CCN or the abandonment filing (collectively, "Requested Actions"). In particular:
- (a) Owner agrees to use commercially reasonable efforts to request and obtain NMPRC Approval of the Requested Actions, and Contractor agrees to cooperate with and assist Owner in these efforts as Owner may reasonably request.
- (b) NMPRC Approval shall be considered received when the NMPRC issues a final written order that is no longer subject to appeal or further proceedings on remand (i) approving this Contract, including authorization to recover the costs of the Requested Actions; or (ii) approving the Requested Actions in part or subject to conditions or substantial modifications, provided that each of Contractor and Owner agrees, subject to its reasonable discretion, to accept those conditions, modifications or such partial approval as sufficient (collectively, "NMPRC Approval").
- (c) If the NMPRC disapproves any of the Requested Actions, then this Contract shall automatically terminate ten (10) Days after the date of such action by the NMPRC and be of no further force or effect, with no further obligation or liability of either Party to the other Party or to any other Person, except obligations incurred prior to termination.
- (d) If any NMPRC Approval is issued as described in Section 19.3.b(ii) above, then the Parties shall meet and confer no later than fifteen (15) Days after the date of the NMPRC Approval order regarding whether Owner or Contractor wish to amend this Contract to address any conditions or substantial modifications or not to accept any partial or conditioned

approval or substantial modification of this Contract. If the Parties are unable to mutually agree on any amendments to this Contract to address such NMPRC Approval order, then this Contract shall automatically terminate ten (10) Days after the date on which the Parties conferred and be of no further force or effect, with no further obligation or liability of either Party to the other Party or to any other Person, except obligations incurred prior to termination, unless Owner and Contractor mutually agree in writing within such ten (10) Day period that this Contract remain in effect.

(e) If the NMPRC has not, for any reason, entered an order upon the request for approval by September 30, 2020 ("Regulatory End Date"), then the Parties shall meet and confer no later than fifteen (15) Days after the Regulatory End Date regarding a potential extension of the Regulatory End Date. If the Parties are unable to mutually agree to an extension of the Regulatory End Date, then this Contract shall automatically terminate ten (10) Days after the date on which the Parties conferred and be of no further force or effect, with no further obligation or liability of either Party to the other Party or to any other Person, unless Owner and Contractor mutually agree in writing within such ten (10) Day period that this Contract remain in effect.

35. MISCELLANEOUS

- 35.1 Severability. The invalidity or unenforceability of any portion or provision of this Contract shall in no way affect the validity or enforceability of any other portion or provision hereof. Any invalid or unenforceable portion or provision shall be deemed severed from this Contract and the balance of the Contract shall be construed and enforced as if the Contract did not contain such invalid or unenforceable portion or provision. If any such provision of this Contract is so declared invalid, the Parties shall promptly negotiate in good faith new provisions to eliminate such invalidity and to restore this Contract as near as possible to its original intent and effect.
- 35.2 <u>Governing Law</u>. This Contract shall be governed by the internal laws of the State of New Mexico, excluding its conflict of laws provisions.
- 35.3 <u>Survival of Termination</u>. The provisions of this Contract which by their nature are intended to survive the termination, cancellation, completion or expiration of the Contract including, but not limited to, any express limitations of or releases from liability shall continue as a valid and enforceable obligation of the Party notwithstanding any such termination, cancellation, completion or expiration.
- 35.4 No Oral Modification. No oral or written amendment or modification of this Contract (including a Change in Work Form accepted under Article 17) by any officer, agent, or employee of Contractor or Owner, either before or after execution of this Contract, shall be of any force or effect unless such amendment or modification is in writing and is signed by any officer of the Party (or of the managing member or managing partner of the Party on behalf of the Party) to be bound thereby; provided, however, that neither Party shall have any duty to confirm the identity, title or office of any signatory of the other Party, and each Party may rely on the signature of a natural person whom such Party reasonably believes to have the authority to sign on behalf of the other Party.
- 35.5 No Waiver. Either Party's waiver of any breach or failure to enforce any of the terms, covenants, conditions, or other provisions of this Contract at any time shall not in any way affect, limit, modify, or waive that Party's right thereafter to enforce or compel strict compliance with every term, covenant, condition, or other provision hereof, any course of dealing or custom of the trade notwithstanding. All waivers must be in writing and signed on behalf of Owner and Contractor in accordance with Section 34.4.
- 35.6 <u>Headings for Convenience Only</u>. The headings contained herein are not part of this Contract and are included solely for the convenience of the Parties.
- 35.7 <u>Third Party Beneficiaries</u>. The provisions of this Contract are intended for the sole benefit of Owner and Contractor and there are no third party beneficiaries hereof, other than assignees contemplated by the terms herein.
- 35.8 Other Assistance. Contractor shall to the extent reasonably requested by Owner, assist Owner in dealing with Suppliers, customers, and Governmental Authorities in any and all matters relating to the Work (including any interconnection facilities).

- 35.9 <u>Further Assurances</u>. Owner and Contractor will each use commercially reasonable efforts to implement the provisions of this Contract, and for such purpose each, at the request of the other, will, without further consideration, promptly execute and deliver or cause to be executed and delivered to the other such assistance, or assignments, consents or other instruments in addition to those required by this Contract, in form and substance satisfactory to the other, as the other may reasonably deem necessary or desirable to implement any provision of this Contract.
- 35.10 Record Retention and Audit Rights. Contractor will maintain complete and accurate records concerning the Work and all related transactions for at least three (3) years from the Final Completion Date. Contractor's obligation to maintain complete and accurate records will include, but is not limited to, records relating to compliance with Applicable Laws relating to employee certifications and qualifications, drug and alcohol use, environmental, and, if applicable, United States Department of Transportation requirements. At any time, but not later than three (3) years after final payment under the EPC Contract, PNM may make such audit of Contractor's records and substantiating material as deemed necessary by PNM. Each payment made will be subject to reduction and refund to PNM, or offset on future payments due Contractor, to the extent of amounts which are found by PNM, and not otherwise disputed by Contractor, not to have been properly payable or to have been overpaid, and will also be subject to increase and payment to Contractor for underpayments not otherwise disputed by PNM to the extent of any amounts which are found by PNM to have been underpaid. PNM, Contractor will use commercially reasonable efforts to require its Subcontractors to insert a clause containing all the provisions of this Section in all subcontracts to permit PNM to make identical audits and inspections of the records of all Subcontractors involved in performance of the work.
- 35.11 <u>Binding on Successors, Etc.</u>. Subject to <u>Article 28</u>, this Contract shall be binding on the Parties hereto and on their respective successors, heirs and assigns.
- 35.12 Merger of Prior Contracts. This Contract supersedes any other agreement, whether written or oral, that may have been made or entered into between Owner and Contractor or by any office or officer of such Party relating to the Project or the Work. This Contract and Exhibits hereto constitute the entire agreement between the Parties with respect to the Project, and there are no other agreements or commitments with respect to the Project except as set forth herein.
- 35.13 <u>Counterpart Execution</u>. This Contract may be executed by the Parties hereto in any number of counterparts (and by each of the Parties hereto on separate counterparts), each of which when so executed and delivered shall be an original, but all such counterparts shall together constitute but one and the same instrument.
- 35.14 <u>Set-Off</u>. Either Party may at any time, but shall be under no obligation to, set off any and all sums due from the other Party under this Contract against sums due to such Party hereunder where the owing Party has been invoiced therefor but has not paid such invoice following notice of such failure and expiration of the applicable cure period.

35.15 <u>Independent Contractor</u>. Contractor is an independent contractor, and nothing contained herein shall be construed as constituting any relationship with Owner other than that of owner and independent contractor, or as creating any relationship whatsoever between Owner and Contractor's employees. Neither Contractor nor any of its employees is or shall be deemed to be an employee of Owner.

35.16 Public Statements.

- (a) Without the prior written consent of Owner not to be unreasonably withheld, (i) Contractor shall make no public announcement or release any information concerning Owner, the Project, this Contract or its business relationship with Owner, to any member of the public, press, business entity or any Governmental Authority (except as required by Applicable Laws); and (ii) Contractor shall not, and shall cause its Subcontractors, Vendors, suppliers and agents not to, engage in advertising, promotion or publicity containing non-public information concerning this Contract or the Work, or make public use of any Owner identification in any circumstances related to this Contract or otherwise. "Identification" means any corporate name, trade name, trademark, service mark, insignia, symbol, logo or any other product, service or organization designation, or any specification or drawing owned by Owner or its Affiliates or any representation thereof.
- (b) Without limiting the generality of the foregoing, Contractor acknowledges and agrees that Owner shall have the right to control media access to the Site and responses to media inquiries regarding the Project or any emergency or other incident at the Site, including without limitation, incidents involving personal injury, property damage or operational events.
- 35.17 Gratuities, Anti-Kickback and False Claims Provisions. Contractor shall not, under any circumstances, extend any gratuity or special favor to employees of PNM that might be reasonably constructed as an attempt to influence the recipients in the conduct of their official duties. Contractor agrees to abide by the Anti-Kickback Act of 1986, 41 U.S.C.A. § 51, et seq., which prohibits any person from (1) providing, attempting to provide or offering to provide any kickback; (2) soliciting, accepting, or attempting to accept any kickback; or (3) including, directly or indirectly, the amount of any kickback in the cost of work charged to PNM by the Contractor. It is also agreed that Contractor will not engage the services of any individual who has been convicted after September 29, 1988, or for a period of five (5) years after the date of conviction, of fraud or any other felony arising out of a contract with the Federal Government. Such person(s) is (are) prohibited from working in a management or supervisory capacity, serving as a consultant, or serving on the board of directors.

(REMAINDER OF PAGE INTENTIONALLY LEFT BLANK)

IN WITNESS WHEREOF, the Parties hereto have caused this Engineering, Procurement, and Construction Contract to be executed as of the date and the year first above written.

OWNER:
PUBLIC SERVICE COMPANY OF NEW
MEXICO,
a New Mexico corporation
By:
Its: Vice President, PNM Generation
CONTRACTOR:
AFFORDABLE SOLAR INSTALLATION, INC.
a New Mexico corporation
DocuSigned by:
By: kevin Bassalleck
Its:DBDEDG30BE4C48President

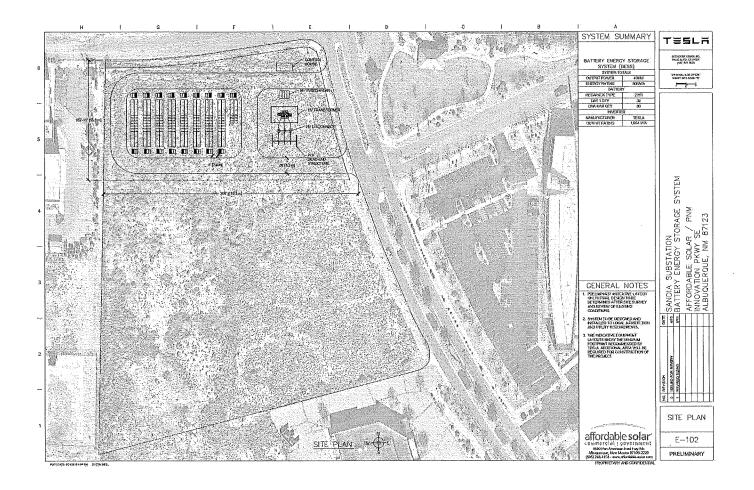
[SIGNATURE PAGE TO ENGINEERING, PROCUREMENT, AND CONSTRUCTION CONTRACT]

EXHIBIT A

STATEMENT OF WORK AND SPECIFICATIONS

Exhibit A consists of technical specifications for the Project, including technical design requirements and interface to the Project Substation, requirements for procurement of site equipment, and requirements relating to commissioning, testing and placing the Project in service. This exhibit is not included in the record as it is voluminous and burdensome to produce. Exhibit A is available for inspection subject to any restrictions on disclosure of certain information due to NERC Critical Electric Infrastructure Information requirements.

EXHIBIT A-1One Line Diagram – Confidential



EPC ATTACHMENT BMILESTONE PAYMENT SCHEDULE

Respondent:	Affordable Solar Installation, Inc.
Project/Site:	All presented PNM sites; See individual project pricing for total cost

Provide proposed milestones for each month after Notice to Proceed with milestones generally representing completion of activities, not commencement.

Month after NTP Date	Milestone	Percent of Total Contract Invoiced	Cumulative Percent Paid	Monthly Invoice (\$)
0	Notice to Proceed	10%	10%	
1				
2	Design Package Complete			
3	Major Equipment (BESS & GSU / MV Xfmr) POs	25%	35%	
4				
5				
6				
7				
8				
9				
10				
11				
14	100% BESS Delivery	45%	80%	
15	Mechanical Completion	10%	90%	
16	Substantial Completion	5%	95%	
17	Final Completion	5%	100%	
18				
19				
20				
21				
22				

EXHIBIT C

OWNER ACQUIRED PERMITS

Permit/Approval/Surveys	Agency
All other Applicable Permits/approvals/surveys as required by Governmental Authorities not listed under Exhibit C-2 to the Agreement. These may include:	As required
Land use/zoning approvals	
Clean Water Act permits, including National Pollutant Discharge Elimination System (NPDES) permits associated with construction activities (Owner coverage)	
Fugitive dust permits (Owner coverage)	
National Environmental Policy Act compliance	
Archaeological and biological surveys	
Building permits (if applicable)	

PNM Exhibit TGF-14

		PNM Exhibit TGF-14
Permit/Approval	Agency	Page 121 of 183
Required Permits/Approvals:	As required	
National Pollutant Discharge Elimination		
System (NPDES) permits associated with		
construction activities (Contractor coverage)		
Fugitive dust permit (Contractor coverage)		
di agitive dasi permit (contractor coverage)		
Grading permits		
S r		
Fence permits		
Access permits		
Trailer permits, and associated drinking water		
and wastewater permit (if necessary)		
New Mexico Contractor's license number		
Fuel storage tank permit (Contractor coverage)		
OGILA		
OSHA permit (Contractor coverage)		
L		

EXHIBIT D

CONTRACTOR RATE SCHEDULE

Office staff:

Engineering: \$180

Engineering Support: \$80

PM: \$120

Quality Management: \$165

Field staff:

General Superintendent: \$95

Field Admin: \$35 Electricians: \$55 Electrical Helpers: \$25 Construction Foreman: \$68

Field SCADA and Electrical Engineer: \$210

Electrical Supervisor: \$90 Concrete Foreman: \$54 Concrete Finisher: \$41 General Laborer: \$27 Mechanical Supervisor: \$55 QA/QC: Technician \$45 Mechanical Technician: \$45 Materials Handler: \$38

Heavy Equipment Operator: \$60 Shipping and Receiving Specialists: \$35

Surveyor Lead: \$100 Surveyor: \$45

UAS/Remote Pilot: \$125

UAS Assistant Technician and report writer: \$85

Commissioning Foreman: \$95 Commissioning Supervisor: \$75 Commissioning Technician: \$40

O&M:

Management: \$85 Lead Electrician: \$75 Electrical Helpers: \$45 Monitoring: \$50

QA/QC Technician: \$55

EXHIBIT E

CHANGE IN WORK FORM

Contract:	
Change In Work #:	· [•]
Date of Change In Work:	[•]
Construction Agreement, date	following change to the Engineering, Procurement and ed as of [•], (the "Agreement"), by and between Owner and ed terms used but not defined herein shall have the respective ment.
Work) are considered an amer Work, this Change In Work F and obligations described in the Contractor under the Agreement full and complete settlement f	It that are described below (collectively the applicable Change In Indoment to the Agreement. With the exception of the Change In Form does not relieve Owner or Contractor of their responsibilities the Agreement or otherwise modify the rights of Owner or ent. The below adjustments to the Agreement terms will constitute a for the Change In Work which is the subject of this Change In Work ded in the detailed description below.
Detailed description of the rec	quested Change In Work and reason for request:
Detailed description of the eff	fect of the Change In Work on the Agreement:
	Change In Work #: Date of Change In Work: The undersigned agree to the Construction Agreement, date Contractor. Initially capitalize meanings given in the Agreem The changes to the Agreement Work) are considered an ame Work, this Change In Work F and obligations described in the Contractor under the Agreem full and complete settlement of Form, unless otherwise provided the recommendation of the recommendation.

	tation establishing the Change In Work cost of performing he Contract Price. If there is no change in cost, state
Description of the change in the Co	ntract Price:
The original Contract Price	is: \$ [●]
The change in the Contract	Price is: \$ [●]
The revised Contact Price (including the Change In Work set forth herein) is: \$ [●]
The method used in determining the	change in Contract Price is indicated on the attached <u>Schedule 1</u> .
Completion Guaranteed Date, state	"none":
The revised Substantial Completion forth herein and all other prior Char	Guaranteed Date (taking into consideration the Change In Work senges In Work) is: [●]
Requested By:	Accepted and Agreed To:
Ву:	By:
Name:	Name:
Title:	Title:

Schedule 1 to Change In Work Form

Method used in determining the change in Contract Price

Details to be provided with Change in Work form

EXHIBIT F

FORM OF CONTRACTOR'S INVOICE

[Date	<u>)</u>		
[Nan [Add	ne of Contractor] ress]		
Atten	tion:		
Gentl	emen:		
Conti betwo	ract (as amended, sup een Contractor and Pu	suant to Article 7 of the Engineering plemented or modified from time blic Service Company of New Mex	to time, the "Contract") by and
		nerein, all capitalized terms used in terms in the Contract.	n this Certificate shall have the
1. and d	_	a duly authorized representative of on behalf of Contractor.	Contractor, authorized to execute
2.	The following is a si	ummary of the current status of the C	Contract account:
		Original Contract Price: Adjustments to Contract Price: Contract Price to Date: Amount of Payments that	\$ \$ \$
		Contractor Has Received to Date:	\$
suppo	ractor or any of its offi	all material documents and supporticers or employees and submitted to und in connection with the Work, tatomplete.	Owner and Engineer and in direct
4.	The Work is being p	erformed in accordance with the Co	ntract, except
5. shall mont \$	include all necessar h of, 20	Work, as particularly set forth in y documentary evidence], was concented. The aggregate amount of the Mile ount of the Milestone Payments for	impleted through the end of the estone Payments for such Work is

received payments is \$ The aggregate amount of Milestone Payments for which Contractor is entitled to be paid is \$
6. The amount of this Contractor's Invoice set forth above, is not (in part or otherwise) attributable to Work which has been rejected by Owner or Contractor or which otherwise constitutes or relates to a Subcontractor's application for payment, billings or invoices which Contractor disputes or for any other reason does not intend to pay.
7. There are no known mechanics' or materialmen's liens outstanding at the date of this Contractor's Invoice, all due and payable bills with respect to the Work have been paid to date or are included in the amount requested in the current application, and, except for such bills not paid but so included, there is no known basis for the filing of any mechanics' or materialmen's liens on the Project or the Work except as described below, and all required releases required to be obtained pursuant to the terms of the Contract have been obtained in such form as to constitute an effective release of lien (corresponding to payments received by them) under the laws of the State of New Mexico (copies of which are attached hereto and incorporated herein by this reference). Contractor, or a Subcontractor, has actually performed and Contractor has not been paid for the Work covered by this Contractor's Invoice.
8. Contractor has paid all sales and use taxes due and owing to any Governmental Authority related to all Equipment and Materials incorporated into the Project.
9. Attached as Exhibit F-1 through F-4 hereto are all applicable Conditional Waivers and Releases Upon Progress Payment and Unconditional Waivers and Releases Upon Progress Payment prepared by Contractor and all applicable Unconditional Waivers and Releases Upon Progress Payment and all Conditional Waivers and Releases Upon Progress Payment from each Subcontractor in accordance with Sections 7.1-7.4, as applicable.
10. Work uncertified from the Contractor's Invoice dated, 20 has been completed (except as set forth in the last sentence of this paragraph), and any disputes concerning less than full certification have been resolved by written agreement among Owner, Contractor and the Engineer, a copy of which resolution is attached as Exhibit F-6 hereto, and Contractor is entitled to a payment which includes:
11. Contractor has delivered the Monthly Progress Report prepared pursuant to <u>Section 8.6</u> of the Contract.
IN WITNESS WHEREOF, the undersigned has executed this Certificate on the date first above written.
By:Project Manager
Project Manager

EXHIBIT F-1

STATE OF NEW MEXICO
COUNTY OF
Conditional Waiver and Release Upon Progress Payment
WHEREAS, Public Service Company of New Mexico ("Owner") and [] ("Contractor") have entered into that certain Engineering, Procurement and Construction Contract, dated as of [], 20[] (the "Contract");
WHEREAS, the undersigned is required to provide this Conditional Waiver and Release Upon Progress Payment pursuant to the terms of Article 7 of the Contract.
Capitalized terms used but not defined herein shall have the meanings given to them in the Contract.
By executing and submitting its interim payment application and the lien waiver below, in consideration for the payment described in the lien waiver below, and for the purpose of inducing the Owner to make this interim payment, the undersigned, for itself, its employees, subcontractors, sub-subcontractors, mechanics, materialmen and laborers, does hereby represent and warrant as follows:
1. All Parties Paid. The undersigned has been paid all amounts owed for all labor, Equipment and Materials, and services furnished to the Project through the effective date of the date of the undersigned's previous application for payment), and that all parties supplying labor, services, Equipment and Materials, to it in connection with the Project have been paid, or will be paid in accordance with the terms of the applicable subcontracts and/or purchase orders, and Applicable Law, including the New Mexico Prompt Payment Act, for all labor, services, Equipment and Materials furnished with relation to the Project.
2. <u>Waiver Of Claims</u> . Conditioned only on the receipt of the sum reflected in Paragraph 4 below, the undersigned waives and releases any and all claims, causes of action, suits, damages, judgments, demands of any kind, character and description, whether known or unknown, against [the Contractor, the Contractor's surety] [delete if Contractor is executing this lien waiver], the Owner, any construction lender or funds, and their respective directors, officers, principals, partners, employees, agents, subsidiaries, parent and related firms, successors and assigns, arising out of work performed, labor furnished, Equipment and Materials, or services provided, and acts or omissions occurring, prior to the effective date of the interim lien waiver below, with the exception of those claims described below in an amount not to exceed the stated amount:

and Vendors. The undersigned acknowleds decision to fund the interim progress paym action to cancel and discharge any such lie the Property or the improvements thereon.	ent described l	herein, that it wil	ll take prompt and full
4. <u>Conditional Waiver Of Lien Rights.</u> Materials, or services (permitting, engine with the permitting, engineering, procu Equipment and Materials for the [insert factories more particularly described as follows:	ering, procure rement, const	ment and constr	ruction) in connection e installation of the
	1		(the "Property")
(Add property legal description or street add	aress)		
Conditionally only upon the receipt of the sundersigned waives and releases any and all through the date of (the of upon the foregoing described Property of Materials, or services (permitting, engineer undersigned, or furnished to or at the reimprovement of the Property or the perform for the Work through the date of application for payment).	date of the urn account of ring, procuremequest of the mance of the W	ndersigned's app any labor, mate tent and construc undersigned, in York described he (the date	erials, Equipment and erials, Equipment and erials, Equipment and erion) furnished by the connection with the erein or in the Contract of the undersigned's
Given under hand and seal this	_ day of		, 201
Contractor, Subcontractor, or Vendor			
By:			
Printed Name:			
Its:			
Sworn and subscribed before me this day of, 201	_		
Notary Public My Commission Expires:			

No Pending Liens. The undersigned represents and warrants that no mechanic's and

materialmen's liens, or any other type of lien claim, has been filed against the Project, the Work, the Property, the Site or the improvements thereon by it or any of its Subcontractors or Vendors, or by those supplying labor, Equipment and Materials, or services through such Subcontractors

EXHIBIT F-2

COUNTY OF
Unconditional Waiver and Release Upon Progress Payment
WHEREAS, Public Service Company of New Mexico ("Owner") and [] ("Contractor") have entered into that certain Engineering, Procurement and Construction Contract, dated as of [], 20[] (the "Contract");
WHEREAS, the undersigned is required to provide this Unconditional Waiver and Release Upon Progress Payment pursuant to the terms of Article 7 of the Contract.
Capitalized terms used but not defined herein shall have the meanings given to them in the Contract.
By executing and submitting its interim payment application and the waiver below, in consideration for the payment described in the lien waiver below, and for the purpose of inducing Owner to make this interim payment, the undersigned, for itself, its employees, subcontractors, sub-subcontractors, mechanics, materialmen and laborers, does hereby represent and warrant as follows:
1. All Parties Paid. The undersigned has been paid all amounts owed for all labor, Equipment and Materials, and services furnished to the Project through the effective date of (the date of the undersigned's previous application for payment), and that all parties supplying labor, services, Equipment and Materials to it in connection with the Project have been paid, or will be paid in accordance with the terms of the applicable subcontracts and/or purchase orders, and Applicable Law, including the New Mexico Prompt Payment Act, for all labor, services, Equipment and Materials furnished with respect to the Project.
2. <u>Waiver Of Claims</u> . The undersigned waives and releases any and all claims, causes of action, suits, damages, judgments, demands of any kind, character and description, whether known or unknown, against [the Contractor, the Contractor's surety] [delete if Contractor is executing this lien waiver], the Owner, any construction lender or funds, and the Project, and their respective directors, officers, principals, partners, employees, agents, subsidiaries, parent and related firms, successors and assigns, arising out of Work performed, labor furnished, Equipment and Materials or services provided, and acts or omissions occurring, prior to the effective date of the interim waiver below, with the exception of those claims described below in an amount not to exceed the stated amount:

3. <u>No Pending Liens</u>. The undersigned represents and warrants that no mechanic's and materialmen's lien, or any other type of lien claim, has been filed against the Project, the Work,

the Site or the improvements thereon by it or any of its Subcontractors or Vendors, or by those supplying labor, Equipment and Materials, or services through such Subcontractors and Vendors. The undersigned acknowledges that this representation is material to the Owner's decision to fund the interim progress payment described herein, that it will take prompt and full action to cancel and discharge any such lien now unknown to it and filed, or to be filed, against the Property or the improvements thereon, and that it will continue to hold harmless the Owner on account of any Losses, expenses or reasonable attorneys' fees incurred as a result of its failure to do so.

4. <u>Unconditional Waiver Of Lien Right</u> and Materials, or services (permitting, engire with the permitting, engineering, procure Equipment and Materials for the [insert fact more particularly described as follows:	neering, procurement rement, construction	and construction) in co , and the installation	onnection of the
(Add property legal description or street add	luo sel	(the "Propert	y")
(Add property legal description of street add	.1688)		
The undersigned waives and releases any a claims through the date of	_ (the date of the under ed Property and Pro- neering, procurement request of the under lance of the Work des	dersigned's previous ap bject on account of ar and construction) furn rsigned, in connection scribed herein or in the	pplication ny labor, nished by with the Contract
Given under hand and seal this	_ day of	, 201_	⁴
Contractor, Subcontractor, or Vendor			
By:	_		
Printed Name:	_		
Its:	_		
Sworn and subscribed before me this day of, 201	_	•	
Notary Public My Commission Expires:	-		

EXHIBIT F-3

STATE OF NEW MEXICO	
COUNTY OF	

Conditional Waiver and Release Upon Final Payment

WHEREAS, Public Service Company of New Mexico ("Owner") and [_____] ("Contractor") have entered into that certain Engineering, Procurement and Construction Contract, dated as of [], 20[] (the "Contract");

WHEREAS, the undersigned is required to provide this Conditional Waiver and Release Upon Final Payment pursuant to the terms of Article 7 of the Contract.

Capitalized terms used but not defined herein shall have the meanings given to them in the Contract.

In consideration for the final payment described in the lien waiver below, and with the knowledge that the representations herein will be relied on by Owner to make final payment, the undersigned, for itself, its employees, subcontractors, sub-subcontractors, mechanics, materialmen and laborers, does hereby represent and warrant as follows:

- 1. All Parties Paid. The undersigned has been paid all amounts owed for all Equipment and Materials, services or labor furnished to the Project through the effective date of the date of the undersigned's previous application for payment), and that all parties supplying labor, Equipment and Materials, services to it in connection with the Project have been paid, or will be paid in accordance with the terms of the applicable subcontracts and/or purchase orders and Applicable Law, including the New Mexico Prompt Payment Act, for all labor, services, Equipment and Materials furnished with respect to the Project.
- 2. <u>No Pending Lien Claims.</u> The undersigned represents that it has not filed or allowed to be filed, or that it has fully and effectively cancelled of record, mechanic's and materialmen's liens against the Site, the Project, or the Property identified below. The undersigned waives and releases any and all mechanic's and materialmen's claims of lien filed against the Site, the Project, or the Property identified below, and authorizes the Owner to file and pursue, in the undersigned's name, any and all documents or actions necessary to discharge and cancel any such lien of record. To the extent that the Owner takes any reasonable action in order to cancel or discharge any lien filed by the undersigned, the undersigned agrees that it shall be fully responsible for all Losses, reasonable attorneys' fees and other costs incurred in so doing.
- 3. <u>Waiver Of Claims</u>. Conditioned only on the receipt of the sum reflected in Paragraph 6 below, the undersigned waives and releases any and all claims, causes of action, suits, damages,

for the Work.

judgments, demands of any kind, character and description, whether known or un [the Contractor, the Contractor's surety] [delete if Contractor is executing this li Owner, any construction lender or funds, and their respective directors, office partners, employees, agents, subsidiaries, parent and related firms, successor arising out of work performed, labor furnished, Equipment and Materials, or ser with the exception of those claims described below in an amount not to examount:	ien waiver], the cers, principals, rs and assigns, rvices provided,
\$ \$	- -
4. <u>Authorization</u> . The undersigned warrants that it is the sole owner of the herein, that it has not sold, assigned or conveyed such claims to any other par individual whose signature appears below has personal knowledge of these mattauthorized and qualified to make these representations on behalf of the undersigned	ty, and that the ters and is fully
5. <u>Scope Of Release</u> . The representations and release contained herein a covenants and operate, and are effective with respect to, all labor, services, or Materials provided by or through the undersigned, under any agreement, whether whether extra or additional to any such agreement, and with respect to any Equipment and Materials, or services to be furnished with respect to the Contract Project or the Property.	Equipment and oral or written, y further labor,
6. <u>Conditional Waiver And Release Of Lien Rights.</u> The undersigned has Equipment and Materials, or services (permitting, engineering, procurement and connection with the permitting, engineering, procurement, construction, and the Equipment and Materials for the [insert facility name] in County and more particularly described as follows:	construction) in e installation of
	Property")
(Add property legal description or street address)	
Conditionally only upon the receipt of the sum of \$	the

undersigned waives and releases any and all mechanic's and materialmen's lien rights and claims upon the foregoing described Property and Project on account of any labor, Equipment and Materials, or services (permitting, engineering, procurement and construction) furnished by the undersigned, or furnished to or at the request of the undersigned, in connection with the improvement of the Property or the performance of the Work described herein or in the Contract

Given under hand and seal this	day of	, 201
Contractor, Subcontractor, or Vendor		
By:		
Printed Name:		
Its:		
Sworn and subscribed before me this day of, 201		
Notary Public My Commission Expires:		

EXHIBIT F-4

STATE OF NE	EW MEXICO	
COUNTY OF		

Unconditional Waiver and Release Upon Final Payment

WHEREAS, Public Service Company of New Mexico ("Owner") and [_____] ("Contractor") have entered into that certain Engineering, Procurement and Construction Contract, dated as of [], 20[_] (the "Contract");

WHEREAS, the undersigned is required to provide this Unconditional Waiver and Release Upon Final Payment pursuant to the terms of Article 7 of the Contract.

Capitalized terms used but not defined herein shall have the meanings given to them in the Contract.

By executing and submitting its payment application and the waiver below, in consideration for the payment described in the lien waiver below, and for the purpose of inducing Owner to make final payment, the undersigned, for itself, its employees, subcontractors, sub-subcontractors, mechanics, materialmen and laborers, does hereby represent and warrant as follows:

- 1. All Parties Paid. The undersigned has been paid all amounts owed for all labor, Equipment and Materials, and services furnished to the Project through the effective date of _______ (the date of the undersigned's previous application for payment), and that all parties supplying labor, services, Equipment and Materials to it in connection with the Project have been paid, or will be paid in accordance with the terms of the applicable subcontracts and/or purchase order and Applicable Law, including the New Mexico Prompt Payment Act, for all labor, services, Equipment and Materials furnished with respect to the Project.
- 2. <u>No Pending Lien Claims.</u> The undersigned represents that it has not filed or allowed to be filed, or that it has fully and effectively cancelled of record, mechanic's and materialmen's liens against the Site or the Property identified below. The undersigned waives and releases any and all mechanic's and materialmen's claims of lien filed against the Site or the Property identified below, and authorizes the Owner to file and pursue, in the undersigned's name, any and all documents or actions necessary to discharge and cancel of record any such lien. To the extent that the Owner takes any reasonable action in order to cancel or discharge any lien filed by the undersigned, the undersigned agrees that it shall be fully responsible for all Losses, reasonable attorneys' fees and other costs incurred by the Owner in so doing.
- 3. <u>Waiver Of Claims</u>. The undersigned waives and releases any and all claims, causes of action, suits, damages, judgments, demands of any kind, character and description, whether known or unknown, against [the Contractor, the Contractor's surety] [delete if Contractor is executing this lien waiver], the Owner, the Project, any construction lender or funds, and their

respective directors, officers, principals, partners, employees, agents, subsidiaries, parent and affiliates, successors and assigns, arising out of work performed, labor furnished, Equipment and Materials, or services provided, with the exception of those claims described below in an amount not to exceed the amount stated in this paragraph 3:
4. <u>Authorization.</u> The undersigned warrants that it is the sole owner of the claims released herein, that it has not sold, assigned or conveyed such claims to any other party, and that the individual whose signature appears below has personal knowledge of these matters and is fully authorized and qualified to make these representations on behalf of the undersigned.
5. <u>Scope Of Release.</u> The representations and releases contained herein are independent covenants and operate, and are effective with respect to, all labor, services, materials or Equipment and Materials provided by or through the undersigned under any agreement, whether oral or written, whether extra or additional to any such agreement, and with respect to any further labor, materials, equipment or services to be furnished with respect to the Contract, the Project, or the Property.
6. <u>Waiver And Release Of Lien Rights.</u> The undersigned has provided labor, Equipment and Materials, or services (permitting, engineering, procurement and construction) in connection with the permitting, engineering, procurement, construction, and the installation of the Equipment and Materials for the [insert facility name] in County, New Mexico, and more particularly described as follows:
(the "Property")
(Add property legal description or street address)
The undersigned waives and releases any and all mechanic's and materialmen's lien rights and claims through the date of (the date of the undersigned's previous application for payment) upon the foregoing described Property and the Project on account of any labor, Equipment and Materials, or services (permitting, engineering, procurement and construction) furnished by the undersigned, or furnished to or at the request of the undersigned, in connection with the improvement of the Property or the performance of the Work described herein or in the Contract for the Work through the date of (the date of the undersigned's previous application for payment).
Given under hand and seal this day of, 201
Contractor, Subcontractor, or Vendor
By:

PNM Exhibit TGF-14 Page 137 of 183

Printed Name:
Its:
Sworn and subscribed before me this day of, 201
Notary Public My Commission Expires:

EXHIBIT F-5

DOCUMENTARY EVIDENCE OF COMPLETED WORK

1.	Contractor to describe the completion of the Project Milestones accomplished under the Contract through the applicable month as described in the Contract.
2.	Contractor to set forth other amounts payable by Owner under Article 17 of the Contract or any other provision thereof.
3.	Contractor to attach to this Exhibit documentary evidence of the completion of each milestone set forth in Paragraph 1 of this Exhibit F-5.

EXHIBIT F-6

DOCUMENTARY RESOLUTION OF PREVIOUSLY UNCERTIFIED WORK

Attached hereto are resolutions of disputes (if any) regarding previous Contractor's invoices.

EXHIBIT G

APPROVED SUBCONTRACTORS

- Tesla, Inc. BESS Vendor
- T&D Services Substation subcontractor
- NEI Engineering SCADA engineer
- RMCI Civil subcontractor

EXHIBIT H

DETERMINATION OF BUY-DOWN AMOUNT

- A. If Contractor has run the Performance Tests pursuant to the Performance Tests Procedures and otherwise in accordance with Exhibit I and the results of such Performance Tests fully satisfy the Minimum Performance Criteria for Substantial Completion but fail to satisfy all of the Performance Guarantees, the Buy-Down Amount to be determined by Owner pursuant to Section 16.2 of the Contract shall be calculated as follows:
- B. If the BESS Capacity is equal to or greater than the Guaranteed BESS Capacity, then the Buy-Down Amount related to the BESS Capacity shall be zero. If the BESS Capacity is less than the Guaranteed BESS Capacity and is equal or greater than 95% of the Guaranteed BESS Capacity as determined by the Minimum Performance Criteria, then the Buy-Down Amount related to the BESS Capacity shall be equal to the product of \$800,000/MW times such BESS Capacity deficiency.
- C. If the BESS Roundtrip Efficiency is equal to or greater than the Guaranteed BESS Roundtrip Efficiency, then the Buy-Down Amount related to the BESS Roundtrip Efficiency shall be zero. If the BESS Roundtrip Efficiency is less than the Guaranteed BESS Roundtrip Efficiency and is equal or greater than 97% of the Guaranteed BESS Roundtrip Efficiency as determined by the Minimum Performance Criteria, then the Buy-Down Amount related to the BESS Roundtrip Efficiency shall be equal to the product of \$3,100 per percent deficiency per MWh of BESS storage capacity (calculated as the Guaranteed BESS Capacity, in MW, times the Guaranteed Storage Hours, in hours), prorated per one-tenth of a percent of roundtrip efficiency deficiency.
- D. If the BESS Plant Auxiliary Loads are equal to or less than the Guaranteed BESS Plant Auxiliary Loads, then the Buy-Down Amount related to the BESS Plant Aux Loads shall be zero. If the BESS Plant Auxiliary Loads are greater than the Guaranteed BESS Plant Auxiliary Loads and are equal or less than 105% of the Guaranteed BESS Plant Auxiliary Loads as determined by the Minimum Performance Criteria, then the Buy-Down Amount related to the BESS Plant Auxiliary Loads shall be equal to the product of \$800,000/MW times such BESS Plant Auxiliary Loads deficiency.

EXHIBIT I

ACCEPTANCE TESTS AND TESTING

I.1 DEFINITIONS

The following terms have the meanings defined below:

'Guaranteed Charge Ramp Rate' is the charge rate in MW per second measured between 15% state of charge to 85% state of charge representing the maximum rate that the BESS can change its input power from the Energy Delivery Point.

'Guaranteed Discharge Ramp Rate' is the discharge rate in MW per second measured between 85% state of charge and 15% state of charge representing the maximum rate that the BESS can change its output power at the Energy Delivery Point.

'Guaranteed System Latency" means the guaranteed time measured between when the control signal is sent and the BESS responds to the signal by changing the discharge or charge power value by more than 1% of the control setpoint.

I.2 PERFORMANCE GUARANTEES

Performance Guarantees shall apply to the Project as outlined herein and shall be achieved during Tests conducted in accordance with this Exhibit. Performance Guarantees must be satisfied to achieve Substantial Completion or Final Completion of the Project, as appropriate and as further defined herein.

"Performance Guarantees" shall mean each of the performance requirements as set forth below:

Bidder shall complete the following table:

Parameter	Unit	Performance Requirement	Conditions for Guarantee
Performance Guarantees a	t Performance Guar	antee Conditions	
Guaranteed BESS Capacity	MW	30 MW (Zamora) 40 MW (Sandia)	Value is at STC (77°F) The following correction curves and ambient temp adjustment process shall be applied for ambient temperatures at time of test and 24 hours preceding: 1. The system shall be connected to the grid and not operated for 24 hours before the test 2. Measured results to be adjusted for 0.5% metering accuracy 3. Please refer to "Real Power Dispatch Test" section within battery manufacturer's testing protocol for details on: Test procedure, recorded values, ambient temp corrections, and acceptance criteria. See Exhibit I.1

Guaranteed Storage Hours	Нг	2 Hours	Guaranteed Storage Hours shall be proven during a combined test with Guaranteed BESS Capacity and the Guaranteed BESS Capacity must be maintained for the duration of the Guaranteed Storage Hours. Corrections noted above for Guaranteed BESS Capacity shall apply.
Guaranteed BESS Roundtrip Efficiency	%	83.5% - 2 hour	Values are at STC (77°F) The following correction curves and ambient temp adjustment process shall be applied for ambient temperatures at time of test and 24 hours preceding: 1. The system shall be connected to the grid and not operated for 24 hours before the test 2. Measured results to be adjusted for 1% metering accuracy 3. Please refer to "Round Trip Efficiency Test" section within battery manufacturer's testing protocol for details on: Test procedure, recorded values, ambient temp corrections, and acceptance criteria. See Exhibit I.1
Guaranteed Charge Ramp Rate	MW/sec	30 MW (Zamora) 40 MW (Sandia)	Real power command is received at Tesla Site Controller, the power output as measured by BESS meter will match the set point within time steps calculated off ramp rate settings. Example, if real power command is 10MW and ramp rate set point is 2MW/sec, then BESS output will match the set point in 5 steps of 1 second each.
Guaranteed Discharge Ramp Rate	MW/sec	30 MW (Zamora) 40 MW (Sandia)	Real power command is received at Tesla Site Controller, the power output as measured by BESS meter will match the set point within time steps calculated off ramp rate settings. Example, if real power command is 10MW and ramp rate set point is 2MW/sec, then BESS output will match the set point in 5 steps of 1 second each.

Guaranteed System Latency	Sec	0.300s	Response time is calculated from reception of the command at the Tesla Site Controller to when the BESS responds to the signal by changing the discharge or charge power value by more than 1% of the control set point as measured at the BESS meter. Measured result to be adjusted by 0.100s to account for measurement accuracy Please refer to "Response Time Test" section within battery manufacturer's testing protocol for details on: Test procedure, recorded values and acceptance criteria. See Exhibit I.1	
Guaranteed Frequency Response Capability	MW / 0.1 Hz	30 MW/0.1 Hz (Zamora) 40 MW/0.1 Hz (Sandia)	Tesla proposed to conduct this test in a lab setting due to following reasons: 1. The change is too fast for a far field measurement equipment to measure. 2. The BESS system by itself cannot adjust the frequency of the grid. Tesla will test the Powerstage response in the lab setting using a grid simulator. Tesla will share the results of the test and offer real time graphs from its existing fleet to demonstrate its frequency response capability.	
Guaranteed BESS Plant Auxiliary Loads	kW	120 kW	Auxiliary Loads excludes thermal loads. Megapack thermal loads are managed within the BESS and accounted for in Roundtrip Efficiency and are not considered an auxiliary load. Measured results to be adjusted for 1% metering accuracy	
Project Reliability	%	96% for 30MW 97% for 40MW	Minimum availability of all equipment over the complete duration of the 5 day Reliability Test	
Noise Performance Guarantees				
Total Project far-field noise level	dBA	70	At the property boundary	
Equipment near-field noise limit, at 3 feet from any item of Equipment	dBA	85	Applicable to total Project operation. Guarantee is for each single piece of equipment in free field environment.	

I.3 MINIMUM PERFORMANCE CRITERIA

Minimum Performance Criteria shall apply to the Project as outlined herein and shall be achieved during Tests conducted in accordance with this Exhibit. Project specific guarantees must be satisfied as required in this Exhibit to achieve Substantial Completion or Final Completion of the Project, as appropriate and as further defined herein.

"Minimum Performance Criteria" for Substantial Completion shall mean each of the guaranteed performance requirements as set forth below:

Bidder shall complete the following table:

Parameter	Unit	Performance Requirement	Conditions for Guarantee
Minimum Performance Gua	rantees at Perfo	rmance Guarantee (Conditions
Guaranteed BESS Capacity	MW	95% of Guarantee	Same as Performance Guarantee conditions
Guaranteed Storage Hours	Hr	95% of Guarantee	Same as Performance Guarantee conditions
Guaranteed BESS Roundtrip Efficiency	%	97% of Guarantee	Same as Performance Guarantee conditions
Guaranteed Charge Ramp Rate	MW/sec	100% of Guarantee	Same as Performance Guarantee conditions
Guaranteed Discharge Ramp Rate	MW/sec	100% of Guarantee	Same as Performance Guarantee conditions
Guaranteed System Latency	Sec	100% of Guarantee	Same as Performance Guarantee conditions
Guaranteed Frequency Response Capability	MW / 0.1 Hz	100% of Guarantee	Same as Performance Guarantee conditions
Guaranteed BESS Plant Auxiliary Loads	kW	105% of Guarantee	Same as Performance Guarantee conditions
Project Reliability		96% for 30MW 97% for 40MW	Minimum availability of all equipment over the complete duration of the 5 day Reliability Tes

[&]quot;Minimum Performance Criteria" for Final Completion shall mean each of the guaranteed performance requirements as set forth below:

Noise Minimum Performance Guarantees			
Total Project far-field noise level	dBA	70	At the property boundary
Equipment near-field noise limit, at 3 feet from any item of Equipment	dBA	85	Applicable to total Project operation. Guarantee is for each single piece of equipment in free field environment.

I.4 FUNCTIONAL GUARANTEES

"Functional Guarantees" shall mean each of the guaranteed functional requirements as set forth in the table below. Contractor shall be responsible for performing the required Functional Guarantee Testing.

Parameter	Functional Guarantee
Volt /VAR Regulation	BESS manufacturer to share it's UL listing for functional verification
Low/High Voltage Ride Through	BESS manufacturer to share it's UL listing for functional verification
Power Factor	0.85 at Point of Delivery
	Test- Set Real Power command to the batteries along with PF set point and lead/lag convention for charging

Parameter	Functional Guarantee
	or discharging (per Control and Communication Manual).
	Pass Criteria- The battery meter Real and Reactive power measured value should match the calculated value based on pf set point and commanded Real Power.
Control System Test	Respondent to meet functional requirements defined in section I.7.6 Control Systems within this document.
Fire Protection System Test	Respondent to meet functional requirements defined in section I.7.3 Fire Protection System Functional Test within this document.

I.5 TESTING

I.5.1 General

The Contractor shall be responsible for carrying out the Tests for Substantial Completion of the Work as well as for Final Completion of the Work. Performance Tests and Functional Guarantee Tests are those Tests defined herein. These Tests shall be completed as appropriate, but in no event until after Mechanical Completion has been achieved.

For the purpose of evaluating guarantee compliance, the Equipment shall be deemed "new and clean" for any and all tests with no allowances for degradation to be considered.

Tests shall be conducted in accordance with the test conditions set forth herein.

Contractor shall perform a pre-test uncertainty analysis and shall provide such analysis to Owner at least 30 days prior to the performance of the associated Performance Tests. No test tolerance will be applied to the test results. Corrections required to adjust for test conditions that differ from the Performance Guarantee Conditions defined herein will be allowed.

All Performance Guarantees and Minimum Performance Criteria shall be met during the same test, if practical, and in accordance with the requirements set forth herein and in the Contract. These Performance Tests shall be the sole determination of whether the Performance Guarantees and Minimum Performance Criteria have been met and shall be binding on the Contractor to determine compliance with the Performance Guarantees and Minimum Performance Criteria.

All Tests shall be completed by the Contractor or a mutually agreeable third party testing contractor under contract to the Contractor. The Contractor shall be responsible for the supply of all personnel, testing equipment, and testing instrumentation.

The Tests shall be performed in general accordance with the IEEE codes and ESIC Test Manual procedures (when applicable) or BESS Supplier test procedures, and in strict accordance with the performance test requirements in the Contract, provided that the Owner and Contractor may mutually agree upon deviations from the IEEE codes and ESIC Test Manual procedures (or other applicable codes and procedures). In the event of a conflict, the order of precedence shall be:

- The Contract
- The Test Procedures developed in accordance with the Contract
- The applicable Performance Test Codes

During all Tests, the Project and equipment shall be operated in a manner consistent with and within the design limits established by the Contractor and equipment manufacturers. Equipment shall be operated in a manner that is suitable for continuous operation of the equipment and in a manner that is consistent with Prudent Industry Practices.

During Tests, the Project shall be operated by or on behalf of Owner under the direction of Contractor.

Prior to the Tests being conducted, Contractor may make minor adjustments to the equipment to ensure it is suitable for testing. Such adjustments shall exclude modifications intended to temporarily improve the performance of the Equipment for any Test.

Repair of any part or replacement of any item of equipment that could materially alter the performance of the Equipment being tested or the results of a Test will not be permitted during a Test. If the Contractor or an equipment manufacturer performs any repair or alterations after a Test that could materially affect the results of a previously conducted Test, the Contractor shall repeat such Test subject to the terms of the Contract. In no event will Substantial Completion be revoked as the result of such retest, but verification of required Performance Guarantees associated with such retest shall be a condition for Final Completion.

Contractor may not operate redundant components to obtain acceptable Test results unless such use is defined for a normal operating scenario as described herein.

If a test interruption occurs for any reason, Contractor and Owner shall mutually agree to either: (a) resume the Test after the cause of the test interruption has been rectified, or (b) restart the Test.

Owner may waive the requirement to perform any one or all of the Tests if the Owner is not able to schedule for the dispatch of the Project or is otherwise satisfied that the BESS is fully functional and capable of expected functionality and guarantees.

Component and Project tests performed by the Owner, in addition to the Performance Tests and Functional Guarantee Tests, shall be allowed.

I.5.2 Test Conditions

The conditions upon which the Contractor shall base the Performance Tests for performance guarantees are listed below:

Parameter	Reference Conditions
Ambient Dry-Bulb Temperature	77 °F
Power Factor at Energy Delivery Point	0.85*

^{*}To be adjusted based on test conditions given this could result in grid disruption. Contractor and Owner shall agree on value.

The conditions upon which the Contractor shall base the Functional Guarantee Tests are as listed below:

Unit Conditions:	
Site Ambient Conditions	Within the full range per Exhibit A, Appendix 03 – Project Data and Terminal Points of the respective Appendix A1 and A2
Equipment Operation	per Test Procedures

At all times during the Tests, the Project as a whole, must comply with all Applicable Laws and Applicable Permits to be considered a successful Test. Contractor shall evaluate and remedy the cause of such failure before attempting the same Test.

All Tests shall be accomplished with the Project operating wholly within its design ratings. In particular, none of the following shall occur:

- Overheating of components
- Excessive power consumption
- Operation of tripping or limiting devices, except where the test is intended to demonstrate such operation
- Rubbing, chaffing, or other mechanism of accelerated wear
- Dangerous occurrences due to Project operation or malfunction
- Leaks from or into cooling systems or vessels that present a situation that could result in damage to BESS equipment or BOP Equipment

I.5.3 Test Procedures

Contractor shall coordinate with the battery system suppliers to develop test procedures including detailed test procedures for the Performance Tests and the Functional Guarantee Tests based on the Project design.

Test procedures, correction curves, and proposed results calculation methodologies (the "Test Procedures") shall be submitted to the Owner one hundred twenty (120) Days prior to the commencement of the first Test and shall be subject to the review and comment of Owner, Owner's representatives and Financing Parties. Owner will review and provide comments to the draft Test Procedures within twenty (20) Business Days after submission by Contractor. Contractor shall effect any changes to reflect the comments and resubmit the draft Test Procedures to Owner, whereupon Owner will review and provide comments to such draft Test Procedures within fifteen (15) Business Days after re-submission by Contractor.

Tests shall be completed with the Project Control System in automatic control and no manual adjustment or manual control of equipment operation except that which is specified in manufacturer's test protocol as mutually agreed.

The Test Procedures shall include as a minimum:

- The purpose of the Performance Test or Functional Guarantee Test, as applicable
- Personnel responsibilities
- · Applicable performance corrections and correction curves
- Codes and standards to be utilized and any mutually agreed upon exceptions to these codes and standards to be taken by the Contractor
- Data collection procedures
- Instrument list including both permanent Project and temporary Performance Test instrumentation to be utilized
- Performance Test operating procedures
- Allowable variation in measured parameters
- Instrument accuracy requirements / Uncertainty Analysis
- Sample data log sheets
- Notification procedures

Correction curves shall be included in the Test Procedures. These curves shall accurately correlate to the curve of the suppliers of the applicable Equipment to correct the performance of the Work for variations from the specified design conditions. Each of the correction curves shall have a range to suit the specified conditions. Each curve shall be provided in both graphical and numerical format.

The curves will be utilized on-Site as a preliminary indication of test results. Final test acceptance shall be based upon the final test report.

1.6 PERFORMANCE TESTS

Contractor shall be responsible for carrying out the Performance Tests which are conducted to demonstrate that the required Minimum Performance Criteria and Performance Guarantees have been achieved. Contractor shall perform all tests in general accordance with the battery manufacturer test protocol.

The "Performance Tests" to be performed for achievement of Substantial Completion shall be as follows and as further defined in the following Articles:

- · Guaranteed BESS Capacity
- Guaranteed BESS Roundtrip Efficiency
- Guaranteed Charge Ramp Rate
- Guaranteed Discharge Ramp Rate
- Guaranteed System Latency
- Guaranteed Frequency Response Capability
- · Guaranteed BESS Plant Auxiliary Loads

I.7.1 Guaranteed BESS Capacity

The test for determining energy capacity of the BESS shall incorporate all components including, the storage medium, auxiliary loads, power conversion equipment, HVAC equipment, and the transformer at the point of common coupling to the utility. Thus, system capacity is determined for the entire utility-integrated BESS. The test results reported will provide capacity information useful for validating the energy delivery capability of the BESS tested.

The test shall be conducted in accordance with the requirements of this section and as futher defined in the battery manufacturer's "Discharge Energy Capacity Test". See See Exhibit I.1

I.7.2 Guaranteed BESS Roundtrip Efficiency

Contractor shall conduct tests to demonstrate the performance of the BESS plant and document the round trip efficiency. The Guaranteed BESS Roundtrip Efficiency Test, consisting of multiple test cycles shall be performed for a 100 percent depth of discharge at full rated charge and discharge power. Additional roundtrip efficiency tests shall be performed to document 100 percent depth of discharge at 75 percent of rated charge and discharge power and 50 percent of rated charge and discharge power as well as 50 percent depth of discharge (from 75 percent to 25 percent State of Charge (SOC)) at full rated charge and discharge power.

The test shall be conducted per battery manufacturer's "Round Trip Efficiency Test". See Exhibit I.1

I.7.3 Guaranteed Charge Ramp Rate Test

Contractor shall conduct tests to demonstrate the achievable rate of change in the charge input power in MW per second measured between 15% state of charge to 85% state of charge representing the maximum rate that the BESS can change its input power from the Energy Delivery Point.

Test: Set the ramp rate parameters to the Guaranteed Charge Ramp Rate (To be finalized before testing if not possible due to system limitations) MW/sec for ramp rate up and down. Command the system with a real power set point for charge or discharge.

Pass Criteria: It should be demonstrated that the Guaranteed Charge Ramp Rate is satisfied.

Real power command is received at Tesla Site Controller, the power output as measured by BESS meter will match the set point within time steps calculated off ramp rate settings. Example, if real power command is 10MW and ramp rate set point is 2MW/sec, then BESS output will match the set point in 5 steps of 1 second each.

I.7.4 Guaranteed Discharge Ramp Rate Test

Contractor shall conduct tests to demonstrate the achievable rate of change in the discharge power in MW per second measured between 85% state of charge and 15% state of charge representing the maximum rate that the BESS can change its output power at the Energy Delivery Point.

Test: Set the ramp rate parameters to the Guaranteed Discharge Ramp Rate (To be finalized before testing if not possible due to system limitations) MW/sec for ramp rate up and down. Command the system with a real power set point for charge or discharge.

Real power command is received at Tesla Site Controller, the power output as measured by BESS meter will match the set point within time steps calculated off ramp rate settings. Example, if real power command is 10MW and ramp rate set point is 2MW/sec, then BESS output will match the set point in 5 steps of 1 second each

Pass Criteria: It should be demonstrated that the Guaranteed Discharge Ramp Rate is satisfied.

I.7.5 Guaranteed System Latency

Contractor shall perform a Performance Test to demonstrate, when the Power Conversion System (PCS) is in active or ready mode and the system is at idle, the guaranteed time measured between when the control signal is sent and the BESS responds to the signal by changing the discharge or charge power value by more than 1% of the control setpoint. Guaranteed System Latency may be demonstrated during the Charge and Discharge Ramp Rate test.

The test shall be conducted per battery manufacturer's "Response Time Test". See Exhibit ${\rm I.1}$

I.7.6 Guaranteed Frequency Response Capability

Contractor shall test the BESS response time and capability of the system to a frequency event. A grid simulator configured for 60Hz nominal shall be utilized to test a single Powerstage. The following Frequency-Watt settings for test to be agreed upon by Owner and contractor during the Test Procedure review:

- · Frequency low
- · Frequency high
- Frequency low slope

• Frequency high slope

Test Procedure -

- 1. Start with grid simulator set to 60Hz.
- 2. Discharge inverter at 70kW.
- 3. Change the grid simulator frequency to [XX] Hz (to be finalized before testing) and hold for 10 seconds.
- 4. Change the grid simulator frequency to [XX] Hz (to be finalized before testing) and hold for 10 seconds.
- 5. Change the grid simulator frequency to [XX] (to be finalized before testing) Hz.

Acceptance criteria -

The pass criteria is <200ms to 2% power accuracy and <100ms to 10% power accuracy.

I.7.7 Self-discharge Rate Test

This test shall determine the rate at which the storage system loses charge, not including auxiliary power. This may be expressed as a function of the state of charge and ambient conditions. This should also include all non-variable parasitic losses (tare losses, control power, etc.).

I.7.8 Reliability Test

Following satisfactory completion of all other Performance Guarantee Tests and prior to achieving Substantial Completion, the BESS and Project shall be available for a 5 day continuous reliability test ("Reliability Test") during which time the Project shall be operated by Owner's operations staff under the supervision of Contractor, to demonstrate the Project Reliability. This Reliability Test shall be performed to validate the reliability of the BESS and Project. Throughout the duration of the test period, the minimum equipment availability shall meet or exceed the Project Reliability.

Contractor shall not be liable for Substantial Completion Delay Liquidated Damages (1) to the extent delays arise from Reliability Test Interruption by Others, or (2) to the extent after the Guaranteed Substantial Completion Date that the BESS is operating in connection with the performance of the Reliability Test.

The duration of reliability testing shall continue until the Contractor can satisfy the Project Reliability requirement set forth in this Exhibit.

Contractor shall conduct the testing and shall notify the Owner at least three (3) Days in advance of starting the Reliability Test. Owner's operating Staff, under the supervision of Contractor, shall operate the Project with normal operating staff levels during the Reliability Test. The Project shall operate during the Reliability Test with dispatch determined by Owner within the Equipment's design capability, as adjusted by Buy-Down Amounts per Exhibit H, and shall start, stop, ramp, cycle, etc. as determined by Owner, but in accordance with planned operational dispatch approved by the Parties. Owner, in its sole discretion, may elect to waive any particular Test and or shorten the duration of any test. The applicable parameters shall be recorded for the Reliability Test.

During the Reliability Test, Contractor shall have reasonable access to the Equipment and be allowed to make minor adjustments which may be necessary, provided that such adjustments do not in any way interfere with or prevent the commercial use of the Equipment by Owner or result in a reduction in output, or decrease of efficiency. All adjustments made by Contractor shall be recorded in a manner to be agreed with Owner.

Performance measurements during the Reliability Test shall be measured using permanent Project instrumentation. Project Operation may involve cycling operation as may be convenient for the working of the Project, and shall be without failure or interruption of any kind during the entire Reliability Test period. Contractor shall be responsible for all outages and load restrictions caused by Contractor's scope of Work during the test period, and all such outages and load restrictions shall result in a failure of the Reliability Test. Load restrictions that do not have any impact on dispatch requirements shall not be calculated as unavailability.

"Reliability Test Interruption by Others" shall mean any period of time the Equipment is out of service to the extent of factors not caused by Contractor including Force Majeure; unavailability of charging energy; faults of the electrical grid; outages, either planned or forced, on the part of Owner; and failure of Owner to operate the Equipment in accordance with the O&M Manuals. Reliability Test Interruptions by Others will be excluded from the Reliability Test period for test data analysis and the Reliability Test shall continue when the interruption is corrected. Reliability Test Interruptions by Others will extend the test period by an amount of time equal to the interruption; provided that, in addition to any other relief to which Contractor is entitled under the Contract, to the extent Owner is the cause of the Reliability Test Interruption by Others event, and there is a material impact the Contractor shall be entitled to a Change Order pursuant to Article 9. Performance Test data collected before the Reliability Test Interruption by Others may be included in the Reliability Calculation for those parties not at fault for the Reliability Test Interruption.

"Reliability Test Interruption by Contractor" shall mean any Reliability Test interruption by Contractor and/or requirement of Contractor to restart the Reliability Test, in each case other than as a result of a Reliability Test Interruption by Others. In the event of a Test Interruption by Contractor, Contractor shall be required to identify the cause of the interruption. Once the cause of the interruption has been identified and, as applicable, issues have been remedied, Contractor shall notify Owner of the issue and the associated remedy. If the remedy is approved by the Owner, the Reliability Test shall be restarted and previous days, or portions thereof, where the BESS was available shall be void and Contractor must initiate a new Reliability Test and must meet the full Project Reliability requirement within this Test. Contractor shall declare the start of each Reliability Test upon the initiation of the test and may not "look back" to determine an appropriate Reliability test period. Contractor is obligated to achieve the Project Reliability at any cost or duration pursuant to the terms of the Contract. It shall be Contractor's responsibility to alter or redesign the BESS until the BESS is capable of achieving the Project Reliability.

The Project shall operate in automatic control as a base control method with normal operating staff levels. The Project shall operate for the assigned Reliability Test duration in cooperation with the dispatch loads requested by the dispatch authority within the Project's design capability. The applicable parameters shall be recorded for the Performance Test period.

Contractor shall collect the data required in order to determine the reliability during the Reliability Test for the BESS.

Contractor shall have the right during the Reliability Test to inspect the Project and all ancillary parts thereof. If as a result of such an inspection, Contractor becomes aware of abnormal operating conditions or an impending failure the Project shall be shut down in

order to permit a detailed inspection over such period as the Owner and the Contractor shall agree to be reasonable in the circumstances.

The "Performance Tests" to be performed for achievement of Final Completion shall be as follows:

Sound Emissions Tests (Article I.7.12)

Contractor shall make every effort to run the Performance Tests at a condition as close to the Reference Conditions as feasibly possible to minimize the application of Performance Test corrections. For conditions that vary from the Reference Conditions, the Contractor shall analytically adjust Performance Test results through the application of corrections to as-measured test results in accordance with the Test Procedures.

I.7.9 Performance Test Points and Instrumentation

The Contractor shall specify a list of key instruments to be used during a Performance Test in the applicable Test Procedures.

All permanent and temporary Performance Test points shall be provided by Contractor in order to demonstrate fully that the Project performance is in compliance with the Contract.

Contractor shall provide drawings indicating the points of measurement together with necessary isolation during Performance Tests. Contractor shall describe the means of measurement of the necessary parameters together with the anticipated standard and accuracy of the instruments.

Test instruments shall be calibrated in accordance with the standards of a recognized national organization such as American Society of Testing and Materials (ASTM), Instrument Society of America (ISA), or the IEEE. Contractor shall calibrate and install special test equipment or instrumentation used in testing as necessary.

Calibration procedures and records shall be submitted to the Owner as part of the Contractor's written Performance Test reports. Calibration of all Performance Test instrumentation shall be verified for and prior to the applicable Performance Test.

Performance Test data shall be monitored and recorded by permanent Project instrumentation using the Project DCS to the greatest extent possible. The Contractor shall ensure that the use of permanent Project instrumentation shall in no way adversely impact the intended Performance Test accuracy and shall provide a pre-test uncertainty analysis based upon the intended instrumentation with the Test Procedure.

Additional precision grade test instruments and signal sources shall be supplied by the Contractor where necessary to comply with and to be used in accordance with the requirements of the appropriate test codes and must meet the accuracy requirements for carrying out the various Performance Tests as specified in the Test Procedures.

Measuring devices and test instruments shall be calibrated.

I.7.10 Preliminary Performance Testing

During commissioning, Contractor shall carry out and complete its own preliminary testing as determined necessary by the Contractor, as well as make and complete such adjustments to the Equipment as may be necessary.

Contractor shall furnish Owner with a description of its proposed preliminary performance testing program, together with calibration certificates for the test equipment, in advance of any such preliminary testing. Owner shall have full access to witness all calibrating and

checking of instruments and other apparatus and all preliminary testing performed. Owner shall receive copies of all preliminary test reports as well as all raw test data for the preliminary tests collected within 48 hours of any such tests.

I.7.11 Performance Test Measurements

The method and the number and location of measurements, and the provision of and duties of observers, shall be mutually agreed by Contractor and Owner before the Performance Test or as specified in battery manufacturer's performance test protocol.

The values used in performance calculations shall be the arithmetical average of the observations made and recorded during the Performance Tests adjusted for obvious errors which shall be excluded from the data set and shall be limited to no more than 5 percent of the available data. As much as practical, the Performance Test data shall be logged automatically on a data logger or in the Project Control System at a rate in excess of one reading per minute. For parameters where this is not practical, data shall be taken during each Performance Test at regular intervals not exceeding five minutes.

I.7.12 Sound Emissions Tests

I.7.6.25 Near Field Noise Tests

Contractor shall perform acoustical noise testing in general accordance with ISO 10494 and ASME PTC-36.

No tolerance or margin in measurement instrumentation will be allowed in determining conformance to Noise Performance Guarantees. Only measurement uncertainty will be allowed.

The near field noise test shall validate that the near-field A-weighted sound pressure levels at a distance of three feet in the horizontal plane from the outermost surface of equipment, including piping, conduit, framework, barriers, mitigation measures, personnel protection devices, curbs, and fluid retainer basins, and five feet above grade shall be limited to sound emissions set forth in the Noise Performance Guarantees.

Corrections for background noise, building effects, and free-field conditions may be applied in determining the sound pressure level. Baseline for correction determined by collecting measurements without the BESS Equipment in operation. Near field levels shall be measured while equipment is operating at base load, steady-state conditions, exclusive of transient events (including but not limited to startup and shutdown) and off-normal operating conditions

I.7.6.26 Far Field Noise Tests

Contractor shall verify through testing performed in accordance with the Test Procedures that the full load noise emissions associated with the Project as a whole are less than or equal to the sound emissions set forth in the Performance Guarantees

No field measurement tolerances are allowed, and they cannot be subtracted from the direct measurements.

Far-field sound measurements shall be determined as equivalent continuous A-weighted sound pressure levels at outdoor locations agreed between the Contractor and Owner. Each measurement position shall be at a height of four to five feet from the ground surface and at a distance of at least three feet from any additional reflecting surface.

The measurements shall be made using a sound level meter conforming to ANSI S1.4 or better. The sound level meter shall be equipped with integrating capabilities to determine the average sound levels over a specified duration. For all measurements, the microphone

shall be equipped with a windscreen provided by or recommended by the sound level meter manufacturer. If necessary, the microphone shall be mounted on a tripod to maintain stability.

The sound level meter shall be field calibrated immediately before and after each measurement series and after any major change in equipment conditions such as rough handling, becoming wet, etc. Field calibration shall be conducted using a precision calibrator and each calibration level shall be recorded. A change in calibration level exceeding +/- 1.0 dB may require that the measurement series be repeated.

The sound level meter equipment and calibrator shall have been laboratory calibrated within the 12 months prior to the Sound Emissions Test. All equipment calibration certificates shall be available during the survey, and copies shall be included with the final survey report.

Instrument, calibration, and measurement details where not specified herein shall be determined from information given in the appropriate ANSI specifications.

Measurements of the existing background noise levels shall be performed over several days without any of the BESS Equipment in operation. The measurements shall be conducted at mutually agreed upon far-field locations. The background noise levels and any sound sources from equipment not furnished by Contractor shall be subtracted from the Sound Emissions Test measurements to remove any area ambient sound not associated with the respective equipment. Corrections for other sources may be made according to standard practice, as given in the ANSI specifications.

Far-field sound measurements shall be made during the four quietest hours of the night time. All measurements shall be taken under quiescent conditions to minimize ambient noise levels and shall be repeated three times to demonstrate reproducibility. Measurements shall be made during operating conditions that are at full load.

Measurements shall be reported as dBA unless due to contamination from intermittent noise sources not associated with the supplied equipment, then an appropriate statistical parameter, such as L90(a) shall be used. A map showing each measurement position shall be produced by the Contractor and included in the test report.

The Sound Emissions Tests and measurement locations for the BESS and Project will depend on surrounding facilities. If surrounding facilities result in significant sound emissions, then near-field measurements around such surrounding equipment shall be required. Subsequent subtraction of these pieces of equipment's sound contribution from the measured sound level at the property boundary shall be performed to estimate the sound contribution solely from the equipment being tested. In the event that these facilities cannot be shut down for the Sound Emission Tests, then one of the two methodologies below shall be followed to demonstrate compliance:

- Measure sound levels at mutually agreed intermediate locations between the
 equipment and the property boundary. These intermediate sound levels, after
 correcting for sound contributions from sources other than the respective equipment
 being tested, shall be used to calculate the property line values by using
 extrapolation methodologies based on ISO 9613 Part 2 standards.
- Measure the sound close to each significant sound source and calculate the total sound level at the property line by using an analytical model and extrapolation methodology based on ISO 9613 Part 2.

1.7 FUNCTIONAL GUARANTEE TESTS

Contractor shall be responsible for successfully completing the following Functional Guarantee Tests for the Work. These Functional Guarantee Tests must be performed and

satisfied to achieve Substantial Completion as identified herein. The Functional Guarantee Tests shall be completed in conjunction with the Performance Tests.

The "Functional Guarantee Tests" to be performed for achievement of Substantial Completion are as follows and as further defined in the following Articles:

- Voltage support including Volt-VAR regulation, Low/high Voltage ride through, power factor and field characterization
- Charge Duration Test
- Fire Protection System Functional Test
- · Black Start Test
- Workplace Sound Survey
- System Back-up and Restoration
- Control System Start-up Test

I.7.1 Voltage Support

Contractor shall conduct functional tests involving the manipulation or stabilization of the grid voltage as follows:

<u>Volt / VAR Regulation</u>: Compliance certification by a nationally recognized testing laboratory (NRTL) to be provided as an agreed replacement of onsite functional test. Test will be used to demonstrate that the BESS can functionally perform Volt-VAR regulation based on system voltage and allow assignment of a Pass/Fail designation for this test. Test procedures in ESIC Energy Storage Test Manual and Pacific Northwest National Lab Protocol for Uniformly Measuring and Expressing the Performance of Energy Storage Systems may be referenced.

Low /High Voltage Ride -through: Compliance certification by a nationally recognized testing laboratory (NRTL) to be provided as an agreed replacement of onsite functional test. Test is intended to verify that the BESS can comply with low/high voltage ride-through (LVRT/HVRT) and low/high frequency ride-through specifications and settings. The specific requirements for LVRT/HVRT curve settings may be based on a codes and standards (e.g. IEEE 1547, UL 1741) or utility interconnection requirements.

<u>Power Factor</u>: Test the ability of the system to control based on a fixed power factor set point and operate using autonomous power factor management based on inputs including voltage and watts. Refer to applicable Codes and standards IEEE 1547 and EPRI Technical document Common Functions for Smart Inverters, Version 3 December 2016, as appropriate.

Test: Set Real Power command and Reactive Power Mode (including Power Factor Set Point and Lead/Lag values) per the battery manufacturer's Controls and Communications Manual, See Exhibit I.1.

The pass criteria is defined by meter real and reactive power values, at the agreed point of measurement, matching calculated values based on power factor setpoint and commanded real power. Values for test to be agreed upon by Owner and contractor during the Test Procedure review.

I.7.2 Charge Duration Test

A Functional Test shall be performed to demonstrate the charge duration of the BESS. The charge duration is the time required for the BESS to reach its maximum SOC starting from its minimum SOC at its rated charge power. To be demonstrated as part of the round trip efficiency test.

I.7.3 Fire Protection System Functional Test

The Contractor shall perform a full "functional test" of the fire protection equipment prior to start up. This test will be witnessed by the insurance carrier, equipment provider, and Owner.

The purpose of this test is to demonstrate a simulated test of the fire detection system, including visual and audible alarms, alarm silence, and reset (as applicable), with the following procedure:

- 1. Initiate a magnetic test per fire detection manufacturer's instruction manual.
- 2. Press "Signal Silence" button or equivalent on fire alarm control panel.
- 3. Press "System Reset" button or equivalent on fire alarm control panel.
- 4. Repeat for each fire detection device.

The pass criteria is defined by verifying each fire detection magnetic test triggers a visible and audible alarm (as applicable) at the fire alarm control panel. Verify audible alarm stops once "signal silence" button or equivalent is pressed. Verify visible indicator turns off once "system reset" button or equivalent is pressed.

I.7.4 Black Start Test

Contractor shall demonstrate the BESS system's Functional capability to provide black start of an Owner generation resource. If Owner's generation asset is unavailable during the Contractor's demonstration test, then load banks at a minimum capacity of 10MW for 20 minutes shall be utilized.

Test procedure:

- 1. Place both BESS and generation asset being black-started (or load bank) into a standby state and connect to bus isolated from larger utility grid
- 2. Command BESS into an active state (Island Control Mode = Intentional Island) to energize isolated bus
- 3. Initiate a black start of generation asset by commanding it to start (or simulate generation asset's black starting load using a load bank)

The pass criteria is a successful black start of the generation asset. If a load bank is used to simulate generation asset's black starting loads, the pass criteria is that voltage of the isolated bus remains above generation asset's under voltage ride through limits.

I.7.5 Workplace Sound Survey

Sound measurements, dB (A), shall be made during BESS rated discharge operation (i.e., after Substantial Completion of the Project).

A sound level meter conforming to the appropriate ANSI specifications shall be utilized. The measurement positions shall normally be at a height of five feet above grade, foundation, platform, or floor and at a minimum distance of three feet from the system/equipment surface. The number of measurement positions and their precise location shall be agreed by Contractor and Owner. The A-weighted rms sound level using the slow response of the sound level meter shall be recorded at each position.

Alternatively, the direct measurement of the equivalent continuous A-weighted sound pressure level may be made at each measurement position using an instrument complying with the appropriate ANSI specifications.

Instrument, calibration, and measurement details where not specified herein shall be determined from information given in the ANSI specifications.

Measurements shall be made during full load conditions. Sound levels greater than 80 dB(A) shall be reported to the nearest 1 dB(A).

For indoor spaces, the level shall also be measured at three feet from the walls at all column lines, and in all occupied spaces such as control rooms, offices, shops, and lockers. Roof top equipment shall also be measured. For these locations, octave or 1/3 octave spectra are required in addition to "A" weighted overall values.

The Contractor shall conduct an in-Project noise survey to identify the in-Project areas that may be exposed to A-weighted sound pressure levels exceeding the near-field noise guarantee during normal operation. To the extent such areas are identified, these areas shall be identified with warning signs prescribing hearing protection. The in-Project noise survey shall be conducted in accordance with the Test Procedures.

I.7.6 Control Systems

The Contractor shall perform control system testing to demonstrate the following:

- Ability to restore control systems from back-up site configurations.
- Ability of the instrumentation and control systems to function as specified in a real operating environment
- Ability of the instrumentation and control system to function in automatic from minimum stable load to full load

I.7.6.1 System Back-up and Restoration

After Substantial Completion of the Project, Contractor shall make a back-up of all system and program files and then demonstrate to Owner the restoration of the system from the back-up medium.

The pass criteria is defined by successfully reviving the DCS, and Tesla Site Controller, RTAC and HMI computer from the back-up configuration.

I.7.6.2 Control System Start-up Test

The Contractor shall demonstrate that the Project control systems are capable safely controlling the BESS during charging operations from minimum to maximum SOC, and subsequently during discharge from maximum to minimum SOC while all controllers are in automatic, all permissives are met, and redundant equipment are in a standby mode ready for service.

The Control System Start-up Test shall begin with the BESS at minimum SOC. The Project operator shall then manually initiate at the control system the charging process per standard operating procedures. Following this step, the BESS charging shall be automatically initiated from the Owner's remote control location and stop automatically at maximum SOC. After charging and with the BESS at maximum SOC, the Project operator shall then manually initiate at the control system the discharge process from Owner's remote control location per standard operating procedures. Following this step, the BESS discharge shall be automatically initiated and stop automatically at minimum SOC.

After initiation of the Control System Start-up Test, no controllers shall be placed in manual operation except unless otherwise approved by the Owner prior to initiation of the Control System Start-up Test.

1.8 FUNCTIONAL GUARANTEE AND PERFORMANCE TEST RESULTS

Contractor shall submit the methodology by which it proposes to calculate the results based on the measured data to Owner.

Prior to the calculation of the test results, Owner's agreement will be required to the fundamental data obtained from the trials which shall not be unreasonably withheld.

Preliminary corrected performance figures shall be calculated at the completion of each test to allow the Owner and Contractor, as applicable, to judge if the test completed was satisfactory or whether it should be repeated.

A preliminary report of all Performance Tests shall be produced and three copies issued to Owner for approval within five business days of the completion of each Performance Test.

The form of calculation sheets and diagrams, which shall conform to the format agreed with Owner, shall clearly identify the values measured in the Performance Test.

A final and complete report of the Tests shall be produced and three copies issued to Owner for approval within five business days of receipt of the gas analysis.

The official test reports shall include, as a minimum, the following details:

- Date and time of each test start and finish
- Full procedure adopted
- Instrumentation details and calibration data including signed and approved instrument calibration forms
- Full schematic of the Work systems together with instrument locations
- The standard to which the test was carried out and the Code of Practice followed, plus other reference data used
- The operating conditions prior to the test
- Variations in system frequency/generating unit speed
- Summary of test readings, results and conclusions
- Calculations
- · Pre-test uncertainty calculations
- · Copies of test data sheets or other raw data
- Notes on any unusual observations, data or conclusions
- Attendance
- Results of the test

EXHIBIT J

KEY PERSONNEL

<u>Individual</u> <u>Title and Duties</u>

Nick Babic Contractor Project Manager:

nick.babic@affordable-solar.com

Phone: 505-944-4231

Contractor and Owner to agree on additional Key Personnel to identify for Contractor, Subcontractors, and Vendors no later than thirty (30) Days after the issuance of the NTP.

EXHIBIT K

FORM OF ASSIGNMENT CLAUSE FOR SUBCONTRACTS

[SUBCONTRACTOR] under this [DESCRIPTION OF SUBCONTRACT] with [CONTRACTOR] ("Contractor") hereby, in the event of a Contractor Event of Default (as such term is defined under the Engineering, Procurement, and Construction Contract, dated [], 20[] (the "Prime Contract"), between Public Service Company of New Mexico, a New Mexico corporation ("Owner"), and [______] (Contractor"), consents to the assignment of [CONTRACTOR]'s rights in this [SUBCONTRACT] by [CONTRACTOR] to Owner, its permitted assigns and/or its lenders. Such assignment shall not take effect until the occurrence of, and written notice by Owner of, the termination of the Prime Contract and Owner's request for an assignment to [SUBCONTRACTOR].

EXHIBIT L

FORM OF MONTHLY PROGRESS REPORT

Each Monthly Progress Report shall be a written statement of Project status prepared by Contractor for review by Owner. The following items shall be included in monthly reports to be submitted by Contractor.

TABLE OF CONTENTS FOR MONTHLY PROGRESS REPORT

1.0 EXECUTIVE SUMMARY – (CURRENT MONTH)

The executive summary shall provide a brief and general overview of the projects progress during the previous month. Include progress graphs by permitting, engineering, procurement, construction, commissioning, and for the total project.

2.0 SUMMARY OF PROGRESS AND STATUS OF PERMITTING, ENGINEERING, PROCUREMENT AND CONSTRUCTION

2.1 Current Month

2.1.1 Engineering work activities:

Include a listing of work activities completed during the previous month and those planned for the next month sorted by engineering discipline. Include an overall summary of the engineering progress.

2.1.2 Procurement work activities:

Include a listing of work activities completed during the previous month and those planned for the next month sorted by equipment, bulk materials, and subcontracts. Include an overall summary of the procurement progress.

2.1.3 Construction work activities:

Include a listing of work activities completed during the previous month and those planned for the next month sorted by major WBS area. Include an overall summary of the construction progress.

2.1.4 Startup & Commissioning work activities:

Include a listing of work activities completed during the previous month and those planned for the next month sorted by turnover package. Include an overall summary of the startup & commissioning progress.

Reporting format shall be based on completion of Project Milestones and construction, permitting, engineering (organized by discipline), procurement (issuance of purchase orders), shipment of materials and equipment to the Site, training and commissioning.

2.2 Next Month

The expected progress for the Project in the next thirty (30) Days shall be provided in outline form based on permitting, construction, engineering, procurement, shipment, training and commissioning.

3.0 MEETING STATUS

A summary of major meetings for the current month identifying the date and the attendees, and a schedule of meeting dates for the next month, including a one or two-sentence summary of anticipated topics of discussion for the next month and schedule for next month meeting date.

4.0 PRIORITIES/ISSUES/CONCERNS

Identification and evaluation of problem areas that are anticipated to have a material effect on either Project Schedule or that may, in the opinion of Contractor, require a modification of Exhibit A to the Contract. Issues identified would include, but not be limited to, risks to satisfactory completion of the Contract, possible change orders, QA/QC concerns, potential subcontractor performance problems, etc. The monthly report will provide a narrative description of the resolution plans for the key issues.

5.0 SAFETY

Provide a statement concerning the safety aspects of the work including a report of accidents, near misses, OSHA incident rate, etc. The report shall include a summary of all written accident reports for lost time accidents that occur at the Site during such month, prepared in accordance with the safety and security assurance program.

6.0 SCHEDULE UPDATE

Report important items and events, such as date of arrival of major equipment components, and completion of milestones and Critical Path Items in the Project Schedule.

The reports shall be presented in a format used by the Contractor and reasonably acceptable to Owner. An updated copy of the Level 1 working schedule shall be attached to the Monthly Progress Report with a written analysis of schedule status, including actual versus planned progress, with reference to the Critical Path Items and Project Schedule. The schedule shall indicate early, late, and actual curves. A functional version of the Level 1 schedule shall be submitted with the Monthly Progress Report.

The schedule update shall include a listing of milestones which display the baseline milestones, milestones completed and forecasted completion of the milestones still to complete. The analysis shall include a written definition of the critical path with reasons for it being on the

critical path plus anticipated work around and actions to keep it from becoming more critical and impacting the project completion. Secondary critical paths shall also be identified.

7.0 CHANGE IN WORK

This Section shall describe each event including events of Force Majeure that provides the basis on which Contractor can claim that the Contract Price should be increased (except for an event of Force Majeure) or that either of the Project Guaranteed Dates should be extended and with respect to each such event, specifies the amount of such proposed increase in the Contract Price (except for an event of Force Majeure) and the duration of each such proposed extension. A detailed change order log listing all agreed and potential change orders shall be maintained and included.

8.0 PERMIT STATUS

Provide listing of all Contractor Acquired Permits and Contractor Acquired Operating Permits including current status and the date the permit is to be obtained.

9.0 DRAWING AND PROCUREMENT STATUS

Provide the updated engineering drawing list, engineering and procurement schedule, and current status as compared to overall schedule.

10.0 PROJECT FINANCIAL STATUS

The Section shall include the billing breakdown for the current month, a comparison of the Milestone Payment Schedule with the actual progress payments to date, and financial review of the Project to date.

The Section shall also include a forecast of all milestone payments in the month it is expected to occur. Each month, the milestone achieved and actual payment amount shall be recorded and included in the progress report.

11.0 PROGRESS PHOTOGRAPHS

Contractor shall supply color photographs to document progress and to record significant completed elements of work. Electronic format is acceptable.

Also provide photographs of fabrication of major equipment and Site progress. Photographs should be chosen carefully to illustrate progress.

EXHIBIT M

FORM OF PERFORMANCE AND PAYMENT BOND

Document A312™ - 2010

Conforms with The American Institute of Architects AIA Document 312

Performance Bor	id			
CONTRACTOR: (Name, legal status and address)		SURETY: (Name, legal status and p	rincipal place of business)	
		Mailing Address for N	otices	This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.
OWNER: (Name, legal status and address)				Any singular reference to Contractor, Surety, Owner or other party shall be considered plural where applicable.
CONSTRUCTION CONTRA	ACT			
Amount: \$				
Description: (Name and location)				
BOND Date: (Not earlier than Construction Co	ntract Date)			
Amount: \$				
Modifications to this Bond;	None	See Section 16		
CONTRACTOR AS PRINC Company:	IPAL (Corporate Seat)	SURETY Company:	(Corporate Seal)	
Signature:		Signature:		
Name and Title:		Name and Title:		
(Any additional signatures appear	on the last page of th	is Performance Bond.)		
(FOR INFORMATION ONLY	Name, address and to	•		
AGENT or BROKER;		OWNER'S REPRES! (Architect, Engineer or ot		
S-1852/AS 8/10				

- § 1The Contractor and Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the Owner for the performance of the Construction Contract, which is incorporated herein by reference.
- §2 If the Contractor performs the Construction Contract, the Surety and the Contractor shall have no obligation under this Bond, except when applicable to participate in a conference as provided in Section 3.
- §3 If there is no Owner Default under the Construction Contract, the Surety's obligation under this Bond shall arise after
 - the Owner first provides notice to the Contractor and the Surety that the Owner is considering declaring a Contractor Default. Such notice shall indicate whether the Owner is requesting a conference among the Owner, Contractor and Surety to discuss the Contractor's performance. If the Owner does not request a conference, the Surety may, within five (5) business days after receipt of the Owner's notice, request such a conference. If the Surety timely requests a conference, the Owner shall attend. Unless the Owner agrees otherwise, any conference requested under this Section 3.1 shall be held within ten (10) business days of the Surety's receipt of the Owner's notice. If the Owner, the Contractor and the Surety agree, the Contractor shall be allowed a reasonable time to perform the Construction Contract, but such an agreement shall not waive the Owner's right, if any, subsequently to declare a Contractor Default.
 - .2 the Owner declares a Contractor Default, terminates the Construction Contract and notifies the Surety, and
 - .3 the Owner has agreed to pay the Balance of the Contract Price in accordance with the terms of the Construction Contract to the Surety or to a contractor selected to perform the Construction Contract.
- §4 Failure on the part of the Owner to comply with the notice requirement in Section 3.1 shall not constitute a failure to comply with a condition precedent to the Surety's obligations, or release the Surety from its obligations, except to the extent the Surety demonstrates actual prejudice.
- §5 When the Owner has satisfied the conditions of Section 3, the Surety shall promptly and at the Surety's expense take one of the following actions:
- §5.1 Arrange for the Contractor, with the consent of the Owner, to perform and complete the Construction Contract;
- §5.2 Undertake to perform and complete the Construction Contract itself, through its agents or independent contractors;
- §6.3 Obtain bids or negotiated proposals from qualified contractors acceptable to the Owner for a contract for performance and completion of the Construction Contract, arrange for a contract to be prepared for execution by the Owner and a contractor selected with the Owner's concurrence, to be secured with performance and payment bonds executed by a qualified surety equivalent to the bonds issued on the Construction Contract, and pay to the Owner the amount of damages as described in Section 7 in excess of the Balance of the Contract Price incurred by the Owner as a result of the Contract Default; or
- § 5.4 Waive its right to perform and complete, arrange for completion, or obtain a new contractor and with reasonable promptness under the circumstances:
 - .1 After investigation, determine the amount for which it may be liable to the Owner and, as soon as practicable after the amount is determined, make payment to the Owner; or
 - .2 Deny liability in whole or in part and notify the Owner, citing the reasons for denial.
- §6 If the Surety does not proceed as provided in Section 5 with reasonable promptness, the Surety shall be deemed to be in default on this Bond seven days after receipt of an additional written notice from the Owner to the Surety demanding that the Surety perform its obligations under this Bond, and the Owner shall be entitled to enforce any remedy available to the Owner. If the Surety proceeds as provided in Section 5.4, and the Owner refuses the payment or the Surety has denied liability, in whole or in part, without further notice the Owner shall be entitled to enforce any remedy available to the Owner.

§ 7 If the Surety elects to act under Section 5.1, 5.2 or 5.3, then the responsibilities of the Surety to the Owner shall not be greater than those of the Contractor under the Construction Contract, and the responsibilities of the Owner to the Surety shall not be greater than those of the Owner under the Construction Contract. Subject to the commitment by the Owner to pay the Balance of the Contract Price, the Surety is obligated, without duplication, for

- 1 the responsibilities of the Contractor for correction of defective work and completion of the Construction Contract;
- .2 additional legal, design professional and delay costs resulting from the Contractor's Default, and resulting from the actions or failure to act of the Surety under Section 5; and
- .3 liquidated damages, or if no liquidated damages are specified in the Construction Contract, actual damages caused by delayed performance or non-performance of the Contractor.
- § 81fthe Surety elects to act under Section 5.1, 5.3 or 5.4, the Surety's liability is limited to the amount of this Bond.
- § 9 The Surety shall not be liable to the Owner or others for obligations of the Contractor that are unrelated to the Construction Contract, and the Balance of the Contract Price shall not be reduced or set off on account of any such unrelated obligations. No right of action shall accrue on this Bond to any person or entity other than the Owner or its heirs, executors, administrators, successors and assigns.
- § 10 The Surety hereby waives notice of any change, including changes of time, to the Construction Contract or to related subcontracts, purchase orders and other obligations.
- § 11 Any proceeding, legal or equitable, under this Bond may be instituted in any court of competent jurisdiction in the location in which the work or part of the work is located and shall be instituted within two years after a declaration of Contractor Default or within two years after the Contractor ceased working or within two years after the Surety refuses or fails to perform its obligations under this Bond, whichever occurs first. If the
- provisions of this Paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable.
- § 12Notice to the Surety, the Owner or the Contractor shall be mailed or delivered to the address shown on the page on which their signature appears.
- § 13 When this Bond has been furnished to comply with a statutory or other legal requirement in the location where the construction was to be performed, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. When so furnished, the intent is that this Bond shall be construed as a statutory bond and not as a common law-bond.

§14Definitions

- § 14.1 Balance of the Contract Price. The total amount payable by the Owner to the Contractor under the Construction Contract after all proper adjustments have been made, including allowance to the Contractor of any amounts received or to be received by the Owner in settlement of insurance or other claims for damages to which the Contractor is entitled, reduced by all valid and proper payments made to or on behalf of the Contractor under the Construction Contract.
- \S 14.2 Construction Contract. The agreement between the Owner and Contractor identified on the cover page, including all Contract Documents and changes made to the agreement and the Contract Documents.
- § 14.3 Contractor Default. Failure of the Contractor, which has not been remedied or waived, to perform or otherwise to comply with a material term of the Construction Contract.
- § 14.4 Owner Default. Failure of the Owner, which has not been remedied or waived, to pay the Contractor as required under the Construction Contract or to perform and complete or comply with the other material terms of the Construction Contract.
- § 14.5 Contract Documents, All the documents that comprise the agreement between the Owner and Contractor.
- § 15 If this Bond is issued for an agreement between a Contractor and subcontractor, the term Contractor in this Bond shall be deemed to be Subcontractor and the term Owner shall be deemed to be Contractor.

§ 16 Modifications to this bond are as follows:		
(Space is provided below for additional signatures of CONTRACTOR AS PRINCIPAL	added parties, other than those appearing SURETY	on the cover page.)
Company: (Corporate Sea		(Corporate Seal)
Signature:Name and Title Address	Signature: Name and Title: Address	

Document A312™ - 2010

Conforms with The American Institute of Architects AIA Document 312

Payment Bond

CONTRACTOR: (Name, legal status and address)		SURETY: (Name, legal status and	principal place of business)	
OWNER:		Mailing Address for	Notices	This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.
(Name, legal status and address)				Any singular reference to Contractor, Surety, Owner or other party shall be considered plural where applicable.
CONSTRUCTION CONTRA	ACT			
Amount: \$				
Description: (Name and location)				
BOND Date:				
(Not earlier than Construction Co	ontract Date)			
Amount: \$				
Modifications to this Bond:	None	See Section 18		
CONTRACTOR AS PRINC Company:	IPAL (Corporate Seal)	SURETY Company:	(Corporate Seal)	
Signature:		Signature:		
Name and Title:		Name and Title:		
(Any additional signatures appear				
(FOR INFORMATION ONLY —	Name, gaaress and t			
AGENT or BROKER:		OWNER'S REPRES (Architect, Engineer or c		
S-2149/AS 8/10				

- § 1 The Contractor and Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the Owner to pay for labor, materials and equipment furnished for use in the performance of the Construction Contract, which is incorporated herein by reference, subject to the following terms.
- § 2 If the Contractor promptly makes payment of all sums due to Claimants, and defends, indemnifies and holds harmless the Owner from claims, demands, liens or suits by any person or entity seeking payment for labor, materials or equipment furnished for use in the performance of the Construction Contract, then the Surety and the Contractor shall have no obligation under this Bond.
- § 3 If there is no Owner Default under the Construction Contract, the Surety's obligation to the Owner under this Bond shall arise after the Owner has promptly notified the Contractor and the Surety (at the address described in Section 13) of claims, demands, liens or suits against the Owner or the Owner's property by any person or entity seeking payment for labor, materials or equipment furnished for use in the performance of the Construction Contract and tendered defense of such claims, demands, liens or suits to the Contractor and the Surety.
- §4 When the Owner has satisfied the conditions in Section 3, the Surety shall promptly and at the Surety's expense defend, indemnify and hold harmless the Owner against a duly tendered claim, demand, lien or suit.
- §5 The Surety's obligations to a Claimant under this Bond shall arise after the following:
- § 5.1 Claimants, who do not have a direct contract with the Contractor,
 - .1 have furnished a written notice of non-payment to the Contractor, stating with substantial accuracy the amount claimed and the name of the party to whom the materials were, or equipment was, furnished or supplied or for whom the labor was done or performed, within ninety (90) days after having last performed labor or last furnished materials or equipment included in the Claim; and
 - .2 have sent a Claim to the Surety (at the address described in Section 13).
- §5.2 Claimants, who are employed by or have a direct contract with the Contractor, have sent a Claim to the Surety (at the address described in Section 13).
- § 6 If a notice of non-payment required by Section 5.1.1 is given by the Owner to the Contractor, that is sufficient to satisfy a Claimant's obligation to furnish a written notice of non-payment under Section 5.1.1.
- § 7 When a Claimant has satisfied the conditions of Sections 5.1 or 5.2, whichever is applicable, the Surety shall promptly and at the Surety's expense take the following actions:
- § 7.1 Send an answer to the Claimant, with a copy to the Owner, within sixty (60) days after receipt of the Claim, stating the amounts that are undisputed and the basis for challenging any amounts that are disputed; and
- §7.2 Pay or arrange for payment of any undisputed amounts.
- §7.3 The Surety's failure to discharge its obligations under Section 7.1 or Section 7.2 shall not be deemed to constitute a waiver of defenses the Surety or Contractor may have or acquire as to a Claim, except as to undisputed amounts for which the Surety and Claimant have reached agreement. If, however, the Surety fails to discharge its obligations under Section 7.1 or Section 7.2, the Surety shall indemnify the Claimant for the reasonable attorney's fees the Claimant incurs thereafter to recover any sums found to be due and owing to the Claimant.
- § 8 The Surety's total obligation shall not exceed the amount of this Bond, plus the amount of reasonable attorney's fees provided under Section 7.3, and the amount of this Bond shall be credited for any payments made in good faith by the Surety.
- § 9 Amounts owed by the Owner to the Contractor under the Construction Contract shall be used for the performance of the Construction Contract and to satisfy claims, if any, under any construction performance bond. By the Contractor furnishing and the Owner accepting this Bond, they agree that all funds earned by the Contractor in the performance of the Construction Contract are dedicated to satisfy obligations of the Contractor and Surety under this Bond, subject to the Owner's priority to use the funds for the completion of the work..

§10 The Surety shall not be liable to the Owner, Claimants or others for obligations of the Contractor that arc unrelated to the Construction Contract.

The Owner shall not be liable for the payment of any costs or expenses of any Claimant under this Bond, and shall have under this Bond no obligation to make payments to, or give notice on behalf of, Claimants or otherwise have any obligations to Claimants under this Bond.

- § 11 The Surety hereby waives notice of any change, including changes of time, to the Construction Contract or to related subcontracts, purchase orders and other obligations.
- § 12 No suit or action shall be commenced by a Claimant under this Bond other than in a court of competent jurisdiction in the state in which the project that is the subject of the Construction Contract is located or after the expiration of one year from the date (1) on which the Claimant sent a Claim to the Surety pursuant to Section 5.1.2 or 5.2, or (2) on which the last labor or service w s performed by anyone or the last materials or equipment were furnished by anyone under the Construction Contract, whichever of (1) or (2) first occurs. If the provisions of this Paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable.
- § 13 Notice and Claims to the Surety, the Owner or the Contractor shall be mailed or delivered to the address shown on the page on which their signature appears. Actual receipt of notice or Claims, however accomplished, shall be sufficient compliance as of the date received.
- § 14 When this Bond has been furnished to comply with a statutory or other legal requirement in the location where the construction was to be performed, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. When so furnished, the intent is that this Bond shall be construed as a statutory bond and not as a common law bond.
- §16 Upon request by any person or entity appearing to be a potential beneficiary of this Bond, the Contractor and Owner shall promptly furnish a copy of this Bond or shall permit a copy to be made.

§16 Definitions

§ 16.1 Claim. A written statement by the Claimant including at a minimum:

- .1 the name of the Claimant;
- .2 the name of the person for whom the labor was done, or materials or equipment furnished;
- .3 a copy of the agreement or purchase order pursuant to which labor, materials or equipment was furnished for use in the performance of the Construction Contract;
- .4 a brief description of the labor, materials or equipment furnished;
- .6 the date on which the Claimant last performed labor or last furnished materials or equipment for use in the performance of the Construction Contract;
- .6 the total amount earned by the Claimant for labor, materials or equipment furnished as of the date of the Claim;
- .7 the total amount of previous payments received by the Claimant; and
- .8 the total amount due and unpaid to the Claimant for labor, materials or equipment furnished as of the date of the Claim.
- § 16.2 Claimant. An individual or entity having a direct contract with the Contractor or with a subcontractor of the Contractor to furnish labor, materials or equipment for use in the performance of the Construction Contract. The term Claimant also includes any individual or entity that has rightfully asserted a claim under an applicable mechanic's lien or similar statute against the real property upon which the Project is located. The intent of this Bond shall be to include without limitation in the terms "labor, materials or equipment that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental equipment used in the Construction Contract, architectural and engineering services required for performance of the work of the Contractor and the Contractor's subcontractors, and all other items for which a mechanic's lien may be asserted in the jurisdiction where the labor, materials or equipment were furnished.
- §16.3 Construction Contract. The agreement between the Owner and Contractor identified on the cover page, including all Contract Documents and all changes made to the agreement and the Contract Documents.

- § 16.4 Owner Default. Failure of the Owner, which has not been remedied or waived, to pay the Contractor as required under the Construction Contract or to perform and complete or comply with the other material terms of the Construction Contract.
- §16.5 Contract Documents. All the documents that comprise the agreement between the Owner and Contractor.
- § 17 If this Bond is issued for an agreement between a Contractor and subcontractor, the term Contractor in this Bond shall be deemed to be Subcontractor and the term Owner shall be deemed to be Contractor.
- § 18 Modifications to this bond are as follows:

(Space is provided below	pace is provided below for additional signatures of added parties, other than those appearing on the coverpage.)							
CONTRACTOR AS	PRINCIPAL	SURETY						
Company:	(Corporate Seal)	Company:	(Corporate Seal)					
Signature:		Signature:						
Name and Title:		Name and Title:						
Address		Address						

WARRANTY

BOND			
KNOWN ALL BY THESE I	PRESENTS: That we		
as Principal, and			, a
corporation organized and ex	isting under the Laws of th	ne State of,	as Surety, are
held and firmly bound unto_			as Obligee, in
the total sum of	\ for the nex	yment whereof said Principal	and Curaty hind
themselves, jointly and sever	ally, as provided herein.	ment whereof said Finicipal	and Surety bind
WHEREAS, the Principal enfor	tered into a contract with the	he Obligee dated	and the second s
			("Work")
•			
void; otherwise it shall remain	commencing on (the "War in in full force and effect.	terials and workmanship for a pranty Period"), then this obligated in the state of	tion shall be
		ed, however, that if this limitati	
		itation shall be deemed to be a	
		by such law, and said period of	
be deemed to have accrued a	nd shall commence to run of	on the expiration date of the Wa	arranty Period.
SIGNED this	day of		(Principal)
By:	-		
By:	A	ttornev-in-Fact	

EXHIBIT N

[RESERVED]

EXHIBIT O PROJECT IMPLEMENTATION SCHEDULE

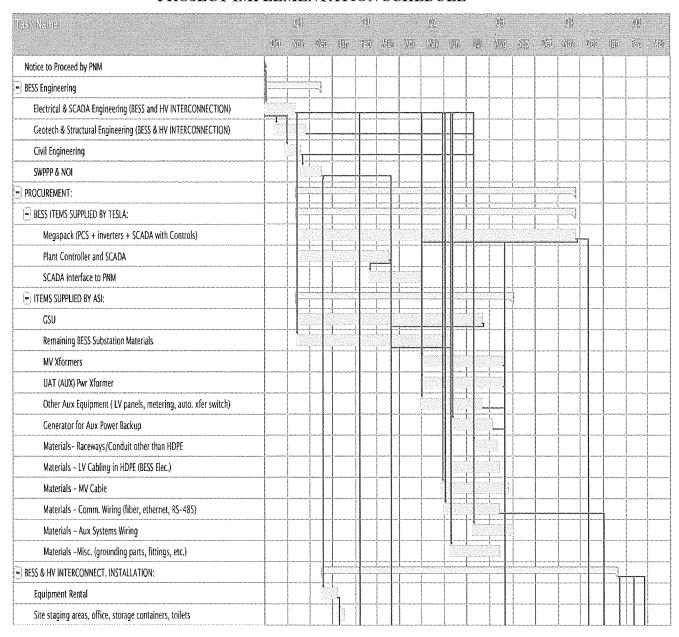


EXHIBIT P ESSENTIAL CONTRACTOR DELIVERABLES

Reference Technical Specifications, Appendix A, Section 05—Submittals, Table 5-1

EXHIBIT Q

FORM OF MANUFACTURER'S LIMITED WARRANTY



MEGAPACK SYSTEM MANUFACTURER'S LIMITED WARRANTY (USA)

Effective Date: October 11, 2018

Applies to: Any Tesla Megapack system that is supplied by Tesla, Inc. ("Tesla") or its affiliate for installation within the United States of America and to which this Limited Warranty is expressed to apply in the System purchase agreement (each, the "System").

