

CHADBOURNE  
& PARKE LLP

Robert F. Shapiro  
direct tel 202-974-5670  
rshapiro@chadbourne.com

1200 New Hampshire Avenue NW, Washington, DC 20036

tel 202-974-5600 fax 202-974-5602

March 4, 2004

Via Federal Express

Honorable Jaclyn A. Brilling  
Acting Secretary  
New York State Public Service Commission  
Executive Office, 14th Floor  
3 Empire State Plaza  
Albany, New York 12223-1350

Re: Case 04-E-\_\_\_\_ - In the Matter of the Petition of Black River  
Power, LLC, Black River Generation, LLC, EIF Hamakua, LLC  
and United States Power Fund, L.P. For an Expedited Declaratory  
Ruling Regarding the Applications of Section 70 Of the Public  
Service Law, or, In the Alternative, Petition for Approval Under  
Section 70 of the Public Service Law

Dear Secretary Brilling:

Please find enclosed for filing with the New York State Public Service  
Commission ("Commission") an original and five copies of the Petition for Expedited  
Declaratory Ruling or in the Alternative Approval Under Section 70 of the Public Service  
Law. Please stamp two copies and return them to me in the enclosed Federal Express  
envelope.

The Petitioners seek an expedited declaratory ruling, or in the alternative,  
approval under Section 70 of the Public Service Law for the transfer of interests in Black  
River Power, LLC.

Included with this filing is a verification form executed by an authorized  
representative of the petitioners and a Short Environmental Assessment Form.

Petitioners respectfully request that the Commission expedite approval of this  
Petition and act by April 4, 2004.

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Honorable Jaclyn A. Brillling

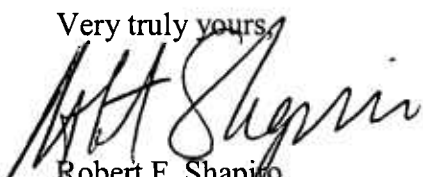
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March 4, 2004

If you have any questions arising in connection with this filing, please contact  
Robert F. Shapiro at (202) 974-5670.

*ack wew*

Very truly yours,



Robert F. Shapiro  
Donna Bobbish  
Chadbourn & Parke LLP  
1200 New Hampshire Avenue, NW  
Washington, DC 20036  
(202) 974-5600

Attorneys for Petitioners

Enclosures

**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

**In the Matter of the Petition of Black River        )     Case 04-E-\_\_\_\_  
Power, LLC, Black River Generation, LLC,        )  
EIF Hamakua, LLC and United States Power        )  
Fund, L.P. For an Expedited Declaratory Ruling )  
Regarding the Application of Section 70            )  
Of the Public Service Law, or, In the             )  
Alternative, Petition for Approval Under Section )  
70 of the Public Service Law                        )**

**PETITION FOR EXPEDITED DECLARATORY RULING  
OR IN THE ALTERNATIVE APPROVAL UNDER  
SECTION 70 OF THE PUBLIC SERVICE LAW**

**Robert F. Shapiro  
Donna Bobbish  
Chadbourn & Parke LLP  
1200 New Hampshire Avenue, NW  
Washington, DC 20036  
(202) 974-5600**

**Attorneys for Petitioners**

**March 4, 2004**

**STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION**

**In the Matter of the Petition of Black River        )     Case 04-E-\_\_\_\_**  
**Power, LLC, Black River Generation, LLC,        )**  
**EIF Hamakua, LLC, and United States            )**  
**Power Fund L.P. for an Expedited                )**  
**Declaratory Ruling Regarding the Application of)**  
**Section 70 of the Public Service Law, or, In the )**  
**Alternative, Petition for Approval Under Section)**  
**70 of the Public Service Law                    )**

**PETITION FOR EXPEDITED DECLARATORY RULING OR  
IN THE ALTERNATIVE APPROVAL UNDER  
SECTION 70 OF THE PUBLIC SERVICE LAW**

Black River Power, LLC, on behalf of itself, Black River Generation, LLC, Black River Energy, LLC, EIF Hamakua, LLC, and United States Power Fund L.P. (collectively, "Petitioners") hereby petitions the New York State Public Service Commission ("Commission") for expedited rulings under section 70 of the Public Service Law approving the transfer of assets from Black River Power, LLC to its to-be-formed affiliate Black River Generation, LLC, and confirming the "Wallkill Presumption" that no section 70 regulation would adhere to the upstream transfer of membership interests in Black River Energy (as owner of 100% of the membership interests in Black River Generation) to EIF Hamakua, LLC.

**BACKGROUND AND BASIS FOR REQUEST**  
**FOR EXPEDITED ACTION**

Black River Power, LLC, formerly known as the Fort Drum Power Plant, owns a 50 Megawatt circulating fluidized bed coal-fired power plant near Watertown, New York. The plant, located on the Fort Drum Army Base, was placed in service as a qualifying cogeneration facility in 1988 and sold its output to Niagara Mohawk under a long term contract. As a result of the Master Restructuring Agreement involving Niagara Mohawk, the power contract was terminated in 1998 and the project currently sells power at wholesale as an Exempt Wholesale Generator (Black River Power, LLC, 90 FERC P62,004( January 4, 2000)), rather than as a qualifying facility. Black River is currently in negotiations with Select Energy, to whom it sells its output, to restructure that contract.

On September 26, 2003, J.A. Jones, Inc. ("J.A. Jones") and certain of its subsidiaries filed petitions to commence a bankruptcy case under Chapter 11 of the United States Bankruptcy Code with the United States Bankruptcy Court for the Western District of North Carolina. Subsequently, on September 29, 2003, Jones Capital, LLC ("Jones Capital") and Black River, a subsidiary of Jones Capital, filed petitions with the Bankruptcy Court to commence a bankruptcy case.

Pursuant to the terms of the "Membership Interest Purchase Agreement By and Among J.A. Jones, Inc., Jones Capital, LLC, Black River Energy, LLC and EIF Hamakua, LLC Relating to the Purchase of All of the Membership Interests in Black River Energy, LLC Dated as of February 23, 2004" (the "Purchase Agreement") and the subsequent approval of the Purchase Agreement by the Bankruptcy Court on March 2,

2004, Black River Power, LLC proposes to transfer its generation facilities to Black River Generation, LLC, which will be formed by Jones Capital as a wholly-owned subsidiary of Black River Energy, LLC ("Black River Energy") and which, in turn, has recently been formed as a wholly-owned subsidiary of Jones Capital. All of the membership interests in Black River Energy will then be sold to EIF Hamakua, which is a subsidiary of The United States Power Fund LP ("USPF"), which is a private equity investment fund that invests in power projects in the United States. A copy of the Purchase Agreement is attached to this Petition as Attachment A. An Organizational Chart is attached to this Petition as Attachment B.

In accordance with the Purchase Agreement, approved two days ago by order of the bankruptcy judge overseeing the assets of the seller-owner of Black River, the closing of the transaction is to occur before April 8, 2004. In order to meet this deadline, Black River requests that the Commission approve the transfer of assets from Black River Power, LLC to Black River Generation and approve the upstream transfer of all ownership interests of Black River Energy, LLC (as owner of 100% of the membership interests in Black River Generation, LLC) to EIF Hamakua, LLC on an emergency basis, pursuant to section 202(6) of the state Administrative Procedure Act ("SAPA") or otherwise on an expedited basis. Petitioners seek a shortened notice period to permit the Commission to grant this petition within 30 days of the filing. An approval within this period will permit the parties to close the transaction by the deadline in the Purchase Agreement and consequently will improve the financial condition of Black River Power and Jones Capital, and permit the seller in bankruptcy to pay off its creditors.

## DISCUSSION

1. In order to accomplish the upstream transfer of ownership interests, there will be a two-step process which will happen simultaneously. Black River Power, LLC will first transfer the generating assets to Black River Generation, which will be directly owned by a newly-formed wholly owned subsidiary of Jones Capital, known as Black River Energy. This is an intracorporate transfer of assets. Then the upstream ownership of Black River Energy will be transferred EIF Hamakua. Black River Generation will be a single asset company making only wholesale sales of electricity. Since the existing project company, Black River Power, qualifies for lightened regulation under the Commission's consistent regulatory practice and Black River Generation, the entity that will be transferred the generating facilities currently owned by Black River Power, also qualifies for lightened regulation by the Commission, Black River requests that the Commission either approve the section 70 (i) transfer of the assets from Black River Power to Black River Generation and (ii) the upstream transfer of ownership interests of Black River Energy, (as owner of 100% of the membership interests in Black River Generation, the entity that will become an electrical corporation subject to the jurisdiction of the Commission), or apply the "Walkill Presumption" and declare that section 70 regulation does not adhere to this transfer of ownership.

The asset transfer is intracorporate in nature and will not affect captive ratepayers. Both before and after the transfer, there will be an entity that is a single-asset generating company selling power exclusively at wholesale in interstate commerce. For lightly-regulated entities, the Commission has established the "Walkill Presumption" pursuant to

which "it will be presumed that section 70 regulation does not adhere to transfer of ownership interests in entities upstream from the parents of the New York competitive electric generation subsidiary, unless there is a potential for harm to the interests of captive utility ratepayers sufficient to override the presumption." Case 91-E-0350, **Wallkill Generating Co., L.P.**, Order Establishing Regulatory Regime (April 11, 1994). The Wallkill Presumption has been applied by the Commission in numerous cases. See, e.g., Case 03-E-1694, **Joint Petition of UtilCo Group, Inc, et al**, Declaratory Ruling And Order Concerning Transfer of Ownership Interests (February 13, 2004); Case 02-E-1184, **Sithe Energy, Inc**, Transfer, Declaratory Ruling on Review of Stock Transactions (issued November 26, 2002); Case 01-E-1680, **Reliant Resources et al.**, Declaratory Ruling on Review of Stock Transfer (December 20, 2001);

Neither USPF nor its wholly-owned subsidiary is affiliated with entities that own or control traditional public utilities with franchised service territories or power marketers operating in New York or adjacent to New York, and neither owns or controls any inputs to power generation, including fuel supply. See Case 01-E-1680, **Reliant Resources, et al.**, Declaratory Ruling on Review of Stock Transfer (December 20, 2001). A subsidiary of Xcel Energy, a utility holding company, through a subsidiary known as Quixx Corp., holds an 11% limited partnership interest in USPF. Xcel Energy has operating utilities subsidiaries with operations in the north central and western portions of the United States. Accordingly, the Wallkill Presumption applies to the proposed transfer and further review of the proposed transfer is not warranted.



2. Black River has included Part 1 of the Short Environmental Assessment Form as Attachment C to this filing.

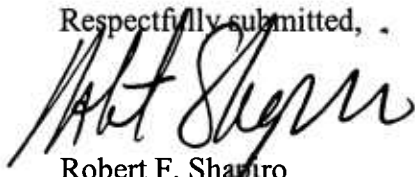
3. Since the transfer involves an operating facility and the power generated by the facility is and will be used exclusively for wholesale sales in interstate commerce, no certificate of public convenience and necessity pursuant to Public Service Law section 68 is required. See Case 99-E-0679, Erie Boulevard HydroPower, L.P., Petition for a Declaratory Ruling that Lightened Regulation be Applied to its Purchase of Certain Hydropower Assets From Niagara Mohawk Corporation (June 28, 1999); Case 02-E-1419, Petition of Global Common Greenport LLC ( January 23, 2003).

4. Petitioners also request that the Commission waive the same requirements for Black River Generation that the Commission has waived for other wholesale generators under its light-handed regulatory regime.

### CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Commission to issue an expedited order no later than April 4, 2004, authorizing the transfer of generating assets to Black River Generation and the upstream transfer of ownership interests in Black River Energy to EIF Hamakua LLC.

Respectfully submitted, .



Robert F. Shapiro  
Donna Bobbish  
Chadbourn & Parke LLP  
1200 New Hampshire Avenue, NW  
Washington, DC 20036  
(202) 974-5600

Attorneys for Petitioners

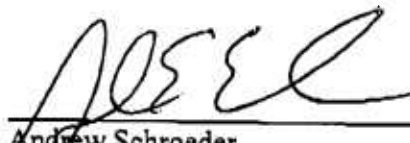
March 4, 2004

**VERIFICATION**

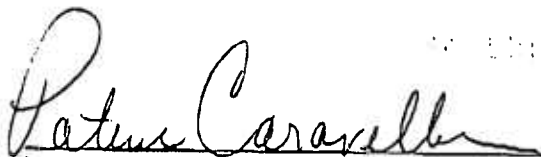
STATE OF NEW YORK )

COUNTY OF NEW YORK ) ss:

Andrew Schroeder, being duly sworn, deposes and says that he is a partner of EIF Hamakua LLC, that he has read the foregoing Petition and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

  
Andrew Schroeder

Sworn to me this 4<sup>th</sup> day of March, 2004.

  
Notary Public

PATRICIA CARAVELLA  
Notary Public, State of New York  
No. 01CA6087114  
Qualified in New York County  
Commission Expires Feb. 10, 2007

**ATTACHMENT A**

**MEMBERSHIP INTEREST PURCHASE AGREEMENT**

**BY AND AMONG**

**J.A. JONES, INC.,**

**JONES CAPITAL, LLC,**

**BLACK RIVER ENERGY, LLC**

**AND**

***[AFFILIATE OF UNITED STATES POWER FUND L.P.]***

**RELATING TO**

**THE PURCHASE OF ALL OF THE MEMBERSHIP INTERESTS**

**IN BLACK RIVER ENERGY, LLC**

**DATED AS OF**

**FEBRUARY 23, 2004**

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|           |   |
|-----------|---|
| Exhibit A | Contribution Agreement between Black River Generation and Black River |
| Exhibit B | Contribution Agreement between Jones Hamakua and BR Hamakua           |
| Exhibit C | Contribution Agreement between Seller and the Company                 |
| Exhibit D | Escrow Agreement  |
| Exhibit E | Indemnity Escrow Agreement  |
| Exhibit F | Acquired Subsidiaries   |

## MEMBERSHIP INTEREST PURCHASE AGREEMENT

THIS MEMBERSHIP INTEREST PURCHASE AGREEMENT (together with all Schedules and Exhibits, this "Agreement"), dated as of February 23, 2004, is entered into by and among J.A. Jones, Inc, a Delaware corporation, debtor and debtor-in-possession (the "Parent"), Jones Capital, LLC, a Delaware limited liability company, debtor and debtor-in-possession (the "Seller"), Black River Energy, LLC, a Delaware limited liability company, (the "Company") and [Affiliate of United States Power Fund L.P.], a \_\_\_\_\_ ("Buyer").

### STATEMENT OF PURPOSE

1. Parent owns all of the issued and outstanding membership interests in Seller, and Seller owns all of the issued and outstanding membership interests of the Company and the Acquired Subsidiaries.

2. This Agreement provides for the purchase by Buyer of all of the issued and outstanding membership interests in the Company (the "Membership Interests"), in exchange for an aggregate of 16,500,000 (subject to adjustment) and either (a) the assumption of or (b) arrangements providing for the release of liabilities under guarantees in the aggregate amount of \$10,500,000 with respect to Black River Power, LLC, a New York limited liability company, debtor and debtor-in-possession ("Black River") and with respect to Hamakua Energy Partners, LP, a Hawaiian limited partnership ("HEP") and the continuation of the nonrecourse liabilities of an aggregate of \$42,500,000 with respect to project financing for HEP.

3. The Company is a holding company which, directly or indirectly, will own the following assets:

(i) All of the outstanding membership interests in Black River Generation, LLC, a New York limited liability company ("Black River Generation");

(ii) All of the outstanding membership interests in BR Hamakua, LLC, a Hawaii limited liability company ("BR Hamakua"), which shall own by the Closing Date (a) 50% of the limited liability partnership interests in Hamakua Land Partnership, LLP, a Hawaiian limited liability partnership ("Hawaii Land Partnership"), and (b) a 1% general partner interest in HEP; and

(iii) 50% of the outstanding membership interests in Hamakua A, LLC, a Delaware limited liability company ("Hamakua A"), which owns 98% of the limited partner interests in HEP.

Each of Black River Generation, BR Hamakua, Hawaii Land Partnership, HEP and Hamakua A is referred to herein individually as an "Acquired Subsidiary" and collectively, as the "Acquired Subsidiaries."

4. Seller, through the Acquired Subsidiaries, develops, manages, and makes direct equity investments in power and energy projects (the "Business").

