

May 25, 2018

Ms. Lynn Jarvis
Chief Clerk
North Carolina Utilities Commission
430 N. Salisbury Street
Raleigh, NC 27603

RE: Duke Energy Progress, LLC and Duke Energy Carolinas, LLC's Notice of Posting of CPRE Tranche 1 RFP and Compliance with February 21, 2018 Order Modifying and Approving Joint CPRE Program and NCUC Rule R8-71(d)(4)

DOCKET NO. E-2, SUB 1159

DOCKET NO. E-7, SUB 1156

Dear Ms. Jarvis:

On behalf of the North Carolina Clean Energy Business Alliance ("NCCEBA") and North Carolina Sustainable Energy Association ("NCSEA"), we hereby submit this **Joint Motion** in the above-referenced docket.

If you have any questions or comments regarding this filing, please do not hesitate to call me.

Thank you in advance for your assistance.

Very truly yours,

/s/Karen M. Kemerait

skb

Enclosure

cc: Parties of Record

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. E-2, SUB 1159
DOCKET NO. E-7, SUB 1156

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of:
Duke Energy Progress, LLC and Duke Energy
Carolinas, LLC's Notice of Posting of CPRE
Tranche 1 RFP and Compliance with
February 21, 2018 Order Modifying and
Approving Joint CPRE Program and NCUC
Rule R8-71(d)(4)

JOINT MOTION

NOW COME the North Carolina Clean Energy Business Alliance ("NCCEBA") and the North Carolina Sustainable Energy Association ("NCSEA") (collectively, "Petitioners"), by and through their undersigned counsel, and respectfully request the following: (1) that the North Carolina Utilities Commission (the "Commission") order Duke Energy Progress, LLC ("DEP") and Duke Energy Carolinas, LLC ("DEC") (collectively, "Duke Energy" or "Duke") and the Independent Administrator, Accion Group, LLC ("IA") to remove all recently added energy storage requirements and protocols from the Tranche 1 pro forma Competitive Procurement of Renewable Energy ("CPRE") purchase power agreement ("Tranche 1 PPA") until there is stakeholder consensus about energy storage requirements and Commission approval of the Tranche 1 PPA energy storage provisions; (2) that the final Tranche 1 PPA be filed with the Commission for approval with opportunity for comment by intervenors in the docket; (3) that Duke's recently provided Build Transfer Agreement ("BT Agreement"), Engineering, Procurement and Construction Agreement ("EPC Agreement"), and Asset

Purchase Agreement (“APA”) (collectively, the “Agreements”) be filed with the Commission for approval with opportunity for comment by intervenors.

In support of these requests, Petitioners show the following:

I. PROCEDURAL HISTORY

1. On November 27, 2017, Duke Energy filed a petition requesting approval of its proposed joint CPRE Program. In the petition, Duke included its proposed initial CPRE Program guidelines, pro forma PPAs, initial CPRE Program plan, and requests for waivers of regulatory conditions and code of conduct requirements.

2. On December 1, 2017, the Commission issued an Order requiring the Public Staff-North Carolina Utilities Commission (“Public Staff”) to file a report with the Commission addressing whether Duke’s proposed CPRE Program is reasonably designed to meet the requirements of N.C.G.S. § 62-110.8 and Commission Rule R8-71. The Commission also asked the Public Staff to provide a recommendation as to whether the Commission should approve Duke’s proposed CPRE Program, accept the initial CPRE Program plan, and grant Duke’s requested waivers of regulatory conditions and code of conduct requirements.

3. On January 10, 2018, the Public Staff filed its report and initial comments.

4. On January 11, 2018, NCCEBA and NCSEA jointly filed comments. In the Joint Comments, NCCEBA and NCSEA provided detailed comments and objections about Duke’s proposed pro forma CPRE PPAs and a red line of the pro forma PPA. *See* Joint Comments, pp. 13-14, 15-23 and attached red line of PPA. NCCEBA and NCSEA

also expressed concern as to the Duke's planned timing for finalizing the Tranche 1 PPA.¹

5. On January 26, 2018, Duke Energy, Duke Renewables, Inc., and the Public Staff filed reply comments.

6. On February 21, 2018, the Commission issued its Order Modifying and Approving Joint CPRE Program ("Order"). In that Order, despite extensive objections by Petitioners to the pro forma PPAs filed by Duke Energy, the Commission approved those PPAs for use in CPRE Tranche 1 based on Duke's representation that the pro forma PPAs were virtually identical to ones that had been successfully financed by solar developers.² The Commission directed Duke to continue discussions with the Public Staff, NCCEBA, and NCSEA as to the reasonableness of the objectionable provisions of the pro forma PPAs with the goal of reaching consensus on revisions and report the result of the discussions in the September filings required by the CPRE Rule. The Commission requested that the parties alert the Commission if the terms and conditions of the pro forma PPAs are a barrier to achieving the goals of the CPRE Program. *See* Order Modifying and Approving Joint CPRE Program, p. 29.

¹ NCCEBA and NCSEA also objected to the delay in Duke's delivery of the draft pro forma PPA as follows: "NCCEBA and NCSEA believe that the pro forma PPA, which was required to be submitted with the CPRE Program Plan and Program Guidelines, must be approved by the Commission and should be reviewed and approved by the Commission as part of its review and approval of those documents. Waiting until 30 days before the Tranche 1 solicitation to finalize the pro forma PPA does not give market participants notice of the terms and conditions on which their proposals must be based or sufficient opportunity to object to unreasonable PPA terms and conditions."

² In Duke's petition filed on November 27, 2017, Duke represented: "The CPRE PPA proposed for Tranche 1 is virtually identical to, and substantively the same as, the current power purchase agreement utilized by the Companies, and executed by sellers, for bilateral PURPA sales to the Companies" *See* Petition Requesting Approval of Joint CPRE Program, Attachment 1, p. 7 (emphasis added).

7. On April 4, 2018, the IA filed notice of a delay in the previously targeted issuance date for the initial CPRE Tranche 1 RFP.

8. On May 11, 2018, Duke filed notice that the IA had posted Duke's draft CPRE Tranche 1 RFP to the IA's RFP website on May 11, 2018. The documents posted to the IA website include the Tranche 1 PPA (with substantial unilateral revisions to the pro forma PPA previously approved by the Commission)³, a summary RFP document presenting the overall framework for the RFP, the BT Agreement, the EPC Agreement, and the APA. Extensive changes to the Tranche 1 PPA, including detailed new energy storage provisions, as well as the summary RFP document, the BT Agreement, the EPC Agreement, and the APA had not been shared with market participants until May 11, 2018. Not only did Duke not share the documents with NCCEBA or NCSEA before posting them to the IA website, but Duke did not engage NCCEBA or NCSEA regarding any of the problematic provisions of the pro forma PPA, as requested by the Commission. These documents are comprised of hundreds of pages, and contain numerous problematic and unreasonable terms and conditions. Despite the fact that these documents with new and controversial provisions had not been provided until two weeks ago, Duke Energy and the IA are allowing interested parties an extremely short period—only two weeks—to submit comments. (Duke's Tranche 1 PPA that was posted to the IA website is attached hereto as Exhibit A.)

9. In Duke's May 11, 2018 filing, Duke stated that the final RFP documents will be posted to the IA RFP website and that the Tranche 1 CPRE RFP Solicitation will begin on July 10, 2018.

³ Some of these changes helpfully resolve problems previously identified by Petitioners, but others create significant new issues.

II. ENERGY STORAGE SHOULD NOT BE INCLUDED IN THE
TRANCHE 1 PPA WITHOUT STAKEHOLDER INPUT AND COMMISSION
APPROVAL

10. Energy storage technologies—that are capable of capturing usable energy for use at another time—provide innovative and flexible solutions to serve energy needs and address existing and emerging challenges. Energy storage is a new and emerging technology in North Carolina with tremendous potential benefits to the state. Much work has already been performed by interested parties to develop appropriate and workable energy storage policies; but the Commission has not yet established rules and regulations for this new technology, let alone how it should be treated under the CPRE program.

11. Over the past the past eight months, Duke has submitted detailed proposed rules governing the CPRE program, a detailed program plan and program guidelines, and proposed pro forma PPAs for use in the CPRE program, but until two weeks ago had not proposed any protocols governing the inclusion of storage projects in CPRE proposals. These protocols in several key respects are unreasonable, unnecessary, and extremely onerous, and will likely render storage projects unfinanceable. As requested by the Commission, NCCEBA and NCSEA are alerting the Commission that the new storage provisions in the Tranche 1 PPA are a barrier to achieving the goals of the CPRE Program.

12. Duke should not be permitted to unilaterally dictate energy storage policy without input from the Public Staff, the solar industry, and the Commission. However, that is precisely what Duke has done in the Tranche 1 PPA. Duke inserted sweeping and problematic energy storage requirements in the previously approved Tranche 1 PPA, and

failed to allow opportunity for meaningful comment from the industry that will be directly affected by the new rules.

13. To ensure that new energy storage rules are carefully considered, there needs to be a stakeholder discussion before Duke implements any new rules. Through a stakeholder discussion, valuable input can be provided by the Public Staff and experienced industry participants for appropriate and workable new rules.

14. Moreover, Duke cannot include new energy storage requirements in the Tranche 1 PPA without Commission approval. Pursuant to N.C.G.S. § 62-110.8(b)(3), and as discussed by the Commission in its February 21, 2018 Order, the Commission has a statutory duty to review and approve the terms and conditions of Duke's CPRE pro forma PPA. *See* Order, p. 29.

15. In NCCEBA's and NCSEA's previous comments about Duke's pro forma PPA in this docket, NCCEBA and NCSEA objected to a number of provisions included in Duke's pro forma PPA. After noting NCCEBA and NCSEA's objections to the terms and conditions of Duke's pro forma PPA, the Commission stated that it "accepts Duke's representations that the pro forma PPA is similar to contracts that have been accepted in negotiations with owners of renewable energy facilities as supporting approval of the pro forma PPA." (*See* Order, pp. 28-29) That understanding was one of the bases for the Commission's decision to approve Duke's pro forma PPA for the purposes of the Tranche 1 CPRE RFP Solicitation in its February 21, 2018 Order. (*See* Order, p. 29) Duke's recent inclusion of brand new energy storage provisions in its Tranche 1 PPA contradicts its previous representation to the Commission (*i.e.*, that its Tranche 1 PPA is

similar to contracts that have been accepted in negotiations with owners of solar energy facilities). *See* Commission Order, p. 29.

16. Duke's unilateral action to insert energy storage provisions in its Tranche 1 PPA without Commission approval is in clear violation of N.C.G.S. § 62-110.8(b)(3) and the Commission's Order. (*See* the Commission's Order stating the Commission has a statutory duty to review and approve the terms and conditions of the pro forma PPA.) Also, by failing to include energy storage in its Tranche 1 pro forma CPRE PPA that was filed with the Commission on November 27, 2017, NCCEBA, NCSEA, and other intervenors had no opportunity to comment on Duke's proposed energy storage rules. Duke should not be permitted to avoid meaningful input from stakeholders and Commission approval by making substantial changes to the already approved PPA.

17. Accordingly, Duke should not be permitted to add energy storage provisions to the Tranche 1 PPA unless and until there is stakeholder consensus on the new rules, and until the Commission has approved the new rules.

18. Petitioners would certainly prefer that the issuance of the Tranche 1 CPRE RFP Solicitation not be delayed and would prefer that projects including storage be eligible to bid into Tranche 1. To prevent delay, Petitioners are committed to participating in a stakeholder process with the goal that consensus be reached and energy storage provisions be approved by the Commission by July 10, 2018 (the date for opening of the Tranche 1 Solicitation) for inclusion in the Tranche 1 PPA.⁴ In the event that the energy storage provisions cannot be approved by the Commission by July 10, 2018, all such provisions should be removed from the Tranche 1 PPA.

⁴ Petitioners believe only limited and relatively simple provisions dealing with storage are needed.

**III. ALL OF DUKE’S RECENTLY FILED AGREEMENTS SHOULD
BE SUBJECT TO COMMENT AND COMMISSION APPROVAL**

19. While the introduction of new and problematic storage provisions is the most egregious unilateral change that has been made to pro forma PPA, there are other changes to the approved PPA that, if not resolved through comments to the IA, may be objectionable to Petitioners and other parties. The Commission should therefore require that the final proposed modified Tranche 1 PPA in its entirety be submitted to the Commission for approval after comment by interested parties.⁵

20. Of equal concern, just two weeks ago Duke filed three new Agreements consisting of hundreds of pages on the IA website that it intends to use in the Tranche 1 RFP. (NCCEBA and NCSEA expressed concern in their Joint Comments that Duke Energy did not include MIPAs or EPC contracts in the CPRE Program Guidelines or CPRE Program Plan, and pointed out that those contracts need to be reviewed by market participants and approved by the Commission. *See* Joint Comments, p. 14.) The Public Staff and market participants had no information about these Agreements until May 11 because Duke failed to file them with its joint CPRE Program. The Agreements contain terms and conditions that affect substantial rights of the market participants, and as such, require careful consideration by the Commission and the market participants.

⁵ In addition, contrary to Duke’s prior representation to the Commission, the previously approved PPA contains several material changes to PPAs previously financed by solar developers. A number of these have been removed or improved in the newly proposed pro forma PPAs, but Petitioners reserve the right to present other problematic issues with the Tranche 1 PPA to the extent that they depart from previously financed PPAs.

21. Due to the extremely short time period permitted for comment, Duke has allowed no opportunity for meaningful comment to agreements that contain problematic terms and conditions.

22. N.C.G.S. § 62-110.8(b)(3) contemplates that CPRE agreements be approved by the Commission.⁶ While this section of the law was poorly drafted and is ambiguous and could be read to refer only to the pro forma PPAs, there is no reason to infer that the General Assembly wanted the Commission to approve one type of contract to be utilized in the CPRE program but not others. In any case, the Commission clearly has the authority to require that all program documents be submitted for its approval, and did exactly that in adopting Rule R8-71(c). That rule requires each utility to submit to the Commission for approval as part of its program guidelines “[p]ro forma contract(s) to be utilized in the CPRE Program.”

23. Duke, however, is seeking to utilize in the CPRE Program three new, complex, and severely flawed agreements that were not submitted with its program guidelines, that were not shared with interested parties until two weeks ago, and that it does not propose to submit to the Commission for review and approval.⁷ The Commission should not permit these new Agreements to be utilized in the CPRE Program until the Commission has approved them after comment by intervenors.

⁶ N.C.G.S. § 62-110.8(b)(3) provides: “Each public utility shall submit to the Commission for approval and make publicly available at 30 days prior to each competitive procurement solicitation a pro forma contract to be utilized for the purpose of informing market participants of terms and conditions of the competitive procurement.”

⁷ In Duke’s May 11, 2018 filing, Duke indicated that the Tranche 1 PPA would be filed with the Commission on June 8, 2018. However, Duke apparently is not planning to file the BT Agreement, the ECP Agreement, or the APA with the Commission.

CONCLUSION

The importance of ensuring that carefully considered policies and rules are made for the new energy storage technology cannot be overstated. Petitioners respectfully request that the Commission not permit Duke to include energy storage in its Tranche 1 PPA unless and until stakeholder agreement about new rules has been reached and the Commission has approved the new requirements. Petitioners also request that Duke be required to file the modified PPAs, BT Agreement, the EPC Agreement, and the APA with the Commission for approval and comment by intervenors.

Respectfully submitted this 25th day May, 2018.

SMITH MOORE LEATHERWOOD LLP

/s/ Karen M. Kemerait

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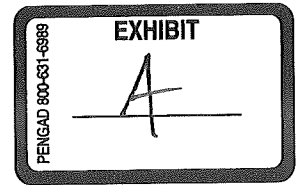
*Regulatory Counsel for North Carolina Sustainable
Energy Association*

CERTIFICATE OF SERVICE

I hereby certify that all persons on the docket service list have been served true and accurate copies of the foregoing **JOINT MOTION TO EXCLUDE ENERGY STORAGE PROVISIONS FROM TRANCHE 1 PRO FORMA CPRE PPA** by first class mail deposited in the U.S. mail, postage pre-paid, or by email transmission to all parties of record.

This the 25th day of May, 2018.

/s/ Karen M. Kemerait
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AGREEMENT TO RENEWABLE POWER PURCHASE THE OUTPUT AGREEMENT
OF THE [NAME] SOLAR FACILITY
(CPRE Tranche 1)

Buyer: ~~[Duke Energy Carolinas, LLC OR]~~ [Duke Energy Progress, LLC]

Overnight Mail: 400 South Tryon Street
 Mail Code: ST ~~13A14Q~~
 Charlotte, North Carolina 28202
 Regular Mail: PO Box ~~10101006~~
 Mail Code: ST ~~13A14Q~~
 Charlotte, NC 28201-~~10101006~~
 Attn.: ~~Wholesale Renewable Manager~~ Contract Administrator
DERContracts@duke-energy.com

With Additional Notices of Events of Default
Or Potential Event of Default to:
 Overnight Mail: 550 S. Tryon St.
 Charlotte, North Carolina 28202
 Regular Mail: P.O. Box 1321, DEC45
 Charlotte, North Carolina 28201-1321
 Attn.: VP Commercial Legal Support

Seller: _____

This Renewable Power Purchase Agreement to Purchase the Output of the [NAME] Solar Facility, including Exhibits 1-5—10 hereto, which are incorporated into and made part hereof (collectively, the "Agreement"), is made and entered into by and between [insert full legal name of Seller] (the "Seller") and [Duke Energy Carolinas, LLC] [Duke Energy Progress, LLC] (the "Buyer") under the terms specified herein. Buyer and Seller may be referred to individually as a "Party" and collectively as the "Parties." Notwithstanding anything set forth herein, neither this Agreement nor any transaction contemplated hereunder will be effective **unless and until both Parties have executed** and delivered this Agreement, and the later of such date shall be the "Effective Date" of this Agreement.

NOW THEREFORE, IN CONSIDERATION OF THE PROMISES AND MUTUAL COVENANTS SET FORTH HEREIN, FOR GOOD AND VALUABLE CONSIDERATION, THE SUFFICIENCY OF WHICH IS ACKNOWLEDGED, AND INTENDING TO BE BOUND HEREBY, THE PARTIES AGREE AS FOLLOWS:

1. **Definitions**

Unless defined in the body of the Agreement, any capitalized term herein shall have the meaning set forth below:

- 1.1. "AAA" is defined in Section 23.2.1.
- 1.2. "Abandon(s)" means the relinquishment of control or possession of the Facility and/or cessation of operations of or at the Facility by Seller. "Abandon" excludes cessation of generation to comply with Prudent Utility Practices, Permitted Excuse to Perform, or due to maintenance or repair of the Facility (including Maintenance Outages and Planned Outage), provided that such maintenance or repair activities are being performed in a Commercially Reasonable Manner and with Prudent Utility Practice.
- 1.3. "Account" means a Party's electronic account with the Tracking System.
- 1.4. "Act" means the North Carolina Renewable Energy and Energy Efficiency Portfolio Standard, N.C. Gen. Stat. 62-133.8, including all rules promulgated by the Commission associated therewith, as each may be amended or modified from time-to-time, and any successor renewable energy standards, statutes, regulations, or rules.
- 1.5. "Affiliate" means, with respect to any entity, each entity that directly or indirectly controls, is controlled by, or is under common control with, such designated entity, with "control" meaning the possession, directly or indirectly, of the power to direct management and policies, or otherwise have control of an entity, whether through the ownership of voting securities or by contract or otherwise. Notwithstanding the foregoing, with respect to Buyer the term Affiliate does not include any subsidiaries or affiliates whose activities are subject to the oversight or regulation of any state commission(s) and/or federal energy regulatory commission.
- 1.6. "Agreement" is defined in the introductory paragraph hereof.
- 1.7. "Annual Payment Threshold" is defined in Section 8.9.
- 1.8. "Assignment" is defined in Section 24.1.
- 1.9. "Back-Up Tapes" is defined in Section 16.3.
- 1.10. "Bankrupt" means, with respect to a Party or any Affiliate of such Party that is currently acting as its credit support provider, that such Party or ~~its~~ Affiliate acting as credit support provider: (a) makes an assignment or any general arrangement for the benefit of creditors;

(b) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy or similar law for the protection of creditors; (c) has such a petition filed against it as debtor and such petition is not stayed, withdrawn, or dismissed within thirty (30) Business Days of such filing; (d) seeks or has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets; (e) has a distress, execution, attachment, sequestration or other legal process levied, enforced or sued on or against all or substantially all of its assets; (f) is unable to pay its debts as they fall due or admits in writing of its inability to pay its debts generally as they become due; and/or (g) otherwise becomes bankrupt or insolvent (however evidenced).

- 1.11. "Billing Meter" is defined in Section 10.
- 1.12. "Billing Period" is defined in Section 11.
- 1.13. "Business Day" means any day on which the Federal Reserve member banks in New York City are open for business. A Business Day shall run from 8:00 a.m. to 5:00 p.m. Eastern Prevailing Time.
- 1.14. "Buyer" shall have the meaning specified in the first paragraph of this Agreement
- 1.15. "Capacity" means and includes the electric generation capability and ability of the Facility and all associated characteristics and attributes, inclusive of the ability to contribute to peak system demands, as well as reserve requirements.
- 1.16. "Certificate" means the electronic instrument created and issued by the Tracking System.
- 1.17. "Change of Control" means a transaction or series of related transactions (by way of merger, consolidation, sale of stock or assets, or otherwise) with any person, entity or "group" (within the meaning of Section 13(d)(3) of the U.S. Securities Exchange Act of 1934) of persons pursuant to which such person, entity, or group would acquire (i) 50% or more of the voting interests in Seller or (ii) substantially all of the assets of Seller.
- 1.18. "Commercial Operation" means that the Facility is operational and placed into service such that all of the following have occurred and remain simultaneously true and accurate: (a) the Facility has been constructed, tested, and is fully capable of operating for the purpose of generating the Product and delivering as required herein; (b) the Facility has received written authorization from the Transmission Provider for interconnection and synchronization of the Facility with the System; ~~and, (c) the Facility has obtained all Permits and Required Approvals; (d) the Facility has met all requirements to be deemed commercially operational under any applicable state and/or federal tax credit, grant, subsidy, or any other similar incentives or benefit that the Facility is eligible for and pursuing in connection with financing or the overall economics of the Facility; and, and~~ (d) the Facility has met all requirements necessary for safely and reliably generating the Product and delivering the Product to Buyer in accordance with Prudent Utility Practice.
- 1.19. "Commercial Operation Date" means the date on which the Facility achieves or achieved Commercial Operation.
- 1.20. "Commercially Reasonable Manner" or "Commercially Reasonable" means, with respect to a given goal or requirement, the manner, efforts and resources a reasonable person in the position of the promisor would use, in the exercise of its reasonable business discretion and industry practice, so as to achieve that goal or requirement, which in no event shall be less than the level of efforts and resources standard in the industry for comparable companies with respect to comparable products. Factors used to determine whether a goal or requirement has been performed in a "Commercially Reasonable Manner" may include, but

shall not be limited to, any specific factors or considerations identified in the Agreement as relevant to such goal or requirement.