- 1. <u>Limited Warranty</u>. Tesla warrants that the System shall (a) conform to the Specifications¹ on the Original Sale Date²; (b) be free from defects in design, workmanship and materials as set out in <u>Exhibit 1</u>; and (c) retain energy capacity as set out in <u>Exhibit 1</u>.
- 2. <u>No Extensions</u>. If the System, or any component, is repaired or replaced under this Limited Warranty, the remainder of the periods referenced in <u>Exhibit 1</u> shall apply to the repaired or replacement system. Under no circumstance shall any such period be extended on account of any warranty repair or replacement.
- 3. Remedies. If a valid claim is submitted in accordance with the procedures described in this Limited Warranty, Tesla shall, in its sole discretion, (a) repair the defective System or component, (b) replace the defective System or component with an equivalent System or component (or, if Tesla or the manufacturer of such component has discontinued manufacture of such component, a mutually acceptable alternative component), or (c) where permitted in Exhibit 2, pay Energy Shortfall Damages (as defined in Exhibit 2). Tesla shall inform System owner of its remedy election in writing within 10 days of Tesla's validation of the claim. If Tesla repairs or replaces the defective System, Tesla shall also be responsible for the costs of teardown, disassembly, transportation, re-assembly and re-installation of the System or component (or their respective replacements).
- Items Not Covered. This Limited Warranty does not cover (a) normal wear and tear or deterioration, or 4. superficial defects, dents or marks that do not impact System performance; (b) vibration that does not impact System performance; (c) damage that occurs during shipping or transportation (other than shipping or transportation by or on behalf of Tesla); (d) defects or performance issues resulting from use of the System outside the "Operating Temperature" range set out in the Specifications; (e) defects or performance issues resulting from the commissioning, operation, maintenance, modification or repair of the System in violation of the applicable Tesla Manual³, other than by Tesla or its affiliate or subcontractor; (f) defects or performance issues to the extent that Tesla would have been able to prevent or limit such defect or performance issues if Tesla had a remote connection to the System, in circumstances where (i) Tesla did not have such remote connection at the required time and (ii) the System Purchase Agreement states that the System owner is responsible for establishing and maintaining such remote connection; (g) defects or performance issues resulting from abuse, negligence, accidents or force majeure events, including but not limited to lightning, flood, earthquake, fire, or other events outside the reasonable control of Tesla; (h) damage or deterioration that occurs after the expiration or voiding of this Limited Warranty or that is reported more than 10 days after the expiration or voiding of this Limited Warranty; or (i) theft or vandalism of the System or any of its components.
- Exclusions. Each of the following shall permanently void this Limited Warranty: (a) commissioning, maintenance, modification or repair of the System by anyone other than Tesla, its affiliate or a Tesla approved technician; and (b) removal and reinstallation of the System at a different location without the written consent of Tesla. Each of the following shall permanently void this Limited Warranty when performed by anyone other than Tesla or its affiliate or subcontractor: (i) installation of the System in contravention of the "Megapack System Installation Manual", (ii) storage of the System in contravention of the "Megapack System Storage Guidelines" or in violation of the "Storage Conditions (on the shelf)" set out in the "Environmental Specifications" section of the Specifications and (iii) any attempt to extend or reduce the life of the System or prevent or hinder the recovery of

¹ Specifications means the "Megapack System Specifications" referenced in the System purchase agreement.

² Original Sale Date means the date that risk of loss of the System transferred to the original buyer under the System purchase agreement.

³ Tesla Manuals means the System manuals published on Tesla Partner Portal (https://partners.teslamotors.com).

data regarding System usage.

- Exclusive Remedies. This Limited Warranty is provided voluntarily and does not constitute an independent guarantee. TO THE FULLEST EXTENT PERMITTED BY LAW, THIS LIMITED WARRANTY AND THE REMEDIES SET FORTH HEREIN ARE EXCLUSIVE AND IN LIEU OF ANY OTHER WARRANTIES, REMEDIES AND CONDITIONS, WHETHER ORAL, WRITTEN, STATUTORY, EXPRESS OR IMPLIED (INCLUDING ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, USE OR APPLICATION, AND ANY WARRANTIES AGAINST LATENT OR HIDDEN DEFECTS), ALL OF WHICH ARE EXPRESSLY DISCLAIMED. TO THE EXTENT THAT SUCH WARRANTIES CANNOT BE DISCLAIMED, TESLA LIMITS THE DURATION OF AND REMEDIES FOR SUCH WARRANTIES TO THE DURATIONS AND REMEDIES DESCRIBED HEREIN.
- 7. <u>Limitation of Liability</u>. In no event will tesla be liable for any consequential, incidental, indirect, special, exemplary or punitive damages arising out of or related to this limited warranty, regardless of the form of action and regardless of whether a party has been informed of, or otherwise might have anticipated, the possibility of such damages. . In no event will tesla's liability arising out of or related to limited warranty claims with respect to an individual system exceed the system price⁴. Some states do not allow the exclusion or limitation of damages, including incidental or consequential damages, so the above exclusion or limitation may not apply, or may only apply to a limited extent.
- 8. <u>Limitation on Use</u>. The system is not intended for use as a primary or back-up power source for life-support systems or other medical equipment. Tesla disclaims any liability arising out of any such use of the system, reserves the right to refuse to service the system if used for these purposes and disclaims any liability arising out of tesla's service of, or refusal to service, any such system.
- 9. <u>Governing Law; Dispute Resolution; Venue</u>. This Limited Warranty will be governed by and interpreted in accordance with the laws of the State of California. The United Nations Convention on Contracts for the International Sale of Goods will not apply to this Limited Warranty. Any dispute arising from or relating to this Limited Warranty shall first be promptly referred to the senior level management of Tesla and the System owner for resolution. If the dispute is not resolved within 20 days after referral, then either party may take such dispute to binding arbitration in accordance with the then-current Streamlined Arbitration Rules of the Judicial Arbitration and Mediation Services ("JAMS"). The existence, content and result of the arbitration shall be held in confidence by Tesla and the System owner, their representatives, any other participants and the arbitrator. The arbitration will be conducted by a single arbitrator selected by agreement of Tesla and the System owner or, failing such agreement, appointed in accordance with the JAMS rules. The arbitration shall be conducted in English and in San Francisco, California. Tesla and the System owner will each bear its own expenses in the arbitration and will share equally the costs of the arbitration; provided, however, that the arbitrator may, in its discretion, award reasonable costs and fees to the prevailing party.
- 10. <u>Claims Process.</u> Claims under this Limited Warranty must be made by notifying Tesla at the email address identified below. For a claim to be processed, proof of the original purchase of the System and any subsequent transfers of ownership of the System need to accompany the claim. The claim must include a description of any alleged defect or energy capacity shortfall, as well as the relevant System's serial number, Original Sale Date and Commissioning Date. If the claim is contested by Tesla, it shall be the System owner's responsibility to show that the defect or energy capacity shortfall is covered by this Limited Warranty and that none of the exclusions in this Limited Warranty apply. In the case of energy capacity shortfall claims, Tesla shall be permitted to perform one or more Standard Capacity Tests upon 24 hours' prior written notice to determine if the applicable Minimum Energy Retention Percentage set forth in <u>Exhibit1</u> has been achieved. Prior to returning any System or component to Tesla, a Return Merchandise Authorization number is required. This may be obtained by contacting Tesla at the email address, address or telephone number identified below.

⁴ System Price means the purchase price paid to Tesla for the System, as shown in the System purchase agreement. If you did not purchase the System direct from Tesla, you should contact Tesla to confirm the System Price.

Exhibit 1 - Limited Warranty Periods

Years 1 through 10 following Commissioning Date

The System shall be free from defects in design, workmanship and materials during years 1 through 10 following the Commissioning Date⁵ or (if earlier) until the Aggregate Discharge Throughput exceeds 2,996kWh per kWh of Nameplate Energy Capacity for 2-Hour Systems or 3,104kWh per kWh of Nameplate Energy Capacity for 4-hour Systems, and the Actual Energy Retention Percentage⁶ shall be equal to or greater than the applicable "Minimum Energy Retention Percentage" below until the below periods have expired or (if earlier) the Aggregate Discharge Throughput Limitation".

Period (Warranty Years ⁸ following Commissioning Date)	Aggregate Discharge Throughput Limitation (2 Hour Systems)	Minimum Energy Retention Percentage (2 Hour Systems)	Aggregate Discharge Throughput Limitation (4 Hour Systems)	Minimum Energy Retention Percentage (4 Hour Systems)
1	349	93.0%	351	94.0%
2	678	88.0%	686	90.0%
3	990	84.0%	1,008	87.0%
4	1,290	81.0%	1,319	84.0%
5	1,584	80.0%	1,622	82.5%
6	1,873	79.0%	1,922	82.0%
7	2,160	78.0%	2,220	81.5%
8	2,442	77.0%	2,517	81.0%
9	2,721	76.0%	2,811	80.5%
10	2,996	75.0%	3,104	80.0%

Extension to Years 11-15 following Commissioning Date, for low utilization scenario

This section only applies if the Aggregate Discharge Throughput during the first 10 years following the Commissioning Date is equal to or less than 2,052kWh per kWh of Nameplate Energy Capacity for 2-Hour Systems, or equal to or less than 3,104kWh per kWh of Nameplate Energy Capacity for 4-Hour Systems. The System shall be free from defects in design, workmanship during years 11 through 15 following the Commissioning Date or (if earlier) until the Aggregate Discharge Throughput exceeds 2,956kWh per kWh of Nameplate Energy Capacity for 2-Hour Systems or 4,469kWh per kWh of Nameplate Energy Capacity for 4-hour Systems. The Actual Energy Retention Percentage shall be equal to or greater than the applicable "Minimum Energy Retention Percentage" below until the below periods have expired or (if earlier) the Aggregate Discharge Throughput exceeds the below "Aggregate Discharge Throughput Limitation".

Period (Warranty Years following Commissioning Date)	Aggregate Discharge Throughput Limitation (2 Hour Systems)	Minimum Energy Retention Percentage (2 Hour Systems)	Aggregate Discharge Throughput Limitation (4 Hour Systems)	Minimum Energy Retention Percentage (4 Hour Systems)
11	2,238	74.0%	3,391	78.0%
12	2,421	73.0%	3,672	76.0%
13	2,602	72.0%	3,945	74.0%
14	2,780	71.0%	4,211	72.0%
15	2,956	70.0%	4,469	70.0%

⁵ Commissioning Date means the earlier of (a) the date the System is commissioned or (b) the date falling 90 days after the Original Sale Date.

⁶ Actual Energy Retention Percentage means the energy discharged by the System as a whole (as measured at the AC terminal(s) of the Megapack(s)) at Standard Test Conditions, expressed as a percentage of the Nameplate Energy Capacity.

⁷ Aggregate Discharge Throughput means the aggregate discharge throughput of the System (at the Megapack AC terminal(s)) in kWh per kWh of Nameplate Energy Capacity.

⁸ Warranty Year means each consecutive 365 day period commencing on the Commissioning Date and each anniversary of the Commissioning Date.

⁹ Nameplate Energy Capacity means the kWh energy capacity of the System set out in the System purchase agreement.

Standard Test Conditions

When measuring the Actual Energy Retention Percentage, (i) the System shall be fully charged to 100% state of energy and then fully and continuously discharged at Nominal Power (as defined in the Specifications) to 0% state of energy, (ii) the ambient temperature at the System location and the initial temperature of all battery pods is 25° C, and (iii) the initial temperature of all battery pods when the System starts both charging and discharging shall be 25° C $\pm 5^{\circ}$ C.

Exhibit 2 - Energy Shortfall Damages

Circumstances where Payment of Energy Shortfall Damages is Permitted

Tesla may remedy any claims under <u>Section 1(c)</u> of this Limited Warranty by paying Energy Shortfall Damages unless (a) the Minimum Energy Retention Percentage for the Warranty Year in which the claim is made (as set out in <u>Exhibit 1</u>) exceeds the Actual Energy Retention Percentage at the time of the claim by more than 5 percentage points ¹⁰ or (b) the amount of the Energy Shortfall Damages, when aggregated with any previous Energy Shortfall Damages paid by Tesla under this Limited Warranty, exceeds 5% of the System Price. If paragraph (a) or (b) above applies to a claim, Tesla must repair or replace the System or component under <u>Section 3(a)</u> or <u>3(b)</u> of the Limited Warranty.

Calculation of Energy Shortfall Damages

1. The "Energy Shortfall Damages" payable in respect of a Limited Warranty claim shall be calculated as follows:

$$\left[\frac{[MERP\ (Warranty\ Year\ n)-AERP\ (Warranty\ Year\ n)]\times D}{\sum_{1}^{n}MERP\ (Warranty\ Year\ i)\ \times 365\ days}\right]\times System\ Price$$

where:

n = Number of Warranty Years elapsed since the Commissioning Date, rounded up to the nearest Warranty Year.

MERP = For any Warranty Year, the Minimum Energy Retention Percentage for that Warranty Year, as set out in Exhibit 1.

AERP = For any Warranty Year, the Actual Energy Retention Percentage (as defined in Exhibit 1) for that Warranty Year.

D = 365.

Example: The System Price was US\$1,000,000. In Warranty Year 4, the MERP for a 4-hour System is 84%, the AERP is 81%, and Tesla has never previously paid any Energy Shortfall Damages. Tesla may elect to pay Energy Shortfall Damages, and the amount of those Energy Shortfall Damages would be calculated as follows:

$$\frac{[84\% - 81\%] \times 365}{[94\% + 90\% + 87\% + 84\%] \times 365} \times \$1,000,000 = \$8,451$$

If the System was 2MWh, this \$8451 amount is equivalent to \$0.42 for each kWh of throughput that was "lost" in Contract Year 4 as a result of the AERP being lower than the MERP.

2. If Tesla elects to pay Energy Shortfall Damages in respect of more than one claim made by System owner in the same Warranty Year, then the Energy Shortfall Damages payable by Tesla in respect of the second (and each subsequent) claim shall be calculated as [the Energy Shortfall Damages payable by Tesla in respect of the second (or subsequent) claim] minus [the sum of all Energy Shortfall Damages paid by Tesla in respect of Limited Warranty claims made by System owner in the same Warranty Year].

Payment of Energy Shortfall Damages

Tesla shall pay any Energy Shortfall Damages to System owner within 30 days of its election to do so under <u>Section</u> <u>3</u> of this Limited Warranty, in the same currency as the System Price was denominated in the System purchase agreement.

¹⁰ This subsection refers to absolute values. For example, if the Minimum Energy Retention Percentage is 73%, then the Actual Energy Retention Percentage would have to be less than 68% in order for this subsection to apply.

EXHIBIT R

REMOTE MONITORING INFORMATION FROM THE BESS VENDOR

The data provided in this section are read-only values provided by the Tesla Site Controller with respect to the battery energy storage system, to give the Owner configuration and status information. The below list comprises the data which transfer to the Owner upon creation (or if later, on the date that Tesla receives payment in full for the battery system), according to the customer's contract with Tesla. Any data which Tesla collects from the battery system and are not listed below will be owned by Tesla.

NOTE: This list indicates ownership rights with respect to certain data but does not comprise an agreement by Tesla to convey such data to customer. The customer may obtain data generated by the battery using its own SCADA interface, or through a subscription to Tesla's Powerhub monitoring software.

- 1. <u>Devices Connected</u>. This value indicates the number of inverter blocks and meters with which the Tesla Site Controller is configured to communicate.
- 2. <u>Target Battery Power</u>. This value indicates the target battery power command that the Tesla Site Controller is sending to the battery.
- 3. <u>Target Battery Reactive Power</u>. This value indicates the target battery reactive power command that the Tesla Site Controller is sending to the battery.
- 4. <u>Full Pack Energy</u>. This value indicates the available energy of the battery at full charge and nominal temperature.
- 5. <u>Nominal Energy Remaining</u>. This value indicates the energy remaining if the battery is operated at nominal temperature (25 deg C).
- 6. <u>Available Charge Power</u>. This value comprises an estimate of the maximum power available to the user to charge the battery.
- 7. <u>Available Discharge Power</u>. This value comprises an estimate of the maximum power available to the user to discharge the battery.
- 8. <u>Available Blocks</u>. This value indicates the aggregated number of inverter blocks that are available for operation.
- 9. <u>Customer-Facing Alerts</u>. Alerts related to system operation available to the Customer.
- 10. For each meter included within the battery:
 - a. Real power
 - b. Reactive power
 - c. Voltage
 - d. Current
 - e. Lifetime exported energy
 - f. Lifetime imported energy
 - g. Frequency

Zamora Storage EPC Contract

PNM Exhibit TGF-15

Is contained in the following 185 pages.

PNM Exhibit TGF-15
Page 1 of 185
EXECUTION VERSION
PNM Contract No: 1057696

ENGINEERING, PROCUREMENT, AND CONSTRUCTION CONTRACT

by and between

PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation

and

AFFORDABLE SOLAR INSTALLATION INC.

for

ZAMORA ENERGY STORAGE FACILITY

Dated as of June 27, 2019

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ENGINEERING, PROCUREMENT, AND CONSTRUCTION CONTRACT

THIS ENGINEERING, PROCUREMENT, AND CONSTRUCTION CONTRACT (this "Contract") is made and entered into as of this 27th day of June, (the "Effective Date"), by and between PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation (hereinafter "Owner" or "PNM"), and Affordable Solar Installation, Inc., a New Mexico corporation (hereinafter, "Contractor"). Each entity is sometimes individually referred to herein as a "Party" and are sometimes collectively referred to herein as the "Parties".

RECITALS

- A. Owner desires to develop a battery energy storage facility to be constructed in and located near Zamora Substation, as more specifically described herein (the "Project" as defined herein).
- B. Owner desires to engage Contractor to permit, design, engineer, procure, construct, test and commission the Project and to train the persons who will operate and maintain the Project, all on a fixed price, date certain to complete, turnkey basis, and Contractor desires to provide such work, all in accordance with the terms and conditions set forth in this Contract.

C. Contractor has:

- (1) provided preliminary conceptual drawings for the Project,
- (2) inspected the real property on which the Project shall be constructed, and
- (3) performed or reviewed such other investigations, studies, and analyses which Contractor has determined to be necessary or prudent in connection with entering into this Contract.
- D. Contractor is willing to guarantee (a) the timely completion of the Project, and (b) operating performance of the Project in accordance with the terms and conditions of this Contract.

AGREEMENT

NOW, THEREFORE, in consideration of the sums to be paid to Contractor by Owner and of the covenants, premises and agreements set forth herein (including those set forth above that are hereby incorporated by reference), the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. DEFINITIONS AND RULES OF INTERPRETATION

- 1.1 For the purposes of this Contract, except as otherwise expressly provided or unless the context otherwise requires, the following terms shall have the following meanings.
- "Acceptance Tests" means the Performance Tests, Functional Guarantee Tests, and each other test and activity to be performed prior to, and as a condition to, Substantial Completion and Final Completion, as applicable, as such tests and activities are set forth in <u>Exhibit I</u>.
- "Acceptance Tests Procedures" means the written test procedures, standards, protective settings, and the testing program for the Acceptance Tests as set forth in Exhibit I.
- "Affiliate" means, with respect to any Person, another Person that is controlled by, that controls, or is under common control with, such Person; and, for this purpose, "control" with respect to any Person shall mean the ability to effectively control, directly or indirectly, the operations and business decisions of such Person whether by voting of securities or partnership interests or any other method.

"Applicable Laws" means and includes all of the following:

- (a) any applicable statute, license, law, rule, treaties, regulation, code, ordinance, certificates, orders, judgment, decree, writ, legal requirement, order or the like, of any national, federal, provincial, state, tribal or local court or other Governmental Authority, and the written interpretations thereof, including, without limitation, any statute, license, law, rule, treaties, regulation, code, ordinance, certificates, orders, judgment, decree, writ, legal requirement, order or the like, regulating, relating to or imposing liability or standards of conduct concerning:
- (i) Contractor, the Site or the performance of any portion of the Work or the Work taken as a whole, or the operation of the Project; or
- (ii) safety and the prevention of injury to persons and the damage to property on, about or adjacent to the Site or any other location where any other portion of the Work shall be performed; or
- (iii) protection of human health or the environment or emissions, discharges, releases or threatened releases of pollutants, contaminants, chemicals or industrial, toxic or hazardous substances or wastes into the environment including, without limitation, ambient air, surface water, ground water, or land, or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport, or handling of pollutants, contaminants, chemicals, Hazardous Materials or other industrial, toxic materials or wastes, as now or may at any time hereafter be in effect; and

(b) any Permit Requirement.

"Applicable Permits" means each and every national, state, local or other license, consent, appraisal, authorization, ruling, exemption, variance, order, judgment, decree, declaration, regulation, certification, filing, recording, environmental plans and/or studies, permit

or other approval with, from or of any Governmental Authority, including, without limitation, each and every environmental, construction, operating or occupancy permit and any agreement, consent or approval from or with any other Person, that is required by any Applicable Law or that is otherwise necessary for the performance of the Work or operation of the Project, including without limitation, the Owner Acquired Permits and Contractor Acquired Permits.

"Approval" has the meaning given in Section 1.2(e).

"Balance of Plant Activities" means all Work other than that portion of the Work performed or to be performed by the BESS Vendor.

"Battery Energy Storage System" or "BESS" means the battery arrays, battery system controller, inverters, transformers, thermal management system, and other equipment necessary to charge, store, and subsequently deliver electricity from the Project to the Energy Delivery Point as described in Exhibit A.

"BESS Capacity" means the capacity of the System as measured by Contractor as required in Exhibit I.

"BESS Plant Auxiliary Loads" "BESS Plant Auxiliary Loads" means loads for ancillary equipment separately metered from the energy storage system on the high side of the UAT transformers as adjusted by Contractor to environmental conditions using correction curves and pre-test uncertainty analysis,

"BESS Roundtrip Efficiency" means the ratio of energy discharged by the System to the energy required to charge the System to effect that same energy discharge (expressed as a percentage) as measured by Contractor as required in Exhibit I.

"BESS Vendor" means Tesla, Inc.

"Business Day" means a Day, other than a Saturday or Sunday, on which banks are generally open for business in the State of New Mexico, or the Friday following Thanksgiving. A Business Day shall begin at 8:00 a.m. and end at 5:00 p.m. local time for the Party sending the Notice or payment or performing a specified action hereunder.

"Buy-Down Amount" means the amount to be paid by Contractor to Owner in accordance with the provisions of <u>Section 16.2</u> and calculated in accordance with <u>Exhibit H</u> for the failure of the Project to achieve the Performance Guarantees.

"CCN" means Owner's application for a Certificate of Public Convenience and Necessity filed with the NMRPC relating to the Project.

"Change in Law" means the enactment, adoption, promulgation, material modification, or repeal after the Effective Date of any Applicable Law of any Governmental Authority including, but not limited to, a change in any requirement or condition on or with respect to the application for, or issuance, maintenance, renewal or transfer of, any Applicable Permit; provided, however, any of the following shall not be a Change in Law: (a) the enactment, adoption, promulgation, modification or repeal after the Effective Date of any national, federal,

provincial or any other law imposing a tax, duty, levy, impost, fee, royalty, or similar charge based on the importation or exportation of any item or service for which Contractor is responsible hereunder; and (b) the enactment, adoption, promulgation, modification or repeal after the Effective Date of any national, federal, provincial or any other income tax law.

"Change in Work" means an authorized modification to the Work for the reasons set forth in Section 17.1.

"Change in Work Form" means the form documenting a Change in Work attached hereto as Exhibit E.

"Charging Energy" means Energy supplied by Owner at Owner's cost and in accordance with Industry Standards and delivered to Contractor at the Energy Delivery Point for the purpose of charging the BESS, as measured by the Electric Metering Devices.

"Chronic Failure" has the meaning set forth in Section 18.8.

"Claim Notice" has the meaning set forth in Section 25.5.

"Completion Costs" has the meaning set forth in Section 20.3(a).

"Conditional Waiver and Release Upon Final Payment" means a written statement, the form of which is attached hereto as Exhibit F-3, containing a waiver and release of liens pursuant to which a Person conditionally waives and releases all Contractor Liens, stop notices and bond rights with respect to all Work conditioned only upon final payment.

"Conditional Waiver and Release Upon Progress Payment" means a written statement, the form of which is attached hereto as Exhibit F-1, containing a waiver and release of liens pursuant to which a Person conditionally waives and releases all Contractor Liens, stop notices and bond rights with respect to all Work through the last day of the calendar month for which Contractor requested payment in the current Contractor's Invoice conditioned only upon payment of the amount set forth therein.

"Confidential Information" means any and all non-public proprietary written information, data, analyses, documents, and materials furnished or made available by a Party or its Representatives to the other Party or its Representatives in connection with this Contract, including any information processed or stored on computers or other electronic media by PNM, on PNM's behalf, or by Contractor for PNM, and any and all analyses, compilations, studies, documents, or other material prepared by the receiving Party or its Representatives to the extent containing or based upon such information, data, analyses, documents, and materials; provided, however, Confidential Information of Owner shall also mean information, ideas or materials related to the Work or Project that is or are:

- (a) obtained, developed or created by or for Contractor exclusively in connection with the Work; or
 - (b) disclosed by Owner or any of its Affiliates.

Confidential Information shall not include any information that: (w) is already in the public knowledge or which becomes public knowledge absent any violation of the terms of this Contract; (x) was already in the possession of a Party prior to disclosure by the other Party; (y) a Party obtains from another Person which such Party reasonably believes was not under an obligation of confidentiality; or (z) is or becomes generally available to, or is independently known to or has been or is developed by, any Party or any of its Affiliates other than materially as a result of any disclosure of proprietary information by the transferor to the transferee.

"Construction Tests" means the construction tests, equipment checks, commissioning activities and system walkdowns to be performed prior to, and as a condition to, Mechanical Completion, as such tests and activities are set forth in Section 23 of Exhibit A.

"Contract" means this Engineering, Procurement, and Construction Contract, including all Exhibits hereto, as the same may be modified, amended, or supplemented from time to time in accordance with the terms hereof.

"Contract Price" means the fixed amount for performing the Work that is payable to Contractor as set forth in Section 6.1, as the same may be modified from time to time in accordance with the terms hereof.

"Contractor" means Affordable Solar Installation, Inc., and its permitted successors and assigns under this Contract.

"Contractor Acquired Permits" means and includes the following permits:

- (a) building permits and New Mexico Construction Industries License required for the construction of the Project;
- (b) labor or health standard permits and approvals reasonably related to Work assigned to Contractor with respect to the construction of the Project;
- (c) business permits reasonably related to the conduct of the operations of Contractor and all Subcontractors in the State of New Mexico and any other location where such permits may be required (including all contractors' licenses and related documents);
- (d) permits, approvals, consents or agreements from or with any Person necessary for the performance and completion by Contractor of the Work or its warranty obligations hereunder, for the transportation or importation of Equipment and Materials or for the transportation or importation of equipment, tools, machinery and other items used by Contractor in performance of the Work;
- (e) permits, visas, approvals and certifications necessary for Contractor's employees to legally perform the Work in the State of New Mexico (including documentation of citizenship or legal residency in the United States); and
- (f) all Applicable Permits required for the Work other than those listed as Owner Acquired Permits in Exhibit C.

Without limiting the foregoing, Contractor Acquired Permits include permits for temporary construction utilities and temporary sanitary facilities, dump permits, road use permits, NPDES Construction General Stormwater Permit, Storm Water Protection Plan ("SWPP") Development, Spill Prevention, Control and Countermeasure Plan, permits related to the use, storage and disposal of Hazardous Materials that the Contractor or its Subcontractors or Vendors brings to the Site or are used under Contractor's supervision during the construction and commissioning of the Project, the Construction Tests and the Acceptance Tests, and permits issued pursuant to any building, mechanical, electrical, plumbing or similar codes in connection with the performance of the Work; provided, that Contractor Acquired Permits do not include Owner Acquired Permits.

"Contractor Caused Delay" means a material delay in Contractor's performance of any Critical Path Item to the extent actually and demonstrably caused by any of the following:

- (a) the failure of the Work to (1) pass any performance or functional test required by the Contract; (2) substantially conform to a certified drawing that Contractor shall have delivered to Owner; (3) substantially conform to the specifications for such Work set forth in the Contract; or (4) perform in accordance with the terms of any Contract; or
- (b) (1) any Defect (including any Defect in design, manufacture or workmanship) in the Work; or (2) the failure by Contractor to perform or deliver services, goods or Work, as required by the terms, conditions and schedules of the Contracts;
- (c) Contractor's failure to obtain any Contractor Acquired Permit (1) in final form by the applicable milestone or milestone date specified in Exhibit B or (2) in full force and effect on or prior to the date on which it is required, under this Contract and Applicable Law, to be in full force and effect, so as to permit Contractor to perform its obligations under this Contract.

Contractor Caused Delays shall not include delays to the extent caused by Force Majeure or Excusable Conditions.

"Contractor Deliverables" means each of the design criteria, system descriptions, Required Manuals, Drawings and Specifications, design calculations, quality assurance reports and all other material documents relating to the Project to be delivered to Owner in accordance with the requirements of this Contract.

"Contractor Event of Default" has the meaning set forth in Section 20.1.

"Contractor Inchoate Default" means any occurrence, circumstance or event, or any combination thereof, which with the lapse of time or the giving of Notice, or both, would constitute a Contractor Event of Default.

"Contractor Lien" has the meaning set forth in Article 30.

"Contractor Indemnitee" has the meaning set forth in Section 25.2.

- "Contractor's Invoice" means an invoice from Contractor to Owner in the form of Exhibit F hereto.
- "Corrective Action" means all the materials, tasks and Work necessary to make the Project meet each Performance Guarantee.
- "Critical Path Item(s)" means the items identified as critical path items on the Project Schedule (including, without limitation, Mechanical Completion, Substantial Completion and Final Completion).
 - "Day" or "day" means a calendar day, unless otherwise specified.
- "Defect" means and includes, without limitation, any design, engineering or installation of the Work, Equipment and Materials, or other Work which in any of the foregoing cases:
- (a) does not conform to the Contract or the Drawings and Specifications either as contained in this Contract or issued by Contractor for the Project;
 - (b) is of improper or inferior workmanship or material;
- (c) is not suitable or does not operate suitably for the Project's intended purpose as described in Exhibit A;
 - (d) is inconsistent with Industry Standards; or
- (e) materially and adversely affects the mechanical, electrical, or structural integrity, or the continuous efficient, effective or safe operation or reliability of the Project.
 - "Delay Notice" means a notice of delay as set forth in Section 9.2.
- "Direct Costs" means, as it relates to any Work or Change in Work, the cost of labor, support labor, material, equipment, services, tools, supplies, Subcontracts, jobsite facilities, utilities, and jobsite staffing necessary to perform such Work or Change in Work.
 - "Dollars" or "\$" means the lawful currency of the United States of America.
- "Drawings and Specification Table" means table of Drawings and Specifications to be delivered by Contractor, which must satisfy the requirements of Exhibit A and be prepared by Contractor and accepted by Owner in accordance with Section 12.3 of the Contract.
- "Drawings and Specifications" means the drawings, specifications, drawing logs, conformed technical specifications, manufacturers' drawings and data, plans and designs that are part of the Statement of Work or that have been prepared by Contractor or any Subcontractor or Vendor with respect to the Work (including those drawings and specifications identified in Exhibit A).
 - "Effective Date" has the meaning set forth in the preamble.

"Electric Metering Device(s)" means all metering and data processing equipment used to measure, record, or transmit data relating to Energy delivered by the Project or Charging Energy delivered to the Project. Electric Metering Devices include the metering current transformers and the metering voltage transformers.

"Electrical Interconnection Facilities" means the facilities and equipment necessary to connect the Project to the Project Substation from the Energy Delivery Point.

"Eligible Issuer" means a surety licensed to do business in the State of New Mexico, listed in the latest issue of the U.S. Treasury Circular 570, with an AM Best rating of A- or better, and on the New York State Insurance Department's website listing insurers and their authorized coverages, or any other issuer reasonably acceptable to Owner.

"Energy" means three-phase, 60-cycle alternating current electric energy, expressed in units of kWh or MWh, as measured by the Electric Metering Devices.

"Energy Delivery Point" means the Contractor furnished outgoing dead-end termination structure located on the high voltage side of the Project step-up transformers.

"Engineer" means any engineering firm or firms or other engineer or engineers (which may be employees of Owner) selected and designated by Owner.

"Equipment and Materials" means the BESS and all other equipment, materials, supplies, apparatuses, devices, machinery, parts, tools, special tools, components, construction aids, construction utilities to the extent provided in Exhibit A, instruments, appliances, spare parts and appurtenances thereto that are:

- (a) required for the design, installation, construction or operation of the Project in accordance with Industry Standards and this Contract; or
- (b) described in, required by, reasonably inferable from or incidental to the Statement of Work or the Drawings and Specifications;

<u>provided</u>, that Equipment and Materials shall not include Electrical Interconnection Facilities or Production Inputs.

"Essential Contractor Deliverables" means those Contractor Deliverables, as provided in Exhibit P, the absence or incomplete nature of which after the Substantial Completion Date could adversely and materially affect the continuous efficient, effective or safe operation or reliability of the Project, or any portion thereof, for the delivery of power through the Project Substation to Owner's customers.

"Excusable Condition" means any of the following:

- (a) Owner Caused Delay; or
- (b) a Change in Law, the direct effect of which is to prevent Contractor from completing a Major Milestone by the scheduled completion date set forth in Exhibit O; or

(c) solely for purposes of resetting the Contract Price and/or Project Schedule under Section 8.1.2 for a Notice to Proceed delivered after September 30, 2020, extraordinary circumstances that are beyond the reasonable control of Contractor, other than failure to obtain NMPRC Approval, that occur after the Effective Date but prior to the Notice to Proceed Date.

"Exhibits" means each Exhibit listed in the table of contents and attached hereto as incorporated herein in its entirety by this reference.

"Final Completion" means satisfaction by Contractor or waiver by Owner of all of the conditions for Final Completion set forth in Section 15.3.

"Final Completion Date" means the date on which Final Completion of the Project occurs.

"Final Completion Expected Date" means the date that is ninety (90) days after the earlier of the Substantial Completion Date or the Substantial Completion Guaranteed Date, as such date may be modified in accordance with the terms hereof.

"Final Completion Payment" means the Milestone Payment made by Owner to Contractor in connection with Final Completion pursuant to <u>Section 7.2</u>.

"Force Majeure" means, except as qualified in the proviso below, any act, event or circumstance demonstrably beyond the reasonable control of, and not caused by a breach of this Contract by, Owner (in the case of an event of Force Majeure claimed by Owner) or Contractor or any Subcontractor (in the case of an event of Force Majeure claimed by Contractor) and which would not have been avoided had Owner (in the case of an event of Force Majeure claimed by Owner) or Contractor or any Subcontractor (in the case of an event of Force Majeure claimed by Contractor) used reasonable care or acted in compliance with Industry Standards, including, without limitation, the following (to the extent the following satisfy the foregoing requirements of this sentence): (a) acts of God such as droughts, floods, tornados, hurricanes, and earthquakes; (b) war (declared or undeclared), riots, hostilities, belligerence, revolution, public disorder, insurrection, rebellion, acts of the public enemy, acts of terrorism and sabotage, blockades and embargoes; (c) strikes or labor disturbances; (d) expropriation, requisition, confiscation, or nationalization; (e) export or import restrictions by any Governmental Authority; (f) closing or accidents to harbors, docks, or canals; (g) rationing or allocation imposed by law, decree, or regulation of any Governmental Authority; (h) volcano, tide, or tidal wave; (i) epidemic or quarantine; and (i) unreasonable delay or denial of any Applicable Permit by a Governmental Authority after timely application therefor; provided, however that the following events, matters or things shall not constitute an event of Force Majeure:

- (i) the absence of sufficient financial means to perform obligations;
- (ii) any labor disturbance, strike or dispute specific to Contractor's workers or personnel or specific to the Project;
- (iii) any labor disturbance, strike or dispute specific to any Subcontractor's workers or personnel performing Work at the Site or otherwise specific to the Project;

- (iv) mechanical or equipment failures unless caused by an event of Force Majeure;
- (v) failure to timely apply and diligently pursue the application for any Applicable Permit;
- (vi) the unavailability or shortages of labor or Equipment and Materials unless otherwise caused by an event of Force Majeure; and
- (vii) weather events that do not exceed the applicable NOAA 100 year average for the Site.
- "Functional Guarantees" means those guarantees defined in $\underline{Exhibit\ I}$ as Functional Guarantees.
- "Functional Guarantee Tests" means those tests defined in <u>Exhibit I</u> as Functional Guarantee Tests to be completed in conjunction with the Performance Tests for determining compliance with the Functional Guarantees.
- "Functional Guarantee Tests Procedures" means the written test procedures, standards, protective settings, and the testing program produced by Contractor and agreed to by Owner for the Functional Guarantee Tests as set forth in Exhibit I.
 - "Governmental Action" has the meaning set forth in Section 21.1.2.
- "Governmental Approval" means any authorization, consent, permission, approval (including an NMPRC Approval), license, ruling, permit, exemption, variance, order, judgment, instruction, condition, direction, directive, decree, declaration of or regulation by any Governmental Authority relating to the construction, development, ownership, occupation, startup, testing, operation or maintenance of the Project.
- "Governmental Authorities" means applicable national, federal, state, provincial, tribal and local governments of the United States and all agencies, authorities, departments, instrumentalities, courts, corporations, securities exchange, other authorities lawfully exercising or entitled to exercise any administrative, executive, judicial, legislative, police, regulatory or taxing authority or power, or other subdivisions of any of the foregoing having or claiming a regulatory interest in or jurisdiction over all or any portion of the Site, the Project, the Work or the Parties to this Contract, but for the avoidance of doubt, does not include the Owner.
 - "Guaranteed BESS Capacity" has the meaning given in Exhibit I, Section 1.2.
 - "Guaranteed BESS Plant Auxiliary Loads" has the meaning set forth in Exhibit I.
- "Guaranteed BESS Roundtrip Efficiency" has the meaning given in Exhibit I, Section 1.2.
 - "Guaranteed Storage Hours" has the meaning set forth in Exhibit I.

"Hazardous Materials" means any substance, material, gas, or particulate matter that is regulated by any local Governmental Authority, any applicable state, or the United States of America as an environmental pollutant or dangerous to public health, public welfare, or the natural environment including, without limitation, protection of non-human forms of life, land, water, groundwater, and air, including any material or substance that is (i) defined as "toxic," "polluting," "hazardous waste," "hazardous material," "hazardous substance," "extremely hazardous waste," "solid waste" or "restricted hazardous waste" under any provision of local, state, or federal law; (ii) petroleum, including any fraction, derivative or additive; (iii) asbestos; (iv) polychlorinated biphenyls; (v) radioactive material; (vi) designated as a "hazardous substance" pursuant to the Clean Water Act, 33 U.S.C. § 1251 et seq.; (vii) defined as a "hazardous waste" pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq.; (viii) defined as a "hazardous substance" pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq.; (ix) defined as a "chemical substance" under the Toxic Substances Control Act, 15 U.S.C. § 2601 et seq.; or (x) defined as a "pesticide" under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq.

"Industry Standards" or Industry Grade" means those standards of design, engineering, construction, operation, maintenance, workmanship, Equipment and Materials, and components specified in Exhibit A; provided, however, if the relevant standard is not so specified or is ambiguous therein, then "Industry Standard" or "Industry Grade" shall mean the relevant practices, procedures and methods generally applied in or approved by a significant portion of the electric generation industry of the United States (including utilities and independent power producers) for similar newly constructed power plants that, at any particular time, in the exercise of reasonable judgment in light of the facts which are known or which reasonably could have been known at the time a decision is made, would be expected to accomplish the desired result in a manner consistent with good engineering design practices, Applicable Laws, Applicable Permits, safety, reliability, environmental protection, geographical considerations, economy, expedition, and other standards established for such work. "Industry Standards" or "Industry Grade" is not intended to be limited to the optimum standards, practices, procedures, methods or acts to the exclusion of all others, but rather to be any of the good and proper standards, practices, procedures, methods and acts as described above.

"Intellectual Property Claim" means a claim or legal action for unauthorized disclosure or use of any trade secret, patent, copyright, or trademark protected by Applicable Law arising from Contractor's performance (or that of its Affiliates or Subcontractors) under this Contract that:

- (a) concerns any Equipment and Materials or other items or services, in all cases, that are provided by Contractor, any of its Affiliates, or any Subcontractor under this Contract;
- (b) is based upon or arises out of the performance of the Work by Contractor, any of its Affiliates, or any Subcontractor, including the use of any tools or other implements of construction by Contractor, any of its Affiliates, or any Subcontractor; or

- (c) is based upon or arises out of the design or construction of any item by Contractor under this Contract or the operation of any item according to directions embodied in Contractor's final process design, or any revision thereof, prepared or approved by Contractor.
- "Intellectual Property Rights" means all licenses, trade secrets, copyrights, patents, trademarks, proprietary information and other ownership rights protected by Applicable Law related to the Work or otherwise necessary for the ownership and maintenance of the Project, including, but not limited to, all Project-related documents, models, computer drawings and other electronic expressions, photographs and other expressions.
- "Key Personnel" means the natural persons named and assigned to the identified positions set forth on Exhibit J.
- "Liability Cap" means an amount equal to one hundred percent (100%) of the Contract Price (as the same may increase or decrease from time to time in accordance with the terms of this Contract).
- "LIBOR" means the London inter-bank offered rate for one-year United States Dollar deposits, as published in The Financial Times, or other replacement rate agreed to by the Parties.
 - "Lien Indemnitees" has the meaning set forth in Article 30.
- "Limited Notice to Proceed" means a notice signed by an authorized representative of Owner to Contractor authorizing Contractor to perform the Preliminary Work.
- "Loss(es)" means any and all liabilities (including but not limited to liabilities arising out of the application of the doctrine of strict liability), obligations, losses, damages, penalties, claims, actions, suits, judgments, costs, expenses and disbursements (including reasonable legal fees and expenses), and whether arising in equity, at common law, or by statute, or under the law of contracts, torts or property, of whatsoever kind and nature, including without limitation claims for property damage, and personal injury (including emotional distress), and whether or not involving damages to the Project or the Site.
 - "Major Milestone" means the milestone activities identified in Exhibit O.
 - "Materials Warranty" means the warranty of Contractor under Section 18.2.
- "Maximum Contractor Aggregate Liquidated Damages" means fifteen percent (15%) of the Contract Price.
- "Mechanical Completion" means satisfaction of the following requirements for the Project:
- (a) the Project is mechanically, electrically, and structurally constructed in accordance with the requirements of this Contract, the Statement of Work and Industry Standards, except for Non-Critical Deficiencies;

- (b) the Project and each sub-system thereof is mechanically, electrically and functionally complete and ready for initial operations, adjustment and testing, except for Non-Critical Deficiencies;
- (c) each of the Construction Tests was successfully completed in the most recently run test; and
 - (d) all initial fills are complete;
 - (e) all relays have been set and ground checks made;
 - (f) all piping has been hydro tested and flushed/cleaned as appropriate;
 - (g) all motor rotational checks are complete;
 - (h) all instrumentation calibrations are complete;
- (i) all electrical circuits have been point-to-point checked to verify correct installation and response to simulated test signals;
- (j) individual and/or integrated balance of systems and associated equipment have been tested successfully and verified to comply with support service needs of the Project; and
 - (k) the Project is ready to support commissioning activities.
- "Mechanical Completion Date" means the date on which Mechanical Completion actually occurs for the Project.
- "Milestone Payment" means a "Milestone Payment" amount set forth in the Milestone Payment Schedule in respect of a corresponding Project Milestone, as the same may be modified from time to time in connection with a modification in the Contract Price hereunder.
- "Milestone Payment Schedule" means the list and schedule of the Milestone Payments and corresponding Project Milestones set forth in $\underline{\text{Exhibit B}}$.
 - "Minimum Performance Criteria" has the meaning given in Exhibit I, Section 1.3.
- "Minimum Performance Criteria for Final Completion" means the Noise Minimum Performance Guarantees.
- "Minimum Performance Criteria for Substantial Completion" means those minimum performance guarantees defined in Exhibit I as Minimum Performance Criteria for Substantial Completion.
- "Monthly Progress Report" means a written monthly progress report prepared by Contractor in form and content generally in accordance with Exhibit L.

- "NMPRC" means the New Mexico Public Regulation Commission or any successor agency having jurisdiction over Owner and the Project.
 - "NMPRC Approval" has the meaning set forth in Section 34.2(b).
- **"Noise Minimum Performance Guarantees"** means those performance guarantees defined in Exhibit I as Noise Minimum Performance Guarantees.
- "Non-Critical Deficiencies" means Each item of Work that Owner, the Engineer, or Contractor identifies as requiring completion or containing Defects; provided that such completion or Defects:
- (a) are not material to the safe operation of the Project for the delivery of power through Owner's transmission system to Owner's customers;
- (b) do not impair the operability, safety or mechanical or electrical integrity of the Project; and
- (c) would not reasonably be expected to cost more than One Hundred Thousand Dollars (\$100,000) in the aggregate to complete or remedy.
- "Non-Essential Contractor Deliverables" means all Contractor Deliverables other than the Essential Contractor Deliverables.
- "Notice of Final Completion" means a Notice from Contractor to Owner in accordance with Section 15.3(q) certifying that Contractor believes the Project has satisfied the requirements for Final Completion.
- "Notice of Mechanical Completion" means a Notice from Contractor to Owner in accordance with <u>Section 14.3(a)</u> certifying that Contractor believes that the Project has satisfied the requirements for Mechanical Completion.
- "Notice of Substantial Completion" means a Notice from Contractor to Owner in accordance with <u>Section 15.2(m)</u> certifying that Contractor believes the Project has satisfied the requirements for Substantial Completion.
- "Notice" or "notice" means a written communication between the Parties required or permitted by this Contract and conforming to the requirements of <u>Article 31</u>.
- "Notice to Proceed" or "NTP" means the notice given from Owner to Contractor directing Contractor to commence performance of the entire Work.
- "Operating Consumables" means consumable items, such as lubricants, filters, lamps, light bulbs, and other consumable equipment and materials, necessary for the operation and maintenance of the Project (excluding Production Inputs).

"Operating Personnel" means individuals trained under an Equipment manufacturer's training program and employed by or acting at the request of Owner in connection with the operation of the Project from time to time.

"Original Performance Bond Amount" has the meaning set forth in Section 4.24.1(b).

"Outstanding Balance" means the aggregate unpaid amount of the Contract Price, calculated at any given time.

"Owner" means Public Service Company of New Mexico ("PNM"), a New Mexico corporation, and its successors and permitted assigns.

"Owner Acquired Permits" means all Applicable Permits necessary for the ownership, operation and maintenance of the Project, including those permits listed as Owner Acquired Permits in Exhibit C.

"Owner Caused Delay" means a delay in Contractor's performance of any Critical Path Item to the extent actually and demonstrably caused by any of the following:

- (a) material breach of this Contract by Owner;
- (b) any unreasonable active interference by Owner with Contractor's performance of the Work;
- (c) Owner's failure to cause the Electrical Interconnection Facilities to be substantially complete and ready for interconnection by January 1, 2022, as certified by thee Transmission Provider, or failure to timely provide any Production Inputs as required under the Contract;
- (d) Owner's failure to obtain any Owner Acquired Permit (1) in final form by the applicable milestone or milestone date specified in <u>Exhibit C</u> or (2) in full force and effect on or prior to the date on which it is required, under this Contract and Applicable Law, to be in full force and effect, so as to permit Contractor to perform its obligations under this Contract;
- (e) an act or omission of Owner's Separate Contractors or Operating Personnel that is negligent or reckless or constitutes willful misconduct of the Owner's Separate Contractors or Operating Personnel;
- (f) Owner's failure to timely comply with any of its obligations under Sections 3.2, 3.4 and 3.5; and
- (g) Owner's failure to provide Charging Energy to the Site by the applicable date set forth in Exhibit O.

"Owner Directive" has the meaning set forth in Section 17.5.

"Owner Event of Default" has the meaning set forth in Section 20.4.

- "Owner Indemnitee" has the meaning set forth in Section 25.1.
- "Owner's Separate Contractors" means each contractor or other Person that is in direct or indirect contractual privity with Owner and that performs any work in respect of the Project excluding Contractor and each person in direct or indirect contractual privity with Contractor, including in such exclusion each Subcontractor, and Owner's Separate Contracts has a like meaning.
- "PCS" or "Power Conditioning System" means the BESS power conditioning system utilized to convert electric power from one form to another (AC to DC, DC to AC, and/or between different voltage levels), and to condition the power quality to what is needed by the interconnected systems.
- "Performance Bond" means a performance and payment bond corresponding to the Balance of Plant Activities to be provided by Contractor to Owner under the terms of Section 4.24 in the form of Exhibit M and issued by an Eligible Issuer.
- "Performance Guarantees" means those performance guarantees defined in Exhibit I as Performance Guarantees.
- "Performance Tests" means the BESS performance tests described in <u>Exhibit I</u> and required to determine whether the Performance Guarantees and Minimum Performance Criteria have been achieved.
- "Performance Tests Procedures" means the written test procedures, standards, protective settings, and the testing program produced by Contractor and agreed to by Owner for the Performance Tests as set forth in Exhibit I.
- "Permit Requirement" means any requirements or conditions on or with respect to the issuance, maintenance, renewal or transfer of any Applicable Permit or any application therefor.
- "Person" means any individual, corporation, company, voluntary association, partnership, incorporated organization, trust, limited liability company, or any other entity or organization, including any Governmental Authority.
- "PNM Grid" means all property and other assets other than the Project, now or hereafter existing, which are owned by the Public Service Company of New Mexico and under the operational control of Owner, and used for or directly associated with the transmission of electric power, including all additions, extensions, expansions, and improvements thereto.
 - "Point of Interconnection" means the Project Substation.
 - "Post Test Modifications" has the meaning set forth in Section 14.7.
 - "Preliminary Work" has the meaning set forth in Section 8.1.2.

- "Production Inputs" means Charging Energy for the testing and commissioning of the Project, as referenced in Exhibit A to the extent Exhibit A specifies that Owner is responsible for providing such item.
- "Project" means the Zamora BESS, 30 MW 2-hour storage, to be designed, procured, constructed, tested and commissioned under this Contract, together with all ancillary equipment and subsystems, including all equipment, supplies and materials required for the facility (including the Equipment and Materials), as generally described in, and including all items described, in or inferable from, this Contract and Exhibit A.
- "Project Guaranteed Dates" means the Substantial Completion Guaranteed Date, the Substantial Completion Deadline Date and the Final Completion Expected Date.
- "Project Manager" means the Project Manager designated by Contractor and approved by Owner pursuant to <u>Section 11.6</u>.
- "Project Mechanical Completion Date" means the date on which Mechanical Completion actually occurs for the Project.
- "Project Milestone" means one of the discrete divisions of the Work identified as a "Milestone" in the Milestone Payment Schedule.
- "Project Representative" means the Project Representative designated by Owner pursuant to Section 3.1.
- "Project Schedule" means a project schedule prepared by Contractor and approved by Owner pursuant to Section 8.4 describing the time of completion by Contractor of the Critical Path Items and completion of the Work by Contractor, as such schedule may be modified in accordance with Section 8.4.
 - "Project Substation" means the existing 46 kV substation located at Zamora Substation.
 - "Punchlist" has the meaning set forth in Section 15.1.2.
 - "Regulatory End Date" has the meaning set forth in Section 34.2(e).
- "Remedial Plan" means a plan of Corrective Action, submitted by Contractor pursuant to Section 8.5 or Section 14.4.2 that:
- (a) if delivered prior to initial Acceptance Testing, specifies in reasonable detail the actions (including acceleration of the Work, for example, by using additional shifts, overtime, additional crews or resequencing of the Work, as applicable) the Contractor will take so that Substantial Completion may be achieved no later than the Substantial Completion Guaranteed Date (or the Substantial Completion Deadline Date if the Substantial Completion Guaranteed Date has passed at the time of submission of the Remedial Plan). For the avoidance of doubt, Contractor shall cause the Remedial Plan to be prepared so that, if the Remedial Plan is followed, it will be reasonably likely that Substantial Completion will occur by the Substantial

Completion Guaranteed Date (or the Substantial Completion Deadline Date if the Substantial Completion Guaranteed Date has passed at the time of submission of the Remedial Plan).

- (b) if delivered after initial Acceptance Testing:
- (i) specifies in reasonable detail the actions Contractor proposes to undertake to cause the Project to satisfy the Performance Guarantees; and
- (ii) specifies in reasonable detail the period of time during which Contractor proposes to undertake such actions (including any time required to re-run any applicable Acceptance Test), which period of time shall neither: (A) end after the Substantial Completion Guaranteed Date (or the Substantial Completion Deadline Date if the Substantial Completion Guaranteed Date has passed at the time of submission of the Remedial Plan); nor (B) exceed thirty (30) days after Contractor delivers such plan to Owner (or such longer period not to exceed sixty (60) days if the Corrective Action is not reasonably capable of being completed within such thirty (30) days, which period, including the sixty (60) day limitation, shall be extended by the period of time, if any, that Contractor is actually and demonstrably delayed in the performance of such Remedial Plan only to the extent of an Excusable Condition or Force Majeure); and
- (iii) demonstrates that completing such Corrective Action is reasonably likely to cause the Project to satisfy the Performance Guarantees by root cause analysis of deficiencies identified by previous testing.
- "Representatives" means the officers, directors, members, employees, legal counsel, accountants, lenders, potential lenders or equity participants, advisors, or ratings agencies and other agents or representatives of a Party or of its Affiliates and in the case of Owner, includes Owner's Separate Contractors, and in the case of Contractor, includes its Subcontractors.
 - "Requested Actions" has the meaning set forth in Section 34.2.
- "Required Manuals" means all operating data and manuals, spare parts manuals, integrated and coordinated operation and maintenance manuals and instructions, and training aids, whether created by Contractor or any Subcontractor or Vendor which are reasonably necessary to safely and efficiently commission, test, start up, operate, maintain and shut down the Project.
- "Schedule Recovery Plan" means a plan of Corrective Action submitted by Contractor pursuant to Section 8.4.2 that sets forth, in reasonable detail, the actions (including but not limited to acceleration of the Work, for example, by using additional shifts, overtime, additional crews or resequencing of the Work, as applicable) Contractor will take so that the milestone identified by Owner may be achieved no later than the scheduled completion date set forth in Exhibit O. For the avoidance of doubt, Contractor shall cause the Schedule Recovery Plan to be prepared so that, if the Schedule Recovery Plan is followed, it will be reasonably likely that the milestone will be achieved by the scheduled completion date set forth in Exhibit O.
- "Scheduling Coordinator" means an entity identified by PNM as a "Scheduling Coordinator."

"Site" means the location of the Work described in Exhibit A.

"Site Conditions" means the physical and other conditions at the Site and the surrounding area as a whole as of the Effective Date, including conditions relating to the environment, transportation, access, waste disposal, handling and storage of materials, the availability and quality of electric power, the availability and quality of water, the availability and quality of roads, the availability and quality of labor personnel, and local work and labor rules in effect as of the Effective Date, climatic conditions and seasons, topography, air, and water quality conditions, potable water conditions, ground surface conditions, surface soil conditions, sound attenuation, subsurface geology, general nature and quantity of surface and subsurface materials to be encountered, the geological and general subsurface conditions of the Site, all other local and other conditions which may be material to Contractor's performance of its obligations under this Contract, and the location of underground utilities, equipment and facilities needed before and during performance of Contractor's obligations under this Contract.

"Statement of Work" means the requirements regarding the Work set forth in this Contract or in Exhibit A.

"Subcontractor" means any Person, including any Vendor, other than Contractor, or Owner, that performs any portion of the Work (including any subcontractor of any tier when performing Work for the Project) in furtherance of Contractor's obligations under this Contract, and "Subcontract" has a like meaning.

"Substantial Completion" means satisfaction or waiver of all of the conditions set forth in <u>Section 15.2</u>.

"Substantial Completion Date" means the date on which Substantial Completion actually occurs.

"Substantial Completion Deadline Date" means the date that is ninety (90) days after the Substantial Completion Guaranteed Date, as such date may be modified in accordance with the terms hereof.

"Substantial Completion Guaranteed Date" means May 31, 2022, as such date may be modified in accordance with the terms hereof.

"Substantial Completion Delay Liquidated Damages" has the meaning set forth in Section 16.1.

"Supplier" means any Person who will supply Production Inputs to the Project.

"Supply Bond" means a performance and payment bond corresponding to the Work other than the Balance of Plant Activities, to be procured by Contractor from the BESS Vendor, but issued in favor of Owner, and provided by Contractor to Owner under the terms of Section 4.24 in the form of Exhibit M and issued by an Eligible Issuer.

"Suspensions for Cause" means any suspension under <u>Article 22</u> by Owner as a result of:

- (a) A Contractor Event of Default;
- (b) A Contractor Inchoate Default if such Contractor Inchoate Default creates imminent danger to persons or property; provided, however that such suspension shall not prevent Contractor from curing such Contractor Inchoate Default during the applicable cure period associated with the Contractor Event of Default that would result if such Contractor Inchoate Default were not cured; or
 - (c) Contractor's gross negligence or willful misconduct.

"Temporary Work" means supplies or services required for the performance of the Work but which do not form a permanent part of the completed Work, including without limitation, all temporary structures and other facilities required for the proper and safe performance and completion of the Work or that Contractor must provide for the use of Contractor or other parties, and that do not form part of the Work, including but not limited to office trailers, hoarding, fences, covered ways, temporary footways and stairs, protection for workers such as guardrails, fences, notices, temporary lights, power, water, and other consumables, utilities and services, erection structures and equipment including any shoring, falsework, forming materials, scaffolding, temporary stairs, staging, and all sanitary, safety, and first aid and fire prevention facilities of a temporary nature.

"Termination Value" means (a) the documented and aggregate value of all Work completed prior to the date of termination of this Contract (including in respect of partially completed Project Milestones and Major Milestones), (b) after the effective date of termination, an amount equal to Contractor's actual, demonstrable and reasonable direct costs (exclusive of overhead and profit) incurred in terminating the remaining Work and demobilization relating thereto, but less salvage value of materials or Equipment which Owner elects not to accept.

"Transmission Provider" means Owner, Owner's designated agent, or a third party acting in its capacity owning, controlling, or operating facilities used for the transmission of electric energy in interstate commerce and providing transmission service under the OATT and any successor entity, if applicable.

"Unconditional Waiver and Release Upon Final Payment" means a written statement, the current form of which is attached hereto as to Exhibit F-4, containing a waiver and release of liens pursuant to which a Person unconditionally waives and releases all Contractor Liens, stop notices and bond rights with respect to all Work.

"Unconditional Waiver and Release Upon Progress Payment" means a written statement, the current form of which is attached hereto as to Exhibit F-2, containing a waiver and release of liens pursuant to which a Person unconditionally waives and releases all Contractor Liens, stop notices and bond rights with respect to all Work for which Contractor requested payment in the Contractor's Invoice that immediately preceded the current Contractor's Invoice.

"Unforeseen Subsurface Site Conditions" has the meaning set forth in <u>Section 13.3</u>.

- "U.S. Customary System" means the primary system of weights and measures (other than the metric system) used in the United States today, which system was inherited from, but is now different from, the British Imperial System of weights and measures.
- "Vendor(s)" means persons, other than the Owner, that supply Equipment and Materials to Contractor or any Subcontractor in connection with the performance of the Work.
 - "Warranty Bond" has the meaning set forth in Section 7.9.
- "Warranty Bond Amount" means an amount equal to ten percent (10%) of the amount of the original Supply Bond.
- "Warranty Period" means the sixty (60) month period commencing on the Substantial Completion Date and, in each case, as deemed extended with respect to any given item of Work and Equipment and Materials, as specified in <u>Section 18.3</u>.
- "Water" means potable which meets the quality, flow rate and related specifications necessary to complete the Work.
- "Work" means all obligations, duties, and responsibilities assigned to or undertaken by Contractor under this Contract with respect to the Project, including all engineering, design and construction of the Project (including the Preliminary Work), all procurement and provision of Equipment and Materials, all erection and installation of Equipment and Materials, and all training, calibration, inspection, and testing included in or required for the Project (including coordinated testing of the Project with the Vendors), all as generally described in, and including all items and services described in or reasonably inferable from, Exhibit A. Where this Contract describes a portion of the Work in general, but not in complete detail, the Parties acknowledge and agree that the Work includes any work required: (a) for the design or construction of the Project in accordance with Industry Standards; or (b) for the Project to be capable of being operated in accordance with Industry Standards. Notwithstanding the foregoing, Work shall not include Electrical Interconnection Facilities or Production Inputs.

"Work Warranties" means the warranties of Contractor under Section 18.1.

- 1.2 Rules of Interpretation.
 - (a) The masculine shall include the feminine and neuter.
- (b) References to "Articles," "Sections," "Exhibits" or "Schedules" shall be to articles, sections, exhibits, or schedules of this Contract unless otherwise stated.
- (c) The Exhibits and Schedules attached hereto are incorporated in and are intended to be a part of this Contract; provided, that in the event of a conflict between the terms of any Exhibit or Schedule and the terms of this Contract, the terms of this Contract shall take precedence.
- (d) This Contract was negotiated and prepared by both Parties with the advice and participation of counsel. The Parties have agreed to the wording of this Contract and none of

the provisions hereof shall be construed against one Party on the ground that such Party is the author of this Contract or any part hereof.

- The Parties shall act reasonably and in accordance with the principles of (e) good faith and fair dealing in the performance of this Contract. Unless expressly provided otherwise in this Contract, (i) where the Contract requires the consent, approval, or similar action by a Party, such consent, approval or similar action shall not be unreasonably withheld, conditioned or delayed, and (ii) wherever the Contract gives a Party a right to determine, require, specify or take similar action with respect to a matter, such determination, requirement, specification or similar action shall be reasonable. In addition, where Contractor must obtain Owner approval, review, consent or other, similar outcome (collectively, "Approval"), the following shall apply unless a different Approval process is specifically set forth in this Agreement: when Contractor believes that the conditions for Approval have been met or Owner's Approval is otherwise required by this Agreement, Contractor shall deliver to Owner the information or other deliverable for which Approval is required. Within fifteen (15) Business Days after Owner's receipt of such information or deliverable, Owner shall either (i) Approve the same, or (ii) if the work or matter is not in accordance with the requirements of this Agreement, disapprove (or equivalent) the same and provide a detailed explanation of the reasons therefor. If Owner disapproves (or equivalent) such information or deliverable, Contractor shall correct the Defects or deficiencies identified by Owner in its disapproval (or equivalent) notice and the review procedure shall be repeated until Approval is granted. If Owner fails to disapprove (or equivalent) within fifteen (15) Business Days of receipt of Contractor delivery of the affected information or deliverable for Owner review, then same shall be deemed Approved by Owner. Notwithstanding any pending review, comment, Approval or disapproval of Owner hereunder, Contractor may proceed with the Work at its own risk unless this Agreement expressly provides otherwise.
- (f) Use of the words "include" or "including" or similar words shall be interpreted as "including but not limited to" or "including, without limitation."
- (g) Use of the words "tax" or "taxes" shall be interpreted to include taxes, fees, surcharges, and the like.

2. AGREEMENT, EXHIBITS AND CONFLICTS

- 2.1 <u>Exhibits</u>. This Contract includes the Exhibits and any schedules annexed hereto, as the same may be amended from time to time. Any reference in this Contract to an "Exhibit" by letter designation or title shall mean one of the Exhibits identified in the table of contents and such reference shall indicate such Exhibit herein.
- 2.2 <u>Terms; References.</u> Terms defined in a given number, tense, or form shall have the corresponding meaning when used in this Contract with initial capitals in another number, tense, or form. Except as otherwise expressly noted, reference to specific Articles, Sections, Subsections, and Exhibits are references to such provisions of or attachments to this Contract. References containing terms such as "hereof," "herein," "herein," "hereinafter," and other terms of like import are not limited in applicability to the specific provision within which such references are set forth but instead refer to this

Contract taken as a whole. "Includes" or "including" shall not be deemed limited by the specific enumeration of items, but shall be deemed without limitation. The term "or" is not exclusive. Reference to a Governmental Authority shall include an entity succeeding to its functions. All documents required to be provided under this Contract shall be in English.

- 2.3 <u>Conflicts in Documentation</u>. In the event of any conflict in interpretation or inconsistencies in the Contract documents, the following precedence of interpretation shall prevail: (a) any mutually agreed Change in Work or other Contract amendment duly authorized and executed by both Parties in accordance herewith, solely with regard to the subject matter of any such Change in Work or Contract amendment; (b) <u>Articles 1</u> through <u>34</u> of this Contract, as the same may be amended from time to time; (c) <u>Exhibit A</u>; (d) <u>Exhibits B</u> and <u>N</u>; (e) the remaining Exhibits, which Exhibits shall be read to be consistent and complementary to the greatest extent possible.
- 2.4 <u>Documentation Format</u>. This Contract and all documentation to be supplied hereunder shall be in the English language and all units of measurement in the design process, specifications, drawings and other documents shall be specified in U.S. Customary System dimensions.

3. RESPONSIBILITIES OF OWNER

Owner shall, at Owner's cost and expense:

- 3.1 <u>Project Representative</u>. Designate (by a Notice delivered to Contractor) a Project Representative, who shall act as a single point of contact for Contractor with respect to the prosecution of the Work (but who shall not be authorized to execute or make any amendments to, or provide waivers under, this Contract, except that such Project Representative shall be authorized to execute Change in Work Forms under <u>Article 17</u>). Until delivery of Notice to Contractor of a new Project Representative, the Project Representative for Owner shall be Kevin Mataczynski.
- 3.2 <u>Operating Personnel</u>. No later than thirty (30) days prior to the anticipated Mechanical Completion Date for the Project (as determined by Owner in consultation with Contractor based on the circumstances existing at the time of determination), Owner shall provide Operating Personnel:
 - (a) for training by Contractor as provided pursuant to Section 4.17; and
- (b) to provide ordinary operating and maintenance support to Contractor for testing and commissioning of the Project.

Until Substantial Completion, the Operating Personnel made available pursuant to this Section 3.2 shall (x) provide normal operating and maintenance support (including during the Construction Tests) under the management, supervision, and direction of Contractor, but shall not be required to provide any services that would not be required for normal operation of the Project; and (y) during the Acceptance Tests, shall operate the Project, in each case (x) and (y) under the supervision and control of Contractor. The number of Operating Personnel to be

provided by Owner during such periods shall be the amount reasonably determined by Owner as necessary to support the above tasks. Notwithstanding the foregoing:

- (i) such Operating Personnel shall not be deemed employees or Subcontractors of Contractor;
- (ii) Contractor shall not direct the Operating Personnel to undertake any unusual or extraordinary operating or maintenance activities for the purposes of successfully completing any Acceptance Test; and
- (iii) Contractor shall remain solely responsible for performing the Work in accordance with this Contract, including Contractor's obligation to achieve Substantial Completion and Final Completion by the applicable Project Guaranteed Dates in accordance with the terms of this Contract.
 - 3.3 <u>Ministerial Assistance; Project Information and Documents; Approvals.</u> Execute applications required to be signed by Owner and provide assistance (to be provided at no cost to Contractor) as Contractor may reasonably request in connection with obtaining any Contractor Acquired Permit. Keep Contractor informed of progress regarding the anticipated NTP effective date, and all technical aspects relating to transmission interconnection, and the fuel supply agreement. Provide all approvals of Contractor Deliverables within the time periods specified pursuant to <u>Section 12.4</u>, provided such Contractor Deliverables are timely submitted to Owner by Contractor.
 - 3.4 Owner Acquired Permits. Obtain, with Contractor's assistance (to be provided at no additional cost to Owner), and pay for all Owner Acquired Permits. Owner will obtain all Owner Acquired Permits in final form by the applicable milestones or milestone dates specified in Exhibit C.
 - 3.5 Access to Site. Subject to Sections 4.9 and 4.15, make the Site, including a suitable staging area, laydown area and an area for site stormwater discharge containment, all of which will be shown on Exhibit A, Appendix 1, available to Contractor and assure reasonable right of ingress and egress to and from the Site for Contractor to perform site testing work as may reasonably be necessary in connection with preparation for or performance of the Work. Following Owner's issuance of the Notice to Proceed, and subject to Sections 4.9 and 4.15 and consistent with the terms of the Applicable Permits, make the Site available to Contractor and assure reasonable rights of ingress and egress to and from the Site for Contractor for performance of the Work, including, without limitation, sufficient rights of ingress and egress to and from the Site for heavy equipment; provided, however, that Contractor shall coordinate with Owner regarding initial entry onto the Site or any part thereof and contact with the persons who own property on or near, or have granted license or easement rights in and to, the Site.
 - 3.6 <u>Production Inputs</u>. Provide the Production Inputs as more fully set forth in <u>Exhibit A</u>. Notwithstanding anything in this Contract to the contrary, Contractor's sole remedy for the failure of Owner to provide or cause to be provided any of the Production Inputs in accordance with the terms of this Contract is the relief granted in <u>Section 9.4.2</u>.

Without limiting the terms of this Contract, any such failure shall not be considered a breach of any covenant, condition, representation or warranty of Owner, and shall not be construed as an Owner Event of Default.

- 3.7 <u>Electrical Interconnection Facilities</u>. Cause to be provided the Electrical Interconnection Facilities as specified in <u>Exhibit A</u>. Owner shall be responsible for coordinating and contracting for all metering and interconnection requirements necessary to connect the Project to the Point of Interconnection.
- 3.8 <u>Cooperation with Owner's Separate Contractors</u>. Cause Owner's Separate Contractors to cooperate with Contractor and the Subcontractors who may be working at or near the Site in order to assure that neither Owner nor any of Owner's Separate Contractors unreasonably hinders or increases the work being performed by Contractor and the Subcontractors.
- 3.9 <u>Scheduling Coordinator</u>. Owner, as owner of the Project, shall take all necessary actions and enter into all arrangements and agreements required to deliver power produced by the Project to the Point of Interconnection in the balancing area. Owner shall also become the Scheduling Coordinator for the Project in order to schedule energy deliveries for testing and commissioning of the Project; provided, however, that Contractor shall provide thirty (30) Days advance written notice to Owner as to when Owner's obligations as Scheduling Coordinator are expected to commence.

4. RESPONSIBILITIES OF CONTRACTOR.

In order for Contractor to complete the Work, Contractor shall:

- 4.1 <u>General Obligations</u>. Contractor shall perform, furnish, be responsible for, and pay the cost of, all of the Work, including all services, labor, Equipment and Materials (excluding the Production Inputs, and the Electrical Interconnection Facilities) and supervision necessary to provide an operable Project in accordance with the provisions of this Contract.
- 4.2 <u>Performance of Work.</u> Perform and complete all of the Work, and cause each Subcontractor to perform and complete each such Subcontractor's respective work in accordance with the terms of the Contract and in compliance with Industry Standards, Applicable Laws and Applicable Permits.
- 4.3 <u>Design and Construction of Project</u>. Engineer, design and construct the Project so that it is capable of operation, at the design levels specified in this Contract and the Statement of Work, and in compliance with Industry Standards, Applicable Laws and Applicable Permits. Contractor shall provide all necessary engineering and design services necessary to set forth in detail the specifications, drawings and requirements for the procurement of Equipment and Materials and for the construction and installation of the entire Project in a manner which satisfies the requirements of this Contract. Contractor shall preserve all permanent survey construction monuments and benchmarks during its performance of the Work.
- 4.4 <u>Temporary Facilities and Utilities</u>. Provide all temporary communication facilities, Water, electricity and sanitary utilities to be used by Contractor and Subcontractors and their respective employees through Substantial Completion as specified in the Statement of Work. Electricity, telephone, data lines and sanitary services for the trailers shall be provided by the Contractor. All office furniture and office equipment for the trailers shall be provided by Contractor. Contractor is responsible for providing all necessary parking to support construction vehicles, Owner and Vendor vehicles and Project worker vehicles.
- 4.5 <u>Organization</u>. Maintain a qualified and competent organization at the Site with adequate capacity and numbers of construction, commissioning and testing personnel, equipment, and facilities to execute the Work in a safe, efficient, environmentally sound, and professional manner at a rate of progress in accordance with the Project Schedule.
- 4.6 <u>Permits Acquired by Contractor</u>. Obtain all Contractor Acquired Permits so that the Project can be designed, constructed, owned, operated, and maintained at the design levels specified in this Contract and the Statement of Work and in compliance with Industry Standards, Applicable Laws and the schedules set forth in this Contract.
- 4.7 <u>Maintenance of Site</u>. Maintain the Site clear of debris, waste material, and rubbish. Contractor shall dispose of such debris, waste material, and rubbish in accordance with Applicable Law.
- 4.8 <u>Price Allocation Schedule</u>. No later than sixty (60) Days prior to the anticipated achievement of Substantial Completion, provide a price allocation schedule for the Work and other information reasonably necessary for Owner to maintain

segregated accounts for its tax records and fixed asset records (including any FERC accounting requirements). Contractor shall provide an updated price allocation schedule for the Project prior to Final Completion.

- Safeguards. Comply with the requirements of Exhibit A and provide, and cause its Subcontractors (as applicable) and Vendors (as applicable) to provide, all necessary and adequate safeguards at the Site for the protection of the Work, the Project, the Vendors and their personnel, other work installed by Owner and all other persons and other property (including existing structures) located on the Site including that owned by Contractor, Owner, and others connected to the Work, including an unmanned security fence pursuant to a safety and security assurance program reasonably acceptable to Owner, or otherwise reasonably required to prevent physical loss and damage including vandalism, theft, malicious mischief, and danger to the Project or personnel. Within thirty (30) days after the Notice to Proceed Date, Contractor shall provide a Notice to Owner describing the safety and security assurance program to be used by Contractor in the performance of the Work. Owner shall have the right to promptly review and comment on such program as described in such Notice from Contractor; provided, however, that Contractor shall remain solely responsible for performing such Work in accordance with this Contract. If Owner provides any comments with respect to such safety and security assurance program to Contractor, then Contractor shall incorporate changes into the safety and security assurance program addressing such comments, and resubmit the safety and security assurance program to Owner. Such resubmission of the safety and security assurance program shall not be considered a Change in Work. Contractor shall perform the Work in accordance with Contractor's approved safety and security assurance program. Contractor shall promptly provide Owner with:
- (a) written accident reports for lost time accidents that occur at the Site prepared in accordance with the safety and security assurance program approved by Owner pursuant to this Section 4.9; and
- (b) copies of all written communications with Governmental Authorities and insurance companies (including any notices) with respect to accidents that occur at the Site, and thereafter provide such written reports relating thereto as Owner may reasonably request.

Owner shall provide site-specific training information for Contractor to incorporate into its safety and security assurance program. Contractor and its Subcontractors shall abide by Owner's security procedures, rules and regulations and properly display identification badges at all times while on Owner's premises. In addition, Contractor and its Subcontractors shall comply with reasonable health and safety requirements established from time to time by Owner at the Site.

- 4.10 Expediting. Arrange for complete handling of all Equipment and Materials to the extent required under Article 32, and construction equipment, including inspection, expediting, shipping, loading, unloading, customs clearance, receiving, storage, and claims. All Equipment and Materials and, to the extent required by Article 32, shall be stored and maintained in storage in accordance with the applicable manufacturer's recommendations. Contractor shall be responsible for loading and customs clearance of Equipment at any of the Vendor facilities and shipping Equipment to the Site.
- 4.11 <u>Temporary Work.</u> Provide all Temporary Work, supplies, construction utilities and facilities, special tools, consumable materials, fuels and commissioning supplies reasonably necessary or appropriate for the construction, testing, commissioning, and operation and maintenance of the Project until achievement of Substantial Completion. By delivery of a Notice to Owner prior to the disposition of any surplus, used construction materials, or supplies remaining on the Site after the Substantial Completion Date (other than materials and supplies necessary to achieve Final Completion), Contractor shall give Owner the option to purchase each such item at a price not exceeding Contractor's cost therefor, less the reduction in the reasonable value of such item as a result of Contractor's use of such item. Owner shall exercise such right, if it so elects, within thirty (30) days after receipt of such Notice.
- 4.12 Operating Consumables. (a) Provide all Operating Consumables necessary or appropriate for the construction, testing, commissioning, operation or maintenance of the Project until Contractor achieves Substantial Completion; (b) at Substantial Completion, replace any inventory of Operating Consumables used by Contractor; and (c) provide to Owner, at least ninety (90) days prior to the Substantial Completion Date, a detailed list of potential suppliers of all Operating Consumables.
- 4.13 Applicable Laws/Permits. Upon request from time to time by Owner, promptly provide all technical support and information, and other reasonably requested information, to enable Owner to apply for and obtain Owner Acquired Permits. Comply in all respects with all Applicable Laws and Applicable Permits relating to the Project, the Site, and the performance of the Work, and perform the Work so that, upon Substantial Completion, the Project shall meet, and will be capable of being operated in compliance with, all requirements of Applicable Laws and Applicable Permits and using methods and Equipment and Materials that satisfy Industry Standards.
- 4.14 <u>Quality Assurance Meetings</u>. To supplement Monthly Progress Reports, allow Owner and the Engineer to participate in construction status meetings. Contractor shall have such meetings no less than one per week with its Subcontractors.
- 4.15 Access. Use only the entrance(s) to the Site specified by Owner for ingress and egress of all personnel, Equipment and Materials and vehicles. Contractor shall perform the Work consistent and in accordance with Owner's ownership, license and easement rights in and to the Site that are disclosed to Contractor in writing by Owner. Contractor shall observe access routes, entrance gates or doors, parking and temporary storage areas as designated by Owner. Under no circumstances shall

Contractor's or its Subcontractors' personnel cause their respective vehicles or equipment to enter, be moved, handled, maintained or stored upon any area not authorized by Owner.

- 4.16 Data; Drawings. Provide all operating data and preliminary, construction and final as-built drawings necessary to safely and efficiently start up, test, operate, shut down, and maintain the Project (including those set forth in Exhibit A). Contractor shall furnish or cause its Subcontractors to furnish, the services of all personnel, including supervisors, engineers, designers and draftsmen necessary for the preparation of all Contractor Deliverables. The design services shall include all architectural, civil, structural, mechanical, electrical, instrumentation and control work. All Contractor Deliverables shall be prepared in a form and level of completion necessary to operate the Project in accordance with Applicable Laws, Industry Standards and in accordance with the provisions of this Contract. Contractor shall accurately prepare "as-built" drawings of the Project and deliver to Owner such as-built drawings no later than ninety (90) days after Substantial Completion, which as-built drawings shall be in form and substance usual and customary for such documents. Such "as-built" drawings shall show the location of the Project and shall show all related easements, improvements, utilities and rights-of-way above and below ground, on and off the Site, as of the date of delivery of such documents. Such "as-built" drawings shall also show the dimensions and the distances to the nearest benchmarks. All drawings provided to Owner pursuant to this Contract shall be provided in hard-copy "Size E," AutoCAD, and "Adobe pdf" formats. Subject to Section 27.1, Contractor hereby assigns to Owner without reservation, all Intellectual Property Rights that are prepared specifically for Owner or in connection with the Work and required to be delivered to Owner pursuant to the terms of this Contract, including all Drawings and Specifications. Subject to Section 27.1, Contractor shall, prior to directing any Subcontractor to produce any design or engineering work in connection with the Project, obtain a valid written assignment of any necessary Intellectual Property Rights from such Subcontractor in terms substantially similar to those that obligate Contractor to Owner as expressed in this Section 4.16, which Intellectual Property Rights Contractor hereby assigns to Owner. In order to facilitate observations and inspections, Contractor shall maintain at the Site in a safe place one working copy of all Project Schedules, drawings, specifications, addenda, executed Changes in Work, graphic or written instructions, interpretations and clarifications, and all other documents related to the Work, in good order and marked currently to record all changes made during construction, together with blueprints, general arrangements, manufacturing and shop drawings, product data and samples, and copies of all electrical plumbing and public safety codes applicable to the Work. Such documents shall be available to Owner (and the Engineer) for such parties' reference, copying and use.
- 4.17 <u>Training of Operating Personnel.Design and Review of Training Program</u>. Contractor shall design, and prepare a written narrative description of, the training program (in accordance with the provisions of <u>Exhibit A</u>) and the proposed written materials to be used in the training program, including coordination of training to be provided by Vendors. Contractor shall submit such description to Owner by no later than the date that is ninety (90) days before the anticipated Mechanical Completion Date of the Project (as determined by Owner based on the circumstances existing at the time

of determination). Owner will review, comment on, and approve or disapprove such program in writing within thirty (30) days after such submission by Contractor. If Owner conditions its approval on reasonable changes in the program submitted by Contractor, then Contractor will effect such changes at no additional cost to Owner and resubmit the program to Owner within ten (10) days after Contractor receives Owner's conditional approval. If Owner fails to respond within the period specified above, Owner shall be deemed to have approved the program submitted by Contractor.

- 4.17.2 Commencement of Training. Not later than the date that is one hundred twenty (120) days following the Notice to Proceed Date, Contractor shall advise Owner of the estimated date that Contractor will commence the Acceptance Tests. Contractor shall keep Owner continuously apprised of any change to such estimated commencement date. Commencing at the time specified in Section 3.2, Contractor shall train the designated Operating Personnel in the requirements for the operation and maintenance of, and safety, general process understanding and emergency procedures for, the Project and all of its sub-systems all in accordance with the training program approved by Owner pursuant to Section 4.17.1. Contractor shall coordinate with the applicable Vendors so that an integrated training curriculum is presented to such Operating Personnel. Contractor shall also train or cause the applicable Subcontractor to train the Operating Personnel on all of the major items of the equipment installed under this Contract at the Project. In particular, without limiting the generality of the foregoing, the Contractor or Subcontractor, as the case may be, which provides the control system shall train the Operating Personnel on the operation and maintenance of such equipment.
- 4.17.3 Operating and Maintenance Manuals. Contractor shall provide operating and maintenance procedures and manuals for all equipment, components, systems and subsystems in the form set forth in Exhibit A.
- 4.18 Spare Parts.Construction and Commissioning Spare Parts. Contractor shall provide all spare parts required in connection with installation, commissioning and testing of the Project and shall provide all special tools necessary for the performance of the Work and to maintain the Project, the costs of which are included in the Contract Price. Owner may make available to Contractor for Contractor's use any spare parts owned by Owner, but in no event shall Owner be liable or shall Contractor be entitled to a Change in Work in the event that the absence of any particular spare part(s) impacts the critical path of the Project. Notwithstanding the foregoing, at Substantial Completion, Contractor shall pay for or replace any spare parts used by Contractor that were originally owned by Owner with new parts identical to those parts used by Contractor pursuant to this Section.
- 4.18.2 Operating Spare Parts. No later than one hundred eighty (180) days before the date Contractor anticipates it will achieve Substantial Completion, Contractor shall be responsible for identifying an initial stock of spare parts reasonably necessary for the operation and maintenance of the Project after Substantial Completion.

Owner may procure all or a portion of such spare parts for delivery prior to Substantial Completion. Owner shall provide written notice to Contractor of its election to so procure such spare parts prior to a deadline date reasonably determined by Contractor that would assure delivery at or prior to Substantial Completion. The costs of such spare parts are not included in the Contract Price and shall be addressed as a Change in Work.

- 4.19 <u>Commissioning and Testing Personnel</u>. Contractor shall provide or cause to be provided appropriate installation, commissioning, and testing representatives from Vendors or Subcontractors of major equipment and control systems, all necessary supervising personnel, all equipment, tools, construction and temporary material and all other labor necessary for all Construction Tests, Performance Tests, Functional Guarantee Tests, and commissioning.
- 4.20 <u>PNM Grid</u>. Design and construct the Project to operate in parallel with the PNM Grid such that the maximum net electrical energy from the Project can be delivered to the Point of Interconnection and the maximum net electrical Charging Energy can be delivered to the Project by means of the Electrical Interconnection Facilities. Contractor shall coordinate with Owner in respect of the interconnection of the Project with the Electrical Interconnection Facilities to provide for proper operation of the Project and to allow delivery of electricity to the Point of Interconnection and delivery of Charging Energy from the Point of Interconnection in the capacities required under this Contract. Contractor shall also provide all assistance related to the Work or the Project as is reasonably requested by Owner in coordinating with the construction of the Electrical Interconnection Facilities.
- 4.21 <u>Non-Interference With Adjacent Properties</u>. Subject to the other terms of this Contract, Contractor shall be responsible for mitigating or correcting any damage away from the Site caused by performing the Work under this Contract. Contractor shall also be responsible for off-site lay-down areas and improvements necessary to mitigate construction impacts to owners and users of property adjacent to the Site. Contractor will utilize its own clearance/lock-out-tag-out system to establish redundant clearance points.
- 4.22 <u>Production Outputs</u>. Provide week-ahead and day-ahead expected Energy export and Charging Energy consumption during the commissioning phase of the Project.
- 4.23 <u>Information and Support</u>. Contractor shall provide to Owner at no additional cost to Owner Confidential Information (with any required supporting statements, affidavits, and other documents) required to be disclosed, and shall also provide and agree to the release of unredacted versions of Confidential Information including this Contract when (i) required under any order or subpoena of a Governmental Authority; (ii) pursuant to a confidentiality agreement entered into under a protective order of a Governmental Authority; (iii) necessary in Owner's sole discretion in connection with any Governmental Authority approval sought or filing required to be made by Owner; or (iv) required by any of Owner's lenders. Contractor shall also provide to Owner, such lenders, and insurers of the Work, at no additional cost to Owner, all information and support that may be reasonably necessary to/for Owner to: obtain

approvals or Permits from any Governmental Authority; demonstrate compliance of the Work with applicable requirements of this Contract; respond to any information request or demand from any or Governmental Authority; or make any required disclosure or respond to any discovery request in any administrative or legal proceeding of any Governmental Authority.

4.24 Performance Bond.

4.24.1 No later than five (5) Business Days following the date on which Owner issues the Notice to Proceed Date, Contractor shall furnish to Owner (a) a Supply Bond, and (b) a Performance Bond in an amount equal to (i) the Contract Price less (ii) the value of the Supply Bond (the value of the Performance Bond being "Original Performance Bond Amount"). Contractor shall obtain and maintain the Performance Bond and Supply Bond at its sole cost and expense. The Performance Bond and Supply Bond shall be in the form attached herein as Exhibit M.

4.24.2 Upon Substantial Completion:

(a) the value of the Performance Bond shall be reduced to ten percent (10%) of the Original Performance Bond Amount. PNM must release the Performance Bond, returning it to Contractor upon the later of (i) Final Completion or (ii) the payment by Contractor of all Buy-Down Amounts and Substantial Completion Delay Liquidated Damages (or, if applicable, the resolution of disputes regarding Buy-Down Amounts or Substantial Completion Delay Liquidated Damages and the payment by Contractor of any amounts due to PNM pursuant to such resolution); and

(b) PNM shall release the Supply Bond, returning it to Contractor or Contractor's designee.

5. COVENANTS, WARRANTIES AND REPRESENTATIONS

- 5.1 <u>Of Contractor</u>. Contractor covenants, represents, and warrants to Owner, during the term of this Contract, that:
- 5.1.1 Organization, Standing and Qualification. Contractor is a corporation, duly organized, validly existing, and in good standing under the laws of the State of New Mexico, and has full power and authority to execute, deliver and perform its obligations hereunder and to engage in the business it presently conducts and contemplates conducting, and is and will be duly licensed or qualified to do business and in good standing under the laws of the State of New Mexico and in each other jurisdiction wherein the nature of the business transacted by it makes such licensing or qualification necessary and where the failure to be licensed or qualified would have a material adverse effect on its ability to perform its obligations hereunder.
- 5.1.2 <u>Professional Skills</u>. Contractor has all the required authority, ability, skills, experience and capacity necessary to perform and shall diligently perform the Work in a timely and professional manner, utilizing sound engineering principles, project management procedures, construction procedures and supervisory procedures, all

in accordance with Industry Standards. Contractor has the experience and skills necessary to determine, and Contractor has reasonably determined, that Contractor can perform the Work for the Contract Price.

- 5.1.3 Enforceable Contract. This Contract has been duly authorized, executed, and delivered by or on behalf of Contractor and is, upon execution and delivery, the legal, valid, and binding obligation of Contractor, enforceable against Contractor in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency or similar laws affecting creditors' rights generally and by general equitable principles.
- 5.1.4 No Conflict. The execution, delivery and performance by Contractor of this Contract will not conflict with or cause any default under: (a) its organizational documents; (b) any indenture, mortgage, chattel mortgage, deed of trust, lease, conditional sales contract, loan or credit arrangement or other agreement or instrument to which Contractor is a party or by which it or its properties may be bound or affected; or (c) any Applicable Laws; and will not subject the Project or any component part thereof or the Site or any portion thereof to any lien other than as contemplated or permitted by this Contract.
- 5.1.5 Government Approvals. The Contractor Acquired Permits either have been obtained by Contractor and are in full force and effect on the Effective Date or Contractor will use commercially reasonable efforts to obtain such Contractor Acquired Permits so that they will be in full force and effect on or prior to the date on which they are required, under this Contract and Applicable Law, to be in full force and effect, so as to permit Contractor to commence and prosecute the Work to completion in accordance with the Project Schedule. Other than with respect to the Contractor Acquired Permits, neither the execution nor delivery by Contractor of this Contract requires the consent or approval of, or the giving of notice to or registration with, or the taking of any other action in respect of, any Governmental Authority.
- 5.1.6 No Suits, Proceedings. There are no material actions, suits, proceedings, patent or license infringements, or investigations pending or, to Contractor's knowledge, threatened against it at law or in equity before any court (United States or otherwise) or before any Governmental Authority (whether or not covered by insurance) that individually or in the aggregate could result in any materially adverse effect on the business, properties, or assets or the condition, financial or otherwise, of Contractor or in any impairment of its ability to perform its obligations under this Contract. Contractor has no knowledge of any violation or default with respect to any order, writ, injunction, or decree of any court or any Governmental Authority that may result in any such materially adverse effect or such impairment.
- 5.1.7 <u>Patents</u>. Contractor owns or has, or will have on or prior to the date on which it is required, the right to use all patents, trademarks, service marks, trade names, copyrights, licenses, franchises, and permits necessary to perform the Work without conflict with the rights of others.

- 5.1.8 <u>Business Practices</u>. Contractor and its representatives have not made any payment or given anything of value, and Contractor will not, and Contractor will direct its employees, agents, and Subcontractors directly contracting with Contractor, and their employees or agents to not, make any payment or give anything of value, in either case to any government official (including any officer or employee of any Governmental Authority) to influence his, her, or its decision or to gain any other advantage for Owner or Contractor in connection with the Work to be performed hereunder. None of Contractor, its Subcontractors, nor any of their employees or agents shall take any action that in any way violates the United States Foreign Corrupt Practices Act or any similar Applicable Law. Contractor shall immediately notify Owner of any violation of this covenant.
- 5.1.9 Fixed Price Obligation. Contractor acknowledges that this Contract constitutes a fixed price obligation to permit, engineer, design, procure, construct, test and commission through Final Completion the Project (including the training of the Operating Personnel), complete in every detail, within the time and for the purpose designated herein. Contractor is obligated to supply all of the Equipment and Materials (excluding the Production Inputs and the Electrical Interconnection Facilities), labor and design services and to supply and perform all of the Work, in each case as may reasonably be required, necessary, incidental, or appropriate (whether or not specifically set forth in this Contract) to complete the Work such that the Project satisfies the applicable terms, conditions, Performance Guarantees, Functional Guarantees, and other guarantees and requirements set forth in this Contract and Exhibit I, all for the Contract Price.
- 5.1.10 Owner Provided Information. Owner may provide or may have provided Contractor with copies of certain studies, reports or other information (including oral statements) and Contractor acknowledges that all such documents or information have been or will be provided as background information and as an accommodation to Contractor. Contractor further acknowledges that Owner does not make any representation or warranty with respect to the accuracy of such documents or the information (including oral statements) or opinions therein contained or expressed. Subject to Section 13.3, Contractor further represents and warrants that it is not relying on Owner for any information, data, inferences, conclusions, or other information with respect to Site Conditions, including the surface or sub-surface conditions of the Site and the surrounding areas.
- 5.1.11 Financial Condition. Contractor is financially solvent, able to pay its debts as they mature, and possessed of sufficient working capital to complete its obligations under this Contract.
- 5.1.12 <u>Licenses</u>. All Persons who have been authorized by Contractor to perform, and who do perform, any portion of the Work have and will have all business and professional certifications required by Applicable Law to perform the services under this Contract.

- 5.1.13 <u>Licensing Requirement</u>. Contractor (a) is, and through completion of the Project will be, licensed by the Contractor's State License Board in New Mexico, and (b) is licensed by the Construction and Industries Division of the New Mexico Regulation and Licensing Department, or any successor entity.
- 5.2 <u>Of Owner</u>. Owner covenants, represents, and warrants to Contractor, during the term of the Contract, that:
- 5.2.1 Organization, Standing and Qualification. Owner is a corporation, duly formed, validly existing, and in good standing under the laws of the State of New Mexico, and has full power and authority to execute, deliver and perform its obligations hereunder and to engage in the business Owner presently conducts and contemplates conducting, and is and will be duly licensed or qualified to do business and in good standing in each jurisdiction wherein the nature of the business transacted by it makes such licensing or qualification necessary and where the failure to be licensed or qualified would have a material adverse effect on its ability to perform its obligations hereunder.
- 5.2.2 Enforceable Contract. This Contract has been duly authorized, executed, and delivered by or on behalf of Owner and is, upon execution and delivery, the legal, valid, and binding obligation of Owner, enforceable against Owner in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency or similar laws affecting creditors' rights generally and by general equitable principles.
- 5.2.3 No Conflict. The execution, delivery and performance by Owner of this Contract will not conflict with or cause any default under: (a) its organizational documents; (b) any indenture, mortgage, chattel mortgage, deed of trust, lease, conditional sales contract, loan or credit arrangement or other agreement or instrument to which Owner is a party or by which it or its properties may be bound or affected; or (c) any Applicable Laws.
- 5.2.4 Governmental Approvals. The Owner Acquired Permits, other than NMPRC Approval, either have been obtained by Owner and are in full force and effect on the Effective Date or Owner will use its good faith efforts to obtain such Owner Acquired Permits so that they will be in full force and effect on or prior to the date on which they are required, under this Contract and Applicable Law, to be in full force and effect, so as to permit Contractor to perform its obligations under this Contract. Other than with respect to the Owner Acquired Permits, neither the execution nor delivery by Owner of this Contract requires the consent or approval of, or the giving of notice to or registration with, or the taking of any other action in respect of, any Governmental Authority.
- 5.2.5 No Suits, Proceedings. There are no material actions, suits, proceedings, or investigations pending or, to Owner's knowledge, threatened against it at law or in equity before any court (United States or otherwise) or before any Governmental Authority (whether or not covered by insurance) that individually or in the aggregate could result in any materially adverse effect on the business, properties, or assets or the

condition, financial or otherwise, of Owner or in any impairment of its ability to perform its obligations under this Contract. Owner has no knowledge of any violation or default with respect to any order, writ, injunction, or any decree of any court or any Governmental Authority that may result in any such materially adverse effect or such impairment.

- 5.2.6 <u>Business Practices</u>. Owner will not, and Owner will direct its employees, agents, and subcontractors, and their employees and agents not to, make any payment or give anything of value to any government official (including any officer or employee of any Governmental Authority) to influence his, her, or its decision or to gain any other advantage for Owner or Contractor in connection with the Work to be performed hereunder. Neither Owner nor any of its employees or agents shall take any action that violates the United States Foreign Corrupt Practices Act or any similar Applicable Law. Owner shall immediately notify Contractor of any violation of this covenant.
- 5.2.7 <u>Financial Condition</u>. Owner is financially solvent, able to pay its debts as they mature, and possessed of sufficient working capital to complete its obligations under this Contract.

6. COST OF WORK

- 6.1 <u>Contract Price</u>. As full compensation for the Work and all of Contractor's obligations hereunder, Owner shall pay to Contractor a fixed price amount of Twenty-Nine Million Nine Hundred Ninety-Nine Thousand Five Hundred Seven Dollars (\$29,999,507) (the "<u>Contract Price</u>"), plus applicable gross receipts taxes. The Contract Price shall be changed only by the express terms set forth in this Contract including Changes in Work approved in accordance with <u>Article 17</u>, and the terms of <u>Article 22</u>, Suspension. The Contract Price shall be paid in accordance with <u>Article 7</u>.
- 6.2 All Items of Work Included. The Contract Price includes payment for: (a) all costs of Equipment and Materials (excluding the costs of Production Inputs, and the Electrical Interconnection Facilities, which costs are the exclusive responsibility of Owner), temporary equipment, labor, transportation, engineering, design and other services relating to Contractor's performance of its obligations under this Contract and the Work (including any intellectual property rights licensed under this Contract, expressly or by implication) provided by Contractor or such Subcontractors; (b) all United States federal, state, regional, and local taxes, goods and services taxes, and other sales taxes effective or enacted as of the Effective Date or thereafter, each as imposed on Contractor or its Subcontractors or the Work; (c) all other taxes, duties, levies, imposts, fees, or charges of any kind (whether in the United States or elsewhere and including, without limitation, any of the foregoing related to the importation of any items into the United States) arising out of Contractor's or any such Subcontractor's performance of the Work, including any increases thereof that may occur during the term of this Contract; and (d) any duties, levies, imposts, fees, charges, and royalties (and including, without limitation, any of the foregoing related to the importation of any items into the United States) imposed on Contractor or its Subcontractors with respect to any Equipment and Materials, labor, or services provided under this Contract. The taxes covered hereby

include occupational, excise, unemployment, FICA, sales, use, ownership, value-added, gross receipts, compensating and income taxes, state and federal gasoline and fuel taxes, property taxes on Contractor's equipment, tools and supplies and any and all other taxes and duties on any item, Equipment and Materials, lease or service that is part of the Work, whether such tax is normally included in the price of such item or service or is normally stated separately, all of which shall be for the account of Contractor. The Contract Price shall not be increased with respect to any of the foregoing taxes. Notwithstanding anything to the contrary in the foregoing, each Party shall be responsible for payment of its own income taxes. Contractor shall be responsible for property taxes on all materials and equipment used and owned by Contractor.

