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**OPERATION AND MAINTENANCE AGREEMENT**

by and between

**ENTERGY LOUISIANA, LLC**

and

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

Dated as of [\_\_\_\_\_] , 20

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## **EXHIBITS**

- Exhibit A-1 Included Services
- Exhibit A-2 T&M Services
- Exhibit A-3 Excluded Services
- Exhibit A-4 Covered Equipment
- Exhibit B - Key Personnel
- Exhibit C - Site
- Exhibit D-1 The PV Plant
- Exhibit D-2 The BESS
- Exhibit E - Interconnection Agreement
- Exhibit F - NERC Compliance
- Exhibit G-1 Guaranteed PV Plant Performance
- Exhibit G-2 Guaranteed BESS Availability and Guaranteed BESS RT Efficiency
- Exhibit H - Operating Data and Records
- Exhibit I - Permits
- Exhibit J - O&M Contractor's Security and Safety Procedures
- Exhibit K Subcontracting Plan Template

The statements contained in this RFP are made subject to the Reservation of Rights set forth in Appendix E of this RFP and the terms and acknowledgements set forth in the Proposal Submission Agreement.

## OPERATION AND MAINTENANCE AGREEMENT

This OPERATION AND MAINTENANCE AGREEMENT (“Agreement”) is dated as of [\_\_\_], 202[\_\_\_] (“Execution Date”) between **ENTERGY LOUISIANA, LLC**, a Texas limited liability company (“Owner”), and [\_\_\_\_\_], a [\_\_\_\_\_] (“O&M Contractor”). Owner and O&M Contractor are sometimes referred to in this Agreement individually as a “Party” and collectively as the “Parties”.

### RECITALS

WHEREAS, Owner owns or leases certain property, as more fully described in Exhibit C (the “Site”), for the purpose of constructing and operating an onsite solar photovoltaic facility and a related battery storage system on the Site, as more fully described in Exhibit D-1 and Exhibit D-2 attached hereto.

WHEREAS, O&M Contractor has expertise and knowledge in the management, operation, maintenance and administration of solar energy systems such as the PV Plant and battery energy systems such as the BESS, and Owner wishes to engage O&M Contractor as an independent contractor, during the Term, for the purpose of operating and maintaining the PV Plant and the BESS and performing certain other duties, including administration of the PV Plant and the BESS on behalf of Owner, subject to and in accordance with the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Owner and O&M Contractor, intending to be legally bound, hereby agree as follows:

### ARTICLE 1 DEFINITIONS

#### 1.1 Definitions.

As used in this Agreement, all capitalized terms shall have the following meanings:

“Additional Insureds” shall have the meaning set forth in Section 13.1(h)(v)(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” shall have the meaning set forth in the preamble.

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“Annual Liquidated Damages Cap” shall have the meaning set forth in Section 10.6.

“Annual Operating Plan” shall have the meaning set forth in Section 4.7.

“Annual Report” shall have the meaning set forth in Section 4.10(b).

“Applicable Law” shall mean all applicable federal, state, local, municipal, foreign, or other laws, codes, and other legal requirements issued, enacted, adopted, promulgated, implemented, or constitutions, statutes, rules, regulations, ordinances, orders, treaties, 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.

“BESS” means the DC-connected battery energy storage system, to be located and constructed in accordance with the BOT Agreement on the Project Site, and all related assets and properties. A general description of the BESS is provided in Schedule D-2.

“BESS Availability” shall have the meaning set forth in Exhibit G-2.

“BESS Availability Liquidated Damages” shall have the meaning set forth in Section 10.3(b).

“BESS RT Efficiency” shall have the meaning set forth in Exhibit G-2.

“BESS RT Efficiency Liquidated Damages” shall have the meaning set forth in Section 10.4(b).

“BOT Agreement” shall mean the Engineering, Procurement, and Construction Agreement between [\_\_\_\_\_] and Entergy Louisiana, LLC dated [,] 2020 by and between Owner and Seller.

“BOT Warranty” shall have the meaning set forth in the BOT Agreement for Project Warranty.

“Business Day” shall mean 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.

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

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“Change in Law” means the enactment, adoption, promulgation, issuance, modification, or repeal after the Execution 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 Execution Date but that becomes effective after the Execution Date, and (iii) a change in the enforcement or interpretation of an Applicable Law outside of the United States.

“Claims” shall 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, 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.

“Commencement Date” shall have the meaning set forth in Section 3.1.

“Consumables” means any and all items that may need to be replaced, consumed, or otherwise used (and the replacement thereof) in the performance of Services, 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; and all other materials, supplies, and other items replaced, consumed, or otherwise used (and the replacement thereof) in the performance of the Services.

“Contractor Deliverables” shall have the meaning set forth in Section 14.2.

“Contractor Taxes” shall mean all applicable sales, use, gross receipts and similar taxes legally imposed on O&M Contractor or any Subcontractor for the Work as the primarily responsible party and not as collection agent on behalf of Owner or an applicable Governmental Authority, including sales taxes paid (or which should have been paid) to O&M Contractor’s or Subcontractors’ vendors, or use taxes self-accrued and remitted directly (or which should have been self-accrued and remitted directly) to taxing authorities by O&M Contractor or Subcontractors, if such sales, use, gross receipts and similar taxes are incorporated (or should have been incorporated) in lump sum fixed price contract prices set forth in the Contract. Contractor Taxes shall specifically include sales, use, gross receipts and similar taxes on consumables, rentals and any other taxable items that are purchased for use in the performance of the Work but do not become part of the permanent materials of Owner at the end of the Work.

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“Covered Equipment” means that equipment described on Exhibit A-4.

“Dispute” shall have the meaning set forth in Section 17.4.

“Emergency” shall mean any condition or event that (a) is existing or is imminently likely to result in (i) serious personal injury or (ii) material loss or damage to any part of the Project and (b) requires, in the good faith determination of O&M Contractor or Owner, immediate preventative or remedial action by O&M Contractor.

“Energy Storage Industry Standards” means those standards of care and diligence which in the exercise of reasonable judgment and in light of the facts known at the time the decision was made, are considered good, safe and prudent practice for utility scale energy storage projects in connection with the design, construction, installation, maintenance, operation and use of electrical and other equipment, facilities and improvements, with commensurate standards of safety, performance, dependability, efficiency and economy, and as are in accordance with generally accepted national standards of professional care, skill, diligence and competence applicable to utility scale energy storage engineering, construction and project management practices, including codes, standards and specifications, including all addenda, in effect as of the time the Services are performed.

“Environmental Laws” means all Applicable Laws and 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 Applicable 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.; the Occupational Safety and Health Administration or Occupational Safety and Health Act of 1970 (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 Applicable Laws of the United States of America, or any other Governmental

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Authority having jurisdiction over the Services, the PV Plant, the BESS, the Site, or O&M Contractor.

“Execution Date” shall have the meaning set forth in the introductory paragraph of this Agreement.

“FERC” means the Federal Energy Regulatory Commission.

“Financing” shall mean any debt, funds, construction financing, term financing, leveraged lease, equity financing (including tax equity) or other extension of credit provided by any Project Lender in connection with the Project, including any portfolio or similar aggregate financing in which the Project is included.

“Fixed Fees” shall have the meaning set forth in Section 6.1.

“Force Majeure Event” shall mean an event that (i) occurs after the Execution Date, (ii) is not within the reasonable control, directly or indirectly, of the Party claiming a Force Majeure Event (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 the Force Majeure Event (including such Party’s agents, contractors, and subcontractors of any tier), (iv) does not result from the negligence or fault of the Party claiming the Force Majeure Event (or the negligence or fault of such Party’s agents, contractors, or subcontractors of any tier), and (v) causes the Party claiming the Force Majeure Event, 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, the Services, 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 Events shall include the following events, except as otherwise provided in this definition: (A) acts of God, including tornadoes, hurricanes, earthquakes, tsunamis, and, to the extent directly affecting the 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 Services or the equipment necessary to perform the Services; and (E) unless initiated or otherwise arising as a result of the conduct or other actions or omissions of O&M Contractor, or any of its Subcontractors at the Site or with respect to the Services, nationwide or industry-wide labor strikes, slowdowns, or stoppages.

“Force Majeure Event” shall not include: (1) 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) above or similarly independent, identifiable Force Majeure Events; (2) sabotage by any

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employee, agent, contractor, or subcontractor (including vendor) of any tier, or representative of the Party claiming the Force Majeure Event; (3) 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 (x) the Party claiming the Force Majeure Event has a firm contract for (or self-generates and has not committed to other uses of) the applicable service or item and (y) the provider, if it were a party hereto, would be entitled to Force Majeure Event protection as an affected party; (4) any weather event that is not an act of God (including one hundred year weather events); (5) a Party's financial inability to perform; (6) any delay in obtaining, inability to obtain, or revocation of any Permit; (7) events that affect the cost of services, equipment, or materials (including clause (11) 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); (8) lack of, or insufficient, solar insolation for energy production (including as a result of environmental or weather conditions); (9) labor strikes, slowdowns, or stoppages that are not nationwide or industry-wide or, if O&M Contractor is the Party claiming the Force Majeure Event, that are initiated or otherwise arise as a result of the conduct or other actions or omissions of O&M Contractor, any of its Subcontractors, or any representative of O&M Contractor at the Site or with respect to the Services; (10) labor shortages (except to the extent directly and proximately resulting from a Force Majeure Event described in the preceding sentence); and (11) any change or other modification to any Applicable Law that would not meet the requirements of a Change in Law.

“Governmental Authority” shall mean 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 the SERC Reliability Corporation, 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 Owner or O&M Contractor, each to the extent related to any matter relating to the Work and/or the Services, the Project, or the Site, and each as applicable.

“Guaranteed BESS Availability” shall have the meaning set forth in Exhibit G-2.

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2. “Guaranteed BESS RT Efficiency” shall have the meaning set forth in Exhibit G-2.

“Guaranteed Performance” shall have the meaning set forth in Section 10.2(b).

“Handling” shall mean production, use, treatment, storage, transportation, generation, manufacture, processing, distribution, disposal, Release or threatened Release.

“Hazardous Substances” means any substance, pollutant, toxic substance, hazardous waste, hazardous material, or 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.

“Imaged Document” shall have the meaning set forth in Section 17.19.

“Indemnitee” shall have the meaning set forth in Section 8.1.

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

“Intellectual Property Claim” means a third party claim for actual or alleged unauthorized disclosure, use, infringement or misappropriation of any Intellectual Property Right arising from O&M Contractor’s performance (or that of its Affiliates or Subcontractors) under this Agreement that: (a) concerns any parts and materials or other services or equipment provided by O&M Contractor, any of its Affiliates, or any Subcontractor under this Agreement; (b) is based upon or arises out of the performance of the Services by O&M Contractor, any of its Affiliates, or any Subcontractor, including the use or provision of any tools or other implements by O&M Contractor, any of its Affiliates, or any Subcontractor; or (c) is based upon or arises out of the design of any item by O&M Contractor or any of its Affiliates or Subcontractors under this Agreement or the operation

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of any item according to directions embodied in the O&M Manuals, or any revision thereof, prepared or approved by O&M Contractor.

“Intellectual Property Rights” means (a) 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 Applicable Law under any jurisdiction that provides protective or other similar rights for Intellectual Property and (b) all rights to sue and recover damages for infringement, dilution, misappropriation, or other violation of such rights.

“Interconnection Agreement” shall mean the certain Interconnection Agreement between [ ] and Owner, dated as of [ ] by and between Owner and the Utility for the Project as set forth in Exhibit E.

“Key Personnel” means the natural persons named and assigned to the identified positions set forth on Exhibit B.

“Legal Requirement” shall mean the requirements of any Applicable Law, including any Environmental Law, or any Permit.

“Maintenance Specific Logs” shall mean separately kept logs for the Project in a paper or electronic format.

“Major Undertaking” means any T&M Services consisting of repairs or expenditures at the Project anticipated to result in T&M Costs in excess of [Five Thousand Dollars (\$5,000)].

“Measured BESS RT Efficiency” shall have the meaning set forth in Exhibit G-2.

“Measured Availability” shall have the meaning set forth in Exhibit G-1.

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

“MISO Rules” means, collectively, (a) the MISO Tariff, (b) the MISO Business Practice Manuals (as defined in the MISO Tariff), and (c) 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.

“NERC” means the North American Electric Reliability Corporation.

“Notice of Claim” has the meaning set forth in Section 8.3(a).

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“Notice Period” has the meaning set forth in Section 8.3(b).

“O&M Contractor” shall have the meaning set forth in the introductory paragraph of this Agreement, and shall include its successors and permitted assigns, if any.

“O&M Contractor Employee Claim” shall have the meaning set forth in Section 17.11(b).

“O&M Contractor Event of Default” shall have the meaning set forth in Section 9.1(a).

“O&M Manuals” shall mean the operation and maintenance manuals for the equipment in the Project provided by Seller pursuant to the BOT Agreement, as well as all operating manuals supplied by all vendors or manufacturers with respect to the components making up the Project or any Spare Parts.

“Operating Period” shall mean each annual period commencing on the Commencement Date and on each anniversary thereof.

“Owner” shall have the meaning set forth in the preamble, and shall include its permitted successors and assigns, if any, under the Agreement.

“Owner Event of Default” shall have the meaning set forth in Section 9.2(a).

“Owner’s Property” shall have the meaning set forth in Section 7.5.

“Owner’s Representative” shall have the meaning set forth in Section 7.3.

“Party” and “Parties” shall have the meanings set forth in the preamble.

“Performance Liquidated Damages” shall have the meaning set forth in Section 10.2(b).

“Permissible Materials” shall have the meaning set forth in Section 5.1(b).

“Permit” shall mean any and all (i) permits, registrations, licenses, franchises, certificates, and consents of Governmental Authorities, including 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 Site), to the extent related to the Services 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

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the Services or the Project, including the ownership, possession, use, operation, maintenance, or repair thereof.

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

“Project” means, collectively, the PV Plant and the BESS located on the Site, and the related assets and properties, and subject to the terms hereof, any additions thereto or replacements to any of the foregoing.

“Project Agreements” shall mean the Interconnection Agreement, the O&M Manuals, and the Real Property Documents, each as provided to O&M Contractor by Owner on the Execution Date or such later date by Seller pursuant to the BOT Agreement.

“Project Hardware” shall mean the Goods (as defined in the BOT Agreement) provided by Seller under the BOT Agreement.

“Project Hardware Warranties” shall mean the warranties relating to the Project Hardware a copy of which have been provided by Seller to O&M Contractor.

“Project Lender” means (a) any and all lenders providing senior or subordinated construction, interim or long-term debt financing or refinancing to Owner or its Affiliates; (b) any and all equity investors in Owner or its Affiliates providing tax equity investment or leveraged lease-financing or refinancing (or any other direct equity investor that makes a direct capital contribution to Owner or its Affiliates in cash or in kind) or (c) any Person providing credit support on behalf of Owner or its Affiliates, in each case, in connection with the Project or a portfolio of projects (including the Project) and, in each case, any trustee or agent acting on the behalf of any of the foregoing.

“Project Meters” shall mean all Project meters and related performance monitoring equipment, including meters that relate to the inverters and substation revenue meters on the Project’s side of the point of interconnection with the Utility, but excluding the Utility’s meters.

“Project Substantial Completion Date” shall mean the date on which Substantial Completion (as defined in the BOT Agreement) is achieved under the BOT Agreement.

“Project Substantial Completion Payment Date” shall have the meaning set forth in the BOT Agreement.

“Prudent Industry Practice” shall mean the practices, methods and acts engaged in or approved by a significant portion of the solar photovoltaic electric generation industry in the MISO south region of the United States with respect to assets and properties of a

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type and size similar to those constituting the PV Plant 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 Applicable Laws and applicable Permits. Prudent 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.

“PV Plant” shall mean each of the integrated assembly of photovoltaic panels, mounting assemblies, racking/trackers, inverters, converters, metering, transformers, disconnects, combiners, switches, wiring devices and wiring to be constructed by Seller on the Site and listed on Exhibit D-1 hereto in accordance with, and as described in, the BOT Agreement.

“Real Property Documents” shall mean easements, option agreements, leases, subordinations and other real property agreements that create or evidence any real property interests relating to the PV Plant or the BESS as provided to O&M Contractor by Owner on the Execution Date.

“Release” shall have 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 Site, any Hazardous Substances, including the migration of any Hazardous Substances 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 the Release or presence of Hazardous Substances into or in the environment at the Site, including (a) monitoring, investigation, assessment, treatment, clean-up, containment, remediation, removal, mitigation, response, or restoration work, (b) obtaining any Permit necessary to conduct any such work, (c) preparing and implementing any plan or study for such work, (d) obtaining a written notice from a Governmental Authority with jurisdiction under Environmental Laws that no material additional work is required by such Governmental Authority, (e) any response to, or preparation for, any inquiry, hearing, or other proceeding by or before any Governmental Authority with respect to any such Release, or presence of Hazardous Substances, and (f) any other activity that is appropriate or required under Environmental Laws to address the presence or Release of Hazardous Substances in or into the environment at the Site.

