

# Master Power Purchase & Sale Agreement

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**MASTER POWER PURCHASE AND SALES AGREEMENT**

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**MASTER POWER PURCHASE AND SALE AGREEMENT**

This Agreement is made as of the \_\_ day of \_\_\_\_\_, 20\_\_ (the "Effective Date"). This Agreement and the exhibits, schedules, appendices and any written supplements hereto, including Exhibits 1 through \_\_\_\_\_ inclusive hereof, and the Confirmation, are collectively referred to as the "Agreement." The Parties to this Agreement are the following:

Name: Power Authority of the State of New York ("NYPA")

Name: \_\_\_\_\_ ("Seller")

All Notices:  
Street: 123 Main Street  
City, State Zip: White Plains, NY 10601

All Notices:  
Street: \_\_\_\_\_  
City, State Zip: \_\_\_\_\_

Attn: \_\_\_\_\_  
Phone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_  
Duns: \_\_\_\_\_  
Federal Tax ID Number: \_\_\_\_\_

Attn: \_\_\_\_\_  
Phone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_  
Duns: \_\_\_\_\_  
Federal Tax ID Number: \_\_\_\_\_

**Confirmations:**  
Attn: Confirmations – Accounting Dept (J. Brennan)  
Phone: (914) 287-3133  
Facsimile: (914) 287-3391

**Confirmations:**  
Attn: \_\_\_\_\_  
Phone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_

**Invoices:**  
Attn: \_\_\_\_\_  
Phone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_

**Invoices:**  
Attn: \_\_\_\_\_  
Phone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_

**Scheduling:**  
Attn: \_\_\_\_\_  
Phone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_

**Scheduling:**  
Attn: \_\_\_\_\_  
Phone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_

**Payments:**  
Attn: \_\_\_\_\_  
Phone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_

**Payments:**  
Attn: \_\_\_\_\_  
Phone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_

**Wire Transfer:**  
BNK: \_\_\_\_\_  
ABA: \_\_\_\_\_  
ACCT: \_\_\_\_\_

**Wire Transfer:**  
BNK: \_\_\_\_\_  
ABA: \_\_\_\_\_  
ACCT: \_\_\_\_\_

**Credit and Collections:**  
Attn: Credit Manager \_\_\_\_\_  
Phone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_

**Credit and Collections:**  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_  
Phone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_

With additional Notices of an Event of Default or Potential Event of Default to:

Attn: \_\_\_\_\_  
Phone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_

With additional Notices of an Event of Default or Potential Event of Default to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_  
Phone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_

The Parties hereby agree that the General Terms and Conditions are incorporated herein.

GENERAL TERMS AND CONDITIONS

## ARTICLE ONE GENERAL DEFINITIONS

1.1 “Act” means Sections 1000-1017 of the New York Public Authorities Law.

1.2 “Affiliate” means, with respect to any person, any other person (other than an individual) that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, such person. For this purpose, “control” means the direct or indirect ownership of fifty percent (50%) or more of the outstanding capital stock or other equity interests having ordinary voting power.

1.3 “Agreement” has the meaning set forth in the preamble hereof.

1.4 “Ancillary Services” means any and all services defined in the NYISO Ancillary Services Manual at any time which the Facility is capable of providing.

1.5 “Bankrupt” means with respect to a Party or any Credit Support Provider of such Party, such Person: (1) is dissolved (other than pursuant to a consolidation, amalgamation or merger); (2) becomes insolvent or is unable to pay its debts or fails or admits in writing its inability generally to pay its debts as they become due; (3) makes a general assignment, arrangement or composition with or for the benefit of its creditors; (4)(A) institutes or has instituted against it, by a regulator, supervisor or any similar official with primary insolvency, rehabilitative or regulatory jurisdiction over it in the jurisdiction of its incorporation or organization or the jurisdiction of its head or home office, a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors’ rights, or a petition is presented for its winding-up or liquidation by it or such regulator, supervisor or similar official, or (B) has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other relief under any bankruptcy or insolvency law or other similar law affecting creditors’ rights, or a petition is presented for its winding-up or liquidation, and such proceeding or petition is instituted or presented by a Person not described in clause (A) above and either (I) results in a judgment of insolvency or bankruptcy or the entry of an order for relief or the making of an order for its winding-up or liquidation or (II) is not dismissed, discharged, stayed or restrained in each case within sixty (60) Days of the institution or presentation thereof; (5) has a resolution passed for its winding-up, official management or liquidation (other than pursuant to a consolidation, amalgamation or merger); (6)(A) seeks or becomes subject to the appointment of an administrator, provisional liquidator, conservator, receiver, trustee, custodian or other similar official for it or for all or substantially all its assets or (B) in the case of NYPA (I) there shall be appointed or designated with respect to it, an entity such as an organization, board, commission, authority, agency or body to monitor, review, oversee, recommend or declare a financial emergency or similar state of financial distress with respect to it or (II) there shall be declared by any legislative or regulatory body with competent jurisdiction over it, the existence of a state of financial emergency or similar state of financial distress in respect of it; (7) has a secured party take possession of all or substantially all its assets or has a distress, execution, attachment, sequestration or other legal process levied, enforced or sued on or against all or substantially all its assets and such secured party maintains possession, or any such process is not dismissed, discharged, stayed or restrained, in each case

within fifteen (15) Days thereafter; (8) causes or is subject to any event with respect to it which, under the applicable laws of any jurisdiction, has an analogous effect to any of the events specified in clauses (1) to (7) above (inclusive); or (9) takes any action in furtherance of, or indicating its consent to, approval of, or acquiescence in, any of the foregoing acts.

1.6 “Bankruptcy Code” means Title 11 of the United States Code entitled “Bankruptcy,” as now or hereafter in effect, or any successor statute.

1.7 “Business Day” means any day except a Saturday, Sunday, or a Federal Reserve Bank holiday. A Business Day shall open at 8:00 a.m. and close at 5:00 p.m. local time for the relevant Party’s principal place of business. The relevant Party, in each instance unless otherwise specified, shall be the Party from whom the notice, payment or delivery is being sent and by whom the notice or payment or delivery is to be received.

1.8 “Capacity” or “UCAP” means unforced capacity from the Facility for delivery to NYISO pricing zone “J” in accordance with NYISO Rules.

1.9 “Claiming Party” has the meaning set forth in Section 3.3.

1.10 “Claims” means all third party claims or actions, threatened or filed and, whether groundless, false, fraudulent or otherwise, that directly or indirectly relate to the subject matter of an indemnity, and the resulting losses, damages, expenses, attorneys’ fees and court costs, whether incurred by settlement or otherwise, and whether such claims or actions are threatened or filed prior to or after the termination of this Agreement.

1.14 “COD Notice” has the meaning set forth in Section 3.6(c) of this Agreement.

1.15 “Commercial Operation” has the meaning set forth in Section 3.6(b).

1.16 “Commercial Operation Date” has the meaning set forth in Section 3.6(c).

1.17 “Confirmation” means the confirmation of the Transaction attached to this Agreement as Exhibit 2.

1.18 “Consents” has the meaning set forth in Section 3.6(b).

1.19 “Construction Milestone” has the meaning set forth in Section 3.6(d).

1.20 “Contract Year” means each twelve (12) month period of the Delivery Term defined in the Confirmation commencing with the month in which the Commercial Operation Date occurs.

1.21 “Costs” means, with respect to the Non-Defaulting Party, brokerage fees, commissions and other similar third party transaction costs and expenses reasonably incurred by such Party either in terminating any arrangement pursuant to which it has hedged its obligations or entering into new arrangements which replace the Terminated Transaction; and all reasonable

attorneys' fees and expenses incurred by the Non-Defaulting Party in connection with a terminated Transaction.

1.22 “Credit Event” means, with respect to any Qualified Issuer, the absence, suspension or withdrawal of such Person’s Credit Rating by S&P or Moody’s, or the downgrade of such Person’s Credit Rating below A by S&P, A2 by Moody’s or an equivalent rating by any other nationally recognized rating agency.

1.23 “Credit Rating” means with respect to any Person, the rating then assigned to such entity’s unsecured, senior long-term debt obligations (not supported by third party credit enhancements) or if such entity does not have a rating for its senior unsecured long-term debt, then the rating then assigned to such entity as an issuer rating by S&P, Moody’s or any other rating agency agreed by the Parties as set forth in this Agreement.

1.24 “Credit Support Document” means each Seller Letter of Credit provided pursuant to this Agreement and any undertaking of any Credit Support Provider.

1.28 “Credit Support Provider” means any issuer of any Seller Letter of Credit or Person who commits to provide any Seller Letter of Credit.

1.29 “Credit Support Termination Date” means the ninety-eighth (98th) Day following the Final Payment Date applicable to Seller.

1.30 “Day” or “day” unless otherwise modified, means one (1) calendar day.

1.31 “Defaulting Party” has the meaning set forth in Section 5.1.

1.32 “Delay Termination Date” has the meaning set forth in Section 3.6(d).

1.33 “Delivery Period” means the period of delivery for the Transaction, as specified in the Confirmation.

1.34 “Delivery Point” means the point at which the Product will be delivered and received, as specified in the Confirmation.

1.35 “Delivery Term” has the meaning set forth in the Confirmation.

1.36 “Design” has the meaning set forth in Section 3.6(a).

1.37 “Development Costs” has the meaning set forth in Section 3.8.

1.38 “Early Termination Date” has the meaning set forth in Section 5.2.

1.39 “Eastern Prevailing Time” means Eastern Standard Time, or during the period when daylight savings time is in effect in New York State, Eastern Daylight Time.

1.40 “Effective Date” has the meaning set forth in the preamble hereof.



1.41 “Energy” means three-phase alternating current electricity delivered in accordance with NYISO Rules.

1.42 “EPC Contract” means the primary engineering, procurement and construction contract for the development of the Facility.

1.43 “Equitable Defenses” means any bankruptcy, insolvency, reorganization and other laws affecting creditors’ rights generally, and with regard to equitable remedies, the discretion of the court before which proceedings to obtain same may be pending.

1.44 “Event of Default” has the meaning set forth in Section 5.1.

1.45 “Excused Delay” has the meaning set forth in Section 3.6(f).

1.46 “Facility” means the 200 nominal megawatt block of an electric generating project to be located at a site controlled by Seller within the Phillips 66 Refinery Complex in Linden, NJ consisting of two gas-fired combustion turbines operating in simple cycle and associated equipment, and which electric generating project is sufficient to provide and deliver the Products referenced in the Confirmation.

1.46 “FERC” means the Federal Energy Regulatory Commission or any successor government agency.

1.47 “Final Payment Date” means, as to a Party, the final date on which all outstanding payment obligations of such Party to the other Party, including but not limited to any payments due pursuant to Articles Three and/or Four, Termination Payment under Article Five, or payments due under Article Six, have been fully liquidated and satisfied in full. In the event any payment due under this Agreement becomes the subject of a dispute, the Final Payment Date with respect to the Party owing the disputed amount shall not occur until such dispute is finally resolved and the amount owed as determined upon resolution of such dispute, if any, is paid in full.

1.48 “Financing” has the meaning set forth in Section 3.6(d).

1.49 “Force Majeure” means an event or circumstance which prevents one Party from performing its obligations under the Transaction, which event or circumstance was not anticipated as of the date the Transaction was entered, which is not reasonably within the control of, or the result of the negligence of or breach of contract by, the Claiming Party, and which, by the exercise of due diligence, the Claiming Party is unable to overcome or avoid or cause to be avoided. Force Majeure shall not be based on (i) NYPA’s inability to use the Products; (ii) the loss or failure of Seller’s supply, including any mechanical breakdown or failure of the Facility unless due to an event which would otherwise constitute Force Majeure; (iii) failure or delay of any supplier, contractor or subcontractor to perform, unless such failure or delay results from an event that would constitute Force Majeure with respect to such supplier, contractor or subcontractor in accordance with the foregoing definition, or (iv) Seller’s ability to sell the Product at a price greater than the UCAP Strike Price or any other amount payable under the Confirmation. For the purposes of exception (ii) in the preceding sentence, a mechanical breakdown or failure of the Facility in whole or part will not be deemed a Force Majeure event

unless caused by (a) storm, lightning, ice, flood, seismic activity, extreme weather conditions or other similar natural occurrence; (b) act or intervention of any third party other than Seller's employees, suppliers, contractors, subcontractors or agents; or (c) any casualty not caused directly or indirectly by any act or omission of Seller or its suppliers, contractors, subcontractors or agents, the consequences of which natural occurrences, intervention or casualty described in (a), (b) and (c) above Seller could not reasonably have prevented; and breakdowns or failures arising from operator or contractor error, defects in equipment or systems, design flaws or unknown causes are not Force Majeure events notwithstanding the facts that they may be unanticipated and that Seller cannot reasonably prevent them. A general strike or other general labor action shall be considered a Force Majeure event, but neither a strike or labor action affecting only the Facility nor any lockout shall be a Force Majeure event. A failure to obtain or renew a Consent not attributable to the fault or negligence of the Claiming Party shall be considered a Force Majeure event. Neither Party may raise a claim of Force Majeure based in whole or in part on curtailment by a Transmission Provider unless such Party has contracted for firm transmission with a Transmission Provider for the Product to be delivered to or received at or from the Delivery Point, as applicable; provided, however, that existence of the foregoing factors shall not be sufficient to conclusively or presumptively prove the existence of a Force Majeure absent a showing of other facts and circumstances which in the aggregate with such factors establish that a Force Majeure as defined in the first sentence hereof has occurred. The applicability of Force Majeure to the Transaction is governed by the terms of this Agreement and the Confirmation.

1.50 "Gains" means, with respect to any Party, an amount equal to the present value of the economic benefit to it, if any (exclusive of Costs), resulting from the termination of the Transaction, determined in good faith and using commercially reasonable procedures. Gains shall be calculated in accordance with Exhibit 1 (Calculation of Gains and Losses).

1.51 "Good Utility Practice" means any of the practices, methods, or acts engaged in, or approved by, a significant portion of the electric utility or independent power industry in North America during the relevant time period, or any of the practices, methods, or acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety, and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather to delineate acceptable practices, methods, or acts generally accepted in the region.

1.52 "Governmental Charges" has the meaning set forth in Section 9.2.

1.53 "Halting Order" has the meaning set forth in Section 3.8.

1.54 "Imaged Agreement" has the meaning set forth in Section 10.10.

1.55 "Interest During Construction" means the dollar amount of interest charged to, or imputed by, Seller on funds used or expended by Seller on the Project beginning on the Effective Date through and ending thirty (30) Days after the date of a Halting Order.

