



**MONTGOMERY  
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March 31, 2020

**Via Email:** [prc.records@state.nm.us](mailto:prc.records@state.nm.us)

Ms. Melanie Sandoval  
Records Bureau  
New Mexico Public Regulation Commission  
1120 Paseo de Peralta  
Santa Fe, NM 87501  
[melanie.sandoval@state.nm.us](mailto:melanie.sandoval@state.nm.us)

Re: **Case No. 19-00099-UT**  
El Paso Electric Company's Amended Application for Approval of its  
Amended 2019 Renewable Energy Act Plan; 2020 Renewable Energy Act Plan;  
Third Revised Rate No. 38 – RPS Cost Rider Advice Notice No. 266, and  
Testimony in Support Thereof Pursuant to the Renewable Energy Act  
and Rule 17.9.572 NMAC

Dear Ms. Sandoval:

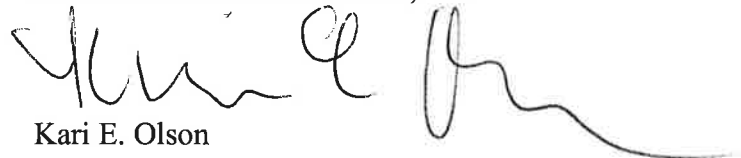
Enclosed for filing please find a pdf of *El Paso Electric Company's Amended Application for Approval of its Amended 2019 Renewable Energy Plan; 2020 Renewable Energy Act Plan; and Revised Rate No. 38 – RPS Cost Rider Advice Notice No. 266 (Attachment B to Application)*, and the supporting Direct Testimonies of James Schichtl, Omar Gallegos, Rene F. Gonzalez, and Wayne Oliver.

Also enclosed please find a scanned copy of a check with the required \$1 filing fee for the advice notice. The check will be mailed to the Records Division.

Thank you for your assistance in this matter.

Very truly yours,

**MONTGOMERY & ANDREWS, P.A.**



Kari E. Olson

Enclosures  
cc: Service List

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**REPLY TO:**

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Santa Fe, New Mexico 87504-2307

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

<b>AMENDED APPLICATION FOR APPROVAL OF )</b>	
<b>EL PASO ELECTRIC COMPANY'S AMENDED )</b>	
<b>2019 RENEWABLE ENERGY ACT PLAN AND )</b>	
<b>2020 RENEWABLE ENERGY ACT PLAN )</b>	
<b>PURSUANT TO THE RENEWABLE ENERGY )</b>	<b>CASE NO. 19-00099-UT</b>
<b>ACT AND 17.9.572 NMAC, AND THIRD )</b>	
<b>REVISED RATE NO. 38 – RPS COST RIDER )</b>	
<b>)</b>	
<b>EL PASO ELECTRIC COMPANY, )</b>	
<b>Applicant. )</b>	
<b>)</b>	

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**EL PASO ELECTRIC COMPANY’S AMENDED APPLICATION FOR APPROVAL OF  
ITS 2019 RENEWABLE ENERGY ACT PLAN AND 2020 RENEWABLE ENERGY ACT  
PLAN AND THIRD REVISED RATE NO. 38-RPS COST RIDER**

El Paso Electric Company ("EPE" or "Company"), pursuant to the Order Vacating Procedural Schedule and Staying Case at Ordering ¶ B (November 18, 2019) ("Stay Order"), hereby files this Amended Application for approvals related its Amended 2019 Renewable Energy Act ("REA") Plan and its 2020 REA Plan ("2019 and 2020 Plan") ("Amended Application"). This Amended Application presents EPE’s plan for compliance with the New Mexico Renewable Energy Act NMSA 1978, Sections 62-16-1 to -10 (2004, as amended through 2019) ("REA" or "Act") and the New Mexico Public Regulation Commission’s ("NMPRC" or "Commission") Rule 17.9.572 NMAC ("Rule 572" or "Rule"), to the extent it does not conflict with statute.

For this Plan Year (2020 and 2021) and the Next Plan Year (2022), the Plan determines renewable portfolio standard ("RPS") calculations; identifies existing RPS eligible procurements approved by the Commission in EPE’s most recent REA Plan, Case No. 18-00109-UT, and then describes EPE’s planned procurement actions and associated costs to meet the incremental renewable RPS provided in Section 62-16-4 of the REA for this Plan Year (2020 and 2021) and

Next Plan Year (2022). Per Rule 572, the Plan Year (2020 and 2021) data is presented for Commission approval and the Next Plan Year (2022) data is presented for informational purposes. The 2019-2020 Plan also reconciles RPS costs and rider revenues for 2019, the prior plan year, and proposes revisions to Rate No. 38 – Renewable Portfolio Standard Cost Rider ("RPS Cost Rider") to reflect RPS procurement costs for the rest of this Plan Year (2021), including 2019 reconciliation amounts and the removal of the statutory cap on billing for certain large customers. EPE's 2019-2020 Plan is supported by the testimonies of EPE Witnesses James Schichtl, Omar Gallegos, Rene Gonzalez, and Merrimack Energy Group, Inc. Principal, Wayne Oliver who served as the Independent Evaluator for EPE's competitive procurement process, the 2019 Renewable Energy Request for Proposals ("2019 RFP"). EPE's Advice Notice No. 266, requesting approval of its 3rd Revised Rate No. 38 effective January 1, 2021, is being filed concurrently with this Amended Application.

As described in more detail below, EPE's renewable energy procurement is complicated by the fact that EPE provides retail service across two jurisdictions with differing statutory requirements related to the provision of renewable energy to customers. EPE's 2019-2020 Plan identifies the proactive steps EPE is taking toward meeting 20 percent RPS for New Mexico customers in this Plan Year, including its issuance of requests for proposals to procure dedicated renewable generation resources for service in New Mexico and its proposal to temporarily assign EPE's Texas jurisdictional quantity of solar energy from EPE's existing Macho Springs Solar Facility ("Macho Springs") for delivery to New Mexico customers and to retire the associated Renewable Energy Certificates ("REC") for RPS compliance purposes, until EPE's newly proposed renewable resources are in commercial operation, but in no case later than December 31, 2022.

EPE requests approval of its 2019-2020 Plan and specifically requests the following authorizations in this Amended Application:

- Authorization to enter into a 20-year purchased power agreement with Hecate Energy for 50 Megawatts ("MW") of solar generation at \$18.93 per MWh;
- Authorization to enter in a 20-year purchased power agreement with Buena Vista Energy for 20 MW of solar generation at \$19.88 per MWh;
- Authorization to temporarily assign EPE's Texas jurisdictional quantity of solar energy from EPE's existing Macho Springs Solar Facility for delivery to New Mexico customers and to retire the associated RECs for RPS compliance purposes, until EPE's newly proposed renewable resources are in commercial operation, but in no case later than December 31, 2022;
- Approval of reconciled RPS rider costs and rider revenue collections for calendar year 2019; and
- Approval to revise Rate No. 38 - RPS Cost Rider from \$0.009128 per kWh to \$0.011086, to recover approved 2021 Plan Year costs adjusted for the 2019 reconciliation, and to eliminate provisions of the statutory cap for certain large customers from Rate No. 38.

In addition, but only to the extent such approval may be required, EPE requests:

- Approval of a variance from all Rule 572 provisions that are now inconsistent with the REA;
- Approval of a variance from compliance with the 2020 and 2021 RPS under Section 10 of Rule 572; and,
- Approval of a variance from the data filing requirements of 17.9.530 NMAC.

The 2019-2020 Plan and the revised RPS Cost Rider, with requested variances, satisfies all requirements of the REA and Rule 572. In further support of this Amended Application, EPE states as follows:

**I. DESCRIPTION OF EPE**

1. EPE is certified and authorized to conduct the business of providing public utility service within the State of New Mexico and is a public utility subject to the jurisdiction of the NMPRC under the New Mexico Public Utility Act ("PUA").

2. EPE generates, transmits, and distributes electricity through an interconnected system to customers in southern New Mexico and Texas. EPE owns, operates, leases, or controls the plant, property, and facilities used by it for the generation, transmission, distribution, sale, or furnishing of electricity to or for the public within both states.

3. EPE has obtained certificates of public convenience and necessity required for the ownership, operation, leasing, or controlling of such plant, property, and facilities.

4. EPE's principal business address and telephone number for its New Mexico service area are:

El Paso Electric Company  
100 N. Stanton Street  
El Paso, Texas 79901  
(915) 543-5711.

**II. REA FILING REQUIREMENTS**

5. The REA has three purposes:

- prescribe the amounts of renewable energy resources that public utilities shall include in their electric energy supply portfolios for sales to retail customers in New Mexico by prescribed dates;
- allow public utilities to recover costs through the rate-making process incurred for procuring or generating renewable energy used to comply with the prescribed amounts; and

- protect the public utilities and their ratepayers from renewable energy costs that are above a reasonable cost threshold.

NMSA 1978, § 62-16-2(B).

6. The REA provides incremental RPS, identified in Section 62-16-4, to guide utilities in making “reasonable and consistent progress over time toward” having “zero carbon resources [ ] supply one hundred percent of all retail sales of electricity to New Mexico by 2045”, subject to certain limitations. Section 62-16-4(6). Specifically, the RPS increases from no less than twenty percent by January 1, 2020, to forty percent by 2025, fifty percent by 2030, eighty percent by 2040, and requires 100 percent zero carbon resources by 2045.

7. Under the REA, EPE is required to file an annual report with the Commission on procurement and generation of renewable energy during the prior calendar year, and a procurement plan for the following calendar year. The information that should be included in the annual report and plan is listed in Section 62-16-4(F) (until June 30, 2019) and Section 62-16-4(G) (starting July 1, 2020).<sup>1</sup>

8. The Commission provides further guidance for information to be addressed in the procurement plan through Rule 572.

9. EPE’s most recent REA procurement plan cases were Case Nos. 14-00121-UT, 15-00117-UT, 16-00109-UT, 17-00090-UT, and 18-00109-UT. The Commission has also established standards for procurement plan filings in these previous EPE procurement plan cases.

10. The REA was significantly amended in 2019. The substantive amendments that are relevant to this filing are summarized as follows:

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<sup>1</sup> Although the 2019-2020 Plan is submitted prior to the July 1, 2020 date set forth in statute, EPE was directed under the Stay Order to comply with Section 62-4-16(G) instead of 62-16-4(F).

- a. Extended and increased renewable energy requirement to supply “one hundred percent of all retail sales of electricity in New Mexico” from zero carbon resources by January 1, 2045, subject to certain limitations stated in statute, and corresponding directive to make “reasonable and consistent progress...over time toward that requirement.” *See* § 62-16-4(A) and (B).
- b. Added progressively higher renewable portfolio standards to guide utility’s progress toward achieving 100 percent zero carbon resources by 2045. § 62-16-4(A).
- c. Removed Commission authority to establish a RCT and replaced the Commission’s definition of RCT with “an average annual levelized cost of sixty dollars (\$60.00) per megawatt-hour at the point of interconnection of the renewable energy resource with the transmission system, adjusted for inflation after 2020.” § 62-16-3(E).
- d. Deleted Section 62-16-4(A)(2) addressing adjustment and cost recovery for certain large customers;
- e. Deleted Section 62-16-4(A)(4) requiring diversification of the type of renewable energy resource in the renewable portfolio; and
- f. Added new reporting requirements, beginning with the 2020 report and procurement plan filing, including:
  - (1) the cost of procurement for new renewable energy required to comply with the renewable portfolio standard;
  - (2) the capital, operating and fuel costs on a per-megawatt-hour basis during the preceding calendar year of each nonrenewable generation resource rate-based by the utility, or dedicated to the utility through a power purchase

agreement of one year or longer, and the nonrenewable generation resources' carbon dioxide emissions on a per megawatt-hour basis during that same year;

(3) information, including exhibits, as applicable, that demonstrates that the proposed procurement: (a) was the result of competitive procurement that included opportunities for bidders to propose purchased power, facility self-build or facility build-transfer options; (b) has a cost that is reasonable as evidenced by a comparison of the price of electricity from renewable energy resources in the bids received by the public utility to recent prices for comparable energy resources elsewhere in the southwestern United States; and (c) is in the public interest, considering factors such as overall cost and economic development opportunities”, and;

(4) strategies used to minimize costs of renewable energy integration, including location, diversity, balancing area activity, demand-side management and load management.

§ 62-16-4(G).

11. EPE’s prior REA procurement plan filings were made under the previous version of the REA. Since the recent adoption of the amendments, EPE has been working diligently to make adjustments to its prior approved Plan to follow and comply with amendments to the REA. As part of this Amended Application, EPE seeks guidance from the Commission as it makes the transition.



### **III. EPE's 2019-2020 PLAN**

#### **A. Annual Report**

12. Pursuant to REA and Rule 572, EPE separately filed its 2018 RPS Report on May 1, 2019 with the Commission's Records Management Bureau.

13. In response to Paragraph F(2) of the Commission's Procedural Order (October 19, 2019), a true and correct copy of the 2018 RPS Report, as corrected on October 10, 2019 was filed in this docket as Exhibit JS-S1 to the Supplemental Testimony of James Schichtl (November 8, 2019).

14. EPE will file its 2019 RPS Report with the Commission's Records Management Bureau on May 1, 2020, in accord with Rule 572. The 2019 RPS Report will include information responsive to the new reporting requirements set forth in Section 62-16-4(G)(2) and (4) in accordance with the Stay Order.

#### **B. 2019-2020 Plan**

15. EPE filed its Application for Approval of its 2019 Annual Renewable Energy Plan ("2019 Plan") on October 1, 2019, pursuant to the Order Granting EPE's Verified Motion to Vacate May 1, 2019 Filing Date, at Ordering ¶ A (April 24, 2019).

16. The case was subsequently stayed pending EPE's filing of an amended Plan "as soon as EPE finalizes the contract with the bidder from the 2019 RFP , but no later than March 31, 2020...that (i) seeks approval of the selected procurement from the 2019 RFP; (ii) seeks approval of EPE's 2020 Renewable Energy Act Plan for the 2021 Plan Year in addition to its already filed 2019 Plan for the 2020 Plan Year; and (iii) complies with NMSA 1978, Section 62-16-4(G)(2019)."

17. On December 6, 2019, in response to a Motion filed by Pro Se Intervenor Merrie Lee Soules, the Hearing Examiner ordered EPE to (A) file its Response to the Motion on the same day it files its Amended Application, and (B) treat Ms. Soules' Motion as a request that it be ordered to produce the requested information the form of supplemental testimony to its Amended Application. On a Motion Requesting the Hearing Examiner to Require EPE to Produce Additional Evidence, Ordering ¶ C ("December Order").

18. EPE finalized purchased power agreements for the awarded resources on March 30, 2020.

19. EPE is simultaneously filing a motion to withdraw the October 1, 2019 Application and supporting testimonies and exhibits to replace that filing with this Amended Application and supporting testimonies and exhibits timely filed by the March 31, 2020 deadline set forth in the Commission's Stay Order and one day after the contracts for the procurements selected from the 2019 RFP were finalized.

20. EPE's 2019-2020 Plan includes Plan Year (2020 and 2021) data for approval and Next Plan Year (2022) data for informational purposes. The 2019-2020 Plan is attached as Exhibit OG-2 to Mr. Gallegos' direct testimony filed in support of this Amended Application. Mr. Gallegos describes the 2019-2020 Plan and the procurement actions EPE is proposing to meet 20 percent RPS in the second half of this Plan Year (2021).

21. To the extent possible, the 2019-2020 Plan complies with both the REA and Rule 572. Because the Commission has not yet updated Rule 572 to address the 2019 amendments to the REA, EPE complies with the REA rather than the Rule where inconsistencies exist.

22. Specifically, EPE identifies the following areas where EPE's 2019-2020 Plan departs from Rule 572:

- A. The 2019-2020 Plan relies on the amended definition of RCT in place of the prior 3 percent RCT established by the Commission;
- B. The 2019-2020 Plan does not calculate a large customer adjustment or cap costs for certain large customers;
- C. The 2019-2020 Plan does not address Rule 572 diversification requirements or otherwise provide a plan for achieving a diversified portfolio; and
- D. The 2019-2020 Plan relies on the amended definition of RCT and uses RECs associated with energy delivered to EPE's system for RPS compliance.

EPE requests variances from the Rule 572 sections which have been superseded by the amended REA, and additionally requests a variance from the 2020 and 2021 RPS under Section 10 of the Rule.

23. As explained by Mr. Schichtl in his direct testimony, the statutory changes to the RCT methodology significantly impacted the 2019-2020 Plan. Under the prior definition of RCT, it was not practically possible for EPE to achieve RPS targets after Plan Year 2015 because EPE's previously approved procurement costs exceeded three percent of the respective plan year total revenues, the RCT set by the Commission pursuant to the former statutory provision. While EPE sought and was granted conditional, partial waivers from total RPS requirements since the 2012 Plan Application, EPE was able to rely on existing resources, banked RECs, and in one case RECs provided at no cost to meet total RPS requirements through 2015. EPE has relied on partial waivers from total RPS since the 2016 plan year.

24. The statutory amendments also impact RPS calculations in the 2019-2020 Plan. RPS costs for EPE's four (4) qualifying large customers will no longer be capped at 2 percent of

billed revenue under the RPS Cost Rider. Each of these customers will be impacted with an increase in their total annual bill in the future due to the elimination of this cap.

25. In response to these changes, EPE proactively took steps to procure new renewable energy resources for New Mexico by issuing the 2019 RFP to solicit, evaluate, and select additional renewable resources needed to comply with the RPS on May 29, 2019 (prior to the effective date of the new amendments).

26. EPE selected and has entered into purchased power agreements for two projects for purchased power from two new solar facility resources that are expected to be in commercial operation by 2022. Hecate Santa Teresa Energy 2 is a new 50 MW solar plan project that will sell EPE 96,054 MWh of first year energy in 2022 and 143,319MWh of full year energy in 2023 under a 20-year LTPPA. Buena Vista Energy Center 2 is a new 20 MW solar plan project that will sell EPE 42,756 MWh of first year energy in 2022 and 62,688 MWh of full year energy in 2023 under a 20-year LTPPA.

27. Despite EPE's proactive efforts, EPE did not receive any proposals from the 2019 RFP for facilities that could viably contribute towards the 20 percent requirement before 2022.

28. EPE has also entered into Long-Term Purchased Power Agreements for new renewable (solar) system resources that are pending Commission approval in Case No. 19-00348-UT. If approved, these resources will provide energy and RECs for New Mexico customers toward meeting RPS starting in 2022.

29. EPE also issued a second RFP on September 19, 2019, to solicit bids from other utilities or independent power producers to provide a targeted energy amount for a one-year market sale to meet the 20 percent RPS in 2020 and bridge the shortfall until long-term resources could be selected, approved, and constructed. EPE did not receive any responsive proposals.

30. Having exhausted efforts to identify and procure new renewable energy resources for New Mexico through a competitive process, EPE is instead seeking authorization to take alternative action that will allow EPE to more closely meet the 20 percent RPS by the second half of this Plan Year (2021) and until the newly selected resources are in commercial operation but in no case later than December 31, 2022.

31. Specifically, EPE is proposing a temporary arrangement to purchase additional energy, and associated RECs, from Macho Springs, approved as a system resource by Commission Final Order in Case No. 12-00386-UT. EPE has petitioned the Public Utility Commission of Texas to temporarily transfer allocation of approximately 110,000 MWh of renewable energy and REC's annually to New Mexico from Texas subject to approval by this Commission.

32. The bundled cost of the energy and RECs from Macho Springs was previously approved at a rate of \$57.90 per MWh by Commission Final Order in Case No. 12-00386-UT.

### **C. Rate Rider**

33. In accordance with ¶¶ F and G, of the Stay Order, EPE withdrew Advice Notice No. 264 reflecting proposed 2019 Plan costs for the 2020 Plan Year and refiled Advice Notice No. 264, effective January 1, 2020, to “effect a reconciliation of the overcollection in the 2018 Plan Year.”

34. EPE's 2019-2020 Plan reconciles RPS costs and rider revenues for the 2019 Plan Year and proposes revisions to Rate No. 38 - RPS Cost Rider consistent with the REA.

35. In Case No. 17-00090-UT, the Commission approved the RPS Cost Rider and approved recovery of specified 2018 Plan Year costs, and in Case No. 18-00109-UT, the Commission approved recovery of specified 2019 Plan Year Costs and revised RPS Cost Rider rates.

36. Concurrent with this Amended Application, EPE is filing Advice Notice No. 266 which contains a 3rd Revised Rate No. 38 – Renewable Portfolio Standard Cost Rider.

#### **D. Testimony and Exhibits**

37. EPE's 2019-2020 Plan is detailed in the Direct Testimonies and Exhibits of James Schichtl, Omar Gallegos, Rene Gonzalez, and Wayne Oliver.

- A. EPE Witness Schichtl's testimony introduces EPE's witnesses and discusses RPS issues from a regulatory policy perspective, including: EPE's history of compliance with the REA, the impact of the 2019 amendments to the REA on EPE's 2018 Plan approved in Case No. 18-00109-UT, EPE's 2019-2020 Plan for compliance with the REA RPS, EPE's requests for variances, EPE's proposed 2021 RPS Cost Rider, and updated information on EPE's REC purchase programs for customer-installed Distributed Generation (DG) systems.
- B. EPE Witness Gallegos's testimony presents EPE's 2019-2020 Plan for 2020 and 2021 plan year approval, and he presents 2022 plan year data for informational purposes. Mr. Gallegos also presents EPE's proposed resource procurements for dedicated renewable facilities resulting from the 2019 Renewable Energy RFP. For all three plan years Mr. Gallegos presents RPS calculations, forecasted generation and procurement cost for the portfolio of generation resources supplying renewable energy to New Mexico, and other information required to meet the REA. Mr. Gallegos also provides a five-year trajectory for EPE's planned compliance with the requirements of the REA through dedicated and system renewable resources. Finally, Mr. Gallegos provides information requested in Pro Se Intervenor Soules' Motion as ordered by the Commission in the December Order.

- C. Witness Oliver is a principal with Merrimack Energy Group, Inc. and served as the independent evaluator for EPE's 2019 RFP. Mr. Oliver was primarily responsible for reviewing and tracking EPE's implementation of the competitive bidding process from design of the 2019 RFP through the bid evaluation and selection process with the objective of ensuring the process was undertaken in a fair, equitable, and unbiased manner. His testimony summarizes his final report regarding the conduct and results of the 2019 RFP.
- D. EPE Witness Gonzalez's testimony presents the calculation of EPE's proposed 2021 RPS Cost Rider, effective January 1, 2021, for recovery of EPE's Commission-approved RPS procurement costs in 2021, including a proposed adjustment for reconciliation of actual 2019 RPS costs and rider revenues. Mr. Gonzalez also presents, for informational purposes only, the 2022 RPS Cost Rider rate that would incorporate the new, dedicated renewable resources described by Mr. Gallegos.

### **III. SERVICE AND NOTICE**

38. Service of all notices, pleadings and other documents related to this Amended Application should be made as follows:

Judith M. Parsons  
El Paso Electric Company  
100 N. Stanton Street  
El Paso, Texas 79901-1442  
Post Office Box 982  
El Paso, Texas 79960-0982  
Telephone (915) 543-5777

Nancy B. Burns  
Senior Attorney  
New Mexico Bar No. 7538  
El Paso Electric Company  
300 Galisteo Street, Suite 206  
Santa Fe, New Mexico 87501  
Telephone (505) 982-7391

In addition to service on the above, EPE requests electronic service of all pleadings and documents as follows:

[judith.parsons@epelectric.com](mailto:judith.parsons@epelectric.com)  
[nancy.burns@epelectric.com](mailto:nancy.burns@epelectric.com)  
[patricia.griego@epelectric.com](mailto:patricia.griego@epelectric.com);  
[jwechsler@montand.com](mailto:jwechsler@montand.com);  
[kolson@montand.com](mailto:kolson@montand.com); and  
[ltalley@montand.com](mailto:ltalley@montand.com)

39. A Proposed Form of Notice to Customers is attached as Attachment A.

40. EPE's Advice Notice No. 266, Table of Contents, and 3<sup>rd</sup> Revised Rate No. 38 – Renewable Portfolio Standard ("RPS") Cost Rider is attached hereto as Attachment B.

WHEREFORE, EPE respectfully requests a Commission Order approving the relief requested in this Amended Application and 2019-2020 Plan in accordance with the REA and Rule 572 and granting such other approvals, authorizations and actions required under the REA, Rule 572, and Commission rules and orders to implement the 2019-2020 Plan and revisions to the RPS Cost Rider.



Respectfully submitted,

Nancy B. Burns  
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New Mexico Bar No. 7538  
El Paso Electric Company  
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Santa Fe, New Mexico 87501  
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[nancy.burns@epelectric.com](mailto:nancy.burns@epelectric.com)

MONTGOMERY & ANDREWS, P.A.

By: /s/ Kari E. Olson  
Jeffrey J. Wechsler  
Kari E. Olson  
Post Office Box 2307  
Santa Fe, New Mexico 87504-2307  
(505) 982-3873  
[jwechsler@montand.com](mailto:jwechsler@montand.com)  
[kolson@montand.com](mailto:kolson@montand.com)

**ATTORNEYS FOR EL PASO  
ELECTRIC COMPANY**

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

**AMENDED APPLICATION FOR APPROVAL OF )  
EL PASO ELECTRIC COMPANY'S AMENDED )  
2019 RENEWABLE ENERGY ACT PLAN AND )  
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PURSUANT TO THE RENEWABLE ENERGY ) CASE NO. 19-00099-UT  
ACT AND 17.9.572 NMAC, AND THIRD )  
REVISED RATE NO. 38 – RPS COST RIDER )  
)  
EL PASO ELECTRIC COMPANY, )  
Applicant. )  
\_\_\_\_\_)**

**NOTICE TO EPE CUSTOMERS**

**NOTICE** is hereby given of the following matters pertaining to the above captioned case pending before the New Mexico Public Regulation Commission ("Commission" or "NMPRC"):

On March 31, 2020, El Paso Electric Company ("EPE" or "Company") filed its 2019-2020 Annual Renewable Energy Plan ("2019-2020 Plan") for its renewable energy compliance with the New Mexico Renewable Energy Act ("REA" or "Act") and the Commission's Rule 17.9.572 NMAC, Renewable Energy as a Source of Electricity ("Rule 572" or "Rule"). EPE's 2019-2020 Plan covers the years 2020, 2021, and 2022. EPE states that its 2019-2020 Plan details the previously approved actions and estimated costs for Plan Years 2020 and 2021 to contribute to meeting the applicable Renewable Energy Portfolio Standard ("RPS") requirements of the Act. In its 2019-2020 Plan, EPE is requesting Commission approval of two Purchase Power Agreements ("PPAs") to supply a combined 70 MW of renewable energy for delivery to New Mexico customers beginning in 2022. EPE additionally states that its 2019-2020 Plan requests NMPRC authorization to temporarily reallocate energy produced by the Macho Springs Solar Facility ("Macho Springs") from Texas to New Mexico customers. If

approved by the PUCT and this Commission, EPE will retire the associated WREGIS-registered renewable energy certificates ("RECs") for RPS compliance until EPE's requested new resources begin commercial operation.

EPE requests that the Commission approve its 2019-2020 Plan and additionally seeks the following:

- (A) Authorization to temporarily reallocate solar energy from Macho Springs to New Mexico customers from Texas, and retire the associated RECs for RPS purposes, until EPE can procure new resources for New Mexico.
- (B) Approval of two PPAs for a combined 70 MW of solar generation, to begin providing renewable energy to New Mexico customers in 2022;
- (C) Approval to reconcile RPS Rider costs and rider revenue collections for the 2019 Plan Year; and
- (D) Revisions to Rate No. 38 - Renewable Portfolio Standard ("RPS") Cost Rider that was approved in Case No. 18-00109-UT to recover Commission-approved, procurement plan costs for 2021, adjusted for 2019 reconciliation amounts.

1. EPE proposes revisions to recover \$19.894 million of authorized RPS costs in 2021 through the RPS Cost Rider, at a rate of \$0.011158 per kWh except as indicated below. This represents an increase of 24.5 percent in RPS costs over the authorized amount of \$15.982 million in 2019. This rate is applicable for retail service to all customers served under the following rate schedules; Residential Service, Small Commercial Service, General Service, Irrigation Service, City and County Service, Water and Sewage Pumping Service, Large Power Service, Military Research and Development, Street Lighting Service, Private Area Lighting Service, Seasonal Agricultural Processing Service, Outdoor Recreational Lighting Service, State

University Service and Interruptible Service.

2. Large non-governmental customers with energy purchases exceeding 10 million kWh annually will no longer be billed two percent (%) of pre-tax retail charges. These customers will now pay the RPS Rider rate applicable to all other customers.
3. The following Table shows typical bill impacts resulting from the increase in the RPS Rider for the Residential rate class. These impacts are subject to change by the Commission based upon its findings in this case.

Residential Typical Bill Comparison by kWh Level (Summer)

kWh	Current Base & Fuel Rates			Proposed Base & Fuel Rates			Percent Impact		
	Base Plus Fuel	RPS Rider	Total	Base Plus Fuel	RPS Rider	Total	Base Plus Fuel	RPS Rider	Total
0	6.73	-	6.73	6.73	-	6.73	0.0%	0.0%	0.0%
100	15.93	0.91	16.84	15.93	1.12	17.05	0.0%	23.1%	1.2%
250	29.73	2.28	32.01	29.73	2.79	32.52	0.0%	22.4%	1.6%
500	52.72	4.56	57.28	52.72	5.58	58.30	0.0%	22.4%	1.8%
750	78.34	6.85	85.19	78.34	8.37	86.71	0.0%	22.2%	1.8%
1000	105.68	9.13	114.81	105.68	11.16	116.84	0.0%	22.2%	1.8%
2000	215.07	18.26	233.33	215.07	22.32	237.39	0.0%	22.2%	1.7%

Residential Typical Bill Comparison by kWh Level (Winter)

kWh	Current Base & Fuel Rates			Proposed Base & Fuel Rates			Percent Impact		
	Base Plus Fuel	RPS Rider	Total	Base Plus Fuel	RPS Rider	Total	Base Plus Fuel	RPS Rider	Total
0	6.73	-	6.73	6.73	-	6.73	0.0%	0.0%	0.0%
100	14.97	0.91	15.88	14.97	1.12	16.09	0.0%	23.1%	1.3%
250	27.33	2.28	29.61	27.33	2.79	30.12	0.0%	22.4%	1.7%
500	47.91	4.56	52.47	47.91	5.58	53.49	0.0%	22.4%	1.9%
750	68.51	6.85	75.36	68.51	8.37	76.88	0.0%	22.2%	2.0%
1000	89.11	9.13	98.24	89.11	11.16	100.27	0.0%	22.2%	2.1%
2000	171.49	18.26	189.75	171.49	22.32	193.81	0.0%	22.2%	2.1%

This case has been docketed as Case No. 19-00099-UT, and any inquiries should be referred to that number.

(D) Approval of a variance(s) from (i) all Rule 572 requirements superseded by the 2019 amendments to the REA; (ii) the 2020 and 2021 RPS under Section 10 of Rule 572; and (iii) the data filing requirements of 17.9.530 NMAC.

Any interested person may inspect EPE's Application through the *Case Lookup EdoCKET* on the Commission's Website at <http://164.64.85.108/> and in person at the following places:

El Paso Electric Company  
201 N. Water Street  
Las Cruces, NM 88001  
  
Phone (575) 526-5551

Public Regulation Commission  
Records Department  
1120 Paseo de Peralta, Room 406  
Santa Fe, NM 87504

The procedural schedule for this case is as follows:

1. Any person desiring to intervene in the proceeding must file a Motion to Intervene pursuant to 1.2.2.23 NMAC on or before May \_\_, 2020.
2. The Commission's Utility Division Staff shall, and any intervenor may, file direct testimony on or before May \_\_, 2020.
3. Any rebuttal testimony shall be filed on or before June \_\_, 2020.
4. Any person whose testimony has been filed shall attend the hearing and submit to examination under oath.
5. A public hearing to hear and receive testimony, exhibits, arguments, and any other appropriate matters relevant to this proceeding is set to commence at 9:30 a.m. on July \_\_, 2020 and continue if necessary through July \_\_, 2020. The Hearing will be held in the Ground Floor Board Room of the P.E.R.A. Building at 1120 Paseo de Peralta in Santa Fe, New Mexico. The hearing may be vacated if deemed not required under NMSA 1978, § 62-9-1(C) (2005); in such case, the Commission will take public comment and dispose of the Application at an Open Meeting.

Any interested person should contact the Commission for confirmation of the hearing date, time, and place since hearings are occasionally rescheduled.

Any interested person may appear at the public hearing and give a written or oral comment pursuant to the Commission's Utility Division Rules of Procedure 1.2.2.23(F) NMAC without becoming an intervenor. Comments will not be considered as evidence in this case. Interested persons may also file written comments, which shall make reference to NMPRC Case No. 19-00099-UT, at the following address:

New Mexico Public Regulation Commission  
Records Department  
1120 Paseo de Peralta  
PO Box 1269  
Santa Fe, New Mexico 87501-1269

The Commission's Utility Division Procedures 1.2.2 NMAC apply to this case, except as modified by Order of the Commission or the Hearing Examiner, and they are available at the Commission's Website at <http://164.64.110.239/nmac/titles.htm>.

Anyone filing pleadings, documents, or testimony in this case shall serve copies thereof on all parties of record and Staff via email. Any such filings shall also be sent to the Hearing Examiner by email at \_\_\_\_\_. All pleadings shall be emailed on the date they are filed with the Commission.

Any person with a disability requiring special assistance to participate in this proceeding should contact the Commission at 1-888-427-5772 at least 24 hours prior to the hearing.

The procedural dates and requirements provided herein are subject to further order of the Commission or Hearing Examiner.

**I S S U E D** at Santa Fe, New Mexico this \_\_\_ day of April, 2020.

**NEW MEXICO PUBLIC REGULATION COMMISSION**

---

**Hearing Examiner**

**EL PASO ELECTRIC COMPANY****ADVICE NOTICE NO. 266**

PAGE 1 OF 1

**NEW MEXICO PUBLIC REGULATION COMMISSION  
OF THE STATE OF NEW MEXICO**

El Paso Electric Company (EPE) hereby gives notice to the public and the Commission of the filing and publishing of the following changes in its Rates, which are attached hereto:

**RATES**

<b>Rate Number</b>	<b>Title of Rate</b>	<b>Cancelling Rate Number</b>	<b>Date Effective</b>
3 <sup>rd</sup> Revised Rate No. 38	Renewable Portfolio Standard (RPS) Cost Rider	2 <sup>nd</sup> Revised Rate No. 38	01/01/2021

Advice Notice No. 266

Signature/Title   
**James Schichtl**  
**Vice President-Regulatory Affairs**

## EL PASO ELECTRIC COMPANY

## REVISED TABLE OF CONTENTS

## RATE SCHEDULES

PAGE 1 OF 2

<b>Rate Schedule Number</b>	<b><u>Title</u></b>
11 <sup>th</sup> Revised Rate 1	Residential Service Rate
13 <sup>th</sup> Revised Rate 3	Small General Service Rate
13 <sup>th</sup> Revised Rate 4	General Service Rate
14 <sup>th</sup> Revised Rate 5	Irrigation Service Rate
10 <sup>th</sup> Revised Rate 7	City and County Service Rate
11 <sup>th</sup> Revised Rate 8	Water, Sewage, Storm Sewage Pumping or Sewage Disposal Rate
11 <sup>th</sup> Revised Rate 9	Large Power Service Rate
13 <sup>th</sup> Revised Rate 10	Military Research and Development Power Rate
12 <sup>th</sup> Revised Rate 11	Street Lighting Service Rate
12 <sup>th</sup> Revised Rate 12	Private Area Lighting Rate
8 <sup>th</sup> Revised Rate 15	Miscellaneous Service Charges
39 <sup>th</sup> Revised Rate 16	Purchased Power Service
10 <sup>th</sup> Revised Rate 17	Efficient Use of Energy Recovery Factor (EUERF)
19 <sup>th</sup> Revised Rate 18	FPPCAC
10 <sup>th</sup> Revised Rate 19	Seasonal Agriculture Processing Service Rate
10 <sup>th</sup> Revised Rate 21	Supplementary Power Service Cogeneration and Small Power Production Facilities
10 <sup>th</sup> Revised Rate 22	Backup Power Service Cogeneration and Small Power Production Facilities

Advice Notice No. 266

Signature/Title   
**James Schichtl**  
**Vice President – Regulatory Affairs**



## EL PASO ELECTRIC COMPANY

## REVISED TABLE OF CONTENTS

## RATE SCHEDULES

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10 <sup>th</sup> Revised Rate 23	Maintenance Power Service Cogeneration and Small Power Production Facilities	
10 <sup>th</sup> Revised Rate 24	Curtailable Power Service Cogeneration and Small Power Production Facilities	
8 <sup>th</sup> Revised Rate 25	Outdoor Recreational Lighting Service Rate	
7 <sup>th</sup> Revised Rate 26	State University Service Rate	
5 <sup>th</sup> Revised Rate 29	Noticed Interruptible Service for Rate Large Power Service	
6 <sup>th</sup> Revised Rate 30	Load Retention Rate	
3 <sup>rd</sup> Revised Rate 32	Voluntary Renewable Energy Rate	
5 <sup>th</sup> Revised Rate 33	Small System Renewable Energy Certificate Purchase	
4 <sup>th</sup> Revised Rate 34	Medium System Renewable Energy Certificate Purchase	
2 <sup>nd</sup> Revised Rate 35	Large System Renewable Energy Certificate Purchase	
Original Rate 37	eSmart Thermostat Program Rate	
3 <sup>rd</sup> Revised Rate 38	Renewable Portfolio Standard (RPS) Cost Rider	X
Original Rate 39	Economic Development Rate	
Original Rate 41	Federal Tax Credit Factor (FTCF)	

Advice Notice No. 266

Signature/Title   
**James Schichtl**  
**Vice President – Regulatory Affairs**

**EL PASO ELECTRIC COMPANY**

**3<sup>rd</sup> REVISED RATE NO. 38**

X

**RENEWABLE PORTFOLIO STANDARD (RPS) COST RIDER**

**APPLICABILITY:**

This Rider is applicable to bills for electric service provided under all of EPE's retail rate schedules. This Rider is established to recover Renewable Portfolio Standard ("RPS") costs. This Rider is not applicable to customers exempt from charges for renewable energy procurements pursuant to NMSA 1978, Section 62-16-4(C).

X  
X  
X  
X

**TERRITORY:**

Areas served by the Company in Doña Ana, Sierra, Otero and Luna Counties.

X

**MONTHLY RATES:**

	Rate
All Retail Rate Schedules, per kWh	\$0.011158

X  
X  
  
X  
X  
X  
X

**RECONCILIATION FILING:**

This Rider shall be adjusted to reconcile a prior plan year's RPS Cost Rider revenues with actual RPS costs. Any over-recovery of the previously approved RPS costs will represent a credit to and reduction of the approved Rider in a subsequent plan year and any under-recovery of the previously approved renewable energy costs will represent a charge in addition to the approved Rider in a subsequent plan year.

X  
  
X  
X

Advice Notice No. 266

Signature/Title   
**James Schichtl**  
**Vice President – Regulatory Affairs**

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

**AMENDED APPLICATION FOR APPROVAL OF )  
EL PASO ELECTRIC COMPANY'S AMENDED )  
2019 RENEWABLE ENERGY ACT PLAN AND )  
2020 RENEWABLE ENERGY ACT PLAN )  
PURSUANT TO THE RENEWABLE ENERGY )  
ACT AND 17.9.572 NMAC, AND THIRD )  
REVISED RATE NO. 38 – RPS COST RIDER )  
)  
EL PASO ELECTRIC COMPANY, )  
Applicant. )  
\_\_\_\_\_ )**

**CASE NO. 19-00099-UT**

**DIRECT TESTIMONY**

**OF**

**JAMES SCHICHTL**

**MARCH 31, 2020**

**EL PASO ELECTRIC COMPANY  
DIRECT TESTIMONY OF  
JAMES SCHICHTL**

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**EXHIBITS**

Exhibit JS-1	Rate Schedule No. 38 - Renewable Portfolio Standard (RPS) Cost Rider
Exhibit JS-2	Historical Procurement Costs and Reasonable Cost Threshold
Exhibit JS-3	Monthly Total and Jurisdictional Macho Springs Energy
Exhibit JS-4	Estimate of Net Fuel and Purchased Power Cost Adjustment Clause Impact - Macho Springs Proposal

**EL PASO ELECTRIC COMPANY  
DIRECT TESTIMONY OF  
JAMES SCHICHTL**

1                   **I.     INTRODUCTION AND QUALIFICATIONS**

2   **Q.     PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

3   **A.**    My name is James Schichtl, and my business address is 100 North Stanton Street,  
4            El Paso, Texas, 79901.

5  
6   **Q.     HOW ARE YOU EMPLOYED?**

7   **A.**    I am employed by El Paso Electric Company ("EPE") as Vice President of  
8            Regulatory Affairs.

9  
10   **Q.    PLEASE SUMMARIZE YOUR EDUCATIONAL AND BUSINESS**  
11       **BACKGROUND.**

12   **A.**    I have been employed by EPE since February 2012. In June 2016, I was promoted  
13            from Director of Regulatory Affairs to Vice President. Prior to becoming Director,  
14            I was manager of EPE's Economic & Rate Research group, responsible for EPE's  
15            jurisdictional cost of service, rate design analysis, and developing EPE's retail rate  
16            schedules and charges. Prior to that, I was a Senior Regulatory Case Manager,  
17            responsible for the production, filing, and execution of regulatory applications  
18            before both the Public Utility Commission of Texas ("PUCT") and the New Mexico  
19            Public Regulation Commission ("NMPRC" or "Commission").

**EL PASO ELECTRIC COMPANY  
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1           Prior to joining EPE in February 2012, I spent 18 years in various regulatory  
2 functions at Southern California Edison Company ("SCE"), 12 of those in a  
3 managerial capacity. As Manager of Pricing Design and Research, I was  
4 responsible for SCE's rates and tariffs during deregulation and changes required in  
5 following the California power crisis in 2001. I was subsequently promoted to  
6 Manager of Tariffs and Advice Letters, with broad responsibility within regulatory  
7 for evaluating California statute, rules, and regulations and managing regulatory  
8 efforts at the California Public Utilities Commission ("CPUC").

9           I graduated with a Bachelor of Science in Mechanical Engineering in 1987  
10 from the University of Texas at El Paso, where I also studied graduate level finance,  
11 economics, and econometrics. Throughout my career at EPE, I have attended and  
12 presented material for numerous seminars and workshops related to cost of service,  
13 rate and program design, and regulation.

14  
15 **Q. PLEASE DESCRIBE YOUR CURRENT RESPONSIBILITIES WITH EPE.**

16 **A.** As Vice President of Regulatory Affairs, I am responsible for the oversight and  
17 direction of EPE's Economic Research, Rate Research, and Regulatory Accounting  
18 groups, as well as EPE's Regulatory Case Management group. Economic Research  
19 performs load research and analysis and forecasting functions. Rate Research  
20 encompasses EPE's rate research function, jurisdictional and class cost of service

**EL PASO ELECTRIC COMPANY  
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1 studies, rate design analysis, and the development of retail rate schedules and  
2 charges. The Regulatory Accounting group is responsible for the scheduling,  
3 preparation, and review of jurisdictional regulatory accounting and reporting. The  
4 Regulatory Case Management group coordinates and oversees regulatory filings  
5 made by EPE with the PUCT, NMPRC, the Federal Energy Regulatory  
6 Commission ("FERC"), and local municipal regulators. My job duties require  
7 knowledge of the statutory and regulatory requirements of each jurisdiction.  
8

9 **Q. ARE YOU SPONSORING ANY EXHIBITS IN THIS FILING?**

10 **A.** Yes, I am sponsoring the exhibits listed in the Table of Contents.  
11

12 **Q. HAVE YOU PREVIOUSLY PRESENTED TESTIMONY BEFORE**  
13 **UTILITY REGULATORY BODIES?**

14 **A.** Yes, I have previously filed testimony with and testified before the NMPRC,  
15 PUCT, FERC, and the CPUC.  
16

17 **II. PURPOSE OF TESTIMONY**

18 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

19 **A.** The purpose of my testimony is to present and support EPE's Amended Application  
20 for Approval of its Amended 2019 Renewable Energy Act ("REA") Plan and 2020

**EL PASO ELECTRIC COMPANY  
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1 REA Plan ("2019-2020 Plan") and the Third Revised Rate No. 38-RPS Cost Rider  
2 ("2021 RPS Cost Rider") to be effective in 2021 ("Amended Application").

3 In my testimony, I introduce EPE's other witnesses in this case, provide a  
4 brief description of EPE, summarize the procedural background of this case, and  
5 then address the following:

- 6 • EPE's history of REA compliance;
- 7 • Impact of 2019 amendments to the REA on EPE's 2018 REA Plan filed and  
8 approved in Case No. 18-00109-UT ("2018 Plan");
- 9 • EPE's 2019-2020 Plan for Renewable Portfolio Standard ("RPS")  
10 compliance;
- 11 • EPE's request for variances from Commission Rule 17.9.572 ("Rule 572"  
12 or "RPS Rule");
- 13 • EPE's proposed 2021 RPS Cost Rider for recovery of EPE's Commission-  
14 approved RPS procurement costs in 2021, including a proposed adjustment  
15 for reconciliation of actual 2019 RPS costs and rider revenues; and
- 16 • An update on EPE's existing Renewable Energy Credit ("REC") purchase  
17 program for customer-installed Distributed Generation ("DG") systems,  
18 which was closed to new customers by Commission Final Order in Case  
19 No. 17-00090-UT.

20



**EL PASO ELECTRIC COMPANY  
DIRECT TESTIMONY OF  
JAMES SCHICHTL**

1   **Q.   WHO ARE THE OTHER WITNESSES TESTIFYING FOR EPE IN THIS**  
2           **CASE?**

3   **A.**   EPE employees Omar Gallegos and Rene Gonzalez, and a principal with  
4           Merrimack Energy Group, Inc., Wayne Oliver, also provide testimony in support  
5           of EPE's Application. Mr. Gallegos presents EPE's 2019-2020 Plan for 2020 and  
6           2021 plan year approval, and he presents 2022 plan year data for informational  
7           purposes. EPE witness Gallegos also presents EPE's proposed resource  
8           procurements for dedicated renewable facilities resulting from EPE's Request for  
9           Proposal ("RFP") issued May 29, 2019 ("2019 RFP"). For all three plan years  
10          Mr. Gallegos presents RPS calculations, forecasted generation, and RPS  
11          procurement cost for the portfolio of generation resources supplying renewable  
12          energy to New Mexico, and other information required to meet the REA. EPE  
13          witness Gallegos also provides a five-year trajectory for EPE's planned compliance  
14          with the requirements of the REA through dedicated and system renewable  
15          resources. Finally, Mr. Gallegos provides information requested in Pro Se  
16          Intervenor Soules' Motion as ordered by the Commission in the Order on Motion  
17          Requesting the Hearing Examiner to Require EPE to Produce Additional Evidence  
18          (December 6, 2019).

19                   Mr. Oliver served as the independent evaluator for EPE's 2019 RFP. EPE  
20          witness Oliver was primarily responsible for reviewing and tracking EPE's

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1 implementation of the competitive bidding process from design of the 2019 RFP  
2 through the bid evaluation and selection process with the objective of ensuring the  
3 process was undertaken in a fair, equitable, and unbiased manner. Mr. Oliver's  
4 direct testimony summarizes his final report regarding the conduct and results of  
5 the 2019 RFP.

6 EPE witness Gonzalez calculates EPE's proposed RPS Cost Rider, effective  
7 January 1, 2021, for recovery of EPE's Commission-approved and proposed RPS  
8 procurement costs in 2021, including a proposed adjustment for reconciliation of  
9 actual 2019 RPS costs and rider revenues. Mr. Gonzalez also presents, for  
10 informational purposes only, the estimated 2022 RPS Cost Rider rate that would  
11 incorporate the new, dedicated renewable resources described by Mr. Gallegos.

12  
13 **III. SUMMARY OF PROCEDURE, 2019-2020 PLAN, AND REQUESTED**  
14 **APPROVALS**

15 **Q. PLEASE SUMMARIZE THE PROCEDURAL BACKGROUND OF THIS**  
16 **PROCEEDING.**

17 **A.** EPE sought and was granted a Commission variance from the May 1, 2019 filing  
18 requirement in Rule 17.9.572.14 to instead file its 2019 REA Plan ("2019 Plan")  
19 Application on October 1, 2019 in order for EPE to make changes to address the  
20 significant amendments to the REA that went into effect on June 14, 2019.

21 EPE submitted its 2019 Plan on October 1, 2019, in accordance with the

**EL PASO ELECTRIC COMPANY  
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1 REA and, to the extent possible, Rule 572 and prior Commission Orders. On  
2 November 6, 2019, the Commission issued an Order Adopting Initial  
3 Recommended Decision with Instructions for the Hearing Examiner ("Order") that  
4 required a second prehearing conference to discuss an approach that would  
5 “integrate compliance for 2020 and 2021 into a single proceeding.” That second  
6 prehearing was held on November 14, 2019. EPE, Commission Utility Division  
7 Staff and Intervenors agreed at that hearing that EPE would file an Amended 2019  
8 Plan and 2020 Plan by March 31, 2020 that could seek approval of any  
9 procurements that were selected from EPE's then outstanding 2019 RFP.

10 The Commission issued an Order Vacating Procedural Schedule and  
11 Staying Case ("Stay Order") on November 18, 2019 staying the case pending EPE's  
12 filing of its amended Plan Application. The Stay Order also directed EPE to  
13 withdraw and refile Advice Notice No. 264 to reconcile its RPS Cost Rider for its  
14 2018 overcollection. In accordance ¶¶ F and G, of the Stay Order, EPE withdrew  
15 the Advice Notice No. 264 reflecting proposed 2019 Plan costs for the 2020 Plan  
16 Year and refiled Advice Notice No. 264, effective January 1, 2020, to “effect a  
17 reconciliation of the overcollection in the 2018 Plan Year.”

18 Concurrent with the filing of this 2019-2020 Plan and direct testimonies and  
19 exhibits in support thereof, EPE is filing a motion to withdraw its 2019 Plan  
20 Application and supporting testimonies and exhibits. The 2019-2020 Plan and

**EL PASO ELECTRIC COMPANY  
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1 supporting testimonies and exhibits replace the Application filed October 1, 2019,  
2 including the 2019 Plan and supporting testimonies in its entirety, consistent with  
3 the Stay Order.

4

5 **Q. PLEASE SUMMARIZE EPE'S 2019-2020 PLAN.**

6 **A.** EPE's 2019-2020 Plan identifies the procurement actions EPE is proposing for this  
7 Plan Year (2020 and 2021) to make reasonable progress toward meeting RPS and  
8 presents data for Next Plan Year (2022) for informational purposes. The 2019-  
9 2020 Plan also includes reconciliation of RPS costs and rider revenues for the 2019  
10 Plan Year and proposes a revised RPS Cost Rider to reflect the amended REA, RPS  
11 procurement costs for the 2021 Plan Year, and the results of the 2019 reconciliation.  
12 The revised rider proposal also eliminates the large customer cap consistent with  
13 REA amendments. Because an order in this proceeding is not expected until later  
14 in 2020, EPE is not proposing to modify the currently effective RPS Cost Rider  
15 tariff in 2020, which will be reconciled in EPE's next plan filing.

16

17 **Q. WHAT COMMISSION APPROVALS IS EPE SEEKING IN THIS**  
18 **APPLICATION?**

19 **A.** EPE requests approval of the 2019-2020 Plan and specifically requests the  
20 following authorizations in this Application:

**EL PASO ELECTRIC COMPANY  
DIRECT TESTIMONY OF  
JAMES SCHICHTL**

- 1           • Authorization to enter into a 20-year purchased power agreement with  
2           Hecate Energy for 50 Megawatts ("MW") of solar generation at \$18.93  
3           per Megawatt-hour ("MWh");
- 4           • Authorization to enter in a 20-year purchased power agreement with  
5           Buena Vista Energy for 20 MW of solar generation at \$19.88 per MWh;
- 6           • Authorization to temporarily assign EPE's Texas jurisdictional quantity  
7           of solar energy from EPE's existing Macho Springs Solar Facility  
8           ("Macho Springs") for delivery to New Mexico customers and to retire  
9           the associated REC's for RPS compliance purposes, until EPE's newly  
10          proposed renewable resources are in commercial operation, but in no  
11          case later than December 31, 2022;
- 12          • Approval of reconciled RPS rider costs and rider revenue collections for  
13          calendar year 2019; and
- 14          • Approval to revise the RPS Cost Rider Rate No. 38 from \$0.009128 per  
15          kilowatt-hour ("kWh") to \$0.011086, to recover approved 2021 Plan  
16          Year costs adjusted for the 2019 reconciliation, and to eliminate  
17          provisions of the statutory cap for certain large customers from Rate  
18          No. 38.

19                In addition, but only to the extent such approval may be required, EPE  
20          requests:

**EL PASO ELECTRIC COMPANY  
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- 1           • Approval of a variance from all Rule 572 provisions that are now  
2           inconsistent with the REA;
- 3           • Approval of a variance from compliance with the 2020 and 2021 RPS  
4           under Section 10 of Rule 572; and,
- 5           • Approval of a variance from the data filing requirements of 17.9.530  
6           NMAC.

7

8

**IV.    OVERVIEW OF EPE**

9

**Q.    PLEASE PROVIDE A BRIEF DESCRIPTION OF EPE.**

10

**A.**    EPE is a vertically integrated investor-owned utility providing bundled electric service to approximately 432,800 retail and wholesale customers in a 10,000 square mile area of the Rio Grande Valley in west Texas and southern New Mexico. Its service territory extends from Hatch, New Mexico south to Van Horn, Texas. EPE's principal industrial and large customers include a steel production facility, an oil refinery, several medical centers, two large universities, and U.S. military installations, including White Sands Missile Range and Holloman Air Force Base in New Mexico and the U.S. Army at Fort Bliss in Texas. EPE directly employs approximately 1,100 people and is one of the largest companies headquartered in El Paso, Texas. The Company owns or has significant ownership interests in several electrical generating facilities providing it with a net dependable generating

20

**EL PASO ELECTRIC COMPANY  
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1 capacity of approximately 2,085 MW. For the year ended December 31, 2019, the  
2 Company's energy sources consisted of approximately 44 percent nuclear fuel,  
3 44 percent natural gas, 12 percent purchased power and less than 1 percent  
4 generated by Company-owned solar photovoltaic ("PV") panels. The Company has  
5 power purchase agreements for 107 MW from solar PV generation facilities and  
6 intends to expand its portfolio of renewable energy sources, particularly solar PV  
7 generation.

8  
9 **Q. WHAT ARE SOME OF THE CHALLENGES FOR EPE IN PROVIDING**  
10 **ELECTRICITY TO MULTIPLE JURISDICTIONS WITH DIFFERING**  
11 **RENEWABLE ENERGY REQUIREMENTS?**

12 **A.** EPE provides retail service across two jurisdictions with differing statutory  
13 requirements related to the provision of renewable energy to customers. Generally  
14 speaking, EPE procures generation to serve customer load on a total company basis.  
15 EPE customers benefit from this total Company approach because increased  
16 diversity and size of load reduces the average cost of power from the system  
17 resource portfolio. However, the differing requirements for renewable resources  
18 across jurisdictions can limit this total Company approach because, in EPE's case,  
19 dedicated renewable generation resources will likely be procured for service to  
20 New Mexico customers for RPS compliance.

**EL PASO ELECTRIC COMPANY  
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**V. HISTORIC REA COMPLIANCE**

1  
2 **Q. HAS EPE MET ITS TOTAL RPS REQUIREMENTS IN PRIOR**  
3 **COMMISSION APPROVED REA PLANS?**

4 **A.** Application of the three percent reasonable cost threshold ("RCT") limited EPE's  
5 ability to add renewable resources to its portfolio that contribute to meeting the  
6 statutory RPS because the compliance cost of EPE's existing portfolio exceeded the  
7 three percent RCT. EPE's renewable resource procurements were sufficient to meet  
8 RPS from inception through 2015, as demonstrated through EPE's Annual  
9 Renewable Energy Portfolio Reports ("RPS Reports") on file with the Commission.  
10 EPE has been reliant on partial waivers from total RPS requirements starting with  
11 Plan Year 2016.<sup>1</sup> EPE's 2017, 2018, and 2019 Plan Year compliance also relied on  
12 approved partial waivers from total RPS and approved variances from Wind and  
13 Biomass/other diversity targets, as approved by the Commission in Case  
14 No. 15-00117-UT, Case No. 16-00109-UT, and Case No. 17-00090-UT,  
15 respectively.

16 EPE plans to file its 2019 RPS Report on May 1, 2020, as required. As  
17 noted, EPE received Commission approved for a partial waiver from compliance  
18 with the RPS and partial variance from compliance with diversity requirements in  
19 2019, by final order in its 2017 Plan proceeding, Case No. 17-00090-UT.

---

<sup>1</sup> Case No. 14-00121-UT.



**EL PASO ELECTRIC COMPANY  
DIRECT TESTIMONY OF  
JAMES SCHICHTL**

1

2 **Q. PLEASE EXPLAIN WHY EPE HAS HAD TO SEEK WAIVERS FOR PAST**  
3 **PLAN YEAR APPLICATION PROCEEDINGS.**

4 **A.** EPE's previously approved procurement costs included in EPE's recent RPS plan  
5 applications exceeded the three percent RCT set by the Commission.

6 In 2013, the Commission amended Rule 572.14(C) to modify the  
7 methodology by which the RCT is evaluated so that plan year costs are calculated  
8 as revenue requirements that reflect how a procurement plan will impact customer  
9 bills in the plan year. The result was that EPE's compliance cost as a percentage of  
10 plan year revenues (the RCT metric) increased in one year, even though EPE's total  
11 procurement cost decreased in the same period. Exhibit JS-2 summarizes the  
12 procurement and compliance costs for RCT purposes for the 2010 Plan Year filing  
13 through EPE's most recent filing in 2018. It demonstrates that although EPE's total  
14 procurement plan costs have actually decreased from the 2013 to 2014 Plan Years,  
15 RPS compliance cost (as defined by the Rule) increased significantly as a  
16 percentage of annual revenues. The significant increase in the compliance costs in  
17 2014 resulted almost entirely from the change in the amendment to Rule 572.14(C).

18

19 **Q. DOES EPE EXPECT THAT THE NEW DEFINITION OF RCT WILL**  
20 **IMPACT EPE'S ABILITY TO MEET THE RPS?**

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1   **A.**    Yes. The new RCT does not provide the same limitation on the addition of new  
2           resources to the RPS portfolio as was the case previously, except as now may be  
3           applied to specific new resources. The Commission has not yet promulgated rules  
4           implementing the recent changes to the REA. However, EPE expects to now be  
5           able to add resources towards meeting the expanded RPS under the REA where it  
6           was previously limited by application of the RCT.

7

8   **Q.    HOW DO PRIOR RPS ORDERS IMPACT EPE'S 2019-2020 PLAN?**

9   **A.**    Several issues addressed in the final order in Case No. 18-00109-UT relate to RPS  
10          issues that are no longer applicable under the REA, specifically orders related to  
11          calculation of the previously-applicable RCT and the large customer adjustment. I  
12          discuss these REA amendments in the next section.

13                 The final order in Case No. 18-00109-UT also approved a 10-year extension  
14          of EPE's REC procurement agreement with the Camino Real Landfill to Energy  
15          Facility ("CRLEF"). The Commission's approval of the CRLEF contract extension  
16          is currently on appeal before the New Mexico Supreme Court in Case  
17          No. S-1-SC-37,458. On November 18, 2019, the Commission granted a Partial  
18          Stay of REC payments to the CRLEF pending the appeal. Pursuant to the  
19          Commission's partial stay order, EPE stopped making REC payments to CRLEF  
20          effective with the October 2019 billing month. However, the partial stay does not

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1 eliminate EPE's obligation under the Commission-approved procurement to pay  
2 CRLEF for RECs (which continue to be delivered by CRLEF monthly).

3 The current RPS Cost Rider reflects the annual costs associated with the  
4 CRLEF REC procurement, and EPE has continued to reflect the cost of those REC  
5 payments in the in the 2019-2020 Plan and the 2021 RPS Cost Rider under the  
6 assumption that they will ultimately be paid to CRLEF when the appeal is resolved.  
7 EPE witnesses Gallegos and Gonzalez both incorporate these RECs and costs in  
8 their direct testimonies and exhibits.

9  
10 **VI. AMENDMENTS TO THE REA AND CORRESPONDING IMPACT ON**  
11 **PRIOR REA PLANS**

12 **Q. PLEASE PROVIDE A SUMMARY OF THE AMENDMENTS TO THE REA**  
13 **THAT ARE RELEVANT TO THIS FILING.**

14 **A.** The substantive amendments to the REA that are relevant to this filing are  
15 summarized as follows:

- 16 a. Extended and increased renewable energy requirement to supply “one  
17 hundred percent of all retail sales of electricity in New Mexico” from zero  
18 carbon resources by January 1, 2045, subject to certain limitations stated in  
19 statute, and corresponding directive to make “reasonable and consistent  
20 progress...over time toward that requirement.” See § 62-16-4(A) and (B).

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- 1           b. Added progressively higher renewable portfolio standards to guide utility's  
2           progress toward achieving 100 percent zero carbon resources by 2045.  
3           § 62-16-4(A).
- 4           c. Removed Commission authority to establish a RCT and replacement of the  
5           Commission's definition of RCT with “an average annual levelized cost of  
6           sixty dollars (\$60.00) per megawatt-hour at the point of interconnection of  
7           the renewable energy resource with the transmission system, adjusted for  
8           inflation after 2020.” § 62-16-3(E).
- 9           d. Deleted Section 62-16-4(A)(2) addressing an adjustment RPS requirements  
10          and cost recovery for certain large customers;
- 11          e. Deleted Section 62-16-4(A)(4) requiring diversification of the type of  
12          renewable energy resource in the renewable portfolio; and
- 13          f. Added new reporting requirements, beginning with the 2020 report and  
14          procurement plan filing, including:
- 15                 (1) the cost of procurement for new renewable energy required to  
16                 comply with the renewable portfolio standard;
- 17                 (2) the capital, operating and fuel costs on a per-megawatt-hour  
18                 basis during the preceding calendar year of each nonrenewable  
19                 generation resource rate-based by the utility, or dedicated to the  
20                 utility through a power purchase agreement of one year or longer,

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1                   and the nonrenewable generation resources' carbon dioxide  
2                   emissions on a per megawatt-hour basis during that same year;  
3                   (3) information, including exhibits, as applicable, that demonstrates  
4                   that the proposed procurement: (a) was the result of competitive  
5                   procurement that included opportunities for bidders to propose  
6                   purchased power, facility self-build or facility build-transfer  
7                   options; (b) has a cost that is reasonable as evidenced by a  
8                   comparison of the price of electricity from renewable energy  
9                   resources in the bids received by the public utility to recent prices  
10                  for comparable energy resources elsewhere in the southwestern  
11                  United States; and (c) is in the public interest, considering factors  
12                  such as overall cost and economic development opportunities”, and;  
13                  (4) strategies used to minimize costs of renewable energy  
14                  integration, including location, diversity, balancing area activity,  
15                  demand-side management and load management. § 62-16-4(G)

16

17   **Q.    DOES EPE'S 2019-2020 PLAN FILING ADDRESS AND COMPLY WITH**  
18   **THE    NEW    REPORTING    REQUIREMENTS    STATED**  
19   **SECTION 62-16-4(G)?**

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1   **A.**    Yes. Although this Plan is submitted prior to the date set forth in statute, EPE was  
2            directed in the Commission Stay Order to comply with Section 62-14-6(G). The  
3            2019-2020 Plan therefore addresses Section 62-16-4(G)(1) and (3), requirements  
4            which relate specifically to new procurement proposals included with REA plans.

5                    EPE will provide the additional information required by  
6            Section 62-16-4(G)(2) and (4) in its 2019 RPS Report, because these reporting  
7            requirements are more general in nature or relate very specifically to the reporting  
8            year (in the case of Section 62-16-4(G)(2)).

9

10   **Q.    WHEN DOES EPE INTEND TO FILE ITS 2019 RPS REPORT TO**  
11    **INCLUDE THE NEW REQUIREMENTS?**

12   **A.**    EPE will file its 2019 RPS Report on May 1, 2020, as required by Rule 572. The  
13            report will include the new reporting requirements added in Section 62-16-4(G)(2)  
14            and (4) for 2019.

15

16   **Q.    HAS THE COMMISSION REVISED RULE 572 TO ACCOUNT FOR THE**  
17    **2019 AMENDMENTS TO THE REA?**

18   **A.**    No. The Rule has not been amended to account for the amendments to the REA  
19            modifying the RCT, deleting the large customer adjustment provisions, and  
20            eliminating the diversity of resources requirements. It thus follows that these Rule

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1 provisions are now inconsistent with the statute, precluding EPE from submitting a  
2 Plan that fully complies with both the REA and the Rule in the near term.

3  
4 **Q. HOW IS EPE ADDRESSING INCONSISTENCIES BETWEEN THE REA  
5 AND THE RPS RULE IN THE 2019-2020 PLAN FILING?**

6 **A.** To the extent possible, the 2019-2020 Plan complies with both the REA and  
7 Rule 572. However, where inconsistencies exist, EPE complies with the REA  
8 rather than the Rule. First, the 2019-2020 Plan does not follow Rule provisions  
9 related to “large customers” (17.9.572.7.L and .M) which cap cost recovery for RPS  
10 procurement from certain, qualifying large customers, as defined, at the minimum  
11 of a total dollar amount or fixed percentage of the customers' billed revenue, and  
12 which reduce EPE's total RPS energy requirement consistent with the reduced  
13 procurement attributable to the large customer cap. Elimination of the large  
14 customer adjustment will result in significant increases for a limited number of  
15 formerly capped large customers but will also decrease the RPS Cost Rider rate  
16 applicable to other (uncapped) customers. In the 2019-2020 Plan, EPE's proposed  
17 2021 RPS Cost Rider tariff presented in Exhibit JS-1 is revised to remove the large  
18 customer billing provision and includes a rider rate applicable to all customers.

19 Second, the 2019-2020 Plan does not follow the Rule diversification  
20 requirements (17.9.572.11).

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1           Finally, the 2019-2020 Plan does not apply the three percent RCT limitation  
2           established by the Commission in Rule 572 (17.9.572.12). As explained above,  
3           under the new RCT definition, EPE is once again able to add new resources to its  
4           RPS portfolio.

5  
6   **Q.   DO THESE CHANGES TO THE REA IMPACT THE COMMISSION'S**  
7   **FINAL ORDER APPROVING EPE'S 2018 PLAN IN CASE**  
8   **NO. 18-00109-UT?**

9   **A.**   In two instances, yes. The Commission Final Order approving the 2018 Plan in  
10       Case No. 18-00109-UT determined that the “large customer adjustment” to the RPS  
11       requirement should be calculated based on procurement costs, based on recent  
12       Commission policy and precedent. Additionally, that final order accepted EPE's  
13       Direct Comparison methodology for RCT determination, which was originally  
14       approved by Commission final order in Case No. 15-00117-UT. As the result of  
15       the changes embodied in the REA amendments, these provisions are no longer  
16       applicable for EPE's 2019-2020 Plan.

17  
18           **VII.   EPE'S 2019-2020 PLAN FOR RPS COMPLIANCE**

19   **Q.   WHAT STEPS HAS EPE TAKEN TO PROCURE ADDITIONAL**  
20   **RESOURCES TO MOVE TOWARD RPS COMPLIANCE IN THIS PLAN**



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1           **YEAR?**

2   **A.**    EPE proactively took steps to procure new renewable energy by issuing its 2019  
3           RPF for Renewable Energy for New Mexico on May 29, 2019, to solicit, evaluate,  
4           and select the additional renewable resources needed to comply with the RPS  
5           before the amendments to the REA went into effect. On September 19, 2019, EPE  
6           issued a second RFP for a targeted one-year renewable energy market purchase  
7           from existing facilities. EPE witness Gallegos discusses the competitive  
8           procurement process in his direct testimony.

9

10   **Q.    DID EPE IDENTIFY AND SELECT NEW RENEWABLE RESOURCES?**

11   **A.**    Yes. Although EPE did not receive any responsive or viable bids for additional  
12           renewable resources that would contribute to EPE meeting its RPS requirements in  
13           2020 or 2021, EPE was able to identify and select two new solar energy  
14           procurements proposed for approval in this case that are expected to be  
15           commercially operable by 2022. Again, the specifics of these proposals are  
16           addressed in the direct testimony of Mr. Gallegos.

17

18   **Q.    DOES EPE PROPOSE ANY ADDITIONAL PROCUREMENTS THAT CAN  
19           PROVIDE RECS UNTIL EPE'S NEWLY SELECTED RPS RESOURCES  
20           ARE APPROVED AND COMMERCIALY OPERATIONAL?**

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1    **A.**    Yes. EPE is proposing to supplement existing RPS resources by reassigning and  
2            delivering energy and associated RECs from Macho Springs that are currently  
3            allocated and assigned to Texas. EPE filed to request PUCT approval for this  
4            temporary reassignment of Texas' solar energy and RECs from Macho Springs on  
5            March 18, 2020. If approved by both the PUCT and by this Commission, EPE will  
6            temporarily reassign solar energy generated from EPE's existing purchase power  
7            agreement with the Macho Springs from Texas to New Mexico and will retire the  
8            Western Renewable Energy Generation Information system ("WREGIS")  
9            registered RECs associated with that solar generation for RPS compliance purposes  
10           until EPE's new resources are commercially operational, but no later than  
11           December 31, 2022. Exhibit JS-3 shows historical monthly Macho Springs energy  
12           production, and the amounts currently allocated to New Mexico. Under EPE's  
13           reassignment proposal, the full output of Macho Springs renewable energy would  
14           be assigned for a period of time to New Mexico customers.

15

16    **Q.    IS MACHO SPRINGS AN APPROVED EPE SYSTEM RESOURCE?**

17    **A.**    Yes. Macho Springs was approved as a system resource by Commission Final  
18           Order in Case No. 12-00386-UT, and by the PUCT by Final Order in Docket  
19           No. 46831. As a system resource, Macho Springs energy is currently allocated pro  
20           rata between jurisdictions based on monthly energy consumption, with the

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1 associated costs recovered through the Fuel and Purchased Power Cost Adjustment  
2 Clause ("FPPCAC") in New Mexico and a combination of fuel cost and base rates  
3 in Texas.

4

5 **Q. WHAT IS THE COST OF ENERGY AND RECS GENERATED BY MACHO**  
6 **SPRINGS?**

7 **A.** The total bundled cost of the Macho Springs energy and RECs generated at Macho  
8 Springs has been previously approved by the Commission in Case  
9 No. 12-00386-UT at a rate of \$57.90 per MWh.

10

11 **Q. WHAT IS THE CURRENT RCT?**

12 **A.** As discussed by EPE witness Gallegos, the RCT currently is \$60 per MWh at the  
13 point of interconnection.

14

15 **Q. DO THE PROCUREMENT COSTS FOR MACHO SPRINGS ENERGY**  
16 **EXCEED THE RCT?**

17 **A.** No. While the NMPRC has not yet promulgated a rule to implement the new RCT,  
18 the \$60 per MWh RCT for RPS resources is higher than the authorized rate of  
19 \$57.90 per MWh for Macho Springs. New Mexico customers currently purchase a  
20 jurisdictional share of energy (about 20 percent on an annual basis) from the facility

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1           at this price, and the additional energy to be supplied by EPE would be provided at  
2           the same price.

3  
4   **Q.   HOW WILL EPE RECOVER COSTS FOR THE PROPOSED MACHO**  
5   **SPRINGS PROCUREMENT?**

6   **A.**   EPE proposes to recover the cost of energy and RECs supplied to New Mexico  
7           customers under the Macho Springs proposal through the RPS Cost Rider.

8  
9   **Q.   IF APPROVED, WILL EPE'S PROPOSAL RESULT IN AN INCREASE IN**  
10   **MONTHLY COSTS EQUAL TO THE ADDITIONAL MACHO SPRINGS**  
11   **ENERGY DELIVERED TO NEW MEXICO CUSTOMERS AT THE**  
12   **MACHO SPRINGS PRICE OF \$57.90 PER MWH?**

13   **A.**   No, two offsetting factors reduce the total increase to the costs to be recovered  
14           through the RPS Rider under EPE's proposal. First, EPE will reduce the cost for  
15           the additional renewable energy supplied by Macho Springs by the value of the  
16           associated capacity for system resources already being recovered from  
17           New Mexico customers in base rates. Second, the additional energy being  
18           delivered to New Mexico customers from Macho Springs will reduce the energy  
19           otherwise supplied by system resources, which will reduce fuel costs recovered  
20           through the FPPCAC. Exhibit JS-4 provides an annual estimate of the net increase

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1 in RPS rider costs under the EPE proposal, based on actual monthly fuels costs and  
2 Macho Springs energy output for the 12-months ended September 2019.

3  
4 **Q. HOW DOES EPE PROPOSED TO CALCULATE THE VALUE OF**  
5 **CAPACITY ASSOCIATED WITH MACHO SPRINGS ENERGY**  
6 **DETERMINED TO BE CREDITED AGAINST THE PPA PRICE FOR**  
7 **ENERGY?**

8 **A.** EPE is proposing to net an imputed capacity value of \$2.35 per MW/month against  
9 the PPA charges reflected in the monthly FPPCAC for Macho Springs energy  
10 reassigned for delivery to New Mexico customers under EPE's proposal. The  
11 charge is based on the WSPP (formerly known as Western Systems Power Pool)  
12 Agreement capacity rate of \$7.32/kW/Month for firm power, with adjustments  
13 made based on the intermittency of the Macho Springs resource. First, using EPE's  
14 Open Access Tariff charges for the necessary ancillary services attributable to an  
15 intermittent resource, the rate was reduced to \$7.20/kW/month. Then, adjusting for  
16 a historical energy output of approximately 32.6 percent for the Macho Springs  
17 facility results in a charge of \$2.35 per MW/month. EPE is using a lower imputed  
18 capacity charge to reflect the appropriate level of dependable output that EPE can  
19 rely on to meet its load requirements. The Macho Springs PPA counter-party has  
20 no obligation to produce power to meet EPE's peak load requirements - their

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1 obligation is limited to an annual minimum total energy output. Consequently, the  
2 capacity associated with this renewable PPA is of lower value. The imputed  
3 capacity charge as determined recognizes the Solar PPAs contribution to EPE's  
4 planning reserves, while at the same time recognizing these resources are primarily  
5 energy resources given their intermittency and contribution to serving loads  
6 throughout all hours of the year.

7

8 **Q. IS THIS THE SAME IMPUTED CAPACITY CHARGE UTILIZED FOR**  
9 **TEXAS RATEMAKING PURPOSES FOR THE MACHO SPRINGS**  
10 **RESOURCE?**

11 **A.** Yes.

12

13 **Q. IF APPROVED, DOES EPE PLAN TO USE RECS FROM MACHO**  
14 **SPRINGS ENERGY TOWARD RPS COMPLIANCE IN 2020?**

15 **A.** Yes. With approval of both the NMPRC and the PUCT, EPE would begin  
16 assigning all Macho Springs renewable energy for delivery to New Mexico  
17 customers, and retire the associated RECs for purposes of RPS compliance in  
18 New Mexico. EPE intends that the provision of energy and application of the  
19 associated RECs occur prospectively from date of approval by both state

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1 commissions. This reassignment could begin as early as late-2020 but would more  
2 likely begin in January 2021 following a Commission order in this proceeding.

3

4 **Q. HAS EPE IDENTIFIED MACHO SPRINGS ENERGY AS THE LOWEST**  
5 **COST RENEWABLE RESOURCE AVAILABLE TO SERVE**  
6 **NEW MEXICO CUSTOMERS IN 2021?**

7 **A.** Yes. As discussed by EPE witness Gallegos, once EPE became aware of proposed  
8 amendments to the REA that would lift historic constraints on procurement of new  
9 renewable resources, before the amendments actually became effective, EPE  
10 initiated two RFPs to identify available renewable resources in the near term for  
11 RPS compliance. Unfortunately, despite these efforts, no other renewable resource  
12 options were offered capable of providing renewable energy toward RPS  
13 compliance in 2020 and 2021.

14 EPE has thus determined that Macho Springs energy is the only available  
15 renewable energy resource in the near term that offers the opportunity for increased  
16 RPS compliance, and at a price previously approved by the Commission. I discuss  
17 the RPS and customer impact of the Macho Springs proposal later in my testimony.

18

19 **Q. IS EPE TAKING ANY OTHER ACTION TO ACHIEVE RPS**  
20 **COMPLIANCE?**

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1   **A.**    EPE is planning significant increases in renewable system and dedicated resource  
2           procurement by 2023 and is taking reasonable steps to meet 40 percent RPS in  
3           2025. This is supported by data in EPE witness Gallegos' direct testimony.

4

5

**VIII. REQUESTED VARIANCES**

6   **Q.**    **PLEASE IDENTIFY SECTIONS OF RULE 572 FROM WHICH EPE**  
7           **SEEKS A VARIANCE IN THIS CASE.**

8   **A.**    To the extent required, EPE seeks variances from the following rule sections due  
9           to inconsistencies between the rule and the REA: 17.9.572.7.L and .M because the  
10          2019-2020 Plan does not calculate a large customer adjustment; 17.9.572.11  
11          because the 2019-2020 Plan does not address diversity or otherwise provide a plan  
12          for achieving a diversified portfolio; and 17.9.572.12 because the 2019-2020 Plan  
13          relies on the statutory definition of RCT in place of the RCT set forth in  
14          Commission Rule.

15

16   **Q.**    **DOES EPE SEEK ANY OTHER RULE VARIANCES?**

17   **A.**    EPE seeks a variance from the minimum data requirements for Commission  
18          Rule 17.9.530 to the extent required to review and approve its revised RPS Cost  
19          Rider. Additionally, to the extent required, EPE requests a variance from total RPS  
20          in 2020 and 2021.



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1 **Q. DOES EPE SEEK ANY VARIANCES FROM COMMISSION FINAL**  
2 **ORDERS IN PRIOR PROCUREMENT PLAN CASES?**

3 **A.** To the extent required, yes. EPE also seeks variances from applicable provisions  
4 of Commission Final Orders in prior EPE procurement plans cases, including Case  
5 No. 18-00109-UT pertaining to RCT and large customer calculations which are  
6 now inconsistent with REA. As noted previously, because EPE is no longer  
7 calculating and applying a large customer adjustment to its annual RPS  
8 requirement, the related ordering paragraph in the Final Order in Case  
9 No. 18-00109-UT is no longer applicable. Prior orders in EPE's RPS plan  
10 application cases have addressed the calculation of the RCT, which are likewise no  
11 longer relevant to this filing.

12

13 **IX. EPE'S RPS COST RIDER**

14 **Q. DOES EPE CURRENTLY HAVE A RATE RIDER FOR PURPOSES OF**  
15 **RECOVERING COSTS ASSOCIATED WITH THE RPS?**

16 **A.** Yes. Rate No. 38 - Renewable Portfolio Standard (RPS) Cost Rider was originally  
17 approved by the Commission's Final Order in Case No. 17-00090-UT and  
18 implemented effective January 1, 2018. The RPS Cost Rider was updated and  
19 approved by the Commission's Final Order in Case No. 18-00109-UT, and a revised  
20 rate level was implemented effective January 1, 2019. Pursuant to the Stay Order,

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1 EPE withdrew and refiled Advice Notice No 264 to reconcile its then-current RPS  
2 Cost Rider for its 2018 RPS overcollection. The revised rate became effective  
3 January 1, 2020 and is currently being reflected in customer billing.

4

5 **Q. WHAT COSTS DOES EPE CURRENTLY RECOVER THROUGH THE**  
6 **RPS RIDER?**

7 A. EPE's current rider recovers the cost of renewable energy and associated RECs  
8 authorized by the Commission in Case No. 18-00109-UT, including estimated  
9 WREGIS-related costs, adjusted for an over-collection of \$1.6 million rider  
10 revenue versus actual RPS resource costs for 2018.

11

12 **Q. ARE ANY RPS COSTS CURRENTLY RECOVERED THROUGH EPE'S**  
13 **BASE RATES?**

14 A. Yes. Stand-alone REC costs (without associated energy) and WREGIS costs  
15 previously deferred pursuant to RPS-related Final Orders through the end of the  
16 2014 test year in EPE's most recent rate case are currently recovered through base  
17 rates. In the Final Order in EPE's 2015 rate case (Case No. 15-00127-UT), the  
18 Commission authorized recovery of \$1.115 million of deferred stand-alone REC  
19 and WREGIS costs through base rates annually for five years.

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1 **Q. DOES EPE CONTINUE TO DEFER ANY APPROVED RPS COSTS FOR**  
2 **RECOVERY IN BASE RATES?**

3 A. Yes. RPS costs of \$800,000, incurred in 2015 for stand-alone REC purchases  
4 (without associated energy), have been deferred since EPE's 2015 rate case and are  
5 not included in the rider. Recovery of these costs will continue to be deferred, with  
6 carrying charges, until approved for recovery in EPE's next rate case, to be filed in  
7 May 2020.

8

9 **Q. IS EPE PROPOSING TO CONTINUE TO IMPOSE RATE CAPS ON ITS**  
10 **LARGE CUSTOMERS THROUGH ITS PROPOSED RPS COST?**

11 A. No. As I addressed above, doing so is now inconsistent with the REA. EPE will  
12 no longer reflect a large customer cap in the calculation of the RPS Cost Rider, and  
13 EPE has removed the large customer billing provision in the proposed Rate No. 38  
14 tariff. Formerly capped large customers will now pay the same RPS Cost Rider  
15 rate as all other customers.

16

17 **Q. DOES EPE'S PROPOSED 2021 RPS COST RIDER INCLUDE A**  
18 **RECONCILIATION FOR PRIOR YEARS?**

19 A. Yes. In addition to estimated 2021 Plan Year procurement costs, EPE is also  
20 including a reconciliation amount for over-recovery of actual RPS-related costs for

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1 the 2019 Plan Year. The calculation for the reconciliation is provided in the direct  
2 testimony of EPE witness Gonzalez. The current RPS Cost Rider, being used for  
3 billing in 2020, incorporates the 2018 reconciliation amount. EPE is not including  
4 a reconciliation component with the 2022 RPS Rider rate, which is only presented  
5 in this application for informational purposes.

6  
7 **Q. IS EPE INCLUDING A PROPOSED RATE RIDER TARIFF IN THIS**  
8 **APPLICATION FOR THE 2021 PLAN YEAR?**

9 **A.** Yes, the Third Revised Rate No. 38 - Renewable Portfolio Standard (RPS) Cost  
10 Rider is included with my testimony as Exhibit JS-1. EPE is filing an advice notice  
11 concurrent with this application containing the proposed rider for billing beginning  
12 January 2021.

13  
14 **Q. WHAT IS THE CHANGE IN THE PROPOSED RPS RIDER IN 2021**  
15 **COMPARED TO THE CURRENT 2020 RATE AND HOW DOES IT**  
16 **IMPACT CUSTOMERS?**

17 **A.** The net effect of increased annual RPS procurement costs (which includes EPE's  
18 proposed temporary reallocation of Macho Springs energy), the forecasted increase  
19 in New Mexico retail energy sales, and the reconciliation adjustment for 2019 RPS  
20 costs and revenues, is an increase in the RPS Cost Rider charge of \$0.002030 per

**EL PASO ELECTRIC COMPANY  
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1 kWh over the current rate of \$0.009128. No costs are included in 2021 for the new  
2 proposed RPS resources discussed by Mr. Gallegos, which if approved would be  
3 expected to begin commercial operation in 2022. EPE witness Gonzalez provides  
4 seasonal impacts for Residential customer monthly bills for the change in the RPS  
5 Cost Rider in 2021.

6  
7 **Q. WHAT RATE INFORMATION IS EPE PRESENTING IN THIS**  
8 **APPLICATION FOR THE NEXT PLAN YEAR (2022)?**

9 **A.** EPE witness Gallegos presents RPS portfolio production and costs for the Next  
10 Plan Year for informational purposes. The Next Plan Year portfolio includes  
11 increased REC production and expected costs associated with the newly proposed  
12 renewable resources presented by Mr. Gallegos and the removal of the reassigned  
13 energy and costs for Macho Springs in 2022. REC production for RPS compliance  
14 purposes will also reflect commercial operation of 200 MW of solar system  
15 resources EPE is expecting to begin commercial operation in 2022. EPE witness  
16 Gonzalez calculates an illustrative RPS Cost Rider for 2022, which will be revised  
17 again in EPE's 2021 Plan filing to incorporate know changes and reconciliation of  
18 actual 2021 RPS revenues and costs.

19  
20

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1     **X.     DISTRIBUTED GENERATION ("DG") REC PURCHASE PROGRAMS**

2     **Q.     PLEASE DESCRIBE EPE'S EXISTING SYSTEM REC PURCHASE**  
3     **PROGRAMS.**

4     **A.**     Pursuant to previous Commission approvals, EPE established a Small System REC  
5     Program (Rate No. 33 - Small System Renewable Energy Certificate Purchase) to  
6     purchase RECs from customers' solar and wind DG facilities with maximum rated  
7     capacity of 10 kW or less, and a Medium System REC Program (Rate No. 34 -  
8     Medium System Renewable Energy Certificate Purchase) to purchase RECs from  
9     customers' solar and wind DG facilities with maximum rated capacity greater than  
10    10 kW and up to 100 kW. In NMPRC Case No. 11-00263-UT, the Commission  
11    adopted the tiered pricing system for REC purchases through calendar year 2020  
12    shown in Table I below. The Tier 5 price established in that case, effective  
13    January 1, 2014, was to continue thereafter, and the Commission established a  
14    common termination date of December 31, 2020 for all new Small and Medium  
15    REC Program contracts ("REC Agreements") beginning January 21, 2012.

16

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Table I

Tier	Period	Small System		Medium System	
		Solar	Wind	Solar	Wind
Tier 1	1/12/2012 – 6/30/2012	\$0.10	\$0.06	\$0.12	\$0.024
Tier 2	7/1/2012 – 12/31/2012	\$0.08	\$0.05	\$0.09	\$0.022
Tier 3	1/1/2013 – 6/30/2013	\$0.06	\$0.04	\$0.06	\$0.02
Tier 4	7/1/2013 – 12/31/2013	\$0.04	\$0.03	\$0.04	\$0.02
Tier 5	1/12/2014 – 12/31/16	\$0.02	\$0.02	\$0.02	\$0.02

EPE offered these programs through the Commission-approved Small and Medium System Renewable Energy Certificate Purchase rates for REC purchase program applications submitted prior to January 1, 2017. Customers were also required to interconnect their facilities in accordance with the DG interconnection rules and agreements established by the Commission.

EPE also currently has an authorized Large System REC Program (Rate No. 35 - Large System Renewable Energy Certificate Purchase) for systems with capacity greater than 100 kW and less than one MW. The REC prices paid under the Large System REC Program are established under individual contracts and are limited by a cap tied to the Medium System REC Program prices. This program was initiated in 2011 pursuant to the Commission's Final Order in Case No. 11-00263-UT.

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1   **Q.    ARE THE REC PURCHASE PROGRAMS CURRENTLY OPEN TO NEW**  
2           **CUSTOMERS WITH RENEWABLE GENERATION?**

3   **A.**    No. In its Final Order in Case No. 16-00109-UT adopting EPE's 2016 RPS Plan,  
4           the Commission approved EPE's proposal to close the REC purchase programs to  
5           new customers effective January 1, 2017. Customers who submitted an application  
6           to participate in a REC purchase program as set forth in EPE's tariffs prior to  
7           January 1, 2017, remain eligible to participate in the REC purchase programs and  
8           receive the applicable REC credit once their system becomes operational until, with  
9           some exceptions, the common termination date of 2020.<sup>2</sup> Customers with  
10          interconnection agreements for renewable generation installations submitted after  
11          that date are not eligible for the REC purchase programs.

12

13   **Q.    HOW DID THE PROGRAM CLOSURE IMPACT EXISTING PROGRAM**  
14           **PARTICIPANTS?**

15   **A.**    There is no impact of the Commission-approved closure on existing customers.  
16           Participating customers with DG systems interconnected and operating prior to  
17           January 1, 2017, will continue to participate under the tariffs and continue to receive

---

<sup>2</sup> The 2020 common termination date does not apply to REC purchase agreements entered into prior to the January 1, 2012 implementation of the tiered pricing system for REC purchases described above in my testimony.



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1 their designated REC credit, based on the date they originated service under the  
2 applicable schedule, at the Commission-approved REC price.

3  
4 **Q. WHEN DO EPE'S REC PURCHASE PROGRAMS TERMINATE?**

5 A. As noted above, the Commission established a common termination date of  
6 December 31, 2020, for all REC contracts that were initiated January 1, 2012 or  
7 later under the REC purchase programs. Purchase contracts that were entered into  
8 prior to January 1, 2012, had their own identified termination dates, some of which  
9 extend into 2023. Table II provides planned termination dates and customers  
10 impacted for DG systems currently participating in the REC purchase programs.

11 Table II

Termination Year of REC Purchases	Number of Customers
2020	1,925
2021	112
2022	182
2023	341

12  
13  
14  
15  
16 Of all customers currently participating in EPE's REC purchase programs,  
17 the contracts of approximately 75 percent of those customers will terminate on  
18 December 31, 2020, and all contracts in the REC purchase programs will terminate  
19 by the end of 2023.

20

**EL PASO ELECTRIC COMPANY  
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1 **Q. DO THE PROJECTED COSTS FOR EPE'S PORTFOLIO IN THIS**  
2 **APPLICATION REFLECT THE EXPIRATION OF REC PURCHASE**  
3 **PROGRAMS BEGINNING ON DECEMBER 31, 2020?**

4 **A.** Yes. As can be seen in Exhibit OG-3 to the direct testimony of EPE witness  
5 Gallegos, DG REC costs drop in 2021 as the result of the expiration of contracts at  
6 the end of 2020. The number of RECs procured remains constant and even  
7 increases however, because DG penetration continues to grow and EPE continues  
8 to retain ownership of DG RECs as I discuss below.

9  
10 **Q. DOES CLOSURE OF THE REC PURCHASE SCHEDULES IMPACT THE**  
11 **ABILITY OF NEW DG CUSTOMERS TO INTERCONNECT WITH EPE**  
12 **OR PARTICIPATE IN NET ENERGY METERING?**

13 **A.** No. New customers continue to be allowed to interconnect their generating  
14 facilities and participate under the existing tariff provisions for metering options  
15 and sell exported energy to EPE.

16  
17 **Q. HOW MANY SMALL RENEWABLE DG FACILITIES ARE**  
18 **PARTICIPATING IN EPE'S CURRENT SMALL SYSTEM REC**  
19 **PROGRAM?**

**EL PASO ELECTRIC COMPANY  
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1   **A.**    As of December 31, 2019, 2,393 solar DG facilities and six wind DG facilities are  
2           participating and receiving REC payments in the program. The total capacity for  
3           all the REC program eligible small DG systems (the sum of nameplate rated  
4           capacity) is 11.5 MW.

5  
6   **Q.**    **WHAT IS EPE'S CURRENT PARTICIPATION IN THE MEDIUM  
7           SYSTEM REC PROGRAM?**

8   **A.**    As of December 31, 2019, 134 customer-owned medium renewable DG facilities  
9           were connected to or had submitted applications to connect to EPE's system in New  
10          Mexico. All of these facilities are solar PV. The total capacity for all the REC  
11          program eligible medium DG systems (the sum of nameplate rated capacity) is  
12          3.1 MW.