- 1.21. "Commission" means the North Carolina Utilities Commission or any successor thereto.
- 1.22. "Contract Price" is defined in Section 4.5.
- 1.23. "Contract Quantity" is defined in Section 4.3.
- 1.24. "Control Compensation" is defined in Section 8.9.1.
- 1.25. "Control Equipment" is defined in Section 8.7.
- 1.26. "Control Instruction" means any System Operator Instruction to dispatch, operate, and/or control the Facility in the same manner and/or for any reason as the System Operator may, in its sole discretion, dispatch, operate, and/or control Buyer's own generating resources and power purchase arrangements used to provide service to Buyer's native load customers.
- 1.27. "Costs" means, with respect to the Non-Defaulting Party, brokerage fees, commissions, and other similar third party transaction costs and expenses, and other costs and expenses reasonably incurred by such Party either in terminating any arrangement pursuant to which it has hedged its obligations or entering into new arrangements which replace the terminated transaction(s), and all reasonable attorneys' fees and other legal expenses incurred by the Non-Defaulting Party in connection with the termination.
- 1.28. "CPRE Program" means the Competitive Procurement of Renewable Energy Program instituted by Buyer pursuant to N.C. Gen. Stat. Section 62-110.8
- 1.29. ~~1.28.~~ "Credit Rating" means, with respect to any entity, the rating then assigned to such entity's unsecured, senior long-term debt obligations (not supported by third party credit enhancements) or if such entity does not have a rating for its senior unsecured long-term debt, then the rating then assigned to such entity as a corporate or issuer rating.
- 1.30. "Creditworthy" or "Creditworthiness" - means (i) a Person with an investment grade Credit Rating from two (2) of the three (3) Rating Agencies such that its senior unsecured debt (or issuer rating if such Person has no senior unsecured debt rating) is rated at least (A) BBB- by S&P, if rated by S&P, (B) Baa3 by Moody's, if rated by Moody's, and (C) BBB- by Fitch, if rated by Fitch, respectively, and (ii) has satisfactory and verifiable creditworthiness determined in Buyer's sole discretion.
- 1.31. ~~1.29.~~ "Defaulting Party" is defined in Section 19.
- 1.32. ~~1.30.~~ "Delivery Period" is defined in Section 4.1.
- 1.33. ~~1.31.~~ "Dispatch Down" means any reduction or cessation of Energy generation by the Facility in response to an order or instruction by or direct action taken by the System Operator.
- 1.34. ~~1.32.~~ "Disputes" is defined in Section 23.1.
- 1.35. ~~1.33.~~ "Early Termination Date" is defined in Section 20.1.
- 1.36. ~~1.34.~~ "Delivery Point" means the point of interconnection between the Facility and the System on the high side (Buyer or Transmission Provider side) of the System.
- 1.37. ~~1.35.~~ "Effective Date" is defined in the introductory paragraph hereto.
- 1.38. ~~1.36.~~ "Emergency Condition" means, no matter the cause: (a) any urgent, abnormal, operationally unstable, dangerous, or public safety condition that is existing on the System or any portion thereof; (b) any urgent, abnormal, operationally unstable, dangerous, and/or

public safety condition that is likely to result in any of the following: (i) loss or damage to the Facility or the System, (ii) disruption of generation by the Facility, (iii) disruption of service or stability on, to or of the System, or (iv) condition that may result in endangerment of human life or public safety; or (c) any circumstance that requires action by the System Operator to comply with standing NERC regulations or standards, including without limitation actions to respond to, prevent, limit, or manage loss or damage to the Facility, loss or damage to the System, disruption of generation by the Facility, disruption of service on the System, an abnormal condition on the System, and/or endangerment to human life or safety. An Emergency Condition will be an excuse to Seller's performance only if such condition is not due to Seller's negligence, willful misconduct, and/or Seller's failure to perform as required under this Agreement.

1.39. ~~1.37.~~ "Emergency Condition Instruction" means any System Operator Instruction relating to, due to, in response to, or to address an Emergency Condition.

1.40. ~~1.38.~~ "Energy" means three-phase, 60-cycle alternating current electric power and energy, expressed in either kWh or MWh, as the case may be.

1.41. ~~1.39.~~ "EPT" or "Eastern Prevailing Time" means the time in effect in the Eastern Time Zone of the United States of America, whether it be Eastern Standard Time or Eastern Daylight Savings Time.

1.42. ~~1.40.~~ "Estimation Methodology" is defined in Section 8.9.3.

1.43. ~~1.41.~~ "Event of Default" is defined in Section 19.

1.44. ~~1.42.~~ "Expected Annual Output" means the quantity of Energy identified in Exhibit 5 for each calendar year during the Delivery Period of the Facility.

1.45. ~~1.43.~~ "Facility" means Seller's ~~solar photovoltaic~~ [describe facility including renewable energy resource used] electric generating facility located in [_____] County, [_____] [State], at _____, as further identified in Exhibit 4.

1.46. ~~1.44.~~ "FERC" means the Federal Energy Regulatory Commission or any successor thereto.

1.47. ~~1.45.~~ "First COD Date" is defined in Section 20.5.

1.48. "Fitch" - means Fitch Ratings Ltd. or its successor.

1.49. ~~1.46.~~ "Force Majeure" is defined in Section 14.1.

1.50. ~~1.47.~~ "Force Majeure Instruction" means any System Operator Instruction relating to, due to, in response to, or to address a Force Majeure.

1.51. ~~1.48.~~ "GAAP" is defined in Section 9.1.

1.52. ~~1.49.~~ "Gains" means, with respect to the Non-Defaulting Party, an amount equal to the present value of the economic benefit to the Non-Defaulting Party, if any (exclusive of Costs), resulting from the termination of this Agreement for the remaining Term, determined in a Commercially Reasonable Manner. Factors used in determining the economic benefit may include, without limitation, reference to information available either internally or supplied by third parties, including without limitation, quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, or other relevant market data, comparable transactions, settlement prices or market prices for comparable transactions, forward price curves, production by comparable facilities, expected and historical production, all calculated for the remaining Term of the Agreement for the Product (inclusive of all components).

1.53. ~~1.50.~~ "Governmental Authority" means any federal, state or local government, legislative body, court of competent jurisdiction, administrative agency or commission or other

governmental or regulatory authority or instrumentality or authorized arbitral body, including, without limitation, the Commission.

- 1.54. "Guarantor" means any Creditworthy Person having the authority and agreeing to guarantee the Seller's obligations under this Agreement and is otherwise acceptable to Buyer in its sole discretion.
- 1.55. "Guaranty" means a parent company guaranty, in substantially the form set forth in Exhibit 6 attached hereto, provided by a Guarantor in favor of Buyer guaranteeing the obligations of Seller under this Agreement.
- 1.56. ~~1.51.~~ "Interconnection Agreement" means the separate interconnection and transmission service agreement (or agreements) to be negotiated and executed between Seller and the Transmission Provider concerning the interconnection of the Facility with the System, upgrade to the System to accommodate the Facility's interconnection with and operation in parallel with the System, and the requirements for transmission service.
- 1.57. "Interconnection Facilities and System Upgrades In-Service Date" shall be the later of the Requested Upgraded In-Service Date and Requested Facilities In-Service Date as specified in Appendix 4 (Milestones) of the Interconnection Agreement).
- 1.58. ~~1.52.~~ "Interconnection Instruction" means any order, action, signal, requirement, demand, and/or direction, howsoever provided or implemented by the System Operator due to, in response to, or to address any condition relating to any service and/or obligation occurring under the Interconnection Agreement.
- 1.59. ~~1.53.~~ "Interest Rate" means, for any date, the lesser of (a) the per annum rate of interest equal to the prime lending rate as may from time to time be published in *The Wall Street Journal* under "Money Rates" on such day (or if not published on such day on the most recent preceding day on which published), plus two percent (2%); and, (b) the maximum rate permitted by applicable law.
- 1.60. ~~1.54.~~ "kW" means kilowatt.
- 1.61. ~~1.55.~~ "kWh" means kilowatt-hour.
- 1.62. ~~1.56.~~ "Letter(s) of Credit" means one or more irrevocable standby letters of credit in the form of Exhibit 7 attached hereto, issued by a U.S. commercial bank or a U.S. branch of a foreign bank or other financial institution reasonably acceptable to Buyer, which is not an Affiliate of Seller, which has and maintains a Credit Rating of at least A- from S&P and A3 from Moody's, for the Security Period, permitting Buyer to draw the entire amount if either such amount is owed or such Letter of Credit is not renewed or replaced at least thirty (30) Business Days prior to its stated expiration date, and is otherwise acceptable in all respects to Buyer in its sole discretion.
- 1.63. ~~1.57.~~ "Lien" means any mortgage, deed of trust, lien, pledge, charge, claim, security interest, easement, covenant, right of way, restriction, equity, or encumbrance of any nature whatsoever.
- 1.64. ~~1.58.~~ "Losses" means, with respect to the Non-Defaulting Party, an amount equal to the present value of the economic loss to the Non-Defaulting Party, if any (exclusive of Costs), resulting from the termination of this Agreement for the remaining Term, determined in a Commercially Reasonable Manner. Factors used in determining the economic loss or loss of economic benefit may include, without limitation, reference to information available either internally or supplied by third parties, including without limitation, quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, or other relevant market data, comparable transactions, settlement prices or market prices for comparable transactions,

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forward price curves, production by comparable facilities, expected and historical production, all calculated for the remaining Term of the Agreement for the Product (inclusive of all components).

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- 1.65. ~~1.59.~~ "Maintenance Outage" means the temporary operational removal of the Facility from service to perform work on specific components of the Facility, at a time when the Facility must be removed from service before the next Planned Outage in the interest of safety or the prevention of injury or damage to or undue wear and tear on the Facility or any component thereof.
- 1.66. ~~1.60.~~ "Milestone Deadline" means the deadline for Seller to achieve each Operational Milestone as set forth in Exhibit 3.
- 1.67. ~~1.61.~~ "Moody's" means Moody's Investors Service, Inc. or any successor-rating agency thereto.
- 1.68. ~~1.62.~~ "MW" means megawatt.
- 1.69. ~~1.63.~~ "MWh" means megawatt-hour.
- 1.70. ~~1.64.~~ "Nameplate Capacity Rating" means the installed nameplate capacity rating of the Facility set forth in Exhibit 4.
- 1.71. ~~1.65.~~ "NERC" means the North American Electric Reliability Corporation. For purposes of this Agreement, NERC includes any applicable regional entity with delegated authority from NERC, such as the SERC Reliability Corporation (SERC).
- 1.72. ~~1.66.~~ "New Renewable Energy Facility" is defined in the Act.
- 1.73. ~~1.67.~~ "Non-Defaulting Party" is defined in Section 20.
- 1.74. ~~1.68.~~ "Operational Milestone" means each operational event and result that Seller must achieve as set forth in the Operational Milestone Schedule, with such supporting documentation as may be requested by Buyer from time-to-time in its Commercially Reasonable discretion.
- 1.75. ~~1.69.~~ "Operational Milestone Schedule" means the schedule established in Exhibit 3 setting forth each Operational Milestone that Seller must fully complete by the Milestone Deadline.
- 1.76. ~~1.70.~~ "Party" or "Parties" is defined in the introductory paragraph hereto.
- 1.77. ~~1.71.~~ "Performance Assurance" means collateral in the form of either cash, Letter(s) of Credit, or other security a Guaranty that is acceptable to Buyer in its sole discretion, in each case that meets the requirements set forth in this Agreement (including, without limitation, Section 5) provided by Seller to Buyer for the benefit of Buyer pursuant to this Agreement, as credit support, adequate assurances, and security to secure Seller's performance under this Agreement.
- 1.78. ~~1.72.~~ "Permit" means any permit, license, registration, filing, certificate of occupancy, certificate of public convenience and necessity, approval, variance or any authorization from or by any Governmental Authority and pursuant to any Requirements of Law.
- 1.79. ~~1.73.~~ "Permitted Excuse to Perform" means that Seller's obligation to generate, deliver, and sell and Buyer's obligation to receive and purchase is excused and no damages will be payable by either Party to the other Party, if and to the extent such failure is due solely to any of the following occurrences: (a) an Emergency Condition Instruction; (b) a Control Instruction; (c) an Interconnection Instruction; or, (d) a Force Majeure Instruction.
- 1.80. ~~1.74.~~ "Person" means any individual, entity, corporation, general or limited partnership, limited liability company, joint venture, estate, trust, association or other entity or Governmental Authority.
- 1.81. ~~1.75.~~ "Planned Outage" means the temporary operational removal of the Facility from

service to perform work on specific components in accordance with a pre-planned operations schedule, such as for a planned annual overhaul, inspections, or testing of specific equipment of the Facility.

~~1.76. "Posting Cap" is defined in Section 5.3.~~

~~1.82. 1.77.~~ "Product" means the Capacity of the Facility, Energy generated by the Facility, and the RECs associated with the Energy generated by the Facility.

~~1.83. 1.78.~~ "Protected Information" is defined in Section 16.1

~~1.84. 1.79.~~ "Prudent Utility Practice" means those practices, methods, equipment, specifications, standards of safety, and performance, as the same may change from time to time, as are commonly used in the construction, interconnection, operation, and maintenance of electric power facilities, inclusive of delivery, transmission, and generation facilities and ancillaries, which in the exercise of good judgment and in light of the facts known at the time of the decision being made and activity being performed are considered: (i) good, safe, and prudent practices; (ii) are in accordance with generally accepted standards of safety, performance, dependability, efficiency, and economy in the United States; (iii) are in accordance with generally accepted standards of professional care, skill, diligence, and competence in the United States; and, (iv) are in compliance with applicable regulatory requirements and/or reliability standards. Prudent Utility Practices are not intended to be limited to the optimum practices, methods or acts to the exclusion of others, but rather are intended to include acceptable practices, methods and acts generally accepted in the energy generation and utility industry.

~~1.85. 1.80.~~ "PSC" means the Public Service Commission of South Carolina, or successor thereto.

~~1.86. 1.81.~~ "PURPA" means the Public Utility Regulatory Policies Act of 1978, as amended, and as such may be amended from time to time.

~~1.87. 1.82.~~ "PURPA Fuel Requirements" means the requirements set forth in 18 C.F.R. § 292.204 OR 205, as may be amended and/or restated.

~~1.88. 1.83.~~ "Qualifying Facility" means an electric generating facility that has been registered and certified by FERC as generator that qualifies for and meets the requirements set forth in PURPA, as it may be amended, and associated rules, regulations, orders.

~~1.89. "Rating Agency" or "Rating Agencies" - means the rating entities of S&P, Moody's or Fitch.~~

~~1.90. 1.84.~~ "REA Reporting Rights" means the right of the reporting person or entity to report that it owns the Renewable Energy Attributes to any Governmental Authority or other party under any compliance, voluntary, trading, or reporting program, public or private and to any person, customers, or potential customers for, including without limitation, purposes of compliance, marketing, publicity, advertising, or otherwise.

~~1.91. 1.85.~~ "Regulatory Event" is defined in Section 15.1.

~~1.92. 1.86.~~ "Renewable Energy Attributes" means any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, attributable to the generation of Energy by the Facility, the use of such Energy, or such Energy's displacement of conventional Energy generation, including any and all renewable or environmental characteristics and benefits of the Energy generated by the Facility. Renewable Energy Attributes include but are not limited to: (1) any avoided emissions of pollutants to the air, soil or water such as sulfur oxides (SOx), nitrogen oxides (NOx), carbon monoxide (CO) and other pollutants; (2) any avoided emissions of carbon dioxide (CO2), methane (CH4), nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride and other

greenhouse gases (GHGs), ozone depleting substances, ozone, and non-methane volatile organic compounds that have been or may be determined by the United Nations Intergovernmental Panel on Climate Change (UNIPCC), by law, or otherwise by science or in the voluntary markets to contribute to the actual or potential threat of altering the Earth's climate by trapping heat in the atmosphere; (3) any credit, allowance or instrument issued or issuable pursuant to a state implementation plan under regulations promulgated by the Environmental Protection Agency under the Clean Air Act and (4) the reporting rights to any of the foregoing, including, without limitation, REA Reporting Rights and any and all renewable and/or environmental characteristics and benefits of the Energy generated by the Facility. Renewable Energy Attributes do not include: (i) any Energy or Capacity of the Facility; (ii) investment tax credits, production tax credits, or other tax credits, cash grants in lieu of tax credits associated with the construction, ownership or operation of the Facility, or (iii) any adverse wildlife or environmental impacts.

- 1.93. ~~1.87.~~ "Renewable Energy Certificate(s)" or "REC(s)" means and, notwithstanding anything to the contrary set forth in the Act includes, all of the Renewable Energy Attributes and REA Reporting Rights associated with one (1) megawatt hour (MWh) of Energy generated by the Facility. The REC represents all title to and claim over all of the Renewable Energy Attributes and REA Reporting Rights associated with in any manner with the Energy generated by the Facility.
- 1.94. ~~1.88.~~ "Renewable Energy Resource" is defined in the Act.
- 1.95. ~~1.89.~~ "Required Approval" is defined in Section 6.
- 1.96. ~~1.90.~~ "Requirements of Law" means any federal, state, and local law, statute, regulation, rule, code, ordinance, resolution, order, writ, judgment, decree or Permit enacted, adopted, issued or promulgated by any Governmental Authority, including, without limitation, (i) the Act, (ii) those pertaining to the creation and delivery of the Product, (iii) those pertaining to electrical, building, zoning, occupational safety, health requirements or to pollution or protection of the environment, and (iv) principles of common law under which a person may be held liable for the release or discharge of any hazardous substance into the environment or any other environmental damage.
- 1.97. ~~1.91.~~ "Second COD Date" is defined in Section 20.5.1.
- 1.98. ~~1.92.~~ "Security Period" is defined in Section ~~5.7.5.6.~~
- 1.99. ~~1.93.~~ "Seller" shall have the meaning specified in the first paragraph of this Agreement.
- 1.100. ~~1.94.~~ "S&P" means Standard & Poor's Ratings Services, Inc. or any successor-rating agency thereto.
- 1.101. ~~1.95.~~ "Station Power" means the Energy generated by the Facility and, whether metered or unmetered, used on-site to supply the Facility's auxiliary load and parasitic load and/or for powering the electric generation equipment. Station Power shall not include any Energy generated by the Facility and stored for later sale or delivery to the Buyer under this Agreement.
- 1.102. ~~1.96.~~ "System" means the transmission, distribution, and generation facilities that are owned, directed, managed, interconnected, controlled, or operated by Buyer and/or the Transmission Provider, including, without limitation, facilities to provide retail or wholesale service, substations, circuits, reinforcements, meters, extensions, or equipment associated with or connected to any interconnected facility or customer.
- 1.103. ~~1.97.~~ "System Operator" means the operators of the System that have the responsibilities for ensuring that the System as a whole or any part thereof operates safely, efficiently,

and reliably, including without limitation the responsibilities to comply with any applicable operational or reliability requirements, the responsibilities to balance generation supply with customer load, the responsibilities to comply with any other regulatory obligation including least cost dispatch and System optimization, and the responsibilities to provide dispatch and curtailment instructions to generators supplying Energy to the System. The System Operator includes any person or entity delivering any such instructions or signals to Seller or taking any action relating to, due to, in response to, or to address such instructions.

1.104. ~~1.98.~~ "System Operator Instruction" for purposes of this Agreement means any order, action, signal, requirement, demand, dispatch decision, and/or direction, howsoever provided or implemented by the System Operator to operate, dispatch, control, manage, or otherwise operate the System in accordance with any applicable obligation and/or regulatory requirement, including, without limitation, those undertaken and implemented by the System Operator, in its sole discretion based on relevant System factors and dispatch considerations, including any and all operating characteristics, maintenance requirements, operational limitations, operational or dispatch planning, reliability (including standing NERC regulations or standards), safety, least cost dispatch, constraints, discharge, emissions limitations, compliance requirements, communications, resource ramp-up and ramp-down constraints and implementation, and any other System considerations, which may include, without limitation, any such instruction to: (i) interconnect, disconnect, integrate, operate in parallel, or synchronize with the System, (ii) increase, reduce, or cease generation output to comply with standing NERC regulations or standards or any other regulatory obligation applicable to the dispatch or operation of the System; (iii) respond to any transmission, distribution, or delivery limitations or interruptions; (iv) perform or cease performing any activity so as to operate in accordance with System limitations, including, without limitation, operational constraints that would require the System Operator to force offline or reduce generation output from reliability generators to accommodate generation by the Facility; and, (v) suspend, interrupt, dispatch, increase or decrease any operational and/or generation activity occurring on or into the System pursuant to Control Instructions, Emergency Condition Instructions, and Force Majeure Instructions.

1.104.1. ~~1.98.1.~~ For purposes of this Agreement, a System Operator Instruction shall not include any Interconnection Instruction.

1.105. ~~1.99.~~ "Taxes" means all taxes, fees, levies, licenses or charges imposed by any Governmental Authority, together with any interest and penalties thereon.

1.106. ~~1.100.~~ "Term" is defined in Section 3.1.

1.107. ~~1.101.~~ "Testing Period" is defined in Section ~~4.3.4.4.4.~~

1.108. ~~1.102.~~ "Tracking System" means the verification system that accounts for the generation, sale, purchase, and/or retirement of renewable energy and credits, which will be the North Carolina Renewable Energy Tracking System, administered by the Commission pursuant to the Act.

1.109. ~~1.103.~~ "Transmission Provider" means the entity or division within [Duke Energy Carolinas, LLC] [Duke Energy Progress, LLC] that will provide interconnection and/or electric distribution or transmission service to enable delivery of Energy generated by the Facility to Buyer, and any such entity or division will include any successor or replacement thereto, including without limitation, a consolidated control area or a regional transmission organization.

1.110. ~~1.104.~~ "Vintage" means the moment when the MWh of Energy is generated by the Facility, and therefore, when the REC associated with that MWh of Energy is generated by the Facility.

2. **Interpretation**

2.1. **Intent.** Unless a different intention clearly appears, the following terms and phrases shall be interpreted as follows: (a) the singular includes the plural and vice versa; (b) the reference to any Person includes such Person's legal and/or permitted successors and assignees, and reference to a Person in a particular capacity excludes such Person in any other capacity or individually; (c) the reference to any gender includes the other gender and the neuter; (d) reference to any document, including this Agreement, refers to such document as it may be amended, amended and restated, modified, replaced or superseded from time to time in accordance with its terms, or any successor document(s) thereto; (e) reference to any section or exhibit means such section or exhibit of this Agreement unless otherwise indicated; (f) "hereunder", "hereof", "hereto", "herein", and words of similar import shall be deemed references to this Agreement as a whole and not to any particular section or other provision; (g) "including" (and with correlative meaning "include"), means "including without limitation" and when following any statement or term, is not to be construed as limiting the general statement or term to the specific items or matters set forth or to similar items or matters, but rather as permitting the general statement or term to refer to all other items or matters that could reasonably fall within its broadest possible scope; (h) relative to the determination of any period of time, "from" means "from and including", "to" means "to but excluding" and "through" means "through and including"; (i) reference to any Requirements of Law refers to such Requirements of Law as it may be amended, modified, replaced or superseded from time to time, or any successor Requirements of Law thereto; and (j) all exhibits and attachments to this Agreement are hereby incorporated into this Agreement. Other terms used, but not defined in Section 1 or in the body of the Agreement, shall have meanings as commonly used in the English language and, where applicable, in the electric utility industry. Words not otherwise defined herein that have well known and generally accepted technical or trade meanings are used herein in accordance with such recognized meanings.