7. TERMS OF PAYMENT

- 7.1 <u>Method of Compensation</u>. Owner shall compensate Contractor for performance of the Work in accordance with the Milestone Payment Schedule and the terms of this <u>Article 7</u>.
- 7.1.1 <u>Invoice</u>. Other than with respect to payment for completion of the Final Completion Project Milestone (which shall be governed by <u>Section 7.2</u>), Contractor may submit a Contractor's Invoice for the completion of a Project Milestone(s) in the amount equal to the applicable Milestone Payment set forth in the Milestone Payment Schedule and any other amounts then payable by Owner to Contractor under <u>Article 17</u> or any other provision hereof (without limiting Owner's right to dispute in good faith any amounts requested for payment). However, in the case of Contractor's completion of any Project Milestone(s) in advance of the scheduled completion date for the Project Milestone as set forth in the Milestone Payment Schedule, Contractor shall not include in a Contractor's Invoice any amounts for Milestone Payment(s) more than two (2) months in advance of the scheduled completion date for the corresponding Project Milestone set forth in the Milestone Payment Schedule. Contractor's Invoice:
- (a) shall include information reasonably required for Owner to assess the completion of the applicable Project Milestone for which Contractor is seeking a Milestone Payment, including if applicable the delivery of the Notice of Mechanical Completion in accordance with Section 14.3(a) or Notice of Substantial Completion in accordance with Section 15.2(m);
- (b) shall include an Unconditional Waiver and Release Upon Progress Payment of Contractor for payments previously made by Owner, if any, pursuant to this Contract and a Conditional Waiver and Release Upon Progress Payment of Contractor for the current payment made by Owner pursuant to this Contract; and
- (c) shall include, with respect to each Subcontractor contracting directly with Contractor and performing services at the Site, either:
- (i) an Unconditional Waiver and Release Upon Progress Payment of Subcontractor or, if such Subcontractor has completed all Work that such Subcontractor is to perform, an Unconditional Waiver and Release Upon Final Payment; or

(ii) a bond in form and substance reasonably acceptable to Owner, which bond shall name Owner as "obligee" thereof, and which bond shall be in an amount greater than the difference of: (x) one hundred fifty percent (150%) of the total amount of such Subcontractor's subcontract or purchase order (which subcontract or purchase order Contractor shall deliver to Owner to verify the amount of such subcontract or purchase order), less (y) the amounts that such Subcontractor has previously been paid by Contractor as certified by such Subcontractor.

Contractor understands and agrees that, if any Contractor's Invoice is inaccurate or incomplete or lacks reasonable detail, specificity, or supporting documentation required by or otherwise fails to conform to this <u>Article 7</u>, then, to the extent of such deficiency, such Contractor's Invoice shall not constitute a valid request for payment and Owner shall so notify Contractor of the same no later than ten (10) Business Days after receipt of said invoice.

- 7.1.2 Payments. Within twenty-one (21) days after Owner receives a Contractor's Invoice under Section 7.1.1, Owner shall pay all amounts invoiced therein that are then owed by Owner under this Contract and not subject to a good faith dispute (where Owner has notified Contractor of such dispute within five (5) Business Days of receipt of invoice), subject, however, to any right of Owner to offset against such payment any amount then due from Contractor to Owner pursuant to Section 35.14. All payments shall be made by wire transfer to an escrow account designated by the Parties (the "Escrow Account"). However, notwithstanding anything herein to the contrary, Owner shall not be obligated to make any Milestone Payment included in a Contractor's Invoice for a completed Milestone with a scheduled completion date set forth in the Milestone Payment Schedule that is more than two (2) months after the date of such Contractor's Invoice. Contractor agrees to pay each of its Subcontractors in accordance with the payment terms set forth in each of its subcontracts and in full compliance with Applicable Laws, including the New Mexico Prompt Payment Act.
- 7.1.3 <u>Payment for Partial Project Milestones</u>. Other than payments due under, or made in accordance with, <u>Articles 20</u> or <u>21</u>, there shall be no payment for partial completion of a Project Milestone.
- 7.2 <u>Final Completion Payment</u>. Subject to the provisions of <u>Sections 7.7</u>, <u>7.9</u>, <u>15.1.3</u>, <u>15.3</u>, <u>Article 16</u>, and <u>Section 18.7</u>, upon the delivery of the Notice of Final Completion in accordance with <u>Section 15.3(k)</u>, Contractor shall submit a Contractor's Invoice which shall set forth all amounts due to Contractor that remain unpaid (including the Final Completion Payment), and provided Contractor has achieved Final Completion and upon Contractor's approval of such Contractor's Invoice, Owner shall pay to the Escrow Account the Final Completion Payment and any such unpaid amounts. In such case, Owner shall make the Final Completion Payment and payment of any such unpaid amounts within twenty-one (21) days after receipt of such Contractor's Invoice if and only if Contractor has delivered the following items to Owner:
- (a) with respect to each Subcontractor contracting directly with Contractor and performing services at the Site, either:

- (i) an Unconditional Waiver and Release Upon Final Payment of Subcontractor; or
- (ii) a bond in form and substance reasonably acceptable to Owner, which bond shall name Owner as "obligee" thereof, and which bond shall indemnify and fully protect Owner against any claim by such Subcontractor with respect to its right to be paid in connection with the Project or the performance of the Work; and
- (b) with respect to Contractor, an Unconditional Waiver and Release Upon Progress Payment of Contractor for payments previously made by Owner pursuant to this Contract and a Conditional Waiver and Release Upon Progress Payment of Contractor for the current payment made by Owner pursuant to this Contract.
 - 7.3 <u>Warranty Security</u>. Subject to the provisions of <u>Sections 7.7</u>, <u>7.9</u> and <u>18.7</u>, upon the expiration of the Warranty Period, Contractor shall submit a Contractor's Invoice which shall set forth the value of the outstanding warranty claims under <u>Article 18</u> which Contractor has not corrected in accordance with this Contract and are still due to Owner, and upon approval thereof by Owner (such approval not to be unreasonably withheld, conditioned or delayed), Contractor may reduce the stated value of the Warranty Bond in accordance with <u>Section 7.9</u> to an amount equal to the stated value of the Warranty Bond less the amount set forth in the Contractor's paid Invoice under this <u>Section 7.3</u> if and only if Contractor has delivered the following items to Owner:
- (a) with respect to each Subcontractor that contracted directly with Contractor and performed any Work at the Site during the Warranty Period, either:
- (i) an Unconditional Waiver and Release Upon Final Payment of Subcontractor; or
- (ii) a bond in form and substance reasonably acceptable to Owner, which bond shall name Owner as "obligee" thereof, and which bond shall indemnify and fully protect Owner against any claim by such Subcontractor with respect to its right to be paid in connection with the Project or the performance of the Work; and
 - (b) with respect to Contractor:
 - (i) a certification to the effect that:
- A. Contractor has been paid in full all amounts owing or that may become owing to Contractor with respect to the Project and the performance of the Work, and except for amounts requested in any outstanding Contractor Invoices;
- B. Contractor has paid all amounts that Contractor is required to pay in connection with the performance of the Work, including all amounts to be paid to any Subcontractor with respect to the Project and the performance of the Work; and
- (ii) an Unconditional Waiver and Release Upon Progress Payment of Contractor for payments previously made by Owner pursuant to this Contract and a Conditional

Waiver and Release Upon Final Payment of Contractor for the current payment made by Owner pursuant to this Contract.

- 7.4 Method of Payment. All payments to be made to Contractor under this Contract shall be paid in Dollars and may, at Owner's option, be made in immediately available funds on the due date by Automated Clearing House or wire transfer to the Escrow Account such bank account as is designated by Contractor to Owner or, if such date is not a Business Day, on the immediately succeeding Business Day to such account as may be designated by Contractor from time to time by Notice to Owner in accordance with Article 31. All bonds to be returned by Owner under this Contract shall be returned on the date required to be returned or, if such date is not a Business Day, on the immediately succeeding Business Day, to Contractor or the Eligible Issuer for cancellation as Contractor may direct.
- 7.5 <u>Disputes</u>. Subject to <u>Section 33.4</u>, Failure by Owner to pay any amount subject to a good faith dispute (where Owner has notified Contractor of such dispute) until resolution of such dispute in accordance with this Contract shall neither in any respect alleviate, diminish, modify nor excuse the performance of, Contractor's obligations to perform hereunder, including Contractor's obligation to meet the Project Guaranteed Dates. Contractor's acceptance of any payment shall not be deemed to constitute a waiver of amounts that are then in dispute. Contractor and Owner shall use their reasonable efforts to resolve all disputed amounts reasonably expeditiously and in accordance with the provisions of <u>Section 33.4</u>. No payment made hereunder shall be construed to be acceptance or approval of that part of the Work to which such payment relates or to relieve Contractor of any of its obligations hereunder.

7.6 [Not used]

7.7 <u>Contract Interest Rate</u>. Overdue payment obligations of the Owner and the Contractor hereunder shall bear interest from the date due until the date paid at a rate the lesser of LIBOR in effect from time to time plus two percent (2.0%) per annum and the highest rate permitted by Applicable Law.

7.8 [Not Used].

- 7.9 <u>Warranty Bond</u>. Upon Final Completion of the Project, and in order to secure, in part, Contractor's performance and Warranty obligations, Contractor must deliver to Owner a performance bond (or renewal of the existing Performance Bond) for the benefit of Owner in an initial amount equal to the Warranty Bond Amount ("<u>Warranty Bond</u>"). Contractor shall obtain and maintain the Warranty Bond at its sole cost and expense. The Warranty Bond shall be in the form set forth in <u>Exhibit M</u>.
- 7.9.1 Term of Warranty Bond. The Warranty Bond must be maintained in full force and effect at all times until One Hundred Eighty (180) days after the expiration of the Warranty Period (as the Warranty Period may be extended under Section 18.3), subject to the adjustments provided for herein. At the conclusion of the initial Warranty Period, the Warranty Bond will be reduced to an amount equal to actual and projected

costs of unremedied Defects and warranty work, and an amount equal to the value of any re-performance, repair, correction, or replacement of any Work.

- 7.9.2 <u>Draw on Warranty Bond</u>. Owner may draw upon the Warranty Bond pursuant to this <u>Section 7.9</u> in the following situations:
- (a) If the Contractor fails to perform any obligations pursuant to Section 18.7 or 18.8, then Owner shall be entitled to draw upon the Warranty Bond for the amount due by Contractor.
- (b) If Contractor fails to deliver to Owner an extended, or replacement Warranty Bond if required by this Contract not less than thirty (30) Days prior to the expiration of any then current Warranty Bond then Owner shall be entitled to draw upon the Warranty Bond for the full amount.

In addition to any other remedy available to it, Owner may draw from, offset against or make demand under such security to recover any amounts owing to it arising out of the Contract, including any damages due to Owner and any amount for which Owner is entitled to indemnification under the Contract. Owner may draw from, offset against or make demand under all or any part of the amounts due to it from any form of security provided to Owner and from all such forms, in any sequence, as Owner may select

7.9.3 Release of Warranty Bond. Owner shall have no obligation to release the Warranty Bond until the end of the Warranty Period (as the Warranty Period may be extended under Section 18.3). Upon the end of the Warranty Period, Owner may draw upon the Warranty Bond for the value of any unperformed obligations of Contractor under Section 18.7 or 18.8, and shall return the Warranty Bond to Contractor if it has not been fully drawn down no later than fifteen (15) Business Days following the end of the Warranty Period.

8. COMMENCEMENT AND SCHEDULING OF THE WORK

8.1 Notice to Proceed.

- 8.1.1 Commencement and Notice to Proceed. Owner shall cooperate with Contractor to provide as much advance notice as reasonably possible to Contractor, and shall endeavor to provide no less than thirty (30) days written notice of the date it intends to issue the Notice to Proceed. The Business Day after Owner provides Contractor with a Notice to Proceed shall be the "Notice to Proceed Date". On the Notice to Proceed Date, Contractor shall continue with the performance of the Work (including any remaining Preliminary Work) in accordance with the Project Schedule and shall thereafter diligently pursue the Work assigning to it a priority that should permit the attainment of Substantial Completion on or before the Substantial Completion Guaranteed Date, and Final Completion on or before the Final Completion Expected Date.
- 8.1.2 <u>Preliminary Work to Proceed</u>. Other than as expressly set forth in the <u>Limited Notice to Proceed</u>, Contractor shall not be obligated to commence any Work

prior to the issuance of a Notice to Proceed by Owner. Any Work performed by or on behalf of Contractor under a Limited Notice to Proceed ("Preliminary Work") shall comply with the terms of this Contract to the extent not modified by the express terms of the Limited Notice to Proceed. On the Notice to Proceed Date, Contractor and Owner agree that the Limited Notice to Proceed is hereby assumed by and incorporated into this Contract and (a) the Preliminary Work performed thereunder shall be deemed to be in part satisfaction of Contractor's obligations hereunder, (b) all amounts paid to Contractor in accordance with the Limited Notice to Proceed shall be credited towards the Contract Price hereunder, and (c) the terms of this Contract apply to the Preliminary Work performed under the Limited Notice to Proceed.

- 8.1.3 Right to Terminate. If the Notice to Proceed has not been issued by September 30, 2020 (or such other date as may be agreed in writing by the Parties), Contractor and Owner shall each have the right to terminate this Contract upon Notice to the other Party (which termination right shall terminate upon the issuance of the Notice to Proceed). If this Contract is terminated pursuant to this Section 8.1.3 or Section 21.1, then neither Party shall have any further rights or obligations hereunder (other than such rights and obligations set forth in the aforesaid sections of the Contract or that by the express terms of this Contract survive the expiration or earlier termination of this Contract including the obligation of Owner to pay Contractor for the Preliminary Work, if any, performed prior to termination of this Contract and Termination Value resulting from such early termination, as applicable), and Contractor shall not be entitled to any other compensation for additional work performed by, or costs incurred by, Contractor.
- 8.2 <u>Contractor's Acknowledgment.</u> Contractor expressly agrees that the period of time specified to complete all Work and the timely achievement of the Project Guaranteed Dates includes allowance for reasonable coordination with Owner, the Engineer, and Owner's Separate Contractors. No claim shall be made by Contractor for hindrances or delays for any cause during the progress of the Work, except as provided under <u>Articles 9</u> and <u>17</u>.
- 8.3 <u>Prosecution of Work.</u> Contractor shall prosecute the Work in accordance with the Project Schedule. Contractor shall cause Project Mechanical Completion, Substantial Completion and Final Completion to occur on or before the applicable Project Guaranteed Date in accordance with the terms of this Contract.

8.4 Project Schedule.

8.4.1 Project Schedule Updates. The Project Schedule is as set forth in Exhibit O. Until Final Completion, Contractor shall update its Project Schedule to reflect the current status of the Work. At a minimum, the updates shall be performed and provided to Owner (in digital and hard-copy form) on a monthly basis as part of the Monthly Progress Report. Contractor shall advise Owner of any proposed Project Schedule changes of more than fifteen (15) days and the reasons therefor. Contractor shall employ a project management system satisfactory to Owner that is capable of providing schedule monitoring and analysis which shall include a comparison of the Project Schedule with the actual progress for each time period with all variances noted and shall

provide such analysis and Project Schedule to Owner in a native file format, capable of manipulation by Owner, on a monthly basis. Schedule analysis shall include a determination of the impact of such variance, if material, on the Project Schedule and any action necessary to correct the variance. Utilizing the critical path method, Contractor shall continually be aware of factors that are delaying or that could delay completion of Critical Path Items by the applicable date on the Project Schedule, and Contractor shall take reasonable remedial actions within its control to eliminate or minimize schedule delays including, without limitation, over-time for the employees of Contractor and Subcontractors and the assignment of additional personnel and/or other resources.

- 8.4.2 Schedule Recovery Plan. If Owner reasonably believes Contractor will not complete a Major Milestone by the scheduled completion date set forth in Exhibit O and which shall have a material impact on the Substantial Completion Guaranteed Date, for any reason that is not an Excusable Condition, Owner may notify Contractor in writing, and Contractor shall, within five (5) days of receipt of Owner's notice, provide to Owner a written Schedule Recovery Plan as necessary to minimize delay of the Project Schedule. Within five (5) days after Owner's receipt of such Schedule Recovery Plan, Owner shall deliver written comments to the Schedule Recovery Plan to Contractor. Contractor shall then resubmit a revised Schedule Recovery Plan after taking into consideration such comments as shall have been provided by Owner, as the case may be, within three (3) additional days. Upon acceptance of the Schedule Recovery Plan by Owner, Contractor shall promptly proceed with implementing the Schedule Recovery Plan and continue to diligently pursue implementation of the Schedule Recovery Plan thereafter. Approval by Owner of such Schedule Recovery Plan shall not (a) be deemed in any way to have relieved Contractor of its obligations under this Contract relating to the failure to perform the Work in accordance with the Project Schedule, (b) be a basis for an increase in the Contract Price or (c) otherwise limit the rights and remedies of Owner under this Contract. Further, Contractor acknowledges that the implementation of any such Schedule Recovery Plan may result in material additional costs and expenditures for Contractor (including by way of overtime, additional crews and/or additional shifts). Contractor agrees that it shall not be entitled to a Change in Work or any other compensation or increase in the Contract Price or any adjustment to the Project Schedule in connection with the implementation of any such Schedule Recovery Plan.
- 8.5 Remedial Plan. Contractor shall achieve Substantial Completion by the Substantial Completion Guaranteed Date. Contractor shall, within five (5) days after Contractor becomes aware of actual or potential delays in the performance, progress, or completion of the Work (other than by reason of Force Majeure or Excusable Condition) that would jeopardize the achievement of a Critical Path Item in accordance with the Project Schedule, submit for approval by Owner, a Remedial Plan. Within five (5) days after receipt of the Remedial Plan, Owner shall deliver written approval or disapproval of the Remedial Plan to Contractor, the approval thereof not to be unreasonably withheld. If Owner disapproves all or any portion of the Remedial Plan, Owner shall approve those portions of the Remedial Plan that are acceptable and provide comments to those portions

of the Remedial Plan that have been disapproved. Contractor shall then revise the Remedial Plan to address such comments as shall have been provided by Owner and resubmit the revised Remedial Plan for Owner's and the Engineer's further comments within five (5) additional days. Upon approval by Owner, Contractor shall promptly proceed with completing the Work in the manner specified by the Remedial Plan and with any additional work as may be required under the Remedial Plan. Contractor shall be responsible for all costs and expenses of implementing the Remedial Plan without any increase to the Contract Price. Approval by Owner of a Remedial Plan shall not be deemed in any way to relieve Contractor of its obligations under this Contract relating to the failure to achieve Substantial Completion or Final Completion by the applicable Project Guaranteed Dates, shall not be a basis for an increase in the Contract Price, and shall not limit the rights of Owner under Section 16.1 or 16.2.

- 8.6 Progress Reporting. Following the Notice to Proceed, Contractor shall prepare true and correct Monthly Progress Reports satisfying the requirements of Exhibit L and submit them to Owner within ten (10) days after the end of each calendar month through and until completion of the calendar month immediately following the Final Completion Date. In addition, Contractor shall keep, and furnish to Owner at Owner's request, such information as Owner or the Engineer may reasonably require. Contractor also shall keep daily logs at the Site and shall provide to Owner weekly reports of actual construction progress as compared with scheduled progress.
- 8.7 Meetings. Contractor shall schedule and conduct monthly meetings with Owner and (at Owner's option) the Engineer in accordance with the requirements of Exhibit A, before mobilization, at Owner's office or such other location as the Parties may agree, and after mobilization, at the Site, or such other location as the Parties may agree, for the purpose of reviewing the progress of the Work and adherence to the Project Schedule. The frequency of such meetings shall be established and modified, from time to time, by mutual agreement of the Parties; provided, however, such meetings shall occur no less frequently than monthly; provided, further, if Owner reasonably believes that Contractor will complete fewer than all of the Critical Path Items within ten (10) days after the date scheduled in the Project Schedule for such Critical Path Items to be achieved, then Owner shall be entitled to require that meetings occur as frequently as If Owner so requests, Contractor shall cause a representative of any weekly. Subcontractor to attend such meeting. After commencement of the on-site Work, Owner, Contractor, and any Subcontractor then performing Work on the Site shall each designate a representative to attend weekly meetings to review and discuss the progress of the Work. Contractor's representative at such weekly meeting shall provide a rolling twoweek look ahead schedule outlining the Work to be performed at the Site during the three calendar weeks following such meeting.

8.8 Acceleration of Work.

8.8.1 Owner Directive. In accordance with the Change in Work procedure set forth in Section 17.4.1, Owner shall have the right to direct that the Work be accelerated by means of overtime, additional crews or additional shifts or resequencing of the Work notwithstanding that the Work may be progressing with or without delay in accordance

with the established Project Schedule. In such an event, and subject to the last sentence of this Section 8.8.1, Contractor shall use commercially reasonable efforts to accelerate the Work as directed, and the Contract Price shall be increased by the sum of (a) the actual, demonstrable and reasonable Direct Costs (without profit, overhead or contingency) expected to be incurred by Contractor because of such acceleration, plus (b) a ten percent (10%) allowance for profit, overhead and contingency, minus any savings expected to be incurred because of such acceleration. Contractor expressly waives any other compensation therefor unless otherwise agreed by Owner in writing in advance of performing the accelerated Work; provided, that Contractor shall not be obligated to perform any accelerated Work unless and until Owner has so agreed.

8.8.2 <u>General Provisions</u>. Owner shall have the right reasonably to audit Contractor's calculated savings incurred due to Owner's acceleration. In the event of any acceleration requested pursuant to this Section, Contractor shall promptly provide a plan for such acceleration, including Contractor's recommendations for the most effective and economical acceleration. Any acceleration of the Work not specifically requested by Owner in writing shall be at Contractor's sole cost and expense.

9. FORCE MAJEURE AND EXCUSABLE CONDITION

- 9.1 Force Majeure. No delay, failure or omission to carry out or observe any of the terms, provisions, or conditions of this Contract shall give rise to any claim by either Party against any other Party hereto, or be deemed to be a breach or default of this Contract if such delay, failure or omission shall be caused by or arise out of an event of Force Majeure. No obligations of either Party that arose before the occurrence of an event of Force Majeure causing the suspension of performance shall be excused as a result of such occurrence. If Owner or Contractor is prevented, wholly or partially, from performing its obligations under this Contract by a Force Majeure Event or a Change in Law, said Party will be excused to the extent such performance is prevented by the Force Majeure Event or Change in Law. The obligation to pay money in a timely manner for obligations and liabilities that matured prior to the occurrence of an event of Force Majeure, however, shall not be subject to the Force Majeure provisions.
- 9.2 Notice. If either Party's ability to perform its obligations under this Contract is affected by an event of Force Majeure or if Contractor's ability to perform its obligations under this Contract is affected by an Excusable Condition, such Party (in the case of Force Majeure) or the Contractor (in the case of an Excusable Condition) shall, promptly, but in all cases within ten (10) Business Days after such Party becomes aware of such delay, give Notice (a "Delay Notice") to the other Party of the occurrence of such event. For the avoidance of doubt, only Contractor may issue a Delay Notice in respect of or arising out of an Excusable Condition. Within ten (10) days after delivery of such Notice, the Party claiming an event of Force Majeure or Excusable Condition shall provide reasonable evidence to the extent practicable to the other Party of the nature of the event, its anticipated duration and effect upon the performance of such Party's obligations, and any action being taken to avoid or minimize its effect. The Party claiming an event of Force Majeure or Excusable Condition shall have a continuing obligation to deliver to the other Party additional documentation and/or analysis

supporting its claim regarding an event of Force Majeure or Excusable Condition promptly after such information is available to the Party claiming such event of Force Majeure or Excusable Condition. The burden of proof shall be on the Party claiming to be affected pursuant to this Section 9.2. Any delay in providing a Delay Notice or in providing supporting documentation as and when required pursuant to this Section 9.2 (other than any such delay which itself arises out of Force Majeure or an Excusable Condition) shall be deemed a waiver and release of the delayed Party's right to claim the occurrence as an event of Force Majeure or Excusable Condition, but only to the extent that such failure or delay actually prejudices the non-claiming Party. Each of the Parties acknowledges that a delay in issuing its claim may prejudice the non-claiming Party's ability to reasonably determine whether the cost or schedule extension claimed were actually and demonstrably incurred as a result of such Force Majeure and/or Excusable Condition. Within ten (10) days after an event of Force Majeure or Excusable Condition has ended, the Party that was affected by such event of Force Majeure, or Contractor (if the Contractor was affected by an Excusable Condition), shall give Notice to the other Party of: (i) the length of time such event of Force Majeure or Excusable Condition was in effect; (ii) in the case of an Excusable Condition or Force Majeure, the effect Contractor claims the Excusable Condition or Force Majeurehad on the Contract Price; and (iii) the effect such Party claims such event of Force Majeure or Excusable Condition had on the applicable Project Guaranteed Dates.

- 9.3 <u>Force Majeure: Scope of Suspension; Duty to Mitigate</u>. The suspension of performance due to an event of Force Majeure shall be of no greater scope and no longer duration than is required by such event. The excused Party shall use its reasonable efforts:
- (a) to mitigate the duration of, and costs arising from, any suspension or delay in the performance of its obligations under this Contract;
 - (b) to continue to perform its obligations hereunder; and
 - (c) to remedy its inability to perform.

When the affected Party is able to resume performance of its obligation under this Contract, such affected Party shall give the other Party Notice to that effect.

9.4 Contractor's Remedies.

9.4.1 <u>Force Majeure</u>. If an event of Force Majeure occurs that is claimed by Contractor and affects Contractor's ability to perform under this Contract to which Contractor is entitled to relief pursuant to this <u>Article 9</u>, then: (a) the Project Guaranteed Dates and all other relevant dates hereunder (including dates on the Project Schedule for performance of Critical Path Items) shall be extended by the period of time sufficient for Contractor to overcome the impact of such Force Majeure if Contractor is actually and demonstrably delayed in the performance of Critical Path Item(s), and the Project Schedule shall be correspondingly adjusted; and (b) if Contractor's costs increase despite Contractor's efforts to mitigate any such increases pursuant to the Contract, the Contract Price shall be increased by the actual and reasonably

substantiated costs incurred by Contractor (including any reasonable costs incurred by Contractor in connection with the mitigation measures implemented by Contractor pursuant to the Contract); provided, in each case, that Contractor is working diligently to mitigate the impact of the event of Force Majeure.

- 9.4.2 Excusable Condition. If an Excusable Condition occurs that affects Contractor's ability to perform under this Contract to which Contractor is entitled to relief pursuant to this Article 9, then:
- (a) the Project Guaranteed Dates and all other relevant dates hereunder (including dates on the Project Schedule for performance of Critical Path Items) shall be extended by the period of time reasonably required for Contractor to overcome the impact of such Excusable Condition if Contractor is actually and demonstrably delayed in the performance of Critical Path Item(s), and the Project Schedule shall be correspondingly adjusted; and
- (b) the Contract Price shall be increased by an amount equal to the sum of: (i) the Direct Costs actually, demonstrably and reasonably incurred by Contractor because of such Excusable Condition plus a five percent (5%) allowance for profit, overhead and contingency, minus any savings incurred because of such Excusable Condition.

Contractor expressly waives any other compensation as a result of such Excusable Condition.

10. SUBCONTRACTORS AND VENDORS

- 10.1 <u>Use of Certain Subcontractors</u>. Attached hereto as <u>Exhibit G</u> is a list of services and equipment anticipated for the execution of the Work along with Owner approved Subcontractors and Vendors. Contractor shall be required to source the noted services and equipment for the Project from this list. Should Contractor propose to add a Subcontractor or Vendor to <u>Exhibit G</u> during the term of this Contract, Contractor shall provide Notice to Owner of such proposed Subcontractor and the specific Work that such Subcontractor will provide. Within ten (10) Days of receipt of such Notice, Owner shall notify Contractor whether it approves (such approval not to be unreasonably withheld) or rejects such proposed Subcontractor. If Owner approves such proposed Subcontractor, the proposed Subcontractor shall be added to <u>Exhibit G</u> pursuant to a Change in Work.
- 10.2 <u>No Approvals; Contractor Responsible for Work.</u> The review by Owner of any Subcontractor under this <u>Article 10</u> shall not: (a) constitute any approval of the Work undertaken by any such Person; (b) cause Owner to have any responsibility for the actions, the Work, or payment of such Person or to be deemed to be in an employer-employee relationship with any such Subcontractor; or (c) in any way relieve Contractor of its responsibilities and obligations under this Contract.
- 10.3 <u>Information; Access</u>. Contractor shall furnish such information and access relative to its Subcontractors as Owner may reasonably request.
- 10.4 <u>Terms in Subcontracts</u>. All subcontracts shall conform to the requirements of this Contract, insofar as applicable to such Subcontractor's performance of Work at the Site. All Work performed for Contractor by a Subcontractor shall be

pursuant to an appropriate written agreement between Contractor and the Subcontractor which shall with respect to either (i) a Subcontractor performing Work on the Site or (ii) a Subcontractor with a Subcontract having a price of more than One Million Dollars (\$1,000,000), contain provisions that (or flowdown to such Subcontractor the following provisions that):

- (a) require such Subcontractor to make available a representative with whom the Owner may discuss questions regarding the progress of the Work being performed by the Subcontractor;
- (b) to the extent Contractor is providing spare parts prior to Final Completion as required in Exhibit A, require the affected Subcontractor to notify Contractor and Owner in the event such Subcontractor intends to discontinue supplying any functional spare parts and permit Owner to order any quantity of any of such parts at the prices therefor prevailing prior to such discontinuance of supply;
- (c) require such Subcontractor to provide and maintain adequate insurance consistent with Subcontractor's obligations related to this Contract;
- (d) subject to Applicable Laws and the terms and conditions of any applicable collective bargaining agreement, require such Subcontractor to remove any employee or independent contractor of such Subcontractor used in the Work or in such Subcontractor's warranty obligations within ten (10) days after receiving notice from Owner to remove such employee or independent contractor;
- (e) require such Subcontractor to provide Owner with reasonable access to the Work for purposes of inspection consistent with <u>Section 12.2</u>; and
- (f) contain a provision in the form of Exhibit K permitting its assignment to Owner, upon Owner's written request, following upon a Contractor Event of Default or termination of this Contract pursuant to Section 21.1.2 (Governmental Action).
- (g) Notwithstanding anything to the contrary, with respect to the BESS Vendor the provisions of this Section 10.4 regarding the flow-down of Agreement terms shall apply only to the BESS Vendor's Work performed at the Project Site or to BESS Vendor's personnel when performing Work at the Project Site. To the extent that Owner desires to inspect portions of the Work being performed off of the Project Site or the BESS Vendor's records pertaining to the Work pursuant to this Agreement, such inspection shall be on terms and at such times as are agreeable to Owner and the BESS Vendor and in the case of records shall not include any information subject to the attorney-client privilege, work product doctrine or similar concepts.

Contractor shall otherwise cause (x) all such subcontracts to reasonably preserve and protect all the rights of Owner under this Contract and to the Work to be performed under the applicable subcontract, so that the subcontracting thereof will not prejudice such rights; and (y) all Work performed under any subcontract to be performed in accordance with the applicable requirements of this Contract. No subcontract or purchase order shall bind or purport to bind Owner.

10.5 Cooperation With Other Contractors. Contractor shall cooperate and cause its Subcontractors to cooperate with Owner and other Owner's Separate Contractors who may be working at or near the Site in order to assure that neither Contractor nor any of its Subcontractors unreasonably hinders or increases, or makes more difficult than necessary, the work being performed by Owner or Owner's Separate Owner shall cooperate and cause Owner's Separate Contractors to cooperate with Contractor and the Subcontractors who may be working at or near the Site in order to assure that neither Owner nor any of Owner's Separate Contractors unreasonably hinders or increases, or makes more difficult than necessary, the work being performed by Contractor and the Subcontractors. Without limiting the foregoing, Contractor acknowledges that Owner's Separate Contractors will be constructing, installing and completing the Electrical Interconnection Facilities at the Site while Contractor is performing the Work, and both Parties covenant to cooperate in connection therewith and to provide access to the Site, to such Subcontractors and Owner's Separate Contractors.

11. LABOR RELATIONS

- 11.1 <u>General Management of Employees</u>. Subject to <u>Section 11.5</u>, and notwithstanding the provisions of <u>Section 11.2</u>, Contractor shall preserve its rights to exercise, and shall exercise, its management rights in performing the Work.
- 11.2 <u>Labor Disputes</u>. Contractor shall use reasonable efforts to adopt policies and practices designed to avoid work stoppages, slowdowns, disputes and strikes, and to minimize the risk of labor-related delays or disruption of the progress of the Work. Contractor shall advise Owner promptly, in writing, of any actual or threatened labor dispute of which Contractor has knowledge that might materially affect the performance of the Work by Contractor or by any of its Subcontractors. Notwithstanding the foregoing, the settlement of strikes, walkouts, lockouts or other labor disputes shall be at the discretion of the Party having the difficulty.
- 11.3 <u>Personnel Documents</u>. Contractor shall ensure that all its personnel and personnel of any Subcontractors performing the Work are, and at all times shall be, in possession of all such documents (including, without limitation, visas, driver's licenses and work permits) as may be required by any and all Applicable Laws.
- 11.4 <u>Key Personnel</u>. Contractor shall provide staff to supervise and coordinate the work of Contractor and Subcontractors on the Site. The Key Personnel of Contractor shall at all times hold the positions and be dedicated to the performance of the duties described in <u>Exhibit J</u>. Any replacement of the Key Personnel of Contractor shall be subject to the prior written consent of Owner, which consent shall not be unreasonably withheld. If Owner fails to respond to a request for consent within five (5) Business Days after Contractor's request, Owner shall be deemed to have consented to the proposed individual.
- 11.5 Replacement at Owner's Request; Site Access. Promptly (and no later than one (1) Business Day) after request by Owner (such reason for the request to be in Owner's reasonable determination), Contractor shall deny access to or remove from the Site and performance of the Work, and cause any Subcontractor to deny access to or to remove from the Site and performance of the Work, and as soon as reasonably practicable, any natural person performing the Work (including any of the Key Personnel). To the extent Contractor has actual knowledge thereof, Contractor may not bring former employees of Owner (or Affiliates thereof) onto the Site in any capacity without prior written approval from Owner (such approval not to be unreasonably withheld, conditioned or delayed).
- 11.6 <u>Project Manager</u>. Contractor's Project Manager designated on Exhibit J has full responsibility for the prosecution of the Work and shall act as a single point of contact in all matters on behalf of Contractor (but who shall not be authorized to execute or make any amendments to, or provide waivers under, this Contract, except that such Project Manager shall be authorized to execute Change in Work Forms under <u>Article 17</u>).
- 11.7 <u>Labor Relations</u>. Contractor shall be responsible for all labor relations matters relating to the Work.

12. INSPECTION; EFFECT OF REVIEW AND COMMENT

12.1 <u>Right to Reject Work.</u> Regardless of whether payment has been made therefor, Owner shall have the right to reject, at any time prior to Substantial Completion, any portion of the Work completed before Substantial Completion that contains any Defect. Upon such rejection, Contractor shall promptly remedy, at its sole cost and expense, any Defect that is identified by Owner as giving rise to such rejection; provided, however, that if such Defect is a Non-Critical Deficiency, it may be included on the Punchlist and remedied by Contractor in accordance with <u>Section 15.1</u>. If such Defect is something for which Contractor or any of its Subcontractors or Vendors is not responsible, then the work involved in the remedy of such Defect will be considered a Change in Work resulting from an Owner Directive and will be subject to the terms of Section 17.5.

12.2 <u>Inspection</u>.

12.2.1 Contractor understands that Owner and any other person authorized in writing by Owner and their respective representatives and consultants (including the Engineer) have the right to observe and inspect the Work, which will include periodic environmental compliance audits at the Site, any item of Equipment and Materials, design, engineering, service, or workmanship to be provided hereunder and to observe all tests of the Work and the Project (including factory or other tests performed at a location other than the Site) upon mutually agreeable terms. Such persons shall have reasonable access to, by way of example, and not limitation, all drawings, calculations, procurement specifications, purchase orders (but only the non-commercial portions thereof), test procedures, measurements, laboratory analyses, quality control reports and test reports and data, including all equipment adjustment, installation, and alignment data to the extent reasonably available to Contractor and located at the Site. Upon reasonable Notice to Contractor by Owner, Contractor shall allow Owner and its representatives (including the Engineer) reasonable access at the Site to the Work (including Equipment and Materials under fabrication) and the Project. Contractor shall use commercially reasonable efforts to arrange reasonable access for Owner and its representatives (including the Engineer) to inspect Equipment and Materials at the location of fabrication and any factory or other off-Site tests conducted with respect to such Equipment and Materials. Owner also shall be entitled to inspect, review, and (as applicable) approve the Contractor Deliverables or technical details, and inspection and testing reports pertaining thereto as reasonably requested by Owner or its representatives (including the Engineer). Contractor shall comply with all inspection and testing requirements. In addition to the foregoing, upon prior written notice, Contractor agrees to permit any Governmental Authority reasonable access to the Site to inspect the Project if such inspection is reasonably required under the applicable tariff or Applicable Law. Any party arriving on Site to observe and inspect the Work shall abide by all of Contractor's safety programs and procedures, and in any case, such inspections shall not delay or interfere with the performance of the Work. In no case, however, shall Owner be responsible for any delay or interference in Contractor performing the Work due to (i) an inspection of the Work conducted by Governmental Authorities or (ii) an inspection of the Site conducted by or on behalf of Owner where Owner has a reasonable basis to believe a safety violation for which Contractor is responsible has or reasonably likely to occur with respect to the Work or the Project.

- Drawings and Specification Table. Within thirty (30) days after the 12.3 Notice to Proceed Date, Contractor shall provide a Notice to Owner attaching the Drawings and Specification Table identifying all Contractor Deliverables to be delivered to Owner for review, comment, and if applicable approval, in accordance with Exhibit A, the deadline for delivery thereof, and Owner's time period for review and comment with respect thereto. Owner shall have the right to promptly review and comment on such Drawings and Specification Table. If Owner provides any comments with respect to the Drawings and Specification Table to Contractor, then Contractor shall incorporate changes into such Drawings and Specification Table addressing such comments, and resubmit the same to Owner. Such incorporation of changes to address Owner's comments shall not be considered a Change in Work; provided, such changes are ministerial and not substantive and do not impact Contractor's cost to perform or schedule for performing the Work. If Owner fails to comment within fifteen (15) days after receipt of such Notice, then Owner (as applicable) shall be deemed to have accepted such Drawings and Specification Table.
- Owner Review of Documents. Contractor shall submit to Owner for 12.4 review hard (printed) copies and soft copies (in normal construction formats) of all Contractor Deliverables in accordance with the requirements of Exhibit A and the Drawings and Specification Table. Owner shall have the right to make all such materials available to the Engineer. Contractor shall ensure that all such items undergo a comprehensive review and approval process before submission of such items to Owner. After receipt of any Contractor Deliverable, Owner shall have the right, during the time period for Owner's review specified in the Drawings and Specification Table, to describe errors or omissions in the design identified in such Contractor Deliverable. Notwithstanding anything in Article 7 to the contrary, until Owner has completed its review, which in any case shall not exceed the time specified in Exhibit A, Section 5 for such Contractor Deliverable, Contractor shall neither: (a) issue any purchase order based on any Contractor Deliverable; nor (b) release any Contractor Deliverable for use in connection with the Work; nor (c) submit any Contractor's Invoice with respect to any Contractor Deliverable.
- 12.5 Remedy of Flaws. If Owner identifies any errors or omissions in the design with respect to any Contractor Deliverables submitted for review, then Contractor shall incorporate changes into such Contractor Deliverables addressing and remedying the errors and omissions and resubmit the same to Owner, and such incorporation of changes to address Owner's comments shall not be considered a Change in Work.
- 12.6 <u>Limitation on Owner's Obligations</u>. Inspection, review, approval or comment by Owner with respect to any Subcontract or any Drawings and Specifications, samples, and other documents, or any other work or services performed by Contractor or any Subcontractor or Vendor, is solely at the discretion of Owner and shall neither in any way affect or reduce Contractor's obligations to complete the Work in accordance with

the provisions of this Contract nor be deemed to be a warranty, approval or acceptance by Owner with respect thereto.

12.7 <u>Inspection by Contractor</u>. Contractor shall perform all inspection, expediting, quality surveillance, and other like services required for performance of the Work, including inspecting all Equipment and Materials that comprise the Project or that are to be used in the performance of the Work.

13. SITE CONDITIONS

- 13.1 <u>Site Conditions.</u> Contractor represents and warrants that it has inspected and is familiar with the Site Conditions. Solely for the purposes of Contractor's performance of the Work, and, based on Contractor's investigations, Contractor represents and warrants that it has correlated its findings and observations regarding the Site Conditions with the requirements of the Contract and, except as set forth in Section 13.3, the Site constitutes an acceptable and suitable site for the construction and operation of the Project in accordance with the requirements of this Contract. Contractor will provide immediate notice to Owner of the existence of any conditions at the Site that might create a safety hazard or pose a risk of harm to Owner or any of Owner's Separate Contractors' operations. Contractor subsequently will cause the Work to be performed in a manner that accounts for such conditions and as necessary to assure the safety of all persons at or near the site and to prevent damage to property and bodily injury
- 13.2 <u>Differing Site Conditions</u>. Contractor specifically acknowledges and accepts the Site Conditions and agrees that, except as set forth in <u>Section 13.3</u>, no Project Guaranteed Date shall be extended, the Contract Price shall not be modified, and Contractor shall not be entitled to request or be granted any Change in Work, as a result of any Site Conditions or any variance between the condition of the Site indicated by this Contract or expected to exist by Contractor, and the Site Conditions, including any unknown physical conditions above the surface of the ground.
- Subsurface Site Conditions. Subject to, and only if authorized under, the second and third sentences in this Section 13.3, Contractor shall be entitled to a Change in Work for the following unexpected subsurface Site Conditions (each, an "Unforeseen Subsurface Site Condition"): (i) the presence of any Hazardous Materials at the Site (unless Contractor or any Subcontractor is responsible for the placement of or discharge of such Hazardous Materials), (ii) those Site Conditions described in Section 13.5, or (iii) any Site Condition substantially outside the initial GeoTech survey at the Site. If Contractor is actually and demonstrably delayed in the performance of Critical Path Item(s) as a result of an Unforeseen Subsurface Site Condition, the Project Guaranteed Dates and all other relevant dates hereunder (including dates on the Project Schedule for performance of Critical Path Items) shall be extended by the period of time reasonably required for Contractor to overcome the impact of such Unforeseen Subsurface Site Condition, and the Project Schedule shall be correspondingly adjusted. If the Unforeseen Subsurface Site Condition causes a demonstrable cost increase to Contractor that exceeds Ten Thousand Dollars (\$10,000) in the aggregate, then Contractor may request a Change in the Contract Price pursuant to Section 17.4.2 which shall not exceed the sum of: (i) the

Direct Costs expected to be actually, demonstrably and reasonably incurred by Contractor because of such Unforeseen Subsurface Site Condition, plus (ii) a five percent (5%) allowance for profit, overhead and contingency, minus any savings expected to be incurred because of such Unforeseen Subsurface Site Condition.

- 13.4 <u>Signs</u>. Contractor shall not place or maintain, or permit to be placed or maintained, any sign, bill, or poster on or about the Site without the prior consent of Owner; provided, however, such approval is not required to place any signs, bills or posters related to Contractor's safety and quality program or required by Applicable Law or related to Contractor's standard work protocols.
- 13.5 <u>Archeological or Historical Finds</u>. In the event that any relics or items with archeological or historical value or other valuable materials are discovered on the Site by Contractor or any Subcontractor or Vendor, Contractor shall immediately notify Owner and await the decision of Owner before proceeding with any further Work that might adversely impact such relics, items, or materials. Neither Contractor, nor any Subcontractor or Vendor shall have any property rights to such relics, items, or materials.
- 13.6 Security. Contractor shall construct a suitable fence around the Site. Contractor shall provide security for the Site, as well as any off-Site security reasonably necessary to protect the Work in accordance with Applicable Laws and any other reasonable requirements imposed by Owner or any Governmental Authority. The admission of Persons to the Site shall be strictly controlled by Contractor at all times, and no Person who is not required for the performance or supervision of the Work shall be admitted. Contractor agrees to comply and to require all Personnel of Contractor, Subcontractors and Vendors to comply with all Site security procedures and policies of Owner which have been notified to Contractor in writing.

14. PERFORMANCE GUARANTEES AND TESTS.

- 14.1 Performance Guarantees, Functional Guarantees, and Other Requirements. Contractor shall perform the Work so that the Project satisfies the Performance Guarantees and Functional Guarantees and other Acceptance Testing requirements set forth in Exhibit I. Subject to Section 16.2, Contractor shall demonstrate that the Project satisfies the Performance Guarantees and Functional Guarantees prior to Substantial Completion by satisfactorily running and completing the Performance Tests and Functional Guarantee Tests pursuant to the respective Performance Tests Procedures and Functional Guarantee Tests Procedures and otherwise in accordance with Exhibit I; provided, however, that Contractor shall be required to achieve the Minimum Performance Criteria for Final Completion prior to Final Completion. Pursuant to the provisions of Section 14.3(b), Contractor shall monitor, observe and collect the data produced during the Acceptance Tests. Contractor shall be responsible for all costs and expenses (except the Production Inputs) for all Acceptance Tests.
- 14.2 <u>Acceptance Test Schedules</u>. Contractor shall agree on Acceptance Test schedules with Owner and the Engineer at least 60 days in advance of the initiation of any Acceptance Test. When Contractor establishes the final scheduled date(s) for the

Acceptance Tests required pursuant to this Contract, it shall give Owner at least ten (10) Business Days' prior Notice thereof. Contractor shall keep the Project Representative continuously apprised of the specified schedule, and changes therein, for the commencement and performance of Acceptance Tests, and shall give the Project Representative at least two (2) Business Days' prior Notice of the re-performance of any Acceptance Test.

- 14.3 <u>Mechanical Completion</u>; <u>Acceptance Tests</u>. After satisfaction by Contractor or waiver by Owner of the requirements to Mechanical Completion,
- (a) Contractor shall issue to Owner a Notice of Mechanical Completion stating that Contractor believes it has satisfied the requirements to Mechanical Completion, and a report of the Work completed with sufficient detail to enable Owner and the Engineer to determine whether Mechanical Completion has been achieved. Owner shall execute and acknowledge Contractor's Notice of Mechanical Completion confirming that Mechanical Completion has occurred as soon as possible, and in no event more than ten (10) Business Days after satisfaction in full by Contractor of all of the requirements to Mechanical Completion; provided, however, that the Mechanical Completion Date shall be the earlier of the date of actual satisfaction or waiver of the requirements for Mechanical Completion, not the date Owner executes and acknowledges Contractor's Notice of Mechanical Completion.
- (b) Contractor shall achieve Mechanical Completion for the Project, and shall satisfy all of its other obligations under this Contract to ensure that the Project has been completed and that all components have been properly adjusted and tested prior to conducting the Acceptance Tests. Contractor shall conduct the Acceptance Tests for the Project in accordance with the Acceptance Test Procedures and Exhibit I. Prior to Substantial Completion, Contractor shall have overall control over the Project during the performance of the Acceptance Tests and shall direct the operation of the Project during the Acceptance Tests in accordance with the Acceptance Tests Procedures and Exhibit I. The representatives of Owner and the Engineer shall have the right to be present during any Acceptance Tests performed by Contractor under this Article 14.

14.4 <u>Non-Conforming Work/Remedial Plan.</u>

14.4.1 At any time during and promptly after completion (whether or not successful) of the Acceptance Tests (or any re-performance of any Acceptance Test or pursuant to any Remedial Plan), Owner shall advise Contractor, and Contractor shall advise Owner, in writing of any Defect that was discovered during an Acceptance Test. Except as provided in Section 14.4.2, if Contractor is notified of or discovers any such Defect, Contractor shall, at Contractor's sole cost and expense, correct such Defect and promptly provide Notice to Owner in writing that such corrective measures have been completed. Any dispute regarding the existence or correction of any such Defect shall be resolved pursuant to Article 33.

14.4.2 If, at any time following the Substantial Completion Guaranteed Date, Contractor's results from the most recent Acceptance Tests shall have failed to satisfy the Minimum Performance Criteria, then Contractor shall (i) submit to Owner a

Remedial Plan that is reasonably acceptable to Owner within ten (10) days after the date when Contractor shall have completed its initial Acceptance Tests and (ii) continuously and diligently pursue completion of the Remedial Plan at Contractor's sole cost. Contractor's delivery of a Remedial Plan shall not relieve Contractor of its obligations to pay Substantial Completion Delay Liquidated Damages under Section 16.1.

- 14.5 <u>Certificate of Completion of Acceptance Test</u>. Upon successful completion of any Acceptance Test as demonstrated by a test report delivered to Owner by Contractor, Contractor and Owner shall jointly issue a certificate that such test has been successfully completed.
- 14.6 Revenues and Costs. Any revenues generated by the Project during commissioning or the performance of any Construction Test or Acceptance Test shall be paid to and for the benefit of Owner. If a re-test is required and to the extent the Contractor or any Subcontractor was the cause of such re-test, the actual cost of the retest will be borne by Contractor. The actual cost of the re-test shall include (i) the cost of special instrumentation and equipment (including rental cost) including required calibration of the instrumentation, and (ii) personnel cost of Contractor, Subcontractor and the applicable Vendors, but shall not include the cost of any Production Inputs.

14.7 Post Test Modifications. If:

- (a) an Acceptance Test has been completed;
- (b) a certificate of completion of such Acceptance Test has been issued pursuant to Section 14.5;
- (c) Contractor or any Subcontractor makes any modification to the Project following such Acceptance Test (any such modification, a "Post Test Modification");
- (d) Contractor cannot reasonably demonstrate that such modification would not have compromised the outcome of such Acceptance Test if it had been made before the completion of such Acceptance Test;
- (e) then the Acceptance Test shall be re-run, as a condition to achieving Substantial Completion, all previous runs of such Acceptance Tests shall be void, and, if Contractor achieved Substantial Completion as a result of said prior Acceptance Tests, then Substantial Completion shall be deemed not to have occurred unless Contractor reasonably demonstrates by analysis or by performing a component test or tests that the Post Test Modification would not have had a material effect on the outcome of the prior Acceptance Test.

15. SUBSTANTIAL COMPLETION AND FINAL COMPLETION OF THE PROJECT

15.1 Punchlist.

15.1.1 At all times during performance of the Work, Contractor shall maintain a list setting forth parts of the Work which remain to be performed in order to

confirm that the Work fully complies with the terms of the Contract. Contractor shall promptly provide a copy of such list to Owner upon request. Contractor shall make such revisions to such list as and when requested by Owner from time to time.

- 15.1.2 No later than thirty (30) days before the expected Substantial Completion of the Plant, Contractor shall prepare and submit to Owner a comprehensive list (the "Punchlist") of minor items of Work to be completed for the Project to reach Final Completion, but which will not individually or in the aggregate, affect the safe, continuous and reliable operation of the Project or the Work, as the case may be, in accordance with Industry Standards and in compliance with all Applicable Laws. For the avoidance of doubt, the Punchlist may include only Non-Critical Deficiencies. Contractor shall make such revisions to the Punchlist as and when requested by Owner from time to time.
- 15.1.3 <u>Completion of Punchlist</u>. Contractor shall proceed promptly to complete and correct all items on the Punchlist. Failure to include an item on the Punchlist does not alter Contractor's responsibility to complete all Work in accordance with this Contract. On a bi-weekly basis after Substantial Completion, Contractor shall revise and update the Punchlist to include the date(s) that Non-Critical Deficiencies listed on such Punchlist are completed by Contractor and accepted by Owner. Notwithstanding any of the foregoing, the Non-Critical Deficiencies listed on such Punchlist shall not be considered complete until Owner shall have inspected such Non-Critical Deficiencies and acknowledged, by notation on the updated Punchlist, that such item of Work is complete.
- 15.1.4 The Parties agree that with respect to Punchlist items that remain uncompleted and which are preventing Final Completion, it may be more expedient for Owner to complete such Punchlist items, at its election and option. If the Parties agree, Owner may, in lieu of requiring Contractor to complete the Punchlist items, require Contractor to pay to Owner an amount equal to two hundred percent (200%) of the commercial value of the remaining Punchlist items as reasonably determined by the Parties. Owner shall have the right to offset such amount owed by Contractor against any amounts owed by Owner to Contractor at Final Completion, or otherwise under the Contract Documents.
- 15.2 <u>Substantial Completion</u>. Substantial Completion shall occur upon satisfaction by Contractor or waiver by Owner of the following conditions:
- (a) Contractor has paid (or credited against the Contract Price) all Substantial Completion Delay Liquidated Damages due under this Contract due and owing as of Substantial Completion;
- (b) Owner has received copies of all Contractor Acquired Permits required to be obtained by Contractor pursuant to Section 4.6 (other than such permits as the failure to obtain could not reasonably be expected to have a material adverse effect on Owner's ability to own, operate and maintain the Project at the design levels specified in this Contract and the Statement of Work), which Contractor Acquired Permits shall be in full force and effect and

neither (i) subject to any legal proceeding or any unsatisfied condition that could reasonably be expected to result in material modification or revocation to any such Contractor Acquired Permit, nor (ii) under appeal, nor (iii) subject to any appeal period available under Applicable Law;

- (c) Owner has received all Essential Contractor Deliverables;
- (d) Contractor has completed all training of Operating Personnel required under this Contract, and has certified by a Notice to Owner that such training is complete;
 - (e) Contractor has achieved Project Mechanical Completion;
- (f) all Work other than Non-Essential Contractor Deliverables and other Non-Critical Deficiencies has been completed;
- (g) all Performance Tests have been successfully completed pursuant to the Performance Tests Procedures and otherwise in accordance with Exhibit I, and either (i) the Project shall have fully satisfied the Performance Guarantees, or (ii) the Project shall have fully satisfied the Minimum Performance Criteria for Substantial Completion and Contractor shall have paid all Buy-Down Amounts due pursuant to Section 16.2 (or such Buy-Down Amounts have been credited against the Contract Price due and owing as of Substantial Completion) and all of the other requirements set forth in Section 16.2 have been satisfied, as applicable;
- (h) all Functional Guarantee Tests have been successfully completed pursuant to the Functional Guarantee Tests Procedures and otherwise in accordance with <u>Exhibit I</u>, and the Project shall have fully satisfied the Functional Guarantees;
- (i) Contractor has delivered to Owner the Acceptance Test results indicating that the Project has successfully completed each such Acceptance Test pursuant to the applicable Acceptance Test Procedures;
- (j) Contractor has delivered a certification to Owner stating that all major items of Equipment and Materials within Contractor's scope of Work have been properly installed and tested in accordance with the applicable manufacturers' recommendations and requirements in all material respects;
- (k) other than Non-Essential Contractor Deliverables, all spare parts to be purchased by Contractor pursuant to Section 4.18 have been delivered or purchased for delivery to Owner free and clear of liens (other than liens related to Owner non-payment) and all special tools included as part of the Equipment and Materials and otherwise required by Section 4.18.1 have been turned over to Owner;
- (I) Contractor has delivered to Owner the Warranty Bond in accordance with Section 7.9; and
- (m) Contractor has delivered to Owner a Notice of Substantial Completion stating that Contractor believes it has satisfied the conditions set forth in Section 15.2(a) through (1), and a report of the Work completed with sufficient detail to enable Owner and the Engineer to determine whether Substantial Completion has been achieved.

After satisfaction by Contractor or waiver by Owner of the conditions set forth in this Section 15.2, Owner shall execute and acknowledge Contractor's Notice of Substantial Completion confirming that Substantial Completion has occurred; provided, however, that the Substantial Completion Date shall be the date of actual satisfaction or waiver of the conditions set forth in this Section 15.2, not the date Owner executes and acknowledges Contractor's Notice of Substantial Completion. Owner shall execute and acknowledge Contractor's Notice of Substantial Completion as soon as possible, and in no event more than ten (10) Business Days after satisfaction in full by Contractor of all of the conditions set forth in this Section 15.2; provided, however, it being understood and acknowledged by Owner that, notwithstanding any election by Owner to so delay executing and acknowledging such Notice of Substantial Completion or paying Contractor for achievement of Substantial Completion, (i) the Substantial Completion Date shall be the date of actual satisfaction or waiver of the conditions set forth in this Section 15.2 and (ii) Contractor shall not be obligated to pay, or otherwise be liable for, Substantial Completion Delay Liquidated Damages in respect of any day, time or period following the date of actual satisfaction or waiver of the conditions set forth in this Section 15.2. Owner agrees that it will not temporarily or permanently take over and operate the Facility prior to Contractor satisfying each of the requirements necessary for Substantial Completion other than as provided for in Section 20.1 and Article 21.

- 15.3 <u>Final Completion</u>. Final Completion shall be deemed to have occurred upon satisfaction by Contractor or waiver by Owner of the following conditions precedent:
- (a) Substantial Completion, including payment of all Substantial Completion Delay Liquidated Damages and Buy-Down Amounts;
- (b) all Performance Tests for the Minimum Performance Criteria for Final Completion have been successfully completed pursuant to the Performance Tests Procedures and otherwise in accordance with Exhibit I, and the Project shall have fully satisfied the Minimum Performance Criteria for Final Completion;
- (c) Owner has received copies of all Contractor Acquired Permits required to be obtained by Contractor pursuant to Section 4.6, which Contractor Acquired Permits shall be in full force and effect and neither subject to (i) any legal proceeding or any unsatisfied condition that could reasonably be expected to result in material modification or revocation to any such Contractor Acquired Permit, nor (ii) under appeal, nor (iii) subject to any appeal period available under Applicable Law;
- (d) Contractor has completed all items on the Punchlist except with respect to any item for which Owner has deducted from the Final Payment under <u>Section 15.1.4</u>;
- (e) Owner has received all Non-Essential Contractor Deliverables, Spare Parts lists, and other technical information each as required hereunder for Owner to operate and maintain the Project;
- (f) All Contractor's and Subcontractors' personnel, Equipment and Materials, surplus materials, waste materials, rubbish, and other Temporary Work other than those to which Owner holds title have been removed from the Site as required by Exhibit A, and any permanent

facilities used by Contractor and the Site have been restored to the same condition that such permanent facilities and the Site were in on the Notice to Proceed Date, taking into account the construction of the Project, ordinary wear and tear excepted. All cleanup and disposal shall be conducted in accordance with all Applicable Laws;

- (g) Owner has received from Contractor all information requested by Owner and required for Owner's final fixed asset records (including any FERC accounting requirements) with respect to the Project in accordance with <u>Section 4.8</u>;
- (h) Contractor has delivered to Owner a certification identifying all outstanding claims of Contractor under this Contract with documentation sufficient to support such claims;
- (i) Contractor has assigned to Owner, or provided Owner, with all warranties or guarantees that Contractor received from Subcontractors to the extent Contractor is obligated to do so pursuant to Article 18;
- (j) Contractor has delivered the certifications, the lien releases from Contractor, the lien releases from Subcontractors or the bonds, all in accordance with <u>Section 7.2</u>, and has delivered such other documents and certificates as Owner has reasonably requested to ensure compliance with all applicable labor laws and regulations of United States;
- (k) any Defects found in the Work have been corrected other than any such Defects for which Contractor is actively and diligently pursuing a correction under a Work Warranty;
- (l) the Project has been constructed in accordance with the Contract and the Drawings and Specifications;
- (m) the final as-built documentation accurately reflects the Project as constructed;
- (n) the Project is capable of being operated in a safe and proper manner in accordance with Applicable Laws and Applicable Permits;
- (o) Contractor shall have delivered to Owner all operation and maintenance manuals and final documentation in accordance with the Contract;
- (p) Contractor has delivered true and correct copies of all Intellectual Property Rights and otherwise assigned such Intellectual Property Rights to Owner to the extent Contractor is obligated to do so pursuant to Article 27; and
- (q) Contractor has delivered to Owner a Notice of Final Completion stating that Contractor believes it has satisfied the provisions of <u>Sections 15.3(a)</u> through <u>(p)</u>.

After satisfaction by Contractor or waiver by Owner of the conditions set forth in this Section 15.3, Owner shall execute and acknowledge Contractor's Notice of Final Completion confirming that Final Completion has occurred; provided, however, that the Final Completion

Date shall be the date of actual satisfaction or waiver of the conditions set forth in this <u>Section 15.3</u>, not the date Owner executes and acknowledges Contractor's Notice of Final Completion. Owner shall execute and acknowledge Contractor's Notice of Final Completion as soon as possible, and in no event more than ten (10) Business Days after satisfaction in full by Contractor of all of the conditions set forth in this Section 15.3.

If Final Completion does not occur on or before the Final Completion Expected Date, in addition to any other remedy under this Contract, Owner may avail itself of any remedy available to it in law or equity.

- Substantial Completion, Contractor shall be responsible for coordinating remedial work with the Owner and Owner shall provide Contractor with reasonable and timely access to complete all items on the Punchlist and to satisfy the other requirements for Final Completion. The Parties expect that Contractor shall accomplish any necessary modification, repairs or additional Work with minimal interference to commercial operation of the Project and that reductions in and shut-downs of the Project's operations will be required only when necessary, taking into consideration:
 - (a) the length of the proposed reduction or shut-down, and
 - (b) Owner's obligations and liabilities to Suppliers, customers or others.

Notwithstanding the foregoing, should a reduction in or shut-down of the Project's operations be required to complete any items on the Punchlist or to satisfy the other requirements for Final Completion, then such reduction or shut-down shall be scheduled solely at the discretion of Owner, and Contractor shall use all reasonable efforts to complete such Work during such Owner scheduled reduction or shut-down. Contractor acknowledges that Owner may schedule such reduction or shut-down at any time including off-peak hours, nights, weekends and holidays.

15.5 <u>Changes in Project Guaranteed Dates</u>. Except as otherwise set forth in this Contract, no action by either Party (unless Owner and Contractor mutually agree in writing to the contrary) required or permitted under this <u>Article 15</u> shall modify the Project Guaranteed Dates.

16. DELAY DAMAGES; BUY-DOWN AMOUNTS

16.1 <u>Substantial Completion Delay Liquidated Damages</u>. Contractor understands that if the Substantial Completion Date does not occur on or before the Substantial Completion Guaranteed Date, Owner will suffer substantial damages, reduction of return on Owner's equity investment in the Project and other operating and construction costs and charges. Therefore, Contractor agrees that if Substantial Completion is not achieved by the Substantial Completion Guaranteed Date, then (subject to the terms of <u>Sections 15.2</u> and <u>32.2.2</u>) Contractor shall pay liquidated damages to Owner in the amount of Three Hundred Dollars (\$300) per MW of Guaranteed BESS Capacity ("<u>Substantial Completion Delay Liquidated Damages</u>") for each day (or portion thereof) by which the Substantial Completion Date is delayed beyond the Substantial

Completion Guaranteed Date. Substantial Completion Delay Liquidated Damages will be capped at a value equivalent to Fifty-Five Thousand Dollars (\$55,000) per MW of Guaranteed BESS Capacity. Any amount Contractor is obligated to pay to Owner under this Section 16.1 shall be due and payable ten (10) days after receipt of a request therefor from Owner.

- 16.2 <u>Buy-Down for Performance Tests</u>. If Contractor has completed the Acceptance Tests on or before the Substantial Completion Deadline Date, and Contractor has successfully satisfied the Performance Guarantees, then the remaining provisions of this <u>Section 16.2</u> shall no longer apply. If, on or before the Substantial Completion Deadline Date:
 - (a) Contractor has achieved Project Mechanical Completion;
- (b) Contractor has provided Owner with Notice that it will not perform any further Acceptance Tests;
- (c) Contractor's results from the most recent Acceptance Tests shall have satisfied the Minimum Performance Criteria for Substantial Completion and the Functional Guarantees; and
 - (d) one or more of the Performance Guarantees has not been satisfied;

then (subject to the terms of <u>Section 32.2.2</u>) Contractor shall pay the Buy-Down Amount set forth on <u>Exhibit H</u> based on Contractor's most recent attempted Performance Test. Owner may elect to have such payment made as a credit against the Contract Price. Upon payment of the Buy-Down Amount, the applicable Performance Guarantees shall be deemed amended to reflect the actual performance levels used in calculation of the Buy-Down Amount for all other Acceptance Tests.

16.3 Sole Remedy. With the exception of Contractor's absolute obligation to satisfy the Minimum Performance Criteria and Functional Guarantees during the Acceptance Tests, Owner's sole remedies for delays in achieving Substantial Completion and for the failure of the Project to meet the Performance Guarantees during the Acceptance Tests shall be the amounts payable under Sections 16.1 and 16.2, respectively, the other remedies expressly provided for in this Article 16, and, if such delays or failure constitute a Contractor Event of Default, the remedies provided for in Sections 20.2(a)-(g). The Parties agree that Owner's actual damages, as applicable, in the event of such delays and failures would be extremely difficult or impracticable to determine and that, after negotiation, the Parties have agreed that the Substantial Completion Delay Liquidated Damages and the Buy-Down Amount are a reasonable estimate of the damages that Owner would incur as a result of such delays or failures and are in the nature of liquidated damages, and not a penalty. For the avoidance of doubt, nothing in this Section 16.3 shall limit Contractor's obligations under Article 18 and Contractor shall have an absolute obligation to satisfy (a) Project Mechanical Completion; (b) the Minimum Performance Criteria; and (c) the Functional Guarantees.

17. CHANGES IN THE WORK

- 17.1 <u>Change in Work.</u> A change in Work may result only from any of the following ("Change in Work"):
- (a) Changes in the Work required by Owner in writing, including an acceleration of Work in accordance with Section 8.8 or Section 17.2;
- (b) The occurrence of an Excusable Condition (as and only to the extent permitted by Section 9.4.2);
- (c) The occurrence of an event of Force Majeure (as and only to the extent permitted by Section 9.4.1);
- (d) An Owner Directive (as and only to the extent permitted by <u>Section 17.5</u>); or
- (e) Unforeseen Subsurface Site Conditions (as and only to the extent permitted by Section 13.3); or
- (f) A Change in Work to which Contractor is otherwise expressly entitled under this Contract.

17.2 By Owner.

- 17.2.1 General. Owner shall have the right to make changes in the Work, within the general scope thereof, whether such changes are modifications, accelerations, alterations, additions, or deletions. All such changes shall be made in accordance with this Article 17, be documented in accordance with Section 17.4.1 and shall be considered, for all purposes of this Contract, as part of the Work. Notwithstanding the foregoing, and except as set forth in Section 8.8, Section 17.2.2, and Section 17.5, unless Contractor and Owner shall have agreed upon a Change in Work Form in accordance with the provisions of Section 17.4 or Owner shall have issued an Owner Directive, Contractor shall have no obligation to, and shall not, perform or comply with any modification, acceleration, alteration, addition, or deletion by Owner to the Work after execution of this Contract that:
 - (a) conflicts, or could conflict, with this Contract;
 - (b) accelerates, or could accelerate, the Project Schedule;
- (c) affects, or could affect, the performance of the Project under the Performance Guarantees and those other requirements and guarantees set forth in Exhibit I; or
 - (d) increases, or could increase, the costs of the Contractor.
 - 17.2.2 Change in Work for Optional Spare Parts. In the event that Owner elects to cause Contractor to procure operating spare parts pursuant to Section 4.18.2(b), then

the Contract Price shall be adjusted as provided in <u>Section 17.4.1.1</u> and Contractor expressly waives any other compensation as a result of such Change in Work (including, but not limited to, any adjustment to the Project Schedule (and the Substantial Completion Guaranteed Date and Final Completion Expected Date referenced therein)).

- 17.3 <u>Not Used.</u>
- 17.4 Procedures.
- 17.4.1 <u>Preparation of Change in Work Form Due to Acceleration, Owner Initiated Change in Work.</u>
- 17.4.1.1 <u>Contractor's Estimate</u>. If Owner provides Notice to Contractor that Owner is considering a Change in Work permitted pursuant to <u>Sections 4.18.2</u>, <u>8.8</u> or <u>17.2</u>, then Contractor shall, as soon as practicable, prepare a Change in Work Form, which shall include, subject to the remaining provisions of this <u>Section 17.4.1</u>, a detailed proposal for such Change in Work, together with a detailed explanation and basis thereof, of:
- (a) the change, if any, to the Project Schedule and the Project Guaranteed Dates associated with such Change in Work (subject to Section 17.2.2); and
- (b) the increase, if any, in the cost and time required to complete the Work on the Change in Work Form.

Contractor's proposed change in the Contract Price for such Change in Work shall not exceed the sum of: (i) the Direct Costs expected to be actually, demonstrably and reasonably incurred by Contractor because of such Change in Work <u>plus</u> (ii) a five percent (5%) contingency for profit, overhead and contingency, <u>minus</u> any savings expected to be incurred because of such Change in Work. The adjustment in the Contract Price and Project Schedule and the Project Guaranteed Dates specified in this <u>Section 17.4.1.1</u> shall be the sole adjustment related to such Change in Work unless stated otherwise therein.

- 17.4.1.2 Execution of Change in Work Form. If Contractor and Owner reach agreement on the matters listed in the Change in Work Form submitted by Contractor pursuant to this Section 17.4.1, then Contractor shall execute such Change in Work Form and Owner shall sign "Accepted by Owner" on such Change in Work Form and execute such Change in Work Form (indicating any amendments necessary to reflect the agreement of the Parties).
 - 17.4.2 <u>Preparation of Change in Work Form Due to an Excusable Condition,</u> Event of Force Majeure, Unforeseen Subsurface Site Conditions or Other Entitlement.
- 17.4.2.1 <u>Contractor's Estimate</u>. If Contractor provides Notice of, becomes aware of, or is entitled to, a Change in Work permitted pursuant to <u>Sections 17.1(b)</u>, (c) or (e), then Contractor shall as soon as practicable serve Notice thereof to Owner, and Contractor shall, as soon as practicable, prepare a Change in Work Form,

which form shall include, subject to the remaining provisions of this <u>Section 17.4.2</u>, a detailed estimate for such Change in Work, together with a detailed explanation thereof, of:

- (a) (i) with respect to a Change in Work under Section 17.1(c), Section 17.1(b) or Section 17.1(e), the change, if any, to the Project Schedule and the Project Guaranteed Dates to which Contractor is entitled under Section 9.4.1, Section 9.4.2, or Section 13.3, respectively, or (ii) with respect to a Change in Work under Section 17.1(f), if Contractor is actually and demonstrably delayed in the performance of Critical Path Item(s) by such Change in Work, the extension of the Project Schedule and Project Guaranteed Dates sufficient for Contractor to overcome the impact of such Change in Work, provided Contractor is working diligently to mitigate the impact of such Change in Work; and
- (b) Contractor's proposed change in the Contract Price for such Change in Work, which change shall not exceed the sum allowed under Section 9.4.1, Section 9.4.2, or Section 13.3 with respect to a Change in Work under Section 17.1(c), Section 17.1(b) or Section 17.1(c), respectively, or the sum of the following with respect to any Change in Work under Section 17.1(f): (i) the Direct Costs expected to be actually, demonstrably and reasonably incurred by Contractor because of such Change in Work plus (ii) a five percent (5%) allowance for profit, overhead and contingency, minus any savings expected to be incurred because of such Change in Work.

The adjustment in the Contract Price and the Project Schedule and the Project Guaranteed Dates specified in this <u>Section 17.4.2.1</u> shall be the sole adjustment related to such Change in Work unless stated otherwise therein. The Contractor's estimate for the Change in Work shall utilize the Contractor's rate schedule in <u>Exhibit D</u>.

Owner reach agreement on the matters listed in the Change in Work Form submitted by Contractor pursuant to this Section 17.4.2, then Contractor shall execute such Change in Work Form and Owner shall sign "Accepted by Owner" on such Change in Work Form and execute such Change in Work Form (indicating any amendments necessary to reflect the agreement of the Parties). If the Parties cannot reach agreement on the matters listed in the Change in Work Form submitted pursuant to this Section 17.4.2, then such matter shall be referred to dispute resolution under Article 33 unless an Owner Directive is issued under Section 17.5.

17.4.3 No Obligation or Payment Without Executed Change in Work Form. IN NO EVENT SHALL CONTRACTOR BE ENTITLED TO UNDERTAKE OR BE OBLIGATED TO UNDERTAKE A CHANGE IN WORK UNTIL CONTRACTOR HAS RECEIVED A CHANGE IN WORK FORM SUBMITTED BY CONTRACTOR AND ACCEPTED BY OWNER AND, EXCEPT AS SET FORTH IN SECTION 17.5 OR IN ORDER TO RESPOND TO ANY EMERGENCY, IN THE ABSENCE OF SUCH SIGNED CHANGE IN WORK FORM, IF CONTRACTOR UNDERTAKES ANY CHANGES IN THE WORK, THEN CONTRACTOR SHALL MAKE ANY SUCH CHANGES AT CONTRACTOR'S SOLE RISK AND EXPENSE AND SHALL NOT BE ENTITLED TO ANY PAYMENT HEREUNDER FOR UNDERTAKING SUCH CHANGES.

- 17.5 Owner Directives. If Contractor and Owner are unable to agree on the matters described in the Change in Work Form submitted by Contractor pursuant to Section 17.4.1, then Contractor shall perform the Work as modified by the contemplated change if Owner so directs in writing and such change is not illegal, does not affect the safe performance of the Work, does not require or cause the Contractor to otherwise be in breach of this Contract, and is not inconsistent with the fundamental nature of this Project as a battery energy storage facility (an "Owner Directive"). In such an event:
- (a) the Contract Price shall be increased by the sum of: (i) the Direct Costs actually, demonstrably and reasonably incurred by Contractor because of such Change in Work plus (ii) a five percent (5%) allowance for profit, overhead and contingency, minus any savings expected to be incurred because of such Change in Work, and Owner shall pay such amount net 21 days from invoice as said costs are incurred; and
- (b) the Critical Path Items on the Project Schedule and the Project Guaranteed Dates shall be equitably adjusted to allow Contractor to overcome the impact, if any, of such Owner Directive.

Contractor expressly waives any other compensation as a result of such Owner Directive unless otherwise stated therein.

- 17.6 Express Waiver. Except as may be expressly set forth in Sections 8.8, 9.4.1, 9.4.2, 13.3, 17.4 and 17.5, Contractor expressly waives any other change in the Project Schedule, the Project Guaranteed Dates and the Contract Price or any other compensation for any Change in Work executed pursuant to the provisions of Article 17.
- 17.7 <u>No Suspension.</u> Contractor shall not suspend the Work pending resolution of any proposed Change in Work unless directed by Owner in writing in accordance with <u>Article 22</u>, except (i) as specifically provided for in <u>Section 20.5(a)</u> herein or (ii) with respect to a Change in Work that (A) is a prohibited Owner Directive under the first sentence of <u>Section 17.5</u> or (B) Contractor cannot reasonably perform any other Work until such prohibited Owner Directive is resolved.

18. WARRANTIES CONCERNING THE WORK

- 18.1 <u>Work Warranties</u>. Contractor warrants to Owner with respect to the Project (the "<u>Work Warranties</u>") that all Work (other than Work covered by the Materials Warranty), including the construction and design of the Project and the installation of the Equipment and Materials:
 - (a) shall be in accordance with Industry Standards;
 - (b) shall be free from Defects;
- (c) shall conform to all applicable requirements of the Contract, <u>Exhibit A</u>, any Applicable Law and the Applicable Permits; and
 - (d) shall be fit for use as a battery energy storage facility.

- 18.2 <u>Materials Warranty</u>. Contractor further warrants that all Equipment and Materials and other items furnished by Contractor and any Subcontractors and Vendors hereunder (the "Materials Warranty"):
 - (a) shall be new and of good and suitable quality when installed;
- (b) shall conform to the requirements of the Contract, <u>Exhibit A</u>, any Applicable Law and the Applicable Permits;
- (c) once paid for in full by Owner, shall be free from any charge, lien, security interest or other encumbrance imposed by Contractor or any Subcontractor, except for items in dispute; and
- (d) shall be free of any Defects including Defects in design, materials or fabrication.
 - 18.3 <u>Warranty Period</u>. Contractor shall have no liability under <u>Sections 18.1</u> or <u>18.2</u> with respect to any matter with respect to which Owner first notifies Contractor after the end of the Warranty Period (as such period may be extended in accordance with the terms hereof); provided, however, that the Warranty Period for any item or part required to be repaired, corrected or replaced following a warranty claim that is made during the original Warranty Period shall be extended from the time such repair, correction or replacement is complete for a period equal to the original Warranty Period for such item or part, but in no event shall such extended Warranty Period exceed twelve (12) months after expiration of the original Warranty Period. Subject to the terms hereof, Contractor shall perform all warranty work so that the respective repair or replacement parts are complete and reasonably expected to perform satisfactorily for a reasonable period of time after the date of repair, correction or replacement.
 - 18.4 <u>Enforcement After Expiration</u>. Commencing on the expiration of the Warranty Period, or such later date as is provided in <u>Section 18.3</u>, Contractor shall provide reasonable assistance to Owner, on a reimbursable basis, in enforcing representations, warranties, and guarantees made by a Subcontractor or Vendor, when and as reasonably requested by Owner. In addition, prior to the expiration of the Warranty Period, or such later date as is provided in <u>Section 18.3</u>, Owner, at its option and upon prior written Notice to Contractor, may enforce the particular warranty, the Work Warranty or the Materials Warranty against any Subcontractor or Vendor if
 - (a) a Contractor Event of Default exists.
 - 18.5 <u>Exclusions</u>. The Work Warranties and Materials Warranty shall not apply to:
- (a) Damage to or Defects in any Work, or Equipment and Materials, to the extent such damage or Defect is caused by:

- (i) Owner's failure to operate and maintain such Equipment and Materials or the Work in accordance with the recommendations set forth in the Required Manuals but only if such failure occurs after Substantial Completion;
- (ii) operation of such Equipment and Materials or the Work in a manner inconsistent with the operating specifications for such Equipment and Materials or Work as set forth in the Required Manuals but only if such failure occurs after Substantial Completion;
- (iii) the use of spare parts and normal consumables in the repair or maintenance of such Equipment and Materials or Work that are not in accordance with specifications and recommendations set forth in the Required Manuals but only if such failure occurs after Substantial Completion;
- (iv) normal wear and tear, but only if such failure occurs after Substantial Completion,
- (v) an event of Force Majeure (which excludes warranty failure hereunder);
- (vi) the negligence or willful misconduct of Owner, Owner's Separate Contractors or Operating Personnel; or
- (vii) repair or modification of such Equipment and Materials or Work contrary to Contractor's expressly provided recommendations, which is performed by someone other than Contractor or its Subcontractors.

Notwithstanding the foregoing, damage caused by Contractor or Operating Personnel while under the direction of Contractor shall be the responsibility of Contractor, unless such damage is due to or arises out of the Operating Personnel's negligence or willful misconduct.

18.6 Subcontractor and Vendor Warranties.

18.6.1 Without in any way derogating from Contractor's own representations and warranties and its Performance Guarantees and Functional Guarantees and other testing requirements and guarantees set forth in Exhibit I with respect to all of the Work, Contractor shall obtain warranties in the form of Exhibit Q with a warranty period of no less than five (5) years from the Vendor(s) for the BESS (the "Manufacturer's Limited Warranty,") and Contractor shall use commercially reasonable efforts to obtain warranties for all other Work (including Equipment and Materials) furnished or performed by each Subcontractor or Vendor on similar terms as this Article 18, use commercially reasonable efforts to obtain from all Subcontractors and Vendors any representations, warranties, guarantees, and obligations offered by such Subcontractors and Vendors and to negotiate the longest practical warranty periods at no additional cost with respect to design, workmanship, Equipment and Materials, and other items furnished by such Subcontractors and Vendors. Contractor hereby assigns to Owner all representations, warranties, guarantees, and obligations of all Subcontractors and Vendors, effective upon the earlier of the end of the Warranty Period or termination

or expiration of this Contract. Contractor shall deliver to Owner promptly following execution thereof duly executed copies of all contracts containing such representations, warranties, guarantees, and obligations; provided, however, that pricing terms may be redacted.

18.6.2 Remote Monitoring; Use of Monitoring Data. In order to provide the Manufacturer's Limited Warranty, the BESS Vendor requires the ability to (a) remotely monitor performance of the BESS, and (b) provide remote firmware and software upgrades to the BESS. Owner hereby consents to the BESS Vendor performing such remote monitoring and providing such firmware and software upgrades as such Vendor reasonably deems appropriate. Any information obtained by the BESS Vendor through remote monitoring of the BESS that falls within the parameters stated to be made available to customers as set forth in Exhibit R shall be owned by Owner, shall be Confidential Information of Owner for purposes of this Agreement, and shall be made available by the BESS Vendor to Owner on request, in a reasonably accessible format. Owner hereby grants to the BESS Vendor an irrevocable, perpetual worldwide, royalty-free license to use of all data obtained via the remote monitoring of the Project and the BESS (i) to perform its obligations under the Manufacturer's Limited Warranty, (ii) to improve the BESS Vendor's products and services generally (including by performing analyses on such information), and (iii) to aggregate with other data. Notwithstanding anything to the contrary in this Agreement, public disclosure of such information by the BESS Vendor is permitted if Owner could not reasonably be identified from the publicly disclosed information. Any information obtained by the BESS Vendor through remote monitoring of the BESS that falls outside the parameters stated to be made available to customers in the Communication Interface Manual shall be owned by BESS Vendor, shall be Confidential Information of the BESS Vendor, and shall not be required to be made available by the BESS Vendor to Owner.

18.7 <u>Correction of Defects.</u>

18.7.1 Generally. Owner shall promptly provide Notice to Contractor upon discovery that any of the Work fails to satisfy the Work Warranty or the Materials Warranty prior to the end of the applicable Warranty Period, including any extensions of the Warranty Period pursuant to Section 18.3. Contractor shall, at its own cost and expense (including overtime), re-perform any necessary engineering and purchasing relating to such Work, and shall pay the cost of removing any Defect and the cost of replacement thereof, including, without limitation, necessary transportation, reassembly and retesting, as well as reworking, repair or replacement of such Work, disassembly and reassembly of piping, ducts, machinery, Equipment or other Work as necessary to give access to improper, defective or non-conforming Work and correction, removal or repair of any damage to other work or property that is included as part of the Work and that arises from the Defect as shall be necessary to cause the Work and the Project to conform to the Work Warranty or Materials Warranty. Within five (5) days after receipt by Contractor of a Notice from Owner specifying a failure of any of the Work to satisfy Contractor's Work Warranty or the Materials Warranty and requesting Contractor to correct the failure, Contractor and Owner shall reasonably agree when and how Contractor shall remedy such failure. Notwithstanding

the foregoing and subject to <u>Section 18.7.2.2</u>, if any of the Work shall fail to satisfy Contractor's Work Warranty or the Materials Warranty, and such failure endangers human health or property or materially and adversely affects the operation of the Project, then Contractor shall correct the failure as soon as is reasonably practicable.

18.7.2 Owner Performance.

18.7.2.1. <u>Upon Contractor's Request</u>. Notwithstanding the foregoing, Contractor may request Owner to perform all or any portion of Contractor's obligations with respect to any warranty claim, and, if Owner desires (in its sole discretion) to perform such obligations, Owner shall perform such obligations for Contractor's account (including, without limitation, drawing from Warranty Bond provided pursuant to <u>Section 7.9</u> to pay for costs and expenses incurred in performing such obligations). Owner shall have no liability to Contractor in respect of the performance of such obligations and (subject to <u>Section 18.5</u>) such performance by Owner shall in no way limit Contractor's continuing warranty obligations hereunder.

18.7.2.2. Failure of Contractor to Perform Warranty Work. If Contractor does not use commercially reasonable efforts to proceed to complete warranty work approved by Owner pursuant to Section 18.7.1 within the agreed time, or if Contractor and Owner fail to reach such an agreement within such five (5) day period set forth in Section 18.7.1, then Owner shall have the right to perform the necessary remedy, or have third parties perform the necessary remedy, and Contractor shall bear the Direct Costs demonstrably and reasonably incurred by Owner for reasons attributable to Contractor (which may include, without limitation, Owner drawing from the Warranty Bond provided pursuant to Section 7.9 to pay for these costs incurred in performing such remedy). In the event any of the Work fails to satisfy the Work Warranty or the Materials Warranty during the applicable Warranty Period and any such failure occurs under circumstances in which there is an imminent and material threat to human health, the environment, or property and Contractor is not immediately available, then Owner may perform such warranty work and Contractor shall bear the Direct Costs demonstrably and reasonably incurred by Owner (including, without limitation, drawing from the Warranty Bond provided pursuant to Section 7.9 to pay for these costs incurred in performing such obligations). Neither Owner nor any such third parties shall have any liability to Contractor in respect of their performance of such obligations and (subject to Section 18.5) such performance by Owner shall in no way limit Contractor's continuing warranty obligations hereunder. In the event Owner performs any of the warranty work pursuant to this Section 18.7.2.2 then within sixty (60) days of completing the Work, and prior to drawing from the Warranty Bond, Owner shall provide Contractor with an invoice and supporting documentation evidencing the Direct Costs in performing the Work. Nothing in this Section 18.7.2.2 is intended or shall be deemed to be a waiver or modification of Owner's rights relating to the Warranty Bond.

18.7.3 Acceptance Tests. If, during the Warranty Period, Contractor shall change, repair or replace any Work or Equipment and Materials, Owner, in its reasonable discretion, may require Contractor to conduct and satisfactorily complete any Acceptance Test with respect to the affected Equipment and Materials; provided, however, in connection with any re-performance of an Acceptance Test pursuant to this Section 18.7.3, an appropriate degradation allowance with respect to the performance of such Equipment and Materials shall be made for the fact that such Equipment and

Materials may have operated prior thereto. If after running a Performance Test or Functional Guarantee Test pursuant to this Section, the results of such Performance Test or Functional Guarantee Test indicate a degradation in the performance (as measured against the test results used to satisfy the Performance Guarantees or Functional Guarantees prior to Substantial Completion or Final Completion, as applicable, and adjusted consistent with the degradation allowed) or fails to satisfy any other Acceptance Test, then Contractor shall repair, correct or replace such affected Work or Equipment and Materials and re-run such Acceptance Test until the performance is at a level consistent with the performance on the Substantial Completion Date or Final Completion Date, as applicable (as adjusted consistent with the degradation allowed). Owner shall be responsible for all costs incurred by Contractor in conducting any Acceptance Test required by Owner under this Section 18.7.3, unless the results of such Acceptance Test indicate said degradation or failure in the Equipment, in which case Contractor will be responsible for all costs of conducting the Acceptance Test.

Chronic Failure Repairs/Root Cause Analysis. If the Work (or any 18.8 portion thereof) experiences two (2) or more of the same failures of the Work Warranty or the Materials Warranty for the same type of Work or Materials, as applicable, within any one hundred eighty (180) consecutive day period during the Warranty Period or if any Remedial Plan determines the existence of a design-based failure in the Work (or any portion thereof) (any such set of failures, a "Chronic Failure"), Contractor shall: (i) investigate the cause of such Chronic Failure by conducting a rigorous process (including a root cause analysis) of evaluating the evidence and the physical sequence of events involving the Contractor, Owner, and/or (at the Contractor's sole discretion) any third party expert(s) to determine the underlying reason for such Chronic Failure or the factor(s) the absence of which would have avoided the such Chronic Failure, and Contractor shall provide the results of such investigation and process to Owner upon their completion; and (ii) make such reperformance, repairs, replacements, or adjustments necessary to correct the cause of the Chronic Failure as shall be necessary to cause the Work and the Project to conform to the Work Warranty or Materials Warranty.

18.9 Limitations on Warranties.

WARRANTIES **EXCEPT** FOR THE **EXPRESS** ANDREPRESENTATIONS SET FORTH IN THIS CONTRACT (INCLUDING IN ANY EXHIBIT HERETO), CONTRACTOR DOES NOT MAKE ANY OTHER EXPRESS OR ORAL WARRANTIES OR REPRESENTATIONS, OR ANY WARRANTIES OR REPRESENTATIONS, OF ANY IMPLIED WHATEVER, AND NO IMPLIED, STATUTORY, OR COMMON LAW WARRANTY OF ANY KIND, INCLUDING MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, SHALL APPLY.

19. EQUIPMENT IMPORTATION; TITLE

19.1 <u>Importation of Equipment and Materials</u>. Contractor, at its own cost and expense, shall make all arrangements, including the processing of all documentation, necessary to import into the United States, Equipment and Materials to be incorporated

into the Project, and any other equipment and other items necessary to perform the Work, and shall coordinate with the applicable Governmental Authority in achieving clearance of United States customs for all such Equipment and Materials and other items. In no event shall Owner be responsible for any delays in customs clearance or any resulting delays in performance of the Work.

19.2 <u>Title.</u>

- 19.2.1 Subject to <u>Article 30</u>, upon the achievement of Substantial Completion Contractor warrants good title, free and clear of all liens, claims, charges, security interests, and encumbrances whatsoever, to all Equipment and Materials and other items furnished by it or any of its Subcontractors that become part of the Project.
- 19.2.2 Subject to Article 30, upon the achievement of Substantial Completion, title to all Equipment and Materials and other items that become part of the Project shall pass to Owner free and clear of all liens, claims, charges, security interests, and encumbrances.
- 19.2.3 The transfer of title shall in no way affect Owner's rights as set forth in any other provision of this Contract. Contractor shall have care, custody, and control of all Equipment and Materials and other items and exercise due care with respect thereto until the time set forth in Section 19.4 below.
- 19.3 <u>Protection</u>. For the purpose of protecting Owner's interest in all Equipment and Materials and other items with respect to which title has passed to Owner pursuant to <u>Section 19.2</u> but that remain in possession of another party, Contractor shall take or cause to be taken all steps reasonably necessary under the laws of the appropriate jurisdiction(s) to protect Owner's title and to protect Owner against claims by other parties with respect thereto; provided, however, that Contractor shall assist Owner when any filing with any security interest registry is necessary to protect Owner's title or to protect Owner against claims by other parties; and provided, further, that it shall be Owner's responsibility to make any such filings.
- 19.4 <u>Owner Possession</u>. Owner shall take care, custody and control, and otherwise take complete possession of the Project (including taking on all risk of loss therefor) at Substantial Completion.

20. DEFAULT

- 20.1 <u>Contractor Events of Default</u>. Contractor shall be in material default of its obligations pursuant to this Contract upon the occurrence of any one or more events of default set forth below (each, a "<u>Contractor Event of Default</u>"):
- (a) Contractor or its parent corporation or guarantor makes an assignment for the benefit of creditors, admits in writing its inability to pay its debts as they become due, files a voluntary petition in bankruptcy, is adjudicated as bankrupt or insolvent; files a petition or answer seeking for Contractor any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any present or future statute, law, or regulation;

Contractor files any answer admitting or not contesting the material allegations of a petition filed against Contractor (as applicable) in any such proceeding, or Contractor seeks, consents to, or acquiesces in, the appointment of any trustee, receiver, custodian, or liquidator of Contractor or of all or any substantial part of Contractor's properties; or Contractor's directors, or shareholders take action to dissolve or liquidate the Contractor;

- (b) involuntary petitions in bankruptcy are brought against Contractor or an answer proposing the adjudication of Contractor as a debtor or bankrupt or proposing Contractor's liquidation or reorganization pursuant to any applicable bankruptcy law is filed in any court and Contractor consents to or acquiesces in the filing thereof or such petition or answer is not dismissed within sixty (60) days after the filing thereof;
- (c) any material representation or warranty made by Contractor herein was materially false or misleading when made and Contractor fails to remedy such false or misleading representation or warranty, and to make Owner whole for any consequences thereof, within thirty (30) days after Contractor receives a Notice from Owner with respect thereto;
- (d) Contractor assigns or transfers this Contract or any right or interest herein, except as expressly permitted under <u>Article 28</u>;
- (e) (i) Contractor fails to maintain any insurance coverages required of it in accordance with Article 23 and (ii) (A) Contractor fails to remedy such failure within five (5). Days after Contractor receives a Notice from Owner with respect thereto, or (B) if such failure is not capable of being cured within such five (5) Day period but Contractor has commenced the cure within such period, is diligently pursuing it and has stopped the affected portion of the Work, Contractor fails to remedy such failure within an additional twenty-five (25) days. Contractor's stoppage of the Work pursuant to this Section 20.1(e) shall not entitle it to any adjustments to the Contract Price or the Project Guaranteed Dates unless otherwise specified in this Contract;
- (f) Contractor fails to perform or observe in any respect any provision of this Contract providing for the payment of money that is owed to Owner under this Contract (other than payments of money subject to good faith disputes), or any other material provision of this Contract not otherwise addressed in this Section 20.1, and such failure continues for ten (10) days in the case of a payment obligation or thirty (30) days in the case of any other obligation, except such thirty (30) day period shall be extended if (i) curing such failure reasonably requires more than thirty (30) days, (ii) Contractor commences such cure within such thirty (30) day period and diligently prosecutes such cure, and (iii) such cure is accomplished within seventy-five (75) days, in each case after Contractor receives a Notice from Owner with respect thereto;
- (g) (i) Contractor fails to timely deliver a Remedial Plan pursuant to <u>Section 8.5</u> or, following approval of a Remedial Plan pursuant to <u>Section 8.5</u>, Contractor fails, other than for an Excusable Condition or an event of Force Majeure or Change in Work, to meet the schedule set forth in the Remedial Plan (as determined from the revised Project Schedule established by the Remedial Plan), or (ii) Contractor fails to timely deliver a Schedule Recovery Plan pursuant to <u>Section 8.4.2</u> or, following approval of a Schedule Recovery Plan pursuant to Section 8.4.2. Contractor fails, other than for an Excusable Condition or an event of Force

Majeure or Change in Work, to meet the schedule set forth in the Schedule Recovery Plan, and (iii) in the case of either (i) or (ii), Contractor fails to remedy such failure within thirty (30) days after Contractor receives a Notice from Owner with respect thereto;

- (h) the Minimum Performance Criteria for Substantial Completion and Functional Guarantees have not been achieved by the Substantial Completion Deadline Date;
- (i) Contractor suspends or Abandons (except for a suspension or Abandonment under Section 20.5(a) herein or due to an Excusable Condition or an event of Force Majeure or Change in Work) the Work and Contractor fails to cure such suspension or Abandonment within ten (10) days after Contractor receives a Notice from Owner with respect thereto. "Suspension" for the purposes of this Section 20.1(i) shall mean that Contractor has not accomplished any material progress toward any of the Critical Path Items for a period of thirty (30) or more days except for a suspension under Section 20.5(a) herein or due to an Excusable Condition or an event of Force Majeure or Change in Work. "Abandonment" for the purposes of this Section 20.1(i) shall mean that Contractor, except to the extent caused by an event described under Section 20.5(a) herein or due to Force Majeure or Excusable Condition or Change in Work, has substantially reduced personnel at the Site or removed further required equipment from the Site such that, in the reasonable opinion of the Engineer, Contractor would not be capable of maintaining progress in accordance with the Project Schedule, as adjusted pursuant to the terms of this Contract for any Excusable Condition, Change in Work or event of Force Majeure;
- (j) with respect to a Performance Bond or Warranty Bond, the failure by Contractor to provide for the benefit of Owner (1) a substitute Performance Bond or Warranty Bond, as applicable; or (2) cash, in either case, in the amount required hereunder within five (5) Business Days after Contractor receives notice of the occurrence of any of the following events:
- (i) the issuer of the outstanding Performance Bond or Warranty Bond shall fail to meet the conditions of an "Eligible Issuer";
- (ii) the issuer of such Performance Bond or Warranty Bond (A) files a petition or otherwise commences, authorizes, or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy, insolvency, reorganization or similar law, or has any such petition filed or commenced against it, (B) makes an assignment or any general arrangement for the benefit or creditors, (C) otherwise becomes bankrupt or insolvent (however evidenced), (D) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (E) is generally unable to pay its debts as they fall due;
- (iii) the issuer of the Performance Bond or Warranty Bond shall fail to comply with or perform its obligations under such bond and such failure shall be continuing after the lapse of any applicable grace period permitted under such bond;
- (iv) the issuer of the Performance Bond or Warranty Bond shall fail to honor a properly documented demand for payment or performance thereunder;

- (v) the issuer of the outstanding Performance Bond or Warranty Bond shall disaffirm, disclaim, repudiate or reject, in whole or in part, or challenge the validity of, such bond; or
- (vi) Contractor shall fail to renew or cause the renewal of the Performance Bond or Warranty Bond on a timely basis as provided in such bond and as provided in accordance with this Contract, and in no such event less than thirty (30) days prior to the expiration of the outstanding Performance Bond or Warranty Bond.
- (k) Contractor fails to comply with the Owner-approved safety plan and such failure continues for five (5) Business Days after Contractor receives Notice from Owner; or
- (l) The Substantial Completion Date has not occurred by the Substantial Completion Deadline Date, as the date may be extended pursuant to this Contract.
 - 20.2 Owner's Rights and Remedies. In the event of a Contractor Event of Default, subject to Article 32, Owner or its assignees shall have the following rights and remedies, in addition to any other rights and remedies that may be available to Owner or its assignees under this Contract and Applicable Law, and Contractor shall have the following obligations:
- (a) Owner, without prejudice to any of its other rights or remedies, may terminate this Contract by delivery of written notice to Contractor delivered within ninety (90) days after the date of the Contractor Event of Default, specifying a date not more than sixty (60) days after the date of such notice on which the termination shall occur;
- (b) Owner may, without prejudice to any of its other rights or remedies, seek performance by enforcing any security given by or for the benefit of Contractor for its obligations hereunder;
- (c) Owner may require Contractor to, and Contractor shall, (i) withdraw from the Site, (ii) assign to Owner (without recourse to Contractor) such of Contractor's Subcontracts as Owner may request, and (iii) (to the extent permitted by Contractor's contracts with third parties) deliver or and make available to Owner all information, patents, and licenses of Contractor or an applicable third party (including Subcontractors or Vendors) related to the Work reasonably necessary to permit Owner (or Owner's designee) to complete or cause the completion of the Work, and in connection therewith Contractor authorizes Owner and its respective agents to use such information in completing the Work, shall remove such materials, equipment, tools, and instruments used by and any debris or waste materials generated by Contractor in the performance of the Work as Owner (or Owner's designee) may direct, and Owner may take possession of any or all Contractor Deliverables and Site facilities of Contractor related to the Work necessary for completion of the Work (whether or not such Contractor Deliverable and Site facilities are complete);
- (d) Owner, without incurring any liability to Contractor, shall have the right (either with or without the use of Contractor's equipment) to have the Work finished, whether by enforcing any security given by or for the benefit of Contractor for its performance under this Contract or otherwise, in which case Owner shall have the right to take possession of and use all

equipment of Contractor necessary for completion of the Work, and Contractor shall have no right to remove such items from the Site until such completion;

- (e) Owner may seek equitable relief to cause Contractor to take action or to refrain from taking action pursuant to this Contract, or to make restitution of amounts improperly received under this Contract;
- (f) Owner may make such payments or perform such obligations as are reasonably required to cure any Contractor Event of Default and offset the cost of such payment or performance against payments otherwise due to Contractor under this Contract; and
- (g) Owner may seek damages as provided in <u>Section 20.3</u>, including proceeding against any bond or other security given by or for the benefit of Contractor for its performance under this Contract.
 - 20.3 <u>Damages for Termination Due to Contractor Default</u>. In the event Owner terminates this Contract in accordance with <u>Section 20.2(a)</u>, and subject to <u>Article 32</u>:
- If the Completion Costs (defined below) exceed the Outstanding Balance (a) at the time of Owner's termination, then subject to Article 32, Contractor shall be liable and pay to Owner within sixty (60) days following completion of the Project and the Work the amount equal to the difference between (i) Owner's aggregate actual, direct and documented costs of completing the Project and the Work (including out-of-pocket compensation for obtaining a replacement contractor or for obtaining additional professional services required as a consequence of Contractor's Event of Default) incurred by Owner in a commercially reasonable manner (but excluding any liquidated damages (including Substantial Completion Delay Liquidated Damages or any Buy-Down Amount) that Contractor would have been otherwise liable for on or following the effective date of Owner's termination, had Owner not terminated the Contract) (the "Completion Costs") and (ii) the Outstanding Balance (calculated at the time of Contractor's default). If the Outstanding Balance so calculated exceeds the Completion Costs, then (X) Contractor shall not be liable for any such difference and the Contractor shall not be liable to pay Owner any damages under this Section 20.3, and (Y) Owner shall, within the earlier of seven hundred twenty (720) Days after the date of such termination or thirty (30) Days after Final Completion of the Work by Owner hereunder, pay Contractor an amount equal to the sum of (i) any unpaid portion of the Contract Price attributable to the Work performed by Contractor prior to the date of such termination plus (ii) the value of any unused or partially used equipment, parts or materials furnished by Contractor which are used by Owner and have not already been paid for as part of the Contract Price paid to Contractor. In the event of a Contractor Event of Default, and subject to Article 32, Owner shall be entitled to withhold further payments to Contractor for the Work performed prior to termination of this Contract until Owner determines the liability of Contractor, if any, under this Section 20.3. Upon determination of the Completion Costs and the Outstanding Balance, Owner shall notify Contractor in writing of the amount, if any, that Contractor shall pay Owner, subject to Contractor's right to audit and review in accordance with the terms hereof. Contractor acknowledges that in the event of such a termination, Owner may enter into a turn-key contract for the completion of the Project with the same performance guarantees, completion deadlines and liquidated damages as are provided for

in this Contract and that the cost to complete the Project in such event may greatly exceed the cost hereunder.