“SCADA” shall mean the supervisory control and data acquisition system for the Project.

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“Scheduled Maintenance” shall mean all scheduled and preventative maintenance required by Prudent Industry Practices, Energy Storage Industry Standards, the original equipment manufacturers, the O&M Manuals, Applicable Laws, Permits and the requirements of this Agreement, for the safe, continuous operation of the Project (including all components or parts thereof up to the physical point of interconnection), including the provision of all wear and tear parts and Consumables and the performance of the tasks expressly identified in Exhibit A-1.

“Seller” shall mean [ \_\_\_\_\_ ], a [ \_\_\_\_\_ ] and Affiliate of O&M Contractor.

“Services” shall have the meaning set forth in Section 4.4(c).

“Site” shall have the meaning set forth in the recitals of this Agreement.

“Spare Parts” shall mean all appliances, parts, instruments, appurtenances, accessories, furnishings and other equipment of whatever nature (excluding Consumables) which may be from time to time installed in or attached to any equipment or any other portion of the Project or held in inventory, all costs of which shall be borne by Owner.

“Staffing Plan” shall have the meaning set forth in Section 4.6.

“Subcontracting Plan” shall have the meaning set forth in Section 2.3(e)(i)

“Subcontractors” shall mean any subcontractor, of any tier, or supplier of materials, equipment or services to O&M Contractor or any subcontractor, of any tier, or any Person engaged or employed by O&M Contractor or any Subcontractor in connection with the performance of the scope of this Agreement.

“T&M Costs” shall mean O&M Contractor’s actual, reasonable and verifiable (and reasonably documented) direct cost of labor (including home office labor directly performing the Services), support labor, material, equipment, services, tools, supplies, subcontracts, and utilities necessary to perform the T&M Services, plus ten percent (10%) for overhead and profit; *provided* that, with respect to any T&M Services for which a fixed fee has been specified in Exhibit A-2, “T&M Costs” shall mean the amount of such fee payable each time such T&M Service is performed.

“T&M Services” shall have the meaning set forth in Section 4.4(c).

“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

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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 Applicable 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.

“Term” shall have the meaning set forth in Section 3.1.

“Termination Costs” shall have the meaning set forth in Section 9.2(b).

“Third Party Claim” has the meaning set forth in Section 8.3(a).

“Unscheduled Maintenance” means the repair or replacement of any parts or components that are defective or otherwise fail to perform their intended function in accordance with the technical specifications or designs (excluding wear and tear parts, consumables and other items included in Scheduled Maintenance), including all equipment, materials and other items necessary to perform such services.

“Utility” shall mean Entergy Louisiana, LLC

“Warranty” shall have the meaning set forth in Section 10.1.

“Work” means each and every element of the maintenance, modification, repair, construction, technical services, or other activities required by this Agreement, and includes all labor, testing, materials, equipment, transportation and other items necessary to complete such activities, except for items that are expressly stated in this Agreement to be the responsibility of Owner.

## 1.2 **Interpretation.**

As used in this Agreement, the terms “herein,” “herewith” and “hereof” are references to this Agreement, taken as a whole, the terms “includes” or “including” shall mean “including, without limitation,” and references to a “Section,” “Article” or “Exhibit” shall mean a Section, Article or Exhibit of this Agreement, as the case may be, unless in any such case the context requires otherwise. All references to a given Exhibit, agreement, instrument or other document shall be a reference to that Exhibit, agreement, instrument or other document as modified, amended, supplemented and restated through the date as of which such reference is made. Except where a definition specifically refers to any Applicable Laws as in effect as of the Execution Date, references to Applicable Laws referenced in this Agreement refer to such Laws as they may be amended from time to time, and references to particular provisions of an Applicable Law include any

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corresponding provisions of any succeeding Applicable Law. A reference to a Person includes its permitted successors and permitted assigns, and reference to a Person in a particular capacity excludes such Person in any other capacity. The singular shall include the plural, and the masculine shall include the feminine and neuter, and vice versa. Unless expressly specified otherwise, reference to any “day,” “month,” or “year” shall be to a calendar day, month or year. The expression “and/or” shall connote “any or all of.” The terms “indemnification,” “indemnify,” and derivative words shall be deemed to include reference to any related compensation or reimbursement obligations.

## **ARTICLE 2 ENGAGEMENT OF O&M CONTRACTOR**

### **2.1 Engagement of O&M Contractor.**

Owner hereby engages O&M Contractor as an independent contractor to perform the Services in accordance with the terms and conditions of this Agreement. In consideration of the Fixed Fee and the T&M Costs payable to O&M Contractor for the T&M Services hereunder, O&M Contractor accepts such engagement and agrees to perform the Services in accordance with the terms and conditions hereof.

### **2.2 Relationship.**

O&M Contractor shall act as an independent contractor of Owner with respect to the performance of its obligations hereunder. Neither O&M Contractor nor its Affiliates, employees, Subcontractors, vendors or suppliers, or the employees of any such parties employed in connection with the Services shall be deemed to be agents, representatives, employees, or servants of Owner. O&M Contractor shall not have the right or authority to assume, create or incur any liability or obligation, express or implied, against, in the name of, or on behalf of Owner. This Agreement is not intended to create, and shall not be construed to create, a relationship of partnership or an association of profit between Owner and O&M Contractor.

### **2.3 Engagement of Third Parties.**

(a) All Work and/or Services shall be performed solely by O&M Contractor or by those Subcontractors that Owner may from time to time allow by its prior written approval. No Owner approval shall relieve O&M Contractor of any of its obligations under this Agreement. O&M Contractor shall be responsible to Owner for Work performed by all of its Subcontractors to the same extent it is for activities performed by O&M Contractor’s employees. O&M Contractor shall remain liable for all acts, errors, omissions and negligence of all Subcontractors. O&M Contractor shall ensure that all of its agreements with its Subcontractors contain provisions which are in conformity with and no less stringent than the provisions of this Agreement between Owner and O&M Contractor. Lists of all Subcontractors, including expenditures with those Subcontractors,

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that qualify as such small or small disadvantaged businesses shall be supplied to Owner by O&M Contractor on a timely basis.

(b) O&M Contractor shall select or permit to perform the Services only qualified, reputable, competent, and appropriately licensed Subcontractors with an established record of successful performance in their respective trades of the Services they are contracted to perform.

(c) No contract between O&M Contractor and any of its Subcontractors relating to the Services or the Project shall be deemed to release O&M Contractor from any liability to Owner under, or arising by virtue of, this Agreement, and, with respect to any claim or other action brought by Owner against O&M Contractor under, or arising by virtue of, this Agreement, O&M Contractor shall be responsible for all acts or omissions of its Subcontractors relating to the Services or the Project, including any of the work, services, equipment, or other goods provided by its Subcontractors.

(d) As between O&M Contractor and Owner, O&M Contractor acknowledges and agrees that it shall have the sole responsibility to pay its Subcontractors for any and all amounts due in connection with the Services and, without prejudice to Owner's obligation to pay O&M Contractor the Fixed Fees and T&M Costs according to the terms of this Agreement, Owner shall have no liability to remit any payment to O&M Contractor for or in connection with any Services performed by any Subcontractors arising out of, related to or in conjunction with this Agreement. In addition, without limiting Owner's other rights and protections under this Agreement, as between O&M Contractor and Owner, O&M Contractor shall be solely responsible for the payment of all O&M Contractor's employees involved in the performance of the Services (i) 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 Applicable Law or applicable labor agreements, and (ii) contributions, payroll taxes, and premiums payable under Applicable Law.

(e) Diverse Subcontracting.

(i) *Plan for Utilization of Diverse Suppliers.* O&M Contractor shall comply with the provisions contained in 48 CFR 52.219-8 (May 2004) (Utilization of Small Business Concerns) and 48 CFR 52.219-9 (Jan 2002) (Small Business Subcontracting Plan). O&M Contractor shall submit a plan for utilizing diverse suppliers to Owner's Supply Chain Director, Strategic Sourcing (the "Subcontracting Plan"). The Subcontracting Plan shall include a listing of each proposed supplier expected to be directly utilized by O&M Contractor broken out by category of service/material with the targeted spend amount for each. O&M Contractor may use the Subcontracting Plan Template, a copy of which is attached hereto as Exhibit K, to satisfy this requirement. O&M Contractor may consult with

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Owner's Supply Chain Director, Strategic Sourcing or his/her designee for assistance in identifying potential diverse suppliers.

(ii) *Reporting Diverse Supplier Spending.* O&M Contractor's reporting, as prescribed below, shall include a listing of each of the diverse suppliers by company name, address, point of contact, commodity group and/or services and spend amount. Upon request, O&M Contractor shall provide a detailed plan of action to overcome any performance gaps against its initial Subcontracting Plan. O&M Contractor shall provide quarterly reporting of diverse supplier spending through Owner's third-party managed registration and second tier spend reporting website shall be provided to both the Contract Manager identified in Section 15.1 and Owner's Supplier Diversity Manager identified in subsection (iv), below. For reporting purposes, women-owned businesses shall be limited to non-minority women. As such, ethnic minority women owned businesses shall be reported as minority-owned businesses and not a part of women-owned business reporting. O&M Contractor shall contact Owner's Supplier Diversity Manager to gain access to this website.

(iii) *Maintaining Competitive Business Practices.* Nothing contained in this Section 2.3(e) is intended to imply or to impose any obligation on the part of O&M Contractor to pay a premium for the utilization of diverse suppliers or local suppliers. Consistent with good business practices, O&M Contractor shall fulfill these requirements while maintaining competitive prices for goods and services procured from all suppliers.

(iv) Owner's Supplier Diversity Manager may be contacted as follows:

Rivers Frederick  
Supplier Diversity Manager  
Entergy Services, LLC  
L-ENT-4A  
639 Loyola Avenue  
New Orleans, LA 70113  
[rfreder@entergy.com](mailto:rfreder@entergy.com)

(v) In order to receive the diversity performance final milestone payment of two percent (2%) allocated out of the total compensation for the Work, O&M Contractor must verify both quarterly and at final invoicing that the required diversity performance target of addressable spend and the required local suppliers target of addressable spend has been achieved.

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## 2.4 Labor Relations; Means and Methods of O&M Contractor.

(a) O&M Contractor shall provide and make available, and/or shall cause its 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 Services in accordance with the standards set forth in Section 4.1, including technical assistants that are skilled and experienced in their respective trades and callings and skilled, semi-skilled, and unskilled labor. O&M Contractor's personnel, and that of its Subcontractors, shall be fully competent, qualified, licensed (to the extent required by Applicable Laws or Permits), and experienced in the duties to which they are assigned, and shall meet the other requirements herein. O&M Contractor shall have sole authority and responsibility to employ, discharge, and otherwise direct and control its employees and Subcontractors; *provided, however*, that, strictly in connection with its performance of the Services, O&M Contractor shall not employ, or permit any Subcontractor to employ, any unfit individual or anyone not skilled in the portion of the Services assigned to such individual.

(b) O&M Contractor shall be responsible for all labor relations matters relating to the Services. O&M Contractor shall use commercially reasonable efforts to employ, hire, use, or direct labor, 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 Services, delay performance of the Services, or adversely affect O&M Contractor's other obligations under or in connection with this Agreement. In addition, O&M Contractor shall use, and shall cause its Subcontractors to use, commercially reasonable efforts to maintain good working relations (i) between and among union personnel (if any) and other personnel employed by any O&M Contractor or its Subcontractors in connection with the Services and (ii) with and among Owner, unions interested in but not performing work at the Site, property owners, residents, and other Persons bordering or near the Site, affected sporting and recreational groups, the general public, and Governmental Authorities.

(c) O&M Contractor shall ensure (with respect to its employees), and shall cause its Subcontractors to ensure (with respect to their respective employees), that at the time of hiring, all personnel performing the Services are in possession of all such documents (including visas, driver's licenses and work permits) as may be required by any Applicable Law. At the request of Owner, O&M Contractor shall provide any such documentation reasonably requested to Owner in a timely fashion in order to the extent required for Owner to comply with any request or requirement of any Governmental Authority.

(d) Unless this Agreement otherwise provides specific instructions concerning a means and/or method, O&M Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating the Services consistent with the terms of this Agreement, including the timely performance by its Subcontractors and agents.

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(e) O&M Contractor warrants and represents that it will not use any retiree of Owner or its Affiliates to perform any portion of the Work, as an employee, Subcontractor (including as a 1099 worker) or in any other capacity, if the individual has not been retired from Owner or Affiliates for at least six (6) consecutive months prior to performing services for O&M Contractor. O&M Contractor shall indemnify and hold harmless Owner and its past, present and future Affiliates, and any one or all of its or their past, present and future officers, directors, employees, plan fiduciaries, shareholders, and agents with respect to any Claims that any one or all of them may incur relating to or arising from or out of or in connection with any allegations by any of O&M Contractor's personnel or O&M Contractor or any third party, including any Governmental Authority, that (i) any of O&M Contractor's personnel is or was an employee of Owner or any Affiliate of Owner; (ii) any individual or individuals are entitled to benefits from Owner or any Affiliate of Owner, including benefit or welfare plan participation, vacation, or sick leave; or (iii) asserts any claim or allegation of wrongful termination, libel, slander, interference with employment or business relationships, or any type of employment action or discrimination in employment activities.

**2.5 Maintenance Audit.** At any time during the Term, upon reasonable coordination with O&M Contractor and provided O&M Contractor has the right to be present during such audit, Owner may inspect or audit the Project or any part thereof, any documents prepared in the course of performing the Services, O&M Contractor's or its Subcontractors' employees performing Services at the Site, any additional documentation as reasonably requested by Owner with respect to O&M Contractor's performance of the Services in order to determine if the Services are being performed in accordance with the requirements of this Agreement or otherwise in connection with Owner's regulatory filings, inquiries or claims. Owner shall be responsible for the reasonable costs of any such inspection and audit. O&M Contractor shall, promptly upon notice of any failure to perform the Services in accordance with the requirements of this Agreement, correct or otherwise remedy such failure, without cost to Owner. Owner shall be permitted to make copies any documents reviewed in connection with an audit under this Section 2.5.

### **ARTICLE 3 TERM AND RENEWAL**

#### **3.1 Term.**

The term of this Agreement shall commence on the Project Substantial Completion Payment Date (the "Commencement Date") and shall continue for a period of [\_\_\_\_\_( )]<sup>1</sup> years after the Commencement Date (the "Term"); *provided* that (a) beginning on the second (2<sup>nd</sup>) anniversary of the Commencement Date and continuing each year of the Term

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<sup>1</sup> **Note to O&M Contractor:** Please provide quotes for 2-, 3-, 4-, and 5-contract year terms for ELL's consideration.

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thereafter, Owner may, upon thirty (30) days' written notice terminate this Agreement if (i) the Measured Availability of the PV Plant is below ninety-five percent (95%) in the previous Operating Period, (ii) the Measured BESS RT Efficiency is less than ninety-five percent (95%) of Guaranteed BESS RT Efficiency, or (iii) the BESS Availability is less than ninety-five percent (95%) in any previous Operating Period, and (b) this Agreement and the Term are otherwise subject to earlier termination pursuant to ARTICLE 9.

#### **ARTICLE 4 DUTIES OF O&M CONTRACTOR**

##### **4.1 General Operating Standards.**

(a) O&M Contractor has read and understands the requirements of all Project Agreements provided to it by Owner and shall comply with the material requirements thereof in providing the Services, including the delivery of any required notices and obtaining any required consents applicable to any of the Services.

(b) Subject to Section 6.3, O&M Contractor shall perform the Services in accordance with Applicable Law, the Permits, Prudent Industry Practice, Energy Storage Industry Standards, the terms of all the Project Hardware Warranties, the BOT Warranty, the Project Agreements, the O&M Manuals, the Annual Operating Plan, all applicable requirements of O&M Contractor's insurance policies in respect of the Services, and all other requirements of this Agreement, including the Exhibits hereto. Should the rules, standards or guidelines derived from the foregoing sources be inconsistent in any regard, O&M Contractor shall consult with Owner for direction, but in the interim shall follow the most stringent of such inconsistent standards. Without limiting the foregoing, O&M Contractor shall use commercially reasonable efforts to maximize net profit, energy production, and Project efficiency; to optimize the useful life of the Project; to utilize O&M Contractor's personnel in the performance of the Services; and to minimize Project downtime and T&M Costs, including by scheduling outages during non-daylight hours and working evenings to return the Project to service to limit downtime during daylight hours. While performing any Services under this Agreement, O&M Contractor will comply with all terms and requirements applicable to the operation, maintenance and monitoring of the Project as specified (i) in the Project Hardware Warranties and the BOT Warranty, and shall not take or fail to take any action that could release, void or waive any Project Hardware Warranty or the BOT Warranty, and (ii) in the written instructions of the original equipment manufacturers or vendors with respect to equipment supplied by them included in the Project. O&M Contractor shall coordinate with the original equipment manufacturers who supplied the components for the Project to obtain any technical information letters, bulletins, or other maintenance requirements developed or provided by such original equipment manufacturers during the Term, and O&M Contractor shall incorporate the recommendations in such technical information letters, bulletins and other maintenance requirements into the Services. Owner agrees to provide O&M Contractor

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with written notice of any changes to the foregoing terms and requirements received by Owner.

