

obligations under this Agreement, irrespective of whether such failure constitutes an Event of Default.

ARTICLE 16
DAMAGES IN THE EVENT OF TERMINATION BY COMPANY

- 16.1 Termination Due to Failure to Meet a Guaranteed Project Milestone Date. If the Agreement is terminated by Company pursuant to Section 13.4 (Damages and Termination), Company shall be entitled to Termination Damages calculated by multiplying the BESS Contract Capacity by \$50/kW.
- 16.2 Termination Due to an Event of Default. If the Agreement is terminated by Company in accordance with this Agreement due to an Event of Default where Seller is the Defaulting Party, Company shall be entitled to Termination Damages calculated by multiplying the BESS Contract Capacity by \$75/kW.
- 16.3 Liquidated Damages Appropriate. Each Party agrees and acknowledges that (i) the damages that Company would incur due to early termination of the Agreement pursuant to either Section 13.4 (Damages and Termination) or Section 15.4 (Rights of the Non-defaulting Party; Forward Contract) would be difficult or impossible to calculate with certainty, (ii) the Termination Damages are an appropriate approximation of such damages, and (iii) payment of Termination Damages does not relieve Seller of liability for costs and balances incurred prior to the effective date of such termination. The Termination Damages are the sole and exclusive remedy for Company's losses arising out of the termination of this Agreement pursuant Section 16.1 (Termination Due to Failure to Meet a Guaranteed Project Milestone Date) or Section 16.2 (Termination Due to an Event of Default). 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 under such sections, including, without limitation, Company's right to recover under Section 17.1 (Indemnification of Company).
- 16.4 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 16.4 (Consequential Damages) shall limit any of (i) the indemnification obligations of either Party under

Article 17 (Indemnification) of this Agreement, (ii) the liability of either Party for liquidated damages as set forth in this Agreement, (iii) 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 or (iv) the liability of either Party for gross negligence or intentional misconduct.

ARTICLE 17
INDEMNIFICATION

17.1 Indemnification of Company.

- (a) Indemnification Against Third Party Claims. Seller shall indemnify, defend, and hold harmless Company, its successors, permitted assigns, affiliates, controlling persons, directors, officers, employees, agents, contractors, subcontractors and the employees of any of them (collectively referred to as an "Indemnified Company Party"), from and against any Losses suffered, incurred or sustained by any Indemnified Company Party 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 relating to (i) Seller's development, permitting, construction, ownership, operation and/or maintenance of the Facility and 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, provided, however, that such exclusion shall not apply to matters discovered after the Transfer Date attributable to acts or omissions of Seller before the Transfer Date, or (B) if Company constructs any portion of the Company-Owned Interconnection Facilities, the construction, ownership, operation and/or maintenance of such portion(s) of the Company-Owned Interconnection Facilities); or (ii) 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, except as and to the extent that 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. If Seller shall obtain knowledge of any Claim subject to Section 17.1(a) (Indemnification Against Third Party Claims), Section 17.1(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.
- (1) In case any Claim subject to Section 17.1(a) (Indemnification Against Third Party Claims) or Section 17.1(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 17.1 (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.
 - (2) Seller shall not be entitled to assume and control the defense of any such Claim subject to Section 17.1(a) (Indemnification Against Third Party Claims), Section 17.1(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 17.1(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.

- (3) Upon payment of any Losses by Seller, pursuant to this Section 17.1 (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.
- (4) 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 17.1 (Indemnification of Company).

17.2 Indemnification of Seller.

- (a) Indemnification Against Third Party Claims. Company shall indemnify, defend, and hold harmless Seller, its successors, permitted assigns, affiliates, controlling persons, directors, officers, employees, agents, contractors, subcontractors and the employees of any of them (collectively referred to as an "Indemnified Seller Party"), from and against any Losses suffered, incurred or sustained by any Indemnified Seller Party 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, excluding, however, matters discovered after the Transfer Date attributable to acts or omissions of Seller before the Transfer Date, or (B) if Company constructs any portion of the Company-Owned

Interconnection Facilities, the construction, ownership, operation and/or maintenance of such portion(s) of the Company-Owned Interconnection Facilities and (ii) 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 Company Party, except to the extent that any such Loss is attributable to the 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. If Company shall obtain knowledge of any Claim subject to Section 17.2(a) (Indemnification Against Third Party Claims), Section 17.2(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.
 - (1) In case any Claim subject to Section 17.2(a) (Indemnification Against Third Party Claims), Section 17.2(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 17.2 (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

ARTICLE 20
SALE OF ENERGY TO THIRD PARTIES

Seller shall not sell energy from the Facility to any Third Party.

