



Appendix B-3

BOT Agreement Term Sheet

for

2024 Request for Proposals

for

***Combined-Cycle Combustion Turbine
Resources***

for

Entergy Louisiana, LLC

Entergy Services, LLC

~~November 11, 2024~~

~~Draft~~ January 27, 2025

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BOT Agreement Term Sheet

The following term sheet (this “**Term Sheet**”) describes certain terms and conditions of a potential agreement between Buyer (as defined in item 2 below) and the seller proposed by the applicable bidder (“**Bidder**”) in Bidder’s proposal submitted pursuant to the RFP (“**Seller**” and, together with Buyer, the “**Parties**”) for the purchase by Buyer of a developmental combined-cycle combustion turbine (CCCT) resource meeting the requirements of the RFP, together with related assets. The terms and conditions set forth in this Term Sheet will establish the basis for the negotiation and execution of a definitive agreement between Buyer and each Seller whose proposal is selected by Entergy Services, LLC (“**ESL**”) for contract negotiations (together with any agreements and other documents ancillary thereto, the “**Definitive Agreement**”), with necessary changes to accurately reflect any special exceptions set forth in Bidder’s proposal that are accepted by Buyer in its sole and absolute discretion. Buyer will provide the initial draft of the Definitive Agreement to the selected Bidder (if any) at the beginning of contract negotiations.

If Bidder is unable or unwilling to accept one or more of the terms and conditions in this Term Sheet or wishes to propose any alternate or additional terms or conditions, Bidder should indicate in the “Special Considerations” section of its Proposal Package (i) the terms and conditions to which Bidder takes exception, describing with specificity any terms and conditions that Bidder proposes in substitution therefor, and/or (ii) the additional terms and conditions that Bidder proposes as a supplement to the terms and conditions in this Term Sheet. Bidder is advised to refer to Section 2.3 in the Main Body for additional information and requirements pertaining to Special Considerations. In this Term Sheet, the term “including” will be construed to mean “including, without limitation,” and any capitalized term used but not defined in this Term Sheet will have the meaning ascribed to such term in Appendix A to the RFP.

| | Proposal Term | Description of Proposal Term |
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| 1 | Product Description: | The product described in this Term Sheet is designated as the “ Asset Acquisition-Developmental Resource (B-O-T) Product .” This product provides for flexible generation capacity from 600 to 800 MW (at full load, including duct-firing if included as part of the resource) of net nameplate capacity (measured at the Electric Interconnection Point (as defined in item 5 below)) under Summer Conditions (“ Summer Rated Capacity ”) from a designated developmental CCCT resource capable of meeting the requirements of this Product. |
| 2 | Buyer: | “ Buyer ” will be Entergy Louisiana, LLC (“ ELL ”) or its designee. For purposes of the RFP and the Definitive Agreement, Buyer will be considered an entity entirely separate and distinct from, and unaffiliated with, any Entergy transmission organization (including the ELL transmission organization), and, without limiting the foregoing, the acts and omissions of any Entergy transmission organization will not be deemed to be acts and omissions of Buyer or its affiliates for any purpose arising out of or relating to the RFP or the Definitive Agreement. |
| 3 | Seller: | “ Seller ” will be the party specified by Bidder in the applicable proposal. |

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| 4 | Facility: | The “ Facility ,” including the nameplate capacity and major equipment, will be as specified by Bidder in the applicable proposal in accordance with the terms of the RFP. |
| 5 | Electric Interconnection/ Transmission Service: | <p>The “Electric Interconnection Point” will be a point where the Facility will be interconnected to the host utility (and represented by a CP Node), as specified by Bidder in the applicable proposal. The Electric Interconnection Point must be located in Local Resource Zone 9 of the MISO Transmission System (“LRZ-9”). (Section 1.2 of the Main Body shows a map of LRZ-9.) The Electric Interconnection Point must be consistent with Bidder’s generator interconnection application submitted to MISO for the Facility prior to submission of the applicable proposal under the RFP.</p> <p>Seller will be responsible for (and will bear the full costs and risks of) the arrangement, procurement, and receipt by the Closing (as defined in item 6 below), and (subject to item 11 below) operation and maintenance through the Substantial Completion Payment Date (as defined in item 17 below), of the interconnection, deliverability, and transmission facilities and service required for the Facility and for Full Deliverability (as defined below), including (i) the arrangement, procurement, payment for, construction, installation, and readiness for energization by Closing, and subsequent energization, operation, and maintenance (subject to item 11 below) through the Substantial Completion Payment Date, of the Facility electric interconnection facilities and any system interconnection and transmission upgrades (including any coordination with the host utility and transmission provider with respect thereto); (ii) by no later than the Closing, the establishment and recognition by MISO and other applicable balancing authorities of (A) the Facility as a separate generating resource at the Electric Interconnection Point, including for settlement, scheduling, offering, and bidding purposes, and (B) the Electric Interconnection Point as a separate (and the exclusive) CP Node for the Facility (the “Required Facility Recognition”); and (iii) by no later than the Closing, (A) the receipt by the Facility of energy resource interconnection service (“ERIS”) that equals or exceeds the rating of the Facility at defined Winter Conditions of 10° Fahrenheit and 60% relative humidity (including duct-firing if included as part of the Facility) and network resource interconnection service (“NRIS”)¹ that equals or exceeds the Guaranteed Capacity (as defined in item 19 below), (B) full deliverability of at least the Guaranteed Capacity from the Facility to Buyer’s load on a firm network resource basis for the life of the Facility, and (C) qualification and recognition by MISO of the Facility as a firm network</p> |

¹ **NTD:** This Term Sheet assumes that Seller will obtain NRIS for the Facility. As indicated in Section 2.5.1 of the Main Body, Buyer will accept for evaluation proposals that contemplate network integration transmission service (“**NITS**”) in place of NRIS if Bidder elects in its proposal for ELL to procure NITS in MISO at Seller’s sole cost and risk. In such event, modifications to this Term Sheet will be required.

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| | | <p>resource and, if sought, Capacity Resource (as defined in the MISO rules) with such level of deliverability (collectively, “Full Deliverability”).</p> <p>Seller will be responsible for causing Buyer to obtain all auction revenue right allocations, financial transmission or congestion rights, and other similar allocations and entitlements associated with the Facility, and, if requested by Buyer, will act (at Seller’s expense) at Buyer’s reasonable direction in connection therewith. Without limiting the foregoing, Seller will support fully, and not take any action or position to oppose or prevent, Buyer’s entitlement to or receipt of such allocations and entitlements.</p> |
| 6 | Closing: | <p>The closing of the sale and purchase of the Closing Assets (as defined in item 7 below) (the “Closing”) will occur ten (10) business days after the Facility has achieved Mechanical Completion (as defined in item 13 below) and all other Closing conditions (as detailed in items 13 and 14 below) have been satisfied (and continue to be satisfied through the Closing) or waived by the applicable Party. At the Closing, Seller will transfer to Buyer the Closing Assets, free and clear of all encumbrances and liabilities, except Permitted Encumbrances (as defined below) and assumed liabilities as defined in the Definitive Agreement.</p> <p>Additional asset transfers from Seller to Buyer will occur after the Closing with respect to assets incorporated into, or acquired for or in connection with, the Facility during start-up, testing, and commissioning, during punch list completion, as part of achieving Substantial Completion (as defined in item 18 below) and Final Completion (as defined in item 20 below), and in connection with any warranty work performed by or for Seller.</p> <p>For purposes of the Definitive Agreement, “Permitted Encumbrances” will be limited to (i) liens for property taxes and other governmental charges not yet due and payable or the validity of which is being contested in good faith by appropriate proceedings described in a schedule attached to the Definitive Agreement (<u>provided</u> that, for any such lien from and after the Closing, Seller will be required to maintain (A) a bond covering such lien at a ten percent (10%) premium in accordance with law or otherwise in a manner reasonably satisfactory to Buyer or (B) full coverage under the title insurance policy provided by Seller to Buyer for the Facility), (ii) mechanics’, materialmen’s, and other similar liens arising in the ordinary course of the performance of the Work (as defined below in item 10) by operation of law for sums not yet due and payable and that have not been filed of record (provided that, for any such lien from and after the Closing, Seller will be required to maintain (A) a bond covering such lien at a ten percent (10%) premium in accordance with law or otherwise in a manner reasonably satisfactory to Buyer or (B) full coverage under the title insurance policy provided by Seller to Buyer for the Facility), (iii) any financing and other liens described in a schedule attached to the Definitive Agreement that will be and are discharged or released prior</p> |

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| | | to or simultaneously with the Closing, (iv) liens benefitting, or created by, through, or under, Buyer, (v) matters expressly identified on the title commitment to which Buyer does not object during the title objection process described in item 41 below, and (vi) liens expressly agreed to or waived in writing by Buyer. |
| 7 | Closing Assets: | <p>The “Closing Assets” will be the Facility and real and personal property assets, properties, and rights, of every kind and nature, of Seller and its affiliates relating to, generated by, used by or for, or held for use by or for, the Facility or the operation, maintenance, ownership, possession, use, replacement or repair thereof, <u>except</u> those expressly excluded under the Definitive Agreement (the “Excluded Assets”). Examples of Closing Assets include all equipment, systems, parts, fixtures, goods, inventory (including capital and non-capital spares), permits, books, records, documents, drawings (including AutoCAD), reports, logs, operating data, operating safety and maintenance manuals, inspection reports, registrations, engineering design plans, design drawings, specifications and procedures, and similar items (including turnover manuals), intellectual property rights, real property and related rights (including rights with respect to the Facility site, including easements, licenses, and rights-of-way),² water rights and contracts, fuel interconnection, supply (subject to the following paragraph), and transportation contracts, electric interconnection, transmission, distribution, and related contracts, credits, or other rights, capacity credits and rights to any other capacity-related benefits, emissions allowances, environmental attributes, tax credits, abatements, and similar benefits, licenses, and contracts and unexpired warranties, indemnities, or guarantees relating to, generated by, used by or for, or held for use by or for, the Facility or the operation, maintenance, ownership, possession, use, replacement or repair thereof, <u>excluding</u> any of the foregoing that are Excluded Assets.</p> <p>Buyer will not be required (whether at the Closing or thereafter) to acquire any EPC or other subcontract for the Work (other than the Subcontractor Warranties (as defined in item 31 below) therein), fuel supply contracts, long-term service agreement for the generating units, operations and maintenance agreement, Work-related permits (other than any such permits that (i) are required between Closing and the Substantial Completion Payment Date and must be held in the name of Buyer, as owner of the Facility, and cannot be held by Seller or any affiliate, contractor, or subcontractor thereof or (ii) are also required for the ownership, use, operation, or maintenance of the Facility or other purchased assets, including the project site, after the Substantial Completion Payment Date), or any contracts, permits, or other rights (or</p> |

² **NTD:** Buyer’s strong preference is to acquire ownership of the project site for its long-term owned conventional generation facilities. Accordingly, this Term Sheet assumes that Seller will hold and transfer to Buyer fee ownership of the project site. If such assumption does not hold, modifications to this Term Sheet will be required.

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| | | <p>associated obligations) that have not been entered into or obtained and maintained according to the Definitive Agreement, all of which will be considered Excluded Assets under the Definitive Agreement. For this purpose, any new contracts, permits, or other rights (including modifications to previously approved contracts, permits, and other rights) will require the approval of Buyer, in Buyer’s sole and absolute discretion, in order to be included in the Closing Assets or any subsequent transfer of assets. There will also be specific baseline requirements applicable to the procurement of Subcontractor Warranties, intellectual property rights, certain other contracts, and certain permits.</p> <p>While Seller will be responsible, as part of the Work, for procuring (in compliance with the Definitive Agreement) fuel supply contracts required for the Facility through the Substantial Completion Payment Date and otherwise for the Work, Seller will not be responsible for, and Buyer will negotiate its own, fuel supply contracts other than those described above. In addition, Seller will not be responsible for, and Buyer will negotiate on its own, any desired long-term service agreement and/or operations and maintenance agreement for the period after the Substantial Completion Payment Date.</p> <p>Based on diligence conducted by or for Buyer, Buyer may require fuel interconnection and transportation contracts (in each case, acceptable to Buyer in its sole and absolute discretion) and certain other arrangements (such as, for example, certain real estate or water rights and contracts) to be in place prior to execution of the Definitive Agreement.</p> <p>Buyer will not own, acquire title to, or pay for any of the Closing Assets (or any other assets) prior to the Closing.</p> |
| 8 | <p>Purchase Price and Payment Terms:</p> | <p>The purchase price for the Closing Assets and subsequent asset transfers (the “Purchase Price”) will be as specified by Bidder in the applicable proposal, subject to adjustments set forth in the Definitive Agreement, including adjustments reflecting (i) the final tested Summer Rated Capacity of the Facility, with and without duct-firing if included as part of the Facility (see item 19 below), (ii) the final tested net heat rate of the Facility (at full load, without duct-firing if included as part of the Facility) adjusted to Summer Conditions (see item 19 below), (iii) the final tested net heat rate of the duct-firing capacity of the Facility (if included as part of the Facility) at full load adjusted to Summer Conditions (see item 19 below), (iv) the Replacement MISO Capacity Credits (as defined in item 46 below) provided by Seller to Buyer for any MISO planning period(s) commencing after the Guaranteed Substantial Completion Date (as defined in item 18 below) (any “Relevant MISO Planning Period(s)”) but for which the Substantial Completion Payment Date occurs after the fifteenth (15th) day prior to the deadline for submission into the MISO planning resource auction (or successor process) (the “MISO Capacity Auction Deadline”) (see item 46 below), (v) change</p> |

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| | <p>orders issued to Seller in Buyer’s discretion, (vi) change orders for the actual increased direct costs incurred by Seller as a result of Buyer-Caused Delay (as defined in item 28 below), (vii) the proration of specified proratable items (e.g., property taxes) as of the Substantial Completion Payment Date, (viii) set-offs permitted in the Definitive Agreement, and (ix) other items specified in the Definitive Agreement.</p> <p>The Purchase Price will be payable as follows:</p> <ul style="list-style-type: none"> (i) 75% of the Purchase Price will be paid at the Closing. (ii) The remainder of the Purchase Price will be paid on the Substantial Completion Payment Date, less an amount (the “Final Completion Holdback”) equal to the greater of (A) 175% of the agreed estimated costs to complete any punch list items for the Facility as specified in the agreed punch list for Substantial Completion (“Agreed Punch List”) (the amount in clause (A), the “Punch List Holdback”) and (B) the amount to be specified in the Definitive Agreement to secure delivery of drawings, manuals, and other comparable documents or items (“Non-Pecuniary Punch List Items”) by Seller to Buyer on or before, and other requirements of, Final Completion (the amount in clause (B), the “Minimum Final Completion Holdback”). (iii) The Final Completion Holdback will be released as a lump sum payment to Seller on or before five (5) business days after the achievement of Final Completion, <u>provided</u> all Non-Pecuniary Punch List Items and Agreed Punch List have been completed. If all Non-Pecuniary Punch List Items and Agreed Punch List have not been completed by the Final Completion Expiration Date, the Final Completion Holdback will be released as provided in item 21 below. <p>The Purchase Price will not be earned or payable except as set forth above.</p> |
| <p>9 Seller Credit Support:</p> | <p>Seller will deliver to Buyer and maintain in favor of Buyer a letter of credit issued by a U.S. commercial bank or U.S. branch office of a foreign bank with (i) a local long-term issuer credit rating of “A-” or better by S&P and a senior unsecured long-term debt rating of “A3” or better by Moody’s (or, if the issuer has a local long-term issuer credit rating by S&P or a senior unsecured long-term debt rating by Moody’s, but not both, a local long-term issuer credit rating of “A-” or better by S&P or a senior unsecured long-term debt rating of “A3” or better by Moody’s) and (ii) total assets of at least \$10,000,000,000. Such letter of credit will secure Seller’s obligations under the Definitive Agreement and must be adjusted to equal the following</p> |

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| | amounts at each of the following adjustment dates, subject to the immediately following paragraph and to item 46 below: ³ |
| Adjustment Date | Amount |
| Execution of Definitive Agreement | \$17,500 per MW of Guaranteed Capacity |
| FNTP (as defined in item 12 below) | \$120,000 per MW of Guaranteed Capacity |
| Closing | 25% of the Purchase Price, excluding Purchase Price adjustments other than pursuant to change orders issued to Seller in Buyer's discretion or resulting from Buyer-Caused Delay (the " Unadjusted Purchase Price ") |
| Substantial Completion Payment Date | 15% of the Unadjusted Purchase Price <u>plus</u> the amount of any pending claim of Buyer or its group, <u>provided</u> that such pending claims will not increase the required amount of the letter of credit above the required amount of the letter credit as of Closing less any amounts drawn on such letter of credit after the Closing |
| 12 months after the Substantial Completion Payment Date | 10% of the Unadjusted Purchase Price <u>plus</u> the amount of any pending claim of Buyer or its group, <u>provided</u> that such pending claims will not increase the required amount of the letter of credit above the required amount of the letter credit on the Substantial Completion Payment Date less any amounts drawn on such letter of credit after the Substantial Completion Payment Date |
| 24 months after the Substantial Completion Payment Date | 5% of the Unadjusted Purchase Price <u>plus</u> the amount of any pending claim of Buyer or its group, <u>provided</u> that |

³ **NTD:** As detailed in Appendix E to the RFP, the credit support amounts to be supplied by Seller at the Closing and thereafter may also be provided in the form of a cash holdback of the Purchase Price or a combination of letter(s) of credit and a cash holdback. For simplicity, this Term Sheet assumes the liquid credit support will be provided in the form of a letter of credit.