3. **Term and Termination**

- 3.1. **Term.** This Agreement shall be effective as of the Effective Date and shall remain in full force and effect until the [twentieth (20th)] anniversary of the Commercial Operation Date ("Term"), unless terminated earlier pursuant to the provisions of this Agreement.
- 3.2. **Termination and Survival.** This Agreement may be terminated earlier than the expiration of the Term as provided for herein. If this Agreement is terminated earlier than the expiration of the Term for any reason, including, without limitation, whether by its terms, mutual agreement, early termination, and/or event of default, such termination shall not relieve any Party of any obligation accrued or accruing prior to the effectiveness of such termination. Furthermore, any obligations, limitations, exclusions and duties which by their nature or the express terms of this Agreement extend beyond the expiration or termination of this Agreement, including, without limitation, provisions relating to compliance requirements, accounting, billing, billing adjustments, limitations or liabilities, dispute resolution, Performance Assurance, and any other provisions necessary to interpret or enforce the respective rights and obligations of the Parties hereunder, shall survive the expiration or early termination of this Agreement.
- 3.3. [FOR FACILITIES LOCATED IN SOUTH CAROLINA ONLY] **Condition Precedent for Buyer.** It is a condition to the continuing obligations of each Party under this Agreement that the Public

Service Commission of South Carolina (the "PSC") shall have delivered to Buyer written notice that the PSC has: ~~(i) completed its review of this Agreement; and, (ii) has accepted this Agreement for filing with the PSC without any modification (unless such modification is acceptable to all the Parties),~~ condition, suspension, or investigation. No later than twenty (20) Business Days after both Parties have executed this Agreement, Buyer will submit the Agreement for filing with the PSC. Seller agrees that Buyer will have sole discretion over all aspects of such submittal, including without limitation, the form and substance of the submittal, confidentiality, procedure, responding to any data requests, and providing any information to the PSC and the South Carolina Office of Regulatory Staff. Seller will not oppose or challenge the PSC's acceptance of this Agreement, and upon request by Buyer will promptly and fully support the PSC's acceptance of this Agreement without any modification, condition, suspension, or investigation. Buyer will make a good faith request that the PSC and the South Carolina Office of Regulatory Staff keep confidential the terms and conditions of this Agreement; *provided, however*, Seller agrees and acknowledges that information (including Protected Information) contained in this Agreement may become public by its submission to the PSC and the South Carolina Office of Regulatory Staff, and Seller hereby consents to any such disclosure, without any reservations and without any prior notice to Seller. If the PSC issues an order or any other directive to modify, condition, suspend, or investigate any aspect of this Agreement prior to its acceptance, then this Agreement will immediately terminate, and upon any such termination neither Party shall have any obligation, duty, or liability to the other Party under this Agreement. In the event of such termination, each Party will retain its respective rights under PURPA. Buyer will provide notice to Seller after Buyer has received written notice of the PSC's determination in regards to Buyer's request that the PSC accept the Agreement for filing, and if such written notice from the PSC accepts this Agreement without any modification, condition, suspension, or investigation then Buyer will notify Seller that the condition precedent under this Section 3.3 has been satisfied.

4. **Purchase and Sale Obligations**

- 4.1. Delivery Period. The "Delivery Period" for the Product to be generated by the Facility and sold by Seller to Buyer shall be for all hours starting at 12:00:01 AM EPT on the Commercial Operation Date through the end of the Term, unless this Agreement is terminated earlier pursuant to its terms and conditions.
- 4.2. Vintage. The RECs shall be of the same Vintage as the MWh of Energy generated by the Facility, and the RECs shall arise due to the generation of Energy by the Facility.
- 4.3. Contract Quantity. The "Contract Quantity" will be one hundred percent (100%) of the Capacity, output of Energy (including stored Energy), and associated RECs produced by the Facility, less that associated with Station Power.
 - 4.3.1. Seller shall sell and deliver the Contract Quantity of the Product exclusively and solely to Buyer. Seller's failure to generate, sell, and deliver the Contract Quantity of the Product to Buyer will be excused with no damages payable to Buyer solely to the extent such failure is due to a Permitted Excuse to Perform.
 - 4.3.2. Buyer shall have no obligation to receive, purchase, pay for, or pay any damages associated with not receiving the Product due to a Permitted Excuse to Perform. Buyer shall have full and exclusive rights to the Product (inclusive of all components), and will be entitled to full and exclusive use of the Product (inclusive of all components) for its purposes and in its sole and exclusive discretion.
 - 4.3.3. The estimated monthly and annual Energy production of the Facility during the Delivery Period is set forth in Exhibit 1 hereto.

- 4.4. Testing Period. Prior to the Facility's Commercial Operation Date Seller may test the capability of the Facility to operate and generate the Product in accordance with this Agreement (such operational period, the "Testing Period"). Seller shall provide Buyer with written notice of a date certain on which Seller desires to initiate the Testing Period. After the Facility has achieved the Commercial Operation Date, the Buyer shall, expressly subject to the limitations set forth below, purchase the Product produced by the Facility during the Testing Period at the applicable Contract Price set forth in Exhibit 2, but expressly subject to the Buyer fully satisfying the following conditions: (i) the Testing Period shall not exceed sixty (60) days; (ii) the RECs shall meet all of the requirements set forth in this Agreement; and, (iii) Seller shall certify in writing to Buyer, and to Buyer's satisfaction, together with supporting details, that each unit of the Product (including the associated REC) to be sold and purchased during the Testing Period was generated in compliance with the requirements of this Agreement. To the extent Seller is unable to satisfy the foregoing requirements; the Buyer shall purchase the Energy generated by the Facility at the rate for the Energy-only component of the Product set forth in Exhibit 2.
- 4.5. Contract Price. The "Contract Price" for the Product shall be the price corresponding to the relevant portion of the Delivery Period as set forth in Exhibit 2.
- 4.6. Energy Delivery. Seller shall deliver the Contract Quantity of the Energy component of Product at the Delivery Point, and Seller shall be fully responsible for all costs, charges, expenses, and requirements associated with delivering the Energy to the Delivery Point. Buyer will have no obligation to pay for any Energy not delivered to the Delivery Point.
- 4.7. REC Delivery. Seller shall deliver to Buyer's Account the Contract Quantity of the REC component of the Product in the form of Certificates. Seller agrees that in addition to representing the attributes and characteristics under the Tracking System's operating rules and requirements, the Certificate will also represent the REC, Renewable Energy Attributes, and REA Reporting Rights as defined in this Agreement. No later than fourteen (14) calendar days after the meter data is delivered to Seller's Account, Seller shall review the meter data and complete all acts necessary to create the Certificates in the Tracking System and shall transfer the Certificates into Buyer's Account. Each Party shall establish an Account with the Tracking System for the creation, transfer, and/or receipt of the Certificates. Seller agrees to establish the Account for the Facility no later than fifteen (15) Business Days prior to the Commercial Operation Date.
- 4.8. Payment for Product. Buyer agrees to pay Seller for the Product generated and delivered in accordance with this Agreement by Seller to Buyer in accordance with the pricing set forth in Exhibit 2. Seller agrees that to the extent Buyer has already paid for the Product prior to Seller transferring the REC component of the Product in the manner noted above, Buyer shall have ownership of the REC component of the Product, and Seller shall hold the same in trust for Buyer until the transfer is completed as provided for herein. Buyer shall not be obligated to pay for, and shall receive a full refund with respect to, any RECs for which the Certificates are not delivered to Buyer's Account.
- 4.9. Transfer. In no event shall Seller procure or have the right to procure the Product or any component of the Product from any source other than the Facility for sale and delivery pursuant to this Agreement. Title to and risk of loss to the Product sold and delivered hereunder shall transfer from Seller to Buyer after completion of delivery at the Delivery Point and after completion of transfer of the REC component of the Product. Seller shall be responsible for any costs and charges imposed on or associated with the Product and the delivery of the Product at the Delivery Point and upon completion of transfer of the REC component. Buyer shall be responsible for any costs or charges imposed on or associated with the Product after the Delivery Point and after completion of transfer of the REC.

5. Credit and Related Provisions.

- 5.1. Pre-COD Performance Assurance Requirements. ~~No~~ Subject to Section 5.3 below, no later than five (5) business days after the Effective Date, Seller shall provide and deliver to Buyer Performance Assurance in the amount of [4% x total projected revenue under the Agreement during the Term as determined by Buyer in its reasonable discretion], as such Performance Assurance may be adjusted pursuant to Section 20.5.1.
- 5.2. Post-COD Performance Assurance. ~~After~~ Subject to Section 5.3 below, after the Facility achieves Commercial Operation, Seller shall continue to provide Buyer with Performance Assurance in the amount of [for each year during the Term the greater of (i) 2% x total projected revenue under the Agreement during the Term as determined by Buyer in its reasonable discretion and (ii) the overpayment to the Seller under the contract price relative to Buyer's actual avoided cost in the applicable year] set forth in the below table corresponding to the applicable period during the Term of this Agreement. Seller may request and Buyer may, subject to Section 5.2, adjust the amount of such Performance Assurance within fifteen (15) Business Days of Seller's written request to coincide with the amount set forth in the below table. Seller's failure to provide the Performance Assurance and/or to maintain the Performance Assurance in the required amount and in full force and effect throughout the Term of this Agreement will be an Event of Default under this Agreement. Notwithstanding and without limiting the foregoing, Buyer may request additional credit support security from Seller pursuant to Section 5.3.

[Insert TABLE – Annual Performance Assurance]

- 5.3. Adequate Assurances. ~~Notwithstanding and without limiting any payment obligations or any other existing performance assurance obligation, if any, set forth herein, Buyer may, from time to time, request, in writing, that Seller provide Buyer with Performance Assurance, including an additional amount of Performance Assurance, in an amount reasonably determined by Buyer relative to Seller's performance obligations under this Agreement, if at any time Buyer has reasonable grounds for insecurity concerning Seller's ability to perform any of its obligations under this Agreement; provided, however, such amount shall not exceed _____ [e.g. highest amount identified in accordance with Section 5.1/5.2] (the "Posting Cap"). Expressly without limiting the generality of the foregoing, reasonable grounds for insecurity include, but are not limited to knowledge that (i) Seller or its guarantor or any direct or indirect parent company is defaulting under other material contracts or transactions (including, without limitation, contracts or transactions with third parties); or, (ii) any imminent or threatened material adverse change in the financial condition of a Party or its guarantor. Upon receipt of such notice, Seller shall have five (5) Business Days to provide such Performance Assurance to Buyer. In the event that Seller fails to provide the required amount of such Performance Assurance to Buyer within five (5) Business Days of receipt of notice, then Buyer may declare such failure an Event of Default and exercise any or all other remedies provided for hereunder or pursuant to law or equity. Seller requirement to refresh or replenish the required amount of Performance Assurance at Buyer's request up to the Posting Cap, including, without limitation, where Buyer has exercised its right to draw upon any Performance Assurance.~~ Unsecured Credit For Creditworthy Sellers. If Seller, or its Guarantor as applicable, is Creditworthy and is not in default of any provisions under this Agreement or any Guaranty issued in support of this Agreement, the Seller shall be excused from the requirement to post Performance Assurance as required under Sections 5.1 and 5.2 above, as long as it remains Creditworthy. If at any time during the Term of this Agreement, Seller, or its Guarantor, ceases to be Creditworthy due to a change in its Credit Rating, then Seller will notify Buyer of such change in its credit status and shall provide Performance Assurance to Buyer in the amounts

required under Section 5.1 or 5.2, as applicable, within five (5) Business Days after such change in its Credit Rating.

- 5.4. **Financial Disclosures.** Seller shall timely provide to Buyer financial information of Seller as follows: (i) within sixty (60) days after the end of each fiscal quarter of each fiscal year that this Agreement is effective, a copy of Seller's quarterly report containing unaudited consolidated financial statements for such fiscal quarter signed and verified by an authorized officer of Seller attesting to their accuracy; and, (ii) within 120 days after the end of each fiscal year that this Agreement is effective a copy of Seller's annual report containing audited consolidated financial statements for such fiscal year. The statements shall be prepared in accordance with generally accepted accounting principles or other procedures with which Seller is required to comply with under applicable law.
- 5.5. **Netting.** If an Event of Default has not occurred and a Party is required to pay an amount to the other Party under this Agreement, then such amounts shall be netted, and the Party owing the greater aggregate amount shall pay to the other Party any difference between the amounts owed. All outstanding obligations to make payment under this Agreement or any other agreement between the Parties may be netted, offset, set off, or recouped therefrom, and payment shall be owed as set forth above. Unless Buyer notifies Seller in writing (except in connection with a liquidation and termination) all amounts netted pursuant to this section shall not take into account or include any credit support, which may be in effect to secure Seller's performance under this Agreement. The netting set forth above, shall be without prejudice and in addition to any and all rights, liens, setoffs, recoupments, counterclaims and other remedies and defenses (to the extent not expressly herein waived or denied) that such Party has or to which such Party may be entitled arising from or out of this Agreement.
- 5.6. **Set-off.** In addition to any rights of set-off a Party may have as a matter of law or otherwise and subject to applicable law, upon the occurrence of an Event of Default, the Non-Defaulting Party shall have the right (but shall not be obligated to) without prior notice to the Defaulting Party or any other person to set-off any obligation of the Defaulting Party owed to the Non-Defaulting Party under this Agreement ~~and any other agreement between the Parties~~ (whether or not matured, whether or not contingent and regardless of the currency, place of payment or booking office of the obligation) against any obligations of the Non-Defaulting Party owing to the Defaulting Party under this Agreement ~~and any other agreement between the Parties~~ (whether or not matured, whether or not contingent and regardless of the currency, place of payment or booking office of the obligation). If any such obligation is unascertained, the Non-Defaulting Party may in a Commercially Reasonable Manner estimate that obligation and set-off in respect of the estimate, subject to the relevant Party providing an accounting and true-up to the other Party after the amount of the obligation is ascertained.
- 5.7. **Performance Assurance Requirements.** Seller shall ensure that the Performance Assurance in the required amount remains in full force, and effect, and outstanding, in the required amount, and for the duration required by this Agreement. All applicable Performance Assurance, as the amount thereof may be increased, decreased, and/or replenished pursuant to the terms of this Agreement, shall remain in full force, and effect, and outstanding for the benefit of Buyer until ~~one hundred and fifty (150)~~sixty (60) days following the later of: (a) the end of the Term or (b) the date on which Seller has fully satisfied all obligations to Buyer under this Agreement (the "Security Period"). If at any time any Performance Assurance fails to meet any of the requirements under this Agreement, Seller shall replace such Performance Assurance with alternative Performance Assurance that meets each of the requirements under this Agreement. Seller will be solely

responsible for any and all costs incurred with providing and maintaining any Performance Assurance to the full amount required by this Agreement. If Seller fails to replace, renew, or otherwise maintain the required Performance Assurance as and when required by this Agreement, then Buyer: (a) shall be entitled to draw and retain hereunder the full amount of the Performance Assurance; (b) shall not be obligated to make any further payments to Seller until Seller shall have provided Buyer with the replacement Performance Assurance; and, (c) shall be entitled to give Seller notice of an Event of Default and pursue the termination rights and remedies provided for in this Agreement.

- 5.8. Grant of Security Interest. To secure its obligations and liabilities under this Agreement to Buyer, Seller hereby grants to Buyer a present and continuing first priority security interest in, and lien on (and right of netting and set-off against), and assignment of, all present and future Performance Assurance, including, without limitation, cash collateral and cash equivalent collateral and any and all proceeds resulting therefrom or the liquidation thereof, whether now or hereafter held by, on behalf of, or for the benefit of, Buyer; and, furthermore Seller agrees to take such actions as Buyer reasonably requires to perfect Buyer's first-priority security interest in, and lien on (and right of netting, recoupment, and set-off against), such Performance Assurance and any and all products and proceeds resulting therefrom or from the liquidation thereof, including without limitation proceeds of insurance. Upon or any time after the occurrence or deemed occurrence of an Event of Default or upon an Early Termination Date, Buyer (if it is the Non-Defaulting Party) may do any one or more of the following with respect to Seller (if it is the Defaulting Party): (i) exercise any of the rights and remedies of a secured party with respect to all Performance Assurance, including any such rights and remedies under law then in effect; (ii) exercise its rights of netting, recoupment, and set-off against any and all property of Seller in the possession of Buyer or its agent; (iii) draw on any outstanding applicable forms of Performance Assurance provided for the benefit of Buyer; and, (iv) liquidate all Performance Assurance then held by or for the benefit of Buyer free from any claim or right of any nature whatsoever of Seller, including any equity or right of purchase or redemption by Seller.

6. Seller Compliance Requirements.

- 6.1. Required Approvals. Seller shall at its sole cost and expense timely obtain, maintain, and comply with all Required Approvals during the Term of this Agreement. Without limiting the generality of the following, "Required Approvals" means all of the following:
- 6.1.1. Commission approval and certification that the Facility is registered and certified as a New Renewable Energy Facility for Buyer to use the Product, including, without limitation, for use to comply with the Act.
 - 6.1.2. All approvals and certifications that the Facility is a Qualifying Facility.
 - 6.1.3. All Permits, authorizations, certifications, and/or approvals from any Governmental Authority and under any Requirements of Law, including, without limitation, from the Commission or FERC, for Seller to construct, build, own, operate, and maintain the Facility and sell and deliver the Product to Buyer.
- 6.2. Seller Covenants. Seller covenants to Buyer that it shall comply with all of the requirements of the Act and other Requirements of Law applicable to Seller, the Facility, and/or Seller's obligations under the Agreement. Without limiting the generality of the foregoing Seller represents and warrants to Buyer as of the Effective Date of this Agreement and throughout

the Term of this Agreement that: (a) Seller has obtained an approved and valid report of proposed construction or certificate of public convenience and necessity for the Facility from the [Commission][PSC]; (b) Seller has submitted to the Transmission Provider and the Transmission Provider has accepted the completed interconnection request for the Facility; and (c) Seller has obtained all applicable certifications and/or approvals for the Facility from FERC. Seller agrees and acknowledges that Buyer has entered into this Agreement in reliance upon the representations and warranties set forth in this section, and in the event of a breach or failure of or relating to any of the foregoing covenants and warranties, including without limitation for being false or misleading in any respect, then this Agreement will terminate upon Buyer providing Seller with ~~a five (5) Business Days~~ thirty (30) day's written notice. Seller will indemnify and hold Buyer harmless for any breach or failure relating to any of the foregoing covenants and warranties, notwithstanding anything else to the contrary in this Agreement.

- 6.3. Seller Requirements. Seller agrees and acknowledges that the Act requires Buyer to make certain filings and/or submissions relating to Buyer's obligations under the Act. Within twenty (20) Business Days of a written request from Buyer, Seller agrees to provide Buyer with all information, documents, and affidavits from a duly authorized representative of Seller certifying that the Facility fully complies with PURPA, including without limitation, the PURPA Fuel Requirements and that the Facility and/or the Product complies with the Act and the requirements of the Tracking System. If Seller fails to promptly provide Buyer with such documentation, and Buyer is unable to use the Product for compliance in the calendar year that Buyer desires to use such Product for compliance purposes, then Seller shall be liable to Buyer for cover cost damages as set forth in Section ~~21 and Seller will also reimburse Buyer for any payments previously made by Buyer for such Product.~~ 21.

7. Seller's Facility Requirements.

- 7.1. Seller Requirements. Seller covenants (except to the extent expressly set forth in this Agreement) that: the Facility shall be designed, constructed, operated, controlled, maintained, and tested at Seller's sole cost and expense; the Facility shall be designed, constructed, operated (inclusive, without limitation, of control, metering equipment, and personnel and staffing levels), controlled, maintained, and tested by Seller to perform as required by this Agreement and in compliance with all applicable Requirements of Law and Prudent Utility Practice; the Facility shall be capable of supplying the Product in a safe and reliable manner consistent with the requirements of each applicable Requirements of Law and Prudent Utility Practice; and, that all contracts, agreements, arrangements, and/or Permits (including, without limitation, those necessary or prudent for the construction, ownership and operation of the Facility, such as land use permits, site plan approvals, real property titles and easements, environmental compliance and authorizations, grading and building permits, and contracts and/or licenses to obtain the underlying fuel, install and operate the Facility, and deliver and sell the Product of the Facility) shall be timely obtained and maintained by Seller, at Seller's sole cost and expense. Seller shall be responsible for arranging and obtaining, at its sole risk and expense, any station service required by the Facility. Seller shall construct, interconnect, operate, and maintain the Facility in accordance with Prudent Utility Practice. Seller shall be responsible for all costs, charges, and expenses associated with generating, scheduling, and delivering the Energy to Buyer.

- 7.1.1. Notice Requirement. For each Operational Milestone, Seller shall deliver written notice to Buyer within ~~one five (15) Business Day~~ Days of Seller having met such Operational Milestone. If Seller will be unable to timely meet any Operational Milestone, Seller shall also deliver written notice to Buyer informing Buyer that Seller will be unable to meet an Operational Milestone, but in any event Seller shall deliver

notice to Buyer no later than ~~one~~^{five} (15) Business Day after the due date of the Operational Milestone that Seller failed to achieve. Buyer shall have no obligation or liability to Seller for Buyer failing to advise Seller of any condition, damages, circumstances, infraction, fact, act, omission or disclosure discovered or not discovered by Buyer with respect to any Operational Milestone, the Facility, the System or any contractor.

- 7.2. Seller Responsibilities. Notwithstanding any provision of this Agreement to the contrary, the Seller agrees that: (a) Buyer shall have no responsibility whatsoever for any costs and/or Taxes relating to the design, development, construction, maintenance, ownership, or operation of the Facility (including but not limited to any financing costs, and any costs and/or Taxes imposed by any Governmental Authority on or with respect to emissions from or relating to the Facility, and including but not limited to costs and/or Taxes related to any emissions allowances *inter alia* for oxides for sulfur dioxide or nitrogen, carbon dioxide, and mercury), all of which shall be entirely at Seller's sole cost and expense; and, (b) any risk as to the availability of production tax benefits, investment tax credits, grants or any other incentives relating to the design, development, construction, maintenance, ownership, or operation of the Facility shall be borne entirely by Seller.

- 7.2.1. No Exclusions. If any production or investment tax credit, grants, subsidy, or any other similar incentives or benefit relating, directly or indirectly, to the Facility is unavailable or becomes unavailable at any time during the Term of this Agreement, Seller agrees that such event or circumstance will not: (a) constitute a Force Majeure or Regulatory Event; (b) excuse or otherwise diminish Seller's obligations hereunder in any way; and, (c) give rise to any right by Seller to terminate or avoid performance under this Agreement. Seller agrees that it will solely and fully bear all risks, financial and otherwise throughout the Term, associated with Seller's or the Facility's eligibility to receive any such tax treatment or otherwise qualify for any preferential or accelerated depreciation, accounting, reporting, or tax treatment.

- 7.3. Transmission Provider. Seller agrees and acknowledges that the Interconnection Agreement is (and will be) a separate agreement (or agreements) between Seller and Transmission Provider, and will exclusively govern all requirements and obligations between Seller and Transmission Provider. Only the Interconnection Agreement will govern all obligations and liabilities set forth in the Interconnection Agreement, and Seller shall be solely and fully responsible for all costs and expenses for which Seller is responsible for under the Interconnection Agreement. Seller shall comply with all Interconnection Instructions.

- 7.3.1. Nothing in the Interconnection Agreement, nor any other agreement between Seller on the one hand and Transmission Provider on the other hand, nor any alleged event of default thereunder, shall affect, alter, or modify the Parties' rights, duties, obligation, and liabilities under this Agreement. This Agreement shall not be construed to create any rights between Seller and the Transmission Provider, and the terms of this Agreement are not (and will not) be binding upon the Transmission Provider. Seller agrees and acknowledges that Seller's performance under this Agreement depends on Seller's performance under the Interconnection Agreement, and Seller hereby grants Buyer the right and entitlement to obtain information from the Transmission Provider in regards to Seller's performance under the Interconnection Agreement.

- 7.4. System Operations. Seller agrees and acknowledges that the System Operator will be solely responsible for its functions, and that nothing in this Agreement will be construed to create any rights between Seller and the System Operator. Seller agrees that it is obligated to engage in interconnected operations with Buyer and the System, and Seller agrees to fully

comply with all System Operator Instructions.