- (b) any full or partial reduction in the availability of the Facility to provide the Energy Storage Services in response to Company Dispatch that is caused by or arises from (i) a mechanical or equipment breakdown or (ii) other mishap or events or conditions attributable to normal wear and tear or defects, unless such mishap is caused by Force Majeure;
- (c) changes in market conditions that affect the cost of Seller's supplies, or that affect demand or price for any of Seller's products, or that otherwise render this Agreement uneconomic or unprofitable for Seller;
- (d) Seller's inability to obtain Governmental Approvals or Land Rights for the construction, ownership, operation and maintenance of the Facility and the Company-Owned Interconnection Facilities, or Seller's loss of any such Governmental Approvals or Land Rights once obtained, except, in the case of Seller's inability to obtain Governmental Approvals, such inability is attributable solely to the Governmental Authority responsible for issuing such approval where Seller has provided satisfactory evidence that: (i) all commercially reasonable measures have been taken by Seller to timely apply for such Governmental Approval and to timely respond to questions, revisions and clarifications required by such Governmental Authority in connection with such Governmental Approval; and (ii) all required information, requirements and conditions necessary to issue such Governmental Approval have been met;
- (e) [RESERVED]
- (f) Seller's inability to obtain sufficient fuel, power or materials to operate its Facility, except if Seller's inability to obtain sufficient fuel, power or materials is caused solely by an event of Force Majeure;
- (g) 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;
- (h) a forced outage except where such forced outage is caused by an event of Force Majeure;

- (i) litigation or administrative or judicial action pertaining to the Agreement, the Site, the Facility, the Land Rights, the acquisition, maintenance or renewal of financing or any Governmental Approvals, or the design, construction, ownership, operation or maintenance of the Facility, the Company-Owned Interconnection Facilities or the Company System;
- (j) 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 Project; or
- (k) any full or partial reduction in the availability of the Facility to receive and deliver to the Point of Interconnection electric energy in response to Company Dispatch which is caused by any Third Party including, without limitation, any vendor or supplier of Seller or Company, except to the extent due to Force Majeure.

21.4 Satisfaction of Certain Conditions. Section 21.5 (Guaranteed Project Milestones Including Commercial Operations), Section 21.6 (Termination for Force Majeure) and Section 21.7 (Effect of Force Majeure) defer or limit certain liabilities of a Party for delay and/or failure in performance to the extent such delay or failure is the result of conditions or events of Force Majeure; provided, however, that a Non-performing Party is only entitled to such limitations or deferrals of liabilities as and to the extent the following conditions are satisfied:

- (a) the Non-performing Party gives the other Party, within 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, 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 after the 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 condition or event of 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.

21.5 Guaranteed Project Milestones Including Commercial Operations. The Parties shall have the rights and obligations set forth in Article 13 (Guaranteed Project Milestones Including Commercial Operations) in the event a condition or event of Force Majeure affects the achievement of a Guaranteed Project Milestone Date, including the Guaranteed Commercial Operations Date.

21.6 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 stated in the Force Majeure Notice, and such delay or failure of performance would have otherwise constituted an Event of Default under Article 15 (Event of Default), 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 21.6 (Termination for Force Majeure), neither Party shall be liable for any damages or have any obligations to the other, except as provided in Section 29.25 (Survival of Obligations) other than as provided in Section 29.25(b).

- 21.7 Effect of Force Majeure. Other than as provided in Section 21.5 (Guaranteed Project Milestones Including Commercial Operations) and Section 21.6 (Termination for Force Majeure), neither Party shall be responsible or liable for any delays or failures in its performance under this Agreement as and to the extent (i) such delays or failures are substantially caused by conditions or events of Force Majeure, and (ii) the conditions of Section 21.4 (Satisfaction of Certain Conditions) are satisfied.
- 21.8 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 (including, but not limited to, payment obligations) to the extent that performance of such obligations is not precluded by the condition or event of Force Majeure.
- 21.9 No Extension of the 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 22
WARRANTIES AND REPRESENTATIONS

22.1 By the Parties. Both Company and Seller represent, warrant, and covenant, as of the Execution Date and for the extent of the Term, respectively, that:

- (a) Each respective Party has all necessary right, power and authority to execute, deliver and perform this Agreement.
- (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.