5. On September 26, 2003, Parent and certain of its subsidiaries, but excluding the Seller, the Company and the Acquired Subsidiaries, filed petitions to commence a bankruptcy case under Chapter 11 of the United States Bankruptcy Code ("Bankruptcy Code") with the United States Bankruptcy Court for the Western District of North Carolina ("Bankruptcy Court"). Subsequently, on September 29, 2003, the Seller and Black River filed petitions (collectively, with the petitions filed by Parent and its subsidiaries, the "Bankruptcy Filing") with the Bankruptcy Court to commence a bankruptcy case under the Bankruptcy Code. The bankruptcy cases referred to above are being jointly administered in the Bankruptcy Court and are referred to herein collectively as the "Bankruptcy Cases."

6. Subject to the approval of the Bankruptcy Court, immediately prior to the Closing, Seller shall transfer, assign and deliver to the Company, either directly or indirectly, as a contribution to capital, and the Company shall acquire, either directly or indirectly, all of Seller's right, title and interests in the Acquired Subsidiaries.

7. Subject to the approval of the Bankruptcy Court, immediately prior to the Closing, Black River shall transfer, assign and deliver to Black River Generation, and Black River Generation shall acquire, all of the assets and specified liabilities of Black River.

8. Subject to the approval of the Bankruptcy Court, immediately prior to the Closing, Jones Hamakua, Inc., a Hawaii corporation ("Jones Hamakua") shall transfer, assign and deliver to BR Hamakua, and BR Hamakua shall acquire, all of the assets and none of the liabilities of Jones Hamakua.

9. Subject to the Approval Order of the Bankruptcy Court, Seller desires to sell, and Buyer desires to buy, the Membership Interests on the terms and conditions set forth in this Agreement.

THEREFORE, in consideration of the mutual covenants, representations, warranties and obligations contained in this Agreement and subject to the approval of the Bankruptcy Court, the parties, intending to be legally bound, agree as follows:

## ARTICLE 1

### PURCHASE AND SALE OF MEMBERSHIP INTERESTS

Section 1.1 Purchase and Sale. Subject to the terms and conditions of this Agreement, Seller shall sell, transfer, convey, assign and deliver to Buyer, and Buyer agrees to buy from Seller, at the Closing (as defined below) all, and not less than all, of the Membership Interests, free and clear of any mortgage, pledge, lien, security interest, charge, option or other restriction or encumbrance of any kind ("Lien"), except for Permitted Liens and Assumed Liabilities (as such terms are hereinafter defined).

Section 1.2 Conveyance of Black River and Jones Hamakua; Contribution of Acquired Subsidiaries.

(a) Immediately prior to the transaction described in Section 1.1, Black River shall convey to Black River Generation all of the assets owned by, and certain specified



liabilities of Black River, pursuant to a Contribution Agreement between Black River Generation and Black River in the form attached hereto as Exhibit A. From and after the date hereof until the date of the Auction under the Bidding Procedures Order, Buyer shall have the right to make additions to, and deletions from, the list of Contracts contained in Schedule 1 to Exhibit A (the Contribution Agreement relating to Black River) by delivering a marked copy of such list to Seller.

(b) Immediately prior to the transaction described in Section 1.1, Jones Hamakua shall cause to be conveyed to BR Hamakua all of the assets owned by, and none of the liabilities of Jones Hamakua, pursuant to a Contribution Agreement between BR Hamakua and Jones Hamakua in the form attached hereto as Exhibit B.

(c) Immediately prior to the transaction described in Section 1.1, the Seller shall contribute and transfer to the Company all of the Seller's rights in the Acquired Subsidiaries, including all right, title and interest in and to all the ownership (whether stock, membership, partnership or otherwise) and economic interests in each of such entities, including, but not limited to, a 50% limited partner interest in Hamakua A, and (ii) the furniture, fixtures and equipment used in the conduct of the business of Seller pursuant to a Contribution Agreement between the Seller and the Company in the form attached hereto as Exhibit C (together with Exhibits A and B, the "Contribution Agreements").

(d) At the reasonable request of Buyer, Parent and Seller shall change the legal form procedures and structure of the transfer of the Hamakua A membership interests and the assets of Jones Hamakua to the Buyer pursuant to documentation and on other terms acceptable to Buyer.

Section 1.3 Assumption of Liabilities of Parent and Seller. At the Closing, Buyer shall either (a) assume, and thereafter pay, perform and discharge when due, or (b) enter into other arrangements providing for the express release of Parent and Seller from any obligations under the following liabilities (as more expressly set forth in Schedule 1.3) (the "Assumed Liabilities"):

(a) all liabilities and obligations of the Parent and/or Seller as guarantor of that certain termination fee payable to Tesoro Hawaii Corporation;

(b) all liabilities and obligations of the Parent and/or Seller as guarantor of that certain product payment payable to Tesoro Hawaii Corporation;

(c) all liabilities and obligations of the Parent and/or Seller as guarantor of that certain Power Purchase Agreement with Hawaii Electric Light Company, Inc.; and

(d) all liabilities and obligations of the Parent and/or Seller as guarantor of that certain Select Energy Power Purchase Agreement.

Section 1.4 Continuation of Nonrecourse Liabilities. Buyer acknowledges that the nonrecourse liabilities of an aggregate of \$42,735,000 with respect to project financing for HEP will continue beyond the Closing Date.

ARTICLE *TPD* *WIG*

CONSIDERATION *TPD* *WIG* *16,500,000* *JPB*

*Sixteen Million Five Hundred Thousand*

Section 2.1 Purchase Price. The aggregate consideration for the sale and transfer of the Membership Interests will be (a) ~~ten million~~ *16,500,000* Dollars (\$~~10,000,000~~ *16,500,000*) plus or minus, as applicable, the adjustment provided for in Section 2.3 (the "Purchase Price") which will be payable in the form provided in Section 2.2 and (b) the assumption by Buyer of the Assumed Liabilities, which the parties agree have an aggregate value of up to Ten Million Five Hundred Thousand Dollars (\$10,500,000) (such assumption, together with the Purchase Price, the "Total Consideration"). The Purchase Price shall be payable in accordance with Section 2.2.

Section 2.2 Amount of Purchase Price. The Purchase Price to be paid by Buyer to Seller is payable in cash or readily available funds and shall be payable as follows:

(a) Earnest money in the amount of Five Hundred Thousand Dollars (\$500,000) (the "Earnest Money") shall be paid by wire transfer of immediately available funds to a recognized national banking institution mutually identified by the parties (the "Escrow Agent") pursuant to an escrow agreement in substantially the form attached to this Agreement as Exhibit D among the Escrow Agent, Seller and Buyer (the "Earnest Money Escrow Agreement"), within ~~two (2) business days after~~ *one (1) business day* after the date hereof, to be released to the Seller at the Closing, or (ii) disbursed in accordance with the Escrow Agreement (which shall provide for a return of the Earnest Money to Buyer upon a termination of this Agreement other than pursuant to Section 13.1(b)); *JPB* *TPD* *WIG*

(b) One Million Dollars (\$1,000,000) to the Escrow Agent pursuant to an escrow agreement in substantially the form attached to this Agreement as Exhibit E among the Escrow Agent, Parent, Seller and Buyer (the "Indemnity Escrow Agreement") on the Closing Date (the "Indemnity Escrow") to be applied to any claim Buyer may have against Parent or Seller pursuant to Articles 8 or 14. The Earnest Money Escrow Agreement and the Indemnity Escrow Agreement are referred to herein as the "Escrow Agreements";

(c) \$1,766,204, representing the aggregate dollar amount of the claims owed to certain vendors of Black River as set forth on Schedule 2.2(c) (collectively, the "Black River Vendors Claims") shall be retained by the Buyer to be used by the Buyer in connection with paying or satisfying such Black River Vendors Claims. Buyer hereby assumes payment or other satisfaction of the Black River Vendors Claims. Buyer shall pay or otherwise satisfy the Black River Vendors Claims as soon as practicable after the Closing Date but no later than ten (10) business days after the Closing Date. Buyer shall provide to Seller satisfactory evidence that the Black River Vendors Claims have been paid or otherwise satisfied;

TJW WNS (TJB)

Thirteen Million Two Hundred Thirty-Three Thousand Seven Hundred Ninety-Six

13,233,796

(d) Additional earnest money in the amount of ~~Ten Million Seven Hundred Thirty-Three Thousand Seven Hundred Ninety Six Dollars (\$10,733,796)~~ (the "Purchase Price Balance Earnest Money") shall be paid by wire transfer of immediately available funds to the Escrow Agent pursuant to an escrow agreement in substantially the form attached to this Agreement as Exhibit G among the Escrow Agent, Seller and Buyer (the "Purchase Price Balance Earnest Money Escrow Agreement") within ~~two (2) business days after~~ fifteen (15) business days after the date hereof, or (ii) disbursed in accordance with the Purchase Price Balance Escrow Agreement (which shall provide for a return of the Purchase Price Balance Earnest Money to Buyer upon a termination of this Agreement other than pursuant to Section 13.1(b)). The Purchase Price Balance Earnest Money Escrow Agreement will provide that sums up to an aggregate of \$750,000 may, upon request of Seller, be disbursed from escrow to Seller for Seller to use to fund certain regular maintenance expenses of the power plant owned by Black River (the "Maintenance Expenses") after review by Buyer of Seller's budget for such Maintenance Expenses. Prior to Closing, Buyer shall deposit in the Purchase Price Balance Earnest Money escrow account the aggregate amount of the Maintenance Expenses which have been disbursed to Seller such that the aggregate amount of the Purchase Price Balance Earnest Money escrow account shall be ~~\$10,733,796.000~~. In the event that this Agreement is terminated as provided in Sections 13.1 (a), (c), (d), (g), (i) or (j), then Seller shall repay to Buyer the aggregate of the Maintenance Expenses disbursed to Seller from the Purchase Price Balance Earnest Money escrow account by the date six (6) months after the date hereof together with interest accrued on such amount after the date of termination of this Agreement at a simple interest rate equal to the prime rate of Bank of America, N.A. as announced from time to time; and

to be (i) released to Seller at the Closing.

and approval

as the exercise of Buyer's reasonable discretion

(e) If, between the date of the Interim Financial Statements and the Determination Time, Jones Hamakua or Hamakua A has paid, distributed, set aside or made any other payments to Parent, Seller or any of their affiliates thereof, the Purchase Price shall be decreased on a dollar for dollar basis by the amount of such payments.

Section 2.3 Adjustments to Purchase Price; Adjustment Procedure. The Purchase Price shall be subject to adjustment as follows:

(a) if as of the close of business on the Closing Date (the "Determination Time") the Net Working Capital of Black River Generation exceeds \$2,273,201 (the "Minimum Working Capital"), the Purchase Price shall be increased by the amount of that excess;

(b) if as of the Determination Time the Net Working Capital of Black River Generation is less than the Minimum Working Capital but greater than zero, the Purchase Price shall be decreased by the amount of that shortage;

(c) if as of the Determination Time the Net Working Capital of Black River Generation is zero or less than zero, the Purchase Price shall be decreased by the amount, if any, below zero plus an amount equal to the Minimum Working Capital; and

(d) "Net Working Capital" shall mean the aggregate dollar value of current assets minus the aggregate dollar value of current liabilities, in each case as such items are set forth under those headings on Schedule 2.3(d). Net Working Capital shall be determined in accordance with U.S. generally accepted accounting principles ("U.S. GAAP") on a basis consistent with the calculation of the Minimum Working Capital.

**Section 2.4 Determination of Working Capital Adjustment.**

(a) Seller shall cause the chief financial officer of Black River Generation to prepare and submit to Buyer two (2) business days prior to the Closing Date, a good faith written estimate of the Net Working Capital (the "Estimated Net Working Capital") and the amount of the adjustment to the Purchase Price pursuant to Sections 2.3(a), 2.3(b) or 2.3(c). The amount of the Purchase Price payable at the Closing shall be based upon the Estimated Net Working Capital. The written estimate shall be determined on the basis of the Net Working Capital of Black River Generation as of the close of business on the day preceding the estimate, adjusted to reflect the state of facts reasonably expected to exist as of the Determination Time, and shall be accompanied by (i) a statement setting forth in reasonable detail the calculation of the Estimated Net Working Capital and (ii) a certificate signed by the chief financial officer of Black River Generation confirming that the Estimated Net Working Capital was determined in accordance with Section 2.3 and this Section 2.4.

(b) Within sixty (60) days after the Determination Time, Buyer shall prepare and submit to Seller the Net Working Capital of Black River Generation as of the Determination Time (the "Buyer Working Capital Notice"). The Buyer Working Capital Notice shall be accompanied by a statement signed by Buyer's chief financial officer (A) setting forth, in reasonable detail, the calculation of the Net Working Capital and (B) certifying that the calculation of the Net Working Capital conforms with Section 2.3 and Section 2.4. The Buyer Working Capital Notice shall be final and binding on the parties and shall become the "Final Net Working Capital" unless, within twenty (20) days after delivery thereof, Seller delivers a written notice to Buyer disputing any item contained therein (stating in reasonable detail the item or items in dispute and the basis for Seller's objection). If Seller delivers a notice of dispute, Buyer and Seller shall negotiate in good faith to resolve the dispute, but if they are unable to resolve the disputed matter within thirty (30) days after Seller's notice, the disputed item or items shall be submitted for determination to Ernst & Young LLP (or such other firm of independent certified public accountants as Seller and Buyer may agree upon). The determination of any disputed item or items pursuant to the preceding sentence shall be final and binding on the parties, and the fees and expenses of the accounting firm engaged to resolve the dispute shall be borne 50% by Buyer and 50% by Seller. Such firm of independent accountants shall determine and deliver to Buyer and Seller the Net Working Capital of Black River Generation as of the Determination Time based upon the undisputed items in the Buyer's Working Capital Notice and its determination with respect to any disputed items submitted by the parties (the "Final Net Working Capital").

(c) Within two business days of the delivery of the Final Net Working Capital to Buyer and Seller,

(i) if the Final Net Working Capital equals the Estimated Net Working Capital, then no further payments shall be made by either party;

(ii) if the Final Net Working Capital exceeds the Estimated Net Working Capital, then Buyer shall pay such excess to Seller by wire transfer of immediately available funds to such bank account as is designated by Seller; or

(iii) if the Final Net Working Capital is less than the Estimated Net Working Capital, then Seller shall pay the amount of such shortage to Buyer by wire transfer of immediately available funds to such bank account as is designated by Buyer.

Section 2.5 Further Adjustments. The Purchase Price shall be further subject to credit and adjustment for property taxes, prepaid insurance and all other items (excluding personal property taxes and other taxes) normally adjusted in connection with similar transactions, which shall be prorated between Seller and Buyer as of the Closing Date and shall be reflected in the Closing statement, with Seller liable to the extent such items relate to any time period prior to the Closing Date and Buyer liable to the extent such items relate to periods beginning with and subsequent to the Closing Date; provided that no such adjustment or proration shall be made to the extent such amounts are reflected in the Final Net Working Capital. Such prorations shall be made and paid insofar as is possible at the Closing, and in any event within 30 days thereafter.

Section 2.6 Purchase Price Allocation. (a) Buyer and Seller shall in good faith allocate the Purchase Price and any adjustment thereto among the Acquired Subsidiaries in a manner consistent with the fair market values determined in good faith and on a reasonable basis by Buyer and Seller prior to the Closing. Such allocation shall be consistent with Section 1060 of the Code and the Treasury Regulations thereunder. In addition, Buyer and Seller will use reasonable efforts to prepare IRS Form 8594 and related exhibits and will act in accordance with the allocation agreed to by the parties on such Form 8594 and in the preparation, filing and audit of any and all tax returns.

### ARTICLE 3

#### REPRESENTATIONS AND WARRANTIES CONCERNING PARENT AND SELLER

Parent and Seller jointly and severally represent and warrant to Buyer, as follows:

Section 3.1 Authority. Subject to the receipt of the Required Consents (as defined herein) and the Approval Order (as defined herein), Parent and Seller have all requisite power and authority to execute and deliver this Agreement, the Contribution Agreements and the Escrow Agreements (the "Related Agreements") and to consummate the transactions contemplated hereby and thereby. The execution, delivery and performance of this Agreement and the Related Agreements have been duly and validly authorized by all necessary corporate and limited liability company action on the part of Parent and Seller. Subject to entry of the Approval Order and the legal effects caused by the Bankruptcy Filing, this Agreement and the Related Agreements have been, or will be at Closing, duly and validly executed and delivered by Parent and Seller and each constitutes, or will constitute when executed or delivered, a valid and

binding obligation of Parent and Seller, enforceable against Parent and Seller in accordance with their terms.