- 7.5. **Insurance Obligations.** Commencing with the initiation of construction activities of the Facility and continuing until the termination of this Agreement, and at no additional cost to Buyer, Seller shall maintain or cause to be maintained by contracted parties at the Facility, occurrence form insurance policies as follows: (a) Workers' Compensation in accordance with the statutory requirements of the state in which the Services are performed and Employer's Liability Insurance of not less than \$500,000 each accident/employee/disease; (b) Commercial General Liability Insurance having a limit of at least \$1,000,000 per occurrence/\$2,000,000 in the aggregate for contractual liability, personal injury, bodily injury to or death of persons, and damage to property, premises and operations liability and explosion, collapse, and underground hazard coverage; (c) Commercial/Business Automobile Liability Insurance (including owned (if any), non-owned or hired autos) having a limit of at least \$1,000,000 each accident for bodily injury, death, property damage and contractual liability; (d) Property Damage insurance on the Facility written on an all risk of loss basis; and, (e) if Seller will be handling or the Facility will have present environmentally regulated or hazardous materials, Pollution Legal Liability, including coverage for sudden/accidental occurrences for bodily injury, property damage, environmental damage, cleanup costs and defense with a minimum of \$1,000,000 per occurrence (claims-made form acceptable with reporting requirements of at least one (1) year). All insurance policies provided and maintained by Seller or applicable party shall: (i) be underwritten by insurers which are rated A.M. Best "A- VII" or higher; (ii) specifically include Buyer as additional insured's, excluding, however, for Worker's Compensation/Employer's Liability and Property Damage insurance; (iii) be endorsed to provide, where permitted by law, waiver of any rights of subrogation against Buyer; and (iv) provide that such policies and additional insured provisions are primary and without right of contribution from any other insurance, self-insurance or coverage available to Buyer. Any deductibles or retentions shall be the sole responsibility of Seller or the applicable party. Seller's compliance with these provisions and the limits of insurance specified herein shall not constitute a limitation of Seller's liability pursuant to this Agreement. Any failure to comply with and these provisions shall not be deemed a waiver of any rights of Buyer under this Agreement or with respect to any insurance coverage required hereunder. Buyer at its sole discretion may request Seller to provide a copy of any or all of its required insurance policies, including endorsements in which Buyer is included as an additional insured for any claims filed relative to the Facility or this Agreement.

8. Facility Performance Requirements

- 8.1. **Planned Outages.** No later than fifteen (15) Business Days prior to the end of each year during the Term, Seller shall provide to Buyer a Planned Outage schedule for the upcoming year. Seller shall provide Buyer with reasonable advance notice of any material change in the Planned Outage schedule. Seller shall determine the number and extent of Planned Outages in a Commercially Reasonable Manner recognizing that it is the intent of the Parties to maximize production of the Facility and to such extent Seller shall be excused from providing the Product during such Planned Outage(s). Unless both Parties expressly agree otherwise, any Planned Outage shall only occur during the months of March, April, May, September, October, or November.
- 8.2. **Maintenance Outages.** If Seller needs or desires to schedule a Maintenance Outage of the Facility, Seller shall notify Buyer, as far in advance as reasonable and practicable under the circumstances, of such proposed Maintenance Outage, and the Parties shall plan such outage to mutually accommodate the reasonable requirements of Seller and delivery expectations of

Buyer. Notice of a proposed Maintenance Outage shall include the expected start date of the outage, the amount of output of the Facility that will not be available and the expected completion date of the outage. Buyer may request reasonable modifications in the schedule for the outage. Subject to its operational and maintenance needs, Seller shall comply with such requests to reschedule a Maintenance Outage. If rescheduled, Seller shall notify Buyer of any subsequent changes in the output that will not be available to Buyer and any changes in the Maintenance Outage completion date. As soon as practicable, any such notifications given orally shall be confirmed in writing.

- 8.3. Notice. Seller shall promptly provide to Buyer an oral report of all outages, Emergency Conditions, de-ratings, major limitations, or restrictions affecting the Facility, which report shall include the cause of such restriction, amount of generation from the Facility that will not be available because of such restriction, and the expected date that the Facility will return to normal operations. Seller shall update such report as necessary to advise Buyer of any material changed circumstances relating to the aforementioned restrictions. As soon as practicable, all oral reports shall be confirmed in writing. Seller shall promptly dispatch personnel to perform the necessary repairs or corrective action in an expeditious and safe manner in accordance with Prudent Utility Practice.
- 8.4. Performance. Seller shall act in a Commercially Reasonable Manner to maximize the output of the Facility in a safe manner to generate the Product and to minimize the occurrence, extent, and duration of any event adversely affecting the generation of the Product, in each case consistent with Prudent Utility Practice.
- 8.5. Output Requirement. Starting the first full calendar year after the Commercial Operation Date of the Facility, for each year during the Delivery Period, Seller shall deliver to Buyer no less than seventy percent (70%) of the Expected Annual Output averaged over two consecutive calendar years on a rolling basis during the Delivery Period (the "Net Output Requirement"). Where a Permitted Excuse to Perform adversely affects actual generation output of the Facility, the Net Output Requirement shall be reduced by the amount of Energy not generated due to the Permitted Excuse to Perform; provided, however, Seller agrees that it must demonstrate to Buyer, in Buyer's Commercially Reasonable discretion, that the Facility's generation output was actually reduced due to a Permitted Excuse to Perform. Buyer's sole remedy for Seller's failure to deliver the Net Output Requirement for any period of two consecutive years shall be to receive a credit against the Contract Price for each month during the immediately following full calendar year. The foregoing monthly credit to Buyer shall be determined by (a) multiplying (i) the difference between the Net Output Requirement and the actual Energy (expressed in MWh) delivered by Seller and received by Buyer during the applicable period by (ii) [insert amount equal to 50% of contract priceContract Price for Energy] and (b) then dividing the amount calculated by (a) above by twelve (12). If Seller fails to satisfy the Net Output Requirement for any two-year period, to determine compliance with the Net Output Requirement in the next rolling two-year period, then the amount of Energy generated in the first year of such two-year rolling period will be deemed to be the higher of (i) seventy percent (70%) of the Expected Annual Output for such year, or (ii) the actual amount of Energy generated by the Facility in such year.
- 8.6. System Operator Instructions. Seller shall take all steps needed of it to implement and shall cooperate with Buyer in the implementation of all aspects of all System Operator Instructions. Seller shall immediately and fully comply with all System Operator Instructions, including without limitation all Control Instructions, Emergency Condition Instructions, and Force Majeure Instruction. Seller shall also immediately and fully comply with all Interconnection Instructions provided pursuant to the independent and separate Interconnection Agreement with the Transmission Operator.

- 8.6.1. Seller hereby expressly agrees to and fully authorizes and grants to Buyer the right to fully control the Facility in any manner necessary to enable Buyer to directly take all actions required to implement or otherwise effectuate all System Operator Instructions, including Control Instructions, Emergency Condition Instructions, and Force Majeure Instructions. Except for the payments provided by Buyer pursuant to Section 8.9 hereof, Seller hereby releases and holds Buyer harmless from and against all harm to Seller or the Facility in any way arising from or relating to any direct or indirect control of the Facility by Buyer to implement or otherwise effectuate any System Operator Instructions: except to the extent resulting from Buyer's negligence.
- 8.7. Control Equipment. To implement the control rights Seller has granted Buyer under Section 8.6, Seller shall design and construct the Facility to provide for Buyer and System Operation to have full or incremental and instantaneous control over the Facility to directly implement or otherwise effectuate any System Operator Instructions as currently or hereafter specified by Buyer, including installing automatic generation control with the current requirements further described in Exhibit 4 hereto ("Control Equipment"). Seller shall design the Facility to provide for the inclusion and operation of the Control Equipment and shall install and maintain the Control Equipment so that Buyer and System Operator shall have full or incremental instantaneous control over the Facility to take any action based in any manner to implement or otherwise effectuate any System Operator Instruction.
- 8.8. Control Instructions. The System Operator shall be entitled to and is hereby authorized to require the Facility to take or to directly take all actions to dispatch or otherwise control the generation output and operations of the Facility for any Control Instruction. Except to the extent expressly set forth in Section 8.9, Seller shall not receive any compensation for any losses due to a Dispatch Down. Except as set forth in Section 8.9, all Seller losses for a Dispatch Down shall be borne solely and entirely by Seller, including, without limitation, for any losses arising due to the lost or reduced generation by the Facility, lost tax benefits, lost investment tax credits, grants or any other incentives or monetary opportunity relating to the design, development, generation from, construction, maintenance, ownership, or operation of the Facility.
- 8.9. Limited Payments for Control Instruction Dispatch Down. During any calendar year during the Term hereof, Seller shall not receive any ~~additional~~ compensation from Buyer for ~~the any~~ Dispatch Down ~~of until the Dispatch Down of Energy exceeds~~ [first tranche ten (10) % for DEP and] [first tranche five (5) % for DEC ~~—%~~] of annual expected output] ~~(e.g. 20,000) stated in whole MWhs~~ of Energy that the Facility would have generated but did not generate due to compliance with and implementation of Control Instructions (such quantity, the "Annual Payment Threshold"). For any partial calendar year during the Term hereof, the Annual Payment Threshold shall be ratably prorated for the number of days in such partial calendar year.
- 8.9.1. Control Compensation. In any calendar year, except as set forth in Section 8.10, after satisfaction of the Annual Payment Threshold, Seller shall receive compensation from Buyer for the Dispatch Down of Energy that the Facility would have generated but did not generate due to compliance with and implementation of Control Instructions, starting with the [e.g. 20,001 ~~insert amount specified in 8.9 + 1~~] MWh of Energy that is not so generated. Buyer shall calculate such amount payable to Seller by multiplying the Contract Price times the amount of Energy that could have been generated but was not generated due to compliance with and implementation of the Control Instruction ("Control Compensation"). The Control Compensation shall be determined using the Estimation Methodology set forth in

Section 8.9.3. The Control Compensation shall be included in the invoice for the month of March ~~incommencing with the calendar year immediately following the first~~ completed year of service and in each subsequent March invoice thereafter ~~concluding with the calendar year immediately following the last completed year of service during the Term.~~

8.9.2. Limitations on Control Compensation. Buyer shall pay Seller a Control Compensation for the Dispatch Down of Energy if, and only if: (i) the Facility was ~~operating~~ generating Energy at the time of the Control Instruction and meteorological and Facility operating conditions were such that the Facility would have actually reduced produced Energy at the time of the Dispatch Down instruction; (ii) the actual cumulative reduction of Energy generation by the Facility due to the Dispatch Down exceeds the Annual Payment Threshold for the calendar year; and, (iii) the Dispatch Down was due to a System Operator Instruction that was a Control Instruction, but not due to an Emergency Condition Instruction, Force Majeure Instruction, or Interconnection Instruction. The Control Compensation shall be Seller's sole and exclusive payment and remedy for compliance with the Control Instructions in excess of the Payment Threshold, and any and all other Seller losses or payments are expressly disclaimed and waived. For purposes of determining Control Compensation, the discharge of Energy from a Storage Resource shall not constitute the generation of Energy.

8.9.3. ~~The Parties~~ Estimation Methodology. Buyer shall determine in a Commercially Reasonable Manner the quantity of Energy that could not be generated due to compliance with and implementation of the Dispatch Down instruction(s) based on: ~~(wi) The power plant controller output data points specified in Exhibit 9 attached hereto, which Seller shall provide to Buyer, on a real time basis, during the Term of this Agreement;~~ (ii) the duration of the Dispatch Down; ~~(xiii) the amount of the generating capability of the Facility that is curtailed by the applicable Dispatch Down (e.g. 10% generation capability is curtailed);~~ ~~(xiv) the solar exposure, irradiance, and meteorological circumstances actually recorded at the Facility during the Dispatch Down period;~~ and ~~(zv) the Facility design, performance capability, and historic performance using a modeling program agreed upon by the Parties in a Commercially Reasonable Manner (the "Estimation Methodology").~~ Seller shall be responsible for installing and maintaining all equipment necessary to provide Buyer with the power plant controller output data points specified in Exhibit 9 on a real time basis. In the event that the real time data specified in 8.9.3(i) is unavailable, historical production data required under Section 9.4.5 shall be used in its place.

8.10. Emergency Condition and Force Majeure Instructions. Notwithstanding any exceedance of the Annual Payment Threshold for any calendar year due to Control Instructions that the System Operator may provide or implement, the System Operator shall be entitled to and is hereby authorized to require the Facility to take or to directly take all actions to dispatch or otherwise control the generation output and operations of the Facility for Emergency Condition Instructions and Force Majeure Instructions. Except to the extent expressly set forth in Sections 8.10.1, Seller shall not receive any compensation for any losses due to a Dispatch Down for Emergency Condition Instructions or Force Majeure Instructions. Except as set forth in Section 8.10.1, all Seller losses for a Dispatch Down for Emergency Condition Instructions and Force Majeure Instructions shall be borne solely and entirely by Seller, including, without limitation, for any losses arising due to the lost or reduced generation by the Facility, production tax benefits, investment tax credits, grants or any other incentives or monetary opportunity relating to the design, development, construction, maintenance, ownership, or operation of the Facility.

8.10.1. In the event Seller proves that a Dispatch Down instruction issued by or action taken by the System Operator does not fall within the definition of an Emergency Condition Instruction or a Force Majeure Instruction and that the Facility actually reduced Energy production pursuant to such Dispatch Down instruction, then such Dispatch Down shall be administered as provided for in Section 8.9 hereof (*Limited Payments for Control Instruction Dispatch Down*).

8.11. Energy Storage. If the Facility is to be equipped with battery storage or other energy storage device (the "Storage Resource"), the Storage Resource shall be identified in Exhibit 4 attached to this Agreement, which shall be subject to Buyer's final approval. In all cases, the Storage Resource must be charged solely by the Facility and the use of any Storage Resource shall be operated and equipped in accordance with the System Operator's Energy Storage Protocol, a copy of which is attached hereto as Exhibit 10, as may be modified from time to time by the System Operator (the "Energy Storage Protocol").

9. **Information Requirements**

9.1. Accounting Information. Generally Accepted Accounting Principles ("GAAP") and SEC rules can require Buyer to evaluate various aspects of its economic relationship with Seller, e.g., whether or not Buyer must consolidate Seller's financial information. To evaluate if certain GAAP requirements are applicable, Buyer may need access to Seller's financial records and personnel in a timely manner. In the event that Buyer determines that consolidation or other incorporation of Seller's financial information is necessary under GAAP, Buyer shall require the following for each calendar quarter during the term of this Agreement, within 90 days after quarter end: (a) complete financial statements, including notes, for such quarter on a GAAP basis; and, (b) financial schedules underlying the financial statements. Seller shall grant Buyer access to records and personnel to enable Buyer's independent auditor to conduct financial audits (in accordance with GAAP standards) and internal control audits (in accordance with Section 404 of the Sarbanes-Oxley Act of 2002). Any information provided to Buyer pursuant to this section shall be considered confidential in accordance with the terms of this Agreement and shall only be disclosed, as required by GAAP, on an aggregate basis with other similar entities for which Buyer has power purchase agreements.

9.2. Facility Information. As of Effective Date and continuing for a period of three months after the Commercial Operation Date, Seller shall promptly provide to Buyer reports relating to the progress of the Facility's development and construction, financing, interconnection activities and performance under the Interconnection Agreement, testing, Seller's good faith estimate of the date for occurrence of the Commercial Operation Date, operational activities, and other information that Buyer may request in its Commercially Reasonable discretion to inform Buyer of Seller's performance under this Agreement. Within ten (10) days after the end of each calendar month until the Commercial Operation Date is achieved, Seller shall prepare and submit to Buyer a written status report which shall cover the previous calendar month, shall be prepared in a manner and format (hard copy or electronic) reasonably acceptable to Buyer and shall include (a) a detailed description of the progress of the Facility's construction, (b) a statement of any significant issues which remain unresolved and Seller's recommendations for resolving the same, (c) a summary of any significant events which are scheduled or expected to occur during the following thirty (30) days; and, (d) all additional information reasonably requested by Buyer. If Seller has reason to believe that the Facility is not likely to timely achieve any Milestone Deadline, including the Commercial Operation Date, Seller shall promptly provide written notice to Buyer with all relevant facts, and will provide Buyer with any other information Buyer may request from Seller in respects to such failure of Seller. Seller shall give written notice to Buyer no later than 30 days before Seller projects that the Facility will achieve Commercial Operation. Seller shall

provide written notice to Buyer when the Commercial Operation Date has occurred. Following the Commercial Operation Date, Seller shall promptly provide to Buyer information requested by Buyer to verify any amounts of delivered Product, or to otherwise audit the Product delivered to Buyer. Seller shall, within ten (10) Business Days of electronic or written request provide Buyer with any other information germane to this Agreement and/or Seller's performance under and compliance with this Agreement, requested by Buyer in its Commercially Reasonable discretion.

- 9.3. Other Information. Seller shall provide to Buyer all information, instruments, documents, statements, certificates, and records relating to this Agreement and/or the Facility as requested by Buyer concerning any administrative, regulatory, compliance, or legal requirements determined by Buyer to fulfill any Requirements of Law, regulatory reporting requirements or otherwise relating to any request by any Governmental Authority. Seller will, at its own expense, provide Buyer with all information requested by Buyer to register, verify, or otherwise obtain Commission or any other third party recognition of the Product for use by Buyer, and at Buyer's request Seller shall register, verify, or otherwise validate or obtain Commission and/or any other third party recognition of the Product for use by Buyer.

- 9.3.1. Information Under the Act. Seller agrees and acknowledges that the Act requires Seller to make certain filings and/or submissions, including, without limitation, to maintain registration and certification of the Facility under the Act and to use the Product for compliance under the Act. Seller shall provide Buyer, for informational purposes only, a copy of any report, certification or filing that Seller submits to the Commission, within a reasonable time after making such submission, but in any event no later than five (5) Business Days after such submission. Notwithstanding anything to the contrary, Seller agrees and acknowledges that it shall be solely responsible for timely complying with all requirements under the Act.

- 9.4. Forecasts. Seller shall prepare and provide Buyer with the Facility's forecasted Energy production by fuel type, if applicable. These non-binding forecasts of production will be determined and prepared in a Commercially Reasonable Manner with the intent of being as accurate as possible. Seller shall update a forecast any time information becomes available indicating a change in the forecast relative to the most previously provided forecast.

- 9.4.1. Year-Ahead Forecasts. Seller shall, by December 1 of each year during the Term (except for the last year of the Term), provide Buyer with a forecast of each month's average-day Energy production from the Facility, by hour, for the following calendar year. This forecast shall include an expected range of uncertainty based on historical operating experience. Seller shall update the forecast for each month at least five (5) Business Days before the first Business Day of such month.

- 9.4.2. Week-Ahead Forecasts. By 0800 EPT on the Friday preceding the immediately upcoming week of delivery, Seller shall provide Buyer with a daily forecast of deliveries for the upcoming week (Monday through Sunday). Seller shall update a forecast any time information becomes available indicating a change in the forecast of generation relative to the most previously provided forecast.

- 9.4.3. Day-Ahead Forecasts. By 0500 EPT on the ~~Business Day~~calendar day immediately preceding the day of delivery, Seller shall provide Buyer with an hourly forecast of deliveries for each hour of the next day; ~~provided, however, that a forecast provided on a day before any non-Business Day shall include forecasts for each day to and including the next Business Dayseven (7) days.~~ In the event that Seller has any information or other Commercially Reasonable basis to believe that the production from the Facility on any day will be materially lower or higher than what would

otherwise be expected based on the forecasts provided, then Seller will inform Buyer of such circumstance by 0500 EPT on the preceding Business Day.

9.4.4. Communication. Seller shall communicate forecasts in a form, template, substance, and manner as requested by Buyer (e.g. Excel template), which form, template, substance, and manner may be modified by Buyer from time to time. Forecasts shall be transmitted by email (to be sent to: RenewableEnergyForecast@duke-energy.com) or by other media (e.g. website upload), as Buyer may instruct Seller from time to time. Requested forecast data may include but is not limited to, location, forecast timestamp, site capacity, a flag for actual or forecasted data, available site capacity, energy, reason for any capacity reduction, site plane of array (POA) irradiance, air pressure, and relative humidity for each hour of the next seven days.

9.4.5. History. Seller shall prepare and provide Buyer with the Facility's historical Energy production by fuel type, if applicable. The historical production will be determined and prepared by Seller in a Commercially Reasonable Manner with the intent of being as accurate as reasonably possible. Seller shall update any correction to the history any time information becomes available.

9.4.5.1. Daily History. By 0500 EPT on the Business Day immediately following the day of delivery, Seller shall provide Buyer with an hourly profile of deliveries for each hour of the previous seven days.

9.4.5.2. History Communication. Seller shall communicate history in a form, template, substance, and manner as requested by Buyer (e.g. Excel template), which form, template, substance, and manner may be modified by Buyer from time to time. The History shall be transmitted by email (to be sent to: RenewableEnergyForecast@duke-energy.com) or by other media (e.g. website upload), as Buyer may instruct Seller from time to time. Requested historical data may include but is not limited to, location, site capacity, a flag for actual or forecasted data, available site capacity, energy generated, reason for any capacity reduction, site POA irradiance, air pressure, and relative humidity for each hour of the previous seven days.

10. Metering

10.1. **Billing Meter.** In the Interconnection Agreement between Seller and Transmission Provider, Seller shall arrange with the Transmission Provider to construct and install such meters and metering equipment as are necessary to measure the Energy delivered and received in accordance with the terms and conditions of this Agreement (the "Billing Meter"). Buyer shall provide to Seller the reasonable allowable accuracy limits relating to the performance of the Billing Meter, and Seller shall arrange with Transmission Provider to install and operate a Billing Meter that meets the allowable accuracy limits. Seller shall be responsible for paying the Transmission Provider for all costs relating to the Billing Meter, including, without limitation, its procurement, installation, operation, calibration, and maintenance. Seller shall ensure in its arrangement with the Transmission Provider for the Billing Meter to include communication equipment that enables Buyer to access and read the meter from a remote location. Seller hereby grants Buyer with rights to physically access the Billing Meter. Seller shall provide Buyer (at Seller's cost) with appropriate telephonic/electronic communication to allow Buyer to remotely read the meter. Seller may, at its own expense, install and maintain additional metering equipment for purposes of monitoring, recording or transmitting data relating to its sale of Energy from the Facility, so long as such equipment does not interfere with the Billing

Meter. Seller shall arrange with the Transmission Provider to test the Billing Meter at regular intervals. Seller shall also arrange for either Party to have the right to request and obtain, at reasonable intervals and under reasonable circumstances, additional/special tests of the Billing Meter. The Party making such request for the test shall incur the costs associated with such test.

11. **Billing Period and Payment**

- 11.1. **Billing Period.** Subject to Seller authorizing Transmission Provider to provide Buyer with electronic access to the Billing Meter, Buyer shall read/obtain data from the Billing Meter at regular intervals, which shall be not less than twenty-seven (27) consecutive days and not more than thirty-three (33) consecutive days (each, a "Billing Period"). Within twenty-five (25) days after reading/obtaining data from the Billing Meter, Buyer shall provide Seller with an invoice detailing the amount of Product (Energy and an equal amount of RECs) delivered during the relevant Billing Period and the associated amount owed by Buyer to Seller for the Product, subject to Seller cooperating with Buyer and providing Buyer with such information and/or data that Buyer may request to accurately prepare the invoice. Buyer shall pay Seller the invoiced amounts for each Billing Period, subject to Seller having transferred (or caused to be transferred) the REC Certificates from Seller's Account to Buyer's Account in the Tracking System. Payment by Buyer shall be due by the later of thirty (30) days after the invoice date or fifteen (15) days after Buyer receives notification that the Seller has transferred the REC Certificates into Buyer's Account. If such amounts are not paid by the deadline, they shall accrue interest at the Interest Rate from the applicable due date until the date paid. Amounts not paid by such deadline shall accrue interest at the Interest Rate from the original due date until the date paid in accordance with this Agreement.
- 11.2. **Meter Malfunction.** In the event the Billing Meter fails to register accurately within the allowable accuracy limits as set forth above, then for purposes of preparing (or adjusting) any affected invoice Buyer shall adjust the amount of measured Energy for the period of time the Billing Meter was shown to be in error. If the time the Billing Meter became inaccurate can be determined, then the adjustment to the amount of measured Energy shall be made for the entire time from the time that the Billing Meter became inaccurate until the recalibration of the Billing Meter. If the time the Billing Meter became inaccurate cannot be determined, then the Billing Meter shall be deemed to have failed to register accurately for fifty percent (50%) of the time since the date of the last calibration of the Billing Meter.
- 11.3. **Out-of-Service.** If the Billing Meter is out of service, then for purposes of preparing any affected invoice, the Parties shall negotiate in good faith to determine an estimate of the amount of Energy delivered during the relevant Billing Period. Seller's meter (if any), may be used to establish such estimate, if both Parties agree. If, within twenty (20) days after the date that the Billing Meter is read as set forth above, the Parties have not reached agreement regarding an estimate of the amount of Energy delivered during the relevant Billing Period, then the amount of Energy delivered during the relevant Billing Period shall be determined using the Estimation Methodology.
- 11.4. **Errors.** If any overcharge or undercharge in any form whatsoever shall at any time be found for an invoice, and such invoice has been paid, the Party that has been paid the overcharge shall refund the amount of the overcharge to the other Party, and the Party that has been undercharged shall pay the amount of the undercharge to the other Party, within forty-five (45) days after final determination thereof; provided, however, that no retroactive adjustment shall be made for any overcharge or undercharge unless written notice of the same is provided to the other Party within a period of twelve (12) months

from the date of the invoice in which such overcharge or undercharge was first included. Any such adjustments shall be made with interest calculated at the Interest Rate from the date that the undercharge or overcharge actually occurred.