(c) O&M Contractor acknowledges that the major policies and business decisions concerning the Project, including those listed below, shall be established by Owner. The day-to-day management of the Project shall be the responsibility of O&M Contractor as further described in Exhibit A; *provided* that O&M Contractor shall not be responsible for the scheduling of energy or other dispatch of the Project. O&M Contractor shall obtain Owner's permission before engaging in activities with respect to the Project that are not within the scope of Exhibit A or required by Emergency (subject to Section 4.5). O&M Contractor shall not, under any circumstances, unless otherwise directed by Owner, undertake any of the following actions:

(i) subject to Section 5.3, cause the creation or assumption by Owner of any indebtedness for borrowed money, or cause any mortgage, lien, security interest or encumbrance on any assets or properties of the Project;

(ii) cause Owner to act as surety, grant guaranties or incur similar liabilities on behalf of third parties, directly or indirectly, whether for borrowed money or otherwise;

(iii) cause the conveyance, modification, sale or other disposition of any part of the Project; or

(iv) negatively change the capacity characteristics of the Project from the level achieved at the Project Substantial Completion Date.

#### **4.2 Operation and Maintenance Services.**

During the Term, O&M Contractor shall perform all maintenance, diagnostics, repair and replacement services, Scheduled Maintenance, and Unscheduled Maintenance necessary to operate and maintain the Project in accordance with the performance standards set forth in Section 4.1(b) and to achieve the Guaranteed Performance, including providing all work, materials, Consumables, items, labor and services specifically identified in, or reasonably inferred from this Agreement, including Exhibit A-1. For the avoidance of doubt, (a) all of O&M Contractor's obligations under this Agreement are included in and shall be performed for the Fixed Fee, unless specifically excluded as T&M Services, and (b) all labor required to perform Unscheduled Maintenance is included in the Fixed Fee but any replacement parts or equipment necessary to perform such Unscheduled Maintenance shall be provided as a T&M Service.

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#### 4.3 Administration and Reporting Requirements.

During the Term of this Agreement, O&M Contractor shall perform the administration and reporting services required under this Agreement, including as set forth in Exhibit A-1.

#### 4.4 Spare Parts and Consumables; T&M Services.

(a) [Owner has procured certain Spare Parts for the Project under the terms of the BOT Agreement.]<sup>2</sup> O&M Contractor may utilize such Spare Parts in the performance of the Services; *provided* that O&M Contractor promptly replaces such Spare Parts at Owner's sole cost and expense to the extent not covered by the BOT Warranty or the Project Warranties. O&M Contractor shall provide all Consumables required for the performance of the Services. To the extent that Owner desires, at its option, to purchase additional Spare Parts beyond the Spare Parts purchased under the BOT Agreement, O&M Contractor shall supply such Spare Parts to Owner at T&M Costs. The mark-up included in the T&M Costs for any Spare Parts O&M Contractor procures for Owner shall be applied only to the base cost of the procurement and not to any taxes, shipping, handling or other item that the vendor includes on its invoice. O&M Contractor shall provide original invoicing with all reimbursement requests.

(b) All Spare Parts and other materials procured or utilized by O&M Contractor for performance under this Agreement during the term of any applicable Project Hardware Warranties or the BOT Warranty shall be of specification and quality required so as to in no way invalidate such Project Hardware Warranties or BOT Warranty, or any portion thereof. Spare Parts may include new and/or newly refurbished parts; *provided* that any newly refurbished parts shall be used only upon written approval of Owner.

(c) O&M Contractor shall perform the services set forth on Exhibit A-2 at T&M Costs (the "T&M Services" and, together with the services set forth in Section 4.2, the "Services").

(d) Any T&M Services included in the Annual Operating Plan approved by Owner may be performed in accordance with the approved budget for such T&M Services set forth in such Annual Operating Plan. For minor T&M Services not included in the Annual Operating Plan, the T&M Cost of which is reasonably anticipated not to rise to the level of a Major Undertaking, O&M Contractor may proceed with the repairs in question without specific prior authorization from Owner and invoice Owner for the amount of such T&M Services; *provided, however*, that (i) O&M Contractor shall not continue performing such T&M Services without prior written approval from Owner once the cost of such T&M Services exceeds (or is reasonably expected to exceed) the level of a Major Undertaking; and (ii) O&M Contractor shall not perform the type of T&M

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<sup>2</sup> **NTD:** Parties to discuss spare parts inventory.

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Services authorized by this Section 4.4(d) once the aggregate cost of such T&M Services exceeds [Twenty Thousand Dollars (\$20,000)] in any calendar year without prior written approval from Owner.

(e) Pricing Procedure.

(i) Without limiting Section 4.4(d), if T&M Services not included in the Annual Operating Plan that would constitute a Major Undertaking are requested by Owner or O&M Contractor, O&M Contractor shall provide a proposed firm fixed price for performing such services, including any Spare Parts or Consumables. Owner shall respond promptly (and in any event within five (5) Business Days, unless a longer period is mutually agreed to between the Parties or is otherwise required under the terms of any financing agreement with a Project Lender, with notice of such longer period provided to O&M Contractor) to any O&M Contractor proposal for T&M Services delivered by Owner, and either provide O&M Contractor with written authorization to initiate the requested services on the proposed fixed fee or at T&M Cost or inform O&M Contractor that O&M Contractor is not authorized to initiate the requested services. Notwithstanding the foregoing, for any T&M Services for which a fixed fee is specified in Exhibit A-2, O&M Contractor shall obtain Owner's approval to perform such services but shall not submit or negotiate any other fee arrangement.

(ii) Without limiting O&M Contractor's rights to compensation for an Emergency as provided in Section 4.5 and except as otherwise expressly permitted pursuant to Section 4.4(d), O&M Contractor shall not perform any T&M Services unless and until Owner authorizes O&M Contractor to do so in writing. Upon the receipt of written authorization from Owner, O&M Contractor shall promptly perform such T&M Services; *provided* that, if the authorization for such T&M Services is based on an estimate (rather than a firm fixed price), O&M Contractor shall not exceed (or allow its Subcontractors working on such T&M Services to in the aggregate incur cost overruns which result in an exceedance of) the estimated cost for such services as disclosed to Owner by O&M Contractor under the applicable order for T&M Services (or response thereto) without Owner's prior written consent.

**4.5 Emergencies.**

Notwithstanding Section 4.4(d) and (e), in the event of any Emergency, O&M Contractor shall take such action as may be reasonable and necessary to prevent, avoid or mitigate injury or death to Persons, or damage or loss to the Project or the environment (including any endangered species or other wildlife). O&M Contractor shall, as soon as practicable, report any such Emergency, including O&M Contractor's response thereto, to Owner. To the extent the Services performed to mitigate the Emergency were not caused by O&M Contractor's or its Subcontractors' negligence, willful misconduct or failure to

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perform Services required to be performed hereunder, O&M Contractor shall be reimbursed at T&M Costs for any costs or expenses incurred in taking such action to prevent, avoid or mitigate such Emergency.

#### **4.6 Staffing Plan.**

Not later than thirty (30) days after the Commencement Date, O&M Contractor shall communicate the staffing plan for the Project, which shall be in form and substance reasonably satisfactory to Owner (the “Staffing Plan”). The Staffing Plan shall remain in effect throughout the Term, subject to updating, revision, and amendment as the Parties may reasonably agree. Owner and O&M Contractor shall endeavor in good faith to agree on changes to the Staffing Plan as are suggested by either Party. Notwithstanding the foregoing, the Key Personnel shall at all times hold the positions and be dedicated to the performance of the duties described in Exhibit B. Any replacement or substantial reduction or change in responsibility of any of the Key Personnel shall be subject to the prior written consent of Owner, which consent shall not be unreasonably withheld. O&M Contractor’s Representative designated in Exhibit B has full responsibility for the prosecution of the Services and shall act as a single point of contact in all matters on behalf of O&M Contractor. O&M Contractor shall remain solely responsible for determining working hours, rates of compensation and all other matters relating to the employment of such personnel. O&M Contractor shall at all times remain responsible for the actions and omissions of its employees. Owner shall have the right to require that O&M Contractor replace such personnel for reasonable cause.

#### **4.7 Annual Operating Plan.**

At least thirty (30) days prior to the scheduled Project Substantial Completion Date and at least thirty (30) days prior to the anniversary of the Commencement Date each year of the Term thereafter, O&M Contractor shall prepare and submit to Owner a proposed annual operating plan, consistent with the requirements set forth in Exhibit A-1, for the upcoming Operating Period setting forth the underlying assumptions and implementation plans in connection with the Services, including anticipated operations, maintenance, repairs and capital improvements, scheduled outages, procurement, staffing, personnel and labor activities, training plans, program enhancements and administrative activities and any anticipated T&M Services and budget for T&M Costs expected during such Operating Period. Owner shall promptly review O&M Contractor’s proposed annual operating plan and may, by written request, propose changes, additions, deletions, and modifications thereto. If O&M Contractor does not concur with any or all of Owner’s proposed changes, Owner and O&M Contractor will discuss the open issues and shall use good faith efforts to resolve such issues. After such consultations, O&M Contractor shall submit a revised proposed annual operating plan to Owner incorporating any agreed-upon revisions. Owner shall thereafter either (a) approve the revised proposed annual operating plan or (b) return such revised proposed annual operating plan together with proposed changes, additions, deletions, or modifications thereto for O&M Contractor’s approval, which approval shall

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not be unreasonably withheld. The final document resulting from this process shall be the “Annual Operating Plan.” The Annual Operating Plan shall remain in effect throughout the applicable Operating Period, subject to updating, revision, and amendment as may be proposed by either Party and consented to in writing by the other Party, which consent shall not be unreasonably withheld.

#### 4.8 **Deviations from Annual Operating Plan.**

O&M Contractor shall notify Owner as soon as reasonably possible of any actual or anticipated material deviations or discrepancies from the projections contained in the Annual Operating Plan.

#### 4.9 **Operating Data and Records.**

O&M Contractor shall monitor and record all operating data in accordance with Exhibit H. O&M Contractor shall obtain from Seller and maintain an inventory of original Project installation documents, including the following:

- As-built drawings, site plans, photo records, electrical single-line diagrams, schematics, drawings, performance estimates, insolation/shade studies
- Installed component "cut sheets", specifications, and warranties (including warranties from system installer)
- Operation manuals associated with any equipment (including emergency shutdown and normal operating procedures)
- Expired contracts for preventative maintenance, service, and operations

O&M Contractor shall maintain an organized set of field service reports for all Services performed. Additionally, O&M Contractor shall include in this set of documents receipts of all Consumables, Spare Parts and other items purchased or obtained by O&M Contractor for the Project. O&M Contractor shall provide to Owner any such documentation upon Owner's request. O&M Contractor shall make such operating data available to Owner upon Owner's request at any time, within seventy-two (72) hours of such request. Such operating data shall include operating logs, records, reports, meter and gauge readings, Maintenance Specific Logs, records, electrical output information, and cost information.

It is expressly agreed between the Parties that any Project documents and records prepared by O&M Contractor during the Term solely for the purposes of this Agreement shall be directly prepared for Owner's benefit and shall automatically become Owner's Property. Any such documentation shall be stored by O&M Contractor on behalf of Owner until its final delivery to Owner. At the end of the Term, O&M Contractor shall provide

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all records related to the Project and the Services to Owner. Owner hereby grants to O&M Contractor a non-exclusive, royalty-free license to use such documentation for internal O&M Contractor purposes. O&M Contractor may retain a copy of all records related to the Project to comply with O&M Contractor's auditors' and/or regulators' expectation of best practices.

#### 4.10 Reports.

O&M Contractor shall upon request cooperate with Owner in complying with the reasonable reporting requirements of any Project Lenders and any other reasonable reporting requirements relating to the Project and shall, from and after the Commencement Date, furnish or cause to be furnished to Owner the following reports (and any other reports reasonably requested by Owner) concerning the Project operations and the Services:

(a) Monthly Reports. Within ten (10) Business Days after the end of each calendar month, O&M Contractor shall submit:

(i) a comprehensive report, in detail reasonably acceptable to Owner, that (A) details all operations and maintenance activities conducted during the prior calendar month, including all procurements, capital improvements, corrective maintenance and repairs (whether planned or unplanned), training activities and significant interactions with Governmental Authorities, and includes a comparison (with respect to quantitative items) of actual values to corresponding values in the Annual Operating Plan; (B) outlines all significant issues about which O&M Contractor is aware and which relate to the operation or maintenance of the Project, including information regarding labor relations, accidents, safety issues, environmental and Permit issues (including any notices of violation), any litigation, material claims or disputes, and any significant operating problems, in each case to be accompanied by action plans to address such issues; (C) provides up-to-date information for the Project regarding the power generation and availability (each on a monthly and year-to-date basis); and (D) provides a summary of all technical information letters and service bulletins received from original equipment manufacturers, whether such technical information letter or service bulletin is required to be followed by the original equipment manufacturer to maintain the original equipment manufacturer's warranty, and if not required to maintain the original equipment manufacturer's warranty, whether O&M Contractor recommends following the guidance in such technical information letter or service bulletin;

(ii) a statement that compares all T&M Costs paid or incurred (for the prior month and year-to-date) to the relevant portions of the applicable Annual Operating Plan and explains in reasonable detail any deviations between the two (and outlines any remedial plans to address any overruns, if possible); and

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(iii) all BESS operating, service and outage information, including capacity, availability and round trip efficiency information and calculations required under Exhibit G-2.

(b) Annual Reports. As soon as available, and in any event within thirty (30) days after the end of each Operating Period, O&M Contractor shall submit to Owner an annual report (“Annual Report”) describing, in detail substantially similar to that contained in the monthly reports referred to in Section 4.10(a), all of the Project operations for such Operating Period and presenting a comparison of the Project operations with the plan set forth in the Annual Operating Plan for such Operating Period and with the details of Project operations presented in the preceding Operating Period’s Annual Report, if any. The Annual Report shall also include (i) an updated inventory of all Project equipment and Spare Parts, (ii) the Maintenance Specific Log, and (iii) annual lost energy production (in kWh) and period hour monthly availability for the Project. Within thirty (30) days after the submission of each Annual Report, if requested by Owner, O&M Contractor shall meet with Owner to review and discuss the report and to report upon any other aspects of the Project operations that Owner may request.

(c) Availability of Production Statistics. Production statistics for the PV Plant, including energy generation, auxiliary load consumed, ambient conditions (temperature, wind speed/direction, solar insolation, etc.) and availability shall be collected by SCADA system and O&M Contractor shall make such production statistics generated by the SCADA system available to Owner at all times.

#### 4.11 **Metering.**

(a) Responsibility. Responsibility for Project Meters is set out in this Section 4.11, and Exhibit A-1 and Exhibit G-1.

(b) Testing.

(i) O&M Contractor shall arrange for the testing and calibration of all Project Meters on installation and thereafter on a regularly scheduled basis in compliance with the applicable manufacturer’s recommendations.

(ii) No more than once in any twelve (12) month period, Owner shall have the right to direct O&M Contractor to arrange for the testing of any Project Meter or measuring equipment; *provided* that Owner (A) has reasonable grounds to suspect that such Project Meter or measuring equipment is not accurate in any respect, and (B) shall have notified O&M Contractor of the discrepancy or suspected discrepancy in writing along with any evidence in support of such claim. O&M Contractor shall not hamper, impair or otherwise improperly manipulate any Project Meters in order to affect their performance analysis.

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(c) Testing Costs. The costs of all testing pursuant to this Section 4.11 shall be borne by O&M Contractor except in the case of testing carried out at the request of Owner.

#### 4.12 **Access to Data and Meters.**

Throughout the Term, and thereafter to the extent relevant to calculations necessary for periods prior to the end of the Term, and subject to any confidentiality obligation owed to any third party and/or any restrictions on the disclosure of information which may be subject to any Intellectual Property Rights restricting disclosure:

(a) Owner shall allow O&M Contractor access to all data relating to the electricity production of the PV Plant and the weather conditions at the Site, it being understood that it is O&M Contractor's responsibility to determine the performance of the Project, and any other calculations as required under this Agreement.