13  
14 **Q.**    **DOES EPE HAVE CUSTOMERS PARTICIPATING IN THE LARGE  
15          SYSTEM REC PROGRAM?**

16 **A.**    Yes. EPE currently has six systems participating in the large REC purchase  
17          program. These systems receive payments based on contractual arrangements with  
18          EPE pursuant to the large system REC purchase tariff. The total capacity of these  
19          six solar systems is 1.4 MW.

20

**EL PASO ELECTRIC COMPANY  
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1 **Q. WHAT ARE THE EXPECTED ANNUAL COSTS OF THE SMALL,**  
2 **MEDIUM, AND LARGE SYSTEM REC PURCHASE PROGRAMS IN THE**  
3 **2020 AND 2021 PLAN YEARS?**

4 **A.** Exhibit OG-3 lists the total expected cost for the REC Purchase Programs to be  
5 approximately \$1.644 million in 2020, \$0.802 million in 2021, and \$0.697 in 2022.  
6 Prices paid for RECs by EPE have varied over time and are a function of when a  
7 DG system began operation (see Table II). The annual costs reflect rates ranging  
8 from \$0.155 to \$0.02 per kWh. With REC program tariffs closed to new customers  
9 the cost of the combined programs is projected to remain fairly level for 2020,  
10 although normal variations in DG system energy output would likely result in some  
11 differences as would any approved expansions. The lower expected costs in 2021  
12 and 2022 reflect the expiration of most REC contracts at the common termination  
13 date of programs in 2020 (see Table III), for customers who applied for  
14 interconnection after January 1, 2012, and additional contract terminations by the  
15 end of 2021.

16

17 **Q. WITH THE DG REC PROGRAMS CLOSED, DID THE NUMBER OF DG**  
18 **RECS ACQUIRED BY EPE FROM DG CUSTOMERS STABILIZE AS**  
19 **WELL?**

**EL PASO ELECTRIC COMPANY  
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1   **A.**   No. Because the number of DG systems interconnecting to EPE's system in  
2           New Mexico continues to grow, at an average of 558 per year (for the period of  
3           2015 through 2019), the number of RECs produced by these customers and  
4           acquired by EPE continues to increase. The REC purchase programs represented  
5           payments to DG system owners for the RECs generated by their systems, but EPE  
6           remains the owner of DG RECs from all interconnected systems, because EPE  
7           purchases the energy produced by these qualifying facility systems. The Company  
8           expects the total quantity of DG RECs produced and registered for RPS compliance  
9           in New Mexico will continue to increase as new systems interconnect and  
10          commence operation, to the benefit of all customers.

11

12   **Q.    HOW MANY DG RECS DOES EPE FORECAST WILL BE GENERATED**  
13       **AND ACQUIRED BY EPE IN THE 2020, 2021, AND 2022 PLAN YEARS?**

14   **A.**   As shown in Exhibit OG-3, EPE forecasts generation of 45,421 DG RECs in 2020,  
15           49,874 DG RECs in 2021, and 54,305 DG RECs in 2022. These RECs will be  
16           registered with WREGIS and will be eligible for retirement to contribute toward  
17           satisfaction of the total RPS requirements in those plan years.

18

19

20

**EL PASO ELECTRIC COMPANY  
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**XI. CONCLUSION**

1  
2 **Q. CAN YOU PLEASE SUMMARIZE YOUR TESTIMONY AND EPE'S**  
3 **PROPOSALS IN ITS 2019-2020 PLAN FILING?**

4 **A.** As EPE witness Gallegos describes in his direct testimony, EPE's 2019-2020 Plan  
5 filing is in full compliance with REA and the Rule and should be approved with the  
6 necessary variances. As I have demonstrated in my testimony, EPE's progress  
7 toward meeting the 20 percent RPS requirement in 2020 was clearly limited by the  
8 RCT restriction previously applicable under the REA. With that restriction lifted  
9 in June of this year, EPE has worked rapidly to develop a plan to move to annual  
10 RPS compliance as quickly as possible without adversely impacting customers.  
11 EPE's plan to utilize renewable energy and RECs from existing resources while  
12 moving forward with contracting and PPA approvals to procure additional long-  
13 term resources is a reasonable and prudent approach which, when combined with  
14 increasing renewable generation from system resources, will allow EPE to meet  
15 RPS requirements now and into the future.

16 EPE implemented its RPS Rider (Rate No. 38 – Renewable Portfolio  
17 Standard Cost Rider) effective January 1, 2018, pursuant to the Commission's Final  
18 Order in Case No. 17-00090, and updated the rate on January 1, 2019, based on the  
19 Commission's Final Order approving EPE's 2018 Plan in Case No. 18-00109-UT.  
20 The rider rate was subsequently modified effective January 1, 2020, following the

**EL PASO ELECTRIC COMPANY  
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1           delay in the proceeding to allow for the filing of this amended application. EPE  
2           proposes to revise the existing rates in the RPS Rider for billing in 2021 in order to  
3           recover its projected procurement costs and to include reconciliation of actual 2019  
4           costs and revenue. The revised tariff is shown in Exhibit JS-1 and included with  
5           an advice notice filed concurrent with this application and should be approved for  
6           billing beginning January 1, 2021.

7

8   **Q.    DOES THIS CONCLUDE YOUR TESTIMONY?**

9   **A.    Yes.**

**EL PASO ELECTRIC COMPANY**

**3<sup>rd</sup> REVISED RATE NO. 38**

X

**RENEWABLE PORTFOLIO STANDARD (RPS) COST RIDER**

**APPLICABILITY:**

This Rider is applicable to bills for electric service provided under all of EPE's retail rate schedules. This Rider is established to recover Renewable Portfolio Standard ("RPS") costs. This Rider is not applicable to customers exempt from charges for renewable energy procurements pursuant to NMSA 1978, Section 62-16-4(C).

X  
X  
X  
X

**TERRITORY:**

Areas served by the Company in Doña Ana, Sierra, Otero and Luna Counties.

X

**MONTHLY RATES:**

	Rate
All Retail Rate Schedules, per kWh	\$0.011158

X  
X  
  
X  
X  
X  
X

**RECONCILIATION FILING:**

This Rider shall be adjusted to reconcile a prior plan year's RPS Cost Rider revenues with actual RPS costs. Any over-recovery of the previously approved RPS costs will represent a credit to and reduction of the approved Rider in a subsequent plan year and any under-recovery of the previously approved renewable energy costs will represent a charge in addition to the approved Rider in a subsequent plan year.

X  
  
  
X  
X

Advice Notice No. 266

Signature/Title   
**James Schichtl**  
**Vice President – Regulatory Affairs**



**EPE Historical Compliance and Procurement Costs**

Case No. for Plan Year	10-00200-UT 2011 [1]	11-00263-UT 2012 [2]	12-00217-UT 2013 [3]	13-00223-UT 2014 [4]	14-00121-UT 2015 [5]	15-00117-UT 2016 [6]	16-00109-UT 2017 [7]	17-00090-UT 2018 [8]	18-00109-UT 2019 [9]
Proposed RPS Portfolio Cost	\$ 3,475,586	\$ 14,222,679	\$ 20,230,170	\$ 16,193,126	\$ 16,421,659	\$ 15,238,697	\$ 14,793,319	\$ 14,207,571	\$ 14,062,913
Compliance Cost	\$ 1,320,885	\$ (4,242,974)	\$ (1,904,997)	\$ 13,466,047	\$ 13,141,484	\$ 10,212,666	\$ 11,928,966	\$ 12,189,304	\$ 13,165,294
Plan Year Revenue Requirement	\$ 193,639,820	\$ 199,147,476	\$ 204,289,639	\$ 199,026,438	\$ 201,966,796	\$ 191,221,136	\$ 190,973,497	\$ 186,280,474	\$ 165,526,570
RPS Cost Percentage	0.68%	-2.13%	-0.93%	6.77%	6.51%	5.34%	6.25%	6.54%	7.95%

**Analysis:**

*RPS portfolio costs increased from 2011 through 2013 as EPE added several large PPA's for solar resources. Until the 2013 Plan Year, the capacity added by these resources and others in the portfolio were credited for avoided costs based on the cost of a combined cycle combustion turbine, which actually resulted in a net credit compliance cost in 2013. Avoided capacity cost of \$20.1 million was credited against RPS Portfolio costs in the 2013 Plan Year. Following the change in the RPS Rule, this avoided cost credit was not longer included in the RCT analysis, resulting in a substantial increase in compliance cost expressed as a percentage of Plan Year revenue requirement even though the total RPS Portfolio cost decreased for the 2014 Plan Year. EPE's RPS Portfolio costs for 2019 are roughly equal to costs for 2012.*

[1] See 2011 Plan Year data provided in Exhibit RA-3, Exhibit EDE-1, and Exhibit EDE-2.

[2] See 2012 Plan Year data provided in Exhibit RA-4, Exhibit EDE-1, and Exhibit EDE-2.

[3] See 2013 Plan Year data provided in Exhibit RA-5, Exhibit CH-1, and Exhibit CH-4.

[4] See 2014 Plan Year data provided in Exhibit JS-1.

[5] See 2015 Plan Year data provided in Exhibit JS-1.

[6] See 2016 Plan Year data provided in Exhibit RA-1 and Exhibit JS-1.

[7] See 2017 Plan Year data provided in Exhibit OG-2 and Exhibit MC-1.

[8] See 2018 Plan Year data provided in Exhibit MC-1.

[9] See 2019 Plan Year data provided in Exhibit MC-1.

El Paso Electric Company  
Macho Springs (MS) Reassignment Proposal  
Historical Annual Output and Jurisdictional Allocation

Line No.	(a) Month	(b) Total MS Energy (MWH)	(c) New Mexico Retail Allocator	(d) Texas Retail Allocator	(e) MS Energy Allocated to NM (MWH)	(f) MS Energy Allocated to TX (MWH)
1	Jan-18	8,711.23	21.13%	78.24%	1,840.55	6,815.35
2	Feb-18	8,700.79	20.42%	78.97%	1,776.40	6,870.63
3	Mar-18	12,426.35	19.47%	79.69%	2,419.88	9,902.55
4	Apr-18	14,150.90	18.88%	80.19%	2,671.26	11,347.09
5	May-18	16,580.83	19.31%	79.67%	3,201.04	13,210.20
6	Jun-18	15,034.32	19.25%	79.90%	2,894.72	12,013.09
7	Jul-18	13,248.73	19.78%	79.43%	2,620.96	10,523.81
8	Aug-18	13,066.39	19.92%	79.28%	2,603.09	10,358.43
9	Sep-18	12,571.75	19.59%	79.83%	2,462.64	10,036.11
10	Oct-18	8,596.70	19.60%	79.91%	1,684.79	6,869.65
11	Nov-18	9,214.21	19.41%	80.06%	1,788.82	7,377.00
12	Dec-18	6,560.44	20.96%	78.45%	1,375.31	5,146.71
13	2018 Total	<u>138,862.64</u>			<u>27,339.46</u>	<u>110,470.62</u>
14	Jan-19	8,116.48	20.69%	78.70%	1,679.08	6,387.44
15	Feb-19	8,847.22	20.83%	78.57%	1,842.76	6,951.09
16	Mar-19	11,898.55	19.91%	79.22%	2,369.08	9,426.51
17	Apr-19	13,679.98	18.97%	80.05%	2,595.02	10,950.60
18	May-19	15,394.12	18.50%	80.44%	2,848.08	12,383.30
19	Jun-19	15,372.67	18.43%	80.66%	2,833.06	12,398.97
20	Jul-19	13,440.73	19.54%	79.50%	2,625.71	10,685.88
21	Aug-19	13,085.77	19.33%	79.67%	2,528.85	10,425.90
22	Sep-19	11,946.71	19.91%	79.54%	2,378.07	9,502.79
23	Oct-19	11,580.18	18.96%	80.62%	2,195.86	9,336.26
24	Nov-19	7,288.96	19.95%	79.50%	1,454.26	5,795.01
25	Dec-19	7,269.23	20.81%	78.57%	1,512.59	5,711.31
26	2019 Total	<u>137,920.60</u>			<u>26,862.42</u>	<u>109,955.06</u>

Note: Allocation to wholesale service accounts for the difference between total and jurisdictional allocated energy.

El Paso Electric Company  
Macho Springs (MS) Reassignment Proposal  
Estimated Net Impact Based on Historical Monthly Fuel Costs

	(a)	(b)	(c)	(d)	(e) = (c) - (b)	(f)	(g) = (e) + (f)
Line No.	Month	NM Jurisdictional MS PPA Cost	NM Reassigned MS PPA Costs	Imputed Capacity Cost - Reassigned MS PPA Cost	MS PPA RPS Rider Cost	Estimated Change in Allocated FPPCAC Cost	Net Impact of MS Reassigned Energy
1	Oct-18	\$ 97,549	\$ 397,753	\$ 93,895	\$ 303,858	\$ (132,642)	\$ 171,216
2	Nov-18	103,573	427,128	94,072	333,056	(143,183)	189,873
3	Dec-18	79,630	297,995	92,180	205,815	(90,490)	115,325
4	Jan-19	97,219	369,833	92,469	277,364	(134,492)	142,871
5	Feb-19	106,696	402,468	92,317	310,151	(23,656)	286,494
6	Mar-19	137,170	545,795	93,088	452,707	(107,330)	345,377
7	Apr-19	150,252	634,040	94,057	539,983	(117,014)	422,969
8	May-19	164,904	716,993	94,519	622,474	(114,151)	508,323
9	Jun-19	164,034	717,900	94,771	623,130	(74,941)	548,189
10	Jul-19	152,029	618,712	93,417	525,296	(126,403)	398,892
11	Aug-19	146,420	603,660	93,616	510,043	(163,709)	346,334
12	Sep-19	137,690	550,212	93,463	456,748	(123,135)	333,613
13	12-month Total	<u>\$ 1,537,166</u>	<u>\$ 6,282,488</u>	<u>\$ 1,121,864</u>	<u>\$ 5,160,624</u>	<u>\$ (1,351,147)</u>	<u>\$ 3,809,477</u>

(b) NM Jurisdictional MS costs continue to be recovered monthly through the FPPCAC.

(f) Estimated FPPCAC reduction due to reassignment of Macho Springs energy.

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

<b>AMENDED APPLICATION FOR APPROVAL OF )</b>	
<b>EL PASO ELECTRIC COMPANY'S AMENDED )</b>	
<b>2019 RENEWABLE ENERGY ACT PLAN AND )</b>	
<b>2020 RENEWABLE ENERGY ACT PLAN )</b>	
<b>PURSUANT TO THE RENEWABLE ENERGY )</b>	<b>CASE NO. 19-00099-UT</b>
<b>ACT AND 17.9.572 NMAC, AND THIRD )</b>	
<b>REVISED RATE NO. 38 – RPS COST RIDER )</b>	
<b>EL PASO ELECTRIC COMPANY, )</b>	
<b>Applicant. )</b>	
<hr style="border: 1px solid black;"/>	

**DECLARATION OF JAMES SCHICHTL IN SUPPORT  
OF THE FOREGOING DIRECT TESTIMONY TO THE APPLICATION FOR  
APPROVAL OF EL PASO ELECTRIC COMPANY'S 2019-2020 RENEWABLE  
ENERGY PLAN PURSUANT TO THE RENEWABLE ENERGY ACT**

I *James Schichtl*, pursuant to Rule 1-011 NMRA, state as follows:

1. I affirm in writing under penalty of perjury under the laws of the State of New Mexico that the following statements are true and correct.
  
2. I am over 18 years of age and have personal knowledge of the facts stated herein. I am employed by El Paso Electric Company ("EPE" or "the Company") as the *Vice President of Regulatory Affairs*.
  
3. The foregoing Direct Testimony of James Schichtl, together with all exhibits sponsored therein and attached thereto, is true and accurate based on my knowledge and belief.
  
4. I submit this Declaration, based upon my personal knowledge and upon information and belief, in support of EPE's *Application for Approval of El Paso Electric Company's 2019-2020 Renewable Energy Act Plan Pursuant to the Renewable Energy Act*.

FURTHER, DECLARANT SAYETH NAUGHT.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 25, 2020.

A handwritten signature in black ink, reading "James Schichtl". The signature is written in a cursive style with a large initial "J" and "S".

*JAMES SCHICHTL*

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

**AMENDED APPLICATION FOR APPROVAL OF )  
EL PASO ELECTRIC COMPANY'S AMENDED )  
2019 RENEWABLE ENERGY ACT PLAN AND )  
2020 RENEWABLE ENERGY ACT PLAN )  
PURSUANT TO THE RENEWABLE ENERGY )  
ACT AND 17.9.572 NMAC, AND THIRD )  
REVISED RATE NO. 38 – RPS COST RIDER )  
)  
EL PASO ELECTRIC COMPANY, )  
Applicant. )  
\_\_\_\_\_ )**

**CASE NO. 19-00099-UT**

**DIRECT TESTIMONY**

**OF**

**OMAR GALLEGOS**

**MARCH 31, 2020**

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**EXHIBITS**

Exhibit OG-1	EPE's New Mexico Renewable Portfolio Standard Requirement
Exhibit OG-2	EPE's 2019-2020 Renewable Energy Act Procurement Plan
Exhibit OG-3	Plan Year RECs and Costs
Exhibit OG-4	Purchase Power Agreement between Hecate Energy, LLC and El Paso Electric Company
Exhibit OG-5	Purchase Power Agreement between Nextera Energy Resources, LLC and El Paso Electric Company

**EL PASO ELECTRIC COMPANY  
DIRECT TESTIMONY OF  
OMAR GALLEGOS**

1                   **I.     INTRODUCTION AND QUALIFICATIONS**

2     **Q.     PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

3     **A.**     My name is Omar Gallegos, and my business address is 100 N. Stanton Street,  
4             El Paso, Texas 79901.

5  
6     **Q.     HOW ARE YOU EMPLOYED?**

7     **A.**     I am employed by El Paso Electric Company ("EPE" or "the Company") as  
8             Director of the Resource Planning and Management Department.

9  
10    **Q.     PLEASE SUMMARIZE YOUR EDUCATIONAL AND BUSINESS**  
11       **BACKGROUND.**

12    **A.**     In 1995, I graduated from the University of Texas at El Paso with a Bachelor of  
13             Science degree in Mechanical Engineering and a Master of Business  
14             Administration degree in 2006. In 2014, I completed a Graduate Certificate in  
15             Public Utility Regulation and Economics from New Mexico State University.

16             From 1995 to May 2009, I was employed by Delphi Corporation in  
17             product engineering. During my final eight years at Delphi Corporation, I was  
18             Supervisor for Product Engineering, where my responsibilities included design  
19             development, product validation, cost estimating, and project management.



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1           In May 2009, I accepted a position with EPE as a Real-Time Scheduler.  
2           In that capacity, I was responsible for managing energy transfer schedules over  
3           the Company's transmission lines in accordance with Federal Energy Regulatory  
4           Commission requirements and North American Electric Reliability Corporation  
5           reliability standards. From September 2010 to May 2013, I was an Associate -  
6           Business Development as a Project Manager for renewable energy projects and  
7           new generation projects. My responsibilities in that position included financial  
8           analysis, business process flows, and evaluation of emerging technologies. In  
9           May 2013, I was promoted to System Operations Outage Coordinator where I  
10          coordinated EPE's transmission, generation, and system outages in adherence with  
11          reliability requirements. In March 2014, I was promoted to Manager-Asset  
12          Management Services. During that time, I was responsible for Transmission and  
13          Distribution project management initiatives, budgeting, asset management, and  
14          support of regulatory permitting for transmission assets. In February 2016, I was  
15          promoted to Director of the Resource Planning Department. In July 2016, I  
16          assumed responsibility of EPE's Resource Management Department.

17

18   **Q.   PLEASE DESCRIBE YOUR CURRENT RESPONSIBILITIES WITH EPE.**

19   **A.**   As Director of EPE's Resource Planning and Management Department, I manage  
20          and supervise the Company's generation and resource planning, renewable energy

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1 procurement, long-term planning/acquisition of interstate gas pipeline transport  
2 capacity, intrastate gas pipeline transport/storage, fuel oil supply/transport,  
3 wholesale power transactions, fuel supply planning and procurement, and real-  
4 time market operations. In this capacity I supervise and confirm the input and  
5 analysis of the Company's PROMOD, STRATEGIST, and AURORA modeling.

6  
7 **Q. HAVE YOU PRESENTED TESTIMONY BEFORE UTILITY**  
8 **REGULATORY BODIES?**

9 **A.** Yes, I have filed testimony and testified before the New Mexico Public  
10 Regulation Commission ("NMPRC" or "Commission"), and I have filed  
11 testimony with the Public Utility Commission of Texas ("PUCT").

12  
13 **II. PURPOSE OF TESTIMONY**

14 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

15 **A.** The purpose of my testimony is to present and support EPE's Amended 2019 and  
16 2020 Annual Renewable Energy Act ("REA") Procurement Plan ("2019-2020  
17 Plan" or "Plan") by:

- 18 • Summarizing EPE's renewable energy needs and renewable portfolio  
19 standards ("RPS") requirements (Exhibit OG-1)

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- 1                   • Providing an overview of EPE's existing RPS eligible resources and  
2                   2019-2020 Renewable Energy Act Procurement Plan (Exhibit OG-2)
- 3                   • Explaining EPE's competitive procurement processes to identify and  
4                   select additional renewable energy resources needed to meet RPS;
- 5                   • Identifying the estimated procurement costs associated with EPE's  
6                   2019-2020 Plan (Exhibit OG-3);
- 7                   • Demonstrating that EPE's proposed 2019-2020 Plan complies with the  
8                   REA, Section 62-16-4(G) and Rule 572, where not inconsistent with  
9                   the REA, and should be approved by the Commission; and
- 10                  • Identifying Next Plan Year data for informational purposes.

11

12 **Q. ARE YOU SPONSORING ANY EXHIBITS IN THIS FILING?**

13 **A.** Yes, I am sponsoring the exhibits listed above in the Table of Contents.

14

15   **III. EPE'S 2019-2020 PLAN**

16 **Q. PLEASE SUMMARIZE EPE'S 2019-2020 PLAN**

17 **A.** The 2019-2020 Plan provides information and data required by REA and  
18 Rule 551 (where not inconsistent with statute) for the Plan Year (2020 and 2021)  
19 for Commission approval and Next Plan Year (2022) for informational purposes.  
20 The 2019-2020 Plan first provides EPE's RPS calculation for Plan Year (2020 and

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1           2021) and Next Plan year (2022). Next, the Plan also describes EPE's existing  
2           RPS eligible procurements including respective renewable energy certificates  
3           ("RECs") to be applied toward RPS for Plan Year and Next Plan Year and  
4           identifies additional energy needs to achieve RPS in the Plan Years. The Plan  
5           then describes EPE's proposed new procurements and their eligibility under the  
6           new REA reasonable cost threshold ("RCT"). Finally, the Plan provides EPE's  
7           proposed mechanism for cost recovery of its 2019 and 2020 renewable energy and  
8           other RPS-related costs.

**IV.   DETERMINATION OF THE RPS**

11   **Q.   WHAT IS THE RPS?**

12   **A.**   The RPS is a percentage of total retail jurisdictional energy sales to New Mexico  
13           consumers that should be met by renewable energy resources.<sup>1</sup> The REA directs  
14           public utilities to meet the RPS subject to the limitations provided in statute.  
15           Specifically, the REA requires; "no later than January 1, 2040, renewable energy  
16           resources shall supply no less than eighty percent of all retail sales of electricity in  
17           New Mexico," Section 62-16-4(A)(5) and "no later than January 1, 2045, zero  
18           carbon resources shall supply one hundred percent of all retail sales of electricity

---

<sup>1</sup> The percentage of total jurisdictional energy sales to New Mexico consumers is subject to rate impact and cost considerations.

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1 in New Mexico," and, "reasonable and consistent progress shall be made over  
2 time toward this requirement" Section 62-16-4(A)(6). Administration of the RPS  
3 is, however, subject to limitations provided in Section 62-16-4(B) including the  
4 requirements to, "maintain and protect the safety, reliable operation and balancing  
5 of loads and resources on the electric system," Section 62-16-4(B)(2) and  
6 "prevent unreasonable impacts to customer electricity bills, taking into  
7 consideration the economic and environmental costs and benefits of renewable  
8 energy resources and zero carbon resources", Section 62-16-4(B)(3).

9 For this Plan Year (2020 and 2021) and Next Plan Year (2022), the RPS is  
10 set at 20 percent.

11  
12 **Q. HOW DOES EPE DEMONSTRATE COMPLIANCE WITH RPS?**

13 **A.** Compliance is demonstrated through the retirement of RECs which correspond to  
14 renewable energy that is either procured by EPE or generated from EPE-owned  
15 renewable resources and delivered to EPE's New Mexico customers. RECs are  
16 registered and retired with the regional tracking system known as WREGIS  
17 within four years of their creation. The RECs acquired by EPE are normally  
18 expressed in Megawatt-hour ("MWh") units. One MWh or REC is equal to  
19 1,000 kilowatt-hours ("kWh"). The energy associated with the acquired RECs is  
20 received by EPE for delivery to New Mexico customers.

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1

2 **Q. PLEASE EXPLAIN EPE'S RPS CALCULATION.**

3 **A.** As explained above, RPS is a percentage of forecasted New Mexico jurisdictional  
4 energy sales. The "RPS calculation" is EPE's determination of the amount of  
5 renewable energy (expressed in RECs) that EPE projects it will need to meet the  
6 applicable RPS based on EPE's projected net jurisdictional kWh sales for the Plan  
7 Year. The net jurisdictional kWh sales are the forecasted New Mexico  
8 jurisdictional energy sales adjusted for weather, projected energy efficiency,  
9 distributed generation ("DG"), and load management reductions and reduced for  
10 energy sales related to voluntary renewable energy programs.

11

12 **Q. DOES EPE HAVE ANY EXEMPTED CUSTOMERS UNDER**  
13 **SECTION 62-16-4(C) OF THE REA?**

14 **A.** No.

15

16 **Q. DOES EPE MAKE ANY ADJUSTMENTS TO THE RPS CALCULATION**  
17 **FOR LARGE CUSTOMERS?**

18 **A.** No.

19 **Q. HAS EPE CALCULATED THE RECS NEEDED TO MEET 20 PERCENT**  
20 **RPS IN 2020, 2021, AND 2022?**

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1    **A.**    Yes. Exhibit OG-1 shows EPE's RPS calculation for the Plan Years (2020 to  
2            2021) and Next Plan Year (2022). In summary, to meet 20 percent RPS in 2020,  
3            EPE projects needing 342,261 RECs (342,261,451 kWh). For 2021, EPE projects  
4            needing 344,802 RECs (344,802,017) kWh. Finally, for informational purposes,  
5            EPE projects needing 346,657 RECs (346,657,861) kWh to meet 20 percent RPS  
6            in 2022.

7

8            **V.        OVERVIEW OF EXISTING RPS PROCUREMENTS**

9    **Q.        PLEASE    DESCRIBE    EPE'S    APPROVED    RPS    ELIGIBLE**  
10    **PROCUREMENTS.**

11   **A.**    RPS eligible procurements refers to EPE's renewable energy resources and RECs  
12            procured by EPE for RPS compliance pursuant to Commission-approved  
13            procurement plans. The RPS eligible procurements may be for energy with RECs  
14            or RECs only. The procurement costs for the Camino Real Landfill Gas to  
15            Energy Facility ("CRLEF") and DG Programs are for RECs only and the  
16            associated energy for these qualifying facilities are recovered through EPE's  
17            FPPCAC. EPE's existing renewable resources and RECs are procured through  
18            purchased power agreements ("PPAs") and existing DG customers. I list and  
19            describe these projects in Exhibit OG-2.

20

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1 **Q. ARE THERE ANY ADDITIONAL RESOURCES CONTRIBUTING TO**  
2 **RPS WHICH ARE NOT RPS PROCUREMENTS?**

3 **A.** Yes. EPE also has two renewable resources, Macho Springs and Holloman  
4 Air Force Base ("HAFB"), that were secured for purposes other than RPS  
5 compliance. These projects are also described in Exhibit OG-2. EPE applies  
6 RECs from these resources to its RPS at no cost to the RPS portfolio.

7  
8 **Q. DOES EPE OWN RENEWABLE GENERATING RESOURCES THAT**  
9 **ARE NOT UTILIZED FOR RPS COMPLIANCE?**

10 **A.** Yes. EPE owns and operates small, demonstration-scale, solar photovoltaic  
11 facilities. Currently, EPE does not use those renewable energy resources for  
12 New Mexico RPS but uses the resources to supply its Texas RPS and  
13 New Mexico's Voluntary Renewable Energy customers. Additionally, EPE has a  
14 community solar project in Texas.

15  
16 **Q. DOES EPE HAVE ANY ADDITIONAL RENEWABLE RESOURCES**  
17 **THAT CAN BE UTILIZED FOR RPS COMPLIANCE?**

18 **A.** Yes. EPE has a pending Application for Approval of three Long-Term Power  
19 Purchase Agreements ("LTPPAs") that include 200 MW of additional renewable  
20 (solar) system resources selected from its 2017 All Source Request for Proposals



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1 ("Planned 2022 All-Source Resources"). If approved, the energy and cost of this  
2 new generation will be jurisdictionally allocated between New Mexico and Texas.  
3 The New Mexico allocated portion of these resources will provide energy for  
4 New Mexico customers towards meeting the RPS requirements.

5  
6 **Q. WILL THOSE SOLAR RESOURCES, IF APPROVED, CONTRIBUTE TO**  
7 **MEETING 20 PERCENT RPS IN THIS PLAN YEAR (2020 AND 2021)?**

8 **A.** No. Because those resources are not expected to be commercially operational  
9 until 2022, they will not contribute renewable energy for the Plan Year (2020 and  
10 2021). If approved by the Commission in Case No. 19-00348-UT, they are  
11 expected to contribute renewable energy in the Next Plan Year (2022).

12  
13 **Q. DOES EPE HAVE SUFFICIENT, PREVIOUSLY APPROVED RPS**  
14 **PROCUREMENTS TO MEET 20 PERCENT RPS IN THIS PLAN YEAR?**

15 **A.** No. As demonstrated in Table 1 below, the total RECs provided by previously  
16 approved RPS procurements is expected to produce 12.7 percent of net retail  
17 energy sales in 2020 and 12.8 percent of net retail energy sales in 2021.

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**TABLE 1. RPS with Approved Procurements**

<b>Year</b>	<b>2020</b>	<b>2021</b>	<b>2022</b>	<b>2023</b>	<b>2024</b>	<b>2025</b>
RPS	20%	20%	20%	20%	20%	40%
RPS Energy Approved Resources	217,594	220,985	224,361	227,721	231,086	234,416
Planned 2022 All-Source Resources <sup>1</sup>	-	-	61,322	122,644	122,031	121,421
Projected RPS Percent	12.7%	12.8%	16.5%	20.1%	20.1%	20.2%
Deficiency/Margin	(124,667)	(123,843)	(61,000)	1,556	2,304	(350,524)
Cumulative Deficiency/Margin	(124,667)	(248,510)	(309,510)	(307,954)	(305,650)	(656,175)

<sup>1</sup> The "Planned 2022 All-Source Resources" are pending LTPPA approval in Docket No. 19-000348-UT.

1

2           **VI.       PROCUREMENT ACTIONS TO MEET 20 PERCENT RPS**

3       **Q.       HAS EPE TAKEN STEPS TO PURCHASE RENEWABLE ENERGY TO**  
4           **MEET 20 PERCENT RPS IN THIS PLAN YEAR?**

5       **A.**     Yes, EPE's Resource Planning Department ("RPD") issued an RFP for renewable  
6           energy resources on May 29, 2019 ("2019 RFP"). The 2019 RFP was open to  
7           utilities and existing facilities that could offer a long-term and/or short-term  
8           purchase of energy and RECs to satisfy EPE's 2020 RPS.

9                     EPE also issued a second RFP on September 19, 2019 ("September 2019  
10           RFP"), to solicit bids from other utilities or independent power producers to  
11           provide a targeted energy amount for a one-year market sale in an effort to meet

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1           20 percent RPS in 2020 and bridge the shortfall until long-term renewable  
2           resources could be selected, approved, and constructed.

3

4   **Q.   PLEASE DESCRIBE THE 2019 RFP.**

5   **A.**   On May 29, 2019, EPE issued an RFP to select the most economic renewable  
6           energy resource, or combination of resources for New Mexico REA. The 2019  
7           RFP was open to all renewable resource technology types. To elicit robust  
8           participation, the 2019 RFP was widely distributed via e-mail to a listing of  
9           previous RFP participants and any participants that had requested to be included  
10          on the distribution list. EPE also issued a press release posted the 2019 RFP to  
11          EPE's public internet page. Respondents were initially allotted two months to  
12          submit proposals; however, EPE communicated the ability to request a one-month  
13          extension<sup>2</sup>. At the request of a potential bidder, the response period was extended  
14          an additional month for all bidders.

15

16   **Q.   WHAT WAS THE OUTCOME OF THE 2019 RFP PROCESS?**

---

<sup>2</sup> EPE allowed for a one-month extension if requested by a bidder due to the recent Commission preference for a minimum 3-month submittal period.

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1    **A.**    The 2019 RFP process resulted in two projects being selected that when  
2            combined, provided the best overall option to meet the RPS at the lowest  
3            reasonable cost. The selected proposals are listed below:

- 4                    • Hecate Energy Santa Teresa 2 Project (50 MW)
- 5                    • Buena Vista Energy Center 2 Project (20 MW)

6

7    **Q.    WHAT REC REQUIREMENTS DID EPE SPECIFY IT NEEDED IN THE**  
8            **2019 RFP?**

9    **A.**    EPE requested bids for a guaranteed minimum annual generation of  
10           141,000 MWh of firm renewable energy, and associated RECs, with commercial  
11           operation dates ("COD") before the end of 2020 if achievable, but no later than  
12           May 1, 2022. EPE was also open to proposals that offered greater than the  
13           maximum requested 141,000 MWh per year, with a later COD if they offered  
14           benefits to customers. Further, EPE requested that bidders must verify that  
15           proposed resources meet the SB 489 definition of eligible renewable energy  
16           resources.

17

18   **Q.    DID THE 2019 RFP INCLUDE OPPORTUNITIES FOR BIDDERS TO**  
19           **PROPOSE PURCHASED POWER, FACILITY SELF BUILD, OR**  
20           **FACILITY BUILD-TRANSFER OPTIONS?**

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1   **A.**    Yes.

2

3   **Q.**    **HOW MANY PROPOSALS DID EPE RECEIVE?**

4   **A.**    EPE received a total of 69 proposals.

5

6   **Q.**    **CAN YOU DESCRIBE THE PROPOSALS RECEIVED IN RESPONSE TO  
7           THE 2019 RFP?**

8   **A.**    Yes. EPE received multiple proposals from 16 firms with each proposal having  
9           various options and technology types for a total of 69 proposals. The proposal  
10          distribution for the various technology types is shown in Table 2 below.

**TABLE 2. Proposal Distribution**

Solar	Solar + Storage	Wind	Wind + Storage	Wind + Storage + Solar	DG
26	38	2	1	1	1

11

12   **Q.**    **WHAT WERE THE PROPOSED COMMERCIAL OPERATION DATES  
13          FOR THE PROJECTS RECEIVED?**

14   **A.**    The proposed commercial operation dates for the projects received from the 2019  
15          RFP varied from December 9, 2020 to December 15, 2022.

16

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1   **Q.    DID EPE USE AN INDEPENDENT EVALUATOR TO REVIEW THE**  
2       **BIDS?**

3   **A.**    Yes.  In anticipation of an EPE self-build proposal submittal, the third-party  
4       Independent Evaluator utilized in previous EPE RFPs, Merrimack Energy Group,  
5       Inc. ("Merrimack") and its Principal, Wayne Oliver, was solicited to ensure that  
6       the self-build options did not have any undue preferential treatment and to ensure  
7       the process is fair and transparent, identify and resolve issues as they arise,  
8       oversee the evaluation and selection process, review all modeling results and  
9       analysis, and monitor and if necessary, and to participate in contract negotiation  
10      process.

11

12   **Q.    WERE ANY OF THE BIDDERS ELIMINATED AT THE OUTSET?**

13   **A.**    No.

14

15   **Q.    PLEASE DESCRIBE THE EVALUATION CRITERIA USED TO RANK**  
16       **THE PROPOSALS.**

17   **A.**    The evaluation criteria included both a qualitative review and a quantitative  
18       review.  The qualitative review included criteria such as; bid submitted on time,  
19       eligible resource technology, submittal of all forms, bidder experience, site  
20       control, interconnection plan, bidder financial capability, amongst others.  The

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1 quantitative review looked at the economic information for each proposal option  
2 and calculated the Levelized Cost of Energy ("LCOE") and Annual Cost for each.  
3 Interconnection upgrades and associated costs were also evaluated for each  
4 proposal option and the resulting costs were added to the LCOE and Annual  
5 Costs. EPE used the Annual Cost measure to rank the proposals and identify the  
6 lowest cost option for customers. All proposals were initially reviewed  
7 individually and in combinations.

8

9 **Q. WHAT DOES THE TERM LEVELIZED COST MEAN AND HOW ARE**  
10 **LEVELIZED COSTS CALCULATED?**

11 **A.** The LCOE is a cost metric commonly used in the energy industry to compare the  
12 cost competitiveness of same technology type energy generating resources. The  
13 LCOE is calculated by first taking the net present value of the total cost of energy  
14 over the term of the PPA. This number is then divided by the total energy  
15 generation over the term of the PPA. The unit for LCOE is \$/MWh.

16

17 **Q. HOW WAS THE ANNUAL COST CALCULATED?**

18 **A.** The Annual Cost was calculated by multiplying the LCOE of the project by the  
19 annual expected energy output of the project.

20

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1   **Q.   WHY DID EPE USE THE ANNUAL COST MEASURE INSTEAD OF**  
2       **LCOE TO RANK THE PROPOSALS?**

3   **A.**   The Annual Cost measure proved to be a more effective cost measure, than the  
4       LCOE by itself, for selecting the lowest cost project to meet RPS.  Selecting  
5       resources based on the lower annual cost minimizes the cost burden to customers  
6       in order to contribute to the near-term RPS targets.  The following explains this  
7       further.

8               When considering LCOE by itself, a larger nameplate project bidding in  
9       excess energy can take advantage of economies of scale to reduce costs and can  
10      result in a lower LCOE than a smaller nameplate project while having a higher  
11      total cost.  However, while the larger project may have a lower LCOE, it will have  
12      a larger annual cost commitment due to the higher energy output.  By multiplying  
13      the LCOE by the annual energy output of the project, in effect calculating the  
14      Annual Cost, the projects can be ranked and selected based on the lowest overall  
15      cost to the customer.

16              For example, consider two 20-year PPA projects, Firm A and Firm B, with  
17      similar CODs.  Table 3 below shows the calculated LCOE and Annual Cost for  
18      each of the two projects.

19



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**Table 3. LCOE & Annual Cost Comparison**

<b>Firm</b>	<b>Capacity (MW)</b>	<b>Energy (MWh)</b>	<b>LCOE (\$)</b>	<b>Annual Cost (\$)</b>
A	150	463,200	19.90	9,217,680
B	50	150,000	24.25	3,637,500

1

2

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From an LCOE perspective, the Firm A project has the lower LCOE but from an Annual Cost perspective, Firm B has the lowest Annual Cost and better meets the 2020 RPS. Thus, the Annual Cost measure proved to be the more effective cost measure for selecting the lowest cost project(s) for the customer. The larger project would only be beneficial to customers if the cost was low enough to result in a net fuel and purchase power savings.

**Q. ONCE THE LCOE AND ANNUAL COST OF PROPOSALS WERE CALCULATED, WHAT INITIAL DETERMINATIONS WERE DETERMINED?**

**A.** First, it was determined that none of the proposals provided pricing that would result in net fuel and purchased power savings. The larger projects would impose a higher cost burden to customers, for a 20-year PPA term, for an amount of renewable energy that is greater than the immediate RPS need. Therefore, larger

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1 energy projects with a high annual cost dropped to the bottom of the ranking.  
2 This included all of the wind proposals and the larger solar proposals.

3  
4 **Q. DID ANALYSIS DETERMINE THAT RECEIVED WIND PROPOSALS**  
5 **WERE NOT THE BEST FIT RESOURCES AT THIS TIME?**

6 **A.** Yes. Given that the proposed wind pricing did not offer net fuel and purchased  
7 power savings, were not the lowest LCOE proposals, and resulted in high annual  
8 cost to customers, it collectively resulted in the determination that wind was not  
9 the best fit for New Mexico customers at this time.

**Table 4. Proposal Capacity versus LCOE and Annual Cost Ranges**

<b>Solar &amp; Wind Capacity MW</b>	<b>LCOE low (\$/MWh)</b>	<b>LCOE high (\$/MWh)</b>	<b>Annual Cost Low (\$)</b>	<b>Annual Cost High (\$)</b>	<b>Tech Type</b>
0-49	23.79	47.33	1,491,348	4,797,652	Solar
50-99	20.68	50.31	2,963,839	7,763,125	Solar
100-160	20.42	46.68	8,054,086	21,622,741	Solar, Wind

10

11 **Q. NOW THAT THE SELECTION PROCESS WAS NARROWED TO**  
12 **SOLAR AND SOLAR WITH BATTERY STORAGE OPTIONS, WHAT**  
13 **WAS THE NEXT STEP?**

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1    **A.**    It was necessary to determine if the added cost of the battery storage provided any  
2           benefit to New Mexico customers.  As it relates to this selection, battery storage  
3           would offer value to customers if it mitigated curtailment of solar resources and  
4           aided in contributing to the RPS.

5

6    **Q.    DOES EPE EXPECT THE NEED TO CURTAIL ANY OF THE OUTPUT**  
7           **FROM THE PROPOSED SOLAR FACILITIES?**

8    **A.**    Yes, it may be necessary to curtail the solar output during the low load months  
9           and potentially during morning hours at sunrise during heavy load months.

10

11   **Q.    HOW DID EPE DETERMINE IT WAS BEST TO ADDRESS THE**  
12           **CURTAILMENT WHICH WOULD REDUCE THE AMOUNT OF**  
13           **RENEWABLE ENERGY DELIVERED FOR RPS COMPLIANCE?**

14   **A.**    EPE evaluated the amount of curtailment mitigated by battery storage and its cost  
15           versus adding additional solar capacity to generate a higher amount of renewable  
16           energy during heavy load months and replace the curtailed energy.  EPE  
17           determined that adding additional renewable energy to replace the curtailed  
18           energy was more cost effective.

19

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1 **Q. WHAT CHARACTERISTICS OF SOLAR WITH BATTERY STORAGE**  
2 **MADE IT LESS COST EFFECTIVE THAN ADDING ADDITIONAL**  
3 **STAND-ALONE SOLAR?**

4 **A.** Battery with solar proposals were higher cost than standalone solar and the energy  
5 curtailment during the low load months cannot be effectively mitigated by battery  
6 storage because there isn't sufficient load to discharge the battery in the afternoon  
7 or evening hours. Consequently, battery storage is not able to fully mitigate  
8 energy curtailment and therefore the benefit of the battery option is insufficient to  
9 overcome the higher cost of selecting a proposal with battery.

10

11 **Q. NOW THAT THE SELECTION PROCESS DETERMINED THAT**  
12 **STAND-ALONE SOLAR WAS THE MOST COST-EFFECTIVE AND**  
13 **BEST FIT, WHAT WAS THE NEXT STEP?**

14 **A.** Now that it was determined that the selection was down to stand-alone solar  
15 resources, EPE determined it was appropriate to select the resources with the  
16 lowest annual cost that would provide the approximate 141,000 MWh of  
17 renewable energy with consideration of the curtailed energy in low load months.

18

19 **Q. WHY IS THE ANNUAL COST, WHICH IS BASED ON LCOE, A**  
20 **REASONABLE QUANTITATIVE SELECTION AS OPPOSED TO**

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1           **EVALUATING PROPOSALS THROUGH STRATEGIST CAPACITY**  
2           **EXPANSION MODEL?**

3   **A.**     Because the solicitation was narrowed down to only solar proposals, the LCOE  
4           and Annual Cost measures were appropriate quantitative measures that would  
5           provide the lowest overall cost to the customer.

6

7   **Q.     DID EPE ASSESS TIMING FEASIBILITY FOR COMMERCIAL**  
8           **OPERATION?**

9   **A.**     The next step in the RFP process was to perform a risk assessment for the  
10          proposal options with a late 2020 or early 2021 COD. EPE estimated that even  
11          with an optimistic view, considering contract negotiations, regulation approvals,  
12          transmission interconnection requests/build, and actual facility build, would likely  
13          result in a COD of 2022 as shown in the Table 3 below. Considering the timeline  
14          (Table 3), no proposals from the 2019 RFP were deemed viable to provide  
15          sufficient energy to meet 20 percent RPS by 2020 or 2021.

16

17           **Table 5. Regulatory Approval & Transmission Interconnection Timeline**

Quarter	2019 Q2			2020 Q1			2020 Q2			2020 Q3			2020 Q4			2021 Q1			2021 Q2			2021 Q3			2021 Q4			2022 Q1			
	Month	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC	JAN	FEB	MAR
CONTRACT (Dependent on 3rd party)																															
FILE FOR REGULATORY APPROVAL																															
RPS DOCKET (180 DAYS)																															
INTERCONNECT REQUEST																															
INTERCONNECT BUILD																															
BUILD																															

18

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1 **Q. PLEASE DESCRIBE THE SELECTED PROJECTS.**

2 **A.** Two winning projects were selected, both of which are expected to be on-line by  
3 May 1, 2022. The Hecate Energy Santa Teresa 2 Project is a new 50 MW solar  
4 plant project that proposes to sell EPE 96,054 MWh of first year energy in 2022  
5 and 143,319 MWh of full year energy in 2023 under a 20-year PPA. The Hecate  
6 Energy Santa Teresa 2 agreement is attached as Exhibit OG-4.

7 The Buena Vista Energy Center 2 Project is a new 20 MW solar plant  
8 project that proposes to sell EPE 42,756 MWh of first year energy in 2022 and  
9 62,688 MWh of full year energy in 2023 under a 20-year PPA. The Buena Vista  
10 Energy Center 2 is attached as Exhibit OG-5. Table 4 below summarizes the EPE  
11 2019 RFP selected project details.

12

**Table 6. EPE 2019 RFP Selected Project Details**

<b>Project</b>	<b>Technology</b>	<b>Capacity (MW)</b>	<b>Location</b>	<b>Term (Years)</b>	<b>COD</b>	<b>Rate</b>	<b>Escalation (Yearly)</b>	<b>MWh/Year (Expected)</b>
Hecate Energy Santa Teresa 2	Solar Photovoltaic	50	Santa Teresa, New Mexico	20	May 2022	\$18.93	None	143,319
Buena Vista Energy Center 2	Solar Photovoltaic	20	Otero, New Mexico	20	May 2022	\$19.88	None	62,688

13

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1 **Q. DO TERMS IN THE AGREEMENT ADDRESS CURTAILMENT?**

2 **A.** Yes. The agreements allow for 2 percent curtailment at no cost. Any curtailment  
3 above this amount will require payment.

4

5 **Q. ARE THERE ANY DRAWBACKS ASSOCIATED WITH THE SELECTED  
6 HECATE ENERGY SANTA TERESA 2 PROJECT AND THE BUENA  
7 VISTA ENERGY CENTER 2 PROJECT?**

8 **A.** Yes. As shown in Table 4 above, the selected projects have a COD of May 2022  
9 and EPE needs the resources before 2022 to meet 20 percent RPS in this Plan  
10 Year.

11

12 **Q DID EPE RECEIVE ANY PROPOSALS FROM THE RFP THAT COULD  
13 PROVIDE ENERGY OR RECS TO MEET 20 PERCENT RPS IN THIS  
14 PLAN YEAR (2020 AND 2021)?**

15 **A.** No. EPE did not receive any proposals from the RFP for facilities that could  
16 viably contribute towards the 20 percent requirement before 2022. Projects with  
17 COD proposals in 4th quarter 2020 and early 2021 were not developed adequately  
18 enough to feasibly complete COD by the proposed dates considering timing for  
19 contract negotiations, regulatory approval, interconnection request process, and  
20 construction. See (Table 3) above.

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1

2 **Q. WHAT OTHER IMMEDIATE ALTERNATIVES FOR RPS**  
3 **COMPLIANCE IN PLAN YEAR (2020 AND 2021) HAS EPE EXPLORED?**

4 **A.** EPE issued the September 2019 RFP for solicitation for a short-term (1-yr)  
5 market purchase of renewable energy from an existing renewable project. No  
6 proposals were received for this solicitation.

7 EPE is also seeking authorization to temporarily assign EPE's Texas  
8 jurisdictional quantity of solar energy from EPE's existing Macho Springs Solar  
9 Facility for delivery to New Mexico customers. This proposal is described in the  
10 direct testimony of EPE witness James Schichtl.

11

12 **Q. WILL THE PROPOSED MACHO SPRINGS PROCUREMENT ALLOW**  
13 **EPE TO ATTAIN 20 PERCENT RPS IN THIS PLAN YEAR?**

14 **A.** Assuming regulatory approvals in fourth quarter 2020, the proposed reallocation  
15 of the Macho Springs procurement will not significantly contribute towards  
16 20 percent RPS in 2020. However, again, assuming regulatory approvals in  
17 fourth quarter 2020, the Macho Springs procurement will bring EPE to  
18 19.2 percent in 2021 and dependent on actual renewable energy output and load  
19 may be closer to 20 percent RPS in 2021. As shown in Table 7 below, and in



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1 Exhibit OG-3, EPE estimates supplying 14.3 percent of jurisdictional retail sales  
2 from renewable energy in 2020 and 19.2 percent in 2021.

**TABLE 7. RPS Compliance with Existing and MS Procurement**

<b>Year</b>	<b>2020</b>	<b>2021</b>	<b>2022</b>	<b>2023</b>	<b>2024</b>	<b>2025</b>
RPS	20%	20%	20%	20%	20%	40%
RPS Energy Approved Resources	217,594	220,985	224,361	227,721	231,086	234,416
Planned 2022 All-Source Resources <sup>1</sup>	-	-	61,322	122,644	122,031	121,421
Macho Springs TX Purchase	27,602	110,407	34,293	-	-	-
New NM RPS Resource <sup>2</sup>	-	-	138,810	206,007	204,977	203,952
Future RPS Procurement <sup>3</sup>	-	-	-	-	-	146,572
Projected RPS Percent	14.3%	19.2%	26.5%	31.9%	31.8%	40.0%
Deficiency /Margin	(97,065)	(13,436)	112,103	207,563	207,281	(0)
Cumulative Deficiency/Margin	(97,065)	(110,501)	1,601	209,165	416,445	416,445

1 The "Planned 2022 All-Source Resources" are pending LTPPA approval in Docket No. 19-000348-UT.

2 "New NM RPS Resource" refers to resources presented in this docket.

3 "Future RPS Procurement" is future resource to be solicited at a future date.

3

4 **Q. IS THE REALLOCATION OF MACHO SPRINGS ENERGY THE**  
5 **LOWEST COST RESOURCE AVAILABLE TO EPE AT THIS TIME?**

6 **A.** Yes, the Macho Springs proposal is the only resource option EPE is aware of at  
7 this time that may contribute towards the RPS in this Plan Year without exceeding  
8 the statutory reasonable cost threshold of \$60.

9

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1 **Q. ARE OTHER REASONABLE ALTERNATIVES AVAILABLE TO EPE?**

2 **A.** No. As explained above, EPE has attempted through issuance of multiple RFPs  
3 to identify reasonable alternatives to meet RPS and is unaware of any alternatives  
4 at this time.

5  
6 **Q. WILL EPE MEET 20 PERCENT RPS IN THE NEXT PLAN YEAR (2022)?**

7 **A.** Yes. As shown in Table 5 above, with existing approved resources, the Planned  
8 2022 All-Source Resources<sup>3</sup>, and the newly proposed NM RPS resources selected  
9 from the 2019 RFP, EPE estimates being able to supply 26.5 percent of its retail  
10 jurisdictional energy sales to New Mexico customers from renewable energy in  
11 2022, exceeding the statutory 20 percent RPS.

12

13

**VII. COST OF EPE'S 2019-2020 PLAN**

14 **Q. WHAT EXISTING PROCUREMENT COSTS ARE ASSOCIATED WITH**  
15 **EPE'S 2019-2020 PLAN AS PRESENTED HERE?**

16 **A.** The costs associated with EPE's 2019-2020 Plan include the cost to procure RECs  
17 and any associated energy from various previously-approved RPS procurements,  
18 including the cost to purchase RECs from customers participating in EPE's REC

---

<sup>3</sup> The "Planned 2022 All-Source Resources" are pending LTPPA approval in Docket No. 19-000348-UT.

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1 Purchase Programs for distributed generation<sup>4</sup>, and the cost of complying with  
2 REC registration and tracking through WREGIS.

3

4 **Q. WHAT IS THE ESTIMATED PROCUREMENT COST FOR EPE'S 2019-**  
5 **2020 PLAN?**

6 **A.** The total estimated cost associated with EPE's 2019-2020 Plan are \$16,886,451  
7 for 2020 and \$19,894,014 for 2021 considering currently approved procurements  
8 that will carry over into 2020 and 2021 and procurement costs of the Macho  
9 Springs procurement proposal. The resources included in the procurement plan  
10 and associated RECs to be applied toward RPS and applicable RPS procurement  
11 costs for 2020 and 2021 are listed in Exhibit OG-3. That exhibit also includes, for  
12 informational purposes, the projected resources and associated RECs to be  
13 applied toward RPS and applicable RPS procurement costs for 2022.

14

15 **Q. ARE THE PROCUREMENT COSTS FOR THE 2019 AND 2020 PLAN**  
16 **REASONABLE?**

17 **A.** The Commission has determined in EPE's previous procurement cases that EPE's  
18 existing RPS eligible procurements carrying over into Plan Years 2020 and 2021

---

<sup>4</sup> As addressed by EPE witness James Schichtl in his direct testimony, a large portion of the REC Purchase Program ends payment for RECs in 2020 and the costs are estimated to decline by approximately \$900,000 in 2021.

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1 are reasonable. The only new procurement being proposed in Plan Years 2020  
2 and 2021 is the reallocation of Macho Springs. The Macho Springs PPA  
3 approved cost of \$57.90 per MWh is below the new RCT definition of "an  
4 average annual levelized cost of sixty (\$60.00) per megawatt-hour at the point of  
5 interconnection of the renewable energy resources with the transmission system,  
6 adjusted for inflation after 2020." As demonstrated by EPE's efforts to solicit  
7 resources via the 2019 RFP and the September 2019 RFP, there are no other  
8 options for renewable energy and as such Macho Springs is the only available  
9 renewable energy resource for Plan Years 2020 and 2021. Therefore, Macho  
10 Springs is the most reasonable available option to contribute renewable energy  
11 and it is below the RCT. It is further noted that the Macho Springs procurement  
12 is proposed as a short-term commitment to bridge the gap until the new renewable  
13 energy procurements can be brought online in 2022 and would not commit  
14 customers for an extended term.

15  
16 **Q. HOW DO THE ESTIMATED PROCUREMENT COSTS FOR THE NEXT**  
17 **PLAN YEAR (2022) COMPARE TO THE RCT?**

18 **A.** The PPA costs for the Hecate Energy Santa Teresa-2 (50 MW) PPA is \$18.93 per  
19 MWh and for the Buena Vista Energy Center-2 (20 MW) PPA is \$19.88 per  
20 MWh. Both are well below the \$60 per MWh RCT.

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1   **Q.   PLEASE EXPLAIN WHY A COST GREATER THAN THE \$14.99 PER**  
2       **MEGAWATT-HOUR (MWH) PURCHASED POWER AGREEMENT**  
3       **(PPA) PRICING THAT IS SUBJECT TO REVIEW AND APPROVAL IN**  
4       **CASE NO. 19-00348-UT IS REASONABLE.<sup>5</sup>**

5   **A.**   It is first necessary to note that the \$14.99 per MWh price of the 2017 RFP  
6       resource appears to be the lowest PPA price publicly disclosed by any utility.  
7       Additionally, it was the clear frontrunner in the 2017 RFP for stand-alone solar.  
8       Utility Scale Solar PV PPA pricing depends on many economic and noneconomic  
9       factors that are inherently variable such as finance costs, material costs,  
10      construction costs, wages, tariffs, federal and/or state tax incentives, real estate  
11      prices, etc. Consequently, a proposed PPA price for a renewable resource may be  
12      higher or lower, at any given time, based on the level and/or status of the factors  
13      mentioned above.

14  
15   **Q.   HAS EPE REVIEWED RECENT PRICES FOR COMPARABLE ENERGY**  
16      **RESOURCES ELSEWHERE IN THE SOUTHWESTERN UNITED**

---

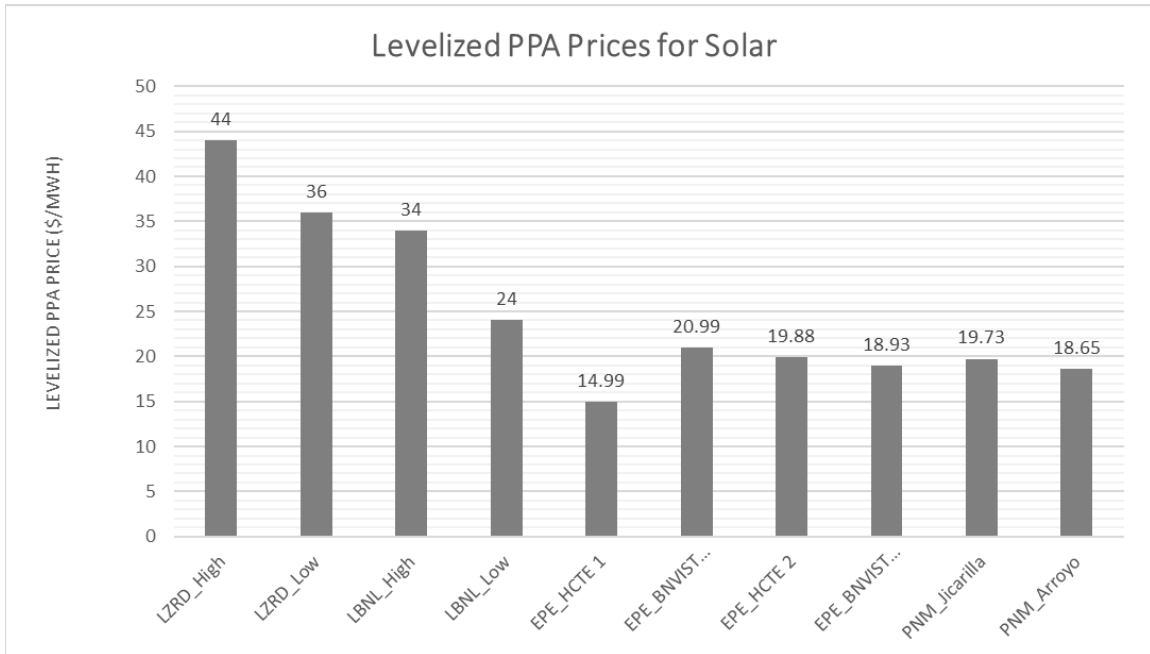
5 This testimony, providing “just cause for why any proposed procurement may be greater than the \$14.99 per megawatt-hour (MWh) Purchased Power Agreement (PPA) pricing now subject to review and approval in Case No. 19-00348-UT” is intended to serve as EPE’s response to the Motion of Merrie Lee Soules Requesting the Hearing Examiner to Require EPE’s Production of Additional Evidence in compliance with paragraph C of the Hearing Examiner’s Order on Motion Requesting The Hearing Examiner to Require EPE to Produce Additional Evidence (December 6, 2019).



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1

**Figure 1. Levelized PPA Price Comparison**



2

3

4 **Q. HOW DID THE BIDS RECEIVED IN RESPONSE TO THE 2019 RFP**  
5 **COMPARE TO THOSE RECENT PRICES?**

6 **A.** As illustrated in Figure 1, the EPE Hecate 2 and Buena Vista 2 are in line with  
7 recent regional procurements and below the Lazard and LBNL reference costs.  
8 The Hecate Energy Santa Teresa-2 Project's PPA price of \$18.93 per MWh and  
9 the Buena Vista Energy Center-2 Project's PPA price of \$19.88 per MWh are  
10 below the low end of the 2019 Lazard LCOE range of \$32-\$42/MWh for Solar  
11 PV-Crystalline Utility Scale and below the low end of 2019 LBNL PPA LCOE of

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1           \$24-\$34/MWh range for the southwest region ISO utility-scale solar, and in line  
2           with PNM Solar PPAs of \$18.65 and \$19.73 per MWh.

3

4   **Q.    ARE THE PROPOSED PROJECTS IN THE PUBLIC INTEREST BY**  
5           **CONSIDERING FACTORS SUCH AS OVERALL COST AND**  
6           **ECONOMIC DEVELOPMENT OPPORTUNITIES?**

7   **A.**    Yes. The cost of the 2019 RFP proposed projects are below the low end of the  
8           range of 2019 published levelized costs for comparable renewable resources from  
9           Lazards, LNBL and PNM, (see Figure 1 above). Also, besides the environmental  
10          benefits they generate, the new solar plants bring site construction, maintenance,  
11          and operation jobs that will stimulate the local economy. Multiple published  
12          studies have concluded that, on average, the construction and operation of a  
13          renewable energy facility created between 5.65 and 17.4 jobs/\$1 million of  
14          investment.<sup>9</sup>

15

16   **Q.    IS EPE'S PLAN CONSISTENT WITH ITS INTEGRATED RESOURCE**  
17          **PLAN ("IRP")?**

---

<sup>9</sup> Huntington 2009; Pollin et al. 2009; Carley et al. 2011, 2012



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1   **A.**    Yes. EPE's RPS procurements are consistent with EPE's last accepted 2015 IRP  
2            Plan and the 2018 Amended IRP Plan filed January 3, 2019, in Docket  
3            No. 18-00293-UT.

4

5

**VIII. CONCLUSION**

6   **Q.**    **PLEASE SUMMARIZE THE APPROVALS THAT EPE IS REQUESTING.**

7            Pursuant to the REA and Rule, EPE requests that the Commission approve its  
8            2019-2020 Plan and related cost recovery for reasonable costs consistent with the  
9            2019-2020 Plan. EPE will continue to procure, in accordance with previously  
10           approved purchase agreements:

- 11                   • Solar energy and RECs from Hatch, Solar Road Runner NRG, and  
12                    SunE EPE1 and SunE EPE 2;
- 13                   • RECs from DG customers, and
- 14                   • RECs from CRLEF.

15           EPE will continue to apply to its RPS the following:

- 16                   • RECs from Macho Springs and Holloman at no additional cost to the  
17                    RPS portfolio.

18           EPE also requests the Commission approve:

- 19                   (1) Hecate Energy Santa Teresa 2 Project;
- 20                   (2) Buena Vista Energy Center 2 Project; and

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1 (3) Macho Springs proposal.

2

3 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

4 **A.** Yes, it does.

EPE's NEW MEXICO RENEWABLE PORTFOLIO STANDARD REQUIREMENT

	(a)	(b)	(c)	(d)	(e)
Line No.	Description	Reference	2020	2021	2022
	RPS Requirement				
1	Forecasted New Mexico Jurisdictional kWh Sales	See Note (1)	1,711,441,857	1,724,139,583	1,733,415,506
2	Voluntary Renewable Energy Sales		134,600	129,500	126,200
3	Net Forecasted New Mexico Jurisdictional kWh Sales	Line 1 - Line 2	1,711,307,257	1,724,010,083	1,733,289,306
4	Renewable Portfolio Standard		20.00%	20.00%	20.00%
5	Total RPS Requirement	Line 3 x Line 4	342,261,451	344,802,017	346,657,861

Notes:

(1) EPE's New Mexico jurisdictional retail energy sales are based on EPE's 2019 Long-Term Forecast.

**2019-2020 NEW MEXICO RENEWABLE ENERGY ACT PROCUREMENT PLAN**

**EL PASO ELECTRIC COMPANY**

**March 31, 2020**

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**GLOSSARY OF ACRONYMS AND DEFINED TERMS**

<u>Acronym/Defined Term</u>	<u>Meaning</u>
2018 Amended IRP Plan Commission	EPE's Current Integrated Resource Plan New Mexico Public Regulation Commission
COD	Commercial Operation Date
DG	Distributed Generator
EPE	El Paso Electric
LTPPA	Long Term Power Purchase Agreement
MW	Megawatt
MWh	Megawatt-hour
Next Plan Year	2022
Plan Year	2020-2021
PPA	Purchased Power Agreement
REA	Renewable Energy Act (NMSA 1978, §§62-16-1 to -10 (2007 as amended through 2019))
REC	Renewable Energy Certificate
RCT	Reasonable Cost Threshold
RPS	Renewable Portfolio Standard
Rule 572	17.9.572 NMAC

## I. INTRODUCTION

El Paso Electric Company ("EPE" or "Company") files this Amended 2019 and 2020 Renewable Energy Act Procurement Plan ("2019-2020 Plan") pursuant to Section 62-16-4(G) of the Renewable Energy Act ("REA"), NMSA 1978, §§ 62-16-4(G) (2004 as amended through 2019), New Mexico Public Regulation Commission's ("NMPRC" or "Commission") Rule 17.9.572.14 NMAC ("Rule 572" or "Rule"),<sup>1</sup> and the Commission's Order Vacating Procedural Schedule and Staying Case (November 18, 2019) ("Stay Order"). The 2019-2020 Plan presents 2020 and 2021 ("Plan Year")<sup>2</sup> data for Commission approval and presents 2022 ("Next Plan Year") data for informational purposes.

## II. SUMMARY OF 2019-2020 PLAN

The 2019-2020 Plan provides EPE's determination of Plan Year and Next Plan Year Renewable Portfolio Standard ("RPS") calculation and then presents EPE's procurement plan for 2020 and 2021 to progress toward meeting the RPS. Since Plan Year 2015, EPE's previously approved procurement costs have exceeded three (3) percent of the respective plan year total revenues, the reasonable cost threshold ("RCT") set by Commission Rule, effectively forestalling EPE's ability to procure new RPS resources. *See* 17.9.572.12(B) NMAC.

The 2019 amendment to the statutory definition of RCT replaced the three (3) percent RCT set by Commission Rule with an average annual levelized cost of \$60 per Megawatt-hour ("MWh"). This has resulted in a higher RCT, which EPE has applied to the 2019-2020 Plan.

---

<sup>1</sup> Where possible, the 2019-2020 Plan complies with both the REA and Rule 572. However, because the Commission has not yet updated Rule 572 to address the 2019 Amendments to the REA, where inconsistencies exist, the 2019 to 2020 Plan complies with the REA.

<sup>2</sup> Consistent with the Stay Order, EPE combined its 2019 and 2020 Plans. As such EPE is seeking approval for a Plan Year that spans two calendar years, 2020 and 2021.

The 2019-2020 Plan relies on a combination of existing renewable resources and RECs previously approved by the Commission to satisfy the RPS (except SWEC), as well as three new procurements which include 20-year purchased power agreements with the two resources selected from EOPE's 2019 Renewable Request for Proposal ("2019 RFP")- Hecate Energy for 50 Megawatts ("MW") of solar generation at \$18.93 per MWh and Buena Vista Energy for 20 MW of solar generation at \$19.88 per MWh and a short-term, new procurement of solar energy and RECs generated from EPE's existing Macho Springs Solar facility that are currently jurisdictionally allocated to Texas. The proposed procurement of short-term reallocated energy and RECs from Texas to New Mexico is only until EPE's newly proposed renewable resources are commercially operation, but no later than December 31, 2022.

### **III. DETERMINATION OF RPS**

#### **A. Changes From 2018 Plan Projections**

The 2019 amendments to the REA impact the 2018 Plan projections in three significant ways.

First, the amendments changed the way RPS is calculated by removing rate caps for EPE's four (4) qualifying large customers. As a result, EPE's 2019-2020 Plan does not apply the large customer adjustment to reduce its RPS requirement as it did in the 2018 Plan.

Second, as explained above, because the change in definition of RCT, replacing the RCT set by the Commission in Rule 572, with "an average annual levelized cost of sixty dollars (\$60.00) per megawatt-hour," in effect, increased the threshold. The 2018 Plan projection that additional costs for new plan year procurements will exceed the RCT in 2019 and 2020 is no longer accurate.



Finally, the amendments to the REA removed portfolio diversification requirements. Accordingly, EPE's concern over portfolio diversity addressed in the 2018 Plan is no longer relevant.

**B. Plan Year RPS Calculations**

Table I below shows EPE's projected RPS calculation for the Plan Year. In summary, EPE projects that net New Mexico jurisdictional kilowatt-hour ("kWh") sales will be 1,711,441,857 in 2020 and 1,724,139,583 in 2021. The corresponding projected RPS calculation for 2020 is 342,261 RECs (342,261,451 kWh) and for 2021 is 344,802 RECs (344,802,017 kWh).

If the proposed procurements set forth in the Plan are approved, EPE projects being able to meet 20 percent RPS by 2022. If the temporary procurement of Texas allocated Macho Spring solar energy/RECs purchase is approved by the third quarter 2020, EPE will achieve a 19.2 percent RPS in 2021 closing the gap towards 20 percent

**Table I**

Line No.	Description	2020	2021
RPS Requirement			
1	Forecasted New Mexico Jurisdictional kWh Sales	1,711,441,857	1,724,139,583
2	Voluntary Renewable Energy Sales	134,600	129,500
3	Net Forecasted New Mexico Jurisdictional kWh Sales	1,711,307,257	1,724,010,083
4	Renewable Portfolio Standard	20.00%	20.00%
5	Total RPS Requirement	342,261,451	344,802,017

**C. Next Plan Year RPS Calculations**

Table II below shows the RPS calculation for Next Plan Year (2022). In summary, EPE projects that net New Mexico jurisdictional kWh sales will be 1,733,415,506 in 2022. The corresponding projected RPS calculation for 2022 is 346,658 RECs (346,657,861 kWh). EPE projects meeting or exceeding 20 percent RPS in 2022 assuming the proposed new RPS procurements identified in the 2019 RFP are approved and commercially operational by the anticipated 2022 deadline.

Table II.

Line No.	Description	2022
RPS Requirement		
1	Forecasted New Mexico Jurisdictional kWh Sales	1,733,415,506
2	Voluntary Renewable Energy Sales	126,200
3	Net Forecasted New Mexico Jurisdictional kWh Sales	1,733,289,306
4	Renewable Portfolio Standard	20.00%
5	Total RPS Requirement	346,657,861

**IV. EXISTING RENEWABLE ENERGY RESOURCES**

EPE's existing renewable energy portfolio consists of the following renewable resources and RECs previously approved by the Commission to satisfy the RPS requirements.

**A. RECs Procured Through Existing PPAs**

Camino Real Landfill Gas to Energy Facility ("CRLEF") - A facility located in Sunland Park, New Mexico uses methane gas from a landfill to fuel its generating facility. Under a Qualifying Facility ("QF") agreement with Four Peaks Energy LLC, EPE purchases 2-to-1 weighted value biomass RECs from CRLEEF. The project provides a maximum net capacity of

approximately two MW. As part of EPE's approved 2018 Plan, and to ensure the continued viability of the project, the Commission authorized EPE to pay Four Peaks Energy \$0.030/kWh per REC generated by the project with a 1-to-1 REC weighting. The \$0.030/kWh REC payment was contracted with an expiration date of December 2028. However, because EPE is required in the ordinary course of business to purchase all energy produced from a QF, such as CRLEF, at EPE's avoided cost rates, EPE does not include the cost of the underlying energy purchases from CRLEF in the proposed plan. Rather, the energy purchase costs are recovered through the fuel and purchased power cost adjustment clause ("FPPCAC") mechanism on a jurisdictional basis.

Roadrunner Project - A 20 MW solar photovoltaic ("PV") project located in Santa Theresa, New Mexico. Until 2018, the Roadrunner Project was owned by NRG. In 2018, ownership was transferred to Global Infrastructure Partners (Clearway Energy). Under a 20-year PPA, Roadrunner Project provides energy and RECs to EPE.

The Hatch Solar Energy Center 1 ("HSEC") - A five MW facility located in Hatch, New Mexico. The HSEC Project is owned by Nextera Energy Resources. Under a 25-year PPA, the HSEC Project provides energy and RECs to EPE.

Centennial Solar - A 12 MW facility located in Las Cruces, New Mexico. The Facility was previously owned by SunEdison. In September 2017, Silicon Ranch Corporation purchased this facility. Under a 25-year PPA, provides energy and RECs to EPE.

Chaparral Solar - A 10 MW facility located in Chaparral, New Mexico. The facility was previously owned by SunEdison. In October 2017, Longroad Solar Portfolio Holdings, LLC purchased this facility. Under a 25-year PPA, provides energy and RECs to EPE.

## **B. RECs From DG Customers**

As of December 31, 2019, 2,393 small renewable DG facilities and six wind DG facilities are participating and receiving REC payments in the program. The total capacity for all the REC program eligible small DG systems (the sum of nameplate rated capacity) is 11.5 MW

As of December 31, 2019, 134 customer-owned medium renewable DG facilities were connected to or had submitted applications to connect to EPE's system in New Mexico. All of these facilities are solar PV. The total capacity for all the REC program eligible medium DG systems (the sum of nameplate rated capacity) is 3.1 MW.

EPE currently has 6 systems participating in the large REC purchase program. These systems receive payments based on contractual arrangements with EPE pursuant to the large system REC purchase tariff. The total capacity of these six solar systems is 1.4 MW.

At the end of December 2019, there were 4,583 DG customers interconnected to EPE in New Mexico. The total capacity for all the DG systems currently operating in New Mexico (the sum of nameplate rated capacity) is 25.88 MW. EPE forecasts generation of 45,421 DG RECs in 2020, 49,874 DG RECs in 2021, and 54,305 DG RECs in 2022. These RECs will be registered with the Western Renewable Energy Generation Information System ("WREGIS") and will be eligible for retirement to satisfy the DG diversity requirement and contribute toward satisfaction of the total RPS requirements in those plan years.

## **C. Other Previously Approved RECs**

Macho Springs Project - A fifty (50) MW solar facility located near Deming, New Mexico. Macho Springs is currently owned by the Southern Power Company. Macho Springs, under a 20-year PPA, provides energy and RECs as a system resource allocated between

Texas and New Mexico approved in NMPRC Case No. 12-00386-UT. EPE agreed in prior plans to use New Mexico RECs from the Macho Springs Project for the RPS although the bundled cost of the energy and RECs is not included in the New Mexico RPS. Rather, the Commission approved EPE recovery of the costs of this system resource through the FPPCAC mechanism.

HAFB – A five (5) MW solar project located at Holloman Air Force Base in New Mexico and owned by EPE. As a dedicated customer facility, HAFB provides RECs for the RPS at no additional cost to the New Mexico RPS.

#### **D. New System PPAs Pending Approval<sup>3</sup>**

Hecate Santa Teresa Energy 1 – A Long-Term Power Purchase Agreement ("LTTPA") for one-hundred (100) MW renewable (solar) system resource selected from EPE's 2017 All Source Request for Proposals. If approved, the new solar facility will be built in Santa Teresa New Mexico and the energy and cost of this new generation will be jurisdictionally allocated between New Mexico and Texas. Under a 20-year PPA, the New Mexico allocated portion of this resource will provide energy and RECs for New Mexico customers towards meeting the RPS requirements. The scheduled COD for this project is May 1, 2022.

Buena Vista Energy Center 1 – A Long-Term Power Purchase Agreement ("LTTPA") one-hundred (100) MW renewable (solar) system with fifty (50) MW of battery storage resource selected from its 2017 All Source Request for Proposals. If approved, the new solar facility will be built in Otero New Mexico and the energy and cost of this new generation will be jurisdictionally allocated between New Mexico and Texas. Under a 20-year PPA, the New Mexico allocated portion of this resource will provide energy and RECs for New Mexico

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<sup>3</sup> These cases are currently before the Commission in Case No. 19-00348-UT.

customers towards meeting the RPS requirements. The scheduled COD for this project is May 1, 2022.

#### **E. Facilities No Longer in Portfolio**

SWEC- The six-kW, solar-PV commercial project located in Las Cruces, New Mexico is no longer operational. EPE previously entered into a 20-year power purchase agreement ("PPA") to purchase energy and 3-to-1 weighted-value RECs from the SWEC solar PV project.

### **V. PROPOSED NEW PROCUREMENTS**

#### **A. Proposed Resources Selected from 2019 RFP**

On May 29, 2019 EPE issued a request for proposals ("RFP") soliciting bids from utilities and existing facilities to offer a short-term purchase for energy and RECs to satisfy EPE's 2020 RPS and for new and existing facilities to offer long-term renewable energy resource procurements. EPE did not receive any responsive proposals for short-term purchase of energy and RECs and did not receive any proposals for existing facilities capable of providing adequate energy to meet the 20 percent requirement in 2020, or for any new facilities that could provide sufficient output in 2019 or 2020 to meet the 20 percent RPS requirement for 2020 or 2021.

EPE did, however, receive proposals for two projects for purchased power from two new solar facility resources discussed below, that in combination, will be able to provide sufficient energy to meet the RPS requirement including any potential curtailment during low load months in 2022 and beyond. The proposals selected included:

Hecate Santa Teresa Energy 2 – A new 50 MW solar plant project that proposes to sell EPE 96,054 MWh of first year energy in 2022 and 143,319 MWh of full year energy in 2023 under a 20-year PPA. This resource will provide energy and RECs for New Mexico customers

towards meeting the RPS requirements. The scheduled COD for this project is May 1, 2022. The Hecate Energy Santa Teresa 2 agreement is attached as Exhibit OG-4.

Buena Vista Energy Center 2 – A new 20 MW solar plant project that proposes to sell EPE 42,756 MWh of first year energy in 2022 and 62,688 MWh of full year energy in 2023 under a 20-year PPA. This resource will provide energy and RECs for New Mexico customers towards meeting the RPS requirements. The scheduled COD for this project is May 1, 2022. The Buena Vista Energy Center 2 is attached as Exhibit OG-5.

## **B. Macho Springs Procurement**

EPE is also seeking authorization to temporarily assign EPE's Texas jurisdictional quantity of solar energy from EPE's existing Macho Springs Solar Facility for delivery to New Mexico customers. If approved, this procurement would allow EPE to achieve a RPS of 19.2 percent in 2021, closing the gap towards 20 percent, and is further described in the direct testimony of EPE witness James Schichtl.

## **VI. COSTS**

### **A. New Procurement Costs**

EPE projects that its 2020 annual renewable procurement costs will be approximately \$16,886,451 and that its 2021 annual renewable procurement costs will be approximately \$19,894,014. Table III lists, by resource, respective RECs to be applied toward RPS and applicable RPS procurement costs for 2020 and 2021.

**Table III.**

PROCUREMENT PLAN YEAR RECS AND COSTS									
	2020			2021			2022		
	(kWh)	RECs (MWh)	(\$) <sup>(6)</sup>	(kWh)	RECs (MWh)	(\$) <sup>(6)</sup>	(kWh)	RECs (MWh)	(\$) <sup>(6)</sup>
CRLEF <sup>(1)</sup>	16,974,072	16,974	509,222	16,974,072	16,974	509,222	16,974,072	16,974	509,222
NRG <sup>(2)</sup>	49,397,630	49,398	6,295,728	49,027,148	49,027	6,248,510	48,659,444	48,659	6,201,646
SunEdison <sup>(2)</sup>	54,297,767	54,298	5,695,293	53,863,385	53,863	5,649,730	53,432,478	53,432	5,604,533
Macho Springs <sup>(3)</sup>	27,219,987	27,220	-	27,083,887	27,084	-	26,948,468	26,948	-
Macho Springs TX <sup>(5)</sup>	27,602,000	27,602	1,316,156	110,406,935	110,407	5,264,562	34,292,974	34,293	1,515,563
Hatch <sup>(2)</sup>	11,954,546	11,955	1,422,591	11,894,773	11,895	1,415,478	11,835,299	11,835	1,408,401
Holloman <sup>(3)</sup>	12,329,123	12,329	-	12,267,477	12,267	-	12,206,140	12,206	-
Hecate Santa Teresa <sup>(7)</sup>	-	-	-	-	-	-	28,664,000	28,664	-
Buena Vista Energy Center <sup>(7)</sup>	-	-	-	-	-	-	32,658,000	32,658	-
Hecate Santa Teresa 2 <sup>(7)</sup>	-	-	-	-	-	-	96,054,000	96,054	1,818,302
Buena Vista Energy Center 2 <sup>(7)</sup>	-	-	-	-	-	-	42,756,000	42,756	849,989
DG REC <sup>(4)</sup>	45,421,202	45,421	1,644,107	49,874,245	49,874	802,274	54,304,798	54,305	696,948
WREGIS	---	---	3,354	---	---	4,238	---	---	5,534
Total	245,196,327	245,196	16,886,451	331,391,922	331,392	19,894,014	458,785,672	458,786	18,610,138

Notes:

(1) CRLEF REC purchase agreement shown with new cost of \$30/REC. The cost reflect purchase of REC only.

(2) The procurement cost include energy and REC.

(3) There is zero procurement cost since cost are covered outside of the RPS; however, RECs are utilized for RPS.

(4) Costs are for REC purchases up to the closure of the program which several phase-out in 2021.

(5) Proposed Macho Springs purchase of Texas share of energy and associated RECs.

(6) Macho Springs TX cost amounts include a credit for imputed capacity that is currently reflected in base rates.

(7) Hecate Santa Teresa 2 and Buena Vista Energy Center 2 in 2022 denote partial year with COD on May 1, 2022.

EPE projects that its Next Plan Year 2022 annual renewable procurement costs will be approximately \$18,610,138. Table III above lists, by resource, respective RECs to be applied toward RPS and applicable RPS procurement costs for Next Plan Year, 2022.



## **VII. OTHER REQUIREMENTS**

EPE's RPS procurements are consistent with EPE's last accepted 2015 IRP Plan and the 2018 Amended IRP Plan filed January 3, 2019 in Docket No. 18-00293-UT and are in the public's interest.

Procurement of the two new long-term renewable energy resources is in the public interest because it is reasonable as to terms and conditions and cost, and it presents economic development opportunities.

The proposed Macho Springs procurement should be presumed to be reasonable as to terms and conditions because Macho Springs is an existing Commission approved facility and the procurement of additional RECs is under the same terms stated in the Commission approved purchased power agreement at the same rate approved by Commission Final Order in Case No. 12-00286-UT. Also, the proposed Macho Springs procurement is below the newly established Amended REA RCT threshold of \$60/MWh. Further, when procured, Macho Springs was part of a competitive RFP and was selected as the lowest cost project for the RFP.

## **VIII. RENEWABLE RIDER RATE FOR 2020**

EPE projects that the revenue requirement to be recovered during 2020 through the RPS Rider, including WREGIS fees, will be \$16,886,451. EPE proposes to revise the existing rates in the RPS Rider for billing in 2021 in order to recover its projected procurement costs, adjusted to include a reconciliation of 2019 costs and revenue, of \$19,236,191. The revised tariff is shown in Exhibit JS-1 and included with Advice Notice No. 266 filed concurrent with this application.

PROCUREMENT PLAN YEAR RECS AND COSTS									
	2020			2021			2022		
	(kWh)	RECs (MWh)	(\$) <sup>(6)</sup>	(kWh)	RECs (MWh)	(\$) <sup>(6)</sup>	(kWh)	RECs (MWh)	(\$) <sup>(6)</sup>
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Holloman <sup>(3)</sup>	12,329,123	12,329	-	12,267,477	12,267	-	12,206,140	12,206	-
Hecate Santa Teresa <sup>(7)</sup>	-	-	-	-	-	-	28,664,000	28,664	-
Buena Vista Energy Center <sup>(7)</sup>	-	-	-	-	-	-	32,658,000	32,658	-
Hecate Santa Teresa 2 <sup>(7)</sup>	-	-	-	-	-	-	96,054,000	96,054	1,818,302
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WREGIS	---	---	3,354	---	---	4,238	---	---	5,534
Total	245,196,327	245,196	16,886,451	331,391,922	331,392	19,894,014	458,785,672	458,786	18,610,138

Notes:

- (1) CRLEF REC purchase agreement shown with new cost of \$30/REC. The cost reflect purchase of REC only.
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- (3) There is zero procurement cost since cost are covered outside of the RPS; however, RECs are utilized for RPS.
- (4) Costs for REC purchases up to the closure of the program begin to phase out in 2021.
- (5) Proposed Macho Springs purchase of Texas share of energy and associated RECs.
- (6) The row for Macho Springs TX include a credit to cost amounts for imputed capacity that is currently reflected in base rates.
- (7) Hecate Santa Teresa 2 and Buena Vista Energy Center 2 in 2022 denote partial year with COD on May 1, 2022.

**Purchase Power Agreement**

**Between**

**Hecate Energy Santa Teresa 2 LLC**

**as Seller**

**and El Paso Electric Company**

**as Buyer**

**dated as of**

**March 18, 2020**

**Purchase Power Agreement  
Between  
Hecate Energy Santa Teresa 2 LLC  
and  
El Paso Electric Company  
March 18, 2020**

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**Purchase Power Agreement  
Between  
Hecate Energy Santa Teresa 2 LLC and  
El Paso Electric Company**

This Purchase Power Agreement (including all exhibits attached hereto, this “Agreement”) is made this 18th day of March, 2020 (the “Execution Date”) by and between Hecate Energy Santa Teresa 2 LLC (“Seller”), a Delaware limited liability company with a principal place of business at 621 W. Randolph Street, Chicago, Illinois 60661, and El Paso Electric Company (“EPE”), a Texas corporation with headquarters in El Paso, Texas (EPE and Seller each being sometimes referred to in this Agreement as a “Party” or, collectively, as the “Parties”).

WHEREAS, Seller desires to develop, design, construct, own or lease and operate a solar electric generating facility with a Designed Maximum Capacity of approximately fifty (50) MWac (the “Facility,” as more fully described and defined below); and

WHEREAS, Seller intends to locate the Facility at the Site (as defined below) and to interconnect the Facility with the transmission facilities of EPE as provided for in a separate Interconnection Agreement; and

WHEREAS, Seller desires to sell and deliver to EPE at the Point of Delivery (as defined below) the Net Output (as defined below) produced by the Facility, and EPE desires to buy the Net Output from Seller; and

WHEREAS, the Net Output sold to EPE by Seller will be documented by Renewable Energy Certificates, and it is the intention of the Parties that all Renewable Energy Certificates documented and associated with the Net Output sold to EPE shall be transferred to and owned by EPE at no additional cost to the rates included in Article 8.

NOW THEREFORE, in consideration of the mutual covenants herein contained, the sufficiency and adequacy of which are hereby acknowledged, the Parties agree to the following:

**ARTICLE 1 - RULES OF CONSTRUCTION, INTERPRETATION,  
AND DEFINITIONS**

1.1 Rules of Construction. Capitalized terms in this Agreement, including as defined in this Article 1 shall have the meanings set forth herein whenever the terms appear in this Agreement, whether in the singular or the plural or in the present or past tense. Words not otherwise defined herein that have well known and generally accepted technical or trade meanings are used herein in accordance with such recognized meanings. In addition, the following rules of construction shall apply:

(A) References to “Articles,” “Sections,” or “Exhibits” shall be to articles, sections, or exhibits of this Agreement.

(B) The Exhibits attached hereto are incorporated in and are intended to be a part of this Agreement; *provided, that*, in the event of a conflict between the terms of any

Exhibit or Schedule and the terms of this Agreement, the terms of this Agreement shall control.

(C) This Agreement was negotiated and prepared by both Parties with the advice and participation of counsel. The Parties have agreed to the wording of this Agreement, and none of the provisions hereof shall be construed against one Party on the ground that such Party is the author of this Agreement or any part hereof.

(D) The Parties shall act in a commercially reasonable manner and in accordance with the principles of good faith and fair dealing in the performance of this Agreement. Unless and except as expressly provided otherwise in this Agreement, where this Agreement requires the consent, approval, or similar action by a Party, such consent or approval shall not be unreasonably withheld, conditioned or delayed. Unless and except as expressly provided otherwise in this Agreement, wherever this Agreement gives a Party a right to determine, require, specify or take similar action with respect to a matter, such determination, requirement, specification or similar action shall be commercially reasonable. References herein to any Applicable Law, including 17.9.572 New Mexico Admin. Code (the “Rule”), shall, except as otherwise specified, mean such Applicable Law as amended and in effect from time to time, including any successor to or replacement of such Applicable Law.

(E) Use of the words “include” or “including” or similar words shall be interpreted as “include without limitation” or “including, without limitation.”

(F) Use of the words “tax” or “taxes” shall be interpreted to include taxes, fees, surcharges, and the like.

(G) Use of the terms “Dollars” and “\$” shall mean U.S. Dollars, the lawful currency of the United States of America.

1.2 Interpretation with Interconnection Agreement. Each Party represents that it conducts its operations in a manner intended to comply with FERC Order No. 717, “Standards of Conduct for Transmission Providers,” requiring the separation of its transmission and merchant functions, to the extent such order is applicable to a Party or its operations. Moreover, the Parties acknowledge that EPE’s transmission function offers transmission service on its system in a manner intended to comply with FERC policies and requirements relating to the provision of open-access transmission service. The Parties recognize that Seller will enter into a separate Interconnection Agreement with EPE, and that such Interconnection Agreement will provide for FERC-jurisdictional interconnection service.

1.3 Interpretation of Arrangements for Electric Supply to the Facility. The Parties recognize that this Agreement does not provide for the supply of any retail electric service by EPE to Seller or to the Facility, and Seller must enter into separate arrangements for the supply of retail electric services to the Facility.

(A) The Parties acknowledge and agree that the arrangements for the supply of electric services to the Facility shall be separate and free-standing arrangements and that the terms of this Agreement are not binding upon the supplier of such electric services.

(B) Notwithstanding any other provision in this Agreement, nothing in the arrangements for the supply of retail electric services to the Facility shall alter or modify Seller's or EPE's rights, duties and obligations under this Agreement. This Agreement shall not be construed to create any rights between Seller and the supplier of such retail electric services.

(C) Seller expressly recognizes that, for purposes of this Agreement, the supplier of retail electric services to the Facility shall be deemed to be a separate entity and a separate contracting party whether or not the arrangement for the supply of retail electric services to the Facility is entered into with EPE or an Affiliate of EPE, if any.

1.4 Definitions. Unless defined elsewhere herein, capitalized terms used in this Agreement will have the following scope and meaning:

1.4.1 "Abandonment" means (i) the relinquishment of all possession and control of the Facility by Seller, other than a transfer or sale permitted under this Agreement or any consent to assignment executed by EPE with a Facility Lender, or (ii) if prior to the Commercial Operation Date, the cessation of all design, construction, testing and inspection activities with respect to the Facility for sixty (60) consecutive Days by Seller and Seller's EPC Contractor, unless such relinquishment or cessation is (x) pursuant to Section 4.4(i)-(ii), (y) at EPE's express request, or (z) caused by or attributable to a Force Majeure Event.

1.4.2 "Account" has the meaning set forth in Section 12.1(C)(2).

1.4.3 "Additional Consents" means the approvals, consents, authorizations or other requirements not listed in the definition of Governmental Approvals in this Agreement that are required from any Governmental Authority with respect to the Facility.

1.4.4 "Additional Maintenance Outages" has the meaning set forth in Section 14.6.

1.4.5 "Affiliate" of any named person or entity means any other person or entity that controls, is under the control of, or is under common control with, the named entity. The term "control" (including the terms "controls," "under the control of" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management of the policies of a person or entity, whether through ownership interest, by contract or otherwise.

1.4.6 "Agreement Approval Date" means the date on which EPE Board Approval and the State Regulatory Approval both have occurred and EPE has notified Seller in writing of same.

1.4.7 "Anniversary Date" means (i) the last Day of the eleventh (11th) Commercial Operation Year, and (ii) the twentieth (20th) anniversary of the Commercial Operation Date.