- 11.5. Invoice/Payment Dispute. If a Party in good faith reasonably disputes the amount set forth in an invoice, charge, statement, or computation, or any adjustment thereto, such Party shall provide to the other Party a written explanation specifying in detail the basis for such dispute. The Party disputing the invoice, if it has not already done so, shall pay the undisputed portion of such amount no later than the applicable due date. If the Parties are thereafter unable to resolve the dispute through the exchange of additional documentation, then the Parties shall pursue resolution of such dispute according to the dispute resolution and remedy provisions set forth in the Agreement. Notwithstanding any other provision of this Agreement to the contrary, if any invoice, statement charge, or computation is found to be inaccurate, then a correction shall be made and payment (with applicable interest) shall be made in accordance with such correction; provided, however, no adjustment shall be made with respect to any invoice, statement, charge, computation or payment hereunder unless a Party provides written notice to the other Party questioning the accuracy thereof within twenty-four (24) months after the date of such invoice, statement, charge, computation, or payment.

12. Audit Rights

- 12.1. Process. Buyer shall have the right, at its sole expense and during normal business hours, without Seller requiring any compensation from Buyer, to examine and copy the records of Seller to verify the accuracy of any invoice, statement, charge or computation made hereunder or to otherwise verify Seller's performance under this Agreement, including, without limitation, verifying that the delivered Product complies with the Agreement.
- 12.2. Survival. All audit rights shall survive the expiration or termination of this Agreement for a period of twenty-four (24) months after the expiration or termination. Seller shall retain any and all documents (including, without limitation, paper, written, and electronic) and/or any other records relating to this Agreement and the Facility for a period of twenty-four (24) months after the termination or expiration of this Agreement.

13. Taxes

- 13.1. Seller. Seller shall be liable for and shall pay Buyer, or Seller shall reimburse Buyer if Buyer has paid or cause to be paid, all Taxes imposed by a Governmental Authority on or with respect to the Product delivered hereunder and arising prior its delivery to and at the Delivery Point (including ad valorem, franchise or income taxes which are related to the sale of the Product by Seller to Buyer and are, therefore, the responsibility of Seller). Seller shall indemnify, defend, and hold harmless Buyer from any liability for such Taxes, including related audit and litigation expenses.
- 13.2. Buyer. Buyer shall be liable for and shall pay Seller, or Buyer shall reimburse Seller if Seller has paid or caused to be paid, all Taxes imposed by a Governmental Authority on or with respect to the Product delivered hereunder and arising after the Delivery Point (other than ad valorem, franchise or income taxes which are related to the sale of the Product by Seller to Buyer and are, therefore, the responsibility of Seller). Buyer shall indemnify, defend, and hold harmless Seller from any liability for such Taxes, including related audit and litigation expenses.
- 13.3. Remittances. In the event Seller is required by any Requirements of Law to remit or pay Taxes that are Buyer's responsibility hereunder, Seller may request reimbursement of such payment from Buyer by sending Buyer an invoice, and Buyer shall include such

reimbursement in the next monthly invoice and Buyer shall remit payment thereof. Conversely, if Buyer is required by any Requirements of Law to remit or pay Taxes that are Seller's responsibility hereunder; Buyer may deduct the amount of any such Taxes from the sums otherwise due to Seller under this Agreement. Any refunds or remittances associated with such Taxes shall be administered in accordance with Section 11.1.

- 13.4. Documentation. A Party, upon written request of the other Party, shall promptly provide a certificate of exemption or other reasonably satisfactory evidence of exemption if such Party is exempt from any Tax. Nothing herein shall obligate a Party to pay or be liable to pay any Taxes from which it is exempt pursuant to applicable law.

14. **Force Majeure**

- 14.1. Definition. "Force Majeure" means: (A) war, riots, floods, hurricanes, tornadoes, earthquakes, lightning, ice-storms, excessive winds, and other such extreme weather events and natural calamities; (B) explosions or fires arising from lightning or other natural causes unrelated to acts or omissions of the Party; (C) insurrection, rebellion, nationwide strikes; (D) an act of god or other such significant and material event or circumstance which prevents one Party from performing a material and significant obligations hereunder, which such event or circumstance was not anticipated as of the Effective Date, is not within the Commercially Reasonable control of, or the result of the negligence of such claiming Party, and which, by the exercise of Commercially Reasonable Efforts, the claiming Party is unable to overcome or avoid or cause to be avoided and, (E) delays in obtaining goods or services from any subcontractor or supplier caused solely by the occurrence of any of the events described in the immediately preceding subparts (A) through (D). The acts, events or conditions listed in subparts (A) through (E) above shall only be deemed a Force Majeure if and to the extent they actually and materially delay or prevent the performance of a Party's obligations under this Agreement and: (i) are beyond the reasonable control of the Party, (ii) are not the result of the willful misconduct or negligent act or omission of such Party (or any person over whom that Party has control), (iii) are not an act, event or condition that reasonably could have been anticipated, or the risk or consequence of which such Party has assumed under the Agreement; and, (iv) cannot be prevented, avoided, or otherwise overcome by the prompt exercise of Commercially Reasonable diligence by the Party (or any Person over whom that Party has control).

- 14.1.1. Notwithstanding anything to the contrary herein, Force Majeure will not include the following: (a) any strike or labor dispute of the employees of either Party or any subcontractor that is not part of a nationwide strike or labor dispute; (b) any difficulty in obtaining or maintaining sufficient, or appropriately skilled, personnel to perform the work in accordance with the requirements of this Agreement; (c) normal wear and tear or obsolescence of any equipment; (d) Buyer's inability to economically use or resell the Product delivered and purchased hereunder; (e) Seller's ability to sell the Product (or any component of the Product) at a more advantageous price; (f) loss by Seller of any contractual arrangement; (g) any Regulatory Event; (h) loss or failure of Seller's supply of the Product or inability to generate the Product that is not caused by an independent Force Majeure event; (i) the cost or availability or unavailability of fuel, solar energy, wind, or motive force, as applicable, to operate the Facility; (j) economic hardship, including, without limitation, lack of money or financing or Seller's inability to economically generate the Product or operate the Facility; (k) any breakdown or malfunction of Facility equipment (including any serial equipment defect) that is not directly caused by an independent event of

Force Majeure; (l) the imposition upon Seller of costs or taxes allocated to Seller hereunder or Seller's failure to obtain or qualify for any tax incentive, preference, or credit; (m) delay or failure of Seller to obtain or perform any Permit; (n) any delay, alleged breach of contract, or failure under any other agreement or arrangement between Seller and another entity, including without limitation, an agent or sub-contractor of Seller (except as a direct result of an event of Force Majeure defined in 14.1(E)); (o) Seller's failure to obtain, or perform under, the Interconnection Agreement, or its other contracts and obligations to Transmission Provider; or (p) increased cost of electricity, steel, materials, equipment, labor, or transportation.

- 14.2. Event. If either Party is rendered unable by Force Majeure to carry out, in whole or in part, any material obligation hereunder, such Party shall provide notice and reasonably full details of the event to the other Party as soon as reasonably practicable after becoming aware of the occurrence of the event (but in no event later than three (3) Business Days of the initial occurrence of the event of Force Majeure). Such notice may be given orally but shall be confirmed in writing as soon as practicable thereafter (and in any event within ten (10) days of the initial occurrence of the event of Force Majeure); provided however, a reasonable delay in providing such notice shall not preclude a Party from claiming Force Majeure but only so long as such delay does not prejudice or adversely affect the other Party.
- 14.3. Effect. Subject to the terms and conditions of Section 14, for so long as the event of Force Majeure is continuing, the specific obligations of the Party that are demonstrably and specifically adversely affected by the Force Majeure event, shall be suspended to the extent and for the duration made necessary by the Force Majeure, will not be deemed to be an Event of Default, and performance and termination of this Agreement will be governed exclusively by this Section 14. Notwithstanding anything to the contrary in this Agreement, Force Majeure will *not* be applicable to and will *not* be available as an excuse to Seller's performance of the obligations set forth in Sections 19.3 through and including 19.24. Notwithstanding anything to the contrary in this Agreement, Force Majeure will not be available as an excuse to any delays or failures in Seller timely achieving Commercial Operations by the Commercial Operations Date, delays or failures for which shall be governed exclusively by Section 20.5.
- 14.4. Remedy. The Party claiming Force Majeure shall act in a Commercially Reasonable Manner to remedy the Force Majeure as soon as practicable and shall keep the other Party advised as to the continuance of the Force Majeure event. If a bona fide Force Majeure event persists for a continuous period of ninety (90) days, then the Party not claiming Force Majeure shall have the right, in its sole and unfettered discretion, to terminate this Agreement upon giving the other Party ten (10) Business Days advance written notice. ~~The Party claiming the Force Majeure may delay the termination date of the Agreement for an additional ninety (90) days by paying the other Party [2% x total projected revenue under the Agreement during the Term as determined by Buyer in its reasonable discretion] U.S. dollars (\$ _____) in liquidated damages prior to the expiration of the ten (10) Business Days' notice period, and upon such timely payment the termination of this Agreement shall be suspended for such additional 90-day period; provided, however, if; provided, however, that where the Force Majeure has not been fully event cannot be remedied within the ninety (90) additional days, the Agreement ninety (90) days and the claiming Party can demonstrate to the non-claiming Party its intention and ability to implement a Commercially Reasonable plan to remedy such Force Majeure event within an additional ninety days (90) days after the initial sixty (90) day period and the claiming Party uses Commercially Reasonable efforts to implement such plan, the non-claiming Party shall not have the right to terminate automatically on the ninety-first the Agreement until the expiration of such~~

~~additional ninety (91st) day without any action or notice by the other Party.~~ 90) day period.

14.5. **Termination.** Unless otherwise agreed upon by the Parties in writing and in each Party's sole discretion, upon the expiration of the periods set forth above in Sections 14.4, this Agreement may be terminated without any further notice and further opportunity to cure any non-performance. Upon termination becoming effective pursuant to a Force Majeure under Section 14, neither Party will have any liability to the other Party or recourse against the other Party, other than for amounts arising prior to termination. Notwithstanding the claimed existence of a Force Majeure event or any other provisions of this Agreement, nothing herein shall relieve any Party from exercising any right or remedy provided under this Agreement with respect to any liability or obligation of the other Party that is not excused or suspended by the Force Majeure event, including, without limitation, the right to liquidate and early terminate the Agreement for any Event of Default not excused by the Force Majeure event. Nothing herein shall be construed so as to obligate any Party to settle any strike, work stoppage or other labor dispute or disturbance or to make significant capital expenditures, except in the sole discretion of the Party experiencing such difficulty.

15. **Change in Law**

15.1. **Regulatory Event.** A "Regulatory Event" means one or more of the following events:

15.1.1. **Illegality.** After the Effective Date, due to the adoption of, or change in, any applicable Requirements of Law or in the interpretation thereof by any Governmental Authority with competent jurisdiction, it becomes unlawful for a Party to perform any material obligation under this Agreement.

15.1.2. **Adverse Government Action.** After the Effective Date, there occurs any adverse material change in any applicable Requirements of Law (including material change regarding a Party's obligation to sell, deliver, purchase, or receive the Product) and any such occurrence renders illegal or unenforceable any material performance or requirement under this Agreement.

15.2. **Process.** Upon the occurrence of a Regulatory Event the Party affected by the Regulatory Event may notify the other Party in writing of the occurrence of a Regulatory Event, together with details and explanation supporting the occurrence of a Regulatory Event. Upon receipt of such notice, the Parties agree to undertake, during the thirty (30) days immediately following receipt of the notice, to negotiate such modifications to reform this Agreement to remedy the Regulatory Event and attempt to give effect to the original intention of the Parties. Upon the expiration of the 30-day period, if the Parties are unable to agree upon modifications to the Agreement that are acceptable to each Party, in each Party's sole discretion, then either Party shall have the right, in such Party's sole discretion, to terminate this Agreement with a 30-day advance written notice.

16. **Confidentiality**

16.1. **Protected Information.** Except as otherwise set forth in this Agreement, neither Party shall, without the other Party's prior written consent, disclose any term of this Agreement or any information relating to this Agreement, or any discussion or documents exchanged between the Parties in connection with this Agreement (such information, the "Protected Information") to any third person (other than the Party's employees, affiliates, counsel, and accountants, and current and prospective lenders and investors in the Facility if Buyer is given at least ten (10) Business Days advance written notice of such disclosure and to whom such disclosure is being made, who have a need to know such information, have agreed to keep such terms confidential for the Term, and for whom the Party shall be liable in the event of a breach of such confidentiality obligation), at any time during the Term or for five

(5) years after the expiration or early termination of this Agreement. Each Party shall be entitled to all remedies available at law or in equity (including but not limited to specific performance and/or injunctive relief,) to enforce, or seek relief in connection with, this confidentiality obligation. Notwithstanding any other provision of this Agreement, a violation of any confidentiality obligations shall be an Event of Default hereunder, and any claim related to or arising out of any confidentiality obligations herein may be brought directly in any state or federal court of competent jurisdiction in [DEP - Wake County, North Carolina] [DEC - Mecklenburg County, North Carolina], in accordance with Section 26.5 of this Agreement, and shall not be subject to dispute resolution or arbitration pursuant to Section 23 of this Agreement.

- 16.2. Non-Confidential Information. Protected Information does not include information: (i) that is or becomes available to the public other than by disclosure of receiving Party in breach of this Agreement; (ii) known to receiving Party prior to its disclosure; (iii) available to receiving Party from a third party who is not bound to keep such information confidential; or, (iv) independently developed by the receiving Party without reliance upon the Protected Information. Notwithstanding anything to the contrary herein, in no event will Protected Information include the concept of constructing or providing energy from a power plant, using any specific fuel source, in any specific location.
- 16.3. Return of Confidential Information. Upon request of disclosing Party, receiving Party shall either (i) return the Protected Information, including all copies, or (ii) destroy the Protected Information, including all copies, and present written assurances of the destruction to disclosing Party. Notwithstanding the foregoing, both Parties acknowledge that Protected Information transferred and maintained electronically (including e-mails) may be automatically archived and stored by Receiving Party on electronic devices, magnetic tape, or other media for the purpose of restoring data in the event of a system failure (collectively, "Back-Up Tapes"). Notwithstanding the terms of this Agreement, in no event shall Receiving Party be required to destroy Protected Information stored on Back-Up Tapes; provided, however, any Protected Information not returned or destroyed pursuant to this Section shall be kept confidential for the duration of its existence. Furthermore, the receiving party may retain one (1) copy of such Protected Information in receiving Party's files solely for audit and compliance purposes for the duration of its existence; provided, however, such Protected Information shall be kept confidential for the duration of its existence in accordance with the terms of this Agreement.
- 16.4. Required Disclosures. Notwithstanding the confidentiality requirements set forth herein, a Party may, subject to the limitations set forth herein, disclose Protected Information to comply with the Act, request of any Governmental Authority, applicable Requirements of Law, or any exchange, control area or System operator rule, in response to a court order, or in connection with any court or regulatory proceeding. Such disclosure shall not terminate the obligations of confidentiality unless the Protected Information falls within one of the exclusions of this Agreement. To the extent the disclosure of Protected Information is requested or compelled as set forth above, the receiving Party agrees to give disclosing Party reasonable notice of any discovery request or order, subpoena, or other legal process requiring disclosure of any Confidential Information. Such notice by the receiving Party shall give disclosing Party an opportunity, at disclosing Party's discretion and sole cost, to seek a protective order or similar relief, and the receiving Party shall not oppose such request or relief. If such protective order or other appropriate remedy is not sought and obtained within at least thirty (30) days of receiving Party's notice, receiving Party shall disclose only that portion of the Protected Information that is required or necessary in the opinion of receiving Party's legal counsel; provided, however, receiving Party shall use reasonable efforts to obtain assurances that confidential treatment will be accorded to any Confidential

Information so disclosed.

- 16.5. Regulatory Disclosures by Buyer. This Section 16.5 will apply notwithstanding anything to the contrary in this Agreement. Seller acknowledges that Buyer is regulated by various regulatory and market monitoring entities. Buyer is permitted, in its sole discretion, to disclose or to retain and not destroy (in case of a future disclosure need as determined by Buyer in its sole discretion) any information (including Protected Information) to any regulatory commission (inclusive of the NCUC, SCPSC, FERC), NERC, market monitor, office of regulatory staff, and/or public staff, or any other regulator or legislative body without providing prior notice to the Seller or consent from the Seller, using Buyer's business judgment and the appropriate level of confidentiality Buyer seeks for any such disclosures or retentions in its sole discretion. In the event of the establishment of any docket or proceeding before any regulatory commission, public service commission, public utility commission, or other agency, tribunal, or court having jurisdiction over Buyer, the Protected Information shall automatically be governed solely by the rules and procedures governing such docket or proceeding to the extent such rules or procedures are additional to, different from, or inconsistent with this Agreement. In regulatory proceedings in all state and federal jurisdictions in which Buyer does business, Buyer will from time-to-time be required to produce Protected Information, and Buyer may do so without prior notice to Seller or consent from Seller, using Buyer's business judgment, and the appropriate level of confidentiality Buyer seeks for such disclosures in its sole discretion. When a request for disclosure of information, including Protected Information, is made to Buyer, Buyer may disclose the information, including Protected Information, without prior notice to the Seller or consent from the Seller, using Buyer's business judgment and the appropriate level of confidentiality Duke seeks for such disclosures in its sole discretion. Seller further acknowledges that Buyer is required by law or regulation to report certain information that could embody Protected Information from time-to-time, and Buyer may from time-to-time make such reports, without providing prior notice to Seller or consent from Seller, using Buyer's business judgment and the appropriate level of confidentiality Buyer seeks for such disclosures in its sole discretion.

17. Mutual Representations and Warranties

- 17.1. As of the Effective Date and throughout the Term, each Party represents and warrants to the other Party that:
- 17.1.1. It is duly organized, validly existing and in good standing under the Requirements of Law of the jurisdiction of its organization or formation and has all requisite power and authority to execute and enter into this Agreement;
 - 17.1.2. It has all authorizations under the Requirements of Law (including but not limited to the Required Approvals), necessary for it to legally perform its obligations and consummate the transactions contemplated hereunder or will obtain such authorizations in a timely manner prior to the time that performance by such Party becomes due;
 - 17.1.3. The execution, delivery, and performance of this Agreement will not conflict with or violate any Requirements of Law or any contract, agreement or arrangement to which it is a party or by which it is otherwise bound;
 - 17.1.4. This Agreement constitutes a legal, valid, and binding obligation of such Party enforceable against it in accordance with its terms, and such Party has all rights necessary to perform its obligations to the other Party in accordance with the terms and conditions of this Agreement;

- 17.1.5. It is acting for its own account, has made its own independent decision to enter into this Agreement and as to whether or not this Agreement is appropriate or proper for it based upon its own judgment, is not relying upon the representations, advice or recommendations of the other Party in so doing, is capable of assessing the merits of this Agreement, and understands and accepts the terms, conditions, and risks of this Agreement for fair consideration on an arm's length basis;
- 17.1.6. No Event of Default or event which with notice or lapse of time, or both, would become an Event of Default, has occurred with respect to such Party, and that such Party is not Bankrupt and there are no proceedings pending or being contemplated by it, or to its knowledge, threatened against it which would result in it being or becoming Bankrupt;
- 17.1.7. There is no pending, or to its knowledge, threatened legal proceeding at law or equity against it or any Affiliate, that materially adversely affects its ability to perform its obligations under this Agreement;
- 17.1.8. It is a "forward contract merchant" and this Agreement constitutes a "forward contract" as such terms are defined in the United States Bankruptcy Code;
- 17.1.9. It is an "eligible commercial entity" within the Commodity Exchange Act;
- 17.1.10. It is an "eligible contract participant" within the Commodity Exchange Act; and;
- 17.1.11. Each person who executes this Agreement on behalf of such Party has full and complete authority to do so, and that such Party will be bound by such execution.

18. Seller Representations and Warranties to Buyer

- 18.1. For all Product and every aspect thereof, Seller represents, warrants, and reaffirms to Buyer as a continuing warranty and representation that:
 - 18.1.1. No Product (including any REC) has been, or will be, sold, retired, claimed, represented as part of any electricity output, use, or sale, or otherwise used to satisfy any renewable energy, efficiency, emissions, and/or offset obligation under the Act, or under any voluntary or mandatory standard, marketplace, or jurisdiction, or otherwise;
 - 18.1.2. All Product (including every REC) will meet the specifications and requirements in this Agreement, including without limitation, compliance with the Act;
 - 18.1.3. Each unit of the Product will be and was generated during the applicable Vintage;
 - 18.1.4. Seller has provided and conveyed and will provide and convey to Buyer all Capacity rights associated with the Facility and all Energy produced by the Facility;
 - 18.1.5. Seller has provided and conveyed and will provide and convey to Buyer all Renewable Energy Attributes and REA Reporting Rights associated with all Energy generated by the Facility as part of the Product being delivered to Buyer;
 - 18.1.6. Seller holds all the rights to all the Product from the Facility, Seller has the right to sell the Product to Buyer, and Seller agrees to convey and does convey to Buyer all rights and good title to the Product free and clear of any Liens, encumbrances, or title defects;
 - 18.1.7. Seller has not and will not double sell, double claim or any manner otherwise double count the Product (including, without limitation, any Capacity of the Facility or any REC, Renewable Energy Attributes, or REA Reporting Rights) in any manner (including, for example, by issuing a press release or otherwise claiming that

Seller is creating any environmental benefit, using a renewable energy source, or selling renewable energy (in each case inclusive of thermal energy) to any person other than exclusively to and for the benefit of Buyer); Seller will not claim to for itself any of the Renewable Energy Attributes, "green energy", "clean energy", "carbon-free energy" or other rights sold to Buyer, in any public communication concerning the output of the Facility, the Facility or the RECs;

18.1.8. Seller shall at all times be fully compliant with the requirements of the Federal Trade Commission's "Green Guides," 77 F.R. 62122, 16 C.F.R. Part 260, as amended or restated, and;

18.1.9. Seller has not and will not in any manner interfere with, encumber or otherwise impede Buyer's use, transfer, and sale of any Product.