(b) Owner shall allow O&M Contractor access to all data from all meters which measure conditions at the Site for the Project, or which measure the electricity production of the PV Plant.

(c) O&M Contractor shall be entitled to use the foregoing data in connection with the performance of the Services and for its internal purposes subject to Section 17.5.

#### 4.13 **NERC Compliance.**

O&M Contractor shall register as the Generator Operator of the Facility effective as of the Commencement Date. Owner shall register as Generator Owner of the Facility. O&M Contractor shall comply with all NERC obligations related to the Project or this Agreement applicable to the Generator Operator required as of the Effective Date, new NERC standards becoming effective after the Effective Date but publicly available on the Effective Date, and any new NERC standards that require compliance within twelve (12) months after the Commencement Date, including those items listed as O&M Contractor's sole obligation in Part II of Exhibit F. In addition, O&M Contractor shall perform all tests and prepare all documents and models necessary to support Owner's submission and defense of the NERC obligations specified in Part I of Exhibit F. Owner and O&M Contractor shall provide such cooperation and support to the other Party as such other Party may reasonably request with respect to the shared responsibility NERC compliance obligations in Part III of Exhibit F; *provided* that the Party listed as the responsible party in Exhibit F for such obligation shall have the overall responsibility for compliance with such NERC obligation.

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**ARTICLE 5**  
**O&M CONTRACTOR’S GENERAL COVENANTS**

**5.1 Environmental Matters.**

(a) O&M Contractor shall obtain and maintain in full force and effect (or obtain and maintain valid exemptions from) all of the Permits required under Applicable Laws, including Environmental Laws, or otherwise necessary or desirable for O&M Contractor to perform the Services, including the Permits set forth on Part I of Exhibit I, and shall perform all Services in compliance with such Permits, all Permits held by Owner, and Applicable Law, including Environmental Laws. As part of the Services, O&M Contractor shall review all Applicable Laws containing or establishing compliance requirements in connection with the operation and maintenance of the Project and shall (i) assist Owner, at Owner’s request, in securing and complying with, as appropriate, all other necessary Permits (and renewals of the same) and (ii) develop and maintain precautions and procedures necessary to comply with Applicable Laws, including those related to prevention of injury to Persons or damage to property at the Project. To the extent the Permits set forth on Part I of Exhibit I are required by Applicable Law to be in the name of Owner, Owner shall cooperate with O&M Contractor in O&M Contractor’s efforts to obtain and maintain such Permits.

(b) O&M Contractor shall not, nor shall it direct any other Person to, bring any Hazardous Substances on the Site, other than Hazardous Substances to be used by O&M Contractor or any Subcontractor in a manner that both (i) does not violate, or require reporting or disclosure under, or result in liability pursuant to any Environmental Laws, and (ii) is consistent in quantity and use with customary business practice for operating and maintaining photovoltaic solar energy plants, such as motor fuels, solvents and lubricants (collectively, “Permissible Materials”).

(c) Solely as between O&M Contractor and Owner (and without affecting or waiving any rights or Claims that O&M Contractor may have against Persons other than Owner), O&M Contractor shall bear all responsibility and liability for (i) any Hazardous Substances brought, created or generated on the Site by O&M Contractor or any Subcontractor or any of its agents or employees, including with respect to any Release of such Hazardous Substances, or (ii) the negligent Handling or Release of pre-existing Hazardous Substances by O&M Contractor or any Subcontractor or any of its agents or employees.

(d) Title to all Hazardous Substances used in connection with the Services or other Permissible Materials stored by O&M Contractor or a Subcontractor at the Site shall be held by O&M Contractor.

(e) O&M Contractor shall minimize the use of Hazardous Substances in performance of the Services and shall not utilize, or permit or cause any Subcontractor to

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utilize, such Hazardous Substances as are prohibited under Applicable Law, including Environmental Law, from being imported into or used in the United States. O&M Contractor shall maintain an updated file of all material safety data sheets for all Hazardous Substances used in connection with performance of the Services at or near the Site and shall deliver an update of such file to Owner no later than ten (10) Business Days after the end of each month. O&M Contractor shall maintain an accurate record and current inventory of all Hazardous Substances used in performance of the Services at or near the Site, which record shall identify quantities, location, storage, use and final disposition of such Hazardous Substances. Following written notice to and coordination with Owner, O&M Contractor shall dispose or cause to be disposed of all Hazardous Substances brought, created or generated on the Site by O&M Contractor or a Subcontractor pursuant to and in accordance with a contract with a licensed, insured, competent and professional contractor contracted by O&M Contractor in a safe manner and in accordance with Applicable Laws, including Environmental Laws.

(f) Upon O&M Contractor's discovery or receipt of notice, directly or indirectly, of the existence of Hazardous Substances on, in, above, or under the Site (other than a properly contained and stored or utilized Hazardous Substances that is reasonably necessary to perform the Services) or any Release or possible Release of a Hazardous Substances in connection with or potentially affecting the Services or the Site, O&M Contractor shall: (i) issue prompt verbal notification thereof to Owner; (ii) notify the appropriate Governmental Authorities and any other Person as and to the extent required by any Applicable Law or Permit after first providing to Owner, 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 Owner to be considered in good faith by O&M Contractor), or if such advance notice is not reasonably possible, promptly after giving such notice, inform Owner that it has so notified such Governmental Authorities and Persons; (iii) promptly cease performance of any Services in the area known or suspected to contain Hazardous Substances Released or discovered by O&M Contractor; (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 Owner a written report setting forth reasonable details surrounding the discovery, a preliminary recommended course of action; and (v) use commercially reasonable efforts to mitigate the effects of such discovery or notice on the performance of the Services. Without limiting O&M Contractor's indemnification obligations in Article 8, if there is a discovery or receipt of notice of any Hazardous Substances or any Release or possible Release thereof for which O&M Contractor or a Subcontractor is responsible hereunder, O&M Contractor shall promptly mitigate, or cause its Subcontractors to promptly mitigate, the migration of and Remediate the same in accordance with the Applicable Law (including Environmental Law) and Permits, and any costs and expenses and any delay in performance of the Services incurred by O&M Contractor as a result thereof, whether arising out of the mitigation of

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the migration of, or the Remediation of, such Hazardous Substances shall be exclusively for O&M Contractor's account.

(g) O&M Contractor and Owner acknowledge and agree that, in developing and performing any action under this Section 5.1, O&M Contractor shall utilize, to the extent not specifically precluded by Applicable Law or any Permit, the following factors in developing the particular action(s) to be undertaken:

Permit;

(i) specific requirements, if any, of Applicable Law or any

(ii) technical feasibility of the action(s);

(iii) economic reasonableness of the action(s);

(iv) continued industrial use of the Site; and

(v) 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.

(h) Communication.

(i) O&M Contractor shall promptly notify Owner of any communication from any Governmental Authority that alleges that O&M Contractor is not acting in compliance with Applicable Law or any Permit.

(ii) Subject to the other terms of this Agreement, O&M Contractor shall promptly provide Owner with copies of all data, results, and reports prepared by or for O&M Contractor, and all correspondence of O&M Contractor, directly or indirectly, with any Governmental Authority, regarding any Release of any Hazardous Substances in connection with the Services or this Agreement.

## 5.2 **Personnel.**

O&M Contractor shall provide and make available as necessary all such labor and professional, supervisory, and managerial personnel as are required to perform the Services. O&M Contractor's operation and maintenance personnel as a group, including any Persons engaged by O&M Contractor pursuant to Section 2.3, shall be qualified in operating and maintaining solar generating facilities similar to the PV Plant and battery energy storage facilities similar to the BESS, and any Persons engaged by O&M Contractor

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pursuant to Section 2.3 shall be qualified and experienced in the duties to which they are assigned. Except as otherwise provided in this Agreement and training required by Owner, O&M Contractor shall be solely responsible for the training of its personnel. O&M Contractor shall retain sole authority, control and responsibility with respect to labor matters in connection with the performance of the Services by its personnel.

### **5.3 Liens.**

Except for liens arising out of a failure of Owner to make any payment when due hereunder to O&M Contractor or any other Person providing labor or services to the Project under contract to Owner (“Payment Obligations”), O&M Contractor shall not (to the extent permitted by Applicable Law), as a consequence of its own acts or acts of its suppliers and Subcontractors, suffer or permit liens or encumbrances arising out of the furnishing of work, goods or Services by O&M Contractor or its suppliers or Subcontractors to attach to the Project or the Site and shall secure the release of any such liens that attach to the Project or the Site which do not arise out of the failure of Owner to meet all Payment Obligations.

### **5.4 O&M Contractor’s Representative.**

O&M Contractor shall appoint a representative to perform on O&M Contractor’s behalf certain matters related to the day-to-day administrative, fiscal, operation, maintenance and project contract management services for the Project.

### **5.5 Safety & Security.**

O&M Contractor shall be responsible for the security of the Site and the Project during the duration of the Term. O&M Contractor shall comply with, and require all Subcontractors to comply with, the security and safety procedures set forth in Exhibit J. O&M Contractor shall notify Owner within ten (10) Business Days of any revisions of such security and safety procedures. O&M Contractor shall hold O&M Contractor personnel, including any Persons engaged pursuant to Section 2.3, (when working at the Site) to the standards set forth in Exhibit J, including the policies regarding drugs, alcoholic beverages and weapons, and any other policies of the lessor of the Site. O&M Contractor shall promptly remove, and deny access to the Site to, any O&M Contractor personnel, including any Persons engaged pursuant to Section 2.3, who violate such standards hereunder upon Owner’s request, and in any event within one (1) Business Day of receipt of such request. In addition to the foregoing, in the event Owner believes that any O&M Contractor personnel, including any Persons engaged pursuant to Section 2.3, is violating the standards of care and performance contained in this Agreement, upon notice from Owner, O&M Contractor and Owner shall meet to discuss and mutually agree upon a resolution of such issues which may, if deemed necessary, include the removal of such O&M Contractor personnel, including any Persons engaged pursuant to Section 2.3. O&M Contractor shall promptly provide Owner with: (a) verbal notification of recordable accident(s) within twenty four (24) hours, (b) written accident reports for O.S.H.A. lost

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time and recordable accidents that occur at or in connection with the Project within seven (7) Business Days of the accident, prepared in accordance with the safety and security assurance program approved by Owner pursuant to this Section, and (c) copies of all written communications with any Governmental Authority and insurance company (including any notices, written warnings, notice of violation, or cease and desist orders) with respect to accidents or inspections that occur at or in connection with the Project within seven (7) days of receipt by O&M Contractor, and thereafter provide such written reports relating thereto as Owner may reasonably request.

## **ARTICLE 6 FEES AND COST REIMBURSEMENT**

### **6.1 Fixed Fees.**

During the Term, Owner shall pay O&M Contractor an annual fee in the amount of \$[ ] (“Fixed Fees”) as full and complete compensation for performing the Services (other than the T&M Services).

### **6.2 T&M Costs.**

(a) T&M Services are not included in the Fixed Fee. Provided that the T&M Services are authorized by Owner or the express terms of this Agreement and rendered by O&M Contractor, such T&M Services shall be billed to Owner at the T&M Costs and shall be considered “Services” for the purpose of this Agreement.

(b) T&M Costs shall be invoiced monthly in arrears and shall be payable as set forth in Section 6.3.

### **6.3 Payment Procedure.**

(a) The Fixed Fees shall be payable in quarterly installments, in arrears, on January 1st, April 1st, July 1st and October 1st of each calendar year of the Term and shall be prorated for partial months at the beginning and end of the Term.

(b) On or before the fifteenth (15th) day of each month following the Commencement Date, O&M Contractor shall submit to Owner a detailed invoice and all supporting documentation of the T&M Costs incurred by O&M Contractor in the prior month.

(c) All payments made by Owner to O&M Contractor under this ARTICLE 6 shall be paid within forty-five (45) days of receipt of a proper invoice by Owner by wire transfer of immediately available funds to O&M Contractor at an account designated in writing by O&M Contractor.

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(d) In the event Owner is affected by a Force Majeure Event and this Agreement has not otherwise been terminated pursuant to ARTICLE 9, Owner shall continue to pay O&M Contractor the Fixed Fees, as well as T&M Costs (*provided* that O&M Contractor takes reasonable measures to mitigate its costs after its receipt of notice of Owner being affected by a Force Majeure Event); *provided* that the Fixed Fees shall be equitably adjusted to account for any reduction in Services covered by the Force Majeure Event.

(e) Owner's Contract Manager identified in Section 15.1 and the appropriate contract number must be referenced on all invoices. Invoices shall be submitted electronically to Entergy using the self-service functionality within the supplier portal, <https://supplier.entergy.com/psp/supprd/SUPPLIER/ERP/>, unless otherwise approved by Entergy Supply Chain. If O&M Contractor receive Supply Chain approval, O&M Contractor may email invoices to <https://accountspayableinvoices@entergy.com>. Submission by email is limited to one invoice in PDF format not to exceed 15 MB. In the event invoices are unable to be submitted through either the supplier portal or by email then O&M Contractor shall contact [esupplier@entergy.com](mailto:esupplier@entergy.com).

(f) Owner may withhold from any payment any amount reasonably necessary to protect Owner from loss resulting from:

(i) Amounts subject to a good faith dispute; *provided* that the undisputed amount shall be paid;

(ii) O&M Contractor's or any of its Subcontractors' failure to perform the Services in accordance with this Agreement;

(iii) O&M Contractor's failure to pay any undisputed liquidated damages with respect to the Guaranteed Performance, the Guaranteed BESS Availability, or the Guaranteed BESS RT Efficiency;

(iv) Claims for indemnification made against Owner on account of O&M Contractor's performance or furnishing of the Services; or

(v) O&M Contractor's failure to pay its Subcontractors when due.

(g) O&M Contractor shall include the applicable withheld amounts on the next invoice after the issue for which Owner has withheld payment pursuant to Section 6.3(f) has been resolved to Owner's satisfaction. No interest shall be payable on amounts withheld pursuant to Section 6.3(f), unless such amount is determined to have been improperly withheld pursuant to Section 17.4.

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#### 6.4 **Records and Audits.**

Except as otherwise required by Applicable Laws, O&M Contractor shall keep books and records in accordance with generally accepted accounting principles with respect to T&M Costs, the Project or such other property in which Owner has an interest and which comprises or is used in connection with the Project for a period of seven (7) years after the applicable creation date of such book or record. O&M Contractor shall make such books and records available, upon reasonable notice to O&M Contractor, for inspection and audit by Owner or its designated agents at Owner's expense during O&M Contractor's regular business hours and at the office where such books and records are kept; *provided* that O&M Contractor's company software, books and records not directly related to this Agreement and personnel records shall not be subject to inspection or audit.

#### 6.5 **Past Due Amounts.**

Any amounts due under this Agreement, if not timely paid by the Party from whom they are due, shall bear interest at the per annum rate equal to the Prime Rate (as published in The Wall Street Journal) plus two percent (2%), prorated on the basis of a three hundred sixty-five (365) day year (or such lower rate as is the maximum rate permitted by Applicable Law) from the date that such amount was due, taking into account any grace period herein provided until the time that such amount is paid.

#### 6.6 **Taxes; Other Payments.**

(a) Owner and O&M Contractor agree the Fixed Fee Services to be performed may be comprised of taxable and non-taxable services for sales and use tax purposes. O&M Contractor shall itemize taxable and non-taxable services on each quarterly instalment invoice. The Fixed Fee does not include any sales, use, gross receipts, or other similar taxes (other than such taxes on O&M Contractor's consumables), O&M Contractor shall invoice, collect and remit any applicable sales, use, gross receipts and similar taxes on the taxable services performed to the proper taxing jurisdiction. To the extent O&M Contractor includes or bills Owner for any not applicable / incorrect sales, use, gross receipts or similar taxes on non-taxable Services, and the same has been conclusively agreed between the Parties, Owner shall be entitled to a refund of such taxes from O&M Contractor immediately upon thirty (30) days from the date of the request.

(b) Owner shall be responsible for all applicable sales, use, gross receipts and similar taxes levied on T&M Services performed pursuant to this Agreement; *provided, however,* that O&M Contractor shall separately state the price of materials, taxable services and non-taxable services on its invoice. O&M Contractor shall invoice, collect and remit any applicable sales, use, gross receipts and similar taxes to the proper taxing jurisdiction. Owner shall not be responsible for Contractor Taxes and any sales, use, gross receipts or similar taxes for which Owner, in its sole discretion, asserts any available exemption or exclusion from such taxes. O&M Contractor shall cooperate with Owner to diligently

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prosecute any exemption or exclusion (including, if applicable, a request for refund) asserted by Owner, in Owner’s reasonable discretion, from any sales, use, gross receipts or similar taxes on any item or services furnished in connection with the Work.

