



**Hawaiian
Electric**

*Model
Energy Storage Power
Purchase Agreement*

~~*April 1,*~~
July 10, 2019
~~*Draft*~~ *Version*

~~Drafting Note: This document has been prepared for Hawaiian Electric Company, Inc. projects. It will be adapted for use for by Hawaii Electric Light Company Inc. and Maui Electric Company, Limited by (1) changing the entity designated as “the Company,” (2) modifying the Company’s address for notices at Section 27.3(a), (3) modifying the Hawaii general excise tax rate at Section 27.20, (4) revising the Company’s signature Block and (5) substituting the form-~~

~~of Attachment B (Facility Owned by Seller) appropriate to the designated Company entity. There may also be revisions to a limited number of other provisions. For Hawaii Electric Light, the forms of Attachment N (Acceptance Test General Criteria) and Attachment O (Control System Acceptance Test Criteria) will also be modified, as will the defined terms to the extent necessary to conform to Hawaii Electric Light's Attachments B, N and O.~~

This document indicates, for information purposes only, the terms and conditions that may be negotiated in a contract for the sale of energy storage services to be executed by Hawaiian Electric Company, Inc. The terms and conditions that may be offered by Hawaiian Electric Company, Inc. in an energy storage power purchase agreement may be modified to reflect factors such as different storage technologies, project specifics, changes in applicable rules, guidance from the Public Utilities Commission in proceedings concerning the approval or negotiation of such energy storage power purchase agreements, results of an interconnection requirements study and other negotiated terms and conditions. This document also assumes that the proposed facility will be a battery energy storage system. If a proposal containing technology other than a battery for the energy storage system is selected for the RFP's final award group, replacement provisions accounting for such differing technology will need to be developed for the energy storage power purchase agreement for such project proposal.

[NOTE: TEXT WITHIN THIS DOCUMENT THAT APPEARS IN BOLD AND/OR BRACKETS INDICATES A PROVISION THAT MAY REQUIRE REVISION TO CONFORM TO A SPECIFIC PROJECT.]

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ENERGY STORAGE

POWER PURCHASE AGREEMENT

This Energy Storage Power Purchase Agreement, together with the Attachments (collectively, this “**Agreement**”) is made and entered into as of this [____] day of [Month], [Year] (“**Execution Date**”) by **HAWAIIAN ELECTRIC COMPANY, INC.**, a Hawai‘i corporation (“**Company**,” and [**SELLER**], a [Seller’s business registration] (“**Seller**”). Company and Seller are sometimes referred to herein individually as a “**Party**” and jointly as the “**Parties**.” Capitalized terms used in this Agreement and not otherwise defined in the context in which they first appear are defined in the Schedule of Defined Terms.

RECITALS

WHEREAS, Company is an operating electric public utility on the Island of O‘ahu, subject to the Hawai‘i Public Utilities Law (Hawai‘i Revised Statutes, Chapter 269) and the rules and regulations of the Hawai‘i Public Utilities Commission (the “**PUC**”); and

WHEREAS, the Company System is operated as an independent power grid and must both maximize system reliability for its customers by ensuring that sufficient generation is available and meet the requirements for voltage stability, frequency stability, and reliability standards; and

WHEREAS, Seller desires to build, own and operate a safe, reliable and operationally flexible battery energy storage system to provide the Company System with those benefits and services associated with the Energy Storage Services, as defined herein; and

WHEREAS, Seller understands the need to use all commercially reasonable efforts to maximize the overall reliability of the Company System; and

WHEREAS, the Facility is proposed to be located at _____, County of Honolulu, State of Hawai‘i, as more fully described in **Attachment A** (Description of Storage Facility) and **Attachment B** (Facility Owned by Seller) attached hereto and made a part hereof; and

WHEREAS, Seller desires to sell to Company, and Company agrees to purchase upon the terms and conditions set forth herein, the availability of the Energy Storage Services provided by the Facility;

NOW, THEREFORE, in consideration of the premises and the respective promises herein, Company and Seller hereby agree as follows:

ARTICLE 1

PARALLEL OPERATION

In connection with its operation of the Facility to provide the Energy Storage Services to Company, Seller shall comply in all respects with any and all requirements and obligations to enable the interconnection and parallel operation of the Facility with the Company System; provided, however, that such interconnection and parallel operation (a) shall not (i) adversely affect Company's property or the operations of its customers and customers' property; (ii) present safety hazards to the Company System, Company's property or employees or Company's customers or the customers' property or employees; or (iii) otherwise fail to comply with any applicable Laws, Governmental Approvals, Company's interconnection requirements or this Agreement; and (b) shall be contingent upon the satisfactory completion, as determined solely by Company, of the Acceptance Test and, to the extent applicable, the Control System Acceptance Test, in accordance with Good Engineering and Operating Practices.

ARTICLE 2

FACILITY OWNED AND OPERATED BY SELLER

~~2.1.~~ 2.1. Facility Owned and Operated by Seller.

Seller agrees to design, furnish, install, operate and maintain the Facility in accordance with all applicable Laws, Governmental Approvals, Good Engineering and Operating Practices and the terms and conditions of this Agreement. Seller agrees that no changes or additions to the Facility shall be made without prior written approval by Company and amendment to the Agreement unless such changes or additions to the Facility could not reasonably be expected to have a material effect on the assumptions used in performing the IRS.

2.1. ~~2.2.~~ Allowed Capacity.

The net instantaneous MW output from the Facility may not exceed the Allowed Capacity. Seller shall take all necessary affirmative action to limit Discharge Energy to no more than the Allowed Capacity. Company may take appropriate action to limit the Discharge Energy pursuant to, but not limited to, **Article 12** (Dispatching and Charging the Facility; Scheduling); **Article 16** (Personnel and System Safety), **Attachment B** (Facility Owned by Seller) and Good Engineering and Operating Practices. Company shall not be required to pay for any Discharge Energy.

2.2. ~~2.3.~~ Interconnection Requirements Study.

If this Agreement is executed prior to completion of the Interconnection Requirements Study, then following the completion of the IRS:

(a) The Parties shall, no later than the ESPPA Amendment Deadline, execute a formal amendment to this Agreement substituting new versions of **Attachment B** (Facility Owned by Seller), **Attachment E** (Single-Line Drawing and Interface Block Diagram), **Attachment F** (Relay List and Trip Scheme), **Attachment G** (Company-Owned Interconnection Facilities), **Attachment K** (Guaranteed Project Milestones), **Attachment K-1** (Seller's Conditions Precedent and Company Milestones) and **Attachment L** (Reporting Milestones) (the “**Interconnection Requirements Amendment**”) to reflect the results of the IRS; or

(b) This Agreement may be declared null and void (i) by either Party upon written notice to the other Party if the Interconnection Requirements Amendment is not executed by the ESPPA Amendment Deadline; or (ii) by Seller upon written notice delivered to Company no later than the Termination Deadline.

ARTICLE 3

TERM OF THE AGREEMENT

3.1. Term

Subject to **Section 3.3** (Effectiveness of Certain Obligations), the initial term of this Agreement shall commence upon the Execution Date, and, unless earlier terminated as provided herein, shall remain in effect for [] Contract Years following the Commercial Operations Date (the “**Initial Term**”). This Agreement shall automatically terminate upon expiration of the Initial Term. If the Parties desire, the Parties may negotiate terms and conditions of an extension term (“**Extended Term**”), including reduced contract pricing terms in recognition that Seller will have recovered its capital and financing costs, which terms and conditions (a) shall be submitted to the PUC by Company for approval no later than one (1) year prior to the expiration of the Initial Term and (b) shall have no effect without PUC approval.

3.2. Information Sharing and Shared Learning.

Seller acknowledges that Company is entering into this Agreement, in part, to gain operational and market information regarding the performance, efficiency, operations, maintenance, and uses of energy storage assets as an integral part of Company’s portfolio of assets to meet its customers’ needs. Throughout the Term, Seller agrees to share such information with Company upon Company’s reasonable request, with such information to be treated by Company as confidential if Seller so requests. which will include, without limitation, design logic, and tunable parameters and values, which in total determine the technical and operational characteristics, and historical data to review operational performance.

3.3. Effectiveness of Certain Obligations.

Only **Article 2** (Facility Owned and/or Operated By Seller), this **Article 3** (Term of the Agreement); **Article 6** (Events of Default; Remedies; Termination), **Article 14** (Credit Assurance and Security), as it relates to Development Period Security, **Article 15** (Sale and Assignment), **Article 18** (Representations and Warranties), **Article 19** (Limitations), **Article 20** (Indemnification), **Article 23** (Financial Compliance), **Article 24** (Regulatory Approval), **Article 26** (Dispute Resolution), **Article 27** (Miscellaneous), **Section 3** (Seller Payment to Company for Company-Owned Interconnection Facilities and Review of Facility) of **Attachment G** (Company-Owned Interconnection Facilities) and the Schedule of Defined Terms of this Agreement shall become effective on the Execution Date. Except where obligations of the Parties are explicitly stated as being effective before the Effective Date, all other portions of this Agreement shall become effective on the Effective Date.

3.4. Prior to Effective Date.

Company may, by written notice delivered prior to the Effective Date, declare the Agreement null and void if any one or more of the following conditions applies:

(a) Seller implements a material change to the Facility (i) without following the requirements of **Section 8(b)** of **Attachment A** (Description of Storage Facility); or (ii) in a manner inconsistent with the process established under **Section 2.3** (Interconnection Requirements Study).

(b) Seller is in breach of any of its representations and warranties under this Agreement, including, but not limited to: (i) Seller's representation and warranty in **Section 18.2(c)** and **(d)** that Seller have all Land Rights and Governmental Approvals as provided therein; and (ii) the provisions of **Section 3(b)** (Total Estimated Interconnection Cost) of **Attachment G** (Company-Owned Interconnection Facilities) requiring the payment by Seller to Company of the amounts specified within the time periods provided therein.

(c) Seller, subsequent to making the payment to Company required under **Section 3(b)(ii)** (Company-Owned Interconnection Facilities Prepayment) of **Attachment G** (Company-Owned Interconnection Facilities), or subsequent to making the payment to Company to pay for the IRS, requests in writing that Company stop or otherwise delay the performance of the work for which Company received such payment.

3.5. Agreement Null and Void.

If the Agreement is declared null and void pursuant to **Section 2.3** (Interconnection Requirements Study), **Section 3.4** (Prior to Effective Date), **Section 24.3** (Time Period for PUC Submittal Date), or **Section 24.4** (Time Period for PUC Approval), the Parties hereto shall thereafter be free of all obligations hereunder except as set forth in this **Section 3.5** (Agreement Null and Void) and **Section 14.1(b)** (Return of Development Period Security), and shall pursue no further remedies against the other; provided, however, that if, in response to Seller's request and offer of adequate assurance of reimbursement, Company agrees in writing to incur costs associated with Company-Owned Interconnection Facilities prior to the Non-Appealable PUC Approval Order Date or completion of the IRS: (a) Seller shall pay Company the actual costs and cost obligations incurred by Company as of the date the Agreement is declared null and void for Company-Owned Interconnection Facilities and any reasonable costs incurred thereafter; and (b) Company shall refund to Seller any amounts advanced by Seller in excess of such costs. A declaration that this Agreement is null and void pursuant to **Section 2.3** (Interconnection Requirements Study), **Section 3.4** (Prior to Effective Date), **Section 24.3** (Time Period for PUC Submittal Date), or **Section 24.4** (Time Period for PUC Approval), shall not affect the following provisions, which shall remain in full force and effect: **Section 3.2** (Information Sharing and Shared Learning), **Section 3.3** (Effectiveness of Certain Obligations), this **Section 3.5** (Agreement Null and Void), **Section 23.2** (Confidentiality), **Article 26** (Dispute Resolution), **Section 27.3** (Notices), **Section 27.8** (Governing Law, Jurisdiction and Venue), **Section 27.13** (Settlement of Disputes), **Section 27.16** (Computation of Time), **Section 27.19** (No Third-Party Beneficiaries), **Section 27.20** (Hawai'i General Excise Tax), and **Section 7** (Land Restoration) of **Attachment G** (Company-Owned Interconnection Facilities). Notwithstanding the foregoing, the right of either Party to terminate the Agreement at any time upon the occurrence of any Event of Default described in **Article 6** (Events of Default; Remedies; Termination) shall remain in full force and effect.

ARTICLE 4

COMPENSATION; PERFORMANCE METRICS

[DRAFTING NOTE: For any projects which intend to meet the capacity need for Oahu and which propose a GCOD after March 2022 (but, in no event later than June 1, 2022), such projects shall be required to meet the availability and performance metrics of this Article 4 immediately as of GCOD (i.e., no seasoning period), and liquidated damages would be assessable for failure to satisfy such metrics without taking into account a seasoning period. Conforming revisions to be made based on a project's proposed GCOD and whether such project intends to meet the capacity need for Oahu.]

4.1. Lump Sum Payment.

Commencing on the Commercial Operations Date, Company shall pay to Seller a monthly Lump Sum Payment in consideration for the availability of the Facility's Energy Storage Services to respond to Company Dispatch/Charge in accordance with this Agreement. For purposes of calculating the monthly Lump Sum Payment, the monthly Lump Sum Payment shall be adjusted downward to account for the time the Facility is not available for Company Dispatch/Charge because of a Force Majeure condition (a) at the Facility or (b) that otherwise delays or prevents the Seller from making the Facility available for Company Dispatch/Charge, as more fully set forth in **Attachment J** (Adjustment to Lump Sum Payment) to this Agreement.

4.2. Performance Metrics.

In order to provide Company with reasonable assurances of the Facility's capability to make the Energy Storage Services available for Company Dispatch/Charge: (a) the Capacity Performance Metric shall be used to confirm the capability of the Facility to discharge continuously for six (6) hours at Maximum Rated Output or to discharge continuously for a total energy (MWh) equal to the Contract Capacity if the test is conducted at less than Maximum Rated Output; (b) the EAF Performance Metric shall be used to determine whether the Facility is meeting its expected availability; ~~and~~ (c) the EFOF Performance Metric shall be used to evaluate whether the Facility is experiencing excessive unplanned outages; and (d) the RTE Performance Metric shall be used to evaluate the Facility's storage efficiency. Seller shall design, operate and maintain the Facility in a manner consistent with the standard of care reasonably expected of an experienced owner/operator with the desire and financial resources necessary to design, operate and maintain the Facility to achieve the Performance Metrics all in accordance with Good Engineering and Operating Practices. The Performance Metrics set forth in **Section 4.3** (Capacity Performance Metric) through **Section 4.5** (Equivalent Forced Outage Factor Performance Metric) of this Agreement shall be interpreted consistent with the NERC GADS Data Reporting Instructions.

4.3. Capacity Performance Metric.

(a) **Capacity Test and Liquidated Damages.** ~~For~~During commissioning, and for each Measurement Period following the Commercial Operations Date, the

Facility shall be required to complete a Capacity Test, as more fully set forth in **Attachment T** (~~Capacity Test~~ Facility Tests) to this Agreement. For each Measurement Period for which the Facility fails to demonstrate that it satisfies the Capacity Performance Metric, Seller shall pay, and Company shall accept, as liquidated damages for such shortfall, the amount set forth in the following table (on a progressive basis) upon proper demand at the end the Measurement Period in question:

Capacity Ratio	Liquidated Damage Amount
<u>Tier 1</u> 95.0% - 99.9%	For each one-tenth of one percent (0.001) that the Capacity Ratio is below 100% and is above 94.9%, an amount equal to one-tenth of one percent (0.001) of the Lump Sum Payment for the Measurement Period in question; plus
<u>Tier 2</u> 85.0% - 94.9%	For each one-tenth of one percent (0.001) that the Capacity Ratio is below 95% and is above 84.9%, an amount equal to one and a half-tenths of one percent (0.0015) of the Lump Sum Payment for the Measurement Period in question; plus
<u>Tier 3</u> 75.0% - 84.9%	For each one-tenth of one percent (0.001) that the Capacity Ratio is below 85% and is above 74.9%, an amount equal to two-tenths of one percent (0.002) of the Lump Sum Payment for the Measurement Period in question; plus
<u>Tier 4</u> 60.0% - 74.9%	For each one-tenth of one percent (0.001) that the Capacity Ratio is below 75% and is above 59.9%, an amount equal to two and a half-tenths of one percent (0.0025) of the Lump Sum Payment for the Measurement Period in question; plus
<u>Tier 5</u> 50.0% - 59.9%	For each one-tenth of one percent (0.001) that the Capacity Ratio is below 60% and is above 49.9%, an amount equal to three-tenths of one percent (0.003) of the Lump Sum Payment for the Measurement Period in question; plus
<u>Tier 6</u> 49.9% and below ("Lowest Capacity Bandwidth")	For each one-tenth of one percent (0.001) that the Capacity Ratio is below 50%, an amount equal to three and a half-tenths of one percent (0.0035) of the Lump Sum Payment for the Measurement Period in question.

For purposes of determining liquidated damages under this **Section 4.3(a)** (Capacity Test and Liquidated Damages), the starting and end points for the duration of the period that the Facility discharges shall be rounded to the nearest MWh. Each Party agrees and acknowledges that (i) the damages that Company would incur if the Seller fails to achieve the Capacity Performance Metric for a Measurement Period would be difficult or impossible to calculate with certainty and (ii) the aforesaid liquidated

damages are an appropriate approximation of such damages.

EXAMPLE: The following is an example calculation of liquidated damages for the Capacity Performance Metric and is included for illustrative purposes only. Assume the following:

The Maximum Rated Output for the Facility is 25 MW.

A Capacity Test was conducted and the Facility was measured to have discharged 97.5 MWh

Contract Capacity = 25 MW x 6 hours = 150 MWh

Capacity Ratio = MWh Discharged ÷ Contract Capacity = 97.5 MWh ÷ 150 MWh = 0.65

LD = [((1 - 0.950) x 1) + ((0.950 - 0.850) x 1.5) + ((0.850 - 0.750) x 2 + ((0.750 - 0.65) x 2.5)] x Lump Sum Payment for the Measurement Period in question

= 0.65 x Lump Sum Payment for the Measurement Period in question

(b) Capacity Test Termination Rights. The Parties acknowledge that, although the intent of the liquidated damages payable under **Section 4.3(a)** (Capacity Test and Liquidated Damages) is to compensate Company for the damages that Company would incur if the Facility fails to demonstrate satisfaction of the Capacity Performance Metric during a Measurement Period, such liquidated damages are not intended to compensate Company for the damages that Company would incur if a pattern of underperformance establishes a reasonable expectation that the Facility is likely to continue to substantially underperform the Company's expectations. Accordingly, and without limitation to Company's rights under said **Section 4.3(a)** (Capacity Test and Liquidated Damages) for those Measurement Periods during which the Facility fails to demonstrate satisfaction of the Capacity Performance Metric, substantial underperformance shall give rise to a termination right as set forth in this **Section 4.3(b)** (Capacity Test Termination Rights). If the Facility is in the Lowest Capacity Bandwidth for any two Measurement Periods during a 12-month period, an **[18-month]** cure period (the "**Capacity Cure Period**") will commence on the Day following the close of the second such Measurement Period. For each Measurement Period during such Capacity Cure Period, Capacity Tests shall continue to be conducted as set forth in **Attachment T** (~~Capacity Test~~Facility Tests) to demonstrate satisfaction of the Capacity Performance Metric during such Measurement Period, and liquidated damages paid and accepted as set forth in **Section 4.3(a)** (Capacity Test and Liquidated Damages); provided, however, that if the Seller fails to demonstrate satisfaction of the Capacity Performance Metric prior to the expiration of the Capacity Cure Period, such failure shall constitute an Event of Default under **Section 6.1(c)** of this Agreement for which Company shall have the rights (including but not limited to the termination rights) set forth in **Article 6** (Events of Default; Remedies; Termination).

4.4. Equivalent Availability Factor Performance Metric.

(a) Annual Equivalent Availability Factor and Liquidated Damages. For

each Measurement Period following the Commercial Operations Date, an Annual Equivalent Availability Factor (“**Annual EAF**”) shall be calculated as set forth in **Attachment U** (Annual Equivalent Availability Factor). If the Annual EAF for such Measurement Period is less than **97%** (the “**EAF Performance Metric**”), Seller shall pay, and Company shall accept, as liquidated damages for such shortfall, the amount set forth in the following table (on a progressive basis) upon proper demand at the end the current Measurement Period:

Annual Equivalent Availability Factor	Liquidated Damage Amount
<u>Tier 1</u> 85.0% - 96.9%	For each one-tenth of one percent (0.001) by which the Annual EAF falls below 97% but equal to or above 85%, an amount equal to one-tenth of one percent (0.001) of the Lump Sum Payment for the Measurement Period in question; plus
<u>Tier 2</u> 80.0% - 84.9%	For each one-tenth of one percent (0.001) by which the Annual EAF falls below 85% but equal to or above 80%, an amount equal to two-tenths of one percent (0.002) of the Lump Sum Payment for the Measurement Period in question; plus
<u>Tier 3</u> 75.0% - 79.9%	For each one-tenth of one percent (0.001) by which the Annual EAF falls below 80% but equal to or above 75%, an amount equal to three-tenths of one percent (0.003) of the Lump Sum Payment for the Measurement Period in question; plus
<u>Tier 4</u> Below 75.0%	For each one-tenth of one percent (0.001) by which the Annual EAF falls below 75%, an amount equal to four-tenths of one percent (0.004) of the Lump Sum Payment for the Measurement Period in question.

Such liquidated damages shall be due within thirty (30) Days after the first to occur of the end of such Measurement Period or the end of Term. In the event Seller fails to pay Company amounts of liquidated damages due under this **Section 4.4(a)** (Annual Equivalent Availability Factor and Liquidated Damages) within thirty (30) Days of receipt of Company’s written demand, Company may, without limitation to any other remedy Company may have, set-off such amounts due against payments it is otherwise obligated to make under this Agreement.

For purposes of determining liquidated damages under this **Section 4.4(a)** (Annual Equivalent Availability Factor and Liquidated Damages), the Annual EAF for the Measurement Period in question shall be rounded to the nearest one-tenth of one percent (0.001). Each Party agrees and acknowledges that (i) the damages that Company would incur if the Seller fails to achieve the EAF Performance Metric for a Measurement Period would be difficult or impossible to calculate with certainty and (ii) the aforesaid liquidated damages are an appropriate approximation of such damages.

(b) Annual Equivalent Availability Factor Termination Rights. The Parties acknowledge that, although the intent of the liquidated damages payable under

Section 4.4(a) (Annual Equivalent Availability Factor and Liquidated Damages) is to compensate Company for the damages that Company would incur if the Seller fails to achieve the EAF Performance Metric for a Measurement Period, such liquidated damages are not intended to compensate Company for the damages that Company would incur if a pattern of underperformance establishes a reasonable expectation that the Facility is likely to continue to substantially underperform the EAF Performance Metric. Accordingly, and without limitation to Company’s rights under said **Section 4.4(a)** (Annual Equivalent Availability Factor and Liquidated Damages) for those Measurement Periods during which the Seller failed to achieve the EAF Performance Metric, the failure of the Seller to achieve, for each of four (4) consecutive Measurement Periods, an Annual EAF of not less than **75%** shall constitute an Event of Default under **Section 6.1(d)** of this Agreement for which Company shall have the rights (including but not limited to the termination rights) set forth in **Article 6** (Events of Default; Remedies; Termination); provided, however, that if a Measurement Period for which the aforementioned 75% threshold is not achieved falls within a Capacity Cure Period, such Measurement Period shall be excluded from the calculation of the aforementioned “four (4) consecutive Measurement Periods” if the failure to achieve the aforementioned 75% threshold was the result of unavailability caused by the process of carrying out the repairs to or replacements of the Facility and/or Storage Unit(s) necessary to remedy the failure of the Facility to achieve the Capacity Performance Metric.

4.5. Equivalent Forced Outage Factor Performance Metric.

(a) Annual Equivalent Forced Outage Factor and Liquidated Damages.

For each Measurement Period following the Commercial Operations Date, the Facility shall maintain an Annual Equivalent Forced Outage Factor (“**Annual EFOF**”) of not more than 4% (the “**EFOF Performance Metric**”) as calculated as set forth in **Attachment V** (Annual Equivalent Forced Outage Factor). If the EFOF for such Measurement Period exceeds the EFOF Performance Metric, Seller shall pay, and Company shall accept, as liquidated damages for exceeding the EFOF Performance Metric, the amount set forth in the following table (on a progressive basis) upon proper demand by the Company at the end of the Measurement Period in question:

Annual Equivalent Forced Outage Factor	Liquidated Damage Amount
0.0% - 4.0%	-0-
4.1% - 6.9%	For each one-tenth of one percent (0.001) that the Annual EFOF is above 4.0% but less than 7.0%, an amount equal to two-tenths of one percent (0.002) of the Lump Sum Payment for the Measurement Period in question; plus
7.0% and above	For each one-tenth of one percent (0.001) that the Annual EFOF is above 6.9%, an amount equal to four-tenths of one percent (0.004) of the Lump Sum Payment for the Measurement Period in question.

Such liquidated damages shall be due within thirty (30) Days after the first to occur of the end of such Measurement Period or the end of Term. In the event Seller fails to

pay Company amounts of liquidated damages due under this **Section 4.5(a)** (Annual Equivalent Forced Outage Factor and Liquidated Damages) within thirty (30) Days of receipt of Company's written demand, Company may set-off such amounts due against payments it is otherwise obligated to make under this Agreement.

For purposes of determining liquidated damages under this **Section 4.5(a)** (Annual Equivalent Forced Outage Factor and Liquidated Damages), the Annual EFOF for the Measurement Period in question shall be rounded to the nearest one-tenth of one percent (0.001). Each Party agrees and acknowledges that (i) the damages that Company would incur if the Seller fails to achieve the EFOF Performance Metric for a Measurement Period would be difficult or impossible to calculate with certainty and (ii) the aforesaid liquidated damages are an appropriate approximation of such damages.

For example, if the Annual EFOF was 4.1% as calculated in the example in **Attachment V** (Annual Equivalent Forced Outage Factor) attached hereto and the Lump Sum Payment for the Measurement Period in question is \$1,000,000, the liquidated damages would be \$2,000, calculated as follows:

$$\begin{aligned} 4.1\% - 4.0\% &= 0.1\% \\ \$1,000,000 \times .002 &= \$2,000 \\ \$2,000 \times 1 &= \$2,000 \end{aligned}$$

(b) Annual Equivalent Forced Outage Factor Termination Rights. The Parties acknowledge that, although the intent of the liquidated damages payable under **Section 4.5(a)** (Annual Equivalent Forced Outage Factor and Liquidated Damages) is to compensate Company for the damages that Company would incur if the Seller fails to achieve the EFOF Performance Metric for a Measurement Period, such liquidated damages are not intended to compensate Company for the damages that Company would incur if a pattern of underperformance establishes a reasonable expectation that the Facility is likely to continue to substantially underperform the EFOF Performance Metric. Accordingly, and without limitation to Company's rights under said **Section 4.5(a)** (Annual Equivalent Forced Outage Factor and Liquidated Damages) for those Measurement Periods during which the Seller failed to achieve the EFOF Performance Metric, the failure of the Seller to maintain, for each of four (4) consecutive Measurement Periods, an Annual EFOF of less than **7.0%** shall constitute an Event of Default under **Section 6.1(de)** of this Agreement for which Company shall have the rights (including but not limited to the termination rights) set forth in **Article 6** (Events of Default; Remedies; Termination).

4.6. Round Trip Efficiency Test; Liquidated Damages; Termination Rights.

(a) RTE Test and Liquidated Damages. For each Measurement Period following the Commercial Operations Date, the Facility shall be required to complete a RTE Test or otherwise demonstrate satisfaction of the RTE Performance Metric, as more fully set forth in **Attachment T** (Facility Tests) to this Agreement. For each Measurement Period for which the Facility fails to demonstrate that it satisfies the RTE Performance Metric, Seller shall pay, and Company shall accept, as liquidated damages for such shortfall, in the amount to be calculated as provided in this **Section**

4.6(a) (RTE Test and Liquidated Damages), upon proper demand at the end the Measurement Period in question.

The RTE Performance Metric is [redacted] % as measured at the Point of Interconnection.
[DRAFTING NOTE: PERCENTAGE TO BE TAKEN FROM RESPONSE TO RFP.]

The liquidated damages threshold (“LDT”) is equal to the RTE Performance Metric minus 2 percentage points.

The Selected RTE Test is the RTE Test that came closest to satisfying the RTE Performance Metric during the BESS Measurement Period in question.

Seller shall be liable for liquidated damages if:

$$(PM - RTE Ratio) * 100 > 2\%$$

Where:

PM = RTE Performance Metric stated as percentage

RTE Ratio = RTE Ratio from Selected RTE Test stated as percentage

For each percentage point by which the RTE Ratio is below the LDT, Seller shall pay, and Company shall accept, liquidated damages in an amount equal to two-tenths of one percent (0.002) of the Lump Sum Payment for the Measurement Period in question.

Each Party agrees and acknowledges that (i) the damages that Company would incur if the Seller fails to achieve the RTE Performance Metric for a Measurement Period would be difficult or impossible to calculate with certainty and (ii) the aforesaid liquidated damages are an appropriate approximation of such damages.

(b) RTE Test Termination Rights. The Parties acknowledge that, although the intent of the liquidated damages payable under **Section 4.6(a)** (RTE Test and Liquidated Damages) is to compensate Company for the damages that Company would incur if the Facility fails to demonstrate satisfaction of the RTE Performance Metric during a Measurement Period, such liquidated damages are not intended to compensate Company for the damages that Company would incur if a pattern of underperformance establishes a reasonable expectation that the Facility is likely to continue to substantially underperform the Company’s expectations. Accordingly, and without limitation to Company’s rights under said **Section 4.6(a)** (RTE Test and Liquidated Damages) for those Measurement Periods during which the Facility fails to demonstrate satisfaction of the RTE Performance Metric, substantial underperformance shall give rise to a termination right as set forth in this **Section 2.11(b)** (RTE Test Termination Rights). If the RTE Ratio for the Selected RTE Test for the Measurement Period in question is more than 15 percentage points below the RTE Performance Metric for any two Measurement Periods during a 12-month period, an **18-month** cure period (the “**RTE Cure Period**”) will commence on the Day following the close of the second such Measurement Period. For each Measurement Period during such RTE Cure Period, RTE Tests shall continue to be conducted as set forth in

[Attachment T \(Facility Tests\) and liquidated damages paid and accepted as set forth in Section 4.6\(a\) \(RTE Test and Liquidated Damages\); provided, however, that if Seller fails to demonstrate satisfaction of the RTE Performance Metric prior to the expiration of the RTE Cure Period, such failure shall constitute an Event of Default under Section 6.1\(f\) of this Agreement for which Company shall have the rights \(including but not limited to the termination rights\) set forth in Article 6 \(Events of Default; Remedies; Termination\).](#)

4.7. ~~4.6.~~ Payment of Liquidated Damages for Failure to Achieve Performance Metrics; Limitation on Liquidated Damages.

(a) **Payment of Liquidated Damages.** With respect to the liquidated damages payable under **Section 4.3(a)** (Capacity Test and Liquidated Damages), **Section 4.4(a)** (Annual Equivalent Availability Factor and Liquidated Damages) ~~and~~, **Section 4.5(a)** (Annual Equivalent Forced Outage Factor and Liquidated Damages) and Section 4.6(a) (RTE Test and Liquidated Damages) (collectively, the “**Performance Metrics LDs**”), Company shall have the right, at any time on or after the LD Assessment Date for the liquidated damages in question, at Company’s option, to set-off such liquidated damages from the amounts to be paid to Seller under **Section 4.1** (Lump Sum Payment) of this Agreement or, to draw such liquidated damages from the Operating Period Security, as follows:

(i) if the Facility fails to achieve the Capacity Performance Metric for a Measurement Period, ~~the~~ Company shall have the right to set-off or draw the amount of liquidated damages owed for such failure as calculated as provided in **Section 4.3(a)** (Capacity Test and Liquidated Damages);

(ii) if the Quarterly Report for the Measurement Period in question, ~~as applicable~~, shows a failure to achieve one or more of the Performance Metrics required for such period, and Company does not submit a Notice of Disagreement with respect to such Quarterly Report, ~~the~~ Company shall have the right to set-off or draw the amount of liquidated damages owed for such failure as calculated as provided in **Section 4.4(a)** (Annual Equivalent Availability Factor and Liquidated Damages) ~~and~~, **Section 4.5(a)** (Annual Equivalent Forced Outage Factor and Liquidated Damages) and Section 4.6(a) (RTE Test and Liquidated Damages), as applicable;

(iii) in all cases in which Company submits a Notice of Disagreement for a given Quarterly Report, Company shall have the right to set-off or draw all or any portion of the amount of liquidated damages for the Measurement Period in question, as applicable, as calculated on the basis of the shortfall(s) in the achievement of the Performance Metric(s) in question, as shown in such Notice of Disagreement; and

(iv) in the event of any disagreement as to the liquidated damages owed under clause (a) and (b) above:

(A) if the amount set-off or drawn by the Company exceeds the amount of liquidated damages for such Measurement Period that are eventually found to be payable for the LD Period in question as determined under **Section 2** (Quarterly

Report Disagreements) of **Attachment S** (Quarterly Reporting and Dispute Resolution by Independent Evaluator) to this Agreement, Company shall promptly (and in no event more than forty-five (45) Business Days from the date of such determination) repay such excess to Seller together with, unless the Parties otherwise agree in writing, interest from the date of Company's set-off or draw until the date that such excess is repaid to Seller at the average Prime Rate for such period; and

(B) if Company does not exercise its rights to set-off or draw liquidated damages for such Measurement Period, or does not set-off or draw the full amount of the liquidated damages for such period eventually found to be payable for the LD Period in question as determined under **Section 2** (Quarterly Report Disagreements) of **Attachment S** (Quarterly Reporting and Dispute Resolution by Independent Evaluator) to this Agreement, Seller shall promptly, upon such determination as aforesaid, pay to Company the amount of liquidated damages that are found to be owing together with, unless otherwise agreed by the Parties in writing, interest on the amount of such liquidated damages that went unpaid from the applicable LD Assessment Date for such liquidated damages until the date such liquidated damages are paid to Company in full at the average Prime Rate for such period, and Company shall have the right, at its option, to set-off such interest for the amounts to be paid to Seller under **Section 4.1** (Lump Sum Payment) of this Agreement or to draw from the Operating Period Security.

Any delay by Company in exercising its rights to set-off liquidated damages and/or interest from the amounts to be paid to Seller under **Section 4.1** (Lump Sum Payment) of this Agreement, or to draw such liquidated damages and/or interest from the Operating Period Security, shall not constitute a waiver by Company of its right to do so.

(b) Limitation on Liquidated Damages. Notwithstanding any other provision of this Agreement to the contrary, the aggregate liquidated damages paid by Seller during each Contract Year for the Performance Metrics LDs, such payments by Seller to include but not be limited to any set-offs or draws made by Company during such Contract Year pursuant to **Section 4.64.7(a)** (Payment of Liquidated Damages), shall not exceed the total of the twelve (12) monthly Lump Sum Payments payable during such Contract Year pursuant to **Section 4.1** (Lump Sum Payment) and **Section 5.4** (Payment Procedures). For avoidance of doubt: A monthly Lump Sum Payment that is invoiced by Seller to Company pursuant to **Section 5.3** (Seller's Preparation of the Monthly Invoice and Quarterly Report) for, e.g., the twelfth (12th) calendar month of Contract Year N but is paid during Contract Year N+1 as provided in **Section 5.4** (Payment Procedures) shall, for purposes of determining the limitation on Performance Metrics LDs under this **Section 4.64.7(b)** (Limitation on Liquidated Damages), be included in the total of the twelve (12) monthly Lump Sum Payments payable during Contract Year N+1. As a result of the foregoing, the total of the monthly Lump Sum Payments used to establish the limitation on Performance Metrics LDs for the initial Contract Year under this **Section 4.64.7(b)** (Limitation on Liquidated Damages) will be less than twelve (12). The Parties acknowledge that, because the monthly Lump Sum Payment is subject to adjustment (including downward adjustment) as provided in **Section 4.1** (Lump Sum Payment), it is possible that a downward adjustment in some or all of the monthly Lump Sum Payments payable during a Contract Year might cause the Performance Metrics LDs paid by

Seller during the course of such Contract Year to exceed the limitation on the Performance Metrics LDs for such Contract Year established at the close of such Contract Year pursuant to the first sentence of this **Section 4.64.7(b)** (Limitation on Liquidated Damages). In such case, Company shall promptly upon the determination that the Performance Metrics LDs paid during the course of such Contract Year exceeded the limitation on Performance Metrics LDs for such Contract Year (and in no event more than forty-five (45) Business Days from the end of such Contract Year) repay such excess amount to Seller without interest.

ARTICLE 5 BILLING AND PAYMENT

5.1. No Payments Prior to Commercial Operations Date.

Company shall not be obligated to make any payment for the availability of the Facility's Energy Storage Services prior to the Commercial Operations Date.

5.2. Sales of Electric Energy by Company to Seller; Seller Payments.

Sales of electric energy by Company to Seller (e.g., for Station Use) shall be governed by an applicable rate schedule filed with the PUC and not by this Agreement, except with respect to the reactive amount adjustment (if any) referred to in **Attachment B** (Facility Owned by Seller). Seller shall pay to Company (a) all amounts pursuant to **Attachment G** (Company-Owned Interconnection Facilities); (b) all amounts pursuant to **Section 9.1** (Revenue Metering Package; Station Use Metering Equipment) and **Section 9.2** (Meter Testing); (c) a monthly metering charge of \$25.00 per month, which is in addition to any charges due Company pursuant to the applicable rate schedule pursuant the preceding sentence of this **Section 5.2** (Sales of Electric Energy By Company to Seller; Seller Payments) of this Agreement; and (d) such other costs to be incurred by Company and reimbursed by Seller as set forth in this Agreement.

5.3. Seller's Preparation of the Monthly Invoice and Quarterly Report.

(a) Monthly Invoice. By the tenth (10th) Business Day of each calendar month, Seller shall submit to Company an invoice for the payment obligations incurred by Company and Seller during the preceding month pursuant to **Article 4** (Compensation; Performance Metrics) and **Section 5.2** (Sales of Electric Energy by Company to Seller; Seller Payments), together with all supporting documentation and calculations reasonably necessary to evidence all amounts charged thereunder.

(b) Quarterly Report. Commencing with the month during which the Commercial Operations Date is achieved, and for each Measurement Period thereafter during the Term, Seller shall prepare and provide to Company a Quarterly Report by the tenth (10th) Business Day of the following month in accordance with **Section 1** (Quarterly Report) of **Attachment S** (Quarterly Reporting and Dispute Resolution by Independent Evaluator) of this Agreement. Beginning with the Quarterly Report for the last Measurement Period of the initial Contract Year, Seller shall include calculations of (a) the Capacity Ratio, [the RTE Ratio](#), the Annual EAF and the Annual EFOF for the Measurement Period, as well as (b) any liquidated damages to be assessed, as set forth in the form of Quarterly Report set forth in **Section 1** (Quarterly Report) of said **Attachment S** (Quarterly Reporting and Dispute Resolution by Independent Evaluator). The rights and obligations of the Parties with respect to each Quarterly Report and any disagreements arising out of any Quarterly Report are set forth in **Section 1** (Quarterly Report) and **Section 2** (Quarterly Report Disagreements)

of **Attachment S** (Quarterly Reporting and Dispute Resolution by Independent Evaluator) to this Agreement.

5.4. Payment Procedures.

By the twentieth (20th) Business Day of each calendar month following the month during which the invoice was submitted (i.e., by the twentieth (20th) Business Day of the second calendar month following the calendar month covered by the invoice in question), but, except as otherwise provided in the following sentence, no later than the last Business Day of that month if there are less than twenty (20) Business Days in that month, Company shall, subject to its right to set-off liquidated damages as provided in **Section 4.64.7** (Payment of Liquidated Damages for Failure to Achieve Performance Metrics; Limitation on Liquidated Damages), make payment on such invoice, or provide to Seller an itemized statement of its objections to all or any portion of such invoice and pay any undisputed amount. Notwithstanding the foregoing, the Day by which Company shall make payment to Seller hereunder shall be increased by one (1) Day for each Day that Seller is delinquent in providing to Company either: (a) the Quarterly Report for the Measurement Period in question pursuant to **Section 1** (Quarterly Report) of **Attachment S** (Quarterly Reporting and Dispute Resolution by Independent Evaluator); or (b) the information required under **Section 5.3** (Seller's Preparation of the Monthly Invoice and Quarterly Report) of this Agreement.

5.5. Late Payments.

Notwithstanding all or any portion of such invoice in dispute, and subject to the provisions of **Section 4.64.7** (Payment of Liquidated Damages for Failure to Achieve Performance Metrics), interest shall accrue on any invoiced amount that remains unpaid following the twentieth (20th) Business Day of each calendar month (or the last Business Day of that month if there are less than twenty (20) Business Days in that month), or following the due date for such payment if extended pursuant to **Section 5.4** (Payment Procedures), at the average daily Prime Rate for the period commencing on the Day following the Day such payment is due until the invoiced amounts (or amounts due to Seller if determined to be less than the invoiced amounts) are paid in full. Partial payments shall be applied first to outstanding interest and then to outstanding invoice amounts.

5.6. Adjustments to Invoices After Payment.

In the event adjustments are required to correct inaccuracies in an invoice after payment, the Party requesting adjustment shall recompute and include in the Party's request the principal amounts due during the period of the inaccuracy together with the amount of interest from the date that such invoice was payable until the date that such recomputed amount is paid at the average daily Prime Rate for the period. The difference between the amount paid and that recomputed for the invoice, along with the allowable amount of interest, shall either be (a) paid to Seller or set-off by Company, as appropriate, in the next invoice payment to Seller; or (b) objected to by the Party responsible for such payment within thirty (30) Days following its receipt of such request. If the Party responsible for such payment objects to the request, then the Parties shall work together in good faith to resolve the objection. If the Parties are

unable to resolve the objection, the matter shall be resolved pursuant to **Article 26** (Dispute Resolution). All claims for adjustments shall be waived for any amounts that were paid or should have been payable more than thirty-six (36) months preceding the date of receipt of any such request.

5.7. Company's Billing Records.

Seller, after giving reasonable advance written notice to Company, shall have the right to review all billing, metering and related records necessary to verify the accuracy of payments relating to the Facility during Company's normal working hours on Business Days. Company shall maintain such records for a period of not less than thirty-six (36) months.

5.8. Set Off.

Company shall have the right to set off any payment due and owing by Seller, including, but not limited to, any payment under this Agreement and any payment due under any award made under **Article 26** (Dispute Resolution), against Company's payments of subsequent monthly invoices as necessary.

ARTICLE 6

EVENTS OF DEFAULT; REMEDIES; TERMINATION

6.1. Events of Default by Seller.

The occurrence of any of the following shall constitute an Event of Default by Seller:

- (a) Subsequent to the Commercial Operations Date, Seller procures, provides or substitutes Energy Storage Services from any source other than the Facility;
- (b) Seller sells, assigns, or otherwise transfers, or commits to sell, assign, or otherwise transfer, any portion or component of the Energy Storage Services (e.g., Discharge Energy), or the availability thereof, to any party other than Company;
- (c) Subsequent to the Commercial Operations Date, Seller fails to demonstrate satisfaction of the Capacity Performance Metric prior to the expiration of the Capacity Cure Period;
- (d) Subsequent to the Commercial Operations Date, Seller fails to achieve an Annual EAF of not less than **75%** for each of four (4) consecutive Measurement Periods as provided in **Section 4.4(b)** (Annual Equivalent Availability Factor Termination Rights);
- (e) Subsequent to the Commercial Operations Date, Seller fails to maintain an Annual EFOF of less than **7.0%** for each of four (4) consecutive Measurement Periods as provided in **Section 4.5(b)** (Annual Equivalent Forced Outage Factor Termination Rights);
- (f) Subsequent to the Commercial Operations Date, Seller fails to demonstrate satisfaction of the RTE Performance Metric prior to the expiration of the RTE Cure Period;
- (g) ~~(f)~~ Seller fails to satisfy the requirements specified in **Article 14** (Credit Assurance and Security) of this Agreement;
- (h) ~~(g)~~ Seller fails to comply with the requirements of **Section 15.1** (Sale of the Facility) and **Attachment P** (Sale of Facility by Seller);
- (i) ~~(h)~~ During the Term, the Facility Lender declares a default under the Financing Documents and then fails to initiate, within sixty (60) Days thereafter, such actions as may be legally necessary (such as foreclosure) to take possession of the Facility and to thereafter diligently prosecute such actions to conclusion;
- (j) ~~(i)~~ Seller fails to comply with the Charging Energy obligations under **Article 8** (Charging Energy Obligations);
- (k) ~~(j)~~ Subsequent to the Commercial Operations Date, the Facility is unavailable to provide the Energy Storage Services to Company in response to

Company Dispatch/Charge pursuant to the terms and conditions of this Agreement for a period of three hundred sixty-five (365) or more consecutive Days; or

(l) ~~(k)~~ Subsequent to the Commercial Operations Date, Seller fails to operate, maintain, or repair the Facility in accordance with Good Engineering and Operating Practices if such failure is not cured within thirty (30) Days after written notice of such failure from Company unless such failure cannot be cured within said thirty (30) Day period and Seller is making commercially reasonable efforts to cure such failure, in which case Seller shall have a cure period of one hundred eighty (180) Days after Company's written notice of such failure.

6.2. Events of Default by a Party.

The occurrence of any of the following during the Term of the Agreement shall constitute an Event of Default by the Party responsible for the failure, action or breach in question:

(a) The failure to make, when due, any payment required to be made to the other Party pursuant to this Agreement, if such failure is not cured within ten (10) Business Days after written notice of such failure is received by the non-performing Party;

(b) Any representation or warranty made by such Party herein is false or misleading in any material respect when made or when deemed made or repeated if the representation or warranty is continuing in nature;

(c) Such Party becomes insolvent, or makes an assignment for the benefit of creditors (other than an assignment to a Facility Lender pursuant to the Financing Documents) or fails generally to pay its debts as they become due; or such Party shall have an order for relief in an involuntary case under the bankruptcy laws as now or hereafter constituted entered against it, or shall commence a voluntary case under the bankruptcy laws as now or hereafter constituted, or shall file any petition or answer seeking for itself any arrangement, composition, adjustment, liquidation, dissolution or similar relief to which it may be entitled under any present or future statute, law or regulation, or shall file any answer admitting the material allegations of any petition filed against it in such proceeding; or such Party seeks or consents to or acquiesces in the appointment of or taking possession by, any custodian, trustee, receiver or liquidator of it or of all or a substantial part of its properties or assets; or such Party takes action looking to its dissolution or liquidation; or within ninety (90) Days after commencement of any proceedings against such Party seeking any arrangement, composition, adjustment, liquidation, dissolution or similar relief under any present or future statute, law or regulation, such proceedings shall not have been dismissed; or within ninety (90) Days after the appointment of, or taking possession by, any custodian, trustee, receiver or liquidator of any or of all or a substantial part of the properties or assets of such Party, without the consent or acquiescence of such Party, any such appointment or possession shall not have been vacated or terminated;

(d) Such Party engages in or is the subject of a transaction requiring the prior written consent of the other Party under **Section 15.2** (Assignment by Seller) or **Section 15.6** (Assignment by Company), as applicable, without having obtained such

consent;

(e) Such Party fails to comply with either (i) a decision under **Article 26** (Dispute Resolution); or (ii) an Independent Evaluator's decision under **Article 22** (Revisions to Performance Standards), in either case within thirty (30) Days after such decision becomes binding on the Parties in accordance with **Article 26** (Dispute Resolution) or within thirty (30) Days of the issuance of such decision under **Article 22** (Revisions to Performance Standards), as applicable, or, if such decision cannot be complied with within thirty (30) Days, such Party fails to have commenced commercially reasonable efforts designed to achieve compliance within such thirty (30) Days and diligently continues such commercially reasonable efforts until compliance is attained; or

(f) A Party, by act or omission, materially breaches or defaults on any material covenant, condition or other provision of this Agreement, other than the provisions specified in **Section 6.1** (Events of Default by Seller) and **Section 6.2(a)** through **Section 6.2(e)**, if such breach or default is not cured within thirty (30) Days after written notice of such breach or default from the other Party; provided, however, that if the breach or default in question is one that could not be cured within said thirty (30) Day period by an experienced independent power producer or electric utility, as applicable, willing and able to exert commercially reasonable efforts to timely achieve such cure, then, for so long as the non-performing Party is making the same effort to cure such breach or default as would be expected of an experienced independent power producer or electric utility, as applicable, willing and able to exert commercially reasonable efforts to timely achieve such cure, the non-performing Party shall have a cure period equal to the shorter of (i) the duration of the period within which a cure could reasonably be expected to be achieved by an experienced independent power producer or electric utility, as applicable, willing and able to exert commercially reasonable efforts to achieve such cure; or (ii) a period of three hundred sixty five (365) Days beginning on the date of written notice of such breach or default; provided, further, that if the material breach in question involves Seller's failure to meet the operational and performance standards set forth in **Attachment B** (Facility Owned by Seller), the provisions of **Section 1(j)** (Demonstration of Facility) of **Attachment B** (Facility Owned by Seller) shall apply in lieu of the extended cure period provided under the preceding proviso.

6.3. Cure/Grace Periods.

Before becoming an Event of Default, the occurrences set forth in **Section 6.1** (Events of Default by Seller) and **Section 6.2** (Events of Default by a Party) are subject to the following cure/grace periods:

(a) If the occurrence is not the result of Force Majeure, the non-performing Party shall be entitled to a cure period to the limited extent expressly set forth in the applicable provision of **Section 6.1** (Events of Default by Seller) or **Section 6.2** (Events of Default by a Party); or

(b) If the occurrence is the result of Force Majeure, and if and so long as the conditions set forth in **Section 17.4** (Satisfaction of Certain Conditions) are satisfied, the non-performing Party shall be entitled to a grace period as provided in **Section**

17.5 (Termination for Force Majeure), which shall apply in lieu of any cure periods provided in **Section 6.1** (Events of Default by Seller) and **Section 6.2** (Events of Default by a Party).

6.4. Rights of the Non-Defaulting Party; Forward Contract.

If an Event of Default shall have occurred and be continuing, the other Party (the “**Non-Defaulting Party**”) shall have the right to (a) terminate this Agreement by sending notice to the Defaulting Party as provided in this **Section 6.4** (Rights of the Non-Defaulting Party; Forward Contract); (b) withhold any payments due to the Defaulting Party under this Agreement; (c) suspend performance; and (d) exercise any other right or remedy available at law or in equity to the extent permitted under this Agreement, including, without limitation, **Section 6.6** (Equitable Remedies). A notice terminating this Agreement pursuant to this **Section 6.4** (Rights of the Non-Defaulting Party; Forward Contract) shall designate the Day such termination is to be effective (the “**Termination Date**”) which shall be no later than thirty (30) Days after such notice is deemed to be received by the Defaulting Party and not earlier than the first to occur of the Day such notice is deemed to be received by the Defaulting Party or the Day following the expiration of any period afforded the Defaulting Party under **Section 6.1** (Events of Default by Seller) and **Section 6.2** (Events of Default by a Party) to cure the default in question. Without limiting the generality of the foregoing provisions of this **Section 6.4** (Rights of the Non-Defaulting Party; Forward Contract), the Parties agree that, under 11 U.S.C. § 362(b)(6), this Agreement constitutes a “forward contract,” and Company is a “forward contract merchant” such that, upon the occurrence of an Event of Default by Seller under **Section 6.1** (Events of Default by Seller) or **Section 6.2** (Events of Default by a Party), this Agreement may be terminated by Company as provided in this Agreement notwithstanding any bankruptcy petition affecting Seller.

6.5. Calculation of Termination Damages.

In the event of this Agreement is terminated by Company due to one or more Events of Default by Seller of this Agreement, Company shall have the right to collect liquidated damages, calculated in accordance with this **Section 6.5** (Calculation of Termination Damages) (the “**Termination Damages**”). If the Termination Date occurs prior to COD, Company shall be entitled to Termination Damages calculated by multiplying the Contract Capacity by \$50/kW. If the Termination Date occurs after COD, the Company shall be entitled to Termination Damages calculated by multiplying the Contract Capacity by \$75/kW.

6.6. Equitable Remedies.

Seller acknowledges that Company is a public utility and is relying upon Seller’s performance of its obligations under this Agreement, and that Company and/or its customers may suffer irreparable injury as a result of the failure of Seller to perform any of such obligations, whether or not such failure constitutes an Event of Default or otherwise gives rise to one or more of the remedies set forth in **Section 6.5** (Calculation of Termination Damages). Accordingly, the remedies set forth in **Section 6.5** (Calculation of Termination Damages) shall not limit or otherwise affect

Company's right to seek specific performance injunctions or other available equitable remedies for Seller's failure to perform any of its obligations under this Agreement, irrespective of whether such failure constitutes an Event of Default.

ARTICLE 7

COMPANY-OWNED INTERCONNECTION FACILITIES

The terms and conditions related to the Company-Owned Interconnection Facilities are set forth in **Attachment G** (Company-Owned Interconnection Facilities) of this Agreement. In accordance with **Section 8** (Transfer of Ownership/Title) of **Attachment G** (Company-Owned Interconnection Facilities), on the Transfer Date, Seller shall convey title to the Company-Owned Interconnection Facilities that were designed and constructed by or on behalf of Seller by executing a Bill of Sale and Assignment document substantially in the form set forth in **Attachment H** (Form of Bill of Sale and Assignment). In addition, in accordance with **Section 8** (Transfer of Ownership/Title) of **Attachment G** (Company-Owned Interconnection Facilities), on the Transfer Date, Seller shall deliver to Company any and all executed documents required to assign all Land Rights necessary to operate and maintain the Company-Owned Interconnection Facilities on and after the Transfer Date to Company, which documents shall be substantially in the form set forth in **Attachment I** (Form of Assignment of Lease and Assumption).

ARTICLE 8

CHARGING ENERGY OBLIGATIONS

Except as otherwise set forth in this **Article 8** (Charging Energy Obligations) or as expressly set forth in this Agreement, following the Commercial Operations Date, Company shall be responsible for and bear the cost of delivering all of the Charging Energy for the Facility to the Point of Interconnection. So long as the State of Charge is less than 100%, Seller shall take all actions necessary to accept the Charging Energy, as delivered by Company by manual dispatch or automatic signals, at and from the Point of Interconnection as part of making available to Company the Facility's Energy Storage Services in accordance with the terms of this Agreement and Company tariffs, including, without limitation, maintenance, repair or replacement of equipment in Seller's possession or control used to deliver the Charging Energy to the Facility. Seller shall only use the Charging Energy for Company's benefit in accordance with the terms of this Agreement. ~~Company shall hold title to, possession of, and risk of loss of the Charging Energy up to the Point of Interconnection, and Seller shall take title to, possession of, and risk of loss of the Charging Energy at and from the Point of Interconnection. Once Seller takes title to the Charging Energy, Company may set off the amount of any Energy costs which are Seller's responsibility from any amounts due from Company to Seller in accordance with **Section 5.8** (Set Off).~~

ARTICLE 9

METERING; MONITORING AND COMMUNICATIONS

9.1. Revenue Metering Package; Station Use Metering Equipment.

(a) Company shall purchase, own, install and maintain the Revenue Metering Package dedicated exclusively to the Facility and by which all measurable aspects of the Energy Storage Services must be measured to be eligible for payment under this Agreement. The metering point shall be located as close as possible to the Point of Interconnection as allowed by Company, and Seller shall make available a mutually agreeable location for the Revenue Metering Package, to measure the Discharge Energy, the Charging Energy, and, as applicable, Integral Station Use. Seller shall separately meter Station Use, except for Integral Station Use, with the Station Use Metering Equipment, and shall cause the installation, maintenance, operation and replacement (as needed) of the Station Use Metering Equipment. Seller will design, construct, and operate the Facility such that (i) no Station Use is measured and served via the Revenue Metering Package except Integral Station Use; and (ii) Energy Storage Services do not serve Station Use. **[Note: Seller to provide justification for components included in Integral Station Use prior to execution.]**

(b) Seller shall install, own and maintain the infrastructure and other related equipment associated with the Revenue Metering Package and the Station Use Metering Equipment, including but not limited to all enclosures (meter cabinets, meter pedestals, meter sockets, pull boxes, and junction boxes, along with their grounding/bonding connections), CT/PT mounting structures, conduits and ductlines, enclosure support structures, ground buses, pads, test switches, terminal blocks, isolation relays, telephone surge suppressors, and analog phone lines (one per meter), subject to Company's review and approval, as further described in **Section 1(e)** (Other Equipment) of **Attachment B** (Facility Owned by Seller). Seller shall install this infrastructure such that it meets the requirements set forth in Chapter Six (IPP Metering) of the latest edition of the Company's Electric Service Installation Manual (ESIM). Company shall test such meter equipment prior to installation and every fifth (5th) year thereafter. Seller shall reimburse Company for all reasonably incurred costs for the procurement, installation, maintenance (including maintenance replacements) and testing work associated with the Revenue Metering Package and the Station Use Metering Equipment.

