BEFORE THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

DOCKET NO. 2019-185-E
DOCKET NO. 2019-186-E

In the Matter of:	)	
	)	
South Carolina Energy Freedom Act (H.3659) Proceeding to Establish Duke Energy Carolinas, LLC's and Duke Energy Progress LLC's Standard Offer Avoided Cost Methodologies, Form Contract Power Purchase Agreements, Commitment to Sell Forms, and Any Other Terms or Conditions Necessary (Includes Small Power Producers as Defined in 16 United States Code 796, as Amended) – S.C. Code Ann. Section 58-41-20(A)	)	**DIRECT TESTIMONY OF DAVID B. JOHNSON ON BEHALF OF DUKE ENERGY CAROLINAS, LLC AND DUKE ENERGY PROGRESS, LLC**

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I. INTRODUCTION AND PURPOSE

Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

A. My name is David B. Johnson. My business address is 400 South Tryon Street, Charlotte, North Carolina 28202.

Q. BY WHOM ARE YOU EMPLOYED AND IN WHAT CAPACITY?

A. I am employed by Duke Energy Corporation ("Duke Energy") as Director of Business Development and Compliance.

Q. PLEASE DESCRIBE YOUR CURRENT RESPONSIBILITIES IN YOUR POSITION WITH DUKE ENERGY.

A. I am responsible for wholesale power purchase agreements ("PPA") that Duke Energy enters into with third-party suppliers. These include PPAs that Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") (collectively, the "Companies" or "Duke") enters into with Qualifying Facilities ("QFs"), renewable PPAs to comply with South Carolina's Act 236 and North Carolina's Renewable Energy and Energy Efficiency Portfolio Standard ("NC REPS"), Competitive Procurement of Renewable Energy ("CPRE") PPAs, and conventional (non-renewable) PPAs. I have responsibility for the negotiation and execution of these PPAs, as well as the on-going management of all executed PPAs. In addition, I am responsible for Duke's compliance with the NC REPS and the CPRE Program.

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Q. PLEASE BRIEFLY SUMMARIZE YOUR EDUCATIONAL AND PROFESSIONAL EXPERIENCE.

A. My educational background includes a Bachelor of Science in Civil Engineering from the University of Tennessee. With respect to professional experience, I have been in the utility industry for over 38 years. I started as an associate Design Engineer in the Design Engineering Department at Duke Power in 1980. From 1991-1995, I worked for Duke Energy's affiliate companies Duke/Fluor Daniel and Duke Engineering & Services, Inc. In 1996, I worked in the initial Duke Power Trading Group, where I focused on marketing and business development and management until 2006. From 2006 to 2017, I worked as a Business Development Manager and Director in the Duke Energy wholesale and renewable energy areas. I began my current role in late 2017.

Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA ("COMMISSION")?

A. No, this is the first time I am testifying before the Commission.

Q. ARE YOU INCLUDING ANY EXHIBITS IN SUPPORT OF YOUR TESTIMONY?

A. Yes, I am sponsoring two exhibits for DEC and DEP, respectively, which are described below:

- **Johnson DEC/DEP Exhibit 1** presents a copy of DEC's and DEP's proposed Notice of Commitment to Sell Form ("Notice of Commitment Form" or the "Form"); and

- **Johnson DEC/DEP Exhibit 2** presents a copy of DEC's and DEP's standard form of PPA available to small power producer QFs that are not eligible for the Standard Offer (as that term is defined by S.C. Code Ann. § 58-41-10(15) (the "Large QF PPA").

Q. WERE THESE EXHIBITS PREPARED BY YOU OR AT YOUR DIRECTION AND UNDER YOUR SUPERVISION?

A. Yes, these exhibits were prepared by me or at my direction and under my supervision.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THIS PROCEEDING?

A. The purpose of my testimony is to support the Companies' Notice of Commitment Form and to explain how the Form can be used to establish a non-contractual legally enforceable obligation under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), as well as how the Form complies with the requirements of the South Carolina Energy Freedom Act ("Act 62" or the "Act"). My testimony also supports the terms of the Companies' Large QF PPA as commercially reasonable, consistent with PURPA, and in compliance with the requirements of Act 62.

II. NOTICE OF COMMITMENT FORM

Q. PLEASE BRIEFLY EXPLAIN ACT 62'S DIRECTIVE FOR THE COMMISSION TO APPROVE A NOTICE OF COMMITMENT TO SELL FORM.

A. Section 58-41-20(D) of the Act provides that small power producer QFs (as defined in the Act) shall have the right to sell their electric output to an electric utility by

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executing and delivering to the utility a Commission-approved "notice of commitment to sell form". By delivering a Notice of Commitment Form, the Act prescribes that the small power producer is committing to sell its output (a) at the avoided cost rates, and (b) pursuant to the PPA terms in effect at the time it submits the form to the utility. The Act does not specify each element of the Form required to establish the QF's "commitment to sell," but makes clear that the Form must provide the small power producer a "reasonable period of time" from submittal of the Form to execute a PPA with the utility. The Act also prohibits a utility from requiring a small power producer to execute a PPA prior to receiving "a final interconnection agreement from the electrical utility" as a condition to "preserving the pricing and terms and conditions established by its submittal of the form to execute a [PPA]."[1]

Q. IS IT YOUR UNDERSTANDING THAT THE ACT'S DIRECTIVE TO ESTABLISH A NOTICE OF COMMITMENT FORM IS INTENDED TO ESTABLISH A COMMISSION-APPROVED PROCESS FOR A QF TO COMMIT TO SELL ITS POWER PURSUANT TO A "LEGALLY ENFORCEABLE OBLIGATION" UNDER PURPA?

A. Yes. Act 62 specifically provides that South Carolina's implementation of PURPA must be consistent with PURPA and the Federal Energy Regulatory Commission's ("FERC") implementing regulations and orders.[2] FERC's regulations implementing PURPA specify that a QF can choose to sell its output to the utility

[1] S.C. Code Ann. 58-41-20(D).
[2] S.C. Code Ann. § 58-41-20(A).

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on an uncommitted and "as available" basis or the QF can choose to sell its output pursuant to a "legally enforceable obligation," ("LEO") whereby the QF commits to deliver energy and capacity to the utility over a specified term.[3] Where the QF chooses to sell its power pursuant to a LEO, PURPA requires that rates paid to the QF be fixed at the utility's avoided costs calculated at the time the LEO is established or, at the QF's option, at the time the power is delivered.[4] FERC has recognized that a LEO may be established by the QF and the utility executing a mutually-binding contract, such as a power purchase agreement ("PPA"). However, when a utility refuses to sign a contract, the QF may petition this Commission to recognize the creation of a non-contractual LEO. It is my understanding that the South Carolina legislature intended this Notice of Commitment Form to serve as the "non-contractual LEO" that FERC's regulations describe.

[3] *See* 18 C.F.R. § 292.304(d).
[4] *Id.*

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Q. BEFORE ADDRESSING THE QF'S NEW OPTION UNDER ACT 62 TO ESTABLISH A LEGALLY ENFORCEABLE OBLIGATION BY EXECUTING AND DELIVERING A NOTICE OF COMMITMENT FORM, CAN YOU PLEASE BRIEFLY EXPLAIN THE PROCESS THAT A QF WOULD FOLLOW TO COMMIT TO SELL ITS OUTPUT TO THE UTILITY TODAY?

A. Yes. QFs today establish a legally enforceable obligation by committing to deliver their energy and/or capacity over a specified delivery term by executing a legally-enforceable and mutually binding PPA.

For smaller QFs eligible for the Companies' standard offer, the QF would commit to sell its output at the currently-authorized standard offer rates by executing the Standard Offer PPA, as supported by Duke Witness Steve Wheeler.

For QFs larger than 2 MW not eligible for the standard offer, the Companies follow a standardized process for negotiating a PPA with a QF. The process begins at the QF's election by submitting project specific information to the utility along with a request for "indicative" avoided cost pricing. The Companies respond by delivering indicative pricing to the QF, calculated as of the time the QF requests the Companies to provide avoided cost pricing. During this early phase of negotiations, the QF has not made any commitment to sell its power to the Companies, and, therefore, the indicative pricing is non-binding on either party. The QF has the right to request the Companies tender to the QF an executable PPA at any time. If requested by the QF, DEC or DEP will submit an executable PPA, along with current avoided cost pricing. The pricing provided in the PPA that is

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tendered to the QF remains valid for 60 calendar days. If the QF elects not to proceed with finalizing the PPA for execution within the required time frame, the QF may request new indicative pricing in the future. If agreement cannot be reached on specific terms of the PPA, the QF or the utility may petition the Commission for review to resolve any disputes. Once the parties are in full agreement on all terms and conditions of the PPA, Duke prepares and forwards to the QF owner a final, executable PPA, which is executed by the QF and returned to DEC or DEP.

In addition to the Companies' standard commercial terms and conditions memorializing the contractual obligations of the parties, the final executable PPA includes the QF's committed commercial operation date ("COD"), as well as information regarding the QF Facility's nameplate capacity and estimated annual deliveries of energy over the specified term of the PPA. In this manner, the PPA memorializes the QF's legally enforceable obligation to commence delivering power to the utility on the COD for the specified term of the PPA, and provides that the QF is at risk of default and incurring financial damages and potential termination of the PPA for failure to perform and deliver energy by the COD the QF has committed to in the PPA.

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Q. RECOGNIZING ACT 62'S DIRECTIVE TO ESTABLISH A NEW NOTICE OF COMMITMENT FORM PROCESS, WILL THE QF AND THE UTILITY ULTIMATELY CONTINUE TO EXECUTE A MUTUALLY-BINDING PPA?

A. Yes. Ultimately, the utility and QF will still enter into a mutually-binding PPA that contractually obligates the QF to sell and deliver its full output to the utility and obligates the utility to purchase the QF's delivered energy and capacity priced at the utility's avoided costs over the specified delivery term. The non-contractual LEO option, as provided for in FERC's regulations and to be accomplished through submission of the Notice of Commitment Form, reflects the unique circumstances of the mandatory purchase obligation under PURPA and protects the QF's right to sell its output to the utility should the utility refuse to agree to enter into a PPA contract.

Q. PLEASE EXPLAIN.

A. While I am not an attorney, it is my understanding that the non-contractual LEO concept was intended "to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility *merely by refusing to enter into a contract with the qualifying facility*."[5] FERC has explained that the concept of a legally enforceable obligation recognizes that a QF may commit to sell its electric output through execution of a contract, or "if the electric utility refuses to sign a contract, the QF may seek state regulatory authority assistance to enforce

[5] *Final Rule Regarding the Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 12224 (1980) ("Order No. 69") (emphasis added).

the PURPA-imposed obligation on the electric utility to purchase from the QF, and a non-contractual, but still legally enforceable, obligation will be created pursuant to the state's implementation of PURPA."[6] Thus, it is my understanding that the unique non-contractual LEO concept created in FERC's regulations is intended to protect the QF's right to sell power to the utility under PURPA where the QF and the utility cannot agree to a form of PPA, the specified term of PPA, the avoided cost rates to be paid for the QF's power under the PPA or some other aspect of the contractual relationship between the QF and the utility.

Put simply, FERC's legally enforceable obligation concept set forth in 18 C.F.R. 292.304(d)(2) provides that the QF and the utility can either negotiate and enter into to a PPA or, if the utility refuses to enter into a contract, the QF can still bind the utility to purchase power from the QF by establishing a non-contractual, but still binding, LEO prior to executing a PPA.

Q. HAS FERC ESTABLISHED SPECIFIC STANDARDS OR REQUIREMENTS THAT QFS MUST MEET TO ESTABLISH A NON-CONTRACTUAL LEO?

A. No, FERC has provided only general guidance that "a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, *but binding, legally enforceable obligations*."[7] FERC has also recently made clear that "the establishment of a legally enforceable obligation turns on the QF's commitment,

[6] *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61, 187 at P 40 (2013) (*citing JD Wind 1, LLC*, 129 FERC ¶ 61,148, at P 25 (2009)).
[7] *JD Wind 1, LLC*, 129 FERC ¶ 61,148 at P25 (2009) (emphasis added).

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and *not* the utility's actions."[8] It is my understanding that PURPA and FERC provide state regulatory commissions with wide latitude to define when and how a LEO is created—either on a case-by-case basis or by establishing a general rule or standard—so long as the state's LEO requirements are not otherwise inconsistent with FERC's regulations.

Q. HOW DOES DUKE'S PROPOSED NOTICE OF COMMITMENT FORM COMPARE TO LEO STANDARDS ADOPTED BY OTHER STATES?

A. The notion of establishing a LEO by simply executing a form and delivering it to the utility is incredibly unique, particularly in light of the purpose of a non-contractual LEO, as described earlier in my testimony. North Carolina is the only state in the country that has adopted a form to establish a non-contractual LEO. North Carolina's LEO standard is also unique because all QF generating facilities two MW or greater must apply for and obtain a certificate of public convenience and necessity from the North Carolina Utilities Commission ("NCUC") prior to commencing construction, which the NCUC has long held is a threshold requirement to establishing a LEO under state law in North Carolina.[9] Unlike North Carolina, there is no similar CPCN requirement applicable to third party QF generators up to 75 MW in South Carolina.

While states vary in their tests and requirements for establishing a LEO, the common essential element is that the QF must make a binding and substantial

[8] *FLS Energy, Inc*., 157 FERC ¶ 61,211 at P 24 (Dec. 15, 2016) (emphasis in original).

[9] *See Order on Pending Motions*, Docket No. E-100, Sub 74 (Feb. 13, 1995) (holding that a QF "must be ready, willing and able to sign a contract" to establish a LEO and that a Certificate of Public Convenience and Necessity is a prerequisite to a QF being in a position to sign a contract under NC law); *Order Establishing Standard Rates and Contract Terms for Qualifying Facilities*, Docket No. E-100, Sub 148 at 106 (October 11, 2017) (affirming CPCN requirement to establish LEO in North Carolina).

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commitment to sell the electrical output of its facility. For example, Idaho looks to whether a QF has made "a firm, binding, and unconditional offer" to deliver energy and capacity,[10] while Wyoming's standard turns upon an "unconditional commitment" by the QF to deliver energy and capacity to the utility.[11] Montana and Oregon have gone further and require the QF to tender a unilaterally executed PPA to the utility prior to establishing a LEO.[12] The standard established in Pennsylvania has similarly emphasized that a QF unilaterally asserting that a non-contractual LEO has been formed must have "done everything within its power to create such an obligation" and that a LEO does not exist "when the QF has not yet obligated itself to deliver power and remains free to walk away from the negotiations without liability."[13]

Q. PLEASE COMMENT ON HOW ACT 62 AND THE LEO STANDARDS IN OTHER STATES HAVE INFORMED THE COMPANIES' PROPOSED APPROACH TO THE NOTICE OF COMMITMENT FORM.

A. First, it is important to recognize that Act 62 prescribes a number of new requirements that should minimize the need for negotiations between QFs and utilities, and, relatedly, should minimize the perceived need for a QF to establish a non-contractual LEO through submitting a Notice of Commitment Form separate

[10] *In the Matter of Idaho Power Co.'s Petition to Modify Terms & Conditions of PURPA Purchase Agreements., et al.*, No. 33419, 2015 WL 6958997, at *14 (Idaho P.U.C. Nov. 5, 2015).
[11] *In the Matter of the Amended Joint Complaint Filing by Trireme Energy Dev. II, LLC, et al.*, No. 20000-505-EC-16, 2018 WL 6931868, at *10–12 (Wyo. P.S.C. Dec. 31, 2018).
[12] *See id.*; *In the Matter of P.U.C. of Oregon Staff's Investigation into Qualifying Facility Contracting and Pricing*, Docket No. UM 1610, Order No. 16-174 at 27 (Or. P.U.C. May 13, 2016) ("[A] LEO exist[s] when a QF signs a final draft of an executable standard contract[.]").
[13] *Armco Advanced Materials Corp. v. Pa. Pub. Util. Comm'n*, 135 Pa. Commw. 15, 33-34 (Pa. Commw. Ct. 1990).

from contractually committing to deliver power by entering into a PPA. For example, the Act now requires the Commission to approve the avoided cost methodology used to determine the utility's next capacity need and to calculate its forecasted avoided cost of energy. The Act also provides that the Commission shall approve the form of Large QF PPA pursuant to which the QF has the right to sell to the utility and prescribes a ten year contract term for all QFs that have interconnection requests on file with the utility as of Act 62's date of enactment, up to a prescribed maximum aggregate quantity.[14] Based upon this expanded Commission oversight of PURPA implementation, it is difficult to see how a utility could—as contemplated by FERC in providing QFs the option to establish a non-contractual LEO—frustrate the QF's ability to sell its power by refusing to enter into a PPA with a QF.

In any case, to the extent that a QF believes a utility is refusing to enter into a PPA and seeks to establish a non-contractual LEO, the Companies' Notice of Commitment Form aligns with LEO standards from other jurisdictions by requiring a QF to make a binding and substantial obligation to deliver power in the near future and attempts to ensure the QF is not simply provided a unilateral right to sell or "put option" for a speculative project whose delivery date is entirely unknown while permitting the QF to walk away from its purported legally enforceable commitment to sell without liability.

[14] S.C. Code § 58-41-20(F)(1).

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Q. PLEASE DISCUSS THE KEY PROVISIONS OF THE PROPOSED NOTICE OF COMMITMENT FORM.

A. The Companies' Notice of Commitment Form has been developed to clearly identify the QF "Seller" making the commitment to sell and to then require the QF to certify that it is actually making a commitment substantial enough to establish a binding LEO, as described in more detail below.

Required Certification with FERC as QF. While perhaps an obvious requirement, a developer of a QF generating facility must meet FERC's regulatory requirements to self-certify as a QF or to obtain an Order granting QF certification from FERC prior to establishing a LEO to sell power as a QF. QF certification is required to execute a PPA to sell to the Companies under PURPA and should similarly be required to establish a non-contractual LEO. FERC also provides a clear process for certification on its website at https://www.ferc.gov/industries/electric/gen-info/qual-fac/obtain.asp which is entitled "How to Obtain QF Status for Your Facility."

Required Commitment to execute PPA within 90 days and to deliver power within 365 days of Notice of Commitment Form Submittal Date. The Companies believe that a crucial element of establishing a non-contractual LEO through submitting a Notice of Commitment Form is that the QF must make a binding commitment to execute a PPA in the near future and to unconditionally commit to deliver energy and capacity to the utility within a specified amount of time. Requiring the QF to execute a PPA within 90 days of submitting the Notice of Commitment Form and commit to deliver energy and capacity within one year (365

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days) after the date that a binding commitment to sell is made is reasonable and provides the QF an appropriate amount of time from the date of commitment to execute a PPA and to then begin delivering power. This requirement strikes an appropriate balance between the QF's interest and those of the utility and, most importantly, the utility's customers in terms of ensuring that the utility's avoided cost rates as of the LEO date accurately reflect the costs that the utility will avoid by purchasing power from the QF. For example, if the QF is not required to demonstrate its commitment to deliver power within a certain amount of time, a speculative QF earlier in the development process can simply submit a Notice of Commitment Form and lock-in avoided cost rates calculated when its non-contractual LEO is established, but not actually execute a PPA (which actually commits the QF to perform) or to begin delivering energy and capacity until years later when a utility's avoided costs may be substantially different.

Establishing a reasonable timeframe for a QF to commit to deliver power also ensures that the QF is actually capable (or at least will be capable in the reasonably near future) of delivering its committed power to the utility. Because the QF's establishment of a non-contractual LEO represents a unilateral act by the QF that binds not only the QF to sell its energy and capacity, but also the utility to purchase such energy and capacity, it is crucial that the QF be ready, willing, and able to deliver its output to the utility at the time that the QF asserts that it is making a non-contractual but still binding legally enforceable obligation to sell. Without this provision, a QF could lock in a price commitment from the utility and effectively be afforded a put option to build the QF in the future, but without any

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commitment on its part to deliver energy. In contrast, as I describe above, when a PPA is signed, the QF contractually agrees to deliver power by a specified COD and over a specified term or be subject to financial damages if it fails to meet its delivery obligations.

The Companies believe that requiring a QF to be capable of delivering power within one year of the date the QF opts to make a non-contractual commitment to sell achieves this goal and appropriately mitigates the risk of stale and inaccurate avoided cost rates for customers. The Companies do not believe allowing a longer period than one year would be consistent with the General Assembly's express directive for the Commission to "strive to reduce the risk placed upon the using and consuming public" within its implementation of PURPA.[15] The longer the period of time between when the utility's avoided cost rates are established and the delivery of energy, the more difficult it is to accurately estimate the utility's future avoided cost and the greater the risk for customers that the locked-in rates are stale and inaccurate. Such a result would also be inconsistent with Act 62's requirement that avoided cost rates offered to QFs in South Carolina be consistent with PURPA and FERC's regulations, which requires rates for purchases from QFs to be just and reasonable to electric consumers and not to exceed the utility's avoided cost.[16]

It is also important to note that Duke's proposed requirement to deliver power with 365 days is less stringent than LEO standards established in other states

[15] S.C. Code § 58-41-20(A).
[16] *See* 18 C.F.R. § 292.304(a)(1)(i)-(2).

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across the country. The Public Utilities Commission of Texas ("PUCT"), for example, prescribes a significantly shorter delivery period for a QF to establish a non-contractual LEO, requiring the QF be able to deliver energy and capacity within 90 days.[17] While I am not a lawyer, it is my understanding that the United States Court of Appeals for the Fifth Circuit held that the PUCT's 90-day standard and, more generally, the requirement that QFs be able to deliver power within a specified timeframe are consistent with PURPA.[18] Similarly, the New Mexico Public Regulation Commission's regulations require a QF to be already constructed and physically interconnected to the utility's system in order to unilaterally establish a non-contractual LEO.[19] Notably, the New Mexico Commission recently upheld this standard in 2017 after its regulations were challenged by a QF to be inconsistent with PURPA.[20] Again, the Companies' proposal to allow the QF 90 days to execute a PPA and a full year to deliver power from the date that a non-contractual LEO is established is significantly longer than these other jurisdictions, and balances the interest of the QF and the utility and customers that are obligated to pay the QF at the utility's avoided costs as of the date that the LEO is established.

Demonstration of Control of Project Site and Required Permits. Requiring the QF to demonstrate site control for the specified term of its committed delivery period is another fundamental element of making a binding and substantial commitment. Indeed, Montana has adopted a similar requirement within its LEO

[17] Tex. P.U.C. Substantive Rule 25.242(f)(1)(B).
[18] *Power Res. Grp., Inc. v. Pub. Util. Comm'n of Texas*, 422 F.3d 231, 239 (5th Cir. 2005).
[19] *See* N. M. Admin. Code § 17.9.570.9.
[20] *W. Water and Power Prod. Ltd., LLC, v. P.S.C. of New Mexico*, No. 11-00466-UT, 2016 WL 4160265, at * (N.M.P.R.C. Aug3, 2016).

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standard,[21] while Minnesota has identified site permits, design details, and an executed lease agreement as indicia of project viability that would support formation of a non-contractual LEO.[22] By requiring the QF to demonstrate that it has the requisite site control, approvals, and permits required to construct the QF generating facility and to deliver power for the full delivery period, speculative projects early in the development process will be discouraged from attempting to game the Commission's LEO requirements, as they will be required to provide documentation and to make a reasonable showing that they are ready, willing and able to deliver power to the utility commencing upon a specified future date and for a specified term. For example, a speculative QF should not be able to establish a LEO for any amount of time if it cannot demonstrate that it maintains the necessary legal control over the project site in the form of ownership, leasehold or option to actually deliver such energy and capacity to the utility for the planned delivery term. This requirement ensures that a QF is making a binding and substantial commitment by demonstrating that it has the permits and approvals required to construct its facility and has control over its project site for the term of the proposed delivery period.

Requirement to Be Interconnection Customer of Utility: The Companies have incorporated a provision requiring that the QF needs to have submitted an Interconnection Request to become an Interconnection Customer of the utility and

[21] *See* Mont. Admin. R. 38.5.1909.

[22] *In the Matter of a Complaint by Red Lake Falls Cmty. Hybrid LLC Regarding Potential Purchased Power Agreement Terms & Pricing with Otter Tail Power Co.*, Nos. E-017/CG-16-1021 & E017/CG-17-464, 2018 WL 2684390, at *7-8 (Minn. P.U.C. May 31, 2018).

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that the utility has determined that its Interconnection Request application is complete. While I am not an attorney, I am generally aware that FERC held in 2016 that requiring an executed Interconnection Agreement ("IA") as part of a State's LEO standard is inconsistent with FERC's PURPA regulations because "[s]uch a requirement allows the utility to control whether and when a legally enforceable obligation exists – e.g., by delaying the facilities study or by delaying the tendering by the utility to the QF of an executable interconnection agreement."[23] Accordingly, through this provision, the Companies are making clear that they are only requiring the QF to demonstrate that it has submitted a complete Interconnection Request application to the Companies.

Q. DOES THE FORM ADDRESS THE ACT'S REQUIREMENT THAT THE UTILITY MUST GIVE THE QF A REASONABLE AMOUNT OF TIME TO EXECUTE A PPA, BUT THAT THE UTILITY CANNOT REQUIRE THE QF TO EXECUTE A PPA PRIOR TO THE UTILITY DELIVERING THE FINAL INTERCONNECTION AGREEMENT TO THE QF?

A. Yes. Section 6.ii of the Notice of Commitment Form specifically provides the QF with 90 days from the utility's delivery of an "executable" PPA to execute such PPA, which may be extended upon mutual agreement of Seller and Company for a period not to exceed a 365 day period from the Form's Submittal Date (which corresponds to the future date by which the QF has non-contractually obligated itself to begin delivering power). Consistent with the Act, this section further provides that if the Companies have not delivered a final interconnection agreement

[23] *FLS Energy, Inc.*, 157 FERC ¶ 61,211at P. 23 (2016).

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to the QF prior to the end of such 90-day period, the period will be "automatically extended until the date that is five business days after the date that the final interconnection agreement is tendered to the [QF]." Thus, the minimum time that a QF will have to execute and return the PPA is 90 days, and QFs are provided the additional assurance that they will not be required to execute and return the PPA until they have received an IA. In this way, the Form provides the QF a reasonable period of time—at least 90 days—to execute the PPA and longer if the QF elects to establish a non-contractual LEO and has not yet received an IA from the utility.

