

B-O-T ACQUISITION AGREEMENT

by and among

[●]<sup>1</sup>,

[●]<sup>2</sup>,

solely with respect to Section 20.9 (No Solicitation), Section 20.10(f) (Confidentiality; Public Announcements), and Article XXVI (General Provisions),

and

[●]<sup>3</sup>,

Dated as of [●]

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<sup>1</sup> **NTD:** Insert name of Seller entity.

<sup>2</sup> **NTD:** Insert name of Seller Parent Guarantor entity.

<sup>3</sup> **NTD:** Insert name of Buyer entity.

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## EXHIBITS AND SCHEDULES

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CONFIDENTIAL

**B-O-T ACQUISITION AGREEMENT<sup>4</sup>**

THIS B-O-T ACQUISITION AGREEMENT, dated as of [●], [●] (the “*Effective Date*”), is made and entered into by and among [●], a [●] organized and existing under the Laws of the State of [●] (“*Seller*”), and, solely with respect to Section 20.9 (No Solicitation), Section 20.10(f) (Confidentiality; Public Announcements), and Article XXVI (General Provisions), [●], a [●] organized and existing under the laws of the State of [●] (“*Seller Parent Guarantor*”), on the one hand, and [●], a [●] organized and existing under the laws of the State of [●] (“*Buyer*”), on the other hand. Each of Seller, Seller Parent Guarantor, and Buyer may be referred to individually as a “*Party*” or together as the “*Parties*”. Capitalized terms used in this Agreement are defined in Section 1.1.

**RECITALS**

WHEREAS, Seller [owns][leases] the Project Site, located near [●], [●], Texas<sup>5</sup>; and

WHEREAS, Seller desires to develop, design, engineer, procure, construct and install on the Project Site, commission, and test the Project; and

WHEREAS, Seller desires to sell, transfer, and assign to Buyer, and Buyer desires to purchase and receive from Seller, all of Seller’s right, title, and interest in and to the Project Assets at the times, on the terms, and subject to the conditions set forth in this Agreement; and

WHEREAS, Seller and Buyer desire for Seller to perform and complete the Work after the Closing on the terms and subject to the conditions set forth in this Agreement; and

WHEREAS, Seller Parent Guarantor is an indirect parent of Seller and joins this Agreement solely with respect to Section 20.9 (No Solicitation), Section 20.10(f) (Confidentiality; Public Announcements), and Article XXVI (General Provisions) hereunder to induce Buyer to enter into this Agreement on the terms and conditions set forth herein and acknowledges that it will derive a material and substantial benefit from the Transactions.

NOW, THEREFORE, in consideration of the foregoing recitals and the representations, warranties, covenants, and undertakings contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties, intending to be legally bound, do hereby agree as follows:

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<sup>4</sup> **NTD:** This Agreement remains subject in all respects to Buyer’s continued due diligence and internal review (including by Buyer’s subject matter experts) and the development of the detailed Project scope. In some instances, this draft either (i) reserves on a matter when Buyer believed that it lacked sufficient information, time or input or it was premature to propose specific language or (ii) will need to be updated to reflect a more comprehensive or careful approach to a matter. On occasion, this draft includes certain provisions on the basis that the drafters were unaware of information that might cause those provisions to be drafted in a materially different way or eliminated altogether. This draft may also need to be revised to reflect certain matters included or not addressed in Exhibit A. Please note that in developing this draft, Buyer has assumed there will be some intervening time period between Mechanical Completion and the Closing. To improve the accuracy of the draft, the Parties should discuss the role(s), if any, that Seller’s Affiliates will have in the Work.

<sup>5</sup> **NTD:** Insert the city and county where the Project is located.

## ARTICLE I. DEFINITIONS

**Section 1.1. Certain Defined Terms.** The following terms, when used in this Agreement with initial letters capitalized, have the meanings set forth below:

“**AC**” means alternating current.

“**Action**” means any action, cause of action, grievance, arbitration, assessment, hearing, claim, demand, suit, proceeding (including any proceeding related to a Permit), citation, summons, subpoena, examination, audit, review, inquiry or investigation of any nature, civil, criminal, regulatory or otherwise, in law or in equity, by or before any Governmental Authority or arbitrator.

“**Actual Energy Yield**” means, in respect of an Energy Yield Test Period, the actual energy produced and delivered to the Electrical Interconnection Point by [the Project] during such Energy Yield Test Period, as measured at the meter at the Electrical Interconnection Point (in MWh AC).

“**Adjustment Date**” has the meaning set forth in Section 24.13(a).

“**Affiliate**” means, with respect to any specified Person, any other Person who directly or indirectly through one or more intermediaries, controls or is controlled by or is under common control with the Person specified. For purposes of this definition, control of a Person means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such Person, whether through the ownership of voting securities or interests having voting power, by agreement or otherwise.

“**Agreement**” means this B-O-T Acquisition Agreement, including the Schedules and Exhibits hereto.

“**Ancillary Agreements**” means (i) the Bill of Sale, (ii) the Deed, (iii) the Assignment and Assumption Agreement, (iv) the MISO Agreement, (v) the Confidentiality Agreement, (vi) the Post-Closing Confidentiality Agreement, (vii) the Post-Closing Assignment and Assumption Agreements, (viii) the Post-Closing Bills of Sale[, and (ix) *[reserved]*] [and (x)] any and all additional agreements, certificates, documents, and instruments that may be executed and delivered by any Party or any Affiliate thereof at or in connection with the Closing, the Substantial Completion Payment Date, or Final Completion.

“**Anticipated Mechanical Completion Date**” has the meaning set forth in Section 7.2.

“**Applicable Environmental Attribute Program**” means a mandatory or voluntary domestic, international or foreign renewable energy, or other program, system, scheme, or organization, with respect to a market, registry or reporting for Environmental Attributes.

“**Approved Vendor**” means an approved manufacturer of machinery, equipment and other parts incorporated into the Project, as specified in the Scope Book.

**“Appurtenances”** means all appurtenances used or connected with the beneficial use or enjoyment of the Land, including (i) any mining, oil, gas, or other minerals relating to the Land or to the surface or subsurface thereof, (ii) any riparian, appropriative, or other water rights appurtenant to the Land and relating to surface or subsurface waters, (iii) development rights and air rights, (iv) any strips, gores, or pieces of property abutting, bounding, or adjacent or contiguous to the Land, (v) any land to the midpoint of the bed of any highway, street, alley, road, or avenue, open or proposed, in front of, abutting, or adjoining the Land, (vi) all wastewater (sewer) treatment capacity and all water capacity assigned to the Land, and (vii) all reversionary interests benefitting the Land.

**“Assignment and Assumption Agreement”** means the Assignment and Assumption Agreement, substantially in the form of Exhibit E-1, to be executed and delivered by Seller and Buyer at the Closing.

**“Assumed Liabilities”** has the meaning set forth in Section 16.3(b).

**“Bankrupt”** means, with respect to any entity, such entity (i) 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, (ii) has a petition filed or commenced against it for a proceeding or cause of action under any bankruptcy, insolvency, reorganization, or similar law and such petition is not dismissed within sixty (60) days of its filing, (iii) makes an assignment or any general arrangement for the benefit of creditors, (iv) otherwise becomes bankrupt or insolvent (however evidenced), (v) 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 (vi) is generally unable to pay its debts as they fall due.

**“Bill of Sale”** means a Bill of Sale, substantially in the form of Exhibit F-1, to be executed and delivered by Seller at the Closing.

**“Business Day”** means any day other than Saturday, Sunday or any day on which Federal Reserve member banks located in New York, New York, are not open for the transaction of normal banking business.

**“Buyer”** has the meaning set forth in the introductory paragraph of this Agreement.

**“Buyer Caused Delay”** means (i) a material breach or default under this Agreement or any Ancillary Agreement by Buyer, or (ii) property damage resulting from the negligence, including gross negligence, fraud or willful misconduct of Buyer.

**“Buyer Contract Administrator”** means the individual designated by Buyer pursuant to Section 3.4 to act as Buyer’s liaison to Seller to the extent described therein.

**“Buyer Contract Manager”** means the individual designated by Buyer pursuant to Section 3.3 to act as Buyer’s liaison to Seller to the extent described therein.

**“Buyer Discretionary Change”** has the meaning set forth in Section 8.2(a).

“**Buyer Group**” has the meaning set forth in Section 24.1.

“**Buyer Project Intellectual Property Rights**” means all Intellectual Property Rights required to be provided or procured by Buyer or its Affiliates pursuant to Section 5.3 for the ownership, use, and/or operation of the Project (including the Project Assets) and conduct of Buyer’s business operations by the Buyer Project Intellectual Property Users.

“**Buyer Project Intellectual Property Users**” means Buyer, its Affiliates, and their respective employees and contractors.

“**Buyer’s Consents**” means the notices to or Consents of any Person other than a Governmental Authority that are required to be made or obtained by or on behalf of Buyer or any of its Affiliates prior to consummation of the Closing, as specified in Part I of Schedule 19.5.

“**Buyer’s Regulatory Approvals**” means, excluding Permits, the notices to, applications or other filings with, or Consents of or from any Governmental Authority of competent jurisdiction over Buyer (including Buyer’s operations), any Affiliates of Buyer, the Project Assets, or the Transactions to be filed, made, or obtained by Buyer or any of its Affiliates that Buyer deems necessary or advisable for it to consummate the Transactions, including approval from a Governmental Authority having jurisdiction over Buyer (i) authorizing Buyer’s participation in the Transactions on the terms set forth herein and in the Ancillary Agreements and the full recovery of all costs associated with the Transactions (through base rates, fuel adjustment charges, and/or such other rates or charges as may be applied pursuant to a rider or otherwise) on terms and conditions acceptable to Buyer in its sole and absolute discretion pursuant to a finding that the consummation of the Transactions by Buyer is prudent and in the public interest, and (ii) providing for such other regulatory treatment of the Transactions, this Agreement, the Ancillary Agreements, and Buyer on terms and conditions acceptable to Buyer in its sole and absolute discretion. Buyer’s Regulatory Approvals as of the Effective Date are generally described in Part II of Schedule 19.5.

“**Buyer’s Required Consents**” means the Buyer’s Consents marked with an asterisk on Part I of Schedule 19.5.

“**Central Prevailing Time**” or “**CPT**” means standard time or daylight savings time, as applicable to the Central Time Zone.

“**CERCLA**” means the Federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.*

“**Change in Law**” means the enactment, adoption, promulgation, issuance, modification, or repeal after the Effective Date of any applicable Law or any material change in the enforcement or interpretation of any applicable Law by any Governmental Authority, except that none of the following shall be a Change in Law: (i) a change in any law related to income taxes or a change in any income tax rate, (ii) an enactment, adoption, promulgation, or material change in the enforcement or interpretation of an applicable Law that is published prior to the Effective Date but that becomes effective after the Effective Date, and (iii) a change in the enforcement or interpretation of an applicable Law outside of the United States.

“**Change Order**” means a written amendment to the Agreement entered into by Seller and Buyer in accordance with Article VIII (Change Orders) that modifies the scope of Work, the Project Schedule, if applicable, and the Closing Expiration Date, the Guaranteed Substantial Completion Date, the Substantial Completion Termination Trigger Date, the Final Completion Termination Trigger Date, the Purchase Price, and the Substantial Completion Payment Amount, as applicable, as provided in Article VIII (Change Orders). The Change Order and Change Notice Form are attached hereto as Exhibit C.

“**Change Notice**” means a notice provided by Seller or Buyer, as applicable, pursuant to Article VIII with respect to a proposed change to the Work.

“**Closing**” has the meaning set forth in Section 17.1.

“**Closing Assets**” has the meaning set forth in Section 16.1.

“**Closing Assumed Liabilities**” has the meaning set forth in Section 16.3(a).

“**Closing Date**” has the meaning set forth in Section 17.1.

“**Closing Date Survey**” has the meaning set forth in Section 21.12(c).

“**Closing Date Tax Opinion**” has the meaning set forth in Section 20.7(j).

“**Closing Expiration Date**” means [\_\_\_\_\_].

“**COBRA**” means the Consolidated Omnibus Budget Reconciliation Act of 1985, as codified in Section 4980B of the Code and Section 601 et seq. of ERISA.

“**Code**” means the Internal Revenue Code of 1986.

“**Collective Bargaining Agreement**” means any and all agreements, verbal or written, between (i) any Seller Service Provider, on the one hand, and (ii) a trade union, labor organization, collective bargaining representative, or employee representative of any Project Employee, on the other hand, concerning terms and conditions of employment of such Project Employee, as well as all modifications of, or amendments to, such agreements, and any Laws, procedures, awards, or decisions of competent jurisdiction interpreting or applying such agreements.

“**Confidentiality Agreement**” means that certain Amended and Restated Confidentiality Agreement, dated as of [●], between [●] and [●].

“**Consents**” means consents, authorizations, approvals, releases, waivers, estoppel certificates, and any similar agreements or approvals.

“**Construction Commencement Date**” means the earlier of (a) the date on which Seller issues to the EPC Contractor a notice to proceed that authorizes the EPC Contractor to mobilize to the Project Site and commence physical construction, and (b) the date on which the EPC

Contractor has mobilized to the Project Site to commence physical construction at the Project Site.

“**Consumables**” means any and all items that may need to be replaced, consumed, or otherwise used (and the replacement thereof) in the performance of the Work (including in achieving Mechanical Completion and testing the Project and, during the period from and after the Closing until Final Completion, maintaining the Project), including: lubricants, chemicals, fluids, oils, filters, fittings, connectors, seals, gaskets, hardware, wire, safety equipment, replacement parts and other similar materials; maintenance, shop, and office supplies; fuel supplies, if any, on hand and stored at, or in transit to, the Project Site as of the Closing; and all other materials, supplies, and other items replaced, consumed, or otherwise used (and the replacement thereof) in the performance of the Work.

“**Contract**” means any binding contract, agreement (including any collective bargaining agreement or other labor agreement), purchase order, transaction under a master agreement, license, sublicense, lease, sublease, sale and purchase order, easement, mortgage, security agreement, instrument, guaranty, commitment, undertaking, or other similar arrangement, whether express or implied, written, electronic or oral.

“**Contractor**” means any Person having a Contract with Seller to provide any Goods or perform any part of the Work.

“**DC**” means direct current.

[“**Deed**” means one or more Deeds, substantially in the form of Exhibit D, conveying each of the Owned Real Properties included in the Project Assets, free and clear of all Encumbrances other than Permitted Encumbrances, with legal descriptions suitable for conveyance of such Owned Real Properties of record, to be executed and delivered by Seller at the Closing.]<sup>6</sup>

“**Default Interest Rate**” means, for any date, the lesser of (i) the per annum rate of interest equal to the prime lending rate as may from time to time be published in *The Wall Street Journal* on such day (or if not published on such day, on the most recent preceding day on which such prime lending rate is published) plus two percent (2%) and (ii) the maximum lawful rate permitted by Law.

“**Defect**” means any portion of the Work that is defective, incorrect, or deficient or otherwise does not conform to the requirements of this Agreement. For the avoidance of doubt, Defect includes any failure of the Project, the Work, or Seller to comply with the Project Warranty (provided that, for purposes of interpreting this definition, the Project Warranty shall be deemed to be in effect at such time, whether or not the Project Warranty is, in fact, in effect at such time) and any defects or deficiencies in design, engineering, manufacture, procurement, application, construction, installation, assembly, materials, and workmanship.

“**Defending Party**” has the meaning set forth in Section 24.5(e).

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<sup>6</sup> **NTD:** To be deleted if not necessary (i.e., because the Land is leased and the term otherwise unused).



***“Delay Liquidated Damages”*** has the meaning set forth in Section 7.3(b).

***“Deliverability Request”*** has the meaning set forth in Section 20.16(d).

***“Deliverability Upgrade Costs”*** shall have the meaning set forth in Section 20.16(c).

***“Direct Costs”*** means the actual, reasonable, and documented costs, without mark-up, directly incurred by Seller for the following items in the performance of the Work: (i) payroll wages paid (or avoided) for labor in the direct employ of a Contractor (excluding any Affiliate of Seller) engaged in the performance of the Work at the Project Site, including incremental insurance and Taxes; (ii) costs of materials and permanent equipment required for the Project or to perform the Work; (iii) payments properly made by a Contractor to Subcontractors (excluding any Affiliate of Seller) for performance of the Work; (iv) third party rental charges for machinery and equipment (excluding hand tools and Consumables) used at the Project Site and necessary to perform the Work; (v) Permit fees attributable solely to performance of the Work; and (vi) compensation based upon contractual rate sheets for construction management, engineers, or other design professionals employed directly by a Contractor, to the extent that their services are directly related to and necessary for performance of the Work. Notwithstanding the foregoing, Direct Costs shall not include any: (a) salary or other compensation (including any cost of contributions, assessments, fringe benefits, or Taxes based on salary or compensation) of any Employee or other Representative of Seller, any of its Affiliates, or any of their respective Contractors or Subcontractors at Seller’s or such Affiliate’s or Contractor’s or Subcontractor’s principal office or any branch office (except as provided in clause (vi) immediately above); (b) expenses of any principal or branch office of Seller, any of its Affiliates, or any of their respective Contractors or Subcontractors; (c) profit, corporate overhead, or general expenses of any kind of Seller, any of its Affiliates, or any of their respective Contractors or Subcontractors; (d) replacement, repair, or other costs or Liabilities arising from any loss of or damage to any equipment, tools, or other property owned or used by Seller, any of its Affiliates, or any of their respective Contractors or Subcontractors; (e) costs to correct or re-perform any of the Work as a result of the negligent acts or omissions or fault of Seller, any of its Affiliates, or any of their respective Contractors or Subcontractors or any breach of this Agreement, the MISO Agreement, or any other agreement applicable to the Work or the Project by Seller, any of its Affiliates, or any of their respective Contractors or Subcontractors; (f) fines or penalties assessed against Seller, any of its Affiliates, or any of their respective Contractors or Subcontractors in connection with the Work; or (g) costs or expenses other than those specifically set forth above as Direct Costs.

***“Dispute”*** has the meaning set forth in Section 26.10.

***“Easements”*** has the meaning set forth in Section 16.1(c).

***“Effective Date”*** has the meaning set forth in the introductory paragraph of this Agreement.

***“Electric Interconnection Facilities”*** means all structures, facilities, equipment, substations, switchyards, auxiliary equipment, devices and apparatus directly or indirectly required or installed to interconnect and deliver electric energy from the Project to the applicable

delivery points on the ETI Transmission System or otherwise, including electric transmission and/or distribution lines, transformers, switching equipment, electric metering equipment, and any other metering equipment, communications equipment, and safety equipment, including equipment required to protect (i) the electrical system to which the Project is connected and customers on such system from faults occurring at the Project and (ii) the Project from faults occurring on the electrical system to which the Project is connected or on other electrical systems to which such electrical system is directly or indirectly connected.

**“Electrical Interconnection Point”** means the point of electrical interconnection between the Project and the ETI Transmission System, as set forth in the GIA.

**“Employee”** means, with respect to a Person, any individual who such Person considers its employee, and any individual who is or is deemed to be a full-time, part-time, or other employee of such Person under applicable federal, state, or local Laws, including Tax and employment Laws. References to Employees include former employees and individuals that become employees during the term of this Agreement.

**“Employee Pension Benefit Plan”** has the meaning set forth in ERISA § 3(2).

**“Employee Plan”** means and includes each Employee Pension Benefit Plan, each Employee Welfare Benefit Plan, and each other plan, Contract, program, fund, or policy, whether or not subject to ERISA, and whether written or oral, qualified or non-qualified, funded or unfunded, foreign or domestic, providing for compensation or employee benefits, including (i) severance pay or other severance benefits, retention, stay pay, salary continuation, change in control payments or benefits, bonuses, commissions, profit-sharing, equity options, employee stock ownership, or other forms of cash or equity-based compensation or incentives; (ii) vacation or vacation pay, holiday or holiday pay, paid or unpaid sick leave, or other paid or unpaid time-off; (iii) health, welfare, medical, vision, dental, disability, reimbursement, life, accidental death and dismemberment, employee assistance, wellness, educational assistance, relocation, or fringe benefits or perquisites, including post-employment benefits; or (iv) compensation, deferred compensation, defined benefit or defined contribution, thrift savings, retirement, supplemental retirement, early retirement or pension benefits, or equity grants, in each case that covers any Employee of Seller or any of its ERISA Affiliates, or that is maintained, administered, sponsored, made available, or with respect to which (a) contributions are made or required to be made by Seller or any of its ERISA Affiliates in respect of Employees of Seller or any of its ERISA Affiliates or their beneficiaries, (b) Seller or any of its ERISA Affiliates is a participating employer, or (c) Seller or any of its ERISA Affiliates has any ongoing Liability whatsoever.

**“Employee Welfare Benefit Plan”** has the meaning set forth in ERISA § 3(1).

**“Encumbrances”** means any and all mortgages, deeds of trust, pledges, assessments, claims, security interests, options, warrants, purchase rights (including rights of first refusal, rights of first offer and any other preferential purchase rights), liens (statutory or otherwise), royalties, franchises, conditional and installment sales agreements, title retention agreements, easements, activity and use restrictions and limitations, exceptions, rights-of-way, deed restrictions, defects or imperfections of title, encumbrances, and charges of any kind.

“**Energy Model**” means the PVsyst model for the PV Plant developed and finalized<sup>7</sup> in accordance with the Scope Book.

“**Energy Yield Guarantee**” shall have the meaning set forth in Section 9.4(a).

“**Energy Yield Liquidated Damages**” means, with respect to any Energy Yield Test Period, an amount equal to (i) [●] multiplied by (ii) the ratio of (a) the Expected Energy Yield for such Energy Yield Test Period minus the Actual Energy Yield for such Energy Yield Test Period divided by (b) the Expected Energy Yield for such Energy Yield Test Period.

“**Energy Yield Test**” means, with respect to the PV Plant, the test described in the Scope Book to determine compliance with the Energy Yield Guarantee, all performed in accordance with the requirements of this Agreement, including the Scope Book and the remainder of the Performance Standard.

“**Energy Yield Test Period**” means each of (i) the one-year period commencing at the start of the day on the Energy Yield Test Start Date and ending at the end of the day before the first anniversary of the Energy Yield Test Start Date and (ii) the one-year period commencing at the start of the day on the first anniversary of the Energy Yield Test Start Date and ending at the end of the day before the second anniversary of the Energy Yield Test Start Date.

“**Energy Yield Test Start Date**” means the Substantial Completion Payment Date.

“**Environment**” means the environment, including any of the following media and any living organism or systems supported by any such media: (i) land, including surface land, sub-surface strata, sea bed and riverbed under water (as described in clause (ii) hereof) and any natural structures; (ii) water, including coastal and inland waters, navigable waters, surface waters, ground waters, drinking water supplies and water in drains and sewers, surface and sub-surface strata; and (iii) air, including indoor and outdoor air and air within buildings and other man-made or natural structure above or below ground.

“**Environmental Assessment**” means an environmental site assessment with respect to the Project and the Project Site prepared by the Environmental Consultant on behalf of Seller and Buyer for purposes of, among other things, satisfying CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(B), and the regulations thereunder defining “all appropriate inquiry,” 40 CFR Part 312, and ASTM E1527-13, including a vapor intrusion assessment per ASTM E 2600.

“**Environmental Attributes**” means all emission reduction credits, renewable energy credits, green certificates, green tags, and any other renewable energy or Environmental characteristic, claim, credit, benefit, emission reduction, offset, allocation, allowance, or other attribute attributed to or associated with the Project.

“**Environmental Claim**” means any notice, claim, suit (whether in law or in equity), demand, or other communication by any Person alleging or asserting a Party’s or any other Person’s actual or potential Liability for investigation, response, investigation costs, cleanup, or

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<sup>7</sup> **NTD:** The Energy Model will need to reflect a P50 under expected site conditions that equals or exceeds the P50 included in Seller’s bid.

Remediation costs, compliance costs, enforcement costs, response costs, fees, defense costs, capital expenditures (whether incurred to construct, repair, restore, replace, Remediate, or modify any of the Project Assets as necessary for a Party to perform its obligations under this Agreement or otherwise), or the funding necessary therefor, actual damages, consequential damages, punitive damages, claims for contribution or indemnity, damages to natural resources or other property, personal injuries (including those arising from or related to toxic torts), fines, or penalties, based on or resulting from, in whole or in part, (i) the presence or Release of any Hazardous Substance at any location, whether or not on property owned by such Person, or (ii) circumstances forming the basis of any violation or alleged violation of or legal Liability pursuant to any Environmental Law, Environmental Claims include claims for Remediation or costs associated with Remediation, or claims for nuisance arising out of matters of the Environment.

**“Environmental Condition”** means (i) the presence or Release of a Hazardous Substance in the Environment with respect to the Project or the Project Site that is in violation of an Environmental Permit or that is not allowed, approved or permitted by an Environmental Permit for which there is an obligation under Environmental Law to engage in any monitoring, investigation, assessment, treatment, cleanup, containment, removal, mitigation, reporting, response or restorative work, or which concerns a matter over which a Governmental Authority has imposed requirements or obligations under Environmental Laws, or (ii) a violation of Environmental Law.

**“Environmental Consultant”** means [●], or such other recognized environmental consulting firm as shall be selected by Buyer and reasonably acceptable to Seller.

**“Environmental Laws”** means all Laws and Environmental Permits, whether of federal, state or local issuance, relating to pollution or protection of the Environment, natural resources or human health and safety (to the extent related to Hazardous Substances or other matters pertaining to the Environment), including remediation standards and treaties and international agreements to the extent having force of law, and any applicable legally binding judicial or administrative interpretation thereof, including such applicable Orders, consent decrees, or judgments, relating to pollution or for the protection of the Environment (including natural resources) or human health and safety (to the extent related to Hazardous Substances or other matters pertaining to the Environment), including Laws relating to Releases of Hazardous Substances or the manufacture, processing, distribution, use, treatment, storage, transport, disposal or handling of Hazardous Substances, including CERCLA, the Federal Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*, the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 *et seq.*, the Toxic Substances Control Act, 15 U.S.C. §§ 2601 through 2629, the Oil Pollution Act, 33 U.S.C. § 2701 *et seq.*, the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11001 *et seq.*, the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.*, the Solid Waste Disposal Act (42 U.S.C. § 6901 *et seq.*), OSHA (to the extent related to Hazardous Substances or other matters pertaining to the Environment), the Safe Drinking Water Act, 42 U.S.C. § 300f through 300j, [●] and any

and all similar Laws of the United States of America, [●],<sup>8</sup> or any other Governmental Authority having jurisdiction over the Work, the Project, the Project Site, or Seller.

**“Environmental Liability”** means any Loss that is attributable to (i) any Environmental Condition or any related Environmental Claim or (ii) any event, action, or omission occurring or condition or circumstance in violation of any Environmental Law.

**“Environmental Permit”** means any Permit required, issued, or administratively continued under or pursuant to any Environmental Law, including any Order, consent decree, judgment, or binding agreement issued or entered into by a Governmental Authority under any applicable Environmental Law pertaining to the Project or the Project Site.

**“EPC Contract”** means a contract for the engineering, procurement and construction of all or substantially all of the Project to be entered into between Seller and EPC Contractor.

**“EPC Contractor”** means a Contractor to be selected by Seller from the list of Project EPC Contractors identified in the Scope Book.]

**“Equity Interests”** means shares of capital stock, partnership interests, membership interests in a limited liability company, beneficial interests in a trust, or other equity ownership interests in a Person, and any warrants, options, or other rights entitling the holder thereof to purchase or acquire any such Equity Interest.

**“ERIS”** means energy resource interconnection service (as defined in the MISO Tariff), or the equivalent if MISO discontinues or modifies such service.

**“ERISA”** means the Employee Retirement Income Security Act of 1974.

**“ERISA Affiliate”** means any trade or business (whether or not incorporated) that is or ever has been (i) a member of a “controlled group of corporations” or under “common control” or a member of an “affiliated service group” (within the meaning of Sections 414(b), (c), or (m) of the Code) with Seller or any of its Affiliates, (ii) required to be aggregated with Seller or any of its Affiliates under Section 414(o) of the Code, (iii) under “common control” with Seller or any of its Affiliates within the meaning of Section 4001(a)(14) of ERISA, or (iv) treated as, or deemed to be, a single employer with Seller or any of its Affiliates within the meaning of Section 4001(b)(1) of ERISA or Section 414 of the Code.

**“ESI”** means Entergy Services, Inc.

**“Estimated Closing Adjustment”** has the meaning set forth in Section 17.7(a).

**“Estimated Closing Statement”** has the meaning set forth in Section 17.7(a).

**“Estimated Purchase Price”** has the meaning set forth in Section 17.7(a).

**“ETI Transmission”** means Entergy Texas, Inc., as transmission owner.

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<sup>8</sup> NTD: Insert applicable state and local laws and the name of the state in which the Project is located.

“**ETI Transmission System**” means the transmission system of ETI Transmission that is used to provide transmission services under the MISO Tariff, including the ETI Transmission System Interconnection Facilities.

“**ETI Transmission System Interconnection Facilities**” means the “Transmission Owner’s Interconnection Facilities”, as such term is defined in the GIA.

“**ETI Transmission System Interconnection Facilities Cap**” shall have the meaning set forth in Section 20.16(c)(i)(A).

“**Exchange Act**” means the Securities Exchange Act of 1934.

“**Excluded Assets**” has the meaning set forth in Section 16.2.

“**Excluded Liabilities**” has the meaning set forth in Section 16.4.

“**Excluded Project Contracts**” has the meaning set forth in Section 16.2(b).

“**Excluded Project Intellectual Property Rights**” means the Buyer Project Intellectual Property Rights and, except to the extent licensed to Buyer or any other Buyer Project Intellectual Property User, the Retained Rights.

“**Existing Title Commitment**” means [●].<sup>9</sup>

“**Expected Energy Yield**” means, in respect of an Energy Yield Test Period, the aggregate energy at the Electrical Interconnection Point (in MWh AC) that results from running (using actual Project Site conditions) the Energy Model with respect to the PV Plant for such Energy Yield Test Period, as adjusted<sup>10</sup> in accordance with the Scope Book.

“**Extraordinary Transaction Proposal**” has the meaning set forth in Section 20.9(a).

“**Federal Investment Tax Credit**” means the energy credit described in Section 48 of the Code.

“**FERC**” means the Federal Energy Regulatory Commission.

“**Final Completion**” means that: (i) Substantial Completion has occurred; (ii) Seller has successfully completed, in accordance with the terms of this Agreement and free from Defects, any and all Punchlist Items on the Punchlist and all other Work; (iii) Buyer has approved the statement distributing the entire Purchase Price against the retirement units listed on Exhibit J-1, as contemplated by Section 20.8(c); (iv) Seller has provided evidence, in form and substance reasonably satisfactory to Buyer, that all Encumbrances against or applicable to the Project Assets have been released or extinguished and that there are no Encumbrances arising out of the Work against or applicable to the Project Assets, other than Permitted Encumbrances; (v) Seller has delivered to Buyer a complete and accurate list of all (a) Transferred Closing Tangible

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<sup>9</sup> **NTD:** Describe recent title commitments with respect to the Project Site, if any.

<sup>10</sup> **NTD:** Downtime attributable to Defects will count against Seller (i.e., those periods will be included) in calculating Expected Energy Yield during each Energy Yield Test Period.

Personal Property and Transferred Post-Closing Tangible Personal Property, (b) Transferred Closing Project Contracts and Transferred Post-Closing Project Contracts, (c) Transferred Closing Warranties and Transferred Post-Closing Project Warranties, (d) Transferred Closing Intellectual Property Ownership and Contract Rights and Transferred Post-Closing Intellectual Property Ownership and Contract Rights, and (e) all Non-Assigned Assets; (vi) Seller has delivered to Buyer complete and accurate copies of engineering, design, and construction drawings and plans related to the Project, including as-built drawings and all deliverables required to be provided to Buyer at Final Completion pursuant to the Scope Book; (vii) Seller has delivered lien waivers, in form and substance reasonably satisfactory to Buyer, from all Major Contractors and Subcontractors; and (viii) Seller has demobilized and removed, and has caused its Contractors and Subcontractors to have demobilized and removed, all personnel and all of Seller's and its Contractors' and Subcontractors' equipment, materials, and other items (including temporary structures, facilities, systems, and improvements and excluding, for the avoidance of doubt, Project Assets) from the Project Site and has left the Project Site in the condition required by Section 4.1(a). The date of such Final Completion shall be determined in accordance with Section 7.4.

***“Final Completion Termination Trigger Date”*** means the date that is [●] ([●]) days after the date on which Substantial Completion has been achieved.

***“Final Project Performance Test”*** has the meaning set forth in Section 9.2(f).

***“Final Project Performance Test Results”*** has the meaning set forth in Section 9.2(f).

***“Financing Encumbrances”*** means the Encumbrances affecting any Project Asset that were granted in connection with Seller's or any of its Affiliate's Indebtedness.

***“Financing Parties”*** means the Person(s) (including any trustee or agent on behalf of such Person(s)) providing financing or refinancing to or for the benefit of Seller for the performance of the Work in accordance with this Agreement.

***“FNTP Date”*** has the meaning set forth in Section 7.1(b).

***“FNTP Expiration Date”*** means [\_\_\_\_\_].

***“FNTP Tax Opinion”*** has the meaning set forth in Section 20.7(j).

***“Force Majeure”*** has the meaning set forth in Section 14.1(a).

***“Full Deliverability”*** means (i) the interconnection of the Project to the ETI Transmission System with ERIS in a quantity equal to at least the Minimum ERIS, and NRIS in a quantity equal to at least the Minimum NRIS, for the life of the Project, (ii) deliverability of at least [\_\_]<sup>11</sup> MW from the Project to Buyer's load on a firm network resource basis for the life of the Project, and (iii) qualification and recognition by MISO of the Project as a firm network resource and, if sought, Capacity Resource (as defined in the MISO Rules) with the deliverability described in clause (ii) of this definition.

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<sup>11</sup> **NTD:** Insert Guaranteed PV Plant Capacity.

**“Fundamental Buyer Representations”** has the meaning set forth in Section 24.3(a)(iii).

**“Fundamental Seller Representations”** has the meaning set forth in Section 24.3(a)(i).

**“GAAP”** means generally accepted accounting principles as in effect from time to time in the United States, applied on a consistent basis.

**“GIA”** means the Generator Interconnection Agreement specific to the Project by and among Seller, ETI Transmission, and MISO, including all agreements, exhibits, and attachments thereto.

**“Good Industry Practices”** means those practices, methods, and acts engaged in or approved by a significant portion of the solar photovoltaic electric generation industry in MISO South with respect to assets and properties of a type and size similar to those constituting the Project during the relevant time period that, in the exercise of reasonable judgment in light of the facts known at the time the decision is made, would have been expected to accomplish a desired result consistent with good business practices, reliability, and safety and in compliance with all Laws and applicable Permits. Good Industry Practices are not limited to the optimum practices, methods, or acts to the exclusion of others, but rather in the range of practices, methods, and acts that meet the requirements of the immediately preceding sentence.

**“Goods”** means the machinery (mobile or otherwise), equipment, systems, vehicles, pumps, fittings, tools, furniture, furnishings, meters and metering equipment, Consumables, or other property purchased by Seller from its Contractors and Subcontractors to be incorporated into the Work or included as a Project Asset.

**“Governmental Authority”** means any federal, state, regional, local, foreign, or other governmental subdivision, regulatory, or administrative agency, commission, body, court, tribunal, arbitral panel, or other authority (including FERC, NERC, and SERC, any balancing authority (including MISO), and any other transmission provider) exercising or entitled to exercise any administrative, executive, judicial, legislative, police, regulatory, Tax, or other authority or power over the matters specified or, if such matters are not specified, over Seller, Entergy Corporation, Buyer, or ESI, each to the extent related to any matter relating to the Work, the Project, the Project Site, or the Transactions, and each as applicable.

**“GSU”** means the main step-up transformer for the Project.

**“Guaranteed LD Performance Test Requirements”** means the Guaranteed PV Plant Capacity.

**“Guaranteed PV Plant Availability”** means a PV Plant Availability of one hundred percent (100%).

**“Guaranteed PV Plant Capacity”** means a PV Plant Capacity of [●] kW (AC).

**“Guaranteed Substantial Completion Date”** means [\_\_\_\_\_].



**“Hazardous Substance”** means and includes any hazardous or toxic substance or waste, any contaminant or pollutant or any chemical, element, compound, mixture, or substance, whether solid, liquid, or gaseous, regulated as toxic, hazardous, or otherwise injurious or deleterious under applicable Environmental Laws, including (i) natural gas, petrochemical, or petroleum products, oil, coal ash, radioactive materials, radon gas, asbestos, or asbestos-containing material, polychlorinated biphenyls, or transformers or other equipment that contains polychlorinated biphenyls, lead-based paint, or urea formaldehyde foam insulation, (ii) any and all chemicals, materials, substances, or wastes defined or regulated as “hazardous substances,” “hazardous materials,” “hazardous constituents,” “restricted hazardous materials,” “extremely hazardous substances,” “hazardous wastes,” “extremely hazardous wastes,” “restricted hazardous wastes,” “toxic substances,” “toxic pollutants,” “toxic air pollutants,” “pollutants,” “contaminants,” or words of similar meaning and regulatory effect, including as the foregoing may be defined under any Environmental Law, and (iii) any and all other chemicals, materials, wastes, pollutants, or substances, the exposure to or treatment, storage, transportation, use, disposal, or Release of which is prohibited, limited, or regulated by any applicable Environmental Law.

**“Holdback Amount – Closing”** means [●].<sup>12</sup>

**“Imaged Document”** has the meaning set forth in Section 26.2.

**“Indebtedness”** means, with respect any Person, without duplication, (i) the unpaid principal amount of, and accrued interest on, all indebtedness for borrowed money of any such Person, including indebtedness for borrowed money in favor of such Person or any of its Affiliates, or payment obligations issued or incurred in substitution or exchange for payment obligations for borrowed money, (ii) amounts owing as deferred purchase price for property or services, including “earn-out” payments, (iii) commitments or obligations by which any such Person assures a creditor against loss, including contingent reimbursement obligations with respect to letters of credit, (iv) payment obligations secured by an Encumbrance on assets or properties of such Person, (v) all obligations of such Person evidenced by bonds, debentures, mortgages, notes, or other similar instruments or debt securities, (vi) all unreimbursed obligations in respect of letters of credit and bankers’ acceptances issued for the account of any such Person that have been drawn, (vii) obligations to repay deposits or other amounts advanced by and owing to third parties, (viii) obligations as lessee under capitalized leases, and (ix) all guaranties of any Person in connection with clauses (i) through (viii) above.

**“Indemnatee”** means a Person entitled to indemnification under this Agreement.

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<sup>12</sup> **NTD:** If third party construction financing is contemplated, Buyer anticipates paying approximately 75% of the Purchase Price at the Closing so that Seller can release lender liens. The Holdback Amount – Closing would then be approximately 25% of the Purchase Price, which would be paid at the Substantial Completion Payment Date less the Punchlist Holdback Amount and any indemnity claims existing at the time of payment. For Projects not utilizing third party construction financing, Buyer anticipates making a payment of approximately 20% of the Purchase Price at the Closing, with the remainder to be paid at the Substantial Completion Payment Date less the Punchlist Holdback Amount and any indemnity claims existing at the time of payment. Bidders should indicate whether they will use third party construction financing and require the higher payment at the Closing to release all liens. Additional provisions may be added or existing provisions may require modification depending on how the Project is financed.

“**Indemnitor**” means a Person against whom indemnification is sought under this Agreement.

“**Independent Accounting Firm**” means [●] or such other nationally recognized, independent accounting firm as is mutually appointed by Seller and Buyer for purposes of this Agreement; provided, however, that such Independent Accounting Firm shall not have been engaged by Seller, Buyer, or any of their respective Affiliates as its principal auditor during the preceding three (3) years.

“**Initial Post-Closing Adjustment**” has the meaning set forth in Section 17.7(d).

“**Initial Project Performance Test**” has the meaning set forth in Section 9.2(b).

[“**Intellectual Property**” means domestic or foreign patent rights, trade secrets, copyrights, or other intellectual property and proprietary rights.

“**Intellectual Property Rights**” means (i) all proprietary or other legally enforceable rights and privileges throughout the world with respect to Intellectual Property, including license and similar rights, provided under any Contract or any Law under any jurisdiction that provides protective or other similar rights for Intellectual Property and (ii) all rights to sue and recover damages for infringement, dilution, misappropriation, or other violation of such rights.]

“**Intended Use**” means the construction, ownership, possession, use, operation, maintenance, and repair of the Project as contemplated under this Agreement without any increase in the cost of owning, possessing, using, operating, maintaining, or repairing the Project or the Project Site from and after the Closing.

“**Interest Rate**” means, for any date, the lesser of (i) the per annum rate of interest equal to the prime lending rate as may from time to time be published in *The Wall Street Journal* on such day (or if not published on such day, on the most recent preceding day on which such prime lending rate is published) and (ii) the maximum lawful rate permitted by Law.

“**Interim Milestone**” means each of the critical path milestones set forth in the Project Schedule (other than Substantial Completion and the Substantial Completion Payment Date).

“**Interim Milestone Date**” means, with respect to each Interim Milestone, the milestone date for such Interim Milestone as set forth in the Project Schedule, as may be adjusted by any Change Order.

“**Inventory**” means any and all of the parts, equipment, supplies, and other items of inventory intended to be used or consumed at the Project in the ordinary course of the conduct of the Business, including (i) Consumables, (ii) new, repaired, or refurbished equipment, components, assemblies, or sub-assemblies, (iii) spare, replacement, or other parts (including capital and non-capital spare parts), (iv) tools, special tools, or similar equipment, and (v) all associated materials, supplies, and other goods and other similar items of movable property.

[“**IP Rider**” has the meaning set forth in Section 5.3(b)(iii).]

“*ITC Tax Counsel*” has the meaning set forth in Section 20.7(j).

“*Knowledge*” means the extent of the knowledge, as of the applicable time, of the individuals listed in Schedule 1.1A, with respect to Seller, or Schedule 1.1B, with respect to Buyer, in each case after the due inquiry by such individuals (or their replacements or successors) of other individuals employed by the applicable Party or any of its Affiliates who would reasonably be expected to have knowledge of relevant facts, events, circumstances, conditions, occurrences, or other matters.

“*kW*” means kilowatt.

“*Land*” has the meaning specified in Section 16.1(a).

“*Laws*” means all applicable federal, state, local, municipal, foreign, or other laws, constitutions, statutes, rules, regulations, ordinances, Orders, treaties, codes, and other legal requirements issued, enacted, adopted, promulgated, implemented, or otherwise put into effect by or under the authority of any Governmental Authority, including the common law, Environmental Laws, FERC rules and regulations, MISO Rules (or tariffs, rules, requirements, policies, and procedures of any other applicable balancing authority), and NERC requirements, including the NERC reliability standards promulgated pursuant to 18 CFR Part 39.

“*Leased Real Property*” has the meaning set forth in Section 16.1(b).

“*Letter of Credit*” means an irrevocable, standby letter of credit, in the form attached hereto as Exhibit L, issued by a U.S. commercial bank or the U.S. branch office of a foreign bank, where such letter of credit bank has (i) (x) if such letter of credit bank has a local long-term issuer credit rating by Standard & Poor’s Corporation and senior unsecured long-term debt rating by Moody’s Investor Service, Inc., a local long-term issuer credit rating of “A-” or better by Standard & Poor’s Corporation and a senior unsecured long-term debt rating of “A3” or better by Moody’s Investor Service, Inc. or (y) if such letter of credit bank has a local long-term issuer credit rating by Standard & Poor’s Corporation or a senior unsecured long-term debt rating by Moody’s Investor Service, Inc., but not both, a local long-term issuer credit rating of “A-” or better by Standard & Poor’s Corporation or a senior unsecured long-term debt rating of “A3” or better by Moody’s Investor Service, Inc. and (ii) total assets of at least Ten Billion Dollars (\$10,000,000,000).

“*Liability*” means any liability or obligation (whether known or unknown, asserted, or unasserted, accrued or unaccrued, liquidated or unliquidated, and due or to become due).

“*Losses*” means any and all demands, claims, suits, fines, penalties, obligations, damages, losses, Liabilities, payments, costs, and expenses, including interest payable as part thereof, reasonable legal, accounting, consultant, and other fees and expenses in connection therewith, and costs and expenses incurred in connection with investigating, preparing, or settling any Action.

“*Major Contractor and Subcontractor*” means any Contractor or Subcontractor, as applicable, having a Contract with Seller or a Contractor or any director or indirect subcontractor

of a Contractor, as applicable, to perform any part of the Work, the value of which Contract(s) exceeds One Hundred Thousand Dollars (\$100,000).

“**Major Project Hardware**” means the PV Modules, the PCUs, the GSU and the Trackers, collectively, or any of them, as the context may require.

“**Major Warranties**” means (i) the warranties and guaranties under (A) the EPC Contract (and any replacement thereof, in whole or in part), (B) any material balance of plant engineering, procurement and construction Contract with a Subcontractor, and (C) any Contract with respect to Major Project Hardware, and (ii) any credit support therefor.

“**Material Adverse Effect**” means, with respect to Seller, any occurrence set forth in clause (a) or (b) of this definition, and, with respect to Buyer, any occurrence set forth in clause (a) of this definition:

(a) any fact, event, circumstance, or condition materially impairing such Party’s authority, right, or ability to perform or consummate, or otherwise have a material adverse effect on such Party’s ability to perform or consummate, any of its material obligations under this Agreement or any Ancillary Agreement to which it is a party or the Transactions; or

(b) any fact, event, circumstance, or condition that, individually or in the aggregate, would reasonably be expected to have any change (or changes taken together) in, or effect on, the Project Assets or the Project that is materially adverse to the development, designing, engineering, procurement, financing, construction, installation, testing, ownership, possession, use, operations, maintenance, repair, or physical condition of the Project Assets or the Project taken as a whole, except that any such fact, event, circumstance, or condition due to the following occurring after the Effective Date shall be excluded from this clause (b) for purposes of Section 7.1(a)(xiv)(C) (Seller’s no Material Adverse Effect certification for FNTP) and Section 21.9 (Buyer’s no Material Adverse Effect Closing condition):

(i) a change in the economic conditions of the national or regional electric industry generally affecting such national or regional electric industry as a whole and not having a materially disproportionate effect on the Project Assets or the Project relative to other solar photovoltaic electric generation facilities located in [●]<sup>13</sup> and registered with MISO as a generation resource participating in the MISO markets;

(ii) a general change in the price of Goods, services, equipment, materials, or other supplies or components, including Consumables, for the Project Assets or the Project;

(iii) a general change in market prices for real estate;

(iv) a general change in market prices for the sale and purchase of electric generating facilities or capacity, capacity-related benefits, electric energy, or Other Electric Products;

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<sup>13</sup> **NTD:** Insert the state, region, or city in which the Project is located, depending on balancing authority coverage.

(v) an act of terrorism, war (whether or not declared), or military action, excluding acts that cause physical damage to the Project or electric transmission, transportation, or water or commodity delivery service to, or electric transmission service or water/effluent/waste disposal from, the Project or prevent, materially restrict, or impair the Intended Use of the Project, or any climate change;

(vi) a change in United States or global economic conditions affecting capital or financial markets generally; and

(vii) the execution or delivery of this Agreement, compliance with the terms of this Agreement or any Ancillary Agreement, the consummation of the Transactions, or the public announcement or other publicity with respect to any of the foregoing.

**“Mechanical Completion”** means that: (i) the Project is mechanically and electrically complete and pre-operational testing (including all functionality tests contemplated by the Scope Book to be conducted prior to, or as part of achieving, Mechanical Completion) has been successfully completed; (ii) the components and systems of the Project have been assembled, constructed, and installed and the Project is ready to commence commissioning, testing, and operation per the Work; (iii) all required system interfaces for the Project are complete and all process and safety systems for the Project are ready for operational testing per the Work; (iv) the Project satisfies the requirements of, and is in compliance with, the applicable interconnection agreements (including the GIA) and any other Required Deliverability Arrangements and all Laws and applicable Permits; (v) Seller has delivered lien waivers, in form and substance reasonably satisfactory to Buyer, from all Major Contractors and Subcontractors with respect to all Work performed prior to Mechanical Completion; and (vi) *[reserved]*. The date of such Mechanical Completion shall be determined in accordance with Section 7.2.

**“Minimum ERIS”** means [●] MW of ERIS.<sup>14</sup>

**“Minimum NRIS”** means [●] MW of NRIS.<sup>15</sup>

**“Minimum Performance Test Requirements”** means the Minimum PV Plant Availability and the Minimum PV Plant Capacity.

**“Minimum PV Plant Availability”** means a PV Plant Availability of ninety-nine percent (99%).

**“Minimum PV Plant Capacity”** means a PV Plant Capacity of [●]<sup>16</sup> kW (AC).

**“MISO”** means the Midcontinent Independent System Operator, Inc.

**“MISO Agreement”** means the MISO Agreement, dated of even date herewith, by and among Buyer, Seller, and Seller Parent Guarantor, and attached hereto as Exhibit B.

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<sup>14</sup> **NTD:** This amount should be equal to at least the maximum energy capability of the Project (even if it exceeds the Guaranteed PV Plant) and any agreed tolerance/adder.

<sup>15</sup> **NTD:** This amount must be at least the Guaranteed PV Plant Capacity plus any agreed tolerance/adder.

<sup>16</sup> **NTD:** Insert 95% of the Guaranteed PV Plant Capacity.

“**MISO Rules**” means, collectively, (i) the MISO Tariff, (ii) the MISO Business Practice Manuals (as defined in the MISO Tariff), and (iii) all other applicable binding policies, rules, guidelines, procedures, protocols, standards, criteria, instructions, directives, and requirements of MISO.

“**MISO Tariff**” means the MISO Open Access Transmission, Energy and Operating Reserve Market Tariff on file with FERC.

“**MW**” means megawatt.

“**NERC**” means the North American Electric Reliability Corporation.

“**Network Upgrades**” has the meaning set forth in the MISO Tariff.

“**Network Upgrades Cap**” shall have the meaning set forth in Section 20.16(c)(i)(C).

“**Non-Assigned Asset**” has the meaning set forth in Section 20.5(c).

“**Non-Defending Party**” has the meaning set forth in Section 24.5(e).

“**Notice of Claim**” has the meaning set forth in Section 24.5(a).

“**Notice Period**” has the meaning set forth in Section 24.5(b).

“**NRIS**” means network resource interconnection service (as defined in the MISO Tariff), or the equivalent if MISO discontinues or modifies such service.

“**Off-Site Real Property**” means any real property owned or controlled by Seller or any of its Affiliates and used (or to be used) in connection with the Project other than the Project Site.

“**Opinion of Tax Counsel**” means a legal opinion from ITC Tax Counsel substantially in the form of Exhibit Q.

“**Optional Project Performance Re-Test**” has the meaning set forth in Section 9.2(c).

“**Order**” means any legally binding order, injunction, judgment, decree, ruling, writ, or assessment of a Governmental Authority or decision of an authorized arbitrator.

“**Organizational Documents**” means the articles of incorporation, certificate of incorporation, certificate of formation, bylaws, operating agreement, certificate of limited partnership, partnership agreement, and all other similar documents, instruments, or certificates executed, adopted, or filed in connection with the creation, formation, or organization of a Person, including amendments thereto.

“**Original Works**” has the meaning set forth in Section 5.3(c)(ii).

“**OSHA**” means as the context requires, the Occupational Safety and Health Administration or Occupational Safety and Health Act of 1970.

**“Other Electric Products”** means all of the services and products associated with capabilities or operational attributes or regulatory treatment of an electric generating unit, including the capability to provide ancillary services (e.g., reactive supply and voltage control), reserves, operational functions, and other power generation-related services and products.

**“Owned Real Property”** has the meaning set forth in Section 16.1(a).

**“Party”** or **“Parties”** has the meaning set forth in the introductory paragraph of this Agreement.

**“PBG”** has the meaning set forth in Section 18.19.

**“PCU”** means each DC to AC inverter (or power conversion unit) in the Project.

**“Pending Claim”** means any claim for indemnification for which a Notice of Claim has been validly given by a member of the Buyer Group pursuant to Section 24.5(a).

**“Performance Standard”** has the meaning set forth in Section 2.1.

**“Permits”** means any and all (i) permits, registrations, licenses, franchises, certificates, and Consents of Governmental Authorities, including Environmental Permits, to the extent related to the Work or the Project, including the ownership, possession, use, operation, maintenance, or repair thereof, and (ii) pending applications for any new permit, registration, license, franchise, certificate, or Consent of any Governmental Authority or the renewal, extension, or modification of any permit, registration, license, franchise, certificate, or Consent of any Governmental Authority, to the extent related to the Work or the Project, including the ownership, possession, use, operation, maintenance, or repair thereof.

**“Permitted Encumbrances”** means (i) liens for Property Taxes and other charges and assessments of Governmental Authorities (x) that are not yet due and payable or (y) the validity of which is being contested in good faith by appropriate proceedings as described in Part I(A) of Schedule 1.1C, (ii) mechanics’, materialmen’s, laborers’, carriers’, workers’, repairers’, and other similar liens arising in the ordinary course of the performance of the Work by operation of Law for sums not yet due and payable and that have not been filed of record, (iii) the Financing Encumbrances described in Part I(B) of Schedule 1.1C and any and all other Encumbrances that will be and are discharged or released prior to or simultaneously with the Closing, (iv) Encumbrances with respect to any of the Project Assets and created by, through, or under Buyer, (v) Encumbrances in favor of Buyer resulting from this Agreement, (vi) the matters disclosed in [Items [●]] of Schedule [B, Section II] of the Existing Title Commitment, (vii) any Encumbrance that is susceptible of being cured by the payment of money if, on or before the Closing Date, Seller bonds over such Encumbrance at a ten percent (10%) premium in accordance with Law or otherwise in a manner reasonably satisfactory to Buyer, (viii) easements, rights-of-way, including utility rights-of-way, servitudes, covenants, conditions, and restrictions and other encumbrances burdens and defects, imperfections, or irregularities of title that do not, individually or in the aggregate, materially interfere with the use of the property burdened thereby, including the ability to install, construct, interconnect, operate, maintain, repair and remove the Project on the Project Site, or materially increase the cost of ownership, use, maintenance, repair, or removal thereof, and (ix) Encumbrances expressly agreed to or

waived by Buyer, including the matters deemed to be Permitted Encumbrances pursuant to Section 20.6(b)(iii) and Title Objections waived by Buyer pursuant to Section 20.6(e).<sup>17</sup>

“**Person**” means any individual, partnership, joint venture, corporation, limited liability company, estate, trust, association, or unincorporated organization, any Governmental Authority or any other entity.

“**Post-Closing Assignment and Assumption Agreement**” means the Post-Closing Assignment and Assumption Agreement, substantially in the form of Exhibit E-2, to be executed and delivered by Seller and Buyer in accordance with Section 11.2, if applicable.

“**Post-Closing Assumed Liabilities**” has the meaning set forth in Section 16.3(b).

“**Post-Closing Bill of Sale**” means a Post-Closing Bill of Sale, substantially in the form of Exhibit F-2, to be executed and delivered by Seller in accordance with Section 11.2, if applicable.

“**Post-Closing Confidentiality Agreement**” means the Amended and Restated Confidentiality Agreement to be executed and delivered by Seller Parent Guarantor and ESI, as agent for Buyer, at the Closing in the form attached hereto as Exhibit H.

“**Post-Closing Project Asset**” means any asset, interest, property, right, license, or Contract primarily relating to, used by or for, or held for use by or for the Project for which Seller obtains any right, title, or interest after the Closing Date and that would have constituted a Closing Asset if such asset, interest, property, right, license, or Contract had been transferred at the Closing, including any Transferred Post-Closing Environmental Attribute, Transferred Post-Closing Intellectual Property Ownership and Contract Right, Transferred Post-Closing Inventory, Transferred Post-Closing Permit, Transferred Post-Closing Project Contract, Transferred Post-Closing Tangible Personal Property, and Transferred Post-Closing Warranty.

“**Post-Closing Statement**” has the meaning set forth in Section 17.7(b).

“**Predecessor-in-Interest**” means any prior owner of, or predecessor-in-interest with respect to, the Project, including [●] and its Affiliates.

“**Project**” means, collectively, the PV Plant located on the Project Site and all related assets and properties, including the Electric Interconnection Facilities, Protective Apparatus, the Project Site, the Transferred Closing Tangible Personal Property, the Transferred Post-Closing

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<sup>17</sup> **NTD:** If Buyer is provided an Existing Title Commitment with respect to the Project Site, legible copies of any and all documents referenced therein as exceptions to title, an ALTA Land Title Survey that permits Buyer to adequately evaluate such exceptions, and adequate time to review such title documents and survey, Buyer can agree to diligence such exceptions and determine whether they are acceptable encumbrances on title; however, in no event will Buyer be required to agree to any exception related to monetary liens or that would, in Buyer’s opinion, have an adverse effect on the Project or the Project Site or the value of the Project or the Project Site.



Tangible Personal Property, and, subject to the other terms hereof, any additions thereto or replacements to any of the foregoing.<sup>18</sup>

**“Project Assets”** means, collectively, (i) the Closing Assets and (ii) the Post-Closing Project Assets.

**“Project Contract”** means any Contract, excluding this Agreement and, as and when executed, the Ancillary Agreements [*reserved*], to which Seller is a party, or by which Seller or any of the Project Assets is bound, that relates to or has the primary purpose of supporting the Work or the Project, including, for the avoidance of doubt, any Contract pursuant to which Seller or any of its Affiliates is licensed or granted the right to use, or holds or possesses, any Project Intellectual Property Rights.

**“Project Employee”** means any Employee of a Seller Service Provider.

**“Project Execution Plan”** has the meaning set forth in the Scope Book.

**“Project Financing Indebtedness”** means the Indebtedness incurred by Seller for the development, design, engineering, procurement, financing, construction, installation, commissioning, testing, ownership, possession, use, operation, maintenance, study, or repair of the Project.

[**“Project Intellectual Property Rights”** means all Intellectual Property Rights required (or provided by or through Seller) for the use and/or operation of the Project (including the Project Assets) by the Buyer Project Intellectual Property Users, other than the Excluded Project Intellectual Property Rights. Project Intellectual Property Rights include (i) licenses to use (a) Seller-Owned Project Intellectual Property (if any) embodied in a deliverable provided to Buyer pursuant to this Agreement and (b) all third party Intellectual Property, including software, and (ii) Seller-Owned Project Intellectual Property, to the extent conveyed to Buyer (or its designated Affiliate) under this Agreement.]

**“Project Operational Permits”** has the meaning set forth in Section 5.5(b).

**“Project Performance Test”** means, with respect to the Project, the test or tests described in the Scope Book to determine the PV Plant Availability and the PV Plant Capacity, all performed in accordance with the requirements of this Agreement, including the Scope Book and the remainder of the Performance Standard.

**“Project Performance Test Contractor”** means [●] or such other independent, experienced, and reputable contractor for performance testing of solar photovoltaic electric generating facilities as Buyer and Seller may agree upon in a writing signed by Buyer and Seller.

**“Project Performance Test Report”** has the meaning set forth in Section 9.1(e).

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<sup>18</sup> **NTD:** The definition of the term “Project” and the use of the terms “Project”, “Project Assets” and “Project Site” throughout this Agreement, including the Scope Book, remain under Buyer’s review. Subsequent drafts of the Agreement may reflect changes throughout the Agreement, including the Scope Book, once Buyer has completed its review.

***“Project Performance Test Results”*** has the meaning set forth in Section 9.1(e).

***“Project Recognition Agreement”*** means an agreement between MISO (or other applicable balancing authority) and Seller in which the Required Project Recognition is provided.

***“Project Recognition Request”*** has the meaning set forth in Section 20.16(d).

***“Project Schedule”*** means the then-current project schedule prepared in accordance with the Project Execution Plan.

***“Project Services”*** means the performance of services, including operation, management, administrative or similar services, for the Project, the development, design, engineering, procurement, financing, construction, installation, commissioning, testing, ownership, possession, use, operation, maintenance, study, or repair of the Project Assets or the performance of the Work.

***“Project Site”*** means (i) the Owned Real Property, (ii) the Leased Real Property, and (iii) the Easements.

***“Project Site Security Plan”*** has the meaning set forth in Section 12.1(b).

***“Project Tax Benefits”*** has the meaning set forth in Section 20.7(h).

***“Project Tax Benefits Document”*** has the meaning set forth in Section 20.7(i).

***“Project Warranty”*** means the Goods Warranty, the Design Warranty, the Non-Design Work Warranty, and the warranties described in Section 10.1(a), or any of them, as the context requires.

***“Project Work Permit”*** has the meaning set forth in Section 5.5(b).

***“Property Tax”*** means any Tax resulting from and relating to the assessment of real or personal property by any Governmental Authority.

***“Proposed Post-Closing Adjustment”*** has the meaning set forth in Section 17.7(b).

***“Proratable Tax Item”*** means the Property Taxes assessed with respect to the Project Site for the year in which the Closing occurs. For the avoidance of doubt, no Tax other than a Property Tax shall be a Proratable Tax Item.

***“Protective Apparatus”*** means such equipment and apparatus, including protective relays, circuit breakers and the like, necessary or appropriate to isolate the Project from the electrical system to which they are connected consistent with Good Industry Practices.

***“Punchlist”*** means the list of Punchlist Items for the period from Substantial Completion through Final Completion, prepared and established pursuant to Section 7.5(b).

**“Punchlist Holdback Amount”** means one hundred seventy-five percent (175%) of the aggregate cost to complete the Punchlist Items identified on the Punchlist.

**“Punchlist Item”** means an item that is minor in nature (*i.e.*, an item the non-completion of which will not affect the safe, reliable, efficient, and continuing ownership, possession, use, operation, maintenance, or repair of the Project), is part of the Work, and has not been completed as of Mechanical Completion or Substantial Completion, as applicable. Without limiting the foregoing, no item or matter that may prevent the Project from achieving Substantial Completion or may cause an outage of, or a reduction in the production or delivery of electrical power from, the Project or is by design an integral part of a system required for operation of the Project may be considered a Punchlist Item. Examples of typical Punchlist Items include completion of painting, landscaping, final Project clean up, and final grading.

**“Purchase Price”** has the meaning set forth in Section 17.4.

**“PV Module”** means each solar photovoltaic module incorporated into the Project.

**“PV Plant”** means the solar photovoltaic electric generation facility, with a PV Plant Capacity equal to at least the Minimum PV Plant Capacity, to be located and constructed in accordance with this Agreement on the Project Site, and all related assets and properties, including [●], ancillary equipment, the Electric Interconnection Facilities, Protective Apparatus, the applicable portions of the Project Site, the Transferred Closing Tangible Personal Property and the Transferred Post-Closing Tangible Personal Property, and, subject to the other terms hereof, any additions thereto or replacements to any of the foregoing. A general description of the PV Plant is provided in Schedule 1.1D.

**“PV Plant Availability”** means the PV Plant’s availability rate, expressed as a percentage, determined in accordance with the Scope Book and other applicable provisions of this Agreement pursuant to a Project Performance Test.<sup>19</sup>

**“PV Plant Capacity”** means the aggregate net generation capacity (AC) of the PV Plant at the Electrical Interconnection Point at Standard Test Conditions and expressed in whole kW (with a fractional kW amount below 0.5 being rounded down to the nearest whole kW and a fractional kW amount equal to or above 0.5 being rounded up to the nearest whole kW), determined in accordance with the Scope Book and other applicable provisions of this Agreement pursuant to a Project Performance Test.

**“Qualifying Counterparty”** means a Person that (i) has (or is an Affiliate of a Person that has) at least three (3) years’ experience engineering, procuring, constructing, operating and maintaining large-scale solar photovoltaic electric generation facilities in the Gulf Coast region of the United States aggregating to at least 250 MW, (ii) has (or has a guaranty of its obligations under this Agreement from a Person having) a tangible net worth of at least \$[●], and (iii) is not, and during the period commencing four (4) years prior to the date of an assignment of this Agreement to such Person has not been, involved in Action that is adverse to Entergy Corporation or any of its Affiliates that involves or involved, as the case may be, (a) the potential imposition of criminal liability on Entergy Corporation or any of its Affiliates (or its or their

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<sup>19</sup> **NTD:** PV Plant Availability will be calculated over a five (5) consecutive day period.

respective Representatives), (b) the potential imposition on Entergy Corporation or any of its Affiliates of new or additional adverse regulation, (c) claims against Entergy Corporation or any of its Affiliates (or its or their respective Representatives) for or of slander, libel, defamation, damage to reputation, or other similar legal claims, or (d) an amount in controversy exceeding One Million Dollars (\$1,000,000).

**“Real Property Leases”** has the meaning set forth in Section 16.1(b).

**“Recorded Documents”** has the meaning set forth in Section 20.6(a)(ii).

**“Related Person”** means, with respect to any Person, all past and present directors, officers, partners, members, managers, stockholders, Employees, controlling persons, agents, professionals, attorneys, accountants, investment bankers, Affiliates, or other Representatives of any such Person.

**“Release”** has the meaning set forth in Environmental Laws, including CERCLA, but also shall include any actual or threatened release, spill, leak, discharge, abandonment, disposal, pumping, pouring, emitting, emptying, injecting, leaching, dumping, deposit, or dispersal of, or allowing to escape or migrate into or through the Environment or any of the Project Site, any Hazardous Substance, including the migration of any Hazardous Substance into, under, on, through, or in the air, soil, subsurface strata, surface water, groundwater, drinking water supply, any sediment associated with any body of water, or any other environmental medium.