1.4.8 "Applicable Law" means all applicable laws, statutes, treaties, codes, ordinances, regulations, certificates, orders, licenses and permits of any Governmental

Authority, now in effect or hereafter enacted, amendments to any of the foregoing, interpretations of any of the foregoing by a Governmental Authority having jurisdiction, and all applicable judicial, administrative, arbitration and regulatory decrees, judgments, injunctions, writs, orders, awards or like actions (including those relating to human health, safety, the natural environment, or otherwise).

1.4.9 “Avoided Cost” means the estimated incremental energy costs for electric energy an electric utility would incur if required to generate electric energy itself or purchase from another source as defined by 17.9.570 New Mexico Admin Code or other Applicable Law.

1.4.10 “Back-Up Metering” means redundant Electric Metering Devices installed by either Party pursuant to Section 5.2(B).

1.4.11 “Business Day” means any Day that is not a Saturday, a Sunday, or a NERC-recognized holiday.

1.4.12 “CAMD” means the Clean Air Markets Division of the Environmental Protection Agency or successor administrator (collectively with any local, state, regional, or federal entity given jurisdiction over a program involving transferability of Environmental Attributes).

1.4.13 “Capacity Attributes” means any current or future defined characteristic, certificate, tag, credit, ancillary service, or attribute thereof, whether general in nature or specific as to the location or any other attribute of the Facility, intended to value any aspect of the electric generation capability and capacity of the Facility or the Facility’s capability and ability to produce Energy at a given capacity level or ability to ramp up or down at a given rate, including, but not limited to, any accounting construct so that the full Designed Maximum Capacity of the Facility (or such portion of the Designated Maximum Capacity as may be available and eligible for counting under Applicable Law) may be counted toward any resource adequacy requirement or any other measure by the WECC, the FERC, or any other entity invested with the authority under Applicable Law to require EPE to procure, or to procure at EPE’s expense, resource adequacy or other such products. Capacity Attributes are measured in MWs and do not include any Tax Credits, or any other tax incentives existing now or in the future associated with the construction, ownership or operation of the Facility.

1.4.14 “Close of the Business Day” means 5:00 PM prevailing time in El Paso, Texas, on a Business Day.

1.4.15 “Commercial Operation” means the period beginning on the Commercial Operation Date and continuing through the Term.

1.4.16 “Commercial Operation Date” means the date designated by Seller on which (i) the Facility is energized and operates in parallel with the EPE transmission system and begins delivering Net Output to EPE pursuant to the terms of this Agreement, which shall take effect no sooner than the date that EPE has accepted Seller’s declaration, pursuant

to Section 4.9, that all of the Conditions specified in Section 4.9 have occurred or otherwise been satisfied.

1.4.17 “Commercial Operation Milestone” means the Construction Milestone for the Commercial Operation Date as specified in Exhibit A, as it may be extended or accelerated pursuant to Section 4.4. When used herein, Commercial Operation Milestone includes all applicable extensions and accelerations.

1.4.18 “Commercial Operation Year” means each twelve (12) consecutive Month period during the Term, commencing with the first Day of the Month following the Commercial Operation Date and each anniversary thereof. If the Commercial Operation Date does not occur on the first Day of the Month, then the first Month of the first Commercial Operation Year is deemed to include the period commencing on the Commercial Operation Date and ending on the last Day of the Month in which the Commercial Operation Date occurs.

1.4.19 “Commissioning” means, with respect to the Facility, the commencement of the period during which the Facility has begun Commissioning Testing and ending on the Commercial Operation Date as determined in accordance with Section 4.9.

1.4.20 “Commissioning Tests” or “Commissioning Testing” has the meaning set forth in Section 4.6.

1.4.21 “Committed Net Output” has the meaning set forth in Section 7.2.

1.4.22 “Compliance Actions” has the meaning set forth in Section 7.6(A).

1.4.23 “Compliance Cap” has the meaning set forth in Section 7.6(A).

1.4.24 “Compliance Obligations” has the meaning set forth in Section 4.9(F).

1.4.25 “Conditions” has the meaning set forth in Section 4.9.

1.4.26 “Confidential Information” has the meaning set forth in Section 20.19(D).

1.4.27 “Construction Event(s) of Default” has the meaning set forth in Section 13.1.

1.4.28 “Construction Milestone(s)” means the date(s) set forth in Exhibit A by which Seller agrees to achieve the corresponding result(s) specified for such date(s), including, but not limited to, the Commercial Operation Milestone, as such date(s) may be extended or accelerated pursuant to Section 4.4. When used herein, Construction Milestone(s) includes all applicable extensions and accelerations.

1.4.29 “COVID-19” means the viral pneumonia named coronavirus disease 2019 (COVID-19) by the World Health Organization and caused by the virus named Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) by the International Committee on Taxonomy of Viruses and any mutations thereof.

- 1.4.30 “COVID-19 Delay” has the meaning set forth in Section 4.4.3.
- 1.4.31 “COVID-19 Event” has the meaning set forth in Section 4.4.3.
- 1.4.32 “Curtailed Energy” has the meaning set forth in Section 8.3(A)(2).
- 1.4.33 “Daily Good Faith Estimate” has the meaning set forth in Section 14.3(C).
- 1.4.34 “Day” means a calendar day.
- 1.4.35 “Delay Damages” has the meaning set forth in Section 4.3.
- 1.4.36 “Delivery Excuse” means an event solely due to actions or omissions by EPE that prevents or delays delivery of Net Output hereunder.
- 1.4.37 “Designed Maximum Capacity” means the maximum capacity for which the Facility is designed, and which shall be fifty (50) MWac (plus or minus 0.25 MWac), subject to an annual degradation factor of eight tenths of one percent (0.8%).
- 1.4.38 “Disclosing Party” has the meaning set forth in Section 20.19(A).
- 1.4.39 “Dispute” has the meaning set forth in Section 13.8.
- 1.4.40 “Dispute Notice” has the meaning set forth in Section 13.8.
- 1.4.41 “Electric Metering Device(s)” means metering equipment, and data processing equipment used to measure, record, or transmit data relating to the Output from the Facility and that are specified in the Interconnection Agreement. Electric Metering Devices include the metering current transformers (“CTs”) and the metering voltage transformers (“VTs”).
- 1.4.42 “Emergency Condition” means a condition or situation (including any condition or requirement imposed on either Party or the Facility by a State Regulator or the failure by Seller to perform any obligation hereunder consistent with Good Utility Practices or applicable requirements of an Independent System Operator or Regional Transmission Organization of which EPE is a member) that (i) presents an imminent physical threat of danger to life, health or property, or (ii) could reasonably be expected, in the opinion of EPE, as Interconnection Provider, to cause a significant disruption to EPE’s system; *provided, however*, that for purposes of Section 8.3, “Emergency Condition” is subject to the qualifications specified in Section 8.3(B)(1).
- 1.4.43 “Energy” means the net electrical energy generated in MWh using solar photovoltaic generation technologies and delivered to EPE at nominal voltage to the Point of Delivery as measured by Electric Metering Devices installed pursuant to Section 5.2. Energy shall be of a power quality of 60 cycle, three-phase alternating current that is compliant with the Interconnection Agreement.

1.4.44 “Environmental Attributes” means all attributes, excluding Tax Credits, of an environmental or other nature that are created or otherwise arise from the Facility’s generation of electricity from solar energy in contrast with the generation of electricity using nuclear or fossil fuels or other traditional resources. Forms of such attributes include any and all environmental air quality credits, green credits, carbon credits, emissions reduction credits, certificates, tags, offsets, allowances, or similar products or rights, howsoever entitled, (i) resulting from the avoidance of the emission of any gas, chemical, or other substance, including mercury, nitrogen oxide, sulfur dioxide, carbon dioxide, carbon monoxide, particulate matter or similar pollutants or contaminants of air, water, or soil, gas, chemical, or other substance, and (ii) attributable to the generation, purchase, sale or use of Net Output associated with the Committed Net Output delivered by Seller from or by the Facility, or otherwise attributable to the Facility during the Term. Environmental Attributes include those currently existing or arising during the Term under local, state, regional, federal, or international legislation or regulation relevant to the avoidance of any emission described in this Section 1.4.44 under any governmental, regulatory or voluntary program, including the United Nations Framework Convention on Climate Change and related Kyoto Protocol or other programs, laws or regulations involving or administered by the CAMD. Environmental Attributes do not include any ITCs or any other Tax Credits, or certain other tax incentives existing now or in the future associated with the construction, ownership or operation of the Facility.

1.4.45 “Environmental Contamination” means the introduction or presence of Hazardous Materials at such levels, quantities or location, or of such form or character, as to constitute a violation of federal, state or local laws or regulations, and present a material risk under federal, state or local laws and regulations that the Site will not be available or usable for the purposes contemplated by this Agreement.

1.4.46 “Environmental Law” means any law, statute, regulation, rule or order, by any federal, state or local agency or body relating to protection of human health or the environment, including Hazardous Materials.

1.4.47 “Environmental Permits” means any Governmental Approval required under any Environmental Law.

1.4.48 “EPC Contract” means the engineering, procurement and construction contract entered into between Seller and the EPC Contractor in relation to construction of the Facility.

1.4.49 “EPC Contractor” means the contractor as identified to EPE once selected by Seller, or its Affiliate and identified in a written notice to Buyer, which notice shall be provided by the applicable milestone for execution of all material contracts as specified in the Exhibit A.

1.4.50 “EPE Board Approval” has the meaning set forth in Section 6.1(A).

1.4.51 “EPE Event(s) of Default” has the meaning set forth in Section 13.4.



1.4.52 “EPE’s Interconnection Facilities” means the facilities owned and operated by EPE as identified in the Interconnection Agreement. Arrangements for the installation and operation of EPE’s Interconnection Facilities shall be governed by the Interconnection Agreement.

1.4.53 “EPE System Operations Center” or “EPE SOC” means EPE’s organization responsible for dispatch of generating units, including the Facility.

1.4.54 “Event of Default” has the meaning set forth in Section 13.5.

1.4.55 “Execution Date” has the meaning set forth in the first paragraph of this Agreement.

1.4.56 “Expansion Energy” has the meaning set forth in Section 9.1(A).

1.4.57 “Expected Net Output” means the number of alternating current MWh of Net Output that Seller expects the Facility to generate and deliver to the Point of Delivery for sale to EPE during each Commercial Operation Year. The Expected Net Output for each such Commercial Operation Year shall be as specified for such Commercial Operation Year in Exhibit F.

1.4.58 “Facility” means Seller’s electric generating facility and Seller’s Interconnection Facilities, as identified and described in Article 3 and Exhibit B, including, but not limited to, all of the following, the purpose of which is to produce Output from the sun and deliver Net Output to the Point of Delivery: the Site, Seller’s equipment, buildings, all of Seller’s generation facilities, including panels, inverters, step up transformers, output breakers, Seller’s facilities necessary to connect to the Point of Interconnection, protective and associated equipment, improvements, and other tangible assets or contract rights reasonably necessary for the construction, operation, and maintenance of the electric generating facility that produces Output subject to this Agreement. The address of the Facility is as described in Exhibit B. A scaled map that identifies the Site, the location of the Facility at the Site, the location of the Point of Interconnection and the location of the important ancillary facilities and Interconnection Facilities, is included in Exhibit B.

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

1.4.60 “Facility Lender” means, collectively, any Person or successors in interest thereof (A) lending money, extending credit or providing loan guarantees (whether directly to Seller or to an Affiliate of Seller) as follows: (i) for the construction, interim or permanent financing or refinancing of the Facility; (ii) for working capital or other ordinary business requirements of the Facility (including the maintenance, repair, replacement or improvement of the Facility); (iii) for any development financing, bridge financing, credit support, credit enhancement or interest rate protection in connection with the Facility; (iv) for any capital improvement or replacement related to the Facility; or (v) for the

purchase of the Facility and the related rights from Seller; or (B) participating (directly or indirectly) as an equity investor (including a Tax Equity Investor) in the Facility; or (C) any long-term lessor of the Facility in a sale-leaseback.

1.4.61 “Fair Market Value” means the fair market value of the Facility as determined pursuant to Section 9.3.

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

1.4.63 “Financing Documents” means the loan and credit agreements, notes, bonds, indentures, security agreements, lease financing agreements, agreements relating to investments in Seller or the Facility by one or more Tax Equity Investors, mortgages, deeds of trust, interest rate exchanges, swap agreements and other documents relating to the development, bridge, construction, or permanent debt financing for the Facility, including any credit enhancement, credit support, working capital financing, or refinancing documents, and any and all amendments, modifications, or supplements to the foregoing that may be entered into from time to time at the discretion of Seller or any Affiliate of Seller subject to any required approvals, whether in this Agreement, or otherwise, in connection with development, construction, ownership, leasing, operation or maintenance of the Facility.

1.4.64 “First Post-COD Testing Period” has the meaning set forth in Section 4.6(B)(1).

1.4.65 “Fifth Post-COD Testing Period” has the meaning set forth in Section 4.6(B)(5).

1.4.66 “Force Majeure Event” has the meaning set forth in Article 15.

1.4.67 “Forced Outage” means a reduction of, or cessation in the delivery of, or inability to deliver, Net Output that is not the result of (i) a Scheduled Maintenance Outage, (ii) a Force Majeure Event, (iii) a Delivery Excuse, or (iv) an Emergency Condition.

1.4.68 “Fourth Post-COD Testing Period” has the meaning set forth in Section 4.6(B)(4).

1.4.69 “Good Utility Practice(s)” means any of the practices, methods and acts (including but not limited to the practices, methods and acts engaged in or approved by a significant portion of the solar electric industry and the Interconnection Provider) during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather to be practices, methods, or acts generally accepted in the region. With respect to the Facility, Good Utility Practice(s) includes, without limitation, reasonable steps to ensure that: (i) equipment, materials, resources, and supplies, including spare parts

inventories, are available to meet the Facility's needs; (ii) sufficient operating personnel are available as and when necessary and are adequately experienced and trained and licensed as necessary to operate the Facility properly, efficiently, and in coordination with EPE and are capable of responding to reasonably foreseeable emergency conditions whether caused by events on or off the Site; (iii) preventive, routine, and non-routine maintenance and repairs are performed on a basis that ensures reliable, long-term and safe operation, and are performed by knowledgeable, trained, and experienced personnel utilizing proper equipment and tools; (iv) appropriate monitoring and testing are performed to ensure equipment is functioning as designed; (v) equipment is not operated in a reckless manner, in violation of manufacturer's guidelines or in a manner unsafe to workers, the general public, or the interconnected system or contrary to Environmental Laws or without regard to defined limitations such as flood conditions, safety inspection requirements, operating voltage, current, volt-ampere reactive loading, frequency, polarity, synchronization, and control system limits; (vi) equipment and components meet or exceed the standard of durability that is generally used for solar electric generation operations in the region and will function properly over the full range of ambient temperature and weather conditions reasonably expected to occur at the Site and under both normal and Emergency Conditions; and (vii) equipment, components, and processes are appropriately permitted with any local, state, or federal Governmental Authority and are operated and maintained in accordance with applicable permit and regulatory requirements.

1.4.70 "Governmental Approval" means any authorization, consent, permission, approval, license, ruling, permit, exemption, variance, order, judgment, instruction, condition, direction, directive, decree, declaration of or regulation by any Governmental Authority relating to the construction, development, ownership, occupation, start-up, testing, operation or maintenance of the Facility or to the execution, delivery or performance of this Agreement or the procurement pursuant to this Agreement of Net Output and Environmental Attributes for inclusion in EPE's renewable energy portfolio pursuant to Applicable Law and recovery of the related costs, and shall also mean, where and as applicable and the context so dictates, any and all authorization, consent, permission, approval, license, ruling, permit, exemption, variance, order, judgment, instruction, condition, direction, directive, decree, declaration of or regulation with regard to any Compliance Obligations.

1.4.71 "Governmental Authority" means any federal, state, local or other governmental regulatory or administrative agency, court, commission, department, board, or other governmental subdivision, legislature, rulemaking board, tribunal, or other governmental authority, including State Regulators, or such other entities with authority over EPE or Seller such as NERC, WECC, or a Regional Transmission Organization or an Independent System Operator having jurisdiction over a Party or the Parties, their respective facilities, or the respective services they provide, and exercising or entitled to exercise any administrative, executive, police, or taxing authority or power.

1.4.72 "Guaranty" has the meaning set forth in Section 12.1(C)(3).

1.4.73 "Hazardous Materials" means any substance, material, gas, or particulate matter that is regulated by any Governmental Authority as an environmental pollutant or

dangerous to public health, public welfare, or the natural environment including, without limitation, protection of non-human forms of life, land, water, groundwater, and air, including, without limitation, any material or substance that is: (i) defined as “toxic,” “polluting,” “hazardous waste,” “hazardous material,” “hazardous substance,” “extremely hazardous waste,” “solid waste” or “restricted hazardous waste” under any provision of local, state, or federal law; (ii) petroleum, including any fraction, derivative or additive; (iii) asbestos; (iv) polychlorinated biphenyls; (v) radioactive material; (vi) designated as a “hazardous substance” pursuant to the Clean Water Act, 33 U.S.C. §1251 *et seq.* (33 U.S.C. §1251); (vii) defined as a “hazardous waste” pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. §6901 *et seq.* (42 U.S.C. §6901); (viii) defined as a “hazardous substance” pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601 *et seq.* (42 U.S.C. §9601); (ix) defined as a “chemical substance” under the Toxic Substances Control Act, 15 U.S.C. §2601 *et seq.* (15 U.S.C. §2601); or (x) defined as a pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §136 *et seq.* (7 U.S.C. §136).

1.4.74 “Hour Ending” means the preceding hourly time period in a 24-hours day. As an example, 12:01 a.m. to 1:00 am is HE01; 1:00 p.m. to 2:00 p.m. is HE13.

1.4.75 “Indemnified Party” has the meaning set forth in Section 18.1.

1.4.76 “Indemnifying Party” has the meaning set forth in Section 18.1.

1.4.77 “Interconnection Agreement” means the separate agreement to be negotiated between Seller and EPE, as such agreement may be amended from time to time, providing for interconnection of the Facility to the transmission facilities of EPE at the location specified in such agreement.

1.4.78 “Interconnection Facilities” has the same meaning as that same term is defined in the Interconnection Agreement.

1.4.79 “Interconnection Provider” means EPE, acting in its capacity as interconnection provider under the Interconnection Agreement.

1.4.80 “Interest Rate” has the meaning set forth in Section 5.3(C).

1.4.81 “Interests” has the meaning set forth in Section 19.3.

1.4.82 “Issuer” has the meaning set forth in Section 12.1(C).

1.4.83 “ITCs” means the investment tax credits established pursuant to Section 48 of the Internal Revenue Code, as such law may be amended or superseded.

1.4.84 “kW” means kilowatt.

1.4.85 “kWh” means kilowatt hour.

1.4.86 “Lender Consent” has the meaning set forth in Section 19.2(B).

1.4.87 “Letter of Credit” has the meaning set forth in Section 12.1(C)(1).

1.4.88 “Market REC Price” means EPE’s average quoted price per REC (including transaction and incidental costs) of purchasing replacement RECs of similar type and characteristics to cover the REC shortfall associated with a particular shortfall in Net Output delivery under this Agreement. To determine the average quoted price of such replacement RECs, EPE shall solicit quotes from two (2) independent brokers and/or sellers of RECs that are not Affiliates of EPE. If EPE receives quotes from two (2) such independent broker(s), the Market REC Price shall be the average of the quotes received. If EPE is unable to secure quotes from two (2) such brokers and/or sellers despite commercially reasonable efforts, the Market REC Price shall equal the average price of RECs of similar type and characteristics already delivered to EPE from solar generating facilities of third-party, non-Affiliates of EPE during the applicable shortfall period.

1.4.89 “Minimum Amount” means an amount equal to the sum of (i) the amount specified in Exhibit L for the applicable date for which the Minimum Amount is being calculated, plus (ii) all additional amounts required to ensure that Facility Lenders are repaid in full including payment of any applicable prepayment penalty.

1.4.90 “Month” means a calendar month.

1.4.91 “Mountain Prevailing Time” or “MPT” means the time in effect in the Mountain Time Zone of the United States of America, whether Mountain Standard Time or Mountain Daylight Saving Time.

1.4.92 “MW” means megawatt or one thousand kW.

1.4.93 “MWh” means megawatt hours.

1.4.94 “NERC” means the North American Electric Reliability Council or any successor organization.

1.4.95 “Non-appealable State Regulatory Approval Order” means a State Regulatory Approval Order (i) that is not subject to appeal to any state court because the period permitted for such an appeal has passed without the filing of notice of such appeal, or (ii) that was affirmed on appeal to any state court or was affirmed upon further appeal or appellate process, and that is not subject to further appeal, because the jurisdictional time permitted for such an appeal and/or further appellate process such as a motion for reconsideration or an application for writ of certiorari has passed without the filing of notice of such an appeal or the filing for further appellate process.

1.4.96 “Net Output” means all energy and capacity produced by the Facility, less station use and less transformation and transmission losses and other adjustments (e.g., Seller’s load other than station use), if any. For purposes of calculating payment under this Agreement, Net Output of energy shall be the amount of energy flowing through the Point of Delivery.

1.4.97 “Net Output Shortfall” has the meaning set forth in Section 7.3(B).

1.4.98 “NMPRC” means the New Mexico Public Regulation Commission.

1.4.99 “Non-Scheduled Maintenance Period” has the meaning set forth in Section 14.5(A).

1.4.100 “Notice of Proposed Third Party Sale” has the meaning set forth in Section 9.2(C).

1.4.101 “Notice to Proceed” means the written notice from Seller to EPC Contractor that directs EPC Contractor to commence full construction of the Facility at the Site.

1.4.102 “Notification Date” has the meaning set forth in Section 4.9.

1.4.103 “Offered Interests” has the meaning set forth in Section 9.2(A).

1.4.104 “Offeror” has the meaning set forth in Section 9.2(A).

1.4.105 “Operating Committee” means one representative each from EPE and Seller pursuant to Section 14.2(A).

1.4.106 “Operating Procedures” means those procedures developed pursuant to Section 14.2(B).

1.4.107 “Operation and Maintenance Agreement” means that certain operation and maintenance agreement between Seller and the Operation and Maintenance Contractor with respect to the Facility, if applicable.

1.4.108 “Operation and Maintenance Contractor” means an operation and maintenance contractor as identified to EPE, if used by Seller.

1.4.109 “Operational Events of Default” has the meaning set forth in Section 13.2.

1.4.110 “Option Confirmation Notice” has the meaning set forth in Section 9.3(D).

1.4.111 “Output” means all energy produced by the Facility.

1.4.112 “Parent” has the meaning set forth in Section 19.3.

1.4.113 “Party Representative” or “Parties’ Representatives” has the meaning set forth in Section 13.8.

1.4.114 “Payment Rate” means the rate paid by EPE to Seller for Net Output and Environmental Attributes as specified in Exhibit F.

1.4.115 “Permitted Extension” has the meaning set forth in Section 4.4.

1.4.116 “Permitted Transfer” has the meaning set forth in Section 19.4.

1.4.117 “Person” means any natural person, corporation, limited liability company, general partnership, limited partnership, proprietorship, other business organization, trust, union, association or Governmental Authority.

1.4.118 “Photovoltaic Module Supply Agreement” means the agreement to purchase photovoltaic modules entered into between a Tier 1 Supplier and either Seller or EPC Contractor in relation to construction of the Facility.

1.4.119 “Point of Delivery” means the point at which electricity generated by the Facility is delivered to EPE. In general, the Point of Interconnection shall be the same as the Point of Delivery. Any differences between the Point of Interconnection and Point of Delivery shall be identified in Exhibit B.

1.4.120 “Point of Interconnection” has the same meaning as that same term is defined in the Interconnection Agreement.

1.4.121 “Preliminary Interest Notice” has the meaning set forth in Section 9.3(A).

1.4.122 “Project Contracts” means this Agreement, the EPC Contract, the Photovoltaic Module Supply Agreement, the Interconnection Agreement, and the Operation and Maintenance Agreement.

1.4.123 “Projected Schedule” has the meaning set forth in Section 14.3(A).

1.4.124 “Proposed Purchase Notice” has the meaning set forth in Section 9.2(B).

1.4.125 “Proposed Sale Notice” has the meaning set forth in Section 9.2(B).

1.4.126 “Receiving Party” has the meaning set forth in Section 20.19(A).

1.4.127 “Renewable Energy Certificate(s)” or “REC(s)” means a certificate(s) that complies in all respects with Applicable Law, including any applicable final orders of a State Regulator, which documents that the Energy delivered under this Agreement is Solar Energy and is provided with the associated energy from Seller at no additional cost to EPE, except as set forth in Section 11.5. RECs do not include any Tax Credits.

1.4.128 “Replacement Energy Costs” means those damages suffered by EPE as a direct result of Seller’s failure to perform its obligations under this Agreement, including (i) all incremental costs suffered by EPE to replace the Net Output or the Environmental Attributes that Seller fails to deliver to EPE under this Agreement with alternatives that are of the same type (e.g., solar RECs) and characteristics (e.g., vintage) that were required to be delivered by Seller to EPE hereunder and that meet the requirements of Applicable Law, (ii) any replacement solar capacity necessary to make up for any shortfall in the capacity to be provided under this Agreement (to comply with the Applicable Law) which shortfall was caused by Seller or the Facility, (iii) costs and penalties imposed by any Governmental Authority, paid or required to be paid by EPE as a result of Seller’s failure to perform under this Agreement, and (iv) EPE’s expenses including reasonable attorneys’ fees suffered as a result of Seller’s failure to perform under this Agreement. The “Replacement Energy Cost”

of RECs associated with Seller's failure to perform under this Agreement shall be based upon the Market REC Price.

1.4.129 "Representative" has the meaning set forth in Section 20.19(B).

1.4.130 "Required Amount" has the meaning set forth in Section 12.1(A).

1.4.131 "Required Commercial Operation Date" is May 1, 2022, as may be extended as a result of a Permitted Extension or as otherwise provided in this Agreement. When used herein, Required Commercial Operation Date includes all applicable extensions.

1.4.132 "Required Facility Documents" means the Permits and other authorizations, rights and agreements now or hereafter necessary for construction, ownership, operation, and maintenance of the Facility, and to deliver the Net Output and Environmental Attributes generated by the Facility to EPE in accordance with this Agreement and Applicable Law, including those set forth in Exhibit E.

1.4.133 "Restoration" and "Restoration Schedule" have the meanings set forth in Section 15.3(B)(2).

1.4.134 "Restoration Report" has the meaning set forth in Section 15.3(E).

1.4.135 "Revised Commercial Operation Milestone" means a date specified by Seller pursuant to Section 13.1(F).

1.4.136 "ROFO" has the meaning set forth in Section 9.2(A).

1.4.137 "Rule" has the meaning set forth in Section 1.1(D).

1.4.138 "Scheduled Maintenance Outage" means a time period during which the Facility is shut down or its output reduced to undergo scheduled maintenance in accordance with this Agreement, or as otherwise agreed by Seller and EPE.

1.4.139 "Second Post-COD Testing Period" has the meaning set forth in Section 4.6(B)(2).

1.4.140 "Security Fund" has the meaning set forth in Section 12.1.

1.4.141 "Seller's Interconnection Facilities" means the facilities owned and operated by the Seller as identified in the Interconnection Agreement. Arrangements for the installation and operation of the Seller's Interconnection Facilities shall be governed by the Interconnection Agreement.

1.4.142 "Shortfall Amount" has the meaning set forth in Section 7.3(B).

1.4.143 "Shortfall Damages" has the meaning set forth in Section 7.3(B).

1.4.144 "Site" means real estate on which the Facility will be constructed and located, including any interests, easements, water rights, and access rights reasonably



necessary for the construction, operation and maintenance of the Facility. The Site is more specifically described in Exhibit B.

1.4.145 “Solar Energy” means Energy that qualifies as solar energy as defined by the Rule or other Applicable Law.

1.4.146 “Solar Energy Dispatch” means the Facility’s ability to generate energy in a range from 0% to 100% of the Facility’s total nameplate capacity in increments no greater than two and one-half percent (2.5%) by receiving real-time communication signals from EPE’s EMS and SOC. Subject to the foregoing, dispatch of the Facility must be able to provide control of MW ramping, for voltage and frequency regulation, in real-time while providing maximum flexibility.

1.4.147 “State Regulator” means the NMPRC or the Public Utility Commission of Texas as applicable.

1.4.148 “State Regulatory Approval” has the meaning set forth in Section 6.1(B).

1.4.149 “State Regulatory Approval Order” means an order of the State Regulator for State Regulatory Approval that is not an Unfavorable State Regulatory Order.

1.4.150 “Tax Credits” means any state, local and/or federal production tax credits, tax deduction, and/or investment tax credit (including the ITC) specific to the production of renewable energy and/or investment in renewable energy facilities.

1.4.151 “Tax Equity Investor” means an investor that has acquired an equity interest in Seller pursuant to a financing structure that assigns such investor rights, title and benefits to the Tax Credits of Seller.

1.4.152 “Term” means the period of time during which this Agreement shall remain in full force and effect, and which is further defined in Article 2.

1.4.153 “Test Date” means the date on which Seller shall commence Commissioning of the Facility and shall be the date falling no later than thirty (30) Days prior to the Commercial Operation Date or such other date as Seller and EPE may agree in writing.

1.4.154 “Test Energy” means Energy produced by the Facility in order to perform testing of the Facility prior to Commercial Operation.

1.4.155 “Third Post-COD Testing Period” has the meaning set forth in Section 4.6(B)(3).

1.4.156 “Tier 1 Supplier” means either (i) any solar module manufacturer that is identified in Exhibit M, or (ii) a solar module manufacturer mutually agreed upon by the Parties that (a) is identified as a “Tier 1 Supplier” by Bloomberg New Energy Finance as of the Execution Date, and (b) has had its solar modules successfully installed in utility-scale solar electric generating facilities of similar size as the Facility.

1.4.157 “Unfavorable State Regulatory Order” means an order of the State Regulator concerning EPE’s requests for State Regulatory Approval that: (i) dismisses EPE’s application for State Regulatory Approval with prejudice; (ii) denies EPE’s application for State Regulatory Approval; (iii) approves EPE’s application for State Regulatory Approval in a form not substantially similar to EPE’s original application as determined by EPE in its sole discretion; or (iv) is deemed to be an Unfavorable State Regulatory Order as provided in Section 6.1(B).

1.4.158 “WECC” means the Western Electricity Coordinating Council, a NERC regional electric reliability council, or any successor organization.

1.4.159 “WREGIS” means the Western Renewable Energy Generation Information System.

1.4.160 “WREGIS Certificate” means “Certificate” as defined by the WREGIS Operating Rules.

1.4.161 “WREGIS Operating Rules” means the operating rules and requirements adopted by WREGIS.

1.4.162 “Year” means a calendar year consisting of 365 Days.

## ARTICLE 2 - TERM

2.1 Term. This Agreement shall be in full force and effect from the Execution Date and shall remain in effect until the end of the Day on the twentieth (20<sup>th</sup>) anniversary of the Commercial Operation Date, subject to any early termination or extension provisions set forth herein.

## ARTICLE 3 - FACILITY DESCRIPTION

3.1 Summary Description. Seller shall be responsible for the design, engineering, construction, ownership, operation, and maintenance of the Facility, which shall consist of devices for generating electricity and associated equipment having the Designed Maximum Capacity, which electricity shall qualify as Solar Energy and which devices and equipment shall be located in New Mexico on the Site. Exhibit B provides a detailed description of the Facility, including identification of the major equipment and components that comprise the Facility. The Expected Net Output generated from the Facility (i) for the first Commercial Operation Year shall be 143,319 MWh, and (ii) for each subsequent Commercial Operation Year shall be the amount specified for such Commercial Operation Year in Exhibit F.

(A) Sale/Leaseback. Subject to and conditioned upon the prior written consent of EPE, which consent shall not be unreasonably withheld, Seller may sell the Facility to a third party and lease-back and operate the Facility in accordance with the terms of this Agreement, *provided that*, Seller covenants and agrees that no provision in the Financing Documents for such sale/leaseback transaction shall adversely affect EPE’s rights and interests under this Agreement. In addition, Seller shall reimburse all reasonable internal

and external costs associated with such contemplated sale/leaseback, whether completed or not.

3.2 General Design and Operation of the Facility. Seller shall be responsible for the design, engineering, construction, and operation of the Facility according to Good Utility Practice(s), the Interconnection Agreement and the requirements of Applicable Law that apply to construction, operation or maintenance of the Facility (including any applicable Additional Consents from any Governmental Authority). During Commercial Operation, Seller shall maintain the Facility according to Good Utility Practice(s) and the Interconnection Agreement, and in accordance with the Financing Documents (if any). In addition to the requirements of the Interconnection Agreement, the Facility shall at all times:

(A) have the required panel space and 125V DC battery supplied voltage to accommodate metering, generator telemetering equipment and communications equipment;

(B) use communication circuits from the Facility to EPE's SOC for the purpose of telemetering, supervisory control/data acquisition, and voice communications as required by EPE in the Interconnection Agreement; and

(C) have the ability to receive real-time communications with EPE's EMS to provide the capability to remotely signal Solar Energy Dispatch and curtailment of the Facility.

3.3 Environmental Compliance. Seller must obtain and pay for all applicable Environmental Permits from any Governmental Authority needed for construction, operation, maintenance, and decommissioning of the Facility, copies of which will be provided by Seller to EPE within ten (10) Business Days of the issuance of such permits. Seller shall promptly notify EPE of any and all violations and any and all investigations, actions, claims, suits, notices of violation, fines, penalties, orders, revocations, and other proceedings related to violations or alleged violations of Environmental Laws, including, but not limited to, permits issued thereunder, which are asserted against Seller or any of Seller's personnel in connection with the Facility or their activities on, along, adjacent to or near the Site by any Governmental Authority, except to the extent that any of the foregoing do not, and reasonably could not be expected to, have a material adverse impact on Seller's ability to perform its obligations under this Agreement. Seller will keep EPE informed on a regular basis of the progress made and resolution of such events.

3.4 Tax Credits. Seller shall notify EPE whether Seller has elected to claim ITCs or other Tax Credits, as applicable, within thirty (30) Days following the date that Seller (or an Affiliate of Seller, on a consolidated basis) files its first tax return after the Commercial Operation Date. Seller shall bear all risks, financial and otherwise throughout the Term, associated with Seller's or the Facility's eligibility to receive ITCs or other Tax Credits, or to qualify for accelerated depreciation for Seller's accounting, reporting or tax purposes. The obligations of the Parties under this Agreement, including those obligations regarding the purchase and price for and Seller's obligation to deliver Output, shall be effective regardless of whether the sale of Output from the Facility is eligible for, or receives, ITCs or other Tax Credits during the Term.

## ARTICLE 4 - PRE-COMMERCIAL OPERATION

### 4.1 Construction of the Facility.

(A) Seller shall use commercially reasonable efforts to obtain any land rights necessary for the Facility.

(B) Other than the rights and obligations of EPE specified in this Agreement and any documents ancillary hereto, neither this Agreement nor any such ancillary document shall be interpreted to create in favor of EPE, and EPE specifically disclaims, any present right, title or interest in any part of the Facility.

(C) In the event Seller should determine that the expected Commercial Operation Date is not feasible or is impossible to achieve, Seller shall promptly notify EPE and shall advise EPE of the new expected Commercial Operation Date; *provided, however*, such new expected Commercial Operation Date shall not be later than the Required Commercial Operation Date.

(D) As of the Execution Date, the Required Commercial Operation Date is May 1, 2022 and the Commercial Operation Milestone and other Construction Milestones in Exhibit A have been established accordingly, subject to potential further extension or acceleration in accordance with Section 4.4.

4.2 Monitoring and Inspection. EPE shall have the right to monitor the construction, start-up and testing of the Facility, and Seller shall comply with all reasonable requests of EPE with respect to the monitoring of these events. Seller shall cooperate in such physical inspections of the Facility as may be reasonably requested by EPE during and after completion of construction; *provided*, that EPE's technical review and inspection of the Facility shall not be construed as either endorsing the design thereof or as any warranty of safety, durability, or reliability of the Facility, or as otherwise giving EPE any right to approve the design of the Facility. Persons visiting the Facility on behalf of EPE shall comply with Seller's applicable safety and health rules and requirements and shall not interfere with Seller's construction or operation of the Facility.

4.3 Construction Milestones; Delay Damages. The Parties agree that time is of the essence and that in order to achieve the Commercial Operation Milestone by the date specified therefore in Exhibit A. Seller agrees to use commercially reasonable efforts to meet the Construction Milestones set forth in Exhibit A. In the event that Seller fails to achieve any Construction Milestone by the date set forth in Exhibit A (unless such Construction Milestone has been extended pursuant to Section 4.4), Seller shall, as a payment to EPE of liquidated damages on account of such delay, pay EPE the amount of \$1,500 for each Day of delay in achieving such Construction Milestone ("Delay Damages"), and such Delay Damages shall continue to accrue until such Construction Milestone is achieved; *provided, however*, that (A) if Seller subsequently achieves Commercial Operation by the Commercial Operation Milestone (as such date may be extended pursuant to Section 4.4), then EPE shall refund to Seller any Delay Damages previously paid by Seller, less EPE's verifiable third party costs incurred in investigating the availability of replacement energy or Environmental Attributes as a result of Seller's failure to achieve such Construction Milestone, and (B) if Seller subsequently achieves Commercial Operation after the

Commercial Operation Milestone (as such date may be extended pursuant to Section 4.4), then EPE shall refund to Seller the positive difference (if any) between (i) Delay Damages previously paid by Seller, less EPE's verifiable third party costs incurred in investigating the availability of replacement energy or Environmental Attributes as a result of Seller's failure to achieve such Construction Milestone, and (ii) the product of (x) \$1,500 and (y) the number of Days after such Commercial Operation Milestone that Seller achieves Commercial Operation, less EPE's verifiable third party costs incurred in investigating the availability of replacement energy or Environmental Attributes as a result of Seller's failure to achieve such Construction Milestone, and (C) the Commercial Operation Milestone may not be extended by more than two hundred forty (240) Days by payment of Delay Damages. Each Party agrees and acknowledges that (A) the damages that EPE would incur due to Seller's delay in achieving the Construction Milestones would be difficult or impossible to predict with certainty, (B) the Delay Damages are a reasonable forecast of just compensation for such damages, and (C) Seller will not seek to raise as a defense to payment of Delay Damages in any legal or equitable proceeding (including any mediation pursuant to Section 13.9) that such damages are unenforceable as a penalty or otherwise contrary to Applicable Law or public policy.

#### 4.4 Extension of Construction Milestones and the Required Commercial Operation Date.

4.4.1 After executing this Agreement and subject to Sections 6.1 and 15.3(C)(1), Seller may extend any Construction Milestone (including the Commercial Operation Milestone) and the Required Commercial Operation Date as a result of the occurrence of any of the following events (each, a "Permitted Extension"): (A) one or more Force Majeure Events pursuant to Section 4.4.2, (B) one or more COVID-19 Events pursuant to Section 4.4.3, or (C) the events described in Section 4.4.4; *provided, however, that*, if two or more events that give rise to a Permitted Extension occur concurrently, then the Permitted Extensions for those events shall occur concurrently and not consecutively. Changes in a Construction Milestone for any reason other than a Permitted Extension are not allowed, except as provided in Section 4.3 by payment of Delay Damages.

4.4.2 Seller may extend one or more Construction Milestones and/or the Commercial Operation Milestone and Required Commercial Operation Date on a Day-for-Day basis if achievement of the Commercial Operation Milestone and Required Commercial Operation Date will be delayed as a result of one or more Force Majeure Events; *provided, however*, that such extension for reasons of Force Majeure Events alone may not delay achievement of any Construction Milestone by more than three hundred sixty-five (365) Days in the aggregate.

4.4.3 Seller may extend one or more Construction Milestones and/or the Commercial Operation Milestone and Required Commercial Operation Date on a Day-for-Day basis if achievement of the Construction Milestone, Commercial Operation Milestone and/or Required Commercial Operation Date will be delayed as a result of (i) a delay in the manufacture, shipment, or delivery to the site of equipment ordered for the Facility, (ii) Seller's inability to place a new order for equipment required for the Facility or to purchase sufficient equipment meeting Seller's specifications for use in the Facility, (iii) a delay in commencing or completing construction of the Facility, or (iv) Seller's or its

contractors' inability to retain or employ sufficient labor, or to obtain sufficient resources, to construct the Facility on time (each a "COVID-19 Delay"), and such COVID-19 Delay is caused by or attributable to COVID-19, including (a) any resulting quarantines, travel restrictions, social distancing requirements, recommendations for social distancing issued by a Governmental Authority, factory shutdowns or slowdowns, workplace or worksite shutdowns or slowdowns or work from home requirements, shipment interruptions or slowdowns, and (b) any other measures initiated or occurring in response to COVID-19, and any other events or conditions resulting from COVID-19 (each of the foregoing is a "COVID-19 Event"); *provided, however*, that such extension for reasons of COVID-19 Delay alone may not delay achievement of any Construction Milestone by more than three hundred sixty-five (365) Days in the aggregate. Seller shall provide written notice to EPE as soon as possible after becoming aware of a COVID-19 Delay caused by a COVID 19-Event. Such written notice shall describe the COVID-19 Delay and how it was caused by or attributable to a COVID-19 Event in reasonable detail and shall identify the resulting Day for Day extensions to the affected Construction Milestone, Commercial Operation Milestone and/or Required Commercial Operation Date. Seller shall use commercially reasonable efforts to overcome the COVID-19 Delay, to provide written notices to EPE of the status of the COVID-19 Delay and Seller's efforts to overcome the COVID-19 Delay, and to minimize the Day-for-Day extensions provided for herein; *provided*, that such efforts shall not require Seller to breach, disregard, or duplicate its contractual commitments relating to equipment purchases for the Facility, or to incur costs that materially exceed the costs that Seller reasonably expected to incur to build the Facility and achieve Commercial Operation under this Agreement. As soon as reasonably possible and in any event within five (5) Business Days after Seller becomes aware of the cessation of the COVID-19 Delay, Seller shall notify EPE in writing of the cessation of the COVID-19 Delay.

4.4.4 Seller may extend one or more Construction Milestones and/or the Commercial Operation Milestone and Required Commercial Operation Date on a Day-for-Day basis if achievement of the Commercial Operation Milestone and Required Commercial Operation Date will be delayed as a result of (i) failure of the Parties to execute an Interconnection Agreement on or before the "Interconnection Agreement Deadline" specified in Exhibit A, so long as such failure is solely due to any failure by EPE to complete, in a commercially reasonable manner and timeframe to facilitate such execution on or before such date, the relevant facility studies necessary for the execution of an Interconnection Agreement, excluding any such failure by EPE caused by a failure by Seller to provide to EPE, in a commercially reasonable manner and timeframe to facilitate the timely completion of such facility studies, the relevant information relating to the Facility necessary for EPE to complete such facility studies, (ii) failure of EPE for any reason to complete the construction of EPE's Interconnection Facilities on or before the "Interconnection Facilities Deadline" specified in Exhibit A (excluding any such failure caused by a failure of Seller as described in clause (i) of this Section 4.4.4), (iii) the inability of Seller, despite due diligence, to obtain any licenses, permits, or approvals required by any Governmental Authority, or (iv) the failure of EPE to receive State Regulatory Approval on or before December 31, 2020, shall extend such Construction Milestone Day-for-Day.

4.5 Progress Reports. Commencing upon the Agreement Approval Date, Seller shall submit to EPE, on the first Business Day of each calendar quarter until construction of the Facility begins, progress reports in a form reasonably satisfactory to EPE. Once Seller has achieved the “Start of Permitting” Construction Milestone (as described on Exhibit A), Seller shall submit such progress reports to EPE on the first Business Day of each Month. These progress reports shall notify EPE of the current status of each Construction Milestone and an updated completion schedule for the Facility. Such Monthly reports shall provide a schedule showing items completed and to be completed and a best estimate time-frame within which Seller expects the EPC Contractor to complete such non-completed works. Seller shall, from time to time, upon reasonable advance request from EPE, meet with EPE to discuss the progress of the construction of the Facility. None of the foregoing shall be deemed to be in lieu of, or in substitution for, the general record keeping and reporting obligations of Seller in accordance with Article 14.

4.6 Commissioning Tests.

(A) Seller shall give EPE at least thirty (30) Days prior written notice of the approximate Test Date and of the proposed tests scheduled relating to the Commissioning of the Facility (“Commissioning Tests”). Representatives of EPE shall have the right to be present at all such testing. Seller shall promptly notify EPE of any changes to the Test Date or the date of any Commissioning Tests relating to the Facility in order that EPE may arrange for its respective representatives to attend.

(B) The Commissioning Tests shall demonstrate the Facility is capable of generating the Designed Maximum Capacity, as adjusted by applicable performance conditions (including the solar irradiance and module temperature) at the time of such Commissioning Tests, *provided*, that the results of such Commissioning Tests shall confirm a Designed Maximum Capacity of not less than forty seven and one-half (47.5) MWac; *provided, further*, that if the Commissioning Tests confirm a Designed Maximum Capacity of not less than forty seven and one-half (47.5) MWac but less than fifty (50) MWac, then the following procedures shall apply:

(1) Seller shall conduct subsequent Commissioning Tests during the period, if any, beginning on the Commercial Operation Date and ending on the Required Commercial Operation Date (the “First Post-COD Testing Period”) to confirm a Designed Maximum Capacity of not less than fifty (50) MWac.

(2) If Commissioning Tests conducted by Seller during the First Post-COD Testing Period fail to confirm a Designed Maximum Capacity of not less than fifty (50) MWac on or before the Required Commercial Operation Date, then Seller shall (a) pay EPE, as liquidated damages and not as a penalty, an amount equal to Twenty-Five Thousand Dollars (\$25,000.00) on or before May 15, 2022, and (b) conduct subsequent tests during the period beginning May 2, 2022, and ending July 31, 2022 (the “Second Post-COD Testing Period”) to confirm a Designed Maximum Capacity of not less than fifty (50) MWac.

(3) If Commissioning Tests conducted by Seller during the Second Post-COD Testing Period fail to confirm a Designed Maximum Capacity of not less

than fifty (50) MWac on or before July 31, 2022, then Seller shall (a) pay EPE, as liquidated damages and not as a penalty, an amount equal to Twenty-Five Thousand Dollars (\$25,000.00) on or before August 15, 2022, and (b) conduct subsequent tests during the period beginning August 1, 2022, and ending October 31, 2022 (the “Third Post-COD Testing Period”) to confirm a Designed Maximum Capacity of not less than fifty (50) MWac.

(4) If Commissioning Tests conducted by Seller during the Third Post-COD Testing Period fail to confirm a Designed Maximum Capacity of not less than fifty (50) MWac on or before October 31, 2022, then Seller shall (a) pay EPE, as liquidated damages and not as a penalty, an amount equal to Twenty-Five Thousand Dollars (\$25,000.00) on or before November 15, 2022, and (b) conduct subsequent tests during the period beginning November 1, 2022, and ending January 31, 2023 (the “Fourth Post-COD Testing Period”) to confirm a Designed Maximum Capacity of not less than fifty (50) MWac.

(5) If Commissioning Tests conducted by Seller during the Fourth Post-COD Testing Period fail to confirm a Designed Maximum Capacity of not less than fifty (50) MWac on or before January 31, 2023, then Seller shall (a) pay EPE, as liquidated damages and not as a penalty, an amount equal to Twenty-Five Thousand Dollars (\$25,000.00) on or before February 15, 2023, and (b) conduct subsequent tests during the period beginning February 1, 2023, and ending April 30, 2023 (the “Fifth Post-COD Testing Period”) to confirm a Designed Maximum Capacity of not less than fifty (50) MWac.

(6) If Commissioning Tests conducted by Seller during the Fifth Post-COD Testing Period fail to confirm a Designed Maximum Capacity of not less than fifty (50) MWac on or before April 30, 2023, then (a) the Designed Maximum Output of the Facility shall be reduced to the maximum capacity demonstrated by the last Commissioning Test conducted in the Fifth Post-COD Testing Period, and (b) Seller shall pay EPE, as liquidated damages and not as a penalty, an amount equal to the difference between

(i) the product of (y) One Hundred Thousand Dollars (\$100,000.00), multiplied by (z) the difference between (I) fifty (50) MWac minus (II) the maximum capacity demonstrated by the last Commissioning Test conducted in the Fifth Post-COD Testing Period, minus

(ii) the sum of the liquidated damages paid by Seller to EPE pursuant to Sections 4.6(B)(2) through 4.6(B)(5).

(C) Nothing herein shall prevent or limit Seller or EPE subject to any required Governmental Approval, from establishing a new Committed Net Output at any level that the Parties mutually agree in writing is appropriate and desirable under this Agreement.



(D) Test Energy produced by the Facility during any Commissioning Tests shall be delivered by Seller to EPE at the Point of Delivery, and EPE shall purchase the Test Energy and related Environmental Attributes at the rate described in Section 8.1(A).

(E) In the event that Seller has failed to deliver the Committed Net Output in any prior Commercial Operation Year, or if EPE has reason to believe that Seller will fail to deliver the Committed Net Output in any future Commercial Operation Year, EPE shall have the right to require that Seller re-demonstrate the Designed Maximum Capacity in MW of the Facility within sixty (60) Days of the demand; *provided, however*, that such demand shall be coordinated among EPE and Seller so that the sixty (60) Day period for re-demonstration avoids, if practical, previously notified periods of Scheduled Maintenance Outages and Additional Maintenance Outages pursuant to this Article 4, and *provided further*, that EPE shall not require such re-demonstration more than once in any twelve (12) Month period.

4.7 Site Report. Seller shall conduct, at its sole expense, a Phase I environmental investigation of the Site and shall provide EPE, not later than the date that is twelve (12) weeks from the Agreement Approval Date, with a copy of the report summarizing such investigation, together with any data or information generated pursuant to such investigation. Seller shall provide to EPE confirmation from an environmental engineer that (i) the Site has been inspected for Environmental Contamination in a manner consistent with a Phase I environmental assessment, and (ii) a Phase I environmental assessment has been completed. Such report, or other written confirmation provided by Seller, shall include a confirmation that, based upon such investigation and to the best of Seller's knowledge based on the level of review specified above, no conditions involving Environmental Contamination exist at or under the Site that would prevent or materially delay construction or operation of the Facility at the Site, or a description of any such conditions and Seller's plan for resolving or removing them.

4.8 Facility Contracts. Upon request by EPE, Seller shall provide EPE with copies of (subject to reasonable redaction of Seller's or its counterparties' commercially sensitive or proprietary information and any other information required to be redacted or withheld under non-disclosure covenants or similar provisions applicable to Seller) the following to the extent executed and in existence at the time of the request: (i) contracts for the manufacture, delivery and installation of the Facility's solar panels and inverters; (ii) engineering, procurement and construction, or other general contractor agreements; and (iii) applicable operating agreements; *provided that*, in the case of the foregoing items (i) and (ii), Seller may alternatively provide evidence reasonably satisfactory to EPE demonstrating that the applicable delivery and milestone dates required to be performed or met by the solar panel supplier, inverter supplier and engineering, procurement and construction contractor under such contracts or agreements are consistent with Seller's achievement of the Construction Milestones set forth in Exhibit A. Upon request, Seller shall also provide EPE with reasonable evidence that it has or will have the capability to finance construction of the Facility. Seller shall provide sufficient information for EPE to be reasonably assured that Seller has contracted with financially responsible vendors as part of the Facility construction process.

4.9 Conditions to Commercial Operation. Seller will (i) notify EPE when the Facility has achieved all of the conditions set forth in this Section 4.9 ("Conditions"), and (ii) provide

evidence reasonably acceptable to EPE of the satisfaction or occurrence of such Conditions (the date of such notice being the “Notification Date”). EPE must accept or challenge (with reasonable specificity) Seller’s declaration that all Conditions have been satisfied or occurred within ten (10) Business Days of the Notification Date, and any Condition that EPE does not challenge within ten (10) Business Days of the Notification Date will be deemed satisfied. The Parties shall attempt to resolve any dispute that may arise regarding the satisfaction or occurrence of any Condition(s) through direct discussion or mediation, as set forth in Sections 13.8 and 13.9. Seller shall promptly notify EPE of the satisfaction or occurrence of any of the Conditions and provide the evidence required pursuant to clause (ii) of this Section 4.9 with respect to each such Condition prior to or concurrently with Seller’s delivery of the related notice to EPE, in order that the review and approval of the satisfaction or occurrence of the Conditions and Seller’s evidence thereof may occur on an ongoing and incremental basis, pending resolution of any dispute, as such Conditions are satisfied or occur. All costs and expenses necessary to meet the Conditions shall be borne solely by Seller. The Conditions are:

(A) Seller has satisfied all the requirements of the Interconnection Agreement and the Facility has commenced interconnected operations with EPE’s transmission facilities at its full Designed Maximum Capacity, as adjusted by applicable performance conditions (including the solar irradiance and module temperature) at the time of the Commissioning Tests (but subject to the proviso set forth in Section 4.6(B));

(B) Seller has made all arrangements and executed all agreements required to deliver the Energy from the Facility to the Point of Delivery in accordance with the provisions of this Agreement;

(C) Seller has provided EPE with copies of certificates of insurance evidencing that the coverage required by Article 17 has been obtained and submitted to EPE;

(D) The Security arrangements meeting the requirements of Article 12 have been established;

(E) Seller has submitted to EPE a certificate of an officer of Seller specifically familiar with the Facility stating, after due inquiry, that all permits, consents, licenses, approvals, and authorizations required to be obtained by Seller from any Governmental Authority to operate the Facility in compliance with Applicable Law and this Agreement have been obtained and are in full force and effect, and to the knowledge of that officer, Seller is in compliance with the terms and conditions in all material respects;

(F) As applicable, Seller has made all necessary governmental filings and applications for Environmental Attributes and other accreditation or registration with WREGIS. Additionally, Seller shall be in compliance in all material respects with all applicable and required existing national and regional reliability standards, including standards set by WECC, NERC, FERC, and the applicable State Regulator, or any successor agencies setting reliability standards for the operation of generation facilities in the location of the Facility. Prior to Commercial Operation Date, Seller shall register and provide documentation to EPE showing that it has registered with the appropriate Regional Reliability Organization (“RRO”) as a generator owner and has registered the generator

operator to the extent required by NERC and the RRO. Except for FERC regulations, all of the foregoing requirements shall constitute the “Compliance Obligations” under this Agreement;

(G) An officer of Seller specifically familiar with the Facility has certified that the Designed Maximum Capacity of the Facility complies with the description of the Facility provided in Exhibit B on the date of certification; and

(H) The Facility has demonstrated the reliability of its communications systems and communications with the EPE SOC.

None of the foregoing Conditions shall be deemed to be in lieu of, or in substitution for, the obligations of Seller in accordance with Section 14.13.

4.10 Test Energy. Seller shall coordinate the production and delivery of Test Energy with EPE. EPE shall cooperate with Seller to facilitate Seller’s testing of the Facility necessary to satisfy the Conditions set forth in Section 4.9.

## **ARTICLE 5 - DELIVERY AND METERING**

### 5.1 Delivery Arrangements.

(A) Seller shall be responsible for negotiating, entering into, and performing in accordance with the Interconnection Agreement with EPE and any other necessary entities for the design, installation and operation of the Interconnection Facilities.

(B) Seller shall be responsible for all interconnection, electric losses, and costs required to deliver Output from the Facility to EPE at the Point of Delivery, and Seller shall maintain all records, regardless of form (e.g., machine readable media such as disk, tape, etc.) or type (e.g., databases, applications software, database management software, utilities, etc.) sufficient to verify all electric losses claimed to have been incurred by Seller prior to delivery of Energy to EPE to the Point of Interconnection. Upon EPE’s request, Seller will provide records related to electric losses during any of the twelve (12) previous Months no later than the end of the subsequent Month that EPE made such request.

(C) EPE shall be responsible for all electric losses and delivery service arrangements and costs required to deliver Net Output from the Point of Delivery to points beyond the Point of Delivery.

### 5.2 Metering.

(A) All Electric Metering Devices used to measure the Net Output made available to EPE by Seller under this Agreement and to monitor and coordinate operation of the Facility shall be owned, installed, and maintained in accordance with the Interconnection Agreement at no cost to EPE under this Agreement. Seller shall be responsible for providing a suitable location on its premises, or other location as agreed by EPE, for EPE to install revenue grade metering equipment. The metering equipment and the cost of the installation shall be the responsibility of Seller. Such Electric Metering

Devices shall be capable of measuring the energy output of the Facility on a 30-minute basis for all hours in a Month. Seller, at its own expense, shall inspect and test such Electric Metering Devices upon installation and at least annually thereafter. Upon request from EPE, Seller also shall perform additional inspections or tests of such Electric Metering Devices. Seller shall provide EPE with reasonable advance notice of, and permit a representative of EPE to witness and verify, all such inspections and tests, *provided, however,* that any such representative of EPE shall not unreasonably interfere with or disrupt Seller's operation of the Facility and shall comply with all applicable safety standards as in effect and established by Seller from time to time. The actual expense of any EPE-requested additional inspections or tests shall be borne by EPE, unless, upon such inspection or test, such Electric Metering Devices are found to register inaccurately by more than the allowable limits established in this Article 5, in which event the expense of the requested additional inspection or test shall be borne by Seller. If requested in writing, Seller shall provide copies of any inspection or test reports to EPE.

(B) Either EPE or Seller may elect to install and maintain, at its own expense, Back-Up Metering devices in addition to the Electric Metering Devices, which installation and maintenance shall be performed in a manner acceptable to EPE. Seller shall be responsible for providing a suitable location on its premises, or other location as agreed by EPE, for EPE to install Back-Up Metering devices. The installing Party, at its own expense, shall inspect and test Back-Up Metering upon installation and at least annually thereafter. The installing Party shall provide the other Party with reasonable advance notice of, and permit a representative of such other Party to witness and verify, such inspections and tests, *provided, however,* that such other Party shall not unreasonably interfere with or disrupt the activities of the installing Party and shall comply with all applicable safety standards. Upon request, the installing Party shall perform additional inspections or tests of Back-Up Metering and shall permit a qualified representative of the other Party to inspect or witness the testing of Back-Up Metering; *provided, however,* that such other Party shall not unreasonably interfere with or disrupt the activities of the installing Party and shall comply with all applicable safety standards as in effect and established by the installing Party from time to time. The actual expense of any such requested additional inspection or testing shall be borne by the Party requesting the test, unless, upon such inspection or testing, Back-Up Metering is found to register inaccurately by more than the allowable limits established in this Article 5, in which event the expense of the requested additional inspection or testing shall be borne by the installing Party. If requested in writing, the installing Party shall provide copies of any inspection or testing reports to the requesting Party.

(C) If Electric Metering Devices or Back-Up Metering are not installed at the Point of Delivery, meters or meter readings shall be adjusted to reflect losses from the Electric Metering Devices or Back-Up Metering to the Point of Delivery.

(D) If any Electric Metering Device, or Back-Up Metering, is found to be defective or inaccurate, it shall be adjusted, repaired, replaced and recalibrated, as necessary, as near as practicable to a condition of zero error by the Party owning such defective or inaccurate Electric Metering Device or Back-Up Metering and at that Party's expense.

5.3 Adjustment for Inaccurate Meters. If any Electric Metering Device, or Back-Up Metering, fails to register, or if the measurement made by an Electric Metering Device, or Back-Up Metering, is found upon testing to be inaccurate by more than one percent (1.0%), an adjustment shall be made correcting all measurements by the inaccurate or defective Electric Metering Device, or Back-Up Metering, for both the amount of the inaccuracy and the period of the inaccuracy, in the following manner:

(A) In the event that the Electric Metering Device is found to be defective or inaccurate, the Parties shall use Back-Up Metering, if installed, to determine the amount of such inaccuracy, *provided, however,* that Back-Up Metering has been tested and maintained in accordance with the provisions of this Article 5. In the event that either Party did not install Back-Up Metering, or Back-Up Metering is also found to be inaccurate by more than one percent (1.0%), the Parties shall estimate the amount of the necessary adjustment on the basis of deliveries of Net Output from the Facility to the Point of Delivery during periods of similar operating conditions when the Electric Metering Device was registering accurately. The adjustment shall be made for the period during which inaccurate measurements were made.

(B) In the event that the Parties cannot agree on the actual period during which the inaccurate measurements were made, the period during which the measurements are to be adjusted shall be the shorter of (i) the last one-half of the period from the last previous test of the Electric Metering Device to the test that found the Electric Metering Device to be defective or inaccurate, or (ii) the one hundred eighty (180) Days immediately preceding the test that found the Electric Metering Device to be defective or inaccurate.

(C) To the extent that the adjustment period covers a period of deliveries for which payment has already been made by EPE, EPE shall use the corrected measurements as determined in accordance with this Article 5 to re-compute the amount due for the period of the inaccuracy and shall subtract the previous payments by EPE for this period from such re-computed amount. If the difference is a positive number, the difference shall be paid by EPE to Seller; if the difference is a negative number, that difference shall be paid by Seller to EPE. In either case, the owing Party, at its discretion, may offset such payments due the other Party against undisputed amounts owed by the other Party as specified in Section 10.3(A). The owing Party shall provide the other Party with notice and supporting documentation of the amount due. Except for offsets to payments, which may be offset immediately, payment of such difference by the owing Party shall be made not later than thirty (30) Days after the owing Party receives notice and supporting documentation of the amount due. Interest shall be computed for any payments or offsets to payments made pursuant to this Section 5.3(C) at a rate equal to the prime rate published in the *Wall Street Journal* on the invoice due date (the "Interest Rate").

## ARTICLE 6 - CONDITIONS PRECEDENT

6.1 Conditions Precedent. This Agreement shall become effective as of the Execution Date, subject to the fulfillment (or waiver by EPE, in its sole discretion) of each of the conditions precedent set forth in Sections 6.1(A) through 6.1(C), and the fulfillment (or waiver by Seller, in

its sole discretion) of the condition precedent set forth below in Section 6.1(D), in each case on or before the date (if any) specified for the fulfillment (or waiver) of such condition precedent:

(A) The Board of Directors of EPE (or a duly authorized committee thereof) shall have approved the execution and delivery of this Agreement by EPE, and the performance by EPE of its obligations under this Agreement (the “EPE Board Approval”); and

(B) On or before June 30, 2021, EPE shall have received all Non-appealable State Regulatory Approval Order(s) approving this Agreement and all other relief related to EPE’s application(s) to the State Regulator (which for purposes of this Section 6.1(B) is the NMPRC), including any requested accounting treatment and recovery of costs (collectively, the “State Regulatory Approval”). For avoidance of doubt, any State Regulatory Approval that contains a term or condition the compliance with which would require modification or amendment of this Agreement shall be deemed to be an Unfavorable State Regulatory Order unless such modification or amendment is accepted in writing by Seller and EPE.

(C) On or before March 31, 2021, the Parties shall have completed negotiation of a mutually acceptable form and terms of the Interconnection Agreement, and finalized, executed and delivered, the Interconnection Agreement, except to the extent that the failure of such negotiation to be completed and the Interconnection Agreement to be finalized, executed and delivered on or before such date resulted from any failure by EPE to use its commercially reasonable efforts to negotiate a mutually acceptable form and terms of, and then to finalize, execute and deliver, the Interconnection Agreement on or before such date.

(D) On or before March 31, 2021, the Parties shall have completed negotiation of a mutually acceptable form and terms of the Interconnection Agreement, and finalized, executed and delivered, the Interconnection Agreement, except to the extent that the failure of such negotiation to be completed and the Interconnection Agreement to be finalized, executed and delivered on or before such date resulted from any failure by Seller to use its commercially reasonable efforts to negotiate a mutually acceptable form and terms of, and then to finalize, execute and deliver, the Interconnection Agreement on or before such date.

In the event the Agreement Approval Date has not occurred on or before June 30, 2021, Seller may, upon written notice to EPE within five (5) Business Days after such date, terminate this Agreement without any financial or other obligation to either Party as a result of such termination.

## **ARTICLE 7 - SALE AND PURCHASE OF NET OUTPUT AND ENVIRONMENTAL ATTRIBUTES**

7.1 Sale and Purchase. Beginning on the Commercial Operation Date, Seller shall generate from the Facility, deliver to the Point of Delivery, and sell to EPE, and EPE shall accept, purchase and pay Seller, at the applicable prices set forth in Article 8, all Net Output from the Facility delivered at the Point of Delivery and all Environmental Attributes associated with the Output or otherwise resulting from the generation of energy by the Facility. Except as otherwise expressly provided for herein, this Agreement shall not be construed to constitute a “take or pay”

contract, and EPE shall have no obligation to pay for any Output that has not actually been generated by the Facility, measured by the Electric Metering Device(s), and delivered to EPE at the Point of Delivery.

7.2 Committed Net Output. “Committed Net Output” for each Commercial Operation Year is set forth in Exhibit F and is the number of MWh of Net Output committed to be delivered by Seller to EPE in each Commercial Operation Year. The Committed Net Output level is seventy-five percent (75%) of the Expected Net Output level.

7.3 Failure to Deliver Committed Net Output.

(A) Seller shall be required to deliver to EPE no less than the Committed Net Output during each Commercial Operation Year.

(B) If Seller delivers less than the Committed Net Output in any Commercial Operation Year (“Net Output Shortfall”) then Seller shall pay liquidated damages (“Shortfall Damages”) (not as a penalty) as calculated in Section 7.3(C). The “Shortfall Amount” in any Commercial Operation Year shall be an amount equal to the Committed Net Output minus the Net Output in the applicable Commercial Operation Year. During the Term and for the first year following the termination or expiration of the Term, Seller shall provide a report to EPE within thirty (30) Days after the close of a Commercial Operation Year summarizing the Committed Net Output delivered in the previous Commercial Operation Year and the Shortfall Damages, if any, payable by Seller to EPE for such Commercial Operation Year.

(C) The Shortfall Damages payment shall be equal to (i) the Shortfall Amount for the applicable Commercial Operation Year *multiplied by* the Payment Rate per MWh for the applicable Commercial Operation Year. Within forty-five (45) Days of the end of any Commercial Operation Year for which there is a Net Output Shortfall, Seller shall provide notice to EPE in writing of the amount of the Shortfall Damages and provide supporting documentation, if any, and Seller shall pay EPE the amount of Shortfall Damages shown in such notice within sixty (60) Days after the end of such Commercial Operation Year. For the avoidance of doubt, Seller’s total liability to EPE under this Agreement for Shortfall Damages and for the replacement of Environmental Attributes pursuant to Section 11.7 as a result of a Net Output Shortfall shall not exceed EPE’s Replacement Energy Costs relating to such Net Output Shortfall. Each Party agrees and acknowledges that (A) the damages that EPE would incur due to Seller’s delivery of less than the Committed Net Output (and associated Environmental Attributes) in any Commercial Operation Year would be difficult or impossible to predict with certainty, and (B) the Shortfall Damages are a reasonable forecast of just compensation for such damages, and (C) Seller will not seek to raise as a defense to payment of Shortfall Damages in any legal or equitable proceeding (including any mediation pursuant to Section 13.9) that such damages are unenforceable as a penalty or otherwise contrary to Applicable Law or public policy.

(D) In calculating whether there is a Net Output Shortfall and the amount of such Net Output Shortfall, if any, for purposes of determining Seller’s obligation to pay

Shortfall Damages, and deliver replacement Environmental Attributes pursuant to Article 11, for any Net Output Shortfall, any and all of the following shall be treated as Net Output in calculating the Shortfall Amount: (a) Net Output not produced by Seller or delivered to EPE due to the curtailment events described in Sections 7.5 or 8.3; (b) Net Output not produced by Seller or delivered to EPE due to a Force Majeure Event; (c) Net Output not produced by Seller or delivered to EPE due to a breach by EPE of its obligations under this Agreement; or (d) Net Output not delivered to or accepted by EPE due to a breach or default by EPE under the Interconnection Agreement; *provided* that, in each such case, such Output otherwise would have been produced by the Facility and delivered to EPE at the Point of Delivery but for the circumstances specified above.

7.4 Title and Risk of Loss. As between the Parties, Seller shall be deemed to be in control of the Output from the Facility up to and until delivery and receipt at the Point of Delivery, and EPE shall be deemed to be in control of the Net Output at and beyond delivery and receipt at the Point of Delivery. Title and risk of loss related to Net Output shall transfer from Seller to EPE at the Point of Delivery.

7.5 Temporary Curtailment of the Facility. No payments shall be due to Seller for curtailments of delivery of Net Output resulting from a Temporary Curtailment (as such term is defined in the Interconnection Agreement and modified for purposes of this Agreement). For purposes of this Section 7.5, Temporary Curtailment in any Commercial Operation Year shall be limited to a total curtailment of not more than two percent (2%) of the Facility's MWh generation for such Commercial Operation Year, and any curtailment in excess of that amount for a given Commercial Operation Year shall be treated as curtailment for which EPE must compensate Seller under Section 8.3(A).

7.6 Capacity Attributes.

(A) The Parties agree that Seller shall, upon request by EPE and at Seller's sole cost, take all commercially reasonable actions and execute any and all documents and instruments that may be necessary to enable EPE to use the Capacity Attributes toward satisfying any resource adequacy procurement obligations that are imposed on load serving entities, including EPE, by any Governmental Authority during the Term. Such commercially reasonable actions may include, but are not limited to, (i) cooperating with the applicable Governmental Authority responsible for certifying or qualifying the Capacity Attributes for resource adequacy purposes, (ii) taking all actions necessary to register the Facility with the applicable Governmental Authority to ensure that the Capacity Attributes are recognized and counted toward any such resource adequacy requirements, (iii) coordinating with EPE on any resource adequacy plan that is to be submitted to the applicable Governmental Authority, and (iv) complying with any applicable reporting requirements ("Compliance Actions"); *provided, however*, that if the costs required to be incurred by Seller in connection with such Compliance Actions exceed \$75,000 in any Commercial Operation Year or \$500,000 during the Term (the "Compliance Cap"), then EPE shall have the right to: (x) reimburse Seller for such costs in excess of the Compliance Cap, or (y) excuse Seller from performing the obligations of this Agreement that would otherwise cause it to incur incremental new costs in excess of the Compliance Cap. No later than sixty (60) Days after Seller becomes aware the Compliance Actions will cause it



to incur costs in excess of the Compliance Cap, Seller shall provide to EPE notice with an estimate of the expected costs caused by the Compliance Actions. Within thirty (30) Days of the delivery of such notice with the estimate, EPE shall provide Seller notice of (i) EPE's request for Seller to incur costs in excess of the Compliance Cap, or (ii) EPE's waiver of Seller's performance of such Compliance Actions

(B) To the extent that, during the Term, Seller is compensated by a third party for any products produced by the Facility, including, without limitation, any Capacity Attributes or Environmental Attributes, Seller shall promptly remit all such compensation directly to EPE.

## ARTICLE 8 - ENERGY PAYMENT CALCULATIONS

8.1 Energy Payments. Energy payments to Seller shall be calculated as follows for each Month:

(A) Prior to Commercial Operation. EPE shall pay Seller for Test Energy at a rate equal the lesser of fifty percent (50%) of the Payment Rate specified in Exhibit F or EPE's then-current Avoided Cost set forth in the most recent Rate No. 16 set pursuant to 17.9.570 New Mexico Admin. Code.

(B) During Commercial Operation. For all Net Output delivered by Seller to EPE in a Commercial Operation Year up to and including one hundred ten percent (110%) of the Expected Net Output, EPE shall pay Seller the product of (i) the Net Output delivered to EPE by Seller in each Month of the Commercial Operation Year, and (ii) the Payment Rate specified for each Commercial Operation Year. For all Net Output delivered by Seller to EPE in a Commercial Operation Year that is in excess of one hundred ten percent (110%) of the Expected Net Output, EPE shall have the option to either (a) pay Seller the then-current Avoided Cost of EPE set forth in the most recent Rate No. 16 set pursuant to 17.9.570 New Mexico Admin. Code for all Net Output delivered by Seller to EPE at the Point of Delivery in excess of one hundred ten percent (110%) of the Expected Net Output ("Excess Net Output") for such Commercial Operation Year, or (b) elect not to accept any Excess Net Output. If EPE exercises its applicable right not to accept Excess Net Output, Seller shall have the right to sell such Excess Net Output (together with any Environmental Attributes associated with such Excess Net Output) to another buyer until the end of the applicable Commercial Operation Year and the term of such transaction shall not be longer than the remainder of such Commercial Operation Year, after which the Parties' obligations shall resume pursuant to this Agreement; *provided*, that Seller shall be responsible for securing any necessary transmission arrangements for such transaction with the other buyer at its sole expense. Seller shall notify EPE upon Seller's delivery of a quantity of Net Output hereunder that exceeds one hundred five percent (105%) of Expected Net Output for a Commercial Operation Year. EPE shall elect within ten (10) Business Days of Seller's notice to either accept or decline any Excess Net Output that the Facility may produce during such Commercial Operation Year. In the event EPE does not accept Excess Net Output in accordance with this Section 8.1, EPE shall use commercially reasonable efforts, consistent with Applicable Laws, to assist Seller with securing transmission service, which shall be at Seller's expense.

## 8.2 Non-Solar Energy.

(A) Except as provided by Section 8.3, EPE shall not be obligated to make any payment, regardless of reason or Force Majeure Event, affecting either Party, for Net Output that: (i) does not qualify as Solar Energy; (ii) is not measured by the Electric Metering Device(s) installed pursuant to Section 5.2, as such measurement may be adjusted pursuant to Section 5.3; or (iii) is not delivered to EPE at the Point of Delivery.

(B) For Net Output that does not qualify as Solar Energy, EPE shall have the option, at its sole discretion, to purchase such Net Output that does not qualify as Solar Energy from Seller and shall pay Seller EPE's then-current Avoided Cost calculated as set forth in Section 8.1(A). If EPE declines to purchase such Net Output that does not qualify as Solar Energy, then Seller may sell such Net Output at wholesale to a third party; *provided*, that Seller shall be responsible for securing any necessary transmission arrangements for such transaction at its sole expense.

## 8.3 Curtailed Energy Payment Rate.

(A) EPE shall have the right to curtail delivery of Net Output for any reason by providing notice to Seller in accordance with this Agreement, and if Net Output is curtailed by EPE, then:

(1) Seller may but shall not be obligated to sell the Net Output from the Facility to a third party;

(2) If Seller does not sell the Net Output to a third party, the Parties shall determine and verify, by comparing expected energy projected with estimated solar data based on irradiance and module temperature at the Site, the quantity of Net Output that would have been generated by the Facility and delivered to the Point of Delivery had its generation not been so curtailed ("Curtailed Energy"), and EPE shall pay at the applicable Payment Rate to Seller for such Curtailed Energy all amounts that Seller would have received from EPE under this Agreement had generation not been so curtailed; and

(3) The rate to be paid by EPE to Seller for Curtailed Energy shall be the applicable Payment Rates for the curtailment period. The rate to be paid by EPE to Seller for any Net Output sold by Seller to a third party pursuant to Section 8.3(A)(1) above shall be the positive difference, if any, between the applicable Payment Rates for the curtailment period and the price received by Seller for such third party sale.

(B) Notwithstanding anything in this Section 8.3 to the contrary, and except as specified in Sections 8.3(B)(1) and 8.3(B)(3), no payment shall be due to Seller from EPE under Section 8.3(A) for curtailments of delivery of Net Output resulting from:

(1) an Emergency Condition, which for purposes of excusing EPE's obligation to pay for curtailed energy under this Agreement shall not include any curtailment initiated or implemented for any of the following purposes or reasons:

(a) for economic or least-cost dispatch purposes; (b) to address or resolve any oversupply condition; (c) for system balancing or management purposes; or (d) to make room for or accommodate other generating resources, or their startup, shutdown, long-lead time or other operating restrictions, that are needed to provide energy or ancillary services or to meet EPE's load-following, reliability or resource adequacy needs (curtailment for any and all of the reasons under clauses (a)-(d) of this Section 8.3(B)(1) shall be treated as curtailment for which compensation must be paid by EPE for under Section 8.3(A) for all associated Curtailed Energy);

(2) a Force Majeure Event;

(3) any action properly taken by EPE under the Interconnection Agreement, but not in excess of Temporary Curtailment as defined herein (such excess shall be treated as Curtailed Energy for which EPE must pay Seller under Section 8.3(A)); or

(4) any notification from EPE's SOC requiring Seller to curtail deliveries of Net Output due to Seller's failure to obtain or maintain in full force and effect any Governmental Approval which has the effect of preventing delivery of Net Output pursuant to this Agreement.

8.4 Payment Support Requirement. Neither Party shall initiate any action before any Governmental Authority to deny recovery of payments under this Agreement. Each Party shall use commercially reasonable efforts to defend all terms and conditions of this Agreement consistent with Applicable Law.

8.5 Survival on Termination. The provisions of this Article 8 shall survive the repudiation, termination or expiration of this Agreement for so long as may be necessary to give effect to any outstanding payment obligations of the Parties due and payable prior to any such repudiation, termination or expiration.

## **ARTICLE 9 - RIGHT OF FIRST OFFER AND PURCHASE OPTION**

### 9.1 EPE's Rights to Facility Expansion.

(A) Seller's Duty to Offer Expansion Energy. If, at any time during the Term, Seller or any Affiliate of Seller intends to install equipment on the Site in addition to the equipment included in the original Facility, including storage capacity, and such installation is designed to increase the capacity of the Facility to more than the Designed Maximum Capacity or to provide storage capacity, Seller shall first offer (or cause its Affiliate to offer) the excess above the Designed Maximum Capacity or the capacity or services associated with storage capacity (each is referred to herein as the "Expansion Energy") to EPE. Such offer shall set forth the terms and conditions of the offer in writing and in reasonable detail. Seller shall promptly answer any questions that EPE may have concerning the offered terms and conditions and shall meet with EPE to discuss the offer.

(B) EPE's Rejection of Offer; Revival of Offer. If EPE does not accept the offered terms and conditions within thirty (30) Days after receiving Seller's offer, Seller

(or the applicable Affiliate of Seller) may enter into an agreement to sell the Expansion Energy to a third party on terms and conditions no more favorable to the third party than those offered to EPE, provided such sale of Expansion Energy may not in any way impact or alter EPE's rights, obligations or entitlements under this Agreement. If Seller (or its Affiliate) wishes to enter into an agreement with a third party on terms more favorable to EPE than those previously offered to EPE under this Section 9.1, Seller shall contemporaneously offer (or cause its Affiliate to offer) the revised terms and conditions to EPE under this Section 9.1.

(C) EPE's Acceptance of Offer. If EPE accepts an offer made by Seller (or its Affiliate) under this Section 9.1, the Parties shall within sixty (60) Days following such acceptance enter into a power purchase agreement in substantially the same form as this Agreement for the purchase and sale of such Expansion Energy (with appropriate provisions proportionally adjusted to account for the size of the proposed expansion relative to the Designed Maximum Capacity of the Facility), but incorporating such changes as are expressly identified in the terms and conditions offered by Seller (or its Affiliate).

## 9.2 EPE's Rights in Event of Proposed Facility Sale or Transfer.

(A) After achievement of the Commercial Operation Date, each of Seller and the Seller Parent (each, an "Offeror") hereby grants to EPE a right of first offer (a "ROFO") for any proposed sale or transfer by Seller to a third-party that is not an Affiliate of Seller of (i) Seller's ownership interests in the Facility and related assets, or (ii) any stock or ownership interest in Seller (the Facility and ownership interests in Seller, each the "Offered Interests"), all in accordance with the provisions of this Section 9.2; *provided, however*, that the ROFO and this Section 9.2 shall not apply to any sale, transfer or conveyance effectuated for purposes of financing or refinancing, including any tax equity financing transaction, or to the exercise of remedies by any lender providing financing or refinancing for the Facility.

(B) Prior to the Offeror commencing the negotiation of a sale of the Offered Interest, the Offeror shall provide notice to EPE of the Offeror's intention to sell the Offered Interest (a "Proposed Sale Notice"). Upon receipt of such Proposed Sale Notice, EPE shall have thirty (30) Days in which to provide notice to Offeror indicating whether EPE is interested in negotiating with Offeror to purchase the Offered Interests from Offeror (a "Proposed Purchase Notice"). If EPE provides such Proposed Purchase Notice, then the Offeror and EPE shall undertake for a period of up to forty-five (45) Days from the date of EPE's Proposed Purchase Notice to negotiate in good faith and use commercially reasonable efforts to determine if they are able to reach mutual agreement on a term sheet that sets forth the fundamental terms and conditions of a sale of the Offered Interests to EPE.

(C) If (i) EPE does not provide such Proposed Purchase Notice to the Offeror indicating that EPE is interested in negotiating the purchase of the Offered Interests from Offeror following a Proposed Sale Notice, or (ii) the Offeror and EPE are unable to execute a term sheet that sets forth the fundamental terms and conditions of a sale of the Offered

Interests to EPE within the forty-five (45) Day period set forth in Section 9.2(B), then the Offeror shall be free to negotiate the sale of the Offered Interests to a third party; *provided, however*, that, prior to consummating any such sale, the Offeror shall provide EPE with a concise summary of the commercial terms negotiated by the Offeror with such third party, subject to any confidentiality obligations to which Offeror is subject in connection with such sale (a “Notice of Proposed Third Party Sale”).

(D) If an Offeror fails to complete a sale to a third party within nine (9) Months after the date of receipt of the Proposed Sale Notice by EPE, then any subsequent sale shall not be completed unless Seller first provides another Proposed Sale Notice hereunder (and goes through the ROFO process under this Section 9.2) before commencing or continuing negotiations with any third party or consummating a sale of the Offered Interests.

(E) The ROFO shall not limit EPE’s rights to purchase the Facility under the purchase option pursuant to Section 9.3.

### 9.3 Purchase Option.

(A) Purchase Option. EPE shall have the option to purchase Seller’s ownership interests in the Facility and all rights of Seller therein or relating thereto, for the greater of the Fair Market Value of the Facility or the applicable Minimum Amount, on an Anniversary Date in accordance with the provisions set forth in this Section 9.3. EPE shall indicate its preliminary interest with respect to the option, if at all, by delivering to Seller a preliminary notice of its interest no less than two (2) years prior to such Anniversary Date (the “Preliminary Interest Notice”). If EPE fails to deliver such notice by such date, EPE’s option with respect to such Anniversary Date shall terminate.

(B) Determination of Fair Market Value of the Facility and the Minimum Amount. Promptly following delivery of the Preliminary Interest Notice, the Parties shall mutually agree to the Fair Market Value of the Facility. If EPE and Seller cannot mutually agree to a Fair Market Value of the Facility within thirty (30) Days of delivery of the Preliminary Interest Notice, then each of EPE and Seller shall select and retain, at each Party’s own cost and expense, a nationally recognized independent appraiser with experience and expertise in appraising solar photovoltaic power generation facilities to determine separately the value of the Facility. Subject to the appraisers’ execution and delivery to Seller of a suitable confidentiality agreement in a form reasonably acceptable to Seller, Seller shall provide both appraisers access to the Facility and its books and records during business hours and upon prior written notice. The appraisers shall act reasonably and in good faith to determine the Fair Market Value of the Facility and the Parties shall use their best efforts to cause the appraisers to complete such determination no later than sixty (60) Days following delivery of the Preliminary Interest Notice. If for any reason (other than failure by Seller to provide access hereunder to EPE’s appraiser), one of the appraisals is not completed within ninety (90) Days following delivery of the Preliminary Interest Notice, the results of the other completed appraisal shall be deemed the Fair Market Value of the Facility. Each Party may provide to both appraisers a list of factors which the Parties suggest be taken into consideration when the appraisers generate their appraisals, consistent with industry standards prevailing at such time for appraising

solar photovoltaic power generation facilities. Any information provided to an appraiser by a Party shall be provided to the other appraiser and the other Party at the same time, it being the intent of the Parties that the appraisers have access to the same information. EPE and Seller shall deliver the results of their respective appraisal to the other Party when completed. If so requested by either Party, the appraisals shall be exchanged simultaneously. After both appraisals are completed and exchanged, the Parties and their appraisers promptly shall confer and attempt to agree upon the Fair Market Value of the Facility. Contemporaneously with the determination of the Fair Market Value of the Facility, Seller shall provide EPE with a calculation of the applicable Minimum Amount and reasonable supporting documentation substantiating the basis for such calculation.

(C) Disagreement as to Value. If, within thirty (30) Days after completion of both appraisals, the Parties cannot agree on the Fair Market Value of the Facility, and the values of the appraisals are within ten percent (10%) of each other, the Fair Market Value of the Facility shall be the simple average of the two appraisals. If the values of the two appraisals differ by ten percent (10%) or more, the first two appraisers shall choose a third independent appraiser experienced in appraising solar photovoltaic power generation assets, or, if the first two appraisers fail to agree upon a third appraiser within ten (10) Days after the expiration of the thirty (30)-Day period following completion of both appraisals, such appointment shall be made by the American Arbitration Association upon application of either Party in accordance with the applicable rules and regulations of the American Arbitration Association for such selection. The third appraiser shall have access to the same information as was available to the two other appraisers. The Parties shall direct the third appraiser to determine the fair market value of the Facility within sixty (60) Days following retention of the third appraiser. The costs and expenses of such third appraiser shall be shared equally by the Parties. Upon completion of the fair market value of the Facility by such appraiser, the Fair Market Value of the Facility will be the simple average of the three appraisal values completed in accordance with this Section 9.3.

(D) Exercise of Purchase Option. Within ninety (90) Days following the later of the determination of the Fair Market Value of the Facility or confirmation of the Minimum Amount pursuant to this Section 9.3, but in no event later than twelve (12) Months following delivery of a Preliminary Interest Notice, EPE shall notify Seller if EPE elects to exercise its option (an "Option Confirmation Notice").

(E) Purchase and Sale. If EPE delivers a valid and timely Option Confirmation Notice, Seller shall sell, transfer, assign and convey to EPE all of the Facility and all rights of Seller therein or relating thereto, on an "AS IS, WHERE IS" basis, free and clear of all liens, claims, encumbrances, or rights of others arising through Seller on the applicable Anniversary Date, including good and valid title to the Facility and Seller's rights in the Site. In connection with such sale, transfer, assignment and conveyance, Seller shall (a) assign or otherwise make available, to the extent permitted by Applicable Law and not already assigned or otherwise transferred to EPE, Seller's interest in all applicable Required Facility Documents; (b) cooperate with all reasonable requests of EPE for purposes of enabling EPE to obtain any and all applicable Permits that are or will be required to be obtained by EPE in connection with the use, occupancy, operation or maintenance of the Facility or the Site in compliance with Applicable Law; and (c) provide

EPE copies of all documents, instruments, plans, maps, specifications, manuals, drawings and other documentary materials relating to the installation, maintenance, operation, construction, design, modification and repair of the Facility, as shall be in Seller's possession and shall be reasonably appropriate or necessary for the continued operation of the Facility.

## ARTICLE 10 - BILLING AND PAYMENT

10.1 Seller's Invoices. The monthly billing period shall be the Month. No later than four (4) Business Days after the end of each Month, Seller shall provide to EPE, by electronic means or first-class mail, an invoice showing the invoice date, the invoice due date and all billing parameters, rates, and any other data reasonably pertinent to the invoice, including information required by Section 11.6, for the amount owed by EPE to Seller for Net Output provided by Seller and purchased by EPE pursuant to Section 8.1 during the previous Month billing period.

10.2 EPE's Invoices. No later than four (4) Business Days after the end of a Month in which Seller owes payments to EPE under this Agreement, EPE shall provide to Seller, by electronic means or first-class mail, an invoice showing the invoice date, the invoice due date and all billing parameters, rates, and any other data reasonably pertinent to the invoice for any amount owed by Seller to EPE under this Agreement.

10.3 Payments. Unless otherwise specified herein, payments owed under this Agreement shall be due and payable by check or by electronic funds transfer, as designated by the invoicing Party, on or before the twentieth (20th) Business Day following the date of the billing invoice provided that such invoice was rendered within the five Business Day period required under Sections 10.1 or 10.2, as applicable, and, if not so rendered, such payment shall be due on the twentieth (20th) Business Day of the following Month. Remittances received by mail will be considered to have been paid when due if the postmark indicates the payment was mailed on or before the fifteenth (15th) Business Day following receipt of the invoice.

(A) EPE may offset any amounts that it owes Seller against any undisputed amounts that Seller owes EPE under this Agreement, including damages, interest payments, and other payments. Seller may include in its invoices and offset any amounts that it owes EPE against any undisputed amounts that EPE owes Seller for the purchase of Net Output under this Agreement, including damages, interest payments, and other payments. Any such offsets by either Party shall be clearly represented in the invoices described in Sections 10.1 or 10.2.

(B) Undisputed and non-offset portions of amounts invoiced under Sections 10.1 or 10.2 not paid on or before the invoice due date shall be subject to the late payment interest charges calculated as set forth in this Section 10.3(B). The late payment interest charge rate per Month shall be at the Interest Rate. The late payment interest charge shall equal the Interest Rate times the unpaid balance of undisputed and non-offset portions of amounts invoiced. The late payment interest charge shall be added and itemized in the next billing invoice of either EPE or Seller, whichever is appropriate.

10.4 Billing Disputes. Either Party may dispute invoiced amounts but shall pay to the other Party at least the undisputed portion of invoiced amounts on or before the invoice due date pending resolution of the dispute. Full payment of an invoice shall not waive a Party's right to later dispute the invoice provided that notice of a disputed invoice is presented by the disputing Party to the other Party within twelve (12) Months of an invoice due date, accompanied by an explanation of the specifics of the dispute as well as a request for a refund or an additional payment, whichever is appropriate. When a billing dispute is resolved, EPE or Seller, as appropriate, shall invoice the other Party the amount agreed to by the Parties (or finally determined pursuant to Sections 13.8 or 13.9) no later than fifteen (15) Business Days after the end of the Month in which the dispute is resolved. The amount owed shall include any late payment interest charges calculated from the original invoice due date in accordance with the provisions of Section 10.3(B). Either Seller or EPE may elect to offset amounts owed to the other Party pursuant to Section 10.3(A).

10.5 Statement Errors. If, within two (2) years of the date of a statement, either Party becomes aware of any error in any statement, such Party shall, immediately upon discovery of the error, notify in writing the other Party of such error and the other Party shall rectify such error (whether such error was in the form of an underpayment or overpayment) within thirty (30) Days of such notification. Provided that the other Party is satisfied (in its sole and reasonable discretion) that the aforementioned notification requirements have been complied with in good faith by the Party who has made the error, interest shall be payable in respect of any amount that was erroneously overpaid or underpaid at the Interest Rate.

10.6 Set-Off and Payment Adjustments. Except as otherwise expressly provided for in this Agreement, all payments between the Parties under this Agreement shall be made free of any restriction or condition and without deduction or withholding on account of any other amount, whether by way of set-off or otherwise. Payments to be made under this Agreement shall, for a period of not longer than two (2) years, remain subject to adjustment based on billing adjustments due to error or omission by either Party, *provided* that such adjustments have been agreed to between the Parties or resolved in accordance with the provisions of Sections 13.8 or 13.9.

10.7 Survival on Termination. The provisions of this Article 10 shall survive the repudiation, termination or expiration of this Agreement for so long as may be necessary to give effect to any outstanding payment obligations of the Parties that became due and payable prior to any such repudiation, termination or expiration.

## **ARTICLE 11 - ENVIRONMENTAL ATTRIBUTES**

11.1 Title. Title to the Environmental Attributes shall pass from Seller to EPE immediately upon the generation of the Output at the Facility that gives rise to such Environmental Attributes.

11.2 Compliance with Rule. Seller must comply with Applicable Law and provide all Environmental Attributes associated with Net Output in the reasonable format to be provided by EPE and in compliance with any State Regulator requirements. All REC's required to be delivered by Seller to EPE, or Replacement Energy Costs or other damages payable by Seller to EPE with



respect to replacement RECs, shall be for solar RECs, except to the extent that EPE has confirmed in writing to Seller that such RECs need not be solar RECs.