9.2. Meter Testing.

Company shall provide at least twenty-four (24) hours' notice to Seller prior to any test it may perform on the revenue meters or metering equipment. Seller shall have the right to have a representative present during each such test. Seller may request, and Company shall perform, if requested, tests in addition to the every fifth (5th) year test and Seller shall pay the cost of such tests. Company may, in its sole discretion, perform tests in addition to the fifth (5th) year test and Company shall pay the cost of such tests. If any of the metering equipment is found to be inaccurate at any time, as determined by testing in accordance with this **Section 9.2** (Meter Testing), Company

shall promptly cause such equipment to be made accurate, and the period of inaccuracy, as well as an estimate for correct meter readings, shall be determined in accordance with **Section 9.3** (Corrections).

9.3. Corrections.

If any test of the metering equipment conducted by Company indicates that the meter readings are in error by one percent (1%) or more, the meter readings shall be corrected as follows: (a) determine the error by testing the meter at approximately ten percent (10%) of the rated current (test amperes) specified for such meter; (b) determine the error by testing the meter at approximately one hundred percent (100%) of the rated current (test amperes) specified for the meter; (c) the average meter error shall then be computed as the sum of (i) one-fifth ($\frac{1}{5}$) of the error determined in the foregoing clause (a) and (ii) four-fifths ($\frac{4}{5}$) of the error determined in the foregoing clause (b). The average meter error shall be used to adjust the invoices in accordance with **Section 5.6** (Adjustments to Invoices After Payment) for the Energy Storage Services made available to Company for the previous six (6) months from the Facility, unless records of Company conclusively establish that such error existed for a greater or lesser period, in which case the correction shall cover such actual period of error.

9.4. Monitoring and Communications Equipment.

Seller shall install and maintain appropriate equipment, including high-resolution data recording equipment, for the purposes of (a) measuring the data required in order for Company to monitor Seller's compliance with the ~~Performance Standards~~ operational and performance standards set forth in **Section 3** (Performance Standards) of **Attachment B** (Facility Owned by Seller) and, if the monitoring equipment is part of the Company-Owned Interconnection Facilities, as set forth in **Attachment G** (Company-Owned Interconnection Facilities); and (b) recording and transferring such data to Company in real time (the "**Monitoring and Communications Equipment**"). Seller shall maintain at the Site sufficient replacement parts to avoid or otherwise minimize any shutdown pursuant to **Section 9.6** (Shutdown for Lack of Reliable Real Time Data) while any of the Monitoring and Communication Equipment is being repaired, replaced or re-calibrated.

9.5. Calibrations, Maintenance and Repairs.

(a) **Documentation Requirement.** Seller shall provide to Company (i) the manufacturer's recommended schedule for the calibration and maintenance of each component of the Monitoring and Communication Equipment; and (ii) subject to the limitation set forth in **Section 1(a)(ii)** (As-Builts) of **Attachment B** (Facility Owned by Seller) of this Agreement, documentation of the performance of all such calibration and maintenance per manufacturer specifications. Although Company is to receive from Seller the aforesaid recommended schedules for calibration and maintenance, as well documentation of the performance of all such calibration and maintenance, Company shall have no responsibility to monitor Seller's compliance with such calibration and maintenance schedules. Accordingly, any failure by Company to bring Seller's attention any apparent failure by Seller to perform such recommended calibration and maintenance shall neither relieve Seller of its obligations under this

Agreement to perform such calibration and maintenance nor constitute a waiver of Company's rights under this Agreement with respect to such failure in performance by Seller.

(b) Corrective Measures; Repairs. In the event of a pattern of material inconsistencies in the data stream provided by the Monitoring and Communication Equipment, Seller shall perform, at Seller's expense, such corrective measures as Company may reasonably require, such as the recalibration of all field measurement device components of the Monitoring and Communication Equipment. In the event of any failure in the Monitoring and Communication Equipment, Seller shall repair or replace such equipment within fifteen (15) Days of such failure, or within such longer period as may be reasonably agreed to by the Parties.

9.6. Shutdown for Lack of Reliable Real Time Data.

Company shall have the right to direct Seller to shutdown the Facility due to the unavailability of reliable real time data as required under **Section 9.4** (Monitoring and Communications Equipment). In addition, in the event of the performance of corrective measures (including recalibration) and/or repairs to any Monitoring and Communications Equipment pursuant to **Section 9.5(b)** (Corrective Measures; Repairs), Company shall have the right to direct Seller to shutdown the Facility and the Facility shall remain shutdown until such corrective action and/or repairs are completed. In the event the cause for any shutdown in this **Section 9.6** (Shutdown For Lack of Reliable Real Time Data) falls within the definition of Seller-Attributable Unavailability, such period of time shall be allocated as such for purposes of calculating the Annual EAF under **Section 4.4(a)** (Annual Equivalent Availability Factor and Liquidated Damages) of this Agreement until such time as the successful completion of such corrective measures and/or repairs has been communicated by Seller to Company. If, after such communication, Company attempts to dispatch the Facility and determines that such corrective measures and/or repairs were not successfully completed, all time from the notice of successful completion to actual successful completion shall be revised as continuance of the deration or outage. Notwithstanding the foregoing, if Seller requests in writing for confirmation that the Facility's data is available to Company, then Company shall use reasonable efforts to respond to such request within three (3) Business Days in writing (with Email being acceptable) confirming that either (1) the Facility's data is available to Company (at which point no additional time after such request shall count as Seller-Attributable Unavailability), or (2) the Facility's data is not available so that Seller can take further appropriate corrective actions.

ARTICLE 10

GOVERNMENTAL APPROVALS AND LAND RIGHTS

[DRAFTING NOTE: To the extent a developer intends to site its Project on a Company-owned Site, appropriate revisions shall be made to this Agreement, including this Article 10, to reference the applicable terms of Attachment X.]

10.1. Governmental Approvals for Facility.

Seller shall obtain, at its expense, any and all Governmental Approvals required for the construction, ownership, operation and maintenance of the Facility and the interconnection of the Facility to the Company System. Under no circumstances shall Seller commence any construction, operation or maintenance of the Facility or interconnection of the Facility to the Company System, without Seller first obtaining the required, applicable Governmental Approvals.

10.2. Land Rights for Facility.

Seller shall obtain, at its expense, any and all Land Rights required for the construction, ownership, operation and maintenance of the Facility on the Site and the interconnection of the Facility to the Company System. Seller shall provide the following documentation to Company within the timeframes set forth below:

(a) No later than the Execution Date, Seller shall provide to Company copies of the documents, recorded, if required by Company (including but not limited to any agreements with landowners) evidencing Seller's Land Rights establishing the right of Seller to construct, own, operate and maintain the Facility on the Site, whether by fee simple ownership of the Site, leasehold interest of the Site for a term at least as long as the Term of this Agreement or, in the alternative for actual fee simple or leasehold interest in the Site, a binding, executed letter of intent establishing the right of Seller to enter into a lease for the Site subject only to reasonable conditions related to PUC approval of this Agreement and such conditions that shall not affect the ability of the Seller to execute such lease.

(b) Within six (6) months of the Execution Date, Seller shall provide to Company a current survey (dated no earlier than the Execution Date) for the Site and any other property identified by Seller as requiring Land Rights. Within four (4) months of the Execution Date, Seller shall provide to Company (i) a preliminary title report (dated no earlier than the Execution Date) for the Site and any other property identified by Seller as requiring Land Rights; (ii) copies of all Land Rights already obtained; and (iii) a current list identifying all Land Rights required for the construction, ownership, operation and maintenance of the Facility and the interconnection of the Facility to the Company System, including Seller's status as to whether such Land Rights have been obtained, have been negotiated or not yet pursued and if so, an estimated date when such Land Rights would be pursued.

(c) Within three (3) months of Seller's identification of such additional necessary Land Rights under **Section 10.2(b)** above, Seller shall provide to Company copies of such completed Land Rights, if any.

Under no circumstances shall Seller commence any construction, operation or maintenance of the Facility or interconnection of the Facility to the Company System, or require or permit Company to commence any such construction, without Seller first obtaining the required, applicable Land Rights. Seller shall bear complete responsibility for all delays in construction, operation and maintenance of the Facility or the interconnection of the Facility to the Company System resulting from Seller's failure to identify and/or timely obtain necessary Land Rights. In each case, such Land Rights documents may be redacted but only to the extent required to prevent disclosure of confidential or proprietary information of Seller or the counterparty to such agreement. Under no circumstances shall such redactions conceal information that is necessary for the Company to determine whether such documents establish the Land Rights of Seller to construct, own, operate and maintain the Facility on the Site and the interconnection of the Facility to the Company System in accordance with the terms of this Agreement.

10.3. Company-Owned Interconnection Facilities.

Seller shall provide the necessary Governmental Approvals and Land Rights for the construction, ownership operation and maintenance of the Company-Owned Interconnection Facilities in accordance with **Section 9** (Governmental Approvals for Company-Owned Interconnection Facilities) of **Attachment G** (Company-Owned Interconnection Facilities) and **Section 10** (Land Rights) of **Attachment G** (Company-Owned Interconnection Facilities). Regardless of whether Company or Seller constructs the Company-Owned Interconnection Facilities, Seller shall provide Company with an accounting of all necessary Governmental Approvals (in a list or spreadsheet) at the commencement of construction including relevant information regarding status and estimated completion. Seller shall update Company on the status of all necessary Governmental Approvals, including the addition of any new Governmental Approvals that may be discovered and required, in Seller's Monthly Progress Report submitted to Company in accordance with **Section 11.2** (Monthly Progress Report). Notwithstanding the above, under no circumstance shall Seller commence any construction, operation or maintenance of the Company-Owned Interconnection Facilities, or require or permit Company to commence any such construction, without first obtaining the required, applicable Governmental Approvals and Land Rights. Seller shall bear complete responsibility for all delays in construction, operation and maintenance of the Company-Owned Interconnection Facilities resulting from Seller's failure to identify and/or timely obtain necessary Governmental Approvals and Land Rights for such Company-Owned Interconnection Facilities.

ARTICLE 11

CONSTRUCTION PERIOD AND MILESTONES

~~[COMPANY TO DECIDE, FOLLOWING COMPLETION OF IRS, IF ANY GUARANTEED PROJECT MILESTONES ARE NECESSARY IN ADDITION TO THOSE LISTED IN ATTACHMENT K AND, IF SO, WHAT ARE THE CONSEQUENCES OF MISSING SUCH OTHER GUARANTEED PROJECT MILESTONES.]~~

11.1. Time is of the Essence.

Time is of the essence of this Agreement, and Seller's ability to timely achieve the Construction Milestones is critically important.

11.2. Monthly Progress Report.

Commencing upon the Execution Date of this Agreement, Seller shall submit to Company, on the tenth (10th) Business Day of each calendar month until the Commercial Operations Date, a progress report for the prior month in a form set forth on **Attachment R** (Form of Monthly Progress Report) ("**Monthly Progress Report**"). These progress reports shall notify Company of the current status of each Construction Milestone. Seller shall include in any Monthly Progress Report a list of all letters, notices, applications, approvals, authorizations and filings referring or relating to Governmental Approvals, and shall provide any such documents as may be reasonably requested by Company. In addition, Seller shall advise Company, as soon as reasonably practicable, of any problems or issues of which Seller is aware which could materially impact its ability to timely achieve any Construction Milestone. Seller shall provide Company with any requested documentation to support the achievement of an applicable Construction Milestone within ten (10) Business Days of receipt of such request from Company. Upon the occurrence of a Force Majeure event, Seller shall also comply with the requirements of **Section 17.4** (Satisfaction of Certain Conditions) to the extent such requirements provide for communications to Company beyond those required under this **Section 11.2** (Monthly Progress Report).

11.3. Remedial Action Plan.

In the event Seller does not timely achieve a Reporting Milestone, Seller shall submit to Company, within ten (10) Business Days of any such missed Reporting Milestone date, a remedial action plan which shall provide a detailed description of Seller's course of action and plan to achieve (a) the missed Reporting Milestone within ninety (90) Days of the missed Reporting Milestone date; and (b) all subsequent Construction Milestones; provided, that delivery of any remedial action plan shall not relieve Seller of its obligation to timely achieve such Construction Milestones.

11.4. Milestone Dates.

Seller shall achieve each Guaranteed Project Milestone Date or Reporting Milestone Date, subject (to the extent applicable) to the following extensions:

(a) if the PUC Approval Order Date occurs more than one hundred eighty (180) Days after the Execution Date, Seller and Company shall be entitled to an extension of the Guaranteed Project Milestone Dates, Reporting Milestone Dates, Seller's Conditions Precedent Dates and Company Milestone Dates equal to the number of Days that elapse between the end of the aforesaid 180-Day period and the PUC Approval Order Date; provided, that in no event will the Guaranteed Commercial Operations Date be extended beyond **[OUTSIDE DATE TO BE INSERTED BASED ON TYPE OF PROPOSAL]**;

(b) if the failure to achieve a Construction Milestone by the applicable Guaranteed Project Milestone Date or Reporting Milestone Date is the result of Force Majeure (which, for purposes of this **Section 11.4(b)** excludes any delay in obtaining the PUC Approval Order because that contingency is addressed in **Section 11.4(a)** above), and if and so long as the conditions set forth in **Section 17.4** (Satisfaction of Certain Conditions) are satisfied, such Guaranteed Project Milestone Date or Reporting Milestone Date shall be extended by a period equal to the lesser of three hundred sixty-five (365) Days or the duration of the delay caused by the Force Majeure; or

(c) if the failure to achieve a Guaranteed Project Milestone by the applicable Guaranteed Project Milestone Date is the result of any failure by Company in the timely performance of its obligations under this Agreement, including achievement of its Company Milestones by the Company Milestone Dates as set forth on **Attachment K-1** (Seller's Conditions Precedent and Company Milestones), as such dates may be extended in accordance with **Section 11.4** (Milestone Dates) and **Section 11.5** (Company Milestones), Seller shall, provided Seller has satisfied Seller's Conditions Precedent set forth in **Attachment K-1** (Seller's Conditions Precedent and Company Milestones) by the respective Seller's Conditions Precedent Date set forth in said **Attachment K-1**, be entitled to an extension of such Guaranteed Project Milestone Date ~~shall be extended by a period~~ equal to the duration of the period of delay directly caused by such failure in Company's timely performance. Such extension on the terms described above shall be Seller's sole remedy for any such failure by Company. For purposes of this **Section 11.4(c)**, Company's performance will be deemed to be "timely" if it is accomplished within the time period specified in this Agreement with respect to such performance or, if no time period is specified, within a reasonable period of time. If the performance in question is Company's review of plans, the determination of what is a "reasonable period of time" will take into account Company's past practices in reviewing and commenting on plans for similar facilities.

11.5. Company Milestones.

Company's obligation to achieve the Company Milestones is contingent upon Seller completing the Seller's Conditions Precedent set forth in **Attachment K-1** (Company Milestones and Seller's Conditions Precedent). Company shall achieve each of the Company Milestones by the date set forth for such Company Milestones in **Attachment K-1** (Seller's Conditions Precedent and Company Milestones) of this Agreement (each such date, a "**Company Milestone Date**"), as such date may be extended in accordance with **Section 11.4** (Milestone Dates) and this **Section 11.5** (Company Milestones); provided, however in the event Seller does not complete a Seller's Condition Precedent on or before the applicable date set forth in **Attachment K-1** (Seller's Conditions Precedent and Company Milestones) (each such date, a

“**Seller’s Conditions Precedent Date**”), subject to the extensions set forth in **Section 11.4** (Milestone Dates), Company shall be entitled to an extension ~~for as follows:~~ (i) for the commencement of Acceptance Testing, the new Company Milestone Date shall be as set forth in clause “(gg)” of **Section 2(f)(i) of Attachment G** (Company-Owned Interconnection Facilities); and (ii) for any other Company Milestone Date, the extension shall be for the period of time reasonably necessary to meet any such Company Milestone Date adversely affected by Seller's failure, which extension shall be no shorter than a day-for-day extension.

11.6. Damages and Termination.

(a) Daily Delay Damages.

(i) If a Guaranteed Project Milestone (other than Commercial Operations) has not been achieved by the applicable Guaranteed Project Milestone Date, as extended as provided in **Section 11.4** (Milestone Dates), Company shall collect and Seller shall pay liquidated damages in the amount of \$_____ (“**Daily Delay Damages**”) for each Day following the applicable Guaranteed Project Milestone Date, as extended in accordance with **Section 11.4** (Milestone Dates); provided, however, that the number of Days for which Company shall collect and Seller shall pay Daily Delay Damages for a failure to achieve a Guaranteed Project Milestone by the Guaranteed Project Milestone Date shall not exceed sixty (60) Days for each such missed Guaranteed Project Milestone Date (the “**Construction Delay LD Period**”). **[Note: Daily Delay Damages = Contract Capacity x \$50/kW ÷ 180 Days]**

(ii) If the Commercial Operations Date has not been achieved by the Guaranteed Commercial Operations Date, as extended as provided in **Section 11.4** (Milestone Dates), in addition to any Daily Delay Damages collected pursuant to **Section 11.6(a)(i)**, Company shall collect and Seller shall pay Daily Delay Damages for each Day following the Guaranteed Commercial Operations Date, as such date may be extended in accordance with **Section 11.4** (Milestone Dates); provided that the number of Days for which Company shall collect and Seller shall pay Daily Delay Damages for failing to timely achieve the Commercial Operations Date shall not exceed one hundred eighty (180) Days (the “**COD Delay LD Period**”).

(b) Termination and Termination Damages for Failure to Achieve Guaranteed Project Milestone Date. If, upon the expiration of the Construction Delay LD Period or the COD Delay LD Period, as applicable, Seller has not achieved the applicable Guaranteed Project Milestone, Company shall have the right, notwithstanding any other provision of this Agreement to the contrary, to terminate this Agreement with immediate effect by issuing a written termination notice to Seller designating the Day such termination is to be effective; provided, that Company shall issue such notice no later than thirty (30) Days following the expiration of the Construction Delay LD Period or the COD Delay LD Period, as applicable. The effective date of such termination shall be not later than the date that is thirty (30) Days after such notice is deemed to be received by Seller, and not earlier than the later to occur of the Day such notice is deemed to be received by Seller or the Day following the expiration of the Construction Delay LD Period or the COD Delay LD Period, as applicable. If the Agreement is terminated by Company pursuant to this **Section 11.5** (Damages and Termination), Company shall have the right to collect

Termination Damages, which shall be calculated in accordance with **Section 6.5** (Calculation of Termination Damages) of this Agreement.

11.7. Payment of Daily Delay Damages.

Company shall draw upon the Development Period Security on a monthly basis for payment of the total Daily Delay Damages incurred by Seller during the preceding calendar month. If the Development Period Security is at any time insufficient to pay the amount of the draw to which Company is then entitled, Seller shall pay any such deficiency to Company promptly upon demand.

11.8. Liquidated Damages Appropriate.

The Parties acknowledge and agree that (a) the damages that Company would incur due to either (i) a delay in achieving Commercial Operations by the Guaranteed Commercial Operations Date (subject to the extensions provided in **Section 11.4** (Milestone Dates)); or (ii) the termination of this Agreement, would be difficult or impossible to calculate with certainty; (b) the Daily Delay Damages set forth in **Section 11.6** (Damages and Termination) and the Termination Damages calculated in accordance with **Section 6.5** (Calculation of Termination Damages), respectively, are an appropriate approximation of such damages; (c) the Daily Delay Damages are the sole and exclusive remedies for Seller's failure to achieve Commercial Operations by the Guaranteed Commercial Operations Date; and (d) the Termination Damages are the sole and exclusive remedy for Company's losses arising out of the termination of this Agreement; provided, that (i) payment of Termination Damages does not relieve Seller of liability for costs and balances incurred prior to the effective date of such termination; and (ii) the Termination Damages are not intended to limit Company's rights or remedies, or Seller's liabilities or duties, with respect to losses arising independent of the termination of this Agreement, including, without limitation, Company's right to recover under **Section 20.1** (Indemnification of Company).

ARTICLE 12 DISPATCHING AND CHARGING THE FACILITY; SCHEDULING

12.1. Dispatching and Charging the Facility.

(a) **Company's Exclusive Rights.** Company shall have the exclusive right, through supervisory equipment or otherwise, to direct and control the provision of all aspects of the Energy Storage Services, at any time, as it deems appropriate in its reasonable discretion, subject only to and consistent with Good Engineering and Operating Practices, the ~~Operational Limitations, the~~operational and performance standards requirements set forth in **Section 3** (Performance Standards) of **Attachment B** (Facility Owned by Seller), and Seller's maintenance schedule determined in accordance with **Section 12.2** (Seller's Maintenance Schedule) ("**Company Dispatch/Charge**"). Seller shall make the full capability of the Facility available for Company Dispatch/Charge. Company Dispatch/Charge will either be by Seller's manual control under the direction of the Company System Operator or by remote computerized control by the Energy Management System provided in **Section 1(g)** (Active Power Control Interface) of **Attachment B** (Seller's Facility), in each case at Company's reasonable discretion, and in accordance with the Performance Standards.

~~(b) — **Operational Limitations.** In exercising its right of Company Dispatch/Charge, Company shall use reasonable efforts to comply with the applicable Operational Limitations. In the event a Company Dispatch/Charge does not conform to the Operational Limitations, Seller shall (i) immediately notify Company of the non-conformity; and (ii) notwithstanding the non-conformity, unless otherwise directed or instructed by Company, provide the Energy Storage Services as close to that directed by a Company Dispatch/Charge within the applicable Operational Limitations.—~~

(b) (e) Failure to Comply; Seller-Attributable Unavailability. Company may require deration or outage in response to the Facility's failure to comply with Company Dispatch/Charge or to any conditions of Seller-Attributable Unavailability. A deration or outage required by Company pursuant to the preceding sentence shall be considered an Unplanned Deration and shall "count against" Seller for the purpose of calculating the Annual EAF and Annual EFOF until the conditions that led to the deration or outage are resolved by Seller and Seller notifies Company of same. If, after such notification, Company attempts to dispatch the Facility and determines that such conditions that led to the deration or outage are not resolved, all time from the notice of resolution to actual resolution shall be revised as continuance of the deration or outage. If Seller requests confirmation from Company that Seller's actions to resolve such conditions that led to the deration or outage were successfully completed, then Company shall use reasonable efforts to respond to such request within three (3) Business Days in writing (with Email being acceptable) to allow Seller the opportunity to take further appropriate corrective actions if needed.

12.2. Seller's Maintenance Schedule.

(a) **Quarterly Schedule.** By each March 1, June 1, September 1 and December 1 (as applicable, subsequent to the Commercial Operations Date), Seller shall provide to Company, in the form requested by Company, a projection of maintenance outages and estimated reductions in capacity for the next calendar quarter. Seller shall provide Company with prompt written notice of any deviation from its quarterly maintenance schedule but in any case Seller shall provide such written notice not less than one (1) week prior to commencing any such rescheduled maintenance event. During any scheduled or rescheduled maintenance event, Seller shall provide updates to Company's operating personnel in the event there are any delays or changes to the proposed schedule, and shall promptly respond to any requests from Company for updates regarding the status of such maintenance event.

(b) **Annual Schedule.** By each June 30 subsequent to the Commercial Operations Date, Seller shall submit to Company, in the form requested by Company, a schedule of maintenance outages which will reduce the capacity of the Facility by **[Drafting Note: the lower of five (5) MW or 25% of Allowed Capacity]** or more for the next two-year period, beginning with January of the following year. Such annual schedule shall state the proposed dates and durations of scheduled maintenance, the scope of work for the maintenance and the estimated reductions in capacity for each projected maintenance event. Company shall review the maintenance schedule for the two-year period and inform Seller in writing no later than December 1 of the same year of Company's concurrence or requested revisions, which Seller shall agree to unless, in Seller's judgment, such proposed revisions will void or violate any warranties of equipment that is part of, or used in connection with, the Facility or violate any long-term service agreement with respect to such equipment; provided, that, in each such case, Seller shall promptly notify Company thereof, and Seller and Company shall endeavor to reach a mutually satisfactory resolution of the matter in question.

12.3. Seller's Notification Obligations.

When Seller learns that any of its equipment will be removed from or returned to service, and any such removal or return may affect the ability of the Facility to make the Energy Storage Services available to Company, Seller shall notify Company as soon as practicable and any unit shut-down shall be coordinated with Company in advance to the extent practicable.

12.4. Outage Costs.

Seller shall return the Facility at the end of an outage to service with the same amount of Energy available for discharge as was stored immediately prior to the outage. Seller shall bear all costs for Energy required to charge and discharge the Facility for the purposes of the outage, including those costs needed to restore the Energy stored in the Facility to the same amount stored in the Facility prior to the start of the outage. For billing purposes, during full Facility outages, revenue meter readings shall be taken at the start of the outage and upon completion of the outage.

ARTICLE 13

FACILITY OPERATIONS, MAINTENANCE AND REPAIR

13.1. Operations Logs.

Seller shall maintain a daily operations log for the Facility which shall record all pertinent data that will indicate whether the Facility is being operated in accordance with Good Engineering and Operating Practices. These data logs shall include, but not be limited to, information on charging and discharging, electric energy consumption and efficiency, the electrical characteristics of each Storage Unit (including settings or adjustments of such Storage Unit(s) control equipment/power conversion system and protective devices), availability (including availability to charge and discharge and its ability to store energy), maintenance and inspections performed and/or deferred (including applicable correspondence between Seller and its insurer(s) for the Facility equipment pertaining to Seller's maintenance practices and Seller's procedures and scheduling (including deferral) of maintenance at the Facility), testing, Outages, changes in operating status, unusual conditions experienced or observed, and any other significant events related to the operation of the Facility. Company shall have the right, upon reasonable notice and during regular Business Day hours to review and copy such data logs maintained pursuant to this **Section 13.1** (Operations Logs); provided, that if such logs reveal any inconsistency with Company's records, Company may request and review Seller's supporting records, correspondence, memoranda and other documents or electronically recorded data associated with such logs related to the operation and maintenance of the Facility in order to resolve such inconsistency.

13.2. Maintenance and Repair.

(a) Seller's Summary of Maintenance and Inspection Performed. Prior to February 1 of each calendar year, Seller shall submit to Company for inspection at the Site, a summary in a format similar to the example provided in **Attachment W** (Summary of Maintenance and Inspection Performed in Prior Calendar Year) of (i) all maintenance and inspection work performed in the prior calendar year; (ii) all conditions experienced or observed during such calendar year that may have a material adverse effect on or may materially impair the short-term or long-term operation of the Facility at the operational levels contemplated by this Agreement; and (iii) Seller's proposals for correcting or preventing recurrences of identified equipment problems and for performing such other maintenance and inspection work as is required by Good Engineering and Operating Practices. The summary shall present the requested data in a meaningful and informative manner consistent with the cooperative exchange of information between the Parties. If available and practicable, such summary shall be provided in electronic format with sufficient software so that Company can group activities for specific process areas of the Facility and be able to view the maintenance history of a specific equipment item.

(b) Company's Written Recommendations. Within sixty (60) Days of receiving such summary, and after any reasonable inspection desired by Company of the Facility and consultation with Seller, in the event there are issues identified that may have a material adverse effect on or may materially impair the short-term or long-

term operation of the Facility at the operational levels contemplated by this Agreement, for purposes of addressing such issues, Company may provide written recommendations for specific operation or maintenance actions or for changes in the operation or maintenance program of the Facility. Company's making or failing to make such recommendations shall not be construed as endorsing the operation and maintenance thereof or as any warranty of the safety, durability or reliability of the Facility nor as a waiver of any Company right. If Seller agrees with Company, Seller shall, within a reasonable time after Company makes such recommendations, not to exceed ninety (90) Days (or such longer period as reasonably agreed to by the Parties), implement Company's recommendations. If Seller disagrees with Company, it shall, within ten (10) Days, inform Company of alternatives it will take to accomplish the same intent, or provide Company with a reasonable explanation as to why no action is required by Good Engineering and Operating Practices. If Company disagrees with Seller's position, and if, for each of the three preceding Contract Years, the Annual EAF was less than ~~94% and/or~~ the Capacity Ratio was less than the Tier 1 bandwidth under **Section 4.3(a)** (Capacity Test and Liquidated Damages) for such Contract Year, then the parties shall commission a study by a Qualified Consultant selected from among the entities listed in **Attachment D** (Consultants List) and the Qualified Consultant will make a recommendation to remedy the situation. Seller shall abide by the Qualified Consultant's recommendation contained in such study. Both Parties shall equally share in the cost for the Qualified Consultant. However, Seller shall pay all costs associated with implementing the recommendation contained in the Qualified Consultant's report. Notwithstanding the foregoing, Seller shall not be required to comply with any recommendations that, in Seller's reasonable judgment, will violate or void any warranties of equipment that is a part of, or used in connection with, the Facility or violate any long-term service agreement, or conflict with any written requirements, specifications or operating parameters of the manufacturer, with respect to such equipment; provided, that, in each such case, Seller shall promptly notify Company thereof, and Seller and Company shall endeavor to reach a mutually satisfactory resolution of the matter in question.

13.3. Manuals; Reports, Studies and Assessments.

Seller shall provide Company with (a) any and all manufacturer's equipment manuals together with a copy of the operating and maintenance manual no later than the Commercial Operations Date; and (b) any updates, supplements and/or amendments thereto within three (3) Business Days after Seller's receipt of the same. In addition, throughout the Term, Seller shall deliver to Company, promptly upon Seller's receipt of the same, any reports, studies or assessments of the Facility prepared by an independent engineer for the benefit of the Seller.

13.4. Time Period for Maintaining Records.

Any and all records, correspondence, memoranda and other documents or electronically recorded data related to the operation, maintenance and repair of the Facility shall be maintained by Seller for a period of not less than six (6) years.

ARTICLE 14

CREDIT ASSURANCE AND SECURITY

14.1. Development Period Security.

(a) **General.** To guarantee undertaking the performance of Seller's obligations under the Agreement for the period prior to the Commercial Operations Date (including but not limited to Seller's obligation to meet the Guaranteed Commercial Operations Date), Seller shall provide satisfactory development period security to Company in the amount equal to \$75 for each kilowatt of the Contract Capacity (the "**Development Period Security**"). Seller shall provide fifty percent (50%) of the Development Period Security to Company within ten (10) Days of the Execution Date of this Agreement, and the remaining fifty percent (50%) of the Development Period Security within ten (10) Business Days of the execution of the Interconnection Requirements Amendment.

(b) **Return of Development Period Security.** The Development Period Security shall be returned to Seller, subject to Company's right to draw from the Development Period Security as set forth in **Section 14.5** (Company's Right to Draw from Security Funds), in the following circumstances: (i) following Company's receipt of satisfactory Operating Period Security pursuant to **Section 14.2** (Operating Period Security) of this Agreement; or (ii) this Agreement is declared null and void pursuant to **Section 2.3** (Interconnection Requirements Study), **Section 3.4** (Prior to Effective Date), **Section 24.3** (Time Period for PUC Submittal Date), or **Section 24.4** (Time Period for PUC Approval).

14.2. Operating Period Security.

To guarantee the performance of Seller's obligations under the Agreement for the period starting from the Commercial Operations Date, Seller shall provide satisfactory operating period security to Company in the amount equal to \$125 for each kilowatt of the Contract Capacity (the "**Operating Period Security**"). Seller shall provide such Operating Period Security to Company within five (5) Business Days after the Commercial Operations Date, provided that, at all times, some form of Security Funds shall be in place and available to Company, whether Development Period Security or Operating Period Security.

14.3. Form of Security.

Seller shall supply the Development Period Security and Operating Period Security required in the form of an irrevocable standby letter of credit with no documentation requirement substantially in the form attached to this Agreement as **Attachment M** (Form of Letter of Credit) from a bank chartered in the United States with a credit rating of "A-" or better. If the rating (as measured by Standard & Poor's) of the bank issuing the standby letter of credit falls below A-, Company may require Seller to replace, within thirty (30) Days' notice by Company, the standby letter of credit with a standby letter of credit from another bank chartered in the United States with a credit rating of "A-" or better. Such letter of credit shall be issued for a minimum term of

one (1) year. Furthermore, at the end of each year, the security shall be renewed for an additional one (1) year term so that at the time of such renewal, the remaining term of any such security shall not be less than one (1) year. The letter of credit shall include a provision for at least thirty (30) Days advance notice to Company and Seller of any expiration or earlier termination of the letter of credit so as to allow Company sufficient time to exercise its rights under said security if Seller fails to extend or replace the security. In all cases, the reasonable costs and expenses of establishing, renewing, substituting, canceling, increasing, reducing, or otherwise administering the letter of credit shall be borne by Seller. In the event Company receives notice from the issuing bank that a letter of credit for the Development Period Security or Operating Period Security will be cancelled or is set to expire and will not be extended, Company shall endeavor, but shall not be obligated, to provide Seller with notice of such cancellation or termination. Company shall not be responsible for any lack of notice to Seller of such letter of credit's cancellation or termination and the events resulting therefrom, provided, however, that if Company draws upon the then full amount remaining under the letter of credit, the provisions of **Section 14.6** (Failure to Renew or Extend Letter of Credit) and **Section 14.7** (L/C Proceeds Escrow) shall apply. In the event the letter of credit for Development Period Security or Operating Period Security ever expires or is terminated without Company drawing on such full amount remaining under the letter of credit prior to its expiration, and Seller has not been afforded the opportunity to replace the letter of credit prior to its expiration or termination because of lack of notice, Seller shall be provided a grace period of five (5) Business Days from any notice of such expiration or termination of the letter of credit to obtain and provide to Company a substitute letter of credit meeting the requirements of this **Article 14** (Credit Assurance and Security).

14.4. Security Funds.

The Development Period Security and Operating Period Security, including L/C Proceeds therefrom (collectively, the "**Security Funds**") established, funded, and maintained by Seller pursuant to the provisions of this **Article 14** (Credit Assurance and Security) shall provide security for the performance of Seller's obligations under this Agreement and shall be available to be drawn on by Company as provided in **Section 14.5** (Company's Right to Draw from Security Funds). Seller shall maintain the Security Funds at the contractually-required level throughout the Term of this Agreement. Seller shall replenish the Security Funds to such required level within fifteen (15) Business Days after any draw on the Security Funds by Company or any reduction in the value of Security Funds below the required level for any other reason. Notwithstanding the foregoing, Seller's obligation to replenish the Development Period Security shall not exceed in total three (3) times the original amount of the Development Period Security required under **Section 14.1** (Development Period Security) of this Agreement.

14.5. Company's Right to Draw from Security Funds.

In addition to any other remedy available to it, Company may, before or after termination of this Agreement, draw from the Security Funds such amounts as are necessary to recover amounts Company is owed pursuant to this Agreement or the IRS Letter Agreements, including, without limitation, any damages due Company, any

interconnection costs owed pursuant to **Attachment G** (Company-Owned Interconnection Facilities) and any amounts for which Company is entitled to indemnification under this Agreement. Company may, in its sole discretion, draw all or any part of such amounts due Company from any of the Security Funds to the extent available pursuant to this **Article 14** (Credit Assurance and Security), and from all such forms, and in any sequence Company may select. Any failure to draw upon the Security Funds or other security for any damages or other amounts due Company shall not prejudice Company's rights to recover such damages or amounts in any other manner.

14.6. Failure to Renew or Extend Letter of Credit.

If the letter of credit is not renewed or extended at least thirty (30) Days prior to its expiration or earlier termination, Company shall have the right to draw immediately upon the full amount of the letter of credit and to place the proceeds of such draw (the "**L/C Proceeds**"), at Seller's cost, in an escrow account in accordance with **Section 14.7** (L/C Proceeds Escrow), until and unless Seller provides a substitute letter of credit meeting the requirements of this **Article 14** (Credit Assurance and Security).

14.7. L/C Proceeds Escrow.

If Company draws on the letter of credit pursuant to **Section 14.6** (Failure to Renew or Extend Letter of Credit), and so long as a substitute letter of credit meeting the requirements of this **Article 14** (Credit Assurance and Security) is not obtained and provided to Company, Company shall, in order to avoid comingling the L/C Proceeds, have the right, but not the obligation, to place the L/C Proceeds in an escrow account as provided in this **Section 14.7** (L/C Proceeds Escrow) with a reputable escrow agent acceptable to Company ("**Escrow Agent**"). Without limiting the generality of the foregoing, a federally-insured bank shall be deemed to be a "reputable escrow agent." Company shall have the right to apply the L/C Proceeds as necessary to recover amounts Company is owed pursuant to this Agreement or the IRS Letter Agreements, including, without limitation, any damages due Company, any interconnection costs owed pursuant to **Attachment G** (Company-Owned Interconnection Facilities) and any amounts for which Company is entitled to indemnification under this Agreement. To that end, the documentation governing such escrow account shall be in form and content satisfactory to Company and shall give Company the sole authority to draw from the account. Seller shall not be a party to such documentation and shall have no rights to the L/C Proceeds. Upon full satisfaction of Seller's obligations under this Agreement, including recovery by Company of amounts owed to it under this Agreement, Company shall instruct the Escrow Agent to remit to the bank that issued the letter of credit that was the source of the L/C Proceeds the remaining balance (if any) of the L/C Proceeds. If there is more than one escrow account with L/C Proceeds, Company may, in its sole discretion, draw on such accounts in any sequence Company may select. Any failure to draw upon the L/C Proceeds for any damages or other amounts due Company shall not prejudice Company's rights to recover such damages or amounts in any other manner. If a substitute letter of credit satisfying the requirements of this **Article 14** (Credit Assurance and Security) is obtained and provided to Company, the net L/C Proceeds remaining as of the date that such substitute letter of credit is provided, shall be returned to Seller, or as Seller

directs in writing.

14.8. Release of Security Funds.

Promptly following the end of the Term, and the complete performance of all of Seller's obligations under this Agreement, including, but not limited to, the obligation to pay any and all amounts owed by Seller to Company under this Agreement, Company shall release the Security Funds to Seller.

ARTICLE 15

SALE AND ASSIGNMENT

15.1. Sale of the Facility.

Seller shall comply with the requirements of **Attachment P** (Sale of Facility by Seller) before Seller's right, title or interest in the Facility, in whole or in part, including a Change in Control, may be disposed of (other than the disposition of equipment in the ordinary course of operating and maintaining the Facility). Any attempt by Seller to make any such disposition or Change in Control without fulfilling the requirements of **Attachment P** (Sale of Facility by Seller) shall be deemed null and void and shall constitute an Event of Default pursuant to **Article 6** (Events of Default; Remedies; Termination).

15.2. Assignment by Seller.

This Agreement may not be assigned by Seller without the prior written consent of Company (such consent not to be unreasonably withheld, conditioned or delayed), provided that Seller shall have the right, without the consent of Company, to assign its interest in this Agreement (a) to a wholly-owned subsidiary or to an affiliated company under common control with **[INSERT APPROPRIATE PARENT ENTITY]**, provided that such assignment does not impair the ability of Seller to perform its obligations under this Agreement; and (b) as collateral security for purposes of arranging or rearranging debt and/or equity financing for the Facility, or for sale-leaseback financing, to assign all or any part of its rights or benefits, but not its obligations, to any lender providing debt financing for the Facility. Seller shall promptly provide written notice to Company of any assignment of all or part of this Agreement and Seller shall provide to Company information about the assignee and the assignee's operational experience reasonably requested by Company. Company shall not be required to incur any duty or obligation as a result of, or in connection with, such assignment made without its consent beyond those duties and obligations set forth in this Agreement, unless otherwise agreed to by Company in writing.

15.3. Company's Acknowledgment.

In connection with any assignment relating to the Facility Debt pursuant to **Section 15.2** (Assignment by Seller), Company shall, if requested by Seller and if its costs (including reasonable attorneys' fees of outside counsel) in responding to such request are paid by Seller: (a) execute and/or provide such Hawai'i-law-governed documents as may be reasonably requested by the Facility Lender, and reasonably acceptable to Company, including (i) to acknowledge (A) such assignment and/or pledge/mortgage, (B) the right of the Facility Lender to receive copies of notices of Events of Default where the Seller is the Defaulting Party and (C) the Facility Lender's reasonable opportunity to cure such Events of Default and to exercise remedies to assume Seller's obligations under this Agreement; and (ii) estoppel certificates as to Seller's and Company's compliance with the terms and conditions of this Agreement; and (b) provide a legal opinion as to the due authorization of such Company acknowledgment.

15.4. Financing Document Requirements.

Seller shall include in the terms of the Financing Documents as provisions for Company's benefit that provide that as a condition to the Facility Lender, or any purchaser, successor, assignee and/or designee of the Facility Lender ("**Subsequent Owner**"), succeeding to ownership or possession of the Facility as a result of the exercise of remedies under the Financing Documents, and thereafter operating the Facility to generate electric energy, such Facility Lender or Subsequent Owner shall, prior to operating the Facility for such purpose, have provided to Company, evidence reasonably acceptable to Company that such Subsequent Owner has (a) the qualifications, or has contracted with an entity having the qualifications, to operate the Facility in a manner consistent with the terms and conditions of this Agreement; and (b) assumed all of Seller's rights and obligations under this Agreement.

15.5. Reimbursement of Company Costs.

Seller shall reimburse Company for costs and expenses incurred by Company (including reasonable attorneys' fees of outside counsel) in responding to Facility Lender's requests or as a result of any event of default by Seller under the Financing Documents, including, but not limited to any assumption of Seller's obligations under **Section 15.4** (Financing Document Requirements).

15.6. Assignment by Company.

This Agreement shall not be assigned by Company without the prior written consent of Seller (which consent shall not be unreasonably withheld, conditioned or delayed); provided, however, that Company shall have the right, without the consent of Seller, to assign its interest in this Agreement to any affiliated company owned in whole or in part by HEI so long as such assignee (a) shall have assumed all obligations of Company under this Agreement; and (b) is a utility regulated by the PUC.

15.7. Consequences for Failure to Comply.

Any attempt to make any pledge, mortgage, grant of a security interest or collateral assignment for which consent is required under **Section 15.2** (Assignment by Seller) or **Section 15.6** (Assignment by Company) (as applicable), without fulfilling the requirements of this **Article 15** (Sale and Assignment) shall be null and void and shall constitute an Event of Default pursuant to **Article 6** (Events of Default; Remedies; Termination).

ARTICLE 16

PERSONNEL AND SYSTEM SAFETY

Notwithstanding any other provisions of this Agreement, if at any time Company reasonably determines that the Facility may endanger Company's personnel, and/or the continued operation of the Facility may endanger the integrity of the Company System or have an adverse effect on Company's other customers' electric service, Company shall have the right to disconnect the Facility from the Company System, as determined in the sole discretion of the Company System Operator. The Facility shall immediately comply with the dispatch instruction, which may be initiated through remote control, and shall remain disconnected (and in Seller-Attributable Unavailability status if so determined), until such time as Company is satisfied that the condition(s) referred to above have been corrected. If Company disconnects the Facility from the Company System for personnel or system safety reasons, it shall as soon as practicable notify Seller by telephone, and thereafter make reasonable efforts to confirm, in writing (with email being acceptable), within three (3) Days of the disconnection, the reasons for the disconnection. If the reason for the disconnection constitutes Seller-Attributable Unavailability, Company will notify Seller (a) whether the conditions resulting in such disconnection have been resolved (in which case no additional time after such confirmation shall count as Seller-Attributable Unavailability); or (b) that conditions resulting in such disconnection have not been resolved so that Seller can take such appropriate corrective actions. Seller shall notify Company in writing when such corrective action has been completed; provided, however, that Seller shall remain in Seller-Attributable Unavailability until Company is satisfied that the condition resulting in the disconnection has been corrected. Company shall use reasonable efforts to inspect such corrective measures (if necessary) and confirm the resolution of such condition within three (3) Business Days after Seller's notification.

ARTICLE 17

FORCE MAJEURE

17.1. Definition of Force Majeure.

The term “**Force Majeure**” as used in this Agreement means any occurrence that:

- (a) In whole or in part delays or prevents a Party’s performance under this Agreement;
- (b) Is not the direct or indirect result of the fault or negligence of that Party;
- (c) Is not within the control of that Party notwithstanding such Party having taken all reasonable precautions and measures in order to prevent or avoid such event; and
- (d) The Party has been unable to overcome by the exercise of due diligence.

17.2. Events That Could Qualify as Force Majeure.

Subject to the foregoing, events that could qualify as Force Majeure include, but are not limited to, the following:

- (a) acts of God, flooding, lightning, landslide, earthquake, fire, drought, explosion, epidemic, quarantine, storm, hurricane, tornado, volcano, other natural disaster or unusual or extreme adverse weather-related events;
- (b) war (declared or undeclared), riot or similar civil disturbance, acts of the public enemy (including acts of terrorism), sabotage, blockade, insurrection, revolution, expropriation or confiscation; or
- (c) except as set forth in **Section 17.3(i)**, strikes, work stoppage or other labor disputes (in which case the affected Party shall have no obligation to settle the strike or labor dispute on terms it deems unreasonable).

17.3. Exclusions From Force Majeure.

Force Majeure, however, does not include any of the following:

- (a) any acts or omissions of any third party, including, without limitation, any vendor, materialman, customer, or supplier of Seller, unless such acts or omissions are themselves caused by an event of Force Majeure;
- (b) any full or partial reduction in the availability of the Facility to provide the Energy Storage Services in response to Company Dispatch/Charge that is caused by or arises from either (i) a mechanical or equipment breakdown, or other mishaps, events or conditions attributable to normal wear and tear, unless such mishap is caused by Force Majeure; or (ii) any action or inaction of a third party, including but

not limited to any vendor or supplier of the Seller or Company, except to the extent such action or inaction is due to Force Majeure;

(c) changes in market conditions that affect the cost of the Seller's supplies, or that otherwise render this Agreement uneconomic or unprofitable for the Seller;

(d) Seller's inability to obtain Governmental Approvals or Land Rights for the construction, ownership, operation or maintenance of the Facility, or Seller's loss of any such Governmental Approvals or Land Rights once obtained;

(e) Seller's inability to obtain sufficient fuel, power or materials to operate the Facility, except if Seller's inability to obtain sufficient power or materials is caused solely by an event of Force Majeure;

(f) Seller's failure to obtain additional funds, including funds authorized by a state or the federal government or agencies thereof, to supplement the payments made by Company pursuant to this Agreement;

(g) a forced outage except where such forced outage is caused by an event of Force Majeure;

(h) litigation or administrative or judicial action pertaining to Seller's interest in this Agreement, the Site, the Facility, the Land Rights, any Governmental Approvals, or the construction, ownership, operation or maintenance of the Facility, the Company-Owned Interconnection Facilities or the Company System;

(i) A strike, work stoppage, or labor dispute limited only to any one or more of the Indemnified Seller Parties or any other third party employed by Seller to work on the Facility.

17.4. Satisfaction of Certain Conditions.

Subject to **Article 11** (Construction Period and Milestones), **Section 17.5** (Termination for Force Majeure) and **Section 17.6** (Effect of Force Majeure), if, because of Force Majeure, either Party is unable to perform its obligations under this Agreement, such Party shall be excused from whatever performance is affected by the Force Majeure only to the extent so affected; provided:

(a) the non-performing Party gives the other Party, no more than five (5) Days after the non-performing Party becomes aware or should have become aware of the Force Majeure condition or event, but in any event no later than thirty (30) Days after the Force Majeure condition or event begins, notice written notice (the "Force Majeure Notice") stating that the non-performing Party considers such condition or event to constitute Force Majeure and describing the particulars of such Force Majeure condition or event, including the date the Force Majeure commenced;

(b) the non-performing Party gives the other Party, within fourteen (14) Days ~~of providing the notice described in Section 17.4(a)~~ Force Majeure Notice was or should have been provided, a written explanation of the Force Majeure condition or event and its effect on the non-performing Party's performance, which explanation

shall include evidence reasonably sufficient to establish that the occurrence constitutes Force Majeure;

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

(d) the non-performing Party exercises commercially reasonable efforts to remedy its inability to perform and provides written weekly progress reports to the other Party describing actions taken to end the Force Majeure; and

(e) when the condition or event of Force Majeure ends and the non-performing Party is able to resume performance of its obligations under this Agreement, that Party shall give the other Party written notice to that effect.

17.5. Termination for Force Majeure.

If Force Majeure delays or prevents a Party's performance for more than three hundred sixty-five (365) Days from the occurrence or inception of the Force Majeure, as ~~noticed pursuant to Section 17.4(a)~~ [stated in the Force Majeure Notice](#), and such delay or failure of performance would have otherwise constituted an Event of Default under **Article 6** (Events of Default; Remedies; Termination), the other Party shall have the right to terminate this Agreement by written notice. Such notice shall designate the date such termination is to be effective, which date shall be no later than thirty (30) Days after such notice is deemed to be received by the Party whose performance has been delayed or prevented. In the event of termination pursuant to this **Section 17.5** (Termination for Force Majeure), neither Party shall be liable for any damages or have any obligations to the other, except as provided in **Section 27.22** (Survival of Obligations) (but excluding **Section 27.22(b)**).

17.6. Effect of Force Majeure.

Except as provided in **Article 11** (Construction Period and Milestones) and **Section 17.5** (Termination for Force Majeure), neither Party will be considered to be in default in the performance of any of its obligations set forth in this Agreement (except for obligations to pay money) when and to the extent failure of performance is caused by Force Majeure; provided, that a failure to make payments when due that accrued prior to the Force Majeure event shall not be excused.

17.7. No Relief of Other Obligations.

Except as otherwise expressly provided for in this Agreement, the existence of a condition or event of Force Majeure shall not relieve the Parties of their obligations under this Agreement to the extent that performance of such obligations is not precluded by the condition or event of Force Majeure.

17.8. No Extension of Term.

In no event will any delay or failure of performance caused by any conditions or events of Force Majeure extend this Agreement beyond its stated Term.

ARTICLE 18

REPRESENTATIONS AND WARRANTIES

18.1. Representations and Warranties of Both Parties.

As of the Execution Date and for the extent of the Term, each Party represents and warrants to the other Party that:

- (a)** Each respective Party has all necessary right, power and authority to execute, deliver and perform this Agreement; and
- (b)** The execution, delivery and performance of this Agreement by each respective Party will not result in a violation of any Laws, or conflict with, or result in a breach of, or cause a default under, any agreement or instrument to which such Party is also a party or by which it is bound. No consent of any person or entity not a Party to this Agreement, including any Governmental Authority (other than agencies whose approval is necessary for the development, construction, operation and maintenance of the Facility and the Company-Owned Interconnection Facilities or the PUC), is required for such execution, delivery and performance by either Party.

18.2. Representations and Warranties of Seller.

Seller represents and warrants to Company that:

- (a)** As of the Execution Date and for the extent of the Term, it is an entity in good standing with the Hawai'i Department of Commerce and Consumer Affairs and shall provide Company with a certified copy of a certificate of good standing by the Execution Date;
- (b)** As of the Execution Date, Seller is a subsidiary of [_____], a company with extensive experience developing, constructing, owning and operating utility-scale renewable energy generation facilities.
- (c)** Seller has obtained or will obtain Land Rights within the time periods set forth in **Section 10.2** (Land Rights for Facility) and **Section 10.3** (Company-Owned Interconnection Facilities);
- (d)** Seller shall have obtained, at the time legally required (i) all Governmental Approvals for the construction, ownership, operation and maintenance of the Company-Owned Interconnection Facilities and (ii) all Governmental Approvals necessary for the construction, ownership, operation and maintenance of the Facility; and
- (e)** As of the Commercial Operations Date and for the extent of the Term, Discharge Energy shall be delivered to Company free and clear of all liens, security interests, claims and encumbrances or any other interest therein or thereto by any person.

ARTICLE 19 LIMITATIONS

19.1. Consequential Damages.

NEITHER PARTY SHALL BE LIABLE FOR DAMAGES INCURRED BY THE OTHER PARTY FOR ANY LOSS OF PROFIT OR REVENUES, LOSS OF PRODUCT, LOSS OF USE OF PRODUCTS OR SERVICES OR ASSOCIATED EQUIPMENT, INTERRUPTION OF BUSINESS, COST OF CAPITAL, DOWNTIME COSTS, INCREASED OPERATING COSTS, OR FOR ANY SPECIAL, CONSEQUENTIAL, INCIDENTAL, INDIRECT OR PUNITIVE DAMAGES; PROVIDED, HOWEVER, THAT NOTHING IN THIS **SECTION 19.1** (CONSEQUENTIAL DAMAGES) SHALL LIMIT ANY OF (A) THE INDEMNIFICATION OBLIGATIONS OF EITHER PARTY UNDER **ARTICLE 20** (INDEMNIFICATION) OF THIS AGREEMENT; (B) THE LIABILITY OF EITHER PARTY FOR LIQUIDATED DAMAGES AS SET FORTH IN THIS AGREEMENT; (C) THE LIABILITY OF EITHER PARTY FOR DIRECT DAMAGES FOR BREACH OF THIS AGREEMENT AS AND TO THE EXTENT SUCH DAMAGES HAVE NOT BEEN LIQUIDATED AS SET FORTH IN THIS AGREEMENT; (D) THE LIABILITY OF EITHER PARTY FOR GROSS NEGLIGENCE OR INTENTIONAL MISCONDUCT; OR (E) THE RIGHT OR ABILITY OF COMPANY TO PROCEED AGAINST OR OTHERWISE EXERCISE ITS RIGHTS WITH RESPECT TO ANY DEVELOPMENT PERIOD SECURITY OR OPERATING PERIOD SECURITY.

19.2. No Representation by Company.

Any review by Company of the Facility, including the design, construction or refurbishment, operation or maintenance of the Facility, or otherwise, is solely for Company's information. By making such review, Company makes no representation as to the economic and technical feasibility, operational capability, or reliability of the Facility, and Seller shall in no way represent to any third party that any such review by Company of the Facility, including, but not limited to, any review of the design, construction or renovation, operation, or maintenance of the Facility by Company, constitutes any such representation by Company. Seller is solely responsible for the economic and technical feasibility, operational capability, and reliability of the Facility.

ARTICLE 20 INDEMNIFICATION

20.1. Indemnification of Company.

(a) **Third-Party Claims.** In addition to any other indemnification obligations Seller may have elsewhere in this Agreement, which are hereby incorporated in this **Section 20.1(a)** (Third-Party Claims), Seller shall indemnify, defend, and hold harmless Company, its successors, permitted assigns, affiliates, controlling persons, directors, officers, employees, servants and agents, including but not limited to contractors, subcontractors and the employees of any of them (each, a “**Indemnified Company Party**”), from and against any Losses suffered, incurred or sustained by any Indemnified Company Party or to which any Indemnified Company Party becomes subject, resulting from, arising out of, or relating to, any Claim due to any Claim (whether or not well founded, meritorious or unmeritorious) by a third party not controlled by, or under common ownership and/or control with, Company (whether or not well founded, meritorious or unmeritorious) relating to (i) the Energy Storage Services or Seller’s development, permitting, deployment, ownership, operation and/or maintenance of the Facility or Company-Owned Interconnection Facilities (excluding (A) if Seller constructs the Company-Owned Interconnection Facilities, the ownership, operation and/or maintenance of the Company-Owned Interconnection Facilities following the Transfer Date; or (B) if Company constructs the Company-Owned Interconnection Facilities, the construction, ownership, operation and/or maintenance of the Company-Owned Interconnection Facilities); (ii) any breach of Seller of its representations and warranties in **Article 18** (Representations and Warranties); or (iii) any actual or alleged personal injury or death or damage to property, in any way arising out of, incident to, or resulting directly or indirectly from the acts or omissions of any Indemnified Seller Party or its agents or subcontractors, except as and to the extent that any of the foregoing such Loss is attributable to the negligence or willful misconduct of an Indemnified Company Party.