**“Remediate”** or **“Remediation”** means any action of any kind to address an Environmental Condition, or the Release or presence of Hazardous Substances into or in the Environment at the Project Site or any Off-Site Real Property, including (i) monitoring, investigation, assessment, treatment, clean-up, containment, remediation, removal, mitigation, response, or restoration work, (ii) obtaining any Permit necessary to conduct any such work, (iii) preparing and implementing any plan or study for such work, (iv) obtaining a written notice from a Governmental Authority with jurisdiction under Environmental Laws that no material additional work is required by such Governmental Authority, (v) any response to, or preparation for, any inquiry, hearing, or other proceeding by or before any Governmental Authority with respect to any such Environmental Condition, Release, or presence of Hazardous Substances, and (vi) any other activity that is appropriate or required under Environmental Laws to address an Environmental Condition, or the presence or Release of Hazardous Substances in or into the Environment at the Project Site or any other Off-Site Real Property.

**“Remedy”** means, with respect to any Defect, the full and complete repair or restoration of the Defect to good working order in accordance with Good Industry Practices, the Performance Standard, and the other requirements of this Agreement, including with respect to any engineering, design, procurement, construction, or installation performed by or for, or any operation or use by or for, Seller or its Affiliates in connection with such repair or restoration. The term “remedy,” “remedied,” or “remedying” (and similar terms) shall be broadly construed, and shall include or allow for the replacement of all or any portion of the Defect. Any Defect that includes parts, machinery, equipment, facilities, systems, or other items shall not be considered Remedied if (i) such “Remedy” addresses the effect, but not the cause of, such Defect or is otherwise temporary or transitional in nature, or such parts, machinery, equipment,

facilities, systems, or other items are not new and safely and properly connected to, or integrated and operating safely and properly with, the other machinery, equipment, facilities, systems, and/or items (if any) to which it is connected or integrated or with which it operates or (ii) (a) the operating performance and capabilities of such machinery, equipment, facilities, systems, or other items, or other machinery, equipment, facilities, systems, or other items constituting Closing Assets or Post-Closing Project Assets affected by the repair or restoration, shall have diminished as a result of such Defect or “Remedy,” or (b) the cost to operate and maintain such machinery, equipment, facilities, systems, or other items following such “Remedy” shall be greater as a result of such “Remedy,” in each case by more than a negligible and immaterial amount relative to (1) if such operating performance and capabilities or costs are available, the operating performance and capabilities or costs prior to the occurrence of the Defect or (2) if such operating performance and capabilities or costs are unavailable, the operating performance and capabilities or costs that are reasonable and customary for such machinery, equipment, facilities, systems, or items in new and undamaged condition and free of Defects. The “Remedy” of any design Defect or serial manufacturing Defect requires the retrofit or replacement of all affected components (even if the Defect has not yet manifested) in accordance with the requirements of this Agreement, including the Performance Standard.

“**Representatives**” means, as to any Person, its officers, directors, Employees, agents, partners, members, independent engineers, counsel, accountants, financial advisers, investment bankers and consultants.

“**Required Deliverability Arrangements**” means all reservations, Contracts, and other arrangements necessary to qualify for and obtain Full Deliverability. For the avoidance of doubt, the Required Deliverability Arrangements include the GIA and any other related agreement, including any Facilities Construction Agreement, Multi-Party Facilities Construction Agreement, and engineering, procurement, and construction contract for Stand-Alone Network Upgrades.

“**Required Project Performance Re-Test**” has the meaning set forth in Section 9.2(b).

“**Required Project Recognition**” has the meaning set forth in Section 20.16(a).

“**Retained Rights**” has the meaning set forth in Section 5.3(c)(i).

“**SC Transfer Date**” means the earlier of Substantial Completion and the Substantial Completion Termination Trigger Date.

“**Schedule Supplement**” has the meaning set forth in Section 20.13(a).

“**Scope Book**” means Exhibit A.

“**Seller**” has the meaning set forth in the introductory paragraph of this Agreement.

“**Seller Change of Control**” means an event or series of events by which (a) [●] shall cease to own and control, of record and beneficially, directly or indirectly, more than fifty percent (50%) of the aggregate ordinary voting power represented by the issued and outstanding Equity Interests of Seller on a fully diluted basis (which for this purpose shall exclude all Equity Interests that have not yet vested), or (b) [●] shall cease to have the ability to elect (either

through share ownership or contractual voting rights) a majority of the board of directors or equivalent governing body of Seller.

“**Seller Group**” has the meaning set forth in Section 24.2.

“**Seller Group Employee Claim**” has the meaning set forth in Section 2.7(b).

“**Seller-Owned Project Intellectual Property**” means Intellectual Property that is (i) created or owned by Seller or any Affiliate thereof and (ii) used exclusively in a Project Asset or for the Project.

“**Seller Parent Guarantor**” has the meaning set forth in the introductory paragraph of this Agreement.

“**Seller Project Manager**” means the individual designated as Seller’s designated representative pursuant to Section 3.2 to be responsible for managing all aspects of the Project on behalf of Seller.

“**Seller Service Affiliate**” means any Affiliate of Seller that provides services to Seller with respect to the Work.

“**Seller Service Provider**” means any of Seller, its Affiliates, and their respective Contractors or Subcontractors.

“**Seller Tax Certificate**” has the meaning set forth in Section 20.7(j).

“**Seller’s Consents**” means the notices to or Consents of any Person other than a Governmental Authority that are required to be made or obtained by or on behalf of Seller or any of its Affiliates prior to the Closing in order to avoid the violation or breach of, or the default under, or the creation of an Encumbrance on the Project Assets pursuant to, any Law or any Project Contract. Seller’s Consents are specified in Part I of Schedule 1.1F.

“**Seller’s Regulatory Approvals**” means, excluding any Permits, the notices to, applications or other filings with, or Consents of or from any Governmental Authority that are necessary for Seller to consummate the Transactions and to be made or obtained by or on behalf of Seller prior to the Closing. Seller’s Regulatory Approvals are specified in Part II of Schedule 1.1F.

“**Seller’s Required Consents**” means the Seller’s Consents marked with an asterisk on Part I of Schedule 1.1F.

“**SERC**” means the SERC Reliability Corporation.

“**Special Tools**” means tools or devices that are (i) provided by original equipment manufacturers or other Contractors or Subcontractors supplying Goods to Seller in connection with the performance of the Work and received by Seller and (ii) designed or intended specifically for use in connection with the construction, installation, testing, use, operation,

maintenance, repair, removal, or replacement of the Project or any portion thereof, including those listed on Schedule 1.1E.

***“Stand-Alone Network Upgrades”*** has the meaning given to it in the MISO Tariff.

***“Standard Test Conditions”*** means an irradiance in the plane of the photovoltaic panel tilt angle of one thousand (1,000) W/m<sup>2</sup> and a photovoltaic cell operating temperature of twenty-five degrees Celsius (25°C) and such other test conditions mutually agreed in writing by authorized representatives of Seller and Buyer.

***“Subcontractor”*** means any Person having a Contract with a Contractor or any direct or indirect subcontractor of Contractor to provide any Goods or perform any part of the Work. For the avoidance of doubt, the term “Subcontractor” includes Subcontractors of any tier.

***“Substantial Completion”*** means that: (i) Mechanical Completion has occurred and, since the date the Work achieved Mechanical Completion, no event or circumstance has occurred and is continuing that would cause any of the criteria described in the definition of “Mechanical Completion” to cease to be true; (ii) Seller has completed, in accordance with the terms of this Agreement and free from Defects, all Work other than the completion of the Punchlist Items on the Punchlist and the discharge of other Seller obligations under this Agreement concerning the Work following Substantial Completion; (iii) the Project has successfully completed start up, commissioning, and testing (including all functionality tests contemplated by the Scope Book to be conducted prior to, or as part of achieving, Substantial Completion) in accordance with the Performance Standard; (iv) the Project has achieved, after the Closing, initial synchronization with the ETI Transmission System and is available for normal and continuous operation and fully capable of reliably producing energy, capacity, capacity-related benefits, and Other Electric Products as contemplated by this Agreement and delivering the same to the ETI Transmission System at the Electrical Interconnection Point; (v) the Project’s meteorological stations and field sensors (collectively, the Project’s local control system (LCS)), communications, and telemetry equipment required by the Scope Book or other provisions of this Agreement or any Ancillary Agreement (a) have been properly programmed, installed, and interconnected to the appropriate ETI Transmission equipment and systems, (b) have been commissioned and tested, and (c) have demonstrated that they are fully capable of (1) safely, accurately, and reliably transmitting real-time data to ETI Transmission and (2) allowing for the receipt and use of such data by ETI Transmission, in each case, in accordance with the Scope Book and the Performance Standard; (vi) (A) Seller, the Project Performance Test Contractor, and the Project shall have successfully performed and completed the most recent Project Performance Test in accordance with the requirements of this Agreement, (B) Seller shall have delivered to Buyer (1) the Final Project Performance Test Results for such Performance Test, as prepared and certified by the Project Performance Test Contractor in accordance with the requirements of this Agreement, showing that all Minimum Performance Test Requirements were achieved and all other requirements for passing the applicable Project Performance Test were satisfied, (2) all certifications, approvals, data, documents, and instruments required to be provided under this Agreement in connection with such Project Performance Test Results, and (3) if such Final Project Performance Test Results show that the Guaranteed LD Performance Test Requirements were not achieved, a writing signed by Seller acknowledging its obligations to pay to Buyer, pursuant to a reduction in the Substantial Completion Payment Amount, the liquidated damages associated with the failure

of the Project to achieve the Guaranteed LD Performance Test Requirements in accordance with this Agreement; and (vii) the Punchlist has been approved by Buyer pursuant to Section 7.5(b).<sup>20</sup> The date of Substantial Completion shall be determined in accordance with Section 7.3.

**“Substantial Completion Payment Amount”** means an amount, which shall not be less than Zero Dollars (\$0), equal to (i) the unpaid portion of the Purchase Price, minus (ii) any outstanding amount claimed by Buyer, in a notice of indemnity claim delivered to Seller pursuant to Article XXIV (Indemnification), minus (vi) any amounts due by Seller to Buyer under this Agreement or any Ancillary Agreement and unpaid as of the Substantial Completion Payment Date, minus (vii) the Punchlist Holdback Amount.

**“Substantial Completion Payment Date”** means the date that is the tenth (10<sup>th</sup>) Business Day following the date on which the conditions set forth in Article XXIII (Conditions to Substantial Completion Payment Date), other than those conditions that by their nature are to be satisfied on the Substantial Completion Payment Date, have been either satisfied or waived by Buyer, or on such other date as the Parties may mutually agree in writing.

**“Substantial Completion Termination Trigger Date”** means the date that is [●] ([●]) days after the Guaranteed Substantial Completion Date, as may be adjusted by any Change Order.<sup>21</sup>

**“Substantial Completion Termination Notice”** has the meaning set forth in Section 7.3(c).

**“Survey”** has the meaning set forth in Section 20.6(a)(iii).

**“Suspension for Cause”** has the meaning set forth in Section 6.4.

**“Tax”** means any federal, state, local or foreign income, gross receipts, license, payroll, employment, excise, severance, production, stamp, occupation, premium, windfall profits, carbon, Btu, fuel, energy, utility, emissions, environmental, customs or import duties or other similar costs of importation, foreign value-added, tariff, capital stock, franchise, profits, withholding, social security (or similar), unemployment, disability, real property (including assessments, fees or other charges based on the use or ownership of real property, Property Tax, and ad valorem tax), personal property, transactional, sales, use, transfer, registration, value added, alternative or add-on minimum, estimated or other tax of any kind whatsoever, including any interest, penalty or addition thereto, whether disputed or not, including any item for which Liability arises as a transferee or secondary Liability in respect to any tax (whether imposed by Law, contractual agreement or otherwise), and any Liability in respect of any tax as a result of being a member of any affiliated, consolidated, combined, unitary or similar group.

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<sup>20</sup> **NTD:** Additional conditions for achieving Substantial Completion may be included depending on the particular proposed Project, Buyer’s need to capture certain benefits or attributes from the Project and other Buyer requirements for the Project, and Buyer’s diligence.

<sup>21</sup> **NTD:** Insert “ninety” and “90” as appropriate (unless there is an uneven distribution of Delay Liquidated Damages after the Guaranteed Substantial Completion Date).



“**Tax Return**” means any return, report, information return, declaration, claim for refund or other document, together with all amendments and supplements thereto, including all related or supporting information, required to be supplied to any Governmental Authority responsible for the administration of Laws governing Taxes, including information returns or reports with respect to backup withholding and other payments to third parties.

“**Termination Date**” has the meaning set forth in Section 25.1.

“**Termination for Cause Termination Fee (Post-Closing)**” has the meaning set forth in Section 25.4(a).

“**Termination Order**” has the meaning set forth in Section 25.1(d).

“**Third Party Claim**” means an Action instituted or threatened by any Person, other than one made or threatened by a member of the Seller Group or the Buyer Group, (i) for the enforcement of its rights under or relating to this Agreement or (ii) for which a specific remedy is provided under this Agreement. “Third Party Claim” shall include any claim, other than a claim by a member of the Seller Group or the Buyer Group, for the costs of conducting Remediation or seeking an Order or demanding that a Person undertake Remediation.

“**Title Commitment**” has the meaning set forth in Section 20.6(a)(i).

“**Title Insurer**” means First American Title Insurance Company, New York branch.

“**Title IV Plan**” has the meaning set forth in Section 18.19.

“**Title Objection**” has the meaning set forth in Section 20.6(b).

“**Title Objection Period**” has the meaning set forth in Section 20.6(b)(iii).

“**Title Policy**” has the meaning set forth in Section 21.12(a).

“**Title Policy Amount**” has the meaning set forth in Section 20.6(a)(i).

“**Total Outstanding Amount**” means the aggregate undrawn face amount of a Letter of Credit required to be maintained pursuant to Section 24.13(a).

“**Tracker**” means each racking/tracker unit for the PV Modules, including the structures (including posts, actuator arms, lower actuator mounts, torque tubes, module interface brackets, tables, and bearing assembly) supporting the PV Modules, the tracking hardware for the PV Modules and the associated control systems.

“**Training**” means the training required by the Scope Book.

“**Transactions**” means the build-own-transfer purchase and sale and related transactions contemplated by this Agreement and the Ancillary Agreements.

“**Transfer Tax**” means any sales, gross receipts, transfer, transaction, excise, value added, use, real property transfer, stamp, or other similar fee, governmental charge, or Tax,

including any related penalty, interest or other addition thereto, levied, assessed, or charged by any Governmental Authority in connection with, as applicable, the transfer of the Project Assets from Seller to Buyer and the Transactions or the transfer of all of Buyer's right, title, and interest in and to the Project to Seller.

***“Transferred Closing Environmental Attributes”*** has the meaning set forth in Section 16.1(n).

***“Transferred Closing Intellectual Property Ownership and Contract Rights”*** has the meaning set forth in Section 16.1(k).

***“Transferred Closing Inventory”*** has the meaning set forth in Section 16.1(e).

***“Transferred Closing Permits”*** has the meaning set forth in Section 16.1(g).

***“Transferred Closing Project Contracts”*** has the meaning set forth in Section 16.1(e).

***“Transferred Closing Tangible Personal Property”*** has the meaning set forth in Section 16.1(a).

***“Transferred Closing Warranties”*** has the meaning set forth in Section 16.1(i).

***“Transferred Post-Closing Environmental Attributes”*** means any Environmental Attribute for which title is transferred to Buyer after the Closing that would have constituted a Closing Asset if such Environmental Attribute had been transferred at the Closing.

***“Transferred Post-Closing Intellectual Property Ownership and Contract Rights”*** means any Seller-Owned Project Intellectual Property and Project Intellectual Property Rights with respect to or in connection with the Work or the Project for which title is transferred to Buyer after the Closing that would have constituted a Closing Asset if such Seller-Owned Project Intellectual Property and Project Intellectual Property Rights had been transferred at the Closing.

***“Transferred Post-Closing Inventory”*** means any Inventory for which title is transferred to Buyer after the Closing that would have constituted a Closing Asset if such Inventory had been transferred at the Closing.

***“Transferred Post-Closing Permits”*** means any Project Operational Permit for which title is transferred to Buyer after the Closing that would have constituted a Closing Asset if such Project Operational Permit had been transferred at the Closing.

***“Transferred Post-Closing Project Contracts”*** means any Project Contract for which title is transferred to Buyer after the Closing that would have constituted a Closing Asset if such Project Contract had been transferred at the Closing.

***“Transferred Post-Closing Tangible Personal Property”*** means any panels, Trackers, inverters, wiring, transformers, machinery (mobile or otherwise), equipment, vehicles, pumps, fittings, tools, furniture, furnishings, meters and metering equipment, and other property (including any installed software on the foregoing) that is located at the Project Site or acquired

by Seller specifically or primarily for use or consumption at the Project, including the Special Tools, assets temporarily off-site for repair or other purposes, assets being shipped to Seller or the Project Site, and assets housed or kept at Off-Site Real Property, for which title is transferred to Buyer after the Closing that would have constituted a Closing Asset if such panels, Trackers, inverters, wiring, transformers, machinery (mobile or otherwise), equipment, vehicles, pumps, fittings, tools, furniture, furnishings, meters and metering equipment, and other property (including any installed software on the foregoing) had been transferred at the Closing.

**“Transferred Post-Closing Warranties”** means any unexpired warranties, indemnities, and guarantees made or given by Seller, Contractors, Subcontractors (including manufactures, vendors, service providers, suppliers, architects, engineers, and consultants), or others in connection with the or relating to the Project for which title is transferred to Buyer after the Closing that would have constituted a Closing Asset if such warranties, indemnities, or guarantees had been transferred at the Closing.

**“WARN Act”** means the Worker Adjustment and Retraining Notification Act of 1988.

**“Warranty Period”** has the meaning set forth in Section 10.2(a).

**“Warranty Transfer Date”** means, with respect to each unexpired Transferred Closing Warranty or Transferred Post-Closing Warranty, as applicable, the date such Transferred Closing Warranty or Transferred Post-Closing Warranty, as applicable, is transferred to Buyer pursuant to Article X.

**“Work”** means all labor, engineering, design, procurement, supervision, planning, installation, inspecting, materials, operations, maintenance, managerial, intellectual property, communications, information technology, equipment, transportation, repair, replacement, removal, testing, commissioning, and other items or services necessary or appropriate to complete the Project in accordance with the Scope Book and the other terms and conditions of this Agreement and any applicable Ancillary Agreements and all work that is incidental to or reasonably can be inferred to be part of the work for which Seller is responsible, including all work not specifically mentioned herein but necessary for the development, design, engineering, procurement, construction, installation, commissioning, testing, ownership, possession, use, operation, maintenance, study, or repair (including Remedy) of the Project and Project Assets in accordance with the Scope Book and the other terms and conditions of this Agreement and any applicable Ancillary Agreement. For the avoidance of doubt, and without limiting Buyer’s rights hereunder after the Closing, the Work includes operation (subject to Buyer’s (or any of its Affiliate’s or agent’s) express instructions to Seller pursuant to Section 20.19 or the MISO Agreement) and maintenance of the Project, including technical support, during the period from the Closing through the Substantial Completion Payment Date, and warranty work pursuant to Article X.

**Section 1.2. Certain Interpretive Matters.** In this Agreement, unless the context otherwise requires or this Agreement otherwise specifies:

- (a) the singular number includes the plural number and vice versa;

(b) reference to any Person includes such Person's successors and assigns but, if applicable, only if such successors and assigns are permitted by this Agreement, and reference to a Person in a particular capacity excludes such Person in any other capacity;

(c) reference to any gender includes each other gender;

(d) reference to any agreement (including this Agreement), document, or instrument means such agreement, document, or instrument as amended, restated, supplemented, or otherwise modified and in effect from time to time in accordance with the terms thereof and, if applicable, the terms hereof;

(e) reference to any Article, Section, Schedule, or Exhibit means such Article, Section, Schedule, or Exhibit of or to this Agreement, and references in any Article, Section, Schedule, Exhibit, or definition to any clause means such clause of such Article, Section, Schedule, Exhibit, or definition unless otherwise specified;

(f) any accounting term used and not otherwise defined in this Agreement or any Ancillary Agreement has the meaning assigned to such term in accordance with GAAP;

(g) "hereunder," "hereof," "hereto," and words of similar import are references to this Agreement as a whole and not to any particular Section or other provision hereof or thereof;

(h) "including" (and with correlative meaning "include" and other grammatical forms of the same) means including without limiting the generality of any description preceding or following such term;

(i) relative to the determination of any period of time, "from" means "from and including," "to" means "to but excluding" and "through" means "through and including;"

(j) reference to any Law (including statutes and ordinances) means such Law as amended, modified, codified, reformed, revised, supplemented, reenacted, or replaced, in whole or in part, and in effect from time to time, including rules and regulations promulgated thereunder;

(k) all calculations and computations pursuant to this Agreement shall be carried and rounded to the nearest two (2) decimal places;

(l) reference to any "day," "month," or "year" shall be to a calendar day, month or year;

(m) this Agreement and any documents or instruments delivered pursuant hereto, including the Ancillary Agreements, shall be construed without regard to the identity of the Person who drafted the various provisions of the same and any rule of construction that a document is to be construed against the drafting party shall not be applicable either to this Agreement or such other documents and instruments;

(n) the captions of the various Articles, Sections, Exhibits, and Schedules of this Agreement have been inserted only for convenience of reference and do not modify, explain, enlarge, or restrict any of the provisions of this Agreement;

(o) the terms “real property” and “real estate” shall be deemed to include immovable property; the term “fee estate” shall include full ownership; the term “personal property” shall be deemed to include movable property; the term “tangible property” shall be deemed to include corporeal property; the term “easements” shall be deemed to include servitudes and rights of use; and the term “buildings” shall be deemed to include other constructions;

(p) the term “statute of limitations” shall be deemed to include prescriptive periods;

(q) the terms “indemnification,” “indemnify,” and derivative words shall be deemed to include reference to any related compensation or reimbursement obligations (whether or not related to any Third Party Claim);

(r) all amounts in this Agreement are stated and shall be paid in United States currency;

(s) in the event of any conflict that cannot be reasonably reconciled between the provisions of this Agreement and those of any Exhibit or Schedule, the provisions of this Agreement shall control and prevail;

(t) a reference in this Agreement to “notice,” “claim,” “demand,” “request,” or any other communication, consent (or Consent), or agreement required to be in writing pursuant to Section 26.7 or other term of this Agreement shall be deemed to mean “written notice,” “written claim,” “written demand,” “written request,” “written consent” (or “written Consent”), “written agreement,” and the like, and the terms “notice,” “claim,” “demand,” “request,” “consent” (or “Consent”), and “agreement” and “written notice,” “written claim,” “written demand,” “written request,” “written consent” (or “written Consent”), and “written agreement” and the like shall have no distinction for purposes of the construction of this Agreement;

(u) if and to the extent the Scope Book or any other Exhibit, Schedule, or other attachment to this Agreement assigns or allocates any responsibility or Liability to an Affiliate, Contractor, Subcontractor, or Representative of Seller, then, as between Buyer and Seller, such responsibility or Liability shall be deemed to have been assigned or allocated to Seller; and

(v) a reference to “ETI Transmission” or any balancing authority (including local balancing authority and MISO) that includes the entity defined in this Agreement as Buyer shall be deemed to be a separate entity and separate contracting party from Buyer even if it is the same legal entity as Buyer or an Affiliate of Buyer, and even if any orders, directives, or other communications from such entities are communicated to Seller through Buyer. Without limiting the foregoing, the acts and omissions of ETI Transmission in its capacity as transmission owner

and any balancing authority (including local balancing authority and MISO) shall not be deemed to be acts and omissions of Buyer for any purpose arising out of or relating to this Agreement.

## **ARTICLE II. THE WORK**

**Section 2.1. Performance Standard.** Seller shall perform the Work, and shall cause each Contractor and Subcontractor to perform the Work contracted thereto, in a workmanlike manner using new materials and in accordance with, and so that the Project and the Project Assets comply with, (a) the Project Execution Plan, (b) Good Industry Practices, (c) all applicable manufacturer's recommendations, standards, and warranties, (d) all applicable requirements of Seller's insurance policies in respect of the Work, (e) all Laws and applicable Permits, including all Laws pertaining to development, design, engineering, procurement, financing, construction, commissioning, testing, ownership, possession, use, operation, health, safety, MISO Rules, NERC requirements, applicable codes and standards (including those specified in the Scope Book), the Environment, Taxes, land use, or labor, employment, or benefits (including employment compensation and benefits Laws and Laws regarding equal opportunity employment, non-segregated facilities, affirmative action, employment of the disabled, and utilization of small business concerns), (f) the Scope Book, (g) the Project Warranty, (h) the Project Contracts, (i) Engineering Materials (as defined in the Scope Book) approved by Buyer, and (j) all other applicable requirements of this Agreement and any Ancillary Agreement (collectively, the "***Performance Standard***"). In the event there is any inconsistency or conflict between or among any of the individual components of the Performance Standard with respect to an aspect of the Work, the most stringent standard shall apply, or if there is no most stringent standard, as determined by Buyer. Without limiting any of the foregoing, all Goods utilized in, and the workmanship of, the Project, the Project Assets, and the Work shall be of the respective character, quality, and kind required by this Agreement or any applicable Ancillary Agreement, including the Performance Standard.

**Section 2.2. Overall Project Responsibility.** Seller has carefully reviewed this Agreement, including the Scope Book, and concluded that it adequately addresses all material aspects of the Work, the Project, and the Project Assets, and, to the best of its Knowledge, is accurate. Seller shall be fully responsible for any and all aspects of the Work performed pursuant to this Agreement, including (a) all engineering, procurement, and construction-related means, methods, techniques, sequences, and procedures in connection with, and for coordinating all portions of, the Work, whether performed by Seller, any of its Affiliates, or any of their respective Employees, or any of Seller's or its Affiliates' Contractors or Subcontractors, and (b) all Work performed after the Closing. Without limiting the other applicable terms of this Agreement or any applicable Ancillary Agreement, Buyer shall not be responsible for, among other things, any failure of Seller to carry out the Work in accordance with this Agreement (unless and except to the extent such failure results from (i) a material breach or material default under this Agreement by Buyer or (ii) the fraud or willful misconduct of any member of the Buyer Group).

**Section 2.3. Project Diligence.** Seller acknowledges and agrees that, prior to the Effective Date, it has taken, in its opinion both as the [owner] [lessee] of the Project Site and a power generation facility owner and developer with substantial experience, directly and through

its Affiliates, in the development, design, engineering, procurement, financing, construction, installation, commissioning, testing, ownership, possession, use, operation, maintenance, study, repair, purchase, and sale of solar photovoltaic electric generation facilities, the steps necessary to investigate and ascertain the nature and location of the Work and the sufficiency of the Purchase Price to cause the Work to be performed and the Transactions to be completed in accordance with this Agreement, and has investigated and satisfied itself as to, and has factored into its determination that the Purchase Price is sufficient for performance of the Work and completion of the Transactions, the matters and conditions that can affect the time or ability to perform or the cost of the Work or the Transactions, or the Closing or the Substantial Completion Payment Date, including: (a) the general and local conditions at or affecting use of the Project Site, such as, for purposes of illustration only, availability and condition of roads, railways, and waterways, climate (including temperature, humidity, rainfall, and proximity to bodies of salt or fresh water), and seasonal conditions, physical conditions at the Project Site, including existing structures or buildings, Hazardous Substances, Project Site topography, ground surface and subsurface conditions (e.g., soil composition, compaction, drainage/hydrology), and underground obstructions or interferences; (b) the information and material included in the Scope Book; (c) the obligations and requirements of Seller under all Laws and Permits applicable to the Work, the Project (including the Project Site), including Laws relating to health and safety, hiring or employment, project engineering, procurement, and construction, licensing, Permits, Taxes, zoning, or building; (d) the conditions and contingencies bearing upon the transportation, delivery, receipt, handling, storage, disposal, use, or cost of equipment, material, and other items relating to the Work; (e) the availability, reliability, and cost of utilities and related services during construction, commissioning, and testing of the Project; (f) the availability and cost of Contractors and Subcontractors, labor, and personnel to perform the Work and the competency and reliability of each; (g) the uncertainties of climate, weather, or similar conditions at the Project Site or affecting the Work; (h) the risk of (i) damage to the Project (including the Project Site), items used in connection with performance of the Work (including plant equipment and material), and other property, (ii) injury to individuals, whether located at or near the Project Site or elsewhere, (iii) delays in the schedule for and performance deficiencies and other Defects of the Project, (iv) incurring Liabilities in connection with the Work, including fines and penalties, and (v) not using and removing existing improvements and other assets that are Excluded Assets and the plan for the Work (in each case to the extent permitted in the Scope Book or otherwise provided for in this Agreement); and (i) all other matters that can affect performance or completion of the Work, including the cost or schedule associated with the performance of the Work. None of the foregoing shall relieve Seller from the schedule for, the costs of, or successfully performing the Work in accordance with the requirements of this Agreement, except to the limited extent expressly provided in Section 8.3.

**Section 2.4. Inspections.** Without limiting its other obligations under this Agreement, Seller shall inspect, examine, and, where applicable, test performance of the Work in accordance with the Scope Book and otherwise as would an experienced, reasonably prudent owner contracting with third parties for the engineering, design, procurement, financing, construction, testing, commissioning, completion, and long-term use of a solar photovoltaic electric generation facility of a similar size and configuration in a similar location at a similar site.

**Section 2.5. Scope Book.** Seller and Buyer agree that the Scope Book is intended, among other things, to establish the design parameters of the Project and was developed by Seller. BUYER HEREBY EXPRESSLY DISCLAIMS ANY RESPONSIBILITY OR LIABILITY OF ANY KIND WHATSOEVER FOR THE DESIGN OR ENGINEERING OF THE PROJECT OR ANY DESIGN OR ENGINEERING WORK PERFORMED (OR THAT SHOULD HAVE BEEN PERFORMED) HEREUNDER, AND SELLER HEREBY ADOPTS AS ITS OWN ALL OF THE ENGINEERING AND DESIGN WORK HEREUNDER AND WAIVES ANY CLAIM IT MAY HAVE AGAINST BUYER IN RESPECT OF SUCH WORK (EXCEPT CLAIMS FOR CHANGE ORDERS OR BREACH OF BUYER'S OBLIGATIONS HEREUNDER). SUBJECT TO THE OTHER TERMS OF THIS AGREEMENT, SELLER SHALL DEFEND, INDEMNIFY, AND HOLD HARMLESS EACH MEMBER OF THE BUYER GROUP FROM AND AGAINST ANY AND ALL CLAIMS AND LOSSES FOR PERSONAL INJURY, ILLNESS, OR DEATH TO ANY PERSON NOT SPECIFIED IN SECTION 24.1 OR PROPERTY DAMAGE RESULTING FROM THE NEGLIGENT, IMPROPER, OR FAULTY DESIGN OR ENGINEERING OF THE PROJECT OR ANY PROJECT ASSET, EVEN IF SUCH PERSONAL INJURY, ILLNESS, OR DEATH OR PROPERTY DAMAGE IS DUE OR ALLEGED TO BE DUE, IN WHOLE OR IN PART, TO THE NEGLIGENCE, FAULT, OR MISCONDUCT OF BUYER OR ANY AFFILIATE THEREOF IN FAILING TO REVIEW, PROPERLY COMMENT UPON, OR DISAPPROVE ANY OF SUCH WORK, IN CONDUCTING (OR FAILING TO CONDUCT) ANY INSPECTION OR TEST OF THE CONSTRUCTION OF THE PROJECT OR ANY PROJECT ASSET, IN COMMENTING UPON OR PROVIDING INPUT TO SELLER OR ANY OTHER MEMBER OF THE SELLER GROUP, OR IN TAKING OR FAILING TO TAKE ANY OTHER ACTION IN RESPECT OF THE ENGINEERING AND DESIGN WORK FOR WHICH SELLER IS RESPONSIBLE HEREUNDER. Seller shall ensure that the conceptual design and detailed design conforms to the Scope Book, as well as the other requirements of this Agreement, and will enable the Project to meet the Guaranteed LD Performance Test Requirements, Guaranteed PV Plant Availability, and Expected Energy Yield and Seller to achieve Final Completion. Without limiting any of its other obligations under this Agreement, Seller shall promptly notify and consult with Buyer if Seller or any of its Contractors or Subcontractors discovers any actual or apparent material error or inconsistency within the Scope Book or between the Scope Book and the main body of this Agreement or any Ancillary Agreement.

**Section 2.6. Consequence of Buyer Review or Approval.** SELLER ACKNOWLEDGES AND AGREES THAT NONE OF (A) THE REVIEW, CONSIDERATION, COMMENTING, INSPECTION, OBSERVATION, WITNESSING, APPROVAL, OR REJECTION (OR FAILURE TO REVIEW, CONSIDER, COMMENT, INSPECT, OBSERVE, WITNESS, APPROVE, OR REJECT) BY BUYER, ANY OF ITS AFFILIATES, OR ANY OF ITS OR THEIR RESPECTIVE REPRESENTATIVES, INCLUDING THE BUYER CONTRACT MANAGER, OF OR ON ANY PORTION OF THE WORK, INCLUDING DEVELOPMENT, DESIGN, ENGINEERING, PROCUREMENT, CONSTRUCTION, COMMISSIONING, AND TESTING WORK, WHETHER SUCH WORK IS PERFORMED BY SELLER OR ANY OF ITS CONTRACTORS OR SUBCONTRACTORS, OR (B) THE MAKING OF ANY REQUEST (INCLUDING ANY REQUEST THAT RESULTS IN A BUYER-DIRECTED CHANGE ORDER) BY BUYER, ANY OF ITS AFFILIATES, OR ANY OF ITS OR THEIR RESPECTIVE



REPRESENTATIVES, INCLUDING THE BUYER CONTRACT MANAGER, SHALL, UNDER ANY CIRCUMSTANCE, (I) CONSTITUTE OR SERVE AS A BASIS FOR ANY LIABILITY OF BUYER, ANY OF ITS AFFILIATES, OR ANY OF THEIR RESPECTIVE REPRESENTATIVES, (II) RELIEVE SELLER OF ANY OF ITS OBLIGATIONS HEREUNDER OR IN ANY WAY AFFECT OR REDUCE SELLER'S OBLIGATION TO COMPLETE THE WORK IN ACCORDANCE WITH THE REQUIREMENTS OF THIS AGREEMENT, OR (III) CONSTITUTE AN AGREEMENT THAT SUCH WORK IS IN COMPLIANCE WITH THE REQUIREMENTS OF THIS AGREEMENT.

### **Section 2.7. Seller's Relationship to Buyer.**

(a) Nothing in or contemplated by this Agreement is intended to create, or shall be construed as creating, a master-servant, principal-agent or owner-contractor relationship,<sup>22</sup> a partnership, joint venture, or other legal entity, or any ongoing or continuing relationship or commitment among the Parties other than as expressly and specifically set forth herein. Unless and except to the extent otherwise specified herein, neither Seller nor Seller Parent Guarantor shall have any authority or right on behalf of Buyer, to assume or create any obligation of any kind or nature, express or implied, on behalf of, or in the name of Buyer, nor bind Buyer in any respect, without the specific prior written authorization of Buyer. Any and all provisions of this Agreement that may appear to give Buyer the right to direct or control any Seller Service Provider or any Employee of any Seller Service Provider as to details of performing the Work, or to exercise any measure of control over the Work, shall be deemed to mean, and shall mean, that Seller shall follow the desires of Buyer in the results of the Work only and not in the means by which the Work is to be accomplished, and, without limiting Section 2.2, Seller and its Contractors and Subcontractors shall have complete control over the Work as to the manner, means, and details of performance of the Work.

(b) Without limiting Section 2.7(a), this Agreement does not establish any employment relationship between Buyer and any Employee of any Seller Service Provider or ERISA Affiliate or other member of the Seller Group, and no Employee of any Seller Service Provider or ERISA Affiliate or other member of the Seller Group shall be deemed to be an Employee of Buyer for any purpose. With respect to the Work performed under this Agreement or any Ancillary Agreement, any Seller Service Provider or any ERISA Affiliate or other member of Seller Group (excluding Buyer) shall be solely responsible and liable for the following: (i) payment of wages, salary, and other compensation for all Project Employees; (ii) as applicable, withholding and payment of federal, state, and local individual income taxes, FICA, and other Taxes and applicable amounts with respect to any payment made to Project Employees; (iii) as applicable, providing Project Employees all pension, welfare, and other employment-related benefits; and (iv) directing, controlling, and making all employment-related decisions relating to Project Employees. In the event any Employee of any Seller Service Provider or any ERISA Affiliate or other member of the Seller Group asserts any claim or commences any Action against Buyer relating to this Agreement, any action or conduct taken by Seller or Buyer in connection with this Agreement, or the performance of the Work (a "*Seller*

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<sup>22</sup> **NTD:** The nature of the relationship between Seller and Buyer after the Closing remains under review by Buyer's employment, benefits, and labor specialists. Additional representations, indemnities, and other terms (including this Article II and Article III, Section 18.18, and Section 18.19) may be required after Buyer's employment, benefits, and labor specialists have completed their review.

*Group Employee Claim*”), Seller shall (A) take, or cause the applicable Seller Group Member or Seller Service Provider to take, at the earliest opportunity, all steps reasonably necessary to have Seller or such Seller Group Member or Seller Service Provider determined to be the sole and exclusive employer and/or former employer of such Employee, (B) retain or assume, or cause the applicable Affiliate or Seller Service Provider to retain or assume, as applicable, all Liability with respect to such Seller Group Employee Claim, and (C) defend, indemnify, and hold harmless each member of the Buyer Group from and against any and all Seller Group Employee Claims and any and all Losses imposed upon or incurred by any member of the Buyer Group that arise out of or relate to any Seller Group Employee Claim, pursuant to the provisions of Article XXIV (Indemnification).

(c) Notwithstanding anything to the contrary in this Agreement, Buyer reserves all rights to raise any applicable statutory employer defense.

**Section 2.8. Compliance with Certain Laws.** Unless this Agreement is exempt from Executive Order 11246 under the rules and regulations of the United States Secretary of Labor, 41 CFR Part 60, and without limiting the Performance Standard, Seller agrees that during the performance of the Work it will fully comply with the provisions of the equal opportunity clause as set forth in Section 202 of Executive Order 11246 and 41 CFR Part 60–1.4(a)(1–7), which provisions are hereby incorporated by reference and made a part of this Agreement. Seller also agrees that, during the performance of the Work, and without limiting the Performance Standard, it will fully comply with all applicable immigration laws and the applicable equal opportunity provisions of the Rehabilitation Act of 1973 and applicable rules and regulations, 41 CFR Part 60–741 *et seq.*, and the Vietnam Era Veterans Readjustment Act of 1974 and applicable regulations, 41 CFR Part 60–2.50 *et seq.*, all of which are hereby incorporated by reference and made a part of this Agreement. Seller certifies that it does not and will not allow undocumented aliens to perform Work under this Agreement. Seller further certifies that it does not and will not maintain or provide for its Employees any facilities that are segregated by race, color, religion, or national origin, or permit its Employees to perform any services at any location under its control where segregated facilities are maintained, and Seller will obtain a similar certification from its Contractors and Subcontractors, as required by 41 CFR Part 60–1.8. Seller shall abide by, and cause its Contractors and Subcontractors to abide by, the requirements of (i) 41 CFR Part 60-300.5(a) prohibiting discrimination against qualified protected veterans and requiring affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans and (ii) 41 CFR Part 60-741.5(a) prohibiting discrimination against qualified individuals on the basis of disability and requiring affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified individuals with disabilities. Seller further agrees that, to the extent applicable, it will fully comply with the requirements of the Small Business Act, 15 U.S.C. Section 631 *et seq.*, and the Office of Procurement Policy Act, 41 U.S.C. Section 423 *et seq.*, as implemented in the Federal Acquisition Regulations found at 48 CFR Part 1 *et seq.*, all of which are hereby incorporated by reference and made a part of this Agreement.

**Section 2.9. Acknowledgment Regarding Obligation to Pay Contractors and Subcontractors.** As between Seller and Buyer, Seller acknowledges and agrees that it shall have the sole responsibility to pay its Contractors and Subcontractors for any and all amounts due in connection with the Work and, without prejudice to Buyer’s obligation to pay Seller the

Purchase Price according to the terms of this Agreement, Buyer shall have no Liability to remit any payment to Seller for or in connection with any Work performed by Seller or any of its Contractors or Subcontractors arising out of, related to or in conjunction with this Agreement. In addition, without limiting Buyer's other rights and protections under this Agreement, as between Seller and Buyer, Seller shall be solely responsible for the payment of all Project Employees' (a) wages or salaries; benefits such as vacation, sick leave, pension, holidays, medical, disability benefits, dental, and life insurance; workers' compensation, unemployment insurance, and any and all other amounts required to be paid by Law or applicable labor agreements, and (b) contributions, payroll taxes, and premiums payable under Law.

**Section 2.10. Acknowledgment Regarding Construction and Engineering Services.**

Each of Seller and Buyer expressly acknowledges and agrees that, notwithstanding anything to the contrary, (a) neither this Agreement nor any discussion, communication, offer, or negotiation in connection with the execution of this Agreement constitutes an offer, promise, or contract to perform construction services, engineering services, or any other professional or trade service for which licensure is required for or on behalf of Buyer by Seller or any of its Contractors or Subcontractors, and (b) Seller is not and will not be performing or offering to perform any professional or trade service for which licensure is required or on behalf of Buyer under this Agreement or otherwise in connection with the Project.

**Section 2.11. Purchase Price Payment and Seller's Post-Closing Work Obligation Acknowledgments.** Notwithstanding anything to the contrary, Seller acknowledges and agrees that (a) Buyer's obligation to purchase the Closing Assets from Seller is subject to the terms and conditions of this Agreement, including the satisfaction (or waiver) of the conditions to the Closing set forth in Article XXI (Buyer's Conditions to Closing), (b) Buyer will not make progress or similar advance payments of the Purchase Price to Seller and the Purchase Price will be payable in three (3) installments due on each of the Closing Date, the Substantial Completion Payment Date, and the date on which Final Completion is achieved, and subject to adjustment from time to time as described in this Agreement, (c) if the Closing does not occur, Seller will retain all of the Project Assets, subject to limited exceptions set forth in Section 25.2, and (d) if the Closing occurs, Seller's obligation to cause the Work to achieve Substantial Completion and Final Completion and to perform its other obligations under this Agreement will continue and, except to the extent provided in fully executed and delivered Post-Closing Assignment and Assumption Agreements and Section 25.2, will not be assumed by Buyer.

**Section 2.12. Special Tools.** Seller shall obtain, unload, provide, and maintain an inventory of, store in accordance with the Performance Standard, and deliver to Buyer at the Closing, one (1) complete set of any Special Tools required for operation, maintenance, or repair of the Project. If Seller performs any work after the Closing to Remedy a Defect in accordance with Article X (Warranty), Buyer shall make all such Special Tools available to Seller upon request. Seller shall repair promptly to a condition free of any Defect or replace promptly with an equal or superior product any such Special Tool that is damaged or lost while in Seller's possession or control.

**ARTICLE III.**  
**PERSONNEL MATTERS; CONTRACTING AND SUBCONTRACTING**

**Section 3.1. Seller's Personnel; Objectionable Conduct.**

(a) Seller shall provide and make available, and/or shall cause its Contractors and Subcontractors to provide and make available, all such labor and professional, supervisory, and managerial personnel required for the proper and timely execution, completion, and maintenance of the Work in accordance with the Performance Standard, including technical assistants that are skilled and experienced in their respective trades and callings and skilled, semi-skilled, and unskilled labor. Seller's personnel, and that of its Contractors and Subcontractors, shall be fully competent, qualified, licensed (to the extent required by Laws or applicable Permits), and experienced in the duties to which they are assigned, and shall meet the other requirements herein. Seller shall have sole authority and responsibility to employ, discharge, and otherwise direct and control its Employees, Contractors, and Subcontractors; provided, however, that, strictly in connection with its performance of the Work, Seller shall not employ, or permit any Contractor or Subcontractor to employ, any unfit individual or anyone not skilled in the portion of the Work assigned to such individual.

(b) Buyer shall have the right, at any time after the Closing Date, to object to and request the removal of any individual employed or utilized at the Project Site by Seller or any of its Contractors or Subcontractors who, in Buyer's good faith opinion, conducts himself or herself improperly, is abusive, disorderly, careless, incompetent, or negligent in the performance of his or her duties, disregards the terms of this Agreement, or whose presence on the Project Site is otherwise deemed by Buyer in its good faith opinion to be interfering with or threatening to the performance of the Work in accordance with this Agreement or the timely completion of the Work in accordance with the Project Schedule. Upon receipt of such request, Seller shall cause, at its sole cost and expense, such individual to cease further participation in the performance of the Work, and such individual shall be removed from the Project Site by Seller or its Contractor or Subcontractor and shall perform no portion of, and have no more involvement in, any of the Work without the written consent of Buyer, which may be withheld in its sole discretion. Any such objection or request by Buyer under this Section 3.1 is intended to and shall be construed to pertain only to the applicable individual's involvement in or effect on the Work and not to any other work performed by such individual. BUYER SHALL HAVE NO LIABILITY FOR CLAIMS OR LOSSES ARISING OUT OF OR IN CONNECTION WITH THE REMOVAL OF ANY EMPLOYEE OF SELLER SERVICE PROVIDER FROM THE WORK FOLLOWING A REQUEST THEREFOR BY BUYER AND, SUBJECT TO THE OTHER TERMS OF THIS AGREEMENT, SELLER SHALL DEFEND, INDEMNIFY, AND HOLD HARMLESS EACH MEMBER OF THE BUYER GROUP FROM AND AGAINST ANY AND ALL SUCH CLAIMS MADE OR ASSERTED OR LOSSES INCURRED OR SUSTAINED BY ANY THIRD PARTY (INCLUDING ANY EMPLOYEE OF ANY SELLER SERVICE PROVIDER).

**Section 3.2. Seller Project Manager.** Seller designates as the initial Seller Project Manager the following individual to serve as the liaison to Buyer with respect to this Agreement:

Seller Project Manager: [●]

Phone: [●]  
Email: [●]

Seller may, from time to time upon written notice to Buyer, change the Seller Project Manager and the Seller Project Manager's contact details. Buyer may object to any such change, and Seller shall give due consideration in good faith to any such objection by Buyer and shall reasonably address any of Buyer's related concerns and objections. The Seller Project Manager shall give his or her personal attention to the prosecution of the Work, and shall be present on the Project Site as needed following commencement of construction activities comprising the Work and regularly during its progress.

**Section 3.3. Buyer Contract Manager.** Buyer designates as the initial Buyer Contract Manager the following individual to serve as the liaison to Seller with respect to this Agreement:

Buyer Contract Manager: [●]  
Phone: [●]  
Email: [●]

Buyer may, from time to time upon written notice to Seller, change the Buyer Contract Manager and the Buyer Contract Manager's contact details. The Buyer Contract Manager shall not have the authority to amend or waive any terms of this Agreement or to execute any Change Order; provided, however, that the Buyer Contract Manager shall have the authority to authorize a Change Notice as provided in Section 8.2 or a Change Order that modifies the scope of the Work but does not result in a modification to the Guaranteed Substantial Completion Date, the Substantial Completion Termination Trigger Date, the Closing Expiration Date, or the Purchase Price.

**Section 3.4. Buyer Contract Administrator.** Buyer designates as the initial Buyer Contract Administrator the following individual to serve as the liaison to Seller with respect to this Agreement:

Buyer Contract Administrator: [●]  
Phone: [●]  
Email: [●]

Buyer may, from time to time upon written notice to Seller, change the Buyer Contract Administrator and the Buyer Contract Administrator's contact details. The Buyer Contract Administrator shall have primary responsibility for assuring proper routing, review, and execution of any and all Change Orders by Buyer.

**Section 3.5. Contracting and Subcontracting.**

(a) Seller accepts responsibility as a principal for its agents, Contractors, Subcontractors, and all others it hires or otherwise engages to perform or assist in the performance of the Work. Buyer shall have the right, but not the obligation, to review the qualifications of each Person performing any portion of the Work.

(b) Seller shall select or permit to perform the Work only qualified, reputable, competent, and appropriately licensed Contractors or Subcontractors with an established record of successful performance in their respective trades of the Work they are contracted to perform. Seller shall obtain Buyer's prior written approval (which shall not be unreasonably withheld, conditioned, or delayed) for any of the Work at the Project Site if the applicable Contractor or Subcontractor does not meet each of the following four safety criteria:

(i) The Contractor or Subcontractor shall have been in business for at least three (3) years at the time of contracting;

(ii) The Contractor's or Subcontractor's Experience Modification Rate (EMR) shall be equal to or below .99 measured over the past three (3)-year period;

(iii) The Contractor's or Subcontractor's latest full year Recordable Index Rate (RIR) or Recordable Accident Index (RAI) shall be equal to or below eighty percent (80%) of the North American Industrial Classification System Code (NAICS); and

(iv) The Contractor or Subcontractor shall have zero (0) fatalities over the latest three (3)-year period.

In the event Seller believes there is a compelling business reason to utilize a Contractor or Subcontractor for Work at the Project Site that does not satisfy all of the requirements set forth in clauses (i)-(iv) immediately above, Seller shall present Buyer with an explanation in writing specifying the rationale and plan for utilizing such Contractor or Subcontractor as part of the request for Buyer's prior written approval.

(c) If requested by Buyer, Seller shall promptly advise Buyer of the identity of any Contractor or Subcontractor used for any portion of the Work not performed at the Project Site.

(d) No Contract between Seller and any of its Contractors or with any of its Subcontractors relating to the Work or the Project shall be deemed to release Seller from any Liability to Buyer under, or arising by virtue of, this Agreement, and, with respect to any claim or other Action brought by Buyer against Seller under, or arising by virtue of, this Agreement, Seller shall be responsible for all acts or omissions of its Contractors and Subcontractors relating to the Work or the Project, including any of the work, services, equipment, machinery, materials, items, or other goods provided by its Contractors or Subcontractors.

### **Section 3.6. Diverse Subcontracting.**

(a) Seller shall use commercially reasonable efforts to provide opportunities to small and small disadvantaged businesses (as such businesses are defined by the Small Business Administration or by the Federal Acquisition Regulations) for participation in Contracts, including subcontracts and purchase orders, entered into by or for Seller in the performance of the Work. Seller may consult with Buyer's Representative with the title of "Supply Chain Director, Strategic Sourcing," or his or her designee, for assistance in identifying potential Contractors and Subcontractors that qualify as one of the foregoing businesses.

(b) Nothing contained in this Section 3.6 is intended to imply or to impose any obligation on the part of Seller to pay a premium or use unqualified Persons in order to utilize Contractors or Subcontractors that qualify as small or small disadvantaged businesses. Consistent with good business practices, Seller shall fulfill these requirements while maintaining competitive prices for goods and services procured from all Contractors and Subcontractors.

(c) The contact details for Buyer's Supply Chain Director, Strategic Sourcing, are:

Rivers Frederick  
Supply Chain Director,  
Strategic Sourcing  
Entergy Services, Inc.  
L-ENT-4A  
639 Loyola Ave.  
New Orleans, LA 70113  
(504) 576-4924  
**rfreder@entergy.com**

Buyer may change its Supply Chain Director from time to time and may replace or update his or her contact details under this Section 3.6(c) on written notice to Seller.

**Section 3.7. Labor Relations.** Seller shall be responsible for all labor relations matters relating to the Work. Seller shall use commercially reasonable efforts to employ, hire, use, or direct labor, Contractors, and Subcontractors in a manner that does not cause or lead to conflict, interference, or disputes with or between the various trades involved in the Work, delay performance of the Work, or adversely affect Seller's other obligations under or in connection with this Agreement. In addition, Seller shall use, and shall cause its Contractors and Subcontractors to use, commercially reasonable efforts to maintain good working relations (a) between and among union personnel (if any) and other personnel employed by any Seller Service Provider in connection with the Work and (b) with and among Buyer (including the Buyer Contract Manager), unions interested in but not performing work at the Project Site, property owners, residents, and other Persons bordering or near the Project Site, affected sporting and recreational groups, the general public, and Governmental Authorities.

#### **ARTICLE IV. USE OF PROJECT SITE; HAZARDOUS SUBSTANCES**

##### **Section 4.1. Use of Project Site and Off-Site Real Property.**

(a) At all times during performance of the Work, Seller shall keep, and shall cause its Contractors and Subcontractors to keep, its work areas, including the Project Site, in a neat, clean, orderly, and workmanlike appearance in accordance with the Performance Standard and in a safe condition, as further described in the Project Execution Plan. As a condition to achieving Final Completion, Seller will be required to dispose of, lawfully and appropriately, all rubbish, unused materials, and other equipment and materials belonging to it or used in the performance of the Work and not constituting Project Assets. If Seller fails to keep or leave the

Project Site in a neat, clean, orderly, and safe condition in accordance with the Performance Standard, Buyer shall notify Seller and, if Seller does not commence corrective action within three (3) Business Days and continue to diligently pursue such corrective action, Buyer may take all actions necessary to do so at Seller's cost and expense.

(b) Without limiting Section 2.3 or Section 5.7, Seller's duties hereunder shall include planning the routes for delivery of all Goods to be brought into the Project Site by making use of such roadways, waterways, and railways as may safely accommodate loads and sizes of deliveries. If the Work involves transportation of over-sized loads or construction under or about public roads, waterways, or railroads, Seller and its Contractors and Subcontractors shall make suitable arrangements with Governmental Authorities and railroads to ensure that other users of the roadways, waterways, and railways are safeguarded from accident and/or delay as a result of such transportation. Any roadway, bridge, sidewalk, tree, vegetation, landscaping, grounds, or other property damaged as a result of the Work shall be properly repaired or duly replaced by Seller at its expense to the extent required by Law.

(c) Seller shall install and maintain fencing and other security measures for the Project Site and the area at the Project Site for Seller to unload, store, and deliver from storage to the Project Site all Goods and other supplies, equipment, materials, or property to be supplied by Seller for the performance of the Work under this Agreement in accordance with the requirements of this Agreement, including the Scope Book, the Project Site Security Plan, and the Performance Standard. Seller shall perform, or cause its Contractor or Subcontractors to perform, receipt inspections of Goods and other supplies, equipment, materials, or property to be included in the Project, provided to Buyer as a Project Asset, or used to perform the Work and shall be responsible for the reporting of damaged goods, shortages, and other defects or shipping issues to the responsible carrier or vendor. If storage facilities on the Project Site and methods of storage are not described in the Scope Book, the location of storage shall be as agreed by Seller and Buyer in writing.

#### **Section 4.2. Hazardous Substances.**

(a) Unless and except to the extent reasonably necessary to perform the Work, Seller shall not, and shall not permit any of its Employees or other Representatives or any Employee or other Representative of any of its Contractors or Subcontractors to, bring any Hazardous Substances onto the Project Site or transport, handle, store, or use any Hazardous Substances in connection with the Work, except in accordance with all Laws and applicable Permits. Without limiting Seller's indemnification obligations in Article XXIV (Indemnification), except to the extent Buyer is responsible for the same pursuant to Section 4.2(c), Seller shall bear full responsibility and Liability in respect of any Hazardous Substance that (i) is brought onto or Released from any portion of the Project Site by any Person while the same was under Seller's care, custody, and control, (ii) arises out of any action, omission, event, or condition taken, made, occurring, or created outside of the Project Site while the same was under Seller's care, custody, and control, or (iii) arises out of any action, omission, event, or condition taken, made, occurring, or created by Seller or any of its Affiliates, Contractors, or Subcontractors. Without limiting Buyer's indemnification obligations in Article XXIV (Indemnification), Buyer shall bear full responsibility and Liability for any Hazardous Substance that arises out of any action, omission, event, or condition taken, made,



occurring, appearing, or created at any portion of the Project Site while the same was under Buyer's care, custody, and control, except to the extent Seller is responsible for the same as provided immediately above. Seller shall transport, handle, store, use, and properly dispose of Hazardous Substances in accordance with the requirements of the Performance Standard, including this Section 4.2.

(b) To the extent that Seller is required to transport, handle, store, use, or dispose of any Hazardous Substance, including any contaminated soil, water, or material resulting from a Release of a Hazardous Substance (or Remediation of a Release) for which Seller is responsible in the performance of the Work, Seller shall comply with all Laws and applicable Permits, including Environmental Laws, and the other requirements of the Performance Standard, in transporting, handling, storing, using, and disposing of the same. Seller shall permit only properly trained (and, to the extent required by Laws or applicable Permits, licensed), competent, and qualified Employees of Seller or its Contractors or Subcontractors to transport, handle, store, use, and dispose of Hazardous Substances under the supervision of properly trained (and, to the extent required by Laws or applicable Permits, licensed), competent, and qualified personnel. Before the Closing, Seller shall remove any and all Hazardous Substances used, placed, stored, or located in, on, above, or under the Project Site, except those Hazardous Substances, if any, that are intended under this Agreement to be a part of the Work tendered to Buyer or are to be transferred by Seller to Buyer at or before Closing as part of Seller's obligations hereunder or that are Buyer's responsibility under this Section 4.2.

(c) Upon Seller's discovery or receipt of notice, directly or indirectly, of the existence of a Hazardous Substance on, in, above, or under the Project Site (other than a properly contained and stored or utilized Hazardous Substance that is intended under this Agreement to be a part of the Work tendered to Buyer or to be transferred by Seller to Buyer at or before the Closing or is reasonably necessary to perform the Work) or any Release or possible Release of a Hazardous Substance in connection with or potentially affecting the Work or the Project Site, Seller shall: (i) issue prompt verbal notification thereof to Buyer; (ii) notify the appropriate Governmental Authorities and any other Person as and to the extent required by all Laws and applicable Permits after first providing to Buyer, to the extent reasonably possible, reasonable advance notice thereof and a reasonable opportunity to review and comment on any written communication to such Governmental Authorities (with any such comments of Buyer to be considered in good faith by Seller), or if such advance notice is not reasonably possible, promptly after giving such notice, inform Buyer that it has so notified such Governmental Authorities and Persons; (iii) promptly cease performance of any Work in the area known or suspected to contain Hazardous Substance(s) released or discovered by Seller; (iv) promptly, but in no event more than twenty (20) days after delivering verbal notice under clause (i) above (and reasonably in advance of delivery to any Governmental Authority), provide Buyer a written report setting forth reasonable details surrounding the discovery, a preliminary recommended course of action, and potential effect on the Project Schedule, including Substantial Completion and Final Completion; and (v) use commercially reasonable efforts to mitigate the effects of such discovery or notice on the performance of the Work. Without limiting Seller's indemnification obligations in Article XXIV (Indemnification), if there is a discovery or receipt of notice of any Hazardous Substance or any Release or possible Release thereof for which Seller is responsible under this Section 4.2, Seller shall promptly mitigate, or cause its Contractors or Subcontractors to promptly mitigate, the migration of and Remediate the same in accordance with the

Performance Standard, and any costs and expenses and any delay in performance of the Work incurred by Seller as a result thereof, whether arising out of the mitigation of the migration of, or the Remediation of, such Hazardous Substance shall be exclusively for Seller's account. Seller shall have no obligation to Remediate any Hazardous Substance or Release for which Buyer is responsible hereunder.

(d) Subject to the other terms of this Agreement, Seller shall promptly provide Buyer with copies of all data, results, and reports prepared by or for Seller, and all correspondence of Seller, directly or indirectly, with any Governmental Authority, regarding any Release of a Hazardous Substance in connection with the Work or this Agreement.

(e) Seller and Buyer acknowledge and agree that, in developing and performing any action under this Section 4.2, Seller shall utilize, to the extent not specifically precluded by Laws or applicable Permits, the following factors in developing the particular action(s) to be undertaken:

- (i) specific requirements, if any, of Laws or applicable Permits or Contracts;
- (ii) technical feasibility of the action(s);
- (iii) economic reasonableness of the action(s);
- (iv) effect on the Project Schedule;
- (v) continued industrial use of the Project Site; and
- (vi) the following human health and risk-based factors with respect to the Environment: (A) likely exposure pathways consistent with such industrial use; (B) typical simulated exposure distributions consistent with such exposures; (C) fate and transport characteristics; (D) local geology and hydrogeology; and (E) toxicity of the material(s) in question.

## **ARTICLE V. PROCUREMENT**

**Section 5.1. Procurement of Goods and Services.** Without limiting the other terms of this Agreement, Seller shall procure and provide, or cause its Contractors and Subcontractors to procure and provide, the services of all Persons, and procure and provide, or cause its Contractors and Subcontractors to procure and provide, all equipment, materials, systems, items, and other Goods necessary to perform and complete the Work and fulfill its obligations under this Agreement in accordance with the requirements of this Agreement.

### **Section 5.2. Procurement of Warranties.**

(a) Without limiting Article X (Warranty) (including Section 10.2(b)) or the Performance Standard, Seller shall obtain commercially available warranties in accordance with Good Industry Practices, guarantees, and other terms from each Contractor and Subcontractor for

the Work contracted to such Contractor or Subcontractor. Without limiting the foregoing, Seller shall cause all such warranties and guarantees (including those referenced in Section 10.2(b) or otherwise required by the Scope Book) to include Seller and, effective upon the Closing (or, with respect to any post-Closing Work involving any such warranty or guarantee, upon completion of such Work), Buyer as a direct, named beneficiary thereof with an independent right to enforce such warranties and guarantees; provided, however, that Seller shall be required to obtain and have in effect as of Closing, (i) warranties and guarantees from each Contractor or Subcontractor for the Major Project Hardware that satisfy the minimum warranty requirements set forth in the Scope Book and otherwise comply with this Section 5.2 and (ii) other Major Warranties that comply with this Section 5.2. Seller shall transfer its interest in the Transferred Closing Warranties at the Closing and the Transferred Post-Closing Warranties at the Substantial Completion Payment Date; provided that, notwithstanding such transfer and subject to Buyer's rights in the event of a Step-In Failure under Section 10.4(c), Seller (A) shall be exclusively (as between Buyer and Seller) permitted and obligated to directly administer, manage, and enforce such warranties and guarantees at its sole cost and expense until the end of the Warranty Period, and (B) shall at all times be entitled to any proceeds, services, or other benefits arising from such warranties and guarantees (including any enforcement thereof) to the extent provided by or on behalf of any warranty provider or guarantor and necessary for Seller to perform, or pay for the performance of, Seller's obligations hereunder. Without limiting the other provisions of this Agreement, Seller shall cooperate with and assist Buyer in the enforcement of each Transferred Closing Warranty and each Transferred Post-Closing Warranty assigned to Buyer (or required to be assigned to Buyer) and take such other and further actions as may be reasonable and necessary for Buyer to obtain the full benefit of each such Transferred Closing Warranty and Transferred Post-Closing Warranty (or required to be assigned to Buyer).

(b) Seller shall cause all warranties and guarantees (and any credit support therefor) to permit Seller to freely assign, transfer, and convey such warranty or guarantee (and any credit support therefor) to Buyer without the Consent of any Person, including, for the avoidance of doubt, without any requirement that Buyer or any Affiliate of Buyer enter into a new Contract with the counterparty (or any other Person), make any payment to such counterparty (or any other Person), or provide any other new consideration to such counterparty (or any other Person) as a condition to the effectiveness of such assignment, transfer, and/or conveyance.

(c) Seller shall include, or cause to be included, language to make Buyer (together with any successors and assigns of Buyer) an express third-party beneficiary with respect to the Major Warranties at all times.

(d) Without limiting Section 16.4 (Excluded Liabilities), Seller shall cause all Major Warranties, and any warranty or guarantee (or any credit support therefor) that has a term exceeding two (2) years after the Substantial Completion Payment Date, to be fully paid-up and irrevocable at, and not require any further payment or other commitments or other consideration to the applicable Contractor or Subcontractor after, the Substantial Completion Payment Date.

(e) Seller shall, upon procuring (or amending, supplementing or otherwise modifying) any Major Warranty or any warranty or guarantee (or any credit support therefor)

that has a term exceeding two (2) years after the Substantial Completion Payment Date, provide a complete and accurate copy thereof to Buyer.

### **Section 5.3. Procurement of Intellectual Property.**

(a) (i) As part of the Work, including any post-Closing Work, Seller shall be responsible for procuring and providing, or causing to be procured and provided, all Project Intellectual Property Rights, in accordance with the applicable terms of this Agreement. Buyer shall be responsible for procuring and providing the Buyer Project Intellectual Property Rights (if any) in accordance with Schedule 5.3.

(ii) Seller shall assign, convey, or otherwise transfer to Buyer (or its designated Affiliate), or cause to be assigned, conveyed, or otherwise transferred to Buyer (or its designated Affiliate), at the Closing (or, with respect to any post-Closing Work involving any Project Intellectual Property Right, in accordance with Section 11.2), certain Project Intellectual Property Rights in accordance with the applicable terms of this Agreement. Without limiting its other obligations in this Section 5.3, including Section 5.3(b)(i), Seller shall be responsible for obtaining prior to the Closing (or, with respect to any post-Closing Work involving any Project Intellectual Property Right, prior to the assignment, conveyance, or other transfer thereof to Buyer (or a designated Affiliate) pursuant to Section 11.2) any and all necessary Consents to each such assignment, conveyance, or other transfer to Buyer (or its designated Affiliate).