11.3 Documentation. The Parties shall execute all additional documents and instruments reasonably requested by EPE in order to further document the transfer of the Environmental Attributes to EPE or its designees. Should the CAMD notify EPE that it will not authorize the retention by EPE of any Environmental Attributes as contemplated by this Agreement, Seller shall cooperate with the CAMD and take all reasonable action to enable EPE to retain the Environmental Attributes as herein described. Seller shall not submit to the CAMD, under §1605(b) of the Energy Policy Act of 1992 or any other applicable program, any reports describing any of the Environmental Attributes as belonging to anyone other than EPE or its respective designees. Seller and EPE will promptly give to one another copies of any documents they submit to the CAMD. Further, in the event of the promulgation of a scheme involving Environmental Attributes administered by a Governmental Authority, upon notification by such Governmental Authority that any transfers contemplated by this Agreement will not be recorded, the Parties shall promptly cooperate in taking all reasonable actions necessary so that such transfers can be recorded.

11.4 WREGIS. Seller, at its own cost and expense, shall register with, pay all fees required by, and comply with, all reporting and other requirements of WREGIS relating to the Facility or Environmental Attributes. Seller shall ensure that the Facility will participate in and comply with, during the Term (commencing with the Commercial Operation Date), all aspects of WREGIS. Seller shall, at its sole expense, effectuate the transfer of WREGIS Certificates to EPE in accordance with WREGIS Operating Rules. Seller shall promptly provide EPE copies of all documentation it submits to WREGIS.

11.5 Compliance with Rule. Seller must comply with Applicable Law and provide all Environmental Attributes associated with Net Output in the format to be provided by EPE and in compliance with any requirements of a State Regulator. All RECs required to be delivered by Seller to EPE, or Replacement Energy Costs or other damages payable by Seller to EPE with respect to replacement RECs, shall be for solar RECs, except to the extent that EPE has confirmed in writing to Seller that such RECs need not be solar RECs.

11.6 Monthly RECs. Seller shall provide RECs monthly using the format in Exhibit G and shall include the appropriate number of RECs associated with the Net Output purchased during the previous Month in each monthly invoice.

11.7 Seller's Failure to Provide Environmental Attributes. Except for Force Majeure Event(s) and any curtailments pursuant to Sections 7.5 or 8.3, if Seller fails to provide the Committed Net Output (calculated by including all credits applicable to a Net Output Shortfall as specified in Section 7.3(D)) and to deliver to EPE the associated Environmental Attributes, Seller shall first use commercially reasonable efforts to obtain replacement Environmental Attributes of similar type and characteristics and deliver them to EPE up to the quantity of Environmental Attributes associated with the Net Output Shortfall (less any Environmental Attributes previously delivered by Seller to EPE for the applicable Commercial Operation Year). Seller must deliver appropriate replacement Environmental Attributes for the Net Output Shortfall within thirty (30) Days after the end of the Commercial Operation Year in which a Net Output Shortfall of Environmental Attributes occurs. EPE will reimburse Seller for the actual cost of the replacement

Environmental Attributes. However, should the total of the actual cost of (a) the replacement Environmental Attributes that Seller purchases, and (b) the replacement energy that EPE actually purchased to replace the Net Output Shortfall not provided by Seller, assuming that such replacement energy is an as-available energy product excluding Environmental Attributes (and taking into account any Shortfall Damages actually paid by Seller to EPE pursuant to Section 7.3 for the applicable period), exceed the price of energy sold to EPE under this Agreement per Exhibit F, such incremental costs may be deducted from the monies owed to Seller for the replacement Environmental Attributes.

(A) If such appropriate replacement Environmental Attributes are not obtained and delivered by Seller to EPE, EPE may, at its discretion but no later than ninety (90) Days after Seller's failure to provide the Environmental Attributes associated with the Net Output Shortfall, attempt to obtain replacement Environmental Attributes up to the quantity of Environmental Attributes associated with the Net Output Shortfall. EPE will be responsible for the costs for these replacement Environmental Attributes. However, should the total of the actual cost of the replacement Environmental Attributes that EPE purchases and the replacement energy that EPE actually purchased to replace the Net Output Shortfall not provided by Seller (and taking into account any Shortfall Damages actually paid by Seller to EPE pursuant to Section 7.3 for the applicable period) exceed the price of energy sold to EPE under this Agreement per Exhibit F, such incremental costs will be paid by Seller to EPE. EPE's failure to obtain replacement Environmental Attributes associated with the Net Output Shortfall does not relieve Seller of the obligation to obtain replacement Environmental Attributes in an amount equal to the Net Output Shortfall.

(B) If sufficient replacement Environmental Attributes are unavailable, Seller shall pay EPE the cost of any fines and/or penalties incurred by EPE as a result of Seller's failure to provide the Net Output Shortfall and associated Environmental Attributes.

(C) For the avoidance of doubt, and notwithstanding anything in this Section 11.7 to the contrary, the payment by Seller to EPE of Shortfall Damages for a Net Output Shortfall pursuant to Section 7.3 shall not relieve Seller of its obligations under this Agreement with respect to the replacement of Environmental Attributes as a result of Seller's failure to deliver the Committed Net Output.

11.8 Publicity. Seller shall not make any public statement or report under any program that any of the Environmental Attributes purchased by EPE under this Agreement belong to any person other than EPE. Seller shall reasonably cooperate in any registration by EPE of the Facility in the renewable portfolio standard or equivalent program in all such further states and programs in which EPE may wish to register or maintain registration of the Facility by providing copies of all such information as EPE reasonably requires for such registration.

11.9 Renewable Claims. Seller will comply with the Federal Trade Commission requirements set forth in 16 CFR Part 260 in any communications concerning the Output, the Facility and Environmental Attributes that are or may be generated from the Facility. Seller will not claim the Environmental Attributes or other "renewable energy," "green energy," "clean energy" or similar attributes of the Output or the Facility as belonging to the Seller or any Seller Affiliate.

11.10 Administrative Compliance Cost Obligations.

(A) Seller shall be solely responsible for the cost of administrative compliance with all Compliance Obligations, as well as all costs of complying with Applicable Law, including any applicable rule(s) of an applicable State Regulator governing the registration and accounting for Environmental Attributes that may be enacted or amended after the Execution Date.

(B) Administrative compliance cost obligations referenced in this Section 11.8 shall not include costs associated with Seller's obligations pursuant to Sections 3.3 and 4.7 or any fines or penalties assessed against Seller.

**ARTICLE 12 - SECURITY FOR PERFORMANCE**

12.1 Security Fund.

(A) Seller shall establish, fund, and maintain a security fund, pursuant to the provisions of this Article 12 ("Security Fund"), which shall be available to (i) pay any amount due EPE pursuant to this Agreement, whether arising before, on, or after the Commercial Operation Date or termination of this Agreement, (ii) provide EPE security that Seller will construct the Facility to meet the Construction Milestones, and (iii) provide security to EPE to cover damages, including Replacement Energy Costs, should the Facility fail to achieve the Commercial Operation Date or otherwise not operate in accordance with this Agreement. Seller shall establish the Security Fund at a level of Five Million Dollars (\$5,000,000) (the "Required Amount"), one-third of which (One Million Six-Hundred Sixty-Six Thousand Six-Hundred Sixty-Six Dollars and Sixty-Seven Cents (\$1,666,666.67)) shall be established no later than thirty (30) Business Days following the Agreement Approval Date. Seller shall increase the Security Fund by an additional one-third (One Million Six-Hundred Sixty-Six Thousand Six-Hundred Sixty-Six Dollars and Sixty-Seven Cents (\$1,666,666.67)) on or prior to the later of (A) one year prior to the Required Commercial Operation Date and (B) fifteen (15) Business Days following the Agreement Approval Date. Seller shall increase the Security Fund to a level equal to the Required Amount by no later than the Commercial Operation Date. Seller shall maintain the Security Fund at the Required Amount throughout the remainder of the Term. Seller shall replenish the Security Fund to the applicable portion of the Required Amount within ten (10) Business Days after any draw on the Security Fund by EPE; provided, however, that Seller's replenishment requirement will be limited to an aggregate amount no greater than the level of the Security Fund posted at the time of the replenishment.

(B) In addition to any other remedy available to it under this Agreement or at law, EPE may, to the extent Seller fails to perform or abide by the terms of this Agreement, or by order of a Governmental Authority of competent jurisdiction, before, on, or after termination of this Agreement, draw from the Security Fund such amounts as are necessary to recover amounts owing to EPE pursuant to this Agreement. Such amounts include any damages due to EPE and any amounts for which EPE is entitled to indemnification under this Agreement. EPE must provide notice to Seller ten (10) Business Days prior to drawing such amounts from the Security Fund. If Seller fails to deliver payment of such amounts

by check or electronic funds transfer to EPE within ten (10) Business Days of such notification, EPE may, in its sole discretion, draw all or any part of such amounts due to it from any form of security to the extent available pursuant to this Section 12.1, and from all such forms, and in any sequence EPE may select. Any failure to draw upon the Security Fund or other security for any damages or other amounts due to EPE shall not prejudice EPE's rights to recover such damages or amounts in any other manner. EPE shall not draw upon the Security Fund for any contested obligation for so long as it remains the subject of a bona fide dispute between the parties pursuant to Article 13.

(C) The Security Fund shall be established in the amounts specified in Section 12.1(A), shall be maintained at Seller's sole expense. Prior to the Commercial Operation Date, the Security Fund shall be in the form of the instrument described in Section 12.1(C)(1) or 12.1(C)(2). After the Commercial Operation Date, the Security Fund may, at Seller's election and at EPE's reasonable discretion, be in the form described in Sections 12.1(C)(1), 12.1(C)(2) or 12.1(C)(3):

(1) An irrevocable standby letter of credit in a form and substance acceptable to EPE, and substantially in the form set forth in Exhibit I ("Letter of Credit") from a financial institution that is a United States-based commercial bank with at least ten billion dollars (\$10,000,000,000) in assets and an unsecured bond rating (not enhanced by third-party support) equivalent to A- or better as determined by Standard & Poor's and a credit rating of A3 or better as determined by Moody's, or, if either one or both are not available, equivalent ratings from alternate rating sources acceptable to EPE (such financial institution, an "Issuer"). In addition, if such unsecured bond rating of the Issuer is exactly equivalent to A-, the Issuer must not be on credit watch or similar classification, or have a negative outlook (or the equivalent) by a rating agency. Such Letter of Credit must be consistent with this Agreement and shall include a provision for at least thirty (30) Days advance notice to EPE of any expiration or earlier termination of the Letter of Credit, so as to allow EPE sufficient time to exercise its rights under the Letter of Credit should Seller fail to extend or replace the same. The form of the Letter of Credit must meet EPE's requirements to ensure that claims or draw-downs can be made unilaterally by EPE in accordance with the terms of this Agreement. Such security must be issued for a minimum term of three hundred and sixty-five (365) Days. Seller shall cause the renewal or extension of the security for additional consecutive terms of three hundred and sixty-five (365) Days or more (or, if shorter, the remainder of the Term) no later than thirty (30) Days prior to each expiration date of the Letter of Credit. If the Letter of Credit is not renewed or extended as required herein, EPE shall have the right to draw immediately upon the Letter of Credit and to place the amounts so drawn, at Seller's cost and with Seller's funds, in an interest bearing escrow account in accordance with Section 12.1(C)(2). The Letter of Credit shall be governed by the Uniform Customs and Practice for Documentary Credits (2007 Revision), International Chamber of Commerce Brochure No. 600 (the "UCP"), except to the extent that the terms hereof are inconsistent with the provisions of the UCP, in which case the terms of the Letter of Credit shall govern.

(2) United States currency deposited with an Issuer, in which EPE holds a first and exclusive security interest perfected by control, either: (i) in an account under which EPE is designated as beneficiary with sole authority to draft from the account or otherwise access the security; or (ii) in an account held by Issuer as escrow agent with instructions to pay claims made by EPE pursuant to this Agreement (and the Seller paying for any costs associated with such account), such instructions to be in a form satisfactory to EPE (each an “Account”). Security provided in this form shall include a requirement for immediate notice to EPE from Issuer and Seller in the event that the sums held as security in the Account do not at any time meet the required level for the Security Fund as set forth in this Section 12.1. Funds held in the Account may be deposited in a money-market fund, short-term treasury obligations, investment-grade commercial paper and other liquid investment-grade investments with maturities of three Months or less, with all investment income thereon to be taxable to, and to accrue for the benefit of, Seller. After the Commercial Operation Date is achieved, annual Account sweeps for recovery of interest earned by the Security Fund (net of any taxes on such interest paid or payable by EPE) shall be allowed by Seller.

(3) A guaranty from a guarantor with a senior unsecured credit rating (not enhanced by third-party support) equivalent to at least two of the following: (i) BBB- or better by Standard & Poor’s, (ii) Baa3 or better by Moody’s, or (iii) BBB- or better by Fitch, in substantially the form set forth in Exhibit N (“Guaranty”). If the credit rating of the guarantor ceases to meet the criteria required by this Section 12.1(C)(3), then Seller shall be required to convert the Guaranty provided by such guarantor (y) to a Letter of Credit meeting the criteria set forth in Section 12.1(C)(1), or, (z) at Seller’s election, and at EPE’s reasonable discretion, to an Account or a Guaranty meeting the criteria set forth in Sections 12.1(C)(2) and 12.1(C)(3), respectively, no later than thirty (30) Days after receiving notice from EPE that such conversion is required pursuant to this Section 12.1(C)(3).

(D) Promptly following the end of the Term and the completion of all of Seller’s obligations under this Agreement, EPE shall release the balance of the Security Fund (including any accumulated interest, if applicable) to Seller.

(E) If there is an early termination of this Agreement that is not due to default by Seller and no amounts remain outstanding and unpaid by Seller under the Agreement, EPE shall take all actions necessary to release the balance of the Security Fund (including any accumulated interest, if applicable, and net of any taxes on such interest paid or payable by EPE) to Seller.

(F) Seller shall reimburse EPE for the reasonably incurred incremental direct third party and out of pocket expenses (including the reasonable fees and expenses of counsel) incurred by EPE in connection with the preparation, negotiation, execution or release of any security instruments, and other related documents, used by Seller to establish and maintain the Security Fund pursuant to Seller’s obligations under this Section 12.1, except for releases due to an Event of Default by EPE hereunder.

## ARTICLE 13 - DEFAULT AND REMEDIES

13.1 Construction Events of Default. Subject to the notice and cure provision set forth in this Section 13.1, any Construction Event of Default shall give EPE the unconditional right, in its sole discretion, to: (i) terminate this Agreement; or (ii) draw upon or otherwise negotiate and liquidate the Security Fund to the extent of amounts owed by Seller to EPE hereunder. EPE shall provide notice to Seller thirty (30) Days prior to taking any of the actions set forth in Section 13.1(i) (which shall be in addition to the cure periods specified below for each Construction Event of Default), specifying the Construction Event(s) of Default triggering such action(s), and shall not take such action(s) if Seller has remedied the specified Construction Event(s) of Default within the thirty (30) Day period following EPE's notification;. The following shall constitute "Construction Events of Default":

(A) Seller becomes insolvent, becomes a debtor in any bankruptcy or receivership proceedings, or dissolves as a legal business entity and, in the case of any involuntary proceeding in respect of the foregoing, such proceeding is not dismissed within sixty (60) Days of the filing thereof;

(B) Any representation or warranty made by Seller is false or misleading in any material respect, and Seller fails to comply with such representation or warranty within thirty (30) Days after a demand by EPE to do so;

(C) Seller fails to comply with any other material terms and conditions of this Agreement (other than payment obligations, which are addressed in Section 13.1(D)) within sixty (60) Days after a demand by EPE to do so, or such longer period as may be required to effectuate compliance if Seller has commenced and is reasonably pursuing actions to effectuate compliance, not to exceed an additional thirty (30) Days;

(D) Subject to Section 13.9, Seller fails to make, when due, any payment required pursuant to this Agreement, if such failure is not remedied within fifteen (15) Days after notice is received by Seller;

(E) Seller fails to meet any Construction Milestone (other than the Commercial Operation Milestone, which failure is covered by Section 13.1(F)) unless such failure is due to the action(s) or inaction(s) of EPE or is otherwise excused under this Agreement for reasons of Force Majeure Events or the occurrence of any of the Permitted Extensions; *provided*, that if Seller or its lender or investor notifies EPE within thirty (30) Days after the date of such Construction Milestone that such failure is not susceptible to cure within such thirty (30) Day period and demonstrates to EPE's satisfaction that it is diligently pursuing achievement of the Construction Milestone and that such achievement is capable of being accomplished within ninety (90) Days after the date of such Construction Milestone, then such Construction Milestone shall be extended for ninety (90) Days; *provided, however*, that if such Construction Milestone is not achieved within such additional ninety (90) Day period, then a Construction Event of Default shall be deemed to have occurred;

(F) The Facility fails, for reasons other than a Force Majeure Event or the occurrence of any of the Permitted Extensions, to meet the Commercial Operation Milestone (as extended after payment of Delay Damages under Section 4.3), unless (i) Seller has kept EPE informed on the progress of the Facility in accordance with Section 4.4.4, and notifies EPE prior to the Commercial Operation Milestone of the anticipated Revised Commercial Operation Milestone that is no later than the Required Commercial Operation Date, and (ii) pursuant to Section 11.7, Seller obtains and delivers replacement Environmental Attributes to EPE for the quantity of Environmental Attributes that EPE notifies Seller EPE requires, up to the quantity of Environmental Attributes associated with the Committed Net Output for the period between the Commercial Operation Milestone and the Commercial Operation Date (as extended after payment of Delay Damages under Section 4.3); and (iii) the Commercial Operation Date occurs no later than the Required Commercial Operation Date; or

(G) This Agreement, the Facility, or the Interests are transferred by Seller without the requisite consent of EPE, as provided in Article 19.

13.2 Operational Events of Default. Subject to the notice and cure provisions set forth in this Section 13.2, any Operational Event of Default shall give EPE the unconditional right, in its sole discretion, to: (i) terminate this Agreement; or (ii) draw upon or otherwise negotiate and liquidate the Security Fund to the extent of amounts owed by Seller to EPE hereunder. EPE shall provide notice to Seller thirty (30) Days prior to taking any of the actions set forth in Section 13.2(i) (which shall be in addition to the cure periods specified below for each Operational Event of Default), specifying the Operational Event(s) of Default triggering such action(s), and shall not take such action(s) if Seller has remedied the specified Operational Event(s) of Default within the thirty (30) Day period following EPE's notification. The following shall constitute "Operational Events of Default":

(A) Seller becomes insolvent, becomes a debtor in any bankruptcy or receivership proceedings, or dissolves as a legal business entity, and, in the case of any involuntary proceeding in respect of the foregoing, such proceeding is not dismissed within sixty (60) Days of the filing thereof;

(B) Any representation or warranty made by Seller is false or misleading in any material respect, and Seller fails to comply with such representation or warranty within thirty (30) Days after a demand by EPE to do so; provided, that if such false or misleading representation or warranty is not reasonably capable of being cured within such thirty (30) Day period, and so long as Seller demonstrates that it is diligently seeking to cure, then such cure period will be extended for an additional period, not to exceed an additional thirty (30) Days;

(C) Seller fails to comply with any other material terms and conditions of this Agreement (other than payment obligations, which are addressed in Section 13.2(D)) within sixty (60) Days after a demand by EPE to do so; provided, that if such failure is not reasonably capable of being cured within such sixty (60) Day period, and so long as Seller demonstrates that it is diligently seeking to cure, then such cure period will be extended for an additional period, not to exceed an additional thirty(30) Days;

(D) Subject to Section 13.9, Seller fails to make, when due, any payment required pursuant to this Agreement, if such failure is not remedied within fifteen (15) Days after notice is received by Seller;

(E) The Facility fails to generate at least fifty percent (50%) of Expected Net Output to be delivered to EPE under this Agreement for any eighteen (18) consecutive-Month period (*provided* that Net Output not generated or delivered to EPE due to a Force Majeure Event, curtailment event described in Sections 7.5 or 8.3, a breach by EPE of its obligations under this Agreement, or a Delivery Excuse shall be considered generated for the purposes of this provision if, in each such case, such Net Output otherwise would have been produced by the Facility; *provided, further*, that if such failure is due to a Force Majeure Event(s), and if such Force Majeure Event is not capable of being cured within ninety (90) Days after the end of such eighteen (18) consecutive-Month period, then EPE may terminate this Agreement as provided in Section 15.5, but such failure shall not constitute an Event of Default hereunder). If EPE does not terminate this Agreement as provided herein, Seller, pursuant to Sections 7.3 and 11.7, shall still be obligated to pay Shortfall Damages associated with the Net Output not produced; or

(F) This Agreement, the Facility, or the Interests are transferred by Seller without the requisite consent of EPE, as provided in Article 19.

13.3 Seller's Abandonment of Construction or Operation of the Facility. Subject to the notice and cure provision set forth in this Section 13.3, any event(s) of Abandonment shall give EPE the unconditional right, in its sole discretion, to: (i) terminate this Agreement; or (ii) draw upon or otherwise negotiate and liquidate the Security Fund to the extent of amounts due from Seller to EPE hereunder. EPE shall provide notice to Seller thirty (30) Days prior to taking any of the actions set forth in clauses (i) or (ii) of this Section 13.3, specifying the event(s) of Abandonment triggering such action(s), and shall not take such action(s) if Seller has remedied the specified event(s) of Abandonment within the thirty (30) Day period following EPE's notification.

13.4 EPE Events of Default. Subject to the notice and cure provision set forth in this Section 13.4, any EPE Event of Default shall give Seller the unconditional right, in its sole discretion, to terminate this Agreement. Seller shall provide notice to EPE thirty (30) Days prior to terminating this Agreement, specifying the Event(s) of Default triggering such termination, and shall not terminate if EPE has remedied the specified Event(s) of Default within the specified cure period, and if no such cure period is provided, within the thirty (30) Day period following Seller's notification. The following shall constitute "EPE Event(s) of Default":

(A) EPE becomes insolvent, becomes a debtor in any bankruptcy or receivership proceedings, or dissolves as a legal business entity, and, in the case of any involuntary proceeding in respect of the foregoing, such proceeding is not dismissed within sixty (60) Days of the filing thereof;

(B) Any representation or warranty made by EPE is false or misleading in any material respect, and EPE fails to comply with such representation or warranty within thirty (30) Days after a demand by Seller to do so; provided, that if such false or misleading



representation or warranty is not reasonably capable of being cured within such thirty (30) Day period, and so long as EPE demonstrates that it is diligently seeking to cure, then such cure period will be extended for an additional period, not to exceed an additional thirty (30) Days;

(C) EPE fails to comply with any other material terms and conditions of this Agreement (other than payment obligations, which are addressed in Section 13.4(D)) within sixty (60) Days after a demand by Seller to do so; provided, that if such failure is not reasonably capable of being cured within such sixty (60) Day period, and so long as EPE demonstrates that it is diligently seeking to cure, then such cure period will be extended for an additional period, not to exceed an additional thirty (30) Days; or

(D) Subject to Section 13.9, EPE fails to make, when due, any payment required pursuant to this Agreement, if such failure is not remedied within fifteen (15) Days after notice is received by EPE.

13.5 Actual Damages. For all events of default described in Sections 13.1, 13.2, 13.3 and 13.4 (each an “Event of Default”), the non-defaulting Party shall be entitled to receive from the defaulting Party all actual direct damages incurred by the non-defaulting Party in connection with such Event of Default; *provided*, that if Seller is the defaulting Party, (i) the damages recoverable by EPE on account of a Construction Event of Default or an Operational Event of Default shall be equal to the amount by which Replacement Energy Costs exceed the amounts EPE would have paid for Net Output at the Payment Rate specified in Exhibit F, provided, further, that damages associated with a Construction Event of Default shall not exceed the amount of the Security Fund provided by Seller, and (ii) the damages recoverable by EPE on account of a Construction Event of Default resulting solely from a delay in achieving a Construction Milestone (including the Commercial Operation Milestone) shall not exceed the Delay Damages; *provided that*, the foregoing limitation set forth in Section 13.5(ii) shall not restrict EPE’s ability to terminate this Agreement for an Event of Default under Section 13.1(F). If EPE is the defaulting Party and does not accept Net Output generated by the Facility (or capable of being generated by the Facility) during such Event of Default, Seller shall use commercially reasonable efforts to sell the Expected Net Output (and associated Environmental Attributes) to third parties, and EPE shall pay Seller the differential between the Payment Rate and sales price for the amount of Net Output (and associated Environmental Attributes) sold to third parties for the entire duration that the Event of Default has occurred and is continuing. If, notwithstanding such commercially reasonable efforts, Seller is unable to sell any of the Net Output (or associated Environmental Attributes) to third parties during an Event of Default, EPE shall pay Seller an amount equal to the Payment Rate *multiplied by* either (A) the Net Output actually generated during the Event of Default (in the case of an Event of Default resulting from EPE’s refusal to accept Net Output generated by the Facility), or (B) the Net Output that the Parties reasonably calculate would have been generated (in the case of an Event of Default by EPE that results in an inability of EPE to accept Net Output that would have been generated absent such Event of Default), *provided that*, for purposes of this calculation, the Facility shall be deemed to have generated the same quantity of electric energy in MWh generated by the Facility during the relevant interval of the prior year, subject to an annual degradation factor of eight tenths of one percent (0.8%), or if such data is unavailable during such relevant interval, then the Parties shall calculate such quantity of electric energy using available data or interpolated data determined in accordance with Good Utility Practice.

13.6 No Incidental, Consequential, or Indirect Damages. Except for Seller's obligations to make EPE whole for Environmental Attributes as described in Article 11 and Section 13.1(F) and the potential penalties assessed to Seller pursuant to Section 20.3, the express remedies and measures of damages provided in this Agreement satisfy the essential purposes hereof. If no remedy or measure of damages is expressly herein provided, the obligor's liability shall be limited to direct, actual damages only. To the extent any damages to be paid hereunder are liquidated, the Parties agree and acknowledge that the damages are difficult or impossible to determine, and the damages calculated hereunder constitute a reasonable forecast of the harm or loss to be incurred. Neither Party shall be liable to the other Party for consequential, incidental, punitive, exemplary or indirect damages, lost profits or other business interruption damages by statute, in tort or contract (except in each case to the extent expressly provided herein); provided that, if either Party is held liable to a third party for such damages, and the Party held liable for such damages is entitled to indemnification under this Agreement from the other Party, the Indemnifying Party shall be liable for, and obligated to reimburse the Indemnified Party for, such damages, all in accordance with the indemnification provisions of Article 18.

13.7 Duty to Mitigate. Each Party agrees that it has a duty to mitigate damages and agrees that it will use commercially reasonable efforts to minimize any damages that may incur as a result of the other Party's performance or non-performance of the Agreement.

13.8 Dispute Resolution.

(A) In the event of any dispute arising under this Agreement ("Dispute"), within ten (10) Days following the delivered date of a written request by either Party (a "Dispute Notice"), (i) each Party shall appoint a representative (individually, a "Party Representative" and collectively "Parties' Representatives"), and (ii) the Parties' Representatives shall meet, negotiate and attempt in good faith to resolve the Dispute quickly, informally and inexpensively.

(B) In the event the Parties' Representatives cannot resolve the Dispute within thirty (30) Days after commencement of negotiations, within ten (10) Days of the conclusion of such negotiations at the written request of either Party, each Party Representative shall (i) independently prepare a written summary of the Dispute describing the issues and claims, (ii) exchange its summary with the summary of the Dispute prepared by the other Party Representative, and (iii) submit a copy of both summaries to the senior management of the Party Representatives with authority to irrevocably bind the Party to a resolution of the Dispute.

(C) Within ten (10) Business Days after receipt of the Dispute summaries, the senior management for both Parties shall negotiate in good faith to resolve the Dispute.

(D) In such meetings and exchanges, a Party shall have the right to designate as confidential any information that such Party offers. No Confidential Information exchanged in such meetings for the purpose of resolving a Dispute may be used by a Party in any proceeding against the other Party.

13.9 Mediation. Disputes not resolved under Section 13.8 shall, upon mutual consent, be submitted to mediation pursuant to the Mediation Rules of the American Arbitration Association. The Parties shall select the mediator within fifteen (15) Days of the request for mediation. Mediation shall be conducted in Texas, at a location to be determined by the Parties, notwithstanding anything to the contrary under the Mediation Rules of the American Arbitration Association.

13.10 Other Dispute Processes. If neither the negotiations under Section 13.8 nor mediation successfully resolves the dispute within ninety (90) Days of the delivery of the Dispute Notice, the Parties agree that an action may be filed in the appropriate state or federal court located in Texas.

13.11 Cost of Dispute Resolution. The cost of any mediation proceeding shall be shared equally by the Parties. The prevailing Party in any Dispute that goes beyond mediation arising out of or relating to this Agreement or its breach shall be entitled to recover from the other Party reasonable attorneys' fees, costs and expenses incurred by the prevailing Party in connection with such Dispute.

13.12 Specific Performance. In addition to the other remedies specified in this Article 13, in the event that any Operational Event of Default is not cured within the applicable cure period, EPE may elect to treat this Agreement as being in full force and effect, and EPE shall have the right to specific performance. If the breach by Seller arises from a failure by a third party operating the Facility pursuant to an operating agreement entered into with Seller, and Seller fails or refuses to enforce its rights under the operating agreement that would result in the cure, or partial cure, of the Operational Event of Default, then EPE's right to specific performance shall include the right to seek a court order compelling Seller to enforce its rights under the operating agreement.

13.13 Remedies Cumulative. The exercise, or the beginning of the exercise, by a Party of any one or more of the rights or remedies provided for herein shall not preclude the simultaneous or later exercise by such Party of any or all other rights or remedies provided for herein.

13.14 Payment of Amounts Due. Without limiting any other provisions of this Article 13 and at any time before or within one (1) year after termination of this Agreement, either Party may send the other Party an invoice for such damages or other amounts as are due at such time under this Agreement, and such invoice shall be payable in the manner, and in accordance with the applicable provisions, set forth in Article 10, including the provision for late payment charges. As applicable, EPE may withdraw funds from the Security Fund as needed to provide payment for such invoice if the invoice is not paid by Seller on or before the twentieth (20th) Business Day following the invoice due date.

## **ARTICLE 14 - FACILITY OPERATION AND CONTRACT ADMINISTRATION**

14.1 Facility Operation. Seller shall staff, control, and operate the Facility at all times in a manner that:

- (A) is consistent with Good Utility Practice(s), subject only to Emergency Conditions, Force Majeure Events and Delivery Excuses;

(B) complies with all applicable national and regional reliability standards, including standards set by WECC, NERC, the FERC, and the applicable State Regulator, or any successor agencies setting reliability standards for the operation of generation facilities interconnected in the WECC; and

(C) complies with the Operating Procedures developed by Seller and approved by EPE.

#### 14.2 Operating Committee and Operating Procedures.

(A) EPE and Seller shall each appoint one representative and one alternate representative to act in matters relating to the Parties' performance obligations under this Agreement and to develop operating arrangements for the generation, delivery and receipt of Net Output. Such representatives shall constitute the "Operating Committee". The Parties shall notify each other in writing of such appointments and any changes thereto. The Parties' representatives designated above shall have authority to act for their respective principals in all technical matters relating to performance of this Agreement and to attempt to resolve disputes or potential disputes. The Operating Committee shall have no authority to modify the terms or conditions of this Agreement.

(B) Prior to the Commercial Operation Date, Seller shall develop and finalize (subject to approval by EPE) written operating procedures ("Operating Procedures") in the form specified in Exhibit J that shall include, but not be limited to: (i) a key personnel list for applicable EPE and Seller operating centers; (ii) the method of Day-to-Day communications; (iii) metering, telemetering, telecommunications, data acquisition, and Facility status reporting procedures; (iv) procedures for the development and communication of weekly and daily forecasts of the hourly net generation from the Facility, in the format as shown in the sample template provided in Exhibit K; (v) maintenance scheduling and reporting procedures; (vi) procedures as defined in Sections 14.3, 14.4, 14.5, 14.6, 14.7, 14.8, 14.9, 14.10, 14.11, 14.12, and 14.13; and (v) such other matters as may be mutually agreed upon by the Parties. If any such procedures are not developed and approved by EPE, Seller will operate the Facility using other procedures that comply with Section 14.1 until agreed procedures are developed.

#### 14.3 Scheduling.

(A) Seller shall schedule Energy deliveries to the Point of Delivery based upon the expected delivery of Net Output, except for Forced Outages, Scheduled Maintenance Outages, Additional Maintenance Outages, Force Majeure Events and Emergency Conditions. At least sixty (60) Days prior to the anticipated Commercial Operation Date, Seller shall provide EPE with a good faith estimate of the quantity of Net Output associated with the Expected Net Output that it expects the Facility to generate for the remainder of that Year and, thereafter, no later than sixty (60) Days prior to each succeeding Commercial Operation Year, Seller shall provide EPE with a good faith estimate of the quantity of Net Output associated with the Expected Net Output that Seller expects the Facility to generate in each such Commercial Operation Year (the "Projected Schedule").

(B) Seller shall provide or cause the Operation and Maintenance Contractor to provide to EPE its good faith estimates of the daily quantity of Net Output associated with the Expected Net Output to be delivered by Seller to the Point of Delivery for each week (starting on Sunday through Saturday) by 4:00 p.m. MPT on the date falling at least three (3) Days prior to the beginning of that week.

(C) Pursuant to scheduling instructions of EPE or any superseding policies or procedures of EPE's SOC or otherwise, by 5:00 a.m. MPT on each Day, Seller shall submit to EPE a good faith estimate of the hourly quantities of Net Output associated with the Expected Net Output to be delivered to EPE at the Point of Delivery for the next seven (7) subsequent Days (the "Daily Good Faith Estimate").

(D) If, at any time following submission of a good faith estimate to EPE on the Day preceding the next subsequent Day, Seller becomes aware of any change by more than ten percent (10%) to any of the values contained in the Daily Good Faith Estimate or predicts that such values will be subject to change by more than ten percent (10%) before the end of the next subsequent Day, then Seller shall promptly notify EPE no later than sixty (60) minutes before the next scheduling hour of such change or predicted change.

14.4 Forced Outages. Seller shall notify EPE by telephone or e-mail (with confirmation to follow by written notice in each case) immediately upon discovering that the Facility is unable to deliver all or part of any scheduled quantity of Net Output associated with the Expected Net Output due to a Forced Outage that reduces the output of the Facility by more than ten percent (10%) of the Designed Maximum Capacity and which is expected to last more than ten (10) consecutive Days and, as soon as reasonably practicable following such discovery, shall notify EPE in writing of its best estimate of the expected duration of such Forced Outage. Such estimate by Seller shall be based on the best information available to it. Should Seller expect any further changes in the duration of any such Forced Outage, it shall promptly notify EPE of the same.

14.5 Scheduled Maintenance.

(A) Three (3) Months prior to the Commercial Operation Date and, thereafter, no later than ninety (90) Days prior to each succeeding Commercial Operation Year, Seller shall deliver to EPE the Projected Schedule for the Facility for the subsequent four (4) Year period, including Scheduled Maintenance Outages. Seller shall take manufacturers' recommendations and Good Utility Practices into account when establishing the proposed schedule for Scheduled Maintenance Outages, which schedule shall correspond with the Projected Schedule. Unless otherwise required by Good Utility Practices, Scheduled Maintenance Outages and Additional Maintenance Outages may not be scheduled during the Months of May, June, July, August, or September unless agreed to in writing by EPE at its sole discretion (the "Non-Scheduled Maintenance Period").

(B) Within thirty (30) Days of receiving the Projected Schedule for Scheduled Maintenance Outages from Seller, EPE may propose amendments thereto. Seller shall not unreasonably withhold its consent to such proposed amendments, provided that, it shall not be unreasonable for Seller to withhold its consent to any such proposed amendments that

would be contrary to Good Utility Practices or that would adversely affect Seller's ability to meet performance requirements under this Agreement or Seller's ability to deliver the Expected Net Output for the applicable Commercial Operation Year, and EPE shall pay the incremental costs of implementing such proposed amendments.

(C) In the event that Seller should reject any proposed amendments of EPE as set forth in Section 14.5(B), Seller shall promptly notify EPE of its reasons for such rejection, whereupon Seller and EPE shall in good faith negotiate a reasonable schedule of Scheduled Maintenance Outages. If such agreement is not reached within ten (10) Days of receipt by EPE of Seller's rejection notice, Seller shall submit a final schedule of Scheduled Maintenance Outages based on Good Utility Practices and the availability of the Operation and Maintenance Contractor which final schedule shall, to the extent reasonably possible, take into account the proposed amendments of EPE.

(D) Seller shall be entitled to change any Scheduled Maintenance Outages for the then-current Year if such changes are required to comply with Good Utility Practices or, in the alternative, if EPE consents to the change, provided that: (i) any changes in annual scheduled maintenance of up to two (2) Days' duration shall require one (1) week's prior written notice to EPE; (ii) any changes in annual scheduled maintenance of greater than two (2) Days but less than three (3) weeks' duration shall require one (1) Months' prior written notice to EPE; and (iii) any changes shall not be scheduled during the Non-Scheduled Maintenance Period unless consented to by EPE. Seller shall not unreasonably refuse to change the schedule of Scheduled Maintenance Outages if requested to do so by EPE upon not less than thirty (30) Days prior notice, *provided* that: (y) any such change would not be contrary to Good Utility Practices; and (z) the Operation and Maintenance Contractor is available.

(E) Any maintenance outages that do not correspond to the descriptions contained in Sections 14.5(A)-(D) shall be deemed to be Additional Maintenance Outages under Section 14.6.

14.6 Additional Maintenance Outages. As the need arises for Seller to conduct further maintenance on the Facility in addition to that conducted pursuant to Section 14.2, Section 14.5 and elsewhere in this Agreement ("Additional Maintenance Outages"), Seller shall notify EPE of such required maintenance, together with proposed dates for carrying out such additional maintenance and the estimated duration of the work to be carried out. Unless deferral of such maintenance would cause an Emergency Condition, without prejudice to the commitment of Seller in respect of the Committed Net Output, Seller and EPE shall negotiate in good faith a reasonable schedule during which such Additional Maintenance Outages shall take place. If agreement is not reached within twenty (20) Days of receipt of such notice, Seller shall prepare a schedule of such Additional Maintenance Outages based on Good Utility Practices taking into account the reasonable requests of EPE to the extent reasonably possible.

14.7 Access to and Inspection of Facility.

(A) Seller shall provide EPE and its authorized agents, employees and inspectors with reasonable access to the Facility for the purposes set forth in this Article 14.

EPE acknowledges that such access does not provide EPE with the right to direct or modify the operation of the Facility in any way and further acknowledges that any exercise by EPE of its rights under this Section 14.7 shall be at its own risk and expense.

(B) No inspections of the Facility, whether by EPE or otherwise, shall relieve Seller of its obligation to maintain the Facility and operate the same in accordance with Good Utility Practices. In no event shall any statement, representation, or lack thereof by EPE, either express or implied, relieve Seller of its exclusive responsibility for the Facility. Any inspection of property or equipment owned or controlled by Seller by EPE or any review by EPE or consent by EPE to Seller plans, shall not be construed as an endorsement by EPE of the design, fitness or operation of the Facility equipment or a warranty by EPE as to the safety, durability or reliability of the Facility equipment.

#### 14.8 Operating Parameters.

(A) Seller shall: (i) have the sole responsibility to, and shall at its sole expense, operate and maintain the Facility in accordance with all requirements set forth in this Agreement; and (ii) comply with reasonable requirements of EPE regarding Day-to-Day or hour-by-hour communications with EPE. Seller agrees to operate the Facility in such a manner that Net Output delivered by Seller will meet all applicable requirements for voltage level, harmonics, power factor, vars, ancillary services and other electrical specifications required by EPE in accordance with the Interconnection Agreement.

(B) Seller shall operate the Facility in accordance with all system protection equipment as required by the Interconnection Agreement.

14.9 Operating Records. Seller and EPE shall each keep and maintain complete and accurate records and all other data required by each of them for the purposes of proper administration of this Agreement, including such records as may be required by Governmental Authorities and WECC in the prescribed format of those entities. Such requirements shall be specified in the Operating Procedures described in Section 14.2. All records of Seller and EPE pertaining to this Agreement or to the operation of the Facility, as specified herein or otherwise shall be maintained for a period of two (2) years in either hard copy (paper) or in electronic form by Seller at the Facility or at its remote operations center or by EPE, as applicable, in the El Paso, Texas, metropolitan area in such format as may be required by Applicable Law or any Governmental Authority.

14.10 Operating Log. Seller shall maintain an accurate and up-to-date operating log in electronic format as defined in the Operating Procedures, with records of production for each hour and changes in operating status.

14.11 Availability Reporting. Seller shall comply with all current EPE, NERC, and WECC generating unit outage reporting requirements as they may be revised from time to time and as they apply to the Facility. Such outage reporting requirements shall be specified in the Operating Procedures.

14.12 Examination and Retention of Records. Seller or EPE may examine, and each at its own expense obtain copies, of the operating records and data kept by the other Party relating to

transactions under and administration of this Agreement, at any time during the period the records are required to be maintained, upon prior request and during normal business hours. A Party's review of any such data shall in no way relieve the other Party of its responsibility for the professional quality, technical accuracy and completeness of such data. Each Party shall retain such operating records and data for the period of time required by Applicable Law.

14.13 Facility Development Records and Data Submissions. Seller shall submit or cause to be submitted to EPE the following documents on or before the dates specified below:

(1) In addition to the progress reports required under Section 4.4.4, commencing on the Agreement Approval Date and ending on the Commercial Operation Date, (i) a summary of such other reports as are submitted to Seller by its engineer, and (ii) written notification, when and as Seller becomes aware, of any new condition or event that may have a material adverse effect on the timely completion of the Facility.

(2) Seller shall maintain all records, invoices and other information relating to the costs of construction of the Facility. Quarterly, beginning no later than ninety (90) Days after the Agreement Approval Date and ending when all costs have been determined or incurred, a statement from Seller showing the percentage of the level of completion of the Facility (which may be redacted by Seller to remove Seller's or its counterparties' commercially sensitive and proprietary information and to comply with non-disclosure covenants and similar obligations applicable to Seller).

(3) No later than forty-five (45) Days prior to the Commercial Operation Date, (i) evidence demonstrating that Seller has obtained all Governmental Approvals then required to be obtained by Seller for the ownership, operation and maintenance of, and the supply of Net Output from, the Facility in accordance with this Agreement, and (ii) a list identifying the remaining Governmental Approvals for which Seller is responsible under the terms, which Governmental Approvals are not yet required for the operation and maintenance of, and the supply of Net Output from, the Facility, together with a plan reasonably acceptable to EPE for obtaining such Governmental Approvals and an estimate of the time within which such Governmental Approvals will be obtained by Seller.

(4) On or before the Commercial Operation Date, a certificate from its engineer to the effect that, based upon the engineer's monitoring and review of construction, the Facility has been constructed in all material respects in compliance with the development plan for the Facility and all permanent equipment installed as part of the Facility was new (or remanufactured) and unused (as remanufactured, if applicable) when installed.

(5) A certificate dated as of the Commercial Operation Date signed by the representative of Seller, which certificate shall specify that no default or Event of Default by Seller has occurred that would, with or without the giving of notice or passage of time, or both, constitute an Event of Default by Seller.



(6) As soon as available, but not later than sixty (60) Days following the Commercial Operation Date, two (2) copies of all results of Commissioning Tests performed on the Facility, including Commissioning Testing of major equipment included in the Facility and Seller's Interconnection Facilities.

(7) Upon request by EPE, a list of all as-built drawings for the Facility, including the civil and architectural works, and when provided to Seller, a list of all other design and engineering data and information necessary to enable the Operation and Maintenance Contractor to operate and maintain the Facility during any period when such operation and maintenance is required under the Operation and Maintenance Agreement. However, should EPE exercise its rights under this Agreement to operate and/or purchase the Facility, Seller shall immediately provide copies of the aforementioned documents to EPE, and EPE shall utilize such documents on a need-to-know basis for the sole purpose of operating the Facility.

(8) The receipt of the above schedules, data, certificates and reports by EPE shall not (i) be construed as an endorsement by EPE of the design of the Facility, (ii) constitute a warranty by EPE as to the safety, durability or reliability of the Facility, (iii) relieve Seller of any of its obligations or potential liabilities under the Project Contracts, or (iv) except with respect to the obligations of EPE to maintain the confidentiality of documents and information received by it, impose any obligation or liability on EPE.

## **ARTICLE 15 - FORCE MAJEURE**

### **15.1 Definition of a Force Majeure Event.**

(A) The term "Force Majeure Event" means an event not reasonably anticipated as of the date of this Agreement that is beyond the reasonable control of the Party claiming a Force Majeure Event, could not have been avoided by the exercise of due diligence by such Party, is not the result of the fault or negligence of such Party, and which, by the exercise of due diligence, such Party is unable to overcome or obtain or cause to be obtained a commercially reasonable substitute therefor. Force Majeure Events include, without limitation: (i) acts of God; (ii) unusually severe or sudden actions of the elements such as floods, earthquakes, or tornadoes; (iii) lightning, fire, ice storms, or sabotage; (iv) terrorism; (v) war; (vi) riots; (vii) explosion; (viii) blockades or embargoes; (ix) insurrection; (x) strike; (xi) labor slow down or labor disruptions (except when such slow down or disruptions are restricted to such Party's contractors and subcontractors) even if such slow down or disruptions could be resolved by conceding to the demands of a labor group; (xii) actions or inactions by any Governmental Authority taken after the date hereof (excluding (a) actions or inactions by any Governmental Authority in respect of any Additional Consent required to construct or operate the Facility and (b) the adoption or change in any rule or regulation or environmental constraints lawfully imposed by such Governmental Authority), but only if such actions or inactions prevent or delay performance; (xiii) a national, regional, local, or global pandemic as declared by the United States government or the World Health Organization; and (xiv) delays in obtaining goods or services from any material subcontractor or Tier One Supplier caused solely by the

occurrence of any of the events described in the immediately preceding subparts excluding subparts (x) and (xi) to the extent that such events are not specific to such material subcontractor's or Tier One Supplier's personnel at the Site or such subcontractor's or Tier One Supplier's facilities.

(B) The term Force Majeure Event *does not include*: (a) any acts or omissions of any third party, including, without limitation, any vendor, customer, or supplier of Seller, unless such acts or omissions are themselves excused by reason of an event of condition that meets the definition of a Force Majeure Event; (b) any failure or inability to make payments when due; (c) any full or partial curtailment in the electric output of the Facility that is caused by or arises from a mechanical or equipment breakdown or other mishap or events or conditions attributable to normal wear and tear or flaws (unless such mishap is caused by one of the following: (i) acts of God, (ii) unusually severe or sudden actions of the elements, including, but not limited to, floods, hurricanes, or tornadoes, (iii) lightning, fire, ice storms or sabotage, (iv) terrorism, (v) war, (vi) riots, (vii) explosions, (viii) blockades or embargoes, (ix) insurrection, (x) strike, (xi) slowdown or labor disruptions (even if such difficulties could be resolved by conceding to the demands of a labor group) or (xii) emergency orders issued by a Governmental Authority; (d) changes in market conditions that affect the cost of EPE's or Seller's supplies, or that affect demand or price for any of EPE's or Seller's products; or (e) a COVID-19 Event.

#### 15.2 Applicability of Force Majeure.

(A) Except as otherwise provided in this Agreement, neither Party shall be responsible or liable for any delay or failure in its performance under this Agreement, nor shall any delay, failure, or other occurrence or event become a Construction Event of Default, an Operational Event of Default, or an EPE Event of Default, to the extent such delay, failure, occurrence or event is substantially caused by a Force Majeure Event, provided that the notification obligations and terms of Section 15.3(B) and Section 15.4(B) are complied with. A Party claiming that a Force Majeure Event has occurred shall not be entitled to any relief therefor until a conforming notice is provided to the other Party.

(B) Except as otherwise expressly provided for in this Agreement, the existence of a Force Majeure Event shall not relieve the Parties of their obligations under this Agreement to the extent that performance of such obligations is not precluded by a Force Majeure Event, *provided, however*, a Force Majeure Event shall not excuse either Party from any failure or inability to make payments when due.

#### 15.3 Effect of Seller's Force Majeure.

(A) Seller's Notification Obligations. In the event of any delay or nonperformance by Seller resulting from a Force Majeure Event, Seller shall notify EPE in writing as soon as practicable after becoming aware of such occurrence. Within fourteen (14) Days of becoming aware of the occurrence of a Force Majeure Event, Seller shall notify EPE in writing of the nature, cause, date of commencement thereof and the anticipated duration, and shall indicate whether any deadlines or date(s) imposed under this Agreement may be affected thereby. The suspension of performance shall be of no greater

scope and of no greater duration than the cure for the Force Majeure Event requires. Seller shall notify EPE of the cessation of the Force Majeure Event or of the conclusion of Seller's cure for the Force Majeure Event, in either case within two (2) Business Days thereof.

(B) Seller's Duty to Mitigate. Seller shall use commercially reasonable efforts to cure the cause(s) preventing its performance of this Agreement; *provided, however*, that the settlement of strikes, lockouts and other labor disputes shall be entirely within the discretion of Seller, and Seller shall not be required to settle such strikes, lockouts or other labor disputes by acceding to demands which Seller deems to be unreasonable.

(1) Seller's Force Majeure Restoration. In the event that, as a result of one or more Force Majeure Event(s) or its or their effects or by any combination thereof, the construction or operation of the Facility (or any portion thereof) is affected and is not restored or remedied within thirty (30) Days following the date the Force Majeure Event(s) began, then Seller shall prepare and deliver to EPE a Restoration Report pursuant to Section 15.3(E), and Sections 15.3(B)(3) through 15.3(C)(1) shall apply.

(2) Subject to Sections 15.3(B)(3) and 15.3(C), Seller shall proceed with the remedying of the construction or operation of the Facility ("Restoration") in accordance with a schedule contained in the relevant Restoration Report, as defined in Section 15.3(E) (the "Restoration Schedule"). The cost of such Restoration shall be the sole responsibility of Seller; and no compensation shall be payable by EPE to Seller with respect to any damage to the Facility as a result of the Force Majeure Event.

(3) If EPE does not agree with the Restoration Schedule contained in the Restoration Report, then EPE shall notify Seller within fifteen (15) Days of receipt of the Restoration Report and shall, in such notice, propose an alternative Restoration Schedule. If the Parties cannot agree upon a revised Restoration Schedule within the fifteen (15) Day period following the notice, then either Party may submit the matter to mediation pursuant to Section 13.9 to determine the proper Restoration Schedule. Notwithstanding the foregoing, Seller shall, subject to satisfying any of the conditions or requirements of the entity providing the financing for the Restoration (including any insurance company paying a claim to Seller), have the option to proceed with the Restoration while the issue of the Restoration Schedule is being resolved.

(C) If Restoration of the Facility is not technically feasible or the Restoration cost estimate is greater than \$30 Million U.S. Dollars (\$30,000,000), then Seller shall have the right to terminate this Agreement, whereupon EPE shall have the right but not the obligation to purchase the Facility at the greater of Fair Market Value, as determined in a commercially reasonable manner, or the applicable Minimum Amount. Seller shall not be entitled to any compensation from EPE unless EPE elects that Seller shall sell the Facility to EPE or its designee(s).

(1) Where Seller is prevented from complying with its obligations under this Agreement as a result of one or more Force Majeure Event(s) or its or their effects or by any combination thereof for a continuous period of more than three hundred sixty five (365) Days, then Section 15.5 shall apply.

(D) Seller's Restoration Consents. Notwithstanding anything herein to the contrary, Seller shall not be required to proceed with any Restoration unless and until it shall have received all necessary consents from the Facility Lender, Additional Consents and any Governmental Approvals required therewith. If Seller does not receive any such consents from the Facility Lender, Additional Consents or any Governmental Approvals required therewith for any reason (other than an act, omission or default of Seller) within twelve (12) Months (or two (2) Months, in the case of the Facility Lender's consent) after the date that it becomes obligated to proceed with such Restoration, then both Seller and EPE shall have the right to terminate this Agreement. If Seller terminates this Agreement pursuant to this Section 15.3(D), EPE shall have the right but not the obligation to purchase the Facility at the greater of Fair Market Value, as determined in a commercially reasonable manner, or the applicable Minimum Amount.

(E) Preparation of Seller's Restoration Report. When required by Section 15.3(B)(1), Seller shall commence the preparation of an appraisal report (the "Restoration Report") within thirty (30) Days after the date it was required to provide a notice under Section 15.3(A) and shall deliver a copy of such Restoration Report to EPE within sixty (60) Days after provision of such notice was required. The Restoration Report shall be accompanied by reasonable supporting data and certificates and reports of financial and technical advisers of Seller, as appropriate or as reasonably requested by EPE, in support of the Force Majeure Event in question, and shall include (i) a description of such Force Majeure Event and its impact on the Facility, (ii) an estimate in good faith of the time required to restore the Facility (insofar as practicable) to its condition immediately prior to the occurrence of the Force Majeure Event, and (iii) a proposed Restoration Schedule.

(F) Discussion of Seller's Restoration Report. Within fifteen (15) Days of the delivery of a Restoration Report to EPE or such further time as the Parties may agree, the Parties shall meet to discuss the Restoration Report and any action to be taken. Seller shall promptly provide to EPE such additional financial and related information pertaining to the Restoration Report and the matters described therein as EPE may reasonably request in connection with its review of the Restoration Report.

#### 15.4 Effect of EPE's Force Majeure.

(A) EPE's Notification Obligations. In the event of any delay or nonperformance by EPE resulting from a Force Majeure Event, EPE shall notify Seller in writing as soon as practicable after becoming aware of such occurrence. Within fourteen (14) Days of becoming aware of the occurrence of a Force Majeure Event, EPE shall notify Seller in writing of the nature, cause, date of commencement thereof and the anticipated duration, and shall indicate whether any deadlines or date(s) imposed under this Agreement may be affected thereby. The suspension of performance shall be of no greater

scope and of no greater duration than the cure for the Force Majeure Event requires. EPE shall notify Seller of the cessation of the Force Majeure Event or of the conclusion of EPE's cure for the Force Majeure Event, in either case within two (2) Business Days thereof.

(B) EPE's Duty to Mitigate. EPE shall use commercially reasonable efforts to cure the cause(s) preventing its performance of this Agreement; provided, however, that the settlement of strikes, lockouts and other labor disputes shall be entirely within the discretion of EPE, and EPE shall not be required to settle such strikes, lockouts or other labor disputes by acceding to demands which EPE deems to be unreasonable.

15.5 Limitations on Effect of Force Majeure. In no event will any delay or failure of performance caused by a Force Majeure Event extend this Agreement beyond its stated Term. In the event that any delay or failure of performance caused by a Force Majeure Event continues for an uninterrupted period of more than three hundred sixty-five (365) Days from its occurrence or inception, the Party not claiming a Force Majeure Event may, so long as the Force Majeure Event is continuing beyond the three hundred sixty-five (365) Day period (and except under the circumstances provided for in Section 13.2(E)), terminate this Agreement upon no less than sixty (60) Days written notice to the affected Party and without further obligation by either Party, except as to the obligations incurred prior to the effective date of such termination. Once the right to terminate as provided in this Section 15.5 is triggered, the Party with the termination right must exercise such right within sixty (60) Days of the date such right is triggered, and the right to terminate this Agreement with respect to the specific Force Majeure Event shall be waived after the expiration of such sixty (60) Day period. The Party not claiming a Force Majeure Event may, but shall not be obligated to, extend the three hundred sixty-five (365) Day period, for such additional time as it, in its sole discretion, deems appropriate, such additional time not to exceed two (2) years.

## **ARTICLE 16 - REPRESENTATIONS, WARRANTIES AND COVENANTS**

16.1 Seller's Representations, Warranties and Covenants. Seller hereby represents and warrants as follows:

(A) Seller is a Delaware limited liability company, validly existing and in good standing under the laws of the State of its creation. Seller is qualified to do business in each other jurisdiction where the failure to so qualify would have a material adverse effect on the business or financial condition of Seller, and Seller has all requisite power and authority to conduct its business, to own its properties, and to execute, deliver, and perform its obligations under this Agreement.

(B) The execution, delivery, and performance of its obligations under this Agreement by Seller have been duly authorized by all necessary corporate action, and do not and will not:

(1) require any consent or approval by any governing body of Seller, other than that which has been obtained and is in full force and effect (evidence of which shall be delivered to EPE upon its request), except such consents or

approvals as will be obtained by Seller in the ordinary course of business prior to the Commercial Operation Date;

(2) violate any provision of law, rule, regulation, order, writ, judgment, injunction, decree, determination, or award currently in effect having applicability to Seller or violate any provision in any formation documents of Seller, the violation of which could have a material adverse effect on the ability of Seller to perform its obligations under this Agreement;

(3) result in a breach or constitute a default under Seller's formation documents or bylaws, or under any agreement relating to the management or affairs of Seller or any indenture or loan or credit agreement, or any other agreement, lease, or instrument to which Seller is a party or by which Seller or its properties or assets may be bound or affected, the breach or default of which could reasonably be expected to have a material adverse effect on the ability of Seller to perform its obligations under this Agreement; or

(4) result in, or require the creation or imposition of any mortgage, deed of trust, pledge, lien, security interest, or other charge or encumbrance of any nature (other than as may be contemplated by this Agreement) upon or with respect to any of the assets or properties Seller now owns or hereafter acquires, the creation or imposition of which could reasonably be expected to have a material adverse effect on the ability of Seller to perform its obligations under this Agreement.

(C) This Agreement is a valid and binding obligation of Seller, subject to the fulfillment (or waiver) of the conditions precedent set forth in Section 6.1.

(D) The execution and performance of this Agreement will not conflict with or constitute a breach or default under any contract or agreement of any kind to which Seller is a party or any judgment, order, statute, or regulation that is applicable to Seller or the Facility.

(E) To the knowledge of Seller, Seller has identified in Exhibit E all permits, consents, approvals, licenses and authorizations which Seller anticipates will be obtained by Seller in the ordinary course of business, and all permits, consents, approvals, licenses, authorizations, or other action required by any Governmental Authority to authorize Seller's execution, delivery and performance of this Agreement. Seller shall obtain all such permits, consents, approvals, licenses, and authorizations or other action required by any Governmental Authority prior to the date required therefore in order for Commercial Operation of the Facility to occur by the Commercial Operation Milestone. However, failure of Seller to identify a necessary permit, consent, approval, license or authorization in Exhibit E does not relieve Seller of the obligation under this Agreement to obtain all such necessary Governmental Approvals, and Seller shall notify EPE of any such necessary Governmental Approvals not identified in Exhibit E promptly after Seller acquires knowledge thereof.

(F) To the knowledge of Seller, all Required Facility Documents are listed on Exhibit H. Pursuant to the Required Facility Documents, Seller holds as of the Execution Date, or will hold by the Commercial Operation Date (or such other later date as may be specified under Applicable Law), and will maintain for the Term all Required Facility Documents. To the knowledge of Seller, the anticipated use of the Facility complies with all applicable restrictive covenants affecting the Site. Following the Commercial Operation Date, Seller shall promptly notify EPE of any additional Required Facility Documents.

(G) On or before the Commercial Operation Date, Seller shall hold rights sufficient to enable Seller to deliver Net Output at the Designed Maximum Capacity from the Facility to the Point of Delivery pursuant to this Agreement throughout the Term.

(H) Seller has or will obtain all legal rights necessary for the Seller to enter upon and occupy the Site for the purpose of constructing, operating and maintaining the Facility for the Term. Seller shall maintain all leases or other land grants necessary for the construction, operation and maintenance of the Facility as valid for the Term. Upon request by EPE, Seller shall provide copies of all leases of real property required for the operation of the Facility or the performance of any obligations of Seller hereunder, as well as copies of the memoranda of lease recorded in connection with the development of the Facility.

(I) Seller shall comply with all applicable local, state, and federal laws, regulations, and ordinances, including but not limited to equal opportunity and affirmative action requirements and all applicable Environmental Laws presently in effect or which may be enacted during the Term, except to the extent that any failure to comply would not have a material adverse effect on Seller's ability to perform its obligations under this Agreement.

(J) As soon as reasonably practicable after it is known to Seller, Seller shall disclose to EPE the nature and extent of any (i) Environmental Contamination on or relating to the Site (and Seller shall be solely responsible and liable for any corresponding clean-up and remediation costs), (ii) any material violation of any laws or regulations; or (iii) litigation, liens, or encumbrances arising out of the construction or operation of the Facility that could have a material adverse effect on Seller's ability to perform its obligations under this Agreement.

(K) Seller has engaged those professional or other experts it believes necessary to understand its rights and obligations pursuant to this Agreement. All professionals or experts including engineers, attorneys or accountants, that Seller may have consulted or relied on in undertaking the transactions contemplated by this Agreement have been solely those of Seller. In entering into this Agreement and the undertaking by Seller of the obligations set forth herein, Seller has investigated and determined that it is capable of performing hereunder and has not relied upon the advice, experience or expertise of EPE in connection with the transactions contemplated by this Agreement.

(L) All information relating to the Facility, its operation and Output and the Site provided to EPE and contained in this Agreement has been verified by Seller and is true and accurate to the best of Seller's knowledge and belief.

(M) Seller has at all times complied with the Federal Trade Commission requirements set forth in 16 CFR Part 260 in any communications concerning the Facility, the Output, and the Environmental Attributes that have or may be generated from the Facility. Seller has not claimed the Environmental Attributes, RECs, or other "renewable energy," "green energy," "clean energy" or similar attributes of the Output or the Facility as belonging to the Seller or any Affiliate of Seller and is not aware of any such claims made by third parties with respect to the Facility or the Output.

16.2 EPE's Representations, Warranties and Covenants. EPE hereby represents and warrants as follows:

(A) EPE is a corporation duly organized, validly existing and in good standing under the laws of the State of Texas and is qualified in each other jurisdiction where the failure to so qualify would have a material adverse effect upon the business or financial condition of EPE. EPE has all requisite power and authority to conduct its business, to own its properties, and to execute, deliver, and perform its obligations under this Agreement.

(B) Upon the receipt of the EPE Board Approval, then, from and after the time that EPE receives the EPE Board Approval, the execution, delivery, and performance of its obligations under this Agreement by EPE have been duly authorized by all necessary corporate action, and do not and will not:

(1) require any consent or approval of EPE's Board of Directors, or shareholders, other than that which has been obtained and is in full force and effect (evidence of which shall be delivered to Seller upon its request);

(2) violate any provision of law, rule, regulation, order, writ, judgment, injunction, decree, determination, or award currently in effect having applicability to EPE or violate any provision in any corporate documents of EPE, the violation of which could have a material adverse effect on the ability of EPE to perform its obligations under this Agreement;

(3) result in a breach or constitute a default under EPE's corporate charter or bylaws, or under any agreement relating to the management or affairs of EPE, or any indenture or loan or credit agreement, or any other agreement, lease, or instrument to which EPE is a party or by which EPE or its properties or assets may be bound or affected, the breach or default of which could reasonably be expected to have a material adverse effect on the ability of EPE to perform its obligations under this Agreement; or

(4) result in, or require the creation or imposition of, any mortgage, deed of trust, pledge, lien, security interest, or other charge or encumbrance of any nature (other than as may be contemplated by this Agreement) upon or with respect to any



of the assets or properties of EPE now owned or hereafter acquired, the creation or imposition of which could reasonably be expected to have a material adverse effect on the ability of EPE to perform its obligations under this Agreement.

(C) This Agreement is a valid and binding obligation of EPE, subject to the fulfillment (or waiver) of the conditions precedent set forth in Section 6.1.

(D) The execution and performance of this Agreement will not conflict with or constitute a breach or default under any contract or agreement of any kind to which EPE is a party or any judgment, order, statute, or regulation that is applicable to EPE.

(E) To the knowledge of EPE, all approvals, authorizations, consents, or other action required by any Governmental Authority to authorize EPE's execution, delivery and performance of this Agreement, have been duly obtained and are in full force and effect.

## ARTICLE 17 - INSURANCE

17.1 Evidence of Insurance. Seller shall pursuant to the requirements of Section 4.9(C) and within thirty (30) Days of each insurance program renewal during the Term, provide EPE with copies of certificates of insurance evidencing that insurance coverages specific to the Facility are in compliance with the specifications for insurance coverage required for the Facility as set forth in Exhibit D. Such certificates shall (a) provide that EPE shall receive thirty (30) Days prior written notice of non-renewal, cancellation of, or significant modification to any of the corresponding policies (except that such notice shall be ten (10) Days for non-payment of premiums), and (b) provide a waiver of any rights of subrogation against EPE, its Affiliates and their officers, directors, agents, subcontractors, and employees. All policies shall be written with insurers that EPE, in its reasonable discretion, deems acceptable (such acceptance will not be unreasonably withheld). All policies shall be written on an occurrence basis, except as provided in Section 17.2. All policies shall contain an endorsement that Seller's policy shall be primary in all instances regardless of like coverage, if any, carried by EPE. Seller's liability under this Agreement is not limited to the amount of insurance coverage required herein.

### 17.2 Term and Modification of Insurance.

(A) All insurance required under this Agreement shall cover occurrences during the Term and claims for events occurring during the Term for a period of two (2) years after the Term. In the event that any insurance as required herein is commercially available only on a "claims-made" basis, such insurance shall provide for a retroactive date not later than the Execution Date, and such insurance shall be maintained by Seller, with a retroactive date not later than the retroactive date required above, for a minimum of five (5) years after the Term. Any insurer shall carry at least an A.M. Best rating of A-IX or better and must include EPE as an additional insured. A waiver of subrogation will also be required.

(B) EPE shall have the right, at times deemed appropriate to EPE during the Term, to request Seller to modify the insurance minimum limits specified in Exhibit D in order to maintain reasonable coverage amounts. Seller shall comply with such request if commercially reasonable.

(C) If any insurance required to be maintained by Seller under this Agreement ceases to be reasonably available and commercially feasible in the commercial insurance market, Seller shall provide written notice to EPE, accompanied by a certificate from an independent insurance advisor of recognized national standing, certifying that such insurance is not reasonably available and commercially feasible in the commercial insurance market for electric generating plants of similar type, geographic location and design. Upon receipt of such notice, Seller shall use commercially reasonable efforts to obtain other insurance that would provide comparable protection against the risk to be insured, and EPE shall not unreasonably withhold its consent to modify or waive such requirement.

17.3 Endorsements to Fire and All-Perils and Machinery Breakdown Policies. Upon the Facility's Commercial Operation Date, Seller shall insure (or ensure that coverage is otherwise in place to insure) the Facility against all risks of physical loss or damage, including machinery breakdown in the form of all risk property insurance and shall also maintain business interruption/extra expense endorsements as set forth in Exhibit D, and such coverage shall be reasonable and customary in the power generation industry for projects of the size and scope of the Facility and, further, Seller shall cause its insurers and brokers to provide EPE with the standard thirty (30) Days' notice for any cancellation or non-renewal (or ten (10) Days' notice for non-payment of premium) of such policies and shall name EPE as an additional insured, as its interests may appear.

17.4 Insurance Reports. Seller shall provide EPE with copies of any technical underwriters' reports or other technical reports received by it from any insurer; provided, however, that EPE shall not disclose such reports to any other Person except as necessary in connection with administration and enforcement of this Agreement or as may be required by any Governmental Authority or other relevant authority having jurisdiction over EPE, and shall use and internally distribute such reports only as necessary in connection with the administration and enforcement of this Agreement.

## **ARTICLE 18 – INDEMNITY**

18.1 Indemnification. EACH PARTY (THE “INDEMNIFYING PARTY”) AGREES TO INDEMNIFY, DEFEND AND HOLD HARMLESS THE OTHER PARTY (THE “INDEMNIFIED PARTY”) FROM AND AGAINST ALL THIRD PARTY CLAIMS, DEMANDS, LOSSES, LIABILITIES, PENALTIES, AND EXPENSES (INCLUDING REASONABLE ATTORNEYS' FEES) TO THE EXTENT ARISING OUT OF, RESULTING FROM, OR CAUSED BY: (A) CONSTRUCTION EVENTS OF DEFAULT, OPERATIONAL EVENTS OF DEFAULT, OR EPE EVENTS OF DEFAULT, AS APPLICABLE; (B) VIOLATION OF ANY APPLICABLE ENVIRONMENTAL LAWS; OR (C) THE NEGLIGENT OR TORTIOUS ACTS, ERRORS, OR OMISSIONS OF THE INDEMNIFYING PARTY, ITS AFFILIATES, ITS DIRECTORS, OFFICERS, EMPLOYEES, OR AGENTS IN PERFORMING ITS OBLIGATIONS UNDER THIS AGREEMENT OR ITS FAILURE TO ABIDE BY THE PROVISIONS OF THIS AGREEMENT. NOTHING IN THIS Article 18 SHALL ENLARGE OR RELIEVE SELLER OR EPE OF ANY LIABILITY TO THE OTHER FOR ANY BREACH OF THIS AGREEMENT. NEITHER PARTY SHALL BE INDEMNIFIED FOR ITS DAMAGES RESULTING FROM ITS OWN NEGLIGENCE, INTENTIONAL ACTS

OR WILLFUL MISCONDUCT. THESE INDEMNITY PROVISIONS SHALL NOT BE CONSTRUED TO RELIEVE ANY INSURER OF ITS OBLIGATION TO PAY CLAIMS CONSISTENT WITH THE PROVISIONS OF A VALID INSURANCE POLICY.

18.2 Indemnification for Fines and Penalties. Except as otherwise provided in Sections 11.7(B) and 20.3, any fines or other penalties incurred by a Party (other than fines or penalties due to the negligence or intentional acts or omissions of the other Party) for non-compliance with any municipal, state or federal laws shall be the sole responsibility of the non-complying Party.

18.3 Notice of Claim, Loss or Proceeding. Each Party shall promptly notify the other Party in writing of any claim, loss, suit, or administrative or legal proceeding in respect of which such notifying Party is or may be entitled to indemnification pursuant to Section 18.1 (an “Indemnification Event”). Such notice shall be given as soon as reasonably practicable after the relevant Party becomes aware of the Indemnification Event and that such Indemnification Event may give rise to an indemnification, but in any event no later than seven (7) Days after the Party seeking indemnification has notice or becomes aware of the Indemnification Event. The delay or failure of such Indemnified Party to provide the notice required pursuant to this Section 18.3 to the other Party shall not release the other Party from any indemnification obligation which it may have to such Indemnified Party except (i) to the extent that such failure or delay materially and adversely affects the Indemnifying Party’s ability to defend such Indemnification Event or increases the amount of the loss, and (ii) that the Indemnifying Party shall not be liable for any costs or expenses of the Indemnified Party in the defense of the Indemnification Event during such period of failure or delay.

18.4 Defense of Claims.

(A) Claim, Loss or Proceeding. Promptly after receipt by a Party of notice of an Indemnification Event, the Indemnifying Party shall have the option to assume the defense of the Indemnification Event, with counsel designated by such Indemnifying Party, *provided, however,* the Indemnified Party shall have the right to select and be represented by separate counsel if: (i) the Indemnified Party shall have reasonably concluded and specifically notified the Indemnifying Party that there may be specific defenses available to it which are different from or additional to those available to the Indemnifying Party, or that such Indemnification Event involves or could have a material adverse effect upon the Indemnified Party beyond the scope of this Agreement, unless a liability insurer is willing to cover such effects; or (ii) the Indemnified Party shall have reasonably concluded and specifically notified the Indemnifying Party that there may be a conflict of interest between the Indemnifying Party and the Indemnified Party in the conduct of the defense of such Indemnification Event. If the Indemnified Party has the right to select and be represented by separate counsel as provided herein, then counsel for the Indemnified Party shall have the right to direct the defense of the Indemnification Event on behalf of the Indemnified Party and, to the extent possible, shall coordinate with counsel representing the Indemnifying Party.

(B) Unless and until the Indemnifying Party assumes control of the defense of an Indemnification Event in accordance with Section 18.4(A), the Indemnified Party shall

have the right, but not the obligation, to contest, defend and litigate, with counsel of its own selection, any such Indemnification Event, and the reasonable costs and expenses thereof shall be subject to the indemnification obligations of the Indemnifying Party hereunder.

(C) Neither the Indemnifying Party nor the Indemnified Party shall be entitled to settle or compromise any Indemnification Event without the prior consent of the other; *provided, however*, that after agreeing in writing to indemnify the Indemnified Party, the Indemnifying Party may settle or compromise any claim without the approval of such Indemnified Party. Except where such consent is unreasonably withheld, if the Indemnified Party settles or compromises an Indemnification Event without the prior consent of the Indemnifying Party, the Indemnifying Party shall be excused from any indemnification obligation in respect of such settlement or compromise.

18.5 Subrogation. Upon payment of any indemnification pursuant to Section 18.1, the Indemnifying Party, without any further action, shall be subrogated to any and all claims that the Indemnified Party may have relating thereto, and the Indemnified Party shall, at the request and expense of the Indemnifying Party, cooperate with the Indemnifying Party and give at the request and expense of the Indemnifying Party such further assurances as are necessary or advisable to enable the Indemnifying Party vigorously to pursue such claims.

#### **ARTICLE 19 - ASSIGNMENT AND OTHER TRANSFER RESTRICTIONS**

19.1 No Assignment Without Consent. Except as permitted in this Article 19, neither Party shall assign this Agreement or any portion thereof, without the prior written consent of the other Party, which consent shall not be unreasonably withheld, delayed or conditioned. Assignment of this Agreement or any portion thereof shall be permitted without the prior written consent of the other Party under the following circumstances:

(A) No consent to assignment shall be required for a Party to assign this Agreement to an Affiliate of such Party.

(B) EPE's consent shall not be required for Seller to assign this Agreement for collateral purposes to the Facility Lender. Seller shall notify EPE, pursuant to Section 20.4, of any such assignment to the Facility Lender no later than twenty (20) Days prior to the assignment.

In addition, the following conditions shall apply to all assignments, except as otherwise specified: (i) for assignments other than to a Facility Lender (which are addressed in Section 19.1(B)), at least thirty (30) Days' prior notice of any such assignment is given to the other Party; (ii) any assignee expressly assumes the assignor's obligations under this Agreement, unless otherwise agreed to by the other Party, and no assignment, whether or not consented to, shall relieve the assignor of its obligations under this Agreement in the event the assignee fails to perform, unless the other Party agrees in writing in advance to waive the assignor's continuing obligations pursuant to this Agreement; (iii) no such assignment impairs any security given by Seller under this Agreement; (iv) EPE shall be reimbursed for any direct and indirect costs associated with any such assignment, whether or not completed; and (v) before the Agreement is assigned by Seller, the

assignee first obtains such approvals as may be required by all applicable Governmental Authorities; *provided, however*, that clauses (i) and (ii) of this Section 19.1 shall not apply to the collateral assignment of this Agreement by Seller to a Facility Lender pursuant to Section 19.1(B).

19.2 Accommodation of Facility Lender.

(A) EPE acknowledges that upon an event of default under any Financing Documents relating to the Facility, any of the Facility Lenders may (but shall not be obligated to) assume all of the interests, rights and obligations of Seller thereafter arising under this Agreement, *provided* that, regardless of whether any such Facility Lender assumes all of the interests, rights and obligations of Seller thereafter arising under this Agreement, EPE's interests, rights and obligations under this Agreement will remain in full force and effect.

(B) To facilitate Seller's obtaining of financing of the Facility, EPE shall make commercially reasonable efforts to provide such consents to collateral assignment (a "Lender Consent"), certifications, representations, information, opinions, warranties or other documents as may be commercially reasonably requested by Seller or the Facility Lender in connection with the financing of the Facility; *provided, however*, that in responding to any such request, EPE shall have no obligation to provide any consent, certification, representation, information or other document, or enter into any agreement, that adversely affects any of EPE's rights, benefits, risks and/or obligations under this Agreement, and *provided further*, that in the case of a Seller Event of Default, EPE shall provide the Facility Lenders (if any) with notice of such Event of Default and the Facility Lenders shall have the right (but not the obligation) for thirty (30) Days after receipt of such notice to cure all such Seller Events of Default on behalf of Seller. Seller shall reimburse, or shall cause the Facility Lender to reimburse, EPE for the incremental direct expenses (including the reasonable fees and expenses of counsel) incurred by EPE in the preparation, negotiation, execution and/or delivery of the Lender Consent or any other documents requested by Seller or the Facility Lender, and provided by EPE, pursuant to this Section 19.2(B).

19.3 Restriction on Transfers. Except as otherwise permitted by this Agreement, (A) Seller may not sell the Facility, and (B) after the Commercial Operation Date, Hecate Energy Holdings LLC (the "Parent") may not, directly or indirectly, transfer all or a majority portion of the equity interests (the "Interests") in Seller, without the prior written consent of EPE. After the Commercial Operation Date, none of the Interests may be transferred, directly or indirectly, to any non-Affiliate of Seller without the prior written consent of EPE, not to be unreasonably withheld, conditioned or delayed. In the event that a Parent should pledge or otherwise encumber any of its Interests as security for the payment of indebtedness under the Financing Documents, any such pledge or hypothecation shall be made pursuant to a pledge or hypothecation agreement that requires the pledgee or secured party to be bound by all of the terms and conditions of this Article 19, subject to such modifications as a lender or other financing party or investor may reasonably request. Notwithstanding the foregoing, the restrictions in this Section 19.3 shall not apply to transactions and transfers occurring prior to the Commercial Operation Date or otherwise to accommodate financing of the Facility prior to the Commercial Operation Date.

19.4 Permitted Transfers. Subject to the conditions and restrictions set forth in this Article 19 and written notice to EPE not less than ten (10) Days prior to a transfer (except in the case of a transfer under clause (C) of this Section 19.4, for which notice shall be provided not less than five (5) Days after the public announcement thereof), (A) Parent may at any time transfer all or any portion of its Interests to any Affiliate of Parent, (B) Seller may at any time transfer all or any portion of its ownership interest in the Facility to any Affiliate of Seller, (C) the Interests may be transferred in connection with a change in control of the Parent or its successors (*provided* no such transfer impairs any security given by Seller under this Agreement), and (D) the Interests may be transferred prior to the Commercial Operation Date or otherwise to accommodate financing of the Facility prior to the Commercial Operation Date (any such transfer being referred to in this Agreement as a “Permitted Transfer”).

19.5 Transfer without Consent is Null and Void. Any sale, transfer, or assignment of (a) the Interests, (b) any interest in the Facility, or (c) this Agreement made in contravention of the terms and conditions set forth in this Article 19 shall be null and void and shall constitute an Event of Default pursuant to Article 13.

19.6 Reimbursement for EPE’s Costs from Transfers or Assignments. Seller agrees that, in the event Seller assigns or transfers an interest in the Facility or the Agreement, as such transactions are described Article 19, Seller shall be responsible for costs incurred by EPE, including reimbursement of costs, expenses and reasonable attorneys’ fees incurred to effectuate the consent to such proposed transaction.

## ARTICLE 20 - MISCELLANEOUS

20.1 Waiver. Unless specifically provided otherwise in this Agreement, the failure of either Party to enforce or insist upon compliance with or strict performance of any of the terms or conditions of this Agreement, or to take advantage of any of its rights under this Agreement, shall not constitute a waiver or relinquishment of any such terms, conditions, or rights, but the same shall be and remain at all times in full force and effect.

### 20.2 Taxes.

(A) Seller shall be solely responsible for:

(1) any and all present or future taxes and other impositions of Governmental Authorities relating to the construction, ownership or leasing, operation or maintenance of the Facility, the Site, or any components or appurtenances thereof, including, without limitation, taxes and impositions that vary based upon the amount of power produced;

(2) any and all present or future taxes and other impositions of Governmental Authorities on or with respect to the energy generated by the Facility or the transaction under this Agreement arising up to the Point of Delivery, including *ad valorem* taxes; and

(3) all *ad valorem* taxes relating to the Facility except for *ad valorem* taxes on or with respect to the energy generated by the Facility or the transaction under this Agreement arising at or beyond the Point of Delivery.

(B) Seller shall not be responsible for payment of gross receipts taxes on energy sales to EPE.

(C) EPE shall be solely responsible for any and all present or future taxes and other impositions of Governmental Authorities on or with respect to the energy generated by the Facility or the transaction under this Agreement arising at or beyond the Point of Delivery, including *ad valorem* taxes.

(D) In the event EPE is required by law or regulation to remit or pay such taxes or other impositions of Governmental Authorities that are Seller's responsibility pursuant to Section 20.2(A), Seller shall promptly reimburse EPE for such amounts. If Seller is required by law or regulation to remit or pay such taxes or other impositions of Governmental Authorities that are EPE's responsibility pursuant to Section 20.2(C), EPE shall promptly reimburse Seller for such amounts. Either Party may offset such amounts against any undisputed amounts owed to it by the other Party, as provided in Section 10.3(A).

(E) The Parties shall cooperate to minimize tax exposure; however, neither Party shall be obligated to incur any financial burden to reduce taxes for which the other Party is responsible under this Agreement.

20.3 Monetary Penalties. If fees, fines, penalties, or costs are claimed or assessed against EPE or Seller by any Governmental Authority that are in whole or in part contributed to or due to noncompliance by the other Party with this Agreement, any requirements of law, any permit or contractual obligation, the other Party shall promptly reimburse EPE or Seller for related monetary penalties to the extent of such contribution or attribution.

20.4 Notices in Writing. Notices required by this Agreement shall be addressed to the Party's representative named in Exhibit C at the addresses noted in such Exhibit C. Any notice, request, consent, or other communication required or authorized under this Agreement to be given by one Party to the other Party shall be in writing. It shall either be hand delivered or mailed, postage paid, to the representative of the other Party. If mailed, the notice, request, consent or other communication shall be simultaneously sent by facsimile or other electronic means. Any such notice, request, consent, or other communication shall be deemed to have been received by the Close of the Business Day on which it was hand delivered or transmitted electronically (unless hand delivered or transmitted after such close, in which case it shall be deemed received at the close of the next Business Day). Real-time or routine communications concerning Facility operations shall be exempt from this Section 20.4.

20.5 Exhibit Changes. Either Party may change its representative or the information for its notice addresses in Exhibit C at any time without the approval of the other Party. Exhibit A, Exhibit B, Exhibit F, Exhibit G, and Exhibit H may be changed at any time with the mutual consent of both Parties. Exhibit D may be changed in accordance with Section 17.2(B). Exhibit E

may be changed by Seller prior to the date set forth in such exhibit. A Party making a change that does not require the consent of the other Party shall provide thirty (30) Days' notice of the change to the other Party.

20.6 Other Changes.

(A) The terms and conditions and the rates for service specified in this Agreement shall remain in effect for the term of the transaction described herein. Absent the Parties' written agreement, this Agreement shall not be subject to change by application of either Party pursuant to Sections 205 or 206 of the Federal Power Act.

(B) Absent the written agreement of all entities to a proposed change, the standard of review for changes to this Agreement whether proposed by a Party, a non-party, or the FERC acting *sua sponte* shall be the "public interest" standard of review set forth in *United Gas Pipe Line v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) as clarified by *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish*, 554 U.S. 527 (2008) (known as the "Mobile-Sierra doctrine").

20.7 Disclaimer of Third Party Beneficiary Rights. In executing this Agreement, EPE does not, nor should it be construed to, extend its credit or financial support for the benefit of any third parties lending money to or having other transactions with Seller. Nothing in this Agreement shall be construed to create any duty to, or standard of care with reference to, or any liability to, any person not a Party to this Agreement.

20.8 Relationship of the Parties.

(A) This Agreement shall not be interpreted to create an association, joint venture, or partnership between the Parties or to impose any partnership obligation or liability upon either Party. Neither Party shall have any right, power, or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as an agent or representative of, the other Party.

(B) Seller shall be solely liable for the payment of all wages, taxes, and other costs related to the employment of persons to perform such services, including all federal, state, and local income, social security, payroll, and employment taxes and statutorily mandated workers' compensation coverage. None of the persons employed by Seller shall be considered employees of EPE for any purpose; nor shall Seller represent to any person that he or she is or shall become an EPE employee.

20.9 Equal Employment Opportunity Compliance Certification. Seller acknowledges that, as a government contractor, EPE is subject to various federal laws, executive orders, and regulations regarding equal employment opportunity and affirmative action. All applicable equal employment opportunity and affirmative action clauses shall be deemed to be incorporated herein as required by federal laws, executive orders, and regulations, including, but not limited to, 41 C.F.R. § 60 1.4(a)(1-7) but shall not thereby apply to Seller.



20.10 Survival of Obligations. Cancellation, expiration, or earlier termination of this Agreement shall not relieve the Parties of obligations that by their nature should survive such cancellation, expiration, or termination, prior to the term of the applicable statute of limitations, including without limitation warranties, remedies, or indemnities, which shall survive for the period of the applicable statute(s) of limitation. Applicable provisions of this Agreement shall continue in effect after termination, including early termination, to the extent necessary to enforce or complete the duties, obligations or responsibilities of the Parties arising prior to termination and, as applicable, to provide for final billings and adjustments related to the period prior to termination, payment of any money due and owing to either Party pursuant to this Agreement, payment of principal and interest associated with the Security Fund, and the indemnifications specified in this Agreement.

20.11 Severability. In the event any of the terms, covenants, or conditions of this Agreement, its Exhibits, or the application of any such terms, covenants, or conditions, shall be held invalid, illegal, or unenforceable by any court or administrative body having jurisdiction, all other terms, covenants, and conditions of the Agreement and their application not adversely affected thereby shall remain in force and effect; *provided, however*, that EPE and Seller shall negotiate in good faith to attempt to implement an equitable adjustment in the provisions of this Agreement with a view toward effecting the purposes of this Agreement by replacing the provision that is held invalid, illegal, or unenforceable with a valid provision the economic effect of which comes as close as possible to that of the provision that has been found to be invalid, illegal or unenforceable.

20.12 Complete Agreement; Amendments. The terms and provisions contained in this Agreement and its Exhibits constitute the entire agreement between EPE and Seller with respect to the sale of Net Output from the Facility and shall supersede all previous communications, representations, or agreements, either verbal or written, between EPE and Seller with respect to the sale of Net Output from the Facility. This Agreement may be amended, changed, modified, or altered, provided that such amendment, change, modification, or alteration shall be in writing and signed by both Parties hereto, and provided further, that the Exhibits attached hereto may be changed according to the provisions of Section 20.5.

20.13 Binding Effect. This Agreement, as it may be amended from time to time pursuant to this Section 20.12, shall be binding upon and inure to the benefit of the Parties hereto and their respective successors in interest, legal representatives, and permitted assigns.

20.14 Headings. Captions and headings used in this Agreement are for ease of reference only and do not constitute a part of this Agreement.

20.15 Counterparts. This Agreement may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument.

20.16 Governing Law. The interpretation and performance of this Agreement and each of its provisions shall be governed and construed in accordance with the laws of the State of New Mexico.

20.17 Choice of Forum. EACH PARTY IRREVOCABLY CONSENTS AND AGREES THAT ANY LEGAL ACTION OR PROCEEDING ARISING OUT OF THIS AGREEMENT OR THE ACTIONS OF THE PARTIES LEADING UP TO THE AGREEMENT SHALL BE BROUGHT EXCLUSIVELY IN THE DISTRICT COURTS OF EL PASO COUNTY, TEXAS, OR THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION. BY EXECUTION AND DELIVERY HEREOF, EACH PARTY (A) ACCEPTS THE EXCLUSIVE JURISDICTION OF ANY SUCH COURT AND WAIVES ANY OBJECTION THAT IT MAY NOW OR HEREAFTER HAVE TO THE EXERCISE OF PERSONAL JURISDICTION BY ANY SUCH COURT OVER EACH PARTY FOR THE PURPOSE OF ANY PROCEEDING RELATED TO THIS AGREEMENT, (B) IRREVOCABLY AGREES TO BE BOUND BY ANY FINAL JUDGMENT (AFTER ANY AND ALL APPEALS) OF ANY SUCH COURT ARISING OUT OF SUCH DOCUMENTS OR ACTIONS, (C) IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, ANY OBJECTION THAT IT MAY NOW OR HEREAFTER HAVE TO THE LAYING OF VENUE OF ANY SUIT, ACTION OR PROCEEDINGS ARISING OUT OF SUCH DOCUMENTS BROUGHT IN ANY SUCH COURT (INCLUDING ANY CLAIM THAT ANY SUCH SUIT, ACTION OR PROCEEDING HAS BEEN BROUGHT IN AN INCONVENIENT FORUM) IN CONNECTION HERewith, (D) AGREES THAT SERVICE OF PROCESS IN ANY SUCH ACTION MAY BE EFFECTED BY MAILING A COPY THEREOF BY REGISTERED OR CERTIFIED MAIL, POSTAGE PREPAID, TO SUCH PARTY AT ITS ADDRESS AS SET FORTH HEREIN, AND (E) AGREES THAT NOTHING HEREIN SHALL AFFECT THE RIGHT TO EFFECT SERVICE OF PROCESS IN ANY OTHER MANNER PERMITTED BY LAW.

20.18 Waiver of Jury Trial. EACH PARTY KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND IRREVOCABLY WAIVES THE RIGHT TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON THIS AGREEMENT, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT AND ANY AGREEMENT EXECUTED OR CONTEMPLATED TO BE EXECUTED IN CONJUNCTION WITH THIS AGREEMENT, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY. THIS PROVISION IS A MATERIAL INDUCEMENT TO EACH OF THE PARTIES FOR ENTERING INTO THIS AGREEMENT. EACH PARTY HEREBY WAIVES ANY RIGHT TO CONSOLIDATE ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR ANY OTHER AGREEMENT EXECUTED OR CONTEMPLATED TO BE EXECUTED IN CONJUNCTION WITH THIS AGREEMENT, OR ANY MATTER ARISING HEREUNDER OR THEREUNDER, WITH ANY PROCEEDING IN WHICH A JURY TRIAL HAS NOT OR CANNOT BE WAIVED. THIS SECTION 20.18 WILL SURVIVE THE EXPIRATION OR TERMINATION OF THIS AGREEMENT.

20.19 Confidentiality.

(A) For purposes of this Section 20.19, “Disclosing Party” refers to the Party disclosing information to the other Party, and the term “Receiving Party” refers to the Party receiving information from the other Party.

(B) Other than in connection with this Agreement or as otherwise required by Applicable Law, the Receiving Party shall not use the Confidential Information (as defined in Section 20.19(D)) and shall keep the Confidential Information confidential. The Confidential Information may be disclosed to the Receiving Party's or its affiliates' directors, officers, employees, financial advisors, legal counsel and accountants, Facility Lenders or potential Facility Lenders (collectively, "Representatives"), but only if such Representatives need to know the Confidential Information in connection with this Agreement. The Parties agree that (i) such Representatives will be informed by the Receiving Party of the confidential nature of the Confidential Information and the requirement and the limitations of its use, (ii) such Representatives will be required to agree to and be bound by the terms of this Section 20.19 as a condition of receiving the Confidential Information, and (iii) in any event, the Receiving Party will be responsible for any disclosure of Confidential Information, or any other breach of confidentiality provisions of this Agreement, by any of its Representatives. The Receiving Party shall not disclose the Confidential Information to any Person other than as permitted hereby, and shall safeguard the Confidential Information from unauthorized disclosure using the same degree of care as it takes to preserve its own confidential information (but in any event no less than a reasonable degree of care). To the extent the Receiving Party is required to submit Confidential Information of the Disclosing Party to a Governmental Authority, the Receiving Party shall cooperate in good faith with the Disclosing Party to maintain the confidentiality of such Confidential Information by requesting confidential treatment with all filings to the extent appropriate and permitted by Applicable Law.