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| | | | <p>such pending claims will not increase the required amount of the letter of credit above the required amount of the letter credit on the 12-month anniversary of the Substantial Completion Payment Date less any amounts drawn on such letter of credit after the 12-month anniversary of the Substantial Completion Payment Date</p> |
| | | <p>36 months after the Substantial Completion Payment Date</p> | <ul style="list-style-type: none"> • If there are no pending claims of Buyer or its group at such time, then the letter of credit will be returned to Seller • If there are pending claims of Buyer or its group at such time, the letter of credit will be adjusted to the amount of such pending claims, <u>provided</u> that the required amount of the letter of credit will not exceed the required amount of the letter credit on the 24-month anniversary of the Substantial Completion Payment Date less any amounts drawn on such letter of credit after the 24-month anniversary of the Substantial Completion Payment Date |
| | | <p>Buyer will have no obligation to post any independent credit support to or in support of Seller or the Facility.</p> | |
| <p>10</p> | <p>Seller's Work:</p> | <p>Seller will be responsible for all items, services, and work necessary or advisable to, among other things, (i) develop, finance, design, engineer, manufacture, procure, supply, transport, deliver to and unload at the Facility site, store, perform preventative maintenance during storage, assemble, erect, construct, install, test, start-up, commission, and otherwise provide to Buyer a complete, fully functional, and fully developed Facility that meets the performance standards specified in the Definitive Agreement (including all permits and other assets, properties, rights, and interests necessary or advisable for Buyer to operate, maintain, own, possess, deliver power to the Electric Interconnection Point from and otherwise use, replace, and repair the Facility from and after the Closing), (ii) consummate the transactions contemplated by the Definitive Agreement, and (iii) perform Seller's other obligations under the Definitive Agreement as and when due thereunder (the</p> | |

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| | | <p>“Work”). The Work will include all items, services, and work that are incidental to or reasonably can be inferred to be part of the scope described above, even if not specifically mentioned in the Definitive Agreement. All Work will be required to be performed in accordance with (and so that the Facility complies with and can be operated according to) the performance standards specified in the Definitive Agreement, including, among other things, prudent utility practices, applicable laws, permits, and other legal or quasi-legal (e.g., balancing authority, NERC, ISO) requirements, manufacturers’ manuals, requirements, specifications, and recommendations, Seller’s quality management plan, applicable insurance requirements, Buyer’s technical specifications (including the Scope Book), the Facility Warranty (as defined in item 31 below) and Subcontractor Warranties, the requirements of the Definitive Agreement, and the third-party contracts relating to the Facility.</p> <p>Seller will retain responsibility (including financing, project execution, and construction risk) for the Work at all times prior to completion of the Work, including during the period between the Closing and Final Completion.</p> |
| 11 | <p>Risk of Loss; Operation and Maintenance; Security:</p> | <p>Seller will have care, custody, control, and risk of loss for the Facility until the Substantial Completion Payment Date (and, with respect to any portion thereof that is not incorporated into the Facility until after the Substantial Completion Payment Date, until such later time as such portion is incorporated into the Facility and transferred to Buyer), whether or not title thereto is held by Seller at such time.</p> <p>Without limiting the foregoing, Seller (a) will be responsible, at its sole cost and expense, for the operation and maintenance of the Facility through the Substantial Completion Payment Date, including bearing, with respect to the period until the Substantial Completion Payment Date, all costs and expenses associated with the Facility and related assets (including property taxes, any real property payments, fuel and utility costs, MISO costs and expenses, and other costs and expenses, but excluding any amounts for which Seller is expressly entitled to indemnification or a change order under the Definitive Agreement and limited MISO costs and expenses for which Buyer is responsible under the MISO Agreement (as defined in item 45 below), and (b) will be entitled to any MISO payments and credits (excluding any MISO zonal resource credits and other applicable capacity credits (or the equivalent) associated with capacity from the Facility (“Facility MISO Capacity Credits”) and related payments). Seller will be required to reimburse Buyer on a monthly basis for any such costs and expenses that are incurred by Buyer, and any such amounts that have not been reimbursed by Seller by the Substantial Completion Payment Date will be offset against the payment of the Purchase Price due to Seller on that date. Notwithstanding the foregoing, from and after the date on which the Facility achieves initial synchronization</p> |

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| | | <p>with the host utility. Seller will not operate, or sell or deliver any electric energy, capacity, or other electric product from or attributable to, the Facility other than to conduct required performance testing under the Definitive Agreement or as instructed by Buyer (which instructions may be provided by Buyer under the MISO Agreement) to comply with MISO requirements applicable to the Facility, including any requirements that apply as a result of Buyer’s offer (in its sole and absolute discretion) of Facility MISO Capacity Credits into any MISO planning resource auction (or successor process) and/or the acceptance thereof by MISO.</p> <p>Also without limiting the first paragraph of this item 11, Seller will be responsible for the security of the Facility and the Facility site through the Substantial Completion Payment Date. Seller will develop and deliver to Buyer, no later than one hundred twenty (120) days prior to the anticipated FNTP date, a plan for the care, custody, protection, and safekeeping of the Facility and Facility site through the Substantial Completion Payment Date, which shall be subject to approval by Buyer in its sole and absolute discretion (the “Custody Plan”). It is expected that, for the period from the Closing through the Substantial Completion Payment Date, the terms of the Custody Plan will be no less stringent than the terms of Buyer’s health, safety, quality, construction, workplace, and security rules, procedures, and programs applicable to sites similar to the Facility site and the performance of work similar to the Work (or otherwise acceptable in writing to Buyer in its sole and absolute discretion) and in compliance with the requirements of the performance standards for the Work.</p> <p>Without limiting Seller’s indemnities (see item 32 below) and other responsibilities under the Definitive Agreement (including due to the negligence, willful misconduct, or breach of this Agreement or any ancillary agreement by any member of the Seller group), Buyer will assume care, custody, control, and risk of loss for the Facility, and take over operation and maintenance of the Facility, after the Substantial Completion Payment Date (or, with respect to any portion thereof that is not incorporated into the Facility until after the Substantial Completion Payment Date, such later time as such portion is incorporated into the Facility and transferred to Buyer).</p> |
| 12 | FNTP Conditions: | <p>Buyer will issue to Seller a full notice to proceed (“FNTP”) promptly after satisfaction (and continued satisfaction through FNTP) or waiver by Buyer of the specified conditions to FNTP, including:</p> <ul style="list-style-type: none"> • Buyer has obtained all approvals and other authorizations from governmental authorities deemed necessary or advisable by Buyer for it to consummate the transactions contemplated by the Definitive Agreement (other than those that, as specified on an agreed disclosure |

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| | | <p>schedule, may be obtained after FNTP and on or before the Closing)⁴ on terms and conditions acceptable to Buyer in its sole and absolute discretion, and such approvals and authorizations are in full force and effect, final, and not subject to appeal or other challenge or modification.</p> <ul style="list-style-type: none"> • Buyer has obtained all non-governmental consents required by Buyer, and such consents are in full force and effect and on terms and conditions acceptable to Buyer in its sole and absolute discretion. • There is no preliminary or permanent order invalidating or rendering unenforceable the Definitive Agreement in any respect or restraining or otherwise prohibiting the consummation of the transactions contemplated by the Definitive Agreement, and no action taken by a governmental authority, or law applicable to such transactions, directly or indirectly prohibits the consummation of such transactions. • Seller has entered into all agreements (and received any and all associated approvals and other authorizations) necessary for Full Deliverability (including the generator interconnection agreement), and such agreements, approvals, and other authorizations are in full force and effect and on terms and conditions satisfactory to Buyer in its sole and absolute discretion. • Seller has entered into or obtained all real property rights (including, for the avoidance of doubt, fee ownership of the Facility site and necessary easements and other real property rights), all fuel interconnection and transportation contracts, certain Subcontractor Warranties to be specified in the Definitive Agreement, and all other major project contracts that may be specified in the Definitive Agreement (and received any and all associated approvals and other authorizations) necessary for the use, ownership, operation, maintenance, and repair of the Facility from and after the Closing according to good industry practices and the performance standards specified in the Definitive Agreement, and such contracts, approvals, and other authorizations are in full force and effect and on terms and conditions satisfactory to Buyer in its sole and absolute discretion. • Seller has delivered to Buyer the title documentation required under item 41 below (including any updates thereto required by item 41 below), Buyer's title objection period(s) with respect to such title documentation (and any updates thereto) ha(s)(ve) expired, and any and all title objections have been (and are) cured by Seller in accordance with the requirements of the Definitive Agreement or |
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⁴ **NTD:** The Buyer regulatory approvals to be obtained after FNTP would be customary minor approvals for transactions of this type (e.g., approval of FCC radio license transfer, if necessary) that should not adversely affect the financeability of the transaction.

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| | <p>Buyer has elected to waive, and has waived, any such title objections not so cured by Seller.</p> <ul style="list-style-type: none"> • Seller has obtained the air permit (including Title V (construction and operation), Title IV (acid rain), PSD, and NSR), any water use permit, the wastewater disposal permit, and all other major permits that may be specified in the Definitive Agreement necessary for the use, ownership, operation, maintenance, and repair of the Facility from and after the Closing according to good industry practices and the performance standards specified in the Definitive Agreement, and such permits are in full force and effect and on terms and conditions satisfactory to Buyer in its sole and absolute discretion. • There has been no actual or threatened taking of the Facility site, in whole or in part, or any other material real property interest to be conveyed to Buyer by condemnation, eminent domain, or comparable proceedings that could reasonably be expected to adversely affect, in whole or in part, Buyer's use of the Facility or Facility site for its intended use. • Seller has provided to Buyer the credit support required from Seller at FNTF (see item 9 above), and the same is in full force and effect. • Seller has obtained and has in full force and effect builder's all risk insurance on the terms required by the Definitive Agreement and reflecting Buyer's reasonable review and comment and delivered to Buyer an insurance certificate from Seller's insurer or broker demonstrating Seller's compliance with the insurance requirements of the Definitive Agreement. • Buyer has received an officer's certificate from Seller certifying that (i) the representations and warranties of Seller and, if applicable, its affiliates, in the Definitive Agreement and ancillary agreements are true and correct in all material respects as of FNTF (except that fundamental representations of Seller and any representations and warranties of Seller qualified by materiality are true and correct in all respects as of FNTF), (ii) Seller and its affiliates have performed and are in compliance in all material respects with all covenants, obligations, and agreements of Seller or its affiliates contained in the Definitive Agreement and ancillary agreements that are required to be performed or complied with at or prior to FNTF (<u>provided</u> that, with respect to covenants, obligations, and agreements that are qualified by materiality, Seller and its affiliates shall have performed and be in compliance with such covenants, obligations, and agreements in all respects), and (iii) as of FNTF, no material adverse effect exists with respect to Seller or the Facility. • Seller has delivered an environmental site assessment with respect to the Facility and the Facility site for purposes of, among other things, |
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| | | <p>satisfying CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(B), and the regulations thereunder defining “all appropriate inquiry,” 40 CFR Part 312, and ASTM E1527-13, including a vapor intrusion assessment per ASTM E 2600, that is satisfactory to Buyer in its sole and absolute discretion.</p> <ul style="list-style-type: none"> • Seller has performed and delivered to Buyer all endangered species, cultural use and other environmental studies necessary or advisable (in Buyer’s reasonable discretion) in connection with the Facility, and the results thereof (including any conservation plans, permits, and other limitations or requirements derivative therefrom) are satisfactory to Buyer in its sole and absolute discretion. • Seller has delivered to Buyer the progress and incident reports required by the Definitive Agreement to be delivered to Buyer prior to FNTP in form and substance reasonably acceptable to Buyer. <p>FNTP conditions in addition to those set forth above may be included in the Definitive Agreement as a result of EPC, real property/title, environmental, physical, or operational aspects of the Facility, necessary property tax abatements or similar reductions, diligence conducted by or for Buyer, the status of applicable laws and markets, regulatory conditions, and other factors as Buyer deems relevant in its sole and absolute discretion.</p> <p>Without limiting termination for cause rights that may be available as described under item 36 below, if the FNTP has not occurred by the “FNTP Expiration Date” specified by Bidder in the applicable proposal (the “FNTP Expiration Date”), either Seller or Buyer will have the right to terminate the applicable Definitive Agreement without liability to the other, except that this right will not be available to a Party whose material breach of the Definitive Agreement was the primary cause of such failure.</p> |
| 13 | Buyer’s Closing Conditions: | <p>The obligation of Buyer to consummate the Closing will be subject to the satisfaction (and continued satisfaction through the Closing, <u>provided</u> that, for the occurrence of Mechanical Completion condition in the fifth bullet point below, this “continued satisfaction” requirement will be deemed met if, as of the Closing, no event or circumstance has occurred and is continuing that causes any of the criteria described in the definition of “Mechanical Completion” to cease to be true) or waiver by Buyer of specified Buyer’s conditions to Closing, including:</p> <ul style="list-style-type: none"> • Seller and its affiliates have performed and are in compliance in all material respects with all covenants, obligations, and agreements of Seller or its affiliates contained in the Definitive Agreement and ancillary agreements that are required to be performed or complied with at or prior to the Closing (<u>provided</u> that, with respect to covenants, obligations, and agreements that are qualified by materiality, Seller and its affiliates shall have performed and be in |

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| | | <p>compliance with such covenants, obligations, and agreements in all respects).</p> <ul style="list-style-type: none"> • There is no preliminary or permanent order invalidating or rendering unenforceable the Definitive Agreement in any respect or restraining or otherwise prohibiting the consummation of the transactions contemplated by the Definitive Agreement, and no action taken by a governmental authority, or law applicable to such transactions, directly or indirectly prohibits the consummation of such transactions. • Buyer has obtained, on terms and conditions acceptable to Buyer in its reasonable discretion, all approvals and other authorizations from governmental authorities that, as specified on an agreed disclosure schedule, may be obtained after FNTP and on or before the Closing,⁵ and such approvals and authorizations are in full force and effect, final, and not subject to appeal or other challenge or modification. • The representations and warranties of Seller and, if applicable, its affiliates in the Definitive Agreement and ancillary agreements are true and correct in all material respects as of the Closing (except that fundamental representations of Seller and any representations and warranties of Seller qualified by materiality are true and correct in all respects as of the Closing). • Mechanical Completion has occurred and, since achievement of Mechanical Completion, no event or circumstance has occurred and is continuing that causes any of the criteria described in the definition of “Mechanical Completion” to cease to be true. • Buyer has received an officer’s certificate from Seller certifying that the first, fourth, and fifth conditions above have been and are satisfied. • Buyer has received (i) certain required organizational documents and certificates (e.g., Secretary’s and incumbency certificates) from Seller, (ii) a bringdown of the environmental assessment required at FNTP that shows no new environmental conditions and is dated within 180 days prior to the Closing, and (iii) other required Closing deliverables from Seller (including certain certifications, affidavits, consents, approvals, and permits required to demonstrate satisfaction of all representations, warranties, and covenants made by Seller pertaining to the Closing and other documents and instruments reasonably required by Buyer for the Closing, executed by a duly authorized representative of Seller to the extent required). • Seller has delivered to Buyer complete and accurate copies of engineering, design, and construction drawings and plans related to the Facility required to be provided to Buyer at or prior to the Closing |
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⁵ **NTD:** The Buyer regulatory approvals to be obtained after FNTP would be customary minor approvals for transactions of this type (e.g., approval of FCC radio license transfer, if necessary) that should not adversely affect the financeability of the transaction.