19. Events of Default

- 19.1. An "Event of Default" means with respect to the non-performing Party (such Party, the "Defaulting Party"), the occurrence of any one or more of the following, each of which, individually, shall constitute a separate Event of Default:
- 19.2. The failure to make, when due, any payment required pursuant to this Agreement if such failure is not remedied within ten (10) Business Days after the Defaulting Party's receipt of written notice; *provided, however*, a Party will have two (2) Business Days to remedy any failure to make payment required under Section 21;
- 19.3. Any covenant or warranty made by Seller under Section 6.2 (Seller Covenant) is false or misleading in any respect when made or when deemed made or repeated.
- 19.4. Any representation or warranty made by a Party under Section 17 and elsewhere in this Agreement (except Section 18 which is a separate Event of Default) is false or misleading in any material respect when made or when deemed made or repeated;
- 19.5. Seller fails to comply with Section ~~7.1.1~~ 7.1.1 and such failure is not remedied within three Business Days after Seller's receipt of written notice from Buyer.
- 19.6. Any representation or warranty made by Seller under Section 18 (Seller Representations and Warranties to Buyer) is false or misleading in any respect when made or when deemed made or repeated;
- 19.7. If Seller prior to the Commercial Operation Date ceases construction of the Facility for more than thirty (30) consecutive days;
- 19.8. Seller fails to fully and timely achieve any of the Operational Milestone Schedule events (other than the Commercial Operation Date that is governed exclusively by Section 19.9) ~~and 20.5~~; *provided, however*, that such failure shall not be deemed an Event of Default if Seller can make a Commercially Reasonable demonstration to Buyer, in Buyer's Commercially Reasonable discretion, that in spite of missing the Milestone Deadline the Facility will achieve Commercial Operation by the Commercial Operation Date as it may be extended pursuant to the terms of Section 20.5.
- 19.9. Seller fails to achieve Commercial Operation by the Commercial Operation Date, as it may be extended pursuant Section ~~20.5~~ 20.5;
- 19.10. The actual Nameplate Capacity Rating of the Facility is higher than the Nameplate Capacity Rating set forth in Exhibit 4, or is lower than the Nameplate Capacity Rating by more than five (5) percent of the Nameplate Capacity Rating set forth in Exhibit 4.
- 19.11. Seller Abandons the Facility for more than ~~fifteen~~ thirty (15/30) consecutive days;

- 19.12. Seller fails to obtain or maintain the Facility's registration or certification as a Qualifying Facility under PURPA.
- 19.13. Seller fails to obtain or maintain the Facility's registration as a New Renewable Energy Facility, and such failure is not cured within ~~five (5) Business Days~~ thirty (30) days.
- 19.14. Seller fails to fully comply with the PURPA Fuel Requirements.
- 19.15. Seller delivers or attempts to deliver to Buyer any Product (or any component thereof) that was not generated by the Facility.
- 19.16. Seller delivers or attempts to deliver any Product (or component thereof) to any entity or person other than to the Buyer.
- 19.17. Seller fails to promptly and fully comply with a System Operator Instruction.
- 19.18. Seller fails to provide, replenish, renew, or replace the Performance Assurance and/or otherwise fails to fully comply with the credit related requirements of this Agreement, including without limitation, Section 5, and any such failure is not cured within ~~two~~ five (25) Business Days.
- 19.19. Seller fails to fully meet all the insurance requirements set forth in Section 7.5, and such failure is not cured within five (5) Business Days.
- 19.20. Seller fails to fully comply with all of the confidentiality obligations set forth in Section 16.
- 19.21. Seller consolidates or amalgamates with, or merges with or into, or transfers all or substantially all of its assets to, another entity and: (i) at the time of such consolidation, amalgamation, merger or transfer, the resulting, surviving or transferee entity fails to assume all the obligations of Seller under this Agreement to which it or its predecessor was a party by operation of law or pursuant to an agreement reasonably satisfactory to the other Party; or (ii) the creditworthiness of the party or the resulting, surviving, transferee or successor entity is weaker than that of Seller prior to such action; or (iii) the benefits of any guaranty fail to extend to the performance by such resulting, surviving, transferee or successor entity of its obligations under this Agreement
- 19.22. An assignment by or Change of Control with respect to Seller, other than in compliance with Section 24;
- 19.23. A Party becomes Bankrupt;
- 19.24. Seller transfers or assigns or otherwise conveys any of its rights or obligations under this Agreement to another Person in violation of the terms and conditions of this Agreement;
- 19.25. Seller violates the publicity ~~obligates~~ obligations set forth in Section 26.10; ~~and~~
- 19.26. If the Facility is equipped with a Storage Resource: (i) Seller's failure to materially comply with the Energy Storage Protocol as required under this Agreement and such failure is not remedied within three Business Days after Seller's receipt of written notice from Buyer, or (ii) if Seller fails to materially comply with any Energy Storage Protocol on more than three (3) occasions over the Term of this Agreement; provided however, that any such failure shall not be counted against the cumulative limit if Seller can make a Commercially Reasonable demonstration to Buyer that Seller's failure to materially comply with the Energy Storage Protocol was beyond Seller's reasonable control and not the result of Seller's intentional misconduct or gross negligence; and
- 19.27. ~~19.26.~~ Except to the extent constituting a separate Event of Default (in which case the provisions applicable to that separate Event of Default shall apply) the failure to perform

any material covenant or obligation set forth in this Agreement, if such failure is not remedied within ~~twenty~~thirty (2030) days after the Defaulting Party's receipt of written notice.

20. **Early Termination.**

- 20.1. **Early Termination Date.** If an Event of Default with respect to a Defaulting Party has occurred and is continuing, then the other Party (such Party, the "Non-Defaulting Party") shall have the right, in its sole discretion and upon written notice to the Defaulting Party, to pursue any or all of the following remedies: (a) withhold payments due to the Defaulting Party under this Agreement; (b) suspend performance under this Agreement; and/or (c) designate a day (which day shall be no earlier than the day such notice is effective and shall be no later than twenty (20) days after the delivery of such notice is effective) as an early termination date to accelerate all amounts owing between the Parties, liquidate, net, recoup, set-off, and early terminate this Agreement and any other agreement between the Parties (such day, the "Early Termination Date").
- 20.2. **Effectiveness of Default and Remedies.** Where an Event of Default is specified herein and is governed by a system of law which does not permit termination to take place upon or after the occurrence of the relevant Event of Default in accordance with the terms of this Agreement an Event of Default and Early Termination Date shall be deemed to have occurred immediately upon any such event and no prior written notice shall be required. All of the remedies and provisions set forth in this section shall be without prejudice to any other right of the Non-Defaulting Party to accelerate amounts owed, net, recoup, setoff, liquidate, and early terminate this Agreement.
- 20.3. **Net Settlement Amount.** If the Non-Defaulting Party establishes an Early Termination Date, then the Non-Defaulting Party shall calculate its Gains or Losses and Costs resulting from the termination as of the Early Termination Date, in a Commercially Reasonable Manner. The Non-Defaulting Party shall aggregate such Gains or Losses and Costs with respect to the liquidation of the termination and any other amounts due under this Agreement and any other agreement between the Parties into a single net amount expressed in U.S. dollars (the "Net Settlement Amount"). The Non-Defaulting Party shall then notify the Defaulting Party of the Net Settlement Amount. The Defaulting Party shall pay the Non-Defaulting Party the full amount of the Net Settlement Amount within two (2) Business Days of delivery to the Defaulting Party of the notice of the Net Settlement Amount that the Defaulting Party is liable for.
- 20.4. **Payment.** Any Net Settlement Amount will only be due and payable only to the Non-Defaulting Party from and by the Defaulting Party. If the Non-Defaulting Party's aggregate Gains exceed its aggregate Losses and Costs, if any, resulting from the termination of this Agreement, the Net Settlement Amount will be deemed to be zero and no payment will be due or payable. The Non-Defaulting Party shall under no circumstances be required to account for or otherwise credit or pay the Defaulting Party for economic benefits accruing to the Non-Defaulting Party as a result of the Defaulting Party's default. The Non-Defaulting Party shall be entitled to recover any Net Settlement Amount by netting or set-off or to otherwise pursue recovery of damages. Additionally, Buyer will be entitled to recover any Net Settlement Amount by drawing upon any Performance Assurance or by netting or set-off, or to otherwise pursue recovery of damages. Any calculation and payment of the Net Settlement Amount will be independent of and in addition to Seller's obligation to reimburse Buyer for overpayments pursuant to Section 20.6.
- 20.5. **Commercial Operation Date Liquidated Damages.**

20.5.1. **Failure to Achieve First COD Date.** Notwithstanding anything to the contrary in this

Agreement, to the extent an Event of Default occurs due to Seller's failure to timely ~~meet its~~ achieve the Commercial Operation Date obligations as set forth in Exhibit 3 (the "First COD Date"), then ~~this Agreement shall terminate and Seller agrees that it will~~ shall be liable to Buyer and will pay Buyer for liquidated damages ~~[(LD)]~~ in the amount of $[4\% \times \text{total projected revenue under the Agreement during the Term as determined by Buyer in its reasonable discretion}]$ U.S. dollars (\$)] (the "Default Liquidated Damages") which shall be due and payable by Seller within five (5) Business Days after the First COD Date; provided however, if no later than twenty (20) Business Days prior to the First COD Date Seller notifies Buyer in writing that Seller will be unable to achieve Commercial Operation by the First COD Date and Seller also notifies Buyer in writing that Seller desires to continue performance under this Agreement, then this Agreement shall remain in full force and effect and upon payment of liquidated damages to Buyer in the amount of $[25\% \text{ of the Default Liquidated Damages}]$ (the "Initial Liquidated Damages") within five (5) Business Days after the First COD Date, Seller shall have up to an additional one hundred eighty (180) days from the First COD Date to achieve Commercial Operation (such extended date, the "Second COD Date").

~~20.5.1. Subject to this Section 20.5.1 and Section 20.5.2, if no later than twenty (20) Business Days prior to the First COD Date Seller notifies Buyer in writing that Seller will be unable to achieve Commercial Operation by the First COD Date and Seller also notifies Buyer in writing that Seller desires to continue performance under this Agreement, then Seller may continue performance hereunder and shall have up to an additional one hundred eighty (180) days, in two increments of 90 days each, from the First COD Date to achieve Commercial Operation (such extended date, the "Second COD Date"), but expressly subject to (A) Seller increasing, notwithstanding anything to the contrary in this Agreement, the amount of Performance Assurance to [double the LD amount specified in 20.5 U.S. dollars (\$)] by the First COD Date and (B) Seller paying Buyer liquidated damages as set forth below in Sections 20.5.1.1 through Section 20.5.1.3, as applicable.~~

~~20.5.2.~~ 20.5.1.1. Within five (5) Business Days of achieving Second COD Date. If Seller achieves Commercial Operation on or before the Second COD Date Seller shall pay Buyer additional liquidated damages, within five (5) Business Days of achieving the Second COD Date, in the amount of [LD amount specified in 20.5] 75% of the Default Liquidated Damages divided by 90 [180] [U.S. dollars (\$)] per day (the "Per Diem Liquidated Damages") for each day that Commercial Operation was delayed beyond the First COD Date up to and including the ~~ninetieth (90th)~~ one hundred eightieth (180th) day following the First COD Date as the per diem liquidated damages for failing to timely achieve Commercial Operation by the First COD Date.

~~20.5.1.2. If Seller fails to achieve Commercial Operation within ninety (90) days following the First COD Date then Seller shall either terminate this agreement effective immediately on the ninety first (91st) day after the First COD Date, and Seller will be liable to Buyer for liquidated damages and will pay Buyer liquidated damages in the amount of [the LD amount specified in 20.5] U.S. dollars (\$) or, alternatively, on the ninety first (91st) day following the First COD Date, Seller will pay Buyer liquidated damages in the amount of [the LD amount specified in 20.5] U.S. dollars (\$) and continue performance hereunder for the purposes of achieving Commercial Operation by the Second COD Date, as provided~~

for in Section 20.5.1.3 (including replenishing the Performance Assurance to secure for the benefit of Buyer the payment of the liquidated damages pursuant to Section 20.5.1.3, as required by Buyer).

20.5.3. ~~20.5.1.3. If Seller does not terminate this Agreement pursuant to Section 20.5.1.2 and is able to achieve Commercial Operation Failure to Achieve Second COD Date. If Seller fails to achieve Commercial Operation by the Second COD Date (i.e., within one hundred eighty (180) days following the First COD Date) then Seller will be liable to Buyer and will pay Buyer, within five (5) Business Days of achieving Commercial Operation, additional per diem liquidated damages in the amount of [LD amount specified in 20.5 divided by 90] U.S. dollars (\$) per day for each day until the day that Commercial Operation was achieved. If Seller does not terminate this Agreement pursuant to Section 20.5.1.2 and fails to achieve Commercial Operation by the Second COD Date (i.e., within one hundred eighty (180) days following the First COD Date) then this Agreement will terminate and Seller will be liable to Buyer and will pay Buyer, within five (5) Business Days of such failure, additional liquidated damages (in addition to the liquidated damages Initial Liquidated Damages paid pursuant to under Section 20.5.1.2 20.5.1) in the amount of [the LD amount specified in 20.5] Default Liquidated Damages [75% of the Default Liquidated Damages U.S. dollars (\$)].~~

20.5.4. ~~20.5.2. Seller agrees that if Seller does not provide timely written notice to Buyer of Seller's desire to continue performance under this Agreement as set forth in Section 20.5.1 and fails to achieve Commercial Operation by the First COD Date, then this Agreement will terminate automatically on the First COD Date, and Seller will be liable for and will pay Buyer the liquidated damages in the amount of [the LD amount specified in 20.5] U.S. dollars (\$) no later than five (5) Business Days after the First COD Date. Seller agrees that the termination of the Agreement shall not limit Buyer entitlement to draw upon any Performance Assurance to collect liquidated damages payable by Seller. Exclusive Remedy. The Parties agree that it would be extremely difficult and impracticable under the presently known and anticipated facts and circumstances to ascertain and fix the actual damages Buyer would incur if Seller does not achieve Commercial Operation by the promised Commercial Operation Date. Accordingly, the Parties agree that if Seller does not meet the promised Commercial Operation Date (as may be extended under this Section 20.5), Buyer's sole remedy for that delay shall be to recover from Seller as liquidated damages, and not as a penalty, the amount of liquidated damages specified in this Section 20.5. The agreed upon delay liquidated damages shall not limit Buyer's remedies for other breaches, actions or omissions of Seller under this Agreement.~~

20.6. Overpayment Reimbursement. Notwithstanding anything else in this Agreement to the contrary, including without limitation the Net Settlement Amount calculation and payment provisions set forth in Sections 20.1 through 20.5, and without limiting any of Buyer's other rights or remedies hereunder, Seller agrees and acknowledges that in the event this Agreement is terminated prior to the expiration of the Term for any reason other than an Event of Default by Buyer, that Seller will reimburse Buyer for all amounts paid by Buyer to Seller under this Agreement in excess of Buyer's Avoided Cost for energy and capacity over the period starting from the Commercial Operation Date through the date of termination of this Agreement plus interest on such amount calculated at the rate of [UPDATED EVERY YEAR, CURRENTLY - DEP ~~3.82.9%~~ (three two and eight nine tenths percent)] [DEC ~~3.753.7%~~ (three and seventy five hundredths seven tenths percent)] until repaid (the "Overpayment

Amount"). Seller agrees to reimburse Buyer for the Overpayment Amount notwithstanding anything to the contrary in this Agreement and without regard to whether Seller is or may be liable to Buyer for any additional amounts under this Agreement, including, without limitation, any Net Settlement Amount, Gains, and/or Losses determined or to be determined pursuant to this Agreement. The Seller will pay Buyer the Overpayment Amount no later than three (3) Business Days after the Early Termination Date.

20.7. Survival. This Section 20 will survive any expiration or termination of this Agreement.

21. **Cover Costs.**

21.1. Exclusive Remedies. Except ~~as where a specific and exclusive remedy is~~ otherwise set forth in this Agreement, the remedies set forth in this Section shall be a Party's exclusive remedies prior to termination for the other Party's failure to deliver the Product or to receive the Product pursuant to and in accordance with this Agreement.

21.2. Seller's Failure to Deliver. If Seller fails to deliver Product that complies with the requirements set forth in this Agreement or fails to deliver all or part of the Contract Quantity (each will be deemed as a failure to deliver for purposes of calculating damages), and such failure is not excused by a Permitted Excuse to Perform or Buyer's failure to perform, then Buyer shall elect in its sole discretion: (i) to terminate and liquidate this Agreement if such failure is an Event of Default as set forth herein, and in which case Buyer shall calculate its termination payment in accordance with this Agreement as though it were the Non-Defaulting Party; or, (ii) to require Seller to pay Buyer within three (3) Business Days of invoice receipt, liquidated damages in the amount obtained by multiplying the number of units of Product (or component thereof) that Seller failed to deliver to Buyer multiplied by two (2) times the per unit Contract Price.

21.3. Buyer's Failure to Accept Delivery. If Buyer fails to receive all or part of the Contract Quantity that Seller attempted to deliver to Buyer in accordance with this Agreement, and such failure by Buyer is not excused by a Permitted Excuse to Perform or Seller's failure to perform, then Seller shall elect in its sole discretion either to: (i) terminate and liquidate this Agreement if such failure is an Event of Default as set forth herein, and in which case Seller shall calculate its termination payment in accordance with this Agreement as though it were the Non-Defaulting Party; or, (ii) require Buyer to pay Seller within three (3) Business Days of invoice receipt, liquidated damages in the amount obtained by multiplying the number of units of Product (or component thereof) that Buyer failed to receive multiplied by two (2) times the per unit Contract Price.

21.4. Event of Default. Any failure by Seller to pay amounts due under this Section 21 will be an Event of Default under Section 19.2.

21.5. Survival. This Section 21 will survive any expiration or termination of this Agreement.

22. **Limitation of Liabilities & Liquidated Damages.**

22.1. Reasonableness. THE EXPRESS REMEDIES AND MEASURES OF DAMAGES, INCLUDING WITHOUT LIMITATION DETERMINATION OF LIQUIDATED DAMAGES, COVER COSTS, AND NET SETTLEMENT AMOUNT DAMAGES PROVIDED FOR IN THIS AGREEMENT (i) ARE REASONABLE AND SATISFY THE ESSENTIAL PURPOSES HEREOF FOR BREACH OF ANY PROVISION FOR WHICH THE EXPRESS REMEDY OR MEASURE OF DAMAGES IS PROVIDED, AND (ii) UNLESS OTHERWISE STATED IN SUCH PROVISIONS, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, THE OBLIGOR'S LIABILITY SHALL BE LIMITED AS SET FORTH IN SUCH PROVISIONS, AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. TO THE EXTENT ANY PROVISION OF THIS AGREEMENT PROVIDES FOR, OR IS DEEMED TO CONSTITUTE OR INCLUDE, LIQUIDATED DAMAGES, THE PARTIES STIPULATE AND AGREE THAT THE ACTUAL DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO ESTIMATE OR DETERMINE, THE LIQUIDATED AMOUNTS ARE A REASONABLE APPROXIMATION OF AND METHODOLOGY TO

DETERMINE THE ANTICIPATED HARM OR LOSS TO THE PARTY, AND OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT. THE PARTIES FURTHER STIPULATE AND AGREE THAT ANY PROVISIONS FOR LIQUIDATED DAMAGES ARE NOT INTENDED AS, AND SHALL NOT BE DEEMED TO CONSTITUTE, A PENALTY, AND EACH PARTY HEREBY WAIVES THE RIGHT TO CONTEST SUCH PROVISIONS AS AN UNREASONABLE PENALTY OR AS UNENFORCEABLE FOR ANY REASON.

- 22.2. Limitation. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY HEREIN PROVIDED, (i) THE OBLIGOR'S LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY, SUCH DIRECT ACTUAL DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED; AND (ii) NEITHER PARTY SHALL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, EVEN IF SUCH DAMAGES ARE ALLOWED OR PROVIDED BY STATUTE, STRICT LIABILITY, ANY TORT, CONTRACT, OR OTHERWISE.
- 22.3. Damages Stipulation. Each Party expressly agrees and stipulates that the terms, conditions, and payment obligations set forth in Sections 20 and 21 are a reasonable methodology to approximate or determine harm or loss, each Party acknowledges the difficulty of determining actual damages or loss, and each Party hereby waives the right to contest such damages and payments as unenforceable, as an unreasonable penalty, or otherwise for any reason. The Parties further acknowledge and agree that damages and payments determined under Sections 20 and 21 are direct damages, will be deemed to be a direct loss, and will not be excluded from liability or recovery under the Limitations of Liabilities provisions of this Section 22.
- 22.4. Survival. This Section 22 will survive any expiration or termination of this Agreement.

23. Disputes and Arbitration

- 23.1. Resolution by the Parties. The Parties shall attempt to resolve any claims, disputes and other controversies arising out of or relating to this Agreement (collectively, "Dispute(s)") promptly by negotiation between executives who have authority to settle the Dispute and who are at a higher level of management than the persons with direct responsibility for administration of this Agreement. A Party may give the other Party written notice of a Dispute that has not been resolved in the normal course of business. Such notice shall include: (a) a statement of that Party's position and a summary of arguments supporting such position, and (b) the name and title of the executive who will be representing that Party and of any other person who will accompany the executive. Within ten (10) Business Days after delivery of the notice, the receiving Party shall respond with (a) a statement of that Party's position and a summary of arguments supporting such position, and (b) the name and title of the executive who will represent that Party and of any other person who will accompany the executive. Within twenty (20) Business Days after delivery of the initial notice, the executives of both Parties shall meet at Buyer's offices, and thereafter as often as they reasonably deem necessary, to attempt to resolve the Dispute. At the request of either Party, the Parties shall enter into a confidentiality agreement to cover any Dispute and discussions related thereto.
- 23.2. Demand for Arbitration.
- 23.2.1. If a Dispute has not been resolved by negotiation within thirty (30) Business Days of the disputing Party's initial notice, the Parties shall fully and finally settle the Dispute by binding arbitration administered by the American Arbitration Association ("AAA"), or such other nationally recognized arbitration association or organization as the Parties may mutually agree. The Arbitration shall be

conducted in accordance with the AAA Commercial Arbitration Rules then in effect, and shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16. To the extent the AAA Rules conflict with any provision of Section 23 of this Agreement, the terms of this Agreement shall govern and control.

- 23.2.2. Either Party may serve the demand for arbitration on the other Party; provided, however, no demand for arbitration shall be made or permitted after the date when the institution of a civil action based on the Dispute would be barred by the applicable statute of limitations or repose.
- 23.2.3. All arbitration proceedings shall take place in [DEC - Charlotte] [DEP - Raleigh], North Carolina.
- 23.2.4. A single arbitrator will arbitrate all Disputes where the amount in controversy is less than five-hundred thousand U.S. dollars (\$500,000), and will be selected by the Parties or by the AAA if the Parties cannot agree to the arbitrator. Such arbitrator shall be a licensed attorney with at least ten (10) years of experience in the electric utility industry. The cost of the arbitrator(s) shall be borne equally by the Parties.
- 23.2.5. A panel of three (3) arbitrators will conduct the proceeding when the amount in controversy is equal to or more than five hundred thousand U.S. dollars (\$500,000). If the Parties have not so agreed on such three (3) arbitrator(s) on or before thirty (30) days following the delivery of a demand for Arbitration to the other Party, then each Party, by notice to the other Party, may designate one arbitrator (who shall not be a current or former officer, director, employee or agent of such Party or any of its Affiliates). The two (2) arbitrators designated as provided in the immediately preceding sentence shall endeavor to designate promptly a third (3rd) arbitrator.
- 23.2.6. If either Party fails to designate an initial arbitrator on or before forty five (45) days following the delivery of an arbitration notice to the other Party, or if the two (2) initially designated arbitrators have not designated a third (3rd) arbitrator within thirty (30) days of the date for designation of the two (2) arbitrators initially designated, any Party may request the AAA to designate the remaining arbitrator(s) pursuant to its Commercial Arbitration Rules. Such third (3rd) arbitrator shall be a licensed attorney with at least ten (10) years of experience in the electric utility industry.
- 23.2.7. If any arbitrator resigns, becomes incapacitated, or otherwise refuses or fails to serve or to continue to serve as an arbitrator, the Party entitled to designate that arbitrator shall designate a successor.
- 23.3. Discovery. Either Party may apply to the arbitrators for the privilege of conducting discovery. The right to conduct discovery shall be granted by the arbitrators in their sole discretion with a view to avoiding surprise and providing reasonable access to necessary information or to information likely to be presented during the course of the arbitration, provided that such discovery period shall not exceed sixty (60) Business Days.
- 23.4. Binding Nature. The arbitrator(s)' decision shall be by majority vote (or by the single arbitrator if a single arbitrator is used) and shall be issued in a writing that sets forth in separately numbered paragraphs all of the findings of fact and conclusions of law necessary for the decision. Findings of fact and conclusions of law shall be separately designated as such. The arbitrator(s) shall not be entitled to deviate from the construct, procedures or requirements of this Agreement. The award rendered by the arbitrator(s)

in any arbitration shall be final and binding upon the Parties, and judgment may be entered on the award in accordance with applicable law in any court of competent jurisdiction.