(b) **Compliance with Laws.** Any Losses incurred by an Indemnified Seller Party for noncompliance by Seller or an Indemnified Seller Party with applicable Laws shall not be reimbursed by Company but shall be the sole responsibility of Seller. Seller shall indemnify, defend and hold harmless each Indemnified Company Party from and against any and all Losses in any way arising out of, incident to, or resulting directly or indirectly from the failure of Seller to comply with any Laws.

(c) **Notice of Claim.** If Seller shall obtain knowledge of any Claim subject to **Section 20.1(a)** (Indemnification Against Third Party Claims), **Section 20.1(b)** (Compliance with Laws) or otherwise under this Agreement, Seller shall give prompt notice thereof to Company, and if Company shall obtain any such knowledge, Company shall give prompt notice thereof to Seller.

(d) **Indemnification Procedures.**

(i) In case any Claim subject to **Section 20.1(a)** (Indemnification Against Third Party Claims) or **Section 20.1(b)** (Compliance with Laws) or otherwise under this Agreement, shall be brought against an Indemnified Company Party,

Company shall notify Seller of the commencement thereof and, provided that Seller has acknowledged in writing to Company its obligation to an Indemnified Company Party under this **Section 20.1** (Indemnification of Company), Seller shall be entitled, at its own expense, acting through counsel acceptable to Company, to participate in and, to the extent that Seller desires, to assume and control the defense thereof; provided, however, that Seller shall not compromise or settle a Claim against an Indemnified Company Party without the prior written consent of Company which consent shall not be unreasonably withheld or delayed.

(ii) Seller shall not be entitled to assume and control the defense of any such Claim subject to **Section 20.1(a)** (Indemnification Against Third Party Claims), **Section 20.1(b)** (Compliance with Laws) or otherwise under this Agreement, if and to the extent that, in the sole opinion of Company, such Claim involves the potential imposition of criminal liability on an Indemnified Company Party or a conflict of interest between an Indemnified Company Party and Seller, in which case Company shall be entitled, at its own expense, acting through counsel acceptable to Seller to participate in any Claim, the defense of which has been assumed by Seller. Company shall supply, or shall cause an Indemnified Company Party to supply, Seller with such information and documents requested by Seller as are necessary or advisable for Seller to possess in connection with its participation in any Claim to the extent permitted by this **Section 20.1(d)(2)**. Company shall not enter, and shall restrict any Indemnified Company Party from entering, into any settlement or other compromise with respect to any Claim without the prior written consent of Seller, which consent shall not be unreasonably withheld or delayed.

(iii) Upon payment of any Losses by Seller, pursuant to this **Section 20.1** (Indemnification of Company) or other similar indemnity provisions contained herein, to or on behalf of Company, Seller, without any further action, shall be subrogated to any and all claims that an Indemnified Company Party may have relating thereto.

(iv) Company shall fully cooperate and cause all Company Indemnified Parties to fully cooperate, in the defense of or response to, any Claim subject to **Section 20.1** (Indemnification of Company).

20.2. Indemnification of Seller.

(a) **Third-Party Claims.** Company shall indemnify, defend, and hold harmless Seller, its successors, permitted assigns, affiliates, controlling persons, directors, officers, employees, servants and agents, including but not limited to contractors, subcontractors and their employees of any of them (each, a “**Indemnified Seller Party**”), from and against any Losses suffered, incurred or sustained by any Indemnified Seller Party or to which any Indemnified Seller Party becomes subject, resulting from, arising out of, or relating to, due to any Claim (whether or not well founded, meritorious or unmeritorious) by a third party not controlled by or under common ownership and/or control with Seller relating to (i)(A) if Seller constructs the Company-Owned Interconnection Facilities, the ownership, operation and/or maintenance of the Company-Owned Interconnection Facilities following the Transfer Date; or (B) if Company constructs the Company-Owned Interconnection Facilities, the construction, ownership, operation and/or maintenance of the Company-Owned

Interconnection Facilities; (ii) any breach of Company of its representations and warranties in **Article 18** (Representations and Warranties); or (iii) to any actual or alleged personal injury or death or damage to property, in any way arising out of, incident to, or resulting directly or indirectly from the acts or omissions of Company, except to the extent that any such Loss is attributable to the gross negligence or willful misconduct of an Indemnified Seller Party.

(b) Compliance with Laws. Any Losses incurred by an Indemnified Company Party for noncompliance by Company or an Indemnified Company Party with applicable Laws shall not be reimbursed by Seller but shall be the sole responsibility of Company. Company shall indemnify, defend and hold harmless each Indemnified Seller Party from and against any and all Losses in any way arising out of, incident to, or resulting directly or indirectly from the failure of Company to comply with any Laws.

(c) Notice of Claim. If Company shall obtain knowledge of any Claim subject to **Section 20.2(a)** (Indemnification Against Third Party Claims), **Section 20.2(b)** (Compliance with Laws) or otherwise under this Agreement, Company shall give prompt notice thereof to Seller, and if Seller shall obtain any such knowledge, Seller shall give prompt notice thereof to Company.

(d) Indemnification Procedures.

(i) In case any Claim subject to **Section 20.2(a)** (Indemnification Against Third Party Claims), **Section 20.2(b)** (Compliance with Laws), or otherwise under this Agreement, shall be brought against an Indemnified Seller Party, Seller shall notify Company of the commencement thereof and, provided that Company has acknowledged in writing to Seller its obligation to an Indemnified Seller Party under this **Section 20.2** (Indemnification of Seller), Company shall be entitled, at its own expense, acting through counsel acceptable to Seller, to participate in and, to the extent that Company desires, to assume and control the defense thereof; provided, however, that Company shall not compromise or settle a Claim against an Indemnified Seller Party without the prior written consent of Seller which consent shall not be unreasonably withheld or delayed.

(ii) Company shall not be entitled to assume and control the defense of any such Claim subject to **Section 20.2(a)** (Indemnification Against Third Party Claims), **Section 20.2(b)** (Compliance with Laws), or otherwise under this Agreement, if and to the extent that, in the opinion of Seller, such Claim involves the potential imposition of criminal liability on an Indemnified Seller Party or a conflict of interest between an Indemnified Seller Party and Company, in which case Seller shall be entitled, at its own expense, acting through counsel acceptable to Company, to participate in any Claim the defense of which has been assumed by Company. Seller shall supply, or shall cause an Indemnified Seller Party to supply, Company with such information and documents requested by Company as are necessary or advisable for Company to possess in connection with its participation in any Claim, to the extent permitted by this **Section 20.2(d)(2)**. Seller shall not enter, and shall restrict any Indemnified Seller Party from entering, into any settlement or other compromise with respect to any Claim without the prior written consent of Company, which consent shall not be unreasonably withheld or delayed.

(iii) Upon payment of any Losses by Company pursuant to this **Section 20.2** (Indemnification of Seller) or other similar indemnity provisions contained herein to or on behalf of Seller, Company, without any further action, shall be subrogated to any and all claims that an Indemnified Seller Party may have relating thereto.

(iv) Seller shall fully cooperate and cause all Seller Indemnified Parties to fully cooperate, in the defense of, or response to, any Claim subject to **Section 20.2** (Indemnification of Seller).

ARTICLE 21 INSURANCE

21.1. Required Coverage.

Seller, and anyone acting under its direction or control or on its behalf, shall, at its own expense, acquire and maintain, or cause to be maintained in full effect, commencing with the start of construction of the Facility, as applicable, and continuing throughout the Term, as applicable, the minimum insurance coverage set forth in **Attachment Q** (Required Insurance), or such higher amounts as the Seller and/or the Facility Lender reasonably determines to be necessary during construction and operation of the Facility. Seller's indemnity and other obligations shall not be limited by the foregoing insurance requirements.

21.2. Waiver of Subrogation.

Seller, and anyone acting under its direction or control or on its behalf, shall cause its insurers to waive all rights of subrogation which Seller or its insurers may have against Company, Company's agents, or Company's employees.

21.3. Additional Insureds.

The insurance policies specified in **Section 2** (General Liability Insurance), **Section 3** (Automobile Liability Insurance) and **Section 9** (Pollution Liability Insurance) of **Attachment Q** (Required Insurance) shall name Company as an additional insured, as its interests may appear, with respect to any and all third-party bodily injury and/or property damage claims, including completed operations, arising from Seller's performance of this Agreement, and Seller shall submit to Company a copy of such additional insured endorsement with evidence of insurance as required herein. The insurance policies specified in **Section 4** (Builders All Risk Insurance) and **Section 5** (All Risk Property/Mechanical and Electrical Breakdown Insurance (Upon Completion of Construction)) of **Attachment Q** (Required Insurance) shall include Company as loss payee, as its interest may appear with respect to any Property or Mechanical and Electrical losses. Seller shall promptly, and in no event later than five (5) Days after such cancellation, modification or non-renewal, provide written notice to Company should any of the insurance policies required under this Agreement be cancelled, materially modified, or not renewed upon expiration. Company acknowledges that the Facility Lender shall be entitled to receive and distribute any and all loss proceeds as stipulated by any Financing Documents related to any policy described in this **Article 21** (Insurance) and **Attachment Q** (Required Insurance).

21.4. Evidence of Policies Provided to Company.

Evidence of insurance for the coverage specified in this **Article 21** (Insurance) shall be provided to Company within thirty (30) Days after the Effective Date or prior to the start of construction, whichever shall first occur. Within thirty (30) Days of any change of any policy and upon renewal of any policy, Seller shall provide certificates of insurance to Company. Upon Company's reasonable request during the Term, Seller

shall make available to Company for its inspection at Seller's designated location certified copies of the insurance policies described in this **Article 21** (Insurance) and **Attachment Q** (Required Insurance). Receipt of any evidence of insurance showing less coverage than requested is not a waiver of Seller's obligations to fulfill the requirements.

21.5. Deductibles.

Company acknowledges that any policy required herein may contain reasonable deductibles or self-insured retentions, the amounts of which will be reviewed for acceptance by Company. Acceptance will not be unreasonably withheld. Any deductible shall be the responsibility of Seller.

21.6. Application of Proceeds from All Risk Property/Mechanical and Electrical Breakdown Insurance.

Seller shall use commercially reasonable efforts to obtain provisions in the Financing Documents, on reasonable terms, providing for the insurance proceeds from All Risk Property/Mechanical and Electrical Breakdown Insurance to be applied to repair of the Facility.

21.7. Annual Review by Company.

The coverage limits shall be reviewed annually by Company and if, in Company's discretion, Company determines that the coverage limits should be increased, Company shall so notify Seller. The amount of any increase of the coverage limits, when considered as a percentage of the then existing coverage limits, shall not exceed the cumulative amount of increase in the Consumer Price Index occurring after the coverage limits herein were last set. Seller shall, within thirty (30) Days of notice from Company, increase the coverage as directed in such notice and the costs of such increased coverage limits shall be borne by Seller.

21.8. No Representation of Coverage Adequacy.

By requiring insurance herein, Company does not represent that coverage and limits will necessarily be adequate to protect Seller, and such coverage and limits shall not be deemed as a limitation on Seller's liability under the indemnities granted to Company in this Agreement.

21.9. Subcontractors.

Seller shall ensure that each of its subcontractors is either (a) named as an additional insured under the insurance policies procured by Seller; or (b) separately covered by insurance policies equivalent in type and monetary limits as those required of Seller. All such insurance shall be provided at the sole cost of Seller or its subcontractor.

21.10. General Insurance Requirements.

Each policy shall be specifically endorsed by blanket or otherwise to provide that

Seller's insurance is primary. Any other insurance carried by Company will be excess only and not contribute with this insurance. Each policy is to be written by an insurer with a rating by A.M. Best Company, Inc. of "A-VII" or better. If coverage is written on a claims-made basis, Seller warrants that any retroactive date applicable to coverage under the policy is equal to or prior to the Execution Date; and that continuous coverage will be maintained or an extended discovery period will be exercised for a period of three (3) years beginning from the end of the Term. If the limits of available liability coverage required herein become substantially reduced as a result of claim payments, Seller shall promptly, and in no event later than thirty (30) Days after such substantial reduction, at its own expense, purchase additional liability insurance (if such coverage is available at commercially reasonable rates) to increase the amount of available coverage to the limits of liability coverage required herein.

ARTICLE 22

REVISIONS TO PERFORMANCE STANDARDS

22.1. Revisions to Performance Standards.

The Parties acknowledge that, during the Term, certain Performance Standards and Telemetry and Control interfaces may be revised or added to facilitate necessary improvements in integrating energy storage resources into the Company System and operations. Such revisions or additions may be attributable to, without limitation, the following: changes in the Company System, changes in communications and control platforms, changes in system protection requirements, changes to the state of commercially available technology, changes in customer electrical usage (such as changes in average hourly load profiles) and changes in Laws (e.g., new environmental constraints, which may limit Company's ability to start/stop its generators in response to integration of intermittent generation, or constraints impacting the power quality standards for the Company System, such as constraints imposed by HERA or by the PUC under the HERA Law). Changes in Facility characteristics achieved through control system configuration, settings, or other tunable parameters shall not be considered a revision to performance standards. These types of changes should be implemented by ~~the~~ Seller in response to Company request unless it can be shown that the changes negatively impact ~~the~~ Seller's ability to ~~meets~~meet its obligations under this Agreement.

22.2. Performance Standards Information Request.

If Company reasonably concludes that a Performance Standards Revision is necessary or important for the operation of the Company System and is capable of being complied with by Seller, Company shall have the right to issue to Seller a Performance Standards Information Request with respect to such Performance Standards Revision. Seller shall, within a reasonable period of time following Seller's receipt of such Performance Standards Information Request, but in no event more than ninety (90) Days after Seller's receipt of such request (or such other period of time as Company and Seller may agree in writing), submit to Company a Performance Standards Proposal responsive to the Performance Standards Revision proposed in such Performance Standards Information Request.

22.3. Performance Standards Proposal.

Upon receipt of a Performance Standards Proposal submitted in response to a Performance Standards Information Request, Company will evaluate such Performance Standards Proposal and Seller shall assist Company in performing such evaluation as and to the extent reasonably requested by Company (including, but not limited to, providing such additional information as Company may reasonably request and participating in meetings with Company as Company may reasonably request). Company shall have no obligation to evaluate a Performance Standards Proposal submitted at Seller's own initiative.

22.4. Performance Standards Revision Document.

If, following Company's evaluation of a Performance Standards Proposal, Company desires to consider implementing the Performance Standards Revision addressed in such Proposal, Company shall provide Seller with written notice to that effect, such notice to be issued to Seller within one hundred eighty (180) Days of receipt of the Performance Standards Proposal, and Company and Seller shall proceed to negotiate in good faith a Performance Standards Revision Document setting forth the specific changes to the Agreement that are necessary to implement such Performance Standards Revision. A decision by Company to initiate negotiations with Seller as aforesaid shall not constitute an acceptance by Company of any of the details set forth in Seller's Performance Standards Proposal for the Performance Standards Revision in question, including, but not limited to, the Performance Standards Modifications and the Performance Standards Pricing Impact. Any adjustment to the payments due from Company under this Agreement pursuant to such Performance Standards Revision Document shall be limited to the Performance Standards Pricing Impact (other than with respect to the financial consequences of non-performance as to a Performance Standards Revision). The time periods set forth in such Performance Standards Revision Document as to the effective date for the Performance Standards Revision shall be measured from the date the PUC Performance Standards Revision Order becomes non-appealable, as provided in **Section 22.6** (PUC Performance Standards Revision Order).

22.5. Failure to Reach Agreement.

If Company and Seller are unable to agree upon and execute a Performance Standards Revision Document within one hundred eighty (180) Days of Company's written notice to Seller pursuant to **Section 22.4** (Performance Standards Revision Document), Company shall have the option of declaring the failure to reach agreement on and execute such Performance Standards Revision Document to be a dispute and submit such dispute to an Independent Evaluator for the conduct of a determination pursuant to **Section 22.10** (Dispute) of this Agreement. Any decision of the Independent Evaluator, rendered as a result of such dispute shall include a form of a Performance Standards Revision Document as described in **Section 22.4** (Performance Standards Revision Document).

22.6. PUC Performance Standards Revision Order.

No Performance Standards Revision Document shall constitute an amendment to the Agreement unless and until a PUC Performance Standards Revision Order issued with respect to such document has become non-appealable. Once the condition of the preceding sentence has been satisfied, such Performance Standards Revision Document shall constitute an amendment to this Agreement. To be "non-appealable" under this **Section 22.6** (PUC Performance Standards Revision Order), such PUC Performance Standards Revision Order shall be either (a) not subject to appeal to any Circuit Court of the State of Hawai'i or the Supreme Court of the State of Hawai'i, because the thirty (30) Day period (accounting for weekends and holidays as appropriate) permitted for such an appeal has passed without the filing of notice of such an appeal; or (b) affirmed on appeal to any Circuit Court of the State of Hawai'i or the Supreme Court, or the Intermediate Appellate Court upon assignment by the Supreme Court, of the State of Hawai'i, or affirmed upon further appeal or appellate

process, and is not subject to further appeal, because the jurisdictional time permitted for such an appeal (and/or further appellate process such as a motion for reconsideration or an application for writ of certiorari) has passed without the filing of notice of such an appeal (or the filing for further appellate process).

22.7. Company's Rights.

The rights granted to Company under **Section 22.4** (Performance Standards Revision Document) and **Section 22.5** (Failure to Reach Agreement) above are exclusive to Company. Seller shall not have a right to initiate negotiations of a Performance Standards Revision Document or to initiate dispute resolution under **Section 22.10** (Dispute), as a result of a failure to agree upon and execute any Performance Standards Revision Document.

22.8. Seller's Obligation.

Notwithstanding any provision of this **Article 22** (Revisions to Performance Standards) to the contrary, Seller shall have no obligation to respond to more than one (1) Performance Standards Information Request during any twelve (12) month period.

22.9. Limited Purpose.

This **Article 22** (Revisions to Performance Standards) is intended to specifically address necessary revisions to the Performance Standards [and Telemetry and Control interfaces](#) to enhance integration of energy storage resources onto the Company System, or to comply with future Laws which may be driven in part by higher integration of energy storage resources, and is not intended for either Party to provide a means for renegotiating any other terms of this Agreement. Revisions to the Performance Standards in accordance with the provisions of this **Article 22** (Revisions to Performance Standards) are not intended to materially increase Seller's risk of non-performance or default.

22.10. Dispute.

If Company decides to declare a dispute as a result of the failure to reach agreement and execute a Performance Standards Revision Document pursuant to **Section 22.5** (Failure to Reach Agreement), it shall provide written notice to that effect to Seller. Within twenty (20) Days of delivery of such notice Seller and Company shall agree upon an Independent Evaluator to resolve the dispute regarding a Performance Standards Revision Document. The Independent Evaluator shall be reasonably qualified and expert in battery energy storage systems, matters relating to the Performance Standards, financing, and energy storage power purchase agreements. If the Parties are unable to agree upon an Independent Evaluator within such 20-Day period, Company shall apply to the PUC for the appointment of an Independent Evaluator. If an Independent Observer retained under the Competitive Bidding Framework is qualified and willing and available to serve as Independent Evaluator, the PUC shall appoint one of the persons or entities qualified to serve as an Independent Observer to be the Independent Evaluator; if not, the PUC shall appoint another qualified person or entity to serve as Independent Evaluator. In its

application, Company shall ask the PUC to appoint an Independent Evaluator within thirty (30) Days of the application.

(a) Promptly upon appointment, the Independent Evaluator shall request the Parties to address the following matters within the next fifteen (15) Days:

(i) The Performance Standard Revision(s);

(ii) The technical and operational feasibility of complying with the Performance Standard Revision(s) and likelihood of compliance;

(iii) How Seller would comply with the Performance Standard Revision(s);

(iv) Reasonably expected net costs and/or lost revenues associated with the Performance Standards Revision(s);

(v) The appropriate level, if any, of Performance Standards Pricing Impact in light of the foregoing; and

(vi) Contractual consequences for non-performance that are commercially reasonable under the circumstances.

(b) Within ninety (90) Days of appointment, the Independent Evaluator shall render a decision unless the Independent Evaluator determines it needs to have additional time, not to exceed forty-five (45) Days, to render a decision.

(c) The Parties shall assist the Independent Evaluator throughout the process of preparing its review, including making key personnel and records available to the Independent Evaluator, but neither Party shall be entitled to participate in any meetings with personnel of the other Party or review of the other Party's records. However, the Independent Evaluator will have the right to conduct meetings, hearings or oral arguments in which both Parties are represented. The Parties may meet with each other during the review process to explore means of resolving the matter on mutually acceptable terms.

(d) The following standards shall be applied by the Independent Evaluator in rendering his or her decision: (i) if it is not technically or operationally feasible for Seller to comply with a Performance Standard Revision, the Independent Evaluator shall determine that the Agreement shall not be amended to incorporate such Performance Standard Revision (unless the Parties agree otherwise); (ii) if it is technically or operationally feasible for Seller to comply with a Performance Standard Revision, the Independent Evaluator shall incorporate such Performance Standard Revision into a Performance Standards Revision Document including (A) Seller's Performance Standards Modifications; (B) pricing terms that incorporate the Performance Standards Pricing Impact; and (C) contract terms and conditions that are commercially reasonable under the circumstances, especially with respect to the consequences of non-performance by Seller as to the Performance Standards Revision(s). In addition to the Performance Standards Revision Document, the Independent Evaluator shall render a decision which sets forth the positions of the

Parties and Independent Evaluator's rationale for his or her decisions on disputed issues.

(e) The fees and costs of the Independent Evaluator shall be paid by Company up to the first \$30,000 of such fees and costs; above those amounts, the Party that is not the prevailing Party shall be responsible for any such fees and costs; provided, that, if neither Party is the prevailing Party, the fees and costs of the Independent Evaluator above \$30,000 shall be borne equally by the Parties. The Independent Evaluator in rendering his or her decision shall also state which Party prevailed over the other Party, or that neither Party prevailed over the other.

22.11. HERA Law.

The provisions of this **Article 22** (Revisions to Performance Standards) are without limitation to the obligations of the Parties under the HERA Law and the reliability standards and interconnection requirements developed and adopted by the PUC pursuant to the HERA Law.

ARTICLE 23

FINANCIAL COMPLIANCE

23.1. Financial Compliance.

Seller shall provide or cause to be provided to Company on a timely basis, as reasonably determined by Company, all information, including but not limited to information that may be obtained in any audit referred to below (the “**Financial Compliance Information**”), reasonably requested by Company for purposes of permitting Company and its parent company, HEI, to comply with the requirements (initial and on-going) of (a) the accounting principles of Financial Accounting Standards Board (“**FASB**”) Accounting Standards Codification 810, Consolidation (“**FASB ASC 810**”); (b) Section 404 of the Sarbanes-Oxley Act of 2002 (“**SOX 404**”); and (c) all clarifications, interpretations and revisions of and regulations implementing FASB ASC 810 and SOX 404, issued by the FASB, Securities and Exchange Commission, the Public Company Accounting Oversight Board, Emerging Issues Task Force or other Governmental Authorities. In addition, if required by Company in order to meet its compliance obligations, Seller shall allow Company or its independent auditor to audit, to the extent reasonably required, Seller’s financial records, including its system of internal controls over financial reporting; provided, however, that Company shall be responsible for all costs associated with the foregoing, including but not limited to Seller’s reasonable internal costs. Company shall limit access to such Financial Compliance Information to persons involved with such compliance matters and restrict persons involved in Company’s monitoring, dispatch or scheduling of Seller and/or Facility, or the administration of this Agreement, from having access to such Financial Compliance Information (unless approved in writing in advance by Seller).

23.2. Confidentiality.

Company shall, and shall cause HEI to, maintain the confidentiality of the Financial Compliance Information as provided in this **Article 23** (Financial Compliance). Company may share the Financial Compliance Information on a confidential basis with HEI and the independent auditors and attorneys for HEI. (Company, HEI, and their respective independent auditors and attorneys are collectively referred to in this **Article 23** (Financial Compliance) as “**Recipient**.”) If either Company or HEI, in the exercise of their respective reasonable judgments, concludes that consolidation or financial reporting with respect to Seller and/or this Agreement is necessary, Company and HEI each shall have the right to disclose such of the Financial Compliance Information as Company or HEI, as applicable, reasonably determines is necessary to satisfy applicable disclosure and reporting or other requirements and give Seller prompt written notice thereof (in advance, to the extent practicable under the circumstances). If Company or HEI disclose Financial Compliance Information pursuant to the preceding sentence, Company and HEI shall, without limitation to the generality of the preceding sentence, have the right to disclose Financial Compliance Information to the PUC and the Division of Consumer Advocacy of the Department of Commerce and Consumer Affairs of the State of Hawai‘i in connection with the PUC’s rate making activities for Company and other HEI-affiliated entities; provided, that, if the scope or content of the Financial Compliance Information to be disclosed to the

PUC exceeds or is more detailed than that disclosed pursuant to the preceding sentence, such Financial Compliance Information will not be disclosed until the PUC first issues a protective order to protect the confidentiality of such Financial Compliance Information. Neither Company nor HEI shall use the Financial Compliance Information for any purpose other than as permitted under this **Article 23** (Financial Compliance).

23.3. Required Disclosure.

In circumstances other than those addressed in **Section 23.2** (Confidentiality), if any Recipient becomes legally compelled under applicable Laws or by legal process (e.g., deposition, interrogatory, request for documents, subpoena, civil investigative demand or similar process) to disclose all or a portion of the Financial Compliance Information, such Recipient shall undertake reasonable efforts to provide Seller with prompt notice of such legal requirement prior to disclosure so that Seller may seek a protective order or other appropriate remedy and/or waive compliance with the terms of this **Article 23** (Financial Compliance). If such protective order or other remedy is not obtained, or if Seller waives compliance with the provisions at this **Article 23** (Financial Compliance), Recipient shall furnish only that portion of the Financial Compliance Information which it is legally required to so furnish and to use reasonable efforts to obtain assurance that confidential treatment will be accorded to any disclosed material.

23.4. Exclusions from Confidentiality.

The obligation of nondisclosure and restricted use imposed on each Recipient under this **Article 23** (Financial Compliance) shall not extend to any portion(s) of the Financial Compliance Information which (a) was known to such Recipient prior to receipt; (b) without the fault of such Recipient, is available or becomes available to the general public; or (c) is received by such Recipient from a third party not bound by an obligation or duty of confidentiality.

23.5. Consolidation.

Company does not want to be subject to consolidation as set forth in FASB ASC 810, as issued and amended from time to time by FASB.

(a) **Consolidation.** Company represents that, as of the Execution Date, it is not required to consolidate Seller into its financial statements in accordance with relevant accounting guidance under U.S. generally accepted accounting principles (“GAAP”). If, due to a change in applicable law or accounting guidance under U.S. GAAP, or as a result of a material amendment to the Agreement, in each case, after the Execution Date, Company determines, in its sole but good faith discretion, that it is required to consolidate Seller into its financial statements in accordance with relevant accounting guidance in accordance with U.S. GAAP, then Seller, upon Company’s written request, shall, as soon as reasonably practicable (but in no event longer than fifteen (15) Days) provide audited financial statements (including footnotes) in accordance with U.S. GAAP (and as of the reporting periods Company is required to report thereafter) in order for Company to consolidate and file its financial

statements within the reporting deadlines of the Securities and Exchange Commission; provided, however, that if Seller does not normally prepare audited financial statements for the periods requested, Company shall reimburse Seller fifty percent (50%) of the reasonable costs of having necessary audits performed and preparation of the audited financial statement; provided, further that the foregoing reimbursement shall only apply if Seller normally prepares financial statements on an annual basis. Notwithstanding the foregoing requirement that Seller provide audited financial statements to Company, the Parties will take all commercially reasonable steps, which may include modification of this Agreement to eliminate the consolidation treatment, while preserving the economic “benefit of the bargain” to both Parties. If the Parties are unable to eliminate the consolidation treatment by other means, the Parties shall effectuate a sale of the Facility to Company ~~at (i) if the sale occurs before the end of the [] () Contract Year,~~ for an amount equal to the greater of: (i) the Make Whole Amount determined pursuant to **Section 6** (Make Whole Amount) of **Attachment P** (Sale of Facility of Seller) or ~~the fair market value determined pursuant to **Section 3** (Procedure to Determine Fair Market Value of the Facility) of **Attachment P** (Sale of Facility by Seller);~~ or (ii) if the sale occurs on or after the beginning of the [] () Contract Year, (ii) the fair market value determined pursuant to **Section 3** (Procedure to Determine Fair Market Value of the Facility) of ~~**Attachment P** (Sale of Facility by Seller), but not less than the Financial Termination Costs determined pursuant to **Section 6** (Make Whole Amount) of **Attachment P**~~ (Sale of Facility by Seller), in either case under a Purchase and Sale Agreement to be negotiated based on the terms and conditions set forth in **Section 4** (Purchase and Sale Agreement) of **Attachment P** (Sale of Facility by Seller).

(b) **Reserved.**

(c) **Reserved.**

ARTICLE 24

REGULATORY APPROVAL

24.1. General.

This Agreement is subject to approval by the PUC in the form of a satisfactory PUC Approval Order and the Parties' respective obligations hereunder are conditioned upon receipt of such approval, except as specifically provided otherwise herein. Upon the Execution Date of this Agreement, the Parties shall use good faith efforts to obtain, as soon as practicable, a PUC Approval Order that satisfies the requirements of **Section 24.5(a)** (PUC Approval Order). Company shall submit to the PUC an application for a satisfactory PUC Approval Order but does not extend any assurances that a PUC Approval Order will ultimately be obtained. As requested by Company, Seller ~~shall use commercially reasonable efforts and~~ will provide reasonable cooperation to support Company in obtaining a PUC Approval Order, including timely providing information requested by Company to support its application, including information for Company and its consultant to conduct a greenhouse gas emissions analysis for the PUC application, as well as information requested by the PUC and parties to the PUC proceeding in which approval is being sought. Seller understands that lack of cooperation may result in Company's inability to file an application with the PUC and/or a failure to receive a PUC Approval Order. For the avoidance of doubt, Company has no obligation to seek reconsideration, appeal, or other administrative or judicial review of any Unfavorable PUC Order. The Parties agree that neither Party has control over whether a PUC Approval Order will be issued and each Party hereby assumes any and all risks arising from, or relating in any way to, the inability to obtain a satisfactory PUC Approval Order and hereby releases the other Party from any and all claims relating thereto.

24.2. Seller Participation.

Seller shall seek participation without intervention in the PUC docket for approval of this Agreement pursuant to applicable rules and orders of the PUC. The scope of Seller's participation shall be determined by the PUC. However, Seller expressly agrees to seek participation for the limited purpose and only to the extent necessary to assist the PUC in making an informed decision regarding the approval of this Agreement. If Seller chooses not to seek participation in the docket, Seller expressly agrees and knowingly waives the right to claim, before the PUC, in any court, arbitration or other proceeding, that the information submitted and the arguments offered by Company in support of the application requesting the PUC Approval Order are insufficient to meet Company's burden of justifying that the terms of this Agreement are just and reasonable and in the public interest, or otherwise deficient in any manner for purposes of supporting the PUC's approval of this Agreement. Seller shall not seek in the docket and Company shall not disclose any confidential information to Seller that would provide Seller with an unfair business advantage or would otherwise harm the position of others with respect to their ability to compete on equal and fair terms.

24.3. Time Period for PUC Submittal Date.

If the PUC Submittal Date has not occurred within one hundred twenty (120) Days of the Execution Date, or such longer period as Company and Seller may agree to by a subsequent written agreement, Company may, by written notice delivered within thirty (30) Days of the expiration of such period, declare the Agreement null and void if the reason the application has not been filed is (a) any one or more of the conditions set forth in **Section 3.4** (Prior to Effective Date); or (b) Seller's failure to provide in a timely manner information reasonably requested by Company to support such application.

24.4. Time Period for PUC Approval.

If the Commission issues an Unfavorable PUC Order or if a PUC Approval Order is not issued within twelve (12) months of the PUC Submittal Date, or within such longer period as Company and Seller may agree to by a written agreement ("**PUC Approval Time Period**"), then Company or Seller may, by written notice delivered within one hundred and eighty (180) Days of (a) in the case that an Unfavorable PUC Order has been issued, the date the Unfavorable PUC Order becomes non-appealable ~~or (b), or (b)~~ in the case that a PUC Approval Order is not issued within twelve (12) months of the PUC Submittal Date, or the expiration of the PUC Approval Time Period, as applicable, declare this Agreement null and void. If a PUC Approval Order or an Unfavorable PUC Order is issued within the PUC Approval Time Period but that order is appealed, and a Non-Appealable PUC Approval Order is not obtained within twenty-four (24) months of the PUC Submittal Date, or within such longer period as Company and Seller may agree to by a subsequent written agreement (the "**PUC Order Appeal Period**"), then Company or Seller may, by written notice delivered within ninety (90) Days after the expiration of the PUC Order Appeal Period, declare this Agreement null and void.

24.5. Regulatory Approval Terms.

(a) **PUC Approval Order.** The term "**PUC Approval Order**" means an order from the PUC that does not contain terms and conditions deemed to be unacceptable by Company, and is in a form deemed to be reasonable by Company, in its sole, but nonarbitrary, discretion, ordering that:

(i) this Agreement is approved;

(ii) Company is authorized to include the purchased energy storage costs (and related revenue taxes) that Company incurs under this Agreement in Company's Energy Cost Recovery Clause or equivalent, to the extent such costs are not included in base rates for the Term;

(iii) Company is authorized to include the Lump Sum Payment that Company incurs under this Agreement in Company's Purchase Power Adjustment Clause, to the extent such costs are not included in Base Rates for the Term;

(iv) The purchased energy storage costs to be incurred by Company as a result of this Agreement are reasonable; and

(v) Company's energy storage arrangements under this Agreement, pursuant to which Company will purchase the availability of the Facility's Energy Storage Services from Seller, are prudent and in the public interest.

(b) Non-Appealable PUC Approval Order. The term “**Non-Appealable PUC Approval Order**” means a PUC Approval Order (i) that is not subject to appeal to any Circuit Court of the State of Hawai‘i, Intermediate Court of Appeals of the State of Hawai‘i, or the Supreme Court of the State of Hawai‘i, because the period permitted for such an appeal (the “**Appeal Period**”) has passed without the filing of notice of such an appeal; or (ii) that was affirmed on appeal to any Circuit Court of the State of Hawai‘i, Intermediate Court of Appeals of the State of Hawai‘i, or the Supreme Court of the State of Hawai‘i, or was affirmed upon further appeal or appellate process, and that is not subject to further appeal, because the jurisdictional time permitted for such an appeal and/or further appellate process such as a motion for reconsideration or an application for writ of certiorari has passed without the filing of notice of such an appeal or the filing for further appellate process.

(c) Company’s Written Statement. Not later than thirty-five (35) Days after the issuance of a PUC order approving this Agreement, Company shall provide Seller with a copy of such order together with a written statement as to whether the conditions set forth in **Section 24.5(a)** (PUC Approval Order) have been met and the order constitutes a PUC Approval Order. If Company’s written statement declares that the conditions set forth in **Section 24.5(a)** (PUC Approval Order) have been satisfied, the date of the issuance of the PUC Approval Order shall be the “**PUC Approval Order Date.**”

(d) Non-Appealable PUC Approval Order Date. If Company provides the written statement referred to in **Section 24.5(c)** (Company’s Written Statement) to the effect that the conditions referred to in **Section 24.5(a)** (PUC Approval Order) have been satisfied, the term “**Non-Appealable PUC Approval Order Date**” shall be defined as follows:

(i) If a PUC Approval Order is issued and is not made subject to a motion for reconsideration or clarification filed with the PUC or an appeal, the Non-Appealable PUC Approval Order Date shall be the date one (1) Day after the expiration of the Appeal Period following the issuance of the PUC Approval Order, or the date of Company’s written statement as required under **Section 24.5(c)** (Company’s Written Statement), whichever is later;

(ii) If the PUC Approval Order became subject to a motion for reconsideration or clarification, and the motion for reconsideration or clarification is denied or the PUC Approval Order is affirmed after reconsideration or clarification, and such order is not made subject to an appeal, the Non-Appealable PUC Approval Order Date shall be deemed to be the date one (1) Day after the expiration of the Appeal Period following the order denying reconsideration of or affirming the PUC Approval Order; or

(iii) If the PUC Approval Order, or an order denying reconsideration or clarification of the PUC Approval Order or affirming approval of the PUC Approval Order after reconsideration, becomes subject to an appeal, then the Non-Appealable PUC Approval Order Date shall be the date upon which the PUC Approval Order becomes a non-appealable order within the meaning of the definition of a Non-Appealable PUC Approval Order in **Section 24.5(b)** (Non-Appealable PUC Approval Order).

(e) Unfavorable PUC Order. The term “**Unfavorable PUC Order**” means an order from the PUC concerning this Agreement that: (i) dismisses Company’s application; (ii) denies Company’s application; or (iii) approves Company’s application but contains terms and conditions deemed unacceptable by Company in its sole discretion and therefore does not meet the definition of a PUC Approval Order as set forth in **Section 24.5(a)** (PUC Approval Order).

ARTICLE 25

EQUAL EMPLOYMENT OPPORTUNITY

25.1. Equal Employment Opportunity.

(Applicable to all contracts of \$10,000 or more in the whole or aggregate. 41 CFR 60-1.4 and 41 CFR 60-741.5.) Seller is aware of and is fully informed of Seller's responsibilities under Executive Order 11246 (reference to which include amendments and orders superseding in whole or in part) and shall be bound by and agrees to the applicable provisions as contained in Section 202 of said Executive Order and the Equal Opportunity Clause as set forth in 41 CFR 60-1.4 and 41 CFR 60-741.5(a), which clauses are hereby incorporated by reference.

25.2. Equal Opportunity for Disabled Veterans, Recently Separated Veterans, Other Protected Veterans and Armed Forces Service Medal Veterans.

(Applicable to (i) contracts of \$25,000 or more entered into before December 31, 2003 (41 CFR 60-250.4) or (ii) each federal government contract of \$100,000 or more, entered into or modified on or after December 31, 2003 (41 CFR 60-300.4) for the purchase, sale or use of personal property or nonpersonal services (including construction).) If applicable to Seller under this Agreement, Seller agrees that it is, and shall remain, in compliance with the rules and regulations promulgated under The Vietnam Era Veterans Readjustment Assistance Act of 1974, as amended by the Jobs for Veterans Act of 2002, including the requirements of 41 CFC 60-250.5(a) (for orders/contracts entered into before December 31, 2003) and 41 CFR 60-300.5(a) (for orders/contracts entered into or modified on or after December 31, 2003) which are incorporated into this Agreement by reference.

ARTICLE 26

DISPUTE RESOLUTION

26.1. Good Faith Negotiations.

Except as otherwise expressly set forth in this Agreement, before submitting any Dispute under this Agreement to the dispute resolution procedures set forth in **Section 26.2** (Dispute Resolution Procedures), the presidents, vice presidents, or authorized delegates from both Supplier and Company having full authority to settle the Dispute(s), shall personally meet in Hawai'i and attempt in good faith to resolve the Dispute(s) ("**Management Meeting**"), within thirty (30) Days after a request by either Party.

26.2. Dispute Resolution Procedures.

Except as otherwise expressly set forth in this Agreement and subject to **Section 26.1** (Good Faith Negotiations), any and all Dispute(s) arising out of or relating to this Agreement (a) which remain unresolved for a period of twenty (20) Days after the Management Meeting takes place; or (b) for which the Parties fail to hold a Management Meeting within sixty (60) Days of the date that a Management Meeting was requested by a Party, may upon the agreement of the Parties, first be submitted to confidential mediation in Honolulu, Hawai'i, pursuant to the administration by, and in accordance with the Mediation Rules, Procedures and Protocols of, Dispute Prevention & Resolution, Inc. (or its successor) or, in their absence, the American Arbitration Association ("**DPR**") then in effect. If the Parties agree to submit the dispute to confidential mediation, the Parties shall each pay fifty percent (50%) of the cost of the mediation (i.e., the fees and expenses charged by the mediator and DPR) and shall otherwise each bear their own costs and attorney's fees. If the Parties do not submit the Dispute(s) to mediation, or if they do submit the Dispute(s) to mediation but settlement of the Dispute(s) is not reached within sixty (60) Days after commencement of the mediation, either Party may initiate legal proceedings in a court of competent jurisdiction in the State of Hawai'i. Notwithstanding the foregoing, the provisions of this **Article 26** (Dispute Resolution) shall not apply to any Dispute within the authority of an Independent Evaluator under **Article 22** (Revisions to Performance Standards) or **Attachment S** (Quarterly Reporting and Dispute Resolution by Independent Evaluator).

26.3. Document Retention.

If either party initiates dispute resolution under this **Article 26** (Dispute Resolution), then each Party must retain and preserve all records, including documents, which may be relevant to such Dispute, in accordance with applicable Laws until such Dispute is resolved.

ARTICLE 27 MISCELLANEOUS

27.1. Amendments.

Any amendment or modification of this Agreement or any part hereof shall not be valid unless in writing and signed via manual signature by the Parties. Any waiver hereunder shall not be valid unless in writing and signed via manual signature by the Party against whom waiver is asserted. Notwithstanding the foregoing, administrative changes mutually agreed by Company and Seller in writing, such as changes to settings shown in the **Attachment E** (Single-Line Drawing and Interface Block Diagram) and **Attachment F** (Relay List and Trip Scheme) and changes to numerical values of Performance Standards in **Section 3** (Performance Standards) of **Attachment B** (Facility Owned by Seller) shall not be considered amendments to this Agreement requiring PUC approval.

27.2. Binding Effect.

This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective successors, legal representatives, and permitted assigns.

27.3. Notices.

(a) All notices, consents and waivers under this Agreement shall be in writing and will be deemed to have been duly given when (i) delivered by hand, (ii) sent by E-Mail, (iii) sent by certified mail, return receipt requested, or (iv) when received by the addressee, if sent by a nationally recognized overnight delivery service (receipt requested), in each case to the appropriate addresses and E-mail addresses set forth below (or to such other addresses and facsimile numbers as a Party may designate by notice to the other Party):

Company:

By Mail:

Hawaiian Electric Company, Inc.
P.O. Box 2750
Honolulu, Hawai'i 96840
Attn: _____ Manager, Energy Contract
Management

Delivered by Hand or Overnight Delivery:

Hawaiian Electric Company, Inc.
Central Pacific Plaza
220 South King Street, Suite 2100
Honolulu, Hawai'i 96813
Attn: _____ Manager, Energy Contract

Management

By E-Mail:

Hawaiian Electric Company, Inc.

Attn: _____

Manager, Energy Contract Management

Email:

_____ ppanotices@hawaiianelectric.com

With a copy to:

By Mail:

Hawaiian Electric Company, Inc.

Legal Division

P.O. Box 2750

Honolulu, Hawai'i 96840

By E-Mail:

Hawaiian Electric Company, Inc.

Legal Division

Email: legalnotices@hawaiianelectric.com

Seller: The contact information listed in **Attachment A** (Description of Storage Facility).

(b) Notice sent by mail shall be deemed to have been given on the date of actual delivery or at the expiration of the fifth (5th) Day after the date of mailing, whichever is earlier. Any Party hereto may change its address for written notice by giving written notice of such change to the other Party hereto.

(c) Any notice delivered by E-Mail shall request a receipt thereof confirmed by E-Mail or in writing by the recipient and followed by personal or mail delivery of such correspondence and attachments as may be requested by the recipient, and the effective date of such notice shall be the date of receipt, provided such receipt has been confirmed by the recipient.

(d) The Parties may agree in writing upon additional means of providing notices, consents and waivers under this Agreement in order to adapt to changing technology and commercial practices.

27.4. Entire Agreement.

This Agreement and the IRS Letter Agreements (together with any confidentiality or non-disclosure agreements entered into by the Parties during the process of negotiating this Agreement and/or discussing the specifications of the Facility) constitutes the entire agreement between the Parties relating to the subject matter hereof, superseding all prior agreements, understandings or undertakings, oral or

written. Each of the Parties confirms that in entering into this Agreement, it has not relied on any statement, warranty or other representations (other than those set out in this Agreement) made or information supplied by or on behalf of the other Party.

27.5. Effect of Section and Attachment Headings.

The table of contents and paragraph headings of the various sections and attachments have been inserted in this Agreement as a matter of convenience for reference only and shall not modify, define or limit any of the terms or provisions hereof and shall not be used in the interpretation of any term or provision of this Agreement.

27.6. Non-Waiver.

Except as otherwise provided in this Agreement, no delay or forbearance of Company or Seller in the exercise of any remedy or right will constitute a waiver thereof, and the exercise or partial exercise of a remedy or right shall not preclude further exercise of the same or any other remedy or right.

27.7. Relationship of the Parties.

Nothing in this Agreement shall be deemed to constitute either Party hereto as partner, agent or representative of the other Party or to create any fiduciary relationship between the Parties. Seller does not hereby dedicate any part of Facility to serve Company, Company's customers or the public.

27.8. Governing Law, Jurisdiction and Venue.

Interpretation and performance of this Agreement shall be in accordance with, and shall be controlled by, the laws of the State of Hawai'i, other than the laws thereof that would require reference to the laws of any other jurisdiction. By entering into this Agreement, Seller submits itself to the personal jurisdiction of the courts of the State of Hawai'i and agrees that the proper venue for any civil action arising out of or relating to this Agreement shall be Honolulu, Hawai'i.

27.9. Limitations.

Nothing in this Agreement shall limit Company's ability to exercise its rights as specified in Company tariffs as filed with the PUC, or as specified in General Order No. 7 of the PUC's Standards for Electric Utility Service in the State of Hawai'i, as either may be amended from time to time.

27.10. Further Assurances.

If either Party determines in its reasonable discretion that any further instruments, assurances or other things are necessary or desirable to carry out the terms of this Agreement, the other Party will execute and deliver all such instruments and assurances and do all things reasonably necessary or desirable to carry out the terms of this Agreement.

27.11. Electronic Signatures and Counterparts.

This Agreement and any subsequent writings, including amendments, may be executed and delivered by exchange of executed copies via E-mail or other acceptable electronic means, and in electronic formats such as Adobe PDF or other formats mutually agreeable between the parties which preserve the final terms of this Agreement or such writing. A party's signature transmitted by facsimile, E-mail, or other acceptable electronic means shall be considered an "original" signature which is binding and effective for all purposes of this Agreement. This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which shall together constitute one and the same instrument binding all Parties notwithstanding that all of the Parties are not signatories to the same counterparts. For all purposes, duplicate unexecuted and unacknowledged pages of the counterparts may be discarded and the remaining pages assembled as one document.

27.12. Severability.

If any term or provision of this Agreement, or the application thereof to any person, entity or circumstances is to any extent invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons, entities or circumstances other than those as to which it is invalid or unenforceable, shall not be affected thereby, and each term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law, and the Parties will take all commercially reasonable steps, including modification of the Agreement, to preserve the economic "benefit of the bargain" to both Parties notwithstanding any such aforesaid invalidity or unenforceability.

27.13. Settlement of Disputes.

Except as otherwise expressly provided, any dispute or difference arising out of this Agreement or concerning the performance or the non-performance by either Party of its obligations under this Agreement shall be determined in accordance with the dispute resolution procedures set forth in **Article 26** (Dispute Resolution) of this Agreement.

27.14. Proprietary Rights.

Seller agrees that in fulfilling its responsibilities under this Agreement, it will not use any process, program, design, device or material that infringes on any United States patent, trademark, copyright or trade secret ("**Proprietary Rights**"). Seller agrees to indemnify, defend and hold harmless the Indemnified Company Party from and against all losses, damages, claims, fees and costs, including but not limited to reasonable attorneys' fees and costs, arising from or incidental to any suit or proceeding brought against the Indemnified Company Party for infringement of third-party Proprietary Rights arising out of Seller's performance under this Agreement, including but not limited to patent infringement due to the use of technical features of the Facility to meet the Performance Standards specified in the Agreement.

27.15. Negotiated Terms.

The Parties agree that the terms and conditions of this Agreement are the result of negotiations between the Parties and that this Agreement shall not be construed in favor of or against any Party by reason of the extent to which any Party or its professional advisors participated in the preparation of this Agreement.

27.16. Computation of Time.

In computing any period of time prescribed or allowed under this Agreement, the Day of the act, event or default from which the designated period of time begins to run shall not be included. If the last Day of the period so computed is not a Business Day, then the period shall run until the end of the next Day which is a Business Day.

27.17. Community Outreach Plan.

~~Seller has initiated, or has plans to initiate, discussions and/or informational sessions with community and neighborhood groups in and around the vicinity of the Facility to inform the neighboring public and community about the Facility and to gather information regarding neighboring public and community concerns regarding the Facility. Seller shall formulate and implement a community outreach plan no later than the PUC Submittal Date and provide a copy of such plan to Company upon its finalization and before implementation. The purpose and scope of such plan shall be in Seller's discretion, provided, however, that any such plan shall, at a minimum, include provisions to inform the neighboring community, allay concerns, and implement, where commercially reasonable and possible, requests from the community to garner support for the Facility from the neighboring community.~~

(a) The Parties acknowledge that, prior to the Execution Date, Seller provided to Company a comprehensive community outreach and communications plan to work with and inform neighboring communities and stakeholders to gain their support for the Project ("**Community Outreach and Engagement Plan**"). Seller agrees to work with neighboring communities and stakeholders and to provide them timely information during all phases of the Project, including, but not limited to the following information: Project description, Project stakeholders, community concerns and Seller's efforts to address such concerns, Project benefits, government approvals, Project schedule, and a Community Outreach and Engagement Plan. Seller's Community Outreach and Engagement Plan is a public document and shall remain available to members of the community on Seller's website for the Term of this Agreement and upon request. Seller shall also provide Company with links to their Project website and Community Outreach and Engagement Plan.

(b) The Parties also acknowledge that, prior to the Execution Date, Seller provided reasonable advance notice and hosted a public meeting for community and neighborhood groups in and around the vicinity of the Project site that provided the neighboring community, stakeholders, and the general public with: (i) a reasonable opportunity to learn about the proposed Project; (ii) an opportunity to engage in a dialogue about concerns, mitigation measures, and potential community benefits of the proposed Project; and (iii) information concerning the process and/or intent for the public's input and engagement, including advising attendees that they will have thirty (30) Days from the date of said public meeting to submit written comments to Company and/or Seller for inclusion in Company's submission to the PUC of its

application for a satisfactory PUC Approval Order. Seller shall collect all public comments, and then provide Company copies of all comments received in their original, unedited form, along with copies of all comments with personal information redacted and ready for filing. Seller agrees that Company may submit any and all public comments (presented in its original, unedited form) as part of its PUC application for this Project.

(c) Seller acknowledges and agrees that subsequent to the PUC Submittal Date and prior to the date when the Parties' statements of position are to be filed in the docketed PUC proceeding for this Project, Seller will solicit public comments concerning the Project a second time. Seller will submit to the PUC as part of the docketed PUC proceeding for this Project any and all public comments (presented in its original, unedited form) received by Company and/or Seller regarding the Project that are not received in time to include as part of Company's application for a satisfactory PUC Approval Order.

(d) The Parties acknowledge and agree that Seller is responsible for community outreach and engagement for the Project, and that the public meeting and comment solicitation process described in this **Section 27.17** (Community Outreach Plan) do not represent the only community outreach and engagement activities that can or should be performed by Seller. Without limitation to the generality of the preceding sentence, Seller agrees to take into account the Project's potential impacts on historical and cultural resources and, at a minimum, Seller shall describe: (i) any valued cultural, historical, or natural resources in the area in question, including the extent to which traditional and customary native Hawaiian rights are exercised in the area; (ii) the extent to which those resources – including traditional and customary native Hawaiian rights – will be affected or impaired by the Project; and (iii) the feasible action, if any, to be taken to reasonably protect native Hawaiian rights if they are found to exist. Seller shall determine and implement such additional means as may be reasonably necessary to share information with and involve the community and neighborhood groups in and around the vicinity of the Facility during the Project planning and development process through the Term of this Agreement, and shall timely inform Company of its plans and activities in this regard.

(e) Upon the Execution Date and at all times during the Term of this Agreement, Seller shall designate an individual as the "Seller's Community Representative." The Seller's Community Representative shall be the primary contact between the community and the Seller and shall be available during the Term of this Agreement to receive and answer questions from the community. As of the Execution Date the Seller's Community Representative shall be:

Name: [name of Seller's Community Representative]

Contact Information: [email address]

Seller shall notify Company in writing upon designation of any new Seller's Community Representative.

27.18. Change in Standard System or Organization.

(a) Consistent with Original Intent. If, during the Term, any standard, system or organization referenced in this Agreement should be modified or replaced in the normal course of events, such modification or replacement shall from that point in time be used in this Agreement in place of the original standard, system or organization, but only to the extent such modification or replacement is generally consistent with the original spirit and intent of this Agreement.

(b) Eliminated or Inconsistent with Original Intent. If, during the Term, any standard system or organization referenced in this Agreement should be eliminated or cease to exist, or is modified or replaced and such modification or replacement is inconsistent with the original spirit and intent of this Agreement, then in such event the Parties will negotiate in good faith to amend this Agreement to a standard, system or organization that would be consistent with the original spirit and intent of this Agreement.

27.19. No Third-Party Beneficiaries.

Nothing expressed or referred to in this Agreement will be construed to give any person or entity other than the Parties any legal or equitable right, remedy, or claim under or with respect to this Agreement or any provision of this Agreement. This Agreement and all of its provisions and conditions are for the sole and exclusive benefit of the Parties and their successors and permitted assigns.

27.20. Hawai'i General Excise Tax.

Seller shall, when making payments to Company under this Agreement, pay such additional amount as may be necessary to reimburse Company for the Hawai'i general excise tax on gross income and all other similar taxes imposed on Company by any Governmental Authority with respect to payments in the nature of gross receipts tax, sales tax, privilege tax or the like (including receipt of any payment made under this **Section 27.20** (Hawai'i General Excise Tax)), but excluding federal or state net income taxes. By way of example and not limitation, as of the Execution Date, all payments subject to the ~~4.5%~~ Hawai'i general excise tax plus surcharge on O'ahu (totaling 4.5% as of the Execution Date) would include an additional 4.712% so that the underlying payment will be net of such tax liability. Company will not reimburse Seller for any taxes or fees imposed on Seller including, but not limited to, State of Hawai'i general excise tax.

27.21. Specifications; No Endorsement.

Wherever in this Agreement Company has the right to give specifications, determinations or approvals, such specifications, determinations or approvals shall be given in accordance with Company's standard practices, policies and procedures and shall not be unreasonably withheld. Any such specifications, determinations, or approvals shall not be deemed to be an endorsement, warranty, or waiver of any right of Company.

27.22. Survival of Obligations.

The rights and obligations that are intended to survive a termination of this Agreement are all of those rights and obligations that this Agreement expressly provides shall survive any such termination and those that arise from Seller's or Company's covenants, agreements, representations, and warranties applicable to, or to be performed, at or during any time prior to or as a result of the termination of this Agreement, including, without limitation:

- (a) The obligation to pay Daily Delay Damages under **Section 11.6** (Damages and Termination);
- (b) The obligation to pay Termination Damages under **Article 6** (Events of Default; Remedies; Termination);
- (c) The indemnity obligations under **Article 20** (Indemnification) and **Section 27.14** (Proprietary Rights);
- (d) The dispute resolution provisions of **Article 26** (Dispute Resolution);
- (e) **Article 19** (Limitations), **Section 27.3** (Notices), **Section 27.6** (Non-Waiver), **Section 27.8** (Governing Law, Jurisdiction and Venue), **Section 27.9** (Limitations), **Section 27.12** (Severability), **Section 27.13** (Settlement of Disputes), **Section 27.14** (Proprietary Rights), **Section 27.16** (Computation of Time), **Section 27.19** (No Third-Party Beneficiaries), **Section 27.20** (Hawai'i General Excise Tax), this **Section 27.22** (Survival of Obligations), **Section 7** (Land Restoration) of **Attachment G** (Company-Owned Interconnection Facilities) and **Section 1(d)** (Seller's Right to Transfer) and **Section 2(d)** (Right of First Refusal) of **Attachment P** (Sale of Facility by Seller); and Seller's obligations to pay interconnection, operation and maintenance costs incurred up to the date of termination of the Agreement under **Section 3** (Seller Payment To Company for Company-Owned Interconnection Facilities and Review Of Facility) and **Section 4** (Ongoing Operation and Maintenance Charges) of **Attachment G** (Company-Owned Interconnection Facilities).