Q. PLEASE EXPLAIN WHY THE COMPANIES HAVE INCLUDED SECTION 7 PROVIDING THAT TERMINATION OF THE QF's NOTICE OF COMMITMENT RESULTS IN THE QF ONLY BEING OFFERED AS-AVAILABLE RATES FOR A TWO-YEAR PERIOD.

A. As I have explained in discussing other sections of the Form above, the Companies' interest and focus in developing the Notice of Commitment Form is to ensure that a QF that opts to establish a non-contractual LEO versus proceeding directly to execute a mutually-binding PPA and is actually making a substantial and binding commitment to deliver its output for the specified delivery term at the Companies' avoided costs, which are fixed as of the time the LEO is established. This approach is consistent with FERC's regulations and avoids gaming of the LEO standard. Section 7 is similarly designed to ensure a QF that has asserted a legally enforceable obligation by submitting a Notice of Commitment Form has actually made a binding commitment to execute a PPA and to deliver power to the Companies. This provision provides that if the QF fails to meet its obligations under its executed

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Notice of Commitment Form and termination occurs under Section 6 of the Form, then the QF would be limited only to delivering its power as-available for a two-year period following expiration or termination of the QF's Notice of Commitment.

Q. WHY DID THE COMPANIES INCLUDE AN ATTESTATION CLAUSE ON THE SIGNATURE PAGE OF THE FORM?

A. As stated above, the QF's establishment of a non-contractual LEO is a unilateral commitment tantamount to a contract that commits the QF to sell and deliver energy and capacity to the utility over the specified delivery term. Act 62 requires that the Notice of Commitment Form be "executed" by the QF, and the Companies included this attestation requirement to ensure that the Form is executed by an officer of the QF possessing personal knowledge of the certifications made therein, and who is committing the QF to meet the legally enforceable obligation requirements of the Form.

Q. ARE THE COMPANIES PROPOSING A DIFFERENT FORM FOR SMALLER QUALIFYING FACILITIES THAT QUALIFY FOR THE STANDARD OFFER?

A. No. The proposed Notice of Commitment Form is appropriate for small power producer QFs 2 MW or less committing to sell under the Companies' Standard Offer Tariffs supported by Duke Witness Wheeler, as well as for larger QFs committing to sell under the Large QF PPA. Section 1 of the Form recognizes that QFs with a net power production capacity of 1 MW or less are exempted from

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obtaining QF certification[24] and provides that these QF may alternatively provide a physical address and description of the QF facility, which shall be designated the "Project Site."

III. STANDARD FORM LARGE QF POWER PURCHASE AGREEMENT

Q. PLEASE INTRODUCE THE LARGE QF PPA THAT DEC AND DEP ARE FILING WITH THE COMMISSION AS DEC & DEP EXHIBIT 2.

A. The Large QF PPA is the standard form PPA that the Companies will use to contract with small power producer QFs greater than 2 MW in size and not eligible for the Standard Offer ("Large QF") that commit to sell and deliver energy and capacity to the Companies over a future specified term under PURPA.

Q. WHAT ARE THE SPECIFIC REQUIREMENTS OF ACT 62 REGARDING LARGE QF PPAS?

A. While the Commission has always had the jurisdiction to review and approve the terms and conditions of contracts between QFs and electric utilities, Act 62 now expressly requires the Commission to review and approve one or more standard form PPAs for use by small power production facilities not eligible for the Standard Offer.[25] The Act provides that such form PPAs should not be determinative of the avoided cost price and length (or "term") of the power purchase agreement, but requires utilities' form PPAs to contain a variety of commercial terms and conditions, including, but not limited to, provisions addressing force majeure,

[24] *Order No. 732*, 130 FERC ¶ 61,214 (2010) (adopting exemption of generating facilities with net power production capacities of 1 MW or less from the requirement that a generating facility, to be a QF, must file either a notice of self-certification or an application for Commission certification").
[25] S.C. Code Ann. § 58-41-20(A).

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indemnification, choice of venue, and confidentiality.[26] The Act further requires DEC and DEP to continue to file with the Commission all PPAs resulting from voluntary negotiations between the Companies and QFs not eligible for the Standard Offer.[27]

Q. DOES THE COMPANIES' PROPOSED LARGE QF PPA COMPLY WITH THOSE REQUIREMENTS?

A. Yes. Each of the contractual provisions required by Act 62 are included in the Companies' Large QF PPA that I am filing with the Commission as Johnson DEC/DEP Exhibit 2. The Companies are presenting the Large QF PPA as a "form," which does not specify any pre-determined price or contract term provisions in the PPA.

Q. DOES ACT 62 SET FORTH ANY OTHER REQUIREMENTS THAT MAY BE APPLICABLE TO THE COMPANIES' LARGE QF PPAS?

A. Yes. Act 62 generally requires that all PPAs must be commercially reasonable and consistent with regulations and orders promulgated by the Federal Energy Regulatory Commission ("FERC") implementing PURPA.[28] Act 62 also requires that the Commission's implementation and administration of PURPA should strive to reduce the risk placed upon the using and consuming public.[29]

[26] S.C. Code Ann. § 58-41-20(A).
[27] S.C. Code Ann. § 58-41-20(E)(1).
[28] S.C. Code Ann. § 58-41-20(B)(2).
[29] S.C. Code Ann. § 58-41-20(A).

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Q. DOES THE COMPANIES' PROPOSED LARGE QF PPA COMPLY WITH THOSE GENERAL REQUIREMENTS?

A. Yes. The Companies' proposed Large QF PPA is consistent with applicable FERC regulations and orders and sets forth commercially reasonable terms as more specifically discussed below. The Companies' proposed Large QF PPA also strives to reduce the risk placed upon the using and consuming public, which is an objective expressly contemplated by Act 62 in the Commission's implementation of PUPRA.[30]

Q. PLEASE DESCRIBE SOME OF THE KEY PROVISIONS OF THE COMPANIES' LARGE QF PPA.

A. The proposed Large QF PPA is a comprehensive power purchase agreement that is substantially similar to the form of PPA that the Companies have used to contract with large QF facilities (including numerous large solar QF facilities) over the past several years. The Large QF PPA provides for the exclusive purchase and sale of 100% of the output of energy and capacity from a QF facility on a fixed price, fixed term basis. There are 26 articles and 10 exhibits included in the Large QF PPA. In addition to the terms specified above and among other provisions, the Large QF PPA:

- Establishes a condition precedent that allows the Seller a due diligence period of up to 30 days after the effective date to terminate the PPA without penalty;
- Establishes a "testing period" that provides the circumstances and price under which the Companies will purchase energy produced by the facility during the testing phase prior to full commercial operation;

[30] S.C. Code Ann. § 58-41-20(A).

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- Sets forth financial performance assurance requirements to be met by the QF Seller covering obligations both before the commercial operation date ("COD") and post-COD;

- Includes an exception from the performance assurance posting requirements for Creditworthy Sellers (as defined in the PPA);

- Sets forth a description of the QF facility (the "Facility"), including, but not limited to, nameplate capacity rating (AC and DC), major components, design, and location;

- Requires that the Facility receive and maintain all approvals and certifications necessary to qualify and maintain status as a Qualifying Facility under PURPA throughout the term of the PPA;

- Establishes a minimum output requirement equal to not less than 70% of the expected annual output of energy in each rolling two-year period during the contract term;

- Requires the Facility to include a power plant controller that permits the Companies to control the Facility as needed to implement a System Operator Instruction, as further defined in the PPA;

- Establishes a procedure by which the QF Seller will be compensated if the Facility is required to reduce or cease generation of energy due to a System Operator Instruction delivered to the generator due to non-economic reliability and operational conditions on the system;

- Requires battery storage or other energy storage device, if integrated into the Facility, to be identified in the Facility description and operated in accordance with the Companies' Energy Storage Protocol; and

- Sets forth a variety of standard contractual provisions, including, but not limited to force majeure, confidentiality, indemnification, representations and warranties, default, early termination, liquidated damages for failure to achieve the specified COD, limitation of liability, arbitration, choice of law and venue, and limitations to assignment and change of control rights.

- In addition to the above-described provisions, the Companies' Large QF PPA also includes ten exhibits that further describe the Facility and the parties' respective obligations under the PPA:

  <u>Exhibit 1:</u> Estimated Monthly Energy Production of the Facility

  <u>Exhibit 2</u>: Contract Price

  <u>Exhibit 3</u>: Operational Milestone Schedule

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Exhibit 4: Facility Information

Exhibit 5: Expected Annual Output

Exhibit 6: Form of Guaranty

Exhibit 7: Form of Letter of Credit

Exhibit 8: Form of Acknowledgement of Non-Default

Exhibit 9: Power Plant Controller Output Data Points

Exhibit 10: Energy Storage Protocol

Q. IN YOUR OPINION, IS THE COMPANIES' LARGE QF PPA COMMERCIALLY REASONABLE?

A. Yes. As I noted above, Act 62 requires the Commission to ensure that the Companies' Large QF PPA is commercially reasonable.[31] It is my opinion, based upon my experience overseeing DEC's and DEP's PPA contracting process with larger QFs, that the Companies' form of negotiated PPA is commercially reasonable.

Q. PLEASE EXPLAIN.

A. Although the Companies have never been required by law to offer a standardized form Large QF PPA to all QFs, it has been the Companies' consistent practice for a number of years to employ such a standard form as a baseline for negotiated PPAs offered to larger QFs that commit to sell their output to DEC or DEP. As I describe in more detail below, the Companies believe that the longstanding QF marketplace acceptance of their negotiated PPA—which has facilitated an unparalleled level of solar QF development across the Companies' North Carolina and South Carolina

[31] S.C. Code Ann. § 58-41-20(B)(2).

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service territories—is strong evidence of the Large QF PPA's commercial reasonableness.

Q. PLEASE DISCUSS THE STANDARD OF "COMMERCIAL REASONABLENESS" AS USED IN ACT 62.

A. The term "commercially reasonable" is incapable of a precise definition and may vary depending upon time, location, and context in which it is used. It is based upon a standard of reasonableness, which is a subjective test of what a reasonable person would do in the individual circumstance, taking all factors into account. The Companies believe that the commercial reasonableness of a contract is best determined between willing contracting parties in the business arena and involves both legal and business judgment and assessment of the risk which a reasonable person would be willing to accept in the exercise of his/her business discretion and judgement. Whether a commercial contract, or discrete provision within a contract, is "commercially reasonable" should also be informed by the then-prevailing practices within the industry and in the location where the transaction is situated and based upon the circumstances and prior dealings between the parties.

Q. HOW DOES MARKETPLACE ACCEPTANCE OF THE LARGE QF PPA SUPPORT ITS COMMERCIAL REASONABLENESS?

A. The standard form Large QF PPA that the Companies are submitting for Commission approval is appropriately based on forms that have been proven to be acceptable to QF developers, their investors, and lenders through a course of dealing between the Companies and large and small QF developers which has extended over many years.

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In particular, the commercial reasonableness of the Companies' Large QF PPA form has been tested and proven in numerous and recent actual business transactions negotiated between small power producer QFs and the Companies. The foundational commercial terms incorporated into the Companies' Large QF negotiated PPA have been accepted by 24 small power producers QFs located in South Carolina, representing approximately 100 MW of new renewable energy capacity over the past eight years, with 14 of these PPAs recently being executed since January 2018. These same basic negotiated contractual terms included in the Large QF PPA form have also been accepted and executed by over 150 small power producer QFs (totaling over 2,000 MW of aggregate QF capacity) in North Carolina. This recent market acceptance of the Companies' form of negotiated PPA strongly supports the commercial reasonableness and industry acceptance of the Companies' Large QF PPA terms being submitted to the Commission for approval in this proceeding.

Q. HAVE THE COMPANIES ALSO RECENTLY CONSIDERED QF INDUSTRY FEEDBACK REGARDING THE REASONABLENESS OF THE TERMS AND CONDITIONS OF THE COMPANIES' LARGE QF PPAS?

A. Yes. The Companies recently had an opportunity to receive and consider extensive QF industry feedback on DEC's and DEP's form of PPA during Tranche 1 of the North Carolina CPRE Program solicitation process. While the CPRE Program provides the Companies' additional rights and benefits (*i.e.*, economic dispatch rights; rights to renewable energy attributes) that were memorialized in the Tranche

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1 CPRE PPA, the PPA approved for used in the CPRE Tranche 1 RFP and the Large QF PPA being filed with the Commission for approval otherwise include substantially similar provisions.

During the Tranche 1 pre-solicitation process, which was administered by the CPRE Program Independent Administrator pursuant to the North Carolina Utilities Commission's ("NCUC") rules,[32] the Companies received, evaluated, and provided responses to extensive comments that were offered on the CPRE Tranche 1 PPA template. In response to these stakeholder comments the Companies also made several changes to the CPRE Tranche 1 PPA template—including, but not limited to, changes to the force majeure provision, revisions to the credit provisions, extension of several cure periods, and a streamlined COD liquidated damages provision. Likewise, many of the same changes implemented into the CPRE PPA template through the stakeholder process have also been included in the form of Large QF PPA that DEC and DEP are now submitting for Commission approval in South Carolina.

Q. DID THE QF INDUSTRY ACCEPT THE PPA USED IN TRANCHE 1 OF THE CPRE PROGRAM AS COMMERCIALLY REASONABLE?

A. Yes. Over 2,250 MWs (68 bids) of third party QF proposals, including 1,501 MW (29 bids) of QF projects sited in South Carolina, bid into the CPRE Program Tranche 1 RFP, demonstrating the commercial reasonableness of the form PPA used in that process. Three of the 13 winning proposals were sited in South

[32] NCUC Rule R8-71(f).

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Carolina and each of these QF developers have now executed the CPRE Tranche 1 PPA.

Q. DOES THE COMPANIES' LARGE QF PPA CONTINUE TO APPROPRIATELY STRIVE TO REDUCE THE RISK PLACED ON THE USING AND CONSUMING PUBLIC?

A. Yes. As discussed by Duke Witness George Brown, Act 62 establishes that the Commission's decisions in implementing PURPA should strive to reduce the risk placed on the using and consuming public who are the customers that ultimately pay for the Companies' must-take purchases of energy and capacity from QFs. While the Companies have accepted certain QF industry-recommended modifications to the form of Large QF PPAs as commercially reasonable and not increasing the risk assigned to the Companies and customers under the negotiated PPA, Duke has also rejected other recommendations that would erode remedies that enforce compliance with the QF's contractual obligations or would otherwise shift the risk and costs of QF non-performance to the Companies and their customers. For example, non-creditworthy QFs have requested to eliminate or drastically reduce the amount of "performance assurance" that QF Sellers are required to provide the Companies as security for the QF meeting its obligations to construct, own, and operate the generation facility as promised under the PPA. Typically, the QFs that enter into PPAs with the Companies are single purpose entities that are not rated by any credit rating agencies and have no significant assets other than the generation facility (once it is built) and most often those assets are encumbered by a first priority lien held by the financing lender. Therefore, without some

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meaningful performance assurance in the event that the QF were to become insolvent, fail to perform, or otherwise default under the PPA, the Companies and their customers would be exposed to the QF for cover or replacement costs without recourse against the QF. Importantly, once the PPA is executed, QFs and their owners/investors have little accountability to the Commission and the form of PPA must assure that QFs will meet their obligations to deliver the committed energy and capacity to the Companies to serve customers' future energy needs. By including contractual terms and conditions that hold the QF accountable to meeting its obligations under the PPA, the risk of QF non-performance is reduced.

Q. DOES ACT 62 IDENTIFY ANY OTHER SPECIFIC CONSIDERATIONS THAT THE COMMISSION SHOULD TAKE INTO ACCOUNT IN ESTABLISHING THE TERMS AND CONDITIONS OF THE COMPANIES' LARGE QF PPAS?

A. Yes. Act 62 directs the Commission to consider whether it should prohibit termination of the PPA, collection of damages, or commencement of the PPA term prior to commercial operation if delays in achieving commercial operation of the facility are due to the utility's interconnection delays.[33]

[33] S.C. Code Ann. § 58-41-20(E)(3)(a).

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Q. DOES THE COMPANIES' LARGE QF PPA INCLUDE PROVISIONS THAT IMPOSE DAMAGES OR TERMINATE THE PPA IN THE EVENT THE QF FAILS TO ACHIEVE ITS COMMITTED COMMERCIAL OPERATION DATE?

A. Yes. Section 20.5 of the Large QF PPA includes remedies to the Companies, including liquidated damages and termination of the PPA, in the event that the QF fails to achieve commercial operation by the QF's committed COD.

Q. DO THE COMPANIES BELIEVE THE COMMISSION SHOULD EXPRESSLY PROHIBIT SUCH PROVISIONS IN THE PPA OR OTHERWISE?

A. No. As a threshold matter, it is important to emphasize that contract provisions that require a party to pay liquidated damages or that allow a party to terminate the contract if the contract is breached are widely-accepted and generally viewed as commercially reasonable contract provisions within wholesale purchased power agreements that Duke Energy enters into with both QF and non-QF counter-parties.

When a QF Seller enters into a PPA with the utility Buyer, the QF obligates itself to sell power to the utility by a date certain and to deliver its energy and capacity over a specified term. The utility then relies upon the QF's contractual commitment to deliver the contracted-for power over the term of the PPA as part of its resource planning and utility operations. For example, the utility's integrated resource plans assume the QF will begin delivering energy and capacity as of the COD committed to in the PPA, and the QF's failure to meet its delivery obligations can impact the timing of the utility's next identified need for new generation. The

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utility will also assume that the QF is delivering energy during the contract period in planning whether shorter-term wholesale market purchase are needed to ensure system reserve margins are maintained. The establishment of a contractual commitment to commence delivery of power by a specified date is an essential term of the PPA. The inclusion of a delivery commencement deadline in a power purchase agreement and a penalty for failure to achieve that deadline are standard concepts to buyers and sellers entering into such commitments and that are routinely accepted in power purchase agreements entered into by willing buyers and sellers. Furthermore, where an essential term of a contract is not met, the imposition of a penalty on the non-performing party is entirely reasonable and has been agreed to by both parties at the time the contract was executed.

It is also important to understand that a Seller's COD is primarily determined as a result of the interconnection process. Until the QF receives an IA from the Companies, the future date by which interconnection can be completed and the QF's Facility can become operational is purely speculative. More specifically, prior to the point where the Companies undertake the construction planning process prescribed in Section 5.1 of the South Carolina Generator Interconnection Procedures ("SC GIP") and contractually commit in the IA entered into pursuant to SC GIP Section 5.2 to complete construction of the interconnection facilities and system Upgrades by a specified date, the QF developer is essentially proceeding "at risk" as to the timing of interconnection and often without any reasonable expectation of when the interconnection can realistically be achieved. Where a sophisticated QF developer elects to enter into a Large QF PPA prior to

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receiving an IA from the Companies establishing the milestones requirements and estimated COD for completing construction of Interconnection Facilities and any required Upgrades under the SC GIP, the QF developer knowingly chooses to assume the risk that the QF's own estimate of its COD will be incorrect. The Companies' experience has been that QFs choose to execute such PPAs prematurely in order to "lock into" an advantageous avoided cost rate, often as early as two or more years prior to its proposed commercial operation date. This scenario has been prompted by recent declining fuel commodity prices—the most significant component of avoided energy costs—which have reduced the avoided cost rate paid by customers to QFs.

It is widely understood that the interconnection process can take several years to progress from submittal of an interconnection request to an IA and then through construction of interconnection facilities and Upgrades to COD. Many QF Facility developers interpret this lengthy interconnection timeline to constitute a "delay" in the interconnection process, justifying the QF's failure to achieve COD. However, this is not the case, and such perceived "delay" is often driven by considerations beyond the utility's control. For example, where the QF developer proposes to site its project in a location where the interconnection facilities and Upgrades required to safely and reliably interconnect the Interconnection Customer are "interdependent" upon the decisions of one or more earlier queued Interconnection Customers, the study process is delayed in accordance with the Interdependent Project Review Process approved as Exhibit 2 to Order No. 2016-191 adopting the current SC GIP. As the Commission is aware, this scenario has

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increasingly occurred over the past few years as hundreds of solar QF projects have requested to interconnect to the same distribution and transmissions infrastructure.

As another example, under the Federal Energy Regulatory Commission's ("FERC") rules regulating the interconnection process, a proposed FERC-jurisdictional generator interconnection customer can suspend its IA for up to three years without penalty. At the end of the three-year period, the project can either continue moving forward or its IA is deemed terminated. As a result, if a QF desiring to sell power to the Companies enters the interconnection queue after the FERC-jurisdictional project and the QF's interconnection is dependent upon an Upgrade assigned to the FERC-jurisdictional project, it may be several years before the Companies can provide the QF an IA, because such agreement is dependent upon the decisions of the earlier-queued FERC-jurisdictional project.

If the Commission were to prohibit the Companies from imposing damages upon QFs or terminating the PPAs for failure to meet the COD contractually committed to by the QF as a result of long interconnection timelines, QFs would be incentivized to enter into PPAs as early as possible, setting impracticable CODs not grounded in any reliable projection of the Facility's in-service date, in an effort to lock in more favorable avoided cost rates that customers will be responsible for paying. Such a race to execute the PPA would render the QF's legal commitment to deliver power by the contracted-for COD meaningless and increase the risk that customers would be paying QFs stale avoided cost rates that exceed the value of the energy and capacity actually being delivered to them.

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Finally, with regard to commencing the PPA term prior to COD, the Companies' standard form Large QF PPA does not include a provision allowing for the commencement of the PPA term prior to COD. However, the Companies also believe that this is a reasonable option that some QF developers have agreed to in the past, and that the Commission should not preclude parties from agreeing to as part of a negotiated PPA that deviates from the standard form of PPA. To prohibit such a provision would unnecessarily limit the QF's and Companies' options in negotiating to a mutually-agreeable outcome if the QF fails to achieve COD. In sum, the length of the interconnection process should not justify a QF's failure to meet the COD that the QF has committed to achieve under its PPA. Such a result would shift risk from QF developers seeking to lock into advantageous avoided cost prices to the Companies and, most importantly, customers, who bear the entire burden of paying avoided cost rates, regardless of whether they reflect the actual value of the energy and capacity being provided by the QF.

Q. DOES ACT 62 DIRECT THE COMMISSION TO CONSIDER ANY OTHER PROHIBITIONS WITH RESPECT TO THE COMPANIES' LARGE QF PPAS?

A. Yes. The Commission must also consider whether it should prohibit the Companies from reducing the price paid to the small power producer QF based on costs incurred by the electrical utility to respond to the intermittent nature of electrical generation by the small power producer.

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Q. DO THE COMPANIES BELIEVE THE COMMISSION SHOULD EXPRESSLY PROHIBIT SUCH ACTIONS IN THE TERMS OF THE PPA OR OTHERWISE?

No. As more fully explained in the testimony of Duke Witnesses Glen Snider and Steve Wheeler, the identified Solar Integration Services Charge is an identified cost that is caused by solar QFs due to the intermittent nature of the energy they produce. If the solar QF is not required to pay for this cost, then the Companies' customers will continue to subsidize these costs.

Q. DO THE COMPANIES INTEND TO CONTINUE NEGOTIATING PPAs WITH QFs THAT PROVIDE FOR MODIFICATIONS TO THE LARGE QF PPA IN ORDER TO MEET INDIVIDUAL NEEDS OF THE QF?

A. Yes. Act 62 is clear that the provision requiring the Commission to approve a form contract PPA does not restrict the right of the parties to enter into PPAs with terms that differ from Commission-approved PPAs.[34] While the Companies strive to offer all QFs fair and non-discriminatory terms and conditions that appropriately protect ratepayers from the risk that I have described above, the Companies have historically accepted limited modifications to their form PPAs at the request of QF owners. The standard the Companies apply when assessing an amendment to the Companies' form of PPA is whether the terms are mutually beneficial or, at minimum, do not materially increase the risks assigned to the Companies and ratepayers.

[34] S.C. Code Ann. § 58-41-20(A).

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Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes, it does.

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NOTICE OF COMMITMENT TO SELL THE OUTPUT
OF A SMALL POWER PRODUCER QUALIFYING FACILITY TO
Duke Energy Carolinas, LLC or Duke Energy Progress, LLC
(South Carolina)

This notice of commitment form establishes a binding legally enforceable obligation on behalf of the small power producer qualifying facility ("QF"), further described as "Seller" below, committing to sell and deliver the full energy and capacity output of a proposed QF generating facility to Duke Energy Carolinas, LLC or Duke Energy Progress, LLC (the "Company") as provided for in S.C. Code Ann. § 58-41-20(D) and 18 C.F.R. 292.304(d)(2).

Instructions to QF: The QF shall deliver, via certified mail, courier, hand delivery or email, its executed Notice of Commitment to:

Duke Energy - Distributed Energy Technologies
400 South Tryon Street
Mail Code: ST 14A
Charlotte, North Carolina 28202
Attn.: Wholesale Renewable Manager
DERContracts@duke-energy.com

Any subsequent notice that a QF is required to provide to Company pursuant to this Notice of Commitment shall be delivered to the same address by one of the foregoing delivery methods.

1. **[_____]** ("Seller") hereby commits to sell and deliver to the Company all of the electrical output of the Seller's QF described in Seller's self-certification of QF status filed with the Federal Energy Regulatory Commission in Docket No. QF _____ (the "Facility"), located at _____ (the "Project Site"). (Note: QFs with a net power production capacity of 1 MW or less that are exempted from obtaining QF certification may alternatively provide a physical address and description of the Facility, which shall be designated the "Project Site.")

2. The name, address, and contact information for Seller is:

_____ Telephone: _____

_____ Email: _____

_____

3. By execution and submittal of this binding legally enforceable obligation to sell and deliver the output of the Facility for the Delivery Term (the "Notice of Commitment"), Seller certifies as follows:

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i. Within 365 days of the Submittal Date (as defined below), Seller will achieve commercial operation and shall commence delivery of its electrical output to the Company for the committed Delivery Term specified by Seller in 3.ii below.

ii. Seller obligates itself to deliver its full electrical output to the Company for a period of *[2 years, 5 years, 10 years]* (the "Delivery Term").

iii. The documents attached hereto as Exhibit A confirm that Seller has secured (A) control of the Project Site for at least the length of the Delivery Term, and (B) all required land use approvals and environmental permits necessary to construct and operate the Facility at the Project Site.

iv. Seller has requested to become an Interconnection Customer of the Company, as that term is defined in the South Carolina Generator Interconnection Procedures, and the Company has notified the Seller that its Interconnection Request application is complete.

v. The information the QF provided in its self-certification with the Federal Energy Regulatory Commission (FERC Form 556) is accurate as of the Submittal Date.