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| | <p>pursuant to the Scope Book, including issued for construction drawings.</p> <ul style="list-style-type: none">• The MISO Agreement is in full force and effect, Buyer (or its specified agent) has been at all times prior to the Closing, and will be as of the Closing, the “Market Participant” for the Facility and, as of the Closing, there shall be no pending notice or other submission to MISO that could result in Buyer (or its specified agent) not being the Market Participant for the Facility after the Closing, excluding any such notice or other submission made by Buyer or any of its affiliates.• Since the signing of the Definitive Agreement, no material adverse effect with respect to Seller or the Facility has occurred that has not been cured.• There has been no actual or threatened taking of any Closing Assets (including the Facility site), in whole or in part, by condemnation, eminent domain, or comparable proceedings that could reasonably be expected to adversely affect, in whole or in part, Buyer’s use of same for its intended use.• Seller has delivered to Buyer evidence reasonably satisfactory to Buyer that any encumbrance on, or affecting, the Facility, the Facility real property, or any other asset or interest of Seller to be conveyed to Buyer at the Closing (including any financing encumbrance) has been removed as of the Closing, other than Permitted Encumbrances.• Seller has delivered to Buyer executed lien waivers, in the form required by the Definitive Agreement, from each major contractor and major subcontractor with respect to all Work performed prior to the Closing.• In connection with any update to the real property rights for the Facility after FNTP, Seller has delivered to Buyer the title documentation required under item 41 below (including any updates thereto required by item 41 below), Buyer’s title objection period(s) with respect to such title documentation (and any updates thereto) ha(s)(ve) expired, and any and all title objections have been (and are) cured by Seller in accordance with the requirements of the Definitive Agreement or Buyer has elected to waive, and has waived, any such title objections not so cured by Seller.• Seller has delivered to Buyer (i) (A) the required title insurance policy for the project in the form and substance required by the Definitive Agreement (including required endorsements and affirmative coverage for statutory liens (including mechanic’s and materialman’s liens) related to the Work (including after the Closing), subject only to Permitted Encumbrances, or (B) a binding title insurance commitment issued by the title company committing to issue such title insurance policy, together with evidence, in form and substance |
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| | <p>reasonably satisfactory to Buyer, establishing or confirming that all of the title company’s requirements for issuing such title policy have been met as of the Closing, and (ii) other title work and documentation required by the Definitive Agreement (including title affidavits and surveys/updates) (collectively, the “Definitive Title Documentation”).</p> <ul style="list-style-type: none"> • The Facility has not been synchronized or provided, transmitted, or delivered any electric energy, capacity, or any other electric product to the grid and does not include FERC-jurisdictional transmission assets, and Seller has tendered to Buyer the required certification to that effect. • Buyer has approved the statement distributing the entire Purchase Price (as adjusted) against the retirement units of Buyer. • Seller has in place (i) from MISO for the Facility, Full Deliverability (including the completion, testing, and entry into service by the host utility (or other applicable entity) of any system interconnection and transmission upgrades required therefor) and the Required Facility Recognition, (ii) the full capability to transport fuel to, and receive delivery of fuel at, the fuel interconnection point(s), and (iii) without limiting the foregoing, all agreements and all approvals and other authorizations necessary for transport of fuel to, and receipt of delivery of fuel at, the fuel interconnection point(s), Full Deliverability, and the Required Facility Recognition (all of which are final and not subject to appeal or legal challenge, in full force and effect, and available for immediate use by the Facility from and after the Closing). • Seller has provided to Buyer the credit support required from Seller at the Closing (see item 9 above), and the same is in full force and effect. <p>“Mechanical Completion” means that the specified requirements for Mechanical Completion have been satisfied (and continue to be satisfied through Mechanical Completion) or waived by Buyer, including:</p> <ul style="list-style-type: none"> • The Facility (including the components, systems and civil and electrical infrastructure thereof) has been designed, engineered, manufactured, assembled, constructed, and installed, and is otherwise complete (including mechanically, electrically, and structurally), according to the specifications (including the nameplate capacity) and descriptions set forth in, and the other requirements of, the Definitive Agreement (including the Scope Book and other aspects of the performance standards specified in the Definitive Agreement), is electrically, mechanically, and structurally sound, and is free from violations of the Facility Warranty, the Subcontractor Warranties, and other defects and deficiencies. |
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| | | <ul style="list-style-type: none"> • Pre-operational testing (including all factory and functionality tests contemplated by the Scope Book to be conducted prior to, or as part of achieving, Mechanical Completion) has been successfully completed according to the requirements of the Definitive Agreement (including the Scope Book and other aspects of the performance standards specified in the Definitive Agreement), and, since successful completion thereof, no event or circumstance has occurred and is continuing that could reasonably be expected to result in the failure of such pre-operational testing if repeated. • The Facility is ready to commence commissioning, testing, and operation according to the specifications and descriptions set forth in, and the other requirements of, the Definitive Agreement (including the Scope Book and other aspects of the performance standards specified in the Definitive Agreement). • Without limiting the foregoing, all required system interfaces for the Facility are complete, and all process, safety, communications, and other systems for the Facility are ready for operational testing, according to the specifications and descriptions set forth in, and the other requirements of, the Definitive Agreement (including the Scope Book and other aspects of the performance standards specified in the Definitive Agreement). • Further without limiting the foregoing, the Facility satisfies the requirements of, and is in compliance with, (i) the applicable interconnection (including gas and electric) agreements, (ii) all fuel transportation arrangements, (iii) any other arrangements required for Full Deliverability and the Required Facility Recognition, and (iv) all laws and applicable permits. <p>For purposes of the Definitive Agreement, the achievement of Mechanical Completion will be deemed to occur on the earlier of (i) Buyer confirming in writing to Seller that it agrees with Seller’s certification of Mechanical Completion or (ii) if within fifteen (15) business days after receipt of Seller’s certification of Mechanical Completion, Buyer has neither confirmed in writing to Seller that it agrees with such certification nor provided to Seller a notice of objections, the fifteenth (15th) business day after Seller issued to Buyer such certification.</p> <p>Conditions to Mechanical Completion and Buyer Closing conditions in addition to those set forth above in this item 13 may be included in the Definitive Agreement.</p> |
| 14 | Seller’s Closing Conditions: | The obligation of Seller to consummate the Closing will be subject to the satisfaction (and continued satisfaction through the Closing) or waiver by Seller of the following Seller’s conditions to Closing: |

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| | | <ul style="list-style-type: none"> • Buyer and its affiliates have performed and are in compliance in all material respects with all covenants, obligations, and agreements of Buyer or its affiliates contained in the Definitive Agreement and ancillary agreements that are required to be performed or complied with at or prior to the Closing (<u>provided</u> that, with respect to covenants, obligations, and agreements that are qualified by materiality, Buyer and its affiliates shall have performed and be in compliance with such covenants, obligations, and agreements in all respects). • There is no preliminary or permanent order invalidating or rendering unenforceable the Definitive Agreement in any respect or restraining or otherwise prohibiting the consummation of the transactions contemplated by the Definitive Agreement, and no action taken by a governmental authority, or law applicable to such transactions, directly or indirectly prohibits the consummation of such transactions. • Seller has obtained all approvals and other authorizations from governmental authorities, and all non-governmental consents, necessary for Seller to consummate the transactions contemplated by the Definitive Agreement, as scheduled in the Definitive Agreement, on terms and conditions reasonably acceptable to Seller, and such approvals and authorizations are in full force and effect, final and not subject to appeal or other challenge or modification. • The representations and warranties of Buyer and, if applicable, its affiliates, in the Definitive Agreement and ancillary agreements are true and correct in all material respects as of the Closing (except that fundamental representations of Buyer and any representations and warranties of Buyer qualified by materiality are true and correct in all respects as of the Closing). • Seller has received an officer's certificate from Buyer certifying that the first and fourth conditions above have been and are satisfied. • Seller has received (i) certain required organizational documents and certificates (e.g., Secretary's and incumbency certificates) from Buyer and (ii) other required Closing deliverables from Buyer. |
| 15 | Termination for Delay in Closing: | <p>If the Closing has not occurred by the "Closing Expiration Date" (expected to be as specified by Bidder in the applicable proposal) (as may be adjusted according to the Definitive Agreement, the "Closing Expiration Date"), either Seller or Buyer will have the right to terminate the applicable Definitive Agreement, except that this right will not be available to a Party whose material breach of the Definitive Agreement was the primary cause of such failure. Any such termination will be treated as a termination for cause, and Seller will pay to Buyer (i) liquidated damages of \$102,000 per MW of Guaranteed Capacity plus (ii) all liquidated damages (including any Lost</p> |

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| | | Capacity Credit LDs (as defined in item 46 below)) and other damages or net amounts due Buyer and unpaid by Seller under the Definitive Agreement. |
| 16 | Excluded Liabilities: | <p>Notwithstanding the occurrence of the Closing, Seller will retain, and Buyer will not assume or be obligated to pay, perform or otherwise discharge, certain liabilities (the “Excluded Liabilities”), including:</p> <ul style="list-style-type: none"> • Liabilities relating to, or based in whole or in part on any fact, event, circumstance, condition (including any environmental condition), or occurrence (or set of facts, events, circumstances, conditions, or occurrences) occurring or existing during, the period on or prior to the Closing (or after the Closing with respect to obligations performed by or for Seller, or other acts or omissions of the Seller group, or other liability allocated to Seller, under the Definitive Agreement), including any act or omission of any predecessor of Seller but excluding liabilities for which Buyer provides express indemnification to Seller under the Definitive Agreement. • Liabilities related to Excluded Assets or other assets that are not Closing Assets or the ownership, operation, or conduct of any business in connection therewith or therefrom. • Liabilities concerning the Closing Assets (or any subsequent transfer of assets) other than liabilities expressly assumed by Buyer under the Definitive Agreement. • Liabilities pursuant to, under, or otherwise with respect to the Closing Assets (or any subsequent transfer of assets) arising out of or relating to the transactions contemplated by the Definitive Agreement and ancillary agreement (including any rights triggered thereby), including any amounts requested or required for, or otherwise incurred in connection with, obtaining any consent. • Liabilities of Seller or any of its affiliates incurred or accruing after the Closing, other than the liabilities for which Buyer provides express indemnification under the Definitive Agreement. • Other liabilities allocated to Seller under the Definitive Agreement. <p>Without limiting the foregoing, the Excluded Liabilities would include taxes for which Seller is responsible, labor-related, employment-related, and employee benefit plan-related liabilities of Seller, related persons of Seller, Seller’s ERISA affiliates, Seller’s contractors and subcontractors of any tier, and others, payment liabilities under any of Seller’s vendor, service, engineering, or other contracts, and environmental liabilities arising out of any environmental condition or matter existing or caused prior to the Closing, liabilities for non-compliance with laws (including fines, penalties, charges, and costs), and indebtedness of Seller or any affiliate thereof.</p> |
| 17 | Substantial Completion | The “ Substantial Completion Payment Date ” will occur ten (10) business days after the satisfaction (and continued satisfaction through the Substantial |