Section 3.2 No Conflict or Breach. Subject to the entry of the Approval Order, the execution, delivery and performance of this Agreement and the Related Agreements do not and will not:

(a) conflict with or result in a violation or breach of any of the terms, conditions or provisions of the Organizational Documents of Parent or Seller;

(b) violate any law or any rule or regulation of any governmental body or administrative agency, or conflict with any judicial or administrative order or decree relating to Parent, Seller, the Company or the Acquired Subsidiaries;

(c) except as set forth on Schedule 4.4, require the consent of, notice to or filing with any governmental or regulatory authority or administrative agency on behalf of Parent, Seller, the Company or the Acquired Subsidiaries; or

(d) (i) conflict with, constitute a default under, result in a breach or acceleration of, (ii) result in or give to any person any right of termination, cancellation, acceleration or modification in or with respect to or (iii) result in or give to any person any right of first refusal or right of first offer or any additional rights or entitlement to increased, additional, accelerated or guaranteed payments under any contract, agreement, commitment, mortgage, note, license or other instrument or obligation to which Parent, Seller, the Company or any Acquired Subsidiary is a party or by which Parent, Seller, the Company or any Acquired Subsidiary is bound;

(e) (i) result in the creation or imposition of any Lien upon Parent, Seller, the Company or any Acquired Subsidiary or any of their respective assets or properties or (ii) result in the creation or imposition of any Lien on the Interests (as defined below) or any Contracts to which Parent, Seller, the Company or any Acquired Subsidiary is a party;

except (i) with respect to clause (c), such consents or notices as the failure to obtain or give would not have a material adverse effect on the condition (financial or otherwise), assets, properties, prospects or results of operations of the Business or on the ability of Parent and Seller to execute and deliver and perform its obligations under this Agreement or to consummate the transactions contemplated by this Agreement (hereinafter, a "Material Adverse Effect"); and (ii) with respect to clause (d) and (e), any of the foregoing which do not or will not have a Material Adverse Effect.

Section 3.3 Ownership of the Membership Interests. Seller is the owner, beneficially and of record, of all right, title and interest in and to all of the Membership Interests and no other person or entity holds any equity interest in the Company. The Membership Interests are duly authorized, validly issued, outstanding, fully paid and nonassessable. Seller has, and will have at the Closing, good and marketable title to all the Membership Interests and, subject to the entry of the Approval Order, the right to sell, assign and transfer the same to Buyer, free and clear of all Liens. Each of Seller, Parent and the Company is not a party to any option, warrant, right, contract, call, put or other agreement or commitment providing for the disposition or acquisition

of any of the Membership Interests and there are no obligations that might require the Company to issue any such options, warrants, rights, contracts, calls, puts or other agreements providing for the disposition or acquisition of any of the Membership Interests (other than this Agreement). Seller is not a party to any voting trust, proxy or other agreement or understanding with respect to any of the Membership Interests.

Section 3.4 Brokers. No finder, broker, agent or other intermediary has acted for or on behalf of Parent or Seller in connection with the transactions contemplated by this Agreement, and there are no claims for any brokerage commission, finder's fee or similar payment due from Parent or Seller.

#### ARTICLE 4

#### REPRESENTATIONS AND WARRANTIES CONCERNING COMPANY AND ACQUIRED SUBSIDIARIES

Parent and Seller, jointly and severally, represent and warrant to Buyer as follows:

Section 4.1 Acquired Subsidiaries. Exhibit F describes, with respect to each Acquired Subsidiary, the type of entity, the entity's federal income tax classification, the jurisdiction of organization and the nature of the interest owned (or to be owned, as of the Closing Date), directly or indirectly, by the Company. The information on Exhibit F is true and complete and includes all the current owners of each entity listed.

Section 4.2 Organization and Good Standing; Governing Documents. The Company is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware. The Acquired Subsidiaries are of the type indicated on Exhibit F and are duly organized, validly existing and in good standing under the laws of the State indicated on Exhibit F. Subject to the entry of the Approval Order, as of the Closing Date, the Company will have the requisite power and authority to own, operate and lease its properties and to carry on the Business as now being conducted. The Acquired Subsidiaries have the requisite corporate power and authority to own, operate and lease their respective assets and to carry on the Business as now being conducted. As of the Closing Date, the Company will be duly qualified to do business as a foreign limited liability company and will be in good standing in all other jurisdictions in which the character of the property owned, leased or operated by it or the nature of the Business makes such qualification necessary, and such jurisdictions are listed on Schedule 4.2A. A true and complete list of the organizational documents (the "Organizational Documents") of the Company and each of the Acquired Subsidiaries, together with all amendments thereto, is set forth on Schedule 4.2B.

Section 4.3 Authority of the Company. Subject to the entry of the Approval Order, the Company has all requisite power and authority to execute, deliver and perform this Agreement and to consummate the transactions contemplated by this Agreement. The execution, delivery and performance of this Agreement, and the consummation of the transactions contemplated by this Agreement, have been or will be, prior to the Closing, duly and validly authorized by all necessary limited liability company action on the part of the Company, Parent and Seller. Subject to the entry of the Approval Order, this Agreement has been duly and validly

executed and delivered by the Company and constitutes a valid and binding obligation of the Company, enforceable against the Company in accordance with its terms except as the enforceability thereof may be limited by bankruptcy, insolvency, reorganization or other similar laws affecting creditor's rights generally and by principles of equity regarding the availability of remedies.

Section 4.4 No Conflict or Breach. Subject to the entry of the Approval Order, the execution, delivery and performance of this Agreement and the Related Agreements do not and will not:

(a) conflict with or result in a violation of the Organizational Documents of the Company or the Acquired Subsidiaries;

(b) violate any law or any rule or regulation of any governmental body or administrative agency, or conflict with any judicial or administrative order or decree relating to the Company or the Acquired Subsidiaries or their assets;

(c) except as set forth on Schedule 4.4, require the consent of, notice to or filing with any governmental or regulatory authority or administrative agency on behalf of Company or the Acquired Subsidiaries; or

(d) (i) conflict with, constitute a default under, result in a breach or acceleration of, (ii) result in or give to any person any right of termination, cancellation, acceleration or modification in or with respect to, (iii) result in or give to any person any right of first refusal or right of first offer or any additional rights or entitlement to increased, additional, accelerated or guaranteed payments under any contract, agreement, commitment, mortgage, note, license or other instrument or obligation to which the Company or any Acquired Subsidiary is a party or by which the Company or any Acquired Subsidiary is bound;

(e) (i) result in the creation or imposition of any Lien on the Interests (as defined below) or any Contracts to which the Company or any Acquired Subsidiary is a party, or (ii) result in the creation or imposition of any Lien upon the Parent, Seller, the Company or any Acquired Subsidiary or any of their respective assets or properties;

except (i) with respect to clause (c), such consents or notices as the failure to obtain or give would not have a Material Adverse Effect; and (ii) with respect to clause (d) and (e), any of the foregoing which do not or will not have a Material Adverse Effect. The matters described on Schedule 4.4 are referred to as the "Required Consents."

Section 4.5 Ownership of the Acquired Subsidiaries. The interests described on Exhibit F will constitute, as of the Closing Date, (i) all of the Company's rights in the Acquired Subsidiaries which will, upon execution and delivery of the Contribution Agreements, be first tier, direct subsidiaries of the Company, including all ownership (whether membership, partnership or otherwise) and economic interests in such Acquired Subsidiaries; and (ii) all of the Acquired Subsidiaries' rights in the other Acquired Subsidiaries which will, on the Closing Date, be lower tier, indirect subsidiaries of the Company, including all of the ownership (whether membership, partnership or otherwise) and economic interests owned, directly or indirectly, by



any of the Acquired Subsidiaries in such lower tier Acquired Subsidiaries (the interests in (i) and (ii), collectively, the "Subsidiary Interests"). The Membership Interests and the Subsidiary Interests are referred to, collectively, as the "Interests." Exhibit F provides a true and complete list of all the Acquired Subsidiaries and the current owners thereof. As of the Closing Date, all of the Subsidiary Interests will be duly authorized, validly issued, outstanding, fully paid and nonassessable and will be owned of record and beneficially by the Company or the Acquired Subsidiaries. Immediately prior to the Closing, the Company and the applicable Acquired Subsidiaries will have, and Buyer will have at Closing, good and marketable title to all the Subsidiary Interests free and clear of all Liens and other exceptions to title with respect to the ownership of the Subsidiary Interests, except for Permitted Liens. Except as disclosed in Schedule 4.2B, (a) there are no outstanding or authorized options, warrants, rights, contracts, calls, puts, right to subscribe, conversion rights or other agreements or commitments to which the Company or any of the Acquired Subsidiaries is a party or which are binding upon the Company, or any of the Acquired Subsidiaries providing for the issuance, disposition or acquisition of any of the Subsidiary Interests (other than this Agreement); (b) there are no voting trusts, proxies or any other agreements or understandings with respect to the voting of the Subsidiary Interests; and (c) neither the Company nor any of the Acquired Subsidiaries is subject to any obligation (contingent or otherwise) to repurchase or otherwise acquire or retire any of the Subsidiary Interests (other than this Agreement).

Section 4.6 Minute Books. The minute books of the Company and the Acquired Subsidiaries are true, correct, complete and current in all material respects and contain accurate and complete records of all material actions taken at all meetings and by all written consents in lieu of a meeting by each entity's shareholders and directors or members and managers, as the case may be, and all signatures contained in such minute books are the true signatures of the persons whose signatures they purport to be. Schedule 4.6 to this Agreement sets forth a true, correct and complete list of the names and titles of each entity's officers, directors, or managers, as the case may be.

Section 4.7 Financial Statements.

(a) Seller has previously delivered to Buyer true and complete copies of (i) the unaudited balance sheet, income statement and statement of cash flow of the Seller and each of the Acquired Subsidiaries as of December 31, 2002 (the "Unaudited Financial Statements") and (ii) the unaudited balance sheet, income statement and statement of cash flow of the Seller and each of the Acquired Subsidiaries as of September 30, 2003, (the "Interim Financial Statements," together with the Unaudited Financial Statements, the "Financial Statements"). The Financial Statements (a) are in accordance with the books and records of the Seller and the Acquired Subsidiaries; (b) present fairly, in all material respects, the assets, liabilities and financial condition of the Seller and the Acquired Subsidiaries as of the respective dates of the Financial Statements, and the results of operations for the periods then ending; and (c) have been prepared in accordance with U.S. GAAP applied on a consistent basis throughout the periods involved.

(b) Except as disclosed on Schedule 4.7, the Seller, the Company and the Acquired Subsidiaries have no liability or obligation, whether accrued, absolute or

contingent that is not reflected or reserved against in the Interim Financial Statements except for those that are not required by U.S. GAAP to be included therein. Any items of income or expense which are unusual or of a nonrecurring nature are separately disclosed in the Financial Statements. Schedule 4.7 to this Agreement sets forth a true, correct and complete listing of the liabilities and indebtedness of the Company and the Acquired Subsidiaries as of the date of the Interim Financial Statements.

Section 4.8 Books and Records. The books and records of the Company and the Acquired Subsidiaries are true, accurate and complete and, where appropriate, have been maintained, in all material respects in accordance with U.S. GAAP applied on a consistent basis. At Closing, all such books and records, including, without limitation, all tax returns, will be in the possession of the Company or the Acquired Subsidiaries.

Section 4.9 Title to Assets; Liens. The Company and each of the Acquired Subsidiaries has, or will have immediately prior to the Closing, good and marketable title to all of the properties and assets (real or personal, tangible or intangible) owned by it (including, without limitation, those properties and assets shown on the Financial Statements, and a valid leasehold or other possessory interest in all other properties and assets used, operated or occupied by it, located on its premises or otherwise shown on the Financial Statements, except for tangible personal property sold or disposed of in the ordinary course of business and consistent with past practice. All of the Company's and the Acquired Subsidiaries' properties and assets (whether real or personal, tangible or intangible, owned, leased or otherwise acquired) are free and clear of any and all Liens, other than:

(a) easements that do not affect the full use and enjoyment of the Real Property for the purposes for which it is currently used or detract from its value;

(b) imperfections of title and encumbrances, if any, which, do not detract from the marketability or value of the properties subject thereto, and do not impair the operations of the owner thereof;

(c) Liens for taxes not yet due and payable;

(d) Liens described on Schedule 4.9; and

(e) With respect to the Leased Real Property, Liens on the underlying real property imposed by creditors of the landlords of the underlying real property or other action or inaction of such landlords

(collectively, "Permitted Liens").

#### Section 4.10 Real Property.

(a) Schedule 4.10(a) contains a true and correct description of all (i) real property owned by the Company or the Acquired Subsidiaries (the "Owned Real Property"); (ii) real property leased by the Company or the Acquired Subsidiaries, as lessor or lessee (the "Leased Real Property"); (iii) leases relating to the Leased Real Property (collectively, the "Real Property Leases" together with the Owned Real

Property, the "Real Property"); (iv) each parcel of real property as to which it has rights of easements, (v) Liens upon or affecting any of the Owned Real Property or the Buyer's rights to or interest in any of the Leased Real Property or any Real Property Lease; (vi) agreements, oral or written, pursuant to which any person or entity (other than Seller, the Company or the Acquired Subsidiaries) leases, subleases, occupies or has the right to occupy any Owned Real Property or Leased Real Property; and (vii) agreements and other undertakings, oral or written, to sell, lease, sublease, assign, encumber or otherwise dispose of any Owned Real Property, Leased Real Property or Real Property Lease.

(b) Subject to the entry of the Approval Order and except as set forth on Schedule 4.10(b), each of the leases (the "Property Leases") with respect to the Leased Real Property is or will on the Closing Date be valid, in full force and effect, and enforceable in accordance with its terms and constitutes a legal and binding obligation of each party thereto, except to the extent the invalidity, ineffectiveness, unenforceability, illegality, or nonbinding nature of any such leases would not, individually or in the aggregate, have a Material Adverse Effect. Subject to the entry of the Approval Order and except as set forth on Schedule 4.10(b), neither the Company nor any of the Acquired Subsidiaries have given nor received any notice of default, termination or partial termination under any Real Property Leases, and there is no existing or continuing default by the Company or any other party in the performance or payment of any obligation under any Property Lease, except to the extent any such defaults, terminations or partial terminations would not, individually or in the aggregate, have a Material Adverse Effect.

(c) Except for the real property leased to others referred to in clause (ii) of paragraph (a) above, the Company and the Acquired Subsidiaries is in possession of each parcel of Real Property, together with all buildings, structures, facilities, fixtures and other improvements thereon. The Company and the Acquired Subsidiaries have adequate rights of ingress and egress with respect to the Real Property and all buildings, structures, facilities, fixtures and other improvements thereon. None of such Real Property, Easements, buildings, structures, facilities, fixtures or other improvements, or the use thereof, contravenes or violates any building, zoning, administrative, occupational safety and health or other applicable law in any material respect (whether or not permitted on the basis of prior nonconforming use, waiver or variance). Except as set forth on Schedule 4.10(c), the Real Property (other than Real Property leased to others by the Company or the Acquired Subsidiaries) and the easements comprise all of the real estate and real estate rights that are necessary for the Company and the Acquired Subsidiaries to conduct the Business.

Section 4.11 Tangible Personal Property. The Company and the Acquired Subsidiaries are in possession of and have good title to or have valid leasehold interests in or valid rights under contract to use all buildings, machinery, equipment and other tangible assets necessary for the conduct of the Business (the "Tangible Property"). Each material item of Tangible Property which includes all tangible personal property reflected in the Financial Statements and tangible personal property acquired since the Financial Statement date is in operating order, condition and repair, ordinary wear and tear excepted. No material item of Tangible Property is in need of repair or replacement other than as part of routine maintenance in the ordinary course of

business. All Tangible Personal Property is free and clear of all Liens except for Permitted Liens.