4. The mutually-binding legally enforceable obligation established by this Notice of Commitment shall take effect on its "Submittal Date" as hereinafter defined. "Submittal Date" means (i) the receipted date of deposit of this Notice of Commitment with the U.S. Postal Service for certified mail delivery to the Company, (ii) the receipted date of deposit of this Notice of Commitment with a third-party courier (e.g., Federal Express, United Parcel Service) for trackable delivery to the Company, (iii) the receipted date of hand delivery of this Notice of Commitment to the Company at the address set forth above, or (iv) the date on which an electronic copy of this Notice of Commitment is sent via email to the Company if such email is sent during regular business hours (9:00 a.m. to 5:00 p.m.) on a business day (Monday through Friday excluding federal and state holidays). Emails sent after regular business hours or on days that are not business days shall be deemed submitted on the next business day.

5. By execution and submittal of this Notice of Commitment, Seller acknowledges that the date of the QF's binding legally enforceable obligation to sell the Facility's full capacity and energy output to the Company ("LEO Date") will be determined as of the Submittal Date. Rates for purchases from the Facility will be based on the Company's avoided costs as of the LEO Date, calculated using data current as of the LEO Date.

6. This Notice of Commitment shall automatically terminate and be of no further force and effect in each of the following circumstances:

i. Upon execution of a power purchase agreement ("PPA") between Seller and Company.

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ii. If Seller does not execute a PPA within 90 days (as such period may be extended by mutual agreement of Seller and Company for a period not to exceed 365 days from Submittal Date) after the Company's delivery of an "executable" PPA to the Seller that contains all information necessary for execution and which the Company has requested the Seller to execute and return, provided, however, that if a final interconnection agreement for the Facility has not been tendered to Seller prior to the expiration of such deadline, the deadline for execution of the PPA shall be automatically extended until the date that is five business days after the date that the final interconnection agreement is tendered to the Seller.

iii. If the Seller does not commence delivery of its electrical output to the Company within 365 days of the Submittal Date.

7. Termination of this Notice of Commitment shall result in termination of the LEO and the Seller shall only be offered an as-available rate for a two-year period following expiration or termination of this Notice of Commitment. Thereafter, the Seller may elect to submit a new Notice of Commitment Form to establish a new LEO.

8. Seller will make the Company whole for any damages or expenses arising from Seller's breach of any warranty, representation, or covenant in this Notice of Commitment.

[*signature page follows*]

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I swear or affirm, in my capacity as a duly-appointed officer of the Seller, that I have personal knowledge of the facts stated in this Notice of Commitment, I am competent to testify to those facts, and I have authority to make this binding legally enforceable obligation to the Company on behalf of Seller. I further swear or affirm that all of the statements and representations made in this Notice of Commitment are true and correct as of the date hereof. I further swear or affirm that Seller will comply will all requirements of this Notice of Commitment.

_____
By

_____
Name

_____
Title

_____
Date

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Exhibit A

[Seller to Attach Documents Establishing Site Control for Delivery Term and Required Land Use Approvals and Environmental Permits Necessary to Construct and Operate the Facility at the Project Site]

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DUKE NOTICE: THIS WORKING DRAFT DOES NOT CONSTITUTE A BINDING OFFER, SHALL NOT FORM THE BASIS FOR AN AGREEMENT BY ESTOPPEL OR OTHERWISE, AND IS CONDITIONED UPON BUYER'S RECEIPT OF ALL REQUIRED APPROVALS (INCLUDING MANAGEMENT, CREDIT AND LEGAL APPROVAL). ANY ACTIONS TAKEN BY A PARTY IN RELIANCE ON THE TERMS SET FORTH IN THIS WORKING DRAFT OR ON STATEMENTS MADE DURING NEGOTIATIONS PURSUANT TO THIS WORKING DRAFT SHALL BE AT THAT PARTY'S OWN RISK. UNTIL THIS AGREEMENT IS FULLY NEGOTIATED, APPROVED BY BUYER IN ITS SOLE DISCRETION, AND EXECUTED BY BOTH PARTIES, NO PARTY WILL HAVE ANY LEGAL OBLIGATION OR LIABILITY, WHETHER EXPRESSED OR IMPLIED, OR OTHERWISE ARISING IN ANY MANNER UNDER THIS DRAFT OR IN THE COURSE OF NEGOTIATIONS.

POWER PURCHASE AGREEMENT

Buyer: [Duke Energy Carolinas, LLC] [Duke Energy Progress, LLC].

Overnight Mail: 400 South Tryon Street
Mail Code: ST 14Q
Charlotte, North Carolina 28202
Regular Mail: PO Box 1006
Mail Code: ST 14Q
Charlotte, NC 28201-1006
Attn.: Contract Administrator
DERContracts@duke-energy.com

With Additional Notices of Events of Default
Or Potential Event of Default to:
Overnight Mail: 550 S. Tryon St.
Charlotte, North Carolina 28202
Regular Mail: P.O. Box 1321, DEC45
Charlotte, North Carolina 28201-1321
Attn.: VP Commercial Legal Support

Seller:

_____
_____
_____
_____
_____

This Power Purchase Agreement, including Exhibits 1-10 hereto, which are

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incorporated into and made part hereof (collectively, the "Agreement"), is made and entered into by and between [*insert full legal name of Seller*] ("Seller") and Duke Energy [Carolinas][Progress], LLC ("Buyer") under the terms specified herein. Buyer and Seller may be referred to herein individually as a "Party" and collectively as the "Parties." Notwithstanding anything set forth herein, neither this Agreement nor any transaction contemplated hereunder will be effective **unless and until both Parties have executed** and delivered this Agreement, and the later of such date shall be the "Effective Date" of this Agreement.

NOW THEREFORE, IN CONSIDERATION OF THE PROMISES AND MUTUAL COVENANTS SET FORTH HEREIN, FOR GOOD AND VALUABLE CONSIDERATION, THE SUFFICIENCY OF WHICH IS ACKNOWLEDGED, AND INTENDING TO BE BOUND HEREBY, THE PARTIES AGREE AS FOLLOWS:

1. **Definitions**

Unless defined in the body of the Agreement, any capitalized term herein shall have the meaning set forth below:

1.1. "AAA" is defined in Section 6.2.1.

1.2. "Abandon(s)" means the relinquishment of control or possession of the Facility and/or cessation of operations of or at the Facility by Seller. "Abandon" excludes cessation of generation to comply with Prudent Utility Practices, Permitted Excuse to Perform, or due to maintenance or repair of the Facility (including Maintenance Outages and Planned Outages), provided that such maintenance or repair activities are being performed in a Commercially Reasonable Manner and with Prudent Utility Practice.

1.3. "Affiliate" means, with respect to any entity, each entity that directly or indirectly controls, is controlled by, or is under common control with, such designated entity, with "control" meaning the possession, directly or indirectly, of the power to direct management and policies, or otherwise have control of an entity, whether through the ownership of voting securities or by contract or otherwise. Notwithstanding the foregoing, with respect to Buyer the term Affiliate does not include any subsidiaries or affiliates whose activities are subject to the oversight or regulation of any state commission(s) and/or federal energy regulatory commission.

1.4. "Agreement" is defined in the introductory paragraph hereof.

1.5. "Assignment" is defined in Section 24.1.

1.6. "Back-Up Tapes" is defined in Section 16.3.

1.7. "Bankrupt" means, with respect to a Party or any Affiliate of such Party that is currently acting as its credit support provider, that such Party or Affiliate acting as credit support provider: (a) makes an assignment or any general arrangement for the benefit of creditors; (b) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy or similar law for the protection of creditors; (c) has such a petition filed against it as debtor and such petition is not stayed, withdrawn, or dismissed within sixty (60) Business Days of such filing; (d) seeks or has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets; (e) has a distress, execution, attachment, sequestration or other legal process levied or enforced on or against all or substantially all of its assets; (f) is unable to pay its debts as they fall due or admits in writing of its inability to pay its debts generally as they become due; and/or (g) otherwise becomes bankrupt or insolvent (however evidenced).

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1.8. "Billing Meter" is defined in Section 10.

1.9. "Billing Period" is defined in Section 11.

1.10. "Business Day" means any day on which the Federal Reserve member banks in New York City are open for business. A Business Day shall run from 8:00 a.m. to 5:00 p.m. Eastern Prevailing Time.

1.11. "Buyer" shall have the meaning specified in the first paragraph of this Agreement.

1.12. "Capacity" means and includes the electric generation capability and ability of the Facility and all associated characteristics and attributes, inclusive of the ability to contribute to peak system demands, as well as reserve requirements.

1.13. "Change of Control" means a transaction or series of related transactions (by way of merger, consolidation, sale of stock or assets, or otherwise) with any person, entity or "group" (within the meaning of Section 13(d)(3) of the U.S. Securities Exchange Act of 1934) of persons pursuant to which such person, entity, or group would directly or indirectly acquire (i) 50% or more of the voting interests in Seller or (ii) substantially all of the assets of Seller. Notwithstanding the foregoing, a Change of Control shall not be deemed to occur based on an internal reorganization where the ultimate parent of the Seller (as of the Effective Date) directly or indirectly retains 50% or more of the voting interests in Seller or substantially all of its assets and provided that Seller has provided Buyer no less than thirty (30) days prior written notice of such reorganization.

1.14. "Commercial Operation" means that the Facility is operational and placed into service such that all of the following have occurred and remain simultaneously true and accurate: (a) the Facility has been constructed, tested, and is fully capable of operating for the purpose of generating the Product and delivering as required herein; (b) the Facility has received written authorization from the Transmission Provider for interconnection and synchronization of the Facility with the System; and, (c) the Facility has obtained all necessary Permits and Required Approvals; and, (d) the Facility has met all requirements necessary for safely and reliably generating the Product and delivering the Product to Buyer in accordance with Prudent Utility Practice.

1.15. "Commercial Operation Date" means the date on which the Facility achieves or achieved Commercial Operation.

1.16. "Commercially Reasonable Manner" or "Commercially Reasonable" means, with respect to a given goal or requirement, the manner, efforts and resources a reasonable person in the position of the promisor would use, in the exercise of its reasonable business discretion and industry practice, so as to achieve that goal or requirement, which in no event shall be less than the level of efforts and resources standard in the industry for comparable companies with respect to comparable products. Factors used to determine whether a goal or requirement has been performed in a "Commercially Reasonable Manner" may include, but shall not be limited to, any specific factors or considerations identified in the Agreement as relevant to such goal or requirement.

1.17. "Commission" means the Public Service Commission of South Carolina, or any successor thereto.

1.18. "Contract Price" is defined in Section 4.4.

1.19. "Contract Quantity" is defined in Section 4.2.

1.20. "Costs" means, with respect to the Non-Defaulting Party, brokerage fees, commissions, and other similar third party transaction costs and expenses, and other costs and expenses

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reasonably incurred by such Party either in terminating any arrangement pursuant to which it has hedged its obligations or entering into new arrangements which replace the terminated transaction(s), and all reasonable attorneys' fees and other legal expenses incurred by the Non-Defaulting Party in connection with the termination.

1.21. "Credit Rating" means, with respect to any entity, the rating then assigned to such entity's unsecured, senior long-term debt obligations (not supported by third party credit enhancements) or if such entity does not have a rating for its senior unsecured long-term debt, then the rating then assigned to such entity as a corporate or issuer rating.

1.22. "Creditworthy" or "Creditworthiness" - means (i) a Person with an investment grade Credit Rating from two (2) of the three (3) Rating Agencies such that its senior unsecured debt (or issuer rating if such Person has no senior unsecured debt rating) is rated at least (A) BBB- by S&P, if rated by S&P, (B) Baa3 by Moody's, if rated by Moody's, and (C) BBB- by Fitch, if rated by Fitch, respectively, or (ii) has satisfactory and verifiable creditworthiness determined in Buyer's reasonable discretion.

1.23. "Defaulting Party" is defined in Section 19.1.

1.24. "Delivery Period" is defined in Section 4.1.

1.25. "Delivery Point" means the point of interconnection between the Facility and the System on the high side (Buyer or Transmission Provider side) of the System.

1.26. "Dispatch Down" is defined in Section 8.6.

1.27. "Dispatch Down Payment Event" is defined in Section 8.6.

1.28. "Disputes" is defined in Section 23.1.

1.29. "Due Diligence Period" is defined in Section 3.3.

1.30. "Early Termination Date" is defined in Section 20.1.

1.31. "Effective Date" is defined in the introductory paragraph hereto.

1.32. "Emergency Condition" means, no matter the cause: (a) any urgent, abnormal, operationally unstable, dangerous, or public safety condition that is existing on the System or any portion thereof; (b) any urgent, abnormal, operationally unstable, dangerous, and/or public safety condition that is likely to result in any of the following: (i) loss or damage to the Facility or the System, (ii) disruption of generation by the Facility, (iii) disruption of service or stability on, to or of the System, or (iv) condition that may result in endangerment of human life or public safety; or (c) any circumstance that requires action by the System Operator to comply with standing NERC regulations or standards, including without limitation actions to respond to, prevent, limit, or manage loss or damage to the Facility, loss or damage to the System, disruption of generation by the Facility, disruption of service on the System, an abnormal condition on the System, and/or endangerment to human life or safety. An Emergency Condition will be an excuse to Seller's performance only if such condition is not due to Seller's negligence, willful misconduct, and/or Seller's failure to perform as required under this Agreement.

1.33. "Emergency Condition Instruction" means any System Operator Instruction relating to, due to, in response to, or to address an Emergency Condition.

1.34.

1.35. "Energy" means three-phase, 60-cycle alternating current electric power and energy, expressed in either kWh or MWh, as the case may be.

1.36. "EPT" or "Eastern Prevailing Time" means the time in effect in the Eastern Time Zone of the

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United States of America, whether it be Eastern Standard Time or Eastern Daylight Savings Time.

1.37. "Estimation Methodology" is defined in Section 8.6.2.

1.38. "Event of Default" is defined in Section 19.1.

1.39. "Expected Annual Output" means the quantity of Energy identified in Exhibit 5 for each calendar year during the Delivery Period of the Facility.

1.40. "Facility" means Seller's [describe facility including renewable energy resource used] electric generating facility located in [_____] County, [_____ [State], at _____], as further identified in Exhibit 4.

1.41. "FERC" means the Federal Energy Regulatory Commission or any successor thereto.

1.42. "First COD Date" is defined in Section 20.5.

1.43. Fitch" - means Fitch Ratings Ltd. or its successor.

1.44. "Force Majeure" is defined in Section 14.1.

1.45. "Force Majeure Instruction" means any System Operator Instruction relating to, due to, in response to, or to address a Force Majeure.

1.46. "GAAP" is defined in Section 9.1.

1.47. "Gains" means, with respect to the Non-Defaulting Party, an amount equal to the present value of the economic benefit to the Non-Defaulting Party, if any (exclusive of Costs), resulting from the termination of this Agreement for the remaining Term, determined in a Commercially Reasonable Manner. Factors used in determining the economic benefit may include, without limitation, reference to information available either internally or supplied by third parties, including without limitation, quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, or other relevant market data, comparable transactions, settlement prices or market prices for comparable transactions, forward price curves, production by comparable facilities, expected and historical production, all calculated for the remaining Term of the Agreement for the Product (inclusive of all components).

1.48. "Governmental Authority" means any federal, state or local government, legislative body, court of competent jurisdiction, administrative agency or commission or other governmental or regulatory authority or instrumentality or authorized arbitral body, including, without limitation, the Commission.

1.49. "Guarantor" means any Creditworthy Person having the authority and agreeing to guarantee a Party's obligations under this Agreement and is otherwise acceptable to Buyer in its reasonable discretion.

1.50. "Guaranty" means a parent company guaranty, in substantially the form set forth in Exhibit 6 attached hereto, provided by a Guarantor in favor of Buyer guaranteeing the obligations of Seller under this Agreement.

1.51. "Interconnection Agreement" means the separate interconnection and transmission service agreement (or agreements) to be negotiated and executed between Seller and the Transmission Provider concerning the interconnection of the Facility with the System and the requirements for transmission service.

1.52. "Interconnection Instruction" means any order, action, signal, requirement, demand, and/or direction, howsoever provided or implemented by the System Operator due to, in response to, or to address any condition relating to any service and/or obligation occurring under the Interconnection Agreement.

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1.53. "Interest Rate" means, for any date, the lesser of (a) the per annum rate of interest equal to the prime lending rate as may from time to time be published in *The Wall Street Journal* under "Money Rates" on such day (or if not published on such day on the most recent preceding day on which published), plus two percent (2%); and, (b) the maximum rate permitted by applicable law.

1.54. "kW" means kilowatt.

1.55. "kWh" means kilowatt-hour.

1.56. "Letter(s) of Credit" means one or more irrevocable standby letters of credit substantially in the form of Exhibit 7 attached hereto (with only such changes as the issuing bank may reasonably require and as may be acceptable to Buyer in its reasonable discretion), issued by a U.S. commercial bank or other financial institution reasonably acceptable to Buyer, which is not an Affiliate of Seller, which has and maintains a Credit Rating of at least A- from S&P and A3 from Moody's, for the Security Period, permitting Buyer to draw the entire amount if either such amount is owed or such Letter of Credit is not renewed or replaced at least thirty (30) Business Days prior to its stated expiration date.

1.57. "Lien" means any mortgage, deed of trust, lien, pledge, charge, claim, security interest, easement, covenant, right of way, restriction, equity, or encumbrance of any nature whatsoever.

1.58. "Losses" means, with respect to the Non-Defaulting Party, an amount equal to the present value of the economic loss to the Non-Defaulting Party, if any (exclusive of Costs), resulting from the termination of this Agreement for the remaining Term, determined in a Commercially Reasonable Manner. Factors used in determining the economic loss or loss of economic benefit may include, without limitation, reference to information available either internally or supplied by third parties, including without limitation, quotations (either firm or indicative) of relevant rates, prices, yields, yield curves, or other relevant market data, comparable transactions, settlement prices or market prices for comparable transactions, forward price curves, production by comparable facilities, expected and historical production, all calculated for the remaining Term of the Agreement for the Product (inclusive of all components).

1.59. "Maintenance Outage" means the temporary operational removal of the Facility from service to perform work on specific components of the Facility, at a time when the Facility must be removed from service before the next Planned Outage in the interest of safety or the prevention of injury or damage to or undue wear and tear on the Facility or any component thereof.

1.60. "Milestone Deadline" means the deadline for Seller to achieve each Operational Milestone as set forth in Exhibit 3.

1.61. "Moody's" means Moody's Investors Service, Inc. or any successor-rating agency thereto.

1.62. "MW" means megawatt.

1.63. "MWh" means megawatt-hour.

1.64. "Nameplate Capacity Rating" means the maximum generating capability of the Facility as measured at the Delivery Point (AC) as set forth in Exhibit 4.

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1.65. "NERC" means the North American Electric Reliability Corporation. For purposes of this Agreement, NERC includes any applicable regional entity with delegated authority from NERC, such as the SERC Reliability Corporation (SERC).

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1.66. "Non-Defaulting Party" is defined in Section 20.

1.67. Operational Milestone" means each operational event and result that Seller must achieve as set forth in the Operational Milestone Schedule, with such supporting documentation as may be requested by Buyer from time-to-time in its Commercially Reasonable discretion.

1.68. "Operational Milestone Schedule" means the schedule established in Exhibit 3 setting forth each Operational Milestone that Seller must fully complete by the Milestone Deadline.

1.69. "Party" or "Parties" is defined in the introductory paragraph hereto.

1.70. "Performance Assurance" means collateral in the form of either cash, Letter(s) of Credit, or a Guaranty that is acceptable to Buyer in its sole discretion, in each case that meets the requirements set forth in this Agreement (including, without limitation, Section 5) provided by Seller to Buyer for the benefit of Buyer pursuant to this Agreement, as credit support, adequate assurances, and security to secure Seller's performance under this Agreement.

1.71. "Permit" means any permit, license, registration, filing, certificate of occupancy, certificate of public convenience and necessity, approval, variance or any authorization from or by any Governmental Authority and pursuant to any Requirements of Law.

1.72. "Permitted Excuse to Perform" means that Seller's obligation to generate, deliver, and sell and Buyer's obligation to receive and purchase is excused and no damages will be payable by either Party to the other Party, if and to the extent such failure is due solely to any of the following occurrences: (a) an Emergency Condition and/or (b) a Force Majeure event.

1.73. "Person" means any individual, entity, corporation, general or limited partnership, limited liability company, joint venture, estate, trust, association or other entity or Governmental Authority.

1.74. "Planned Outage" means the temporary operational removal of the Facility from service to perform work on specific components in accordance with a pre-planned operations schedule, such as for a planned annual overhaul, inspections, or testing of specific equipment of the Facility.

1.75. "Product" means the Capacity of the Facility and Energy generated by the Facility.

1.76. "Protected Information" is defined in Section 16.1

1.77. "Prudent Utility Practice" means those practices, methods, equipment, specifications, standards of safety, and performance, as the same may change from time to time, as are commonly used in the construction, interconnection, operation, and maintenance of electric power facilities similar to the Facility, inclusive of delivery, transmission, and generation facilities and ancillaries, which in the exercise of good judgment and in light of the facts known at the time of the decision being made and activity being performed are considered: (i) good, safe, and prudent practices; (ii) are in accordance with generally accepted standards of safety, performance, dependability, efficiency, and economy in the United States; (iii) are in accordance with generally accepted standards of professional care, skill, diligence, and competence in the United States; and, (iv) are in compliance with applicable regulatory requirements and/or reliability standards. Prudent Utility Practices are not intended to be limited to the optimum practices, methods or acts to the exclusion of others, but rather are intended to include acceptable practices, methods and acts generally accepted in the energy generation and utility industry.

1.78. "PURPA" means the Public Utility Regulatory Policies Act of 1978, as amended, and as may be amended from time to time.

1.79. "PURPA Fuel Requirements" means the requirements set forth in 18 C.F.R. § 292.204 OR 205,

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as may be amended and/or restated.

1.80. "Qualifying Facility" means an electric generating facility that has been registered and certified by FERC as generator that qualifies for and meets the requirements set forth in PURPA, as it may be amended, and associated rules, regulations, orders.

1.81. "Rating Agency" or "Rating Agencies" - means the rating entities of S&P, Moody's or Fitch.

1.82. "Regulatory Event" is defined in Section 15.1.

1.83. "Required Approval" is defined in Section 6.

1.84. "Requirements of Law" means any applicable federal, state, and local law, statute, regulation, rule, code, ordinance, resolution, order, writ, judgment, decree or Permit enacted, adopted, issued or promulgated by any Governmental Authority, including, without limitation, (i) PURPA, (ii) those pertaining to the creation and delivery of the Product, (iii) those pertaining to electrical, building, zoning, occupational safety, health requirements or to pollution or protection of the environment, and (iv) principles of common law under which a person may be held liable for the release or discharge of any hazardous substance into the environment or any other environmental damage.

1.85. "Second COD Date" is defined in Section 20.5.1.

1.86. "Security Period" is defined in Section 5.7.

1.87. "Seller" shall have the meaning specified in the first paragraph of this Agreement.

1.88. "S&P" means Standard & Poor's Ratings Services, Inc. or any successor-rating agency thereto.

1.89. "Station Power" means the Energy generated by the Facility and, whether metered or unmetered, used on-site to supply the Facility's auxiliary load and parasitic load and/or for powering the electric generation equipment. Station Power shall not include any Energy generated by the Facility and stored for later delivery to the Buyer under this Agreement.

1.90. "System" means the transmission, distribution, and generation facilities that are owned, directed, managed, interconnected, controlled, or operated by Buyer and/or the Transmission Provider, including, without limitation, facilities to provide retail or wholesale service, substations, circuits, reinforcements, meters, extensions, and equipment associated with or connected to any interconnected facility or customer.

1.91. "System Operator" means the operators of the System that have the responsibilities for ensuring that the System as a whole or any part thereof operates safely, efficiently and reliably, including without limitation, the responsibilities to comply with any applicable operational or reliability requirements, the responsibilities to balance generation supply with customer load, the responsibilities to comply with any other regulatory obligation and the responsibilities to provide dispatch and curtailment instructions to generators supplying Energy to the System, and includes any person or entity delivering any such instruction to Seller.

1.92. "System Operator Instruction" means any order, action, requirement, demand, or direction, from the System Operator in accordance with Prudent Utility Practice, and delivered to Seller in a non-discriminatory manner, to operate, manage, and/or otherwise maintain safe and reliable operations of the System, including, without limitation those undertaken and implemented by the System Operator, in its sole discretion based on relevant System factors and considerations, including any and all operating characteristics, maintenance requirements, operational limitations, reliability (including, without limitation, standing NERC regulations or standards), safety, dispatch, constraints, discharge, emissions limitations, compliance requirements, communications, resource ramp-up and ramp-down constraints and

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implementation, and any other System considerations, which may include, without limitation, an order or action to: (i) interconnect, disconnect, integrate, operate in parallel, or synchronize with the System, (ii) increase (based on generator characteristics and Prudent Utility Practices), reduce, or cease generation output to comply with standing NERC regulations or standards; (iii) respond to any transmission, distribution, or delivery limitations or interruptions; (iv) perform or cease performing any activity so as to operate in accordance with System limitations, including, without limitation, operational constraints that would require the System Operator to force offline or reduce generation output from reliability generators to accommodate generation by the Facility; and, (v) suspend or interrupt any operational activity for an Emergency Condition or Force Majeure event; provided however, a System Operator instruction in response to an Emergency Condition, Force Majeure event, or operational condition relating specifically to or created by the Facility shall not be deemed or considered discriminatory.

1.93. "Taxes" means all taxes, fees, levies, licenses or charges imposed by any Governmental Authority, together with any interest and penalties thereon.

1.94. "Term" is defined in Section 3.1.