27.23. Certain Rules of Construction.

For purposes of this Agreement:

- (a) "Including" and any other words or phrases of inclusion will not be construed as terms of limitation, so that references to "included" matters will be regarded as non-exclusive, non-characterizing illustrations;
- (b) "Copy" or "copies" means that the copy or copies of the material to which it relates are true, correct and complete;
- (c) When "Article," "Section," "Schedule," or "Attachment" is capitalized in this Agreement, it refers to an article, section, schedule or attachment to this Agreement;
- (d) "Will" has the same meaning as "shall" and, thus, connotes an obligation and an imperative and not a futurity;

(e) Titles and captions of or in this Agreement, the cover sheet and table of contents of this Agreement, and language in parenthesis following Section references are inserted only as a matter of convenience and in no way define, limit, extend or describe the scope of this Agreement or the intent of any of its provisions;

(f) Whenever the context requires, the singular includes the plural and plural includes the singular, and the gender of any pronoun includes the other genders; and

(g) Any reference to any statutory provision includes each successor provision and all applicable Laws as to that provision.

27.24. Agreement is Not a Design or Construction Contract.

The Parties acknowledge and agree that Seller will finance and develop the Facility for Seller to own and operate. Seller is not a design professional or a contractor. Seller is not hereby undertaking to perform and is not holding itself out or offering to perform any work for which a professional or contractor's license may be required under the laws of the State of Hawai'i. Notwithstanding anything to the contrary, all work related to the design, engineering, and construction of the Facility shall be performed by design professionals and contractors who hold the appropriate licenses issued by the State of Hawai'i and intend to develop the Facility in full compliance with all applicable state laws. For the avoidance of doubt, in all instances where this Agreement refers to Seller performing the acts of constructing, building or installing, said language shall be interpreted to mean that such work will be performed by duly licensed contractors properly retained by Seller in accordance with laws of the State of Hawai'i.

**[Signatures for Energy Storage Power Purchase Agreement
appear on the following page]**

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

HAWAIIAN ELECTRIC COMPANY, INC., a
Hawai'i corporation

By: _____

Name:

Title:

By: _____

Name:

Title:

(“Company”)

[SELLER NAME], a **[Seller's business registration]**

By: _____

Name:

Title:

By: _____

Name:

Title:

(“Seller”)

SCHEDULE OF DEFINED TERMS

“**Acceptance Notice**” has the meaning set forth in **Section 1(a)(ii)** of **Attachment P** (Sale of Facility by Seller) to this Agreement.

“**Acceptance Test**” means a test conducted by Seller and witnessed by Company, within thirty (30) Days of completion of all Interconnection Facilities and in accordance with criteria and test procedures determined by Company and Seller as set forth in **Section 2(f)** (Acceptance Test Procedures) of **Attachment G** (Company-Owned Interconnection Facilities), to determine conformance with **Attachment B** (Facility Owned by Seller), **Attachment G** (Company-Owned Interconnection Facilities) and Good Engineering and Operating Practices. **Attachment N** (Acceptance Test General Criteria) provides general criteria to be included in the written protocol for the Acceptance Test. Successful completion of the Acceptance Test shall be a condition precedent for the performance of the Control System Acceptance Test and the Commercial Operations Date.

“**Active Power Control Interface**” has the meaning set forth in **Section 1(g)** (Active Power Control Interface) of **Attachment B** (Facility Owned by Seller) of this Agreement.

“**Agreement**” has the meaning set forth in the preamble.

“**Allowed Capacity**” has the meaning set forth in **Section 8(a)** of **Attachment A** (Description of Storage Facility) to this Agreement.

“**Annual EAF**” has the meaning set forth in **Section 4.4(a)** (Annual Equivalent Availability Factor and Liquidated Damages).

“**Annual EFOF**” has the meaning set forth in **Section 4.5(a)** (Annual Equivalent Forced Outage Factor and Liquidated Damages).

“**Appeal Period**” has the meaning set forth in **Section 24.5(b)** (Non-Appealable PUC Approval Order).

“**Appraised Fair Market Value of the Facility**” has the meaning set forth in **Section 3(d)** of **Attachment P** (Sale of Facility by Seller) to this Agreement.

“**Bill of Material**” means a list of equipment to be installed at the Facility including, but not necessarily limited to, items such as relays, breakers, and switches.

“**Business Day**” means any Day except a Saturday, a Sunday, or a federal or Hawai'i state holiday.

“**Capacity Performance Metric**” has the meaning set forth in **Attachment T** (~~Capacity Test~~Facility Tests) to this Agreement.

“**Capacity Cure Period**” has the meaning set forth in **Section 4.3(b)** (Capacity Test Termination Rights).

“**Capacity Ratio**” has the meaning set forth in **Attachment T** (~~Capacity Test~~Facility

Tests) to this Agreement.

“**Capacity Test**” has the meaning set forth in **Attachment T** (~~Capacity Test~~Facility Tests) to this Agreement.

“**Charging Energy**” means the amount of Energy withdrawn from the Company System to be stored by the Facility and discharged at a later time, as measured in MWh by the Revenue Metering Package. Charging Energy does not include Station Use or Energy required to charge the Facility for the purposes of an Outage or testing.

“**Change in Control**” has the meaning set forth in **Section 1(b)** (Change in Ownership Interests and Control of Seller) of **Attachment P** (Sale of Facility by Seller) to this Agreement.

“**Claim**” means any claim, suit, action, demand or proceeding.

“**COD Delay LD Period**” has the meaning set forth in **Section 11.6(a)(ii)**.

“**Commercial Operations**,” with respect to the Facility, shall be considered achieved upon satisfaction of the following conditions:

- (a) the Acceptance Test has been passed;
- (b) all Storage Unit(s) have passed Control System Acceptance Tests;
- (c) the Transfer Date has occurred;
- (d) Seller has (i) provided to Company the Required Models (as defined in **Section 6(a)** (Seller's Obligation to Provide Models) of **Attachment B** (Facility Owned by Seller)) in the form of Source Code; (ii) placed the current version of the Source Code for the Required Models with the Source Code Escrow Agent as required in **Section 6(b)(i)(A)** (Establishment of Source Code Escrow) of **Attachment B** (Facility Owned by Seller); or (iii) if Seller is unable to arrange for the placement of the appropriate Source Code into the Source Code Escrow account, placed the required funds with the Monetary Proceeds Escrow Agent as required in **Section 6(b)(ii)(A)** (Establishment of Monetary Escrow) of **Attachment B** (Facility Owned by Seller); and
- (e) Seller has provided Company with written notice that Seller is ready to declare the Commercial Operations Date, which shall be the Day following the Day Company receives such written notice from Seller.

“**Commercial Operations Date**” or “**COD**” means the date on which the Facility first achieves Commercial Operations.

“**Company**” has the meaning set forth in the preamble of this Agreement.

“**Company-Owned Interconnection Facilities**” has the meaning set forth in **Section 1** (General) of **Attachment G** (Company-Owned Interconnection Facilities).

“**Company Dispatch/Charge**” has the meaning set forth in **Section 12.1(a)** (Company's Exclusive Rights).

“Company Milestones” means each of the milestones identified as such in **Attachment K-1** (Seller's Conditions Precedent and Company Milestones).

“Company Milestone Date” has the meaning set forth in **Section 11.5** (Company Milestones).

“Company System” means the electric system owned and operated by Company (to include any non-utility owned facilities) consisting of power plants, transmission and distribution lines, and related equipment for the production and delivery of electric power to the public.

“Company System Operator” means the authorized representative(s) of Company who is/are responsible for carrying out Company Dispatch/Charge with respect to the Facility.

“Company’s Recommendations” has the meaning set forth in **Section 4(c)** of **Attachment B** (Facility Owned by Seller).

“Competitive Bidding Framework” means The Framework for Competitive Bidding contained in Decision and Order No. 23121 issued by the Public Utilities Commission on December 8, 2006, and any subsequent orders providing for modifications from those set forth in Order No. 23121 issued December 8, 2006.

“Construction Delay LD Period” has the meaning set forth in **Section 11.6(a)(i)**.

“Construction Milestones” means the Guaranteed Project Milestones and the Reporting Milestones set forth in **Attachment K** (Guaranteed Project Milestones) **Attachment L** (Reporting Milestones) of this Agreement, respectively.

“Consultants List” has the meaning set forth in **Section 4(e)** of **Attachment B** (Facility Owned by Seller).

“Contract Capacity” has the meaning set forth in **Section 8(c)** of **Attachment A** (Description of Storage Facility)

“Contract Year” means the twelve (12) calendar month period commencing on either (a) the Commercial Operations Date (if the Commercial Operations Date occurs on the first (1st) Day of a calendar month); or (b) the first Day of the calendar month following the month during which the Commercial Operations Date occurs, and thereafter on each anniversary of the first Day of such month; provided, however, that, in the latter case, the initial Contract Year shall also include the Days from the Commercial Operations Date to the first (1st) Day of succeeding calendar month.

“Contractors” has the meaning set forth in **Section 2(a)(i)** of **Attachment G** (Company-Owned Interconnection Facilities) to this Agreement.

“Control System Acceptance Test” or **“CSAT”** means a test or tests performed on the centralized and collective control systems and Active Power Control Interface of the Facility, which includes successful completion of the Control System Telemetry and Control List, in accordance with procedures set forth in **Section 1(h)** (Control System Acceptance Test Procedures) of **Attachment B** (Facility Owned by Seller). **Attachment**

O (Control System Acceptance Test Criteria) provides general criteria to be included in the written protocol for the Control System Acceptance Test.

“Control System Telemetry and Control List” includes, but is not limited to, all of the Facility’s equipment and generation performance/quality parameters that will be monitored, alarmed and/or controlled by the EMS throughout the Term of this Agreement. Examples of the Control System Telemetry and Control List include:

- (a) Seller's substation/equipment status – breaker open/closed status, equipment normal/alarm operating status, etc.
- (b) Active Power control interface – dispatch MW setpoint, etc.
- (c) Voltage control interface – voltage kV setpoint, etc.
- (d) Power factor control interface – power factor setpoint, etc.

“Daily Delay Damages” has the meaning set forth in **Section 11.6(a)(i)**.

“Day” means a calendar day.

“Defaulting Party” means the Party whose failure, action or breach of its obligations under this Agreement results in an Event of Default under **Article 6** (Events of Default; Remedies; Termination).

“Development Period Security” has the meaning set forth in **Section 14.1(a)** (General).

“Discharge Energy” means all Energy discharged from the Facility as measured in MWh by the Revenue Metering Package.

“Disconnection Event” has the meaning set forth in **Section 4(a)** of **Attachment B** (Facility Owned by Seller).

“Dispute” means any and all disputes, claims or controversies arising out of, relating to, concerning or pertaining to the terms of this Agreement, or to either Party’s performance or failure of performance under this Agreement.

“DPR” has the meaning set forth in **Section 26.2** (Dispute Resolution Procedure).

“EAF Performance Metric” has the meaning set forth in **Section 4.4(a)** (Annual Equivalent Availability Factor and Liquidated Damages).

“EFOF Performance Metric” has the meaning set forth in **Section 4.5(a)** (Annual Equivalent Forced Outage Factor and Liquidated Damages).

“E-Mail” means electronic mail.

“Effective Date” means the last to occur of (a) the Non-Appealable PUC Approval Order Date; and (b) the date that the Interconnection Requirements Amendment (if required pursuant to **Section 2.3(a)** of this Agreement) is executed and delivered as such date is

set forth in the Interconnection Requirements Amendment.

“Energy” means alternating current electrical energy measured in kilowatthours (kWh).

“Energy Cost Recovery Clause” means the provision in Company’s rate schedules that allows Company to pass through to its customers Company’s costs of fuel and purchased power.

“Energy Management System” or **“EMS”** means the real-time, computer-based control system, or any successor thereto, used by Company to manage the supply and delivery of electric energy to its consumers. It provides the Company System Operator with an integrated set of manual and automatic functions necessary for the operation of the Company System under both normal and emergency conditions. The EMS provides the interfaces for the Company System Operator to perform real-time monitoring and control of the Company System, including but not limited to monitoring and control of the Facility for system balancing, supplemental frequency control and economic dispatch as prescribed in this Agreement.

“Energy Storage Services” means, collectively or individually, the acceptance of Charging Energy at the Point of Interconnection from the Company System, the storing of Energy in the Facility, the delivery of Discharge Energy to the Point of Interconnection from the Facility, ~~and the provision of ancillary services associated with such Energy Storage Services all~~ in accordance with Company Dispatch/Charge and the technical and operational requirements of Attachment B (Facility Owned by Seller) and the terms of this Agreement.

“Engineering and Design Work” has the meaning set forth in **Section 3(a)(i)** of **Attachment G** (Company-Owned Interconnection Facilities).

“Environment” has the meaning set forth in **Section 1(b)(iii)(G)(2)** (Malware) of **Attachment B** (Facility Owned by Seller).

“EPC Contract” means Seller’s engineering, procurement and construction contract with the EPC Contractor.

“EPC Contractor” means Seller’s engineering, procurement and construction contractor for the Facility.

“ESPPA Amendment Deadline” means the sixtieth (60th) Day following the date the completed IRS is provided to Seller, or such later date as Company and Seller may agree to by written agreement.

“Escrow Agent” has the meaning set forth in **Section 14.7** (L/C Proceeds Escrow).

“Event of Default” has the meaning set forth in **Article 6** (Events of Default; Remedies; Termination).

“Exclusive Negotiation Period” has the meaning set forth in **Section 2(b)** (Negotiations) of **Attachment P** (Sale of Facility by Seller) to this Agreement.

“Execution Date” has the meaning set forth in the preamble of this Agreement.

“Exempt Sales” has the meaning set forth in **Section 1(c)** (Exempt Sales) of **Attachment P** (Sale of Facility by Seller) to this Agreement.

“Extended Term” has the meaning set forth in **Section 3.1** (Term).

“Facility” means the battery energy storage system that is the subject of this Agreement, together with all Storage Units, Seller-Owned Interconnection Facilities, and all other equipment, devices, associated appurtenances owned, controlled, operated and managed by Seller in connection with, and to facilitate the storing of electric energy at the Facility and the charging of electric energy from, and the discharging of electric energy to, the Company System, as described in **Attachment A** (Description of Storage Facility) and **Attachment B** (Facility Owned by Seller).

“Facility Debt” means the obligations of Seller to any lender pursuant to the Financing Documents, including without limitation, principal of, premium and interest on indebtedness, fees, expenses or penalties, amounts due upon acceleration, prepayment or restructuring, swap or interest rate hedging breakage costs and any claims or interest due with respect to any of the foregoing.

“Facility Lender” means any lender(s) or tax equity financing party providing any Facility Debt and any successor(s) or assigns thereto, collectively.

“FASB” has the meaning set forth in **Section 23.1** (Financial Compliance).

“FASB ASC 810” has the meaning set forth in **Section 23.1** (Financial Compliance).

“Final Non-Appealable Order from the PUC” has the meaning set forth in **Section 5(d)** of **Attachment P** (Sale of Facility by Seller) to this Agreement.

“Financial Compliance Information” has the meaning set forth in **Section 23.1** (Financial Compliance).

“Financial Termination Costs” has the meaning set forth in **Section 6** (Make Whole Amount) of **Attachment P** (Sale of Facility by Seller).

“Financing Documents” means the loan and credit agreements, notes, bonds, indentures, security agreements, lease financing agreements, mortgages, deeds of trust, interest rate exchanges, swap agreements and other documents relating to the development, bridge, construction and/or permanent debt financing for the Facility, including any credit enhancement, credit support, working capital financing, tax equity financing or refinancing documents, and any and all amendments, modifications, or supplements to the foregoing that may be entered into from time to time at the discretion of Seller in connection with development, construction, ownership, leasing, operation or maintenance of the Facility.

“Force Majeure” means an event that satisfies the requirements of **Section 17.1** (Definition of Force Majeure), **Section 17.2** (Events That Could Qualify as Force Majeure) and **Section 17.3** (Exclusions From Force Majeure).

“Force Majeure Notice” [has the meaning set forth in Section 17.4 \(Satisfaction of Certain Conditions\).](#)

“GAAP” has the meaning set forth in **Section 23.5(a)** (Consolidation).

“**Good Engineering and Operating Practices**” means the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry for similarly situated U.S. facilities, considering Company's isolated island setting, that at a particular time, in the exercise of reasonable judgment in light of the facts known or that reasonably should be known at the time a decision is made, would be expected to accomplish the desired result in a manner consistent with Law, regulation, reliability for an island system, safety, environmental protection, economy and expedition. With respect to the Facility, Good Engineering and Operating Practices include, but are not limited to, taking reasonable steps to ensure that:

(a) Adequate materials, resources and supplies, including fuel and spare parts inventories, are available to meet the Facility's needs under normal conditions and reasonably foreseeable abnormal conditions.

(b) Sufficient operating personnel are available and are adequately experienced and trained to operate the Facility properly, efficiently and within manufacturer's guidelines and specifications and are capable of responding to emergency conditions.

(c) Preventive, routine and non-routine maintenance and repairs are performed on a basis that ensures reliable long-term and safe operation, and are performed by knowledgeable, trained and experienced personnel utilizing proper equipment, tools, and procedures.

(d) Appropriate monitoring and testing is done to ensure equipment is functioning as designed and to provide assurance that equipment will function properly under both normal and reasonably foreseeable abnormal conditions.

(e) Equipment is operated in a manner safe to workers, the general public and the environment and in accordance with equipment manufacturer's specifications, including, without limitation, defined limitations such as steam pressure, temperature, moisture content, chemical content, quality of make-up water, operating voltage, current, frequency, rotational speed, polarity, synchronization, control system limits, etc.

(f) Equipment and components are designed and manufactured to meet or exceed the standard of durability that is generally used for similarly situated battery energy storage systems/facilities, considering Company's isolated island setting, and will function properly over the full range of ambient temperature and weather conditions reasonably expected to occur at the Site and under both normal and emergency conditions.

“**Governmental Approvals**” means all permits, licenses, approvals, certificates, entitlements and other authorizations issued by Governmental Authorities, as well as any agreements with Governmental Authorities, required for the construction, ownership, operation and maintenance of the Facility and the Company-Owned Interconnection Facilities, and all amendments, modifications, supplements, general conditions and addenda thereto.

“Governmental Authority” means any federal, state, local or municipal governmental body; any governmental, quasi-governmental, regulatory or administrative agency, commission, body or other authority exercising or entitled to exercise any administrative, executive, judicial, legislative, policy, regulatory or taxing authority or power; or any court or governmental tribunal.

“Guaranteed Commercial Operations Date” is the date specified as such in **Attachment K** (Guaranteed Project Milestones) of this Agreement, by which Seller guarantees it will achieve the Commercial Operations Date.

“Guaranteed Procurement Payment Date” means the date specified in **Attachment K** (Guaranteed Project Milestones) that Seller shall make payment to Company of the amount required under **Section 3(b)(iii)** (Balance of Company-Owned Interconnection Facilities Prepayment) of **Attachment G** (Company-Owned Interconnection Facilities).

“Guaranteed Project Milestone” means each of the milestone events identified in **Attachment K** (Guaranteed Project Milestones) of this Agreement.

“Guaranteed Project Milestone Date” means each of the milestone dates identified in **Attachment K** (Guaranteed Project Milestones) of this Agreement.

“HEI” means Hawaiian Electric Industries, Inc.

“HERA” means the Hawai‘i Electricity Reliability Administrator.

“HERA Law” means Act 166 (Haw. Leg. 2012), which was passed by the 27th Hawai‘i Legislature in the form of S.B. No. 2787, S.D. 2, H.D.2, C.D.1 on May 2, 2012 and signed by the Governor on June 27, 2012. The effective date for the law is July 1, 2012. The HERA Law authorizes (a) the PUC to develop, adopt, and enforce reliability standards and interconnection requirements; (b) the PUC to contract for the performance of related duties with a party that will serve as the HERA; and (c) the collection of a Hawai‘i electricity reliability surcharge to be collected by Hawai‘i’s electric utilities and used by the HERA. Reliability standards and interconnection requirements adopted by the PUC pursuant to the HERA Law will apply to any electric utility and any user, owner, or operator of the Hawai‘i electric system. The PUC also is provided with the authority to monitor and compel the production of data, files, maps, reports, or any other information concerning any electric utility, any user, owner or operator of the Hawai‘i electric system, or other person, business, or entity, considered by the commission to be necessary for exercising jurisdiction over interconnection to the Hawai‘i electric system, or for administering the process for interconnection to the Hawai‘i electric system.

“Indemnified Company Party” has the meaning set forth in **Section 20.1(a)** (Third-Party Claims).

“Indemnified Seller Party” has the meaning set forth in **Section 20.2(a)** (Third-Party Claims).

“Independent Evaluator” means a person empowered, pursuant to **Section 22.5** (Failure to Reach Agreement), **Section 22.10** (Dispute) and **Section 2(c)** (Appointment

of Independent Evaluator) of **Attachment S** (Quarterly Reporting and Dispute Resolution by Independent Evaluator) to this Agreement, to resolve (a) disputes due to failure of the Parties to agree on a Performance Standards Revision Document; and (b) disagreements due to failure of the Parties to resolve a Quarterly Report Disagreement.

“**Initial Term**” has the meaning set forth in **Section 3.1** (Term).

“**Integral Station Use**” is that subset of Station Use that is metered through the Revenue Metering Package for Station Use components that are so integrated with the Facility design that it is not feasible to meter such Energy separately and that is described in **Attachment B** (Facility Owned by Seller).

“**Interconnection Facilities**” means all the equipment and devices required to permit the Facility to operate in parallel with the Company System; make available to Company the Energy Storage Services; and provide reliable and safe operation of, and power quality on, the Company System (in accordance with applicable provisions of the PUC’s General Order No. 7, Company tariffs, operational practices, interconnection requirements studies, and planning criteria), such as, but not limited to, transmission and distribution lines, transformers, switches, and circuit breakers.

“**Interconnection Requirements Amendment**” has the meaning set forth in **Section 2.3** of this Agreement.

“**Interconnection Requirements Study**” or “**IRS**” means a study, performed in accordance with the terms of the IRS Letter Agreements to determine, among other things, (a) the system requirements and equipment requirements to interconnect the Facility with the Company System; (b) the Performance Standards for the Facility; and (c) an estimate of costs and schedule for interconnection of the Facility.

“**Interface Block Diagram**” means the visual representation of the signals between Seller and Company, including but not limited to Telemetry and Control points, digital fault recorder settings, telecommunications and protection signals.

“**IRS Letter Agreements**” means the system impact study and Facility study letter agreements and any written, signed amendments thereto, between Company and Seller that collectively describe the scope, schedule and payment arrangements for the IRS.

“**L/C Proceeds**” has the meaning set forth in **Section 14.6** (Failure to Renew or Extend Letter of Credit).

“**Land**” means, for purposes of **Section 7** (Land Restoration) of **Attachment G** (Company-Owned Interconnection Facilities), any portion of the Site and any other real property where any Company-Owned Interconnection Facilities are located.

“**Land Rights**” means all easements, rights of way, licenses, leases, surface use agreements and other interests or rights in real estate.

“**Laws**” means all federal, state and local laws, rules, regulations, orders, ordinances, permit conditions and other governmental actions.

“LD Assessment Date” means, for the last month of each LD Period, the Day following the expiration of the 10-Business Day period provided for Company to submit a Notice of Disagreement pursuant to **Section 2(a)** (Notice of Disagreement With Quarterly Report) of **Attachment S** (Quarterly Reporting and Dispute Resolution by Independent Evaluator) to this Agreement.

“LD Period” means a rolling period of twelve (12) calendar months each. At the end of each calendar month, the LD Period rolls forward to include the next calendar month. The initial “LD Period” shall consist of the twelve (12) full calendar months of the initial Contract Year.

“Losses” means any and all direct, indirect or consequential damages, fines, penalties, deficiencies, losses, liabilities (including settlements and judgments), costs, expenses (including reasonable attorneys’ fees and court costs) and disbursements.

“Lowest Capacity Bandwidth” has the meaning set forth in **Section 4.3(a)** (Capacity Test and Liquidated Damages).

“Lump Sum Payment” means the payment to be made by Company to Seller in exchange for Seller making the Energy Storage Services of the Facility available for Company Dispatch/Charge, based on the pricing Seller submitted in its RFP Proposal.

“Make Whole Amount” has the meaning set forth in **Section 6** (Make Whole Amount) of **Attachment P** (Sale of Facility by Seller).

“Malware” means computer software, code or instructions that: (a) intentionally, and with malice intent by a third party, adversely affect the operation, security or integrity of a computing, telecommunications or other digital operating or processing system or environment, including without limitation, other programs, data, databases, computer libraries and computer and communications equipment, by altering, destroying, disrupting or inhibiting such operation, security or integrity; (b) without functional purpose, self-replicate without manual intervention; (c) purport to perform a useful function but which actually performs either a destructive or harmful function, or perform no useful function other than utilize substantial computer, telecommunications or memory resources with the intent of causing harm; or (d) without authorization collect and/or transmit to third parties any information or data; including such software, code or instructions commonly known as viruses, Trojans, logic bombs, worms, adware and spyware.

“Management Meeting” has the meaning set forth in **Section 26.1** (Good Faith Negotiations).

“Maximum Rated Output” means the net maximum output of the Facility in MW, which shall not exceed the Allowed Capacity.

“Measurement Period” means, in any Contract Year, the following periods of three (3) calendar months each: (a) the period beginning on the first day of the first (1st) calendar month of such Contract Year and extending through the last day of the third (3rd) calendar month of such Contract Year; (b) the period beginning on the first (1st) day of the fourth (4th) calendar month of such Contract Year and extending through

the last day of the sixth (6th) calendar month of such Contract Year; (c) the period beginning on the first (1st) day of the seventh (7th) calendar month of such Contract Year and extending through the last day of the ninth (9th) calendar month of such Contract Year; and (d) the period beginning on the first (1st) day of the tenth (10th) calendar month of such Contract Year and extending through the last day of the twelfth (12th) calendar month of such Contract Year.

“Monitoring and Communications Equipment” has the meaning set forth in **Section 9.4** (Monitoring and Communications Equipment).

“Monthly Progress Report” has the meaning set forth in **Section 11.2** (Monthly Progress Report).

“Quarterly Report” means the report of the data (for the LD Period and the Measurement Period in question) necessary for the calculation of the Performance Metrics to be provided by Seller to Company as set forth in **Section 1** (Quarterly Report) of **Attachment S** (Quarterly Reporting and Dispute Resolution by Independent Evaluator) to this Agreement.

“Quarterly Report Disagreement” means any disagreement arising out of the same Quarterly Report.

“NERC GADS” means the North American Electric Reliability Corporation Generating Availability Data System.

“Non-Appealable PUC Approval Order” has the meaning set forth in **Section 24.5(b)** (Non-Appealable PUC Approval Order).

“Non-Appealable PUC Approval Order Date” has the meaning set forth in **Section 24.5(d)** (Non-Appealable PUC Approval Order Date).

“Non-Defaulting Party” has the meaning set forth in **Section 6.4** (Rights of the Non-Defaulting Party; Forward Contract).

“Notice of Disagreement” has the meaning set forth in **Section 2(a)** (Notice of Disagreement With Quarterly Report) of **Attachment S** (Quarterly Reporting and Dispute Resolution by Independent Evaluator).

“Offer Date” has the meaning set forth in **Section 1(a)(i)** of **Attachment P** (Sale of Facility by Seller) to this Agreement.

“Offer Materials” has the meaning set forth in **Section 1(a)(i)** of **Attachment P** (Sale of Facility by Seller) to this Agreement.

“Offer Notice” has the meaning set forth in **Section 1(a)(i)** of **Attachment P** (Sale of Facility by Seller) to this Agreement.

“Offer Price” has the meaning set forth in **Section 1(a)(i)** of **Attachment P** (Sale of Facility by Seller) to this Agreement.

“Operating Period Security” has the meaning set forth in **Section 14.2** (Operating

Period Security).

“Performance Metrics” means each of the Capacity Performance Metric, the EAF Performance Metric, and the EFOF Performance Metric.

“Performance Metrics LDs” has the meaning set forth in **Section 4.64.7** (Payment of Liquidated Damages for Failure to Achieve Performance Metrics; Limitation on Liquidated Damages).

“Performance Standards” means the various performance standards specified in **Section 3** (Performance Standards) of **Attachment B** (Facility Owned by Seller) for the operation of the Facility, including the availability of Energy Storage Services to Company, as such standards may be revised from time to time pursuant to **Article 22** (Revisions to Performance Standards) of this Agreement.

“Performance Standards Information Request” means a written notice from Company to Seller proposing revisions to one or more of the Performance Standards then in effect and requesting information from Seller concerning such proposed revision(s).

“Performance Standards Modifications” means, for each Performance Standards Revision, any capital improvements, additions, enhancements, replacements, repairs or other operational modifications to the Facility and/or to changes in Seller’s operations or maintenance practices necessary to enable the Facility to achieve the performance requirements of such Performance Standards Revision.

“Performance Standards Pricing Impact” means any adjustment in the payment obligations of Company under this Agreement ~~in \$/MWh~~ necessary to specifically reflect the recovery of the net costs and/or net lost revenues specifically attributable to any Performance Standards Modification necessary to comply with a Performance Standard Revision, which shall consist of the following: (a) recovery of, and return on, any capital investment (i) made over a cost recovery period starting after the Performance Standards Revision is made effective following a PUC Performance Standards Revision Order through the end of the Term; and (ii) based on a proposed capital structure that is commercially reasonable for such an investment and the return on investment is at market rates for such an investment or similar investment); (b) recovery of reasonably expected net additional operating and maintenance costs; and (c) an adjustment in pricing necessary to compensate Seller for reasonably expected reductions, if any, in the provision of Energy Storage Services to Company under this Agreement.

“Performance Standards Proposal” means a written communication from Seller to Company detailing the following with respect to a proposed Performance Standards Revision: (a) a statement as to whether Seller believes that it is technically feasible to comply with the Performance Standards Revision and the basis therefor; (b) the Performance Standards Modifications proposed by Seller to comply with the Performance Standards Revision; (c) the capital and incremental operating costs of any necessary technical improvements, and any other incremental net operating or maintenance costs associated with any necessary operational changes, and any expected lost revenues associated with expected reductions in the Energy Storage

Services provided to Company; (d) the Performance Standards Pricing Impact of such costs and/or lost revenues; (e) information regarding the effectiveness of such technical improvements or operational modifications; (f) proposed contractual consequences for failure to comply with the Performance Standard Revision that would be commercially reasonable under the circumstances; and (g) such other information as may be reasonably required by Company to evaluate Seller's proposals. A Performance Standards Proposal may be issued either in response to a Performance Standards Information Request or on Seller's own initiative; provided, however, that, in accordance with **Section 22.3** (Performance Standards Proposal), Company shall have no obligation to evaluate a Performance Standards Proposal submitted at Seller's own initiative.

"Performance Standards Revision" means a revision, as specified in a Performance Standards Information Request or a Seller-initiated Performance Standards Proposal, to the Performance Standards in effect as of the date of such request or proposal.

"Performance Standards Revision Document" means a document specifying one or more Performance Standards Revisions and setting forth the changes to the Agreement necessary to implement such Performance Standards Revision(s). A Performance Standards Revision Document may be either a written agreement executed by Company and Seller or as directed by the Independent Evaluator pursuant to **Section 22.10** (Dispute) of this Agreement, in the absence of such written agreement.

"Permitted Lien" has the meaning set forth in **Section 4** (Purchase and Sale Agreement) of **Attachment P** (Sale of Facility by Seller) to this Agreement.

"Plans" has the meaning set forth in **Section 2(b)** (Coordination of Construction) of **Attachment G** (Company-Owned Interconnection Facilities).

"Point of Interconnection" of **"POI"** means the point of delivery of Energy supplied by Seller to Company, where the Facility owned by the Seller interconnects with the Company System. The Seller shall own and maintain the facilities from the Facility to the Point of Interconnection, excluding any Company-Owned Interconnection Facilities located on the Site. The Company shall own and maintain the facilities from the Point of Interconnection to the Company System. The Point of Interconnection will be identified in the IRS and set forth on the Single-Line Drawing and Interface Block Diagram in **Attachment E** (Single-Line Drawing and Interface Block Diagram). The Point of Interconnection will be at the voltage level of the Company System. If it is necessary to step up the voltage at which Energy supplied by Seller is delivered to Company System, the Point of Interconnection will be on the high voltage side of the step-up transformer.

"Prime Rate" means the "prime rate" of interest, as published from time to time by The Wall Street Journal in the "Money Rates" section of its Western Edition Newspaper (or the average prime rate if a high and a low prime rate are therein reported). The Prime Rate shall change without notice with each change in the prime rate reported by The Wall Street Journal, as of the date such change is reported. Any such rate is a general reference rate of interest, may not be related to any other rate, may not be the lowest or best rate actually charged by any lender to any customer or a favored rate and may not correspond with future increases or decreases in interest rates charged

by lenders or market rates in general.

“**Proceeds**” has the meaning set forth in **Section 6(b)(ii)(C)** (Extend Letter of Credit) of **Attachment B** (Facility Owned by Seller) to this Agreement.

“**Proceeds Authorized Use**” has the meaning set forth in **Section 6(b)(ii)(H)** (Authorized Use) of **Attachment B** (Facility Owned by Seller) to this Agreement.

~~“**Proceeds Escrow**” has the meaning set forth in **Section 6(b)(ii)(D)** (Authorized Use) of **Attachment B** (Facility Owned by Seller) to this Agreement.~~

“**Proceeds Escrow Agent**” has the meaning set forth in **Section 6(b)(ii)(D)** (Authorized Use) of **Attachment B** (Facility Owned by Seller) to this Agreement.

~~“**Proceeds Escrow Agreement**” means the escrow agreement between Company and the Proceeds Escrow Agent naming Company as beneficiary thereunder, which agreement shall be acceptable in form and substance to Company~~has the meaning set forth in **Section 6(b)(ii)(D)** (Authorized Use) of **Attachment B** (Facility Owned by Seller) to this Agreement.

“**Project Documents**” means this Agreement any ground lease or other agreement or instrument in respect of the Site and/or the Land Rights, all construction contracts to which Seller is or becomes a party thereto, operation and maintenance agreements, and all other agreements, documents and instruments to which Seller is or becomes a party thereto in respect of the Facility, other than the Financing Documents, as the same may be modified or amended from time to time in accordance with the terms thereof.

“**Proposed Actions**” has the meaning set forth in **Section 4(c)** of **Attachment B** (Facility Owned by Seller) to this Agreement.

“**Proprietary Rights**” has the meaning set forth in **Section 27.14** (Proprietary Rights).

“**PSA**” has the meaning set forth in **Section 4** (Purchase and Sale Agreement) of **Attachment P** (Sale of Facility by Seller) to this Agreement.

“**PUC**” has the meaning set forth in the recitals of this Agreement.

“**PUC Approval Order**” has the meaning set forth in **Section 24.5(a)** (PUC Approval Order).

“**PUC Approval Order Date**” has the meaning set forth in **Section 24.5(c)** (Company’s Written Statement).

“**PUC Approval Time Period**” has the meaning set forth in **Section 24.4** (Time Period for PUC Approval).

“**PUC Order Appeal Period**” has the meaning set forth in **Section 24.4** (Time Period for PUC Approval).

“**PUC Performance Standards Revision Order**” means the decision and order of the

PUC approving the application or motion by the Parties seeking (a) approval of the Performance Standards Revision in question and the associated Performance Standards Revision Document; (b) finding that the impact of the changes to Company's payment obligations under this Agreement on Company's revenue requirements is reasonable; and (c) approval to include the costs arising out of pricing changes in Company's Energy Cost Recovery Clause (or equivalent).

"PUC Submittal Date" means the date of the submittal of Company's complete application or motion for a satisfactory PUC Approval Order pursuant to **Section 24.1** (General).

"PUC's Standards" means the Standards for Small Power Production and Cogeneration in the State of Hawai'i, issued by the Public Utilities Commission of the State of Hawai'i, Chapter 74 of Title 6, Hawai'i Administrative Rules, currently in effect and as may be amended from time to time.

"Qualified Consultant" has the meaning set forth in **Section 4(e)** of **Attachment B** (Facility Owned by Seller) to this Agreement.

"Recipient" has the meaning set forth in **Section 23.2** (Confidentiality).

"Reporting Milestone" means each of the milestones identified as such in **Attachment L** (Reporting Milestones).

"Required Model(s)" has the meaning set forth in **Section 6(a)** (Seller's Obligation to Provide Models) of **Attachment B** (Facility Owned by Seller).

"Revenue Metering Package" means the revenue meter(s), revenue metering PTs and CTs and secondary wiring for the Facility.

"RFP" means the Company's Request for Proposals for Variable Renewable Dispatchable Generation and Energy Storage, Island of O'ahu, issued on [_____], 2019.

"RFP Proposal" means the documents and submissions comprising Seller's proposal selected in the Final Award Group in response to the RFP.

"Right of First Negotiation Period" has the meaning set forth in **Section 1(a)(ii)** of **Attachment P** (Sale of Facility by Seller) to this Agreement.

"Second NUB Contract" has the meaning set forth in **Section 1(e)** (Revisions to Costs) of **Attachment G** (Company-Owned Interconnection Facilities).

"Security Funds" has the meaning set forth in **Section 14.4** (Security Funds).

"Seller" has the meaning set forth in the preamble in this Agreement.

"Seller-Attributable Unavailability" means the time periods during which the inverter in question (or the Facility as a whole) is not dispatched or is derated or shutdown (or the Facility is disconnected) because of any of the following:

(a) The Facility's failure to comply with any of the Performance Standards, Good Engineering and Operating Practices, Governmental Approvals, applicable Laws or Seller's other obligations under this Agreement;

(b) Seller-Attributable System Conditions;

(c) Conditions at or on either side of the Point of Interconnection arising from the acts or omissions of Seller or any of its affiliates, employees, agents, contractors, vendors, materialmen, independent contractors or suppliers of Seller, acting in such capacity for the benefit of Seller ("**Seller Representatives**"), unless such acts or omissions are themselves excused by reasons of Force Majeure pursuant to **Article 17** (Force Majeure) of this Agreement;

(d) A disconnection initiated by the Company pursuant to **Article 16** (Personnel and System Safety) of this Agreement) that is caused by Seller or any Seller Representatives;

(e) The Company has reasonably decided that it is inadvisable for such inverter (or the Facility as a whole) to continue normal operations without a further Control System Acceptance Test as provided in **Section 7(a)** (Testing Requirements) of **Attachment B** (Facility Owned by Seller);

(f) The Facility is deemed to be in Seller-Attributable Unavailability status under any of the following sections of **Attachment B** (Facility Owned by Seller): **Section 1(j)** (Demonstration of Facility) or **Section 4(e)**; and

(g) ~~(g)~~ The Facility is shutdown at the direction of Company as provided in **Section 9.6** (Shutdown for Lack of Reliable Real Time Data), and such shutdown is caused by Seller or any Seller Representatives.

Each time period of Seller-Attributable Unavailability shall constitute an Outage or Deration, as applicable.

"Seller-Attributable System Conditions" means conditions on the Company System:

(a) that result from either (i) the Facility's storage and/or delivery of electric power to the Company System; or (ii) any condition arising from the acts or omissions of Seller or any Seller Representative, unless such acts or omissions are themselves excused by reasons of Force Majeure pursuant to **Article 17** (Force Majeure) of this Agreement; and

(b) caused by or attributable to the Facility or Seller or any Seller Representatives that Company reasonably determines to either (i) be inconsistent with Good Engineering and Operating Practices on the Company System; or (ii) jeopardize the safety, reliability or stability of the Company System.

"Seller-Owned Interconnection Facilities" means the Interconnection Facilities constructed and owned by Seller.

"Seller's Conditions Precedent Date" has the meaning set forth in **Section 11.5** (Company Milestones).

“**Site**” means the parcel of real property on which the Facility will be constructed and located, together with any Land Rights reasonably necessary for the construction, ownership, operation and maintenance of the Facility. The Site is identified in **Attachment A** (Description of Storage Facility) to this Agreement.

“**Source Code**” means the human readable source code of the Required Models which: (a) will be narrated documentation related to the compilation, linking, packaging and platform requirements and any other materials or software sufficient to enable a reasonably skilled programmer to build, modify and use the code within a commercially reasonable period of time for the purposes of a Source Code Authorized Use; and (b) can reasonably be compiled by a computer for execution.

“**Source Code Authorized Use**” has the meaning set forth in **Section 6(b)(i)(E)** (Authorized Use) of **Attachment B** (Facility Owned by Seller).

“**Source Code Escrow**” means the escrow established with the Source Code Escrow Agent under the terms of the Source Code Escrow Agreement under which Source Code shall be confidentially deposited by a Source Code Owner for safekeeping and, upon the satisfaction of certain conditions, release to the Company.

“**Source Code Escrow Agent**” means [_____] or such other similar escrow agent approved by Company.

“**Source Code Escrow Agreement**” means a multi-party escrow agreement between Company, Source Code Escrow Agent and any and all Source Code Owners depositing Source Code into the Source Code Escrow which, among other matters, names Company as beneficiary thereunder, and is otherwise acceptable in form and substance to Company.

“**Source Code Owner**” means the developer and/or owner of the Required Models utilizing Source Code authorized to deposit the Source Code with the Source Code Escrow Agent upon the terms of the Source Code Escrow Agreement.

“**SOX 404**” has the meaning set forth in **Section 23.1** (Financial Compliance).

“**Standards**” has the meaning set forth in **Section 2(c)** (Plans) of **Attachment G** (Company-Owned Interconnection Facilities).

“**State of Charge**” or “**SOC**” means the amount of Storage Energy in the Facility stated as a percentage of the Contract Capacity (e.g., 80% SOC).

“**Station Use**” means the electrical load of the Facility’s auxiliary equipment that are necessary for operation of the Facility as set forth in **Attachment B** (Facility Owned by Seller). The auxiliary equipment includes, but is not limited to, forced and induced draft fans, air conditioner systems, cooling towers, plant lighting and control systems, any heating or cooling equipment necessary to keep energy storage componentry within their normal operating temperatures, any motors or pumps required for moving material within the battery energy storage system, and any other electrical loads required for the Energy Storage Services.

“Station Use Metering Equipment” means, for the Facility, a Company-approved revenue quality meter (or meters), Company-approved data processing gateway or remote intelligence gateway, telemetering equipment and data acquisition services sufficient for monitoring, recording and reporting, in real time, all electric energy consumed by the Facility for Station Use.

“Storage Energy” means the Energy the Facility can deliver from 100% SOC to 0% SOC.

“Storage Unit(s)” means the battery energy storage system unit or units specified in **Attachment A** (Description of Storage Facility) through which Seller has agreed to make available the Energy Storage Services to Company pursuant to this Agreement.

“Study” has the meaning set forth in **Section 4(e)** of **Attachment B** (Facility Owned by Seller).

“Supervisory Control and Data Acquisition” or **“SCADA”** means the Company system that provides remote control and monitoring of Company’s transmission and sub-transmission systems and enables Company to perform real-time control of equipment in the field and to monitor the conditions and status of the Company System.

“Submission Notice” has the meaning set forth in **Section 2(c)** (Appointment of Independent Evaluator) of **Attachment S** (Quarterly Reporting and Dispute Resolution by Independent Evaluator) to this Agreement.

“Subsequent Owner” has the meaning set forth in **Section 15.4** (Financing Document Requirements).

“Telemetry and Control” means the interface between Company’s EMS and the physical equipment at the Facility.

“Term” means, collectively, the Initial Term and the Extended Term (if any).

“Termination Damages” means liquidated damages calculated in accordance with **Section 6.5** (Calculation of Termination Damages).

“Termination Date” has the meaning set forth in **Section 6.4** (Rights of the Non-Defaulting Party; Forward Contract).

“Termination Deadline” means the fourteenth (14th) Day following the date the completed IRS is provided to Seller, or such later date as Company and Seller may agree to in writing.

“Total Actual Interconnection Cost” means the actual costs for the Interconnection Facilities, to be designed, engineered and constructed by Company, as provided in **Attachment G** (Company-Owned Interconnection Facilities) to this Agreement.

“Total Actual Relocation Cost” has the meaning set forth in **Section 5(b)** of **Attachment G** (Company-Owned Interconnection Facilities) to this Agreement.

“Total Estimated Interconnection Cost” means the estimated costs for the Interconnection Facilities, to be designed, engineered and constructed by Company, as provided in **Attachment G** (Company-Owned Interconnection Facilities) to this Agreement.

“Total Estimated Relocation Cost” has the meaning set forth in **Section 5(a)** of **Attachment G** (Company-Owned Interconnection Facilities) to this Agreement.

“Total Interconnection Cost” has the meaning set forth in **Section 3(a)(i)** of **Attachment G** (Company-Owned Interconnection Facilities) to this Agreement.

“Transfer Date” means the date, prior to the Commercial Operations Date, upon which Seller transfers to Company all right, title and interest in and to Company-Owned Interconnection Facilities to the extent, if any, that such facilities were constructed by Seller and/or its contractors.

“Unfavorable PUC Order” has the meaning set forth in **Section 24.5(e)** (Unfavorable PUC Order).

ATTACHMENT A
DESCRIPTION OF STORAGE FACILITY

1. Name of Facility: _____

(a) Location: _____ (TMK No. _____)

(b) Telephone number (for system emergencies): (____) _____

(c) E-mail Address: _____

(d) Contact Information for Notices pursuant to **Section 27.3** (Notices) of the Agreement:

Mailing Address:

Address for Hand/Overnight Delivery:

E-Mail Address: _____

Phone: _____

2. Owner (if different from Seller): _____

If Seller is not the owner, Seller shall provide Company with a certified copy of a certificate warranting that the owner is a corporation, partnership or limited liability company in good standing with the Hawai'i Department of Commerce and Consumer Affairs which shall be attached hereto as **Exhibit A-1** (Good Standing Certificates).

3. Operator: _____

If Seller is not the operator, Seller shall provide a copy of the agreement between Seller and the operator which requires the operator to operate the Facility and which establishes the scope of operations by the operator and the respective rights of Seller and the operator with respect to the availability of Energy Storage Services to Company by the Commercial Operations Date. In addition, Seller shall provide a certified copy of a certificate warranting that the operator is a corporation, partnership or limited liability company in good standing with the Hawai'i Department of Commerce and Consumer Affairs no later than the Commercial Operations Date.

4. Name of person to whom payments are to be made: _____

(a) Mailing address:

(b) Hawai'i Gross Excise Tax License number: _____

5. Insurance Carrier(s): [SELLER TO PROVIDE INFORMATION]

6. Seller shall provide a certified copy of a certificate warranting that Seller is a corporation, partnership or limited liability company in good standing with the Hawai'i Department of Commerce and Consumer Affairs which shall be attached hereto as **Exhibit A-1** (Good Standing Certificates).

7. Ownership Structures:

(a) Seller, owner and operator shall provide Company a certificate and/or description of their ownership structures which shall be attached hereto as **Exhibit A-2** (Ownership Structures).

(b) In the event of a change in ownership or identity of Seller, owner or operator, such entity shall provide within thirty (30) Days thereof, a certified copy of a new certificate and a revised ownership structure.

8. Equipment:

(a) The "**Allowed Capacity**" of this Agreement shall be the lower of (i) Contract Capacity or (ii) the net nameplate capacity (net for export) of the Facility installed by the Commercial Operations Date.

(b) Seller may propose revisions to this **Section 8** (Equipment) of **Attachment A** (Description of Storage Facility) ("**Section 8**") for Company's approval prior to commencement of construction, provided, however, that (i) no such revision to this Section 8 shall change the type of Facility or equipment deployed at the Facility from a standalone battery energy storage system; (ii) Seller shall be in compliance with all other terms and conditions of this Agreement; and (iii) such revision(s) shall not change the characteristics of the Facility equipment or the specifications used in the IRS. Any revision to this Section 8 complying with items (i) through (iii) above shall be subject to Company's prior approval, which approval shall not be unreasonably withheld. If Seller's proposed revision(s) to this Section 8 otherwise satisfies items (i) and (ii) above but not item (iii) such that Company, in its reasonable discretion, determines that a re-study or revision to all or any part of the IRS is required to accommodate Seller's proposed revision(s), Company may, in its sole and absolute discretion, conditionally approve such revision(s) subject to a satisfactory re-study or revision to the IRS and Seller's payment and continued obligation to be liable and responsible for all costs and expenses of re-studying or revising such portions of the IRS and for modifying and paying for all costs and expenses of modification to the Facility, the Company-Owned Interconnection Facilities based on the results of the re-studies or revisions to the IRS. Any changes made

to this **Attachment A** (Description of Storage Facility) or the Agreement as a result of this **Section 8(b)** of **Attachment A** (Description of Storage Facility) shall be reflected in a written amendment to the Agreement.

Seller understands and acknowledges that Company's review and approval of Seller's proposed revisions to this Section 8 and any necessary re-studies or revisions to the IRS shall be subject to Company's then-existing time and personnel constraints. Company agrees to use commercially reasonable efforts, under such time and personnel constraints, to complete any necessary reviews, approvals and/or re-studies or revisions to the IRS.

Any delay in completing, or failure by Seller to meet, any subsequent Seller milestones under **Article 11** (Construction Period and Milestones) as a result of any revision pursuant to this Section 8 by Seller (whether requiring a re-study or revision to the IRS or not) shall be borne entirely by Seller and Company shall not be responsible or liable for any delay or failure to meet any such milestones by Seller.

(c) Design and capacity

Energy Storage Capacity ("**Contract Capacity**"): _____ MW / _____ MWh

Total Number of Energy Storage Units:

[number and size of each Energy Storage Unit. e.g. one (1) Brand X, 200 kW; one (1) Brand Y, 300 kW]

Description of Equipment:

[For example: Describe the type of battery energy storage system equipment, capacity, and any special features.]

	kW	kVAR Consumed	kVAR Produced
<u>Full load</u>			
<u>Startup</u>	_____	_____	_____

Energy Storage Unit:

Type _____

Rated Power _____ kW

Voltage _____ V, ___ phase

Frequency _____ HZ

Class of Protection _____

Number of Poles N/A

Rated Speed	N/A
Rated Current	_____ A
Rated Power Factor	See Exhibit B-2

(d) Single or 3 phase:

(e) Name of manufacturer:

(f) Description of Facility SCADA and control system(s):

EXHIBIT A-1
GOOD STANDING CERTIFICATES

EXHIBIT A-2
OWNERSHIP STRUCTURES

[This Attachment will be revised to reflect the results of the IRS]

ATTACHMENT B **FACILITY OWNED BY SELLER**

1. The Facility.

(a) Drawings, Diagrams, Lists, Settings and As-Builts.

(i) Single-Line ~~Diagram~~Drawing, Interface Block Diagram, Relay List, Relay Settings and Trip Scheme. A preliminary single-line ~~diagram~~drawing (including notes), Interface Block Diagram, relay list, relay settings, and trip scheme of the Facility shall, after Seller has obtained prior written consent from Company, be attached to this Agreement on the Execution Date as **Attachment E** (Single-Line Drawing and Interface Block Diagram) and **Attachment F** (Relay List and Trip Scheme). A final single-line drawing (including notes), Interface Block Diagram, relay list and trip scheme of the Facility shall, after having obtained prior written consent from Company, be labeled the “Final” Single-Line Drawing, the “Final” Interface Block Diagram and the “Final” Relay List and Trip Scheme and shall supersede **Attachment E** (Single-Line Drawing and Interface Block Diagram) and **Attachment F** (Relay List and Trip Scheme) to this Agreement and shall be made a part hereof on the Commercial Operations Date. After the Commercial Operations Date, no changes shall be made to the “Final” Single-Line Drawing, the “Final” Interface Block Diagram and the “Final” Relay List and Trip Scheme without the prior written consent of Seller and Company. The single-line drawing shall expressly identify the Point of Interconnection of Facility to ~~the~~ Company System.

(ii) As-Builts. Seller shall provide final as-built drawings of the Seller-Owned Interconnection Facilities within ~~thirty (30)~~30 Days of the successful completion of the Acceptance Test.

(iii) No Material Changes. Seller agrees that no material changes or additions to the Facility as reflected in the “Final” Single-Line Drawing (including notes), the “Final” Interface Block Diagram, and the “Final” Relay List and Trip Scheme shall be made without Seller first having obtained prior written consent from Company. The foregoing are subject to changes and additions as part of any Performance Standards ~~Modification~~Modifications. If Company directs any changes in or additions to the Facility, records and operating procedures that are not part of any Performance Standards Modifications, Company shall specify such changes or additions to Seller in writing, and, except in the case of an emergency, Seller shall have the opportunity to review and comment upon any such changes or additions in advance.

(b) Certain Specifications for the Facility.

(i) Seller shall furnish, install, operate and maintain the Facility, including breakers, relays, switches, synchronizing equipment, monitoring equipment and control and protective devices approved by Company as suitable for parallel operation of the Facility with ~~the~~ Company System. The Facility shall be accessible at

all times to authorized Company personnel.

(ii) The Facility shall include:

[LIST OF THE FACILITY

Examples may include, but are not limited to:

- **Seller-Owned Interconnection Facilities**
- **Substation**
- **Control and monitoring facilities**
- **Transformers**
- **Energy storage system equipment (as described in Attachment A)**
- **“Lockable” cabinets or housings suitable for the installation of the Company-Owned Interconnection Facilities located on the Site**
- **Relays and other protective devices**
- **Leased telephone line and/or equipment to facilitate microwave communication]**

(iii) The Facility shall comply with the following **[includes excerpts of language that may be requested by Company]:**

(A) Seller shall install a kV gang operated, load breaking, lockable disconnect switch and all other items for its switching station (relaying, control power transformers, high voltage circuit breaker). Bus connection shall be made to a manually and automatically (via protective relays) operated high-voltage circuit breaker. The high-voltage circuit breaker shall be fitted with bushing style current transformers for metering and relaying. Downstream of the high-voltage circuit breaker, a structure shall be provided for metering transformers. From the high-voltage circuit breaker, another bus connection shall be made to another pole mounted disconnect switch, with surge protection.

(B) Seller shall provide within the Seller-Owned Interconnection Facilities a separate, fenced area with separate access for Company. Seller shall provide all conduits, structures and accessories necessary for Company to install the Revenue Metering Package. Seller shall also provide, within such area, space for Company to install its communications, SCADA equipment (remote terminal unit (or equivalent) and certain relaying if necessary for the interconnection. Seller shall also provide AC and DC source lines as specified ~~later~~ by Company. Seller shall provide a telephone line for Company-owned meters. Seller shall work with Company to determine an acceptable location and size of the fenced-in area. Seller shall provide an acceptable demarcation cabinet on its side of the fence where Seller and Company wiring will connect/interface.

(C) Seller shall ensure that the Seller-Owned Interconnection Facilities ~~has~~have a lockable cabinet for switching station relaying equipment. Seller shall select and install relaying equipment acceptable to Company. At a minimum, the relaying equipment will provide over and under frequency (81), negative phase

sequence (46), under voltage (27), over voltage (59), ground over voltage (59G), over current functions (50/51) and direct transfer trip. Seller shall install protective relays that operate a lockout relay, which in turn will trip the main circuit breaker.

(D) Seller shall configure the relay protection system to provide overpower protection to enable the Facility to comply with the Allowed Capacity limitation.

(E) Seller's equipment also shall provide at a minimum:

(1) Interface with Company's Telemetry and Control, or designated communications and control interface, to provide telemetry of electrical quantities such as total Facility net MW, MVar, power factor, voltages, currents, and other quantities as identified by the Company;

(2) Interface with Company's Telemetry and Control, or designated communications and control interface, to provide status for circuit breakers, reactive devices, switches, and other equipment as identified by the Company;

(3) Interface with Company's Telemetry and Control, or designated communications and control interface, to provide control to incrementally raise and lower the voltage target at the point of regulation operating in automatic voltage regulation control. If Company's Telemetry and Control, or designated communications and control interface, is unavailable, due to loss of communication link, Telemetry and Control failure, or other event resulting in loss of the remote control by Company, provision must be made for Seller to be able to institute via local controls, within thirty (30) minutes (or such other period as Company accepts in writing) of the verbal directive by the Company System Operator, such change in voltage regulation target as directed by the Company System Operator;

(4) Interface with Company's Telemetry and Control, or designated communications and control interface, to provide active power control to set level of net real power import or export from the Facility, to change the level of net real power import or export from the Facility, and to enable, disable, dispatch and/or schedule other aspects of the energy storage system real power and energy operations; and

(5) Interface with Company's Telemetry and Control, or designated communications and control interface, to provide telemetry of inverter availability and energy storage system state and status. Unless agreed otherwise by Company and Seller in writing, Seller shall provide such telemetry to Company via SCADA communication and protocol acceptable to Company at a continuous scan updated not less frequently than every 2 seconds.