**ARTICLE 7  
DUTIES OF OWNER; OWNER’S RIGHTS**

**7.1 Necessary Documents.**

As of the Execution Date, Owner has provided to O&M Contractor or O&M Contractor otherwise has copies of all Project Agreements (including amendments, supplements, and exhibits) necessary for O&M Contractor to perform the Services. After the Execution Date, Owner shall provide O&M Contractor with any further amendments or supplements to the Project Agreements necessary for O&M Contractor to perform the Services; *provided* that such further amendments or supplements shall not impact O&M Contractor’s cost or ability to perform the Services as agreed in this Agreement.

**7.2 Response Time.**

O&M Contractor shall respond to alerts and/or unscheduled maintenance within the required response time specified in the table below:

<u>Priority Level</u>	<u>Definition</u>	<u>Response Time to Notification</u>	<u>Site Visit Scheduling</u>
<b>High</b>	Any issue that appears to be reducing PV Plant production by 25% or more; or any issue that appears to be reducing BESS capacity or charge/discharge rates by more than 25%.	Owner shall be notified by O&M Contractor within [XX] business hours	Site visit scheduled within [XX] working days
<b>Medium</b>	Any issue that appears to be reducing PV Plant production by 5% to 25%; or any issue that appears to be reducing BESS	Owner shall be notified by O&M Contractor within [XX] business hours	Site visit scheduled within [XX] working days

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	capacity or charge/discharge rates by 5% to 25%.		
<b>Low</b>	Any issue that appears to be reducing system production by less than 5%; or any issue that appears to be reducing BESS capacity or charge/discharge rates by less than 5%.	Owner shall be notified by O&M Contractor within [XX] business hours	Site visit scheduled within [XX] working days

In all circumstances where O&M Contractor requests the approval, consent or cooperation of Owner to any action (or inaction) hereunder, Owner shall consider and respond to such request as promptly as reasonable under the circumstances, within any applicable time limits set forth herein, and, if appropriate, within the response time requested by O&M Contractor. If O&M Contractor is directly and unavoidably prevented from performing its obligations under this Agreement by Owner’s failure to respond within any time period expressly stipulated in this Agreement, O&M Contractor’s obligations hereunder shall be reduced to the extent performance has been so prevented by such delay.

**7.3 Owner’s Representative.**

Owner shall appoint an “Owner’s Representative” to perform on Owner’s behalf certain matters related to the day-to-day administrative, fiscal, operation, maintenance and project contract management services for the Project. O&M Contractor shall comply with any reasonable instruction given by the Owner’s Representative to the extent that such instructions do not increase O&M Contractor’s obligations under this Agreement, prejudice O&M Contractor in connection with performing its obligations or require O&M Contractor to violate Applicable Law or breach its obligations under this Agreement.

**7.4 Permits.**

Owner, at its own expense, shall obtain and maintain all of the Permits set forth on Part II of Exhibit I. O&M Contractor, at its own expense, shall obtain and maintain all of the Permits required under Applicable Laws, including Environmental Laws, or otherwise necessary or desirable for O&M Contractor to perform the Services, including the Permits set forth on Part I of Exhibit I. O&M Contractor shall perform all Services in compliance with such Permits and Applicable Law, including Environmental Laws. Owner shall be

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liable for all costs or expenses, including any fines or penalties, incurred in connection with wildlife mortality or habitat damage; *provided, however*, O&M Contractor shall be responsible for any such costs, expenses, fines or penalties to the extent resulting from the negligence or willful misconduct of O&M Contractor or its Subcontractors or as a result of O&M Contractor's failure to perform the Services in accordance with Legal Requirements, Prudent Industry Practices, Energy Storage Industry Standards, the Project Agreements and the other requirements of this Agreement. O&M Contractor shall not be responsible for obtaining any new Permits required in connection with Owner's ownership of the Project.

#### **7.5 Owner's Property.**

O&M Contractor hereby acknowledges and agrees that Owner shall hold free and clear title to all Spare Parts provided by O&M Contractor hereunder for which Owner has paid pursuant to an invoice for T&M Costs submitted by O&M Contractor, and O&M Contractor further acknowledges and agrees that Owner shall hold free and clear title to all reports, performance data, records, books, plans, designs, papers or printouts, or other information used by O&M Contractor exclusively in connection with the performance of the Services, including those which O&M Contractor has generated, received or purchased in the course of performing the Services (collectively, "Owner's Property"), but excluding O&M Contractor's company or proprietary software, books and records, other materials not directly and exclusively related to its performance of the Services, and personnel records. O&M Contractor further agrees to deliver to Owner all of Owner's Property (including any copies thereof) upon expiration or termination of this Agreement and upon request of Owner.

#### **7.6 License of Owner's Property.**

Owner hereby grants to O&M Contractor, during the Term, a non-exclusive, irrevocable, license to use Owner's Property in connection with the performance of the Services under this Agreement.

#### **7.7 Site Access.**

From and after the Project Substantial Completion Date and subject to any requirements of Applicable Law, the Real Property Documents and the terms of this Agreement (including Section 5.5 and the last sentence of Section 4.6), Owner shall provide O&M Contractor and its Subcontractors, agents and employees with access to the Project and the relevant portion of the applicable Site at all times and without prior notice to the extent required to perform the Services or any activity related to the Services. Owner and its agents, employees and invitees shall have access to the Project and Site to perform any investigations, studies, operations and maintenance work or any other activities deemed appropriate by Owner in its sole discretion. During any such access to the Site,

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any such agents, employees and invitees shall comply with all reasonable safety and security procedures.

If the Site has state, federal or other security restrictions requiring pre-authorization for access to the Site, O&M Contractor shall obtain and maintain all required approvals, consents or badges required for O&M Contractor's and its Subcontractors' personnel to access the Site or perform the Services, including completing any required training or other access procedures.

## **ARTICLE 8 INDEMNIFICATION**

### **8.1 Indemnification by O&M Contractor.**

(a) O&M Contractor shall, to the fullest extent allowed by Applicable Law, indemnify, protect, defend, and hold harmless Owner, the Project Lenders, and its and their Affiliates, and each of their officers, directors, employees, agents, and representatives (the "Indemnitees") from and against any and all losses, damages, claims, liabilities, costs, and expenses (including demands, fines, remediation costs, penalties, attorneys' fees, court costs, legal, and other reasonable expenses) that may be imposed on, or incurred by the Indemnitees, or asserted against the Indemnitees or any of them by any party or parties (including a Governmental Authority), to the extent arising from, in whole or part: (i) O&M Contractor's or Subcontractor's negligence, wrongful act or omission, or failure to comply with Applicable Law or Permits by reason of property damage, personal injury, or death, of whatsoever nature in connection with the performance of the Services by O&M Contractor or Subcontractor, **AND SUCH OBLIGATION SHALL APPLY EVEN IN THE EVENT OF THE CONCURRENT NEGLIGENCE, ACTIVE OR PASSIVE, OF ANY OR ALL INDEMNITEES**, (ii) any violation of Applicable Law or Permits, including Environmental Laws, by O&M Contractor or Subcontractor in performing the Services, (iii) O&M Contractor's or Subcontractor's treatment, storage, disposal, Handling, transportation, Release, spillage, or leakage of any Hazardous Substance by O&M Contractor or its Subcontractors in any form in the performance of the Services relating to the Hazardous Substances that O&M Contractor or any of its Subcontractors has brought onto the Site for the performance of the Services, (iv) the negligent or willful disturbance, exacerbation, or mishandling of any known pre-existing Hazardous Substance or, after discovery of any Hazardous Substance, failure to stop work when identified in writing by Owner to do so by O&M Contractor or its Subcontractors at the Site in any form in the performance of the Services, or (v) any employer's liability or workers' compensation claims filed by any employee of O&M Contractor or any of its Subcontractors, including with respect to on account of the death or occupational illness of, or injury to O&M Contractor or any Subcontractor, any employees, personnel, or agents of O&M Contractor or Subcontractor, caused by, connected with, relating to, or arising from, in any way, in whole or in part, directly or indirectly, the Services performed or to be performed, or from the presence, for whatever purpose, of O&M Contractor or any

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Subcontractors, or their suppliers, materialmen, employees, personnel, agents, or representatives on or near the Site or any property owned, leased, controlled, or occupied by Owner or Affiliates **WITHOUT REGARD TO WHETHER ANY SUCH DEATH OR PERSONAL INJURIES HAVE BEEN CAUSED BY OR ARE ATTRIBUTABLE TO, IN WHOLE OR IN PART, DIRECTLY OR INDIRECTLY, THE NEGLIGENCE, ACTIVE OR PASSIVE, OF ANY OR ALL INDEMNITEES, THE CONDITION OF THE SITE, STRICT OR PRODUCTS LIABILITY, OR OTHERWISE, AND NOTWITHSTANDING ANY OTHER PROVISIONS HEREIN TO THE CONTRARY.**

(b) In case the use of any aspect of the Services in the form submitted by O&M Contractor, for its intended purposes, is protected by patent, trademark, copyright, trade secret or other proprietary right and is enjoined, O&M Contractor shall, in addition to the foregoing indemnity and defense, at its own expense, either procure for Owner the right of continued use or replace the same with non-infringing articles or processes of equal value, functionality and efficiency.

(c) Further, O&M Contractor shall be solely responsible for and shall indemnify, protect, defend and hold harmless Indemnitees, and upon request of an Indemnitee, defend the Indemnitees, and each of them, from and against any and all losses, damages, including consequential, incidental and punitive damages, claims, liabilities, costs and expenses (including demands, fines, penalties, attorneys' fees, court costs, legal, accounting, consulting, engineering and other expenses), on account of the death or occupational illness of or injury to the employees and personnel of O&M Contractor or any Subcontractor to the extent caused by the Services performed or to be performed while such individuals are on or near the Site or any property owned, leased, controlled or occupied by Owner or any Affiliate.

## 8.2 Intellectual Property Indemnity.

(a) No Infringement. O&M Contractor represents and warrants to Owner that, to the best of O&M Contractor's knowledge, the Services to be performed by O&M Contractor, including all equipment, specifications and documents to be provided, installed or prepared by or on behalf of O&M Contractor in connection with the Project pursuant to this Agreement will not infringe upon any Intellectual Property Rights of any Person and, to the best of O&M Contractor's knowledge, no Intellectual Property Claim has been asserted by any third party. O&M Contractor understands that Owner makes no representation that O&M Contractor will be safe from any Intellectual Property Claims in operating or maintaining the Project as required under this Agreement.

(b) Indemnification. O&M Contractor agrees to indemnify, defend, and hold harmless the Indemnitees from and against any and all Intellectual Property Claims, arising out of or relating to any infringement or the improper use of any Intellectual

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Property Rights which may occur in connection with O&M Contractor's or any Subcontractor's or vendor's performance of the Services pursuant to this Agreement.

(c) Removal of Injunctions. If Owner is enjoined from operation of the Project or any part thereof, or from the use, operation or enjoyment of the Project, the equipment, or any part thereof, as a result of any Intellectual Property Claim, legal action or litigation of the type described in Section 8.5(b), O&M Contractor shall promptly arrange, in each case at no cost to Owner, to have such injunction removed, or to substitute non-infringing equipment or processes with at least the same expected performance and lifetime of the infringing equipment, or to modify such infringing equipment or processes or the Project so it becomes non-infringing subject to maintaining the same expected performance and lifetime of such equipment, *provided* that Owner may, at its option and without thereby limiting any other right it may have hereunder or at law or in equity, require O&M Contractor to supply, temporarily or permanently, equipment not subject to such injunction and not infringing any Intellectual Property Right or to remove all such equipment and refund the cost thereof to Owner or to take such steps as may be necessary to ensure compliance by Owner with such injunction, all to the satisfaction of Owner and all without cost or expense to Owner.

### 8.3 **Indemnification Procedure.**

(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 Indemnitee for which such Indemnitee is entitled to indemnification under this Agreement (such claim, a "Third Party Claim"), the Indemnitee shall promptly notify O&M Contractor in writing of any loss which the Indemnitee has determined has given or could give rise to a claim under this Agreement. 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. 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 O&M Contractor'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"), O&M Contractor shall notify the Indemnitee whether or not it will irrevocably indemnify the Indemnitee, at O&M Contractor's sole cost and expense, against the Third Party Claim(s) set forth in the Indemnity Notice. The failure of O&M Contractor to provide such notice within the Notice Period shall be deemed a refusal to provide the requested indemnity.

(c) If O&M Contractor irrevocably acknowledges its obligation to indemnify the Indemnitee against such Third Party Claim within the Notice Period then, except as hereinafter provided, O&M Contractor shall contest and defend, at its sole cost and expense, with counsel of its choosing that is reasonably acceptable to the Indemnitee,

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any such Third Party Claim; *provided, however*, that O&M Contractor 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 Applicable Law or Permit by any of the Indemnites, or (ii) requires any of the Indemnites 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 O&M Contractor is defending under this Section 8.3, 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 O&M Contractor if Indemnitee's counsel advises that separate counsel is necessary to protect its interests with respect to a Third Party Claim involving both the Indemnitee and O&M Contractor. The Indemnitee may not, without the prior written consent of O&M Contractor, which shall not be unreasonably withheld, conditioned, or delayed, compromise or settle any Third Party Claim defended by O&M Contractor hereunder so long as O&M Contractor is conducting such defense in good faith.

(d) Notwithstanding anything to the contrary in this Section 8.3, if (i) the assumption of the defense of a Third Party Claim by O&M Contractor 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) O&M Contractor 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) O&M Contractor 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 O&M Contractor, 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 O&M Contractor 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) O&M Contractor and O&M Contractor's counsel and Representatives shall reasonably consult with Owner and Owner'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. O&M Contractor shall have reasonable access, during normal business hours and following reasonable notice, to employees of Owner who may have knowledge, material, documents or information relevant to the defense of any Third Party Claim. Owner shall make available to O&M

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Contractor, at reasonable times and for reasonable periods, its employees and other Representatives and such information, books, and records and other materials in Owner's possession or control and reasonably required by O&M Contractor 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 Parties). If and to the extent reasonably requested by O&M Contractor, Owner shall cooperate with O&M Contractor 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. O&M Contractor shall reimburse Owner for any reasonable, documented out-of-pocket expense incurred by Owner in cooperating with or acting at the request of O&M Contractor.

#### 8.4 **Survival.**

Notwithstanding any other provision of this Agreement, the provisions of this ARTICLE 8 are intended to and shall survive termination of this Agreement so as to cover all Claims instituted within the period set forth in the applicable statute of limitations.

### **ARTICLE 9 TERMINATION**

#### 9.1 **Termination by Owner.**

(a) O&M Contractor Events of Default. The following shall constitute events of default on the part of O&M Contractor (each, an "O&M Contractor Event of Default") under this Agreement:

(i) O&M Contractor fails to make any undisputed payment required hereunder within thirty (30) days after written notice thereof has been given to O&M Contractor;

(ii) any representation or warranty of O&M Contractor in this Agreement proves to have been false or misleading in any material respect when made, and O&M Contractor has not, within thirty (30) days after written notification thereof from Owner, fully remedied all adverse impacts on Owner resulting therefrom; *provided* that such thirty (30) day period may be extended to sixty (60) days; *provided, further*, that O&M Contractor has commenced and is at all times diligently pursuing such remedy;

(iii) O&M Contractor (A) files a petition or otherwise commences, authorizes, or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy, insolvency, reorganization, or similar law, or has any such petition filed or commenced against it, (B) has a petition filed or commenced against it for a proceeding or cause of action under any bankruptcy,

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insolvency, reorganization, or similar law and such petition is not dismissed within sixty (60) days of its filing, (C) makes an assignment or any general arrangement for the benefit of creditors, (D) otherwise becomes bankrupt or insolvent (however evidenced), (E) 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 (F) is generally unable to pay its debts as they fall due;

(iv) O&M Contractor fails to maintain insurance pursuant to ARTICLE 13;

(v) O&M Contractor fails to comply with any material provision of this Agreement not otherwise set forth in this Section 9.1(a) and fails to cure or remedy such failure within thirty (30) days after notice and a written demand is made by Owner to O&M Contractor to cure the same or, if such failure cannot be cured within thirty (30) days, O&M Contractor fails to commence to cure such breach within thirty (30) days after such notice and written demand and thereafter diligently pursue such cure to completion, which cure shall in no event be later than sixty (60) days after such notice;

(vi) O&M Contractor's aggregate annual liability for Performance Liquidated Damages, BESS Availability Liquidated Damages and BESS RT Efficiency Liquidated Damages exceeds the Annual Liquidated Damages Cap; or

(vii) the BOT Agreement is terminated due to a default by Seller.