1.95. "Testing Period" is defined in Section 4.3.

1.96. "Transmission Provider" means the entity or division within [Duke Energy Carolinas, LLC] [Duke Energy Progress, LLC] that will provide interconnection and/or electric distribution or transmission service to enable delivery of Energy generated by the Facility to Buyer, and any such entity or division will include any successor or replacement thereto, including without limitation, a consolidated control area or a regional transmission organization.

2. **Interpretation**

2.1. Intent. Unless a different intention clearly appears, the following terms and phrases shall be interpreted as follows: (a) the singular includes the plural and vice versa; (b) the reference to any Person includes such Person's legal and/or permitted successors and assignees, and reference to a Person in a particular capacity excludes such Person in any other capacity or individually; (c) the reference to any gender includes the other gender and the neuter; (d) reference to any document, including this Agreement, refers to such document as it may be amended, amended and restated, modified, replaced or superseded from time to time in accordance with its terms, or any successor document(s) thereto; (e) reference to any section or exhibit means such section or exhibit of this Agreement unless otherwise indicated; (f) "hereunder", "hereof", "hereto", "herein", and words of similar import shall be deemed references to this Agreement as a whole and not to any particular section or other provision; (g) "including" (and with correlative meaning "include"), means "including without limitation" and when following any statement or term, is not to be construed as limiting the general statement or term to the specific items or matters set forth or to similar items or matters, but rather as permitting the general statement or term to refer to all other items or matters that could reasonably fall within its broadest possible scope; (h) relative to the determination of any period of time, "from" means "from and including", "to" means "to but excluding" and "through" means "through and including"; (i) reference to any Requirements of Law refers to such Requirements of Law as it may be amended, modified, replaced or superseded from time to time, or any successor Requirements of Law thereto; and (j) all exhibits and attachments to this Agreement are hereby incorporated into this Agreement. Other terms used, but not defined in Section 1 or in the body of the Agreement, shall have meanings as commonly used in the English language and, where applicable, in the electric utility industry. Words not otherwise defined herein that have well known and generally accepted technical or trade

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meanings are used herein in accordance with such recognized meanings.

3. **Term and Termination**

3.1. Term. This Agreement shall be effective as of the Effective Date and shall remain in full force and effect until [insert term length] anniversary of the Commercial Operation Date ("Term"), unless terminated earlier pursuant to the provisions of this Agreement.

3.2. Termination and Survival. This Agreement may be terminated as provided for herein prior to the expiration of the Term. If this Agreement is terminated earlier than the expiration of the Term for any reason, including, without limitation, whether by its terms, mutual agreement, early termination, and/or event of default, such termination shall not relieve any Party of any obligation accrued or accruing prior to the effectiveness of such termination. Furthermore, any obligations, limitations, exclusions and duties which by their nature or the express terms of this Agreement extend beyond the expiration or termination of this Agreement, including, without limitation, provisions relating to compliance requirements, accounting, billing, billing adjustments, limitations or liabilities, dispute resolution, Performance Assurance, and any other provisions necessary to interpret or enforce the respective rights and obligations of the Parties hereunder, shall survive the expiration or early termination of this Agreement.

3.3. Condition Precedent for Seller. It is a condition to the continuing obligations of each Party under this Agreement that by no later than thirty (30) days from the Effective Date of this Agreement, Seller shall have delivered to Buyer written notice that Seller has completed its due diligence and has determined to continue to be obligated in accordance with this Agreement as executed (such period, "Due Diligence Period"). Seller agrees that it will perform such due diligence in good faith and in a Commercially Reasonable Manner to determine whether or not it can develop the Facility to perform under this Agreement, including determining whether Seller can obtain required Permits and debt and/or equity financing for the Facility. Seller agrees that it will be fully and solely responsible for any and all costs associated with developing the Facility, including the costs incurred during the Due Diligence Period. If Seller determines that it desires to perform under this Agreement, then prior to the expiration of the Due Diligence Period Seller shall deliver to Buyer written notice that it has completed its due diligence and it agrees to perform under this Agreement.

3.3.1. If Seller fails to deliver to Buyer, prior to the expiration of the Due Diligence Period, written notice in accordance with this Agreement that Seller desires to continue to be obligated in accordance with and under this Agreement, then this Agreement will automatically terminate as of such day, and neither Party shall have any obligation, duty, or liability to the other arising under this Agreement.

3.4. Condition Precedent for Buyer. It is a condition to the continuing obligations of each Party under this Agreement that the Commission shall have delivered to Buyer written notice that the Commission has: (i) completed its review of this Agreement; and, (ii) has accepted this Agreement for filing with the Commission without any modification, condition, suspension, or investigation. No later than ten (10) Business Days after both Parties have executed this Agreement, Buyer will submit the Agreement for filing with the Commission. Seller agrees that Buyer will have sole discretion over all aspects of such submittal, including without limitation, the form and substance of the submittal, confidentiality, procedure, responding to any data requests, and providing any information to the Commission and the South Carolina Office of Regulatory Staff. Seller will not oppose or challenge the Commission's acceptance of this Agreement, and upon request by Buyer will promptly and fully support the Commission's acceptance of this Agreement without any modification, condition, suspension, or investigation. Buyer will make a good faith request that the Commission and the South

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Carolina Office of Regulatory Staff keep confidential the terms and conditions of this Agreement; *provided, however,* Seller agrees and acknowledges that information (including Protected Information) contained in this Agreement may become public by its submission to the Commission and the South Carolina Office of Regulatory Staff, and Seller hereby consents to any such disclosure, without any reservations and without any prior notice to Seller. If the Commission issues an order or any other directive to modify, condition, suspend, or investigate any aspect of this Agreement prior to its acceptance, then this Agreement will immediately terminate, and upon any such termination neither Party shall have any obligation, duty, or liability to the other Party under this Agreement. Buyer will provide notice to Seller after Buyer has received written notice of the Commission's determination in regards to Buyer's request that the Commission accept the Agreement for filing, and if such written notice from the Commission accepts this Agreement without any modification, condition, suspension, or investigation then Buyer will notify Seller that the condition precedent under this Section 3.4 has been satisfied.

4. **Purchase and Sale Obligations**

4.1. Delivery Period. The "Delivery Period" for the Product to be generated by the Facility and sold by Seller to Buyer shall be for all hours starting at 12:00:01 AM EPT on the Commercial Operation Date through 11:59:59 PM EPT on the last day of the Term, unless this Agreement is terminated earlier pursuant to its terms and conditions.

4.2. Contract Quantity. The "Contract Quantity" will be one hundred percent (100%) of the Capacity, output of Energy (including stored Energy) produced by the Facility, less that associated with Station Power.

4.2.1. Seller shall sell and deliver the Contract Quantity of the Product exclusively and solely to Buyer. Seller's failure to generate, sell, and deliver the Contract Quantity of the Product to Buyer will be excused with no damages payable to Buyer solely to the extent such failure is due to a Permitted Excuse to Perform.

4.2.2. Buyer shall have no obligation to receive, purchase, pay for, or pay any damages associated with not receiving the Product due to a Permitted Excuse to Perform. Buyer shall have full and exclusive rights to the Product (inclusive of all components), and will be entitled to full and exclusive use of the Product (inclusive of all components) for its purposes and in its sole and exclusive discretion.

4.2.3. The estimated monthly and annual Energy production of the Facility during the Delivery Period is set forth in Exhibit 1 hereto.

4.3. Testing Period. Prior to the Commercial Operation Date Seller may test the Facility's capability to operate and generate the Product in accordance with this Agreement (the "Testing Period"). Seller shall provide Buyer with written notice of a date certain on which Seller desires to initiate the Testing Period. After the Commercial Operation Date, Buyer shall purchase the Energy produced by the Facility during the Testing Period, but expressly subject to Buyer fully satisfying the following conditions: (i) the Testing Period will not exceed sixty (60) days; and, (ii) Seller shall certify in writing to Buyer, and to Buyer's sole satisfaction, together with all supporting details, that all the Energy offered for purchase by Buyer during the Testing Period was generated by the Facility in compliance with the requirements of this Agreement. Provided that Seller fully satisfies the foregoing requirements, Buyer will purchase the Product generated during the Testing Period at the rate for the Energy only component set forth in Exhibit 1.

4.4. Contract Price. The "Contract Price" for the Product shall be the price corresponding to the

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relevant portion of the Delivery Period as set forth in Exhibit 2.

4.5. Energy Delivery. Seller shall deliver the Contract Quantity of the Product at the Delivery Point, and Seller shall be fully responsible for all costs, charges, expenses, and requirements associated with delivering the Product to the Delivery Point. Buyer will have no obligation to pay for any Product not delivered to the Delivery Point.

4.6. Payment for Product. During the Term of this Agreement, Buyer agrees to pay Seller the product of (i) the Contract Price for the Product, as applicable, multiplied by (ii) the amount of Energy delivered by Seller to Buyer at the Delivery Point during the Delivery Period.

4.7. Transfer. In no event will Seller procure or have the right to procure the Product or any component of the Product from any source other than the Facility for sale and delivery pursuant to this Agreement. Title to and risk of loss to the Product sold and delivered hereunder shall transfer from Seller to Buyer after completion of delivery at the Delivery Point. Seller shall be responsible for any costs and charges imposed on or associated with the Product and the delivery of the Product at the Delivery Point. Buyer shall be responsible for any costs or charges imposed on or associated with the Product after the Delivery Point.

4.8. Solar Integration Services Charge. Seller shall be charged a monthly Solar Integration Services Charge (SISC) in the amount of $____/Mwh, which shall be updated on a biennial basis to conform to the SISC approved by the Commission in Buyer's most recently approved South Carolina avoided cost proceeding. The SISC shall be capped at $_____/Mwh over the term of this Agreement.

5. **Credit and Related Provisions**.

5.1. Pre-COD Performance Assurance Requirements. Subject to Section 5.3 below, no later than 10 Business Days after the Effective Date, Seller shall provide and deliver to Buyer Performance Assurance in the amount of _____($_____) [insert amount equal to 2*% x total projected revenue under the Agreement during the Term as determined by Buyer in its reasonable discretion*], as such Performance Assurance may be adjusted pursuant to Section 20.5.1.].

5.2. Post-COD Performance Assurance. Subject to Section 5.3 below, after the Facility achieves Commercial Operation, Seller shall provide Buyer with Performance Assurance in the amount set forth in the below table corresponding to the applicable period during the Term of this Agreement. Post COD Performance Assurance shall be calculated by Buyer in a Commercially Reasonable Manner and shall equal the estimated year end overpayment balance for each calendar year of the Term taking into account the contract price relative to Buyer's projected avoided cost for the Term of the Agreement, calculated as of the Effective Date. Seller may request and Buyer may, subject to Section 5.2, adjust the amount of such Performance Assurance within fifteen (15) Business Days of Seller's written request to coincide with the amount set forth in the below table. Seller's failure to provide the Performance Assurance and/or to maintain the Performance Assurance in the required amount and in full force and effect throughout the Term of this Agreement will be an Event of Default under this Agreement.

[*Insert* TABLE – Annual Performance Assurance]

5.3. Unsecured Credit For Creditworthy Sellers. If Seller is Creditworthy and is not in default of any provisions under this Agreement the Seller shall be excused from the requirement to post Performance Assurance as required under Sections 5.1 and 5.2 above, as long as it remains

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Creditworthy. If at any time during the Term of this Agreement, Seller, or its Guarantor, ceases to be Creditworthy due to a change in its Credit Rating, then Seller will notify Buyer of such change in its credit status and shall provide (or replace) Performance Assurance to Buyer in the amounts required under Section 5.1 or 5.2, as applicable, within five (5) Business Days after such change in its Credit Rating.

5.4. Financial Disclosures. If requested by Buyer, Seller shall timely provide to Buyer financial information of Seller as follows: (i) a copy of Seller's most recent quarterly report containing unaudited consolidated financial statements for such fiscal quarter signed and verified by an authorized officer of Seller attesting to their accuracy; and, (ii) within 120 days after the end of each fiscal year that this Agreement is effective a copy of Seller's annual report containing audited consolidated financial statements for such fiscal year. If Seller does not have audited financial statements, Seller shall deliver to Buyer financial statements in a form reasonably acceptable to Buyer and certified by a financial officer of Seller. All financial statements required hereunder shall be prepared in accordance with generally accepted accounting principles or other procedures with which Seller is required to comply with under applicable law. If information required under this Section 5.3 is available on a publicly available web site, then the delivery requirement shall be deemed to be satisfied.

5.5. Netting. If an Event of Default has not occurred and a Party is required to pay an amount to the other Party under this Agreement, then such amounts shall be netted, and the Party owing the greater aggregate amount shall pay to the other Party any difference between the amounts owed. All outstanding obligations to make payment under this Agreement may be netted, offset, set off, or recouped therefrom, and payment shall be owed as set forth above. Unless Buyer notifies Seller in writing (except in connection with a liquidation and termination) all amounts netted pursuant to this section shall not take into account or include any credit support, which may be in effect to secure Seller's performance under this Agreement. The netting set forth above, shall be without prejudice and in addition to any and all rights, liens, setoffs, recoupments, counterclaims and other remedies and defenses (to the extent not expressly herein waived or denied) that such Party has or to which such Party may be entitled arising from or out of this Agreement.

5.6. Set-off. In addition to any rights of set-off a Party may have as a matter of law or otherwise and subject to applicable law, upon the occurrence of an Event of Default, the Non-Defaulting Party shall have the right (but shall not be obligated to) without prior notice to the Defaulting Party or any other person to set-off any obligation of the Defaulting Party owed to the Non-Defaulting Party under this Agreement (whether or not matured, whether or not contingent and regardless of the currency, place of payment or booking office of the obligation) against any obligations of the Non-Defaulting Party owing to the Defaulting Party under this Agreement (whether or not matured, whether or not contingent and regardless of the currency, place of payment or booking office of the obligation). If any such obligation is unascertained, the Non-Defaulting Party may in a Commercially Reasonable Manner estimate that obligation and set-off in respect of the estimate, subject to the relevant Party providing an accounting and true-up to the other Party after the amount of the obligation is ascertained.

5.7. Performance Assurance Requirements. Seller shall ensure that the Performance Assurance in the required amount remains in full force and effect and outstanding for the duration required by this Agreement. All applicable Performance Assurance, in the amount required pursuant to the terms of this Agreement, shall remain in full force and effect and outstanding for the benefit of Buyer until sixty (60) days following the later of (a) the end of the Term or (b) the date on which Seller has fully satisfied all obligations to Buyer under this Agreement (the "Security Period"). If at any time any Performance Assurance fails to meet any of the requirements under this Agreement, Seller shall replace such Performance Assurance with

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alternative Performance Assurance that meets each of the requirements under this Agreement. Seller will be solely responsible for any and all costs incurred with providing and maintaining any Performance Assurance to the full amount required by this Agreement. If Seller fails to replace, renew, or otherwise maintain the required Performance Assurance as and when required by this Agreement, then Buyer: (a) shall be entitled to draw and retain hereunder the full amount of the Performance Assurance; (b) shall not be obligated to make any further payments to Seller until Seller shall have provided Buyer with the replacement Performance Assurance; and, (c) shall be entitled to give Seller notice of an Event of Default and pursue the termination rights and remedies provided for in this Agreement.

5.8. Grant of Security Interest. To secure its obligations and liabilities under this Agreement to Buyer, Seller hereby grants to Buyer a present and continuing first priority security interest in, and lien on (and right of netting and set-off against), and assignment of, all present and future Performance Assurance, including, without limitation, cash collateral and cash equivalent collateral and any and all proceeds resulting therefrom or the liquidation thereof, whether now or hereafter held by, on behalf of, or for the benefit of, Buyer; and, furthermore Seller agrees to take such actions as Buyer reasonably requires to perfect Buyer's first-priority security interest in, and lien on (and right of netting, recoupment, and set-off against), such Performance Assurance and any and all products and proceeds resulting therefrom or from the liquidation thereof, including without limitation proceeds of insurance. Upon or any time after the occurrence or deemed occurrence of an Event of Default or upon an Early Termination Date, Buyer (if it is the Non-Defaulting Party) may do any one or more of the following with respect to Seller (if it is the Defaulting Party): (i) exercise any of the rights and remedies of a secured party with respect to all Performance Assurance, including any such rights and remedies under law then in effect; (ii) exercise its rights of netting, recoupment, and set-off against any and all property of Seller in the possession of Buyer or its agent; (iii) draw on any outstanding applicable forms of Performance Assurance provided for the benefit of Buyer; and, (iv) liquidate all Performance Assurance then held by or for the benefit of Buyer free from any claim or right of any nature whatsoever of Seller, including any equity or right of purchase or redemption by Seller.

6. **Seller Compliance Requirements**.

6.1. Required Approvals. Seller shall at its sole cost and expense timely obtain, maintain, and comply with all Required Approvals (definition follows) during the Term of this Agreement. "Required Approvals" means all of the following:

6.1.1. All approvals and certifications that the Facility is a Qualifying Facility.

6.1.2. All required Permits, authorizations, certifications, and/or approvals from any Governmental Authority and under any Requirements of Law, including, without limitation, from the Commission or FERC, for Seller to construct, build, own, operate, and maintain the Facility and sell and deliver the Product to Buyer in accordance with the requirements under this Agreement.

6.2. Seller Covenants. Seller covenants and warrants to Buyer as of the Effective Date of this Agreement and throughout the Term of this Agreement that: (a) Seller has submitted to the Transmission Provider and the Transmission Provider has accepted the completed interconnection request for the Facility; and (b) Seller has obtained all applicable certifications and/or approvals for the Facility from FERC. Seller agrees and acknowledges that Buyer has entered into this Agreement in reliance upon the covenants and warranties set forth above in this section, and in the event of a breach or failure of or relating to any of the foregoing covenants and warranties, including without limitation for being false or misleading in any

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respect, then this Agreement will terminate upon Buyer providing Seller with thirty (30) day's written notice unless such breach or failure has been cured before the end of such thirty (30) day period. Seller will indemnify and hold Buyer harmless for any breach or failure relating to any of the foregoing covenants and warranties, notwithstanding anything else to the contrary in this Agreement.

6.3. Seller Requirements. Within twenty (20) Business Days of a written request from Buyer, Seller agrees to provide Buyer with all information, documents, and affidavits from a duly authorized representative of Seller certifying that the Facility fully complies with PURPA, including, without limitation, the PURPA Fuel Requirements.

7. **Seller's Facility Requirements.**

7.1. Seller Requirements. Seller covenants (except to the extent expressly set forth in this Agreement) that: the Facility shall be designed, constructed, operated, controlled, maintained, and tested at Seller's sole cost and expense; the Facility shall be designed, constructed, operated (inclusive, without limitation, of control, metering equipment, and personnel and staffing levels), controlled, maintained, and tested by Seller to perform as required by this Agreement and in compliance with all applicable Requirements of Law and Prudent Utility Practice; the Facility shall be capable of supplying the Product in a safe and reliable manner consistent with the requirements of each applicable Requirements of Law and Prudent Utility Practice; and, that all contracts, agreements, arrangements, and/or Permits (including, without limitation, those necessary or prudent for the construction, ownership and operation of the Facility, such as land use permits, site plan approvals, real property titles and easements, environmental compliance and authorizations, grading and building permits, and contracts and/or licenses to obtain the underlying fuel, install and operate the Facility, and deliver and sell the Product of the Facility) shall be timely obtained and maintained by Seller, at Seller's sole cost and expense. Seller shall be responsible for arranging and obtaining, at its sole risk and expense, any station service required by the Facility. Seller shall construct, interconnect, operate, and maintain the Facility in accordance with Prudent Utility Practice. Seller shall be responsible for all costs, charges, and expenses associated with generating, scheduling, and delivering the Energy to Buyer.

7.1.1. Notice Requirement. For each Operational Milestone, Seller shall deliver written notice to Buyer within five (5) Business Days of Seller having met such Operational Milestone. If Seller will be unable to timely meet any Operational Milestone, Seller shall also deliver written notice to Buyer informing Buyer that Seller will be unable to meet an Operational Milestone, but in any event Seller shall deliver notice to Buyer no later than five (5) Business Day after the due date of the Operational Milestone that Seller failed to achieve. Buyer shall have no obligation or liability to Seller for Buyer failing to advise Seller of any condition, damages, circumstances, infraction, fact, act, omission or disclosure discovered or not discovered by Buyer with respect to any Operational Milestone, the Facility, the System or any contractor.

7.2. Seller Responsibilities. Notwithstanding any provision of this Agreement to the contrary, the Seller agrees that: (a) Buyer shall have no responsibility whatsoever for any costs and/or Taxes relating to the design, development, construction, maintenance, ownership, or operation of the Facility (including but not limited to any financing costs, and any costs and/or Taxes imposed by any Governmental Authority on or with respect to emissions from or relating to the Facility, and including but not limited to costs and/or Taxes related to any emissions allowances *inter alia* for oxides for sulfur dioxide or nitrogen, carbon dioxide, and mercury), all of which shall be entirely at Seller's sole cost and expense; and, (b) any risk as to the

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availability of production tax benefits, investment tax credits, grants or any other incentives relating to the design, development, construction, maintenance, ownership, or operation of the Facility shall be borne entirely by Seller.

7.2.1. No Exclusions. If any production or investment tax credit, grants, subsidy, or any other similar incentives or benefit relating, directly or indirectly, to the Facility is unavailable or becomes unavailable at any time during the Term of this Agreement, Seller agrees that such event or circumstance will not: (a) constitute a Force Majeure or Regulatory Event; (b) excuse or otherwise diminish Seller's obligations hereunder in any way; and, (c) give rise to any right by Seller to terminate or avoid performance under this Agreement. Seller agrees that it will solely and fully bear all risks, financial and otherwise throughout the Term, associated with Seller's or the Facility's eligibility to receive any such tax treatment or otherwise qualify for any preferential or accelerated depreciation, accounting, reporting, or tax treatment.

7.3. Transmission Provider. Seller agrees and acknowledges that the Interconnection Agreement is (and will be) a separate agreement (or agreements) between Seller and Transmission Provider, and will exclusively govern all requirements and obligations between Seller and Transmission Provider. Only the Interconnection Agreement will govern all obligations and liabilities set forth in the Interconnection Agreement, and Seller shall be solely and fully responsible for all costs and expenses for which Seller is responsible for under the Interconnection Agreement. Seller shall comply with all Interconnection Instructions. Nothing in the Interconnection Agreement, nor any other agreement between Seller on the one hand and Transmission Provider on the other hand, nor any alleged event of default thereunder, shall affect, alter, or modify the Parties' rights, duties, obligation, and liabilities under this Agreement. This Agreement shall not be construed to create any rights between Seller and the Transmission Provider, and the terms of this Agreement are not (and will not) be binding upon the Transmission Provider. Seller agrees and acknowledges that Seller's performance under this Agreement depends on Seller's performance under the Interconnection Agreement, and Seller hereby grants Buyer the right and entitlement to obtain information from the Transmission Provider in regards to Seller's performance under the Interconnection Agreement.

7.4. System Operations. Seller agrees and acknowledges that the System Operator will be solely responsible for its functions, and that nothing in this Agreement will be construed to create any rights between Seller and the System Operator. Seller agrees that it is obligated to engage in interconnected operations with Buyer and the System, and Seller agrees to fully comply with all System Operator Instructions.

7.5. Insurance Obligations. Commencing with the initiation of construction activities of the Facility and continuing until the termination of this Agreement, and at no additional cost to Buyer, Seller shall maintain or cause to be maintained by contracted parties at the Facility, occurrence form insurance policies as follows: (a) Workers' Compensation in accordance with the statutory requirements of the state in which the Services are performed and Employer's Liability Insurance of not less than $500,000 each accident/employee/disease; (b) Commercial General Liability Insurance having a limit of at least $1,000,000 per occurrence/$2,000,000 in the aggregate for contractual liability, personal injury, bodily injury to or death of persons, and damage to property, premises and operations liability and explosion, collapse, and underground hazard coverage; (c) Commercial/Business Automobile Liability Insurance (including owned (if any), non-owned or hired autos) having a limit of at least $1,000,000 each accident for bodily injury, death, property damage and contractual liability; (d) Property Damage insurance on the Facility written on an all risk of loss basis; and, (e) if Seller will be handling or the Facility will have present environmentally regulated

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or hazardous materials, Pollution Legal Liability, including coverage for sudden/accidental occurrences for bodily injury, property damage, environmental damage, cleanup costs and defense with a minimum of $1,000,000 per occurrence (claims-made form acceptable with reporting requirements of at least one (1) year). All insurance policies provided and maintained by Seller or applicable party shall: (i) be underwritten by insurers which are rated A.M. Best "A- VII" or higher; (ii) specifically include Buyer as additional insured's, excluding, however, for Worker's Compensation/Employer's Liability and Property Damage insurance; (iii) be endorsed to provide, where permitted by law, waiver of any rights of subrogation against Buyer; and (iv) provide that such policies and additional insured provisions are primary and without right of contribution from any other insurance, self-insurance or coverage available to Buyer. Any deductibles or retentions shall be the sole responsibility of Seller or the applicable party. Seller's compliance with these provisions and the limits of insurance specified herein shall not constitute a limitation of Seller's liability pursuant to this Agreement. Any failure to comply with and these provisions shall not be deemed a waiver of any rights of Buyer under this Agreement or with respect to any insurance coverage required hereunder. Buyer at its sole discretion may request Seller to provide a copy of any or all of its required insurance policies, including endorsements in which Buyer is included as an additional insured for any claims filed relative to the Facility or this Agreement.

8. **Facility Performance Requirements**

8.1. Planned Outages. No later than fifteen (15) Business Days prior to the end of each year during the Term, Seller shall provide to Buyer a Planned Outage schedule for the upcoming year. Seller shall provide Buyer with reasonable advance notice of any material change in the Planned Outage schedule. Seller shall determine the number and extent of Planned Outages in a Commercially Reasonable Manner recognizing that it is the intent of the Parties to maximize production of the Facility and to such extent Seller shall be excused from providing the Product during such Planned Outage(s). Unless both Parties expressly agree otherwise, any Planned Outage shall only occur during the months of March, April, May, September, October, or November.