(F) If Seller adds, deletes and/or changes any of its equipment, or changes its design in a manner that would change the characteristics of the equipment and specifications used in the IRS, Seller shall be required to obtain Company's prior written approval. If an analysis to revise parts of the IRS is required, Seller shall be responsible for the cost of revising those parts of the IRS, and modifying

and paying for the cost of the modifications to the Facility and/or the Company-Owned Interconnection Facilities based on the revisions to the IRS.

(G) Critical Infrastructure Protection.

(1) Documentation. Seller shall submit documentation describing the approach, methodology and design to provide physical and cyber security with its submittal of the design drawings pursuant to **Section 1(c)** (Design Drawings, Bill of Materials, Relay Settings and Fuse Selection) of **Attachment B** (Facility Owned by Seller) which shall be at least sixty (60) Days prior to the Acceptance Test.

- The design shall meet industry standards and best practices, as indicated by NERC CIP guidelines and requirements for critical generation facilities. The system shall be designed with the criteria to meet applicable industry standards and guidelines (at the time of this writing, NERC CIP, or any future standard adopted by the industry in its place), compliance requirements and identify areas that are not consistent with NERC CIP guidelines and requirements.

- The cyber-security documentation shall include a block diagram of the control system with all external connections clearly described.

- Seller shall provide such additional information as Company may reasonably request as part of a security posture assessment.

- Company shall be notified in advance when there is any condition that would compromise physical or cyber security, or if any breaches in security, or security incidents are detected.

(2) Malware. Seller shall (consistent with the following sentence) ensure that no malware or similar items are coded or introduced into any aspect of the Facility, Interconnection Facilities, the Company Systems interfacing with the Facility and Interconnection Facilities, and any of Seller's critical control systems or processes used by Seller to provide energy, including the information, data and other materials delivered by or on behalf of Seller to Company, (collectively, the "**Environment**"). Seller will continue to review, analyze and implement improvements to and upgrades of its Malware prevention and correction programs and processes that are commercially reasonable and consistent with the then current technology industry's standards and, in any case, not less robust than the programs and processes implemented by Seller with respect to its own information systems. If Malware is found to have been introduced into the Environment, Seller will promptly notify Company and Seller shall take immediate action to eliminate and remediate the effects of the Malware, at Seller's expense. Seller shall not modify or otherwise take corrective action with respect to the Company Systems except at Company's request. Seller will promptly report to Company the nature and status of all Malware elimination and remediation efforts.

(3) Security Breach. In the event that Seller discovers

or is notified of a breach, potential breach of security, or security incident at Seller's Facility or of Seller's systems, Seller shall immediately (a) notify Company of such potential, suspected or actual security breach, whether or not such breach has compromised any of Company's confidential information, (b) investigate and promptly remediate the effects of the breach, whether or not the breach was caused by Seller, (c) cooperate with Company with respect to any such breach or unauthorized access or use; (d) comply with all applicable privacy and data protection laws governing Company's or any other individual's or entity's data; and (e) to the extent such breach was caused by Seller, provide Company with reasonable assurances satisfactory to Company that such breach, potential breach, or security incident shall not recur. Seller shall provide documentation to Company evidencing the length and impact of the breach. Any remediation of any such breach will be at Seller's sole expense.

(4) Monitoring and Audit. Seller shall provide information on available audit logs and reports relating to cyber and physical and security. Company may audit Seller's records to ensure Seller's compliance with the terms of this **Section 1(b)(iii)(G)** (Critical Infrastructure Protection) of this **Attachment B** (Facility Owned by Seller), provided that Company has provided reasonable notice to Seller and any such records of Seller's will be treated by Company as confidential.

(H) The Facility shall, a minimum, satisfy the wind load and seismic load requirements of the International Building Code and any more stringent requirements imposed under applicable Laws.

(c) Design Drawings, Bill of Materials, Relay Settings and Fuse Selection. Seller shall provide to Company for its review the design drawings, Bill of Material, relay settings and fuse selection for the Facility, and Company shall have the right, but not the obligation, to specify the type of electrical equipment, the interconnection wiring, the type of protective relaying equipment, including, but not limited to, the control circuits connected to it and the disconnecting devices, and the settings that affect the reliability and safety of operation of Company's and Seller's interconnected system. Seller shall provide the relay settings, and protection coordination study, including fuse selection, and AC/DC Schematic Trip Scheme (part of design drawings), for the Facility to Company ~~at least sixty (60) Days prior to the Acceptance Test~~ during the 60% design. Company, at its option, may, with reasonable frequency, witness Seller's operation of control, synchronizing, and protection schemes and shall have the right to periodically re-specify the settings. Seller shall utilize relay settings prescribed by Company, which may be changed over time as ~~the~~ Company System requirements change.

~~(d) — Reserved.~~ **(d) Disconnect Device.** Seller shall provide a manually operated disconnect device which provides a visible break to separate Facility from Company System. Such disconnect device shall be lockable in the OPEN position and be readily accessible to Company personnel at all times.

(e) Other Equipment. Seller shall install, own and maintain the infrastructure associated with the Revenue Metering Package, including but not limited to all enclosures (meter cabinets, meter pedestals, meter sockets, pull boxes, and junction boxes, along with their grounding/bonding connections), CT/PT

mounting structures, conduits and ductlines, enclosure support structures, ground buses, pads, test switches, terminal blocks, isolation relays, telephone surge suppressors, and analog phone lines (one per meter), subject to Company's review and approval. **[COMPANY TO REVISE THIS SECTION 1(e) PRIOR TO EXECUTION FOR SPECIFICS OF THE PROJECT.]**

(f) Maintenance Plan. Seller shall maintain Seller-Owned Interconnection Facilities in accordance with Good Engineering and Operating Practices and the following maintenance plan:

Transmission line: _____

_____ kV Facility switching station: _____

Relay protection equipment: _____

Other equipment as identified: _____

Seller shall furnish to Company a copy of records documenting such maintenance, within thirty (30) Days of completion of such maintenance work.

(g) Active Power Control Interface.

(i) Seller shall provide and maintain in good working order all equipment, computers and software associated with the control system (the "**Active Power Control Interface**") necessary to interface the Facility active power controls with the Company System Operations Control Center for real power and energy control of the Facility by the Company System Operator. The Active Power Control Interface will be used to control the net real power and energy import and export from the Facility as required under this **Attachment B** (Facility Owned by Seller). The implementation of the Active Power Control Interface will allow Company System Operator to control the net real power and energy import and export from the entire Facility, up to Power Possible, remotely from the Company System Operations Control Center through control signals from the Company System Operations Control Center.

(ii) Company shall review and provide prior written approval of the design for the Active Power Control Interface to ensure compatibility with Company's SCADA and EMS systems. In order to ensure such continued compatibility, Seller shall not materially change the approved design without Company's prior review and prior written approval.

(iii) The Active Power Control Interface shall include, but not be limited to, a demarcation cabinet, ancillary equipment and software necessary for Seller to connect to Company's Telemetry and Control, located in Company's portion of the Facility switching station which shall provide the control signals to the Facility and send feedback status to the Company System Operations Control Center. The control type shall be analog output (set point) controls.

(iv) The Active Power Control Interface shall also include provision for

feedback points from the Facility indicating when the Company System Operator active power controls are in effect and the analog value of the controls received from the Company. The Facility shall provide the feedback to the Company SCADA system within 2 seconds of receiving the respective control signal from the Company.

(v) Seller shall provide an analog input to the Company's Telemetry and Control for the MW input or output of the individual generating units, and an analog signal for the total MW input or output at the Point of Interconnection.

(vi) The Active Power Control Interface shall provide for remote control of the net real power and energy input and output of the Facility by the Company at all times. If the Active Power Control Interface is unavailable or disabled, the Facility shall not import or export net real power from or to Company and the Facility shall be deemed to be in Seller-Attributable Unavailability status, unless the Company, in its sole discretion, agrees to supply or accept electric energy and Seller and Company agree on an alternate means of dispatch. Notwithstanding the foregoing, if Seller fails to provide such remote control features (whether temporarily or throughout the Term) and fails to discontinue importing or exporting electric energy to Company as required by this **Section 1(g)(vi)**, then, notwithstanding any other provision of this **Attachment B** (Facility Owned by Seller), Company shall have the right to derate or disconnect the entire Facility during those periods that such control features are not provided and the Facility shall be deemed to be in Seller-Attributable Unavailability status for such periods.

- If all local and remote active power controls become unavailable or fail, the Facility shall immediately disconnect from the Company System.

- If the direct transfer trip is unavailable due to loss of communication link, Telemetry and Control failure, or other event resulting in the loss of the remote control by Company, provision must be made for Seller to shutdown the Facility and open and lockout the main circuit breaker.

(vii) The Facility will respond to the active power control requests.
[THESE REQUIREMENTS MAY BE CHANGED BY COMPANY FOLLOWING COMPLETION OF THE IRS]

(viii) The Active Power Control Interface shall accept the following active power control(s) from the Company SCADA and EMS systems:

- Maximum Power Import and Export Limits: The Facility is not allowed to exceed these settings under any circumstances. The frequency response control specified in **Section 3(m)** (Frequency Response) of **Attachment B** (Facility Owned by Seller) is not allowed to increase the Facility's net real power import or export above the Import and Export limits, respectively.

- Power Reference Set Point: The Facility is to import or export active power at this level to the extent allowed by the energy storage and is not allowed to exceed this setting when system frequency is within the deadband determined in **Section 3(m)(iii)** of **Attachment B** (Facility Owned by Seller). When

system frequency exceeds the deadband determined in **Section 3(m)(iii)** of **Attachment B** (Facility Owned by Seller), the Facility's net real power import or export is allowed to exceed this setting or be further reduced below this setting when commanded by the frequency response control specified in **Section 3(m)** (Frequency Response) of **Attachment B** (Facility Owned by Seller).

- Any additional remote controls necessary to enable, disable, dispatch and/or schedule the energy storage system real power and energy operations mutually agreed upon in writing by the Parties.

- Inverter Enable/Disable Control: The Facility shall include an inverter Enable/Disable control. When Disable is selected, the Facility shall ramp down, shutdown, and leave offline its inverters. When Enable is selected, the Facility inverters start up, ramp up, and remain in normal operations.

(ix) Seller shall not override Company's active power controls without first obtaining specific approval to do so from the Company System Operator.

(x) The requirements of the Active Power Control Interface may be modified as mutually agreed upon in writing by the Parties.

(h) Control System Acceptance Test Procedures.

(i) Conditions Precedent. The following conditions precedent must be satisfied prior to ~~the conduct of~~conducting the Control System Acceptance Test:

- Successful completion of the Acceptance Test;
- Facility has been successfully energized;
- All of the Facility's generators have been fully synchronized;
- The control system computer has been programmed for normal operations; and

- All equipment that is relied upon for normal operations (including ancillary devices such as capacitors/inductors, fire protection, HVAC systems, statcom, etc.) shall have been commissioned and be operating within normal parameters.

(ii) Facility Energy Storage System Units and Inverters. Unless all of the Facility's energy storage system units and inverters are available for the duration of the Control System Acceptance Test, the Control System Acceptance Test will have to be re-run from the beginning unless Seller demonstrates to the satisfaction of the Company that the test results attained with less than all of the Facility's energy storage system units and inverters are consistent with the results that would have been attained if all of the Facility's energy storage system units and inverters had been available for the duration of the test.

(iii) Procedures. The Control System Acceptance Test will be

conducted on Business Days during normal working hours on a mutually agreed upon schedule. No Control System Acceptance Test will be scheduled during the final twenty-one (21) Days of a calendar year. No later than thirty (30) Days prior to conducting the Control System Acceptance Test, Company and Seller shall agree on a written protocol setting out the detailed procedure and criteria for passing the Control System Acceptance Test. **Attachment O** (Control System Acceptance Test Criteria) provides general criteria to be included in the written protocol for the Control System Acceptance Test. Within fifteen (15) Business Days of completion of the Control System Acceptance Test, Company shall notify Seller in writing whether the Control System Acceptance Test(s) has been passed and, if so, the date upon which such Control System Acceptance Test(s) was passed. If any changes have been made to the technical specifications of the Facility or the design of the Facility in accordance with **Section 8(b)** of **Attachment A** (Description of Storage Facility), such changes shall be reflected in an amendment to this Agreement, and the written protocol for the Control Systems Acceptance Test shall be based on the Facility as modified. Such amendment shall be executed prior to conducting the Control System Acceptance Test and Company shall have no obligation for any delay in performing the Control Systems Acceptance Test due to the need to complete and execute such amendment.

(i) Facility Security and Maintenance. Seller is responsible for securing the Facility. Seller shall have personnel available to respond to all calls related to security incidents and shall take commercially reasonable efforts to prevent any security incidents. Seller is also responsible for maintaining the Facility, including vegetation management, to prevent security breaches. Seller shall comply with all commercially reasonable requests of Company to update security and/or maintenance if required to prevent security breaches.

(j) Demonstration of Facility. Company shall have the right at any time, other than during maintenance or other special conditions, including Force Majeure, communicated by Seller, to notify Seller in writing of Seller's failure, as observed by Company and set forth in such written notice, to meet the operational and performance requirements specified in **Section 1(g)** (Active Power Control Interface) and **Section 3** (Performance Standards) of this **Attachment B** (Facility Owned by Seller), and to require documentation or testing to verify compliance with such requirements. Upon receipt of such notice, Seller shall promptly investigate the matter, implement corrective action and provide to Company, within thirty (30) Days of such notice, a written report of both the results of such investigation and the corrective action taken by Seller; provided, that, if thirty (30) Days is not a reasonable time period to investigate the matter, implement corrective action and provide such written report, Seller shall complete the foregoing within such longer commercially reasonable period of time agreed to by the Parties in writing. If Seller's report does not resolve the issue to Company's reasonable satisfaction, the Parties shall promptly commission a study to be performed by one of the engineering firms then included on the Consultants List to evaluate the cause of the non-compliance and to make recommendations to remedy such non-compliance. Seller shall pay for the cost of the study. The study shall be completed within ninety (90) Days, unless the selected consultant determines such study cannot reasonably be completed within ninety (90) Days, in which case, such longer period of time as the selected consultant determines is necessary to complete such study shall apply. The consultant shall send the study to Company and Seller. Seller and/or its third-party consultants and contractors), at

Seller's expense, shall take such action as the study shall recommend with the objective of resolving the non-compliance. Such recommendations shall be implemented by Seller to Company's reasonable satisfaction no later than forty-five (45) Days from the Day the completed study is issued by the consultant, unless provided that such recommendations cannot reasonably be implemented within forty-five (45) Days, in which case, Seller shall implement such recommendations within such longer commercially reasonable period of time agreed to by the Parties in writing. Failure to implement such recommendations within this period shall constitute a material breach of this Agreement. Unless the aforementioned written report and study are being completed, and any recommendations are being implemented, solely to address Seller's failure to satisfy the requirements of **Section 3(w)** (Round Trip Efficiency) of this **Attachment B** (Facility Owned by Seller), the Company shall have the right to declare the Facility derated and in Seller-Attributable Unavailability status until the Seller's aforementioned written report has been completed, any subsequent study commissioned by the Parties has been completed and any recommendations to resolve the non-compliance have been implemented to Company's reasonable satisfaction.

2. Operating Procedures. [NOTE: NUMERICAL SPECIFICATIONS IN THIS SECTION 2 MAY VARY DEPENDING ON THE SPECIFIC FACILITY AND THE RESULTS OF THE FACILITY-SPECIFIC IRS.]

(a) Reviews of the Facility. Company may require periodic reviews of the Facility, maintenance records, available operating procedures and policies, and relay settings, and Seller shall implement changes Company deems necessary for parallel operation or to protect the Company System from damages resulting from the parallel operation of the Facility with the Company System.

(b) Separation. Seller must separate from the Company System whenever requested to do so by the Company System Operator pursuant to **Article 12** (Dispatching and Charging the Facility; Scheduling) and **Article 16** (Personnel and System Safety) of the Agreement.

(c) Seller Logs. Logs shall be kept by Seller for information on unit availability including reasons for planned and forced outages; circuit breaker trip operations, relay operations, including target initiation and other unusual events. Company shall have the right to review these logs, especially in analyzing system disturbances. Seller shall maintain such records for a period of not less than six (6) years.

(d) Reclosing. Under no circumstances shall Seller, when separated from the Company System for any reason, reclose into the Company System without first obtaining specific approval to do so from the Company System Operator.

(e) Reserved.

(f) Reserved.

(g) Critical Infrastructure Protection. Seller shall comply with the critical infrastructure protection requirements set forth in **Section 1(b)(iii)(G)** of this

Attachment B (Facility Owned by Seller).

(h) Allowed Operations. Facility shall be allowed to import or export net real power to the Company System only when the [_____] circuit is in normal operating configuration served by breaker [_____] at [_____] Substation. **[TO BE DETERMINED BY COMPANY BASED ON THE RESULTS AND REQUIREMENTS OF THE IRS.]**

3. Performance Standards.

(a) Reactive Power Control. Seller shall control its reactive power by automatic voltage regulation control. Seller shall automatically regulate voltage at a point, the point of regulation, between the Seller's generator terminal and the Point of Interconnection to be specified by Company, to within 0.5% of a voltage specified by the Company System Operator to the extent allowed by the Facility reactive power capabilities as defined in **Section 3(b)** (Reactive Amount) of this **Attachment B** (Facility Owned by Seller). **[FOR FACILITIES CONNECTED TO THE DISTRIBUTION SYSTEM, THESE REQUIREMENTS MAY BE CHANGED BY COMPANY UPON COMPLETION OF THE IRS.]**

(b) Reactive Amount. **[THESE REQUIREMENTS MAY BE CHANGED BY COMPANY UPON COMPLETION OF THE IRS.]**

(i) Seller shall install sufficient equipment so that each _____ kVA energy storage unit inverter online at the Facility will have the ability to deliver or receive, at its terminal, reactive power as illustrated in the **[energy storage unit]** curve(s) attached to this Agreement as **Exhibit B-2** (Energy Storage Capability Curve(s)). **[NOTE: THE IRS WILL DETERMINE IF ANY ADDITIONAL REACTIVE POWER RESOURCES WILL BE REQUIRED.]**

(ii) The Facility shall contain equipment able to continuously and actively control the output of reactive power under automatic voltage regulation control reacting to system voltage fluctuations. The automatic voltage regulation response speed at the point of regulation shall be such that at least 90% of the initial voltage correction needed to reach the voltage control target will be achieved within one (1) second following a step change.

(iii) If the Facility does not operate in accordance with **Section 3(b)(i)** of this **Attachment B** (Facility Owned by Seller), Company may disconnect all or a part of Facility from Company System until Seller corrects its operation (such as by installing capacitors at Seller's expense).

(c) Ramp Rates.

(i) The Facility in start up, normal operations including when executing a command from the Company active power controls, and shut down shall adjust its net real power import or export at a ramp rate, as calculated in accordance with **Attachment C** (Methods and Formulas for Measuring Performance Standards), to be specified by the Company without intentional delay. Such ramp rate shall be in the range of _____ MW/min to _____ MW/min.

(ii) The Facility is allowed to exceed the Company-specified ramp rate when Facility net real power import or export is changed by the frequency response control described in **Section 3(m)** (Frequency Response) of this **Attachment B** (Facility Owned by Seller).

~~(d)~~ **Reserved. (d) Ride-Through Requirements.** In meeting the voltage and frequency ride-through requirements in **Section 3(e)** (Undervoltage Ride-Through), **Section 3(f)** (Over Voltage Ride-Through), **Section 3(i)** (Underfrequency Ride-Through), and **Section 3(j)** (Overfrequency Ride-Through) of this **Attachment B** (Facility Owned by Seller), the Facility shall not enter momentary cessation of operations within the voltage and frequency zones and time periods where the Facility must remain connected to the Company System. **[THIS PROVISION MAY BE ADJUSTED BY COMPANY UPON COMPLETION OF THE IRS IF MOMENTARY CESSATION IS NEEDED TO PREVENT EQUIPMENT DAMAGE DUE TO A POWER EQUIPMENT LIMITATION. DOCUMENTATION FROM THE EQUIPMENT MANUFACTURER OF SUCH LIMITATION SHALL BE PROVIDED TO COMPANY IN WRITING FOR THE OWNER'S RFP SUBMITTAL AND THE CONDUCT OF THE IRS.]**

(e) **Undervoltage Ride-Through.** The Facility, as a whole, will meet the following undervoltage ride-through requirements during low voltage affecting one or more of the three voltage phases ("V" is the voltage of any three voltage phases at the Point of Interconnection). **[THESE VALUES MAY BE CHANGED BY COMPANY UPON COMPLETION OF THE IRS. WITHOUT LIMITATION, FOR A DISTRIBUTION-CONNECTED FACILITY, UPON COMPLETION OF THE IRS THE COMPANY MAY SPECIFY REQUIREMENTS FOR A MANDATORY DISCONNECTION FROM THE COMPANY SYSTEM.]**:

$0.88 \text{ pu} \leq V \leq 1.00 \text{ pu}$	The Facility remains connected to the Company System.
$0.70 \text{ pu} \leq V < 0.88 \text{ pu}$	The Facility may initiate disconnection from the Company System if the voltage remains in this range for more than 20 seconds.
$0.50 \text{ pu} \leq V < 0.70 \text{ pu}$	The Facility may initiate disconnection from the Company System if the voltage remains in this range for more than 10 seconds.
$0.00 \text{ pu} \leq V < 0.50 \text{ pu}$	The Facility may disconnection from the Company System if voltage remains in this range for more than 600 milliseconds.

Seller shall have sufficient capacity to fulfill the above-mentioned requirements to ride-through the following sequences or combinations thereof **[THE ACTUAL CLEARING TIMES WILL BE DETERMINED BY COMPANY IN CONNECTION WITH THE IRS]**:

- Normally cleared 138 kV transmission faults cleared after 5 cycles with one reclose attempt, cleared in 5 cycles, 30 cycles after the initial fault was cleared. The voltage at the Point of Interconnection will recover above the 0.80 p.u.

level for the 30 cycles between the initial clearing time and the reclosing time.

- Normally cleared 46 kV subtransmission faults cleared in 7 cycles with one reclose attempt, cleared in 7 cycles, 23 cycles after the initial fault was cleared. The voltage at the Point of Interconnection will recover above the 0.80 p.u. level for the 23 cycles between the initial clearing time and the reclosing time.

(f) Over Voltage Ride-Through. The overvoltage protection equipment at the Facility shall be set so that the Facility will meet the following overvoltage ride-through requirements during high voltage affecting one or more of the three voltage phases (as described below) (“V” is the voltage of any of the three voltage phases at the Point of Interconnection). **[THESE VALUES MAY BE CHANGED BY THE COMPANY UPON COMPLETION OF THE IRS. WITHOUT LIMITATION, FOR A DISTRIBUTION-CONNECTED FACILITY, UPON COMPLETION OF THE IRS THE COMPANY MAY SPECIFY REQUIREMENTS FOR A MANDATORY DISCONNECTION FROM THE COMPANY SYSTEM AT $V > 1.2$ pu. RIDE-THROUGH REQUIREMENTS FOR OTHER SYSTEMS WILL BE DETERMINED IN THE IRS.]**:

$1.00 \text{ pu} < V \leq 1.10 \text{ pu}$	The Facility remains connected to the Company System.
$1.10 \text{ pu} < V \leq 1.20 \text{ pu}$	The Facility may initiate disconnection from the Company System if voltage remains in this range for more than 0.92 seconds.
$V > 1.20 \text{ pu}$	The Facility may initiate disconnection from the Company System immediately.

(g) Reserved.

~~**(h) Fault Ride-Through.** For fault related voltage dips at the Point of Interconnection that stay within the limits of the under voltage ride through requirements in **Section 3(e)** (Undervoltage Ride Through) of this **Attachment B** (Facility Owned by Seller), upon clearing of the fault, Seller shall within 1 second of restoration, provide at least 90% of the real power output at the Point of Interconnection immediately before the fault without regard to the ramp rate requirements of **Section 3(e)** (Ramp Rates) of this **Attachment B** (Facility Owned by Seller) to the extent allowed by the availability of the solar resource and energy storage. The fault ride through requirement does not apply if the Facility is operating at less than five percent (5%) of the Facility's nameplate capacity. **(h) Reserved.**~~

(i) Underfrequency Ride-Through. The Facility shall meet the following underfrequency ride-through requirements during an underfrequency disturbance (“f” is the Company System frequency at the Point of Interconnection):

$57.0 \text{ Hz} \leq f \leq 60.0 \text{ Hz}$	The Facility remains connected to the Company System.
$56.0 \text{ Hz} \leq f \leq 57.0 \text{ Hz}$	The Facility may initiate disconnection from the Company System if frequency remains in this range

for more than twenty (20) seconds.

$f < 56.0 \text{ Hz}$

The Facility may initiate disconnection from the Company System immediately.

(j) Overfrequency Ride-Through. The Facility will behave as specified below for overfrequency conditions (“f” is the Company System frequency at the Point of Interconnection):

$60.0 \text{ Hz} \leq f \leq 63.0 \text{ Hz}$

The Facility remains connected to the Company System.

$63.0 \text{ Hz} < f < 64.0 \text{ Hz}$

The Facility shall initiate disconnection from the Company System if frequency remains in this range for more than 20 seconds.

$f > 64.0 \text{ Hz}$

The Facility shall initiate disconnection from the Company System immediately.

(k) Voltage Flicker. Any voltage flicker on the Company System caused by the Facility shall not exceed the limits stated in IEEE Standard 1453-2011, or latest version “Recommended Practice – Adoption of IEC 61000-4-15:2010, Electromagnetic compatibility (EMC) – Testing and measurement techniques – Flickermeter – Functional and design specifications.”

(l) Harmonics. Harmonic distortion at the Point of Interconnection caused by the Facility shall not exceed the limits stated in IEEE Standard 519-1992, or latest version “Recommended Practices and Requirements for Harmonic Control in Electrical Power Systems.” Seller shall be responsible for the installation of any necessary controls or hardware to limit the voltage and current harmonics generated from the Facility to defined levels.

(m) Frequency Response. Seller Facility shall provide a primary frequency response with a frequency droop characteristic reacting to system frequency fluctuations at the Point of Interconnection in both the overfrequency and underfrequency directions except to the extent such response is not operationally possible because of the depletion of energy storage.

(i) The Facility frequency response control shall adjust, without intentional delay and without regard to the ramp rate limits in **Section 3(c)** (Ramp Rates) of this **Attachment B** (Facility Owned by Seller), the Facility’s net real power import or export when system frequency is not 60 Hz based on frequency deadband and frequency droop settings specified by the Company.

(ii) The Facility frequency response control shall be allowed to increase the net real power import or export above the Power Reference Set Point set under **Section 1(g)(viii)** of this **Attachment B** (Facility Owned by Seller) or further decrease the net real power import or export from the Power Reference Set Point in its operations.

(iii) The frequency deadband shall be settable in the range from +/- 0.01 Hz to +/- 0.10 Hz and the frequency droop shall be settable in the range of 0.1% to 10%

(iv) The Facility frequency response control shall be in continuous operation when the Facility is online and connected to the Company unless directed otherwise by the Company.

~~(n)~~ **Reserved.** **(n) Grid Forming.** Seller Facility inverters shall be capable of operating in grid forming mode supporting system operation under normal and emergency conditions without relying on the characteristics of synchronous machines. This includes operation as a current independent ac voltage source during normal and transient conditions (as long as no limits are reached within the inverter), and the ability to synchronize to other voltage sources or operate autonomously if a grid reference is unavailable.

(i) Seller shall operate the Facility in grid forming mode only as directed by the System Operator, in its sole discretion.

(ii) The Facility shall include safeguards to prevent the unintentional switching of the Facility into and out of grid forming mode. The safeguards shall be approved in writing by Company and implemented by Seller in the Facility prior to conducting the CSAT.

(o) Round Trip Efficiency. The round trip efficiency of the BESS as measured at the Point of Interconnection shall be not less than [] percent ([]%). [Note – The percentage for round trip efficiency shall be taken from Seller’s RFP Proposal.]

4. Maintenance of Seller-Owned Interconnection Facilities.

(a) Seller must address any Disconnection Event (as defined below) according to the requirements of this **Section 4** (Maintenance of Seller-Owned Interconnection Facilities) of **Attachment B** (Facility Owned by Seller). For this purpose, a “**Disconnection Event**” is a disconnection from Company System of at least ___ MW **[TO BE DETERMINED BY COMPANY FOLLOWING THE IRS]** from the Facility over a “rolling 120-second period,” ~~if such disconnection is due to a defect in or a failure of Seller-Owned Interconnection Facilities~~ (i) that is not the result of Company dispatch, frequency droop response, or isolation of the Facility resulting from designed protection fault clearing, and (ii) for which Company does not issue for such disconnection the written notice for failure to meet operational and performance requirements as set forth in **Section 1(j)** (Demonstration of Facility) of this **Attachment B** (Facility Owned by Seller). A “rolling 120-second period” means a period that is comprised of 120 seconds and such rolling period will change as each new one (1) second elapses. With the elapse of each new one (1) second, the newest one (1) second would be added to the 120-second period, and the oldest one (1) second would no longer be included in the rolling 120-second period. Company’s election to exercise its rights under **Section 1(j)** (Demonstration of Facility) shall not relieve Seller of its obligation to comply with the requirements of this **Section 4** (Maintenance of Seller-Owned Interconnection Facilities) for any future Disconnection Event during the

[pendency of such election or thereafter.](#)

(b) For every Disconnection Event from the Company System, Seller shall investigate the cause. Within three (3) Business Days of the Disconnection Event, Seller shall provide, in writing to Company, an incident report that summarizes the sequence of events and probable cause of the Disconnection Event.

(c) Within forty-five (45) Days of a Disconnection Event, Seller shall provide, in writing to Company, Seller's findings, data relied upon for such findings, and proposed actions to prevent reoccurrence of a Disconnection Event ("**Proposed Actions**"). Company may assist Seller in determining the causes of and recommendations to remedy or prevent a Disconnection Event ("**Company's Recommendations**"). Seller shall implement such Proposed Actions (as modified to incorporate the Company's Recommendations, if any) and Company's Recommendations (if any) in accordance with the time period agreed to by the Parties.

(d) In the event Seller and Company disagree as to (i) whether a Disconnection Event occurred, (ii) the sequence of events and/or probable cause of the Disconnection Event, (iii) ~~whether the Disconnection Event is a disconnection, (iv) the Proposed Actions, (v) Company's Recommendations, and/or (vi) the time period to implement the Proposed Actions and/or Company's Recommendations,~~ then the Parties shall follow the procedure set forth in **Section 5** (Expedited Dispute Resolution) of this **Attachment B** (Facility Owned by Seller).

(e) Upon the fourth (4th) Disconnection Event (and each subsequent Disconnection Event) within any Contract Year, the Parties shall follow the procedures set forth in **Section 4(a)** and **Section 4(d)** of **Attachment B** (Facility Owned by Seller), to the extent applicable. If after following the procedures set forth in this **Section 4** (Maintenance of Seller-Owned Interconnection Facilities) of **Attachment B** (Facility Owned by Seller), Seller and Company continue to have a disagreement as to (i) the probable cause of the Disconnection Event, (ii) the Proposed Actions, (iii) the Company's Recommendations, and/or (iv) the time period to implement the Proposed Actions and/or the Company's Recommendations, then the Parties shall commission a study to be performed by a qualified independent third-party consultant ("**Qualified Consultant**") chosen from the Qualified Independent Third-Party Consultants List ("**Consultants List**") attached to the Agreement as **Attachment D** (Consultants List). Such study shall review the design of, review the operating and maintenance procedures dealing with, recommend modifications to, and determine the type of maintenance that should be performed on Seller-Owned Interconnection Facilities ("**Study**"). Seller and Company shall each pay for one-half of the total cost of the Study. The Study shall be completed within ninety (90) Days from such fourth Disconnection Event (and each subsequent Disconnection Event) within any Contract Year, unless the Qualified Consultant determines the Study cannot reasonably be completed within ninety (90) Days, in which case, such longer period of time as the Qualified Consultant determines is necessary to complete the Study shall apply. The Qualified Consultant shall send the Study to Company and Seller. Seller (and/or its third-party consultants and contractors), at Seller's expense, shall change the design of, change the operating and maintenance procedures dealing with, implement modifications to, and/or perform the maintenance on Seller-Owned Interconnection Facilities recommended by the Study. Such design changes, operating and

maintenance procedure changes, modifications, and/or maintenance shall be completed no later than forty-five (45) Days from the Day the completed Study is issued by the Qualified Consultant, unless such design changes, operating and maintenance procedure changes, modifications, and/or maintenance cannot reasonably be completed within forty-five (45) Days, in which case, Seller shall complete the foregoing within such longer commercially reasonable period of time agreed to by the Parties in writing. ~~In the event the time requirement for the (i) commissioning of the Study, (ii) completion of the Study, or (iii) completion of the design change, operating and maintenance procedure change, modifications, and/or maintenance recommended by the Study is not achieved, Company may limit the total Allowed Capacity~~ Company shall have the right to derate the Facility to a level that maintains reliable operations in accordance with Good Engineering and Operating Practices ~~for the period that such requirement has not been achieved, and the Facility shall be deemed to be in Seller-Attributable Unavailability status, until the study has been completed and the study's recommendations have been implemented by Seller to Company's reasonable satisfaction.~~ Nothing in this provision shall affect Company's right of Company Dispatch/Charge as provided for in this Agreement.

(f) The Consultants List attached hereto as **Attachment D** (Consultants List) contains the names of engineering firms which both Parties agree are fully qualified to perform the Study. At any time, except when a Study is being conducted, either Party may remove a particular consultant from the Consultants List by giving written notice of such removal to the other Party. However, neither Party may remove a name or names from the Consultants List without approval of the other Party if such removal would leave the list without any names. Intended deletions shall be effective upon receipt of notice by the other Party, provided that such deletions do not leave the Consultants List without any names. Proposed additions to the Consultants List shall automatically become effective thirty (30) Days after notice is received by the other Party unless written objection is made by such other Party within said thirty (30) Day period. By mutual agreement between the Parties, a new name or names may be added to the Consultants List at any time.

5. Expedited Dispute Resolution. If there is a disagreement between Company and Seller regarding ~~(a) Seller's compliance with the standards set forth in Section 3 (Performance Standards) of this Attachment B (Facility Owned by Seller), and/or (b) Section 4 (Maintenance of Seller Owned Interconnection Facilities) of this Attachment B (Facility Owned by Seller) such as (u) whether a Disconnection Event occurred, (v) the sequence of events and/or probable cause of the Disconnection Event, (w) whether the Disconnection Event is a Disconnection, (x) the Proposed Actions, (y) the Company's Recommendations, and (z) the time period to implement the Proposed Actions and/or the Company's Recommendations,~~ then authorized representatives from Company and Seller, having full authority to settle the disagreement, shall meet in Hawai'i (or by telephone conference) and attempt in good faith to settle the disagreement. Unless otherwise agreed in writing by the Parties, the Parties shall devote no more than five (5) Business Days to settle the disagreement in good faith. In the event the Parties are unable to settle the disagreement after the expiration of the time period, then such disagreement shall constitute a Dispute for which either Party may pursue the dispute resolution procedure set forth in ~~Article 26~~ Section 26.2 (Dispute Resolution Procedures) of this Agreement.

6. Modeling.

(a) Seller's Obligation to Provide Models. Within thirty (30) Days of Company's written request, but no later than the Commercial Operations Date, Seller shall provide detailed data regarding the design and location of the Facility, in a form reasonably satisfactory to Company, to allow the modeling of the inverters and any other equipment within the Facility identified in the IRS which utilizes Source Code (such as energy storage system, STATCOM or DVAR equipment), including, but not limited to, integrated and validated power flow and transient stability models (such as PSS/E models), a short circuit model (such as an ASPEN model), and an electro-magnetic transient model (such as a PSCAD model) of the inverters and any additional equipment identified in the IRS as set forth above, applied assumptions, and pertinent data sets (each a "**Required Model**" and collectively, the "**Required Models**"). Thereafter, during the Term, Seller shall provide working updates of any Required Model within thirty (30) Days of (i) Company's written request, or (ii) Seller obtaining knowledge or notice that any Required Model has been modified, updated or superseded by the Source Code Owner.

(b) Escrow Establishment. If, pursuant to **Section 6(a)** (Seller's Obligation to Provide Models) of this **Attachment B** (Facility Owned by Seller), the Required Models are provided to the Company in a form other than Source Code, Seller shall arrange for and ensure that the Source Code for the relevant Required Model is deposited into the Source Code Escrow as set forth below in **Section 6(b)(i)** (Source Code Escrow) of this **Attachment B** (Facility Owned by Seller) no later than the time periods set forth in **Section 6(a)** (Seller's Obligation to Provide Models) of this **Attachment B** (Facility Owned by Seller) for delivery of the Required Models. Seller shall be responsible for all costs associated with establishing and maintaining the Source Code Escrow. If, however, Seller is unable to deposit the required Source Code into the Source Code Escrow within the time periods set forth in **Section 6(a)** (Seller's Obligation to Provide Models), Seller shall, no later than such time periods, instead establish a monetary escrow as set forth below in **Section 6(b)(ii)** (Monetary Escrow) of this **Attachment B** (Facility Owned by Seller).

(i) Source Code Escrow.

(A) Establishment of Source Code Escrow. If the Required Models are not provided to the Company in the form of Source Code pursuant to **Section 6(a)** of this **Attachment B** (Facility Owned by Seller), Seller shall: (1) arrange for and ensure the deposit of a copy of the current version of the Source Code and relevant documentation for all Required Models with the Source Code Escrow Agent under the terms and conditions of the Source Code Escrow Agreement, and (2) arrange for and ensure the update of the deposited Source Code and relevant documentation for Major Releases and Minor Releases of the Required Models as soon as reasonably possible after they are made generally available.

(B) Release Conditions. Company shall have the right to obtain from the Source Code Escrow Agent one copy of the escrowed Source Code for the Required Models, under the following conditions upon Company's request:

- (1)** A receiver, trustee, or similar officer is appointed,

pursuant to federal, state or applicable foreign law, for the Source Code Owner;

(2) Any voluntary or involuntary petition or proceeding is instituted, under (a) U.S. bankruptcy laws or (b) any other bankruptcy, insolvency or similar proceeding outside of the United States, by or against the Source Code Owner;

(3) Failure of the Source Code Owner to function as a going concern or operate in the ordinary course; or

(4) Seller and the Source Code Owner fail to provide to Company the Required Models or updated Required Models, or, alternatively, fail to issue a Source Code LC, within the time periods set forth in **Section 6(a)** (Seller's Obligation to Provide Models) of this **Attachment B** (Facility Owned by Seller), Company gives written notice of such failure to Seller and the Source Code Owner, and Seller and Source Code Owner fail to remedy such breach within five (5) Days following receipt of such notice.

(C) Remedies. If Company has the right to obtain from the Source Code Escrow Agent one copy of the escrowed Source Code for the Required Models pursuant to **Section 6(b)(i)(B)** (Release Conditions) of **Attachment B** (Facility Owned by Seller), and Company finds that Seller failed to arrange for and ensure the update the Source Code Escrow with the modified and/or updated Source Code and relevant documentation for Major Releases and Minor Releases of the Required Models as provided in **Section 6(b)(i)** (Establishment of Source Code Escrow) of **Attachment B** (Facility Owned by Seller) or that the Source Code for the Required Models is incomplete or otherwise unusable, Seller shall be liable to Company for liquidated damages in the amount of \$500 per Day for each Day Seller fails to provide such Source Code to Company or such update to the Source Code to Company from the date such Major Release or Minor Release was first made available by the Source Code Owner to customers of the Source Code Owner. Failure to provide the updated Source Code of the Required Models within 30 Days' notice from Company of a breach of **Section 6(b)(i)(A)** (Establishment of Source Code Escrow) of **Attachment B** (Facility Owned by Seller); provided, that Seller has also failed to provide a satisfactory Source Code LC as set forth in **Section 6(b)(ii)** (~~Monetary Escrow~~ [Source Code Security](#)) of this **Attachment B** (Facility Owned by Seller) shall constitute an Event of Default pursuant to **Section 6.2(f)** under the Agreement.

(D) Certification. The Source Code Escrow Agent shall release the Source Code of the Required Models to Company upon receipt of a signed statement by a representative of Company that reads substantially as follows:

The undersigned hereby certifies that (i) I am duly authorized to execute this document on behalf of Hawaiian Electric Company, Inc. ("**Hawaiian Electric**"), and (ii) Hawaiian Electric is entitled to a copy of the Source Code of the Required Models Pursuant to **Section 6(b)(i)(B)** (Release Conditions) of **Attachment B** (Facility Owned by Seller) of the Energy Storage Power Purchase Agreement dated as of _____, between _____, and Hawaiian Electric.

(E) Authorized Use. If Company becomes entitled to a release of the Source Code of the Required Models from escrow, Company may thereafter correct, modify, update and enhance the Required Models for the sole purpose of providing itself the support and maintenance it otherwise would have been entitled to if it had been provided the Required Models by Seller under **Section 6(a)** (Seller's Obligation to Provide Models) of this **Attachment B** (Facility Owned by Seller) (the "**Source Code Authorized Use**").

(F) Confidentiality Obligations. Company shall keep the Source Code of the Required Models confidential pursuant to the confidentiality obligations of the Source Code Escrow Agreement. Company shall restrict access to the Source Code of the Required Models to those employees, independent contractors and consultants of Company who have agreed in writing to be bound by confidentiality and use obligations consistent with those specified in the Escrow Agreement, and who have a need to access the Source Code of the Required Models on behalf of Company to carry out their duties for the Authorized Use. Promptly upon Seller's request, Company shall provide Seller with the names and contact information of all individuals who have accessed the Source Code of the Required Models, and shall take all reasonable actions required to recover any such Source Code in the event of loss or misappropriation, or to otherwise prevent their unauthorized disclosure or use.

(ii) Source Code Security.

(A) Establishment of Source Code Security. If the Required Models and their relevant Source Code are not provided to the Company in the form of Source Code pursuant to **Section 6(a)** (Seller's Obligation to Provide Models) of this **Attachment B** (Facility Owned by Seller) and if the Seller is unable to arrange for and ensure the deposit of the Source Code into the Source Code Escrow established for the benefit of the Company pursuant to **Section 6(b)(i)** (Source Code Escrow) of this **Attachment B** (Facility Owned by Seller) then, no later than the time periods set forth in **Section 6(a)** (Seller's Obligation to Provide Models) of this **Attachment B** (Facility Owned by Seller) for delivery of the Required Models and Source Code, Seller shall provide an irrevocable standby letter of credit (the "**Source Code LC**") with no documentation requirement in the amount of Two Hundred Fifty Thousand Dollars (\$250,000) per Required Model (and its relevant Source Code) substantially in the form attached to this Agreement as **Attachment M** (Form of Letter of Credit) from a bank chartered in the United States with a credit rating of "A-" or better from Standard & Poor's or A3 or better from Moody's. Such letter of credit shall be issued for a minimum term of one (1) year. Furthermore, at the end of each year the security shall be renewed for an additional one (1) year term so that at the time of such renewal, the remaining term of any such security shall not be less than one (1) year. The letter of credit shall include a provision for at least thirty (30) Days' advance notice to Company of any expiration or earlier termination of the letter of credit so as to allow Company sufficient time to exercise its rights under said security if Seller fails to extend or replace the security. In all cases, the reasonable costs and expenses of establishing, renewing, substituting, canceling, increasing, reducing, or otherwise administering the letter of credit shall be borne by Seller.

(B) Release Conditions. Company shall have the right to ~~obtain from~~ draw on the ~~Monetary Escrow Agent~~ letter of credit the funds necessary to

develop and recreate the Required Model or Required Models upon Company's request if Seller fails to provide the Company the Required Models or updated Required Models within the time periods set forth in **Section 6(a)** (Seller's Obligation to Provide Models) or **Section 6(b)(i)(C)** (Remedies) of this **Attachment B** (Facility Owned by Seller), Company gives written notice of such failure to Seller, and Seller fails to remedy such breach within five (5) Days following receipt of such notice for a breach under **Section 6(a)** (Seller's Obligation to Provide Models), or within thirty (30) Days following receipt of such notice for a breach under **Section 6(b)(i)(C)** (Remedies).

(C) Extend Letter of Credit. If the letter of credit is not renewed or extended no later than thirty (30) Days prior to its expiration or earlier termination, Company shall have the right to draw immediately upon the full amount of the letter of credit and to place the proceeds of such draw (the "**Proceeds**"), at Seller's cost, in an escrow account in accordance with **Section 6(b)(ii)(D)** (Proceeds Escrow), until and unless Seller provides a substitute form of letter of credit meeting the requirements of this **Section 6(b)(ii)** (~~Monetary Escrow~~[Source Code Security](#)) of this **Attachment B** (Facility Owned by Seller).

(D) Proceeds Escrow. If Company draws on the letter of credit pursuant to **Section 6(b)(i)(C)** (Extend Letter of Credit) of this **Attachment B** (Facility Owned by Seller), Company shall, in order to avoid comingling the Proceeds, have the right but not the obligation to place the Proceeds in an escrow account as provided in this **Section 6(b)(ii)(D)** (Proceeds Escrow) of this **Attachment B** (Facility Owned by Seller) with a reputable escrow agent acceptable to Company ("**Proceeds Escrow Agent**"), subject to ~~a~~[an escrow agreement acceptable to Company](#) ("**Proceeds Escrow Agreement**"~~(the "**Proceeds Escrow**")~~). Without limitation to the generality of the foregoing, a federally-insured bank shall be deemed to be a "reputable escrow agent." Company shall have the right to apply the Proceeds as necessary to recover amounts Company is owed pursuant to this **Section 6** (Modeling) of this **Attachment B** (Facility Owned by Seller). To that end, the Proceeds Escrow Agreement governing ~~the~~[such escrow account](#) shall give Company the sole authority to draw from the account. Seller shall not be a party to such Proceeds Escrow Agreement and shall have no rights to the Proceeds. Upon full satisfaction of Seller's obligations under **Section 6** (Modeling) of this **Attachment B** (Facility Owned by Seller), Company shall instruct the Proceeds Escrow Agent to remit to the bank that issued the letter of credit that was the source of the Proceeds the remaining balance (if any) of the Proceeds. If there is more than one escrow account with Proceeds, Company may, in its sole discretion, draw on such accounts in any sequence Company may select. Any failure to draw upon the Proceeds for any damages or other amounts due Company shall not prejudice Company's rights to recover such damages or amounts in any other manner.

(E) Seller's Obligation. If the letter of credit is not sufficient to cover Company's associated consultant fees, costs and expenses to develop and recreate the Required Models, Seller shall pay to Company the difference within ten (10) Days of Company's written notice to Seller.

(F) Model Verification. Seller shall work with the Company to validate the new Required Models developed by or on behalf of Company within sixty (60) Days of receiving such new Required Models. Seller shall also arrange for and

ensure that Company may obtain new Required Models directly from the Source Code Owner in the event that Seller ceases to operate as a going concern or is subject to voluntary or involuntary bankruptcy and is unable or unwilling to obtain the new Required Models from the Source Code Owner.

(G) Certification. The terms of the letter of credit shall provide for a release of the funds, or in the event the funds have been placed into a Proceeds Escrow, the Monetary Proceeds Escrow Agent shall release the necessary funds to Company upon receipt of a signed statement by a representative of Company that reads substantially as follows:

The undersigned hereby certifies that (i) I am duly authorized to execute this document on behalf of Hawaiian Electric Company, Inc. (“**Hawaiian Electric**”), and (ii) Hawaiian Electric is entitled to \$_____, pursuant to **Section 6(b)(ii)(B)** (Release Conditions) of **Attachment B** (Facility Owned by Seller) of the Energy Storage Power Purchase Agreement dated as of _____, between _____, and Hawaiian Electric.

(H) Authorized Use. If Company becomes entitled to a draw of funds from the Source Code Security or a release of funds from the Proceeds Escrow, Company may thereafter use such funds to develop, recreate, correct, modify, update and enhance the Required Models for the sole purpose of providing itself the support and maintenance it otherwise would have been entitled to if it had been provided the Required Models by Seller under **Section 6(a)** (Seller’s Obligation to Provide Models) of this **Attachment B** (Facility Owned by Seller) (the “**Proceeds Authorized Use**”).

(iii) Supplementary Agreement. The parties stipulate and agree that the escrow provisions in this **Section 6(b)** (Escrow Establishment) of **Attachment B** (Facility Owned by Seller), and the Source Code Escrow Agreement and Proceeds Escrow Agreement are “supplementary agreements” as contemplated in 11 U.S.C. § 365(n)(1)(B). In any voluntary or involuntary bankruptcy proceeding involving Seller, failure by Company to assert its rights to “retain its rights” to the intellectual property encompassed by the Source Code or the funds in the Proceeds Escrow, pursuant to 11 U.S.C. § 365(n)(1)(B), under an executory contract rejected in a bankruptcy proceeding, shall not be construed as an election to terminate the contract by Company under 11 U.S.C. § 365(n)(1)(A).

7. Testing Requirements.

(a) Testing Requirements. Once the Control System Acceptance Test has been successfully passed, Seller shall not replace and/or change the configuration of the Facility Control, inverter control settings, energy storage system controls and/or ancillary device controls, without prior written notice to Company. In the event of any such replacement and/or change, if after review, it is determined by the Company to have potential impact on the prior testing, the relevant test(s) of the Control System Acceptance Test shall be redone and must be successfully passed before the replacement or altered equipment is allowed to be placed in normal operations. In the event that Company reasonably determines that such replacement and/or change of

controls makes it inadvisable for the Facility to continue in normal operations without a further Control Systems Acceptance Test, the Facility shall be deemed to be in Seller-Attributable Unavailability status until the new relevant tests of the Control System Acceptance Test have been successfully passed.

(b) Periodic Testing. Seller shall coordinate periodic testing of the Facility with Company to ensure that the Facility is meeting the performance standards specified under this Agreement.

8. Reserved.

9. Technology Specific Requirements.

(a) Reserved.

(b) Reserved.

(c) Inverter Systems.

(i) Direct current generators and non-power (i.e. other than 60 Hertz) alternating current generators can only be installed in parallel with the Company System using a non-islanding synchronous inverter. The design shall comply with the requirements of IEEE Std 1547-2003 (or latest version), except as described in **Section 3** (Performance Standards) of this **Attachment B** (Facility Owned by Seller), unless alternate designs are approved by Company.

(ii) Self-commutated inverters of the Company-interactive type shall synchronize to the Company System. Line-commutated, thyristor-based inverters are not recommended and will require additional technical study to determine harmonic and reactive power requirements. All interconnected inverter systems shall comply with the harmonic current limits of IEEE Std 519-1992 (or latest version).

(d) ~~Operational Parameters and Limitations~~ Battery Energy Storage System. The operating parameters of the Facility shall be as follows:

~~**(i)** The Facility shall have telemetry, local controls, and remote controls necessary to monitor, enable, disable, dispatch and/or schedule the energy storage system real power and energy operations and the ability to coordinate the various controls. Telemetry or controls not already specifically defined in **Attachment B** (Facility Owned by Seller) shall be mutually agreed upon in writing by the Parties. No more than []% of the BESS energy capacity can be charged from the grid prior to the fifth anniversary of the Commercial Operations Date. Thereafter, 100% of the BESS energy capacity can be charged from the grid. **[DRAFTING NOTE: 5-YEAR LIMITATION ON GRID CHARGING WILL BE DELETED IF INVESTMENT TAX CREDIT RECAPTURE IS NOT APPLICABLE TO THE BESS]**~~

(ii) For Contract Years that are non-leap years, the Facility shall be discharged no more than the Contract Capacity multiplied by 365 Days in each such Contract Year. For Contract Years that are leap years, the Facility shall be discharged no more than the Contract Capacity multiplied by 366 Days in each such Contract

Year.

(iii) The Facility will not be required to discharge more energy than available relative to the available State of Charge.

EXHIBIT B-1
REQUIRED MODELS

PSS/E

ASPEN

PSCAD

EXHIBIT B-2
ENERGY STORAGE CAPABILITY CURVE(S)

[This Attachment will be revised to reflect the results of the IRS]

ATTACHMENT C **MEASURING PERFORMANCE STANDARDS**

1. Performance Standards as defined below shall be used, in part, to govern actions by Company to limit the Actual Output of the Facility for purposes of maintaining power quality on Company System. Specific standards are defined for:

- Ramp Rate (RR)

2. Formulas for measuring the performance standards are presented below, and assume that the power fluctuations will be monitored on the Company's SCADA and EMS systems. These formulas are based on the periodicity at which analog data is retrieved from Telemetry and Control. This periodicity is called the "scan rate". Company presently uses a two-second analog scan rate. The formulas below are based on the two-second scans. The two-second scan rate, characteristics of transducers and Telemetry and Control reporting, and SCADA method of calculation, were considered and included in the proposed values for the performance standards.

3. Ramp Rate Calculation:

$$RR = MW_s - MW_{s-30}$$

RR = Ramp Rate, may be calculated once every scan

MW_{s-30} = The instantaneous MW analog value 30 scans (60 seconds) prior the present scan

MW_s = The instantaneous MW analog value for the present scan

[DRAFT STANDARDS BEING DEVELOPED]

4. All changes in output shall be implemented as a ramp rate, and not with one or two step changes within the period. It is not acceptable, for example, for a two MW/minute ramp rate compliance, that all values be zero except for a 2 MW change in the last scan value.

ATTACHMENT D
CONSULTANTS LIST

ATTACHMENT E
SINGLE-LINE DRAWING AND INTERFACE BLOCK DIAGRAM

(To be attached pursuant to **Section 1(a)** of **Attachment B**)

ATTACHMENT F
RELAY LIST AND TRIP SCHEME

(To be attached pursuant to **Section 1(a)** of **Attachment B**)

[This Attachment will be revised to reflect the results of the IRS]

ATTACHMENT G

COMPANY-OWNED INTERCONNECTION FACILITIES

1. Description of Company-Owned Interconnection Facilities.

(a) General. Company shall furnish or construct (or may have Seller furnish or construct, in whole or in part), own, operate and maintain all Interconnection Facilities required to interconnect Company System with Facility at ____ volts, up to the Point of Interconnection (collectively, the “**Company-Owned Interconnection Facilities**”).

(b) Site. Where any Company-Owned Interconnection Facilities are to be located on the Site, Seller shall provide, at no expense to Company, a location and access acceptable to Company for all such Company-Owned Interconnection Facilities, as well as an easement, license or right of entry to access such Company-Owned Interconnection Facilities. If power sources (120/240 VAC) are required, Seller shall provide such sources, at no expense to Company.

(c) IRS. An IRS addressing Facility requirements was completed for the Facility in accordance with the IRS Letter Agreements, and the results have been incorporated in **Attachment B** (Facility Owned by Seller) and this **Attachment G** (Company-Owned Interconnection Facilities) as appropriate.

(d) Seller’s Payment Obligations. Company-Owned Interconnection Facilities, for which Seller has agreed to pay, whether designed, engineered and constructed by Seller or Company, include **[ADD LIST OF COMPANY-OWNED INTERCONNECTION FACILITIES THAT ARE REQUIRED PURSUANT TO THE RESULTS OF THE IRS. THE FOLLOWING IS AN EXAMPLE OF THE TYPES OF FACILITIES THAT COULD BE LISTED]:**

(i) [Line extension];

(ii) A manually operated, lockable, group operated switch located on a pole prior to the Facility switching station. Company will install a ____ kV drop into Seller-provided deadend structure;

(iii) Substation additions and/or modifications of Company’s existing structures as necessary, including, but not be limited to, protective relaying and setting changes;

(iv) Supervisory control and communications equipment (including but not limited to, SCADA/Telemetry and Control, microwave, satellite, dedicated phone line(s) and/or any other acceptable communications means (determined by Company), fiber optics, copper cabling, installation of batteries and charger system, etc.);

(v) Revenue Metering Package, as provided in **Section 9.1** (Revenue Metering Package; Station Use Metering Equipment);

(vi) Any additional Interconnection Facilities needed to be installed as a result of final determination of Facility switching station site, final design of Facility to enable Company to complete the Interconnection Facilities and be compatible with Good Engineering and Operating Practices; and

(vii) If equipment that is not standard to Company is utilized, Seller shall, at the discretion of Company, provide adequate spares.