- 20.4 Owner Event of Default. Owner shall be immediately in default of its obligations pursuant to this Contract upon the occurrence of any one or more events of default below (each, an "Owner Event of Default"):
- (a) Owner makes an assignment for the benefit of creditors, admits in writing its inability to pay its debts as they become due, files a voluntary petition in bankruptcy, is adjudicated as bankrupt or insolvent; files a petition or answer seeking for Owner any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any present or future statute, law, or regulation; Owner files any answer admitting or not contesting the material allegations of a petition filed against Owner (as applicable) in any such proceeding, or Owner seeks, consents to, or acquiesces in, the appointment of any trustee, receiver, custodian, or liquidator of Owner or of all or any substantial part of Owner's properties; or Owner's directors, or shareholders take action to dissolve or liquidate the Owner;
- (b) involuntary petitions in bankruptcy are brought against either Owner or an answer proposing the adjudication of Owner as a debtor or bankrupt or proposing Owner's liquidation or reorganization pursuant to any applicable bankruptcy law is filed in any court and Owner consents to or acquiesces in the filing thereof or such petition or answer is not dismissed within sixty (60) days after the filing thereof;
- (c) any material representation or warranty made by Owner herein was materially false or misleading when made and Owner fails to remedy such false or misleading representation or warranty, and to make Contractor whole for any consequences thereof, within thirty (30) days after Owner receives a Notice from the Contractor with respect thereto;
- (d) Owner fails to perform or observe in any respect any provision of this Contract providing for the payment of money that is owed to Contractor under the terms of this Contract (other than payments of money subject to good faith disputes) or any other material provision of this Contract not otherwise addressed in this Section 20.4, and such failure continues for ten (10) days in the case of such a payment obligation or thirty (30) days in the case of any other obligation, except such thirty (30) day period shall be extended if: (i) curing such failure reasonably requires more than thirty (30) days, (ii) Owner commences such cure within such thirty (30) day period and diligently prosecutes such cure, and (iii) such cure is accomplished within seventy-five (75) days, in each case after Owner receives a Notice from Contractor with respect thereto; or
- (e) Owner assigns or transfers this Contract or any right or interest herein, except as expressly permitted under <u>Article 28.</u>
 - 20.5 <u>Contractor's Remedies</u>. In the event of an Owner Event of Default and subject to <u>Article 32</u>, Contractor shall only have the following remedies:
- (a) suspend performance of the Work until Owner cures such Owner Event of Default (in which event, Contractor shall be compensated in the manner specified in

Section 22.3), it being understood that Contractor may at any time it sees fit rescind a suspension under this Section 20.5(a);

- (b) give Owner notice of Contractor's intent to terminate the Contract delivered within ninety (90) days after the date of the Owner Event of Default, specifying a date not more than sixty (60) days after the date of such notice on which the termination shall occur, which termination will be deemed a termination for Owner's convenience; or
- (c) avail itself of any other rights and remedies that may be available to Contractor or its assignees under this Contract and Applicable Law including any legal or equitable remedy to enforce the obligations of Owner under this Contract, subject to the limitations in Section 32.
 - 20.5.1.2 <u>Mitigation of Damages</u>. Each Party shall use reasonable efforts to mitigate its damages in connection with a breach of this Contract by the other Party.

21. EARLY TERMINATION

21.1 General.

- 21.1.1 Owner may in its sole discretion terminate this Contract with or without cause at any time prior to the issuance of NMPRC Approval by giving Notice of termination to Contractor, to be effective upon the receipt of such Notice by Contractor or upon such other termination date specifically identified by Owner therein.
- 21.1.2 Notwithstanding anything to the contrary in this Contract, Owner may terminate this Contract at any time if the action of any Governmental Authority or change in Applicable Law prevents performance by Owner of its obligations hereunder or materially and adversely impacts the economic benefit of this Contract to Owner ("Governmental Action"); provided, however, that Owner shall not be entitled to terminate this Contract pursuant to this Section 21.1. 2 if the applicable Governmental Action is due to a breach by Owner of the terms of this Contract or Applicable Law.
- 21.1.3 If Owner terminates the Work without cause or for any cause other than a Contractor Event of Default specified in Section 20.1, or if this Contract is terminated pursuant to any of Sections 20.5(b), 21.1 or 22.2, then Owner and Contractor shall have the following rights, obligations and duties:
- 21.2 <u>Termination Value</u>. If this Contract is terminated pursuant to Section 21.1, then as compensation for the Work performed through the effective date of termination pursuant to Section 21.1, Owner shall pay to Contractor the Termination Value. In no event shall the amount paid to Contractor exceed the unpaid balance of the Contract Price. Contractor hereby waives and forfeits all other claims for payment and all other damages, including anticipated profits on Work not performed.
- 21.2.1 Cooperation regarding Termination Value. Contractor shall cooperate with Owner reasonably and in good faith to minimize Contractor's expenses associated

with a termination under this Section 21, including taking reasonable action requested by Owner to reduce Subcontractors' cancellation charges in connection with such termination.

- 21.2.2 Assumption of Contractor Contracts following Contractor Event of Default or Governmental Action. Owner shall have the right, but only following the Notice to Proceed Date, at its sole option, to assume and become liable for any obligations that Contractor may have in good faith incurred for its Site personnel and for any written obligations and commitments that Contractor may have in good faith undertaken with third parties in connection with the Work to be performed at the Site; provided, however, that such right shall only apply with respect to a termination for Contractor Event of Default or Governmental Action. If Owner elects to assume any obligation of Contractor as described in this Section 21.1.3, then (a) Contractor shall execute all documents and take all other reasonable steps requested by Owner which may be required to vest in Owner all rights, set-offs, benefits and titles necessary to such assumption by Owner of such obligations described in this Article 21, and (b) Owner shall simultaneously agree to indemnify Contractor against liabilities thereafter arising under the assumed obligations or commitments.
- 21.3 Completion of Work. Upon a termination of this Contract by Owner following a Contractor Event of Default or Governmental Action, Owner may require Contractor to, and Contractor shall (if so required), (a) withdraw from the Site, (b) deliver to Owner all Work completed as of the effective date of such termination, (c) assign to Owner (without recourse to Contractor) such of Contractor's subcontracts as Owner may request (if permitted pursuant to Section 21.2.2), and (d) (to the extent permitted by Contractor's contracts with third parties) deliver or make available to Owner all information, patents, and licenses of Contractor or an applicable third party (including Subcontractors or Vendors) related to the Work reasonably necessary to permit Owner (or Owner's designee) to complete or cause the completion of the Work, and in connection therewith Contractor authorizes Owner and its respective agents to use such information in completing the Work, shall remove such materials, equipment, tools, and instruments used by and any debris or waste materials generated by Contractor in the performance of the Work as Owner (or Owner's designee) may direct, and Owner may take possession of any or all Contractor Deliverables and Site facilities of Contractor related to the Work necessary for completion of the Work (whether or not such Contractor Deliverable and Site facilities are complete).
- 21.4 <u>Claims for Payment</u>. All claims for payment by Contractor under this <u>Article 21</u> must be made within one hundred eighty (180) days after the effective date of a termination hereunder. Owner shall make payments under this <u>Article 21</u> in accordance with <u>Article 7</u>.
- 21.5 <u>Nature of Termination Payments</u>. The payments described in <u>Section 21.1.1</u> are intended to constitute Contractor's sole compensation for: (a) all costs of Equipment and Materials, temporary equipment, labor, transportation, engineering, design and other services relating to Contractor's performance of its obligations under this Contract (including any intellectual property rights licensed under this Contract,

expressly or by implication) provided by Contractor or such Subcontractors or Vendors, (b) all national, state, regional and local taxes, and other sales taxes effective or enacted as of the date of execution of this Contract or thereafter, each as imposed on Contractor or its Subcontractors or Vendors, (c) all other taxes, duties, levies, imposts, fees, or charges of any kind (whether in the United States or elsewhere) arising out of Contractor's or any such Subcontractor's or Vendor's performance, including any increases thereof that may occur during the term of this Contract, and (d) any duties, levies, imposts, fees, charges, and royalties imposed on Contractor or its Subcontractors or Vendors with respect to any such Equipment and Materials, labor, or services provided under this Contract. The taxes covered hereby include occupational, excise, unemployment, ownership, value-added, gross receipts, sales and income taxes and any and all other taxes and duties on any item or service that is part, whether such tax is normally included in the price of such item or service or is normally stated separately, all of which shall be for the account of Contractor. The above-described payments shall not be increased with respect to any of the foregoing items or with respect to any withholdings relating to any of the foregoing items that Owner may be required to make.

21.6 <u>Failure to Obtain Permits</u>. If, within three hundred sixty (360) Days following Owner's issuance of the Notice to Proceed, Owner is unable to obtain all of the Owner Acquired Permits necessary for Contractor to perform the Work, either Party may, upon thirty (30) Days' notice to the other Party, terminate this Contract. Such termination shall, for all purposes hereof, be deemed a termination pursuant to <u>Section 21</u>.

22. SUSPENSION

- 22.1 <u>General</u>. Owner may suspend performance of the Work at any time by giving Notice thereof to Contractor. Such suspension shall continue for the period specified in the suspension Notice. The Project Guaranteed Dates and Contract Price shall be adjusted as provided in <u>Section 22.3</u> (other than for a Suspension for Cause). At any time after the effective date of the suspension, Owner may require Contractor to resume performance of the Work on five (5) days' Notice.
- 22.2 <u>Contractor's Termination Right</u>. If, at the end of the specified suspension period, Owner has not requested a resumption of the Work or has not notified Contractor of any extension of the suspension period (but in no event beyond one hundred eighty (180) days for all such suspensions, other than Suspensions for Cause) Contractor's shall have the right to terminate this Contract as of the expiration of the suspension period and such termination shall, for all purposes hereof, be deemed a termination pursuant to Section 21.
- 22.3 <u>Extension of Time and Compensation Rights</u>. In the case of any suspension under this <u>Article 22</u> or any suspension by Contractor under <u>Section 20.5(a)</u>, other than a Suspension for Cause:
- (a) the Project Guaranteed Dates shall be extended by a period equal to the suspension period, plus a reasonable period for demobilization and remobilization;

- (b) The Contract Price shall be increased by the sum of those Direct Costs (without profit, overhead or contingency) actually, demonstrably and reasonably incurred during the suspension period, to the extent attributable to the suspension, and that are:
- (i) for the purpose of safeguarding and/or storing the Work and the Equipment and Materials at the point of fabrication, in transit, or at the Site;
- (ii) for personnel, Subcontractors, or rented Equipment and Materials, the payments for which, with Owner's prior written concurrence, are continued during the suspension period;
 - (iii) for reasonable costs of demobilization and remobilization;
- (iv) for rescheduling the Work (including escalation for suspension, and penalties or additional payments to Subcontractors for the same); or
- (v) other reasonable Direct Costs related to such suspension including escalation of pricing for Equipment and Materials not ordered at the time of suspension;

less any savings incurred because of such suspension;

- (c) the Project Schedule and the Critical Path Items on the Project Schedule shall be adjusted to account for same; and
- (d) Owner shall pay Contractor the corresponding percentage of a Milestone Payment for the portion of Work relating to the Milestone Payment that was actually and demonstrably completed by Contractor at the time of the suspension, as mutually agreed by the Parties. The balance of any such Milestone Payment shall be paid once the remaining Work thereunder is completed by Contractor.
 - 22.4 <u>Claims for Payment</u>. All claims by Contractor for compensation or extension of time under this <u>Article 22</u> must be made within ninety (90) days after the suspension period has ended and the Work has been either terminated or resumed. Failure of Contractor to make such claim within said period shall be deemed a waiver by Contractor of any such claims.

23. INSURANCE

23.1 General.

(a) Contractor shall procure at its own expense and maintain in full force and effect the minimum insurance coverages and limits as required under Section 23.2, with insurance companies authorized to do business in the State of New Mexico, throughout the performance of the Work under this Contract, commencing with any and all Work performed on Site or off Site in preparation for the Notice to Proceed and Contractor's mobilization at the Site (with the exception that the umbrella/excess liability insurance set forth in Section 23.2.4 and extended completed operations coverage of the commercial general liability coverage set forth in Section 23.2.2 need not commence until Contractor's mobilization at the Site in connection with

the Notice to Proceed) and shall be maintained in force until Final Completion. All policies shall be on an occurrence basis with the exception that the Professional Liability Insurance described in Section 23.2.6 may be written on a claims made form; provided that the policy (a) has a retroactive date prior to the date of the commencement of the Work, and (b) is maintained by Contractor throughout the performance of the Work and for at least three (3) years after Final Completion either through policy renewal or an extended reporting period.

- (b) Owner shall procure at its own expense and maintain in full force and effect as required under this Contract, with insurance companies authorized to do business in the State of New Mexico, the types and limits of insurance as set forth in Section 23.3 and 23.4 and maintained by Owner throughout the performance of the Work and for at least three (3) years after Final Completion either through policy renewal or an extended reporting period.
- (c) Such insurance companies shall be rated by A.M. Best Company as having a financial strength rating of "A-" or better and a financial size category of "VIII" or greater.
- (d) Capitalized terms used in this <u>Article 23</u> and not otherwise defined in this Contract shall have the meanings generally ascribed to them in the commercial insurance industry in the United States.
- (e) Each Party, at its own cost, may purchase any additional insurance it believes necessary to protect its interests.
- (f) Any insurance coverages required below may be satisfied through a combination of primary and excess liability policies.
- To the extent permitted by law, Contractor shall waive on behalf of itself (g) and its insurers all rights to assert claims for any losses, damages, liabilities, and expenses, such expenses to include but not be limited to attorney's fees, against Owner, Owner's subsidiaries and Affiliates along with their respective directors, officers, and employees, to the extent proceeds realized from policies of insurance maintained or required to be maintained in connection with services or products provided under this Contract are applied to such losses, damages, liabilities, and expenses. Each policy of insurance required herein, with the exception of the professional liability insurance required under Section 23.2.6, shall include an endorsement acknowledging such waiver of subrogation. To the extent permitted by law, Owner shall waive on behalf of itself and its insurers all rights to assert claims for any losses, damages, liabilities, and expenses, such expenses to include but not be limited to attorney's fees, against Contractor and its Subcontractors, Contractor's subsidiaries and Affiliates along with their respective directors, officers, and employees, to the extent proceeds realized from policies of insurance maintained or required to be maintained under this Contract by Owner are applied to such losses, damages, liabilities, and expenses. Each policy of insurance required herein shall include an endorsement acknowledging such waiver of subrogation.
 - 23.2 <u>Contractor's Insurance</u>. Contractor shall obtain and maintain in full force and effect the insurance policies specified in this <u>Section 23.2</u>. Any and all deductibles and premiums associated with the policies specified in this <u>Section 23.2</u> shall be assumed by, for the account of, and at the sole risk of Contractor. Each policy of insurance, as

allowed by statute and with the exception of the insurance required under Section 23.2.6, shall waive all of the insurer's rights of recovery under subrogation or otherwise, against Owner and its Affiliates and their respective directors, officers, managers, representatives, agents and employees and any other parties as the Owner may designate.

23.2.1 Workers' Compensation and Employer's Liability Insurance. Contractor shall maintain workers' compensation insurance and such other forms of insurance which Contractor is required to maintain in order to comply with statutory limits in the State of New Mexico or under workers' compensation laws of any applicable jurisdiction in the United States (and any other location in which the Work is to be performed) including USL&H coverage (if any exposure exists), where applicable, and employer's liability (including occupational disease) coverage with limits of at least One Million Dollars (\$1,000,000) per accident for bodily injury by accident and, One Million Dollars for each employee and policy limit for bodily injury by disease. Such insurance shall cover all of Contractor's employees, whether full-time, leased, temporary or casual, who are engaged in the Work.

23.2.2 Commercial General Liability Insurance. Contractor shall maintain commercial general liability insurance written on an occurrence basis and with a combined single limit of at least One Million Dollars (\$1,000,000) per occurrence, Two Million Dollars (\$2,000,000) general aggregate, Two Million Dollars (\$2,000,000) products and completed operations aggregate. Aggregate limits shall reinstate annually, be on a per project basis, dedicated entirely to the project or location for which Work is to be provided under this Contract, and shall not be shared with any other obligations of Contractor. Such insurance shall include coverage for premises/operations liability, products and completed operations liability, personal and advertising injury liability, broad form contractual liability, and independent contractor's liability for Work performed on Site and off Site. With respect to the performance of construction activities, Contractor shall maintain extended completed operations coverage, for at least ten (10) years after Final Completion through an extended reporting period endorsement. Such insurance shall provide severability of interests or cross liability provisions permitting one insured to bring a claim against another insured, and shall be endorsed to include Owner and its Affiliates and their respective directors, officers, managers, representatives, agents and employees or any other parties that Owner may be contractually obligated to include as additional insureds prior to a loss. Owner shall be added as an additional insured with respect to Contractor's ongoing operations through CG 20 10 07 04 or a substitute equivalent form and with respect to Contractor's completed operations through CG 20 37 07 04 or a substitute equivalent form, limited only to the extent required, if applicable, by NMSA 1978 § 56-7-1, as amended. Such additional insured status shall apply regardless of the enforceability of the indemnity provisions in this Contract. Such insurance maintained by Contractor shall be primary with respect to the interest of Owner, and any other insurance or self-insurance maintained by Owner or its Affiliates is in excess and not contributory to Contractor's insurance in all instances regardless of any like insurance that Owner or any of its Affiliates may have.

- 23.2.3 Automobile Liability Insurance. Contractor shall maintain automobile liability insurance (including coverage for owned, non-owned and hired automobiles) covering vehicles used by Contractor in connection with the Work in an amount of at least One Million Dollars (\$1,000,000) combined single limit per occurrence for bodily injury and property damage. Contractor's automobile liability insurance coverage shall contain appropriate no-fault insurance provisions or other endorsements in accordance with Applicable Laws. Such insurance shall be endorsed to include Owner and its Affiliates and their respective directors, officers, managers, representatives, agents, employees or any other parties that Owner may be contractually obligated to include as additional insureds. Owner shall be added as additional insured prior to a loss, limited only to the extent required, if applicable, by NMSA 1978 § 56-7-1, as amended. Such additional insured status shall apply regardless of the enforceability of the indemnity provisions in this Contract. Such insurance maintained by Contractor shall be primary with respect to the interest of Owner, and any other insurance or self-insurance maintained by Owner or its Affiliates is in excess and not contributory to Contractor's insurance policies in all instances regardless of any like insurance coverage that Owner or any of its Affiliates may have.
- 23.2.4 Umbrella or Excess Liability Insurance. Contractor shall maintain up until Final Completion umbrella/excess insurance on an occurrence basis covering itself and its Subcontractors and Vendors against claims in excess of the underlying insurance described in Sections 23.2.2 in the amount of at least Twenty Million Dollars (\$20,000,000) per occurrence, Twenty Million Dollars (\$20,000,000) general aggregate, and Twenty Million Dollars (\$20,000,000) products and completed operations aggregate (with coverage for completed operations to be in place throughout the performance of the Work and for ten (10) years after Final Completion through an extended reporting Aggregate limits shall be on a per project basis, dedicated period endorsement). entirely to the project or location for which Work is to be provided under this Contract, and shall not be shared with any other obligations of Contractor. Insurance coverages and limits required herein should not in any way limit the extent of Contractor's responsibilities and liabilities specified elsewhere in this Contract. Such insurance shall be written as follow-form or with an insurance coverage form that provides coverage that is at least as broad as the primary insurance policies, and shall satisfy the maintenance of the required limits through a combination of umbrella liability and/or excess liability insurance policies.
- 23.2.5 Contractor shall maintain umbrella/excess liability insurance for liabilities not covered under Section 23.2.4, including but not limited to coverage in excess of the automobile liability coverage set forth in Section 23.2.3, the employers liability coverage set forth in Section 23.2.1, and commercial general liability coverage set forth in Section 23.2.2 with respect to the Work performed in connection with the Project before mobilization at the Site in connection with the Notice to Proceed and after Final Completion, with limits of not less than Ten Million Dollars (\$10,000,000) each occurrence, Ten Million Dollars (\$10,000,000) general aggregate, and Ten Million Dollars (\$10,000,000) products and completed operations aggregate. Such insurance shall be written as follow-form or with an insurance coverage form that provides coverage that is at least as broad as the primary insurance policies, and shall satisfy the

maintenance of the required limits through a combination of umbrella liability and/or excess liability insurance policies.

23.2.6 <u>Professional Liability Insurance</u>. Contractor shall secure and maintain, professional liability insurance (errors and omissions) covering financial loss arising from engineering, architectural, construction management, and other design build professional services rendered, required or reasonably inferable from the Statement of Work, with a minimum single limit of Five Million Dollars (\$5,000,000) each claim and Five Million Dollars (\$5,000,000) annual aggregate. Such insurance shall be extended to cover with no sublimit bodily injury and property damage arising from the performance of professional services in connection with the Work where such claims are excluded under the commercial general liability insurance required under <u>Section 23.2.2</u>. This insurance shall include coverage for professional services provided in connection with the Work performed by Contractor, its Subcontractors, and anyone directly or indirectly employed by any of them in connection with the Project unless Contractor can evidence pursuant to <u>Sections 23.5</u> and <u>23.6</u> that insurance in compliance with this <u>Section 23.2.6</u> and <u>Section 23.1</u> is being maintained by each Subcontractor performing such Work.

23.2.7 Pollution Liability Insurance. Contractor shall maintain on behalf of itself and its Subcontractors contractors pollution liability insurance or the equivalent, with a minimum limit of One Million Dollars (\$1,000,000) per occurrence and Two Million Dollars (\$2,000,000) annual aggregate. Such insurance shall include coverage for pollution losses, including but not limited to bodily injury, property damage (including but not limited to clean-up costs), and financial loss arising out of pollution conditions resulting from Contractor's and its Subcontractors' and Vendors' operations and Such insurance shall define pollution completed operations under this Contract. conditions at a minimum as the discharge, dispersal, release, or escape of any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, medical waste and waste materials into or upon land, or any structure on land, the atmosphere or any watercourse or body of water, including groundwater, provided such conditions are not naturally present in the environment in the concentration or amounts discovered. Such insurance shall add Owner and its Affiliates and their respective directors, officers, managers, representatives, agents and employees as an additional insured with respect to Work performed under this Contract (but limited only to the extent required, if applicable, by NMSA 1978 § 56-7-1, as amended). In lieu of Contractor maintaining the insurance for pollution losses arising from the Work on behalf of itself, its Subcontractors and Vendors, and anyone directly or indirectly employed by any of them, Contractor shall evidence pursuant to Section 23.5 and 23.6 that insurance in compliance with this Section 23.2.7 and Section 23.1 is being maintained by each Subcontractor for which the Work involves exposure to pollutions conditions as described above or invasive testing.

23.2.8 <u>Property Insurance</u>. Consistent with its obligations pursuant to <u>Section 24.1(a)</u>, Contractor shall assume the risk of loss for Temporary Work, equipment and materials (stationary or mobile), supplies, tools, and other personal property (including employee tools) (a) belonging to Contractor or to any of its Subcontractors or (b) used

by or on behalf of Contractor or any of its Subcontractors for its performance hereunder which is not intended to become a permanent part of the completed Work. Such Temporary Work, equipment and materials, supplies and other personal property shall be brought to and kept at the Site at the sole cost, risk and expense of Contractor or such Subcontractor, and Owner shall not be liable for loss or damage thereto. It is agreed that Owner shall be held harmless by Contractor and its Subcontractors for any loss or damage to such property and that any property insurance maintained by Contractor and its Subcontractors covering such equipment, supplies and materials shall include a waiver of subrogation precluding any claims being made against the Owner and its Affiliates and their respective directors, officers, managers, representatives, agents and employees and any other parties Owner may be contractually obligated to do so.

- 23.3 Owner's Insurance. Owner shall obtain and maintain in full force and effect the insurance policies specified in this Section 23.3 with respect to Owner's employees.
- 23.3.1 Workers' Compensation Insurance and Employers' Liability Insurance. In accordance with the laws of the State of New Mexico, Owner shall maintain in force workers' compensation insurance for all of its employees. Owner shall also maintain employer's liability coverage in an amount of not less than One Million Dollars (\$1,000,000) per accident and per employee for disease. In lieu of such insurance, Owner may maintain a self-insurance program meeting the requirements of the State of New Mexico along with the required employer's liability insurance.
- Builder's Risk Insurance. Contractor shall provide standard form "All 23.4 Risk" Builders Risk or Installation insurance covering One Hundred Percent (100%) replacement value of property built or installed on a completed value basis covering the Project against loss or damage during the period of construction commencing at the latest of the Notice to Proceed Date or Contractor's mobilization at the Site and expiring upon Substantial Completion of the Project. The insurance shall be endorsed to include (a) replacement cost coverage; (b) delayed completion coverage: (c) property in transit coverage for materials and equipment to be incorporated into the project; (d) permission for partial occupancy or use of the premises; (e) ordinance or law coverage, including (i) coverage for loss to the undamaged portion of the project, (ii) demolition cost coverage, and (iii) increased cost of construction: and (f) a loss payable endorsement naming PNM as a loss payee as their interests may appear. The delayed completion coverage endorsement shall provide on an actual loss sustained basis indemnification for scheduled soft costs, loss of rental income, and loss of gross earnings arising from any delay in the completion of the insured project due to direct physical loss or damage to the insured structures or materials. Insurance proceeds shall be paid to and used by the Party having risk of loss at the time of the claim pursuant to Article 24 and any disputes between Owner and Contractor regarding the application of insurance proceeds shall be addressed in accordance with Article 33.
- 23.5 <u>Subcontractor Insurance</u>. Contractor shall require each of its Subcontractors and Vendors performing work at the Site, to obtain, maintain and keep in force during the time during which they are involved in performance of the Work,

insurance coverage in accordance with the insurance requirements of Contractor set forth in Sections 23.2.1, 23.2.2, and 23.2.3. To the extent Subcontractor and Vendor is performing engineering, architectural, construction management, or other design build professional services, Subcontractors and Vendors shall maintain coverages and limits set forth in Section 23.2.6. To the extent permitted by law, Contractor shall determine the appropriate levels of insurance to be maintained by its Subcontractors and Vendors and, with the exception of the professional liability insurance required under Section 23.2.6, shall cause said Subcontractors and Vendors to waive on behalf of themselves and its insurers all rights to assert claims for any losses, damages, liabilities, and expenses, such expenses to include but not be limited to attorneys fees, against Owner, Owner's subsidiaries and Affiliates along with their respective directors, officers, and employees, to the extent proceeds realized from policies of insurance maintained or required to be maintained in connection with services or products provided under their respective Subcontracts are applied to such losses, damages, liabilities, and expenses. Each policy of said Subcontractor and Vendor required herein shall include an endorsement acknowledging such waiver of subrogation.

- 23.6 Contractor Certificates. No later than (i) thirty (30) Days prior to the commencement of performance of the Work, including any and all Work performed on Site or off Site in preparation for the Notice to Proceed, and (ii) thirty (30) Days prior to Contractor's mobilization at the Site in connection with the Notice to Proceed, and thereafter prior to the renewal of any policy required herein, Contractor shall furnish to Owner certificates of insurance from each insurance carrier showing that the above required insurance for the Project is in full force and effect, the amount of any deductibles and retentions, and all limits of liability including sublimits. Each policy shall provide that it will not be canceled or non-renewed until the expiration of at least thirty (30) days (or ten (10) days in the case of cancellation due to non-payment of premiums) after Notice of such cancellation or non-renewal has been furnished to Owner. Contractor shall also be responsible for obtaining certificates of insurance for the insurances required to be maintained by such Subcontractors and Vendors in accordance with Section 23.5 from each of the Subcontractors and Vendors before such Subcontractor or Vendor is allowed to commence Work at the Site and provide such certificates to the Owner upon request. Contractor and its Subcontractors and Vendors shall evidence all insurance required in Section 23.2 on the Accord 25 Certificate of Liability Insurance form.
- 23.7 <u>No Limitation of Liability</u>. Subject in all respects to the terms of <u>Article 32</u>, the insurance coverages required of Contractor set forth in <u>Section 23.2</u> shall in no way affect, nor are they intended as a limitation of, Contractor's liability with respect to its performance of the Work.

24. RISK OF LOSS OR DAMAGE

- 24.1 Risk of Loss for Project Before Substantial Completion.
- (a) Prior to Substantial Completion (and subject to Section 24.1(c)), Contractor assumes risk of loss for, and full responsibility for the cost of replacing or repairing

any damage to, the Project and all Equipment and Materials, and maintenance equipment (including temporary materials, equipment and supplies) which are purchased by Contractor for permanent installation in or for use during construction of the Project or otherwise supplied or to be supplied by Contractor or its Subcontractors, regardless of whether Owner has title thereto under this Contract;

- (b) If prior to Substantial Completion any portion of the Project is lost or damaged, then Contractor shall replace or repair any such loss or damage and complete the Work.
- (c) However, if any portion of the Project is lost or damaged before Substantial Completion of the Project due to any negligent or intentional act or omission of Owner, any Affiliate of Owner or any Operating Personnel or Owner's Separate Contractor, or anyone employed by any of them, or anyone for whose acts such Person may be liable, then Owner shall bear the cost and expense of replacing or repairing such loss or damage.
 - 24.2 Risk of Loss for Project After Substantial Completion. Generally, but subject to and without limiting Contractor's obligations expressly set forth in this Contract arising from and after Substantial Completion, Owner shall bear the risk of loss for, and full responsibility for, the cost of replacing or repairing any damage to the Project from and after Substantial Completion of the Project. However, if any portion of the Project is lost or damaged after Substantial Completion of the Project due to any negligent or intentional act or omission of Contractor, any Affiliate of Contractor or any Subcontractor or Vendor, or anyone directly or indirectly employed by any of them, or anyone for whose acts such Person may be liable, then Contractor shall bear all of the cost and expense of replacing or repairing such loss or damage.

25. INDEMNIFICATION

- 25.1 <u>By Contractor</u>. Contractor shall defend, indemnify, and hold harmless Owner and any Person acting for or on behalf of Owner, and each of their respective employees, agents, partners, Affiliates, shareholders, directors, officers, and assigns (each an "Owner Indemnitee"), from and against all Losses directly or indirectly arise out of or result from third party claims for the following:
- (a) any negligent, reckless, or otherwise tortious act or omission (including strict liability) during the performance of its obligations under this Contract, or any curative action under any warranty following performance of the Work, of Contractor or any Affiliate thereof, any Subcontractor, or anyone directly or indirectly employed by any of them, or anyone for whose acts such Person may be liable, but only to the extent not caused or resulting from the negligence, act or omission of the Owner Indemnitees, Operating Personnel, Owner's Separate Contractors, or any other third party for which Contractor is not responsible;
- (b) personal injury or death of a third party, but only to the extent not caused or resulting from the negligence, act or omission of the Owner Indemnitees, the Operating Personnel, Owner's Separate Contractors or any other third party for which Contractor is not responsible;

- (c) physical damage to property on or off the Site owned by a third party but only to the extent not caused or resulting from the negligent act or omission of the Owner Indemnitees, the Operating Personnel, Owner's Separate Contractors or any other third party for which Contractor is not responsible;
- (d) Contractor Liens filed by Contractor, Subcontractors, Vendors or any other Person performing any Work;
- (e) any fines or penalties imposed on Owner Indemnitees by a Governmental Authority to the extent involving the failure of Contractor or any of its Subcontractors to comply with, or the failure of the Project, as designed, constructed and completed by Contractor, to comply with, or be capable of operating in compliance with, the terms and conditions of Applicable Laws or the conditions or provisions of Applicable Permits but only to the extent not caused or resulting from the negligent act or omission of the Owner Indemnitees, the Operating Personnel, Owner's Separate Contractors or any other third party for which Contractor is not responsible;
- (f) the use, presence, or existence of Hazardous Materials at the Site that were brought onto, released, disturbed or generated at the Site by Contractor or any Subcontractor (other than Hazardous Materials, such as lubricants, intended to be used in or to comprise a portion of the Project in accordance with Applicable Law), including, without limitation:
- (i) the storage, transportation, processing or disposal of Hazardous Materials for which Contractor is responsible;
- (ii) any environmental condition caused by Hazardous Materials for which Contractor is responsible that is actionable under any Applicable Law;

provided, that Contractor shall not have any liability for the discharge, release or migration of Hazardous Materials located at the Site on the Effective Date unless Contractor actually knew such Hazardous Materials were located on the Site where discharged or released or where Contractor's acts or omissions caused the discharge, release or migration of same.

- (g) the breach or default of any obligation, representation or warranty of Contractor under this Contract to the extent such Losses arise out of or result from any demand, claim, litigation, action, suit or proceeding by a Person other than either of the Parties or Owner Indemnitees; and
- (h) the failure of Contractor to pay, as and when due, all lawfully imposed taxes, duties, levies, assessments, tariffs, imposts, fees or charges or any kind (together with any and all interest, penalties, additions to tax and additional amounts imposed with respect thereto) imposed by any Governmental Authority for which Contractor is obligated to pay pursuant to the terms of this Contract.
 - 25.2 <u>By Owner.</u> Owner shall defend, indemnify, and hold harmless Contractor and any Person acting for or on behalf of Contractor and each of their respective employees, agents, partners, Affiliates, shareholders, directors, officers, and

assigns (each a "Contractor Indemnitee") from and against all Losses that directly or indirectly arise out of or result from third party claims for the following:

- (a) any negligent, reckless, or otherwise tortious act or omission (including strict liability) by Owner or any of Owner's Separate Contractors during the performance of Owner's obligations under the Contract or any Affiliate thereof, including the performance of any Owner's Separate Contractor, but only to the extent not caused or resulting from the negligent act or omission of the Contractor Indemnitees or any other third party for which Owner is not responsible;
- (b) personal injury or death of a third party, but only to the extent not caused or resulting from the negligent act or omission of the Contractor Indemnitees or any other third party for which Owner is not responsible;
- (c) any fines or penalties imposed on Contractor Indemnitees by a Governmental Authority to the extent involving the failure of Owner or any of its Owner's Separate Contractors to comply with the terms and conditions of Applicable Laws or the conditions or provisions of Applicable Permits but only to the extent not caused or resulting from the negligent act or omission of the Contractor Indemnitees, Subcontractors or any other third party for which Owner is not responsible;
- (d) the use, presence, or existence of Hazardous Materials at the Site that were either at the Site prior to the date Contractor commences Work at the Site or brought onto or released or generated at the Site by Owner or any Owner's Separate Contractor (other than Hazardous Materials, such as lubricants, intended to be used in or to comprise a portion of the Project in accordance with Applicable Law), including, without limitation:
- (i) the storage, transportation, processing or disposal of Hazardous Materials for which Owner is responsible;
- (ii) any environmental condition caused by Hazardous Materials for which Owner is responsible that is actionable under any Applicable Law;
- (e) the breach or default of any obligation, representation or warranty of Owner under this Contract to the extent such Losses arise out of or result from any demand, claim, litigation, action, suit or proceeding by a Person other than either of the Parties or Contractor Indemnitees; and
- (f) the failure of Owner to pay, as and when due, all taxes, duties, levies, assessments, tariffs, imposts, fees or charges or any kind (together with any and all interest, penalties, additions to tax and additional amounts imposed with respect thereto) imposed by any Governmental Authority for which Owner is obligated to pay pursuant to the terms of this Contract.
 - 25.3 <u>Actions by Governmental Authorities</u>. Contractor shall defend, indemnify, and hold the Owner Indemnitees harmless from and against all claims by any Governmental Authority claiming taxes based on gross receipts or on income of Contractor, any of its Subcontractors, or any of their respective agents or employees with

respect to any payment for the Work made to or earned by Contractor, any of its Subcontractors, or any of their respective agents or employees under this Contract and any fines imposed by a Governmental Authority due to Contractor's performance under this Contract. Owner shall defend, indemnify, and hold the Contractor Indemnitees harmless from and against all claims by any Governmental Authority claiming taxes based on gross receipts or on income of Owner, any Owner's Separate Contractors, or any of their respective agents or employees with respect to any payment made to or earned by Owner, any Owner's Separate Contractors, or any of their respective agents or employees under this Contract and any fines imposed by a Governmental Authority other than due to Contractor's or Subcontractors' performance under this Contract.

25.4 Patent Infringement and Other Indemnification Rights. Contractor shall defend, indemnify, and hold harmless the Owner Indemnitees against all Losses arising from any Intellectual Property Claim (subject, however, to Section 25.6 and 25.7); provided, Contractor shall not be responsible for indemnifying or holding harmless the Owner Indemnitees to the extent that a particular design, process or product of a particular manufacturer or manufacturers is required or specified by Owner or where the copyright violations are contained in drawings, specifications or other documents prepared or provided by Owner or others for whom Owner is responsible. Without limiting the provisions of Section 25.5, if Owner provides Notice to Contractor of the receipt of any such claim, Contractor shall, at its own expense, settle or defend any such Intellectual Property Claim and pay all damages and costs awarded in such Intellectual Property Claim against Owner and (a) procure for Owner, or reimburse Owner for procuring, the permanent right to continue using the infringing service, Equipment and Materials, or other Work, as the case may be: (b) modify the infringing service, Equipment and Materials, or other Work, as the case may be, so that the same becomes non-infringing; or (c) replace the infringing service, Equipment and Materials, or other Work, as the case may be, with noninfringing service, Equipment and Materials, or other Work, as the case may be. If Owner is enjoined from completing the Project or any part thereof, or from the use, operation, or enjoyment of the Project or any part thereof, as a result of such claim or legal action or any litigation based thereon, then Contractor shall promptly use commercially reasonable efforts to have such injunction removed and to take one or more of the actions under the preceding clauses (a), (b) or (c), provided, that in no case shall Contractor take any action which adversely affects Owner's continued use and enjoyment of the applicable service, Equipment and Materials, or other Work, as the case may be, without the prior written consent of Owner. Owner's acceptance of the Contractor Deliverables or supplied Equipment and Materials shall not be construed to relieve Contractor of any obligation hereunder. Notwithstanding anything in this Contract to the contrary, Contractor's obligation to indemnify, defend and hold Owner harmless against infringement of Intellectual Property Claims does not apply to: (i) Equipment, Materials or other Work is provided according to Owner's or Owner's Separate Contractors design or instructions, and (ii) the Equipment, Materials or other Work being used for the Project for which this Contract is executed where such Equipment, Materials or other Work is not being used by the Owner for its intended use. Any Equipment, Materials or other Work not manufactured or developed by Contractor or its Affiliates will be limited to the indemnity, if any, of the manufacturer, supplier or vendor of said Equipment, Materials or other Work.

25.5 Claim Notice. An indemnitee hereunder shall provide Notice to the indemnifying party, within ten (10) Days after receiving written notice of the commencement of any legal action or of any claims or threatened claims against such indemnitee in respect of which indemnification may be sought pursuant to the foregoing provisions of this Article 25 or any other provision of this Contract providing for an indemnity (such notice, a "Claim Notice"). The indemnitee's failure to give, or tardiness in giving, such Claim Notice will reduce the liability of the indemnifying party by the amount of damages attributable to such failure or tardiness, or to the extent the indemnifying Party is prejudiced by such failure or late notice, but shall not otherwise relieve the indemnifying party from any liability that it may have under this Contract. In case any such claim or legal action shall be made or brought against an indemnitee hereunder and such indemnitee shall notify (by sending a Claim Notice) the indemnifying party thereof, the indemnifying party shall have the right, by Notice given to the indemnitee within ten (10) Days after the date of the applicable Claim Notice, and if applicable, after notifying and consulting with any insurers who may provide claims coverage for the claim subject to such Claim Notice, to assume and control the defense of the claim that is the subject of such Claim Notice, including the employment of counsel selected by the indemnifying party after consultation with the indemnitee and the indemnifying party shall pay all expenses of the conduct of such defense. indemnitee shall have the right to employ separate counsel in any such proceeding and to participate in (but not control) the defense of such claim, but the fees and expenses of such counsel shall be borne by the indemnitee unless the indemnifying party shall agree otherwise; provided, however, if the named parties to any such proceeding (including any impleaded parties) include both the indemnitee and the indemnifying party, the indemnifying party requires that the same counsel represent both the indemnitee and the indemnifying party, and representation of both parties by the same counsel would be inappropriate due to actual or potential differing interests between them, then the indemnitee shall have the right to retain its own counsel at the reasonable cost and expense of the indemnifying party. If the indemnifying party shall have failed to assume or diligently prosecute the defense of any claim in accordance with the provisions hereof, then the indemnitee shall have the absolute right to control the defense of such claim and the fees and expenses of such defense, including reasonable attorneys' fees of the indemnitee's counsel and any amount determined to be owed by the indemnitee pursuant to such claim shall be borne by the indemnifying party, provided that the indemnifying party shall be entitled, at its expense, to participate in (but not control) such defense. Subject to the foregoing, (a) the indemnifying party shall control the settlement of all claims, in coordination with any insurer as required under the applicable insurance policies set forth in Article 23, as to which it has assumed the defense; provided, however, that (i) such settlement shall include a dismissal with prejudice of the claim and an explicit and unconditional release from the party bringing such claim or other proceedings of all indemnitees; and (ii) the indemnifying party shall not conclude any settlement without the prior approval of the indemnitee, which approval shall not be unreasonably withheld; and (b) except as provided in the preceding sentence concerning the indemnifying party's failure to assume or to diligently prosecute the defense of any claim, no indemnitee seeking reimbursement pursuant to the foregoing indemnity shall, without the prior written consent of the indemnifying party, settle, compromise, consent to the entry of any judgment in or otherwise seek to terminate any action, claim, suit,

investigation or proceeding for which indemnity is afforded hereunder unless such indemnitee reasonably believes based on written opinion of legal counsel that the matter in question involves potential criminal liability. The indemnitee shall provide reasonable assistance to the indemnifying party when the indemnifying party so requests in connection with such legal action or claim, including executing any powers-of-attorney or other documents required by the indemnifying party with regard to the defense or indemnity obligations, and any expenses in connection therewith in excess of the indemnitee's ordinary administrative costs and de minimus expenses shall be at the indemnifying party's expense.

- 25.6 <u>Limitations</u>. With respect to <u>Section 25.1</u>, <u>Section 25.2</u> and <u>Section 25.3</u> the Parties intend that principles of comparative negligence will apply, and each Party shall bear the proportionate cost of any loss, damage, expense, and liability attributable to that Party's negligence, recklessness or otherwise tortious conduct.
- 25.7 Owner's Intellectual Property Indemnity. Owner shall indemnify and hold harmless Contractor from and against any and all Claims, (involving (i) any Owner modification, use or reuse of the Work or any Contractor Deliverable other than as permitted under this Contract, (ii) use of the BESS in combination with any other products, materials or equipment not expressly authorized by the Contractor in circumstances where the infringement would have been avoided by the use of the BESS not so combined; or (iii) any modifications or changes made to the BESS other than by the BESS Vendor in circumstances where the infringement would have been avoided without such modifications or changes.

26. TREATMENT OF CONFIDENTIAL INFORMATION

- 26.1 <u>Confidentiality Obligation</u>. Except as otherwise expressly agreed in writing by the other Party, and except as otherwise agreed in <u>Section 26.2</u>, each receiving Party shall (a) keep strictly confidential and take reasonable precautions to protect against the disclosure of (i) the terms and conditions and other facts with respect to this Contract and (ii) all Confidential Information, and (b) use all Confidential Information solely for the purposes of performing its obligations under this Contract and not for any other purpose; provided that a Party may disclose facts, terms and conditions referred to in clause (a) above and Confidential Information to those of its Representatives who need to know such information for the purposes of performing the receiving Party's obligations under this Contract if, but only if, prior to being told of such matters or being given access to Confidential Information, such Representatives are informed of the confidentiality thereof and the requirements of this Contract and are directed to comply with the requirements of this Contract. Each Party will be responsible for any breach of this Contract by its Representatives.
- 26.2 <u>Disclosures to Governmental Authorities</u>. Provided that the disclosing Party complies with the notice requirements set forth in <u>Section 26.3.1</u>, the disclosing Party may disclose the terms, conditions or other matters relating to this Contract and all Confidential Information furnished or made available by the other Party pursuant to or in connection with this Contract:

- (a) to duly authorized Governmental Authorities, including without limitation the Federal Energy Regulatory Commission, the NMPRC and the Securities and Exchange Commission; and
- (b) to the extent necessary to comply with any Applicable Law or any discovery or data request of a party to any proceeding pending before any of the foregoing.

Neither Party shall have no liability whatsoever to the other Party in the event of any unauthorized use or disclosure by a Governmental Authority of any Confidential Information or other information disclosed to any of them by the disclosing Party.

26.3 Compelled Disclosure.

- 26.3.1 Notice of Disclosure Requirement. If any Party or its respective Representatives become subject to a requirement of an Applicable Law or other request of a Governmental Authority to disclose any Confidential Information, or any part thereof, or any other matter required by Section 26.1 to be kept confidential, such Party will promptly notify the other Party of the existence, terms, and circumstances of such requirements so that such other Party may seek an appropriate protective order or waive compliance with the provisions of this Contract.
- 26.3.2 <u>Limitation of Disclosure</u>. If Contractor complies with <u>Section 26.3.1</u> but it or its Representatives are compelled, in the opinion of its legal counsel, to make disclosure in response to a requirement described in <u>Section 26.3.1</u> or else stand liable for contempt or suffer other penalty, the compelled person may disclose only that portion of the Confidential Information which is legally required and will exercise commercially reasonable efforts to obtain reliable assurance that confidential treatment will be accorded to the disclosed Confidential Information or other matter.
- 26.4 Ownership and Return of Information. All Confidential Information shall be and remain the property of the Party providing it. No right or license is granted to Contractor or any third party respecting the use of such Confidential Information by virtue of this Contract, except to the extent required for Contractor's performance of its obligations hereunder. Upon the request of a Party, all Confidential Information, including all written or recorded copies thereof, shall be promptly returned to the requesting Party or destroyed, and if destroyed, such destruction shall be certified in writing to the requesting Party by a responsible officer of the other Party; provided, however, the receiving Party may retain one copy of the disclosing Party's Confidential Information solely for audit compliance purposes and the receiving party shall (i) notify the requesting Party in writing promptly following any disclosure of such Confidential Information and (ii) return such copy to the requesting Party promptly following the conclusion of the applicable audit compliance procedures.
- 26.5 <u>Enforcement</u>. The Parties agree that irreparable damage could occur if the confidentiality obligations under this Contract were not performed in accordance with its terms or were otherwise breached. Accordingly, a Party will be entitled to seek an injunction or injunctions to prevent breaches of this <u>Article 26</u> and to enforce specifically

its provisions in any court of competent jurisdiction, in addition to any other remedy to which the Party may be entitled by law or equity.

27. INVENTIONS AND LICENSES

- 27.1 Work Product. Any and all material and information prepared, accumulated or developed by Contractor, any Subcontractor or their respective employees or representatives, including, without limitation, documents, drawings, designs, calculations, maps, plans, workplans, text, filings, estimates, manifests, certificates, books, specifications, sketches, notes, reports, summaries, analyses, data models and samples, including summaries, extracts, analyses and preliminary or draft materials developed in connection therewith, prepared, or to be prepared, exclusively in connection with the Work (hereinafter, collectively "Work Product") shall become the sole property of Owner without any further consideration to be provided therefor, whether or not delivered by Contractor; provided, that notwithstanding anything to the contrary the BESS Vendor shall remain the sole and exclusive owner of any and all patents, trademarks, copyrights, mask work rights, trade secrets and any other intellectual or proprietary rights associated with the BESS or any parts or derivations thereof as well as of all drawings, specifications, documents, software and engineering and other data furnished or to be furnished by the BESS Vendor in connection with the Work (which drawings, specifications, documents, software and engineering constitute "instruments of service" in connection with the Work). Contractor shall deliver the Work Product, or any portion thereof, to Owner on request (or pursuant to the Project Schedule, if delivery of such Work Product is provided therein), together with any other requested materials and/or equipment furnished to Contractor by Owner hereunder.
- 27.2 <u>Contractor Patents and Proprietary Licenses</u>. Contractor further agrees to grant and hereby grants to Owner an irrevocable, perpetual, fully-paid, non-exclusive, royalty-free license under all patents, copyrights and other proprietary information of Contractor related to or incorporated into the Work now or hereafter owned or controlled by Contractor to the extent reasonably necessary:
- (a) for the operation, maintenance, repair, or alteration of the Project or any subsystem or component thereof designed, specified, or constructed by Contractor under this Contract; or
- (b) to the extent such patents, copyrights and other proprietary information of Contractor are related to any specific design concepts developed primarily for the Project;

provided, that with respect to the BESS Vendor none of the foregoing is intended or represented to be suitable for reuse on extensions of the Project or any other project. Any such reuse and any modification will be at Owner's sole risk and without liability or legal exposure to the Contractor and Owner shall indemnify Contractor for same pursuant to Section 25.7.

Contractor shall cause each Subcontractor to grant a corresponding license to Owner. No other license in such patents and proprietary information is granted pursuant to this Contract.

27.3 <u>Software Licenses</u>. To the extent Contractor purchases any software that is necessary for the continued operation of the Project after Substantial Completion, Contractor shall register the Owner as the licensee of such software with the applicable Vendor, and Contractor shall be responsible for any registration, renewal or transfer costs. If any of the licenses for required software are not transferable from Contractor to Owner, then Contractor shall obtain fully functional versions of the applicable software for Owner. Such software shall be licensed to Owner, and any costs incurred to obtain the software license shall be at Contractor's sole expense. In addition, if the BESS includes any embedded software (i.e., firmware), Contractor shall procure for Owner a limited, non-exclusive, non-sublicensable, non-transferable (except to subsequent owners of the BESS) license to use such software solely in the operation of the BESS. Except for the foregoing, no license or other right to the intellectual property rights related to such software is granted or implied hereby. For the avoidance of doubt, Owner is not granted any license to modify the BESS or such software.

28. ASSIGNMENT

Contractor understands that this Contract is personal to Contractor. Subject to the other terms of this Section 28, Contractor shall have no right, power, or authority to assign or delegate this Contract or any portion thereof, either voluntarily or involuntarily, or by operation of law. Contractor's attempted assignment or delegation of any of its Work hereunder in contravention of the terms of this Section 28 shall be null and void and shall be ineffective to relieve Contractor of its responsibility for the Work assigned or delegated. Notwithstanding the foregoing, (i) prior to the issuance by Owner of the Notice to Proceed, subject to Owner's written approval (such approval to be in Owner's sole discretion), Contractor may assign its rights and obligations under this Contract to any of Contractor's qualified Affiliates under a form of assignment acceptable to Owner. Contractor may employ Subcontractors on the terms and conditions set forth herein to perform the Work; provided, however, that the use of Subcontractors shall not in any way relieve Contractor of its responsibilities and obligations under this Contract. Owner may, without Contractor's consent, assign all (but not part) of this Contract to an Affiliate of Owner subject to a customary assignment and assumption agreement under which such assignee shall agree to be bound by the terms and conditions of this Contract.

29. HAZARDOUS MATERIALS

Contractor shall not and shall not permit any of its Subcontractors, directly or indirectly to, permit the manufacture, storage, transmission, use or presence of any Hazardous Materials on the Site except in accordance with Applicable Laws and as required to complete the Work. Contractor shall not and shall not permit any of its Subcontractors to release, disturb, discharge or otherwise dispose of any Hazardous Materials on the Site. Contractor shall conduct and complete all investigations, studies, sampling and testing of the Site in connection with the potential presence of Hazardous Materials at the Site in connection with the Work to the extent required under any Applicable Laws, and Contractor shall promptly comply with all lawful orders and directives of all Governmental Authorities regarding Applicable Laws. If Contractor discovers, encounters or is notified of the existence of any contaminated materials or Hazardous Materials at the Site, then:

- (a) Contractor shall promptly notify Owner thereof and cordon off the area containing such contaminated materials or Hazardous Materials;
- (b) if Contractor or any Subcontractor is responsible for the placement of or discharge of such Hazardous Materials, then Contractor shall remove such Hazardous Materials from the Site and remediate the Site as required by Applicable Law at Contractor's sole cost and expense; and
- (c) to the extent Contractor or any Subcontractor is responsible for the placement of or discharge of such Hazardous Materials, then Contractor shall not be entitled to any extension of time or additional compensation hereunder for any delay or costs incurred by Contractor as a result of the existence of such Hazardous Materials.

To the extent neither Contractor nor any Subcontractor is responsible for the placement or discharge of such Hazardous Materials, then Contractor shall be entitled to an appropriate Change in Work which will entitle Contractor to an adjustment to the Contract Price and/or Project Guaranteed Dates as a result of the original scope of Work being delayed or made more difficult by the existence of such Hazardous Materials as if such an event constituted an Excusable Condition in accordance with Article 17.

30. NON-PAYMENT CLAIMS

Provided Owner is current with its payment obligations under this Contract, (x) Contractor shall not directly or indirectly create, incur, assume or suffer to be created by it or any Subcontractor, employee, laborer, materialman or other supplier of goods or services any right of retention, mortgage, pledge, assessment, security interest, lease, advance claim, levy, claim, lien, charge or encumbrance on the Work, the Site, the Project or any part thereof or interest therein (each a "Contractor Lien"), and (y) Contractor hereby waives any such Contractor Lien to the extent allowed by Applicable Laws and Contractor shall keep the Site, the Work and all Subcontractor equipment and materials free of Contractor Liens. Provided Owner is current with its payment obligations under this Contract, excluding payment for any disputed items, Contractor shall promptly pay or discharge, and discharge of record, any such Contractor Lien or other charges which, if unpaid, might be or become a Contractor Lien. Contractor shall promptly notify the Owner of the assertion of any Contractor Lien. Provided Owner is current with its payment obligations under this Contract, excluding payment for any disputed items, Contractor shall indemnify and hold harmless Owner and its Affiliates (collectively, the "Lien Indemnitees") and defend each of them from and against any and all Losses arising out of any and all claims for payment, whether or not reduced to a lien or mechanics lien, filed by Contractor or any Subcontractors, or other persons performing any portion of the Work, including reasonable attorneys' fees and expenses incurred by any Lien Indemnitee in discharging any Contractor Lien. If any Lien Indemnitee becomes aware of any Contractor Lien, then such Lien Indemnitee may so notify Contractor in writing, and provided Owner is current with its payment obligations under this Contract, excluding payment for any disputed items Contractor shall then (a) satisfy such Contractor Lien, or (b) defend the Lien Indemnitees against any such Contractor Lien and provide assurances of payment as described in the last sentence of this Article 30. If Contractor does not promptly, and in any event within thirty (30) days after such Notice, satisfy such Contractor Lien, give such Lien Indemnitee reasons in writing that are reasonably satisfactory to such Lien Indemnitee for not causing the release of such Contractor Lien, or contest such Contractor Lien in accordance with the provisions of the last sentence of this Article 30, and Owner is current with its payment obligations under this Contract, excluding payment for any disputed items, then any Lien Indemnitee shall have the right, at its option, after written notification to Contractor, to cause the release of, pay, or settle such Contractor Lien, and Owner at its sole option may (i) require Contractor to pay, within thirty (30) days after invoice by Owner, or (ii) offset against any amount due or to become due to Contractor (in which case Owner shall, if it is not the applicable Lien Indemnitee, pay such amounts directly to the Lien Indemnitee causing the release, payment, or settlement of such liens or claims), all reasonable, and documented costs and expenses incurred by the Lien Indemnitee in causing the release of, paying, or settling such Contractor Lien, including reasonable attorneys' fees, and other expenses. Contractor shall have the right to contest any such Contractor Lien, provided it first provides to Owner a bond or other assurances of payment reasonably satisfactory to Owner in the amount of such Contractor Lien and in form and substance reasonably satisfactory to Owner.

31. NOTICES AND COMMUNICATIONS

31.1 Requirements. Any Notice pursuant to the terms and conditions of this Contract shall be in writing and deemed effective as follows: (a) delivered personally, upon delivery; (b) sent by certified mail, return receipt requested, upon certified receipt; (c) sent by a recognized overnight mail or courier service, with delivery receipt requested, upon receipt; or (d) sent by confirmed facsimile transmission or electronic mail, when acknowledged by recipient as having been received in full, to the following addresses:

If to Contractor:

Affordable Solar Installation, Inc. 4840 Pan American Fwy NE Albuquerque, NM 87109 Attn: Kevin Bassalleck

If to Owner:

Public Service Company of New Mexico

2401 Aztec Rd, NE Albuquerque, NM 87107 Facsimile: (505) 241-4147 Attn: Kevin Mataczynski

With a copy to:

PNM Resources, Inc. Alvarado Square, MS 0805 Albuquerque, NM 87158 Facsimile: (505) 241-2338

Attn: Madonna Bixby, Corporate Counsel

- 31.2 <u>Effective Time</u>. Notices shall be effective as set forth in <u>Section 31.1</u>.
- 31.3 <u>Representatives</u>. Any technical or other communications pertaining to the Work shall be with the Parties' designated representative. Each Party shall notify the other in writing of the name of such representatives. The Project Manager and the Project Representative each shall have knowledge of the Work and be available at all reasonable times for consultation. Each Party's representative shall be authorized on behalf of such Party to administer this Contract, agree upon procedures for coordinating the efforts of the Parties, and, when appropriate, to furnish information to or receive information from the other Party in matters concerning the Work.

32. LIMITATIONS OF LIABILITY AND REMEDIES

32.1 <u>Limitations on Damages</u>. Except for the liquidated damages specified under <u>Sections 16.1</u>, <u>16.2</u> and <u>21.1</u>, and notwithstanding anything else in this Contract to the contrary, no Party shall be liable to the other Party (or any of its Affiliates or any of its or their respective employees, agents, shareholders, members, directors, or officers) for any loss of profits, loss of revenue, or loss of use of the Project or any indirect, incidental consequential, exemplary, special or punitive damages arising out of this Contract, regardless of whether any such damages arise out of breach of contract, guaranty or warranty, tort, product liability, indemnity, contribution, strict liability or any other legal theory; provided, however, that the foregoing shall not limit a Party's obligation to pay damages that may be awarded to a third party in connection with any Loss to the extent that such Party is obligated to indemnify the other Party for such Loss under this Contract.

32.2 <u>Limitations on Contractor's Liability.</u>

- In no event shall Contractor's 32.2.1 Liability Under Contract. aggregate liability to Owner or any of Owner's Affiliates in connection with this Contract, the Work and the Project, whether arising in contract, warranty or guaranty, tort, product liability, indemnity, contribution, strict liability or otherwise, be greater in the aggregate than an amount equal to the Liability Cap; provided, however, that nothing contained in this Section 32.2 or in any other provision of this Contract shall be construed to limit Contractor's liability (a) with respect to vitiation of any insurance policy required to be maintained by Contractor under Article 23 that results from the gross negligence, willful misconduct or fraud on the part of Contractor or any Subcontractor, (b) with respect to any gross negligence, willful misconduct or fraud on the part of Contractor or any Subcontractor, (c) with respect to any of Contractor's indemnity obligations under Article 25 to the extent any such obligation is covered and paid by Contractor's insurance required to be carried under this Contract, or (d) for failure to satisfy the Minimum Performance Criteria and Functional Guarantees.
- 32.2.2 <u>Liquidated Damages</u>. In no event shall Contractor's liability for Substantial Completion Delay Liquidated Damages and the Buy-Down Amount exceed, in the aggregate, the Maximum Contractor Aggregate Liquidated Damages.

Notwithstanding any of the foregoing, the limitations of this <u>Section 32.2.2</u> shall not limit Owner's remedies for any other breach of this Contract other than a failure to achieve Substantial Completion on or before the Substantial Completion Guaranteed Date, or the failure to satisfy the Performance Guarantees.

32.3 Limitation on Owner's Liability.

- 32.3.1 <u>Liability Under Contract</u>. In no event shall Owner's liability in connection with this Contract, the Work and the Project, whether arising in contract, warranty or guaranty, tort, product liability, indemnity, contribution, strict liability or otherwise, be greater in the aggregate than one hundred percent (100%) of the Contract Price (as the same may increase from time to time in accordance with the terms of this Contract); provided, however, that nothing contained in this Section 32.3 or in any other provision of this Contract shall be construed to limit Owner's liability (a) with respect to vitiation of any insurance policy required to be maintained by Owner that results from the gross negligence, willful misconduct or fraud on the part of Owner, or (b) with respect to any gross negligence, willful misconduct or fraud on the part of Owner, any Operating Personnel or Owner's Other Contractors.
- 32.3.2 <u>Exclusions from Limitation on Liability</u>. Notwithstanding anything herein to the contrary, for purposes of determining whether the limit on Owner's liability pursuant to this Contract has been exceeded, liabilities of Owner to Contractor covered by insurance required to be carried by Owner pursuant to <u>Article 23</u> (except deductibles paid by Owner) shall be excluded from the calculation of Owner's aggregate liability.
- 32.4 <u>Releases, Indemnities and Limitations</u>. Except as expressly set forth herein, releases, assumptions of and limitations on liabilities and limitations on remedies expressed in this Contract as well as waivers of subrogation rights shall apply even in the event of fault, negligence, or strict liability of the Party released or whose liability is limited or assumed or against whom the right of subrogation is waived and shall extend to the officers, directors, employees, licensees, agents, partners, or entities of such partners such as partners and related entities.
- 32.5 <u>Representations</u>. Each Party makes no representations, covenants, warranties, or guarantees, express or implied, other than those expressly set forth herein and in the Exhibits hereto.

33. DISPUTES

33.1 <u>Referral to Senior Management</u>. Any and all controversies, disputes or differences between the Parties to this Contract, if not amicably settled by the Parties within thirty (30) days following written notice of dispute, shall be referred to executive officers (senior vice president or higher) of the Parties for resolution. In the event the dispute has not been resolved within thirty (30) days following referral to senior management, or such longer period as the Parties may mutually agree, then either Party,

upon ten (10) days' notice to the other Party, may submit the dispute to arbitration pursuant to Section 33.2.

- 33.2 Arbitration. In the event the Parties are unable to resolve the dispute pursuant to Section 33.1 and the aggregate amount of the claim (including counterclaims) is equal to or less than Two Million Dollars (\$2,000,000), then the dispute shall be resolved by binding arbitration. Such arbitration shall be governed by the then-prevailing Construction Rules of the American Arbitration Association. A Party electing to submit a dispute to arbitration shall give the other Party a timely demand for arbitration and shall file the demand and the requisite fee with the American Arbitration Association. Such demand for arbitration shall describe the nature of the dispute and the amount in controversy. The Parties shall then jointly select a single arbitrator in accordance with the Construction Arbitration Rules of the American Arbitration Association. The arbitration shall be held in Albuquerque, New Mexico. Discovery shall be by agreement of the Parties or as ordered by the arbitrator, provided that the Parties shall comply with the following minimum discovery requirements: at least ninety (90) calendar days prior to the arbitration, the Parties shall exchange copies of all exhibits to be used at the arbitration, all Contract documents in any way related to the dispute, a list of witnesses and a summary of the matters as to which each witness is expected to testify. A reasonable number of depositions may be taken. The arbitrator shall decide the dispute in strict accordance with the Contract and by providing a reasoned award within thirty (30) days of the conclusion of the hearings. The award entered by the arbitrator shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. All costs of arbitration (including the fees of the arbitrator) shall be split equally by the Parties, except that the Parties shall be responsible for payment of their own attorney fees, expert fees, preparation fees, travel costs, witness fees, photocopying and similar costs. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law of the State of New Mexico. Indemnity claims are not subject to mandatory arbitration.
- 33.3 Other Matters. If the aggregate amount of the claims in dispute exceeds Two Million Dollars (\$2,000,000), then the Parties may agree in writing to submit the matter to binding arbitration before three arbitrators appointed in accordance with the Construction Arbitration Rules of the American Arbitration Association; however, failing such an agreement to arbitrate within thirty (30) days of a Party submitting the claim in writing to the other Party, either Party may bring an action only in the federal or state courts of New Mexico. This Section 33.3 shall have no application to claims, or requests for additional compensation or time, if those requests have not been properly submitted to the applicable Party pursuant to the terms of this Contract. An arbitration demand shall include all claims and disputes then ripe for the dispute.
- 33.4 Work to Continue. Unless otherwise agreed in writing, Contractor shall diligently carry on the Work during the pendency of any dispute proceeding so long as all undisputed amounts payable to Contractor hereunder have been paid. If it shall be determined, either by agreement of the Parties or through any dispute proceeding, that any payment of the Contract Price or any other amount payable to Contractor hereunder shall have been unduly paid by Owner to Contractor, Contractor shall within twenty-one

- (21) days after the final decision is made refund the amount of such excess payment together with interest thereon at the lesser of LIBOR in effect from time to time plus four percent (4.0%) per annum and the highest rate permitted by Applicable Law, from the day following the date of such payment (as so determined) until the date of full refund to Owner. If it shall be determined, either by agreement of the Parties or through any dispute proceeding, that any payment of the Contract Price or other amount payable to Contractor hereunder shall have been withheld by Owner, Owner shall pay or cause to be paid to Contractor within twenty-one (21) days after the final decision is made such withheld amount together with interest thereon at the lesser of the LIBOR in effect from time to time plus four percent (4.0%) per annum and the highest rate permitted by Applicable Law, from the day following the date on which such payment is determined to have been withheld (as so determined) until the date of payment in full to Contractor. As a condition precedent to Contractor's agreement under this Section 33.4 to continue to perform its Work in the case where Owner is disputing any amount, Owner agrees to escrow with a third party reasonably acceptable to Contractor said amounts or otherwise provide another form of payment security reasonably acceptable to Contractor until such time as the dispute concerning payment is resolved.
- 33.5 <u>Claims</u>. Each Party shall grant reasonable audit rights to the other Party with respect to all relevant documentation pertaining to any claim under this Contract.

34. LEGAL AND REGULATORY COMPLIANCE AND NMPRC APPROVAL

- 34.1 <u>Governmental Approvals</u>. Each Party shall timely and lawfully procure and maintain in good standing, at its own cost and expense, all Governmental Approvals relative to their respective obligations under this Contract and shall timely and properly pay its respective charges and fees in connection therewith.
- 34.2 <u>NMPRC Approval</u>. The obligations of the Parties hereunder shall be conditioned upon NMPRC Approval in connection with (i) the execution and performance of this Contract; (ii) the execution and performance of the CCN; and (iii) abandonment of Owner's ownership interests in San Juan Generating Station, including any requested financing or other cost recovery method, and any waivers as set forth in Owner's request for approval of this Contract, the CCN or the abandonment filing (collectively, "Requested Actions"). In particular:
- (a) Owner agrees to use commercially reasonable efforts to request and obtain NMPRC Approval of the Requested Actions, and Contractor agrees to cooperate with and assist Owner in these efforts as Owner may reasonably request.
- (b) NMPRC Approval shall be considered received when the NMPRC issues a final written order that is no longer subject to appeal or further proceedings on remand (i) approving this Contract, including authorization to recover the costs of the Requested Actions; or (ii) approving the Requested Actions in part or subject to conditions or substantial

modifications, provided that each of Contractor and Owner agrees, subject to its reasonable discretion, to accept those conditions, modifications or such partial approval as sufficient (collectively, "NMPRC Approval").

- (c) If the NMPRC disapproves any of the Requested Actions, then this Contract shall automatically terminate ten (10) Days after the date of such action by the NMPRC and be of no further force or effect, with no further obligation or liability of either Party to the other Party or to any other Person, except obligations incurred prior to termination.
- (d) If any NMPRC Approval is issued as described in Section 19.3.b(ii) above, then the Parties shall meet and confer no later than fifteen (15) Days after the date of the NMPRC Approval order regarding whether Owner or Contractor wish to amend this Contract to address any conditions or substantial modifications or not to accept any partial or conditioned approval or substantial modification of this Contract. If the Parties are unable to mutually agree on any amendments to this Contract to address such NMPRC Approval order, then this Contract shall automatically terminate ten (10) Days after the date on which the Parties conferred and be of no further force or effect, with no further obligation or liability of either Party to the other Party or to any other Person, except obligations incurred prior to termination, unless Owner and Contractor mutually agree in writing within such ten (10) Day period that this Contract remain in effect.
- (e) If the NMPRC has not, for any reason, entered an order upon the request for approval by September 30, 2020 ("Regulatory End Date"), then the Parties shall meet and confer no later than fifteen (15) Days after the Regulatory End Date regarding a potential extension of the Regulatory End Date. If the Parties are unable to mutually agree to an extension of the Regulatory End Date, then this Contract shall automatically terminate ten (10) Days after the date on which the Parties conferred and be of no further force or effect, with no further obligation or liability of either Party to the other Party or to any other Person, unless Owner and Contractor mutually agree in writing within such ten (10) Day period that this Contract remain in effect.

35. MISCELLANEOUS

- 35.1 <u>Severability</u>. The invalidity or unenforceability of any portion or provision of this Contract shall in no way affect the validity or enforceability of any other portion or provision hereof. Any invalid or unenforceable portion or provision shall be deemed severed from this Contract and the balance of the Contract shall be construed and enforced as if the Contract did not contain such invalid or unenforceable portion or provision. If any such provision of this Contract is so declared invalid, the Parties shall promptly negotiate in good faith new provisions to eliminate such invalidity and to restore this Contract as near as possible to its original intent and effect.
- 35.2 <u>Governing Law</u>. This Contract shall be governed by the internal laws of the State of New Mexico, excluding its conflict of laws provisions.
- 35.3 <u>Survival of Termination</u>. The provisions of this Contract which by their nature are intended to survive the termination, cancellation, completion or expiration of

the Contract including, but not limited to, any express limitations of or releases from liability shall continue as a valid and enforceable obligation of the Party notwithstanding any such termination, cancellation, completion or expiration.

- 35.4 <u>No Oral Modification</u>. No oral or written amendment or modification of this Contract (including a Change in Work Form accepted under <u>Article 17</u>) by any officer, agent, or employee of Contractor or Owner, either before or after execution of this Contract, shall be of any force or effect unless such amendment or modification is in writing and is signed by any officer of the Party (or of the managing member or managing partner of the Party on behalf of the Party) to be bound thereby; provided, however, that neither Party shall have any duty to confirm the identity, title or office of any signatory of the other Party, and each Party may rely on the signature of a natural person whom such Party reasonably believes to have the authority to sign on behalf of the other Party.
- 35.5 <u>No Waiver</u>. Either Party's waiver of any breach or failure to enforce any of the terms, covenants, conditions, or other provisions of this Contract at any time shall not in any way affect, limit, modify, or waive that Party's right thereafter to enforce or compel strict compliance with every term, covenant, condition, or other provision hereof, any course of dealing or custom of the trade notwithstanding. All waivers must be in writing and signed on behalf of Owner and Contractor in accordance with <u>Section 34.4</u>.
- 35.6 <u>Headings for Convenience Only</u>. The headings contained herein are not part of this Contract and are included solely for the convenience of the Parties.
- 35.7. <u>Third Party Beneficiaries</u>. The provisions of this Contract are intended for the sole benefit of Owner and Contractor and there are no third party beneficiaries hereof, other than assignees contemplated by the terms herein.
- 35.8 Other Assistance. Contractor shall to the extent reasonably requested by Owner, assist Owner in dealing with Suppliers, customers, and Governmental Authorities in any and all matters relating to the Work (including any interconnection facilities).
- 35.9 <u>Further Assurances</u>. Owner and Contractor will each use commercially reasonable efforts to implement the provisions of this Contract, and for such purpose each, at the request of the other, will, without further consideration, promptly execute and deliver or cause to be executed and delivered to the other such assistance, or assignments, consents or other instruments in addition to those required by this Contract, in form and substance satisfactory to the other, as the other may reasonably deem necessary or desirable to implement any provision of this Contract.
- 35.10 Record Retention and Audit Rights Contractor will maintain complete and accurate records concerning the Work and all related transactions for at least three (3) years from the Final Completion Date. Contractor's obligation to maintain complete and accurate records will include, but is not limited to, records relating to compliance with Applicable Laws relating to employee certifications and qualifications, drug and alcohol use, environmental, and, if applicable, United States Department of Transportation requirements. At any time, but not later than three (3) years after final payment under the

EPC Contract, PNM may make such audit of Contractor's records and substantiating material as deemed necessary by PNM. Each payment made will be subject to reduction and refund to PNM, or offset on future payments due Contractor, to the extent of amounts which are found by PNM, and not otherwise disputed by Contractor, not to have been properly payable or to have been overpaid, and will also be subject to increase and payment to Contractor for underpayments not otherwise disputed by PNM to the extent of any amounts which are found by PNM to have been underpaid. Upon request by PNM, Contractor will use commercially reasonable efforts to require its Subcontractors to insert a clause containing all the provisions of this Section in all subcontracts to permit PNM to make identical audits and inspections of the records of all Subcontractors involved in performance of the work.

- 35.11 <u>Binding on Successors, Etc..</u> Subject to <u>Article 28</u>, this Contract shall be binding on the Parties hereto and on their respective successors, heirs and assigns.
- 35.12 Merger of Prior Contracts. This Contract supersedes any other agreement, whether written or oral, that may have been made or entered into between Owner and Contractor or by any office or officer of such Party relating to the Project or the Work. This Contract and Exhibits hereto constitute the entire agreement between the Parties with respect to the Project, and there are no other agreements or commitments with respect to the Project except as set forth herein.
- 35.13 <u>Counterpart Execution</u>. This Contract may be executed by the Parties hereto in any number of counterparts (and by each of the Parties hereto on separate counterparts), each of which when so executed and delivered shall be an original, but all such counterparts shall together constitute but one and the same instrument.
- 35.14 <u>Set-Off</u>. Either Party may at any time, but shall be under no obligation to, set off any and all sums due from the other Party under this Contract against sums due to such Party hereunder where the owing Party has been invoiced therefor but has not paid such invoice following notice of such failure and expiration of the applicable cure period.
- 35.15 <u>Independent Contractor</u>. Contractor is an independent contractor, and nothing contained herein shall be construed as constituting any relationship with Owner other than that of owner and independent contractor, or as creating any relationship whatsoever between Owner and Contractor's employees. Neither Contractor nor any of its employees is or shall be deemed to be an employee of Owner.

35.16 Public Statements.

(a) Without the prior written consent of Owner not to be unreasonably withheld, (i) Contractor shall make no public announcement or release any information concerning Owner, the Project, this Contract or its business relationship with Owner, to any member of the public, press, business entity or any Governmental Authority (except as required by Applicable Laws); and (ii) Contractor shall not, and shall cause its Subcontractors, Vendors, suppliers and agents not to, engage in advertising, promotion or publicity containing non-public information concerning this Contract or the Work, or make public use of any Owner

identification in any circumstances related to this Contract or otherwise. "Identification" means any corporate name, trade name, trademark, service mark, insignia, symbol, logo or any other product, service or organization designation, or any specification or drawing owned by Owner or its Affiliates or any representation thereof.

- (b) Without limiting the generality of the foregoing, Contractor acknowledges and agrees that Owner shall have the right to control media access to the Site and responses to media inquiries regarding the Project or any emergency or other incident at the Site, including without limitation, incidents involving personal injury, property damage or operational events.
 - 35.17 Gratuities, Anti-Kickback and False Claims Provisions. Contractor shall not, under any circumstances, extend any gratuity or special favor to employees of PNM that might be reasonably constructed as an attempt to influence the recipients in the conduct of their official duties. Contractor agrees to abide by the Anti-Kickback Act of 1986, 41 U.S.C.A. § 51, et seq., which prohibits any person from (1) providing, attempting to provide or offering to provide any kickback; (2) soliciting, accepting, or attempting to accept any kickback; or (3) including, directly or indirectly, the amount of any kickback in the cost of work charged to PNM by the Contractor. It is also agreed that Contractor will not engage the services of any individual who has been convicted after September 29, 1988, or for a period of five (5) years after the date of conviction, of fraud or any other felony arising out of a contract with the Federal Government. Such person(s) is (are) prohibited from working in a management or supervisory capacity, serving as a consultant, or serving on the board of directors.

(REMAINDER OF PAGE INTENTIONALLY LEFT BLANK)

IN WITNESS WHEREOF, the Parties hereto have caused this Engineering, Procurement, and Construction Contract to be executed as of the date and the year first above written.

OWNER:

PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation

By: Thomas Fallgren	
Its: Vi-16A45E858C2C4B9	eneration

CONTRACTOR:

AFFORDABLE SOLAR INSTALLATION, INC.

a New Mexico corporation

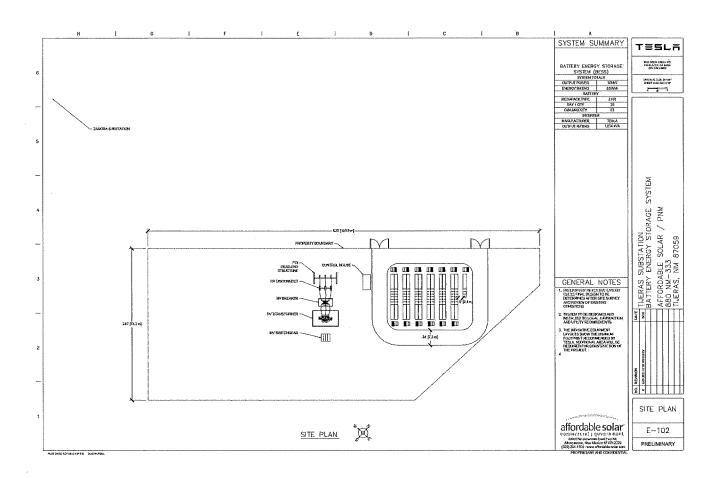
[SIGNATURE PAGE TO ENGINEERING, PROCUREMENT, AND CONSTRUCTION CONTRACT]

EXHIBIT A

STATEMENT OF WORK AND SPECIFICATIONS

Exhibit A consists of technical specifications for the Project, including technical design requirements and interface to the Project Substation, requirements for procurement of site equipment, and requirements relating to commissioning, testing and placing the Project in service. This exhibit is not included in the record as it is voluminous and burdensome to produce. Exhibit A is available for inspection subject to any restrictions on disclosure of certain information due to NERC Critical Electric Infrastructure Information requirements.

EXHIBIT A-1One Line Diagram - Confidential



EPC ATTACHMENT BMILESTONE PAYMENT SCHEDULE

Respondent:	Affordable Solar Installation, Inc.
Project/Site:	All presented PNM sites; See individual project pricing for total cost

Provide proposed milestones for each month after Notice to Proceed with milestones generally representing completion of activities, not commencement.

Month after NTP Date	Milestone	Percent of Total Contract Invoiced	Cumulative Percent Paid	Monthly Invoice (\$)
0	Notice to Proceed	10%	10%	
1				
2	Design Package Complete			
3	Major Equipment (BESS & GSU / MV Xfmr) POs	25%	35%	
4				
5				
6				
7				
8				
9				
10				
11				
14	100% BESS Delivery	45%	80%	
15	Mechanical Completion	10%	90%	
16	Substantial Completion	5%	95%	
17	Final Completion	5%	100%	
18				
19				
20				
21				
22				

EXHIBIT C

OWNER ACQUIRED PERMITS

Permit/Approval/Surveys	Agency
All other Applicable Permits/approvals/ surveys as required by Governmental Authorities not listed under Exhibit C-2 to the Agreement. These may include: • Land use/zoning approvals	As required
 Clean Water Act permits, including National Pollutant Discharge Elimination System (NPDES) permits associated with construction activities (Owner coverage) Fugitive dust permits (Owner coverage) 	
National Environmental Policy Act compliance	
Archaeological and biological surveys	
Building permits (if applicable)	
	•

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		PNM Exh
Permit/Approval	Agency	Page
Required Permits/Approvals:	As required	
National Pollutant Discharge Elimination		
System (NPDES) permits associated with construction activities (Contractor coverage)		
Fugitive dust permit (Contractor coverage)		
Grading permits		
Fence permits		
Access permits		
Trailer permits, and associated drinking water and wastewater permit (if necessary)		
New Mexico Contractor's license number		
Fuel storage tank permit (Contractor coverage)		
OSHA permit (Contractor coverage)		

EXHIBIT D

CONTRACTOR RATE SCHEDULE

Office staff:

Engineering: \$180

Engineering Support: \$80

PM: \$120

Quality Management: \$165

Field staff:

General Superintendent: \$95

Field Admin: \$35 Electricians: \$55 Electrical Helpers: \$25 Construction Foreman: \$68

Field SCADA and Electrical Engineer: \$210

Electrical Supervisor: \$90 Concrete Foreman: \$54 Concrete Finisher: \$41 General Laborer: \$27 Mechanical Supervisor: \$55 QA/QC: Technician \$45 Mechanical Technician: \$45 Materials Handler: \$38

Heavy Equipment Operator: \$60 Shipping and Receiving Specialists: \$35

Surveyor Lead: \$100 Surveyor: \$45

UAS/Remote Pilot: \$125

UAS Assistant Technician and report writer: \$85

Commissioning Foreman: \$95 Commissioning Supervisor: \$75 Commissioning Technician: \$40

O&M:

Management: \$85 Lead Electrician: \$75 Electrical Helpers: \$45 Monitoring: \$50

QA/QC Technician: \$55

EXHIBIT E

CHANGE IN WORK FORM

Contract:			
Change In Work #:	[•]		
Date of Change In Work:	[•]		
Construction Agreement, date	following change to the Engineering, Procurement and d as of [•], (the "Agreement"), by and between Owner and d terms used but not defined herein shall have the respective nent.		
The changes to the Agreement that are described below (collectively the applicable Change In Work) are considered an amendment to the Agreement. With the exception of the Change In Work, this Change In Work Form does not relieve Owner or Contractor of their responsibilities and obligations described in the Agreement or otherwise modify the rights of Owner or Contractor under the Agreement. The below adjustments to the Agreement terms will constitute a full and complete settlement for the Change In Work which is the subject of this Change In Work Form, unless otherwise provided in the detailed description below.			
Detailed description of the rec	quested Change In Work and reason for request:		
Detailed description of the eff	ect of the Change In Work on the Agreement:		
,			

Description of attached documentation the work other than a change in the Cournous.":	establishing the Change In Work cost of performing ntract Price. If there is no change in cost, state
Description of the change in the Contract	Deigo
Description of the change in the Contract	
The original Contract Price is: \$ [
The change in the Contract Price	is: \$ [●] ling the Change In Work set forth herein) is: \$ [●]
•	ge in Contract Price is indicated on the attached Schedule 1.
	B
set forth below. If there is no change is Completion Guaranteed Date, state "none	the Items and Substantial Completion Guaranteed Date are in the Work Schedule, Milestone Items and Substantial Schedule, Milestone Items and Schedule, Milestone Items a
	ranteed Date (taking into consideration the Change In Work sen
Requested By:	Accepted and Agreed To:
By:	By:
Name:	Name:
Title:	Title:

Schedule 1 to Change In Work Form

Method used in determining the change in Contract Price

Details to be provided with Change in Work form

EXHIBIT F

FORM OF CONTRACTOR'S INVOICE

[Date	1		
[Nam [Addı	e of Contractor] ress]		
Attent	tion:		
Gentle	emen:		
Contr. betwe	act (as amended, supper en Contractor and Pul	uant to Article 7 of the Engineering elemented or modified from time to lic Service Company of New Mex], 201[_] ("Contract").	to time, the "Contract") by and
	s otherwise defined h	erein, all capitalized terms used in terms in the Contract.	n this Certificate shall have the
1. and d	The undersigned is a eliver this Certificate o	duly authorized representative of Contractor.	Contractor, authorized to execute
2.	The following is a su	mmary of the current status of the C	Contract account:
		Original Contract Price: Adjustments to Contract Price: Contract Price to Date: Amount of Payments that Contractor Has Received to	\$ \$ \$
		Date:	\$
suppo	actor or any of its offic	Il material documents and supportions or employees and submitted to on in connection with the Work, talescent	Owner and Engineer and in direct
4.	The Work is being po	erformed in accordance with the Cor	ntract, except
5. shall montl	include all necessary	Work, as particularly set forth in documentary evidence, was co. The aggregate amount of the Mile bunt of the Milestone Payments for	impleted through the end of the estone Payments for such Work is

received payments is \$ The aggregate amount of Milestone Payments for which Contractor is entitled to be paid is \$
6. The amount of this Contractor's Invoice set forth above, is not (in part or otherwise) attributable to Work which has been rejected by Owner or Contractor or which otherwise constitutes or relates to a Subcontractor's application for payment, billings or invoices which Contractor disputes or for any other reason does not intend to pay.
7. There are no known mechanics' or materialmen's liens outstanding at the date of this Contractor's Invoice, all due and payable bills with respect to the Work have been paid to date or are included in the amount requested in the current application, and, except for such bills not paid but so included, there is no known basis for the filing of any mechanics' or materialmen's liens on the Project or the Work except as described below, and all required releases required to be obtained pursuant to the terms of the Contract have been obtained in such form as to constitute an effective release of lien (corresponding to payments received by them) under the laws of the State of New Mexico (copies of which are attached hereto and incorporated herein by this reference). Contractor, or a Subcontractor, has actually performed and Contractor has not been paid for the Work covered by this Contractor's Invoice.
8. Contractor has paid all sales and use taxes due and owing to any Governmental Authority related to all Equipment and Materials incorporated into the Project.
9. Attached as <u>Exhibit F-1</u> through <u>F-4</u> hereto are all applicable Conditional Waivers and Releases Upon Progress Payment and Unconditional Waivers and Releases Upon Progress Payment prepared by Contractor and all applicable Unconditional Waivers and Releases Upon Progress Payment and all Conditional Waivers and Releases Upon Progress Payment from each Subcontractor in accordance with <u>Sections 7.1-7.4</u> , as applicable.
10. Work uncertified from the Contractor's Invoice dated, 20 has been completed (except as set forth in the last sentence of this paragraph), and any disputes concerning less than full certification have been resolved by written agreement among Owner, Contractor and the Engineer, a copy of which resolution is attached as Exhibit F-6 hereto, and Contractor is entitled to a payment which includes:
11. Contractor has delivered the Monthly Progress Report prepared pursuant to <u>Section 8.6</u> of the Contract.
IN WITNESS WHEREOF, the undersigned has executed this Certificate on the date first above written.
By: Project Manager

EXHIBIT F-1

STATE OF NEW MEXICO
COUNTY OF
Conditional Waiver and Release Upon Progress Payment
WHEREAS, Public Service Company of New Mexico ("Owner") and [] ("Contractor") have entered into that certain Engineering, Procurement and Construction Contract, dated as of [], 20[] (the "Contract");
WHEREAS, the undersigned is required to provide this Conditional Waiver and Release Upon Progress Payment pursuant to the terms of Article 7 of the Contract.
Capitalized terms used but not defined herein shall have the meanings given to them in the Contract.
By executing and submitting its interim payment application and the lien waiver below, in consideration for the payment described in the lien waiver below, and for the purpose of inducing the Owner to make this interim payment, the undersigned, for itself, its employees, subcontractors, sub-subcontractors, mechanics, materialmen and laborers, does hereby represent and warrant as follows:
1. <u>All Parties Paid.</u> The undersigned has been paid all amounts owed for all labor, Equipment and Materials, and services furnished to the Project through the effective date of the date of the undersigned's previous application for payment), and that all parties supplying labor, services, Equipment and Materials, to it in connection with the Project have been paid, or will be paid in accordance with the terms of the applicable subcontracts and/or purchase orders, and Applicable Law, including the New Mexico Prompt Payment Act, for all labor, services, Equipment and Materials furnished with relation to the Project.
2. <u>Waiver Of Claims</u> . Conditioned only on the receipt of the sum reflected in Paragraph 4 below, the undersigned waives and releases any and all claims, causes of action, suits, damages, judgments, demands of any kind, character and description, whether known or unknown, against [the Contractor, the Contractor's surety] [delete if Contractor is executing this lien waiver], the Owner, any construction lender or funds, and their respective directors, officers, principals, partners, employees, agents, subsidiaries, parent and related firms, successors and assigns, arising out of work performed, labor furnished, Equipment and Materials, or services provided, and acts or omissions occurring, prior to the effective date of the interim lien waiver below, with the exception of those claims described below in an amount not to exceed the stated amount:
\$ \$
\$

or by those supplying labor, Equipment an and Vendors. The undersigned acknowled decision to fund the interim progress paym action to cancel and discharge any such lie the Property or the improvements thereon.	ges that this re lent described	presentation is material to the Owner's herein, that it will take prompt and full
4. <u>Conditional Waiver Of Lien Rights.</u> Materials, or services (permitting, engine with the permitting, engineering, procu Equipment and Materials for the [insert fact more particularly described as follows:	ering, procure rement, const	ruction, and the installation of the
····		(the "Property")
(Add property legal description or street add	dress)	
Conditionally only upon the receipt of the s undersigned waives and releases any and al through the date of (the outpose the foregoing described Property of Materials, or services (permitting, engineer undersigned, or furnished to or at the reimprovement of the Property or the perform for the Work through the date of application for payment).	date of the un on account of ring, procurem equest of the mance of the W	and labor, materials, Equipment and labor, materials, Equipment and lent and construction) furnished by the undersigned, in connection with the look described herein or in the Contract
Given under hand and seal this	day of	, 201
Contractor, Subcontractor, or Vendor	_	
By:	_	
Printed Name:		
Its:	_	
Sworn and subscribed before me this day of, 201	_	
Notary Public My Commission Expires:	_	

No Pending Liens. The undersigned represents and warrants that no mechanic's and

materialmen's liens, or any other type of lien claim, has been filed against the Project, the Work, the Property, the Site or the improvements thereon by it or any of its Subcontractors or Vendors,

EXHIBIT F-2

STATE OF NEW MEXICO
COUNTY OF
Unconditional Waiver and Release Upon Progress Payment
WHEREAS, Public Service Company of New Mexico ("Owner") and [] ("Contractor") have entered into that certain Engineering, Procurement and Construction Contract, dated as of [], 20[] (the "Contract");
WHEREAS, the undersigned is required to provide this Unconditional Waiver and Release Upon Progress Payment pursuant to the terms of Article 7 of the Contract.
Capitalized terms used but not defined herein shall have the meanings given to them in the Contract.
By executing and submitting its interim payment application and the waiver below, in consideration for the payment described in the lien waiver below, and for the purpose of inducing Owner to make this interim payment, the undersigned, for itself, its employees, subcontractors, sub-subcontractors, mechanics, materialmen and laborers, does hereby represent and warrant as follows:
1. All Parties Paid. The undersigned has been paid all amounts owed for all labor, Equipment and Materials, and services furnished to the Project through the effective date of (the date of the undersigned's previous application for payment), and that all parties supplying labor, services, Equipment and Materials to it in connection with the Project have been paid, or will be paid in accordance with the terms of the applicable subcontracts and/or purchase orders, and Applicable Law, including the New Mexico Prompt Payment Act, for all labor, services, Equipment and Materials furnished with respect to the Project.
Waiver Of Claims. The undersigned waives and releases any and all claims, causes of action, suits, damages, judgments, demands of any kind, character and description, whether known or unknown, against [the Contractor, the Contractor's surety] [delete if Contractor is executing this lien waiver], the Owner, any construction lender or funds, and the Project, and their respective directors, officers, principals, partners, employees, agents, subsidiaries, parent and related firms, successors and assigns, arising out of Work performed, labor furnished, Equipment and Materials or services provided, and acts or omissions occurring, prior to the effective date of the interim waiver below, with the exception of those claims described below in an amount not to exceed the stated amount:
\$ \$

3. <u>No Pending Liens</u>. The undersigned represents and warrants that no mechanic's and materialmen's lien, or any other type of lien claim, has been filed against the Project, the Work,

the Site or the improvements thereon by it or any of its Subcontractors or Vendors, or by those supplying labor, Equipment and Materials, or services through such Subcontractors and Vendors. The undersigned acknowledges that this representation is material to the Owner's decision to fund the interim progress payment described herein, that it will take prompt and full action to cancel and discharge any such lien now unknown to it and filed, or to be filed, against the Property or the improvements thereon, and that it will continue to hold harmless the Owner on account of any Losses, expenses or reasonable attorneys' fees incurred as a result of its failure to do so.

4. <u>Unconditional Waiver Of Lien Right</u> and Materials, or services (permitting, engire with the permitting, engineering, procur Equipment and Materials for the [insert fact more particularly described as follows:	neering, procurement and rement, construction,	nd construction) in connection and the installation of the
(Add property legal description or street add	(maga)	(the "Property")
(Add property legal description of street add	1688)	
The undersigned waives and releases any a claims through the date of for payment) upon the foregoing describe Equipment and Materials or services (enging the undersigned, or furnished to or at the improvement of the Property or the perform for the Work through the date of application for payment).	_ (the date of the under ed Property and Proje neering, procurement an request of the undersi- tance of the Work descri-	rsigned's previous application ct on account of any labor, and construction) furnished by gned, in connection with the ribed herein or in the Contract
Given under hand and seal this	_ day of	, 201
Contractor, Subcontractor, or Vendor	_	
By:		
Printed Name:	_	
Its:	-	
Sworn and subscribed before me this day of, 201		
Notary Public My Commission Expires:	_	

EXHIBIT F-3

STATE OF NEW MEXICO
COUNTY OF
Conditional Waiver and Release Upon Final Payment
WHEREAS, Public Service Company of New Mexico ("Owner") and [] ("Contractor") have entered into that certain Engineering, Procurement and Construction Contract, dated as of [], 20[] (the "Contract");
WHEREAS, the undersigned is required to provide this Conditional Waiver and Release Upon Final Payment pursuant to the terms of Article 7 of the Contract.
Capitalized terms used but not defined herein shall have the meanings given to them in the Contract.
In consideration for the final payment described in the lien waiver below, and with the knowledge that the representations herein will be relied on by Owner to make final payment, the undersigned, for itself, its employees, subcontractors, sub-subcontractors, mechanics, materialmen and laborers, does hereby represent and warrant as follows:
1. All Parties Paid. The undersigned has been paid all amounts owed for all Equipment and

- and Materials, services or labor furnished to the Project through the effective date of (the date of the undersigned's previous application for payment), and that all parties supplying labor, Equipment and Materials, services to it in connection with the Project have been paid, or will be paid in accordance with the terms of the applicable subcontracts and/or purchase orders and Applicable Law, including the New Mexico Prompt Payment Act, for all labor, services, Equipment and Materials furnished with respect to the Project.
- No Pending Lien Claims. The undersigned represents that it has not filed or allowed to be filed, or that it has fully and effectively cancelled of record, mechanic's and materialmen's liens against the Site, the Project, or the Property identified below. The undersigned waives and releases any and all mechanic's and materialmen's claims of lien filed against the Site, the Project, or the Property identified below, and authorizes the Owner to file and pursue, in the undersigned's name, any and all documents or actions necessary to discharge and cancel any such lien of record. To the extent that the Owner takes any reasonable action in order to cancel or discharge any lien filed by the undersigned, the undersigned agrees that it shall be fully responsible for all Losses, reasonable attorneys' fees and other costs incurred in so doing.
- Waiver Of Claims. Conditioned only on the receipt of the sum reflected in Paragraph 6 3. below, the undersigned waives and releases any and all claims, causes of action, suits, damages,

(the "Property")

judgments, demands of any kind, character and description, when [the Contractor, the Contractor's surety] [delete if Contractor is Owner, any construction lender or funds, and their respective partners, employees, agents, subsidiaries, parent and related arising out of work performed, labor furnished, Equipment and with the exception of those claims described below in an amamount:	executing this lien waiver], the e directors, officers, principals, firms, successors and assigns, Materials, or services provided,
	\$ \$
4. <u>Authorization</u> . The undersigned warrants that it is the so herein, that it has not sold, assigned or conveyed such claims individual whose signature appears below has personal knowled authorized and qualified to make these representations on behalf	to any other party, and that the lge of these matters and is fully
5. <u>Scope Of Release</u> . The representations and release cocovenants and operate, and are effective with respect to, all lab Materials provided by or through the undersigned, under any agreement, and with Equipment and Materials, or services to be furnished with respect Project or the Property.	bor, services, or Equipment and reement, whether oral or written, h respect to any further labor,
6. <u>Conditional Waiver And Release Of Lien Rights.</u> The Equipment and Materials, or services (permitting, engineering, procurement, consthe Equipment and Materials for the [insert facility name] in and more particularly described as follows:	procurement and construction) in struction, and the installation of

Given under hand and seal this	day of	, 201
Contractor, Subcontractor, or Vendor		
By:		
Printed Name:		
Its:	***************************************	
Sworn and subscribed before me this		
day of, 201		
Notary Public	*****	
My Commission Expires:		

EXHIBIT F-4

STATE OF NE	EW MEXICO	
COUNTY OF		

Unconditional Waiver and Release Upon Final Payment

WHEREAS, Public Service Company of New Mexico ("Owner") and [_____] ("Contractor") have entered into that certain Engineering, Procurement and Construction Contract, dated as of [], 20[] (the "Contract");

WHEREAS, the undersigned is required to provide this Unconditional Waiver and Release Upon Final Payment pursuant to the terms of Article 7 of the Contract.

Capitalized terms used but not defined herein shall have the meanings given to them in the Contract.

By executing and submitting its payment application and the waiver below, in consideration for the payment described in the lien waiver below, and for the purpose of inducing Owner to make final payment, the undersigned, for itself, its employees, subcontractors, sub-subcontractors, mechanics, materialmen and laborers, does hereby represent and warrant as follows:

- 1. All Parties Paid. The undersigned has been paid all amounts owed for all labor, Equipment and Materials, and services furnished to the Project through the effective date of _______ (the date of the undersigned's previous application for payment), and that all parties supplying labor, services, Equipment and Materials to it in connection with the Project have been paid, or will be paid in accordance with the terms of the applicable subcontracts and/or purchase order and Applicable Law, including the New Mexico Prompt Payment Act, for all labor, services, Equipment and Materials furnished with respect to the Project.
- 2. <u>No Pending Lien Claims.</u> The undersigned represents that it has not filed or allowed to be filed, or that it has fully and effectively cancelled of record, mechanic's and materialmen's liens against the Site or the Property identified below. The undersigned waives and releases any and all mechanic's and materialmen's claims of lien filed against the Site or the Property identified below, and authorizes the Owner to file and pursue, in the undersigned's name, any and all documents or actions necessary to discharge and cancel of record any such lien. To the extent that the Owner takes any reasonable action in order to cancel or discharge any lien filed by the undersigned, the undersigned agrees that it shall be fully responsible for all Losses, reasonable attorneys' fees and other costs incurred by the Owner in so doing.
- 3. <u>Waiver Of Claims</u>. The undersigned waives and releases any and all claims, causes of action, suits, damages, judgments, demands of any kind, character and description, whether known or unknown, against [the Contractor, the Contractor's surety] [delete if Contractor is executing this lien waiver], the Owner, the Project, any construction lender or funds, and their

respective directors, officers, principals, affiliates, successors and assigns, arising	out of work perfor	rmed, labor furnished, Equipment and
Materials, or services provided, with the onot to exceed the amount stated in this pa		claims described below in an amount
		\$ \$
	warrants that it is conveyed such cla w has personal kn	the sole owner of the claims released aims to any other party, and that the owledge of these matters and is fully
5. <u>Scope Of Release.</u> The represent covenants and operate, and are effective Equipment and Materials provided by or oral or written, whether extra or additional labor, materials, equipment or services to or the Property.	ive with respect through the under al to any such agre	signed under any agreement, whether ement, and with respect to any further
6. Waiver And Release Of Lien Rigard Materials, or services (permitting, en with the permitting, engineering, pro Equipment and Materials for the [insert more particularly described as follows:	igineering, procure curement, constru	uction, and the installation of the
(Add property legal description or street a	nddragg)	(the "Property")
The undersigned waives and releases and claims through the date of for payment) upon the foregoing describe Equipment and Materials, or services (property furnished by the undersigned, or furnished with the improvement of the Property or Contract for the Work through the date of previous application for payment).	y and all mechani (the date of the date of the determinant of the permitting, engined to or at the requirement of the performance of the perf	the Project on account of any labor, ering, procurement and construction) uest of the undersigned, in connection of the Work described herein or in the
Given under hand and seal this	day of	, 201
Contractor, Subcontractor, or Vendor		
D		

PNM Exhibit TGF-15 Page 139 of 185

Printed Name:
Its:
Sworn and subscribed before me this day of, 201
Notary Public My Commission Expires:

EXHIBIT F-5

DOCUMENTARY EVIDENCE OF COMPLETED WORK

1.	Contractor to describe the completion of the Project Milestones accomplished under the Contract through the applicable month as described in the Contract.
2.	Contractor to set forth other amounts payable by Owner under Article 17 of the Contract or any other provision thereof.
3.	Contractor to attach to this Exhibit documentary evidence of the completion of each milestone set forth in Paragraph 1 of this Exhibit F-5.

EXHIBIT F-6

DOCUMENTARY RESOLUTION OF PREVIOUSLY UNCERTIFIED WORK

Attached hereto are resolutions of disputes (if any) regarding previous Contractor's invoices.