8.2. Maintenance Outages. If Seller needs or desires to schedule a Maintenance Outage of the Facility, Seller shall notify Buyer, as far in advance as reasonable and practicable under the circumstances, of such proposed Maintenance Outage, and the Parties shall plan such outage to mutually accommodate the reasonable requirements of Seller and delivery expectations of Buyer. Notice of a proposed Maintenance Outage shall include the expected start date of the outage, the amount of output of the Facility that will not be available and the expected completion date of the outage. Buyer may request reasonable modifications in the schedule for the outage. Subject to its operational and maintenance needs, Seller shall comply with such requests to reschedule a Maintenance Outage. If rescheduled, Seller shall notify Buyer of any subsequent changes in the output that will not be available to Buyer and any changes in the Maintenance Outage completion date. As soon as practicable, any such notifications given orally shall be confirmed in writing.

8.3. Notice. Seller shall promptly provide to Buyer an oral report of all outages, Emergency Conditions, de-ratings, major limitations, or restrictions affecting the Facility, which report shall include the cause of such restriction, amount of generation from the Facility that will not be available because of such restriction, and the expected date that the Facility will return to normal operations. Seller shall update such report as necessary to advise Buyer of any material changed circumstances relating to the aforementioned restrictions. As soon as practicable, all oral reports shall be confirmed in writing. Seller shall promptly dispatch personnel to perform the necessary repairs or corrective action in an expeditious and safe manner in accordance

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with Prudent Utility Practice.

8.4. Performance. Seller shall fully satisfy the PURPA Fuel Requirements during the Term of this Agreement and shall act in a Commercially Reasonable Manner to maximize the output of the Facility in a safe manner to generate the Product and to minimize the occurrence, extent, and duration of any event adversely affecting the generation of the Product, in each case consistent with Prudent Utility Practice.

8.5. Output Requirement. Starting the first full calendar year after the Commercial Operation Date of the Facility, for each year during the Delivery Period, Seller shall deliver to Buyer no less than seventy percent (70%) of the Expected Annual Output averaged over two consecutive calendar years on a rolling basis during the Delivery Period (the "Net Output Requirement"). Where a Permitted Excuse to Perform adversely affects actual generation output of the Facility, the Net Output Requirement shall be reduced by the amount of Energy not generated due to the Permitted Excuse to Perform; provided, however, Seller agrees that it must demonstrate to Buyer, in Buyer's Commercially Reasonable discretion, that the Facility's generation output was actually reduced due to a Permitted Excuse to Perform. Buyer's sole remedy for Seller's failure to deliver the Net Output Requirement for any period of two consecutive years shall be to receive a credit against the Contract Price for each month during the immediately following full calendar year. The foregoing monthly credit to Buyer shall be determined by (a) multiplying (i) the difference between the Net Output Requirement and the actual Energy (expressed in MWh) delivered by Seller and received by Buyer during the applicable time period by (ii) [50% of average Contract Price for Energy delivered to Buyer in the previous 12 months] and (b) then dividing the amount calculated by (a) above by twelve (12). If Seller fails to satisfy the Net Output Requirement for any two-year period, to determine compliance with the Net Output Requirement in the next rolling two-year period, then the amount of Energy generated in the first year of such two-year rolling period will be deemed to be the higher of (i) seventy percent (70%) of the Expected Annual Output for such year, or (ii) the actual amount of Energy generated by the Facility in such year.

8.6. System Operator Instructions and Payments. Seller shall cooperate with Buyer to immediately and fully comply with all System Operator Instructions, and Seller hereby authorizes and grants to Buyer the right to control the Facility in any manner necessary to enable Buyer to take any actions required to implement or effectuate any System Operator Instruction. In order to implement the control rights authorized in this Section 8.6, Seller shall design and construct the Facility to provide Buyer with full control capabilities over the Facility, and Seller shall install and maintain the equipment set forth in Exhibit 4 so as to enable Buyer to have full control over the Facility to take any action based in any manner on or in response to an System Operator Instruction. If the System Operator requires the Facility to reduce or stop the generation of Energy pursuant to a System Operator Instruction (such reductions or cessations of Energy, the "Dispatch Down" of production by the Facility), Buyer shall pay Seller the amount set forth below if, and only if: (i) the Facility was operating at the time of the Dispatch Down instruction, and was required to and actually reduced Energy production pursuant to a Dispatch Down instruction; (ii) the actual reduction of Energy generation by the Facility due to Dispatch Down instructions exceeds [insert amount =_5% of annual expected output for year one stated in whole MWhs _(___)] MWh (the "Dispatch Down Payment Threshold") in a calendar year (January – December); and, (iii) the Dispatch Down instruction was not due to an Emergency Condition or Force Majeure event (the foregoing items (i)-(iii), collectively, the "Dispatch Down Payment Event").

8.6.1. For each calendar year, after a Dispatch Down Payment Event occurs during that calendar year, Buyer shall pay Seller starting with the [insert amount specified in 8.6 + 1] ____(___)] MWh, at the Contract Price for the Product multiplied by the units of

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Product not generated due to the Dispatch Down instruction(s).

8.6.2. Estimation Methodology. Buyer shall determine in a Commercially Reasonable Manner the quantity of Energy that could not be generated due to compliance with and implementation of the Dispatch Down instruction(s) based on: (i) The power plant controller output data points specified in Exhibit 6 attached hereto, which Seller shall provide to Buyer, on a real time basis, during the Term of this Agreement; (ii) the duration of the Dispatch Down; (iii) the amount of the generating capability of the Facility that is curtailed by the applicable Dispatch Down (e.g. 10% generation capability is curtailed); (iv) the solar exposure, irradiance, and meteorological circumstances actually recorded at the Facility during the Dispatch Down period; and (v) the Facility design, performance capability, and historic performance (the "Estimation Methodology"). Seller shall be responsible for installing and maintaining all equipment necessary to provide Buyer with the power plant controller output data points specified in Exhibit 9 on a real-time basis. In the event that the real-time data specified in 8.6.2(i) is unavailable historical production data required under Section 9.4.5 shall be used in its place.

8.6.3. In the event Seller demonstrates that a Dispatch Down instruction issued by the System Operator does not fall within the definition of a System Operator Instruction and that the Facility actually reduced Energy production pursuant to such Dispatch Down instruction, Seller shall be entitled to a compensatory payment from Buyer, calculated using the Estimation Methodology, in the amount of the Contract Price for the Product not generated due to compliance with the Dispatch Down instruction (starting with the first MWh of Product not generated) as Seller's sole and exclusive payment and remedy for its compliance with such instruction.

8.7. Energy Storage. If the Facility is to be equipped with battery storage or other energy storage device (the "Storage Resource"), the Storage Resource shall be identified in Exhibit 4 attached to this Agreement, which shall be subject to Buyer's final approval. In all cases the Storage Resource must be charged solely by the Facility and the use of any Storage Resource shall be operated and equipped in accordance with the System Operator's Energy Storage Protocol, a copy of which is attached hereto as Exhibit 10, as may be modified from time to time by the System Operator (the "Energy Storage Protocol").

9. **Information Requirements**

9.1. Accounting Information. Generally Accepted Accounting Principles ("GAAP") and SEC rules can require Buyer to evaluate various aspects of its economic relationship with Seller, e.g., whether or not Buyer must consolidate Seller's financial information. To evaluate if certain GAAP requirements are applicable, Buyer may need access to Seller's financial records and personnel in a timely manner. In the event that Buyer determines that consolidation or other incorporation of Seller's financial information is necessary under GAAP, Buyer shall require the following for each calendar quarter during the term of this Agreement, within 90 days after quarter end: (a) complete financial statements, including notes, for such quarter on a GAAP basis; and, (b) financial schedules underlying the financial statements. Seller shall grant Buyer access to records and personnel to enable Buyer's independent auditor to conduct financial audits (in accordance with GAAP standards) and internal control audits (in accordance with Section 404 of the Sarbanes-Oxley Act of 2002). Any information provided to Buyer pursuant to this section shall be considered confidential in accordance with the terms of this Agreement and shall only be disclosed, as required by GAAP, on an aggregate basis with other similar entities for which Buyer has power purchase agreements.

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9.2. Facility Information. After the expiration of the Due Diligence Period, and continuing for a period of three months after the Commercial Operation Date, Seller shall promptly provide to Buyer reports relating to the progress of the Facility's development and construction, financing, interconnection activities and performance under the Interconnection Agreement, testing, Seller's good faith estimate of the date for occurrence of the Commercial Operation Date, operational activities, and other information that Buyer may request in its Commercially Reasonable discretion to inform Buyer of Seller's performance under this Agreement. Within ten (10) days after the end of each calendar month until the Commercial Operation Date is achieved, Seller shall prepare and submit to Buyer a written status report which shall cover the previous calendar month, shall be prepared in a manner and format (hard copy or electronic) reasonably acceptable to Buyer and shall include (a) a detailed description of the progress of the Facility's construction, (b) a statement of any significant issues which remain unresolved and Seller's recommendations for resolving the same, (c) a summary of any significant events which are scheduled or expected to occur during the following thirty (30) days; and, (d) all additional information reasonably requested by Buyer. If Seller has reason to believe that the Facility is not likely to timely achieve any Milestone Deadline, including the Commercial Operation Date, Seller shall promptly provide written notice to Buyer with all relevant facts, and will provide Buyer with any other information Buyer may request from Seller in respects to such failure of Seller. Seller shall give written notice to Buyer no later than 30 days before Seller projects that the Facility will achieve Commercial Operation. Seller shall provide written notice to Buyer when the Commercial Operation Date has occurred. Following the Commercial Operation Date, Seller shall promptly provide to Buyer information requested by Buyer to verify any amounts of delivered Product, or to otherwise audit the Product delivered to Buyer. Seller shall, within ten (10) Business Days of electronic or written request provide Buyer with any other information germane to this Agreement and/or Seller's performance under and compliance with this Agreement, requested by Buyer in its Commercially Reasonable discretion.

9.3. Other Information. Seller shall provide to Buyer all information, instruments, documents, statements, certificates, and records relating to this Agreement and/or the Facility as reasonably requested by Buyer concerning any administrative, regulatory, compliance, or legal requirements reasonably determined by Buyer to fulfill any Requirements of Law, regulatory reporting requirements or otherwise relating to any request by any Governmental Authority.

9.4. Forecasts. Seller shall prepare and provide Buyer with the Facility's forecasted Energy production by fuel type, if applicable. These non-binding forecasts of production will be determined and prepared in a Commercially Reasonable Manner with the intent of being as accurate as possible. Seller shall update a forecast any time information becomes available indicating a material change in the forecast relative to the most previously provided forecast.

9.4.1. Year-Ahead Forecasts. Seller shall, by December 1 of each year during the Term (except for the last year of the Term), provide Buyer with a forecast of each month's average-day Energy production from the Facility, by hour, for the following calendar year. This forecast shall include an expected range of uncertainty based on historical operating experience. Seller shall update the forecast for each month at least five (5) Business Days before the first Business Day of such month.

9.4.2. Week-Ahead Forecasts. By 0800 EPT on the Friday preceding the immediately upcoming week of delivery, Seller shall provide Buyer with a daily forecast of deliveries for the upcoming week (Monday through Sunday).

9.4.3. Day-Ahead Forecasts. By 0500 EPT on the calendar day immediately preceding the day of delivery, Seller shall provide Buyer with an hourly forecast of deliveries for each

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hour of the next seven (7) days. In the event that Seller has any information or other Commercially Reasonable basis to believe that the production from the Facility on any day will be materially lower or higher than what would otherwise be expected based on the forecasts provided, then Seller will inform Buyer of such circumstance by 0500 EPT on the preceding Business Day.

9.4.4. Communication. Seller shall communicate forecasts in a form, template, substance, and manner as requested by Buyer (e.g. Excel template), which form, template, substance, and manner may be modified by Buyer from time to time. Forecasts shall be transmitted by email (to be sent to: RenewableEnergyForecast@duke-energy.com) or by other media (e.g. website upload), as Buyer may instruct Seller from time to time. Requested forecast data may include but is not limited to, location, forecast timestamp, site capacity, a flag for actual or forecasted data, available site capacity, energy, reason for any capacity reduction, site plane of array (POA) irradiance, air pressure, and relative humidity for each hour of the next seven days.

9.4.5. History. Seller shall prepare and provide Buyer with the Facility's historical Energy production by fuel type, if applicable. The historical production will be determined and prepared by Seller in a Commercially Reasonable Manner with the intent of being as accurate as reasonably possible. Seller shall update any correction to the history any time information becomes available.

9.4.5.1. Daily History. By 0500 EPT on the Business Day immediately following the day of delivery, Seller shall provide Buyer with an hourly profile of deliveries for each hour of the previous seven days.

9.4.6. History Communication. Seller shall communicate history in a form, template, substance, and manner as requested by Buyer (e.g. Excel template), which form, template, substance, and manner may be modified by Buyer from time to time. The History shall be transmitted by email (to be sent to: RenewableEnergyForecast@duke-energy.com) or by other media (e.g. website upload), as Buyer may instruct Seller from time to time. Requested historical data may include but is not limited to, location, site capacity, a flag for actual or forecasted data, available site capacity, energy generated, reason for any capacity reduction, site POA irradiance, air pressure, and relative humidity for each hour of the previous seven days.

10. **Metering**

10.1. Billing Meter. In the Interconnection Agreement between Seller and Transmission Provider, Seller shall arrange with the Transmission Provider to construct and install such meters and metering equipment as are necessary to measure the Energy delivered and received in accordance with the terms and conditions of this Agreement (the "Billing Meter"). Buyer shall provide to Seller the reasonable allowable accuracy limits relating to the performance of the Billing Meter, and Seller shall arrange with Transmission Provider to install and operate a Billing Meter that meets the allowable accuracy limits. Seller shall be responsible for paying the Transmission Provider for all costs relating to the Billing Meter, including, without limitation, its procurement, installation, operation, calibration, and maintenance. Seller shall ensure in its arrangement with the Transmission Provider for the Billing Meter to include communication equipment that enables Buyer to access and read the meter from a remote location. Seller hereby grants Buyer with rights to physically access the Billing Meter. Seller shall provide Buyer (at Seller's cost) with appropriate telephonic/electronic communication to allow Buyer to remotely read the meter. Seller may, at its own expense, install and maintain additional metering equipment for purposes of monitoring, recording or transmitting data relating to its sale of Energy from the Facility, so long as such equipment

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does not interfere with the Billing Meter. Seller shall arrange with the Transmission Provider to test the Billing Meter at regular intervals. Seller shall also arrange for either Party to have the right to request and obtain, at reasonable intervals and under reasonable circumstances, additional/special tests of the Billing Meter. The Party making such request for the test shall incur the costs associated with such test.

11. **Billing Period and Payment**

11.1. Billing Period. Subject to Seller authorizing Transmission Provider to provide Buyer with electronic access to the Billing Meter, Buyer shall read/obtain data from the Billing Meter at regular intervals, which shall be not less than twenty-seven (27) consecutive days and not more than thirty-three (33) consecutive days (each, a "Billing Period") except for the initial and final billing periods hereunder which may be shorter to permit the readings to otherwise coincide with calendar months. Within twenty-five (25) days after reading/obtaining data from the Billing Meter, Buyer shall provide Seller with an invoice detailing the amount of Product delivered during the relevant Billing Period and the associated amount owed by Buyer to Seller for the Product, subject to Seller cooperating with Buyer and providing Buyer with such information and/or data that Buyer may request to accurately prepare the invoice. Buyer shall pay Seller the invoiced amounts for each Billing Period. Payment by Buyer shall be due thirty (30) days after the invoice date. If such amounts are not paid by the deadline, they shall accrue interest at the Interest Rate from the applicable due date until the date paid. Amounts not paid by such deadline shall accrue interest at the Interest Rate from the original due date until the date paid in accordance with this Agreement.

11.2. Meter Malfunction. In the event the Billing Meter fails to register accurately within the allowable accuracy limits as set forth above, then for purposes of preparing (or adjusting) any affected invoice Buyer shall adjust the amount of measured Energy for the period of time the Billing Meter was shown to be in error. If the time the Billing Meter became inaccurate can be determined, then the adjustment to the amount of measured Energy shall be made for the entire time from the time that the Billing Meter became inaccurate until the recalibration of the Billing Meter. If the time the Billing Meter became inaccurate cannot be determined, then the Billing Meter shall be deemed to have failed to register accurately for fifty percent (50%) of the time since the date of the last calibration of the Billing Meter.

11.3. Out-of-Service. If the Billing Meter is out of service, then for purposes of preparing any affected invoice, the Parties shall negotiate in good faith to determine an estimate of the amount of Energy delivered during the relevant Billing Period. Seller's meter (if any), may be used to establish such estimate, if both Parties agree. If, within twenty (20) days after the date that the Billing Meter is read as set forth above, the Parties have not reached agreement regarding an estimate of the amount of Energy delivered during the relevant Billing Period, then the amount of Energy delivered during the relevant Billing Period shall be determined using the Estimation Methodology.

11.4. Errors. If any overcharge or undercharge in any form whatsoever shall at any time be found for an invoice, and such invoice has been paid, the Party that has been paid the overcharge shall refund the amount of the overcharge to the other Party, and the Party that has been undercharged shall pay the amount of the undercharge to the other Party, within forty-five (45) days after final determination thereof; provided, however, that no retroactive adjustment shall be made for any overcharge or undercharge unless written notice of the same is provided to the other Party within a period of twenty-four (24) months from the date of the invoice in which such overcharge or undercharge was first included. Any such adjustments shall be made with interest calculated at the Interest Rate from the date that

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the undercharge or overcharge actually occurred.

11.5. Invoice/Payment Dispute. If a Party in good faith reasonably disputes the amount set forth in an invoice, charge, statement, or computation, or any adjustment thereto, such Party shall provide to the other Party a written explanation specifying in detail the basis for such dispute. The Party disputing the invoice, if it has not already done so, shall pay the undisputed portion of such amount no later than the applicable due date. If the Parties are thereafter unable to resolve the dispute through the exchange of additional documentation, then the Parties shall pursue resolution of such dispute according to the dispute resolution and remedy provisions set forth in the Agreement. Notwithstanding any other provision of this Agreement to the contrary, if any invoice, statement charge, or computation is found to be inaccurate, then a correction shall be made and payment (with applicable interest) shall be made in accordance with such correction; provided, however, no adjustment shall be made with respect to any invoice, statement, charge, computation or payment hereunder unless a Party provides written notice to the other Party questioning the accuracy thereof within twenty-four (24) months after the date of such invoice, statement, charge, computation, or payment.

12. **Audit Rights**

12.1. Process. Buyer shall have the right, at its sole expense and during normal business hours, without Seller requiring any compensation from Buyer, to examine and copy the records of Seller to verify the accuracy of any invoice, statement, charge or computation made hereunder or to otherwise verify Seller's performance under this Agreement, including, without limitation, verifying that the delivered Product complies with the Agreement.

12.2. Survival. All audit rights shall survive the expiration or termination of this Agreement for a period of twenty-four (24) months after the expiration or termination. Seller shall retain any and all documents (including, without limitation, paper, written, and electronic) and/or any other records relating to this Agreement and the Facility for a period of twenty-four (24) months after the termination or expiration of this Agreement.

13. **Taxes**

13.1. Seller. Seller shall be liable for and shall pay Buyer, or Seller shall reimburse Buyer if Buyer has paid or cause to be paid, all Taxes imposed by a Governmental Authority on or with respect to the Product delivered hereunder and arising prior its delivery to and at the Delivery Point (including ad valorem, franchise or income taxes which are related to the sale of the Product by Seller to Buyer and are, therefore, the responsibility of Seller). Seller shall indemnify, defend, and hold harmless Buyer from any liability for such Taxes, including related audit and litigation expenses.

13.2. Buyer. Buyer shall be liable for and shall pay Seller, or Buyer shall reimburse Seller if Seller has paid or caused to by paid, all Taxes imposed by a Governmental Authority on or with respect to the Product delivered hereunder and arising after the Delivery Point (other than ad valorem, franchise or income taxes which are related to the sale of the Product by Seller to Buyer and are, therefore, the responsibility of Seller). Buyer shall indemnify, defend, and hold harmless Seller from any liability for such Taxes, including related audit and litigation expenses.

13.3. Remittances. In the event Seller is required by any Requirements of Law to remit or pay Taxes that are Buyer's responsibility hereunder, Seller may request reimbursement of such

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payment from Buyer by sending Buyer an invoice, and Buyer shall include such reimbursement in the next monthly invoice and Buyer shall remit payment thereof. Conversely, if Buyer is required by any Requirements of Law to remit or pay Taxes that are Seller's responsibility hereunder; Buyer may deduct the amount of any such Taxes from the sums otherwise due to Seller under this Agreement. Any refunds or remittances associated with such Taxes shall be administered in accordance with Section 11.1.

13.4. Documentation. A Party, upon written request of the other Party, shall promptly provide a certificate of exemption or other reasonably satisfactory evidence of exemption if such Party is exempt from any Tax. Nothing herein shall obligate a Party to pay or be liable to pay any Taxes from which it is exempt pursuant to applicable law.

14. **Force Majeure**

14.1. Definition. "Force Majeure" means: (A) war, riots, floods, hurricanes, tornadoes, earthquakes, lightning, ice-storms, excessive winds, and other such extreme weather events and natural calamities; (B) explosions or fires arising from lightning or other natural causes unrelated to acts or omissions of the Party; (C) insurrection, rebellion, nationwide strikes; and (D) an act of god or other such significant and material event or circumstance which prevents one Party from performing a material and significant obligations hereunder, which such event or circumstance was not anticipated as of the Effective Date, is not within the Commercially Reasonable control of, or the result of the negligence of such claiming Party, and which, by the exercise of Commercially Reasonable Efforts, the claiming Party is unable to overcome or avoid or cause to be avoided; and (E) delays in obtaining goods or services from any subcontractor or supplier to the extent caused by the occurrence of any of the events described in the immediately preceding subparts (A) through (D). The acts, events or conditions listed in subparts (A) through (E) above shall only be deemed a Force Majeure if and to the extent they actually and materially delay or prevent the performance of a Party's obligations under this Agreement and: (i) are beyond the reasonable control of the Party, (ii) are not the result of the willful misconduct or negligent act or omission of such Party (or any person over whom that Party has control), (iii) are not an act, event or condition that reasonably could have been anticipated, or the risk or consequence of which such Party has assumed under the Agreement; and, (iv) cannot be prevented, avoided, or otherwise overcome by the prompt exercise of Commercially Reasonable diligence by the Party (or any Person over whom that Party has control).

14.1.1. Notwithstanding anything to the contrary herein, Force Majeure will *not* include the following: (a) any strike or labor dispute of the employees of either Party or any subcontractor that is not part of a regional or nationwide strike or labor dispute; (b) any difficulty in obtaining or maintaining sufficient, or appropriately skilled, personnel to perform the work in accordance with the requirements of this Agreement; (c) normal wear and tear or obsolescence of any equipment; (d) Buyer's inability to economically use or resell the Product delivered and purchased hereunder; (e) Seller's ability to sell the Product (or any component of the Product) at a more advantageous price; (f) loss by Seller of any contractual arrangement; (g) any Regulatory Event; (h) loss or failure of Seller's supply of the Product or inability to generate the Product that is not caused by an independent Force Majeure event; (i) the cost or availability or unavailability of fuel, solar energy, wind, or motive force, as applicable, to operate the Facility; (j) economic hardship, including, without limitation, lack of money or financing or Seller's inability to economically generate the Product or operate the Facility; (k) any breakdown or malfunction of Facility equipment (including any serial

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equipment defect) that is not directly caused by an independent event of Force Majeure; (l) the imposition upon Seller of costs or taxes allocated to Seller hereunder or Seller's failure to obtain or qualify for any tax incentive, preference, or credit; (m) delay or failure of Seller to obtain or perform any Permit; (n) any delay, alleged breach of contract, or failure under any other agreement or arrangement between Seller and another entity, including without limitation, an agent or sub-contractor of Seller (except as a direct result of an event of Force Majeure defined in 14.1(E)); (o) Seller's failure to obtain, or perform under, the Interconnection Agreement, or its other contracts and obligations to Transmission Provider; or (p) increased cost of electricity, steel, materials, equipment, labor, or transportation.

14.2. Event. If either Party is rendered unable by Force Majeure to carry out, in whole or in part, any material obligation hereunder, such Party shall provide notice and reasonably full details of the event to the other Party as soon as reasonably practicable after becoming aware of the occurrence of the event (but in no event later than three (3) Business Days of the initial occurrence of the event of Force Majeure). Such notice may be given orally but shall be confirmed in writing as soon as practicable thereafter (and in any event within ten (10) days of the initial occurrence of the event of Force Majeure); provided however, a reasonable delay in providing such notice shall not preclude a Party from claiming Force Majeure but only so long as such delay does not prejudice or adversely affect the other Party.

14.3. Effect. Subject to the terms and conditions of Section 14, for so long as the event of Force Majeure is continuing, the specific obligations of the Party that are demonstrably and specifically adversely affected by the Force Majeure event, shall be suspended to the extent and for the duration made necessary by the Force Majeure, will not be deemed to be an Event of Default, and performance and termination of this Agreement will be governed exclusively by this Section 14. Notwithstanding anything to the contrary in this Agreement, Force Majeure will *not* be applicable to and will *not* be available as an excuse to Seller's performance of the obligations set forth in Sections 19.3 through and including 19.24. Notwithstanding anything to the contrary in this Agreement, Force Majeure will *not* be available as an excuse to any delays or failures in Seller timely achieving Commercial Operations by the Commercial Operations Date, and any such delays or failures shall be governed exclusively by Section 20.5.

14.4. Remedy. The Party claiming Force Majeure shall act in a Commercially Reasonable Manner to remedy the Force Majeure as soon as practicable and shall keep the other Party advised as to the continuance of the Force Majeure event. If a bona fide Force Majeure event persists for a continuous period of one hundred eighty (180) days, then the Party not claiming Force Majeure shall have the right, in its sole and unfettered discretion, to terminate this Agreement upon giving the other Party ten (10) Business Days advance written notice; provided, however, that where the Force Majeure event cannot be remedied within one hundred eighty (180) days and the claiming Party can demonstrate to the non-claiming Party its intention and ability to implement a Commercially Reasonable plan to remedy such Force Majeure event within an additional one hundred eighty (180) days after the initial one hundred eighty (180) day period and the claiming Party uses Commercially Reasonable efforts to implement such plan, the non-claiming Party shall not have the right to terminate the Agreement until the expiration of such additional one hundred eighty (180) day period.