(e) **Revisions to Costs.** The list of Company-Owned Interconnection Facilities, and engineering and testing costs for Company-Owned Interconnection Facilities, for which Seller agrees to pay in accordance with this **Attachment G** (Company-Owned Interconnection Facilities), are subject to revision if (i) before approving this Agreement, the PUC approves an energy storage power purchase agreement for another non-Company owned battery energy storage system/facility ("**Second NUB Contract**") making Energy Storage Services available to Company using the same line to which Facility is to be connected; or (ii) the line to which Facility is to be connected and/or the related transformer(s) need(s) to be upgraded and/or replaced as a result of this Agreement and a Second NUB Contract, and the PUC, in approving this Agreement, determines that Seller should pay for all or part of the cost of such upgrade and/or replacement.

(f) **Review of the Listing and Costs.** If the Commercial Operations Date is not achieved by the Guaranteed Commercial Operations Date, as such date may be extended as provided in **11.4** (Milestone Dates), the listing of the Company-Owned Interconnection Facilities required in this Agreement and the cost-estimates for such Company-Owned Interconnection Facilities are subject to review and revision. Such revision may include, but not be limited to, such items as reconductoring an existing transmission or distribution line, construction of a new line, increase transformer capacity, and alternative relay specifications. In addition, such review and revision may require that the Company re-perform or update the IRS at Seller's expense.

(g) **Responsibility of Seller and Company.** The general responsibilities of Seller and Company for the design, procurement, installation, programming/testing, and maintenance/ownership of equipment at the Facility and the Company Owned Interconnection Facilities is specified in **Matrix G-1** (Substation Responsibilities) and **Matrix G-2** (Telecom Responsibilities). **[DRAFTING NOTE: MATRIXES WILL BE UPDATED FOLLOWING COMPLETION OF IRS.]**

[DRAFTING NOTE: THE TYPICAL TIMEFRAMES ON O'AHU FOR COMPANY TO ENGINEER, PROCURE AND CONSTRUCT THE COMPANY-OWNED INTERCONNECTION FACILITIES, FOLLOWING THE COMPLETION OF: 1) THE IRS; 2) SELLER'S SINGLE-LINE DIAGRAM; AND 3) COMPANY'S SINGLE-LINE DIAGRAM ARE AS FOLLOWS:

(i) 36 MONTHS FOR 138 kV FACILITIES. [DRAFTING NOTE: TRANSMISSION SYSTEMS AND TIME ESTIMATES WILL VARY FOR OTHER ISLANDS.]

(ii) 30 MONTHS FOR 46 kV FACILITIES WITH MINOR INFRASTRUCTURE IMPROVEMENTS.] [DRAFTING NOTE:

TRANSMISSION SYSTEMS AND TIME ESTIMATES WILL VARY FOR OTHER ISLANDS.]

~~[Note – Hawaiian Electric will follow up with its Engineering Project Management Team for further information on typical timeframes provided above.]~~

2. Construction and Support Services By Seller.

(a) Construction and Support Services By Seller.

(i) Seller (and/or its third-party consultants or contractors (collectively, “**Contractors**”)) will design, engineer, construct, test and place in service, at Seller’s expense:

(A) The items identified in **Matrix G-1** (Substation Responsibilities) and **Matrix G-2** (Telecom Responsibilities) as being the responsibility of Seller to construct; and

(B) [ANY OTHER COMPANY-OWNED INTERCONNECTION FACILITIES TO BE CONSTRUCTED BY SELLER. NOTE: SUBPARTS “A” AND “B” BETWEEN THEM SHOULD GENERALLY INCLUDE A SUBSET OF THE LIST IN SECTION 1(d) ABOVE.]

(ii) Seller shall provide the necessary support for the Company’s ___kV overhead line extension work, which may include, but not limited to:

(A) Furnish surveyed topographical drawing including contour lines of project areas and beyond as needed in State Plane coordinates with overlay of the Facility and Company pole line route(s) indicating pole locations and anchors in CADD format acceptable to Company.

(B) Staking of Company proposed poles and anchors by surveyor.

(C) Graded access roads including gravel if required by Company to provide sufficient vehicle access to Company poles and anchors by Company trucks and cranes.

(D) Graded level pads to provide vehicle working areas around all Company poles and anchors.

(E) Grading of the areas beneath the Company’s overhead lines as needed to provide required ground clearance.

(F) Grubbing and clearing of vegetation within Company’s easement area or as required.

(b) Coordination of Construction. Prior to Seller engaging the Contractors, Seller shall obtain Company’s written approval, which approval shall not be unreasonably withheld. Prior to Seller and/or its Contractors first starting to work on

the construction plans for Company-Owned Interconnection Facilities to be constructed by Seller (and/or its Contractors), such as the civil, structural, and construction drawings, specifications to vendors, vendor approved final drawings and materials lists (collectively, the “**Plans**”), Seller and/or its Contractors shall meet with Company to discuss the construction of such Company-Owned Interconnection Facilities, including but not limited to subjects concerning coordination of construction milestone dates, agreement on areas of interface design, and Company’s design/drawing layout and symbols standards, equipment specifications and construction specifications and standards. Company will provide the ~~design and equipment~~ specifications, and construction specifications and standards information so Seller can incorporate such information in its bid documents.

(c) Plans. Seller shall provide Company its complete Plans at 30%, 60% and 90% completion. No later than sixty (60) Days before Seller and/or its Contractors first start to order materials and equipment for Company-Owned Interconnection Facilities to be constructed by Seller and/or its Contractors, Seller shall provide Company with the final Plans. The Plans for Company-Owned Interconnection Facilities to be constructed by Seller (and/or its Contractors) shall comply with (i) all applicable Laws; (ii) Company’s design/drawing layout and symbol standards, equipment specifications, and construction specifications and standards; and (iii) Good Engineering and Operating Practices (collectively, the “**Standards**”). Seller shall submit design drawings in MicroStation format per Company standards.

(d) Company’s Review of the Plans. Unless otherwise agreed to by the Parties, Company shall have thirty (30) Days following receipt of the complete Plans at each stage (30%, 60%, 90% and final) for it to review and comment on the Plans, and verify in writing to Seller that the Plans comply with the Standards, which verification shall not be unreasonably withheld. If Company reasonably determines that the Plans are not in accordance with the Standards, then it may request in writing a response from Seller to its comments and Seller shall respond in writing within thirty (30) Days of such request by providing (i) its justification for why its Plans conform to the Standards; or (ii) changes in the Plans responsive to Company’s comments and in accordance with the Standards.

(e) Company Inspection. Construction work will be subject to Company inspections to ensure that construction is done in accordance with the Standards. Company inspectors will be allowed access to the construction sites for inspections and to monitor construction work. The inspector shall have the authority to work with the appropriate construction supervisor to stop any work that does not meet the Standards. All equipment and materials used in Company-Owned Interconnection Facilities to be constructed by Seller and/or its Contractors shall meet the Standards.

(f) Acceptance Test Procedures.

(i) Seller acknowledges that: (aa) Company has multiple on-going projects with other developers as well as its own capital improvement projects; (bb) Company has limited resources to provide engineering oversight (such as review of plans) to such projects and to participate in the testing of such projects; (cc) in order for Company to accommodate such oversight and testing, it is necessary for Company to sequentially allocate its resources for each project a year or more in advance; (dd)

the result is a queue of such projects that reflects the scheduling commitments of Company's resources to conduct such oversight and to participate in such testing; (ee) if a project is behind the schedule on which Company's resources have been scheduled for the oversight of such project, or if a project is not ready for testing at the time Company's resources have been scheduled for the testing of such project, or if a project does not complete testing within the period for which Company's resources have been scheduled for such testing, the progress of projects later in the queue may be adversely affected; (ff) the Test Ready Deadline that is set forth in **Attachment K-1** (Seller's Conditions Precedent and Company Milestones) reflects the scheduling commitment of Company's resources to (i) conduct the oversight necessary to facilitate Seller's achievement of that Test Ready Deadline, (ii) commence the Acceptance Test on the Acceptance Testing Milestone Date that is set forth in **Attachment K-1** (Seller's Conditions Precedent and Company Milestones) and (iii) thereafter participate in the Control System Acceptance Test; and (gg) the Project will lose its place in the queue and will be assigned a new Acceptance Testing Milestone Date for commencement of the Acceptance Test that will be behind the other projects then in the queue if (i) Seller fails to satisfy any of the conditions precedent set forth in **Section 2(f)(ii)** of this **Attachment G** (Company-Owned Interconnection Facilities) within the time period specified therein for the task in question or, if no time period is specified therein, by the Test Ready Deadline, (ii) the Seller fails to satisfy any of the Seller's Conditions Precedent set forth in **Attachment K-1** (Seller's Conditions Precedent and Company Milestones) and/or (iii) the Acceptance Test and the Control System Acceptance Test are not satisfactorily completed within the time allotted to complete such testing.

(ii) ~~(i)~~The Conduct of the Acceptance Test is subject to the satisfaction of the following conditions precedent ~~must be satisfied prior to the conduct of the Acceptance Test~~ within the time period specified below for the task in question or, if no time period is specified, by the Test Ready Deadline that is set forth in **Attachment K-1** (Seller's Conditions Precedent and Company Milestones):

(A) Final Single-Line Drawing, and notes, has received Company's written consent pursuant to **Section 1(a)(i)** (Single-Line Drawing, Interface Block Diagram, Relay List, Relay Settings and Trip Scheme) of **Attachment B** (Facility Owned by Seller) to this Agreement.

(B) Final Relay List and Trip Scheme have received Company's written consent pursuant to **Section 1(a)(i)** (Single-Line Drawing, Interface Block Diagram, Relay List, Relay Settings and Trip Scheme) of **Attachment B** (Facility Owned by Seller) to this Agreement.

(C) Final Interface Block Diagram has received Company consent pursuant to **Section 1(a)(i)** (Single-Line Drawing, Interface Block Diagram, Relay List, Relay Settings and Trip Scheme) of **Attachment B** (Facility Owned by Seller) to this Agreement.

(D) Final Control System Telemetry and Control List has received Company consent.

(E) Final ~~digital fault recorder settings~~ phasor measurement unit (PMU) devices, if applicable, have received Company consent.

(F) Control system design and tunable parameters reviewed and mutually agreed upon as needed to meet the Company requirements in accordance with **Section 3** (Performance Standards) of **Attachment B** (Facility Owned by Seller) to this Agreement.

(G) Agreement on Active Power Control Interface.

(H) No later than fourteen (14) Days prior to commencement of the Acceptance Test:

(1) Seller shall have certified to Company that Seller-Owned Interconnection Facilities have been installed and commissioned and such certification has not, prior to the commencement of the Acceptance Test, been subsequently challenged by Company on the basis of onsite observations made by the Company's representatives following the walk-through to be conducted pursuant to **Section 2(f)(iii)** of this **Attachment G** (Company-Owned Interconnection Facilities).

(2) Seller shall have certified to Company that any Company-Owned Interconnection Facilities built by Seller (and/or its Contractors) have been installed and commissioned and such certification has not, prior to the commencement of the Acceptance Test, been subsequently challenged by Company on the basis of onsite observations made by the Company's representatives following the walk-through to be conducted pursuant to **Section 2(f)(iii)** of this **Attachment G** (Company-Owned Interconnection Facilities).

(I) Any Company-Owned Interconnection Facilities not built by or on behalf of Seller have been installed and commissioned.

(J) No later than seven (7) Days prior to the commencement of the Acceptance Test, Seller and Company shall have participated in walk-through of fully constructed Interconnection Facilities.

(K) Redlined as-built drawings of the Seller-Owned Interconnection Facilities and any of the Company-Owned Interconnection Facilities built by Seller (and/or its Contractors) shall have been provided to Company.

(L) Continuous power is being supplied to Company's protection and SCADA equipment.

(M) Not less than four (4) weeks prior to the commencement of the Acceptance Test, the high speed communication lines required under this Agreement have been commissioned and are ready for use for EMS and revenue metering purposes.

(N) Not less than two (2) weeks prior to the commencement of the Acceptance Test, Seller and Company have participated in an on-Site Acceptance Test coordination meeting.

(ii) Seller shall provide Company with at least fourteen (14) Days advance written notice of the Acceptance Test, which shall be scheduled during

normal business hours on a Business Day (and may take a minimum of thirty (30) Days to complete). No electric energy will be delivered from Seller to Company during this Acceptance Test. No later than thirty (30) Days prior to conducting the Acceptance Test, Company and Seller shall agree on a written protocol setting out the detailed procedure and criteria for passing the Acceptance Test. **Attachment N** (Acceptance Test General Criteria) provides general criteria to be included in the written protocol for the Acceptance Test. At the time that Seller provides its 14-Day notice of the Acceptance Test to Company, Seller shall concurrently schedule a site walk-through of the Facility with Company to occur no later than seven (7) Days prior to the Acceptance Test. Seller's 14-Day notice to Company of the Acceptance Test shall constitute its certification that (A) the installation and commissioning of the Seller-Owned Interconnection Facilities and the Company-Owned Interconnection Facilities built by Seller (and/or its Contractors) has been completed; and (B) a walk-through by Company shall demonstrate, to Company's reasonable satisfaction, Seller's readiness to commence with the Acceptance Test. If, after the site walk-through, Company representatives reasonably determine that Seller is not ready to commence with the Acceptance Test, the Project will lose its place in the queue and will be assigned a new Test Ready Deadline and a new Acceptance Testing Milestone Date that will be behind the other projects then in the queue. In the meantime, Seller shall remediate the deficiencies identified by Company ~~and, upon completion, re-submit its 14-Day written notice of the Acceptance Test~~, and the process described in this **Section 1(f)** (Acceptance Test Procedures) of **Attachment G** (Company-Owned Interconnection Facilities), shall commence again until Seller's readiness for the Acceptance Test is demonstrated to Company's reasonable satisfaction. Successful completion of the Acceptance Test requires successful completion of each of the individual tests that comprise the Acceptance Test. Retesting of any individual test constitutes as restart of the Acceptance Test if such retesting is required because of a prior failure of such individual test or because a prior test could not be completed because of a problem with the Facility. Within fifteen (15) Business Days of successful completion of the Acceptance Test and Company's receipt of the final report setting forth the results of the Acceptance Test, Company shall notify Seller in writing whether the Acceptance Test has been passed and, if so, the date upon which the Acceptance Test was passed.

(iii) Company will be present when the Acceptance Test is conducted, and Seller shall promptly correct any deficiencies identified during the Acceptance Test. Seller will be responsible for the cost of Company personnel (and/or Company contractors) performing the duties (such as reviewing the Plans and reviewing the construction) necessary for Company-Owned Interconnection Facilities to be constructed by Seller (and/or its Contractors). If Company (A) does not make any inspection or test; (B) does not discover defective workmanship, materials or equipment; or (C) accepts Company-Owned Interconnection Facilities (that were constructed by Seller and or its Contractors), such action or inaction shall not relieve Seller from its obligation to do and complete the work in accordance with the Plans approved by Company.

(g) As-Built Drawings. Within thirty (30) Days of the successful completion of the Acceptance Test, Seller shall provide for Company review a set of the proposed as built drawings for the Company-Owned Interconnection Facilities constructed by Seller (and/or its Contractors). Within thirty (30) Days of Company's receipt of the

proposed as-built drawings, Company shall provide Seller with either (i) its comments on the proposed as-built drawings; or (ii) notice of acceptance of the proposed as-built drawings as final as-built drawings. If Company provides comments on the proposed as-built drawings, Seller shall incorporate such comments into a final set of as-built drawings and provide such final as-built drawings to Company within twenty (20) Days of Seller's receipt of Company's comments.

3. Seller Payment to Company for Company-Owned Interconnection Facilities and Review of Facility. ~~[TO BE REVISED THROUGH INTERCONNECTION REQUIREMENTS AMENDMENT TO REFLECT COMPANY-BUILD OR DEVELOPER-BUILD SCENARIO, AS APPLICABLE]~~

(a) Seller Payment to Company.

(i) Seller shall pay the Total Estimated Interconnection Cost which is comprised of the estimated costs of (A) acquiring, constructing and installing the Company-Owned Interconnection Facilities to be designed, engineered and constructed by Company; (B) the engineering and design work (including but not limited to Company, affiliated Company and contracted engineering and design work) associated with (1) the application process for the PUC Approval Order; (2) developing such Company-Owned Interconnection Facilities; and (3) reviewing and specifying those portions of Facility which allow interconnected operations as such are described in **Attachment B** (Facility Owned by Seller) (collectively, the “**Engineering and Design Work**”), and (cc) conducting the Acceptance Test and Control System Acceptance Test. The Total Actual Interconnection Cost (the actual cost of items (A) through (C)) are the “**Total Interconnection Cost.**”

(ii) Summary List of Company-Owned Interconnection Facilities and Related Services to be designed, engineered and constructed by Company:

[THIS LIST SHOULD GENERALLY INCORPORATE A SUBSET OF THE LIST IN ATTACHMENT G, SECTION 1(d), PLUS TESTING.]

(iii) The following summarizes the Total Estimated Interconnection Cost of the Company-Owned Interconnection Facilities to be designed, engineered and constructed by Company:

[THIS LIST SHOULD INCLUDE ESTIMATED COSTS FOR THE ITEMS LISTED IN ATTACHMENT G, SECTION 3(a)(ii).]

The Total Estimated Interconnection Cost is \$_____.

(b) Total Estimated Interconnection Cost. The Total Estimated Interconnection Cost, which, except as otherwise provided herein, is non-refundable, shall be paid in accordance with the following schedule:

(i) Initial Payment. Prior to the execution of the Interconnection Requirements Amendment, Seller shall pay to Company \$____,000.00.

(ii) Company-Owned Interconnection Facilities Prepayment.

Within thirty (30) Days after the execution of the Interconnection Requirements Amendment, ~~Seller shall pay to Company~~ the total estimated costs related to the Engineering and Design Work are due and payable by Seller to Company. Company shall not be obligated to perform any ~~Engineering and Design Work~~ work on Company-Owned Interconnection Facilities until Seller pays the amounts in **Section 3(b)(i)** (Initial Payment) and **Section 3(b)(ii)** (Company-Owned Interconnection Facilities Prepayment) of this **Attachment G** (Company-Owned Interconnection Facilities). Company's receipt of such payments shall constitute Seller's irrevocable authorization to Company to perform such ~~Engineering~~ engineering and ~~Design Work~~ design work.

(iii) Balance of Company-Owned Interconnection Facilities Prepayment. On the Guaranteed Procurement Payment Date, ~~Seller shall pay to Company the remaining balance outstanding~~ the difference between the portion of the Total Estimated Interconnection Cost paid to date and the Total Estimated Interconnection Cost is due and payable by Seller to Company. Company shall not be obligated to ~~procure and construct~~ work on Company-Owned Interconnection Facilities until Seller pays the amount in this **Section 3(b)(iii)** (Balance of Company-Owned Interconnection Facilities Prepayment) of this **Attachment G** (Company-Owned Interconnection Facilities). Company's receipt of such payment shall constitute Seller's irrevocable authorization to Company to perform such procurement and construction work.

(c) True-Up. The final accounting shall take place within one hundred twenty (120) Days of the first to occur of (i) the Commercial Operations Date, (ii) the date this Agreement is declared null and void under either **Section 2.3** (Interconnection Requirements Study), **Section 3.4** (Prior to Effective Date), **Section 24.3** (Time Period for PUC Submittal Date), or **Section 24.4** (Time Period for PUC Approval Date) of this Agreement, or (iii) the date this Agreement is terminated. Company shall be entitled to an extension for a commercially reasonable amount of time to complete the final accounting if a delay in such completion is caused by Seller's delay or failure to respond to any Company request for information needed to complete the final accounting or take any action necessary for Company to complete the final accounting. Upon completion of the final accounting, Company shall deliver to Seller an invoice for payment of the amount, if any, of the difference between the Total Estimated Interconnection Cost paid to date and the Total Actual Interconnection Cost, which is the final accounting of the Total Interconnection Costs. Payment of such invoice shall be made within thirty (30) Days of receipt of such invoice from Company. If the Total Actual Interconnection Cost is less than the payments received by Company as the Total Estimated Interconnection Cost, Company shall repay the difference to Seller within thirty (30) Days of the final accounting.

(d) Audit Rights. Seller shall have the right for a period of one (1) year following receipt of the invoice: (i) upon reasonable prior notice, to audit the books and records of Company to the limited extent reasonably necessary to verify the basis for the amount (if any) by which the Total Actual Interconnection Cost invoiced to Seller exceeds the Total Estimated Interconnection Cost, and (ii) to dispute the amount of any such excess. Seller shall not have the right to audit any other financial records of Company. Company shall make such information available during normal business hours at its offices in Hawai'i. Seller shall pay Company's reasonable actual, verifiable

costs for such audits, including allocated overhead.

(e) **Ownership.** All Company-Owned Interconnection Facilities including those portions, if any, provided, or provided and constructed, by Seller shall be the property of Company.

4. **Ongoing Operation and Maintenance Charges.**

(a) **Prior to the Transfer Date.** Seller shall operate and maintain, at its sole cost and expense, Company-Owned Interconnection Facilities that it or its Contractors constructed, if any, prior to the Transfer Date.

(b) **On or After the Transfer Date.** On and after the Transfer Date, Company shall own, operate and maintain Company-Owned Interconnection Facilities.

(c) **Monthly Bill.** Company shall bill Seller monthly (or periodically as costs are incurred) for any reasonable costs incurred in operating, maintaining and replacing (to the extent not covered by insurance) Company-Owned Interconnection Facilities. Company's costs will be determined on the basis of, but not limited to, direct payroll, material costs, applicable overhead at the time incurred, consulting fees and applicable taxes. Seller shall, within thirty (30) Days after receipt of an invoice, reimburse Company for such monthly billed operation and maintenance charges. Company's invoice will include itemized charges reasonably necessary for Seller to verify the basis for such charges.

5. **Relocation of Company-Owned Interconnection Facilities.**

(a) In the event that the Land Rights include a relocation clause and such clause is exercised or if Company-Owned Interconnection Facilities must be relocated for any other reason not caused by Company, Seller shall bear the cost of such relocation. Prior to the relocation of the Company-Owned Interconnection Facilities Company shall invoice Seller for the total estimated cost of relocating the Company-Owned Interconnection Facilities (the "**Total Estimated Relocation Cost**"). Seller shall, within thirty (30) Days after the invoice date, pay to Company the Total Estimated Relocation Cost.

(b) Once the relocation of the Company-Owned Interconnection Facilities is complete, Company shall conduct a final accounting of all costs related thereto. Within thirty (30) Days of the final accounting, which shall take place within one hundred and twenty (120) Days of completion of the relocation of Company-Owned Interconnection Facilities, Seller shall remit to Company the difference between the Estimated Relocation Cost paid to date and the total actual relocation cost incurred by Company (the "**Total Actual Relocation Cost**"). If the Total Actual Relocation Cost is less than the payments received by Company as the Total Estimated Relocation Cost, Company shall repay the difference to Seller within thirty (30) Days of the final accounting.

6. **Guarantee for Interconnection Costs.**

(a) **Standby Letter of Credit.** To ensure payment by Seller of all costs and

expenses incurred by Company (i) in excess of the Total Estimated Interconnection Cost paid in connection with the Company-Owned Interconnection Facilities to be provided and/or constructed by Company described in **Section 3** (Seller Payment to Company for Company-Owned Interconnection Facilities and Review of Facility) of this **Attachment G** (Company-Owned Interconnection Facilities), and (ii) if applicable, in excess of the Total Estimated Relocation Costs paid in connection with the relocation of the Company-Owned Interconnection Facilities as provided in **Section 5** (Relocation of Company-Owned Interconnection Facilities) of this **Attachment G** (Company-Owned Interconnection Facilities), Seller shall obtain an Irrevocable Standby Letter of Credit with no Documentary Requirement (“**Standby Letter of Credit**”) in accordance with the requirements of **Section 6(b)** (Requirements of the Standby Letter of Credit) of this **Attachment G** (Company-Owned Interconnection Facilities), wherein Company shall receive payment from the bank upon request by Company.

(b) Requirements of the Standby Letter of Credit. The Standby Letter of Credit shall be (i) in an amount not less than twenty-five percent (25%) of the Total Estimated Interconnection Cost or Total Estimated Relocation Cost, as applicable, and (ii) in substantially in the form attached to this Agreement as **Attachment M** (Form of Letter of Credit) from a bank chartered in the United States with a credit rating of “A-” or better. If the rating (as measured by Standard & Poor’s) of the bank issuing the Standby Letter of Credit falls below A-, Company may require Seller to replace the Standby Letter of Credit with a Standby Letter of Credit from another bank chartered in the United States with a credit rating of “A-” or better. In connection with the construction of the Company-Owned Interconnection Facilities, the Standby Letter of Credit shall be effective from the earlier of (aa) thirty (30) Days following the Effective Date, or (bb) the date that Seller requests Company to order equipment or commence construction on Company-Owned Interconnection Facilities. In connection with the relocation of the Company-Owned Interconnection Facilities, if applicable, the Standby Letter of Credit shall be effective within thirty (30) Days after Seller receives the invoice from Company for the Total Estimated Relocation Cost as set forth in **Section 5** (Relocation of Company-Owned Interconnection Facilities) of this **Attachment G** (Company-Owned Interconnection Facilities). The Standby Letter of Credit shall be in effect through the earlier of forty-five (45) Days after the final accounting or seventy-five (75) Days after the Agreement is terminated. Seller shall provide to Company within fourteen (14) Days of the date the Standby Letter of Credit is to be effective as aforesaid, a document from the bank which indicates that such a Standby Letter of Credit has been established.

(c) Other Form of Security. Notwithstanding the foregoing, in lieu of a Standby Letter of Credit, Company may, at its sole discretion, agree in writing to accept such other form of security it deems to provide protection equivalent to a Standby Letter of Credit.

7. Land Restoration.

(a) Removal of Interconnection Facilities. After termination of this Agreement or in the event this Agreement is declared null and void under either **Section 2.3** (Interconnection Requirements Study), **Section 3.4** (Prior to Effective Date), **Section 24.3** (Time Period for PUC Submittal Date), or **Section 24.4** (Time Period for PUC Approval) of this Agreement, Seller shall, at its sole cost and expense,

remove the Company-Owned Interconnection Facilities and the Seller-Owned Interconnection Facilities from the Land, and, in conjunction with such removal, shall develop and implement a program to recycle, to the fullest extent possible, or to otherwise properly dispose of, all such removed infrastructure; provided, however, that, Company may elect to remove all or part of the Company-Owned Interconnection Facilities and/or Seller-Owned Interconnection Facilities from the Land because of operational concerns over the removal of such Interconnection Facilities, in which case Seller shall reimburse Company for its costs to remove such Company-Owned Interconnection Facilities and/or Seller-Owned Interconnection Facilities. To the extent Seller is obligated to remove Company-Owned Interconnection Facilities and/or Seller-Owned Interconnection Facilities, Seller shall complete such removal within ninety (90) Days of termination of this Agreement (or declaration that the Agreement is null and void under either **Section 2.3** (Interconnection Requirements Study), **Section 3.4** (Prior to Effective Date), **Section 24.3** (Time Period for PUC Submittal Date), or **Section 24.4** (Time Period for PUC Approval) of this Agreement, or as otherwise agreed to by both Parties in writing.

(b) Restoration of the Land. After the termination of this Agreement (or declaration that the Agreement is null and void under either **Section 2.3** (Interconnection Requirements Study), **Section 3.4** (Prior to Effective Date), **Section 24.3** (Time Period for PUC Submittal Date), or **Section 24.4** (Time Period for PUC Approval) of this Agreement) and removal of the Company-Owned Interconnection Facilities and/or Seller-Owned Interconnection Facilities, as the case may be, Seller shall, at its sole cost and expense, restore the Land to its condition prior to construction of such Company-Owned Interconnection Facilities and/or Seller-Owned Interconnection Facilities, as applicable. Land restoration shall be completed within ninety (90) Days of termination of this Agreement (or declaration that the Agreement is null and void under either **Section 2.3** (Interconnection Requirements Study), **Section 3.4** (Prior to Effective Date), **Section 24.3** (Time Period for PUC Submittal Date), or **Section 24.4** (Time Period for PUC Approval) of this Agreement), or as otherwise agreed to by both Parties in writing.

8. Transfer of Ownership/Title.

(a) Transfer of Ownership and Title. On the Transfer Date, Seller shall transfer to Company all right, title and interest in and to Company-Owned Interconnection Facilities to the extent such facilities were designed and constructed by Seller and/or its Contractors together with (i) all applicable manufacturers' or Contractors' warranties which are assignable; and (ii) all Land Rights necessary to own, operate and maintain Company-Owned Interconnection Facilities on and after the Transfer Date. Seller shall provide a written list of the manufacturers' and Contractors' warranties which will be assigned to Company and the expiration dates of such warranties no later than thirty (30) Days before the Transfer Date.

(b) No Liens or Encumbrances. Company's title to and ownership of Company-Owned Interconnection Facilities that were designed and constructed by Seller and/or its Contractors shall be free and clear of liens and encumbrances.

(c) Form of Documents. The transfers to be made to Company pursuant to this **Section 8** (Transfer of Ownership/Title) of **Attachment G** (Company-Owned

Interconnection Facilities) shall not require any further payment by Company. The form of the document to be used to convey title to the Company-Owned Interconnection Facilities that were designed and constructed by or on behalf of Seller shall be substantially in the form set forth in **Attachment H** (Form of Bill of Sale and Assignment). The form of the document(s) to be used to assign leases shall be substantially in the form set forth in **Attachment I** (Form of Assignment of Lease and Assumption). To the extent Land Rights other than leases are transferred to Company, appropriate modifications will be made to **Attachment I** (Form of Assignment of Lease and Assumption) to effectuate the transfer of such Land Rights.

9. Governmental Approvals for Company-Owned Interconnection Facilities.

Seller shall obtain at its sole cost and expense all Governmental Approvals necessary to the construction, ownership, operation and maintenance of the Company-Owned Interconnection Facilities. For Company-Owned Interconnection Facilities to be constructed by Company, Seller shall provide all Governmental Approvals necessary for the construction of such Company-Owned Interconnection Facilities prior to the commencement of construction by Company. For Company-Owned Interconnection Facilities to be constructed by Seller, Seller shall obtain all Governmental Approvals necessary for construction of the Company-Owned Interconnection Facilities prior to commencement of the construction activity for which such Governmental Approval is required. For all other Governmental Approvals for Company-Owned Interconnection Facilities, Seller shall provide these prior to the Transfer Date. On or before the Transfer Date, Seller shall provide Company with (a) copies of all such Governmental Approvals obtained by Seller regarding the construction, ownership, operation and maintenance of Company-Owned Interconnection Facilities that Seller (and/or its Contractors) constructed; and (b) documentation regarding the satisfaction of any condition or requirement set forth in any Governmental Approvals for Company-Owned Interconnection Facilities or that such Governmental Approvals have otherwise been closed with the issuing Governmental Authority.

10. Land Rights. Seller shall, prior to the commencement of construction of the Company-Owned Interconnection Facilities (whether to be built by Seller or by Company), obtain at its sole cost and expense all Land Rights that are required to construct, own, operate and maintain the Company-Owned Interconnection Facilities. Without limitation to the preceding sentence, Seller shall pay all surveying and mapping costs, appraisal fees, document preparation fees, recording fees or other costs. Seller shall use commercially reasonable efforts to obtain on behalf of the Company perpetual Land Rights for the Company-Owned Interconnection Facilities. Such Land Rights shall contain terms and conditions which are acceptable to Company and the documents setting forth the Land Rights shall be provided in advance of execution to Company for its review and approval and shall be recorded if required by Company. Following the Execution Date, Seller shall provide as part of the Monthly Progress Report the status of negotiations with landowner(s) regarding the Land Rights. Notwithstanding the foregoing, Company shall have the right in its sole discretion, at any time upon notice to Seller, to communicate directly with the landowner(s) and/or participate in the negotiations with landowner(s) for the Land Rights. For so long as Seller has the right under this Agreement to make available Facility's Energy Storage Services to Company, Seller shall pay for any rents and other payments due under such Land Rights that are associated with Company-Owned Interconnection Facilities.

11. Contracts for Company-Owned Interconnection Facilities. For all contracts entered into by or on behalf of Seller for Company-Owned Interconnection Facilities to be designed, engineered and constructed, in whole or in part, by or on behalf of Seller: (a) Company shall be made an intended third-party beneficiary of such contracts; and (b) Company shall be provided with copies of such executed contracts, which may be redacted but only to the extent required to prevent disclosure of confidential or proprietary information of Seller or the counterparty to such agreement; provided, however, that such redactions may not conceal information that is necessary for the Company to determine and exercise Company's rights under such contracts as a third-party beneficiary.

MATRIX G-1
SUBSTATION RESPONSIBILITIES

MATRIX G-2
TELECOM RESPONSIBILITIES

ATTACHMENT H
FORM OF BILL OF SALE AND ASSIGNMENT

THIS BILL OF SALE AND ASSIGNMENT (“**Bill of Sale**”), made as of the _____ day of _____, 20____, by _____ (“**Transferor**”) and _____ (“**Transferee**”).

W I T N E S S E T H:

1. Bill of Sale. In consideration of the mutual covenants and agreements of Transferor and Transferee under the Energy Storage Power Purchase Agreement between Transferor and Transferee dated _____, 20____ (“**ESPPA**”) and other good and valuable consideration paid to Transferor by Transferee, the receipt and sufficiency of which are hereby acknowledged, Transferor does hereby sell, assign and transfer over to Transferee all of Transferor's right, title and interest, in and to (i) all the tangible personal property and fixtures (including but not limited to the items set forth in **Schedule H-1** (Description of Tangible Personal Property and Fixtures) attached hereto and incorporated herein), that constitutes what is referred to as the “Company-Owned Interconnection Facilities to be installed by or on behalf of Seller” (or words to similar effect) as set forth in **Attachment G** (Company-Owned Interconnection Facilities) to the ESPPA between [**Transferor and Transferee**] and (ii) the intangible personal property (including but not limited to the intangible personal property set forth in **Schedule H-2** (Description of Intangible Personal Property) attached hereto and incorporated herein) owned by Transferor and used or to be used in the ownership, operation and maintenance of the aforesaid tangible personal property, to the extent assignable by Transferor, including without limitation, certificates of occupancy, permits, licenses, transferable warranties and guaranties, instruments, documents of title, and general intangibles pertaining to the aforesaid intangible personal property.

2. Warranty of Title. Transferor hereby warrants to Transferee that Transferor is the legal owner of the aforesaid tangible personal property and the aforesaid intangible personal property (including but not limited to the property set forth in **Schedule H-1** (Description of Tangible Personal Property and Fixtures) and **Schedule H-2** (Description of Intangible Personal Property)), and that said property is being sold, assigned and transferred to Transferee free and clear of all liens and encumbrances.

3. Governing Law. This Bill of Sale shall be governed by, and construed and interpreted in accordance with, the laws of the State of Hawai‘i.

**[Signatures for Bill of Sale and Assignment
Appear on the Following Page]**

IN WITNESS WHEREOF, Transferor and Transferee have executed this instrument on the day and year first above written.

_____,
a _____ corporation

_____,
a Hawai'i corporation

By: _____

By: _____

Name:

Name:

Title:

Title:

(“Transferor”)

(“Transferee”)

Schedule H-1
Description of Tangible Personal Property and Fixtures

Schedule H-2
Description of Intangible Personal Property

LAND COURT SYSTEM

REGULAR SYSTEM

Return by Mail () Pickup () To:

Tax Map Key Nos.:

Total pages: _____

ATTACHMENT I
FORM OF ASSIGNMENT OF LEASE AND ASSUMPTION

THIS ASSIGNMENT is made as of this ____ day of _____, 20__, by _____, a _____, whose principal place of business and post office address is _____, hereinafter called the "**Assignor**," and _____, a Hawai'i corporation, whose principal place of business and post office address is _____, Honolulu, Hawai'i 968__, hereinafter called the "**Assignee**,"

W I T N E S S E T H:

THAT the Assignor, for and in consideration of the sum of TEN DOLLARS (\$10.00) and other good and valuable consideration to it paid by the Assignee, the receipt and sufficiency of which are hereby acknowledged, and of the covenants and agreements of the Assignee hereinafter contained and on the part of the Assignee to be faithfully kept and performed, does hereby sell, assign, delegate, transfer, set over and deliver unto the Assignee, and its successors and assigns, all of Assignor's right, title and interest in and to the lease described in **Schedule 1** (the "**Lease**"); together with all interests thereto appertaining, and together with the personal property located on the land thereby demised.

And all of the estate, right, title and interest of the Assignor in and to the land thereby demised, and all buildings, improvements, rights, easements, privileges and appurtenances thereunto belonging or appertaining or used, occupied and

enjoyed in connection with said Lease and the land thereby demised.

TO HAVE AND TO HOLD the same unto Assignee and its successors and assigns, for and during the respective unexpired term of said Lease, and as to said personal property (if any) absolutely and forever.

AND, in consideration of the premises, the Assignor does hereby covenant with the Assignee that the Assignor is the lawful owner of the herein described real property; that said Lease is in full force and effect and is not in default; that said real property is free and clear of and from all liens and encumbrances, except for the lien of real property taxes not yet by law required to be paid; that the Assignor is the lawful owner of said personal property (if any) and that Assignor's title thereto is free and clear of and from all liens and encumbrances, that the Assignor has good right to sell and assign said real property and personal property (if any) as aforesaid; and, that the Assignor will WARRANT AND DEFEND the same unto the Assignee against the lawful claims and demands of all persons, except as aforesaid.

AND, in consideration of the foregoing, the Assignee does hereby promise, covenant and agree to and with the Assignor and to and with the lessor under the Lease, that the Assignee will, effective as of and from the date of the execution and delivery of this instrument and during the residue of the term of said Lease, pay the rents thereby reserved as and when the same become due and payable pursuant to the provisions of said Lease, and will also faithfully observe and perform all of the covenants and conditions contained in said Lease which from and after the date hereof are or ought to be observed and performed by the lessee therein named, and will at all times hereafter indemnify and save harmless the Assignor from and against the nonpayment of said rent and the nonobservance or nonperformance of said covenants and conditions and each of them.

The terms "Assignor" and "Assignee," as and when used herein, or any pronouns used in place thereof, shall mean and include the masculine, feminine or neuter, the singular or plural number, individuals, partnerships, trustees or corporations and their and each of their respective successors, heirs, personal representatives, successors in trust and assigns, according to the context hereof. All covenants and obligations undertaken by two or more persons shall be deemed to be joint and several unless a contrary intention is clearly expressed elsewhere herein. The term "**Lease**," as and when used herein, means the lease or sublease demising the leasehold estate described in **Schedule 1**, together with all recorded amendments thereof, if any, whether or not listed in **Schedule 1**. The term "rent," as and when used herein, means and includes all rents, taxes, assessments and any other sums charged pursuant to the Lease.

This instrument may be executed in any number of counterparts, each of which shall be deemed an original, but all of which shall constitute one instrument binding on all the Parties hereto, notwithstanding that all the Parties are not signatory to the original or the same counterpart.

**[Signatures for Assignment of Lease and Assumption are
on following page.]**

IN WITNESS WHEREOF, Company and Assignor have executed this instrument as of the date first above written.

By _____
Name:
Title:

By _____
Name:
Title:

“Assignor”

By _____
Name:
Title:

By _____
Name:
Title:

“Assignee”

SCHEDULE 1

- Description of Lease
- To Be Attached

ATTACHMENT J
ADJUSTMENT TO LUMP SUM PAYMENT

Under the Company’s previous forms of as-available power purchase agreements for renewable energy, the independent power producer was compensated for the production and delivery of electrical energy and assumed the risk of non-payment for events such as Force Majeure that prevented such production and delivery. Although under this Agreement Seller’s compensation will be in the form of a Lump Sum Payment rather than for the production and delivery of electrical energy, it is not the intent of the Parties that Seller should be entitled to unrestricted compensation in circumstances in which an independent power producer would not have been able to earn compensation under the Company’s prior form of power purchase agreements (i.e., if the Facility or any portion thereof is unable to receive and/or deliver electric energy). Although the liquidated damages that are payable if the Annual EAF fails to satisfy the EAF Performance Metric address this issue in certain of the circumstances when the Facility or a portion thereof is unable to receive or deliver electric energy, the Annual EAF does not account for events of Force Majeure because such events are included in the ExcludedTime classification under **Attachment U** (Annual Equivalent Availability Factor) to this Agreement. Accordingly, the monthly Lump Sum Payment shall be adjusted downward pro rata for each Day or portion thereof during the calendar month in question that the Facility inverter(s) or a portion thereof was not available to respond to Company Dispatch/Charge because of a Force Majeure condition (a) affecting the Facility or any portion thereof or (b) that otherwise delays or prevents Seller from making the Facility inverter(s) in question or a portion thereof available for Company Dispatch.

Example: If a Facility has forty (40) battery energy storage system inverter(s) and, during the month of June (which has 30 calendar days), one (1) inverter is not available to respond to Company Dispatch/Charge for a period of ten (10) Days due to a Force Majeure condition as aforesaid, the monetary amount of the resulting downward adjustment to the monthly Lump Sum Payment for the month of June would be calculated as follows:

$$\text{Monetary Amount of Downward Adjustment} = \text{MLSP} \times \frac{1}{40} \times \frac{10}{30}$$

where:

MLSP = The monthly Lump Sum Payment that would be payable for such month but for the downward adjustment

For purposes of determining the monetary amount of the foregoing downward adjustment, the product obtained by multiplying a monetary value by a fraction shall be rounded to the nearest cent.

[Attachment K will be revised to reflect the results of the IRS]

ATTACHMENT K
GUARANTEED PROJECT MILESTONES

[For Developer Interconnection Build]

**Guaranteed Project
Milestone Date**

**Description of Each Guaranteed Project
Milestone**

[SPECIFY DATE CERTAIN]

Construction Financing Milestone: Seller shall provide Company with documentation reasonably satisfactory to Company evidencing (a) the closing on financing for the Facility including ability to draw on funds by **[insert same date certain as in left column]** or (b) the financial capability to construct the Facility

[SPECIFY DATE CERTAIN]

Permit Application Filing Milestone: Seller shall provide Company with documentation reasonably satisfactory to Company evidencing the filing by or on behalf of Seller of the following applications for Governmental Approvals required for the ownership, construction, operation and maintenance of the Facility: **[INSERT LIST OF GOVERNMENTAL APPROVALS]**

[SPECIFY DATE CERTAIN]

Guaranteed Commercial Operations Date

[Attachment K will be revised to reflect the results of the IRS]

ATTACHMENT K-1
SELLER'S CONDITIONS PRECEDENT AND COMPANY
MILESTONES

[For Developer Interconnection Build]

Seller's Conditions Precedent Date	Description of Each of Seller's Conditions Precedent
	Seller shall make payment to Company of the amount required under Section 3(b)(ii) of Attachment G (Company-Owned Interconnection Facilities)
	Seller shall provide Company a right of entry for the Company-Owned Interconnection Facilities site(s).
	Seller shall make payment to Company of the amount required under Section 3(b)(iii) of Attachment G (Company-Owned Interconnection Facilities)
	Seller's EPC Contractor shall obtain grading permit.
	Seller's EPC Contractor shall obtain and provide Company all permits (other than any required occupancy permits, if applicable), licenses, easements and approvals to construct the Company-Owned Interconnection Facilities, including the building permit.
No later than three (3) months prior to commencement of the Acceptance Test	Seller shall provide station service power, if applicable, as required by Company.
No later than three (3) months prior to the commencement of the Acceptance Test	Seller or Seller's EPC Contractor shall have Hawaiian Telcom Backup (or equivalent) installed which shall consist of a 1.5 Mbps Routed Network Services circuit for backup SCADA communications from Company's Substation at Seller's Facility to Company's EMS located at 820 Ward Avenue, Honolulu, Hawaii.
	Seller's EPC Contractor shall complete installation of physical bus and structures within Company's substation up to the demark point as necessary to interconnect.

<p><u>[specify date] (“Test Ready Deadline”)</u></p>	<p>Seller’s EPC Contractor shall complete construction of the Seller-Owned Interconnection Facilities and be, <u>Seller shall have satisfied the conditions precedent to the conduct of the Acceptance Test set forth in Section 2(f)(ii) of Attachment G (Company-Owned Interconnection Facilities) and Seller is otherwise</u> ready to conduct the Acceptance Test.</p>
	<p>Seller shall close grading permit, unless Seller provides documentation establishing, to Company's reasonable satisfaction, that closing the grading permit is not required by the relevant Governmental Authority prior to energization, testing and use of the Facility.</p>

COMPANY MILESTONES

If Seller satisfies the foregoing Seller's Conditions Precedent, the following Company Milestones shall apply:

<p>Company Milestone Date</p>	<p>Description of Each Company Milestone</p>
<p><u>[] Business Days following the Test Ready Deadline</u></p>	<p>Company shall, <u>subject to Seller’s continued satisfaction of the requirements set forth in Section 2(f)(ii) and Section 2(f)(iii) of Attachment G (Company-Owned Interconnection Facilities)</u>, commence Acceptance Testing.</p>
	<p>Energization of Company-Owned Interconnection Facilities, provision of back-feed power to support commissioning.</p>

[Attachment K will be revised to reflect the results of the IRS]

ATTACHMENT K
GUARANTEED PROJECT MILESTONES

[For Company Interconnection Build]

Guaranteed Project Milestone Date	Description of Each Guaranteed Project Milestone
<p>The later of (i) date that is thirty (30) Days after PUC Approval or (ii) [INSERT DATE BY WHICH EQUIPMENT MUST BE ORDERED TO MEET CONSTRUCTION SCHEDULE] (“Guaranteed Procurement Payment Date”)</p>	<p>Seller shall make payment to Company of the amount required under Section 3(b)(iii) (Balance of Company Owned Interconnection Facilities-Prepayment) of Attachment G (Company Owned Interconnection Facilities)-</p>
<p>[SPECIFY DATE CERTAIN]</p>	<p><u>Permit Application Filing Milestone:</u> Seller shall provide Company with documentation reasonably satisfactory to Company evidencing the filing by or on behalf of Seller of the following applications for Governmental Approvals required for the ownership, construction, operation and maintenance of the Facility: [INSERT LIST OF GOVERNMENTAL APPROVALS]</p>
<p>[SPECIFY DATE CERTAIN]</p>	<p><u>Construction Financing Milestone:</u> Seller shall provide Company with documentation reasonably satisfactory to Company evidencing (a) the closing on financing for the Facility including ability to draw on funds by [insert same date certain as in left column] or (b) the financial capability to construct the Facility</p>
<p>[SPECIFY DATE CERTAIN]</p>	<p>Guaranteed Commercial Operations Date</p>

[Attachment K will be revised to reflect the results of the IRS]

ATTACHMENT K-1
SELLER'S CONDITIONS PRECEDENT AND COMPANY
MILESTONES

[For Company Interconnection Build]

Seller's Conditions Precedent Date	Description of Each of Seller's Conditions Precedent
Ten (10) Days after execution of the Interconnection Requirements Amendment	Seller shall make payment to Company of the amount required under Section 3(b)(ii) of Attachment G (Company Owned Interconnection Facilities)
	Seller shall provide Company a right of entry for the Company Owned Interconnection Facilities site(s).
	Seller's EPC Contractor shall obtain grading permit.
	Completion of Site Preparation: Seller or Seller's EPC Contractor shall complete preparation of the site(s) of the Company Owned Interconnection Facilities consistent with the requirements of all applicable permits including, but not limited to, the grading permit, for start of construction by Company.
	Seller's EPC Contractor shall obtain and provide Company all permits (other than any required occupancy permits, if applicable), licenses, easements and approvals to construct the Company Owned Interconnection Facilities, including the building permit.
No later than three (3) months prior to commencement of the Acceptance Test	Seller shall provide station service power, if applicable, as required by Company.
No later than three (3) months prior to the commencement of the Acceptance Test	Seller's EPC Contractor shall have Hawaiian Telecom (or equivalent) Backup installed which shall consist of a 1.5-Mbps Routed Network Services circuit for backup SCADA communications from Company's Substation at Seller's Facility to Company's EMS located at 820 Ward Avenue, Honolulu, Hawaii.

	Seller's EPC contractor shall complete installation of physical bus and structures within Company's substation up to the demark point as necessary to interconnect.
	Seller's EPC contractor shall complete construction of the Seller Owned Interconnection Facilities and be ready to conduct the Acceptance Test.
	Seller shall close grading permit, unless Seller provides documentation establishing, to Company's reasonable satisfaction, that closing the grading permit is not required by the relevant Governmental Authority prior to energization, testing and use of the Facility.

~~COMPANY MILESTONES~~

~~If Seller satisfies the foregoing Seller's Conditions Precedent, the following Company Milestones shall apply:~~

Company Milestone Date	Description of Each Company Milestone
	Company shall commence Acceptance Testing.
	Energization of Company Owned Interconnection Facilities, provision of back feed power to support commissioning.

[Attachment L will be revised to reflect the results of the IRS]

ATTACHMENT L
REPORTING MILESTONES

[For Developer Interconnection Build]

Reporting Milestone Date	Description of Each Reporting Milestone
[Date]	Seller shall provide Company with a redacted copy of the executed Facility equipment, engineering, procurement and construction, or other general contractor agreements; provided, that, under no circumstances shall redactions conceal information that is necessary for Company to verify its rights under the Agreement
[Date]	Seller shall provide Company with redacted copies of executed purchase orders/contracts for the delivery and installation of Facility inverters
[Date]	Seller shall provide Company with copies, as applicable, of executed Facility operating agreements
[Date]	Construction Start Date (defined as the start of civil work on Site)
[Date]	Seller shall have laid the foundation for all Facility buildings and step-up transformer facilities
[Date]	All inverters for the Facility shall have been installed at the Site
[Date]	The step-up transformer shall have been installed at the Site

[Attachment L will be revised to reflect the results of the IRS]

ATTACHMENT L
REPORTING MILESTONES

[For Company Interconnection Build]

Reporting Milestone Date	Description of Each Reporting Milestone
{Date}	Seller shall provide Company with a redacted copy of the executed Facility equipment, engineering, procurement and construction, or other general contractor agreements; provided, that, under no circumstances shall redactions conceal information that is necessary for Company to verify its rights under the Agreement
{Date}	Seller shall provide Company with redacted copies of executed purchase orders/contracts for the delivery and installation of Facility inverters
{Date}	Seller shall provide Company with copies, as applicable, of executed Facility operating agreements
{Date}	Construction Start Date (defined as the start of civil work on Site)
{Date}	Seller shall have laid the foundation for all Facility buildings and step-up transformer facilities
{Date}	All inverters for the Facility shall have been installed at the Site
{Date}	The step-up transformer shall have been installed at the Site

ATTACHMENT M
FORM OF LETTER OF CREDIT

[Bank Letterhead]

[Date]

Beneficiary: Hawaiian Electric Company, Inc.
[Address]

[Bank's Name]
[Bank's Address]

Re: **[Standby Letter of Credit Number]**

Ladies and Gentlemen:

We hereby establish, in your favor, our standby Letter of Credit Number _____ (this "**Letter of Credit**") for the account of **[Applicant's Name]** and **[Applicant's Address]** in the initial amount of \$_____ **[dollar value]** and authorize you, Hawaiian Electric Company, Inc. ("**Beneficiary**"), to draw at sight on **[Bank's Name]**.

Subject to the terms and conditions hereof, this Letter of Credit secures **[Project Entity Name]**'s certain obligations to Beneficiary under the Energy Storage Power Purchase Agreement dated as of _____ between **[Project Entity Name]** and Beneficiary.

This Letter of Credit is issued with respect to the following obligations:
_____.

This Letter of Credit may be drawn upon under the terms and conditions set forth herein, including any documentation that must be delivered with any drawing request.

Partial draws of this Letter of Credit are permitted. This Letter of Credit is not transferable. Drafts on us at sight shall be accompanied by a Beneficiary's signed statement signed by a representative of Beneficiary as follows:

The undersigned hereby certifies that (i) I am duly authorized to execute this document on behalf of Hawaiian Electric Company, Inc., and [(ii) the amount of the draft accompanying this certification is due and owing to Hawaiian Electric Company, Inc. under the terms of the Energy Storage Power Purchase Agreement dated as of _____, between _____ and Hawaiian Electric Company, Inc.] [(ii) the Letter of Credit will expire in less than thirty (30) days, it has not been replaced or extended and collateral is still required under **Section** ___ of the Energy Storage Power Purchase Agreement.¹]

¹ For draw relating to lapse of Letter of Credit while credit support is still required pursuant to the Energy Storage Power Purchase Agreement.

Such drafts must bear the clause “Drawn under **[Bank's Name and Letter of Credit Number _____ and date of Letter of Credit.]**”

All demands for payment shall be made by presentation of originals or copies of documents, or by facsimile transmission of documents to **[Bank Fax Number]** or other such number as specified from time to time by the bank, with originals or copies of documents to follow by overnight mail. If presentation is made by facsimile transmission, you may contact us at **[Bank Phone Number]** to confirm our receipt of the transmission. Your failure to seek such a telephone confirmation does not affect our obligation to honor such a presentation. If presented by facsimile, original documents are not required.

This letter of credit shall expire one year from the date hereof. Notwithstanding the foregoing, however, this letter of credit shall be automatically extended (without amendment of any other term and without the need for any action on the part of the undersigned or Beneficiary) for one year from the initial expiration date and each future expiration date unless we notify you and Applicant in writing at least thirty (30) days prior to any such expiration date that this letter of credit will not be so extended. Any such notice shall be delivered by registered or certified mail, or by FedEx, both to ~~revise for HELCO or MECO, as appropriate~~:

Beneficiary at:

Director, Renewable Acquisition Division
Hawaiian Electric Company, Inc.
Central Pacific Plaza
220 South King Street, 21st Floor
Honolulu, Hawaii 96813

and to

SVP and Chief Financial Officer
Hawaiian Electric Company, Inc.
900 Richards Street, 4th Floor
Honolulu, Hawai'i 96813

And to Applicant at:

We hereby agree with drawers that drafts and documents as specified above will be duly honored upon presentation to **[Bank's Name]** and **[Bank's Address]** if presented on or before the then-current expiration date hereof.

Payment of any amount under this Letter of Credit by **[Bank]** shall be made as the Beneficiary shall instruct on the next Business Day after the date the **[Bank]** receives all documentation required hereunder, in immediately available funds on such date. As used in this Letter of Credit, the term "Business Day" shall mean any day other than a Saturday or Sunday or any other day on which banks in the State of **[Insert State of issuing Bank's location]** are authorized or required by law to be closed.

Unless otherwise expressly stated herein, this irrevocable standby letter of credit is issued subject to the rules of the International Standby Practices, International Chamber of Commerce publication no. 590 ("**ISP98**").

[Bank's Name]:

By: _____
[Authorized Signature]

ATTACHMENT N

ACCEPTANCE TEST GENERAL CRITERIA

[This Attachment to be modified based on the type/design of the Facility and the results of the IRS]

Upon final completion of Company review of the Facility's drawings, final test criteria and procedures shall be agreed upon by Company and Seller no later than thirty (30) Days prior to conducting the Acceptance Test in accordance with the Agreement. The Acceptance Test may include the following:

1. Interconnection:

(a) Based on manufacturer's specification, test the local operation of the Facility's kV breakers, which connect the Facility to Company System – must open and close locally using the local controls. Test and ensure that the status shown on the Energy Management System is the same as the actual physical status in the field.

(b) Remotely test the operation of the Facility's ___kV breakers which connect the Facility to Company System – must open and close remotely from Company's EMS. Test and ensure that the status shown on the EMS is the same as the actual physical status in the field.

(c) Relay test engineers to connect equipment and simulate certain inputs to test and ensure that the protection schemes such as any under/over frequency and under/over voltage protection or the Direct Transfer Trip operate as designed. (For example, a fault condition may be simulated to confirm that the breaker opens to sufficiently clear the fault. Additional scenarios may be tested and would be outlined in the final test criteria and procedures.) Seller to also test the synchronizing mechanisms to which the Facility would be synchronizing and closing into the Company System to ensure correct operation. Other relaying also to be tested as specified in the protection review of the IRS and on the single line diagram, **Attachment E** (Single-Line Drawing and Interface Block Diagram) for the Facility.

(d) All ___kV breaker disconnects and other high voltage switches will be inspected to ensure they are properly aligned and operated manually or automatically (if designed).

(e) Switching Station inspections – The Switching Station may be inspected to test and ensure that the equipment that Seller has installed is installed and operating correctly based upon agreed-to design. Wiring may be field verified on a sample basis against the wiring diagrams to ensure that the installed equipment is wired properly. The grounding mat at the Switching Station may be tested to make sure there is adequate grounding of equipment.