EXHIBIT G

APPROVED SUBCONTRACTORS

- Tesla, Inc. BESS Vendor
- T&D Services Substation subcontractor
- NEI Engineering SCADA engineer
- RMCI Civil subcontractor

EXHIBIT H

DETERMINATION OF BUY-DOWN AMOUNT

- A. If Contractor has run the Performance Tests pursuant to the Performance Tests Procedures and otherwise in accordance with Exhibit I and the results of such Performance Tests fully satisfy the Minimum Performance Criteria for Substantial Completion but fail to satisfy all of the Performance Guarantees, the Buy-Down Amount to be determined by Owner pursuant to Section 16.2 of the Contract shall be calculated as follows:
- B. If the BESS Capacity is equal to or greater than the Guaranteed BESS Capacity, then the Buy-Down Amount related to the BESS Capacity shall be zero. If the BESS Capacity is less than the Guaranteed BESS Capacity and is equal or greater than 95% of the Guaranteed BESS Capacity as determined by the Minimum Performance Criteria, then the Buy-Down Amount related to the BESS Capacity shall be equal to the product of \$800,000/MW times such BESS Capacity deficiency.
- C. If the BESS Roundtrip Efficiency is equal to or greater than the Guaranteed BESS Roundtrip Efficiency, then the Buy-Down Amount related to the BESS Roundtrip Efficiency shall be zero. If the BESS Roundtrip Efficiency is less than the Guaranteed BESS Roundtrip Efficiency and is equal or greater than 97% of the Guaranteed BESS Roundtrip Efficiency as determined by the Minimum Performance Criteria, then the Buy-Down Amount related to the BESS Roundtrip Efficiency shall be equal to the product of \$3,100 per percent deficiency per MWh of BESS storage capacity (calculated as the Guaranteed BESS Capacity, in MW, times the Guaranteed Storage Hours, in hours), prorated per one-tenth of a percent of roundtrip efficiency deficiency.
- D. If the BESS Plant Auxiliary Loads are equal to or less than the Guaranteed BESS Plant Auxiliary Loads, then the Buy-Down Amount related to the BESS Plant Aux Loads shall be zero. If the BESS Plant Auxiliary Loads are greater than the Guaranteed BESS Plant Auxiliary Loads and are equal or less than 105% of the Guaranteed BESS Plant Auxiliary Loads as determined by the Minimum Performance Criteria, then the Buy-Down Amount related to the BESS Plant Auxiliary Loads shall be equal to the product of \$800,000/MW times such BESS Plant Auxiliary Loads deficiency.

EXHIBIT I

ACCEPTANCE TESTS AND TESTING

I.1 DEFINITIONS

The following terms have the meanings defined below:

'Guaranteed Charge Ramp Rate' is the charge rate in MW per second measured between 15% state of charge to 85% state of charge representing the maximum rate that the BESS can change its input power from the Energy Delivery Point.

'Guaranteed Discharge Ramp Rate' is the discharge rate in MW per second measured between 85% state of charge and 15% state of charge representing the maximum rate that the BESS can change its output power at the Energy Delivery Point.

'Guaranteed System Latency" means the guaranteed time measured between when the control signal is sent and the BESS responds to the signal by changing the discharge or charge power value by more than 1% of the control setpoint.

I.2 PERFORMANCE GUARANTEES

Performance Guarantees shall apply to the Project as outlined herein and shall be achieved during Tests conducted in accordance with this Exhibit. Performance Guarantees must be satisfied to achieve Substantial Completion or Final Completion of the Project, as appropriate and as further defined herein.

"Performance Guarantees" shall mean each of the performance requirements as set forth below:

Bidder shall complete the following table:

Parameter	Unit	Performance Requirement	Conditions for Guarantee	
Performance Guarantees a	Performance Guarantees at Performance Guarantee Conditions			
Guaranteed BESS Capacity	MW	30 MW (Zamora) 40 MW (Sandia)	Value is at STC (77°F) The following correction curves and ambient temp adjustment process shall be applied for ambient temperatures at time of test and 24 hours preceding: 1. The system shall be connected to the grid and not operated for 24 hours before the test 2. Measured results to be adjusted for 0.5% metering accuracy 3. Please refer to "Real Power Dispatch Test" section within battery manufacturer's testing protocol for details on: Test procedure, recorded values, ambient temp corrections, and acceptance criteria. See Exhibit I.1	

Guaranteed Storage Hours	Hr	2 Hours	Guaranteed Storage Hours shall be proven during a combined test with Guaranteed BESS Capacity and the Guaranteed BESS Capacity must be maintained for the duration of the Guaranteed Storage Hours. Corrections noted above for Guaranteed BESS Capacity shall apply.
Guaranteed BESS Roundtrip Efficiency		83.5% - 2 hour	Values are at STC (77°F) The following correction curves and ambient temp adjustment process shall be applied for ambient temperatures at time of test and 24 hours preceding: 1. The system shall be connected to the grid and not operated for 24 hours before the test 2. Measured results to be adjusted for 1% metering accuracy 3. Please refer to "Round Trip Efficiency Test" section within battery manufacturer's testing protocol for details on: Test procedure, recorded values, ambient temp corrections, and acceptance criteria. See Exhibit I.1
Guaranteed Charge Ramp Rate	MW/sec	30 MW (Zamora) 40 MW (Sandia)	Real power command is received at Tesla Site Controller, the power output as measured by BESS meter will match the set point within time steps calculated off ramp rate settings. Example, if real power command is 10MW and ramp rate set point is 2MW/sec, then BESS output will match the set point in 5 steps of 1 second each.
Guaranteed Discharge Ramp Rate	MW/sec	30 MW (Zamora) 40 MW (Sandia)	Real power command is received at Tesla Site Controller, the power output as measured by BESS meter will match the set point within time steps calculated off ramp rate settings. Example, if real power command is 10MW and ramp rate set point is 2MW/sec, then BESS output will match the set point in 5 steps of 1 second each.

Guaranteed System Latency	Sec	0.300s	Response time is calculated from reception of the command at the Tesla Site Controller to when the BESS responds to the signal by changing the discharge or charge power value by more than 1% of the control set point as measured at the BESS meter. Measured result to be adjusted by 0.100s to account for measurement accuracy Please refer to "Response Time Test" section within battery manufacturer's testing protocol for details on: Test procedure, recorded values and acceptance criteria. See Exhibit I.1
Guaranteed Frequency Response Capability	MW / 0.1 Hz	30·MW/0.1 Hz (Zamora) 40 MW/0.1 Hz (Sandia)	Tesla proposed to conduct this test in a lab setting due to following reasons: 1. The change is too fast for a far field measurement equipment to measure. 2. The BESS system by itself cannot adjust the frequency of the grid. Tesla will test the Powerstage response in the lab setting using a grid simulator. Tesla will share the results of the test and offer real time graphs from its existing fleet to demonstrate its frequency response capability.
Guaranteed BESS Plant Auxiliary Loads	kW	120 kW	Auxiliary Loads excludes thermal loads. Megapack thermal loads are managed within the BESS and accounted for in Roundtrip Efficiency and are not considered an auxiliary load. Measured results to be adjusted for 1% metering accuracy
Project Reliability	%	96% for 30MW 97% for 40MW	Minimum availability of all equipment over the complete duration of the 5 day Reliability Test
Noise Performance Guarar	itees		
Total Project far-field noise level	dBA	70	At the property boundary
Equipment near-field noise limit, at 3 feet from any item of Equipment	dBA	85	Applicable to total Project operation. Guarantee is for each single piece of equipment in free field environment.

I.3 MINIMUM PERFORMANCE CRITERIA

Minimum Performance Criteria shall apply to the Project as outlined herein and shall be achieved during Tests conducted in accordance with this Exhibit. Project specific guarantees must be satisfied as required in this Exhibit to achieve Substantial Completion or Final Completion of the Project, as appropriate and as further defined herein.

"Minimum Performance Criteria" for Substantial Completion shall mean each of the guaranteed performance requirements as set forth below:

Bidder shall complete the following table:

Parameter	Unit	Performance Requirement	Conditions for Guarantee
Minimum Performance Gua	rantees at Perfo	rmance Guarantee (Conditions
Guaranteed BESS Capacity	MW	95% of Guarantee	Same as Performance Guarantee conditions
Guaranteed Storage Hours	Hr	95% of Guarantee	Same as Performance Guarantee conditions
Guaranteed BESS Roundtrip Efficiency	%	97% of Guarantee	Same as Performance Guarantee conditions
Guaranteed Charge Ramp Rate	MW/sec	100% of Guarantee	Same as Performance Guarantee conditions
Guaranteed Discharge Ramp Rate	MW/sec	100% of Guarantee	Same as Performance Guarantee conditions
Guaranteed System Latency	Sec	100% of Guarantee	Same as Performance Guarantee conditions
Guaranteed Frequency Response Capability	MW / 0.1 Hz	100% of Guarantee	Same as Performance Guarantee conditions
Guaranteed BESS Plant Auxiliary Loads	kW	105% of Guarantee	Same as Performance Guarantee conditions
Project Reliability		96% for 30MW 97% for 40MW	Minimum availability of all equipment over the complete duration of the 5 day Reliability Test

[&]quot;Minimum Performance Criteria" for Final Completion shall mean each of the guaranteed performance requirements as set forth below:

Noise Minimum Performance Guarantees				
Total Project far-field noise level	dBA	70	At the property boundary	
Equipment near-field noise limit, at 3 feet from any item of Equipment	dBA	85	Applicable to total Project operation. Guarantee is for each single piece of equipment in free field environment.	

I.4 FUNCTIONAL GUARANTEES

"Functional Guarantees" shall mean each of the guaranteed functional requirements as set forth in the table below. Contractor shall be responsible for performing the required Functional Guarantee Testing.

Parameter	Functional Guarantee
Volt /VAR Regulation	BESS manufacturer to share it's UL listing for functional verification
Low/High Voltage Ride Through	BESS manufacturer to share it's UL listing for functional verification
Power Factor	0.85 at Point of Delivery
	Test- Set Real Power command to the batteries along with PF set point and lead/lag convention for charging

Parameter	Functional Guarantee
	or discharging (per Control and Communication Manual).
	Pass Criteria- The battery meter Real and Reactive power measured value should match the calculated value based on pf set point and commanded Real Power.
Control System Test	Respondent to meet functional requirements defined in section I.7.6 Control Systems within this document.
Fire Protection System Test	Respondent to meet functional requirements defined in section I.7.3 Fire Protection System Functional Test within this document.

I.5 TESTING

I.5.1 General

The Contractor shall be responsible for carrying out the Tests for Substantial Completion of the Work as well as for Final Completion of the Work. Performance Tests and Functional Guarantee Tests are those Tests defined herein. These Tests shall be completed as appropriate, but in no event until after Mechanical Completion has been achieved.

For the purpose of evaluating guarantee compliance, the Equipment shall be deemed "new and clean" for any and all tests with no allowances for degradation to be considered.

Tests shall be conducted in accordance with the test conditions set forth herein.

Contractor shall perform a pre-test uncertainty analysis and shall provide such analysis to Owner at least 30 days prior to the performance of the associated Performance Tests. No test tolerance will be applied to the test results. Corrections required to adjust for test conditions that differ from the Performance Guarantee Conditions defined herein will be allowed.

All Performance Guarantees and Minimum Performance Criteria shall be met during the same test, if practical, and in accordance with the requirements set forth herein and in the Contract. These Performance Tests shall be the sole determination of whether the Performance Guarantees and Minimum Performance Criteria have been met and shall be binding on the Contractor to determine compliance with the Performance Guarantees and Minimum Performance Criteria.

All Tests shall be completed by the Contractor or a mutually agreeable third party testing contractor under contract to the Contractor. The Contractor shall be responsible for the supply of all personnel, testing equipment, and testing instrumentation.

The Tests shall be performed in general accordance with the IEEE codes and ESIC Test Manual procedures (when applicable) or BESS Supplier test procedures, and in strict accordance with the performance test requirements in the Contract, provided that the Owner and Contractor may mutually agree upon deviations from the IEEE codes and ESIC Test Manual procedures (or other applicable codes and procedures). In the event of a conflict, the order of precedence shall be:

- The Contract
- The Test Procedures developed in accordance with the Contract
- The applicable Performance Test Codes

During all Tests, the Project and equipment shall be operated in a manner consistent with and within the design limits established by the Contractor and equipment manufacturers. Equipment shall be operated in a manner that is suitable for continuous operation of the equipment and in a manner that is consistent with Prudent Industry Practices.

During Tests, the Project shall be operated by or on behalf of Owner under the direction of Contractor.

Prior to the Tests being conducted, Contractor may make minor adjustments to the equipment to ensure it is suitable for testing. Such adjustments shall exclude modifications intended to temporarily improve the performance of the Equipment for any Test.

Repair of any part or replacement of any item of equipment that could materially alter the performance of the Equipment being tested or the results of a Test will not be permitted during a Test. If the Contractor or an equipment manufacturer performs any repair or alterations after a Test that could materially affect the results of a previously conducted Test, the Contractor shall repeat such Test subject to the terms of the Contract. In no event will Substantial Completion be revoked as the result of such retest, but verification of required Performance Guarantees associated with such retest shall be a condition for Final Completion.

Contractor may not operate redundant components to obtain acceptable Test results unless such use is defined for a normal operating scenario as described herein.

If a test interruption occurs for any reason, Contractor and Owner shall mutually agree to either: (a) resume the Test after the cause of the test interruption has been rectified, or (b) restart the Test.

Owner may waive the requirement to perform any one or all of the Tests if the Owner is not able to schedule for the dispatch of the Project or is otherwise satisfied that the BESS is fully functional and capable of expected functionality and guarantees.

Component and Project tests performed by the Owner, in addition to the Performance Tests and Functional Guarantee Tests, shall be allowed.

I.5.2 Test Conditions

The conditions upon which the Contractor shall base the Performance Tests for performance quarantees are listed below:

Parameter	Reference Conditions
Ambient Dry-Bulb Temperature	77 °F
Power Factor at Energy Delivery Point	0.85*

^{*}To be adjusted based on test conditions given this could result in grid disruption. Contractor and Owner shall agree on value.

The conditions upon which the Contractor shall base the Functional Guarantee Tests are as listed below:

Unit Conditions:		
Site Ambient Conditions	Within the full range per Exhibit A, Appendix 03 – Project Data and Terminal Points of the respective Appendix A1 and A2	
Equipment Operation	per Test Procedures	

At all times during the Tests, the Project as a whole, must comply with all Applicable Laws and Applicable Permits to be considered a successful Test. Contractor shall evaluate and remedy the cause of such failure before attempting the same Test.

All Tests shall be accomplished with the Project operating wholly within its design ratings. In particular, none of the following shall occur:

- Overheating of components
- Excessive power consumption
- Operation of tripping or limiting devices, except where the test is intended to demonstrate such operation
- · Rubbing, chaffing, or other mechanism of accelerated wear
- Dangerous occurrences due to Project operation or malfunction
- Leaks from or into cooling systems or vessels that present a situation that could result in damage to BESS equipment or BOP Equipment

I.5.3 Test Procedures

Contractor shall coordinate with the battery system suppliers to develop test procedures including detailed test procedures for the Performance Tests and the Functional Guarantee Tests based on the Project design.

Test procedures, correction curves, and proposed results calculation methodologies (the "Test Procedures") shall be submitted to the Owner one hundred twenty (120) Days prior to the commencement of the first Test and shall be subject to the review and comment of Owner, Owner's representatives and Financing Parties. Owner will review and provide comments to the draft Test Procedures within twenty (20) Business Days after submission by Contractor. Contractor shall effect any changes to reflect the comments and resubmit the draft Test Procedures to Owner, whereupon Owner will review and provide comments to such draft Test Procedures within fifteen (15) Business Days after re-submission by Contractor.

Tests shall be completed with the Project Control System in automatic control and no manual adjustment or manual control of equipment operation except that which is specified in manufacturer's test protocol as mutually agreed.

The Test Procedures shall include as a minimum:

- The purpose of the Performance Test or Functional Guarantee Test, as applicable
- Personnel responsibilities
- Applicable performance corrections and correction curves
- Codes and standards to be utilized and any mutually agreed upon exceptions to these codes and standards to be taken by the Contractor
- Data collection procedures
- Instrument list including both permanent Project and temporary Performance Test instrumentation to be utilized
- Performance Test operating procedures
- Allowable variation in measured parameters
- Instrument accuracy requirements / Uncertainty Analysis
- Sample data log sheets
- Notification procedures

Correction curves shall be included in the Test Procedures. These curves shall accurately correlate to the curve of the suppliers of the applicable Equipment to correct the performance of the Work for variations from the specified design conditions. Each of the correction curves shall have a range to suit the specified conditions. Each curve shall be provided in both graphical and numerical format.

The curves will be utilized on-Site as a preliminary indication of test results. Final test acceptance shall be based upon the final test report.

I.6 PERFORMANCE TESTS

Contractor shall be responsible for carrying out the Performance Tests which are conducted to demonstrate that the required Minimum Performance Criteria and Performance Guarantees have been achieved. Contractor shall perform all tests in general accordance with the battery manufacturer test protocol.

The "Performance Tests" to be performed for achievement of Substantial Completion shall be as follows and as further defined in the following Articles:

- Guaranteed BESS Capacity
- Guaranteed BESS Roundtrip Efficiency
- · Guaranteed Charge Ramp Rate
- Guaranteed Discharge Ramp Rate
- Guaranteed System Latency
- Guaranteed Frequency Response Capability
- Guaranteed BESS Plant Auxiliary Loads

I.7.1 Guaranteed BESS Capacity

The test for determining energy capacity of the BESS shall incorporate all components including, the storage medium, auxiliary loads, power conversion equipment, HVAC equipment, and the transformer at the point of common coupling to the utility. Thus, system capacity is determined for the entire utility-integrated BESS. The test results reported will provide capacity information useful for validating the energy delivery capability of the BESS tested.

The test shall be conducted in accordance with the requirements of this section and as futher defined in the battery manufacturer's "Discharge Energy Capacity Test". See See Exhibit ${\bf I.1}$

I.7.2 Guaranteed BESS Roundtrip Efficiency

Contractor shall conduct tests to demonstrate the performance of the BESS plant and document the round trip efficiency. The Guaranteed BESS Roundtrip Efficiency Test, consisting of multiple test cycles shall be performed for a 100 percent depth of discharge at full rated charge and discharge power. Additional roundtrip efficiency tests shall be performed to document 100 percent depth of discharge at 75 percent of rated charge and discharge power and 50 percent of rated charge and discharge power as well as 50 percent depth of discharge (from 75 percent to 25 percent State of Charge (SOC)) at full rated charge and discharge power.

The test shall be conducted per battery manufacturer's "Round Trip Efficiency Test". See Exhibit I.1

I.7.3 Guaranteed Charge Ramp Rate Test

Contractor shall conduct tests to demonstrate the achievable rate of change in the charge input power in MW per second measured between 15% state of charge to 85% state of charge representing the maximum rate that the BESS can change its input power from the Energy Delivery Point.

Test: Set the ramp rate parameters to the Guaranteed Charge Ramp Rate (To be finalized before testing if not possible due to system limitations) MW/sec for ramp rate up and down. Command the system with a real power set point for charge or discharge.

Pass Criteria: It should be demonstrated that the Guaranteed Charge Ramp Rate is satisfied.

Real power command is received at Tesla Site Controller, the power output as measured by BESS meter will match the set point within time steps calculated off ramp rate settings. Example, if real power command is 10MW and ramp rate set point is 2MW/sec, then BESS output will match the set point in 5 steps of 1 second each.

I.7.4 Guaranteed Discharge Ramp Rate Test

Contractor shall conduct tests to demonstrate the achievable rate of change in the discharge power in MW per second measured between 85% state of charge and 15% state of charge representing the maximum rate that the BESS can change its output power at the Energy Delivery Point.

Test: Set the ramp rate parameters to the Guaranteed Discharge Ramp Rate (To be finalized before testing if not possible due to system limitations) MW/sec for ramp rate up and down. Command the system with a real power set point for charge or discharge.

Real power command is received at Tesla Site Controller, the power output as measured by BESS meter will match the set point within time steps calculated off ramp rate settings. Example, if real power command is 10MW and ramp rate set point is 2MW/sec, then BESS output will match the set point in 5 steps of 1 second each

Pass Criteria: It should be demonstrated that the Guaranteed Discharge Ramp Rate is satisfied.

I.7.5 Guaranteed System Latency

Contractor shall perform a Performance Test to demonstrate, when the Power Conversion System (PCS) is in active or ready mode and the system is at idle, the guaranteed time measured between when the control signal is sent and the BESS responds to the signal by changing the discharge or charge power value by more than 1% of the control setpoint. Guaranteed System Latency may be demonstrated during the Charge and Discharge Ramp Rate test.

The test shall be conducted per battery manufacturer's "Response Time Test". See Exhibit I.1

I.7.6 Guaranteed Frequency Response Capability

Contractor shall test the BESS response time and capability of the system to a frequency event. A grid simulator configured for 60Hz nominal shall be utilized to test a single Powerstage. The following Frequency-Watt settings for test to be agreed upon by Owner and contractor during the Test Procedure review:

- Frequency low
- · Frequency high
- Frequency low slope

· Frequency high slope

Test Procedure -

- 1. Start with grid simulator set to 60Hz.
- 2. Discharge inverter at 70kW.
- 3. Change the grid simulator frequency to [XX] Hz (to be finalized before testing) and hold for 10 seconds.
- 4. Change the grid simulator frequency to [XX] Hz (to be finalized before testing) and hold for 10 seconds.
- 5. Change the grid simulator frequency to [XX] (to be finalized before testing) Hz.

Acceptance criteria -

The pass criteria is <200ms to 2% power accuracy and <100ms to 10% power accuracy.

I.7.7 Self-discharge Rate Test

This test shall determine the rate at which the storage system loses charge, not including auxiliary power. This may be expressed as a function of the state of charge and ambient conditions. This should also include all non-variable parasitic losses (tare losses, control power, etc.).

I.7.8 Reliability Test

Following satisfactory completion of all other Performance Guarantee Tests and prior to achieving Substantial Completion, the BESS and Project shall be available for a 5 day continuous reliability test ("Reliability Test") during which time the Project shall be operated by Owner's operations staff under the supervision of Contractor, to demonstrate the Project Reliability. This Reliability Test shall be performed to validate the reliability of the BESS and Project. Throughout the duration of the test period, the minimum equipment availability shall meet or exceed the Project Reliability.

Contractor shall not be liable for Substantial Completion Delay Liquidated Damages (1) to the extent delays arise from Reliability Test Interruption by Others, or (2) to the extent after the Guaranteed Substantial Completion Date that the BESS is operating in connection with the performance of the Reliability Test.

The duration of reliability testing shall continue until the Contractor can satisfy the Project Reliability requirement set forth in this Exhibit.

Contractor shall conduct the testing and shall notify the Owner at least three (3) Days in advance of starting the Reliability Test. Owner's operating Staff, under the supervision of Contractor, shall operate the Project with normal operating staff levels during the Reliability Test. The Project shall operate during the Reliability Test with dispatch determined by Owner within the Equipment's design capability, as adjusted by Buy-Down Amounts per Exhibit H, and shall start, stop, ramp, cycle, etc. as determined by Owner, but in accordance with planned operational dispatch approved by the Parties. Owner, in its sole discretion, may elect to waive any particular Test and or shorten the duration of any test. The applicable parameters shall be recorded for the Reliability Test.

During the Reliability Test, Contractor shall have reasonable access to the Equipment and be allowed to make minor adjustments which may be necessary, provided that such adjustments do not in any way interfere with or prevent the commercial use of the Equipment by Owner or result in a reduction in output, or decrease of efficiency. All adjustments made by Contractor shall be recorded in a manner to be agreed with Owner.

Performance measurements during the Reliability Test shall be measured using permanent Project instrumentation. Project Operation may involve cycling operation as may be convenient for the working of the Project, and shall be without failure or interruption of any kind during the entire Reliability Test period. Contractor shall be responsible for all outages and load restrictions caused by Contractor's scope of Work during the test period, and all such outages and load restrictions shall result in a failure of the Reliability Test. Load restrictions that do not have any impact on dispatch requirements shall not be calculated as unavailability.

"Reliability Test Interruption by Others" shall mean any period of time the Equipment is out of service to the extent of factors not caused by Contractor including Force Majeure; unavailability of charging energy; faults of the electrical grid; outages, either planned or forced, on the part of Owner; and failure of Owner to operate the Equipment in accordance with the O&M Manuals. Reliability Test Interruptions by Others will be excluded from the Reliability Test period for test data analysis and the Reliability Test shall continue when the interruption is corrected. Reliability Test Interruptions by Others will extend the test period by an amount of time equal to the interruption; provided that, in addition to any other relief to which Contractor is entitled under the Contract, to the extent Owner is the cause of the Reliability Test Interruption by Others event, and there is a material impact the Contractor shall be entitled to a Change Order pursuant to Article 9. Performance Test data collected before the Reliability Test Interruption by Others may be included in the Reliability Calculation for those parties not at fault for the Reliability Test Interruption.

"Reliability Test Interruption by Contractor" shall mean any Reliability Test interruption by Contractor and/or requirement of Contractor to restart the Reliability Test, in each case other than as a result of a Reliability Test Interruption by Others. In the event of a Test Interruption by Contractor, Contractor shall be required to identify the cause of the interruption. Once the cause of the interruption has been identified and, as applicable, issues have been remedied, Contractor shall notify Owner of the issue and the associated remedy. If the remedy is approved by the Owner, the Reliability Test shall be restarted and previous days, or portions thereof, where the BESS was available shall be void and Contractor must initiate a new Reliability Test and must meet the full Project Reliability requirement within this Test. Contractor shall declare the start of each Reliability Test upon the initiation of the test and may not "look back" to determine an appropriate Reliability test period. Contractor is obligated to achieve the Project Reliability at any cost or duration pursuant to the terms of the Contract. It shall be Contractor's responsibility to alter or redesign the BESS until the BESS is capable of achieving the Project Reliability.

The Project shall operate in automatic control as a base control method with normal operating staff levels. The Project shall operate for the assigned Reliability Test duration in cooperation with the dispatch loads requested by the dispatch authority within the Project's design capability. The applicable parameters shall be recorded for the Performance Test period.

Contractor shall collect the data required in order to determine the reliability during the Reliability Test for the BESS.

Contractor shall have the right during the Reliability Test to inspect the Project and all ancillary parts thereof. If as a result of such an inspection, Contractor becomes aware of abnormal operating conditions or an impending failure the Project shall be shut down in

order to permit a detailed inspection over such period as the Owner and the Contractor shall agree to be reasonable in the circumstances.

The "Performance Tests" to be performed for achievement of Final Completion shall be as follows:

• Sound Emissions Tests (Article I.7.12)

Contractor shall make every effort to run the Performance Tests at a condition as close to the Reference Conditions as feasibly possible to minimize the application of Performance Test corrections. For conditions that vary from the Reference Conditions, the Contractor shall analytically adjust Performance Test results through the application of corrections to as-measured test results in accordance with the Test Procedures.

I.7.9 Performance Test Points and Instrumentation

The Contractor shall specify a list of key instruments to be used during a Performance Test in the applicable Test Procedures.

All permanent and temporary Performance Test points shall be provided by Contractor in order to demonstrate fully that the Project performance is in compliance with the Contract.

Contractor shall provide drawings indicating the points of measurement together with necessary isolation during Performance Tests. Contractor shall describe the means of measurement of the necessary parameters together with the anticipated standard and accuracy of the instruments.

Test instruments shall be calibrated in accordance with the standards of a recognized national organization such as American Society of Testing and Materials (ASTM), Instrument Society of America (ISA), or the IEEE. Contractor shall calibrate and install special test equipment or instrumentation used in testing as necessary.

Calibration procedures and records shall be submitted to the Owner as part of the Contractor's written Performance Test reports. Calibration of all Performance Test instrumentation shall be verified for and prior to the applicable Performance Test.

Performance Test data shall be monitored and recorded by permanent Project instrumentation using the Project DCS to the greatest extent possible. The Contractor shall ensure that the use of permanent Project instrumentation shall in no way adversely impact the intended Performance Test accuracy and shall provide a pre-test uncertainty analysis based upon the intended instrumentation with the Test Procedure.

Additional precision grade test instruments and signal sources shall be supplied by the Contractor where necessary to comply with and to be used in accordance with the requirements of the appropriate test codes and must meet the accuracy requirements for carrying out the various Performance Tests as specified in the Test Procedures.

Measuring devices and test instruments shall be calibrated.

I.7.10 Preliminary Performance Testing

During commissioning, Contractor shall carry out and complete its own preliminary testing as determined necessary by the Contractor, as well as make and complete such adjustments to the Equipment as may be necessary.

Contractor shall furnish Owner with a description of its proposed preliminary performance testing program, together with calibration certificates for the test equipment, in advance of any such preliminary testing. Owner shall have full access to witness all calibrating and

checking of instruments and other apparatus and all preliminary testing performed. Owner shall receive copies of all preliminary test reports as well as all raw test data for the preliminary tests collected within 48 hours of any such tests.

I.7.11 Performance Test Measurements

The method and the number and location of measurements, and the provision of and duties of observers, shall be mutually agreed by Contractor and Owner before the Performance Test or as specified in battery manufacturer's performance test protocol.

The values used in performance calculations shall be the arithmetical average of the observations made and recorded during the Performance Tests adjusted for obvious errors which shall be excluded from the data set and shall be limited to no more than 5 percent of the available data. As much as practical, the Performance Test data shall be logged automatically on a data logger or in the Project Control System at a rate in excess of one reading per minute. For parameters where this is not practical, data shall be taken during each Performance Test at regular intervals not exceeding five minutes.

I.7.12 Sound Emissions Tests

I.7.6.25 Near Field Noise Tests

Contractor shall perform acoustical noise testing in general accordance with ISO 10494 and ASME PTC-36.

No tolerance or margin in measurement instrumentation will be allowed in determining conformance to Noise Performance Guarantees. Only measurement uncertainty will be allowed.

The near field noise test shall validate that the near-field A-weighted sound pressure levels at a distance of three feet in the horizontal plane from the outermost surface of equipment, including piping, conduit, framework, barriers, mitigation measures, personnel protection devices, curbs, and fluid retainer basins, and five feet above grade shall be limited to sound emissions set forth in the Noise Performance Guarantees.

Corrections for background noise, building effects, and free-field conditions may be applied in determining the sound pressure level. Baseline for correction determined by collecting measurements without the BESS Equipment in operation. Near field levels shall be measured while equipment is operating at base load, steady-state conditions, exclusive of transient events (including but not limited to startup and shutdown) and off-normal operating conditions

I.7.6.26 Far Field Noise Tests

Contractor shall verify through testing performed in accordance with the Test Procedures that the full load noise emissions associated with the Project as a whole are less than or equal to the sound emissions set forth in the Performance Guarantees

No field measurement tolerances are allowed, and they cannot be subtracted from the direct measurements.

Far-field sound measurements shall be determined as equivalent continuous A-weighted sound pressure levels at outdoor locations agreed between the Contractor and Owner. Each measurement position shall be at a height of four to five feet from the ground surface and at a distance of at least three feet from any additional reflecting surface.

The measurements shall be made using a sound level meter conforming to ANSI S1.4 or better. The sound level meter shall be equipped with integrating capabilities to determine the average sound levels over a specified duration. For all measurements, the microphone

shall be equipped with a windscreen provided by or recommended by the sound level meter manufacturer. If necessary, the microphone shall be mounted on a tripod to maintain stability.

The sound level meter shall be field calibrated immediately before and after each measurement series and after any major change in equipment conditions such as rough handling, becoming wet, etc. Field calibration shall be conducted using a precision calibrator and each calibration level shall be recorded. A change in calibration level exceeding +/- 1.0 dB may require that the measurement series be repeated.

The sound level meter equipment and calibrator shall have been laboratory calibrated within the 12 months prior to the Sound Emissions Test. All equipment calibration certificates shall be available during the survey, and copies shall be included with the final survey report.

Instrument, calibration, and measurement details where not specified herein shall be determined from information given in the appropriate ANSI specifications.

Measurements of the existing background noise levels shall be performed over several days without any of the BESS Equipment in operation. The measurements shall be conducted at mutually agreed upon far-field locations. The background noise levels and any sound sources from equipment not furnished by Contractor shall be subtracted from the Sound Emissions Test measurements to remove any area ambient sound not associated with the respective equipment. Corrections for other sources may be made according to standard practice, as given in the ANSI specifications.

Far-field sound measurements shall be made during the four quietest hours of the night time. All measurements shall be taken under quiescent conditions to minimize ambient noise levels and shall be repeated three times to demonstrate reproducibility. Measurements shall be made during operating conditions that are at full load.

Measurements shall be reported as dBA unless due to contamination from intermittent noise sources not associated with the supplied equipment, then an appropriate statistical parameter, such as L90(a) shall be used. A map showing each measurement position shall be produced by the Contractor and included in the test report.

The Sound Emissions Tests and measurement locations for the BESS and Project will depend on surrounding facilities. If surrounding facilities result in significant sound emissions, then near-field measurements around such surrounding equipment shall be required. Subsequent subtraction of these pieces of equipment's sound contribution from the measured sound level at the property boundary shall be performed to estimate the sound contribution solely from the equipment being tested. In the event that these facilities cannot be shut down for the Sound Emission Tests, then one of the two methodologies below shall be followed to demonstrate compliance:

- Measure sound levels at mutually agreed intermediate locations between the
 equipment and the property boundary. These intermediate sound levels, after
 correcting for sound contributions from sources other than the respective equipment
 being tested, shall be used to calculate the property line values by using
 extrapolation methodologies based on ISO 9613 Part 2 standards.
- Measure the sound close to each significant sound source and calculate the total sound level at the property line by using an analytical model and extrapolation methodology based on ISO 9613 Part 2.

1.7 FUNCTIONAL GUARANTEE TESTS

Contractor shall be responsible for successfully completing the following Functional Guarantee Tests for the Work. These Functional Guarantee Tests must be performed and

satisfied to achieve Substantial Completion as identified herein. The Functional Guarantee Tests shall be completed in conjunction with the Performance Tests.

The "Functional Guarantee Tests" to be performed for achievement of Substantial Completion are as follows and as further defined in the following Articles:

- Voltage support including Volt-VAR regulation, Low/high Voltage ride through, power factor and field characterization
- Charge Duration Test
- Fire Protection System Functional Test
- Black Start Test
- Workplace Sound Survey
- System Back-up and Restoration
- Control System Start-up Test

I.7.1 Voltage Support

Contractor shall conduct functional tests involving the manipulation or stabilization of the grid voltage as follows:

<u>Volt / VAR Regulation</u>: Compliance certification by a nationally recognized testing laboratory (NRTL) to be provided as an agreed replacement of onsite functional test. Test will be used to demonstrate that the BESS can functionally perform Volt-VAR regulation based on system voltage and allow assignment of a Pass/Fail designation for this test. Test procedures in ESIC Energy Storage Test Manual and Pacific Northwest National Lab Protocol for Uniformly Measuring and Expressing the Performance of Energy Storage Systems may be referenced.

<u>Low /High Voltage Ride -through</u>: Compliance certification by a nationally recognized testing laboratory (NRTL) to be provided as an agreed replacement of onsite functional test. Test is intended to verify that the BESS can comply with low/high voltage ride-through (LVRT/HVRT) and low/high frequency ride-through specifications and settings. The specific requirements for LVRT/HVRT curve settings may be based on a codes and standards (e.g. IEEE 1547, UL 1741) or utility interconnection requirements.

<u>Power Factor</u>: Test the ability of the system to control based on a fixed power factor set point and operate using autonomous power factor management based on inputs including voltage and watts. Refer to applicable Codes and standards IEEE 1547 and EPRI Technical document Common Functions for Smart Inverters, Version 3 December 2016, as appropriate.

Test: Set Real Power command and Reactive Power Mode (including Power Factor Set Point and Lead/Lag values) per the battery manufacturer's Controls and Communications Manual, See Exhibit I.1.

The pass criteria is defined by meter real and reactive power values, at the agreed point of measurement, matching calculated values based on power factor setpoint and commanded real power. Values for test to be agreed upon by Owner and contractor during the Test Procedure review.

I.7.2 Charge Duration Test

A Functional Test shall be performed to demonstrate the charge duration of the BESS. The charge duration is the time required for the BESS to reach its maximum SOC starting from its minimum SOC at its rated charge power. To be demonstrated as part of the round trip efficiency test.

I.7.3 Fire Protection System Functional Test

The Contractor shall perform a full "functional test" of the fire protection equipment prior to start up. This test will be witnessed by the insurance carrier, equipment provider, and Owner.

The purpose of this test is to demonstrate a simulated test of the fire detection system, including visual and audible alarms, alarm silence, and reset (as applicable), with the following procedure:

- 1. Initiate a magnetic test per fire detection manufacturer's instruction manual.
- 2. Press "Signal Silence" button or equivalent on fire alarm control panel.
- 3. Press "System Reset" button or equivalent on fire alarm control panel.
- 4. Repeat for each fire detection device.

The pass criteria is defined by verifying each fire detection magnetic test triggers a visible and audible alarm (as applicable) at the fire alarm control panel. Verify audible alarm stops once "signal silence" button or equivalent is pressed. Verify visible indicator turns off once "system reset" button or equivalent is pressed.

I.7.4 Black Start Test

Contractor shall demonstrate the BESS system's Functional capability to provide black start of an Owner generation resource. If Owner's generation asset is unavailable during the Contractor's demonstration test, then load banks at a minimum capacity of 10MW for 20 minutes shall be utilized.

Test procedure:

- 1. Place both BESS and generation asset being black-started (or load bank) into a standby state and connect to bus isolated from larger utility grid
- 2. Command BESS into an active state (Island Control Mode = Intentional Island) to energize isolated bus
- 3. Initiate a black start of generation asset by commanding it to start (or simulate generation asset's black starting load using a load bank)

The pass criteria is a successful black start of the generation asset. If a load bank is used to simulate generation asset's black starting loads, the pass criteria is that voltage of the isolated bus remains above generation asset's under voltage ride through limits.

I.7.5 Workplace Sound Survey

Sound measurements, dB (A), shall be made during BESS rated discharge operation (i.e., after Substantial Completion of the Project).

A sound level meter conforming to the appropriate ANSI specifications shall be utilized. The measurement positions shall normally be at a height of five feet above grade, foundation, platform, or floor and at a minimum distance of three feet from the system/equipment surface. The number of measurement positions and their precise location shall be agreed by Contractor and Owner. The A-weighted rms sound level using the slow response of the sound level meter shall be recorded at each position.

Alternatively, the direct measurement of the equivalent continuous A-weighted sound pressure level may be made at each measurement position using an instrument complying with the appropriate ANSI specifications.

Instrument, calibration, and measurement details where not specified herein shall be determined from information given in the ANSI specifications.

Measurements shall be made during full load conditions. Sound levels greater than 80 dB(A) shall be reported to the nearest 1 dB(A).

For indoor spaces, the level shall also be measured at three feet from the walls at all column lines, and in all occupied spaces such as control rooms, offices, shops, and lockers. Roof top equipment shall also be measured. For these locations, octave or 1/3 octave spectra are required in addition to "A" weighted overall values.

The Contractor shall conduct an in-Project noise survey to identify the in-Project areas that may be exposed to A-weighted sound pressure levels exceeding the near-field noise guarantee during normal operation. To the extent such areas are identified, these areas shall be identified with warning signs prescribing hearing protection. The in-Project noise survey shall be conducted in accordance with the Test Procedures.

I.7.6 Control Systems

The Contractor shall perform control system testing to demonstrate the following:

- Ability to restore control systems from back-up site configurations.
- Ability of the instrumentation and control systems to function as specified in a real operating environment
- Ability of the instrumentation and control system to function in automatic from minimum stable load to full load

I.7.6.1 System Back-up and Restoration

After Substantial Completion of the Project, Contractor shall make a back-up of all system and program files and then demonstrate to Owner the restoration of the system from the back-up medium.

The pass criteria is defined by successfully reviving the DCS, and Tesla Site Controller, RTAC and HMI computer from the back-up configuration.

I.7.6.2 Control System Start-up Test

The Contractor shall demonstrate that the Project control systems are capable safely controlling the BESS during charging operations from minimum to maximum SOC, and subsequently during discharge from maximum to minimum SOC while all controllers are in automatic, all permissives are met, and redundant equipment are in a standby mode ready for service.

The Control System Start-up Test shall begin with the BESS at minimum SOC. The Project operator shall then manually initiate at the control system the charging process per standard operating procedures. Following this step, the BESS charging shall be automatically initiated from the Owner's remote control location and stop automatically at maximum SOC. After charging and with the BESS at maximum SOC, the Project operator shall then manually initiate at the control system the discharge process from Owner's remote control location per standard operating procedures. Following this step, the BESS discharge shall be automatically initiated and stop automatically at minimum SOC.

After initiation of the Control System Start-up Test, no controllers shall be placed in manual operation except unless otherwise approved by the Owner prior to initiation of the Control System Start-up Test.

I.8 FUNCTIONAL GUARANTEE AND PERFORMANCE TEST RESULTS

Contractor shall submit the methodology by which it proposes to calculate the results based on the measured data to Owner.

Prior to the calculation of the test results, Owner's agreement will be required to the fundamental data obtained from the trials which shall not be unreasonably withheld.

Preliminary corrected performance figures shall be calculated at the completion of each test to allow the Owner and Contractor, as applicable, to judge if the test completed was satisfactory or whether it should be repeated.

A preliminary report of all Performance Tests shall be produced and three copies issued to Owner for approval within five business days of the completion of each Performance Test.

The form of calculation sheets and diagrams, which shall conform to the format agreed with Owner, shall clearly identify the values measured in the Performance Test.

A final and complete report of the Tests shall be produced and three copies issued to Owner for approval within five business days of receipt of the gas analysis.

The official test reports shall include, as a minimum, the following details:

- Date and time of each test start and finish
- Full procedure adopted
- Instrumentation details and calibration data including signed and approved instrument calibration forms
- Full schematic of the Work systems together with instrument locations
- The standard to which the test was carried out and the Code of Practice followed, plus other reference data used
- The operating conditions prior to the test
- Variations in system frequency/generating unit speed
- Summary of test readings, results and conclusions
- Calculations
- Pre-test uncertainty calculations
- Copies of test data sheets or other raw data
- Notes on any unusual observations, data or conclusions
- Attendance
- · Results of the test

EXHIBIT J

KEY PERSONNEL

Individual

Title and Duties

Nick Babic

Contractor Project Manager: nick.babic@affordable-solar.com

Phone: 505-944-4231

Contractor and Owner to agree on additional Key Personnel to identify for Contractor, Subcontractors, and Vendors no later than thirty (30) Days after the issuance of the NTP.

EXHIBIT K

FORM OF ASSIGNMENT CLAUSE FOR SUBCONTRACTS

[SUBCONTRACTOR] under this [DESCRIPTION OF SUBCONTRACT] with [CONTRACTOR] ("Contractor") hereby, in the event of a Contractor Event of Default (as such term is defined under the Engineering, Procurement, and Construction Contract, dated [], 20[] (the "Prime Contract"), between Public Service Company of New Mexico, a New Mexico corporation ("Owner"), and [______] (Contractor"), consents to the assignment of [CONTRACTOR]'s rights in this [SUBCONTRACT] by [CONTRACTOR] to Owner, its permitted assigns and/or its lenders. Such assignment shall not take effect until the occurrence of, and written notice by Owner of, the termination of the Prime Contract and Owner's request for an assignment to [SUBCONTRACTOR].

EXHIBIT L

FORM OF MONTHLY PROGRESS REPORT

Each Monthly Progress Report shall be a written statement of Project status prepared by Contractor for review by Owner. The following items shall be included in monthly reports to be submitted by Contractor.

TABLE OF CONTENTS FOR MONTHLY PROGRESS REPORT

1.0 EXECUTIVE SUMMARY – (CURRENT MONTH)

The executive summary shall provide a brief and general overview of the projects progress during the previous month. Include progress graphs by permitting, engineering, procurement, construction, commissioning, and for the total project.

2.0 SUMMARY OF PROGRESS AND STATUS OF PERMITTING, ENGINEERING, PROCUREMENT AND CONSTRUCTION

2.1 Current Month

2.1.1 Engineering work activities:

Include a listing of work activities completed during the previous month and those planned for the next month sorted by engineering discipline. Include an overall summary of the engineering progress.

2.1.2 Procurement work activities:

Include a listing of work activities completed during the previous month and those planned for the next month sorted by equipment, bulk materials, and subcontracts. Include an overall summary of the procurement progress.

2.1.3 Construction work activities:

Include a listing of work activities completed during the previous month and those planned for the next month sorted by major WBS area. Include an overall summary of the construction progress.

2.1.4 Startup & Commissioning work activities:

Include a listing of work activities completed during the previous month and those planned for the next month sorted by turnover package. Include an overall summary of the startup & commissioning progress.

Reporting format shall be based on completion of Project Milestones and construction, permitting, engineering (organized by discipline), procurement (issuance of purchase orders), shipment of materials and equipment to the Site, training and commissioning.

2.2 Next Month

The expected progress for the Project in the next thirty (30) Days shall be provided in outline form based on permitting, construction, engineering, procurement, shipment, training and commissioning.

3.0 MEETING STATUS

A summary of major meetings for the current month identifying the date and the attendees, and a schedule of meeting dates for the next month, including a one or two-sentence summary of anticipated topics of discussion for the next month and schedule for next month meeting date.

4.0 PRIORITIES/ISSUES/CONCERNS

Identification and evaluation of problem areas that are anticipated to have a material effect on either Project Schedule or that may, in the opinion of Contractor, require a modification of Exhibit A to the Contract. Issues identified would include, but not be limited to, risks to satisfactory completion of the Contract, possible change orders, QA/QC concerns, potential subcontractor performance problems, etc. The monthly report will provide a narrative description of the resolution plans for the key issues.

5.0 SAFETY

Provide a statement concerning the safety aspects of the work including a report of accidents, near misses, OSHA incident rate, etc. The report shall include a summary of all written accident reports for lost time accidents that occur at the Site during such month, prepared in accordance with the safety and security assurance program.

6.0 SCHEDULE UPDATE

Report important items and events, such as date of arrival of major equipment components, and completion of milestones and Critical Path Items in the Project Schedule.

The reports shall be presented in a format used by the Contractor and reasonably acceptable to Owner. An updated copy of the Level 1 working schedule shall be attached to the Monthly Progress Report with a written analysis of schedule status, including actual versus planned progress, with reference to the Critical Path Items and Project Schedule. The schedule shall indicate early, late, and actual curves. A functional version of the Level 1 schedule shall be submitted with the Monthly Progress Report.

The schedule update shall include a listing of milestones which display the baseline milestones, milestones completed and forecasted completion of the milestones still to complete. The analysis shall include a written definition of the critical path with reasons for it being on the

critical path plus anticipated work around and actions to keep it from becoming more critical and impacting the project completion. Secondary critical paths shall also be identified.

7.0 CHANGE IN WORK

This Section shall describe each event including events of Force Majeure that provides the basis on which Contractor can claim that the Contract Price should be increased (except for an event of Force Majeure) or that either of the Project Guaranteed Dates should be extended and with respect to each such event, specifies the amount of such proposed increase in the Contract Price (except for an event of Force Majeure) and the duration of each such proposed extension. A detailed change order log listing all agreed and potential change orders shall be maintained and included.

8.0 PERMIT STATUS

Provide listing of all Contractor Acquired Permits and Contractor Acquired Operating Permits including current status and the date the permit is to be obtained.

9.0 DRAWING AND PROCUREMENT STATUS

Provide the updated engineering drawing list, engineering and procurement schedule, and current status as compared to overall schedule.

10.0 PROJECT FINANCIAL STATUS

The Section shall include the billing breakdown for the current month, a comparison of the Milestone Payment Schedule with the actual progress payments to date, and financial review of the Project to date.

The Section shall also include a forecast of all milestone payments in the month it is expected to occur. Each month, the milestone achieved and actual payment amount shall be recorded and included in the progress report.

11.0 PROGRESS PHOTOGRAPHS

Contractor shall supply color photographs to document progress and to record significant completed elements of work. Electronic format is acceptable.

Also provide photographs of fabrication of major equipment and Site progress. Photographs should be chosen carefully to illustrate progress.

EXHIBIT M

FORM OF PERFORMANCE AND PAYMENT BOND

Document A312™ - 2010

Conforms with The American Institute of Architects AIA Document 312

Performance Bo	nd			
CONTRACTOR: (Name, legal status and address)	l:	SURETY: (Name, legal status and p.	rincipal place of business)	
040)55		Malling Address for N	òtices	This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.
OWNER: (Name, legal status and address)				Any singular reference to Contractor, Surety, Owner or other party shall be considered plural where applicable.
CONSTRUCTION CONTR Date:	ACT			
Amount: \$				
Description: (Name and location)				
BOND Date: (Not earlier than Construction C.	ontract Date)			
Amount: \$				
Modifications to this Bond:	☐ Nanc	See Section 16		
CONTRACTOR AS PRINC Company:	CIPAL (Corporate Seat)	SURETY Company:	(Corporate Seal)	
Signature:	***************************************	Signature;		
Name and Title:		Name and Title:		
(Any additional signatures appea	er on the last page of th	nis Performance Bond.)		
(FOR INFORMATION ONLY -	Name, address and to	elephone)		
AGENT or BROKER:		OWNER'S REPRESE (Architect, Engineer or ot)		
S-1852/AS 8/10				

- § 1The Contractor and Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the Owner for the performance of the Construction Contract, which is incorporated herein by reference.
- §2 If the Contractor performs the Construction Contract, the Surety and the Contractor shall have no obligation under this Bond, except when applicable to participate in a conference as provided in Section 3.
- §3 If there is no Owner Default under the Construction Contract, the Surety's obligation under this Bond shall arise after
 - the Owner first provides notice to the Contractor and the Surety that the Owner is considering declaring a Contractor Default. Such notice shall indicate whether the Owner is requesting a conference among the Owner, Contractor and Surety to discuss the Contractor's performance. If the Owner does not request a conference, the Surety may, within five (5) business days after receipt of the Owner's notice, request such a conference. If the Surety timely requests a conference, the Owner shall attend. Unless the Owner agrees otherwise, any conference requested under this Section 3.1 shall be held within ten (10) business days of the Surety's receipt of the Owner's notice. If the Owner, the Contractor and the Surety agree, the Contractor shall be allowed a reasonable time to perform the Construction Contract, but such an agreement shall not waive the Owner's right, if any, subsequently to declare a Contractor Default.
 - .2 the Owner declares a Contractor Default, terminates the Construction Contract and notifies the Surety, and
 - .3 the Owner has agreed to pay the Balance of the Contract Price in accordance with the terms of the Construction Contract to the Surety or to a contractor selected to perform the Construction Contract.
- §4 Failure on the part of the Owner to comply with the notice requirement in Section 3.1 shall not constitute a failure to comply with a condition precedent to the Surety's obligations, or release the Surety from its obligations, except to the extent the Surety demonstrates actual prejudice.
- §5 When the Owner has satisfied the conditions of Section 3, the Surety shall promptly and at the Surety's expense take one of the following actions:
- §5.1 Arrange for the Contractor, with the consent of the Owner, to perform and complete the Construction Contract;
- §5.2 Undertake to perform and complete the Construction Contract itself, through its agents or independent contractors;
- §6.3 Obtain bids or negotiated proposals from qualified contractors acceptable to the Owner for a contract for performance and completion of the Construction Contract, arrange for a contract to be prepared for execution by the Owner and a contractor selected with the Owner's concurrence, to be secured with performance and payment bonds executed by a qualified surety equivalent to the bonds issued on the Construction Contract, and pay to the Owner the amount of damages as described in Section 7 in excess of the Balance of the Contract Price incurred by the Owner as a result of the Contract Default; or
- § 5.4 Waive its right to perform and complete, arrange for completion, or obtain a new contractor and with reasonable promptness under the circumstances:
 - .1 After investigation, determine the amount for which it may be liable to the Owner and, as soon as practicable after the amount is determined, make payment to the Owner; or
 - .2 Deny liability in whole or in part and notify the Owner, citing the reasons for denial.
- §6 If the Surety does not proceed as provided in Section 5 with reasonable promptness, the Surety shall be deemed to be in default on this Bond seven days after receipt of an additional written notice from the Owner to the Surety demanding that the Surety perform its obligations under this Bond, and the Owner shall be entitled to enforce any remedy available to the Owner. If the Surety proceeds as provided in Section 5.4, and the Owner refuses the payment or the Surety has denied liability, in whole or in part, without further notice the Owner shall be entitled to enforce any remedy available to the Owner.

§ 7 If the Surety elects to act under Section 5.1, 5.2 or 5.3, then the responsibilities of the Surety to the Owner shall not be greater than those of the Contractor under the Construction Contract, and the responsibilities of the Owner to the Surety shall not be greater than those of the Owner under the Construction Contract. Subject to the commitment by the Owner to pay the Balance of the Contract Price, the Surety is obligated, without duplication, for

- .1 the responsibilities of the Contractor for correction of defective work and completion of the Construction Contract;
- .2 additional legal, design professional and delay costs resulting from the Contractor's Default, and resulting from the actions or failure to act of the Surety under Section 5; and
- .3 liquidated damages, or if no liquidated damages are specified in the Construction Contract, actual damages caused by delayed performance or non-performance of the Contractor.
- § 8 If the Surety elects to act under Section 5.1, 5.3 or 5.4, the Surety's liability is limited to the amount of this Bond.
- § 9 The Surety shall not be liable to the Owner or others for obligations of the Contractor that are unrelated to the Construction Contract, and the Balance of the Contract Price shall not be reduced or set off on account of any such unrelated obligations. No right of action shall accrue on this Bond to any person or entity other than the Owner or its heirs, executors, administrators, successors and assigns.
- § 10 The Surety hereby waives notice of any change, including changes of time, to the Construction Contract or to related subcontracts, purchase orders and other obligations.
- § 11 Any proceeding, legal or equitable, under this Bond may be instituted in any court of competent jurisdiction in the location in which the work or part of the work is located and shall be instituted within two years after a declaration of Contractor Default or within two years after the Contractor ceased working or within two years after the Surety refuses or fails to perform its obligations under this Bond, whichever occurs first. If the
- provisions of this Paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable.
- § 12Notice to the Surety, the Owner or the Contractor shall be mailed or delivered to the address shown on the page on which their signature appears.
- §13 When this Bond has been furnished to comply with a statutory or other legal requirement in the location where the construction was to be performed, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. When so furnished, the intent is that this Bond shall be construed as a statutory bond and not as a common law-bond.

§14Definitions

- § 14.1 Balance of the Contract Price. The total amount payable by the Owner to the Contractor under the Construction Contract after all proper adjustments have been made, including allowance to the Contractor of any amounts received or to be received by the Owner in settlement of insurance or other claims for damages to which the Contractor is entitled, reduced by all valid and proper payments made to or on behalf of the Contractor under the Construction Contract.
- §14.2 Construction Contract. The agreement between the Owner and Contractor identified on the cover page, including all Contract Documents and changes made to the agreement and the Contract Documents.
- § 14.3 Contractor Default. Failure of the Contractor, which has not been remedied or waived, to perform or otherwise to comply with a material term of the Construction Contract.
- § 14.4 Owner Default. Failure of the Owner, which has not been remedied or waived, to pay the Contractor as required under the Construction Contract or to perform and complete or comply with the other material terms of the Construction Contract.
- §14.5 Contract Documents. All the documents that comprise the agreement between the Owner and Contractor.
- § 15 If this Bond is issued for an agreement between a Contractor and subcontractor, the term Contractor in this Bond shall be deemed to be Subcontractor and the term Owner shall be deemed to be Contractor.

§ 16 Modifications to this bond are as	follows:		
(Space is provided below for addition CONTRACTOR AS PRINCIPAL Company:		, other than those appearing on th SURETY Company:	e cover page.) (Corporate Seal)
Signature:Name and Title		Signature:Name and Title:	
Address		Address	

Document A312™ - 2010

Conforms with The American Institute of Architects AIA Document 312

Payment	Bo	na
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CONTRACTOR: (Name, legal status and address)	SURETY: (Name, legal status and pr	incipal place of business)	
	Mailing Address for No	otices	This document has important tegal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.
OWNER: (Name, legal status and address)			Any singular reference to Contractor, Surety, Owner or other party shall be considered plural where applicable.
CONSTRUCTION CONTRACT Date:			
Amount: \$			
Description: (Name and location)			
BOND Date:			
(Not earlier than Construction Contract Date)			
Amount: \$			
Modifications to this Bond:	See Section 18		
CONTRACTOR AS PRINCIPAL Company: (Corporate Seal)	SURETY Company:	(Corporate Seal)	
Signature:	Signature:		
Name and Title:	Name and Title:		
(Any additional signatures appear on the last page o	f this Payment Bond.)		
(FOR INFORMATION ONLY - Name, address and	d telephone)		
AGENT or BROKER:	OWNER'S REPRESE (Architect, Engineer or oth		

S-2149/AS 8/10

- § 1 The Contractor and Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the Owner to pay for labor, materials and equipment furnished for use in the performance of the Construction Contract, which is incorporated herein by reference, subject to the following terms.
- § 2 If the Contractor promptly makes payment of all sums due to Claimants, and defends, indemnifies and holds harmless the Owner from claims, demands, liens or suits by any person or entity seeking payment for labor, materials or equipment furnished for use in the performance of the Construction Contract, then the Surety and the Contractor shall have no obligation under this Bond.
- § 3 If there is no Owner Default under the Construction Contract, the Surety's obligation to the Owner under this Bond shall arise after the Owner has promptly notified the Contractor and the Surety (at the address described in Section 13) of claims, demands, liens or suits against the Owner or the Owner's property by any person or entity seeking payment for labor, materials or equipment furnished for use in the performance of the Construction Contract and tendered defense of such claims, demands, liens or suits to the Contractor and the Surety.
- §4 When the Owner has satisfied the conditions in Section 3, the Surety shall promptly and at the Surety's expense defend, indemnify and hold harmless the Owner against a duly tendered claim, demand, lien or suit.
- §5 The Surety's obligations to a Claimant under this Bond shall arise after the following:
- § 5.1 Claimants, who do not have a direct contract with the Contractor,
 - have furnished a written notice of non-payment to the Contractor, stating with substantial accuracy the amount claimed and the name of the party to whom the materials were, or equipment was, furnished or supplied or for whom the labor was done or performed, within ninety (90) days after having last performed labor or last furnished materials or equipment included in the Claim; and
 - .2 have sent a Claim to the Surety (at the address described in Section 13).
- § 5.2 Claimants, who are employed by or have a direct contract with the Contractor, have sent a Claim to the Surety (at the address described in Section 13).
- § 6 If a notice of non-payment required by Section 5.1.1 is given by the Owner to the Contractor, that is sufficient to satisfy a Claimant's obligation to furnish a written notice of non-payment under Section 5.1.1.
- § 7 When a Claimant has satisfied the conditions of Sections 5.1 or 5.2, whichever is applicable, the Surety shall promptly and at the Surety's expense take the following actions:
- § 7.1 Send an answer to the Claimant, with a copy to the Owner, within sixty (60) days after receipt of the Claim, stating the amounts that are undisputed and the basis for challenging any amounts that are disputed; and
- §7.2 Pay or arrange for payment of any undisputed amounts.
- §7.3 The Surety's failure to discharge its obligations under Section 7.1 or Section 7.2 shall not be deemed to constitute a waiver of defenses the Surety or Contractor may have or acquire as to a Claim, except as to undisputed amounts for which the Surety and Claimant have reached agreement. If, however, the Surety fails to discharge its obligations under Section 7.1 or Section 7.2, the Surety shall indemnify the Claimant for the reasonable attorney's fees the Claimant incurs thereafter to recover any sums found to be due and owing to the Claimant.
- § 8 The Surety's total obligation shall not exceed the amount of this Bond, plus the amount of reasonable attorney's fees provided under Section 7.3, and the amount of this Bond shall be credited for any payments made in good faith by the Surety.
- § 9 Amounts owed by the Owner to the Contractor under the Construction Contract shall be used for the performance of the Construction Contract and to satisfy claims, if any, under any construction performance bond. By the Contractor furnishing and the Owner accepting this Bond, they agree that all funds earned by the Contractor in the performance of the Construction Contract are dedicated to satisfy obligations of the Contractor and Surety under this Bond, subject to the Owner's priority to use the funds for the completion of the work.

§10 The Surety shall not be liable to the Owner, Claimants or others for obligations of the Contractor that arc unrelated to the Construction Contract.

The Owner shall not be liable for the payment of any costs or expenses of any Claimant under this Bond, and shall have under this Bond no obligation to make payments to, or give notice on behalf of, Claimants or otherwise have any obligations to Claimants under this Bond.

- § 11 The Surety hereby waives notice of any change, including changes of time, to the Construction Contract or to related subcontracts, purchase orders and other obligations.
- § 12No suit or action shall be commenced by a Claimant under this Bond other than in a court of competent jurisdiction in the state in which the project that is the subject of the Construction Contract is located or after the expiration of one year from the date (1) on which the Claimant sent a Claim to the Surety pursuant to Section 5.1.2 or 5.2, or (2) on which the last labor or service w s performed by anyone or the last materials or equipment were furnished by anyone under the Construction Contract, whichever of (1) or (2) first occurs. If the provisions of this Paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable.
- § 13 Notice and Claims to the Surety, the Owner or the Contractor shall be mailed or delivered to the address shown on the page on which their signature appears. Actual receipt of notice or Claims, however accomplished, shall be sufficient compliance as of the date received.
- § 14 When this Bond has been furnished to comply with a statutory or other legal requirement in the location where the construction was to be performed, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. When so furnished, the intent is that this Bond shall be construed as a statutory bond and not as a common law bond.
- § 16 Upon request by any person or entity appearing to be a potential beneficiary of this Bond, the Contractor and Owner shall promptly furnish a copy of this Bond or shall permit a copy to be made.

§16 Definitions

§ 16.1 Claim. A written statement by the Claimant including at a minimum:

- .1 the name of the Claimant;
- .2 the name of the person for whom the labor was done, or materials or equipment furnished;
- .3 a copy of the agreement or purchase order pursuant to which labor, materials or equipment was furnished for use in the performance of the Construction Contract;
- .4 a brief description of the labor, materials or equipment furnished;
- .6 the date on which the Claimant last performed labor or last furnished materials or equipment for use in the performance of the Construction Contract;
- .6 the total amount earned by the Claimant for labor, materials or equipment furnished as of the date of the Claim;
- .7 the total amount of previous payments received by the Claimant; and
- .8 the total amount due and unpaid to the Claimant for labor, materials or equipment furnished as of the date of the Claim,
- § 16.2 Claimant. An individual or entity having a direct contract with the Contractor or with a subcontractor of the Contractor to furnish labor, materials or equipment for use in the performance of the Construction Contract. The term Claimant also includes any individual or entity that has rightfully asserted a claim under an applicable mechanic's lien or similar statute against the real property upon which the Project is located. The intent of this Bond shall be to include without limitation in the terms "labor, materials or equipment that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental equipment used in the Construction Contract, architectural and engineering services required for performance of the work of the Contractor and the Contractor's subcontractors, and all other items for which a mechanic's lien may be asserted in the jurisdiction where the labor, materials or equipment were furnished.
- §16.3 Construction Contract. The agreement between the Owner and Contractor identified on the cover page, including all Contract Documents and all changes made to the agreement and the Contract Documents.

- § 16.4 Owner Default. Failure of the Owner, which has not been remedied or waived, to pay the Contractor as required under the Construction Contract or to perform and complete or comply with the other material terms of the Construction Contract.
- §16.5 Contract Documents. All the documents that comprise the agreement between the Owner and Contractor.
- § 17 If this Bond is issued for an agreement between a Contractor and subcontractor, the term Contractor in this Bond shall be deemed to be Subcontractor and the term Owner shall be deemed to be Contractor.
- § 18 Modifications to this bond are as follows:

CONTRACTOR AS PRINCIPA Company:	L (Corporate Seal)	SURETY Company:	(Corporate Seal)	
company.	(corporate sear)	company.	(corporate sear)	
Signature:		Signature:		
Name and Title:		Name and Title:		
Address		Address		

(Space is provided below for additional signatures of added parties, other than those appearing on the cover page.)

WARRANTY BOND			
as Principal, and corporation organized and exheld and firmly bound unto	isting under the Laws o	of the State of	as Surety, are as Obligee, in
U.S. Dollars () for the ally, as provided herein	payment whereof said Principal	and Surety bind
WHEREAS, the Principal en	tered into a contract wi	th the Obligee dated	
•			("Work")
maintain and remedy said W	ork free from defects in commencing on (the "	OBLIGATION IS SUCH, that if materials and workmanship for a Warranty Period"), then this obligatt.	period of
from the expiration date of the by any law controlling the co- be equal to the minimum per	e Warranty Period; pro nstruction hereof, such iod of limitation permit	ond shall be commenced no later to vided, however, that if this limitated limitation shall be deemed to be a sted by such law, and said period of the win on the expiration date of the Weight	ion is prohibited mended so as to f limitation shall
SIGNED this	day of		(Principal)
By:		_	
By:		_ Attorney-in-Fact	

EXHIBIT N

[RESERVED]

EXHIBIT O PROJECT IMPLEMENTATION SCHEDULE

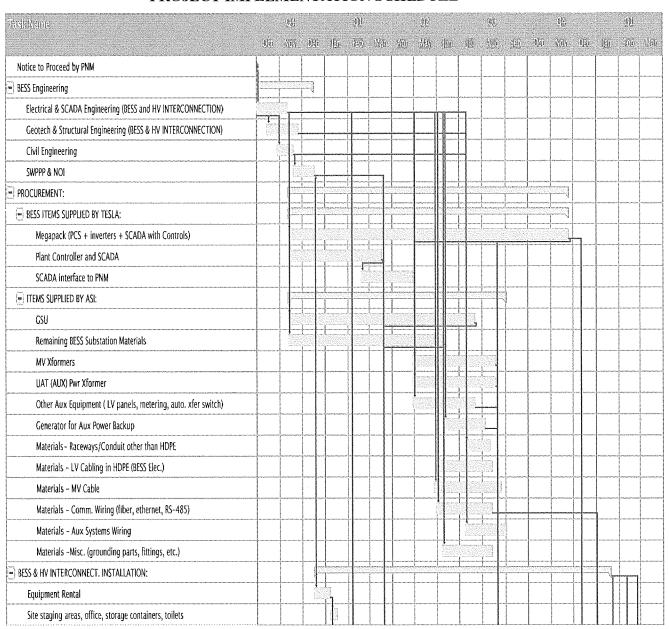


EXHIBIT P ESSENTIAL CONTRACTOR DELIVERABLES

Reference Technical Specifications, Appendix A, Section 05—Submittals, Table 5-1

EXHIBIT Q

FORM OF MANUFACTURER'S LIMITED WARRANTY



MEGAPACK SYSTEM MANUFACTURER'S LIMITED WARRANTY (USA)

Effective Date: October 11, 2018

Applies to: Any Tesla Megapack system that is supplied by Tesla, Inc. ("Tesla") or its affiliate for installation within the United States of America and to which this Limited Warranty is expressed to apply in the System purchase agreement (each, the "System").

- 1. <u>Limited Warranty</u>. Tesla warrants that the System shall (a) conform to the Specifications¹ on the Original Sale Date²; (b) be free from defects in design, workmanship and materials as set out in <u>Exhibit 1</u>; and (c) retain energy capacity as set out in <u>Exhibit 1</u>.
- 2. <u>No Extensions</u>. If the System, or any component, is repaired or replaced under this Limited Warranty, the remainder of the periods referenced in <u>Exhibit 1</u> shall apply to the repaired or replacement system. Under no circumstance shall any such period be extended on account of any warranty repair or replacement.
- 3. Remedies. If a valid claim is submitted in accordance with the procedures described in this Limited Warranty, Tesla shall, in its sole discretion, (a) repair the defective System or component, (b) replace the defective System or component with an equivalent System or component (or, if Tesla or the manufacturer of such component has discontinued manufacture of such component, a mutually acceptable alternative component), or (c) where permitted in Exhibit 2, pay Energy Shortfall Damages (as defined in Exhibit 2). Tesla shall inform System owner of its remedy election in writing within 10 days of Tesla's validation of the claim. If Tesla repairs or replaces the defective System, Tesla shall also be responsible for the costs of teardown, disassembly, transportation, re-assembly and re-installation of the System or component (or their respective replacements).
- Items Not Covered. This Limited Warranty does not cover (a) normal wear and tear or deterioration, or 4. superficial defects, dents or marks that do not impact System performance; (b) vibration that does not impact System performance; (c) damage that occurs during shipping or transportation (other than shipping or transportation by or on behalf of Tesla); (d) defects or performance issues resulting from use of the System outside the "Operating Temperature" range set out in the Specifications; (e) defects or performance issues resulting from the commissioning, operation, maintenance, modification or repair of the System in violation of the applicable Tesla Manual³, other than by Tesla or its affiliate or subcontractor; (f) defects or performance issues to the extent that Tesla would have been able to prevent or limit such defect or performance issues if Tesla had a remote connection to the System, in circumstances where (i) Tesla did not have such remote connection at the required time and (ii) the System Purchase Agreement states that the System owner is responsible for establishing and maintaining such remote connection; (g) defects or performance issues resulting from abuse, negligence, accidents or force majeure events, including but not limited to lightning, flood, earthquake, fire, or other events outside the reasonable control of Tesla; (h) damage or deterioration that occurs after the expiration or voiding of this Limited Warranty or that is reported more than 10 days after the expiration or voiding of this Limited Warranty; or (i) theft or vandalism of the System or any of its components.
- Exclusions. Each of the following shall permanently void this Limited Warranty: (a) commissioning, maintenance, modification or repair of the System by anyone other than Tesla, its affiliate or a Tesla approved technician; and (b) removal and reinstallation of the System at a different location without the written consent of Tesla. Each of the following shall permanently void this Limited Warranty when performed by anyone other than Tesla or its affiliate or subcontractor: (i) installation of the System in contravention of the "Megapack System Installation Manual", (ii) storage of the System in contravention of the "Megapack System Storage Guidelines" or in violation of the "Storage Conditions (on the shelf)" set out in the "Environmental Specifications" section of the Specifications and (iii) any attempt to extend or reduce the life of the System or prevent or hinder the recovery of

¹ Specifications means the "Megapack System Specifications" referenced in the System purchase agreement.

² Original Sale Date means the date that risk of loss of the System transferred to the original buyer under the System purchase agreement.

³ Tesla Manuals means the System manuals published on Tesla Partner Portal (https://partners.teslamotors.com).

data regarding System usage.

- 6. <u>Exclusive Remedies</u>. This Limited Warranty is provided voluntarily and does not constitute an independent guarantee. TO THE FULLEST EXTENT PERMITTED BY LAW, THIS LIMITED WARRANTY AND THE REMEDIES SET FORTH HEREIN ARE EXCLUSIVE AND IN LIEU OF ANY OTHER WARRANTIES, REMEDIES AND CONDITIONS, WHETHER ORAL, WRITTEN, STATUTORY, EXPRESS OR IMPLIED (INCLUDING ANY WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, USE OR APPLICATION, AND ANY WARRANTIES AGAINST LATENT OR HIDDEN DEFECTS), ALL OF WHICH ARE EXPRESSLY DISCLAIMED. TO THE EXTENT THAT SUCH WARRANTIES CANNOT BE DISCLAIMED, TESLA LIMITS THE DURATION OF AND REMEDIES FOR SUCH WARRANTIES TO THE DURATIONS AND REMEDIES DESCRIBED HEREIN.
- 7. <u>Limitation of Liability</u>. IN NO EVENT WILL TESLA BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, SPECIAL, EXEMPLARY OR PUNITIVE DAMAGES ARISING OUT OF OR RELATED TO THIS LIMITED WARRANTY, REGARDLESS OF THE FORM OF ACTION AND REGARDLESS OF WHETHER A PARTY HAS BEEN INFORMED OF, OR OTHERWISE MIGHT HAVE ANTICIPATED, THE POSSIBILITY OF SUCH DAMAGES. . IN NO EVENT WILL TESLA'S LIABILITY ARISING OUT OF OR RELATED TO LIMITED WARRANTY CLAIMS WITH RESPECT TO AN INDIVIDUAL SYSTEM EXCEED THE SYSTEM PRICE⁴. SOME STATES DO NOT ALLOW THE EXCLUSION OR LIMITATION OF DAMAGES, INCLUDING INCIDENTAL OR CONSEQUENTIAL DAMAGES, SO THE ABOVE EXCLUSION OR LIMITATION MAY NOT APPLY, OR MAY ONLY APPLY TO A LIMITED EXTENT.
- 8. <u>Limitation on Use</u>. The system is not intended for use as a primary or back-up power source for life-support systems or other medical equipment. Tesla disclaims any liability arising out of any such use of the system, reserves the right to refuse to service the system if used for these purposes and disclaims any liability arising out of tesla's service of, or refusal to service, any such system.
- 9. <u>Governing Law; Dispute Resolution; Venue</u>. This Limited Warranty will be governed by and interpreted in accordance with the laws of the State of California. The United Nations Convention on Contracts for the International Sale of Goods will not apply to this Limited Warranty. Any dispute arising from or relating to this Limited Warranty shallfirst be promptly referred to the senior level management of Tesla and the System owner for resolution. If the dispute is not resolved within 20 days after referral, then either party may take such dispute to binding arbitration in accordance with the then-current Streamlined Arbitration Rules of the Judicial Arbitration and Mediation Services ("JAMS"). The existence, content and result of the arbitration shall be held in confidence by Tesla and the System owner, their representatives, any other participants and the arbitrator. The arbitration will be conducted by a single arbitrator selected by agreement of Tesla and the System owner or, failing such agreement, appointed in accordance with the JAMS rules. The arbitration shall be conducted in English and in San Francisco, California. Tesla and the System owner will each bear its own expenses in the arbitration and will share equally the costs of the arbitration; provided, however, that the arbitrator may, in its discretion, award reasonable costs and fees to the prevailing party.
- 10. <u>Claims Process</u>. Claims under this Limited Warranty must be made by notifying Tesla at the email address identified below. For a claim to be processed, proof of the original purchase of the System and any subsequent transfers of ownership of the System need to accompany the claim. The claim must include a description of any alleged defect or energy capacity shortfall, as well as the relevant System's serial number, Original Sale Date and Commissioning Date. If the claim is contested by Tesla, it shall be the System owner's responsibility to show that the defect or energy capacity shortfall is covered by this Limited Warranty and that none of the exclusions in this Limited Warranty apply. In the case of energy capacity shortfall claims, Tesla shall be permitted to perform one or more Standard Capacity Tests upon 24 hours' prior written notice to determine if the applicable Minimum Energy Retention Percentage set forth in <u>Exhibit 1</u> has been achieved. Prior to returning any System or component to Tesla, a Return Merchandise Authorization number is required. This may be obtained by contacting Tesla at the email address, address or telephone number identified below.

⁴ System Price means the purchase price paid to Tesla for the System, as shown in the System purchase agreement. If you did not purchase the System direct from Tesla, you should contact Tesla to confirm the System Price.

Exhibit 1 - Limited Warranty Periods

Years 1 through 10 following Commissioning Date

The System shall be free from defects in design, workmanship and materials during years 1 through 10 following the Commissioning Date⁵ or (if earlier) until the Aggregate Discharge Throughput exceeds 2,996kWh per kWh of Nameplate Energy Capacity for 2-Hour Systems or 3,104kWh per kWh of Nameplate Energy Capacity for 4-hour Systems, and the Actual Energy Retention Percentage⁶ shall be equal to or greater than the applicable "Minimum Energy Retention Percentage" below until the below periods have expired or (if earlier) the Aggregate Discharge Throughput⁷ exceeds the below "Aggregate Discharge Throughput Limitation".

Period (Warranty Years ⁸ following Commissioning Date)	Aggregate Discharge Throughput Limitation (2 Hour Systems)	Minimum Energy Retention Percentage (2 Hour Systems)	Aggregate Discharge Throughput Limitation (4 Hour Systems)	Minimum Energy Retention Percentage (4 Hour Systems)
1	349	93.0%	351	94.0%
2	678	88.0%	686	90.0%
3	990	84.0%	1,008	87.0%
4	1,290	81.0%	1,319	84.0%
5	1,584	80.0%	1,622	82.5%
6	1,873	79.0%	1,922	82.0%
7	2,160	78.0%	2,220	81.5%
8	2,442	77.0%	2,517	81.0%
9	2,721	76.0%	2,811	80.5%
10	2,996	75.0%	3,104	80.0%

Extension to Years 11-15 following Commissioning Date, for low utilization scenario

This section only applies if the Aggregate Discharge Throughput during the first 10 years following the Commissioning Date is equal to or less than 2,052kWh per kWh of Nameplate Energy Capacity for 2-Hour Systems, or equal to or less than 3,104kWh per kWh of Nameplate Energy Capacity for 4-Hour Systems. The System shall be free from defects in design, workmanship during years 11 through 15 following the Commissioning Date or (if earlier) until the Aggregate Discharge Throughput exceeds 2,956kWh per kWh of Nameplate Energy Capacity for 2-Hour Systems or 4,469kWh per kWh of Nameplate Energy Capacity for 4-hour Systems. The Actual Energy Retention Percentage shall be equal to or greater than the applicable "Minimum Energy Retention Percentage" below until the below periods have expired or (if earlier) the Aggregate Discharge Throughput Emitation".

Period (Warranty Years following Commissioning Date)	Aggregate Discharge Throughput Limitation (2 Hour Systems)	Minimum Energy Retention Percentage (2 Hour Systems)	Aggregate Discharge Throughput Limitation (4 Hour Systems)	Minimum Energy Retention Percentage (4 Hour Systems)
11	2,238	74.0%	3,391	78.0%
12	2,421	73.0%	3,672	76.0%
13	2,602	72.0%	3,945	74.0%
14	2,780	71.0%	4,211	72.0%
15	2,956	70.0%	4,469	70.0%

⁵ **Commissioning Date** means the earlier of (a) the date the System is commissioned or (b) the date falling 90 days after the Original Sale Date.

⁶ Actual Energy Retention Percentage means the energy discharged by the System as a whole (as measured at the ACterminal(s) of the Megapack(s)) at Standard Test Conditions, expressed as a percentage of the Nameplate Energy Capacity.

⁷ Aggregate Discharge Throughput means the aggregate discharge throughput of the System (at the Megapack AC terminal(s)) in kWh per kWh of Nameplate Energy Capacity.

⁸ Warranty Year means each consecutive 365 day period commencing on the Commissioning Date and each anniversary of the Commissioning Date.

⁹ Nameplate Energy Capacity means the kWh energy capacity of the System set out in the System purchase agreement.

Standard Test Conditions

When measuring the Actual Energy Retention Percentage, (i) the System shall be fully charged to 100% state of energy and then fully and continuously discharged at Nominal Power (as defined in the Specifications) to 0% state of energy, (ii) the ambient temperature at the System location and the initial temperature of all battery pods is 25° C, and (iii) the initial temperature of all battery pods when the System starts both charging and discharging shall be 25° C $\pm 5^{\circ}$ C.

Exhibit 2 - Energy Shortfall Damages

Circumstances where Payment of Energy Shortfall Damages is Permitted

Tesla may remedy any claims under <u>Section 1(c)</u> of this Limited Warranty by paying Energy Shortfall Damages unless (a) the Minimum Energy Retention Percentage for the Warranty Year in which the claim is made (as set out in <u>Exhibit 1</u>) exceeds the Actual Energy Retention Percentage at the time of the claim by more than 5 percentage points ¹⁰ or (b) the amount of the Energy Shortfall Damages, when aggregated with any previous Energy Shortfall Damages paid by Tesla under this Limited Warranty, exceeds 5% of the System Price. If paragraph (a) or (b) above applies to a claim, Tesla must repair or replace the System or component under <u>Section 3(a)</u> or <u>3(b)</u> of the Limited Warranty.

Calculation of Energy Shortfall Damages

1. The "Energy Shortfall Damages" payable in respect of a Limited Warranty claim shall be calculated as follows:

$$\left[\frac{[\textit{MERP (Warranty Year n)} - \textit{AERP (Warranty Year n)}] \times \textit{D}}{\sum_{1}^{n} \textit{MERP (Warranty Year i)} \times 365 \textit{ days}}\right] \times \textit{System Price}$$

where:

n = Number of Warranty Years elapsed since the Commissioning Date, rounded up to the nearest Warranty Year.
 MERP = For any Warranty Year, the Minimum Energy Retention Percentage for that Warranty

Year, **a**s set out in <u>Exhibit 1</u>.

A ERP = For any Warranty Year, the Actual Energy Retention Percentage (as defined in Exhibit

<u>1</u>) for that Warranty Year.

D = 365.

Example: The System Price was US\$1,000,000. In Warranty Year 4, the MERP for a 4-hour System is 84%, the AERP is 81%, and Tesla has never previously paid any Energy Shortfall Damages. Tesla may elect to pay Energy Shortfall Damages, and the amount of those Energy Shortfall Damages would be calculated as follows:

$$\frac{[84\% - 81\%] \times 365}{[94\% + 90\% + 87\% + 84\%] \times 365} \times \$1,000,000 = \$8,451$$

If the System was 2MWh, this \$8451 amount is equivalent to \$0.42 for each kWh of throughput that was "lost" in Contract Year 4 as a result of the AERP being lower than the MERP.

2. If Tesla elects to pay Energy Shortfall Damages in respect of more than one claim made by System owner in the same Warranty Year, then the Energy Shortfall Damages payable by Tesla in respect of the second (and each subsequent) claim shall be calculated as [the Energy Shortfall Damages payable by Tesla in respect of the second (or subsequent) claim] minus [the sum of all Energy Shortfall Damages paid by Tesla in respect of Limited Warranty claims made by System owner in the same Warranty Year].

Payment of Energy Shortfall Damages

Tesla shall pay any Energy Shortfall Damages to System owner within 30 days of its election to do so under <u>Section</u> <u>3</u> of this Limited Warranty, in the same currency as the System Price was denominated in the System purchase agreement.

¹⁰ This subsection refers to a bsolute values. For example, if the Minimum Energy Retention Percentage is 73%, then the Actual Energy Retention Percentage would have to be less than 68% in order for this subsection to apply.

EXHIBIT R

REMOTE MONITORING INFORMATION FROM THE BESS VENDOR

The data provided in this section are read-only values provided by the Tesla Site Controller with respect to the battery energy storage system, to give the Owner configuration and status information. The below list comprises the data which transfer to the Owner upon creation (or if later, on the date that Tesla receives payment in full for the battery system), according to the customer's contract with Tesla. Any data which Tesla collects from the battery system and are not listed below will be owned by Tesla.

NOTE: This list indicates ownership rights with respect to certain data but does not comprise an agreement by Tesla to convey such data to customer. The customer may obtain data generated by the battery using its own SCADA interface, or through a subscription to Tesla's Powerhub monitoring software.

- 1. <u>Devices Connected</u>. This value indicates the number of inverter blocks and meters with which the Tesla Site Controller is configured to communicate.
- 2. <u>Target Battery Power</u>. This value indicates the target battery power command that the Tesla Site Controller is sending to the battery.
- 3. <u>Target Battery Reactive Power</u>. This value indicates the target battery reactive power command that the Tesla Site Controller is sending to the battery.
- 4. <u>Full Pack Energy</u>. This value indicates the available energy of the battery at full charge and nominal temperature.
- 5. <u>Nominal Energy Remaining</u>. This value indicates the energy remaining if the battery is operated at nominal temperature (25 deg C).
- 6. <u>Available Charge Power</u>. This value comprises an estimate of the maximum power available to the user to charge the battery.
- 7. <u>Available Discharge Power</u>. This value comprises an estimate of the maximum power available to the user to discharge the battery.
- 8. <u>Available Blocks</u>. This value indicates the aggregated number of inverter blocks that are available for operation.
- 9. <u>Customer-Facing Alerts.</u> Alerts related to system operation available to the Customer.
- 10. For each meter included within the battery:
 - a. Real power
 - b. Reactive power
 - c. Voltage
 - d. Current
 - e. Lifetime exported energy
 - f. Lifetime imported energy
 - g. Frequency

Pinon Solar EPC Contract

PNM Exhibit TGF-16

Is contained in the following 181 pages.

ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT

by and between

PUBLIC SERVICE COMPANY OF NEW MEXICO

and

AFFORDABLE SOLAR INSTALLATION INC.

for the

PIÑON SOLAR FACILITY

Dated as of June 27, 2019

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T

ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT

This ENGINEERING, PROCUREMENT AND CONSTRUCTION AGREEMENT is made and entered into as of this 27th day of June, 2019 (the "Effective Date"), by and between PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation ("Owner") and AFFORDABLE SOLAR INSTALLATION INC., a New Mexico corporation ("Contractor"). Each entity is sometimes individually referred to herein as a "Party" and the entities are sometimes collectively referred to herein as the "Parties."

RECITALS

WHEREAS, Owner is developing a photovoltaic power generation facility with a proposed Gross Maximum Capacity of twenty (20) MW_{AC}, located in San Juan County, New Mexico, as more particularly described herein; and

WHEREAS, Owner desires to engage Contractor to design, engineer, procure, install, construct, test and commission the PV Power Plant for the Contract Price, and Contractor desires to provide such services, all in accordance with the terms and conditions set forth in this Agreement.

NOW, THEREFORE, in consideration of the sums to be paid to Contractor by Owner and of the covenants and agreements set forth herein, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

AGREEMENT

1. DEFINITIONS AND RULES OF INTERPRETATION

1.1. **Definitions.** For the purposes of this Agreement, the following terms shall have the following meanings:

"Abandon" means Contractor's failure or refusal to continue to diligently pursue or substantially perform the Work so as to complete the Project in substantial conformance with the Work Schedule and shall include instances in which Contractor has, in breach of its obligations under this Agreement: (a) suspended its operations at the Site; (b) reduced personnel at the Site; (c) removed required equipment from the Site; and (d) otherwise conducted its operations such that Contractor would not be capable of maintaining progress sufficient to achieve Substantial Completion of the PV Power Plant by the Substantial Completion Guaranteed Date.

"AC" means alternating current.

"Affiliate" means, with respect to a specified Person, any other Person that directly, or indirectly through one or more intermediaries, controls, is under common control with, or is controlled by such specified Person. For purposes of this definition, "control" means, with respect to any Person, the ability to control, influence or limit, directly or indirectly, the operations, business decisions or policies of such Person, whether through the ownership of voting securities,

by contract or otherwise.

"Agreement" means this Engineering, Procurement and Construction Agreement, including all Exhibits and attachments hereto, as the same may be modified, amended or supplemented from time to time in accordance with the terms hereof.

"Aggregate LD Cap" has the meaning set forth in Section 30.2(e).

"Applicable Law" means and includes any statute, license, law, rule, regulation, code, ordinance, judgment, injunction, arbitral award, decree, writ, legal requirement or order, of any national, federal, provincial, tribal, state or local court or other Governmental Authority, and the official, written judicial interpretations thereof, applicable to (a) the Project, the Work, the PV Modules, the Site or the Parties; (b) safety or the prevention of injury to persons or the damage to property on, about or adjacent to a Site or any other location where any other portion of the Work will be performed; (c) labor relations, employee relations, employment discrimination, affirmative action, employee benefits, fair labor standards, family and medical leave, immigration, payment of wages, prevailing wages, hours of employment or other terms and conditions of employment; (d) protection of human health or the environment; or (e) emissions, discharges, releases or threatened releases of pollutants, contaminants, chemicals or industrial, toxic or hazardous substances or wastes into the environment including, without limitation, ambient air, surface water, groundwater, or land, or otherwise relating to the manufacture, processing, distribution, use, treatment, storage, disposal, transport, or handling of pollutants, contaminants, chemicals, Hazardous Materials or other industrial, toxic materials or wastes, as now or may at any time hereafter be in effect.

"Applicable Permit(s)" means each national, state, local or other license, consent, waiver, appraisal, authorization, ruling, exemption, variance, order, judgment, decree, declaration, regulation, certification, filing, recording, permit (including, where applicable, conditional permits) or other approval with, from or of any Governmental Authority, including each and every environmental, construction, operating or occupancy permit, that is required by Applicable Law for the performance of the Work or operation and maintenance of the PV Power Plant, including those set forth in Exhibit C-1 and the Contractor-Acquired Permits set forth in Exhibit C-2.

"Business Day" means a day, other than a Saturday or Sunday or a public holiday, on which banks are generally open for the transaction of business in the City of Albuquerque, New Mexico.

"Capacity LD Cap" has the meaning set forth in Section 30.2(d).

"Capacity Liquidated Damages" means the amount calculated pursuant to <u>Section 15.2.2</u> by multiplying the Contract Price by a fraction, the numerator of which shall be equal to the difference between the Guaranteed Capacity and the Tested Capacity and the denominator of which shall be equal to the Guaranteed Capacity.

"Capacity Liquidated Damages Guarantee" has the meaning set forth in Section 15.2.

"Capacity Test" or "Capacity Testing" means the test described in Exhibit H-2.

"Capacity Test Procedures" means the written test procedures, standards, protective settings and testing programs for the Capacity Test developed pursuant to Section 13.3 and Exhibit H-2.

"CCN" means Owner's application for a Certificate of Public Convenience and Necessity filed with the NMRPC relating to the Project.

"Change In Law" means the enactment, adoption, promulgation, modification (including a written change in interpretation by a Governmental Authority), or repeal after the Effective Date of any Applicable Law that materially and adversely affects the Work; provided, however, that (a) a change in any national, federal, state or provincial income Tax law (or any other Tax law based on income), or any other law imposing a tax, duty, levy, impost, fee, royalty, or similar charge based on the importation or exportation of any item or service for which Contractor is responsible hereunder shall not be a Change In Law pursuant to this Agreement; and (b) the final enactment, modification, amendment or repeal of an Applicable Law prior to the Effective Date with an effective date of such action that falls after the Effective Date shall not be a Change In Law pursuant to this Agreement.

"Change In Work" means a change in the Work as defined in Section 16.1.

"Change In Work Form" means the form prepared in respect of a Change In Work in the form attached hereto as Exhibit Q.

"Claim Notice" has the meaning set forth in Section 23.6.

"Commercially Reasonable Efforts" means, with respect to any action required to be made, attempted or taken by a Party under this Agreement, the level of effort in light of the facts known to such Party at the time a decision is made that: (a) can reasonably be expected to accomplish the desired action; and (b) is consistent with Industry Standards and Applicable Law, taking into consideration the costs of such action (including whether such cost is reasonable), the amount of notice of the need to take such action, the duration and type of action and the commercial and regulatory environment in which such action occurs.

"Commissioning Plan" has the meaning set forth in Exhibit H-1.

"Confidential Information" has the meaning set forth in Section 24.1.

"Contract Interest Rate" has the meaning set forth in Section 6.5.

"Contract Price" has the meaning set forth in Section 5.1.

"Contractor" has the meaning set forth in the preamble and shall include any of its permitted successors and assigns.

"Contractor-Acquired Permits" means the permits, approvals, consents and

certifications, other than Owner-acquired permits, required for the performance of the Work including those set forth in <u>Exhibit C-2</u>.

"Contractor Credit Support" means either the Performance Bond or the Warranty Bond or both of them, as the context requires.

"Contractor Cure Period" has the meaning set forth in Section 19.2.

"Contractor Deliverable" means all of the deliverables set forth on the Contractor Deliverables Table.

"Contractor Deliverables Table" means the table of Contractor Deliverables attached hereto as Exhibit B.

"Contractor Event of Default" has the meaning set forth in Section 19.1.

"Contractor Financing Parties" means (a) any and all lenders providing senior or subordinated construction, interim or long-term debt financing or refinancing to Contractor or its Affiliates or (b) any Person providing credit support to Contractor or its Affiliates, in each case, in connection with the PV Power Plant or a portfolio of projects (including any other PV power plant that Contractor is developing for or on behalf of Owner or any Affiliate of Owner), and, in each case, any trustee or agent acting on Contractor's or its Affiliate's behalf.

"Contractor Hazardous Materials" has the meaning set forth in Section 27.1.

"Contractor Indemnitee" has the meaning set forth in Section 23.3.

"Contractor Lien" has the meaning set forth in Section 28.1.

"Contractor's Invoice" means an invoice from Contractor to Owner prepared by Contractor and in a form attached as Exhibit S.

"Contractor's Project Manager" means the project manager designated by Contractor pursuant to Section 3.4 or any other project manager appointed by Contractor, subject to the consent of Owner, which consent shall not be unreasonably denied or delayed.

"Contractor's Safety Procedures" means those procedures and protocols noted on Exhibit D.

"Cure Period" has the meaning set forth in <u>Section 15.2</u>, as the same may be extended pursuant to <u>Section 15.4</u>.

"Data Acquisition System" or "DAS" has the meaning set forth in Exhibit A-1.

"DC" means direct current.

"Defect" means, as the context requires, any Equipment, engineering, design or installation Work, in each case, that does not conform in any material respect to the standards set forth in this Agreement, the Statement of Work, Applicable Law or the Contractor Deliverables.

"Defect Warranty" means the warranties of Contractor under Section 17.1.1.

"Defect Warranty Period" has the meaning set forth in Section 17.2.1.

"Delay LD Cap" has the meaning set forth in Section 30.2(c).

"Delay Liquidated Damages" has the meaning set forth in Section 15.1.

"Delay Notice" has the meaning set forth in Section 8.2.1.

"Design Warranty" has the meaning set forth in Section 17.1.2.

"Design Warranty Period" has the meaning set forth in Section 17.2.2.

"Disclosing Party" has the meaning set forth in Section 24.1.

"Dispute" has the meaning set forth in <u>Section 31.1</u>.

"Dollars," "dollars" or "\$" means United States Dollars.

"Effective Date" has the meaning set forth in the preamble.

"Equipment" means the PV Modules and all materials, supplies, apparatus, devices, equipment, machinery, tools, components, instruments and appliances (other than the Owner-Provided Facilities and Services) that are to be incorporated into the PV Power Plant, whether provided by Contractor or any Subcontractor.

"Event of Default" means either a Contractor Event of Default or an Owner Event of Default, as the context may require.

"Excusable Event" means an event that adversely affects Contractor's performance of the Work, to the extent such event is attributable to: (a) an Unforeseeable Site Condition, (b) a failure of the PV Power Plant (or any system thereof) caused by an event (other than a Force Majeure Event, Change In Law or an Owner-Caused Delay) that is external to the PV Power Plant and beyond the reasonable control of Contractor (such as a grid outage or disturbance), (c) the occurrence of a Change In Law or a change in Industry Standards or (d) the occurrence of an Owner-Caused Delay.

"Fence" means the permanent fence for the Site to be provided by Contractor as set forth in Exhibit A-1.

"Final Completion" means satisfaction by Contractor or waiver by Owner of all of the

conditions set forth in Section 14.4 for Final Completion of the PV Power Plant.

"Final Completion Date" has the meaning set forth in Section 14.5.

"Final Contractor's Invoice" has the meaning set forth in Section 6.6.

"Final Payment" has the meaning set forth in Section 6.6.

"Force Majeure Event" means any event or circumstance that prevents a Party from timely performing its obligations under this Agreement and that is not within the reasonable control of, or that is not the result of the negligence, willful and wanton misconduct or intentional misconduct of, the claiming Party and that, by the exercise of reasonable due diligence the claiming Party is unable to overcome or avoid or cause to be avoided. Depending on the facts and circumstances, the following may constitute such an event: including war, terrorist act, public disorder, expropriation, confiscation or nationalization, blockage of exports of essential equipment by any non-U.S. governmental authorities imposed after the Effective Date; the action or inaction of a Governmental authority, fire, explosion, epidemic, quarantine, unusually severe weather conditions, or other acts of God; provided, however, that the following shall not constitute a Force Majeure Event:

- (a) with respect to Labor Disputes and labor matters, the following shall not constitute a Force Majeure Event: (i) any labor shortage affecting Contractor or any Subcontractor; (ii) any Labor Disputes involving strikes, walkouts, boycotts, or disturbances directed specifically at Contractor or any Subcontractors; or (iii) any labor disturbances, disputes, boycotts or strikes (whether primary or secondary in nature) involving Contractor or any Subcontractors taking place at the Site, or a facility of Contractor or any Subcontractors;
- (b) mechanical or equipment failure (so long as such failure was not itself caused by a Force Majeure Event); and
- (c) normal climatic conditions based on a twenty-five (25) year history of weather at the Site.

"Full Notice to Proceed" means a Notice signed by a representative of Owner to Contractor authorizing Contractor to commence and complete all Work for the PV Power Plant under this Agreement.

"Full Notice to Proceed Date" means the first Business Day after Owner provides Contractor with the Full Notice to Proceed for the PV Power Plant.

"Functional Test" means the test to determine the functionality of the PV Power Plant as set forth in the Functional Test Phase description in Exhibit H-2.

"Governmental Authority" means applicable national, federal, state, tribal, provincial, and local governments and all agencies, authorities, departments, instrumentalities, courts, tribunals, corporations, other authorities lawfully exercising or entitled to exercise any

administrative, executive, judicial, legislative, police, regulatory or taxing authority or power, or other subdivisions of any of the foregoing having a regulatory interest in or jurisdiction over the Site, the Project, the Work or the Parties, including any non-governmental body administering, regulating or having general oversight over system reliability, safety, the environment, or gas, electricity, or power generation, distribution or transmission, including the North American Electric Reliability Corporation and the Western Electricity Coordinating Council.

"Gross Maximum Capacity" means the nameplate rating of the PV Power Plant as determined by reference to the sum of the DC STC rating of all installed PV Modules or, as applicable, the sum of the AC nameplate rating of all installed inverters for the PV Power Plant, in each case without considering generation, transmission or distribution losses.

"Guaranteed Capacity" means the guaranteed capacity for the PV Power Plant as set forth in Exhibit H-2.

"Hazardous Materials" means any chemical, substance or material regulated or governed by any Applicable Permit, or any substance, emission or material now or hereafter deemed by any Governmental Authority to be a "regulated substance," "hazardous material," "hazardous waste," "hazardous constituent," "hazardous substance," "toxic substance," "radioactive substance" or "pesticide" or similar designation.

"Indemnitee" means an Owner Indemnitee or a Contractor Indemnitee, as the context may require.

"Industry Standards" means those practices, methods, techniques, standards and acts (a) engaged in or approved by a significant portion of the regulated photovoltaic solar power generation industry in the United States, including the practices, methods, techniques, standards and acts which, in the exercise of reasonable judgment are expected to accomplish a desired result consistent with good business practices, reliability, and safety in connection with the design, supply, construction, start-up, testing, commissioning, completion, operation or maintenance of similar work on projects of the same or similar size and type and at similar locations as the Project and the exercise of that degree of skill, diligence, prudence and foresight that would reasonably be expected from a skilled and experienced licensed engineer or contractor employing generally accepted professional standards with respect to the performance of the Work expected to accomplish the desired result in a manner consistent with Applicable Laws, Applicable Permits, codes and standards, reliability, safety, environmental protection, economy and expediency; and (b) that conform in all material respects to the design, engineering, construction, testing, operation, maintenance and other recommendations and guidelines applicable to the Work in question. Industry Standards is not intended to be the optimum practice, method or acts to the exclusion of all others, but rather is intended to be any of the practices, methods or actions generally accepted in the United States that meet the foregoing standards. To the extent that the standards of construction, workmanship, Equipment and components specified in Exhibit A exceed Prudent Utility Practice, then the standards imposed by this Agreement control.

"Installation Requirements" has the meaning set forth in Section 17.1.3.

"Intellectual Property Claim" means a claim or legal action for unauthorized disclosure or use or infringement of any trade secret, foreign or domestic patent or patent rights, copyright, trademark rights, service mark or other intellectual property (whether or not legally protected or protectable) in connection with, arising out of or in any way related to Contractor's performance (or that of its Affiliates or Subcontractors) under this Agreement.

"Intellectual Property Rights" means all licenses, trade secrets, copyrights, patents, trademarks, proprietary information or other ownership rights necessary for the ownership, operation, maintenance and decommissioning of the PV Power Plant.

"Invention" has the meaning set forth in Section 25.1.

"Invoice Payment" has the meaning set forth in Section 6.4.

"Issuer" means a United States surety or a foreign insurer with a United States branch with an A.M. Best Insurance financial strength rating of A VIII or better in the latest edition of A.M. Best and that is Treasury listed.

"Labor Dispute" means work stoppages, slowdowns, strikes, disputes, disruptions, boycotts, walkouts and other labor difficulties.

"Limited Notice to Proceed" or "LNTP" means a Notice signed by an authorized representative of Owner to Contractor authorizing Contractor to perform the LNTP Work for the PV Power Plant.

"Limited Notice to Proceed Date" means the first Business Day after Owner provides Contractor with the Limited Notice to Proceed for the PV Power Plant.

"LNTP Work" has the meaning set forth in Section 7.1.

"Losses" means, subject to Section 30, any and all actions, suits, judgments claims, demands, costs, charges, expenses, liabilities (including liabilities arising out of the application of the doctrine of strict liability), losses, penalties, injuries, interest or damages, whether arising in equity, at common law, or by statute, or under the law of contract, tort or property, of whatsoever kind and nature, including reasonable attorney fees, court or arbitration costs and fees, expert costs and fees, and expenses and costs of investigation.