1.56 “Interest Rate” means the lesser of (i) the highest rate allowed by law or (ii) a rate per annum equal to the prime rate as listed in the Money Rates section of the *Wall Street Journal* under “Money Rates” on the date of determination (or if not published on such day the most recent preceding day on which published) plus two percent (2%); provided, that where NYPA is the Party owing interest, and such interest is subject to the provisions of Section 2880 of the New York Public Authorities Law (or any successor thereto) concerning late payments of proper invoices then in such case, and only with respect to NYPA, “Interest Rate” shall mean the rate allowed pursuant to Section 2880.

1.57 “kW” means kilowatt.

1.58 “Letter(s) of Credit” means an irrevocable, transferable, multiple-draw standby letter of credit issued by a Qualified Issuer, the costs of which shall be borne by the applicant therefor.

1.59 “Losses” means, with respect to any Party, an amount equal to the present value of the economic loss to it, if any (exclusive of Costs), resulting from termination of the Transaction, determined in good faith and using commercially reasonable procedures. Losses shall be calculated in accordance with Exhibit 1 (Calculation of Gains and Losses).

1.60 “Measured Value” has the meaning set forth in the Confirmation.

1.61 “Meter Readings” has the meaning set forth in Section 6.3.

1.62 “Moody’s” means Moody’s Investor Services, Inc. or its successor.

1.63 “MW” means megawatt.

1.64 “MWh” means megawatt hour(s) of Energy.

1.65 “Non-Defaulting Party” has the meaning set forth in Section 5.2.

1.66 “Notice to Proceed” has the meaning set forth in Section 3.6(d).

1.67 “NYISO” means the New York Independent System Operator, or any successor entity performing similar functions.

1.68 “NYISO Rules” means the NYISO Open Access Transmission Tariff, the NYISO Market Services Tariff and all NYISO manuals, technical bulletins, rules, procedures, agreements or other documents relating to the operation of, reliability and purchase and sale of Products as such govern the participation of market participants with respect thereto in the markets administered by NYISO as in effect from time-to-time (provided that in the event of a conflict between FERC filed tariffs and other documents referred to in this definition, the provisions of FERC filed tariffs shall prevail).

1.69 “NYPA” has the meaning set forth on page 1 of this Agreement.

1.70 “Performance Assurance” means collateral in the form of either cash, Letter(s) of Credit, or other security acceptable to the Party entitled to receive such security.

1.71 “Performance Assurance Amount” means (a) prior to and on the date on which all Consents become final and no longer subject to rehearing or appeal, [\_\_Dollars (\$\_\_\_\_\_)], (b) after the date on which all Consents become final and no longer subject to rehearing or appeal and through the Commercial Operation Date, [\_\_\_\_\_ Dollars (\$\_\_\_\_\_)], and (c) after the Commercial Operation Date, [\_\_\_\_\_Dollars (\$\_\_\_\_\_)].

1.72 “Person” means any person, firm or business association or other entity of any nature whatsoever, including but not limited to a Party or Credit Support Provider.

1.73 “Potential Event of Default” means an event which, with notice or passage of time or both, would constitute an Event of Default.

1.74 “Products” means Capacity, Energy and Ancillary Services.

1.75 “PSC” means the Public Service Commission of the State of New York, or any successor thereof.

1.76 “Qualified Issuer” means a commercial bank organized or otherwise lawfully qualified to do business under the laws of the United States or any state, having a Credit Rating of A or higher by S&P, A2 or higher by Moody’s, or an equivalent Credit Rating by any other nationally recognized rating agency. Notwithstanding anything to the contrary herein, NYPA agrees that General Electric Capital Corporation shall constitute a Qualified Issuer for all purposes under this Agreement.

1.77 “Regulatory Event” has the meaning set forth in Section 10.7.

1.78 “S&P” means the Standard & Poor’s Rating Group (a division of McGraw-Hill, Inc.) or its successor.

1.79 “Schedule” or “Scheduling” means the actions of Seller and/or its designated representatives, including its Transmission Provider(s), if applicable, of notifying, requesting and confirming the quantity and type of Product to be delivered on any given day or days during the Delivery Period at a specified Delivery Point.

1.80 “Seller” has the meaning set forth on page 1 of this Agreement.

1.81 “Seller Letter of Credit” means a Letter of Credit with a face amount equal to the Seller Letter of Credit Amount, issued within ten (10) Business Days of the execution of this Agreement, substantially in the form set out in Exhibit 3 (Form of Seller Letter of Credit), and each replacement or supplemental Letter of Credit therefor substantially in the same form.

1.82 “Seller Letter of Credit Amount” means the Performance Assurance Amount.

1.83 “Settlement Amount” means, with respect to the Transaction and the Non-Defaulting Party, the Losses or Gains, and Costs, expressed in U.S. Dollars, which such Party incurs as a result of the liquidation and termination of the Transaction pursuant to Section 5.2.

1.84 “Site” has the meaning set forth in Section 3.6(a).

1.85 “Target Commercial Operation Date” has the meaning set forth in Section 3.6(b).

1.86 “Target Consents Application Date” has the meaning set forth in Section 3.6(d).

1.87 “Target Financing Date” has the meaning set forth in Section 3.6(d).

1.88 “Target Notice to Proceed Date” has the meaning set forth in Section 3.6(d).

1.89 “Termination Payment” has the meaning set forth in Section 5.3.

1.90 “TO/LSE Tariff” means the PSC-approved tariff rider of each applicable transmission operator or load-serving entity providing for a charge on retail customer bills to cover the costs incurred by NYPA associated with the Transaction.

1.91 “Transaction” means the transaction that is the subject of the Confirmation attached as Exhibit 2 of this Agreement.

1.92 “Transmission Provider” means any entity or entities transmitting or transporting the Product on behalf of Seller to or from the Delivery Point in the Transaction.

1.93 “UCAP” has the meaning set forth in Section 1.8.

1.94 “UCAP Strike Price” has the meaning set forth in the Confirmation.

## ARTICLE TWO TRANSACTION TERMS AND CONDITIONS

2.1 Transaction. The Transaction shall be entered into upon agreement of the Parties in writing by means of the Confirmation.

2.2 Governing Terms. The Transaction shall be governed by this Agreement. This Agreement (including all exhibits, schedules and any written supplements hereto), any designated collateral, credit support or margin agreement or similar arrangement between the Parties in support of this Agreement and the Confirmation shall form a single integrated agreement between the Parties. Any inconsistency between any terms of this Agreement and any terms of the Confirmation shall be resolved in favor of the terms of the Confirmation.

## ARTICLE THREE OBLIGATIONS AND DELIVERIES

3.1 Seller’s and NYPA’s Obligations. As provided in the Confirmation, Seller shall sell and deliver, or cause to be delivered, the Product at the Delivery Point, and the Parties shall pay each other monthly settlements. Each of Seller and NYPA shall perform its other obligations in the Confirmation. Seller shall be responsible for any costs or charges imposed on or associated with the Product or its delivery of the Product up to the Delivery Point, and NYPA

shall be responsible for any costs or charges imposed on or associated with the Product at and after the Delivery Point

3.2 Transmission and Scheduling. Seller shall arrange and be responsible for any transmission service to the Delivery Point and shall Schedule or arrange for Scheduling services with its Transmission Providers, as specified by the Parties in the Transaction, or in the absence thereof, in accordance with the practice of the Transmission Providers, to deliver the Product to the Delivery Point.

3.3 Force Majeure. To the extent either Party is prevented by Force Majeure from carrying out, in whole or part, its obligations under the Transaction and such Party (the “**Claiming Party**”) gives notice and details of the Force Majeure to the other Party as soon as practicable, then the Claiming Party shall be excused from the performance of its obligations with respect to the Transaction (other than the obligation to make payments then due or becoming due with respect to performance prior to the Force Majeure, subject to the provisions of Section 6.3). The Claiming Party shall use reasonable efforts to remedy its inability to perform. The non-Claiming Party shall not be required to perform or resume performance of its obligations to the Claiming Party corresponding to the obligations of the Claiming Party excused by Force Majeure.

3.4 Closing Deliveries. On the Effective Date and as a condition to the obligations of the other Party under this Agreement, (a) NYPA shall provide Seller hereto (i) a certified copy of the resolution evidencing the necessary authorizations with respect to the execution, delivery and performance by NYPA of this Agreement and (ii) the written opinions set forth on Exhibit 4 (NYPA Opinions), in form and substance reasonably acceptable to Seller, issued by legal counsel acceptable to Seller (which with respect to opinion No. 3, shall include NYPA’s in-house counsel) and (b) Seller shall provide NYPA with (i) a certified copy of the resolution evidencing the necessary authorizations with respect to the execution, delivery and performance by Seller of this Agreement and (ii) the written opinions set forth on Exhibit 5 (Seller Opinions), in form and substance reasonably acceptable to NYPA, issued by legal counsel acceptable to NYPA.

3.5 No Immunity Claim. NYPA warrants and covenants that, to the fullest extent permitted by applicable law, with respect to its contractual obligations hereunder and performance thereof, it will not claim immunity on the grounds of sovereignty or similar grounds with respect to itself or its revenues or assets from (a) suit, (b) jurisdiction of court (including a court located outside the jurisdiction of its organization), (c) relief by way of injunction, order for specific performance or recovery of property, (d) attachment of assets, or (e) execution or enforcement of any judgment.

3.6 Seller Facility Development Obligations.

(a) Seller will provide the Products for the Transaction from the Facility. The Facility will be constructed at Linden, NJ, on a site described more fully in Exhibit 6A (the “**Site**”), in accordance with the design set forth in Exhibit 6B (“**Design**”). Seller provide to NYPA notice of any material change in the Site or Design after the Effective Date. Seller shall keep NYPA reasonably apprised of Seller’s progress toward completion of the Facility and

qualification with the NYISO for the delivery of Products. Seller shall furnish NYPA with copies of monthly progress reports provided by Seller's principal contractor for construction of the Facility, or summaries thereof in a mutually-agreed format, and will keep NYPA apprised of the probable date for commencement of Commercial Operation.

(b) The Facility is expected to be in service, with all required interconnections, arrangements and authorizations necessary to commence providing the Products required under the Confirmation (such status "**Commercial Operation**") by June 1, 2016 (the "**Target Commercial Operation Date**"). Seller represents and warrants that it has or will obtain by the Target Commercial Operation Date (i) all necessary rights to real property necessary for development and operation of the Facility, (ii) all other necessary consents, permits, approvals, certificates, authorizations and arrangements, required from all governmental or regulatory agencies or authorities or the NYISO necessary for development, interconnection and operation of the Facility ("**Consents**"), and (iii) the financial capability to proceed and complete the development of the Facility.

(c) For purposes of this Agreement, the date on which the Facility commences Commercial Operation (the "**Commercial Operation Date**") shall be the first day of the Month following the date on which Seller provides to NYPA documentation (the "**COD Notice**") confirming that the Facility is: (i) completed and commercially operational in accordance with the Design (including, as applicable, fuel delivery facilities and interconnections), (ii) interconnected (including electrically interconnected) at the Delivery Point, (iii) in compliance with all applicable laws, regulations, Consents or other governmental requirements, excluding only such non-material non-compliance as would not result, either at the Commercial Operation Date or thereafter with the passage of time, in any impairment of Seller's ability to perform its obligations under the Transaction, (iv) in compliance with all applicable provisions under this Agreement, excluding only such non-material non-compliance as would not result, either at the Commercial Operation Date or thereafter with the passage of time, in any impairment of Seller's ability to perform its obligations under the Transaction, and (v) capable in normal operations and qualified with NYISO to provide and deliver not less than \_\_\_\_ kW of Capacity and related Energy (such status "**Commercial Operation**"). Seller shall deliver the COD Notice to NYPA within fifteen (15) days following the purported satisfaction of the foregoing requirements of Section 3.6(c)(i) through (c)(v). NYPA must accept the COD Notice if the stated requirements for Commercial Operation are met. If the COD Notice is delivered less than fifteen (15) Days prior to the first Day of the following Month, then at NYPA's option, by notice to Seller given within five (5) Days following NYPA's receipt of the COD Notice, the Commercial Operation Date will be deferred until the first Day of the second Month commencing after the COD Notice.

(d) Construction Schedule and Milestones. Seller will develop the Facility in accordance with the following timetable (each timetable date a "**Construction Milestone**"):

(i) Seller expects to complete its submission of applications for all remaining authorizations, permits, Consents, authorizations, interconnections and land use rights set forth in Exhibit 6C needed to construct and operate the Facility by [\_\_\_\_\_] (the "**Target Consents Application Date**").

(ii) Seller expects to complete and close the financing and/or otherwise provide for all funds required to construct the Facility (such events, the “**Financing**”) by [\_\_\_\_\_] (the “**Target Financing Date**”).

(iii) Seller expects to complete firm equipment orders and authorize its general contractor to mobilize for construction at the site for the Facility (such events “**Notice to Proceed**”) by [\_\_\_\_\_] (the “**Target Notice to Proceed Date**”).

(iv) Seller expects the Commercial Operation Date to occur on or before the Target Commercial Operation Date.

Notwithstanding that each Construction Milestone is described as the date on which Seller “expects” to complete or achieve a defined task, and that each such Construction Milestone is expressed as a “target” date, Seller shall be responsible for accomplishing the defined tasks in each Construction Milestone by the date thereof unless such date is extended by reason of an Excused Delay, and if Seller fails to complete the relevant task associated with a Construction Milestone date, including a Construction Milestone date, if applicable, extended pursuant to Section 3.6(f), Seller shall pay liquidated damages to NYPA as set forth in Section 3.6(f).

(e) Seller shall provide NYPA with at least fifteen (15) Business Days prior notice before issuing the Notice to Proceed. Seller shall not issue the Notice to Proceed without the prior written consent of NYPA; provided, however, that if a Halting Order is not issued within fifteen (15) Business Days of NYPA’s receipt of notice from Seller of Seller’s intent to issue the Notice to Proceed, NYPA shall be deemed to have consented to such action. As soon as practicable (but in any event no later than least fifteen (15) Business Days prior to issuing the Notice to Proceed), Seller shall provide NYPA with a schedule of financial commitments under the EPC Contract and any other contract related to the development of the Facility requiring material expenditures, and will promptly notify NYPA of any material changes to such schedule.

(f) Delay, Liquidated Damages and NYPA Early Termination Rights

(i) Seller will meet all Construction Milestones unless delayed or prevented by Force Majeure or by NYPA’s failure to comply with the provisions of this Agreement (any such cause an “**Excused Delay**”), provided, delay, price increases or non-performance by Seller’s equipment vendors, contractors or subcontractors shall not constitute Excused Delay except to the extent such events are caused by Force Majeure. Each Construction Milestone will be extended Day-for-Day with respect to the effects of any Excused Delay.