(b) Owner Remedies upon O&M Contractor Event of Default.

(i) Upon the occurrence and during the continuation of an O&M Contractor Event of Default, in addition to any or all other remedies available at law or at equity, all of which shall be cumulative, Owner may terminate this Agreement upon ten (10) days' written notice to O&M Contractor. If any termination for cause by Owner pursuant to this Section 9.1(b) is ultimately determined to have been wrongful, then such termination shall be deemed a termination for an Owner Event of Default pursuant to Section 9.2(b), and O&M Contractor's sole remedy shall be the receipt of the amounts set forth in Section 9.2(b).

(ii) If Owner terminates this Agreement pursuant to this Section 9.1(b), O&M Contractor shall cooperate with Owner and its agents and representatives in the turnover of the Project to the new operator and, prior to the effective date of termination, O&M Contractor shall provide the new operator reasonable access to the Project to facilitate the orderly transition of responsibilities from O&M Contractor to the new operator. Until the effective date of termination,

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O&M Contractor shall continue to operate the Project in compliance with the terms of this Agreement, during which time O&M Contractor and the new operator shall prepare for the transition of responsibilities from O&M Contractor to the new operator.

(iii) If Owner terminates this Agreement pursuant to this Section 9.1(b), upon Owner's request, O&M Contractor (A) shall withdraw from the Site, (B) shall assist Owner in preparing an inventory of all equipment located on the Site, in storage or in transit, (C) shall assign to Owner (or to any replacement contractor) such of O&M Contractor's subcontracts (including warranties), purchase orders, and Permits as Owner may request, and (D) shall deliver and make available to Owner all information, Project performance data, drawings, specifications documents, patents, and licenses of O&M Contractor (whether or not such information, drawings, specifications documents, patents, and licenses are complete) and any proprietary components related to the Project reasonably necessary to permit Owner to operate and maintain the Project, and in connection therewith O&M Contractor authorizes Owner and its agents to use such information in operating and maintaining the Project. Further, O&M Contractor shall reimburse Owner a proportionate amount of the Fixed Fee that would have covered any period of time post-termination. Notwithstanding the foregoing, O&M Contractor shall not be required to license or otherwise make available to Owner the proprietary software used by O&M Contractor in connection with operating the Project; *provided, however*, that O&M Contractor shall cooperate with Owner to facilitate the transfer of the Project monitoring system to a replacement service provider. O&M Contractor and Owner shall negotiate in good faith terms and conditions for a license for Owner's continued use of such software. O&M Contractor shall remove all materials, equipment, tools, and instruments used by and any debris or waste materials generated by O&M Contractor in the performance of the Services as Owner may direct. O&M Contractor shall execute all documents and take all other reasonable steps requested by Owner that may be required to assign to and vest in Owner all rights, benefits, interests and title in connection with such contracts or obligations.

## 9.2 **Owner Events of Default.**

(a) Owner Events of Default. The following shall constitute events of default on the part of Owner (each, an "Owner Event of Default") under this Agreement:

(i) Owner fails to make any undisputed payment required hereunder within thirty (30) days after written notice thereof from O&M Contractor;

(ii) any representation or warranty of Owner in this Agreement proves to have been false or misleading in any material respect when made, and

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Owner has not, within thirty (30) days after written notification thereof from O&M Contractor, either fully remedied, or commenced and diligently pursued the remedy of, all adverse impacts on O&M Contractor resulting therefrom; *provided* that such thirty (30) day period may be extended to sixty (60) days; *provided, further*, that Owner has commenced and is at all times diligently pursuing such remedy;

(iii) Owner (A) files a petition or otherwise commences, authorizes, or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy, insolvency, reorganization, or similar law, or has any such petition filed or commenced against it, (B) 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, (C) makes an assignment or any general arrangement for the benefit of creditors, (D) otherwise becomes bankrupt or insolvent (however evidenced), (E) 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 (F) is generally unable to pay its debts as they fall due; or

(iv) Owner fails to comply with any material provision of this Agreement not otherwise set forth as an Owner Event of Default in this Section 9.2(a) and fails to cure or remedy such failure within thirty (30) days after notice and a written demand is made by O&M Contractor to Owner to cure the same or, if such failure cannot be cured within thirty (30) days, Owner fails to commence to cure such breach within thirty (30) days after such notice and written demand and thereafter diligently pursue such cure to completion, which cure shall in no event be later than sixty (60) days after such notice.

(b) Upon the occurrence and continuation of an Owner Event of Default, O&M Contractor may suspend its work or terminate this Agreement, and, in the case of termination, Owner shall pay to O&M Contractor (as O&M Contractor's sole and exclusive remedy) an amount equal to the following (collectively, the "Termination Costs"):

(i) Any unpaid portion of the Fixed Fees that is due and payable at the time of termination;

(ii) all T&M Costs for which O&M Contractor has not previously been paid; and

(iii) the actual and reasonable demobilization and other costs directly related to such termination, including O&M Contractor's actual costs to secure, protect and transfer the Project to Owner in accordance with Owner's instructions as a result of such termination.

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O&M Contractor's Claim (which shall contain detailed supporting documentation) shall be submitted within thirty (30) days of the effective date of termination under this Section 9.2. O&M Contractor waives any Claims for any other damages due to a termination pursuant to this Section 9.2, and the above amounts shall constitute O&M Contractor's sole remedy for such termination.

### **9.3 Force Majeure Termination Event**

In the event that O&M Contractor is prevented from performing its obligations hereunder for a continuous period of one hundred eighty (180) days due to one or more Force Majeure Events, either Party may terminate this Agreement upon written notice to the other Party and Owner shall pay to O&M Contractor (as O&M Contractor's sole and exclusive remedy) an amount equal to all Termination Costs.

### **9.4 Project Condition at End of Term.**

Upon termination or expiration of this Agreement, all Services to be performed as of such termination or expiration date shall have been performed through the date of termination or expiration, and all payments required hereunder shall have been made through such date.

## **ARTICLE 10 WARRANTY**

### **10.1 Services Warranty.**

O&M Contractor warrants to Owner that all of the Services shall be performed in accordance with this Agreement (and the standards of performance set forth herein) and the Project Agreements, by qualified personnel, and all equipment, materials and other items installed in the Project shall be free from defects in design, material and workmanship ("Warranty"). The foregoing Warranty, and the remedy set forth below, applies to any defect that appears within two (2) years from the date the work giving rise to the Claim was performed. Each Party shall notify the other Party promptly after such Party becomes aware of a defect. Any repair, replacement or other work performed pursuant to the Warranty shall be subject to the Warranty for two (2) years from the date of such Warranty work; *provided* that in no event shall the Warranty extend beyond two (2) years after the Term. O&M Contractor shall have no liability to Owner under this Agreement (whether based on warranty or otherwise) (a) for any defect that appears later than two (2) years after the date the work giving rise to the defect was performed or (b) for any damage or defect that occurs solely as a result of any negligent act or omission of Owner or any parties acting under a separate agreement with Owner. In the case of any damage or defect that occurs as a result of any negligent act or omission of Owner and breach of the Warranty by O&M Contractor, O&M Contractor's liability shall be in proportion to its relative responsibility for such damage or defect.

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## 10.2 **Guaranteed Performance for the PV Plant.**

(a) Performance Reports. For each year during the Term, within thirty (30) days after the anniversary of the Commencement Date, O&M Contractor shall deliver to Owner a written report containing the Measured Availability for the PV Plant during the prior twelve (12) month period and such information and data requested by Owner reasonably necessary to confirm the results of such determinations.

(b) Performance Liquidated Damages. If the Measured Availability for the PV Plant is equal to or greater than ninety-eight percent (98%) (the “Guaranteed Performance”) for any annual reporting period (or, if shorter, the initial reporting period), then the Guaranteed Performance for the PV Plant shall be deemed satisfied for such period and O&M Contractor shall have no liability to Owner in relation to the Guaranteed Performance for the PV Plant. If the Measured Availability is less than the Guaranteed Performance for any annual reporting period (or, if shorter, the initial reporting period), O&M Contractor shall pay Owner, as liquidated damages and not as a penalty, the amount equal to (i) the Guaranteed Availability minus the Measured Availability, multiplied by (ii) the quotient resulting from dividing (A) the actual production of the Facility (in MWh) by (B) the Measured Availability, multiplied by (iii) the Facility’s production-weighted MISO locational marginal price (LMP) (in \$/MWh) (the “Performance Liquidated Damages”). Performance of the PV Plant shall be determined in accordance with Exhibit G-1. THE PARTIES AGREE THAT (A) IT IS DIFFICULT OR IMPOSSIBLE TO DETERMINE WITH PRECISION THE AMOUNT OF DAMAGES THAT WOULD OR MIGHT BE INCURRED BY OWNER AS A RESULT OF SUCH FAILURE TO ACHIEVE SUCH GUARANTEED PERFORMANCE; (B) OWNER WOULD BE DAMAGED BY ANY FAILURE OF O&M CONTRACTOR TO ACHIEVE SUCH PERFORMANCE GUARANTIES; (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 10.2; (B) ARE 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 O&M CONTRACTOR AND OWNER HEREBY IRREVOCABLY WAIVES ANY RIGHT TO CLAIM TO ANY COURT OR ARBITRAL TRIBUNAL OR SEEK THE ADJUSTMENT OF ANY SUCH SUMS.

## 10.3 **Guaranteed BESS Availability.**

(a) Availability Reports. For each year during the Term, within thirty (30) days after the anniversary of the Commencement Date, O&M Contractor shall deliver to Owner a written report containing the BESS Availability during the prior twelve (12) month period and such information and data requested by Owner reasonably necessary to confirm the results of such determinations.

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(b) BESS Availability Liquidated Damages. If the BESS Availability is equal to or greater than the Guaranteed BESS Availability for any annual reporting period (or, if shorter, the initial reporting period), then the Guaranteed BESS Availability shall be deemed satisfied for such period and O&M Contractor shall have no liability to Owner in relation to the Guaranteed BESS Availability. If the BESS Availability is less than the Guaranteed BESS Availability for any annual reporting period (or, if shorter, the initial reporting period), O&M Contractor shall pay Owner, as liquidated damages and not as a penalty, the amount indicated in Exhibit G-2 (the “BESS Availability Liquidated Damages”). BESS Availability shall be determined in accordance with Exhibit G-2.

#### 10.4 **Guaranteed BESS RT Efficiency.**

(a) BESS RT Efficiency Reports. For each year during the Term, within thirty (30) days after the anniversary of the Commencement Date, O&M Contractor shall deliver to Owner a written report containing the BESS RT Efficiency during the prior twelve (12) month period and such information and data requested by Owner reasonably necessary to confirm the results of such determinations.

(b) BESS RT Efficiency Liquidated Damages. If the Measured BESS RT Efficiency is equal to or greater than the Guaranteed BESS RT Efficiency for any annual reporting period (or, if shorter, the initial reporting period), then the Guaranteed BESS RT Efficiency shall be deemed satisfied for such period and O&M Contractor shall have no liability to Owner in relation to the Guaranteed BESS RT Efficiency. If the Measured BESS RT Efficiency is less than the Guaranteed BESS RT Efficiency for any annual reporting period (or, if shorter, the initial reporting period), O&M Contractor shall pay Owner, as liquidated damages and not as a penalty, the amount indicated in Exhibit G-2 (the “BESS RT Efficiency Liquidated Damages”). BESS RT Efficiency shall be determined in accordance with Exhibit G-2.

10.5 Nature of Liquidated Damages. THE PARTIES AGREE THAT (A) IT IS DIFFICULT OR IMPOSSIBLE TO DETERMINE WITH PRECISION THE AMOUNT OF DAMAGES THAT WOULD OR MIGHT BE INCURRED BY OWNER AS A RESULT OF THE FAILURE TO ACHIEVE THE GUARANTEED PERFORMANCE, THE GUARANTEED BESS AVAILABILITY, OR THE GUARANTEED BESS RT EFFICIENCY; (B) OWNER WOULD BE DAMAGED BY ANY FAILURE OF O&M CONTRACTOR TO ACHIEVE THE GUARANTEED PERFORMANCE, THE GUARANTEED BESS AVAILABILITY, OR THE GUARANTEED BESS RT EFFICIENCY; (C) IT WOULD BE IMPRACTICABLE OR EXTREMELY DIFFICULT TO FIX THE ACTUAL DAMAGES RESULTING THEREFROM; (D) ANY SUMS THAT WOULD BE PAYABLE UNDER SECTION 10.2(B), SECTION 10.3(B), AND SECTION 10.4(B) ARE 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

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ANTICIPATED FROM SUCH FAILURE; AND (F) EACH OF O&M CONTRACTOR AND OWNER HEREBY IRREVOCABLY WAIVES ANY RIGHT TO CLAIM TO ANY COURT OR ARBITRAL TRIBUNAL OR SEEK THE ADJUSTMENT OF ANY SUCH SUMS.

10.6 **Liquidated Damages Cap.** O&M Contractor's maximum aggregate annual liability for Performance Liquidated Damages, BESS Availability Liquidated Damages and BESS RT Efficiency Liquidated Damages under Sections 10.2, 10.3, and 10.4 shall not exceed one hundred percent (100%) of the annual Fixed Fee to be paid by Owner to O&M Contractor for the applicable year (the "Annual Liquidated Damages Cap").

10.7 **Exclusive Warranty.**

The Warranty contained in this ARTICLE 10 is exclusive and in lieu of all other warranties, whether written, oral, implied or statutory, but does not affect any separate express warranty provided by any equipment supplier to the Project or Seller under the BOT Agreement. NO IMPLIED WARRANTY OF MERCHANTABILITY OR OF FITNESS FOR A PARTICULAR PURPOSE, COURSE OF DEALING AND USAGE OF TRADE SHALL APPLY. O&M Contractor does not warrant under this Agreement any product, material or services of others which Owner has furnished.

10.8 **Exclusive Remedy.**

Subject to ARTICLE 11,

(a) the exclusive remedy for any Claim based on the failure of, or defect in performance of the Services shall be the replacement of personnel and re-performance of the defective portion of the Services; *provided, however*, that the replacement of personnel and re-performance of the defective portion of the Services shall not be deemed to be a remedy for other breaches by O&M Contractor of its obligations hereunder that may accompany such failure;

(b) the exclusive remedy for any Claim based on a lack of availability of the PV Plant shall be the payment of Performance Liquidated Damages; *provided, however*, that the payment of Performance Liquidated Damages shall not be deemed to be a remedy for other breaches by O&M Contractor of its obligations hereunder that may accompany such lack of availability; and

(c) the exclusive remedy for any Claim based on a lack of availability of the BESS shall be the payment of BESS Availability Liquidated Damages and for any Claim based on the deficiency in the BESS RT Efficiency shall be the payment of the BESS RT Efficiency Liquidated Damages; *provided, however*, that the payment of BESS Availability Liquidated Damages and/or the BESS RT Efficiency Liquidated Damages

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shall not be deemed to be a remedy for other breaches by O&M Contractor of its obligations hereunder that may accompany such lack of availability or BESS RT Efficiency.

**10.9 Assignment of Warranties.**

O&M Contractor shall use commercially reasonable efforts to obtain warranties from all Subcontractors and suppliers at least as favorable to Owner as required from O&M Contractor under this Agreement, shall use commercially reasonable efforts to secure the longest commercially reasonable manufacturers' warranties with respect to any Spare Parts or materials provided to and used by O&M Contractor under this Agreement, and shall where possible assign all such warranties to Owner.

**ARTICLE 11  
LIMITATIONS OF LIABILITY**

**11.1 Total Limitation of Liability.**

O&M Contractor's total liability under this Agreement to Owner, on all Claims of any kind, whether based on contract, warranty, tort (including negligence), strict liability or otherwise, for all losses or damages arising out of, connected with, or resulting from this Agreement or from the performance or breach thereof, or from any Services performed or furnished by O&M Contractor during the Term, shall in no case exceed the sum of the Fixed Fees paid or payable to O&M Contractor over the entire Term; *provided, however*, that (a) the foregoing limitation shall not apply to acts of gross negligence, willful misconduct or fraud by O&M Contractor or O&M Contractor's indemnification obligations under ARTICLE 8; (b) if O&M Contractor receives insurance proceeds with respect to the relevant loss or damage in excess of the foregoing cap, then the foregoing cap shall be increased by the amount of such excess; and (c) the foregoing limitation shall not apply to the payment of liquidated damages pursuant to Section 10.2, 10.3, or 10.4. O&M Contractor's liability under this Agreement shall cease one (1) year after expiration, or earlier termination, of this Agreement, except for third party indemnity claims and such other provisions that expressly survive the Term of this Agreement.