(C) If the Receiving Party or its Representatives are requested or required (by oral question, interrogatories, requests for information or documents, subpoena, civil investigative demand or similar process, or by applicable law) to disclose any Confidential Information, the Receiving Party shall promptly notify the Disclosing Party of such request or requirement, if that notification can be made without violating the terms of such compelled disclosure, so that the Disclosing Party may seek an appropriate protective order to protect the confidentiality of the Confidential Information or waive compliance with this Section 20.19 with respect to such disclosure. If, in the absence of a protective order or the receipt of a waiver under this Agreement, the Receiving Party or its Representatives are, in the opinion of their legal counsel, compelled to disclose the Confidential Information, the Receiving Party and its Representatives may disclose only such of the Confidential Information to the party compelling disclosure as is required by law and, in connection with such compelled disclosure, the Receiving Party and its Representatives shall use their reasonable efforts to obtain from the party to whom disclosure is made written assurance that confidential treatment will be accorded to such portion of the Confidential Information as is disclosed.

(D) As used in this Section 20.19, "Confidential Information" means all information that is furnished in connection with this Agreement to the Receiving Party or its Representatives by the Disclosing Party, or to which the Receiving Party or its Representatives have access by virtue of this Agreement (in each case, whether such information is furnished or made accessible in writing, orally, visually or by any other (including electronic) means), or which concerns this Agreement, the Disclosing Party or the Disclosing Party's stockholders, members, affiliates or subsidiaries, and which is

designated by the Disclosing Party at the time of its disclosure, or promptly thereafter, as “confidential” (whether by stamping any such written material or by memorializing in writing the confidential nature of any such oral or visual information). Any such Confidential Information furnished to the Receiving Party or its Representatives by a director, officer, employee, affiliate, stockholder, consultant, agent or Representative of the Disclosing Party will be deemed furnished by the Disclosing Party for the purpose of this Agreement. To protect its Confidential Information from disclosure, Seller shall have to right to redact or withhold information that constitutes proprietary or commercially sensitive information of Seller or its counterparties, or as necessary to comply with non-disclosure or similar obligations applicable to Seller. Notwithstanding the foregoing, the following will not constitute Confidential Information for purposes of this Agreement:

(1) information that is or becomes generally available to the public other than as a result of a disclosure or other act by the Receiving Party or its Representatives;

(2) information that can be shown by the Receiving Party to have been already known to the Receiving Party on a non-confidential basis prior to being furnished to the Receiving Party by the Disclosing Party;

(3) information that becomes available to the Receiving Party on a non-confidential basis from a source other than the Disclosing Party or a representative of the Disclosing Party if, to the Receiving Party’s knowledge, such source was not subject to any prohibition against transmitting the information to the Receiving Party; and

(4) information developed by the Parties during the negotiation of this Agreement that relates solely to this Agreement (as opposed to confidential business or operating information of either Party, including pricing), which information shall be deemed proprietary to both Parties, each of whom shall be free to use such information, as they would any information already known to the Parties prior to the negotiation of this Agreement.

(E) The Confidential Information will remain the property of the Disclosing Party. Any Confidential Information that is reduced to writing, except for that portion of the Confidential Information that may be found in analyses, compilations, studies or other documents prepared by or for the Receiving Party in connection with this Agreement, will be returned to the Disclosing Party immediately upon its request after expiration or termination of this Agreement, unless such Confidential Information has been destroyed by the Receiving Party, and no copies will be retained by the Receiving Party or its Representatives, unless the Parties agree otherwise. That portion of the Confidential Information that may be found in analyses, compilations, studies or other documents prepared by or for the Receiving Party, oral or visual Confidential Information, and written Confidential Information not so required to be returned will be held by the Receiving Party and kept subject to the terms of this Agreement, or destroyed.

(F) It is understood and agreed that neither this Agreement nor disclosure of any Confidential Information by the Disclosing Party to the Receiving Party shall be construed as granting to the Receiving Party or any of its Representatives any license or rights in respect of any part of the Confidential Information disclosed to it, including any trade secrets included in any such Confidential Information.

(G) The Parties acknowledge that EPE is required by law or regulation to report certain information that is or could otherwise embody Confidential Information from time to time. Such reports include models, filings, reports of EPE's net power costs, general rate case filings, power cost adjustment mechanisms, FERC-required reporting such as those made on FERC Form 1 or Form 714, market power and market monitoring reports, annual state reports that include resources and loads, integrated resource planning reports, reports to entities such as NERC, WECC, WREGIS, or similar or successor organizations, forms, filings, or reports, the specific names of which may vary by jurisdiction, along with supporting documentation. Additionally, in regulatory proceedings in all state and federal jurisdictions in which it does business, EPE will from time to time be required to produce Confidential Information. EPE may use its business judgment in its compliance with all of the foregoing and the appropriate level of confidentiality it seeks for such disclosures. EPE may submit Confidential Information in regulatory proceedings without notice to Seller, provided that EPE submits such Confidential Information under seal or subject to a reasonable protective order or confidentiality or non-disclosure agreement. Seller agrees to intervene in all proceedings necessary to secure State Regulatory Approval. Seller shall solely be responsible for seeking and defending protective orders at its sole cost for its Confidential Information that may be subject to disclosure during the proceeding. Seller further does not object to the release of information required by Sections 17.9.551.8(D) and 17.9.551.11(C) New Mexico Code Annotated or other Applicable Law.

(H) Each Party agrees that violation of the terms of this Section 20.19 constitutes irreparable harm to the other, and that the harmed Party may seek any and all remedies available to it at law or in equity, including injunctive relief.

20.20 Compliance with Applicable Law. This Agreement and the obligations of the Parties under this Agreement are subject to all present and future laws with respect to the subject matter hereof, either state or federal, and to all valid present and future orders, rules, and regulations of duly constituted Governmental Authorities having jurisdiction. The Parties agree to comply with any and all such applicable federal, state, and local laws, orders, and regulations in connection with the performance of their respective obligations under this Agreement. Subject to Section 20.19, each Party shall deliver or cause to be delivered to the other Party such certificates and documents, and shall make available such personnel and records relating to the Facility, to the extent that the requesting Party requires the same in order to fulfill any regulatory reporting requirements, or to assist in any administrative proceedings relating to this Agreement or the Facility.

20.21 Press Releases and Media Contact. Upon the request of either Party, the Parties shall develop a mutually agreed joint press release to be issued describing the location, size, type and timing of the Facility, the long-term nature of this Agreement, and other relevant factual information about the relationship. In the event during the Term, either Party is contacted by the

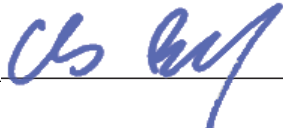
media concerning this Agreement, the contacted Party shall inform the other Party of the existence of the inquiry, and the Parties shall jointly agree upon the substance of any information to be provided to the media.

20.22 Due Authority. Each Party represents and warrants that (a) it has full and complete authority to enter into and perform this Agreement, subject, in the case of EPE, to the condition precedent in Section 6.1(A), and (b) 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 thereby, subject, in the case of EPE, to the condition precedent in Section 6.1(A).

IN WITNESS WHEREOF, the Parties have executed this Agreement.

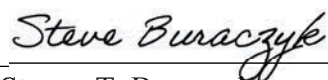
**Seller:**

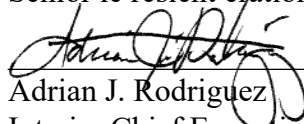
Hecate Energy Santa Teresa 2 LLC

By:   
President of Hecate Energy LLC, Manager


**EPE:**

El Paso Electric Company

By:   
Steven T. Buraczyk  
Senior Vice President Operations

By:   
Adrian J. Rodriguez  
Interim Chief Executive Officer

APPROVED AS TO FORM

By:   
Matthew K. Behrens, Senior Attorney

DATED: March 30, 2020

**EXHIBIT A**  
**CONSTRUCTION MILESTONES**

Seller shall meet the following Construction Milestones.

<u>MILESTONES</u>	<u>DATES</u>
1. <u>Start of Permitting</u> . Seller to have submitted an application for the main site use permit required by Doña Ana County to allow the Facility to be located on the Site.	08/01/2021
2. <u>Permitting</u> . Seller to have obtained all permits necessary to start physical construction of the Facility at the Site.	11/30/2021
3. <u>Material Contracts</u> . Seller to have provided evidence that all contracts for the supply of equipment and services necessary to complete construction and installation of the Facility have been executed by Seller.	06/30/2021
4. <u>Construction Start</u> . Seller to have issued a full Notice to Proceed to commence physical construction and installation of the Facility at the Site.	12/01/2021
5. <u>Seller's Interconnection Facilities</u> . Seller to have completed construction of the Seller's Interconnection Facilities and such facilities are capable of being energized.	04/01/2022

Required Commercial Operation Date: May 1, 2022

Interconnection Agreement Deadline: December 31, 2020

Interconnection Facilities Deadline: March 30, 2022



## EXHIBIT B

### FACILITY DESCRIPTION AND SITE MAPS

1. **Generating Facility Description.** The Facility will be a fifty (50) MWac photovoltaic generating facility comprised of photovoltaic modules, a single-axis horizontal tracking rack, inverters, step-up transformers and ancillary power generation equipment. The Facility will interconnect to EPE's electric system pursuant to the Interconnection Agreement. Project layout and 1-line included.
2. **Site Description.** The Facility will be located in the town Santa Teresa, New Mexico at the corner of route 136 and route 9, immediately adjacent to the El Paso Electric 345 kV. Approximately 400 acres have been made available for lease by the property owner

#### Legal Property Descriptions.

ALL that real property situated in Doña Ana County, New Mexico, described as follows:

1,240 Acres, more or less

#### PARCEL 1:

640 acres, more or less

ALL of Section 34, Township 28 South, Range 2 East, Doña Ana County, New Mexico.

#### PARCEL 2:

300 acres, more or less

The Portion of Section 35 lying Westerly of the El Paso Electric 345KV Power Line,  
Township 28 South,  
Range 2 East, Doña Ana County, New Mexico.

#### PARCEL 3:

300 acres, more or less

The North Half of Section 3, Township 29 South, Range 2 East, Doña Ana County, New Mexico

Site map below

**EXHIBIT C**  
**NOTICE ADDRESSES**

<b>EPE</b>	<b>Seller</b>
<p><b>Notices:</b> El Paso Electric Company Attn: Paul Garcia, Director – Renewable &amp; Emergent Technologies PO Box 982 El Paso, TX 79901 Phone: 915-521-4418</p>	<p><b>Notices:</b> Hecate Energy Santa Teresa 2 LLC Attn: Chris Bullinger 621 W. Randolph St Chicago, IL 60661 Phone: 480.239.5617</p>
<p><b>Reference Numbers:</b> Duns: 007928955 Federal Tax ID Number: 74-0607870</p>	<p><b>Reference Numbers:</b> Duns: Federal Tax ID Number:</p>
<p><b>Contract Administration:</b> Attn: Brad Green Manager – Asset Optimization Phone: 915-521-4475 Fax: 915-521-4656 E-mail: <a href="mailto:brad.green@epelectric.com">brad.green@epelectric.com</a> Attn: Paul Garcia Director – Renewable &amp; Emergent Technologies Phone: 915-521-4076 Fax: 915-521-7894 E-mail: <a href="mailto:paul.garcia@epelectric.com">paul.garcia@epelectric.com</a></p>	<p><b>Contract Administration:</b> Attn: Craig Overmyer Phone: 312.315.9953  E-mail: <a href="mailto:contracts@hecateenergy.com">contracts@hecateenergy.com</a></p>
<p><b>Maintenance Forecasting/Scheduling:</b> Attn: Brad Green Manager – Asset Optimization Phone: 915-521-4475 Fax: 915-521-4656 E-mail: <a href="mailto:brad.green@epelectric.com">brad.green@epelectric.com</a> Attn: Paul Garcia Director – Renewable &amp; Emergent Technologies Phone: 915-521-4076 Fax: 915-521-7894 E-mail: <a href="mailto:paul.garcia@epelectric.com">paul.garcia@epelectric.com</a></p>	<p><b>Maintenance Forecasting/Scheduling:</b> Attn: Preston Schultz Phone: 415.999.1427  E-mail: <a href="mailto:PSchultz@HecateEnergy.com">PSchultz@HecateEnergy.com</a></p>

<p><b>Day Ahead Forecasting/Scheduling:</b></p> <p>Attn: Prescheduler Phone: (915) 543-2044</p> <p><b>Day Ahead, Hour Ahead, and Real Time Forecasting/Scheduling</b></p> <p>Attn: Real-Time Desk Phone: (915) 543-4306 Phone: To be provided by Seller</p>	<p><b>Day Ahead, Hour Ahead, and Real Time Forecasting/Scheduling:</b></p> <p>Attn: Preston Schultz Phone: 415.999.1427</p>
<p><b>Payments, Security:</b></p> <p>Attn: Ana Boisselier, Supervisor, Energy Accounting Phone: (915) 543-2055</p>	<p><b>Payments, Security:</b></p> <p>Attn: Craig Overmyer Phone: 312.315.9953 Facsimile: Email: COvermyer@HecateEnergy.com</p>
<p><b>With additional Notices of an Event of Default or Potential Event of Default to:</b></p> <p>Attn: Brad Green Phone: 915-521-4475 Facsimile: 915-521-4656 Email: <a href="mailto:brad.green@epelectric.com">brad.green@epelectric.com</a></p>	<p><b>With additional Notices of an Event of Default or Potential Event of Default to:</b></p> <p>Attn: Chris Bullinger Phone: 480.239.5617 Facsimile: Email: CBullinger@HecateEnergy.com</p>

## EXHIBIT D

### INSURANCE COVERAGE

<u>Type of Insurance</u>	<u>Minimum Limits of Coverage</u>
1. <b>Commercial General Liability (CGL)</b>	\$2,000,000 per occurrence and \$5,000,000 combined single limit each and commercial umbrella occurrence and the aggregate, where applicable. If CGL insurance contains a general aggregate limit, it shall apply separately to the Facility.

CGL insurance shall be written on ISO occurrence form CG 00 01 01 96 (or a substitute form providing equivalent coverage) and shall cover liability arising from premises, operations, independent contractors, products/completed operations, contracts, property damage, personal injury and advertising injury, and liability assumed under an insured contract (including the tort liability of another assumed in a business contract), all with limits as specified above. CGL insurance shall include ISO endorsement CG 24 17 (or an equivalent endorsement) which modifies the definition of "Insured contract" to eliminate the exclusion of easement or license agreements in connection with construction or demolition operations on or within 50 feet of a railroad. There shall be no endorsement or modification of the CGL insurance limiting the scope of coverage for liability arising from explosion, collapse, or underground property damage.

EPE shall be included as an additional insured under the CGL policy, using ISO additional insured endorsement CG 20 10 (or a substitute providing equivalent coverage), and under the commercial umbrella insurance. The commercial umbrella insurance shall provide coverage over the top of the CGL insurance, the Business Automobile Liability insurance, and the Employers Liability insurance.

The CGL and commercial umbrella insurance to be obtained by or on behalf of Seller shall be endorsed as follows:

Such insurance as afforded by this policy for the benefit of EPE shall be primary as respects any claims, losses, damages, expenses, or liabilities arising out of that certain Purchase Power Agreement dated March 18, 2020 and insured hereunder, and any insurance carried by EPE shall be excess of and noncontributing with insurance afforded by this policy.

- |   |   |
|---|---|
| 2. <b>Business Automobile Liability</b> | \$1,000,000 combined single limit (each accident), including all Owned, Non Owned, Hired and Leased Autos |
|---|---|

Business Automobile Liability insurance shall be written on ISO form CA 00 01, CA 00 05, CA 00 12, CA 00 20, or a substitute form providing equivalent liability coverage. If necessary, the policy shall be endorsed to provide contractual liability coverage equivalent to that provided in the 1990 and later editions of CA 00 01.

- 3. Workers Compensation**                      \$1,000,000 minimum and Statutory Requirements.  
Seller may comply with these requirements through  
the use of a qualified self-insurance plan.
- 4. Employers Liability**                      \$1,000,000 each accident for bodily injury by  
accident, or  
  
\$1,000,000 each employee for bodily injury by  
disease.
- 5. Excess Liability Coverage**              \$10,000,000 general aggregate
- 6. Property All Risk and  
Business Interruption/Extra  
Expense<sup>1</sup>**                                      Limits as per below  
  
No later than the Commercial Operation Date, Seller  
shall procure and maintain property insurance  
covering physical damage to the Facility. The policy  
will be written with a combined single limit of  
liability equal to the full replacement value of the  
Facility and shall insure against all risks of direct  
physical loss or damage including the perils of flood  
and earthquake and all other customary sub-limits  
and aggregate sub-limits within the limit of liability.  
The policy will be endorsed to provide time element  
coverages within the combined single limit including  
business interruption in the amount of \$3,000,000  
per occurrence with a 12-month period of indemnity,  
Extra Expense and all other usual and customary  
time element extensions. The policy wording will  
waive subrogation against EPE.

**EXHIBIT E**

**SELLER'S REQUIRED GOVERNMENTAL AUTHORITY PERMITS, CONSENTS,  
APPROVALS, LICENSES AND AUTHORIZATIONS TO BE OBTAINED**

1. Construction Stormwater General Permit
2. Driveway/Right-Of-Way Permit
3. Special Permit
4. Building Permit

This Exhibit E may be updated by Seller from time to time and shall be completed no later than thirty (30) Days prior to the Start of Permitting Milestone date set forth in Exhibit A.

**EXHIBIT F**

**SELLER'S EXPECTED NET OUTPUT AND COMMITTED NET OUTPUT  
AND PAYMENT RATE**

<b>Year / MONTH</b>	<b>Expected Net OUTPUT (MWh)</b>	<b>Committed Net OUTPUT (MWh)</b>	<b>Product Rate (\$/MWh)</b>
2022	143,319	107,490	18.93
2023	142,172	106,630	18.93
2024	141,035	105,777	18.93
2025	139,907	104,930	18.93
2026	138,788	104,091	18.93
2027	137,677	103,258	18.93
2028	136,576	102,432	18.93
2029	135,483	101,613	18.93
2030	134,399	100,800	18.93
2031	133,324	99,993	18.93
2032	132,258	99,193	18.93
2033	131,199	98,400	18.93
2034	130,150	97,613	18.93
2035	129,109	96,832	18.93
2036	128,076	96,057	18.93
2037	127,051	95,289	18.93
2038	126,035	94,526	18.93
2039	125,027	93,770	18.93
2040	124,026	93,020	18.93
2041	123,034	92,276	18.93

**EXHIBIT G**

**SELLER'S FORMAT FOR RENEWABLE ENERGY CERTIFICATES**

In accordance with Article 10, Seller shall provide EPE with RECs in the format prescribed in this exhibit.

**RENEWABLE ENERGY CERTIFICATE**

Period: For the month of \_\_\_\_\_, 20\_\_.

Source of REC: Renewable Energy Provider

Hecate Energy Santa Teresa 2 LLC

Contact:  
Preston Schultz

Hecate Energy Santa Teresa 2 LLC  
621 W. Randolph St  
Chicago, IL 60661  
415.999.1427

Generator type: \_\_\_\_\_

Nameplate capacity: \_\_\_\_\_ (in MW)

Date of generator start-up: \_\_\_\_\_

Fuel source: \_\_\_\_\_

Revenue Meter manufacturer and identification / serial number:

\_\_\_\_\_

Location of generator: \_\_\_\_\_

Renewable Energy Purchaser:

Interconnection Utility: El Paso Electric Company

Control Area Operator: El Paso Electric Company



EPE Contact:  
Brad Green  
P.O. Box 982  
El Paso, TX 79901  
(915) 521-4475  
Fax (915) 521-4656

**MONTHLY STATEMENT OF RECS**

Renewable Energy delivery for the month of \_\_\_\_\_, 20\_\_

Energy Delivered: \_\_\_\_\_ kWh

**SUPPLIER CERTIFICATION**

I, \_\_\_\_\_, hereby certify that:

The energy produced, sold and delivered by Hecate Energy Santa Teresa 2 LLC to El Paso Electric Company from these facilities is from a renewable energy resource, as defined by 17.9.572 New Mexico Admin Code.

Each megawatt hour of electricity is generated using a solar fuel source; and

No other Renewable Energy Certificates associated with the renewable energy produced and delivered by Hecate Energy Santa Teresa 2 LLC to El Paso Electric Company have been traded, sold, retired or otherwise transferred by Hecate Energy Santa Teresa 2 LLC to any other person or entity.

Hecate Energy Santa Teresa 2 LLC

By: \_\_\_\_\_  
Chris Bullinger  
CEO Hecate Energy NAF LLC, Sole Member  
Hecate Energy Santa Teresa 2 LLC

\_\_\_\_\_  
Date

**EXHIBIT H**  
**REQUIRED FACILITY DOCUMENTS**

**EXHIBIT I**  
**FORM LETTER OF CREDIT**

**[ISSUING BANK] IRREVOCABLE STANDBY LETTER OF CREDIT**

**DATE OF ISSUANCE:**

**[Date of issuance]**

**[BENEFICIARY]** (“**Beneficiary**”)

*[Address]*

*Attention:* *[Contact Person]*

Re: [ISSUING BANK] Irrevocable Standby Letter of Credit No. \_\_\_\_\_

Sirs/Mesdames:

We hereby establish in favor of Beneficiary (sometimes alternatively referred to herein as “**you**”) this Irrevocable Standby Letter of Credit No. \_\_\_\_\_ (the “**Letter of Credit**”) for the account of *[Hecate bank account name]* on behalf of Hecate Energy Santa Teresa 2 LLC, located at 621 W. Randolph Street, Chicago, Illinois 60661 (“**Account Parties**”), effective immediately and expiring on the date determined as specified in numbered paragraphs 5 and 6 below.

We have been informed that this Letter of Credit is issued pursuant to the terms of that certain Purchase Power Agreement between Hecate Energy Santa Teresa 2 LLC (“**Seller**”) and El Paso Electric Company (“**Buyer**”) dated as of \_\_\_\_\_, 2020 (“**Agreement**”).

**1. Stated Amount.** The maximum amount available for drawing by you under this Letter of Credit shall be *[written dollar amount]* United States Dollars (US\$*[dollar amount]*) (such maximum amount referred to as the “**Stated Amount**”).

**2. Drawings.** A drawing hereunder may be made by you on any Business Day on or prior to the date this Letter of Credit expires by delivering to [ISSUING BANK], at any time during its business hours on such Business Day, at *[bank address]* (or at such other address as may be designated by written notice delivered to you as contemplated by numbered paragraph 9 hereof), a copy of this Letter of Credit together with (i) a Draw Certificate executed by an authorized person substantially in the form of Attachment A hereto (the “**Draw Certificate**”), appropriately completed and signed by your authorized officer (signing as such) and (ii) your draft substantially in the form of Attachment B hereto (the “**Draft**”), appropriately completed and signed by your authorized officer (signed as such). Partial drawings and multiple presentations may be made under this Letter of Credit. Draw Certificates and Drafts under this Letter of Credit may be presented by Beneficiary by means of facsimile or original documents sent by overnight delivery or courier to [ISSUING BANK] at our address set forth above, *Attention:* \_\_\_\_\_ (or at such other address

as may be designated by written notice delivered to you as contemplated by numbered *paragraph 9* below). If presentation is made by facsimile transmission, you must contact us at **[insert phone number]** to confirm our receipt of the transmission. In the event of a presentation by facsimile transmission, the original of such documents need not be sent to us.

**3. Time and Method for Payment.** We hereby agree to honor a drawing hereunder made in compliance with this Letter of Credit by transferring in immediately available funds the amount specified in the Draft delivered to us in connection with such drawing to such account at such bank in the United States as you may specify in your Draw Certificate. If the Draw Certificate is presented to us at such address by 12:00 noon, [ ] time on any Business Day, payment will be made not later than our close of business on the same business day and if such Draw Certificate is so presented to us after 12:00 noon, [ ] time on any Business Day, payment will be made on the subsequent Business Day. In clarification, we agree to honor the Draw Certificate as specified in the preceding sentences, without regard to the truth or falsity of the assertions made therein.

**4. Non-Conforming Demands.** If a demand for payment made by you hereunder does not, in any instance, conform to the terms and conditions of this Letter of Credit, we shall give you prompt notice that the demand for payment was not effectuated in accordance with the terms and conditions of this Letter of Credit, stating the reasons therefor and that we will upon your instructions hold any documents at your disposal or return the same to you. Upon being notified that the demand for payment was not effectuated in conformity with this Letter of Credit, you may correct any such non-conforming demand.

**5. Expiration.** This Letter of Credit shall automatically expire at the close of business on the date on which we receive a Cancellation Certificate in the form of *Attachment C* hereto executed by your authorized officer and sent along with the original of this Letter of Credit and all amendments (if any).

**6. Initial Period and Automatic Rollover.** The initial period of this Letter of Credit shall terminate on [*one year from the issuance date*] (the “**Initial Expiration Date**”). This Letter of Credit shall be automatically extended without amendment for one (1) year periods from the Initial Expiration Date or any future expiration date, unless at least sixty (60) days prior to any such expiration date we send you notice by registered mail or courier at your address first shown (or such other address as may be designated by you as contemplated by numbered *paragraph 9*) that we elect not to consider this Letter of Credit extended for any such additional one year period.

**7. Business Day.** As used herein, “**Business Day**” shall mean any day on which commercial banks are not authorized or required to close in the State of New York, and inter-bank payments can be effected on the Fedwire system.

**8. Governing Law.** THIS LETTER OF CREDIT IS GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, AND, EXCEPT AS OTHERWISE EXPRESSLY STATED HEREIN, TO THE INTERNATIONAL STANDBY PRACTICES, ICC PUBLICATION NO. 590 (THE “ISP98”), AND IN THE EVENT OF ANY CONFLICT, THE LAWS OF THE STATE OF NEW YORK WILL CONTROL, WITHOUT REGARD TO PRINCIPLES OF CONFLICT OF LAWS.

9. **Notices.** All communications to you in respect of this Letter of Credit shall be in writing and shall be delivered to the address first shown for you above or such other address as may from time to time be designated by you in a written notice to us. All documents to be presented to us hereunder and all other communications to us in respect of this Letter of Credit, which other communications shall be in writing, shall be delivered to the address for us indicated above, or such other address as may from time to time be designated by us in a written notice to you.

10. **Irrevocability.** This Letter of Credit is irrevocable.

11. **Complete Agreement.** This Letter of Credit sets forth in full our undertaking, and such undertaking shall not in any way be modified, amended, amplified or limited by reference to any document, instrument or agreement referred to herein, except for the ISP98 and Attachment A, Attachment B and Attachment C hereto and the notices referred to herein and any such reference shall not be deemed to incorporate herein by reference any document, instrument or agreement except as set forth above.

\* \* \*

SINCERELY,

[ISSUING BANK]

\_\_\_\_\_

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

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

Address:

**ATTACHMENT A**

**FORM OF DRAW CERTIFICATE**

The undersigned hereby certifies to [ISSUING BANK] (“**Issuer**”), with reference to Irrevocable Letter of Credit No. \_\_\_\_\_ (the “**Letter of Credit**”) issued by Issuer in favor of the undersigned (“**Beneficiary**”), as follows:

- (1) The undersigned is the \_\_\_\_\_ of Beneficiary and is duly authorized by Beneficiary to execute and deliver this Certificate on behalf of Beneficiary.
- (2) Beneficiary hereby makes demand against the Letter of Credit by Beneficiary’s presentation of the draft accompanying this Certificate, for payment of \_\_\_\_\_ U.S. dollars (US\$ \_\_\_\_\_), which amount, when aggregated together with any additional amount that has not been drawn under the Letter of Credit, is not in excess of the Stated Amount (as in effect of the date hereof).
- (3) The conditions for a drawing by Beneficiary are pursuant to that certain Purchase Power Agreement between Hecate Energy Santa Teresa 2 LLC and Beneficiary dated as of \_\_\_\_\_, 2020 (“**Agreement**”), and Beneficiary hereby certifies that the conditions specified in Section 12.1(B) of the Agreement exist and authorize Beneficiary to draw on the Letter of Credit in the amount specified above.
- (4) You are hereby directed to make payment of the requested drawing to: (insert wire instructions)

Beneficiary Name and Address:

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

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

Date: \_\_\_\_\_

- (5) Capitalized terms used herein and not otherwise defined herein shall have the respective meanings set forth in the Letter of Credit.

[*BENEFICIARY*]

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

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

Date: \_\_\_\_\_

**ATTACHMENT B**

**DRAWING UNDER IRREVOCABLE LETTER OF CREDIT NO. \_\_\_\_\_**

Date:

PAY TO: [BENEFICIARY]

U.S.\$ \_\_\_\_\_

FOR VALUE RECEIVED AND CHARGE TO THE ACCOUNT OF LETTER OF  
CREDIT NO. \_\_\_\_\_.

[BENEFICIARY]

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

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

Date: \_\_\_\_\_



**ATTACHMENT C**

**CANCELLATION CERTIFICATE**

Irrevocable Letter of Credit No. \_\_\_\_\_

The undersigned, being authorized by the undersigned (“**Beneficiary**”), hereby certifies on behalf of Beneficiary to [*ISSUING BANK*] (“**Issuer**”), with reference to Irrevocable Letter of Credit No. \_\_\_\_\_ issued by Issuer to Beneficiary (the “**Letter of Credit**”), that all obligations of [PROJECT ENTITY], under the [*describe the underlying agreement which requires this LC*] have been fulfilled.

Pursuant to Section 5 thereof, the Letter of Credit shall expire upon Issuer’s receipt of this certificate.

Capitalized terms used herein and not otherwise defined herein shall have the respective meanings set forth in the Letter of Credit.

[*BENEFICIARY*]

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

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

Date: \_\_\_\_\_

## EXHIBIT J

### OPERATING PROCEDURES

#### Day-Ahead Pre-Schedule Notification from Seller to EPE

- **Seller provides to EPE on a Day-Ahead notice the expected**
  - Solar Output Seven (7)-day Forecast



#### Day-Ahead Preschedule Receipt

- **Preschedule Solar Energy**
  - Day-Ahead receives expected schedule at 5:00 a.m. for next seven (7) days from Seller and plans/trades for day
- **Day-Ahead Solar Energy Curtailment**
  - Day-Ahead has capability for solar energy curtailment
  - Curtailment amount schedule sent to Seller
  - Seller confirms curtailment request



#### Same-Day Modifications to Schedules

- **Seller provides current hour forecast** for next 24 hours provided at the top of each hour
- **Same-Day Solar Energy Curtailment (EPE)**
  - Buyer reserves the right to conduct solar energy curtailments during same-day hours

## EXHIBIT K

### SOLAR FORECASTING FILE TEMPLATE

Vendors are required to submit files to a designated EPE SFTP folder.

- EPE will provide a user id and password to vendor to gain access to the SFTP Folder.
- Vendors are required to submit two files:
  - a) Daily File – The Daily file needs to be submitted daily by 5:00 am MST, Current Day plus next 7 Days forecast (24 hour).
  - b) Hourly File – The Hourly file needs to be submitted at the top of each hour. Current hour plus next 24 hours forecast.
- Vendors are required to automate the process.

#### **Definitions:**

Daily File – Reports the Solar Forecasting MW by hour and is updated daily.

Hourly File – Reports the Solar Forecasting MW by hour and is updated hourly to reflect any changes.

Hour Ending (“HE”) – Reports should provide hourly output as projected output at hour ending

#### **File Format:**

- File needs to be in CSV format.
- Fields need to have a comma delimiter. This should be a single character.
- Keep each record on a separate line. Each record must start on its own line, but a single record can span multiple lines.
- Do not follow the last record in a file with a carriage return.
- Every hour requires a value, if forecasted to be zero, the value must be zero
- The enclosing character (typically double quotes) must be used when required, such as when the delimiter appears in a field. Delimiter by pipe.

#### **Troubleshooting and Resolution of issues:**

- EPE will send automated emails when Files are not delivered in a timely manner to the corresponding FTP folders.
- Vendor will need to provide contact information where automated emails need to be sent for the notification of file receipt issues and the resolution of issues.
- Vendor is to provide current – Contact Name, Email, Phone.
- Vendor is responsible for updating contact information when it changes.

#### **File Naming Convention and CSV Samples**

Daily File: Site Name\_DayAheadForecast\_YYYYMMDD.csv

Hourly File: Site Name\_HourAheadForecast\_YYYYMMDDHEHH.csv (where “HE” is a constant and HH represents the Hour from 01 to 24)

**SOLAR FORECASTING FILE TEMPLATE**

Site Name	Time Zone: MST																							
	HE1	HE2	HE3	HE4	HE5	HE6	HE7	HE8	HE9	HE10	HE11	HE12	HE13	HE14	HE15	HE16	HE17	HE18	HE19	HE20	HE21	HE22	HE23	HE24
1 10/18/2018									1.06	4.26	6.44	8.73	10.2	10.51	10.76	12.88	13.4	6.35	0.15	0	0	0	0	0
2 10/19/2018	0	0	0	0	0	0	0	0.83																

Site Name	Time Zone: MST																									
FORECAST DERIVATION DATE																										
	10/18/2018																									
	HE1	HE2	HE3	HE4	HE5	HE6	HE7	HE8	HE9	HE10	HE11	HE12	HE13	HE14	HE15	HE16	HE17	HE18	HE19	HE20	HE21	HE22	HE23	HE24		
1	10/19/2018	0	0	0	0	0	0	0	1	9.4	15.8	16.67	16.04	14.96	14.29	14.24	14.96	12.56	3.62	0	0	0	0	0	0	0
2	10/20/2018	0	0	0	0	0	0	0	0.92	9.87	15.75	16.61	16.33	15.86	16.1	16.63	16.65	14.87	5.9	0.12	0	0	0	0	0	0
3	10/21/2018	0	0	0	0	0	0	0	0.87	7.94	13.23	16.53	16.23	15.27	14.82	15.42	15.73	14.39	5.69	0.1	0	0	0	0	0	0
4	10/22/2018	0	0	0	0	0	0	0	0.81	7.77	13.14	16.45	16.15	15.18	14.74	15.34	15.66	14.29	5.47	0.09	0	0	0	0	0	0
5	10/23/2018	0	0	0	0	0	0	0	0.78	8.82	13.27	13.88	14.59	14.19	14.82	15.15	14.77	12.56	4.13	0	0	0	0	0	0	0
6	10/24/2018	0	0	0	0	0	0	0	0	3.56	9.89	10.42	11.61	11.91	12.45	14.33	9.65	1.98	0	0	0	0	0	0	0	
7	10/25/2018	0	0	0	0	0	0	0	0	0	1	7.97	11.69	9.55	10.71	14.84	15.95	13.37	4.83	0.08	0	0	0	0	0	0

**EXHIBIT L**

**CALCULATION OF MINIMUM AMOUNT**

To calculate the Minimum Amount, the value to be inserted in subpart (i) of the definition of Minimum Amount shall be the following, which correspond to the date for which the calculation is being performed.

<b>Commercial Operation Year</b>	<b>Value for subpart (i) in definition of Minimum Amount</b>
The last Day of the eleventh (11th) Commercial Operation Year	\$ 47,878,251
The twentieth (20 <sup>th</sup> ) anniversary of the Commercial Operation Date	\$ 38,081,910
All other dates	Will be individually calculated by Seller, if necessary

**EXHIBIT M**  
**LIST OF TIER 1 SUPPLIERS**

1. **LONGI SOLAR**
2. **JINKO SOLAR**
3. **HANWHA QCELLS**
4. **CANADIAN SOLAR**
5. **RISEN ENERGY**
6. **TRINA SOLAR**
7. **GCL SYSTEMS**
8. **TALESUN**
9. **SERAPHIM**
10. **CHINT/ASTRONERGY**
11. **LG ELECTRONICS**
12. **VSUM SOLAR**
13. **HT-SHAE**
14. **HANSOL TECHNICS**
15. **NEO SOLAR POWER/URE**

**EXHIBIT N**  
**FORM OF GUARANTY**

THIS GUARANTY (this “**Guaranty**”), dated as of \_\_\_\_\_, \_\_\_\_ (the “**Effective Date**”), is made by [ ] (“**Guarantor**”), in favor of [ \_\_\_\_\_ ] (“**Counterparty**”).

**RECITALS:**

**A.** WHEREAS, Counterparty and [Hecate Energy Santa Teresa 2 LLC] (“**Obligor**”), have entered into, or concurrently herewith are entering into, that certain Renewable Power Purchase Agreement dated as of \_\_\_\_\_, 2019 (together, the “**Agreement**”); and

**B.** WHEREAS, Guarantor will directly or indirectly benefit from the Agreement to be entered into between Obligor and Counterparty.

NOW THEREFORE, in consideration of the foregoing premises and as an inducement for Counterparty’s execution, delivery and performance of the Agreement, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Guarantor hereby agrees for the benefit of Counterparty as follows:

1. **GUARANTY.** Subject to the terms and provisions hereof, Guarantor hereby absolutely and irrevocably guarantees the timely payment when due of all obligations owing by Obligor to Counterparty arising pursuant to the Agreement on or after the Effective Date (the “**Obligations**”). This Guaranty shall constitute a guarantee of payment and not of collection. The liability of Guarantor under this Guaranty shall be subject to the following limitations:

(a) Notwithstanding anything herein or in the Agreement to the contrary, the maximum aggregate obligation and liability of Guarantor under this Guaranty, and the maximum recovery from Guarantor under this Guaranty, shall in no event exceed \_\_\_\_\_ U.S. Dollars (U.S. \$ \_\_\_\_\_) (the “**Maximum Recovery Amount**”).

(b) The obligation and liability of Guarantor under this Guaranty is specifically limited to payments expressly required to be made under the Agreement, as well as costs of collection and enforcement of this Guaranty (including attorney’s fees) to the extent reasonably and actually incurred by the Counterparty (subject in all instances, to the limitations imposed by the Maximum Recovery Amount as specified in Section 1(a) above). In no event, however, shall Guarantor be liable for or obligated to pay any consequential, indirect, incidental, lost profit, special, exemplary, punitive, equitable or tort damages.

2. **DEMANDS AND PAYMENT.**

(a) If Obligor fails to pay any Obligation to Counterparty when such Obligation is due and owing under the Agreement (an “**Overdue Obligation**”), Counterparty may present a written demand to Guarantor calling for Guarantor’s payment of such Overdue Obligation pursuant to this Guaranty (a “**Payment Demand**”).

- (b) Guarantor's obligation hereunder to pay any particular Overdue Obligation(s) to Counterparty is conditioned upon Guarantor's receipt of a Payment Demand from Counterparty satisfying the following requirements: (i) such Payment Demand must identify the specific Overdue Obligation(s) covered by such demand, the specific date(s) upon which such Overdue Obligation(s) became due and owing under the Agreement, and the specific provision(s) of the Agreement pursuant to which such Overdue Obligation(s) became due and owing; (ii) such Payment Demand must be delivered to Guarantor in accordance with Section 9 below; and (iii) the specific Overdue Obligation(s) addressed by such Payment Demand must remain due and unpaid at the time of such delivery to Guarantor.
- (c) After issuing a Payment Demand in accordance with the requirements specified in Section 2(b) above, Counterparty shall not be required to issue any further notices or make any further demands with respect to the Overdue Obligation(s) specified in that Payment Demand, and Guarantor shall be required to make payment with respect to the Overdue Obligation(s) specified in that Payment Demand within five (5) Business Days after Guarantor receives such demand. As used herein, the term "**Business Day**" shall mean all weekdays (i.e., Monday through Friday) other than any weekdays during which commercial banks or financial institutions are authorized to be closed to the public in the State of New Mexico, the State of Texas, or the State of New York.

3. **REPRESENTATIONS AND WARRANTIES.** Guarantor represents and warrants that:

- (a) it is a corporation duly organized and validly existing under the laws of the [ ] and has the corporate power and authority to execute, deliver and carry out the terms and provisions of the Guaranty;
- (b) no authorization, approval, consent or order of, or registration or filing with, any court or other governmental body having jurisdiction over Guarantor is required on the part of Guarantor for the execution and delivery of this Guaranty; and
- (c) this Guaranty constitutes a valid and legally binding agreement of Guarantor, enforceable against Guarantor in accordance with the terms hereof, except as the enforceability thereof may be limited by the effect of any applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors' rights generally and by general principles of equity.

4. **RESERVATION OF CERTAIN DEFENSES.** Without limiting Guarantor's own defenses and rights hereunder, Guarantor reserves to itself all rights, setoffs, counterclaims and other defenses to which Obligor is or may be entitled arising from or out of the Agreement, except for defenses (if any) based upon the bankruptcy, insolvency, dissolution or liquidation of Obligor or any lack of power or authority of Obligor to enter into and/or perform the Agreement.

5. **AMENDMENT OF GUARANTY.** No term or provision of this Guaranty shall be amended, modified, altered, waived or supplemented except in a writing signed by Guarantor and Counterparty.



6. **WAIVERS AND CONSENTS.** Subject to and in accordance with the terms and provisions of this Guaranty:

- (a) Except as required in Section 2 above, Guarantor hereby waives (i) notice of acceptance of this Guaranty; (ii) presentment and demand concerning the liabilities of Guarantor; and (iii) any right to require that any action or proceeding be brought against Obligor or any other person, or to require that Counterparty seek enforcement of any performance against Obligor or any other person, prior to any action against Guarantor under the terms hereof.
- (b) No delay by Counterparty in the exercise of (or failure by Counterparty to exercise) any rights hereunder shall operate as a waiver of such rights, a waiver of any other rights or a release of Guarantor from its obligations hereunder (with the understanding, however, that the foregoing shall not be deemed to constitute a waiver by Guarantor of any rights or defenses which Guarantor may at any time have pursuant to or in connection with any applicable statutes of limitation).
- (c) Without notice to or the consent of Guarantor, and without impairing or releasing Guarantor's obligations under this Guaranty, Counterparty may: (i) change the manner, place or terms for payment of all or any of the Obligations (including renewals, extensions or other alterations of the Obligations); (ii) release Obligor or any person (other than Guarantor) from liability for payment of all or any of the Obligations; or (iii) receive, substitute, surrender, exchange or release any collateral or other security for any or all of the Obligations.

7. **REINSTATEMENT.** Guarantor agrees that this Guaranty shall continue to be effective or shall be reinstated, as the case may be, if all or any part of any payment made hereunder is at any time avoided or rescinded or must otherwise be restored or repaid by Counterparty as a result of the bankruptcy or insolvency of Obligor, all as though such payments had not been made.

8. **TERMINATION.** Unless terminated earlier, this Guaranty and the Guarantor's obligations hereunder will terminate automatically and immediately at \_\_\_\_\_. [Insert Contract expiration date]; provided, however, that no such termination shall affect Guarantor's liability with respect to any Obligation incurred prior to the time the termination is effective, which Obligations shall remain subject to this Guaranty.

9. **NOTICE.** Any Payment Demand, notice, request, instruction, correspondence or other document to be given hereunder (herein collectively called "Notice") by Counterparty to Guarantor, or by Guarantor to Counterparty, as applicable, shall be in writing and may be delivered either by (i) U.S. certified mail with postage prepaid and return receipt requested, or (ii) recognized nationwide courier service with delivery receipt requested, in either case to be delivered to the following address (or to such other U.S. address as may be specified via Notice provided by Guarantor or Counterparty, as applicable, to the other in accordance with the requirements of this Section 9):

TO GUARANTOR: *	TO COUNTERPARTY:
[ ]	_____

	Attn: _____
[Tel: [ ] -- for use in connection with courier deliveries]	[Tel: (____) ____-____ -- for use in connection with courier deliveries]

Any Notice given in accordance with this Section 9 will (i) if delivered during the recipient's normal business hours on any given Business Day, be deemed received by the designated recipient on such date, and (ii) if not delivered during the recipient's normal business hours on any given Business Day, be deemed received by the designated recipient at the start of the recipient's normal business hours on the next Business Day after such delivery.

**10. MISCELLANEOUS.**

- (a) This Guaranty shall in all respects be governed by, and construed in accordance with, the law of the State of New York, without regard to principles of conflicts of laws thereunder (other than Sections 5-1401 and 5-1402 of the New York General Obligations Law).
- (b) This Guaranty shall be binding upon Guarantor and its successors and permitted assigns and inure to the benefit of and be enforceable by Counterparty and its successors and permitted assigns. Guarantor may not assign this Guaranty in part or in whole without the prior written consent of Counterparty. Counterparty may not assign its rights or benefits under this Guaranty in part or in whole without the prior written consent of Guarantor.
- (c) This Guaranty embodies the entire agreement and understanding between Guarantor and Counterparty and supersedes all prior agreements and understandings relating to the subject matter hereof.
- (d) The headings in this Guaranty are for purposes of reference only, and shall not affect the meaning hereof. Words importing the singular number hereunder shall include the plural number and vice versa, and any pronouns used herein shall be deemed to cover all genders. The term "person" as used herein means any individual, corporation, partnership, joint venture, limited liability company, association, joint-stock company, trust, unincorporated association, or government (or any agency or political subdivision thereof).
- (e) Wherever possible, any provision in this Guaranty which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective only to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any one jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.
- (f) Counterparty (by its acceptance of this Guaranty) and Guarantor each hereby irrevocably:
  - (i) consents and submits to the exclusive jurisdiction of the United States District Court for the Southern District of New York, or if that court does not have subject matter jurisdiction, to the exclusive jurisdiction of the Supreme Court of the State of New York, New York County (without prejudice to the right of any party to remove to the United States District

Court for the Southern District of New York) for the purposes of any suit, action or other proceeding arising out of this Guaranty or the subject matter hereof or any of the transactions contemplated hereby brought by Counterparty, Guarantor or their respective successors or assigns; and (ii) waives (to the fullest extent permitted by applicable law) and agrees not to assert any claim that it is not personally subject to the jurisdiction of the above-named courts, that the suit, action or proceeding is brought in an inconvenient forum, that the venue of the suit, action or proceeding is improper or that this Guaranty or the subject matter hereof may not be enforced in or by such court.

- (g) COUNTERPARTY (BY ITS ACCEPTANCE OF THIS GUARANTY) AND GUARANTOR EACH HEREBY IRREVOCABLY, INTENTIONALLY AND VOLUNTARILY WAIVES THE RIGHT TO TRIAL BY JURY WITH RESPECT TO ANY LEGAL PROCEEDING BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH, THIS GUARANTY OR THE AGREEMENT, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PERSON RELATING HERETO OR THERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO GUARANTOR'S EXECUTION AND DELIVERY OF THIS GUARANTY.

IN WITNESS WHEREOF, the Guarantor has executed this Guaranty on \_\_\_\_\_, 20\_\_, but it is effective as of the Effective Date

[ ]

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

**Purchase Power Agreement**

**Between**

**Buena Vista Energy Center II, LLC**

**as Seller**

**and**

**El Paso Electric Company**

**as Buyer**

**dated as of**

**March 18, 2020**

Purchase Power Agreement  
Between  
Buena Vista Energy Center II, LLC  
and  
El Paso Electric Company  
March 18, 2020

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**Purchase Power Agreement  
Between  
Buena Vista Energy Center II, LLC and  
El Paso Electric Company**

This Purchase Power Agreement (including all exhibits attached hereto, this “Agreement”) is made this 18th day of March, 2020 (the “Execution Date”) by and between Buena Vista Energy Center II, LLC (“Seller”), a Delaware limited liability company with a principal place of business at 700 Universe Boulevard, Juno Beach, FL 33408, and El Paso Electric Company (“EPE”), a Texas corporation with headquarters in El Paso, Texas (EPE and Seller each being sometimes referred to in this Agreement as a “Party” or, collectively, as the “Parties”).

WHEREAS, Seller desires to develop, design, construct, own or lease and operate a solar electric generating facility with a Designed Maximum Capacity of approximately 20 MWac (the “Facility,” as more fully described and defined below); and

WHEREAS, Seller intends to locate the Facility at the Site (as defined below) and to interconnect the Facility with the transmission facilities of EPE as provided for in a separate Interconnection Agreement; and

WHEREAS, Seller desires to sell and deliver to EPE at the Point of Delivery (as defined below) the Net Output (as defined below) produced by the Facility, and EPE desires to buy the Net Output from Seller; and

WHEREAS, the Net Output sold to EPE by Seller will be documented by Renewable Energy Certificates, and it is the intention of the Parties that all Renewable Energy Certificates documented and associated with the Net Output sold to EPE shall be transferred to and owned by EPE at no additional cost to the rates included in Article 8.

NOW THEREFORE, in consideration of the mutual covenants herein contained, the sufficiency and adequacy of which are hereby acknowledged, the Parties agree to the following:

**ARTICLE 1 - RULES OF CONSTRUCTION, INTERPRETATION,  
AND DEFINITIONS**

1.1 Rules of Construction. Capitalized terms in this Agreement, including as defined in this Article 1 shall have the meanings set forth herein whenever the terms appear in this Agreement, whether in the singular or the plural or in the present or past tense. Words not otherwise defined herein that have well known and generally accepted technical or trade meanings are used herein in accordance with such recognized meanings. In addition, the following rules of construction shall apply:

(A) References to “Articles,” “Sections,” or “Exhibits” shall be to articles, sections, or exhibits of this Agreement.

(B) The Exhibits attached hereto are incorporated in and are intended to be a part of this Agreement; *provided, that*, in the event of a conflict between the terms of any

Exhibit or Schedule and the terms of this Agreement, the terms of this Agreement shall control.

(C) This Agreement was negotiated and prepared by both Parties with the advice and participation of counsel. The Parties have agreed to the wording of this Agreement, and none of the provisions hereof shall be construed against one Party on the ground that such Party is the author of this Agreement or any part hereof.

(D) The Parties shall act in a commercially reasonable manner and in accordance with the principles of good faith and fair dealing in the performance of this Agreement. Unless and except as expressly provided otherwise in this Agreement, where this Agreement requires the consent, approval, or similar action by a Party, such consent or approval shall not be unreasonably withheld, conditioned or delayed. Unless and except as expressly provided otherwise in this Agreement, wherever this Agreement gives a Party a right to determine, require, specify or take similar action with respect to a matter, such determination, requirement, specification or similar action shall be commercially reasonable. References herein to any Applicable Law, including 17.9.572 New Mexico Admin. Code (the “Rule”), shall, except as otherwise specified, mean such Applicable Law as amended and in effect from time to time, including any successor to or replacement of such Applicable Law.

(E) Use of the words “include” or “including” or similar words shall be interpreted as “include without limitation” or “including, without limitation.”

(F) Use of the words “tax” or “taxes” shall be interpreted to include taxes, fees, surcharges, and the like.

(G) Use of the terms “Dollars” and “\$” shall mean U.S. Dollars, the lawful currency of the United States of America.

1.2 Interpretation with Interconnection Agreement. Each Party represents that it conducts its operations in a manner intended to comply with FERC Order No. 717, “Standards of Conduct for Transmission Providers,” requiring the separation of its transmission and merchant functions, to the extent such order is applicable to a Party or its operations. Moreover, the Parties acknowledge that EPE’s transmission function offers transmission service on its system in a manner intended to comply with FERC policies and requirements relating to the provision of open-access transmission service. The Parties recognize that Seller will enter into a separate Interconnection Agreement with EPE, and that such Interconnection Agreement will provide for FERC-jurisdictional interconnection service.

1.3 Interpretation of Arrangements for Electric Supply to the Facility. The Parties recognize that this Agreement does not provide for the supply of any retail electric service by EPE to Seller or to the Facility, and Seller must enter into separate arrangements for the supply of retail electric services to the Facility.

(A) The Parties acknowledge and agree that the arrangements for the supply of electric services to the Facility shall be separate and free-standing arrangements and that the terms of this Agreement are not binding upon the supplier of such electric services.

(B) Notwithstanding any other provision in this Agreement, nothing in the arrangements for the supply of retail electric services to the Facility shall alter or modify Seller's or EPE's rights, duties and obligations under this Agreement. This Agreement shall not be construed to create any rights between Seller and the supplier of such retail electric services.

(C) Seller expressly recognizes that, for purposes of this Agreement, the supplier of retail electric services to the Facility shall be deemed to be a separate entity and a separate contracting party whether or not the arrangement for the supply of retail electric services to the Facility is entered into with EPE or an Affiliate of EPE, if any.

1.4 Definitions. Unless defined elsewhere herein, capitalized terms used in this Agreement will have the following scope and meaning:

1.4.1 "Abandonment" means (i) the relinquishment of all possession and control of the Facility by Seller, other than a transfer or sale permitted under this Agreement, or (ii) if prior to the Commercial Operation Date, the cessation of all design, construction, testing and inspection activities with respect to the Facility for thirty (30) consecutive Days by Seller and Seller's EPC Contractor, unless such relinquishment or cessation is (x) pursuant to Section 4.4(i)-(ii), (y) at EPE's express request, or (z) caused by or attributable to a Force Majeure Event.

1.4.2 "Account" has the meaning set forth in Section 12.1(C)(2).

1.4.3 "Additional Consents" means the approvals, consents, authorizations or other requirements not listed in the definition of Governmental Approvals in this Agreement that are required from any Governmental Authority with respect to the Facility.

1.4.4 "Additional Maintenance Outages" has the meaning set forth in Section 14.6.

1.4.5 "Affiliate" of any named person or entity means any other person or entity that controls, is under the control of, or is under common control with, the named entity. The term "control" (including the terms "controls," "under the control of" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management or the policies of a person or entity, whether through ownership interest, by contract or otherwise. NextEra Operating Partners, LP, NextEra Energy Partners, LP, and their respective subsidiaries are deemed to be Affiliates of Seller.

1.4.6 "Agreement Approval Date" means the date on which EPE Board Approval and the State Regulatory Approval both have occurred and EPE has notified Seller in writing of same.

1.4.7 "Anniversary Date" means the last Day of the tenth (10th), the fifteenth (15th) and the twentieth (20th) Commercial Operation Years.

1.4.8 “Applicable Law” means all applicable laws, statutes, treaties, codes, ordinances, regulations, certificates, orders, licenses and permits of any Governmental Authority, now in effect or hereafter enacted, amendments to any of the foregoing, interpretations of any of the foregoing by a Governmental Authority having jurisdiction, and all applicable judicial, administrative, arbitration and regulatory decrees, judgments, injunctions, writs, orders, awards or like actions (including those relating to human health, safety, the natural environment, or otherwise).

1.4.9 “Avoided Cost” means the estimated incremental energy costs for electric energy an electric utility would incur if required to generate electric energy itself or purchase from another source as defined by 17.9.570 New Mexico Admin Code or other Applicable Law.

1.4.10 “Back-Up Metering” means redundant Electric Metering Devices installed by either Party pursuant to Section 5.2(B).

1.4.11 “Business Day” means any Day that is not a Saturday, a Sunday, or a NERC-recognized holiday.

1.4.12 “CAMD” means the Clean Air Markets Division of the Environmental Protection Agency or successor administrator (collectively with any local, state, regional, or federal entity given jurisdiction over a program involving transferability of Environmental Attributes).

1.4.13 “Capacity Attributes” means any current or future defined characteristic, certificate, tag, credit, ancillary service, or attribute thereof, whether general in nature or specific as to the location or any other attribute of the Facility, intended to value any aspect of the electric generation capability and capacity of the Facility or the Facility’s capability and ability to produce Energy at a given capacity level or ability to ramp up or down at a given rate, including, but not limited to, any accounting construct so that the full Designated Maximum Capacity of the Facility (or such portion of the Designated Maximum Output as may be available and eligible for counting under Applicable Law) may be counted toward any resource adequacy requirement or any other measure by the WECC, the FERC, or any other entity invested with the authority under Applicable Law to require EPE to procure, or to procure at EPE’s expense, resource adequacy or other such products. Capacity Attributes are measured in MWs and do not include any Tax Credits, or any other tax incentives existing now or in the future associated with the construction, ownership or operation of the Facility.

1.4.14 “Close of the Business Day” means 5:00 PM prevailing time in El Paso, Texas, on a Business Day.

1.4.15 “Commercial Operation” means the period beginning on the Commercial Operation Date and continuing through the Term.

1.4.16 “Commercial Operation Date” means the date designated by Seller on which (i) the Facility is energized and operates in parallel with the EPE transmission system and begins delivering Net Output to EPE pursuant to the terms of this Agreement, which

shall take effect no sooner than the date that EPE has accepted Seller's declaration, pursuant to Section 4.9, that all of the Conditions specified in Section 4.9 have occurred or otherwise been satisfied.

1.4.17 "Commercial Operation Milestone" means the Construction Milestone for the Commercial Operation Date as specified in Exhibit A, as it may be extended or accelerated pursuant to Section 4.4. When used herein, Commercial Operation Milestone includes all applicable extensions and accelerations.

1.4.18 "Commercial Operation Year" means each twelve (12) consecutive Month period during the Term, commencing with the first Day of the Month following the Commercial Operation Date and each anniversary thereof. If the Commercial Operation Date does not occur on the first Day of the Month, then the first Month of the first Commercial Operation Year is deemed to include the period commencing on the Commercial Operation Date and ending on the last Day of the Month in which the Commercial Operation Date occurs.

1.4.19 "Commissioning" means, with respect to the Facility, the commencement of the period during which the Facility has begun Commissioning Testing and ending on the Commercial Operation Date as determined in accordance with Section 4.9.

1.4.20 "Commissioning Tests" or "Commissioning Testing" has the meaning set forth in Section 4.6.

1.4.21 "Committed Net Output" has the meaning set forth in Section 7.2.

1.4.22 "Compliance Actions" has the meaning set forth in Section 7.6(A).

1.4.23 "Compliance Cap" has the meaning set forth in Section 7.6(A).

1.4.24 "Compliance Obligations" has the meaning set forth in Section 4.9(F).

1.4.25 "Conditions" has the meaning set forth in Section 4.9.

1.4.26 "Confidential Information" has the meaning set forth in Section 20.19(D).

1.4.27 "Construction Event(s) of Default" has the meaning set forth in Section 13.1.

1.4.28 "Construction Milestone(s)" means the date(s) set forth in Exhibit A by which Seller agrees to achieve the corresponding result(s) specified for such date(s), including, but not limited to, the Commercial Operation Milestone, as such date(s) may be extended or accelerated pursuant to Section 4.4. When used herein, Construction Milestone(s) includes all applicable extensions.

1.4.29 "Costs" means, with respect to a non-defaulting Party, brokerage fees, commissions and other similar third-party transaction costs and expenses reasonably incurred by such Party in entering into new arrangements which replace this Agreement and

all reasonable attorneys' fees and expenses incurred by a Party in connection with enforcing its rights under this Agreement. With respect to Seller, Costs include any (i) make-whole for early prepayment provisions payable by Seller to the Facility Lender, or (ii) expenses incurred by Seller in either entering into or terminating any arrangement pursuant to which it has hedged its obligations.

1.4.30 "COVID-19" means the viral pneumonia named coronavirus disease 2019 (COVID-19) by the World Health Organization and caused by the virus named Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2) by the International Committee on Taxonomy of Viruses and any mutations thereof.

1.4.31 "COVID-19 Delay" has the meaning set forth in Section 4.4.3

1.4.32 "COVID-19 Event" has the meaning set forth in Section 4.4.3.

1.4.33 "Curtailed Energy" has the meaning set forth in Section 8.3(A)(2).

1.4.34 "Daily Good Faith Estimate" has the meaning set forth in Section 14.3(C).

1.4.35 "Day" means a calendar day.

1.4.36 "Delay Damages" has the meaning set forth in Section 4.3.

1.4.37 "Delivery Excuse" means an event solely due to actions or omissions by EPE that prevents or delays delivery of Net Output hereunder.

1.4.38 "Designed Maximum Capacity" means the maximum capacity for which the Facility is designed, and which shall be 20 MWac (plus or minus 0.25 MWac) at the Point of Interconnection.

1.4.39 "Disclosing Party" has the meaning set forth in Section 20.19(A).

1.4.40 "Dispute" has the meaning set forth in Section 13.8.

1.4.41 "Dispute Notice" has the meaning set forth in Section 13.8.

1.4.42 "Early Termination Date" has the meaning set forth in Section 13.5(A).

1.4.43 "Electric Metering Device(s)" means metering equipment, and data processing equipment used to measure, record, or transmit data relating to the Output from the Facility and that are specified in the Interconnection Agreement. Electric Metering Devices include the metering current transformers ("CTs") and the metering voltage transformers ("VTs").

1.4.44 "Emergency Condition" means a condition or situation (including any condition or requirement imposed on either Party or the Facility by a State Regulator or the failure by Seller to perform any obligation hereunder consistent with Good Utility Practices or applicable requirements of an Independent System Operator or Regional Transmission



Organization of which EPE is a member) that (i) presents an imminent physical threat of danger to life, health or property, or (ii) could reasonably be expected, in the opinion of EPE, as Interconnection Provider, to cause a significant disruption to EPE's system

1.4.45 “Energy” means the net electrical energy generated in MWh using solar photovoltaic generation technologies. Energy shall be of a power quality of 60 cycle, three-phase alternating current that is compliant with the Interconnection Agreement.

1.4.46 “Environmental Attributes” means all attributes, excluding Tax Credits, of an environmental or other nature that are created or otherwise arise from the Facility's generation of electricity from solar energy in contrast with the generation of electricity using nuclear or fossil fuels or other traditional resources. Forms of such attributes include any and all environmental air quality credits, green credits, carbon credits, emissions reduction credits, certificates, tags, offsets, allowances, or similar products or rights, howsoever entitled, (i) resulting from the avoidance of the emission of any gas, chemical, or other substance, including mercury, nitrogen oxide, sulfur dioxide, carbon dioxide, carbon monoxide, particulate matter or similar pollutants or contaminants of air, water, or soil, gas, chemical, or other substance, and (ii) attributable to the generation, purchase, sale or use of Net Output associated with the Committed Net Output delivered by Seller from or by the Facility, or otherwise attributable to the Facility during the Term. Environmental Attributes include those currently existing or arising during the Term under local, state, regional, federal, or international legislation or regulation relevant to the avoidance of any emission described in this Section 1.4.46 under any governmental, regulatory or voluntary program, including the United Nations Framework Convention on Climate Change and related Kyoto Protocol or other programs, laws or regulations involving or administered by the CAMD. Environmental Attributes do not include ITCs or any other Tax Credits, or certain other tax incentives existing now or in the future associated with the construction, ownership or operation of the Facility.

1.4.47 “Environmental Contamination” means the introduction or presence of Hazardous Materials at such levels, quantities or location, or of such form or character, as to constitute a violation of federal, state or local laws or regulations, and present a material risk under federal, state or local laws and regulations that the Site will not be available or usable for the purposes contemplated by this Agreement.

1.4.48 “Environmental Law” means any law, statute, regulation, rule or order, by any federal, state or local agency or body relating to protection of human health or the environment, including Hazardous Materials.

1.4.49 “Environmental Permits” means any Governmental Approval required under any Environmental Law.

1.4.50 “EPC Contract” means the engineering, procurement and construction contract entered into between Seller and the EPC Contractor in relation to construction of the Facility.

1.4.51 “EPC Contractor” means the contractor as identified to EPE once selected by Seller.

1.4.52 “EPE Board Approval” has the meaning set forth in Section 6.1(A).

1.4.53 “EPE Event(s) of Default” has the meaning set forth in Section 13.4.

1.4.54 “EPE’s Interconnection Facilities” means the facilities owned and operated by EPE as identified in the Interconnection Agreement. Arrangements for the installation and operation of EPE’s Interconnection Facilities shall be governed by the Interconnection Agreement.

1.4.55 “EPE System Operations Center” or “EPE SOC” means EPE’s organization responsible for dispatch of generating units, including the Facility.

1.4.56 “Event of Default” has the meaning set forth in Section 13.5.

1.4.57 “Execution Date” has the meaning set forth in the first paragraph of this Agreement.

1.4.58 “Expansion Energy” has the meaning set forth in Section 9.1(A).

1.4.59 “Expected Net Output” means the number of alternating current MWh of Net Output that Seller expects the Facility to generate and deliver to the Point of Delivery for sale to EPE during each Commercial Operation Year. The Expected Net Output for each such Commercial Operation Year shall be as specified for such Commercial Operation Year in Exhibit F.

1.4.60 “Facility” means Seller’s electric generating facility and Seller’s Interconnection Facilities, as identified and described in Article 3 and Exhibit B, including, but not limited to, all of the following, the purpose of which is to produce Output from the sun and deliver Net Output to the Point of Delivery: the Site, Seller’s equipment, buildings, all of Seller’s generation facilities, including panels, inverters, step up transformers, output breakers, Seller’s facilities necessary to connect to the Point of Interconnection, protective and associated equipment, improvements, and other tangible assets or contract rights reasonably necessary for the construction, operation, and maintenance of the electric generating facility that produces Output subject to this Agreement. The address of the Facility is as described in Exhibit B. A scaled map that identifies the Site, the location of the Facility at the Site, the location of the Point of Interconnection and the location of the important ancillary facilities and Interconnection Facilities, is included in Exhibit B.

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

1.4.62 “Facility Lender” means, collectively, any Person or successors in interest thereof (A) lending money, extending credit or providing loan guarantees (whether directly to Seller or to an Affiliate of Seller) as follows: (i) for the construction, interim or permanent financing or refinancing of the Facility; (ii) for working capital or other ordinary business requirements of the Facility (including the maintenance, repair, replacement or improvement of the Facility); (iii) for any development financing, bridge financing, credit support, credit enhancement or interest rate protection in connection with the Facility; (iv) for any capital improvement or replacement related to the Facility; or (v) for the purchase of the Facility and the related rights from Seller; or (B) participating (directly or indirectly) as an equity investor (including a Tax Equity Investor) in the Facility; or (C) any long-term lessor of the Facility in a sale-leaseback.

1.4.63 “Fair Market Value” means the fair market value of the Facility as determined pursuant to Section 9.3.

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

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

1.4.66 “First Post-COD Testing Period” has the meaning set forth in Section 4.6(B)(1).

1.4.67 “Fifth Post-COD Testing Period” has the meaning set forth in Section 4.6(B)(5).

1.4.68 “Force Majeure Event” has the meaning set forth in Article 15.

1.4.69 “Forced Outage” means a reduction of, or cessation in the delivery of, or inability to deliver, Net Output that is not the result of (i) a Scheduled Maintenance Outage, (ii) a Force Majeure Event, (iii) a Delivery Excuse, or (iv) an Emergency Condition.

1.4.70 “Fourth Post-COD Testing Period” has the meaning set forth in Section 4.6(B)(4).

1.4.71 “Gains” means, with respect to a non-defaulting Party, an amount equal to the present value of the economic benefit to it, if any (exclusive of Costs), resulting from the termination of this Agreement for the remaining Term, determined in a commercially reasonable manner, which economic benefit (if any) shall be deemed to be the gain (if any)

to such non-defaulting Party represented by the difference between the present value of the payments or deliveries required to be made during the remaining Term and the present value of the payments or deliveries that would be required to be made under a transaction(s) replacing this Agreement.

1.4.72 “Good Utility Practice(s)” means any of the practices, methods and acts (including but not limited to the practices, methods and acts engaged in or approved by a significant portion of the solar electric industry and the Interconnection Provider) during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather to be practices, methods, or acts generally accepted in the region. With respect to the Facility, Good Utility Practice(s) includes, without limitation, reasonable steps to ensure that: (i) equipment, materials, resources, and supplies, including spare parts inventories, are available to meet the Facility’s needs; (ii) sufficient operating personnel are available as and when necessary and are adequately experienced and trained and licensed as necessary to operate the Facility properly, efficiently, and in coordination with EPE and are capable of responding to reasonably foreseeable emergency conditions whether caused by events on or off the Site; (iii) preventive, routine, and non-routine maintenance and repairs are performed on a basis that ensures reliable, long-term and safe operation, and are performed by knowledgeable, trained, and experienced personnel utilizing proper equipment and tools; (iv) appropriate monitoring and testing are performed to ensure equipment is functioning as designed; (v) equipment is not operated in a reckless manner, in violation of manufacturer’s guidelines or in a manner unsafe to workers, the general public, or the interconnected system or contrary to Environmental Laws or without regard to defined limitations such as flood conditions, safety inspection requirements, operating voltage, current, volt-ampere reactive loading, frequency, polarity, synchronization, and control system limits; (vi) equipment and components meet or exceed the standard of durability that is generally used for solar electric generation operations in the region and will function properly over the full range of ambient temperature and weather conditions reasonably expected to occur at the Site and under both normal and Emergency Conditions; and (vii) equipment, components, and processes are appropriately permitted with any local, state, or federal Governmental Authority and are operated and maintained in accordance with applicable permit and regulatory requirements.

1.4.73 “Governmental Approval” means any authorization, consent, permission, approval, license, ruling, permit, exemption, variance, order, judgment, instruction, condition, direction, directive, decree, declaration of or regulation by any Governmental Authority relating to the construction, development, ownership, occupation, start-up, testing, operation or maintenance of the Facility or to the execution, delivery or performance of this Agreement or the procurement pursuant to this Agreement of Net Output and Environmental Attributes for inclusion in EPE’s renewable energy portfolio pursuant to Applicable Law and recovery of the related costs, and shall also mean, where and as applicable and the context so dictates, any and all authorization, consent, permission, approval, license, ruling, permit, exemption, variance, order, judgment, instruction,

condition, direction, directive, decree, declaration of or regulation with regard to any Compliance Obligations.

1.4.74 “Governmental Authority” means any federal, state, local or other governmental regulatory or administrative agency, court, commission, department, board, or other governmental subdivision, legislature, rulemaking board, tribunal, or other governmental authority, including State Regulators, or such other entities with authority over EPE or Seller such as NERC, WECC, or a Regional Transmission Organization or an Independent System Operator having jurisdiction over a Party or the Parties, their respective facilities, or the respective services they provide, and exercising or entitled to exercise any administrative, executive, police, or taxing authority or power.

1.4.75 “Guaranty” has the meaning set forth in Section 12.1(C)(3).

1.4.76 “Hazardous Materials” means any substance, material, gas, or particulate matter that is regulated by any Governmental Authority as an environmental pollutant or dangerous to public health, public welfare, or the natural environment including, without limitation, protection of non-human forms of life, land, water, groundwater, and air, including, without limitation, any material or substance that is: (i) defined as “toxic,” “polluting,” “hazardous waste,” “hazardous material,” “hazardous substance,” “extremely hazardous waste,” “solid waste” or “restricted hazardous waste” under any provision of local, state, or federal law; (ii) petroleum, including any fraction, derivative or additive; (iii) asbestos; (iv) polychlorinated biphenyls; (v) radioactive material; (vi) designated as a “hazardous substance” pursuant to the Clean Water Act, 33 U.S.C. §1251 *et seq.* (33 U.S.C. §1251); (vii) defined as a “hazardous waste” pursuant to the Resource Conservation and Recovery Act, 42 U.S.C. §6901 *et seq.* (42 U.S.C. §6901); (viii) defined as a “hazardous substance” pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601 *et seq.* (42 U.S.C. §9601); (ix) defined as a “chemical substance” under the Toxic Substances Control Act, 15 U.S.C. §2601 *et seq.* (15 U.S.C. §2601); or (x) defined as a pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §136 *et seq.* (7 U.S.C. §136).

1.4.77 “Hour Ending” means the preceding hourly time period in a 24-hours day. As an example, 12:01 a.m. to 1:00 am is HE01; 1:00 p.m. to 2:00 p.m. is HE13.

1.4.78 “Indemnification Event” has the meaning set forth in Section 18.3.

1.4.79 “Indemnified Party” has the meaning set forth in Section 18.1.

1.4.80 “Indemnifying Party” has the meaning set forth in Section 18.1.

1.4.81 “Interconnection Agreement” means the separate agreement to be negotiated between Seller and EPE, as such agreement may be amended from time to time, providing for interconnection of the Facility to the transmission facilities of EPE at the location specified in such agreement.

1.4.82 “Interconnection Facilities” has the same meaning as that same term is defined in the Interconnection Agreement.

1.4.83 “Interconnection Provider” means EPE, acting in its capacity as interconnection provider under the Interconnection Agreement.

1.4.84 “Interest Rate” has the meaning set forth in Section 5.3(C).

1.4.85 “Interests” has the meaning set forth in Section 19.3.

1.4.86 “Issuer” has the meaning set forth in Section 12.1(C).

1.4.87 “ITCs” means the investment tax credits established pursuant to Section 48 of the Internal Revenue Code, as such law may be amended or superseded.

1.4.88 “kW” means kilowatt.

1.4.89 “kWh” means kilowatt hour.

1.4.90 “Lender Consent” has the meaning set forth in Section 19.2(B).

1.4.91 “Letter of Credit” has the meaning set forth in Section 12.1(C)(1).

1.4.92 “Losses” means, with respect to the non-defaulting Party, an amount equal to the present value of the economic loss to it, if any (exclusive of Costs), resulting from termination of this Agreement for the remaining Term, determined in a commercially reasonable manner, which economic loss (if any) will be deemed to be the loss (if any) to such Party represented by the difference between the present value of the payments or deliveries required to be made under this Agreement and the present value of the payments or deliveries that would be required to be made under transactions replacing this Agreement, each of which shall be calculated for the remaining Term of the Agreement. If EPE is the non-defaulting Party, its economic losses will include the cost of replacing the Environmental Attributes lost as a result of such termination.

1.4.93 “Market REC Price” means EPE’s average quoted price per REC (including transaction and incidental costs) of purchasing replacement RECs of similar type and characteristics to cover the REC shortfall associated with a particular shortfall in Net Output delivery under this Agreement. To determine the average quoted price of such replacement RECs, EPE shall solicit quotes from two (2) independent brokers and/or sellers of RECs that are not Affiliates of EPE. If EPE receives quotes from two (2) such independent broker(s), the Market REC Price shall be the average of the quotes received. If EPE is unable to secure quotes from two (2) such brokers and/or sellers despite commercially reasonable efforts, the Market REC Price shall equal the average price of RECs of similar type and characteristics already delivered to EPE from solar generating facilities of third-party, non-Affiliates of EPE during the applicable shortfall period.

1.4.94 “Month” means a calendar month.

1.4.95 “Mountain Prevailing Time” or “MPT” means the time in effect in the Mountain Time Zone of the United States of America, whether Mountain Standard Time or Mountain Daylight Saving Time.

1.4.96 “MW” means megawatt or one thousand kW.

1.4.97 “MWh” means megawatt hours.

1.4.98 “NERC” means the North American Electric Reliability Council or any successor organization.

1.4.99 “Non-appealable State Regulatory Approval Order” means a State Regulatory Approval Order (i) that is not subject to appeal to any state court because the period permitted for such an appeal has passed without the filing of notice of such appeal, or (ii) that was affirmed on appeal to any state court or was affirmed upon further appeal or appellate process, and that is not subject to further appeal, because the jurisdictional time permitted for such an appeal and/or further appellate process such as a motion for reconsideration or an application for writ of certiorari has passed without the filing of notice of such an appeal or the filing for further appellate process.

1.4.100 “Net Output” means all Energy and capacity produced by the Facility, less Station Usage and less transformation and transmission losses and other adjustments (e.g., Seller’s load other than Station Usage), if any. For purposes of calculating payment under this Agreement, Net Output of energy shall be the amount of energy flowing through the Point of Delivery.

1.4.101 “Net Output Shortfall” has the meaning set forth in Section 7.3(B).

1.4.102 “NMPRC” means the New Mexico Public Regulation Commission.

1.4.103 “Non-Scheduled Maintenance Period” has the meaning set forth in Section 14.5(A).

1.4.104 “Notice of Proposed Third Party Sale” has the meaning set forth in Section 9.2(C).

1.4.105 “Notice to Proceed” means the written notice from Seller to EPC Contractor that directs EPC Contractor to commence full construction of the Facility at the Site.

1.4.106 “Notification Date” has the meaning set forth in Section 4.9.

1.4.107 “Offered Interests” has the meaning set forth in Section 9.2(A).

1.4.108 “Offeror” has the meaning set forth in Section 9.2(A).

1.4.109 “Operating Committee” means one representative each from EPE and Seller pursuant to Section 14.2(A).

1.4.110 “Operating Procedures” means those procedures developed pursuant to Section 14.2(B).

1.4.111 “Operation and Maintenance Agreement” means that certain operation and maintenance agreement between Seller and the Operation and Maintenance Contractor with respect to the Facility, if applicable.

1.4.112 “Operation and Maintenance Contractor” means an operation and maintenance contractor as identified to EPE, if used by Seller.

1.4.113 “Operational Events of Default” has the meaning set forth in Section 13.2.

1.4.114 “Option Confirmation Notice” has the meaning set forth in Section 9.3(D).

1.4.115 “Output” means all energy produced by the Facility.

1.4.116 “Parent” has the meaning set forth in Section 19.3.

1.4.117 “Party Representative” or “Parties’ Representatives” has the meaning set forth in Section 13.8.

1.4.118 “Payment Rate” means the rate paid by EPE to Seller for Net Output and Environmental Attributes as specified in Exhibit F.

1.4.119 “Permitted Extension” has the meaning set forth in Section 4.4.1.

1.4.120 “Permitted Transfer” has the meaning set forth in Section 19.4.

1.4.121 “Person” means any natural person, corporation, limited liability company, general partnership, limited partnership, proprietorship, other business organization, trust, union, association or Governmental Authority.

1.4.122 “Photovoltaic Module Supply Agreement” means the agreement to purchase photovoltaic modules entered into between a Tier 1 Supplier and either Seller or EPC Contractor in relation to construction of the Facility.

1.4.123 “Point of Delivery” means the point at which electricity generated by the Facility is delivered to EPE. In general, the Point of Interconnection shall be the same as the Point of Delivery. Any differences between the Point of Interconnection and Point of Delivery shall be identified in Exhibit B.

1.4.124 “Point of Interconnection” has the same meaning as that same term is defined in the Interconnection Agreement.

1.4.125 “Preliminary Interest Notice” has the meaning set forth in Section 9.3(A).

1.4.126 “Project Contracts” means this Agreement, the EPC Contract, the Photovoltaic Module Supply Agreement, the Interconnection Agreement, and the Operation and Maintenance Agreement.

1.4.127 “Projected Schedule” has the meaning set forth in Section 14.3(A).



1.4.128 “Proposed Purchase Notice” has the meaning set forth in Section 9.2(B).

1.4.129 “Proposed Sale Notice” has the meaning set forth in Section 9.2(B).

1.4.130 “Receiving Party” has the meaning set forth in Section 20.19(A).

1.4.131 “Renewable Energy Certificate(s)” or “REC(s)” means a certificate(s) that complies in all respects with Applicable Law, including any applicable final orders of a State Regulator, which documents that the Energy delivered under this Agreement is Solar Energy and is provided with the associated energy from Seller at no additional cost to EPE, except as set forth in Section 11.5. RECs do not include any Tax Credits.

1.4.132 “Replacement Energy Costs” means those damages suffered by EPE as a direct result of Seller’s failure to perform its obligations under this Agreement, including (i) all incremental costs suffered by EPE to replace the Net Output or the Environmental Attributes that Seller fails to deliver to EPE under this Agreement with alternatives that are of the same type (e.g., solar RECs) and characteristics (e.g., vintage) that were required to be delivered by Seller to EPE hereunder and that meet the requirements of Applicable Law, (ii) any replacement solar capacity necessary to make up for any shortfall in the capacity to be provided under this Agreement (to comply with the Applicable Law) which shortfall was caused by Seller or the Facility, (iii) costs and penalties imposed by any Governmental Authority, paid or required to be paid by EPE as a result of Seller’s failure to perform under this Agreement, and (iv) EPE’s expenses including reasonable attorneys’ fees suffered as a result of Seller’s failure to perform under this Agreement. The “Replacement Energy Cost” of RECs associated with Seller’s failure to perform under this Agreement shall be based upon the Market REC Price.

1.4.133 “Representative” has the meaning set forth in Section 20.19(B).

1.4.134 “Required Amount” has the meaning set forth in Section 12.1(A).

1.4.135 “Required Commercial Operation Date” is May 1, 2022, as may be extended as a result of a Permitted Extension, by payment of Delay Damages, or as otherwise provided in this Agreement. When used herein, Required Commercial Operation Date includes all applicable extensions.

1.4.136 “Required Facility Documents” means the Permits and other authorizations, rights and agreements now or hereafter necessary for construction, ownership, operation, and maintenance of the Facility, and to deliver the Net Output and Environmental Attributes generated by the Facility to EPE in accordance with this Agreement and Applicable Law, including those set forth in Exhibit H.

1.4.137 “Revised Commercial Operation Milestone” means a date specified by Seller pursuant to Section 13.1(E).

1.4.138 “ROFO” has the meaning set forth in Section 9.2(A).

1.4.139 “Rule” has the meaning set forth in Section 1.1(D).

1.4.140 “Scheduled Maintenance Outage” means a time period during which the Facility is shut down or its output reduced to undergo scheduled maintenance in accordance with this Agreement, or as otherwise agreed by Seller and EPE.

1.4.141 “Second Post-COD Testing Period” has the meaning set forth in Section 4.6(B)(2).

1.4.142 “Security Fund” has the meaning set forth in Section 12.1.

1.4.143 “Seller Approval Period” has the meaning set forth in Section 6.1(D).

1.4.144 “Seller’s Interconnection Facilities” means the facilities owned and operated by the Seller as identified in the Interconnection Agreement. Arrangements for the installation and operation of the Seller’s Interconnection Facilities shall be governed by the Interconnection Agreement.

1.4.145 “Settlement Amount” means, with respect to the non-defaulting Party, the Losses and Costs less any Gains, expressed in U.S. dollars, which such Party incurs as a result of a termination of this Agreement in accordance with Section 13.5(B); provided, that if the calculation above results in a negative number, the result of such calculation shall be deemed to be zero; and provided, further, for purposes of this calculation, the Facility shall be deemed to have generated the same quantity of electric energy in MWh generated by the Facility during the relevant interval of the prior year, subject to an annual degradation of 0.5%, or if such data is unavailable during such relevant interval, then the Parties shall calculate such quantity of electric energy using available data or interpolated data determined in accordance with Good Utility Practice.

1.4.146 “Shortfall Amount” has the meaning set forth in Section 7.3(B).

1.4.147 “Shortfall Damages” has the meaning set forth in Section 7.3(B).

1.4.148 “Site” means real estate on which the Facility will be constructed and located, including any interests, easements, water rights, and access rights reasonably necessary for the construction, operation and maintenance of the Facility. The Site is more specifically described in Exhibit B.

1.4.149 “Solar Energy” means Energy that qualifies as solar energy as defined by the Rule or other Applicable Law.

1.4.150 “Solar Energy Dispatch” means the Facility’s ability to generate energy in a range from 0% to 100% of the Facility’s total nameplate capacity in increments no greater than 2 MW by receiving real-time communication signals from EPE’s EMS and SOC. Subject to the foregoing, dispatch of the Facility must be able to provide control of MW ramping, for voltage and frequency regulation, in real-time while providing maximum flexibility.

1.4.151 “State Regulator” means the NMPRC or the Public Utility Commission of Texas as applicable.

1.4.152 “State Regulatory Approval” has the meaning set forth in Section 6.1(B).

1.4.153 “State Regulatory Approval Order” means an order of the State Regulator for State Regulatory Approval that is not an Unfavorable State Regulatory Order.

1.4.154 “Station Usage” means all Energy produced by the Facility that is used within the Facility to power the lights, motors, control systems and other auxiliary electrical loads that are necessary for operation of the Facility.

1.4.155 “Tax Credits” means any state, local and/or federal production tax credits, tax deduction, and/or investment tax credit (including the ITC) specific to the production of renewable energy and/or investment in renewable energy facilities.

1.4.156 “Tax Equity Investor” means an investor that has acquired an equity interest in Seller pursuant to a financing structure that assigns such investor rights, title and benefits to the Tax Credits of Seller.

1.4.157 “Term” means the period of time during which this Agreement shall remain in full force and effect, and which is further defined in Article 2.

1.4.158 “Termination Payment” has the meaning set forth in Section 13.5(A).

1.4.159 “Test Date” means the date on which Seller shall commence Commissioning of the Facility and shall be the date falling no later than thirty (30) Days prior to the Commercial Operation Date or such other date as Seller and EPE may agree in writing.

1.4.160 “Test Energy” means Energy produced by the Facility in order to perform testing of the Facility prior to Commercial Operation.

1.4.161 “Third Post-COD Testing Period” has the meaning set forth in Section 4.6(B)(3).

1.4.162 “Tier 1 Supplier” means either (i) any solar module manufacturer that is identified in Exhibit M, or (ii) a solar module manufacturer mutually agreed upon by the Parties that (a) is identified as a “Tier 1 Supplier” by Bloomberg New Energy Finance as of the Execution Date, and (b) has had its solar modules successfully installed in utility-scale solar electric generating facilities of similar size as the Facility.

1.4.163 “Unfavorable State Regulatory Order” means an order of the State Regulator concerning EPE’s requests for State Regulatory Approval that: (i) dismisses EPE’s application for State Regulatory Approval with prejudice; (ii) denies EPE’s application for State Regulatory Approval; (iii) approves EPE’s application for State Regulatory Approval in a form not substantially similar to EPE’s original application as determined by EPE in its sole discretion; or (iv) is deemed to be an Unfavorable State Regulatory Order as provided in Section 6.1(B).

1.4.164 “WECC” means the Western Electricity Coordinating Council, a NERC regional electric reliability council, or any successor organization.

1.4.165 “WREGIS” means the Western Renewable Energy Generation Information System.

1.4.166 “WREGIS Certificate” means “Certificate” as defined by the WREGIS Operating Rules.

1.4.167 “WREGIS Operating Rules” means the operating rules and requirements adopted by WREGIS.

1.4.168 “Year” means a calendar year consisting of 365 Days.

## ARTICLE 2 - TERM

2.1 Term. This Agreement shall be in full force and effect from the Execution Date and shall remain in effect until the end of the Day on the twentieth (20<sup>th</sup>) anniversary of the Commercial Operation Date, subject to any early termination or extension provisions set forth herein.

## ARTICLE 3 - FACILITY DESCRIPTION

3.1 Summary Description. Seller shall be responsible for the design, engineering, construction, ownership, operation, and maintenance of the Facility, which shall consist of devices for generating electricity and associated equipment having the Designed Maximum Capacity, which electricity shall qualify as Solar Energy and which devices and equipment shall be located in New Mexico on the Site. Exhibit B provides a detailed description of the Facility, including identification of the major equipment and components that comprise the Facility. The Expected Net Output generated from the Facility (i) for the first Commercial Operation Year shall be 62,688 MWh, and (ii) for each subsequent Commercial Operation Year shall be the amount specified for such Commercial Operation Year in Exhibit F.

3.2 General Design and Operation of the Facility. Seller shall be responsible for the design, engineering, construction, and operation of the Facility according to Good Utility Practice(s), the Interconnection Agreement and the requirements of Applicable Law that apply to construction, operation or maintenance of the Facility (including any applicable Additional Consents from any Governmental Authority). During Commercial Operation, Seller shall maintain the Facility according to Good Utility Practice(s) and the Interconnection Agreement, and in accordance with the Financing Documents (if any). In addition to the requirements of the Interconnection Agreement, the Facility shall at all times:

(A) have the required panel space and 125V DC battery supplied voltage to accommodate metering, generator telemetering equipment and communications equipment;

(B) use communication circuits from the Facility to EPE's SOC for the purpose of telemetering, supervisory control/data acquisition, and voice communications as required by EPE in the Interconnection Agreement; and

(C) have the ability to receive real-time communications with EPE's EMS to provide the capability to remotely signal Solar Energy Dispatch and curtailment of the Facility.

3.3 Environmental Compliance. Seller must obtain and pay for all applicable Environmental Permits from any Governmental Authority needed for construction, operation, maintenance, and decommissioning of the Facility, copies of which will be provided by Seller to EPE within ten (10) Business Days of the issuance of such permits. Seller shall promptly notify EPE of any and all violations and any and all investigations, actions, claims, suits, notices of violation, fines, penalties, orders, revocations, and other proceedings related to violations or alleged violations of Environmental Laws, including, but not limited to, permits issued thereunder, which are asserted against Seller or any of Seller's personnel in connection with the Facility or their activities on, along, adjacent to or near the Site by any Governmental Authority, except to the extent that any of the foregoing do not, and reasonably could not be expected to, have a material adverse impact on Seller's ability to perform its obligations under this Agreement. Seller will keep EPE informed on a regular basis of the progress made and resolution of such events.

3.4 Tax Credits. Seller shall bear all risks, financial and otherwise throughout the Term, associated with Seller's or the Facility's eligibility to receive ITCs or other Tax Credits, or to qualify for accelerated depreciation for Seller's accounting, reporting or tax purposes. The obligations of the Parties under this Agreement, including those obligations regarding the purchase and price for and Seller's obligation to deliver Output, shall be effective regardless of whether the sale of Output from the Facility is eligible for, or receives, ITCs or other Tax Credits during the Term.

#### **ARTICLE 4 - PRE-COMMERCIAL OPERATION**

##### 4.1 Construction of the Facility.

(A) Seller shall use commercially reasonable efforts to obtain any land rights necessary for the Facility.

(B) Other than the rights and obligations of EPE specified in this Agreement and any documents ancillary hereto, neither this Agreement nor any such ancillary document shall be interpreted to create in favor of EPE, and EPE specifically disclaims, any present right, title or interest in any part of the Facility.

(C) In the event Seller should determine that the expected Commercial Operation Date is not feasible or is impossible to achieve, Seller shall promptly notify EPE and shall advise EPE of the new expected Commercial Operation Date; *provided, however*, such new expected Commercial Operation Date shall not be later than the Required Commercial Operation Date.

(D) As of the Execution Date, the Required Commercial Operation Date is May 1, 2022 and the Commercial Operation Milestone and other Construction Milestones in Exhibit A have been established accordingly, subject to potential further extension in accordance with Section 4.4.

4.2 Monitoring and Inspection. Upon reasonable prior notice and during normal business hours, EPE shall have the right to monitor the construction, start-up and testing of the Facility, and Seller shall comply with all reasonable requests of EPE with respect to the monitoring of these events. Seller shall cooperate in such physical inspections of the Facility as may be reasonably requested by EPE during and after completion of construction; *provided*, that EPE's technical review and inspection of the Facility shall not be construed as either endorsing the design thereof or as any warranty of safety, durability, or reliability of the Facility, or as otherwise giving EPE any right to approve the design of the Facility. Persons visiting the Facility on behalf of EPE shall comply with Seller's applicable safety and health rules and requirements and shall not interfere with Seller's construction or operation of the Facility.

4.3 Construction Milestones; Delay Damages. In order to achieve the Commercial Operation Milestone by the date specified therefor in Exhibit A, Seller agrees to use commercially reasonable efforts to meet the Construction Milestones set forth in Exhibit A. In the event that Seller fails to achieve any Construction Milestone by the date set forth in Exhibit A (unless such Construction Milestone has been extended pursuant to Section 4.4), Seller shall, as a payment to EPE of liquidated damages on account of such delay, pay EPE the amount of \$1,500 for each Day of delay in achieving such Construction Milestone ("Delay Damages"), and such Delay Damages shall continue to accrue until such Construction Milestone is achieved; *provided, however*, that (A) if Seller subsequently achieves Commercial Operation by the Commercial Operation Milestone (as such date may be extended pursuant to Section 4.4), then EPE shall refund to Seller any Delay Damages previously paid by Seller, less EPE's verifiable third party costs incurred in investigating the availability of replacement energy or Environmental Attributes as a result of Seller's failure to achieve such Construction Milestone, and (B) if Seller subsequently achieves Commercial Operation after the Commercial Operation Milestone (as such date may be extended pursuant to Section 4.4), then EPE shall refund to Seller the positive difference (if any) between (i) Delay Damages previously paid by Seller, less EPE's verifiable third party costs incurred in investigating the availability of replacement energy or Environmental Attributes as a result of Seller's failure to achieve such Construction Milestone, and (ii) the product of (x) \$1,500 and (y) the number of Days after such Commercial Operation Milestone that Seller achieves Commercial Operation, less EPE's verifiable third party costs incurred in investigating the availability of replacement energy or Environmental Attributes as a result of Seller's failure to achieve such Construction Milestone, and (C) the Commercial Operation Milestone may not be extended by more than two hundred forty (240) Days by payment of Delay Damages. Each Party agrees and acknowledges that (A) the damages that EPE would incur due to Seller's delay in achieving the Construction Milestones would be difficult or impossible to predict with certainty, (B) the Delay Damages are a reasonable forecast of just compensation for such damages, and (C) Seller will not seek to raise as a defense to payment of Delay Damages in any legal or equitable proceeding (including any mediation pursuant to Section 13.9) that such damages are unenforceable as a penalty or otherwise contrary to Applicable Law or public policy.

