

January 11, 2018

434 Fayetteville Street  
Suite 2800  
Raleigh, NC 27601

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

**RE:                    *North Carolina Clean Energy Business Alliance  
In the Matter of Petition for Approval of Competitive Procurement of  
Renewable Energy Program  
NCUC Dockets E-2, Sub 1159 and E-7, Sub 1156  
ATTACHMENT TO JOINT COMMENTS OF NORTH CAROLINA  
CLEAN ENERGY BUSINESS ALLIANCE AND NORTH CAROLINA  
SUSTAINABLE ENERGY ASSOCIATION  
PART 2 OF 2***

Dear Ms. Jarvis:

On behalf of the North Carolina Clean Energy Business Alliance ("NCCEBA") and North Carolina Sustainable Energy Association ("NCSEA"), we hereby submit the Attachment as referenced in the Joint Comments of NCCEBA and NCSEA that were filed with the Commission on January 10, 2018 in the above referenced dockets.

This Attachment was filed on January 10, 2018 as well, but was rejected. Notice of same was received this morning. The Attachment to the Joint Comments was rejected because a docket number was not shown on the Attachment itself. Docket numbers have now been noted on the Attachment.

The Commission's system also rejected the filing yesterday evening when filed as a whole due to the size of the document being too large. Therefore, we are herewith submitting the Attachment in two parts – Part 1 of 2 and Part 2 of 2. Please accept **Part 2 of 2 as attached**. The filing of Part 1 of 2 superseded this submittal.

Thank you in advance for your assistance. If you have any questions or comments regarding this filing, please do not hesitate to call me.

Very truly yours,

/s/Karen M. Kemerait

pbb

Karen M. Kemerait | Direct: 919-755-8764 | karen.kemerait@smithmoorelaw.com | www.smithmoorelaw.com

Ms. Lynn Jarvis  
Chief Clerk  
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Enclosure

cc: Christopher J. Ayers, Esq.  
Parties of Record

**ATTACHMENT TO JOINT COMMENTS OF NCCEBA  
AND NCSEA FILED ON 1-10-2018 IN DOCKET  
NUMBERS E-2, SUB 1159 AND E-7, SUB 1156**

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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.

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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, provided, however, that where the Force Majeure event cannot be remedied with 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 (90) days after the initial sixty (60) days period and the non-claiming Party uses commercially reasonable efforts to implement such plan, the non-claiming party shall not have the right to terminate the Agreement until the expiration of such additional ninety (90) day period. ~~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 the Force Majeure has not been fully remedied within the ninety (90) additional days, the Agreement shall terminate automatically on the ninety-first (91<sup>st</sup>) day without any action or notice by the other Party.~~

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**

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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

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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

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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;

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- 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.

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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.
- 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, if such Operational Milestone cannot be cured prior to the Commercial Operation Date (other than the Commercial Operation Date that is governed exclusively by Section 19.9);
- 19.9. Seller fails to achieve Commercial Operation by the Commercial Operation Date, as it may be extended pursuant Section 20.5.1;
- 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 thirtyfive (3015) 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 thirtyfive (305) Business 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 material System Operator Instruction, and such failure is not promptly cured.
- 19.18. Seller fails to provide, replenish, renew, or replace the Performance Assurance and/or credit related provision otherwise fails to fully comply with the requirements of this Agreement, including without limitation, Section 5, and any such failure is not cured within

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~~fivetwo~~ (52) 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 set forth in Section 26.10; and
- 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 ~~thirtytwo~~ (3020) 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

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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. 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 Commercial Operation Date obligations as set forth in Exhibit 3 (the "First COD Date"), then Seller agrees that it will be liable to Buyer and will pay Buyer liquidated damages [(LD)] in the amount of [4% x total projected revenue under the Agreement during the first year of the Term as determined by Buyer in its reasonable discretion \_\_\_\_\_ U.S. dollars (\$ \_\_\_\_\_) divided by one hundred and eighty (180)] within five (5) Business Days after the First 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.~~

~~20.5.1.1. Within five (5) Business Days of achieving Commercial Operation Seller shall pay Buyer liquidated damages in the amount of [LD amount specified in 20.5 divided by 90] U.S. dollars (\$ \_\_\_\_\_) per day for each day that Commercial Operation was delayed beyond the First COD Date up to and including the ninetieth (90th) day following the First COD Date as the per diem liquidated damages for failing to timely achieve Commercial Operation by the First COD Date.~~

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~~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).~~

~~20.5.1.3. If Seller does not terminate this Agreement pursuant to Section 20.5.1.2 and is able 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 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 paid pursuant to Section 20.5.1.2 in the amount of [the LD amount specified in 20.5] \_\_\_\_\_ U.S. dollars (\$ \_\_\_\_\_)).~~

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 [Buyer's actual damages] ~~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.

~~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, 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 3.8% (three and eight tenths percent)] [DEC 3.75% (three and seventy five hundredths percent)] until repaid (the~~

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~~"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.~~

~~20.7.20.6. Survival.~~ This Section 20 will survive any expiration or termination of this Agreement.

21. **Cover Costs.**

21.1. Exclusive Remedies. Except as otherwise set forth in this Agreement, specifically including Section 8.5 to the extent that a delivery shortfall is not the result of the Seller delivering Product to a party other than the Buyer, 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 that Seller failed to deliver to Buyer 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

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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.

**DUKE ENERGY PROGRESS/CAROLINAS, LLC**

- 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 (3<sup>rd</sup>) 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 (3<sup>rd</sup>) 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 (3<sup>rd</sup>) 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

**DUKE ENERGY PROGRESS/CAROLINAS, LLC**

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**

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- 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") 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. 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 to any person, including any affiliate or subsidiary of Buyer, whether or not an Affiliate, without any restriction, provided, however, that any assignment of this Agreement by Buyer that gives Seller Commercially Reasonable grounds for financial insecurity about the ability of Buyer's successor to perform the obligations of Buyer under this Agreement shall be subject to the approval of Seller, which shall not be unreasonably withheld.*
- 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 under this Agreement, *provided, however, the exercise by a financing party of its rights under such pledge of collateral security, including through foreclosure, shall be permitted under this Agreement.*
- 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.
- 24.4. Delivery of Assurances & Voidable. Any 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 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 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 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.
- 24.5. Cost Recovery. Without limiting Buyer's rights under this Section 24, to the extent Buyer agrees to a request from Seller for an assignment, 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.

## DUKE ENERGY PROGRESS/CAROLINAS, LLC

- 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.

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- 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 not 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: \_\_\_\_\_

DUKE ENERGY PROGRESS/CAROLINAS, LLC

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        |   |

DUKE ENERGY PROGRESS/CAROLINAS, LLC

Exhibit 2  
Contract Price

| <u>Relevant Portion of the Delivery Period</u> | <u>Contract Price</u> |
|--|-----------------------|
|  |                       |
|  |                       |
|  |                       |
|  |                       |

## DUKE ENERGY PROGRESS/CAROLINAS, LLC

## 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                 |
|          | 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.~~
  - ~~1.8. 1.7.~~ Not require any bonds or performance guarantees that have not already been obtained.
  - ~~1.9. 1.8.~~ No general condition to financing that the lender be satisfied with the project in its discretion.
  - ~~1.10. 1.9.~~ 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.

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

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Exhibit 4

Facility Information

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 control equipment 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]

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Exhibit 5

Expected Annual Output