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| <p>Payment Date Conditions:</p> | <p>Completion Payment Date, <u>provided</u> that, for the occurrence of Substantial Completion condition in the second bullet point below, this “continued satisfaction” requirement will be deemed met if, as of the Substantial Completion Payment Date, no event or circumstance has occurred and is continuing that causes any of the criteria described in the definition of “Substantial Completion” to cease to be true) or waiver by Buyer of specified conditions to the Substantial Completion Payment Date, including:</p> <ul style="list-style-type: none"> • Seller and its affiliates have performed and are in compliance in all material respects with all covenants, obligations, and agreements of Seller or its affiliates contained in the Definitive Agreement and ancillary agreements that are required to be performed or complied with at or prior to the Substantial Completion Payment Date (<u>provided</u> that, with respect to covenants, obligations, and agreements that are qualified by materiality, Seller and its affiliates shall have performed and be in compliance with such covenants, obligations, and agreements in all respects). • Substantial Completion (as defined below) has occurred and, since achievement of Substantial Completion, no event or circumstance has occurred and is continuing that causes any of the criteria described in the definition of “Substantial Completion” to cease to be true. • Buyer has received an officer’s certificate from Seller certifying that the two preceding conditions above have been and are satisfied and that certain representations and warranties are true and correct as of the Substantial Completion Payment Date. • In connection with any update to the real property rights for the Facility after the Closing, Seller has delivered to Buyer the title documentation required under item 41 below (including any updates thereto required by item 41 below), Buyer’s title objection period(s) with respect to such title documentation (and any updates thereto) ha(s)(ve) expired, and any and all title objections have been (and are) cured by Seller in accordance with the requirements of the Definitive Agreement or Buyer has elected to waive, and has waived, any such title objections not so cured by Seller. • Seller has delivered to Buyer a down-date endorsement to the title policy updating the date of the title policy to the Substantial Completion Payment Date and reflecting no encumbrances other than Permitted Encumbrances; <u>provided, however</u>, that, in the case of any update to the real property rights for the Facility after the Closing, Seller has delivered to Buyer the Definitive Title Documentation taking into account such update. • Seller has delivered to Buyer executed lien waivers, in the form required by the Definitive Agreement, from each major contractor |
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| | <p>and major subcontractor with respect to all Work performed prior to the Substantial Completion Payment Date.</p> <ul style="list-style-type: none"> • Seller has completed all training of Buyer personnel required by the Scope Book. • Seller has provided to Buyer the credit support required from Seller at the Substantial Completion Payment Date (see item 9 above), and the same is in full force and effect. • If Substantial Completion occurred after the Guaranteed Substantial Completion Date, Seller has acknowledged in writing its obligations to pay to Buyer, pursuant to a reduction in the Substantial Completion Payment Date amount and the Purchase Price, the Delay Liquidated Damages (as defined in item 18 below) associated with such failure as described in item 18 below. • Seller is in compliance with item 47 below, including, if applicable, provision of any Replacement MISO Capacity Credits and/or payment of any Lost Capacity Credit LDs (or acknowledgement by Seller in writing of its obligations to pay to Buyer, pursuant to a reduction in the Substantial Completion Payment Date amount and the Purchase Price, such Lost Capacity Credit LDs). <p>“Substantial Completion” means that the specified requirements for Substantial Completion have been satisfied (and continue to be satisfied through Substantial Completion, <u>provided</u> that, for the occurrence of Mechanical Completion condition in the first bullet point below, this “continued satisfaction” requirement will be deemed met if, as of Substantial Completion, no event or circumstance has occurred and is continuing that causes any of the criteria described in the definition of “Mechanical Completion” to cease to be true) or waived by Buyer, including:</p> <ul style="list-style-type: none"> • Mechanical Completion has occurred and, since achievement of Mechanical Completion, no event or circumstance has occurred and is continuing that causes any of the criteria described in the definition of “Mechanical Completion” to cease to be true. • All Work (other than Agreed Punch List items and other Seller obligations concerning the Work following Substantial Completion) is completed in accordance with the specifications (including the nameplate capacity) and descriptions set forth in, and the other requirements of, the Definitive Agreement (including the Scope Book and other aspects of the performance standards specified in the Definitive Agreement), electrically, mechanically and structurally sound, and free from violations of the Facility Warranty, the Subcontractor Warranties, and other defects and deficiencies. |
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| | <ul style="list-style-type: none">• The Facility has successfully completed start up, commissioning, and testing (including all functionality tests contemplated by the Scope Book to be conducted prior to, or as part of achieving, Substantial Completion) according to the requirements of the Definitive Agreement (including the Scope Book and other aspects of the performance standards specified in the Definitive Agreement), and, since successful completion thereof, no event or circumstance has occurred and is continuing that could reasonably be expected to result in the failure thereof if repeated.• The Facility achieved, after the Closing, initial synchronization with, and is synchronized with, the host utility and is available for normal and continuous operation and fully capable of reliably producing energy, capacity, capacity-related benefits, and other electric products as contemplated by the Definitive Agreement and delivering the same to the host utility at the Electric Interconnection Point.• (i) All conditions for the Facility to transport fuel to, and receive delivery of fuel at, the fuel interconnection point(s) and for Full Deliverability and Required Facility Recognition have been and are satisfied, (ii) the Facility has and is transporting fuel to, and receiving deliveries of fuel at, the fuel interconnection point(s) reliably and as required for normal and continuous operation, (iii) the Facility has in place Full Deliverability and the Required Facility Recognition, and (iv) without limiting the foregoing, (A) the Facility has in place all agreements and all approvals and other authorizations necessary for transport of fuel to, and receipt of delivery of fuel at, the fuel interconnection point(s), Full Deliverability, and the Required Facility Recognition (all of which are final and not subject to appeal or legal challenge, in full force and effect, and available for immediate use by the Facility from and after the Closing), and (B) the Facility satisfies the requirements of, and is in compliance with, (1) the applicable interconnection (including gas and electric) agreements, (2) all fuel transportation arrangements, (3) any other arrangements required for Full Deliverability and the Required Facility Recognition and (4) all laws and applicable permits.• The Facility's local control system (LCS), communications, and telemetry equipment required by the Scope Book or other provisions of the Definitive Agreement (i) have been and are properly programmed, installed, and interconnected to the appropriate interconnection provider equipment and systems, (ii) have successfully completed commissioning and testing and, since successful completion thereof, no event or circumstance has occurred and is continuing that could reasonably be expected to result in the failure thereof if repeated, and (iii) are, and have demonstrated that |
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| | <p>they are, fully capable of (A) safely, accurately, and reliably transmitting real-time data to the interconnection provider and (2) allowing for the receipt and use of such data by the interconnection provider, in each case, in accordance with the requirements of the Definitive Agreement (including the Scope Book and other aspects of the performance standards specified in the Definitive Agreement).</p> <ul style="list-style-type: none">• All final Facility performance testing (see item 19 below) has been successfully completed and all required reports and certifications have been delivered to, and approved by, Buyer in accordance with the requirements of the Definitive Agreement (including the Scope Book and other aspects of the performance standards specified in the Definitive Agreement), with the final test results showing that the Facility has achieved at least (i) the Minimum Base Capacity (as defined in item 19 below) and the Minimum Duct-Firing Capacity (as defined in item 19 below) (if duct-firing is included as part of the Facility), (ii) the Maximum Base Heat Rate (as defined in item 19 below) and the Maximum Duct-Fired Heat Rate (as defined in item 19 below) (if duct-firing is included as part of the Facility) (in each case, by not exceeding such heat rate), and (iii) the other minimum performance characteristics required by the Definitive Agreement (see item 19 below).• If the final results of the performance testing show that the Guaranteed Base Capacity (as defined in item 19 below), Guaranteed Duct-Firing Capacity (as defined in item 19 below) (if duct-firing is included as part of the Facility), Guaranteed Base Heat Rate (as defined in item 19 below), or Guaranteed Duct-Fired Heat Rate (as defined in item 19 below) (if duct-firing is included as part of the Facility) has not been met, Seller has acknowledged in writing its obligations to pay to Buyer, pursuant to a reduction in the Substantial Completion Payment Date amount and the Purchase Price, the liquidated damages associated with such failure as described in item 19 below.• The punch list for the Facility has been approved by Buyer.• Buyer has received all deliverables required to be provided to Buyer at or prior to Substantial Completion pursuant to the Scope Book. <p>For purposes of the Definitive Agreement, the achievement of Substantial Completion will be deemed to occur on the earlier of (i) Buyer confirming in writing to Seller that it agrees with Seller's certification of Substantial Completion or (ii) if within fifteen (15) business days after receipt of Seller's certification of Substantial Completion, Buyer has neither confirmed in writing to Seller that it agrees with such certification nor provided to Seller a</p> |
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| | <p>notice of objections, the fifteenth (15th) business day after Seller issued to Buyer such certification; <u>provided</u> that, for purposes of the Delay Liquidated Damages and termination rights described in item 18 below, the achievement of Substantial Completion will be deemed to occur on (i) if Buyer does not dispute Seller’s written certification of Substantial Completion as provided above, the date Seller issues to Buyer such certification or (ii) if Buyer does dispute Seller’s written certification of Substantial Completion as provided above and, without resolving Buyer’s objections and resubmitting its certification of Substantial Completion, Seller disputes Buyer’s objections, then the later of (A) the date Seller issued to Buyer such certification or (B) the date that, according to the final resolution of Buyer’s objections (whether by agreement of the Parties or by dispute resolution), is determined to be the date that all conditions to Substantial Completion were, and continued to be, satisfied.</p> <p>Conditions to Substantial Completion and the Substantial Completion Payment Date in addition to those set forth above may be included in the Definitive Agreement.</p> |
| <p>18 Buyer Remedies for Delay in Substantial Completion:</p> | <p>If Substantial Completion is not achieved by the “Guaranteed Substantial Completion Date” (expected to be as specified by Bidder in the applicable proposal) (as may be adjusted according to the Definitive Agreement, the “Guaranteed Substantial Completion Date”), Seller will pay to Buyer liquidated damages in the amount of \$125 per MW of Guaranteed Capacity per day (the “Delay Liquidated Damages”), for each day after the Guaranteed Substantial Completion Date that Substantial Completion is not achieved until the earliest of (i) the date Seller achieves Substantial Completion, (ii) the date the Definitive Agreement is validly terminated, and (iii) one hundred eighty (180) days after the Guaranteed Substantial Completion Date (the “Substantial Completion Termination Trigger Date”). The foregoing right to Delay Liquidated Damages will not limit Buyer’s rights or remedies with respect to any Seller breach or default under the Definitive Agreement for the consequences thereof other than the failure of the Substantial Completion to occur on or prior to the Guaranteed Substantial Completion Date and will not limit Buyer’s remedies described in item 45 below or Buyer’s termination rights and remedies.</p> <p>In addition, if the Substantial Completion Payment Date does not occur by fifteen (15) days prior to the MISO Capacity Auction Deadline for any Relevant MISO Planning Period, then Buyer’s remedies described in item 45 below will apply.</p> <p>If Substantial Completion is not achieved on or prior to the Substantial Completion Termination Trigger Date, Buyer will have the right to terminate the Definitive Agreement for cause.</p> |

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| | | <ul style="list-style-type: none"> • If such termination occurs prior to the Closing, Seller will pay to Buyer (i) liquidated damages of \$102,000 per MW of Guaranteed Capacity plus (ii) all liquidated damages (including any Lost Capacity Credit LDs) and other damages or net amounts due Buyer and unpaid by Seller under the Definitive Agreement. • If such termination occurs after the Closing, Seller will be required to undertake certain transition actions and will be liable to Buyer for an amount equal to (i) the total reasonable and necessary costs and expenses actually incurred and accrued by Buyer in connection with such termination, including for the completion of the Work and to replace the warranties, guaranties, and liquidated damages provisions (including the coverage relating to MISO capacity credits described in item 46 below) under the Definitive Agreement (including additional reasonable and necessary overhead and all legal fees and related expenses), plus (ii) the diminution in value resulting from, to the extent applicable, reduced Facility capacity below the Guaranteed Base Capacity and/or Guaranteed Duct-Firing Capacity (if included as part of the Facility), Facility heat rate at full load without duct-firing (if included as part of the Facility) above the Guaranteed Base Heat Rate, heat rate of the duct-firing capacity of the Facility (if included as part of the Facility) above the Guaranteed Duct-Fired Heat Rate, and termination of the warranty, guaranty, and liquidated damages provisions under the Definitive Agreement (including the coverage relating to MISO capacity credits described in item 46 below), net of the value of any replacement provisions obtained by Buyer for which Seller compensates Buyer according to clause (i) above, plus (iii) 10% of the amounts described in clause (i) above, plus (iv) all liquidated damages (including any Lost Capacity Credit LDs) and other damages or net amounts due Buyer and unpaid by Seller under the Definitive Agreement. If such sum is greater than the unpaid portion of the Purchase Price, Seller will pay to Buyer the difference equal to such sum, less the unpaid portion of the Purchase Price. If such sum is less than the unpaid portion of the Purchase Price, Buyer will pay to Seller the difference equal to the unpaid portion of the Purchase Price, less such sum, but only if Seller has completed the transition actions required of Seller upon termination. |
| 19 | Facility Performance Testing: | The Definitive Agreement will provide for tests of the performance of the Facility, including the individual generating units, to be conducted, at Seller's expense, in connection with Substantial Completion. The tests will cover (i) Guaranteed Base Capacity and Guaranteed Duct-Firing Capacity (if included as part of the Facility), (ii) Guaranteed Base Heat Rate and Guaranteed Duct-Fired Heat Rate (if duct firing is included as part of the Facility), (iii) reliability (as further described below), (iv) specified pollutant |

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| | <p>and noise emissions, (v) operating range, and (vi) other plant performance metrics and criteria set forth in the Definitive Agreement, including compliance with heat rate curves, load-following capabilities, start-up capabilities (including start times and start fuel), ramp times/modes, minimum operating times, generation unit islanding capabilities, vibration levels, and diligence-related items. The results of the tests will be compared against the corresponding values specified in the Definitive Agreement. The tests will be conducted within a specified period prior to Substantial Completion pursuant to an agreed detailed testing protocol, and certain of these tests will be required to be conducted simultaneously. Subsequent tests may be required depending on the results of the previous performance test, intervening events or circumstances after such performance test (e.g., extended project/force majeure delays, material casualty/repairs to the project), and/or material modifications to the date of Substantial Completion. Unless Buyer otherwise directs, each subsequent test will be performed by the testing contractor that performed the initial test. Final test results may give rise to liquidated damages, a reduction in the Purchase Price, and/or termination of the Definitive Agreement, as described below. Seller will not be entitled to any increase in the Purchase Price or any other compensation from Buyer if the test results indicate that performance for a particular metric or criteria is better than required by the Definitive Agreement.</p> <p>The Guaranteed Base Capacity, Guaranteed Duct-Firing Capacity (if included as part of the Facility), Guaranteed Base Heat Rate, and Guaranteed Duct-Fired Heat Rate (if duct-firing is included as part of the Facility) will be, and the minimum performance characteristics will include, the following:</p> <ul style="list-style-type: none">• The “Guaranteed Capacity” will be the sum of the Guaranteed Base Capacity and the Guaranteed Duct-Firing Capacity (if duct-firing is included as part of the Facility). The “Guaranteed Base Capacity” will be 100% of the Summer Rated Capacity of the Facility, in MW, without duct-firing (if duct-firing is included as part of the Facility), as specified by Bidder in the applicable proposal. The “Guaranteed Duct-Firing Capacity” will be applicable only if duct-firing is included as part of the Facility and will be 100% of the Summer Rated Capacity of the Facility, in MW, with duct-firing, as specified by Bidder in the applicable proposal, less the Guaranteed Base Capacity. There will also be a “Minimum Base Capacity” and “Minimum Duct-Firing Capacity” (if duct-firing is included as part of the Facility) equal to 95% of the Guaranteed Base Capacity and Guaranteed Duct-Firing Capacity, respectively.• The “Guaranteed Base Heat Rate” will be the net heat rate of the Facility (at full load, without duct-firing if included as part of the Facility) adjusted to Summer Conditions, as specified by Bidder in the applicable proposal, provided that the Guaranteed Base Heat Rate |
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| | <p>may be no greater than 7,000 Btu (HHV)/kWh (Summer Conditions). The “Guaranteed Duct-Fired Heat Rate” will be the net heat rate of the duct-firing capacity of the Facility (if included as part of the Facility) at full load adjusted to Summer Conditions, as specified by Bidder in the applicable proposal, <u>provided</u> that the Guaranteed Duct-Fired Heat Rate may be no greater than approximately 8,600 Btu (HHV)/kWh (Summer Conditions, with evaporative cooling). There Guaranteed Heat Rate, and a “Maximum Duct-Fired Heat Rate” equal to 105% of the Guaranteed Duct-Fired Heat Rate (if duct-firing is included as part of the Facility). Separately, there will be other maximum net heat rates for the Facility that will be tested at certain other points in the heat rate curve specified by Bidder in the applicable proposal.</p> <ul style="list-style-type: none">• The minimum overall reliability factor during the reliability test will be 94.5% and will be calculated according to a formula set forth in the Definitive Agreement. The reliability test will be a seven (7)-day test that cycles through all operating configurations and includes various start-ups and shutdowns.• The minimum operating range of the Facility is expected to be as specified by Seller in the applicable proposal.• The guaranteed emission rates for NO_x, CO, SO₂, PM, PM₁₀, ammonia, greenhouse gases, and any other emission or pollutant specified in the Definitive Agreement for the Facility will be required to be within the limits specified in the applicable permits for the Facility and not to restrict ordinary operation of the Facility. <p>The minimum performance characteristics (including the Minimum Base Capacity, Minimum Duct-Firing Capacity (if duct-firing is included as part of the Facility), Maximum Base Heat Rate, and Maximum Duct-Fired Heat Rate (if duct-firing is included as part of the Facility)) specified above already include an allowance for measurement uncertainties, so Seller will not be entitled to any relief therefrom for measurement uncertainties.</p> <p>If, pursuant to the most recent performance tests before Substantial Completion, the Facility does not achieve all of the minimum performance characteristics (including the Minimum Base Capacity, Minimum Duct-Firing Capacity (if duct-firing is included as part of the Facility), and Maximum Heat Rate) required by the Definitive Agreement, Seller will be required to retest and will not achieve Substantial Completion until the Facility has achieved all such minimum performance characteristics. If the Facility does not achieve such minimum performance characteristics and, correspondingly, Substantial Completion by the Guaranteed Substantial Completion Date and/or the Substantial Completion Termination Trigger Date, then Buyer’s remedies described in item 18 above (i.e., Delay</p> |
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| | <p>Liquidated Damages and termination rights, as applicable) will apply. In addition, if the Substantial Completion Payment Date does not occur by fifteen (15) days prior to the MISO Capacity Auction Deadline for any Relevant MISO Planning Period, then Buyer’s remedies described in item 46 below will apply.</p> <p>If, pursuant to the most recent performance tests of the Facility before Substantial Completion, the Facility achieves all of the minimum performance characteristics (including the Minimum Base Capacity, Minimum Duct-Firing Capacity (if duct-firing is included as part of the Facility), Maximum Base Heat Rate, and Maximum Duct-Fired Heat Rate (if duct-firing is included as part of the Facility)) required by the Definitive Agreement but does not achieve 100% of the Guaranteed Base Capacity, Guaranteed Duct-Firing Capacity (if duct-firing is included as part of the Facility), Guaranteed Base Heat Rate, and Guaranteed Duct-Fired Heat Rate (if duct-firing is included as part of the Facility), Seller may elect to (i) retest (subject to Buyer’s approval in its sole and absolute discretion if the retest may cause Substantial Completion not to be achieved by the Substantial Completion Termination Trigger Date) or (ii) pay to Buyer, pursuant to a reduction in the Substantial Completion payment amount and Purchase Price, liquidated damages in the amount of:</p> <ul style="list-style-type: none"> • 1.2% of the Purchase Price for each 1.0% (prorated for any fraction thereof) by which the final tested Summer Rated Capacity of the Facility, without duct-firing if duct-firing is included as part of the Facility, is below the Guaranteed Base Capacity; • 1.2% of the Purchase Price for each 1.0% (prorated for any fraction thereof) by which the final tested Summer Rated Capacity of the duct-firing capability of the Facility (if included as part of the Facility) is below the Guaranteed Duct-Firing Capacity; • \$175,000 for each Btu (HHV)/kWh (prorated for any fraction thereof) by which the final tested net heat rate of the Facility (at full load, without duct-firing if included as part of the Facility), adjusted to Summer Conditions, is above the Guaranteed Base Heat Rate; and • \$175,000 for each Btu (HHV)/kWh (prorated for any fraction thereof) by which the final tested net heat rate of the duct-firing capacity of the Facility (if included as part of the Facility) at full load, adjusted to Summer Conditions, is above the Guaranteed Duct-Fired Heat Rate. |
| <p>20 Final Completion Conditions:</p> | <p>“Final Completion” means that the specified requirements for Final Completion have been satisfied (and continue to be satisfied through Final Completion) or waived by Buyer, including:</p> <ul style="list-style-type: none"> • Substantial Completion has occurred. • The Agreed Punch List and all other Work is completed in accordance with the specifications (including the nameplate |