(ii) In the event Seller fails to complete its submission of applications for all Consents by the Target Consents Application Date, Seller will pay NYPA liquidated damages in the amount of [\_\_\_\_\_] Dollars (\$\_\_\_\_\_) per Day or portion thereof, commencing with the Day immediately following the Target Consents Application Date and continuing until and including the Day on which Seller has completed submission of all applications for the Consents, provided, however, the



maximum liquidated damages paid under this Section 3.6(f)(ii) shall be [\_\_\_\_\_ Dollars (\$\_\_\_\_\_)].

(iii) In the event Seller fails to achieve Financing by the Target Financing Date, Seller will pay NYPA liquidated damages in the amount of [\_\_\_\_\_ Dollars (\$\_\_\_\_\_)] per Day or portion thereof, commencing with the Day immediately following the Target Financing Date and continuing until and including the Day on which Financing occurs, provided, however, the maximum liquidated damages paid under this Section 3.6(f)(iii) shall be [\_\_\_\_\_ Dollars (\$\_\_\_\_\_)].

(iv) In the event Seller fails to achieve Notice to Proceed by the Target Notice to Proceed Date, Seller will pay NYPA liquidated damages in the amount of [\_\_\_\_\_ Dollars (\$\_\_\_\_\_)] per Day or portion thereof, commencing with the Day immediately following the Target Notice to Proceed Date and continuing until and including the Day on which Notice to Proceed occurs, provided, however, the maximum liquidated damages paid under this Section 3.6(f)(iv) shall be [\_\_\_\_\_ Dollars (\$\_\_\_\_\_)].

(v) In the event the Commercial Operation Date fails to occur by the Target Commercial Operation Date, Seller will pay liquidated damages in the amount of [\_\_\_\_\_ Dollars (\$\_\_\_\_\_)] per MW per Day or portion thereof, commencing with the Day immediately following the Target Commercial Operation Date and continuing until and including the Day on which Commercial Operation occurs, provided, however, the maximum liquidated damages paid under this Section 3.6(f)(v) shall be [\_\_\_\_\_ Dollars (\$\_\_\_\_\_)].

(vi) The Parties agree that if Seller fails to meet Construction Milestones, other than as the result of an Excused Delay, NYPA will suffer damages that will be difficult to quantify. Accordingly they have agreed that in such event Seller will pay the foregoing liquidated damages amounts, as damages and not as a penalty. Seller shall provide and maintain the Seller Letter of Credit to secure payment of liquidated damages amounts.

(vii) NYPA will hold all liquidated damages paid under this Section 3.6(f) with respect to Seller's failure to meet the Target Consents Application Date, Target Financing Date or Target Notice to Proceed Date in escrow, with interest to accrue. In the event the Commercial Operation Date occurs by the Target Commercial Operation Date notwithstanding any prior unexcused delays, NYPA will refund all previously-paid liquidated damages amounts with interest. Subject to Section 5.3, liquidated damages shall remain with NYPA without repayment or credit to Seller's account for any purpose.

(viii) If Seller does not achieve Commercial Operation of the Facility by the date that is three hundred sixty-five (365) Days following the Target Commercial Operation Date, as such may be extended by Excused Delays, NYPA may, in its sole discretion, upon notice to Seller, terminate the Transaction and such failure shall constitute an Event of Default under Section 5.1(c)(iii) with respect to the Transaction.

(g) Operation of Facility. Upon and after achieving Commercial Operation, Seller shall operate the Facility, and offer, sell and deliver all Products at the Delivery Point set forth in the Confirmation for the Delivery Term. Seller shall at all times operate the Facility in accordance with all applicable laws, regulations, Good Utility Practice, NYISO Rules and equipment manufacturers' warranty requirements. Seller will offer all Products into applicable NYISO Markets, as set forth in the Confirmation, and will participate in the NYISO voltage support service program, subject to and consistent with the requirements of the Consents. Seller shall operate the Facility for its own account and benefit, and shall be entitled to all revenues and settlements from sale and disposition of Products, and shall be solely responsible for all Facility costs of whatsoever nature, including capital costs, fixed and variable operating and overhead costs including but not limited to wages and benefits of employees, Facility maintenance, repair, fuel, insurance, Site leasing and occupancy costs, taxes on Products sales and deliveries, Site tax and any tax or assessments of any nature whatsoever, and environmental allowances required by the Consents.

3.7 Termination Right in Event of Extended Force Majeure. If a Force Majeure arises, the Claiming Party will notify the other Party promptly, and within ten (10) Business Days will notify the other Party of the Claiming Party's intentions and provide a Force Majeure remediation plan, if such a plan is feasible. If a Force Majeure occurs, and (i) Seller advises NYPA that it will be unable to achieve the Commercial Operation of the Facility, (ii) Seller is the Claiming Party and does not provide a Force Majeure remediation plan within thirty (30) Days, or (iii) notwithstanding commercially reasonable efforts of Seller, Seller is unable to achieve Commercial Operation within [\_\_\_\_\_] (\_\_) Months following the original Target Commercial Operation Date of June 1, 2016, NYPA may terminate the Transaction and this Agreement, upon notice to Seller in NYPA's sole discretion, provided, however, that such circumstances shall not constitute an Event of Default and no Party shall be required to make any Termination Payment.

3.8 [Halting Mechanism.

(a) Notice and Order. Facility development shall be subject to halting at any time up to and including the Commercial Operation Date, upon the issuance of a PSC order or notice from NYPA directing that further development of the Facility cease (“**Halting Order**”).

(b) Seller Notice of Intent. Upon the issuance of a Halting Order, Seller will promptly take all steps temporarily to halt all work on the Facility and demobilize all contractors and suppliers, and otherwise to limit and mitigate Seller's costs and obligations. Seller will make a determination, in Seller's sole discretion, whether to terminate the development of the Facility, or to continue to develop the Facility for operation without a power purchase or other contractual arrangement with NYPA. Seller will provide NYPA with written notice of Seller's decision on continuation of development within \_\_\_\_\_ (\_\_) Days following Seller's receipt of a Halting Order. If Seller does not provide NYPA with written notice of Seller's decision on whether to continue development of the Facility within \_\_\_\_\_ (\_\_) Days following Seller's receipt of a Halting Order, Seller shall be deemed, for purposes of this Section 3.8, to have elected to continue development of the Facility and Section 3.8(e) shall apply.

(c) NYPA Review of Facility and Related Records. Upon the issuance of a Halting Order, on NYPA's request Seller shall (i) shall provide NYPA with full access to the

Facility and the Site, and permit it and its designees to inspect and conduct tests at such locations as NYPA deems appropriate, including but not limited to Phase 1 and Phase 2 environmental tests and assessments and (ii) permit NYPA to inspect, examine and make copies of all books, records and contracts relating to the Facility or the Site (including the EPC Contract and any other contract related to the construction of the Facility) and the Development Costs.

(d) NYPA Development Cost Reimbursement upon Termination of Development. The Parties will proceed as follows following a notice by Seller of termination of development of the Facility, with Seller to mitigate costs and NYPA to reimburse costs, subject to the following provisions and limitations:

(i) Seller Mitigation Obligations. Seller shall implement and continue all commercially reasonable steps to terminate all work on the Facility and demobilize all contractors and suppliers, and otherwise to limit and mitigate Seller's costs and obligations. Seller must mitigate costs by prompt reduction in work force and overhead, disposition of the Site and Site occupancy rights and all respective easements and other real property rights and costs, modification, cancellation and liquidation of contracts, salvage sale of equipment already delivered or manufactured in whole or part, and taking all other reasonable and necessary steps to mitigate net costs. Seller shall confer with NYPA promptly following the issuance of a Halting Order concerning its plan to mitigate costs, and shall provide NYPA with a written mitigation plan setting forth proposed disposition of all project assets and settlement of all amounts due to third parties, which shall be subject to prior approval by NYPA before implementation, which approval shall not be unreasonably withheld, conditioned or delayed. NYPA will indemnify Seller for the reasonable and prudent net costs incurred by Seller with respect to its compliance with the Halting Order. To the extent Seller anticipates that corporate, manufacturer or other approvals will be required by Seller to undertake any mitigation activities required pursuant to this Agreement, Seller shall promptly use commercially reasonable efforts to seek such approvals when appropriate on a contingent basis.

(ii) Third Party Contracts. Seller shall use commercially reasonable efforts to (y) sell or assign, negotiate or (where appropriate), issue change orders under contracts with vendors to minimize costs associated with cancellation and (z) cause Seller's mitigated costs for any piece of equipment not to exceed the manufacturer's then-applicable cancellation charge relating thereto, if any. Seller shall use commercially reasonable efforts to ensure that all third party contracts related to the development of the Facility (and in particular, the EPC Contract) include provisions (including halting provisions) that correspond to and are consistent with the provisions of this Section 3.8.

(iii) No Fees. Seller and its affiliates shall not charge NYPA any fee or other charge in connection with its obligations under this Section 3.8, but NYPA shall be required to pay any reasonable out-of-pocket costs incurred by Seller in connection with the mitigation required hereunder.

(iv) Reuse of Equipment. In the event of any Halting Order, Seller shall use commercially reasonable efforts to reuse or transfer any unused project equipment and services on order to an Affiliate of Seller or another project affiliated with

Seller, if available. Adjustments to Development Costs shall be equal to the cost related to such project equipment or services on order that is actually so reused or transferred that would otherwise be reimbursable by Seller, less (y) costs of demobilization and reuse and (z) associated carrying costs.

(v) Development Cost Calculation. Seller will calculate its total actual, reasonable and verifiable Facility development costs incurred on or after the Effective Date as set forth in this Section 3.8 (without adding any profit margin or similar mark-up), including Site occupancy, engineering and development costs, permits and regulatory process, design, EPC and equipment orders, Interest During Construction, plus general overhead accrued in developing the Facility, calculated and mitigated in the manner set forth herein (“**Development Costs**”). Development Costs shall include the reasonable mitigation expenses of Seller incurred pursuant to this Agreement. The final Development Costs shall be in accordance with Seller's mitigation plan previously approved by NYPA, subject to NYPA approval of any material deviations from such plan, such approval not to be unreasonably withheld, conditioned or delayed.

(vi) Accounting and Invoice. Seller shall submit an accounting of its Development Costs within \_\_\_\_ (\_\_) days of the issuance of a Halting Order for a determination by PSC or NYPA as the amount of Development Costs that are reasonable and prudent. Within \_\_\_\_ (\_\_) days of (x) a final and non-appealable PSC order determining said amount, if applicable, or (y) a final review and determination by NYPA of said amount, in each case subject to audit rights as set forth in this Section 3.8, Seller will submit its invoice to NYPA, and NYPA shall reimburse Seller the amount of Development Costs found reasonable, verifiable and prudent by the PSC or NYPA, as applicable (which reimbursement may be paid in several installments over a twelve month period).

(vii) Audit and Challenge. Each Party, through its authorized representatives, shall have the right, on or after \_\_\_\_ (\_\_) Business Days following notice to the other Party, to inspect the books or records of the other Party relating to the Development Costs invoiced pursuant to Section 3.8(d). Reimbursements paid under this Section 3.8 shall not prejudice the right of a Party to protest or challenge the correctness of amounts previously billed, except that all costs and expenses charged shall conclusively be presumed to be true and correct twelve (12) months after billing, unless a Party has notified the other Party of detailed exceptions prior to the expiration of such period.

(viii) Conveyance to NYPA. In the event that Seller decides to terminate the development of the Facility and seek reimbursement of the Development Costs from NYPA, at NYPA's request and option (which can be exercised as to individual items, in NYPA's sole discretion), (a) Seller shall transfer to NYPA or NYPA's designee the equipment, site and contracts associated with the Facility and such Development Costs or (b) Seller shall cause the owner of the equity interests of Seller (or if different, the entity developing the Facility) to transfer such equity interests to NYPA or NYPA's designee.

(ix) Development Cost Caps. Seller agrees that in the event a Halting Order is issued on or before each of the following dates, the maximum Development Cost which NYPA shall be responsible to reimburse Seller will be limited to the following amounts:

- January 1, 201\_        \$[\_\_\_\_] million
- January 1, 201\_        \$[\_\_\_\_] million
- January 1, 201\_        \$[\_\_\_\_] million

In the event any such cap applies, NYPA's obligation to reimburse Development Costs shall be limited to the lesser of Seller's actual Development Costs, determined as set forth in this Section 3.8, or the applicable cap.

(x) Payment of Development Costs, Termination of Agreement; Exclusivity of Remedy. Upon payment to Seller of the Development Costs determined in Section 3.8(d)(vii), subject to any applicable cap set forth in Section 3.8(d)(ix), and the conveyance to NYPA of the assets required by Section 3.8(d)(viii), this Agreement shall terminate with no Termination Payment or other costs, settlements or other payments or remedies due from any Party to the other.

(e) Completion and Operation of Facility following a Halting Order. In the event Seller elects to continue development of the Facility, this Agreement shall terminate with no Termination Payment, reimbursement of Development Costs or other costs, settlements or other payments or remedies due from any Party to the other.]

3.9 [NYPA Termination Right Related to Cost Recovery. It is anticipated that NYPA will be reimbursed for all of its expenditures under this Agreement pursuant to TO/LSE Tariffs with each applicable transmission operator. If, however, at any time prior to \_\_\_\_\_, 201\_ there is no cost recovery arrangement in effect that would reimburse NYPA for all liabilities of NYPA under this Agreement (such arrangement being in form and substance satisfactory to NYPA in its sole discretion), NYPA, in its sole discretion, may terminate this Agreement and the Transaction at such time upon notice to Seller. Any such termination shall not constitute an Event of Default, and no Party shall be required to make any Termination Payment with respect to any such termination. The termination of this Agreement pursuant to this Section 3.9 shall not obligate NYPA to pay any Development Costs. This early termination right is in addition to the halting mechanism referenced in Section 3.8.]

ARTICLE FOUR    REMEDIES FOR FAILURE TO DELIVER

4.1 Seller Failure. If Seller fails to Schedule and/or deliver all or part of the Product to the NYISO pursuant to the Confirmation, and such failure is not excused under the terms of this Agreement or the Confirmation or by NYPA's failure to perform this Agreement, then notwithstanding any provisions of this Agreement to the contrary, Seller shall pay NYPA, within five (5) Business Days of invoice receipt, an amount for such deficiency equal to any penalty or other charge assessed to NYPA by NYISO directly as a result of Seller's failure. The invoice for

such amount shall include a written statement explaining in reasonable detail the calculation of such amount.