14.5. Termination. Unless otherwise agreed upon by the Parties in writing and in each Party's sole discretion, upon the expiration of the periods set forth above in Sections 14.4, this Agreement may be terminated without any further notice and further opportunity to cure any non-performance. Upon termination becoming effective pursuant to a Force Majeure under Section

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14, neither Party will have any liability to the other Party or recourse against the other Party, other than for amounts arising prior to termination. Notwithstanding the claimed existence of a Force Majeure event or any other provisions of this Agreement, nothing herein shall relieve any Party from exercising any right or remedy provided under this Agreement with respect to any liability or obligation of the other Party that is not excused or suspended by the Force Majeure event, including, without limitation, the right to liquidate and early terminate the Agreement for any Event of Default not excused by the Force Majeure event. Nothing herein shall be construed so as to obligate any Party to settle any strike, work stoppage or other labor dispute or disturbance or to make significant capital expenditures, except in the sole discretion of the Party experiencing such difficulty.

15. **Change in Law**

15.1. Regulatory Event. A "Regulatory Event" means one or more of the following events:

15.1.1. Illegality. After the Effective Date, due to the adoption of, or change in, any applicable Requirements of Law or in the interpretation thereof by any Governmental Authority with competent jurisdiction, it becomes unlawful for a Party to perform any material obligation under this Agreement.

15.1.2. Adverse Government Action. After the Effective Date, there occurs any adverse material change in any applicable Requirements of Law (including material change regarding a Party's obligation to sell, deliver, purchase, or receive the Product) and any such occurrence renders illegal or unenforceable any material performance or requirement under this Agreement.

15.2. Process. Upon the occurrence of a Regulatory Event the Party affected by the Regulatory Event may notify the other Party in writing of the occurrence of a Regulatory Event, together with details and explanation supporting the occurrence of a Regulatory Event. Upon receipt of such notice, the Parties agree to undertake, during the thirty (30) days immediately following receipt of the notice, to negotiate such modifications to reform this Agreement to remedy the Regulatory Event and attempt to give effect to the original intention of the Parties. Upon the expiration of the 30-day period, if the Parties are unable to agree upon modifications to the Agreement that are acceptable to each Party, in each Party's reasonable discretion, then either Party shall have the right, in such Party's sole discretion, to terminate this Agreement with a 30-day advance written notice.

16. **Confidentiality**

16.1. Protected Information. Protected Information. Except as otherwise set forth in this Agreement, neither Party (the "Receiving Party") shall, without the other Party's (the "Disclosing Party") prior written consent, disclose any Protected Information (as defined below) of the Disclosing Party to any third person (other than the Party's employees, affiliates, advisors, counsel, accountants, and current and prospective lenders and investors in the Facility who have a need to know such information, have agreed to keep such terms confidential, and for whom the Party shall be liable in the event of a breach of such confidentiality obligation), at any time during the Term or for five (5) years after the expiration or early termination of this Agreement. As used herein the term "Protected Information" means (a) this Agreement, (b) any proprietary information of the Disclosing Party disclosed in connection with this Agreement, including without limitation, proposals and negotiations whether disclosed prior to or after the date hereof that have been clearly marked as confidential or proprietary. Notwithstanding anything to the contrary herein, in no event will Protected Information include the concept of constructing or providing energy from a power

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plant, using any specific fuel source, in any specific location. Each Party shall be entitled to all remedies available at law or in equity (including but not limited to specific performance and/or injunctive relief,) to enforce, or seek relief in connection with, this confidentiality obligation. Notwithstanding any other provision of this Agreement, any claim related to or arising out of any confidentiality obligations herein may be brought directly in any state or federal court of competent jurisdiction in Greenville County, South Carolina, in accordance with Section 26.5 of this Agreement, and shall not be subject to dispute resolution or arbitration pursuant to Section 23 of this Agreement.

16.2. Non-Confidential Information. Protected Information does not include information: (i) that is or becomes available to the public other than by disclosure of Receiving Party in breach of this Agreement; (ii) known to Receiving Party prior to its disclosure; (iii) available to Receiving Party from a third party who is not bound to keep such information confidential; or, (iv) independently developed by the Receiving Party without reliance upon the Protected Information.

16.3. Return of Confidential Information. Upon request of Disclosing Party, Receiving Party shall either (i) return the Protected Information, including all copies, or (ii) destroy the Protected Information, including all copies, and present written assurances of the destruction to Disclosing Party. Notwithstanding the foregoing, both Parties acknowledge that Protected Information transferred and maintained electronically (including e-mails) may be automatically archived and stored by Receiving Party on electronic devices, magnetic tape, or other media for the purpose of restoring data in the event of a system failure (collectively, "Back-Up Tapes"). Notwithstanding the terms of this Agreement, in no event shall Receiving Party be required to destroy Protected Information stored on Back-Up Tapes; provided, however, any Protected Information not returned or destroyed pursuant to this Section shall be kept confidential for the duration of its existence. Furthermore, the Receiving Party may retain one (1) copy of such Protected Information in Receiving Party's files solely for audit and compliance purposes for the duration of its existence; provided, however, such Protected Information shall be kept confidential for the duration of its existence in accordance with the terms of this Agreement.

16.4. Required Disclosures. Notwithstanding the confidentiality requirements set forth herein, a Party may disclose Protected Information to comply with PURPA, request of any Governmental Authority, applicable Requirements of Law, or any exchange, control area or System operator rule, in response to a court order, or in connection with any court or regulatory proceeding. Such disclosure shall not terminate the obligations of confidentiality unless the Protected Information falls within one of the exclusions of this Agreement. To the extent the disclosure of Protected Information is requested or compelled as set forth above, the Receiving Party agrees to give Disclosing Party reasonable notice of any discovery request or order, subpoena, or other legal process requiring disclosure of any Protected Information. Such notice by the Receiving Party shall give Disclosing Party an opportunity, at Disclosing Party's discretion and sole cost, to seek a protective order or similar relief, and the Receiving Party shall not oppose such request or relief. If such protective order or other appropriate remedy is not sought and obtained within at least thirty (30) days of Receiving Party's notice, Receiving Party shall disclose only that portion of the Protected Information that is required or necessary in the opinion of Receiving Party's legal counsel; provided, however, Receiving Party shall use reasonable efforts to obtain assurances that confidential treatment will be accorded to any Protected Information so disclosed.

16.5. Regulatory Disclosures by Buyer. This Section 16.5 will apply notwithstanding anything to the contrary in this Agreement. Seller understands and acknowledges that Buyer is regulated by various regulatory and market monitoring entities. Buyer is permitted, in its sole discretion,

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to disclose or to retain and not destroy (in case of a future disclosure need as determined by Buyer in its sole discretion) any information (including Protected Information) to any regulatory commission (inclusive of the NCUC, SCPSC, FERC), NERC, market monitor, office of regulatory staff, and/or public staff, or any other regulator or legislative body without providing prior notice to the Seller or having obtained the consent from the Seller, using Buyer's business judgment and the appropriate level of confidentiality Buyer seeks for any such disclosures or retentions in its sole discretion. In the event of the establishment of any docket or proceeding before any regulatory commission, public service commission, public utility commission, or other agency, tribunal, or court having jurisdiction over Buyer, the Protected Information shall automatically be governed solely by the rules and procedures governing such docket or proceeding to the extent such rules or procedures are additional to, different from, or inconsistent with this Agreement. In regulatory proceedings in all state and federal jurisdictions in which Buyer does business, Buyer will from time-to-time be required to produce Protected Information, and Buyer may do so without prior notice to Seller or consent from Seller, using Buyer's business judgment, and the appropriate level of confidentiality Buyer seeks for such disclosures in its sole discretion. When a request for disclosure of information, including Protected Information, is made to Buyer, Buyer may disclose the information, including Protected Information, without prior notice to the Seller or consent from the Seller, using Buyer's business judgment and the appropriate level of confidentiality Buyer seeks for such disclosures in its sole discretion. Seller further acknowledges that Buyer is required by law or regulation to report certain information that could embody Protected Information from time-to-time, and Buyer may from time-to-time make such reports, without providing prior notice to Seller or consent from Seller, using Buyer's business judgment and the appropriate level of confidentiality Buyer seeks for such disclosures in its sole discretion.

17. **Mutual Representations and Warranties**

17.1. As of the Effective Date and throughout the Term, each Party represents and warrants to the other Party that:

17.1.1. It is duly organized, validly existing and in good standing under the Requirements of Law of the jurisdiction of its organization or formation and has all requisite power and authority to execute and enter into this Agreement;

17.1.2. It has all authorizations under the Requirements of Law (including but not limited to the Required Approvals), necessary for it to legally perform its obligations and consummate the transactions contemplated hereunder or will obtain such authorizations in a timely manner prior to the time that performance by such Party becomes due;

17.1.3. The execution, delivery, and performance of this Agreement will not conflict with or violate any Requirements of Law or any contract, agreement or arrangement to which it is a party or by which it is otherwise bound;

17.1.4. This Agreement constitutes a legal, valid, and binding obligation of such Party enforceable against it in accordance with its terms, and such Party has all rights necessary to perform its obligations to the other Party in accordance with the terms and conditions of this Agreement;

17.1.5. It is acting for its own account, has made its own independent decision to enter into this Agreement and as to whether or not this Agreement is appropriate or proper for it based upon its own judgment, is not relying upon the representations, advice or

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recommendations of the other Party in so doing, is capable of assessing the merits of this Agreement, and understands and accepts the terms, conditions, and risks of this Agreement for fair consideration on an arm's length basis;

17.1.6. No Event of Default or event which with notice or lapse of time, or both, would become an Event of Default, has occurred with respect to such Party, and that such Party is not Bankrupt and there are no proceedings pending or being contemplated by it, or to its knowledge, threatened against it which would result in it being or becoming Bankrupt;

17.1.7. There is no pending, or to its knowledge, threatened legal proceeding at law or equity against it or any Affiliate, that materially adversely affects its ability to perform its obligations under this Agreement;

17.1.8. It is a "forward contract merchant" and this Agreement constitutes a "forward contract" as such terms are defined in the United States Bankruptcy Code;

17.1.9. It is an "eligible commercial entity" within the Commodity Exchange Act;

17.1.10. It is an "eligible contract participant" within the Commodity Exchange Act; and;

17.1.11. Each person who executes this Agreement on behalf of such Party has full and complete authority to do so, and that such Party will be bound by such execution.

18. **Seller Representations and Warranties to Buyer**

18.1. For all Product and every aspect thereof, Seller represents, warrants, and reaffirms to Buyer as a continuing warranty and representation that:

18.1.1. All Product will meet the specifications and requirements in this Agreement, including without limitation, compliance with PURPA;

18.1.2. Seller has provided and conveyed and will provide and convey to Buyer all Capacity rights associated with the Facility and Energy Produced by the Facility;

18.1.3. Seller holds all the rights to all the Product from the Facility, Seller has the right to sell the Product to Buyer, and Seller agrees to convey and does convey to Buyer all rights and good title to the Product free and clear of any Liens, encumbrances, or title defects;

18.1.4. Seller has not and will not double claim or double count the Product (including, without limitation, any Capacity of the Facility) in any manner (including, for example, by issuing a press release or otherwise claiming that Seller is creating any Capacity benefit, or selling the Product to any person other than exclusively to and for Buyer); and

18.1.5. Seller has not and will not in any manner interfere with, encumber or otherwise impede Buyer's use, transfer, and sale of the Product.

19. **Events of Default**

19.1. An "Event of Default" means with respect to the non-performing Party (such Party, the "Defaulting Party"), the occurrence of any one or more of the following events set forth below in this Section 19, each of which, individually, shall constitute a separate Event of Default:

19.2. The failure to make, when due, any payment required pursuant to this Agreement if such

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failure is not remedied within ten (10) Business Days after the Defaulting Party's receipt of written notice; *provided, however*, a Party will have two (2) Business Days to remedy any failure to make payment required under Section 21;

19.3. Any covenant or warranty made by Seller under Section 6.2 (Seller Covenant) is false or misleading in any respect when made or when deemed made or repeated.

19.4. Any representation or warranty made by a Party under Section 17 and elsewhere in this Agreement (except Section 18 which is a separate Event of Default) is false or misleading in any material respect when made or when deemed made or repeated;

19.5. Seller fails to comply with Section 7.1.1 and such failure is not remedied within three Business Days after Seller's receipt of written notice from Buyer.

19.6. Any representation or warranty made by Seller under Section 18 (Seller Representations and Warranties to Buyer) is false or misleading in any respect when made or when deemed made or repeated;

19.7. If Seller prior to the Commercial Operation Date ceases construction of the Facility for more than sixty (60) consecutive days; *provided, however,* that such cessation shall not be deemed an Event of Default if Seller can make a Commercially Reasonable demonstration to Buyer, in Buyers Commercially Reasonable discretion, that in spite of such cessation the Facility will achieve Commercial Operation by the Commercial Operation Date as it may be extended pursuant to the terms of Section 20.5;

19.8. Seller fails to fully and timely achieve any of the Operational Milestone Schedule events (other than the Commercial Operation Date which is governed by Section 19.9 and 20.5); *provided, however,* that such failure shall not be deemed an Event of Default if Seller can make a Commercially Reasonable demonstration to Buyer, in Buyers Commercially Reasonable discretion, that in spite of missing the Milestone Deadline the Facility will achieve Commercial Operation by the Commercial Operation Date as it may be extended pursuant to the terms of Section 20.5.

19.9. Seller fails to achieve Commercial Operation by the Commercial Operation Date, as it may be extended pursuant Section 20.5;

19.10. The actual Nameplate Capacity Rating of the Facility is higher than the Nameplate Capacity Rating set forth in Exhibit 4, or, as of the Commercial Operation Date, is lower than the Nameplate Capacity Rating by more than five (5) percent of the Nameplate Capacity Rating set forth in Exhibit 4.

19.11. Seller Abandons the Facility for more than sixty (60) consecutive days;

19.12. Seller fails to provide, replenish, renew, or replace the Performance Assurance and/or otherwise fails to fully comply with the credit related requirements of this Agreement, including without limitation, Section 5, and any such failure is not cured within five (5) Business Days.

19.13. Seller adds an energy storage device to the Facility without obtaining Buyer's prior written consent.

19.14. Seller increases the DC/AC ratio of the Facility as shown in Exhibit 4 without obtaining Buyer's prior written consent.

19.15. If the Facility is equipped with a Storage Resource: (i) Seller's failure to materially comply with the Energy Storage Protocol as required under this Agreement and such failure is not remedied within three Business Days after Seller's receipt of written notice from Buyer, or (ii) if Seller fails to materially comply with any Energy Storage Protocol on more than three

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(3) occasions over the Term of this Agreement; *provided however,* that any such failure shall not be counted against the cumulative limit if Seller can make a Commercially Reasonable demonstration to Buyer that Seller's failure to materially comply with the Energy Storage Protocol was beyond Seller's reasonable control and not the result of Seller's intentional misconduct or gross negligence;

19.16. Seller fails to fully meet all the insurance requirements set forth in Section 7.5, and such failure is not cured within five (5) Business Days.

19.17. Seller fails to obtain or maintain the Facility's registration or certification as a Qualifying Facility under PURPA.

19.18. Seller fails to fully comply with the PURPA Fuel Requirements.

19.19. Seller delivers or attempts to deliver to Buyer any Product (or any component thereof) that was not generated by the Facility.

19.20. Seller fails to promptly and fully comply with a System Operator Instruction.

19.21. Seller fails to fully comply with the confidentiality obligations set forth in Section 16.

19.22. Seller consolidates or amalgamates with, or merges with or into, or transfers all or substantially all of its assets to, another entity and: (i) at the time of such consolidation, amalgamation, merger or transfer, the resulting, surviving or transferee entity fails to assume all the obligations of Seller under this Agreement to which it or its predecessor was a party by operation of law or pursuant to an agreement reasonably satisfactory to the other Party; or (ii) the resulting, surviving, transferee or successor entity fails to meet the Creditworthiness standards or post Performance Assurance as required under this Agreement.

19.23. An assignment by or Change of Control with respect to Seller, other than in compliance with Section 24;

19.24. A Party becomes Bankrupt;

19.25. Seller transfers or assigns or otherwise conveys any of its rights or obligations under this Agreement to another Person in violation of the terms and conditions of this Agreement;

19.26. Seller violates the publicity obligations set forth in Section 26.10; and,

19.27. Except to the extent constituting a separate Event of Default (in which case the provisions applicable to that separate Event of Default shall apply) the failure to perform any material covenant or obligation set forth in this Agreement, if such failure is not remedied within thirty (30) days after the Defaulting Party's receipt of written notice.

20. **Early Termination.**

20.1. Early Termination Date. If an Event of Default with respect to a Defaulting Party has occurred and is continuing, then the other Party (such Party, the "Non-Defaulting Party") shall have the right, in its sole discretion and upon written notice to the Defaulting Party, to pursue any or all of the following remedies: (a) withhold payments due to the Defaulting Party under this Agreement; (b) suspend performance under this Agreement; and/or (c) designate a day (which day shall be no earlier than the day such notice is effective and shall be no later than twenty (20) days after the delivery of such notice is effective) as an early termination date to accelerate all amounts owing between the Parties, liquidate, net, recoup, set-off, and early terminate this Agreement and any other agreement between the Parties (such day, the "Early Termination Date").

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20.2. Effectiveness of Default and Remedies. Where an Event of Default is specified herein and is governed by a system of law which does not permit termination to take place upon or after the occurrence of the relevant Event of Default in accordance with the terms of this Agreement an Event of Default and Early Termination Date shall be deemed to have occurred immediately upon any such event and no prior written notice shall be required. All of the remedies and provisions set forth in this section shall be without prejudice to any other right of the Non-Defaulting Party to accelerate amounts owed, net, recoup, setoff, liquidate, and early terminate this Agreement.

20.3. Net Settlement Amount. If the Non-Defaulting Party establishes an Early Termination Date, then the Non-Defaulting Party shall calculate its Gains or Losses and Costs resulting from the termination as of the Early Termination Date, in a Commercially Reasonable Manner. The Non-Defaulting Party shall aggregate such Gains or Losses and Costs with respect to the liquidation of the termination and any other amounts due under this Agreement and any other agreement between the Parties into a single net amount expressed in U.S. dollars (the "Net Settlement Amount"). The Non-Defaulting Party shall then notify the Defaulting Party of the Net Settlement Amount. The Defaulting Party shall pay the Non-Defaulting Party the full amount of the Net Settlement Amount within five (5) Business Days of delivery to the Defaulting Party of the notice of the Net Settlement Amount that the Defaulting Party is liable for.

20.4. Payment. Any Net Settlement Amount will only be due and payable only to the Non-Defaulting Party from and by the Defaulting Party. If the Non-Defaulting Party's aggregate Gains exceed its aggregate Losses and Costs, if any, resulting from the termination of this Agreement, the Net Settlement Amount will be deemed to be zero and no payment will be due or payable. The Non-Defaulting Party shall under no circumstances be required to account for or otherwise credit or pay the Defaulting Party for economic benefits accruing to the Non-Defaulting Party as a result of the Defaulting Party's default. The Non-Defaulting Party shall be entitled to recover any Net Settlement Amount by netting or set-off or to otherwise pursue recovery of damages. Additionally, Buyer will be entitled to recover any Net Settlement Amount by drawing upon any Performance Assurance or by netting or set-off, or to otherwise pursue recovery of damages. Any calculation and payment of the Net Settlement Amount will be independent of and in addition to Seller's obligation to reimburse Buyer for overpayments pursuant to Section 20.6.

20.5. Commercial Operation Date Liquidated Damages.

20.5.1. Failure to Achieve First COD Date. Notwithstanding anything to the contrary in this Agreement, to the extent an Event of Default occurs due to Seller's failure to timely achieve the Commercial Operation Date as set forth in Exhibit 3 (the "First COD Date"), then this Agreement shall terminate and Seller shall be liable to Buyer for liquidated damages in the amount of [*2% x total projected revenue under the Agreement during the Term as determined by Buyer in its reasonable discretion _____ U.S. dollars ($_____)*] (the "Default Liquidated Damages") which shall be due and payable by Seller within five (5) Business Days after the First COD Date; provided however, if no later than twenty (20) Business Days prior to the First COD Date Seller notifies Buyer in writing that Seller reasonably believes that it will be unable to achieve Commercial Operation by the First COD Date and Seller also notifies Buyer in writing that Seller desires to continue performance under this Agreement, then this Agreement shall remain in full force and effect and upon payment of liquidated damages to Buyer in the amount of [25% of the Default Liquidated Damages] (the "Initial Liquidated Damages") within five (5) Business Days after the First COD Date, Seller shall have up to an additional one hundred eighty

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(180) days from the First COD Date to achieve Commercial Operation (such extended date, the "Second COD Date"); provided however, no Initial Liquidated Damages shall be due to Buyer if Seller actually achieves Commercial Operation on or before the First COD Date.

20.5.2. Second COD Date. If Seller achieves Commercial Operation on or before the Second COD Date Seller shall pay Buyer additional liquidated damages, within five (5) Business Days of achieving the Second COD Date, in the amount of [75% of the Default Liquidated Damages divided by 180] [U.S. _____dollars ($_____)] per day (the "Per Diem Liquidated Damages") for each day that Commercial Operation was delayed beyond the First COD Date up to and including the one hundred eightieth (180th) day following the First COD Date as per diem liquidated damages for failing to timely achieve Commercial Operation by the First COD Date.

20.5.3. Failure to Achieve Second COD Date. If Seller fails to achieve Commercial Operation by the Second COD Date (i.e., within one hundred eighty (180) days following the First COD Date) then this Agreement will terminate and Seller will be liable to Buyer and will pay Buyer, within five (5) Business Days of such failure, additional liquidated damages (in addition to the Initial Liquidated Damages paid under Section 20.5.1) in the amount of [the Default Liquidated Damages [75% of the Default Liquidated Damages_____ U.S. dollars ($_____)].

20.5.4. Exclusive Remedy. The Parties agree that it would be extremely difficult and impracticable under the presently known and anticipated facts and circumstances to ascertain and fix the actual damages Buyer would incur if Seller does not achieve Commercial Operation by the promised Commercial Operation Date. Accordingly, the Parties agree that if Seller does not meet the promised Commercial Operation Date (as may be extended under this Section 20.5), Buyer's sole remedy for that delay shall be to recover from Seller as liquidated damages, and not as a penalty, the amount of liquidated damages specified in this Section 20.5. The agreed upon delay liquidated damages shall not limit Buyer's remedies for other breaches, actions or omissions of Seller under this Agreement

20.5.5. .

20.6. Overpayment Reimbursement. Notwithstanding anything else in this Agreement to the contrary, including without limitation the Net Settlement Amount calculation and payment provisions set forth in Sections 20.1 through 20.5, and without limiting any of Buyer's other rights or remedies hereunder, Seller agrees and acknowledges that in the event this Agreement is terminated prior to the expiration of the Term for any reason other than an Event of Default by Buyer, that Seller will reimburse Buyer for all amounts paid by Buyer to Seller under this Agreement in excess of Buyer's avoided cost for energy and capacity over the period starting from the Commercial Operation Date through the date of termination of this Agreement plus interest on such amount calculated at the rate of [DEC- 3.62%][DEP-3.549%] to be adjusted annually until repaid (the "Overpayment Amount"). Seller agrees to reimburse Buyer for the Overpayment Amount notwithstanding anything to the contrary in this Agreement and without regard to whether Seller is or may be liable to Buyer for any additional amounts under this Agreement, including, without limitation, any Net Settlement Amount, Gains, and/or Losses determined or to be determined pursuant to this Agreement. The Seller will pay Buyer the Overpayment Amount no later than three (3) Business Days after the Early Termination Date.

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

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21. **Cover Costs**.

21.1. Exclusive Remedies. Except where a specific and exclusive remedy is otherwise set forth in this Agreement, the remedies set forth in this Section shall be a Party's exclusive remedies prior to termination for the other Party's failure to deliver the Product or to receive the Product pursuant to and in accordance with this Agreement.

21.2. Seller's Failure to Deliver. If Seller fails to deliver Product that complies with the requirements set forth in this Agreement or fails to deliver all or part of the Contract Quantity (each will be deemed as a failure to deliver for purposes of calculating damages), and such failure is not excused by a Permitted Excuse to Perform or Buyer's failure to perform, then Buyer shall elect in its sole discretion: (i) to terminate and liquidate this Agreement if such failure is an Event of Default as set forth herein, and in which case Buyer shall calculate its termination payment in accordance with this Agreement as though it were the Non-Defaulting Party; or, (ii) to require Seller to pay Buyer within three (3) Business Days of invoice receipt, liquidated damages in the amount obtained by multiplying the number of units of Product (or component thereof) that Seller failed to deliver to Buyer multiplied by two (2) times the per unit Contract Price (or component thereof).

21.3. Buyer's Failure to Accept Delivery. If Buyer fails to receive all or part of the Contract Quantity that Seller attempted to deliver to Buyer in accordance with this Agreement, and such failure by Buyer is not excused by a Permitted Excuse to Perform or Seller's failure to perform, then Seller shall elect in its sole discretion either to: (i) terminate and liquidate this Agreement if such failure is an Event of Default as set forth herein, and in which case Seller shall calculate its termination payment in accordance with this Agreement as though it were the Non-Defaulting Party; or, (ii) require Buyer to pay Seller within three (3) Business Days of invoice receipt, liquidated damages in the amount obtained by multiplying the number of units of Product (or component thereof) that Buyer failed to receive multiplied by two (2) times the per unit Contract Price (or component thereof).

21.4. Event of Default. Any failure by Seller to pay amounts due under this Section 21 will be an Event of Default under Section 19.2.