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| | | <p>capacity) and descriptions set forth in, and the other requirements of, the Definitive Agreement (including the Scope Book and other aspects of the performance standards specified in the Definitive Agreement), electrically, mechanically and structurally sound, and free from violations of the Facility Warranty, the Subcontractor Warranties, and other defects and deficiencies.</p> <ul style="list-style-type: none"> • Buyer has approved the statement distributing the entire Purchase Price (as adjusted) against the retirement units of Buyer. • All encumbrances on the Facility and related assets arising out of or relating to the Work or the Seller group have been removed and there are no such encumbrances against or applicable to the Facility and related assets, other than Permitted Encumbrances, and Seller has provided evidence, in form and substance reasonably satisfactory to Buyer, of the foregoing. • Seller has delivered final lien waivers reasonably satisfactory to Buyer from all major contractors and subcontractors. • Seller has delivered to Buyer a complete and accurate list of all assets (including contracts, intellectual property, and other intangibles) transferred to Buyer as part of the acquisition. • Seller has delivered to Buyer all engineering, design, and construction drawings and plans related to the Facility, including as-built drawings and all deliverables required to be provided to Buyer at or prior to Final Completion pursuant to the Scope Book. • Seller and each of its contractors and subcontractors of any tier have demobilized and removed from the Facility site all personnel and all equipment, materials, and other items and have left the Facility site in the condition required by the Definitive Agreement. <p>For purposes of the Definitive Agreement, the achievement of Final Completion will be deemed to occur on the earlier of (i) Buyer confirming in writing to Seller that it agrees with Seller’s certification of Final Completion or (ii) if within fifteen (15) business days after receipt of Seller’s certification of Final Completion, Buyer has neither confirmed in writing to Seller that it agrees with such certification nor provided to Seller a notice of objections, the fifteenth (15th) business day after Seller issued to Buyer such certification.</p> <p>Conditions to Final Completion in addition to those above may be included in the Definitive Agreement.</p> |
| 21 | <p>Buyer’s Remedies for Delay in Final Completion:</p> | <p>If Final Completion has not occurred by one hundred twenty (120) days after the Guaranteed Substantial Completion Date (the “Final Completion Expiration Date”), Buyer will have the right to (i) step in and complete, or waive, all or any of the remaining Agreed Punch List items and/or (ii) waive the remaining requirements for Final Completion.</p> |

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| | | <ul style="list-style-type: none"> • If Buyer elects to step in and complete, or waive, all or any of the remaining Agreed Punch List items (including Non-Pecuniary Punch List Items) without waiving the remaining requirements for Final Completion, then Buyer will be entitled to retain the Punch List Holdback for each Agreed Punch List item that has not been completed (including the Minimum Final Completion Holdback if there are any incomplete Non-Pecuniary Punch List Items), and such Agreed Punch List items will be deemed completed for purposes of Seller achieving Final Completion. • If Buyer elects to waive the remaining requirements for Final Completion, then Buyer will be entitled to retain the entire Final Completion Holdback, except that Buyer will pay to Seller within five (5) business days, (a) if the Non-Pecuniary Punch List Items have been completed, the greater of (1) the sum of the values specified in the Agreed Punch List for each Agreed Punch List item that has been completed by Seller (“Completed Punch List Items Value”) and (2) the Minimum Final Completion Holdback or (b) if the Non-Pecuniary Punch List Items have not been completed, the greater of (1) zero (0) and (2) the Completed Punch List Items Value minus the Minimum Final Completion Holdback. <p>The foregoing rights will not limit Buyer’s rights or remedies with respect to any Seller breach or default under the Definitive Agreement for the consequences thereof other than, if and to the extent such rights are exercised by Seller, the failure of Seller to complete the applicable Agreed Punch List item(s) or other requirements of Final Completion, as applicable.</p> |
| 22 | Representations and Warranties: | <p>The Definitive Agreement will include customary representations and warranties to be made by Buyer and Seller as of each of (i) the execution date of the Definitive Agreement, (ii) the FNTF date, and (iii) the Closing. The representations and warranties to be made by Seller will include:</p> <ul style="list-style-type: none"> • Organization, existence, power and authority.* • Execution, delivery, and enforceability.* • No conflicts.*[as to organizational documents] • Compliance with laws. • Legal proceedings. • Land/land contracts.*[as to title] • Tangible Personal Property.*[as to title] • Contracts and warranties.*[as to title] • Permits.*[as to title] • Consents and approvals. • Sufficiency of the Closing Assets (e.g., as of the Closing, the Closing Assets constitute all assets, rights, and interests reasonably necessary for the use, ownership, operation, maintenance, and repair of the |

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| | | <p>Facility from and after the Closing according to good industry practices and the performance standards specified in the Definitive Agreement, including applicable law and permits).</p> <ul style="list-style-type: none"> • Environmental. • Other representations and warranties of Seller customary for CCCT asset acquisitions of the type described in this Term Sheet, including representations and warranties pertaining to bankruptcy, taxes,* employment, labor, and employee benefits matters (covering Seller and its affiliates, including Seller’s ERISA affiliates, contractors and subcontractors, and all individuals providing services at the Facility),* title,* intellectual property, financing encumbrances,* absence of energization/grid synchronization as of the Closing,* NERC compliance (if applicable), absence of FERC-jurisdictional transmission assets,* brokers,* insurance, and diligence-related and other matters. <p>In addition, certain Seller and Buyer representations and warranties identified in the Definitive Agreements will be “brought down” on the Substantial Completion Payment Date to support, among other things, Buyer’s making of the partial payment of the Purchase Price on the Substantial Completion Payment Date. Seller’s and Buyer’s representations and warranties in the Definitive Agreement, other than Seller’s and Buyer’s “fundamental” representations and warranties and Seller’s environmental representations and warranties, will survive until twenty-four (24) months after the Substantial Completion Payment Date. Seller’s fundamental representations and warranties will include those marked above by an asterisk and will survive for the applicable statute of limitations plus 30 days thereafter. Seller’s environmental representations will survive until thirty-six (36) months after the Substantial Completion Payment Date. Seller and Buyer representations and warranties will be limited to those expressly set forth in the Definitive Agreement.</p> |
| 23 | Covenants: | <p>The covenants (including negative covenants) and agreements in the Definitive Agreement are expected to be customary for CCCT acquisitions of the type described in this Term Sheet and will include covenants and agreements covering Seller’s conduct and actions taken by Seller with respect to the Closing Assets, Seller’s compliance with, and execution or modification of, contracts, regulatory approvals, transfers of permits, title to real and personal property, risk of loss, insurance (including builder’s all risk and contractor and subcontractor insurance), taxes, employees, employee benefits, and labor, gas matters, water matters, utilities, Full Deliverability and Required Facility Recognition, Seller’s non-solicitation obligations, notice and reporting obligations, maintenance of books/records, confidentiality and public announcements, removal of encumbrances,</p> |

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| | | developmental obligations, Buyer’s access to Seller’s books and records and property, inspection rights, and technical or diligence-related matters. |
| 24 | Effect of Knowledge: | The right to indemnification, reimbursement, or other remedy based upon the representations, warranties, covenants, obligations, and agreements in the Definitive Agreement will not be affected by any information made available or furnished to, or any investigation or audit conducted (or that could have been conducted) by, any Party or any knowledge of any Party acquired at any time, whether before, on, or after the signing of the Definitive Agreement or the Closing, with respect to the transaction or the Facility or the accuracy or inaccuracy of, or compliance or non-compliance with, any such representation, warranty, covenant, obligation, or agreement, or any other matter. Each Party will be entitled to rely upon the representations, warranties, covenants, obligations, and agreements of the other Party notwithstanding (i) any investigation or audit conducted (or that could have been conducted) by such Party or any information received or otherwise known (or that should have been known) by such Party before, on, or after the signing of the Definitive Agreement or Closing, or (ii) the decision of such Party to complete the Closing or consummate any other transaction contemplated by the Definitive Agreement. |
| 25 | Disclosure Schedule Updates: | <p>The Definitive Agreement will include various schedules as attachments, including schedules of assets and liabilities included and excluded from the transaction, disclosure schedules corresponding to specific representations and warranties of the Parties, schedules of required regulatory approvals and consents of each Party, and other miscellaneous schedules (such as a listing of persons with knowledge, description of the Facility, etc.). Each of Seller and Buyer will have the obligation to notify the other at specified times of any necessary updates (including additions or deletions) to any of its schedules; however, subject to specified exceptions, such updates will have no effect for purposes of the Definitive Agreement (including for purposes of FNTP, Closing, and other milestone conditions, indemnification, and defining the assets and liabilities that will and will not be transferred to Buyer under the Definitive Agreement), unless approved by the other Party (which, in the case of Buyer, may be withhold in its sole and absolute discretion for any update of Seller required prior to FNTP or resulting from failure by Seller to comply with the Definitive Agreement or any ancillary agreement). Notwithstanding the foregoing:</p> <ul style="list-style-type: none"> • Seller will be permitted to (and, if requested by Buyer, will be required to) add assets to the schedules describing the assets to be transferred to Buyer if they were entered into or acquired in compliance with the Definitive Agreement (which, as described in item 6 above, may require the consent of Buyer) and are within the general scope of the transaction (e.g., relate to the Facility and are not required exclusively for the Work). |

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| | | <ul style="list-style-type: none"> • Buyer will be permitted to update its required regulatory approvals and non-governmental consents until FNTF. <p>Any such permitted updates will be effective for purposes of the applicable milestone conditions and, only if the Closing occurs, defining the assets and liabilities that will and will not be transferred to Buyer (if applicable) and, solely as of the Closing, for purposes of indemnification.</p> |
| 26 | Scope Book: | <p>A high-level working summary of the Scope Book has been issued with the RFP and contains important requirements for the Work that should be taken into account and validated in preparing Bidder’s proposal. Seller will be required in the Definitive Agreement to adopt the Scope Book as its own and to take responsibility for the contents of, and compliance with, the Scope Book. In particular, Bidder should be aware that:</p> <ul style="list-style-type: none"> • The major equipment components of the Facility (e.g., generating units, heat recovery steam generators, transformers, switchgear) must be manufactured by “tier 1” manufacturers that are specified as pre-approved in the Scope Book or otherwise acceptable to Buyer in its sole and absolute discretion. • Seller is required to purchase for the Facility certain other goods and services specified in the Scope Book (e.g., circulation water pump/motor, condensate pump/motor, boiler feed pump/motor, control systems) from vendors, manufacturers, service providers, and other contractors identified as pre-approved for a particular good or service in the Scope Book or otherwise acceptable to Buyer in its sole and absolute discretion. • The Scope Book requires that certain items included in or services provided for the Facility or other Closing Assets be of a make, type, product, and/or class and/or have properties, characteristics, standards, functionality, and/or attributes specified therein for such items and services. |
| 27 | Observation and Inspection: | <p>Buyer and Buyer’s authorized representatives will have the right to observe and inspect the Work and to maintain personnel at the Facility sites for such purpose, certain approval rights, and certain other rights and protections related to Seller’s performance of the Work commensurate with Buyer’s interests in the Facility. Such rights (or the exercise thereof) will in no way relieve Seller of its obligations under the Definitive Agreement.</p> |
| 28 | Change Orders: | <p>Buyer will have the right, through change orders issued to Seller from time to time, to make discretionary changes to the Work, subject to an aggregate change order amount cap on such modifications of 7.5% of the Purchase Price. If Buyer issues any such change order, Seller will be entitled to equitable changes to, as applicable, the Closing Expiration Date, the Guaranteed Substantial Completion Date and/or the Purchase Price (at direct</p> |

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| | <p>costs plus 10%) resulting exclusively from such Buyer discretionary change, except as Buyer and Seller may otherwise agree.</p> <p>Seller will not otherwise be entitled to any cost or schedule relief with respect to the performance of the Work, <u>except</u> that Seller will be entitled to:</p> <ul style="list-style-type: none"> • a change order for any actual delay in achieving Closing by the Closing Expiration Date or Substantial Completion by the Guaranteed Substantial Completion Date, resulting exclusively from Force Majeure (as defined in item 29 below), up to a maximum period of extension (for all Force Majeure change orders in the aggregate) of 180 days; • a change order for any actual net increase in direct costs (plus 10%), and/or actual delay in achieving Closing by the Closing Expiration Date or Substantial Completion by the Guaranteed Substantial Completion Date, resulting exclusively from (i) a material breach or default under the Definitive Agreement by Buyer or (ii) property damage resulting from the negligence (including gross negligence but excluding any actual or alleged negligence that is not a physical tort, including any actual or alleged negligence with respect to design or engineering, any actual or alleged professional negligence, negligent review or oversight of the Work, negligent approval of an action, and negligent failure to enforce (or negligent waiver of) any safety, insurance, or other provision of the Definitive Agreement) (“Physical Negligence”), fraud, or willful misconduct of Buyer (i) and (ii) collectively, “Buyer-Caused Delay”); and • if and to the extent provided in the immediately following paragraph, the builder’s all risk insurance proceeds (if any) received by Seller for damage or loss to the Facility solely as a result of Force Majeure properly claimed by Seller; <p><u>provided</u> that, in order to qualify for such relief, Seller will have to satisfy certain conditions specified in the Definitive Agreement, including advising Buyer of Seller’s claim of, and the actual or potential effect of, the Force Majeure or Buyer-Caused Delay within seven (7) days after the occurrence of such Force Majeure or Buyer-Caused Delay and of the details and support for the specific adjustments claimed by seven (7) days after the effects of the Force Majeure or Buyer-Caused Delay have ended. If Seller does not notify Buyer of Seller’s claim of, and the actual or potential effect of, a Force Majeure or Buyer-Caused Delay in accordance with the requirements of the Definitive Agreement within the first such seven (7)-day period and the details and support for the specific adjustments claimed by the end of the second such seven (7)-day period, Seller will be deemed to have irrevocably waived any and all claims for adjustment to the Purchase Price and the</p> |
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| | <p>Guaranteed Substantial Completion Date arising out of or related to such Force Majeure or Buyer-Caused Delay.</p> <p>Seller will not be entitled to any increase in the Purchase Price or any other compensation based on, arising out of, or relating to the subject matter of any Force Majeure, <u>except</u>, in the case of damage or loss to the Facility prior to the Substantial Completion Payment Date solely as a result of Force Majeure properly claimed by Seller, the net proceeds (if any) for such loss or damage (excluding any amounts under any delays in startup, advance loss of profits, or similar coverage, which shall belong to Buyer) received from the builder's all risk insurance required to be maintained by Seller under item 32 below, to the extent required and used by Seller to fund the remedy of the affected portions of the Facility by Seller (it being understood and agreed that any deductible will be for Seller's account). Buyer will have first priority with respect to all proceeds from the builder's all risk insurance required to be maintained by Seller under item 32 below, and Buyer will disburse such proceeds to Seller to the extent contemplated by this paragraph.</p> <p>Notwithstanding anything to the contrary, Seller will be obligated, as part of the Work and without a Buyer discretionary (or other) change order, to proceed with, and will be responsible for, the performance and completion of the Work in all respects in accordance with the Definitive Agreement despite the occurrence of any loss or damage to the Facility, including for remedying such loss or damage regardless of the cause thereof (but without limiting Buyer's indemnity obligation, if applicable, for the Physical Negligence, gross negligence, or willful misconduct of Buyer or any member of Buyer's group or Seller's rights with respect to Force Majeure hereunder).</p> <p>Notwithstanding anything to the contrary, (i) the FNTTP Expiration Date will not be adjusted pursuant to any change order described above (and may be changed only by express amendment to the Definitive Agreement), and (ii) the Substantial Completion Termination Trigger Date and the Final Completion Expiration Date may be changed by change order only indirectly through a change to the Guaranteed Substantial Completion Date.</p> |
| <p>29 Force Majeure:</p> | <p>"Force Majeure" will mean the occurrence of an event that meets all of the following criteria: (i) the event occurs after the signing of the Definitive Agreement, (ii) the event and its effects are not within the reasonable control, directly or indirectly, of the Party claiming Force Majeure (or such Party's agents, contractors, or subcontractors of any tier), (iii) the events and its effects are unavoidable and could not be prevented, overcome, or removed by the reasonable foresight, efforts, and diligence of the Party claiming Force Majeure (including such Party's agents, contractors, and subcontractors of any tier), (iv) the event and its effects do not result from the negligence or fault of the Party claiming Force Majeure (or the negligence or fault of such Party's agents, contractors, or subcontractors of any tier), and (v) the event</p> |