## ARTICLE FIVE EVENTS OF DEFAULT; REMEDIES

5.1 Events of Default. An “**Event of Default**” shall mean, with respect to a Party (a “**Defaulting Party**”), the occurrence of any of the following:

(a) the failure to make, when due, any payment required pursuant to this Agreement if such failure is not remedied within three (3) Business Days after written notice;

(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;

(c) either (i) the failure to perform any material covenant or obligation set forth in this Agreement (except to the extent constituting a separate Event of Default) if such failure is not remedied within three (3) Business Days after written notice, (ii) any willful failure to deliver Product when required under this Agreement, or (iii) failure of Seller to achieve Commercial Operation by the date that is three hundred sixty-five (365) Days following the Target Commercial Operation Date, as extended by any Excused Delay;

(d) such Party becomes Bankrupt;

(e) the failure of such Party to satisfy the creditworthiness/collateral requirements agreed to pursuant to Article Eight hereof;

(f) such Party or any Credit Support Provider of such Party consolidates or amalgamates with, or merges with or into, or transfers all or substantially all its assets to, another entity (or, without limiting the foregoing, if such Party is NYPA, an entity such as an organization, board, commission, authority, agency or body succeeds to the principal functions of, or powers and duties granted to, Seller) and, at the time of such consolidation, amalgamation, merger, transfer, or succession:

(i) the resulting, surviving, transferee or successor entity fails to assume all the obligations of such Party or such Credit Support Provider under this Agreement or any Credit Support Document to which it or its predecessor was a Seller by operation of law or pursuant to an agreement reasonably satisfactory to the other Party to this Agreement; or

(ii) the resulting, surviving, transferee or successor entity, if a Credit Support Provider, is not a Qualified Issuer; or

(iii) the benefits of any Credit Support Document fail to extend (without the consent of the other Party) to the performance by such resulting, surviving, transferee or successor entity of its obligations under this Agreement, if any;

(g) the occurrence and continuation of (i) a default, event of default or other similar condition or event in respect of such Party or any Credit Support Provider for such Party

under one or more agreements or instruments, individually or collectively, relating to indebtedness for borrowed money in an aggregate amount of not less than \_\_\_\_\_ Million Dollars (\$\_\_\_\_,000,000), which results in such indebtedness becoming immediately due and payable or (ii) a default by such Party or any Credit Support Provider for such Party in making on the due date therefor one or more payments, individually or collectively, in an aggregate amount of not less than \_\_\_\_\_ Million Dollars (\$\_\_\_\_,000,000);

(h) with respect to such Party's Credit Support Provider, if any of the following occurs:

(i) any representation or warranty made by a Credit Support Provider in connection with this Agreement or any Credit Support Document is false or misleading in any material respect when made or when deemed made or repeated;

(ii) the failure of a Credit Support Provider to make any payment required or to perform any other material covenant or obligation in any Credit Support Document and such failure shall not be remedied within three (3) Business Days after written notice;

(iii) a Credit Support Provider becomes Bankrupt;

(iv) the failure of a Credit Support Document to be in full force and effect for purposes of this Agreement (other than in accordance with its terms) prior to the satisfaction of all obligations of such Party under the Transaction without the written consent of the other Party; or

(v) a Party or Credit Support Provider shall repudiate, disaffirm, disclaim, or reject, in whole or in part, or challenge the validity of this Agreement or any Credit Support Document;

provided, however, that any Credit Event, or other event or circumstance with respect to an issuer of a Seller Letter of Credit, shall not constitute an Event of Default unless Seller fails to deliver a replacement Letter of Credit in accordance with Section 8.1 within five (5) Business Days after receipt of written notice from NYPA of such circumstance as described in this Section 5.1(h), and provided, further, that the foregoing proviso shall not prevent any draws on any Seller Letter of Credit by NYPA permitted under Section 8.1;

(i) the failure of such Party to deliver to the other Party any Credit Support Document required by Section 8.1 within the time periods specified therein; or

(j) the drawing by NYPA against any Credit Support Document required by Section 8.1 when or to an extent not authorized under the terms of this Agreement, or the failure of a Party having drawn against any Credit Support Document not to repay any excess amount drawn as required under the terms of this Agreement; provided, however, that such events shall not constitute an Event of Default unless the Party drawing or holding such funds fails to repay

the same within five (5) Business Days after notice from the other Party that such payment is due.

5.2 Declaration of an Early Termination Date and Calculation of Settlement Amounts. If an Event of Default with respect to a Defaulting Party shall have occurred and be continuing, the other Party (the “**Non-Defaulting Party**”) shall have the right (i) designate a day, no earlier than the day such notice is effective and no later than 20 days after such notice is effective, as an early termination date (“**Early Termination Date**”) to accelerate all amounts owing between the Parties and to liquidate and terminate the Transaction (the “**Terminated Transaction**”), (ii) withhold any payments due to the Defaulting Party under this Agreement and (iii) suspend performance. The Non-Defaulting Party shall calculate, in a commercially reasonable manner, a Settlement Amount for the Terminated Transaction as of the Early Termination Date (or, to the extent that in the reasonable opinion of the Non-Defaulting Party the Terminated Transaction is commercially impracticable to liquidate and terminate or may not be liquidated and terminated under applicable law on the Early Termination Date, as soon thereafter as is reasonably practicable).

5.3 Net Out of Settlement Amounts. The Non-Defaulting Party shall aggregate all Settlement Amounts into a single amount by netting out: (a) (1) at the option of the Non-Defaulting Party, any cash or other form of security then available to the Non-Defaulting Party pursuant to draws on Letters of Credit under this Agreement, plus (2) any or all other amounts due to the Defaulting Party under this Agreement, against (b) (1) all Settlement Amounts that are due to the Non-Defaulting Party plus, (2) at the option of the Non-Defaulting Party, any cash or other form of liquid security then in the possession of the Defaulting Party provided as Performance Assurance pursuant to Article Eight, plus (3) any or all other amounts due to the Non-Defaulting Party under this Agreement, so that all such amounts shall be netted out to a single liquidated amount (the “**Termination Payment**”) payable by one Party to the other. Notwithstanding the foregoing, in the event that NYPA is the Non-Defaulting Party, then all amounts paid by Seller to NYPA as liquidated damages under this Agreement shall be netted out from any Termination Payment. The Termination Payment shall be due to or due from the Non-Defaulting Party as appropriate. For the avoidance of doubt, notwithstanding any provision of this Agreement that may be interpreted to the contrary, the Defaulting Party shall not be entitled to recover any Losses upon termination pursuant to Section 5.2.

5.4 Notice of Payment of Termination Payment. As soon as practicable after a liquidation, notice shall be given by the Non-Defaulting Party to the Defaulting Party of the amount of the Termination Payment and whether the Termination Payment is due to or due from the Non-Defaulting Party. The notice shall include a written statement explaining in reasonable detail the calculation of such amount. The Termination Payment shall be made by the Party that owes it within five (5) Business Days after such notice is effective. Notwithstanding any provision to the contrary contained in this Agreement, the Non-Defaulting Party shall not be required to pay to the Defaulting Party any amount under Article Five until the Non-Defaulting Party receives confirmation satisfactory to it in its reasonable discretion (which may include an opinion of its counsel) that all other obligations of any kind whatsoever of the Defaulting Party to make any payments to the Non-Defaulting Party under this Agreement or otherwise which are due and payable as of the Early Termination Date have been fully and finally performed;



provided, however, the period for obtaining such confirmation shall not extend more than sixty (60) days after the date the Defaulting Party's payment is due.

5.5 Disputes With Respect to Termination Payment. If the Defaulting Party disputes the Non-Defaulting Party's calculation of the Termination Payment, in whole or in part, the Defaulting Party shall, within five (5) Business Days of receipt of the Non-Defaulting Party's calculation of the Termination Payment, provide to the Non-Defaulting Party a detailed written explanation of the basis for such dispute; provided, however, that if the Termination Payment is due from Seller, and Seller is the Defaulting Party, Seller shall first transfer Performance Assurance to the NYPA in an amount equal to the Termination Payment.

5.6 Closeout Setoffs. After calculation of a Termination Payment in accordance with Section 5.3, if the Defaulting Party would be owed the Termination Payment, the Non-Defaulting Party shall be entitled, at its option and in its discretion, to (i) set off against such Termination Payment any amounts due and owing by the Defaulting Party to the Non-Defaulting Party under any other agreements, instruments or undertakings between the Defaulting Party and the Non-Defaulting Party and/or (ii) to the extent the Transaction is not yet liquidated in accordance with Section 5.2, withhold payment of the Termination Payment to the Defaulting Party. The remedy provided for in this Section shall be without prejudice and in addition to any right of setoff, combination of accounts, lien or other right to which any Party is at any time otherwise entitled (whether by operation of law, contract or otherwise).

5.7 Specific Performance. Neither Party shall be entitled to seek or obtain a decree compelling specific performance or granting injunctive relief with respect to or enjoining any actual or threatened breach of any obligation of the other Party hereunder.

5.8 Reserved.

5.9 Suspension of Performance. Notwithstanding any other provision of this Agreement, if an Event of Default shall have occurred and be continuing, the Non-Defaulting Party, upon written notice to the Defaulting Party, shall have the right (i) to suspend performance under the Transaction; provided, however, in no event shall any such suspension continue for longer than ten (10) Business Days with respect to the Transaction unless an early Termination Date shall have been declared and notice thereof pursuant to Section 5.2 given, and (ii) to the extent an Event of Default shall have occurred and be continuing and consistent with the terms and conditions of this Agreement, to exercise any remedy available at law or in equity.

## ARTICLE SIX PAYMENT AND NETTING

6.1 Billing Period. The calendar month shall be the standard period for all payments under this Agreement (other than Termination Payments, any payments pursuant to Section 4.1 or 4.2). As soon as practicable after the end of each month, each Party will render to the other Party an invoice for the payment obligations, if any, incurred hereunder during the preceding month.

6.2 Timeliness of Payment. All invoices under this Agreement shall be due and payable in accordance with each Party's invoice instructions on or before the later of the twenty-eighth (28th) day of each month, or tenth (10th) day after receipt of the invoice or, if such day is

not a Business Day, then on the next Business Day. Each Party will make payments by electronic funds transfer, or by other mutually agreeable method(s), to the account designated by the other Party. Any amounts not paid by the due date will be deemed delinquent and will accrue interest at the Interest Rate, such interest to be calculated from and including the due date to but excluding the date the delinquent amount is paid in full, and the Party owing such overdue obligation shall be further obligated to pay the Party owed such obligations for such Party's costs of collection reasonably incurred, including reasonable attorneys' fees.

6.3 Disputes and Adjustments of Invoices. A Party may, in good faith, dispute the correctness of any invoice or any adjustment to an invoice, rendered under this Agreement or adjust any invoice for any arithmetic or computational error within twelve (12) months of the date the invoice, or adjustment to an invoice, was rendered, or the date of any adjustment as provided by the NYISO. In the event an invoice or portion thereof, or any other claim or adjustment arising hereunder, is disputed, payment of the undisputed portion of the invoice shall be required to be made when due, with notice of the objection given to the other Party. Any invoice dispute or invoice adjustment shall be in writing and shall state the basis for the dispute or adjustment. Payment of the disputed amount shall not be required until the dispute is resolved. Upon resolution of the dispute, any required payment shall be made within two (2) Business Days of such resolution along with interest accrued at the Interest Rate from and including the due date to but excluding the date paid. Inadvertent overpayments shall be returned upon request or deducted by the Party receiving such overpayment from subsequent payments, with interest accrued at the Interest Rate from and including the date of such overpayment to but excluding the date repaid or deducted by the Party receiving such overpayment. Any dispute with respect to an invoice is waived unless the other Party is notified in accordance with this Section 6.3 within twelve (12) months after the invoice is rendered or any specific adjustment to the invoice is made, or the date of any adjustment as provided by the NYISO. If an invoice is not rendered within twelve (12) months after the close of the month during which performance occurred, the right to payment for such performance is waived. For the purposes of determining invoice amounts, the parties may rely upon meter readings of the entity designated as the applicable metering authority by NYISO ("Meter Readings"), provided, (i) NYPA shall be notified and have the right to attend any testing or calibration of applicable meters (and Seller shall not object to NYPA's standing or right to attend such events), and (ii) in the event any meter error is detected, the Parties agree to correct invoices to reflect changes in metered amounts of any Product for the period for which such meter error was detected, or if such period is not known, for one-half the period between the date of detection and the last previous test of the applicable meters.

6.4 Netting of Payments. The Parties hereby agree that they shall discharge mutual debts and payment obligations due and owing to each other on the same date through netting, in which case all amounts owed by each Party to the other Party during the monthly billing period under this Agreement, including any related damages calculated pursuant to Article Four (unless one of the Parties elects to accelerate payment of such amounts as permitted by Article Four), interest, and payments or credits, shall be netted so that only the excess amount remaining due shall be paid by the Party who owes it.

6.5 Payment Obligation Absent Netting. If no mutual debts or payment obligations exist and only one Party owes a debt or obligation to the other during the monthly billing period,

including, but not limited to, any related damage amounts calculated pursuant to Article Four, interest, and payments or credits, that Party shall pay such sum in full when due.

6.6 Security. Unless the Party benefiting from Performance Assurance or a guaranty notifies the other Party in writing, and except in connection with a liquidation and termination in accordance with Article Five, all amounts netted pursuant to this Article Six shall not take into account or include any Performance Assurance or guaranty which may be in effect to secure a Party's performance under this Agreement.

## ARTICLE SEVEN LIMITATIONS

7.1 Limitation of Remedies, Liability and Damages. EXCEPT AS SET FORTH HEREIN, THERE IS NO WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND ANY AND ALL IMPLIED WARRANTIES ARE DISCLAIMED. THE PARTIES CONFIRM THAT THE EXPRESS REMEDIES AND MEASURES OF DAMAGES PROVIDED IN THIS AGREEMENT SATISFY THE ESSENTIAL PURPOSES HEREOF. FOR BREACH OF ANY PROVISION FOR WHICH AN EXPRESS REMEDY OR MEASURE OF DAMAGES IS PROVIDED, EXCEPT AS OTHERWISE PROVIDED, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, THE OBLIGOR'S LIABILITY SHALL BE LIMITED AS SET FORTH IN SUCH PROVISION AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN OR IN THE CONFIRMATION, THE OBLIGOR'S LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY, SUCH DIRECT ACTUAL DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. UNLESS EXPRESSLY HEREIN PROVIDED, NEITHER PARTY SHALL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT OR CONTRACT, UNDER ANY INDEMNITY PROVISION OR OTHERWISE. IT IS THE INTENT OF THE PARTIES THAT THE LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER SUCH NEGLIGENCE BE SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE. TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, OR OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT AND THE DAMAGES CALCULATED HEREUNDER CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS.