4.4 Extension of Construction Milestones and the Required Commercial Operation Date.

4.4.1 After executing this Agreement and subject to Sections 6.1, Seller may extend any Construction Milestone (including the Commercial Operation Milestone) and the Required Commercial Operation Date as a result of the occurrence of any of the following events (each, a “Permitted Extension”): (A) one or more Force Majeure Events pursuant to Section 4.4.2, (B) one or more COVID-19 Events pursuant to Section 4.4.3, or (C) one or more of the events described in Section 4.4.4; *provided, however*, that if two or more events that give rise to a Permitted Extension occur concurrently, then the Permitted Extensions for those events shall occur concurrently and not consecutively. Changes in a Construction Milestone for any reason other than a Permitted Extension are not allowed, except as provided in Section 4.3 by payment of Delay Damages.

4.4.2 Seller may extend one or more Construction Milestones and/or the Commercial Operation Milestone and Required Commercial Operation Date on a Day-for-Day basis if achievement of the Commercial Operation Milestone and Required Commercial Operation Date will be delayed as a result of one or more Force Majeure Events; *provided, however*, that such extension for reasons of Force Majeure Events alone may not delay achievement of any Construction Milestone by more than three hundred sixty-five (365) Days in the aggregate.

4.4.3 Seller may extend one or more Construction Milestones and/or the Commercial Operation Milestone and Required Commercial Operation Date on a Day-for-Day basis if achievement of the Construction Milestone, Commercial Operation Milestone and/or Required Commercial Operation Date will be delayed as a result of (i) a delay in the manufacture, shipment, or delivery to the site of equipment ordered for the Facility, or (ii) Seller’s inability to place a new order for equipment required for the Facility or to purchase sufficient equipment meeting Seller’s specifications for use in the Facility, (iii) a delay in commencing or completing construction of the Facility, or (iv) Sellers’ or its contractors’ inability to retain or employs sufficient labor, or to obtain sufficient resources, to construct the Facility on time (each a “COVID-19 Delay”), and such COVID-19 Delay is caused by or attributable to COVID-19, including (a) any resulting quarantines, travel restrictions, social distancing requirements, recommendations for social distancing issued by a Governmental Authority, factory shutdowns or slowdowns, workplace or worksite shutdowns or slowdowns or work from home requirements, shipment interruptions or slowdowns, and (b) any other measures initiated or occurring in response to COVID-19, and any other events or conditions resulting from COVID-19 (each of the foregoing is a “COVID-19 Event”); *provided, however*, that such extension for reasons of COVID-19 Delay alone may not delay achievement of any Construction Milestone by more than three hundred sixty-five (365) Days in the aggregate. Seller shall provide written notice to EPE as soon as possible after becoming aware of a COVID-19 Delay caused by a COVID-19 Event. Such written notice shall describe the COVID-19 Delay and how it was caused by or attributable to a COVID-19 Event in reasonable detail and shall identify the resulting Day-for-Day extensions to the affected Construction Milestone, Commercial Operation Milestone and/or Required Commercial Operation Date. Seller shall use commercially reasonable efforts to overcome the COVID-19 Delay, to provide written notices to EPE of

the status of the COVID-19 Delay and Seller's efforts to overcome the COVID-19 Delay, and to minimize the Day-for-Day extensions provided for herein; *provided, that* such efforts shall not require Seller to breach, disregard, or duplicate its contractual commitments relating to equipment purchases for the Facility, or to incur costs that materially exceed the costs that Seller reasonably expected to incur to build the Facility and achieve Commercial Operation under this Agreement. As soon as reasonably possible and in any event within five (5) Business Days after Seller becomes aware of the cessation of the COVID-19 Delay, Seller shall notify EPE in writing of the cessation of the COVID-19 Delay.

4.4.4 Seller may extend one or more Construction Milestones and/or the Commercial Operation Milestone and Required Commercial Operation Date on a Day-for-Day basis if achievement of the Commercial Operation Milestone and Required Commercial Operation Date will be delayed as a result of (i) failure of the Parties to execute an Interconnection Agreement on or before December 1, 2020, so long as such failure is solely due to any failure by EPE to complete, in a commercially reasonable manner and timeframe to facilitate such execution on or before such date, the relevant facility studies necessary for the execution of an Interconnection Agreement, excluding any such failure by EPE caused by a failure by Seller to provide to EPE, in a commercially reasonable manner and timeframe to facilitate the timely completion of such facility studies, the relevant information relating to the Facility necessary for EPE to complete such facility studies, (ii) failure of EPE for any reason to complete the construction of EPE's Interconnection Facilities on or before December 31, 2021 (excluding any such failure caused by a failure of Seller as described in clause (i) of this Section 4.4.4), (iii) the inability of Seller, despite due diligence, to obtain any licenses, permits, or approvals required by any Governmental Authority, or (iv) the failure of EPE to receive State Regulatory Approval on or before May 1, 2021, shall extend such Construction Milestone Day-for-Day.

4.5 Progress Reports. Commencing upon the Agreement Approval Date, Seller shall submit to EPE, on the first Business Day of each calendar quarter until construction of the Facility begins, progress reports in a form reasonably satisfactory to EPE. Once Seller has achieved the "Construction Start" Construction Milestone (as described on Exhibit A), Seller shall submit such progress reports to EPE on the first Business Day of each Month. These progress reports shall notify EPE of the current status of each Construction Milestone and an updated completion schedule for the Facility. Such Monthly reports shall provide a schedule showing items completed and to be completed and a best estimate time-frame within which Seller expects the EPC Contractor to complete such non-completed works. Seller shall, from time to time, upon reasonable advance request from EPE, meet with EPE to discuss the progress of the construction of the Facility. None of the foregoing shall be deemed to be in lieu of, or in substitution for, the general record keeping and reporting obligations of Seller in accordance with Article 14.

4.6 Commissioning Tests.

(A) Seller shall give EPE at least thirty (30) Days prior written notice of the approximate Test Date and of the proposed tests scheduled relating to the Commissioning of the Facility ("Commissioning Tests"). Representatives of EPE shall have the right to be present at all such testing. Seller shall promptly notify EPE of any changes to the Test



Date or the date of any Commissioning Tests relating to the Facility in order that EPE may arrange for its respective representatives to attend.

(B) The Commissioning Tests shall demonstrate the Facility is capable of generating the Designed Maximum Capacity, as adjusted by applicable performance conditions (including the solar irradiance and module temperature) at the time of such Commissioning Tests, *provided*, that the results of such Commissioning Tests shall confirm a Designed Maximum Capacity of not less than twenty (20) MWac; *provided, further*, that if the Commissioning Tests confirm a Designed Maximum Capacity of not less than nineteen (19) MWac but less than twenty (20) MWac, then the following procedures shall apply:

(1) Seller shall conduct subsequent Commissioning Tests during the period, if any, beginning on the Commercial Operation Date and ending on the Required Commercial Operation Date (the “First Post-COD Testing Period”) to confirm a Designed Maximum Capacity of not less than twenty (20) MWac.

(2) If Commissioning Tests conducted by Seller during the First Post-COD Testing Period fail to confirm a Designed Maximum Capacity of not less than twenty (20) MWac on or before the Required Commercial Operation Date, then Seller shall (a) pay EPE, as liquidated damages and not as a penalty, an amount equal to Fifty Thousand Dollars (\$50,000.00) on or before May 15, 2022, and (b) conduct subsequent tests during the period beginning May 2, 2022, and ending July 31, 2022, (the “Second Post-COD Testing Period”) to confirm a Designed Maximum Capacity of not less than twenty (20) MWac.

(3) If Commissioning Tests conducted by Seller during the Second Post-COD Testing Period fail to confirm a Designed Maximum Capacity of not less than twenty (20) MWac on or before July 31, 2022, then Seller shall (a) pay EPE, as liquidated damages and not as a penalty, an amount equal to Fifty Thousand Dollars (\$50,000.00) on or before August 15, 2022, and (b) conduct subsequent tests during the period beginning August 1, 2022, and ending October 31, 2022, (the “Third Post-COD Testing Period”) to confirm a Designed Maximum Capacity of not less than twenty (20) MWac.

(4) If Commissioning Tests conducted by Seller during the Third Post-COD Testing Period fail to confirm a Designed Maximum Capacity of not less than twenty (20) MWac on or before October 31, 2022, then Seller shall (a) pay EPE, as liquidated damages and not as a penalty, an amount equal to Twenty Thousand Dollars (\$20,000.00) on or before November 15, 2022, and (b) conduct subsequent tests during the period beginning November 1, 2022, and ending January 31, 2023, (the “Fourth Post-COD Testing Period”) to confirm a Designed Maximum Capacity of not less than twenty (20) MWac.

(5) If Commissioning Tests conducted by Seller during the Fourth Post-COD Testing Period fail to confirm a Designed Maximum Capacity of not less than twenty (20) MWac on or before January 31, 2023, then Seller shall (a) pay EPE, as

liquidated damages and not as a penalty, an amount equal to Twenty Thousand Dollars (\$20,000.00) on or before February 15, 2023, and (b) conduct subsequent tests during the period beginning February 1, 2023, and ending April 30, 2023, (the “Fifth Post-COD Testing Period”) to confirm a Designed Maximum Capacity of not less than twenty (20) MWac.

(6) If Commissioning Tests conducted by Seller during the Fifth Post-COD Testing Period fail to confirm a Designed Maximum Capacity of not less than twenty (20) MWac on or before April 30, 2023, then (a) the Designed Maximum Output of the Facility shall be reduced to the maximum capacity demonstrated by the last Commissioning Test conducted in the Fifth Post-COD Testing Period, and (b) Seller shall pay EPE, as liquidated damages and not as a penalty, an amount equal to Ten Thousand Dollars (\$10,000.00) on or before May 15, 2023.

(C) Nothing herein shall prevent or limit Seller or EPE subject to any required Governmental Approval, from establishing a new Committed Net Output at any level that the Parties mutually agree in writing is appropriate and desirable under this Agreement.

(D) Test Energy produced by the Facility during any Commissioning Tests shall be delivered by Seller to EPE at the Point of Delivery, and EPE shall purchase the Test Energy and related Environmental Attributes at the rate described in Section 8.1(A).

(E) If, during the Service Term, the three (3)-month rolling average Net Output for the prior three (3) months is less than twelve and five tenths percent (12.5%) of the Committed Net Output for the applicable Commercial Operation Year, and if EPE has reason to believe that Seller will fail to deliver the Committed Net Output in any future Commercial Operation Year, EPE shall have the right to require that Seller re-demonstrate the Designed Maximum Capacity in MW of the Facility within sixty (60) Days of the demand; *provided, however*, that such demand shall be coordinated among EPE and Seller so that the sixty (60)-Day period for re-demonstration avoids, if practical, previously notified periods of Scheduled Maintenance Outages and Additional Maintenance Outages pursuant to this Article 4, and *provided further*, that EPE shall not require such re-demonstration more than once in any twelve (12) Month period.

4.7 Site Report. Seller shall conduct, at its sole expense, a Phase I environmental investigation of the Site and shall provide EPE, not later than the date that is twelve (12) weeks from the Agreement Approval Date, with a copy of the report summarizing such investigation, together with any data or information generated pursuant to such investigation. Seller shall provide to EPE confirmation from an environmental engineer that (i) the Site has been inspected for Environmental Contamination in a manner consistent with a Phase I environmental assessment, and (ii) a Phase I environmental assessment has been completed. Such report, or other written confirmation provided by Seller, shall include a confirmation that, based upon such investigation and to the best of Seller’s knowledge based on the level of review specified above, no conditions involving Environmental Contamination exist at or under the Site that would prevent or materially delay construction or operation of the Facility at the Site, or a description of any such conditions and Seller’s plan for resolving or removing them.

4.8 Facility Contracts. Upon request by EPE, Seller shall provide EPE with copies of (subject to reasonable redaction of Seller's or its counterparties' commercially sensitive or proprietary information and any other information required to be redacted or withheld under non-disclosure covenants or similar provisions applicable to Seller) the following to the extent executed and in existence at the time of the request: (i) contracts for the manufacture, delivery and installation of the Facility's solar panels and inverters; (ii) engineering, procurement and construction, or other general contractor agreements; and (iii) applicable operating agreements; *provided that*, in the case of the foregoing items (i) and (ii), Seller may alternatively provide evidence reasonably satisfactory to EPE demonstrating that the applicable delivery and milestone dates required to be performed or met by the solar panel supplier, inverter supplier and engineering, procurement and construction contractor under such contracts or agreements are consistent with Seller's achievement of the Construction Milestones set forth in Exhibit A. Upon request, Seller shall also provide EPE with reasonable evidence that it has or will have the capability to finance construction of the Facility.

4.9 Conditions to Commercial Operation. Seller will (i) notify EPE when the Facility has achieved all of the conditions set forth in this Section 4.9 ("Conditions"), and (ii) provide evidence reasonably acceptable to EPE of the satisfaction or occurrence of such Conditions (the date of such notice being the "Notification Date"). EPE must accept or challenge (with reasonable specificity) Seller's declaration that all Conditions have been satisfied or occurred within ten (10) Business Days of the Notification Date, and any Condition that EPE does not challenge within ten (10) Business Days of the Notification Date will be deemed satisfied. The Parties shall attempt to resolve any dispute that may arise regarding the satisfaction or occurrence of any Condition(s) through direct discussion or mediation, as set forth in Sections 13.8 and 13.9. Seller shall promptly notify EPE of the satisfaction or occurrence of any of the Conditions and provide the evidence required pursuant to clause (ii) of this Section 4.9 with respect to each such Condition prior to or concurrently with Seller's delivery of the related notice to EPE, in order that the review and approval of the satisfaction or occurrence of the Conditions and Seller's evidence thereof may occur on an ongoing and incremental basis, pending resolution of any dispute, as such Conditions are satisfied or occur. All costs and expenses necessary to meet the Conditions shall be borne solely by Seller. The Conditions are:

(A) Seller has satisfied all the requirements of the Interconnection Agreement and the Facility has commenced interconnected operations with EPE's transmission facilities at its full Designed Maximum Capacity, as adjusted by applicable performance conditions (including the solar irradiance and module temperature) at the time of the Commissioning Tests (but subject to the proviso set forth in Section 4.6(B));

(B) Seller has made all arrangements and executed all agreements required to deliver the Energy from the Facility to the Point of Delivery in accordance with the provisions of this Agreement;

(C) Seller has provided EPE with copies of certificates of insurance evidencing that the coverage required by Article 17 has been obtained and submitted to EPE;

(D) The Security arrangements meeting the requirements of Article 12 have been established;

(E) Seller has submitted to EPE a certificate of an officer of Seller specifically familiar with the Facility stating, after due inquiry, that all permits, consents, licenses, approvals, and authorizations required to be obtained by Seller from any Governmental Authority to operate the Facility in compliance with Applicable Law and this Agreement have been obtained and are in full force and effect, and to the knowledge of that officer, Seller is in compliance with the terms and conditions in all material respects;

(F) As applicable, Seller has made all necessary governmental filings and applications for Environmental Attributes and other accreditation or registration with WREGIS. Additionally, Seller shall be in compliance in all material respects with all applicable and required existing national and regional reliability standards, including standards set by WECC, NERC, FERC, and the applicable State Regulator, or any successor agencies setting reliability standards for the operation of generation facilities in the location of the Facility. Prior to Commercial Operation Date, Seller shall register and provide documentation to EPE showing that it has registered with the appropriate Regional Reliability Organization (“RRO”) as a generator owner and has registered the generator operator to the extent required by NERC and the RRO. Except for FERC regulations, all of the foregoing requirements shall constitute the “Compliance Obligations” under this Agreement;

(G) An officer of Seller specifically familiar with the Facility has certified that the Designed Maximum Capacity of the Facility complies with the description of the Facility provided in Exhibit B on the date of certification; and

(H) The Facility has demonstrated the reliability of its communications systems and communications with the EPE SOC.

None of the foregoing Conditions shall be deemed to be in lieu of, or in substitution for, the obligations of Seller in accordance with Section 14.13.

4.10 Test Energy. Seller shall coordinate the production and delivery of Test Energy with EPE. EPE shall cooperate with Seller to facilitate Seller’s testing of the Facility necessary to satisfy the Conditions set forth in Section 4.9.

## **ARTICLE 5 - DELIVERY AND METERING**

### **5.1 Delivery Arrangements.**

(A) Seller shall be responsible for negotiating, entering into, and performing in accordance with the Interconnection Agreement with EPE and any other necessary entities for the design, installation and operation of the Interconnection Facilities.

(B) Seller shall be responsible for all interconnection, electric losses, and costs required to deliver Output from the Facility to EPE at the Point of Delivery, and Seller shall maintain all records, regardless of form (e.g., machine readable media such as disk, tape, etc.) or type (e.g., databases, applications software, database management software, utilities, etc.) sufficient to verify all electric losses claimed to have been incurred by Seller prior to delivery of Energy to EPE to the Point of Interconnection. Upon EPE’s request,

Seller will provide records related to electric losses during any of the twelve (12) previous Months no later than the end of the subsequent Month that EPE made such request.

(C) EPE shall be responsible for all electric losses and delivery service arrangements and costs required to deliver Net Output from the Point of Delivery to points beyond the Point of Delivery.

## 5.2 Metering.

(A) All Electric Metering Devices used to measure the Net Output made available to EPE by Seller under this Agreement and to monitor and coordinate operation of the Facility shall be owned, installed, and maintained in accordance with the Interconnection Agreement at no cost to EPE under this Agreement. Seller shall be responsible for providing a suitable location on its premises, or other location as agreed by EPE, for EPE to install revenue grade metering equipment. The metering equipment and the cost of the installation shall be the responsibility of Seller. Such Electric Metering Devices shall be capable of measuring the energy output of the Facility on a 30-minute basis for all hours in a Month. Seller, at its own expense, shall inspect and test such Electric Metering Devices upon installation and at least annually thereafter. Upon request from EPE, but not more than once per Commercial Operation Year, Seller also shall perform additional inspections or tests of such Electric Metering Devices. Seller shall provide EPE with reasonable advance notice of, and permit a representative of EPE to witness and verify, all such inspections and tests, *provided, however*, that any such representative of EPE shall not unreasonably interfere with or disrupt Seller's operation of the Facility and shall comply with all applicable safety standards as in effect and established by Seller from time to time. The actual expense of any EPE-requested additional inspections or tests shall be borne by EPE, unless, upon such inspection or test, such Electric Metering Devices are found to register inaccurately by more than the allowable limits established in this Article 5, in which event the expense of the requested additional inspection or test shall be borne by Seller. If requested in writing, Seller shall provide copies of any inspection or test reports to EPE.

(B) Either EPE or Seller may elect to install and maintain, at its own expense, Back-Up Metering devices in addition to the Electric Metering Devices, which installation and maintenance shall be performed in a manner acceptable to EPE. Seller shall be responsible for providing a suitable location on its premises, or other location as agreed by EPE, for EPE to install Back-Up Metering devices. The installing Party, at its own expense, shall inspect and test Back-Up Metering upon installation and at least annually thereafter. The installing Party shall provide the other Party with reasonable advance notice of, and permit a representative of such other Party to witness and verify, such inspections and tests, *provided, however*, that such other Party shall not unreasonably interfere with or disrupt the activities of the installing Party and shall comply with all applicable safety standards. Upon request, the installing Party shall perform additional inspections or tests of Back-Up Metering and shall permit a qualified representative of the other Party to inspect or witness the testing of Back-Up Metering; *provided, however*, that such other Party shall not unreasonably interfere with or disrupt the activities of the installing Party and shall comply with all applicable safety standards as in effect and established by the installing Party from

time to time. The actual expense of any such requested additional inspection or testing shall be borne by the Party requesting the test, unless, upon such inspection or testing, Back-Up Metering is found to register inaccurately by more than the allowable limits established in this Article 5, in which event the expense of the requested additional inspection or testing shall be borne by the installing Party. If requested in writing, the installing Party shall provide copies of any inspection or testing reports to the requesting Party.

(C) If any Electric Metering Device, or Back-Up Metering, is found to be defective or inaccurate, it shall be adjusted, repaired, replaced and recalibrated, as necessary, by the Party owning such defective or inaccurate Electric Metering Device or Back-Up Metering and at that Party's expense.

5.3 Adjustment for Inaccurate Meters. If any Electric Metering Device, or Back-Up Metering, fails to register, or if the measurement made by an Electric Metering Device, or Back-Up Metering, is found upon testing to be inaccurate by more than one percent (1.0%), an adjustment shall be made correcting all measurements by the inaccurate or defective Electric Metering Device, or Back-Up Metering, for both the amount of the inaccuracy and the period of the inaccuracy, in the following manner:

(A) In the event that the Electric Metering Device is found to be defective or inaccurate, the Parties shall use Back-Up Metering, if installed, to determine the amount of such inaccuracy, *provided, however*, that Back-Up Metering has been tested and maintained in accordance with the provisions of this Article 5. In the event that either Party did not install Back-Up Metering, or Back-Up Metering is also found to be inaccurate by more than one percent (1.0%), the Parties shall estimate the amount of the necessary adjustment on the basis of deliveries of Net Output from the Facility to the Point of Delivery during periods of similar operating conditions when the Electric Metering Device was registering accurately. The adjustment shall be made for the period during which inaccurate measurements were made.

(B) In the event that the Parties cannot agree on the actual period during which the inaccurate measurements were made, the period during which the measurements are to be adjusted shall be the shorter of (i) the last one-half of the period from the last previous test of the Electric Metering Device to the test that found the Electric Metering Device to be defective or inaccurate, or (ii) the one hundred eighty (180) Days immediately preceding the test that found the Electric Metering Device to be defective or inaccurate.

(C) To the extent that the adjustment period covers a period of deliveries for which payment has already been made by EPE, EPE shall use the corrected measurements as determined in accordance with this Article 5 to re-compute the amount due for the period of the inaccuracy and shall subtract the previous payments by EPE for this period from such re-computed amount. If the difference is a positive number, the difference shall be paid by EPE to Seller; if the difference is a negative number, that difference shall be paid by Seller to EPE. In either case, the owing Party, at its discretion, may offset such payments due the other Party against undisputed amounts owed by the other Party as specified in Section 10.3(A). The owing Party shall provide the other Party with notice

and supporting documentation of the amount due. Except for offsets to payments, which may be offset immediately, payment of such difference by the owing Party shall be made not later than thirty (30) Days after the owing Party receives notice and supporting documentation of the amount due. Interest shall be computed for any payments or offsets to payments made pursuant to this Section 5.3(C) at a rate equal to the prime rate published in the *Wall Street Journal* on the invoice due date (the “Interest Rate”).

## ARTICLE 6 - CONDITIONS PRECEDENT

6.1 Conditions Precedent. This Agreement shall become effective as of the Execution Date, subject to the fulfillment (or waiver by EPE, in its sole discretion) of each of the conditions precedent set forth in Sections 6.1(A) through 6.1(C), and the fulfillment (or waiver by Seller, in its sole discretion) of the condition precedent set forth below in Section 6.1(C), in each case on or before the date (if any) specified for the fulfillment (or waiver) of such condition precedent:

(A) The Board of Directors of EPE (or a duly authorized committee thereof) shall have approved the execution and delivery of this Agreement by EPE, and the performance by EPE of its obligations under this Agreement (the “EPE Board Approval”); and

(B) On or before May 1, 2021 EPE shall have received all Non-appealable State Regulatory Approval Order(s) approving this Agreement and all other relief related to EPE’s application(s) to the State Regulator (which for purposes of this Section 6.1(B) is the NMPRC), including any requested accounting treatment and recovery of costs (collectively, the “State Regulatory Approval”). For avoidance of doubt, any State Regulatory Approval that contains a term or condition the compliance with which would require modification or amendment of this Agreement shall be deemed to be an Unfavorable State Regulatory Order unless such modification or amendment is accepted in writing by Seller and EPE.

(C) On or before December 1, 2020, the Parties shall have completed negotiation of a mutually acceptable form and terms of the Interconnection Agreement, and finalized, executed and delivered, the Interconnection Agreement, except to the extent that the failure of such negotiation to be completed and the Interconnection Agreement to be finalized, executed and delivered on or before such date resulted from any failure by a Party to use its commercially reasonable efforts to negotiate a mutually acceptable form and terms of, and then to finalize, execute and deliver, the Interconnection Agreement on or before such date, in which case the other Party may, upon written notice to such Party no later than March 31, 2020, terminate this Agreement without any financial or other obligation to either Party as a result of such termination.

(D) Seller has received all required internal management approvals for the performance by Seller of its obligations under this Agreement. In the event the Seller fails to receive such approvals on or before sixty (60) Days after the Execution Date (the “Seller Approval Period”), EPE may, upon written notice to Seller no later than sixty (60) Days after the end of the Seller Approval Period, terminate this Agreement without any financial or other obligation to either Party as a result of such termination.

(E) In the event the Agreement Approval Date has not occurred on or before March 1, 2021, Seller may, upon written notice to EPE within five (5) Business Days after such date, terminate this Agreement without any financial or other obligation to either Party as a result of such termination.

## ARTICLE 7 - SALE AND PURCHASE OF NET OUTPUT AND ENVIRONMENTAL ATTRIBUTES

7.1 Sale and Purchase. Beginning on the Commercial Operation Date, Seller shall generate from the Facility, deliver to the Point of Delivery, and sell to EPE, and EPE shall accept, purchase and pay Seller, at the applicable prices set forth in Article 8, all Net Output from the Facility delivered at the Point of Delivery and all Environmental Attributes associated with the Output or otherwise resulting from the generation of energy by the Facility. Except as otherwise expressly provided for herein, this Agreement shall not be construed to constitute a “take or pay” contract, and EPE shall have no obligation to pay for any Output that has not actually been generated by the Facility, measured by the Electric Metering Device(s), and delivered to EPE at the Point of Delivery.

7.2 Committed Net Output. “Committed Net Output” for each Commercial Operation Year is set forth in Exhibit F and is the number of MWh of Net Output committed to be delivered by Seller to EPE in each Commercial Operation Year. The Committed Net Output level is seventy percent (70%) of the Expected Net Output level for the first Commercial Operation Year, and seventy-five percent (75%) of the Expected Net Output level for each subsequent Commercial Operation Year.

### 7.3 Failure to Deliver Committed Net Output.

(A) Seller shall be required to deliver to EPE no less than the Committed Net Output during each Commercial Operation Year.

(B) If Seller delivers less than the Committed Net Output in any Commercial Operation Year (“Net Output Shortfall”) then Seller shall pay liquidated damages (“Shortfall Damages”) (not as a penalty) as calculated in Section 7.3(C). The “Shortfall Amount” in any Commercial Operation Year shall be an amount equal to the Committed Net Output minus the Net Output in the applicable Commercial Operation Year. During the Term and for the first year following the termination or expiration of the Term, Seller shall provide a report to EPE within thirty (30) Days after the close of a Commercial Operation Year summarizing the Committed Net Output delivered in the previous Commercial Operation Year and the Shortfall Damages, if any, payable by Seller to EPE for such Commercial Operation Year.

(C) The Shortfall Damages payment shall be equal to (i) the Shortfall Amount for the applicable Commercial Operation Year *multiplied by* the Payment Rate per MWh for the applicable Commercial Operation Year. Within forty-five (45) Days of the end of any Commercial Operation Year for which there is a Net Output Shortfall, Seller shall provide notice to EPE in writing of the amount of the Shortfall Damages and provide supporting documentation, if any, and Seller shall pay EPE the amount of Shortfall



Damages shown in such notice within sixty (60) Days after the end of such Commercial Operation Year. For the avoidance of doubt, Seller's total liability to EPE under this Agreement for Shortfall Damages and for the replacement of Environmental Attributes pursuant to Section 11.7 as a result of a Net Output Shortfall shall not exceed EPE's Replacement Energy Costs relating to such Net Output Shortfall. Each Party agrees and acknowledges that (A) the damages that EPE would incur due to Seller's delivery of less than the Committed Net Output (and associated Environmental Attributes) in any Commercial Operation Year would be difficult or impossible to predict with certainty, and (B) the Shortfall Damages are a reasonable forecast of just compensation for such damages, and (C) Seller will not seek to raise as a defense to payment of Shortfall Damages in any legal or equitable proceeding (including any mediation pursuant to Section 13.9) that such damages are unenforceable as a penalty or otherwise contrary to Applicable Law or public policy.

(D) In calculating whether there is a Net Output Shortfall and the amount of such Net Output Shortfall, if any, for purposes of determining Seller's obligation to pay Shortfall Damages, and deliver replacement Environmental Attributes pursuant to Article 11, for any Net Output Shortfall, any and all of the following shall be treated as Net Output in calculating the Shortfall Amount: (a) Net Output not produced by Seller or delivered to EPE due to the curtailment events described in Sections 7.5 or 8.3; (b) Net Output not produced by Seller or delivered to EPE due to a Force Majeure Event; (c) Net Output not produced by Seller or delivered to EPE due to a breach by EPE of its obligations under this Agreement; or (d) Net Output not delivered to or accepted by EPE due to a Delivery Excuse; *provided* that, in each such case, such Output otherwise would have been produced by the Facility and delivered to EPE at the Point of Delivery but for the circumstances specified above.

7.4 Title and Risk of Loss. As between the Parties, Seller shall be deemed to be in control of the Output from the Facility up to and until delivery and receipt at the Point of Delivery, and EPE shall be deemed to be in control of the Net Output at and beyond delivery and receipt at the Point of Delivery. Title and risk of loss related to Net Output shall transfer from Seller to EPE at the Point of Delivery.

7.5 Temporary Curtailment of the Facility. No payments shall be due to Seller for curtailments of delivery of Net Output resulting from a Temporary Curtailment (as such term is defined in the Interconnection Agreement and modified for purposes of this Agreement). For purposes of this Section 7.5, Temporary Curtailment in any Commercial Operation Year shall be limited to a total curtailment of not more than two percent (2%) of the Facility's MWh generation for such Commercial Operation Year, and any curtailment in excess of that amount for a given Commercial Operation Year shall be treated as curtailment for which EPE must compensate Seller under Section 8.3(A). For the avoidance of doubt, Temporary Curtailments do not include curtailments for economic reasons. Such Temporary Curtailments shall be limited to only such curtailments arising from (A) an Emergency Condition, (B) an action taken by the Interconnection Provider due to a situation that affects the normal function of the electric system, including any abnormal condition that requires action to prevent circumstances such as equipment damage, loss of load, or abnormal voltage conditions, or (C) scheduled or unscheduled maintenance or

construction on the Interconnection Provider's transmission facilities that prevents (i) EPE from receiving, or (ii) Seller from delivering energy at the Point of Interconnection.

#### 7.6 Capacity Attributes.

(A) The Parties agree that Seller shall, upon request by EPE and at Seller's sole cost, take all commercially reasonable actions and execute any and all documents and instruments that may be necessary to enable EPE to use the Capacity Attributes toward satisfying any resource adequacy procurement obligations that are imposed on load serving entities, including EPE, by any Governmental Authority during the Term. Such commercially reasonable actions may include, but are not limited to, (i) cooperating with the applicable Governmental Authority responsible for certifying or qualifying the Capacity Attributes for resource adequacy purposes, (ii) taking all actions necessary to register the Facility with the applicable Governmental Authority to ensure that the Capacity Attributes are recognized and counted toward any such resource adequacy requirements, (iii) coordinating with EPE on any resource adequacy plan that is to be submitted to the applicable Governmental Authority, and (iv) complying with any applicable reporting requirements ("Compliance Actions"); *provided, however*, that if the costs required to be incurred by Seller in connection with such Compliance Actions exceed Seventy-Five Thousand Dollars (\$75,000) in any Commercial Year or Three Hundred Thousand Dollars (\$300,000) during the Term (the "Compliance Cap"), then EPE shall: (y) reimburse Seller for such costs in excess of the Compliance Cap, or (z) excuse Seller from performing the obligations of this Agreement that would otherwise cause it to incur incremental new costs in excess of the Compliance Cap. No later than sixty (60) Days after Seller becomes aware the Compliance Actions will cause it to incur costs in excess of the Compliance Cap, Seller shall provide to EPE notice with an estimate of the expected costs caused by the Compliance Actions. Within thirty (30) Days of the delivery of such notice with the estimate, EPE shall provide Seller notice of (I) EPE's request for Seller to incur costs in excess of the Compliance Cap, in which case EPE shall reimburse Seller for such excess costs, or (II) EPE's waiver of Seller's performance of such Compliance Actions. If EPE does not agree to reimburse Seller for such excess costs or if EPE fails to provide notice by the end of the thirty (30)-Day period, then EPE will be deemed to have waived Seller's performance of such Compliance Actions per subsection (II).

(B) To the extent that, during the Term, Seller is compensated by a third party for any products produced by the Facility, including, without limitation, any Capacity Attributes or Environmental Attributes, Seller shall promptly remit all such compensation directly to EPE.

### **ARTICLE 8 - ENERGY PAYMENT CALCULATIONS**

8.1 Energy Payments. Energy payments to Seller shall be calculated as follows for each Month:

(A) Prior to Commercial Operation. EPE shall pay Seller for Test Energy at a rate equal the lesser of seventy-five percent (75%) of the Payment Rate specified in

Exhibit F or EPE's then-current Avoided Cost set forth in the most recent Rate No. 16 set pursuant to 17.9.570 New Mexico Admin. Code.

(B) During Commercial Operation. For all Net Output delivered by Seller to EPE in a Commercial Operation Year up to and including one hundred fifteen percent (115%) of the Expected Net Output, EPE shall pay Seller the product of (i) the Net Output delivered to EPE by Seller in each Month of the Commercial Operation Year, and (ii) the Payment Rate specified for each Commercial Operation Year. For all Net Output delivered by Seller to EPE in a Commercial Operation Year that is in excess of one hundred fifteen percent (115%) of the Expected Net Output, EPE shall have the option to either (a) pay Seller a rate equal to the lesser of fifty percent (50%) of the Payment Rate or the then-current Avoided Cost as determined by Section 8.1(A) for all Net Output delivered by Seller to EPE at the Point of Delivery in excess of one hundred fifteen percent (115%) of the Expected Net Output ("Excess Net Output") for such Commercial Operation Year, or (b) elect not to accept any Excess Net Output. If EPE exercises its applicable right not to accept Excess Net Output, Seller shall have the right to sell such Excess Net Output (together with any Environmental Attributes associated with such Excess Net Output) to another buyer until the end of the applicable Commercial Operation Year and the term of such transaction shall not be longer than the remainder of such Commercial Operation Year, after which the Parties' obligations shall resume pursuant to this Agreement; *provided*, that Seller shall be responsible for securing any necessary transmission arrangements for such transaction with the other buyer at its sole expense. Seller shall notify EPE upon Seller's delivery of a quantity of Net Output hereunder that exceeds one hundred five percent (105%) of Expected Net Output for a Commercial Operation Year. EPE shall elect within ten (10) Business Days of Seller's notice to either accept or decline any Excess Net Output that the Facility may produce during such Commercial Operation Year. In the event EPE does not accept Excess Net Output in accordance with this Section 8.1, EPE shall use commercially reasonable efforts, consistent with Applicable Laws, to assist Seller with securing transmission service, which shall be at Seller's expense.

## 8.2 Non-Solar Energy.

(A) Except as provided by Section 8.3, EPE shall not be obligated to make any payment, regardless of reason or Force Majeure Event, affecting either Party, for Net Output that: (i) does not qualify as Solar Energy; (ii) is not measured by the Electric Metering Device(s) installed pursuant to Section 5.2, as such measurement may be adjusted pursuant to Section 5.3; or (iii) is not delivered to EPE at the Point of Delivery.

(B) For Net Output that does not qualify as Solar Energy, EPE shall have the option, at its sole discretion, to purchase such Net Output that does not qualify as Solar Energy from Seller and shall pay Seller EPE's then-current Avoided Cost calculated as set forth in Section 8.1(A). If EPE declines to purchase such Net Output that does not qualify as Solar Energy, then Seller may sell such Net Output at wholesale to a third party; *provided*, that Seller shall be responsible for securing any necessary transmission arrangements for such transaction at its sole expense.

8.3 Curtailed Energy Payment Rate.

(A) EPE shall have the right to curtail delivery of Net Output for any reason by providing notice to Seller in accordance with this Agreement, and if Net Output is curtailed by EPE, then:

(1) Seller may but shall not be obligated to sell the Net Output from the Facility to a third party;

(2) If Seller does not sell the Net Output to a third party, the Parties shall determine and verify, by comparing expected energy projected with estimated solar data based on irradiance and module temperature at the Site, the quantity of Net Output that would have been generated by the Facility and delivered to the Point of Delivery had its generation not been so curtailed (“Curtailed Energy”), and EPE shall pay at the applicable Payment Rate to Seller for such Curtailed Energy all amounts that Seller would have received from EPE under this Agreement had generation not been so curtailed; and

(3) The rate to be paid by EPE to Seller for Curtailed Energy shall be the applicable Payment Rates for the curtailment period. The rate to be paid by EPE to Seller for any Net Output sold by Seller to a third party pursuant to Section 8.3(A)(1) above shall be (i) the positive difference, if any, between the applicable Payment Rates for the curtailment period and the price received by Seller for such third party sale, plus (ii) any applicable transmission costs incurred by Seller; *provided*, that no payment will be required if the net price obtained by Seller after adjusting for transmission costs exceeds the Product Rate.

(B) Notwithstanding anything in this Section 8.3 to the contrary, and except as specified in Sections 8.3(B)(1) and 8.3(B)(3), no payment shall be due to Seller from EPE under Section 8.3(A) for curtailments of delivery of Net Output resulting from:

(1) an Emergency Condition, which for purposes of excusing EPE’s obligation to pay for curtailed energy under this Agreement shall not include any curtailment initiated or implemented for any of the following purposes or reasons: (a) for economic or least-cost dispatch purposes; (b) to address or resolve any oversupply condition; (c) for system balancing or management purposes; or (d) to make room for or accommodate other generating resources, or their startup, shutdown, long-lead time or other operating restrictions, that are needed to provide energy or ancillary services or to meet EPE’s load-following, reliability or resource adequacy needs (curtailment for any and all of the reasons under clauses (a)-(d) of this Section 8.3(B)(1) shall be treated as curtailment for which compensation must be paid by EPE for under Section 8.3(A) for all associated Curtailed Energy);

(2) a Force Majeure Event;

(3) any action properly taken by EPE under the Interconnection Agreement, but not in excess of Temporary Curtailment as defined herein (such

excess shall be treated as Curtailed Energy for which EPE must pay Seller under Section 8.3(A)); or

(4) any notification from EPE's SOC requiring Seller to curtail deliveries of Net Output due to Seller's failure to obtain or maintain in full force and effect any Governmental Approval which has the effect of preventing delivery of Net Output pursuant to this Agreement.

8.4 Payment Support Requirement. Neither Party shall initiate any action before any Governmental Authority to deny recovery of payments under this Agreement. Each Party shall use commercially reasonable efforts to defend all terms and conditions of this Agreement consistent with Applicable Law.

8.5 Survival on Termination. The provisions of this Article 8 shall survive the repudiation, termination or expiration of this Agreement for so long as may be necessary to give effect to any outstanding payment obligations of the Parties due and payable prior to any such repudiation, termination or expiration.

## **ARTICLE 9 - RIGHT OF FIRST OFFER AND PURCHASE OPTION**

### 9.1 EPE's Rights to Facility Expansion.

(A) Seller's Duty to Offer Expansion Energy. If, at any time during the Term, Seller or any Affiliate of Seller intends to install equipment on the Site in addition to the equipment included in the original Facility, and such installation is designed to increase the capacity of the Facility to more than the Designed Maximum Capacity or to provide storage capacity, Seller shall first offer (or cause its Affiliate to offer) the excess above the Designed Maximum Capacity or the capacity or services associated with storage capacity (each is referred to herein as the "Expansion Energy") to EPE. Such offer shall set forth the terms and conditions of the offer in writing and in reasonable detail. Seller shall promptly answer any questions that EPE may have concerning the offered terms and conditions and shall meet with EPE to discuss the offer.

(B) EPE's Rejection of Offer; Revival of Offer. If EPE does not accept the offered terms and conditions within thirty (30) Days after receiving Seller's offer, Seller (or the applicable Affiliate of Seller) may enter into an agreement to sell the Expansion Energy to a third party on terms and conditions no more favorable to the third party than those offered to EPE, provided such sale of Expansion Energy may not in any way impact or alter EPE's rights, obligations or entitlements under this Agreement. If Seller (or its Affiliate) wishes to enter into an agreement with a third party on terms more favorable to EPE than those previously offered to EPE under this Section 9.1, Seller shall first offer (or cause its Affiliate to offer) the revised terms and conditions to EPE under this Section 9.1.

(C) EPE's Acceptance of Offer. If EPE accepts an offer made by Seller (or its Affiliate) under this Section 9.1, the Parties shall within sixty (60) Days following such acceptance enter into a power purchase agreement in substantially the same form as this Agreement for the purchase and sale of such Expansion Energy (with appropriate provisions proportionally adjusted to account for the size of the proposed expansion

relative to the Designed Maximum Capacity of the Facility), but incorporating such changes as are expressly identified in the terms and conditions offered by Seller (or its Affiliate).

## 9.2 EPE's Rights in Event of Proposed Facility Sale or Transfer.

(A) After achievement of the Commercial Operation Date, each of Seller and the Seller Parent (each, an "Offeror") hereby grants to EPE a right of first offer (a "ROFO") for any proposed sale or transfer by Seller to a third-party that is not an Affiliate of Seller of (i) the Facility and related assets, or (ii) any stock or ownership interest in Seller (the Facility and ownership interests in Seller, each the "Offered Interests"), all in accordance with the provisions of this Section 9.2; *provided, however*, that the ROFO and this Section 9.2 shall not apply to any sale, transfer or conveyance effectuated for purposes of financing or refinancing, including any tax equity financing transaction, or to the exercise of remedies by any lender providing financing or refinancing for the Facility.

(B) Prior to the Offeror commencing the negotiation of a sale of the Offered Interest, the Offeror shall provide notice to EPE of the Offeror's intention to sell the Offered Interest (a "Proposed Sale Notice"). Upon receipt of such Proposed Sale Notice, EPE shall have thirty (30) Days in which to provide notice to Offeror indicating whether EPE is interested in negotiating with Offeror to purchase the Offered Interests from Offeror (a "Proposed Purchase Notice"). If EPE provides such Proposed Purchase Notice, then the Offeror and EPE shall undertake for a period of up to ninety (90) Days from the date of EPE's Proposed Purchase Notice to negotiate in good faith and use commercially reasonable efforts to determine if they are able to reach mutual agreement on a term sheet that sets forth the fundamental terms and conditions of a sale of the Offered Interests to EPE.

(C) If (i) EPE does not provide such Proposed Purchase Notice to the Offeror indicating that EPE is interested in negotiating the purchase of the Offered Interests from Offeror following a Proposed Sale Notice, or (ii) the Offeror and EPE are unable to execute a term sheet that sets forth the fundamental terms and conditions of a sale of the Offered Interests to EPE within the ninety (90) Day period set forth in Section 9.2(B), then the Offeror shall be free to negotiate the sale of the Offered Interests to a third party; *provided, however*, that, prior to consummating any such sale, the Offeror shall provide EPE with a concise summary of the commercial terms negotiated by the Offeror with such third party, subject to any confidentiality obligations to which Offeror is subject in connection with such sale (a "Notice of Proposed Third Party Sale").

(D) If an Offeror fails to (i) present a Notice of Proposed Third Party Sale within four (4) Months after the expiration of the ninety (90) Day period set forth in Section 9.2(B), or (ii) consummate the sale of the Offered Interest to a third party within three hundred sixty five (365) Days after the expiration of the ninety (90) Day period set forth in Section 9.2(C), then the Offeror shall provide another Proposed Sale Notice hereunder (and go through the ROFO process under this Section 9.2) before commencing or continuing negotiations with any third party or consummating a sale of the Offered Interests.

(E) The ROFO shall not limit EPE's rights to purchase the Facility under the Purchase Option pursuant to Section 9.3.

### 9.3 Purchase Option.

(A) Purchase Option. EPE shall have the option to purchase the Facility and all rights of Seller therein or relating thereto, for the greater of (i) the Fair Market Value or (ii) the book value of the Facility, on an Anniversary Date in accordance with the provisions set forth in this Section 9.3; provided, however, that EPE will not have such option if, as of such Anniversary Date, the Facility is owned, directly or indirectly, by NextEra Energy Operating Partners, LP or NextEra Energy Partners, LP. EPE shall indicate its preliminary interest with respect to the option, if at all, by delivering to Seller a preliminary notice of its interest no less than two (2) years prior to such Anniversary Date (the "Preliminary Interest Notice"). If EPE fails to deliver such notice by such date, EPE's option with respect to such Anniversary Date shall terminate.

(B) Determination of Fair Market Value of the Facility. Promptly following delivery of the Preliminary Interest Notice, the Parties shall mutually agree to the Fair Market Value of the Facility. If EPE and Seller cannot mutually agree to a Fair Market Value of the Facility within thirty (30) Days of delivery of the Preliminary Interest Notice, then each of EPE and Seller shall select and retain, at each Party's own cost and expense, a nationally recognized independent appraiser with experience and expertise in appraising solar photovoltaic power generation facilities to determine separately the value of the Facility. Subject to the appraisers' execution and delivery to Seller of a suitable confidentiality agreement in a form reasonably acceptable to Seller, Seller shall provide both appraisers access to the Facility and its books and records during business hours and upon prior written notice. The appraisers shall act reasonably and in good faith to determine the Fair Market Value of the Facility and the Parties shall use their best efforts to cause the appraisers to complete such determination no later than sixty (60) Days following delivery of the Preliminary Interest Notice. If for any reason (other than failure by Seller to provide access hereunder to EPE's appraiser), one of the appraisals is not completed within ninety (90) Days following delivery of the Preliminary Interest Notice, the results of the other completed appraisal shall be deemed the Fair Market Value of the Facility. Each Party may provide to both appraisers a list of factors which the Parties suggest be taken into consideration when the appraisers generate their appraisals, consistent with industry standards prevailing at such time for appraising solar photovoltaic power generation facilities. Any information provided to an appraiser by a Party shall be provided to the other appraiser and the other Party at the same time, it being the intent of the Parties that the appraisers have access to the same information. EPE and Seller shall deliver the results of their respective appraisal to the other Party when completed. If so requested by either Party, the appraisals shall be exchanged simultaneously. After both appraisals are completed and exchanged, the Parties and their appraisers promptly shall confer and attempt to agree upon the Fair Market Value of the Facility.

(C) Disagreement as to Value. If, within thirty (30) Days after completion of both appraisals, the Parties cannot agree on the Fair Market Value of the Facility, and the values of the appraisals are within ten percent (10%) of each other, the Fair Market Value

of the Facility shall be the simple average of the two appraisals. If the values of the two appraisals differ by ten percent (10%) or more, the first two appraisers shall choose a third independent appraiser experienced in appraising solar photovoltaic power generation assets, or, if the first two appraisers fail to agree upon a third appraiser within ten (10) Days after the expiration of the thirty (30)-Day period following completion of both appraisals, such appointment shall be made by the American Arbitration Association upon application of either Party in accordance with the applicable rules and regulations of the American Arbitration Association for such selection. The third appraiser shall have access to the same information as was available to the two other appraisers. The Parties shall direct the third appraiser to determine the fair market value of the Facility within sixty (60) Days following retention of the third appraiser. The costs and expenses of such third appraiser shall be shared equally by the Parties. Upon completion of the fair market value of the Facility by such appraiser, the Fair Market Value of the Facility will be the simple average of the three appraisal values completed in accordance with this Section 9.3.

(D) Exercise of Purchase Option. Within ninety (90) Days following the determination of the Fair Market Value of the Facility pursuant to this Section 9.3, but in no event later than eighteen (18) Months following delivery of a Preliminary Interest Notice, EPE shall notify Seller if EPE elects to exercise its option (an “Option Confirmation Notice”).

(E) Purchase and Sale. If EPE delivers a valid and timely Option Confirmation Notice, Seller shall sell, transfer, assign and convey to EPE all of the Facility and all rights of Seller therein or relating thereto, on an “AS IS, WHERE IS” basis, free and clear of all liens, claims, encumbrances, or rights of others arising through Seller on the applicable Anniversary Date, including good and valid title to the Facility and Seller’s rights in the Site. In connection with such sale, transfer, assignment and conveyance, Seller shall (a) assign or otherwise make available, to the extent permitted by Applicable Law and not already assigned or otherwise transferred to EPE, Seller’s interest in all applicable Required Facility Documents; (b) cooperate with all reasonable requests of EPE for purposes of enabling EPE to obtain any and all applicable Permits that are or will be required to be obtained by EPE in connection with the use, occupancy, operation or maintenance of the Facility or the Site in compliance with Applicable Law; and (c) provide EPE copies of all documents, instruments, plans, maps, specifications, manuals, drawings and other documentary materials relating to the installation, maintenance, operation, construction, design, modification and repair of the Facility, as shall be in Seller’s possession and shall be reasonably appropriate or necessary for the continued operation of the Facility.

## **ARTICLE 10 - BILLING AND PAYMENT**

10.1 Seller’s Invoices. The monthly billing period shall be the Month. No later than four (4) Business Days after the end of each Month, Seller shall provide to EPE, by electronic means or first-class mail, an invoice showing the invoice date, the invoice due date and all billing parameters, rates, and any other data reasonably pertinent to the invoice, including information required by Section 11.6, for the amount owed by EPE to Seller for Net Output provided by Seller and purchased by EPE pursuant to Section 8.1 during the previous Month billing period.



10.2 EPE's Invoices. No later than four (4) Business Days after the end of a Month in which Seller owes payments to EPE under this Agreement, EPE shall provide to Seller, by electronic means or first-class mail, an invoice showing the invoice date, the invoice due date and all billing parameters, rates, and any other data reasonably pertinent to the invoice for any amount owed by Seller to EPE under this Agreement.

10.3 Payments. Unless otherwise specified herein, payments owed under this Agreement shall be due and payable by check or by electronic funds transfer, as designated by the invoicing Party, on or before the twentieth (20th) Business Day following the date of the billing invoice provided that such invoice was rendered within the five-Business Day period required under Sections 10.1 or 10.2, as applicable, and, if not so rendered, such payment shall be due on the twentieth (20th) Business Day of the following Month. Remittances received by mail will be considered to have been paid when due if the postmark indicates the payment was mailed on or before the fifteenth (15th) Business Day following receipt of the invoice.

(A) EPE may offset any amounts that it owes Seller against any undisputed amounts that Seller owes EPE under this Agreement, including damages, interest payments, and other payments. Seller may include in its invoices and offset any amounts that it owes EPE against any undisputed amounts that EPE owes Seller for the purchase of Net Output under this Agreement, including damages, interest payments, and other payments. Any such offsets by either Party shall be clearly represented in the invoices described in Sections 10.1 or 10.2.

(B) Undisputed and non-offset portions of amounts invoiced under Sections 10.1 or 10.2 not paid on or before the invoice due date shall be subject to the late payment interest charges calculated as set forth in this Section 10.3(B). The late payment interest charge rate per Month shall be at the Interest Rate. The late payment interest charge shall equal the Interest Rate times the unpaid balance of undisputed and non-offset portions of amounts invoiced. The late payment interest charge shall be added and itemized in the next billing invoice of either EPE or Seller, whichever is appropriate.

10.4 Billing Disputes. Either Party may dispute invoiced amounts but shall pay to the other Party at least the undisputed portion of invoiced amounts on or before the invoice due date pending resolution of the dispute. Full payment of an invoice shall not waive a Party's right to later dispute the invoice provided that notice of a disputed invoice is presented by the disputing Party to the other Party within twelve (12) Months of an invoice due date, accompanied by an explanation of the specifics of the dispute as well as a request for a refund or an additional payment, whichever is appropriate. When a billing dispute is resolved, EPE or Seller, as appropriate, shall invoice the other Party the amount agreed to by the Parties (or finally determined pursuant to Sections 13.8 or 13.9) no later than fifteen (15) Business Days after the end of the Month in which the dispute is resolved. The amount owed shall include any late payment interest charges calculated from the original invoice due date in accordance with the provisions of Section 10.3(B). Either Seller or EPE may elect to offset amounts owed to the other Party pursuant to Section 10.3(A).

10.5 Statement Errors. If, within two (2) years of the date of a statement, either Party becomes aware of any error in any statement, such Party shall, immediately upon discovery of the

error, notify in writing the other Party of such error and the other Party shall rectify such error (whether such error was in the form of an underpayment or overpayment) within thirty (30) Days of such notification. Provided that the other Party is satisfied (in its sole and reasonable discretion) that the aforementioned notification requirements have been complied with in good faith by the Party who has made the error, interest shall be payable in respect of any amount that was erroneously overpaid or underpaid at the Interest Rate.

10.6 Set-Off and Payment Adjustments. Except as otherwise expressly provided for in this Agreement, all payments between the Parties under this Agreement shall be made free of any restriction or condition and without deduction or withholding on account of any other amount, whether by way of set-off or otherwise. Payments to be made under this Agreement shall, for a period of not longer than two (2) years, remain subject to adjustment based on billing adjustments due to error or omission by either Party, *provided* that such adjustments have been agreed to between the Parties or resolved in accordance with the provisions of Sections 13.8 or 13.9.

10.7 Survival on Termination. The provisions of this Article 10 shall survive the repudiation, termination or expiration of this Agreement for so long as may be necessary to give effect to any outstanding payment obligations of the Parties that became due and payable prior to any such repudiation, termination or expiration.

## **ARTICLE 11 - ENVIRONMENTAL ATTRIBUTES**

11.1 Title. Title to the Environmental Attributes shall pass from Seller to EPE immediately upon the generation of the Output that gives rise to such Environmental Attributes and in accordance with Good Utility Practices and WREGIS Operating Rules.

11.2 Compliance with Rule. Seller must comply with Applicable Law and provide all Environmental Attributes associated with Net Output in the reasonable format to be provided by EPE and in compliance with any State Regulator requirements. All REC's required to be delivered by Seller to EPE, or Replacement Energy Costs or other damages payable by Seller to EPE with respect to replacement REC's, shall be for solar REC's, except to the extent that EPE has confirmed in writing to Seller that such REC's need not be solar REC's.

11.3 Documentation. The Parties shall execute all additional documents and instruments reasonably requested by EPE in order to further document the transfer of the Environmental Attributes to EPE or its designees (except to the extent Environmental Attributes are retained by Seller pursuant to Section 8.1(B)). Should the CAMD notify EPE that it will not authorize the retention by EPE of any Environmental Attributes as contemplated by this Agreement, Seller shall cooperate with the CAMD and take all reasonable action to enable EPE to retain the Environmental Attributes as herein described. Seller shall not submit to the CAMD, under §1605(b) of the Energy Policy Act of 1992 or any other applicable program, any reports describing any of the Environmental Attributes as belonging to anyone other than EPE or its respective designees. Seller and EPE will promptly give to one another copies of any documents they submit to the CAMD. Further, in the event of the promulgation of a scheme involving Environmental Attributes administered by a Governmental Authority, upon notification by such Governmental Authority that any transfers contemplated by this Agreement will not be recorded, the Parties shall promptly cooperate in taking all reasonable actions necessary so that such transfers can be recorded.

11.4 WREGIS. Seller, at its own cost and expense, shall register with, pay all fees required by, and comply with, all reporting and other requirements of WREGIS relating to the Facility or Environmental Attributes. Seller shall ensure that the Facility will participate in and comply with, during the Term (commencing with the Commercial Operation Date), all aspects of WREGIS. Seller shall, at its sole expense, effectuate the transfer of WREGIS Certificates to EPE in accordance with WREGIS Operating Rules. Seller shall promptly provide EPE copies of all documentation it submits to WREGIS.

11.5 Compliance with Rule. Seller must comply with Applicable Law and provide all Environmental Attributes associated with Net Output in the format to be provided by EPE and in compliance with any requirements of a State Regulator. All RECs required to be delivered by Seller to EPE, or Replacement Energy Costs or other damages payable by Seller to EPE with respect to replacement RECs, shall be for solar RECs, except to the extent that EPE has confirmed in writing to Seller that such RECs need not be solar RECs.

11.6 Monthly RECs. Seller shall provide RECs monthly using the format in Exhibit G and shall include the appropriate number of RECs associated with the Net Output purchased during the previous Month in each monthly invoice.

11.7 Seller's Failure to Provide Environmental Attributes. Except for (i) Force Majeure Event(s), (ii) any curtailments pursuant to Sections 7.5 or 8.3, and (iii) as may be permitted under Section 8.1(B), if Seller fails to provide the Committed Net Output (calculated by including all credits applicable to a Net Output Shortfall as specified in Section 7.3(D)) and to deliver to EPE the associated Environmental Attributes, Seller shall first use commercially reasonable efforts to obtain replacement Environmental Attributes of similar type and characteristics and deliver them to EPE up to the quantity of Environmental Attributes associated with the Net Output Shortfall (less any Environmental Attributes previously delivered by Seller to EPE for the applicable Commercial Operation Year). Seller must deliver appropriate replacement Environmental Attributes for the Net Output Shortfall within thirty (30) Days after the end of the Commercial Operation Year in which a Net Output Shortfall of Environmental Attributes occurs. EPE will reimburse Seller for the actual cost of the replacement Environmental Attributes. However, should the total of the actual cost of (a) the replacement Environmental Attributes that Seller purchases, and (b) the replacement energy that EPE actually purchased to replace the Net Output Shortfall not provided by Seller, assuming that such replacement energy is an as-available energy product excluding Environmental Attributes (and taking into account any Shortfall Damages actually paid by Seller to EPE pursuant to Section 7.3 for the applicable period), exceed the price of energy sold to EPE under this Agreement per Exhibit F, such incremental costs may be deducted from the monies owed to Seller for the replacement Environmental Attributes. The price of the replacement energy purchased by EPE shall be based on the higher of (i) the annual average hourly Day-ahead market price at the Palo Verde hub; and (ii) the Avoided Cost during the year that immediately follows the Commercial Operation Year.

(A) If such appropriate replacement Environmental Attributes are not obtained and delivered by Seller to EPE, EPE may, at its discretion but no later than ninety (90) Days after Seller's failure to provide the Environmental Attributes associated with the Net Output Shortfall, attempt to obtain replacement Environmental Attributes up to the quantity of Environmental Attributes associated with the Net Output Shortfall. EPE will be

responsible for the costs for these replacement Environmental Attributes. However, should the total of the actual cost of the replacement Environmental Attributes that EPE purchases and the replacement energy that EPE actually purchased to replace the Net Output Shortfall not provided by Seller (and taking into account any Shortfall Damages actually paid by Seller to EPE pursuant to Section 7.3 for the applicable period) exceed the price of energy sold to EPE under this Agreement per Exhibit F, such incremental costs will be paid by Seller to EPE. EPE's failure to obtain replacement Environmental Attributes associated with the Net Output Shortfall does not relieve Seller of the obligation to obtain replacement Environmental Attributes in an amount equal to the Net Output Shortfall.

(B) If sufficient replacement Environmental Attributes are unavailable, Seller shall pay EPE the cost of any fines and/or penalties incurred by EPE as a result of Seller's failure to provide the Net Output Shortfall and associated Environmental Attributes.

(C) For the avoidance of doubt, and notwithstanding anything in this Section 11.7 to the contrary, the payment by Seller to EPE of Shortfall Damages for a Net Output Shortfall pursuant to Section 7.3 shall not relieve Seller of its obligations under this Agreement with respect to the replacement of Environmental Attributes as a result of Seller's failure to deliver the Committed Net Output; provided, however, that Seller's maximum liability with respect to replacement of Environmental Attributes, or fines and/or penalties associated with failure to provide replacement Environmental Attributes, shall not exceed the lesser of (i) fifteen dollars (\$15) per MWh, and (ii) any published penalty that may be imposed on EPE for failure to comply with New Mexico Statutes Annotated § 62-15-34 or any other such renewable portfolio standard imposed by any State Regulator as a result of Seller's failure to provide replacement Environmental Attributes.

11.8 Publicity. Seller shall not make any public statement or report under any program that any of the Environmental Attributes purchased by EPE under this Agreement belong to any person other than EPE. Seller shall reasonably cooperate in any registration by EPE of the Facility in the renewable portfolio standard or equivalent program in all such further states and programs in which EPE may wish to register or maintain registration of the Facility by providing copies of all such information as EPE reasonably requires for such registration.

11.9 Renewable Claims. Seller will comply with the Federal Trade Commission requirements set forth in 16 CFR Part 260 in any communications concerning the Output, the Facility and Environmental Attributes that are or may be generated from the Facility. Seller will not claim the Environmental Attributes or other "renewable energy," "green energy," "clean energy" or similar attributes of the Output or the Facility as belonging to the Seller or any Seller Affiliate.

11.10 Administrative Compliance Cost Obligations.

(A) Seller shall be solely responsible for the cost of administrative compliance with all Compliance Obligations, as well as all costs of complying with Applicable Law, including any applicable rule(s) of an applicable State Regulator governing the registration and accounting for Environmental Attributes that may be enacted or amended after the Execution Date.

(B) Administrative compliance cost obligations referenced in this Section 11.8 shall not include costs associated with Seller's obligations pursuant to Sections 3.3 and 4.6(E) or any fines or penalties assessed against Seller.

## **ARTICLE 12 - SECURITY FOR PERFORMANCE**

### **12.1 Security Fund.**

(A) Seller shall establish, fund, and maintain a security fund, pursuant to the provisions of this Article 12 ("Security Fund"), which shall be available to (i) pay any amount due EPE pursuant to this Agreement, whether arising before, on, or after the Commercial Operation Date or termination of this Agreement, (ii) provide EPE security that Seller will construct the Facility to meet the Construction Milestones, and (iii) provide security to EPE to cover damages, including Replacement Energy Costs, should the Facility fail to achieve the Commercial Operation Date or otherwise not operate in accordance with this Agreement. Seller shall establish the Security Fund at a level of Two Million Dollars (\$2,000,000) (the "Required Amount"), one-third of which (Six Hundred Sixty-Six Thousand Six Hundred and Sixty-Seven Dollars (\$666,667)) shall be established no later than fifteen (15) Business Days following the Agreement Approval Date. Seller shall increase the Security Fund by an additional one-third (Six Hundred Sixty-Six Thousand Six Hundred and Sixty-Seven Dollars (\$666,667)) on or prior to the later of (A) one year prior to the Required Commercial Operation Date and (B) fifteen (15) Business Days following the Agreement Approval Date. Seller shall increase the Security Fund to a level equal to the Required Amount by no later than the Commercial Operation Date. Seller shall maintain the Security Fund at the Required Amount throughout the remainder of the Term; provided, that, commencing with the eleventh (11<sup>th</sup>) Commercial Operation Year, the Required Amount will be reduced to One Million Five Hundred Thousand Dollars (\$1,500,000). Seller shall replenish the Security Fund to the applicable portion of the Required Amount within ten (10) Business Days after any draw on the Security Fund by EPE; provided, however, that Seller's replenishment requirement will be limited to an aggregate amount no greater than the level of the Security Fund posted at the time of the replenishment.

(B) In addition to any other remedy available to it under this Agreement or at law, EPE may, to the extent Seller fails to perform or abide by the terms of this Agreement, or by order of a Governmental Authority of competent jurisdiction, before, on, or after termination of this Agreement, draw from the Security Fund such amounts as are necessary to recover amounts owing to EPE pursuant to this Agreement. Such amounts include any damages due to EPE and any amounts for which EPE is entitled to indemnification under this Agreement. EPE must provide notice to Seller ten (10) Business Days prior to drawing such amounts from the Security Fund. If Seller fails to deliver payment of such amounts by check or electronic funds transfer to EPE within ten (10) Business Days of such notification, EPE may, in its sole discretion, draw all or any part of such amounts due to it from any form of security to the extent available pursuant to this Section 12.1, and from all such forms, and in any sequence EPE may select. Any failure to draw upon the Security Fund or other security for any damages or other amounts due to EPE shall not prejudice EPE's rights to recover such damages or amounts in any other manner. EPE shall not draw

upon the Security Fund for any contested obligation for so long as it remains the subject of a bona fide dispute between the parties pursuant to Article 13.

(C) The Security Fund shall be established in the amounts specified in Section 12.1(A), and shall be maintained at Seller's sole expense. Prior to the Commercial Operation Date, the Security Fund shall be in the form of the instrument described in Section 12.1(C)(1). After the Commercial Operation Date, the Security Fund may, at Seller's election, be in the form described in Sections 12.1(C)(1), 12.1(C)(2), or 12.1(C)(3):

(1) An irrevocable standby letter of credit in a form and substance acceptable to EPE, and substantially in the form set forth in Exhibit L ("Letter of Credit") from a financial institution that is a United States-based commercial bank with at least ten billion dollars (\$10,000,000,000) in assets and an unsecured bond rating (not enhanced by third-party support) equivalent to A- or better as determined by Standard & Poor's and a credit rating of A3 or better as determined by Moody's, or, if either one or both are not available, equivalent ratings from alternate rating sources acceptable to EPE (such financial institution, an "Issuer"). In addition, if such unsecured bond rating of the Issuer is exactly equivalent to A-, the Issuer must not be on credit watch or similar classification, or have a negative outlook (or the equivalent) by a rating agency. Such Letter of Credit must be consistent with this Agreement and shall include a provision for at least thirty (30) Days' advance notice to EPE of any expiration or earlier termination of the Letter of Credit, so as to allow EPE sufficient time to exercise its rights under the Letter of Credit should Seller fail to extend or replace the same. The form of the Letter of Credit must meet EPE's requirements to ensure that claims or draw-downs can be made unilaterally by EPE in accordance with the terms of this Agreement. Such security must be issued for a minimum term of three hundred and sixty-five (365) Days. Seller shall cause the renewal or extension of the security for additional consecutive terms of three hundred and sixty-five (365) Days or more (or, if shorter, the remainder of the Term) no later than thirty (30) Days prior to each expiration date of the Letter of Credit. If the Letter of Credit is not renewed or extended as required herein, EPE shall have the right to draw immediately upon the Letter of Credit and to place the amounts so drawn, at Seller's cost and with Seller's funds, in an interest bearing escrow account in accordance with Section 12.1(C)(2). The Letter of Credit shall be governed by the Uniform Customs and Practice for Documentary Credits (2007 Revision), International Chamber of Commerce Brochure No. 600 (the "UCP"), except to the extent that the terms hereof are inconsistent with the provisions of the UCP, in which case the terms of the Letter of Credit shall govern.

(2) United States currency deposited with an Issuer, in which EPE holds a first and exclusive security interest perfected by control, either: (i) in an account under which EPE is designated as beneficiary with sole authority to draft from the account or otherwise access the security; or (ii) in an account held by Issuer as escrow agent with instructions to pay claims made by EPE pursuant to this Agreement, such instructions to be in a form satisfactory to EPE (each an

“Account”). Security provided in this form shall include a requirement for immediate notice to EPE from Issuer and Seller in the event that the sums held as security in the Account do not at any time meet the required level for the Security Fund as set forth in this Section 12.1. Funds held in the Account may be deposited in a money-market fund, short-term treasury obligations, investment-grade commercial paper and other liquid investment-grade investments with maturities of three Months or less, with all investment income thereon to be taxable to, and to accrue for the benefit of, Seller. After the Commercial Operation Date is achieved, annual Account sweeps for recovery of interest earned by the Security Fund (net of any taxes on such interest paid or payable by EPE) shall be allowed by Seller.

(3) A guaranty from a guarantor with a senior unsecured credit rating (not enhanced by third-party support) equivalent to at least two of the following: (i) BBB- or better by Standard & Poor’s, (ii) Baa3 or better by Moody’s, or (iii) BBB- or better by Fitch, in substantially the form set forth in Exhibit M (“Guaranty”). If the credit rating of the guarantor ceases to meet the criteria required by this Section 12.1(C)(3), then Seller shall be required to convert the Guaranty provided by such guarantor (i) to a Letter of Credit meeting the criteria set forth in Section 12.1(C)(1), or, (ii) at Seller’s election, to an Account or a Guaranty meeting the criteria set forth in Sections 12.1(C)(2) and 12.1(C)(3), respectively, no later than thirty (30) Days after receiving notice from EPE that such conversion is required pursuant to this Section 12.1(C)(3).

(D) Promptly following the end of the Term and the completion of all of Seller’s obligations under this Agreement, EPE shall release the balance of the Security Fund (including any accumulated interest, if applicable) to Seller.

(E) If there is an early termination of this Agreement that is not due to default by Seller and no amounts remain outstanding and unpaid by Seller under the Agreement, EPE shall take all actions necessary to release the balance of the Security Fund (including any accumulated interest, if applicable, and net of any taxes on such interest paid or payable by EPE) to Seller.

(F) Seller shall reimburse EPE for the reasonably incurred incremental direct third party and out of pocket expenses (including the reasonable fees and expenses of counsel) incurred by EPE in connection with the preparation, negotiation, execution or release of any security instruments, and other related documents, used by Seller to establish and maintain the Security Fund pursuant to Seller’s obligations under this Section 12.1, except for releases due to an Event of Default by EPE hereunder.

## ARTICLE 13 - DEFAULT AND REMEDIES

13.1 Construction Events of Default. Subject to the notice and cure provision set forth in this Section 13.1, any Construction Event of Default shall give EPE the unconditional right, in its sole discretion, to: (i) terminate this Agreement; or (ii) draw upon or otherwise negotiate and liquidate the Security Fund to the extent of amounts owed by Seller to EPE hereunder. EPE shall provide notice to Seller thirty (30) Days prior to taking any of the actions set forth in

Section 13.1(i) (which shall be in addition to the cure periods specified below for each Construction Event of Default), specifying the Construction Event(s) of Default triggering such action(s), and shall not take such action(s) if Seller has remedied the specified Construction Event(s) of Default within the thirty (30) Day period following EPE's notification; *provided, however,* such notice period shall be fifteen (15) Days with respect to Sections 13.1(B) and 13.1(C) and may be subject to the additional cure provisions with respect to Section 13.1(E)13.1(E). The following shall constitute "Construction Event(s) of Default":

(A) Seller becomes insolvent, becomes a debtor in any bankruptcy or receivership proceedings, or dissolves as a legal business entity and, in the case of any involuntary proceeding in respect of the foregoing, such proceeding is not dismissed within sixty (60) Days of the filing thereof;

(B) Any representation or warranty made by Seller is false or misleading in any material respect, and Seller fails to comply with such representation or warranty within thirty (30) Days after a demand by EPE to do so; provided, that if such false or misleading representation or warranty is not reasonably capable of being cured within such thirty (30) Day period, and so long as Seller demonstrates that it is diligently seeking to cure, then such cure period will be extended for an additional period, not to exceed an additional fifteen (15) Days;

(C) Seller fails to comply with any other material terms and conditions of this Agreement (other than payment obligations, which are addressed in Section 13.1(D)) within sixty (60) Days after a demand by EPE to do so; provided, that if such failure is not reasonably capable of being cured within such sixty (60) Day period, and so long as Seller demonstrates that it is diligently seeking to cure, then such cure period will be extended for an additional period, not to exceed an additional fifteen (15) Days;

(D) Subject to Section 13.9, Seller fails to make, when due, any payment required pursuant to this Agreement, if such failure is not remedied within fifteen (15) Days after notice is received by Seller;

(E) The Facility fails, for reasons other than a Force Majeure Event or the occurrence of any of the Permitted Extensions, to meet the Commercial Operation Milestone (as extended after payment of Delay Damages under Section 4.3), unless (i) Seller has kept EPE informed on the progress of the Facility in accordance with Section 4.5, and notifies EPE prior to the Commercial Operation Milestone of the anticipated Revised Commercial Operation Milestone, and (ii) pursuant to Section 11.7, Seller obtains and delivers replacement Environmental Attributes to EPE for the quantity of Environmental Attributes that EPE notifies Seller EPE requires, up to the quantity of Environmental Attributes associated with the Committed Net Output for the period between the Commercial Operation Milestone and the Commercial Operation Date (as extended after payment of Delay Damages under Section 4.3); or

(F) This Agreement, the Facility, or the Interests are transferred by Seller without the requisite consent of EPE, as provided in Article 19.



13.2 Operational Events of Default. Subject to the notice and cure provisions set forth in this Section 13.2, any Operational Event of Default shall give EPE the unconditional right, in its sole discretion, to: (i) terminate this Agreement; or (ii) draw upon or otherwise negotiate and liquidate the Security Fund to the extent of amounts owed by Seller to EPE hereunder. EPE shall provide notice to Seller thirty (30) Days prior to taking any of the actions set forth in Section 13.2(i) (which shall be in addition to the cure periods specified below for each Operational Event of Default), specifying the Operational Event(s) of Default triggering such action(s), and shall not take such action(s) if Seller has remedied the specified Operational Event(s) of Default within the thirty (30) Day period following EPE's notification. The following shall constitute "Operational Events of Default":

(A) Seller becomes insolvent, becomes a debtor in any bankruptcy or receivership proceedings, or dissolves as a legal business entity, and, in the case of any involuntary proceeding in respect of the foregoing, such proceeding is not dismissed within sixty (60) Days of the filing thereof;

(B) Any representation or warranty made by Seller is false or misleading in any material respect, and Seller fails to comply with such representation or warranty within thirty (30) Days after a demand by EPE to do so; provided, that if such false or misleading representation or warranty is not reasonably capable of being cured within such thirty (30) Day period, and so long as Seller demonstrates that it is diligently seeking to cure, then such cure period will be extended for an additional period, not to exceed an additional fifteen (15) Days;

(C) Seller fails to comply with any other material terms and conditions of this Agreement (other than payment obligations, which are addressed in Section 13.2(D)) within sixty (60) Days after a demand by EPE to do so; provided, that if such failure is not reasonably capable of being cured within such sixty (60) Day period, and so long as Seller demonstrates that it is diligently seeking to cure, then such cure period will be extended for an additional period, not to exceed an additional fifteen (15) Days;

(D) Subject to Section 13.9, Seller fails to make, when due, any payment required pursuant to this Agreement, if such failure is not remedied within fifteen (15) Days after notice is received by Seller;

(E) The Facility fails to generate at least fifty percent (50%) of Expected Net Output to be delivered to EPE under this Agreement for any twenty-four (24) consecutive-Month period (*provided* that Net Output not generated or delivered to EPE due to a Force Majeure Event, curtailment event described in Sections 7.5 or 8.3, a breach by EPE of its obligations under this Agreement, or a Delivery Excuse shall be considered generated for the purposes of this provision if, in each such case, such Net Output otherwise would have been produced by the Facility; *provided, further*, that if such failure is due to a Force Majeure Event(s), EPE may terminate this Agreement as provided in Section Article 16, but such failure shall not constitute an Event of Default hereunder). If EPE does not terminate this Agreement as provided herein, Seller, pursuant to Sections 7.3 and 11.7, shall still be obligated to pay Shortfall Damages associated with the Net Output not produced; or

(F) This Agreement, the Facility, or the Interests are transferred by Seller without the requisite consent of EPE, as provided in Article 19.

13.3 Seller's Abandonment of Construction or Operation of the Facility. Subject to the notice and cure provision set forth in this Section 13.3, any event(s) of Abandonment shall give EPE the unconditional right, in its sole discretion, to: (i) terminate this Agreement; or (ii) draw upon or otherwise negotiate and liquidate the Security Fund to the extent of amounts due from Seller to EPE hereunder. EPE shall provide notice to Seller thirty (30) Days prior to taking any of the actions set forth in clauses (i) or (ii) of this Section 13.3, specifying the event(s) of Abandonment triggering such action(s), and shall not take such action(s) if Seller has remedied the specified event(s) of Abandonment within the thirty (30) Day period following EPE's notification.

13.4 EPE Events of Default. Subject to the notice and cure provision set forth in this Section 13.4, any EPE Event of Default shall give Seller the unconditional right, in its sole discretion, to terminate this Agreement. Seller shall provide notice to EPE thirty (30) Days prior to terminating this Agreement, specifying the Event(s) of Default triggering such termination, and shall not terminate if EPE has remedied the specified Event(s) of Default within the specified cure period, and if no such cure period is provided, within the thirty (30) Day period following Seller's notification; *provided, however*, such notice period shall be fifteen (15) Days with respect to Sections 13.4(B) and 13.4(C) herein. The following shall constitute "EPE Event(s) of Default":

(A) EPE becomes insolvent, becomes a debtor in any bankruptcy or receivership proceedings, or dissolves as a legal business entity, and, in the case of any involuntary proceeding in respect of the foregoing, such proceeding is not dismissed within sixty (60) Days of the filing thereof;

(B) Any representation or warranty made by EPE is false or misleading in any material respect, and EPE fails to comply with such representation or warranty within thirty (30) Days after a demand by Seller to do so; provided, that if such false or misleading representation or warranty is not reasonably capable of being cured within such thirty (30) Day period, and so long as EPE demonstrates that it is diligently seeking to cure, then such cure period will be extended for an additional period, not to exceed an additional fifteen (15) Days;

(C) EPE fails to comply with any other material terms and conditions of this Agreement (other than payment obligations, which are addressed in Section 13.4(D)) within sixty (60) Days after a demand by Seller to do so; provided, that if such failure is not reasonably capable of being cured within such sixty (60) Day period, and so long as EPE demonstrates that it is diligently seeking to cure, then such cure period will be extended for an additional period, not to exceed an additional fifteen (15) Days; or

(D) Subject to Section 13.9, EPE fails to make, when due, any payment required pursuant to this Agreement, if such failure is not remedied within fifteen (15) Days after notice is received by EPE.

13.5 Actual Damages. For all events of default described in Sections 13.1, 13.2, 13.3 and 13.4 (each an “Event of Default”), the non-defaulting Party shall be entitled to receive from the defaulting Party all actual direct damages incurred by the non-defaulting Party in connection with such Event of Default. (which damages shall include reasonable Costs incurred by the non-defaulting Party);

(A) If the non-defaulting Party elects to terminate the Agreement, as provided in Sections 13.1, 13.2, 13.3 and 13.4, as applicable, the non-defaulting Party shall calculate (and provide detailed calculations to the defaulting Party), in a commercially reasonable manner, the Settlement Amount as of the termination date of the Agreement (the “Early Termination Date”). Subject to Section 13.5(B), the non-defaulting Party shall aggregate all payments due and amounts owing under this Agreement into a single amount by netting out (a) all payments and other amounts that are due to the defaulting Party under this Agreement, plus, at the option of the non-defaulting Party, any cash or other form of security then available to, or held for the benefit of, the non-defaulting Party pursuant to Article 12, against (b) the Settlement Amount that is due to the non-defaulting Party, plus any or all other amounts due to the non-defaulting Party under this Agreement, so that all such amounts shall be netted out into a single liquidated amount (the “Termination Payment”). The defaulting Party shall be liable to the non-defaulting Party to the extent the Termination Payment exceeds zero dollars (\$0). In no event shall the non-defaulting Party be obligated to make a Termination Payment to the defaulting Party.

(B) If Seller is the defaulting Party, (i) the damages recoverable by EPE on account of a Construction Event of Default, an Abandonment under Section 13.3, or an Operational Event of Default shall include Replacement Energy Costs, provided that damages associated with a Construction Event of Default or an Abandonment under Section 13.3 shall not exceed the amount of the Security Fund provided by Seller as of the date of the Event of Default, and (ii) the damages recoverable by EPE on account of a Construction Event of Default resulting solely from a delay in achieving a Construction Milestone (including the Commercial Operation Milestone) shall not exceed the Delay Damages; *provided that*, the foregoing limitation set forth in clause (ii) of this Section 13.5(B) shall not restrict EPE’s ability to terminate this Agreement for an Event of Default under Section 13.1(E). If EPE is the defaulting Party and does not accept Net Output generated by the Facility (or capable of being generated by the Facility) during such Event of Default, Seller shall use commercially reasonable efforts to sell the Expected Net Output (and associated Environmental Attributes) to third parties, and EPE shall pay Seller the differential between the Payment Rate and sales price for the amount of Net Output (and associated Environmental Attributes) sold to third parties for the entire duration that the Event of Default has occurred and is continuing. If, notwithstanding such commercially reasonable efforts, Seller is unable to sell any of the Net Output (or associated Environmental Attributes) to third parties during an Event of Default, EPE shall pay Seller an amount equal to the Payment Rate *multiplied by* either (A) the Net Output actually generated during the Event of Default (in the case of an Event of Default resulting from EPE’s refusal to accept Net Output generated by the Facility), or (B) the Net Output that the Parties reasonably calculate would have been generated (in the case of an Event of Default by EPE that results in an inability of EPE to accept Net Output that would have been generated absent such Event of Default), *provided that*, for purposes of this

calculation, the Facility shall be deemed to have generated the same quantity of electric energy in MWh generated by the Facility during the relevant interval of the prior year, subject to an annual degradation of 0.5%, or if such data is unavailable during such relevant interval, then the Parties shall calculate such quantity of electric energy using available data or interpolated data determined in accordance with Good Utility Practice.

(C) As soon as practicable after the Early Termination Date, the non-defaulting Party shall give notice to the defaulting Party of the amount of the Termination Payment due from the defaulting Party, if any. The notice shall include a written statement explaining in reasonable detail the calculation of such amount. If a Termination Payment is owed by the defaulting Party, such Termination Payment shall be made by the defaulting Party within ten (10) Business Days after receipt of such notice.

(D) If the defaulting Party disputes the non-defaulting Party's calculation of the Termination Payment, in whole or in part, the defaulting Party shall, within ten (10) Business Days of receipt of the non-defaulting Party's calculation of the Termination Payment, deliver a Dispute Notice and commence the dispute resolution procedure provided in Section 13.8; *provided, however*, the defaulting Party shall first post collateral in the form of either cash, Letters of Credit or other security reasonably acceptable to the non-defaulting Party in an amount equal to the non-defaulting Party's calculation of the Termination Payment.

13.6 No Incidental, Consequential, or Indirect Damages. Except for Seller's obligations to make EPE whole for Environmental Attributes as described in Article 11 and Section 13.1(E) and the potential penalties assessed to Seller pursuant to Section 20.3, the express remedies and measures of damages provided in this Agreement satisfy the essential purposes hereof. If no remedy or measure of damages is expressly herein provided, the obligor's liability shall be limited to direct, actual damages only. To the extent any damages to be paid hereunder are liquidated, the Parties agree and acknowledge that the damages are difficult or impossible to determine, and the damages calculated hereunder constitute a reasonable forecast of the harm or loss to be incurred. Neither Party shall be liable to the other Party for consequential, incidental, punitive, exemplary or indirect damages, lost profits or other business interruption damages by statute, in tort or contract (except in each case to the extent expressly provided herein); provided that, if either Party is held liable to a third party for such damages, and the Party held liable for such damages is entitled to indemnification under this Agreement from the other Party, the Indemnifying Party shall be liable for, and obligated to reimburse the Indemnified Party for, such damages, all in accordance with the indemnification provisions of Article 18.

13.7 Duty to Mitigate. Each Party agrees that it has a duty to mitigate damages and agrees that it will use commercially reasonable efforts to minimize any damages that may incur as a result of the other Party's performance or non-performance of the Agreement.

13.8 Dispute Resolution.

(A) In the event of any dispute arising under this Agreement ("Dispute"), within ten (10) Days following the delivered date of a written request by either Party (a "Dispute Notice"), (i) each Party shall appoint a representative (individually, a "Party

Representative” and collectively “Parties’ Representatives”), and (ii) the Parties’ Representatives shall meet, negotiate and attempt in good faith to resolve the Dispute quickly, informally and inexpensively.

(B) In the event the Parties’ Representatives cannot resolve the Dispute within thirty (30) Days after commencement of negotiations, within ten (10) Days of the conclusion of such negotiations at the written request of either Party, each Party Representative shall (i) independently prepare a written summary of the Dispute describing the issues and claims, (ii) exchange its summary with the summary of the Dispute prepared by the other Party Representative, and (iii) submit a copy of both summaries to the senior management of the Party Representatives with authority to irrevocably bind the Party to a resolution of the Dispute.

(C) Within ten (10) Business Days after receipt of the Dispute summaries, the senior management for both Parties shall negotiate in good faith to resolve the Dispute.

(D) In such meetings and exchanges, a Party shall have the right to designate as confidential any information that such Party offers. No Confidential Information exchanged in such meetings for the purpose of resolving a Dispute may be used by a Party in any proceeding against the other Party.

13.9 Mediation. Disputes not resolved under Section 13.8 shall, upon mutual consent, be submitted to mediation pursuant to the Mediation Rules of the American Arbitration Association. The Parties shall select the mediator within fifteen (15) Days of the request for mediation. Mediation shall be conducted in Texas, at a location to be determined by the Parties, notwithstanding anything to the contrary under the Mediation Rules of the American Arbitration Association.

13.10 Other Dispute Processes. If neither the negotiations under Section 13.8 nor mediation successfully resolves the dispute within ninety (90) Days of the delivery of the Dispute Notice, the Parties agree that an action may be filed in the appropriate state or federal court located in Texas.

13.11 Cost of Dispute Resolution. The cost of any mediation proceeding shall be shared equally by the Parties. The prevailing Party in any Dispute that goes beyond mediation arising out of or relating to this Agreement or its breach shall be entitled to recover from the other Party reasonable attorneys’ fees, costs and expenses incurred by the prevailing Party in connection with such Dispute.

13.12 Specific Performance. In addition to the other remedies specified in this Article 13, in the event that any Operational Event of Default is not cured within the applicable cure period, EPE may elect to treat this Agreement as being in full force and effect, and EPE shall have the right to specific performance. If the breach by Seller arises from a failure by a third party operating the Facility pursuant to an operating agreement entered into with Seller, and Seller fails or refuses to enforce its rights under the operating agreement that would result in the cure, or partial cure, of the Operational Event of Default, then EPE’s right to specific performance shall include the right to seek a court order compelling Seller to enforce its rights under the operating agreement.

13.13 Remedies Cumulative. The exercise, or the beginning of the exercise, by a Party of any one or more of the rights or remedies provided for herein shall not preclude the simultaneous or later exercise by such Party of any or all other rights or remedies provided for herein.

13.14 Payment of Amounts Due. Without limiting any other provisions of this Article 13 and at any time before or within one (1) year after termination of this Agreement pursuant Sections 13.1, 13.2, 13.3 or 13.4, either Party may send the other Party an invoice for such damages or other amounts as are due at such time under this Agreement, and such invoice shall be payable in the manner, and in accordance with the applicable provisions, set forth in Article 10, including the provision for late payment charges. As applicable, EPE may withdraw funds from the Security Fund as needed to provide payment for such invoice if the invoice is not paid by Seller on or before the twentieth (20th) Business Day following the invoice due date.

## **ARTICLE 14 - FACILITY OPERATION AND CONTRACT ADMINISTRATION**

14.1 Facility Operation. Seller shall staff, control, and operate the Facility at all times in a manner that:

(A) is consistent with Good Utility Practice(s), subject only to Emergency Conditions, Force Majeure Events and Delivery Excuses;

(B) complies with all applicable national and regional reliability standards, including standards set by WECC, NERC, the FERC, and the applicable State Regulator, or any successor agencies setting reliability standards for the operation of generation facilities interconnected in the WECC; and

(C) complies with the Operating Procedures developed by Seller and approved by EPE.

14.2 Operating Committee and Operating Procedures.

(A) EPE and Seller shall each appoint one representative and one alternate representative to act in matters relating to the Parties' performance obligations under this Agreement and to develop operating arrangements for the generation, delivery and receipt of Net Output. Such representatives shall constitute the "Operating Committee". The Parties shall notify each other in writing of such appointments and any changes thereto. The Parties' representatives designated above shall have authority to act for their respective principals in all technical matters relating to performance of this Agreement and to attempt to resolve disputes or potential disputes. The Operating Committee shall have no authority to modify the terms or conditions of this Agreement.

(B) Prior to the Commercial Operation Date, Seller shall develop and finalize (subject to approval by EPE) written operating procedures ("Operating Procedures") in the form specified in Exhibit I that shall include, but not be limited to: (i) a key personnel list for applicable EPE and Seller operating centers; (ii) the method of Day-to-Day communications; (iii) metering, telemetering, telecommunications, data acquisition, and Facility status reporting procedures; (iv) procedures for the development and communication of weekly and daily forecasts of the hourly net generation from the Facility,

in the format as shown in the sample template provided in Exhibit J; (v) maintenance scheduling and reporting procedures; (vi) procedures as defined in Sections 14.3, 14.4, 14.5, 14.6, 14.7, 14.8, 14.9, 14.10, 14.11, 14.12, and 14.13; and (v) such other matters as may be mutually agreed upon by the Parties. If any such procedures are not developed and approved by EPE, Seller will operate the Facility using other procedures that comply with Section 14.1 until agreed procedures are developed.

#### 14.3 Scheduling.

(A) Seller shall schedule Energy deliveries to the Point of Delivery based upon the expected delivery of Net Output, except for Forced Outages, Scheduled Maintenance Outages, Additional Maintenance Outages, Force Majeure Events and Emergency Conditions. At least sixty (60) Days prior to the anticipated Commercial Operation Date, Seller shall provide EPE with a good faith estimate of the quantity of Net Output associated with the Expected Net Output that it expects the Facility to generate for the remainder of that Year and, thereafter, no later than sixty (60) Days prior to each succeeding Commercial Operation Year, Seller shall provide EPE with a good faith estimate of the quantity of Net Output associated with the Expected Net Output that Seller expects the Facility to generate in each such Commercial Operation Year (the “Projected Schedule”).

(B) Seller shall provide or cause the Operation and Maintenance Contractor to provide to EPE its good faith estimates of the daily quantity of Net Output associated with the Expected Net Output to be delivered by Seller to the Point of Delivery for each week (starting on Sunday through Saturday) by 4:00 p.m. MPT on the date falling at least three (3) Days prior to the beginning of that week.

(C) Pursuant to scheduling instructions of EPE or any superseding policies or procedures of EPE’s SOC or otherwise, by 5:00 a.m. MPT on each Day, Seller shall submit to EPE a good faith estimate of the hourly quantities of Net Output associated with the Expected Net Output to be delivered to EPE at the Point of Delivery for the next seven (7) subsequent Days (the “Daily Good Faith Estimate”).

(D) If, at any time following submission of a good faith estimate to EPE on the Day preceding the next subsequent Day, Seller becomes aware of any change by more than ten percent (10%) to any of the values contained in the Daily Good Faith Estimate or predicts that such values will be subject to change by more than ten percent (10%) before the end of the next subsequent Day, then Seller shall promptly notify EPE no later than sixty (60) minutes before the next scheduling hour of such change or predicted change.

14.4 Forced Outages. Seller shall notify EPE by telephone or e-mail (with confirmation to follow by written notice in each case) immediately upon discovering that the Facility is unable to deliver all or part of any scheduled quantity of Net Output due to a Forced Outage that reduces the output of the Facility by more than ten percent (10%) of the Designed Maximum Capacity and which is expected to last more than ten (10) consecutive Days and, as soon as reasonably practicable following such discovery, shall notify EPE in writing of its best estimate of the expected duration of such Forced Outage. Such estimate by Seller shall be based on the best

information available to it. Should Seller expect any further changes in the duration of any such Forced Outage, it shall promptly notify EPE of the same.

#### 14.5 Scheduled Maintenance.

(A) Three (3) Months prior to the Commercial Operation Date and, thereafter, no later than ninety (90) Days prior to each succeeding Commercial Operation Year, Seller shall deliver to EPE the Projected Schedule for the Facility for the subsequent four (4) Year period, including Scheduled Maintenance Outages. Seller shall take manufacturers' recommendations and Good Utility Practices into account when establishing the proposed schedule for Scheduled Maintenance Outages, which schedule shall correspond with the Projected Schedule. Unless otherwise required by Good Utility Practices, Scheduled Maintenance Outages and Additional Maintenance Outages may not be scheduled during the Months of May, June, July, August, or September unless agreed to in writing by EPE at its sole discretion (the "Non-Scheduled Maintenance Period").