Section 4.12 Contracts. Schedule 4.12 contains a true and complete list of all contracts, commitments, agreements (including agreements for the borrowing of money or the extension of credit), leases (other than Real Property Leases), licenses, evidence of indebtedness, mortgages, security agreements, understandings and obligations, whether written or oral, to which the Company or the Acquired Subsidiaries is party or by which the Company or the Acquired Subsidiaries is bound or affected, that are material to the operation of the Business (the "Contracts"). The Company has delivered to Buyer true and complete copies of all written Contracts and true and complete memoranda describing all oral Contracts, including any and all amendments and other modifications to such Contracts. Subject to the entry of the Approval Order, each of the Contracts is valid, binding and enforceable in accordance with its terms and is in full force and effect and constitutes a legal, valid and binding agreement and, except as set forth on Schedule 4.12, neither the Company or any of the Acquired Subsidiaries nor, to the Parent, Seller, Company or the Acquired Subsidiaries knowledge, any other party to such Contract is, or has received notice that it is, in violation or breach of or default under any such Contract (or without notice or lapse of time or both, would constitute defaults, under any of the Contracts). Subject to the entry of the Approval Order, the sale of the Membership Interests by Seller to Buyer will not, with respect to any Contract, (i) constitute a default thereunder; (ii) require the consent of any person or party, except for the Required Consents; (iii) give rise to any right of first refusal or right of first offer or (iv) to Parent, Seller, Company or the Acquired Subsidiaries knowledge affect the continuation, validity and effectiveness of any Contract or the terms of any Contract. Except as disclosed on Schedule 4.12, there are no renegotiations or attempts to renegotiate, or outstanding rights to renegotiate any material amounts paid or payable to the Company or the Acquired Subsidiaries under any Contract, and Parent, Seller and the Company and the Acquired Subsidiaries have received no demands for such renegotiation other than pursuant to directions received from Buyer by Parent, Seller, the Company or any of the Acquired Subsidiaries.

Section 4.13 Receivables. All accounts receivable and trade accounts reflected on the Interim Financial Statements (less any such receivables collected since the date of such financial statement) and all accounts receivable and trade accounts presently owing and to be owing to the Company or the Acquired Subsidiaries on the Closing Date (collectively, the "Receivables"), are, and on the Closing Date will be, legal, valid and binding obligations, created in the ordinary course of business and enforceable in accordance with their terms. All accounts receivable arose from bona fide sales transactions in the ordinary course of business and are payable on ordinary trade terms, consistent with past practice.

Section 4.14 Intellectual Property. Schedule 4.14 sets forth a list of all (i) trademarks, service marks, trade names, logos and other designations owned or used by the Company or the Acquired Subsidiaries and (ii) all computer programs and other computer software (other than off-the-shelf shrink wrapped software), trade secrets, plans and specifications, inventions, know-how, technology, proprietary processes and formulae necessary or used by the Company or the Acquired Subsidiaries in connection with the Business (collectively, "Intellectual Property"). The Company and the Acquired Subsidiaries either have all rights, titles and interests in or valid and binding rights under contract to use, own, or have sufficient lease rights

to use, each item included in the Intellectual Property, free and clear of any Liens other than Permitted Liens. The Intellectual Property consists of all of the intellectual property rights necessary to conduct the Business. There are no claims or suits pending or, to the knowledge of Parent, Seller, Company or the Acquired Subsidiaries, threatened against the Parent, Seller, the Company or the Acquired Subsidiaries challenging the Parent, Seller's, the Company's or the Acquired Subsidiaries' ownership of or unencumbered right to use any of the Intellectual Property, nor does there exist any basis therefor. There are no claims or suits pending or, to the knowledge of Parent, Seller, Company or the Acquired Subsidiaries, threatened against the Parent, Seller, the Company or the Acquired Subsidiaries alleging that any of the Intellectual Property infringes any rights of any third parties, nor does there exist any basis therefor. All registrations with and applications to governmental or regulatory authorities in respect of such Intellectual Property are valid and in full force and effect. Except as set forth on Schedule 4.14, there are no restrictions on the direct or indirect transfer of any contract in respect of such Intellectual Property.

Section 4.15 Litigation.

(a) Except as disclosed on Schedule 4.15, there are no claims, actions, suits, inquiries, hearings or investigations ("Claims") pending or, to the knowledge of the Parent, Seller, Company or the Acquired Subsidiaries, threatened, by or against, or otherwise affecting the Company, or the Acquired Subsidiaries which, if resolved adversely to the Company or the Acquired Subsidiaries, would have a Material Adverse Effect.

(b) To the knowledge of the Parent, Seller, the Company or the Acquired Subsidiaries, there are no facts or circumstances that could be reasonably expected to give rise to any Claims that would be required to be disclosed pursuant to clause (a) above.

Section 4.16 Compliance. Except as set forth on Schedule 4.16, there is not outstanding or, to the knowledge of Parent, Seller, Company or the Acquired Subsidiaries, threatened, any order, writ, injunction or decree of any court, governmental agency or arbitration tribunal against or involving the Company or the Acquired Subsidiaries. The Company and the Acquired Subsidiaries are currently, and have been at all times, in compliance with all laws, statutes, rules, regulations, orders and licensing requirements of federal, state, local and foreign agencies and authorities applicable to the properties or operations of the Business.

Section 4.17 Taxes. Except as set forth on Schedule 4.17, (i) the Seller, the Company and the Acquired Subsidiaries have timely filed all tax returns that they were, or will be, required to file before the Closing Date, and such tax returns were, or will be, correct and complete in all material respects; (ii) all taxes required to be withheld or paid by the Seller, the Company and the Acquired Subsidiaries (whether or not shown on any tax return) have been withheld and paid; (iii) the Company or the Acquired Subsidiaries currently are not the beneficiaries of any extension of time within which to file any tax return and have not waived any statute of limitations in respect of taxes or agreed to any extension of time with respect to a tax assessment or deficiency; (iv) there is no pending or, to the knowledge of Parent, Seller, Company or the Acquired Subsidiaries threatened dispute or claim concerning any tax liability of the Company or

the Acquired Subsidiaries; (v) the Acquired Subsidiaries will not be required to include any adjustment in taxable income for any period ending after the Closing under Section 481 of the Code (or under any similar provision of the laws of any jurisdiction) as a result of a change in the method of accounting for a period ending on or before the Closing or pursuant to an agreement with a Tax authority with regard to the Tax liability of an Acquired Subsidiary for any period ending on or before the Closing; (vi) the Company and each Acquired Subsidiary is treated as either a partnership or is disregarded as a separate entity from its owner for United States Federal tax purposes; (vii) neither the Company nor any Acquired Subsidiary is currently, or has ever been, a member of any consolidated federal income tax group or any similar group under state, local or foreign law that might cause the Company or such Acquired Subsidiary to be jointly or severally liable for the income taxes of any other person, including any tax imposed under Treasury Regulation Section 1.1502-6; and (viii) there are no Tax Sharing Agreements in effect to which the Company or any Acquired Subsidiary is a party and after the Closing, neither the Company nor any Acquired Subsidiary shall have any liabilities under any such agreement. The Company and the Acquired Subsidiaries have no liability for taxes except (x) as of the most recent fiscal month end, as shown on the reserve for tax liability (excluding any reserve for deferred taxes established to reflect timing differences between book and tax income) set forth on the face of the most recent balance sheet (rather than in any notes thereto); (y) as of the Closing Date, as will be shown in the reserve as adjusted for the passage of time through the Closing Date in accordance with the past custom and practice of the Company or the Acquired Subsidiaries in filing their tax returns; and (z) except as set forth on Schedule 4.17. The Company and the Acquired Subsidiaries have not filed a consent under Section 341(f) of the Internal Revenue Code of 1986, as amended (the "Code"), concerning collapsible corporations. Tax Sharing Agreement means any existing contract (whether or not written) binding the Company or any Acquired Subsidiary that provides for the allocation, apportionment, sharing or assignment of any tax liability or benefit, or the transfer or assignment of income, revenues, receipts or gains for the principal purpose of determining any tax liability.

Section 4.18 Licenses; Environmental Matters. Schedule 4.18 contains a true and complete list of all licenses, permits, certificates of authority, authorizations, approvals, registrations, franchises and similar consents granted or issued by any governmental or regulatory authority ("Licenses") used in and material, individually or in the aggregate, to the business or operations of the Company and the Acquired Subsidiaries (and all pending applications for any such Licenses), setting forth the grantor, the grantee, the function and the expiration and renewal date of each. Prior to the execution of this Agreement, the Company has delivered to Buyer true and complete copies of all such Licenses. The Company and the Acquired Subsidiaries have also obtained all Licenses which are required under applicable environmental laws in connection with the conduct of the Business. Each of such Licenses is valid, binding and in full force and effect. The Company and the Acquired Subsidiaries have conducted the Business in compliance in all material respects with the terms and conditions of all such Licenses and with any applicable environmental law. In addition, except as set forth on Schedule 4.18 (with paragraph references corresponding to those set forth below):

- (a) No order has been issued, no environmental claim has been filed, no penalty has been assessed and no investigation or review is pending or, to the knowledge of Parent, Seller, Company or the Acquired Subsidiaries threatened by any governmental or regulatory authority with respect to any alleged failure by the Company or the

Acquired Subsidiaries to have any License required under applicable environmental laws in connection with the conduct of the Business or with respect to any generation, treatment, storage, recycling, transportation, discharge, disposal or release of any Hazardous Material in connection with the Business, and to the knowledge of Parent, Seller, Company or the Acquired Subsidiaries there are no facts or circumstances in existence which could reasonably be expected to form the basis for any such order, environmental claim, penalty or investigation.

(b) Except as set forth on Schedule 4.18, the Company and the Acquired Subsidiaries do not own, operate or lease a treatment, storage or disposal facility on any of the Real Property requiring a permit under the Resource Conservation and Recovery Act, as amended, or under any other comparable state or local law; and, without limiting the foregoing, (i) no polychlorinated biphenyl is or has been present, (ii) no asbestos or asbestos-containing material is or has been present, (iii) there are no underground storage tanks or surface impoundments for Hazardous Materials, active or abandoned, and (iv) no Hazardous Material has been released in a quantity reportable under, or in violation of, any environmental law or otherwise released, in the cases of clauses (i) through (iv), at, on or under any such site or facility during any period that the Company and the Acquired Subsidiaries owned, operated or leased such property.

(c) Neither the Company nor the Acquired Subsidiaries have transported or arranged for the transportation of any Hazardous Material in connection with the operation of the Business to any location that is (i) listed on the National Priorities List under CERCLA ("NPL") (ii) listed for possible inclusion on the NPL by the environmental protection Agency in CERCLIS or on any similar state or local list or (iii) the subject of enforcement actions by federal, state or local governmental or regulatory authorities that may lead to environmental claims against the Company and the Acquired Subsidiaries or the Business.

(d) Except as set forth on Schedule 4.18, no Hazardous Material generated in connection with the operation of the Business has been recycled, treated, stored, disposed of or released by the Company and the Acquired Subsidiaries at any location.

(e) Except as set forth on Schedule 4.18, no oral or written notification of a release of a Hazardous Material in connection with the operation of the Business has been filed by or on behalf of the Company and the Acquired Subsidiaries, and no site or facility now or previously owned, operated or leased by the Company and the Acquired Subsidiaries on any of the Real Property is listed or proposed for listing on the NPL, CERCLIS or any similar state or local list of sites requiring investigation or clean-up.

(f) No Liens have arisen under or pursuant to any environmental law on any site or facility owned, operated or leased by the Company and the Acquired Subsidiaries on any of the Real Property, and no federal, state or local governmental or regulatory authority action has been taken or, to the knowledge of Parent, Seller, Company or the Acquired Subsidiaries, is in process that could subject any such site or facility to such Liens, and the Company and the Acquired Subsidiaries would not be required to place

any notice or restriction relating to the presence of Hazardous Materials at any such site or facility in any deed to the Real Property on which such site or facility is located.

(g) There have been no environmental investigations, studies, audits, tests, reviews or other analyses conducted by, or that are in the possession of, the Company and the Acquired Subsidiaries in relation to any site or facility now or previously owned, operated or leased by the Company and the Acquired Subsidiaries on any of the Real Property which have not been delivered to Buyer prior to the execution of this Agreement.

As used in this Agreement, the term "Hazardous Materials" means (A) any petroleum or petroleum products, flammable explosives, radioactive materials, asbestos in any form that is or could become friable, urea formaldehyde foam insulation and transformers or other equipment that contain dielectric fluid containing levels of polychlorinated biphenyls (PCBs); (B) any chemicals or other materials or substances which are now or hereafter become defined as or included in the definition of "hazardous substances," "hazardous wastes," "hazardous materials," "extremely hazardous wastes," "restricted hazardous wastes," "toxic substances," "toxic pollutants" or words of similar import under any environmental law; and (C) any other chemical or other material or substance, exposure to which is now or hereafter prohibited, limited or regulated by any governmental or regulatory authority under any environmental law.

Section 4.19 Insurance. Schedule 4.19 contains a true and complete list (including the names and addresses of the insurers, the names of the persons to whom such policies have been issued, the expiration dates thereof, the annual premiums and payment terms thereof, whether it is a "claims made" or an "occurrence" policy and a brief description of the interests insured thereby) of all liability, property, workers' compensation, directors' and officers' liability and other insurance policies currently in effect that insure the Business, operations of the Company and the Acquired Subsidiaries and that (i) have been issued to the Company and the Acquired Subsidiaries, or (ii) have been issued to any person (other than the Company and the Acquired Subsidiaries) for the benefit of the Company and the Acquired Subsidiaries (the "Company Insurance Policies"). Each policy listed in Schedule 4.19 is valid and binding and in full force and effect, no premiums due thereunder have not been paid and neither the Company nor the Acquired Subsidiaries nor the person to whom such policy has been issued has received any notice of cancellation or termination in respect of any such policy or is in default thereunder. The insurance policies listed in Schedule 4.19 are placed with financially sound and reputable insurers and, in light of the respective business, operations of the Company and the Acquired Subsidiaries, are in amounts and have coverages that are reasonable and customary for persons engaged in such businesses and operations and having such assets and properties. Neither the Company nor the Acquired Subsidiaries nor the person to whom such policy has been issued has received notice that any insurer under any policy referred to in this section is denying liability with respect to a claim thereunder or defending under a reservation of rights clause.

Section 4.20 Labor and Employment Matters. Except as set forth on Schedule 4.20, no employees of the Company or the Acquired Subsidiaries have been or are represented by a union



or other labor organization or covered by any collective bargaining agreement<sup>1</sup>. There is no unfair labor practice complaint, labor organizational effort, strike, slowdown or similar labor matter pending or, to the knowledge of the Parent, Seller, Company or the Acquired Subsidiaries, threatened against or affecting the Company or its business or the Acquired Subsidiaries.

Section 4.21 Employees; Employee Benefits.

(a) Schedule 4.21 contains a true and complete list of each "employee benefit plan" (within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), including, without limitation, multiemployer plans within the meaning of ERISA Section 3(37)), stock purchase, stock option, severance, employment, change-in-control, fringe benefit, collective bargaining, bonus, incentive, deferred compensation and all other employee benefit plans, agreements, programs, policies or other arrangements, whether or not subject to ERISA (including any funding mechanism therefor now in effect or required in the future as a result of the transaction contemplated by this Agreement or otherwise), whether formal or informal, oral or written, legally binding or not, under which any employee or former employee of the Company or the Acquired Subsidiaries have any present or future right to benefits or under which the Company or the Acquired Subsidiaries have any present or future liability. All such plans, agreements, programs, policies and arrangements shall be collectively referred to as the "Company Plans." Neither the Company nor any Acquired Subsidiary has any express or implied commitment, whether legally enforceable or not, to (i) create, incur liability with respect to, or cause to exist any Company Plan (or any plan, program or arrangement which would be a Company Plan if in effect on the date hereof), (ii) to enter into any contract or agreement to provide compensation or benefits to any individual, or (iii) to modify, change or terminate any Company Plan, other than with respect to a modification, change or termination required by ERISA or by the Code.

(b) With respect to each Company Plan, the Company and the Acquired Subsidiaries have delivered to the Buyer a current, accurate and complete copy (or, to the extent no such copy exists, an accurate description) thereof and, to the extent applicable: (i) any related trust agreement or other funding instrument; (ii) the most recent determination letter, if applicable; (iii) any summary plan description and other written communications (or a description of any oral communications) by the Company or the Acquired Subsidiaries to their employees concerning the extent of the benefits provided under a Company Plan; and (iv) for the three most recent years (A) the Form 5500 and attached schedules, (B) audited financial statements, (C) actuarial valuation reports and (D) attorney's response to an auditor's request for information.