**11.2 Waiver of Consequential Damages.**

EXCEPT FOR O&M CONTRACTOR'S LIABILITY FOR LIQUIDATED DAMAGES AND FOR THOSE INDEMNIFICATION OBLIGATIONS ARISING FROM THIRD PARTY CLAIMS, AS SET FORTH BELOW, NO PARTY SHALL BE LIABLE FOR SPECIAL, PUNITIVE, EXEMPLARY, INCIDENTAL, CONSEQUENTIAL OR INDIRECT DAMAGES, LOST REVENUE OR LOST PROFITS, WHETHER BASED ON CONTRACT, TORT, STRICT LIABILITY, OTHER LAW OR OTHERWISE AND WHETHER OR NOT ARISING FROM THE OTHER PARTY'S SOLE, JOINT OR CONCURRENT NEGLIGENCE, STRICT LIABILITY OR OTHER FAULT.

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**ARTICLE 12**  
**FORCE MAJEURE**

**12.1 Force Majeure Event.**

Except as otherwise expressly provided in this Agreement, each Party shall be excused from performance and shall not be considered to be in default with respect to any obligation hereunder, except the obligation to pay money in a timely manner for Services actually performed or other liabilities actually incurred, if and to the extent that its failure of, or delay in, performance is due to a Force Majeure Event; *provided* that:

(a) such Party gives the other Party written notice describing the particulars of the Force Majeure Event as soon as is reasonably practicable and in any event within seven (7) days after the discovery of the Force Majeure Event and if such Party fails to provide such notice, such Party shall be deemed to have waived any right to claim a Force Majeure Event 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 Force Majeure Event;

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

(c) no obligations of the Party that arose before the occurrence causing the suspension of performance shall be excused as a result of the occurrence;

(d) the Party uses diligent, commercially reasonable efforts to remedy or remove the inability caused by the Force Majeure Event (*provided* that, for a Force Majeure Event, such Party shall be entitled to an adjustment to the times for performance of its obligations hereunder (other than the obligation to make payments required hereunder) and shall resume performance hereunder when and to the extent the inability is remedied or removed);

(e) the Party claiming the Force Majeure Event shall discharge as required herein all of its duties and obligations under this Agreement that are not prevented by such Force Majeure Event; and

(f) when the Party is able to resume performance of its obligations under this Agreement, such Party shall give the other Party written notice to that effect and shall promptly resume performance hereunder.

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## **ARTICLE 13 INSURANCE**

### **13.1 O&M Contractor Insurance.**

Prior to commencing the Services at the Site and throughout the Term, O&M Contractor shall provide and maintain, with insurers of recognized responsibility authorized to do business in the state where the Site is located and assigned an A.M. Best rating of no less than A-/IX, the following insurance, which shall include the minimum coverages and limits set forth below.

(a) Commercial General Liability insurance policy with limits of at least One Million Dollars (\$1,000,000) per occurrence and Two Million Dollars (\$2,000,000) in the annual aggregate for personal injury, bodily injury, including death and property damage including premises and operations, personal injury, broad form property damage, blanket contractual liability coverage products and completed operations coverage, coverage for explosion, collapse and underground hazards, and a cross liability endorsement. The policy deductibles shall not be more than Twenty-Five Thousand Dollars (\$25,000) per occurrence to the extent commercially available and any required payment of the deductible shall be the responsibility of O&M Contractor.

(b) Automobile liability insurance, covering all owned, non-owned, and hired automobiles used in connection with the Work in an amount not less than One Million Dollars (\$1,000,000) per accident for combined bodily injury, property damage or death.

(c) A Workers' Compensation insurance policy to cover statutory limits of the Workers' Compensation laws of the state in which the Project is located which shall cover all of employees engaged at the Sites; *provided* that this Section 13.1(c) shall only apply to O&M Contractor if O&M Contractor has employees.

(d) Employers' Liability Insurance with limits of not less than \$1,000,000 each accident for bodily injury by accident, One Million Dollars (\$1,000,000) each employee for bodily injury by disease, and One Million Dollars (\$1,000,000) policy limit.

(e) Professional Liability. Errors and omissions insurance limits of not less than One Million Dollars (\$1,000,000) each claim on a claims-made basis without impairment by claims on other projects. Coverage shall be maintained in effect during the term for a period ending no earlier than two (2) years following the Commencement Date hereunder or provide a two (2) year extended reporting period to report claims. This insurance requirement applies to professional services including engineering and design roles.

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(f) An Umbrella/Excess Liability policy, with the Commercial General Liability and Employers Liability policies scheduled as underlying policies (following form). Limits of the policy shall be at least and Five Million Dollars (\$5,000,000) per occurrence and Five Million Dollars (\$5,000,000) in the aggregate;

(g) To the extent the Services include Hazardous Substances, a Pollution Liability Insurance applicable to bodily injury; property damage, including loss of use of damaged property or of property that has not been physically injured or destroyed; transportation cost; cleanup costs; and defense, including costs and expenses incurred in the investigation, defense, or settlement of claims, with limits of One Million Dollars (\$1,000,000) each claim and in the aggregate.

(h) To the extent permitted by Applicable Laws, all above-mentioned insurance policies shall provide the following:

(i) Be primary and non-contributory to any other liability insurance carried by Owner;

(ii) Contain cross-liability coverage as provided under standard ISO Forms' separation of insureds clause (with the exception of the Workers' Compensation policy);

(iii) Provide for a waiver of all rights of subrogation which O&M Contractor's or Subcontractor's insurance carriers might exercise against the Indemnitees;

(iv) Any Excess or Umbrella liability coverage will not require contribution before it will apply; and

(v) Additional Insured/Endorsed. The insurance referenced in Sections 13.1(a), 13.1(b), 13.3(f) and 13.3(g) above shall be endorsed to include the following:

(A) Owner and Project Lenders, including the directors, officers, Affiliates, agents, representatives, employees, subsidiaries, successors, and assigns of each ("Additional Insureds") shall be named Additional Insured using endorsements approved by Project Lenders;

(B) The coverage afforded Additional Insureds shall be primary as respects any Claims, losses, damages, expenses or liabilities arising out of, relating to in any way, or incident to the Services or any activities of Subcontractors at the Site, regardless whether instituted against Owner alone or jointly with the Subcontractors or others, and noncontributing with any other insurance maintained by Additional Insureds;

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(C) The coverage afforded Additional Insureds shall not be invalidated by any action or inaction of each such Additional Insured and shall insure each such Additional Insured regardless of any breach or violation of any warranty, declaration or condition contained in such insurance by the primary named insured wherever coverage will apply; and

(D) To the extent commercially available, Owner and Project Lenders shall be given thirty (30) days' advance written notice of cancellation or non-renewal of the policy by the insurer, except ten (10) days' notice for cancellation due to non-payment of premium. Notice of cancellation shall be sent to Owner and Project Lenders.

### 13.2 Subcontractor Insurance.

O&M Contractor shall require all first-tier Subcontractors with subcontracts having a value greater than Two Hundred Fifty Thousand Dollars (\$250,000) to comply with the insurance requirements set forth in Sections 13.1(a), 13.1(b), 13.1(c) (without giving effect to the proviso in Section 13.1(c)) and 13.1(d). O&M Contractor shall require all Subcontractors to include provisions in all lower-tier subcontracts having a value greater than Two Hundred Fifty Thousand Dollars (\$250,000) requiring such lower-tier Subcontractors to comply with such insurance requirements. O&M Contractor shall obtain insurance certificates from each Subcontractor and shall provide such insurance certificates to Owner upon request. O&M Contractor shall require all first-tier Subcontractors with subcontracts having a value equal to or lesser than Two Hundred Fifty Thousand Dollars (\$250,000) to obtain and maintain reasonable and customary policies of insurance. O&M Contractor shall require all Subcontractors with subcontracts having a value equal to or lesser than Two Hundred Fifty Thousand Dollars (\$250,000) to include provisions in all lower-tier subcontracts requiring such lower-tier Subcontractors to obtain and maintain reasonable and customary policies of insurance. O&M Contractor will be responsible for any deficiencies in any Subcontractor's insurance coverage.

### 13.3 Additional Requirements.

(a) Prior to commencement of the Services under this Agreement, O&M Contractor shall provide Owner with certificates of insurance evidencing compliance with the foregoing requirements relating to insurance policies to be obtained and maintained by O&M Contractor, accompanied by copies of the required endorsements. Any failure of such certificates to conform to the contractual requirements specified in this ARTICLE 13 shall not result in a waiver by Owner of any rights under this Agreement or O&M Contractor's required insurance and indemnity obligations herein, and such obligations shall continue in full force and effect.

(b) All coverage required hereunder shall be kept in full force and effect during the performance of the Services; *provided, however*, products/completed operations

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coverage shall continue for two (2) years after expiration or termination of this Agreement, and if any policy is written on a claims made basis, (i) the retroactive date may not be advanced beyond the date of this Commencement Date and (ii) coverage shall be maintained in full force and effect for three (3) years after expiration or termination of this Agreement, which coverage may be in the form of tail coverage or extended reporting period coverage if agreed by the Parties.

(c) If O&M Contractor fails to comply with its obligations as specified in this ARTICLE 13, Owner shall have the right, but not the obligation, to procure the required insurance coverage at O&M Contractor's expense without in any way compromising or waiving any right or remedy at law or in equity, and O&M Contractor shall not be relieved of or excused from the obligation to obtain and maintain such insurance amounts and coverages. All such costs incurred by Owner shall be promptly reimbursed by O&M Contractor and/or may be withheld from any payment due O&M Contractor.

(d) To the extent allowed by Applicable Law, O&M Contractor shall furnish Owner with accident report(s) covering accidents occurring in connection with or as a result of the performance of the Services within five (5) Business Days of the occurrence of such an accident.

(e) O&M Contractor shall be responsible for any deductibles or self-insured retentions applicable to the insurance provided in compliance with ARTICLE 13, except as described in Section 13.4.

(f) Insurance coverage provided by O&M Contractor under this ARTICLE 13 shall not include any endorsement limiting coverage available to Owner which is otherwise required by this ARTICLE 13.

(g) O&M Contractor shall notify Owner in writing when coverages required herein have been reduced as a result of claim payments, expenses or both.

(h) None of the requirements contained in this ARTICLE 13 as to types, limits, or Owner's approval of insurance coverage to be maintained by O&M Contractor are intended to, and they shall not in any manner, limit, qualify or quantify the liabilities and obligations assumed by O&M Contractor hereunder, in any other agreement with Owner, or as otherwise provided by Applicable Law.

(i) The Commercial General Liability insurance policy shall contain standard cross-liability provisions.

(j) O&M Contractor hereby waives all rights of subrogation against the Indemnitees.

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(k) Failure of O&M Contractor to provide insurance as herein required, or failure of Owner to require evidence of insurance or to notify O&M Contractor of any breach by O&M Contractor of the requirements of this ARTICLE 13, shall not be deemed to be a waiver by Owner of any of the terms and conditions of this Agreement, nor shall it be deemed to be a waiver of the obligation of O&M Contractor to indemnify, defend, and hold harmless Owner as required herein. The obligation to procure and maintain any insurance required is a separate responsibility of O&M Contractor and independent of the duty to furnish a copy or certificate of such insurance policies.

#### 13.4 **Owner Insurance.**

During the Term, Owner shall obtain and maintain, with insurers of recognized responsibility authorized to do business in the state where the Site is located and assigned an A.M. Best rating of no less than A-/X, All Risk Property Damage/Machinery Breakdown Insurance, in an amount sufficient to cover one hundred percent (100%) of the replacement cost of the Project. This policy shall provide an express waiver of subrogation in favor of O&M Contractor, Subcontractors, Seller and the insurers of all of them. Coverage shall be written on an "All Risk" basis including flood and earthquake coverage, including mechanical and electrical breakdown insurance covering resulting damage with respect to consequence of design, workmanship or material defect (LEG 2/96 or better), the perils of flood, earthquake, named windstorm, strike, sabotage, riot and civil commotion, vandalism and malicious mischief, subject to terms that are consistent with current industry practice insuring all real and personal property of O&M Contractor whether at a fixed (including non-owned location for off-site repair or refurbishment), off-site storage or a warehouse location or while in the course of inland or ocean transit (as the case may be), for an amount of not less than the full replacement cost value of the property and equipment at each location without the presence of coinsurance. The policy shall contain a Notice of Cancellation provision of no less than sixty (60) days and business interruption coverage following all perils.

Sub-limits are permitted with respect to the following perils:

- (a) debris removal, 5% of the limit;
- (b) inland transit in such amounts to satisfy replacement cost values of the shipment;
- (c) offsite storage in such amounts to satisfy replacement cost values of the largest property storage area;
- (d) CAT perils including Wind, Named Windstorm, Flood and Earthquake;

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(e) such other coverages acceptable to O&M Contractor (in consultation with the insurance consultant) that are customarily sub-limited and/or aggregated in reasonable amounts consistent with current industry practice with respect to similar risks and acceptable to O&M Contractor, including extra expense, expediting expense and ordinance or law coverage including the increased cost of construction to comply with the enforcement of any law that regulates the construction or repair of damaged property including the cost to demolish undamaged portions of the Project.

Such policy shall include (A) an automatic reinstatement of limits following each loss (except for the perils of earthquake, pollution cleanup, flood and named windstorm) and (B) a replacement cost valuation endorsement with no deduction for depreciation and no coinsurance clauses (or a waiver thereof). In the event all risk property and mechanical and electrical breakdown insurance is not written on the same policy, the mechanical and electrical breakdown coverage shall be placed on a “comprehensive” basis including resulting damage with respect to consequence of design, workmanship or material defect on a replacement cost basis with limits not less than the full replacement cost of the insured objects and each all-risk property and mechanical and electrical breakdown policy shall contain a joint loss agreement.

Deductibles applicable to property losses may be adjusted at discretion of Owner, based on the structure of Owner’s corporate property insurance program and capacity available in the commercial insurance marketplace. O&M Contractor shall be responsible for the deductibles but only for events attributable to negligence of or a breach by O&M Contractor of its obligations under this Agreement and with a cap of Two Hundred Fifty Thousand Dollars (\$250,000) per event and Two Hundred Fifty Thousand Dollars (\$250,000) in the aggregate.

Owner shall provide a copy of the cover notes or other evidence of cover in respect of such insurances at the time of the Commencement Date and copies of the insurance policies not later than thirty (30) Days after the Commencement Date.

## **ARTICLE 14 INTELLECTUAL PROPERTY LICENSE**

### **14.1 IP License.**

Any Intellectual Property Rights that O&M Contractor may conceive, make, develop, create, reduce to practice or work on, in whole or in part, in the course of performing the Services, shall be owned and retained by O&M Contractor. O&M Contractor hereby grants to Owner an irrevocable, nonexclusive royalty-free license (which license is freely transferable to any party to which the Project is sold, collaterally assigned, or otherwise transferred) to use all such Intellectual Property Rights, other proprietary rights and specialized knowledge of O&M Contractor which, in each case, are used in connection with the Services for Owner’s use to the extent reasonably necessary for the operation, maintenance, repair, or alteration of the Project or components thereof.

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To the extent necessary, O&M Contractor shall, prior to such Subcontractor performing any Services in connection with the Project, obtain a valid written license of any such Subcontractor's Intellectual Property Rights, specialized knowledge or other proprietary property from such Subcontractor in terms substantially similar to those that obligate O&M Contractor to Owner as expressed in this Section 14.1. Without diminishing the rights granted in this Section 14.1, O&M Contractor also acknowledges and agrees that it shall not be a breach of the license granted in this Section 14.1 for any Affiliate of Owner to utilize as reference material any such Intellectual Property Rights, proprietary right or specialized knowledge to the extent reasonably necessary or appropriate in connection with the ownership, use, operation, maintenance, repair, or alteration of the Project or components thereof. Except as specifically stated herein, no other license in such patents and proprietary information is granted pursuant to this Agreement.

#### **14.2 Contractor Deliverables and Intellectual Property.**

All documents, reports and other deliverables accumulated or developed by O&M Contractor, its employees or any Subcontractors in the performance of the Services ("Contractor Deliverables") shall become the property of Owner without any further consideration to be provided therefor, when prepared or in process, whether or not delivered by O&M Contractor; *provided* that all Intellectual Property Rights previously owned or created by O&M Contractor or any Subcontractor (but not transferred to Owner under the BOT Agreement) in connection with the Services shall continue to be owned by O&M Contractor or such Subcontractor, as applicable, and O&M Contractor hereby grants to Owner a perpetual, nontransferable, non-exclusive, irrevocable, royalty-free right and license to use all such Intellectual Property Rights of O&M Contractor and, to the extent practicable, Subcontractor, in connection with the operation, maintenance or repair of the Project or any subsystem or component thereof. O&M Contractor shall procure title to any Contractor Deliverables from each Subcontractor pursuant to its subcontract with such Subcontractors, for the purposes of passing title to Owner under this Section 14.2. For the avoidance of doubt, O&M Contractor or Subcontractors, as applicable, will maintain ownership of all Intellectual Property Rights contained within the Contractor Deliverables. O&M Contractor shall deliver the Contractor Deliverables to Owner upon its request upon any termination of this Agreement, or completion of the Services.