21.5. Survival. This Section 21 will survive any expiration or termination of this Agreement.

22. **Limitation of Liabilities & Liquidated Damages.**

22.1. Reasonableness. THE EXPRESS REMEDIES AND MEASURES OF DAMAGES, INCLUDING WITHOUT LIMITATION DETERMINATION OF LIQUIDATED DAMAGES, COVER COSTS, AND NET SETTLEMENT AMOUNT DAMAGES PROVIDED FOR IN THIS AGREEMENT (i) ARE REASONABLE AND SATISFY THE ESSENTIAL PURPOSES HEREOF FOR BREACH OF ANY PROVISION FOR WHICH THE EXPRESS REMEDY OR MEASURE OF DAMAGES IS PROVIDED, AND (ii) UNLESS OTHERWISE STATED IN SUCH PROVISIONS, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, THE OBLIGOR'S LIABILITY SHALL BE LIMITED AS SET FORTH IN SUCH PROVISIONS, AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. TO THE EXTENT ANY PROVISION OF THIS AGREEMENT PROVIDES FOR, OR IS DEEMED TO CONSTITUTE OR INCLUDE, LIQUIDATED DAMAGES, THE PARTIES STIPULATE AND AGREE THAT THE ACTUAL DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO ESTIMATE OR DETERMINE, THE LIQUIDATED AMOUNTS ARE A REASONABLE APPROXIMATION OF AND METHODOLOGY TO DETERMINE THE ANTICIPATED HARM OR LOSS TO THE PARTY, AND OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT. THE PARTIES FURTHER STIPULATE AND AGREE THAT ANY PROVISIONS FOR LIQUIDATED DAMAGES ARE NOT INTENDED AS, AND SHALL

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NOT BE DEEMED TO CONSTITUTE, A PENALTY, AND EACH PARTY HEREBY WAIVES THE RIGHT TO CONTEST SUCH PROVISIONS AS AN UNREASONABLE PENALTY OR AS UNENFORCEABLE FOR ANY REASON.

22.2. Limitation. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY HEREIN PROVIDED, (i) THE OBLIGOR'S LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY, SUCH DIRECT ACTUAL DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED; AND (ii) NEITHER PARTY SHALL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, EVEN IF SUCH DAMAGES ARE ALLOWED OR PROVIDED BY STATUTE, STRICT LIABILITY, ANY TORT, CONTRACT, OR OTHERWISE.

22.3. Damages Stipulation. Each Party expressly agrees and stipulates that the terms, conditions, and payment obligations set forth in Sections 20 and 21 are a reasonable methodology to approximate or determine harm or loss, each Party acknowledges the difficulty of determining actual damages or loss, and each Party hereby waives the right to contest such damages and payments as unenforceable, as an unreasonable penalty, or otherwise for any reason. The Parties further acknowledge and agree that damages and payments determined under Sections 20 and 21 are direct damages, will be deemed to be a direct loss, and will not be excluded from liability or recovery under the Limitations of Liabilities provisions of this Section 22.

22.4. Survival. This Section 22 will survive any expiration or termination of this Agreement.

23. **Disputes and Arbitration**

23.1. Resolution by the Parties. The Parties shall attempt to resolve any claims, disputes and other controversies arising out of or relating to this Agreement (collectively, "Dispute(s)") promptly by negotiation between executives who have authority to settle the Dispute and who are at a higher level of management than the persons with direct responsibility for administration of this Agreement. A Party may give the other Party written notice of a Dispute that has not been resolved in the normal course of business. Such notice shall include: (a) a statement of that Party's position and a summary of arguments supporting such position, and (b) the name and title of the executive who will be representing that Party and of any other person who will accompany the executive. Within ten (10) Business Days after delivery of the notice, the receiving Party shall respond with (a) a statement of that Party's position and a summary of arguments supporting such position, and (b) the name and title of the executive who will represent that Party and of any other person who will accompany the executive. Within twenty (20) Business Days after delivery of the initial notice, the executives of both Parties shall meet at Buyer's offices, and thereafter as often as they reasonably deem necessary, to attempt to resolve the Dispute. At the request of either Party, the Parties shall enter into a confidentiality agreement to cover any Dispute and discussions related thereto.

23.2. Demand for Arbitration.

23.2.1. If a Dispute has not been resolved by negotiation within thirty (30) Business Days of the disputing Party's initial notice, the Parties shall fully and finally settle the Dispute by binding arbitration administered by the American Arbitration Association ("AAA"), or such other nationally recognized arbitration association or organization as the Parties may mutually agree. The Arbitration shall be conducted in accordance

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with the AAA Commercial Arbitration Rules then in effect, and shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16. To the extent the AAA Rules conflict with any provision of Section 23 of this Agreement, the terms of this Agreement shall govern and control.

23.2.2. Either Party may serve the demand for arbitration on the other Party; provided, however, no demand for arbitration shall be made or permitted after the date when the institution of a civil action based on the Dispute would be barred by the applicable statute of limitations or repose.

23.2.3. All arbitration proceedings shall take place in Greenville, South Carolina.

23.2.4. A single arbitrator will arbitrate all Disputes where the amount in controversy is less than five-hundred thousand U.S. dollars ($500,000), and will be selected by the Parties or by the AAA if the Parties cannot agree to the arbitrator. Such arbitrator shall be a licensed attorney with at least ten (10) years of experience in the electric utility industry. The cost of the arbitrator(s) shall be borne equally by the Parties.

23.2.5. A panel of three (3) arbitrators will conduct the proceeding when the amount in controversy is equal to or more than five hundred thousand U.S. dollars ($500,000). If the Parties have not so agreed on such three (3) arbitrator(s) on or before thirty (30) days following the delivery of a demand for Arbitration to the other Party, then each Party, by notice to the other Party, may designate one arbitrator (who shall not be a current or former officer, director, employee or agent of such Party or any of its Affiliates). The two (2) arbitrators designated as provided in the immediately preceding sentence shall endeavor to designate promptly a third (3rd) arbitrator.

23.2.6. If either Party fails to designate an initial arbitrator on or before forty five (45) days following the delivery of an arbitration notice to the other Party, or if the two (2) initially designated arbitrators have not designated a third (3rd) arbitrator within thirty (30) days of the date for designation of the two (2) arbitrators initially designated, any Party may request the AAA to designate the remaining arbitrator(s) pursuant to its Commercial Arbitration Rules. Such third (3rd) arbitrator shall be a licensed attorney with at least ten (10) years of experience in the electric utility industry.

23.2.7. If any arbitrator resigns, becomes incapacitated, or otherwise refuses or fails to serve or to continue to serve as an arbitrator, the Party entitled to designate that arbitrator shall designate a successor.

23.3. Discovery. Either Party may apply to the arbitrators for the privilege of conducting discovery. The right to conduct discovery shall be granted by the arbitrators in their sole discretion with a view to avoiding surprise and providing reasonable access to necessary information or to information likely to be presented during the course of the arbitration, provided that such discovery period shall not exceed sixty (60) Business Days.

23.4. Binding Nature. The arbitrator(s)' decision shall be by majority vote (or by the single arbitrator if a single arbitrator is used) and shall be issued in a writing that sets forth in separately numbered paragraphs all of the findings of fact and conclusions of law necessary for the decision. Findings of fact and conclusions of law shall be separately designated as such. The arbitrator(s) shall not be entitled to deviate from the construct, procedures or requirements of this Agreement. The award rendered by the arbitrator(s) in any arbitration shall be final and binding upon the Parties, and judgment may be entered on the award in accordance with applicable law in any court of competent jurisdiction.

23.5. Consolidation. No arbitration arising under the Agreement shall include, by consolidation,

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joinder, or any other manner, any person not a party to the Agreement unless (a) such person is substantially involved in a common question of fact directly relating to the Dispute; provided however, such person will not include any Governmental Authority, (b) the presence of the person is required if complete relief is to be accorded in the arbitration, and (c) the person has consented to be included.

23.6. Mediation. At any time prior or subsequent to a Party initiating arbitration, the Parties may mutually agree to (but are not obligated to) attempt to resolve their Dispute by non-binding mediation, using a mediator selected by mutual agreement. The mediation shall be completed within thirty (30) Business Days from the date on which the Parties agree to mediate. Unless mutually agreed by the parties, any mediation agreed to by the Parties shall not delay arbitration. The Parties shall pay their own costs associated with mediation and shall share any mediator's fee equally. The mediation shall be held in Raleigh, North Carolina, unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court of competent jurisdiction.

23.7. Remedies. Except for Disputes regarding confidentiality arising under Section 16 of this Agreement, the procedures specified in this Section 23 shall be the sole and exclusive procedures for the resolution of Disputes between the Parties arising out of or relating to this Agreement; provided, however, that a Party may file a judicial claim or action on issues of statute of limitations or repose or to seek injunctive relief, sequestration, garnishment, attachment, or an appointment of a receiver, subject to and in accordance with the provisions of Section 26.5 (Venue/Consent to Jurisdiction). Preservation of these remedies does not limit the power of the arbitrator(s) to grant similar remedies, and despite such actions, the Parties shall continue to participate in and be bound by the dispute resolution procedures specified in Section 23.

23.8. Settlement Discussions. All negotiations and discussion concerning Disputes between the Parties pursuant to Section 23 of this Agreement are to be deemed confidential and shall be treated as compromise and settlement negotiations for purposes of applicable rules of evidence and settlement privilege. No statement of position or offers of settlement made in the course of the dispute resolution process can be or will be offered into evidence for any purpose, nor will any such statements or offers of settlement be used in any manner against any Party. Further, no statement of position or offers of settlement will constitute an admission or waiver of rights by either Party. At the request of either Party, any such statements or offers, and all copies thereof, shall be promptly returned to the Party providing the same.

23.9. Survival. This Section 23 will survive any expiration or termination of this Agreement.

24. **Assignment**

24.1. Limitation. Except as set forth below in Section 24.2 with respect to pledging as collateral security, Seller shall not assign or encumber (collectively, the "Assignment") this Agreement, any rights or obligations under the Agreement, or any portion hereunder, without Buyer's prior written consent. Seller shall give Buyer at least thirty (30) days prior written notice of any requested Assignment. Subject to Seller providing Buyer with information demonstrating to Buyer, in Buyer's Commercially Reasonable Discretion, that Seller's proposed assignee has the technical, engineering, financial, and operational capabilities to perform under this Agreement, Buyer may not unreasonably withhold its consent; *provided, however*, that any such assignee shall agree in writing to be bound by the terms and conditions hereof and shall deliver to Buyer Performance Assurance in the

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amount required under this Agreement, and such enforceability assurance as the Buyer may request in its sole Commercially Reasonable discretion. Notwithstanding anything to the contrary herein, Buyer may pledge, encumber, or assign this Agreement without the consent of Seller to any Person that is Creditworthy, or that has provided Seller with a guaranty substantially in the form of Exhibit 6 from a Creditworthy credit support provider guaranteeing the assignee's obligations hereunder, and that has agreed in writing to assume the obligations of Buyer hereunder.

24.2. Pledge. Seller may, without prior consent of Buyer but with no less than ten (10) Business Days prior written notice to Buyer, pledge as collateral security this Agreement to a financing party in connection with any loan, lease, or other debt or equity financing arrangement for the Facility. Any pledge of this Agreement as collateral security will not relieve Seller of any obligation or liability under this Agreement or compromise, modify or affect any rights, benefits or risks of Buyer under this Agreement.

24.3. Acknowledgement of Non-Default. Provided that Seller is not in default of its obligations under this Agreement, upon reasonable request by Seller, Buyer will execute a written acknowledgement of non-default in the form of Exhibit 8 attached hereto (the "Acknowledgement") which shall be based on the actual knowledge of Buyer's personnel responsible for administering the Agreement at the time of the execution of the Acknowledgement and after due inquiry of Buyer's internal records only. Notwithstanding any provision to the contrary set forth in the Acknowledgment, Buyer reserves all rights and defenses available to it under the Agreement, and nothing stated therein shall be deemed to have waived, amended or modified any such rights or defenses. In no event shall the issuance of any Acknowledgement introduce any third party to this Agreement or create any rights, including third party beneficiary rights for any Person under this Agreement. .

24.4. Change of Control. Any Change of Control of Seller (however this Change of Control occurs) shall require the prior written consent of Buyer, which shall not be unreasonably withheld or delayed. Seller shall give Buyer at least thirty (30) days prior written notice of any such requested consent to a Change of Control.

24.5. Delivery of Assurances & Voidable. Any Assignment or Change of Control will not relieve Seller of its obligations hereunder, unless Buyer agrees in writing in advance to waive the Seller's continuing obligations under this Agreement. In case of a permitted Assignment , such requesting party or parties shall agree in writing to assume all obligations of Seller and to be bound by the terms and conditions of this Agreement and shall deliver to Buyer such tax, credit, performance, and enforceability assurances as Buyer may request, in its Commercially Reasonable discretion. Further, Buyer's consent to any Assignment may be conditioned on and subject to Seller's proposed assignee having first obtained all approvals that may be required by any Requirements of Law and from all applicable Governmental Authorities. Any sale, transfer, Change of Control, and/or Assignment of any interest in the Facility or in the Agreement made without fully satisfying the requirements of this Agreement shall be null and void and will be an Event of Default hereunder with Seller as the Defaulting Party.

24.6. Cost Recovery. Without limiting Buyer's rights under this Section 24, to the extent Buyer agrees to a request from Seller for one or more consent(s) to an Assignment or Change of Control under this Agreement, Seller shall pay Buyer ten thousand dollars ($10,000) prior to Buyer processing Seller's request.

25. **Notices**.

25.1. Process. All notices, requests, or invoices shall be in writing and shall be sent to the address of the applicable Party as specified on the first page of this Agreement. A Party may change

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its information for receiving notices by sending written notice to the other Party. Notices shall be delivered by hand, certified mail (postage prepaid and return receipt requested), or sent by overnight mail or courier. This section shall be applicable whenever words such as "notify," "submit," "give," or similar language are used in the context of giving notice to a Party.

25.2. Receipt of Notices. Hand delivered notices shall be deemed delivered by the close of the Business Day on which it was hand delivered. Notices provided by certified mail (postage prepaid and return receipt requested), mail delivery or courier service, or by overnight mail or courier service will be deemed received on the date of delivery recorded by the delivery service or on the tracking receipt, as applicable. Notwithstanding anything to the contrary, if the day on which any notice is delivered or received is not a Business Day or is after 5:00 p.m. EPT on a Business Day, then it shall be deemed to have been received on the next following Business Day.

26. **Miscellaneous.**

26.1. Costs. Each Party shall be responsible for its own costs and fees associated with negotiating or disputing or taking any other action with respect to this Agreement, including, without limitation, attorney costs, except that the cost of the arbitrator(s) will be allocated equally between the Parties as provided in Section 23.

26.2. Access. Upon reasonable prior notice, Seller shall provide to Buyer and its authorized agents (including contractors and sub-contractors), employees, auditors, and inspectors reasonable access to the Facility to: (i) tour or otherwise view the Facility; (ii) ascertain the status of the Facility with respect to construction, start-up and testing, or any other obligation of Seller under this Agreement; and, (iii) read meters and perform all inspections, maintenance, service, and operational reviews as may be appropriate to facilitate the performance of this Agreement or to otherwise audit and/or verify Seller's performance under this Agreement. Upon reasonable prior notice, Seller shall provide to Buyer and its guests or customers reasonable access to the Facility to only tour or otherwise view the Facility. While at the Facility, the foregoing agents, employees, auditors, inspectors, guests, and customer shall observe such reasonable safety precautions as may be required by Seller, conduct themselves in a manner that will not interfere with the operation of the Facility, and adhere to Seller's reasonable rules and procedures applicable to Facility visitors. Seller shall have the right to have a representative of Seller present during such access.

26.3. Safe Harbor and Waiver of Section 366. Each Party agrees that it will not assert, and waives any right to assert, that the other Party is performing hereunder as a "utility," as such term is used in 11 U.S.C. Section 366. Further, each Party hereby waives any right to assert and agrees that it will not assert that 11 U.S.C. Section 366 applies to this Agreement or any transaction hereunder in any bankruptcy proceeding. In any such proceeding each Party further waives the right to assert and agrees that it will not assert that the other Party is a provider of last resort with respect to this Agreement or any transaction hereunder or to otherwise limit contractual rights to accelerate amounts owed, net, recoup, set-off, liquidate, and/or early terminate. Without limiting the generality of the foregoing or the binding nature of any other provision of this Agreement on permitted successors and assigns, this provision is intended to be binding upon all successors and assigns of the Parties, including, without limitation, judgment lien creditors, receivers, estates in possession, and trustees thereof.

26.4. Governing Law. THIS AGREEMENT AND THE RIGHTS AND DUTIES OF THE PARTIES HEREUNDER SHALL BE GOVERNED BY AND CONSTRUED, ENFORCED, AND PERFORMED IN ACCORDANCE WITH THE LAWS OF THE STATE OF SOUTH CAROLINA, WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAW, AND, IF APPLICABLE, BY THE FEDERAL LAW OF

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THE UNITED STATES OF AMERICA.

26.5. Venue/Consent to Jurisdiction. Except for Disputes that are subject to Arbitration as provided herein, any judicial action, suit, or proceedings arising out of, resulting from, or in any way relating to, this Agreement, or any alleged breach or default under the same or the warranties and representations contained in the same, shall be brought only in a state or federal court of competent jurisdiction located in Greenville County, South Carolina. The Parties hereto irrevocably consent to the jurisdiction of any federal or state court within Greenville County, South Carolina and hereby submit to venue in such courts. Without limiting the generality of the foregoing, the Parties waive and agree not to assert by way of motion, defense, or otherwise in such suit, action, or proceeding, any claim that (i) such Party is not subject to the jurisdiction of the state or federal Courts within North Carolina; or (ii) such suit, action, or proceeding is brought in an inconvenient forum; or (iii) the venue of such suit, action, or proceeding is improper. The exclusive forum for any litigation between them under this Agreement that is not subject to Arbitration shall occur in federal or state court within Greenville County, South Carolina.

26.6. Limitation of Duty to Buy. If this Agreement is terminated due to a default by Seller, neither Seller, nor any affiliate and/or successor of Seller, nor any affiliate and/or successor to the Facility, including without limitation owner and/or operator of the Facility will require or seek to require Buyer to purchase any output (Energy or otherwise) from the Facility under any Requirements of Law (including without limitation PURPA) or otherwise for any period that would have been covered by the Term of this Agreement had this Agreement remained in effect at a price that exceeds the Contract Price. Seller, on behalf of itself and on behalf of any other entity on whose behalf it may act, and on behalf of any successor to the Seller or successor to the Facility, hereby agrees to the terms and conditions in the above sentence, and hereby waives its right to dispute the above sentence. Seller authorizes the Buyer to record notice of the foregoing in the real estate records.

26.7. Entire Agreement and Amendments. This Agreement represents the entire agreement between the Parties with respect to the subject matter of this Agreement, and supersedes all prior negotiations, binding documents, representations and agreements, whether written or oral. No amendment, modification, or change to this Agreement shall be enforceable unless agreed upon in a writing that is executed by the Parties.

26.8. Drafting. Each Party agrees that it (and/or its counsel) has completely read, fully understands, and voluntarily accepts every provision, term, and condition of this Agreement. Each Party agrees that this Agreement shall be considered for all purposes as prepared through the joint efforts of the Parties, and no Party shall have any provision hereof construed against such Party by reason of such Party drafting, negotiating, or proposing any provision hereof, or execution of this Agreement. Each Party irrevocably waives the benefit of any rule of contract construction that disfavors the drafter of a contract or the drafter of specific language in a contract.

26.9. Headings. All section headings in this Agreement are included herein for convenience of reference only and shall not constitute a part of this Agreement for any other purpose.

26.10. Publicity.

26.10.1. Limitation on Seller. Seller shall not make any announcement or release any information concerning or otherwise relating to this Agreement to any member of the public, press, Person, official body, or otherwise without Buyer's prior written consent, which shall not be unreasonably withheld; provided, however, any content approved by Buyer shall be limited to the non-confidential facts of the Agreement and will not imply, directly or indirectly, any endorsement, partnership,

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support, or testimonial of Seller by Buyer.

26.10.2. Limitation on the Parties. Neither Party shall make any use of the other Party's name, logo, likeness in any publication, promotional material, news release, or similar issuance or material without the other Party's prior review, approval, and written consent. Seller agrees and acknowledges that any reference or likeness to "Duke" shall be a prohibited use of Buyer's name, logo, likeness. Seller agrees and acknowledges that any direct or indirect implication of any endorsement, partnership, support, or testimonial of Seller by Buyer is prohibited, and any such use, endorsement, partnership, support, and/or testimonial will be an Event of Default under this Agreement. Subject to the foregoing, either Party may disclose to the public general information in connection with the Party's respective business activities; *provided, however,* no such disclosure or publicity by Seller will directly or indirectly imply any endorsement, partnership, support, or testimonial of Seller by Buyer.

26.11. Waiver. No waiver by any Party of any of its rights with respect to the other Party or with respect to any matter or default arising in connection with this Agreement shall be construed as a waiver of any subsequent right, matter or default whether of a like kind or different nature. Any waiver under this Agreement will be effective only if it is in writing that has been duly executed by an authorized representative of the waiving Party.

26.12. Partnership and Beneficiaries. Nothing contained in this Agreement shall be construed or constitute any Party as the employee, agent, partner, joint venture, or contractor of any other Party. This Agreement is made and entered into for the sole protection and legal benefit of the Parties, and their permitted successors and assigns. No other person or entity, including, without limitation, a financing or collateral support provider, will be a direct or indirect beneficiary of or under this Agreement, and will not have any direct or indirect cause of action or claim under or in connection with this Agreement.

26.13. Severability. Any provision or section hereof that is declared or rendered unlawful by any applicable court of law, or deemed unlawful because of a statutory change, shall not, to the extent practicable, affect other lawful obligations under this Agreement.

26.14. Counterparts. This Agreement may be executed in counterparts, including facsimiles hereof, and each such executed document will be deemed to be an original document and together will complete execution and effectiveness of this Agreement.

[Remainder of page intentionally left blank. Signature page follows.]

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IN WITNESS WHEREOF, Seller and Buyer have caused this Agreement to be executed by their respective duly authorized officers as of the Effective Date.

[DUKE ENERGY CAROLINAS, LLC] [DUKE ENERGY PROGRESS, LLC]

BY: _____
NAME:
TITLE:
DATE:

[_SELLER_____]

BY: _____
NAME: _____
TITLE: _____
DATE:

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Exhibit 1

Estimated Monthly Energy Production of the Facility

Month	Estimated Facility Energy Production (MWh)
January	
February	
March	
April	
May	
June	
July	
August	
September	
October	
November	
December	
Total	

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Exhibit 2

Contract Price

Testing Period Energy Contract Price: _____

Relevant Portion of the Delivery Period	Contract Price

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Exhibit 3

Operational Milestone Schedule

Deadline	Performance / Result Seller Must Timely Achieve
	Due Diligence Period Completion
	Interconnection Agreement Executed
	Financing Milestone Commitment
	Initial Performance Assurance Delivery
	Final System Design under Interconnection Agreement
	Required Permits and Approval Deadlines
	Commencement Readiness Requirements
	Commercial Operation Date

1. **Financing Milestone Commitment.** If third party financing is being obtained by Seller to construct the Facility, Seller shall deliver to Buyer a letter of commitment for full project financing meeting all of the minimum requirements set forth below, as determined by Buyer in Buyer's sole Commercially Reasonable discretion. Buyer has no responsibility or obligation of any kind to Seller or any other person or entity with respect to Seller in connection with Seller's financing or the Financing Milestone Commitment.
   - 1.1. Fully-underwritten and binding (not "best efforts," a term sheet, or some lesser commitment);
   - 1.2. In an amount that is, along with fully underwritten and committed equity, adequate funding for the construction and operation of the project.
   - 1.3. Full agreement of the lender and Seller with respect to term, interest rates, fees and other economics of the lending transaction.
   - 1.4. Lender has approved the form of the power purchase agreement, turbine/panel supply agreement, engineering procurement and construction contract and other significant project agreements, subject only to the execution and delivery of those documents, as well as the construction budget for the project, and that the lender has completed all necessary due diligence.
   - 1.5. Lender retains no further approval rights with respect to size, site or technical aspects of the project.
   - 1.6. Free of conditions to effectiveness relating to further equity commitments, the confirmation of tax attributes, the approvals of other public or private third parties or the satisfactory completion of third party reports or assessments (environmental, insurance or otherwise).
   - 1.7. Not require any bonds or performance guarantees that have not already been obtained.
   - 1.8. No general condition to financing that the lender be satisfied with the project in its discretion.
   - 1.9. Fully executed by the lender and the Seller.

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2. If Seller (or its Affiliate) is balance sheet financing the construction of the Facility, Seller shall satisfy this Financial Milestone Commitment by delivering to Buyer evidence of Seller's, or its Affiliate's, approval for funding in an amount adequate for the construction of the Facility

3. **Final System Design Under Interconnection Agreement.** Seller shall deliver to Buyer a copy of the design specifications delivered by Seller to the Transmission Provider as of Seller's execution of the facility study agreement with the Transmission Provider, which design specifications shall be deemed as the "final" system design for purposes of Seller's obligation to timely achieve the Commercial Operation Date set forth above in this Exhibit 3. The final design specification documents delivered by Seller shall be labeled as "***FINAL***", and shall be sealed with a South Carolina Professional Engineer for purposes of establishing the final design submitted by the Seller based on which the Transmission Provider will determine impacts to the System and construct interconnection facilities for Seller to interconnect with the System and perform under this Agreement. Seller understands that changes in system design may be deemed as material or significant design changes by the Transmission Provider, and could result in the Transmission Provider withdrawing Seller's position in the transmission queue or otherwise withdrawing Seller's transmission request, as may be determined by the Transmission Provider.

4. **Required Permits and Approval Deadlines.** Seller shall deliver to Buyer a list of required Permits and deadlines to secure each of those Permits. Seller shall identify and list all Permits customary and necessary for Seller to design, construct, test, commission, and fully operate the Facility. Seller shall also identify and list the deadline by which Seller must secure all final Permits for Seller to achieve the Commercial Operation Date set forth above in this Exhibit 3 and such final deadline shall be deemed to be a Milestone Deadline. Seller shall keep Buyer informed of its efforts to secure the Permits. For each identified Permit, Seller shall provide Buyer written notice, and any supporting documentation requested by Buyer in its Commercially Reasonable Discretion, that the identified Permits have been obtained, including, without limitation, any approvals from the local Governmental Authority approving the land use, site plan and construction of the Facility.