(c) (i) Each Company Plan has been established and administered in accordance with its terms, and in compliance with the applicable provisions of ERISA, the Code and other applicable laws, rules and regulations; (ii) each Company Plan which is intended to be qualified within the meaning of Code Section 401(a) is so qualified and has received a favorable determination letter as to its qualification, and nothing has

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<sup>1</sup> Buyer may require additional provisions in the Agreement after review of the Black River union contract, pension plan and related issues.

occurred, whether by action or failure to act, that could reasonably be expected to cause the loss of such qualification; (iii) no event has occurred and no condition exists that would subject the Company or the Acquired Subsidiaries, either directly or by reason of their affiliation with any member of their "Controlled Group" (defined as any organization which is a member of a controlled group of organizations within the meaning of Code Sections 414(b), (c), (m) or (o)), to any tax, fine, lien, penalty or other liability imposed by ERISA, the Code or other applicable laws, rules and regulations, except as follows: (A) there is an "accumulated funding deficiency" (for which an excise tax is due or will be due in the absence of a waiver), as defined in Section 412 of the Code or as defined in Section 302(a)(2) of ERISA, whichever may apply, with respect to the Pension Plan of J.A. Jones, Inc., as a result of the failure of J.A. Jones, Inc. to make a minimum funding contribution of \$4,882,899 for the plan year ending on December 31, 2002, by the due date of such contribution of September 15, 2003; therefore, the assets of the Company and the Acquired Subsidiaries are jointly and severally subject to a lien under Sections 412 (n) of the Code and 302(f) of ERISA as a result of the failure to make the minimum funding contribution; and (B) during the calendar year 2003, J.A. Jones, Inc. did not make required quarterly installments when due for the 2003 plan year for the Pension Plan of J.A. Jones, Inc., but did make all such required quarterly installments within thirty (30) days of the due date of such required quarterly installments; (iv) for each Company Plan with respect to which a Form 5500 has been filed, no material change has occurred with respect to the matters covered by the most recent Form since the date thereof; (v) no "reportable event" (as such term is defined in ERISA Section 4043), "prohibited transaction" (as such term is defined in ERISA Section 406 and Code Section 4975) or "accumulated funding deficiency" (as such term is defined in ERISA Section 302 and Code Section 412 (whether or not waived)) has occurred with respect to any Company Plan, except as follows: (x) as disclosed above in section 4.21(c)(iii)(A) and (B), an accumulated funding deficiency has occurred with respect to a Company Plan, and (y) with respect to "reportable events" (as that term is defined in ERISA Section 4043), J.A. Jones, Inc. has notified the Pension and Benefit Guaranty Corporation ("PBGC") of (A) the failure to make the contributions described above in section 4.21(c)(iii)(A) by timing filing of Form 200 with the PBGC, (B) the bankruptcy of J.A. Jones, Inc. by timely filing of Form 10 with the PBGC, and (C) a material reduction in the number of active plan participants by timely filing of Form 10; (vi) no Company Plan provides retiree welfare benefits and neither the Company nor the Acquired Subsidiaries have any obligations to provide any retiree welfare benefits, with the exception of the J.A. Jones, Inc. Health & Welfare Plan & Trust; (vii) all awards, grants or bonuses made pursuant to any Company Plan have been, or will be, fully deductible to the Company or the Acquired Subsidiaries notwithstanding the provisions of Section 162(m) of the Internal Revenue Code and the regulations promulgated thereunder; and (viii) each Company Plan may be amended or terminated without obligation or liability other than normal claims for benefits in the ordinary course.

(d) With respect to each of the Company Plans that is not a multiemployer plan within the meaning of Section 4001(a)(3) of ERISA but is subject to Title IV of ERISA, as of the Closing Date, the assets of each such Company Plan are at least equal in value to the present value of the accrued benefits (vested and unvested) of the participants in such Company Plan on a termination basis, based on the actuarial assumptions used by

the PBGC in terminating a pension plan (if such termination were to occur on the date hereof), and on a projected benefit obligation basis, based on the actuarial methods and assumptions indicated in the most recent actuarial valuation reports, except as follows: the assets of the Pension Plan of J.A. Jones, Inc. are less than the present value of the accrued benefits (vested and unvested) of the participants in that plan on a termination basis, based on the actuarial assumption used by the PBGC in terminating a pension plan (if such termination were to occur on the date hereof), and on a projected benefit obligation basis, based on the actuarial methods and assumptions indicated in the most recent actuarial valuation reports.

(e) With respect to any multiemployer plan (within the meaning of ERISA Section 4001(a)(3)) to which the Company, the Acquired Subsidiaries or any member of their Controlled Group has any liability or contributes (or has at any time contributed or had an obligation to contribute): (i) none of the Company, the Acquired Subsidiaries or any member of their Controlled Group has incurred any withdrawal liability under Title IV of ERISA or would be subject to such liability if, as of the Closing Date, the Company, the Acquired Subsidiaries or any member of their Controlled Group were to engage in a complete withdrawal (as defined in ERISA Section 4203) or partial withdrawal (as defined in ERISA Section 4205) from any such multiemployer plan, except as follows: although no withdrawal liability existed as of December 31, 2002, J.A. Jones, Inc. and any member of its Controlled Group (including, but not limited to, the Company and the Acquired Subsidiaries) may have incurred withdrawal liability as a result of the participation of a former J.A. Jones, Inc. subsidiary, Tompkins Builders, Inc., in two multiemployer plans (the Laborers District Council of Washington DC Pension Trust and the Washington DC Area Carpenters' Pension and Retirement Trust); and (ii) no such multiemployer plan is in reorganization or insolvent (as those terms are defined in ERISA Sections 4241 and 4245, respectively).

(f) With respect to any Company Plan, (i) no actions, suits or claims (other than routine claims for benefits in the ordinary course) are pending or threatened, (ii) no facts or circumstances exist that could give rise to any such actions, suits or claims, and (iii) no written or oral communication has been received from the PBGC in respect of any Company Plan subject to Title IV of ERISA concerning the funded status of any such plan or any transfer of assets and liabilities from any such plan in connection with the transactions contemplated herein, except as follows: employees of J.A. Jones, Inc. and members of its Controlled Group (including, but not limited to, the Company and the Acquired Subsidiaries) who have incurred claims that would be payable under the health plans of J.A. Jones, Inc. may find that such claims are not paid due to J.A. Jones, Inc.'s failure to pay required premiums under the relevant plans.

(g) There are no unfunded Company Plans except as described on Schedule 4.21.

(h) No Company Plan could result in the payment to any present or former employee of the Company or the Acquired Subsidiaries of any money or other property or accelerate or provide any other rights or benefits to any present or former employee of the Company or the Acquired Subsidiaries as a result of the transaction contemplated by

this Agreement, whether or not such payment would constitute a parachute payment within the meaning of Code Section 280G.

Section 4.22 Absence of Certain Changes. Except as disclosed on Schedule 4.22, since the Interim Financial Statements the Seller, the Company and the Acquired Subsidiaries have conducted the Business only in the ordinary course consistent with past practices, and have not:

(a) suffered an adverse change which has had a Material Adverse Effect, or any event or development which, individually or together with other such events, could reasonably be expected to result in a Material Adverse Change, in the condition of the Business; have not suffered any physical damage, destruction or other casualty loss or damage to the real or personal property or equipment of the Company or the Acquired Subsidiaries (whether or not covered by insurance);

(b) redeemed or repurchased, directly or indirectly, any ownership interests or shares of capital stock, as the case may be, or declared, set aside or paid any dividends or made any other distributions with respect to any ownership interests or shares of capital stock, as the case may be (except as set forth in this Agreement);

(c) issued, sold or transferred any notes, bonds or other debt securities or any equity securities, securities convertible, exchangeable or exercisable into equity securities, or warrants, options or other rights to acquire equity securities, of the Company or the Acquired Subsidiaries;

(d) borrowed any amount or incurred or become subject to any liabilities, with respect to the conduct of the business in an aggregate principal amount exceeding \$50,000 or had any material change in any method of calculating bad debt;

(e) discharged or satisfied any lien or encumbrance or paid, waived, or canceled any obligation or liability, other than liabilities paid in the ordinary course of business, or prepaid in advance of a scheduled payment date any amount of indebtedness for borrowed money;

(f) subjected any portion of their properties and assets to any Lien except as disclosed on Schedule 4.9;

(g) sold, leased, assigned, acquired or transferred (including, without limitation, transfers to Seller or any employees or affiliates of the Company) any portion of any assets and properties used or held for use in the conduct of business, except for sales of inventory in the ordinary course of business consistent with past practice, or canceled without fair consideration any debts or claims owing to or held by them;

(h) suffered any extraordinary Losses or waived any rights of value in excess of \$10,000, whether or not in the ordinary course of business or consistent with past custom and practice;

(i) entered into, amended, modified, waived or terminated (partial or complete) any lease, contract, agreement or commitment, or taken any other action or

entered into any other transaction other than in the ordinary course of business and in accordance with past custom and practice, or entered into any transaction with any employee, officer, affiliate of Seller, director of the Company the Acquired Subsidiaries or with Seller;

(j) suffered any material change in any pricing, investment, accounting, financial reporting, inventory, credit, allowance or tax practice or policy of the business; or

(k) had any (i) increase in the compensation or fringe benefits of any present or former director, officer or employee of the Company or the Acquired Subsidiaries (except for increases in salary or wages in the ordinary course of business consistent with past practice), (ii) grant of any severance or termination pay to any present or former director, officer or employee of the Company or the Acquired Subsidiaries, (iii) loan or advance of money or other property by the Company or the Acquired Subsidiaries to any of their present or former directors, officers or employees or (iv) establishment, adoption, entrance into, amendment or termination of any Company Plan.

Section 4.23 Disclosure. All material facts relating to the business or the condition of the Company and the Acquired Subsidiaries have been disclosed to Buyer in or in connection with this Agreement. No representation or warranty contained in this Agreement, and no statement contained on any of the schedules or in any certificate, list or other writing furnished to Buyer pursuant to any provision of this Agreement (including without limitation the Financial Statements), contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements herein or therein, in the light of the circumstances under which they were made, not misleading other than that they were prepared in good faith on the basis of reasonable assumptions.

Section 4.24 Guaranties. Except as set forth on Schedule 4.24, the Company and the Acquired Subsidiaries do not have any obligations (absolute or contingent) to provide funds on behalf of, or to guarantee or assume any debt, liability or obligation of, any person or entity.

Section 4.25 Affiliate Transactions. Except as disclosed in Schedule 4.25 (the "Affiliate Transactions"), (i) there are no intercompany liabilities, indebtedness or obligations between the Company or the Acquired Subsidiaries, on the one hand, and the Seller, any officer, director or affiliate (other than the Company and the Acquired Subsidiaries) of Parent and Seller, on the other hand, (ii) neither Parent, Seller nor any such officer, director or affiliate provides or causes to be provided any assets, services or facilities to the Company or the Acquired Subsidiaries, (iii) the Company and the Acquired Subsidiaries do not provide or cause to be provided any assets, services or facilities to Seller or any such officer, director or affiliate and (iv) the Company and the Acquired Subsidiaries do not beneficially own, directly or indirectly, any debentures, notes and other evidences of indebtedness, stocks, securities (including rights to purchase and securities convertible into or exchangeable for other securities), interests in joint ventures and general and limited partnerships, mortgage loans and other investment or portfolio assets issued by Parent, Seller or any such officer, director or affiliate. Except as disclosed in Schedule 4.25, each of the Affiliate Transactions was engaged in on an arm's-length basis. Except as disclosed in Schedule 4.25, since December 31, 2002, all settlements of intercompany

liabilities between the Company and the Acquired Subsidiaries, on the one hand, and Seller or any such officer, director or affiliate, on the other hand, have been made, and all allocations of intercompany expenses have been applied, in the ordinary course of business consistent with past practice.

Section 4.26 Black River. Black River is engaged exclusively in the business of selling electricity at wholesale and not to retail customers.

## ARTICLE 5

### REPRESENTATIONS AND WARRANTIES OF BUYER

Buyer represents and warrants to Seller and the Company as follows:

Section 5.1 Organization and Good Standing. Buyer is a corporation duly organized, validly existing and in good standing under the laws of the State of Delaware.

Section 5.2 Authority. Buyer has the requisite corporate power and authority to execute, deliver and perform this Agreement and the Related Agreements and to consummate the transactions contemplated hereby and thereby. The execution, delivery and performance of this Agreement and the Related Agreements, and the consummation of the transactions contemplated hereby and thereby, have been duly and validly authorized by all necessary action on the part of Buyer. This Agreement and the Related Agreements have been, or, at Closing, will be duly executed and delivered by Buyer and each constitutes, or will constitute when executed and delivered, a valid and binding obligation of Buyer, enforceable against Buyer in accordance with its terms, except as the enforceability thereof may be limited by bankruptcy, insolvency, reorganization or other similar laws affecting creditor's rights generally and by principles of equity regarding the availability of remedies.

Section 5.3 No Conflict or Breach. The execution, delivery and performance of this Agreement and the Related Agreements do not and will not (a) conflict with or constitute a violation of the Articles of Incorporation or Bylaws of Buyer; (b) conflict with or constitute a violation of any law, statute, judgment, order, decree or regulation of any court, administrative agency, governmental authority or arbitrator applicable to or relating to Buyer; or (c) constitute a breach or default under any contract or any other agreement or instrument by which Buyer is bound; or (d) require any consent, notice to or filing with any governmental authority or administrative agency or any private person or firm on behalf of Buyer.

Section 5.4 Financial Capability of Buyer. Buyer has the capability and funding resources to close and consummate the transactions contemplated by this Agreement and the Related Agreements and to perform its objectives hereunder and thereunder.

Section 5.5 Investment Intent. Buyer is acquiring the Membership Interests for its own account and not with a view to their distribution within the meaning of applicable federal and state securities laws.

Section 5.6 No Other Representations. Buyer acknowledges that other than as set forth in Articles 3 and 4, Seller and Parent have made no other representations or warranties, and

Buyer has conducted its own due diligence with respect to the Company, the Business and the Interests and other matters contemplated in this Agreement and has relied upon such due diligence and Seller's and the Company's representations and warranties set forth in Articles 3 and 4.

## ARTICLE 6

### COVENANTS OF PARENT, SELLER AND THE COMPANY

Parent, Seller and the Company, jointly and severally, covenant and agree with Buyer as follows:

Section 6.1 Conduct of Business. Subject to any orders which may be entered in the Bankruptcy Case, between the date of this Agreement and the Closing Date, the Company, Seller and Parent shall cause each of the Company and each of the Acquired Subsidiaries, to the extent within the Parent's, the Seller's or the Company's control and except as otherwise specifically consented to in writing by Buyer:

(a) Conduct its operations in the normal and customary manner in the ordinary course of business;

(b) Maintain and keep its tangible assets in good operating order, repair and condition, ordinary wear and tear excepted;

(c) Perform all of its obligations under and not amend, alter or modify any material provision of the Contracts and Real Property Leases and not enter into any material contract with any person other than in the ordinary course of business consistent with past practice;

(d) Use its commercially reasonable efforts to preserve its organization intact and maintain its relationships with their employees, suppliers and customers;

(e) Promptly advise Buyer of any material adverse change in the condition, or otherwise, of its business or assets;

(f) Promptly advise Buyer of the occurrence of any material event or circumstance which affects the consummation of the transactions contemplated by this Agreement or which, if in existence on the date of this Agreement, would have been required to have been disclosed in a schedule to this Agreement;

(g) Promptly advise Buyer of any change in the list of employees referred to in Section 4.22 or in the compensation payable to any such employee;

(h) Maintain and collect the Receivables and extend credit terms to its customers in the ordinary course of business consistent with past practices;

(i) Not take any affirmative action, or fail to take any reasonable action within its control, as a result of which any of the changes or events listed in Section 4.22 is likely to occur;

(j) Not to dispose of any assets except in the ordinary and usual course of its business. Notwithstanding the foregoing, Seller shall neither terminate, or permit the Company or the Acquired Subsidiaries to terminate, nor assign, convey, encumber or otherwise transfer, in whole or in part, its rights and interests in or under any contract or agreement described on, or required to be described on Schedule 4.12 except for contracts or agreements with customers of the Business involving payments of not more than \$50,000 per month which are terminated by Seller or the Company or the Acquired Subsidiaries for non-payment or non-performance by the other party to such contract or agreement in a manner consistent with the Company's past practice;

(k) Not to issue or sell any shares of capital stock, or issue or sell any options, warrants or other rights of any kind to acquire any such shares, or securities convertible into or exchangeable for, or which otherwise confer on the holder thereof any right to acquire, any such shares;

(l) Discuss with Buyer any material filing (or amendment thereto) with any governmental or regulatory agency;

(m) Not to permit any material change in any pricing, investment, accounting, financial reporting, credit, allowance or tax practice or policy of the Company or the Acquired Subsidiaries;

(n) Use commercially reasonable efforts to maintain in full force and effect until the Closing substantially the same levels of coverage of insurance in effect as of the date of this Agreement; and

(o) Comply with all laws, rules, regulations and orders of any governmental or regulatory authority applicable to the Company, the Acquired Subsidiaries or the Business.