- 23.5. Consolidation. No arbitration arising under the Agreement shall include, by consolidation, joinder, or any other manner, any person not a party to the Agreement unless (a) such person is substantially involved in a common question of fact directly relating to the Dispute; provided however, such person will not include any Governmental Authority, (b) the presence of the person is required if complete relief is to be accorded in the arbitration, and (c) the person has consented to be included.
- 23.6. Mediation. At any time prior or subsequent to a Party initiating arbitration, the Parties may mutually agree to (but are not obligated to) attempt to resolve their Dispute by non-binding mediation, using a mediator selected by mutual agreement. The mediation shall be completed within thirty (30) Business Days from the date on which the Parties agree to mediate. Unless mutually agreed by the parties, any mediation agreed to by the Parties shall not delay arbitration. The Parties shall pay their own costs associated with mediation and shall share any mediator's fee equally. The mediation shall be held in Raleigh, North Carolina, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court of competent jurisdiction.
- 23.7. Remedies. Except for Disputes regarding confidentiality arising under Section 16 of this Agreement, the procedures specified in this Section 23 shall be the sole and exclusive procedures for the resolution of Disputes between the Parties arising out of or relating to this Agreement; provided, however, that a Party may file a judicial claim or action on issues of statute of limitations or repose or to seek injunctive relief, sequestration, garnishment, attachment, or an appointment of a receiver, subject to and in accordance with the provisions of Section 26.5 (Venue/Consent to Jurisdiction). Preservation of these remedies does not limit the power of the arbitrator(s) to grant similar remedies, and despite such actions, the Parties shall continue to participate in and be bound by the dispute resolution procedures specified in Section 23.
- 23.8. Settlement Discussions. All negotiations and discussion concerning Disputes between the Parties pursuant to Section 23 of this Agreement are to be deemed confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence and settlement privilege. No statement of position or offers of settlement made in the course of the dispute resolution process can be or will be offered into evidence for any purpose, nor will any such statements or offers of settlement be used in any manner against any Party. Further, no statement of position or offers of settlement will constitute an admission or waiver of rights by either Party. At the request of either Party, any such statements or offers, and all copies thereof, shall be promptly returned to the Party providing the same.
- 23.9. Survival. This Section 23 will survive any expiration or termination of this Agreement.

24. **Assignment**

- 24.1. Limitation. Except as set forth below in Section 24.2 with respect to pledging as collateral security, Seller shall not assign, ~~pledge, and/or~~ encumber (collectively, the "~~assignment~~Assignment") this Agreement, any rights or obligations under the Agreement, or any portion hereunder, without Buyer's prior written consent. Seller shall give Buyer at least thirty (30) days prior written notice of any requested ~~assignment~~Assignment. Subject to Seller providing Buyer with information demonstrating to Buyer, in Buyer's sole Commercially Reasonable Discretion, that Seller's proposed assignee has the technical,

engineering, financial, and operational capabilities to perform under this Agreement, Buyer may not unreasonably withhold its consent; *provided, however*, that any such assignee shall agree in writing to be bound by the terms and conditions hereof and shall deliver to Buyer such tax, credit, Performance Assurance in the required amount, and enforceability assurance as the Buyer may request in its sole Commercially Reasonable discretion. Notwithstanding anything to the contrary herein, Buyer may pledge, encumber, or assign this Agreement ~~without the consent of Seller to any person, including any affiliate or subsidiary of Buyer, whether or not an Affiliate, without any restriction~~ Person that is Creditworthy, or that has a Creditworthy credit support provider, and that has agreed in writing to assume the obligations of Buyer hereunder.

- 24.2. **Pledge.** Seller may, without prior consent of Buyer but with no less than ten (10) Business Days prior written notice to Buyer, pledge as collateral security this Agreement to a financing party in connection with any loan, lease, or other debt or equity financing arrangement for the Facility. Any pledge of this Agreement as collateral security will not relieve Seller of any obligation or liability under this Agreement, ~~and it will not create any rights, including any third party beneficiary rights, for any person or compromise, modify or affect any rights, benefits or risks of Buyer under this Agreement.~~
- 24.3. **Acknowledgement of Non-Default.** Provided that Seller is not in default of its obligations under this Agreement, upon reasonable request by Seller, Buyer will execute a written acknowledgement of non-default in the form of Exhibit 8 attached hereto (the "Acknowledgement") which shall be based on the actual knowledge of Buyer's personnel responsible for administering the Agreement at the time of the execution of the Acknowledgement and after due inquiry of Buyer's internal records only. Notwithstanding any provision to the contrary set forth in the Acknowledgment, Buyer reserves all rights and defenses available to it under the Agreement, and nothing stated therein shall be deemed to have waived, amended or modified any such rights or defenses. In no event shall the issuance of any Acknowledgement introduce any third party to this Agreement or create any rights, including third party beneficiary rights for any Person under this Agreement.
- 24.4. **24.3-Change of Control.** Any Change of Control of Seller (however this Change of Control occurs) shall require the prior written consent of Buyer, which shall not be unreasonably withheld or delayed. Seller shall give Buyer at least thirty (30) days prior written notice of any such requested consent to a Change of Control.
- 24.5. **24.4-Delivery of Assurances & Voidable.** Any ~~assignment~~ Assignment or Change of Control will not relieve Seller of its obligations hereunder, unless Buyer agrees in writing in advance to waive the Seller's continuing obligations under this Agreement. In case of a permitted ~~assignment~~ Assignment and/or Change of Control, such requesting party or parties shall agree in writing to assume all obligations of Seller and to be bound by the terms and conditions of this Agreement and shall deliver to Buyer such tax, credit, performance, and enforceability assurances as Buyer may request, in its sole Commercially Reasonable discretion. Further, Buyer's consent to any ~~assignment~~ Assignment may be conditioned on and subject to Seller's proposed assignee having first obtained all approvals that may be required by any Requirements of Law and from all applicable Governmental Authorities. Any sale, transfer, Change of Control, and/or ~~assignment~~ Assignment of any interest in the Facility or in the Agreement made without fully satisfying the requirements of this Agreement shall be null and void and will be an Event of Default hereunder with Seller as the Defaulting Party.
- 24.6. **24.5-Cost Recovery.** Without limiting Buyer's rights under this Section 24, to the extent Buyer agrees to a request from Seller for an ~~assignment~~ Assignment, Change of Control, or

other changes in administering this Agreement, Seller shall pay Buyer ten thousand dollars (\$10,000) prior to Buyer processing Seller's request.

25. Notices.

- 25.1. Process. All notices, requests, or invoices shall be in writing and shall be sent to the address of the applicable Party as specified on the first page of this Agreement. A Party may change its information for receiving notices by sending written notice to the other Party. Notices shall be delivered by hand, certified mail (postage prepaid and return receipt requested), or sent by overnight mail or courier. This section shall be applicable whenever words such as "notify," "submit," "give," or similar language are used in the context of giving notice to a Party.
- 25.2. Receipt of Notices. Hand delivered notices shall be deemed delivered by the close of the Business Day on which it was hand delivered. Notices provided by certified mail (postage prepaid and return receipt requested), mail delivery or courier service, or by overnight mail or courier service will be deemed received on the date of delivery recorded by the delivery service or on the tracking receipt, as applicable. Notwithstanding anything to the contrary, if the day on which any notice is delivered or received is not a Business Day or is after 5:00 p.m. EPT on a Business Day, then it shall be deemed to have been received on the next following Business Day.

26. Miscellaneous.

- 26.1. Costs. Each Party shall be responsible for its own costs and fees associated with negotiating or disputing or taking any other action with respect to this Agreement, including, without limitation, attorney costs, except that the cost of the arbitrator(s) will be allocated equally between the Parties as provided in Section 23.
- 26.2. Access. Upon reasonable prior notice, Seller shall provide to Buyer and its authorized agents (including contractors and sub-contractors), employees, auditors, and inspectors reasonable access to the Facility to: (i) tour or otherwise view the Facility; (ii) ascertain the status of the Facility with respect to construction, start-up and testing, or any other obligation of Seller under this Agreement; and, (iii) read meters and perform all inspections, maintenance, service, and operational reviews as may be appropriate to facilitate the performance of this Agreement or to otherwise audit and/or verify Seller's performance under this Agreement. Upon reasonable prior notice, Seller shall provide to Buyer and its guests or customers reasonable access to the Facility to only tour or otherwise view the Facility. While at the Facility, the foregoing agents, employees, auditors, inspectors, guests, and customer shall observe such reasonable safety precautions as may be required by Seller, conduct themselves in a manner that will not interfere with the operation of the Facility, and adhere to Seller's reasonable rules and procedures applicable to Facility visitors. Seller shall have the right to have a representative of Seller present during such access.
- 26.3. Safe Harbor and Waiver of Section 366. Each Party agrees that it will not assert, and waives any right to assert, that the other Party is performing hereunder as a "utility," as such term is used in 11 U.S.C. Section 366. Further, each Party hereby waives any right to assert and agrees that it will not assert that 11 U.S.C. Section 366 applies to this Agreement or any transaction hereunder in any bankruptcy proceeding. In any such proceeding each Party further waives the right to assert and agrees that it will not assert that the other Party is a provider of last resort with respect to this Agreement or any transaction hereunder or to otherwise limit contractual rights to accelerate amounts owed, net, recoup, set-off, liquidate, and/or early terminate. Without limiting the generality of the foregoing or the binding nature of any other provision of this Agreement on permitted

successors and assigns, this provision is intended to be binding upon all successors and assigns of the Parties, including, without limitation, judgment lien creditors, receivers, estates in possession, and trustees thereof.

- 26.4. Governing Law. THIS AGREEMENT AND THE RIGHTS AND DUTIES OF THE PARTIES HEREUNDER SHALL BE GOVERNED BY AND CONSTRUED, ENFORCED, AND PERFORMED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NORTH CAROLINA [SOUTH CAROLINA], WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAW, AND, IF APPLICABLE, BY THE FEDERAL LAW OF THE UNITED STATES OF AMERICA.
- 26.5. Venue/Consent to Jurisdiction. Except for Disputes that are subject to Arbitration as provided herein, any judicial action, suit, or proceedings arising out of, resulting from, or in any way relating to, this Agreement, or any alleged breach or default under the same or the warranties and representations contained in the same, shall be brought only in a state or federal court of competent jurisdiction located in [DEP - Wake County, North Carolina or DEC - Mecklenburg County, North Carolina]. The Parties hereto irrevocably consent to the jurisdiction of any federal or state court within in [DEP - Wake County, North Carolina, DEC - Mecklenburg County, North Carolina] and hereby submit to venue in such courts. Without limiting the generality of the foregoing, the Parties waive and agree not to assert by way of motion, defense, or otherwise in such suit, action, or proceeding, any claim that (i) such Party is not subject to the jurisdiction of the state or federal Courts within North Carolina; or (ii) such suit, action, or proceeding is brought in an inconvenient forum; or (iii) the venue of such suit, action, or proceeding is improper. The exclusive forum for any litigation between them under this Agreement that is not subject to Arbitration shall occur in federal or state court within in [DEP - Wake County, North Carolina, DEC - Mecklenburg County, North Carolina].
- 26.6. Limitation of Duty to Buy. If this Agreement is terminated due to a default by Seller, neither Seller, nor any affiliate and/or successor of Seller, nor any affiliate and/or successor to the Facility, including without limitation owner and/or operator of the Facility will require or seek to require Buyer to purchase any output (Energy or otherwise) from the Facility under any Requirements of Law (including without limitation PURPA) or otherwise for any period that would have been covered by the Term of this Agreement had this Agreement remained in effect at a price that exceeds the Contract Price. Seller, on behalf of itself and on behalf of any other entity on whose behalf it may act, and on behalf of any successor to the Seller or successor to the Facility, hereby agrees to the terms and conditions in the above sentence, and hereby waives its right to dispute the above sentence. Seller authorizes the Buyer to record notice of the foregoing in the real estate records.
- 26.7. Entire Agreement and Amendments. This Agreement represents the entire agreement between the Parties with respect to the subject matter of this Agreement, and supersedes all prior negotiations, binding documents, representations and agreements, whether written or oral. No amendment, modification, or change to this Agreement shall be enforceable unless agreed upon in a writing that is executed by the Parties.
- 26.8. Drafting. Each Party agrees that it (and/or its counsel) has completely read, fully understands, and voluntarily accepts every provision, term, and condition of this Agreement. Each Party agrees that this Agreement shall be considered for all purposes as prepared through the joint efforts of the Parties, and no Party shall have any provision hereof construed against such Party by reason of such Party drafting, negotiating, or proposing any provision hereof, or execution of this Agreement. Each Party irrevocably waives the benefit of any rule of contract construction that disfavors the drafter of a contract or the drafter of specific language in a contract.

- 26.9. Headings. All section headings in this Agreement are included herein for convenience of reference only and shall not constitute a part of this Agreement for any other purpose.
- 26.10. Publicity.
- 26.10.1. Limitation on Seller. Seller shall not make any announcement or release any information concerning or otherwise relating to this Agreement to any member of the public, press, Person, official body, or otherwise without Buyer's prior written consent, which shall not be unreasonably withheld; provided, however, any content approved by Buyer shall be limited to the non-confidential facts of the Agreement and will not imply, directly or indirectly, any endorsement, partnership, support, or testimonial of Seller by Buyer.
- 26.10.2. Limitation on the Parties. Neither Party shall make any use of the other Party's name, logo, likeness in any publication, promotional material, news release, or similar issuance or material without the other Party's prior review, approval, and written consent. Seller agrees and acknowledges that any reference or likeness to "Duke" shall be a prohibited use of Buyer's name, logo, likeness. Seller agrees and acknowledges that any direct or indirect implication of any endorsement, partnership, support, or testimonial of Seller by Buyer is prohibited, and any such use, endorsement, partnership, support, and/or testimonial will be an Event of Default under this Agreement. Subject to the foregoing, either Party may disclose to the public general information in connection with the Party's respective business activities; *provided, however*, no such disclosure or publicity by Seller will directly or indirectly imply any endorsement, partnership, support, or testimonial of Seller by Buyer.
- 26.11. Waiver. No waiver by any Party of any of its rights with respect to the other Party or with respect to any matter or default arising in connection with this Agreement shall be construed as a waiver of any subsequent right, matter or default whether of a like kind or different nature. Any waiver under this Agreement will be effective only if it is in writing that has been duly executed by an authorized representative of the waiving Party.
- 26.12. Partnership and Beneficiaries. Nothing contained in this Agreement shall be construed or constitute any Party as the employee, agent, partner, joint venture, or contractor of any other Party. This Agreement is made and entered into for the sole protection and legal benefit of the Parties, and their permitted successors and assigns. No other person or entity, including, without limitation, a financing or collateral support provider, will be a direct or indirect beneficiary of or under this Agreement, and will not have any direct or indirect cause of action or claim under or in connection with this Agreement.
- 26.13. Severability. Any provision or section hereof that is declared or rendered unlawful by any applicable court of law, or deemed unlawful because of a statutory change, shall not, to the extent practicable, affect other lawful obligations under this Agreement.
- 26.14. Counterparts. This Agreement may be executed in counterparts, including facsimiles hereof, and each such executed document will be deemed to be an original document and together will complete execution and effectiveness of this Agreement.

[Remainder of page intentionally left blank. Signature page follows.]

DUKE ENERGY PROGRESS/CAROLINAS, LLC

IN WITNESS WHEREOF, Seller and Buyer have caused this Agreement to be executed by their respective duly authorized officers as of the Effective Date.

[DUKE ENERGY CAROLINAS, LLC]

[DUKE ENERGY PROGRESS, LLC]

BY: _____

NAME:

TITLE:

DATE:

SELLER _____

BY: _____

NAME: _____

TITLE: _____

DATE: _____

Exhibit 1

Estimated Monthly Energy Production of the Facility

<u>Month</u>	<u>Estimated Facility Energy Production (MWh)</u>
January	
February	
March	
April	
May	
June	
July	
August	
September	
October	
November	
December	
Total	

Exhibit 2
Contract Price

Relevant Portion of the Delivery Period	Contract Price

Exhibit 3

Operational Milestone Schedule

Deadline	Performance/Result Seller Must Timely Achieve
	Interconnection Agreement Executed
	Financing Milestone Commitment
	Final System Design under Interconnection Agreement
	Required Permits and Approval Deadlines
	Commencement Readiness Requirements
<u>90 calendar days after the Interconnection Facilities and System Upgrades In-Service Date, and extended day-to-day for any delays not caused by the Seller.</u>	Commercial Operation Date

1. **Financing Milestone Commitment.** Seller shall deliver to Buyer a letter of commitment for full project financing meeting all of the minimum requirements set forth below, as determined by Buyer in Buyer's sole Commercially Reasonable discretion. Buyer has no responsibility or obligation of any kind to Seller or any other person or entity with respect to Seller in connection with Seller's financing or the Financing Milestone Commitment.

- 1.1. Fully-underwritten and binding (not "best efforts," a term sheet, or some lesser commitment).
- 1.2. In an amount that is, along with fully underwritten and committed equity, adequate funding for the construction and operation of the project.
- 1.3. Full agreement of the lender and Seller with respect to term, interest rates, fees and other economics of the lending transaction.
- 1.4. Lender has approved the form of the power purchase agreement, turbine/panel supply agreement, engineering procurement and construction contract and other significant project agreements, subject only to the execution and delivery of those documents, as well as the construction budget for the project, and that the lender has completed all necessary due diligence.
- 1.5. Lender retains no further approval rights with respect to size, site or technical aspects of the project.
- 1.6. Free of conditions to effectiveness relating to further equity commitments, the confirmation of tax attributes, the approvals of other public or private third parties or the satisfactory completion of third party reports or assessments (environmental, insurance or otherwise).
- ~~1.7. Not require an estoppel or consent to the collateral assignment of the power purchase agreement from Buyer.~~
- ~~1.7.~~ 1.8. Not require any bonds or performance guarantees that have not already been obtained.
- ~~1.8.~~ 1.9. No general condition to financing that the lender be satisfied with the project in its discretion.

~~1.9.~~ ~~1.10.~~ Fully executed by the lender and the Seller.

2. **Final System Design Under Interconnection Agreement.** Seller shall deliver to Buyer a copy of the design specifications delivered by Seller to the Transmission Provider as of Seller's execution of the facility study agreement with the Transmission Provider, which design specifications shall be deemed as the "final" system design for purposes of Seller's obligation to timely achieve the Commercial Operation Date set forth above in this Exhibit 3. The final design specification documents delivered by Seller shall be labeled as "**FINAL**", and shall be sealed with a [North Carolina/South Carolina] Professional Engineer for purposes of establishing the final design submitted by the Seller based on which the Transmission Provider will determine impacts to the System and construct interconnection facilities for Seller to interconnect with the System and perform under this Agreement. Seller understands that changes in system design may be deemed as material or significant design changes by the Transmission Provider, and could result in the Transmission Provider withdrawing Seller's position in the transmission queue or otherwise withdrawing Seller's transmission request, as may be determined by the Transmission Provider.
3. **Required Permits and Approval Deadlines.** Seller shall deliver to Buyer a list of required Permits and deadlines to secure each of those Permits. Seller shall identify and list all Permits customary and necessary for Seller to design, construct, test, commission, and fully operate the Facility. Seller shall also identify and list the deadline by which Seller must secure the final Permits for Seller to achieve the Commercial Operation Date set forth above in this Exhibit 3. Each required Permit that Seller must secure shall be deemed to be an Operational Milestone, and the deadline by which Seller must secure the Permit shall be deemed to be a Milestone Deadline. Seller shall keep Buyer informed of its efforts to secure the Permits, including, without limitation, date when the request for the Permit is submitted to and date that the final Permit is obtained from the Governmental Authority. For each identified Permit, Seller shall provide Buyer written notice, and any supporting documentation requested by Buyer in its Commercially Reasonable Discretion, that the identified Permits have been obtained, including, without limitation, any approvals from the local Governmental Authority approving the land use, site plan and construction of the Facility.
4. **Commencement Readiness Requirements.** Seller shall deliver to Buyer the list of major development and construction activities, together with deadlines for the commencement and successful completion of those activities for Seller to achieve the Commercial Operation Date set forth in this Exhibit 3. The list of major development and construction activities, together with commencement and completion deadlines, shall include each of the activities set forth below. Each such major development and construction activity shall be deemed to be an Operational Milestone, and the deadline by which Seller must successfully complete each such activity for Seller to achieve the Commercial Operation Date set forth in this Exhibit 3 shall be deemed to be a Milestone Deadline. For each identified activity, Seller shall provide Buyer written notice, and any supporting documentation requested by Buyer in its Commercially Reasonable Discretion, that the identified activity has been commenced and/or successfully completed.
 - 4.1. Proof of Seller's rights and interest in the site upon which the Facility is to be constructed, including the applicable sale agreement or long-term lease.
 - 4.2. Delineation of any long lead-time procurement items, including a schedule for ordering and proof of such activity.
 - 4.3. A project key milestone schedule, reflecting the critical milestone events for design and construction of the facility including the date upon which Seller shall achieve: thirty and ninety percent detailed design; site mobilization and commencement; mechanical completion; substantial completion; and final completion.
 - 4.4. Identification of Seller's key personnel, with primary responsibility for the design and construction of the Facility and communications with Buyer.
 - 4.5. Seller's operations and maintenance plan.
 - ~~4.6.~~ Seller's performance and capacity testing plan and performance guarantees, in which Seller defines the performance output requirements of the Facility and describes the procedures and

DUKE ENERGY PROGRESS/CAROLINAS, LLC

timing for all testing that will be conducted to demonstrate whether the Facility meets the applicable performance requirements and conditions.

OFFICIAL COPY

May 25 2018

Exhibit 4

Facility Information

The Facility covered under this Agreement is hereby identified as follows:

1. Facility Name:
2. Facility Address:
3. Description of Facility (include number, manufacturer and model of Facility generating units, and layout):
4. Nameplate Capacity Rating:
5. Fuel Type/Generation Type:
6. Site Map (include location and layout of the Facility, equipment, and other site details):
7. Delivery Point Diagram (include Delivery Point, metering, Facility substation):
8. Control Equipment. Subject to final approval by Buyer as of the date of final execution of the Interconnection Agreement, ~~Seller proposes the following control equipment shall~~ be installed at the Facility as follows: ~~[Please describe the proposed control equipment and specifications, including, without limitation, control devices and associated functionality, telecommunication equipment, relaying specifications, and head unit controller for active power dispatch down and up to enable Buyer to have full control over the Facility to implement the control rights authorized in Section 8.6 of the Agreement]:~~ A Power Plant Controller (PPC) which includes all features required to comply with this Agreement and the Interconnection Agreement, including, but not limited to, active power control (dispatch), power factor set point control, voltage schedule set point control, active power ramp rates, and frequency response control (from regulation signal sent from System Operator). Set points such as active power control, as required by this Agreement, will be made available to Buyer via a hard-wired DNP3 path at the Facility's Point of Interconnection. Remote access to the Facility's HMI (the Plant Controller Interface) will be given for control of the required variables, by the Buyer
9. Storage Resources. Subject to final approval by Buyer as of the date of final execution of the Interconnection Agreement, ~~the following Storage resources shall be connected to or incorporated into the Facility [identify the design and all material components of any battery storage or other energy storage device connected to or incorporated into the Facility]~~

UPON EXECUTION OF THE AGREEMENT TO WHICH THIS EXHIBIT IS ATTACHED, ANY MATERIAL MODIFICATION TO THE FACILITY SHALL REQUIRE BUYER'S PRIOR APPROVAL, AND SHALL BE MEMORIALIZED IN WRITING IN AN AMENDMENT TO THE AGREEMENT.