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| | <p>causes the Party claiming Force Majeure, despite such Party’s (including such Party’s agents, contractors, and subcontractors of any tier) use of reasonable efforts and diligence, to be actually delayed in performing, or unable to perform, the Work or its obligations under this Agreement, in whole or in part (for reasons other than economic hardship, including lack of money). Provided the event meets all of the criteria described immediately above and not otherwise excluded by the immediately following paragraph, Force Majeure will include the following events: (A) tornadoes, hurricanes, earthquakes, tsunamis, one hundred (100)-year (or greater) floods, and similar acts of God of equivalent magnitude (<u>provided</u> that flooding will not be considered Force Majeure except to the extent within or immediately adjacent to the Facility site and adversely affecting immediate access thereto); (B) acts of war, undeclared war, revolution, and riot; (C) Change in Law (as defined below); and (D) nationwide or industry-wide labor strikes, slowdowns, and stoppages.</p> <p>Notwithstanding the foregoing, “Force Majeure” will not include: (i) mechanical failure or other breakdown, flaw, defect, or failure of parts, machinery, equipment, facilities, systems, or other items not the direct and proximate result of certain Force Majeure events expressly described in the Definitive Agreement or similarly independent, identifiable Force Majeure events; (ii) sabotage by the Party claiming Force Majeure or any agent, contractor, or subcontractor (including vendor) of any tier, or representative of the Party claiming Force Majeure; (iii) the failure or other act or omission of a Party or any agent, contractor, or subcontractor of any tier (including any fuel transporter or supplier), 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 (including with respect to interconnection, deliverability, and transmission goods or services, including under the arrangements for Full Deliverability), shortage, or other unavailability of machinery, materials, facilities, systems, consumables, water, fuel, labor, equipment, or services (including any interruption or curtailment of electric transmission or fuel transportation, including lack of pressure and curtailment of transportation service by the fuel transporter), unless (A) the Party claiming Force Majeure has a firm contract for the applicable service or item (which, in the case of fuel, requires firm fuel transportation and firm fuel supply and, in the case of firm gas transportation, the transportation curtailed is primary, in-path firm transportation or (only if primary, in-path firm transportation would have also been curtailed) secondary firm transportation) and (B) the provider, if it were a party hereto, would be entitled to Force Majeure protection as an affected party; (iv) any weather event that is not a tornado, hurricane, earthquake, tsunami, one</p> |
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| | <p>hundred (100)-year (or greater) flood, or similar act of God of equivalent magnitude (<u>provided</u> that flooding will not be considered Force Majeure except to the extent within or immediately adjacent to the Project Site and adversely affecting immediate access thereto); (v) a Party’s financial inability to perform; (vi) any delay in obtaining, inability to obtain, or modification or revocation of, any permit; (vii) events that affect the cost of services, equipment, or materials (including, without limiting clause (xi) below, additional or changes to taxes, tariffs, fees, or other charges or costs imposed by governmental authorities) or other costs of designing, engineering, procuring equipment for, constructing, installing, commissioning, testing, owning, possessing, using, operating, operating, maintaining, studying, repairing, or replacing the Facility, in whole or in part, or changes in market conditions affecting the economics of a Party (including a change in commodity prices or increased inflation) or any other economic hardship (including lack of money); (viii) any event stated in the technical specifications of the Project, or any component thereof, or required by this Agreement (including the Scope Book) to be within the tolerance of the Project or such component thereof; (ix) labor strikes, slowdowns, or stoppages (A) that are not nationwide or industry-wide or (B) without limiting clause (iii) above, if Seller is the Party claiming Force Majeure, that are initiated or otherwise arise as a result of the conduct or other actions or omissions of Seller, any contractor or subcontractor of Seller, or any representative of Seller at the Facility site or with respect to the Work; (x) without limiting clause (iii) above, labor shortages (except to the extent successfully procured and obtained on a firm basis by the Party claiming Force Majeure and subsequently lost as a direct and proximate result of a Force Majeure event expressly described in the Definitive Agreement); (xi) any change or other modification to any Law that would not meet the requirements of a Change in Law; and (xii) the matters described in item 30 below, except to the extent of certain enumerated Force Majeure events that will be expressly listed in the Definitive Agreement; <u>provided, however</u>, that the existence of one or more of the factors listed in the exceptions to clauses (i), (iii), (iv), (ix), (x), and (xii) shall not be sufficient to conclusively or presumptively prove the existence of a Force Majeure if the event does not meet the criteria described in the first sentence of the first paragraph of this item 29.</p> <p>“Change in Law” will mean the enactment, adoption, promulgation, issuance, modification, or repeal after the signing date of the Definitive Agreement 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 will be considered a Change in Law: (i) a change in any law related to income taxes or a change in any income tax rate, (ii) an <u>enactment, adoption, promulgation, or material change in the enforcement or</u></p> |
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| | | <p>interpretation of an applicable law that is published prior to the signing date of the Definitive Agreement but that becomes effective after such signing date, and (iii) a change in the enforcement or interpretation of an applicable law outside of the United States.</p> |
| <p>30</p> | <p>Seller Diligence:</p> | <p>Seller will acknowledge and agree that, prior to the signing date of the Definitive Agreement, it has taken, in its opinion both as the developer of the Facility site and a power generation facility owner and developer with substantial experience, directly and through its affiliates, in work of this type, the steps necessary to investigate and ascertain the nature and location of the Work and the sufficiency of the Purchase Price to cause the Work to be performed and the transactions to be completed in accordance with the Definitive Agreement, and has investigated and satisfied itself as to, and has factored into its determination that the Purchase Price is sufficient for performance of the Work and completion of the transactions, the matters and conditions that can affect the time or ability to perform or the cost of the Work or the transactions, including: (a) the general and local conditions at or affecting use of the Facility site, such as, for purposes of illustration only, availability and condition of roads, railways, and waterways, climate (including seismic conditions, temperature, humidity, rainfall, wind, and proximity to bodies of salt or fresh water), and seasonal conditions, physical conditions at the Facility site, including existing structures or buildings, hazardous substances, Facility site topography, ground surface and subsurface conditions (e.g., soil composition, compaction, drainage/hydrology), and underground obstructions or interferences; (b) the information and material included in the Scope Book; (c) the obligations and requirements of Seller under all laws and permits applicable to the Work, the Facility (including the Facility site), including laws relating to health and safety, hiring or employment, project design, engineering, procurement, and construction, licensing, permits, contracts, taxes, zoning, or building; (d) the conditions and contingencies bearing upon the transportation, delivery, receipt, handling, storage, disposal, use, or cost of equipment, material, and other items relating to the Work (recognizing, for the avoidance of doubt, that any required updates and other improvements to public roads is the responsibility of Seller); (e) the availability, reliability, and cost of utilities and related services during construction, commissioning, and testing of the Facility; (f) the availability and cost of contractors and subcontractors, labor, and personnel to perform the Work and the competency and reliability of each; (g) the uncertainties of climate, weather, or similar conditions at the Facility site or affecting the Work; (h) the risk of (i) damage to the Facility (including the Facility site), items used in connection with performance of the Work (including plant equipment and material), and other property, (ii) injury to individuals, whether located at or near the Facility site or elsewhere, (iii) delays in the schedule for, and other risks of, performance deficiencies</p> |

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| | | <p>and other defects of the Facility, (iv) incurring liabilities in connection with the Work, including fines and penalties, (v) off-site laydown and storage, and (vi) not using and removing existing improvements and other assets that are Excluded Assets and the plan for the Work (in each case to the extent permitted in the Scope Book or otherwise provided for in the Definitive Agreement); and (i) all other matters that can affect performance or completion of the Work, including the cost or schedule associated with the performance of the Work. None of the foregoing will relieve Seller from the schedule for, the costs of, or successfully performing the Work in accordance with the requirements of this Agreement, except to the extent of certain enumerated Force Majeure events that will be expressly listed in the Definitive Agreement.</p> |
| 31 | <p>Facility Warranty:</p> | <p>Seller will provide for the benefit of Buyer upon the Closing, a full “wrap” project warranty (the “Facility Warranty”).</p> <p>The Facility Warranty will include:</p> <ul style="list-style-type: none"> • the equipment, systems, and other items included in the Facility will be in new, undamaged condition, of high quality, free from defects and deficiencies in design, engineering, manufacture, assembly, application, installation, construction, materials, workmanship, and otherwise, and sufficiently sized and properly built and used for the specific use and/or application for which it was intended under the Definitive Agreement, will operate safely and free of nuisance errors that are resolved only temporarily by automatic or manual resets, will withstand Facility site conditions during the design lifetime for the Facility required by the Scope Book, will be free from any liens other than Permitted Encumbrances, and will conform to the specifications and descriptions set forth in, and the other requirements of, the Definitive Agreement (including the Scope Book and other aspects of the performance standards specified in the Definitive Agreement); • all of the Work (including in respect of the design, drafting, engineering, procurement, assembly, installation, construction, completion, testing, commissioning, start-up, and any repair of the Facility) will be performed and completed in a good and workmanlike manner, will be of high quality and free from defects and deficiencies, and will be in full conformity with the Definitive Agreement (including the Scope Book and other aspects of the performance standards specified in the Definitive Agreement); and • without limiting the foregoing, all of the Work (including the equipment, systems, and other items included in the Facility) will be completed such that the Facility will be capable of operating in compliance with (i) all laws and applicable permits and the other components of the performance standards specified in the Definitive |

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| | <p>Agreement and (ii) the specified minimum performance characteristics for the Facility (see item 19 above).</p> <p>The Facility Warranty will extend to all goods and services provided by or for Seller for the Facility (including step-in Work performed by Buyer), including by its contractors and subcontractors of any tier, and be in addition to other warranties and contractual obligations of Seller arising out of the Definitive Agreement. The Subcontractor Warranties will be deemed incorporated into and part of the Facility Warranty (as if fully set forth therein) during the warranty period of the Facility Warranty, provided that any exclusion in any Subcontractor Warranty that is attributable or related to other aspects of the Work shall be deemed for all purposes not to be an exclusion to the Facility Warranty.</p> <p>The Facility Warranty will commence on the Substantial Completion Payment Date, remain in effect for at least two (2) years after the Substantial Completion Payment Date, and include a one (1)-year extension on defects identified during the Facility Warranty period (from the time of completion of repair of the defect), subject to a sunset to the warranty period of three (3) years from the Substantial Completion Payment Date.</p> <p>If Buyer makes a valid claim under the Facility Warranty, Seller will be required to promptly correct the defect covered by the Facility Warranty. Any cost Seller incurs to discharge its obligation to remedy any defect, including shipping and transportation costs, costs of gaining access to defective items, costs of removing and replacing defective items, and costs of reassembly of any items required for gaining access to defective items, will, as between Seller and Buyer, be costs borne by Seller. If Seller fails to remedy any defect in accordance with the Facility Warranty requirements within the timeframe required by the Facility Warranty, Buyer will be entitled to step in and remedy such defect, either itself or through a third party, and to recover from Seller the reasonable and necessary costs incurred by Buyer in connection with remedying such defect.</p> <p>Seller will be required to obtain from the major equipment manufacturers (e.g., generating units, heat recovery steam generators, transformers, switchgear), and certain other suppliers and other contractors and subcontractors, warranties and guarantees for the Facility (together with any credit support and indemnities therefor) that meet (or are superior to) baseline requirements specified in the Definitive Agreement. Through a partial assignment, Seller will transfer (or cause to be transferred) to Buyer such warranties and guarantees (together with any credit support and indemnities therefor) and (without duplication) all supplier and other contractor and subcontractor warranties and other warranties, indemnities, guarantees, and similar contract rights related to the Facility and benefitting Seller (collectively, the “Subcontractor Warranties”) at the Closing or, for assets</p> |
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| | | to be transferred to Buyer after the Closing, upon the transfer of title of such assets to Buyer. Buyer will provide to Seller the benefit of responsive warranties, indemnities, guarantees, and contract rights transferred to Buyer in the event that Buyer makes a claim under the Facility Warranty. |
| 32 | Insurance: | <p>Seller will procure and maintain, at its expense, with qualified insurers, appropriate types and agreed levels of insurance to protect against typical project development, EPC, and ownership risks, including worker’s compensation, business auto liability, comprehensive general liability, errors and omissions, equipment, excess liability (the combined limits of the excess and umbrella liability coverages are expected to be approximately \$50 million), and full project replacement value builder’s all risk insurance (covering insured occurrences through the Substantial Completion Payment Date with per occurrence deductibles of not more than five percent (5%) for earthquakes, named windstorms, and floods and not more than \$[500,000] for all other losses or damages, and policy sublimits (if any) that Buyer has agreed to accept), along with insurance required by applicable laws, lenders or other third-party persons financing the Facility (if any), or applicable contracts. Certain insurance will be required to be in effect on the signing date of the Definitive Agreement and certain insurance will be required to be provided initially and in effect by FNTF. Subject to limited exceptions, Buyer, its affiliates, and other specified parties will be additional insureds on the foregoing policies. The insurance policies will be Facility-specific, primary to Buyer’s policies, require Seller to waive subrogation rights against Buyer, its affiliates, and other specified parties, have stipulated deductible maximums, and contain other customary terms. Seller will cause its agents and contractors of any tier to carry appropriate levels of insurance and will provide to Buyer specified insurance-related notices, reports, and certifications. Insurance will be required to be obtained from reputable, qualified insurers having a rating of “A-VII” or better by A.M. Best.</p> <p>Notwithstanding the transfer of title to the Closing Assets to Buyer at the Closing (and other assets thereafter), builder’s all risk insurance for the Facility and related assets will be maintained by Seller until the Substantial Completion Payment Date. As described in item 28 above, Buyer will be entitled to the proceeds of any claims on such insurance relating to coverage for the period after the Closing (subject to disbursement of such proceeds to Seller to the extent contemplated by the third paragraph of item 28 above and without limiting Buyer’s indemnity obligation, if applicable, for the Physical Negligence, gross negligence, or willful misconduct of Buyer or any member of Buyer’s group). Without limiting Buyer’s indemnity obligation, if applicable, for the Physical Negligence, gross negligence, or willful</p> |