(iii) Seller shall be responsible for the timely payment of any consent, transfer, or other fee, charge, or cost in connection with any assignment, conveyance, or other transfer of any Project Intellectual Property Right hereunder to Buyer (or its designated Affiliate), other than costs Buyer incurs in providing the items or taking the actions described in clause (3) of the following sentence. No assignment, conveyance, or other transfer of any Project Intellectual Property Right, nor the maintenance thereof by Buyer, shall require (A) payment by Buyer (or any other member of the Buyer Group) to the holder or owner of such Project Intellectual Property Right or to any other Person in order to be effective or (B) the giving of other consideration of any kind or form by Buyer or any Affiliate of Buyer, or any Representative thereof, except (1) the written assumption by Buyer (or its designated Affiliate) of any Seller-Owned Project Intellectual Property or of any Project Contract granting the right to use any Intellectual Property of a third party included in the Project Intellectual Property Rights, (2) any modification of any such Project Contract necessary to reflect such assumption, (3) the entry by Buyer (or its designated Affiliate) into a reasonable confidentiality agreement required under any such Project Contract or in connection with the use of any Seller-Owned Project Intellectual Property Right, and (4) any modification of such Project Contract or new agreement or term that Buyer agrees to enter into or accept. Nothing in this Section 5.3 shall limit a Buyer Project Intellectual Property Users' obligations to comply with the terms of a Project Contract granting the right to use the Intellectual Property of a third party including in the Project Intellectual Property Rights after the consummation of such assignment, conveyance, or other transfer of such Project Contract to Buyer in accordance with the terms hereof or the terms of the Confidentiality Agreement prior to such assignment, conveyance, or other transfer of such Contract or Seller's obligations under Section 5.3(b)(ii).

(iv) Without limiting Section 16.4 or Section 24.1, Seller shall defend, indemnify, and hold harmless the Buyer Group from and against any Action against or Liability of the Buyer Group in accordance with Section 24.5 to the extent arising out of (A) any breach by Seller or any other member of the Seller Group of its obligations with respect to any Intellectual Property included in the Project Intellectual Property Rights assigned, conveyed, or otherwise transferred to Buyer (or its designed Affiliate) pursuant to this Agreement, or (B) any claim that the assignment, conveyance, or other transfer of such Intellectual Property is itself an infringement of a third-party's Intellectual Property Rights. Without limiting Section 24.1, if any such Action results in an injunction against Buyer or any Buyer Project Intellectual Property User prohibiting or limiting the use of such Intellectual Property provided hereunder or in the event the use of any such Intellectual Property is determined in a final order by a court of competent jurisdiction or arbitrator to constitute infringement of a third-party's Intellectual Property Rights, then Seller, at its option and sole expense, either shall promptly (1) procure for Buyer and Buyer Project Intellectual Property Users the right to continue using the infringing Intellectual Property included in the Project Intellectual Property Rights without additional cost to Buyer or any affected Buyer Project Intellectual Property User or (2) replace such Intellectual Property with non-infringing items of equivalent value and performance, use, safety, functionality, and expected lifetime or modify the same so that it becomes non-infringing and retains its full value and performance, use, safety, functionality, and expected lifetime, in each case at no greater cost of ownership, construction, administration, operation, maintenance, repair, service, or use of the Project or applicable Project Asset.

(b) (i) Seller shall use commercially reasonable efforts to obtain, or cause to be obtained, commercially reasonable and commercially available terms and conditions in any license or other Project Contract that grants, or after assignment, conveyance, or other transfer will grant, Project Intellectual Property Rights to Buyer (or its designated Affiliate). Without limiting the foregoing, (A) any Project Contract that grants, or after assignment, conveyance, or other transfer will grant, to Buyer rights to use another Person's Intellectual Property may limit (1) the Persons having a right to use such Project Intellectual Property Rights to the Buyer Project Intellectual Property Users (or, if applicable, Buyer Project Intellectual Property Users that are not competitors of the grantor, provided that the relevant Intellectual Property Rights granting provisions of such Project Contract expressly identify and list, by name, each competitor of the grantor that is not permitted to be a Buyer Project Intellectual Property User under such Project Contract), (2) the right to use such Project Intellectual Property Rights solely for the ownership or possession, operation, use, maintenance, and repair of the Project or Project Assets, and (3) the right to use such Project Intellectual Property Rights solely to the extent that such Project Intellectual Property Rights are embedded in, encompassed by, or used in connection with, any equipment or material delivered to or for the Project or Project Assets, and (4) disclosure by the Buyer Project Intellectual Property Users of non-public confidential information related to such Project Intellectual Property Rights or related confidential and proprietary information of the holder of such Project Intellectual Property Rights (but shall not prevent the confidential disclosure of such information to Buyer Project Intellectual Property Users who have a reasonable need to know such information in connection with a permitted use of such information or as required by Law or applicable Permits and who fulfill any standard protocols required by such holder or owner to limit and protect the use of such information), and (B) Seller shall use commercially reasonable efforts to include, or cause to be included, in the license or other Project Contract that grants, or after assignment, conveyance, or transfer will

grant, such Project Intellectual Property Rights to Buyer (or its designated Affiliate) a non-exclusive, worldwide, royalty-free, fully paid-up license for Buyer (or such designated Affiliate) and the other Buyer Project Intellectual Property Users to use the Project Intellectual Property Rights solely for the ownership or possession, operation, use, maintenance, and repair of the Project at and after (x) the Closing, with respect to such license or other Project Contract that constitutes a Closing Asset, (y) the date upon which such license or other Project Contract is assigned, conveyed, or otherwise transferred to Buyer pursuant to Section 11.2, with respect to such license or other Project Contract that constitutes a Post-Closing Project Asset, or (z) the transfer such license or Project Contract to Buyer pursuant to Section 25.2 or Section 25.4. Upon request, Seller shall apprise Buyer of progress and developments in the procurement of licenses and other Project Contracts that grant, or after assignment, conveyance, or other transfer of such license or Project Contract will grant, such Project Intellectual Property Rights to Buyer. Seller shall promptly notify Buyer if it becomes apparent to Seller that, despite the use of commercially reasonable efforts, Seller will be unable to include in any Project Contract the license described in Section 5.3(b)(i)(B).

(ii) Seller and Buyer acknowledge and agree that none of the Buyer Project Intellectual Property Rights are necessary for the performance or completion of the Work, for the ownership, possession, operation, maintenance, repair, or performance of the Project, or for Seller to be able to make the representations or warranties regarding the sufficiency of the Project Assets in Section 18.15 and Section 1.9 of Exhibit M.

(iii) (A) In furtherance of its obligations in Section 5.3(b)(i), and without limiting its obligations under Section 5.3(a), Seller shall use commercially reasonable efforts to cause each Project Contract entered into by Seller or assigned, conveyed, or otherwise transferred to Buyer by Seller that grants or provides Project Intellectual Property Rights to Seller (or directly to Buyer) and could reasonably be expected to be a Project Asset to include a provision substantially similar to the following (the “**IP Rider**”):

*[Seller/Contractor] understands that the [software/IP] shall be used solely in connection with the ownership or possession, operation, use, maintenance, or repair of a solar photovoltaic electric generating facility (“Project”) that [Owner/Purchaser/Buyer] is constructing and intends to sell to [Entergy \_\_\_\_\_] (“[Entergy]”) (the “Plant Acquisition”). [Seller/Contractor] agrees that [Owner/Purchaser/Buyer] may assign, convey, or otherwise transfer [this Agreement], including, without limitation, all of [Owner/Purchaser/Buyer’s] rights with respect to the [ownership or license of software/IP, as applicable], to Entergy (or any affiliate thereof designated by Entergy (“Entergy Affiliate Assignee”)) as the assignee of [this Agreement] at any time without [Seller/Contractor’s] consent in connection with the Plant Acquisition (“Transfer”). [Seller/Contractor] confirms that the Transfer requires no fee, payment, or other consideration or further assurances of any kind or form to [Seller/Contractor], or to any other person, in order to be effective, except the assumption by Entergy (or the Entergy Affiliate Assignee) of [this Agreement] and any modification thereof necessary solely to reflect the fact of such assumption. Upon the Transfer, Entergy (or the Entergy Affiliate Assignee) shall become subject to the terms hereof. [Seller/Contractor] agrees that Entergy (or the Entergy Affiliate Assignee) is not assuming and shall have no liability for, and [Seller/Contractor] hereby releases Entergy (or the Entergy Affiliate Assignee) and*

*their respective affiliates and employees from, any liability of any kind arising out of or in connection with the performance or non-performance of [this Agreement] by [Owner/Purchaser/Buyer] prior to the Transfer (including any liability based upon or otherwise deriving from actions or omissions of [Owner/Purchaser/Buyer] occurring prior to the Transfer). Without limiting the foregoing, [Seller/Contractor] agrees that Entergy and each of its affiliates' agents, contractors, or other representatives that has executed or is subject to a binding confidentiality agreement with or confidentiality obligation substantially meeting the requirements of [this Agreement] that applies to such agent's, contractor's, or representative's access to or use of the [software/IP] shall be fully authorized to have access to and use the [software/IP] to the extent such access or use is necessary for the performance of its work. The agreements and principles (including, without limitation, the lack of a [Seller/Contractor] consent requirement or charge for assignments and the [Owner/Buyer/Contractor] releases) in this paragraph shall apply to any sale, conveyance, or transfer of [this Agreement] after the Transfer in connection with the sale, conveyance, or transfer of the Project, or any portion thereof, by Entergy (or the Entergy Affiliate Assignee) to a third party.*

(B) If, in the course of negotiating any such Project Contract, it becomes apparent to Seller that, despite the use of commercially reasonable efforts, Seller will be unable to include a provision substantially similar to the IP Rider in such Project Contract, Seller shall promptly notify Buyer.

(c) (i) Seller and its Affiliates shall be entitled to retain all of their respective rights, title, and interest in their know-how, concepts, materials, and information developed prior to or independent of this Agreement and any Intellectual Property that does not relate exclusively to the Project (collectively, "**Retained Rights**"), regardless of whether such Retained Rights are embodied in a Project Asset. To the extent that Project Intellectual Property Rights provided to Buyer (or its designated Affiliate) are subject to any Retained Right of Seller and its Affiliates at or after the Closing, Seller hereby grants to the Buyer Project Intellectual Property Users (and their permitted assigns who assume in writing all the rights and obligations of the Buyer Project Intellectual Property Users, and Buyer's contractors and representatives with a need to know who agree to keep such Retained Rights confidential and limit use to only authorized purposes) a non-exclusive, worldwide, royalty-free, fully paid-up license to Buyer (or its designated Affiliate) and the other Buyer Project Intellectual Property Users to use such Retained Rights solely as necessary to use such Project Intellectual Property Rights in accordance with the requirements, and subject to the limitations of this Section 5.3 and the other terms of this Agreement.

(ii) Without limiting Section 5.3(b), Seller shall use commercially reasonable efforts to include, and require its Contractors and Subcontractors to include, in its Project Contracts that may involve the creation of drawings, plans, specifications, manuals, data (including data contained in any storage media), writings, and similar materials and information first developed or produced as part of the Work ("Original Works"), terms designed to convey and protect Seller's (and, upon the Closing or the later of (a) completion of the relevant post-Closing Work or (b) acquisition of such Original Works from the creator thereof, as applicable) or Buyer's (or its designated Affiliate's) ownership rights and interest in Original Works prepared for Seller or Buyer by or for such Contractors and Subcontractors, all at no additional

charge or cost to Seller (or its Contractors and Subcontractors). In the event Seller, despite using commercially reasonable efforts, is unable to obtain the agreement of a prospective Contractor or Subcontractor to such ownership provisions, Seller shall negotiate a license to use such Original Works, including retention of a copy for archival or project execution purposes, in accordance with the terms of Section 5.3(b)(iii)(A).

(d) Unless required by Law, Seller shall not, without the prior written consent of Buyer, permit any Project Contract that could reasonably be expected to be a Transferred Closing Project Contract or a Transferred Post-Closing Project Contract to include any provision that restricts Buyer (or its designated Affiliate) from allowing access to a Project Intellectual Property Right granted in or pursuant to such Project Contract (i) by individuals who are outside the United States or (ii) by individuals who are not U.S. citizens or lawful permanent residents. Notwithstanding the foregoing, nothing herein shall restrict Seller from agreeing to a provision in a Transferred Closing Project Contract or a Transferred Post-Closing Project Contract that requires Buyer to comply with applicable export Laws.

**Section 5.4. Procurement of Utilities.** Without limiting the express requirements of Section 2.1, Section 2.2, and the Scope Book, Seller shall obtain, provide, and pay for all commodities, utilities, and utility products and services necessary or desirable for the performance of the Work in accordance with this Agreement, including all start up and construction power, water, water services, waste water, and sanitation (including sewage) equipment and services, and telephone, internet, and other communications equipment and services.

**Section 5.5. Procurement of Permits.**

(a) Buyer has obtained, or will obtain on a timely basis, and will maintain as necessary, all Permits shown as its responsibility under this Agreement as listed in Part I of Schedule 5.5.<sup>23</sup>

(b) Other than the Permits for which Buyer is responsible pursuant to Section 5.5(a), if any, Seller has obtained, or will obtain on a timely basis, and will maintain as necessary, (i) all Permits required by Law for the lawful performance of the Work, including the Permits listed in Part I of Schedule 18.11 (collectively, but excluding any such Permits that are also Project Operational Permits, the “*Project Work Permits*”), and (ii) all Permits necessary for the commissioning, testing, ownership, possession, use, operation, maintenance, servicing or repair of the Project or the Project Assets in accordance with the Performance Standard, including the Permits listed in Part II of Schedule 18.11 (collectively, the “*Project Operational Permits*”). In connection with the procurement of all such Project Work Permits and Project Operational Permits, Seller shall comply with the obligations of Seller set forth in Part II of Schedule 5.5.

(c) Seller shall provide to Buyer (i) reasonably in advance of the time for submittal thereof, a reasonable opportunity to review and comment on each application to a Governmental Authority by Seller or any of its Representatives concerning a Project Operational

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<sup>23</sup> **NTD:** No Permits will be listed on Part I of Schedule 5.5.



Permit, including any application related to any supplement, amendment, revision, or other modification of any such Project Operational Permit and (ii) reasonably in advance of Seller's deadline for submitting any response or comments to a draft Project Operational Permit issued by a Governmental Authority, a reasonable opportunity to review and comment on such draft Project Operational Permit. Seller shall consider in good faith comments received from Buyer within fifteen (15) Business Days after Buyer's receipt of such application with respect to any Project Operational Permit or such draft Project Operational Permit, as applicable. Buyer shall have the right to approve each application for any Project Operational Permit (including the application for any supplement, amendment, revision, or modification thereof) or any material submission related thereto prior to the submission thereof. In addition, and without limiting any other term of this Agreement, Seller shall (A) provide Buyer with a complete and accurate copy of the application for each Project Operational Permit (including the application for any supplement, amendment, revision, or modification thereof), any draft Project Operational Permit issued by a Governmental Authority and any material submission submitted by or for Seller (unless Buyer is a party to such document) promptly after the execution, filing, or submission thereof, (B) notify Buyer of any material development in the processing or treatment of such application or material submission promptly after Seller obtains knowledge thereof, (C) notify Buyer reasonably in advance of, and, to the extent permitted by Laws, allow Buyer and its respective Representatives to attend and participate in, any substantive meeting between or among Seller (or any Representative of Seller) and relevant Governmental Authorities and/or other third parties regarding the application for any Project Operational Permit required to be obtained by Seller pursuant to this Section 5.5 (including any application related to any supplement, amendment, revision, or modification of such Project Operational Permit) and (D) upon procuring (or receiving any amendment, supplement or other modification thereto) any Project Operational Permit, provide a complete and accurate copy thereof to Buyer. Buyer shall have ten (10) Business Days from the date such Project Operational Permit (including any amendment, supplement or other modification thereto) is provided to Buyer to review and approve each such Project Operational Permit procured by Seller pursuant to this Section 5.5. Certain additional rights and obligations of the Parties with respect to Permits are set forth in Section 20.5. All notices, communications, documents, and other information to be provided by Seller to Buyer pursuant to this Section 5.5(c) shall be provided to the Buyer Contract Manager.

(d) Buyer shall provide to Seller, reasonably in advance of the time for submittal thereof, a reasonable opportunity to review and comment on any application to a Governmental Authority by Buyer or any its Representatives concerning each Permit required to be obtained by Buyer pursuant to this Section 5.5 (including any application related to any supplement, amendment or modification of such Permit). Buyer shall consider in good faith timely comments from Seller with respect to each such application. In addition, Buyer shall (i) provide Seller with a complete and accurate copy of the application for each Permit (including the application for any supplement, amendment, revision, or other modification thereof) submitted by or for Buyer (unless Seller or any Affiliate thereof is a party to such document) promptly after the execution, filing, or submission thereof and (ii) notify Seller of any material development in the processing or treatment of such application promptly after Buyer obtains knowledge thereof.

#### **Section 5.6. Procurement of Project Contracts.**

(a) As part of the Work, including any post-Closing Work, Seller shall be responsible for procuring and providing, or causing to be procured and provided, all Project Contracts in accordance with the applicable terms of this Agreement.

(b) Without limiting Section 5.3, Section 20.16, or Section 20.18, prior to entering into any material Project Contract that Seller believes in good faith would reasonably be expected to become a Transferred Closing Project Contract or a Transferred Post-Closing Project Contract (or any amendment or modification to such material Project Contract), Seller shall (i) provide Buyer with a complete and accurate copy of such material Project Contract (or such amendment or modification), (ii) provide Buyer with a reasonable opportunity to review and comment on such material Project Contract (or such amendment or modification), and consider in good faith timely comments from Buyer on such material Project Contract (or such amendment or modification), and (iii) not enter into such material Project Contract (or such amendment or modification) without the prior approval of Buyer, which shall not be unreasonably withheld, conditioned, or delayed, and which shall be deemed given if Buyer fails to object by written notice delivered to Seller within twenty (20) Business Days after Seller requests such approval prior to the FNTP Date and within ten (10) Business Days after the FNTP Date.

(c) With respect to each Project Contract entered into by Seller in connection with or relating to the Project after the Effective Date that is reasonably expected to be a Transferred Closing Project Contract or a Transferred Post-Closing Project Contract, Seller shall use commercially reasonable efforts to (i) cause each such Project Contract to permit Seller to freely assign, transfer, and/or convey such Project Contract to Buyer without the Consent of any Person, or (ii) cause each counterparty to each such Project Contract to consent to the assignment, transfer, and/or conveyance of such Project Contract to Buyer after the Closing Date, in each case including, for the avoidance of doubt, without any requirement that Buyer or any Affiliate of Buyer enter into a new Contract with the counterparty to such Project Contract (or any other Person), make any payment to such counterparty (or any other Person), or provide any other new consideration to such counterparty (or any other Person) as a condition to the effectiveness of such assignment, transfer, and/or conveyance.

**Section 5.7. Responsibility for Transportation, Storage, and Handling of Goods.** Seller shall be responsible for the complete and safe expediting, tracking, inspection, shipping, customs clearance, unloading, receiving, delivery, and handling of or concerning all Goods and any other equipment, material, and items procured or to be used in connection with the Work.

**Section 5.8. Substitution of Goods and Services.** Seller shall not procure, or permit its Contractors or Subcontractors to procure, any service or Good (including any equipment, system, material, or item) that (i) is required in the Scope Book to be procured from an Approved Vendor from any Person other than an Approved Vendor or (ii) does not meet the requirements set forth in the Scope Book, without obtaining Buyer's prior written consent.

**ARTICLE VI.**  
**PROJECT SCHEDULE; PROGRESS REPORTS; SCHEDULE DELAYS; SUSPENSION**

**Section 6.1. Project Schedule.** The Project Schedule is the critical path schedule for performance of the Work and includes schedules for the development and construction of the Project. The Project Schedule may be adjusted from time to time in accordance with the Project Execution Plan or by Change Orders in accordance with the terms of Article VIII (Change Orders).

**Section 6.2. Progress Reports.** Commencing the first full calendar month after the Effective Date, and for each calendar month thereafter until the month after Final Completion has been achieved, (a) pursuant to and in accordance with the Project Execution Plan, Seller shall deliver, or cause to be delivered, to Buyer, within ten (10) days after the end of such calendar month (or, if any such report has not been delivered to Seller by its Contractor or Subcontractor within ten (10) days after the end of such calendar month, within two (2) Business Days after receiving any such report), all reports prepared by Seller's Contractors or Subcontractors and delivered to Seller related to Seller's Contractors' or Subcontractors' progress in developing and constructing the Project or otherwise performing the Work for Seller and (b) to the extent the reports prepared by Seller's Contractors and Subcontractors and delivered to Buyer pursuant to clause (a) of this Section 6.2 omit any information that would reasonably be expected to be material to Seller's or its Contractors' or Subcontractors' progress in developing and constructing the Project or otherwise performing the Work for Seller or Buyer's rights or obligations under this Agreement, Seller shall prepare, or cause to be prepared, and shall deliver, or cause to be delivered, to Buyer, within ten (10) days after the end of such calendar month (or, if any report omitting such information was not delivered to Seller by its Contractor or Subcontractor within ten (10) days after the end of such calendar month, within two (2) Business Days of receiving any such report), a report setting forth in reasonable detail such additional information. Nothing herein shall limit Seller's obligation to provide to Buyer other reports and information in accordance with the other terms of this Agreement.

**Section 6.3. Certain Milestone Date Delays.** Without limiting its other obligations under this Agreement, if at any time Seller does not achieve, or would reasonably be expected not to achieve, (a) satisfaction of any of the conditions described in clauses (iii), (iv), (vi), (vii), (viii), and (ix) of Section 7.1(a) on or prior to the FNTP Expiration Date, (b) Mechanical Completion on or prior to the Closing Expiration Date, (c) Substantial Completion on or prior to the Guaranteed Substantial Completion Date, (d) Substantial Completion on or prior to the Substantial Completion Termination Trigger Date, or (e) Final Completion on or prior to the Final Completion Termination Trigger Date, Seller shall promptly notify the Buyer Contract Manager of such failure (or expected failure), the expected period of the delay, the cause(s) of the delay, and, if Seller or any of its Contractors or Subcontractors have prepared a recovery plan(s) or partial recovery plan(s), a copy of such recovery plan(s). Seller's estimate of the expected period of delay shall be based on the best information obtained by Seller, and Seller shall promptly notify Buyer of any expected change in such period and the cause(s) of such changes. As reasonably requested by Buyer, Seller shall update Buyer from time to time with information regarding such delay and Seller's and its Contractors' and Subcontractors' progress in overcoming such delay. Seller acknowledges that it shall be solely responsible for the efficiency and adequacy of its methods and personnel. Seller shall mitigate any such delay if it is

not reasonably possible to recover and maintain the Project Schedule. All costs Seller incurs or causes its Contractors and Subcontractors to incur to accelerate the Work or implement any recovery plan shall be, as between Seller and Buyer, for the account of Seller and shall not entitle Seller to an adjustment to the Purchase Price or any incremental payment from Buyer hereunder. Without limiting its other obligations under this Agreement, Seller will (i) owe liquidated damages to Buyer pursuant to Section 7.3(b) if Seller does not achieve Substantial Completion on or prior to the Guaranteed Substantial Completion Date and pursuant to Section 25.3(a) or Section 25.4(a), as applicable, if Buyer terminates this Agreement as a result of Seller's failure to achieve Substantial Completion on or prior to the Substantial Completion Termination Trigger Date and (ii) pursuant to Section 17.9(b), waive any right to receive the Punchlist Holdback Amount if Seller does not achieve Final Completion on or prior to the Final Completion Termination Trigger Date.

**Section 6.4. Suspension for Cause by Buyer.** At any time and from time to time, upon notice to Seller, Buyer may suspend further performance of all or any portion of the Work, including construction or delivery of any Goods and installation or erection of any portion of the Project, as a result of (a) any material breach of this Agreement which poses an imminent threat to the safety of any individual or the Work or (b) a material violation of any Law or applicable Permit (a "*Suspension for Cause*"). Notices of Suspension for Cause delivered by Buyer to Seller shall specify the scope and period of suspension (or Buyer's good faith estimate thereof) and the reason(s) therefor. Upon receiving a notice of Suspension for Cause, Seller shall immediately take the actions described in Section 25.2(a)(i) (substituting suspension notice for termination notice) and Section 25.2(a)(v), unless otherwise directed by Buyer, and shall take such other actions as specified and reasonably required by Buyer to protect individuals and the Work or to cure any violation of Law. Seller shall notify Buyer upon ceasing the suspended Work and, if applicable, withdrawing from or vacating the Project Site. During the period of suspension, Seller shall retain its obligations to properly care for and protect all Work in progress, including all Goods, unless otherwise directed by Buyer. Buyer shall withdraw the Suspension for Cause in whole or in part by notice to Seller specifying the scope and effective date of such withdrawal upon the elimination of the threat to the safety of individuals and the Work and cure of any violation of applicable Law. On the specified date of withdrawal, Seller shall, as promptly as practicable, resume performance of the Work for which the Suspension for Cause was withdrawn.

## ARTICLE VII.

### FNTP DATE; MECHANICAL COMPLETION; SUBSTANTIAL COMPLETION; FINAL COMPLETION

#### Section 7.1. FNTP Date.

(a) Buyer shall deliver written notice to Seller promptly after all of the following conditions have been satisfied (or irrevocably waived by Buyer):

(i) Buyer's Regulatory Approvals. All of Buyer's Regulatory Approvals marked with an asterisk on Part II of Schedule 19.5 shall (A) have been obtained and shall not have been granted subject to or containing any term or condition that is unsatisfactory

to Buyer in its sole and absolute discretion, (B) be in full force and effect, and (C) be final and not subject to appeal or otherwise subject to challenge or modification;

(ii) Required Consents. All of Buyer's Required Consents shall have been obtained on terms satisfactory to Buyer in its sole and absolute discretion;

(iii) No Restraint. There shall be no (A) preliminary or permanent Order in effect on the FNTTP Date that (1) declares this Agreement or any Ancillary Agreement invalid or unenforceable in any respect or (2) restrains, enjoins, or otherwise prohibits the consummation of the Transactions, including the transactions contemplated by the Ancillary Agreements, or (B) Action taken, or Law enacted, promulgated, or deemed applicable to the Transactions, by a Governmental Authority that, directly or indirectly, prohibits the consummation of the Transactions, including the transactions contemplated by the Ancillary Agreements, as herein or therein provided;

(iv) Tax Opinion. Buyer shall have received the FNTTP Tax Opinion, issued no earlier than ten (10) days prior to the FNTTP Date and duly executed by ITC Tax Counsel;

(v) Seller Tax Certificate. Buyer shall have received a Seller Tax Certificate in the form attached hereto as Exhibit P-1;

(vi) Continuing Transaction Review Exemptions. Since the Effective Date, there shall have been no Change in Law that requires the review of the Transactions (including the effects thereof), in whole or in part, by the Department of Justice, the Federal Trade Commission, or any other Governmental Authority under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 or FERC under Section 203 of the Federal Power Act, 16 U.S.C. § 791 *et seq.*, or any other Law, or requires notices to, applications or other filings with, or Consents of or from any other Governmental Authority, excluding such notices, applications, filings, or Consents determined by Buyer, in its sole and absolute discretion, to be immaterial to the Transactions, Buyer, or the conduct of its business;

(vii) Interconnection, Deliverability, and Transmission Service. Seller shall have entered into the GIA and any other Required Deliverability Arrangement necessary to provide Full Deliverability to the Project on terms and conditions that are satisfactory to Buyer in its sole and absolute discretion, and each such GIA and other Required Deliverability Arrangement, if any, shall have received all necessary approvals and authorizations from all applicable Governmental Authorities with jurisdiction without any modification of any such terms and conditions, shall be final and not subject to appeal or legal challenge, and shall be in full force and effect;

(viii) No Condemnation. None of the Project Site, in whole or in part, as of the FNTTP Date, shall have become subject to or threatened with any condemnation or eminent domain proceeding that adversely affects or could reasonably be expected to adversely affect, in whole or in part, Buyer's use the Project Site for the Intended Use;

(ix) Credit Support. Seller shall have caused the aggregate available capacity (i.e., undrawn amount) of the Letter(s) of Credit delivered to Buyer pursuant to Section 24.13 to be increased to \$[●]<sup>24</sup> as of the FNTP Date;

(x) BAR Insurance. Seller shall have (A) obtained Builder's All Risk insurance ("**BAR Insurance**"), with coverage effective as of the FNTP Date with terms and conditions meeting the requirements set forth in Section 13.4(a) and subject to Buyer's reasonable review and comment, which insurance shall be valid and binding and in full force and effect, and (B) delivered to Buyer a certificate of insurance evidencing such coverage in accordance with Section 13.3(c);

(xi) Project Operational Permits. Seller shall have delivered to Buyer all Project Operational Permits in form and substance acceptable to Buyer, and such Project Operational Permits shall remain in full force and effect;

(xii) Estoppels. Seller shall have delivered to Buyer a Landlord Estoppel Certificate in the form of Exhibit O, executed by an authorized officer of the landlord under each Real Property Lease;

(xiii) Tax Law Change. No change or other modification to any Tax Law has occurred prior to the FNTP Date;

(xiv) Officer's Certificate of Seller. Buyer shall have received a certificate from Seller, executed on its behalf by a duly authorized officer, dated as of the FNTP Date, certifying as to the satisfaction of the following:

(A) The representations and warranties of Seller set forth in Article XVIII (other than those which are only given on the Closing Date, the Fundamental Seller Representations and any representations and warranties qualified by materiality or Material Adverse Effect) are true and correct in all material respects as of the FNTP Date with the same effect as though made at and as of such date (except those representations and warranties that address matters only as of a specified date, the accuracy of which will be determined as of that specified date in all respects). The Fundamental Seller Representations and any representations and warranties qualified by materiality or Material Adverse Effect are true and correct in all respects as of the FNTP Date (except those representations and warranties that address matters only as of a specified date, the accuracy of which will be determined as of that specified date in all respects);

(B) Seller has performed and complied in all material respects with the agreements, covenants and obligations required by this Agreement to be performed or complied with by Seller at or before the FNTP Date; and

(C) As of the FNTP Date, no Material Adverse Effect exists with respect to Seller;

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<sup>24</sup> **NTD:** Insert amount equal to \$100,000/MW.

(xv) Environmental Assessment. Seller shall have delivered an Environmental Assessment with respect to the Project and the Project Site that is satisfactory to Buyer in its sole and absolute discretion; and

(xvi) Reports. Seller shall have delivered to Buyer a copy of the reports described in, and in accordance with the requirements of, Section 6.2 and Section 15.1(d), in form and substance reasonably acceptable to Buyer.

**[Reserved]**<sup>25</sup>

(b) The date on which Buyer delivers the written notice contemplated by Section 7.1(a) shall be the “**FNTP Date**.”

(c) If the FNTP Date has not occurred on or prior to the FNTP Expiration Date, each of Seller and Buyer shall have the right to terminate this Agreement pursuant to Section 25.1.

(d) Within ten (10) Business Days after the FNTP Date, Seller shall deliver a certificate to Buyer, executed on Seller’s behalf by a duly authorized officer, certifying that, as of the date of such certificate, (i) Seller and its Affiliates have performed or complied in all material respects with all covenants, obligations, and agreements of Seller or its Affiliates contained in this Agreement or any Ancillary Agreement that are required to be performed or complied with at or prior to such date, (ii) the representations and warranties of Seller set forth in Section 18.5 (Bankruptcy Matters) or of Seller or any of its Affiliates in any Ancillary Agreement are true and correct in all material respects, and (iii) since the Effective Date, no Material Adverse Effect with respect to Seller shall have occurred that has not been cured.

**Section 7.2. Mechanical Completion.** Subject to the occurrence of the FNTP Date, Seller shall cause the Work to achieve Mechanical Completion. At least twenty-one (21) days, but no more than thirty-five (35) days, prior to the date on which Seller anticipates the Work will achieve Mechanical Completion (the “**Anticipated Mechanical Completion Date**”), Seller shall provide to Buyer written notice of the Anticipated Mechanical Completion Date. If and when Seller considers that the Work has achieved Mechanical Completion, Seller shall certify the same to Buyer in writing. Buyer shall, within ten (10) Business Days after receipt of such certification, either (a) confirm in writing to Seller that it agrees that the Work has achieved Mechanical Completion or (b) notify Seller in writing that it does not agree that the Work has achieved Mechanical Completion and provide in reasonable detail an explanation of the basis for its disagreement. If Buyer provides Seller with a notice pursuant to clause (b) immediately above, Seller shall promptly address and resolve any and all deficiencies in the Work or that served as a basis for Buyer’s dispute of Seller’s determination that the Work has achieved Mechanical Completion and resubmit its certification of Mechanical Completion to Buyer. For the purposes of this Agreement, the Work shall be deemed to have achieved Mechanical

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<sup>25</sup> **NTD:** Other FNTP conditions may be required as a result of EPC, real property, environmental, physical, or operational aspects of the Project, necessary property tax abatements or similar reductions, special considerations or other provisions included in Seller’s proposal, diligence conducted by or for Buyer, the status of applicable Laws and markets, Buyer’s ARR and FTR requirements for the Project, regulatory conditions, and other factors Buyer deems relevant.

Completion on the earlier of (i) the date Buyer confirms in writing to Seller that it agrees the Work has achieved Mechanical Completion and (ii) unless Buyer provides Seller with a notice pursuant to clause (b) immediately above within ten (10) Business Days after receipt of a written certification from Seller that the Work has achieved Mechanical Completion, the tenth (10<sup>th</sup>) Business Day after Seller issues Buyer a written certification that the Work has achieved Mechanical Completion.

### **Section 7.3. Substantial Completion.**

(a) Subject to the occurrence of the FNTP Date, Seller shall cause the Work to achieve Substantial Completion. If and when Seller considers that the Work has achieved Substantial Completion, Seller shall certify the same to Buyer in writing (and, as provided in Section 7.5(a), shall include with such certification a copy of its proposed Punchlist). Buyer shall, within ten (10) Business Days after receipt of such certification, either (i) confirm in writing to Seller that it agrees that the Work has achieved Substantial Completion or (ii) notify Seller in writing that it does not agree that the Work has achieved Substantial Completion and provide in reasonable detail an explanation of the basis for its disagreement. If Buyer provides Seller with a notice pursuant to clause (ii) immediately above, Seller shall address and resolve any and all deficiencies in the Work or that served as the basis for Buyer's dispute of Seller's determination that the Work has achieved Substantial Completion and resubmit its certification of Substantial Completion to Buyer. For the purposes of determining Seller's obligation to pay liquidated damages pursuant to Section 7.3(b) and Buyer's right to terminate this Agreement pursuant to Section 7.3(c), the Work shall be deemed to have achieved Substantial Completion on the date Seller issues to Buyer a written certification that all conditions for Substantial Completion have been met, unless Buyer disputes Seller's certification of Substantial Completion as provided above. For all other purposes of this Agreement, the Work shall be deemed to have achieved Substantial Completion on the earlier of (A) the date Buyer confirms in writing to Seller that it agrees the Work has achieved Substantial Completion and (B) unless Buyer provides Seller with a notice pursuant to clause (ii) above within ten (10) Business Days of receipt of a written certification from Seller that the Work has achieved Substantial Completion, the tenth (10<sup>th</sup>) Business Day after Seller issues Buyer a written certification that the Work has achieved Substantial Completion.

(b) If Substantial Completion is not achieved on or prior to the Guaranteed Substantial Completion Date, Seller shall pay to Buyer, as liquidated damages and the exclusive remedy of Buyer for Seller's failure to achieve Substantial Completion on or prior to the Guaranteed Substantial Completion Date, [●] Dollars per day (\$[●]/day)<sup>26</sup> ("***Delay Liquidated Damages***") for each day after the Guaranteed Substantial Completion Date that Substantial Completion is not achieved until the earliest of (i) the date Seller achieves Substantial Completion, (ii) the date this Agreement is validly terminated, and (iii) the Substantial Completion Termination Trigger Date. Nothing in this Section 7.3(b) shall limit Buyer's rights or remedies with respect to any breach by or default of Seller of any provision of this Agreement or any Ancillary Agreement. Seller and Buyer agree that the failure of Seller to achieve Substantial Completion on or prior to the Guaranteed Substantial Completion Date shall not constitute, in and of itself, such a breach or default. Seller and Buyer also agree that: (A) it is

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<sup>26</sup> **NTD:** This amount will be \$500/MW of nameplate capacity per day.



difficult or impossible to determine with precision the amount of damages that would or might be incurred by Buyer as a result of the failure of Substantial Completion to be achieved on or prior to the Guaranteed Substantial Completion Date; (B) Buyer would be damaged by any failure of Seller to meet such obligations; (C) it would be impracticable or extremely difficult to fix the actual damages resulting therefrom; (D) any sums that would be payable under this Section 7.3(b) are (i) except for Buyer's termination rights under this Agreement, Buyer's sole and exclusive remedy for such failure and (ii) in the nature of liquidated damages, and not a penalty, and are fair and reasonable; (E) each payment represents a reasonable estimate of fair compensation for the damages that may reasonably be anticipated from such failure; and (F) each of Seller and Buyer hereby irrevocably waives any right to claim to any court or arbitral tribunal or seek the adjustment of any such sums.

(c) If Substantial Completion is not achieved on or prior to the Substantial Completion Termination Trigger Date, Buyer shall be entitled to terminate this Agreement by delivering a written notice to Seller (such notice, a "***Substantial Completion Termination Notice***"). The Substantial Completion Termination Notice shall designate a Termination Date, which shall be no earlier than the date such Substantial Completion Termination Notice is delivered by Buyer.

**Section 7.4. Final Completion.** Subject to the occurrence of the FNTP Date, Seller shall cause the Work to achieve Final Completion. If and when Seller considers that the Work has achieved Final Completion, Seller shall certify the same to Buyer in writing. Buyer shall, within fifteen (15) Business Days after receipt of such certification, either (a) confirm in writing to Seller that it agrees that the Work has achieved Final Completion or (b) notify Seller in writing that it does not agree that the Work has achieved Final Completion and provide in reasonable detail an explanation of the basis for its disagreement. If Buyer provides Seller with a notice pursuant to clause (b) immediately above, Seller shall address and resolve any and all deficiencies in the Work and resubmit its certification of Final Completion to Buyer. For the purposes of this Agreement, the Work shall be deemed to have achieved Final Completion, including completion of previously identified Punchlist Items, on the earlier of (i) the date Buyer confirms in writing to Seller that it agrees the Work has achieved Final Completion and (ii) unless Buyer provides Seller with a notice pursuant to clause (b) above within fifteen (15) Business Days of receipt of a written certification from Seller that the Work has achieved Final Completion, the fifteenth (15<sup>th</sup>) Business Day after Seller issues Buyer a written certification that the Work has achieved Final Completion.

**Section 7.5. Punchlist.**

(a) Contemporaneous with its delivery to Buyer of a certificate under Section 7.2 that the Work has achieved Mechanical Completion, Seller shall deliver to Buyer a list of all Post-Closing Project Assets reasonably expected to be assigned, transferred, or conveyed by Seller to Buyer after the Closing pursuant to Section 11.2, which list shall be organized by category (e.g., Transferred Post-Closing Project Contracts, Transferred Post-Closing Warranties, Transferred Post-Closing Inventory, etc.).

(b) Contemporaneous with its delivery to Buyer of a certificate under Section 7.3(a) that the Work has achieved Substantial Completion, Seller shall deliver to Buyer a

proposed Punchlist, which shall include for each Punchlist Item listed therein a good faith estimate of the cost and time necessary for Seller to complete the Punchlist Item. Buyer shall approve or disapprove, in whole or in part, the Punchlist proposed by Seller within ten (10) Business Days after receipt thereof. If the proposed Punchlist is disapproved, in whole or in part, Buyer shall notify Seller of the reason(s) therefor, and Seller shall promptly modify the proposed Punchlist in accordance with Buyer's reasonable requirements to establish the approved Punchlist prior to Substantial Completion of the Work. Seller shall complete all the Punchlist Items in the approved Punchlist in order to achieve Final Completion.

**Section 7.6. Consequence of Milestones.** Seller acknowledges and agrees that, notwithstanding anything to the contrary, whether Mechanical Completion, Substantial Completion, or Final Completion is deemed to have been achieved as a result of a written confirmation by Buyer, the failure by Buyer to timely object to a certification by Seller that Mechanical Completion, Substantial Completion, or Final Completion has been achieved, or otherwise, the fact that Mechanical Completion, Substantial Completion, or Final Completion is deemed to have occurred shall not reduce or limit the Liability of Seller with respect to any breach of any representation, warranty, term, covenant, or other obligation under this Agreement or any Ancillary Agreement, including the obligation of Seller to complete the Work in accordance with the requirements of this Agreement and to Remedy any Defect covered by the Project Warranty.

## **ARTICLE VIII. CHANGE ORDERS**

**Section 8.1. Change Orders Generally.** Notwithstanding anything to the contrary (including the Project Schedule, the Project Execution Plan, the Scope Book, or any other portion of this Agreement relating to updates of the Project Schedule), (i) the FNTF Expiration Date and the Closing Expiration Date may only be modified by amendment of this Agreement in accordance with Section 26.1, and (ii) the Scope of Work, the Guaranteed Substantial Completion Date, and the Purchase Price (including by modification to the Substantial Completion Payment Amount) may be modified by Change Order in accordance with this Article VIII or by amendment of this Agreement in accordance with Section 26.1. For clarity, the Substantial Completion Termination Trigger Date and the Final Completion Termination Trigger Date may be changed by Change Order or amendment to this Agreement only indirectly by a Change Order or amendment changing the Guaranteed Substantial Completion Date. All Change Orders shall be in writing, executed by duly authorized representatives of each of Seller and Buyer, and made strictly in accordance with this Article VIII. Each Change Order shall contain the full particulars of any modification to be made by such Change Order. Each Change Order shall be limited in effect to the matters and by the terms expressly set forth therein, and shall not invalidate or vitiate any other matter set forth in or any other portion of this Agreement. Except to the extent a Change Order specifically amends one or more provisions hereof, all provisions hereof shall apply to all Change Orders, and no Change Order shall be implied as a result of any other Change Order, individually or collectively. By executing a Change Order, Seller thereafter waives the right to assert any further claim for an extension to the Guaranteed Substantial Completion Date, or an increase to the Purchase Price (including by modification of the Substantial Completion Payment Amount), or any other compensation, relief or right or remedy based on, arising out of or relating to the subject matter of, or the claim addressed by,

such Change Order. Seller acknowledges and agrees that breaches (including any breach of a Project Contract or this Agreement), defaults, errors (including scoping, ordering, and diligencing errors), omissions, and other mistakes, misconduct, or fault (including negligence) by or of Seller or any of its Contractors or Subcontractors are not legitimate grounds, in whole or in part, for any Change Order.

### **Section 8.2. Buyer-Directed Change Orders.**

(a) Buyer shall have the authority to make discretionary changes to the scope of Work pursuant to a Change Order (each a “**Buyer Discretionary Change**”), subject to agreement on any equitable changes to, as applicable, the Guaranteed Substantial Completion Date or the Purchase Price (including any modifications to the Substantial Completion Payment Amount) resulting exclusively from such Buyer Discretionary Change; provided, however, that (i) the aggregate value of all new Work subject to such Change Orders for Buyer Discretionary Changes made by Buyer shall not exceed the greater of (A) Five Million Dollars (\$5,000,000) and (B) seven and one-half percent (7.5%) of the Purchase Price (unless the Buyer Discretionary Change(s) are in connection with a casualty or similar event occurring after the Closing, in which case the foregoing limitation shall not apply), and (ii) any dispute over any equitable change to, as applicable, the Guaranteed Substantial Completion Date or the Purchase Price (including any modifications to the Substantial Completion Payment Amount) due to a Buyer Discretionary Change shall be treated as provided in Section 8.2(d) and Section 8.6.

(b) If Buyer adds new Work or reduces the scope of Work by a Buyer Discretionary Change, the Purchase Price shall be increased or decreased, as applicable, by (i) a lump sum amount that is mutually agreed upon in writing by Buyer and Seller based upon sufficient substantiating data to permit evaluation and determination of the prudence and reasonableness of the price change, or (ii) absent such agreement, in accordance with Section 8.7. If Buyer adds new Work or reduces the scope of Work by a Buyer Discretionary Change initiated after the Closing and prior to the Substantial Completion Payment Date, any Purchase Price adjustment shall be effectuated through a payment by Buyer to Seller or a decrease of the Substantial Completion Payment Amount, as applicable, based on the best cost adjustment information reasonably available to Seller and Buyer at the time of such adjustment.

(c) In the event Buyer desires to make a Buyer Discretionary Change, Buyer shall deliver to Seller a Change Notice for the Buyer Discretionary Change, specifying the methodology to be used to adjust the Purchase Price in accordance with Section 8.2(b). After receipt of each such Change Notice, Seller shall (i) promptly determine, in good faith, the actual or expected effect, if any, of the Buyer Discretionary Change on the Guaranteed Substantial Completion Date or the Purchase Price (including any modifications to the Substantial Completion Payment Amount), (ii) complete the appropriate sections of such Change Notice to reflect such determinations and the other information required by such Change Notice, and (iii) no later than ten (10) days after such receipt (or such other superseding review period as may be mutually agreed by Seller and Buyer), and prior to the start of performance of the proposed change, sign and return the completed Change Notice to the Buyer Contract Manager and the Buyer Contract Administrator, along with documentation supporting Seller’s proposed (A) increase or decrease to the Purchase Price, and (B) change(s) to the Guaranteed Substantial Completion Date.

(d) Following receipt of a completed Change Notice provided pursuant to Section 8.2(c), or if Seller does not deliver such completed Change Notice to Buyer by the time required in Section 8.2(c), Buyer either shall (i) withdraw the proposed Buyer Discretionary Change or (ii) notify Seller that it desires to (A) proceed with the proposed Buyer Discretionary Change pursuant to Section 8.5 by delivering a written notice to Seller to proceed with the Buyer Discretionary Change on the terms reflected in Seller's completed Change Notice (or, if Seller did not deliver such completed Change Notice to Buyer by the time required in Section 8.2(c), on the term originally proposed by Buyer), or (B) enter into negotiations with Seller with respect to the effect of such Buyer Discretionary Change on the Guaranteed Substantial Completion Date or the Purchase Price (including any modifications to the Substantial Completion Payment Amount), as applicable. If Buyer elects to enter into negotiations with Seller pursuant to clause (B) immediately above, Seller shall promptly negotiate with Buyer in good faith to resolve expeditiously any issue regarding the Change Notice and to enter into a Change Order to equitably adjust the Guaranteed Substantial Completion Date or the Purchase Price (including any modifications to the Substantial Completion Payment Amount), as applicable, prior to commencement of the change in the scope of Work; provided, however, that at any time during such negotiations Buyer may elect to implement the Buyer Discretionary Change through a Change Order pursuant to Section 8.6(a). Seller agrees to provide such information and documentation to Buyer as Buyer may, from time to time, reasonably request in connection with Buyer's efforts to assess the merits of or Seller's position on, or to develop or evaluate possible solutions to items in dispute with respect to, any proposed Buyer Discretionary Change.

### **Section 8.3. Seller's Entitlement to Change Orders – Force Majeure.**

(a) In the event of a Force Majeure, Seller shall be entitled to receive a Change Order in accordance with, and subject to, this Section 8.3 for the actual delay in achieving the Guaranteed Substantial Completion Date resulting exclusively from such Force Majeure; provided, however, that, notwithstanding anything to the contrary in this Agreement, the maximum period of extension of the Guaranteed Substantial Completion Date pursuant to this Section 8.3(a) shall be one hundred eighty (180) days in the aggregate.

(b) Seller's sole remedy with respect to any physical damage to the Project occurring as a result of a Force Majeure event shall be schedule relief and the proceeds from the BAR policy required to be maintained by Seller under Section 13.4, which shall be used by Seller to replace or remedy the affected portions of the Project; provided that Buyer shall be responsible for funding the deductible thereunder with respect to any damage to the Project caused by an event of Force Majeure occurring from or after the Closing and shall assign any rights that Buyer has with respect to such proceeds to Seller to the extent required to fund the repair or remedy of the affected portions of the Project.

(c) All claims by Seller for a Change Order pursuant to this Section 8.3 shall be made in accordance with the following procedure:

(i) If Seller believes a Force Majeure has or may have occurred that will delay Seller's ability to achieve Substantial Completion by the Guaranteed Substantial Completion Date that would entitle Seller to a Change Order, Seller may deliver to the Buyer Contract Manager and the Buyer Contract Administrator a Change Notice advising Buyer of

such actual or potential Force Majeure within seven (7) days after the occurrence of the event(s), circumstance(s), or condition(s) forming the basis of such Force Majeure. Seller shall include with such Change Notice the best information and documentation then reasonably available to Seller to support a claim of Force Majeure and any change proposed by Seller to the Guaranteed Substantial Completion Date based on such claim.

(ii) Each Change Notice provided to Buyer under Section 8.3(c)(i) shall be reviewed by Buyer and discussed promptly, but no later than three (3) Business Days after Buyer's receipt of such Change Notice, at a joint meeting between the Buyer Contract Manager and the Seller Project Manager (or their designees). By the date of review thereof by the Seller Project Manager and the Buyer Contract Manager, Seller shall have updated the Change Notice to reflect its then current assessment of the expected effect of the Force Majeure on Seller's ability to achieve Substantial Completion by the Guaranteed Substantial Completion Date and provide such updated Change Notice to Buyer. If Buyer disagrees with Seller's assessment (including whether Seller's proposed change is allowed by this Agreement), Buyer shall promptly advise Seller of such disagreement and, thereafter, Seller shall promptly negotiate with Buyer in good faith to resolve expeditiously any issue regarding the Change Notice provided by Seller to Buyer pursuant to this Section 8.3. Seller agrees to provide such information and documentation to Buyer as Buyer may, from time to time, reasonably request in connection with Buyer's efforts to assess the merits of or Seller's position on, or to develop or evaluate possible solutions to items in dispute with respect to, such a Change Notice.

(iii) Subject to Section 8.3(c)(i), and without limiting Seller's other information and documentation obligations under this Section 8.3, any proposal by Seller for a change to the Guaranteed Substantial Completion Date pursuant to a Change Notice under this Section 8.3 shall include sufficient detail and supporting documentation to permit a thorough analysis of the proposed change, including the methodology of computing the proposed change to the Guaranteed Substantial Completion Date and the delay to the Work necessitating such change.

(d) Notwithstanding anything to the contrary, in the event Seller does not notify Buyer by Change Notice of an actual or potential claim of Force Majeure in accordance with the requirements of Section 8.3(c) within the seven (7)-day time period prescribed by Section 8.3(c)(i), Seller shall be deemed to have irrevocably waived any and all claims for adjustment to the Guaranteed Substantial Completion Date arising out of or related to the occurrence of the event(s), circumstance(s), or condition(s) giving rise to a potential claim of Force Majeure.

#### **Section 8.4. Seller's Entitlement to Change Orders – Buyer Caused Delay.**

(a) Upon the occurrence of a Buyer Caused Delay, Seller shall be entitled to receive a Change Order in accordance with this Section 8.4 adjusting the Purchase Price (including the Substantial Completion Payment Amount) for the actual increased Direct Costs incurred by Seller as a result of such Buyer Caused Delay and adjusting the Guaranteed Substantial Completion Date for the actual delay incurred by Seller as a result of such Buyer Caused Delay.

(b) All claims by Seller for a Change Order pursuant to this Section 8.4 shall be made in accordance with the following procedure:

(i) If Seller believes that a Buyer Caused Delay would increase Seller's Direct Costs or will delay Seller's ability to achieve Substantial Completion by the Guaranteed Substantial Completion Date, Seller may deliver to the Buyer Contract Manager and the Buyer Contract Administrator a Change Notice advising Buyer of the actual or potential effect within seven (7) days after the occurrence of such Buyer Caused Delay. Seller shall include with such Change Notice the best information and documentation then reasonably available to Seller to support any change proposed by Seller to the Purchase Price (including the Substantial Completion Payment Amount) or the Guaranteed Substantial Completion Date based on such claim.

(ii) Each Change Notice provided to Buyer under Section 8.4(b)(i) shall be reviewed by Buyer and discussed within three (3) Business Days after Buyer's receipt of such Change Notice, at a joint meeting between the Buyer Contract Manager and the Seller Project Manager (or their designees). By the date of review thereof by the Seller Project Manager and the Buyer Contract Manager, Seller shall have updated the Change Notice to reflect its then current assessment of the expected effect of the Buyer Caused Delay on the Purchase Price (including the Substantial Completion Payment Amount) or the Guaranteed Substantial Completion Date, as applicable, and provided such updated Change Notice to Buyer. If Buyer disagrees with Seller's assessment (including whether Seller's proposed change is allowed by this Agreement), Buyer shall, within three (3) Business Days after receipt of such updated Change Notice, advise Seller of such disagreement and, thereafter, Seller shall promptly negotiate with Buyer in good faith to resolve expeditiously any issue regarding the Change Notice provided by Seller to Buyer pursuant to this Section 8.4. Seller agrees to provide such information and documentation to Buyer as Buyer may, from time to time, reasonably request in connection with Buyer's efforts to assess the merits of or Seller's position on, or to develop or evaluate possible solutions to items in dispute with respect to, such a Change Notice.

(iii) Subject to Section 8.4(b)(i), and without limiting Seller's other information and documentation obligations under this Section 8.4, any proposal by Seller for a change to the Purchase Price (including the Substantial Completion Payment Amount) or the Guaranteed Substantial Completion Date pursuant to a Change Notice under this Section 8.4 shall include (A) a comparison of the Purchase Price (including the Substantial Completion Payment Amount) and the Guaranteed Substantial Completion Date with and without the proposed change and (B) sufficient detail and supporting documentation to permit a reasonably thorough analysis of the proposed change, including the methodology of computing the proposed change to, the Purchase Price (including the Substantial Completion Payment Amount) or the Guaranteed Substantial Completion Date, and the delay to the Work or increased Direct Costs necessitating such change.

(c) Notwithstanding anything to the contrary, in the event Seller does not notify Buyer by Change Notice of the actual or potential effect of a Buyer Caused Delay in accordance with the requirements of Section 8.4 within the seven (7)-day time period prescribed by Section 8.4(b)(i), Seller shall be deemed to have irrevocably waived any and all claims for adjustment to the Purchase Price (including the Substantial Completion Payment Amount) and

the Guaranteed Substantial Completion Date arising out of or related to such Buyer Caused Delay.

**Section 8.5. Execution of Change Orders.** If, using the applicable Change Notice process described in Section 8.2, Section 8.3, or Section 8.4, Buyer and Seller reach an agreement on the requested change under such Sections, Buyer and Seller shall proceed promptly to enter into a Change Order to amend the Agreement consistent with the Change Notice, and the Work, as changed by the Change Order, thereafter will be performed in accordance with this Agreement.

**Section 8.6. Disputes Regarding Change Orders.**

(a) In the event Seller and Buyer do not agree upon the effect of a Buyer Discretionary Change pursuant to Section 8.2, then, subject to value limitation (if applicable) on Buyer Discretionary Changes set forth in Section 8.2(a), Buyer may issue to Seller a written notice to proceed with, and Seller shall implement, such Buyer Discretionary Change through a provisional Change Order that reflects the agreements between Buyer and Seller, if any, regarding the Buyer Discretionary Change and Buyer's position, or if Buyer elects, a good faith compromise position, on the issue(s) in dispute. Such written notice to proceed and provisional Change Order shall also describe the change in Work scope and the nature of the price and/or schedule-related disagreement between Seller and Buyer. Seller's signature shall not be required for such provisional Change Order to be in full force and effect once signed by Buyer. Seller and Buyer shall endeavor to resolve in a timely manner disputes that are subject to written notices to proceed and provisional Change Orders under this Section 8.6(a). Neither the issuance of, nor the performance of the incremental or decremental Work pursuant to, a notice to proceed and provisional Change Order under this Section 8.6(a) shall be construed as a waiver or admission by (i) Seller as to the validity of Buyer's disputed position with respect to the applicable Buyer Discretionary Change or (ii) Buyer as to the validity of Seller's disputed position with respect to such Buyer Discretionary Change.

(b) In the event Seller and Buyer do not agree upon the effects of an event of Force Majeure or a Buyer Caused Delay, Buyer may issue to Seller a provisional Change Order that reflects the agreements between Buyer and Seller, if any, regarding the effect of the Force Majeure (or the occurrence of the event(s), circumstance(s), or condition(s) forming the basis of Seller's claim of Force Majeure) or Buyer Caused Delay and Buyer's position, or if Buyer elects, a good faith compromise position, on the issue(s) in dispute. Such provisional Change Order shall also describe the nature of the price (in the event of a Buyer Caused Delay only) and/or schedule-related disagreement between Seller and Buyer. Seller and Buyer shall endeavor to resolve in a timely manner disputes that are subject to provisional Change Orders under this Section 8.6(b). Any dispute regarding a Change Notice for Force Majeure or Buyer Caused Delay submitted by Seller to Buyer (including any provisional Change Order under this Section 8.6(b)) must be resolved between Seller and Buyer prior to the Substantial Completion Payment Date.

(c) Any dispute between Seller and Buyer under this Article VIII shall be resolved in accordance with Section 26.10, if and as required, and, notwithstanding anything to

the contrary, Seller shall not delay performance of the Work while such dispute resolution procedures are implemented or resolution of the dispute is pending.

**Section 8.7. Calculation of Direct Costs.** Except to the extent otherwise agreed by the Parties in a Change Order and subject to Section 13.4, the adjustment to the Purchase Price (including to the Substantial Completion Payment Amount, if applicable) to which Seller shall be entitled according to Section 8.2 or Section 8.4 for any actual and substantiated net increase (or decrease) in the Direct Costs of Seller to perform the Work resulting exclusively from a Buyer Discretionary Change or Buyer Caused Delay, respectively, shall be calculated as follows:

(a) for Direct Cost items included on Exhibit R, an amount derived by applying the rates set forth on Exhibit R to the total number of incremental or decremental hours or units resulting exclusively from such Buyer Discretionary Change or Buyer Caused Delay; and

(b) for Direct Cost items not included on Exhibit R, the Direct Cost to Seller resulting exclusively from such Buyer Discretionary Change or Buyer Caused Delay plus ten percent (10%).

**Section 8.8. Presumed Authorization.** For the purposes of this Agreement, when Seller's or Buyer's representative signs a Change Order that states that the signing individual is the duly authorized representative of such Party, such authorization shall be conclusively presumed and such represented Party may not subsequently claim that the Change Order is not binding because the representative lacked authority.

**Section 8.9. Burden of Proof; No Concurrent Delays or Costs.**

(a) The burden of proof shall be on Seller regarding (i) the occurrence of a Buyer Caused Delay and (ii) the impact of Buyer Caused Delay or Buyer Discretionary Change on, and causal connection (if any) between the same and, the Project Schedule (including the anticipated Closing Date and the Guaranteed Substantial Completion Date, if applicable) and/or the Purchase Price (including by modification to the Substantial Completion Payment), as applicable.

(b) Notwithstanding anything to the contrary, to the extent of mutually occurring or concurrent delays, disruptions, interferences, and/or cost increases to the Work resulting, on the one hand, from causes, events, conditions and/or circumstances to which none of Section 8.2, Section 8.3, or Section 8.4 apply, and, on the other hand, from causes, events, conditions and/or circumstances to which one or more of Section 8.2, Section 8.3, and Section 8.4 apply, Seller shall not be entitled to relief under Section 8.2, Section 8.3, or Section 8.4.

**ARTICLE IX.  
PROJECT TESTS; PERFORMANCE GUARANTEES**

**Section 9.1. Project Performance Tests.**



(a) Seller and Buyer agree that this Article IX shall govern the performance of all Project Performance Tests under this Agreement and that all Project Performance Tests shall be performed in accordance with the requirements of this Agreement, including the Scope Book and the remainder of the Performance Standard.

(b) Without limiting the foregoing or the terms of the Scope Book, Seller shall be responsible for the performance of each Project Performance Test. Seller shall bear and be responsible for the timely payment of the costs to perform each Project Performance Test and prepare the Project Performance Test Report setting forth the Project Performance Test Results of each such Project Performance Test, including all costs of the Project Performance Test Contractor. The allocation of the proceeds received from MISO, and responsibility for the costs and charges assessed by MISO, resulting from or arising out each Project Performance Test, shall be as set forth in the MISO Agreement.

(c) (i) For each Project Performance Test, Seller shall retain and require the Project Test Performance Contractor to conduct the Project Performance Test in accordance with the requirements of this Agreement, including the Scope Book and the Performance Standard applicable to Project Performance Tests. For the initial Project Performance Test, Seller shall (A) notify Buyer at least fifteen (15) days, but no more than seventy (70) days, prior to commencing such Project Performance Test, (B) confirm in writing to Buyer the dates and times of such Project Performance Test no later than five (5) Business Days prior to commencing such Project Performance Test, and (C) follow the other processes, procedures, terms, and conditions with regard to such Project Performance Test set forth in this Agreement, including in this Article IX and the Scope Book. For any subsequent Project Performance Test (including following a cancellation of a Project Performance Test), Seller shall (1) notify Buyer at least five (5) Business Days prior to commencing such Project Performance Test, and (2) follow the other processes, procedures, terms, and conditions with regard to such Project Performance Test set forth in this Agreement, including in this Article IX and the Scope Book. If Buyer objects to Seller's proposed dates and times for any Project Performance Test, Buyer shall propose in good faith at least three (3) new dates and times for such Project Performance Test that are as close to Seller's initial proposed dates and times as is reasonably acceptable to Buyer and Buyer and Seller shall promptly select the dates and times of such Project Performance Test from among the alternative dates and times proposed by Buyer and promptly notify Buyer of such selection.

(ii) Without limiting the Scope Book or any other term of this Agreement, Seller shall keep Buyer reasonably apprised of, and promptly notify Buyer of any change in the status of, each Project Performance Test, timely provide to Buyer such other material and information regarding each Project Performance Test as Buyer may reasonably request, and afford Buyer and its Representatives, including independent engineers and testing experts, a reasonable opportunity to witness each Project Performance Test. A Project Performance Test, once begun, may not be interrupted or suspended and then resumed without Buyer's prior written approval. Nothing in the Scope Book or this Agreement shall prevent Seller or the Project Performance Test Contractor from interrupting, suspending, cancelling, or terminating a Project Performance Test and scheduling and conducting, in accordance with the requirements of this Agreement and the Scope Book, a separate subsequent Project Performance Test. For the avoidance of doubt, nothing in this clause (ii) is intended to or shall operate to

extend the Guaranteed Substantial Completion Date or the Substantial Completion Termination Trigger Date.

(d) Buyer shall make the Project available for each Project Performance Test on the agreed dates and times of each Project Performance Test. Seller shall be responsible for providing all test instrumentation (including the instrumentation described in the Scope Book), equipment, systems, tools, calibrations, material, labor (including operators and testing specialists), utilities, and services necessary to conduct each Project Performance Test in accordance with the terms of this Agreement and for staffing and operating the Project as needed for each Project Performance Test. Without limiting Seller's obligations with respect to any Project Performance Test or otherwise under this Agreement, Seller shall timely provide to Buyer such information regarding the staffing and operation of the Project in preparation for, during, and following each Project Performance Test and the actual performance of the Project Performance Test as Buyer may reasonably request. Using Project Performance Test information provided to Buyer by Seller or available to Buyer from Project or MISO equipment, systems, and data, Buyer, as the Market Participant (as defined in the MISO Agreement) for the Project under the MISO Agreement, shall coordinate the scheduling, offering, and dispatch of energy and Other Electric Products and otherwise interface with MISO with respect to each Project Performance Test. Nothing in this Section 9.1(d) is intended to modify or affect the provisions of the MISO Agreement.

(e) For each Project Performance Test, Seller shall cause the Project Performance Test Contractor to (i) prepare and complete the final written report of the Project Performance Test Contractor (the "***Project Performance Test Report***") that documents, presents, analyzes, and explains the performance and final results of such Project Performance Test in a logical, organized, and professional manner (the "***Project Performance Test Results***") and certifies the accuracy and completeness of the Project Performance Test Report, including the Project Performance Test Results, within thirty (30) days after the conclusion of such Project Performance Test and (ii) deliver such Project Performance Test Report contemporaneously to Seller and Buyer. Each Project Performance Test Report shall meet the requirements set forth in this Agreement, including the Scope Book and the Performance Standard applicable to Project Performance Tests, and shall be subject to the approval of Buyer, which shall not be unreasonably withheld, delayed, or conditioned. Seller shall provide to Buyer (A) promptly after receipt, any draft written Project Performance Test Report prepared by the Project Performance Test Contractor and delivered to Seller and a reasonable opportunity (which shall be not less than fourteen (14) days for the initial draft) to review and comment thereon and (B) a reasonable opportunity to participate in any material communication between Seller and the Project Performance Test Contractor related to any Project Performance Test, including during a Project Performance Test. Seller shall consider, and shall ensure that Project Performance Test Contractor shall consider, in good faith any comment on any draft report provided by Buyer under this Section 9.1(e).

## **Section 9.2. Minimum Performance Test Requirements; Certain Re-Test Requirements.**

(a) As a condition and requirement for achieving Substantial Completion, and subject to Section 23.6, the Substantial Completion Payment Date occurring, a valid Project

Performance Test must be successfully performed in accordance with the requirements of this Agreement, including the Scope Book and the Performance Standard applicable to Project Performance Tests, demonstrating that the Project has achieved all Minimum Performance Test Requirements.

(b) If the Project Performance Test Results of the initial Project Performance Test (the “**Initial Project Performance Test**”) show that one or more of the Minimum Performance Test Requirements were not achieved, Seller shall, upon five (5) Business Days prior written notice to Buyer, conduct, at Seller’s expense, using the same Project Performance Test Contractor that performed the Initial Project Performance Test, another Project Performance Test (a “**Required Project Performance Re-Test**”) and comply with the other processes, procedures, terms, and conditions with regard to such Project Performance Test set forth in this Agreement, including in this Article IX and the Scope Book.