## ARTICLE EIGHT CREDIT AND COLLATERAL REQUIREMENTS

8.1 Credit Support to be Provided by Seller.

(a) Obligation to Maintain and Replace Seller Letter of Credit. Seller shall deliver to NYPA within ten (10) Business Days of the execution of this Agreement the initial

Seller Letter of Credit issued by a Qualified Issuer with a stated amount equal to the Seller Letter of Credit Amount. The Seller Letter of Credit Amount shall automatically change on the Commercial Operation Date. The term of the Seller Letter of Credit shall commence within ten (10) Business Days of the execution of this Agreement and terminate on the Credit Support Termination Date, or such earlier time as specified in such Seller Letter of Credit, provided that Seller provides NYPA with a replacement Seller Letter of Credit issued by a Qualified Issuer in the amount required under this Section at least three (3) Business Days prior to the expiration of such Seller Letter of Credit. In the event NYPA shall make any draw against the Seller Letter of Credit in accordance with this Agreement, Seller shall, within five (5) Business Days, cause the Seller Letter of Credit to be reinstated in the full Seller Letter of Credit Amount, or cause a supplemental Seller Letter of Credit to be provided by a Qualified Issuer for the benefit of NYPA, such that the total credit available shall at all times be not less than the Seller Letter of Credit Amount. In any instance in which NYPA has drawn against a Seller Letter of Credit, but has not applied such cash against a payment obligation of Seller then due, and is holding such cash in the manner provided in Section 8.1(c) hereof, the amount of such cash being held by NYPA shall be deemed to satisfy a portion of Seller's obligation to maintain the Seller Letter of Credit, and Seller shall not be required to supplement, reinstate or replace the Seller Letter of Credit as to such amount.

(b) Draws. NYPA shall be entitled to make a draw or draws upon the Seller Letter of Credit upon the occurrence of any of the following events and, where applicable, at the following times, for a portion of or for the full face amount of the Seller Letter of Credit as NYPA shall determine in its sole discretion:

(i) immediately upon Seller and/or the issuer of the Seller Letter of Credit becoming Bankrupt as defined herein;

(ii) upon the occurrence of an Event of Default with respect to Seller (whether or not NYPA elects to exercise remedies under the Agreement in connection therewith); provided, that if such Event of Default is continuing and additional amounts become due and owing by Seller to NYPA hereunder, NYPA may make additional draws in regard to such amounts as they become due;

(iii) at any time within thirty (30) days prior to the date of expiration of the Seller Letter of Credit, Seller is required to provide a Seller Letter of Credit for the date immediately following the expiration of the Seller Letter of Credit and NYPA has not received unqualified written confirmation from a Qualified Issuer that the required renewal or replacement Seller Letter of Credit issued by such Qualified Issuer will be delivered to NYPA no later than three (3) Business Days prior to such date of expiration, in an amount equal to the amount required pursuant to this Agreement and in the form required hereunder;

(iv) if, notwithstanding the written confirmation referenced in Section 8.1(b)(iii) above, the Seller Letter of Credit is not renewed or a replacement Seller Letter of Credit in the form required hereunder and in the amount required by this Agreement is not delivered to NYPA prior to the third (3rd) Business Day prior to the date of expiration of the relevant then-current Seller Letter of Credit; or

(v) if a Credit Event has occurred with respect to the issuer of the Seller Letter of Credit and Seller has failed to deliver to NYPA a replacement Seller Letter of Credit issued by a Qualified Issuer in the form required hereunder within five (5) Business Days of such event.

(c) Application of Proceeds of Draws. In the event that NYPA at any time receives proceeds of the Seller Letter of Credit, title in such proceeds shall vest in NYPA. NYPA shall utilize such proceeds to satisfy amounts owed by Seller to NYPA pursuant to this Agreement and the Transaction. For the purposes of this Section 8.1, amounts owed by Seller to NYPA, and the use of the Seller Letter of Credit proceeds therefor, shall not be affected by any rulings in any bankruptcy or similar proceeding, including but not limited to any stay or discharge of Seller's obligations to NYPA under this Agreement, the intent of the Parties being that this Section 8.1 shall operate as if no bankruptcy had occurred, and NYPA shall be entitled to draw and realize the proceeds of the Seller Letter of Credit to satisfy such obligations without delay, notwithstanding any stay or discharge of Seller's obligations to NYPA under this Agreement. In the event any draw or draws are made pursuant to Section 8.1(b)(i), (iii), (iv) or (v) above, and such funds are not immediately applied to satisfy then-outstanding payment obligations of Seller to NYPA, NYPA shall hold such funds separate and apart from all other funds of NYPA in an interest-bearing account, and apply the same to any future payment obligations of Seller to NYPA; provided, however, if prior to the application of such funds for such purposes, Seller is not in default of any obligation with respect to this Agreement and the Transaction and has provided the appropriate replacement Seller Letter of Credit, NYPA shall promptly remit such funds to Seller, with accrued interest. Following the satisfaction in full of all obligations of Seller in respect of this Agreement and the Transaction and after the Credit Support Termination Date, and after giving effect to the exercise of any set-off rights, any surplus Seller Letter of Credit proceeds held by NYPA shall be transferred to Seller, without interest, provided that if such amounts are not transferred to Seller within five (5) Business Days after the Credit Support Termination Date, such amount shall be returned with interest at the Interest Rate from such date.

(d) Holding Proceeds of Draws. With respect to those amounts drawn pursuant to Section 8.1(b)(i) above that are not used to satisfy any amounts owed by Seller to NYPA hereunder, NYPA shall hold such amounts separate and apart from all other funds of NYPA in an interest-bearing account until a final determination has been made, by a court of competent jurisdiction, that the amounts paid by Seller or the issuer of the Seller Letter of Credit to NYPA prior to Seller becoming Bankrupt are not subject to being recovered from NYPA pursuant to Sections 544, 547, 549 or 550 of the Bankruptcy Code (or pursuant to any successor provisions of law) in any proceeding instituted under the Bankruptcy Code, or any comparable provision of any applicable state bankruptcy or creditors' rights law, by or against Seller or the issuer of the Seller Letter of Credit. If such a final determination is made, NYPA shall pay Seller (or, if applicable, the issuer of the Seller Letter of Credit) the funds drawn under the Seller Letter of Credit pursuant to Section 8.1(b)(i), net of any amounts that have been applied in regard to amounts owed by Seller to NYPA with respect to this Agreement and the Transaction, and actual interest earnings thereon. If such final determination is not made and the bankruptcy trustee or debtor-in-possession recovers moneys from NYPA, NYPA shall retain the funds drawn under the Seller Letter of Credit and any interest earnings thereon equal to the amount of such

recovery, and any excess shall be paid to Seller (or, if applicable, the issuer of the Seller Letter of Credit).

## ARTICLE NINE GOVERNMENTAL CHARGES

9.1 Cooperation. Each Party shall use reasonable efforts to implement the provisions of and to administer this Agreement in accordance with the intent of the Parties to minimize all taxes, so long as neither Party is materially adversely affected by such efforts.

9.2 Governmental Charges. Seller shall pay or cause to be paid all taxes, fees or other charges of whatever kind or nature whatsoever imposed by any government authority existing as of the Effective Date (“**Governmental Charges**”) on or with respect to the Product or the Transaction arising prior to the Delivery Point, and NYPA shall pay or cause to be paid all Governmental Charges on or with respect to the Product or the Transaction arising at and after the Delivery Point; provided, however, notwithstanding Section 10.7(f) or the Confirmation, in the event that new charges, fees or other costs are imposed on Seller or the Facility related to emissions from the Facility, then NYPA shall be responsible for such costs. If either Party is required by law or regulation to remit or pay Governmental Charges which are the other Party’s responsibility hereunder, such Party may deduct the amount of any such Governmental Charges from the sums due under Article Six of this Agreement. Nothing shall obligate or cause a Party to pay or be liable to pay any Governmental Charges for which it is exempt under the law. Either Party, upon written request of the other, shall provide reasonably satisfactory evidence of exemption if either Party is exempt from taxes.

## ARTICLE TEN MISCELLANEOUS

10.1 Term of Agreement. The term of this Agreement shall commence on the Effective Date and shall remain in effect until the fifteenth (15th) anniversary of the Commercial Operation Date, unless previously terminated in accordance with the express terms of this Agreement; provided, however, that such termination shall not affect or excuse the performance of either Party under any provision of this Agreement that by its terms survives any such termination and, provided, further, that this Agreement and any other documents executed and delivered hereunder shall remain in effect with respect to the Transaction until both Parties have fulfilled all of their obligations with respect to the Transaction.

10.2 Representations and Warranties. Notwithstanding any other provision of this Agreement, as of the Effective Date and as of the effective date of the Transaction, each Party represents and warrants to the other Party that:

(i) it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation;

(ii) it has all regulatory authorizations necessary for it to legally perform its obligations under this Agreement and the Transaction (including the Confirmation);

(iii) the execution, delivery and performance of this Agreement and the Transaction (including the Confirmation) are within its powers, have been duly

authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any law, rule, regulation, order or the like applicable to it;

(iv) this Agreement, the Transaction (including the Confirmation), and each other document executed and delivered in accordance with this Agreement constitutes its legally valid and binding obligation enforceable against it in accordance with its term, subject to any Equitable Defenses;

(v) it is not Bankrupt and there are no proceedings pending or being contemplated by it or, to its knowledge, threatened against it which would result in it being or becoming Bankrupt;

(vi) there is not pending or, to its knowledge, threatened against it or any of its Affiliates any legal proceedings that could materially adversely affect its ability to perform its obligations under this Agreement and the Transaction (including the Confirmation);

(vii) no Event of Default or Potential Event of Default with respect to it has occurred and is continuing and no such event or circumstance would occur as a result of its entering into or performing its obligations under this Agreement and the Transaction (including the Confirmation);

(viii) it is acting for its own account, has made its own independent decision to enter into this Agreement and the Transaction (including the Confirmation) and as to whether this Agreement and the Transaction (including the Confirmation) is appropriate or proper for it based upon its own judgment, is not relying upon the advice or recommendations of the other Party in so doing, and is capable of assessing the merits of and understanding, and understands and accepts, the terms, conditions and risks of this Agreement and the Transaction (including the Confirmation);

(ix) [intentionally deleted];

(x) it has entered into this Agreement and the Transaction (including the Confirmation) in connection with the conduct of its business and it has or will have the capacity or ability to make delivery of all Products referred to in the Transaction; and

(xi) it is a producer, processor, commercial user or merchant handling the Product that is the subject of the Transaction, and it is entering into the Transaction for purposes related to its business as such.

10.3 Risk of Loss. NYPA shall have no liability or risk of loss with respect to or related to the Product.

10.4 Assignment. Neither Party shall assign this Agreement or its rights hereunder without the prior written consent of the other Party, which consent shall not be unreasonably withheld, delayed or conditioned, provided that (i) a Party may withhold such consent in its sole discretion if the effect of the assignment would cause the non-assigning Party to be in violation

of or non-compliance with any applicable law, regulation, rule or order of any court, arbitrator or governmental entity, or otherwise have a material adverse effect upon the non-assigning Party); and (ii) subject to the provisions of the immediately preceding subparagraph (i), a Party may, without the consent of the other Party (and without relieving itself from liability hereunder), but with prior notice to the other Party, pledge, encumber or assign this Agreement or the accounts, revenues or proceeds hereof in connection with any financing or other financial arrangements. NYPA agrees to (a) execute and deliver in favor of any financing institution(s) and/or lender(s) (or their agent(s)) a consent to assignment with customary lender protections and such other terms and conditions as a reasonable lender in a non-recourse project financing would require and (b) execute, acknowledge and deliver any and all further documents and instruments, and to take any other actions, which may be necessary to satisfy the reasonable requests of any such financing institution(s) and/or lender(s) (or their agent(s)) in connection with such a financing. Any purported assignment of this Agreement made in violation of the preceding sentence shall be void and of no effect.

10.5 Governing Law. THIS AGREEMENT AND THE RIGHTS AND DUTIES OF THE PARTIES HEREUNDER SHALL BE GOVERNED BY AND CONSTRUED, ENFORCED AND PERFORMED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAW (OTHER THAN SECTIONS 5-1401 AND 5-1402 OF THE NEW YORK GENERAL OBLIGATIONS LAW).

10.6 Notices. All notices, requests, statements or payments shall be made as specified on pages 1-2 of this Agreement, provided notices may not be provided by e-mail unless simultaneously confirmed by a document transmitted in the foregoing manner. Notices (other than scheduling requests) shall, unless otherwise specified herein, be in writing and may be delivered by hand delivery, United States mail, overnight courier service or facsimile. Notice by facsimile or hand delivery shall be effective at the close of business on the day actually received, if received during business hours on a Business Day, and otherwise shall be effective at the close of business on the next Business Day. Notice by overnight United States mail or courier shall be effective on the next Business Day after it was sent. A Party may change its addresses by providing notice of same in accordance herewith.

10.7 General.

(a) This Agreement (including the exhibits, schedules, appendices and any written supplements hereto), any designated collateral, credit support or margin agreement or similar arrangement between the Parties and the Confirmation constitute the entire agreement between the Parties relating to the subject matter. This Agreement shall be considered for all purposes as prepared through the joint efforts of the Parties and shall not be construed against one Party or the other as a result of the preparation, substitution, submission or other event of negotiation, drafting or execution hereof.

(b) Except to the extent herein provided for, no amendment or modification to this Agreement shall be enforceable unless reduced to writing and executed by both Parties.



(c) Each Party agrees if it seeks to amend any applicable wholesale power sales tariff during the term of this Agreement, such amendment will not in any way affect the Transaction under this Agreement without the prior written consent of the other Party. Each Party further agrees that it will not assert, or defend itself, on the basis that any applicable tariff is inconsistent with this Agreement.

(d) This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this Agreement).

(e) Waiver by a Party of any default by the other Party shall not be construed as a waiver of any other default.

(f) If (i) any provision of this Agreement is declared, deemed, rendered or becomes unlawful or void, or otherwise becomes incapable of being performed in the manner originally contemplated in this Agreement, as a result of any order, judgment, action or process of an applicable court, regulatory agency, governmental entity or NYISO, or as the result of a statutory or regulatory change, or if a new tax, fee or other charges of whatever kind or nature is imposed by any governmental entity or NYISO (individually or collectively, any such event referred to as a “**Regulatory Event**”) or (ii) as the result of a Regulatory Event, a Party is not capable of receiving a material portion of the originally intended bargain, such Regulatory Event will not otherwise affect the remaining obligations that arise under this Agreement; provided, however, that if a Regulatory Event occurs, (y) the Parties shall promptly negotiate in good faith to reform this Agreement in order to give effect to the original intention of the Parties to the greatest possible reasonable extent in the absence of the provisions affected by the Regulatory Event, and (z) if the nature of the Regulatory Event is such that the remaining unaffected portions of the Agreement cannot reasonably be reformed and continued in effect, or the transactions herein cannot be undertaken without depriving one or both Parties of a material aspect of their original bargain, the Agreement shall terminate as of the implementation date of the Regulatory Event without any further payment obligation by either Party other than settlement of payments or adjustments due with respect to the Transaction previously performed by the Parties in good faith; provided, however, that upon any such termination, neither Party shall be obligated to pay or entitled to receive any payment for Gains or Losses or any transaction costs.