5. **Commencement Readiness Requirements.** Seller shall deliver to Buyer the list of major development and construction activities, together with deadlines for the commencement and successful completion of those activities for Seller to achieve the Commercial Operation Date set forth in this Exhibit 3. The list of major development and construction activities, together with commencement and completion deadlines, shall include each of the activities set forth below. Each such major development and construction activity shall be deemed to be an Operational Milestone, and the deadline by which Seller must successfully complete each such activity for Seller to achieve the Commercial Operation Date set forth in this Exhibit 3shall be deemed to be a Milestone Deadline. For each identified activity, Seller shall provide Buyer written notice, and any supporting documentation requested by Buyer in its Commercially Reasonable Discretion, that the identified activity has been commenced and/or successfully completed.
   - 5.1. Proof of Seller's rights and interest in the site upon which the Facility is to be constructed, including the applicable sale agreement or long-term lease.
   - 5.2. Delineation of any long lead-time procurement items, including a schedule for ordering and proof of such activity.
   - 5.3. A project key milestone schedule, reflecting the critical milestone events for design and construction of the facility including the date upon which Seller shall achieve: thirty and ninety percent detailed design; site mobilization and commencement; mechanical completion; substantial completion; and final completion.
   - 5.4. Identification of Seller's key personnel, with primary responsibility for the design and construction of the Facility and communications with Buyer.
   - 5.5. Seller's operations and maintenance plan.

5.6. Seller's performance and capacity testing plan and performance guarantees, in which Seller defines the performance output requirements of the Facility and describes the procedures and timing for all testing that will be conducted to demonstrate whether the Facility meets the applicable performance requirements and conditions.

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Exhibit 4

Facility Information

1. Facility Name:

2. Facility Address:

3. Description of Facility (include number, manufacturer and model of Facility generating units, and layout):

4. Nameplate Capacity Rating (MW): AC and DC:

5. [DC/AC Ratio:]

6. Fuel Type/Generation Type: Solar/Biomass/etc.

7. System Operator Instruction Dispatch Control Equipment: Full automatic generation control, as applicable to the Facility.

8. Site Map (include location and layout of the Facility, equipment, and other site details):

9. Delivery Point Diagram (include Delivery Point, metering, Facility substation):

10. Control Equipment. Subject to final approval by Buyer as of the date of final execution of the Interconnection Agreement, the following control equipment shall be installed at the Facility: A Power Plant Controller (PPC) which includes all features required to comply with this Agreement and the Interconnection Agreement, including, but not limited to, active power control (dispatch), power factor set point control, voltage schedule set point control, active power ramp rates, and frequency response control (from regulation signal sent from System Operator). Set points such as active power control, as required by this Agreement, will be made available to Buyer via a hard-wired DNP3 path at the Facility's Point of Interconnection. Remote access to the Facility's HMI (the Plant Controller Interface) will be given for control of the required variables, by the Buyer

11. [Storage Resources. Subject to final approval by Buyer as of the date of final execution of the Interconnection Agreement, the following Storage resources shall be connected to or incorporated into the Facility [identify the design and all material components of any battery storage or other energy storage device connected to or incorporated into the Facility]

UPON EXECUTION OF THE AGREEMENT TO WHICH THIS EXHIBIT IS ATTACHED, ANY MATERIAL MODIFICATION TO THE FACILITY SHALL REQUIRE BUYER'S PRIOR APPROVAL, AND SHALL BE MEMORIALIZED IN WRITING IN AN AMENDMENT TO THE AGREEMENT.

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Exhibit 5

Expected Annual Output

Year	MWh

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Exhibit 6
Form of Guaranty

THIS GUARANTY AGREEMENT (this "Guaranty"), dated as of [date], is issued and delivered by [**enter corporate legal name**], a [state] [form of entity] (the "Guarantor"), for the account of [**enter corporate name**], a [state] [form of entity] (the "Obligor"), and for the benefit of **[enter corporate name]**, a **[state] [form of entity]** (the "Beneficiary").

Background Statement

WHEREAS, the Beneficiary and Obligor entered into that certain _____ dated (the "Agreement"); and

WHEREAS, Beneficiary has required that the Guarantor deliver to the Beneficiary this Guaranty as an inducement to enter into the Agreement.

Agreement

NOW, THEREFORE, in consideration of the foregoing and for good and valuable consideration, the Guarantor hereby agrees as follows:

1. Guaranty; Limitation of Liability. Subject to any rights, setoffs, counterclaims and any other defenses that the Guarantor expressly reserves to itself under this Guaranty, the Guarantor absolutely and unconditionally guarantees the timely payment of the Obligor's payment obligations under the Agreement (the "Guaranteed Obligations"); provided, however, that the Guarantor's aggregate liability hereunder shall not exceed **[amount] U. S. Dollars (U.S. [$xx,xxx,xxx])**.

Subject to the other terms of this Guaranty, the liability of the Guarantor under this Guaranty is limited to payments expressly required to be made under the Agreement, and except as specifically provided therein, the Guarantor shall not be liable for or required to pay any consequential or indirect loss (including but not limited to loss of profits), exemplary damages, punitive damages, special damages, or any other damages or costs.

2. Effect of Amendments. The Guarantor agrees that the Beneficiary and the Obligor may modify, amend and supplement the Agreement and that the Beneficiary may delay or extend the date on which any payment must be made pursuant to the Agreement or delay or extend the date on which any act must be performed by the Obligor thereunder, all without notice to or further assent by the Guarantor, who shall remain bound by this Guaranty, notwithstanding any such act by the Beneficiary.

3. Waiver of Rights. The Guarantor expressly waives (i) protest, (ii) notice of acceptance of this Guaranty by the Beneficiary, and (iii) demand for payment of any of the Guaranteed Obligations.

4. Reservation of Defenses. Without limiting the Guarantor's own defenses and rights hereunder, the Guarantor reserves to itself all rights, setoffs, counterclaims and other defenses that the Obligor may have to payment of all or any portion of the Guaranteed Obligations except defenses arising from the bankruptcy, insolvency, dissolution or liquidation of the Obligor and other defenses expressly waived in this Guaranty.

5. Settlements Conditional. This guaranty shall remain in full force and effect or shall be reinstated (as the case may be) if at any time any monies paid to the Beneficiary in reduction of the indebtedness of the Obligor under the Agreement have to be repaid by the Beneficiary by virtue of any provision or enactment relating to bankruptcy, insolvency or liquidation for the time being in force, and the liability of the Guarantor under this Guaranty shall be computed as if such monies had never been paid to the Beneficiary

6. Notice. The Beneficiary will provide written notice to the Guarantor if the Obligor defaults under the Agreement.

7. Primary Liability of the Guarantor. The Guarantor agrees that the Beneficiary may enforce this Guaranty without the necessity at any time of resorting to or exhausting any other security or collateral. This is a continuing Guaranty of payment and not merely of collection.

8. Representations and Warranties. The Guarantor represents and warrants to the Beneficiary as of the date hereof that:

a. The Guarantor is duly organized, validly existing and in good standing under the laws of the jurisdiction of its incorporation and has full power and legal right to execute and deliver this Guaranty and to perform the provisions of this Guaranty on its part to be performed;

b. The execution, delivery and performance of this Guaranty by the Guarantor have been and remain duly authorized by all necessary corporate action and do not contravene any provision of its certificate of incorporation or by-laws or any law, regulation or contractual restriction binding on it or its assets;

c. All consents, authorizations, approvals, registrations and declarations required for the due execution, delivery and performance of this Guaranty have been obtained from or, as the case may be, filed with the relevant governmental authorities having jurisdiction and remain in full force and effect, and all conditions thereof have been duly complied with and no other action by, and no notice to or filing with, any governmental authority having jurisdiction is required for such execution, delivery or performance; and

d. This Guaranty constitutes the legal, valid and binding obligation of the Guarantor enforceable against it in accordance with its terms, except as enforcement hereof may be limited by applicable bankruptcy, insolvency, reorganization or other similar laws affecting the enforcement of creditors' rights or by general equity principles.

9. Nature of Guaranty. The Guarantor hereby agrees that its obligations hereunder shall be unconditional irrespective of the impossibility or illegality of performance by the Obligor under the Agreement; the absence of any action to enforce the Agreement; any waiver or consent by Beneficiary concerning any provisions of the Agreement; the rendering of any judgment against the Obligor or any action to enforce the

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same; any failure by Beneficiary to take any steps necessary to preserve its rights to any security or collateral for the Guaranteed Obligations; the release of all or any portion of any collateral by Beneficiary; or any failure by Beneficiary to perfect or to keep perfected its security interest or lien in any portion of any collateral.

10. Subrogation**.** The Guarantor will not exercise any rights that it may acquire by way of subrogation until all Guaranteed Obligations shall have been paid in full. Subject to the foregoing, upon payment of all such Guaranteed Obligations, the Guarantor shall be subrogated to the rights of Beneficiary against the Obligor, and Beneficiary agrees to take at the Guarantor's expense such steps as the Guarantor may reasonably request to implement such subrogation.

11. Term of Guaranty. This Guaranty shall remain in full force and effect until the earlier of (i) such time as all the Guaranteed Obligations have been discharged, and (ii) [date] (the "Expiration Date"); provided however, the Guarantor will remain liable hereunder for Guaranteed Obligations that were outstanding prior to the Expiration Date.

12. Governing Law. This Guaranty shall be governed by and construed in accordance with the internal laws of the State of New York without giving effect to principles of conflicts of law.

13. Expenses. The Guarantor agrees to pay all reasonable out-of-pocket expenses (including the reasonable fees and expenses of the Beneficiary's counsel) relating to the enforcement of the Beneficiary's rights hereunder in the event the Guarantor disputes its obligations under this Guaranty and it is finally determined (whether through settlement, arbitration or adjudication, including the exhaustion of all permitted appeals), that the Beneficiary is entitled to receive payment of a portion of or all of such disputed amounts.

14. Waiver of Jury Trial. The Guarantor and the Beneficiary, through acceptance of this Guaranty, waive all rights to trial by jury in any action, proceeding or counterclaim arising or relating to this Guaranty.

15. Entire Agreement; Amendments. This Guaranty integrates all of the terms and conditions mentioned herein or incidental hereto and supersedes all oral negotiations and prior writings in respect to the subject matter hereof. This Guaranty may only be amended or modified by an instrument in writing signed by each of the Guarantor and the Beneficiary.

16. Headings. The headings of the various Sections of this Guaranty are for convenience of reference only and shall not modify, define or limit any of the terms or provisions hereof.

17. No Third-Party Beneficiary. This Guaranty is given by the Guarantor solely for the benefit of the Beneficiary, and is not to be relied upon by any other person or entity.

18. Assignment. Neither the Guarantor nor the Beneficiary may assign its rights or obligations under this Guaranty without the prior written consent of the other, which consent may not be unreasonably withheld or delayed. Notwithstanding the foregoing, the Beneficiary may assign this Guaranty, without the Guarantor's consent, provided such assignment is made to an affiliate or subsidiary of the Beneficiary

Any purported assignment in violation of this Section 18 shall be void and without effect.

19. Notices. Any communication, demand or notice to be given hereunder will be duly given when delivered in writing or sent by electronic mail to the Guarantor or to the Beneficiary, as applicable, at its address as indicated below:

If to the Guarantor, at:

[Guarantor name]
[Address]
Attention: [contact]
Email:[email address]

With a copy to:

[Seller name]
[Address]
Attention: [contact]
Email:[email address]

If to the Beneficiary, at:

[Beneficiary name]
[Address]
Attention: [contact]
Email:[email address]

or such other address as the Guarantor or the Beneficiary shall from time to time specify. Notice shall be deemed given (a) when received, as evidenced by signed receipt, if sent by hand delivery, overnight courier or registered mail or (b) when received, as evidenced by email confirmation, if sent by email and received on or before 4 pm local time of recipient, or (c) the next business day, as evidenced by email confirmation, if sent by email and received after 4 pm local time of recipient.

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IN WITNESS WHEREOF, the Guarantor has executed this Guaranty as of the day and year first above written

[Guarantor name]

By: _____
Name:
Title:

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Exhibit 7
Form of Letter of Credit

[LETTERHEAD OF ISSUING BANK]

Irrevocable Standby Letter of Credit No.: _____

Date: _____

Beneficiary:
[Duke Energy Carolinas, LLC][Duke Energy Progress, LLC]
550 S. Tryon Street, DEC 40C
Charlotte, North Carolina 28202
Attn: Chief Risk Officer

Ladies and Gentlemen:

By the order of:

Applicant:
_____
_____
_____

We hereby issue in your favor our irrevocable standby letter of credit No.: _____ for the account of_____ for an amount or amounts not to exceed _____ US Dollars in the aggregate (US$_____) available by your drafts at sight drawn on [Issuing Bank] effective _____ and expiring at our office on _____ (the "Expiration Date").

The Expiration Date shall be deemed automatically extended without amendments for one year from the then current Expiration Date unless at least ninety (90) days prior to the then applicable Expiration Date, we notify you in writing by certified mail return receipt requested or overnight courier that we are not going to extend the Expiration Date. During said ninety (90) day period, this letter of credit shall remain in full force and effect

Funds under this letter of credit are available against your draft(s), in the form of attached Annex 1, mentioning our letter of credit number and presented at our office located at [Issuing Bank's address must be in US] and accompanied by a certificate in the form of attached Annex 2 with appropriate blanks completed, purportedly signed by an authorized representative of the Beneficiary, on or before the Expiration Date in accordance with the terms and conditions of this letter of credit. Partial drawings under this letter of credit are permitted.

Certificates showing amounts in excess of amounts available under this letter of credit are acceptable, however, in no event will payment exceed the amount available to be drawn under this letter of credit.

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We engage with you that drafts drawn under and in conformity with the terms of this letter of credit will be duly honored on presentation if presented on or before the Expiration Date. Presentation at our office includes presentation in person, by certified, registered, or overnight mail.

Except as stated herein, this undertaking is not subject to any agreement, condition or qualification. The obligation of [Issuing Bank] under this letter of credit is the individual obligation of [Issuing Bank] and is in no way contingent upon reimbursement with respect hereto.

This letter of credit is subject to the International Standby Practices 1998, International Chamber of Commerce Publication No. 590 ("ISP98"). Matters not addressed by ISP98 shall be governed by the laws of the state of New York.

We shall have a reasonable amount of time, not to exceed three (3) business days following the date of our receipt of drawing documents, to examine the documents and determine whether to take up or refuse the documents and to inform you accordingly.

Kindly address all communications with respect to this letter of credit to [Issuing Bank's contact information], specifically referring to the number of this standby letter of credit.

All banking charges are for the account of the Applicant.

This letter of credit may not be amended, changed or modified without our express written consent and the consent of the Beneficiary.

This letter of credit is transferable, and we agree to consent to its transfer, subject to our standard terms of transfer and your payment to us of our standard transfer fee.

Very truly yours
[Issuing Bank]

_____ _____

Authorized Signer Authorized Signer

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This is an integral part of letter of credit number: *[irrevocable standby letter of credit number]*

ANNEX 1

FORM OF SIGHT DRAFT

[Insert date of sight draft]

To: *[Issuing Bank's name and address]*

For the value received, pay to the order of _____ by wire transfer of immediately available funds to the following account:

[name of account]
[account number]
[name and address of bank at which account is maintained]
[aba number]
[reference]

The following amount:

[insert number of dollars in writing] United States Dollars
(US$ *[insert number of dollars in figures]*)

Drawn upon your irrevocable letter of credit No. *[irrevocable standby letter of credit number]* dated *[effective date]*

[Beneficiary]

By: _____
Title: _____

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This is an integral part of letter of credit number: *[irrevocable standby letter of credit number]*

ANNEX 2

FORM OF CERTIFICATE

[Insert date of certificate]

To: *[issuing bank's name and address]*

[check appropriate draw condition]

[_____] An Event of Default (as defined in the [Name of Agreement between [Beneficiary's Name] and [Insert Counterparty's Name] dated as of _____ (the "Agreement")) has occurred with respect to [Counterparty's Name] and such Event of Default has not been cured within the applicable cure period, if any provided for in the Agreement.

Or

[_____] [Counterparty's Name] is required, pursuant to the terms of the Agreement, to maintain a letter of credit in favor of [Beneficiary's Name], has failed to renew or replace the Letter of Credit and the Letter of Credit has less than thirty (30) days until the expiration thereof.

[Beneficiary]

By: _____
Title:_____

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Exhibit 8
Acknowledgement of Non-Default

[Print Duke Energy letterhead]

Date:

Address of Seller

Re: Acknowledgement of Non-Default (the "Acknowledgement") of the Power Purchase Agreement, between [Duke Energy Carolinas, LLC][Duke Energy Progress, LLC] ("Buyer") and [insert Seller name] dated as of _____ (the "Agreement").

Dear Sir or Madam:

The undersigned, a duly authorized representative of Buyer hereby acknowledges to Seller as follows:

1. The copy of the Agreement attached hereto as Exhibit A (including any amendments thereto) constitutes a true and complete copy of the Agreement;

2. Buyer has not transferred or assigned its interest in the Agreement; and

3. as of the date of this Acknowledgement based on the actual knowledge of Buyer's personnel responsible for administering the Agreement after due inquiry of Buyer's internal records only, there is no current Event of Default by Seller or Buyer under the Agreement, nor to Buyer's knowledge, has any event or omission occurred which, with the giving of notice or the lapse of time or both, would constitute an Event of Default under the Agreement and the Agreement is in full force and effect.

Notwithstanding any provision to the contrary set forth herein, Buyer reserves all rights and defenses available to it under the Agreement and nothing stated herein shall be deemed to have waived, amended or modified any such rights or defenses.

Except as specified herein to the contrary, capitalized terms used in this Acknowledgement shall have the meaning ascribed to such terms in the Agreement.

Sincerely,

[Duke Energy Carolinas, LLC][Duke Energy Progress, LLC]

By:_____
Name:
Title:

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Exhibit 9

Power Plant Controller Output Points			
Analog	**Units of Measure**	**Accuracy**	**Notes**
Estimated Unit Active Power Operating High Limit		± 5 %	Estimated Generation currently possible given current equipment status, equipment characteristics, and current ambient conditions. Calculation based on site rating, percentage of inverters in service, POA irradiance, DC/AC ratio, ambient conditions, etc.
Estimated Unit Active Power Operating Low Limit		± 5 %	Estimated Minimum Generation currently possible given current equipment status, equipment characteristics, and current ambient conditions. Calculation based on site rating, percentage of inverters in service, POA irradiance, DC/AC ratio, ambient conditions, etc.
Air Temperature	Degrees Celsius	± 1°	
Back Panel Temperature	Degrees Celsius	± 1°	Temperature sensor mounted behind a solar photovoltaic panel.
Plane Of Array Irradiance- Primary Meter	Watts/Meter Sq.	± 25 W/m²	Measured with a Class II pyranometer or equivalent equipment. For fixed-tilt sites, the sensor shall be mounted on a meteorological station facing the same angle and direction as the solar photovoltaic panels at the site. For tracking sites, the sensor shall be mounted on a tracker to be oriented at the same angle and direction as the solar photovoltaic panels at the site.
Plane Of Array Irradiance- Secondary Meter	Watts/Meter Sq.	± 25 W/m²	Measured with a Class II pyranometer or equivalent equipment. For fixed-tilt sites, the sensor shall be mounted on a meteorological station facing the same angle and direction as the solar photovoltaic panels at the site. For tracking sites, the sensor shall be mounted on a tracker to be oriented at the same angle and direction as the solar photovoltaic panels at the site.
Global Horizontal Irradiance	Watts/Meter Sq.	± 25 W/m²	Measured with a Class II pyranometer or equivalent equipment. The sensor shall be mounted on a metrological station set at the global horizontal angle of the earth in reference to the sun solar radiation.
Global Horizontal Diffuse Irradiance	Watts/Meter Sq.	± 25 W/m²	Measured with a Class II pyranometer or equivalent equipment. All Solar irradiance coming from the sky and other reflected surfaces except for solar radiation coming directly from the sun and the circumsolar

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			irradiance within approximately three degrees of the sun. Global diffuse irradiance sensors follow the same accuracy and mounting requirements as the GHI sensors but shall be designed to measure diffused irradiance.
Direct Irradiance (Optional)	Watts/Meter Sq.	± 25 W/m²	Measured with a Class II pyranometer or equivalent equipment. Solar irradiance arriving at the earth's surface from the sun's direct beam, on a plane perpendicular to the beam and is typically measured on a solar tracker.
Number of Inverters in Ready Status			Sum of the Number of inverters currently in service. Can be a decimal if one or more inverters are partially available.
Digital	**Status**	**Accuracy**	**Notes**
Active Power Dispatch Event	ON/OFF		ON indicates the resource is currently being dispatched to the Active Power Automatic Generation Control Setpoint.
Plane Of Array Irradiance- Primary Meter Status	ON/OFF		Communications Online Offline Status
Plane Of Array Irradiance- Secondary Meter Status	ON/OFF		Communications Online Offline Status

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For Facilities equipped with DC tied, behind a solar inverter, Storage Resources the following Power Plant Controller Output Points shall also be reported to Buyer[1]

Analog	**Units of Measure**	**Accuracy**	**Notes**
Unit Net MW			The resource's real power output measured at the low side of the step-up transformer.
Unit Gross MW			The resource's real power output before subtracting the auxiliary real power load or step-up transformer real power losses.
Unit Auxiliary MW			The resource's real power load the generating unit provides to maintain its station service power.
Storage Device Active Power Operating (Discharging) High Limit	+MWs		Storage Device's Active Power Operating High Limit given current equipment status, equipment characteristics, and current ambient conditions.
Storage Device Active Power Operating (Charging) Low Limit	-MWs		Storage Device's Active Power Operating Low Limit given current equipment status, equipment characteristics, and current ambient conditions.

[1] For non-DC tied, behind a solar inverter, Storage Resources Buyer may require additional Power Plant Controller Output Points to be reported upon reasonable notice to Seller.

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Number of Storage Device DC-DC Converters in Ready Status			Sum of the Number of DC-DC Converters currently in service. Can be a decimal if one or more DC-DC Converters are partially available.
Allowable Depth of Discharge	MWh		MWh energy storage potential, considering OEM recommendations and any emergent operating limitations, at a given point in time.
State of Charge			Percentage of the Allowable Depth of Discharge currently charged within the storage device. Example: A nameplate rated 10 MWh storage device is currently allowed to store energy up to 80% of its nameplate rating and down to 20% of its nameplate rating. The storage device currently has 4 MWhs stored in the device. The Allowable Depth of Discharge is 10 MWh *80% - 10 MWH * 20% = 6 MWh The State of Charge = 4 MWh / 6 MWh = 66.66%
Max MWh Charge			Maximum amount of energy currently allowed to be stored in the energy device given current equipment status, equipment characteristics, and current ambient conditions.
Min MWh Charge			Minimum amount of energy currently allowed to be stored in the energy device given current equipment status, equipment characteristics, and current ambient conditions.
Bulk Discharge Window Start Timestamp			The Timestamp of the start of the next Bulk Discharge Window.
Bulk Discharge Window End Timestamp			The Timestamp of the end of the next Bulk Discharge Window.
Bulk Discharge Window Active Power Setpoint			Active Power Setpoint for the current or next Bulk Discharge window taking into account the storage device's current State of Charge and Allowable Depth of Discharge.
Digital	**Status**	**Accuracy**	**Notes**
Storage Device Breaker Status	OPEN/CLOSED		Indicates whether a the Unit Generator Breaker is Open or Closed.

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Exhibit 10
Energy Storage Protocol

1. The Storage Resource must be on the DC side of the inverter and charged exclusively by the Facility.

2. The Storage Resource will be controlled by the Seller, within operational limitations described below.

3. The maximum output of the Facility, including any storage capability, at any given time shall be limited to the Facility's Contract Capacity as specified in the Agreement.

4. The discharge of stored energy is not permitted while the Facility has received or is subject to a curtailment instruction (i.e., System Operator Instruction) from the system operator.

5. Ramp rates for Storage Resource shall not exceed 10 percent of the Storage Resource's capacity (MW) on a per minute basis, up or down, unless the Storage Resource is ramping to mitigate Solar Integration Services Charge, in which case the ramp rate limitation does not apply.

6. Scheduling for capturing peak pricing periods and other storage limitations:
   a. For all (winter and summer) months/days with capacity rate hours ("Capacity Hours"), the Seller shall distribute any discharge of the storage device in a manner that levelizes (holds constant) the output of storage at the highest practical level over the duration of the Capacity Hours of such calendar day, except as limited by ramp rate criteria, inverter capability, and the Facility's Contract Capacity as specified in the Agreement.
      i. For any storage discharge occurring on weekends and holidays where only Off-Peak energy rates apply, the Seller shall apply the same discharge logic (same hours for any desired discharge) that is applied to Weekdays/non-Holidays, for the respective month.
   b. For the remaining (shoulder) months without Capacity Hour windows, the Seller shall distribute any discharge of the storage device in a way that levelizes (holds constant) the output of storage at the highest practical level during the full am on-peak energy period and/or full pm on-peak energy period of the Seller's discretion, except as limited by ramp rate criteria, inverter capability, and the Facility's Contract Capacity as specified in the Agreement.

7. Company reserves the right to add or modify operating restrictions specified in these Energy Storage Protocols to the extent necessary to comply with NERC Standards as such standards may be modified from time to time during the Term. Any such modification shall be implemented by Company in a Commercially Reasonable Manner and shall be applied to the Facility and Company's own generating assets on a non-discriminatory basis. If Seller can make a commercially reasonable demonstration to Company, which is approved by Company in its reasonable discretion, that the Facility does not contribute to potential NERC compliance

violations for which the modifications have been implemented, then such modifications shall not apply to the Facility.

8. If identification of Capacity Hours changes over the course of the term of the Agreement, Seller will make Commercially Reasonable Efforts to work with Company to adjust the hours of charging/discharging to coincide with these updated hours. However, Seller shall not be obligated to do so in a way that compromises their original economic value contemplated for storage resource.

9. Seller will only be compensated for Energy and Capacity actually provided to Buyer in accordance with the terms of the Agreement.

Notes:

a) Other capitalized terms used in this Exhibit which have not been defined herein shall have the meaning ascribed to such terms in the Agreement to which this exhibit is attached.

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