(f) Communication testing – Communication System testing to occur to ensure correct operation. Detailed scope of testing will be agreed by Company and Seller to reflect installed systems and communication paths that tie the Facility to Company's communications system and Company's revenue meter data acquisition system.

(g) Various contingency scenarios to be tested to ensure adequate operation, including testing contingencies such as loss of communications, and fault simulations to ensure that the Facility's ___ kV breakers, if any, open as they are designed to open. (Back up relay testing)

2. Witness of Facility protection scheme testing:

(a) Company may have a representative on-site when Seller performs any testing dealing with Seller's protection schemes such as any under/over voltage or under/over frequency protection schemes to ensure they meet the performance requirements of this Agreement and the IRS.

3. Telephone Communication:

(a) Test to confirm Company has a direct line to the Facility control room at all times and that it is programmed correctly.

(b) Test to confirm that the Facility operators can sufficiently reach Company System Operator.

If agreed by the Parties in writing, some requirements may be postponed to the Control Systems Acceptance Test.

ATTACHMENT O

CONTROL SYSTEM ACCEPTANCE TEST CRITERIA

[This Attachment to be modified based on the type/design of the Facility and the results of the IRS]

Final test criteria and procedures shall be agreed upon by Company and Seller no later than thirty (30) Days prior to conducting the Control System Acceptance Test in accordance with Good Engineering and Operating Practices and with the terms of this Agreement. The Control System Telemetry and Control List is necessary for the effective operation of the Company System and will be tested during the Control System Acceptance Test.

The Control System Acceptance Test is comprised of two parts, a set of onsite (at Facility) specific tests and a monitoring performance test. These tests may include the following:

On-site Tests (Between Facility and Company Dispatch Center):

1. SCADA Test to verify the status and analog telemetry, and if the remote controls between the Company's EMS and the Facility are working properly end-to-end.
2. Meter Test to verify the status and analog telemetry between Company's revenue meter data acquisition system and the Facility's revenue meters are working properly end-to-end.
3. Dispatch Test to verify if the Facility's active power controls and the Active Power Control Interface with the Company's EMS are working properly. This test is generally conducted by setting different active power setpoints and limits and observing the proper dispatch of the appropriate ramp rate of the Facility's real power output.
4. Control Test for Voltage Regulation to verify the Facility can properly perform automatic voltage regulation as defined in this Agreement. This test is generally conducted by making small adjustments of the voltage setpoint and verifying by observation that the Facility regulates the voltage at the point of regulation to the setpoint by delivering/receiving reactive power to/from the Company System to maintain the applicable setpoint according to the reactive power control and the reactive amount requirements of **Section 3** (Performance Standards) of **Attachment B** (Facility Owned by Seller) to this Agreement.
5. Frequency Regulation Control Test to verify the Facility provides a frequency droop response as defined in this Agreement. This test is generally conducted by making adjustments of the frequency reference setting and verifying by observation that the Facility responds per droop and deadband settings.
6. Test other controls defined in this Agreement or mutually agreed upon in writing by the Parties to enable, disable, dispatch and/or schedule the energy storage system real power and energy operations.

7. Loss-of-Communication Test to verify the Facility will properly shutdown upon the failure of the direct-transfer-trip communication system. This test is generally conducted by simulating a communications failure and observing the proper shutdown of the Facility.
8. Round Trip Efficiency Test, as described in **Attachment T** (Facility Tests) to verify that the round trip efficiency of the BESS is not less than [] percent ([]%). [Note – The round trip efficiency percentage will be taken from Seller’s RFP Proposal.]
9. Capacity Test to verify the Capacity Ratio.

Monitoring Test:

- (a) The monitoring test requires the Facility to operate as it would in normal operations.
- (b) To ensure useful and valid test data is collected, the monitoring test shall end seven (7) continuous Days from the start of the Monitoring Test.
- (c) The performance of the Facility during the period of a successfully completed monitoring test is evaluated for, e.g., voltage regulation, frequency response, dispatch control, operating limits and ramp rate performance, to verify the performance meets the requirements of this Agreement.

ATTACHMENT P

SALE OF FACILITY BY SELLER

1. Company's Right of First Negotiation Prior to End of the Term.

(a) Right of First Negotiation. Commencing as of the Commercial Operations Date, should Seller desire to sell, transfer or dispose of its right, title, or interest in the Facility, in whole or in part, including a Change in Control (as defined below), then, other than through an "**Exempt Sale**" (as defined below):

(i) Seller shall first offer to sell such interest to Company by providing Company with written notice of the same (the "**Offer Notice**"), which notice shall identify the proposed purchase price for such interest (including a description of any consideration other than cash that will be accepted) (the "**Offer Price**") and any other material terms of the intended transaction, and Company may, but shall not be obligated to, purchase such interest at the Offer Price and upon the other material terms and conditions specified in the Offer Notice, and in accordance with the terms and conditions of this **Attachment P** (Sale of Facility by Seller). Seller shall provide to Company as part of the Offer Notice, information in its possession regarding the Facility to allow Company to conduct due diligence on the potential purchase, including, but not limited to information on the operational status of the Facility and its components, and the amount of debt or other material Seller obligations remaining with respect to the Facility (the Offer Notice and due diligence information on the Facility are collectively referred to as, the "**Offer Materials**"). Within five (5) Days of Company's receipt of the Offer Materials, if Company believes the due diligence information is incomplete, Company shall specify in writing the additional information Company requires to conduct its due diligence. The date on which Company receives the Offer Materials from Seller is referred to hereinafter as the "**Offer Date.**"

(ii) If Company desires to purchase such interest, Company shall indicate so by delivering to Seller a binding, written offer to purchase such interest at the Offer Price and on the terms and conditions specified in the Offer Notice within thirty (30) Days of the Offer Date (an "**Acceptance Notice**"). In the event Company timely delivers an Acceptance Notice, Seller shall sell and transfer to Company the interest substantially on the terms and conditions contained in the Offer Notice consistent with this **Attachment P** (Sale of Facility by Seller) and in accordance with definitive documentation to be entered into between Seller and Company. The Parties shall have sixty (60) Days from the Company's Acceptance Notice, or such other extended timeframe as agreed to by the Parties in writing, to negotiate in good faith, the terms and conditions of a purchase and sale agreement. The period beginning with the Offer Date and ending with such sixty (60) Day period (as may be extended as aforesaid) is referred to as the "**Right of First Negotiation Period.**"

(iii) Seller shall not solicit any offers for the sale of such interest to any other party during the Right of First Negotiation Period unless, during that period, Company provides Seller with written notice that Company no longer desires to purchase such interest, whereupon negotiations shall terminate.

(iv) In the event that (A) Company fails to timely deliver an Acceptance Notice, (B) Company delivers a notice to Seller that it no longer desires to purchase the interest, or (C) the Parties are not able to execute a purchase and sale agreement within the 60-Day period set forth in **Section 1(a)(ii)** of this **Attachment P** (Sale of Facility by Seller), Seller may for a period of two hundred seventy (270) Days following the event specified in subsection (A), (B) or (C) above, commence solicitation of offers and negotiations from and with other parties for the sale of such interest. If the interest is not transferred to a purchaser or purchasers for any reason within the two hundred seventy (270) Day period, the interest may only be transferred by again complying with the procedures set forth in this **Section 1(a)** (Right of First Negotiation) of **Attachment P** (Sale of Facility by Seller); provided, however, if Seller and the prospective purchaser have entered into definitive agreement(s) for the sale of the interest that was reasonably expected to close within such two hundred seventy (270) Day period and such agreement(s) remain in full force and effect between Seller and such prospective purchaser and are subject to conditions precedent that are expected to be satisfied within a reasonable period, the two hundred seventy (270) Day period shall be extended as to such agreement(s) and such prospective purchaser for up to one hundred eighty (180) additional Days or, if sooner, until such date that such agreement(s) have been terminated, cancelled or otherwise become no longer in full force and effect.

(v) After expiration of the Right of First Negotiation Period, Company will not be precluded from providing offers or proposals to Seller along with other prospective purchasers in accordance with any offer or bid procedures established by Seller in its discretion.

(b) Change in Ownership Interests and Control of Seller. Commencing as of the Commercial Operations Date, the Right of First Negotiation shall also be triggered by a transfer or sale of an ownership interest in Seller (whether in a single transaction or a series of related or unrelated transactions) following which **[Insert Parent Entity]** or an entity controlled by **[Parent Entity]** is no longer a direct or indirect owner of at least fifty-one percent (51%) of the equity interest or voting control of Seller (excluding any equity interest or voting control of Seller held by a tax equity investor or for Financing Purposes (as defined below)) (such transfer of ownership interest and change in control collectively referred to as a “**Change in Control**”); provided, however that a transfer or sale whereby **[Parent Entity]** retains the possession, directly or indirectly, or the power to direct or cause the direction of the management and policies of Seller, whether through ownership, by contract, or otherwise, shall not be deemed a Change in Control.

(c) Exempt Sales. Exempt Sales shall not trigger a Right of First Negotiation and shall not require the consent of Company. As used herein, “**Exempt Sales**” means: (i) a change in ownership of the Facility or equity interests in Seller resulting from the direct or indirect transfer or assignment by or of Seller in connection with financing or refinancing of the Facility (“**Financing Purposes**”), including, without limitation, any exercise of rights or remedies (including foreclosure) with respect to Seller’s right, title, or interest in the Facility or equity interests in Seller undertaken by any financing party in accordance with applicable financing documents, and including, without limitation, (x) a sale and leaseback of the Facility, (y) an inverted lease, (z) a sale or transfer of equity in Seller to facilitate a tax credit

financing (including any partnership "flip" transaction), (ii) a disposition of equipment in the ordinary course of operating and maintaining the Facility, (iii) a sale that does not result in a Change in Control, and (iv) a sale or transfer of any interest in Seller or the Facility to one or more companies directly or indirectly controlling, controlled by or under common control with Seller.

(d) Seller's Right to Transfer. The provisions of this **Section 1(d)** (Seller's Right to Transfer) shall apply (i) from the Execution Date through the Commercial Operations Date and (ii) from the Commercial Operations Date in the event that Company does not consummate a purchase pursuant to its exercise of the Right of First Negotiation in accordance with the terms and conditions of this **Attachment P** (Sale of Facility by Seller). In such circumstances, Seller shall, subject to the prior written consent of Company, which consent shall not be unreasonably withheld, conditioned or delayed, have the right to transfer or sell the Facility to any person or entity which proposes to acquire the Facility with the intent to continue the operation of the Facility in accordance with the provisions of this Agreement pursuant to an assignment of this Agreement. Company shall consent to the assignment of this Agreement to such prospective purchaser upon receiving documentation from Seller establishing, to Company's reasonable satisfaction, that the assignee (i) has a tangible net worth of \$100,000,000 or a credit rating of "BBB-" or better and has the ability to perform its financial obligations hereunder (or provides a guaranty from an entity that meets this description) in a manner consistent with the terms and conditions of this Agreement; (ii) has experience in the ownership of battery energy storage systems; and (iii) has at least five (5) years of experience in the operation (or contracts with an entity that has at least five (5) years of experience in the operation) of battery energy storage systems. Notwithstanding the foregoing, Company consent shall not be required for any Exempt Sale.

(e) Purchase and Sale Agreement and PUC Approval. In the event that Company exercises its Right of First Negotiation under **Section 1(a)** (Right of First Negotiation) of this **Attachment P** (Sale of Facility by Seller) and the Parties conclude a purchase and sale agreement, such agreement shall contain, at a minimum, the terms set forth in **Section 4** (Purchase and Sale Agreement) of this **Attachment P** (Sale of Facility by Seller), and such agreement shall be subject to PUC Approval as provided in **Section 5** (PUC Approval) of this **Attachment P** (Sale of Facility by Seller).

(f) Right of First Refusal. In the event the Parties fail to agree upon a sale of the Facility or an interest in the Facility to Company prior to the expiration of the Right of First Negotiation Period, the provisions of this **Section 1(f)** (Right of First Refusal) of this **Attachment P** (Sale of Facility by Seller) shall apply if (i) Seller thereafter offers to sell the Facility to a third party for less than (as applicable) the final amount Company had offered to purchase the Facility or (ii) an ownership interest in the Facility that would result in a Change in Control is offered for sale to a third party that is less than the proportionate share of (as applicable) the final amount Company had offered to purchase the Facility. (By way of example, if the final amount offered by Company to purchase the Facility was \$100, and the ownership interest being offered for sale is 75%, the "proportionate share" is \$75, such that an offer to sell such ownership interest for less than \$75 would trigger this **Section 1(f)** (Right of First Refusal) of this **Attachment P** (Sale of Facility by Seller).) Seller shall notify Company in writing of an offer that triggers this **Section 1(f)** (Right of First Refusal) of

this **Attachment P** (Sale of Facility by Seller) and Company shall have the right to purchase the Facility for the amount of such offer on similar terms and conditions consistent with this **Attachment P** (Sale of Facility by Seller) and subject to PUC Approval; provided, that Company shall have one (1) month in which to notify Seller of its intent to exercise this right. If the offer of which Seller notifies Company as aforesaid is an offer to sell the Facility, Company shall have the right to purchase the Facility for the amount of such offer on similar terms and conditions. If the offer of which Seller notifies Company as aforesaid is an offer to sell an ownership interest that could result in a Change in Control, Company shall have the right to purchase the Facility by a price that is proportionate to the amount at which such ownership interest was offered on the terms and conditions to be negotiated by the Parties on the basis of **Section 4** (Purchase and Sale Agreement) of this **Attachment P** (Sale of Facility by Seller), and otherwise consistent with this **Attachment P** (Sale of Facility by Seller). (By way of example, if a 75% ownership Interest is being offered for sale at \$75, the proportionate amount at which Company shall have the right to purchase the Facility would be \$100.)

2. Company's Right of First Negotiation to Purchase at End of Term.

(a) Option of Exclusive Negotiation Period. Company shall have the option of an exclusive negotiation period to negotiate a purchase of the Facility on the last Day of the Term, and all rights of Seller therein or relating thereto. Company shall indicate its preliminary interest in exercising the option for exclusive negotiation by delivering to Seller a notice of its preliminary interest not less than two (2) years prior to the last Day of the Term. If Company fails to deliver such notice by such date, Company's option shall terminate.

(b) Negotiations. Once Company has given such notice of preliminary interest to Seller, for a period not to exceed three (3) months, Company shall have the exclusive right to negotiate in good faith with Seller the terms of a purchase and sale agreement pursuant to which Company may purchase the Facility, which purchase and sale agreement shall include, without limitation, the terms set forth in **Section 4** (Purchase and Sale Agreement) of this **Attachment P** (Sale of Facility by Seller) and a price equal to the Offer Price as presented by Seller in accordance with the procedures identified in **Section 1(a)(i)** through **(v)** of this **Attachment P** (Sale of Facility by Seller). The Parties may agree in writing to extend this period for negotiations. (Such period, as extended as aforesaid, is referred to herein as the "**Exclusive Negotiation Period**.") Seller shall not solicit any offers or negotiate the terms for the sale of the Facility with any other entity during the Exclusive Negotiation Period, unless, during the Exclusive Negotiation Period, Company gives written notice that such negotiations are terminated.

(c) Purchase and Sale Agreement and PUC Approval. In the event that Company exercises its right of exclusive negotiation under **Section 2(a)** (Option of Exclusive Negotiation Period) of this **Attachment P** (Sale of Facility by Seller) and the Parties conclude a purchase and sale agreement pursuant to **Section 2(b)** (Negotiations) of this **Attachment P** (Sale of Facility by Seller), such agreement shall contain, at a minimum, the terms set forth in **Section 4** (Purchase and Sale Agreement) of this **Attachment P** (Sale of Facility by Seller), and such agreement shall

be subject to PUC Approval as provided in **Section 5** (PUC Approval) of this **Attachment P** (Sale of Facility by Seller).

(d) Right of First Refusal. In the event the Parties fail to agree upon a sale of the Facility to Company prior to the expiration of the Exclusive Negotiation Period provided in **Section 2(b)** (Negotiations) of this **Attachment P** (Sale of Facility by Seller), and Seller thereafter offers to sell the Facility to a third party for less than the final amount Company had offered to purchase the Facility, Seller shall notify Company in writing of such offer and Company shall have the right to purchase the Facility for the amount of such offer and on no less favorable terms and conditions consistent with this **Attachment P** (Sale of Facility by Seller) and subject to PUC Approval; provided, however, that Company shall have one (1) month in which to notify Seller of its intent to exercise this right. The Right of First Refusal shall not apply to any offer to purchase the Facility received from a third party more than twelve (12) months after the end of the Term.

3. Procedure to Determine Fair Market Value of the Facility.

(a) If the Parties have agreed to effectuate a sale of the Facility pursuant to **Section 23.5** (Consolidation) and are unable to agree on the fair market value of the Facility, each of Company and Seller shall engage the services of an independent appraiser experienced in appraising battery energy storage system assets similar to the Facility to determine separately the fair market value of the Facility. Subject to the appraisers' execution and delivery to Seller of a suitable confidentiality agreement in form reasonably acceptable to Seller, Seller shall provide both appraisers full access to the books, records and other information related to the Facility required to conduct such appraisal. Company shall pay all reasonable fees and costs of both appraisers, subject to **Section 3(c)** of this **Attachment P** (Sale of Facility by Seller). Each of Company and Seller shall use reasonable efforts to cause its appraisal to be completed within two (2) months following the engagement of the independent appraisers. If for any reason (other than failure by Seller to provide full access to Company's appraiser) one of the appraisals is not completed within such two (2) month period, the results of the other, completed appraisal shall be deemed to be the Appraised Fair Market Value of the Facility. Each Party may provide to both appraisers (with copies to each other) a list of factors which the Parties suggest be taken into consideration when the appraisers generate their appraisals.

(b) Company and Seller shall exchange the results of their respective appraisals when completed and, in connection therewith, the Parties and their appraisers shall confer in an attempt to agree upon the fair market value of the Facility.

(c) If, within thirty (30) Days after completion of both appraisals, the Parties cannot agree on a fair market value for the Facility, within ten (10) Days thereafter the first two appraisers shall by mutual consent choose a third independent appraiser. If the first two appraisers fail to agree upon a third appraiser, such appointment shall be made by DPR upon application of either Party. The Parties shall direct the third appraiser (i) to select one of the appraisals generated by the first two appraisers as the Appraised Fair Market Value of the Facility (without compromise, aka "baseball" arbitration), and (ii) to complete his or her work within one month following his or her

retention. If the third appraiser selects the appraisal originally generated by Seller's appraiser, Company shall pay the fees and costs of the third appraiser. If the third appraiser selects the appraisal originally generated by Company's appraiser, Seller shall pay the fees and costs of the third appraiser and shall pay or reimburse Company for the costs of Seller's original appraiser.

(d) The "**Appraised Fair Market Value of the Facility**" means the fair market value determined by appraisal pursuant to **Section 3(a)** or **Section 3(c)** of this **Attachment P** (Sale of Facility by Seller) as applicable.

4. Purchase and Sale Agreement. The purchase and sale agreement ("**PSA**") concluded by the Parties pursuant to this **Attachment P** (Sale of Facility by Seller) (as applicable) shall contain, among other provisions, the following:

(a) Seller shall, as of the closing of the sale, convey title to the Facility consistent with the state of title in existence as of the date of execution of the PSA, including all rights of Seller in the Facility or relating thereto, free and clear of all liens, claims, encumbrances, or rights of others, except any Permitted Lien;

(b) To the extent assignable or transferrable, Seller shall assign or transfer to Company all of Seller's interest in all Project Documents and Governmental Approvals that are then in effect and that are utilized for the operation or maintenance of the Facility;

(c) Seller shall execute and deliver to Company such deeds, bills of sale, assignments and other documentation as Company may reasonably request to convey title to the Facility consistent with the state of title in existence as of the date of execution of the PSA, free from all liens, claims, encumbrances, or rights of others, except any Permitted Lien;

(d) Seller shall cause all liens on the Facility for monies owed (including liens arising from Financing Documents), and any liens in favor of Seller's affiliates, to be released prior to closing on the sale of the Facility to Company;

(e) Seller shall warrant, as of the date of the closing of the sale of the Facility to Company, title to the Facility consistent with the state of title in existence as of the date of execution of the PSA, is free and clear of all other liens, claims, encumbrances and rights of others, except any Permitted Lien;

(f) Company shall have no liability for damages (including without limitation, any development and/or investment losses, liabilities or damages, and other liabilities to third parties) incurred by Seller on account of Company's purchase of the Facility, nor any other obligation to Seller except for the purchase price, and Seller shall indemnify Company against any such losses, liabilities or damages;

(g) Company shall assume all of Seller's obligations with respect to the Facility accruing from and after the date of closing on the sale of the Facility to Company, including (i) to the extent assignable, all permits held by, for, or related to the Facility, and (ii) all of Seller's agreements with respect to the Facility provided to and approved by Company at least thirty (30) Days prior to the date of closing on the

sale of the Facility to Company, except for such agreements Company has elected to terminate, in which case any related termination expenses shall be, at Company's option, paid directly by Company and deducted from the purchase price;

(h) Seller shall indemnify Company against all of Seller's obligations with respect to the Facility accruing through the date of closing the sale of the Facility to Company, and Company shall indemnify Seller against all of Company's obligations with respect to the Facility accruing from and after the date of closing on the sale of the Facility to Company;

(i) Unless otherwise agreed to by the Parties, Seller makes no representations or warranties with respect to the condition of the Facility, and Company shall purchase the Facility on an as-is basis;

(j) Seller shall warrant that, except as disclosed to and approved by Company in writing at least thirty (30) Days prior to the date of closing on the sale of the Facility to Company, the Facility has been operated by Seller in conformity with all Laws;

(k) Seller shall warrant that Seller provided full access to Company and each appraiser in connection with the procedure to determine fair market value provided in **Section 3** (Procedure to Determine Fair Market Value of the Facility) of this **Attachment P** (Sale of Facility by Seller);

(l) If applicable, Seller's lease of the Site from Company will terminate and Seller will relinquish all rights, privileges and obligations relating to such lease; and

(m) Seller shall maintain the Facility in accordance with Good Engineering and Operating Practices between appraisal and the closing date.

As used in this **Attachment P** (Sale of Facility by Seller), "**Permitted Lien**" shall mean (i) any lien for taxes not yet due or delinquent or being contested in good faith by appropriate proceedings, (ii) any lien arising in the ordinary course of business by operation of applicable Laws with respect to a liability not yet due or delinquent or that is being contested in good faith, (iii) all matters that are disclosed (whether or not subsequently deleted or endorsed over) on any survey, in the title policies insuring any Land Rights or in any title commitments, title reports or other title materials, (iv) any matters that would be disclosed by a complete and correct survey of the Site, (v) zoning, planning, and other similar limitations and restrictions, and all rights of any Governmental Authority to regulate the Site and/or the Facility, (vi) all matters of record, (vii) any lien that is released on or prior to closing of the sale of the Facility to Company, (viii) statutory or common law liens in favor of carriers, warehousemen, mechanics and materialmen, and statutory or common law liens to secure claims for labor, materials or supplies arising in the ordinary course of business which are not delinquent, and (ix) the matters agreed by the Parties, to the extent that such Permitted Liens are taken into account at arriving at the appraised value.

5. PUC Approval. Any purchase and sale agreement related to the Facility entered into by the Parties is subject to approval by the PUC and the Parties'

respective obligations thereunder are conditioned upon receipt of such approval, except as specifically provided otherwise therein.

(a) Company shall submit the purchase and sale agreement to the PUC for approval promptly after execution by both Parties, but Company does not extend any assurances that PUC approval will be obtained. Seller will provide reasonable cooperation to expedite obtaining an approval order from the PUC, including providing information requested by the PUC and parties to the PUC proceeding in which approval is being sought. Seller understands that lack of cooperation may result in Company's inability to file an application with the PUC and/or failure to receive PUC approval. Unless otherwise agreed to in writing by the Parties, neither Company nor Seller shall seek reconsideration, appeal, or other administrative or judicial review of any unfavorable PUC order. The Parties agree that neither Party has control over whether or not a PUC approval order will be issued and each Party hereby assumes any and all risk arising from, or relating in any way to, the inability to obtain a satisfactory PUC order and hereby releases the other Party from any and all claims relating thereto.

(b) Seller shall seek participation without intervention in the PUC docket for approval of the purchase and sale agreement pursuant to applicable rules and orders of the PUC. The scope of Seller's participation shall be determined by the PUC. However, Seller expressly agrees to seek participation for the limited purpose and only to the extent necessary to assist the PUC in making an informed decision regarding the approval of the purchase and sale agreement. If the Seller chooses not to seek participation in the docket, then Seller expressly agrees and knowingly waives the right to claim, before the PUC, in any court, arbitration or other proceeding, that the information submitted and the application requesting the PUC approval are insufficient to meet Company's burden of justifying that the terms of the purchase and sale agreement are just and reasonable and in the public interest, or otherwise deficient in any manner for purposes of supporting the PUC's approval of the purchase and sale agreement. Seller shall not seek in the docket and Company shall not disclose any confidential information to Seller that would provide Seller with an unfair business advantage or would otherwise harm the position of others with respect to their ability to compete on equal and fair terms.

(c) In order to constitute an approval order from the PUC under this **Section 5** (PUC Approval) of this **Attachment P** (Sale of Facility by Seller), the order must approve the purchase and sale agreement, Company's funding arrangements and Company's acquisition of the Facility, shall not contain any terms and conditions deemed to be unacceptable by Company, and be in a form deemed reasonable by Company in its sole, but non-arbitrary, discretion.

(d) The Final Non-Appealable Order from the PUC must be obtained within six (6) months of the submission of the purchase and sale agreement to the PUC, or any extension of such period as agreed by the Parties in writing within ten (10) Days of the expiration of the six (6) month period; provided, however, that if the purchase and sale agreement governs a sale of the Facility executed pursuant to **Section 23.5** (Consolidation) of this Agreement, the Final Non-Appealable Order must be obtained within twelve (12) months of the submission of the purchase and agreement to the PUC, or any extension of such period as agreed by the Parties in writing within ten

(10) Days of the expiration of the twelve (12) month period. The term “**Final Non-Appealable Order from the PUC**” means an Approval Order from the PUC (i) that is not subject to appeal to any Circuit Court of the State of Hawai‘i, Intermediate Court of Appeals of the State of Hawai‘i, or the Supreme Court of the State of Hawai‘i, because the period permitted for such an appeal has passed without the filing of notice of such an appeal, or (ii) that was affirmed on appeal to any Circuit Court of the State of Hawai‘i, Intermediate Court of Appeals of the State of Hawai‘i, or the Supreme Court of the State of Hawai‘i, or was affirmed upon further appeal or appellate process, and that is not subject to further appeal, because the jurisdictional time permitted for such an appeal and/or further appellate process such as a motion for reconsideration or an application for writ of certiorari has passed without the filing of notice of such an appeal or the filing for further appellate process. Such Final Non-Appealable Order from the PUC shall constitute and be referred to as “**PUC Approval**” for purposes of this **Attachment P** (Sale of Facility by Seller).

(e) If a Final Non-Appealable Order from the PUC has not been obtained prior to the deadline provided in **Section 5(b)** of this **Attachment P** (Sale of Facility by Seller), either Party may give written notice to the other Party that it does not wish to proceed further with a sale of the Facility to Company.

(f) If the Final Non-Appealable Order from the PUC does not satisfy the conditions set forth in **Section 5(a)** of this **Attachment P** (Sale of Facility by Seller), either (i) the Parties may agree to renegotiate and submit a revised purchase and sale agreement to the PUC, or (ii) either Party may give written notice to the other Party that it does not wish to proceed further with a sale of the Facility to Company.

6. Make Whole Amount. For purposes of **Section 23.5** (Consolidation) the “**Make Whole Amount**” shall be equal to the sum of the following: (a) Seller’s book value (including depreciation on a fifteen (##15) year straight line basis) of all actual verifiable costs of studies, designs, engineering, and construction of the Facility and all Interconnection Facilities (including any Company-Owned Interconnection Facilities paid for by Seller), including cancellation charges and other costs of unwinding construction and demobilization if the determination is made prior to the Commercial Operations Date, (b) Seller’s book value of all actual verifiable costs and expenses acquiring real estate rights for the Facility and Interconnection Facilities, (c) Seller’s book value of all actual verifiable costs and expenses incurred in obtaining Governmental Approvals, (d) Seller’s book value of all actual verifiable costs of financing the Facility and the Interconnection Facilities, including fees and expenses of bankers, consultants and counsel, and any discounts or premiums paid in connection with any financing, (e) any actual verifiable costs of repaying any financing in connection with a sale, including prepayment penalties or premiums, make whole payments, minimum interest payments, breakage fees, payments on account of taxes, duties and other costs, and other costs of unwinding swaps or other hedges, (f) other breakage, make whole or indemnity payments arising as the result of Company’s purchase of the Facility, (g) tax costs, including recapture of federal or state tax credits and payment of transfer taxes, and (h) interest on the foregoing amounts at annual rate equal to the Prime Rate plus two percent (2%) as in effect from time to time from the date incurred through the date of payment, with all such costs being demonstrated by Seller with support and verified by Company. The items

described in clauses (e), (f) and (g) (and clause (h) to the extent applicable to clauses (e), (f) and/or (g)) are referred to as the “**Financial Termination Cost.**”

ATTACHMENT Q **REQUIRED INSURANCE**

(See also **Article 21** (Insurance))

1. Worker's Compensation and Employers' Liability. This coverage shall include Worker's Compensation, Temporary Disability and other similar insurance required by applicable State or U.S. federal laws. If exposure exists, coverage required by the Longshore and Harbor Worker's Compensation Act (33 U.S.C. § 688) shall be included. Employers' Liability coverage limits shall be no less than:

Bodily Injury by Accident - \$1,000,000 each Accident

Bodily Injury by Disease - \$1,000,000 each Employee

Bodily Injury by Disease - \$1,000,000 policy limit

2. General Liability Insurance.

(a) This coverage shall include Commercial General Liability Insurance or the reasonable equivalent thereof, covering all operations by or on behalf of Seller. Such coverage shall provide insurance for bodily injury and property damage liability for the minimum limits of liability indicated below and shall include coverage for:

- (i)** Premises, operations, and mobile equipment,
- (ii)** Products and completed operations,
- (iii)** Claims resulting from alleged damage to the environment and damage or injury caused by hazardous conditions or hazardous materials to the extent such coverage is appropriate and available at a commercially reasonable cost,
- (iv)** Blanket contractual liability,
- (v)** Broad form property damage (including completed operations),
- (vi)** Explosion, collapse and underground hazard, and
- (vii)** Personal injury liability.

(b) Limits of liability for Bodily Injury & Property Damage shall be:

- (i)** \$10,000,000 combined single limit per occurrence and;
- (ii)** \$20,000,000 aggregate annually.

(c) Coverage limits may be satisfied using Umbrella and/or Excess Liability insurance policies.

3. Automobile Liability Insurance. This insurance shall include coverage for owned, leased and non-owned automobiles. The minimum limits of liability shall be a combined single limit for bodily injury and property damage of Two Million Dollars (\$2,000,000) for each occurrence and in the aggregate annually. The policy shall be endorsed to include Transportation Pollution Liability insurance, covering hazardous materials to be transported by Seller, as appropriate.

4. Builders All Risk Insurance. This insurance shall include but not be limited to coverage for wind including named windstorm, earthquake, flood, perils, property in transit (excluding ocean transit), off-site storage - property in temporary storage or assembly away from the project site, testing, covering all materials, equipment, machinery and supplies of any nature whatsoever, the property of the Seller or of others for which the Seller may have assumed responsibility, used or to be used in or incidental to the site preparation, demolition of existing structures, erection and/or fabrication and/or reconstruction and/or repair of the project insured, including temporary works (all scaffolding, formworks, fences, shoring, hoarding, false work and temporary buildings and all incidental to the project) from the start of construction through the earlier of the Commercial Operations Date or the effective date of the policy coverage set forth in **Section 5** (All Risk Property/Mechanical and Electrical Breakdown Insurance (Upon Completion of Construction)) of this **Attachment Q** (Required Insurance). The amount of coverage shall be purchased on a full replacement cost basis, except for named windstorm, earthquake, and flood perils which shall be provided as sublimits and aggregate limits supported by a Probable Maximum Loss (PML) study and/or Catastrophe (CAT) Modeling report, if such insurance amounts are appropriate and available on commercially reasonable terms. The coverage shall be written on an "All Risks" completed value form and may allow for reasonable other sublimits for transit and for incidental offsite storage. Coverage shall be extended to include testing. Such policies shall be endorsed to require that the coverage afforded shall not be canceled (except for nonpayment of premiums) or reduced without at least thirty (30) Days' prior written notice to Seller and Company; provided, however, that such endorsement shall provide (a) that the insurer may not cancel the coverage for non-payment of premium without giving Seller and Company ten (10) Days' notice that Seller has failed to make timely payment thereof, and (b) that, subject to the consent of the Facility Lender, Seller or Company shall thereupon have the right to pay such premium directly to the insurer.

5. All Risk Property/Mechanical and Electrical Breakdown Insurance (Upon Completion of Construction). This insurance shall provide All Risk Property Coverage (including the perils of wind including named windstorm, earthquake, and flood) and Mechanical and Electrical Breakdown Coverage against damage to the Facility. The amount of coverage shall be purchased on a full replacement cost basis (no coinsurance shall apply) except for named windstorm, earthquake, and flood perils which shall be provided as sublimits and aggregate limits supported by a Probable Maximum Loss (PML) study and/or Catastrophe (CAT) Modeling report, if such insurance amounts are appropriate and available on commercially reasonable terms. Such coverage may allow for other reasonable sublimits. Such policies shall be endorsed to require that the coverage afforded shall not be canceled (except for nonpayment of premiums) or reduced without at least thirty (30) Days' prior written notice to Seller and Company; provided, however, that such endorsement shall provide (a) that the insurer may not cancel the coverage for non-payment of premium without

giving Seller and Company ten (10) Days' notice that Seller has failed to make timely payment thereof, and (b) that, subject to the consent of the Facility Lender, Seller or Company shall thereupon have the right to pay such premium directly to the insurer.

6. Business Interruption Insurance (Upon Completion of Construction). This insurance shall provide coverage for all of Seller's costs to the extent that they would not be eliminated or reduced by the failure of the Facility to operate for a period of at least twelve (12) months following a covered physical damage loss deductible period or reasonable dollar deductible or waiting period.

7. Project Liability Errors and Omissions. Seller shall obtain adequate protection against project liability errors and omissions on account of negligent actions or inactions of architects, engineers, contractors and subcontractors involved in the design and/or construction of the Facility.

8. Ocean Transit. Seller shall take reasonable action to ensure that the risk of loss or damage to any material items of equipment which are subject to ocean transit is adequately protected against by the terms of delivery from contractors or suppliers of such equipment or Seller's own insurance coverage.

9. Pollution Liability Insurance. This insurance shall provide coverage for losses involving hazardous material(s) and caused by pollution incidents or conditions that arise from the Facility, including but not limited to, coverage for bodily injury, sickness, disease, mental anguish or shock sustained by any person, including death, property damage including the resulting loss of use thereof, clean-up costs, and the loss of use of tangible property that has not been physically damaged or destroyed, and defense costs. The coverage must be maintained for a period of not less than three (3) years after this Agreement terminates, or the policy must provide for a supplemental extended reporting period of not less than three (3) years after this Agreement terminates. Such policy shall have minimum limits of \$5,000,000 each occurrence; and \$5,000,000 annual aggregate.

ATTACHMENT R

FORM OF MONTHLY PROGRESS REPORT

1. Instructions

Any capitalized terms used in this report which are not defined herein shall have the meaning ascribed to them in the Energy Storage Power Purchase Agreement by and between _____, a **[Delaware limited liability company]** (“**Seller**”), and Hawaiian Electric Company, Inc., a Hawai‘i corporation, dated _____, 20____ (the “**Agreement**”).

In addition to the remedial action plan requirement set forth in **Article 11** (Construction Period and Milestones) of the Agreement, Seller shall review the status of each Construction Milestone of the construction schedule (the “**Schedule**”) for the Facility and identify such matters referenced in clauses (a)-(e) below as known to Seller and which in Seller’s reasonable judgment are expected to adversely affect the Schedule, and with respect to any such matters, shall state the actions which Seller intends to take to ensure that the Construction Milestones will be attained by their required dates. Such matters may include, but shall not be limited to:

(a) Any material matter or issue arising in connection with a Government Approval, or compliance therewith, with respect to which there is an actual or threatened dispute over the interpretation of a law, actual or threatened opposition to the granting of a necessary Governmental Approvals, any organized public opposition, any action or expenditure required for compliance or obtaining approval that Seller is unwilling to take or make, or in each case which could reasonably be expected to materially threaten or prevent financing of the Facility, attaining any Construction Milestone, or obtaining any contemplated agreements with other parties which are necessary for attaining any Construction Milestone or which otherwise reasonably could be expected to materially threaten Seller's ability to attain any Construction Milestone.

(b) Any development or event in the financial markets or the independent power industry, any change in taxation or accounting standards or practices or in Seller's business or prospects which reasonably could be expected to materially threaten financing of the Facility, attainment of any Construction Milestone or materially threaten any contemplated agreements with other parties which are necessary for attaining any Construction Milestone or could otherwise reasonably be expected to materially threaten Seller's ability to attain any Construction Milestone;

(c) A change in, or discovery by Seller of, any legal or regulatory requirement which would reasonably be expected to materially threaten Seller's ability to attain any Construction Milestone;

(d) Any material change in the Seller’s schedule for initiating or completing any material aspect of the Facility;

(e) The status of any matter or issue identified as outstanding in any prior Monthly Progress Report and any material change in the Seller’s proposed actions to remedy or overcome such matter or issue.

2. Executive Summary

2.1 Major activities completed

Please provide a cumulative summary of the major activities completed for each of the following aspects of the Facility (provide details in subsequent sections of this report):

- 2.1.1 **[Insert Construction Milestones from Attachment K and Attachment L, if needed]**
- 1.1.2 Financing
- 2.1.3 Governmental Approvals for Development
- 2.1.4 Site Control
- 2.1.5 Land Rights for Company-Owned Interconnection Facilities
- 2.1.6 Design and Engineering
- 2.1.7 Major Equipment Procurement
- 2.1.8 Construction
- 2.1.9 Interconnection
- 2.1.10 Startup Testing and Commissioning

2.2. Major activities recently performed

Please provide a summary of the major activities performed for each of the following aspects of the Facility since the previous report (provide details in subsequent sections of this report):

- 2.2.1 **[Insert Construction Milestones from Attachment K and Attachment L, if needed]**
- 2.2.2 Financing
- 2.2.3 Development Permits
- 2.2.4 Site Control
- 2.2.5 Land Rights for Company-Owned Interconnection Facilities
- 2.2.6 Design and Engineering
- 2.2.7 Major Equipment Procurement
- 2.2.8 Construction

- 2.2.9 Interconnection
- 2.2.10 Startup Testing and Commissioning

2.3 Major activities planned but not completed

Please provide a summary of the major activities that were planned to be performed since the previous report but not completed as scheduled, including the reasons for not completing the activities, for each of the following aspects of the Facility:

- 2.3.1 **[Insert Construction Milestones from Attachment K and Attachment L, if needed]**
- 2.3.2 Financing
- 2.3.3 Governmental Approvals for Development
- 2.3.4 Site Control
- 2.3.5 Land Rights for Company-Owned Interconnection Facilities
- 2.3.6 Design and Engineering
- 2.3.7 Major Equipment procurement
- 2.3.8 Construction
- 2.3.9 Interconnection
- 2.3.10 Startup Testing and Commissioning

2.4 Major activities expected during the current month

Please provide a summary of the major activities to be performed during the current month for each of the following aspects of the Facility (provide details in subsequent sections of this report):

- 2.4.1 Construction Milestones
- 2.4.2 Financing
- 2.4.3 Governmental Approvals
- 2.4.4 Site Control
- 2.4.5 Land Rights for Company-Owned Interconnection Facilities
- 2.4.6 Design and Engineering
- 2.4.7 Major Equipment procurement

- 2.4.8 Construction
- 2.4.9 Interconnection
- 2.4.10 Startup Testing and Commissioning

3. Milestones

3.1 Milestone schedule

Please list all Construction Milestones specified in **Attachment K** and state the current status of each.

Construction Milestone	Milestone Date Specified in the Agreement	Status (e.g., on schedule, delayed due to [<i>specify reason</i>]; current expected completion date)
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3.2 Remedial Action Plan (if applicable)

Provide a detailed description of Seller’s course of action and plan to achieve the missed Construction Milestones and all subsequent Construction Milestones by the Guaranteed Commercial Operations Date using the outline provided below.

- 3.2.1 Identify Missed Construction Milestone
- 3.2.2 Explain plans to achieve missed Construction Milestone
- 3.2.3 Explain plans to achieve subsequent Construction Milestones
- 3.2.4 Identify and discuss (a) delays in engineering schedule, equipment procurement, and construction and interconnection schedule and (b) plans to remedy delays as a result of the missed Construction Milestones

4. Financing

Please provide the schedule Seller intends to follow to obtain financing for the Facility. Include information about each stage of financing.

Activity (e.g., obtain \$xx for yy stage from zz)	Completion Date
	__/__/____ (expected / actual)
	__/__/____ (expected / actual)

5. Project Schedule

Please provide a copy of the current version of the overall Facility schedule (e.g., Work

Breakdown Structure, Gantt chart, MS Project report, etc.). Include all major activities for Governmental Approvals for development, design and engineering, procurement, construction, interconnection and testing.

6. Governmental Approvals

6.1 Environmental Impact Review

Please provide information about the primary environmental impact review for the Facility. Indicate whether dates are expected or actual.

Agency

Date of application/submission __/__/__ (expected / actual)

Date application/submission deemed complete by agency __/__/__ (expected / actual)

Date of initial study (if applicable) __/__/__ (expected / actual)

Process (e.g., Notice of Exemption, Negative Declaration, Mitigated Negative Declaration, Environmental Impact Report)

Date of Notice of Preparation __/__/__ (expected / actual)

Date of Draft ND/MND/EIR __/__/__ (expected / actual)

Date Notice of Determination filed at OPR or County Clerk __/__/__ (expected / actual)

Governmental Approvals

Please describe each of the Governmental Approvals to be obtained by Seller and the status of each:

Agency / Approval	Status Summary e.g., dates of application / hearing / notice / etc. (note whether dates are anticipated or actual); major activities (indicate whether planned, in progress and/or completed); primary reasons for possible delay, etc.

6.3 Governmental Approval activities recently performed

Please list all Governmental Approval activities that occurred since the previous report.

6.4 Governmental Approval activities expected during the current month

Please list all Governmental Approval activities that are expected to occur during the current month.

6.5 Governmental Approval Notices received from EPC Contractor

Please attach to this Monthly Progress Report copies of any notices related to Governmental Approval activities received since the previous report, whether from EPC Contractor or directly from Governmental Authorities.

7. Site Control

7.1 Table of Site Control schedule

If not obtained prior to execution of the Agreement, please provide the schedule Seller intends to follow to obtain control of the Site (e.g., purchase, lease).

Activity	Completion Date
	__/__/____ (expected / actual)
	__/__/____ (expected / actual)

7.2 Site Control activities recently performed

Please explain in detail the property acquisition activities that were performed since the previous report.

7.3 Site Control activities expected during the current month

Please explain in detail the site control activities that are expected to be performed during the current month.

8. Land Rights for the Company-Owned Interconnection Facilities

8.1 Table of Land Rights schedule for Company-Owned Interconnection Facilities

If not obtained prior to execution of the Agreement, please provide the schedule Seller intends to follow to obtain control of the land for the Company-Owned Interconnection Facilities (e.g., purchase, lease).

Activity	Completion Date
	__/__/____ (expected / actual)
	__/__/____ (expected / actual)

8.2 Land Control activities recently performed

Please explain in detail the property acquisition activities that were performed since the previous report.

8.3 Land Control activities expected during the current month

Please explain in detail the Land control activities that are expected to be performed during the current month.

9. Design and Engineering

9.1 Design and engineering schedule

Please provide the name of the EPC Contractor, the date of execution of the EPC Contract, and the date of issuance of a full notice to proceed (or equivalent).

Please list all major design and engineering activities, both planned and completed, to be performed by Seller and the EPC Contractor.

Name of EPC Contractor / Subcontractor	Activity	Completion Date
		//___ (expected / actual)
		//___ (expected / actual)

9.2 Design and engineering activities recently performed

Please explain in detail the design and engineering activities that were performed since the previous report.

9.3 Design and engineering activities expected during the current month

Please explain in detail the design and engineering activities that are expected to be performed during the current month.

10. Major Equipment Procurement

10.1 Major equipment to be procured

Please list all major equipment to be procured by Seller or the EPC Contractor:

Equipment Description	Manufacturer	Delivery Date (indicate whether expected or actual)	Installation Date (indicate whether expected or actual)
		//___ (expected / actual)	_/_/___ (expected / actual)
		//___ (expected / actual)	_/_/___ (expected / actual)

Equipment Description	No. Ordered	No. Made	No. On-Site	No. Installed	No. Tested

10.2 Major Equipment procurement activities recently performed

Please explain in detail the major equipment procurement activities that were performed since the previous report.

10.3 Major Equipment procurement activities expected during the current month

Please explain in detail the major equipment procurement activities that are expected to be performed during the current month.

11. Construction

11.1 Construction activities

Please list all major construction activities, both planned and completed, to be performed by Seller or the EPC Contractor.

Activity	EPC Contractor / Subcontractor	Completion Date
		//___ (expected / actual)
		//___ (expected / actual)

11.2 Construction activities recently performed

Please explain in detail the construction activities that were performed since the previous report.

11.3 Construction activities expected during the current month

Please explain in detail the construction activities are expected to be performed during the current month.

11.4 EPC Contractor Monthly Construction Progress Report

Please attach a copy of the Monthly Progress Reports received since the previous report from the EPC Contractor pursuant to the construction contract between Seller and EPC Contractor, certified by the EPC Contractor as being true and correct as of the date issued.

12. Interconnection

12.1 Interconnection activities

Please list all major interconnection activities, both planned and completed, to be performed by Seller or the EPC Contractor.

Activity	Name of EPC Contractor / Subcontractor	Completion Date
		//___ (expected / actual)
		//___ (expected / actual)

12.2 Interconnection activities recently performed

Please explain in detail the interconnection activities that were performed since the previous report.

12.3 Interconnection activities expected during the current month

Please explain in detail the interconnection activities that are expected to be performed during the current month.

13. Startup Testing and Commissioning

13.1 Startup testing and commissioning activities

Please list all major startup testing and commissioning activities, both planned and completed, to be performed by Seller or the EPC Contractor.

Activity	Name of EPC Contractor / Subcontractor	Completion Date
		//___ (expected / actual)
		//___ (expected / actual)

13.2 Startup testing and commissioning activities recently performed

Please explain in detail the startup testing and commissioning activities that were performed since the previous report.

13.3 Startup testing and commissioning activities expected during the current month

Please explain in detail the startup testing and commissioning activities that are expected to be performed during the current month.

14. Safety and Health Reports

14.1 Accidents

Please describe all Facility-related accidents reported since the previous report.

14.2 Work stoppages

Please describe all Facility-related work stoppages from that occurred since the previous report, and the effect of work stoppages on the Facility schedule.

15. Community Outreach

Please describe all community outreach efforts undertaken since the last report.

16. Certification

I, _____, on behalf of and as an authorized representative of [_____], do hereby certify that any and all information contained in this Seller's Monthly Progress Report is true and accurate, and reflects, to the best of my knowledge, the current status of the construction of the Facility as of the date specified below.

By: _____

Name: _____

Title: _____

Date: _____

ATTACHMENT S
QUARTERLY REPORTING AND DISPUTE RESOLUTION BY
INDEPENDENT EVALUATOR

1. Quarterly Report. Commencing with the month during which the Commercial Operations Date is achieved, and for each Measurement Period thereafter during the Term, Seller shall provide to Company a Quarterly Report in Excel, Lotus or such other format as Company may require, which Quarterly Report shall include (a) the data for the Measurement Period in question populated into the form of “Quarterly Report” below; and (b) Seller’s calculations of the Performance Metrics and any liquidated damages assessments for the LD Period ending with such Measurement Period as set forth below. Seller shall deliver such Quarterly Report to Company by the fifth (5th) Business Day following the close of the Measurement Period in question. Seller shall deliver the Quarterly Report electronically to the address provided by the Company. Company shall have the right to verify all data set forth in the Quarterly Report by inspecting measurement instruments and reviewing Facility operating records. Upon Company's request, Seller shall promptly provide to Company any additional data and supporting documentation necessary for Company to audit and verify any matters in the Quarterly Report.

~~Quarterly Report~~ QUARTERLY REPORT

NAME OF IPP FACILITY: [Facility Name]

QUARTERLY REPORT PERIOD: [Month Day, Year] to [Month Day, Year]

[FORM OF QUARTERLY REPORT TO BE ADDED]

Enter the applicable information from which the IPP is using to demonstrate satisfaction of the Capacity Performance Metric during the reporting period. This can either be from a Capacity Test performed during the period or taken from operational data reflecting the net output of the BESS.

<u>Date/Time</u> <u>Start</u>	<u>Date/Time</u> <u>End</u>	<u>Total MWh</u> <u>delivered to the POI</u> <u>(A)</u>	<u>BESS Contract</u> <u>Capacity (MWh)</u> <u>(B)</u>	<u>BESS Capacity</u> <u>Ratio</u> <u>100% x (A ÷ B)</u>

Enter the applicable information from which the IPP is using to demonstrate satisfaction of the RTE Performance Metric during the reporting period. This can either be from a RTE Test performed during the period or taken from operational data reflecting the net output of the BESS.

<u>Date/Time</u> <u>Start</u>	<u>Date/Time</u> <u>End</u>	<u>Total MWh delivered</u> <u>to the POI during</u> <u>Capacity Test</u> <u>(A)</u>	<u>Charging Energy</u> <u>measured at POI (MWh)</u> <u>(B)</u>	<u>RTE Ratio</u> <u>100% x (A ÷ B)</u>

Enter the information for each ExcludedTime event during the reporting period. Dates and times should be entered to the nearest minute. Duration, size of reduction, maximum rated output, and equivalent hours should be rounded to 1 decimal place.

<u>Date/Time Start</u> (A)	<u>Date/Time End</u> (B)	<u>Duration (hrs)</u> (C) = (B - A)	<u>Size of Reduction (MW)</u> (D)	<u>Maximum Rated Output (MW)</u> (E)	<u>Equivalent Hours (hrs)</u> (C x D) ÷ E
...					

Calendar hours in the reporting period: _____

Total equivalent ExcludedTime for the reporting period (from above): _____

Period Hours (PH) in the reporting period: _____

PH from the last three (3) reporting periods: _____

PH for the last four (4) reporting periods: _____

Enter the information for each Outage during the reporting period. Dates and times should be entered to the nearest minute. Duration should be rounded to 1 decimal place.

<u>Date/Time Start</u> (A)	<u>Date/Time End</u> (B)	<u>Duration (hrs)</u> (B - A)
...		

Calendar hours in the reporting period: _____

Total Outage hours for the reporting period (from above): _____

Available Hours (AH) in the reporting period: _____

AH from the last three (3) reporting periods: _____

AH for the last four (4) reporting periods: _____

Enter the information for each Planned Deration event during the reporting period. Dates and times should be entered to the nearest minute. Duration, size of reduction, maximum rated output, and equivalent hours should be rounded to 1 decimal place.

<u>Date/Time Start</u> (A)	<u>Date/Time End</u> (B)	<u>Duration (hrs)</u> (C) = (B - A)	<u>Size of Reduction (MW)</u> (D)	<u>Maximum Rated Output (MW)</u> (E)	<u>Equivalent Hours (hrs)</u> (C x D) ÷ E
...					

Total equivalent planned derated hours (EPDH) for the reporting period: _____

EPDH from the last three (3) reporting periods: _____

EPDH for the last four (4) reporting periods: _____

Enter the information for each Unplanned Deration event during the reporting period. Dates and times should be entered to the nearest minute. Duration, size of reduction, maximum rated output, and equivalent hours should be rounded to 1 decimal place.

<u>Date/Time Start</u> (A)	<u>Date/Time End</u> (B)	<u>Duration (hrs)</u> (C) = (B - A)	<u>Size of Reduction (MW)</u> (D)	<u>Maximum Rated Output (MW)</u> (E)	<u>Equivalent Hours (hrs)</u> (C x D) ÷ E
...					

Total equivalent unplanned derated hours (EUDH) for the reporting period: _____

EUDH for the last three (3) reporting periods: _____

EUDH for the last four (4) reporting periods: _____

Enter the Available Hours, EPDH, EUDH, and Period Hours for the last four (4) reporting periods as calculated above.

<u>AH</u> (A)	<u>EPDH</u> (B)	<u>EUDH</u> (C)	<u>PH</u> (D)	<u>BESS Annual Equivalent Availability Factor</u> 100% x (A - B - C) ÷ D

Enter the information for each Forced Outage during the reporting period. Dates and times should be entered to the nearest minute. Duration should be rounded to 1 decimal place.

<u>Date/Time Start</u> (A)	<u>Date/Time End</u> (B)	<u>Duration (hrs)</u> (B - A)
...		

Total Forced Outage Hours (FOH) for the reporting period (from above): _____

FOH from the last three (3) reporting periods: _____

FOH for the last four (4) reporting periods: _____

Enter the FOH and EUDH for the last four (4) reporting periods as calculated above.

<u>FOH</u> (A)	<u>EUDH</u> (B)	<u>BESS Annual Equivalent Forced Outage Factor</u>

		$100\% \times (A + B) \div 8760$

2. Quarterly Report Disagreements.

(a) Notice of Disagreement With Quarterly Report. Within ten (10) Business Days following the close of the Measurement Period in question, Seller shall provide to Company the Quarterly Report for the LD Period and the Measurement Period in question, as provided in **Section 1** (Quarterly Report) of this **Attachment S** (Quarterly Reporting and Dispute Resolution by Independent Evaluator). Within ten (10) Business Days after Company’s receipt of a Quarterly Report, Company shall provide written notice to Seller of any Quarterly Report Disagreement, including with respect to the data for the Measurement Period covered by such Quarterly Report and Seller’s calculation of, as applicable, any of the Capacity Ratio, the RTE Ratio, the Annual EAF or the Annual EFOF for the Measurement Period in question (“**Notice of Disagreement**”). Together with any such Notice of Disagreement, the Company shall include its own calculations and other support for its position. If Company fails to provide a Notice of Disagreement within said 10-Business Day period, the Quarterly Report provided by Seller shall be deemed to be accepted by Company and shall no longer be subject to dispute by Company or Seller.

(b) Submission of Quarterly Report Disagreement to Independent Evaluator. Upon issuance of a Notice of Disagreement, the Parties shall review the contents of the Quarterly Report(s) together with such Notice of Disagreement and attempt to resolve such Quarterly Report Disagreement. If the Parties are able to agree on a resolution of any Quarterly Report Disagreement, the resulting corrected Quarterly Report(s) in question shall be set forth in a writing executed by both Parties, following which (i) such corrected Quarterly Reports shall no longer be subject to dispute by either Party and (ii) to the extent such resolution of such Quarterly Report Disagreement affects future Quarterly Reports, such future Quarterly Reports shall be prepared, and the Annual EAF and the Annual EFOF in such future Quarterly Reports shall be calculated, in a manner consistent with such resolution. If the Parties are unable to resolve such Quarterly Report Disagreement within ten (10) Business Days after Company's issuance of such Notice of Quarterly Report Disagreement, either Party may, within five (5) Business Days after the end of such 10-Business Day period, submit the unresolved Quarterly Report Disagreement to an Independent Evaluator for resolution.

(c) Appointment of Independent Evaluator. If either Party decides to submit an unresolved Quarterly Report Disagreement to an Independent Evaluator, it shall provide written notice to that effect (the “**Submission Notice**”) to the other Party, which notice shall designate which of the engineering firms on the Consultants List-~~**[PARTIES TO CONSIDER WHETHER DISAGREEMENT OVER PERFORMANCE METRICS SHOULD BE RESOLVED BY A SEPARATE CONSULTANTS LIST]**~~ is to act as the Independent Evaluator for purposes of resolving such dispute; provided, however, for purposes of facilitating consistency in the resolution of Quarterly Report Disagreements, all Quarterly Report Disagreements concerning the same Performance Metric arising out of any one or more of the twelve (12) Quarterly Reports issued for a given Contract Year shall be submitted to the same Independent Evaluator unless

such Independent Evaluator declines to accept any such submission(s). A Submission Notice must be provided within the 5-Business Day period provided in **Section 2(eb)** (Submission of Quarterly Report Disagreement to Independent Evaluator) of this **Attachment S** (Quarterly Reporting and Dispute Resolution by Independent Evaluator). The Parties shall each pay fifty percent (50%) of the fees and expenses charged by the Independent Evaluator.