"Mechanical Completion" means that the PV Power Plant is mechanically, electrically and functionally complete and ready for initial operations, adjustment and testing, except for Non-Critical Deficiencies; Mechanical Completion shall not occur before satisfaction of all the following: (a) all systems, including those required for the safe, routine and efficient operation and control have been constructed and commissioned and (b) all systems have been placed into service for the purpose for which the PV Power Plant is intended.

"Milestone Item" means a discrete portion of the Work as set forth in Exhibit G.

"Milestone Payment Schedule" means the Milestone Payment schedule attached hereto as $\underline{\text{Exhibit I}}$.

"Minimum Guaranteed Capacity" means the Minimum Guaranteed Capacity for the PV Power Plant as set forth in Exhibit H-2.

"Module Warranty Terms and Conditions" means the terms and conditions set forth in Exhibit P.

"Monthly Progress Report" means a written monthly progress report prepared by Contractor in form and content consistent with Section 7.4, "Progress Reporting", or in a form and content as otherwise directed by Owner.

"MV" means medium voltage.

"MW" means megawatt.

"NMPRC" means the New Mexico Public Regulation Commission or any successor agency having jurisdiction over Owner and the Project.

"NMPRC Approval" has the meaning set forth in Section 32.

"Non-Critical Deficiencies" means an item of Work that: (a) Owner or Contractor identifies as requiring completion or containing Defects; (b) does not delay or impede the safe operation of the PV Power Plant; and (c) does not materially affect the capacity, efficiency, reliability, operability, safety or mechanical or electrical integrity of the PV Power Plant.

"Notice" or "Notification" means a written communication between authorized representatives of the Parties required or permitted by this Agreement and conforming to the requirements of <u>Article 29</u>.

"Notice of Final Completion" means a Notice from Contractor to Owner stating that Contractor has satisfied the requirements for Final Completion under <u>Section 14.5</u>.

"Notice of Substantial Completion" means a Notice from Contractor to Owner stating that Contractor has satisfied the requirements for Substantial Completion under Section 14.3.

"Notify" means to provide a Notice or Notification.

"Operating Personnel" means the personnel designated by Owner, or by an entity providing operating services for Owner, to operate the PV Power Plant (including all operators, instrument technicians and supervisors and Owner's contractors (other than Contractor or any Affiliate of Contractor)).

"Owner" has the meaning set forth in the preamble and shall include any of its permitted successors and assigns.

"Owner-Caused Delay" means, with respect to the Work, a delay in Contractor's performance of any material item of the Work or to the Work Schedule to the extent actually and demonstrably caused by the performance or failure to perform by Owner.

"Owner Critical Path Items" means the items identified in $\underline{\text{Exhibit }G}$ as performance obligations of Owner.

"Owner Directive" shall have the meaning set forth in Section 16.7.

"Owner Event of Default" has the meaning set forth in Section 19.3.

"Owner Financing Parties" means (a) any and all lenders providing senior or subordinated construction, interim or long-term debt financing or refinancing to Owner; (b) any and all equity investors in Owner providing tax equity investment or leveraged lease-financing or refinancing (or any other equity investor that makes a capital contribution to Owner in cash or in kind); or (c) any Person providing credit support to Owner, in each case, in connection with the Project or a portfolio of projects (including the PV Power Plant) and, in each case, any trustee or agent acting on Owner's behalf.

"Owner Indemnitee" has the meaning set forth in Section 23.2.

"Owner Interconnection Facilities" means the facilities and equipment for the PV Power Plant that are owned by Owner and located between (and including) the PV Interconnection Switchgear and the point where the PV Power Plant and such PV Interconnection Switchgear are physically and electrically interconnected with the applicable electric system.

"Owner-Provided Facilities and Services" means, within the parameters set forth on Exhibit A-2, (a) the Owner Interconnection Facilities, (b) the office laydown space at the Site for Contractor to place its construction trailers, (c) the equipment and materials laydown area at the Site, (d) the Project's rights-of-way and easements and electrical service (limited to 110v/220v), and (f) other items to be provided by Owner pursuant to Exhibit A-2.

"Owner-Provided Information" means, with respect to the Project, the information provided by or on behalf of Owner as set forth in Exhibit A-3.

"Owner Representative" means the Owner's representative for the Project(s) designated by Owner pursuant to Section 2.1.

"Owner's Certificate of Final Completion" means a certificate of Owner certifying that Final Completion has occurred.

"Owner's Certificate of Substantial Completion" means a certificate from Owner certifying that Substantial Completion has occurred.

"Owner's Engineer" means any engineering firm or firms or other engineer or engineers

(which may be employee(s) of Owner) selected and designated by Owner.

"Owner's Separate Contractors" means each contractor or other Person that is in direct or indirect contractual privity with Owner and that performs any work in respect of the Project, but excluding Contractor and each Person in direct or indirect contractual privity with Contractor, including in such exclusion each Subcontractor.

"PCS" has the meaning set forth in Exhibit A-1.

"Performance Bond" means a bond in the form attached hereto as <u>Exhibit M</u>, issued by an Issuer in an amount equal to fifty percent (50%) of the Contract Price, or such other performance security in form, amount and from an Issuer acceptable to Owner.

"Person" means any natural person, corporation, company, voluntary association, partnership, incorporated organization, trust, limited liability company, joint venture, firm, unincorporated organization, or any other entity or organization, including any Governmental Authority. A Person shall include any officer, director, member, manager, employee or agent of such Person.

"PNM" means Public Service Company of New Mexico and its permitted successors and assigns.

"Pre-Existing Contamination" means any Hazardous Materials present at or under the Site, whether introduced before or after the Effective Date, that are not Contractor Hazardous Materials.

"Preliminary Notice" has the meaning set forth in Section 28.3.

"Project" means the PV Power Plant and the Owner Interconnection Facilities for the PV Power Plant.

"Proposed Punchlist" has the meaning set forth in Section 14.1.1.

"Punchlist" has the meaning set forth in Section 14.1.1.

"Punchlist Amount" means the cost or estimated cost to complete any Punchlist item as approved or deemed approved by the Parties.

"PV" means photovoltaic.

"PV Interconnection Switchgear" means, with respect to the Project, the PV interconnection switchgear that is designed, engineered, procured and constructed by Owner (or Owner's Separate Contractors) for the Project and which collects the feeds from the PVCS for the Project and transforms voltage as required for electrical interconnection to the Transmission Provider.

"PV Modules" means the PV modules acquired by Contractor or its Affiliates for the performance of the Work, which will form in part the PV Power Plant.

"PV Power Plant" means, as the context requires, means the thirty-five (35) MW_{AC} Gross Maximum Capacity power plant to be designed, engineered, procured, constructed, tested and commissioned by Contractor under this Agreement (up to the entry of, but not including, the PV Interconnection Switchgear and the other Owner Interconnection Facilities) located in or near Waterflow, New Mexico. The PV Power Plant includes all equipment and systems up to and including the PVCS but excludes the PV Interconnection Switchgear. The PV Power Plant is restricted to the physical area contained within the Fence and extending 12" beyond such Fence.

"PVCS" means, with respect to the Project, the PV combining switchgear which collects the generated power from the power conversion station (which consists of the static power inverters, inverter step up transformers, cabling and grounding systems) and then serves the PV Interconnection Switchgear for such Project.

"Receiving Party" has the meaning set forth in Section 24.1.

"Remedial Plan" means a plan prepared by Contractor regarding the actions to be taken and the schedule to remedy failures to meet the Guaranteed Capacity for the PV Power Plant, as submitted to and approved by Owner pursuant to Section 15.2.

"Required Manuals" means operation and maintenance manuals, which are reasonably necessary to safely and efficiently operate, maintain and shut down the PV Power Plant, as set forth on Exhibit B.

"SCC" has the meaning set forth in Exhibit A-1.

"Site" means the site of the PV Power Plant, as more particularly described in Exhibit J.

"Site Assumptions" means the assumptions relating to the Site described in Exhibit L.

"Site Conditions" means the physical and other conditions at the Site and the surrounding area as a whole, including conditions relating to the environment, transportation, access, waste disposal, handling and storage of materials, the availability and quality of electric power, the availability and quality of water (including raw water), topography, ground surface conditions, subsurface geology, and nature and quantity of surface and subsurface materials (including Hazardous Materials).

"Site Plan" means the plan that is part of the design package for the PV Power Plant to be developed by Contractor as set forth in Exhibit B.

"Site Safety Officer" has the meaning set forth in Section 3.12.

"Standard Test Conditions" or "STC" has the meaning set forth in Exhibit H-2.

"Statement of Work" means the requirements regarding the Work set forth in Exhibit A
1.

"Subcontractor" means any Person, including any Supplier, other than Contractor or its Affiliates, that performs any portion of the Work in furtherance of Contractor's obligations under this Agreement.

"Substantial Completion" means the satisfaction of all of the conditions for the PV Power Plant as set forth in <u>Section 14.2</u>.

"Substantial Completion Date" has the meaning set forth in Section 14.3.

"Substantial Completion Guaranteed Date" means March 1, 2022.

"Successfully Run" means (a) with respect to the Capacity Test, that (i) the Capacity Test was completed in accordance with the procedures, conditions and requirements for the proper performance of such test set forth in ExhibitH-2 and (ii) the results from the Capacity Test (taking into account any deviations from the Standard Test Conditions) demonstrate that the PV Power Plant has successfully achieved at least the Minimum Guaranteed Capacity as set forth in ExhibitH-2; and (b) the Functional Test was completed in accordance with the provisions of ExhibitH-2 and demonstrated that the PV Power Plant is capable of producing AC electricity.

"Supplier" means a Person that supplies Equipment directly to Contractor in connection with the performance of the Work.

"Suspension for Cause" has the meaning set forth in Section 20.3.2.

"Suspension for Convenience" has the meaning set forth in Section 20.3.1.

"Taxes" means any and all forms of taxation, charges, duties, imposts, levies and rates whenever imposed by any Governmental Authority, including sales tax, gross receipts tax, use tax, compensating tax, income tax, withholding taxes, corporation tax, franchise taxes, capital gains tax, capital transfer tax, inheritance tax, rates, water rates, value added tax, customs duties, capital duty, excise duties, betterment levy, stamp duty, stamp duty reserve tax, national insurance, payroll, social security or other similar contributions, and generally any tax, duty, impost, levy or rate or other amount and any interest, penalty, fine or other amount due in connection therewith.

"**Tested Capacity**" means the tested capacity for the PV Power Plant as set forth in <u>Exhibit</u> H-2.

"Transmission Provider" has the meaning set forth in Exhibit A-1.

"Unforeseeable Site Conditions" has the meaning set forth in Section 12.1.

"United States" means the United States of America.

"Waiver and Release Upon Final Payment" means a written statement of Contractor substantially in the form attached hereto as Exhibit F-1.

"Waiver and Release Upon Progress Payment" means a written statement of Contractor substantially in the form attached hereto as Exhibit F-2.

"Warranty" means the Defect Warranty or the Design Warranty, as the context requires.

"Warranty Bond" means a bond in the form attached hereto as <u>Exhibit M</u>, issued by an Issuer in an amount equal to twenty percent (20%) of the Contract Price, or such other performance security in form, amount and from an Issuer acceptable to Owner.

"Warranty Period" means the Defect Warranty Period or the Design Warranty Period, as the context requires.

"Work" means all of Contractor's obligations set forth in Exhibit A-1.

"Work Schedule" means the work schedule for the PV Power Plant, attached as Exhibit G, describing the time of completion by Contractor of the Milestone Items and describing the time of completion by Owner of the Owner Critical Path Items, as such schedule may be modified in accordance with Section 7.3.

1.2. Exhibits.

This Agreement includes the Exhibits annexed hereto and any reference in this Agreement to an "Exhibit" by letter designation or title shall mean one of the Exhibits identified in the table of contents or otherwise identified in this Agreement and such references shall indicate such Exhibit herein. Each Exhibit attached hereto is incorporated herein in its entirety by this reference.

1.3. Interpretation.

- (a) Terms defined in a given number, tense or form shall have the corresponding meaning when used in this Agreement with initial capitals in another number, tense or form. The meaning assigned to each term defined herein shall be equally applicable to both the singular and the plural forms of such term and vice versa, and words denoting either gender shall include both genders as the context requires. Where a word or phrase is defined herein, each of its other grammatical forms shall have a corresponding meaning.
- (b) The terms such as "hereof," "herein," "hereio," "hereinafter" and other terms of like import are not limited in applicability to the specific provision within which such references are set forth but instead refer to this Agreement taken as a whole.
- (c) When a reference is made in this Agreement to an Article, Section, subsection, preamble, recital, schedule or Exhibit, such reference is to an Article, Section, subsection, preamble, recital, schedule or Exhibit of this Agreement unless otherwise specified.

- (d) The word "include," "includes," and "including" when used in this Agreement shall be deemed to be followed by the words "without limitation," and, unless otherwise specified, shall not be deemed limited by the specific enumeration of items, but shall be deemed without limitation. The term "or" is not exclusive.
- (e) A reference to any Party to this Agreement or any other agreement or document shall include such Party's predecessors, successors and permitted assigns.
- (f) Without adversely impacting a Party's remedies with respect to a Change In Law, reference to any Applicable Law means such Applicable Law as amended, modified, codified, replaced or reenacted, and all rules and regulations promulgated thereunder.
- (g) The Parties have participated jointly in the negotiation and drafting of this Agreement. Any rule of construction or interpretation otherwise requiring this Agreement to be construed or interpreted against any Party by virtue of the authorship of this Agreement shall not apply to the construction and interpretation hereof.

1.4. Headings.

All headings or captions contained in this Agreement are for convenience of reference only, do not form a part of this Agreement and shall not affect in any way the meaning or interpretation of this Agreement.

1.5. Conflicts in Documentation.

This Agreement, including the Exhibits hereto, shall be taken as mutually explanatory. If either Party becomes aware of an express conflict between the provisions of this Agreement or any Exhibit hereto, such Party shall immediately Notify the other Party of such conflict. In the event of a conflict between any provision within <u>Articles1</u> through <u>32</u> of this Agreement and an Exhibit, the provisions of <u>Exhibits A</u> and <u>H</u> shall take precedence over <u>Articles 1</u> through <u>32</u> of this Agreement, which articles shall in turn take precedence over the remaining Exhibits.

1.6. **Documentation Format.**

This Agreement and all documentation to be supplied hereunder shall be in the English language and all units of measurement in the design process, specifications, drawings and other documents shall be specified in dimensions as customarily used in the United States.

2. RESPONSIBILITIES OF OWNER

Owner shall, at Owner's cost and expense:

2.1. Owner Representative.

Designate (by a Notice delivered to Contractor) an Owner Representative, who shall act as the single point of contact on behalf of Owner with respect to the prosecution and scheduling of the Work and any issues relating to this Agreement. Owner may designate a new Owner Representative from time to time by a Notice delivered to Contractor.

2.2. Operating Personnel.

Provide Operating Personnel with requisite plant operating experience to provide operating support to Contractor for the testing and commissioning of the PV Power Plant as provided in Section 3.18.

2.3. Applicable Permits.

Obtain all Applicable Permits, including those set forth in Exhibit C-1, but excluding the Contractor-Acquired Permits. Owner shall use Commercially Reasonable Efforts to obtain the utility exemption from the building and construction permit requirements for the PV Power Plant under laws of the State of New Mexico, if applicable. Owner shall provide such reasonable assistance as Contractor may reasonably request in connection with obtaining any Contractor-Acquired Permits promptly after Contractor's request.

2.4. Electrical Interconnection and Owner-Provided Facilities and Services.

Engineer, design, construct and commission the Owner Interconnection Facilities and the other Owner-Provided Facilities and Services for the PV Power Plant in accordance with the applicable provisions of the Work Schedule.

2.5. Owner-Provided Information.

Provide the Owner-Provided Information and all information required to be provided by Owner pursuant to Exhibit A-3 for the Project to Contractor on or prior to the applicable date set forth on Exhibit A-3.

2.6. Owner's Separate Contractors.

Retain, at Owner's sole cost, determination and responsibility, Owner's Separate Contractors.

2.7. Access to Site.

Provide, as of the Limited Notice to Proceed Date for the PV Power Plant, reasonable access to the Site for the PV Power Plant in conformance with the Work. Contractor shall comply with Contractor's Safety Procedures and with reasonable security procedures (if any) to the extent Owner has provided such security procedures to Contractor.

2.8. Cooperation.

Cooperate and cause Owner's Separate Contractors to cooperate with Contractor and the Subcontractors who may be working at or near the Site.

2.9. Other Owner Responsibilities.

Owner shall perform its other duties and responsibilities set forth in this Agreement,

including Exhibits A-2, G and I.

3. RESPONSIBILITIES OF CONTRACTOR

Contractor shall:

3.1. General.

Perform (or cause to be performed through Subcontractors), furnish and be responsible for all of the Work. Contractor acknowledges and agrees that this Agreement constitutes a fixed price (subject to the terms hereof) obligation to engineer, design, procure, construct, test and commission the PV Power Plant.

3.2. Performance of Work.

Perform and complete all of the Work in accordance with the terms of this Agreement, Applicable Law and Industry Standards. Contractor shall provide, or cause to be provided through Subcontractors, all necessary labor and supervision to perform the Work.

3.3. Design and Construction of the PV Power Plant.

Design, engineer and construct the PV Power Plant so that it meets the requirements of the Contractor Deliverables, and is capable of operation in compliance with Industry Standards and Applicable Laws in effect at the time of the Substantial Completion.

3.4. Contractor's Project Manager.

Designate (by a Notice delivered to Owner within two (2) Business Days after the issuance of the Limited Notice to Proceed under this Agreement) a Contractor's Project Manager who shall have full responsibility for the prosecution of the Work and shall act as a single point of contact in all matters on behalf of Contractor. Contractor may designate a new Contractor's Project Manager from time to time by a Notice delivered to Owner, subject to Owner's consent, which consent shall not be unreasonably denied or delayed. At all times when Work is in progress at the Site, Contractor's Project Manager or his authorized nominee shall be on Site so as to properly supervise the Work in progress. Contractor's Project Manager shall be deemed to have full authority to act on behalf of Contractor. Notices given by Owner to Contractor's Project Manager shall be deemed as having been given to Contractor.

3.5. Utilities and Services.

3.5.1. Provision of Services.

Install, connect and maintain at its own expense during its performance under this Agreement, all utilities, facilities and services, as set forth in <u>Exhibit A-1</u> (other than the Owner-Provided Facilities and Services) required for the performance of the Work.

3.5.2. Payment.

Pay when due all construction utility usage charges and arrange with local

authorities and utility companies having jurisdiction over the Site for the provision of utilities other than or in excess of the utilities provided as part of the Owner-Provided Facilities and Services.

3.5.3. Supply of Construction Facilities.

Other than the Owner-Provided Facilities and Services, obtain all supplies or services required for the performance of the Work but which do not form a permanent part of the completed Work.

3.6. **Inspection.**

Perform all inspection and other like services required for performance of the Work, including inspecting all Equipment.

3.7. **Organization.**

Maintain staff members that are dedicated to the completion of the Work and that have the technical and managerial expertise to control and execute the Work in accordance with the requirements of this Agreement. Contractor shall consult with Owner prior to taking any action with respect to any Labor Dispute involving any labor union affecting Contractor's performance of the Work at the Site or surrounding area.

3.8. Contractor-Acquired Permits; Assistance with Owner-Acquired Permits.

Prepare, apply for, obtain and maintain all Contractor-Acquired Permits. Contractor shall execute such applications as Owner may reasonably request in connection with obtaining Owner-acquired permits promptly after Owner's request.

3.9. Hazardous Materials Disposal System.

To the extent required by Applicable Law, prepare and maintain accurate and complete documentation of all Contractor Hazardous Materials used by Contractor or Subcontractors at the Site in connection with the Work, and of the disposal of any such materials, including transportation documentation and the identity of all Subcontractors providing Hazardous Materials disposal services to Contractor at the Site. Copies of all documentation required under this Section 3.9 shall be timely provided to Owner upon Owner's reasonable request.

3.10. Maintenance of Site.

Maintain the Site clear of debris, waste material and rubbish. Contractor shall dispose of such debris, waste material and rubbish in accordance with Applicable Law.

3.11. Site Security.

Until Final Completion, provide all necessary and reasonably appropriate site security at the Site for the protection of the Work.

3.12. **Safety.**

During the performance of the Work at the Site, be responsible for the safety oversight of the Persons at the Site and for the safe performance of the Work at the Site, in each case in accordance with Owner's and Contractor's Safety Procedures. By written Notice to Owner prior to commencement of the Work at the Site, Contractor shall designate an officer who shall be responsible for safety issues at the Site ("Site Safety Officer"), and Contractor shall ensure that a Site Safety Officer for the Site is designated at all times from the commencement of the Work until Final Completion.

3.13. Shipping and Storage.

Arrange for complete handling of all Equipment and construction equipment, including quality assurance, shipping, loading, unloading, customs clearance, receiving, any storage required to be provided by Contractor hereunder and claims. In connection with the shipping and storage of all Equipment and construction equipment, Contractor shall comply with all relevant manufacturers' requirements in respect of any applicable manufacturer's warranty. Contractor's damage reports describing any damage to Equipment and construction equipment during shipping, loading, unloading, customs clearance, receiving and storage shall be available to Owner upon request.

3.14. Compliance with Applicable Laws.

During and in connection with the Work, comply, and cause its Subcontractors to comply, with all Applicable Laws relating to the performance of the Work.

3.15. Quality Assurance Programs.

Use effective quality assurance programs throughout the performance of the Work. Prior to commencement of the Work, Contractor shall provide Owner with written copies of its quality assurance programs applicable to the performance of the Work. By written Notice to Owner prior to commencement of the Work for the PV Power Plant, Contractor shall designate one or more officers who shall be responsible for quality assurance/quality control issues, and Contractor shall ensure that such an officer is designated at all times from the commencement of the Work until Final Completion. Contractor quality control/quality assurance inspection reports, including reports on inspections of material delivery, shall be available to Owner upon request, and copies of all such inspection reports shall be provided to Owner as part of the Contractor Deliverables.

3.16. Contractor Deliverables.

Issue Contractor Deliverables for Owner review in accordance with Exhibit B.

3.17. Training of Operating Personnel.

Commencing one (1) week prior to the then anticipated Substantial Completion Date, train, or where applicable cause the Subcontractors to train, the designated Operating Personnel in the requirements for the operation of, and safety, general process understanding and procedures for the PV Power Plant in accordance with the requirements set forth in Exhibit E.

3.18. Commissioning Personnel.

Provide or cause to be provided, experienced installation and commissioning representatives from the Suppliers specified in <u>Exhibit K</u>, together with all necessary supervising personnel, all equipment, tools, construction and temporary material and all other labor necessary for all of the Work to complete commissioning.

3.19. Contractor Performance Security.

3.19.1. Performance Bond.

Provide, or cause to be provided, no later than the date on which Owner issues the Full Notice to Proceed (provided that Owner has provided thirty (30) days' prior written notice of the requirement to provide Contractor Credit Support), the Performance Bond to guarantee the performance of Contractor's obligations hereunder. Contractor shall maintain, or cause to be maintained, the Performance Bond until the Final Completion Date. Subject to any claims made in writing by Owner to Issuer under the Performance Bond prior to the Final Completion Date, the Performance Bond shall terminate and shall cease to be of any force or effect upon Final Completion; and

3.19.2. Warranty Bond.

Provide, or cause to be provided, no later than the Final Completion Date, the Warranty Bond to guarantee the performance of Contractor's warranty obligations hereunder. Contractor shall maintain, or cause to be maintained, the Warranty Bond until the later of the demonstration by Contractor that the Capacity Test conducted pursuant to Section 14.8 has been Successfully Run or one hundred eighty (180) days after the expiry of the Defect Warranty Period. Subject to any claims made in writing by Owner to Issuer under the Warranty Bond prior to its termination, the Warranty Bond shall terminate and shall cease to be of any force or effect upon the later of demonstration by Contractor that the Capacity Test conducted pursuant to Section 14.8 has been Successfully Run or one hundred eighty (180) days after termination of the Defect Warranty Period, as may be extended pursuant to this Agreement.

3.20. Other Contractor Responsibilities.

Perform its other duties and responsibilities set forth in this Agreement, including <u>Exhibits A-1, B, C-2, D, E, G, H-1</u> and <u>H-2</u>.

3.21. Price Allocation Schedule.

No later than sixty (60) days prior to the anticipated achievement of Substantial Completion, provide a price allocation schedule for the Work and other information reasonably necessary for Owner to maintain segregated accounts for its tax records and fixed asset records (including any Federal Energy Regulatory Commission accounting requirements). Contractor shall provide an updated price allocation schedule for the Project prior to Final Completion.

4. COVENANTS, WARRANTIES AND REPRESENTATIONS

4.1. Representations and Warranties of Contractor.

Contractor represents and warrants that:

4.1.1. Organization, Standing and Qualification.

Contractor is a corporation, duly organized, validly existing and in good standing under the laws of the State of New Mexico, and has full power and authority to execute, deliver and perform its obligations hereunder and to engage in the business it presently conducts and contemplates conducting, and is and will be duly licensed or qualified to do business and in good standing under the laws of each other jurisdiction wherein the nature of the business transacted by it makes such licensing or qualification necessary and where the failure to be licensed or qualified would have a material adverse effect on its ability to perform its obligations hereunder.

4.1.2. Due Authorization; Enforceability.

Contractor has taken all necessary corporate action to authorize, effect and approve this Agreement and this Agreement has been duly authorized, executed and delivered by or on behalf of Contractor and is, upon execution and delivery, the legal, valid and binding obligation of Contractor, enforceable against Contractor in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency or similar laws affecting creditors' rights generally and by general equitable principles.

4.1.3. No Conflict.

The execution, delivery and performance by Contractor of this Agreement will not conflict with or cause any default under: (a) its organizational documents; (b) any indenture, mortgage, chattel mortgage, deed of trust, lease, conditional sales contract, loan or credit arrangement or other similar agreement or instrument to which Contractor is a party or by which it or its properties may be bound or affected; or (c) any Applicable Laws, and will not subject the PV Power Plant or the Project or any component part thereof or the Site or any portion thereof to any lien other than as contemplated or permitted by this Agreement.

4.1.4. Government Approvals.

Neither the execution nor delivery by Contractor of this Agreement requires the consent or approval of, or the giving of notice to or registration with, or the taking of any other action in respect of, any Governmental Authority other than with respect to Contractor-Acquired Permits.

4.1.5. No Suits, Proceedings.

There are no actions, suits, proceedings, patent or license infringements, or investigations pending or, to Contractor's knowledge, threatened against it in writing at law or in equity before any court (United States or otherwise) or before any Governmental Authority (whether or not covered by insurance) that individually or in the aggregate could result in any materially adverse effect on Contractor's ability to perform its obligations under this Agreement. Contractor has no knowledge of any violation or default with respect to any order, writ, injunction or decree of any court or any Governmental Authority that may result in any such materially adverse

effect or such impairment.

4.1.6. Business Practices.

Neither Contractor nor any of its Representatives has made any payment or given anything of value, and Contractor covenants that it will not make any payment or give anything of value, in either case to any government official (including any officer or employee of any Governmental Authority) to influence his, her or its decision or to gain any other advantage for Owner or Contractor in connection with the Work to be performed hereunder. Contractor shall follow Contractor's Code of Business Conduct and Ethics policy with respect to all of the Work. None of Contractor nor any of its employees or agents shall intentionally take any action with respect to this Agreement or any of the Work that in any way violates any Applicable Laws concerning corrupt practices. Contractor shall immediately Notify Owner of any violation of this covenant.

4.1.7. Owner-Provided Information.

Contractor acknowledges that Owner shall not make any representation or warranty with respect to the accuracy or completeness of documents or information (including oral statements) or opinions expressed by Owner. Contractor will not rely on Owner for any information, data, inferences or conclusions, or other information with respect to any Site Conditions, including the surface conditions of the Site and the surrounding areas.

4.1.8. Legal Requirements.

Contractor has knowledge of all of the Applicable Laws that must be followed in performing the Work, and covenants that the Work shall be performed in compliance with all Applicable Laws.

4.1.9. Licenses.

Contractor and its Subcontractors and their respective employees who will perform any portion of the Work have and will have all necessary certifications and licenses required by Applicable Law to perform the services under this Agreement.

4.1.10. Skills and Knowledge.

Contractor has performed work similar in kind, size and complexity to the Work and possesses the specific training, skills, knowledge, necessary personnel and legal right to perform the Work. Contractor shall provide, in connection with the Work, the standard of care, skill, and diligence normally provided by an experienced contractor in the performance of work similar to the Work and warrants that all such Work shall be performed in accordance with Industry Standards and all Applicable Laws.

4.1.11. Means and Methods.

Contractor shall be responsible for all means, methods, techniques and procedures for performing the Work, and for coordinating all portions of the Work under this Agreement.

4.1.12. Independent Contractor.

Contractor represents that it is an independent contractor, and agrees and understands that neither it nor any of its officers, directors, Affiliates, agents, employees, Subcontractors or Suppliers may act in the name of Owner.

4.1.13. Financial Condition.

Contractor is financially solvent, able to pay its debts as they mature, and possesses sufficient working capital to complete the Work and perform Contractor's obligations required under this Agreement.

4.2. Representations and Warranties of Owner.

Owner represents and warrants that:

4.2.1. Organization, Standing and Qualification.

Owner is a corporation duly formed, validly existing, and in good standing under the laws of the State of New Mexico, and has full power and authority to execute, deliver and perform its obligations hereunder and to engage in the business Owner presently conducts and contemplates conducting, and is and will be duly licensed or qualified to do business and in good standing in each jurisdiction wherein the nature of the business transacted by it makes such licensing or qualification necessary and where the failure to be licensed or qualified would have a material adverse effect on its ability to perform its obligations hereunder.

4.2.2. Due Authorization; Enforceability.

Owner has taken all necessary corporate action to authorize, effect and approve this Agreement and this Agreement has been duly authorized, executed and delivered by or on behalf of Owner and is, upon execution and delivery, the legal, valid, and binding obligation of Owner, enforceable against Owner in accordance with its terms, except as such enforceability may be limited by applicable bankruptcy, insolvency or similar laws affecting creditors' rights generally and by general equitable principles.

4.2.3. No Conflict.

The execution, delivery and performance by Owner of this Agreement will not conflict with or cause any default under: (a) its organizational documents; (b) any indenture, mortgage, chattel mortgage, deed of trust, lease, conditional sales contract, loan or credit arrangement or other similar agreement or instrument to which Owner is a party or by which it or its properties may be bound or affected; or (c) any Applicable Laws.

4.2.4. Governmental Approvals.

Applicable Permits, other than NMPRC Approval, either have been obtained by Owner and are in full force and effect on the Effective Date or will be obtained and will be in full force and effect on or prior to the date on which they are required, under this Agreement and Applicable Law.

4.2.5. No Suits, Proceedings.

There are no actions, suits, proceedings or investigations pending or, to Owner's knowledge, threatened against it in writing at law or in equity before any court (United States or otherwise) or before any Governmental Authority (whether or not covered by insurance) that individually or in the aggregate could result in any materially adverse effect on Owner's obligations under this Agreement. Owner has no knowledge of any violation or default with respect to any order, writ, injunction or any decree of any court or any Governmental Authority that may result in any such materially adverse effect or such impairment.

4.2.6. Land.

Owner holds good and valid title in fee simple in respect of the Site which is sufficient for the execution of the Work and will provide Contractor with access necessary to the Site to perform the Work.

5. COST OF WORK

5.1. Contract Price.

Contractor hereby agrees to accept as compensation for the performance of the Work Twenty-Three Million Eight Hundred Eighty-Seven Thousand Eight Hundred Fifty-Nine Dollars (\$23,887,859) plus applicable Taxes (the "Contract Price"). Neither shall the Contract Price be changed nor shall Contractor be entitled to any other compensation, reimbursement of expenses or additional payment of any kind without prior written authorization of Owner or as otherwise specifically set forth in this Agreement (including Article 8 and Article 16). Payments shall be made at the times and in the manner provided in Article 6. For the avoidance of doubt, the Contract Price includes any New Mexico gross receipts, compensating, sales, and other similar Taxes, and any Taxes imposed under Applicable Law.

5.2. Taxes.

5.2.1. Reporting and Payment.

Contractor shall timely report and pay all Taxes and contributions for unemployment insurance, old age retirement benefits, pensions, annuities, and similar benefits, which may now or hereafter be imposed on Contractor by law or collective bargaining agreements with respect to persons employed by Contractor for performance of the Work. Subject to the following sentence of this Section 5.2.1, Contractor shall be liable for and shall pay and shall indemnify, defend, and hold harmless Owner, and its Affiliates and its or their respective Representatives from and against any and all such Taxes and contributions or any interest accrued and penalties imposed, and reasonable attorney's fees (including income, margin, franchise, withholding, gross receipts, compensating, sales, use, property and all other Taxes of whatsoever

kind and whatsoever nature), excises, assessments, and other charges levied by any governmental agency or authority on Contractor with respect to or because of the Work, or on any materials, equipment, services, or supplies furnished in the performance of the Work. On all invoices, Contractor shall separately show all New Mexico gross receipts, compensating, sales, and other similar Taxes, provided that in no event will interest or penalties on such Taxes be reimbursable by Owner (required gross receipts, compensating, sales, and other similar Taxes are included within the Contract Price and for the avoidance of doubt will be paid by Contractor). Contractor shall also separately itemize services performed outside the State of New Mexico, if any. Contractor shall utilize appropriate New Mexico Nontaxable Transaction Certificates, or similar certificates from other states, where applicable, to minimize such gross receipts, compensating, sales, and other similar Taxes. If the sale of goods or performance of services by Contractor takes place on tribal land, Contractor will comply with applicable state and tribal laws governing the reporting and payment of gross receipts Taxes on those transactions.

5.2.2. Communication and Reimbursement.

If the applicable Governmental Authority makes a determination at any time that any of the Equipment, materials, supplies, services or labor furnished under this Contract is eligible for a sales/use or gross receipts/compensating Tax exemption ("Tax Exemption Determination"), then (a) Owner will provide Contractor with such Tax exemption certificates or other documentation in each case within ten (10) Business Days of Owner's receipt of the same as provided to Owner by the taxing Government Authority which relieves Contractor from the duty to assess, collect and remit such Tax; (b) Owner, as of the effective date of such determination, shall be entitled to an adjustment to the Contract Price equal to forty percent (40%) of the sales/use or gross receipts/compensating Tax included in the original Contract Price, and (c) Contractor shall refund promptly to Owner forty percent (40%) of any previously invoiced Taxes that were paid by Owner but that will not be incurred by Contractor as a result of the Tax Exemption Determination. Such refunds shall be paid electronically (by means of ACH or wire) in immediately available funds to the account designated by Owner.

5.2.3. Contractor and Owner to Cooperate.

Contractor and Owner shall reasonably cooperate with each other to minimize the Tax liability of both Parties to the extent legally permissible, including separately stating taxable charges on Contractor's Invoices and supplying resale and exemption certificates, if applicable, and other information as reasonably requested, in each case if requested by the applicable taxing authority. In addition, to the extent any exemptions, abatements, production tax credits, advanced energy tax credits, or other credits against or deferrals of any Taxes may be available to Owner or Contractor under Applicable Law, the Parties shall reasonably cooperate in order to secure any such exemptions, abatements, credits against, or deferrals of, such Taxes.

6. TERMS OF PAYMENT.

Payments to Contractor shall be made as follows:

6.1. Milestone Payment Schedule.

Contractor shall be paid in accordance with the Milestone Payment Schedule as set forth in Exhibit I.

6.2. Milestone Assessment.

Representatives of Contractor and Owner shall periodically, and in any event at least semimonthly, review the Work completed for the Project and assess the progress of all Work completed on the Site and assess the completion of the related Milestone Payment Schedule milestones.

6.3. Contractor's Invoices.

On or about the first (1st) day of each calendar month after Contractor receives the Limited Notice to Proceed, Contractor shall electronically deliver to Owner a Contractor's Invoice for the Work completed in the immediately preceding month. Each Contractor's Invoice shall be reasonably detailed and shall be accompanied by reasonable supporting documentation with respect to any such Work completed. Contractor shall not request in any Contractor's Invoice the payment of any sum attributable to Work for which Contractor has already been paid. Each Contractor's Invoice (1) shall identify: (i) which activities described on the Milestone Payment Schedule for the Work have been completed; (ii) the related milestone payments set forth on the Milestone Payment Schedule for the Work that are then due; and (iii) any other known amounts then payable by Owner to Contractor under any provision hereof (without limiting Owner's right to dispute any amounts requested for payment); and (2) shall include (if not previously delivered) a Waiver and Release Upon Progress Payment for payments previously made by Owner pursuant to this Agreement and for payments to be made pursuant to such Contractor's Invoice. Contractor understands and agrees that any Contractor's Invoice that is inaccurate shall not, to the extent of such deficiency, constitute a valid request for payment.

6.4. Owner Review.

Within seven (7) days after Owner receives a Contractor's Invoice and all accompanying documentation required by Section 6.3, Owner shall Notify Contractor concerning any Dispute over the accuracy of the submitted Contractor's Invoice and the basis for such Dispute. If Owner does not dispute an invoice, then, subject to the terms and conditions set forth herein, Owner shall pay Contractor the full amount of the Contractor's Invoice within twenty-one (21) days of receipt of the undisputed invoice and all waivers of liens and claims and other documents to be delivered in connection with such invoice (each an "Invoice Payment"); and if Owner fails to do so, then Owner shall pay interest on such amounts due and owing at the rate and for the time period specified from time-to-time in the New Mexico Prompt Payment Act. Disputed Contractor's Invoices or portions thereof that are corrected before the date that payment is due pursuant to Section 6.5, shall be paid on such due date.

6.5. Payments.

All payments to be made to either Party under this Agreement shall be paid in Dollars and shall be paid electronically (by means of ACH or wire) in immediately available funds by the date due or, if such date is not a Business Day, on the immediately succeeding Business Day. All payments shall be made to such account as may be designated by such Party from time to time by Notice to the other Party in accordance with <u>Article 29</u>; <u>provided</u>, <u>however</u>, that banking

transfer instructions have been provided by such Party to the paying Party at least five (5) Business Days before the first payment of the paying Party is due and payable. Except for amounts subject to the New Mexico Prompt Payment Act, which are due as set forth in Section 6.4 and Section 6.6 of this Agreement, all other payments shall be due within thirty (30) days of the paying Party's receipt of the other Party's invoice and any supporting documentation and any delinquent payment, shall bear interest at the prime rate as published in "The Money Rates" Section of The Wall Street Journal (U.S. Edition) until paid, but not to exceed the maximum rate permitted by Applicable Law (the "Contract Interest Rate"). The payment of interest unaccompanied by payment of the delinquent amount shall not excuse or cure any Event of Default or delay in such payment. Contractor shall be responsible for paying all Subcontractors in connection with the Work completed by such Subcontractor.

6.6. Final Payment.

On or after the date on which Contractor delivers to Owner a Notice of Final Completion for the PV Power Plant, Contractor shall submit a final Contractor's Invoice (a "Final Contractor's Invoice") which shall set forth all amounts due to Contractor that remain unpaid less the Punchlist Amounts of any outstanding Punchlist items. Owner shall pay to Contractor the amount due under such Final Contractor's Invoice for the PV Power Plant ("Final Payment") in accordance with (a) Section 6.5, except that, if Owner does not dispute the Final Contractor's Invoice, Final Payment will be due ten (10) days after Owner receives the Final Contractor's Invoice and all waivers of liens and claims and other documents to be delivered in connection with such invoice; and (b) Section 6.7.

6.7. Disputes Regarding Payments.

Subject to Contractor's rights and remedies under Section 19.3(e), failure by Owner to pay any amount disputed in good faith until resolution of such Dispute in accordance with this Agreement shall not alleviate, diminish, modify or excuse the performance of Contractor or relieve Contractor's obligations to perform hereunder. Contractor's acceptance of any payment (including Final Payment), and Owner's payment of any amount under dispute, shall not be deemed to constitute a waiver of amounts that are then in dispute. Contractor and Owner shall use reasonable efforts to resolve all disputed amounts reasonably expeditiously and in any case in accordance with the provisions of Article 31. No payment made hereunder shall be construed to be acceptance or approval of that part of the Work to which such payment relates or to relieve Contractor of any of its obligations hereunder. If a Contractor's Invoice was properly submitted in accordance with all of the provisions of this Agreement and amounts disputed by Owner in regards to such invoice are later resolved in favor of Contractor, Owner shall pay interest on such disputed amounts due to Contractor at the Contract Interest Rate, from the date on which the payment was originally due pursuant to such invoice until the date such payment was received by Contractor. If Owner elects to pay any portion of any disputed invoice and any portion of the amounts so paid by Owner is later resolved in favor of Owner, Contractor shall refund any such payment and pay interest on such payment at the Contract Interest Rate, from the date on which the payment was originally made by Owner until such refunded payment is received by Owner.

7. COMMENCEMENT AND SCHEDULING OF THE WORK

7.1. Limited Notice to Proceed.

On or following the Limited Notice to Proceed Date, Contractor shall perform the following Work: commence PV Power Plant design work and initiate the procurement of PV modules, MV switchgear, posts, inverters, clips, tracker components, MV AC cable, tables, MV transformers, harnesses, DAS equipment, vaults, shelters (if used) DC cable and combiners ("LNTP Work"). If the Limited Notice to Proceed Date is issued later than January 1, 2021, any such delay in the Limited Notice to Proceed Date shall be an Owner-Caused Delay for the purposes of this Agreement and the Substantial Completion Guaranteed Date shall be extended on a day-for-day basis by each day that the Limited Notice to Proceed is delayed due to such Owner-Caused Delay. If, however, Owner does not issue to Contractor the Limited Notice to Proceed on or before March 31, 2021, then Contractor shall have the right to take action pursuant to Section 19.4.

7.2. Full Notice to Proceed.

On the Full Notice to Proceed Date of the PV Power Plant, Contractor shall commence performance of the Work for the PV Power Plant and shall diligently prosecute such Work in accordance with the Work Schedule; provided that Delay Liquidated Damages shall be the sole and exclusive remedies of Owner for Contractor's delays in achieving Substantial Completion by the Substantial Completion Guaranteed Date. If the Full Notice to Proceed Date for the PV Power Plant is later than June 1, 2021, any such delay in the Full Notice to Proceed Date shall be an Owner-Caused Delay for purposes of this Agreement and the Substantial Completion Guaranteed Date shall be extended on a day-for-day basis by each day that the Full Notice to Proceed is delayed due to such Owner-Caused Delay. If, however, Owner does not issue to Contractor the Full Notice to Proceed on or before August 1, 2021, then Contractor shall have the right to take action pursuant to Section 19.4.

7.3. Work Schedule.

Until Final Completion, Contractor shall update the Work Schedule in accordance with the requirements set forth in Exhibit A-1 to reflect the current status of the Work for the PV Power Plant. The updates shall be performed and provided to Owner (in electronic form) on a monthly basis as part of the Monthly Progress Report for the PV Power Plant. Contractor shall supply to Owner a weekly percentage completion report for major components of the Work on Tuesday of each week commencing on mobilization and continuing through Final Completion.

7.4. Progress Reporting.

From and after the Effective Date, Contractor shall prepare a Monthly Progress Report for the PV Power Plant and submit it to Owner within five (5) Business Days after the end of each calendar month. In addition, Contractor shall keep, and furnish to Owner at Owner's request, such information as Owner may reasonably require to determine that the Work is progressing according to the Milestone Items in the Work Schedule and for the purpose of confirming that Invoice Payments are due hereunder. For the sake of clarity, Owner agrees that MS Project is acceptable project scheduling software.

8. FORCE MAJEURE; EXCUSABLE EVENT

8.1. Certain Events.

If Owner is prevented, wholly or partially, from performing its obligations under this Agreement by a Force Majeure Event or a Change in Law, Owner will be excused to the extent such performance is prevented by the Force Majeure Event except as to payment of compensation payable by Owner hereunder. If, during the performance of the Work, Contractor's completion of the Work is delayed by an Excusable Event, then the Work Schedule and any affected milestone deadlines shall be extended by a Change In Work for such reasonable period of time as the Excusable Event has demonstrably impacted the Work Schedule. Excusable Events shall not include usual and foreseeable weather conditions, economic hardships, labor or Equipment shortages or consequences of any changes in general economic conditions, such as inflation, price escalation, interest rates, exchange rates or other factors of general application. Excusable Events also shall not include any delay to the extent resulting from causes within Contractor's or a Subcontractor's reasonable control or to the extent resulting from Contractor's or any Subcontractor's fault or neglect, or that could have been prevented by the exercise of reasonable due diligence by Contractor. Contractor's right to an extension of any Work Schedule and any milestones for an Excusable Event is expressly conditioned on Contractor's compliance with each of the requirements in Section 8.2 (Notice of Force Majeure Event and Excusable Event).

8.2. Notice of Force Majeure Event and Excusable Event.

8.2.1. Notice of Force Majeure Event and Excusable Event (other than an Owner-Caused Delay).

If Contractor's ability to perform its obligations under this Agreement is affected by a Force Majeure Event or an Excusable Event (other than an Owner-Caused Delay, it being understood that the Notice requirements for an Owner-Caused Delay are set forth in Section 8.2.2), Contractor shall, promptly after it becomes aware of the occurrence of the event, and in any event no more than five (5) Business Days after Contractor becomes aware of such occurrence, give Notice to Owner (a "Delay Notice") of the occurrence of such event, including what date Contractor became aware of the occurrence of such event and an estimate of the event's anticipated duration and effect upon the performance of its obligations hereunder, and any action being taken to avoid or minimize its effect. Contractor shall have a continuing obligation to deliver to Owner regular updated reports and any additional documentation and analysis supporting its claim regarding a Force Majeure Event or an Excusable Event (other than an Owner-Caused Delay) promptly after such information is available to Contractor. Contractor's failure to timely and fully observe any of these requirements set forth in this Section 8.2.1 shall prejudice Contractor's right to a time extension and shall cause an otherwise Excusable Event to be deemed unexcused to the extent of such failure.

8.2.2. Owner-Caused Delay Notice.

If Contractor wishes to claim an Owner-Caused Delay, Contractor shall Notify Owner of such Owner-Caused Delay within five (5) Business Days after Contractor becomes aware of such delay. Within ten (10) days after the initial Notice, Contractor shall provide Owner demonstrable evidence of the occurrence and duration of such Owner-Caused Delay and, if requested by Owner, such evidence shall be provided by an independent third party reasonably

acceptable to Owner and Contractor at the sole cost and expense of Owner (if the independent third party verifies Contractor's assertions) or Contractor (in all other cases).

8.3. Scope of Suspension; Duty to Mitigate.

The suspension of, or impact on, performance due to a Force Majeure Event or an Excusable Event shall be of no greater scope and no longer duration than is required by such event. Contractor shall use Commercially Reasonable Efforts:

- (a) to mitigate the duration of, and costs arising from, any suspension or delay in, or other impact to the performance of its obligations under this Agreement; and
 - (b) to continue to perform its obligations hereunder not affected by such event.

When Contractor is able to resume performance of its obligations under this Agreement, Contractor shall promptly give Owner Notice to that effect.

8.4. Contractor's Remedies.

8.4.1. Force Majeure Event.

As Contractor's remedy for the occurrence of a Force Majeure Event, and provided that Contractor has otherwise materially complied with the applicable obligations it may have under Sections 8.2.1 and 8.3, if a Force Majeure Event occurs: (a) the Work Schedule, Milestone Items, Substantial Completion Guaranteed Date and any related modifications to the Work shall be correspondingly adjusted by the period of time (if any) that Contractor is demonstrably delayed in the performance of the Work as a result of the impact of such Force Majeure Event (including the effect such Force Majeure Event could be expected to have on the schedule for performing the Capacity Test in order to provide the necessary stabilization period to mitigate any transient effects on the PV Modules resulting from being stored, idle or unutilized during such Force Majeure Event), and (b) if Contractor's costs increase despite Contractor's efforts to mitigate any such increases pursuant to Section 8.3(a), the Contract Price shall be increased by the actual and reasonably substantiated costs incurred by Contractor (including any reasonable costs incurred by Contractor in connection with the mitigation measures implemented by Contractor pursuant to Section 8.3(a).

8.4.2. Excusable Event.

As Contractor's remedy for the occurrence of an Excusable Event and provided that Contractor has otherwise materially complied with the applicable provisions of <u>Section 8.2</u>, if an Excusable Event occurs:

(a) the Work Schedule, Milestone Items, Substantial Completion Guaranteed Date and any related modifications to the Work shall be correspondingly adjusted by the period of time (if any) that Contractor is demonstrably delayed in the performance of the Work (including the effect such Excusable Event could be expected to have on the schedule for performing the Capacity Test in order to provide the necessary stabilization period to mitigate any transient effects on the PV Modules resulting from being stored, idle or unutilized during

such Excusable Event) as a result of the impact of such an Excusable Event, and

(b) if Contractor's costs increase despite Contractor's efforts to mitigate any such increases, pursuant to Section 8.3(a), the Contract Price shall be increased by the sum of the actual and reasonably substantiated costs incurred by Contractor (including any (i) reasonable costs incurred by Contractor in connection with the mitigation measures implemented by Contractor pursuant to Section 8.3(a); and (ii) any builder's all-risk deductible that Contractor will be liable for).

8.4.3. Changes In Work.

Upon the occurrence of a Force Majeure Event or an Excusable Event for which Contractor is entitled to a change in the Contract Price, the Work Schedule, the Milestone Items, the Substantial Completion Date or modifications to the Work, Contractor and Owner shall prepare a Change In Work Form in accordance with <u>Article 16</u>.

8.5. Contractor's Right to Terminate.

If the Work for the PV Power Plant is suspended, prevented or delayed, in each case in the aggregate, for more than three hundred and sixty-five (365) days by reason of Force Majeure Events, or without prejudice to Section 19.3, Excusable Events, Contractor may terminate this Agreement by Notice to Owner. Upon any such termination, Contractor shall be entitled to receive the payments as set forth in Section 19.4(a), and Owner shall be entitled to payments due from Contractor, if any, in accordance with the terms of this Agreement.

8.6. Owner's Right to Terminate.

If the Work for the PV Power Plant is suspended, prevented or delayed, in each case in the aggregate, for more than three hundred and sixty-five (365) days by reason of Force Majeure Events or Excusable Events (other than an Owner-Caused Delay), Owner may terminate this Agreement by Notice to Contractor. Upon any such termination, Contractor shall be entitled to receive the payments as set forth in Section 19.4(a), and Owner shall be entitled to payments due from Contractor, if any, in accordance with the terms of this Agreement.

9. SUPPLIERS AND SUBCONTRACTORS

9.1. Project Suppliers and Subcontractors.

Contractor may subcontract the performance of portions of the Work. Contractor may only subcontract the performance of portions of the Work to Subcontractors or Suppliers listed in Exhibit K for the types of services or equipment listed. Should Contractor propose to add a Supplier or Subcontractor after the Effective Date, Contractor shall provide Notice to Owner of such proposed Supplier or Subcontractor and the specific Work the proposed Subcontractor or Supplier will provide. Within fifteen (15) days of such Notice, Owner shall Notify Contractor of its approval or rejection of such proposed Subcontractor or Supplier. If Owner approves, or does not object to, such proposed Subcontractor or Supplier within such fifteen (15) day period, the proposed Subcontractor or Supplier shall be deemed approved and added to Exhibit K. Contractor shall update and amend Exhibit K by Notice to Owner from time to time as

necessary to reflect additions or changes thereto. Upon Notice to Contractor, Owner may direct Contractor to remove a Subcontractor or Supplier from the list of Suppliers and Subcontractors set forth on Exhibit K if Owner determines that such Subcontractor or Supplier is creating an adverse material impact on the Project.

9.2. Assignment.

No subcontract or purchase order shall bind or purport to bind Owner, but each subcontract and purchase order with a Subcontractor or Supplier shall provide for assignment of such subcontract or purchase order to Owner or, at Owner's request, to the Owner Financing Parties upon the termination of this Agreement due to a Contractor Event of Default.

10. LABOR RELATIONS

10.1. General Management of Employees.

Notwithstanding the provisions of <u>Section 10.2</u>, Contractor shall preserve its rights to exercise and shall exercise its management rights in performing the Work. Such management rights shall include the rights to hire, discharge, promote and transfer employees; to select and remove persons or supervision; to establish and enforce reasonable standards of production; to determine the number of craftsmen necessary to perform a task, job or project; and to establish, maintain and enforce rules and regulations conducive to efficient and productive operations.

10.2. Labor Disputes.

Contractor shall use reasonable efforts to adopt policies and practices designed to avoid Labor Disputes, and to minimize the risk of labor-related delays or disruption of the progress of the Work. Contractor shall advise Owner promptly, in writing, of any actual or threatened Labor Dispute of which Contractor has knowledge that might materially affect the performance of the Work by Contractor or by any of its Subcontractors or Suppliers, and in accordance with Section 3.7, Contractor shall consult with Owner prior to taking any action with respect to any Labor Dispute involving any labor union affecting Contractor's performance of the Work at the Site or surrounding area. Notwithstanding the foregoing, the settlement of Labor Disputes shall be at the discretion of the Party having the difficulty.

10.3. Personnel Documents.

Contractor shall ensure that at the time of hiring, all its personnel and personnel of any Subcontractors performing the Work on the Site are in possession of all such documents required by Applicable Laws.

11. INSPECTION

11.1. Right to Reject Work.

At any time prior to Substantial Completion, regardless of whether payment has been made therefor, Owner shall have the right to reject any portion of the Work for the PV Power Plant that contains any Defect unless the same constitutes a Non-Critical Deficiency, in which case it shall be included on the Punchlist. Upon such rejection, Contractor shall remedy, at its sole cost and expense (subject to the provisions of <u>Article 8</u>), any such Defect that is identified by Owner as giving rise to such rejection.

11.2. Inspection.

Owner and its Representatives shall have the right to observe and inspect the Project and the Work at the Site in a manner that does not interfere with Contractor's performance of the Work. If requested by Owner, Contractor shall arrange for Owner to inspect the facilities of Suppliers, and Contractor shall provide access for Owner to witness the Functional Tests of Equipment at the Site, such inspections to be arranged at reasonable times and with reasonable advance Notice, at Owner's cost. Owner shall have the right, but not the obligation, to inspect any item of Equipment, including Equipment under fabrication, material, design, construction, service, workmanship or any portion of the Work, provided that disassembly of any completed Work that does not contain Defects shall be at Owner's cost. Owner shall not be responsible for Contractor's or Subcontractor's costs to perform any tests elected to be performed by Contractor or Subcontractor or otherwise required by this Agreement. No inspection performed, witnessed, or failed to be performed or witnessed, by Owner, or any recommendation or lack of recommendation from Owner in connection therewith, shall be a waiver of any of Contractor's obligations hereunder or be construed as an approval or acceptance of any Work.

12. SITE CONDITIONS

12.1. Unforeseeable Site Conditions.

It shall be an Excusable Event, and Contractor shall be entitled to request a reasonable Change In Work, to the extent that the actual Site Conditions (including the existence of any Hazardous Materials, any religious, historical or archeological resources, the existence of liens and encumbrances, the presence of endangered or threatened species on the Site or any unknown physical conditions at, above or below the surface of the ground) vary materially from the Site Assumptions (such Site Conditions or variance being "Unforeseeable Site Conditions"). Contractor shall exercise due care in carrying out the Work to monitor and make itself aware of Site Conditions as the Work progresses, and shall provide immediate Notice to Owner of the existence of any conditions at the Site that may create a safety hazard or pose a risk of harm to Owner or any of Owner's Separate Contractors' operations. Contractor shall, promptly upon the discovery of any such condition, cause the Work to be performed in a manner that accounts for such condition while still achieving the quality and safety standards set forth in this Agreement and implement all safety measures reasonably necessary to assure the safety of all persons at or near the Site and to prevent damage to property and bodily injury that might otherwise result as a consequence of continued performance of the Work in a manner that fails to account for such condition.

13. GUARANTEED CAPACITY AND TESTS

13.1. Guaranteed Capacity and Other Requirements.

Subject to <u>Section 15.2</u>, Contractor shall perform the Work so that the PV Power Plant satisfies its Guaranteed Capacity as set forth in <u>Exhibit H-2</u>.

13.2. Commissioning Plan.

Contractor shall provide for Owner's review and approval a Commissioning Plan within sixty (60) days prior to commissioning of the PV Power Plant in accordance with the requirements of Exhibit H-1. If Owner fails to Notify Contractor in writing of its approval or disapproval of any Commissioning Plan within fifteen (15) Business Days after Owner's receipt of such Commissioning Plan from Contractor, then Owner shall be deemed to have approved such Commissioning Plan.

13.3. Capacity Test Procedures.

Contractor shall develop Capacity Test Procedures in accordance with Exhibit H-2 and shall provide the Capacity Test Procedures to Owner for Owner's review and approval not less than fifteen (15) days prior to the date on which Contractor anticipates commencing the Capacity Test. If Owner fails to Notify Contractor in writing of its approval or disapproval of the Capacity Test Procedures within ten (10) Business Days after Owner's receipt of the Capacity Test Procedures from Contractor, then Owner shall be deemed to have approved the Capacity Test Procedures.

13.4. Test Schedules.

Contractor shall agree on the Capacity Test schedule with Owner and shall give advance Notice to Owner of the Capacity Test at least two (2) days prior to commencing any such test. If Owner fails to Notify Contractor in writing of its approval or disapproval of the Capacity Test schedule within twenty-four (24) hours after Owner's receipt of such schedule from Contractor, then Owner shall be deemed to have approved the schedule. Contractor shall keep Owner Representative reasonably apprised of the schedule for the Capacity Tests and changes in the schedule, the commencement and performance of any Capacity Test, and shall give Owner Representative at least one (1) Business Day advance Notice of the re-performance of any Capacity Test; provided, however, that any such period of advance Notice may be eliminated if Owner Representative is at the Site and is reasonably informed of re-performance of the Capacity Test. If Owner, or Owner's Engineer, as applicable, fails to be present after Contractor has provided notice of such Capacity Test in accordance with this paragraph, then Contractor shall have the right to proceed with such testing.

13.5. Testing

13.5.1. Functional Testing.

Contractor shall conduct the Functional Test in accordance with <u>Exhibit H-2</u>. Contractor must submit a test report for the Functional Test within five (5) Business Days after the completion of the Functional Test as set forth in <u>Exhibit H-2</u> providing a summary of the Functional Test results.

13.5.2. Capacity Testing.

Contractor shall conduct the Capacity Test in accordance with the approved Capacity Test Procedures and Exhibit H-2. Representatives of Owner, including Owner's Engineer, shall have the right to be present during the Capacity Test performed by Contractor under this

Article 13.

13.6. Non-Conforming Work.

At any time during and promptly after completion (whether or not successful) of the Capacity Test (or any re-performance of the Capacity Test or pursuant to the Remedial Plan), Owner shall advise Contractor in writing of any Defect that was discovered by Owner during the Capacity Test. Contractor shall, at Contractor's sole cost and expense (subject to Article 8), correct any Defect (except if such Defect is a Non-Critical Deficiency, in which case it shall be included on the Punchlist) and promptly provide Notice to Owner that such corrective measures have been completed. Any Dispute regarding the existence or correction of any such Defect shall be resolved pursuant to Article 31.

14. SUBSTANTIAL COMPLETION AND FINAL COMPLETION

14.1. Punchlist

14.1.1. Creation of Punchlist.

When Contractor believes that the PV Power Plant is ready for testing and commissioning, Contractor and Owner shall jointly walk-down the PV Power Plant and confer together as to the items which should be included on the finalized Punchlist. Contractor shall then prepare and deliver the list of Defects to Owner for its review and approval, ("Proposed Punchlist") for the PV Power Plant. Such Proposed Punchlist shall include a proposed completion, correction or repair schedule and Punchlist Amount for the completion, correction or repair of such Defects. If Owner does not deliver any changes to the Proposed Punchlist to Contractor within five (5) Business Days after the later to occur of (a) Contractor's submission to Owner of such Proposed Punchlist; and (b) the day that the joint walk-down occurred, then such Proposed Punchlist shall be deemed approved. The Proposed Punchlist that is ultimately approved or deemed to have been approved by Owner for the PV Power Plant shall be referred to as the "Punchlist" for the PV Power Plant. Neither Owner's approval of a Punchlist, nor Owner's failure to identify Defects to be added to the Punchlist, shall relieve Contractor of sole and complete responsibility for Defects in the Work or Equipment. If the Punchlist for the PV Power Plant is not finalized by the Substantial Completion Date, the Proposed Punchlist as modified by Owner shall be deemed the Punchlist for the PV Power Plant for all purposes hereunder until the Parties resolve such Dispute and otherwise finalize the Punchlist for the PV Power Plant. Contractor shall note on such Punchlist the items under dispute.

14.1.2. Completion of Punchlist.

Contractor shall proceed promptly to complete and correct all items on the Punchlist for the PV Power Plant. On a weekly basis after Substantial Completion, Contractor shall revise and update the Punchlist for the PV Power Plant to include the date(s) that items listed on such Punchlist are completed by Contractor and accepted by Owner. Notwithstanding any of the foregoing, the items listed on the Punchlist for the PV Power Plant shall not be considered complete until Owner shall have inspected such Non-Critical Deficiencies and acknowledged, by notation on the updated Punchlist, that such item of Work is complete. If Owner does not so inspect and deliver such notations on the updated Punchlist to Contractor within seven (7) days after Contractor

submits the updated Punchlist containing such Punchlist item to Owner, such Punchlist item for the PV Power Plant shall be deemed completed on such seventh (7th) day.

14.2. Substantial Completion.

The following are the conditions precedent for the PV Power Plant to achieve Substantial Completion:

- (a) the PV Power Plant has achieved Mechanical Completion;
- (b) the most recent Capacity Test and Functional Test for the PV Power Plant have been Successfully Run;
- (c) the results of the most recently run Capacity Test for the PV Power Plant reflect achievement of its Minimum Guaranteed Capacity;
- (d) Contractor shall have paid all undisputed Delay Liquidated Damages for the PV Power Plant calculated and due pursuant to <u>Section 15.1</u>; <u>provided</u> that the amount of disputed Delay Liquidated Damages for the PV Power Plant that is ultimately determined to be due and owing shall accrue interest from the Substantial Completion Date at the Contract Interest Rate;
- (e) Owner has received all Contractor Deliverables (if any) for the PV Power Plant as required to be delivered by the Substantial Completion Date pursuant to the Contractor Deliverables Table, including all Required Manuals identified therein, other than final as built drawings;
- (f) the Punchlist for the PV Power Plant shall be in final form or be deemed approved as provided for in <u>Section 14.1.1</u> and only Non-Critical Deficiencies remain on the approved Punchlist; and
- (g) Contractor shall have delivered all applicable Waivers and Releases Upon Progress Payment from Contractor required to be delivered pursuant to <u>Section 6.3</u> for the PV Power Plant and a Conditional Wavier and Release Upon Progress Payment dated no later than the proposed Substantial Completion Date.

14.3. Notice of Substantial Completion.

When Contractor believes that it has satisfied the provisions of Section 14.2, Contractor shall deliver to Owner a Notice of Substantial Completion certifying that all Agreement requirements for Substantial Completion have been met and specifying the date Contractor believes Substantial Completion occurred. Within ten (10) days after receipt of such Notice, Owner shall inspect all Work hereunder and either (a) accept that Substantial Completion has occurred and deliver to Contractor an Owner's Certificate of Substantial Completion for the PV Power Plant dated to reflect the Substantial Completion Date, in which case the Substantial Completion Date shall be the date stated in the Substantial Completion Certificate (which date shall not be earlier than the date such certificate was delivered to Owner); or (b) Notify Contractor in writing that Substantial Completion has not been achieved, stating in detail the reasons therefore. Such procedure shall be repeated as necessary until Substantial Completion has been achieved.

The "Substantial Completion Date" shall be the day after the date on which the last of the conditions of Section 14.2 was satisfied or, in the discretion of Owner, waived.

14.4. Final Completion.

Final Completion shall be deemed to have occurred only if all of the following have occurred:

- (a) Substantial Completion has been achieved and all conditions precedent to Substantial Completion continue to be satisfied;
- (b) All Capacity Tests for the PV Power Plant have been Successfully Run on the most recent performance thereof;
- (c) Contractor shall have completed all items on the Punchlist for the PV Power Plant;
- (d) all Contractor's and Subcontractors' personnel, equipment, surplus materials, waste materials, rubbish and construction facilities other than those to which Owner holds title shall have been removed from the Site, and any permanent facilities used by Contractor and the Site shall have been restored to the same condition that such permanent facilities and the Site were in on the Limited Notice to Proceed Date of the PV Power Plant, ordinary wear and tear excepted;
- (e) Owner shall have received all Contractor Deliverables for the PV Power Plant as set forth on the Contractor Deliverables Table to the extent not already delivered (including final as-built drawings and a supply and listing of spare parts and inventory appropriate for the operation and maintenance of the PV Power Plant in a manner consistent with Industry Standards);
- (f) Contractor shall have assigned to Owner, or provided Owner, all warranties or guarantees that Contractor received from Subcontractors to the extent Contractor is obligated to do so under this Agreement;
- (g) Contractor shall have delivered such other documents and certificates to Owner in compliance with this Agreement and all Applicable Laws;
- (h) Contractor shall have delivered to Owner a Waiver and Release by Contractor Upon Final Payment and a Waiver and Release Upon Final Payment for all Subcontractors for the PV Power Plant;
- (i) Contractor shall have delivered to Owner a Notice of Final Completion that meets the requirements set forth in Section 14.5 of this Agreement;
- (j) In cooperation with Owner Representative, Contractor shall have restored the Site, at Contractor's cost, as required to comply with requirements for filing an EPA Notice of Termination of Coverage under NPDES General Permit. This will include reseeding areas disturbed by Contractor, including laydown areas. Contractor shall not be responsible for restoring

areas disturbed by Owner; and

(k) All other of Contractor's obligations under this Agreement shall have been performed or waived by agreement of the Parties.

14.5. Notice of Final Completion.

When Contractor believes that it has achieved Final Completion, Contractor shall deliver to Owner a Notice of Final Completion stating that Contractor believes it has satisfied the provisions of Section 14.4 for the PV Power Plant. Within ten (10) Business Days after receipt of the Notice of Final Completion for the PV Power Plant, Owner may inspect all Work hereunder and either (a) accept that Final Completion has occurred and deliver to Contractor an Owner's Certificate of Final Completion for the PV Power Plant, in which case the Final Completion Date shall be the date stated in the Owner's Certificate of Final Completion (which date shall not be earlier than the date such Notice was delivered to Owner); or (b) Notify Contractor in writing that Final Completion has not been achieved, stating in detail the reasons therefore. If Owner determines that Final Completion has not been achieved and delivers the Notice under the preceding clause (b), Contractor promptly shall take such action, including the performance of additional Work as will achieve Final Completion, and upon completion of such actions shall issue to Owner another Notice of Final Completion pursuant to this Section 14.5 and the provisions of this Section 14.5 shall apply with respect to the new Notice and each subsequent Notice thereafter in the same manner as they applied to the original Notice. The "Final Completion Date" of the PV Power Plant shall be the day after the date on which the last of the conditions of Section 14.4 for such PV Power Plant was satisfied or, in the discretion of Owner, waived. Upon Final Completion, Contractor shall deliver the Warranty Bond to Owner and Owner shall simultaneously deliver the Performance Bond to Contractor (if such Performance Bond has not been previously called upon by Owner).

14.6. Contractor's Access After Substantial Completion and Final Completion.

Following Substantial Completion, Owner shall provide Contractor with reasonable and timely access to the PV Power Plant, subject to procedures necessary for the operation of the PV Power Plant, to: (a) complete all items on the Punchlist for the PV Power Plant, and (b) satisfy the other requirements for Final Completion. The Parties expect that Contractor shall accomplish any necessary modification, repairs or additional work with minimal interference with commercial operation of the PV Power Plant and that reductions in and shut-downs of the PV Power Plant or any other portion of the Project's operations will be required only when necessary, taking into consideration the length of the proposed reduction or shut-down, and Owner's obligations and liabilities to customers or others. Provided that the correction of Non-Critical Deficiencies on a Punchlist does not require a shut-down of the PV Power Plant or any other portion of such Project, Owner agrees to permit Contractor unrestricted access to the PV Power Plant between sunset and sunrise to perform such Work. Notwithstanding the foregoing, should a reduction in or shut-down of the PV Power Plant's operations be required to complete any items on a Punchlist, then such reduction or shut-down shall be scheduled at the sole discretion of Owner, and Contractor shall complete such Work during such Owner scheduled reduction or shut-down. Contractor acknowledges that Owner may schedule such reduction or shut-down at any time including off peak hours, nights, weekends and holidays; provided that, in any event, Contractor shall be permitted to schedule such a reduction or shut-down between sunset and sunrise, <u>provided</u>, <u>further</u>, that the PV Power Plant is back on-line by sunrise of the next day.

14.7. Consequences of Acceptance.

In no event shall (a) Owner's payment for or acceptance of the Work or any Equipment be construed as or constitute having satisfied the conditions of Substantial Completion or Final Completion; nor (b) the execution of any accompanying Owner's Notice as set forth in this Article 14 be construed as or constitute a waiver of Owner's rights or Contractor's obligations under this Agreement.

14.8. Final Capacity Test.

After Final Completion and prior to the expiry of the Defect Warranty Period, at a time to be agreed by the Parties, Contractor shall conduct a Capacity Test in accordance with the approved Capacity Test Procedures and Exhibit H-2 to demonstrate the capacity of the PV Power Plant as of the date of such Capacity Test. Representatives of Owner, including Owner's Engineer, shall have the right to be present during the Capacity Test performed by Contractor under this Section 14.8. The provisions of Article 13 shall apply mutatis mutandis to the conduct of such Capacity Test. If Contractor demonstrates that such Capacity Test has been Successfully Run, Owner shall return to Contractor all Contractor Credit Support that Owner then holds to the extent that such Contractor Credit Support has not as of such date been previously called upon by Owner.

15. LIQUIDATED DAMAGES

15.1. Delay Liquidated Damages.

Contractor understands that if Substantial Completion for the PV Power Plant does not occur by the Substantial Completion Guaranteed Date, Owner will suffer substantial damages, including the loss of operating revenue, incurring costs to purchase replacement power for its customers, additional interest and financing charges on funds obtained by Owner to finance the Work, reduction of return on Owner's equity investment in the Project, and other operating and construction costs and charges. In that event, Contractor shall, subject to the Delay LD Cap and Aggregate LD Cap, be liable for and shall pay to Owner liquidated damages ("Delay Liquidated Damages") in the amount of One Thousand Dollars (\$1,000) per MW_{AC} per day for each day that Contractor fails to achieve Substantial Completion after such Substantial Completion Guaranteed Date. Any undisputed amount Contractor is obligated to pay to Owner under this Section 15.1 shall be due and payable within twenty-five (25) calendar days after Owner has invoiced Contractor for such amounts.

15.2. Capacity Liquidated Damages Guarantee; Cure Period.

If based on the results from the most recent Capacity Test that has been Successfully Run prior to Substantial Completion, the PV Power Plant shall have satisfied its Minimum Guaranteed Capacity but not its Guaranteed Capacity: (a) Contractor shall exclude from the Substantial Completion invoice, as set forth in the Milestone Payment Schedule, an amount equal to five

percent (5%) of the Contract Price ("Capacity Liquidated Damages Guarantee") as liquidated damages for failure to satisfy its Guaranteed Capacity; (b) within thirty (30) days after the Substantial Completion Guaranteed Date, Contractor shall submit the Remedial Plan to Owner, which shall specify the corrective actions Contractor will take and the commencement date of such corrective actions, for Owner's approval, which shall not be unreasonably withheld; and (c) Contractor shall continue to attempt to satisfy the Guaranteed Capacity for the PV Power Plant in accordance with the Remedial Plan, until the date that is the (a) one hundred eightieth (180th) day after such Substantial Completion Guaranteed Date if Contractor is required to repair or replace a MV switchgear, (b) one hundred fiftieth (150th) day after such Substantial Completion Guaranteed Date if Contractor is required to repair or replace an inverter or (c) one hundred twentieth (120th) day after such Substantial Completion Guaranteed Date if Contractor is required to repair or replace any other Equipment, as applicable (such period, the "Cure Period").

15.2.1. Achievement of Guaranteed Capacity.

If Contractor achieves the Guaranteed Capacity on or prior to the expiration of the applicable Cure Period, Contractor may invoice Owner the amount of the Capacity Liquidated Damages Guarantee excluded from the Substantial Completion invoice for the PV Power Plant within five (5) Business Days after the date on which such Guaranteed Capacity was achieved.

15.2.2. Failure to Achieve Guaranteed Capacity.

If, however, Contractor fails to achieve the Guaranteed Capacity prior to the expiration of the Cure Period, Contractor shall be deemed to have elected to have no further obligation to try to achieve such Guaranteed Capacity for the PV Power Plant. Contractor shall calculate the Capacity Liquidated Damages based on the results from the most recent Capacity Test that has been Successfully Run and Contractor shall deliver to Owner a Notice of such amount. If such amount of Capacity Liquidated Damages is less than the Capacity Liquidated Damages Guarantee, Contractor shall invoice Owner the amount equal to such difference within five (5) Business Days after the date of such Notice. If the Capacity Liquidated Damages calculated by Contractor are greater than the Capacity Liquidated Damages Guarantee, Contractor shall pay to Owner an amount that is equal to the difference between the Capacity Liquidated Damages Guarantee and the Capacity Liquidated Damages calculated by Contractor pursuant to this Section 15.2.2, subject always to the Capacity LD Cap and the Aggregate LD Cap. Any undisputed amount Contractor is obligated to pay to Owner under this Section 15.2.2 shall be due and payable within twenty-five (25) calendar days after Contractor has calculated the Calculated Liquidated Damages payable hereunder.

15.3. Access During Cure Period.

Upon Substantial Completion, Owner shall assume care, custody and control of the PV Power Plant. Notwithstanding the foregoing, during the Cure Period and upon approval of the Remedial Plan, Owner shall provide Contractor with reasonable access to the PV Power Plant. Contractor shall be granted such access, subject to Section 15.4, for purposes of achieving the Guaranteed Capacity and for the period as set forth in the Remedial Plan, to:

- (a) perform corrective actions pursuant to the Remedial Plan; and
- (b) perform the Capacity Test, as provided in such Remedial Plan.

15.4. Operations During Cure Period.

During the Cure Period, Owner shall have the right to operate the PV Power Plant, including the right to maximize the economic benefits of the Project. Any failure by Owner to provide Contractor with access to the PV Power Plant as set forth in this Section 15.4 shall not be considered a breach of any covenant, condition, representation or warranty of Owner, and shall not be construed as an Owner Event of Default. Contractor's only remedy for a failure by Owner to provide Contractor with access to the Project as set forth in this Section 15.4 shall be an equitable extension of the Cure Period until such reasonable access is provided.

15.5. Buy-Down Not Available.

If Contractor fails to achieve the Minimum Guaranteed Capacity for the PV Power Plant, the provisions of Section 15.2 shall not apply. Contractor shall continue seeking to cause the PV Power Plant to achieve at least its Minimum Guaranteed Capacity, and Contractor must continue to perform the Work, and shall, subject to the Delay LD Cap and the Aggregate LD Cap, continue to pay the Delay Liquidated Damages due and owing under Section 15.1, until Contractor achieves Substantial Completion or until this Agreement is terminated in accordance with the provisions hereof.

15.6. Sole Remedy; Liquidated Damages Not a Penalty.

The amounts payable by Contractor or withheld by Owner under this Article 15, as limited by Article 30, and the other remedies provided for in this Article 15, shall be the sole and exclusive remedies of Owner for Contractor's delays in achieving Substantial Completion by the Substantial Completion Guaranteed Date, or for failure to achieve its Guaranteed Capacity during the Capacity Test, except to the extent arising from a Contractor Event of Default. The Parties agree that Owner's actual damages in the event of such delays or failures would be extremely difficult or impracticable to determine. After negotiation, the Parties have agreed that the Delay Liquidated Damages, the Capacity Liquidated Damages Guarantee and the Capacity Liquidated Damages are in the nature of liquidated damages and are a reasonable and appropriate measure of the damages that Owner would incur as a result of such delays or failures, and do not represent a penalty.

15.7. Enforceability.

The Parties explicitly agree and intend that the provisions of this <u>Article 15</u> shall be fully enforceable by any court or arbitration proceeding exercising jurisdiction over any Dispute between the Parties arising under this Agreement. Contractor hereby irrevocably waives any defenses available to it under law or equity relating to the enforceability of the liquidated damages provisions in this <u>Article 15</u> and other provisions relating thereto. If, notwithstanding the express agreement of the Parties that such provisions of this <u>Article 15</u> are enforceable at law and equity as between themselves, Contractor attempts to avoid the application of the remedies relating to the liquidated damages in this Article 15 in any Dispute between the Parties and it is determined by

any court or arbitrator that Contractor's liability for liquidated damages pursuant to this <u>Article 15</u> is unenforceable, then the Parties agree that Owner shall have the right to avail itself of any right or remedy available to it in law or equity, including the right to pursue Contractor for actual damages resulting from a breach by Contractor of its contractual obligations, subject to the limitations on liability set forth in <u>Article 30</u>.

16. CHANGES IN THE WORK

16.1. Change In Work.

A "Change In Work" shall result from one of the following:

- (a) changes in the Work required by Owner and permitted by Section 16.2;
- (b) the occurrence of a Force Majeure Event or an Excusable Event (as and only to the extent permitted by <u>Sections 8.4.1</u> or <u>8.4.2</u>, respectively);
 - (c) an Owner Directive, in accordance with Section 16.7;
 - (d) an Owner requested delay in the Work pursuant to <u>Section 20.3.1</u>;
- (e) any reduction or increase in the Gross Maximum Capacity of the PV Power Plant requested by Owner, subject to Section 16.2; or
- (f) any other event or circumstance specifically identified in this Agreement as constituting a Change In Work or entitling either Party to seek a Change In Work or Change In Work Form.

16.2. **By Owner.**

Subject to <u>Section 16.4</u>, Owner shall have the right to make modifications, deletions, accelerations, alterations, suspensions, or additions to the Work; <u>provided, however</u> that, in no event may Owner, without Contractor's prior written consent, make a change in the Work that would (a) reduce or increase the Gross Maximum Capacity of the PV Power Plant or (b) require that any portion of the PV Power Plant be located at any site other than the Site unless such change is required by Applicable Law. All such changes shall be made in accordance with this <u>Article 16</u>, shall be documented in accordance with <u>Section 16.4</u> and shall be considered, for all purposes of this Agreement, as part of the Work.

16.3. Adjustment to Work Schedule Due to Force Majeure Events or Excusable Events.

If a Force Majeure Event or an Excusable Event occurs, the Work Schedule, the Milestone Items, the Substantial Completion Guaranteed Date and the Contract Price shall be modified as and to the extent provided in <u>Section 8.4.1</u> or <u>8.4.2</u>, as the case may be, and as set forth in the Change In Work Form accepted by Owner.

16.4. Preparation of Change In Work Form

16.4.1. Due to Owner Initiated and Other Changes In Work.

Upon the occurrence of any of the events set forth in Section 16.1(a), (d), (e), or (f), Owner or Contractor, as applicable, shall provide the other Party with a Notice of the occurrence of such event, and Contractor shall, as soon as practicable, prepare and submit to Owner a preliminary written estimate relating to the proposed Change In Work, including (a) any projected change in the cost of the performance of the Work and any projected modification of the Contract Price, occasioned by such Change In Work; (b) the effect such Change In Work could be expected to have on the Work Schedule (including the effect such Change In Work could be expected to have on the schedule for performing the Capacity Test in order to provide the necessary stabilization period to mitigate any transient effects on the PV Modules resulting from being stored, idle or unutilized); and (c) the potential effect of such Change In Work on Contractor's ability to comply with any of its obligations hereunder, including Contractor's warranties and the Guaranteed Capacity. Contractor's cost of any Change shall include and identify all elements of cost and a total lump sum cost using the following guidelines: (i) in the case of any Change (other than a Change resulting from the events set forth in Section 16.1(e)), the actual and reasonably substantiated costs incurred by Contractor and (ii) in the case of any Change resulting from the events set forth in Section 16.1(e), an amount equal to the pro rata portion of the Contract Price corresponding to each MW_{AC} of reduction or increase in the Gross Maximum Capacity. The adjustment in the Contract Price specified in this Section 16.4.1 and the Work Schedule shall be the sole adjustment related to such specific Change In Work (to the exclusion of other theories of recovery such as cumulative impact). If the Parties cannot agree to a lump sum adjustment for such Change In Work, then Owner may direct Contractor to perform such Work in accordance with Section 16.7 on a time and materials basis.

16.4.2. Due to Excusable Event or an Event of Force Majeure.

If a Force Majeure Event or an Excusable Event occurs for which Contractor is entitled to an adjustment to either the Work Schedule or the Contract Price pursuant to Section 8.4.1 or Section 8.4.2, as applicable, then Contractor shall, as soon as practicable, prepare and submit to Owner in accordance with Section 8.4.3 a proposed Change In Work Form, which shall include (a) any projected change in the Contract Price, occasioned by such Change In Work; and (b) the effect such Change In Work could be expected to have on the Work Schedule (including adjustments necessary regarding the schedule for performing the Capacity Test in order to provide the necessary stabilization period to mitigate any transient effects on the PV Modules resulting from being stored, idle or unutilized), or any other schedule or dates for performance by Contractor hereunder, in each case all as and to the extent provided in Section 8.4.1 (with respect to a Force Majeure Event) and Section 8.4.2 (with respect to an Excusable Event) and as set forth in the Change In Work Form accepted by Owner. The adjustment in the Contract Price specified in this Section 16.4.2 and the Work Schedule shall be the sole adjustment related to such specific Change In Work and the applicable Force Majeure Event or Excusable Event. If the Parties cannot reach agreement on the matters listed in the Change In Work Form submitted pursuant to this Section 16.4.2, then such matter shall be referred to dispute resolution under Article 31. If Owner elects to proceed with the proposed Change In Work, Owner and Contractor shall agree upon a Change In Work Form.

16.5. Execution of Change In Work Form.

If Contractor and Owner reach agreement on the matters that constitute the Change In Work, then the Parties shall execute a Change In Work Form. If the Parties cannot reach agreement on the matters listed in the Change In Work Form submitted pursuant to this Section 16.5, then such matter shall be referred to dispute resolution under Article 31, unless Owner directs Contractor to perform the Change In Work pursuant to an Owner Directive pursuant to Section 16.7.

16.6. No Obligation or Payment Without Executed Change In Work Form.

Contractor shall not be obligated to undertake a Change In Work until Contractor has received (a) a Change In Work Form submitted by Contractor and accepted by Owner, except as set forth in Section 16.7, or if immediate action is reasonably required to address an emergency which endangers human health or property; or (b) received a written Owner Directive; or (c) received Notice from Owner indicating that Owner does not believe that Contractor is entitled to a Change in Work with respect to the matters that are the subject of Contractor's Notice of a change or claim, and directing that Contractor proceed with the disputed Work. In the absence of such executed Change In Work Form, except as set forth in Section 16.7 or in the event of such emergency, if Contractor undertakes any changes in the Work, or performs extra work or otherwise incurs added costs, then Contractor shall make any such changes at Contractor's risk and expense and shall not be entitled to any schedule modification or payment hereunder for undertaking such changes (subject to Contractor's right to a Change In Work in the circumstances specified in Sections 8.4.1, 8.4.2 and 8.4.3). Nothing in this Section16.6 shall be deemed to waive Contractor's right to avail itself of the dispute resolution procedures pursuant to Article 31 with respect to disputed Change In Work Forms.

16.7. Owner Directives.

If Contractor and Owner are unable to agree on whether a Change In Work has occurred or on the matters described in a Change In Work Form, regardless of whether such Change In Work Form was initiated by Contractor or by Owner, Contractor shall perform the Work as Owner so directs in writing (provided that such work is subject to the limitations set forth in Section 16.2 (an "Owner Directive")) on a monthly time-and-materials basis, plus a fee of ten percent (10%) for overhead and general and administrative costs and profit, in accordance with the following procedures:

- (a) Contractor shall, as soon as practicable, prepare and submit to Owner a preliminary written estimate relating to the Owner Directive;
- (b) the Parties shall then promptly mutually agree on the schedule and other changes in terms and conditions associated with work under the Owner Directive, including the estimate described in clause (a) of this Section 16.7;
- (c) Owner shall assign a "Pending Item Claim Number" to the Work in question and shall issue Contractor a separate Notice to proceed;
 - (d) Contractor shall proceed to perform the Work identified therein;
 - (e) Using the "Pending Item Claim Number" to identify the Work identified

in the Owner Directive, Contractor shall submit on a monthly basis a Contractor's Invoice to Owner for payment of an amount equal to the sum of the time and materials costs, which may include reasonable allowances for overhead and profit; and

(f) Upon Owner's request, Contractor shall prepare and provide reasonable calculations of any such charges and Subcontractor invoices, time sheets and such other reasonable documents to support such Contractor's Invoice.

Contractor expressly waives any other compensation or relief as a result of such Owner Directive.

16.8. Disputed Changes In Work.

Any Disputes regarding a Change In Work Form or whether a Change In Work has occurred or that are otherwise related to a Change In Work shall be subject to the dispute resolution provisions of Article 31.

16.9. No Suspension.

Contractor shall not suspend or stop the Work pending resolution of any alleged or proposed Change In Work unless directed by Owner in writing to suspend the Work.

17. WARRANTIES CONCERNING THE WORK

17.1. Defect and Design Warranties.

With respect to the PV Power Plant, Contractor warrants and guarantees to Owner:

17.1.1. Defect Warranty.

That all Work, including the supply of Equipment (other than the PV Modules included in the Equipment, which such warranty is set forth in Section 17.1.3) furnished by Contractor (and any of its Subcontractors or Suppliers) for the PV Power Plant shall:

- (a) be free from Defects in material, manufacture and workmanship;
- (b) be new and unused (when installed) unless the Parties agree otherwise in advance and in writing;
 - (c) be of good quality and good condition (when installed);
 - (d) conform to the applicable requirements of the Statement of Work;
 - (e) be in compliance with Applicable Law and Industry Standards; and
- (f) with respect to Equipment, be free from any charge, lien, security interest or other encumbrance.

(the "Defect Warranty").

17.1.2. Design Warranty.

That the design of the PV Power Plant (for avoidance of doubt, other than the PV Modules included in the Equipment, which such warranty is set forth in <u>Section 17.1.3</u>) shall conform to <u>Section 1.6</u> of the Statement of Work, Industry Standards and Applicable Law (the "**Design Warranty**").

17.1.3. PV Module Warranty.

Contractor shall procure from the relevant Suppliers warranties for the PV Modules for the PV Power Plant in accordance with the Module Warranty Terms and Conditions. Contractor shall install such PV Modules in accordance with the manufacturer's applicable installation manual attached hereto as ExhibitT, Owner specifications set forth in this Agreement and Applicable Law (collectively, "Installation Requirements"). Contractor's failure to install such PV Modules in accordance with the Installation Requirements shall not provide a basis for invalidating the Module Warranty Terms and Conditions. The Parties agree that Contractor shall be permitted to supply and install PV Modules that contain minor visual spots or blemishes; provided that none of the Warranties provided herein, the Capacity Tests to be performed hereunder or the Module Warranty Terms and Conditions shall in any way be conditioned as a result of such visual spots or blemishes.

17.2. Warranty Periods

17.2.1. Defect Warranty Period.

Contractor shall provide the Defect Warranty for a period ending twelve (12) months after the Final Completion Date (the "Defect Warranty Period"); provided, however, that the warranty period for any Equipment for the PV Power Plant required to be re-performed, repaired, corrected or replaced following discovery of a Defect or other non-compliance with the Defect Warranty during the Defect Warranty Period shall continue until the end of the later of (a) the expiration of the Defect Warranty Period and (b) one (1) year from the date of completion of such repair or replacement. Notwithstanding any other provision of this Section 17.2, the Defect Warranty Period (as the same may be extended pursuant to clause (b) of this Section 17.2.1) shall end no later than twenty-four (24) months after the Final Completion Date.

17.2.2. Design Warranty Period.

Contractor shall provide the Design Warranty applicable to the PV Power Plant for a period of twelve (12) months commencing on the Final Completion Date (the "Design Warranty Period").

17.3. Exclusions

17.3.1. Defect Warranty and Design Warranty.

The Defect Warranty and Design Warranty shall not apply to:

(a) damage to or failure of any Work or Equipment to the extent such

damage or failure is directly caused by:

- (i) a failure by Owner or its representatives, agents or contractors to maintain or operate such Equipment in accordance with Industry Standards or in accordance with the recommendations set forth in the Required Manuals but only if such failure occurs after the Substantial Completion Date;
- (ii) operation of such Equipment by Owner or its representatives, agents or contractors in excess of operating specifications for such Equipment as set forth in the Required Manuals but only if such failure occurs after the Substantial Completion Date; or
 - (iii) a Force Majeure Event or an Excusable Event; and
- (b) items that require replacement due to normal wear and tear, normal erosion or corrosion or casualty loss.

17.3.2. Operating Personnel.

Notwithstanding the foregoing, prior to the training of the Operating Personnel provided by Contractor pursuant to Section 3.17, any adverse stress or damage to the Equipment caused by Operating Personnel while under the direction of Contractor shall be the responsibility of Contractor, except to the extent such Operating Personnel's acts or omissions constitute negligence or willful misconduct.

17.4. Enforcement by Owner; Subcontractor Warranties; Supplier Warranties.

All Subcontractors', manufacturers', and Suppliers' warranties and guarantees, express or implied, respecting any part of the Work, any Equipment, and any materials used therein shall be deemed obtained by Contractor for the benefit of Owner without the necessity of separate transfer or assignment thereof. However, Contractor shall use its Commercially Reasonable Efforts to cause all written warranties and guarantees to name Owner as the recipient and beneficiary.

17.4.1. Owner's Right to Enforce Warranties.

Commencing on the expiration of the Defect Warranty Period, Owner shall be entitled to enforce all applicable, unexpired original warranties from Subcontractors, and Contractor shall use Commercially Reasonable Efforts, at Owner's cost, to assist Owner in enforcing such warranties, when and as reasonably requested by Owner. In addition, prior to the expiration of such Defect Warranty Period, Owner, at its option and upon prior Notice to Contractor, may enforce the Defect Warranty against any Subcontractor if a Contractor Event of Default exists and this Agreement has been terminated in accordance with Article 19.

17.4.2. Assignment of Warranties by Contractor.

If a Contractor Event of Default exists and this Agreement has been terminated in accordance with <u>Article 19</u>, or otherwise at the end of the Defect Warranty Period, Contractor shall assign all applicable, unexpired and assignable original warranties of all Suppliers, at the request

and direction of Owner, to Owner, subject to the terms and conditions of any such remaining warranties of all Suppliers; <u>provided</u>, <u>however</u>, that, notwithstanding such assignment, Contractor shall be entitled to enforce each such warranty through the end of such Defect Warranty Period. Contractor shall use Commercially Reasonable Efforts to cause Owner to be an express third-party beneficiary of all such warranties of the Supplier (but at no additional cost to Contractor for such warranties). At Owner's request, Contractor shall deliver to Owner, at the end of such Defect Warranty Period, copies of all subcontracts containing such assignable warranties (with reasonable redactions to keep commercial and economic terms confidential).

17.5. Correction of Defects

17.5.1. Notice of Warranty Claim.

Promptly upon Owner's Notice to Contractor of the discovery of any failure of the Work to meet the Defect Warranties or Design Warranties, which failure shall have arisen prior to the expiration of the Defect Warranty Period or Design Warranty Period, as applicable, Contractor shall promptly (at Contractor's option and expense), correct, repair or replace the Defect. Any remediation or repair performed by Contractor shall be performed to the standards set forth in this Agreement. Additionally, Contractor shall pay the cost of removing any Defect and the cost of re-performing, repairing, replacing or testing such part of the Work as shall be necessary to cause the Work to conform to the Warranty. The timing of and the work to be completed with respect to any such remediation or repair shall be subject to Owner's approval, such approval not to be unreasonably withheld or delayed. Notwithstanding the foregoing and subject to Section 17.5.3, if any of the Work shall fail to satisfy the Warranty during the Warranty Period, and such failure endangers human health or property or materially and adversely affects the operation of the PV Power Plant, Contractor shall correct the failure as soon as is practicable. Notwithstanding anything to the contrary herein, Contractor shall have a right to dispute any Defect Warranty claim.

17.5.2. Failure of Contractor to Perform Warranty Work.

Contractor shall be given a reasonable opportunity to perform any Work under its Defect Warranty or Design Warranty under this Article 17. If Contractor does not use its reasonable efforts to promptly proceed to complete the warranty work for the PV Power Plant, or cause any relevant Subcontractor to proceed to complete such warranty work, required to satisfy any warranty claim properly asserted under the terms of this Article 17, Owner shall, after giving Contractor at least three (3) Business Days' prior Notice of Owner's intent to perform the remedy itself, have the right to perform the necessary warranty work to remedy the warranty claim, or have third parties perform the necessary warranty work and Contractor shall bear the reasonable costs thereof.

17.5.3. Chronic Failure.

If a chronic failure of any component occurs during the Defect Warranty Period, Contractor will investigate the root cause of the failure and repair, replace or adjust to correct the root cause of the chronic failure in accordance with Industry Standards. For the purpose of this Section 17.5.3, chronic failure shall mean a substantially similar failure occurring more than two

(2) times within a twelve (12) month period.

17.6. Limitations On Warranties.

EXCEPT FOR THE EXPRESS WARRANTIES AND REPRESENTATIONS SET FORTH IN <u>ARTICLE 4</u>, THIS <u>ARTICLE 17</u> AND <u>SECTION 18.2.1</u>, CONTRACTOR DOES NOT MAKE ANY OTHER EXPRESS WARRANTIES OR REPRESENTATIONS, OR ANY IMPLIED WARRANTIES OR REPRESENTATIONS, OF ANY KIND, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR PURPOSE.

18. EQUIPMENT IMPORTATION; TITLE

18.1. Importation of Equipment.

Contractor or its Subcontractors, at Contractor's own cost and expense, shall make all arrangements, including the processing of all documentation, necessary to import into the United States the Equipment and any other equipment and other items necessary to perform the Work and shall coordinate with the applicable Governmental Authorities in achieving clearance of United States customs for all such Equipment and other items and, to the extent available under Applicable Laws of the United States but without limiting Contractor's liability, for any and all Taxes as specified in Section 5.2.

18.2. Title

18.2.1. Condition.

Subject to Section 18.2.2, Contractor warrants good and marketable title, free and clear of all liens, claims, charges, security interests, and encumbrances whatsoever (other than those created by Owner or any Owner's Separate Contractor), to all Work, Equipment and other items furnished by Contractor or any of its Subcontractors and that (x) become part of the PV Power Plant or (y) are to be used for the operation, maintenance or repair thereof.

18.2.2. Transfer.

Title to all Equipment and all Work provided hereunder for the PV Power Plant shall pass in accordance with <u>Section 18.2.1</u> to Owner upon the earlier of payment for such Equipment or incorporation of such Equipment or Work into the Project (other than to the extent set forth in <u>Section 19.4(a)</u>); <u>provided, however</u>, that the vesting of title to Owner shall not impose any obligations on Owner or relieve Contractor of any of its obligations hereunder. Owner shall have a security interest in all Equipment pursuant to the Uniform Commercial Code, and Contractor agrees to take all action necessary to perfect such security interest in Owner.

18.2.3. Custody During Performance.

The transfer of title shall in no way affect Owner's rights as set forth in any other provision of this Agreement. Contractor shall have care, custody, and control of all Equipment for the PV Power Plant and exercise due care with respect thereto until the earlier of the Substantial Completion Date or the termination of this Agreement.

18.3 Transfer of Care, Custody and Control

On and after the Substantial Completion Date or the termination of this Agreement, Owner shall take complete possession and control and assume responsibility for the daily operation and maintenance of the PV Power Plant.

19. DEFAULTS AND REMEDIES

19.1. Contractor Events of Default.

Contractor shall be in default of its obligations pursuant to this Agreement upon the occurrence of any one or more events of default set forth below (each, a "Contractor Event of Default"):

- (a) Contractor becomes insolvent, generally does not pay its debts as they become due, admits in writing its inability to pay its debts, or makes a general assignment for the benefit of creditors, or Contractor commences any case, proceeding or other action seeking reorganization or receivership, or adopts an arrangement with creditors, under any bankruptcy, insolvency, reorganization or similar law of the United States or any state thereof for the relief of creditors or affecting the rights or remedies of creditors generally;
- (b) insolvency, receivership, reorganization, or bankruptcy or similar proceedings are commenced against Contractor and such proceeding shall remain undismissed or unstayed for a period of thirty (30) days;
- (c) any material representation or warranty made by Contractor herein was false or misleading when made;
- (d) Contractor purports to assign or transfer this Agreement or any right or interest herein except in accordance with <u>Article 26</u>;
- (e) Contractor fails to maintain any insurance coverages required of it in accordance with <u>Article 21</u> and Contractor fails to remedy such breach within three (3) Business Days after the earlier of the date on which Contractor first receives a Notice from Owner with respect thereto;
- (f) Contractor fails to discharge or remove any lien or claim filed against Owner, the Project or the underlying property, or against any improvements thereof, as and when required by this Agreement;
- (g) Contractor fails to make prompt payments due and owing to any Subcontractor, as required by this Agreement or Applicable Law;
- (h) Contractor submits a fraudulent claim (including an exaggerated or unsupported request for additional compensation) in an effort to unfairly obtain additional compensation from Owner;
 - (i) Contractor fails to perform any provision of this Agreement providing

for the payment of money to Owner, except for any disputed amounts, or Contractor fails to perform any material provision of this Agreement not otherwise addressed in this Section 19.1;

- (j) the Substantial Completion Date has not occurred by the sixtieth (60th) day after the Substantial Completion Guaranteed Date of the PV Power Plant, as such date may be extended pursuant to the provisions of this Agreement;
- (k) except as a result of an Owner Event of Default or a Force Majeure Event, (i) Contractor Abandons the Work and Contractor fails to remedy such breach within ten (10) days after the date on which Contractor first receives a Notice from Owner with respect thereto, or (ii) Contractor fails to commence performance of the Work for the PV Power Plant within ten (10) Business Days after the Full Notice to Proceed Date of the PV Power Plant; or
- (l) if Contractor Credit Support is invalid for any reason, is no longer in effect or is unenforceable at any time at which Contractor Credit Support is required to be in force.

19.2. Owner's Rights and Remedies.

If a Contractor Event of Default occurs, subject to Article 30, Owner shall give Contractor Notice and a ten (10) day cure period unless a shorter cure period is set forth for a particular Contractor Event of Default in Section 19.1 (each a "Contractor Cure Period"). If such breach cannot be remedied within the applicable Contractor Cure Period, such period shall be extended if: (i) curing such failure reasonably requires more than the Contractor Cure Period; and (ii) Contractor commences such cure within such Contractor Cure Period and diligently prosecutes such cure. Where an extension is warranted, Owner and Contractor shall use their Commercially Reasonable Efforts to agree upon an appropriate Contractor Cure Period in good faith, provided that the failure to so agree shall not affect the rights and obligations of the Parties hereunder. If Contractor fails to cure the Contractor Event of Default within the applicable Contractor Cure Period or agreed-upon extension, Owner or its assignees shall have the following rights and remedies and may elect to pursue any or all of them, in addition to any other rights and remedies that may be available to Owner hereunder, and Contractor shall have the following obligations:

- (a) (i) Owner may terminate this Agreement by giving Notice of such termination to Contractor;
- (ii) if Owner terminates this Agreement in accordance with the provisions hereof, Contractor shall withdraw from the Site, shall assign (to the extent such subcontract may be assigned) to Owner (without recourse to Contractor) such of Contractor's subcontracts as Owner may request, and shall license, in the manner provided herein, to Owner all Intellectual Property Rights of Contractor related to the Work reasonably necessary to permit Owner to complete or cause the completion of the Work, and in connection therewith Contractor authorizes Owner and its respective agents to use such information in completing the Work, shall remove such materials, equipment, tools, and instruments used by and any debris or waste materials generated by Contractor in the performance of the Work as Owner may direct, and Owner may take possession of any or all Contractor Deliverables necessary for completion of the Work (whether or not such Contractor Deliverables are complete); and

- (iii) if Owner terminates this Agreement, Owner may seek damages as provided in Section 20.1;
 - (b) Owner may proceed against the Contractor Credit Support;
- (c) Owner may seek equitable relief solely to cause Contractor to take action, or to refrain from taking action, pursuant to this Agreement, or make restitution of amounts improperly received under this Agreement;
- (d) Owner may pursue the dispute resolution procedures set forth in <u>Article</u> <u>31</u> to enforce the provisions of this Agreement;
- (e) Owner may make such payments as are reasonably required to cure any monetary-related Contractor Event of Default and either offset the cost of such payment against payments otherwise due to Contractor under this Agreement or Contractor shall be otherwise liable to pay and reimburse such amounts plus interest at the Contract Interest Rate to Owner promptly;
- (f) Owner may suspend the Work by giving Notice of such suspension to Contractor; or
- (g) Without exercising Owner's termination for default rights, Owner may perform the obligation in respect of which Contractor is in default, all at Contractor's expense, using Owner's own forces or by engaging other contractors.