#### **14.3 Software Licenses.**

To the extent O&M Contractor purchases any software which software is necessary for the continued operation of the Project, O&M Contractor shall register Owner as a licensee of such software.

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**ARTICLE 15  
NOTICES**

**15.1 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 delivered to Owner:

ENTERGY LOUISIANA, LLC<sup>3</sup>

Contract Manager  
Kevin A. Gallien  
10055 Grogans Mill Rd  
The Woodlands, Texas 77380  
Entergy Services, LLC  
T-PKWD-4A  
Email: KGALLIE@entergy.com  
Tel: (281) 297-2308

And

Supply Chain Representative  
Kevin Long  
**[ENTERGY TO PROVIDE ADDRESS]**  
A-ISES  
Email: [klong3@entergy.com](mailto:klong3@entergy.com)  
Tel: (870) 698-4539

If delivered to O&M Contractor: [Name]

With copy to: [Name]

Each Party shall have the right to change the place to which notice shall be sent or delivered or to specify one (1) additional address to which copies of notices may be sent,

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<sup>3</sup> **Note to ELL:** Please confirm notice information.

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in either case by similar notice sent or delivered in like manner to the other Party. All notices shall be effective upon receipt.

#### **15.2 Technical Communications.**

Any technical or other communications pertaining to the Services shall be between O&M Contractor's project manager and Owner's Representative or other representatives as agreed by both Parties. Each Party shall notify the other in writing of the names of such representatives. O&M Contractor's representatives shall be satisfactory to Owner, have knowledge of the Services and be available at all reasonable times for consultation.

### **ARTICLE 16 ASSIGNMENT**

#### **16.1 Assignment and Transfer Generally.**

The rights under this Agreement shall not be assignable or transferable, nor the duties delegable, by Owner, without the prior written consent of O&M Contractor, or by O&M Contractor, without the prior written consent of Owner, 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.

#### **16.2 Owner's Assignment Rights.**

(a) Notwithstanding Section 16.1, Owner may without the prior written consent of O&M Contractor, (i) collaterally assign, mortgage, hypothecate, pledge, or otherwise encumber all or any portion of its rights and/or interest in and to this Agreement to its, or any of its Affiliates', lenders or any other Persons providing financing to Owner 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 Owner to O&M Contractor hereunder), and (ii) subject to Section 16.2(b), assign all of its rights and obligations under this Agreement (A) to any Affiliate of Owner and (B) to (1) any Person succeeding to all or substantially all of the assets of Owner, or (2) any Person or Persons acquiring the Project (or Owner's rights thereto). In connection with and contingent upon the closing of any financing by Owner pursuant to which Owner collaterally assigns, mortgages, hypothecates, pledges or otherwise encumbers all or any portion of its rights and/or interest in and to this Agreement, O&M Contractor will, at Owner'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 16.2(a)(ii) to be effective, the assignee must be bound by the terms of this Agreement, and have assumed all of Owner's obligations under this Agreement, relating to the period from and after the

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date of assignment (either pursuant to a written agreement reasonably satisfactory to O&M Contractor and consistent with the provisions hereof or by operation of Applicable Law). Upon any such assignment, Owner 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 O&M Contractor shall be deemed to have waived any right of recourse against Owner with respect to such obligations and liabilities.

### 16.3 O&M Contractor's Assignment Rights.

(a) Notwithstanding Section 16.1, and subject to Section 16.3(b), O&M Contractor may, with prior notice to, but without the prior written consent of Owner, assign all of its rights and obligations under this Agreement (in whole but not in part) (i) any Affiliate of O&M Contractor, or (ii) any Person succeeding to all or substantially all of the assets of O&M Contractor, *provided* that the assignee (A) is a Person that (1) 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, (2) has (or has a guaranty of its obligations under this Agreement from a Person having) a tangible net worth of at least \$[●], and (3) 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, (I) the potential imposition of criminal liability on Entergy Corporation or any of its Affiliates (or its or their respective representatives), (II) the potential imposition on Entergy Corporation or any of its Affiliates of new or additional adverse regulation, (III) 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 (IV) an amount in controversy exceeding One Million Dollars (\$1,000,000), and (B) has a creditworthiness equal to or higher than that of O&M Contractor as of immediately prior to the assignment.

(b) In order for a transfer or assignment permitted under Section 16.3(a) to be effective, the assignee must be bound by the terms of this Agreement, and have assumed all of the obligations of O&M Contractor under this Agreement, relating to the period from and after the date of assignment (either pursuant to an agreement reasonably satisfactory to Owner and consistent with the provisions hereof or by operation of Applicable Law). Upon any such assignment, O&M Contractor 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 Owner shall be deemed to have waived any right of recourse against O&M Contractor with respect to such obligations and liabilities.

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#### 16.4 **Purported Assignment.**

Any purported assignment or delegation not effected in accordance with this Article 16 shall be deemed void and of no force and effect.

#### 16.5 **O&M Contractor Change of Control.**

O&M Contractor shall notify Owner immediately upon the occurrence of 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 O&M Contractor 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 O&M Contractor.

### **ARTICLE 17 MISCELLANEOUS**

#### 17.1 **Representations and Warranties**

(a) General Representations and Warranties. Each Party hereby represents and warrants to the other Party that:

(i) It is a duly organized, validly existing, and in good standing under the laws of the State of its formation 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. It is duly qualified to do business and is in good standing in the State of its formation 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 its ability to perform its obligations hereunder.

(ii) It has all requisite power and authority to execute and deliver, and to perform its obligations under, this Agreement. The execution and delivery by it of this Agreement and the performance of its obligations hereunder have been duly and validly authorized by all necessary [limited liability company] action required and no other [limited liability company] 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 the other Party of this Agreement, this Agreement constitutes the valid and legally binding obligations of the representing Party, enforceable against the representing Party in accordance with

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the terms hereof, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar Applicable Laws of general application relating to or affecting the enforcement of creditors' rights and by general equitable principles.

(iii) None of the execution and delivery by the representing Party of this Agreement or the representing Party's compliance with any provision hereof or thereof will: (A) violate, conflict with, or result in a breach of any of the provisions of its organizational document, (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 the representing Party is a party or by which the representing Party is bound, or (C) violate, conflict with, or result in a breach in any material respect of any Applicable Law or Permit applicable to the representing Party or any of its assets.

(iv) No authorization, approval, exemption, or consent of or by any Person is required by it in connection with the execution, delivery, and performance of this Agreement.

(b) Additional Representations and Warranties of O&M Contractor.  
O&M Contractor hereby represents and warrants to Owner that:

(i) O&M Contractor has (either directly or through its Subcontractors) all the required authority, ability, skill, experience and capacity necessary to perform the Services and diligently do so in a timely and professional manner, utilizing sound engineering and design principles, project management procedures, construction procedures and supervisory procedures, all in accordance with Applicable Laws, Permits, Prudent Industry Practice and Energy Storage Industry Standards.

(ii) The Permits required to be obtained by O&M Contractor (or a Subcontractor) either have been obtained by O&M Contractor (or a Subcontractor) and are in full force and effect on the date hereof or will be obtained by O&M Contractor (or a Subcontractor) and will be in full force and effect on or prior to the date on which they are required, under Applicable Law, to be in full force and effect, so as to permit O&M Contractor to perform the Services hereunder.

## 17.2 **Entire Agreement.**

This Agreement and the documents executed in connection herewith constitute the entire agreement among the Parties with respect to the subject matter hereof and thereof

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and supersede any prior understandings, negotiations, agreements or representations of the Parties of any nature, whether written or oral, to the extent they relate in any way to the subject matter hereof or thereof.

### **17.3 Waiver of Compliance.**

To the extent permitted by Applicable Law, any failure to comply with any obligation, covenant, agreement, or condition set forth herein, or any breach of any representation or warranty set forth herein, 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.

### **17.4 Dispute Resolution.**

In the event of any claim or dispute between Owner and O&M Contractor 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 Applicable Law, Owner may, by delivering a notice thereof to O&M Contractor, and O&M Contractor may, by delivering a notice thereof to Owner, refer the Dispute to senior executives of Owner and to O&M Contractor in accordance with this Section 17.4. The Parties agree that, on or before three (3) Business Days after receipt of any such notice from Owner to O&M Contractor, or of any such notice from O&M Contractor to Owner, O&M Contractor shall designate a senior executive of O&M Contractor or his or her designee to represent O&M Contractor, and Owner shall designate a senior executive of Owner or his or her designee to represent Owner, 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 Owner to O&M Contractor 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

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subject to the other terms hereof, the Parties may pursue all of their respective rights and remedies under this Agreement and any Applicable Law with respect to the Dispute.

#### 17.5 Confidentiality.

(a) All information provided or obtained by O&M Contractor, directly or indirectly, from or on behalf of Owner, or by Owner, directly or indirectly, from or on behalf of O&M Contractor, in each case, under this Agreement shall be subject to the Post-Closing Confidentiality Agreement (as defined in the BOT Agreement). [Each of Owner and O&M Contractor hereby adopts and agrees to be bound, effective as of the Execution Date, by the Post-Closing Confidentiality Agreement as though they were signatories thereto. O&M Contractor shall abide by, and shall cause its Affiliates and Subcontractors to abide by, the terms of such agreement.]<sup>4</sup>

(b) Notwithstanding any other provisions of this Section 17.5, O&M Contractor shall have the right to access the Project and the data acquisition system in order to collect data for its own uses, *provided, however*, that O&M Contractor shall keep such information confidential pursuant to the Post-Closing Confidentiality Agreement and shall not use such information in any manner that is, or could be, detrimental to the Project or Owner.

#### 17.6 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 Louisiana. Any action or proceeding arising under this Agreement shall be adjudicated by the United States District Court for the Middle District of Louisiana located in the Parish of East Baton Rouge, or, if such court does not have jurisdiction over such Action, in the state courts of the State of Louisiana located in the Parish of East Baton Rouge, and, in each case, the appellate courts 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

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<sup>4</sup> **NTD:** Include if and as appropriate.

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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 PROVISIO, 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.

#### **17.7 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.

#### **17.8 Time of Performance.**

Time is of the essence in the performance of each provision of this Agreement.

#### **17.9 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.

#### **17.10 Headings.**

The table of contents and section headings contained in this Agreement are for reference purposes only and shall not be deemed a part of this Agreement or affect in any way the meaning or interpretation of this Agreement.

#### **17.11 Relationship of the Parties.**

(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

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relationship, 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, O&M Contractor shall not have any authority or right on behalf of Owner, to assume or create any obligation of any kind or nature, express or implied, on behalf of, or in the name of Owner, nor bind Owner in any respect, without the specific prior written authorization of Owner. Any and all provisions of this Agreement that may appear to give Owner the right to direct or control O&M Contractor or any employee of O&M Contractor as to details of performing the Services, or to exercise any measure of control over the Services, shall be deemed to mean, and shall mean, that O&M Contractor shall follow the desires of Owner in the results of the Services only and not in the means by which the Services is to be accomplished, and O&M Contractor and its Subcontractors shall have complete control over the Services as to the manner, means, and details of performance of the Services.

(b) Without limiting Section 17.11(a), this Agreement does not establish any employment relationship between Owner and any employee of O&M Contractor, and no employee of O&M Contractor shall be deemed to be an employee of Owner for any purpose. With respect to the Services performed under this Agreement, O&M Contractor shall be solely responsible and liable for the following: (i) payment of wages, salary, and other compensation for all of its 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 of its employees; (iii) as applicable, providing its employees all pension, welfare, and other employment-related benefits; and (iv) directing, controlling, and making all employment-related decisions relating to its employees. In the event any employee of O&M Contractor or one of its Affiliates asserts any claim or commences any action against Owner relating to this Agreement, any action or conduct taken by O&M Contractor or Owner in connection with this Agreement, or the performance of the Service (a “O&M Contractor Employee Claim”), O&M Contractor shall (A) take, or cause the applicable Affiliate to take, at the earliest opportunity, all steps reasonably necessary to have O&M Contractor or such Affiliate determined to be the sole and exclusive employer and/or former employer of such employee, (B) retain or assume, or cause the applicable Affiliate to retain or assume, as applicable, all liability with respect to such O&M Contractor Employee Claim, and (C) defend, indemnify, and hold harmless each Indemnitee from and against any and all O&M Contractor Employee Claims and any and all Claims imposed upon or incurred by any Indemnitee that arise out of or relate to any O&M Contractor Employee Claim, pursuant to the provisions of Article 8.

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

#### **17.12 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

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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.

#### **17.13 Further Assurances.**

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. In particular, O&M Contractor shall cooperate with and provide reasonable assistance to Owner, Project Lenders and the Project insurers and their independent engineering, environmental, financial, legal, technical and other consultants, officers, employees, representatives and agents, in relation to their due diligence, financial, technical, scientific, engineering, accounting, and environmental studies, monitoring, inspections, and audits, and the creation and administration of milestone and completion tests that shall test the physical, mechanical, legal, reliability, financial, regulatory and other relevant aspects of providing the Services.

#### **17.14 Financing Assistance.**

O&M Contractor shall cooperate with Owner in connection with Owner's efforts to obtain and maintain any Financing. Without limiting the generality of the foregoing, O&M Contractor: (a) shall execute such typical documents as an operations and maintenance contractor executes in a project finance transaction or as Owner reasonably requests in connection with obtaining and maintaining any Financing, including a consent to assignment and any certifications and opinions required with respect to the Financing in form and substance reasonably acceptable to O&M Contractor, Owner and the Project Lender; (b) shall deliver to Owner and the Project Lender information customarily provided in connection with a project financing in format and content mutually acceptable to the Parties regarding the financial capability of O&M Contractor and shall facilitate reasonable inspections of the Site; (c) shall, at Owner's reasonable request, attend and participate in presentations to actual and potential Project Lenders; (d) hereby authorizes Owner to (i) provide this Agreement to potential Project Lenders (subject to Section 17.5), and (ii) include a description of the material provisions of this Agreement in any offering circular or document required for the Financing and/or, if the Financing must be registered or otherwise disclosed in accordance with Applicable Law, that Owner may, after consultation with O&M Contractor, file this Agreement as an exhibit to such registration statement or other disclosure; (e) at Owner's request, shall reasonably cooperate with the independent engineer and any rating agencies or credit enhancement entities associated with a Financing; (f) at Owner's request, shall reasonably cooperate in connection with tax-exempt Financing or any Financing or other arrangements effected to reduce taxes on

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the Project or the work, which cooperation shall not include, or be considered or deemed to be, tax advice or planning; and (g) shall provide Owner and the Project Lenders with legal opinions of counsel regarding the execution, delivery and validity of this Agreement, absence of conflicts, and the legal status of O&M Contractor, as Owner or any Project Lender may reasonably request in connection with obtaining and maintaining the Financing, *provided* that Owner shall reimburse O&M Contractor for any third-party expense reasonably incurred in providing such opinions.

#### **17.15 Severability.**

Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be valid, binding, and enforceable under Applicable Law, but if any provision of this Agreement is held to be invalid, illegal, void (or voidable), or unenforceable under Applicable 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 APPLICABLE LAW, THE PARTIES WAIVE ANY PROVISION OF APPLICABLE LAW THAT RENDERS ANY PROVISION HEREOF PROHIBITED OR UNENFORCEABLE IN ANY RESPECT.

#### **17.16 Conflicting Provisions.**

In the event of any conflict between this document and any exhibit hereto, the terms and provisions of this document, as amended from time to time, shall control. In the event of any conflict between Exhibit A (Scope of Services) and the balance of the exhibits, Exhibit A (Scope of Services) shall control. In the event of any conflict among the exhibits not including Exhibit A (Scope of Services), such conflict shall be reconciled reasonably to be consistent with the Agreement as a whole.

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**17.17 Survival.**

The provisions of ARTICLE 6, ARTICLE 8, ARTICLE 9, ARTICLE 10, ARTICLE 11 and ARTICLE 17 shall survive termination of this Agreement to the extent required for their full performance.

**17.18 Attorneys' Fees.**

In any litigation or other proceeding between Owner and O&M Contractor, 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.

**17.19 Counterparts.**

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 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 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.

[SIGNATURE PAGE FOLLOWS]

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IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed by their duly authorized representatives as of the Execution Date.

OWNER:

ENTERGY LOUISIANA, LLC

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

Name:

Title:

O&M CONTRACTOR:

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

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

Name:

Title:

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