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| | | <p>misconduct of Buyer or any member of Buyer’s group, Seller will be responsible for paying any deductibles under such insurance.</p> |
| <p>33</p> | <p>Indemnification:</p> | <p>Each Party will defend, indemnify, and hold harmless the other Party and its respective employees, representatives, officers, directors, affiliates, and agents from and against any and all damages and losses arising out of:</p> <ul style="list-style-type: none"> • any breach or violation of any covenant, obligation, or agreement of the indemnifying Party or its affiliates in the Definitive Agreement (including any certificate or agreement delivered pursuant thereto); • any breach or inaccuracy of any representation or warranty made by the indemnifying Party or its affiliates in the Definitive Agreement (including any certificate or agreement delivered pursuant thereto); or • any of the Excluded Liabilities (in the case of Seller as the indemnifying Party) or the liabilities expressly assumed by Buyer at the Closing (in the case of Seller as the indemnifying Party). <p>In addition, Seller will defend, indemnify, and hold harmless Buyer and its respective employees, representatives, officers, directors, affiliates, and agents from and against any and all damages and losses arising out:</p> <ul style="list-style-type: none"> • bodily injury or death, or property damage or loss, to Seller, its affiliates or contractors or subcontractors, except to the extent resulting from the Physical Negligence, gross negligence, or willful misconduct of Buyer or any member of Buyer’s group; <u>provided</u> that this bullet point will apply to damage or loss to the Facility or related assets or any portion thereof at any time on or prior to the Substantial Completion Payment Date, whether or not title thereto is held by Seller, even in the case that such damage or loss was the result of Force Majeure properly claimed by Seller; or • except to the extent otherwise provided in the first bullet point of the immediately following paragraph (Buyer’s indemnity), the negligence (including gross negligence) or willful misconduct of Seller or any member of Seller’s group; • all fines or penalties issued by any governmental authority that arise or result from a violation of any applicable law or permit by Seller or any member of Seller’s group; • the use or release of hazardous substances by Seller or any of its contractors or subcontractors; • any lien on the Facility, the Facility site, or related assets, other than liens benefitting, or created by, through, or under, Buyer; or • any intellectual property infringement claims arising out of the Work (with the additional obligation for Seller to obtain the necessary rights to allow the continued use of the infringing property or to replace such property with non-infringing equivalent property). |

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| | | <p>Further, Buyer will defend, indemnify, and hold harmless Seller and its respective employees, representatives, officers, directors, affiliates, and agents from and against any and all damages and losses arising out of:</p> <ul style="list-style-type: none"> • bodily injury or death, or property damage or loss, to Buyer, its affiliates or contractors or subcontractors, except to the extent resulting from the Physical Negligence, gross negligence, or willful misconduct of Seller or any member of Seller’s group; <u>provided</u> that this bullet point will not apply to damage or loss to the Facility or related assets or any portion thereof; or • the Physical Negligence, gross negligence, or willful misconduct of Buyer or any member of Buyer’s group. |
| 34 | Limitations of Liability: | <p>From and after the Substantial Completion Payment Date, each Party’s liability for indemnity for breach of representations and warranties will be limited to 15% of the Unadjusted Purchase Price, <u>provided</u> that this limitation will not apply to fraud, willful misconduct, or such Party’s fundamental representations.</p> <p>In addition, except with respect to fraud or willful misconduct, Seller’s aggregate liability under the Definitive Agreement will be limited to (i) if the Closing does not occur, any amounts related to third-party claims (including fines or penalties issued by any governmental authority and costs in complying with a remediation or other order from a governmental authority) plus any liquidated damages due Buyer and unpaid by Seller under the Definitive Agreement plus the liquidated amount of any termination payment payable by Seller as described in this Term Sheet and (ii) if the Closing occurs, the portion of the Purchase Price that has or will be paid by Buyer to Seller under the Definitive Agreement (including pursuant to a termination for cause by Buyer or Seller, without regard to the fact that such payment may, in the case of a termination for cause by Buyer, be offset, in whole or in part, by any termination payment payable by Seller pursuant thereto).</p> |
| 35 | Consequential Damages: | <p>No Party to the Definitive Agreement will be liable to another Party for indirect, consequential, or punitive damages arising out of the Definitive Agreement, except (i) liquidated damages and replacement contract losses as expressly provided in the Definitive Agreement or, subject to the other liability limitations in the Definitive Agreement, to receive “cover” damages, (ii) any termination payment payable pursuant to the Definitive Agreement, (iii) any claim for indemnification pursuant to the Definitive Agreement for any punitive, indirect, or consequential damages owed to a third person, (iv) damages attributable to a Party’s fraud, gross negligence, or willful misconduct, (v) Seller’s indemnity for intellectual property infringement claims, and (vi) diminution in value of the Facility or related assets.</p> |

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| <p>36 Termination:</p> | <p>The Definitive Agreement will include termination rights customary for CCCT asset acquisitions of the type described in this Term Sheet, including:</p> <ul style="list-style-type: none"> • by mutual written consent of the Parties; • by either Party, if the Closing has not occurred by the Closing Expiration Date, except that this right will not be available to a Party whose material breach of the Definitive Agreement was the primary cause of such failure;* • by either Party, if the FNTP has not occurred by the FNTP Expiration Date, except that this right will not be available to a Party whose material breach of the Definitive Agreement was the primary cause of such failure; • by either Party: (i) without limiting clause (iii) below, if any governmental authority of competent jurisdiction has issued a permanent order declaring the Definitive Agreement invalid or unenforceable in any material respect or restraining, enjoining, or otherwise prohibiting or making illegal the consummation of the transactions contemplated thereby, and such order has become final and non-appealable (a “Termination Order”); (ii) if, prior to FNTP, any of Seller’s required regulatory approvals or Buyer’s required regulatory approvals is denied in a final, non-appealable order or other final, non-appealable action issued or taken by a governmental authority with jurisdiction; or (iii) if any action shall have been taken, or law enacted, promulgated, or deemed applicable to the transactions contemplated by the Definitive Agreement, by a governmental authority with competent jurisdiction that, directly or indirectly, prohibits the consummation of such transactions as contemplated; <u>provided, however</u>, that a Party will not have the right to terminate the Definitive Agreement pursuant to clause (i) or clause (iii) above if such Party or any of its affiliates has sought the entry of, or has failed to use commercially reasonable efforts to oppose the entry of, the applicable Termination Order or, to the extent specific to, or primarily directed at, the Facility or the transactions contemplated by the Definitive Agreement, the applicable governmental authority action or enactment, promulgation or deemed application of law; • by either Party, if there has been a material breach or material default by the other Party (other than failure by Seller to deliver title documentation required under item 41 below within the timeframe specified therein, which failure is addressed separately below) that is not cured within 30 days after notice plus, if it is not possible to cure within such 30 days but can be cured in an additional 60 days, an additional 60 days so long as the defaulting Party continues to diligently pursue cure (<u>provided</u> that, if the material breach or default is with respect to Seller’s credit support obligation, the cure period |
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| | <p>will be three (3) business days with no extensions, and, if the material breach or default is a failure to pay, the cure period will be ten (10) business days with no extensions);*</p> <ul style="list-style-type: none"> • by Buyer, if Substantial Completion has not occurred by the Substantial Completion Termination Trigger Date;* • by either Party, if the other Party becomes Bankrupt;* • by Buyer, if there is a change of control of Seller before the Substantial Completion Payment Date;* • by Buyer, if Seller fails to deliver to Buyer the title documentation required under item 41 below (including any updates thereto required by item 41 below) within the timeframe specified therein;* • by Buyer, if Seller fails to have all real property rights (acceptable to Buyer in its sole and absolute discretion) in place by one hundred twenty (120) days before the FNTP Expiration Date;* and • by Buyer, if there are uncured real property title objections (or title documentation required under item 41 below that has not been delivered by Seller or for which the title objection period has not expired) on or after forty-five (45) days before the FNTP Expiration Date or on or after forty-five (45) days before the Closing Expiration Date.* <p><i>Termination for Cause by Seller.</i> If Seller terminates the Definitive Agreement due to the material default or material breach by Buyer (including a failure to pay an amount due and owing to Seller thereunder) or Buyer becoming Bankrupt, Seller will be required to undertake certain transition actions and, at Buyer’s request, transfer to Buyer the existing Facility and related assets (to the extent not previously transferred). If such termination occurs prior to the Closing, Buyer will be required to pay to Seller (i) the direct costs incurred by Seller for the Work performed prior to termination and in performing the transition actions required as a result of such termination, plus 10% of such direct costs; <u>provided</u> that the aggregate amount payable pursuant to this clause (i) will not exceed \$[3],000,000 for termination prior to FNTP or 100% of the Purchase Price after FNTP and prior to the Closing, less (ii) all liquidated damages (including any Lost Capacity Credit LDs) and other damages or net amounts due Buyer and unpaid by Seller under the Definitive Agreement. If such termination occurs after the Closing but prior to the Substantial Completion Payment Date, Buyer will pay to Seller (i) the unpaid portion of the Purchase Price, plus (ii) the direct costs incurred by Seller in performing the transition actions required as a result of such termination, less (iii) the costs that Seller did not incur that Seller reasonably would have been expected to incur to perform the balance of Work as of such termination (<u>provided</u> that the sum of (i), (ii), and (iii) will not exceed the unpaid portion of the Purchase Price), less (iv) all liquidated damages (including any Lost Capacity Credit LDs) and other</p> |
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| | <p>damages or net amounts due Buyer and unpaid by Seller under the Definitive Agreement. Seller will not be entitled to terminate for any reason after the Substantial Completion Payment Date. Payment by Buyer of any amount under this paragraph will be conditioned on Seller's completion of the transition actions required of Seller upon the applicable termination.</p> <p><i>Termination for Cause by Buyer prior to Closing.</i> If the Definitive Agreement is terminated prior to the Closing pursuant to any default marked above by an asterisk (including failure to Close by the Closing Expiration Date, even if Seller is the terminating Party, but excluding any termination by Seller for material breach by Buyer or Bankruptcy of Buyer) before the Closing, Seller will pay to Buyer (i) liquidated damages of \$[102,000] per MW of Guaranteed Capacity plus (ii) all liquidated damages (including any Lost Capacity Credit LDs) and other damages or net amounts due Buyer and unpaid by Seller under the Definitive Agreement.</p> <p><i>Termination for Cause by Buyer after Closing.</i> If the Definitive Agreement is terminated prior to the Closing pursuant to any default marked above by an asterisk (including failure to Close by the Closing Expiration Date, even if Seller is the terminating Party, but excluding any termination by Seller for material breach by Buyer or Bankruptcy of Buyer) after the Closing but prior to the Substantial Completion Payment Date, Seller will be required to undertake certain transition actions and will be liable to Buyer for an amount equal to (i) the total reasonable and necessary costs and expenses actually incurred and accrued by Buyer in connection with such termination, including for the completion of the Work and to replace the warranties, guaranties, and liquidated damages provisions (including the coverage relating to MISO capacity credits described in item 46 below) under the Definitive Agreement (including additional reasonable and necessary overhead and all legal fees and related expenses), plus (ii) the diminution in value resulting from, to the extent applicable, reduced Facility capacity below the Guaranteed Base Capacity and/or Guaranteed Duct-Firing Capacity (if included as part of the Facility), Facility heat rate above the Guaranteed Heat Rate, and termination of the warranty, guaranty, and liquidated damages provisions under the Definitive Agreement (including the coverage relating to MISO capacity credits described in item 46 below), net of the value of any replacement provisions obtained by Buyer for which Seller compensates Buyer according to clause (i) above, plus (iii) 10% of the amounts described in clause (i) above, plus (iv) all liquidated damages (including any Lost Capacity Credit LDs) and other damages or net amounts due Buyer and unpaid by Seller under the Definitive Agreement. If such sum is greater than the unpaid portion of the Purchase Price, Seller will pay to Buyer the difference equal to such sum, less the unpaid portion of the Purchase Price. If such sum is less than the unpaid portion of the Purchase Price, Buyer will pay to Seller the difference equal to the unpaid portion of the Purchase Price,</p> |
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| | | <p>less such sum, but only if Seller has completed the transition actions required of Seller upon termination.</p> <p><i>No-Fault Termination.</i> If the Definitive Agreement is terminated pursuant to any termination event above that is not marked by an asterisk, there will be no liability of either Party arising out of such termination.</p> |
| 37 | Suspension for Cause by Buyer: | <p>Buyer will be entitled to order Seller to suspend performance of (i) that portion of the Work (A) being performed in breach of the Definitive Agreement to the extent such performance poses an imminent danger to the safety of any individual or the Work or (B) that results in any material violation of any law or applicable permit or (ii) the Work as a whole if, after the Closing, (A) Seller fails to maintain any insurance coverage required to be maintained in the Definitive Agreement or (B) there have been at least two (2) material violations of laws or applicable permits or applicable health, safety, quality, construction, workplace, and security rules, procedures, and programs with respect to Work or the project site. Notices of any such suspension delivered by Buyer to Seller will specify the scope and period of suspension (or Buyer’s good faith estimate thereof) and the reason(s) therefor. Upon receiving a notice of any such suspension, Seller will be required to suspend the Work or portion of the Work, as applicable, and take such other actions as specified and reasonably required by Buyer to protect individuals and property and to cure any condition that resulted in such suspension. During the period of suspension, Seller will retain its obligation to properly care for and protect all Work in progress, unless otherwise directed by Buyer. Buyer will withdraw the suspension upon the elimination of the condition(s) or, in the case of a suspension pursuant to clause (ii)(B), Buyer’s approval (not to be unreasonably withheld) of a plan developed by Seller to prevent the future occurrence of violations that resulted in or could result in such suspension. On the specified date of withdrawal, Seller will, as promptly as practicable, resume performance of the Work for which the suspension was withdrawn. For the avoidance of doubt, Seller will not be entitled to any cost, schedule or other relief with respect to the performance of the Work arising out of or relating to any suspension under this item 37.</p> |
| 38 | Assignment and Financing Assistance: | <p>The rights and obligations under the Definitive Agreement may not be assigned or otherwise transferred by Buyer without the prior written consent of Seller or by Seller without the prior written consent of Buyer, in each case, which consent may be granted or withheld in the respective sole and absolute discretion of the applicable Party.</p> <p>Notwithstanding the foregoing:</p> <p>(i) Buyer may, without the prior written consent of Seller, (A) collaterally assign or otherwise encumber all or any portion of its rights and/or interest in and to the Definitive Agreement to its and any of its affiliates’</p> |

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| | | <p>lenders (and grant to such lenders the power to assign the same in connection with an exercise of such lenders' remedies) and (B) transfer or assign its rights and obligations under the Definitive Agreement (1) prior to the Substantial Completion Payment Date, to any affiliate of Buyer that is a regulated electric utility or that provides to Seller a separate guarantee from a regulated electric utility of payment of such assignee's obligations under the Definitive Agreement to which such affiliate is a party or agrees to remain liable for such affiliate's payment obligations after the date of assignment as a payment guarantor on terms equivalent to those set forth in the Definitive Agreement for Seller Payment Guarantor, (2) during the two (2) years after the Substantial Completion Payment Date, to (x) any person succeeding to all or substantially all of the assets of Buyer or (y) any person acquiring all or substantially all of the Facility and related assets (or Buyer's rights thereto), and (3) thereafter, in its sole and absolute discretion; and</p> <p>(ii) Seller may, without the prior written consent of Buyer, transfer or assign its rights and obligations under the Definitive Agreement (in whole but not in part) to any affiliate of Seller, provided that such assignee (A) acquires all of the Facility and all other assets, properties, and interests of Seller in and with respect to the Facility and the Work and (B) continues to comply with the obligations of Seller to provide and maintain credit support according to the Definitive Agreement and (C) the obligations of Seller continue under the Definitive Agreement with respect to all obligations and liabilities (whether before or after assignment) of "Seller" (whether assignor or assignee).</p> <p>In order for a transfer or assignment permitted above (other than a collateral assignment) to be effective, the assignee must be bound by the terms of the Definitive Agreement and have assumed all of the obligations of the assignor thereunder relating to the period from and after the date of assignment. Upon any such assignment (other than a collateral assignment), the assignee will be released from any and all obligations and liabilities under the Definitive Agreement relating to the period from and after the date of assignment (and any other obligations and liabilities assumed by the assignee).</p> <p>Buyer acknowledges that Seller may enter into one or more financings for the performance of the Work in accordance with the Definitive Agreement. In connection with and contingent upon the closing of any such financing, Buyer agrees that it will, at Seller's sole cost and expense, enter into an agreement with the financing parties regarding such financing substantially in the form attached to the Definitive Agreement.</p> |
| 39 | Certain Accounting Matters: | At times specified in the Definitive Agreement, Seller will prepare and provide to Buyer a statement estimating the distribution of the full Purchase Price over Buyer's "retirement units" listed in an exhibit to the Definitive |