19.3. Owner Event of Default.

Owner shall be in default of its obligations pursuant to this Agreement upon the occurrence of any one or more events of default set forth below (each, an "Owner Event of Default"):

- (a) Owner becomes insolvent, generally does not pay its debts as they become due, admits in writing its inability to pay its debts, or makes a general assignment for the benefit of creditors, or Owner commences any case, proceeding or other action seeking reorganization or receivership, or adopts an arrangement with creditors, under any bankruptcy, insolvency, reorganization or similar law of the United States or any state thereof for the relief of creditors or affecting the rights or remedies of creditors generally;
- (b) insolvency, receivership, reorganization, or bankruptcy or similar proceedings are commenced against Owner and such proceeding shall remain undismissed or unstayed for a period of thirty (30) days;
- (c) any material representation or warranty made by Owner herein was false or misleading when made;
- (d) Owner purports to assign or transfer this Agreement or any right or interest herein, except in accordance with <u>Article 26</u>;
 - (e) Owner fails to perform any provision of this Agreement requiring Owner

to pay money to Contractor and such failure continues for ten (10) days after Owner has received a Notice from Contractor with respect thereto; or

(f) Owner fails to perform any material provision of this Agreement not otherwise addressed in this Section 19.3.

19.4. Contractor's Rights and Remedies.

If an Owner Event of Default occurs, subject to <u>Article 30</u>, Contractor shall give Owner Notice of such Owner Event of Default and a seven (7) day period in which to cure the Owner Event of Default unless a shorter cure period is set forth for a particular Owner Event of Default in <u>Section 19.3</u>. If the Owner Event of Default is not cured within such cure period, and subject to <u>Article 30</u>, Contractor shall have the following rights and remedies:

- (a) to seek equitable relief solely to cause Owner to take action, or refrain from taking action, pursuant to this Agreement, or make restitution of amounts improperly received under this Agreement;
- (b) to pursue the dispute resolution procedures set forth in <u>Article31</u> to enforce the provisions of this Agreement; or
- (c) suspend the Work by giving Notice of such suspension to Owner; <u>provided</u> that such Notice of suspension may be given by Contractor either concurrently with or at any time after Contractor has issued a Notice described in Section 19.4(b), or
- (d) if the Owner Event of Default is not cured within thirty (30) days of Notice of Owner Event of Default, Contractor may give notice of its intent to terminate this Agreement by giving Notice thereof to Owner, and Contractor may terminate this Agreement, in which case such termination shall be deemed to be a termination for Owner's convenience pursuant to Section 20.2.

20. TERMINATION OR SUSPENSION

20.1. Termination and Damages for Contractor Event of Default.

20.1.1. Consequences of Contractor Event of Default.

In the event of a Contractor Event of Default, and Contractor's failure to cure the Contractor Event of Default as provided by Section 19.2, Owner may terminate Contractor's Work by Notice to Contractor, and Contractor shall be liable to Owner for any and all actual costs and damages to Owner as a result of such Contractor Event of Default, it being understood that, to the extent that the actual costs of completing the Work, including out-of-pocket costs paid by Owner in obtaining a replacement contractor, replacement Equipment or services, or otherwise to perform the Work or for professional services required as a consequence of such Contractor Event of Default, exceed those costs that would have been payable to Contractor but for such Contractor Event of Default, Contractor shall be obligated to pay the difference to Owner, provided, however, that the Parties acknowledge and agree that nothing in this Section 20.1 is

intended to, and shall not, increase or otherwise affect Contractor's aggregate limit of liability set forth in Section 30.2(a). Subject to the proviso in the immediately preceding sentence, Contractor shall, in addition to such actual costs, remain liable for Delay Liquidated Damages under Article 15 to the extent accrued prior to the date of termination. In addition, in the event of a Contractor Event of Default, no additional payments to Contractor shall be deemed amounts due or owing until the liability of Contractor is determined in accordance with this Agreement, if any, under this Section 20.1. Upon determination of the total cost of the Work, and costs and damages caused by Contractor Event of Default, Owner shall Notify Contractor in writing of the amount, if any, that Contractor shall pay Owner. Contractor acknowledges, subject to Contractor's aggregate limit of liability set forth in Section 30.2(a), that in the event of such a termination, Owner may enter into a contract for the completion of the PV Power Plant with substantially the same deliverables, completion deadlines and liquidated damages as are provided for in this Agreement, taking into account additional time required to procure such contract and to allow for transition to a new contractor when determining completion deadlines that may be different from those set forth in this Agreement, and that the cost to complete the PV Power Plant in such event may greatly exceed the cost hereunder, including amounts paid to induce any replacement contractor to keep substantially similar completion deadlines, deliverables and liquidated damages as provided for in this Agreement and/or warrant any Work performed by Contractor prior to termination.

20.1.2. Deemed Termination for Convenience.

If it is determined for any reason that there was not a Contractor Event of Default or that Owner was not entitled to the remedy against Contractor provided above, the termination will be deemed to be a termination for convenience pursuant to Section 20.2, and Contractor's sole and exclusive remedies whether in tort, contract or otherwise against Owner shall be the same as, and shall be strictly limited to, those afforded in Section 20.2.

20.2. Termination for Convenience.

20.2.1. Termination for Convenience; General.

Owner may in its sole discretion terminate the Work or this Agreement in whole or in part without cause at any time by giving Notice of termination to Contractor, to be effective upon such Notice by Owner or upon such other termination date specifically identified by Owner therein. If Owner terminates such Work without cause or for any cause other than a Contractor Event of Default specified in Section 20.1, then Owner and Contractor shall have the following rights, obligations and duties:

(a) Cancellation Charge.

If such Work is terminated pursuant to this <u>Section 20.2</u>, as total compensation for such Work performed through the effective date of such termination and demobilization of such Work, Owner shall pay to Contractor only: (x) any amount owing under any unpaid, undisputed invoice prior to the effective date of such termination; and (y) after the effective date of termination, an amount equal to Contractor's actual, demonstrable and reasonable direct costs (exclusive of overhead and profit) incurred in the demobilization of such Work, but less

salvage value of materials or Equipment which Owner elects not to accept. In no event shall the amount paid to Contractor exceed the unpaid balance of the Contract Price. Contractor hereby waives and forfeits all other claims for payment and all other damages, including anticipated profits on Work not performed.

(b) <u>Contractor Cooperation</u>.

Contractor shall cooperate with Owner reasonably and in good faith to minimize Contractor's expenses associated with a termination under this Section 20.2, including taking reasonable action requested by Owner to reduce Suppliers' or Subcontractors' cancellation charges in connection with such termination. Immediately upon issuance of the Notice of termination pursuant to this Section 20.2, Contractor shall cease all operations, or cease those operations specified by Owner in the Notice. Contractor shall place no further subcontracts or orders for materials, services, Equipment or facilities, except as necessary to complete any portion of the Work that is not terminated. Contractor shall assign to Owner, if requested, all right, title and interest of Contractor under any subcontracts that Owner elects to accept. Contractor shall terminate all subcontracts that relate to the terminated Work, and that Owner does not elect to accept by assignment. As directed by Owner, Contractor shall, upon termination under this Section 20.2, grant title and deliver to Owner the Work in progress, completed Work, supplies, Equipment and material produced or acquired for the terminated Work, and any completed or partially completed plans, drawings, as-built drawings, construction information and other property that, if the Work had been completed, would be required to be delivered to Owner. In relation to the foregoing, Contractor shall take any action that may be reasonably necessary, or that Owner may reasonably direct, in each case at Owner's cost, for the protection and preservation of the Work. Upon any such termination Owner shall return to Contractor all Contractor Credit Support that Owner then holds to the extent that such Contractor Credit Support has not as of the termination date been previously called upon by Owner.

20.2.2. Claims for Payment.

All claims for payment by Contractor under this <u>Section 20.2</u> must be made within sixty (60) days after the effective date of termination hereunder. Owner shall make payments under this <u>Section 20.2</u> in accordance with and subject to the requirements of <u>Article 6</u>.

20.3. Suspension by Owner

20.3.1. Suspension for Convenience.

Owner may suspend performance of the Work at any time for its convenience by giving five (5) Business Days' advance Notice thereof to Contractor ("Suspension for Convenience"). Such Suspension for Convenience shall continue for the period specified in the suspension Notice. The Contract Price shall be adjusted and Contractor shall be entitled to such other relief as provided in Section 20.3.4 to reflect any additional increased costs of and delays to the Work Schedule that Contractor actually and demonstrably suffers or incurs from any such suspension. At any time after the effective date of the suspension, Owner may require Contractor to resume performance of the Work on ten (10) Business Days' Notice.

20.3.2. Suspension for Cause.

(a) Stop Work Suspension for Cause.

Owner may (i) order Contractor to stop performance immediately of that portion of the Work that causes an imminent danger to life or damage to property or (ii) by giving ten (10) Business Days' advance Notice thereof to Contractor, suspend performance of the Work due to a Contractor Event of Default (each a "Suspension for Cause"). If the Work is suspended as a result of a valid Suspension for Cause, then Contractor shall not be entitled to any schedule extensions or change in the cost of the performance of the Work, pursuant to Article 16, for the associated impact of such Suspension for Cause, except to the extent a Suspension for Cause identified in part (i) above arises as a result of a Force Majeure Event or an Excusable Event. Owner's right to suspend performance of the Work under this Section 20.3.2(a) shall be without prejudice to any other right or remedy Owner may have under this Agreement.

(b) <u>Resumption of Work.</u>

In the case of a Suspension for Cause pursuant to Section 20.3.2(a) once the cause of such Suspension for Cause has been resolved by Contractor in accordance with the instructions of Owner in its Notice of Suspension for Cause as provided above or by other reasonable means identified by Contractor and agreed to by Owner, and if this Agreement is still in effect, then if Owner does not re-order the resumption of the Work after five (5) Business Days' Notice, any further delay to the resumption of the Work shall be considered an Owner-Caused Delay. In the event that any such Suspension for Cause is subsequently determined not to have been properly issued in accordance with the provisions of Section 20.3.2(a), then such suspension shall be deemed to have been a Suspension for Convenience ordered pursuant to Section 20.3.1, and Owner shall make any payments due as a result of the same under such Section.

20.3.3. Contractor's Termination Right.

If, at the end of the suspension period specified pursuant to <u>Section 20.3.1</u>, Owner has not requested a resumption of the Work or has not Notified Contractor of any extension of the suspension period (but in no event beyond one hundred eighty (180) days in the aggregate for all such suspensions), Contractor may, upon ten (10) days' advance Notice to Owner, terminate this Agreement, and such termination shall be deemed to be a termination for Owner's convenience pursuant to <u>Section 20.2</u>, and Contractor's sole and exclusive remedies whether in tort, contract or otherwise against Owner shall be the same as, and shall be strictly limited to, those afforded in <u>Section 20.2</u>.

20.3.4. Extension of Time and Compensation Rights.

In the case of any suspension under Section 20.3.1:

(a) the Work Schedule, Milestone Items and the Substantial Completion Guaranteed Date shall be extended by a period no less than the suspension period, plus a reasonable period for demobilization and remobilization, as mutually agreed upon by Contractor and Owner (plus an additional period, to the extent necessary, to compensate for the effect such suspension could be expected to have on the schedule for performing the Capacity Test in order to provide the necessary stabilization period to mitigate any transient effects on the PV Modules resulting from being stored, idle or unutilized);

- (b) Owner shall pay Contractor for those reasonable costs and cost increases actually incurred during the suspension period that are documented by Contractor to the reasonable satisfaction of Owner, to the extent directly attributable to the suspension, and that are incurred:
- (i) for the purpose of safeguarding or storing the Work and the Equipment at the point of fabrication, in transit, or at the Site;
- (ii) for personnel, Subcontractors or Equipment, the payments for which are continued during the suspension period;
- (iii) for costs of demobilization and remobilization of Contractor and its Subcontractors, including suspension costs set forth in any subcontract, purchase order or other agreement;
- (iv) for rescheduling the Work (including penalties or additional payments to Subcontractors for the same) which may include reasonable allowances for overhead and profit.

20.4. Claims for Payment.

All claims by Contractor for compensation or extension of time under <u>Sections 20.3.2</u> and <u>20.3.4</u> must be made within sixty (60) days after Notice from the Owner that the Work has been terminated or the suspension period has ended, respectively.

21. INSURANCE

21.1. General.

21.1.1. Contractor Insurances.

Contractor shall procure at its own expense and maintain in full force and effect for the PV Power Plant the minimum insurance coverages and limits as required under <u>Section 21.2</u> of this Agreement, with responsible insurance companies authorized to do business in the United States.

21.1.2. Owner Insurances.

Owner shall procure at its own expense and maintain in full force and effect for the PV Power Plant as required under this Agreement, with responsible insurance companies authorized to do business in the United States, the types and limits of insurance as set forth in Section 21.3.

21.1.3. Financial Strength of Insurance Providers.

Such insurance companies shall have an A.M. Best Insurance financial strength rating of A VIII or better in the latest edition of A.M. Best.

21.1.4. Capitalized Terms.

Capitalized terms used in this <u>Article 21</u> and not otherwise defined in this Agreement shall have the meanings generally ascribed to them in the commercial insurance industry in the United States.

21.1.5. Additional Insurances.

Each Party, at its own cost, may purchase any additional insurance it believes necessary to protect its interests, but these costs cannot be passed on to the other Party.

21.2. Contractor's Insurance.

Contractor's obligations to obtain and maintain in full force and effect the insurance policies specified in this <u>Article 21</u> shall be subject to the specified coverage being available on commercially reasonable terms. If any such coverage is not available, the Parties shall work together to find a mutually acceptable alternative.

21.2.1. Workers' Compensation and Employer's Liability Insurance.

Contractor shall maintain workers' compensation insurance and such other forms of insurance which Contractor is required to maintain in order to comply with statutory limits under workers' compensation laws of any applicable jurisdiction in the United States (and any other location in which the Work is to be performed), where applicable, and employer's liability (including occupational disease) coverage with limits of at least One Million Dollars (\$1,000,000) per accident, One Million Dollars (\$1,000,000) for disease, and One Million Dollars (\$1,000,000) for each employee, which shall cover all of Contractor's employees, whether full-time, leased, temporary or casual, who are engaged in the Work.

21.2.2. Commercial General Liability Insurance

Contractor shall maintain commercial general liability insurance written on an occurrence basis and with a combined single limit of at least One Million Dollars (\$1,000,000) per occurrence and Two Million Dollars (\$2,000,000) per project annual aggregate and Two Million Dollars (\$2,000,000) products and completed operations per project annual aggregate. Aggregate limits shall reinstate annually, be on a per project basis, dedicated entirely to the project or location for which Work is to be provided under this Agreement, and shall not be shared with any other obligations of Contractor. Such insurance shall include coverage for premises/operations liability, for products/completed operations, broad form contractual liability for written contracts, broad form property damage and personal injury liability, and independent contractors liability for Work performed on the Site and off the Site. With respect to the performance of construction activities for the PV Power Plant, Contractor shall maintain extended completed operations coverage, for at least ten (10) years after Owner's final acceptance of the Work for the PV Power Plant either through policies in force or through an extended reporting period endorsement. Contractor shall certify that such coverage is in place for up to ten (10) years after the Project is completed within thirty (30) days after Contractor's receipt of a written notice from Owner requesting such certification. Such insurance shall provide severability of interests or cross liability provisions permitting one insured to bring a claim against another insured, and shall be endorsed to include Owner and its Affiliates and their respective directors, officers, managers, representatives, agents and employees or any other parties that are related to the Project and that Owner is contractually obligated to include as additional insureds prior to loss, limited only to the extent required, if applicable, by NMSA 1978 § 56-7-1, as amended. Such additional insured status shall apply regardless of the enforceability of the indemnity provisions in this Agreement. Such insurance maintained by Contractor shall be primary with respect to the interest of Owner, and any other insurance or self-insurance maintained by Owner or its Affiliates is in excess and not contributory to Contractor's insurance in all instances regardless of any like insurance that Owner or any of its Affiliates may have. Minimum insurance can be satisfied through a combination of primary and umbrella/excess liability insurance policies.

21.2.3. Commercial Automobile Liability Insurance.

Contractor shall maintain commercial automobile liability insurance (including coverage for owned, non-owned and hired automobiles) covering vehicles used by Contractor in connection with the Work in an amount of at least One Million Dollars (\$1,000,000) combined single limit per occurrence for bodily injury and property damage. Contractor's automobile liability insurance coverage shall contain appropriate no-fault insurance provisions or other endorsements in accordance with Applicable Laws. Such insurance shall be endorsed to include Owner and its Affiliates and their respective directors, officers, managers, representatives, agents, employees or any other parties that are related to the Project and that Owner is contractually obligated to include as additional insureds prior to a loss, limited only to the extent required, if applicable, by NMSA 1978 § 56-7-1, as amended. Such additional insured status shall apply regardless of the enforceability of the indemnity provisions in this Agreement. Such insurance maintained by Contractor shall be primary with respect to the interest of Owner, and any other insurance or self-insurance maintained by Owner or its Affiliates is in excess and not contributory to Contractor's insurance policies in all instances regardless of any like insurance coverage that Owner or any of its Affiliates may have. Minimum insurance can be satisfied through a combination of primary and umbrella/excess liability insurance policies.

21.2.4. Umbrella or Excess Liability Insurance.

Contractor shall maintain umbrella/excess insurance on an occurrence basis covering claims in excess of the underlying insurance described in Sections 21.2.2 and 21.2.3, in the amount of at least Twenty Million Dollars (\$20,000,000) per occurrence in excess of the primary commercial general liability, commercial automobile liability, and employer's liability insurance (with coverage for completed operations for the PV Power Plant to be in place throughout the performance of the Work for the PV Power Plant and for ten (10) years after Final Completion of the PV Power Plant either through policies in force or through an extended reporting period endorsement). Contractor shall certify that such coverage is in place for up to ten (10) years after the Project is completed within thirty (30) days after Contractor's receipt of a written notice from Owner requesting such certification. Insurance coverages and limits required herein should not in any way limit the extent of Contractor's responsibilities and liabilities specified elsewhere in this Agreement. Such insurance shall be written as follow-form or with an insurance coverage form that provides coverage that is at least as broad as the primary insurance policies, and shall satisfy the maintenance of the required limits either through a single umbrella liability insurance policy or a combination of umbrella liability and excess liability insurance policies.

21.2.5. Professional Liability Insurance.

If the Work includes engineering, architectural, design or other professional services, Contractor shall secure and maintain, professional liability insurance (errors and omissions), with no exclusions for bodily injury or property damage, with a minimum single limit of Five Million Dollars (\$5,000,000), per claim and per annual aggregate with coverage remaining in place throughout the performance of the Work. Such insurance may be written on a claims made basis rather than an occurrence basis as long as the policy (a) has a retroactive date prior to the date of Work commencement and (b) is maintained by Contractor throughout the performance of the Work for the PV Power Plant and for at least three (3) years after Final Completion of the PV Power Plant either through ongoing policy renewals or an extended reporting period.

21.2.6. Pollution Liability Insurance.

Contractor shall maintain pollution liability insurance or the equivalent, with a minimum limit of One Million Dollars (\$1,000,000) per occurrence and Two Million Dollars (\$2,000,000) annual aggregate. Such insurance shall include coverage for pollution losses, including but not limited to bodily injury, property damage, and financial loss arising out of Contractor's operations and completed operations and for sudden and gradual pollution arising out of Contractor's performance under this Agreement. Such insurance shall add Owner and its Affiliates and their respective directors, officers, managers, representatives, agents, employees or any other parties that are related to a Project and that Owner is contractually obligated to include as additional insured prior to a loss as an additional insured with respect to Work performed under this Agreement, limited only to the extent required, if applicable, by NMSA 1978§ 56-7-1, as amended.

21.2.7. Equipment, Supplies and Materials.

All equipment, supplies and materials (a) belonging to Contractor or to any of its Subcontractors or (b) used by or on behalf of Contractor or any of its Subcontractors for its performance hereunder which is not intended to become a permanent part of the completed Work shall be brought to and kept at the Site at the sole cost, risk and expense of Contractor or such Subcontractor, and Owner shall not be liable for loss or damage thereto.

21.3. Owner's Insurance.

Owner's obligation to obtain and maintain in full force and effect the insurance policies specified in this <u>Article 21</u> shall be subject to the specified coverage being available on commercially reasonable terms. If any such coverage is not available, the Parties shall work together to find a mutually acceptable alternative.

21.3.1. Workers' Compensation Insurance and Employer's Liability Insurance.

In accordance with the laws of the State of New Mexico, Owner shall maintain in force workers' compensation insurance for all of its employees. Owner shall also maintain employer's liability coverage in an amount of not less than One Million Dollars (\$1,000,000) per accident and per employee for disease. In lieu of such insurance, Owner may maintain a self-insurance program meeting the requirements of the State of New Mexico along with the required employer's liability insurance.

21.3.2. Commercial General Liability Insurance

Owner shall maintain commercial general liability insurance written on an occurrence basis and with a combined single limit of One Million Dollars (\$1,000,000) per occurrence and Two Million Dollars (\$2,000,000) annual aggregate. Such insurance shall include coverage for products/completed operations, broad form contractual liability for written contracts, broad form property damage and personal injury liability, and independent contractor liability. In lieu of the insurance described in this Section 21.3.2, Owner may maintain a self-insurance program or alternative insurance program structure, including a combination of insured/self-insured.

21.3.3. Commercial Automobile Liability Insurance.

Owner shall maintain commercial automobile liability insurance (including coverage for owned, non-owned, and hired automobiles) covering vehicles used by Owner, including the loading or unloading of such vehicles, in an amount of One Million Dollars (\$1,000,000) combined single limit per occurrence for bodily injury, and property damage. Owner's automobile liability insurance coverage shall contain appropriate no-fault insurance provisions or other endorsements in accordance with Applicable Laws. In lieu of the insurance described in this Section 21.3.3, Owner may maintain a self-insurance program.

21.3.4. Umbrella or Excess Liability Insurance.

Owner shall maintain umbrella/excess insurance on a claims-made basis covering claims in excess of the underlying insurance described in <u>Sections 21.3.2</u> and <u>21.3.3</u> in the amount of Ten Million Dollars (\$10,000,000) per occurrence in excess of the primary commercial general liability, automobile liability, and employer's liability insurance.

21.4. Builder's All-Risk Insurance.

A minimum of thirty (30) days prior to Contractor's commencement of its performance of the Work on the Site, Contractor shall obtain and thereafter at all times during performance of the Work for the PV Power Plant expiring upon Substantial Completion of the PV Power Plant, maintain, or cause to be maintained, builder's all-risk insurance. The completed value form shall specify the estimated completed value of the PV Power Plant at the end of construction. The Builder's Risk Policy shall be endorsed to include: (A) named insured status for Owner and Contractor; (B) replacement cost coverage; (C) coverage for materials, supplies and equipment to be incorporated into the PV Power Plant while such are located on-Site, in transit or while temporarily located off-Site for the purpose of repair, adjustment or storage at the risk of one of the insured parties; (D) permission for partial occupancy or use of the premises; (E) ordinance or law coverage, including (i) coverage for loss to the undamaged portion of the building, (ii) demolition cost coverage, and (iii) increased cost of construction; and (F) a loss payable endorsement naming as loss payees Contractor and Owner as their interests may appear. Such insurance shall provide for a waiver of the insurer's right to subrogate against Owner and Contractor where contractually required. Contractor shall be responsible for payment of any deductible to the extent the loss arises from the negligence of Contractor or its Subcontractors. Owner shall furnish to Contractor prior to commencement of the Project evidence of such coverage being in place including the following as applicable: (i) insurance company name, (ii) policy number, (iii) policy period, (iv) per occurrence and aggregate limits, and (v) deductibles.

21.5. Loss Payable

Losses if any, covered by builder's all-risk shall be payable to Owner, Contractor, or any other parties that are related to the Project and that Contractor is contractually obligated to include as loss payees prior to a loss, as their respective interests may appear. Any insurance claim proceeds shall be applied to the restoration of the PV Power Plant unless mutually agreed to otherwise by the Owner and Contractor. Any insurance proceeds remaining after payment of all restoration costs shall be applied to the Owner's account.

21.6. Subcontractor Insurance

Contractor shall require each of its Major Subcontractors performing work at the Site to obtain, maintain and keep in force during the time during which they are involved in performance of the Work, insurance coverage in accordance with the insurance requirements of Contractor set forth in Sections 21.2.1, 21.2.2, 21.2.3 and 21.2.4; provided, however, that the limits of any such Major Subcontractors' Umbrella Excess Liability Insurance policies otherwise maintained in accordance with the requirements under Section 21.2.4, shall not be less than Two Million Dollars (\$2,000,000). To the extent permitted by law, Contractor shall determine the appropriate levels of insurance to be maintained by its Major Subcontractors in Sections 21.2.4 and 21.2.7 and shall cause said Subcontractors to waive on behalf of themselves and its insurers all rights to assert claims for any losses, damages, liabilities, and expenses, such expenses to include but not be limited to attorneys' fees, against Owner, Owner's subsidiaries and Affiliates along with their respective directors, officers, and employees, to the extent proceeds realized from policies of insurance maintained or required to be maintained in connection with services or products provided under their respective Subcontracts are applied to such losses, damages, liabilities, and expenses. Each policy of said Major Subcontractors required herein shall include an endorsement acknowledging such waiver of subrogation.

21.7. Contractor Certificates.

On or prior to the date that is thirty (30) days after the Full Notice to Proceed Date of the PV Power Plant, Contractor shall furnish to Owner certificates of insurance from each insurance carrier showing that the above required insurance for the PV Power Plant is in full force and effect, the amount of the carrier's liability thereunder, copies of all applicable additional insured and waiver of subrogation endorsements, and copies of endorsements from the applicable insurer, further providing that the insurance will not be canceled, materially changed or not renewed until the expiration of at least thirty (30) days (or ten (10) days in the case of cancellation due to non-payment of premiums) after notice of such cancellation, material change or non-renewal has been received by Owner. Contractor shall also be responsible for obtaining certificates of insurance for the insurances required to be maintained by such Major Subcontractor in accordance with Section 21.6 from each of the Major Subcontractors before such Major Subcontractor is allowed to commence Work and provide such certificates to the Owner upon request. Certificates of insurance submitted under this Section 21.7 shall be in form and content reasonably acceptable to Owner and shall provide that Owner and any Owner Financing Parties shall timely receive copies of any

notices to Owner or Contractor under such policies of any default or other act or omission by Owner, Contractor or other insured parties that might invalidate, render unenforceable or result in a lapse of such policy in whole or in part. Certificates of each renewal of the insurance should also be delivered to Owner and any Owner Financing Party promptly after receipt.

21.8. Owner Certificates.

On or prior to Contractor's commencement of its performance of the Work on the Site, Owner shall furnish to Contractor certificates of insurance from each insurance carrier, showing that the above required insurance is in full force and effect and the amount of the carrier's liability thereunder.

21.9. Cost of Premium.

It is expressly agreed and understood that:

- (a) the cost of premiums and deductibles for insurance required to be maintained by Contractor as set forth in this <u>Article 21</u> and all Taxes thereon shall be borne by Contractor, and shall be endorsed to provide that Owner shall have no liability for the payment of any premium thereon; and
- (b) that the cost of premiums and deductibles for insurance required to be maintained by Owner as set forth in this Article 21 and all Taxes thereon shall be borne by Owner.

21.10. Owner's Rights to Provide Insurances.

If Contractor fails to provide or maintain any insurance required of it hereunder, Owner shall have the right, but not the obligation, to provide or maintain any such insurance, and to deduct the cost thereof from any amounts due and payable to Contractor (including from any amounts due and payable to Contractor in respect of the Contract Price), or, if there are no such amounts due and payable to Contractor, Contractor shall reimburse Owner for such costs on demand. Should any of the policies required to be maintained by Contractor become unavailable or be canceled for any reason during the period of this Agreement, Contractor shall immediately procure replacement coverage. The failure of Contractor to procure and maintain such replacement coverage (so as to provide continuous coverage) shall constitute a material breach hereunder.

21.11. No Limitation of Liability.

The insurance coverages required of Contractor set forth in this <u>Article 21</u> shall in no way affect, nor are they intended as a limitation of, Contractor's liability with respect to its performance of the Work. Insurance requirements in this Agreement are independent of Contractor's liability under this Agreement. The insurance coverages required of Owner set forth in this <u>Article 21</u> shall in no way affect, nor are they intended as a limitation of, Owner's liability with respect to its performance of its obligations hereunder.

21.12. Other Terms and Provisions.

21.12.1. Omissions; Errors.

It is hereby understood and agreed that the coverages afforded by the insurance policies required of either Party set forth in this <u>Article 21</u> shall not be invalidated or affected by any unintentional omissions or errors.

21.12.2. Notification.

Contractor and Owner shall Notify the other Party of any and all incidents giving rise to an insurance claim, and otherwise keep the other Party timely apprised of insurance claim proceedings. Contractor shall timely Notify Owner of a builders risk claim and each Party shall provide reasonable assistance in the investigation of any known accident or occurrence involving injury to any person or loss or damage to property, and reasonably cooperate with the companies involved in adjusting any claim by securing and giving evidence, and obtaining the participation and attendance of witnesses, in each case, reasonably required for the investigation or defense of any claim or lawsuit.

22. RISK OF LOSS OR DAMAGE

22.1. Care, Custody and Control.

Until the Substantial Completion Date, Contractor shall have care, custody and control of the PV Power Plant; provided that upon Substantial Completion or the earlier termination of this Agreement and transfer of title to Owner pursuant to <u>Article18</u>, Owner shall have care, custody and control of the PV Power Plant to the extent of such transfer of title.

22.2. Risk of Loss.

Until the Substantial Completion Date or the early termination of this Agreement as provided in <u>Article 19</u> or <u>20</u>, subject to the provisions of this <u>Article 22</u>, Contractor assumes risk of loss, and, without limitation of its right to make claims for relief pursuant to <u>Article 8</u>, full responsibility, for the cost of replacing or repairing any damage to the PV Power Plant and the applicable Work (including the Equipment) and assumes risk of loss, and full responsibility, for the cost of replacing or repairing any damage to, any maintenance equipment (including temporary materials, equipment and supplies) which is purchased by Contractor for permanent installation in, or for use during the construction of, the PV Power Plant (other than, for the avoidance of doubt, the Owner Interconnection Facilities).

22.3. Risk of Loss After Substantial Completion.

Owner shall bear the risk of loss for, and full responsibility for, the cost of replacing or repairing any damage to the PV Power Plant from and after its Substantial Completion Date or upon earlier termination of this Agreement.

23. INDEMNIFICATION

23.1. Comparative Fault.

Notwithstanding anything to the contrary herein, and to the extent permitted by Applicable Law, it is the intent of the Parties that where fault is determined to have been joint or contributory, principles of comparative fault will be followed and each Party shall bear the proportionate cost of any loss, damage, expense and liability attributable to such Party's fault.

23.2. By Contractor.

Subject to <u>Section 23.1</u>, to the fullest extent permitted by law, Contractor shall defend, indemnify, and hold harmless, Owner and its employees, agents, partners, Affiliates, shareholders, members, directors, officers, managers and permitted assigns (each, an "Owner Indemnitee"), from and against the following:

(a) all Losses arising from third-party claims for property damage, personal injury or bodily injury or death to the extent caused by any negligent, willful, reckless or otherwise tortious act or omission (including strict liability) of Contractor or any Subcontractor during the performance of the Work or from Contractor or any Subcontractor failing to perform any of its obligations under this Agreement, or any curative action under any warranty following performance of the Work, of Contractor, any Subcontractor, or anyone directly or indirectly employed by any of them, or anyone for whose acts such Person may be liable;

(b) all Losses that directly arise out of or result from:

- (i) all claims for payment of compensation for Work performed hereunder, whether or not reduced to a lien or mechanics lien, filed by Contractor or any Subcontractors, or other persons performing any portion of the Work, including reasonable attorneys' fees and expenses incurred by any Owner Indemnitee in discharging any Contractor Lien, except to the extent of a breach by Owner in relation to any obligation it has to make a payment under this Agreement;
- (ii) employers' liability or workers' compensation claims filed by any employees or agents of Contractor or any of its Subcontractors; and
- (iii) all outstanding claims for payment of compensation for Work performed hereunder filed by any Subcontractors that are listed in the Waiver and Release Upon Final Payment, whether or not reduced to a lien or mechanics lien, including reasonable attorneys' fees and expenses incurred by any Owner Indemnitee in discharging any Contractor Lien, except to the extent that any such claims relate to a good faith Dispute between Contractor and Owner;
- (c) all Losses arising from third-party claims, including claims by Subcontractors and claims for property damage, personal injury or bodily injury or death that directly or indirectly arise out of or result from the failure of Contractor or any of its Subcontractors to comply with the terms and conditions of Applicable Laws during their performance of the Work;

- (d) all fines or penalties issued by any Governmental Authority that directly arise out of or result from the failure of the PV Power Plant, as designed, constructed and completed by Contractor or any Subcontractor, to be capable as of the Final Completion Date, of operating in compliance with all Applicable Laws or the conditions or provisions of all Applicable Permits (to the extent such Applicable Permits relate to the Work), in each case, as in effect as of the Final Completion Date;
- (e) any and all fines, penalties or assessments issued by any Governmental Authority that Owner may incur as a result of executing any applications at Contractor's request;
- (f) all Losses arising from claims by any Governmental Authority that directly or indirectly arise out of or result from the failure of Contractor to pay, as and when due, all Taxes, fees or charges of any kind imposed by any Governmental Authority for which Contractor is obligated to pay pursuant to the terms of this Agreement;
- (g) all Losses arising from claims by any Governmental Authority claiming Taxes based on gross receipts or on income of Contractor, any of its Subcontractors, or any of their respective agents or employees with respect to any payment for the Work made to or earned by Contractor, any of its Subcontractors, or any of their respective agents or employees under this Agreement; and
- (h) all Losses, including claims for property damage or bodily injury or death, whether or not involving damage to the PV Power Plant or the Site, that arise out of or result from the use of Contractor Hazardous Materials (other than arising as a result of unlawful releases or spills described in Section 23.3(f)(ii), whether lawful or unlawful. Such use of or contamination by Contractor Hazardous Materials include:
- (i) the storage, transportation, processing or disposal of such Contractor Hazardous Materials; and
- (ii) any environmental condition caused by such Contractor Hazardous Materials.

23.3. **By Owner.**

Subject to <u>Section 23.1</u>, Owner shall defend, indemnify and hold harmless Contractor and its employees, agents, partners, Affiliates, shareholders, members, directors, officers, members, managers and permitted assigns (each, a "Contractor Indemnitee") from and against the following:

- (a) all Losses arising from third-party claims for property damage, personal injury or bodily injury or death to the extent caused by any negligent, willful, reckless or otherwise tortious act or omission (including strict liability) during the performance by Owner of its obligations or failing to perform any of its obligations under this Agreement or any Affiliate, or anyone directly or indirectly employed by either of them, or anyone for whose acts such Person may be liable;
 - (b) all Losses arising from third-party claims, including claims for property

damage, personal injury or bodily injury or death that directly or indirectly arise out of or result from the failure of Owner to comply with the terms and conditions of Applicable Laws;

- (c) all Losses arising from claims by any Governmental Authority that directly or indirectly arise out of or result from the failure of Owner to pay, as and when due, all Taxes, fees or charges of any kind imposed by any Governmental Authority for which Owner is obligated to pay pursuant to the terms of this Agreement;
- (d) all Losses that directly arise out of or result from employers' liability or workers' compensation claims filed by any employees or agents of Owner; and
- (e) all Losses, including claims for property damage or personal injury or death (including emotional distress) that directly or indirectly arise out of or result from:
- (i) the presence or existence of Hazardous Materials (including any Pre-Existing Contamination) at the Site (A) brought onto or generated at the Site on or before the Effective Date; (B) brought onto or generated at the Site by Owner or any of Owner's Separate Contractors (other than Hazardous Materials that were brought onto the Site or delivered to Contractor or any Subcontractor to be handled by the same in the course of performing the Work); or (C) which migrated onto the Site from another location (other than such Hazardous Materials that were previously in the care, custody or control of Contractor or any Subcontractor), except to the extent the remediation of any such Hazardous Materials is part of the Work; or
- (ii) the unlawful release or spill by Owner or its Affiliates or any of Owner's Separate Contractors of Hazardous Materials, such Hazardous Materials otherwise having been brought onto the Site by Contractor or any Subcontractor in accordance with the terms of this Agreement and all Applicable Laws.

23.4. Patent Infringement and Other Indemnification Rights.

Contractor shall defend, indemnify, and hold harmless the Owner Indemnitees against all Losses arising from any Intellectual Property Claim. If Owner provides Notice to Contractor of the receipt of any such claim, Contractor shall, at its own expense, settle or defend any such Intellectual Property Claim and pay all damages and costs, including reasonable attorneys' fees, awarded against Owner Indemnitees and at Contractor's option either: (a) procure for Owner, or reimburse Owner for procuring, the right to continue using the infringing service, Equipment or other Work, as the case may be; (b) modify the infringing service, Equipment, or other Work, as the case may be, so that the same becomes non-infringing; or (c) replace the infringing service, Equipment or other Work with non-infringing service, Equipment or other Work, as the case may be. If Owner or Contractor is temporarily or permanently enjoined from completing the PV Power Plant or any part thereof, or from the use, operation, or enjoyment of the PV Power Plant or any part thereof, as a result of such claim or legal action or any litigation based thereon, then Contractor shall promptly use its Commercially Reasonable Efforts to have such injunction removed and to take one or more of the actions under the preceding clauses (a), (b) or (c), provided, that in no case shall Contractor take any action that adversely affects Owner's continued use and enjoyment of the applicable service, Equipment, or other Work, as the case may be, without the prior written consent of Owner. Owner's acceptance of the Contractor Deliverables, supplied materials and

equipment or other component of the Work shall not be construed to relieve Contractor of any obligation hereunder. Notwithstanding any provision of this Agreement to the contrary, no Milestone Item completion date or other key date shall be extended due to any injunction described in this Section 23.4. However, notwithstanding anything in this Agreement to the contrary, Contractor shall not have such indemnity obligations or any other liability hereunder for any Intellectual Property Claim to the extent arising from or in connection with any modification of the Work by Owner or any third party, including Owner's Separate Contractors, Owner's variation from Contractor's recommended procedures for using the Work, or Work manufactured to designs and specifications of Owner.

23.5. Electronic Data Files.

Except where any Contractor Deliverable shall be in the form of an electronic data file, any other electronic data files furnished to Owner pursuant to this Agreement are provided only for the convenience of Owner. Owner recognizes that such electronic data files not provided to Owner as a Contractor Deliverable may not be adequate or appropriate for Owner's needs. In the case of any discrepancies between the Contractor Deliverable represented by electronic data files and the plotted hardcopy of such files bearing the seal of Contractor's registered professional engineer, the sealed hardcopy shall govern.

23.6. Claim Notice.

An Indemnitee shall provide Notice to the indemnifying Party, within ten (10) days after receiving Notice of the commencement of any legal action or of any claims or threatened claims against such Indemnitee in respect of which indemnification may be sought pursuant to the foregoing provisions of this Article 23 or any other provision of this Agreement providing for an indemnity (such Notice, a "Claim Notice"). The Indemnitee's failure to give, or tardiness in giving, such Claim Notice will reduce the liability of the indemnifying Party only by the amount of damages attributable to such failure or tardiness, or to the extent the indemnifying Party is prejudiced by such failure or delay, but shall not otherwise relieve the indemnifying Party from any liability that it may have under this Agreement. In case any such claim or legal action shall be made or brought against an Indemnitee and such Indemnitee shall Notify (by sending a Claim Notice) the indemnifying Party thereof, the Indemnitee may by such Claim Notice require the indemnifying Party to assume and control the defense of the claim (other than any Intellectual Property Claim, which shall be controlled by Contractor unless otherwise agreed by the Parties) that is the subject of such Claim Notice, including the employment of counsel reasonably acceptable to the Indemnitee, and the indemnifying Party shall pay all expenses of the conduct of such defense. The Indemnitee shall have the right to employ separate counsel in any such proceeding and to participate in (but not control) the defense of such claim, but the fees and expenses of such counsel shall be borne by the Indemnitee unless the indemnifying Party agrees otherwise; provided, however, that if the named parties to any such proceeding (including any impleaded parties) include both the Indemnitee and the indemnifying Party, and the indemnifying Party requires that the same counsel represent both the Indemnitee and the indemnifying Party, and representation of both parties by the same counsel would be inappropriate due to actual or potential differing interests between them, then the Indemnitee shall have the right to retain its own counsel at the cost and expense of the indemnifying Party. If the indemnifying Party fails to assume or diligently prosecute the defense of any claim in accordance with the provisions of this Section 23.6, then the Indemnitee shall have the absolute right to control the defense of such claim and the fees and expenses of such defense, including reasonable attorneys' fees of the Indemnitee's counsel and any reasonable amount determined to be owed by Indemnitee pursuant to such claim, shall be borne by the indemnifying Party, provided that the indemnifying Party shall be entitled, at its expense, to participate in (but not control) such defense. Subject to all of the foregoing provisions of this Section 23.6, as between the Parties, (a) the indemnifying Party shall control the settlement of all claims, in coordination with any insurer as required under the applicable insurance policies in Article 21 as to which it has assumed the defense; provided, however, that to the extent the indemnifying Party, in relation to such insurer, controls settlement: (i) such settlement shall include a dismissal with prejudice of the claim and an explicit release from the party bringing such claim or other proceedings of all Indemnitees; and (ii) the indemnifying Party shall not conclude any settlement without the prior approval of the Indemnitee, which approval shall not be unreasonably withheld or delayed; and (b) except as provided in the preceding sentence concerning the indemnifying Party's failure to assume or to diligently prosecute the defense of any claim, no Indemnitee seeking reimbursement pursuant to the foregoing indemnity shall, without the prior written consent of the indemnifying Party, settle, compromise, consent to the entry of any judgment in or otherwise seek to terminate any action, claim, suit, investigation or proceeding for which indemnity is afforded hereunder unless such Indemnitee reasonably believes that the matter in question involves potential criminal liability against such Indemnitee. The Indemnitee shall provide reasonable assistance to the indemnifying Party when the indemnifying Party so requests, at the indemnifying Party's expense, in connection with such legal action or claim, including executing any powers-of-attorney or other documents required by the indemnifying Party with regard to the defense or indemnity obligations.

23.7. Survival of Indemnity Obligations.

The indemnities set forth in this <u>Article23</u> relating to the PV Power Plant shall survive the Final Completion Date or the earlier termination of this Agreement for a period expiring two (2) years following the Final Completion Date or said termination, whichever first occurs. All Claim Notices must be delivered, if at all, to the applicable Party prior to the expiration of such two (2) year period. If any Claim Notice is made within such two (2) year period, then the indemnifying period with respect to all claims identified in such Claim Notice (and the indemnity obligation of the Parties hereunder with respect to such claim) shall extend through the final, non-appealable resolution of such claims. For purposes of clarification hereunder, without limiting the other rights granted hereunder to either Party, a Party may enforce the indemnity provisions hereunder pursuant to the provisions of <u>Article 31</u> without having to declare an Owner Event of Default or a Contractor Event of Default, as applicable.

23.8. Limitations on Indemnification Obligations.

Notwithstanding anything to the contrary in this Agreement, no claim for indemnity shall be brought pursuant to this <u>Article 23</u> until the Losses incurred or suffered by the indemnified Person hereunder exceed Twenty-Five Thousand Dollars (\$25,000) in the aggregate, exclusive of Taxes. Once such Losses exceed the threshold set forth in the preceding sentence, the indemnifying Party shall be responsible for all Losses, not merely those Losses in excess of such threshold.

24. CONFIDENTIAL INFORMATION

24.1. Confidential Information.

As used in this Agreement, "Disclosing Party" refers to Contractor whenever it is disclosing information to Owner and to Owner whenever it is disclosing information to Contractor. "Receiving Party" refers to Contractor whenever it is receiving information from Owner and to Owner whenever it is receiving information from Contractor. Each Party shall, and shall use its Commercially Reasonable Efforts to cause its Representatives, as hereinafter defined, and Affiliates to, keep confidential all information marked as "Confidential" in advance of disclosure, as well as proprietary, non-public or confidential information (in any form) concerning the business, operations and assets of Owner or Contractor (as the case may be), or their respective Affiliates provided to the other Party, including the terms and conditions of this Agreement or any related agreement, information or materials prepared in connection with the performance of the Work under this Agreement, or any related subsequent agreement, designs, drawings, specifications, techniques, models, data, documentation, manuals, source code, object code, flow charts, research, development, processes, procedures, know-how, manufacturing, development or marketing techniques and materials, development or marketing timetables, strategies and development plans, business plans, customer, supplier or personnel names and other information related to customers, suppliers or personnel, pricing policies and financial information, and other information of a similar nature, whether or not reduced to writing or other tangible form, and any other trade secrets (collectively, "Confidential Information"). Confidential Information shall not include information that:

- (a) is known to Receiving Party prior to obtaining the same from Disclosing Party as reflected by the written records of Receiving Party;
 - (b) is in the public domain at the time of disclosure by Disclosing Party;
- (c) becomes available to Receiving Party on a non-confidential basis from a source other than Disclosing Party, provided that, to Receiving Party's knowledge after reasonable inquiry, such source is not prohibited from transmitting such information by a contractual, legal, or other obligation;
- (d) can be shown by Receiving Party to have been independently developed by its employees, officers, directors, attorneys, auditors, advisors and/or consultants (collectively, "Representatives") without access to the Confidential Information;
- (e) is necessary to be disclosed to auditors, taxing authorities, or accountants preparing tax reports and filings;
- (f) is required to be disclosed under Applicable Law, stock exchange requirements or by Governmental Authorities, including in connection with any approval sought from, filing with, request for information from, or compliance obligation imposed by, any Governmental Authority; or
- (g) is approved for public release by express prior written consent of an authorized officer of Disclosing Party.

24.2. Use of Confidential Information.

- (a) Receiving Party hereby agrees that it shall use the Confidential Information solely for the purpose of performing its obligations under this Agreement and not in any way detrimental to Disclosing Party, or its Affiliates. Receiving Party agrees to use the same degree of care Receiving Party uses with respect to its own proprietary or confidential information, which in any event shall result in a reasonable standard of care to prevent unauthorized use or disclosure of the Confidential Information. Except as otherwise provided herein, Receiving Party shall keep confidential and not disclose the Confidential Information. Owner and Contractor shall cause each of their Representatives and Subcontractors to become familiar with, and abide by, the terms of this Section 24.2.
- (b) Notwithstanding the provisions of this Section 24.2, Receiving Party may disclose any of the Confidential Information if, but only to the extent, that, based upon reasonable advice of counsel, Receiving Party is required to do so by the disclosure requirements of any Applicable Law. Prior to making or permitting any such disclosure, Receiving Party shall provide Disclosing Party with prompt written Notice of any such requirement so that Disclosing Party (with Receiving Party's assistance if and to the extent reasonably requested) may seek a protective order or other appropriate remedy, unless such Notice is prohibited by any Applicable Law.
- (c) Subject to Section 24.2(b), Receiving Party shall not, without the prior written consent of Disclosing Party, disclose to any third party the fact that such Confidential Information has been made available to Receiving Party. Further, and notwithstanding the foregoing, (i) Contractor may provide any and all information required by (x) its Representatives, Affiliates or then existing Subcontractors and insurance agents that is necessary to complete the Work to such Subcontractors and insurance agents and (y) Contractor Financing Parties and their representatives to the extent necessary to obtain financing for the Work, in each case without the consent of Owner; provided that Contractor shall be responsible for any breaches of any Subcontractors, insurance agents or Contractor Financing Parties of the confidentiality provisions of this Section 24.2; and (ii) Owner may provide any and all information (x) to its Representatives or then existing or prospective successors or assigns; (y) required by its other contractors and insurance agents or insurers that is necessary to perform Owner's obligations under this Agreement; and (z) required by Owner Financing Parties and their representatives, in each case without the consent of Contractor.

24.3. Return of Confidential Information.

- (a) At any time upon the request of Disclosing Party, Receiving Party shall promptly deliver to Disclosing Party or destroy if so directed by Disclosing Party (with such destruction to be certified by Receiving Party) all documents (and all copies thereof, however stored) furnished to or prepared by Receiving Party that contain Confidential Information and all other documents in Receiving Party possession that contain or that are based on or derived from Confidential Information; provided, however, that the Receiving Party may retain one copy of such Confidential Information solely for the purpose of complying with its audit and document retention policies, and provided, further, that all such retained Confidential Information shall be held subject to the terms and conditions of this Agreement.
 - (b) Notwithstanding the return or destruction of all or any part of the

Confidential Information relating to the PV Power Plant, the confidentiality provisions set forth in this Agreement shall nevertheless remain in full force and effect with respect to such specific Confidential Information until the date that is three (3) years after the earlier of (i) the Final Completion Date or (ii) the termination of this Agreement.

24.4. Confidential Information Remedy.

The Parties acknowledge that the Confidential Information is valuable and unique, and that damages would be an inadequate remedy for breach of this <u>Article 24</u> and the obligations of each Party under this <u>Article 24</u> are specifically enforceable. Accordingly, the Parties agree that a breach or threatened breach of this <u>Article 24</u> by either Party, shall entitle the other Party to seek an injunction preventing such breach, without the necessity of proving the inadequacy of damages or posting any bond. Any such relief shall be in addition to, and not in lieu of, monetary damages or any other legal or equitable remedy available to such Party.

25. INVENTIONS AND LICENSES

25.1. Invention, License.

Any idea, invention, work of authorship, drawing, design, formula, algorithm, utility, tool, pattern, compilation, program, device, method, technique, process, improvement, development or discovery (collectively, "Invention"), whether or not patentable, copyrightable or entitled to legal protection as a trade secret or otherwise, that Contractor may conceive, make, develop, create, reduce to practice or work on, in whole or in part, in the course of performing the Work, shall be owned and retained by Contractor. Contractor hereby grants, and shall require its Subcontractors to grant, to Owner a paid-up, irrevocable, perpetual, non-transferable (other than to transferees of the PV Power Plant), nonexclusive, royalty-free license to use all Inventions, Confidential Information or other proprietary rights, intellectual property and specialized knowledge of Contractor that, in each case, form a part of the Work for Owner's use to the extent reasonably necessary for the operation, maintenance, repair, or decommissioning of the PV Power Plant or components thereof, at any time. Notwithstanding the foregoing, Owner can use any Affiliate of Owner or subcontractor or other agent retained by Owner to the extent reasonably necessary to exercise these rights solely on behalf of Owner. Contractor shall, prior to directing any Subcontractor to produce any design or engineering work in connection with the PV Power Plant, obtain a valid license of any such Inventions, specialized knowledge or other proprietary property from such Subcontractor in terms substantially similar to those that obligate Contractor to Owner as expressed in this Section 25.1. Except as specifically stated herein, no other license in such patents and proprietary information is granted pursuant to this Agreement.

25.2. Suitability of Contract Design, Engineering and Computer Programming Information.

All Contractor Deliverables and computer software for the PV Power Plant prepared by Contractor pursuant to this Agreement are instruments of service in respect of the PV Power Plant. They are not intended or represented to be suitable for reuse by Owner or others on extensions of the Project or on any other project. Without any limitation on the provisions set forth in <u>Article 24</u>, any such unauthorized reuse without prior written verification or adaptation by Contractor for the specific purpose intended will be at Owner's sole risk and without liability or

legal exposure to Contractor.

25.3. Contractor Deliverables.

Subject to <u>Section 25.1</u>, the Contractor Deliverables accumulated or developed by Contractor, its employees or any Subcontractors shall become the property of Owner without any further consideration to be provided therefor, when prepared or in process, whether or not delivered by Contractor. Contractor will maintain ownership of all copyrights and other intellectual property contained within the Contractor Deliverables.

25.4. Software Licenses.

To the extent Contractor purchases any software that is necessary for the continued operation of the Project after Substantial Completion, Contractor shall register the Owner as the licensee of such software with the applicable Vendor, and Contractor shall be responsible for any registration, renewal or transfer costs. If any of the licenses for required software are not transferable from Contractor to Owner, then Contractor shall obtain fully functional versions of the applicable software for Owner. Such software shall be licensed to Owner, and any costs incurred to obtain the software license shall be at Contractor's sole expense.

26. ASSIGNMENT

26.1. Assignment to Other Persons.

Except as otherwise provided in this Section 26.1, neither Party may assign or otherwise transfer this Agreement to any third party without the prior written consent of the other Party; which consent shall not be unreasonably withheld or delayed; provided, however, that nothing in this Agreement shall prevent either Party from engaging Affiliates or subcontractors in connection with the performance of its obligations under this Agreement (other than its respective payment obligations). Notwithstanding the foregoing, (a) Owner may (i) collaterally assign its rights, title and interest under this Agreement to any Owner Financing Party, who may further assign such rights, title and interest under this Agreement in accordance with the foregoing upon foreclosure or (ii) assign its rights, title and interest under this Agreement in connection with a synthetic lease, sale-leaseback or other similar financing arrangement for the PV Power Plant and, in each case, in connection therewith, Contractor shall execute and deliver any usual and customary consents, legal opinions or other documents reasonably requested by Owner (which shall include customary additional cure periods for the benefit of Owner Financing Parties (not to exceed, in the aggregate, ten (10) additional Business Days)); and (b) Owner may assign this Agreement to any Affiliate of Owner.

26.2. Indemnitees; Successors and Assigns.

Upon any assignment by either Party hereunder, the definition of Owner Indemnitee or Contractor Indemnitee, as applicable, shall be deemed modified to include the assignor and permitted assignee under such assignment and each of their respective employees, agents, partners, Affiliates, shareholders, officers, directors, members, managers, successors and assigns.

27. HAZARDOUS MATERIALS

27.1. Use by Contractor.

Contractor shall not and shall not permit any of its Subcontractors, directly or indirectly, to permit the manufacture, storage, transmission or presence of any Hazardous Materials on the Site, and Contractor shall not and shall not permit any of its Subcontractors to release, discharge or otherwise dispose of any Hazardous Materials on the Site, in each case, except in accordance with Applicable Law; provided, however, that Contractor or its Subcontractors may bring onto the Site such Hazardous Materials as are necessary to perform the Work ("Contractor Hazardous Materials") so long as the same is done in compliance with Applicable Laws. Contractor shall remain responsible and strictly liable for all such Contractor Hazardous Materials brought on to or generated at the Site, including the management, transportation, storage, labeling, treatment and disposal of all such Contractor Hazardous Materials. Contractor shall notify Owner prior to bringing any Contractor Hazardous Materials onto the Site and shall provide Owner, on Site, the following information with respect to any Contractor Hazardous Materials: (a) material safety data sheet; (b) quantity (volume/mass); (c) length of time on the Site; (d) container type; and (e) disposal location if disposed or otherwise managed. Contractor shall require all Subcontractors to provide the information required under this Section 27.1 to Owner before bringing any Contractor Hazardous Materials to the Site. Contractor shall exclude the use of lead paint and minimize the use of acetone and chlorinated solvents and similar substances at the Site and shall require all Subcontractors to do likewise.

27.2. Remediation by Contractor.

At Contractor's sole cost and expense, Contractor shall conduct and complete all investigations, studies, sampling, testing and remediation of the Site in connection with the release, discharge or presence of Contractor Hazardous Materials unless such release or discharge is caused by Owner, any Person for which Owner is responsible, or any third party including Owner's Separate Contractors. Contractor shall promptly comply with all lawful orders and directives of all Governmental Authorities regarding Applicable Laws relating to the use, transportation, storage, handling, presence or release by Contractor, any Subcontractor or any Person acting on its or their behalf or under its or their control of any Contractor Hazardous Materials, except to the extent any such orders or directives are being contested in good faith by appropriate proceedings in connection with the Work. For the avoidance of doubt, Contractor shall have no obligation to transport, store, remediate or otherwise handle any Pre-Existing Contamination.

27.3. Notice of Hazardous Materials.

- (a) If Contractor discovers, encounters or is notified of the existence of any contaminated materials or Hazardous Materials at the Site, Contractor shall promptly Notify Owner thereof and restrict access to the area containing such contaminated materials or Hazardous Materials;
- (b) If Contractor discovers, encounters or is notified of any spill or release of any Hazardous Materials at the Site:

- (i) if such Hazardous Materials are Contractor Hazardous Materials, Contractor shall promptly remove such Hazardous Materials from the Site and remediate the Site in accordance with all Applicable Laws and Applicable Permits (to the extent the Applicable Permits relate to the Work) in each case at Contractor's sole cost and expense, except where such materials were released or spilled by Owner, its Affiliates, or any third party including Owner's Separate Contractors; and
- (ii) if such Hazardous Materials are Contractor Hazardous Materials, Contractor shall not be entitled to any extension of time or additional compensation hereunder for any delay or costs incurred by Contractor as a result of the existence of such Contractor Hazardous Materials.

28. LIEN FILINGS AND CLAIMS

28.1. Project Liens.

Contractor shall at all times promptly pay for all materials, Equipment, services and labor used in the performance of the Work and shall maintain all Work, materials, Equipment, structures, premises, and other property free and clear from all liens, security interests, attachments and other encumbrances created by, through or under, or as a result of any act or omission (or alleged act or omission) of, Contractor or any Supplier or Subcontractor, or other Person providing materials, Equipment, services or labor in the performance of the Work, including common law, contractual, statutory and constitutional mechanic's liens, materialman's liens and labor liens (each a "Contractor Lien"). Contractor shall promptly bond, pay or discharge and discharge of record, within twenty (20) days of Owner's request, any Contractor Lien or other charges which, if unpaid, might be or become a Contractor Lien. Contractor shall indemnify, defend and hold harmless Owner Indemnitees from and against any and all Losses asserted or awarded against or incurred by such Indemnitees arising out of, resulting from, or relating to, such Contractor Liens. Contractor shall provide Owner upon its request with reasonable evidence (including executed Lien waivers in form acceptable to Owner) showing that all claims for materials, Equipment, labor, and Suppliers and Subcontractors have been paid in full.

28.2. Contractor Failure to Remove Liens.

If Contractor does not act so as to remove, discharge, bond, cancel or otherwise satisfy a Contractor Lien against Owner Indemnitee(s), the Site, the PV Power Plant or the improvements thereon within the stated twenty (20) day period, then Owner at its sole option may: (1) take by way of offset funds from the Agreement balance sufficient to satisfy the Contractor Lien and to pay all Owner Losses and costs incurred by reason thereof; (2) transfer the Contractor Lien to a bond, at Contractor's expense, including all Owner Losses and costs thereby incurred; or (c) Pay directly to the Contractor Lien claimant, from the Agreement balance, the amount reasonably necessary to cause the removal and discharge of the Contractor Lien, with all costs and attorneys' fees thereby incurred chargeable to Contractor. Contractor shall have the right to contest any such Contractor Lien.

28.3. Preliminary Notices.

Contractor shall provide Owner, within fifteen (15) days of receipt thereof, copies of all Preliminary Notices received from potential Contractor Lien claimants intended to preserve Contractor Lien rights in connection with the PV Power Plant Project ("Preliminary Notice"). With respect to any such Preliminary Notice filed or received in connection with the Work, Owner shall be entitled to request and receive Supplier/Subcontractor interim Waivers and Releases, and Supplier/Subcontractor Waivers and Releases Upon Final Payment, from any Supplier or Subcontractor filing or serving any such Preliminary Notice.

28.4. Request for Information.

If any mechanic or materialmen submits a request for information to Owner or Contractor, seeking to obtain information necessary to comply with the Preliminary Notice requirement under New Mexico law, Contractor shall, within five (5) days after such a request is made, provide the requesting mechanic or materialmen with the information required to be included in a Preliminary Notice, and simultaneously provide Owner with Contractor's reply.

29. NOTICES AND COMMUNICATIONS

29.1. Requirements.

Any Notice made pursuant to the terms and conditions of this Agreement shall be in writing and deemed effective as follows: (a) if delivered personally, upon delivery; (b) if sent by certified mail, return receipt requested, upon certified receipt; (c) if sent by a recognized overnight mail or courier service, with delivery receipt requested, upon receipt; or (d) if sent by facsimile transmission, upon confirmation in one of the other accepted methods in parts (a), (b), or (c) of this Section 29.1. To be effective, Notice must be addressed to and sent to the following addresses or to any alternative address which a Party shall identify by means of Notice in accordance with this Agreement:

If to Contractor:

AFFORDABLE SOLAR INSTALLATION, INC.

4840 Pan American Fwy NE Albuquerque, NM 87109 Attn: Kevin Bassalleck

If to Owner:

PUBLIC SERVICE COMPANY OF NEW MEXICO

2401 Aztec Rd, NE Albuquerque, NM 87107 Facsimile: (505) 241-4147 Attn: Kevin Mataczynski

With a copy to:

PNM Resources, Inc. Alvarado Square, MS 0805 Albuquerque, NM 87158 Facsimile: (505) 241-2338

Attn: Madonna Bixby, Corporate Counsel

Nothing contained herein shall preclude the transmission by electronic communication (such as electronic mail) of any communication in the normal course of business and any such transmission may be distributed solely by and between Contractor's Project Manager and the Owner Representative.

29.2. Representatives.

Any technical or other communications pertaining to the Work shall be with the Parties' designated representative. Each Party shall Notify the other in writing of the name of such representatives. Contractor's Project Manager and the Owner Representative each shall have knowledge of the Work and be available at all reasonable times for consultation. Each Party's representative shall be authorized on behalf of such Party to administer this Agreement, agree upon procedures for coordinating the efforts of the Parties, and, when appropriate, to furnish information to or receive information from the other Party in matters concerning the Work.

30. LIMITATIONS OF LIABILITY AND REMEDIES

30.1. Limitations on Damages.

Except (a) for liquidated damages as expressly set forth in this Agreement, (b) to the extent a termination payment made pursuant to Article 20 constitutes consequential damages, (c) to the extent damages claimed by third parties (other than Owner Indemnitees or Contractor Indemnitees) for which Contractor or Owner has a duty to indemnify hereunder as expressly provided in Article 23 are shown to be consequential in nature, and (d) to the extent that a Party has breached any of its obligations set forth in Article 24, notwithstanding anything else in this Agreement to the contrary, no Party (nor that Party's subcontractors) shall be liable to any other Party hereto for any loss, damage or other liability otherwise equivalent to or in the nature of any indirect, incidental, consequential, exemplary, punitive or special damages arising from performing or a failure to perform any obligation under this Agreement, whether such liability arises in contract (including breach, indemnity or warranty), tort (including fault, negligence or strict liability), or otherwise, including for any loss of profits, loss of revenue, or loss of use of Equipment, the PV Power Plant or the Project, downtime costs, increased expense of operation or maintenance of the Equipment or the Project, loss of opportunity or goodwill, cost of purchased or replacement power, equipment or systems, cost of capital, claims of customers for such damages, or any governmental fines, penalties or sanctions imposed.

30.2. Limitations on Contractor's Liability.

- (a) Subject to clause (b) of this <u>Section 30.2</u>, Contractor's liability to Owner and/or Owner Indemnitees under this Agreement, whether such liability arises in contract, tort, warranty or otherwise, shall in no event be greater in the aggregate than an amount equal to one hundred percent (100%) of the Contract Price.
- (b) Contractor's limit of liability set forth in Section 30.2(a) shall not apply to (i) Contractor's indemnification obligations under this Agreement with respect to any third-

party claim; or (ii) any insured claim to the extent that such claim is covered by insurance proceeds actually received from the insurance required to be maintained under this Agreement.

- (c) In no event shall Contractor's liability under this Agreement for Delay Liquidated Damages exceed in the aggregate an amount equal to ten percent (10%) of the Contract Price (the "Delay LD Cap").
- (d) In no event shall Contractor's liability under this Agreement for Capacity Liquidated Damages exceed in the aggregate an amount equal to fifteen percent (15%) of the Contract Price (the "Capacity LD Cap").
- (e) Unless otherwise agreed by Contractor in its sole and absolute discretion, in no event shall the aggregate amount of Delay Liquidated Damages plus Capacity Liquidated Damages exceed in the aggregate an amount equal to twenty percent (20%) of the Contract Price (the "Aggregate LD Cap").

30.3. Limitation on Remedies.

Except as otherwise provided herein, the rights and remedies of each Party as set forth in this Agreement shall be the exclusive rights or remedies of the Parties.

30.4. Limitations on Owner's Liability.

- (a) Subject to clause (b) of this <u>Section 30.4</u>, Owner's liability to Contractor and/or Contractor Indemnitees under this Agreement, whether such liability arises in contract, tort, warranty or otherwise, shall in no event be greater in the aggregate than an amount equal to one hundred percent (100%) of the Contract Price.
- (b) Owner's limit of liability set forth in <u>Section 30.4(a)</u> shall not apply to (i) Owner's indemnification obligations under this Agreement with respect to any third-party claim; or (ii) to Owner's obligation to pay the Contract Price.

31. DISPUTES

31.1. Dispute Resolution.

Any dispute or matter in question between the Parties arising out of or related to this Agreement (a "**Dispute**") shall be resolved pursuant to the procedures set forth in this <u>Article 31</u>, including whether a particular question is the proper subject of arbitration.

31.1.1. Dispute Resolution. Initially, Owner and Contractor shall attempt to resolve any Dispute that may arise in connection with this Agreement. If they are unable to resolve the Dispute within twenty (20) days, either Party may, by Notice, refer the Dispute to the senior management of the Parties for resolution. As used in this <u>Article 31</u>, "senior management" means Senior Vice President or other executive officer with comparable management duties and authority. Senior management representatives shall confer or meet to discuss the Dispute within twenty (20) days of the Notice. If the senior management of the Parties is unable to resolve the Dispute within sixty (60) days of the initial Notice, the Dispute may be submitted to mediation

upon the demand of either Party.

- 31.1.2. Arbitrable Disputes. If the Parties do not agree to mediate the Dispute or are unable to resolve the Dispute through mediation and the aggregate amount of the claim (including counterclaims) is One Hundred Thousand Dollars (\$100,000) or less, then the Dispute shall be resolved by binding arbitration. Such arbitration shall be governed by the thenprevailing Construction Industry Rules of the American Arbitration Association. A Party electing to submit a Dispute to arbitration shall give the other Party a timely demand for arbitration and shall file the demand and the requisite fee with the American Arbitration Association. Such demand for arbitration shall describe the nature of the Dispute and the amount in controversy. The Parties shall then jointly select an arbitrator in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association; or, if the Parties cannot agree, there shall be three selected pursuant to the applicable rules. Such arbitrator(s) shall be familiar with the construction and electric generation industries. The arbitration shall be held in Albuquerque, New Mexico. Discovery shall be by agreement of the Parties or as ordered by the arbitrator(s), provided that the Parties shall comply with the following minimum discovery requirements: at least one hundred twenty (120) calendar days prior to the arbitration, the Parties shall exchange copies of all exhibits to be used at the arbitration, all Project documents in any way related to the Dispute, a list of witnesses and a summary of the matters as to which each witness is expected to testify. A reasonable number of depositions may be taken. The arbitrator(s) shall decide the Dispute in strict accordance with the Agreement documents and by providing a reasoned award within thirty (30) days of the conclusion of the hearings. The award entered by the arbitrator(s) shall be final, and judgment may be entered upon it in accordance with Applicable Law in any court having jurisdiction thereof. All costs of mediation and arbitration (including the fees of the mediator and arbitrator(s)) shall be split equally by the Parties, except that the Parties shall be responsible for payment of their own attorney fees, expert fees, preparation fees, travel costs, witness fees, photocopying and similar costs. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law of the State of New Mexico. Indemnity claims are not subject to mandatory arbitration.
- 31.1.3. Litigation of Larger Disputes. If the aggregate amount of the claims in dispute exceeds One Hundred Thousand Dollars (\$100,000), then the Parties may agree to submit the matter to binding arbitration; however, failing such an agreement to arbitrate, either Party may bring an action only in the federal or state courts of New Mexico. This <u>Article 31</u> shall have no application to claims, or requests for additional compensation or time, if those requests have not been properly preserved for submission to the dispute resolution procedures set forth herein. An arbitration demand shall include all related claims and Disputes then ripe for the dispute resolution procedures set forth herein.
- 31.1.4. Work Continuation. Contractor agrees that it can be fully compensated by money damages for any breach of this Agreement which may be committed by Owner (other than a breach of confidentiality, in respect of which Contractor shall, in addition to any monetary damages, be entitled to seek specific performance, injunction or any other equitable remedy available to Contractor), and Contractor agrees that no default, act or omission of Owner shall entitle Contractor to terminate or rescind this Agreement, or to suspend, delay, stop or Abandon performance of the Work, except as expressly set forth in this Agreement. Subject to the foregoing, Contractor agrees that it will continue to diligently pursue the Work during the

pendency of any Dispute, including any Dispute over payments claimed due and owing by Contractor.

31.2. Waiver of Jury Trial.

EACH PARTY HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES, AND AGREES TO CAUSE EACH OF ITS RESPECTIVE AFFILIATES TO WAIVE, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED HEREON, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH, THIS AGREEMENT, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER ORAL OR WRITTEN) OR ACTIONS OF OWNER OR CONTRACTOR.

32. LEGAL AND REGULATORY COMPLIANCE AND NMPRC APPROVAL

32.1 Applicable Laws

Each Party shall at all times comply with all Applicable Laws. Each Party shall promptly notify the other Party of any material investigations, notices of alleged violations or findings of violation of Applicable Law from any Governmental Authority, including any audit, notification, inspection or inquiry that has been commenced by any Governmental Authority in respect of a potential violation of Applicable Law with regard to the Project or this Agreement. Contractor shall give all required notices, shall timely procure and maintain all Contractor-Acquired Permits, and shall timely pay all charges and fees in connection therewith. Contractor shall make available to Owner, upon reasonable request and at Owner's cost (other than the normal, customary and reasonable costs of Contractor), any personnel or records relating to the Project or this Agreement to the extent Owner requires the same to fulfill any regulatory reporting requirements, or for purposes of litigation or regulatory proceedings, including but not limited to, litigation or proceedings before the NMPRC, FERC, or other regulatory bodies. The Parties shall treat information disclosed pursuant to this Section 32.1 in confidence in accordance with Article 24, unless such information is public information.

32.2 Governmental Approvals

Each Party shall timely and lawfully procure and maintain in good standing, at its own cost and expense, all Governmental Approvals and Additional Consents and shall timely and properly pay its respective charges and fees in connection therewith.

32.3 NMPRC Approval

The obligations of the Parties hereunder shall be conditioned upon NMPRC Approval in connection with (i) the execution and performance of this Agreement; (ii) the execution and performance of the CCN; and (iii) abandonment of Owner's ownership interests in San Juan Generating Station, including any requested financing or other cost recovery method, and any waivers as set forth in Owner's request for approval of this Agreement, the CCN or the abandonment filing (collectively, "Requested Actions"). In particular:

- (a) Owner agrees to use commercially reasonable efforts to request and obtain NMPRC Approval of the Requested Actions, and Contractor agrees to cooperate with and assist Owner in these efforts as Owner may reasonably request.
- (b) NMPRC Approval shall be considered received when the NMPRC issues a final written order that is no longer subject to appeal or further proceedings on remand (i) approving this Agreement, including authorization to recover the costs of the Requested Actions; or (ii) approving the Requested Actions in part or subject to conditions or substantial modifications, provided that each of Contractor and Owner agrees, subject to its reasonable discretion, to accept those conditions, modifications or such partial approval as sufficient (collectively, "NMPRC Approval").
- (i) If the NMPRC disapproves any of the Requested Actions, then this Agreement shall automatically terminate ten (10) Days after the date of such action by the NMPRC and be of no further force or effect, with no further obligation or liability of either Party to the other Party or to any other Person, except obligations incurred prior to termination.
- (ii) If any NMPRC Approval is issued as described in Section 19.3.b(ii) above, then the Parties shall meet and confer no later than fifteen (15) Days after the date of the NMPRC Approval order regarding whether Owner or Contractor to amend this Agreement to address any conditions or substantial modifications or not to accept any partial or conditioned approval or substantial modification of this Agreement. If the Parties are unable to mutually agree on any amendments to this Agreement to address such NMPRC Approval order, then this Agreement shall automatically terminate ten (10) Days after the date on which the Parties conferred and be of no further force or effect, with no further obligation or liability of either Party to the other Party or to any other Person, except obligations incurred prior to termination, unless Owner and Contractor mutually agree in writing within such ten (10) Day period that this Agreement remain in effect.
- (iii) If the NMPRC has not, for any reason, entered an order upon the request for approval by September 30, 2020 ("Regulatory End Date"), then the Parties shall meet and confer no later than fifteen (15) Days after the Regulatory End Date regarding a potential extension of the Regulatory End Date. If the Parties are unable to mutually agree to an extension of the Regulatory End Date, then this Agreement shall automatically terminate ten (10) Days after the date on which the Parties conferred and be of no further force or effect, with no further obligation or liability of either Party to the other Party or to any other Person, unless Owner and Contractor mutually agree in writing within such ten (10) Day period that this Agreement remain in effect.

33. MISCELLANEOUS

33.1. Severability.

The invalidity or unenforceability of any portion or provision of this Agreement shall in no way affect the validity or enforceability of any other portion or provision hereof. Any invalid or unenforceable portion or provision shall be deemed severed from this Agreement and the balance of this Agreement shall be construed and enforced as if this Agreement did not contain such invalid or unenforceable portion or provision. If any such provision of this Agreement is so declared invalid, the Parties shall promptly negotiate in good faith new provisions to eliminate such invalidity and to restore this Agreement as near as possible to its original intent and effect.

33.2. Governing Law.

This Agreement shall be governed by the internal laws of the State of New Mexico, excluding its conflict of laws provisions. THE PARTIES ACKNOWLEDGE AND AGREE THAT THE TERMS AND CONDITIONS OF THIS AGREEMENT HAVE BEEN FREELY, FAIRLY AND THOROUGHLY NEGOTIATED.

33.3. No Oral Modification.

No oral or written amendment or modification of this Agreement by any officer, agent, member, manager or employee of Contractor or Owner, either before or after execution of this Agreement, shall be of any force or effect unless such amendment or modification is in writing and is signed by a duly authorized representative of the Party to be bound thereby.

33.4. No Waiver.

A Party's waiver of any Event of Default, breach or failure to enforce any of the terms, covenants, conditions or other provisions of this Agreement at any time shall not in any way affect, limit, modify or waive that Party's right thereafter to enforce or compel strict compliance with every term, covenant, condition or other provision hereof, any course of dealing or custom of the trade notwithstanding. All waivers must be in writing and signed on behalf of Owner and Contractor in accordance with Section 32.3.

33.5. Review and Approval.

Notwithstanding Owner's review or Owner's approval of any items submitted to Owner for review or approval, neither Owner nor any of its representatives or agents reviewing such items, including the Owner's Engineer, shall have any liability for, under or in connection with the items such Person reviews or approves, and Contractor shall remain responsible for the quality and performance of the Work. Owner's review or approval of any items, including the Contractor Deliverables, shall not constitute a waiver of any claim or right that Owner may then or thereafter have against Contractor. Any inspection comment, review or approval of any Contractor Deliverable shall be performed in Owner's sole discretion. The review or approval by Owner of any Subcontractor shall not constitute any approval of the Work undertaken by any such Person, cause Owner to have any responsibility for the actions, the Work, or payment of such Person or to be deemed to be in an employer-employee relationship with any such Subcontractor, or in any way relieve Contractor of its responsibilities and obligations under this Agreement.

33.6. Third Party Beneficiaries.

The provisions of this Agreement are intended for the sole benefit of Owner and Contractor and there are no third-party beneficiaries hereof (other than the Contractor

Indemnitees and the Owner Indemnitees).

33.7. Further Assurances.

Owner and Contractor will each use its reasonable efforts to implement the provisions of this Agreement, and for such purpose each, at the reasonable request of the other, will, without further consideration, promptly execute and deliver or cause to be executed and delivered to the other such assistance (including in connection with any financing involving the Project by either Party), or assignments, consents or other instruments in addition to those required by this Agreement, in form and substance satisfactory to the cooperating Party, as the requesting Party may reasonably deem necessary or desirable to implement any provision of this Agreement.

33.8. Record Retention.

Contractor agrees to retain for a period of three (3) years from the Final Completion Date all material records relating to its performance of the Work for the PV Power Plant or Contractor's warranty obligations herein related to the PV Power Plant.

33.9. Binding on Successors, Etc.

Subject to <u>Article 26</u>, this Agreement shall be binding on the Parties hereto and on their respective successors, heirs and assigns.

33.10. Merger of Prior Contracts.

This Agreement supersedes any other agreements, whether written or oral, that may have been made or entered into between Owner and Contractor or by any office or officer of such Party relating to the Project, the PV Power Plant or the Work. This Agreement and the Exhibits and other attachments attached hereto constitute the entire agreement between the Parties with respect to the engineering, procurement and construction of the PV Power Plant, and there are no other agreements or commitments with respect to each the PV Power Plant except as set forth herein and therein.

33.11. Counterparts.

This Agreement may be executed in any number of counterparts, and any Party hereto may execute any such counterpart, each of which when executed and delivered shall be deemed to be an original and all of which counterparts taken together shall constitute but one and the same instrument. The Parties agree that the delivery of this Agreement may be effected by means of an exchange of facsimile or emailed signatures with original copies to follow by mail or courier service.

33.12. Announcements; Publications

33.12.1. Prior Approval.

Subject to Section 24.2, neither Party shall (either directly or indirectly), and neither Party shall permit any of its Affiliates to, issue or make any public release or announcement with respect to or concerning any matter the subject of, or contemplated by, this Agreement without

reasonable prior consultation with the other Party and affording such other Party a reasonable opportunity to provide comments on such proposed release or announcement; <u>provided</u>, <u>however</u>, that, subject to the provisions of <u>Section 32.12.2</u>, nothing in this Agreement shall prevent either Party from independently making such public disclosure or filing as it determines in good faith is required by Applicable Law.

33.12.2. Marketing; Advertising.

Notwithstanding anything to the contrary in Section 32.12.1, except as may be restricted or prohibited by Applicable Law, Contractor or any of its Affiliates shall be permitted to show, by photograph or otherwise, in any marketing, advertising or other materials, the Project under construction or as completed (including any related Equipment), without first obtaining the prior consent of Owner. Owner and any Affiliate of Owner shall be permitted to videotape or otherwise record any of the Work, including the installation and/or construction work performed by Contractor hereunder, or show to any other Person any photographs (or similarly recorded images) of such construction or installation Work, without first obtaining the prior written consent of Contractor.

33.13. Independent Contractor.

Contractor is an independent contractor, and nothing contained herein shall be construed as constituting any relationship with Owner other than that of owner and independent contractor, except as expressly provided in this Agreement pursuant to which Owner appoints Contractor as Owner's agent, or as creating any relationship whatsoever between Owner and Contractor's employees. Neither Contractor nor any of its employees is or shall be deemed to be an employee of Owner.

33.14. Audit.

Contractor shall maintain, in accordance with generally accepted accounting principles consistently applied, records and books of account with respect to all Equipment incorporated into, together with all labor utilized in the performance of, the Work. With respect to any Change In Work performed by Contractor on a reimbursable cost or time and materials basis pursuant to an Owner's Directive, or any claim asserted or investigation commenced by the Taxation and Revenue Department of the State of New Mexico with respect to the PV Power Plant, Owner, Owner's Engineer, the Owner Financing Parties, and their authorized representatives shall be entitled to inspect and audit such records and books of account of the PV Power Plant related to such costs or claims, as applicable, during normal business hours and upon reasonable advance Notice during the course of the Work and for a period of three (3) years after Final Completion; provided, that the purpose of any such audit shall be only for verification of such costs and Contractor's compliance with and adherence to the provisions of this Agreement and all Applicable Laws; provided, further, that Contractor shall not be required to provide access to those of its costs covered by the fee, allowances, fixed rates, unit prices, lump sum amounts, or of costs which are expressed in terms of percentages of other costs, except to the extent required by a claim asserted or investigation commenced by the Taxation and Revenue Department of the State of New Mexico. Contractor shall retain all such records and books of account for a period of at least three (3) years after the Final Completion Date. Audit data shall not be released by the auditor to parties other than Contractor, Owner, Owner's Engineer, and their respective officers, directors, members, managers, employees, and agents in connection with any such audit, subject to the provisions of Article 24. If, as a result of any audit conducted pursuant to this Section 33.14, the results of such audit indicate that Contractor received more or less than the amount to which it was entitled under this Agreement, either Owner shall pay the additional amount owed to Contractor or Contractor shall refund any overpayment to Owner, as applicable, in either case within ten (10) days of a written request therefor. Owner shall be responsible for all costs and expenses of such audit.

(REMAINDER OF PAGE INTENTIONALLY LEFT BLANK; SIGNATURE PAGE(S) FOLLOW.)

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed as of the Effective Date.

PUBLIC SERVICE COMPANY OF NEW MEXICO

By: Name:	Thomas Fallgrun 16A45E868C2C4B9 Thomas Fallgren			
Title: _	VP Generation			
AFFORDABLE SOLAR INSTALLATION, INC.				
By:	Lewin Bassalleck			
Name:				

Exhibit A-1: Contractor's Statement of Work

EXHIBIT A-1

CONTRACTOR'S STATEMENT OF WORK

1. GENERAL

1.1. Definitions

In this Exhibit, terms that are capitalized herein but defined in <u>Article 1</u> of the terms and conditions of this Agreement shall have the meanings set forth in <u>Article 1</u>. <u>Section 1.5</u> of the terms and conditions of this Agreement shall apply to the extent that there is any conflict or inconsistency between a defined term set forth herein and any other defined term in this Agreement. Capitalized terms used in this Exhibit and not otherwise defined in this Agreement shall have the meanings generally ascribed to them in the commercial energy generation industry in the United States. Subject to the foregoing, the following terms and expressions used in this Exhibit shall have the following meanings:

- A. "DC" or "dc" means direct current.
- B. "DAS" means the data acquisition system specified in <u>Section 2.10</u>.
- C. "ft" means feet.
- D. "**Hz**" means Hertz.
- E. "kV" means kilovolts.
- F. "kW" means a measure of instantaneous power as measure in kilowatts AC.
- G. "kWh" means kilo-watt-hours (AC).
- H. "NOC" means the network operations center.
- I. "No Fly Zone" means an area designated by Owner in writing in which Contractor is prohibited from placing equipment or routing cable through, either above or below grade.
- J. "POI" means the point of interconnection which defines the location of the physical electrical interconnection to the Transmission Provider.
- K. "PCS" means the power conversion station for the Plant which consists of the static power inverters, inverter step up transformers, cabling and grounding systems.
- L. "Plant" means the PV Power Plant.
- M. "Primary voltage" means low voltage of the inverter step-up transformer.
- N. "PVIS" means photovoltaic interconnection switchgear.
- O. "SCC" means the site control center which shall be the central data storage equipment for the DAS.
- P. "Secondary voltage" means medium voltage of the inverter step-up transformer
- Q. "Tariff" means the Transmission Provider's tariff through which open access transmission service and interconnection service are offered, as filed with the Federal Energy Regulatory Commission, and as amended or supplemented from time to time, or any successor tariff.

R. "Transmission Provider" means the public utility (or its designated agent) that owns, controls, or operates transmission or distribution facilities used for the transmission of electricity in interstate commerce and provides transmission service under the Tariff.

1.2. Contractor Scope of Work Overview

- A. Contractor shall furnish a ground mounted Plant to Owner at the specified Gross Maximum Capacity for the Plant.
- B. Contractor shall design and construct the Plant in accordance with this Statement of Work. This Statement of Work shall require Contractor to:
 - i. Specify and furnish the Equipment which shall include, without limitation, the PV Modules, structural support systems, module string DC wiring harnesses, DC combiner boxes, inverters, medium voltage step-up transformers, PVCS, PCS, DAS and ancillary hardware and software required to connect and operate listed Equipment. Contractor shall provide a communications protocol that identifies all hardware, software and other Equipment necessary to render the Plant capable of remote monitoring by Owner; SCADA data will be exchanged between the Owner and Contractor using uni-directional serial RS-232 connections between the Plant DAS PLC and the owner's RTU (remote terminal unit). Optionally, data may be exchanged using an Ethernet connection between the DAS PLC and the Owner's RTU. The data exchange protocol will be DNP3 (or DNP3/IP). Data to be exchanged will include mutually agreed upon meteorological data, metering, alarms, and device status. Provide outside lighting at each PVCS and PCS.
 - ii. Undertake Plant design engineering and drawing packages for construction permitting, installation and "as-built" documentation, which will be made available to Owner or the Owner's Engineer for review and comment, provided that Owner shall conduct such review and provide comments, if any, as promptly as reasonable practicable and provided further, that under no circumstances shall Contractor be required to delay completion of the Work in order to accommodate Owner's review and comment;
 - iii. Perform Plant construction including Site, perimeter fencing, structural, electrical, mechanical and monitoring/control systems, which will be made available to Owner or the Owner's Engineer for review and comment, provided that the Owner shall conduct such review and provide comments, if any, as promptly as reasonably practical and provided further, that under no circumstances shall Contractor be required to delay completion of the Work in order to accommodate Owner's review and comment;
 - iv. Undertake Plant and construction management, including quality assurance/quality control, Site safety, Site material control and management of all Subcontractors;
 - v. Perform Plant commissioning and testing in accordance with <u>Exhibits</u> H- 1 and H-2;

- vi. Complete Plant turnover including Owner's Operating Personnel training and Plant operations, QA/QC and maintenance documentation;
- vii. Identify document transmittal procedures and maintain current transmittal status throughout the performance of the Work for Owner's and Contractor's review and access;
- viii. Provide an organization chart which shall include names and contact information for critical personnel; and
- ix. Develop and implement a Project document transmittal process to insure all Project material, design and contract information is uniquely identified throughout the Project,

in each case subject to and in accordance with the provisions of the Agreement.

- C. Contractor shall use Commercially Reasonable Efforts to support Owner in obtaining an interconnection agreement for the Plant from the Transmission Provider.
- D. Temporary Facilities & Utilities for the Plant
 - i. Contractor shall be responsible for establishing and maintaining all restroom, lunchroom, and other office and meeting areas for the duration of the construction and commissioning portion of the Plant.
 - ii. Contractor shall provide temporary sanitary facilities consisting of above ground Porta-John type. One such unit shall be dedicated for Owner's use.
 - iii. Contractor shall provide a construction office space complete with temporary electric and WiFi communications, such construction office to include sufficient workspace for Owner's Representative.
 - iv. Contractor shall maintain on-Site dumpsters and personnel on the Site to maintain a clean and rubbish free work-site (on a daily basis).
 - v. Contractor shall install temporary electrical services for its use during construction and commissioning from an Owner-supplied source. Consumption costs shall be paid by Owner.
 - vi. Contractor shall obtain water for its use during construction and commissioning from a Contractor-supplied source. Consumption costs shall be paid by Contractor as an Contractor-Provided Facility and Service. Contractor to provide water consumption report to Owner on a monthly basis.
- E. For the Plant, Contractor shall use Commercially Reasonable Efforts to support Owner's efforts in obtaining services from one or more of Owner's Separate Contractors to prepare the Site and all required construction permits, provided,

however, that Contractor shall not be required to incur any costs, other than

- management time, to provide such support (and any greater standard required under the definition of Commercially Reasonable Efforts shall not apply). Permitting fees and the costs of Site preparation shall be paid by Owner.
- F. Contractor shall be responsible for implementing and adhering to storm water pollution prevention plan during construction and commissioning, including implementation of dust suppression and erosion control measures.
- G. Contractor shall conduct a geotechnical study suitable for the Project level design work including bearing capacities, soil characteristics and infiltration requirements. This study shall also consist of in situ load pile testing.
- H. Contractor shall conduct a hydrological study (i.e., storm water volume and velocity study to include flood inundation depth and velocity maps) in order to verify that sheet flow conditions exist.
- 1.3. Intentionally Omitted
- 1.4. Site and Environmental Criteria
 - A. All design of the Plant shall be based upon the requirements set forth in the below tables and the other requirements of this Agreement:

Table A-1-1 Existing Site Design Conditions

Project Location	The Piñon Solar Facility is sited on a 129-acre parcel (more or less) located in San Juan County, New Mexico, and in the vicinity of the San Juan Generating Station.
Minimum/Maximum	[●]°F / [●]°F ASHRAE 2009, 50 year
Dry Bulb Temperature	To be provided by Owner prior to Full Notice to Proceed.
Maximum Elevation	[•]ft above mean sea level
	To be provided by Owner prior to Full Notice to Proceed.
Environmental	As set forth in Exhibit L (Site Assumptions)
Conditions	
Site Road Access	[•]To be provided by Contractor prior to Full Notice to Proceed.
Seismic Criteria	Site Class D
	S _{DS} =TBD, SD1=TBD
Wind Design	90 MPH (3 sec gust), Exposure C, Importance Factor 1.0 (to be confirmed)
Snow Load	10 PSF (to be confirmed)
Occupancy Class	Ш
Maximum storm water	ft/second (velocity) & ft (depth) [to be supplied]
velocity and depth	To be provided by Contractor in Hydrology Report
Rainfall	To be provided by Contractor in Hydrology Report
Average Min/ Max Annual Rainfall	in./ in. [to be supplied] To be provided by Contractor in Hydrology Report
Maximum 24 hr	in. [to be supplied] To be provided by Contractor in
Rainfall	Hydrology Report
Design Maximum Rainfall Rate	year / hour storm To be provided by Contractor in Hydrology Report
Wetlands	None

Floodplains	None
Existing Site/ Grade	As set forth in Exhibit L (Site Assumptions)
Subsurface Soil Conditions	As set forth in Exhibit L (Site Assumptions)

1.5. Design Criteria

- A. Design life of the Plant shall be 25 years.
- B. Gross Maximum Capacity of the Plant shall be as specified in the first recital of this Agreement.
- C. The Plant shall be oriented physically to optimize annual energy harvest.

1.6. Design Conditions

- A. The Plant shall be designed for fully automatic, unmanned operation.
- B. Plant electrical design generally for the Plant shall be 2017 NEC and/or NESC compliant. However, various components of such Plant may not carry a UL label listing including:
 - i. inverters
 - ii. DC fuses, DC combiner boxes, switches and/or circuit breakers
 - iii. PVCS

Overhead distribution and transmission systems: burial depth of DC conductors is often less than those required by the NEC.

It is assumed that Owner shall claim the utility exemption under the NEC code and therefore, not be required to file for local electrical subcode approvals/permits.

1.7. Operating Criteria

- A. DC grid voltage: 1500 volts DC or greater, grounded or floating, ungrounded
- B. AC grid voltage: 12.47kV (12,470 volts), 60HZ
- C. DC & AC electrical systems under 1000V shall be radially configured with no redundancy. Medium voltage AC systems shall be loop configured with zero redundancy.
- D. Convenience power: 120VAC
- E. Instrumentation voltage: 24 volts DC or 125V_{DC}.
- F. Communications network: Owner will provide Ethernet via direct buried fiber

optic or dedicated phone line to the PVCS.

1.8. Standards

Contractor shall design and construct the Plant in accordance with the following standards, as applicable, as well as Applicable Laws and Applicable Permits:

ACI - American Concrete Institute

AISC - American Institute of Steel Construction

AISI – American Iron and Steel Institute

ANSI - American National Standards Institute,

ASTM - American Society for Testing and Materials

IBC - International Building Code

ICEA - Insulated Cable Engineers Association

IEC - International Electrotechnical Commission

IEEE - Institute of Electrical and Electronics Engineers

ISA – Instrumentation Society of America

NEC - National Electrical Code

NEMA - National Electrical Manufacturers Association

NFPA – National Fire Protection Association

NESC - National Electrical Safety Code

NETA - National Electrical Testing Association

OSHA - Occupational Safety and Health Act

TUV SUD America

UL – Underwriter's Laboratories for all AC equipment (except those listed in paragraph 1.6(B) of this Exhibit above) when such standards exist

In the case where standards have conflicting requirements, Contractor may, subject to Owner's approval, select any of the foregoing standards.

2. PLANT HARDWARE

2.1 Contractor shall provide Equipment for the Plant as described herein. With respect to the Plant, Contractor reserves the right to modify Equipment specified herein to address specific Site Conditions which may be discovered during design or to take benefit of

improved materials or technological advancements, which will be made available to Owner for review and comment, provided that Owner shall conduct such review and provide comments, if any, as promptly as reasonably practicable and provided further, that under no circumstances shall Contractor be required to delay completion of the Work in order to accommodate Owner's review and comment as long such modification does not violate this agreement or the interconnection agreement.

2.2 PV Modules

- A. Hyundai, Trina, Jinko, Hanwha Q-Cells, Canadian Solar, JA Solar, GCL, Longi, or First Solar PV Modules
- B. Glass laminate
- C. Quick connect electrical terminations
- D. Certified for reliability and safety according to IEC 61215 and IEC 61730
- E. Manufacturing certified to ISO9001:2008 and ISO 9001 quality and ISO14001:2004 environmental standards.

Module Support Structure for the Plant

- A. Foundation shall be driven galvanized or equivalent corrosion-resistant steel members, mini-cast augured piles or equivalent.
- B. Module support sub-structure frame may be corrosion resistant steel or aluminum, which will be made available to Owner for review and comment, provided that Owner shall conduct such review and provide comments, if any, as promptly as reasonably practicable and provided further, that under no circumstances shall Contractor be required to delay completion of the Work in order to accommodate Owner's review and comment.
- C. Mounting hardware shall be corrosion resistant.
- 2.3 As set forth in Exhibit L, it is assumed that no cathodic protection will be required. Any evaluation by Contractor of the soil as to the need for cathodic protection, and any cathodic protection requirements determined from the geotechnical survey are not included in the Work.

2.4 DC Wiring

- 2.4.1 DC wiring consisting of 1 kV minimum single copper or aluminum conductor, type XLPE (cross-linked polyethylene) insulation. Harnesses shall be provided with connectors.
- 2.4.2 Connectors shall be of the male and female variety, shall be weatherproof, and shall be provided with means to prevent disconnection by bare hand.
- 2.5 Site Assumptions. Owner shall be responsible for all Site preparation in relation to the Site Assumptions set forth in Exhibit L.
- 2.6 DC Fused Combiner Boxes

- 2.6.1 Enclosure shall be rated minimum NEMA 3R.
- 2.6.2 Factory assembled back panel complete with 1000V_{DC} finger safe fuse holders, main switch, bussing, surge suppressor, labeling and signage.
- 2.6.3 All enclosures shall have provisions for pad locking.
- 2.6.4 Enclosures shall be mounted to driven posts.
- 2.6.5 Completed assemblies might not carry a UL listing.
- 2.7 Power Conversion Stations (PCS)
 - 2.7.1 The PCS shall consist of inverter(s), inverter step up transformer(s), 600 VAC cabling, grounding system, and an inverter shelter (if needed).
 - 2.7.2 Inverter(s)
 - 2.7.2.1 Inverter(s) shall be: line commutated static type, employing solid state high speed switching elements, DC and AC filters, protective features, and fully automatic in operation.
 - 2.7.2.2 Inverters shall be fully rated when supplied with 50°C air temperature, at the inlet of its internal cooling circuit. Inverter shall be capable of dynamic VAR regulation in accordance with WECC requirements and those of the Small Generator Interconnect Agreement. Current harmonics: <3% THD.
 - 2.7.2.3 Inverter efficiency shall not be less than 97% as defined by California Energy Commission
 - 2.7.2.4 Completed assemblies might not carry a UL listing.
 - 2.7.2.5 Completed assemblies shall be CE (*Conformite Europeene*) listed and shall be designed to IEEE-519 standards.
 - 2.7.3 Inverter Shelter (If applicable due to product and/or site specific applications)
 - 2.7.3.1 PCS may be prefabricated metal, pre-cast concrete enclosures where no enclosure is used, inverters and auxiliary equipment shall be NEMA 3R rated.
 - 2.7.4 The PCS shall be provided with supply and/or exhaust ventilation system to facilitate self-cooling of the inverter. Inverter protective features may be activated for brief periods of time if the inverter inlet air temperature exceeds 50°C. (only if a PCS shelter is used.)
 - 2.7.4.1 Inverter(s) size and type shall be determined during detailed design and comply with site interconnection agreement.
 - 2.7.4.2 Inverter(s) shall employ a control algorithm to maximize energy harvest through maximum power point tracking.
 - 2.7.4.3 Inverter self-cooling may be via air or liquid refrigerant, or a combination of these.
 - 2.7.4.4 Inverter protective features shall include the following:

- overload
- short circuit
- high/low AC voltage
- loss/restoration of AC voltage
- high/low grid frequency
- high DC bus voltage
- internal faults
- high internal temperature
- automatic thermal protective control system capable of limiting its power output in the event environmental conditions (e.g., inlet air temperature) are inadequate to remove self-generated heat.
- 2.7.4.5 PCS layout shall include adequate spacing to accommodate inverter maintenance activities.
- 2.7.4.6 PCS shall have space to accommodate Contractor designed DAS equipment.
- 2.7.4.7 PCS shall have adequate task lighting to perform all maintenance activities.
- 2.7.4.8 For purposes of determining local fire protection and HVAC requirements, PCS design is considered unoccupied.
- 2.7.4.9 Smoke/heat detector(s) (wired into DAS) shall be provided in each PCS (only if a PCS shelter is used). No other fire detection and protection devices or systems will be provided.
- 2.7.4.10 PCS shall be provided with a 120/208V load center with transformer sized to provide auxiliary power to inverter fans, PCS lighting, and exhaust fans. (PCS will include utility power system but will not include shelter fans or lighting if no shelter is used.)
- 2.7.4.11 PCS enclosure shall be provided with ventilation equipment controls designed to limit the temperature differential between outside and inside to approximately 5°C, under full load operation (only if a PCS shelter is used), when the ambient temperature is greater than 45°C.
- 2.7.4.12 Enclosure shall be provided with air filtration to a minimum of MERV 8 (only if a PCS shelter is used).
- 2.8 Inverter Step-up Transformers
 - 2.8.1 Inverter step-up transformers shall be compartmental pad-mount design, dead front, loop feed conforming to ANSI C57.12.00
 - 2.8.2 Transformer winding configuration shall be matched to the inverter requirements and shall be KNAN type cooling.
 - 2.8.3 Transformer sizing shall be determined during detailed design, and comply with

- site interconnection agreement.
- 2.8.4 Primary voltage (low) shall be: matched to selected inverter during detailed design. Winding configuration(s) for transformer primary (low) shall be Delta.
- 2.8.5 Secondary voltage (medium): 12.47kV WYE Grounded / with elbow arrestors
- 2.8.6 Windings shall be copper or aluminum
- 2.8.7 If necessary, fully rated no load tap changer with high voltage taps: (2) 2.5% above and (2) 2.5% below nominal position—will be provided
- 2.8.8 Current limiting and overload oil immersed fuses will be accessible through the tank handhole and shall be of the BAY-O-NET type.
- 2.8.9 Biodegradable insulating fluid
- 2.8.10 Top powder coat of ANSI 70 light grey or Pueblo Tan
- 2.8.11 Oil level, pressure/vacuum and oil temperature gauges will be furnished with alarm contacts and shall be monitored by the DAS.
- 2.8.12 Oil drain valve for dissolved gas analysis sampling provisions accessible outside on the tank
- 2.8.13 Transformer shall be mounted on a skid or pad at the PCS with secondary containment.
- 2.8.14 Completed assemblies must carry UL, UL-C, or CSA certification
- 2.8.15 Transformer shall be furnished with an under oil, load break, on/off, high voltage side switch.
- 2.9 Photovoltaic Combining Switchgear (PVCS)
 - 2.9.1 PVCS shall be the same standard design as the other PNM solar sites, manufactured by Powergrid Solutions, formerly Shallbetter. PVCS shall be NEMA rated for the environment, and at Contractor's discretion shall be either:
 - 2.9.1.1 metal enclosed (ANSI C37.20.3) or;
 - 2.9.1.2 air insulated substation type
 - 2.9.2 PVCS shall contain an ANSI C12.20 revenue grade meter equipped with Modbus communication capabilities.
 - 2.9.3 PVCS shall have redundant HVAC systems.
 - 2.9.4 PVCS shall be mounted on a cast in place or pre-cast concrete foundation vault or piers.
 - 2.9.5 The PVCS foundations shall have the requisite size and number of rigid galvanized steel metal conduits stubbed out 5 ft for Owner's interconnection cable entrance to the PVCS. Contractor to coordinate sizes with Owner's cabling requirements.
- 2.10 DAS

- A. DAS is composed of hardware and software, Plant servers, field instrumentation, meteorological stations, and communications devices designed for local monitoring and historical trending, and operation of the Plant.
- B. Upon Owner's final approval of a design for the DAS, Contractor shall supply, install, and commission the DAS hardware (listed in the above paragraph) at the Site.
- C. DAS shall display data in real time and log performance data at regular intervals from the Plant.
- D. Performance data and screens shall be made available to Owner through one of the following options:
 - i. Contractor will host a website with a portal, providing up-to-the-minute performance data. Website will show current day, previous day, week, month and yearly data. Website will also show performance trending, alarm and fault events, and diagnostic tools for optimizing performance;
 - ii. Contractor will offer integration services to add the DAS components to Owner's existing data infrastructure. Owner will then have access to monitor and collect data along with reporting and analysis;
 - iii. Communications between the instrumentation and the controllers in the PCS shall be via Modbus. Communications between the PCS and the SCC shall be transmitted via TCP/IP, typically on a fiber layer; communications over that network shall be transmitted via Modbus, TCP, Ethernet IP or other standard method of communication.
 - iv. Contractor shall program the software for the Plant, Wonderware platform (or its equivalent) at Owner's discretion
 - v. Contractor shall install the selected software on an operator workstation computer, and shall grant Owner a DAS user's license for local viewing of data generated by DAS. The operator workstation computer shall be located at the SCC building. Title to the operator workstation and the user's license shall be transferred to Owner. Owner will be responsible for purchasing additional software licenses and maintenance services associated with Owner's use of the DAS system.
- E. Programmable Logic Controllers (the "PLCs")
 - i. PLCs shall be employed as part of Contractor's DAS for the purpose of data aggregation, protocol converting, and alarming.
 - ii. The PLCs shall function as the input/output point for device signals.