22.2 By Seller. Seller represents, warrants, and covenants 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 the Parent Entity, a company with extensive experience developing, constructing, owning and operating utility-scale energy storage facilities.
- (c) Seller has obtained or will obtain Land Rights within the time periods set forth in Section 11.2 (Land Rights for Facility) and Section 11.3 (Company-Owned Interconnection Facilities).
- (d) At the time legally required, Seller shall have obtained (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.

- (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 23
PROCESS FOR ADDRESSING CERTAIN REVISIONS

23.1 Revisions to Technical and Operational Requirements and Resilience Requirements.

- (a) Revisions to Technical and Operational Requirements. The Parties acknowledge that, during the Term, certain Technical and Operational Requirements 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 penetration levels of intermittent renewable resources on the Company System, 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 to Company-owned generation resources, 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 technical and operational requirements. 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 meet its obligations under this Agreement.
- (b) Revisions to Resilience Requirements. The Parties acknowledge that, during the Term, certain Resilience Requirements may be revised or added to facilitate necessary improvements to improve the resilience of the Company System with respect to withstanding environmental risks, such as hurricanes, wildfires, earthquakes and/or flooding.

23.2 Company Request.

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

23.3 Seller Proposal. Upon receipt of a Seller Proposal submitted in response to a Company Information Request, Company will evaluate such 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 Seller Proposal submitted at Seller's own initiative.

23.4 Revision Document. If, following Company's evaluation of a Seller Proposal, Company desires to consider implementing the changes addressed in such Proposal (including, if applicable, any Technical and Operational Requirements Revisions or any Resilience Requirements Revisions), Company shall provide Seller with written notice to that effect, such notice to be issued to Seller within 180 Days of receipt of the Seller Proposal, and Company and Seller shall proceed to negotiate in good faith a Revision Document setting forth the specific revisions to the Agreement that are necessary to implement the changes addressed in the Seller Proposal (including, if applicable, any Technical and Operational Requirements Revisions or any Resilience Requirements Revisions). 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 the Technical and Operational Requirements Proposal or Resilience Requirements Proposal in question, including but not limited to the proposed revisions to the Agreement and the Modification Pricing Impact. Any adjustment to the payments due from Company under this Agreement pursuant to a Technical and Operational Requirements Revision Document shall be limited to the Technical and Operational Requirements Pricing Impact (other than with respect to the financial consequences of non-performance as to a Technical and Operational Requirements Revision). The time periods set forth in such Revision Document as to the effective date for the Revision Modification shall be measured from the date the PUC Revision Order becomes non-appealable as provided in Section 23.6 (PUC Modification Revision Order).

23.5 Failure to Reach Agreement. If Company and Seller are unable to agree upon and execute a Revision Document within 180 Days of Company's written notice to Seller pursuant to Section 23.4 (Revision Document), Company shall have the option of declaring the failure to reach agreement on and execute such Revision Document to be a dispute and submit such dispute to an Independent Evaluator for the conduct of a determination pursuant to Section 23.10 (Dispute) of this Agreement. Any decision of the Independent Evaluator, rendered as a result of such dispute shall include a form of a Revision Document as described in Section 23.4 (Revision Document).

23.6 PUC Revision Order. No Revision Document shall constitute an amendment to the Agreement unless and until a PUC

Revision Order issued with respect to such Document has become non-appealable. Once the condition of the preceding sentence has been satisfied, such Revision Document shall constitute an amendment to this Agreement. To be "non-appealable" under this Section 23.6 (PUC Revision Order), such PUC Revision Order shall be either (i) 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 (ii) 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).

- 23.7 Company's Rights. The rights granted to Company under Section 23.4 (Revision Document) and Section 23.5 (Failure to Reach Agreement) above are exclusive to Company. Seller shall not have a right to initiate negotiations of a Revision Document or to initiate dispute resolution under Section 23.10 (Dispute), as a result of a failure to agree upon and execute any Revision Document.
- 23.8 Seller's Obligation. Notwithstanding any provision of this Article 23 (Process for Addressing Certain Revisions) to the contrary, Seller shall have no obligation to respond to more than one Technical and Operational Requirements Information Request and one Resilience Requirements Information Request during any 12-month period.
- 23.9 Limited Purpose. This Article 23 (Process for Addressing Certain Revisions) is intended to specifically address: (a) necessary revisions to the Technical and Operational Requirements 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 intermittent resources and/or energy storage resources; and (b) necessary revisions to the Resilience Requirements to support the resilience of the