(B) Within thirty (30) Days of receiving the Projected Schedule for Scheduled Maintenance Outages from Seller, EPE may propose amendments thereto. Seller shall not unreasonably withhold its consent to such proposed amendments, provided that, it shall not be unreasonable for Seller to withhold its consent to any such proposed amendments that would be contrary to Good Utility Practices, and EPE shall pay the incremental costs of implementing such proposed amendments.

(C) In the event that Seller should reject any proposed amendments of EPE as set forth in Section 14.5(B), Seller shall promptly notify EPE of its reasons for such rejection, whereupon Seller and EPE shall in good faith negotiate a reasonable schedule of Scheduled Maintenance Outages. If such agreement is not reached within ten (10) Days of receipt by EPE of Seller's rejection notice, Seller shall submit a final schedule of Scheduled Maintenance Outages based on Good Utility Practices and the availability of the Operation and Maintenance Contractor which final schedule shall, to the extent reasonably possible, take into account the proposed amendments of EPE.

(D) Seller shall be entitled to change any Scheduled Maintenance Outages for the then-current Year if such changes are required to comply with Good Utility Practices or, in the alternative, if EPE consents to the change, provided that: (i) any changes in annual scheduled maintenance of up to two (2) Days' duration shall require one (1) week's prior written notice to EPE; (ii) any changes in annual scheduled maintenance of greater than two (2) Days but less than three (3) weeks' duration shall require one (1) Months' prior written notice to EPE; and (iii) any changes shall not be scheduled during the Non-Scheduled Maintenance Period unless consented to by EPE. Seller shall not unreasonably refuse to change the schedule of Scheduled Maintenance Outages if requested to do so by EPE upon not less than thirty (30) Days prior notice, *provided* that: (y) any such change would not be contrary to Good Utility Practices; and (z) the Operation and Maintenance Contractor is available.



(E) Any maintenance outages that do not correspond to the descriptions contained in Sections 14.5(A)-(D) shall be deemed to be Additional Maintenance Outages under Section 14.6.

14.6 Additional Maintenance Outages. As the need arises for Seller to conduct further maintenance on the Facility in addition to that conducted pursuant to Section 14.2, Section 14.5 and elsewhere in this Agreement (“Additional Maintenance Outages”), Seller shall notify EPE of such required maintenance, together with proposed dates for carrying out such additional maintenance and the estimated duration of the work to be carried out. Unless deferral of such maintenance would cause an Emergency Condition, without prejudice to the commitment of Seller in respect of the Committed Net Output, Seller and EPE shall negotiate in good faith a reasonable schedule during which such Additional Maintenance Outages shall take place. If agreement is not reached within twenty (20) Days of receipt of such notice, Seller shall prepare a schedule of such Additional Maintenance Outages based on Good Utility Practices taking into account the reasonable requests of EPE to the extent reasonably possible.

14.7 Access to and Inspection of Facility.

(A) Seller shall provide EPE and its authorized agents, employees and inspectors with reasonable access to the Facility, upon reasonable prior notice and during normal business hours, for the purposes set forth in this Article 14. EPE acknowledges that such access does not provide EPE with the right to direct or modify the operation of the Facility in any way and further acknowledges that any exercise by EPE of its rights under this Section 14.7 shall be at its own risk and expense.

(B) No inspections of the Facility, whether by EPE or otherwise, shall relieve Seller of its obligation to maintain the Facility and operate the same in accordance with Good Utility Practices. In no event shall any statement, representation, or lack thereof by EPE, either express or implied, relieve Seller of its exclusive responsibility for the Facility. Any inspection of property or equipment owned or controlled by Seller by EPE or any review by EPE or consent by EPE to Seller plans, shall not be construed as an endorsement by EPE of the design, fitness or operation of the Facility equipment or a warranty by EPE as to the safety, durability or reliability of the Facility equipment.

14.8 Operating Parameters.

(A) Seller shall: (i) have the sole responsibility to, and shall at its sole expense, operate and maintain the Facility in accordance with all requirements set forth in this Agreement; and (ii) comply with reasonable requirements of EPE regarding Day-to-Day or hour-by-hour communications with EPE. Seller agrees to operate the Facility in such a manner that Net Output delivered by Seller will meet all applicable requirements for voltage level, harmonics, power factor, vars, and other electrical specifications required by EPE in accordance with the Interconnection Agreement.

(B) Seller shall operate the Facility in accordance with all system protection equipment as required by the Interconnection Agreement.

14.9 Operating Records. Seller and EPE shall each keep and maintain complete and accurate records and all other data required by each of them for the purposes of proper administration of this Agreement, including such records as may be required by Governmental Authorities and WECC in the prescribed format of those entities. Such requirements shall be specified in the Operating Procedures described in Section 14.2. All records of Seller and EPE pertaining to this Agreement or to the operation of the Facility, as specified herein or otherwise shall be maintained for a period of two (2) years in either hard copy (paper) or in electronic form by Seller at the Facility or at its remote operations center or by EPE, as applicable, in the El Paso, Texas, metropolitan area in such format as may be required by Applicable Law or any Governmental Authority.

14.10 Operating Log. Seller shall maintain an accurate and up-to-date operating log in electronic format as defined in the Operating Procedures, with records of production for each hour and changes in operating status.

14.11 Availability Reporting. Seller shall comply with all current EPE, NERC, and WECC generating unit outage reporting requirements as they may be revised from time to time and as they apply to the Facility. Such outage reporting requirements shall be specified in the Operating Procedures.

14.12 Examination and Retention of Records. Seller or EPE may examine, and each at its own expense obtain copies, of the operating records and data kept by the other Party relating to transactions under and administration of this Agreement, at any time during the period the records are required to be maintained, upon prior request and during normal business hours. A Party's review of any such data shall in no way relieve the other Party of its responsibility for the professional quality, technical accuracy and completeness of such data. Each Party shall retain such operating records and data for the period of time required by Applicable Law.

14.13 Facility Development Records and Data Submissions. Seller shall submit or cause to be submitted to EPE the following documents on or before the dates specified below:

(1) In addition to the progress reports required under Section 4.5, commencing on the Agreement Approval Date and ending on the Commercial Operation Date, written notification, when and as Seller becomes aware, of any new condition or event that may have a material adverse effect on the timely completion of the Facility.

(2) Seller shall maintain all records, invoices and other information relating to the costs of construction of the Facility. Quarterly, beginning no later than ninety (90) Days after the Agreement Approval Date and ending on the Commercial Operation Date, a statement from Seller showing the percentage of the level of completion of the Facility (which may be redacted by Seller to remove Seller's or its counterparties' commercially sensitive and proprietary information and to comply with non-disclosure covenants and similar obligations applicable to Seller).

(3) No later than forty-five (45) Days prior to the Commercial Operation Date, (i) evidence demonstrating that Seller has obtained all Governmental Approvals then required to be obtained by Seller for the ownership, operation and maintenance of, and the supply of Net Output from, the Facility in accordance with this Agreement, and (ii) a list identifying the remaining Governmental Approvals for which Seller is responsible under the terms of this Agreement, which Governmental Approvals are not yet required for the operation and maintenance of, and the supply of Net Output from, the Facility, together with a plan reasonably acceptable to EPE for obtaining such Governmental Approvals and an estimate of the time within which such Governmental Approvals will be obtained by Seller.

(4) On or before the Commercial Operation Date, a certificate from its engineer to the effect that, based upon the engineer's monitoring and review of construction, the Facility has been constructed in all material respects in compliance with the development plan for the Facility and all permanent equipment installed as part of the Facility was new (or remanufactured) and unused (as remanufactured, if applicable) when installed.

(5) A certificate dated as of the Commercial Operation Date signed by the representative of Seller, which certificate shall specify that no default or Event of Default by Seller has occurred that would, with or without the giving of notice or passage of time, or both, constitute an Event of Default by Seller.

(6) As soon as available, but not later than sixty (60) Days following the Commercial Operation Date, two (2) copies of all results of Commissioning Tests performed on the Facility, including Commissioning Testing of major equipment included in the Facility and Seller's Interconnection Facilities.

(7) Upon EPE's exercise of the purchase option under Section 9.3, a list of all as-built drawings for the Facility, including the civil and architectural works, and when provided to Seller, a list of all other design and engineering data and information necessary to enable the Operation and Maintenance Contractor to operate and maintain the Facility during any period when such operation and maintenance is required under the Operation and Maintenance Agreement. EPE shall utilize such documents on a need-to-know basis for the sole purpose of operating the Facility.

(8) The receipt of the above schedules, data, certificates and reports by EPE shall not (i) be construed as an endorsement by EPE of the design of the Facility, (ii) constitute a warranty by EPE as to the safety, durability or reliability of the Facility, (iii) relieve Seller of any of its obligations or potential liabilities under the Project Contracts, or (iv) except with respect to the obligations of EPE to maintain the confidentiality of documents and information received by it, impose any obligation or liability on EPE.

## ARTICLE 15 - FORCE MAJEURE

### 15.1 Definition of a Force Majeure Event.

(A) The term “Force Majeure Event,” as used in this Agreement, means causes or events beyond the reasonable control of, and without the fault or negligence of the Party claiming a Force Majeure Event, including, without limitation: (i) acts of God; (ii) unusually severe or sudden actions of the elements such as floods, earthquakes, or tornadoes; (iii) lightning, fire, ice storms, or sabotage; (iv) terrorism; (v) war; (vi) riots; (vii) explosion; (viii) blockades or embargoes; (ix) insurrection; (x) strike; (xi) slow down or labor disruptions (except when such actions or disruptions are restricted to the Party’s contractors and subcontractors) even if such difficulties could be resolved by conceding to the demands of a labor group; (xii) actions or inactions by any Governmental Authority taken after the date hereof (excluding (a) actions or inactions by any Governmental Authority in respect of any Additional Consent required to construct or operate the Facility and (b) the adoption or change in any rule or regulation or environmental constraints lawfully imposed by such Governmental Authority), but only if such requirements, actions, or failures to act prevent or delay performance; and (xiii) a national, regional, local, or global pandemic as declared by the United States government or the World Health Organization.

(B) The term Force Majeure Event *does not include*: (a) any acts or omissions of any third party, including, without limitation, any vendor, customer, or supplier of Seller, unless such acts or omissions are themselves excused by reason of a Force Majeure Event; (b) any failure or inability to make payments when due; (c) any full or partial curtailment in the electric output of the Facility that is caused by or arises from a mechanical or equipment breakdown or other mishap or events or conditions attributable to normal wear and tear or flaws (unless such mishap is caused by one of the following: (i) acts of God, (ii) unusually severe or sudden actions of the elements, including, but not limited to, floods, hurricanes, or tornadoes, (iii) lightning, fire, ice storms or sabotage, (iv) terrorism, (v) war, (vi) riots, (vii) explosions, (viii) blockades or embargoes, (ix) insurrection, (x) strike, (xi) slowdown or labor disruptions (even if such difficulties could be resolved by conceding to the demands of a labor group) or (xii) emergency orders issued by a Governmental Authority; (d) changes in market conditions that affect the cost of EPE’s or Seller’s supplies, or that affect demand or price for any of EPE’s or Seller’s products; or (e) COVID-19 Events.

### 15.2 Applicability of Force Majeure.

(A) Except as otherwise provided in this Agreement, neither Party shall be responsible or liable for any delay or failure in its performance under this Agreement, nor shall any delay, failure, or other occurrence or event become a Construction Event of Default, an Operational Event of Default, or an EPE Event of Default, to the extent such delay, failure, occurrence or event is substantially caused by a Force Majeure Event, provided that the notification obligations and terms of Section 15.3(B) and Section 15.4(B) are complied with. A Party claiming that a Force Majeure Event has occurred shall not be entitled to any relief therefor until a conforming notice is provided to the other Party.

(B) Except as otherwise expressly provided for in this Agreement, the existence of a Force Majeure Event shall not relieve the Parties of their obligations under this Agreement to the extent that performance of such obligations is not precluded by a Force Majeure Event, *provided, however*, a Force Majeure Event shall not excuse either Party from any failure or inability to make payments when due.

### 15.3 Effect of Seller's Force Majeure.

(A) Seller's Notification Obligations. In the event of any delay or nonperformance by Seller resulting from a Force Majeure Event, Seller shall notify EPE in writing as soon as practicable after becoming aware of such occurrence. Within fourteen (14) Days of becoming aware of the occurrence of a Force Majeure Event, Seller shall notify EPE in writing of the nature, cause, date of commencement thereof and the anticipated duration, and shall indicate whether any deadlines or date(s) imposed under this Agreement may be affected thereby. The suspension of performance shall be of no greater scope and of no greater duration than the cure for the Force Majeure Event requires. Seller shall notify EPE of the cessation of the Force Majeure Event or of the conclusion of Seller's cure for the Force Majeure Event, in either case within two (2) Business Days thereof.

(B) Seller's Duty to Mitigate. Seller shall use commercially reasonable efforts to cure the cause(s) preventing its performance of this Agreement; *provided, however*, that the settlement of strikes, lockouts and other labor disputes shall be entirely within the discretion of Seller, and Seller shall not be required to settle such strikes, lockouts or other labor disputes by acceding to demands which Seller deems to be unreasonable.

(C) Delay Caused by Seller's Force Majeure Event. Upon the occurrence and during the continuance of a Force Majeure Event and the effects thereof, to the extent that a Force Majeure Event affects the ability of EPE to accept Net Output at the Point of Delivery or to the extent that a Force Majeure Event affects the ability of Seller to deliver Net Output to the Point of Delivery, then the hours during which the Force Majeure Event occurs shall be excluded from the payment calculations as set forth in Section 8.1.

(D) Seller's Force Majeure Restoration. In the event that, as a result of one or more Force Majeure Event(s) or its or their effects or by any combination thereof, the construction or operation of the Facility (or any portion thereof) is affected and is not restored or remedied within thirty (30) Days following the date the Force Majeure Event(s) began, Seller shall commence the preparation of an appraisal report (the "Restoration Report") within thirty (30) Days after the date it was required to provide a notice under Section 15.3(A) and shall deliver a copy of such Restoration Report to EPE within sixty (60) Days following the date the Force Majeure Event(s) began. The Restoration Report shall include (i) a description of such Force Majeure Event and its impact on the Facility, and (ii) an estimate in good faith of the time required to restore the Facility to its condition immediately prior to the occurrence of the Force Majeure Event.

15.4 Effect of EPE's Force Majeure.

(A) EPE's Notification Obligations. In the event of any delay or nonperformance by EPE resulting from a Force Majeure Event, EPE shall notify Seller in writing as soon as practicable after becoming aware of such occurrence. Within fourteen (14) Days of becoming aware of the occurrence of a Force Majeure Event, EPE shall notify Seller in writing of the nature, cause, date of commencement thereof and the anticipated duration, and shall indicate whether any deadlines or date(s) imposed under this Agreement may be affected thereby. The suspension of performance shall be of no greater scope and of no greater duration than the cure for the Force Majeure Event requires. EPE shall notify Seller of the cessation of the Force Majeure Event or of the conclusion of EPE's cure for the Force Majeure Event, in either case within two (2) Business Days thereof.

(B) EPE's Duty to Mitigate. EPE shall use commercially reasonable efforts to cure the cause(s) preventing its performance of this Agreement; provided, however, that the settlement of strikes, lockouts and other labor disputes shall be entirely within the discretion of EPE, and EPE shall not be required to settle such strikes, lockouts or other labor disputes by acceding to demands which EPE deems to be unreasonable.

(C) Delay Caused by EPE's Force Majeure Event. Upon the occurrence and during the continuance of a Force Majeure Event and the effects thereof, to the extent that a Force Majeure Event affects the ability of EPE to accept Energy at the Point of Interconnection, then the hours during which the Force Majeure Event occurs shall be excluded from the payment calculations as set forth in Section 8.1.

15.5 Limitations on Effect of Force Majeure. In no event will any delay or failure of performance caused by a Force Majeure Event extend this Agreement beyond its stated Term. Subject to Section 15.4(C), in the event that any delay or failure of performance caused by a Force Majeure Event continues for an uninterrupted period of more than three hundred sixty-five (365) Days from its occurrence or inception, the Party not claiming a Force Majeure Event may, so long as the Force Majeure Event is continuing beyond the three hundred sixty-five (365) Day period (and except under the circumstances provided for in Section 13.2(E)), terminate this Agreement upon no less than sixty (60) Days written notice to the affected Party and without further obligation by either Party, except as to the obligations incurred prior to the effective date of such termination. Once the right to terminate as provided in this Section Article 16 is triggered, the Party with the termination right must exercise such right within sixty (60) Days of the date such right is triggered, and the right to terminate this Agreement with respect the specific Force Majeure Event shall be waived after the expiration of such sixty (60) Day period. The Party not claiming a Force Majeure Event may, but shall not be obligated to, extend the three hundred sixty-five (365) Day period, for such additional time as it, in its sole discretion, deems appropriate, such additional time not to exceed two (2) years. If remedying of the construction and operation of the Facility is not technically feasible or the cost estimate for such restoration is greater than twenty-five million dollars (\$25,000,000), then Seller shall have the right to terminate this Agreement, whereupon EPE shall have the right but not the obligation to purchase the Facility at Fair Market Value, consistent with the procedures set forth in Section 9.3. Seller shall not be entitled to any compensation from EPE unless EPE elects that Seller shall sell the Facility to EPE or its designee(s).

## ARTICLE 16 - REPRESENTATIONS, WARRANTIES AND COVENANTS

16.1 Seller's Representations, Warranties and Covenants. Seller hereby represents and warrants as follows:

(A) Seller is a Delaware limited liability company, validly existing and in good standing under the laws of the State of its creation. Seller is qualified to do business in each other jurisdiction where the failure to so qualify would have a material adverse effect on the business or financial condition of Seller, and Seller has all requisite power and authority to conduct its business, to own its properties, and to execute, deliver, and perform its obligations under this Agreement.

(B) The execution, delivery, and performance of its obligations under this Agreement by Seller have been duly authorized by all necessary corporate action, and do not and will not:

(1) require any consent or approval by any governing body of Seller, other than that which has been obtained and is in full force and effect (evidence of which shall be delivered to EPE upon its request), except such consents or approvals as will be obtained by Seller in the ordinary course of business prior to the Commercial Operation Date;

(2) violate any provision of law, rule, regulation, order, writ, judgment, injunction, decree, determination, or award currently in effect having applicability to Seller or violate any provision in any formation documents of Seller, the violation of which could have a material adverse effect on the ability of Seller to perform its obligations under this Agreement;

(3) result in a breach or constitute a default under Seller's formation documents or bylaws, or under any agreement relating to the management or affairs of Seller or any indenture or loan or credit agreement, or any other agreement, lease, or instrument to which Seller is a party or by which Seller or its properties or assets may be bound or affected, the breach or default of which could reasonably be expected to have a material adverse effect on the ability of Seller to perform its obligations under this Agreement; or

(4) result in, or require the creation or imposition of any mortgage, deed of trust, pledge, lien, security interest, or other charge or encumbrance of any nature (other than as may be contemplated by this Agreement) upon or with respect to any of the assets or properties Seller now owns or hereafter acquires, the creation or imposition of which could reasonably be expected to have a material adverse effect on the ability of Seller to perform its obligations under this Agreement.

(C) This Agreement is a valid and binding obligation of Seller, subject to the fulfillment (or waiver) of the conditions precedent set forth in Section 6.1.

(D) The execution and performance of this Agreement will not conflict with or constitute a breach or default under any contract or agreement of any kind to which Seller

is a party or any judgment, order, statute, or regulation that is applicable to Seller or the Facility.

(E) To the knowledge of Seller, Seller has identified in Exhibit E all permits, consents, approvals, licenses and authorizations which Seller anticipates will be obtained by Seller in the ordinary course of business, and all permits, consents, approvals, licenses, authorizations, or other action required by any Governmental Authority to authorize Seller's execution, delivery and performance of this Agreement. Seller shall obtain all such permits, consents, approvals, licenses, and authorizations or other action required by any Governmental Authority prior to the date required therefore in order for Commercial Operation of the Facility to occur by the Commercial Operation Milestone. However, failure of Seller to identify a necessary permit, consent, approval, license or authorization in Exhibit E does not relieve Seller of the obligation under this Agreement to obtain all such necessary Governmental Approvals, and Seller shall notify EPE of any such necessary Governmental Approvals not identified in Exhibit E promptly after Seller acquires knowledge thereof.

(F) To the knowledge of Seller, all Required Facility Documents are listed on Exhibit H. Pursuant to the Required Facility Documents, Seller holds as of the Execution Date, or will hold by the Commercial Operation Date (or such other later date as may be specified under Applicable Law), and will maintain for the Term, all Required Facility Documents. To the knowledge of Seller, the anticipated use of the Facility complies with all applicable restrictive covenants affecting the Site. Following the Commercial Operation Date, Seller shall promptly notify EPE of any additional Required Facility Documents.

(G) On or before the Commercial Operation Date, Seller shall hold rights sufficient to enable Seller to deliver Net Output at the Designed Maximum Capacity from the Facility to the Point of Delivery pursuant to this Agreement throughout the Term.

(H) Seller has or will obtain all legal rights necessary for the Seller to enter upon and occupy the Site for the purpose of constructing, operating and maintaining the Facility for the Term. Seller shall maintain all leases or other land grants necessary for the construction, operation and maintenance of the Facility as valid for the Term. Upon request by EPE, Seller shall provide copies of memoranda of lease for all leases of real property required for the operation of the Facility or the performance of any obligations of Seller hereunder, recorded in connection with the development of the Facility.

(I) Seller shall comply with all applicable local, state, and federal laws, regulations, and ordinances, including but not limited to equal opportunity and affirmative action requirements and all applicable Environmental Laws presently in effect or which may be enacted during the Term, except to the extent that any failure to comply would not have a material adverse effect on Seller's ability to perform its obligations under this Agreement.

(J) As soon as reasonably practicable after it is known to Seller, Seller shall disclose to EPE the nature and extent of any (i) Environmental Contamination on or



relating to the Site (and Seller shall be solely responsible and liable for any corresponding clean-up and remediation costs), (ii) any material violation of any laws or regulations; or (iii) litigation, liens, or encumbrances arising out of the construction or operation of the Facility that could have a material adverse effect on Seller's ability to perform its obligations under this Agreement.

(K) Seller has engaged those professional or other experts it believes necessary to understand its rights and obligations pursuant to this Agreement. All professionals or experts including engineers, attorneys or accountants, that Seller may have consulted or relied on in undertaking the transactions contemplated by this Agreement have been solely those of Seller. In entering into this Agreement and the undertaking by Seller of the obligations set forth herein, Seller has investigated and determined that it is capable of performing hereunder and has not relied upon the advice, experience or expertise of EPE in connection with the transactions contemplated by this Agreement.

(L) All information relating to the Facility, its operation and Output and the Site provided to EPE and contained in this Agreement is, to the best of Seller's knowledge true and accurate.

(M) Seller has not claimed the Environmental Attributes, RECs, or other "renewable energy," "green energy," "clean energy" or similar attributes of the Output or the Facility as belonging to the Seller or any Affiliate of Seller and is not aware of any such claims made by third parties with respect to the Facility or the Output.

16.2 EPE's Representations, Warranties and Covenants. EPE hereby represents and warrants as follows:

(A) EPE is a corporation duly organized, validly existing and in good standing under the laws of the State of Texas and is qualified in each other jurisdiction where the failure to so qualify would have a material adverse effect upon the business or financial condition of EPE. EPE has all requisite power and authority to conduct its business, to own its properties, and to execute, deliver, and perform its obligations under this Agreement.

(B) Upon the receipt of the EPE Board Approval, then, from and after the time that EPE receives the EPE Board Approval, the execution, delivery, and performance of its obligations under this Agreement by EPE have been duly authorized by all necessary corporate action, and do not and will not:

(1) require any consent or approval of EPE's Board of Directors, or shareholders, other than that which has been obtained and is in full force and effect (evidence of which shall be delivered to Seller upon its request);

(2) violate any provision of law, rule, regulation, order, writ, judgment, injunction, decree, determination, or award currently in effect having applicability to EPE or violate any provision in any corporate documents of EPE, the violation of which could have a material adverse effect on the ability of EPE to perform its obligations under this Agreement;

(3) result in a breach or constitute a default under EPE's corporate charter or bylaws, or under any agreement relating to the management or affairs of EPE, or any indenture or loan or credit agreement, or any other agreement, lease, or instrument to which EPE is a party or by which EPE or its properties or assets may be bound or affected, the breach or default of which could reasonably be expected to have a material adverse effect on the ability of EPE to perform its obligations under this Agreement; or

(4) result in, or require the creation or imposition of, any mortgage, deed of trust, pledge, lien, security interest, or other charge or encumbrance of any nature (other than as may be contemplated by this Agreement) upon or with respect to any of the assets or properties of EPE now owned or hereafter acquired, the creation or imposition of which could reasonably be expected to have a material adverse effect on the ability of EPE to perform its obligations under this Agreement.

(C) This Agreement is a valid and binding obligation of EPE, subject to the fulfillment (or waiver) of the conditions precedent set forth in Section 6.1.

(D) The execution and performance of this Agreement will not conflict with or constitute a breach or default under any contract or agreement of any kind to which EPE is a party or any judgment, order, statute, or regulation that is applicable to EPE.

(E) To the knowledge of EPE, all approvals, authorizations, consents, or other action required by any Governmental Authority to authorize EPE's execution, delivery and performance of this Agreement, have been duly obtained and are in full force and effect.

## ARTICLE 17 - INSURANCE

17.1 Evidence of Insurance. Seller shall pursuant to the requirements of Section 4.9(C) and within thirty (30) Days of each insurance program renewal during the Term, provide EPE with copies of certificates of insurance evidencing that insurance coverages specific to the Facility are in compliance with the specifications for insurance coverage required for the Facility as set forth in Exhibit D. Such certificates shall (a) provide that EPE shall receive thirty (30) Days' prior written notice of non-renewal or cancellation of, any of the corresponding policies (except that such notice shall be ten (10) Days for non-payment of premiums), and (b) provide a waiver of any rights of subrogation against EPE, its Affiliates and their officers, directors, agents, subcontractors, and employees. All policies shall be written with insurers rated at least A-VII by A.M. Best (or a near equivalent rating from a nationally recognized rating agency) or that EPE, in its reasonable discretion, deems acceptable (such acceptance will not be unreasonably withheld). All policies shall be written on an occurrence basis, except as provided in Section 17.2. All policies shall contain an endorsement that Seller's policy shall be primary in all instances regardless of like coverage, if any, carried by EPE. Seller may satisfy its insurance requirements using any reasonable combination of primary and excess coverage. Seller's liability under this Agreement is not limited to the amount of insurance coverage required herein.

17.2 Term and Modification of Insurance.

(A) All insurance required under this Agreement shall cover occurrences during the Term (unless specified otherwise) and claims for events occurring during the Term (unless specified otherwise) for a period of two (2) years after the Term. In the event that any insurance as required herein is commercially available only on a “claims-made” basis, such insurance shall provide for a retroactive date not later than the Execution Date, and such insurance shall be maintained by Seller, with a retroactive date not later than the retroactive date required above, for a minimum of five (5) years after the Term. Any insurer shall carry at least an A.M. Best rating of A-VII or better (or a near equivalent rating from a nationally recognized rating agency) and must include EPE as an additional insured (except for Workers’ Compensation). A waiver of subrogation will also be required.

(B) If any insurance required to be maintained by Seller under this Agreement ceases to be reasonably available and commercially feasible in the commercial insurance market, Seller shall provide written notice to EPE, accompanied by a certificate from an independent insurance advisor of recognized national standing, certifying that such insurance is not reasonably available and commercially feasible in the commercial insurance market for electric generating plants of similar type, geographic location and design. Upon receipt of such notice, Seller shall use commercially reasonable efforts to obtain other insurance that would provide comparable protection against the risk to be insured, and EPE shall not unreasonably withhold its consent to modify or waive such requirement.

17.3 Endorsements to Fire and All-Perils and Machinery Breakdown Policies. Upon the Facility’s Commercial Operation Date, Seller shall insure the Facility against all risks of physical loss or damage, including machinery breakdown in the form of All Risk Property Insurance and shall also maintain business interruption/extra expense endorsements as set forth in Exhibit D, and such coverage shall be reasonable and customary in the power generation industry for projects of the size and scope of the Facility and, further, Seller shall cause provide EPE with the standard thirty (30) Days’ notice for any cancellation or non-renewal (or ten (10) Days’ notice for non-payment of premium) of such policies and shall name EPE as an additional insured, as its interests may appear.

**ARTICLE 18 – INDEMNITY**

18.1 Indemnification. EACH PARTY (THE “INDEMNIFYING PARTY”) AGREES TO INDEMNIFY, DEFEND AND HOLD HARMLESS THE OTHER PARTY (THE “INDEMNIFIED PARTY”) FROM AND AGAINST ALL THIRD PARTY CLAIMS, DEMANDS, LOSSES, LIABILITIES, PENALTIES, AND EXPENSES (INCLUDING REASONABLE ATTORNEYS’ FEES) TO THE EXTENT ARISING OUT OF, RESULTING FROM, OR CAUSED BY: (A) CONSTRUCTION EVENTS OF DEFAULT, OPERATIONAL EVENTS OF DEFAULT, ABANDONMENT UNDER SECTION 13.3, OR EPE EVENTS OF DEFAULT, AS APPLICABLE; (B) VIOLATION OF ANY APPLICABLE ENVIRONMENTAL LAWS; OR (C) THE NEGLIGENT OR TORTIOUS ACTS, ERRORS, OR OMISSIONS OF THE INDEMNIFYING PARTY, ITS AFFILIATES, ITS DIRECTORS, OFFICERS,

EMPLOYEES, OR AGENTS IN PERFORMING ITS OBLIGATIONS UNDER THIS AGREEMENT OR ITS FAILURE TO ABIDE BY THE PROVISIONS OF THIS AGREEMENT. NOTHING IN THIS Article 18 SHALL ENLARGE OR RELIEVE SELLER OR EPE OF ANY LIABILITY TO THE OTHER FOR ANY BREACH OF THIS AGREEMENT. NEITHER PARTY SHALL BE INDEMNIFIED FOR ITS DAMAGES RESULTING FROM ITS OWN NEGLIGENCE, INTENTIONAL ACTS OR WILLFUL MISCONDUCT. THESE INDEMNITY PROVISIONS SHALL NOT BE CONSTRUED TO RELIEVE ANY INSURER OF ITS OBLIGATION TO PAY CLAIMS CONSISTENT WITH THE PROVISIONS OF A VALID INSURANCE POLICY.

18.2 Indemnification for Fines and Penalties. Except as otherwise provided in Sections 11.7(B) and 20.3, any fines or other penalties incurred by a Party (other than fines or penalties due to the negligence or intentional acts or omissions of the other Party) for non-compliance with any municipal, state or federal laws shall be the sole responsibility of the non-complying Party.

18.3 Notice of Claim, Loss or Proceeding. Each Party shall promptly notify the other Party in writing of any claim, loss, suit, or administrative or legal proceeding in respect of which such notifying Party is or may be entitled to indemnification pursuant to Section 18.1 (an “Indemnification Event”). Such notice shall be given as soon as reasonably practicable after the relevant Party becomes aware of the Indemnification Event and that such Indemnification Event may give rise to an indemnification, but in any event no later than seven (7) Days after the Party seeking indemnification has notice or becomes aware of the Indemnification Event. The delay or failure of such Indemnified Party to provide the notice required pursuant to this Section 18.3 to the other Party shall not release the other Party from any indemnification obligation which it may have to such Indemnified Party except (i) to the extent that such failure or delay materially and adversely affects the Indemnifying Party’s ability to defend such Indemnification Event or increases the amount of the loss, and (ii) that the Indemnifying Party shall not be liable for any costs or expenses of the Indemnified Party in the defense of the Indemnification Event during such period of failure or delay.

18.4 Defense of Claims.

(A) Claim, Loss or Proceeding. Promptly after receipt by a Party of notice of an Indemnification Event, the Indemnifying Party shall have the option to assume the defense of the Indemnification Event, with counsel designated by such Indemnifying Party, *provided, however*, the Indemnified Party shall have the right to select and be represented by separate counsel if: (i) the Indemnified Party shall have reasonably concluded and specifically notified the Indemnifying Party that there may be specific defenses available to it which are different from or additional to those available to the Indemnifying Party, or that such Indemnification Event involves or could have a material adverse effect upon the Indemnified Party beyond the scope of this Agreement, unless a liability insurer is willing to cover such effects; or (ii) the Indemnified Party shall have reasonably concluded and specifically notified the Indemnifying Party that there may be a conflict of interest between the Indemnifying Party and the Indemnified Party in the conduct of the defense of such Indemnification Event. If the Indemnified Party has the right to select and be represented by separate counsel as provided herein, then counsel for the Indemnified Party shall have

the right to direct the defense of the Indemnification Event on behalf of the Indemnified Party and, to the extent possible, shall coordinate with counsel representing the Indemnifying Party.

(B) Unless and until the Indemnifying Party assumes control of the defense of an Indemnification Event in accordance with Section 18.4(A), the Indemnified Party shall have the right, but not the obligation, to contest, defend and litigate, with counsel of its own selection, any such Indemnification Event, and the reasonable costs and expenses thereof shall be subject to the indemnification obligations of the Indemnifying Party hereunder.

(C) Neither the Indemnifying Party nor the Indemnified Party shall be entitled to settle or compromise any Indemnification Event without the prior consent of the other; *provided, however*, that after agreeing in writing to indemnify the Indemnified Party, the Indemnifying Party may settle or compromise any claim without the approval of such Indemnified Party. Except where such consent is unreasonably withheld, if the Indemnified Party settles or compromises an Indemnification Event without the prior consent of the Indemnifying Party, the Indemnifying Party shall be excused from any indemnification obligation in respect of such settlement or compromise.

18.5 Subrogation. Upon payment of any indemnification pursuant to Section 18.1, the Indemnifying Party, without any further action, shall be subrogated to any and all claims that the Indemnified Party may have relating thereto, and the Indemnified Party shall, at the request and expense of the Indemnifying Party, cooperate with the Indemnifying Party and give at the request and expense of the Indemnifying Party such further assurances as are necessary or advisable to enable the Indemnifying Party vigorously to pursue such claims.

## **ARTICLE 19 - ASSIGNMENT AND OTHER TRANSFER RESTRICTIONS**

19.1 No Assignment Without Consent. Except as permitted in this Article 19, neither Party shall assign this Agreement or any portion thereof, without the prior written consent of the other Party, which consent shall not be unreasonably withheld, delayed or conditioned. Assignment of this Agreement or any portion thereof shall be permitted without the prior written consent of the other Party under the following circumstances:

(A) No consent to assignment shall be required for a Party to assign this Agreement to an Affiliate of such Party.

(B) EPE's consent shall not be required for Seller to assign this Agreement for collateral purposes to the Facility Lender. Seller shall notify EPE, pursuant to Section 20.4, of any such assignment to the Facility Lender no later than twenty (20) Days prior to the assignment.

In addition, the following conditions shall apply to all assignments, except as otherwise specified: (i) for assignments other than to a Facility Lender (which are addressed in Section 19.1(B)), at least thirty (30) Days' prior notice of any such assignment is given to the other Party; (ii) any assignee expressly assumes the assignor's obligations under this Agreement, unless otherwise agreed to by the other Party, and no assignment, whether or not consented to, shall relieve the

assignor of its obligations under this Agreement in the event the assignee fails to perform, unless the other Party agrees in writing in advance to waive the assignor's continuing obligations pursuant to this Agreement; (iii) no such assignment impairs any security given by Seller under this Agreement; (iv) EPE shall be reimbursed for any direct and indirect costs associated with any such assignment, whether or not completed; and (v) before the Agreement is assigned by Seller, the assignee first obtains such approvals as may be required by all applicable Governmental Authorities; *provided, however*, that clauses (i) and (ii) of this Section 19.1 shall not apply to the collateral assignment of this Agreement by Seller to a Facility Lender pursuant to Section 19.1(B).

## 19.2 Accommodation of Facility Lender.

(A) EPE acknowledges that upon an event of default under any Financing Documents relating to the Facility, any of the Facility Lenders may (but shall not be obligated to) assume all of the interests, rights and obligations of Seller thereafter arising under this Agreement, *provided* that, regardless of whether any such Facility Lender assumes all of the interests, rights and obligations of Seller thereafter arising under this Agreement, EPE's interests, rights and obligations under this Agreement will remain in full force and effect.

(B) To facilitate Seller's obtaining of financing of the Facility, EPE shall make commercially reasonable efforts to provide such consents to collateral assignment (a "Lender Consent"), certifications, representations, information, opinions, warranties, estoppels or other documents as may be commercially reasonably requested by Seller or the Facility Lender in connection with the financing of the Facility; *provided, however*, that in responding to any such request, EPE shall have no obligation to provide any consent, certification, representation, information or other document, or enter into any agreement, that adversely affects any of EPE's rights, benefits, risks and/or obligations under this Agreement. Seller shall reimburse, or shall cause the Facility Lender to reimburse, EPE for the incremental direct expenses (including the reasonable fees and expenses of counsel) incurred by EPE in the preparation, negotiation, execution and/or delivery of the Lender Consent or any other documents requested by Seller or the Facility Lender, and provided by EPE, pursuant to this Section 19.2(B).

(C) EPE acknowledges and agrees that the Lender Consent shall include, among others, the following provisions:

(1) Seller and EPE will neither modify nor terminate this Agreement, other than as provided herein, without the prior written consent of the Facility Lender.

(2) The Facility Lender shall have the right, but not the obligation, to do any act required to be performed by Seller under this Agreement, and any such act performed by the Facility Lender shall be as effective to prevent or cure an Event of Default or termination event as if done by Seller itself.

(3) If EPE becomes entitled to terminate this Agreement due to uncured Event of Default by Seller or termination event, EPE shall not terminate this

Agreement or suspend the performance of any of its obligations under this Agreement unless it has first given notice of such uncured Event of Default or termination event to the Facility Lender and has given the Facility Lender the same cure period afforded to Seller, plus an additional (A) thirty (30) Days with respect to a payment obligation, and (B) sixty (60) Days with respect to a non-payment obligation beyond Seller's cure period; provided, however, that if the Facility Lender requires possession of the Facility in order to cure the Event of Default or termination event with respect to a non-payment obligation, the Facility Lender's additional cure period shall not begin until foreclosure is completed or until the foreclosure period has expired, such foreclosure period not to exceed one hundred eighty (180) Days.

(4) Neither the Facility Lender nor any other participant in the Facility Debt shall be obligated to perform or be liable for any obligations of Seller under this Agreement until and unless any of them assumes this Agreement through the exercise of the Facility Lender's rights and remedies.

(5) In the event that the Facility Lender or its designee or successor assumes this Agreement, EPE shall continue this Agreement with the Facility Lender or its designee or successor, as the case may be, substituted wholly in place of Seller.

(6) Within ninety (90) Business Days of any termination of this Agreement in connection with any bankruptcy or insolvency of Seller, the Facility Lender (or its designee or successor) and EPE shall enter into a new agreement on the same terms and conditions as this Agreement and for the period that would have been remaining under this Agreement but for such termination.

(7) EPE's consent shall not be required for Seller to assign this Agreement for collateral purposes to the Facility Lenders. Seller shall notify EPE of any such assignment to the Facility Lenders no later than ten (10) Days after the assignment.

19.3 Restriction on Transfers. Except as otherwise permitted by this Agreement, (A) Seller may not sell the Facility, and (B) ESI Energy, LLC (the "Parent") may not, directly or indirectly, transfer all or a majority of the equity interests (the "Interests") in Seller to a non-Affiliate of Seller, without the prior written consent of EPE. In the event that a Parent should pledge or otherwise encumber any of its Interests as security for the payment of indebtedness under the Financing Documents, any such pledge or hypothecation shall be made pursuant to a pledge or hypothecation agreement that requires the pledgee or secured party to be bound by all of the terms and conditions of this Article 19, subject to such modifications as a lender or other financing party or investor may reasonably request. Notwithstanding the foregoing, the restrictions in this Section 19.3 shall not apply to transactions and transfers occurring prior to the Commercial Operation Date or otherwise to accommodate financing of the Facility prior to the Commercial Operation Date.

19.4 Permitted Transfers. Subject to the conditions and restrictions set forth in this Article 19 and written notice to EPE not less than ten (10) Days prior to a transfer (except in the case of a transfer under clause (C) of this Section 19.4, for which notice shall be provided not less than five (5) Days after the public announcement thereof), (A) Parent may at any time transfer all or any portion of its Interests to any Affiliate of Parent, (B) Seller may at any time transfer all or any portion of its ownership interest in the Facility to any Affiliate of Seller, (C) the Interests may be transferred in connection with a change in control of Parent, NextEra Energy Resources, LLC, NextEra Energy Capital Holdings, Inc., or NextEra Energy, Inc., or its respective successors, and (D) the Interests or the Facility may be transferred in connection with the transfer of all or substantially all of NextEra Energy Resources, LLC's renewable energy generation portfolio, solar energy generation portfolio, or energy storage portfolio, as the case may be (*provided*, in each of clauses (A), (B), (C) and (D) of this Section 19.4, that no such transfer impairs any security given by Seller under this Agreement) (any such transfer being referred to in this Agreement as a "Permitted Transfer").

19.5 Transfer without Consent is Null and Void. Any sale, transfer, or assignment of (a) the Interests, (b) any interest in the Facility, or (c) this Agreement made in contravention of the terms and conditions set forth in this Article 19 shall be null and void and shall constitute an Event of Default pursuant to Article 13.

19.6 Reimbursement for EPE's Costs from Transfers or Assignments. Seller agrees that, in the event Seller assigns or transfers an interest in the Facility or the Agreement, as such transactions are described Article 19, Seller shall be responsible for costs incurred by EPE, including reimbursement of costs, expenses and reasonable attorneys' fees incurred to effectuate the consent to such proposed transaction.

## ARTICLE 20 - MISCELLANEOUS

20.1 Waiver. Unless specifically provided otherwise in this Agreement, the failure of either Party to enforce or insist upon compliance with or strict performance of any of the terms or conditions of this Agreement, or to take advantage of any of its rights under this Agreement, shall not constitute a waiver or relinquishment of any such terms, conditions, or rights, but the same shall be and remain at all times in full force and effect.

### 20.2 Taxes.

(A) Seller shall be solely responsible for:

(1) any and all present or future taxes and other impositions of Governmental Authorities relating to the construction, ownership or leasing, operation or maintenance of the Facility, the Site, or any components or appurtenances thereof, including, without limitation, taxes and impositions that vary based upon the amount of power produced;

(2) any and all present or future taxes and other impositions of Governmental Authorities on or with respect to the energy generated by the Facility or the transaction under this Agreement arising up to the Point of Delivery, including *ad valorem* taxes; and



(3) all *ad valorem* taxes relating to the Facility except for *ad valorem* taxes on or with respect to the energy generated by the Facility or the transaction under this Agreement arising at or beyond the Point of Delivery.

(B) Seller shall not be responsible for payment of gross receipts taxes on energy sales to EPE.

(C) EPE shall be solely responsible for any and all present or future taxes and other impositions of Governmental Authorities on or with respect to the energy generated by the Facility or the transaction under this Agreement arising at or beyond the Point of Delivery, including *ad valorem* taxes.

(D) In the event EPE is required by law or regulation to remit or pay such taxes or other impositions of Governmental Authorities that are Seller's responsibility pursuant to Section 20.2(A), Seller shall promptly reimburse EPE for such amounts. If Seller is required by law or regulation to remit or pay such taxes or other impositions of Governmental Authorities that are EPE's responsibility pursuant to Section 20.2(C), EPE shall promptly reimburse Seller for such amounts. Either Party may offset such amounts against any undisputed amounts owed to it by the other Party, as provided in Section 10.3(A).

(E) The Parties shall cooperate to minimize tax exposure; however, neither Party shall be obligated to incur any financial burden to reduce taxes for which the other Party is responsible under this Agreement.

20.3 Monetary Penalties. If fees, fines, penalties, or costs are claimed or assessed against EPE or Seller by any Governmental Authority that are in whole or in part contributed to or due to noncompliance by the other Party with this Agreement, any requirements of law, any permit or contractual obligation, the other Party shall promptly reimburse EPE or Seller for related monetary penalties to the extent of such contribution or attribution.

20.4 Notices in Writing. Notices required by this Agreement shall be addressed to the Party's representative named in Exhibit C at the addresses noted in such Exhibit C. Any notice, request, consent, or other communication required or authorized under this Agreement to be given by one Party to the other Party shall be in writing. It shall either be hand delivered or mailed, postage paid, or delivered by a reputable overnight courier service, to the representative of the other Party. If mailed or delivered by overnight courier, the notice, request, consent or other communication shall be simultaneously sent by facsimile or other electronic means. Any such notice, request, consent, or other communication shall be deemed to have been received by the Close of the Business Day on which it was hand delivered or transmitted electronically (unless hand delivered or transmitted after such close, in which case it shall be deemed received at the close of the next Business Day). Real-time or routine communications concerning Facility operations shall be exempt from this Section 20.4.

20.5 Exhibit Changes. Either Party may change its representative or the information for its notice addresses in Exhibit C at any time without the approval of the other Party. Exhibit A, Exhibit B, Exhibit F, Exhibit G, Exhibit I, Exhibit J, Exhibit K, Exhibit L, and Exhibit M may be

changed at any time with the mutual consent of both Parties. Exhibit D may be changed in accordance with Section 17.2(B). Exhibit E and Exhibit H may be changed by Seller prior to the date set forth in such exhibit. A Party making a change that does not require the consent of the other Party shall provide thirty (30) Days' notice of the change to the other Party.

#### 20.6 Other Changes.

(A) The terms and conditions and the rates for service specified in this Agreement shall remain in effect for the term of the transaction described herein. Absent the Parties' written agreement, this Agreement shall not be subject to change by application of either Party pursuant to Sections 205 or 206 of the Federal Power Act.

(B) Absent the written agreement of all entities to a proposed change, the standard of review for changes to this Agreement whether proposed by a Party, a non-party, or the FERC acting *sua sponte* shall be the "public interest" standard of review set forth in *United Gas Pipe Line v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) as clarified by *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish*, 554 U.S. 527 (2008) (known as the "Mobile-Sierra doctrine").

20.7 Disclaimer of Third Party Beneficiary Rights. In executing this Agreement, EPE does not, nor should it be construed to, extend its credit or financial support for the benefit of any third parties lending money to or having other transactions with Seller. Nothing in this Agreement shall be construed to create any duty to, or standard of care with reference to, or any liability to, any person not a Party to this Agreement.

#### 20.8 Relationship of the Parties.

(A) This Agreement shall not be interpreted to create an association, joint venture, or partnership between the Parties or to impose any partnership obligation or liability upon either Party. Neither Party shall have any right, power, or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as an agent or representative of, the other Party.

(B) Seller shall be solely liable for the payment of all wages, taxes, and other costs related to the employment of persons to perform such services, including all federal, state, and local income, social security, payroll, and employment taxes and statutorily mandated workers' compensation coverage. None of the persons employed by Seller shall be considered employees of EPE for any purpose; nor shall Seller represent to any person that he or she is or shall become an EPE employee.

20.9 Equal Employment Opportunity Compliance Certification. Seller acknowledges that, as a government contractor, EPE is subject to various federal laws, executive orders, and regulations regarding equal employment opportunity and affirmative action. All applicable equal employment opportunity and affirmative action clauses shall be deemed to be incorporated herein as required by federal laws, executive orders, and regulations, including, but not limited to, 41 C.F.R. § 60 1.4(a)(1-7) but shall not thereby apply to Seller.

20.10 Survival of Obligations. Cancellation, expiration, or earlier termination of this Agreement shall not relieve the Parties of obligations that by their nature should survive such cancellation, expiration, or termination, prior to the term of the applicable statute of limitations, including without limitation warranties, remedies, or indemnities, which shall survive for the period of the applicable statute(s) of limitation. Applicable provisions of this Agreement shall continue in effect after termination, including early termination, to the extent necessary to enforce or complete the duties, obligations or responsibilities of the Parties arising prior to termination and, as applicable, to provide for final billings and adjustments related to the period prior to termination, payment of any money due and owing to either Party pursuant to this Agreement, payment of principal and interest associated with the Security Fund, and the indemnifications specified in this Agreement.

20.11 Severability. In the event any of the terms, covenants, or conditions of this Agreement, its Exhibits, or the application of any such terms, covenants, or conditions, shall be held invalid, illegal, or unenforceable by any court or administrative body having jurisdiction, all other terms, covenants, and conditions of the Agreement and their application not adversely affected thereby shall remain in force and effect; *provided, however,* that EPE and Seller shall negotiate in good faith to attempt to implement an equitable adjustment in the provisions of this Agreement with a view toward effecting the purposes of this Agreement by replacing the provision that is held invalid, illegal, or unenforceable with a valid provision the economic effect of which comes as close as possible to that of the provision that has been found to be invalid, illegal or unenforceable.

20.12 Complete Agreement; Amendments. The terms and provisions contained in this Agreement and its Exhibits constitute the entire agreement between EPE and Seller with respect to the sale of Net Output from the Facility and shall supersede all previous communications, representations, or agreements, either verbal or written, between EPE and Seller with respect to the sale of Net Output from the Facility. This Agreement may be amended, changed, modified, or altered, provided that such amendment, change, modification, or alteration shall be in writing and signed by both Parties hereto, and provided further, that the Exhibits attached hereto may be changed according to the provisions of Section 20.5.

20.13 Binding Effect. This Agreement, as it may be amended from time to time pursuant to this Section 20.12, shall be binding upon and inure to the benefit of the Parties hereto and their respective successors in interest, legal representatives, and permitted assigns.

20.14 Headings. Captions and headings used in this Agreement are for ease of reference only and do not constitute a part of this Agreement.

20.15 Counterparts. This Agreement may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument.

20.16 Governing Law. The interpretation and performance of this Agreement and each of its provisions shall be governed and construed in accordance with the laws of the State of New Mexico.

20.17 Choice of Forum. EACH PARTY IRREVOCABLY CONSENTS AND AGREES THAT ANY LEGAL ACTION OR PROCEEDING ARISING OUT OF THIS AGREEMENT OR THE ACTIONS OF THE PARTIES LEADING UP TO THE AGREEMENT SHALL BE BROUGHT EXCLUSIVELY IN THE DISTRICT COURTS OF EL PASO COUNTY, TEXAS, OR THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION. BY EXECUTION AND DELIVERY HEREOF, EACH PARTY (A) ACCEPTS THE EXCLUSIVE JURISDICTION OF ANY SUCH COURT AND WAIVES ANY OBJECTION THAT IT MAY NOW OR HEREAFTER HAVE TO THE EXERCISE OF PERSONAL JURISDICTION BY ANY SUCH COURT OVER EACH PARTY FOR THE PURPOSE OF ANY PROCEEDING RELATED TO THIS AGREEMENT, (B) IRREVOCABLY AGREES TO BE BOUND BY ANY FINAL JUDGMENT (AFTER ANY AND ALL APPEALS) OF ANY SUCH COURT ARISING OUT OF SUCH DOCUMENTS OR ACTIONS, (C) IRREVOCABLY WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, ANY OBJECTION THAT IT MAY NOW OR HEREAFTER HAVE TO THE LAYING OF VENUE OF ANY SUIT, ACTION OR PROCEEDINGS ARISING OUT OF SUCH DOCUMENTS BROUGHT IN ANY SUCH COURT (INCLUDING ANY CLAIM THAT ANY SUCH SUIT, ACTION OR PROCEEDING HAS BEEN BROUGHT IN AN INCONVENIENT FORUM) IN CONNECTION HERewith, (D) AGREES THAT SERVICE OF PROCESS IN ANY SUCH ACTION MAY BE EFFECTED BY MAILING A COPY THEREOF BY REGISTERED OR CERTIFIED MAIL, POSTAGE PREPAID, TO SUCH PARTY AT ITS ADDRESS AS SET FORTH HEREIN, AND (E) AGREES THAT NOTHING HEREIN SHALL AFFECT THE RIGHT TO EFFECT SERVICE OF PROCESS IN ANY OTHER MANNER PERMITTED BY LAW.

20.18 Waiver of Jury Trial. EACH PARTY KNOWINGLY, VOLUNTARILY, INTENTIONALLY AND IRREVOCABLY WAIVES THE RIGHT TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION BASED ON THIS AGREEMENT, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT AND ANY AGREEMENT EXECUTED OR CONTEMPLATED TO BE EXECUTED IN CONJUNCTION WITH THIS AGREEMENT, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY. THIS PROVISION IS A MATERIAL INDUCEMENT TO EACH OF THE PARTIES FOR ENTERING INTO THIS AGREEMENT. EACH PARTY HEREBY WAIVES ANY RIGHT TO CONSOLIDATE ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR ANY OTHER AGREEMENT EXECUTED OR CONTEMPLATED TO BE EXECUTED IN CONJUNCTION WITH THIS AGREEMENT, OR ANY MATTER ARISING HEREUNDER OR THEREUNDER, WITH ANY PROCEEDING IN WHICH A JURY TRIAL HAS NOT OR CANNOT BE WAIVED. THIS SECTION 20.18 WILL SURVIVE THE EXPIRATION OR TERMINATION OF THIS AGREEMENT.

20.19 Confidentiality.

(A) For purposes of this Section 20.19, “Disclosing Party” refers to the Party disclosing information to the other Party, and the term “Receiving Party” refers to the Party receiving information from the other Party.

(B) Other than in connection with this Agreement or as otherwise required by Applicable Law, the Receiving Party shall not use the Confidential Information (as defined in Section 20.19(D)) and shall keep the Confidential Information confidential. The Confidential Information may be disclosed to the Receiving Party's or its affiliates' directors, officers, employees, financial advisors, legal counsel and accountants, Facility Lenders or potential Facility Lenders (collectively, "Representatives"), but only if such Representatives need to know the Confidential Information in connection with this Agreement. The Parties agree that (i) such Representatives will be informed by the Receiving Party of the confidential nature of the Confidential Information and the requirement and the limitations of its use, (ii) such Representatives will be required to agree to and be bound by the terms of this Section 20.19 as a condition of receiving the Confidential Information, and (iii) in any event, the Receiving Party will be responsible for any disclosure of Confidential Information, or any other breach of confidentiality provisions of this Agreement, by any of its Representatives. The Receiving Party shall not disclose the Confidential Information to any Person other than as permitted hereby, and shall safeguard the Confidential Information from unauthorized disclosure using the same degree of care as it takes to preserve its own confidential information (but in any event no less than a reasonable degree of care). To the extent the Receiving Party is required to submit Confidential Information of the Disclosing Party to a Governmental Authority, the Receiving Party shall cooperate in good faith with the Disclosing Party to maintain the confidentiality of such Confidential Information by requesting confidential treatment with all filings to the extent appropriate and permitted by Applicable Law.

(C) If the Receiving Party or its Representatives are requested or required (by oral question, interrogatories, requests for information or documents, subpoena, civil investigative demand or similar process, or by applicable law) to disclose any Confidential Information, the Receiving Party shall promptly notify the Disclosing Party of such request or requirement, if that notification can be made without violating the terms of such compelled disclosure, so that the Disclosing Party may seek an appropriate protective order to protect the confidentiality of the Confidential Information or waive compliance with this Section 20.19 with respect to such disclosure. If, in the absence of a protective order or the receipt of a waiver under this Agreement, the Receiving Party or its Representatives are, in the opinion of their legal counsel, compelled to disclose the Confidential Information, the Receiving Party and its Representatives may disclose only such of the Confidential Information to the party compelling disclosure as is required by law and, in connection with such compelled disclosure, the Receiving Party and its Representatives shall use their reasonable efforts to obtain from the party to whom disclosure is made written assurance that confidential treatment will be accorded to such portion of the Confidential Information as is disclosed.

(D) As used in this Section 20.19, "Confidential Information" means all information that is furnished in connection with this Agreement to the Receiving Party or its Representatives by the Disclosing Party, or to which the Receiving Party or its Representatives have access by virtue of this Agreement (in each case, whether such information is furnished or made accessible in writing, orally, visually or by any other (including electronic) means), or which concerns this Agreement, the Disclosing Party or the Disclosing Party's stockholders, members, affiliates or subsidiaries, and which is

designated by the Disclosing Party at the time of its disclosure, or promptly thereafter, as “confidential” (whether by stamping any such written material or by memorializing in writing the confidential nature of any such oral or visual information). Any such Confidential Information furnished to the Receiving Party or its Representatives by a director, officer, employee, affiliate, stockholder, consultant, agent or Representative of the Disclosing Party will be deemed furnished by the Disclosing Party for the purpose of this Agreement. To protect its Confidential Information from disclosure, Seller shall have to right to redact or withhold information that constitutes proprietary or commercially sensitive information of Seller or its counterparties, or as necessary to comply with non-disclosure or similar obligations applicable to Seller. Notwithstanding the foregoing, the following will not constitute Confidential Information for purposes of this Agreement:

(1) information that is or becomes generally available to the public other than as a result of a disclosure or other act by the Receiving Party or its Representatives;

(2) information that can be shown by the Receiving Party to have been already known to the Receiving Party on a non-confidential basis prior to being furnished to the Receiving Party by the Disclosing Party;

(3) information that becomes available to the Receiving Party on a non-confidential basis from a source other than the Disclosing Party or a representative of the Disclosing Party if, to the Receiving Party’s knowledge, such source was not subject to any prohibition against transmitting the information to the Receiving Party; and

(4) information developed by the Parties during the negotiation of this Agreement that relates solely to this Agreement (as opposed to confidential business or operating information of either Party, including pricing), which information shall be deemed proprietary to both Parties, each of whom shall be free to use such information, as they would any information already known to the Parties prior to the negotiation of this Agreement.

(E) The Confidential Information will remain the property of the Disclosing Party. Any Confidential Information that is reduced to writing, except for that portion of the Confidential Information that may be found in analyses, compilations, studies or other documents prepared by or for the Receiving Party in connection with this Agreement, will be returned to the Disclosing Party immediately upon its request after expiration or termination of this Agreement, unless such Confidential Information has been destroyed by the Receiving Party, and no copies will be retained by the Receiving Party or its Representatives, unless the Parties agree otherwise. That portion of the Confidential Information that may be found in analyses, compilations, studies or other documents prepared by or for the Receiving Party, oral or visual Confidential Information, and written Confidential Information not so required to be returned will be held by the Receiving Party and kept subject to the terms of this Agreement, or destroyed.

(F) It is understood and agreed that neither this Agreement nor disclosure of any Confidential Information by the Disclosing Party to the Receiving Party shall be construed as granting to the Receiving Party or any of its Representatives any license or rights in respect of any part of the Confidential Information disclosed to it, including any trade secrets included in any such Confidential Information.

(G) The Parties acknowledge that EPE is required by law or regulation to report certain information that is or could otherwise embody Confidential Information from time to time. Such reports include models, filings, reports of EPE's net power costs, general rate case filings, power cost adjustment mechanisms, FERC-required reporting such as those made on FERC Form 1 or Form 714, market power and market monitoring reports, annual state reports that include resources and loads, integrated resource planning reports, reports to entities such as NERC, WECC, WREGIS, or similar or successor organizations, forms, filings, or reports, the specific names of which may vary by jurisdiction, along with supporting documentation. Additionally, in regulatory proceedings in all state and federal jurisdictions in which it does business, EPE will from time to time be required to produce Confidential Information. EPE may use its business judgment in its compliance with all of the foregoing and the appropriate level of confidentiality it seeks for such disclosures. To the extent permitted by Applicable Law, EPE will provide Seller with prior notice before it submits Confidential Information in regulatory proceedings. Seller agrees to intervene in all proceedings necessary to secure State Regulatory Approval. Seller shall solely be responsible for seeking and defending protective orders at its sole cost for its Confidential Information that may be subject to disclosure during the proceeding. Seller further does not object to the release of information required by Sections 17.9.551.8(D) and 17.9.551.11(C) New Mexico Code Annotated or other Applicable Law.

(H) Each Party agrees that violation of the terms of this Section 20.19 constitutes irreparable harm to the other, and that the harmed Party may seek any and all remedies available to it at law or in equity, including injunctive relief.

20.20 Compliance with Applicable Law. This Agreement and the obligations of the Parties under this Agreement are subject to all present and future laws with respect to the subject matter hereof, either state or federal, and to all valid present and future orders, rules, and regulations of duly constituted Governmental Authorities having jurisdiction. The Parties agree to comply with any and all such applicable federal, state, and local laws, orders, and regulations in connection with the performance of their respective obligations under this Agreement. Subject to Section 20.19, each Party shall deliver or cause to be delivered to the other Party such certificates and documents, and shall make available such personnel and records relating to the Facility, to the extent that the requesting Party requires the same in order to fulfill any regulatory reporting requirements, or to assist in any administrative proceedings relating to this Agreement or the Facility.

20.21 Press Releases and Media Contact. Upon the request of either Party, the Parties shall develop a mutually agreed joint press release to be issued describing the location, size, type and timing of the Facility, the long-term nature of this Agreement, and other relevant factual information about the relationship. In the event during the Term, either Party is contacted by the media concerning this Agreement, the contacted Party shall inform the other Party of the existence

of the inquiry, and the Parties shall jointly agree upon the substance of any information to be provided to the media.

20.22 Due Authority. Each Party represents and warrants that (a) it has full and complete authority to enter into and perform this Agreement, subject, in the case of EPE, to the condition precedent in Section 6.1(A), and (b) 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 thereby, subject, in the case of EPE, to the condition precedent in Section 6.1(A).



IN WITNESS WHEREOF, the Parties have executed this Agreement.

**Seller:**

Buena Vista Energy Center II, LLC

By: 

**Matthew S. Handel**

**Senior Vice President**

**EPE:**

El Paso Electric Company

By: 

Steven T. Buraczyk

Senior Vice President Operations

By: 

Adrian J. Rodriguez

Interim Chief Executive Officer

APPROVED AS TO FORM

By: 

Matthew K. Behrens, Senior Attorney

DATED: March 30, 2020

**EXHIBIT A**  
**CONSTRUCTION MILESTONES**

Seller shall meet the following Construction Milestones.

<u>MILESTONES</u>	<u>DATES</u>
1. <u>Start of Permitting.</u> Seller to have submitted an application for the main site use permit required by the State to allow the Facility to be located on the Site.	February 1, 2021
2. <u>Construction Start.</u> Seller to have issued a full Notice to Proceed to commence physical construction and installation of the Facility at the Site.	August 1, 2021
3. <u>Seller's Interconnection Facilities.</u> Seller to have completed construction of the Seller's Interconnection Facilities and such facilities are capable of being energized.	March 1, 2022
4. <u>Commercial Operation.</u> Facility to have achieved Commercial Operation	May 1, 2022

## EXHIBIT B

### FACILITY DESCRIPTION AND SITE MAPS

1. **Generating Facility Description.** The Facility will be a 20 MWac photovoltaic generating facility comprised of photovoltaic modules, a single-axis horizontal tracking rack, inverters, step-up transformers and ancillary power generation equipment. The Facility will interconnect to EPE's electric system pursuant to the Interconnection Agreement. Project layout and 1-line included.

The Facility will consist of solar modules manufactured by a Tier 1 module manufacturer, mounted on a single axis tracking system in order to track the sun on a daily basis. The output of the modules will be combined in strings, and the strings will be aggregated at inverters, where the energy will be converted at each inverter pad from direct current to alternating current and stepped up to medium voltage. Output from each inverter pad will be further aggregated and will be stepped up through a main generator step up transformer to connect to either the 115kV Chaparral - Oro Grande line or the 345kV Amrad - Caliente line on-site.

2. **Site Description.** The Facility will be located in Otero County, New Mexico on State of New Mexico Land approximately 6 miles Northeast of the town of Chaparral. The project site coordinates are 32.069° N; 106.309° W

#### Legal Property Descriptions.

The project will utilize a portion of the 2,774.69± acres located in Otero County, New Mexico, more specifically described as:

**Section 02, Township 26 South, Range 06 East, N.M.P.M.:** Lots 1-3, PT. Lot-4, S2NE4, PT. SW4NW4, SE4NW4, PT. W2SW4, SE4 (647.400 Acres) less and excepting a tract of Land within the W2 of Section-02, Township-26 South, Range-06 East, N.M.P.M. (48.795 acres) = 598.605 acres more or less.

**Section 03, Township 26 South, Range 06 East, N.M.P.M.:**PT. LOT-2, LOTS-3-4, S2NW4, SW4, PT. W2E2 (652.360 Acres) less and excepting a tract of Land within the E2 of Section-03, Township-26 South, Range-06 East, N.M.P.M. (276.473 Acres)=375.887 acres more or less.

**Section 04, Township 26 South, Range 06 East, N.M.P.M.:** ALL=657.48 acres more or less.

**Section 05, Township 26 South, Range 06 East, N.M.P.M.:** ALL=662.72 acres more or less.

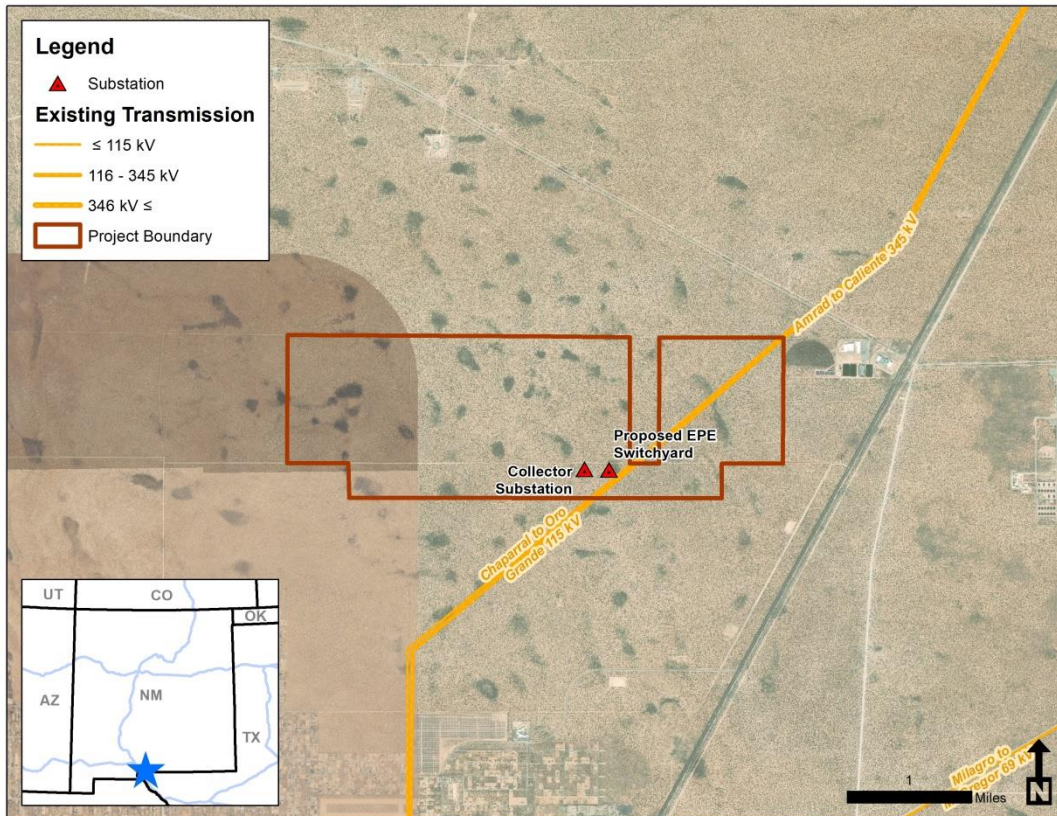
**Section 08, Township 26 South, Range 06 East, N.M.P.M.:** N2NE4=80.00 acres more or less.

**Section 09, Township 26 South, Range 06 East, N.M.P.M.:** N2N2=160.00 acres more or less.

**Section 10, Township 26 South, Range 06 East, N.M.P.M.:** N2N2=160.00 acres more or less.

**Section 11, Township 26 South, Range 06 East, N.M.P.M.:** N2NW4=80.00 acres more or less.

Site Map



**EXHIBIT C**  
**NOTICE ADDRESSES**

<b>EPE</b>	<b>Seller</b>
<p><b>Notices:</b> El Paso Electric Company Attn: Paul Garcia, Director – Renewable &amp; Emergent Technologies PO Box 982 El Paso, TX 79901 Phone: 915-521-4418</p>	<p><b>Notices:</b> Buena Vista Energy Center II, LLC Attn: Paramjeet Dagar Business Management 700 Universe Blvd. Juno Beach, FL 33408 Phone: 561-691-7548</p>
<p><b>Reference Numbers:</b> Duns: 007928955 Federal Tax ID Number: 74-0607870</p>	<p><b>Reference Numbers:</b> Duns: Federal Tax ID Number:</p>
<p><b>Contract Administration:</b> Attn: Brad Green Manager – Asset Optimization Phone: 915-521-4475 Fax: 915-521-4656 E-mail: <a href="mailto:brad.green@epelectric.com">brad.green@epelectric.com</a> Attn: Paul Garcia Director – Renewable &amp; Emergent Technologies Phone: 915-521-4076 Fax: 915-521-7894 E-mail: <a href="mailto:paul.garcia@epelectric.com">paul.garcia@epelectric.com</a></p>	<p><b>Contract Administration:</b> Attn: Paramjeet Dagar Business Management Phone: 561-691-7548 E-mail: <a href="mailto:paramjeet.dagar@nexteraenergy.com">paramjeet.dagar@nexteraenergy.com</a></p>
<p><b>Maintenance Forecasting/Scheduling:</b> Attn: Brad Green Manager – Asset Optimization Phone: 915-521-4475 Fax: 915-521-4656 E-mail: <a href="mailto:brad.green@epelectric.com">brad.green@epelectric.com</a> Attn: Paul Garcia Director – Renewable &amp; Emergent Technologies</p>	<p><b>Maintenance Forecasting/Scheduling:</b> Attn: Paramjeet Dagar Business Management Phone: 561-691-7548 E-mail: <a href="mailto:paramjeet.dagar@nexteraenergy.com">paramjeet.dagar@nexteraenergy.com</a></p>

<p>Phone: 915-521-4076 Fax: 915-521-7894 E-mail: <a href="mailto:paul.garcia@epelectric.com">paul.garcia@epelectric.com</a></p>	
<p><b>Day Ahead Forecasting/Scheduling:</b> Attn: Prescheduler Phone: (915) 543-2044 <b>Day Ahead, Hour Ahead, and Real Time Forecasting/Scheduling</b> Attn: Real-Time Desk Phone: (915) 543-4306 Phone: To be provided by Seller</p>	<p><b>Day Ahead, Hour Ahead, and Real Time Forecasting/Scheduling:</b> Attn: Paramjeet Dagar Business Management Phone: 561-691-7548 E-mail: <a href="mailto:paramjeet.dagar@nexteraenergy.com">paramjeet.dagar@nexteraenergy.com</a></p>
<p><b>Payments, Security:</b> Attn: Ana Boisselier, Supervisor, Energy Accounting Phone: (915) 543-2055</p>	<p><b>Payments, Security:</b> Attn: Paramjeet Dagar Business Management Phone: 561-691-7548 E-mail: <a href="mailto:paramjeet.dagar@nexteraenergy.com">paramjeet.dagar@nexteraenergy.com</a></p>
<p><b>With additional Notices of an Event of Default or Potential Event of Default to:</b> Attn: Brad Green Phone: 915-521-4475 Facsimile: 915-521-4656 Email: <a href="mailto:brad.green@epelectric.com">brad.green@epelectric.com</a></p>	<p><b>With additional Notices of an Event of Default or Potential Event of Default to:</b> Attn: Paramjeet Dagar Business Management Phone: 561-691-7548 E-mail: <a href="mailto:paramjeet.dagar@nexteraenergy.com">paramjeet.dagar@nexteraenergy.com</a></p>

## EXHIBIT D

### INSURANCE COVERAGE

<u>Type of Insurance</u>	<u>Minimum Limits of Coverage</u>
1. <b>Commercial General Liability (CGL)</b>	\$2,000,000 per occurrence and \$5,000,000 in general aggregate; provided, that, if CGL insurance contains a general aggregate limit, it shall apply separately to the Facility.

CGL insurance shall be written on ISO occurrence form CG 00 01 01 96 (or a substitute form providing equivalent coverage) and shall cover liability arising from premises, operations, independent contractors, products/completed operations, contracts, property damage, personal injury and advertising injury, and liability assumed under an insured contract (including the tort liability of another assumed in a business contract), all with limits as specified above. CGL insurance shall include ISO endorsement CG 24 17 (or an equivalent endorsement) which modifies the definition of "Insured contract" to eliminate the exclusion of easement or license agreements in connection with construction or demolition operations on or within 50 feet of a railroad. There shall be no endorsement or modification of the CGL insurance limiting the scope of coverage for liability arising from explosion, collapse, or underground property damage.

EPE shall be included as an additional insured under the CGL policy and under the umbrella or excess liability insurance. The umbrella or excess liability insurance shall provide coverage over the top of the CGL insurance, the Business Automobile Liability insurance, and the Employers Liability insurance.

The CGL and umbrella or excess liability insurance to be obtained by or on behalf of Seller shall be endorsed as follows:

Such insurance as afforded by this policy for the benefit of EPE shall be primary as respects to any claims, losses, damages, expenses, or liabilities arising out of that certain Purchase Power Agreement, dated March 18, 2020, and insured hereunder, and any insurance carried by EPE shall be excess of and noncontributing with insurance afforded by this policy.

For the avoidance of doubt, Seller's blanket primary and non-contributory endorsement will satisfy the above requirement.

- |   |   |
|---|---|
| 2. <b>Business Automobile Liability</b> | \$1,000,000 combined single limit (each accident), including all Owned, Non Owned, Hired and Leased Autos |
|---|---|

Business Automobile Liability insurance shall be written on ISO form CA 00 01, CA 00 05, CA 00 12, CA 00 20, or a substitute form providing equivalent liability coverage. If necessary, the

policy shall be endorsed to provide contractual liability coverage equivalent to that provided in the 1990 and later editions of CA 00 01.

- 3. Workers Compensation** Statutory Requirements, with which Seller may comply through the use of a qualified self-insurance plan.
- 4. Employers Liability** \$1,000,000 each accident for bodily injury by accident, or  
\$1,000,000 each employee for bodily injury by disease.
- 5. Umbrella or Excess Liability Coverage** \$10,000,000 per occurrence and in general aggregate
- 6. All Risk Property** Effective upon the Facility's Commercial Operation Date, such insurance shall include coverage for business interruption (12 Months) and extra expense (\$1,500,000 general aggregate)



**EXHIBIT E**

**SELLER'S REQUIRED GOVERNMENTAL AUTHORITY PERMITS, CONSENTS,  
APPROVALS, LICENSES AND AUTHORIZATIONS TO BE OBTAINED**

1. Construction Stormwater General Permit
2. Driveway/Right-Of-Way Permit
3. Special Permit
4. Building Permit

This Exhibit E may be updated by Seller from time to time and shall be completed no later than thirty (30) Days prior to the Start of Permitting Milestone date set forth in Exhibit A.

**EXHIBIT F**

**SELLER'S EXPECTED NET OUTPUT AND COMMITTED NET OUTPUT  
AND PAYMENT RATE**

<b>COMMERCIAL OPERATION YEAR</b>	<b>EXPECTED NET OUTPUT (MWH)</b>	<b>COMMITTED NET OUTPUT (MWH)</b>	<b>PRODUCT RATE (\$/MWH)</b>
1	62,688	43,882	\$19.88
2	62,375	46,781	\$19.88
3	62,063	46,547	\$19.88
4	61,752	46,314	\$19.88
5	61,444	46,083	\$19.88
6	61,136	45,852	\$19.88
7	60,831	45,623	\$19.88
8	60,527	45,395	\$19.88
9	60,224	45,168	\$19.88
10	59,923	44,942	\$19.88
11	59,623	44,717	\$19.88
12	59,325	44,494	\$19.88
13	59,028	44,271	\$19.88
14	58,733	44,050	\$19.88
15	58,440	43,830	\$19.88
16	58,147	43,611	\$19.88
17	57,857	43,393	\$19.88
18	57,567	43,176	\$19.88
19	57,280	42,960	\$19.88
20	56,993	42,745	\$19.88

**EXHIBIT G**

**SELLER'S FORMAT FOR RENEWABLE ENERGY CERTIFICATES**

In accordance with Article 10, Seller shall provide EPE with RECs in the format prescribed in this exhibit.

**RENEWABLE ENERGY CERTIFICATE**

Period: For the month of \_\_\_\_\_, 20\_\_.

Source of REC: Renewable Energy Provider

Buena Vista Energy Center II, LLC

Contact:

Paramjeet Dagar  
Business Management  
700 Universe Blvd.  
Juno Beach, FL 33408  
Phone: 561-691-7548

Generator type: \_\_\_\_\_

Nameplate capacity: \_\_\_\_\_ (in MW)

Date of generator start-up: \_\_\_\_\_

Fuel source: \_\_\_\_\_

Revenue Meter manufacturer and identification / serial number:

\_\_\_\_\_

Location of generator: \_\_\_\_\_

Renewable Energy Purchaser:

Interconnection Utility: El Paso Electric Company

Control Area Operator: El Paso Electric Company

EPE Contact:  
Brad Green  
P.O. Box 982  
El Paso, TX 79901  
(915) 521-4475  
Fax (915) 521-4656

**MONTHLY STATEMENT OF RECS**

Renewable Energy delivery for the month of \_\_\_\_\_, 20\_\_

Energy Delivered: \_\_\_\_\_ kWh

**SUPPLIER CERTIFICATION**

I, \_\_\_\_\_, hereby certify that:

The energy produced, sold and delivered by [•] to El Paso Electric Company from these facilities is from a renewable energy resource, as defined by 17.9.572 New Mexico Admin Code.

Each megawatt hour of electricity is generated using a solar fuel source; and

No other Renewable Energy Certificates associated with the renewable energy produced and delivered by [•] to El Paso Electric Company have been traded, sold, retired or otherwise transferred by [•] to any other person or entity.

[•]

By: \_\_\_\_\_  
[•], [•]

\_\_\_\_\_  
Date

**EXHIBIT H**  
**REQUIRED FACILITY DOCUMENTS**

This Exhibit H may be updated by Seller from time to time and shall be completed no later than thirty (30) Days prior to the Commercial Operation Milestone date set forth in Exhibit A.

## EXHIBIT I

### OPERATING PROCEDURES

#### Day-Ahead Pre-Schedule Notification from Seller to EPE

- **Seller provides to EPE on a Day-Ahead notice the expected**
  - Solar Output Seven (7)-day Forecast



#### Day-Ahead Preschedule Receipt

- **Preschedule Solar Energy**
  - Day-Ahead receives expected schedule at 5:00 a.m. for next seven (7) days from Seller and plans/trades for day
- **Day-Ahead Solar Energy Curtailment**
  - Day-Ahead has capability for solar energy curtailment
  - Curtailment amount schedule sent to Seller
  - Seller confirms curtailment request



#### Same-Day Modifications to Schedules

- **Seller provides current hour forecast** for next 24 hours provided at the top of each hour
- **Same-Day Solar Energy Curtailment (EPE)**
  - Buyer reserves the right to conduct solar energy curtailments during same-day hours

## EXHIBIT J

### SOLAR FORECASTING FILE TEMPLATE

Vendors are required to submit files to a designated EPE SFTP folder.

- EPE will provide a user id and password to vendor to gain access to the SFTP Folder.
- Vendors are required to submit two files:
  - a) Daily File – The Daily file needs to be submitted daily by 5:00 am MST, Current Day plus next 7 Days forecast (24 hour).
  - b) Hourly File – The Hourly file needs to be submitted at the top of each hour. Current hour plus next 24 hours forecast.
- Vendors are required to automate the process.

#### **Definitions:**

Daily File – Reports the Solar Forecasting MW by hour and is updated daily.

Hourly File – Reports the Solar Forecasting MW by hour and is updated hourly to reflect any changes.

Hour Ending (“HE”) – Reports should provide hourly output as projected output at hour ending

#### **File Format:**

- File needs to be in CSV format.
- Fields need to have a comma delimiter. This should be a single character.
- Keep each record on a separate line. Each record must start on its own line, but a single record can span multiple lines.
- Do not follow the last record in a file with a carriage return.
- Every hour requires a value, if forecasted to be zero, the value must be zero
- The enclosing character (typically double quotes) must be used when required, such as when the delimiter appears in a field. Delimiter by pipe.

#### **Troubleshooting and Resolution of issues:**

- EPE will send automated emails when Files are not delivered in a timely manner to the corresponding FTP folders.
- Vendor will need to provide contact information where automated emails need to be sent for the notification of file receipt issues and the resolution of issues.
- Vendor is to provide current – Contact Name, Email, Phone.
- Vendor is responsible for updating contact information when it changes.

#### **File Naming Convention and CSV Samples**

Daily File: Site Name\_DayAheadForecast\_YYYYMMDD.csv

Hourly File: Site Name\_HourAheadForecast\_YYYYMMDDHEHH.csv (where “HE” is a constant and HH represents the Hour from 01 to 24)



**SOLAR FORECASTING FILE TEMPLATE**

Site Name	Time Zone: MST																							
	HE1	HE2	HE3	HE4	HE5	HE6	HE7	HE8	HE9	HE10	HE11	HE12	HE13	HE14	HE15	HE16	HE17	HE18	HE19	HE20	HE21	HE22	HE23	HE24
1 10/18/2018									1.06	4.26	6.44	8.73	10.2	10.51	10.76	12.88	13.4	6.35	0.15	0	0	0	0	0
2 10/19/2018	0	0	0	0	0	0	0	0	0.83															

Site Name	Time Zone: MST																							
FORECAST DERIVATION DATE																								
10/18/2018	HE1	HE2	HE3	HE4	HE5	HE6	HE7	HE8	HE9	HE10	HE11	HE12	HE13	HE14	HE15	HE16	HE17	HE18	HE19	HE20	HE21	HE22	HE23	HE24
1 10/19/2018	0	0	0	0	0	0	0	0	1	9.4	15.8	16.67	16.04	14.96	14.29	14.24	14.96	12.56	3.62	0	0	0	0	0
2 10/20/2018	0	0	0	0	0	0	0	0	0.92	9.87	15.75	16.61	16.33	15.86	16.1	16.63	16.65	14.87	5.9	0.12	0	0	0	0
3 10/21/2018	0	0	0	0	0	0	0	0	0.87	7.94	13.23	16.53	16.23	15.27	14.82	15.42	15.73	14.39	5.69	0.1	0	0	0	0
4 10/22/2018	0	0	0	0	0	0	0	0	0.81	7.77	13.14	16.45	16.15	15.18	14.74	15.34	15.66	14.29	5.47	0.09	0	0	0	0
5 10/23/2018	0	0	0	0	0	0	0	0	0.78	8.82	13.27	13.88	14.59	14.19	14.82	15.15	14.77	12.56	4.13	0	0	0	0	0
6 10/24/2018	0	0	0	0	0	0	0	0	0	3.56	9.89	10.42	11.61	11.91	12.45	14.33	9.65	1.98	0	0	0	0	0	0
7 10/25/2018	0	0	0	0	0	0	0	0	0	0	1	7.97	11.69	9.55	10.71	14.84	15.95	13.37	4.83	0.08	0	0	0	0

**EXHIBIT K**  
**FORM LETTER OF CREDIT**

**[ISSUING BANK] IRREVOCABLE STANDBY LETTER OF CREDIT**

**DATE OF ISSUANCE:**

**[Date of issuance]**

[BENEFICIARY] (“Beneficiary”)

[Address]

Attention: [Contact Person]

Re: [ISSUING BANK] Irrevocable Standby Letter of Credit No. \_\_\_\_\_

Sirs/Mesdames:

We hereby establish in favor of Beneficiary (sometimes alternatively referred to herein as “you”) this Irrevocable Standby Letter of Credit No. \_\_\_\_\_ (the “Letter of Credit”) for the account of [NextEra Energy Capital Holdings, Inc.] on behalf of [NextEra project entity], located at 700 Universe Boulevard, Juno Beach, Florida 33408 (“Account Parties”), effective immediately and expiring on the date determined as specified in numbered paragraphs 5 and 6 below.

We have been informed that this Letter of Credit is issued pursuant to the terms of that certain [describe the underlying agreement which requires this LC].

**1. Stated Amount.** The maximum amount available for drawing by you under this Letter of Credit shall be [written dollar amount] United States Dollars (US\$[dollar amount]) (such maximum amount referred to as the “Stated Amount”).

**2. Drawings.** A drawing hereunder may be made by you on any Business Day on or prior to the date this Letter of Credit expires by delivering to [ISSUING BANK], at any time during its business hours on such Business Day, at [bank address] (or at such other address as may be designated by written notice delivered to you as contemplated by numbered paragraph 9 hereof), a copy of this Letter of Credit together with (i) a Draw Certificate executed by an authorized person substantially in the form of Attachment A hereto (the “Draw Certificate”), appropriately completed and signed by your authorized officer (signing as such) and (ii) your draft substantially in the form of Attachment B hereto (the “Draft”), appropriately completed and signed by your authorized officer (signed as such). Partial drawings and multiple presentations may be made under this Letter of Credit. Draw Certificates and Drafts under this Letter of Credit may be presented by Beneficiary by means of facsimile or original documents sent by overnight delivery or courier to [ISSUING BANK] at our address set forth above, Attention: \_\_\_\_\_ (or at such other address

as may be designated by written notice delivered to you as contemplated by numbered paragraph 9 below). If presentation is made by facsimile transmission, you must contact us at **[insert phone number]** to confirm our receipt of the transmission. In the event of a presentation by facsimile transmission, the original of such documents need not be sent to us.

**3. Time and Method for Payment.** We hereby agree to honor a drawing hereunder made in compliance with this Letter of Credit by transferring in immediately available funds the amount specified in the Draft delivered to us in connection with such drawing to such account at such bank in the United States as you may specify in your Draw Certificate. If the Draw Certificate is presented to us at such address by 12:00 noon, [ ] time on any Business Day, payment will be made not later than our close of business on the same business day and if such Draw Certificate is so presented to us after 12:00 noon, [ ] time on any Business Day, payment will be made on the subsequent Business Day. In clarification, we agree to honor the Draw Certificate as specified in the preceding sentences, without regard to the truth or falsity of the assertions made therein.

**4. Non-Conforming Demands.** If a demand for payment made by you hereunder does not, in any instance, conform to the terms and conditions of this Letter of Credit, we shall give you prompt notice that the demand for payment was not effectuated in accordance with the terms and conditions of this Letter of Credit, stating the reasons therefor and that we will upon your instructions hold any documents at your disposal or return the same to you. Upon being notified that the demand for payment was not effectuated in conformity with this Letter of Credit, you may correct any such non-conforming demand.

**5. Expiration.** This Letter of Credit shall automatically expire at the close of business on the date on which we receive a Cancellation Certificate in the form of Attachment C hereto executed by your authorized officer and sent along with the original of this Letter of Credit and all amendments (if any).

**6. Initial Period and Automatic Rollover.** The initial period of this Letter of Credit shall terminate on [*one year from the issuance date*] (the “**Initial Expiration Date**”). The Letter of Credit shall be automatically extended without amendment for one (1) year periods from the Initial Expiration Date or any future expiration date, unless at least sixty (60) Days prior to any such expiration date we send you notice by registered mail or courier at your address first shown (or such other address as may be designated by you as contemplated by numbered paragraph 9) that we elect not to consider this Letter of Credit extended for any such additional one year period.

**7. Business Day.** As used herein, “**Business Day**” shall mean any day on which commercial banks are not authorized or required to close in the State of New York, and inter-bank payments can be effected on the Fedwire system.

**8. Governing Law.** THIS LETTER OF CREDIT IS GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, AND, EXCEPT AS OTHERWISE EXPRESSLY STATED HEREIN, TO THE INTERNATIONAL STANDBY PRACTICES, ICC PUBLICATION NO. 590 (THE “ISP98”), AND IN THE EVENT OF ANY CONFLICT, THE LAWS OF THE STATE OF NEW YORK WILL CONTROL, WITHOUT REGARD TO PRINCIPLES OF CONFLICT OF LAWS.

9. **Notices.** All communications to you in respect of this Letter of Credit shall be in writing and shall be delivered to the address first shown for you above or such other address as may from time to time be designated by you in a written notice to us. All documents to be presented to us hereunder and all other communications to us in respect of this Letter of Credit, which other communications shall be in writing, shall be delivered to the address for us indicated above, or such other address as may from time to time be designated by us in a written notice to you.

10. **Irrevocability.** This Letter of Credit is irrevocable.

11. **Complete Agreement.** This Letter of Credit sets forth in full our undertaking, and such undertaking shall not in any way be modified, amended, amplified or limited by reference to any document, instrument or agreement referred to herein, except for the ISP98 and Attachment A, Attachment B and Attachment C hereto and the notices referred to herein and any such reference shall not be deemed to incorporate herein by reference any document, instrument or agreement except as set forth above.

\* \* \*

SINCERELY,

[ISSUING BANK]

\_\_\_\_\_

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

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

Address:

**ATTACHMENT A**

**FORM OF DRAW CERTIFICATE**

The undersigned hereby certifies to [ISSUING BANK] (“**Issuer**”), with reference to Irrevocable Letter of Credit No. \_\_\_\_\_ (the “**Letter of Credit**”) issued by Issuer in favor of the undersigned (“**Beneficiary**”), as follows:

- (1) The undersigned is the \_\_\_\_\_ of Beneficiary and is duly authorized by Beneficiary to execute and deliver this Certificate on behalf of Beneficiary.
- (2) Beneficiary hereby makes demand against the Letter of Credit by Beneficiary’s presentation of the draft accompanying this Certificate, for payment of \_\_\_\_\_ U.S. dollars (US\$ \_\_\_\_\_), which amount, when aggregated together with any additional amount that has not been drawn under the Letter of Credit, is not in excess of the Stated Amount (as in effect of the date hereof).
- (3) The conditions for a drawing by Beneficiary are pursuant to [*describe the draw conditions from the underlying agreement*].
- (4) You are hereby directed to make payment of the requested drawing to: (insert wire instructions)

Beneficiary Name and Address:

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

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

Date: \_\_\_\_\_

- (5) Capitalized terms used herein and not otherwise defined herein shall have the respective meanings set forth in the Letter of Credit.

[*BENEFICIARY*]

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

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

Date: \_\_\_\_\_

**ATTACHMENT B**

**DRAWING UNDER IRREVOCABLE LETTER OF CREDIT NO.**

Date:

PAY TO: [BENEFICIARY]

U.S.\$ \_\_\_\_\_

FOR VALUE RECEIVED AND CHARGE TO THE ACCOUNT OF LETTER OF  
CREDIT NO. \_\_\_\_\_.

[BENEFICIARY]

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

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

Date: \_\_\_\_\_

**ATTACHMENT C**

**CANCELLATION CERTIFICATE**

Irrevocable Letter of Credit No. \_\_\_\_\_

The undersigned, being authorized by the undersigned (“**Beneficiary**”), hereby certifies on behalf of Beneficiary to [*ISSUING BANK*] (“**Issuer**”), with reference to Irrevocable Letter of Credit No. \_\_\_\_\_ issued by Issuer to Beneficiary (the “**Letter of Credit**”), that all obligations of [PROJECT ENTITY], under the [*describe the underlying agreement which requires this LC*] have been fulfilled.

Pursuant to Section 5 thereof, the Letter of Credit shall expire upon Issuer’s receipt of this certificate.

Capitalized terms used herein and not otherwise defined herein shall have the respective meanings set forth in the Letter of Credit.