(g) The term “including” when used in this Agreement shall be by way of example only and shall not be considered in any way to be in limitation. The headings used herein are for convenience and reference purposes only.

(h) All indemnity and audit rights shall survive the termination of this Agreement for twelve (12) months. This Agreement shall be binding on each Party’s successors and permitted assigns.

(i) In the event any index, reference input or other third party source required for any calculation under this Agreement shall no longer be available to the Parties due to cessation of publication thereof, substantive change in the basis or methodology for derivation thereof which makes such source inapplicable or unreliable for any purpose originally intended, or for any other reason, the Parties agree to meet within ten (10) Days of learning of such

unavailability and negotiate in good faith the selection of a substitute reference input that will most closely simulate the reference input that is no longer available. In the event no adequate substitute reference input is available, the parties will negotiate in good faith to revise the applicable calculation formula to produce a result approximating the original formula as closely as possible, utilizing such other variable input sources as may be practicably available.

10.8 Audit. Each Party has the right, at its sole expense and during normal working hours, to examine the records of the other Party relating to performance or non-performance under this Agreement to the extent reasonably necessary to verify the accuracy of any statement, charge or computation made pursuant to this Agreement. If requested, a Party shall provide to the other Party statements evidencing the matters referenced in the Confirmation (including the Product delivered at the Delivery Point). If any such examination reveals any inaccuracy in any statement, the necessary adjustments in such statement and the payments thereof will be made promptly and shall bear interest calculated at the Interest Rate from the date the overpayment or underpayment was made until paid; provided, however, that no adjustment for any statement or payment will be made unless objection to the accuracy thereof was made prior to the lapse of twelve (12) months from the rendition thereof, and thereafter any objection shall be deemed waived.

10.9 Confidentiality.

(a) Neither Party shall disclose the terms or conditions of the Transaction or this Agreement to a third party (other than the Party's employees, trustees, actual or potential lenders, actual or potential investors, counsel, accountants, advisors and Affiliates, and in the case of NYPA, the PSC, the New York State Department of Public Service, Transmission Providers and their employees, trustees, lenders, counsel, accountants and advisors, who have a need to know such information and have agreed to keep such terms confidential subject to any disclosure required by applicable law, regulation, legislative or administrative proceeding) except in order to comply with any applicable law, regulation, or any exchange, control area or independent system operator rule or in connection with any court or regulatory proceedings. The Parties and their Affiliates shall be entitled to all remedies available at law or in equity enforce, or seek relief in connection with, this confidentiality obligation.

(b) Seller hereby expressly acknowledges that NYPA is subject to the requirements of the New York Freedom of Information Law ("FOIL") and must comply therewith. If NYPA is requested by a third party to disclose information that it has received from Seller and it reasonably believes is confidential in nature ("Confidential Information"), NYPA will (i) notify Seller of the request, (ii) provide Seller with the opportunity to provide information regarding the need for confidential treatment, (iii) evaluate the third party's request for disclosure and Seller's request for confidential treatment, and (iv) determine if the Confidential Information is subject to disclosure under FOIL. If NYPA reasonably determines the Confidential Information is not covered by any exception to the disclosure obligation and is required to be disclosed by NYPA under FOIL, NYPA will provide prompt written notice of such determination to Seller so that Seller may seek a protective order or other appropriate remedy. If Seller does not obtain a protective order or no formal proceeding has been initiated by Seller, in each case within a reasonable period of time (but not less than ten (10) Business Days) after NYPA provides notice to Seller of its intent to make public the Confidential Information, then

the Purchaser may disclose such information with no liability or further obligation to Seller; provided that any disclosure by NYPA is limited only to the specific Confidential Information being requested.

10.10 Imaged Agreement. Any original executed Agreement, Confirmation or other related document may be photocopied and stored on computer tapes and disks (the “**Imaged Agreement**”). The Imaged Agreement, if introduced as evidence in automated facsimile form, and all computer records of the foregoing, if introduced as evidence in printed format, in any judicial, arbitration, mediation or administrative proceedings, will be admissible as between the Parties to the same extent and under the same conditions as other business records originated and maintained in documentary form. Neither Party shall object to the admissibility of the Confirmation or the Imaged Agreement (or photocopies of the Confirmation or the Imaged Agreement) on the basis that such were not originated or maintained in documentary form under either the hearsay rule, the best evidence rule or other rule of evidence.

10.11 Dispute Resolution.

(a) If any dispute shall arise between the Parties in connection with or under this Agreement, the Parties shall first attempt in good faith to resolve such dispute between themselves in the following manner. If any such dispute shall arise, either Party may give a notice of dispute to the other Party. Within ten (10) Business Days after the receipt of such notice, the Parties shall meet at the working level to discuss the dispute. If following such discussion the Parties have not resolved such dispute, then within ten (10) Business Days after the conclusion of such meeting at the working level, members of the senior management of the Parties shall meet in person or by telephone to discuss the dispute. If following such discussion the Parties have not resolved such dispute, then either Party may bring such action at law or in equity as it deems necessary or desirable. NYPA and Seller each consents to the exclusive jurisdiction and venue of any state or federal court within or for the City of New York, New York County, New York for adjudication of any such suit, claim, action or other proceeding in law or equity relating to this Agreement or to any other transaction contemplated hereby. NYPA and Seller each accept, generally and unconditionally, the exclusive jurisdiction and venue of the aforesaid courts and waive any objection as to venue and any defense of *forum non conveniens*. Each of NYPA and Seller irrevocably consents to the service of process from any of the aforementioned courts in any such action or proceeding by the mailing of copies thereof by registered or certified mail, postage prepaid, to the addresses set forth herein for the purpose of giving notices. EACH OF NYPA AND SELLER HEREBY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES THE RIGHT ANY MAY HAVE TO A TRIAL BY JURY IN RESPECT TO ANY LITIGATION BASED HEREON, OR ARISING OUT OF, UNDER, OR IN CONNECTION WITH THIS AGREEMENT AND ANY AGREEMENT CONTEMPLATED TO BE EXECUTED IN CONNECTION HEREWITH, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY IN CONNECTION WITH SUCH AGREEMENTS.

(b) Either NYPA or Seller may, without prejudice to any negotiation or mediation procedures, proceed in the courts of the State of New York to obtain provisional judicial relief if, in such Party's sole discretion, such action is necessary to protect public safety,

avoid imminent irreparable harm, to provide uninterrupted electrical and other services, or to preserve the status quo pending the conclusion of any dispute resolution procedures employed by the Parties or pendency of any action at law or in equity. Except for temporary injunctive relief under this section, neither NYPA nor Seller shall bring any action at law or in equity to enforce, interpret, or remedy any breach or default of this Agreement without first complying with the provisions of this Section 10.11.

(c) All applicable statutes of limitation and defenses based upon the passage of time and similar contractual limitations shall be tolled while the procedures specified in this Section 10.11 are pending. The Parties will take such action, if any, required to effectuate such tolling. Without prejudice to the procedures specified in this Section 10.11, a Party may file a complaint for statute of limitations purposes, if in its sole judgment such action may be necessary to preserve its claims or defenses. Despite such action, the Parties will continue to participate in good faith in the procedures specified in this Section 10.11.

#### 10.12 Regulatory Review.

(a) The Parties, for themselves and their respective successors and assigns, (i) agree that (absent the express written agreement of all Parties to the proposed change) the standard of review for proposed changes to any section of this Agreement, or to any other documents, instruments or other agreements executed or entered into by the Parties in connection with this Agreement, that specifies the rate(s) or other material economic terms and conditions agreed to by the Parties, whether proposed by a Party or by or before FERC acting *sua sponte*, shall be the “public interest” standard of review set forth in United Gas Pipe Line Co. v. Mobile Gas Service Corp., 350 U.S. 332 (1956) and Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348 (1956). To the extent permitted by applicable law, the Parties, for themselves and their respective successors and assigns, hereby expressly and irrevocably waive any rights they can or may have to the application of any other standard of review, including the “ordinary just and reasonable standard under Sections 205 and/or 206 of the FPA.” Morgan Stanley Capital Group, Inc. v. P.U.D. No. 1 of Snohomish County, 128 S. Ct. 2733 (2008) (“**Morgan Stanley**”). The Parties, for themselves and their respective successors and assigns, agree that for purposes of any proceeding or review by FERC, any reviewing court, arbitrator, or other tribunal acting in connection with or relating in any way to this Agreement, shall be subject to the “public interest” standard and not in any case the “ordinary just and reasonable standard,” as such terms have been construed in Morgan Stanley.

(b) Notwithstanding Section 10.12(a), to the fullest extent permitted by applicable law, each Party, for itself and its respective successors and assigns, hereby also expressly and irrevocably waives any rights it can or may have, now or in the future, whether under Sections 205 and/or 206 of the Federal Power Act or otherwise, to unilaterally seek to obtain from FERC by any means, directly or indirectly (through complaint, investigation or otherwise), and each hereby covenants and agrees not at any time to seek to so obtain, an order from FERC changing any section of this Agreement specifying the rate(s) or other material economic terms and conditions agreed to by the Parties. The Parties agree that, to the fullest extent permitted by applicable law, the “sanctity of contract” principles acknowledged by FERC in its Notice of Proposed Policy Statement (issued August 1, 2002) in Docket No. PL02-7-000, Standard of Review for Proposed Changes to Market-Based Rate Contracts for Wholesale Sales

of Electric Energy by Public Utilities, shall prevail and neither Party shall unilaterally seek to obtain from FERC any relief changing the rate(s) and other material economic terms and conditions of their agreement(s), as set forth in this Agreement, notwithstanding any changes in applicable law or markets that may occur. To the extent that any non-party seeks such relief, or FERC acts *sua sponte* to consider such changes, the Parties further covenant and agree to use commercially reasonable efforts (which efforts may include the costs and expense of appearing before FERC or in connection with any appeals of FERC orders but shall not otherwise require the payment of money by a Party), to cooperate to jointly oppose the entry of an order by FERC providing any such changes. In the event it were to be determined that applicable law precludes the Parties from waiving their rights to seek changes from FERC to their market-based power sales contracts (including entering into covenants not to do so) then this paragraph shall not apply, provided that, consistent with Section 10.12(a), neither Party shall seek any such changes except under the “public interest” standard of review and otherwise as set forth in Section 10.12(a). Nothing in this Section 10.12(b) shall prevent Seller from making compliance, tariff or other filings as are required by the regulations and orders of the FERC.

(c) To the extent FERC adopts in a final or subsequent policy statement the use of specific language to accomplish the objective described in Section 10.12(a) and (b) above which specific language varies from that set out in Section 10.12(a), then the Parties shall amend Section 10.12(a) above to reflect such specific language, provided that to the extent that the objective behind the specific language adopted in any such final or subsequent policy statement is in any way inconsistent with the mutual intent of the Parties in this regard as currently set forth in Section 10.12(a) and (b), then the Parties shall meet to attempt to negotiate in good faith an amendment to this Section 10.12 to address such inconsistencies, provided, further, that neither Party shall be obligated in any way to agree to any such amendment.

10.13 Counterparts. This Agreement may be executed by the Parties in any number of counterparts, each of which will be deemed an original, but all of which will constitute one and the same instrument. Any signature page of any such counterpart, or any electronic facsimile thereof, may be attached or appended to any other counterpart to complete a fully executed counterpart of this Agreement. This Agreement may be executed in any number of multiple originals, each of which shall be deemed an original instrument. Any electronic facsimile transmission by a Party of any signature of that Party to the other Party shall be deemed an original and shall bind such Party sending such transmission.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be duly executed as of the date first above written.

NYPA:

SELLER:

Power Authority of the State of New York

\_\_\_\_\_

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

**List of Exhibits**

<b>Exhibit</b>	<b>Title</b>
<b>1</b>	<b>Calculation of Gains and Losses</b>
<b>2</b>	<b>Confirmation</b>
<b>3</b>	<b>Form of Seller Letter of Credit</b>
<b>4</b>	<b>NYPA Opinions</b>
<b>5</b>	<b>Seller Opinions</b>
<b>6A</b>	<b>Site</b>
<b>6B</b>	<b>Design</b>
<b>6C</b>	<b>Consents Needed</b>

**Exhibit 1 to Master Agreement****Calculation of Gains or Losses**

Gains or Losses will be determined by the calculating Party, acting in good faith and using commercially reasonable procedures. The Gains or Losses will be determined as of the Early Termination Date, if applicable.

In determining the Gains or Losses, the calculating Party may consider any relevant information, including, without limitation, one or more of the following types of information:

- (i) quotations (either firm or indicative) for replacement transactions of a similar nature (considering quantity, length of term and applicable Product, and any other relevant considerations) supplied by one or more third parties that may take into account the creditworthiness of the calculating Party at the time the quotation is provided and the terms of any relevant documentation, including credit support documentation, between the calculating Party and the third party providing the quotation;
- (ii) information consisting of relevant market data in the relevant market for transactions of a similar nature (considering quantity, length of term and applicable Product, and any other relevant considerations) supplied by one or more third parties including, without limitation, relevant rates, prices, volatilities, spreads, correlations or other relevant market data in the relevant market if that information is of the same type used by the calculating Party in the regular course of its business for the valuation of transactions of a similar nature (considering quantity, length of term and applicable Product, and any other relevant considerations) for financial reporting purposes; or
- (iii) information of the types described in clause (i) or (ii) above from internal sources (including any of the calculating Party's Affiliates) if that information is of the same type used by the calculating Party in the regular course of its business for the valuation of transactions of a similar nature (considering quantity, length of term and applicable Product, and any other relevant considerations) for financial reporting purposes.

The calculating Party will consider, taking into account the standards and procedures described in this definition, quotations pursuant to clause (i) above or relevant market data pursuant to clause (ii) above unless the calculating Party reasonably believes in good faith that such quotations or relevant market data are not readily available or would not satisfy those standards. Third parties supplying quotations pursuant to clause (i) above or market data pursuant to clause (ii) above may include, without limitation, dealers in the relevant markets, end-users of the relevant product, information vendors, brokers and other sources of market information. Such data and quotes (firm, indicative or otherwise) supplied by third parties must be submitted and documented in writing on the letterhead (or some other identifiable means) of the relevant submitting source.