F. SCC

- i. The SCC will act as the central point for the DAS. The SCC will also function as the primary interface for local operators and technicians to troubleshoot and control the system.
- ii. The SCC shall also function as the communications center for the Site.

- iii. The SCC shall also contain the Owner-supplied switch/router for the point of connection to the T1 line used for communication.
- G. Owner shall supply Contractor with electronic access to be used to transfer operational data to Contractor's data storage warehouse, for Contractor's use. The SCC may be housed within the Owner's existing facilities. Exact location shall be determined at time of detailed design.
- H. Meteorological Station (the "Met Station").
 - i. The Met Station shall consist of instruments to measure the meteorological parameters listed below.
 - a. Irradiance (horizontal and plane of array
 - b. Outside air temperature
 - c. Rainfall amount
 - d. Wind speed
 - e. Wind direction
 - f. Relative humidity
 - ii. The number of Met Stations and soiling stations shall be specified in <u>Exhibit H-2</u>.
 - iii. Exact location of the Met Station(s) will be determined during detailed design phase.
 - iv. The Met Station should have a battery backup and be capable of full data logging.
- I. Test Instrumentation
 - i. The number of reference PV Modules and module surface temperature clusters shall be specified in <u>Exhibit H-2</u>.
 - ii. The location of reference PV Module and module surface temperature clusters shall be specified in final design.
- J. Typical points monitored by the DAS system include the following:
 - i. Meteorological, MST (Module Surface Temp) and soiling station parameters
 - ii. Power Conversion Station (PCS) points
 - a. Inverter shelter points (if applicable)
 - (i.) shelter environmental conditions (if applicable)
 - (ii.) shelter door position switch (if applicable)
 - (iii.) Inverter performance points
 - (iv.) To include real time AC and DC electrical characteristics,

including power, energy generated, inverter status and diagnostics, and all data available from inverter system.

- (v.) DC circuit monitoring at the inverter input
- iii. PV module points
 - a. PV module surface temperature
- iv. PV module subarray DC current points
 - a. PV module DC current transmitters
- v. Transformer points
 - a. transformer oil temperature (digital)
 - b. transformer pressure/vacuum (digital)
 - c. transformer oil level (digital)
- vi. Photovoltaic Connection Station (PVCS) points
 - a. AC disconnect switch points with position feedback
 - b. protection relaying auxiliary contacts for alarming
- vii. Photovoltaic Interconnection Switchgear (PVIS) points
 - a. allowance for thirty points from Owner's PVIS equipment via data communications (i.e. Modbus)
- viii. AC Revenue Meter Points @ PVCS(s)
 - a. To include real time AC electrical characteristics, including power and energy generated via a single meter for the Plant from which Owner can access data for the Plant.

3. ELECTRICAL INSTALLATION

- 3.1 General
 - 3.1.1 All work to be installed in a workmanlike manner, consistent with Industry Standards and other applicable standards set forth in the Agreement.
 - 3.1.2 Cable runs shall be made parallel and perpendicular only to array mounting system.
 - 3.1.3 For the Plant, no overall lighting or security systems will be provided.
- 3.2 DC System Cabling
 - 3.2.1 Series string connections between modules will be via quick connect connectors factory-supplied with modules.
 - 3.2.2 Series string circuits may be combined in parallel

- into a single circuit running back to a combiner box. Parallel connections will be made using factory-supplied wiring harnesses consisting of pre-cut lengths of minimum 12 AWG cable with quick connects.
- 3.2.3 DC wiring from the combiner box to the inverters shall be installed in conduit or raceway. A detectable marker tape shall be placed 12" below grade continuously over the conductors. Trench bedding shall be adequate to prevent damage to the cable from any oversized material. As-built drawings will show the location of the underground wiring.
- 3.2.4 DC cabling may run above grade where allowed by code. Method to be reviewed and accepted by Owner.
- 3.2.5 DC cable shall be 1kV minimum 90°C (wet or dry), XLPE insulation cable type designated as RHW-2 Conductors may be stranded copper or aluminum.
- 3.2.6 Exposed cables shall be UV resistant and outdoor rated.
- 3.2.7 DC cabling shall be mechanically protected where subject to damage when transitioning from above grade routing to below grade. Rigid non-metallic conduit (PVC Sch 40) or equivalent will be utilized for this purpose.
- 3.3 AC System Cabling (600V and below)
 - 3.3.1 All conductors, lugs and cable accessories shall be UL listed, or equivalent.
 - 3.3.2 Cables installed in raceways shall be type THHN/THWN-2, XHHW-2. Conductors may be stranded copper or aluminum.
 - 3.3.3 Cables installed in direct burial applications shall be type USE-2 with XLPE insulation. Conductors may be stranded copper or aluminum.
- 3.4 Medium Voltage Cable
 - 3.4.1 Conductors shall be 12.5kV type MV-105, (dry or wet) single compact conductor, copper or aluminum, 100% or 133% TR XLPE or EPR insulation, copper tape shield. Alternative conductor specifications, such as using a full-size concentric neutral, shall be allowed upon review and acceptance by Owner.
 - 3.4.2 Contractor shall have the option of selecting one of the following cable constructions:
 - 3.4.2.1 Single conductors, PVC or polyethylene jacketed, suitable for direct burial. A bare copper equipment grounding conductor shall be routed with the feeder
 - 3.4.2.2 Multi-conductor cable assembly-non armored. Three single insulated conductors with ground wire, all under an overall PVC jacket, suitable for direct burial.
 - 3.4.2.3 Single or Multi-conductor cable assembly-armored. Three single conductors with ground wire, all under an interlocked metallic armor, suitable for direct burial.
 - 3.4.3 Conductors shall be direct buried a minimum of 36" below grade or installed in conduit or raceway. A detectable marker tape shall be placed 12" below grade continuously over the conductors.

3.4.4 Medium voltage terminations shall be cold shrink, outdoor rated for live front applications and shall be of IEEE-386, or equivalent class for non-load break, dead front applications.

3.5 Grounding

- 3.5.1 All ground conductors shall be stranded copper.
- 3.5.2 Ground lugs shall be mechanical.
- 3.5.3 A grounding electrode system consisting of a ring shall be installed at each PCS.
- 3.5.4 Module frames, mounting structure and combiner boxes shall be grounded per NEC requirements.
- 3.5.5 All below grade connections shall be compression type and UL listed, or equivalent for direct burial applications.
- 3.5.6 Transformers and inverters/PCS units shall be bonded to the ground ring.
- 3.5.7 One ground test well shall be furnished at each PCS.
- 3.6 Labeling and Identification
 - 3.6.1 All multi-string harness inputs to each combiner box and the combiner boxes themselves shall be uniquely tagged and identified. These cables shall have a label affixed to the outer jacket with a Brady or equivalent cable marker at each termination.
 - 3.6.2 Electrical equipment shall be labeled to meet applicable safety codes and requirements.
- 3.7 Electrical Equipment Enclosures
 - 3.7.1 Control Cabinets, pullboxes and junction boxes shall be in accordance with NEMA Standards and type number and shall be suitable for the location conditions. Minimum base design shall be:

3.7.1.1 Indoor:

NEMA 1

3.7.1.2 Outdoor:

NEMA

- 3.7.2 All enclosures shall be provided with pad locking provisions.
- 3.8 Lightning Protection
 - A. Lightning protection is included at the SCC only.
 - B. Lightning protection, (where installed) shall be limited to air terminals, down conductors and a connection to the PCS grounding electrode loop as well as surge arrestors.
 - C. Protection at the module arrays or at the PCS is not included.

4. SITE WORK

4.1 Site Preparation

- 4.1.1 Design for the Plant shall take into account Site Conditions in an effort to minimize Site disturbance, subject to the Site Assumptions. Owner shall be responsible for all Site preparation in relation to the Site Assumptions set forth in Exhibit L.
- 4.1.2 Site grading to be performed by Contractor, if any, shall be compatible with the general topography and uses of adjacent properties, right-of-way, set back and easements.

4.2 Site Access

- 4.2.1 Contractor shall provide all temporary and permanent access roads for the Site. Permanent perimeter roads, and interior roads for the Site will be completed after construction has been completed.
- 4.2.2 Contractor shall provide any access roads up to the Fence of the Site. Such access roads shall not be less than 25 feet in width and shall be capable of supporting heavy truck traffic.
- 4.2.3 Contractor shall provide stabilized access roads within the Site. All temporary access roadways used by Contractor for the Plant shall be maintained by Contractor in serviceable condition prior to Substantial Completion of the Plant, to the extent that Contractor causes degradation of the same in excess of normal wear and tear to perform the Work.

4.3 Fencing

- 4.3.1 Contractor shall provide the permanent Fence for the Site, subject to Owner's fencing standards and Owner's approval of Contractor's plot plan identifying access, egress, laydown and storage areas, and turn-around ratios required for deliveries. Fence provided by Contractor shall incorporate the appropriate grounding.
- 4.3.2 Site fencing shall comply with Applicable Laws, Applicable Permits and Industry Standards.

4.4 Grading and Drainage

- 4.4.1 Contractor shall perform grading and drainage, if needed, for the Site.
- 4.4.2 Contractor shall establish storm water management controls for the Project.
 Contractor shall maintain such controls during construction at the Site of such Project.
- 4.4.3 Contractor shall take appropriate measures, including dewatering due to storm water, to prevent the foundation and trenched areas from becoming destabilized by the flow of water into the excavation or by cave-ins or slippage.

4.5 Excavating, Filling and Backfilling

4.5.1 Contractor shall be responsible for performing all operations in connection

- with underground DC and AC cabling and equipment pads. Backfill shall be compacted to 90 to 95% of maximum dry density within a moisture content range of +2% of optimum moisture as determined by ASTM D698.
- 4.5.2 Contractor shall be responsible for performing all excavation, filling, and backfilling operations for the equipment pads and buildings. Subgrade beneath buildings and equipment pads, and backfill for foundations shall be compacted in accordance with geotechnical report for the Site.

4.6 Dust Control:

4.6.1 Contractor shall be responsible for compliance with state and local requirements for fugitive dust emissions. Contractor shall obtain local authority approvals and conform to the dust control regulations.

4.7 Soil Erosion and Sediment Control

4.7.1 Owner shall develop soil erosion and sediment control plans, and install BMPs in accordance with the local erosion and sediment control regulations. Contractor shall maintain applicable erosion and sediment control systems throughout construction at the Site.

4.8 Water

4.8.1 Contractor shall be responsible for water source for construction use (daily quantity to 30,000 gal per day beginning on the Full Notice to Proceed Date of the PV Power Plant). Contractor to provide water usage report to Owner in Monthly Progress Report.

5. STRUCTURAL

5.1 Equipment Foundations

- 5.1.1 Install structural pad or foundations for PCS and medium voltage transformers.
- 5.1.2 Foundations shall be of sufficient strength and stiffness to support anticipated loads and load combinations imposed by applicable code requirements.
- 5.1.3 Foundation recommendations, allowable soil bearing capacities, and solar panel support post embedment depths shall be based on a geotechnical report for the Site.
- 5.1.4 The following foundation design criteria shall be used:
 - 5.1.4.1 Foundations shall be designed using static analysis techniques assuming rigid elements and linear soil pressure distribution such that the allowable settlement and bearing pressure criteria are not exceeded.
 - 5.1.4.2 Foundation stability to be designed in accordance with IBC standards using the appropriate factors of safety.

5.1.5 Concrete

- 5.1.5.1 Reinforced concrete structures shall be designed and constructed in accordance with ACI 318-05, Building Code Requirements for Reinforced Concrete. Concrete work shall conform to the requirements of ACI 301, Specifications for Structural Concrete.
- 5.1.5.2 Concrete production, proportioning and placing as well as the formwork, reinforcing, joints and embedded items, repair, curing and protection shall all be in accordance with the applicable ACI Standards and Specifications.
- 5.1.5.3 Reinforcing bars shall be deformed bars conforming to ASTM A615, Grade 60. Welded wire fabric shall conform to ASTM A185.
- 5.1.5.4 Cement shall be Portland cement conforming to ASTM C150, Type (as required by soil conditions and geotechnical report for the Site), minimum 28 day compressive strength $f^{2}c = 4000$ psi.
- 5.1.5.5 Aggregates for normal weight concrete shall conform to ASTM C33.

5.1.6 Module Support Structures

- 5.1.6.1 Support structures shall be designed to withstand dead load of modules and hardware, snow loads (if applicable), seismic loads, and wind loads based on applicable criteria specified in <u>Table A-1-1</u>, and the ASCE. If wind tunnel testing results are available, these may be used in the design in lieu of loading required by the ASCE.
- 5.1.6.2 Pile driving: See applicable requirements set forth in <u>Table A-1-1</u>.
- 5.1.6.3 Structural Steel.
 - i. Materials for structural steel and miscellaneous steel shall conform to the requirements of one of the following standards: ASTM A36/ASTM A572 Grade 50/ASTM A992 Grade 50:
 - ii. Materials for structural steel and miscellaneous steel may conform to Chinese GB Standard GB/T 11263 Hot Rolled Sections Grade Q345 (50 KSI Min yield) or welded Q345 profiles conforming to ASTM A769/A769M.
 - iii. High strength bolts for sizes ½ in. diameter and larger shall conform to ASTM A325 or AISC A490. Sizes below ½ in. diameter shall conform to ASTM A449.3. Cold formed sheet steel shall be in accordance with requirements of one of the following standards: ASTM A1008/A1008M, ASTM A1003/A1003M: ASTM A653/A653M, or ASTMA 792.
- 5.1.6.4 Anchor bolts shall conform to the requirements of one of the following standards: ASTM A307, ASTM A36, or ASTM F1554;
- 5.1.6.5 nuts shall conform to ASTM A563, grade A or grade DH;
- 5.1.6.6 washers shall conform to ASTM

F346; [and/or]

- 5.1.6.7 anchor bolt sleeves shall conform to ASTM A501.
- 5.1.7 Clips shall be fabricated from stainless steel SS201, conforming to ASTM A666. Associated fasteners shall be made up of stainless steel SS18-8, conforming to ASTM A193.
- 5.1.8 Spring lock shall be fabricated out of spring steel wires, conforming to AISI 1010.
- 5.1.9 Corrosion protection
 - 5.1.9.1 corrosion protection of piles will be provided by galvanizing the whole pile section using the hot-dip process, in accordance with ASTM A123, with a coating thickness of 3 mils.
 - 5.1.9.2 corrosion protection for PV module framing system will be provided either by galvanizing in accordance with ASTM A653, with a coating thickness of G90 (0.8 mils); or aluminum-zinc alloy in accordance with ASTM A792, with a coating thickness of AZ35 (0.56 mils).
 - 5.1.9.3 corrosion protection for hardware shall be zinc plated in accordance with ASTM B633.
 - 5.1.9.4 cathodic protection is not included.

6. COMMISSIONING AND PERFORMANCE TESTING

See Exhibits H-1 and H-2 for requirements of commissioning, process and testing with respect to the Plant.

7. **DESIGN ENGINEERING**

Engineering Design Package: Contractor shall develop a comprehensive design package for the Plant in accordance with Exhibit B to this Agreement.

Exhibit A-2: Owner Provided Facilities and Services

EXHIBIT A-2

OWNER-PROVIDED FACILITIES AND SERVICES

1. GENERAL

1.1. Owner Scope of Work Overview:

- A. Owner shall neither supply water source nor pay consumption costs.
- B. Owner shall perform all engineering work related to obtaining approvals from the Transmission Provider, utility and/or applicable agencies for electrical interconnection. This includes filing documents and paying associated fees. Owner shall be responsible for all cost and schedule impacts resulting from the Transmission Provider's studies.
- C. Owner shall be responsible for all work associated with the interconnection to the Transmission Provider. This shall include, for the Project, all engineering, procurement and construction of the PV Interconnection Switchgear. The PV Interconnection Switchgear shall include switchgear, circuit breakers, disconnect switches, surge arrestors, relay and protective systems, revenue metering, step up transformer(s) (as required), bus work and supports, foundations, grounding systems, lightning protection, auxiliary control power, access roads, control house, utilities, security and other related equipment/system for a complete and functioning system.
- D. Owner shall provide a protective device coordination study and short circuit analysis. This engineering study shall be prepared by a licensed professional engineer and begins at the point of interconnection and ends at the AC output of the inverters for the Project. Owner shall furnish completed study to Contractor in order for Contractor to verify bus bracing and set protective relaying in the PVCS. Contractor will cooperate with Owner to develop all data necessary for the timely design of the transmission path/interconnection.
- E. Owner shall provide an engineering study of the effects of a transmission line ground fault. This study shall be used in Owner's design and construction of protective measures (e.g., ground grid, protective relaying systems) to dissipate fault current in accordance with IEEE Std 80. Owner's design shall limit touch potentials anywhere within the PV Power Plant to safe levels as described in IEEE Std 80. Contractor includes no scope of work to mitigate such an occurrence.
- F. Owner shall provide all environmental and land use planning permit approvals for the Site as required to satisfy Applicable Laws and Applicable Permits.
- G. Owner shall provide a boundary Site survey of the existing Site Conditions. Contour intervals shall be in one foot increments.
- H. Owner shall provide reasonable lay down areas large enough such as not to encumber construction operations on such Site. Contractor shall also provide for the Site a plot plan identifying access, egress, laydown and storage areas, and turn-around ratios required for deliveries.

- I. Owner shall furnish, install, test and terminate a communications connection to the SCC. Owner shall route a 6 strand fiber optic line from the SCC to the Fence. Any extension beyond such point shall be at Contractor's expense.
- J. Owner's step up transformer shall be configured with its primary (low side) winding as solidly grounded WYE to allow ground fault sensing and protection of the 12.47kV transmission system. Contractor's grounding design must be consistent with Industry Standards, including National Electric Code requirements.
- K. To help ensure that Owner and Contractor are in full alignment with respect to coordinating activities for the Project, Owner shall provide Contractor with the following Owner deliverables for the Project upon initiation of Contractor's design efforts for the Project. It shall be understood that Contractor fully intends to rely on the following information during the execution of the Work with respect to the Project.
 - i. Conceptual Site plan: for the Project, to include location and approximate dimensions of Owner-Provided Facilities and Services, including, but not limited to,
 - 1. PV Interconnection Switchgear switchyard,
 - 2. Transmission line routing including structure height and shape to assist in shading analysis,
 - 3. Required turning radii for Contractor provided access roads,
 - 4. Any future infrastructure locations, corridors, duct banks as Owner wishes Contractor to incorporate into its designs, and
 - 5. Any areas that the Owner considers to be No Fly Zones.
- L. Owner shall be responsible for installing and maintaining during Site preparation activities adequate drainage and minimize soil erosion at the Site prior to construction, and Contractor shall be responsible for maintaining drainage and soil erosion systems during construction, in each case in accordance with state and local sediment and erosion control rules, regulations and ordinances.
- M. Owner shall develop soil erosion and sediment control plans in accordance with the applicable local erosion and sediment control regulations.
- N. Owner shall install storm water management controls. Contractor shall maintain such controls during construction of the Project.
- O. Owner shall provide the PV Interconnection Switchgear which connects from Contractor's PVCS to the utility transmission circuit.
- P. Owner agrees that it shall provide Contractor with remote access (and physical access to the extent provided herein) to the supervisory control and data acquisition system furnished by Contractor under the Agreement (the "Data Access Obligations") for purposes of providing Contractor with real-time and/or recorded performance data produced from the PV Power Plant (the "Performance Data"). Such agreement shall survive the termination (for any reason) of the Agreement but in any event shall terminate upon the termination of the Module Warranty Terms and Conditions applicable to the PV Power Plant. Any hardware or software necessary

for Contractor to have such remote access and to collect such Performance Data shall be provided by Contractor, and be maintained and monitored by Contractor, at Contractor's expense. Owner shall provide Contractor with physical access to the PV Power Plant hardware as reasonably necessary for Contractor to install such hardware or software and to perform periodic maintenance and monitoring of such hardware or software. Contractor may use such Performance Data solely for the following purposes:

- (a) to verify the performance of the PV Power Plant with respect to the obligations under the applicable Module Warranty Terms and Conditions;
- (b) to verify and refine the accuracy of Contractor's energy predictions; and
- (c) in publications as an input to general data information regarding the overall performance of the modules over multiple projects, <u>provided</u>, <u>however</u>, that the Performance Data does not expressly identify the PV Power Plant.

Any other use shall require the Owner's prior written consent. Owner shall require that until the expiration of the applicable Module Warranty Terms and Conditions, any transferee assuming ownership of such Project must comply with the Data Access Obligations and any such transferee shall require subsequent transferees to comply with the Data Access Obligations until the expiration of the applicable Module Warranty Terms and Conditions.

- Q. Owner hereby grants to Contractor a paid-up, non-exclusive, world-wide license for Contractor and its Affiliates to use the Intellectual Property Rights related to the Data Acquisition System and any other Intellectual Property Rights owned or licensed by Owner necessary for Contractor to exercise its rights with respect to the Performance Data for the Project; provided, however, that such license may be revoked or otherwise terminated in the event that any use by Contractor of Intellectual Property Rights conferred hereby on Contractor under this Agreement is not in accordance with the terms of this Agreement.
- R. Site shall have security systems sufficient to comply with Applicable Laws, Applicable Permits and Industry Standards.

- 1.2. <u>Related Information</u>. This <u>Exhibit A-2</u> shall include the information regarding specific Owner- Provided Facilities and Services for the PV Power Plant including the following:
 - A. Storm water plan and mitigation features
 - B. Communications line to SCC
 - C. Fiber from SCC to Fence line
 - D. Other information to be determined during the Limited Notice to Proceed period of the PV Power Plant on the basis of consultation between Contractor and Owner.

Exhibit A-3: Owner-Provided Information

EXHIBIT A-3

OWNER-PROVIDED INFORMATION

- Site boundary surveys and any parcel maps available
- Topographical survey for site
- Any relevant preliminary design information pursuant to the Use Permit application process
- NMDOT or county requirements for traffic ingress to the Site
- Any Project or Site related information identified in Exhibit A-2 available prior to contract execution

Exhibit B: Contractor Deliverables Table

EXHIBIT B

CONTRACTOR DELIVERABLES TABLE

1. SCOPE

This Exhibit B sets forth the Contractor Deliverables that Contractor shall deliver to Owner for the PV Power Plant pursuant to this Agreement.

2. RESPONSIBILITIES

- 2.1 Contractor shall develop a comprehensive design package for the PV Power Plant consisting of drawings generated in AutoCAD. Contractor shall submit to Owner a complete drawing package for the PV Power Plant which shall consist of the following minimum drawing package:
 - 2.1.1 Cover sheet
 - 2.1.2 Site plan
 - 2.1.3 Grading and drainage plan (provided by Owner)
 - 2.1.4 Soil erosion and sediment control (provided by Owner)
 - 2.1.5 Symbols, abbreviations and notes
 - 2.1.6 Foundation plans and details
 - 2.1.7 Structural plans, details and elevations
 - 2.1.8 Array layout with shading diagrams
 - 2.1.9 Single-line electrical diagrams
 - 2.1.10 Electrical schematic diagrams
 - 2.1.11 Power and control wiring, including AC and DC systems
 - 2.1.12 PCS enclosure drawings, where applicable
 - 2.1.13 Series and parallel string wiring diagrams
 - 2.1.14 Inverter installation plans
 - 2.1.15 Grounding plans
 - 2.1.16 DAS system
 - 2.1.17 Fence drawing

2.2 Other Documentation

- 2.2.1 Contractor shall submit, in both hard and soft copy, the additional documentation for the PV Power Plant set forth below. Hard copies shall be in the form of three ring binders with a table of contents and tabs. Spines of the hard copy binders shall be marked to identify the documentation. Soft copies shall be posted on Contractor's .ftp website for Owner's access.
 - 2.2.1.1 Site-specific health and safety plan for the Site as required under Exhibit D to this Agreement.
 - 2.2.1.2 As-built drawings for the PV Power Plant shall be submitted no later than ninety (90) days following the Substantial Completion Guaranteed Date and shall reflect the final actual

details of the completed PV Power Plant. Commissioning Plan for the PV Power Plant as required 2.2.1.3 under this Agreement. Commissioning specifications for the PV Power Plant shall be 2.2.1.4 submitted in coordination with Contractor's issuance of subcontract agreements. 2.2.1.5 Commissioning logs for the PV Power Plant shall be submitted as required under this Agreement. 2.2.1.6 Test reports for the PV Power Plant shall be submitted as required under this Agreement. 2.2.1.7 Required Manuals for the PV Power Plant shall be submitted no less than thirty (30) days prior to the scheduled commencement of training for Operator Personnel. 2.2.1.8 Training schedule and course outline for the PV Power Plant, consistent with Exhibit E, shall be submitted no less than fortyfive (45) days prior to the scheduled commencement of training for Operator Personnel.

All other Work-related information and documentation reasonably requested by Owner, consistent with the terms

3. **DESIGN REVIEW**

2.2.1.9

3.1 Owner and Contractor agree to participate in an accelerated review of major Equipment and designs for the PV Power Plant by attending an on-board design review conference for the PV Power Plant (the "Conference").

of this Agreement.

- 3.2 The purpose of the Conference is to afford Owner the opportunity to ensure that Contractor's design and final selection of equipment for the PV Power Plant is in accordance with this Agreement.
- 3.3 The Conference shall be convened when engineering of the PV Power Plant is approximately fifty percent (50%) complete. A fifty percent (50%) complete engineering design package for the PV Power Plant shall be provided to Owner at least one (1) week prior to the Conference.
- Owner shall be provided the Conference schedule for the PV Power Plant no less than two (2) weeks prior to the Conference for the PV Power Plant.

- 3.5 The Conference shall be held at a mutually agreed upon location.
- 3.6 Contractor shall pay for all Conference facilities and meals at Contractor's office.
- 3.7 All Conference participants shall pay their own travel, lodging and other expenses.
- 3.8 Contractor and Owner shall provide access to their respective designated representatives during the Conference.
- 3.9 The fifty percent (50%) complete design package shall consist of the following:
 - 3.9.1 Array layout with major equipment locations
 - AC single line(s) 3.9.2 3.9.3 DC single line(s) Conceptual PCS layout 3.9.4 Conceptual grading plan (provided by Owner) 3.9.5 3.9.6 Conceptual storm water plan (provided by Owner) Instrumentation and control block diagram 3.9.7 Monitored points list 3.9.8 3.9.9 Site logistics plan Specification list 3.9.10 Purchase specifications for: 3.9.11 Inverter transformer 3.9.11.1 **PVCS** 3.9.11.2 Inverter 3.9.11.3 Medium voltage cable 3.9.11.4 3.9.11.5 DAS System

UPS System Fiber Optics

3.9.11.6

3.9.11.7

Exhibit C: Permits

EXHIBIT C

PERMITS

Exhibit C-1: Applicable Permits (Owner)

EXHIBIT C-1 APPLICABLE PERMITS (OWNER)

Piñon Solar Facility

Permit/Approval/Surveys	Agency
All other Applicable Permits/approvals/ surveys as required by Governmental Authorities not listed under Exhibit C-2 to the Agreement. These may include:	As required
Land use/zoning approvals	
Clean Water Act permits, including National Pollutant Discharge Elimination System (NPDES) permits associated with construction activities (Owner coverage)	
Fugitive dust permits (Owner coverage)	
National Environmental Policy Act compliance	
Archaeological and biological surveys	
Building permits (if applicable)	

Exhibit C-2: Contractor Acquired Permits

EXHIBIT C-2 CONTRACTOR-ACQUIRED PERMITS

Piñon Solar Facility

Permit/Approval	Agency
Required Permits/Approvals:	As required
National Pollutant Discharge Elimination	
System (NPDES) permits associated with construction activities (Contractor coverage)	
construction activities (Contractor coverage)	
Fugitive dust permit (Contractor coverage)	
Grading permits	
Fence permits	
Access permits	÷
Trailer permits, and associated drinking water and wastewater permit (if necessary)	
New Mexico Contractor's license number	·
Fuel storage tank permit (Contractor coverage)	
OSHA permit (Contractor coverage)	

Exhibit D: Safety Manual

EXHIBIT D

SAFETY MANUAL

[Insert copy of Contractor's Safety Manual here]

EXHIBIT E

OPERATING PERSONNEL TRAINING PROGRAM

1. GENERAL

Contractor shall conduct Site-specific training for Owner assigned Operating Personnel for the PV Power Plant. The training course for the PV Power Plant shall be conducted two times to accommodate two shifts of Operating Personnel. Each of the two groups shall receive training in alternate weeks.

Each course shall be conducted during a standard 8-hour day and shall take 1 day. Classroom training will be augmented by field reinforcement of the instruction topics. Each classroom training session shall be instructed in an air-conditioned classroom with the appropriate visual aids. The training program will cover all proper aspects of knowledge required by the individual disciplines to allow them to competently operate, troubleshoot, and maintain all PV Power Plant process and utility systems.

Owner shall advise one month in advance of each training program course of the number of Operating Personnel attending each session. A training program sign-up sheet for the PV Power Plant shall document Owner's personnel attendance and Contractor's instructor(s). Contractor will submit its proposed training schedule, training course outline and training manual for Owner's review in accordance with the provisions of this Agreement.

Owner shall ensure that all Owner Operating Personnel attendees (i) are adequately pretrained in all safety aspects of an industrial electrical generation facility as required by Governmental Authorities and Applicable Laws and (ii) shall arrive at the classroom with all appropriate personal protective equipment required for field training at the Site.

2. SITE-SPECIFIC TRAINING

The Operating Personnel training program will encompass on-Site training for the PV Power Plant.

2.1. Owner Responsibility

Provide training facilities for the Site which present an environment conducive to learning (heat, light, noise level and air conditioned and be furnished with an LCD projector or equivalent screen, white boards and markers and podium). Each Operating Personnel attendee's desk/table shall afford working space for training manuals and the associated C size drawings.

2.2. Contractor Responsibility

Contractor shall:

- 2.2.1. Prepare all classroom and training materials.
- 2.2.2. Provide hard and soft copies of training materials in sufficient quantities to allow all

participants to have their own set of documents.

- 2.2.3. Schedule and coordinate all classroom-training courses.
- 2.2.4. Provide instruction, lesson plans, final exam, review and field instruction.
- 2.2.5. Display larger drawings of the general arrangements and plot plans for orientation and discussion.

2.3. Training Topics

2.3.1. PV Systems

Contractor shall describe the process and discuss the principles of operation for the PV Power Plant.

Contractor shall provide experienced instructors to conduct its training program for the PV Power Plant, which shall consist of classroom sessions bolstered by system walk downs and examinations. The course curriculum for the PV Power Plant shall include design considerations. The following outline of topics shall typically be covered:

- 2.3.1.1. Introduction
- 2.3.1.2. Personnel safety
- 2.3.1.3. PV systems
- 2.3.1.4. Utilities
- 2.3.1.5. Commissioning and startup
- 2.3.1.6. DAS

2.4. Lesson Format

Each session shall typically include the following information:

- Lesson objectives
- Design basis and list of resources
- System overview with drawings
- Component description with supporting documentation (figures, tables, graphs, etc.)

2.5. Lesson Content

- 2.5.1. Lesson objectives major information the Operating Personnel attendee is expected to learn and retain from the lesson shall be presented. Referenced materials utilized in the training session shall be displayed. Listed references shall include page numbers in manuals, diagram and/or drawing numbers, and appropriate procedure of section numbers.
- 2.5.2. System overview with drawings this section will include a brief description of the intended use of the system.

- 2.5.3. Component description with supporting documentation this section will include information on the major components in the system. Tables, figures, drawings and design details will also be provided.
- 2.5.4. Principles of operation, including start-up and shutdown procedures various operational modes of the system and documents will be presented, including:
 - operating philosophy
 - start-up
 - normal operation
 - · normal and emergency shutdown
 - recognizing and handling abnormal operating conditions (troubleshooting)
- 2.5.5. Walk-downs walk-downs will be conducted to familiarize the students with the physical location and appearance of equipment and to clarify equipment features, controls, and displays.
- 2.5.6. Examinations Contractor will provide a "final" exam at the end of each session to test the knowledge of each Operating Personnel attendee. Contractor will provide to the Owner the results of this examination. Each Operating Personnel attendee will receive a certificate indicating their attendance of the training program. A complete list of attendees will be provided by Contractor to Owner for training tracking purposes for the PV Power Plant.

Exhibit F: Lien Waiver and Releases

EXHIBIT F

LIEN WAIVER AND RELEASES

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Exhibit F-1: Waiver and Release Upon
Final Payment of Contractor

EXHIBIT F-1

WAIVER AND RELEASE UPON FINAL PAYMENT OF CONTRACTOR

Each Contractor's Invoice shall be reasonably detailed and shall be accompanied by reasonable supporting documentation with respect to the Work completed which shall include a lien waiver upon final payment in the following form:

FINAL PAYMENT AFFIDAVIT, WAIVER, AND RELEASE1

Project Description: The engineering, procurement, and construction of a 20 MW_{AC} Gross Maximum Capacity photovoltaic ("PV") power plant ("PV Power Plant") and the facilities and equipment for the PV Power Plant that are owned by PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation ("Owner") and located between (and including) the PV interconnection switchgear which is designed, engineered, procured and constructed by Owner and the point where the PV Power Plant and PV interconnection switchgear are physically and electrically interconnected with the applicable electric system ("Owner Interconnection Facilities") (collectively the "Project") to be owned by Owner, and the designing, installation, testing and commissioning of the PV Power Plant, pursuant to the terms of that certain Engineering, Procurement, and Construction Agreement, dated [●] (the "Agreement") between AFFORDABLE SOLAR INSTALLATION INC, a New Mexico corporation ("Contractor"), and Owner.

In accordance with Section 6.6 of the Agreement and for the purpose of Final Completion of the PV Power Plant, the undersigned, for and in consideration of the payments made to it by Owner for the Work performed in connection with the PV Power Plant pursuant to the Agreement, hereby certifies as follows:

- 1. The undersigned has received final payment, in full for all deliveries of the Equipment and for all Work performed in connection with the PV Power Plant and the undersigned hereby warrants that there are no outstanding claims by the undersigned or any of the undersigned's Subcontractors against Owner in connection with the PV Power Plant, except as specifically enumerated on the Schedule attached to this Final Payment Affidavit, Waiver and Release ("Final Payment Release").
- 2. The undersigned does hereby waive, release, and quitclaim in favor of Owner, its Affiliates, each and every Person acquiring title to and/or making a loan on the PV Power Plant, and any and all of their successors and assignees, all rights that presently exist or hereafter may accrue to the undersigned to assert a lien or encumbrance upon the land, improvements, labor, materials, equipment and Work comprising the PV Power Plant or relating to the PV Power Plant.
- 3. The undersigned does hereby forever release, waive, and discharge the PV Power Plant and Owner and its Affiliates from any and all liens, right to establish a lien, causes of action, suits, debts, accounts, damages, encumbrances, judgments, claims, and demands of whatsoever kind or nature, in law or equity, including, without limitation, claims for any extension of time or increase in compensation, which the undersigned and/or its successor and/or assignees ever had, now have or ever will have against Owner, its Affiliates and the PV Power Plant, by reason of delivery of the Equipment and performance of Work in connection with the PV Power Plant for the Equipment delivered and Work performed [, and the undersigned hereby agrees to indemnify, defend and hold Owner and its Affiliates, and their respective directors, officers and employees harmless from any

¹ To be delivered by Contractor following receipt of Final Payment under <u>Section 6.6</u>

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and all damages, costs, expenses, demands, suits, and legal fees asserted or awarded, directly or indirectly relating to any of the foregoing claims or liens so released].

- The undersigned has not assigned any claim against Owner or the PV Power Plant, 4. nor any lien or right to perfect a lien against Owner, the Site or the PV Power Plant, and the undersigned has the right, power, and authority to execute this Final Payment Release.
- The undersigned warrants that all laborers and Subcontractors employed by it, all Suppliers or materialmen from which it has acquired material or equipment incorporated into the Work or the PV Power Plant, and any lien or bond claimant relating to the undersigned's work has been paid in full, and that none of such laborers, Subcontractors, Suppliers, materialmen or claimants has any claim, demand, or lien against Owner, the Work, the Site, the Equipment or the PV Power Plant. The undersigned further warrants that all applicable taxes, fees, and benefits relating directly or indirectly to the undersigned's work have been paid in full, except for those contested in good faith which do not affect the PV Power Plant or Owner.

Wording in square brackets to be included when waiver and release is to be executed by subcontractors. Wording in square brackets to be removed when waiver and release is to be executed by Contractor.

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Exhibit F-1: Waiver and Release Upon

Final Payment of Contractor

- 6. No security interest has been given or executed by the undersigned for or in connection with any materials, equipment, appliances, machinery, fixtures, or furnishings placed upon or installed on the PV Power Plant or the Site.
- 7. This Final Payment Release shall be an independent covenant, subject to the foregoing exceptions and clarifications, and shall operate and be effective with respect to Work performed and on the Equipment furnished, on the PV Power Plant. This Final Payment Release shall survive Final Completion of the PV Power Plant, as defined, and to the extent provided for, in the Agreement.

This Final Payment Affidavit, Waiver and Release is effective upon receipt by the undersigned of Final Payment from Owner. Capitalized terms used herein but not defined shall have the meaning set forth in the Agreement.

REOF, this Final Payment Relea	se has been executed on this
[CONTRACTOR]	
Ву:	
Name:	
Its:	

EXHIBIT F-2

WAIVER AND RELEASE UPON PROGRESS PAYMENT OF CONTRACTOR

Each Contractor's Invoice shall be reasonably detailed and shall be accompanied by reasonable supporting documentation with respect to the Work completed which shall include a lien waiver upon progress payment in the following form:

PROGRESS AFFIDAVIT, WAIVER, AND RELEASE

Project Description: The engineering, procurement, and construction of a 20 MW AC Gross Maximum Capacity photovoltaic ("PV") power plant ("PV Power Plant") and the facilities and equipment for the PV Power Plant that are owned by PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation ("Owner") and located between (and including) the PV interconnection switchgear which is designed, engineered, procured and constructed by Owner and the point where the PV Power Plant and PV interconnection switchgear are physically and electrically interconnected with the applicable electric system ("Owner Interconnection Facilities") (collectively the "Project") to be owned by Owner, and the designing, installation, testing and commissioning of the PV Power Plant, pursuant to the terms of that certain Engineering, Procurement, and Construction Agreement, dated [•] (the "Agreement") between Affordable Solar Installation, Inc., a New Mexico corporation ("Contractor"), and Owner.

In accordance with $\underline{\text{Section } 6.3}$ of the Agreement, the undersigned, for and in consideration of the payments made to it by Owner for the Work completed pursuant to the Agreement, hereby certifies as follows:

- 2. The undersigned does hereby waive, release, and quitclaim in favor of Owner, its Affiliates, each and every Person acquiring title to and/or making a loan on the PV Power Plant, and any and all of their successors and assignees, all rights that presently exist or hereafter may accrue to the undersigned to assert a lien or encumbrance upon the land, improvements, labor, materials, equipment and Work comprising the PV Power Plant or relating to the PV Power Plant furnished through the day of

[and the undersigned hereby agrees to indemnify, defend and hold Owner and its Affiliates, respective directors, officers and employees harmless from any and all damages, costs, demands, suits, and legal fees asserted or awarded, directly or indirectly relating to any of the claims or liens by any party for Work which relates to that which was performed, by or for the undersigned hereby agrees to indemnify, defend and hold Owner and its Affiliates, respective directors, officers and employees harmless from any and all damages, costs, of demands, suits, and legal fees asserted or awarded, directly or indirectly relating to any of the claims or liens by any party for Work which relates to that which was performed, by or for the undersigned hereby agrees.	expenses, foregoing
through theday of, 20] ³ . 4. The undersigned has not assigned any claim against Owner or the PV Power any lien or right to perfect a lien against Owner or the PV Power Plant, and the undersigner right, power, and authority to execute this Progress Release.	
5. The undersigned warrants that all laborers and Subcontractors employed Suppliers or materialmen from which it has acquired material or equipment incorporated into or the PV Power Plant, and that any lien or bond claimant relating to the undersigned's work paid in full, and that none of such laborers, Subcontractors, Suppliers, materialmen or claimant claim, demand, or lien against Owner, the Work, the Site, the Equipment or the PV Powthrough theday of, 20, of Work performed on the PV Power Plant of described in the attached document. The undersigned further warrants that all applicable ta and benefits relating directly or indirectly to the undersigned's work have been paid in full to the due and payable as of the date of this Progress Release, except for those contested in good faith	the Work has been s has any ver Plant except as kes, fees, he extent
6. No security interest has been given or executed by the undersigned f connection with any materials, equipment, appliances, machinery, fixtures, or furnishings place or installed on the PV Power Plant or the Site.	
7. This Progress Release, subject to the foregoing exceptions and clarifications an independent covenant and shall operate and be effective with respect to Work performed a Power Plant Hardware furnished, through theday of, 20 , on the PV Power Plant Hardware furnished, through theday of, 20	nd on PV
Capitalized terms used herein but not defined shall have the meaning set for Agreement.	th in the
IN WITNESS WHEREOF, this Progress Release has been executed on thisday	of
[•]	
Ву:	
Name:	
Its:	

¹ Wording in square brackets to be included when waiver and release is to be executed by subcontractors. Wording in square brackets to be removed when waiver and release is to be executed by Contractor.

EXHIBIT G

WORK SCHEDULE

1. Contractor's Work Schedule for the PV Power Plant shall adhere to the following key dates:

MILESTONE ITEMS	DATE	RESPONSIBLE PARTY	
Site survey to include all Site boundaries, obstruction (both above and below ground), easements and unusable areas.	LNTP	Owner	
Geotechnical study to include in situ load pile testing	60 days following LNTP	Contractor	
Hydrological study	60 days following LNTP	Contractor	
Limited Notice to Proceed ("LNTP")	October 1, 2020	Owner	
Conduct an on-board design review Conference (Exhibit B).	October 15, 2020	Owner & Contractor	
Construction Site plot plan-to include proposed PV module field locations, lay down requirements, perimeter fence, temporary facilities and access/egress road locations	October 15, 2020	Contractor	
Engineering design review 50% complete	October 15, 2020	Owner & Contractor	
Building permit submission	November 1, 2020	Contractor	
Full Notice to Proceed ("FNTP")	December 1, 2020	Owner	
Shovel ready Site, including items required for Contractor to commence on-Site work such as all Applicable Permits required under Exhibit C-1, grading leveled Site, fencing and water, and access roads	December 1, 2020	Owner & Contractor	

Mobilization	December 1, 2020	Contractor
Site specific layout issues	30 Days following LNTP	Owner & Contractor
Commence delivery of materials	January 1, 2021	Contractor

KEY DATES	DATE	RESPONSIBLE PARTY
Required construction Permit approvals	December 1, 2020	Contractor
Location of SCC (Exhibit A-1, Section 2.9F)	FNTP	Owner
Completion of interconnection (including relay protection and metering)	January 1, 2022	Owner
PV Power Plant Substantial Completion Date	March 1, 2022	Contractor

- 2. Contractor's normal working days are hereby defined as 5 days per week, Monday through Friday.
- 3. Contractor's normal working hours are hereby defined as 8 hours per day or between sunrise to sunset local time.
- 4. Contractor reserves the right to conduct work on Saturday, Sunday or any legal holiday to accommodate construction requirements or flexibility in scheduling construction crews and to work multiple shifts, including night shifts, as required to meet the Work Schedule.

EXHIBIT H - 1

COMMISSIONING PROCESS

1. INTRODUCTION

The commissioning process of a photovoltaic power generation plant (PV plant) typically involves a series of inspection and test activities that verify compliance of the PV plant with the applicable requirements and standards to which such plant is designed and constructed. As part of this process, the construction contractor will need to inspect and test a representative sample of components and subsystems before they are placed into service. In the case of utility scale solar PV plants, commissioning procedures can be applied to the complete solar plant or to parts of the plant (normally referred to as blocks). The commissioning plan for the PV Power Plant shall be consistent with the foregoing process and the requirements set forth in this Exhibit (such plan being the "Commissioning Plan").

2. <u>COMMISSIONING PROCEDURE</u>

The Commissioning Plan shall cover not only mechanical completion of the PV Power Plant but also Capacity Testing and Functional Testing. This means that in addition to verifying proper installation of all the components and systems, Contractor will be required to undertake testing to verify that such components and systems are (i) working properly and can produce energy safely and reliably and without damage or risk to Operating Personnel, subject to such persons' compliance with the training provided pursuant to this Agreement. and (ii) satisfy the Capacity Test and Function Test requirements set forth in Exhibit H-2, as such testing and will be more particularly described in the Commissioning Plan.

The Commissioning Plan shall be divided into two sets of procedures:

- 1. Inspection procedures; and
- 2. Capacity Testing and Functional Testing procedures.

The detailed procedures to be set forth in the Commissioning Plan for each procedure described above shall include, as a minimum:

- 1. Purpose and description of the procedure;
- 2. Procedure code;
- 3. Needed milestones and conditions;
- 4. Sample size;
- 5. Responsible party and observers;
- 6. Equipment needed;
- Health and safety precautions;
- Pass /fail criteria; and

9. References.

3. <u>ACCEPTANCE INSPECTIONS</u>

The following inspections shall be performed in accordance to IEC 60364-6 and IEC 62446 as part of the inspection aspects of the Commissioning Plan:

Description	Scope
Verification of completed work	100% of PV plant
Verification of support structures	100% of PV plant
Verification of the cable installation	100% of PV plant
Verification of buried cable	100% of PV plant
Weather station verification	100% of PV plant
Verification of the monitoring and control system	100% of PV plant
Verification of the polarity of strings	100% of PV plant
Open circuit medium voltage strings	100% of PV plant
Measurement of electric cable insulation from the combiner box to the inverter	100% of PV plant
Verification of the condition of the junction boxes	100% of PV plant
Meggering MV cables	100% of PV plant
Meggering MV cable jacketing	100% of PV plant
Measuring ground resistance	100% of PV plant
Measure of input short circuit current and open circuit voltage at the	100% of strings
string	measured on site
Verification of the Inverter Efficiency	100% of inverters
Verification of OEM-provided Inverter commissioning documentation	100% of inverters
Verification of the tracker commission protocol as per manufacturer's	100% of trackers
guidelines (see the appendix to this Exhibit H-1)	
Measure transformer insulation resistance – winding to winding	100% of Transformers
Measure transformer insulation resistance – winding to ground	100% of Transformers
Verification of transformer turn ratios at all tap positions	100% of Transformers
Measure core insulation resistance at 500 VDC if the core is insulated and the core ground strap is removable	100% of Transformers
Verify secondary voltage, phase to phase, and phase to neutral, after energization and prior to loading	100% of Transformers
Inspection of photovoltaic modules	100% of PV plant
Thermographic study of hot spots in panels	100% of PV plant
Laboratory toota for photovoltain modules	According to norm
Laboratory tests for photovoltaic modules	UNE 66020-1
Verification of Gross Maximum Capacity	100% of PV plant
Capacity Test as defined on Exhibit H-2	100% of PV plant
Functional Test as defined on Exhibit H-2	100% of PV plant

APPENDIX TO EXHIBIT H-1 (SAMPLE)

Tracker Commissioning Check List

(to be finalized prior to execution of the EPC contract)

	nponent Mechanical pections	<u>Inspection</u> Method	Specification	Comments	Pass/Fail
1	Obtain Job Site	Visual	Latitude, Longitude, Time zone,		
	Information, Tracker		Panel Length, Row Spacing,		
	Design, Site Layout		Drawings.		
2	Module Clamps incl. end of	Visual /	Proper hardware. Spacers end of		
	Row 20013-901	Spot torque	rows. Torque on bolts ~ 13 +/-2 ft		
		test	lbs.		
3	Bolt-on Bearing Housing	Visual /	I Beam- 100- 180 ftlbs.		
	Torque	Torque	Housing Bracket – 70-90 ftlbs.		
		Wrench			
4	Bolt-on Column Cap	Visual /	Bracket - I Beam- 100- 180 ftlbs.		
	Torque	Torque	Chase Nipple – 30-40 ftlbs.		
	1 2014	Wrench	Torque Tube Bolts – 90 - 100 ft		
		,,,,,,,,,,	lbs.		
5	Torsion Tube Welds	Visual /	Porosity, penetration, cold		
_	Totalon Tube (, club	Weld Gage	galvanized		
		''	3/16 Weld all around		
6	Row Straightness	Visual /	Alignment of Rows Length and		
_	The tribung standard	Digital Level	Plane		
	1	Digital Zevel	0 degrees +/- 2 degrees		
7	Harmonic Dampeners	Visual	Correct spacer installation.		
•	Trainforme Bampeners	V ISGGI	Lock washer compressed.		
8	Drivelines and U-Joints	Visual	Min. 2" Engagement splined shaft		
U	Briveinies and G-somis	V 13001	into U-joint. 30-40 ftlbs. U-joints		
			perpendicular on either side of Slew		
			ring.		
9	Slave Drive Gearboxes	Visual	All bolts installed.		
,	Slave Drive Geardoxes	Visuai	100-110 ftlbs.		
10	Drive Gearbox Mechanical	Visual	All bolts installed.		
11	PVC Driveline End Caps	Visual	Driveline shaft ends capped.		
12	Half Row Plugs	Visual	Foam Plugs inserted in Slew rings		
12	Tiali Row Flugs	Visual	openings.		
13	Controller Mechanical	Visual	Mounted in Shade. Facing North.		
13	Site Data, 4X Controls	V ISUAI	Wounted in Shade. Facing North.		
14	Garmin Mechanical	Visual	Mounted outside of enclosure.		
17	Gaimm Mechanica	Visuai	Clear view of sky.		
15	Wind Stow Switch	Visual	Mounted above snow level.		
13	Mechanical	Y ISUAI	Clear wind view all sides.		
	Meeninge	<u> </u>	Clear wind view an sides.		L
Driv	e Motor Inspection				
16	Limit Switches	Visual /	Safety (Omron), Logic Limit,		
10	Emile 5 Witches	Manual	operating correctly, tightened.		
17	Channel Bracket	Visual	Bolts installed correctly.		
. ,	Chamier Bracket	, iodai	Lock washers compressed.		
18	Oil Level Gearbox	Visual	Oil in sight glass. Use Mobil SHC		
10	CII LEVEL GERLOOK	4 1900tl	630.		
19	Breather, Gearbox	Visual	Breather plug in top of gearbox.	i	
$\frac{19}{20}$	Main power conduit	Visual /	All connections tight, no gaps.		
20	INTAILI POWEL COLIGUIT	Manual	An connections ugin, no gaps.		
21	Non Metallic liquid tight	T 1 /	All connections tight		
4 I	inon ivietante riquid tight	Visual /	All connections tight.		
22	DisaMata-C / ID	Manual	No kinks or gaps.		
22	Drive Motor Control Box	Visual /	Upper bracket bolts installed and		
		Manual	secure.		
Flor	trical Connection Inspection a	nd Maasuramant			
<u>E. rec</u> 23	Drive Motor Controller	Multi-Meter			
دے	Dive Motor Controller	Multi-Metel	Correct input voltage Motor max Amp draw driving E/W 4		
			Amps +/-		
			3 Phase 480 VAC / 3 Phase 208 VAC		
~		_1	JIHASE 400 VAC/JEHASE 200 VAC		

24	Central Controller	Multi-Meter /	Correct input voltage		
	Site Data, 4X Controller	Manual	1 Phase 110-240 VAC		
25	TVSSs Install in Motor	Visual /	Motor Controller.		
	Controller	Manual			
26	Garmin Electrical	Visual /	Wire routing, connection OK. Output		
		Manual	#3 Green LED on 4X Control PLC,		
			Site Data PLC.		
27	Wind Stow Switch	Visual /	Wire routing, connection OK. Output		
		Manual	#2 Green LED on 4X Control PLC,		
			Site Data PLC.		
28	Control Network	Visual /	4X Motor Control Digi One	1	
	Site Data, 4X Controller	Manual	connected to Side Data Digi One with	•	
			Cat5 Cable.		
29	Site Data Controller SCADA	Visual /	Connected to Digi One.		
		Manual	Error lights off. All lights Green.		

PC	Initial	Setu	p/Tests	

101	nitial Setup/Tests		
30	Tracker Modbus address check Modbus #11	Modbux #12	Address correct to site layout.
31	Load Garmin Data		Data correct per jobsite. Lat, Long, Date, Time.
32	Motor Direction Input		Proper movement direction. East at calibration
33	Tracker Calibration		Proper total Pulses.
34	Tracker accuracy/offset setting Bias		Manual pos = 0° Measured within 0.2°
35	Backtracking Geometry Check	Visual /	Check & measure extremes Panel length
36	Total Tracker Travel Angle	Manual	Check & measure extremes East and West
37	Operational Check	Digital level	Set to automatic & test accuracy AM/PM
38	Wind Stow Test	Visual /	Trip Wind Stow Switch Reset ·Tracking correctly.
39	PLC Status, General Setup Calc Results, General Setup	Manual	Capture Screen Shots of Results before leaving Site

Exhibit H-2: :Performance Testing

Exhibit H-2: Performance Testing

EXHIBIT H - 2

PERFORMANCE TESTING

4. <u>INTRODUCTION</u>

The ability of a photovoltaic power generation plant (PV plant) to produce net AC electricity at the PV plant's battery limit depends on the local weather conditions and the plant performance. PV plant performance can be understood as a combination of two factors: the overall plant efficiency and on the proportion of potentially productive time is the plant effectively working.

The procedures and tests set forth in this <u>Exhibit H-2</u> establish how performance testing of the PV plant is to be conducted and reported to Owner, and separately to determine whether Contractor has achieved the Guaranteed Capacity and the Minimum Guaranteed Capacity (as applicable).

The Capacity Test Procedures to be developed in accordance with this Agreement shall reflect the provisions set forth in this Exhibit H-2.

5. **DEFINITIONS**

In this Exhibit, unless the context otherwise requires, words and expressions defined in this Agreement and not in this Exhibit H-2 shall have the same meaning when used herein. The following words and phrases in "Title Case" shall when used in this Exhibit H-2 have the meanings assigned to them below, and cognate expressions shall have corresponding meaning, namely:

"In-plane Irradiance" means the Global Irradiance, in watts per square meter, measured in the plane of array. This term is also often referred to as "Plane-of-Array" or "POA" Irradiance.

"Capacity" means in respect of the PV Power Plant, at any time and from time to time, the capability (expressed in MW (AC)) of the PV Power Plant to generate and provide energy to the Delivery Point. For the avoidance of doubt, Capacity shall be net of electrical losses between the generator terminals and the Delivery Point.

"Corrected Capacity" means the most recent actual Tested Capacity, in MW, corrected to STC using the procedures specified in the Capacity Test Procedures as described herein.

"Delivery Point" means the physical point, situated on the high voltage side of the generator transformer of the PV Power Plant, where the PV Power Plant connects to the PV Interconnection Switchgear at the PVCS.

"Guaranteed Capacity" means the Capacity of the PV Power Plant, measured at the Delivery Point and expressed as AC power capacity, net of autoconsumption and electrical losses between the generator terminals and the Delivery Point, which shall be 20 MW (AC).

"Minimum Guaranteed Capacity" means a Capacity of the facility which is equal to 95% of the

Exhibit H-2: :Performance Testing

Guaranteed Capacity. For the purpose of this Agreement, the Minimum Guaranteed Capacity shall be equal to 23.75 MW (AC).

"Standard Test Conditions" or "STC" means a set of ambient reference conditions, which include a photovoltaic module in-plane solar irradiance of thousand (1000) watts per square meter, solar spectrum of AM 1.5 and photovoltaic module cell temperature of twenty-five degrees (25°) Celsius.

6. FUNCTIONAL TEST

6.1. Pre-Test Preparation

Contractor will complete and submit the Production Output Specification form in Exhibit H-3 which includes a performance schedule that is representative of the production estimates submitted. The schedule will include:

- 6.1.1. A Monthly Design Performance Factor that expresses the modeled hourly kWh (AC) output measured at the revenue meter, adjusted for average hourly module temperature, divided by the product of: (1) the physical size of the Array (m2), (2) average hourly In-Plane Irradiance (W/m2), and (3) solar module efficiency. Monthly Design Performance Factors shall be based upon Typical Meteorological Year data and calculated from the agreed upon solar production model.
- 6.1.2. A temperature adjustment factor. This adjustment factor is the module temperature coefficient of maximum power point listed on the module datasheet [%/°C]
- 6.1.3. Total array area (m²).
- 6.1.4. Module efficiency (from manufacturer datasheet).
- 6.2. Test Instrumentation and Measurements
- 6.3. One (1) minute interval readings shall be taken for each of the measuring periods, during which he following data points shall be recorded:
 - 6.3.1. In-plane Irradiance (W/m²) using a minimum of three (3) calibrated pyranometers (with maximum measurement tolerance of 2%) mounted in the same plane as the modules of the Project arrays. One-minute irradiance values from each pyranometer shall be averaged together to calculate the average one-minute plant in-plane irradiance.
 - 6.3.2. Cell temperature (°C) using a minimum of six (6) calibrated, RTD temperature sensors with accuracy of at least +/-1%. One-minute module temperature values from each sensor shall be averaged together to calculate the average one-minute plant module temperature.
 - 6.3.3. Total PV Power Plant energy output (MWh) measured using a revenue-grade power meter compliant with the ANSI C12.20, Class .2 standard located at the Project's metered point of delivery and used for AC power measurements. Power output measurements shall be sampled at one-minute intervals and integrated to yield AC energy measurements.

During testing, Contractor shall use the Project DAS to measure and record the data

Exhibit H-2: :Performance Testing

necessary for any required calculations.

The clock from the weather stations datalogger/SCADA system will be synchronized before the test with the clock from the PV Power Plant energy meter.

6.4. Test Period

The data will be collected over the course of two (2) consecutive days, within the same month. The Test Period shall consist of all Qualifying minutes between (hour beginning) 9 am and 3 pm during the days which performance data is collected. If insufficient Qualifying data is acquired on either day, the Test Period shall be shifted in single day increments until the minimum amount of Qualifying data is collected.

6.5. Data Qualifying Conditions

Data collected under the following conditions shall be considered "Non-Qualifying" and excluded from calculation of the Acceptance Test Performance Factor:

- 6.5.1. Measurement Device Malfunction: Missing or faulty data shall be excluded from the test calculations. Periods when data from the revenue meter, pyranometer, and/or module temperature sensors are not available shall be considered Non-Qualifying.
- 6.5.2. Low Irradiance Periods: Data collected during time periods when measured irradiance falls below 400 W/m2 shall be excluded from the test calculations. This is automatically filtered out by the calculator tool.
- 6.5.3. Inverter Clipping: Data collected during time periods when the measured inverter output power equals the inverter's AC capacity. This is automatically filtered out by the calculator tool.

6.6. Functional Test Reporting

Contractor is expected to use the Owner provided "Monthly Performance Factor Calculator" spreadsheet to be used in conjunction with the agreed upon solar production model. This method allows for transparency and consistency in design performance factor calculations.

6.7. Test Calculation Method

The Functional Test Performance Factor will be calculated in the PNM provided "Monthly Performance Factor Calculator" spreadsheet. Inputs shall include one minute test data downloaded from Project DAS including: test date and time, energy measured at the revenue meter, mutual agreed upon inverter clipping criteria, cell temperature measurement, and In-plane Irradiance measurement. The equation for calculating Hourly Performance Factor is shown below.

$$PF_{Hourly} = \frac{kWh_{meter} \times (1 + (25 - T_{cell}) \times T_{coef})}{Irr_{POA} \times Array Area \times Module Eff}$$

 T_{cell} = Average hourly cell temperature T_{coef} = Temperature coefficient from datasheet

Exhibit H-2: :Performance Testing

Irr_{POA} = Average hourly In-Plane Irradiance

After all Hourly Performance Factors have been calculated, hours which fall in the previously defined Test Period and meet the minimum irradiance criteria (defined below) are averaged for both days. This averaged value is the Acceptance Test Performance Factor (PF_{Test}) which will need to meet the success criteria as outlined in Section 3.6.

6.8. Performance Test Success Criteria

The Acceptance Test will have been successfully run if:

The Acceptance Test Performance Factor multiplied by 1.02 and then divided by the Design Performance Factor for that month, submitted in <u>Exhibit H-3</u>, is greater than 1.

$$\frac{PF_{Test} \times 1.02}{PF_{Initial}} > 1$$

7. GUARANTEED CAPACITY TEST

7.1. Capacity test procedure or as identified in ASTM 2848-13:

The data for the Capacity Test report will be collected during a one (1) Hour duration for all intervals when the minimum In-plane Irradiance conditions of 750 W/m² are met.

In the event the minimum irradiance conditions have not been satisfied at the end of the one (1)-Hour period, the measurement period may be extended.

Testing shall be performed between the hours of 9:00 a.m. to 3:00 p.m. when the In-Plane Irradiance is greater than 750 W/m² with minimal cloud cover. Ten (10) minute interval readings shall be taken, during which following data points shall be recorded:

- 1. In-plane Irradiance (W/m²) using a minimum of two (2) calibrated pyranometers with maximum measurement tolerance of 2%.
- 2. Cell temperature (°C) using a minimum of six (6) calibrated temperature sensors with accuracy of at least +/-1%.
- 3. Ambient air temperature (°C) using a minimum of two (2) calibrated temperature sensors with accuracy of at least +/-1%.
- 4. Total PV Power Plant output (MW) to the grid at the delivery point using facility energy meter.

Once the data points have been completely logged, the dataset will be used to compare the Corrected Capacity of the PV Power Plant to the Guaranteed Capacity and Minimum Guaranteed Capacity for each such interval.

$$C_{cor} = Max \left(C_{meas_i} * \left(\frac{G_{ref}}{G_{meas}} \right) * \left(\frac{1}{1 + T_{coeff}(T_{cell} - T_{stc})} \right) \right)$$

Where:

- C_{meas_i} = Measured AC Capacity of the field in MW for each measurement interval of the dataset
- C_{cor} = Corrected AC output in MW (corrected to Delivery Point Conditions)
- G_{meas} = Measured In-plane Irradiance in W/m2 at the Solar Station
- G_{ref}= 1,000 W/m² (Standard Test Conditions In-plane Irradiance)
- T_{coeff} = Power Temperature Coefficient of PV Modules according to photovoltaic module manufacturer's datasheet in %/°C
- T_{cell} = Temperature of Monitored Cell in °C
- $T_{stc} = 25$ °C (Standard Test Conditions cell temperature)

1. Annual Production

Exhibit H-3: Production Output Specification

EXHIBIT H - 3

PRODUCTION OUTPUT SPECIFICATION

[To be completed once final design & engineering for plant is approved by Owner]

Production Estimate:		MWh _{AC} per year
2. Monthly Design Perfo	rmance Factor	
See Exhibit H-2 Performan	ce Testing for f	urther detail.
	Month	Design Performance Factor (kWh _{AC} /kWh _{DC})
	January	
	February	
	March	
	April	
	May	
	June	
	July	
	August	
	September	
	October	
	November	
	December	
Temperature Adjustment (f	rom module spe	c sheet)
Adjustment:		%/°C
Module Efficiency (from m	odule spec shee	t)
Adjustment:		%
Total Array Area (from des	ign documents)	
Adjustment:		m²

Exhibit H-3: Production Output Specification

EXHIBIT I

MILESTONE PAYMENT SCHEDULE

Owner shall pay Contractor in accordance with the following Milestone Payment Schedule:

Key Milestones	Percentage (%) of Contract Price Payment Requested	Accumulative Percentage (%) of Contract Price Complete
Limited Notice to Proceed Date	10%	10%
Mobilization complete and Site office and laydown areas established	10%	20%
Delivery to site of Equipment (tracker)	15%	35%
Delivery to site of Equipment (50% of modules)	17.5%	52.5%
Delivery to site of Equipment (50% of modules)	17.5%	70%
Mechanical Completion	10%	80%
Substantial Completion	10%	90%
Final Completion and reconciliation payment	10%	100%

Page 152 of 181 Exhibit J: Site Description

EXHIBIT J

SITE DESCRIPTION

A 129-acre parcel (more or less) located in San Juan County, New Mexico, and in the vicinity of the San Juan Generating Station.

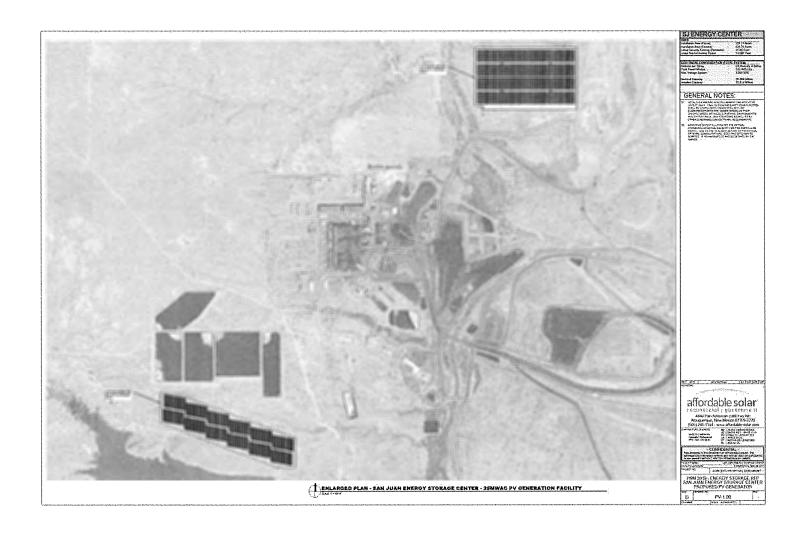


Exhibit K: Specified Suppliers and Specified Subcontractors

EXHIBIT K

SPECIFIED SUPPLIERS AND SPECIFIED SUBCONTRACTORS

1. APPROVED SUPPLIERS

PV Modules	Jinko		
	Hyundai / Boviet		
	Trina		
	Hanwha Q-Cells		
	Canadian Solar		
	Longi		
	GCL		
	JA Solar		
	First Solar		
Inverters	SMA		
Racking Structure (1-Axis Tracker)	Array Technologies NEXtracker		
Transformers	CG		
Transformers	Cooper		
	ABB		
	GE		
	SMA		
PVCS	Powergrid Solutions Inc. Formerly SHALLBETTER		

Exhibit K: Specified Suppliers and Specified Subcontractors

2. <u>APPROVED SUBCONTRACTORS</u>

To be confirmed	Civil Works
RMCI	Foundation Execution
NEI Engineering	SCADA Design & Engineering, Plant Commissioning & PVCS Commissioning
Electric Power Systems Electrical Reliability Services -	NETA testing
RMCI	Structural Contractor

Exhibit L: Site Assumptions

EXHIBIT L

SITE ASSUMPTIONS

The following Site Assumptions shall apply to the Site:

- 1. Non-corrosive/non-hazardous soils; non-hazardous (classified) environmental conditions as defined by Article 500 of the National Electrical Code.
- 2. No archeological, paleontological, historical, religious and/or cultural finds or artifacts.
- 3. No sensitive, protected, endangered or threatened species.
- 4. Site/grade is undeveloped, tolerance of finished grading as shown below:
 - Design Criteria For Uniform Grade:
 - Existing Grade vegetation grubbed
 - Maximum slope shall be 5.0%
- 5. Compaction of the soil needs to be 90% maximum dry density within a moisture content range of +/- 2% of optimum moisture as determined by ASTM D698 pending pile test.
- 6. Soil conditions that allow standard steel posts ("H piles") to be driven directly into soil without imposing structural damage or deflection of pile placement and with the ability to withstand compressive and uplift forces of solar module systems. Required depth below grade typically 5 feet but not greater than 7 feet.
- 7. Minimum bearing capacity 1000 pounds/sq. foot.
- 8. No water table within 10 feet of finished grade.
- Soil up lift resistance (to pile) equal to or greater than 1000 pounds at a maximum pile depth of six feet.
- 10. Soil lateral resistance (to pile) equal to or greater than 4000 pounds imposed at a distance of 6 inches above grade with a maximum deflection of .5 inches at grade.
- 11. No existing utilities, easements, rights of way, improvements or existing structures which inhibit construction of the Project.
- 12. 90 mph wind speed as depicted in Fig 6-1 of the American Society of Civil Engineers (ASCE 7-05) code.

Exhibit L: Site Assumptions

- 13. Unrestricted access to the Site 24 hours per day, seven days per week for the duration of construction and commissioning in two locations to allow for entering and exiting of vehicles; provided that Contractor shall provide Owner with reasonable prior notice of the need for access to the Site during any hours other than normal working hours (as such normal working hours are set forth in the Work Schedule) and Owner shall make Commercially Reasonable Efforts to accommodate such requests for access to the Site. To the extent that Owner is unable to accommodate any such reasonable requests, the provisions of Article 16 of the Agreement shall apply.
- 14. Access to the Site provided from well-maintained, flat, level and compacted public roadways (90-95% density surface) capable of withstanding commercial (e.g., semi-trailers) and construction grade vehicle traffic.
- 15. Interior roads at the Site shall also be compacted to 90 95% density.
- 16. Interconnection point within the Site and voltage at 12.47 KV.

Exhibit M: Form of Bonds

EXHIBIT M

FORMS OF BONDS

Bond No.

Document A312™ - 2010

Conforms with The American Institute of Architects AIA Document 312

Performance Bond

CONTRACTOR: (Name, legal status and address))	SURETY: (Name, legal status d	and principal place of business)	
		Mailing Address (for Notices	This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.
OWNER: (Name, legal status and address)		,		Any singular reference to Contractor, Surety, Owner or other party shall be considered plural where applicable.
CONSTRUCTION CONTR	ACT			
Amount: \$				
Description: (Name and location)				
BOND Date: (Not earlier than Construction C	ontract Date)			
Amount: \$				
Modifications to this Bond:	☐ None	See Section 16		
CONTRACTOR AS PRINC Company:	CIPAL X (Corporate Seal)	SURETY Company:	(Corporate Seal)	
Signature:		Signature:		
Name and Title:		Name and Title:		
(Any additional signatures appea	n on the last page of t		Attorney-in-Fact Surety Phone No.	
(FOR INFORMATION ONLY —				
AGENT or BROKER:		OWNER'S REPR		

- § 1The Contractor and Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the Owner for the performance of the Construction Contract, which is incorporated herein by reference.
- §2 If the Contractor performs the Construction Contract, the Surety and the Contractor shall have no obligation under this Bond, except when applicable to participate in a conference as provided in Section 3.
- §3 If there is no Owner Default under the Construction Contract, the Surety's obligation under this Bond shall arise after
 - .1 the Owner first provides notice to the Contractor and the Surety that the Owner is considering declaring a Contractor Default. Such notice shall indicate whether the Owner is requesting a conference among the Owner, Contractor and Surety to discuss the Contractor's performance. If the Owner does not request a conference, the Surety may, within five (5) business days after receipt of the Owner's notice, request such a conference. If the Surety timely requests a conference, the Owner shall attend. Unless the Owner agrees otherwise, any conference requested under this Section 3.1 shall be held within ten (10) business days of the Surety's receipt of the Owner's notice. If the Owner, the Contractor and the Surety agree, the Contractor shall be allowed a reasonable time to perform the Construction Contract, but such an agreement shall not waive the Owner's right, if any, subsequently to declare a Contractor Default:
 - .2 the Owner declares a Contractor Default, terminates the Construction Contract and notifies the Surety; and
 - .3 the Owner has agreed to pay the Balance of the Contract Price in accordance with the terms of the Construction Contract to the Surety or to a contractor selected to perform the Construction Contract.
- §4 Failure on the part of the Owner to comply with the notice requirement in Section 3.1 shall not constitute a failure to comply with a condition precedent to the Surety's obligations, or release the Surety from its obligations, except to the extent the Surety demonstrates actual prejudice.
- §5 When the Owner has satisfied the conditions of Section 3, the Surety shall promptly and at the Surety's expense take one of the following actions:
- §5.1 Arrange for the Contractor, with the consent of the Owner, to perform and complete the Construction Contract;
- §5.2 Undertake to perform and complete the Construction Contract itself, through its agents or independent contractors;
- §6.3 Obtain bids or negotiated proposals from qualified contractors acceptable to the Owner for a contract for performance and completion of the Construction Contract, arrange for a contract to be prepared for execution by the Owner and a contractor selected with the Owner's concurrence, to be secured with performance and payment bonds executed by a qualified surety equivalent to the bonds issued on the Construction Contract, and pay to the Owner the amount of damages as described in Section 7 in excess of the Balance of the Contract Price incurred by the Owner as a result of the Contractor Default; or
- §5.4 Waive its right to perform and complete, arrange for completion, or obtain a new contractor and with reasonable promptness under the circumstances:
 - After investigation, determine the amount for which it may be liable to the Owner and, as soon as practicable after the amount is determined, make payment to the Owner; or
 - .2 Deny liability in whole or in part and notify the Owner, citing the reasons for denial.
- §6 If the Surety does not proceed as provided in Section 5 with reasonable promptness, the Surety shall be deemed to be in default on this Bond seven days after receipt of an additional written notice from the Owner to the Surety demanding that the Surety perform its obligations under this Bond, and the Owner shall be entitled to enforce any remedy available to the Owner. If the Surety proceeds as provided in Section 5.4, and the Owner refuses the payment or the Surety has denied liability, in whole or in part, without further notice the Owner shall be entitled to enforce any remedy available to the Owner.

§ 7 If the Surety elects to act under Section 5.1, 5.2 or 5.3, then the responsibilities of the Surety to the Owner shall not be greater than those of the Contractor under the Construction Contract, and the responsibilities of the Owner to the Surety shall not be greater than those of the Owner under the Construction Contract. Subject to the commitment by the Owner to pay the Balance of the Contract Price, the Surety is obligated, without duplication, for

- .1 the responsibilities of the Contractor for correction of defective work and completion of the_Construction Contract;
- .2 additional legal, design professional and delay costs resulting from the Contractor's Default, and resulting from the actions or failure to act of the Surety under Section 5; and
- .3 liquidated damages, or if no liquidated damages are specified in the Construction Contract, actual damages caused by delayed performance or non-performance of the Contractor.
- § 8 If the Surety elects to act under Section 5.1, 5.3 or 5.4, the Surety's liability is limited to the amount of this Bond.
- § 9 The Surety shall not be liable to the Owner or others for obligations of the Contractor that are unrelated to the Construction Contract, and the Balance of the Contract Price shall not be reduced or set off on account of any such unrelated obligations. No right of action shall accrue on this Bond to any person or entity other than the Owner or its heirs, executors, administrators, successors and assigns.
- § 10 The Surety hereby waives notice of any change, including changes of time, to the Construction Contract or to related subcontracts, purchase orders and other obligations.
- § 11 Any proceeding, legal or equitable, under this Bond may be instituted in any court of competent jurisdiction in the location in which the work or part of the work is located and shall be instituted within two years after a declaration of Contractor Default or within two years after the Contractor ceased working or within two years after the Surety refuses or fails to perform its obligations under this Bond, whichever occurs first, If the
- provisions of this Paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable.
- § 12 Notice to the Surety, the Owner or the Contractor shall be mailed or delivered to the address shown on the page on which their signature appears.
- §13When this Bond has been furnished to comply with a statutory or other legal requirement in the location where the construction was to be performed, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. When so furnished, the intent is that this Bond shall be construed as a statutory bond and not as a common law-bond.

§14Definitions

- § 14.1 Balance of the Contract Price. The total amount payable by the Owner to the Contractor under the Construction Contract after all proper adjustments have been made, including allowance to the Contractor of any amounts received or to be received by the Owner in settlement of insurance or other claims for damages to which the Contractor is entitled, reduced by all valid and proper payments made to or on behalf of the Contractor under the Construction Contract.
- §14.2 Construction Contract. The agreement between the Owner and Contractor identified on the cover page, including all Contract Documents and changes made to the agreement and the Contract Documents.
- § 14.3 Contractor Default. Failure of the Contractor, which has not been remedied or waived, to perform or otherwise to comply with a material term of the Construction Contract.
- § 14.4 Owner Default. Failure of the Owner, which has not been remedied or waived, to pay the Contractor as required under the Construction Contract or to perform and complete or comply with the other material terms of the Construction Contract.
- § 14.5 Contract Documents. All the documents that comprise the agreement between the Owner and Contractor.
- § 15 If this Bond is issued for an agreement between a Contractor and subcontractor, the term Contractor in this Bond shall be deemed to be Subcontractor and the term Owner shall be deemed to be Contractor.

 $\S 16$ Modifications to this bond are as follows:

(Space is provided below f	or additional signatures of added	parties, other than those appearing on the	cover page.)
CONTRACTOR AS PRINCIPAL		SURETY	
Company:	(Corporate Seal)	Company: Seal)	(Corporate
Signature:		Signature:	
Name and Title: Address		Name and Title	

Address

Bond No.

Document A312™ - 2010

Conforms with The American Institute of Architects AIA Document 312

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001	ITD.	AOT	20	
CU	VTR/	461	OK.	•

(Name, legal status and address)

(Name, legal status and address)

SURETY:

(Name, legal status and principal place of business)

Mailing Address for Notices

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

Any singular reference to Contractor, Surety, Owner or other party shall be considered plural where applicable.

~~~			
CONST	RUCHON	CONTRA	CI

Date:

OWNER:

Amount: \$

Description:

(Name and location)

В	O	N	D

Date:

(Not earlier than Construction Contract Date)

Amount: \$

Modifications to this Bond:

None

See Section 18

CONTRACTOR AS PRINCIPAL

(Corporate Seal)

SURETY Company:

(Corporate Seal)

Signature: _

Company:

_____ Signature:

Name

and Title:

Name

and Title:

Attorney-in-Fact Surety Phone No.

(Any additional signatures appear on the last page of this Payment Bond.)

(FOR INFORMATION ONLY — Name, address and telephone)

AGENT or BROKER:

**OWNER'S REPRESENTATIVE:** 

(Architect, Engineer or other party:)

- § 1 The Contractor and Surety, jointly and severally, bind themselves, their heirs, executors, administrators, successors and assigns to the Owner to pay for labor, materials and equipment furnished for use in the performance of the Construction Contract, which is incorporated herein by reference, subject to the following terms.
- § 2 If the Contractor promptly makes payment of all sums due to Claimants, and defends, indemnifies and holds harmless the Owner from claims, demands, liens or suits by any person or entity seeking payment for labor, materials or equipment furnished for use in the performance of the Construction Contract, then the Surety and the Contractor shall have no obligation under this Bond.
- § 3 If there is no Owner Default under the Construction Contract, the Surety's obligation to the Owner under this Bond shall arise after the Owner has promptly notified the Contractor and the Surety (at the address described in Section 13) of claims, demands, liens or suits against the Owner or the Owner's property by any person or entity seeking payment for labor, materials or equipment furnished for use in the performance of the Construction Contract and tendered defense of such claims, demands, liens or suits to the Contractor and the Surety.
- §4 When the Owner has satisfied the conditions in Section 3, the Surety shall promptly and at the Surety's expense defend, indemnify and hold harmless the Owner against a duly tendered claim, demand, lien or suit.
- §5 The Surety's obligations to a Claimant under this Bond shall arise after the following:
- § 5.1 Claimants, who do not have a direct contract with the Contractor,
  - .1 have furnished a written notice of non-payment to the Contractor, stating with substantial accuracy the amount claimed and the name of the party to whom the materials were, or equipment was, furnished or supplied or for whom the labor was done or performed, within ninety (90) days after having last performed labor or last furnished materials or equipment included in the Claim;
  - .2 have sent a Claim to the Surety (at the address described in Section 13).
- § 5.2 Claimants, who are employed by or have a direct contract with the Contractor, have sent a Claim to the Surety (at the address described in Section 13).
- § 6 If a notice of non-payment required by Section 5.1.1 is given by the Owner to the Contractor, that is sufficient to satisfy a Claimant's obligation to furnish a written notice of non-payment under Section 5.1.1.
- § 7 When a Claimant has satisfied the conditions of Sections 5.1 or 5.2, whichever is applicable, the Surety shall promptly and at the Surety's expense take the following actions:
- § 7.1 Send an answer to the Claimant, with a copy to the Owner, within sixty (60) days after receipt of the Claim, stating the amounts that are undisputed and the basis for challenging any amounts that are disputed; and
- §7.2 Pay or arrange for payment of any undisputed amounts.
- §7.3 The Surety's failure to discharge its obligations under Section 7.1 or Section 7.2 shall not be deemed to constitute a waiver of defenses the Surety or Contractor may have or acquire as to a Claim, except as to undisputed amounts for which the Surety and Claimant have reached agreement. If, however, the Surety fails to discharge its obligations under Section 7.1 or Section 7.2, the Surety shall indemnify the Claimant for the reasonable attorney's fees the Claimant incurs thereafter to recover any sums found to be due and owing to the Claimant.
- § 8 The Surety's total obligation shall not exceed the amount of this Bond, plus the amount of reasonable attorney's fees provided under Section 7.3, and the amount of this Bond shall be credited for any payments made in good faith by the Surety.
- § 9 Amounts owed by the Owner to the Contractor under the Construction Contract shall be used for the performance of the Construction Contract and to satisfy claims, if any, under any construction performance bond. By the Contractor furnishing and the Owner accepting this Bond, they agree that all funds earned by the Contractor in the performance of the Construction Contract are dedicated to satisfy obligations of the Contractor and Surety under this Bond, subject to the Owner's priority to use the funds for the completion of the work..

§10 The Surety shall not be liable to the Owner, Claimants or others for obligations of the Contractor that arc unrelated to the Construction Contract.

The Owner shall not be liable for the payment of any costs or expenses of any Claimant under this Bond, and shall have under this Bond no obligation to make payments to, or give notice on behalf of, Claimants or otherwise have any obligations to Claimants under this Bond.

- § 11 The Surety hereby waives notice of any change, including changes of time, to the Construction Contract or to related subcontracts, purchase orders and other obligations.
- § 12 No suit or action shall be commenced by a Claimant under this Bond other than in a court of competent jurisdiction in the state in which the project that is the subject of the Construction Contract is located or after the expiration of one year from the date (1) on which the Claimant sent a Claim to the Surety pursuant to Section 5.1.2 or 5.2, or (2) on which the last labor or service w s performed by anyone or the last materials or equipment were furnished by anyone under the Construction Contract, whichever of (1) or (2) first occurs. If the provisions of this Paragraph are void or prohibited by law, the minimum period of limitation available to sureties as a defense in the jurisdiction of the suit shall be applicable.
- § 13 Notice and Claims to the Surety, the Owner or the Contractor shall be mailed or delivered to the address shown on the page on which their signature appears. Actual receipt of notice or Claims, however accomplished, shall be sufficient compliance as of the date received.
- § 14 When this Bond has been furnished to comply with a statutory or other legal requirement in the location where the construction was to be performed, any provision in this Bond conflicting with said statutory or legal requirement shall be deemed deleted herefrom and provisions conforming to such statutory or other legal requirement shall be deemed incorporated herein. When so furnished, the intent is that this Bond shall be construed as a statutory bond and not as a common law bond.
- §16 Upon request by any person or entity appearing to be a potential beneficiary of this Bond, the Contractor and Owner shall promptly furnish a copy of this Bond or shall permit a copy to be made.

#### §16 Definitions

§ 16.1 Claim. A written statement by the Claimant including at a minimum:

- .1 the name of the Claimant;
- .2 the name of the person for whom the labor was done, or materials or equipment furnished;
- .3 a copy of the agreement or purchase order pursuant to which labor, materials or equipment was furnished for use in the performance of the Construction Contract;
- .4 a brief description of the labor, materials or equipment furnished;
- .6 the date on which the Claimant last performed labor or last furnished materials or equipment for use in the performance of the Construction Contract;
- .6 the total amount earned by the Claimant for labor, materials or equipment furnished as of the date of the Claim;
- .7 the total amount of previous payments received by the Claimant; and
- .8 the total amount due and unpaid to the Claimant for labor, materials or equipment furnished as of the date of the Claim.
- § 16.2 Claimant. An individual or entity having a direct contract with the Contractor or with a subcontractor of the Contractor to furnish labor, materials or equipment for use in the performance of the Construction Contract. The term Claimant also includes any individual or entity that has rightfully asserted a claim under an applicable mechanic's lien or similar statute against the real property upon which the Project is located. The intent of this Bond shall be to include without limitation in the terms "labor, materials or equipment that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental equipment used in the Construction Contract, architectural and engineering services required for performance of the work of the Contractor and the Contractor's subcontractors, and all other items for which a mechanic's lien may be asserted in the jurisdiction where the labor, materials or equipment were furnished.
- §16.3 Construction Contract. The agreement between the Owner and Contractor identified on the cover page, including all Contract Documents and all changes made to the agreement and the Contract Documents.

- § 16.4 Owner Default. Failure of the Owner, which has not been remedied or waived, to pay the Contractor as required under the Construction Contract or to perform and complete or comply with the other material terms of the Construction Contract.
- §16.5 Contract Documents. All the documents that comprise the agreement between the Owner and Contractor.
- § 17 If this Bond is issued for an agreement between a Contractor and subcontractor, the term Contractor in this Bond shall be deemed to be Subcontractor and the term Owner shall be deemed to be Contractor.
- § 18 Modifications to this bond are as follows:

(Space isprovided below)	for additional signatures of added p	parties, other than those appearing on the coverpa	ige.)
CONTRACTOR AS F	PRINCIPAL	SURETY	
Company:	(Corporate Seal)	Company:	(Corporate Seal)
Signature:		Signature:	
		Name and Title:	
Name and Title:		Address	
Address			

# WARRANTY BOND

KNOWN ALL BY THESE PRESE			
as Principal, and			, a corporation
organized and existing under the L	, as Surety, are held		
and firmly bound unto			
total	sum		of
U.S. Dollars (themselves, jointly and severally, a	) for the payment s provided herein.	whereof said Pri	 ncipal and Surety bind
WHEREAS, the Principal	entered into a c	ontract with	C
or			f
_			("Work")
•			( )
year(s) commodified year(s) commodified year(s) commodified year(s) commodified year(s) the ward of the Ward year year(s) and year(s)	y suit under this bond shall rranty Period; provided, ho ction hereof, such limitation limitation permitted by su	be commenced no owever, that if this less that if the less that if the less that if the less that if the less that is a less t	o later than one (1) year limitation is prohibited to be amended so as to eriod of limitation shall
SIGNED this	day of		·
(Principal)			
By:			
By:	Attorne	ev-in-Fact	

# **EXHIBIT N**

[RESERVED]

Exhibit O: Spare Parts List

# **EXHIBIT O**

# **SPARE PARTS LIST**

The following list of spare parts shall be provided to the Owner upon Final Completion of the Project.

- Spare Parts shall be delivered to an Owner-designated storage facility.
- Cost of Spare Parts shall be the responsibility of the Contractor.
- "%" as the Unit shall mean a given percentage of the installed quantity of the referenced material. Any values that equate to less than one (1) physical unit shall have one (1) spare part purchased.

Item/Equipment	Unit	Qty. Required
PV Modules		
Crystalline modules	%	0.3%
Module clamps (mid and end)	%/Modul e	0.0075%
Field Wiring and Balance of System		
DC homerun wire for each type/size used	FT	TBD
MC4 (or equivalent) connector pairs (M & F)	%/Modul e	0.0027%
DC string fuse for each type used	%	1.0%
Ferrules and lugs	%	1.0%
Low voltage (<1000V) fuses for each size/type used	%	1.0%
AC Breaker for each size/type used	%	1.0%
Low voltage AC wiring for each size/type used	FT	TBD
Nuts and bolts commonly used throughout the System (SAE & Metric)	%/Modul e	0.0037%
Inverter		
Complete inverter spare IGBT stack	EA	1
Inverter replacement fans	EA	1 per Inverter
PV input fuses for each type used	EA	6 per Inverter

Exhibit O: Spare Parts List

Data Acquisition System		
RJ45 connectors	EA	2
Low voltage communication wiring for each type used	FT	50
Low voltage communication crimps for each type used (typically gel-filled)	EA	5
Racking		
Tracking motors (tracking only)	EA	1 per 20 motors
Tracker torque tubes	EA	TBD
Inclinometers (tracking only)	EA	1 per 20 motors
Cold galvanizing compound spray can	EA	1 per MW
Mastic Tape (1" wide, min. 100 mil), or other approved edge protection	FT	25 per MW
Connecting hardware for 1 table of modules (typically 1 string lengthwise)	EA	1
Miscellaneous		
Vacuum breaker, mounted for quick connection	EA	1
Inverter medium-voltage transformer	EA	1
Additional spare parts per Industry Standards		TBD

# **EXHIBIT P**

# MODULE WARRANTY TERMS AND CONDITIONS

[Module Manufacturer's Warranty to be inserted upon approval of final design and engineering]

Exhibit Q: Form of Change of Work Form

# **EXHIBIT Q**

# FORM OF CHANGE IN WORK FORM

### **CHANGE IN WORK FORM**

Project:	Photovoltaic power generation facility with a proposed Gross Maximum Capacity of 20 MW AC, located in or near Waterflow, New Mexico		
Contract:	Engineering, Procurement and Construction Agreement by and betwee PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation ("Owner") and [•] ("Contractor")		
Change In Work #:	[•]		
Date of Change In Work:	[•]		
Agreement, dated as of [•], (tl	following change to the Engineering, Procurement and Construction he "Agreement"), by and between Owner and Contractor. Initially the defined herein shall have the respective meanings given in the		
considered an amendment to Work Form does not relieve ( Agreement or otherwise modi adjustments to the Agreement	that are described below (collectively the applicable Change In Work) are the Agreement. With the exception of the Change In Work, this Change In Owner or Contractor of their responsibilities and obligations described in the ify the rights of Owner or Contractor under the Agreement. The below t terms will constitute a full and complete settlement for the Change In Work hange In Work Form, unless otherwise provided in the detailed description		
Detailed description of the red	quested Change In Work and reason for request:		
Detailed description of the eff	fect of the Change In Work on the Agreement:		
	mentation establishing the Change In Work cost of performing the work ntract Price. If there is no change in cost, state "none":		

Description of the change in the Contract Price	<b>:</b> :
The original Contract Price is: \$ [●]	
The change in the Contract Price is: \$	[ <b>●</b> ]
The revised Contact Price (including the	he Change In Work set forth herein) is: \$ [●]
The method used in determining the change in	Contract Price is indicated on the attached <u>Schedule 1</u> .
forth below. If there is no change in the Work Guaranteed Date, state "none":	ns and Substantial Completion Guaranteed Date are set Schedule, Milestone Items and Substantial Completion
The revised Substantial Completion Guarantee forth herein and all other prior Changes In Wo	d Date (taking into consideration the Change In Work set rk) is: [●]
Requested By:	Accepted and Agreed To:
By:	Ву:
Name:	Name:
Title:	Title:

# Schedule 1 to Change In Work Form

Method used in determining the change in Contract Price

- [ullet]
- [ullet]

### **EXHIBIT R**

### **DATA POINTS**

To be finalized during design review conference (Exhibit B, 3.9.8)

### Sample List

Site DAS should collect and transfer the following data points:

To SCADA: (DNP3 slave port on EPC Contractor PLC)

#### **Analog Points**

- 1. KW
- 2. KVA
- 3. KVAR
- 4. Va
- 5. Vb
- 6. Vc
- 7. IRRADIANCE GHI AVG
- 8. IRRADIANCE POA AVG
- 9. WINDSPEED AVG
- 10. WINDDIR AVG
- 11. TEMP AVG
- 12. BP_ $A\overline{V}G$

### **Status Points**

- 1. Breaker Status
- 2. Relay Trip
- 3. PVCS Door Open ('B' CONTACT)
- 4. PVCS Bldg HIGHTEMP
- 5. PVCS Smoke Alarm
- 6. PVCS HVAC Alarm (Compressor Fail)

#### Counters

- 1. kWh Received from Grid
- 2. kvarh Received from Grid
- 3. kWh Delivered to Grid
- 4. kvarh Delivered to Grid

### To Data Historian/Web Dashboard

#### Inverters:

- 1. Inverter AC Real Power (kW)
- 2. Inverter DC Input Power (kW)

- 3. Inverter AC Cumulative Energy (kWh)
- 4. Inverter DC Input Current (A)
- 5. Inverter DC Input Voltage (V)
- 6. Inverter Matrix A Temperature (°C)
- 7. Inverter Matrix B Temperature (°C)
- 8. Inverter Commanded Active Power
- 9. Limit (kW/%)
- 10. Inverter Commanded Reactive Power
- 11. Limit (kvar/%)
- 12. Inverter Phase A Voltage (V)
- 13. Inverter Phase B Voltage (V)
- 14. Inverter Phase C Voltage (V)
- 15. Inverter Phase A Current (A)
- 16. Inverter Phase B Current (A)
- 17. Inverter Phase C Current (A)
- 18. Inverter AC Reactive Power (kvar)
- 19. Inverter AC Apparent Power (kVA)
- 20. Inverter Phase to Phase Voltage A-B (V)
- 21. Inverter Phase to Phase Voltage B-C (V)
- 22. Inverter Phase to Phase Voltage C-A (V)
- 23. Operational Status (Int/text)
- 24. Fault Code from the Inverter (Int/text)

# **Meteorological Station**

- 1. Global Horizontal Irradiance (W/m²)
- 2. Direct Normal Irradiance (W/m²)
- 3. Diffuse Normal Irradiance (W/m²)
- 4. Daily accumulation of rain (mm)
- 5. Surface Wind Speed (m/s)
- 6. Surface Wind Direction (°)
- 7. Ambient air temperature (°C)
- 8. Barometric Pressure (kPa)
- 9. Relative Humidity (%)

### **Soiling Stations**

- 1. Soiling Station Parameters
- 2. Current for Unwashed Module (A)
- 3. Current for Washed Module (A)
- 4. Soiling Module Measured (%)
- 5. Irradiance (W/m²)

### **Tracker Actuators**

- 1. Tracker Equipment Status (Boolean)
- 2. Actuator Roll Angle (°)
- 3. Actuator Motor Current (A)

#### **Tracker Controllers**

1. Optimal Roll Angle (°)

2. Stow Status of Trackers (Boolean)

# Tracker Plane of Array Irradiance (W/m²)

### DC Current Transducers- Combiner Box (or string)

1. DC Current (A)

### PCS, Substation Control Building, Site Communication Center (SCC)

- 1. Primary PCS Air Conditioning Cumulative Run Time (Hours)
- 2. Secondary PCS Air Conditioning Cumulative Run Time (Hours)
- 3. PCS Shelter Air Temperature (°C)
- 4. PCS Smoke Detector Status (Boolean)
- 5. Door Open Alarm

#### **Transformers**

- 1. Transformer Core Temperature (°C)
- 2. Transformer Oil Reservoir Pressure (kPA)
- 3. Transformer Oil Level Status (Boolean)

### Energy Meters (ALL Including Revenue, Check & Block)

- 1. Net Power at the Plant (or Block) Meter (kW)
- 2. Power Received by the Grid from the Plant (or Block) (kWh)
- 3. Power Delivered by the Grid to the Plant (or Block) (kWh)
- 4. Reactive Power at the Plant (or Block) Meter (kW)
- 5. Power Factor at the Plant (or Block) meter (%)
- 6. Reactive Energy Delivered by the Grid to the Plant (or Block) (kWh)
- 7. Reactive Energy Received by the Grid to the Plant (or Block) (kWh)
- 8. Phase A Voltage at the Plant (or Block) Meter (V)
- 9. Phase B Voltage at the Plant (or Block) Meter (V)
- 10. Phase C Voltage at the Plant (or Block) Meter (V)
- 11. Phase A Current at the Plant (or Block) Meter (A)
- 12. Phase B Current at the Plant (or Block) Meter (A)
- 13. Phase C Current at the Plant (or Block) Meter (A)
- 14. Apparent Power at the Plant (or Block) Meter (kW)
- 15. Phase to Phase Voltage A-B at the Plant (or Block) meter (V)
- 16. Phase to Phase Voltage B-C at the Plant (or Block) meter (V)
- 17. Phase to Phase Voltage C-A at the Plant (or Block) meter (V)

#### Reference Modules

- 1. Reference Module Measured Irradiance (W/m²)
- 2. Reference Module Measured Temperature (°C)
- 3. Module Surface Temperature (°C)

### **Power Plant Controller (PPC)**

#### Relay

- 1. Relay Operation
- 2. Any metering data available from the relay

3. Any microprocessor relay's self-check functions

### Main Breaker

- 1. Main Breaker Status (Open/Close)
- 2. Main Breaker SF6 Pressure
- 3. Main Breaker Controls

### **MOD**

- 1. Motor Operated Disconnect Status (Open/Close)
- 2. Motor Operated Disconnect Control

# HV/MV Breaker (If applicable)

- 1. HV/MV Breaker (Open/Close)
- 2. HV/MV Breaker SF6 Pressure (Dry Contact/Data)

Exhibit S: Form of Contractor's Invoice

# **EXHIBIT S**

# FORM OF CONTRACTOR'S INVOICE

Exhibit S: Form of Contractor's Invoice

INVOICE #PNM XXXXXXXX

Date: XXXXXXX



4840 Pan American East Fwy NE

ABQ, NM 87109

Phone: (505) 944-4237

Camille.jones@affordable-solar.com

To

Public Service Company of New Mexico

Alvarado Square

414 Silver Avenue SW

Albuquerque, NM 87102

	Project	Location	PO#	Total Contract Amount
So	PNM Clear 5ky lar Energy Center	Address of Site	xxxxxxx	

tem#	qty	description	unit price	Previously Invoiced	line total
			:"		
				1	
				1	
				:	
				1	
				-	
***************************************	<u> </u>	Subtotal	\$ -	\$ -	
*CheckeryCheckanics over	450773 PAULITE PROTESTES	Subtotal  Sales Tax	7.3125%	\$ ·	\$ .
Some income programme of the court		Total		\$ -	\$

Thank you for your payment. Contact Camille Jones at (505)944-4237 or Camille.jones@affordable-solar.com if you have any questions.

PNM Exhibit TGF-16 Page 181 of 181

Exhibit T: Module Manufacturer's Installation Manual

# **EXHIBIT T**

[Module Manufacturer's Installation Manual to be inserted upon approval of final design & engineering]

# BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF PUBLIC	SERVICE	)	
<b>COMPANY OF NEW MEXICO</b>	)'S	)	
CONSOLIDATED APPLICATI	ION FOR	)	
APPROVALS FOR THE ABAN	DONMENT,	)	19UT
FINANCING, AND RESOURC	E REPLACEMENT	)	
FOR SAN JUAN GENERATIN	G STATION	)	
PURSUANT TO THE ENERGY	TRANSITION ACT		
	<b>AFFIDAVIT</b>		
STATE OF NEW MEXICO	)		
	) ss		
COUNTY OF BERNALILLO	)		

THOMAS G. FALLGREN, Vice President of Generation for Public Service Company of New Mexico, upon being duly sworn according to law, under oath, deposes and states: I have read the foregoing Direct Testimony of Thomas G. Fallgren and it is true and accurate based on my own personal knowledge and belief.

SIGNED this 28th day of June, 2019.

SUBSCRIBED AND SWORN to before me this day of June, 2019.

NOTARY PUBLIC IN AND FOR THE STATE OF NEW MEXICO

My Commission Expires:

11212020