(c) If the Project Performance Test Results of the Initial Project Performance Test show that all Minimum Performance Test Requirements were achieved but the Guaranteed LD Performance Test Requirements were not achieved, Seller may, upon five (5) Business Days prior written notice to Buyer, conduct, at Seller’s expense, using the same Project Performance Test Contractor that performed the Initial Project Performance Test, another Project Performance Test (an “**Optional Project Performance Re-Test**”) and comply with the other processes, procedures, terms, and conditions with regard to such Project Performance Test set forth in this Agreement, including in this Article IX and the Scope Book; provided, however, that if the performance of such Optional Project Performance Re-Test will or may cause Substantial Completion to be achieved after the Substantial Completion Termination Trigger Date, Buyer may, in its sole and absolute discretion, and upon notice to Seller provided within five (5) days after receipt of Seller’s optional re-test notice, reject Seller’s election to perform an Optional Project Performance Re-Test and require Seller to reduce the Substantial Completion Payment Amount in accordance with Section 9.2(g), and upon such rejection such election by Seller shall be deemed null and void and of no effect.

(d) If the Project Performance Test Results of a Required Project Performance Re-Test or an Optional Project Performance Re-Test show that one or more of the Minimum Performance Test Requirements were not achieved, Seller shall, upon five (5) Business Days prior written notice to Buyer, conduct, at Seller’s expense, using the same Project Performance Test Contractor that performed such Required Project Performance Re-Test or Optional Project Performance Re-Test, as applicable, another Required Project Performance Re-Test as provided herein and comply with the other processes, procedures, terms, and conditions with regard to such Required Project Performance Re-Test set forth in this Agreement, including in this Article IX and the Scope Book. If the Project Performance Test Results of a Required Project Performance Re-Test or an Optional Project Performance Re-Test show that all Minimum Performance Test Requirements were achieved but the Guaranteed LD Performance Test Requirements were not achieved, Seller may, upon five (5) Business Days prior written notice to Buyer, conduct, at Seller’s expense, using the same Project Performance Test Contractor that performed the Initial Project Performance Test, an Optional Project Performance Re-Test as provided herein and, upon such notice, shall comply with the other processes, procedures, terms, and conditions with regard to such Optional Project Performance Re-Test set forth in this Agreement, including in this Article IX and the Scope Book; provided, however, that,

notwithstanding the foregoing, if the performance of such Optional Project Performance Re-Test will or may cause Substantial Completion to be achieved after the Substantial Completion Termination Trigger Date, Buyer may, in its sole and absolute discretion, and upon notice to Seller provided within five (5) days after receipt of Seller's optional re-test notice, reject Seller's election to perform an Optional Project Performance Re-Test and require Seller to reduce the Substantial Completion Payment Amount in accordance with Section 9.2(g), and upon such rejection such election by Seller shall be deemed null and void and of no effect. Following any Required Project Performance Re-Test or Optional Project Performance Re-Test pursuant to this Section 9.2(d), this Section 9.2(d) shall apply again until Seller is not required to perform a Required Project Performance Re-Test, and elects not to (or is not permitted to) perform an Optional Project Performance Re-Test, under this Section 9.2(d).

(e) If, at any time following Substantial Completion but before the Substantial Completion Payment Date, a casualty or other event occurs that materially impacts the Project Buyer may, following the repair or replacement or completion of other remediation work to restore the Project, upon written notice to Seller, require that Seller perform an Optional Project Performance Re-Test. If Buyer requires Seller to perform an Optional Project Performance Re-Test pursuant to this Section 9.2(e), Seller shall, upon five (5) Business Days prior written notice to Buyer, conduct, at Seller's expense, and as a condition to the Substantial Completion Payment Date, using the same Project Performance Test Contractor that performed the most recent Initial Project Performance Test, Required Project Performance Re-Test, or Optional Project Performance Re-Test, as applicable, an Optional Project Performance Re-Test and shall comply with the other processes, procedures, terms, and conditions with regard to such Optional Project Performance Re-Test set forth in this Agreement, including in the Scope Book. If the Project Performance Test Results of such Optional Project Performance Re-Test show that one or more of the Minimum Performance Test Requirements were not achieved, Seller shall, at its sole expense, conduct additional Optional Project Performance Re-Tests until the Project Performance Test Results show that all of the Minimum Performance Test Requirements have been achieved. The Substantial Completion Payment Date shall be extended day for day for each day that the Project Performance Test Results show that the Minimum Performance Test Requirements have not been achieved.

(f) The "**Final Project Performance Test**" shall be the Project Performance Test for either (i) the Initial Project Performance Test, if no Required Project Performance Re-Test or Optional Project Performance Re-Test is required to be or has been conducted, or (ii) the most recent Required Project Performance Re-Test or Optional Project Performance Re-Test, if one or more Required Project Performance Re-Tests or Optional Project Performance Re-Tests have been conducted and no further Required Project Performance Re-Test is required to be, and no further Optional Project Performance Re-Test is, conducted. The "**Final Project Performance Test Results**" shall be the Project Performance Test Results for the Final Project Performance Test.

(g) If the Final Project Performance Test Results show that all Minimum Performance Test Requirements were achieved but the Guaranteed LD Performance Test Requirements were not achieved, then the Purchase Price shall be reduced by \$[●] for each kW by which the PV Plant Capacity is below the Guaranteed PV Plant Capacity.

(h) The reductions to the Purchase Price set forth in this Section 9.2 for shortfalls to the Guaranteed LD Performance Test Requirements when the Minimum Performance Test Requirements have been achieved are liquidated because of the difficulty of ascertaining the exact amount of damages that may be sustained by Buyer by reason of the Project's failure to demonstrate the Guaranteed LD Performance Test Requirements, and such liquidated amounts shall be applicable regardless of the actual amount of damages sustained by Buyer by reason of any such failure. Seller and Buyer agree that Seller's obligation to pay such liquidated amounts shall not limit Seller's Liability or Buyer's rights or remedies hereunder with respect to any breach by or default of Seller of any provision of this Agreement or any Ancillary Agreement (including breach of the requirement that the Project be in good working order), any warranty hereunder (including the Project Warranty and the Energy Yield Guarantee), condition, event, or circumstance.

(i) If the Final Project Performance Test Results show that any Minimum Performance Test Requirement was not achieved, Seller shall, at its expense, use commercially reasonable efforts to correct any such failure to achieve all Minimum Performance Test Requirements as soon as reasonably possible, but in no event later than a date sufficient to allow the Substantial Completion to occur by the Substantial Completion Termination Trigger Date. For the avoidance of doubt, nothing in this clause (i) is intended to or shall extend the Guaranteed Substantial Completion Date or the Substantial Completion Termination Trigger Date. Seller acknowledges and agrees that Seller's failure to satisfy all Minimum Performance Test Requirements will cause Buyer irreparable harm for which monetary damages would not constitute an adequate remedy. Accordingly, this Agreement does not specify or allow performance liquidated damages or an adjustment to the Purchase Price for the failure of Seller to satisfy all Minimum Performance Test Requirements and requires Seller to continue to perform the Work until Substantial Completion is achieved or this Agreement is terminated.

(j) Notwithstanding anything herein to the contrary, Seller shall not be entitled to any increase in the Purchase Price or any other incremental compensation from Buyer if the Final Project Performance Test Results show that the Project exceeds the Guaranteed LD Performance Test Requirements.

**Section 9.3. Other Project Tests.** Without limiting the foregoing, to the extent Seller or Buyer is required by MISO Rules or other Laws or applicable Permits to demonstrate, after the Closing but prior to the Work achieving Substantial Completion, the capability of, or to otherwise test, the Facility for purposes of capacity qualification or for any other purpose (including to meet requirements arising out of the Project's proposed participation in MISO or any marketplace administered by MISO) other than through a Project Performance Test contemplated by Section 9.1 and Section 9.2 and Buyer so requests, Seller shall cause such tests to be performed (including any deliverability test or capability test) in accordance with such MISO Rules or other Laws or applicable Permits, the Performance Standard, and the other requirements of this Agreement, at Seller's sole cost and expense. In planning for and conducting such tests, Seller and Buyer shall follow the provisions of the Scope Book and the principles of this Agreement, including Section 9.1 and Section 9.2, to the extent reasonable and consistent with the requirements of such tests; otherwise, Seller and Buyer shall use commercially reasonable efforts to develop planning, performance, and other terms applicable to

such tests that are reasonable and consistent with the requirements of such tests under the MISO Rules or other Laws or applicable Permits and the principles of this Agreement.

#### **Section 9.4. Energy Yield Guarantee.**

(a) Seller guarantees that, for each Energy Yield Test Period, the Actual Energy Yield shall be equal to or greater than the Expected Energy Yield (the “*Energy Yield Guarantee*”).

(b) During each Energy Yield Test Period, Seller shall conduct an Energy Yield Test in accordance with the requirements of this Agreement, including the Scope Book and the remainder of the Performance Standard. Without limiting any other provision of this Agreement, except for Goods already constituting part of the Project and Buyer’s ordinary course operation and maintenance personnel for the Project, Seller shall be responsible for providing all test instrumentation, equipment, systems, tools, calibrations, material, labor (including testing specialists), utilities (other than backfeed power), and services necessary to conduct each Energy Yield Test and for all costs associated with the foregoing or otherwise with each Energy Yield Test (including preparing the test report therefor). Buyer shall have no obligation to clean the photovoltaic modules at the Project periodically during, or otherwise for purposes of, the Energy Yield Guarantee.

(c) *Energy Yield Liquidated Damages.*

(i) If, for the first Energy Yield Test Period, the Actual Energy Yield is less than the Expected Energy Yield, Seller shall pay to Buyer the amount equal to the Energy Yield Liquidated Damages within thirty (30) days after the end of such Energy Yield Test Period.

(ii) If, for the second Energy Yield Test Period:

(A) the Energy Yield Liquidated Damages exceed the Energy Yield Liquidated Damages for the first Energy Yield Test Period, Seller shall pay to Buyer, within thirty (30) days after the end of such Energy Yield Test Period, the amount equal to the Energy Yield Liquidated Damages for the second Energy Yield Test Period *minus* the Energy Yield Liquidated Damages for the first Energy Yield Test Period;

(B) the Energy Yield Liquidated Damages are less than the Energy Yield Liquidated Damages for the first Energy Yield Test Period, Buyer shall pay to Seller, within thirty (30) days after receiving from Seller an invoice and the associated test report therefor according to Section 9.4(d)(ii), the amount equal to [●]%<sup>27</sup> of the difference equal to (1) the Energy Yield Liquidated Damages for the first Energy Yield Test Period *minus* (2) the Energy Yield Liquidated Damages for the second Energy Yield Test Period; or

(C) the Energy Yield Liquidated Damages are equal to the Energy Yield Liquidated Damages for the first Energy Yield Test Period, no amount with respect to Energy Yield Liquidated Damages shall be payable by either Party in connection with the

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<sup>27</sup> NTD: This multiplier will be transaction-specific and is expected to be in the range of 91-95%.

second Energy Yield Test Period (without limiting any obligation of Seller to pay Energy Yield Liquidated Damages in connection with the first Energy Yield Test Period under Section 9.4(c)(i)).

(d) In addition to any other reporting requirements under this Agreement, Seller shall provide the following reports with respect to each Energy Yield Test:

(i) Within ten (10) days after the end of each month of an Energy Yield Test Period, Seller shall provide a monthly written report to Buyer (A) summarizing the interim results of such Energy Yield Test (including the Actual Energy Yield and Expected Energy Yield) for such month and on an Energy Yield Test Period-to date basis, (B) providing reasonable documentation and the raw data therefor, all in an organized and professional manner and otherwise in accordance with the Performance Standard, (C) if the interim results indicate a failure to satisfy the Energy Yield Guarantee, Seller's best information as to the cause thereof, and (D) certifying the accuracy and completeness of such report, including the interim results set forth therein. Following receipt by Buyer of such monthly report, Seller shall, if requested by Buyer, meet with Buyer to review and discuss the contents thereof, including any comments or objections of Buyer to the data, interim results or other contents expressed therein.

(ii) Within fifteen (15) days after the end of each Energy Yield Test Period, Seller shall provide a written report to Buyer for such Energy Yield Test Period (A) summarizing the results of such Energy Yield Test (including the Actual Energy Yield and Expected Energy Yield) for such Energy Yield Test Period, (B) providing reasonable documentation and the raw data therefor, all in an organized and professional manner and otherwise in accordance with the Performance Standard, (C) if the results indicate a failure to satisfy the Energy Yield Guarantee, Seller's best information as to the cause thereof, and (D) certifying the accuracy and completeness of such report, including the results set forth therein. Following receipt by Buyer of such report, Seller shall, if requested by Buyer, meet with Buyer to review and discuss the contents thereof, including any comments or objections of Buyer to the data, results or other contents expressed therein.

(iii) If the Parties do not reach agreement on the results of an Energy Yield Test, either Party may submit such disagreement for resolution pursuant to Section 26.10 (and, for the avoidance of doubt, Seller's reports shall not be controlling).

## **ARTICLE X. WARRANTY**

### **Section 10.1. Project Warranty.**

(a) Seller hereby warrants to Buyer that:

(i) Each Good included in the Project will:

(A) be new (when installed) and free from damage;

(B) be of good and workmanlike quality and condition;

(C) be free from defects and deficiencies in design, engineering, manufacture, assembly, materials, workmanship, and otherwise; and

(D) conform to the requirements of this Agreement, including the Scope Book and remainder of the Performance Standard (the warranty set forth in this Section 10.1(a)(i), the “*Goods Warranty*”);

(ii) all of the design services included as part of the Work (excluding the design services of the manufacturer of the Goods embodied in the Goods themselves, which are covered under the Goods Warranty, but including, for the avoidance of doubt, the design, drafting and engineering of the Project, including the selection of the Goods to be incorporated therein) will:

(A) conform to (and be performed and completed such that the Project and the Project Assets comply with) all Laws and applicable Permits, and the other requirements of this Agreement, including the Scope Book and remainder of the Performance Standard; and

(B) be performed and completed in a good and workmanlike manner, free from any defects and errors in achieving (1) the design requirements set forth in the Scope Book or otherwise in this Agreement and (2) compliance with clause (A) of this Section 10.1(a)(ii) (the warranty set forth in this Section 10.1(a)(ii), the “*Design Warranty*”); and

(iii) all of the Work, other than the design services included as part of the Work (which are covered, in the case of the design services of the manufacturer of the Goods embodied in the Goods themselves, under the Goods Warranty or, otherwise, under the Design Warranty), will:

(A) conform to (and be performed and completed such that the Project and the Project Assets comply with) all Laws and applicable Permits, and the other requirements of this Agreement, including the Scope Book and remainder of the Performance Standard; and

(B) be performed and completed in a good and workmanlike manner, free from any defects and deficiencies (the warranty set forth in this Section 10.1(a)(iii), the “*Non-Design Work Warranty*”).

(b) The Project Warranty shall extend to all Goods and the Work, without regard to vendor or supplier, and any warranty provided by any Contractor or Subcontractor with respect to the Work shall be deemed incorporated into and part of the Project Warranty during the Warranty Period; provided, however, that any exclusion in any such warranty provided by such Contractor or Subcontractor that is attributable or related to other aspects of the Work shall be deemed for all purposes not to be an exclusion to the Project Warranty. Nothing in this Section 10.1 or elsewhere in this Article X is intended to limit Seller’s obligations under Section 5.2.

## **Section 10.2. Warranty Period.**



(a) The Project Warranty in respect of the Project shall commence on the date the Work shall be deemed to have achieved Substantial Completion (other than for purposes of liquidated damages and termination rights) pursuant to Section 7.3(a) and shall remain in effect for a period of [two (2)]<sup>28</sup> consecutive years from such date (the “**Warranty Period**”); provided that any repairs or other warranty remedies performed pursuant to the Project Warranty shall be warranted for the longer of (i) the remainder of the Warranty Period and (ii) one (1) year after the performance of the warranty repair or other remedy but shall not, in any event, remain in effect for a period longer than [three (3)]<sup>29</sup> consecutive years after Substantial Completion.

(b) Seller acknowledges that the Scope Book requires Seller to obtain warranties that (i) exceed the Warranty Period for or with respect to specified components, equipment, systems, and other parts of the Project, such as, for purposes of illustration only, the PV Modules, Trackers, PCUs, and transformers (including the GSU), and (ii) include other specified warranty terms.

(c) Seller shall assign, convey, and otherwise transfer to Buyer on the applicable Warranty Transfer Date any Transferred Closing Warranties and any Transferred Post-Closing Warranties.

**Section 10.3. No Warranty Impairment.** Seller shall not take, and shall ensure that its Contractors and Subcontractors and their Representatives shall not take, any action (including any action that amounts to inaction) that waives, releases, voids, or otherwise restricts, limits, or impairs any warranty or guaranty in connection with the Work or the Project that Seller or any of its Contractors or Subcontractor may obtain from others.

#### **Section 10.4. Remedies for Defaults in Warranted Work.**

(a) In the event Buyer notifies Seller of, or Seller becomes aware of, any Defect existing within the Warranty Period, upon receipt of such notice or knowledge, Seller, at its sole cost, expense, and risk, and in coordination with Buyer, shall promptly propose to Buyer a schedule for the work with respect to such claimed Defect to be completed as promptly as practicable (which schedule shall be subject to Buyer’s approval, such approval not to be unreasonably withheld or delayed) and, in accordance with the schedule approved by Buyer, promptly perform such tests, inspections, and other diagnostic services, if any, as may be necessary to confirm the existence and/or cause(s) of the claimed Defect, immediately commence corrective action to Remedy the Defect, and prosecute such remedial action with all diligence until the Defect is Remedied in accordance with the Performance Standard and the other requirements of this Agreement. In connection therewith, Buyer shall provide Seller access to the Project Site according and subject to Section 12.3(b). Seller shall keep Buyer regularly apprised of its progress in Remediating the Defect and shall provide to Buyer such information and material in connection therewith as Buyer may reasonably request. Seller shall notify Buyer upon completion of the Remedy of any claimed Defect.

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<sup>28</sup> **NTD:** A two (2)-year warranty period is the minimum. Buyer would look favorably on a three (3)-year warranty period offered in a Bidder’s RFP proposal.

<sup>29</sup> **NTD:** To be four (4) years if Bidder provides a three (3)-year warranty period.

(b) Seller acknowledges and agrees that any cost it incurs under this Section 10.4 to discharge its obligation to Remedy any Defect, including, if applicable, shipping costs, costs of gaining access to defective items, costs of removing and replacing defective items, and costs of reassembly of any items required for gaining access to defective items, shall not be deemed consequential or incidental damages under Section 24.11 and, as between Seller and Buyer, shall be costs borne by Seller.

(c) Should Seller fail to promptly commence to Remedy any claimed Defect in accordance with this Section 10.4 (but not later than ten (10) Business Days after the original notice set forth in Section 10.4(a) or Seller otherwise becoming aware of such claimed Defect) and thereafter prosecute such remedial action with all diligence until the claimed Defect is Remedied in accordance with the requirements of this Agreement (or, without limiting the foregoing, fail to comply with any schedule approved by Buyer pursuant to Section 10.4(a)) (any such failure, a “*Step-In Failure*”), Buyer shall have the right, but shall not be obligated, to provide to Seller a written notice describing the nature of such claimed Step-In Failure and Buyer’s intent to perform a Remedy, either itself or through a third party. Buyer shall then provide Seller with an opportunity to discuss such claim with Buyer (including an opportunity for Seller to describe why Seller disagrees with such claim). From and after five (5) Business Days after receipt of such notice, if any Step-In Failure continues, Buyer shall have the right, but shall not be obligated, to perform a Remedy, either itself or through a third party, and Seller shall be liable for, and shall pay to Buyer within twenty (20) days after receipt of invoices with supporting documentation, the direct and reasonable costs (without markup) incurred by Buyer in connection with Remediating such claimed Defect. Buyer’s performance or non-performance of such Remedy shall not in any way limit or relieve Seller of its obligations or adversely affect Buyer’s rights and remedies under this Agreement and, without limiting the foregoing, such Remedy (or Work) shall be deemed covered under the Project Warranty (including any associated Goods and work being deemed Goods and Work for all purposes thereof as if performed by Seller). Subject and according to Section 12.3(b), Seller shall be given the opportunity to observe, review and test the performance of such work and/or the results of such work for the purposes of confirming that such work has been correctly performed in accordance with this Agreement.

(d) The fact that any Remedy work has been performed or caused to be performed by Seller, or that any Remedy work has been performed by Buyer (or any member of the Buyer Group), shall not operate to preclude Seller from disputing the validity of the associated claim of Defect by Buyer, provided that, promptly after Seller knows, or reasonably should have known, that Buyer’s claim is invalid (and in no event more than seven (7) days after commencement of physical Remedy work), Seller provides Buyer with a written protest notice that it is performing, or causing the performance of, such Remedy work under protest, or that it protests the performance of such Remedy work by Buyer (or any member of the Buyer Group). To the extent such claim is determined not to be a valid claim under this Article X (as resolved or determined by agreement of the Parties or pursuant to the dispute resolution procedure set forth in Section 26.10) and the Remedy work was performed or caused to be performed by Seller, Buyer shall reimburse Seller for the actual and substantiated Direct Costs of Seller incurred solely to perform (or cause to be performed) such Remedy work.

(e) Seller's obligations with respect to effecting a Remedy under the Defects Warranty for any PV Module shall be subject to the following:

(i) if such obligations are initiated by a claim from Buyer, Buyer must provide Seller reasonable documentation supporting its claim of a Defect;

(ii) provided that the definition of "Remedy" and other requirements of this Agreement with respect to a Remedy are met, if a Defect exists, Seller shall have the option to either repair the PV Module or replace the PV Module;

(iii) any replacement PV Modules may be of another type of module, provided that it is compatible with the Project and the definition of "Remedy" and other requirements of this Agreement with respect to a Remedy are met; and

(iv) upon completion of the Remedy, any replaced PV Module shall become property of the original PV Module manufacturer and Seller shall (or shall cause the original PV Module manufacturer to) remove from the Project Site and dispose of the replaced PV Module.

**Section 10.5. Limitations on Warranty.** The scope of the Project Warranty expressly excludes and does not apply to: (a) damage or loss to the Project to the extent caused by (i) the failure by Buyer or any of its Representatives to operate and maintain the Project in compliance with all Laws and applicable Permits and in accordance with the applicable manufacturer operation and/or maintenance manuals or the manufacturer's requirements, as such manuals and requirements are (A) provided in writing to Buyer on or prior to the SC Transfer Date and (B) updated from time to time by Seller, any Contractor or Subcontractor, or the applicable manufacturer provided in writing to Buyer (other than to the extent of any such updates that adversely affect the long-term performance, safety or design or useful life of the Project or any component thereof in any material respect), or (ii) an event of Force Majeure, (b) cosmetic conditions not affecting the performance or safety of the Project arising out of the natural and inevitable wear that would reasonably be expected to occur as a result of operation of the Project, or (c) any implied warranty or any other warranty not expressly set forth herein, including any warranties of merchantability or fitness for a particular purpose.

**Section 10.6. Staffing.** Seller shall ensure, at all times during the Warranty Period, that sufficient competent, qualified personnel are available to respond promptly to Buyer's request for diagnostic or warranty Work and promptly and efficiently handle and correct any Defect discovered or being remedied within the Warranty Period.

## **ARTICLE XI. TITLE**

**Section 11.1. Title Transfer of Closing Assets.** Title to the Closing Assets shall pass from Seller to Buyer at the Closing.

**Section 11.2. Title Transfer and Delivery of Post-Closing Project Assets.**

(a) Seller hereby warrants and guarantees to Buyer that Buyer will receive good and valid title to the Post-Closing Project Assets, free and clear of all Encumbrances other than Permitted Encumbrances, when title passes to and vests in Buyer. Title to any Post-Closing Project Asset shall pass to and vest in Buyer on: (i) with respect to any Post-Closing Project Asset that is a physical Good incorporated into the Project, the date of physical incorporation of such Post-Closing Project Asset into the Project; (ii) with respect to any Transferred Post-Closing Warranty, the Warranty Transfer Date; (iii) with respect to any Transferred Post-Closing Environmental Attribute, Transferred Post-Closing Project Contract, Transferred Post-Closing Permit, or Transferred Post-Closing Intellectual Property Ownership and Contract Rights (excluding any Seller-Owned Project Intellectual Property), subject to Section 20.5, the date such Transferred Post-Closing Environmental Attribute, Transferred Post-Closing Project Contract, Transferred Post-Closing Permit, or Transferred Post-Closing Intellectual Property Ownership and Contract Rights (excluding any Seller-Owned Project Intellectual Property) is assigned to Buyer pursuant to Section 11.2(d); and (iv) with respect to any Good for which there is and will be no physical incorporation of such Post-Closing Project Asset into the Project or any Post-Closing Project Asset not described in clause (ii) or (iii) immediately above (including any Transferred Post-Closing Inventory and Transferred Post-Closing Projects Assets such as, for example, post-Closing books, records, documents, drawings, operating data, manuals, and reports), subject to Section 20.5(c), the date that Seller's creates, or acquires title to, as applicable, such Post-Closing Project Asset. Transfer of title under this Section 11.2 shall have no effect on Buyer's rights under other provisions of this Agreement.

(b) Seller shall have care, custody, and control and risk of loss in respect of each Post-Closing Project Asset through the transfer and vesting of title in such Post-Closing Project Asset as provided herein. Subject to Article X (Warranty), the remainder of this Section 11.2(b), Section 12.1(b), Section 16.4, and Article XXIV (Indemnification), and without limiting Seller's obligations under this Agreement and any Ancillary Agreement with respect to each Post-Closing Project Asset and the Project Site and the performance of the Work after the Closing, Buyer shall have care, custody, and control and risk of loss in respect of each Post-Closing Project Asset after the transfer and vesting of title in such Post-Closing Project Asset as provided herein. Prior to the time title in any Transferred Post-Closing Environmental Attribute, Transferred Post-Closing Project Contract, Transferred Post-Closing Permit, Transferred Post-Closing Warranty, or Transferred Post-Closing Intellectual Property Ownership and Contracts Rights (excluding any Seller-Owned Project Intellectual Property) has passed to and vested in Buyer as provided herein, Seller shall comply and perform in accordance with the terms and conditions of such Transferred Post-Closing Environmental Attribute, Transferred Post-Closing Project Contract, Transferred Post-Closing Permit, Transferred Post-Closing Warranty, and Transferred Post Closing Intellectual Property Ownership and Contract Rights (excluding any Seller-Owned Project Intellectual Property). Seller shall take all steps necessary to protect Buyer's title to and interest in all Post-Closing Project Assets with respect to which title has passed to and vested in Buyer but that remain in the care and possession of Seller or another Person (including Buyer's interest in receiving undamaged Post-Closing Project Assets) and, with respect to Transferred Closing Warranties or Transferred Post-Closing Warranty, Seller shall not amend, supplement, revise, or otherwise modify any Transferred Closing Warranty or Transferred Post-Closing Warranty without Buyer's prior written consent.

(c) At least once every two (2) weeks beginning on the Closing until the Substantial Completion Payment Date, and on the Substantial Completion Payment Date, Seller shall (i) deliver to Buyer (A) an updated list of all Transferred Post-Closing Environmental Attributes, Transferred Post-Closing Intellectual Property Ownership and Contract Rights that constitute Seller-Owned Project Intellectual Property, Transferred Post-Closing Inventory, Transferred Post-Closing Permits, Transferred Post-Closing Tangible Personal Property, and Transferred Post-Closing Warranties and (B) possession at the Project Site (or with respect to Transferred Post-Closing Environmental Attributes, Transferred Post-Closing Intellectual Property Ownership and Contract Rights that constitute Seller-Owned Project Intellectual Property, Transferred Post-Closing Permits, and Transferred Post-Closing Warranties possession at a location specified by Buyer to Seller) of all Transferred Post-Closing Environmental Attributes, Transferred Post-Closing Intellectual Property Ownership and Contract Rights that constitute Seller-Owner Project Intellectual Property, Transferred Post-Closing Inventory, Transferred Post-Closing Permits, Transferred Post-Closing Tangible Personal Property, and Transferred Post-Closing Warranties and (ii) complete, execute, and deliver to Buyer a Post-Closing Bill of Sale and/or a Post-Closing Assignment and Assumption Agreement with respect to the Post-Closing Project Assets included therein and covered thereby (including all Transferred Post-Closing Intellectual Property Ownership and Contract Rights that constitute Seller-Owned Project Intellectual Property). Any such Post-Closing Bill of Sale or Post-Closing Assignment and Assumption Agreement shall identify and describe in reasonable detail each such Post-Closing Project Asset and include such other information as Buyer may reasonably request.

(d) At least once per week from the Closing until the Substantial Completion Payment Date, Seller shall deliver to Buyer an updated list of all proposed Transferred Post-Closing Project Contracts and proposed Transferred Post-Closing Intellectual Property Ownership and Contract Rights (excluding any Seller-Owned Project Intellectual Property) and a complete and accurate copy of such proposed Transferred Post-Closing Project Contracts and proposed Transferred Post-Closing Intellectual Property Ownership and Contract Rights (excluding any Seller-Owned Project Intellectual Property). With respect to each proposed Transferred Post-Closing Project Contract(s) and proposed Transferred Post-Closing Intellectual Property Ownership and Contract Rights (excluding any Seller-Owned Project Intellectual Property) that Buyer directs Seller to assign to Buyer, Seller shall, subject to Section 20.5, complete, execute, and deliver to Buyer a Post-Closing Assignment and Assumption Agreement with respect to such Transferred Post-Closing Project Contract(s) and such Transferred Post-Closing Intellectual Property Ownership and Contract Rights (excluding any Seller-Owned Project Intellectual Property). Any such Post-Closing Assignment and Assumption Agreement shall identify and describe in reasonable detail each such Transferred Post-Closing Project Contract and Transferred Post-Closing Intellectual Property Ownership and Contract Rights (excluding any Seller-Owned Project Intellectual Property) and shall include such other information as Buyer may reasonably request. For the avoidance of doubt, no proposed Transferred Post-Closing Project Contract or proposed Transferred Post-Closing Intellectual Property Ownership and Contract Rights (excluding any Seller-Owned Project Intellectual Property) shall be conveyed, assigned, or otherwise transferred to Buyer unless Buyer has directed Seller to assign such proposed Transferred Post-Closing Project Contract or proposed Transferred Post-Closing Intellectual Property Ownership and Contract Rights (excluding any Seller-Owned Project Intellectual Property) to Buyer pursuant to this Section 11.2(d).

(e) On the Substantial Completion Payment Date, Seller shall deliver to Buyer a comprehensive list of (i) all Transferred Post-Closing Environmental Attributes conveyed to Buyer, Transferred Closing Environmental Attributes conveyed to Buyer, and Environmental Attributes that are Non-Assigned Assets as of such date, (ii) all Transferred Post-Closing Intellectual Property Ownership and Contract Rights that constitute Seller-Owned Project Intellectual Property conveyed to Buyer, Transferred Closing Intellectual Property Ownership and Contract Rights that constitute Seller-Owned Project Intellectual Property conveyed to Buyer, and Intellectual Property Ownership and Contract Rights that constitute Seller-Owned Project Intellectual Property and are Non-Assigned Assets as of such date, (iii) all Transferred Post-Closing Inventory and Transferred Closing Inventory conveyed to Buyer, (iv) all Transferred Post-Closing Permits conveyed to Buyer, Transferred Closing Permits conveyed to Buyer, and Permits that are Non-Assigned Assets as of such date, (v) all Transferred Post-Closing Tangible Personal Property and Transferred Closing Tangible Personal Property conveyed to Buyer, (vi) all Transferred Post-Closing Warranties conveyed to Buyer, Transferred Closing Permits conveyed to Buyer, and Warranties that are Non-Assigned Assets as of such date, (vii) all Transferred Post-Closing Project Contracts conveyed to Buyer, Transferred Closing Project Contracts conveyed to Buyer, and Project Contracts that are Non-Assigned Assets as of such date, and (viii) all Transferred Post-Closing Intellectual Property Ownership and Contract Rights (excluding any Seller-Owned Project Intellectual Property) conveyed to Buyer, and Intellectual Property Ownership and Contract Rights (excluding any Seller-Owned Project Intellectual Property) that are Non-Assigned Assets as of such date. Seller shall organize such list by category and subcategory (e.g., for Project Contracts, having an entry with a conspicuous heading “Project Contracts” and conspicuous sub-headings of “Transferred Post-Closing Project Contracts,” “Transferred Closing Project Contracts,” and “Project Contracts that are Non-Assigned Assets” (or substantially similar headings or sub-headings)) and identify and include in the appropriate subcategory the assets that belong in such subcategory.

**Section 11.3. Indemnification for Title Defects.** WITHOUT LIMITING THE FOREGOING OR Article XXIV (INDEMNIFICATION), SELLER SHALL DEFEND, INDEMNIFY, AND HOLD HARMLESS EACH MEMBER OF THE BUYER GROUP FROM AND AGAINST ANY AND ALL ACTIONS OR LOSSES, WHETHER OR NOT RELATED TO ANY THIRD PARTY CLAIM, SUFFERED, INCURRED, OR SUSTAINED BY ANY OF THEM IN CONNECTION WITH ANY BREACH OF THE WARRANTY PROVIDED UNDER THIS Article XI OR ANY CLAIMED DEFECT (INCLUDING ENCUMBRANCES) IN TITLE TO ANY PROJECT ASSET TRANSFERRED TO BUYER AND COVERED BY THIS Article XI.

## **ARTICLE XII. CARE, CUSTODY, AND CONTROL; RISK OF LOSS; SITE ACCESS**

### **Section 12.1. Project and Project Site.**

(a) For purposes of this Agreement, as between Seller and Buyer: (i) Seller shall have care, custody, and control of (A) the Closing Assets through the Closing and (B) without limiting Article II (The Work) or Buyer’s rights under Section 12.3(b), the Work (other than Work in respect of a Closing Asset) through Final Completion or, with respect to warranty Work or any other Work following Final Completion, the completion of such Work;

(ii) subject to Section 12.1(b), Buyer shall have care, custody, and control of the Closing Assets after the Closing; (iii) subject to Section 11.2(b), Seller shall have care, custody, and control of each Post-Closing Project Asset until the vesting of title in such Post-Closing Project Asset in Buyer; and (iv) subject to Section 11.2(b), Buyer shall have care, custody, and control of each Post-Closing Project Asset from and after the vesting of title in such Post-Closing Project Asset in Buyer.

(b) Seller shall develop a security plan for the Project, including the Project Site and the Goods (the “*Project Site Security Plan*”), through Final Completion. The Project Site Security Plan shall require Seller to assume responsibility for the care, custody, protection, and safekeeping of the Project Assets through the Substantial Completion Payment Date. Seller shall deliver a copy of its proposed Project Site Security Plan to Buyer no later than one hundred twenty (120) days prior to the Construction Commencement Date for Buyer’s review, comment, and approval, such approval not to be unreasonably withheld, conditioned, or delayed. Buyer shall provide its comments to the proposed Project Site Security Plan, if any, to Seller within forty-five (45) days after Buyer’s receipt of the initial Project Site Security Plan from Seller and within ten (10) Business Days after Buyer’s receipt of any modification to an approved Project Site Security Plan from Seller, and Seller shall, in each case, consider in good faith timely comments from Buyer on the Project Site Security Plan. Without limiting Section 4.1(c) or the Performance Standard, Seller shall be responsible for implementing, complying with, and enforcing, and performing the Work in accordance with, the Project Site Security Plan.

#### **Section 12.2. Risk of Loss.**

(a) Without limiting Article XIII (Insurance) or Article XXIV (Indemnification), any loss of or damage to any portion of the Work or the Closing Assets occurring at or prior to the Closing shall be for the account of and Remedied or otherwise corrected in accordance with this Agreement by Seller at its sole risk, cost, and expense. Seller shall proceed with the performance and completion of the Work in all respects in accordance with this Agreement despite the occurrence of any such loss or damage.

(b) Subject to the other terms of this Agreement, including Article X (Warranty), Article XIII (Insurance), Section 16.4 (Excluded Liabilities), and Article XXIV (Indemnification), any loss of or damage to the Closing Assets occurring after the Closing shall be for the account of Buyer.

(c) Any loss of or damage to the Post-Closing Project Assets occurring: (i) at or prior to the time title in such Post-Closing Project Assets has transferred to and vested in Buyer in accordance with Section 11.2 shall be for the account of Seller; and (ii) after the time title in such Post-Closing Project Assets has transferred to and vested in Buyer in accordance with Section 11.2 shall be for the account of Buyer, subject to the other terms of this Agreement, including Section 8.3(b) (Force Majeure Change Orders), Article X (Warranty), Article XIII (Insurance), Section 16.4 (Excluded Liabilities), and Article XXIV (Indemnification).

#### **Section 12.3. Access Rights.**

(a) Buyer's access rights to the Project Site prior to the Closing and with regard to other matters concerning the Work or the Project are set forth in Section 15.3 and elsewhere in this Agreement.

(b) On and after the Closing Date, Seller may enter and use such portion of the Project Assets, subject to compliance with (i) the Project Site Security Plan and (ii) the other terms of this Agreement, including the Performance Standard, as reasonably necessary to exercise its rights and to perform its obligations hereunder, including (A) prior to the Substantial Completion Payment Date, performing the Work, including operating the Project during any Project Performance Test or pursuant to and in accordance with any express instructions provided by Buyer (or any of its Affiliates or agents) to Seller pursuant to Section 20.19 or the MISO Agreement and implementing, complying with, and enforcing, and performing the Work in accordance with, the Project Site Security Plan, and (B) after the Substantial Completion Payment Date, (1) gaining entry to, inspecting, and correcting any alleged Defect covered by the Project Warranty, (2) correcting or otherwise completing any of the Punchlist Items on the Punchlist or performing any other Work necessary to be performed for the Work to achieve Final Completion or (3) performing the Energy Yield Test. Access under the terms hereof shall also be granted to any duly authorized Contractor or Subcontractor of Seller involved in the Work contemplated by clauses (1) and (2) immediately above and approved for access by Buyer, such approval not to be unreasonably withheld, conditioned, or delayed. From and after the Substantial Completion Payment Date, any right of access pursuant to this Section 12.3 shall be coordinated in advance with Buyer and exercised in such a manner as to minimize the effect on the use, operation, and maintenance of the Project Assets and the activities of Buyer and its invitees at the Project Site (which coordination may include consideration by Seller and Buyer of the postponement of corrective work to non-daylight hours).

## **ARTICLE XIII. INSURANCE**

### **Section 13.1. Seller's Insurance.**

(a) Without limiting any of its other obligations, liabilities, and responsibilities under this Agreement, Seller shall carry and maintain in full force and effect, or cause to be carried and maintained in full force and effect, without seeking reimbursement and with Seller's costs covered by the Purchase Price, the insurance set forth below unless otherwise stated herein:

(i) Worker's Compensation Insurance. Worker's Compensation Insurance and/or such similar work-related coverage required by Laws where the Work is performed (or other jurisdictions for which it may be required due to any of its employees' or agents' residence or nationality) and Employer's Liability Insurance, where and for those individuals as applicable, with policy limits of not less than One Million Dollars (\$1,000,000) per occurrence;

(ii) Business Automobile Liability Insurance. Business Automobile Vehicle Liability Insurance covering owned, non-owned, leased, and hired and rented motor vehicles, including loading and unloading, with policy limits of not less than One Million Dollars



(\$1,000,000) combined single limit for bodily injury and property damage per occurrence/aggregate;

(iii) Commercial General Liability Insurance. Commercial General Liability Insurance for Seller's legal liability for all Work performed under this Agreement, with policy limits of not less than One Million Dollars (\$1,000,000) combined single limit for bodily injury, death, and property damage per occurrence and Two Million Dollars (\$2,000,000) annual aggregate, and with coverage that includes coverage for products and completed operations until expiration of the Warranty Period, blanket contractual liability, explosion, collapse, and underground coverage, broad form property damage, and personal injury insurance;

(iv) Excess/Umbrella Liability Insurance. Excess or Umbrella Liability Insurance providing for coverage for each occurrence and in the aggregate in excess of the coverage limits of each policy set forth in Section 13.1 of not less than [[●] Million Dollars (\$\_\_,000,000)]<sup>30</sup> per occurrence/aggregate;

(v) Marine Cargo and Watercraft Insurance. If any owned or non-owned watercraft of any kind is used in the performance of the Work, Marine Cargo Insurance and Protection and Indemnity (P&I) Insurance (including war risk) for the applicable vessels in the following amounts: (A) Hull and Cargo: agreed value of the applicable vessels of the watercraft and reasonable estimation of the replacement value of any cargo carried thereon; and (B) P&I: not less than One Million Dollars (\$1,000,000) per occurrence or the agreed value of the vessel, whichever is greater, it being agreed by Seller and Buyer that such insurance may be provided by Seller or the Contractor(s) or Subcontractor(s) using watercraft in connection with the Work;

(vi) Aircraft Liability Insurance. If any owned or non-owned aircraft is used in the performance of the Work, Aircraft Liability Insurance, which shall be endorsed to provide coverage for owned and non-owned aircraft, Guest Voluntary Settlement, and passengers and crew, with policy limits of: (A) for Bodily Injury, not less than Ten Million Dollars (\$10,000,000) combined single limit; and (B) for Property Damage, not less than Ten Million Dollars (\$10,000,000) per occurrence, it being agreed by Seller and Buyer that such insurance may be provided by the aircraft operator or Seller, as Seller and Buyer deem appropriate based on the specific aircraft and scope of Work to be provided;

(vii) Insurance Required by Laws or Financing Parties. Any other insurance required by Law or required by the Financing Parties and reasonably available in the commercial insurance marketplace; and

(viii) Seller's Equipment Floater. Seller's Equipment Insurance covering Seller's materials, tools, equipment, and items used in the performance of the Work (whether owned, rented, or borrowed) that will not become part of the Project. Seller shall cause all Contractors and Subcontractors to maintain such insurance. Any policy of insurance covering Seller for its owned and leased vehicles, machinery, tools, or equipment used in connection with

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<sup>30</sup> **NTD:** The limits of the Excess/Umbrella Liability Insurance policy will be no less than \$10,000,000 and up to approximately 10% of the Purchase Price.

the Project for physical loss or damage shall provide for the waiver of subrogation in favor of each member of the Buyer Group.

(b) The insurance required under Section 13.1(a)(i) (Worker's Compensation), Section 13.1(a)(ii) (Business Automobile Liability), Section 13.1(a)(iii) (Commercial General Liability), and Section 13.1(a)(iv) (Excess/Umbrella Liability) shall be obtained on or prior to, and be in full force and effect on, the Effective Date and shall be maintained in effect until at least the expiration of the Warranty Period. The insurance required under Section 13.1(a)(v) (Marine Cargo and Watercraft), Section 13.1(a)(vi) (Aircraft Liability), Section 13.1(a)(vii) (Insurance Required by Laws or Financing Parties), and Section 13.1(a)(viii) (Seller's Equipment Floater) shall be obtained on or prior to, and be in full force and effect as of, the FNTF Date, and shall be maintained in effect until the Work has achieved Final Completion.

(c) Seller understands and agrees that the insurance requirements set forth in this Article XIII shall not limit Seller's Liability or responsibility under this Agreement or be construed to be the only types and amounts of insurance that Seller should maintain, or cause to be maintained, to adequately protect and cover the insureds from the hazards of performing the Work or Seller's care, custody, and control or occupation of the Project Site. Buyer shall have no responsibility for the failure of any insurer of Seller or any of its Contractors or Subcontractors to settle or pay out claims. All insurance carried by Seller and its Contractors or Subcontractors pursuant to this Article XIII shall be with reputable and financially solvent insurance companies that have been approved by appropriate Governmental Authorities to conduct insurance business in the State of Texas and are (i) rated "A-VII" or better by A.M. Best's "Insurance Guide and Key Ratings" or (ii) nationally recognized and satisfactory to Buyer in its sole and absolute discretion. All insurance that Seller or any of its Contractors or Subcontractors is required to carry under this Article XIII shall be on an ISO (Insurance Standards Office) occurrence or "claims made" coverage form (or, subject to Buyer's prior written consent, which shall not be unreasonably withheld, conditioned, or delayed, such other form generally accepted in the insurance industry for the applicable coverage) with the exception of the BAR Insurance to be obtained by Seller pursuant to Section 13.4 (BAR Insurance), which may be provided on an "occurrence" coverage form. For insurance coverage provided on a "claims made" form, Seller or the party providing such insurance hereunder shall maintain, whether through renewal of the applicable policy without an adjustment to the retroactive date specified therein or otherwise, such insurance coverage in respect of the Work performed under this Agreement for so long as may be necessary to respond to any occurrence arising out of performance of the Work and covered under the original claims made policy referenced in the certificate of insurance issued hereunder. Seller shall use commercially reasonable efforts to maintain, or cause to be maintained, the current "reinstatement" provisions applicable to the Commercial General Liability and Excess Liability policies hereunder.

(d) With respect to the policies of insurance required to be carried and maintained by or for Seller pursuant to this Section 13.1, Seller shall (i) promptly notify Buyer if any premium or installment is not paid when due, and (ii) if any such insurance policy is to be canceled or terminated for any reason or materially altered (including a reduction of limits), notify Buyer at least thirty (30) days prior to cancellation, termination, or material alteration.

(e) With respect to the policies of insurance required to be carried and maintained by any Contractor or Subcontractor pursuant to Section 13.7, Seller shall, to the extent Seller has such knowledge, (i) promptly notify Buyer if any premium or installment is not paid when due, and (ii) if any such insurance policy is to be canceled or terminated for any reason or materially altered (including a reduction of limits), notify Buyer at least thirty (30) days prior to cancellation, termination, or material alteration.

**Section 13.2. Required Endorsements or Terms.** The policies of insurance required to be carried and maintained by or for Seller (including by any Contractor or Subcontractor) pursuant to Section 13.1, Section 13.4 (BAR Insurance), or Section 13.7 (Contractors and Subcontractors) shall:

(a) specify Buyer and the other members of the Buyer Group as additional insureds (other than for the BAR Insurance to be obtained by Seller pursuant to Section 13.4, which shall include Buyer has named insured, and worker's compensation);

(b) provide that Buyer and the other members of the Buyer Group shall have the right, but not the obligation, to pay premiums, commissions, assessments, and other amounts owed to insurer if Seller or the Person carrying such insurance fails to do so, and that there shall be no recourse against Buyer or any other member of the Buyer Group for payment of such premiums, commissions, assessments, or amounts;

(c) expressly waive any right of subrogation against Buyer and each other member of the Buyer Group; provided, however, that such waiver of subrogation shall be only as to Work performed by or for Seller or Seller's other obligations under this Agreement;

(d) provide, with respect to all liability policies, that the insurance thereunder shall be primary to any other liability insurance maintained by Buyer, any other member of the Buyer Group, or any other Person, and includes liabilities assumed under this Agreement, and that the limits required herein shall be applicable solely to the Project; and

(e) provide for jurisdiction of claims in the United States.

**Section 13.3. Additional Conditions and Duties.** The following additional conditions and duties shall apply to the policies required by Section 13.1 and Seller's responsibilities in connection therewith:

(a) Deductibles. No deductible or self-insured retention with amounts greater than Twenty-Five Thousand Dollars (\$25,000) per occurrence shall be permitted in respect of any policy obtained under Section 13.1 without the prior consent of Buyer.

(b) Certification. Seller shall deliver to Buyer, on or before the fifth (5<sup>th</sup>) Business Day following the Effective Date and at any other times thereafter required by Buyer, (i) a report acceptable to Buyer of a reputable insurance broker or agent certifying that (A) the insurance required to be carried and maintained pursuant to this Article XIII is in full force and effect, (B) Seller is in compliance with its obligations under this Article XIII, and (C) all applicable insurance premiums due and payable with respect to the insurance to be carried and maintained pursuant to this Article XIII have been timely paid, and (ii) any other information

as may be reasonably requested by Buyer in connection with Seller's insurance obligations under this Article XIII. Any and all premiums and deductibles and/or any other charges due with respect to such policies of insurance shall be assumed by, for the account of, and at Seller's sole risk.

(c) Insurance Certificates. Seller shall furnish to Buyer detailed certificate(s) of insurance evidencing, at a minimum, the insurers affording coverage to Seller, the type(s) of insurance obtained or maintained by or for Seller in connection with the Work or this Agreement, and the applicable insurance limits. The certificate(s) shall be in a form reasonably acceptable to Buyer and executed by each insurer providing coverage for Seller hereunder, or an authorized representative or broker of such insurer. Seller shall furnish the certificates of insurance for each insurance coverage required under Section 13.1(a)(i) (Worker's Compensation), Section 13.1(a)(ii) (Business Automobile Liability), Section 13.1(a)(iii) (Commercial General Liability), and Section 13.1(a)(iv) (Excess/Umbrella Liability) on or before the fifth (5<sup>th</sup>) Business Day following the Effective Date and, after Substantial Completion, prior to commencing any Project Warranty Work. For each insurance coverage required under Section 13.1(a)(v) (Marine Cargo and Watercraft), Section 13.1(a)(vi) (Aircraft Liability), Section 13.1(a)(vii) (Insurance Required by Law or Financing Parties), Section 13.1(a)(viii) (Seller's Equipment Floater), or Section 13.4 (BAR Insurance), Seller shall furnish the certificate of insurance for such coverage to Buyer on or before the FNTF Date. Seller shall furnish copies of the certificates of renewal of insurance on an annual basis upon renewal, but in no event later than ten (10) Business Days after the anniversary or expiration of the policy. Seller's failure to deliver certificates reasonably acceptable to Buyer within the time required above or to deliver corrected certificates within seven (7) days of a request therefor by Buyer shall be considered a material failure to comply with Seller obligations hereunder.

(d) Severability of Interest. All liability policies of insurance to be maintained pursuant to this Article XIII shall be endorsed to provide a standard severability of interest or cross-liability clause.

(e) No Invalidating Actions. Seller shall not, and shall ensure that its Affiliates and its and their Contractors and Subcontractors shall not, void or make voidable or materially impair any of the insurance policies and coverages purchased and maintained pursuant to this Article XIII, and Seller shall, and shall ensure that its Contractors and Subcontractors shall, at all times comply with such insurance policies and coverages and the requirements of the insurers so as to prevent the invalidation or material impairment of any such insurance policies and coverages.

(f) Notice of Claim. Seller shall (i) promptly notify Buyer of the occurrence of any casualty, claim, event, condition, circumstance, or occurrence that gives rise to or would reasonably be expected to give rise to a claim under an insurance policy maintained pursuant to this Article XIII and arises out of or in connection with the Work, the Project, or Seller's responsibilities under this Agreement or any Ancillary Agreement, (ii) ensure that Buyer is kept fully informed of subsequent actions and developments concerning the same, and (iii) cooperate and assist in the investigation of any such casualty, claim, event, condition, circumstance, or occurrence.

(g) Collection. Seller shall use commercially reasonable efforts to collect or assist in the collection from insurers of any loss covered by any of the policies maintained pursuant to this Article XIII, including taking such actions as may be reasonably requested by Buyer to the extent that the ultimate payout under any such policies in respect of any such loss will be to Buyer (including indirectly as a result of Seller's Liability to Buyer for such loss). Seller shall, and shall cause any Person maintaining insurance for Seller pursuant to this Article XIII or any Contractor or Subcontractor of Seller to, cooperate with and reasonably assist Buyer in all matters pertaining to the settlement or adjustment of any and all claims and demands for damages on account of any taking or condemnation of the Project or pertaining to the settlement, adjustment, compromising, or resolution of any claim on account of damage to or destruction of the Project or any portion thereof. If requested by Buyer, Seller shall act on behalf of Buyer and Seller for the purpose of adjusting the amount of any claimed insured loss. Subject to Article XI, Article XII and Section 13.4, Seller shall correct and Remedy any loss of or damage to the Project Assets or the Project and complete the Work in accordance with this Agreement.

(h) Additional Insurance. Seller and its Affiliates and its and their Contractors and Subcontractors may carry, at their sole cost and expense, such additional insurance as each of Seller and its Affiliates and its Contractors and Subcontractors may deem necessary to cover their potential Liabilities.

#### **Section 13.4. BAR Insurance.**

(a) Seller shall obtain, or cause to be obtained, at or prior to the FNTP Date, and shall maintain, or cause to be maintained, in effect through at least Substantial Completion, BAR Insurance covering the risk of partial or complete loss or damage to the Work (including LEG-2 or equivalent), both executed and in the course of construction, including all preliminary Work, permanent and temporary Work, real and personal property, buildings, structures, and materials to be incorporated into the Project, including transit (regardless of the mode of transportation) to the Project Site and off-site storage. Such insurance shall provide limits covering the full replacement cost (with sublimits as appropriate) of the Project and provide coverage, including loss or damage caused by fire, explosion, hail, ice, windstorm (including named windstorm), flood, extended coverage, vandalism, malicious mischief, boiler and machinery, and such other risks or perils and coverages typically covered by a BAR Insurance policy for similar projects, including as specified above in this Article XIII, and shall have a deductible of not more than two and one-half percent (2.5%) of the values per occurrence for all losses or damages arising out of an earthquake, named windstorm, or flood; and not more than Two Hundred Fifty Thousand Dollars (\$250,000) per occurrence for all other losses or damages. All deductibles with respect to claims made under the BAR Insurance policy shall be for the account of Seller; provided, however, that (subject to the other terms of this Agreement, including Article X (Warranty), Section 16.4 (Excluded Liabilities), and Article XXIV (Indemnification)) any deductibles with respect to claims made under the BAR Insurance policy with respect to loss or damage to property during the time Buyer has risk of loss therefor according to Section 12.2(c) shall be for the account of Buyer, except that, for each occurrence, Buyer shall be responsible only for the first Two Hundred Fifty Thousand Dollars (\$250,000) of such deductible and Seller shall be responsible for any excess; provided, further, that (a) as provided in Section 12.2(c), Seller is obligated to proceed with, and is responsible for, the

performance and completion of the Work in all respects in accordance with this Agreement despite the occurrence of any loss or damage to the Project Assets, including Remedying such loss or damage, and (b) in consideration thereof, Seller shall be entitled to any BAR Insurance proceeds for such loss or damage (net of the deductible and excluding any amounts under any delays in startup, advance loss of profits, or similar coverage, which shall belong to Buyer) to the extent required to fund the Remedy of the affected portions of the Project by Seller but shall not be entitled to any increase in the Purchase Price (including by modification to the Substantial Completion Payment Amount), or any other compensation based on, arising out of or relating to the subject matter of such loss or damage. Seller shall be responsible for any deductible under the BAR Insurance policy after Closing to the extent Seller or its Subcontractors caused the relevant loss or damage. Seller shall provide the BAR Insurance policy on an “occurrence” coverage form. Without limiting any other provision of this Article XIII or this Agreement, the BAR Insurance policy shall include Buyer as an additional insured; provided that, after Closing, Buyer shall have first priority with respect to all proceeds from such policy and Buyer shall disburse such funds to Seller to the extent required to fund the Remedy of the affected portions of the Project by Seller as a result of the relevant casualty event.

(b) Prior to binding any BAR Insurance policy or making any amendment or modification thereto, Seller shall (i) provide Buyer with a complete and accurate copy of such proposed BAR Insurance policy (or such amendment or modification), (ii) provide Buyer with a reasonable opportunity to review and comment on such proposed BAR Insurance policy (or such amendment or modification), and consider in good faith timely comments from Buyer on such proposed BAR Insurance policy (or such amendment or modification), and (iii) not bind such proposed BAR Insurance policy (or such amendment or modification) without the prior consent of Buyer, which may be withheld in its sole and absolute discretion.

**Section 13.5. Buyer’s Operating Project Property Insurance.** Buyer shall be responsible for obtaining and maintaining operating plant property insurance coverage on the Project after the Substantial Completion Payment Date.

**Section 13.6. Effect of Insurance.** Irrespective of the insurance maintenance requirements of this Article XIII, the purchase or maintenance of any insurance required by this Agreement or otherwise obtained by or for or available to Seller or the insolvency, bankruptcy, or failure of any insurance company to pay claims shall not affect, negate, or waive any of the provisions of this Agreement, including the indemnities. Any insurance proceeds received by Seller with respect to the insurance maintained pursuant to this Article XIII shall not be used by Seller for any purpose other than the discharge of its payment obligations under this Agreement unless and until such payment obligation has been discharged in full. Buyer assumes no responsibility for the solvency of any insurer or surety, the failure of any insurer or surety to perform in accordance with its obligations, or the delay of an insurer in adjusting or responding to an insured or bonded event.

**Section 13.7. Contractors and Subcontractors.** Before permitting a Contractor or Subcontractor to perform any portion of the Work at the Project Site, Seller shall obtain a certificate of insurance from such Contractor or Subcontractor evidencing that such Contractor or Subcontractor has obtained and has in effect (a) policies for worker’s compensation, employer’s liability, commercial general liability, contractor’s equipment floater, auto liability, insurance

required under Laws, and, if Contractor's or Subcontractor's services for such Work are of a professional nature, for design engineering, professional liability, or errors and omissions liability, and (b) such other insurance (if any) as is required of such Contractor or Subcontractor hereunder or is standard in the industry for the work being performed by such Contractor or Subcontractor, in each case for clause (a) or (b), in such amounts (subject to the following sentence), against such risks, and on such terms as is reasonable and prudent in light of the work to be performed by such Contractor or Subcontractor (subject to the commercial availability of such insurance) and commensurate with normal practices in the United States, and, in each case, from carriers authorized to conduct insurance business in the United States. Seller agrees that the professional liability or errors & omissions liability insurance of a design contractor of Seller for the Project (if any) shall have policy limits of not less than Five Million Dollars (\$5,000,000) per claim and policy aggregate. Without limiting any other provision of this Article XIII, all policies of insurance provided by any Contractor or Subcontractor in connection with the Work shall expressly waive any right of subrogation against Buyer and each other member of the Buyer Group. At Buyer's request, Seller shall promptly provide such certificates of insurance to Buyer.

**Section 13.8. Buyer's Right to Procure.** Notwithstanding anything herein to the contrary, Buyer shall have the right and option to secure on behalf of Seller any of the coverages listed in Section 13.1, other than the coverages listed in Section 13.1(a)(i) (Worker's Compensation) and Section 13.1(a)(ii) (Business Automobile Liability), on terms equivalent to the terms set forth herein, and upon the exercise of such option, the Purchase Price shall be reduced by such amount of Buyer's costs for carrying and maintaining such coverage as provided in Section 13.1; provided, however, that Buyer shall have such right and option as described in this Section 13.8 only if Seller (a) has breached its obligation to obtain and maintain coverage as provided in Section 13.1 and (b) has not cured such breach within seven (7) Business Days after receipt of written notice from Buyer demanding such cure.

**Section 13.9. Occurrence-Based Insurance Policies.** Seller shall not terminate or modify, and shall not permit the termination or modification of, coverage under any "occurrence"-based insurance policy required to be maintained by or for Seller pursuant to Section 13.1 in such a manner as to prevent Seller or Buyer from obtaining the benefit of such insurance policy after the Closing with respect to the Project Assets for insured Losses caused by facts, events, circumstances, conditions, or occurrences occurring prior to the Closing.

## **ARTICLE XIV. FORCE MAJEURE**

### **Section 14.1. Force Majeure Definition.**

(a) The term "*Force Majeure*" means an event that (i) occurs after the Effective Date, (ii) is not within the reasonable control, directly or indirectly, of the Party claiming Force Majeure (or such Party's agents, contractors, or subcontractors of any tier), (iii) the events and its effects are unavoidable or could not be prevented, overcome, or removed by the reasonable foresight, efforts, and diligence of the Party claiming Force Majeure (including such Party's agents, contractors, and subcontractors of any tier), (iv) does not result from the negligence or fault of the Party claiming Force Majeure (or the negligence or fault of such

Party's agents, contractors, or subcontractors of any tier), and (v) causes the Party claiming Force Majeure, despite such Party's (including such Party's agents, contractors, and subcontractors of any tier) use of reasonable efforts and diligence, to be actually delayed in performing or unable to perform the Work or its obligations under this Agreement, in whole or in part (for reasons other than economic hardship, including lack of money). Provided the event meets all of the criteria described immediately above, Force Majeure shall include the following events, except as otherwise provided in Section 14.1(b): (A) acts of God, including tornadoes, hurricanes, earthquakes, tsunamis, and, to the extent directly affecting the Project Site or immediate access thereto, flooding; (B) acts of war or the public enemy, undeclared war, revolution, riot, civil commotion, terrorism, and pandemic; (C) Change in Law, (D) fires, explosions, and accidents causing damage to or destruction, in whole or in part, of the Work or the equipment necessary to perform the Work; and (E) unless initiated or otherwise arising as a result of the conduct or other actions or omissions of Seller, any other member of the Seller Group, or any of Seller's Contractors and Subcontractors at the Project Site or with respect to the Work, nationwide or industry-wide labor strikes, slowdowns, or stoppages.

(b) "Force Majeure" shall not include: (i) mechanical failure or other breakdown, flaw, defect, or failure of parts, machinery, equipment, facilities, systems, or other items not the direct and proximate result of a Force Majeure event described in clause (A), (B), or (C) of Section 14.1(a) or similarly independent, identifiable Force Majeure events; (ii) sabotage by any employee, agent, contractor, or subcontractor (including vendor) of any tier, or Representative of the Party claiming Force Majeure; (iii) the failure or other act or omission of a Party or any agent, contractor, or subcontractor of any tier, or Representative of such Party (including the failure of such Party or a contractor or subcontractor thereof of any tier to furnish machinery, equipment, spare parts, materials, Consumables, labor, equipment, or services in accordance with its contractual obligations) or any other non-delivery, delayed delivery, shortage, or other unavailability of machinery, materials, facilities, systems, Consumables, labor, equipment, or services, unless (A) the Party claiming Force Majeure has a firm Contract for (or self-generates and has not committed to other uses of) the applicable service or item and (B) the provider, if it were a party hereto, would be entitled to Force Majeure protection as an affected party; (iv) any weather event that is not an act of God (including one hundred year weather events); (v) a Party's financial inability to perform; (vi) any delay in obtaining, inability to obtain, or revocation of any Permit; (vii) events that affect the cost of services, equipment, or materials (including without limiting clause (xi) below, additional or changes to taxes, tariffs, fees, or other charges or costs imposed by Governmental Authorities) or other costs of designing, engineering, procuring equipment for, constructing, installing, commissioning, testing, owning, possessing, using, operating, operating, maintaining, studying, repairing, or replacing the Project or changes in market conditions affecting the economics of a Party (including a change in commodity prices or increased inflation) or any other economic hardship (including lack of money); (viii) lack of, or insufficient, solar insolation for energy production (including as a result of environmental or weather conditions); (ix) labor strikes, slowdowns, or stoppages that are not nationwide or industry-wide or, if Seller is the Party Claiming Force Majeure, that are initiated or otherwise arise as a result of the conduct or other actions or omissions of Seller, any Contractor or Subcontractor of Seller, or any Representative of Seller at the Project Site or with respect to the Work; (x) labor shortages (except to the extent directly and proximately resulting from a Force Majeure event described in Section 14.1(a)); and (xi) any change or other modification to any Law that would not meet the requirements of a Change in Law.



(c) For purposes of this Agreement, including this Article XIV, Seller shall not be deemed to be an agent, contractor, or subcontractor of any tier of Buyer.

**Section 14.2. Effect of Force Majeure.** Notwithstanding anything to the contrary, prior to Substantial Completion, a Force Majeure claim by Seller shall be governed exclusively by Article VIII (Change Order), (including Section 8.3). Except as otherwise expressly provided in this Agreement, no Party shall be liable to any other Party for a delay in the performance of the Work or its other obligations under this Agreement within the time specified due solely to an event of Force Majeure. The Party claiming Force Majeure shall use diligent, commercially reasonable efforts to remedy or remove the inability caused by Force Majeure and to mitigate the effects of Force Majeure, and shall resume performance hereunder when and to the extent the inability is remedied or removed. During Force Majeure, the Party claiming Force Majeure shall discharge as required herein all of its duties and obligations under this Agreement that are not prevented by Force Majeure. If any Party claiming Force Majeure under this Agreement fails to provide written notice to the other Parties of the occurrence of such event of Force Majeure within seven (7) days after the occurrence thereof, such Party shall be deemed to have waived any right to claim a Force Majeure with respect to such event and shall not be excused from any delay in the performance of, or inability to perform, the Work or any of its other obligations under this Agreement as a result of such event of Force Majeure.