**Exhibit 2 to Master Agreement**

**Exhibit**

**MASTER POWER PURCHASE AND SALE AGREEMENT  
TRANSACTION CONFIRMATION**

This Transaction Confirmation ("Confirmation") shall confirm the Transaction agreed upon the \_\_\_ day of \_\_\_\_\_, 2013, between Power Authority of the State of New York ("NYPA") and \_\_\_\_\_ ("Seller") regarding the transactions set forth in this Confirmation under the terms and conditions set forth herein:

This Transaction Confirmation is being provided pursuant to and in accordance with the Master Power Purchase and Sale Agreement dated \_\_\_\_\_, 2013 (the "**Master Agreement**") between NYPA and Seller, and constitutes part of and is subject to the terms and provisions of the Master Agreement as defined therein. Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Master Agreement.

**Parties:**

**Seller:** \_\_\_\_\_ ("Seller").

**NYPA:** Power Authority of the State of New York.

**Delivery Term:** Commencing with the Month in which the Commercial Operation Date of the Facility occurs and continuing through the Month ending the day before the fifteenth (15<sup>th</sup>) anniversary of the Commercial Operation Date (the "Delivery Term").

**Delivery Point:** \_\_\_\_\_, \_\_\_\_\_ New York, PTID# \_\_\_\_\_.

**Products:** In consideration of the Master Agreement, Seller agrees to offer, deliver and sell all Products available from the Facility into the NYISO Markets at the Delivery Point during the Delivery Term.

**Generation Source:** Seller's Facility located at \_\_\_\_\_, [STATE] \_\_\_\_\_.

**Settlement Period:** Monthly, in arrears, invoiced as set forth in the Master Agreement.

**Calculating Party:** Seller will calculate the differences in each of the Capacity Contract for Differences and Energy Settlements set forth in this Confirmation, provided that following any occurrence and continuation of an Event of Default by Seller, NYPA shall assume the role of calculating party. Seller shall obtain, calculate and forward to NYPA all information for determining payment of the net amount due from the paying Party for each Settlement Period, including all NYISO settlements, as soon as commercially practicable following the end of each Settlement Period.

**Contract for Differences and Settlements:** For each Settlement Period, the Parties will owe and pay, and will settle net differences for such period as follows:

**(A) Capacity Contract for Differences ("Capacity CFD"):**

During each Settlement Period: (i) NYPA will pay to Seller the UCAP Strike Price multiplied by Actual UCAP during such Settlement Period, and (ii) Seller will pay to NYPA the UCAP Revenue Share for such Settlement Period.

1. Capacity Bidding Requirements: For each Settlement Period, Seller shall have full discretion to determine whether, to what extent and at what bid price it may decide to bid all or a portion of the Facility's Actual UCAP into the ICAP Strip Auction ("Strip Auction"), ICAP Monthly Auction ("Monthly Auction") or, except as provided below, the ICAP Demand Curve Spot Market Auction ("Spot Auction") administered by the NYISO for the same Settlement Period pursuant to Section 5.14(3) of the NYISO ICAP Manual (or its successor), provided, however, that Seller must either bid or certify the entirety of the Facility's Actual UCAP into the Spot Auction. For example, if Seller sells 100 MW in the Strip Auction and 50 MW into the Monthly Auction for a given month, it must certify that 150 MW into the Spot Auction and must bid the remainder of the Facility's Actual UCAP into the Spot Auction for such month. The bid price to be submitted by Seller in the Spot Auction shall be no greater than (i) the Facility's marginal going forward costs, recognizing the Capacity revenues anticipated to be received under the Master Agreement and this Confirmation, or (ii) if the Capacity is subject to mitigation pursuant to an order or rule of FERC or any other regulatory authority or the NYISO, the lowest offering price permitted under such mitigation rule.

2. Capacity Quantity Adjustment: In the event Seller has sold a quantity of UCAP (into the Strip Auction or Monthly Auction and settled such sale transaction with the NYISO during a Settlement Period, and the quantity sold covers more than one Month, the UCAP Revenue for such Settlement Period will be deemed to include only the portion of the revenue which the NYISO has committed to Seller for UCAP provided in such Settlement Period and revenue actually realized by Seller from such transaction that corresponds to the UCAP actually provided during such Settlement Period, with the total revenue committed to and realized by Seller from such multi-month UCAP sale to be allocated evenly to all months covered by such sale. To illustrate: (i) If Seller offers and sells UCAP into the Strip Auction and during such Settlement Period Seller realizes revenues from NYISO for six (6) months, then for purposes of determining the UCAP Revenue for each Settlement Period in such six-month period covered by such sale, the portion of such sale revenue included will be one-sixth (1/6) of the total revenue from such transaction. (ii) If Seller offers and sells UCAP into the Monthly Auction for the balance of a period, and NYISO purchases and settles with Seller for UCAP in the 2nd and 4th months of such period only, then the revenue from such sale would be deemed applicable in equal parts to each of the two actual Settlement Periods for which the NYISO purchased such UCAP.

**(B) Energy Settlement ("Energy Settlement"):**

During each Settlement Period, (i) Seller will obtain and realize for Seller's account all Energy Market Revenues, and (ii) for each Hour in such Settlement Period in which the LBMP exceeds the Energy Strike Price, Seller will pay to NYPA the difference between the LBMP and the Energy Strike Price, multiplied by the Contract Energy Amount. For avoidance of doubt, if the LBMP is lower than the Energy Strike Price in any Hour, the Parties will make no payment to each other with respect to such Hour.

1. **Energy Bidding Requirements**: Seller shall bid its available Energy in accordance with NYISO Rules for Installed Capacity Suppliers.

2. **Hours**: For purposes of the Energy Settlement calculations, all Hours in a Settlement Period are included except for (i) Scheduled Maintenance Hours, (ii) whole or prorated partial Additional Maintenance Hours not to exceed the annual allowance set forth in the definitions, and (iii) whole or prorated partial Hours in which the Facility was unable to deliver Energy due to Force Majeure or unavailability of the interconnecting transmission facilities. For avoidance of doubt, Hours or prorated partial Hours affected by any Forced Outage are not deducted from "Hours" for this calculation.

**(C) Ancillary Services Revenue**: Seller will obtain and realize all revenue earned from sale of Ancillary Services during each Settlement Period.

### **Special Conditions**

(1) **Seller's Performance Rights and Obligations.**

(a) **Consideration**: For avoidance of doubt, Seller and NYPA agree to perform the foregoing Capacity CFD and Energy Settlement as an inducement to Seller (i) to build and maintain the Facility, and (ii) to deliver Products into NYISO Capacity, Energy and Ancillary Services Markets at the Delivery Point for Seller's own account, which is deemed a benefit to NYPA. Seller shall maintain NYISO membership, and eligibility to sell all Products from the Facility into the foregoing NYISO Markets, and shall sell such Products into such NYISO Markets and be entitled to retain all revenues from such sales, subject to net settlement payments to NYPA as set forth in this Confirmation. Seller will participate in the NYISO Voltage Support Service program, which requires installation of an automatic voltage regulator at the Facility, subject to and consistent with the requirements of the Consents, and participate in NYISO-required testing associated with such program. The transactions set forth in this Confirmation shall not be subject to any adjustment or set-off by reason of any gains, profits, losses or costs of Seller or its Affiliates from operation of the Facility during the Delivery Term or from any hedging of Product sales.

(b) Seller agrees to operate and maintain the Facility in accordance with Good Utility Practices, applicable Laws and the requirements of applicable Consents and Permits. Seller shall comply in all material respects with all NYISO Rules necessary for all Products to be sold, delivered, made available and received, including, without limitation, all product certification and testing requirements under NYISO Rules. Except as and to the extent otherwise expressly set forth in this Confirmation, Seller shall pay all costs of ownership, operation, maintenance, repair and spare parts of and for the Facility, including but not limited to capital costs, financing principal and interest, depreciation, applicable salaries and benefits of personnel, real and personal property rent, lease payments, taxes and financing costs, all costs of insurance, utilities, costs of all lubricants and other consumable substances, gas and fuel oil commodity, delivery and

storage costs for all fuel purchased, delivered or consumed for any purpose, all hedging costs, settlements or losses, costs of obtaining, maintaining and compliance with all Consents, Permits, all Capacity, Energy and Ancillary Services transaction costs with the NYISO, any NYISO adjustments or penalties, including any imbalance or basepoint tolerance penalties, and cost of waste removal and Site restoration and remediation.

(c) Seller shall provide to NYPA Seller's proposed schedule of expected maintenance outage periods at the Facility during each annual period, and provide NYPA with a reasonable opportunity to consult with Seller on such schedule prior to submission to the NYISO. Subject to any requirements of the NYISO, the interconnection utility, Transmission Providers or any transmission system owner or any applicable regulatory authority, Seller will use commercially reasonable efforts to minimize the duration of, and schedule expected maintenance outages during the shoulder months of March-May and September-December, and will not schedule any Scheduled Maintenance Outages during the Summer Capability Period peak months of June, July or August. Each such Hour during a NYISO-approved maintenance outage (a "Scheduled Maintenance Outage") at the Facility shall be a "Scheduled Maintenance Hour." Scheduled Maintenance Hours shall include only those scheduled outage periods set forth in the annual maintenance schedule submitted to and approved by the NYISO, and any alternate dates for such outages later reasonably proposed by Seller and approved by the NYISO. Any other hours, or prorated portions thereof, that are used for maintenance outages for any purposes shall be deemed Additional Maintenance Hours to the extent that such hours meet the requirements set forth in the definition of "Additional Maintenance Hours" set forth below.

(d) [Electric metering, Meter Readings and meters will conform to NYISO standards or the equivalent. Seller shall provide reasonable notice to NYPA with respect to all gas and electric meter tests, and NYPA shall be entitled to have a representative attend, provided NYPA and its representative agree to observe Seller's rules for persons entering Seller's premises. In the event any inaccuracy exceeding one-half percent (+/- 0.50%) is determined in any test, the Parties will correct data from such meter used for any purpose under the Master Agreement for all periods between the date of such test and the date which is midway between such test date and the date of the last test in which the meter was found to be accurate or recalibrated to be accurate, with such data correction as appropriate to rectify the inaccuracy detected in the most recent test. Seller will make available to NYPA and, at NYPA's request, utilities participating in the applicable TO/LSE Tariff ("Affected TOs") all gas and electric metering data, including electronic real-time readings, and NYISO settlement data in such manner as Seller and NYPA may agree in the communications protocol to be agreed by the Parties as provided in Special Condition 1.]

(e) Seller will provide reasonable notice to NYPA and each Affected TO of each NYISO DMNC test of the Facility, and each NYISO voltage support test in accordance with the NYISO Voltage Support Service Program, or any other significant test of the Facility's output, and NYPA may designate a representative, and may designate representatives of the Affected TOs, to attend such test and inspect results, at NYPA's cost, provided such representatives agree to observe Seller's rules for persons entering Seller's premises.

(f) Seller shall maintain general liability insurance coverages for the Facility with underwriters with an A.M. Best rating of not less than "A" in such amounts and with such deductibles as are customarily maintained by companies in the same business and similarly situated to Seller with each such policy naming NYPA and the Affected TOs as an additional insured with waiver of subrogation. Seller shall provide NYPA and the Affected TOs with documentation on an annual basis demonstrating Seller's insurance coverages, including information as to the names of underwriters, types of policies, policy limits and deductibles, and shall furnish Seller with copies of all policies upon request.

(g) Within five (5) Business Days after the occurrence of any Forced Outage, Seller shall notify NYPA of the cause of such outage and provide NYPA any additional information as NYPA may reasonably request concerning the Forced Outage

(2) **Access to Facility and Data.** Appropriate representatives of NYPA and the Affected TOs shall upon reasonable request to Seller and during normal business hours have access to the Facility to read meters, attend tests and to perform all inspections, maintenance, service, and operational reviews as may be necessary to facilitate the performance of NYPA's obligations under the Master Agreement. While at the Facility, such representatives shall observe such all safety precautions as may be required by Seller and shall conduct themselves in a manner that will not interfere with the operation or maintenance of the Facility. Seller shall provide NYPA and the Affected TOs with access to all operational data and records required for any calculation for which this Confirmation or the Master Agreement provides.

(3) **Escalation Rate Process.** Commencing on the first anniversary date of the Commercial Operation Date and with the first Settlement Period of each following Contract Year thereafter (each, an "**Escalation Date**"), Variable O&M and Fuel Price Adders (the "**Escalated Items**") shall be escalated in accordance with the following process (the "**Escalation Rate Process**"):

(a) The following terms shall have the following meanings for purposes of the Escalation Rate Process:

"**GDPDEF**" means the Gross Domestic Product Implicit Price Deflator calculated and published by the US Department of Commerce Bureau of Economic Analysis. In the event that such index is no longer published, the parties shall in good faith select a substitute index.

"**GDPDEF Actual Percentage**" means, for a particular Escalation Date, the average of all GDPDEF monthly values during the most recently published full twelve (12) Months prior to such Escalation Date, divided by the average of the monthly GDPDEF values for the preceding twelve (12) month period, expressed as a percentage.

(b) Each Escalated Item will be multiplied by the GDPDEF Actual Percentage, with the resulting figure being the value for such Escalated Item for the following Contract Year.

(c) An example of the Escalation Rate Process is attached as Appendix C hereto.

(4) **Seller Responsible for Compliance with all NYISO Rules.** Seller shall comply in all material respects with all NYISO Rules necessary for all Products to be sold, delivered, made available and received, including, without limitation, all Scheduling, notice and certification requirements under NYISO Rules.

(5) **Further Assurances.** Each Party shall execute all other documents and instruments and take all further actions reasonably necessary to implement and perform the transactions agreed to by the Parties. In the event that the Transaction contemplated by this Agreement is deemed to be a swap for purposes of the rules and regulations of the Commodity Futures Trading Commission (“**CFTC**”) that is not exempt from reporting and other requirements of the CFTC, then the Parties will cooperate to provide one another any necessary information, documents or instruments required to comply with such requirements.

(6) **Indemnification.** In addition to the requirements of the Master Agreement, the Parties agree that each Party (the “**Indemnifying Party**”) shall indemnify and defend the other Party and each of its officers, directors, trustees, employees and agents (collectively, the “**Indemnified Party**”) against any claim, suit, cause of action, judgment, award or assessment asserted or threatened by or entered in favor of any third party arising directly or indirectly from any act or omission of the Indemnifying Party. The Indemnified Party shall give prompt notice of any pending or threatened claim to the Indemnifying Party, provided, failure to do so will relieve the Indemnifying Party of liability only to the extent of any actual prejudice. The Indemnifying Party may, at its option, assume the defense of any claim and appoint its own counsel. The Indemnified Party will cooperate with the Indemnifying Party in the defense of any claim, and shall not make or accept any admission or offer of settlement without prior consent of the Indemnifying Party. The Indemnifying Party will pay defense costs, including reasonable attorneys’ fees, as invoiced to the Indemnified Party.