**Section 6.2 Access and Information.** Seller, the Company, and the Acquired Subsidiaries shall permit Buyer and its counsel, accountants and other representatives full access at reasonable times to all the material properties, assets, books, records, agreements and other documents of the Seller, the Company and the Acquired Subsidiaries. Seller and the Company shall furnish to Buyer and its representatives all material information concerning the Seller, the Company and the Acquired Subsidiaries as Buyer may reasonably request. Seller and the Company shall permit and facilitate communications between Buyer and the Acquired Subsidiaries' suppliers, customers, landlords and other persons having relationships with the Acquired Subsidiaries after prior consent of the Seller and the Company. Any investigation by Buyer pursuant to this Section shall be conducted in a manner so as not to interfere with the normal operations of the Seller, the Company or the Acquired Subsidiaries. Buyer and its representatives shall be accompanied on any visits to the premises of the Seller, or the Company, or the Acquired Subsidiaries by representatives of Seller.



Section 6.3 Exclusivity Period; No Other Solicitations. From the date of this Agreement until the first to occur of (i) the termination of this Agreement pursuant to Article 13; or (ii) the Closing (the "Exclusivity Period"), the Sellers and Parent and their respective officers, directors, employees, affiliates and agents shall not solicit, initiate, or encourage the submission of any proposal or offer from any person relating to a Competing Proposal (as defined below) or participate in any discussions or negotiations regarding, or furnish to any person any information with respect to, or take any other action to facilitate any inquiries or the making of any proposal that constitutes, or may reasonably be expected to lead to, any Competing Proposal, except pursuant to a bidding order of the Bankruptcy Court. The Sellers and Parent will notify the Buyer promptly if any person makes any proposal or offer with respect to any of the foregoing. For purposes of this Agreement, "Competing Proposal" shall mean any proposal for a transaction or series of transactions to acquire, lease or manage, in any manner, any interest in the Company, or any portion thereof, or any material portion of the Business, or to merge or engage in any other business combination involving the Company or the Business, other than the transactions contemplated by this Agreement.

Section 6.4 Employee Releases. Sellers will use best efforts to cause its employees to use all of their accrued vacation leave prior to the Closing Date, and thereby to reduce or eliminate Sellers' liability for accrued vacation leave as of the Closing Date.

Section 6.5 Evidence of Fairness of Process. Seller and Parent shall cooperate fully with the Buyer in providing evidence to the Bankruptcy Court that the process of sale of the Company and the terms and conditions of this Agreement and the Related Agreements, were conducted by Seller and Parent in a commercially reasonable, arms' length, non-collusive manner which was fair to all parties in all material respects.

Section 6.6 [Intentionally omitted]

Section 6.7 Post-Closing Transition Services. In connection with winding up the Seller's affairs, Parent and Seller shall provide certain post-closing transition services to the Company and the Acquired Subsidiaries for a period of up to sixty (60) days at the expense of Parent or Seller, such services to include the use of EPIC, Microsoft Outlook and Microsoft Office computer software, the use of the office space currently used by the Seller on the sixth floor of 6000 Fairview, Charlotte, North Carolina and use of the current phone system and service used by Seller, the Company and the Acquired Subsidiaries.

## ARTICLE 7

### MUTUAL COVENANTS

Each of Buyer, Parent, Seller and the Company covenants and agrees with the other as follows:

Section 7.1 Best Efforts. Each of Buyer, Parent, Seller and the Company shall use its best efforts to satisfy the conditions and make or obtain all consents, approvals, authorizations, registrations and filings with all federal, state or local judicial or governmental authorities or administrative agencies as are required in connection with the consummation of the transactions

contemplated by this Agreement and the Related Agreements. In addition, Seller and Parent shall use their best efforts to obtain as promptly as possible all other Required Consents.

Section 7.2 Confidentiality. In recognition of the confidential nature of certain of the information which will be provided to each party by the others, each of Buyer, Parent, Seller and the Company agrees to retain in confidence, and to require its directors, officers, employees, consultants, professional representatives and agents (collectively, its "Representatives") to retain in confidence all information transmitted or disclosed to it by another party to this Agreement, and further agrees that it will not use for its own benefit and will not use or disclose to any third party, or permit the use or disclosure to any third party of, any information obtained from or revealed by the other, except that each of Buyer, Parent, Seller and the Company may disclose the information to those of its Representatives who need the information for the proper performance of their assigned duties with respect to the consummation of the transactions contemplated by this Agreement. In making such information available to its Representatives, each of Buyer, Parent, Seller and the Company shall take any and all precautions necessary to ensure that its Representatives use the information only as permitted by this Agreement. Notwithstanding anything to the contrary in the foregoing provisions, such information may be disclosed (a) where it is required to be disclosed by any order of any regulatory authorities or governmental agencies; (b) if it is required by court order or decree or applicable law; (c) if it is readily ascertainable or obtained from public or published information; (d) if it is received from a third party not known to the recipient to be under an obligation to keep such information confidential; or (e) if the recipient can demonstrate that such information was in its possession prior to disclosure of the information in connection with this Agreement. If any party shall be required to make disclosure of any such information by operation of law, such disclosing party shall give the party from whom such information was received prior notice of the making of such disclosure and shall use all reasonable efforts to afford such other party an opportunity to contest the making of such disclosure. In the event that the Closing shall not occur, each of Buyer, Parent, Seller and the Company shall immediately deliver, or cause to be delivered, to the party from whom such information was received (without retaining any copies) any and all documents, statements or other written information obtained from the other that contain confidential information.

Section 7.3 Cooperation in Litigation. From and after the date hereof, each party shall fully cooperate with the other in the defense or prosecution of any litigation or proceeding already instituted or which may be instituted hereafter against or by such other party relating to or arising out of the conduct of the Seller' business prior to or after the date hereof (other than litigation among the parties hereto or their respective affiliates arising out of the transactions contemplated by this Agreement). The party requesting such cooperation shall pay the reasonable out-of-pocket expenses incurred in providing such cooperation (including legal fees and disbursements) by the party providing such cooperation and by its directors, officers, employees and agents, but shall not be responsible for reimbursing such party or its directors, officers, employees and agent for their time spent in such cooperation.

## ARTICLE 8

### TAX MATTERS

Section 8.1 Definitions. The following terms, as used herein, have the following meanings:

"Acquired Subsidiary Tax Returns" means all material Tax Returns required to be filed by or on behalf of the Company or any Acquired Subsidiary.

"Loss" means any and all damages, fines, fees, penalties, deficiencies, losses and expenses (including without limitation, interest, court costs, fees of attorneys, accountant's and other experts or other expenses of litigation or other proceedings or of any claim, default or assessment), including all costs in defending third party claims.

"Pre-Closing Tax Period" means any Tax period ending on or before the Closing Date; and, with respect to a Tax period that begins on or before the Closing Date and ends thereafter, the portion of such Tax period before and including the Closing Date.

"Tax" means any form of taxation, duties, levies and imposts of any jurisdiction, including without limitation any United States Federal, state or local or any non-United States net or gross income, gross receipts, net proceeds, license, payroll, employment, excise, severance, stamp, occupation, premium, windfall profits, environmental (including taxes under Section 59A of the Code), customs, capital stock, franchise, profits, withholding, social security (or similar), unemployment, disability, real property, personal property, sales, use, transfer, registration, value added, alternative or add-on minimum, estimated or other taxes, assessments, duties, fees, levies or other governmental charges of any kind whatsoever, whether disputed or not, including any interest, penalty or addition thereto.

"Tax Return" means any return, statement, report or form required to be filed with any governmental or regulating authority relating to Taxes.

Section 8.2 Tax Covenants.

(a) Seller shall prepare and file or cause to be prepared and filed (i) all Tax Returns in respect of the Black River assets and (ii) all Acquired Subsidiary Tax Returns, in each case for any taxable period (including short taxable periods) ending on or prior to the Closing Date. Buyer shall cooperate, and cause the Company or the relevant Acquired Subsidiaries to cooperate, with the preparation and filing of such Tax Returns, including by making employees and representatives of Buyer, the Company and the Acquired Subsidiaries available to Seller and its representatives upon their reasonable request.

(b) All Tax Returns not specified in Section 8.2(a) with respect to the Company, any Acquired Subsidiary or the Black River assets to be filed after the Closing Date which includes any Pre-Closing Tax Period will be filed by Buyer when due (taking into account any extension of a required filing date). Unless otherwise required by applicable law, any such Tax Return shall be prepared in a manner consistent with past practice and without a change of any election or any accounting method and shall be submitted by Buyer to Seller at least thirty (30) days prior to the due date (including extensions) of such Tax Return and shall be subject to Seller's review and approval,

which shall not be unreasonably withheld or delayed. Sellers shall cooperate with the preparation and filing of such Tax Returns, including by making employees and representatives of Sellers available to the Acquired Subsidiary or Buyer and its representatives upon their reasonable request.

(c) All transfer, documentary, sales, use, stamp, registration, value added, real property transfer taxes and other such taxes, and all conveyance fees, recording charges and other fees and charges, and any penalties and interest associated with such taxes, fees and charges, incurred in connection with the consummation of the transactions contemplated by this Agreement, shall be paid by Seller when due, and Seller will, at its own expense, file all necessary tax returns and other documentation with respect to all such taxes, fees and charges, and, if required by applicable law, the parties will, and will cause their Affiliates to, join in the execution of any such tax returns and other documentation.

### Section 8.3 Indemnification by Seller.

(a) Seller hereby indemnifies Buyer against and agrees to hold it harmless from any damages attributable to, without duplication, (i) any Tax of the Company or any Acquired Subsidiary or with respect to the Black River assets, in each case relating to a Pre-Closing Tax Period or (ii) any liability of the Company or any Acquired Subsidiary under Treasury Regulation Section 1.1502-6 or any comparable state, local or foreign law, and (iii) any misrepresentation or breach of warranty made by Seller in Section 4.17. Seller shall reimburse Buyer for any Loss within fifteen (15) business days after payment of such damages by Buyer or its Affiliates.

(b) For purposes of this Section 8.3, in the case of any Taxes that are imposed on a periodic basis and are payable for a taxable period that includes (but does not end on) the Closing Date, the portion of such Tax related to the portion of such taxable period ending on the Closing Date shall (x) in the case of any property Taxes or ad valorem Taxes, be deemed to be the amount of such Tax for the entire taxable period multiplied by a fraction the numerator of which is the number of days in the portion of the taxable period ending on the Closing Date and the denominator of which is the number of days in the entire taxable period, and (y) in the case of any Tax not described in clause (x), be deemed to be equal to the amount which would be payable if the relevant taxable period ended on the Closing Date. All determinations necessary to give effect to the foregoing allocations shall be made by Buyer, subject to Seller's approval not to be unreasonably withheld or delayed, in a manner consistent with prior practice.

(c) If any claim or demand for Taxes in respect of which indemnity may be sought pursuant to this Section 8.3 is asserted in writing against any of the Acquired Subsidiaries, Buyer or any of its Affiliates, Buyer shall notify Seller of such claim or demand promptly upon the receipt thereof and shall give Seller such information with respect thereto as Seller may reasonably request. The failure of Buyer to notify Seller promptly shall not relieve Seller of its obligations under this Agreement except to the extent such failure materially prejudices Seller's ability to defend the claim or otherwise increases Seller's liability in respect of the Taxes which are the subject of the claim.

Seller may discharge, at any time, its indemnification obligation under this Section 8.3 by paying to Buyer the amount payable pursuant to this Section 8.3, calculated on the date of such payment. Seller may, at its own expense and subject to Section 8.3(e), participate in and, upon notice to Buyer, assume and control the defense of any such action or proceeding (including any Tax audit), but in such case only so long as Seller conducts the defense of such action or proceeding in good faith and diligently. So long as Seller assumes and controls such defense, (i) Buyer shall have the right (but not the duty) to observe the defense thereof and to employ counsel separate from the counsel employed by Seller; (ii) provided Seller complies with Section 8.3(e), Seller shall not be liable for any expenses incurred thereafter by Buyer in connection with the defense of any such action or proceeding; and (iii) subject to Section 8.3(e), Buyer shall execute or cause the Acquired Subsidiary to execute any power of attorney or other document necessary to permit Seller to control or to settle or to otherwise resolve any such action or proceeding.

(d) Seller shall not be liable under this Section 8.3 for any settlements both (i) effected without the written consent of Seller and (ii) resulting from any action or proceeding in which Seller was not permitted an opportunity to assume and control the defense in accordance with the terms of this Section 8.3; provided, however, that this Section 8.3(d) shall not apply if Seller previously notified Buyer of its intention to control the defense of such action or proceeding and such payment or settlement occurs following Seller's failure to (x) diligently and in good faith control the defense of such action or proceeding or (y) comply with Section 8.3(e).

(e) Seller shall not be entitled pursuant to this Section 8.3 to take any action on behalf of any of the Acquired Subsidiaries or to require Buyer to take any action which would (i) increase the liability to Tax of Buyer, the Acquired Subsidiaries or any of their Affiliates; (ii) involve the disclosure of information confidential to Buyer, the Acquired Subsidiary or their Affiliates; or (iii) otherwise have a adverse affect on the business of Buyer or the Acquired Subsidiaries.

Section 8.4 Survival. The indemnity obligations of Seller in this Article 8 shall survive until one hundred and eighty (180) days after the Closing Date. Furthermore, any claims notified to Seller on or before such date shall survive until they have been finally resolved and any payment to be made in respect of such claim has been paid. The representations and warranties set forth in Section 4.17 shall survive the Closing until one hundred and eighty (180) days after the Closing Date.

Section 8.5 Tax Treatment of Indemnity Payment. The parties agree to treat any indemnity payment made pursuant to this Article 8 as an adjustment to the Purchase Price if payment of the indemnified Tax was includible by Buyer in the tax basis of the Membership Interests.

Section 8.6 Cooperation in Tax Elections. Seller shall cooperate with Buyer to make any necessary elections under the Code to permit Buyer to step-up its tax basis in the assets of Hawaii Land Partnership, HEP and Hamakua A.

Section 8.7 Exclusive Remedy. The indemnification provisions of this Article 8 shall be the exclusive remedy for damages for which Seller has agreed to indemnify Buyer under this Agreement, and Buyer shall not pursue or seek to pursue any other remedy. Further, the funds held pursuant to the Indemnity Escrow Agreement shall be the sole source of satisfaction of Seller's indemnity obligations under this Article 8.

## ARTICLE 9

### CONDITIONS PRECEDENT TO BUYER'S OBLIGATIONS

The obligations of Buyer to consummate the transactions contemplated by this Agreement are subject to the satisfaction of the following conditions on or before the Closing Date, unless specifically waived in writing by Buyer prior to the Closing Date:

Section 9.1 Representations and Warranties. Each of the representations and warranties of Parent, Seller and the Company contained in this Agreement that are qualified as to materiality or Material Adverse Effect shall be true and correct in all respects and those not so qualified shall be true and correct in all material respects on the date of this Agreement and shall be true and correct in all material respects on the Closing Date (as defined in Section 11.1) as though made on and as of the Closing Date.

Section 9.2 Compliance with Covenants. Parent, Seller and the Company shall have duly performed and complied in all material respects with all covenants, agreements and obligations required by this Agreement to be performed or complied with by each on or prior to the Closing.

Section 9.3 Absence of Litigation. Other than any appeal of the Approval Order which is not supported by a stay of the Approval Order, no action or proceeding shall be pending or threatened by or before any court or other governmental body or agency seeking to restrain, prohibit or invalidate the transactions contemplated by this Agreement or which would materially adversely affect the right of Buyer to own the Interests and/or the Company to own the Subsidiary Interests, or the right or ability of the Buyer to operate or control the Company and the Acquired Subsidiaries after the Closing Date.

Section 9.4 Bankruptcy Court Approval; Consents and Approvals. All Required Consents shall have been made or obtained or shall have occurred. The Bankruptcy Court shall have entered the Bidding Procedures Order in the form approved by Buyer and all other provisions of this Agreement, the Bankruptcy Court shall have entered the Approval Order in the form approved by Buyer and all other provisions of this Agreement, in each case in a form and substance reasonably satisfactory to Buyer including, without limitation that the Approval Order makes an express finding that Buyer is a good faith purchaser entitled to the benefits of Section 363(m) of the Bankruptcy Code, and the Approval Order shall not have been reversed, modified, rescinded, or stayed as of the Closing Date.