#### **ARTICLE XV.**

### **REPORTING OBLIGATIONS; MAINTENANCE OF BOOKS AND RECORDS; AUDIT RIGHTS; ACCESS AND INSPECTION RIGHTS**

#### **Section 15.1. Notice of Certain Events; Reporting Obligations.**

(a) Without limiting any other obligation in this Agreement to notify Buyer of any fact, event, circumstance, condition, or occurrence in accordance with the terms of this Agreement, Seller shall, promptly after obtaining knowledge thereof (except with respect to clause (xi) immediately below, the timing-of-notice requirements of which shall be as specified in Section 26.4(d)), notify Buyer in writing (which may be by electronic mail to the proper email address of the then-current Buyer Contract Manager) of, and describing in reasonable detail, the following:

(i) if and to the extent Buyer is not copied on such notice or has not participated in or received such communication, any written notice or other written communication from any Governmental Authority in connection with or relating to the performance of the Work, the Project, or the Transactions (including with respect to any Project Work Permit (from and after the Closing), Project Operational Permit, or any other Permit required with respect to the performance of the Transactions, but excluding any routine and ordinary course notices or communications from any Governmental Authority);

(ii) any damage to, loss of, or unanticipated maintenance or repair of the Project Assets or the Project (other than any ordinary re-work), or any emergency condition affecting or unscheduled interruption of the Work, except when such damage, maintenance or repair, emergency condition, or interruption would not reasonably be expected to (A) exceed, and does not exceed, One Hundred Thousand Dollars (\$100,000) in expenditures for any event

or condition or group of related events or conditions, (B) result in, and does not result in, a material threat to health or safety of any individual or of damage to property of Buyer or third parties, or (C) have a material adverse effect on the development, design, engineering, procurement, construction, commissioning or testing of, or have an adverse effect on the ownership, possession, use, operation, availability, reliability, maintenance, or repair of, the Project Assets or the Project;

(iii) any fact, event, circumstance, condition, or occurrence (or set of facts, events, circumstances, conditions, or occurrences) that makes, or would reasonably be expected to make, impossible or unlikely, or materially delays, or would reasonably be expected to materially delay, (A) satisfaction of the conditions in Section 7.1(a) (FNTP Date), Article XXI (Buyer's Condition to Closing), Article XXII (Seller's Conditions to Closing), or Article XXIII (Conditions to Substantial Completion Payment Date), or (B) Seller's ability to deliver the certificate contemplated by Section 7.1(d);

(iv) any material Defect in the Work or the Project Assets as of or after the Closing, including as of the Substantial Completion Payment Date;

(v) the material default or breach by any Contractor or Subcontractor performing any material portion of the Work in its performance of the Work, the termination or material change to the scope of responsibilities of any Contractor or Subcontractor performing any material portion of the Work in its performance of the Work, or the replacement of any Contractor or Subcontractor performing any material portion of the Work and the identity of such replacement or, if the responsibilities of the former Contractor or Subcontractor were Contracted to more than one replacement Contractor or Subcontractor, replacements;

(vi) any receipt of a notice of a violation, or inquiry or investigation into a possible violation, of any Law or Permit relating to the performance of the Work or the Project;

(vii) any actual accident or injury (or any receipt of written notice of any alleged accident or injury), including death, occurring on the Project Site and any workers' compensation or tort liability Action for bodily injury related to or arising out of the performance of the Work or on the Project Site while under Seller's care, custody, and control, including (A) the time and place of the accident or injury event, if known, and (B) a description of the accident, the injury(ies), and the circumstances surrounding and reasonable particulars of such accident or injury (excluding the identity of any injured or allegedly injured person if not previously made public and information reasonably withheld to protect the legitimate privacy interests of such person or to comply with Law) and any claim resulting therefrom;

(viii) any event related to or arising out of the performance of the Work resulting in actual or alleged damage or loss to the property of Buyer or any third party, including (A) the name and address of the damaged property, (B) the time and place of the event resulting in the property damage, and (C) a description of the alleged property damage;

(ix) any material failure to follow or violation of the Project Site Security Plan;

(x) as soon as reasonably practicable, but in no event later than seven (7) days after the occurrence thereof, any event of Force Majeure; and

(xi) any Seller Change of Control, in accordance with Section 26.4(d).

No notification made pursuant to this Section 15.1(a) or otherwise shall be deemed to cure any inaccuracy of any representation or warranty of Seller or to prevent, limit, or restrict Buyer's exercise of its rights under this Agreement or any Ancillary Agreement.

(b) Promptly after obtaining knowledge thereof, and without limiting any other obligation in this Agreement to notify Seller of any fact, event, circumstance, condition, or occurrence in accordance with the terms of this Agreement, Buyer shall notify Seller in writing of, describing in reasonable detail, any fact, event, circumstance, condition, or occurrence (or set of facts, events, circumstances, conditions, or occurrences) that makes, or would reasonably be expected to make, impossible or unlikely, or materially delays, or would reasonably be expected to materially delay, (i) satisfaction of the conditions in Section 7.1(a) (FNTF Date), Article XXI (Buyer's Conditions to Closing), Article XXII (Seller's Conditions to Closing) or Article XXIII (Conditions to Substantial Completion Payment Date).

(c) In addition to the disclosures required under this Section 15.1 and elsewhere in this Agreement, Seller shall apprise Buyer, and Buyer shall apprise Seller, of its progress with respect to the satisfaction of the conditions of such Party in Section 7.1(a) (FNTF Date), Section 7.3 (Substantial Completion) (with respect to the Work achieving Substantial Completion), Section 7.4 (Final Completion) (with respect to the Work achieving Final Completion), Article XXI (Buyer's Conditions to Closing), Article XXII (Seller's Conditions to Closing), and Article XXIII (Conditions to Substantial Completion Payment Date), as applicable. Copies of all information provided to Seller or Buyer under this Section 15.1 shall be complete and accurate copies.

(d) Without limiting any other obligation of Seller under this Agreement, including its obligations in Section 6.2 and the Scope Book, Seller shall provide to Buyer promptly after the receipt or production thereof by or to Seller or any Affiliate thereof any (i) material recurring periodic report, including each OEM monthly report, or other material report by or on behalf of any Contractor or Subcontractor relating to the Work or the Project, (ii) material report that details or describes any fact, event, circumstance, condition, or occurrence that has a material adverse effect, or would reasonably be expected to have a material adverse effect, on the performance of the Work or the Project, including the ownership, possession, use, operation, maintenance, or repair thereof, or with respect to which Seller is required to provide the notice and information required under Section 15.1(a) or elsewhere in this Agreement (including for illustrative purposes, any report prepared by or for Seller relating to (A) the repair of the Project, (B) the Release of any Hazardous Substance in connection with the Work or the Project, (C) the Remediation of any Environmental Condition, or (D) any material accident, property damage, or safety incident), to the extent permitted by Laws, and (iii) records, reports, and information concerning the Work or the Project that Buyer may reasonably request. For purposes of this Section 15.1(d), the term "reports" shall be construed to include memoranda, letters, studies, bulletins, filings, and other comparable written or electronic materials.

(e) To the extent not available on “EDGAR” or Seller Parent Guarantor’s home page on the World Wide Web at [[www.\[\]com](#)] Seller shall deliver to Buyer, within sixty (60) days following the end of each fiscal quarter and within one hundred twenty (120) days following the end of each fiscal year during the term of this Agreement, a copy of the audited financial statement for such fiscal quarter or fiscal year of Seller Parent Guarantor (or if such financial statements of Seller Parent Guarantor are not audited, the unaudited financial statement for such fiscal quarter or fiscal year), in each case prepared in accordance with GAAP.

## **Section 15.2. Maintenance of Books and Records; Financial Audit Rights.**

(a) Without limiting Buyer’s other rights in this Agreement, including Section 15.3 and the Scope Book, Seller shall, throughout the term of this Agreement and, if the Closing occurs, to the extent such records are not Project Assets transferred to Buyer at or after the Closing, for a period of five (5) years after the Closing or such greater period as may be required under Laws or applicable Permits, prepare, keep, and maintain reasonably detailed records related to the Work and the Project, including (i) complete and accurate copies of all material Contracts with its Contractors and Subcontractors, (ii) such records or accounts of Seller as are necessary to verify that any and all material, services, labor, and other expenses (A) incurred under any material Contract with any of Seller’s Contractors or Subcontractors related to the Work or the Project have been paid and that the Work has been performed as required hereunder and under the Project Contracts or (B) incurred by Seller with respect to the Project are accounted for as required by Section 20.8, (iii) construction logs, reports, vendor documentation, certifications, and test results, and (iv) records of costs and debits included in any adjustment to the Purchase Price or the Substantial Completion Payment Amount as a result of Work performed pursuant to a Change Order other than on a lump sum, fixed-price basis.

(b) Any financial, labor, or accounting books and records described in this Section 15.2 shall be maintained and supported in accordance with GAAP and all Laws. Such books and records shall be made available at the Project Site or the principal place of business of Seller or its applicable Contractor or Subcontractor for copying, audit, review, and inspection by Buyer or its Representatives, including Buyer-authorized third-party auditors. Subject to other provisions to the contrary in this Agreement, including Section 15.2(d), any such copying, audit, review, or inspection authorized herein shall be at Buyer’s sole expense; provided, however, that Seller or the applicable Contractor or Subcontractor shall provide reasonable assistance necessary to enable Buyer to conduct such copying, audit, review, and inspection and shall not charge Buyer for any such assistance. Any such audit, review, or inspection shall be conducted upon not less than one (1) Business Day’s prior written notice to Seller.

(c) This Section 15.2 shall not entitle Buyer or its Representatives to audit fixed prices or fixed rates to determine profits or overhead or the make-up of the fixed price or fixed rate for any Work conducted pursuant to a Change Order (except to the limited extent required to verify the distribution of the Purchase Price against the retirement units in accordance with the requirements of Section 20.8), but shall entitle Buyer to verify time and the proper application of unit prices and rate or the actual documented costs for any Work conducted by Seller or its Contractors or Subcontractors pursuant to a Change Order on a basis other than a lump sum, fixed-price basis.

(d) Amounts incorrectly or inappropriately included in any adjustment to the Purchase Price or the Substantial Completion Payment Amount as a result of Work performed pursuant to a Change Order on a basis other than a lump sum, fixed-price basis, whether discovered prior to or subsequent to Closing or the Substantial Completion Payment Date, as applicable, shall be adjusted or reimbursed, as applicable, to Buyer by Seller within ten (10) days after notification by Buyer to Seller of such error accompanied by supporting documentation. If any examination, audit, review, or inspection pursuant to this Section 15.2 results in an adjustment of five percent (5.0%) percent or more of the amount under audit or the audit uncovers fraud or misrepresentation in respect of the audited Work, Seller shall reimburse Buyer for the reasonable costs and expenses incurred by Buyer in connection with performing such audit. Any and all adjustments or reimbursements made as result of an audit, review, or inspection conducted by Buyer pursuant to this Section 15.2 shall be deemed adjustments to the Purchase Price or the Substantial Completion Payment Amount, as applicable.

(e) Seller shall include the necessary provisions in its material Contracts with its Contractors and Subcontractors that shall assure similar document retention obligations of such Contractors and Subcontractors and similar copying, audit, review, inspection, and access rights, by Seller, Buyer, ESI, and each of their respective Representatives to applicable records of Seller's Contractors and Subcontractors.

### **Section 15.3. Buyer Access and Inspection Rights.**

(a) Seller shall, without additional charge to Buyer, and without limiting its other obligations under this Agreement or any Ancillary Agreement, provide or cause to be provided (to the extent of its ability with respect to unaffiliated third parties) to Buyer, ESI, and their respective Representatives, upon reasonable prior notice to the Seller Project Manager, reasonable access, in a manner that does not unreasonably interfere with normal business operations, to:

(i) working papers, books, data, records, programs, and other material systems or information reasonably relating to the Work, the Project, or the Project Assets, including drawings in AutoCAD or similar programs, OEM manuals, electrical modeling software, and other information and data, in electronic form where applicable, necessary to enable parallel migration to Buyer's information systems; and

(ii) the Project (including the Project Site), Seller's Contractors and Subcontractors, the Seller Project Manager, plant, construction, commissioning, and operations and maintenance managers, design, engineering, procurement, project controls, and scheduling staff, and Representatives of Seller or its Affiliates that are involved with the Work or the Project, for any reasonable business purpose in connection with the Work, the Project, or this Agreement, including:

(A) inspecting, examining, monitoring, testing, reviewing, observing, and assessing the performance and/or progress of the Work, in whole or in part;

(B) planning and facilitating an orderly transition of the management and operation of the Project, or integration of the operations, systems, processes,

and other key business activities and systems relating to the Project, on the Substantial Completion Payment Date;

(C) assessing Seller's compliance with the terms and conditions of this Agreement, including its covenants, agreements, and obligations, and the accuracy of Seller's representations and warranties, under this Agreement and any applicable Ancillary Agreement;

(D) facilitating the determination or assessment of Laws (including MISO Rules and NERC requirements) applicable to or potentially affecting the Project Assets or the Project or the Work;

(E) obtaining updates and information regarding any matter that Seller is required to report to Buyer or notify Buyer of pursuant to Section 15.1 or another provision of this Agreement or any Ancillary Agreement or related agreement, or assessing the scope, completeness, and condition of the Work or the Project Assets;

(F) testing for, sampling, assessing and/or performing other investigations and studies regarding the presence, scope, and extent of any actual or potential Environmental Condition at the Project Site or related matters, including Environmental Liabilities;

(G) observing, monitoring, evaluating, and inspecting performance of any material repair, restoration, replacement, testing, cure, or Remediation in respect of any Project Asset, including the Project and the Project Site, in whole or in part;

(H) allowing the performance of and witnessing of any Environmental Assessment hereunder;

(I) assisting with, obtaining, performing, witnessing, or assessing any survey, boundary, or zoning work with respect to the Project Site (in whole or in part) or other work regarding the Project Site that is reasonably related to the procurement of the Title Commitment, the Title Policy, any update to either, or the acquisition or possession of the Project Site;

(J) without limiting the terms of the Scope Book, locating on the Land and maintaining an office trailer owned, leased, or rented by or for Buyer; and

(K) exercising (or assessing whether to exercise) Buyer's rights and discharging (or assessing whether to discharge) its obligations under this Agreement, any Ancillary Agreement, or any related agreement.

None of the access rights in clause (ii) immediately above shall be deemed to limit any other access right of Buyer. Seller hereby consents, and shall obtain the prior written consent of its Contractors and Subcontractors, to Buyer's lawful use of drones, aircraft, and other aerial or stationary equipment, devices, or machines equipped with the capability to record, film, capture, transmit, and/or store, electronically, digitally, or otherwise, images, data, material, and other information, and to the presence from time to time of such equipment, devices, machines, and

aircraft owned or leased by or under contract to Buyer or an Affiliate thereof in airspace over or on the Project Site, (1) for the purpose of monitoring, tracking, or recording progress of the Work, or events or activities at the Project Site, or compliance with the terms of this Agreement or any Ancillary Agreement, (2) in connection with survey, boundary, zoning, or other work performed pursuant to this Agreement related to the Title Commitment, the Title Policy, or the Project Site, and (3) for any other legitimate commercial purpose related to the Transactions. Nothing herein shall limit Buyer's right of access after the Closing to the Project (including the Project Site) or Representatives of Seller or its Affiliates that are involved with any Work being performed after the Closing, including with respect to any of the matters described in clauses (A) through (K) immediately above, or be interpreted as requiring Buyer to obtain access, or implying that Buyer must obtain access, from Seller or any of the Persons identified in this Section 15.3(a) to any material, information, or Project Asset already purchased by Buyer, including any Post-Closing Project Asset to which title has vested in and possession has transferred to Buyer.

(b) Seller shall use commercially reasonable efforts to include the necessary provisions in its material Contracts with its Contractors and Subcontractors that shall assure similar inspection and access rights by Seller, Buyer, ESI, and each of their respective Representatives with respect to the books, data, records, personnel, properties, premises and facilities of Seller's Contractors and Subcontractors.

(c) Neither Seller nor Buyer shall have any obligation to provide access to any document or information under this Section 15.3 that is privileged under Law from third party disclosure or that such Party is lawfully prohibited by Contract from providing, in each case to the extent such document or information cannot be disclosed to such other Party without waiving the applicable privilege(s); provided, however, that (i) the Party subject to such prohibition shall use, upon request by such other Party, commercially reasonable efforts to cause any such lawful contractual prohibitions to be removed or waived and (ii) nothing in this Section 15.3(c) shall preclude Seller or Buyer from contesting through appropriate legal proceedings any claim of privilege asserted by such other Party where the subject information, work product or communication would, but for the application of privilege, be required to be disclosed under this Agreement.

## **ARTICLE XVI. CLOSING ASSETS; ALLOCATION OF LIABILITIES**

**Section 16.1. Closing Assets.** Upon the terms and subject to the conditions contained in this Agreement, at the Closing Seller shall sell, convey, assign, transfer, and deliver to Buyer, free and clear of all Encumbrances (other than Permitted Encumbrances), and Buyer shall purchase and acquire from Seller, all of the right, title, and interest of Seller in and to the Project and the assets, interests, properties, rights, licenses, and Contracts, of every kind, nature, character, and description, whether fixed, contingent, or otherwise, tangible or intangible, known or unknown, accrued or unaccrued, or carried on or off the books and records of Seller, and wherever situated, in each case, existing on the Closing Date and primarily relating to, used by or for, or held for use by or for the Project, excluding the Excluded Assets (collectively, the "*Closing Assets*"). The Closing Assets include:

(a) all interests in real property consisting of fee simple interest, including in and to the parcels of real property described in Schedule 16.1(a) (the “**Land**”), and all Appurtenances thereto, together with all buildings, fixtures, component parts, other constructions, and other improvements thereon and thereto, including all construction work in progress thereon (collectively, the “**Owned Real Property**”) for the Project and the Project Site;

(b) all interests in real property pursuant to which there is a right of possession, use, occupancy, access, or any other right related to such real property arising under a lease, sublease, or other agreement evidencing such interests of Seller (the “**Real Property Leases**”) described in Schedule 16.1(b), and all appurtenances thereto, together with all buildings, leasehold improvements, fixtures, component parts, other constructions, and other improvements thereon and thereto, including all construction work in progress thereon (collectively, the “**Leased Real Property**”);

(c) all privileges, licenses, rights-of-way, servitudes, and easements appurtenant to or benefiting the Owned Real Property or the Leased Real Property, and easements in gross, held by Seller, as well as the right, by way of license, right-of-way, servitude, easement, or similar right or instrument, to permit access to the Project or the construction, ownership, possession, use, operation, maintenance, repair, or removal of the Project, including those described in Schedule 16.1(c) (collectively, the “**Easements**”);

(d) all solar panels, Trackers, PCUs, wiring, transformers (including the GSU), machinery (mobile or otherwise), vehicles, pumps, fittings, tools, furniture, furnishings, meters and metering equipment, equipment, systems, items, and other property located at the Project Site or acquired by Seller specifically or primarily for use or consumption at the Project, including any Special Tools, assets temporarily off-site for repair or other purposes, assets being shipped to Seller or the Project Site, and assets housed or kept at Off-Site Real Property, and including the property listed or described in Schedule 16.1(d) (collectively, the “**Transferred Closing Tangible Personal Property**”);

(e) all Inventory existing and held by Seller at such time, including the Inventory listed or described in Schedule 16.1(e) (collectively, the “**Transferred Closing Inventory**”);

(f) subject to Section 16.2(b) and Section 20.5(c), all Project Contracts listed or described in Schedule 16.1(f) (including all Project Contracts added to Schedule 16.1(f) between the Effective Date and the Closing Date with the written consent of Buyer) (collectively, the “**Transferred Closing Project Contracts**”);

(g) subject to Section 20.5(c), all Project Operational Permits, including the Permits listed or described in Part II of Schedule 18.11 (collectively, the “**Transferred Closing Permits**”), to the extent legally transferable by sale;

(h) (i) all books, records, documents, drawings, reports, operating data, operating safety and maintenance manuals, inspection reports, engineering design plans, specifications and procedures, and similar items expressly required to be provided by Seller to Buyer pursuant to the Scope Book and (ii) all other material books, records, documents,



drawings, reports, operating data, operating safety and maintenance manuals, inspection reports, engineering design plans, specifications and procedures, and similar items relating to, or used in support of, the Work, the Project Assets, or the Project and owned by Seller (and for which there is no restriction on transfer), including (A) material Environmental logs, data sheets, studies, reports, and records, including correspondence received by or sent to Governmental Authorities, (B) material Permit records and files, (C) material emergency, accident, incident, safety, and inspection reports and records, including material reports submitted to the U.S. Department of Labor's OSHA, (D) material development, design, engineering, procurement, construction, testing, ownership, possession, operating, use, maintenance, study, or repair logs, data sheets, reports, and records, (E) material vendor lists and material vendor Contracts (including material purchase orders) and records, (F) material engineering design and construction drawings and plans, including as-built drawings, CAD drawings, and specifications, (G) material records, plans, reports, and drawings relating to the Project Site, (H) material drawings in AutoCAD or similar programs, OEM manuals and other existing information and data (in electronic form where applicable) necessary to enable parallel migration to Buyer's information systems, (I) material warranty information and records, and (J) material records of or relating to the registration, use, offering, scheduling, operation, modeling, or testing of or disputes involving the Project in MISO and, in each case, (1) the right to use and duplicate the foregoing (whether such drawings, information, and data currently exist or need to be generated by Seller using commercially reasonable efforts) and (2) in a format and on a medium reasonably requested by Buyer (including originals), it being understood and agreed that Seller may make and keep additional copies of any of the foregoing, subject to the Post-Closing Confidentiality Agreement;

(i) subject to Section 10.2(c) and Section 20.5(c), Seller's interest in all unexpired warranties, indemnities, and guarantees made or given by Seller, Contractors, Subcontractors (including manufacturers, vendors, service providers, suppliers, architects, engineers, and consultants), or others in connection with or relating to the Project, including the warranties, indemnities, and guarantees listed or described in Schedule 16.1(i) (collectively, the "*Transferred Closing Warranties*");

(j) all claims or causes of action of Seller or any of its Affiliates against third parties related to the Work, the Project, or the Project Assets, including indemnification claims, contribution claims, warranty claims, and claims for refunds, prepayments, offsets, recoupment, insurance proceeds, condemnation awards, judgments, and the like, other (i) than claims or causes of action solely relating to the period prior to the Closing and (ii) with respect to warranty claims, claims or causes of action solely relating to the period prior to the Warranty Transfer Date (except, in each case, to the extent expressly provided otherwise herein or in any Ancillary Agreement);

(k) all (A) Seller-Owned Project Intellectual Property and (B) Project Intellectual Property Rights (exclusive of Project Intellectual Property Rights that arise out of post-Closing or warranty Work (each of which shall be Post-Closing Project Assets)) with respect to or in connection with the Work or the Project (including the ownership, possession, use, operation, repair, or maintenance thereof), and all right, title, and interest, if any, of Seller or any of its Affiliates in and to the names "[●] Energy Center," "[●] Generating Station," "[●] Generation Facility," "[●] Power Facility," "[●] Power Plant" and "[●] Plant" (and excluding, for the avoidance of doubt, any right to use the name of Seller Parent Guarantor or any related or

similar trade name, trademark, service mark, corporate name, corporate logo, or any part, derivative, or combination thereof, and, except to the extent licensed to any Buyer Project Intellectual Property User, any Retained Right) (collectively, the “***Transferred Closing Intellectual Property Ownership and Contract Rights***”);

(l) all rights to the Federal Investment Tax Credit arising out of the Project, if any;

(m) all rights and benefits associated with the capacity of the Project or registration of the Project in MISO, including all capacity credits (such as MISO zonal resource credits) and similar rights or benefits, all electric energy associated with and provided or to be provided from such capacity and all Other Electric Products available from or associated with such capacity; and

(n) all Environmental Attributes, including all Environmental Attributes attributable to the period prior to the Closing, if any (collectively, “***Transferred Closing Environmental Attributes***”).

***[Reserved]***

The Parties acknowledge and agree that the Closing Assets exclude the Post-Closing Project Assets and that the Post-Closing Project Assets shall be transferred to Buyer as provided in Section 11.2 and the other terms of this Agreement.

**Section 16.2. Excluded Assets.** Nothing in this Agreement shall constitute or be construed as conferring on Buyer, and Buyer shall not be entitled or required to purchase or acquire, any right, title, or interest in, to, or under the following assets, interests, properties, rights, licenses, or Contracts (collectively, the “***Excluded Assets***”):

(a) all of the assets, properties, rights, or interests owned, used, occupied, or held by or for the benefit of Seller or any of its Affiliates that are listed or described in Schedule 16.2(a);

(b) excluding unexpired warranties, guarantees, and indemnities thereunder constituting Closing Assets or Post-Closing Project Assets, all of the rights and interests of Seller and its Affiliates in, to, under, or pursuant to any Project Contract that is not a Transferred Closing Project Contract or a Transferred Post-Closing Project Contract, including any Project Contract listed or described in Schedule 16.2(b) (collectively, the “***Excluded Project Contracts***”);

(c) all of the rights of Seller and its Affiliates under, and any funds and property held in trust or any other funding vehicle pursuant to, any Employee Plan (and in particular, but without limitation, neither Buyer nor any of its Affiliates shall be deemed to have assumed or acquired any right to any Employee Plan by reason of any provision of this Agreement);

(d) except to the extent constituting Closing Assets under Section 16.1(h) or Post-Closing Project Assets, the books and records of Seller and its Affiliates, including Seller’s

and its Affiliates' minute books, limited liability company interest books, ledgers, and company seals;

(e) cash, cash equivalents, bank deposits, accounts, and notes receivable, trade or otherwise, of Seller and its Affiliates;

(f) certificates of deposit, shares of stock, securities, bonds, debentures, evidences of indebtedness, and interests in joint ventures, partnerships, limited liability companies, and other entities of Seller and its Affiliates;

(g) all rights of Seller and its Affiliates arising under this Agreement, the Ancillary Agreements, or any other instrument or document executed and delivered pursuant to the terms of this Agreement or any Ancillary Agreement;

(h) all refunds or credits, if any, of Taxes due to or from Seller or its Affiliates, to the extent provided under this Agreement;

(i) the claims or causes of action against third parties (to the extent solely relating to the period prior to the Closing) listed or described in Schedule 16.2(i); and

(j) all agreements, arrangements, commitments, and other Contracts of any nature in respect of any intercompany transaction between Seller, on the one hand, and any of its Affiliates, on the other hand, whether or not such transaction relates to any contribution to capital, Indebtedness, the provision of goods or services, tax sharing arrangements, payment arrangements, intercompany advances, charges or balances, or the like.

***[Reserved]***

### **Section 16.3. Assumption of Liabilities.**

(a) Upon the terms and subject to the conditions contained in this Agreement, at the Closing, Buyer shall assume, and shall thereafter pay, perform, and discharge as and when due, the Liabilities arising out of the ownership, possession, or operation of the Closing Assets from and after the Closing, excluding the Excluded Liabilities (collectively, the "Closing Assumed Liabilities").

(b) Upon the terms and subject to the conditions in this Agreement, at the time that title to each Post-Closing Project Asset passes to and vests in Buyer pursuant to Section 11.2, Buyer shall assume, and shall thereafter pay, perform, and discharge as and when due, the Liabilities arising out of the ownership, possession, or operation of the Post-Closing Project Assets from and after the transfer of title therefor, excluding the Excluded Liabilities (collectively, the "***Post-Closing Assumed Liabilities***" and, together with the Closing Assumed Liabilities, the "***Assumed Liabilities***").

(c) For the avoidance of doubt, Buyer shall assume the Closing Assumed Liabilities only if the Closing occurs and shall assume the Post-Closing Assumed Liabilities only if title to the applicable Post-Closing Project Asset passes to and vests in Buyer pursuant to Section 11.2.

(d) Notwithstanding the foregoing, the Assumed Liabilities shall only include Liabilities of Seller under the Transferred Closing Project Contracts and the Transferred Closing Permits (subject to Section 20.5), solely to the extent allocable to the period after the Closing Date and not resulting from any breach or default by, or waiver or extension given by or to, Seller.

**Section 16.4. Excluded Liabilities.** Notwithstanding anything to the contrary, Seller shall retain, and Buyer shall not assume or be obligated to pay, perform, or otherwise discharge or be responsible for or liable with respect to, any of the following Liabilities (collectively, the “*Excluded Liabilities*”):

(a) any Liability relating to, based in whole or in part on any fact, event, circumstance, condition, or occurrence (or set of facts, events, circumstances, conditions, or occurrences) occurring or existing in connection with, or arising out of, (i) the development, design, engineering, procurement, financing, construction, installation, commissioning, testing, ownership, possession, use, operation, maintenance, study, repair, or replacement of, or sale, purchase, or other disposition of, the Project, the Project Site, any prior project (other than the Project), any of the Project Assets, or any other assets, properties, rights, or interests asserted with respect to any of the foregoing or the Work, on or prior to the Closing (or after the Closing with respect to obligations performed by or for Seller after the Closing, or other acts or omissions of the Seller Group, or other Liability allocated to Seller, under the terms of this Agreement or any Ancillary Agreement), including (A) the delivery, receipt, movement, use, sale, conveyance, transfer, removal, or disposal of any fuel, power (including any Other Electric Product), water, Hazardous Substance, waste, or any other Project Asset (or any Excluded Asset, including former asset) to or from the Project Site at any time as of or prior to the Closing, (B) compliance or non-compliance with Laws or applicable Permits (including Environmental Laws) as of or prior to the Closing (or after the Closing with respect to obligations to be performed by or for Seller after the Closing under the terms of this Agreement or any Ancillary Agreement), including fines, penalties, charges, and costs, and interest thereon (including for the avoidance of doubt, fines, penalties, charges, and costs, and interest thereon incurred after the Closing due to non-compliance with Laws or Permits originating as of or prior to the Closing), (C) any Environmental Condition or Environmental Liability as of or prior to the Closing (or after the Closing with respect to obligations to be performed by or for Seller after the Closing under the terms of this Agreement or any Ancillary Agreement), (D) any Liability representing Indebtedness (or any refinancing thereof), (E) any Action, whether pending or commencing on, prior to or after Closing, or (F) any Liability for personal injury, death, or property damage arising out of the performance of the Work, including as a result of the negligence, willful misconduct, or breach of any provision of this Agreement or any Ancillary Agreement by Seller or any other member of the Seller Group (including any Seller Service Provider), (ii) any other business, undertaking, or activity of Seller, any of its Affiliates, or any present or former owner (including any Predecessor-in-Interest) or operator of the Project or the Project Site, as of or prior to the Closing (or after the Closing with respect to obligations to be performed by or for Seller after the Closing under the terms of this Agreement or any Ancillary Agreement);

(b) any Liability arising out of or related to the performance or non-performance by Seller or any of its Affiliates (i) as of or prior to the Closing of any Contract or Permit, including any breach by Seller or any of its Affiliates of, default by Seller or any of its

Affiliates under, or waiver or extension given by or to Seller or any of its Affiliates with respect to the performance of, any covenant, representation, term, or other provision of any of the Transferred Closing Project Contracts or Transferred Closing Permits and that would have been, but for such breach, default, waiver, or extension, paid, performed, or otherwise discharged on or prior to the Closing, and (ii) as of or prior to the time that title in each Transferred Post-Closing Project Contract or Transferred Post-Closing Permit, as applicable, passes to and vests in Buyer pursuant to Section 11.2, including any breach by Seller or any of its Affiliates of, default by Seller or any of its Affiliates under, or waiver or extension given by or to Seller or any of its Affiliates with respect to the performance of, any covenant, representation, term, or other provision of any such Transferred Post-Closing Project Contract or Transferred Post-Closing Permit and that would have been, but for such breach, default, waiver, or extension, paid, performed, or otherwise discharged on or prior to the time that title in such Transferred Post-Closing Project Contract or Transferred Post-Closing Permit passes to and vests in Buyer pursuant to Section 11.2;

(c) any Liability of Seller or any of its Affiliates incurred in connection with obtaining any Consent relating to the sale, conveyance, assignment, transfer or delivery of the Project Assets to Buyer or the consummation of the Transactions hereunder;

(d) any Liability of Seller or any of its Affiliates in respect of the pending or threatened Actions set forth (or that should have been set forth) in Schedule 18.6 and the facts and circumstances relating to such matters;

(e) any Liability (i) with respect to any Tax for which Seller is responsible or liable under Section 20.2 or Section 20.7, (ii) with respect to any Tax attributable or allocable to the Work, the Project, the Project Site, or the Project Assets, in respect of any taxable period (or portion thereof) ending on or prior to the Closing Date (or after the Closing Date with respect to obligations performed by or for Seller after the Closing under the terms of this Agreement or any Ancillary Agreement), or (iii) for which Seller is liable under any Contract providing for the allocation, indemnification, or sharing of Taxes;

(f) any Liability to or relating to any Employee or Related Person of Seller or of any of its ERISA Affiliates, or of any of its or its Affiliates' Contractors or Subcontractors, or to or relating to any spouse, child, dependent, alternate payee, or beneficiary of such Employee or Related Person, or to or relating to any Employee Plan or Contract, including any Liability related to, arising out of, or with respect to: (i) any fact, event, circumstance, condition, occurrence, or exposure (or set of facts, events, circumstances, conditions, occurrences, or exposures), in each case whenever any Claim arising therefrom or relating thereto mature or are asserted; (ii) ERISA or the Code; (iii) the withholding, failure to withhold, or payment of or failure to pay any federal, state, or local income, employment, unemployment, or other Tax; (iv) compensation, benefits, severance pay or benefits, vacation pay, continuation coverage, expenses, or any other similar type Claim arising by Contract or under Law from employment; (v) employment, wage and hour restriction, equal employment opportunity, affirmative action, discrimination, retaliation, tort, or immigration and naturalization Law, or any Law relating to any Employee Plan, employee compensation, or benefits, employment discrimination, leave, accommodation, severance, labor relations, hiring or retention, safety, any employment Contract, unemployment, privacy, medical privacy, wages and hours of employees or any other terms or

conditions of employment or any other employment-related matter or workplace issue, including COBRA; (vi) any Collective Bargaining Agreement or other labor agreement, or collective bargaining, labor, or labor relations Law; (vii) any workers' compensation or any other employee health, accident, disability, or safety claim; or (viii) any action (including any action taken in connection with the consummation of the Transactions) that is or could be construed as a "plant closing" or "mass layoff," as those terms are defined in the WARN Act or any similar applicable state or local Law, occurring on or prior to the Closing;

(g) any Liability in respect of any cost determined to be the responsibility of Seller or any of its Affiliates under this Agreement or any Ancillary Agreement;

(h) any Liability of Seller or any of its Affiliates, or their respective directors, officers, members, shareholders, agents, or representatives, arising out of or relating to this Agreement, any of the Ancillary Agreements, the performance of the Work, or any of the Transactions, whether incurred prior to, on, or after the Closing, with respect to any and all finder's or broker's fees and expenses and any and all fees and expenses of any attorneys, accountants, or other professionals or advisors retained by or on behalf of Seller or any of its Affiliates;

(i) any Liability to the extent relating to any Excluded Asset or other asset that is not a Project Asset and the ownership, operation, and conduct of any business in connection therewith or therefrom and, without limiting the foregoing, any payment or other commitments or other consideration to the applicable Contractor or Subcontractor under or with respect to any warranties (even if Buyer is a third-party beneficiary thereof or receives assignment thereof according to this Agreement);

(j) any account payable of Seller or any of its Affiliates for goods purchased and services purchased and received;

(k) any Liability of Seller or any of its Affiliates representing Indebtedness (and any refinancing thereof), including Project Financing Indebtedness;

(l) any Liability of Seller or any of its Affiliates incurred or accruing after the Closing, other than the Liabilities for which Buyer provides indemnification to the Seller Group under Section 24.2; and

(m) any Liability under any Real Property Lease or Easement related to the Conservation Reserve Program or the Environmental Quality Incentives Program, each administered by the United States Department of Agriculture, to the extent arising out of or resulting from the performance of the Work, including as a result of removing any land from such programs in connection with the construction of the Project;

## **ARTICLE XVII.**

### **CLOSING; PURCHASE PRICE; PAYMENT OF SUBSTANTIAL COMPLETION PAYMENT AMOUNT AND PUNCHLIST HOLDBACK AMOUNT**

**Section 17.1. Closing.** Subject to the terms and conditions hereof, the consummation of the Transactions (the "**Closing**") shall take place at the offices of [●], at 10:00 a.m. local time on

the tenth (10th) Business Day following the date on which the conditions set forth in Article XXI (Buyer Conditions to Closing) and Article XXII (Seller Conditions to Closing), other than those conditions that by their nature are to be satisfied at the Closing, have been either satisfied or waived by the Party for whose benefit such conditions exist, or on such other date or at such other place and time as the Parties may mutually agree in writing (the “*Closing Date*”). The Closing shall be deemed to be effective for all purposes as of 11:59:59 p.m. CPT on the Closing Date.

**Section 17.2. Seller Closing Deliverables.** At the Closing, Seller shall deliver, or cause to be delivered, to Buyer the following items:

(a) each Ancillary Agreement to which Seller or any of its Affiliates is a party, executed by a duly authorized representative of Seller or such Affiliate, as applicable, and each document, if any, required to be delivered to Buyer by Seller or any of its Affiliates in accordance with the provisions of any Ancillary Agreement, executed by a duly authorized representative of Seller or such Affiliate, as applicable;

(b) each document required to be delivered to Buyer by Seller pursuant to Article XXI (Buyer Conditions to Closing);

(c) copies of each Seller’s Consent obtained by Seller with respect to the sale and purchase of the Project Assets or the consummation of the Transactions, including with respect to the transfer of any Transferred Closing Project Contract or Transferred Closing Permit;

(d) evidence, in form and substance reasonably satisfactory to Buyer, demonstrating that Seller has obtained all of the Seller’s Regulatory Approvals and Seller’s Required Consents;

(e) Seller’s affidavit and gap indemnity agreement, in substantially the form attached hereto as Exhibit K, and any other documents and instruments that may be required by the Title Insurer with respect to the Title Commitment or the Title Policy, duly executed by a duly authorized representative of Seller and dated as of the Closing;

(f) a certificate and affidavit of non-foreign status of Seller pursuant to Section 1445 of the Code, in substantially the form attached hereto as Exhibit S, duly executed by a duly authorized representative of Seller (or Seller’s tax parent Affiliate, as applicable) and dated as of the Closing;

(g) complete and accurate copies of engineering, design, and construction drawings and plans related to the Project, including issued for construction drawings and all deliverables required to be provided to Buyer at the Closing pursuant to the Scope Book;

(h) a receipt, in substantially the form attached hereto as Exhibit I-1, executed by a duly authorized representative of Seller, acknowledging Seller’s receipt of (i) the Estimated Purchase Price minus (ii) the Holdback Amount – Closing; and

(i) such other documents and instruments reasonably required by Buyer to consummate the Transactions, executed by a duly authorized representative of Seller to the extent required.

*[Reserved]*

**Section 17.3. Buyer Closing Deliverables.** At the Closing, Buyer shall deliver, or cause to be delivered, to Seller the following items:

(a) the Estimated Purchase Price minus the Holdback Amount – Closing, by wire transfer of immediately available funds to the account or accounts designated by Seller to Buyer in writing at least five (5) Business Days prior to the Closing Date;

(b) each Ancillary Agreement to which Buyer is a party, executed by a duly authorized representative of Buyer, and each document required to be delivered to Seller by Buyer in accordance with the provisions of any Ancillary Agreement, executed by a duly authorized representative of Buyer, if applicable;

(c) each document required to be delivered to Seller by Buyer pursuant to Article XXII (Seller Conditions to Closing);

(d) copies of each Buyer's Consent obtained by Buyer with respect to the sale and purchase of the Project Assets or the consummation of the Transactions; and

(e) such other documents and instruments reasonably required by Seller to consummate the Transactions, executed by a duly authorized representative of Buyer to the extent required.

**Section 17.4. Purchase Price.** The purchase price for the Project Assets shall be an amount equal to [●] Dollars (\$[●]), subject to adjustment as provided elsewhere in this Agreement, including Section 17.5, Section 17.6 and Section 20.16(b) (as adjusted, the "**Purchase Price**"), and shall not be payable except at the Closing (excluding the Holdback Amount – Closing and the Punchlist Holdback Amount, which shall be released to Seller subject to and on the terms provided in this Agreement).

**Section 17.5. Proratable Tax Items.** Except as otherwise provided in this Agreement, each Proratable Tax Item, if any, shall be prorated between Seller and Buyer as of the Closing Date without any duplication of payment under this Agreement. Seller shall be solely responsible and liable for the portion of any Proratable Tax Item related to the Tax year period ending on or prior to the Closing Date (measured by calendar days). Buyer shall be solely responsible and liable for the portion of any such Proratable Tax Item related to the Tax year period after the Closing Date (measured by calendar days).

**Section 17.6. Other Purchase Price Adjustments.** In addition to the adjustments contemplated by Section 17.5, the Purchase Price shall be adjusted as contemplated by other provisions of this Agreement or any Ancillary Agreement, including Article VIII (Change Orders) (including increases or decreases to the Purchase Price pursuant to Section 8.2 for discretionary Buyer Change Orders and a reduction to the Purchase Price for the aggregate



amounts provisionally reimbursed by Buyer to Seller pursuant to Section 8.6(a)), Article IX (Project Tests; Performance Guarantees) (reduction to the Purchase Price for liquidated damages due to Buyer for the Project failing to achieve the Guaranteed LD Performance Test Requirements), Article XIII (Insurance) (reduction to the Purchase Price for all out-of-pocket costs, including premiums, commissions, assessments, or other amounts, if any, incurred by Buyer or any member of the Buyer Group to maintain, or secure on behalf of Seller, any of the insurance coverages listed in Section 13.1), Section 24.6 (Purchase Price Adjustment), and Section [●] of the MISO Agreement. The Purchase Price shall also be reduced by the aggregate amounts that Buyer is entitled to recover from Seller under this Agreement, any Ancillary Agreement (including the MISO Agreement), or any other agreement related to the Project for which Buyer has not been previously paid, including interest accruing daily at the applicable Interest Rate on each such amount from the day after Buyer incurred such cost through the Closing Date (and subject to Section 17.7(g)). Outstanding amounts payable between Seller and Buyer pursuant to Section 20.2 shall be netted and added, if Buyer is the net payor, or debited, if Seller is the net payor, to the Purchase Price at the Closing. Further, Buyer may offset any amount payable by Seller to Buyer after the Closing against any amount payable by Buyer to Seller as a result of the Purchase Price reconciliation contemplated by Section 17.7 or otherwise. Adjustments to the Purchase Price shall be determined and made in accordance with Section 17.7.

#### **Section 17.7. Procedures for Closing and Post-Closing Adjustments.<sup>31</sup>**

(a) All adjustments to the Purchase Price pursuant to Section 17.5 or, if applicable, Section 17.6 shall be based upon the applicable amounts accrued through the Closing or paid for the most recent year or other appropriate period for which such amounts paid are available. Seller shall deliver to Buyer at least sixty (60) days advance written notice of the anticipated Closing Date. At least forty (40) days but not more than forty-five (45) days prior to the then anticipated Closing Date, Seller shall prepare and deliver to Buyer an estimated Closing statement (the “*Estimated Closing Statement*”) that includes and sets forth the actual amounts as of the Closing Date of the adjustments required by this Agreement or, if and to the extent the actual amounts are unavailable, Seller’s reasonable best estimate of all adjustments to the Purchase Price required by this Agreement to be made as of the Closing using the best available information (as may be modified under this Section 17.7, the “*Estimated Closing Adjustment*”). No later than fifteen (15) Business Days after Buyer’s receipt of the Estimated Closing Statement, Buyer shall provide to Seller its good faith objections, if any, to the Estimated Closing Adjustment in writing. If Buyer objects to the Estimated Closing Adjustment within such period, Seller and Buyer shall attempt to resolve their differences by good faith negotiation. If Seller and Buyer are unable to reach resolution prior to the Closing Date or if Buyer does not timely object to the Estimated Closing Adjustment as provided above, the Purchase Price shall be adjusted at the Closing by the amount of the Estimated Closing Adjustment, as modified to reflect any agreement reached between Seller and Buyer on any item in dispute. The Purchase Price as adjusted by the Estimated Closing Adjustment or such other amount agreed to by Seller and Buyer shall be the “*Estimated Purchase Price*.”

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<sup>31</sup> **NTD:** Remains under Buyer review and is subject to change.

(b) On or before seventy-five (75) days after the Closing Date, Seller shall prepare and deliver to Buyer a Closing statement (the “**Post-Closing Statement**”) setting forth Seller’s determination of all adjustments to the Purchase Price required by this Agreement to be made as of the Closing to the extent not reflected in the Estimated Purchase Price (the “**Proposed Post-Closing Adjustment**”); provided, however, that any post-Closing adjustment with respect to a Proratable Tax Item or any other item or matter for which Seller, despite its use of commercially reasonable efforts, has not received the information necessary for determination of the actual adjustment shall be made on or before thirty (30) days after Seller’s receipt of the information necessary to render a final post-Closing adjustment for such Proratable Tax Item or other item or matter and shall otherwise be subject to the procedures set forth in this Section 17.7. The Post-Closing Statement shall be prepared using the identical (when possible) or substantially the same (when not) accounting principles, policies, methods and procedures as Seller used in connection with the calculation or determination of the items reflected on the Estimated Closing Statement.

(c) Seller shall furnish promptly, and cause its Representatives to furnish promptly, to Buyer and its Representatives, and Buyer shall furnish promptly, and cause its Representatives to furnish promptly, to Seller and its Representatives, any and all documents, material, data and other information reasonably requested by such other Party in connection with calculation or determination of any item reflected (or that should have been reflected) in the Estimated Closing Adjustment or the Post-Closing Statement, as applicable, and, to the extent reasonably necessary, allow prompt, reasonable access of such other Party and its Representatives to programs and software used to prepare the Estimated Closing Adjustment or the Post-Closing Statement and information relating thereto.

(d) On or before forty-five (45) days after Seller’s delivery of the Post-Closing Statement to Buyer, Buyer may object in good faith to the Proposed Post-Closing Adjustment in writing, stating in reasonable detail each of its objections thereto and the basis therefor and its proposed calculation of any disputed adjustment. If and to the extent Buyer does not dispute or timely object to an amount in the Proposed Post-Closing Adjustment, the Estimated Purchase Price shall be further adjusted (the “**Initial Post-Closing Adjustment**”) by the amount in the Proposed Post-Closing Adjustment not in dispute or not timely objected to. The Initial Post-Closing Adjustment shall be effective as of the earlier of the date Seller receives Buyer’s written objections to the Proposed Post-Closing Adjustment or the date such objections are due and not provided.

(e) If Buyer objects in good faith to the Proposed Post-Closing Adjustment as provided above, Seller and Buyer shall attempt to resolve all such objections by good faith negotiation. If Seller and Buyer are able to resolve any such objection, the Purchase Price shall be promptly adjusted in accordance with Section 17.7(g). If Seller and Buyer are unable to resolve any such objection after the lapse of thirty (30) days after Seller’s delivery to Buyer of the Proposed Post-Closing Adjustment, then either Buyer or Seller may submit in writing its proposed adjustments of the Estimated Purchase Price, relating solely to adjustments pursuant to Section 17.5, to the Independent Accounting Firm. Each such proposed adjustment shall be materially in accordance with the most recent proposed adjustment made by Seller to Buyer, or by Buyer to Seller, as applicable, during their good faith negotiations over the item in dispute. In addition, Seller and Buyer shall submit such calculations, materials, memoranda, arguments,

briefs and evidence in support of their respective positions, and in accordance with such procedures, as the Independent Accounting Firm may require or determine.

(f) On or before twenty (20) Business Days following the due date of such submissions, as to each adjustment of the Estimated Purchase Price in dispute, the Independent Accounting Firm shall select, for each adjustment of the Estimated Purchase Price in dispute, an adjustment of the Estimated Purchase Price proposed by Seller or Buyer. The Independent Accounting Firm shall have no authority to alter any such proposal in any way absent manifest error. Each such determination by the Independent Accounting Firm shall be final, binding and conclusive on Seller and Buyer as to such adjustments of the Estimated Purchase Price for all purposes and shall not be subject to any further challenge of any kind by Seller or Buyer; provided, however, that, notwithstanding anything herein to the contrary, if pursuant to an audit conducted pursuant to Section 15.2, Buyer discovers that any amount was incorrectly or inappropriately included in a Change Order where the Work conducted pursuant to such Change Order was on a basis other than a lump sum, fixed-price basis, Seller shall reimburse Buyer for such amounts in accordance with Section 15.2 regardless of which such inaccuracy or error was identified prior to or after the final determination of any other adjustment to the Purchase Price.

(g) Upon the determination of the appropriate adjustments, Seller and Buyer shall effectuate such adjustments by fully reflecting them in the payments to occur at the Closing or, if such adjustments result in payments being due from Seller to Buyer, or from Buyer to Seller, in each case, after the Closing, by the Party from whom such payment is due delivering the payment to such other Party no later than two (2) Business Days after such determination in accordance with this Section 17.7, in immediately available funds or in any other manner as reasonably requested by the payee, together with daily interest thereon from the Closing Date to the date of payment at the Interest Rate.

(h) Subject to the foregoing, the Independent Accounting Firm may determine the issues in dispute following such procedures, consistent with the provisions of this Agreement, as it deems appropriate and with reference to the amounts in issue. Seller and Buyer do not intend to impose any particular procedures upon the Independent Accounting Firm, it being the desire of Seller and Buyer that any such disagreement shall be resolved as expeditiously and inexpensively as reasonably practicable. Each of Seller and Buyer shall provide the Independent Accounting Firm with such access to documents and personnel as the Independent Accounting Firm may reasonably request and otherwise shall cooperate with the Independent Accounting Firm in the conduct of its work under this Section 17.7. Each of Seller and Buyer agree that the Independent Accounting Firm shall have no Liability to Seller or Buyer in connection with services, except for acts of bad faith, willful misconduct or gross negligence, and Seller and Buyer shall provide such indemnities to the Independent Accounting Firm as it may reasonably request consistent with the foregoing.

(i) The fees and disbursements of the Independent Accounting Firm shall be paid one-half by Seller and one-half by Buyer.

**Section 17.8. Substantial Completion Payment Amount.**

(a) Seller shall not be entitled to receive any portion of the Substantial Completion Payment Amount until the Substantial Completion Payment Date. Subject to the other provisions of this Agreement, Buyer shall pay to Seller the Substantial Completion Payment Amount on the Substantial Completion Payment Date by wire transfer of immediately available funds to the account or accounts designated by Seller to Buyer in writing at least five (5) Business Days prior to the Substantial Completion Payment Date. Upon Seller's receipt of the Substantial Completion Payment Amount, Seller shall deliver to Buyer a receipt, in substantially the form attached hereto as Exhibit I-2, executed by a duly authorized representative of Seller, acknowledging Seller's receipt of the Substantial Completion Payment Amount.

(b) If Seller does not achieve Substantial Completion on or prior to the Substantial Completion Termination Trigger Date, Buyer may terminate this Agreement pursuant to Section 25.1(f) and be entitled to the remedies set forth in Section 25.4. Nothing in this Section 17.8(b) shall limit Buyer's rights or remedies with respect to any breach by or default of Seller of any provision of this Agreement.

#### **Section 17.9. Release of Punchlist Holdback Amount.**

(a) Except as set forth in Section 17.9(b), Seller shall not be entitled to receive any portion of the Punchlist Holdback Amount until the Work achieves Final Completion. Buyer shall pay to Seller, within five (5) Business Days after the date the Work achieves Final Completion (as determined under Section 7.4) and Seller has made a written request to Buyer to remit the Punchlist Holdback Amount to Seller, the full amount of the Punchlist Holdback Amount by wire transfer of immediately available funds to the account or accounts designated by Seller to Buyer in such written request.

(b) If the Substantial Completion Payment Date occurs but the Work does not achieve Final Completion on or prior to the Final Completion Termination Trigger Date and Buyer elects in a written notice delivered to Seller to step in and complete the remaining Punchlist Items, then Buyer shall be entitled to retain the Punchlist Holdback Amount for each Punchlist Item that has not been completed and Seller shall have no, and hereby waives any, right to receive the Punchlist Holdback Amount related to such Punchlist Item, and Buyer shall pay to Seller the Punchlist Holdback Amount related to all Punchlist Items actually completed by Seller within five (5) Business Days after Buyer provides written notice to Seller electing to step in and complete the remaining Punchlist Items. Nothing in this Section 17.9(b) shall limit Buyer's rights or remedies with respect to any breach by or default of Seller of any other provision of this Agreement.

### **ARTICLE XVIII. REPRESENTATIONS AND WARRANTIES OF SELLER**

As of the Effective Date and, except for representations and warranties made solely as of the Effective Date, as of the Closing Date, Seller represents and warrants to Buyer as follows:

**Section 18.1. Organization and Existence.** Seller is a [●], duly formed, validly existing, and in good standing under the laws of the State of [●], and has all requisite power and

authority to develop, design, engineer, and construct the Project and own, use, lease, test, and operate its properties and to carry on its business as now being conducted. Seller is duly qualified to do business and is in good standing in the State of [●] and each other jurisdiction in which the properties owned, leased, or operated by it or the nature of the business conducted by it makes such qualification necessary, except as would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect on Seller.

**Section 18.2. Execution, Delivery, and Enforceability.** Seller and its Affiliates have all requisite power and authority to execute and deliver, and perform their respective obligations under, this Agreement and the Ancillary Agreements to which Seller or its Affiliates, as applicable, is or becomes a party and to consummate the Transactions to the extent Seller or its Affiliates are a party thereto. The execution and delivery by Seller and its Affiliates of this Agreement and the Ancillary Agreements to which Seller or its Affiliates is or becomes a party, the performance by Seller or its Affiliates of its obligations hereunder and thereunder, and the consummation by Seller and its Affiliates of the Transactions have been duly and validly authorized by all necessary corporate or limited liability company actions (or other actions of the appropriate organizational types for any Affiliate of Seller that is not a corporation or limited liability company) required by Seller and its Affiliates, and no other acts, approvals, or corporate or limited liability company proceedings (or other actions of the appropriate organizational types for any Affiliate of Seller that is not a corporation or limited liability company) on its part or on the part of the holders of any of Seller's equity or debt securities or any other Person are necessary to authorize the same. Assuming the due authorization, execution, and delivery by Buyer of this Agreement and the Ancillary Agreements to which Buyer is or becomes a party, this Agreement constitutes, and each Ancillary Agreement to which Seller or any of its Affiliates is or becomes a party when executed and delivered by Seller or such Affiliate shall constitute, the valid and legally binding obligations of Seller or such Affiliate, as applicable, enforceable against it in accordance with their respective terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium, or other similar laws of general application relating to or affecting the enforcement of creditors' rights and by general equitable principles.

**Section 18.3. No Violation.** Assuming receipt of Seller's Consents, and Seller's Regulatory Approvals, none of the execution and delivery by Seller or any of its Affiliates (to the extent such Affiliates are a party to this Agreement or any of the Ancillary Agreements) of this Agreement or any of the Ancillary Agreements to which Seller or such Affiliate is or becomes a party, or Seller's or any of such Affiliate's performance or compliance with any provision hereof or thereof, or Seller's or any of such Affiliate's consummation of the Transactions will:

(a) violate, conflict with, or result in a breach of any of the provisions of the Organizational Documents of Seller or any such Affiliates;

(b) result in a violation or breach, conflict with terms or rights, constitute (with due notice or lapse of time or both) a default, or give rise to any right of termination, cancellation, purchase, first refusal, acceleration, or guaranteed payment, in each case under the terms, conditions, or provisions of any Contract (including any license relating to Intellectual Property or agreement relating to Project Financing Indebtedness) or other instrument to which Seller or any such Affiliates is a party or by which Seller or any such Affiliates is bound;

(c) violate, conflict with, or result in a breach in any material respect of any Law or Permit applicable to Seller or Seller Parent Guarantor or any of their respective assets or operations, the Work, the Project, or any of the Project Assets; or

(d) result in the creation or imposition of, or give any Person (other than Buyer) the right to create or impose, any Encumbrance, other than a Permitted Encumbrance, upon any of the Project Assets.

**Section 18.4. Compliance with Laws.** Except as set forth in Schedule 18.4, neither Seller nor any of its Affiliates (to the extent such Affiliates are a party to this Agreement or any of the Ancillary Agreements) is in material violation of any Law applicable to Seller or any such Affiliates with respect to the performance of the Work, the Project, including the ownership, use, operation, or maintenance thereof, or any of the Project Assets.

**Section 18.5. Bankruptcy Matters.** Neither Seller nor Seller Parent Guarantor is Bankrupt and there are no claims or proceedings pending or being contemplated by Seller or Seller Parent Guarantor, or, to Seller's Knowledge, threatened against Seller or Seller Parent Guarantor, that could reasonably be expected to result in it being or, after giving effect to the consummation of the Transactions, becoming Bankrupt.

**Section 18.6. Litigation.**

(a) Except as set forth in Schedule 18.6, there is no Action pending or, to Seller's Knowledge, threatened against or involving Seller or any of its Affiliates or before or being conducted by any Governmental Authority or arbitrator relating to the Work, the Project (including the development, design, engineering, procurement, financing, construction, installation, commissioning, testing, ownership, possession, use, operation, maintenance, study, or repair thereof), the Project Assets, or the consummation of any of the Transactions, and, to Seller's Knowledge, Seller is not under investigation by a Governmental Authority with respect to the Work, the Project (including the development, design, engineering, procurement, financing, construction, installation, commissioning, testing, ownership, possession, use, operation, maintenance, or repair thereof), any of the Project Assets, or the consummation of any of the Transactions, in each case, that, individually or in the aggregate, would reasonably be expected to result, or has resulted, in (i) the institution of legal proceedings to prohibit or restrain the performance by Seller or any of its Affiliates of its obligations under this Agreement or any of the Ancillary Agreements or the consummation of the Transactions, (ii) a claim against Buyer or any of its Affiliates for damages as a result of Seller or any of its Affiliates entering into this Agreement or any of the Ancillary Agreements or the consummation of the Transactions, (iii) a material delay in or material impairment of Seller's or any of its Affiliates' performance of its obligations under this Agreement or any of the Ancillary Agreements or a material impairment of the authority, right, or ability of Seller to consummate the Transactions, (iv) a Material Adverse Effect, (v) the creation of an Assumed Liability, (vi) a claim against Buyer or any of its Affiliates for damages as a result, or alleging a theory, of successor Liability or (vii) the imposition of an Encumbrance, other than a Permitted Encumbrance, upon any of the Project Assets.

(b) There is no Order enjoining Seller from engaging in or continuing any conduct or practice, or requiring Seller to take any material action, in connection with the Work, the Project, or the Project Assets, and neither Seller nor any of its Affiliates is subject to any outstanding Order relating to the Work, the Project, or the Project Assets, other than, in each case, Orders of general applicability.

### **Section 18.7. Owned Real Property; Easements.**

(a) Schedule 16.1(a) sets forth a complete and accurate legal description of each item of Owned Real Property. Schedule 16.1(c) sets forth a complete and accurate description of each of the Easements. Seller has provided to Buyer complete and accurate copies of each of (i) the deeds, easements, and other documents of conveyance whereby the Owned Real Property and Easements were acquired by Seller, (ii) the title insurance policies (including any and all endorsements thereto) insuring the Owned Real Property, including rights in any and all Easements appurtenant to or benefiting the Owned Real Property, (iii) the documents referenced in such policies, and (iv) all surveys (including ALTA/ACSM surveys) related to the Owned Real Property or any Easements.

(b) Seller has (i) good, marketable, and insurable (at ordinary rates) fee simple absolute title of record to all of the Owned Real Property and (ii) valid and insurable (at ordinary rates) rights in all of the Easements as grantee, in each case free and clear of all Encumbrances except Permitted Encumbrances.

(c) Seller is in possession of all of the Owned Real Property and Easements and has adequate rights of ingress and egress with respect thereto, including all buildings, structures, facilities, fixtures, and other improvements thereon. None of the Owned Real Property or Easements is subject to any Encumbrance except Permitted Encumbrances.

(d) There are no Actions pending or, to Seller's Knowledge, threatened by any Person involving (i) the exercise or a claim of eminent domain, condemnation, or similar right over or with respect to all or any of the Owned Real Property or Easements, including any of the improvements thereon, therein, or thereunder, or (ii) a reduction of, or increase in, the assessed value of any of the Owned Real Property or Easements, excluding annual determinations of assessed valuation pursuant to Tax Laws.

(e) There are no outstanding options, rights of first refusal, rights of first offer, conditional sales agreements, or other agreements or arrangements, whether oral, written, or other, regarding the purchase and sale or other transfer of the Owned Real Property or the Easements (or, in each case, any portion thereof).

(f) Except for the Purchased Easements and the Leased Real Property, there are no contracts, leases, or other agreements affecting the Owned Real Property. All bills and other payments due from Seller with respect to the Owned Real Property have been (or will be by the Closing) paid in full, other than Taxes contemplated by this Agreement.

(g) All of the Easements are valid, binding, and in full force and effect, and any amount due and payable thereon to date has been paid. There exists no default, event, or condition that, with notice or lapse of time, or both, would constitute a default by Seller under

any Easement or, to Seller's Knowledge, by any grantor of any Easement. Except as set forth on Schedule 18.7(g), none of the Easements require any Consent of the grantor or any other Person to the sale, conveyance, assignment, transfer, or delivery thereof to Buyer.

(h) As of the Closing Date, with respect to any transmission line owned or controlled by Seller and serving the Project, (i) the entire and continuous length of each such transmission line and related improvements is located on the Owned Real Property or is covered by recorded Easements in favor of Seller, (ii) the instruments by which Seller acquired the Owned Real Property and the Easements grant to Seller and its successors and assigns the right to locate, develop, construct, test, own, use, operate, maintain, replace, and repair such transmission line and related improvements in, over, under, and across the real property covered thereby, and (iii) each such transmission line and related improvement is located within the contiguous Project Site in compliance with, to the extent, applicable, the Easements, Laws, and applicable Permits, and does not encroach upon any adjoining real property or violate any other Person's real property rights.

(i) To Seller's Knowledge, none of the Project, including buildings, structures, facilities, fixtures, and other improvements on the Project Site, contravenes or violates any building or zoning Law applicable to the Project Site, or any administrative, occupational safety and health, or other Law applicable to the Project Site (whether or not permitted on the basis of prior nonconforming use, waiver, or variance), none of the Owned Real Property or the Easements is subject to any restriction relating to flood zoning, and none of the Owned Real Property serves any adjoining or other real property for any purpose.

### **Section 18.8. Leased Real Property.**<sup>32</sup>

(a) Schedule 16.1(b) sets forth a complete and accurate legal description of each item of Leased Real Property and the Real Property Leases. [Schedule 18.8(a) sets forth a complete and accurate description of each item of Transferred Closing Tangible Personal Property leased or licensed to Seller (the "**Leased Personal Property**" and, together with the Leased Real Property, the "**Leased Property**").] Seller has provided to Buyer complete and accurate copies of (i) [each lease or license of the Leased Property, including all Real Property Leases][each Real Property Lease], (ii) any and all title insurance policies (including any and all endorsements thereto) insuring the Leased Real Property, including rights in any Easement appurtenant to or benefiting any of the Leased Real Property, (iii) the documents referenced in such policies, and (iv) all surveys (including ALTA/ACSM surveys) related to the Leased Real Property and any Easements appurtenant to or benefiting the Leased Real Property.

(b) Seller has good and valid and insurable (at ordinary rates) leasehold interests in the [Leased Real Property][Leased Property]. After the Closing, Buyer shall have the right to quiet enjoyment of all [Leased Real Property][Leased Property] for the full term of each [lease of Leased Property, including each Real Property Lease][Real Property Lease] (unless Buyer waives or loses such right due to its conduct after the Closing).

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<sup>32</sup> **NTD:** Reps and warranties to be revised if there is no Leased Personal Property or no Leased Real Property or Real Property Leases.



(c) Seller has peaceful, undisturbed, and exclusive possession of the Leased Real Property. None of the leasehold interests of Seller in the [Leased Real Property][Leased Property] are subject or subordinate to any Encumbrance, except a Permitted Encumbrance. No option (or similar right) has been exercised under any leasehold interest in [Leased Real Property][Leased Property] other than an option (or similar right) the exercise of which is evidenced by a written document, a complete and accurate copy of which has been made available to Buyer.

(d) All of the [leases of Leased Property, including the Real Property Leases][Real Property Leases], are valid, binding, and in full force and effect, and all lease payments and other amounts due and payable under any [Real Property Leases][lease of Leased Property] have been paid in full. There exists no default, event, or condition that, with notice or lapse of time, or both, would constitute a default by Seller under any [Real Property Lease][lease of Leased Property] or, to Seller's Knowledge, by any other party to such lease.

(e) Except as set forth on Schedule 18.8(e), none of the documents creating a leasehold interest in [Leased Real Property][Leased Property] require any Consent of the counterparty to the assignment thereof to Buyer. The assignment or transfer of any document creating a leasehold interest in any of the [Leased Real Property][Leased Property] will not terminate, invalidate, or limit any rights of the lessee under any such document.

(f) To Seller's Knowledge, there are no Actions pending or threatened by any Person involving (i) the exercise or a claim of eminent domain, condemnation, or similar right over or with respect to all or any of the Leased Real Property, including any of the improvements thereon, therein, or thereunder, or (ii) a reduction of, or increase in, the assessed value of any of the Leased Real Property, excluding annual determinations of assessed valuation pursuant to Tax Laws.

(g) As of the Closing Date, with respect to any transmission line owned or controlled by Seller and serving the Project, (i) the entire and continuous length of each such transmission line and related improvements is located on the Leased Real Property or is covered by recorded Easements in favor of Seller, (ii) the instruments by which Seller acquired the Leased Real Property and the Easements grant to Seller and its successors and assigns the right to locate, develop, construct, test, own, possess, use, operate, maintain, replace, and repair such transmission line and related improvements in, over, under, and across the real property covered thereby, and (iii) each such transmission line and related improvement is located within the contiguous Project Site in compliance with, to the extent, applicable, the Easements, Laws, and applicable Permits, and does not encroach upon any adjoining real property or violate any other Person's real property rights.