(7) **Definitions.** When used in this Confirmation, the following terms shall have the following defined meanings:

**"Actual UCAP"** means Facility capacity for each Capability Period expressed in UCAP as defined as the “Available for Sale UCAP” as posted on the NYISO’s Automated Market System (or its successor).

**"Additional Maintenance Hours"** means any Hours, or prorated portions thereof, which are not Scheduled Maintenance Hours, during which the Facility is required to be removed from service in whole or part for maintenance and repairs which under Good Utility Practice cannot be deferred until the next Schedule Maintenance Outage, which Additional Maintenance Hours shall not exceed \_\_\_\_ Hours in any consecutive twelve Settlement Periods, provided, time for repairs to restore service following commencement of any Forced Outage shall not be Additional Maintenance Hours.

**"Ancillary Services"** means any and all services defined in the NYISO Ancillary Services Manual at any time which the Facility is capable of providing.

**"Capability Period"** means a Summer Capability Period or a Winter Capability Period.

**"Capacity"** means Unforced Capacity from the Facility in accordance with NYISO Rules.

**"CO<sub>2</sub> Emissions Rate"** means the Parties' agreed contractual rate for CO<sub>2</sub> emissions (\_\_\_\_\_ tons/MWh).

**"CO<sub>2</sub> Index"** means the most recent clearing price (\$/ton) of CO<sub>2</sub> allowances established as a result of a Regional Greenhouse Gas Initiative auction or any substitute or successor program auction or pricing arrangement, or if applicable, the average prices quoted for the applicable period by two independent brokers to be agreed upon by the Parties, or other mutually-agreed pricing arrangement.

**"Contract Energy Amount"** means the Actual UCAP in MW times one hour (MWh).

**"Contract Year"** means a twelve (12) consecutive Month period commencing with the Month in which the Commercial Operation Date occurs, and each Month thereafter in which the anniversary of the Commercial Operation Date appears.

**"DMNC"** means Dependable Maximum Net Capability.

**"Emissions Adder"** means a formula for computing the monthly emissions cost (in \$/MWh) consisting of the sum of (the CO<sub>2</sub> Index multiplied by the CO<sub>2</sub> Emissions Rate), plus the (NO<sub>x</sub> Index multiplied by the NO<sub>x</sub> Emissions Rate) plus (SO<sub>2</sub> Index multiplied by SO<sub>2</sub> Emissions Rate).

**"Energy Market Revenues"** means the revenues from selling the Contract Energy Amount into the NYISO Day-Ahead Market.

**"Energy"** means three-phase alternating current electricity delivered in accordance with NYISO Rules.

**"Energy Strike Price"** means the (Guaranteed Heat Rate multiplied by Fuel Price) plus the Variable O&M and the Emissions Adder.

**"Escalated Items"** has the meaning set forth in Special Condition 3.

**"Escalation Date"** has the meaning set forth in Special Condition 3.

**"Escalation Rate Process"** has the meaning set forth in Special Condition 3.

**"Facility"** means the \_\_\_\_\_ nominal megawatt block of an electric generating project to be located at \_\_\_\_\_ in \_\_\_\_\_, [STATE] consisting of \_\_\_\_\_, and which

electric generating project is sufficient to provide and deliver the Products referenced in this Confirmation.

"**FERC**" means the Federal Energy Regulatory Commission, or any successor federal agency.

"**Forced Outage**" means any outage that is not a Scheduled Maintenance Outage, Additional Maintenance Outage or outage arising from Force Majeure or unavailability of the connecting transmission system to receive Energy at the Delivery Point.

"**Fuel Price**" for a Settlement Period means a fuel price (in \$/MMBtu) based on the average of the published daily "Midpoints" reported for each day in such Settlement Period by [LIST INDEX] with respect to weekdays for the flow date, and with respect to weekend days and holidays for the flow rate immediately following such weekend day or holiday plus Fuel Price Adders.

"**Fuel Price Adders**" means agreed defined adjustments for transportation and local delivery service adder(s) set forth in Appendix A.

"**Good Utility Practices**" has the meaning set forth in the Master Agreement.

"**Guaranteed Heat Rate**" means the Parties' agreed to defined, guaranteed heat rate of \_\_\_\_\_ MMBtu (Higher Heating Value (HHV))/MWh at ISO Conditions as adjusted in accordance with the agreed Manufacturer's Degradation Curve.

"**Hour**" means a period of sixty (60) minutes commencing with 12:00 AM on any calendar day, and each full hour commencing at 1:00 AM, 2:00 AM etc. through the following midnight of a calendar day.

"**Indemnified Party**" has the meaning set forth in Special Condition 6.

"**Indemnifying Party**" has the meaning set forth in Special Condition 6.

"**Installed Capacity**" or "**ICAP**" means Installed Capacity as defined in the applicable NYISO Installed Capacity Manual, as published from time to time, or any successor publication.

"**ISO Conditions**" means dry bulb temperature of 59° Fahrenheit at 60 percent relative humidity and atmospheric pressure equal to 14.696 PSIA.

"**Law**" means all laws, statutes, rules, regulations, orders, decrees, judgments or other requirements of any governmental entity or authority, including the NYISO, applicable to the Facility or the Parties.

"**LBMP**" means the hourly Day-Ahead Market Locational Based Market Price at the Delivery Point.



**"Manufacturer's Degradation Curve"** means the heat rate degradation curve for the Facility set forth in Appendix B.

**"NO<sub>x</sub> Emissions Rate"** means the Parties' agreed contractual rate for NO<sub>x</sub> emissions (\_\_\_\_\_ tons/MWh).

**"NO<sub>x</sub> Index"** means the average prices quoted on the first day of a month for Clean Air Interstate Rule annual oxides of nitrogen allowances for such month quoted by two independent brokerages to be agreed upon by the Parties, or other mutually-agreed pricing arrangement.

**"NYISO"** means the New York Independent System Operator Corporation or any successor entity performing similar functions.

**"NYISO Markets"** means, as applicable, each of the NYISO Capacity Markets or NYISO Energy Markets or NYISO Ancillary Services Markets, as defined in the NYISO Rules.

**"Permits"** means the permits and other governmental approvals necessary to construct, interconnect and operate the Facility.

**"Products"** means Capacity, Energy and Ancillary Services.

**"SO<sub>2</sub> Emissions Rate"** means the Parties' agreed contractual rate of SO<sub>2</sub> emissions (\_\_\_\_\_ tons/MWh).

**"SO<sub>2</sub> Index"** means the average of prices quoted for the first day of a month for CAIR annual oxides of sulfur allowances for such month quoted by two independent brokerages to be agreed upon by the Parties, or other mutually-agreed pricing arrangement.

**"Scheduled Maintenance Hour"** has the meaning set forth in Special Condition 1(c).

**"Scheduled Maintenance Outage"** means a scheduled maintenance outage of the Facility as described in Special Condition 1(c).

**"Summer Capability Period"** has the meaning set forth in the NYISO Rules.

**"UCAP"** or **"Unforced Capacity"** has the meaning set forth in the NYISO Rules.

**"UCAP Revenue"** means the actual UCAP revenues received by the Seller from sales of UCAP in all NYISO Capacity Markets, as defined in NYISO Rules, during such Settlement Period.

**"UCAP Revenue Share"** means ninety percent (90%) of UCAP Revenue during a Settlement Period.

**"UCAP Strike Price"** means a defined, contractual firm fixed capacity price of \_\_\_\_\_\$/kW-month (which includes fixed O&M).

**"Variable O&M"** means the Parties' defined, contractual firm fixed VOM of \$\_\_\_\_\_/MWh, escalated as set forth in this Confirmation.

**"Winter Capability Period"** has the meaning set forth in the NYISO Rules.

*[signatures on next page]*

**Accepted and Agreed:**

POWER AUTHORITY OF  
THE STATE OF NEW YORK

\_\_\_\_\_

By: \_\_\_\_\_  
Name: Gil Quiniones  
Title: President and Chief Executive Officer

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**APPENDIX A - Fuel Price Adders**

Transportation adder:

Local Delivery Adder:

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**APPENDIX B - Manufacturer's Annual Degradation Curve**

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**APPENDIX C - Escalation Calculation Example**

**Exhibit 3 to Master Agreement**

**Form of Seller Letter of Credit**

**IRREVOCABLE STANDBY LETTER OF CREDIT FORMAT**

Beneficiary: Power Authority of the State of New York  
123 Main Street  
White Plains, NY 10601

Date of Issuance: \_\_\_\_\_

We hereby establish our Irrevocable Standby Letter of Credit number \_\_\_\_\_ in favor of the Power Authority of the State of New York (“**Beneficiary**”) on behalf of \_\_\_\_\_ (“**Seller**”) available by draft(s) at sight for a maximum of US \$ \_\_\_\_\_ (\_\_\_\_\_ United States Dollars) against any one or more documents presented in the following form:

1) A Beneficiary’s signed certificate stating:

\_\_\_\_\_ (“**Seller**”), the issuer of this letter of credit, and/or the issuer of another letter of credit provided by Seller to Beneficiary pursuant to the Master Power Purchase & Sale Agreement by and between Beneficiary and Seller dated \_\_\_\_\_, as the same may have been amended (the “**Agreement**”) has become Bankrupt as defined in such Agreement.

2) A Beneficiary’s signed certificate stating:

An Event of Default as defined in the Master Power Purchase & Sale Agreement by and between Beneficiary and \_\_\_\_\_ (“**Seller**”) dated \_\_\_\_\_, as the same may have been amended (the “**Agreement**”), has occurred with respect to Seller and is still continuing. Seller has failed to pay Beneficiary in accordance with the terms and provisions of the Agreement, and the amount drawn represents an amount due and owing by Seller to Beneficiary.

3) A Beneficiary’s signed certificate stating:

This letter of credit will expire or another letter of credit provided by \_\_\_\_\_ (“**Seller**”) to Beneficiary pursuant to the Master Power Purchase & Sale Agreement by and between Beneficiary and Seller dated \_\_\_\_\_, as the same may have been amended (the “**Agreement**”) in accordance with its terms within three (3) local business days following the date hereof Seller has failed to provide a replacement letter of credit to Beneficiary in the form required under the Agreement

4) A Beneficiary’s signed certificate stating:

\_\_\_\_\_ (“**Seller**”) has failed to provide within thirty (30) days prior to expiry of this letter of credit or another letter of credit provided by Seller to Beneficiary

pursuant to the Master Power Purchase & Sale Agreement by and between Beneficiary and Seller dated \_\_\_\_\_, as the same may have been amended (the “Agreement”), either (i) written confirmation that such letter of credit will be renewed, or (ii) written confirmation from a Qualified Issuer, as defined in the Agreement, that a replacement letter of credit issued in the form required under the Agreement will be delivered to Beneficiary no later than three (3) local business days prior to expiry of this letter of credit.

5) A Beneficiary’s signed certificate stating:

The credit rating of the issuer of this letter of credit or another letter of credit provided by \_\_\_\_\_ (“Seller”) to Beneficiary pursuant to the Master Power Purchase & Sale Agreement by and between Beneficiary and Seller dated \_\_\_\_\_, as the same may have been amended (the “Agreement”) has been downgraded below A by Standard & Poor’s or A2 by Moody’s and Seller has failed to deliver to Beneficiary a replacement letter of credit issued by a Qualified Issuer as defined in the Agreement, in the form required under the Agreement, within five (5) local business days of notification of such event.

Special Conditions:

- Multiple partial drawings permitted, not to exceed the maximum credit available hereunder in the aggregate.
- Documents must be presented at our servicer’s counter located at \_\_\_\_\_, no later than \_\_\_\_\_, 20\_\_.
- Documents may be presented by overnight courier delivery in lieu of presentation in person by Beneficiary’s representative.

We hereby engage with you that all drafts drawn under and in compliance with the terms of this credit will be duly honored if drawn and presented for payment on or before the expiry date of this credit.

Except as otherwise expressly stated herein, this credit is subject to the International Standby Practices 1998, International Chamber of Commerce No. 590, (“ISP98”) and as to matters not addressed by the ISP98 shall be governed and construed in accordance with the laws of the State of New York, without regard to any applicable conflicts of laws principles thereof, and applicable U.S. Federal law. Notwithstanding Section 3.12(a) of the ISP98, we agree that a lost original credit shall be replaced by us with a new original credit upon your presentation of an affidavit of lost original and execution of a form of indemnification satisfactory to us.



**Exhibit 4 to Master Agreement**

**NYPA OPINIONS**

1. NYPA is duly organized, validly existing and in good standing under the laws of the State of New York.
2. NYPA has all regulatory authorizations necessary for it to legally perform its obligations under the Agreement.
3. The execution, delivery and performance by NYPA of the Agreement are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any law, rule, regulation, order or the like applicable to it.
4. The Agreement and each other document executed and delivered by NYPA in accordance with the Agreement constitute its legally valid and binding obligation enforceable against it in accordance with its terms.

## **Exhibit 5 to Master Agreement**

### **SELLER OPINIONS**

1. Seller is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation.
2. Seller has all regulatory authorizations necessary for it to legally perform its obligations under the Agreement.
3. The execution, delivery and performance by Seller of the Agreement are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any law, rule, regulation, order or the like applicable to it.
4. The Agreement and each other document executed and delivered by Seller in accordance with the Agreement constitute its legally valid and binding obligation enforceable against it in accordance with its terms.

**Exhibit 6A to Master Agreement [if Applicable]**

**SITE DESCRIPTION**

**Exhibit 6B to Master Agreement [if Applicable]**

**DESIGN**

**Exhibit 6C to Master Agreement [if Applicable]**

**CONSENTS**

## **List of Applicable NYPA Appendices**

<b>Appendix</b>	<b>Title</b>
<b>B</b>	<b>Prompt Payment Policy</b>
<b>C</b>	<b>Minority and Women-Owned Business Enterprise (M/WBE) Participation Goal Requirement</b>
<b>E</b>	<b>Omnibus Procurement Act of 1992 Requirements</b>
<b>G</b>	<b>Equal Employment Opportunities Requirements</b>
<b>H</b>	<b>Tax Law Requirements</b>
<b>J</b>	<b>Proposer/Consultant Compliance with New York Power Authority Policy Providing for Certain Procurement Disclosures</b>