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| | | <p>Agreements and a statement estimating the distribution of the full Purchase Price, on a percentage basis, to the accounting/project subcategories listed in another separate exhibit to the Definitive Agreements. Buyer will approve or disapprove, in whole or in part, such statements within an agreed number of days after receipt thereof and, if it disapproves of any such statement, notify Seller of the basis therefor. In negotiations of the Definitive Agreement, Seller and Buyer will consider and address to each other's satisfaction any lease, variable interest, or other accounting issue raised by a Party during negotiation of the transaction.</p> |
| <p>40</p> | <p>Certain Tax Matters:</p> | <p>The Definitive Agreement will allocate to Seller (and, as between Seller and Buyer, Seller will be responsible the payment of) (i) all transfer and similar taxes and any sales, use, and other taxes related to the purchase and sale of the Facility and related assets or to the Work, whether before, on, or after the Closing (including any export or import duties, customs, tariffs, or other taxes, any taxes associated with procuring the real estate rights to or assets incorporated into the Facility or purchased as part of the Work, and any taxes on the purchase by Buyer of the Closing Assets and post-Closing assets); (ii) all taxes relating to the pre-Substantial Completion Payment Date period (including property taxes); and (iii) certain other taxes. Seller will use commercially reasonable efforts to (a) minimize taxes payable by Buyer or any of its affiliates related to the Project or the Purchased Assets or Buyer's conduct of the business of owning, financing, using, operating, maintaining or repairing the Project after the Closing and (b) obtain and maintain or, if requested by Buyer, allow Buyer to obtain and maintain all material federal, state, or local tax exemptions, abatements, credits, incentives, or similar Tax benefits available for the Project or the Purchased Assets. The Definitive Agreement will contain several other covenants and agreements and several Seller representations regarding taxes.</p> |
| <p>41</p> | <p>Certain Real Estate Matters:</p> | <p>Buyer prefers for all real property rights (acceptable to Buyer in its sole and absolute discretion) to be in place prior to execution of the Definitive Agreement. However, to the extent such real property rights (acceptable to Buyer in its sole and absolute discretion) are not in place prior to execution of the Definitive Agreement, the Definitive Agreement will set forth Seller's planned real property rights and contain limitations on deviations therefrom. Seller will, at its sole cost and expense, deliver the following to Buyer no later than thirty (30) days after the execution date of the Definitive Agreement (based on planned real property rights, to the extent all real property rights are not in place prior to such time): (i) a title commitment from a mutually agreed upon title insurance company meeting specified requirements insuring Buyer's fee, easement, and other real property interest, as applicable, in, or appurtenant to, the Facility site, the associated improvements and easements, and all insurable appurtenances, subject only to Permitted Encumbrances, in an amount specified by Buyer and with endorsements that Buyer may</p> |

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| | <p>reasonably require; (ii) complete and legible copies of all exception documents listed in the title commitment; and (iii) a ALTA land title survey of the Facility site meeting specified requirements. If (a) the title commitment discloses that (1) any person other than Seller has title to or a valid interest in the insured property covered by the title commitment or (2) any title exception is not a Permitted Encumbrance, or that Buyer reasonably believes could adversely affect Buyer’s use and enjoyment of the Project described herein, or (b) the survey discloses any matter that is not a Permitted Encumbrance or is or represents a change in the physical location, configuration, or layout of the Facility (in whole or in part) that results in any encroachment onto an otherwise Permitted Encumbrance or the need for additional access rights or Consents, <u>then</u> Buyer may notify Seller in writing of such title objection no later than ninety (90) days after receiving the latest of the title commitment, the exception documents, or the survey. Seller will, at its sole cost and expense, cure each title objection and take all steps required by the title company to eliminate each title objection as an exception to the title commitment. Seller may elect to provide a notice to terminate the Definitive Agreement if the aggregate cost to cure the identified title objections exceeds eight percent (8.0%) of the Purchase Price, and any such termination will be treated as a termination by Buyer for cause giving rise to a Seller termination payment. Buyer will have the right to prevent the termination provided for in any such notice by notifying Seller within a specified period of its election to waive title objections such that the cost cap will not be exceeded or to agree to pay, through an increase to the Purchase Price, the cost above the cost cap to cure the title objections.</p> <p>In the event that Seller acquires any real property rights after the issuance of the title documentation described in the immediately preceding paragraph (including, to the extent such title documentation was based on planned real property rights, upon Seller acquiring the actual real property rights), Seller shall provide updated title documentation no later than fifteen (15) days after such acquisition and repeat the process above (except that the title objection period shall be thirty (30) days, instead of ninety (90) days, after Buyer’s receiving the latest of the title commitment, the exception documents, or the survey). The foregoing will apply each time new real property rights are acquired after the issuance of the title documentation described in the immediately preceding paragraph.</p> <p>No later than thirty (30) days prior to the Closing, Seller will (i) at its sole cost and expense, furnish to Buyer (A) an updated title commitment having an effective date no earlier than thirty (30) days prior to the Closing and (B) an “as-built” update to the original survey that reflects the completion of the Work, and (ii) repeat the process in the second paragraph of this item 41 (except that the title objection period shall be twenty (20) days, instead of</p> |
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| | | <p>ninety (90) days, after Buyer’s receiving the latest of the title commitment, the exception documents, or the survey).</p> <p>The last two bullet points of item 36 above includes termination rights in favor of Buyer related to the title process described in this item 41. None of the timeframes specified in this item 41 (including those for delivery of title documentation) extend, or should be interpreted to extend, the deadlines specified in the last bullet point of item 36 above.</p> |
| 42 | <p>Certain Employment, Benefits, and Labor Matters:</p> | <p>The Definitive Agreement will contain several Seller representations, covenants, and agreements regarding employment, employee benefits, and labor matters, including Seller representations to Buyer that none of Seller or any of its affiliates has, or ever has had at any time, any employee engaged primarily in Facility Services (as defined in the Definitive Agreement), that no employee of Seller or any affiliate of Seller that provides or has provided Facility Services is or has been covered by a collective bargaining agreement or any other labor agreement applicable to Seller or any of its affiliates (a “CBA”); that no employee of any contractor or subcontractor of Seller or its affiliates is covered by a CBA that would require any successor employer to assume or honor any portion of such CBA and that none of Seller or any affiliates of Seller (including “ERISA affiliates”) sponsors, maintains, participates in, contributes to (or owes contributions to), or has any liability with respect to benefit plans and arrangements specified in the Definitive Agreement, including qualified pension plans, multiemployer plans, multiple employer plans, or multiple employer welfare arrangements. Seller will make additional representations to Buyer regarding Seller and its affiliates’ compliance with applicable labor, employment and employee benefit laws, the nonexistence of encumbrances, liens and other liabilities relating to benefit plans, and the termination of tax-qualified pension plans, and the nonexistence of any liability or obligation to provide post-termination or post-employment health, life, or other welfare benefits or under the Affordable Care Act.</p> |
| 43 | <p>Transition Services:</p> | <p>In connection with the negotiation of the Definitive Agreement, Buyer may determine that it desires Seller to provide, or desires to have the contractual right after contract execution to require Seller to provide, for a reasonable period of time after the Substantial Completion Payment Date, any transition service that Buyer reasonably requests and Seller is reasonably capable of providing. If Buyer makes such a determination, Seller would provide the requested transition services on terms negotiated by the Parties, with Buyer reimbursing Seller for its documented out-of-pocket costs reasonably incurred and necessary to perform such services in accordance with the terms of the Parties’ agreement. For the avoidance of doubt, the scope of transition services would exclude Seller’s Facility Warranty work and other services</p> |

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| | | required under other provisions of the Definitive Agreement to be provided by or for Seller for the benefit of Buyer. |
| 44 | Transaction Expenses: | Except as otherwise provided in the Definitive Agreement, the Party incurring costs in connection with the transactions will be responsible for paying them. In addition to the taxes allocated to Seller as described in item 39 above, Seller will pay all (i) documentary, recording, contractual (including license), consent, and other conveyance or assignment charges, fees, and other costs related to the purchase and sale of the Facility and related assets (including permit transfer fees), (ii) survey, filing, and/or recording costs, fees, or similar charges with respect to the procurement of title insurance or the transfer of real property interests from Seller to Buyer, (iii) the cost of required endorsements to the title insurance, and (iv) the amounts charged by the environmental consultant retained at Buyer's direction in connection with the environmental assessment required to be performed prior to FNTP. Except as provided in clauses (ii) and (iii) above, Buyer will pay for the title commitment and the title policy. |
| 45 | MISO Agreement: | As part of the transactions contemplated by the Definitive Agreement, Seller and Buyer will enter into an agreement setting forth the terms and conditions that, as between the Parties, will govern and apply with respect to certain MISO matters applicable to the Facility (the " MISO Agreement "). Subject to the terms of the MISO Agreement, Buyer (or its designee) will serve as the "market participant" for the Facility in MISO (the " Market Participant "). As the Market Participant, Buyer (or its designee) will represent the Facility in MISO and have the right to execute and submit documents and take (or refrain from taking) other actions in its capacity as the Market Participant, subject to certain limitations set forth in the MISO Agreement applicable prior to the Substantial Completion Payment Date, including the general limitations that (i) Buyer will submit such documents and take and refrain from taking such other actions as the Market Participant that Seller reasonably directs Buyer to submit or to take or not take pursuant to Seller's instructions provided in accordance with the MISO Agreement solely to the extent necessary and reasonable for Seller to (a) perform its obligations under and in accordance with the Definitive Agreement and applicable laws or (b) dispute with MISO the amount of any cost, charge, payment, or credit assessed against or provided to Buyer (or its designee) as the Market Participant and allocated to Seller pursuant to the MISO Agreement and (ii) Buyer will not offer products from the Facility into the MISO market other than (a) as instructed by Seller solely to the extent necessary and reasonable for Seller to conduct required performance testing under the Definitive Agreement, (b) solely to the extent elected by Buyer in its sole and absolute discretion, Facility MISO Capacity Credits, or (c) as deemed necessary by Buyer to comply with MISO requirements applicable to the Facility. Seller will be responsible for the out-of-pocket costs and charges |

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| | <p>reasonably incurred by Buyer (or its designee) in its capacity as the Market Participant and all MISO costs and charges with respect to the Facility and participation in the MISO markets that relate to the period before the Substantial Completion Date, including costs with respect to any transaction involving the Facility or the representation of the Facility by the Market Participant, but excluding, solely in the case that Buyer (in its sole and absolute discretion) offers Facility MISO Capacity Credits into the MISO planning resource auction (or successor process) for any Relevant MISO Planning Period, Buyer’s offer is accepted by MISO, and the Substantial Completion Payment Date does not occur prior to the start of such Relevant MISO Planning Period (and without limiting Seller’s obligations (including for Lost Capacity Credit LDs, if applicable) described in item 46 below), any penalties assessed by MISO solely as a result of the Facility not meeting, during the portion of such Relevant MISO Planning Period until the Substantial Completion Payment Date, its MISO obligations that apply solely as a result of Buyer’s offer of Facility MISO Capacity Credits being accepted by MISO (the “MISO Capacity Penalties”). Seller will be entitled to all MISO payments and credits attributable to the Facility (excluding any Facility MISO Capacity Credits and related payments) that relate to the period before the Substantial Completion Payment Date. If Buyer (or its designee) is the Market Participant and the Definitive Agreement terminates (other than in the case of a termination where Buyer acquires Seller’s rights and interest in the Facility), Seller and Buyer will, at Seller’s sole cost and expense, cause MISO to qualify and recognize Seller (or its designee) as the Market Participant at the earliest possible time after such termination event in accordance with the MISO rules. Buyer may net or set-off any MISO cost or charge or other cost or charge payable by Seller to Buyer under the MISO Agreement against any MISO or other payment or credit payable by Buyer to Seller and/or against any other amount payable by Buyer to Seller under the Definitive Agreement or any ancillary agreement. In its capacity as the Market Participant for the Facility, Buyer (or its designee) will (at Seller’s direction, cost and risk, except to the limited extent provided above with respect to offers of Facility MISO Capacity Credits and related payments and MISO Capacity Penalties), among other things, register the Facility in MISO’s commercial models, arrange with MISO capacity demonstration and any other testing of the Facility required or desired under the MISO Rules (e.g., the “GVTC” test), offer energy from the Facility into the MISO markets during tests of the Facility, and financially settle with MISO (for subsequent allocation between the Parties as set forth above) on matters related to the Facility. Buyer expects to settle test energy deliveries from the Facility through financial schedules with MISO.</p> |
| <p>46 Capacity Accreditation:</p> | <p>Buyer expects to receive a quantity of Facility MISO Capacity Credits that equals or exceeds the Applicable ZRC Fraction (as defined below) of the</p> |

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| | <p>Guaranteed Capacity for each Relevant MISO Planning Period. “Applicable ZRC Fraction” means [●].⁶ If, by fifteen (15) days prior to the MISO Capacity Auction Deadline for any Relevant MISO Planning Period, the Substantial Completion Payment Date has not occurred, then Seller will provide to Buyer, by no later than ten (10) days prior to the MISO Capacity Auction Deadline for such Relevant MISO Planning Period, a quantity of MISO zonal resource credits or other applicable capacity credits (or the equivalent) sourced from other resources within Buyer’s local resource zone (“Replacement MISO Capacity Credits”) equal to the Applicable ZRC Fraction of the Guaranteed Capacity. For any Replacement MISO Capacity Credits that Seller does not provide to Buyer (<u>provided</u> that Seller will first be required to use best efforts to provide such Replacement MISO Capacity Credits) as required above, Seller will pay to Buyer, pursuant to a reduction in the portion of the Purchase Price payable on the Substantial Completion Payment Date (or, if the Definitive Agreement is terminated prior to the Substantial Completion Payment Date, as part of the corresponding termination close-out), an amount equal to (i) the product of (a) the auction clearing price (or successor concept) resulting from the MISO planning resource auction (or successor process) for such Relevant MISO Planning Period applicable to a Replacement MISO Capacity Credit or, if Buyer (as market participant for its load), despite good faith efforts, does not procure sufficient Replacement MISO Capacity Credits in such MISO planning resource auction (or successor process) to cover its resource adequacy requirements, the capacity deficiency charges, which could be “cost of new entry” (CONE), and other costs and charges imposed by MISO and other applicable governmental authorities with respect to the shortfall in the MISO zonal resource credits or other applicable capacity credits (or the equivalent) of Buyer to cover its resource adequacy requirements), in either case, as annualized to cover the applicable amount over the full Relevant MISO Planning Period and expressed in \$/MW, multiplied by (b) the amount of Replacement MISO Capacity Credits that Seller so failed to transfer, plus (ii) interest on the amount described in clause (i) at the prime lending rate plus 2% (not to exceed the maximum rate permitted by law) from the date on which Replacement MISO Capacity Credits were required to be transferred to Buyer until the date payment is made by Seller as described above (the “Lost Capacity Credit LDs”). For the avoidance of doubt, the foregoing obligations of Seller to provide Replacement MISO Capacity Credits (or pay Lost Capacity Credit LDs in lieu thereof) according to this item 46 with respect to a Relevant MISO Planning Period apply even if Buyer (in its sole and absolute discretion) offers Facility MISO Capacity Credits into the MISO planning resource auction (or successor process) for such Relevant MISO</p> |
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⁶ The Applicable ZRC Fraction is expected to be approximately the MISO class average for new CCCTs as of a specified number of days prior to the MISO Capacity Auction Deadline.

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| | | <p>Planning Period. In that instance, Buyer is responsible for any associated MISO Capacity Penalties (as described in item 45 above) that may be assessed as a result of Buyer's capacity offer and, in exchange for taking that downside, is entitled to keep any upside from Buyer's capacity offer.</p> <p>The Definitive Agreement will include additional credit support requirements to secure Seller's obligations described in this item 46 that will trigger if the Substantial Completion Payment Date has not occurred within a specified period prior to the MISO Capacity Auction Deadline for each Relevant MISO Planning Period. The provisions of this item 46 will apply successively to each Relevant MISO Planning Period (if more than one).</p> |
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