(h) To Seller's Knowledge, none of the Project, including buildings, structures, facilities, fixtures, and other improvements on the Project Site, contravenes or violates any building or zoning Law applicable to the Project Site, or any administrative, occupational safety and health, or other Law applicable to the Project Site (whether or not permitted on the basis of prior nonconforming use, waiver, or variance), none of the Leased Real Property or the Easements is subject to any restriction relating to flood zoning, and none of the Leased Real Property serves any adjoining or other real property for any purpose.

*[Reserved]*

**Section 18.9. Transferred Closing Tangible Personal Property and Transferred Closing Inventory.**

(a) Schedule 16.1(a) and Schedule 16.1(e) set forth, respectively, a complete and accurate description of each material item of Transferred Closing Tangible Personal Property and Transferred Closing Inventory included in the Project Assets as of the Closing (with respect to the Closing), including each item of Transferred Closing Tangible Personal Property or Transferred Closing Inventory with a book value of Ten Thousand Dollars (\$10,000) or greater.

(b) As of the Closing, Seller has good and valid title to the Transferred Closing Tangible Personal Property and Transferred Closing Inventory, free and clear of all Encumbrances (other than Permitted Encumbrances).

**Section 18.10. Project Contracts.**

(a) There are no material Project Contracts except (i) the Transferred Closing Project Contracts and (ii) the Excluded Project Contracts. Seller has provided to Buyer complete and accurate copies of all Transferred Closing Project Contracts and Excluded Project Contracts (including all amendments, modifications, extensions, renewals, and supplements thereto). No Affiliate or agent of Seller is a party to a Contract that would constitute a Project Contract if Seller, rather than such Affiliate of Seller, were a party thereto.

(b) Except as set forth in Schedule 18.10, no default, event, or condition that, with notice or lapse of time or both, would constitute a breach or default by Seller or, to Seller's Knowledge, any counterparty to any Transferred Closing Project Contract has occurred or exists under any of the Transferred Closing Project Contracts, except such breaches, defaults, events, or conditions (i) as to which requisite waivers have been duly obtained or (ii) that would not (A) result in any Liability to Buyer or any of its Affiliates or (B) give rise to any right of termination under such Transferred Closing Project Contract.

(c) No Action is pending or, to Seller's Knowledge, threatened against Seller challenging the enforceability of any Transferred Closing Project Contract against Seller or, to Seller's Knowledge, against any counterparty to any Transferred Closing Project Contract with respect to such Transferred Closing Project Contract.

(d) Each Transferred Closing Project Contract constitutes the valid and binding obligation of Seller and, to Seller's Knowledge, the other parties thereto, is in full force and effect and enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium, or other similar Laws of general application relating to or affecting the enforcement of creditors' rights and by general equitable principles.

**Section 18.11. Permits.**

(a) Schedule 18.11 sets forth a complete and accurate list of all material Project Work Permits and Project Operational Permits (including Environmental Permits). The

Permits listed in Part I of Schedule 18.11 constitute all the material Project Work Permits (including Environmental Permits). The Permits listed in Part II of Schedule 18.11 constitute all the material Project Operational Permits (including Environmental Permits), excluding any Permit Buyer is responsible for obtaining pursuant to Section 5.5(a). Except as set forth in Part III of Schedule 18.11, Seller and each of its Contractors or Subcontractors held at the time required all Project Work Permits and Project Operational Permits, including all Permits required by the State of Texas for the installation or sale of solar generation equipment and the performance of related services.

(b) Each Transferred Closing Permit is valid and in full force and effect and, as of the Closing, is held by Seller. The Transferred Closing Permits constitute all of the material Project Operational Permits reasonably necessary for the use, ownership, operation, maintenance, and repair of the Project on the Closing Date in accordance with Good Industry Practices, Law and the terms of this Agreement. No event has occurred that permits, requires, or would reasonably be expected to result in, or with or without the giving of notice or the passage of time or both would permit, require, or reasonably be expected to result in, the revocation, suspension, limitation, or termination of, or the adverse modification, suspension, impairment, or limitation in any material respect of, any Transferred Closing Permit. To Seller's Knowledge, no fact, event, circumstance, condition, or occurrence (or set of facts, events, facts, circumstances, conditions, or occurrences) arising out of the development, design, engineering, procurement, financing, construction, testing, ownership, possession, use, operation, maintenance, study, or repair of the Project or the Project Assets or the current or prior conduct of the Work would reasonably be expected to (i) prevent Seller from obtaining or impede the prompt renewal, extension, or transfer in connection with the Transactions of any Transferred Closing Permit with an associated cost not in excess of standard renewal, extension, or transfer fees or (ii) require a modification of any Transferred Closing Permit (other than a modification already obtained).

(c) Except as set forth in Part IV of Schedule 18.11, Seller is, and throughout Seller's ownership or control of the Project Assets and the Project has been, in compliance in all material respects with the Transferred Closing Permits (and any prior Permit that was replaced by any Transferred Closing Permit with respect to the Project Assets or the Project that is no longer in effect but was in effect at some point during Seller's development, design, engineering, procurement, construction, commissioning, testing, ownership, possession, use, operation, or repair of the Project Assets and the Project) and all of its obligations with respect thereto.

**Section 18.12. Warranties.** Seller holds and has the right to enforce all of the Transferred Closing Warranties, subject to the terms thereof. As of the Closing Date, each of the Transferred Closing Warranties shall be in full force and effect and enforceable by Buyer in accordance with their terms.

### **Section 18.13. Intellectual Property.**

(a) Part I(A) of Schedule 18.13 sets forth all Seller-Owned Project Intellectual Property (other than with respect to software) used in or for the Project with a value of Five Hundred Dollars (\$500) or more or that is material to the ownership, possession, use, operation, maintenance, or repair of the Project. Part I(B) of Schedule 18.13 includes a list of all Seller-Owned Project Intellectual Property with respect to software (including application name, vendor

name, and version number) owned by Seller, Seller Parent Guarantor, or any of their respective Affiliates and used in or for the Project.

(b) Part II(A) of Schedule 18.13 sets forth all Project Intellectual Property Rights for which Seller or any of its Affiliates paid One Thousand Dollars (\$1,000) or more, for which Seller or any of its Affiliates has a payment obligation to the licensor or other Person in any calendar year of Five Hundred Dollars (\$500) or more, or that are material to the ownership, possession, use, operation, maintenance, or repair of the Project. Part II(B) of Schedule 18.13 sets forth the Transferred Closing Project Contracts (including licenses and similar agreements) pursuant to which Seller or any of its Affiliates is licensed or granted the right to use, or holds or possesses, the Project Intellectual Property Rights described in Part II(A) of Schedule 18.13, excluding the Transferred Closing Project Contracts that are software licenses or agreements. Part II(C) of Schedule 18.13 sets forth a list of all software licensed, held, or possessed by Seller or any of its Affiliates and used in or for the Project and all Transferred Closing Project Contracts (including licenses and similar agreements) with respect to software pursuant to which Seller or any of its Affiliates is licensed or granted the right to use, or holds or possesses, the Project Intellectual Property Rights described in Part II(A) of Schedule 18.13. Part II(D) of Schedule 18.13 sets forth the Excluded Project Contracts, if any, pursuant to which Seller or any of its Affiliates is licensed or granted the right to use, or holds or possesses, the Intellectual Property Rights described in Part II(A) of Schedule 18.13. All Project Intellectual Property Rights set forth in Part II(A) of Schedule 18.13 consist of licenses and similar rights granted by or from Persons who are not Affiliates of Seller.

(c) As of the Closing, Seller owns, free and clear of all Encumbrances (other than Permitted Encumbrances), licenses or contracts for the right to use, or lawfully holds or possesses all of the Project Intellectual Property Rights necessary for the lawful ownership, possession, use, operation, maintenance, or repair of the Project (including the Project Assets). Upon the Closing, Buyer will own, free and clear of all Encumbrances (other than Permitted Encumbrances), or otherwise have a valid license or right to use the Transferred Intellectual Property Ownership and Contract Rights in compliance with the terms of this Agreement and any applicable Project Contract.

(d) The ownership, use, holding, or possession (as applicable) by Seller or any of its Affiliates of the Project Intellectual Property Rights to be transferred to Buyer by Seller and its Affiliates hereunder and the business and activities of Seller and its Affiliates related to the Project or the Project Assets, including Seller's obligations in this Agreement, do not violate or infringe upon the Intellectual Property Rights of any Person. No Person has notified Seller or any of its Affiliates that Seller or any of its Affiliates is violating or infringing upon the Intellectual Property Rights of any Person. To Seller's Knowledge, no Person is infringing upon or violating any of the Transferred Closing Intellectual Property Ownership and Contract Rights.

**Section 18.14. Seller's Consents and Regulatory Approvals.** Part I of Schedule 1.1F sets forth a complete and accurate list of Seller's Consents and Part II of Schedule 1.1F sets forth a complete and accurate list of Seller's Regulatory Approvals.

**Section 18.15. Condition and Sufficiency of Closing Assets.**

(a) All of the Transferred Closing Tangible Personal Property and all appurtenances and improvements to the Project Site, including all buildings, fixtures, component parts, other constructions, and other appurtenances and improvements thereon, thereto, or thereunder, have been maintained by or for Seller in accordance with the Performance Standard in all material respects.

(b) As of the Closing, except for the Non-Assigned Assets for which Seller's Consents have not been obtained (notwithstanding the requirements of Section 20.3, but for which arrangements have been made according to Section 20.5(c) such that Buyer is getting the benefit thereof as of the Closing), the Closing Assets constitute all of the assets, properties, rights (including all Project Intellectual Property Rights), and interests reasonably necessary for the use, ownership, operation, maintenance, and repair of the Project on the Closing Date according to Good Industry Practices and the terms of this Agreement.

(c) As of the Closing Date, no Affiliate or agent of Seller owns an interest in the Closing Assets (other than indirectly through such Affiliate's ownership interest in Seller).

#### **Section 18.16. Environmental Matters.**

(a) The representations and warranties set forth in this Section 18.16(a) relate exclusively to the period of Seller's or any Affiliate of Seller's ownership or control of the Project or the Project Site. Seller makes no representations and warranties under this Section 18.16 with respect to any period prior to Seller's or any Affiliate of Seller's ownership or control of the Project or the Project Site.

(i) The Project and the Project Site are and have been developed, designed, engineered, procured, constructed, commissioned, tested, owned, possessed, used, operated, maintained, and repaired in compliance in all material respects with all applicable Environmental Laws (including Laws requiring Seller to obtain, maintain, and comply with Environmental Permits).

(ii) None of Seller, any of its Affiliates, or, to Seller's Knowledge, any Contractor, Subcontractor, or Representative of Seller or any of its Affiliates has ever generated, transported, used, stored, treated, disposed of, handled, or managed Hazardous Substances relating to the Project or the Project Site except in compliance in all material respects with all applicable Environmental Laws.

(iii) Except as set forth in Part I of Schedule 18.16, no Environmental Condition exists at the Project or at, on, or under the Project Site, no Hazardous Substance has been Released by the Project or at, on, or under the Project Site, and, to Seller's Knowledge, no Hazardous Substance has migrated onto or from the Project Site, in each case except in compliance with all applicable Environmental Laws or as has been Remediated to the satisfaction of the applicable Government Authorities and in compliance with all applicable Environmental Laws. Each such Remediation is described in Part II of Schedule 18.16.

(iv) There is not, and there has not been, any pending or, to Seller's Knowledge, threatened Environmental Claim with respect to the Project or the Project Site. To Seller's Knowledge, neither Seller nor any other Person has any Environmental Liability relating

to the Project or the Project Site, and there is no event, fact, condition, or circumstance (or set of events, facts, conditions, or circumstances) arising out of the development, design, engineering, procurement, construction, commissioning, testing, ownership, possession, use, operation, maintenance, or repair of the Project or the Project Site or the performance of the Work that would reasonably be expected to give rise to an Environmental Claim or Environmental Liability with respect to the Project or the Project Site.

(v) Except as set forth on Part III of Schedule 18.16, no above-ground storage tank, underground storage tank, or other storage or process tank (in each case, containing any material quantity of any Hazardous Substance) are or, to Seller's Knowledge, have been owned, operated, leased, or used at the Project Site. The Project and the Project Site do not contain, and, to Seller's Knowledge, have not contained, asbestos or asbestos-containing material, polychlorinated biphenyls, or equipment containing the foregoing, regulated concentrations of lead or lead-based paint, or urea formaldehyde foam insulation.

(vi) Seller has not sought or obtained, and, to Seller's Knowledge, no other Person has sought or obtained, environmental insurance with respect to the Project or the Project Site.

(vii) No Encumbrance under any Environmental Law or Environmental Permit exists or has been imposed or, to Seller's Knowledge, threatened to be imposed by any Governmental Authority on the Project or the Project Site and, to Seller's Knowledge, there are no events, facts, circumstances, or conditions (or set of events, facts, circumstances, or conditions) that are otherwise reasonably likely to restrict, encumber, or result in the imposition of any Encumbrance under any Environmental Law or Environmental Permit with respect to the ownership, occupancy, or use of the Project or the Project Site.

***[Reserved]***

#### **Section 18.17. Tax Matters.**

(a) All Taxes imposed on or with respect to the Work or the Project, or for which Seller or any of its Affiliates is or could be liable, whether to Governmental Authorities (as, for example, under Law) or to other Persons (as, for example, under Tax allocation agreements or partnership agreements) with respect to all taxable periods, or portions thereof, ending on or before the Closing, and required to be paid by Seller or any of its Affiliates to Governmental Authorities or other Persons, have been paid, whether or not shown as due on the Tax Returns described in this Section 18.17.

(b) Seller or an Affiliate of Seller has prepared in good faith and duly and timely filed, or caused to be duly and timely filed, all material Tax Returns relating to the Work or the Project and required to be filed by Seller or any of its Affiliates with the applicable Governmental Authority or Person. All Tax Returns described above are true, correct, and complete in all material respects.

(c) Seller and its Affiliates have complied in all material respects with all Tax Laws and all Tax agreements applicable to the Work or the Project.

(d) Neither Seller nor any of its Affiliates is a party to any Action, nor is any Action, to Seller's Knowledge, threatened for the assessment or collection of any Tax, relating to the Work or the Project. No deficiency notice or report has been received by Seller or any of its Affiliates or Representatives in respect of any Tax relating to the Work or the Project that has not resulted in a final binding settlement and payment to the applicable Governmental Authority or Person.

*[Reserved]*

**Section 18.18. Labor Matters.** No Collective Bargaining Agreement shall be binding upon or enforceable against Buyer or any of its successors or assigns.

**Section 18.19. Employee Benefits.** Except as set forth on Schedule 18.19, none of Seller, any Seller Service Affiliate, or any of their respective ERISA Affiliates sponsors, maintains, participates in, contributes to, owes contributions to, or has any Liability with respect to, or at any time within the past six (6) years has sponsored, maintained, participated in, contributed to, owed contributions to, or had any Liability with respect to: (a) any employee defined benefit pension plan that is subject to Section 302 or Title IV of ERISA or Section 412 of the Code; (b) any multiemployer plan as defined in Section 414(f) of the Code or Section 3(37)(A) or 4001(a)(3) of ERISA; (c) any multiple employer plan as defined in Section 413 of the Code; or (d) any multiple employer welfare arrangement as defined in Section 3(40) of ERISA. No assets of Seller, any Seller Service Affiliate, or any of their respective ERISA Affiliates are subject to any Encumbrance under Section 430(k) of the Code or Section 306(g) of ERISA, and, to Seller's Knowledge, no such Encumbrance is pending or threatened against any of the assets of Seller, any Seller Service Affiliate, or any of their respective ERISA Affiliates. No Liability or contingent Liability under Title IV of ERISA has been incurred by Seller, any Seller Service Affiliate, or any of their respective ERISA Affiliates that has not been satisfied in full, and no condition exists that presents a material risk to Seller or any Seller Service Affiliates of incurring any such Liability (other than Liability for premiums in the ordinary course of business to the Pension Benefit Guaranty Corporation ("**PBGC**")). The PBGC has not instituted proceedings to terminate any Employee Plan subject to Title IV of ERISA (a "**Title IV Plan**"), and no condition exists that presents a material risk that such proceedings will be instituted or that would constitute grounds under Section 4042 of ERISA for the termination of, or the appointment of a trustee to administer, any such Title IV Plan. No Employee Plan is sponsored by Seller or maintained exclusively for Project Employees and their spouses, children, dependents, alternate payees, and beneficiaries.

**Section 18.20. Financing Encumbrances.** Schedule 18.20 sets forth a complete and accurate list of all Financing Encumbrances.

**Section 18.21. Grid Synchronization; Power Sales.** The Project has not been synchronized or provided, transmitted, or delivered any electric energy, capacity, or any Other Electric Product to the ETI Transmission System or any other transmission or distribution system. There has not been any sale, transfer, or delivery of, and neither Seller nor any Affiliate of Seller is a party to or bound by any Contract obligating it or any Affiliate of Seller to sell, transfer, or deliver any electric energy, capacity, Other Electric Product, or Environmental Attribute from or attributable to the Project.

**Section 18.22. Regulatory Status.** None of the Closing Assets or the Post-Closing Project Assets to be transferred, conveyed, or assigned to Buyer pursuant to Section 11.2 include any facilities that are subject to the jurisdiction of FERC at the time of the sale to Buyer.

**Section 18.23. NERC Compliance.** *[Reserved]*

**Section 18.24. Brokers.** No agent, broker, finder, investment or commercial banker, or any other Person is, has earned, or will be entitled to any broker's, finder's, or similar fee, commission, or payment arising in connection with this Agreement or any of the Transactions as a result of any Contract or action by Seller or any Affiliate thereof.

**Section 18.25. No Additional Representations and Warranties.** Except for the representations and warranties of Seller expressly set forth in this Agreement or any Ancillary Agreement to which Seller is a party, Seller has not made, and does not make, any representation or warranty, express or implied, oral or written, to Buyer or any Affiliate of Buyer relating to the Work, the Project Assets, or the Project.

*[Reserved]*

## **ARTICLE XIX. REPRESENTATIONS AND WARRANTIES OF BUYER**

As of the Effective Date and as of the Closing Date, Buyer represents and warrants to Seller as follows:

**Section 19.1. Organization and Existence.** Buyer is a [●], duly organized, validly existing, and in good standing under the laws of the State of [●] and has all requisite power and authority to own, use, lease, and operate its properties and to carry on its business as now being conducted. Buyer is duly qualified to do business and is in good standing in the State of [●] and each other jurisdiction in which the properties owned, leased, or operated by it or the nature of the business conducted by it makes such qualification necessary, except as would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect on Buyer.

**Section 19.2. Execution, Delivery, and Enforceability.** Buyer has all requisite power and authority to execute and deliver, and to perform its obligations under, this Agreement and the Ancillary Agreements to which it is or becomes a party and to consummate the Transactions. The execution and delivery by Buyer of this Agreement and the Ancillary Agreements to which Buyer is or becomes a party, the performance by Buyer of its obligations hereunder and thereunder, and the consummation by Buyer of the Transactions have been duly and validly authorized by all necessary [●] action required on the part of Buyer and no other [●] acts, approvals, or proceedings on its part or on the part of the holders of any of its equity or debt securities or any other Person are necessary to authorize the same. Assuming the due authorization, execution, and delivery by Seller of this Agreement and the Ancillary Agreements to which Seller is or becomes a party, this Agreement constitutes, and the Ancillary Agreements to which Buyer is or becomes a party when executed and delivered by Buyer shall constitute, the valid and legally binding obligations of Buyer, enforceable against Buyer in accordance with their respective terms, except as such enforceability may be limited by bankruptcy, insolvency,



reorganization, moratorium or other similar Laws of general application relating to or affecting the enforcement of creditors' rights and by general equitable principles.

**Section 19.3. No Violation.** Assuming receipt of Buyer's Consents and Buyer's Regulatory Approvals, none of the execution and delivery by Buyer of this Agreement or any of the Ancillary Agreements to which Buyer is or becomes a party, or Buyer's compliance with any provision hereof or thereof, or Buyer's consummation of the Transactions will:

(a) violate, conflict with, or result in a breach of any of the provisions of the Organizational Documents of Buyer;

(b) result in a violation or breach, conflict in terms or rights, constitute (with due notice or lapse of time or both) a default, or give rise to any right of termination, cancellation, acceleration, or guaranteed payment, in each case under the terms, conditions, or provisions of any Contract or instrument to which Buyer is a party or by which Buyer is bound; or

(c) violate, conflict with, or result in a breach in any material respect of any Law or Permit applicable to Buyer or any of its assets.

**Section 19.4. Litigation.** Except as set forth in Schedule 19.4, there is no Action pending or, to Buyer's Knowledge, threatened against or involving Buyer or any of its Affiliates before or being conducted by any Governmental Authority or arbitrator that, individually or in the aggregate, would reasonably be expected to result, or has resulted, in (a) the institution of legal proceedings to prohibit or restrain the performance by Buyer of Buyer's obligations under this Agreement or any of the Ancillary Agreements to which Buyer is or becomes a party or the consummation of the Transactions, (b) a claim against Seller or any of its Affiliates for damages as a result of Buyer entering into this Agreement or any of the Ancillary Agreements or the consummation by Buyer of the Transactions, or (c) a material delay in or material impairment of Buyer's performance of its obligations under this Agreement or any of the Ancillary Agreements or a material impairment of the authority, right, or ability of Buyer to consummate the Transactions. There is no Order enjoining Buyer from the performance of its obligations under this Agreement or any of the Ancillary Agreements to which it is a party or the consummation of the Transactions.

**Section 19.5. Buyer's Consents and Regulatory Approvals.** Part I of Schedule 19.5 sets forth a complete and accurate list of Buyer's Consent and Part II of Schedule 19.5 sets forth a complete and accurate list of Buyer's Regulatory Approvals.

**Section 19.6. Brokers.** No agent, broker, finder, investment or commercial banker, or any other Person is, has earned, or will be entitled to any broker's, finder's, or similar fee, commission, or payment arising in connection with this Agreement or any of the Transactions as a result of any agreement, commitment, or action by Buyer or any Affiliate thereof.

**Section 19.7. No Additional Representations and Warranties.** Except for the representations and warranties of Buyer expressly set forth in this Agreement or any Ancillary Agreement to which Buyer is a party, Buyer has not made, and does not make, any

representation or warranty, express or implied, oral or written, to Seller or any Affiliate of Seller related to the Transactions.

**ARTICLE XX.**  
**ADDITIONAL COVENANTS OF THE PARTIES**

**Section 20.1. Efforts to Achieve Closing.**

(a) Subject to the terms and conditions herein, each of Seller and Buyer shall cooperate, and shall use commercially reasonable efforts to cause their Representatives to cooperate, with the other and use commercially reasonable efforts to consummate and make effective, as soon as reasonably practicable, the Transactions. Such actions shall include (i) in the case of Seller, exercising commercially reasonable efforts to (A) obtain each Permit and each of the Consents of any Governmental Authority or other Person required for the FNTP Date, the Closing, or the Substantial Completion Payment Date to occur or required to transfer, convey, and assign the Project Assets to Buyer at or prior to, as applicable, the Closing or the Substantial Completion Payment Date, including Seller's Regulatory Approvals and Seller's Consents, (B) effect all other necessary notifications, registrations, and filings, including filings under Laws, and all other necessary filings with any Governmental Authority having jurisdiction over Seller or the Project, (C) release or remove, or obtain the release or removal of, the Financing Encumbrances described in Part I(B) of Schedule 1.1C, and (D) satisfy all conditions of Seller to the Closing or the Substantial Completion Payment Date set forth herein; and (ii) in the case of Buyer, exercising commercially reasonable efforts to (A) obtain each of the Consents of any Governmental Authority or other Person required for the FNTP Date, the Closing, or the Substantial Completion Payment Date to occur or required to receive the Project Assets from Seller at or prior to, as applicable, the Closing or the Substantial Completion Payment Date, including Buyer's Regulatory Approvals and Buyer's Consents, (B) effect all other necessary notifications, registrations, and filings, including filings under Laws, and all other necessary filings with any Governmental Authority having jurisdiction over Buyer, and (C) satisfy all conditions of Buyer to the Closing set forth herein, in each case without limiting Seller's or Buyer's (as applicable) obligations under this Agreement or any Ancillary Agreement.

(b) Nothing in Section 20.1(a) is intended to or shall vary the terms of any discretion or judgment (however expressed) granted to a Party herein or in any Ancillary Agreement. For the avoidance of doubt, and without limiting the generality of the foregoing, nothing in this Agreement shall require Buyer or any Affiliate of Buyer to (i) offer, accept, or fulfill any term, condition, or limitation of or on any of Buyer's Regulatory Approvals that is unsatisfactory to Buyer in its sole and absolute discretion, including any term or condition (A) requiring Buyer (or any of its Affiliates) to, or to agree to, (1) dispose of, sell, or transfer ownership or control of any of its assets, properties, or businesses, (2) hold or retain separate particular assets or categories of assets, properties, or businesses, (3) divest, dispose of, or hold separate one or more assets or properties, or (4) accept less than full recovery of all Buyer costs associated with the Transactions and Buyer's authorized rate of return or (B) conditioning approval or authorization on any of the terms generally described in clause (A) immediately above, or (ii) appeal any Order or decision issued with respect to any of Buyer's Regulatory Approvals or restraining or prohibiting consummation of the Transactions.

**Section 20.2. Transaction Expenses.** Except as otherwise provided in this Agreement (including the remainder of this Section 20.2) or any Ancillary Agreement, all costs and expenses incurred in connection with this Agreement, any Ancillary Agreement, or the Transactions shall be paid by the Party incurring such expenses, whether or not the Closing or the Substantial Completion Payment Date occurs. The Parties agree that:

(a) except as provided in Section 20.6(a), all costs of the Title Commitment and Title Policy shall be borne by Buyer, including the charges and costs of the Title Insurer to issue the Title Commitment or the Title Policy;

(b) all documentary, Transferred Closing Project Contract, Transferred Post-Closing Project Contract, and license transfer, Consent, or conveyance or assignment fees or similar charges or costs, if any, including Taxes (but excluding Transfer Taxes, which are addressed in Section 20.7(a)(ii)), shall be borne by Seller;

(c) all Transferred Closing Permit, Transferred Post-Closing Permit, Transferred Closing Environmental Attribute or Transferred Post-Closing Environmental Attribute transfer or assignment fees or similar Transferred Closing Permit, Transferred Post-Closing Permit, Transferred Closing Environmental Attribute or Transferred Post-Closing Environmental Attribute conveyance charges or costs, if any, including Taxes (but excluding Transfer Taxes, which are addressed in Section 20.7(a)(ii)), shall be borne by Seller;

(d) all recording fees and charges with respect to the transfer of Transferred Closing Project Contracts, Transferred Post-Closing Project Contracts, Transferred Closing Permits, Transferred Post-Closing Project Permits from Seller to Buyer, transfer of the interest in or to any Project Site from Seller to Buyer, or the release of Encumbrances in connection with this Agreement or any Ancillary Agreement, the Closing, Substantial Completion, or the Substantial Completion Payment Date, including Taxes (but excluding Transfer Taxes, which are addressed in Section 20.7(a)(ii)), shall be borne by Seller;

(e) all amounts charged by the Environmental Consultant, including any subcontractor thereof, in connection with the Environmental Assessment shall be borne one-half by Buyer and one-half by Seller; and

(f) [all fees, charges, or payments associated with all filings or other submissions to a Governmental Authority required in connection with obtaining or maintaining all available Project Tax Benefits up to and including the Substantial Completion Payment Date shall be borne by Seller].

***[Reserved]***

All costs and expenses payable by one Party to another Party under this Section 20.2 shall be settled (i) upon or within thirty (30) days after termination or expiration of this Agreement, (ii) if the Closing occurs, (A) at the Closing if the cost or expense is incurred prior to or on the Closing Date, or (B) in accordance with Section 17.6 and Section 17.7 if the cost or expense is incurred after the Closing Date, or (iii) with respect to any cost or expense incurred after the Closing Date that is not settled in accordance with Section 17.6 and Section 17.7, at the Substantial Completion Payment Date. The Parties acknowledge that other provisions of this

Agreement and the Ancillary Agreements address the allocation of other specified costs and expenses between Buyer and Seller and agree that this Section 20.2 shall not operate to the exclusion of such other provisions.

**Section 20.3. Conduct Pending Substantial Completion Payment Date.** From the Effective Date through the Substantial Completion Payment Date, unless Buyer shall otherwise consent in writing, which consent shall not be unreasonably withheld, conditioned, or delayed, and except for actions required by Law, actions expressly permitted by this Agreement or an Ancillary Agreement or necessary to consummate the Transactions and expressly contemplated hereunder or thereunder, and, subject to the other terms of this Agreement, reasonable actions taken in response to an emergency endangering life or material property in accordance with Good Industry Practices and promptly disclosed in writing to Buyer, Seller shall not, and, where applicable to the Project Assets, shall cause its Affiliates not to:

(a) (i) amend, supplement, or otherwise modify in any material respect, or terminate or, other than as required by its terms, renew or extend any Transferred Closing Project Contract, Transferred Post-Closing Project Contract, Transferred Closing Permit, or Transferred Post-Closing Permit, or (ii) waive any material default by, material term of, or material right against, or release, settle, or compromise any material claim against, any other party to a Transferred Closing Project Contract, Transferred Post-Closing Project Contract, or any other material Contract to which Seller is a party arising out of or related to such Contract except to the extent such waiver, release, settlement, or compromise relates solely to the payment or performance obligations of such other party during the period prior to the Closing and does not create any Assumed Liability or adversely affect, in any material respect, the use, possession, operation, maintenance, repair, or physical condition of the Project Assets;

(b) sell, lease, license, transfer, or otherwise dispose of, or remove from the Project, or make or enter into any Contract for the sale, lease, license, transfer, disposition, or removal of, any material asset or material property that would be included in the Project Assets, except for any sale, lease, license, transfer, or disposition of such asset or property made to Buyer or made necessary because such asset or property is broken, damaged, obsolete, or out of compliance with Laws, applicable Permits, or the requirements of this Agreement;

(c) permit, allow, or cause any of the Project Assets to become subject to any Encumbrance, other than a Permitted Encumbrance or a Financing Encumbrance;

(d) resolve, settle, or compromise any Environmental Claim or any Action under any Law (including Environmental Law) pending before or being conducted by a Governmental Authority, arbitrator, or mediator relating to the Work, the Project Site, or the Project Assets, except to the extent such resolution, settlement, or compromise is an Excluded Liability and would not (i) require or involve any post-Closing Remediation or (ii) adversely affect, in any material respect, Buyer's possession, ownership, use, operation or maintenance of, or the value of, the Project or the Project Assets after the Closing;

(e) incur any Indebtedness, other than (i) extensions of credit and similar events in the ordinary course of the performance of the Work and (ii) the Project Financing Indebtedness;

(f) notwithstanding anything in this Agreement or any Ancillary Agreement to the contrary, sell, transfer, or deliver, or Contract to sell, transfer, or deliver, any electric energy, capacity, capacity-related benefit, or Other Electric Product from or attributable to the Project, other than, between the Closing and the Substantial Completion Payment Date, (i) test energy from the Project subject to and in accordance with the terms of this Agreement and (ii) pursuant to and in accordance with the express instructions provided by Buyer (or any of its Affiliates or agents) to Seller pursuant to Section 20.19 or the MISO Agreement;

(g) sell, transfer, swap, or otherwise make unavailable to Buyer at the Closing any of the Transferred Closing Environmental Attributes or, after the Closing, at the time and place specified in Section 11.2, any of the Transferred Post-Closing Environmental Attributes;

(h) change any method, practice, or principle of financial or tax accounting that is material to the consummation of the Transactions or the obligations of the Parties hereunder, except as required by GAAP or Law;

(i) make or change any election or registration with MISO with respect to the Project that would be applicable to the Project after the Closing except as required by the MISO Agreement or permitted in a writing signed by an authorized representative of Buyer);

(j) hire any Employee or assume any Liability under Law as an employer of any individual in either case with respect to the Project or the performance of the Work or otherwise take any action or fail to take any action that would cause Seller's representations in Section 18.18 or Section 18.19 to be untrue; or

(k) authorize or commit to do or agree to take, whether in writing or otherwise, any of the foregoing prohibited actions.

*[Reserved]*

#### **Section 20.4. Regulatory Approvals.<sup>33</sup>**

(a) Subject to Section 20.4(b), Buyer shall use good faith efforts to file with the [●], on or before the date that is [●] ([●]) days after the Effective Date, [its application seeking approval of the Transactions].

(b) Seller acknowledges and agrees that Buyer shall be deemed to have acted in good faith if any of the application filings described in Section 20.4(a) is delayed beyond the date provided therein as a result of any need to address in such application or resolve any legal or regulatory issue or risk prior to submission of such application (including any issue arising from communications with [●] [or [●]] staff, as applicable, any newly issued or promulgated Law or official guidance, or any factual development) or any issue concerning application or filing sequencing or docket congestion.

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<sup>33</sup> **NTD:** To be updated based on the required regulatory approvals for the Transactions. This draft assumes no HSR review of the Transactions or FERC 203 or 205 (acquisition adjustment) approval is necessary.

(c) [Seller and Buyer (i) acknowledge that Seller Parent Guarantor and Entergy Corporation are parties to that certain Joint Defense Agreement dated as of the Effective Date and (ii) expect that certain disclosures and communications between or among Seller Parent Guarantor, Seller and Buyer regarding Seller's Regulatory Approvals and Buyer's Regulatory Approvals will or may be made pursuant to such Joint Defense Agreement.]<sup>34</sup>

### **Section 20.5. Permits and Project Contracts.**

(a) Subject to Section 20.2(c) and Section 20.5(c)(ii)(B)(2), Buyer shall have primary responsibility for securing the transfer or re-issuance from the applicable Governmental Authorities at or after the Closing of the Permits included in the Project Assets, as and when required by Law. Seller shall use, prior to, on, and, if applicable, after the Closing, and at its expense, commercially reasonable efforts to cooperate and assist Buyer with, and shall cause its Affiliates and its and their respective Representatives to use commercially reasonable efforts to cooperate and assist Buyer with, the transfer and re-issuance of such Permits, including by timely executing and delivering any and all required documents, and providing timely and appropriate notices and information, to Governmental Authorities and other Persons for Buyer to timely obtain all Permits to be transferred or re-issued to it pursuant to Section 11.2 or Section 20.5(c) and by enforcing legal rights available to it, and, as applicable, causing its Affiliates to enforce legal rights available to them, under the terms of such Permits and related Contracts.

(b) Without limiting the terms of the MISO Agreement, Seller shall have primary responsibility for securing, at its cost, Seller's Consents. Subject to Section 20.2(a), Buyer shall use, prior to, on, and, if applicable, after the Closing, commercially reasonable efforts to cooperate and assist Seller with, and shall cause its Representatives to use commercially reasonable efforts to cooperate and assist Seller with, securing Seller's Consents, including by timely executing and delivering any and all reasonably required documentation and providing any reasonably requested information to any Person from whom a Seller's Consent is sought as reasonably requested by Seller or such Person; provided, however, that Buyer shall have no obligation to (i) pay any Consent fee, charge, payment, or other similar cost, however expressed, in connection therewith or (ii) provide any consideration of any kind or form (including the modification of an existing agreement or the entry into a new agreement), except, in the case of a Consent in connection with the assignment of a Project Contract included in the Project Assets, (A) the written assumption by Buyer (or its designated Affiliate) of such Project Contract at the time of transfer to Buyer (or such Affiliate) on the terms and conditions set forth in Exhibit T, (B) any modification to such Project Contract necessary to reflect such assumption, and (C) any modification to such Project Contract that Buyer, in its sole and absolute discretion, expressly agrees in writing to enter into and accept (provided that none of the foregoing in clauses (A)-(C) shall require any payment to any other Person, other than any amount paid by Seller pursuant to Section 20.2(b)).

(c) *Non-Assigned Assets.*

(i) Seller shall not be obligated or permitted, without Buyer's prior consent, to transfer a Permit or Project Contract to Buyer or its designee without the

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<sup>34</sup> **NTD:** This provision to be included if a joint regulatory filing is required or will be made.

corresponding Seller's Consent having been obtained if, notwithstanding Seller's obligations under this Agreement (including Article V) to obtain such Consent, the transfer by Seller or assumption by Buyer (or its designee) of the same would constitute a breach or default under the same or would violate any Law (each a "*Non-Assigned Asset*").

(ii) If any Seller's Consent is not obtained (A) with respect to any Permit or Project Contract, prior to the Closing, or (B) with respect to any Transferred Post-Closing Permit, Transferred Post-Closing Environmental Attribute, or Transferred Post-Closing Project Contract included in the Project Assets, prior to the time at which the same would be transferred to Buyer or its designee pursuant to Section 11.2, Seller shall, at Buyer's election, (1) to the extent and for so long as the applicable Non-Assigned Asset shall not have been transferred to Buyer or its designee, hold such Non-Assigned Asset in trust for the use and benefit of Buyer or its designee, and take such other actions (including entering into written agreements, notice of which shall, with respect to any such Permit, be provided, to the extent required by Law, by Buyer to the Governmental Authority transferring or re-issuing such Non-Assigned Asset) as Buyer may reasonably request in order to place Buyer or its designee in the same position as if such Seller's Consent had been obtained, or to provide Buyer or its designee the full rights, privileges, and benefits of, any such Non-Assigned Asset not transferred to Buyer or its designee and/or (2) reimburse Buyer for all out-of-pocket costs and expenses incurred by Buyer in connection with Buyer or its designee either (x) obtaining a replacement Permit or Contract (or an assignment thereof) to the extent such costs and expenses would not have been incurred by Buyer or its designee if such Non-Assigned Asset had been transferred to Buyer, with respect to any Permit or Project Contract included in the Project Assets, at the Closing, and with respect to any Permit or Project Contract included in the Post-Closing Assets at the time at which the same would be transferred to Buyer or its designee pursuant to Section 11.2 (including renewal, extension, re-licensing, or re-issuance charges, transfer, assignment, or consent fees, and incremental contract costs) or (y) preventing a Permit or Project Contract included in the Project Assets from becoming a Non-Assigned Asset. In order to allow sufficient time for the applicable arrangements to be made, Buyer may elect to initiate clause (B)(2) of the immediately preceding sentence if, at any time prior to Closing or other time when transfer of the applicable Project Asset should be transferred, Buyer reasonably believes that the corresponding Seller's Consent will not be obtained on time.

(iii) If Buyer makes the election in clause (B)(1) of Section 20.5(c)(ii) with respect to any Non-Assigned Asset, Buyer shall agree to perform for the benefit of Seller and comply with the obligations of Seller, at Buyer's expense (other than to the extent otherwise provided herein, including in Section 16.4 and Article XXIV), with respect to such Non-Assigned Asset, to the extent such obligations are reasonably capable of being performed and complied with by Buyer, with respect to any Permit or Project Contract included in the Closing Assets, from and after the Closing, and with respect to any Permit or Project Contract included in the Post-Closing Assets, from and after the time at which the same would be transferred to Buyer or its designee pursuant to Section 11.2 through, in each case, the completion of the transfer or re-issuance of such Non-Assigned Asset to Buyer or its designee or the expiration thereof according to its terms. If Buyer makes the election in clause (B)(2) of Section 20.5(c)(ii) with respect to any Non-Assigned Asset, upon Buyer's obtaining such replacement Permit or Contract, the replaced Permit or Project Contract shall no longer constitute a Project Asset and shall be treated thereafter as an Excluded Asset.

(iv) If any Seller Consent is obtained (A) with respect to any Permit or Project Contract included in the Closing Assets, after the Closing, (B) with respect to any Permit or Project Contract included in the Post-Closing Assets, after the time at which the same would be transferred to Buyer or its designee according to Section 11.2, Seller shall, promptly after obtaining such Consent, notify Buyer in writing and, if Buyer so directs, complete, execute, and deliver to Buyer a Post-Closing Assignment and Assumption Agreement with respect to such Project Asset.

(v) Nothing in this Section 20.5 shall limit a Party's Liabilities under Article X (Warranty), Section 16.4, Article XVII (Closing; Purchase Price; Payment of Substantial Completion Payment Amount and Punchlist Holdback Amount ), Section 20.1 (Efforts to Achieve Closing), Section 20.2 (Transaction Expenses), or Section 20.3 (Conduct Pending Substantial Completion Payment Date), Article XXIV (Indemnification), or the other terms of this Agreement or any Ancillary Agreement.

### **Section 20.6. Certain Evidence of Title; Seller Post-Closing Access.**

(a) Seller shall, at Buyer's sole cost and expense (except for the cost and expense of the endorsements identified in Schedule 20.6(a) as being Seller's responsibility<sup>35</sup> and the cost and expense of the Surveys, which shall each be at Seller's sole cost and expense), deliver the following to Buyer no later than ninety (90) days after the Effective Date with respect to the Project Site:

(i) a title commitment issued by the Title Insurer to insure [title to] the Project Site, subject only to Permitted Encumbrances, (A) on the most current ALTA form of title insurance commitment for an [owner's] policy of title insurance available in the State of Texas, (B) naming Buyer as the proposed insured thereunder, (C) having an effective date within ten (10) days of the date of delivery to Buyer, (D) in an amount specified by Buyer, but not to exceed the Purchase Price (the "**Title Policy Amount**"), (E) insuring the Project and Buyer for any mechanics' or materialmen's claims related to Work performed prior to the Closing Date, and (F) including the endorsements set forth on Schedule 20.6(a)<sup>36</sup> and such other endorsements as Buyer may reasonably require (the "**Title Commitment**"), which Title Commitment shall include the Title Insurer's requirements for issuing the Title Policy, which requirements shall be met by Seller on or before the Closing (including those requirements that must be met by releasing or satisfying monetary Encumbrances and providing any gap indemnity that may be required by the Title Insurer);

(ii) complete and legible copies of all documents listed on Schedule B to such Title Commitment (the "**Recorded Documents**"); and

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<sup>35</sup> **NTD:** Seller will be expected to pay the cost of any endorsements insuring the Project and Buyer for any mechanics' or materialmen's claims related to the Work.

<sup>36</sup> **NTD:** The list of endorsements for each jurisdiction to be provided will include all available and customary endorsements for a project of this nature, including comprehensive (minerals, encroachments, restrictions), same as survey, zoning, contiguity, energy project, encroachments, etc., and, if available, any endorsements insuring the Project and Buyer for any mechanics' or materialmen's claims related to the Work.



(iii) surveys of the Project Site made after the Effective Date by a land surveyor licensed by the State of Texas and bearing a certificate, signed and sealed by the surveyor, certifying to Buyer and the Title Insurer that such survey (A) was made in accordance with “2016 Minimum Standard Requirements for ALTA/NSPS Land/Title Surveys” and includes items 1-4, 6(a), 7(a), 7(b)(1), 7(c), 8, 9, 11, and 13-20 of Table A thereof, (B) correctly shows the locations of all building lines, easements, and areas affected by any Recorded Documents (identified by issuer, commitment number, and an effective date after the Effective Date), and (C) discloses the proposed location of each portion of the Project on the Project Site (each a “*Survey*”).<sup>37</sup>

(b) If any of the following shall occur (each, a “*Title Objection*”):

(i) the Title Commitment or other evidence of title or search of the appropriate real estate records discloses that any Person other than Seller has title to the Project Site;

(ii) the Title Commitment discloses any title encumbrance or defect that is not a Permitted Encumbrance or a title encumbrance or defect that Seller, when delivering the Title Commitment to Buyer, specifies as a title exception that Seller will cause to be deleted from the Title Commitment concurrently with the Closing, including any exception that pertains to any Encumbrance securing any loan or financing that does not constitute an Assumed Liability and any exception that Buyer reasonably believes could adversely affect Buyer’s use and enjoyment of the Project described herein; or

(iii) any Survey discloses any matter that is not a Permitted Encumbrance, then Buyer may notify Seller in writing of such matters no later than [ninety (90)] days after receiving the latest of all of the Title Commitment(s), Surveys, and copies of Recorded Documents for the Project Site (the “*Title Objection Period*”). Any matter expressly disclosed in the Title Commitment and Surveys that Buyer does not object to prior to the expiration of the Title Objection Period shall, as to the portions of the Project Site shown to be affected thereby, be considered a “Permitted Encumbrance;” provided, however, that in no event may any matter or instrument that affects the Project Site become a Permitted Encumbrance prior to the time Buyer has (A) been advised in writing by the Title Insurer or Seller of the existence of such Encumbrance or the instrument creating such Encumbrance and (B) failed to object to said Encumbrance prior to the expiration of the applicable Title Objection Period, and in no event shall any monetary Encumbrance or assessment be a Permitted Encumbrance.

(c) Seller shall cure, at its cost and expense, each Title Objection and take all steps required by the Title Insurer to eliminate each Title Objection as an exception to the Title Commitment; provided, however, that in no event shall Seller be obligated under this Section 20.6(c) to pay in excess of [●] (\$[●]) in the aggregate as to all such Title Objections (the “*Title Cure Cap*”).<sup>38</sup>

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<sup>37</sup> **NTD:** Subject to modification based on the requirements of the jurisdiction in which the Project Site is located.

<sup>38</sup> **NTD:** Insert an amount equal to 10% of the base Purchase Price.

(d) Nothing herein shall waive Buyer's right to claim a breach of any representations or warranties contained herein or to claim a right to indemnification as provided herein if Buyer suffers Losses as a result of a misrepresentation with respect to the condition of title to the Project Site.

(e) Without limiting the obligations of Seller pursuant to Section 20.6(c), if any Title Objection is not timely cured (including if Seller has not cured such Title Objection due to the Title Cure Cap), in a manner reasonably satisfactory to Buyer, then Buyer may elect either to terminate this Agreement or to waive such Title Objection and accept such title as such Seller is able to convey, without reduction in the Purchase Price.

### **Section 20.7. Tax Matters.**

(a) (i) Any and all Taxes, including all sales, use, gross receipts, and similar Taxes legally due with respect to the Work and all Transfer Taxes relating to the transfer of the Project Assets to Buyer or the Transactions shall be the responsibility of Seller, and Seller shall timely pay, or cause to be paid, all such Taxes. Seller acknowledges and agrees that the Purchase Price includes all such Taxes and, other than Seller's right to receive the Purchase Price in accordance with the terms of this Agreement, Seller shall not bill Buyer for, nor shall Buyer have any obligation to pay, any such Taxes. Buyer and Seller shall cooperate with each other to provide all applicable exemption certificates and other documentation necessary to obtain any available Tax-exempt status for the Transactions or to reduce the amount of applicable Transfer Taxes. To the extent the Transactions constitute a sale of tangible personal property, Buyer and Seller intend for such sale to qualify as an isolated or occasional sale of tangible personal property pursuant to Tex. Tax Code Ann. § 151.304.

(ii) Without limiting any of term of this Section 20.7, Seller shall timely prepare and file, to the extent required by Law, all necessary Tax Returns and other documentation with respect to all Transfer Taxes described in Section 20.7(a), and timely pay the amount shown as due on such Tax Returns to the applicable Governmental Authority. Buyer shall be entitled to receive such Tax Returns and other documentation reasonably in advance of filing, but not less than ten (10) Business Days prior to the due date of such Tax Returns, and such Tax Returns and other documentation shall be subject to Buyer's approval, which shall not be unreasonably withheld, conditioned, or delayed; provided, however, that Buyer's failure to approve any such Tax Return shall not limit Seller's right and obligation to timely file such Tax Return and duly and timely pay all Taxes shown to be due thereon. To the extent required by Law, but subject to such review and approval, Buyer or the appropriate Affiliate of Buyer, as applicable, shall join in the execution of any such Tax Return or other documentation. In preparing and reviewing such Tax Returns, the Parties shall cooperate and act in good faith to resolve any disagreement between them or with any Governmental Authority related to such Tax Returns.

(b) Any and all Property Taxes attributable to the Project Site through the Closing Date shall be borne by Seller. Any and all Property Taxes attributable to the Project Site after the Closing Date shall be borne by Buyer. Proratable Tax Items shall be allocated between Seller and Buyer as provided in Section 17.5. For Proratable Tax Items, Buyer shall prepare and timely file each Tax Return required to be filed after the Closing Date with respect to the Project

Assets, and shall duly and timely pay all such Taxes shown to be due on such Tax Return. Buyer shall make each such Tax Return available for Seller's review and approval, which shall not be unreasonably withheld, conditioned, or delayed, at least twenty (20) Business Days prior to the due date for filing such Tax Return; provided, however, that Seller's failure to approve any such Tax Return shall not limit Buyer's right and obligation to timely file such Tax Return and duly and timely pay all Taxes shown to be due thereon. Not less than five (5) Business Days prior to the due date of any such Taxes, Seller shall pay to Buyer the portion of the amount shown as due on such Tax Return that is the responsibility of Seller as determined in accordance with Section 17.5 and, to the extent required by Law, Seller or, if applicable, the appropriate Affiliate(s) of Seller shall join in the execution of any such Tax Return. In preparing and reviewing such Tax Return, the Parties shall cooperate and act in good faith to resolve any disagreement between them or with any Governmental Authority related to such Tax Return.

(c) Any Tax Return prepared by or for Seller or any of its Affiliates relating to an Encumbrance for Property Taxes on or related to the Project Assets that will arise after the Closing Date shall be subject to Buyer's approval, which shall not be unreasonably withheld, conditioned, or delayed. Seller shall make each such Tax Return available for Buyer's review and approval no later than twenty (20) Business Days prior to the due date for filing such Tax Return; provided, however, that Buyer's failure to approve any such Tax Return shall not limit Seller's right and obligation to timely file such Tax Returns and duly and timely pay all Taxes shown to be due thereon. Not less than five (5) Business Days prior to the due date of any such Taxes, Buyer shall pay to Seller the portion of the amount shown as due on such Tax Return that is, as determined in accordance with Section 17.5, the responsibility of Buyer and, to the extent required by Law, Buyer or, if applicable, the appropriate Affiliate(s) of Buyer shall join in the execution of any such Tax Return. In preparing and reviewing such Tax Return, the Parties shall cooperate and act in good faith to resolve any disagreement between them or with any Governmental Authority related to such Tax Return.

(d) If a claim shall be made by any Governmental Authority that might result in an indemnity payment to the Buyer Group pursuant to Section 24.1, Buyer shall promptly notify Seller of such claim. If a claim shall be made by any Governmental Authority that might result in an indemnity payment to the Seller Group pursuant to Section 24.2, Seller shall promptly notify Buyer of such claim. In the event that a Governmental Authority determines a deficiency in any Tax, the Party ultimately responsible for such Tax under this Agreement, whether by indemnity or otherwise, shall have authority to determine whether to dispute such deficiency determination and to control the prosecution or settlement of such dispute; provided, however, with respect to any Property Taxes for a taxable period beginning before the Closing Date and ending after the Closing Date, the Party that is the taxpayer of record shall control the dispute, but shall not settle such dispute without the other Party's consent, not to be unreasonably withheld, conditioned or delayed. The Party that is not ultimately responsible for such Tax under this Agreement shall have the right to participate at its own expense in the conduct of any such proceeding involving a Tax claim that would adversely affect such Party.

(e) Any refund received for Taxes paid or payable with respect to the Project Assets shall be promptly paid (or to the extent payable but not paid due to offset against other Taxes shall be promptly paid by the Party receiving the benefit of the offset) as follows: (i) to Seller, if attributable to Taxes with respect to any Tax year or portion thereof ending on or before

(A) with respect to any Closing Asset (other than a Non-Assigned Asset), the Closing Date (or for any Tax year beginning before and ending after the Closing Date to the extent allocable to the portion of such period beginning before and ending on the Closing Date), (B) with respect to any Post-Closing Project Asset (other than a Non-Assigned Asset), the date on which such Post-Closing Project Asset is transferred to Buyer (or for any Tax year beginning before and ending after the date such Post-Closing Project Asset was transferred to Buyer to the extent allocable to the portion of such period beginning before and ending on the date such Post-Closing Project Asset was transferred to Buyer), and (C) with respect to any Non-Assigned Asset, the date on which such Non-Assigned Asset is transferred to Buyer (or for any Tax year beginning before and ending after the date such Non-Assigned Asset was transferred to Buyer to the extent allocable to the portion of such period beginning before and ending on the date such Non-Assigned Asset was transferred to Buyer); and (ii) to Buyer, if attributable to Taxes with respect to any Tax year or portion thereof beginning after (A) with respect to any Closing Asset (other than a Non-Assigned Asset), the Closing Date (or for any Tax year beginning before and ending after the Closing Date to the extent allocable to the portion of such period after the Closing Date), (B) with respect to any Post-Closing Project Asset (other than a Non-Assigned Asset), the date on which such Post-Closing Project Asset is transferred to Buyer (or for any Tax year beginning before and ending after the date such Post-Closing Project Asset was transferred to Buyer to the extent allocable to the portion of such period after the date such Post-Closing Project Asset was transferred to Buyer), and (C) with respect to any Non-Assigned Asset, the date on which such Non-Assigned Asset is transferred to Buyer (or for any Tax year beginning before and ending after the date such Non-Assigned Asset was transferred to Buyer to the extent allocable to the portion of such period after the date such Non-Assigned Asset was transferred to Buyer).

(f) From and after the Closing, Seller shall (and shall cause its Affiliates to) cooperate fully with Buyer and make available or cause to be made available to Buyer, and Buyer shall (and shall cause its Affiliates to) cooperate fully with Seller and make available or cause to be made available to Seller, in a timely fashion for consultation, inspection, and copying, as applicable, such personnel, Tax data, books, records, documents, financial, technical and operating data, computer records, and other information and materials as may reasonably be requested by such other Party in connection with (i) the preparation or filing by such other Party or any Affiliate thereof of any Tax Return with respect to the Work, the Transactions, the Project Assets, this Agreement, any Ancillary Agreement, or the determination of any Tax payable by a Party hereunder or thereunder, (ii) any audit or other examination by any Tax authority of or affecting a Party (or an Affiliate thereof) to the extent such audit or examination relates to or arises from the Work, the Transactions, the Project Assets, this Agreement, or any Ancillary Agreement, (iii) any judicial, regulatory, or administrative Action relating to Liability for Taxes in connection the Work, the Transactions, the Project Assets, this Agreement, or any Ancillary Agreement, or (iv) any claim for refund of Taxes with respect to the Work, the Transactions, the Project Assets, this Agreement, or any Ancillary Agreement (if not inconsistent with this Agreement or such Ancillary Agreement, as applicable); provided, however, that neither Seller nor Buyer shall have any obligation to provide access to (A) any information protected by legal privilege or that it is contractually prohibited from providing to the other, it being agreed that such Party shall use commercially reasonable efforts to remove or obtain a waiver of such contractual prohibitions, or (B) any information related to income Taxes (provided that documents referenced in Section 20.7(j) and documents supporting the statements of facts and

seller certifications provided in the FNTF Tax Opinion, the Closing Date Tax Opinion and the Seller's Tax Certificates are not information related to income Taxes). Buyer shall retain and provide to Seller, and Seller shall retain and provide to Buyer, any and all material information relevant to such Tax Return, Tax payment, audit, or examination, Action, or claim, and shall make employees of its Affiliates available on a mutually convenient basis to provide additional information about and explanations of any information provided hereunder. Seller shall include in the engineering, procurement, and/or construction contracts with its Contractors terms that (1) require the Contractor to have responsibility for ensuring that all applicable Taxes payable with respect to any of the Work being performed for Seller by the Contractor (and any of its Subcontractors) are fully paid when due and (2) in the event of an audit of Buyer or any Affiliate thereof with respect to the Project, require the Contractor (and each of its Subcontractors) to cooperate with Seller and exercise its reasonable best efforts to provide supporting documentation and information reasonably requested by Seller or Buyer (working through Seller) evidencing the payment of all applicable Taxes by the Contractor (and each of its Subcontractors) with respect to any of the Work performed.

(g) Subject to any shorter period for payment provided elsewhere in this Agreement, a Party shall be entitled to full reimbursement, within thirty (30) days after written request to the other Party, for any Tax borne by such requesting Party that is the responsibility of the other Party pursuant to this Agreement.

(h) Seller shall use commercially reasonable efforts to (i) secure the most favorable tax treatment available for Buyer or any Affiliate of Buyer related to the Project or the Project Assets or Buyer's conduct of the business of owning, possessing, financing, using, operating, maintaining, or repairing the Project and Project Assets after the Closing and (ii) obtain and maintain, or, if requested by Buyer, allow Buyer to obtain and maintain, all material state or local tax exemptions, abatements, credits, incentives, or similar Tax benefits available for the Project or the Project Assets that would reasonably be expected to be obtained by an owner/developer using Good Industry Practices ("**Project Tax Benefits**").

(i) Without limiting Section 20.6(h), Seller shall, at its sole cost and expense, timely execute and file or submit all documents, provide all data, materials, and other information, and take all commercially reasonable actions necessary or reasonably requested by Buyer to obtain promptly and maintain (or, if applicable, allow Buyer to obtain and/or maintain) all available Project Tax Benefits. Without limiting the other terms of this Agreement, Seller shall provide to Buyer, reasonably in advance of the time for submittal thereof, a reasonable opportunity to review and comment on any (i) proposed notification, application, request, filing, or other submission to a Governmental Authority by Seller or any of its Representatives concerning a Project Tax Benefit, (ii) proposed Contract (or amendment or modification thereof) to obtain or maintain a Project Tax Benefit, or (iii) proposed resolution, letter, or other document or deliverable to be submitted with or a part of, or otherwise used to support, any such notification, application, request, filing, submission, or Contract (each a "**Project Tax Benefits Document**") and consider in good faith timely comments from Buyer on any Project Tax Benefits Document. Buyer shall have the right to approve any Project Tax Benefits Document to be entered into, filed, or submitted by or for Seller pursuant to this Section 20.6(i). In addition, and without limiting any other term of this Agreement, Seller shall (A) provide Buyer with a complete and accurate copy of any Project Tax Benefits Document entered into or filed or

submitted by or for Seller (unless Buyer is a party to such document) promptly after the execution, filing, or submission thereof, (B) notify Buyer of any material development in the processing or treatment of any Project Tax Benefits Document promptly after Seller receives notice thereof, (C) notify Buyer reasonably in advance of, and, to the extent permitted by all Laws and applicable Permits, allow Buyer, its Affiliates, and their respective Representatives to attend and participate in, any substantive meeting among Seller (or any Representative of Seller) and relevant Governmental Authorities and/or other third parties regarding Project Tax Benefits, (D) perform in accordance with the terms of each Project Tax Benefits Document prior to the assignment of such Project Tax Benefits Document to Buyer at the Closing, and (E) reasonably cooperate with Buyer with respect to the effort to obtain and maintain any Project Tax Benefit.

(j) Seller shall cooperate with Buyer and its tax counsel (“*ITC Tax Counsel*”) to provide information reasonably required for ITC Tax Counsel to deliver the Opinion of Tax Counsel required under Section 7.1(a)(v) (the “*FNTP Tax Opinion*”) and Section 21.13 (the “*Closing Date Tax Opinion*”), including delivery of copies of contracts with equipment suppliers, delivery certificates, and bills of sale in support of the factual assumptions relied upon by ITC Tax Counsel in the FNTP Tax Opinion and the Closing Tax Opinion, cost allocations from a certified public accountant and appraisals from a recognized utility scale photovoltaic solar project appraiser, in each case, reasonably required by, and acceptable to, ITC Tax Counsel, and to the extent any of the foregoing are not acceptable to ITC Tax Counsel, Buyer shall request ITC Tax Counsel to reasonably promptly inform Seller of the reasons therefor. Seller shall deliver to Buyer on the date of each of the FNTP Tax Opinion and the Closing Date Tax Opinion, a certificate of Seller in the form attached hereto as Exhibit P-1 and Exhibit P-2, respectively (each, a “*Seller Tax Certificate*”), prepared under the direction of and signed by the principal tax officer or other officer of Seller (or parent thereof) who performs a managerial federal tax function, has expertise in Federal Investment Tax Credits, and is sufficiently familiar with the Transactions to provide the required certification. Seller shall reimburse Buyer for up to Seventy-Five Thousand Dollars (\$75,000) of the costs incurred with obtaining the FNTP Tax Opinion and the Closing Tax Opinion.

(k) Seller and Buyer shall attempt in good faith to resolve any dispute between them as to the amount of Taxes payable by a Party hereunder.

#### **Section 20.8. Breakdown of Purchase Price for Accounting Purposes.**

(a) Within five (5) days after the end of the second (2<sup>nd</sup>) of each calendar quarter following the calendar quarter in which the Closing Date occurs through the month of Final Completion, Seller shall prepare and submit to Buyer a statement setting forth the percentage of Work completed for each of the Project’s subcategories listed in Exhibit J-2 and provide with such statement reasonable documentation and information substantiating each such assessment of progress/Work completion, including updated commodity schedules (which shall be substantially in the form included in Exhibit J-2). Each statement shall reflect all Change Orders or binding agreements between Seller and Buyer.

(b) At least thirty (30) days but not more than sixty (60) days prior to the expected Closing Date, Seller shall prepare and submit to Buyer for its review and approval a statement setting forth the distribution of the entire Purchase Price, as adjusted by any Change

Order or binding agreement between Seller and Buyer or otherwise in accordance with this Agreement, to the retirement units listed in Exhibit J-1. If Seller submits such a draft, Buyer, acting reasonably, shall provide any comments to such preliminary draft within ten (10) days. Seller shall consider in good faith any comments provided by Buyer regarding such statement. If Buyer does not provide comments to such preliminary draft within such period, Buyer shall be deemed to have approved such preliminary draft and such preliminary draft shall be considered the final approved statement. At least fifteen (15) but not more than sixty (60) days prior to the expected Closing Date, Seller shall prepare and submit to Buyer for its approval a proposed final statement setting forth the distribution of the entire Purchase Price, as adjusted by any Change Order or binding agreement between Seller and Buyer or otherwise in accordance with this Agreement, to the retirement units listed in Exhibit J-1, which proposed final statement shall take into account any comments timely provided by Buyer on the preliminary statement as set forth above. Buyer shall approve or disapprove, in whole or in part, such proposed final statement within ten (10) days after receipt thereof, and if it disapproves such statement, shall notify Seller of the reason(s) therefor, and if Seller previously provided a preliminary draft in accordance with this paragraph, such reasons shall be limited to any comments Buyer provided on the preliminary draft statement that were not addressed to Buyer's reasonable satisfaction and any difference between the preliminary draft statement and the final statement. Buyer's approval of any such statement prepared and submitted by Seller shall not be unreasonably withheld, conditioned, or delayed.

(c) At least thirty (30) days but not more than sixty (60) days prior to the earlier of the date on which Final Completion is achieved and the Final Completion Termination Trigger Date, Seller shall prepare and submit to Buyer for its review and approval a statement setting forth the distribution of the entire Purchase Price, as adjusted by any Change Order or binding agreement between Seller and Buyer or otherwise in accordance with this Agreement, to the retirement units listed in Exhibit J-1. If Seller submits such a draft, Buyer, acting reasonably, shall provide any comments to such preliminary draft within ten (10) days. Seller shall consider in good faith any comments provided by Buyer regarding such statement. If Buyer does not provide comments to such preliminary draft within such period, Buyer shall be deemed to have approved such preliminary draft and such preliminary draft shall be considered the final approved statement. At least fifteen (15) but not more than sixty (60) days prior to the earlier of the date on which Final Completion is achieved and the Final Completion Termination Trigger Date, Seller shall prepare and submit to Buyer for its approval a proposed final statement setting forth the distribution of the entire Purchase Price, as adjusted by any Change Order or binding agreement between Seller and Buyer or otherwise in accordance with this Agreement, to the retirement units listed in Exhibit J-1, which proposed final statement shall take into account any comments timely provided by Buyer on the preliminary statement as set forth above. Buyer shall approve or disapprove, in whole or in part, such proposed final statement within ten (10) days after receipt thereof, and if it disapproves such statement, shall notify Seller of the reason(s) therefor, and if Seller previously provided a preliminary draft in accordance with this paragraph, such reasons shall be limited to any comments Buyer provided on the preliminary draft statement that were not addressed to Buyer's reasonable satisfaction and any difference between the preliminary draft statement and the final statement. Buyer's approval of any such proposed final statement prepared and submitted by Seller shall not be unreasonably withheld, conditioned, or delayed.

### **Section 20.9. No Solicitation.**

(a) From and after the Effective Date through the Closing Date, neither Seller Parent Guarantor nor Seller shall, and neither Seller Parent Guarantor nor Seller shall permit any of their respective Affiliates, Representatives (or Representatives of any of their respective Affiliates), or other Person acting on Seller Parent Guarantor's, Seller's, or any of such Affiliate's behalf, to (i) solicit, initiate, seek, or encourage the making or submission of, or consider or accept, any proposal or offer, or enter into any confidentiality agreement, term sheet, letter of intent, memorandum of understanding, or purchase agreement or other similar agreement, commitment, or understanding with any Person other than Buyer, with respect to the acquisition of some or all of the Project Assets (whether as a single acquisition or as part of an acquisition of a set or group of assets or equity) or a merger, consolidation, business combination, sale of all or any material portion of the securities of Seller [or any parent of Seller]<sup>39</sup> (other than Seller Parent Guarantor), or any similar extraordinary transaction with respect to Seller or any parent of Seller (other than Seller Parent Guarantor) (an "**Extraordinary Transaction Proposal**"), or (ii) enter into or participate in any negotiation or discussion regarding, or furnish to any Person other than Buyer and its Affiliates any information with respect to, or otherwise cooperate with or assist, facilitate, or encourage, any Extraordinary Transaction Proposal by any Person other than Buyer.