(d) Eligibility for Appointment as Independent Evaluator. Both Parties agree that the engineering firms listed in **Attachment D** (Consultants List) are fully qualified to serve as Independent Evaluator. By mutual agreement between the Parties in writing, a name or names may be added to or removed from the OEPR Consultants List at any time. In no event shall there be less than three (3) names on the Consultants List.

(e) Participation of Parties. Promptly following the issuance of a Submission Notice as provided in **Section 2(ec)** (Appointment of Independent Evaluator) of this **Attachment S** (Quarterly Reporting and Dispute Resolution by Independent Evaluator), Seller and Company shall provide the Independent Evaluator which such data as they consider to be material to the resolution of the disputed issue(s). Seller and Company shall also provide such additional data and information as the Independent Evaluator may reasonably request. The Parties shall assist the Independent Evaluator throughout the process of resolving such dispute, including making key personnel and records available to the Independent Evaluator, but neither Party shall be entitled to participate in any meetings with personnel of the other Party or review of the other Party's records. However, the Independent Evaluator will have the right to conduct meetings, hearing or oral arguments in which both Parties are represented.

(f) Written Decision of Independent Evaluator. The terms of engagement with the Independent Evaluator shall require the Independent Evaluator to issue its written decision resolving the disputed issues submitted to it within the applicable time period set forth below, which time periods are subject to any tolling that may be applicable pursuant to **Section 2(ig)** (Sequence to Resolving Interrelated Disagreements) of this **Attachment S** (Quarterly Reporting and Dispute Resolution by Independent Evaluator): (a) 30 Days as measured from the issuance of the Submission Notice; or (b) such other time period as the Parties may agree in writing. Unless otherwise agreed by the Parties in writing:

(i) for a Performance Metric Disagreement concerning the Capacity Ratio or the RTE Ratio, the written decision of the Independent Evaluator shall set forth the Capacity Ratio and/or RTE Ratio (as applicable) for the Measurement Period in question, as applicable;

(ii) for a Performance Metric Disagreement concerning the Annual EAF, the written decision of the Independent Evaluator shall set forth (aa) the correct values to be used for AH, EPDH, EUDH and PH under **Attachment U** (Annual Equivalent Availability Factor) for the Measurement Period in question if any such values were in dispute and (bb) the Annual EAF for the Measurement Period in question if such Annual EAF was in dispute; and

(iii) for a Performance Metric Disagreement concerning the Annual EFOF, the written decision of the Independent Evaluator shall set forth (aa) the correct values for FOH and EUDH under **Attachment V** (Annual Equivalent Forced Outage Factor) for the Measurement Period in question if any such values were in dispute and (bb) the Annual EFOF for the Measurement Period in question if such Annual EFOF was in dispute.

(g) Sequence for Resolving Interrelated Disagreements. If at the time a Performance Metric Disagreement is submitted to an Independent Evaluator pursuant to **Section 2(ec)** (Appointment of Independent Evaluator) of this **Attachment S** (Quarterly Reporting and Dispute Resolution by Independent Evaluator) there are one or more other unresolved Performance Metric Disagreements concerning the same Performance Metric and the same LD Period that are pending before a different Independent Evaluator, and the resolution of such other Performance Metric Disagreement(s) is necessary to the resolution of the Performance Metric Disagreement that has been newly submitted to a new Independent Evaluator as aforesaid, the time period for such new Independent Evaluator to issue its written decision resolving such newly submitted Performance Metric Disagreement shall be tolled until such pending Performance Metric Disagreement(s) have been resolved. For avoidance of doubt, it is the intent of the Parties that disagreements over performance ratio data and calculations for a given Measurement Period shall (i) not be subject to resolution twice and (ii) once resolved, shall not be reopened.

(h) Final, Conclusive and Binding. The Parties acknowledge the inherent uncertainty in calculating the Performance Metrics, and hereby assume the risk of such uncertainty and waive any right to dispute the qualification of the person or entity appointed as the Independent Evaluator pursuant to **Section 2(ec)** (Appointment of Independent Evaluator) of this **Attachment S** (Quarterly Reporting and Dispute Resolution by Independent Evaluator) and/or the appropriateness of the methodology used by Independent Evaluator in resolving such Performance Metric Disagreements. Without limitation to the generality of the preceding sentence, the decision of the Independent Evaluator as to each Performance Metric Disagreement submitted to an Independent Evaluator shall be final, conclusive and binding upon Company and Seller and shall not be subject to further dispute under **Article 26** (Dispute Resolution) of the Agreement.

3. Periodic Review of Method of Calculating and Reporting Performance Metric. At least once per Contract Year, Company shall review the method of calculating and reporting Performance Metrics under this Agreement to determine if other variables should be incorporated into such calculations. Any revisions to the Performance Metric calculations in this Agreement shall be mutually agreed to by both Seller and Company.

4. Future Changes in Reporting Requirements. Seller shall reasonably cooperate with any Company requested revisions to the Quarterly Report to include additional data that may be necessary from time to time to enable Company to comply with any new reporting requirements directed by the PUC or otherwise imposed under applicable Laws.

ATTACHMENT T

CAPACITY TEST

FACILITY TESTS

Prior to achieving Commercial Operations and in each Measurement Period, unless waived by Company, Seller shall demonstrate that the Facility ~~maintains~~satisfies the following:

Maintains output, provided by the Company, through a control setpoint, as measured at the Point of Interconnection, and is able to continuously dispatch the full Contract Capacity (the “**Capacity Test**”).

Demonstrates the charging/discharging requisite to satisfy the performance standard set forth in Section 3(w) (Round Trip Efficiency) of Attachment B (Facility Owned by Seller) (the “RTE Test”)

The RTE Test requires measurement of “Charging Energy” at the Point of Interconnection (MWh from the grid) from Facility 0% State of Charge to bring the Facility to a 100% State of Charge, followed by measurement of the MWh delivered to the grid to bring the Facility to a 0% State of Charge. The RTE Test will be conducted concurrently with the Capacity Test.

The Capacity Test can only be performed when the Facility is at the lower of: (i) its maximum State of Charge or (ii) 100% State of Charge prior to the start of the Capacity Test and during the Capacity Test the Company Dispatch/Charge allows for continuous dispatch of the Facility to 0% State of Charge with energy delivered to the Point of Interconnection.

For the purposes of evaluating the Capacity Test, the “**Capacity Ratio**” shall be equal to the number, expressed as a percentage, equal to the total MWh delivered to the Point of Interconnection during the Capacity Test, divided by the Contract Capacity. Further, the Capacity Test will be deemed to be “passed” or “satisfied” to the extent the Capacity Ratio is not less than **100%** (the “**Capacity Performance Metric**”).

For the purposes of evaluating the RTE Test, the RTE Ratio shall be equal to the number, expressed as a percentage, equal to the total MWh delivered to the Point of Interconnection during the Capacity Test, divided by the “Charging Energy” measured at the Point of Interconnection. For purposes of the RTE Test, the charging cycle shall begin when the Facility is at a 0% State of Charge prior to the commencement of the Capacity Test and the Charging Energy is the amount of energy imported from the grid, as measured at the Point of Interconnection, that brings the Facility to a 100% State of Charge. The formula is RTE Ratio = MWh discharge ÷ MWh charge. The RTE Test will be deemed to have been “passed” or “satisfied” to the extent the RTE Ratio is not less than the performance standard (the “**RTE Performance Metric**”) set forth in Section 3(w) (Round Trip Efficiency) of Attachment B (Facility Owned by Seller).

Except for the Capacity Test conducted prior to Commercial Operations, Seller shall, in lieu of conducting a Capacity Test, be permitted to demonstrate satisfaction of the

Capacity Performance Metric by reference to the operational data reflecting the net output of the Facility from the Point of Interconnection for such Measurement Period.

Except for the RTE Test conducted prior to Commercial Operations, Seller shall, in lieu of conducting a RTE Test, be permitted to demonstrate satisfaction of the RTE Performance Metric by reference to the operational data reflecting the charging/discharging of the Facility from the Point of Interconnection during such Measurement Period.

Any Capacity Test or RTE Test (each a “Facility Test” and collectively, the “Facility Tests”), other than where the ~~Contract~~ Capacity Performance Metric or RTE Performance Metric, as applicable, is demonstrated by reference to operational data ~~reflecting the net output of the Facility~~ as provided below, shall be performed at a time reasonably requested by the Company in its sole discretion. Within a Measurement Period, Seller shall be permitted up to a total of three (3) ~~Capacity~~ Facility Tests to demonstrate satisfaction of the Capacity Performance Metric and the RTE Performance Metric for such Measurement Period, unless additional ~~Capacity Tests~~ such tests are authorized by Company. Company shall provide notice to Seller no less than three (3) Business Days prior to conducting a ~~Capacity~~ Facility Test.

At any time prior to ~~the conduct of~~ conducting the third (3rd) Capacity Test noticed by Company for a Measurement Period, Seller may demonstrate satisfaction of the Capacity Performance Metric by reference to operational data reflecting the net output of the Facility from the Point of Interconnection for such Measurement Period. If, during a Measurement Period, Seller both fails to pass a Capacity Test noticed by Company and fails to demonstrate satisfaction of the Capacity Performance Metric by reference to operational data for such Measurement Period, the Facility shall nevertheless be deemed to have satisfied the Capacity Performance Metric for the applicable Measurement Period if either (i) Company failed to notice at least three (3) Capacity Tests during such Measurement Period, or (ii) Seller was unable to perform at least two (2) such noticed Capacity Tests during such Measurement Period due to (a) conditions on the Company System other than Seller-Attributable Unavailability or (b) an act or omission by Company.

At any time prior to conducting the third RTE Test noticed by Company for a Measurement Period, Seller may demonstrate satisfaction of the RTE Performance Metric by reference to operational data reflecting charging/discharging of the Facility from the Point of Interconnection during such Measurement Period. If, during a Measurement Period, Seller both fails to pass a RTE Test noticed by Company and fails to demonstrate satisfaction of the RTE Performance Metric by reference to operational data for such Measurement Period, the Facility shall nevertheless be deemed to have satisfied the RTE Performance Metric for the applicable Measurement Period if either (i) Company failed to notice at least three RTE Tests during such Measurement Period, or (ii) Seller was unable to perform at least two (2) such noticed RTE Tests during such Measurement Period due to (a) conditions on the Company System other than Seller-Attributable Unavailability or (b) an act or omission by Company.

Company shall have the right to attend, observe and receive the results of all ~~Capacity~~ Facility Tests. Seller shall provide to Company the results of each

~~Capacity~~Facility Test (including time stamped graphs of system performance based in operational data or test data) no later than ten (10) Business Days after the performance of such ~~Capacity~~Facility Test.

ATTACHMENT U

ANNUAL EQUIVALENT AVAILABILITY FACTOR

To the extent the Commercial Operations Date occurs on a date other than the first day of a Measurement Period, the period between the Commercial Operations Date and the first (1st) day of the next Measurement Period if any, shall be ignored for purposes of this availability test.

For the purposes of calculating the Annual EAF for the first three (3) full Measurement Periods in the first Contract Year, the calculation will assume that the Facility is one hundred percent (100%) available for the remaining hours of the Contract Year.

The Annual Equivalent Availability Factor shall be calculated as follows:

$$\text{Annual Equivalent Availability Factor} = 100\% \times \frac{AH - EPDH - EUDH}{PH}$$

Where:

PH is period hours (8760 hours; except leap year is 8784) minus ~~Excluded Time~~ExcludedTime.

Available Hours (AH) is the number of hours that the Facility is not on Outage. It is sum of all Service Hours (SH) + Reserve Shutdown Hours (RSH).

An “Outage” exists whenever the entire Facility is offline and unable to charge or discharge electric energy and is not in Reserve Shutdown state.

Service Hours (SH) is the number of hours during the LD Period the Facility is online and (i) charging from the Company System or (ii) discharging electric energy to the Company System.

Reserve Shutdown Hours (RSH) is the number of hours the Facility is available but not charging or discharging electric energy or is offline for reasons other than Seller-Attributable Unavailability.

EPDH is the equivalent planned derated hours, including Planned Derations (PD) and Maintenance Derations (D4). A Planned Deration is when the Facility experiences a Deration scheduled well in advance and for a predetermined duration. A Maintenance Deration is a Deration that can be deferred beyond the end of the next weekend (Sunday at midnight or before Sunday turns into Monday) but requires a reduction in capacity before the next Planned Deration (PD). Each individual Deration is transformed into equivalent full outage hour(s) by multiplying the actual duration of the Deration (hours) by (i) the size of the reduction (MW) divided by (ii) Maximum Rated Output. These equivalent hour(s) are then summed.

EUDH is the equivalent unplanned derated hours. An Unplanned Deration

(Forced Derating) occurs when the Facility experiences a Deration that requires a reduction in availability before the end of the nearest following weekend. Unplanned Derations include only those due to Seller-Attributable Unavailability or those by Company pursuant to **Section 12.1** (Failure to Comply; Seller-Attributable Unavailability). Each individual Unplanned Deration is transformed into equivalent full outage hour(s) by multiplying the actual duration of the Deration (hours) by (i) the size of the reduction (MW) divided by (ii) the Maximum Rated Output. These equivalent hour(s) are then summed.

A “Deration” exists when, due to Seller-Attributable Unavailability, the Facility is available but at less than full capacity. Each individual Deration is transformed into equivalent full outage hour(s) by multiplying the actual duration of the derating (hours) by the size of the reduction (MW) and dividing by the Maximum Rated Output. These equivalent hour(s) are then summed.

ExcludedTime is unavailability as a result of the entire Facility or a portion thereof being unavailable due to Force Majeure. The hours and/or equivalent hours of ExcludedTime shall not be added to Available Hours and shall be subtracted from Period Hours. Each event that counts as ExcludedTime is transformed into equivalent full outage hour(s) by multiplying the actual duration of the event by the size of the reduction (MW) and dividing by Maximum Rated Output. These hour(s) are then summed.

The effect of Force Majeure is taken into account in calculating the Annual EAF over a twelve (12) calendar month period as follows: When such 12-month period contains a month during which the Facility or a portion thereof is unavailable due to Force Majeure, then such month shall be excluded from the twelve (12) month period and the calculation period shall be extended back in time to include the next previous month during which there was no such unavailability of the Facility or a portion thereof due to Force Majeure.

The following examples are provided as illustrative examples only:

Example A: The Facility was continuously available, with no maintenance or Unplanned (Forced) Derations. In this case AH = 8760, EPDH and EUDH = 0 hours

$$\text{Annual EAF} = 100\% \times \frac{8,760 - 0}{8,760} = 100\%$$

Example B: Maintenance Deration Hours = 168 hours

Equivalent Unplanned (Forced) Derated Hours = 100 hours

$$\text{AH} = 8,760 - 168 = 8,592$$

$$\text{Annual EAF} = 100\% \times \frac{8,592 - 100}{8,760} = 96.9\%$$

ATTACHMENT V
ANNUAL EQUIVALENT FORCED OUTAGE FACTOR

$$EFOF = 100\% \times \frac{(FOH + EUDH)}{8760}$$

Where:

EUDH is the equivalent unplanned (forced) derated hours. Each Unplanned (Forced) Deration of the Facility is transformed into equivalent full outage hour(s). This is calculated by multiplying the actual duration of the Deration (hours) by (i) the size of the reduction (MW) divided by (ii) the Maximum Rated Output. These equivalent hour(s) are then summed for the Measurement Period and added to the sum of the EUDH for the immediately preceding three (3) full Measurement Periods.

- (Hours of Deration x Size of Reduction) ÷ Maximum Rated Output

Forced Outage Hours (FOH) = Sum of all hours experienced during Forced Outages during the applicable Measurement Period and the sum of all hours experienced during Forced Outages during the immediately preceding three (3) full Measurement Periods, in each case caused by Seller-Attributable Unavailability.

Unplanned (Forced) Derating: A Deration that requires a reduction in capacity of the Facility before the end of the nearest following weekend.

Unplanned (Forced) Outage: An outage that requires removal of the entire Facility from service before the end of the nearest following weekend that is not planned.

EXAMPLE CALCULATION:

Assume a 50 MW Facility that for the Measurement Period in question was completely out of service for 50 hours. For the Measurement Period in question, it also had the following deratings:

<u>Duration of Derating</u>	<u>MW Size Reduction</u>
100 Hours	25 MW
20 Hours	20 MW
50 Hours	5 MW

During the three preceding Measurement Periods, the Facility had a total of 150 Forced Outage Hours and a total of 100 Equivalent Forced Derated Hours.

FOH = 50 hours + 150 hours = 200 hours

EUDH = [(100 x 25) ÷ 50] + [(20 x 20) ÷ 50] + [(50 x 5) ÷ 50] + 100 = 163 hours

$$EFOF = 100\% \times \frac{(200 + 163)}{8760} = 4.1\% \quad \textbf{ATTACHMENT W}$$

**SUMMARY OF MAINTENANCE AND INSPECTION PERFORMED
IN PRIOR CALENDAR YEAR**

(See **Article 13**)

DATE WORK ORDER SUBMITTED: 06/28/96

WO#: 11451

EQUIPMENT #: 1CCF-TNK-1

EQUIPMENT DESCRIPTION: AMMONIA STORAGE TANK 1

PROBLEM DESCRIPTION: PURCHASE EMERGENCY ADAPTER FITTINGS FOR
UNLOADING GASPRO TANKS TO STORAGE TANK

WORK PERFORMED: PURCHASED THE NEW ADAPTERS AND VERIFIED THEIR
OPERATION.

COMPLETION DATE: 06/28/96

WORK ORDER COMPLETED BY: AA

-----END OF CURRENT WORK ORDER-----

DATE WORK ORDER SUBMITTED: 05/19/96

WO#: 11136

EQUIPMENT #: 1WSA-BV-12

EQUIPMENT DESCRIPTION: MAKE-UP PI ISOLATION

PROGRAM DESCRIPTION: 'D' MAKE-UP PUMP PI ISOLATION FITTING LEAKING ON
SPOOL SIDE

WORK PERFORMED: REMOVED AND REPLACED FITTINGS AND FLANGES WITH
STAINLESS STEEL. THIS WORK WAS DONE DURING PUMP OVERHAUL ON WO
1374. JH

COMPLETION DATE: 06/28/96

WORK ORDER COMPLETED BY: BB

-----END OF CURRENT WORK ORDER-----

[This Attachment sets forth the terms and conditions which shall apply if Seller elects to utilize a Company-owned Site.]

ATTACHMENT X **COMPANY-OWNED SITE**

1. Description of Company-Owned Site.

(a) **General.** At the request of Seller, Company shall make available to Seller an area on Company's property to allow performance of Seller's obligations under this Agreement, provided that Company shall make available only as much acreage as necessary for Seller's performance (the "**Company-Owned Site**").

(i) **During Construction of the Facility.** During such time as Seller is actively constructing the Facility, the Company shall make available a reasonable area on Company's property, as determined by Company, for Seller's construction activities, which shall be no larger than _____ acres, as shown on the site plan attached as **Exhibit X.1** (Site Plan) to this **Attachment X** (Company-Owned Site). The Company shall work with Seller to physically demarcate, at Seller's expense, the boundaries of the area that will be made available to Seller during construction of the Facility.

(ii) Upon Completion of the Facility.

(A) Upon Seller's completion of the Facility, Company shall make available to Seller only as much area as necessary for ongoing operation of the Facility under the terms of this Agreement. The Company shall work with Seller to physically demarcate, at Seller's expense, the boundaries of the area that will be made available to Seller for the remainder of the Term after Seller's completion of the Facility.

(B) Upon Seller's request during the Term of this Agreement, Company, in its sole discretion, may make available to Seller additional acreage, on a temporary basis, for Seller's maintenance, repair or replacement of the Facility, or any portion thereof, on an as-needed basis; provided, however, that the additional acreage shall not exceed the boundaries of the area shown on the site plan attached as **Exhibit X.1** (Site Plan) to this **Attachment X** (Company-Owned Site). At any time during the Term, the actual available area that may be available to Seller for such maintenance, repair or replacements activities may change in accordance with the Company's needs and then-current utilization plans for the area, all of which the Company hereby reserves in its sole and absolute discretion.

(b) **Utilization of Site.** Seller shall utilize the Company-Owned Site solely in connection with and for the purposes of constructing a Facility and meeting Seller's obligations to Company under this Agreement. Seller waives and relinquishes any right it may have under Title 11, United States Code, and any other or successor state or federal statute relating to assignment for the benefit of creditors, appointment of a receiver or trustee, bankruptcy, composition, insolvency, moratorium, reorganization, or similar matters ("**Bankruptcy Law**"), in any proceeding, whether voluntary or

involuntary, under any Bankruptcy Law, or otherwise to assert the Company-Owned Site should be used for any purpose other than in connection with and for the purposes of meeting Seller's obligations under this Agreement.

2. Security and Access to Site.

(a) During Construction of the Facility.

(i) Security. During such time as Seller is actively constructing the Facility, Seller at its option may secure the Company-Owned Site with fencing and gates to prevent unauthorized persons or vehicles from entering or crossing through the Company-Owned Site and/or adjacent lands owned or operated by Company. Such fencing and gating shall require the prior written approval of the Company before erecting such fencing and gating.

(ii) Access to Company-Owned Site. During such time as Seller is actively constructing the Facility, Company shall provide access to the Company-Owned Site through a separate contractor's entrance, if available, or through other reasonable means as may be determined by Company in its sole discretion.

(b) Upon Completion of the Facility.

(i) Secured Facility. Seller shall secure the Facility on the Company-Owned Site and prevent access to the Facility by unauthorized personnel in the same matter or higher as Company secures its power generating facilities in the county in which the Company-Owned Site is located. Notwithstanding Company's then current security procedures for its other facilities, in the event of security concerns as may be determined by the Company's security personnel, Company may require Seller to temporarily maintain personnel at the Company-Owned Site 24 hours a day 7 days a week to monitor the security and safety of the Company-Owned Site and Facility.

(ii) Limited Access to Company-Owned Site. Seller shall maintain barriers on the Company-Owned Site to prevent unauthorized persons or vehicles from entering or crossing through the Company-Owned Site and/or adjacent lands owned or operated by Company.

(c) Personnel. At all times during the Term of this Agreement, Seller shall conduct security and background checks on all Seller representatives, employees, independent contractors, agents, and other persons who will be allowed access to the Facility by Seller and shall require all such persons to take periodic drug tests. Seller shall not allow on the Company-Owned Site any persons who do not pass such security checks or drug tests. Due to the critical nature of Company's operations where the Company-Owned Site is situated, Seller agrees that if Company, in its sole discretion and after reasonable consultation with Seller, determines that the continued presence of any Seller representative, employee, contractor or agent on Company property is not consistent with the best interests of Company, then in such an instance Company may request that Seller remove such representative, employee, contractor or agent from the Company-Owned Site and Seller shall forthwith comply with such request. Seller may replace such representative, employee, contractor or agent with another who meets Company's standards at no additional cost to

Company.

(d) Access and Inspection. At all times during the Term of this Agreement, Company and its agents, representatives, and designees may enter the Company-Owned Site upon reasonable notice for any reason, including but not limited to the following: to (a) ascertain whether Seller is complying with this Agreement; (b) cure any failure of Seller to comply with this **Attachment X** (Company-Owned Site); (c) inspect the Company-Owned Site and any construction or improvements, including the Facility; (d) perform such tests, borings, and other analyses as Company determines may be necessary or appropriate relating to (non)compliance with any Laws or possible Hazardous Substances Discharge (hereinafter defined). Company and its designees shall not unreasonably interfere with operations of the Facility and shall comply with Seller's reasonable instructions.

3. Compliance

(a) Generally. Seller shall, at Seller's expense, in all material respects: (i) comply with all Laws, ordinances, requirements, orders, proclamations, directives, rules, and regulations of any Governmental Authority affecting the Company-Owned Site; (ii) comply with all rules regulating the use of and activities and conduct upon the Company's property, including the Company-Owned Site, as may be established and amended from time to time by the Company in its sole discretion; (iii) comply with the covenants, conditions, and restrictions set forth in any documents recorded against the Company-Owned Site; (iv) procure any and all licenses, permits (including building, demolition, alteration, use, and special permits), approvals, consents, certificates (including certificate(s) of occupancy), rulings, variances, authorizations, or amendments to any of the foregoing as shall be necessary or appropriate under any Laws to construct and operate the Facility and to perform repair, alteration, demolition, or other work affecting the Facility ("**Approvals**"); and (v) comply with all Approvals.

(b) Notice of Inspections. Seller shall give Company notice of any proposed inspection of the Company-Owned Site or the Facility by any Governmental Authority immediately upon Seller's receipt of notice of such inspection.

4. Seller's Investigation of the Company-Owned Site.

(a) Investigations and Reports. Seller shall make such independent investigations as Seller deems necessary or appropriate concerning Seller's utilization of the Company-Owned Site for the purposes of meeting Seller's obligations under this Agreement. Notwithstanding the foregoing, if Seller wishes to conduct an environmental or soil assessment on the Company-Owned Site, including but not limited to any Baseline Assessment conducted under **Section 7(a)** (Baseline Assessment) of this **Attachment X** (Company-Owned Site), Company shall select the environmental or engineering consultant to conduct the investigation and shall contract with the consultant to provide the report at Seller's cost. The provision of any such report to Seller shall be subject to the confidentiality provisions of **Section 7(l)** (Confidentiality) of this **Attachment X** (Company-Owned Site).

(b) Permits, Assurances, and Approvals. Seller agrees to provide Company

with copies of all permits, Approvals and assurances pertaining to Seller's construction on the Company-Owned Site, including but not limited to building and grading permits, special management area permits, assurances from Governmental Authorities, utility commitments and service agreements, and any permits, Approvals or assurances regarding the development or use of water, roadways, utilities or other infrastructure.

(b) Acceptance of Company-Owned Site. Seller acknowledges that it has, or has had the opportunity, to inspect carefully the Company-Owned Site, and accepts the Company-Owned Site in AS IS condition WITH ALL FAULTS. Seller further acknowledges that neither Company nor its agents or employees have made any representations or warranties of any kind whatsoever as to the suitability or fitness of the Company-Owned Site for the construction or operation of the Facility or for any other purpose, nor has Company or its agents or employees agreed to make any repairs, undertake any alterations, or construct any improvements on or with respect to the Company-Owned Site other than such Company-Owned Interconnection Facilities as Company has or may agree to build or install.

(c) No Company Services. Seller acknowledges and agrees that Company is under no obligation to provide any services such as security, water, utilities or infrastructure to the Company-Owned Site.

5. Construction, Maintenance and Interference.

(a) Construction. At Seller's sole cost and expense, Seller shall construct the Facility in accordance with the requirements of this Agreement. Seller shall not commence any demolition, construction, reconstruction, restoration, or other work affecting the Company-Owned Site, including construction of the Facility ("Construction") until it has the applicable necessary Approvals. Prior to commencement of any Construction, Seller shall cause each entity involved in such Construction, who is a direct contractor of Seller and who has mechanic lien rights under Chapter 507 of the Hawaii Revised Statutes, to deliver to Company a performance and payment bond in a form acceptable to Company and from a surety reasonably acceptable to Company, covering the faithful performance of such entity's contract with the Seller and the payment of all obligations arising thereunder, and naming Company as an obligee. Seller shall complete Construction of the Facility within the time periods required by this Agreement. Seller shall pay for all Construction when and as required by the parties that perform such Construction. All improvements that Seller constructs on the Company-Owned Site other than Company-Owned Interconnection Facilities shall be the property of the Seller for the Term of this Agreement.

(b) Plans and Specifications. Seller shall promptly provide Company with plans and specifications or surveys (including working plans and specifications and "as-built" plans and specifications and surveys) for any Construction.

(c) Applications. Upon Seller's request, Company shall, without cost to Company, promptly join in and execute any Application (hereinafter defined) as Seller reasonably requests, provided that: (i) such Application is in customary form and imposes no material obligations (beyond obligations ministerial in nature or merely

requiring compliance with applicable Laws) upon Company; (ii) no uncured Event of Default exists; and (iii) Seller reimburses Company's attorneys' fees and costs. Promptly upon Seller's request and without charge (except reimbursement of Company's attorneys' fees and costs), Company shall furnish all information in its possession that Seller reasonably requests for any Application. For the purposes of this **Attachment X** (Company-Owned Site), "**Application**" shall mean any agreement, application, certificate, document, or submission (or amendment of any of the foregoing): (i) necessary or appropriate for any Construction allowed under this **Attachment X** (Company-Owned Site), including any application for any building permit, certificate of occupancy, utility service or hookup, easement, covenant, condition, restriction, subdivision plat, or such other instrument as Seller may from time to time reasonably request for such Construction; (ii) to enable Seller from time to time to seek any Approval or to use and operate the Facility in accordance with this Agreement; or (iii) otherwise reasonably necessary and appropriate to allow Seller to meet its obligations under this **Attachment X** (Company-Owned Site).

(d) Obligation to Maintain. Seller shall remove trash and debris from the Company-Owned Site and the adjoining sidewalk, if any, and maintain them in a reasonably clean condition.

(e) Interference. The Company-Owned Site is located on or adjacent to property and infrastructure owned and operated by Company. Seller acknowledges and agrees that such property and infrastructure includes Company's existing communications configurations, equipment, and frequencies that exist on or adjacent to the Company-Owned Site as of the Effective Date ("**Pre-existing Communications**"). Seller shall not construct, install, operate, use, maintain, repair, or remove any new or existing equipment that will materially interfere with the Pre-existing Communications and shall be responsible for resolving any technical interference problems between the Facility and the Pre-existing Communications. Seller additionally agrees to ensure that the Facility complies with any commercially reasonable communications requirements, specifications or rules developed by Company and provided to Seller with respect to the Company-Owned Site throughout the Term of this Agreement. Seller shall inform and obtain Company's prior written approval before replacing any of its communications equipment or communications service providers (including internet equipment and internet service providers).

6. Prohibited Liens.

(a) Seller's Covenant. Seller shall not permit any mechanic's, vendor's, laborer's, or material supplier's statutory lien or other similar lien arising from work, labor, services, equipment, or materials supplied, or claimed to have been supplied, to Seller (or anyone claiming through Seller) ("**Prohibited Lien**") to attach to the Company-Owned Site or to any adjacent land owned by the Company. If a Prohibited Lien is filed, Seller shall, within 30 Days after receiving notice from Company of such filing (but in any case within 15 Days after Company notifies Seller of commencement of any application for a mechanic's lien or foreclosure proceedings), commence appropriate action to cause such Prohibited Lien to be paid, discharged, bonded, or cleared from title. Seller shall thereafter prosecute such action with reasonable diligence and continuity. If Company receives notice of any such filing, then Company shall promptly notify Seller. Nothing in this Agreement shall be construed to obligate

Seller regarding any lien that results from any act or omission by Company.

(b) **Protection of Company.** Nothing in this Agreement shall be deemed or construed in any way to constitute Company's giving Seller any right, power or authority to contract for, or permit the rendering of, any services, or the furnishing of any materials that would give rise to the filing of any liens against the Company-Owned Site. Seller shall indemnify Company against any claims arising out of Construction undertaken by Seller or anyone claiming through Seller, and against all Prohibited Liens.

7. **Hazardous Substances.**

(a) **Baseline Assessment.** At Seller's request, Company shall obtain a Phase I and/or Phase II Environmental Assessment (hereinafter defined), at Seller's sole cost, revealing the environmental conditions of the Company-Owned Site prior to Seller's commencement of Construction on the Company-Owned Site ("**Baseline Assessment**") and, subject to the confidentiality provisions of **Section 7(l)** (Confidentiality) of this **Attachment X** (Company-Owned Site), shall provide Seller with a copy of the results of the Baseline Assessment. Any Hazardous Substances (hereinafter defined) not disclosed in any Baseline Assessment and discovered on the Company-Owned Site after the Effective Date shall be presumed to be present as a result of Seller's utilization of the Company-Owned Site during the Term, unless Seller shall prove, by clear and convincing proof, that the Hazardous Substances: (i) were present on the Company-Owned Site prior to the Term; (ii) migrated onto the Company-Owned Site as the result of the activities of a third party; or (iii) are present on the Company-Owned Site as the result of Company's improper actions.

(i) For the purposes of this **Attachment X** (Company-Owned Site): (A) "**Phase I Environmental Assessment**" means an environmental assessment and report prepared by a qualified environmental professional reasonably acceptable to Company that meets or exceeds the minimum requirements outlined in the then current version of the American Society of Testing and Materials Standard E 1527-00 (Standard Practice of Environmental Site Assessments: Phase I Environmental Site Assessment Process); and (B) "**Phase II Environmental Assessment**" means an environmental assessment and report prepared by a qualified environmental professional reasonably acceptable to Company that goes beyond the investigations of a Phase I Environmental Assessment and involves sampling and testing of the Company-Owned Site, including (1) an asbestos survey conducted according to the standards of the Asbestos Hazard Emergency Response Act protocol; (2) testing of any transformers on the Company-Owned Site for PCBs; (3) testing for lead based paints; (4) soil and groundwater sampling to measure the effect of any actual or suspected release or discharge of Hazardous Substances on the Company-Owned Site; and (5) such other sampling and testing reasonably necessary to determine the environmental condition of the Company-Owned Site.

(ii) For the purposes of this **Attachment X** (Company-Owned Site), "**Hazardous Substances**" shall include flammable substances, explosives, radioactive materials, asbestos, asbestos-containing materials, polychlorinated biphenyls, chemicals known to cause cancer or reproductive toxicity, pollutants, contaminants, hazardous wastes, medical wastes, toxic substances or related materials, petroleum

and petroleum products, and any “hazardous” or “toxic” material, substance or waste that is defined by those or similar terms or is regulated as such under any Laws, including any material, substance or waste that is: (A) defined as a “hazardous substance” under Section 311 of the Water Pollution Control Act (33 U.S.C. §1317), as amended; (B) defined as a “hazardous waste” under Section 1004 of the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §6901, et seq., as amended; (C) defined as a “hazardous substance” or “hazardous waste” under Section 101 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Reauthorization Act of 1986, 42 U.S.C. §9601 et seq. or any so-called “superfund” or “superlien” law; (D) defined as a “pollutant” or “contaminant” under 42 U.S.C. §9601(33); (E) defined as “hazardous waste” under 40 C.F.R. Part 260; (F) defined as a “hazardous chemical” under 29 C.F.R. Part 1910; or (G) subject to any other Laws regulating, relating to or imposing obligations, liability or standards of conduct concerning protection of human health, plant life, animal life, natural resources, property or the enjoyment of life or property free from the presence in the environment of any solid, liquid, gas, odor or any form of energy from whatever source.

(b) Compliance with Environmental Law. Seller shall keep and maintain the Company-Owned Site, including the land, the air above the land, the surface and run-off water on the land, and the groundwater under the land, in compliance with, and shall not cause or permit the Company-Owned Site or any portion of the Company-Owned Site to be in violation of any Laws regarding: (i) air, environmental, ground water, or soil conditions; or (ii) clean-up, control, disposal, generation, storage, release, transportation, or use of, or liability or standards of conduct concerning, Hazardous Substances (“**Environmental Law**”).

(c) Use of Hazardous Substances. Seller shall not cause or allow any deposit, discharge, generation, release, or spill of Hazardous Substances at or from the Company-Owned Site, or that arises at any time from Seller’s operation of the Facility or any activities conducted on the Company-Owned Site or any adjacent or nearby real property, or resulting from seepage, leakage, or other transmission of Hazardous Substances from other real property to the Company-Owned Site, whether or not caused by Seller or the Company and whether occurring before or after the Effective Date (“**Hazardous Substances Discharge**”), except (i) in the ordinary course of Seller’s business (ii) in accordance with the instructions of the manufacturer and for the purpose described in such instructions, and (iii) in strict compliance with all applicable Environmental Law. Seller shall not install or remove any tank or combination of tanks (including pipes connected to the tanks) used to contain an accumulation of Hazardous Substances, and the volume of which (including the volume of the underground pipes connected to the tanks) is ten percent or more beneath the surface of the ground (“**Underground Storage Tank**”) on, within, under or about the Company-Owned Site without first obtaining Company’s written approval. Seller shall not accept hazardous waste (as defined under any Environmental Law) generated off the Company-Owned Site for any purpose, including treatment, storage or disposal.

(d) List of Hazardous Substances. On the Effective Date and on each anniversary of the Effective Date, and at any other time Company requests, Seller shall provide Company with a written list identifying any Hazardous Substances then

used, stored, or maintained upon the Company-Owned Site, the use and approximate quantity of each such material, a copy of any material safety data sheet (MSDS) issued by the manufacturer thereof, written information concerning the removal, transportation, and disposal of the same, and such other information as Company may reasonably require or as may be required by Law.

(e) Notice of Disturbance of Any Hazardous Substances. Seller shall provide Company 30 Days' prior notice before commencing any activities, including repair or remodeling of the Facility or the Company-Owned Site or installation or removal of any personal property from the Company-Owned Site, which could result in the disturbance of any Hazardous Substances. Together with such notice, Seller shall advise Company of protective measures to be taken by Seller to ensure that Hazardous Substances shall not be released and to ensure compliance with Environmental Law. Seller shall comply with all reasonable conditions (including adequate assurance of financial resources to comply with Environmental Law) that may be imposed by Company in connection with Seller's proposed activities.

(f) Hazardous Substances Claims. Seller shall immediately notify Company of: (i) any Hazardous Substances Claims (hereinafter defined); or (ii) Seller's discovery of any occurrence or condition of the Company-Owned Site which could subject Seller or Company to any liability, or restrictions on ownership, occupancy, transferability or use of the Company-Owned Site under any Environmental Law. For the purposes of this **Attachment X** (Company-Owned Site), "**Hazardous Substances Claims**" shall mean (i) any actual, alleged or threatened Hazardous Substances Discharge; (ii) any and all enforcement, cleanup, removal, mitigation, remediation or other government actions instituted, contemplated or threatened pursuant to Environmental Law affecting the Company-Owned Site; and (iii) all claims made or threatened by any third party against Seller or the Company-Owned Site relating to damage, contribution, cost recovery, compensation, loss or injury resulting from any Hazardous Substances.

(g) Remediation and Removal. Except for the use of Hazardous Substances permitted by this **Attachment X** (Company-Owned Site), Seller shall cause any Hazardous Substances Discharge to be: (i) remediated on-site in accordance with applicable Environmental Law; or (ii) removed from the Company-Owned Site for remediation or disposal and to be transported solely by duly licensed Hazardous Substances transporters to duly licensed disposal facilities for final disposition to the extent required by and in accordance with applicable Environmental Law. Seller shall deliver to Company copies of any hazardous waste manifest reflecting the proper disposition of such Hazardous Substances. Except in emergencies or as otherwise required by Law, Seller shall not take any remedial or removal action in response to a Hazardous Substances Discharge without first notifying Company.

(h) Proceedings on Hazardous Substances Claims; Indemnity. Seller shall not enter into any legal proceeding or other action, settlement, consent decree or other compromise with respect to any Hazardous Substances Claims without first notifying Company of Seller's intention to do so and affording Company the opportunity to join and participate as a party if Company so elects in such proceedings. Seller shall be solely responsible for and shall indemnify Company

against any Hazardous Substances Claims, including: (i) the costs of any required or necessary removal, repair, cleanup or remediation of the Company-Owned Site, and the preparation and implementation of any closure, removal, remedial or other required plans; and (ii) all reasonable costs and expenses incurred by Company in connection therewith, including legal costs.

(i) Assurance of Performance.

(i) Company's Phase II Environmental Assessment. Company may, but shall not be required to, engage such contractors as Company determines to be appropriate to perform from time to time a Phase II Environmental Assessment, including environmental sampling and testing, of: (A) the Company-Owned Site, the surrounding soil and any adjacent areas, and any ground water located under or surface water located adjacent to the Company-Owned Site or any adjoining property; (B) Seller's compliance with all Environmental Law and the provisions of this Attachment X (Company-Owned Site); and (C) the provisions made by Seller for carrying out any removal or remedial action that may be required by reason of the nature of Seller's business and operations on the Company-Owned Site.

(ii) Cost of Assessment. All costs and expenses incurred by Company in connection with any such Phase II Environmental Assessment shall be paid by Company, except that if any such Phase II Environmental Assessment shows that: (A) the environmental condition of the Company-Owned Site has materially declined in comparison to any Baseline Assessment; (B) Seller has failed to comply with the provisions of this Attachment X (Company-Owned Site) with respect to Hazardous Substances; (C) the Company-Owned Site (including surrounding soil and any underlying groundwater or adjacent surface water) has become contaminated due to operations or activities not attributable to the Company; or (D) an event that is the basis for a Hazardous Substances Claim occurred during the Term, then all of the costs and expenses of such assessment shall be paid by Seller.

(iii) Conducting Assessment. Each Phase II Environmental Assessment shall be conducted: (A) only after advance notice of such assessment has been provided to Seller at least 10 Days prior to the date of the assessment; and (B) in a manner reasonably designed to minimize the interruption of Seller's operations and use of the Company-Owned Site. Company shall repair any substantial damage to the Company-Owned Site or to the Facility that is directly caused by Company (but not the environmental consultant) during the Phase II Environmental Assessment.

(j) Seller's Obligations Prior to End of Term.

(i) Seller's Phase I and Phase II Environmental Assessment Deposit. No later than 18 months prior to the date upon which this Agreement terminates, i.e., the end of the Term, Seller shall deposit with Company a sum equal to the then current estimated cost of conducting a Phase I and Phase II Environmental Assessment of the Company-Owned Site. Company shall hold such sum for Seller and shall apply or reimburse such sum as provided in this section.

(ii) Phase I (or Phase II) Environmental Assessment.

(A) No later than the beginning of the last year of the Term, or immediately upon earlier termination of the Term, Company shall cause a Phase I Environmental Assessment of the Company-Owned Site to be conducted and may apply the sums previously deposited by Seller to pay for such assessment.. If the assessment costs more than the amount of the deposit, Seller shall pay to Company, upon demand, the difference. If the assessment costs less than the amount of the deposit, and if the Phase I Environmental Assessment does not identify areas of concern that in Company's reasonable judgment indicate that further investigation is required, Company shall, no later than 30 Days after payment in full of the cost of the Phase I Environmental Assessment, return to Seller a sum equal to the amount by which the deposit exceeds the actual costs of such assessment. In addition, no later than the end of the Term, Seller shall (1) cause all Hazardous Substances previously owned, stored or used by Seller to be removed from the Company-Owned Site and disposed of in accordance with all Environmental Law; and (2) remove any Underground Storage Tanks or other containers installed or used by Seller to store any Hazardous Substances on the Company-Owned Site, and repair any damage to the Company-Owned Site caused by such removal.

(B) If Company's Phase I Environmental Assessment identifies areas of concern that in Company's reasonable judgment indicate that further investigation is required, Company shall cause a Phase II Environmental Assessment of the Company-Owned Site to be conducted and may apply the sums previously deposited by Seller to pay for such assessment. If the assessment costs more than the amount of the deposit, Seller shall pay to Company, upon demand, the difference. If the assessment costs less than the amount of the deposit, Company shall, no later than 30 Days after payment in full of such costs, return to Seller a sum equal to the amount by which the deposit exceeds the actual costs of such assessment. Seller expressly acknowledges and agrees that Seller's covenant and obligation to pay all costs and expenses associated with any Phase II Environmental Assessment required under this section, whether commissioned by Seller or Company, shall survive termination of this Agreement.

(k) Clean-up.

(i) **Environmental Report.** If any written report containing results of any Phase I Environmental Assessment ("**Environmental Report**") shall: (A) reveal that the environmental condition of the Company-Owned Site has materially declined in comparison to the Baseline Assessment; or (B) Seller has materially violated any warranty, representation, or covenant of this **Attachment X** (Company-Owned Site); or (C) recommend the repair, closure, remediation, removal or other clean-up (collectively, the "**Clean-up**") of any Hazardous Substances found on or about the Company-Owned Site, and if Company determines that Seller is responsible for such Clean-up, then:

(A) Company shall provide Seller with a copy of such Environmental Report and with a written explanation of the reasons why Company believes that Seller is responsible under the principles of this section for conducting the Clean-up identified in such Environmental Report.

(B) If, within 30 Days after receiving a copy of such

Environmental Report and such written statement, Seller fails either (1) to complete the Clean-up, or (2) with respect to any Clean-up which cannot be completed within such 30-Day period, fails to proceed with reasonable diligence to complete such Clean-up as promptly as practicable, then Company shall have the right, but not the obligation, to carry out any Clean-up recommended by the Environmental Report or required by any Governmental Authority, and to recover all of the costs and expenses of such Clean-up from Seller from the date Company incurred such costs and expenses until paid in full.

(ii) Emergency. If the Environmental Report reveals a situation which, in Company's sole discretion, constitutes an emergency, then Company shall have the right, but not the obligation, to carry out any Clean-up recommended by the Environmental Report or required by any Governmental Authority, and to recover all of the costs and expenses of such Clean-up from Seller from the date Company incurred such costs and expenses until paid in full.

(iii) Submission of Report to Government. To the extent required by Laws, Company shall be entitled to submit the Environmental Report to any Governmental Authority.

(iv) Completion of Clean-up Before Termination. Seller shall complete Clean-up prior to termination of this Agreement, and shall fully comply with all Environmental Law and requirements of any Governmental Authority over the Clean-up, including any requirement to file such assessment, mitigation plan, risk assessment or other information with any such Governmental Authority prior to such termination.

(v) Seller's Inability to Complete. Should any such Clean-up for which Seller is responsible not be completed or should Seller not receive any Approvals regarding the Company-Owned Site or areas adjacent to the Company-Owned Site required under Environmental Law prior to the expiration or sooner termination of this Agreement, including any extensions of this Agreement, then Seller shall deposit with Company an amount of money equal to the balance of the estimated costs of the Clean-up.

(I) Confidentiality.

(i) Keeping Information Confidential. Except if required to do so by Law, or compelled by subpoena or discovery proceedings in any legal action or governmental proceeding, Seller agrees that Seller shall not disclose, discuss, disseminate or copy any information, data, findings, communications, conclusions and reports regarding the environmental condition of the Company-Owned Site, to any person, including any Governmental Authority, without the prior written consent of Company. Upon completion of any Clean-up of the Company-Owned Site, Seller shall deliver and return to Company, all information, data, findings, communications, conclusions and reports regarding the environmental condition of the Company-Owned Site whether provided to Seller by Company or not.

(ii) Scope of Obligation. Seller's obligation to maintain the confidentiality of all information, data, findings, communications, conclusions and

reports regarding the environmental condition of the Company-Owned Site, include but are not limited to Seller's officers, employees, agents, attorneys, environmental consultants and contractors. Seller's obligation to maintain the confidentiality of all information, data, findings, communications, conclusions and reports regarding the environmental condition of the Company-Owned Site, shall survive the termination of this Agreement.

(m) Copies of Environmental Reports. Seller shall provide Company with a copy of any and all environmental assessments, audits, studies and reports regarding Seller's past or current activities on the Company-Owned Site or the environmental condition of the Company-Owned Site within 30 Days of Seller's receipt of such materials. Seller shall be obligated to provide Company with a copy of such materials without regard to whether they are generated by Seller or prepared for Seller, or how Seller comes into possession of such materials.

(n) Survival of Agreements. The covenants of this section, including the indemnification provision, shall survive the expiration or termination of this Agreement, or any termination of Seller's utilization of the Company-Owned Site.

8. Archeological and Historical Items.

(a) Discovery of Items. In the event any human remains, artifacts, historical items, or any of them (collectively the "Discovered Items") are discovered on the Company-Owned Site, Seller shall, at Seller's sole expense and subject to the approval of Company, be responsible to: (i) cause all excavation in the immediate area which may damage the Discovered Items and the potential historic site to cease; (ii) cause the site to be stabilized and secured to temporarily protect the Discovered Items against damage, theft, or both; (iii) cause the Discovered Items to be left untouched so that their archaeological or historical context may be accurately documented; and (iv) cause the discovery to be reported immediately to Company and to Governmental Authorities as required by applicable Laws. If the artifacts or historical items are found without human remains, and leaving the artifacts or historical items in their stabilized and secured site poses a substantial risk of loss or damage to all or part of them, and their removal is therefore necessary, Seller shall cause such removal and shall cause any tampering with the artifacts, the historical items, and the site to be minimized as much as possible.

(b) Human Remains. In the case of the discovery of human remains, Seller shall, at Seller's sole expense and in addition to the duties set forth in this section, cause to be prepared and executed a mitigation plan acceptable to Company and to Governmental Authorities possessing jurisdiction over such matters. Seller shall also be responsible to obtain written verification that the mitigation plan has been successfully implemented.

(c) Company's Reservation. If any Discovered Items are discovered, then Company shall have the right at all reasonable times to enter the Company-Owned Site upon reasonable notice for the purposes of searching for, exploring for, and removing any of the Discovered Items for preservation as permitted by applicable Laws. All objects, antiquities and specimens of Hawaiian or other ancient art or handicraft or of prehistoric, historic or archaeological interest found on the Company-

Owned Site belong to and at all times shall remain the property of Company.

(d) **No Studies by Seller.** No archaeological studies or historic preservation studies may be sought to be conducted in or on the Company-Owned Site by Seller or anyone acting by or through Seller. If Seller wishes to conduct such studies, or if Seller is required by applicable Laws to permit such studies (Seller to provide bases for conclusion that such Laws mandate any such requested studies), Seller shall obtain Company's prior written consent and shall permit Company, at its option, to commission such studies as required, or Company may permit Seller to commission such studies provided that Seller shall provide Company with prior notice of the commencement of such studies. If Seller commissions such studies, Seller shall upon completion of such studies cause a complete copy of the results of such studies to be provided to Company at the earliest opportunity but no later than 15 days after its issuance.

9. **Transfers.**

(a) **Company's Right to Convey.** Company may transfer title to the Company-Owned Site from time to time at any time without prior notice to, or consent from, Seller, provided that any such transfer is subject to Seller's right to utilize the Company-Owned Site under this Agreement. Company will promptly notify Seller of such a transfer.

(b) **Seller's Limited Right.** Seller may only transfer the rights to utilize the Company-Owned Site under this **Attachment X** (Company-Owned Site) to a permitted assignee of all of the rights and obligations of the Seller under this Agreement. Any attempt by Seller to separately transfer the rights to utilize the Company-Owned Site under this **Attachment X** (Company-Owned Site) shall be void. Any permitted assignee of Seller shall assume all obligations and liabilities of Seller under this **Attachment X** (Company-Owned Site). No transfer shall affect any obligations of Seller or rights of Company under this **Attachment X** (Company-Owned Site).

10. **End of Term.**

(a) **Improvements.** Upon the termination of this Agreement, or in the event this Agreement is declared null and void under either **Section 2.3** (Interconnection Requirements Study), **Section 3.4** (Prior to Effective Date), **Section 24.3** (Time Period for PUC Submittal Date), or **Section 24.4** (Time Period for PUC Approval) of this Agreement ("**Agreement Termination**"), at Company's option: (i) all improvements on the Company-Owned Site shall become Company's property; or (ii) Seller shall, at its sole cost and expense, remove all Seller-constructed improvements, including the Facility, the Company-Owned Interconnection Facilities and the Seller-Owned Interconnection Facilities ("**Improvements**") from the Company-Owned Site, and, in conjunction with such removal, shall develop and implement a program to recycle, to the fullest extent possible, or to otherwise properly dispose of, all such removed infrastructure.

(b) **Seller's Removal of Improvements.** If Seller is required to remove the Improvements upon Agreement Termination, Seller shall have reasonable access to the Company-Owned Site for a period of up to 90 Days after termination of this Agreement

to dismantle, pack and remove the Improvements from the Company-Owned Site (the “Removal Period”). Seller shall work promptly and diligently to remove the Improvements. The Removal Period shall end upon Seller’s completion of removal of the Improvements from the Company-Owned Site. The terms and provisions of this Agreement shall apply during the Removal Period, including Seller’s obligations to provide insurance and to indemnify Company.

(c) Company’s Removal of Improvements. If Company determines that Seller is not making diligent efforts to remove the Improvements, or if Company has operational concerns over the removal of the Improvements, Company shall notify Seller of Company’s intention to remove the Improvements at Seller’s cost. Company shall notify Seller of Company’s election to have Seller remove the Improvements not later than 90 Days before the end of the Term.

(d) Restoration of the Company-Owned Site. After Agreement Termination and removal of Seller’s Improvements by Seller or by Company, as the case may be, Seller shall, at its sole cost and expense, restore the Company-Owned Site to its condition prior to Seller’s Construction. Restoration pursuant to this Section shall be completed within 90 Days of Agreement Termination, or as otherwise agreed to by both Parties in writing.

(e) Assignment of Rights. If Company exercise its option under **Section 10(a)** (Improvements) of this **Attachment X** (Company-Owned Site) to take title to the Improvements, Seller shall assign to Company, without recourse, and give Company copies or originals of, all assignable licenses, permits, contracts, warranties, and guarantees then in effect for the Facility.

(f) Orderly Transition. The parties shall cooperate to achieve an orderly transition of operations from Seller to Company without interruption, including delivery of such books and records (or copies thereof) as Company reasonably requires.

11. Miscellaneous.

(a) Modification. The parties reserve the right to modify this **Attachment X** (Company-Owned Site) by mutual agreement set forth in writing. Such modifications shall not be considered amendments to this Agreement requiring PUC approval.

(b) Security. Seller acknowledges and agrees that Seller’s performance under this **Attachment X** (Company-Owned Site) is secured by both the Development Period Security and the Operating Period Security. Any costs and expenses due to Company, or reimbursable to Company, may at Company’s option, be paid or reimbursed to Company from the applicable Development Period Security or Operating Period Security.

(c) Confidential Information. Without limitation of the obligations set forth elsewhere in this Agreement, each party (including its officers, directors, employees, representatives, brokers, attorneys and advisers) shall, except as otherwise provided by applicable Laws, or in connection with proceedings before the State of Hawaii Public Utilities Commission or other Governmental Authority with jurisdiction over the

Company-Owned Site or this Agreement, or in connection with the evaluation for financing, or as part of disclosure to its affiliates, attorneys, consultants, and advisers in order to conduct its business or proceedings to enforce this **Attachment X** (Company-Owned Site) or this Agreement, keep the contents of this **Attachment X** (Company-Owned Site) and any information related to the Company-Owned Site, Seller and the Seller's utilization of the Company-Owned Site pursuant to this **Attachment X** (Company-Owned Site) confidential, whether or not marked as "confidential" (collectively, the "**Confidential Information**"). The Confidential Information shall not include any information publicly known, or which becomes publicly known, other than through the acts of a party to the Agreement, or any of their respective officers, directors, employees, representatives, brokers, attorneys or advisers. Seller may retain possession of all or any part of the Confidential Information to the extent such Confidential Information relates solely to the Facility and Seller's operation of the Facility.

(d) **No Real Property Interest Conveyed.** Notwithstanding anything to the contrary contained herein, this Agreement shall not result in the conveyance or transfer to Seller, directly or indirectly, expressly or impliedly, or give rise to, any real property right, title, or interest.

DRAFTING NOTES:

- 1. ATTACHMENT X MAY BE REVISED TO ACCOUNT FOR MATTERS SUCH AS THE SPECIFICS OF THE SITE IN QUESTION, SELLER'S FACILITY AND ANY NECESSARY ACCESS ARRANGEMENTS THROUGH COMPANY'S FACILITIES.**
- 2. PROVISIONS OF THE AGREEMENT CONCERNING MATTERS SUCH AS LAND RIGHTS, SCOPE OF INDEMNIFICATION AND DRAWS UPON DEVELOPMENT PERIOD SECURITY OR OPERATING PERIOD SECURITY WILL BE REVISED TO ACCOUNT FOR ATTACHMENT X.**

EXHIBIT X.1

SITE PLAN

[TO BE DETERMINED]

Document comparison by Workshare Compare on Friday, July 12, 2019 9:57:28 AM

Input:	
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Document 2 ID	interwovenSite://HONDMS/General/7594057/1
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Rendering set	Standard

Legend:	
Insertion	
Deletion	
Moved from	
Moved to	
Style change	
Format change	
Moved deletion	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

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