Section 9.5 Contribution Agreements. The Contribution Agreement transferring all of Black River's right, title and interest in and to its assets to Black River Generation shall have been executed and delivered immediately prior to the Closing and shall have been consummated

in accordance with the terms thereof and Black River shall have conveyed all of its assets to Black River Generation in accordance with the Approval Order and pursuant to documentation reasonably acceptable to Buyer. The Contribution Agreement transferring all of Jones Hamakua's right, title and interest in and to its assets to BR Hamakua shall have been executed and delivered immediately prior to the Closing and shall have been consummated in accordance with the terms thereof and Jones Hamakua shall have conveyed all of its assets to BR Hamakua in accordance with the Approval Order and pursuant to documentation reasonably acceptable to Buyer. The Contribution Agreement transferring all of Seller's right, title and interest in and to the Acquired Subsidiaries to the Company shall have been executed and delivered to Buyer immediately prior to the Closing and shall have been consummated in accordance with the terms thereof.

**Section 9.6 Third Party Consents.** The consents (or in lieu thereof waivers) listed in Schedule 4.4, and all other consents (or in lieu thereof waivers) to the performance by Buyer and Seller of their obligations under this Agreement or to the consummation of the transactions contemplated hereby as are required under any Contract to which Buyer, Seller, Company or any of the Acquired Subsidiaries is a party or by which any of their respective assets and properties are bound (a) shall have been obtained, (b) shall be in form and substance reasonably satisfactory to Buyer, (c) shall not be subject to the satisfaction of any condition that has not been satisfied or waived and (d) shall be in full force and effect, except where the failure to obtain any such consent (or in lieu thereof waiver) could not reasonably be expected, individually or in the aggregate with other such failures, to materially adversely affect Buyer, the Business or otherwise result in a material diminution of the benefits of the transactions contemplated by this Agreement to Buyer. Buyer shall have received an acknowledgment from Hawaii Electric Light Company, Inc., a Hawaii corporation ("HELCO") in form and substance acceptable to Buyer to the effect that HELCO (x) consents to the transaction contemplated by this Agreement, (y) expressly waives any rights of first refusal it may have with respect to the Power Purchase Agreement, dated as of October 27, 1997 between Encogen Hawaii, L.P. and HELCO (the "Power Purchase Agreement") and (z) affirms that the Power Purchase Agreement is in full force and effect and that it has no claims against any other party thereto for breach thereof as of the Closing Date. Buyer shall have received an acknowledgment from TPS Hawaii, Inc. ("TPS") and any of its applicable affiliates in form and substance acceptable to Buyer to the effect that TPS and any of its applicable affiliates (x) consents to the transaction contemplated by this Agreement, (y) expressly waive any rights of first refusal it may have with respect to any of the following, and (z) affirms that it has no claims against any other party thereto for breach under any of the following: (i) the Hamakua A, LLC Agreement, dated as of January 12, 2001 between Jones Capital Corporation and TPS (ii) the Partnership Agreement of Enserch/Jones Hamakua Land Partnership L.L.P., dated as of August 29, 1997 between Enserch Development Corporation Hamakua, Inc. and Jones Hamakua, Inc. and (iii) the Agreement of Limited Partnership of Hamakua Energy Partners, L.P. dated as March 31, 2000 between TPS Hamakua, Inc. and Jones Hamakua, Inc. as the general partners and TPS and Jones Hawaii Power, Inc. as the limited partners.

**Section 9.7 Release of Claims.** Buyer shall have received an express release in form and substance acceptable to Buyer from the PBGC and the Pension Plan of J.A. Jones Inc. with respect to any "accumulated funding deficiency" or any Lien or other liability against any of the Company, the Acquired Subsidiaries or any of their assets. Buyer shall have received from the

Laborers District Council of Washington DC Pension Trust and the Washington DC Area Carpenters' Pension and Retirement Trust written notice in form and substance acceptable to Buyer that there is no withdrawal liability in excess of \$50,000 or any Lien or other liability against any of the Company, the Acquired Subsidiaries or any of their assets; provided, however, Buyer's receipt of such notice shall not be a condition to Closing if Jones Hamakua, Inc., with the written consent of Buyer, files for Chapter 11 bankruptcy and joins in the Sale Motion (as defined below) prior to the date on which the auction of the purchased assets (i.e. Membership Interests) is scheduled to be held pursuant to the Bidding Procedures Order (the "Auction").

Section 9.8 Title Insurance; Estoppel Certificates. Buyer shall have received (a) a policy of title insurance on forms of and issued by one or more title companies reasonably satisfactory to Buyer insuring the title of the Company and the Acquired Subsidiaries, as applicable, to the Owned Real Property, subject only to such exceptions as are reasonably satisfactory to Buyer; provided that Buyer shall pay to such title companies, or reimburse the Company for, all expenses and premiums of such title companies in connection with the issuance of such policies, and (b) estoppel certificates with respect to the real property leases listed in Schedule 4.10(a).

Section 9.9 Proceedings. All proceedings to be taken on the part of Seller in connection with the transactions contemplated by this Agreement and all documents incident thereto shall be reasonably satisfactory in form and substance to Buyer, and Buyer shall have received copies of all such documents and other evidences as Buyer may reasonably request in order to establish the consummation of such transactions and the taking of all proceedings in connection therewith.

Section 9.10 FERC. The Federal Energy Regulatory Commission or any successor governmental agency (the "FERC") shall have (i) approved the sale or disposition of jurisdictional facilities, pursuant to Section 203 of the Federal Power Act and (ii) accepted any filings necessary to make wholesale sales of capacity and energy and related services, including ancillary services, at market-based rates, pursuant to Section 205 of the Federal Power Act.

Section 9.11 [Intentionally omitted]

## ARTICLE 10

### CONDITIONS PRECEDENT TO SELLER'S OBLIGATIONS

The obligations of Seller to consummate the transactions contemplated by this Agreement are subject to the satisfaction of each of the following conditions on or before the Closing Date, unless specifically waived in writing by Seller prior to the Closing:

Section 10.1 Representations and Warranties. Each of the representations and warranties of Buyer contained in this Agreement that are qualified as to materiality or Material Adverse Effect shall be true and correct in all respects and those not so qualified shall be true and correct in all material respects on the date of this Agreement, and shall be true and correct in all material respects on the Closing Date as though made on and as of the Closing Date.



Section 10.2 Compliance with Covenants. Buyer shall have duly performed and complied in all material respects with all covenants, agreements and obligations required by this Agreement to be performed or complied with by it on or before the Closing Date.

Section 10.3 Absence of Litigation. No action or proceeding shall be pending by or before any court or other governmental body or agency seeking to restrain, prohibit or invalidate the transactions contemplated by this Agreement.

Section 10.4 Bankruptcy Court Approval; Consents and Approvals. All Required Consents shall have been made or obtained or shall have occurred. The Bankruptcy Court shall have entered the Bidding Procedures Order in accordance with Section 9.4 and all other provisions of this Agreement, the Bankruptcy Court shall have entered the Approval Order in accordance with Section 9.4 and all other provisions of this Agreement, in each case in a form and substance reasonably satisfactory to Seller and the Company, and the Approval Order shall not have been reversed, modified, rescinded, or stayed as of the Closing Date.

Section 10.5 Release of Obligations of Parent and Seller. Parent and Seller shall have been released completely from the Assumed Liabilities listed in Schedule 1.3, and shall have been provided the documents evidencing such complete release.

Section 10.6 Third Party Consents. All consents (or in lieu thereof waivers) to the performance by Seller of its obligations hereunder and to the consummation of the transactions contemplated hereby as are required under the Contracts listed in Schedule 4.12 shall have been obtained, (ii) shall not be subject to the satisfaction of any condition that has not been satisfied or waived and (iii) shall be in full force and effect.

Section 10.7 Proceedings. All proceedings to be taken on the part of Buyer in connection with the transactions contemplated by this Agreement and all documents incident thereto shall be reasonably satisfactory in form and substance to Seller, and Seller shall have received copies of all such documents and other evidences as Seller may reasonably request in order to establish the consummation of such transactions and the taking of all proceedings in connection therewith.

## ARTICLE 11

### CLOSING

Section 11.1 Closing. Subject to Articles IX and X, the closing of the sale of the Membership Interests (the "Closing") shall take place at the offices of Womble Carlyle Sandridge & Rice, PLLC in Charlotte, North Carolina, at 10:00 a.m., local time, the date which is two (2) business days after entry of the Approval Order, or such other date as may be mutually agreed upon by the parties to this Agreement. The date of the Closing is referred to as the "Closing Date."

Section 11.2 Deliveries by Seller. At the Closing, Seller shall deliver or cause to be delivered to Buyer the following:

(a) An assignment of the Membership Interests to Buyer, in form reasonably satisfactory to Buyer;

(b) all bank books, financial and bank records, bookkeeping and accounting records, copies of all Tax Returns and amendments to all of the foregoing, minute books, stock ledgers and all other books and records of or relating to the Company or the Acquired Subsidiaries, certified by Seller and the Company to be true, correct and complete as of the Closing Date;

(c) an officer's certificate of Seller confirming the satisfaction of the conditions set forth in Sections 9.1 and 9.2 above as to representations, warranties and covenants and Section 9.4 above as to absence of changes;

(d) a copy of all corporate and limited liability company resolutions authorizing the execution, delivery and performance of this Agreement and the Seller Agreements by Seller and the Company, and the consummation of the transactions contemplated hereby and thereby, accompanied by the certification of the Secretary or Manager of each of Seller and the Company to the effect that such resolutions are in full force and effect and have not been amended, modified or rescinded;

(e) evidence that all Required Consents have been obtained or satisfied, unless all the Required Consents shall have been rendered unnecessary due to the entry of the Approval Order;

(f) evidence that all intercompany accounts payable and accounts receivable between either Company or any of the Acquired Subsidiaries, on the one hand, and Parent, Sellers or any of their Affiliates (other than between the Companies and the Acquired Subsidiaries), on the other hand, have been paid by the party owing such amount to the party owed such amount or otherwise extinguished (so that, as of the Closing Date, no intercompany accounts payable or accounts receivable shall be outstanding); and

(g) and any other deliveries required by Article 9.

Section 11.3 Deliveries by Buyer. At the Closing, Buyer shall deliver or cause to be delivered to Seller the following:

(a) An officer's certificate of Buyer confirming the satisfaction of the conditions set forth in Sections 10.1 and 10.2 as to representations, warranties and covenants;

(b) a copy of all corporate and other actions authorizing the execution, delivery and performance of this Agreement and the Buyer Agreements, and the consummation of the transactions contemplated hereby and thereby, accompanied by the certification of the Manager of Buyer to the effect that such actions are in full force and effect and have not been amended, modified or rescinded;

(c) the Purchase Price, payable as provided in Section 2.2; and

- (d) and any other deliveries required by Article 10.

Section 11.4 Deliveries by Seller and Buyer. Seller and Buyer shall execute and deliver, or cause to be executed and delivered, to the other the following to the extent not previously delivered:

- (a) the Contribution Agreements; and  
(b) the Escrow Agreements.

Section 11.5 Further Assurances. Seller shall, at any time on or after the Closing Date, take any and all steps requested by Buyer to transfer to Buyer ownership of the Interests, and will do, execute, acknowledge and deliver all such further acts, deeds, assignments, transfers, conveyances, powers of attorney and assurances as may be requested for the more effective transfer to Buyer, or its successors or assigns, operating control of the Company.

## ARTICLE 12

### BANKRUPTCY COURT ACTION

Section 12.1 Bankruptcy Court Action. The Buyer and the Seller acknowledge and agree that the Buyer's obligation to purchase, and the Seller's obligation to sell, the Membership Interests, is subject to the approval of the Bankruptcy Court.

Section 12.2 [Intentionally omitted]

Section 12.3 Bankruptcy Court Approval of Sale. Contemporaneously with the filing of the Bidding Procedures Motion, Parent and Seller shall file a motion with the Bankruptcy Court, in form and substance acceptable to Buyer and its counsel (the "Sale Motion") requesting entry of an order (the "Approval Order"), which shall, among other things, (a) approve this Agreement and the transactions contemplated herein, including, without limitation, (i) the transfer and conveyance by Black River of all of its assets to Black River Generation free and clear of all Liens, other than Permitted Liens (and, with respect to the foregoing, determining that the portion of the Purchase Price that is payable to Black River in exchange for the conveyance of its assets to Black River Generation is fair and reasonable in all respects, and reflects the fair value of the Black River assets) (ii) the transfer and conveyance by Jones Hamakua of all of its assets to BR Hamakua free and clear of all Liens, other than Permitted Liens and (iii) the transfer by Seller of the ownership interests in the Acquired Subsidiaries to the Company, in each case as provided in this Agreement, (b) provide for the sale of the Membership Interests to Buyer free and clear of all Liens, any and such Liens shall attach to the proceeds of sale, other than Permitted Liens, (c) include a specific finding that the Buyer is a good faith purchaser of the Membership Interests and is entitled to the benefits of Section 363(m) of the Bankruptcy Code, (d) provide that the sale (i) of the Black River assets to Black River Generation, (ii) of the Jones Hamakua assets to BR Hamakua, (iii) of the ownership interests of Seller in the Acquired Subsidiaries to the Company, and (iv) of the Membership Interests to Buyer, as provided herein, are each exempt from taxation in accordance with Section 1146(c) of the Bankruptcy Code, and (e) provide for a waiver of the stays contemplated by Rules 6004(g) and 6006(e) of the Federal Rules of Bankruptcy Procedure, (f) find that no third parties have valid rights of first refusal

regarding with respect to the Company or the Acquired Subsidiaries, any assets of the Company or the Acquired Subsidiaries or the Business or that any such rights of first refusal have been waived by the appropriate parties; (g) authorize Seller to form the Company for the purposes set forth in this Agreement; (h) authorize Black River to contribute the assets to the Black River Generation and (i) authorize Jones Hamakua to contribute the assets to the BR Hamakua. Following the filing of the Sale Motion, Parent and Seller shall use all commercially reasonable efforts to obtain the prompt entry of the Approval Order, in form and substance acceptable to Buyer and its counsel. Buyer shall use all commercially reasonable efforts to cooperate with the other parties to this Agreement in this process.

Section 12.4 [Intentionally omitted]

Section 12.5 Public Announcements. The Seller, Parent and the Company, on the one hand, and the Buyer, on the other, will consult with each other before, and obtain the other party's consent with respect to, issuing any press release or otherwise making any public statements with respect to this Agreement and the transactions contemplated hereby (including any press release to be issued by any Acquired Subsidiary), and shall not issue any such press release or make any such public statement prior to such consultation and consent, except to the extent that compliance with law requires a party to issue a press release or public announcement with such consultation and consent or except as required to be filed with the Bankruptcy Court. Any consent required pursuant to the preceding sentence shall not be unreasonably withheld or delayed.

Section 12.6 [Intentionally omitted]

## ARTICLE 13

### TERMINATION

Section 13.1 Termination. This Agreement may be terminated at any time prior to the Closing:

(a) By the mutual written consent of Seller and Buyer at any time prior to Closing;

(b) By Seller and the Company (if Seller and the Company are not then in breach of any term of this Agreement), if Buyer shall (i) fail to perform or observe in any material respect any covenant, agreement or condition contained in this Agreement required to be performed or observed on or prior to the Closing Date; or (ii) materially breach any of its representations or warranties contained in this Agreement, which failure or breach is not cured within ten days after Seller has notified Buyer of its intent to terminate this Agreement pursuant to this subparagraph;

(c) By Buyer (if Buyer is not then in breach of any term of this Agreement), if Parent, Seller or the Company shall (i) fail to perform or observe in any material respect any covenant, agreement or condition contained in this Agreement required to be performed or observed on or prior to the Closing Date; or (ii) materially breach any of their representations or warranties contained in this Agreement, which failure or breach is

not cured within ten days after Buyer has notified Seller of its intent to terminate this Agreement pursuant to this subparagraph;

(d) By Seller and the Company or by Buyer, if there shall be any order, writ, injunction or decree of any court or governmental or regulatory agency binding on Parent, Seller or the Company, or on Buyer, which prohibits or restrains any party from consummating the transactions contemplated by this Agreement;

(e) [Intentionally omitted];

(f) [Intentionally omitted];

(g) By Seller and Buyer if the Closing shall not have occurred on or before March 9, 2004 (the "Outside Date"); provided, however, that the Outside Date shall automatically be extended for one 30 day period if the only condition remaining to be satisfied is the entry of the Approval Order or receipt of the FERC approval described in Section 9.9; provided, further, that in the event the conditions to Closing (other than the conditions regarding the entry of the Sale Procedures Order and the Approval Order) have not been satisfied or waived by the Outside Date, the parties may mutually agree to an extended Closing Date;

(h) [Intentionally Omitted];

(i) By Buyer, at any time prior to the Closing, in the event that Buyer receives notice that any third party is exercising any rights to first refusal with respect to the Company or the Acquired Subsidiaries, any assets of the Company or the Acquired Subsidiaries or the Business;

(j) By Buyer if the Approval Order has not been entered by the Bankruptcy Court within forty-five (45) days of this Agreement; or

(k) [Intentionally Omitted].