(b) Seller Parent Guarantor and Seller shall rescind or reject, and, if applicable, shall cause their respective Affiliates to rescind or reject, any Extraordinary Transaction Proposal outstanding as of the Effective Date in writing within one (1) Business Day after the Effective Date and promptly reject in writing and disclose in full to Buyer any proposal or offer received after the Effective Date relating to any Extraordinary Transaction Proposal pertaining to the Project.

### **Section 20.10. Confidentiality; Public Announcements.**

(a) All information provided or obtained by Seller or Seller Parent Guarantor, directly or indirectly, from or on behalf of Buyer, or by Buyer, directly or indirectly, from or on behalf of Seller or Seller Parent Guarantor, in each case, under this Agreement prior to the Closing shall be subject to the Confidentiality Agreement. [Each of Seller and Buyer hereby adopts and agrees to be bound, effective as of the Effective Date, by the Confidentiality Agreement as though they were signatories thereto. Seller shall abide by, and shall cause its Affiliates and its Contractors and Subcontractors to abide by, the terms of such agreement.]<sup>40</sup>

(b) Seller and Buyer acknowledge and agree that all confidential, proprietary, or competitively sensitive information constituting Project Assets shall be deemed to constitute "Confidential Information" (as defined in the Confidentiality Agreement) that was disclosed by Buyer to Seller pursuant to the terms of the Confidentiality Agreement.

(c) Any nondisclosure or non-use agreement with a Contractor or Subcontractor of Seller to protect data, material, and information owned, held, or controlled by Seller shall have no effect on the rights and obligations of Seller or any Contractor or

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<sup>39</sup> **NTD:** The bracketed language is subject to change depending on the ownership chain of Seller.

<sup>40</sup> **NTD:** Include if and as appropriate.



Subcontractor associated with any deliverable developed for the Project and that constitutes Project Assets under this Agreement.

(d) Seller represents and warrants to Buyer that Seller has or, no later than the time of disclosure to Buyer, will have the full and unrestricted right to disclose any knowledge, data, and other material or information which it or its Employees may disclose to Buyer pursuant to this Agreement.

(e) All information provided or obtained by Seller or Seller Parent Guarantor, directly or indirectly, from or on behalf of Buyer, or by Buyer, directly or indirectly, from or on behalf of Seller or Seller Parent Guarantor, in each case, under this Agreement at or after the Closing shall be subject to the Post-Closing Confidentiality Agreement.

(f) Without limiting the generality of the Confidentiality Agreement, except to the extent required by Law or applicable rules or regulations of a stock or commodities exchange of which it is a member, none of Seller Parent Guarantor or Seller, on the one hand, or Buyer, on the other, or any of their respective Affiliates shall issue a press release or make any other public announcement concerning the Transactions or the contents of this Agreement or any Ancillary Agreement, in whole or in part, without the prior written consent of Seller, in the case of Buyer, and Buyer, in the case of Seller Parent Guarantor or Seller. If any such announcement or other disclosure is required by any Law or applicable rule or regulation of such stock or commodities exchange, Buyer, if Buyer is required to make the disclosure, shall give Seller, or Seller, if Seller or Seller Parent Guarantor is required to make such disclosure, shall give Buyer, to the extent legally permissible, prompt written notice of, and a reasonable opportunity to comment promptly on, the proposed disclosure, and shall limit such disclosure to such information as is reasonably required to comply with such Laws or rules or regulations.

**Section 20.11. Removal of Excluded Assets.** On or before the date on which Substantial Completion of the Work is achieved or promptly upon an earlier termination of this Agreement after Closing, Seller shall have conspicuously labeled all Excluded Assets at, on, in, or under the Project Site as Excluded Assets and property of Seller. On or prior to the date on which Final Completion of the Work is achieved, Seller shall remove any and all tangible Excluded Assets located at, on, in, or under the Project Site or any Off-Site Real Property. If Seller fails to remove all of the tangible Excluded Assets located at, on, in, or under the Project Site on or prior to such date, each such remaining tangible Excluded Asset shall be deemed to have been abandoned by Seller and Buyer may appropriate, sell, store, destroy, or otherwise dispose of all or any portion of such tangible Excluded Assets without notice to Seller and without any obligation to account for such tangible Excluded Assets. To the extent the reasonable out-of-pocket costs and expenses incurred by Buyer in connection with appropriating, selling, storing, destroying, or otherwise disposing of such tangible Excluded Assets exceed the revenues received by Buyer in connection therewith, Seller shall reimburse Buyer for all such reasonable out-of-pocket excess costs and expenses within ten (10) days after Buyer's delivery to Seller of a written request therefor. Notwithstanding anything to the contrary contained herein, the terms and conditions of this Section 20.11 shall survive the Closing.

**Section 20.12. Trade Names.** On or prior to the Closing, Seller shall remove all names of Seller or any Affiliate or related or similar trade names, trademarks, service marks, corporate

names, logos, or any similar Intellectual Property constituting an Excluded Asset that appears on any of the physical plant constituting the Project Assets.

### **Section 20.13. Schedule Updates.**

(a) Subject to the terms of this Section 20.13, (i) at least once during each ninety (90)-day period prior to the FNTP Date until the date that is thirty (30) days prior to the FNTP Date, (ii) at least once during each sixty (60)-day period from and after the FNTP Date until the date that is six (6) months prior to the reasonably anticipated Closing Date, (iii) subject to clause (iv) immediately below, commencing on the date that is six (6) months prior to the reasonably anticipated Closing Date and at least once during each thirty (30)-day period thereafter through the Closing Date, and (iv) at least fifteen (15) Business Days, but no more than thirty (30) days, prior to the anticipated Closing Date, Seller shall notify Buyer, and Buyer shall notify Seller, of any change or addition to any of its Schedules to this Agreement solely by the delivery to the other of any amendment or supplement thereto (each, a “*Schedule Supplement*”). With respect to any Schedule Supplement for which Buyer’s approval is required or for which Buyer would have the right to terminate this Agreement, as set forth in clauses (b) and (d) of this Section 20.13, Seller shall provide Buyer with a reasonable opportunity to review and comment on any Schedule Supplement provided by Seller, and consider in good faith timely comments from Buyer on such Schedule Supplement; provided that Buyer’s approval of such Schedule Supplement shall be deemed given if Buyer fails to object by written notice delivered to Seller within ten (10) Business Days after Seller requests such approval.

(b) Notwithstanding anything to the contrary in this Section 20.13, neither Seller nor Buyer may amend or supplement Schedule 1.1A (Persons With Seller’s Knowledge), Schedule 1.1B (Persons With Buyer’s Knowledge), Schedule 1.1D (Description of Project), Schedule 5.5 (Procurement of Permits), Schedule 16.1(a) (Owned Real Property), Schedule 16.1(b) (Leased Real Property), Schedule 16.1(c) (Easements), Schedule 16.1(f) (Project Contracts), Schedule 16.2(a) (Specified Excluded Assets), Schedule 16.2(b) (Excluded Project Contracts), Part II of Schedule 18.11 (Permit Matters), Schedule 18.4 (Compliance with Laws), Schedule 18.6 (Seller’s Litigation), Schedule 18.16 (Environmental Conditions), Schedule 18.19 (Employee Benefits), Schedule 19.4 (Buyer Litigation), or Schedule 20.6(a) (Title Endorsements) without the prior written approval of Buyer (with respect to amendments or supplements by Seller) or Seller (with respect to amendments or supplements by Buyer), in each case such approval not to be unreasonably withheld or conditioned from and after the FNTP Date.

(c) Subject to Section 20.13(b), each Schedule Supplement delivered by a Party shall have no effect for any purpose in connection with this Agreement, including for purposes of Article XXI (Buyer’s Conditions to Closing), Article XXII (Seller’s Conditions to Closing), and Article XXIV (Indemnification), except as follows:

(i) any Schedule Supplement delivered by Seller in accordance with this Section 20.13 that adds an item to Schedule 16.1(d) (Transferred Closing Tangible Personal Property), Schedule 16.1(e) (Transferred Closing Inventory), Schedule 16.1(i) (Transferred Closing Warranties), Schedule 16.2(i) (Specified Excluded Third Party Claims), Part I(A) and

Part I(B) of Schedule 18.13 (Intellectual Property), or Schedule 18.20 (Financing Encumbrances) shall be deemed to be included in Seller's Schedules for purposes of determining whether the condition to Closing set forth in Section 21.4 has been fulfilled; and

(ii) any Schedule Supplement delivered by Seller or Buyer, as applicable, in accordance with this Section 20.13 that adds an item to Schedule 16.1(c) (Easements), Schedule 1.1E (Special Tools), Part I of Schedule 18.11 (Permit Matters), or Schedule 18.20 (Financing Encumbrances) shall be deemed to be included in such Schedule as of the Closing Date for purposes of Article XXI (Buyer's Conditions to Closing), Article XXII (Seller's Conditions to Closing), and Article XXIV (Indemnification).

(d) If Seller delivers a Schedule Supplement that removes any material item that was listed on Schedule 16.1(d) (Transferred Closing Tangible Personal Property), Schedule 16.1(f) (Transferred Closing Project Contracts), Schedule 16.1(i) (Transferred Closing Warranties), or Schedule 18.11 (Permit Matters) as of the Effective Date, Buyer shall be entitled to terminate this Agreement upon written notice to Seller; provided, however, that, notwithstanding the foregoing, Buyer shall not be entitled to terminate this Agreement pursuant to this Section 20.13(d) if (i) with respect to the removal of any Permit from Schedule 18.11 (Permit Matters), such Permit is no longer required by Law or this Agreement for the commissioning, testing, ownership, possession, use, operation, maintenance, or repair of the Project or the Project Assets, (ii) with respect to the removal of any material item from Schedule 16.1(d) (Transferred Closing Tangible Personal Property) or Schedule 16.1(i) (Transferred Closing Warranties), the removal of such material item will not have an adverse effect on Buyer's ownership, possession, use, operation, maintenance, or repair of the Project or the Project Assets from and after the Closing and (iii) such Schedule Supplement is approved in writing by Buyer for all purposes.

(e) If Seller delivers a Schedule Supplement in accordance with this Section 20.13 that adds a Consent to Part I of Schedule 1.1F (Seller's Consents and Seller's Regulatory Approvals), Schedule 18.7(g) (Easements – Consents), or Schedule 18.8(e) (Leased Property – Consents), such Consent shall constitute a Seller's Required Consent for purposes of Section 21.7(f) and, if the Closing occurs, such matter shall be deemed included in Part I of Schedule 1.1F (Seller's Consents and Seller's Regulatory Approvals), Schedule 18.7(g) (Easements – Consents), or Schedule 18.8(e) (Leased Property – Consents), as applicable, as of the Closing Date for purposes of Article XXIV (Indemnification).

(f) If Buyer delivers a Schedule Supplement prior to the FNTP Date that adds a Consent to Schedule 19.5 (Buyer's Consents and Buyer's Regulatory Approvals), such Consent shall constitute a Buyer's Required Consent for purposes of Section 7.1(a)(ii) and, if the Closing occurs, as of the Closing Date for purposes of Article XXIV (Indemnification), such matter shall be deemed included in Schedule 19.5 (Buyer's Consents and Buyer's Regulatory Approvals).

**Section 20.14. Post-Closing Assurances.** After the Closing, each Party shall execute and deliver, upon the reasonable request of the other Party, any and all further instruments or documents, and exercise commercially reasonable efforts to take such further actions as may reasonably be required, to fulfill and implement the terms of this Agreement or realize the benefits intended to be afforded hereby, including such actions as are necessary or desirable in

connection with obtaining any third party Consent, Permit, or waiver or any regulatory filing as a Party may undertake in connection herewith.

**Section 20.15. MISO Agreement.** Contemporaneous with the execution of this Agreement, the Parties have executed and delivered the MISO Agreement.

**Section 20.16. Interconnection, Deliverability, and Transmission.**

(a) Without limiting either its other obligations, costs, and responsibilities with respect to the Project or Section 20.16(c), Seller shall be responsible for the arrangement, procurement, payment, receipt, and (through the Substantial Completion Payment Date, except as otherwise provided in the MISO Agreement or Section 20.19(c)) operation and maintenance of the interconnection, deliverability, and transmission required for the Project according to this Agreement, including (i) the procurement, payment, construction, ownership, installation, energization, operation, and maintenance of the Seller Interconnection Facilities (including any coordination with ETI Transmission with respect thereto), (ii) the establishment and recognition by MISO and other applicable balancing authorities of (A) the Project as a separate generating resource at the Electrical Interconnection Point, including for settlement, scheduling, offering, and bidding purposes, and (B) the Electrical Interconnection Point as a separate (and the exclusive) commercial pricing or settlement node for the Project, with the Project being the only source of energy injection at the Electrical Interconnection Point for settlement purposes (the “**Required Project Recognition**”), and (iii) the recognition and receipt by Seller or the Project of the Required Deliverability Arrangements (including the matters described in Section 20.16(b)).

(b) Seller shall use commercially reasonable efforts to enter into, prior to the FNTF Expiration Date, (i) the GIA and any other Required Deliverability Arrangement necessary to provide Full Deliverability to the Project and (ii) the Project Recognition Agreements (if any), each on terms and conditions satisfactory to Buyer in its sole and absolute discretion, and obtain all necessary approvals and authorizations from all applicable Governmental Authorities with jurisdiction without any modification of any such terms and conditions, provided that Seller shall not be obligated to enter into the GIA (A) if the estimated Deliverability Upgrade Costs set forth therein for the ETI Transmission System Interconnection Facilities exceed the ETI Transmission Interconnection Facilities Cap or if the estimated Deliverability Upgrade Costs set forth therein for the Network Upgrades (other than the Stand-Alone Network Upgrades) exceed the Network Upgrades Cap and (B) Seller has provided Buyer with notice of Seller’s intent to terminate this Agreement and Buyer has not elected to increase the Purchase Price by the amount by which the Deliverability Upgrade Costs for the ETI Transmission System Interconnection Facilities or the Network Upgrades (other than the Stand-Alone Upgrades) reasonably incurred by Seller exceed the ETI Transmission Interconnection Facilities Cap or the Network Upgrades Cap, as applicable, each in accordance with Section 20.16(c). If the FNTF Date occurs, Seller shall obtain and receive from MISO for the Project, Full Deliverability (including the completion, testing, and entry into service by ETI Transmission (or other applicable Person) of any ETI Transmission System Interconnection Facilities and Network Upgrades required therefor) and the Required Project Recognition and all necessary approvals and authorizations for Full Deliverability and the Required Project Recognition, all of which shall be final and not subject to appeal or legal challenge, in full force and effect, and available for immediate use by the Project as of and after the Closing.

(c) (i) The Parties acknowledge and agree that, with respect to the costs related to the ETI Transmission System Interconnection Facilities, Stand-Alone Network Upgrades, and Network Upgrades (collectively, the “**Deliverability Upgrade Costs**”), and without limiting Buyer’s approval rights under this Agreement with respect to the GIA, other Required Deliverability Arrangements, or otherwise:

(A) the Purchase Price includes the first [\$\_\_\_\_\_] of Deliverability Upgrade Costs reasonably incurred by Seller for the ETI Transmission System Interconnection Facilities and the Purchase Price shall be increased for any additional Deliverability Upgrade Costs reasonably incurred by Seller for the ETI Transmission System Interconnection Facilities up to [\$\_\_\_\_\_] of such additional Deliverability Upgrade Costs (such amounts collectively, the “**ETI Transmission System Interconnection Facilities Cap**”);

(B) the Purchase Price includes all Deliverability Upgrade Costs related to Stand-Alone Network Upgrades and the Purchase Price shall not be increased for Deliverability Upgrade Costs related to Stand-Alone Network Upgrades regardless of the actual cost thereof; and

(C) the Purchase Price includes the first [\$\_\_\_\_\_] of Deliverability Upgrade Costs reasonably incurred by Seller for the Network Upgrades (other than the Stand-Alone Network Upgrades), if any, and the Purchase Price shall be increased for any additional Deliverability Upgrade Costs reasonably incurred by Seller for Network Upgrades (other than Stand-Alone Network Upgrades) up to [\$\_\_\_\_\_] of such additional Deliverability Upgrade Costs (such amounts collectively, the “**Network Upgrades Cap**”).

(D) Notwithstanding the foregoing, if (i) (x) the estimated Deliverability Upgrade Costs set forth in the GIA for the ETI Transmission System Interconnection Facilities are less than the ETI Transmission System Interconnection Facilities Cap and (y) the actual Deliverability Upgrade Costs reasonably incurred by Seller for the ETI Transmission System Interconnection Facilities are more than the ETI Transmission System Interconnection Facilities Cap or (ii) (x) the estimated Deliverability Upgrade Costs set forth in the GIA for the Network Upgrades (other than the Stand-Alone Network Upgrades) are less than the Network Upgrades Cap and (y) the actual Deliverability Upgrade Costs reasonably incurred by Seller for the Network Upgrades (other than the Stand-Alone Network Upgrades) are more than the Network Upgrades Cap, then the Purchase Price shall be increased by the amount that such actual Deliverability Upgrade Costs exceed the ETI Transmission System Interconnection Facilities Cap or Network Upgrades Cap, as applicable.

(ii) If the estimated Deliverability Upgrade Costs set forth in the GIA for either the ETI Transmission System Interconnection Facilities or if the estimated Network Upgrades (other than Stand-Alone Network Upgrades) will exceed the ETI Transmission System Interconnection Facilities Cap or the Network Upgrades Cap, as applicable, Seller may elect either to (A) pay all additional Deliverability Upgrade Costs above the ETI Transmission System Interconnection Facilities Cap or the Network Upgrades Cap, as applicable, without any further adjustment to the Purchase Price or (A) terminate this Agreement without any fault or liability to either Party. Seller shall deliver notice of such election to Buyer on or before the earlier of (1) thirty (30) days after the estimated Deliverability Upgrade Costs for the ETI Transmission

System Interconnection Facilities or the Network Upgrades (other than Stand-Alone Network Upgrades), as applicable, to be included in the GIA have first been specified by MISO in a draft GIA made available to Seller or (2) thirty (30) days prior to the FNTF Expiration Date. If Seller does not elect to terminate this Agreement by the date required under this Section 20.16(c)(ii), then this Agreement shall remain in full force and effect, and Seller shall be responsible for all Deliverability Upgrade Costs in excess of the ETI Transmission Interconnection Facilities Cap or the Network Upgrades Cap, as applicable.

(iii) If Seller elects to terminate this Agreement pursuant to Section 20.16(c)(ii), Buyer shall have fifteen (15) Business Days to provide notice to Seller that Buyer has elected to increase the Purchase Price to include all additional Deliverability Upgrade Costs reasonably incurred by Seller in excess of the ETI Transmission Interconnection Facilities Cap or the Network Upgrades Cap, as applicable, in order to maintain the Agreement in full force and effect. If, within such fifteen (15) Business Day period, Buyer does not provide notice to Seller electing to increase the Purchase Price to include all additional Deliverability Upgrade Costs in excess of the ETI Transmission Interconnection Facilities Cap or the Network Upgrades Cap, as applicable, then this Agreement shall terminate without any fault or Liability of either Party, and neither Party shall have any further Liability under this Agreement, except with respect to those provisions that survive the termination or expiration of this Agreement.

(d) Without limiting Section 20.16(a), Section 20.16(b), or Section 20.16(c), Seller shall timely prepare and submit to the appropriate Persons such documentation and information as required or appropriate for Seller to satisfy the requirements of Section 20.16(b), including documents requesting and, if applicable, confirming the Required Deliverability Arrangements and the Required Project Recognition. Seller shall make timely payments of all application, filing, deposit, study, improvement, upgrade, registration, testing, and other fees, charges, and costs in connection with any request by or for Seller for Full Deliverability (each such request, a “***Deliverability Request***”) or the Required Project Recognition (each such request a “***Project Recognition Request***”). If obtained and received and, if applicable, recognized, Seller shall maintain Full Deliverability and the Required Project Recognition in full force and effect and available for use by the Project through the Closing and thereafter shall not take any action (or omit to take any action that is required as a part of the Work or otherwise under this Agreement) that would cause such status to be terminated or adversely affected.

(e) Seller shall provide to Buyer, reasonably in advance of the earlier of the time required for submittal thereof and the date identified on the then-current Project Schedule for submittal thereof, a reasonable opportunity to review and comment on any Deliverability Request or Project Recognition Request and consider in good faith timely comments provided by Buyer on any Deliverability Request or Project Recognition Request. Any Deliverability Request or Project Recognition Request submitted pursuant to this Section 20.16 shall be subject to Buyer’s prior approval, which shall not be unreasonably withheld, conditioned, or delayed. In addition, and without limiting the other terms of this Agreement or any Ancillary Agreement, Seller shall (i) provide Buyer with a complete and accurate copy of any Deliverability Request or Project Recognition Request submitted to MISO or any transmission provider or other Person and any MISO or third party interconnection, transmission, or deliverability study result (e.g., interconnection, system impact study, facilities study) with respect to any Deliverability Request promptly after such results are provided or made available to Seller, (ii) notify Buyer (A) of any

material development in the processing or treatment of any Deliverability Request or Project Recognition Request promptly after Seller receives notice thereof and (B) reasonably in advance of any material action taken by Seller with respect to any Deliverability Request or Project Recognition Request, (iii) notify Buyer reasonably in advance of, and, to the extent permitted by MISO if MISO's consent is required or by any other balancing authority or Person if such balancing authority's or Person's consent is required, allow Buyer and its respective Representatives to attend and participate in, any substantive meeting with MISO Representatives or other Persons regarding such study or any proposed agreement, including a proposed Required Deliverability Arrangement to obtain Full Deliverability or the Required Project Recognition, (iv) provide Buyer with a reasonable opportunity to review and approve any Required Deliverability Arrangement or Project Recognition Agreement in accordance with Section 5.6, (v) perform in accordance with the terms of each Required Deliverability Arrangement or Project Recognition Agreement prior to the assignment of such Required Deliverability Arrangement or Project Recognition Agreement to Buyer at the Closing, and (vi) cooperate with Buyer with respect to any effort to obtain or maintain Full Deliverability for the Project or commercial pricing node status required herein.

**Section 20.17. Buyer Network Resource Designation.** Buyer intends to seek to have the Project qualified and recognized, effective upon or promptly after the Closing, as a firm network resource of Buyer in MISO (and any other balancing authority within MISO) by MISO or such other balancing authority(ies) with a capacity equal to the actual or estimated PV Plant Capacity. Without limiting Seller's obligations under the MISO Agreement or the other terms of this Agreement, Seller shall, upon Buyer's request, execute and file or submit any and all documents and take or refrain from taking any and all other actions in its capacity as Buyer may reasonably request in connection with Buyer's efforts to obtain such qualification or recognition.

**Section 20.18. Real Property Leases.**

(a) Prior to entering into any Contract on or after the Effective Date that Seller believes in good faith would reasonably be expected to become a Real Property Lease (or any amendment or modification to such proposed Real Property Lease), Seller shall (i) provide Buyer with a complete and accurate copy of such proposed Real Property Lease (or such amendment or modification), (ii) provide Buyer with a reasonable opportunity to review and comment on such proposed Real Property Lease (or such amendment or modification), and consider in good faith timely comments from Buyer on such proposed Real Property Lease (or such amendment or modification), and (iii) not enter into such proposed Real Property Lease (or such amendment or modification) without the prior approval of Buyer, which shall not be unreasonably withheld, conditioned, or delayed.

(b) With respect to each proposed Real Property Lease entered into by Seller in connection with or relating to the Project after the Effective Date, Seller shall cause each such proposed Real Property Lease to permit Seller to freely assign, transfer, and/or convey such proposed Real Property Lease to Buyer without the Consent of any Person, including, for the avoidance of doubt, without any requirement that Buyer or any Affiliate of Buyer enter into a new Contract with the counterparty to such proposed Real Property Lease (or any other Person), make any payment to such counterparty (or any other Person), or provide any other new

consideration to such counterparty (or any other Person) as a condition to the effectiveness of such assignment, transfer, and/or conveyance.

### **Section 20.19. Operation of the Project – Closing to Substantial Completion.**

(a) Seller shall deliver to Buyer written notice of the date on which Seller in good faith anticipates that the Project will achieve initial synchronization with the ETI Transmission System and be capable of delivering energy to the ETI Transmission System at the Electrical Interconnection Point as contemplated by this Agreement. Such written notice shall be delivered by Seller to Buyer at least ten (10) Business Days, but no more than thirty (30) days, prior to the date on which the Project achieves initial synchronization with the ETI Transmission System and is capable of delivering energy to the ETI Transmission System at the Electrical Interconnection Point as contemplated by this Agreement.

(b) No later than three (3) Business Days after the date on which the Project achieves initial synchronization with the ETI Transmission System and is capable of delivering energy to the ETI Transmission System at the Electrical Interconnection Point as contemplated by this Agreement, Seller shall deliver to Buyer a certificate, in the form attached hereto as Exhibit N, dated as of the date such certificate is delivered and executed on Seller's behalf by a duly authorized officer of Seller.

(c) From and after the date on which the Project achieves initial synchronization with the ETI Transmission System and is capable of delivering energy to the ETI Transmission System at the Electrical Interconnection Point as contemplated by this Agreement, other than in connection with any Project Performance Test conducted by Seller pursuant to and in accordance with Article IX (Project Tests; Performance Guarantees), Seller shall not operate the Project or sell, transfer, or deliver of any electric energy, capacity, or Other Electric Product from or attributable to the Project other than pursuant to and in accordance with the express instructions of Buyer (which may be given by electronic mail to the proper email address of the then-current Seller Project Manager or pursuant to the MISO Agreement). If Buyer (or any of its Affiliates or agents) delivers express instructions to operate the Project pursuant to this Section 20.19(c) or the MISO Agreement, Seller shall operate the Project in accordance with such express instructions and the Performance Standard.

### **Section 20.20. Registration of Environmental Attributes.**

(a) Prior to the Closing, Seller shall, upon Buyer's request, execute and file or submit any and all documents, take any and all other actions, and make all other arrangements as Buyer may reasonably request to cause the Project to be certified and otherwise qualified for and registered with any Applicable Environmental Attribute Programs. For the avoidance of doubt, Seller shall not execute, file, or submit any document, take any action, or make any arrangement to cause the Project to be certified or otherwise qualified or registered with any Applicable Environmental Program without the prior written consent of Buyer, which may be withheld in its sole and absolute discretion.

(b) If, at Buyer's request pursuant to Section 20.20(a), Seller causes the Project to be certified or otherwise qualified for or registered with any Applicable Environmental



Attribute Program, Seller shall execute and file or submit any and all documents and take any and all other actions necessary or reasonably requested by Buyer to cause all Transferred Closing Environmental Attributes or other rights of Seller and the Project with respect to each such Applicable Environmental Attribute Program to be transferred to Buyer at the Closing. If from and after the Closing, Seller acquires or obtains Transferred Post-Closing Environmental Attributes or other rights under any Applicable Environmental Attribute Program with respect to the Project, Seller shall promptly execute and file or submit any and all documents and take any and all other actions necessary or reasonably requested by Buyer to cause all such Transferred Post-Closing Environmental Attributes or other rights to be transferred to Buyer in accordance with Section 11.2.

**Section 20.21. ARRs and FTRs.** Buyer will be entitled to receive all auction revenue right allocations, financial transmission rights, or congestion rights, and other similar allocations and entitlements associated with the Project. Seller shall, upon Buyer's request, execute and file or submit any and all documents, take any and all other actions, and make all other arrangements as Buyer may reasonably request to cause Buyer to receive, at or after the Closing, all auction revenue right allocations, financial transmission rights, or congestion rights, and other similar allocations and entitlements associated with the Project.

**Section 20.22. Transition Services.** [*Reserved*]

[*Reserved*]

## **ARTICLE XXI. BUYER'S CONDITIONS TO CLOSING**

The obligation of Buyer to consummate the Transactions shall be subject to satisfaction at or prior to the Closing of each of the following conditions, except to the extent Buyer waives such satisfaction in writing:

**Section 21.1. Agreement Compliance.** Seller and its Affiliates shall have performed or complied in all material respects with all covenants, obligations, and agreements of Seller or its Affiliates contained in this Agreement and the Ancillary Agreements to which Seller or any of its Affiliates is a party that are required to be performed or complied with at or prior to the Closing.

**Section 21.2. No Restraint.** There shall be no (a) preliminary or permanent Order in effect on the Closing Date that (i) declares this Agreement or any Ancillary Agreement invalid or unenforceable in any material respect or (ii) restrains, enjoins, or otherwise prohibits the consummation of the Transactions, including the transactions contemplated by the Ancillary Agreements, or (b) Action taken, or Law enacted, promulgated, or deemed applicable to the Transactions, by a Governmental Authority which, directly or indirectly, prohibits the consummation of the Transactions, including the transactions contemplated by the Ancillary Agreements, as herein or therein provided.

**Section 21.3. Regulatory Approvals.** All of Buyer's Regulatory Approvals (other than those marked with an asterisk on Part II of Schedule 19.5) shall (a) have been obtained and shall not have been granted subject to or containing any term or condition that is unsatisfactory to

Buyer in its sole and absolute discretion, (b) be in full force and effect, and (c) be final and not subject to appeal or otherwise subject to challenge or modification.

**Section 21.4. Representations and Warranties.** The representations and warranties of Seller set forth in this Agreement that are qualified with respect to materiality (whether by reference to Material Adverse Effect or otherwise) shall be true and correct in all respects, and the representations and warranties of Seller set forth in this Agreement that are not so qualified shall be true and correct in all material respects, in each case on and as of the Effective Date and the Closing Date, except to the extent that such representations and warranties by their terms speak as of a date earlier than the Closing Date, in which event they shall be true and correct as of such date.

**Section 21.5. Mechanical Completion.** Mechanical Completion shall have occurred and, since the date the Work achieved Mechanical Completion, no event or circumstance shall have occurred and be continuing that causes any of the criteria described in the definition of “Mechanical Completion” to cease to be true.

**Section 21.6. Officer’s Certificate.** Buyer shall have received a certificate from Seller, executed on its behalf by a duly authorized officer, dated as of the Closing Date, to the effect that the conditions set forth in Section 21.1, Section 21.4, and Section 21.5 have been satisfied.

**Section 21.7. Receipt of Other Documents.** Buyer shall have received the following:

(a) a [certificate of good standing] with respect to Seller, as of a date reasonably near to the Closing Date, issued by [the Secretary of State of the State of [●]];

(b) copies of the [●] and the [●] of Seller certified by [the Secretary of State of the State of [●]], together with a certificate of the Secretary or an Assistant Secretary (or similarly situated individual) of Seller that none of such documents have been amended since the date of such certification;<sup>41</sup>

(c) copies, certified by the Secretary or an Assistant Secretary (or similarly situated individual) of Seller, of resolutions of Seller’s board of directors or similar governing body authorizing the execution and delivery by Seller of this Agreement and each of the Ancillary Agreements to which it is a party and authorizing the performance of its obligations hereunder and thereunder, as applicable, and authorizing or ratifying the execution and delivery of, and performance of its obligations under, all of the other agreements and instruments, in each case, to be executed and delivered by Seller in connection herewith;

(d) a certificate of the Secretary or an Assistant Secretary (or similarly situated individual) of Seller identifying the name and title and bearing the signatures of the officers of Seller authorized to execute and deliver this Agreement and each Ancillary Agreement to which it is a party and the other agreements and instruments contemplated hereby;

(e) all of the items referenced in Section 17.2;

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<sup>41</sup> **NTD:** Insert organizational documents appropriate for the organizational form selected by Seller (e.g., articles of incorporation and certificate of formation for limited liability companies).

(f) receipt of the Seller's Required Consents; and

(g) a bringdown of the Environmental Assessment that was provided pursuant to Section 7.1(a)(xv) from the same consultant that issued such Environmental Assessment, which (i) shows no new environmental conditions with respect to the Project and the Project Site beyond those identified in the original Environmental Assessment delivered pursuant to Section 7.1(a)(xv) and (ii) is dated no more than one hundred eighty (180) days prior to the Closing.

*[Reserved]*

**Section 21.8. MISO Agreement; Market Participant.** The MISO Agreement shall be in full force and effect, Buyer (or an agent thereof specified by Buyer) shall have been at all times prior to the Closing in accordance with the MISO Agreement, and shall be as of the Closing, the "Market Participant" (as such term is defined in the MISO Agreement) for the Project and, as of the Closing, there shall be no pending notice or other submission to MISO that could result in Buyer (or an agent thereof specified by Buyer) not being the Market Participant for the Project after the Closing, excluding any such notice or other submission made by Buyer or any Affiliate thereof.

**Section 21.9. Material Adverse Effect.** Since the Effective Date, no Material Adverse Effect with respect to Seller shall have occurred that has not been cured.

**Section 21.10. No Condemnation.** None of the Closing Assets, including the Project Site, in whole or in part, shall have become subject to or threatened with any condemnation or eminent domain proceeding that adversely affects, or could reasonably be expected to adversely affect, in whole or in part, Buyer's use of the Project Site for the Intended Use.

**Section 21.11. Financing Encumbrance Removal.** Seller shall have delivered to Buyer:

(a) (i) fully executed copies of customary letters from the beneficiary of each Financing Encumbrance, which letters shall (A) contain a full termination and release of each such Financing Encumbrance and provide for the termination of any related collateral document with respect to such Financing Encumbrance, (B) permit the filing of UCC-3 termination statements or other filings as are necessary to release each such Financing Encumbrances, (C) provide for the prompt return of any possessory collateral secured by such Financing Encumbrances, and (D) include such other terms and conditions as Buyer may reasonably request and (ii) evidence, in form and substance reasonably satisfactory to Buyer, establishing or confirming that all Encumbrances applicable to the Closing Assets have been released or extinguished and as of the Closing there are no Encumbrances arising out of the Work against or applicable to the Closing Assets, in each case other than the Permitted Encumbrances as of the Closing;

(b) lien search reports dated within ten (10) days prior to the Closing listing all UCC financing statements naming Seller as "debtor", together with copies of such financing statements; and

(c) to the extent the “collateral” described in any of the financing statements referenced in clause (b) above include all or any Project Assets, and the Encumbrance evidenced by such financing statement is not a Permitted Encumbrance, evidence, in form and substance reasonably satisfactory to Buyer, establishing or confirming that such Encumbrance has been waived, released or extinguished.

**Section 21.12. Title Documents.** Seller shall have delivered to Buyer:

(a) a Title Commitment issued by the Title Insurer no earlier than thirty (30) days prior to the Closing Date pursuant to which the Title Insurer commits to issue an Owner’s Policy of Title Insurance to insure title to the Project Site, subject only to Permitted Encumbrances as of the Closing, (i) on the most current ALTA form owner’s policy of title insurance available in the State of Texas, (ii) naming Buyer as the proposed insured thereunder, (iii) effective on the Closing Date, (iv) for the Title Policy Amount, and (v) including the endorsements set forth in Schedule 20.6(a) and such other endorsements as Buyer may reasonably require (such policy with such endorsements, the “*Title Policy*”);

(b) a Title Affidavit in the form of Exhibit K, executed by an authorized officer of Seller and dated as of the Closing Date; and

(c) (i) an update to each Survey, dated as of or after the date upon which Mechanical Completion was achieved, that collectively show the correct location of all of the Project constructed as of such date and all title exceptions or title defects reflected in the Title Policy (the “*Closing Date Survey*”) and (ii) a certification from Seller, signed by a duly authorized officer of Seller, that no improvements necessary to achieve Substantial Completion will be located outside the boundaries of the improvements shown on the Closing Date Survey.

**Section 21.13. Tax Opinion.** As a bringdown of the FNTF Tax Opinion, Buyer shall have received the Closing Date Tax Opinion, duly executed by ITC Tax Counsel and issued no earlier than ten (10) days prior to the Closing Date.

**Section 21.14. Seller Tax Certificate.** Buyer shall have received a Seller Tax Certificate in the form attached hereto as Exhibit P-2.

**Section 21.15. Grid Synchronization.** The Project shall not have been synchronized or provided, transmitted, or delivered any electric energy, capacity, or any Other Electric Product to the ETI Transmission System or any other transmission or distribution system.

**Section 21.16. Breakdown of Purchase Price for Accounting Purposes.** Buyer shall have approved the statement distributing the entire Purchase Price, as may be adjusted by any Change Order, any binding agreement between Seller and Buyer, or otherwise in accordance with this Agreement, against the retirement units listed in Exhibit J-1, as contemplated by Section 20.8(b).

**Section 21.17. Full Deliverability; Required Project Recognition.** Seller shall have obtained and received (a) from MISO for the Project, Full Deliverability (including the completion, testing, and entry into service by ETI Transmission (or other applicable Person) of any ETI Transmission System Interconnection Facilities and Network Upgrades required

therefor) and the Required Project Recognition, and (b) without limiting the foregoing, the Required Deliverability Arrangements, Project Recognition Agreements, and all necessary approvals and authorizations for Full Deliverability and the Required Project Recognition, all of which shall be final and not subject to appeal or legal challenge, in full force and effect, and available for immediate use by the Project from and after the Closing.

**Section 21.18.** *[Reserved]*<sup>42</sup>

**ARTICLE XXII.  
SELLER'S CONDITIONS TO CLOSING**

The obligation of Seller to consummate the Transactions shall be subject to satisfaction at or prior to the Closing of the following conditions, except to the extent Seller waives such satisfaction in writing:

**Section 22.1. Agreement Compliance.** Buyer and its Affiliates shall have performed or complied in all material respects with all covenants, obligations, and agreements of Buyer or its Affiliates contained in this Agreement and the Ancillary Agreements to which Buyer or any of its Affiliates is a party that are required to be performed or complied with at or prior to the Closing.

**Section 22.2. No Restraint.** There shall be no (a) preliminary or permanent Order in effect on the Closing Date that declares this Agreement or any Ancillary Agreement invalid or unenforceable in any material respect or that restrains, enjoins, or otherwise prohibits the consummation of the Transactions, including the transactions contemplated by the Ancillary Agreements, or (b) Action taken, or Law enacted, promulgated, or deemed applicable to the Transactions, by a Governmental Authority which, directly or indirectly, prohibits the consummation of the Transactions, including the transactions contemplated by the Ancillary Agreements, as herein or therein provided.

**Section 22.3. Regulatory Approvals and Consents.**

(a) All of Seller's Regulatory Approvals shall have been obtained on terms reasonably acceptable to Seller and shall be in full force and effect and shall be final and not subject to appeal or otherwise subject to challenge or modification.

(b) All of Seller's Required Consents shall have been obtained on terms reasonably acceptable to Seller.

**Section 22.4. Representations and Warranties.** The representations and warranties of Buyer set forth in this Agreement that are qualified with respect to materiality (whether by reference to Material Adverse Effect or otherwise) shall be true and correct in all respects, and the representations and warranties of Buyer set forth in this Agreement that are not so qualified

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<sup>42</sup> **NTD:** Other Buyer Closing conditions may be required as a result of EPC, physical, or operational aspects of the Project, special considerations or other provisions included in the applicable proposal selected for negotiation of the Transaction Agreements, diligence conducted by or for Buyer on the Transactions, the status of applicable laws and markets, regulatory conditions, and other factors.

shall be true and correct in all material respects, in each case on and as of the Effective Date and the Closing Date, except to the extent that such representations and warranties by their terms speak as of a date earlier than the Closing Date, in which event they shall be true and correct as of such date.

**Section 22.5. Officer's Certificate.** Seller shall have received a certificate from Buyer, executed on its behalf by a duly authorized officer, dated as of the Closing Date, to the effect that the conditions set forth in Section 22.1 and Section 22.4 have been satisfied.

**Section 22.6. Receipt of Other Documents.** Seller shall have received the following:

(a) a certificate of good standing with respect to Buyer, as of a date reasonably near to the Closing, issued by the Secretary of State of the State of [●];

(b) copies of the certificate of formation of Buyer certified by the Secretary of State of the State of [●], together with a certificate of the Secretary or an Assistant Secretary of Buyer that none of such documents have been amended since the date of such certification;

(c) copies, certified by the Secretary or an Assistant Secretary of Buyer, of resolutions of the board of directors or similar governing body of Buyer authorizing the execution and delivery by Buyer of this Agreement, and each of the Ancillary Agreements to which it is a party and the performance of its obligations hereunder and thereunder, and authorizing the execution and delivery of, and performance of its obligations under, all of the other agreements and instruments, in each case, to be executed and delivered by Buyer in connection herewith;

(d) a certificate of the Secretary or an Assistant Secretary of Buyer, identifying the name and title and bearing the signatures of the officers of Buyer authorized to execute and deliver this Agreement, and each Ancillary Agreement to which Buyer is a party and the other agreements and instruments contemplated hereby; and

(e) all of the items referenced in Section 17.3; and

(f) receipt of the Buyer's Required Consents.

### **ARTICLE XXIII.**

#### **CONDITIONS TO SUBSTANTIAL COMPLETION PAYMENT DATE**

The obligation of Buyer to pay the Substantial Completion Payment Amount to Seller pursuant to Section 17.8 shall be subject to satisfaction on or prior to the Substantial Completion Payment Date of each of the following conditions, except to the extent Buyer waives such satisfaction in writing:

**Section 23.1. Agreement Compliance.** Seller and Seller's Parent Guarantor shall be in compliance in all material respects with all covenants, obligations, and agreements of Seller and Seller Parent Guarantor contained in this Agreement and the Ancillary Agreements to which Seller or Seller Parent Guarantor is a party that are required to be performed or complied with at or prior to the Substantial Completion Payment Date.

**Section 23.2. Substantial Completion.** Substantial Completion shall have occurred and, since the date the Work achieved Substantial Completion, no event or circumstance shall have occurred and be continuing that causes any of the criteria described in the definition of “Substantial Completion” to cease to be true.

**Section 23.3. Officer’s Certificate.** Buyer shall have received a certificate from Seller, executed on its behalf by a duly authorized officer, dated as of the Substantial Completion Payment Date, in the form attached hereto as Exhibit M.<sup>43</sup>

**Section 23.4. Receipt of Other Documents.** Buyer shall have received all deliverables required to be provided to Buyer at Substantial Completion pursuant to the Scope Book.

**Section 23.5. Title Documents.** Seller shall have delivered to Buyer a down-date endorsement to the Title Policy updating the date of the Title Policy to the date of the Substantial Completion Payment Date and reflecting no encumbrances other than Permitted Encumbrances.

**Section 23.6. Project Performance Test Report.** Seller shall have delivered to Buyer the Project Performance Test Report setting forth the Final Project Performance Test Results, together with a written certification from the Project Performance Test Contractor certifying that the Final Project Performance Test Results described in such Project Performance Test Report accurately and completely present the results of the tests described therein, and such Project Performance Test Report shall have been approved by Buyer pursuant to Section 9.1(e).

**Section 23.7. Project Performance Test Results.** The Final Project Performance Test shall have been successfully performed, in accordance with the requirements of this Agreement, including the Scope Book, with the Final Project Performance Test Results showing that the Project has achieved all of the Minimum Performance Test Requirements.

**Section 23.8. Lien Waivers.** Seller shall have delivered to Buyer executed lien waivers, substantially in the form of Exhibit U, from each Major Contractor and Major Subcontractor (if any).

**Section 23.9. Training.** Seller shall have completed the Training.

**Section 23.10. Letter of Credit.** Seller shall have delivered to Buyer a Letter of Credit in accordance with Section 24.13(a)(iv).

**Section 23.11. [Reserved]**

## **ARTICLE XXIV. INDEMNIFICATION**

**Section 24.1. Indemnification by Seller.** Subject to the other provisions of this Article XXIV, from and after the Effective Date with respect to Third Party Claims and from and

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<sup>43</sup> **NTD:** Exhibit M will include a certification by Seller that the conditions set forth in Section 23.1 and Section 23.3 have been satisfied and that certain representations are true and correct as of the Substantial Completion Payment Date.

after the Closing Date with respect to all other claims, Seller shall defend, indemnify, and hold harmless and reimburse Buyer, its Affiliates, and each of their respective Representatives, successors, and assigns (collectively, the “**Buyer Group**”) from and against any and all Losses, suffered, incurred, or sustained by any of them or to which any of them become subject, that arise out of, are in connection with, or result from the following (it being understood that with respect to Losses arising from matters covered by the Title Policy, after Buyer provides Seller written notice of such Losses, Buyer shall use commercially reasonable efforts to make a claim under the Title Policy and to receive reimbursement of, or compensation for, such Losses from the proceeds of the Title Policy before any member of the Buyer Group exercises its rights under this Section 24.1 to seek indemnification in respect of such Losses; provided that if Buyer delivers notice of such Losses prior to the expiration of the survival period applicable to Buyer’s rights under this Section 24.1, such claim shall survive until resolved, whether through proceeds of the Title Policy or indemnification from Seller):

(a) any breach or violation of any covenant, obligation, or agreement of Seller Parent Guarantor, Seller, or any of their respective Affiliates set forth in this Agreement or any Ancillary Agreement to which Seller Parent Guarantor, Seller, or any of their respective Affiliates is or becomes a party;

(b) any breach or inaccuracy of any of the representations or warranties made by Seller Parent Guarantor, Seller, or any of their respective Affiliates in this Agreement or any Ancillary Agreement, whether such representation or warranty is made as of the Effective Date, the Closing Date, the Substantial Completion Payment Date, or any other date specified in such representation or warranty or in any certificate or instrument delivered by Seller Parent Guarantor, Seller, or any of their respective Affiliates pursuant hereto or thereto;

(c) any of the Excluded Liabilities;

(d) bodily injury or death to any of Seller’s, its Affiliates’, its Contractors’ or Subcontractors’ personnel, or damage to, or loss of, any property or equipment owned, leased, or provided by Seller, its Affiliates or their respective Contractors and Subcontractors (other than property to be incorporated into and forming a permanent part of the Project), in each case, arising out of the performance of the Work, Seller’s performance of its other obligations or its exercise of its rights hereunder, **EVEN IF CAUSED BY A BUYER GROUP MEMBER’S NEGLIGENCE, EXCEPT TO THE EXTENT CAUSED BY A BUYER GROUP MEMBER’S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT**; or

(e) the use or Release of Hazardous Substances at the Project Site by Seller or any of its Contractors or Subcontractors.

**Section 24.2. Indemnification by Buyer.** Subject to the other provisions of this Article XXIV, from and after the Effective Date with respect to Third Party Claims and from and after the Closing Date with respect to all other claims, Buyer shall defend, indemnify, hold harmless, and reimburse Seller, its Affiliates, and each of their respective Representatives, successors and assigns (collectively, the “**Seller Group**”) from and against any and all Losses, suffered, incurred, or sustained by any of them or to which any of them become subject, that arise out of, are in connection with, or result from the following:



(a) any breach or violation of any covenant, obligation, or agreement of Buyer set forth in this Agreement or any Ancillary Agreement to which Buyer is or becomes a party;

(b) any breach or inaccuracy of any of the representations or warranties made by Buyer in this Agreement or any Ancillary Agreement, whether such representation or warranty is made as of the Effective Date, the Closing Date, or any other date specified in such representation or warranty or in any certificate delivered by Buyer pursuant hereto;

(c) the failure of Buyer to pay, perform, or discharge any of the Assumed Liabilities as and when due from and after the Closing Date; or

(d) bodily injury or death to any of Buyer's, its Affiliates' or their respective contractors' personnel, or damage to, or loss of, any property or equipment owned, leased, or provided by Buyer, its Affiliates or their respective contractors (other than property to be incorporated into and forming a permanent part of the Project), in each case, arising out of Buyer's performance of its obligations or exercise of its rights hereunder, **EVEN IF CAUSED BY A SELLER GROUP MEMBER'S NEGLIGENCE, EXCEPT TO THE EXTENT CAUSED BY A SELLER GROUP MEMBER'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT.**

### **Section 24.3. Indemnity Caps; Survival.**

(a) Indemnity Caps.

(i) For indemnification pursuant to Section 24.1(b), from and after the Substantial Completion Payment Date, except with respect to Losses arising as a result of fraud or willful misconduct of Seller, the maximum indemnification in the aggregate to which the Buyer Group shall be entitled shall be equal to [●] percent (●%) of the Purchase Price (excluding adjustments other than pursuant to Article VIII)<sup>44</sup>; provided, however, that the limitation in this Section 24.3(a)(i) shall not apply in respect of claims for indemnification arising out of, in connection with, or resulting from a breach of the representations and warranties made in Section 18.1 (Organization and Existence), Section 18.2 (Execution, Delivery, and Enforceability), Section 18.3(a) (No Violation), Section 18.7(b) (Owned Real Property; Easements), Section 18.8(b) (Leased Real Property), Section 18.9(b) (Transferred Closing Tangible Personal Property), Section 18.17 (Tax Matters), Section 18.18 (Labor Matters), Section 18.19 (Employee Benefits), Section 18.20 (Financing Encumbrances), Section 18.21 (Grid Synchronization; Power Sales), Section 18.22 (Regulatory Status), Section 18.24 (Brokers), Section 1.4 (Transferred Post-Closing Tangible Personal Property) of Exhibit M, Section 1.11 (Tax Matters) of Exhibit M, Section 1.14 (Grid Synchronization; Power Sales) of Exhibit M, Section 1.15 (Regulatory Status) of Exhibit M (collectively, the "**Fundamental Seller Representations**"). For the avoidance of doubt, the amount of any liquidated Purchase Price reductions set forth in Section 9.2 (Minimum Performance Test Requirements; Certain Re-Test Requirements) or any liquidated payments set forth in Section 9.4 (Energy Yield Guarantee) shall not constitute Losses for purposes of Section 24.1.

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<sup>44</sup> **NTD:** Insert an amount equal to 25% of the Purchase Price.

(ii) Notwithstanding anything to the contrary in this Agreement, except with respect to Losses arising as a result of the fraud or willful misconduct of Seller, the maximum aggregate liability of Seller under this Agreement (including with respect to the aggregate indemnification to which the Buyer Group is entitled under this Article XXIV) shall be (A) prior to the Closing Date, any and all Losses related to Third Party Claims plus the amount of any termination payment payable by Seller pursuant to Article XXV, and (B) on and after the Closing Date, the portion of the Purchase Price that was actually paid by Buyer to Seller as of the date of the applicable claim.

(iii) For indemnification pursuant to Section 24.2(b), from and after the Substantial Completion Payment Date, except with respect to Losses arising as a result of the fraud or willful misconduct of Buyer, the maximum indemnification in the aggregate to which the Seller Group shall be entitled shall be equal to [●] percent ([●]%) of the Purchase Price (excluding adjustments other than pursuant to Article VIII);<sup>45</sup> provided, however, that the limitation in this Section 24.3(a)(iii) shall not apply in respect of claims for indemnification arising out of, in connection with, or resulting from a breach of the representations and warranties made in Section 19.1 (Organization and Existence), Section 19.2 (Execution, Delivery and Enforceability), Section 19.3(a) (No Violation), and Section 19.6 (Brokers) (collectively, the “*Fundamental Buyer Representations*”).

(b) Survival. Notwithstanding any statute of limitations that would otherwise be applicable, the representations and warranties set forth in this Agreement (excluding, for the avoidance of doubt, the Project Warranty, similar warranties described in or contemplated by Article X (Warranty) or the Scope Book, and the Energy Yield Guarantee), and the Ancillary Agreements shall survive the Closing as follows:

(i) the Fundamental Seller Representations and the Fundamental Buyer Representations shall survive for the applicable statute of limitations plus thirty (30) days thereafter;

(ii) the representations and warranties contained in Section 18.16 (Environmental Matters) shall survive until the third (3rd) anniversary of the Closing Date; and

(iii) all other representations and warranties shall survive until the second (2<sup>nd</sup>) anniversary of the date on which the Work shall be deemed to have achieved Substantial Completion in accordance with this Agreement.

Any breach of any representation or warranty that survives the Closing as provided in the preceding sentence and in respect of which indemnity may be sought under this Agreement shall survive the time at which it would otherwise terminate pursuant to this Section 24.3(b) if written notice of the inaccuracy or breach thereof giving rise to such right of indemnity shall have been given in good faith on or prior to such Termination Date to the Party against which such indemnity may be sought prior to such time.

**Section 24.4. Effect of Knowledge.** The right to indemnification, reimbursement, or other remedy based upon the representations, warranties, covenants, obligations, and agreements

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<sup>45</sup> **NTD:** Insert an amount equal to 25% of the Purchase Price.

herein or in the Ancillary Agreements shall not be affected by any information made available or furnished to, or any investigation or audit conducted (or that could have been conducted) by, any other Party or any of its Representatives, or any knowledge of any Party acquired at any time, whether before, on, or after the Effective Date or the Closing Date, with respect to the Transactions or the accuracy or inaccuracy of, or compliance or non-compliance with, any such representation, warranty, covenant, obligation, or agreement. Each Party shall be entitled to rely upon the representations, warranties, covenants, obligations, and agreements of each other Party set forth herein and in the Ancillary Agreements notwithstanding (a) any investigation or audit conducted (or that could have been conducted) by such Party or any information received by such Party before, on, or after the Closing Date or (b) the decision of such Party to complete the Closing.

#### **Section 24.5. Defense of Third Party Claims.**

(a) Subject to the terms of this Agreement and upon receipt of notice of the assertion of a claim or of the commencement of any suit, action, or proceeding that is a Third Party Claim against any member of the Buyer Group or the Seller Group entitled to indemnification under Section 24.1 or Section 24.2, respectively, the Indemnitee shall promptly notify the Indemnitor in writing of any Loss which the Indemnitee has determined has given or could give rise to a claim under Section 24.1 or Section 24.2. Such written notice is herein referred to as a “*Notice of Claim*.” A Notice of Claim shall specify, in reasonable detail, the facts known to the Indemnitee regarding the claim. Subject to Section 24.3, the failure to provide (or timely provide) a Notice of Claim shall not affect the Indemnitee’s rights to indemnification, except to the extent that the Indemnitor’s ability to defend such Third Party Claim has been irreparably prejudiced by such failure of the Indemnitee.

(b) Within twenty (20) days of its receipt of a Notice of Claim (the “*Notice Period*”), the Indemnitor shall notify the Indemnitee whether or not it will irrevocably indemnify the Indemnitee, at Indemnitor’s sole cost and expense, against the Third Party Claim(s) set forth in the Indemnity Notice. The failure of the Indemnitor to provide such notice within the Notice Period shall be deemed a refusal to provide the requested indemnity.

(c) If the Indemnitor irrevocably acknowledges its obligation to indemnify the Indemnitee against such Third Party Claim within the Notice Period then, except as hereinafter provided, the Indemnitor shall contest and defend, at its sole cost and expense, with counsel of its choosing that is reasonably acceptable to the Indemnitee, any such Third Party Claim; provided, however, that the Indemnitor shall not, without the prior written consent of the Indemnitee, permit a default judgment or consent to the entry of any judgment against the Indemnitee, enter into any settlement or compromise that does not include the giving by the claimant or plaintiff to the Indemnitee of a release from all Liability in respect of such Third Party Claim, or enter into any settlement or compromise that (i) contains an admission or acknowledgment of guilt or criminal wrongdoing or a violation of any Law or Permit by any member of the indemnified Seller Group or Buyer Group, as applicable, or (ii) requires any member of the indemnified Seller Group or Buyer Group, as applicable, to become subject to non-monetary penalties, obligations or restrictions as a result thereof. If the Indemnitee desires to participate in the defense or settlement of any Third Party Claim that the Indemnitor is defending under this Section 24.5, it may do so at its sole cost and expense with counsel of its

choosing; provided, however, that such participation shall be at the sole cost and expense of the Indemnitor if Indemnitee's counsel advises that separate counsel is necessary to protect its interests with respect to a Third Party Claim involving both Indemnitee and Indemnitor. The Indemnitee may not, without the prior written consent of the Indemnitor, which shall not be unreasonably withheld, conditioned, or delayed, compromise or settle any Third Party Claim defended by the Indemnitor hereunder so long as the Indemnitor is conducting such defense in good faith.

(d) Notwithstanding anything to the contrary in this Section 24.5, if (i) the assumption of the defense of a Third Party Claim by the Indemnitor would be inappropriate due to a conflict of interest, (ii) such Third Party Claim (or the facts or allegations related to such Third-Party Claim) involves criminal allegations or seeks equitable or injunctive relief, (iii) the Indemnitor does not have the resources to satisfy such Third Party Claim, (iv) such Third Party Claim, if adversely determined, would reasonably be expected to materially adversely affect the business or reputation of the Indemnitee or its Affiliates, or (v) the Indemnitor does not defend the Indemnitee against a Third Party Claim, whether by not giving the Indemnitee the required notice within the Notice Period or otherwise, the Indemnitee, upon further notice to the Indemnitor, shall have the right to undertake and control the defense of such Third Party Claim in such manner as it deems appropriate, including the terms of any compromise or settlement of such Third Party Claim, and the Indemnitor shall be bound by the actions taken and result obtained by the Indemnitee and shall pay the reasonable fees and expenses of counsel incurred by the Indemnitee in conducting the defense of such Third Party Claim.

(e) The Party, and such Party's counsel and Representatives, defending the Third Party Claim shall reasonably consult with such other Party, and such Party's counsel and Representatives, throughout the pendency of the Third Party Claim regarding the investigation, defense, settlement, trial, appeal or other resolution of the Third Party Claim. The Parties shall cooperate in the defense of the Third Party Claim. The Party defending the Third Party Claim (the "***Defending Party***") in accordance with this Section 24.5 shall have reasonable access, during normal business hours and following reasonable notice, to Employees of each other Party (the "***Non-Defending Party***") who may have knowledge, material, documents or information relevant to the defense of any Third Party Claim. The Non-Defending Party shall make available to the Defending Party, at reasonable times and for reasonable periods, its Employees and other Representatives and such information, books, and records and other materials in the Non-Defending Party's possession or control and reasonably required by the Defending Party for use in contesting any Third Party Claim (subject to obtaining an agreement to maintain the confidentiality of confidential or proprietary materials in a form reasonably acceptable to both the Defending and Non-Defending Parties). If and to the extent reasonably requested by the Defending Party, the Non-Defending Party shall cooperate with the Defending Party and its counsel in contesting such Third Party Claim or, if appropriate, in making any counterclaim against the Person asserting the Third Party Claim, or any cross-complaint relating to such Third Party Claim against any other Person. The Defending Party shall reimburse the Non-Defending Party for any reasonable, documented out-of-pocket expense incurred by the Non-Defending Party in cooperating with or acting at the request of the Defending Party.

**Section 24.6. Purchase Price Adjustment; Payment Address.** Any and all payments required to be made under this Article XXIV shall be deemed adjustments to the Purchase Price.

Any indemnification payment hereunder shall be made by wire transfer of immediately available funds to such account or accounts as the Indemnitee may designate to the Indemnitor in writing.

**Section 24.7. Subrogation.** Upon the payment in full of the amounts due to the Indemnitee in respect of any Third Party Claim as provided herein, the Indemnitor shall be subrogated in place of the Indemnitee with respect to any right of action that the Indemnitee may have with respect to the specific subject matter giving rise the claim of indemnification hereunder.

**Section 24.8. Cooperation; Mitigation.** Seller Group Indemnitees shall reasonably cooperate with Buyer, and Buyer Group Indemnitees shall reasonably cooperate with Seller, and each such Indemnitee shall use commercially reasonable efforts to mitigate any and all Losses subject to indemnification hereunder.

**Section 24.9. Exclusive Remedy.** Except for fraud or willful misconduct and except as provided in Section 24.10 and Article XXV (Termination) from and after the Closing, the indemnification rights set forth in Section 24.1 and Section 24.2 are the sole and exclusive remedies for any Losses arising from or relating to this Agreement, the Ancillary Agreements, and the Transactions. In furtherance of the foregoing, from and after the Closing, all other rights or remedies available at law or in equity, in tort, contract, or otherwise are hereby waived, released, and discharged by each Party, except with respect to fraud or willful misconduct and except as provided in Section 24.10.

**Section 24.10. Specific Performance.** Each Party shall have the right, prior to and after the Closing, and in addition to any other remedy available in equity or law, to specific performance with respect to all obligations arising under Section 5.3(a)(iv) (Procurement of Intellectual Property), Section 8.2 (Buyer-Directed Change Orders), Section 8.6 (Disputes Regarding Changes Orders), Article X (Warranty), Section 11.2 (Title Transfer and Delivery of Post-Closing Project Assets), Section 20.8(c) (Breakdown of Purchase Price for Accounting Purposes), clauses (b) and (c) of Section 20.10 (Confidentiality; Public Announcements), Section 20.14 (Post-Closing Assurances), Section 20.15 (MISO Agreement), Section 20.16 (Interconnection and Transmission Service and Upgrades), and Section [1.2] of the MISO Agreement.

**Section 24.11. Waiver of Certain Damages.** In no event shall any Party or any of its Related Persons be liable to the other Party or any of its Related Persons for punitive, indirect, or consequential damages arising out of or in connection with this Agreement or any Ancillary Agreement; provided, however, that this limitation shall not apply to any claim for indemnification pursuant to this Article XXIV for any punitive, indirect, or consequential damages owed to a third person under a Third Party Claim.

**Section 24.12. Insurance Proceeds; No Duplication.**

(a) The amount of any Losses subject to indemnification under this Article XXIV shall be reduced by the net amount of any indemnification, contribution, or other similar payment (including any insurance proceeds net of any applicable deductible amounts paid by such Party) actually recovered by the relevant Indemnitee and the value of any

contractual right of set-off actually realized with respect to such Losses. If any Indemnitee receives insurance proceeds with respect to Losses that were the subject of indemnification under this Article XXIV at any time subsequent to its receipt of indemnification payments provided hereunder for such Losses, then such Indemnitee shall promptly reimburse the applicable Indemnitor to the extent of the net amount of such insurance proceeds received by such Indemnitee, taking into account any expenses to obtain such insurance proceeds.

(b) Notwithstanding anything herein to the contrary, no Indemnitee shall be entitled to indemnification under any provision of this Agreement for any amount to the extent the receipt of such amount would result in a duplicative recovery, including due to an adjustment made to the Purchase Price.

### **Section 24.13. Credit Support.**

(a) No later than three (3) Business Days following the Effective Date, Seller shall deliver to Buyer a Letter of Credit in favor of Buyer with a face amount equal to Five Million Dollars (\$5,000,000) (the “*Effective Date Credit Support*”).<sup>46</sup> Unless this Agreement has been validly terminated pursuant to Section 25.1, the Parties will take, or cause to be taken, the following actions on the following dates (each such date, an “*Adjustment Date*”):

(i) On the FNTF Date, Seller shall cause the aggregate face amount of the Letter(s) of Credit delivered to Buyer pursuant to this Section 24.13(a) to be increased by [●] Dollars (\$[●]), such that the aggregate face amount of the Letter(s) of Credit provided by Seller is, as of the FNTF Date, [●] Dollars (\$[●])<sup>47</sup> (the “*FNTF Date Credit Support*”);

(ii) On the Construction Commencement Date, Seller shall cause the aggregate face amount of the Letter(s) of Credit delivered to Buyer pursuant to this Section 24.13(a) to be increased by [●] Dollars (\$[●]), such that the aggregate face amount of the Letter(s) of Credit provided by Seller is, as of the Construction Commencement Date, [●] Dollars (\$[●])<sup>48</sup>;

(iii) On the Closing Date, concurrently with the consummation of the Closing, Buyer will return all Letter(s) of Credit previously delivered to Buyer pursuant to this Section 24.13(a), it being the Parties’ intention that Seller’s obligations hereunder and under the Ancillary Agreements be secured by the Holdback Amount – Closing;

(iv) As a condition precedent to the Substantial Completion Payment Date, Seller shall deliver to Buyer a Letter of Credit in favor of Buyer with an aggregate face amount equal to twenty-five percent (25%) of the Purchase Price (excluding adjustments other than pursuant to Article VIII);

(v) On the later of the date (A) that is fifteen (15) days after delivery to Buyer of the written report required to be delivered by Seller with respect to the first Energy Yield Test Period pursuant to Section 9.4(d)(ii), and (B) on which any Energy Yield Liquidated

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<sup>46</sup> **NTD:** To be adjusted for projects materially larger than 100 MW.

<sup>47</sup> **NTD:** Insert amount equal to \$100,000/MW.

<sup>48</sup> **NTD:** Insert amount equal to \$250,000/MW.

Damages required to be paid under Section 9.4(c) are paid in full, Seller will execute such documents and take such actions as may be reasonably requested by Buyer to cause the aggregate undrawn amount of the Letter(s) of Credit delivered to Buyer pursuant to this Section 24.13(a) (and not previously returned to Seller) to equal the sum of fifteen percent (15%) of the Purchase Price (excluding adjustments other than pursuant to Article VIII), plus the amount of any Pending Claim and any unresolved claim under the Project Warranty; provided that, if there is a Pending Claim of a member of the Buyer Group or an unresolved claim under the Project Warranty, the Total Outstanding Amount of such Letter(s) of Credit shall not to exceed the aggregate undrawn amount of the Letter(s) of Credit delivered pursuant to Section 24.13(a)(iv);

(vi) On the later of the date (A) that is fifteen (15) days after delivery to Buyer of the written report required to be delivered by Seller with respect to the second Energy Yield Test Period pursuant to Section 9.4(d)(ii), and (B) on which any Energy Yield Liquidated Damages required to be paid under Section 9.4(c) are paid in full, Seller will execute such documents and take such actions as may be reasonably requested by Buyer to cause the aggregate undrawn amount of the Letter(s) of Credit delivered to Buyer pursuant to this Section 24.13(a) (and not previously returned to Seller) to equal the sum of five percent (5%) of the Purchase Price (excluding adjustments other than pursuant to Article VIII, plus the amount of any Pending Claim and any unresolved claim under the Project Warranty; provided that, if there is a Pending Claim of a member of the Buyer Group or an unresolved claim under the Project Warranty, the Total Outstanding Amount of such Letter(s) of Credit shall not to exceed the aggregate undrawn amount of the Letter(s) of Credit delivered pursuant to Section 24.13(a)(v).