Exhibit 5
Expected Annual Output

[Insert table]

Exhibit 6
Form of Guaranty

OFFICIAL COPY

May 25 2018

THIS GUARANTY AGREEMENT (this "Guaranty"), dated as of [date], is issued and delivered by [enter corporate legal name], a [state] [form of entity] (the "Guarantor"), for the account of [enter corporate name], a [state] [form of entity] (the "Obligor"), and for the benefit of [enter corporate name], a [state] [form of entity] (the "Beneficiary").

Background Statement

WHEREAS, the Beneficiary and Obligor entered into that certain _____ dated (the "Agreement"); and

WHEREAS, Beneficiary has required that the Guarantor deliver to the Beneficiary this Guaranty as an inducement to enter into the Agreement.

Agreement

NOW, THEREFORE, in consideration of the foregoing and for good and valuable consideration, the Guarantor hereby agrees as follows:

1. Guaranty; Limitation of Liability. Subject to any rights, setoffs, counterclaims and any other defenses that the Guarantor expressly reserves to itself under this Guaranty, the Guarantor absolutely and unconditionally guarantees the timely payment of the Obligor's payment obligations under the Agreement (the "Guaranteed Obligations"); provided, however, that the Guarantor's aggregate liability hereunder shall not exceed [amount] U. S. Dollars (U.S. [\$xx,xxx,xxx]).

Subject to the other terms of this Guaranty, the liability of the Guarantor under this Guaranty is limited to payments expressly required to be made under the Agreement, and except as specifically provided therein, the Guarantor shall not be liable for or required to pay any consequential or indirect loss (including but not limited to loss of profits), exemplary damages, punitive damages, special damages, or any other damages or costs.

2. Effect of Amendments. The Guarantor agrees that the Beneficiary and the Obligor may modify, amend and supplement the Agreement and that the Beneficiary may delay or extend the date on which any payment must be made pursuant to the Agreement or delay or extend the date on which any act must be performed by the Obligor thereunder, all without notice to or further assent by the Guarantor, who shall remain bound by this Guaranty, notwithstanding any such act by the Beneficiary.

3. Waiver of Rights. The Guarantor expressly waives (i) protest, (ii) notice of acceptance of this Guaranty by the Beneficiary, and (iii) demand for payment of any of the Guaranteed Obligations.

4. Reservation of Defenses. Without limiting the Guarantor's own defenses and rights hereunder, the Guarantor reserves to itself all rights, setoffs, counterclaims and other defenses that the Obligor may have to payment of all or any portion of the Guaranteed Obligations except defenses arising from the bankruptcy, insolvency, dissolution or liquidation of the Obligor and other defenses expressly waived in this Guaranty.

5. Settlements Conditional. This guaranty shall remain in full force and effect or shall be reinstated (as the case may be) if at any time any monies paid to the Beneficiary in reduction of the indebtedness of the Obligor under the Agreement have to be repaid by the Beneficiary by virtue of any provision or enactment relating to bankruptcy, insolvency or liquidation for the time being in force, and the liability of the Guarantor under this Guaranty shall be computed as if such monies had never been paid to the Beneficiary

6. Notice. The Beneficiary will provide written notice to the Guarantor if the Obligor defaults under the Agreement.

7. Primary Liability of the Guarantor. The Guarantor agrees that the Beneficiary may enforce this Guaranty without the necessity at any time of resorting to or exhausting any other security or collateral. This is a continuing Guaranty of payment and not merely of collection.

8. Representations and Warranties. The Guarantor represents and warrants to the Beneficiary as of the date hereof that:

- a. The Guarantor is duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation and has full power and legal right to execute and deliver this Guaranty and to perform the provisions of this Guaranty on its part to be performed;
- b. The execution, delivery and performance of this Guaranty by the Guarantor have been and remain duly authorized by all necessary corporate action and do not contravene any provision of its certificate of incorporation or by-laws or any law, regulation or contractual restriction binding on it or its assets;
- c. All consents, authorizations, approvals, registrations and declarations required for the due execution, delivery and performance of this Guaranty have been obtained from or, as the case may be, filed with the relevant governmental authorities having jurisdiction and remain in full force and effect, and all conditions thereof have been duly complied with and no other action by, and no notice to or filing with, any governmental authority having jurisdiction is required for such execution, delivery or performance; and
- d. This Guaranty constitutes the legal, valid and binding obligation of the Guarantor enforceable against it in accordance with its terms, except as enforcement hereof may be limited by applicable bankruptcy, insolvency, reorganization or other similar laws affecting the enforcement of creditors' rights or by general equity principles.

9. Nature of Guaranty. The Guarantor hereby agrees that its obligations hereunder shall be unconditional

irrespective of the impossibility or illegality of performance by the Obligor under the Agreement; the absence of any action to enforce the Agreement; any waiver or consent by Beneficiary concerning any provisions of the Agreement; the rendering of any judgment against the Obligor or any action to enforce the same; any failure by Beneficiary to take any steps necessary to preserve its rights to any security or collateral for the Guaranteed Obligations; the release of all or any portion of any collateral by Beneficiary; or any failure by Beneficiary to perfect or to keep perfected its security interest or lien in any portion of any collateral.

10. Subrogation. The Guarantor will not exercise any rights that it may acquire by way of subrogation until all Guaranteed Obligations shall have been paid in full. Subject to the foregoing, upon payment of all such Guaranteed Obligations, the Guarantor shall be subrogated to the rights of Beneficiary against the Obligor, and Beneficiary agrees to take at the Guarantor's expense such steps as the Guarantor may reasonably request to implement such subrogation.

11. Term of Guaranty. This Guaranty shall remain in full force and effect until the earlier of (i) such time as all the Guaranteed Obligations have been discharged, and (ii) [date] (the "Expiration Date"); provided however, the Guarantor will remain liable hereunder for Guaranteed Obligations that were outstanding prior to the Expiration Date.

12. Governing Law. This Guaranty shall be governed by and construed in accordance with the internal laws of the State of New York without giving effect to principles of conflicts of law.

13. Expenses. The Guarantor agrees to pay all reasonable out-of-pocket expenses (including the reasonable fees and expenses of the Beneficiary's counsel) relating to the enforcement of the Beneficiary's rights hereunder in the event the Guarantor disputes its obligations under this Guaranty and it is finally determined (whether through settlement, arbitration or adjudication, including the exhaustion of all permitted appeals), that the Beneficiary is entitled to receive payment of a portion of or all of such disputed amounts.

14. Waiver of Jury Trial. The Guarantor and the Beneficiary, through acceptance of this Guaranty, waive all rights to trial by jury in any action, proceeding or counterclaim arising or relating to this Guaranty.

15. Entire Agreement; Amendments. This Guaranty integrates all of the terms and conditions mentioned herein or incidental hereto and supersedes all oral negotiations and prior writings in respect to the subject matter hereof. This Guaranty may only be amended or modified by an instrument in writing signed by each of the Guarantor and the Beneficiary.

16. Headings. The headings of the various Sections of this Guaranty are for convenience of reference only and shall not modify, define or limit any of the terms or provisions hereof.

17. No Third-Party Beneficiary. This Guaranty is given by the Guarantor solely for the benefit of the Beneficiary, and is not to be relied upon by any other person or entity.

18. Assignment. Neither the Guarantor nor the Beneficiary may assign its rights or obligations under this Guaranty without the prior written consent of the other, which consent may not be unreasonably withheld or delayed. Notwithstanding the foregoing, the Beneficiary may assign this Guaranty, without the Guarantor's consent, provided such

assignment is made to an affiliate or subsidiary of the Beneficiary

Any purported assignment in violation of this Section 18 shall be void and without effect.

19. Notices. Any communication, demand or notice to be given hereunder will be duly given when delivered in writing or sent by electronic mail to the Guarantor or to the Beneficiary, as applicable, at its address as indicated below:

If to the Guarantor, at:

[Guarantor name]
[Address]
Attention: [contact]
Email:[email address]

With a copy to:

[Seller name]
[Address]
Attention: [contact]
Email:[email address]

If to the Beneficiary, at:

[Beneficiary name]
[Address]
Attention: [contact]
Email:[email address]

or such other address as the Guarantor or the Beneficiary shall from time to time specify. Notice shall be deemed given (a) when received, as evidenced by signed receipt, if sent by hand delivery, overnight courier or registered mail or (b) when received, as evidenced by email confirmation, if sent by email and received on or before 4 pm local time of recipient, or (c) the next business day, as evidenced by email confirmation, if sent by email and received after 4 pm local time of recipient.

DUKE ENERGY PROGRESS/CAROLINAS, LLC

IN WITNESS WHEREOF, the Guarantor has executed this
Guaranty as of the day and year first above written

[Guarantor name]

By: _____
Name:
Title:

Exhibit 7
Form of Letter of Credit

[LETTERHEAD OF ISSUING BANK]

Irrevocable Standby Letter of Credit No.: _____

Date: _____

Beneficiary:
[Duke Energy Carolinas, LLC][Duke Energy Progress, LLC]
550 S. Tryon Street, DEC 40C
Charlotte, North Carolina 28202
Attn: Chief Risk Officer

Ladies and Gentlemen:

By the order of:

Applicant:

We hereby issue in your favor our irrevocable standby letter of credit No.: _____ for the
account of _____ for an amount
or amounts not to exceed _____ US Dollars in the aggregate (US\$ _____)
available by your drafts at sight drawn on [Issuing Bank] effective _____ and
expiring at our office on _____ (the "Expiration Date").

The Expiration Date shall be deemed automatically extended without amendments for one year
from the then current Expiration Date unless at least ninety (90) days prior to the then applicable
Expiration Date, we notify you in writing by certified mail return receipt requested or overnight
courier that we are not going to extend the Expiration Date. During said ninety (90) day period,
this letter of credit shall remain in full force and effect

Funds under this letter of credit are available against your draft(s), in the form of attached Annex
1, mentioning our letter of credit number and presented at our office located at [Issuing Bank's
address must be in US] and accompanied by a certificate in the form of attached Annex 2 with
appropriate blanks completed, purportedly signed by an authorized representative of the
Beneficiary, on or before the Expiration Date in accordance with the terms and conditions of this
letter of credit. Partial drawings under this letter of credit are permitted.

Certificates showing amounts in excess of amounts available under this letter of credit are acceptable, however, in no event will payment exceed the amount available to be drawn under this letter of credit.

We engage with you that drafts drawn under and in conformity with the terms of this letter of credit will be duly honored on presentation if presented on or before the Expiration Date. Presentation at our office includes presentation in person, by certified, registered, or overnight mail.

Except as stated herein, this undertaking is not subject to any agreement, condition or qualification. The obligation of [Issuing Bank] under this letter of credit is the individual obligation of [Issuing Bank] and is in no way contingent upon reimbursement with respect hereto.

This letter of credit is subject to the International Standby Practices 1998, International Chamber Of Commerce Publication No. 590 ("ISP98"). Matters not addressed by ISP98 shall be governed by the laws of the state of New York.

We shall have a reasonable amount of time, not to exceed three (3) business days following the date of our receipt of drawing documents, to examine the documents and determine whether to take up or refuse the documents and to inform you accordingly.

Kindly address all communications with respect to this letter of credit to [Issuing Bank's contact information], specifically referring to the number of this standby letter of credit.

All banking charges are for the account of the Applicant.

This letter of credit may not be amended, changed or modified without our express written consent and the consent of the Beneficiary.

This letter of credit is transferable, and we agree to consent to its transfer, subject to our standard terms of transfer and your payment to us of our standard transfer fee.

Very truly yours
[Issuing Bank]

Authorized Signer

Authorized Signer

This is an integral part of letter of credit number: *[irrevocable standby letter of credit number]*

ANNEX I

FORM OF SIGHT DRAFT

[Insert date of sight draft]

To: *[Issuing Bank's name and address]*

For the value received, pay to the order of _____ by wire transfer of immediately available funds to the following account:

[name of account]

[account number]

[name and address of bank at which account is maintained]

[aba number]

[reference]

The following amount:

[insert number of dollars in writing] United States Dollars

(US\$ *[insert number of dollars in figures]*)

Drawn upon your irrevocable letter of credit No. *[irrevocable standby letter of credit number]* dated *[effective date]*

[Beneficiary]

By:

Title:

This is an integral part of letter of credit number: *irrevocable standby letter of credit number*

ANNEX 2

FORM OF CERTIFICATE

[Insert date of certificate]

To: *[issuing bank's name and address]*

[check appropriate draw condition]

[] An Event of Default (as defined in the [Name of Agreement between [Beneficiary's Name] and [Insert Counterparty's Name] dated as of (the "Agreement")) has occurred with respect to [Counterparty's Name] and such Event of Default has not been cured within the applicable cure period, if any provided for in the Agreement.

Or

[] [Counterparty's Name] is required, pursuant to the terms of the Agreement, to maintain a letter of credit in favor of [Beneficiary's Name], has failed to renew or replace the Letter of Credit and the Letter of Credit has less than thirty (30) days until the expiration thereof.

[Beneficiary]

By:

Title:

Exhibit 8

Acknowledgement of Non-Default

[Print Duke Energy letterhead]

Date:

Address of Seller

Re: Acknowledgement of Non-Default (the "Acknowledgement") of the Renewable Power Purchase Agreement, between [Duke Energy Carolinas, LLC][Duke Energy Progress, LLC] ("Buyer") and [insert Seller name] dated as of _____ (the "Agreement").

Dear Sir or Madam:

The undersigned, a duly authorized representative of Buyer hereby acknowledges to Seller that, as of the date of this Acknowledgement based on the actual knowledge of Buyer's personnel responsible for administering the Agreement after due inquiry of Buyer's internal records only, there is no current Event of Default by Seller under the Agreement, nor to Buyer's knowledge, has any event or omission occurred which, with the giving of notice or the lapse of time or both, would constitute an Event of Default under the Agreement and the Agreement is in full force and effect.

Notwithstanding any provision to the contrary set forth herein, Buyer reserves all rights and defenses available to it under the Agreement and nothing stated herein shall be deemed to have waived, amended or modified any such rights or defenses.

Except as specified herein to the contrary, capitalized terms used in this Acknowledgement shall have the meaning ascribed to such terms in the Agreement.

Sincerely,

[Duke Energy Carolinas, LLC][Duke Energy Progress, LLC]

By: _____

Name:

Title:

Exhibit 9

Power Plant Controller Output Points			
Analog	Units of Measure	Accuracy	Notes
Estimated Unit Active Power Operating High Limit		± 5 %	Estimated Generation currently possible given current equipment status, equipment characteristics, and current ambient conditions. Calculation based on site rating, percentage of inverters in service, POA irradiance, DC/AC ratio, ambient conditions, etc.
Estimated Unit Active Power Operating Low Limit		± 5 %	Estimated Minimum Generation currently possible given current equipment status, equipment characteristics, and current ambient conditions. Calculation based on site rating, percentage of inverters in service, POA irradiance, DC/AC ratio, ambient conditions, etc.
Air Temperature	Degrees Celsius	± 1°	
Back Panel Temperature	Degrees Celsius	± 1°	Temperature sensor mounted behind a solar photovoltaic panel.
Plane Of Array Irradiance- Primary Meter	Watts/Meter Sq.	± 25 W/m ²	Measured with a Class II pyranometer or equivalent equipment. For fixed-tilt sites, the sensor shall be mounted on a meteorological station facing the same angle and direction as the solar photovoltaic panels at the site. For tracking sites, the sensor shall be mounted on a tracker to be oriented at the same angle and direction as the solar photovoltaic panels at the site.
Plane Of Array Irradiance- Secondary Meter	Watts/Meter Sq.	± 25 W/m ²	Measured with a Class II pyranometer or equivalent equipment. For fixed-tilt sites, the sensor shall be mounted on a meteorological station facing the same angle and direction as the solar photovoltaic panels at the site. For tracking sites, the sensor shall be mounted on a tracker to be oriented at the same angle and direction as the solar photovoltaic panels at the site.
Global Horizontal Irradiance	Watts/Meter Sq.	± 25 W/m ²	Measured with a Class II pyranometer or equivalent equipment. The sensor shall be mounted on a metrological station set at the global horizontal angle of the earth in reference to the sun solar radiation.
Global Horizontal Diffuse Irradiance	Watts/Meter Sq.	± 25 W/m ²	Measured with a Class II pyranometer or equivalent equipment. All Solar irradiance coming from the sky and other reflected surfaces except for solar radiation coming directly from the sun and the circumsolar irradiance within approximately three degrees.

				of the sun. Global diffuse irradiance sensors follow the same accuracy and mounting requirements as the GHI sensors but shall be designed to measure diffused irradiance.
Direct Irradiance (Optional)	Watts/Meter Sq.	$\pm 25 \text{ W/m}^2$		Measured with a Class II pyranometer or equivalent equipment. Solar irradiance arriving at the earth's surface from the sun's direct beam, on a plane perpendicular to the beam and is typically measured on a solar tracker.
Number of Inverters in Ready Status				Sum of the Number of inverters currently in service. Can be a decimal if one or more inverters are partially available.
Digital	Status	Accuracy		Notes
Active Power Dispatch Event	ON/OFF			ON indicates the resource is currently being dispatched to the Active Power Automatic Generation Control Setpoint.
Plane Of Array Irradiance- Primary Meter Status	ON/OFF			Communications Online Offline Status
Plane Of Array Irradiance- Secondary Meter Status	ON/OFF			Communications Online Offline Status

For Facilities equipped with DC tied, behind a solar inverter, Storage Resources the following Power Plant Controller Output Points shall also be reported to Buyer¹

Analog	Units of Measure	Accuracy	Notes
Unit Net MW			The resource's real power output on the low side of the step-up transformer
Unit Gross MW			The resource's real power output before subtracting the auxiliary real power and step-up transformer real power losses
Unit Auxiliary MW			The resource's real power load the unit provides to maintain its station power.
Storage Device Active Power Operating (Discharging) High Limit	+MWs		Storage Device's Active Power Operating Limit given current equipment status characteristics, and current ambient conditions
Storage Device Active Power Operating (Charging) Low Limit	-MWs		Storage Device's Active Power Operating Limit given current equipment status characteristics, and current ambient conditions
Number of Storage Device DC-DC Converters in Ready Status			Sum of the Number of DC-DC Converters in service. Can be a decimal if one or more Converters are partially available.
Allowable Depth of Discharge	MWh		MWh energy storage potential, considering recommendations and any emergency

¹ For non-DC tied, behind a solar inverter, Storage Resources Buyer may require additional Power Plant Controller Output Points to be reported upon reasonable notice to Seller.

			limitations, at a given point in time.
<u>State of Charge</u>			<p>Percentage of the Allowable Depth currently charged within the storage.</p> <p>Example: A nameplate rated 10 MWh device is currently allowed to store 80% of its nameplate rating and does not reach its nameplate rating. The storage device currently has 4 MWhs stored in the device.</p> <p>The Allowable Depth of Discharge is calculated as follows: $80\% - 10 \text{ MWh} * 20\% = 6 \text{ MWh}$</p> <p>The State of Charge = 4 MWh / 6 MWh</p>
<u>Max MWh Charge</u>			Maximum amount of energy currently be stored in the energy device given current equipment status, equipment characteristics, and current ambient conditions.
<u>Min MWh Charge</u>			Minimum amount of energy currently be stored in the energy device given current equipment status, equipment characteristics, and current ambient conditions.
<u>Bulk Discharge Window Start Timestamp</u>			The Timestamp of the start of the Bulk Discharge Window.
<u>Bulk Discharge Window End Timestamp</u>			The Timestamp of the end of the Bulk Discharge Window.
<u>Bulk Discharge Window Active Power Setpoint</u>			Active Power Setpoint for the current Bulk Discharge window taking into account the device's current State of Charge and Depth of Discharge.
Digital	Status	Accuracy	Notes
<u>Storage Device Breaker Status</u>	<u>OPEN/CLOSED</u>		Indicates whether the Unit Generator is Open or Closed.

Exhibit 10

Energy Storage Protocol

1. The Storage Resource must be on the DC side of the inverter and charged exclusively by the Facility.
2. The Storage Resource will be controlled by the Seller, within operational limitations described below.
3. The maximum output of the Facility, including any storage capability, at any given time shall be limited to the Facility's maximum Nameplate Capacity Rating (AC) as specified in the Agreement.
4. The Seller may not increase the Facility's Capacity, including any DC Nameplate Capacity Rating (MW) or AC Nameplate Capacity Rating (MW) or Storage Resource capacity (MW/MWh) beyond what is specified in the Agreement.
5. The discharge of stored energy is not permitted while the Facility has received or is subject to a Dispatch Down instruction or control signal from the System Operator.
6. Ramp rates for Storage Resource shall not exceed 2 percent of the Facility's Nameplate Capacity Rating on a per minute basis, whether up or down, at any time that the Facility is not generating.
7. When the Facility is generating, the Storage Resource shall not act to increase the net ramp rate of the Facility by more than 1 percent of the Facility's Nameplate Capacity Rating per minute in relation to the output from the Facility alone, over a one minute interval, up or down.
8. Scheduling and other storage limitations:
 - a. Seller shall, by 8am each day, provide a day-ahead forecast of planned initial state of energy storage (MWh) and planned charging (MWh) of storage for each hour.
 - b. By 4pm each day, Buyer will make commercially reasonable efforts to provide Seller with a window for bulk discharge with start and end times for the following day, including off-peak days.
 - i. Outside of the bulk discharge window, discharge of the Storage Resource will not be permitted until the Storage Resource reaches and remains at a state of charge of at least 70% of the Allowable Depth of Discharge (as defined below).
 - ii. During on-peak days, the bulk discharge window will be entirely contained within the respective on-peak hours.

- iii. Buyer will make commercially reasonable efforts to provide a minimum of 3 hours to discharge remaining battery capacity within each on-peak period.
- iv. The discharge rate (in MW) shall be levelized across the bulk discharge window except as limited by ramp rate criteria or inverter capability.
- v. For non-summer periods, if the bulk discharge window is not long enough to empty the battery before solar generation is expected to be at full output, the bulk discharge window may be moved up to allow full storage discharge within the on-peak window.
- c. The storage charging (Active Power) when the Storage Resource is not inverter limited, shall be limited to 30% of a Facility's storage Allowable Depth of Discharge (e.g., a 10MWh battery with an Allowable Depth of Discharge of 8MWh could charge Active Power at a maximum of 2.4MW).
- 9. Buyer reserves the right to add or modify operating restrictions if later determined necessary to ensure renewable plus storage facilities do not increase challenges of balancing load and generation on the System relative to a comparable stand-alone renewable facility.
- 10. Seller will only be compensated for Energy and Capacity actually provided to Buyer in accordance with the terms of the Agreement.

Notes:

- a) For facilities equipped with energy storage devices, Seller shall be required to provide the "Nameplate Capacity Ratings" for the Facility in both AC and DC and include in Exhibit 4.
- b) The storage device capacity (MW and MWh) shall be specified in Exhibit 4.

Definitions:

"Allowable Depth of Discharge" shall mean the MWh energy storage potential, considering the original equipment manufacturer's recommendations and any emergent operating limitations, at a given point in time.

Other capitalized terms used in this Exhibit which have not been defined herein shall have the meaning ascribed to such terms in the Agreement to which this exhibit is attached.

Document comparison by Workshare Compare on Monday, May 07, 2018
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Padding cell	

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