Section 13.2 Effect of Termination. Each party's right of termination under Section 13.1 above is in addition to any other rights such party may have under this Agreement or otherwise and any exercise of such right of termination will not be an election of remedies. Notwithstanding the foregoing, termination of this Agreement pursuant to this Article shall terminate all obligation of the parties hereunder, except for the obligations under this Section 13.2 and Sections 15.1 (with respect to expenses), 15.2 (with respect to publicity) and 7.2 (with respect to confidentiality); provided, however, that termination pursuant to subparagraphs (b) or (c) of Section 13.1 shall not relieve the defaulting or breaching party from any liability to any other party under this Agreement.

## ARTICLE 14

### SURVIVAL OF REPRESENTATIONS AND WARRANTIES; INDEMNIFICATION

Section 14.1 Survival. The representations, warranties, covenants and agreements of Seller and Buyer contained in this Agreement including, but not limited to, the indemnification obligations set forth in this Article 14 will survive the Closing and (a) continue in full force and effect for a period of one hundred and eighty (180) days after the Closing Date; provided that any representation, warranty, covenant or agreement that would otherwise terminate in accordance with clause (a) above will continue to survive if a notice for indemnification shall have been timely given under Article 14 on or prior to such termination date, until the related claim for indemnification has been satisfied or otherwise resolved.

Section 14.2 Indemnification.

(a) Subject to the provisions of Sections 14.3 and 14.4, Parent and Seller shall jointly and severally indemnify and hold harmless Buyer and its affiliates from and against all Losses that Buyer or any of its affiliates may suffer, sustain or become subject to, arising from or related to (i) any misrepresentation by Parent or Seller in this Agreement or any breach by Parent or Seller of any representation and warranty made by them or (ii) any failure to perform any covenant or other agreement to be performed by them pursuant to this Agreement (unless waived by Buyer or any of its affiliates).

(b) Subject to the provisions of Sections 14.3 and 14.4, Buyer shall indemnify and hold harmless Parent and Seller and their affiliates from and against all Losses that they may suffer, sustain or become subject to arising from or related to (i) any misrepresentation by Buyer in this Agreement or any breach by Buyer of any representation and warranty or (ii) any failure to perform any covenant or other agreement to be performed by Buyer in this Agreement (unless waived by Parent or Seller).

Section 14.3 Defense of Claims. If any third party claim is made against either party that, if sustained, would give rise to a liability of the other party for indemnification under this Agreement, the party against whom the claim is made shall promptly cause notice of the claim to be delivered to the other party. Such other party shall have the right to assume the defense by acknowledging the obligation to indemnify and shall bear all costs and expenses of such defense or settlement. Each party shall bear its own expense in defending against the claim and the claim shall not be settled without the consent of the indemnifying party, which shall not be unreasonably withheld.

Section 14.4 Exclusive Remedy. The indemnification provisions of this Article 14 shall be the exclusive remedy for any misrepresentation or breach of warranty or covenant under this Agreement and no party shall pursue or seek to pursue any other remedy, and the funds held pursuant to the Indemnity Escrow Agreement shall be the sole source of satisfaction of Parent's and Seller's indemnity obligations under this Article 14.

Section 14.5 Basket Amount. Parent and Seller shall have no liability to indemnify Buyer under either Article 8 or this Article 14 until the aggregate amount of claims, damages or losses is more than Fifty Thousand Dollars (\$50,000) (hereinafter, the "Basket Amount"), and Parent and Seller shall only be obligated to indemnify Buyer to the extent of the aggregate of claims, damages or losses which exceed the Basket Amount.

## ARTICLE 15

### MISCELLANEOUS

Section 15.1 Expenses. Except as otherwise provided herein, all costs and expenses incurred in connection with this Agreement and the transactions contemplated by this Agreement shall be paid by the party incurring such expense, whether or not the sale of the Interests is consummated. Seller shall be responsible for all expenses incurred in connection with obtaining the Required Consents. Seller agrees that the Company has not paid and will not pay or be responsible for any of Seller's costs or expenses (including any legal fees or expenses) in connection with this Agreement or any of the transactions contemplated by this Agreement.

Section 15.2 Publicity. Each of Seller and Buyer agrees it will not make any press releases or other announcements prior to the Closing with respect to the transactions contemplated by this Agreement, except as required by applicable law, without the prior approval of the other party.

Section 15.3 Best Efforts. Each party to this Agreement agrees to use its best efforts to satisfy the conditions to the Closing set forth in this Agreement and otherwise to consummate the transactions contemplated by this Agreement.

Section 15.4 Notices. All notices, demands and other communications made hereunder shall be in writing and shall be given either by personal delivery, by nationally recognized overnight courier (with charges prepaid) or by facsimile (with telephone confirmation), and shall be deemed to have been given or made when personally delivered, the day following the date deposited with such overnight courier service or when transmitted to facsimile machine and confirmed by telephone, addressed to the respective parties at the following addresses (or such other address for a party as shall be specified by like notice):

If to Parent, Seller or the Company:

J.A. Jones, Inc.  
J.A. Jones Drive  
Charlotte, North Carolina 28287  
Attention: J.P. Bolduc  
Telephone: (704) 553-6502  
Fax: (704) 553-6598

With a copy (which shall not constitute notice) to:

J.A. Jones, Inc.  
J.A. Jones Drive  
Charlotte, North Carolina 28287  
Attention: John W. Springer, General Counsel  
Telephone: (704) 553-3260  
Fax: (704) 553-3214

With a copy (which shall not constitute notice) to:

Womble Carlyle Sandridge & Rice, PLLC  
3500 Wachovia Center  
301 South College Street  
Charlotte, North Carolina 28202  
Attention: J. Alexander Salisbury, Esq.  
Telephone: (704) 331-4929  
Fax: (704) 338-7801

With a copy (which shall not constitute notice) to:

Bradley Arant Rose & White LLP  
1819 5th Avenue North  
Birmingham, Alabama 35203  
Attention: John P. Whittington, Esq.  
Telephone: (205) 521-8242  
Fax: (205) 488-6242

If to Buyer:

*[Affiliate of United States Power Fund L.P.]*  
c/o EIF Group  
One Penn Plaza, Suite 4507  
250 West 34<sup>th</sup> Street  
New York, New York 10119  
Attention: Terence L. Darby  
Telephone: (212) 564-1778  
Fax: (212) 564-4802

With a copy (which shall not constitute notice) to:

Energy Investors Funds (EIF) Group  
591 Redwood Highway, Suite 3210  
Mill Valley, California 94941  
Attention: Michael Gee  
Telephone: (415) 380-0523  
Fax: (415) 380-0527

With a copy (which shall not constitute notice) to:

Chadbourne & Parke LLP  
30 Rockefeller Plaza  
New York, New York 10112  
Attention: Richard Sonkin  
Telephone: (212) 408-5160  
Fax: (212) 541-5369



Section 15.5 Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

Section 15.6 Assignment. This Agreement shall be binding upon and inure to the benefit of the parties to this Agreement and their respective successors and permitted assigns. Neither this Agreement nor any of the rights, interests or obligations hereunder shall be assigned by any of the parties to this Agreement without the prior written consent of all other parties to this Agreement, and any purported assignment without such consent shall be void except that Buyer may assign any or all of its rights, interests and obligations hereunder to an affiliate provided that such affiliate agrees in writing to be bound by all of the terms, conditions and provisions contained herein.

Section 15.7 Third Party Beneficiaries. None of the provisions of this Agreement or any document contemplated by this Agreement is intended to grant any right or benefit to any person or entity which is not a party to this Agreement.

Section 15.8 Headings. The article and section headings contained in this Agreement are solely for the purpose of reference, are not part of this Agreement and shall not in any way affect the meaning or interpretation of this Agreement.

Section 15.9 Recitals. The recitals set forth at the beginning of this Agreement are incorporated by reference in, and made a part of, this Agreement.

Section 15.10 Amendments. Any waiver, amendment, modification or supplement of or to any term or condition of this Agreement shall be effective only if in writing and signed by all parties hereto, and the parties to this Agreement waive the right to amend the provisions of this Section orally.

Section 15.11 Governing Law. This Agreement shall be governed by the laws of the State of North Carolina without giving effect to its conflicts of laws provisions.

Section 15.12 Severability. In the event that any provision in this Agreement shall be determined to be invalid, illegal or unenforceable in any respect, the remaining provisions of this Agreement shall not be in any way impaired, and the illegal, invalid or unenforceable provision shall be fully severed from this Agreement and there shall be automatically added a replacement provision as similar in terms and intent to such severed provision as may be legal, valid and enforceable.

Section 15.13 Entire Agreement. This Agreement and the Schedules and Exhibits to this Agreement, together with the documents and instruments delivered pursuant to this Agreement, constitute the entire contract between the parties to this Agreement pertaining to the subject matter of this Agreement, and supersede all prior and contemporaneous agreements and understandings between the parties with respect to such subject matter.

Section 15.14 Construction. Each party to this Agreement and its counsel have reviewed and revised this Agreement. The normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this

Agreement or of any amendments, schedules or exhibits to this Agreement. The word "including" shall mean including without limitation.

Section 15.15 Time of Essence. With regard to all dates and time periods set forth or referred to in this Agreement, time is of the essence.

Section 15.16 Knowledge. Whenever used herein with respect to a party, the term "knowledge" shall mean the actual knowledge of such party's executive officers after reasonable investigation.

IN WITNESS WHEREOF, each of the parties has signed this Agreement, or has caused this Agreement to be signed by its duly authorized officer, as of the date first above written.

PARENT

J.A. JONES, INC.

By: 

J.P. Bolduc, Chief Executive Officer

SELLER

JONES CAPITAL, LLC

By: 

Name: William A. Garnett

Title: President

COMPANY

BLACK RIVER ENERGY, LLC

By: 

Name: William A. Garnett

Title: Manager

BUYER

[AFFILIATE OF UNITED STATES POWER  
FUND L.P.]

By: 

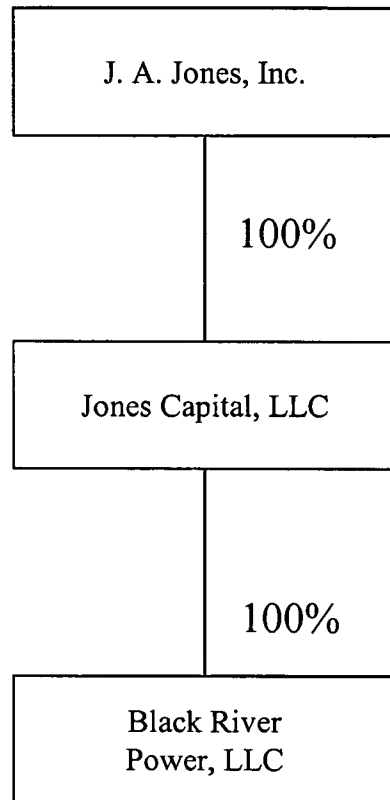
Name: Terence L. Parker

Title: Managing Partner

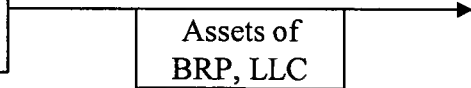
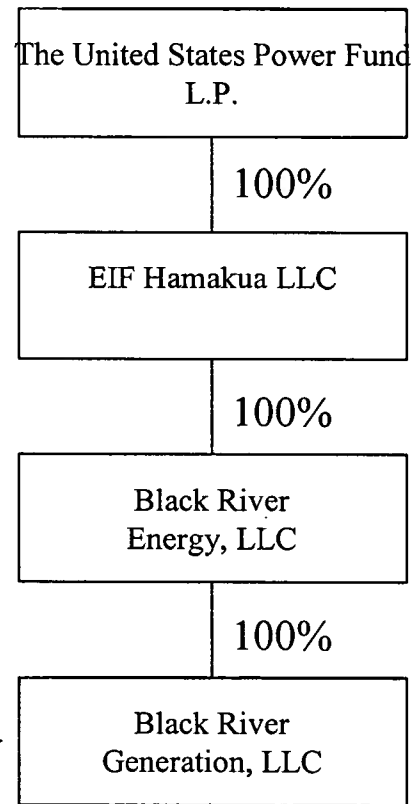
**ATTACHMENT B**

# Organizational Chart

## Existing Structure



## New Structure



**ATTACHMENT C**

## CHAPTER VI GENERAL REGULATIONS

§ 617.20

1616-4 (2/03) - Type 12

PROJECT ID. NUMBER

617.20

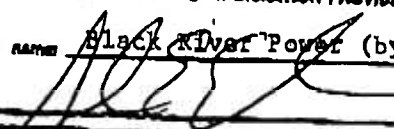
Appendix C

SEQR

State Environmental Quality Review

SHORT ENVIRONMENTAL ASSESSMENT FORM  
For UNLISTED ACTIONS Only

## PART I—PROJECT INFORMATION (To be completed by Applicant or Project sponsor)

|  |  |  |  |
|--|--|--|--|
| 1. APPLICANT/SPONSOR<br>Black River Power, LLC   |  | 2. PROJECT NAME<br>Black River (Fort Drum) |  |
| 3. PROJECT LOCATION<br>Municipality Fort Drum  |  | County Jefferson                           |  |
| 4. PROJECT LOCATION (street address and road intersections, prominent landmarks, etc., or provide map)<br>Second Street West<br>Oneida Avenue<br>Fort Drum, New York 16302   |  |  |  |
| 5. IS PROPOSED ACTION:<br><input checked="" type="checkbox"/> New <input type="checkbox"/> Expansion <input type="checkbox"/> Modification/alteration  |  |  |  |
| 6. DESCRIBE PROJECT BRIEFLY:<br>Transfer of Generating Assets to Affiliate followed by Transfer of Upstream Ownership.   |  |  |  |
| 7. AMOUNT OF LAND AFFECTED:<br>Initially NA acres Ultimately _____ acres   |  |  |  |
| 8. WILL PROPOSED ACTION COMPLY WITH EXISTING ZONING OR OTHER EXISTING LAND USE RESTRICTIONS?<br><input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If No, describe briefly  |  |  |  |
| 9. WHAT IS PRESENT LAND USE IN VICINITY OF PROJECT?<br><input type="checkbox"/> Residential <input checked="" type="checkbox"/> Industrial <input type="checkbox"/> Commercial <input type="checkbox"/> Agriculture <input type="checkbox"/> Parks/Open space <input type="checkbox"/> Other |  |  |  |
| 10. DOES ACTION INVOLVE A PERMIT APPROVAL, OR FUNDING, NOW OR ULTIMATELY FROM ANY OTHER GOVERNMENTAL AGENCY (FEDERAL, STATE OR LOCAL)?<br><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If yes, list agency(ies) and permit/approval                                   |  |  |  |
| 11. DOES ANY ASPECT OF THE ACTION HAVE A CURRENTLY VALID PERMIT OR APPROVAL?<br><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If yes, list agency name and permit/approval   |  |  |  |
| 12. AS A RESULT OF PROPOSED ACTION WILL EXISTING PERMIT/APPROVAL REQUIRE MODIFICATION?<br><input type="checkbox"/> Yes <input checked="" type="checkbox"/> No  |  |  |  |
| I CERTIFY THAT THE INFORMATION PROVIDED ABOVE IS TRUE TO THE BEST OF MY KNOWLEDGE  |  |  |  |
| Applicant/sponsor name: Black River Power (by EIF Hamakua LLC)   |  | Date: 3/4/04                               |  |
| Signature:    |  |  |  |

If the action is in the Coastal Area, and you are a state agency, complete the Coastal Assessment Form before proceeding with this assessment

OVER

1