(vii) On the date that is thirty-six (36) months after the Substantial Completion Payment Date, Buyer will return all Letter(s) of Credit previously delivered to Buyer pursuant to this Section 24.13(a) (and not previously returned to Seller); provided that, if there is a Pending Claim of a member of the Buyer Group or an unresolved claim under the Project Warranty, Buyer shall be permitted to retain such Letter(s) of Credit pending the resolution of such Pending Claim or unresolved claim under the Project Warranty.

(b) On each Adjustment Date, Seller shall provide for the applicable adjustment to the aggregate undrawn amount of the Letter(s) of Credit then in effect and held by Buyer by (i) causing such Letter(s) of Credit to be amended to reflect an aggregate undrawn amount equal to the Total Outstanding Amount required as of such Adjustment Date, (ii) delivering one or more new Letter(s) of Credit to Buyer with an aggregate undrawn amount equal to the Total Outstanding Amount required as of such Adjustment Date (in which case, Buyer shall cooperate with Seller and ensure that, following Buyer's receipt of such new Letter(s) of Credit, each Letter of Credit being replaced is sent to the issuing bank for cancellation), or (iii) delivering an additional Letter of Credit in a face amount that, together with the undrawn amount of the then outstanding Letter of Credit, equals the Total Outstanding Amount required as of such Adjustment Date. In no event shall Seller be entitled to provide more than two (2) Letters of Credit at any one time to satisfy its obligations under this Section 24.13.

(c) If at any time any Letter of Credit delivered by Seller to Buyer pursuant to this Section 24.13 ceases to satisfy the requirements set forth in the definition of "Letter of

Credit” contained in this Agreement and Seller does not, within three (3) Business Days after receipt of notice from Buyer or Seller’s discovery that such requirements have ceased to be satisfied, provide to Buyer one or more substitute Letter(s) of Credit meeting the requirements of this Section 24.13, then Buyer shall be permitted to immediately draw upon such Letter of Credit delivered by Seller pursuant to this Section 24.13. Any such amounts so drawn shall be held by Buyer for Seller’s account to satisfy the obligations of Seller under this Agreement and shall be returned to Seller upon the delivery by Seller of one or more substitute Letter(s) of Credit meeting the requirements of this Section 24.13. Upon delivery to Buyer of any substitute Letter of Credit pursuant to this Section 24.13, Buyer shall cooperate with Seller and ensure that, following Buyer’s receipt of such substitute Letter of Credit, each Letter of Credit being replaced is sent to the issuing bank for cancellation.

(d) Buyer may immediately draw on any Letter of Credit delivered by Seller pursuant to this Section 24.13 in accordance with its terms (or apply amounts previously drawn on any such Letter of Credit pursuant to Section 24.13(c)) to satisfy any payment obligation of Seller to Buyer under this Agreement or any Ancillary Agreement that is due and owing and not paid when due, including the amount of any Losses for which any member of the Buyer Group is entitled to indemnification from Seller under Section 24.1, and any such drawing of amounts shall constitute payment by Seller to Buyer of such amounts for all purposes hereunder.

(e) If Buyer desires to designate a new beneficiary under any Letter(s) of Credit provided by Seller to Buyer pursuant to this Section 24.13, Seller shall, within three (3) Business Days after receipt of notice from Buyer, provide to Buyer one or more substitute Letter(s) of Credit in favor of the new beneficiary designated by Buyer, which substitute Letter(s) of Credit shall be in an aggregate face amount equal to the amount then required to be provided by Seller to Buyer pursuant to this Section 24.13 and otherwise meeting the requirements of this Section 24.13.

## **ARTICLE XXV. TERMINATION**

**Section 25.1. Rights to Terminate.** Subject to Section 25.4, this Agreement may be terminated (the date of such termination, the “*Termination Date*”):

(a) by mutual written consent of the Parties;

(b) by Seller, upon written notice to Buyer, or by Buyer, upon written notice to Seller, on or after the Closing Expiration Date; provided, however, that the right to terminate this Agreement under this Section 25.1(b) shall not be available to a Party whose action or failure to act has been the primary cause of the failure of the Closing to occur on or prior to the Closing Expiration Date and such action or failure to act constitutes a material breach of this Agreement or any Ancillary Agreement by such Party;

(c) by Seller, upon written notice to Buyer, or by Buyer, upon written notice to Seller, if the FNTP Date has not occurred on or prior to the FNTP Expiration Date; provided, however, that the right to terminate this Agreement under this Section 25.1(c) shall not be available to a Party whose action or failure to act has been the primary cause of the failure of the



FNTP Date to occur on or prior to the FNTP Expiration Date and such action or failure to act constitutes a material breach of this Agreement or any Ancillary Agreement by such Party;

(d) by Seller, upon written notice to Buyer, or by Buyer, upon written notice to Seller, if, at any time prior to the Closing, (i) any Governmental Authority of competent jurisdiction shall have issued a permanent Order (A) declaring this Agreement or any Ancillary Agreement invalid or unenforceable in any material respect or (B) restraining, enjoining, or otherwise prohibiting or making illegal the consummation of the Transactions, including the transactions contemplated by the Ancillary Agreements, and such Order shall have become final and non-appealable (a “**Termination Order**”); (ii) prior to the FNTP Date, any of Seller’s Regulatory Approvals or Buyer’s Regulatory Approvals is denied in a final, non-appealable Order or other final, non-appealable action issued or taken by a Governmental Authority with jurisdiction; or (iii) any Action shall have been taken, or Law enacted, promulgated, or deemed applicable to the Transactions, including the transactions contemplated by the Ancillary Agreements, by a Governmental Authority with competent jurisdiction that, directly or indirectly, prohibits the consummation of the Transactions, including the transactions contemplated by the Ancillary Agreements, as herein or therein provided; provided, however, that a Party shall not have the right to terminate this Agreement pursuant to clause (i) of this Section 25.1(d) if such Party or any of its Affiliates has sought the entry of, or has failed to use commercially reasonable efforts to oppose the entry of, such Termination Order;

(e) by Seller, upon written notice to Buyer, if there has been a material default or material breach of any representation, warranty, covenant, or obligation contained in this Agreement (other than any failure of Buyer to make when due any payment to Seller under this Agreement or any Ancillary Agreement) by Buyer, or by Buyer, upon written notice to Seller, if there has been a material default or material breach of any representation, warranty, covenant, or obligation contained in this Agreement (other than a material breach of Section 24.13 or any failure of Seller to make when due any payment to Buyer under this Agreement or any Ancillary Agreement) by Seller, in each case, that is not cured thirty (30) days after receipt by such other Party of written notice from the terminating Party specifying with particularity such breach or default; provided, however, that if it would not reasonably be expected to remedy, or it is impossible to remedy, such default or breach within such thirty (30)-day period, the cure period shall be extended for an additional sixty (60)-day period so long as (i) the Party in default or breach continues to diligently pursue to cure of such default or breach and (ii) such default or breach would reasonably be expected to be cured within such additional sixty (60)-day cure period;

(f) by Buyer in accordance with Section 7.3(c) (Delay in Substantial Completion Date);

(g) by Buyer in accordance with Section 20.13 (Schedule Updates);

(h) by Buyer, upon written notice to Seller, if Seller or Seller Parent Guarantor is or becomes Bankrupt;

(i) by Seller, upon written notice to Buyer, if Buyer is or becomes Bankrupt;

(j) by Buyer, upon written notice to Seller, if there has been a material breach of the obligations of Seller in Section 24.13 (Credit Support) and such breach is not cured within three (3) Business Days after receipt by Seller of written notice from Buyer of such breach;

(k) by Buyer, upon written notice to Seller, if Seller has failed to make when due any payment to Buyer under this Agreement or any Ancillary Agreement and such failure is not cured within ten (10) Business Days after receipt by Seller of written notice from Buyer of such failure;

(l) by Seller, upon written notice to Buyer, if Buyer has failed to make when due any payment to Seller under this Agreement or any Ancillary Agreement and such failure is not cured within ten (10) Business Days after receipt by Buyer of written notice from Seller of such failure;

(m) by Buyer, in accordance with Section 20.6(e) (Certain Evidence of Title; Seller Post-Closing Access); and

(n) by Buyer, upon written notice to Seller, in the event of a Seller Change of Control occurring prior to the Substantial Completion Payment Date.

#### **Section 25.2. Effect of Seller's Termination for Material Buyer Default.**

(a) If Seller terminates this Agreement due to a material default or material breach by Buyer pursuant to Section 25.1(e), then Seller, unless otherwise directed by Buyer, shall:

(i) immediately (except to the extent necessary to implement health and safety measures prior to discontinuation in accordance with the Performance Standard) discontinue the Work on the date and to the extent specified in the termination notice and thereafter perform only that portion of the Work as may be necessary to preserve and protect the Work already performed or in progress, including the Goods and other items at the Project Site or in transit thereto;

(ii) at Buyer's request, promptly make every reasonable effort to implement cancellation of all Contracts that include cancellation provisions therein or procure cancellation upon commercially reasonable terms reasonably satisfactory to Buyer of all other Contracts, including purchase orders and rental agreements, if any, to the extent related to performance of the Work;

(iii) at Buyer's request, transfer custody of and assign to Buyer, pursuant to bills of sales and assignment agreements in a form consistent with the Bill of Sale and Assignment and Assumption Agreement, immediately or, with respect to after-acquired title, promptly upon receipt thereof, title to all Project Assets not then owned by Buyer, at no additional charge to Buyer, including all warranties, licenses, Contracts (to the extent not requested to be canceled under Section 25.2(a)(ii)), applicable Permits and rights and interests in, of and to the Project;

(iv) provide Buyer with the right to acquire and use (A) any and all Seller-Owned Project Intellectual Property and (B) those Project Intellectual Property Rights that Seller has the right to acquire despite the cancellation or termination of the relevant underlying Project Contract; and

(v) subject to the other terms of this Section 25.2, demobilize and remove all personnel and Seller's equipment and material from the Project Site and leave the Project Site in the condition required by this Agreement.

(b) (i) IF SELLER TERMINATES THIS AGREEMENT PRIOR TO THE CLOSING DUE TO A MATERIAL DEFAULT OR MATERIAL BREACH BY BUYER PURSUANT TO SECTION 25.1(e), SELLER AGREES THAT THE SOLE REMEDY FOR OR IN CONNECTION WITH SUCH TERMINATION SHALL BE FOR IT TO RECEIVE PAYMENT FROM BUYER IN AN AMOUNT EQUAL TO:

(A) THE DIRECT COSTS REASONABLY INCURRED BY SELLER FOR THE WORK PERFORMED BY OR FOR SELLER PRIOR TO TERMINATION, IF ANY, PLUS

(B) THE INCREMENTAL DIRECT COSTS REASONABLY INCURRED BY SELLER IN COMPLYING WITH SECTION 25.2(a) (EXCLUDING ANY AMOUNTS FOR ADMINISTRATIVE OVERHEAD), PLUS

(C) AN AMOUNT EQUAL TO TEN PERCENT (10%) OF THE SUM OF THE AMOUNTS SET FORTH IN CLAUSES (A) AND (B) WITH RESPECT TO EACH SUCH TERMINATION (AND SELLER HEREBY WAIVES ANY AND ALL OTHER CLAIMS FOR DAMAGES OR OTHER LOSSES THAT IT MAY HAVE AGAINST BUYER ARISING OUT OF SUCH TERMINATION); PROVIDED THAT SUCH AMOUNT SHALL NOT EXCEED FIVE PERCENT (5%) OF THE PURCHASE PRICE PRIOR TO THE FNTP DATE.

(ii) IF SELLER TERMINATES THIS AGREEMENT AFTER THE CLOSING BUT PRIOR TO THE SUBSTANTIAL COMPLETION PAYMENT DATE DUE TO A MATERIAL DEFAULT OR MATERIAL BREACH BY BUYER PURSUANT TO SECTION 25.1(e), SELLER AGREES THAT THE SOLE REMEDY FOR OR IN CONNECTION WITH SUCH TERMINATION SHALL BE THE PAYMENT TO SELLER OF AN AMOUNT EQUAL TO

(A) THE HOLDBACK AMOUNT – CLOSING, PLUS

(B) THE INCREMENTAL DIRECT COSTS REASONABLY INCURRED BY SELLER IN COMPLYING WITH SECTION 25.2(a) (EXCLUDING ANY AMOUNTS FOR ADMINISTRATIVE OVERHEAD), LESS

(C) THE COSTS SELLER DID NOT INCUR THAT SELLER REASONABLY WOULD HAVE BEEN EXPECTED TO INCUR TO PERFORM THE BALANCE OF THE WORK AS OF SUCH TERMINATION; PROVIDED THAT THE SUM

OF CLAUSES (A), (B) AND (C) SHALL NOT EXCEED THE UNPAID PORTION OF THE PURCHASE PRICE, LESS

(D) ALL AMOUNTS DUE BUYER BY SELLER UNDER THIS AGREEMENT OR ANY ANCILLARY AGREEMENT.

(iii) Seller's compliance with its obligations in Section 25.2(a) shall be a condition precedent to Seller's receipt of any payment under this Section 25.2(b). Buyer shall make such payment to Seller within ten (10) Business Days after such compliance (and Buyer being able to calculate and provide to Seller a calculation of the sum above) to an account designated by Seller in writing.

(c) SELLER SHALL HAVE NO RIGHT, AND HEREBY WAIVES ANY AND ALL RIGHTS, TO TERMINATE THIS AGREEMENT OR ANY ANCILLARY AGREEMENT AFTER THE SUBSTANTIAL COMPLETION PAYMENT DATE.

### **Section 25.3. Effect of Buyer's Termination for Cause Prior to Closing.**

(a) If (i) Seller or Buyer terminates this Agreement prior to the Closing pursuant to Section 25.1(b) (Closing Expiration Date) or (ii) Buyer terminates this Agreement prior to the Closing pursuant to Section 25.1(e) (Seller Breach), Section 25.1(f) (Substantial Completion Delay), Section 25.1(g) (Schedules), Section 25.1(h) (Seller or Seller Parent Guarantor Bankruptcy), Section 25.1(j) (Credit Support), Section 25.1(k) (Seller Payment Default), Section 25.1(m) (Seller Uncured Title Objections), or Section 25.1(n) (Seller Change of Control) *[Reserved]*, Seller shall pay to Buyer an amount equal to [(i)] [●] Million Dollars (\$[●])<sup>49</sup> plus (ii) all liquidated damages and all other damages or amounts due Buyer by Seller under this Agreement or any Ancillary Agreement to the account designated by Buyer in the termination notice delivered pursuant to Section 25.1.

(b) The Parties acknowledge and agree that (i) it is difficult or impossible to determine with precision the amount of damages that would or might be incurred by Buyer as a result of or arising out of either Seller's or Buyer's termination of this Agreement pursuant to Section 25.1(b) (Closing Expiration Date) or Buyer's termination of this Agreement pursuant to, as applicable, Section 25.1(e) (Seller Breach), Section 25.1(f) (Substantial Completion Delay), Section 25.1(g) (Schedules), Section 25.1(h) (Seller or Seller Parent Guarantor Bankruptcy), Section 25.1(j) (Credit Support), Section 25.1(k) (Seller Payment Default), Section 25.1(m) (Seller Uncured Title Objections), or Section 25.1(n) (Seller Change of Control), (ii) Buyer will be damaged as a result of such termination, (iii) it would be impracticable or extremely difficult to fix the actual damages resulting therefrom, (iv) any sums that would be payable under this Section 25.3 are (A) Buyer's sole and exclusive remedy arising out of such termination and (B) in the nature of liquidated damages, and not a penalty, and are fair and reasonable, (v) such payment represents a reasonable estimate of fair compensation for the damages that may reasonably be anticipated from such termination, and (vi) each Party hereby irrevocably waives any right to claim to any court or arbitral tribunal or seek the adjustment of any such sums. Delay Liquidated Damages shall be payable (A) monthly within ten (10) Business Days of

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<sup>49</sup> **NTD:** To be an amount equal to \$150,000/MW.

receipt by Seller of an invoice setting forth the amount of Delay Liquidated Damages payable and (B) on the earlier of five (5) Business Days after (x) the date of Substantial Completion as a condition of the payment of the Substantial Completion Payment Amount and (y) the date that Delay Liquidated Damages otherwise cease to accrue.

**Section 25.4. Effect of Buyer's Termination for Cause After Closing and Prior to Substantial Completion Payment Date.**

(a) If Buyer terminates this Agreement after the Closing and prior to the Substantial Completion Payment Date pursuant to Section 25.1(e) (Seller Breach), Section 25.1(f) (Substantial Completion Delay), Section 25.1(h) (Seller or Seller Parent Guarantor Bankruptcy), Section 25.1(j) (Credit Support), Section 25.1(k) (Seller Payment Default), or Section 25.1(n) (Seller Change of Control), (i) Seller shall discontinue the Work, except, if requested by Buyer, (A) to the extent necessary to implement health and safety measures prior to discontinuation in accordance with the Performance Standard, or (B) to perform only that portion of the Work as may be necessary to preserve and protect the Work already performed or in progress, including the Goods and other items at the Project Site or in transit thereto, in each case, for a period not to exceed thirty (30) Business Days, (ii) (A) Seller shall provide Buyer with a list of all Project Contracts that were not Transferred Closing Project Contracts along with copies of any such Project Contracts not previously provided to Buyer within ten (10) Business Days after Buyer's request therefor, (B) within ten (10) Business Days after Buyer's receipt of such list and copies of such Project Contracts, Buyer shall notify Seller of the Project Contracts Buyer desires Seller to transfer to Buyer and the Project Contracts Buyer desires Seller to cancel and (C) upon such notification, Seller shall promptly make every reasonable effort to transfer or cancel such Project Contracts in accordance with such notification, (iii) Seller and Buyer, acting reasonably, shall as soon as practicable, execute and deliver bills of sales and assignment agreements, in a form consistent with the Bill of Sale and Assignment and Assumption Agreement, for assignment to Buyer of title to, all Project Assets then owned by Seller, including all warranties, licenses, Project Contracts (Buyer requested to be transferred), applicable Permits and rights and interests in, of and to the Project; provided that, as a condition to the transfer of any such Project Contract in respect of which Seller has provided or procured any letter of credit, guaranty, cash collateral, or other credit support securing its performance thereunder, Buyer will cause such credit support to be replaced and released to Seller, (iv) Seller shall provide Buyer with the right to acquire and use (A) any and all Seller-Owned Project Intellectual Property and (B) those Project Intellectual Property Rights that Seller has the right to transfer despite the cancellation or termination of, or any failure of Buyer to assume, the relevant underlying Project Contract, (v) Seller shall demobilize and remove all personnel and Seller's equipment and material from the Project Site and leave the Project Site in a neat, clean and orderly condition and (vi) Buyer shall be entitled to take over and complete the Work by whatever method Buyer reasonably deems expedient, including the hiring of one or more contractors under such Contracts as Buyer may deem advisable.

(b) **BUYER HEREBY AGREES THAT ITS SOLE AND EXCLUSIVE DAMAGES AND OTHER LOSSES, AND SELLER'S SOLE AND EXCLUSIVE LIABILITY, ARISING OUT OF ANY SUCH TERMINATION SHALL BE AN AMOUNT EQUAL TO (I) THE TOTAL REASONABLY AND NECESSARY COSTS AND EXPENSES ACTUALLY INCURRED AND ACCRUED BY BUYER IN CONNECTION WITH SUCH TERMINATION, INCLUDING FOR THE COMPLETION OF THE WORK AND TO REPLACE THE**

WARRANTIES GUARANTIES, AND LIQUIDATED DAMAGES PROVISIONS UNDER THIS AGREEMENT AND THE ANCILLARY AGREEMENTS, INCLUDING ADDITIONAL REASONABLE AND NECESSARY OVERHEAD INCURRED AND ACCRUED BY BUYER TO EFFECT SUCH COMPLETION AND REPLACEMENT AND ALL LEGAL FEES AND RELATED EXPENSES, PLUS (II) THE DIMINUTION IN VALUE RESULTING FROM REDUCED PV PLANT CAPACITY BELOW THE GUARANTEED PV PLANT CAPACITY AND/OR TERMINATION OF THE WARRANTY, GUARANTY, AND LIQUIDATED DAMAGES PROVISIONS UNDER THIS AGREEMENT AND THE ANCILLARY AGREEMENTS, NET OF THE VALUE OF ANY REPLACEMENT PROVISIONS OBTAINED BY BUYER FOR WHICH SELLER COMPENSATES BUYER ACCORDING TO CLAUSE (I) ABOVE, PLUS (III) IF THE FEDERAL INVESTMENT TAX CREDIT FOR THE PROJECT WILL BE BELOW [THIRTY PERCENT (30%)] OF ELIGIBLE COSTS (AS SUCH TERM IS DEFINED IN THE CODE), THE AMOUNT OF SUCH LOST FEDERAL INCOME TAX CREDIT, PLUS (IV) TEN PERCENT (10%) OF THE AMOUNTS DESCRIBED IN CLAUSE (I) ABOVE, PLUS (V) ALL DAMAGES (INCLUDING LIQUIDATED DAMAGES, IF APPLICABLE) AND OTHER AMOUNTS PAYABLE FROM SELLER TO BUYER UNDER THIS AGREEMENT AND ANY ANCILLARY AGREEMENT. If such sum is greater than the unpaid portion of the Purchase Price, Seller shall pay to Buyer the difference equal to such sum, less the unpaid portion of the Purchase Price, within ten (10) Business Days after receiving from Buyer the calculation thereof to an account designated by Buyer in writing. If such sum is less than the unpaid portion of the Purchase Price, Buyer shall pay to Seller the difference equal to the unpaid portion of the Purchase Price, less such sum. Seller's compliance with its obligations in Section 25.4(a) shall be a condition precedent to Seller's receipt of any payment under this Section 25.4(b). Buyer shall make such payment to Seller within ten (10) Business Days after such compliance (and Buyer being able to calculate and provide to Seller a calculation of the sum above) to an account designated by Seller in writing.

**Section 25.5. Effect of Termination by Mutual Consent, FNTP Expiration Date, or Termination Order.** If (a) Seller and Buyer terminate this Agreement by mutual written consent pursuant to Section 25.1(a), or (b) Seller or Buyer terminates this Agreement due to (i) the FNTP Date not occurring on or prior to the FNTP Expiration Date pursuant to Section 25.1(c), or (ii) as a result of (A) a Termination Order, (B) the denial of Seller's Regulatory Approvals or Buyer's Regulatory Approvals prior to the FNTP Date, or (C) any Action taken or Law enacted, promulgated, or deemed applicable to the Transactions that prohibits the consummation of the Transactions pursuant to Section 25.1(d), there will be no Liability of the Parties or any of their respective Related Persons hereunder; provided, however, that nothing in this Section 25.5 shall relieve a Party from Liability with respect to obligations that survive termination.

**Section 25.6. Effect of Termination Generally.**

(a) IF THIS AGREEMENT IS VALIDLY TERMINATED PURSUANT TO SECTION 25.1, THE WRITTEN NOTICE THEREOF GIVEN TO THE NON-TERMINATING PARTY SHALL SPECIFY THE PROVISION HEREOF PURSUANT TO WHICH SUCH TERMINATION IS MADE, AND UPON SUCH TERMINATION THIS AGREEMENT SHALL BECOME NULL AND VOID; PROVIDED, HOWEVER, THAT THE PROVISIONS OF SECTION 2.5 (SCOPE BOOK), SECTION 2.6 (CONSEQUENCE OF BUYER REVIEW OR APPROVAL), SECTION 2.7 (SELLER'S RELATIONSHIP TO BUYER), SECTION 2.9 (ACKNOWLEDGEMENT REGARDING OBLIGATION TO PAY CONTRACTORS AND

SUBCONTRACTORS), SECTION 3.5(a) (CONTRACTING AND SUBCONTRACTING), SECTION 3.5(d) (CONTRACTING AND SUBCONTRACTING), ARTICLE IV (USE OF PROJECT SITE; HAZARDOUS SUBSTANCES), SECTION 5.2 (PROCUREMENT OF WARRANTIES), SECTION 5.3(a)(iii) OR SECTION 5.3(a)(iv) (PROCUREMENT OF INTELLECTUAL PROPERTY), SECTION 7.3(b) (WITH RESPECT TO LIQUIDATED DAMAGES), SECTION 10.3 (NO WARRANTY IMPAIRMENT), ARTICLE XI (TITLE), ARTICLE XII (CARE, CUSTODY, AND CONTROL; RISK OF LOSS), ARTICLE XIII (INSURANCE), SECTION 16.4 (EXCLUDED LIABILITIES), SECTION 20.2 (TRANSACTION EXPENSES), SECTION 20.5 (PERMITS AND PROJECT CONTRACTS), SECTION 20.7(g) (TAX MATTERS), SECTION 20.10(a) (WITH RESPECT TO CONFIDENTIALITY AND PUBLIC ANNOUNCEMENTS), SECTION 20.10(d) (CONFIDENTIALITY; PUBLIC ANNOUNCEMENTS), SECTION 20.11 (REMOVAL OF EXCLUDED ASSETS), SECTION 20.12 (TRADE NAMES) (SOLELY IN THE EVENT OF A TERMINATION AFTER THE CLOSING), ARTICLE XXIV (INDEMNIFICATION), THIS ARTICLE XXV (TERMINATION), AND ARTICLE XXVI (GENERAL PROVISIONS) WILL CONTINUE TO APPLY FOLLOWING ANY SUCH TERMINATION.

(b) If this Agreement is validly terminated pursuant to Section 25.1 (other than a termination by Seller due to a material default or material breach by Buyer pursuant to Section 25.1(e)), Seller shall, at its sole cost and expense (and in no event later than sixty (60) days after such termination), securely remove (or at Buyer's direction, destroy) any and all software owned by Buyer that was provided by Buyer to Seller and/or its Affiliates for use in connection with, or for incorporated into, the Project and shall not use any such software from and after such termination.

## **ARTICLE XXVI. GENERAL PROVISIONS**

**Section 26.1. Entire Document; Amendments.** This Agreement, the Ancillary Agreements, and the Confidentiality Agreement contain the entire agreement between the Parties with respect to the Transactions, and such agreements supersede all negotiations, representations, warranties, commitments, offers, contracts, and writings prior to the Effective Date, written or oral (including any agreement, promise, understanding, or commitment based upon or made relating to or in connection with any proposal submitted by or for Seller pursuant to any request for proposals or solicitation giving rise to this Agreement (including any communication to Seller or any of its Affiliates in any proposal selection notice or any other correspondence with Seller or any of its Affiliates), term sheet, issues list, contract or principal terms proposal or summary, draft agreement, schedule, or exhibit, or other document prepared or made available by or on behalf of Buyer or any communication or correspondence of any kind in connection between or among Buyer, Seller, Seller Parent Guarantor, and their respective Representatives); provided, however, that, for the avoidance of doubt, [the Parties hereby agree that the Confidentiality Agreement and,] to the extent executed prior to the Effective Date, any Ancillary Agreement shall remain in full force and effect in accordance with their terms on and after the Effective Date and the Ancillary Agreements shall remain in full force and effect in accordance with their terms after the Closing Date. Except as provided in Article VIII (Change Orders), no modification or amendment of any provision of this Agreement shall be effective unless made in

writing referring specifically to this Agreement and signed by an officer or representative of each Party duly authorized to enter into such modification or amendment.

**Section 26.2. Counterparts, Signatures, and Originals.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The delivery of an executed counterpart of this Agreement, any Ancillary Agreement and any other document contemplated by this Agreement by facsimile or .pdf shall be deemed to be valid delivery thereof. It shall be sufficient in making proof of this Agreement to produce or account for a facsimile or .pdf copy of an executed counterpart of this Agreement. Any original of this Agreement, any Ancillary Agreement, or any other document issued pursuant to this Agreement or document referenced by the foregoing may be photocopied and stored on computer tapes and disks (the “*Imaged Document*”). The Imaged Document, if introduced in printed format in its original form in any judicial, arbitral, mediation, regulatory, or administrative proceeding will be admissible as between the Parties to the same extent and under the same conditions as other business records originated and maintained in documentary form. No Party shall object to the admissibility of the Imaged Document (or photocopies of the Imaged Document) on the basis that such were not originated or maintained in documentary form, under a hearsay rule, a best evidence rule or other evidentiary rule.

**Section 26.3. Severability.** Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be valid, binding, and enforceable under Law, but if any provision of this Agreement is held to be invalid, illegal, void (or voidable), or unenforceable under Law, such provision shall be ineffective only to the extent held to be invalid, illegal, void (or voidable) or unenforceable, without affecting the remainder of such provision or the remaining provisions of this Agreement. The Parties agree that the courts with jurisdiction to make such determination will have the power to limit the invalid, illegal, void (or voidable), or unenforceable provision, to delete specific words or phrases, or to replace any invalid, illegal, void (or voidable), or unenforceable provision with a provision that is valid, legal, and enforceable and that comes closest to expressing the intention of the invalid, illegal, void (or voidable), or unenforceable provision, and this Agreement will be enforceable as so modified. In the event such courts do not exercise the power granted in the prior sentence, the Parties agree to negotiate in good faith to replace such invalid, illegal, void (or voidable), or unenforceable provision with a valid, legal, and enforceable provision that achieves, to the greatest lawful extent under this Agreement, the economic, business and other purposes of such invalid, illegal, void (or voidable) or unenforceable provision. TO THE EXTENT PERMITTED BY LAW, THE PARTIES WAIVE ANY PROVISION OF LAW THAT RENDERS ANY PROVISION HEREOF PROHIBITED OR UNENFORCEABLE IN ANY RESPECT.

**Section 26.4. Assignment; Seller Change of Control.**

(a) *Assignment and Transfer Generally.* The rights under this Agreement shall not be assignable or transferable, nor the duties delegable, by Buyer, without the prior written consent of Seller, or by Seller or Seller Parent Guarantor, without the prior written consent of Buyer, in each case, which consent may be granted or withheld in such other Party’s sole discretion. Any such assignment transfer or delegation without such consent shall be ineffective.



(i) *Buyer's Assignment Rights.*

(A) Notwithstanding Section 26.4(a), Buyer may without the prior written consent of Seller, (1) collaterally assign, mortgage, hypothecate, pledge, or otherwise encumber all or any portion of its rights and/or interest in and to this Agreement and any Ancillary Agreement to its, or any of its Affiliates', lenders or any other Persons providing financing to Buyer or any of its Affiliates and grant to such lenders or financing parties the power to assign the same in connection with an exercise of such lenders' or financing parties' remedies (provided that neither the grant of any such interest nor the foreclosure of any such interest shall in any way release, reduce or diminish the obligations of Buyer to Seller hereunder), and (2) subject to Section 26.4(a)(i)(B), assign all of its rights and obligations under this Agreement and any Ancillary Agreement (X) at any time prior to Substantial Completion, to any Affiliate of Buyer, and (Y) at any time after Substantial Completion, to (I) any Person succeeding to all or substantially all of the assets of Buyer, or (II) any Person or Persons acquiring the Project Assets (or Buyer's rights thereto). In connection with and contingent upon the closing of any financing by Buyer pursuant to which Buyer collaterally assigns, mortgages, hypothecates, pledges or otherwise encumbers all or any portion of its rights and/or interest in and to this Agreement and/or any Ancillary Agreement, Seller will, at Buyer's sole cost and expense, enter into a consent with the financing parties regarding such collateral assignment.

(B) In order for an assignment permitted under Section 26.4(a)(i)(A)(2) to be effective, the assignee must be bound by the terms of this Agreement, and have assumed all of Buyer's obligations under this Agreement, relating to the period from and after the date of assignment (either pursuant to a written agreement reasonably satisfactory to Seller and consistent with the provisions hereof or by operation of Law). In order for an assignment to an Affiliate under Section 26.4(a)(i)(A)(2)(X) to be effective, the assignment must be to an Affiliate of Buyer that (1) is a regulated electric utility or (2) provides to Seller a guarantee from a regulated electric utility of such Affiliate's payment obligations under this Agreement and any Ancillary Agreement to which such Affiliate is a party. Upon any such assignment, Buyer shall be released from any and all obligations and liabilities hereunder relating to the period from and after the date of assignment (and any other obligations and liabilities assumed by the assignee), and Seller shall be deemed to have waived any right of recourse against Buyer with respect to such obligations and liabilities.

(ii) *Seller's Assignment Rights.*

(A) Notwithstanding Section 26.4(a) and subject to Section 26.4(a)(ii)(B), Seller may, with prior notice to, but without the prior written consent of Buyer, assign all of its rights and obligations under this Agreement and each Ancillary Agreement to (in whole but not in part) (1) any Affiliate of Seller, provided that (x) such assignee (i) acquires all of the Project and Project Assets and all other assets, properties, and interests of Seller in and with respect to the Project and the Work and (ii) for the avoidance of doubt, continues to comply with the obligations of Seller to provide and maintain credit support according to Section 24.13 (including that each Letter of Credit continues to be drawable against all obligations of "Seller" hereunder and under each Ancillary Agreement, whether relating to the period before, on or after the date of the assignment) and (y) the obligations of Seller Parent Guarantor continue hereunder with respect to such assignee, or (2) any Person succeeding to all

or substantially all of the assets of Seller, provided that (x) the assignee (i) is a Qualifying Counterparty, (ii) has a creditworthiness equal to or higher than that of Seller as of immediately prior to the assignment, and (iii) for the avoidance of doubt, continues to comply with the obligations of Seller to provide and maintain credit support according to Section 24.13 (including, for the avoidance of doubt, that each Letter of Credit continues to be drawable against all obligations of “Seller” hereunder and under each Ancillary Agreement, whether relating to the period before, on or after the date of the assignment) and (y) the obligations of Seller Parent Guarantor continue hereunder with respect to such assignee.

(B) In order for a transfer or assignment permitted under Section 26.4(a)(ii)(A) to be effective, the assignee must be bound by the terms of this Agreement and the Ancillary Agreements, and have assumed all of the obligations of Seller under this Agreement and the Ancillary Agreements, relating to the period from and after the date of assignment (either pursuant to an agreement reasonably satisfactory to Buyer and consistent with the provisions hereof or by operation of Law). Upon any such assignment, Seller shall be released from any and all obligations and liabilities hereunder relating to the period from and after the date of assignment (and any other obligations and liabilities assumed by the assignee), and Buyer shall be deemed to have waived any right of recourse against Seller with respect to such obligations and liabilities.

(C) Notwithstanding Section 26.4(a)(ii)(A) and (B), any purported transfer or assignment under this Section 26.4(a)(ii) shall be deemed void and of no force or effect if the assignee will not be allowed to take into account any work performed or costs incurred by Seller with respect to the Project for purposes of the “physical work test” or the “5% safe harbor” as provided in IRS Notice 2018-59.

(b) Buyer acknowledges that Seller may enter into one or more financings for the performance of the Work in accordance with this Agreement. In connection with and contingent upon the closing of any such financing, Buyer agrees that it will, at Seller’s sole cost and expense, enter into an agreement with the Financing Parties regarding such financing substantially in the form of Exhibit G.

(c) Any purported assignment or delegation not effected in accordance with this Section 26.4 shall be deemed void and of no force and effect.

(d) Seller shall notify Buyer immediately upon the occurrence of a Seller Change of Control.

**Section 26.5. Governing Law; Exclusive Choice of Forum Clause.** The validity, interpretation, and effect of this Agreement and the rights and duties of the Parties hereunder shall be governed by, and construed in accordance with, the Laws of the State of New York without regard to conflicts of law doctrines (other than Section 5-1401 of the New York General Obligations Law), except with respect to matters that (a) are preempted by federal law or are governed by the Law of the respective jurisdiction of incorporation or formation, as applicable, of the Parties, or (b) relate to real property and are governed by the Laws of the State of Texas. Any action or proceeding arising under this Agreement shall be adjudicated by courts of the State of Texas located in Houston, Harris County, Texas, and the United States District Court for

the Southern District of Texas (or another federal court with jurisdiction) located in Houston, Harris County, Texas, and appellate courts from any thereof; provided, however, that notwithstanding the foregoing, nothing in this Agreement shall preclude either Party from bringing any Action or dispute in any other jurisdiction if (i) the aforementioned courts lack jurisdiction over the Parties or the subject matter of the Action or dispute or decline to accept the Action or dispute on the grounds of lacking such jurisdiction; (ii) the Action or dispute is commenced by a Party for the purpose of enforcing against the other Party or its property, assets or estate any decision or judgment rendered by any court in which an Action or dispute may be brought as provided hereunder; (iii) the Action or dispute commenced to appeal any such court's decision or judgment to any higher court with competent appellate jurisdiction over that court's decisions or judgments; or (iv) any Action or dispute has been commenced in another jurisdiction by or against the other Party or against its property, assets or estate (including any Bankruptcy suit, action or proceeding), and, in order to exercise or protect its rights, interests or remedies under this Agreement, the Party (A) joins, files a claim, or takes any other action, in any such Action or dispute, or (B) otherwise commences any Action or dispute in that other jurisdiction as the result of that other suit, action, or proceeding having commenced in that other jurisdiction. EXCEPT TO THE EXTENT PROVIDED IN THE IMMEDIATELY PRECEDING PROVISO, EACH PARTY CONSENTS AND AGREES THAT ANY SUCH ACTION OR PROCEEDING MAY BE BROUGHT IN AND ONLY IN SUCH COURTS AND WAIVES (TO THE MAXIMUM EXTENT PERMITTED BY LAW) ANY OBJECTION THAT IT MAY NOW OR HEREAFTER HAVE TO THE VENUE OF ANY SUCH ACTION OR PROCEEDING IN ANY SUCH COURT OR THAT SUCH ACTION OR PROCEEDING WAS BROUGHT IN AN INCONVENIENT FORUM OR ANY SIMILAR OBJECTION AND AGREES NOT TO PLEAD OR CLAIM THE SAME.

**Section 26.6. Waiver of Jury Trial.** EACH OF THE PARTIES EXPRESSLY WAIVES ANY RIGHT TO TRIAL BY JURY IN ANY LITIGATION OR OTHER ACTION ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT.

**Section 26.7. Notices.** All notices, claims, demands, Consents, requests, and other communications provided for in this Agreement shall be in writing and shall be deemed given or made (a) when delivered personally to the recipient, (b) if sent by nationally recognized overnight courier service, or mailed by registered or certified mail (return receipt requested), when received by the recipient, or (c) if sent via facsimile, the date of confirmed delivery. Such notices, claims, demands, requests, and communications shall be sent to the Party at the following addresses (or at such other address for a Party as shall be specified by like notice):

If to Seller or Seller Parent Guarantor to:

[●]

[●]

[●]

Attention: [●]

Facsimile: [●]

with copies to:

[●]  
c/o [●]  
[●]  
[●]  
Attention: [●]  
Facsimile: [●]  
E-mail: [●]

[●]  
[●]  
[●]  
Attention: [●]  
Facsimile: [●]  
E-mail: [●]

and if to Buyer to:

[●]  
[●]  
[●]  
Attention: [●]  
Facsimile: [●]

with copies to:

Entergy Services, Inc.  
10055 Grogans Mill Road, Suite 300  
The Woodlands, TX 77380  
Attention: Vice President, System Planning  
Facsimile: (281) 297-2163

Entergy Services, Inc.  
10055 Grogans Mill Road, Suite 300  
The Woodlands, TX 77380  
Attention: Assistant General Counsel  
Facsimile: (281) 297-3945.

**Section 26.8. No Third Party Beneficiaries.** Except as may be specifically set forth in this Agreement, nothing in this Agreement, whether express or implied, is intended to confer any right or remedy under or by reason of this Agreement on any Person other than the Parties, their respective permitted successors and assigns, and any Person benefiting from the indemnities provided herein, nor is anything in this Agreement intended to relieve or discharge the Liability of any third Persons to any Party or give any third Persons any right of subrogation or action against any Party.

**Section 26.9. Waiver of Compliance.** To the extent permitted by Law, any failure to comply with any obligation, covenant, agreement, or condition set forth herein or in any Ancillary Agreement, or any breach of any representation or warranty set forth herein or in any Ancillary Agreement, may be waived by the Party entitled to the benefit of such obligation, covenant, agreement, condition, representation, or warranty only by a written instrument signed by such Party that expressly waives such failure or breach, but any such waiver shall not operate as a waiver of, or estoppel with respect to, any prior or subsequent failure to comply therewith or breach thereof. The waiver of any condition based on the accuracy of any representation or warranty, or on the performance of or compliance with any covenant or obligation, or the waiver of the fulfillment of any such condition, shall not affect the right to indemnification or other remedy based on such representation, warranty, covenant, or obligation. The failure of a Party to this Agreement to assert any of its rights under this Agreement or otherwise shall not constitute a waiver of such rights. A waiver by a Party of the performance of any obligation, covenant, condition, representation, or warranty of any other Party shall not invalidate this Agreement, nor shall such waiver be construed as a waiver of any other obligation, covenant, condition, representation, or warranty. A waiver by a Party of the time for performing any act shall not constitute a waiver of the time for performing any other act or the time for performing an identical act required to be performed at a later time.

**Section 26.10. Dispute Resolution.**

(a) Except as set forth in Section 26.10(b), in the event of any claim or dispute between Buyer, on the one hand, and Seller or Seller Parent Guarantor, on the other hand, arising out of or relating to this Agreement (each, a “**Dispute**”), even if such Dispute is extra-contractual in nature, sounds in contract, tort, or otherwise, or arises under Law, Buyer may, by delivering a notice thereof to Seller and Seller Parent Guarantor, and Seller or Seller Parent Guarantor may, by delivering a notice thereof to Buyer, refer the Dispute to senior executives of Buyer and Seller Parent Guarantor in accordance with this Section 26.10. The Parties agree that, on or before three (3) Business Days after receipt of any such notice from Buyer to Seller and Seller Parent Guarantor, or of any such notice from Seller or Seller Parent Guarantor to Buyer, Seller and Seller Parent Guarantor shall designate a senior executive of Seller Parent Guarantor or his or her designee to represent Seller and Seller Parent Guarantor, and Buyer shall designate a senior executive of Buyer or his or her designee to represent Buyer, to attempt to resolve the Dispute. In the effort to resolve the Dispute, the Parties shall then cause the two designated senior executives or their respective designees to meet at least once and negotiate in good faith until the end of thirty (30) days after receipt of the notice of referral of the Dispute to senior executives from Buyer to Seller Parent Guarantor or vice versa. Following (and only following) the conclusion of such thirty (30)-day period (whether or not such good faith negotiations have occurred), and subject to the other terms hereof, the Parties may pursue all of their respective rights and remedies under this Agreement and any Law with respect to the Dispute.

(b) In the event of any Dispute regarding (i) the implementation of a Buyer Discretionary Change pursuant to Section 8.6(a), or (ii) the achievement of Mechanical Completion, Substantial Completion or Final Completion, Buyer and Seller shall attempt to resolve such Dispute. Buyer may, by delivering a notice thereof to Seller, and Seller may, by delivering a notice thereof to Buyer, refer such Dispute to senior executives of Buyer and Seller. If Buyer and Seller have not resolved such Dispute within ten (10) days following receipt of any

such notice, either party may refer such Dispute to [Luminate, LLC] (the “*Expert*”) who shall be appointed to act as an expert and not as an arbitrator to determine the resolution of such Dispute. The Expert shall make a determination as to the resolution of such Dispute as promptly as practicable and shall notify Buyer and Seller in writing of its determination, which determination shall be final and binding on Buyer and Seller. The Expert shall not have the power to modify or amend any term or provision of this Agreement. Each of Buyer and Seller shall bear and pay one-half (1/2) of the fees and other costs charged by the Expert. Buyer and Seller shall provide to each other and the Expert all information reasonably requested by the other party or the Expert for purposes of determining the resolution of such Dispute.

**Section 26.11. Mutual Drafting.** Each provision hereof has been subject to the mutual consultation, negotiation, and agreement of the Parties and there is to be no construction against any Party based on any presumption of that Party’s involvement in the drafting thereof.

**Section 26.12. Attorneys’ Fees.** In any litigation or other proceeding between Buyer, on the one hand, and Seller or Seller Parent Guarantor, on the other hand, relating to this Agreement, the prevailing Party shall be entitled to recover from the other its reasonable out-of-pocket costs incurred in connection with such litigation or proceeding, including reasonable attorneys’ fees and other legal expenses.

**Section 26.13. Nature of Seller Parent Guarantor’s Obligations.** In all instances where an obligation is imposed upon Seller under this Agreement but no similar obligation is expressly imposed upon Seller Parent Guarantor, Seller Parent Guarantor shall nevertheless be responsible for any Losses arising from or related to Seller’s breach of such obligation. This Section 26.13 shall in no way limit Seller’s obligations under this Agreement.

**Section 26.14. Payments; Delinquent Payments.** If any amount is due from a Party to another Party under this Agreement and this Agreement does not provide a specific date on which such payment is due, such payment shall be due on the date that is twenty (20) days following the date on which the Party entitled to such payment delivers an invoice to the Party owing such payment. Except as otherwise expressly provided in this Agreement, the unpaid amount of any payment due from a Party to another Party under this Agreement shall accrue interest at the Default Interest Rate from the first day following the date on which payment is due until the date payment is made.

*[Signature page follows]*

**IN WITNESS WHEREOF**, the Parties have caused this Agreement to be executed by their duly authorized representatives as of the Effective Date.

[●]

By \_\_\_\_\_

Name:

Title:

[●], solely with respect to Section 20.9 (No Solicitation), Section 20.10(f) (Confidentiality; Public Announcements), and Article XXVI (General Provisions)

By \_\_\_\_\_

Name:

Title:

[●]

By \_\_\_\_\_

Name:

Title:

EXHIBIT M

FORM OF SUBSTANTIAL COMPLETION DATE CERTIFICATE

**SUBSTANTIAL COMPLETION PAYMENT DATE CERTIFICATE**

The undersigned, [●], as [●] of [●], a [●] (“**Seller**”), pursuant to Section 23.3 of that certain B-O-T Acquisition Agreement, dated as of [●] (as amended, supplemented or otherwise modified and in effect from time to time, the “**Agreement**”), by and among Seller, [●] (“**Seller Parent Guarantor**”), and [●] (“**Buyer**”), does hereby certify the following (capitalized terms used herein and not otherwise defined herein shall have the meanings given such terms in the Agreement):

(a) Seller and its Affiliates have performed or complied in all material respects with all covenants, obligations, and agreements of Seller or its Affiliates contained in the Agreement and the Ancillary Agreements to which Seller or any of its Affiliates is a party required to be performed or complied with at or prior to the date hereof.

(b) The Substantial Completion Date has occurred and all of the requirements of the Substantial Completion Date remain satisfied as of the date hereof.

(c) The representations and warranties of Seller set forth in Attachment A to this certificate that are qualified with respect to materiality (whether by reference to Material Adverse Effect or otherwise) are true and correct in all respects as of the date hereof, and the representations and warranties of Seller set forth in Attachment A to this certificate that are not so qualified are true and correct in all material respects as of the date hereof.

[Execution page follows]



IN WITNESS WHEREOF, the undersigned has executed and delivered this Substantial Completion Payment Date Certificate on this [●] day of [●].

[●]

---

Name: [●]

Title: [●]

ATTACHMENT A

TO EXHIBIT M

For purposes of this Attachment A, reference to any Schedule “of the Agreement” means such Schedule of the Agreement as of the Effective Date and shall not include any item disclosed in any Schedule Supplement.

**ARTICLE I  
REPRESENTATIONS AND WARRANTIES OF SELLER**

As of the date hereof, Seller represents and warrants to Buyer as follows:

**Section 1.1 Compliance with Laws.** Except as set forth in Schedule 18.4 of the Agreement, neither Seller nor any of its Affiliates (to the extent such Affiliates are a party to the Agreement or any of the Ancillary Agreements) is in material violation of any Law applicable to Seller or any such Affiliates with respect to the performance of the Work, the Project, including the ownership, use, operation, or maintenance thereof, or any of the Project Assets.

**Section 1.2 Bankruptcy Matters.** Neither Seller nor Seller Parent Guarantor is Bankrupt and there are no claims or proceedings pending or being contemplated by Seller or Seller Parent Guarantor, or, to Seller’s Knowledge, threatened against Seller or Seller Parent Guarantor, that could reasonably be expected to result in it being or, after giving effect to the consummation of the Transactions, becoming Bankrupt.

**Section 1.3 Litigation.**

(a) Except as set forth in Schedule 18.6 of the Agreement, there is no Action pending or, to Seller’s Knowledge, threatened against or involving Seller or any of its Affiliates or before or being conducted by any Governmental Authority or arbitrator relating to the Work, the Project (including the development, design, engineering, procurement, financing, construction, installation, commissioning, testing, ownership, possession, use, operation, maintenance, study, or repair thereof), the Project Assets, or the consummation of any of the Transactions, and, to Seller’s Knowledge, Seller is not under investigation by a Governmental Authority with respect to the Work, the Project (including the development, design, engineering, procurement, financing, construction, installation, commissioning, testing, ownership, possession, use, operation, maintenance, or repair thereof), any of the Project Assets, or the consummation of any of the Transactions, in each case, that, individually or in the aggregate, would reasonably be expected to result, or has resulted, in (i) the institution of legal proceedings to prohibit or restrain the performance by Seller or any of its Affiliates of its obligations under this Agreement or any of the Ancillary Agreements or the consummation of the Transactions, (ii) a claim against Buyer or any of its Affiliates for damages as a result of Seller or any of its Affiliates entering into this Agreement or any of the Ancillary Agreements or the consummation of the Transactions, (iii) a material delay in or material impairment of Seller’s or any of its Affiliates’ performance of its obligations under this Agreement or any of the Ancillary Agreements or a material impairment of the authority, right, or ability of Seller to consummate the Transactions, (iv) a Material Adverse Effect, (v) the creation of an Assumed Liability, (vi) a claim against Buyer or any of its Affiliates for damages as a result, or alleging a theory, of

successor Liability or (vii) the imposition of an Encumbrance, other than a Permitted Encumbrance, upon any of the Project Assets.

(b) There is no Order enjoining Seller from engaging in or continuing any conduct or practice, or requiring Seller to take any material action, in connection with the Work, the Project, or the Project Assets, and neither Seller nor any of its Affiliates is subject to any outstanding Order relating to the Work, the Project, or the Project Assets, other than, in each case, Orders of general applicability.

#### **Section 1.4 Transferred Closing Tangible Personal Property and Transferred Closing Inventory.**

(a) Part I of Schedule 1.4 of this certificate sets forth a complete and accurate description of each material item of Transferred Closing Tangible Personal Property and Transferred Post-Closing Tangible Personal Property, and Part II of Schedule 1.4 of this certificate sets forth a complete and accurate description of each material item of Transferring Closing Inventory and Transferred Post-Closing Inventory, in each case, for which title has passed to Buyer pursuant to the terms of the Agreement, including each item of Transferred Closing Tangible Personal Property, Transferred Post-Closing Tangible Personal Property, Transferred Closing Inventory, or Transferred Post-Closing Inventory with a book value of Ten Thousand Dollars (\$10,000) or greater.

(b) As of the date hereof, title to the Transferred Closing Tangible Personal Property, Transferred Post-Closing Tangible Personal Property, Transferred Closing Inventory, and Transferred Post-Closing Inventory passed to and vested in Buyer pursuant to Section 11.2 of the Agreement (but immediately prior to giving effect to such transfer), Seller had good and valid title to such Transferred Closing Tangible Personal Property, Transferred Post-Closing Tangible Personal Property, Transferred Closing Inventory, and Transferred Post-Closing Inventory, free and clear of all Encumbrances (other than Permitted Encumbrances).

#### **Section 1.5 Project Contracts.**

(a) There are no material Project Contracts except (i) the Transferred Closing Project Contracts and the Transferred Post-Closing Project Contracts set forth on Schedule 1.5(a) of this certificate and (ii) the Excluded Project Contracts. Seller has provided to Buyer complete and accurate copies of all Transferred Closing Project Contracts, Transferred Post-Closing Project Contracts and Excluded Project Contracts (including all amendments, modifications, extensions, renewals, and supplements thereto). No Affiliate or agent of Seller is a party to a Contract that would constitute a Project Contract if Seller, rather than such Affiliate of Seller, were a party thereto.

(b) At the time each Transferred Post-Closing Project Contract was assigned to Buyer pursuant to Section 11.2 of the Agreement, no default, event, or condition that, with notice or lapse of time or both, would constitute a breach or default by Seller or, to Seller's Knowledge, any counterparty to any Transferred Post-Closing Project Contract existed under such Transferred Post-Closing Project Contract, except such breaches, defaults, events, or conditions (i) as to which requisite waivers have been duly obtained or (ii) that would not (A)

result in any Liability to Buyer or any of its Affiliates or (B) give rise to any right of termination under such Transferred Post-Closing Project Contract.

(c) As of the time each Transferred Post-Closing Project Contract was assigned to Buyer pursuant to Section 11.2 of the Agreement, no Action was pending or, to Seller's Knowledge, threatened against Seller challenging the enforceability of such Transferred Post-Closing Project Contract against Seller or, to Seller's Knowledge, against any counterparty to such Transferred Post-Closing Project Contract with respect to such Transferred Post-Closing Project Contract.

(d) At the time each Transferred Post-Closing Project Contract was assigned to Buyer pursuant to Section 11.2 of the Agreement (but immediately prior to giving effect to such assignment), such Transferred Post-Closing Project Contract constituted the valid and binding obligation of Seller and, to Seller's Knowledge, the other parties thereto, was in full force and effect and enforceable in accordance with its terms, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium, or other similar Laws of general application relating to or affecting the enforcement of creditors' rights and by general equitable principles.

#### **Section 1.6 Permits.**

(a) Seller and each of its Contractors or Subcontractors held at the time required all Project Work Permits and Project Operational Permits, including all Permits required by the State of Texas for the installation or sale of solar generation equipment and the performance of related services.

(b) As of the time each Transferred Post-Closing Permit was transferred to Buyer pursuant to Section 11.2 of the Agreement, (i) such Transferred Post-Closing Permit was valid, in full force and effect, and held by Seller, and (ii) no event had occurred permitting, requiring, or that would have reasonably been expected to result in, or with or without the giving of notice or the passage of time or both would have permitted, required, or reasonably been expected to result in, the revocation, suspension, limitation, or termination of, or the adverse modification, suspension, impairment, or limitation in any material respect of, such Transferred Post-Closing Permit.

(c) As of the time each Transferred Post-Closing Permit was transferred to Buyer pursuant to Section 11.2 of the Agreement, Seller was, and throughout Seller's ownership or control of the Project Assets and the Project had been, in compliance in all material respects with the Transferred Post-Closing Permits (and except as has been remedied, any prior Permit that was replaced by any Transferred Post-Closing Permit with respect to the Project Assets or the Project that is no longer in effect but was in effect at some point during Seller's development, design, engineering, procurement, construction, commissioning, testing, ownership, possession, use, operation, or repair of the Project Assets and the Project) and all of its material obligations with respect thereto.

**Section 1.7 Warranties.** As of the time each Transferred Post-Closing Warranty was assigned to Buyer pursuant to Section 11.2 of the Agreement (but immediately prior to giving

effect to such assignment), (a) Seller held and had the right to enforce such Transferred Post-Closing Warranty, subject to the terms thereof, and (b) such Transferred Post-Closing Warranty was in full force and effect and enforceable by Buyer in accordance with its terms.

### **Section 1.8 Intellectual Property.**

(a) Part I(A) of Schedule 1.8 of this certificate sets forth all Seller-Owned Project Intellectual Property (other than with respect to software) used in or for the Project with a value of Five Hundred Dollars (\$500) or more or that is material to the ownership, possession, use, operation, maintenance, or repair of the Project. Part I(B) of Schedule 1.8(a) of this certificate includes a list of all Seller-Owned Project Intellectual Property with respect to software (including application name, vendor name, and version number) owned by Seller, Seller Parent Guarantor, or any of their respective Affiliates and used in or for the Project.

(b) Part II(A) of Schedule 1.8 of this certificate sets forth all Project Intellectual Property Rights for which Seller or any of its Affiliates paid One Thousand Dollars (\$1,000) or more, for which Seller or any of its Affiliates has a payment obligation to the licensor or other Person in any calendar year of Five Hundred Dollars (\$500) or more, or that are material to the ownership, possession, use, operation, maintenance, or repair of the Project. Part II(B) of Schedule 1.8 of this certificate sets forth the Transferred Closing Project Contracts and the Transferred Post-Closing Project Contracts (including licenses and similar agreements) pursuant to which Seller or any of its Affiliates is licensed or granted the right to use, or holds or possesses, the Project Intellectual Property Rights described in Part II(A) of Schedule 1.8 of this certificate, excluding the Transferred Closing Project Contracts and the Transferred Post-Closing Project Contracts that are software licenses or agreements. Part II(C) of Schedule 1.8 of this certificate sets forth a list of all software licensed, held, or possessed by Seller or any of its Affiliates and used in or for the Project and all Transferred Closing Project Contracts and the Transferred Post-Closing Project Contracts (including licenses and similar agreements) with respect to software pursuant to which Seller or any of its Affiliates is licensed or granted the right to use, or holds or possesses, the Project Intellectual Property Rights described in Part II(A) of Schedule 1.8 of this certificate. Part II(D) of Schedule 1.8 of this certificate sets forth the Excluded Project Contracts, if any, pursuant to which Seller or any of its Affiliates is licensed or granted the right to use, or holds or possesses, the Intellectual Property Rights described in Part II(A) of Schedule 1.8 of this certificate. All Project Intellectual Property Rights set forth in Part II(A) of Schedule 1.8 of this certificate consist of licenses and similar rights granted by or from Persons who are not Affiliates of Seller.

(c) As of the date each Transferred Post-Closing Intellectual Property Ownership and Contract Right was transferred to Buyer pursuant to Section 11.2 of the Agreement (but immediately prior to giving effect to such transfer), Seller owned, free and clear of all Encumbrances (other than Permitted Encumbrances), licensed or contracted for the right to use, or lawfully held or possessed all of the Project Intellectual Property Rights necessary for the lawful ownership, possession, use, operation, maintenance, or repair of the Project (including the Project Assets).

(d) The ownership, use, holding, or possession (as applicable) by Seller or any of its Affiliates of the Project Intellectual Property Rights transferred to Buyer by Seller and its

Affiliates pursuant to the Agreement and the business and activities of Seller and its Affiliates related to the Project or the Project Assets, including Seller's obligations in the Agreement, do not violate or infringe upon the Intellectual Property Rights of any Person. No Person has notified Seller or any of its Affiliates that Seller or any of its Affiliates is violating or infringing upon the Intellectual Property Rights of any Person. To Seller's Knowledge, as of the time each Transferred Post-Closing Intellectual Property Ownership and Contract Right was transferred to Buyer pursuant to Section 11.2 of the Agreement, no Person was infringing upon or violating any of the Transferred Closing Intellectual Property Ownership and Contract Rights.

### **Section 1.9 Condition and Sufficiency of Closing Assets.**

(a) All of the Transferred Closing Tangible Personal Property, Post-Closing Tangible Personal Property and all appurtenances and improvements to the Project Site, including all buildings, fixtures, component parts, other constructions, and other appurtenances and improvements thereon, thereto, or thereunder, have been maintained by or for Seller in accordance with the Performance Standard in all material respects.

(b) As of the date hereof, except for the Non-Assigned Assets for which Seller's Consents have not been obtained (notwithstanding the requirements of Section 20.3 of the Agreement, but for which arrangements have been made according to Section 20.5(c) of the Agreement such that Buyer is getting the benefit thereof as of the date hereof), the Project Assets constitute all of the assets, properties, rights (including all Project Intellectual Property Rights), and interests reasonably necessary for the use, ownership, operation, maintenance, and repair of the Project on the date hereof according to Good Industry Practices and the terms of the Agreement.

(c) As of date hereof, neither Seller nor any of its Affiliates owns an interest in the Project Assets.

### **Section 1.10 Environmental Matters.**

(a) The representations and warranties set forth in this Section 1.10(a) relate exclusively to the period of Seller's or any Affiliate of Seller's ownership or control of the Project or the Project Site. Seller makes no representations and warranties under this Section 1.10(a) with respect to any period prior to Seller's or any Affiliate of Seller's ownership or control of the Project or the Project Site.

(i) The Project and the Project Site are and have been developed, designed, engineered, procured, constructed, commissioned, tested, owned, possessed, used, operated, maintained, and repaired in compliance in all material respects with all applicable Environmental Laws (including Laws requiring Seller to obtain, maintain, and comply with Environmental Permits).

(ii) None of Seller, any of its Affiliates, or, to Seller's Knowledge, any Contractor, Subcontractor, or Representative of Seller or any of its Affiliates has ever generated, transported, used, stored, treated, disposed of, handled, or managed Hazardous Substances relating to the Project or the Project Site except in compliance in all material respects with all applicable Environmental Laws.

(iii) Except as set forth in Part I of Schedule 18.16 of the Agreement, no Environmental Condition exists at the Project or at, on, or under the Project Site, no Hazardous Substance has been Released by the Project or at, on, or under the Project Site, and, to Seller's Knowledge, no Hazardous Substance has migrated onto or from the Project Site, in each case except in compliance with all applicable Environmental Laws or as has been Remediated to the satisfaction of the applicable Government Authorities and in compliance with all applicable Environmental Laws. Each such Remediation is described in Part II of Schedule 18.16 of the Agreement.

(iv) There is not, and there has not been, any pending or, to Seller's Knowledge, threatened Environmental Claim with respect to the Project or the Project Site. To Seller's Knowledge, neither Seller nor any other Person has any Environmental Liability relating to the Project or the Project Site, and there is no event, fact, condition, or circumstance (or set of events, facts, conditions, or circumstances) arising out of the development, design, engineering, procurement, construction, commissioning, testing, ownership, possession, use, operation, maintenance, or repair of the Project or the Project Site or the performance of the Work that would reasonably be expected to give rise to an Environmental Claim or Environmental Liability with respect to the Project or the Project Site.

(v) Except as set forth on Part III of Schedule 18.16 of the Agreement, no above-ground storage tank, underground storage tank, or other storage or process tank (in each case, containing any material quantity of any Hazardous Substance) are or, to Seller's Knowledge, have been owned, operated, leased, or used at the Project Site. The Project and the Project Site do not contain, and, to Seller's Knowledge, have not contained, asbestos or asbestos-containing material, polychlorinated biphenyls, or equipment containing the foregoing, regulated concentrations of lead or lead-based paint, or urea formaldehyde foam insulation.

(vi) Seller has not sought or obtained, and, to Seller's Knowledge, no other Person has sought or obtained, environmental insurance with respect to the Project or the Project Site.

(vii) No Encumbrance under any Environmental Law or Environmental Permit exists or has been imposed or, to Seller's Knowledge, threatened to be imposed by any Governmental Authority on the Project or the Project Site and, to Seller's Knowledge, there are no events, facts, circumstances, or conditions (or set of events, facts, circumstances, or conditions) that are otherwise reasonably likely to restrict, encumber, or result in the imposition of any Encumbrance under any Environmental Law or Environmental Permit with respect to the ownership, occupancy, or use of the Project or the Project Site.

**[Reserved]**

### **Section 1.11 Tax Matters.**

(a) All Taxes imposed on or with respect to the Work or the Project, or for which Seller or any of its Affiliates is or could be liable, whether to Governmental Authorities (as, for example, under Law) or to other Persons (as, for example, under Tax allocation agreements or partnership agreements) with respect to all taxable periods, or portions thereof,

ending on or before date hereof, and required to be paid by Seller or any of its Affiliates to Governmental Authorities or other Persons, have been paid, whether or not shown as due on the Tax Returns described in this Section 1.11.

(b) Seller or an Affiliate of Seller has prepared in good faith and duly and timely filed, or caused to be duly and timely filed, all material Tax Returns relating to the Work or the Project and required to be filed by Seller or any of its Affiliates with the applicable Governmental Authority or Person. All Tax Returns described above are true, correct, and complete in all material respects.

(c) Seller and its Affiliates have complied in all material respects with all Tax Laws and all Tax agreements applicable to the Work or the Project.

(d) Neither Seller nor any of its Affiliates is a party to any Action, nor is any Action, to Seller's Knowledge, threatened for the assessment or collection of any Tax, relating to the Work or the Project. No deficiency notice or report has been received by Seller or any of its Affiliates or Representatives in respect of any Tax relating to the Work or the Project that has not resulted in a final binding settlement and payment to the applicable Governmental Authority or Person.

**[Reserved]**

**Section 1.12 Labor Matters.** No Collective Bargaining Agreement shall be binding upon or enforceable against Buyer or any of its successors or assigns.

**Section 1.13 Encumbrances.** As of the time of the transfer (but immediately prior to giving effect to such transfer), the Post-Closing Project Assets transferred, conveyed, or assigned to Buyer pursuant to Section 11.2 of the Agreement are free and clear of any Encumbrances other than Permitted Encumbrances.

**Section 1.14 Grid Synchronization; Power Sales.** There has not been any sale, transfer, or delivery of any electric energy, capacity, or Other Electric Product from or attributable to the Project, other than (i) test energy subject to and in accordance with the terms of the Agreement and (ii) in accordance with the express instruction of Buyer delivered pursuant to Section 20.19 of the Agreement or pursuant to the MISO Agreement.

**Section 1.15 Regulatory Status.** None of the Closing Assets or the Post-Closing Project Assets to be transferred, conveyed, or assigned to Buyer pursuant to Section 11.2 of the Agreement include any facilities that are subject to the jurisdiction of FERC at the time of the sale to Buyer.