[*BENEFICIARY*]

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

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

Date: \_\_\_\_\_

**EXHIBIT L**  
**FORM GUARANTY**

THIS GUARANTY (this “**Guaranty**”), dated as of \_\_\_\_\_, \_\_\_\_\_ (the “**Effective Date**”), is made by NEXTERA ENERGY CAPITAL HOLDINGS, INC. (“**Guarantor**”), in favor of [\_\_\_\_\_] (“**Counterparty**”).

**RECITALS:**

- A.** WHEREAS, Counterparty and Guarantor’s indirect, wholly-owned subsidiary [NEXTERA ENERGY PROJECT COMPANY] (“**Obligor**”), have entered into, or concurrently herewith are entering into, that certain Renewable Power Purchase Agreement dated as of \_\_\_\_\_, 2019 (together, the “**Agreement**”); and
- B.** WHEREAS, Guarantor will directly or indirectly benefit from the Agreement to be entered into between Obligor and Counterparty.

NOW THEREFORE, in consideration of the foregoing premises and as an inducement for Counterparty’s execution, delivery and performance of the Agreement, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Guarantor hereby agrees for the benefit of Counterparty as follows:

1. **GUARANTY.** Subject to the terms and provisions hereof, Guarantor hereby absolutely and irrevocably guarantees the timely payment when due of all obligations owing by Obligor to Counterparty arising pursuant to the Agreement on or after the Effective Date (the “**Obligations**”). This Guaranty shall constitute a guarantee of payment and not of collection. The liability of Guarantor under this Guaranty shall be subject to the following limitations:

- (a) Notwithstanding anything herein or in the Agreement to the contrary, the maximum aggregate obligation and liability of Guarantor under this Guaranty, and the maximum recovery from Guarantor under this Guaranty, shall in no event exceed \_\_\_\_\_ U.S. Dollars (U.S. \$ \_\_\_\_\_) (the “**Maximum Recovery Amount**”).
- (b) The obligation and liability of Guarantor under this Guaranty is specifically limited to payments expressly required to be made under the Agreement, as well as costs of collection and enforcement of this Guaranty (including attorney’s fees) to the extent reasonably and actually incurred by the Counterparty (subject in all instances, to the limitations imposed by the Maximum Recovery Amount as specified in Section 1(a) above). In no event, however, shall Guarantor be liable for or obligated to pay any consequential, indirect, incidental, lost profit, special, exemplary, punitive, equitable or tort damages.

2. **DEMANDS AND PAYMENT.**

- (a) If Obligor fails to pay any Obligation to Counterparty when such Obligation is due and owing under the Agreement (an “**Overdue Obligation**”), Counterparty may present a



written demand to Guarantor calling for Guarantor's payment of such Overdue Obligation pursuant to this Guaranty (a "**Payment Demand**").

- (b) Guarantor's obligation hereunder to pay any particular Overdue Obligation(s) to Counterparty is conditioned upon Guarantor's receipt of a Payment Demand from Counterparty satisfying the following requirements: (i) such Payment Demand must identify the specific Overdue Obligation(s) covered by such demand, the specific date(s) upon which such Overdue Obligation(s) became due and owing under the Agreement, and the specific provision(s) of the Agreement pursuant to which such Overdue Obligation(s) became due and owing; (ii) such Payment Demand must be delivered to Guarantor in accordance with Section 9 below; and (iii) the specific Overdue Obligation(s) addressed by such Payment Demand must remain due and unpaid at the time of such delivery to Guarantor.
- (c) After issuing a Payment Demand in accordance with the requirements specified in Section 2(b) above, Counterparty shall not be required to issue any further notices or make any further demands with respect to the Overdue Obligation(s) specified in that Payment Demand, and Guarantor shall be required to make payment with respect to the Overdue Obligation(s) specified in that Payment Demand within five (5) Business Days after Guarantor receives such demand. As used herein, the term "**Business Day**" shall mean all weekdays (i.e., Monday through Friday) other than any weekdays during which commercial banks or financial institutions are authorized to be closed to the public in the State of Florida or the State of New York.

3. **REPRESENTATIONS AND WARRANTIES.** Guarantor represents and warrants that:

- (a) it is a corporation duly organized and validly existing under the laws of the State of Florida and has the corporate power and authority to execute, deliver and carry out the terms and provisions of the Guaranty;
- (b) no authorization, approval, consent or order of, or registration or filing with, any court or other governmental body having jurisdiction over Guarantor is required on the part of Guarantor for the execution and delivery of this Guaranty; and
- (c) this Guaranty constitutes a valid and legally binding agreement of Guarantor, enforceable against Guarantor in accordance with the terms hereof, except as the enforceability thereof may be limited by the effect of any applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting creditors' rights generally and by general principles of equity.

4. **RESERVATION OF CERTAIN DEFENSES.** Without limiting Guarantor's own defenses and rights hereunder, Guarantor reserves to itself all rights, setoffs, counterclaims and other defenses to which Obligor is or may be entitled arising from or out of the Agreement, except for defenses (if any) based upon the bankruptcy, insolvency, dissolution or liquidation of Obligor or any lack of power or authority of Obligor to enter into and/or perform the Agreement.

5. **AMENDMENT OF GUARANTY.** No term or provision of this Guaranty shall be amended, modified, altered, waived or supplemented except in a writing signed by Guarantor and Counterparty.

6. **WAIVERS AND CONSENTS.** Subject to and in accordance with the terms and provisions of this Guaranty:

- (a) Except as required in Section 2 above, Guarantor hereby waives (i) notice of acceptance of this Guaranty; (ii) presentment and demand concerning the liabilities of Guarantor; and (iii) any right to require that any action or proceeding be brought against Obligor or any other person, or to require that Counterparty seek enforcement of any performance against Obligor or any other person, prior to any action against Guarantor under the terms hereof.
- (b) No delay by Counterparty in the exercise of (or failure by Counterparty to exercise) any rights hereunder shall operate as a waiver of such rights, a waiver of any other rights or a release of Guarantor from its obligations hereunder (with the understanding, however, that the foregoing shall not be deemed to constitute a waiver by Guarantor of any rights or defenses which Guarantor may at any time have pursuant to or in connection with any applicable statutes of limitation).
- (c) Without notice to or the consent of Guarantor, and without impairing or releasing Guarantor's obligations under this Guaranty, Counterparty may: (i) change the manner, place or terms for payment of all or any of the Obligations (including renewals, extensions or other alterations of the Obligations); (ii) release Obligor or any person (other than Guarantor) from liability for payment of all or any of the Obligations; or (iii) receive, substitute, surrender, exchange or release any collateral or other security for any or all of the Obligations.

7. **REINSTATEMENT.** Guarantor agrees that this Guaranty shall continue to be effective or shall be reinstated, as the case may be, if all or any part of any payment made hereunder is at any time avoided or rescinded or must otherwise be restored or repaid by Counterparty as a result of the bankruptcy or insolvency of Obligor, all as though such payments had not been made.

8. **TERMINATION.** Unless terminated earlier, this Guaranty and the Guarantor's obligations hereunder will terminate automatically and immediately at \_\_\_\_\_. [Insert Contract expiration date]; provided, however, that no such termination shall affect Guarantor's liability with respect to any Obligation incurred prior to the time the termination is effective, which Obligations shall remain subject to this Guaranty.

9. **NOTICE.** Any Payment Demand, notice, request, instruction, correspondence or other document to be given hereunder (herein collectively called "Notice") by Counterparty to Guarantor, or by Guarantor to Counterparty, as applicable, shall be in writing and may be delivered either by (i) U.S. certified mail with postage prepaid and return receipt requested, or (ii) recognized nationwide courier service with delivery receipt requested, in either case to be delivered to the following address (or to such other U.S. address as may be specified via Notice provided by Guarantor or Counterparty, as applicable, to the other in accordance with the requirements of this Section 9):

TO GUARANTOR: *	TO COUNTERPARTY:
NextEra Energy Capital Holdings, Inc. 700 Universe Blvd. Juno Beach, Florida 33408 Attn: Treasurer	_____ _____ _____ Attn: _____
[Tel: (561) 694-6204 -- for use in connection with courier deliveries]	[Tel: (____) ____-____ -- for use in connection with courier deliveries]

\* *(NOTE: Copies of any Notices to Guarantor under this Guaranty shall also be sent via facsimile to ATTN: Contracts Group, Legal, Fax No. (561) 625-7504 and ATTN: Credit Department, Fax No. (561) 625-7642. However, such facsimile transmissions shall not be deemed effective for delivery purposes under this Guaranty.)*

Any Notice given in accordance with this Section 9 will (i) if delivered during the recipient's normal business hours on any given Business Day, be deemed received by the designated recipient on such date, and (ii) if not delivered during the recipient's normal business hours on any given Business Day, be deemed received by the designated recipient at the start of the recipient's normal business hours on the next Business Day after such delivery.

**10. MISCELLANEOUS.**

- (a) This Guaranty shall in all respects be governed by, and construed in accordance with, the law of the State of New York, without regard to principles of conflicts of laws thereunder (other than Sections 5-1401 and 5-1402 of the New York General Obligations Law).
- (b) This Guaranty shall be binding upon Guarantor and its successors and permitted assigns and inure to the benefit of and be enforceable by Counterparty and its successors and permitted assigns. Guarantor may not assign this Guaranty in part or in whole without the prior written consent of Counterparty. Counterparty may not assign its rights or benefits under this Guaranty in part or in whole without the prior written consent of Guarantor.
- (c) This Guaranty embodies the entire agreement and understanding between Guarantor and Counterparty and supersedes all prior agreements and understandings relating to the subject matter hereof.
- (d) The headings in this Guaranty are for purposes of reference only, and shall not affect the meaning hereof. Words importing the singular number hereunder shall include the plural number and vice versa, and any pronouns used herein shall be deemed to cover all genders. The term "person" as used herein means any individual, corporation, partnership, joint venture, limited liability company, association, joint-stock company, trust, unincorporated association, or government (or any agency or political subdivision thereof).
- (e) Wherever possible, any provision in this Guaranty which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective only to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and

any such prohibition or unenforceability in any one jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

- (f) Counterparty (by its acceptance of this Guaranty) and Guarantor each hereby irrevocably: (i) consents and submits to the exclusive jurisdiction of the United States District Court for the Southern District of New York, or if that court does not have subject matter jurisdiction, to the exclusive jurisdiction of the Supreme Court of the State of New York, New York County (without prejudice to the right of any party to remove to the United States District Court for the Southern District of New York) for the purposes of any suit, action or other proceeding arising out of this Guaranty or the subject matter hereof or any of the transactions contemplated hereby brought by Counterparty, Guarantor or their respective successors or assigns; and (ii) waives (to the fullest extent permitted by applicable law) and agrees not to assert any claim that it is not personally subject to the jurisdiction of the above-named courts, that the suit, action or proceeding is brought in an inconvenient forum, that the venue of the suit, action or proceeding is improper or that this Guaranty or the subject matter hereof may not be enforced in or by such court.
- (g) COUNTERPARTY (BY ITS ACCEPTANCE OF THIS GUARANTY) AND GUARANTOR EACH HEREBY IRREVOCABLY, INTENTIONALLY AND VOLUNTARILY WAIVES THE RIGHT TO TRIAL BY JURY WITH RESPECT TO ANY LEGAL PROCEEDING BASED ON, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH, THIS GUARANTY OR THE AGREEMENT, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENTS (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PERSON RELATING HERETO OR THERETO. THIS PROVISION IS A MATERIAL INDUCEMENT TO GUARANTOR'S EXECUTION AND DELIVERY OF THIS GUARANTY.

IN WITNESS WHEREOF, the Guarantor has executed this Guaranty on \_\_\_\_\_, 20 \_\_, but it is effective as of the Effective Date

NEXTERA ENERGY CAPITAL HOLDINGS,  
INC.

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

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

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

**EXHIBIT M**  
**LIST OF TIER 1 SUPPLIERS**

1. Jinko
2. First Solar
3. Astronergy
4. Longi
5. Talesun
6. JA Solar
7. Phono Solar
8. Canadian Solar
9. Risen
10. Hanwha
11. Trina
12. GCL
13. Adani
14. Vikram
15. CSun
16. BYD

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

<b>AMENDED APPLICATION FOR APPROVAL OF )</b>	
<b>EL PASO ELECTRIC COMPANY'S AMENDED )</b>	
<b>2019 RENEWABLE ENERGY ACT PLAN AND )</b>	
<b>2020 RENEWABLE ENERGY ACT PLAN )</b>	
<b>PURSUANT TO THE RENEWABLE ENERGY )</b>	<b>CASE NO. 19-00099-UT</b>
<b>ACT AND 17.9.572 NMAC, AND THIRD )</b>	
<b>REVISED RATE NO. 38 – RPS COST RIDER )</b>	
<b>)</b>	
<b>EL PASO ELECTRIC COMPANY, )</b>	
<b>Applicant. )</b>	
<b>)</b>	
<b>)</b>	

---

**DECLARATION OF OMAR GALLEGOS IN SUPPORT  
OF THE FOREGOING DIRECT TESTIMONY TO THE APPLICATION FOR  
APPROVAL OF EL PASO ELECTRIC COMPANY'S 2019-2020 RENEWABLE  
ENERGY PLAN PURSUANT TO THE RENEWABLE ENERGY ACT**

I *Omar Gallegos*, pursuant to Rule 1-011 NMRA, state as follows:

1. I affirm in writing under penalty of perjury under the laws of the State of New Mexico that the following statements are true and correct.
2. I am over 18 years of age and have personal knowledge of the facts stated herein. I am employed by El Paso Electric Company ("EPE" or "the Company") as the *Director of Resource Planning & Management*.
3. The foregoing Direct Testimony of Omar Gallegos, together with all exhibits sponsored therein and attached thereto, is true and accurate based on my knowledge and belief.
4. I submit this Declaration, based upon my personal knowledge and upon information and belief, in support of EPE's *Application for Approval of El Paso Electric Company's 2019-2020 Renewable Energy Plan Pursuant to the Renewable Energy Act*.

FURTHER, DECLARANT SAYETH NAUGHT.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 25, 2020.



---

*OMAR GALLEGOS*

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

**AMENDED APPLICATION FOR APPROVAL OF )**  
**EL PASO ELECTRIC COMPANY'S AMENDED )**  
**2019 RENEWABLE ENERGY ACT PLAN AND )**  
**2020 RENEWABLE ENERGY ACT PLAN )**  
**PURSUANT TO THE RENEWABLE ENERGY )**  
**ACT AND 17.9.572 NMAC, AND THIRD )**  
**REVISED RATE NO. 38 – RPS COST RIDER )**  
**)**  
**EL PASO ELECTRIC COMPANY, )**  
**Applicant. )**  
**)**  
**)**

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**CASE NO. 19-00099-UT**

**DIRECT TESTIMONY OF**  
**WAYNE OLIVER**  
**AS INDEPENDENT EVALUATOR**

**MARCH 31, 2020**



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**EXHIBITS**

WJO-1	Resume of Wayne J. Oliver
WJO-2	Competitive Bidding Experience
WJO-3	Independent Evaluator Services Statement of Work
WJO-4	Final Report of the Independent Evaluator

**EL PASO ELECTRIC COMPANY  
DIRECT TESTIMONY OF  
WAYNE J. OLIVER**

**I. INTRODUCTION**

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**Q. PLEASE STATE YOUR NAME, POSITION, AND BUSINESS ADDRESS.**

**A.** My name is Wayne J. Oliver. I am President and Founder of Merrimack Energy Group, Inc. ("Merrimack Energy"). My business address is 26 Shipway Place, Charlestown, Massachusetts 02129.

**Q. PLEASE SUMMARIZE YOUR EDUCATIONAL AND PROFESSIONAL EXPERIENCE.**

**A.** My resume is attached as Exhibit WJO-1. I have 40 years of experience in the energy industry. During that time, I have held senior level positions as an economist and consultant with government agencies and private sector firms. I was formerly a Founder and Senior Officer of Reed Consulting Group, Inc. I also served as a Director of Navigant Consulting, Inc. after the acquisition of Reed Consulting Group by Metzler and Associates in 1997 and the subsequent formation of Navigant Consulting to integrate a number of consulting firms acquired by Metzler and Associates. I have also been an assistant professor in the Economics Department at Northeastern University and an adjunct professor in the Finance Department at Babson College, where I taught courses in risk management (at the Master in Business Administration level) and futures and options. I have a Masters degree in economics.

**EL PASO ELECTRIC COMPANY  
DIRECT TESTIMONY OF  
WAYNE J. OLIVER**

1 **Q. WHAT IS YOUR EXPERIENCE WITH COMPETITIVE BIDDING**  
2 **PROGRAMS AND POWER PROCUREMENT PROCESSES?**

3 **A.** I have served as a project manager for approximately 130 competitive bidding or  
4 competitive power procurement assignments in twenty states and three Canadian  
5 Provinces on behalf of electric utilities, public utility commissions, other power  
6 buyers, and public sector organizations representing a range of different technologies,  
7 project structures, and product types, dating back to the late 1980's. Among the  
8 competitive bidding assignments identified above, I have served as Independent  
9 Evaluator ("IE"), Independent Monitor ("IM") or similar function on over one hundred  
10 competitive bidding processes for renewable resources, conventional supply-side  
11 resources, energy storage, combined renewable and energy storage projects and  
12 demand-side management resources. For these assignments, I have reviewed and  
13 evaluated thousands of power supply and demand-side proposals in the United States  
14 and Canada. I have also assisted clients in the design and development of competitive  
15 bidding programs, the development of the rules and guidelines underlying the  
16 requirements to undertake competitive bidding for power supplies, the development  
17 of Request for Proposals ("RFPs") documents and contracts, and evaluation criteria  
18 for both power supply (conventional supply, energy storage options and renewable  
19 resources) and load management options, and in the negotiation of power contracts.  
20 In addition, I have provided technical assistance to utilities and others in evaluating  
21 bids in the areas of economic modeling and quantitative assessment of bids, fuel

**EL PASO ELECTRIC COMPANY  
DIRECT TESTIMONY OF  
WAYNE J. OLIVER**

1 supply arrangements, critical path assessment, credit and financial issues, and the  
2 commercial terms of power supply contracts. I have also worked with power  
3 generators in submitting power supply proposals, conducting market assessments,  
4 benchmark studies and conducting due diligence assessments for power project  
5 acquisition.

6 A complete list and description of my competitive procurement experience is  
7 provided in Exhibit WJO-2 entitled Competitive Bidding Experience Statement of  
8 Merrimack Energy.

9  
10 **Q. HAVE YOU SERVED AS INDEPENDENT EVALUATOR FOR PREVIOUS**  
11 **EL PASO ELECTRIC COMPANY (EPE OR COMPANY) RESOURCE**  
12 **SOLICITATIONS?**

13 **A.** Yes, I have. In addition to serving as IE for EPE's 2019 Request for Proposals for  
14 Renewable Energy for New Mexico ("2019 Renewable Energy RFP" or "2019 RFP"),  
15 I have also served as IE for the following EPE RFPs: (1) EPE's 2017 All Source RFP;  
16 (2) EPE's 2011 Request for Proposals for Electric Peaking Power Supply and Load  
17 Management Resources; (3) EPE's 2011 RFP for Solar Projects; and (4) EPE's 2008  
18 Request for Proposals for Electric Peaking Power Supply and Load Management  
19 Resources.

20  
21 **Q. HOW ARE YOU BEING COMPENSATED FOR THIS ENGAGEMENT?**

**EL PASO ELECTRIC COMPANY  
DIRECT TESTIMONY OF  
WAYNE J. OLIVER**

1    **A.**    I am being compensated by EPE for this assignment on an hourly basis.

2

3    **Q.**    **IS YOUR COMPENSATION TIED IN ANY WAY TO YOUR FINDINGS,**  
4           **RECOMMENDATIONS OR CONCLUSIONS?**

5    **A.**    No, it is not.

6

7

**II.    PURPOSE OF TESTIMONY**

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

9    **A.**    The purpose of my testimony is to address my role as IE for EPE's 2019 Renewable  
10           Energy RFP. In my role of IE, I was involved in the competitive procurement process  
11           during the development of the 2019 Renewable Energy RFP through final resource  
12           selection. As IE, I was primarily responsible for reviewing and tracking EPE's  
13           implementation of the competitive bidding process from design of the 2019  
14           Renewable Energy RFP document through the bid evaluation and selection process  
15           with the objective not only of ensuring the process was undertaken in a fair, equitable,  
16           and unbiased manner but also of providing the best outcome for EPE's New Mexico  
17           customers.

18                 In my testimony, I describe the role of the IE for this assignment based on  
19           EPE's Independent Evaluator Services Statement of Work ("Statement of Work") and  
20           my previous experiences in a number of other competitive bidding processes. A copy  
21           of the Statement of Work is attached to my testimony as Exhibit WJO-3. I will also

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1 discuss my findings regarding the development and implementation of EPE's  
2 competitive bidding process, which are contained in Exhibit WJO-4, Final Report of  
3 the Independent Evaluator ("IE Report"). The IE Report, which I prepared and  
4 sponsor, provides a detailed description of the competitive bidding process from the  
5 development of the 2019 Renewable Energy RFP to the selection of the awarded  
6 renewable resources, assesses the activities and performance of EPE in carrying out  
7 the process, describes the steps taken by EPE to ensure the competitive bidding  
8 process was undertaken in a fair and unbiased manner, and presents my conclusions  
9 and recommendations.

10

11 **Q. PLEASE DESCRIBE THE OVERALL OBJECTIVE OF THE 2019**  
12 **RENEWABLE ENERGY RFP.**

13 **A.** EPE issued the 2019 Renewable Energy RFP to obtain short-term and/or long-term  
14 cost-effective and reliable renewable electric resources to meet EPE's New Mexico  
15 Renewable Portfolio Standard ("RPS") requirements, starting in 2020 per the recently  
16 enacted amendments to the New Mexico Renewable Energy Act set forth in  
17 New Mexico Senate Bill 489 ("SB 489"). SB 489 requires EPE to meet 20% of its  
18 New Mexico retail energy sales with renewable energy resources beginning in 2020.  
19 EPE's preliminary determination is that it requires approximately 141,000 mega-watt  
20 hours ("MWh") of additional renewable energy beginning in 2020. The 2019

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1 Renewable Energy RFP also identified the eligibility requirements that proposals must  
2 meet along with the required resource attributes.

3  
4 **III. INDEPENDENT EVALUATOR OF EPE'S 2019 RENEWABLE**  
5 **ENERGY RFP**

6 **Q. WOULD YOU PLEASE DESCRIBE THE OVERALL ROLE OF AN**  
7 **INDEPENDENT EVALUATOR IN A COMPETITIVE BIDDING OR**  
8 **PROCUREMENT PROCESS?**

9 **A.** The primary objective of the IE is to ensure that the competitive bidding process is  
10 undertaken in a fair, equitable, and unbiased manner with no undue preference  
11 provided to any bidder, including a utility self-build option or utility affiliates, if any.  
12 The IE's involvement in the solicitation process generally begins during the RFP  
13 development process prior to issuance of the RFP, continues through the proposal  
14 evaluation and selection process, and, in some cases, includes monitoring of the  
15 contract negotiation process.

16  
17 **Q. DID EPE OFFER A SELF-BUILD OPTION IN THIS SOLICITATION?**

18 **A.** Yes. EPE stated on page 1 of the 2019 Renewable Energy RFP document that EPE  
19 may also submit a self-build resource proposal in response to the 2019 Renewable  
20 Energy RFP. As discussed in Exhibit WJO-4, the IE report, page 14, EPE initiated  
21 safeguards at the beginning of the design of the solicitation process to ensure that a

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1 self-build resource would be treated similarly relative to all other proposals and have  
2 no inherent competitive advantage.

3

4 **Q. WHAT WAS YOUR ROLE IN EPE'S 2019 RENEWABLE ENERGY RFP?**

5 **A.** As previously noted, my role as IE was to ensure that the solicitation process was  
6 undertaken in a fair and unbiased manner and that the evaluation and selection process  
7 resulted in the selection of proposals that are consistent with the goals and objectives  
8 articulated in the 2019 Renewable Energy RFP. I performed the functions of the IE  
9 as contained in the Statement of Work negotiated with EPE at the beginning of the  
10 2019 Renewable Energy RFP design phase of the process as identified in  
11 Exhibit WJO-3.

12 My key roles and major responsibilities under the Statement of Work included  
13 the following:

- 14 1. Maintain a review and oversight function over the 2019 Renewable  
15 Energy RFP process
- 16 a. Review and comment on the Draft 2019 Renewable Energy RFP;
  - 17 b. Review the evaluation of proposals at all applicable stages in the  
18 process;
  - 19 c. Monitor communications with market participants; and
  - 20 d. Monitor contract negotiations (if requested).



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- 1                   2.    Review and track the utility's implementation of the competitive bidding  
2                   process through the phases of the solicitation process
- 3                   3.    Report any problems or concerns with the bidding process to EPE for  
4                   purposes of resolving any issues
- 5                   4.    Submit a final report which includes any recommendations for  
6                   improving the 2019 Renewable Energy RFP.

7                   In addition, Merrimack Energy undertook a detailed review of the  
8                   analysis results prepared by EPE and commented on the evaluation  
9                   methodology and results.

10

11                   **IV.    SUMMARY OF CONCLUSIONS IN THE FINAL REPORT OF THE IE**

12                   **Q.    HAVE YOU PREPARED A REPORT ON EPE'S 2019 RENEWABLE**  
13                   **ENERGY RFP PROCESS AND YOUR INVOLVEMENT IN THAT**  
14                   **PROCESS?**

15                   A.    Yes. I prepared a detailed report which describes the competitive bidding process in  
16                   detail from the design of the 2019 Renewable Energy RFP through final resource  
17                   selection. The report includes a description of the evaluation criteria and methodology  
18                   implemented to evaluate the proposals received, the role of the IE in the solicitation  
19                   process, the consistency of the process with industry standards, key issues identified  
20                   and addressed during the process, and the basis for bid evaluation and selection. As  
21                   previously identified, the IE Report is attached as Exhibit WJO-4.

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**Q. PLEASE SUMMARIZE YOUR CONCLUSIONS REGARDING THE 2019 RENEWABLE ENERGY RFP PROCESS UNDERTAKEN BY EPE.**

**A.** My conclusions regarding EPE's competitive bidding process are presented in detail in WJO-4. I have summarized the major findings and conclusions below:

1. The 2019 Renewable Energy RFP documents were reasonably detailed and transparent documents that clearly identified the nature of the solicitation process and requirements, the products requested, the amount and timing of energy required, eligible proposals, characteristics of importance to EPE with regard to the resources solicited, the information required of the bidders, and the context of the solicitation within the EPE system.
2. The 2019 Renewable Energy RFP was a reasonably robust and competitive process, with many more megawatt-hours (MWh) submitted relative to the amount required. Furthermore, there was a reasonable level of competition from several types of resource options, notably solar photo voltaic ("PV") purchase power agreement ("PPA") and Build-Transfer Agreement ("BTA") proposals, solar plus storage PPA and BTA options, wind and wind plus storage options, one wind plus solar plus battery, and one distributed generation option.
3. EPE, however, only received eight proposals from four bidders with a 2020 Commercial Operation Date ("COD") date. As discussed in detail in the

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1 Direct Testimony of EPE witness Omar Gallegos, all of these proposals were  
2 fairly high cost options with questions regarding the ability of the project to  
3 meet a 2020 COD date. EPE and the IE also reviewed and evaluated proposals  
4 that offered a 2021 COD date and concluded that such proposals were not  
5 deemed to be viable for 2021 based on the development status of the project  
6 and the conditions proposed by the bidders.

7 4. The outreach process was broad reaching and was targeted to a large  
8 number of potential bidders based on past solicitations and bidder contacts.  
9 The outreach activities were designed to attract a wide audience of bidders.  
10 The types of outreach activities initiated included marketing of the 2019  
11 Renewable Energy RFP via direct contacts with known bidders, issuance of a  
12 press release associated with issuance of the 2019 Renewable Energy RFP, and  
13 through industry trade press options, posting of the 2019 RFP on EPE's  
14 website, and the inclusion of a bidder's pre-bid conference. In addition, EPE  
15 issued a short-term RFP for deliveries in 2020 in conjunction with the 2019  
16 Renewable Energy RFP to attempt to solicit proposals from existing bidders  
17 and power marketers who may have product available to meet the 2020 RPS  
18 requirements. The short-term RFP was issued after EPE reviewed the  
19 proposals submitted in response to the 2019 Renewable Energy RFP in an  
20 attempt to not only secure renewable resources for 2020 but to minimize  
21 customer costs through shorter-term contracts.

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1           5.    EPE revised the evaluation methodology and schedule after issuance of  
2           the RFP but prior to submission of proposals. EPE informed bidders of the  
3           revisions to the RFP document, provided information regarding the changes to  
4           the schedule and methodology and posted a new, red-lined and clean copy of  
5           the 2019 RFP document on its website. In the IE's view, no bidder was  
6           disadvantaged by the revisions to the methodology and schedule and bidders  
7           had adequate time to reflect such changes in their proposals.

8           6.    EPE took steps to ensure there were no inherent advantages afforded to  
9           the self-build options that were submitted by EPE's emerging technologies  
10          group. As noted, EPE retained Merrimack Energy to oversee the solicitation  
11          process and ensure the process was fair and equitable to all bidders. The self-  
12          build options were submitted at the same time as other bids, with Merrimack  
13          Energy present for the "bid opening" and initial review and summary. In  
14          addition, the self-build team followed the protocols identified in the 2019  
15          Renewable Energy RFP for all bidders and provided the same information as  
16          required of all other bidders. EPE informed me that a separate self-build team  
17          was established to prepare the self-build options and that no member of the  
18          self-build team would be involved in bid evaluation. Also, all files associated  
19          with the proposals received, evaluation results, and other information that  
20          needed to be shared among the members of the 2019 Renewable Energy RFP  
21          evaluation team were stored in a document management system (Livelink),

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1 with restricted access only to select members of the 2019 Renewable Energy  
2 RFP evaluation team. In addition, EPE had a shared network drive accessible  
3 only by the Resource Planning Department.

4 7. EPE did make one major change to the evaluation process that was not  
5 transparent to bidders but was designed to be beneficial to ratepayers. EPE did  
6 inform me of the proposed change to the methodology before implementing  
7 the change. The proposed revision involved assessment of the total annual  
8 cost of each proposal or portfolios of proposals as part of the evaluation  
9 process. EPE included this criterion because several bidders offered proposals  
10 from larger projects with energy output much higher than EPE required. If  
11 levelized cost of energy ("LCOE") calculations were the only factor for  
12 ranking and selecting proposals from a quantitative perspective, it would be  
13 entirely possible for a larger project to have a lower LCOE value even if the  
14 generation is not needed to meet early year RPS requirements and potentially  
15 result in long-term cost and volume exposure to meet an earlier COD date. As  
16 the process evolved, this potential impact was not a factor, since EPE selected  
17 the two lowest cost and viable offers that also provided generation that closely  
18 matched EPE's requirements, though coming on line in May 2022. In addition  
19 to having the lowest LCOE values, the two projects selected also had the  
20 lowest total cost relative to other potential portfolios of projects to meet the  
21 generation requirements identified by EPE.

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1           8. EPE engaged the bidders throughout the solicitation process including  
2 requesting information from bidders to ensure their proposals conformed to  
3 the RFP requirements. Only one bidder was deemed to be non-conforming  
4 regarding the requirements of the RFP for bidder eligibility.

5           9. The project portfolio selected two proposals for contract negotiations:  
6 the Hecate Santa Teresa Energy Center 2 (50 MW solar PV project) with a  
7 May 1, 2022 delivery date; and the NextEra Buena Vista Energy Center II  
8 (20 MW solar PV project) with a May 1, 2022 delivery date. The projects  
9 together are expected to produce approximately 206,000 MWh in the first full-  
10 year of operations. The combination of the two projects also offer the lowest  
11 cost portfolio, with a total annual cost of approximately \$4.5 million, lower  
12 than any other portfolio which produces the same or similar amount of annual  
13 output.

14          10. In my view, EPE's 2019 Renewable Energy RFP solicitation process and  
15 assessment was undertaken by EPE in a fair, consistent, comprehensive, and  
16 unbiased manner. EPE established procedures and rules that guided the  
17 evaluation and selection process. While EPE allowed flexibility to bidders to  
18 offer proposal variations in order to provide the most competitive and reliable  
19 options possible, EPE was consistent in its approach to all bidders. The  
20 resulting portfolio of resources selected by EPE includes the lowest cost  
21 resource options proposed. The low costs for the resources selected will result

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1 in benefits to New Mexico customers over the longer-term while also serving  
2 to diversify EPE's generation resource portfolio and enhancing EPE's ability  
3 to meet RPS requirements in New Mexico.

4

5

**V. CONCLUSION**

6 **Q. DOES THIS CONCLUDE YOUR DIRECT TESTIMONY?**

7 **A.** Yes.

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**Wayne J. Oliver**

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Charlestown, Mass. 02129  
(781) 856-0007  
waynejoliver@aol.com

A Management Consultant/Economist with a diverse background in the energy field. Areas of expertise include power procurement and contracting, strategic planning, asset valuation, power project evaluation, energy supply/demand forecasting and planning, competitive fuels analysis, risk management, rate analysis and expert testimony, regional energy market analysis, and project economic and financial analysis. Focus on electric, gas and renewable resource industries. Provided expert testimony at the Federal Energy Regulatory Commission, National Energy Board of Canada, and in over 10 states and Canadian Provinces in nearly 50 proceedings.

**PROFESSIONAL EMPLOYMENT**

2000-present	<b>Merrimack Energy Group, President</b>
1988-2000	<b>Reed Consulting Group/Navigant Consulting, Inc.</b> Managing Director/Senior Vice President/Founder of Reed
1999	<b>Babson College, Adjunct Professor, Finance Department</b>
1984-1988	<b>R.J. Rudden Associates, Inc.</b> Senior Consultant
1983-1984	<b>Massachusetts Executive Office of Energy Resources</b> Consultant
1981-1983	<b>Algonquin Gas Transmission Company</b> Corporate Planner
1980-1981	<b>Massachusetts Executive Office of Energy Resources -- Analysis and Regulations Program</b> Assistant Director
1978-1980	<b>New England Regional Commission -- Energy Policy Analysis Program</b> Coordinator/Senior Economist

**PROFESSIONAL EXPERIENCE**

**Power Procurement/Competitive Bidding**

Served as Independent Evaluator or Independent Consultant for over 100 competitive procurement assignments on behalf of utilities, regulatory agencies and public organizations, serving as Independent Evaluator or in a similar function. As Independent Evaluator responsible to ensure the competitive procurement process is undertaken in a fair and unbiased manner. Assisted a number of utilities in the development and implementation of competitive bidding processes and associated RFPs for long-term supply-side resources, renewable resources, option contracts, distributed resources and demand-side resources. Evaluated hundreds of power supply proposals for a wide range of power generation technology options and contract structures.



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**Resume of Wayne J. Oliver, Page 2**

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Directed a major study for a large electric utility involving the development of a viability methodology for assessing non-utility generation projects. The approach involved the use of Critical Path methodology to assess project status and probability of success

Independent Evaluator or Independent Monitor for a number of power solicitation or competitive bidding processes including: Entergy Services, Inc., Southern California Edison, Pacific Gas & Electric, San Diego Gas & Electric Company, PacifiCorp, Arizona Public Service Company, Avista Utilities, Delmarva Power, El Paso Electric, Baltimore Gas and Electric, Duke Power, Hydro-Quebec (Baseload and Dispatchable Supply, Wind, Biomass, Cogeneration, and several Short-Term Call for Tenders), Portland General Electric, BC Hydro, Central and SouthWest Services (five separate RFPs), Commonwealth Edison, Public Service Company of Oklahoma and Southwestern Electric Power Company RFPs for power supplies.

Assisted Hawaiian Electric with the company's policy associated with the design of competitive procurement rules in Hawaii. Testified for four days on industry practices associated with competitive procurement processes.

Project Manager responsible for designing and developing supply side RFPs for several electric utilities including Boston Edison, Central and South West Services, Inc., Commonwealth Edison Company, Duke Power, Carolina Power & Light, and Hydro-Quebec.

Assisted in the preparation of power supply bids on behalf of utility and non-utility clients for a number of utility solicitations.

Assisted several utilities with the design and development of an evaluation methodology and development of contract terms for RFP's for Power Options. Managed the development of an options pricing model to evaluate bids received.

**Renewable Resources**

Developed renewable resource RFPs and assisted in bid evaluation for Hydro-Quebec Distribution (1000 MW Wind and 100 MW Biomass), Avista Utilities, Massachusetts Technology Collaborative, Portland General Electric (wind, geothermal, and biomass proposals), Central Power & Light Company (wind only RFP), Public Service Company of Oklahoma, Southwestern Electric Power Company, West Texas Utilities, and Hawaiian Electric Company. Served as Independent Evaluator for several renewable resource solicitations including Pacific Gas & Electric, Arizona Public Service, and PacifiCorp.

Chaired two major conferences on green pricing initiatives and renewable resource development

**Asset Valuation**

Conducted due diligence analysis for several banks regarding the potential financing for merchant power projects, gas storage projects, and gas pipeline assets.

Conducted asset valuation analysis for utilities and power generators interested in acquiring power generation assets. Analysis included valuation of gas-fired combined cycle and CTs, coal projects, hydroelectric facilities, power contracts, pipeline capacity commitments, and electric transmission assets.

**Competitive Energy Pricing**

Negotiated several special contracts with unique pricing arrangements between utilities and customers.

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**Resume of Wayne J. Oliver, Page 3**

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Developed a market price evaluation methodology and pricing process for a large electric utility for wholesale and retail marketing initiatives.

Developed approach for resource procurement in a competitive electric market based on portfolio design, which incorporates short and long term resources, flexible contract provisions and option pricing concepts.

**Risk Management**

Conducted seminars for utilities on the use of risk management techniques and financial derivatives to hedge risks, including the use of options, futures and swaps. Applied financial option techniques in the development of physical option arrangements.

Developed a risk management strategy for a major electric utility to hedge its fuel and power trading price risk.

**Fuel Supply Acquisition Strategy and Procurement**

Assisted several LDCs and electric utilities with gas procurement activities including direct purchases from suppliers. Activities included development of a supply portfolio plan, design of an RFP for gas supplies, assessment of the need for price and nomination flexibility for contracting, development of the evaluation criteria, and review and evaluation of proposals submitted. Participated in RFP's for both U.S. and Canadian supplies. Responsible for the evaluation of over 100 proposals for gas supply.

Assisted independent power producers and cogenerators with development of fuel purchase strategies, and implementation of the strategy including identifying producers, suggesting a course of action and negotiation of the fuel purchase contracts and transportation pricing terms and conditions.

Completed gas procurement strategies and portfolio designs for several electric utilities. Responsibilities included evaluating pipeline and storage options, developing a procurement strategy, and recommending a course of action. The projects involved integrating the production cost and operations of the generation units with gas supply and transportation contracting considerations to develop a least cost strategy.

**Energy Market and Economic Policy Studies**

Conducted a number of studies for utility and non-utility clients on the market for power in various regions of the US and in Canada.

Directed merchant power study for an Independent Power Producer assessing the market price of power for the uncommitted capacity from the project as a form of merchant power. Study components included analysis of the competitive market price in both the short and long term, definition of need for capacity and energy, risk assessment of key market factors, and project dispatch analysis.

Assisted in the completion of a gas market study for a proposed natural gas pipeline project assessing the potential of the Northeast market for Canadian gas.

Conducted several market studies and power price forecasts in support of due diligence efforts for acquisition of power generation assets.

**Utility Restructuring**

Managed several projects for electric and gas utilities on industry restructuring and unbundling initiatives.

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**Resume of Wayne J. Oliver, Page 4**

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Presented seminars to utilities, trade organizations and conferences on electric utility restructuring strategies and implementation.

Advised senior management of electric utilities on evaluating and developing strategies for enhancing the value of the utility's assets. Also assisted several utilities in the development of GENCO strategies.

**Strategic Planning and Analysis**

Assisted in a strategic planning study for a major international coal company with the goal of developing strategies to increase market share within the electric power industry.

Completed a strategic planning study for a major electric utility assessing the opportunities for the company in the changing natural gas market, including fuel purchasing strategies, and gas fired cogeneration and combined cycle opportunities.

Prepared economic forecasts and strategic plans for a gas transmission company.

Conducted several seminars for senior management of pipeline companies and electric utilities on opportunities and challenges for gas use in electric generating facilities.

Assisted several local gas distribution companies with development and implementation of gas supply/transportation procurement strategies in response to FERC Order No. 636.

**Forecasting and Modeling**

Managed the development of a monthly demand forecasting model for each rate class for LDCs using both econometric and end-use modeling techniques as part of its integrated resource planning process.

Developed integrated planning and forecasting system for a small electric utility. The system was comprised of production cost, generation planning, cost of service, demand forecasting and rate design modules.

Assisted in econometric research study of the capital structure of a large combination utility.

Developed an electric rate forecasting model integrating production cost projections with a cost-of-service model for a large industrial client for purposes of projecting the electricity costs for the utility over a five-year time horizon.

Managed a number of projects and utilized several production cost and generation expansion models for evaluation of power supply proposals and resource options.

**Cost of Service/Rate Design**

Submitted testimony before the Federal Energy Regulatory Commission on pipeline rate and cost allocation issues in Penn York Energy Corporation and Great Lakes Gas Transmission Limited Partnership rate cases.

Replicated and critiqued several electric and gas cost of service models for rate case intervention dealing with cost allocation, revenue requirements and rate design issues.

**Financial Analysis**

Assisted several utilities in the financial analysis of distributed resources for the purposes of establishing a DG business unit.

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**Resume of Wayne J. Oliver, Page 5**

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Assisted in the preparation of financial and economic feasibility studies of power generation projects for a consortium of banks.

Prepared several financial prefeasibility studies of proposed power generation projects for utilities, independent power producers and industrials.

Directed several studies on power needs and competitive costs of power supply options for large independent power producers for project applications before regulatory authorities.

**EDUCATION**

Northeastern University, Completed Doctoral Course work, Economics, 1977

Northeastern University, M.A., 1976

Assumption College, B.A., 1973

**OTHER**

Past Chairman, Massachusetts Natural Gas Task Force.

Adjunct Professor, Department of Finance, Babson College; Courses taught include Risk Management (MBA Program), Options and Futures

Instructor/Lecturer, Department of Economics, Northeastern University; Courses taught include Energy Economics, Statistics, International Economics, and Principles of Economics.

**Experience Statement Document**  
**Competitive Procurement Experience of Merrimack Energy Group, Inc.**  
**Including Role as Independent Evaluator or Independent Monitor**

<b>Bidding Process</b>	<b>Role</b>	<b>Client</b>	<b>Resources Solicited</b>	<b>Timeframe</b>
Pacific Gas & Electric Company Biomethane Request for Offers in Support of the 2019 System Reliability RFO Distributed Generation Enabled Microgrid Services Phase	Independent Evaluator	Pacific Gas & Electric Company	Solicit offers from bidders to procure incremental biomethane to be used a fuel to procure electricity in the event that a project executed from the DGEMS RFO requires methane as a fuel to produce electricity.	2020
Southern California Edison 2020 Distribution Investment Deferral Framework RFO	Independent Evaluator	Southern California Edison	Through this RFO, SCE's goal is to defer specific traditional distribution projects within SCE's service area with procurement of distributed energy resources ("DERs")	2020
SCE 2020-2024 Resource Adequacy (RA) Capacity, RA with Limited Energy Toll or CHP PPA, and Import Capability Transfers Request for Offers (RFO)	Independent Evaluator	Southern California Edison	Through this RFO, SCE seeks to purchase RA capacity for delivery periods starting August 1, 2020 to December 31, 2024 from eligible supply sources. SCE also seeks to sell RA capacity for delivery period beginning April 1 to June 30 2020.	2020
Pacific Gas & Electric 2019 System Reliability Request for Offers for Distributed Generation	Independent Evaluator	Pacific Gas & Electric Company	Procure energy resources to provide Distributed	2019-2020

**Experience Statement Document  
Competitive Procurement Experience of Merrimack Energy Group, Inc.  
Including Role as Independent Evaluator or Independent Monitor**

Enabled Microgrid Services Phase			Generation Enabled Microgrid Services (DGEMS) for PG&E to minimize impacts on customers from Public Safety Power Shutoff events.	
2020 Demand Response Auction Mechanism (DRAM 5)	Independent Evaluator	SCE; PG&E; and SDG&E	RFPs were issued by all three California utilities based on spending targets determined for each utility by the CPUC.	2019-2020
Arizona Public Service Company 2019 RFP for Wind Generation Resources	Independent Monitor	Arizona Public Service Company	APS is seeking proposals for up to 250 MW of wind generation	2019-2020
El Paso Electric Company 2019 Request for Proposals for Renewable Energy for New Mexico.	Independent Evaluator	El Paso Electric Company	EPE is seeking approximately 141,000 MWh of renewable energy per year beginning in 2020 to meet RPS requirements in New Mexico under SB489.	2019-2020
Arizona Public Service Company RFP for Non-Residential Photovoltaic (PV) System Installations Under the APS Solar Communities Program	Independent Monitor	Arizona Public Service Company	Through this RFP, APS is seeking the services of suppliers (Installers) to design and install solar PV systems at select project sites. APS has received approval from the Commission (“ACC”) to own, operate and maintain the PV	2019

**Experience Statement Document  
Competitive Procurement Experience of Merrimack Energy Group, Inc.  
Including Role as Independent Evaluator or Independent Monitor**

			solar generation connected to the distribution system located on non-residential sites in APS service territory.	
Entergy Texas 2019 Request for Proposals for Solar PV Resources	Independent Monitor	Entergy Texas	ETI seeks to procure up to 100 MW of solar PV generation under an asset acquisition structured as a Build, Own, Transfer (BOT) and up to an additional 100 MW under a Power Purchase Agreement (PPA) to be in service no later than December 31, 2023.	2019
Entergy Arkansas 2019 Request for Proposals for Solar PV Resources	Independent Monitor	Entergy Arkansas	Through this RFP, EAL seeks to acquire, under a Build Own Transfer (BOT) transaction structure up to 200 MW (AC) of solar PV generation resources for service commencing by December 31, 2022.	2019
Massachusetts Utilities Request for Proposals for Long-Term Contracts For Offshore Wind Energy Projects	Independent Evaluator – sub-contractor	Massachusetts Department of Energy Resources	RFP is seeking up to 1,600 MW of Offshore Wind resources	2019-2020
NV Energy Fall 2018	Independent	NV Energy	Up to 350 MW of	2018-2019

**Experience Statement Document  
Competitive Procurement Experience of Merrimack Energy Group, Inc.  
Including Role as Independent Evaluator or Independent Monitor**

Renewable Energy Request for Proposals Including Dispatchable Energy	Evaluator		Long-Term Dispatchable Renewable Energy Resources	
Hawaiian Electric Company Energy Development of Battery Energy Storage RFPs for Oahu and Maui	Consultant	Hawaiian Electric Company	Stand-alone Battery Energy Storage projects	2018
Southern California Edison Company 2018 Aliso Canyon 2 Energy Storage RFO	Independent Evaluator	Southern California Edison Company	20 MW Energy Storage solicitation	2018-2019
Southern California Edison Company 2019 RA RFO	Independent Evaluator	Southern California Edison Company	Resource Adequacy Products to Meet Year-Ahead Capacity Requirements	2018
APS 2018 Battery Storage RFP	Independent Monitor	Arizona Public Service Company	APS is seeking proposals for EPC contracts for battery energy storage systems to be integrated with existing APS-owned Solar PV facilities. Through the RFP, APS is seeking over 100 MW of BESS capacity.	2018
APS 2018 Forest Bioenergy Resources RFP	Independent Monitor	Arizona Public Service Company	RFP seeks up to 60 MW of capacity from forest bioenergy resources	2018
SCE CR-RAM	Independent Evaluator	Southern California Edison	RFOs for Renewable Energy from generating facilities that qualify as Community Renewable or Community	2016-2018



**Experience Statement Document  
Competitive Procurement Experience of Merrimack Energy Group, Inc.  
Including Role as Independent Evaluator or Independent Monitor**

			Renewable Environmental Justice Projects	
San Diego Gas & Electric 2019 Local RA RFP	Independent Evaluator	San Diego Gas & Electric	SDG&E seeks to purchase 2019 Local RA capacity product to assist in optimizing its 2019 RA portfolio.	2018
Pacific Gas & Electric Company Local Sub-Area Energy Storage RFO	Independent Evaluator	Pacific Gas & Electric	Through this RFO, PG&E solicited offers for storage resources through 3 <sup>rd</sup> party arrangements, EPC agreement at its Moss Landing sub-station site and BOT agreements in the local sub-area. PG&E executed 4 contracts for 567 MW of storage capacity.	2018
NV Energy 2018 Renewable Energy Request for Proposals	Independent Evaluator	NV Energy	RFP sought up to 330 MW of renewable resources. Nevada Power and Sierra Pacific contracted for approximately 1,000 MW of Solar PV from 6 projects, including 3 projects which included a total of 100 MW of Battery Energy Storage.	2018
2019 Demand Response Auction Mechanism (DRAM 4)	Independent Evaluator	SCE; PG&E; and SDG&E	RFPs were issued by all three California utilities based on spending targets determined	2018

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			for each utility by the CPUC.	
Entergy Arkansas 2017 Request for Proposals for Build-Own-Transfer Solar PV Resources	Independent Monitor	Entergy Arkansas	The RFP is seeking up to 200 MW of new build Solar PV generation resources to be owned by Entergy Arkansas	2017 - 2018
Arizona Public Service Company – APS Solar Communities Residential Rooftop Solar Program	Independent Monitor	Arizona Public Service Company	APS seeking proposals from rooftop Solar PV Installers to install residential Solar PV systems for limited and moderate income customers	2017-2018
PacifiCorp 2017 Renewable Energy Request for Proposals (2017R RFP)	Independent Evaluator	Utah Public Service Commission	The RFP is seeking up to 1,270 MW of Wind Resources that can achieve a commercial operation date of no later than December 31, 2020. Request for wind generation is integrated with plans to construct a new transmission facility in Wyoming	2017- 2018
El Paso Electric 2017 All Source Request for Proposals For Electric Power Supply and Load Management Resources.	Independent Evaluator	El Paso Electric Company	All Source RFP (including conventional generation, renewable resources, demand management, energy storage, and distributed resources) for up	2017- 2018

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			to 370 MW of summer peak requirements.	
Arizona Public Service Company EPC RFP for Distribution Energy Storage System for Punkin Center	Independent Monitor	Arizona Public Service Company	EPC contract for a 2 MW Battery Storage project at an APS Distribution site	2017
Massachusetts Utilities Request for Proposals for Long-Term Contracts For Offshore Wind Energy Projects	Independent Evaluator – sub-contractor	Massachusetts Department of Energy Resources	RFP is seeking up to 1,600 MW of Offshore Wind resources	2017-2018
Massachusetts Utilities Request for Proposals for Long-Term Contracts For Renewable Energy Projects	Independent Evaluator – sub-contractor	Massachusetts Department of Energy Resources	Request for Proposals For Long-Term Contracts For Clean Energy Projects For 9,450,000 MWh.	2017-2018
Southern California Edison Company Goleta Area RFO for Distributed Energy Resources	Independent Evaluator	Southern California Edison	RFO soliciting offers for third-party distributed resources to meet possible N-2 reliability conditions in the Goleta/Santa Barbara area	2016-2017
Southern California Edison Company Aliso Canyon Energy Storage RFO; Design, Build, Transfer RFP; bilateral storage contract to enhance existing SCE peaking plants	Independent Evaluator	Southern California Edison	RFO solicited RA offers for third-party Energy Storage contracts. SCE also issued Design, Build, Transfer RFP for which Sellers could provide a turnkey solution at SCE designated substation sites.	2016
San Diego Gas & Electric Company 2007 Resource Adequacy RFP	Independent Evaluator	San Diego Gas & Electric Company	Bids and Offers to Buy RA capacity for 2017 including local, system and	2016

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			import capacity	
NV Energy 2016 Emission Reduction and Capacity Replacement Renewable Energy RFP, March 2016	Independent Evaluator	NV Energy	NV Energy seeking 100 MW PPA for third-party ownership and 35 MW Asset Purchase or Turnkey option to be owned by NV Energy. NV Energy also offered a site to potential Bidders	2016
Pacific Gas & Electric Company 2016 Energy Storage Request for Offers	Independent Evaluator	Pacific Gas & Electric Company	PG&E is seeking at least 120 MW of storage projects including both transmission and distribution connected projects. PG&E could acquire the output from the project via an ESA or own the project via a PSA.	2016-2017
SCE 2015 RPS Renewable RFP	Independent Evaluator	Southern California Edison	RFO for renewable resources to meet RPS requirements, including all the electric energy, capacity, RA benefits and Green Attributes.	2016
Arizona Public Service Company 2016 All Source Request for Proposals (RFP)	Independent Monitor	Arizona Public Service Company	All Source RFP for 400 to 600 MW. Eligible resources include: New or existing thermal project Tolling or acquisition options, PPA for Renewable resources, Energy	2016

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			Storage, combined storage and renewable, Demand Response and Energy Efficiency resources	
California Investor-Owned Utilities Demand Response Auction Mechanism (DRAM 1, 2 and 3) Request for Offers	Independent Evaluator	PG&E; SCE; SDG&E	Demand Response Resources – 3 Auction Pilots for over 200 MW of Demand Response Resources for all three IOUs	2015 - 2017
San Diego Gas & Electric Company RFO for 2016 Resource Adequacy (RA Capacity)	Independent Evaluator	San Diego Gas & Electric Company	Resource Adequacy (RA Capacity) for 2016 capacity requirements	2015
Arizona Public Service Company Solar Partners Program Battery Energy Storage System RFP	Independent Monitor	Arizona Public Service Company	Energy Storage Projects at APS sites to support Solar programs	2015
Arizona Public Service Company 2015 Request for Proposals for the Marine Corps Air Station Yuma (MCASY) MicroGrid Project	Independent Monitor	Arizona Public Service Company	Micro-Grid project at Marine Air Base	2015
Entergy Services – Request for Proposals for Long-Term Combined Cycle Gas Turbine Developmental Capacity and Energy Resources – West of Atchafalaya Basin Region (WOTAB)	Independent Monitor – Louisiana Market Based Mechanism	Entergy Services, Inc.	Long Term RFP for Developmental Resources – 800 to 1000 MW from new Gas-fired Combined Cycle units for Entergy Louisiana	2015-2016
Entergy Services – Entergy Texas – Long-	Independent Monitor	Entergy Services,	Long Term RFP for Developmental	2015-2016

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Term Combined Cycle Gas Turbine Capacity and Energy Resources and Limited Term Capacity and Energy Resources		Inc.	Resources – 800 to 1000 MW from new Gas-fired Combined Cycle units and up to 700 MW of PPA and/or Tolling Products for Limited Term (3-5 years) Resources for Entergy Texas	
SCE 2014 RPS Renewable RFP	Independent Evaluator	Southern California Edison	RFO for renewable resources to meet RPS requirements, including all the electric energy, capacity, RA benefits and Green Attributes.	2014 - 2015
Hydro-Quebec Call for Tenders for 500 MW of Firm Capacity and Associated Energy	Independent Consultant	Hydro-Quebec Distribution	500 MW of Peaking capacity for 300 hours per year of operation. Call for Tenders requires 20 year contracts.	2014-2015
Arizona Public Service Company AZ Sun Rooftop Solar Program – Installer RFI (to qualify) and RFPs for 100 residential facility blocks	Independent Monitor	Arizona Public Service Company	Installation of up to 1,5000 PV systems on residential buildings to be owned by Arizona Public Service Company	2014 - 2015
Nevada Power Company 2014 and 2015 Request for Proposals for Renewable Energy	Independent Evaluator	Nevada Power Company	Each RFP is for 100 MW of renewable energy projects located in Nevada	2014 - 2015
Pacific Gas & Electric Company 2014 Energy Storage Request for Offers	Independent Evaluator	Pacific Gas & Electric Company	PG&E is seeking approximately 74 MW of storage projects including both transmission and distribution	2014 -2015

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			connected projects. PG&E could acquire the output from the project via an ESA or own the project via a PSA.	
Southern California Edison Request for Offers for Resource Adequacy and Purchases and Sale of RA Capacity	Independent Evaluator	Southern California Edison Company	The RA RFO is designed to meet SCE's year ahead RA procurement requirements	2014
San Diego Gas & Electric Company RFO for RA Capacity	Independent Evaluator	San Diego Gas & Electric Company	Resource Adequacy (RA Capacity)	2014
PG&E Solar PV Program – Power Purchase Agreements – 2014 RFO	Independent Evaluator	Pacific Gas & Electric Company	Up to 58 MW of small scale (up to 20 MW) PV capacity	2014
Hydro-Quebec Wind Generated Electricity Call for Tenders for 450 MW	Independent Consultant	Hydro-Quebec Distribution	450 MW of Wind generated electricity located in Quebec	2014
San Diego Gas & Electric Company Bilateral Contract for 600 MW of Peaking Capacity	Independent Evaluator	San Diego Gas & Electric Company	Capacity Resources to meet Reliability Requirements in the Local Area	2014
Southern California Edison RFO for GHG Offset Credits	Independent Evaluator	Southern California Edison	Greenhouse Gas Emission Offset Credits	2014
Pacific Gas & Electric Company Third Solicitation for Combined Heat and Power Request for Offers	Independent Evaluator	Pacific Gas & Electric Company	Third of three Solicitations for Combined Heat and Power Facilities	2014
San Diego Gas & Electric Company RFP for RA Capacity	Independent Evaluator	San Diego Gas & Electric Company	Resource Adequacy (RA Capacity)	2014
Southern California	Independent	Southern	Renewable Energy	2013/2014

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Edison Company RFP for RPS Resources	Evaluator	California Edison	Projects Qualifying under the Renewable Portfolio Standard in CA	
Southern California Edison RFO for Resource Adequacy	Independent Evaluator	Southern California Edison	Resource Adequacy (RA Capacity)	2013
San Diego Gas & Electric Company	Independent Evaluator	San Diego Gas & Electric Company	Bilateral contract renegotiation for a 300 MW gas-fired combustion turbine facility	2013
Hawaiian Electric Company	Consultant	Hawaiian Electric Company	Assisting Hawaiian Electric Company with the development of a small renewable generation program	2013
Pacific Gas & Electric Company Second Solicitation for Combined Heat and Power Request for Offers	Independent Evaluator	Pacific Gas & Electric Company	Second of three Solicitations for Combined Heat and Power Facilities	2013
Southern California Edison 2012 RFO for Transmission Capacity	Independent Evaluator	Southern California Edison Company	Solicitation for the procurement of existing firm point-to-point transmission capacity from the Pacific Northwest to California	2012
San Diego Gas & Electric – RFP for 2013 Resource Adequacy (RA) Capacity	Independent Evaluator	San Diego Gas & Electric Company	Resource Adequacy (Capacity only product) for 2013 RA requirements	2012
San Diego Gas & Electric - Bilateral Contract for RA Capacity for 2013	Independent Evaluator	San Diego Gas & Electric Company	Bilateral contract with NRG Power Marketing for the Encina Units	2012
Arizona Public Service	Served as	Arizona	Several	2012



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Company Solar for Schools and Government Program	program auditor to review program strengths and weaknesses and proposed recommendations for future solicitations	Public Service Company	solicitations for the construction of solar facilities on eligible schools	
Arizona Public Service Company Arizona Sun Program – RFP for Hyder II	Independent Monitor	Arizona Public Service Company	EPC Proposals to develop and construct a 14 MW solar PV project for APS ownership at an APS site	2012
Pacific Gas & Electric Company – 2012 Request for Offers – Solar PV Program – Power Purchase Agreements	Independent Evaluator	Pacific Gas & Electric Company	Up to 50 MW of Solar PV projects secured via a PPA – Year 2 of 5 year program	2012
SCE 2011 Combined Heat and Power Facilities Request for Offers	Independent Evaluator	Southern California Edison	First of three Solicitations for Combined Heat and Power Facilities	2011 – 2012
Pacific Gas & Electric Company First Solicitation for Combined Heat and Power Request for Offers	Independent Evaluator	Pacific Gas & Electric Company	First of three Solicitations for Combined Heat and Power Facilities – for up to 690 MW	2011 -2012
PacifiCorp All Source RFP for 2016 Resources	Independent Evaluator	Utah Public Service Commission	Solicitation for 600 MW of Capacity and Energy for 2016. Eligible products include EPC contract for a gas-fired combined	2011-2102

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			cycle at a PacifiCorp site, PPAs, TSA, and APSA's at a Bidder site.	
El Paso Electric Company 2011 RFP for Electric Peaking Supply and Load Management Resources 2011-2012	Independent Evaluator	El Paso Electric Company	RFP for peaking resources for 2014-2016 for approximately 340-400 MW	2011 – 2012
Pacific Gas & Electric Company Request for Proposals for EPC Services for 250 MW of Utility-Owned Photovoltaic Program	Independent Evaluator	Pacific Gas & Electric Company	IE for three solicitations for EPC contractors to develop and construct utility-owned solar PV facilities at a PG&E site	2010-2012
Hawaiian Electric Company RFP for Renewable Firm Dispatchable Capacity Resources	Consultant	Hawaiian Electric Company	Lead consultant involved in the design and development of the RFP document, Bidder Response Package, PPA, and Asset Purchase and Sale Agreement for ownership of an asset by HECO.	2011 -2012
Hawaiian Electric Company RFP for Renewable Energy and Undersea Cable System Projects Delivered to the Island of Oahu	Consultant	Hawaiian Electric Company	Consultant associated with the development of an RFP for an undersea Electric Cable project.	2011 – 2012
El Paso Electric Company 2011 Request for Proposals for Solar Projects	Independent Evaluator	El Paso Electric Company	RFP soliciting bids for 1-2 MW solar facility to be built at company site. Utility will also offer a self-build option.	2011
Arizona Public Service Company 2011 RFP for	Independent Monitor	Arizona Public	RFP for small scale renewable	2011

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Renewable Energy Small Generation Resources		Service Company	resources.	
El Paso Electric Company 2010 All Sources Request for Proposals for Electric Power Supply and Load Management Resources	Independent Evaluator	El Paso Electric Company	Supply-side and Demand-side resources based on PPA, EPE purchase of or equity participation in a bidder's new or existing resource. RFP is for up to 300 MW.	2010
Southern California Edison Company – RFO for Renewable Energy from Generating Facilities Not Greater than 20 MW.	Independent Evaluator	Southern California Edison	Eligible renewable resources for projects not greater than 20 MW located within the CAISO controlled grid. Total resources solicited – 250 MW.	2010
Pacific Gas and Electric Company Solar PV Program – RFPs for Utility-Owned Generation PV Solar Systems and RFO for PPAs for Solar PV projects	Independent Evaluator	Pacific Gas and Electric Company	RFP for utility- owned generation seeking up to 250 MW of Solar PV projects and RFO for PPA options seeking up to 250 MW of third-party Solar PV projects	2010
Pacific Gas and Electric Company Intermediate Term Request for Offers 2010	Independent Evaluator	Pacific Gas and Electric Company	RFO seeks System Resource Adequacy and Bay Area Local Resource Adequacy for the summer period 2011-2015.	2010
Hydro-Quebec Distribution Call for Tenders for Wind- Generated Electricity for a Total of 500 MW.	Independent Consultant	Hydro- Quebec Distribution	Call for Tenders is for 250 MW from Aboriginal Projects and 250 MW from	2010

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			Community Projects in blocks of 25 MW.	
Arizona Public Service Company 2010 Request for Proposals for Arizona Wind Generation Resources	Independent Monitor	Arizona Public Service Company	RFP seeking up to 100 MW of wind resources located in Arizona. Eligible options include PPAs and Build, Own, Transfer options.	2010
Hawaiian Electric Company	Consultant	Hawaiian Electric Company	Development of a Feed-in Tariff program for renewable resources. Focused on development of queuing procedures for applicants to the program.	2009-2010
Southern California Edison 2010 Request for Offers from Independent Power Producers for the Solar Photovoltaic Program	Independent Evaluator	Southern California Edison	RFO seeks PPAs for up to 250 MW of primarily rooftop solar photovoltaic resources over a 5 year period	2009-2010
Hydro-Quebec Distribution 2009 Call for Tenders for Energy Produced by Biomass Cogeneration	Independent Consultant	Hydro-Quebec Distribution	Call for Tenders seeking 125 MW of Firm Capacity and Associated Energy from Biomass	2009
Avista Utilities 2009 Request for Proposals for Renewable Energy	Independent Evaluator	Avista Utilities	RFP designed to acquire renewable resources to meet the utility's IRP requirements of 150 MW.	2009
Massachusetts Utilities Long-Term Contracting Requirements for Renewable Resources under the Green	Member of Consultant Team	Massachusetts Department of Energy Resources	RFP designed to solicit RPS eligible renewable resources for up to 2% of total retail	2009-2010

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Communities Act			load in Massachusetts.	
Southern California Edison Company	Independent Evaluator	Southern California Edison	2009 RFP for all renewable resources that qualify for California RPS requirements	2009
Arizona Public Service Company 2009 Request for Proposals for Renewable Energy Small Generation Resources	Independent Auditor	Arizona Public Service Company	RFP for small scale renewable resources.	2009
Pacific Gas & Electric 2008 Intermediate Term RFO	Independent Evaluator	Pacific Gas & Electric	Local Resource Adequacy; Operationally Flexible Resources; QFs, and RPS energy	2008-2009
El Paso Electric RFP for Electric Peaking Power Supply and Load Management Resources	Independent Evaluator	El Paso Electric Company	Peaking resources including either supply-side or demand-side resources	2008-2009
Arizona Public Service Company 2008 Request for Proposals for Distributed Energy Resources, August 2008.	Independent Auditor	Arizona Public Service Company	RFP for Distributed Energy Resources from renewables – 200,000 MWhs per year.	2008-2009
PacifiCorp Request for Proposals Renewable Electric Resources	Independent Consultant or Monitor	Utah Public Service Commission	RFP for Renewable Resources – 500 MW	2008
PacifiCorp 2008 All Source RFP	Independent Evaluator	Utah Public Service Commission	All Source RFP for resources in the 2012 to 2017 timeframe for up to 2000 MW	2008-2010
PacifiCorp Acquisition of the Chehalis Power Plant	Independent Evaluator	Utah Public Service Commission	Exemption from bidding rules to acquire 525 MW gas-fired combined cycle	2008

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			plant	
Public Service Company of Oklahoma Request for Proposals for Supply-Side Capacity and Energy Resources	Technical Consultant of Industry Practices	Public Service Company of Oklahoma	RFP for 450 to 600 MW of supply-side resources in the form of a PPA, APSA, or Tolling Services Agreement.	2008
Ontario Power Authority Renewable Resource Supply RFP (RES III)	Member of Fairness Advisor Team	Ontario Power Authority	RFP for up to 2000 MW of Renewable Resources	2008 to 2009
Oklahoma Gas and Electric Company Summer 2008-2010 Resources RFP	Independent Monitor	Oklahoma Corporation Commission	RFP for up to 500 MW of firm energy and associated capacity	2007
Pacific Gas and Electric Company 2007 Request for Offers to Meet Renewable Portfolio Standards	Independent Evaluator	Pacific Gas and Electric	2007 RPS RFO to meet 1-2% of retail load (750,000 to 1,500,000 MWh per year).	2007 to 2008
Hydro-Quebec Distribution Wind Energy Call for Tenders	Independent Technical Consultant	Hydro-Quebec Distribution	2000 MW Wind Resources Call for Tenders	2006 to 2008
Hawaiian Electric Company RFP for Renewable Energy Resources	Consultant	Hawaiian Electric Company	100 MW RFP for Renewable Resources to meet RPS requirements	2007 to 2008
PacifiCorp 2012 RFP for Baseload Resources	Independent Evaluator	Public Service Commission of Utah	RFP for up to 1,750 MW of Baseload capacity	2006 to 2008
Maui Electric Company	Consultant	Maui Electric	RFP for approximately 40 MW of peaking capacity	2007 to 2008
Delmarva Power and Light RFP for Supply Resources	Member of Independent Consultant team	Delaware Public Utilities Commission	RFP for up to 400 MW	2006 to 2007
Avista Utilities RFP for Renewable Resources	Consultant	Avista Utilities	RFP for 100 MW of renewable resources	2006

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Public Service Company of Oklahoma 2005 RFP for Peaking and Baseload Resources	Independent Monitor	Public Service Company of Oklahoma	RFPs for Peaking and Baseload Resources – up to 600 MW of baseload capacity and 500 MW of peaking capacity.	2005 to 2007
Southwestern Electric Power Company RFP for Capacity and Energy Resources	Independent Monitor	Southwestern Electric Power Company	RFP for Peaking, Intermediate and Baseload Resources – up to 1,500 MW of capacity and associated energy.	2005 to 2008
Hydro-Quebec Distribution Cogeneration Call for Tenders	Independent Technical Consultant	Hydro-Quebec Distribution	Call for Tenders for 350 MW of capacity from Cogeneration projects	2005
Ontario Power Authority	Member of Fairness Advisor Team	Ontario Power Authority	RFPs for Demand Response Resources and behind the meter generation in several regions of Ontario	2005 to 2006
BC Hydro	Member of Independent Reviewer Team	BC Hydro	Call for Tenders for 150 MW project on Vancouver Island.	2004 to 2005
Hydro-Quebec Distribution Wind Generated Electricity Call for Tenders	Independent Technical Consultant	Hydro-Quebec Distribution	Call for Tenders for 1,000 MW of Wind-Generated Electricity	2004 to 2005
Portland General Electric 2003 Request for Proposals	Independent Observer	Portland General Electric	600 MW RFP including all source long term resources, short-term options contracts, swaps, and exchange agreements.	2003 to 2005
Massachusetts Technology Collaborative	Consultant	Massachusetts Technology	RFP for options agreements on Renewable Energy	2003

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		Collaborative	Certificates	
Hydro-Quebec Distribution Short-Term Call for Tenders	Independent Consultant	Hydro-Quebec Distribution	Semi-annual Call for Tenders for Short-term energy and associated capacity via definition of specific short-term products	2003 to 2007
Hydro-Quebec Distribution Biomass Call for Tenders	Independent Technical Consultant	Hydro-Quebec Distribution	Call for Tenders for 100 MW of biomass resources	2003
Hydro-Quebec Distribution Call for Tenders for Baseload and Cycling Resources	Independent Technical Consultant	Hydro-Quebec Distribution	Call for Tenders for 1,200 MW of Baseload and Cycling Conventional Supply Side Resources	2001 to 2002
Maine Public Utilities Commission Standard Offer Service RFP	Consultant	Maine Public Utilities Commission	Standard Offer Service RFP	1999 to 2000
Houston Light & Power RFP	Consultant	Houston Light & Power	Summer Season Products in ERCOT	1999
Central and SouthWest Services	Consultant	Central and SouthWest Services	RFP for Roof-top Photovoltaic systems on schools	1998
Public Service Company of Oklahoma	Ombudsman	Central and SouthWest Services	All Source RFP – including supply side and DSM resources	1997
West Texas Utilities	Consultant	Central and SouthWest Services	All Source RFP – including supply side and DSM resources	1995 to 1996
Southwestern Electric Power Company	Consultant	Central and SouthWest Services	All Source RFP – including supply side and DSM resources	1995 to 1996
Central Power and Light	Consultant	Central and SouthWest Services	Wind only RFP for 100 MW	1995 to 1996



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Central Power and Light	Consultant	Central and SouthWest Services	All Source RFP – including supply side and DSM resources	1995 to 1996
Wisconsin Power and Light	Independent Consultant	Wisconsin Power and Light	RFP for 150 MW of long-term peaking capacity or tolling service agreements	1997
Carolina Power & Light Supply-side RFP	Independent Consultant	Carolina Power & Light	1997 RFP for Peaking Capacity	1997
Carolina Power & Light Supply-side RFP	Independent Consultant	Carolina Power & Light	1996 RFP for Combined Cycle and Peaking Capacity	1996
General Public Utilities Options RFP	Consultant	General Public Utilities	RFP for Option on power	1997
Delmarva Power & Light Options RFP	Consultant	Delmarva Power & Light	RFP for Option on power	1997
Duke Power Company Supply-side RFP	Independent Consultant	Duke Power	RFP for Long-term peaking capacity and short-term options contracts	1996 to 1997
Boston Edison Company RFP #3	Consultant	Boston Edison	RFP for All Source resource options	1994 to 1995
Lower Colorado River Authority	Consultant	Lower Colorado River Authority	Turnkey contract for project development at Company-owned site	1995 to 1996
Commonwealth Edison	Independent Consultant	Commonwealth Edison	All-source RFP for up to 2,200 MW of supply side and demand side resources	1993 to 1994
Baltimore Gas and Electric	Third-party Evaluator	Baltimore Gas and Electric	Supply-side RFP	1992 to 1993
Delmarva Power and Light	Third-party Evaluator	Delmarva Power and Light	Supply-side RFP	1989 to 1991

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**APPENDIX A**

**El Paso Electric Company  
Independent Evaluator Services  
Statement of Work**

- 1. General Description and Location of Services.** In accordance with the Agreement, Merrimack Energy Group, Inc, the Consultant, as Independent Evaluator (IE) of El Paso Electric's (EPE) *2019 Request for Proposals for Renewable Energy for New Mexico* shall provide the services described in this Statement of Work. The overriding responsibility of the IE is to ensure the competitive bidding process is undertaken in a fair and unbiased manner with the objective of providing the best outcome for EPE's customers.
  
- 2. Consultant Requirements.**
  - 2.1. Review and track the utility's implementation of the competitive bidding process from design of the RFP through contract negotiations.
  
  - 2.2. Maintain a review and oversight function over the RFP process including:
    - a) RFP draft review,
    - b) Bidder proposal review,
    - c) Monitor communications with market participants, and
    - d) Monitor contract negotiations if needed.
  
  - 2.3. Report any problems or concerns with the bidding process to the Company to aid in issue resolution if any arise.
  
  - 2.4. Review and comment on the draft RFP documents and supporting documentation with the goal of:
    - a) Ensuring that the RFP documents are clear and concise with regard to the definition of the products sought, information required of bidders, solicitation schedule, and solicitation process,
    - b) Ensuring the RFP processes and procedures will lead to a fair and equitable solicitation process and encourage a robust market response,
    - c) Ensuring consistency between the RFP, Model Contracts or term sheets and information required of the bidders,
    - d) Ensuring that bidders are provided sufficient information to allow bidders to determine how to effectively compete in the process, and
    - e) Reviewing and commenting on the evaluation criteria, evaluation process and methodology, and ranking and selection process.
  
  - 2.5. Review and comment on the Company's procedures and policies to ensure that self-build or

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affiliate options do not have any undue preferential treatment and to ensure the process is fair and transparent.

**2.6. Relationship to Bidders**

- a) Review and critique the Company's responses to bidders' questions prior to distributing to bidders.
- b) Monitor discussions with shortlisted bidders, if applicable.
- c) Review and monitor communications with shortlisted bidders including requests for additional information to ensure all bidders are treated equitably.

**2.7. "Advisory" Function**

- a) Identify and resolve any issues as they arise, that could affect the fairness of the process.
- b) Identify industry "best practices" or strategies used by others to address similar issues.

**2.8. Bid Evaluation Protocols and Procedures such as:**

- a) Review and verify that the bid evaluation was undertaken consistently with the bid evaluation criteria and protocols for non-price and price evaluation,
- b) Review and verify shortlist selection process,
- c) Review economic modeling approach and price evaluation for different resources (i.e. PPA, self-build, acquisition, DG resources), and
- d) Review and lock-down input assumptions prior to receipt of bids.

**2.9. Receipt of bids**

- a) The Independent Evaluator is to be present at bid receipt and opening of bids when there is a self-build option. The IE along with representatives of the Company will be responsible for receiving bids, securing the bids, and logging in the bids received.
- b) The IE is to prepare a high-level summary of the bids received and compare to EPE's list to ensure all bids are accounted for.

**2.10. The role of the IE in the bid evaluation and selection process is to:**

- a) Oversee the evaluation and selection process to ensure that the process is fair and objective to all bidders,
- b) Read and review all bids relative to the established criteria, and
- c) Meet with the bid evaluation team during the bid evaluation process and "challenge" the results of the bid evaluation process.

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2.11. Review all modeling results and analysis

- a) Review the modeling inputs, model assumptions and model methodologies prior to receipt of bids.
- b) Thoroughly review and assess all the economic evaluation results, including model outputs.
- c) Request supporting documentation, if necessary.

2.12. Role of the IE in Contract Negotiations:

- a) Monitor the contract negotiation process, if required.
- b) Participate in select negotiation sessions if deemed necessary by EPE, including all negotiation sessions with any affiliates, and
- c) Review draft copies of the contracts.

2.13. Reporting Requirements.

- a) Identify a “watch list” of issues that need to be closely monitored during the process.
- b) Submit a Final Findings Report to the Company which shall include the following but not limited to:
  - i. Description of the role of the IE;
  - ii. Description and review of the competitive bidding process and evaluation of Proposals;
  - iii. Evaluation of the Framework and Principles for proposal bid evaluation and selection process; and
  - iv. Recommendations for improving the RFP process.

2.14. Testify in the contract approval, project approval, and regulatory proceedings if required.

**3. EPE Requirements.**

3.1. The Company will provide the necessary information to the IE to perform the services as requested.

3.2. Items to be provided to the IE include but are not limited to:

- a) 2019 Request for Proposals for Renewable Energy for New Mexico,
- b) Bidder List,
- c) Proposal evaluation process approach and criteria,
- d) Bidder proposals,

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- e) Bidder submitted questions and EPE responses,
- f) Proposal review results, and
- g) Contract negotiations.

**4. Period of Performance.** The period of performance for the services shall begin on a date agreed upon between EPE's Project Manager and Consultant and shall continue until the services have been completed and accepted by EPE, in accordance with the Agreement.

**5. Pricing and Payment.**

5.1. The standard billing rate for the consulting services will be fixed at \$250 per hour for the Principal Consultant and \$135 per hour for the Associate Consultant for all hours worked on the project. The rate will be fixed for the term of the project. Out of pocket expenses associated with travel, lodging and meals will be billed as incurred.

5.2. EPE shall pay for the services provided in accordance with the Agreement.

**6. Taxes and Invoicing**

**6.1 Taxes**

These services are nontaxable and per 34 Texas Administrative Code (TAC) Sec. 3.288(g), El Paso Electric Company cannot provide the Consultant with a Texas Direct Pay Exemption Certificate.

**6.2 Invoicing**

Consultant shall state on a single line the total amount due for the services.

**7. EPE Project Manager.** EPE's Project Manager for the services requested herein is Monica Garcia (915) 543-2088, monica.garcia@epelectric.com, Stanton Tower, 100 N. Stanton, El Paso, Texas 79901.

*El Paso Electric Company*  
*2019 Request for Proposals for Renewable Energy for*  
*New Mexico*

*Report of the Independent Evaluator*

*March 2020*

*Prepared by*  
*Merrimack Energy Group, Inc.*



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### **I. Introduction**

El Paso Electric Company (“EPE”) retained Wayne Oliver of Merrimack Energy Group, Inc. (“Merrimack Energy”) to serve as the Independent Evaluator (“IE”) for EPE’s 2019 Request for Proposals for Renewable Energy for New Mexico (“2019 Renewable Energy RFP”, or “2019 RFP”). Merrimack Energy’s role as IE began at the time of development of the 2019 RFP document and continued through the selection of the awarded resources.

EPE issued its 2019 Renewable Energy RFP on May 29, 2019, with the objective of obtaining short-term and/or long-term, cost-effective and reliable renewable electric resources available to meet EPE’s New Mexico Renewable Portfolio Standard (“RPS”), starting in 2020, per recently enacted amendments to the New Mexico Renewable Energy Act set forth in New Mexico Senate Bill 489 (“SB 489” or the “Energy Transition Act”). EPE’s preliminary determination is that it requires approximately 141,000 megawatt-hours (“MWh”) of additional renewable energy per year beginning in 2020. The 2019 RFP was only open to renewable energy resources as defined by SB 489.<sup>1</sup>

EPE indicated it would consider proposals from Bidders that would include supply-side renewable energy proposals, including distributed generation. EPE would also consider the following commercial transactions: Short-term and long-term Power Purchase Agreements (“PPA”) for the sale of energy or energy and capacity; Build-Transfer Agreements (“BTA”) for EPE to purchase proposed generation resources for stand-alone solar and solar paired with battery storage; and proposals for EPE purchase or equity participation in the Bidder’s existing generation facility. EPE stated that it may also submit a self-build proposal in response to the RFP.

EPE solicited renewable energy resources providing a guaranteed minimum annual generation. Proposals seeking to provide the full requirement should provide a guaranteed minimum annual output of 141,000 MWh (EPE will consider acquiring a single resource or a combination of renewable energy resources that are proposed and evaluated in response to this RFP to attain the 141,000 MWh total). EPE may consider whether the proposals can also provide high availability, guaranteed generation output during EPE’s peak hours in the months of May through September, in addition to providing firm renewable energy. Bids for solar and wind are requested to include an option with the integration of battery storage.

EPE originally proposed to use a two-stage pricing process to evaluate proposals in response to the RFP, i.e., evaluate the initial proposals received in response to the RFP, select a shortlist, and then evaluate Best and Final offers from the shortlisted Bidders.<sup>2</sup>

The Statement of Work (“SOW”) of Merrimack Energy as the IE was agreed to between EPE and Merrimack Energy. The SOW was consistent with other competitive bidding

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<sup>1</sup>Renewable Energy Resource means electric or useful thermal energy generated by use of the following energy resources with or without energy storage: solar, wind, geothermal, hydropower facilities brought in service on or after July 1, 2007, biomass resources limited to agriculture or animal waste and small diameter timber, fuel cells that do not use fossil fuels, and landfill gas and anaerobically digested waste biogas.

<sup>2</sup> As addressed in this report, EPE revised the price evaluation process to be a single-stage process.

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assignments Merrimack Energy has undertaken in which Merrimack Energy has served as the IE. The SOW and requirements of an IE were not mandated in any formal bidding rules in New Mexico at the time of this solicitation.

The overriding responsibility of the IE is to ensure that the competitive bidding process is fair, transparent and unbiased with the objective of providing the best deal or outcome for EPE's customers. In addition, since there was a possible option of a self-build proposal, one of the roles of the IE is to ensure that the self-build option does not receive any undue preferential treatment. The SOW identifies the following high-level requirements for the IE. More specific and detailed information on the activities of the IE is contained in Section III of this report.

- Review and track the utility's implementation of the competitive bidding process from design of the RFP through contract negotiations<sup>3</sup>;
- Maintain a review and oversight function over the RFP process, including RFP draft review, proposal review, evaluation of proposals and communications with Bidders;
- Report any problems or concerns with the bidding process to the Company for purposes of resolving any issues;
- Review and comment on the Company's procedures and policies to ensure that the self-build or affiliate option did not have or appear to have any undue or preferential treatment and to ensure the process was fair and transparent;
- Submit a final report which includes any recommendations for improving the process.

This final report meets the requirements listed above and addresses the activities associated with the solicitation process from the development of the RFP to selection of the winning bid(s).

## **II. El Paso Electric's Competitive Bidding Process**

### **Background**

EPE issued the RFP on May 29, 2019. As noted, the purpose of the 2019 RFP was to obtain short-term and/or long-term, cost-effective and reliable renewable electric resources to meet EPE's New Mexico RPS requirements, starting in 2020, as set forth in SB 489. EPE has previously used a competitive procurement process based on an RFP for soliciting and selecting resources since 2003.<sup>4</sup>

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<sup>3</sup> Merrimack Energy has not participated in the contract negotiation process for any of the EPE solicitations in which Merrimack Energy has served as IE. Merrimack Energy's role as IE involved actively tracking the solicitation process from RFP design through final project selection.

<sup>4</sup> EPE issued RFPs in 2003, 2006, 2008, 2011, and 2017 for electric power supply and load management resources.

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**Summary of the Components of the 2019 RFP for Renewable Energy for New Mexico**

The 2019 Renewable Energy RFP clearly identifies the requirements of EPE regarding the need for the resources solicited, types of products requested, the term of the proposals, the amount of energy (MWh) requested, the timing of requirements, price and non-price factors, a description of EPE’s existing system including existing generation resources and demand/supply balance, a description of the role of transmission costs and access, and information which bidders need to incorporate into their proposals. As background, a brief summary of the key components and provisions of the 2019 RFP is included in Table 1.

**Table 1: Summary of 2019 Renewable Energy RFP Requirements**

<b>RFP Characteristics</b>	<b>2019 Renewable Energy RFP</b>
Resource Requirements	EPE’s preliminary determination is that it requires approximately 141,000 MWh of additional renewable energy per year beginning in 2020.
Objectives of RFP	EPE seeks to obtain short-term and/or long-term, cost-effective and reliable renewable electric resources available to meet EPE’s New Mexico RPS requirements, starting in 2020.
Resource Timing On-line date	EPE is soliciting proposals with commercial operation dates (“CODs”) before the end of 2020 if achievable, but no later than May 1, 2022. While EPE is seeking renewable energy to comply with its 2020 RPS requirements per SB 489, if the economics of proposals are higher due to the accelerated target date of 2020, Bidders may propose an option for renewable energy delivery in 2021 or 2022.
Eligibility	<p>The following eligibility requirements are listed in the RFP:</p> <ul style="list-style-type: none"> <li>• A Notice of Intent to Bid (“NOI”) is mandatory for proposals to be accepted. Submittal of an NOI does not bind Bidders to submit a proposal;</li> <li>• Bidders must certify that proposals meet the RPS requirements of SB 489;</li> <li>• The resource has to be eligible for designation as a Network Resource under EPE’s OATT;</li> <li>• All Bidders must complete and return Attachment 9.2;</li> <li>• All Bidders must complete and return Attachment 9.5.;</li> <li>• Bidders must submit their proposals by providing the data required for PPA proposals in Attachment 9.3;</li> <li>• Failure to complete and return all required forms, tables and templates may result in disqualification of</li> </ul>

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RFP Characteristics	2019 Renewable Energy RFP
	<p>the Bidder’s proposal;</p> <ul style="list-style-type: none"> <li>• Proposals are to include and denote anticipated tax amounts. Actual tax treatment will be governed by the final executed contracts;</li> <li>• EPE required bidders to have and provide evidence to EPE of a feasible site selected and at a minimum have a Letter of Intent for site control with land owners and other stakeholders. For sites on federal land such as Bureau of Land Management, alternate documentation may be considered;</li> <li>• All capacity and energy that EPE may purchase pursuant to this RFP must be delivered to the EPE transmission system within its Balancing Authority Area (“BAA”) to ultimately serve EPE’s New Mexico retail customers. Future generation resources in the general vicinity of EPE’s BAA are preferred;</li> <li>• The Bidder must clearly define dispatch capabilities for the power resource proposed;</li> <li>• The RFP also identified specific requirements for each resource type;</li> <li>• For all renewable resources, all RECs associated with the renewable energy proposed must transfer to EPE at no additional cost;</li> </ul>
<p>Requirements Specific to Resource Types</p>	<p>The following requirements are listed in Section 5.0 of the RFP and are applicable to specific resource types:</p> <ul style="list-style-type: none"> <li>• For all renewable resources, EPE prefers the ability to dispatch/curtail the renewable energy on an hourly basis. Proposals may only propose capacity pricing if they include battery storage or some other method to firm up the energy output. Proposals that include capacity pricing must provide the basis for measurement to determine the firm capacity. Bidders shall provide a predictable, specific methodology for energy pricing or energy and capacity pricing on an annual basis;</li> <li>• For non-intermittent renewable resources, proposals such as geothermal, biogas or biomass should identify and quantify fuel resource availability and ability to secure fuel resources for the life of the project. Any dispatchability or output limitations should be clearly described, including yearly total output expectations and commitments. Additionally, typical daily output profiles should be provided for</li> </ul>

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RFP Characteristics	2019 Renewable Energy RFP
	<p>each month and any firm commitment amounts should be conveyed;</p> <ul style="list-style-type: none"> <li>• For intermittent renewable resource proposals such as solar and wind, these proposals should provide expected output profiles, expected yearly energy output and guaranteed/committed yearly energy output amounts. Solar and wind proposals are required to utilize inverters and controls capable of output regulation/curtailment for load following, frequency response and voltage support via EPE’s energy management system (“EMS”) control;</li> <li>• EPE requests that solar and wind proposals provide an option with battery storage at 50% of the renewable energy resource’s nameplate capacity (AC). If the proposal is also capable of providing regulating and system support Bidders should provide operating capabilities and specifications including: number of expected cycles, charge and discharge ranges, round trip efficiency and degradation schedules. All proposals should be capable of direct monitoring and control by EPE’s EMS system.</li> </ul>
<p>Resource Alternatives/Product Requirements/Commercial Transactions</p>	<p>Proposals to be considered by EPE will include supply-side renewable energy proposals including distributed generation (i.e., interconnection at the distribution grid voltage level). EPE will consider the proposal arrangements to include one or a combination of the proposal types listed below: (1) short-term PPA (one to four years) for sale of energy or capacity and energy from existing resources; (2) long-term PPA (five years or greater) for sale of energy or capacity and energy from existing resources; (3) BTA for EPE to purchase proposed generation resources for stand-alone solar, and solar paired with battery storage; (4) proposals for EPE purchase or equity participation in the Bidder’s existing generating facility;</p>
<p>Bidding Process</p>	<p>EPE proposed a single-stage bid evaluation after amending the RFP where there would be no opportunity to submit a Best and Final bid. The evaluation process included the following steps:</p> <ul style="list-style-type: none"> <li>• Threshold evaluation</li> <li>• Economic evaluation</li> <li>• Non-Economic evaluation</li> <li>• Environmental evaluation (if applicable)</li> <li>• Selection of Proposals and Discussions with Bidders</li> </ul>

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<b>RFP Characteristics</b>	<b>2019 Renewable Energy RFP</b>
	<ul style="list-style-type: none"> <li>• Contract negotiations</li> </ul> <p>EPE will evaluate proposals to determine which, if any, have the potential to provide the most economical, reliable, and viable alternatives for EPE’s New Mexico retail customers which comply with EPE’s requirements under SB 489.</p>
Utility Self-Build Options	EPE stated in the RFP that it may also submit a self-bid option in response to the RFP.
Threshold Evaluation	EPE initially reviews each proposal to determine whether it satisfies the threshold criteria of: (1) responsiveness, (2) technical viability, and (3) Bidder financial ability and capability. The responsiveness review would ensure that the proposal is complete, follows the guidelines set forth in the RFP, and includes all information required for a more thorough review. The technical viability review would determine whether the proposal meets EPE’s requirements in a reliable manner and within the timeframe stated in the RFP. The Bidder financial ability and capability review would judge whether the bidder has adequate financial capability and adequate competence, resources, and skills to perform its proposal.
Economic Evaluation Process	EPE originally proposed to use a two-stage pricing process to evaluate those proposals that have satisfied the threshold evaluation of responsiveness and viability. The two-stage pricing process consisted of the evaluation of (1) initial bids that have met the requirements of the responsiveness and viability reviews which would be evaluated based on a levelized cost analysis and would be grouped according to resource type. Once groups were established, EPE may select the top-ranking bids from each group to shortlist; (2) the shortlisted bids selected based on the results of the levelized cost analysis would be required to submit best and final offers <sup>5</sup> .
Economic/Pricing Requirements	<p>The economic analysis will incorporate the following characteristics of the proposed renewable resource type as applicable:</p> <ul style="list-style-type: none"> <li>• Firm energy costs</li> <li>• Fixed and variable O&amp;M costs</li> <li>• Facility/Unit Start-up costs as applicable</li> <li>• Variable costs impacting production cost</li> </ul>

<sup>5</sup> As noted, in its amended RFP, EPE revised this section to include a single-stage pricing process. Bidders will have no opportunity to provide a best and final offer and resource ranking and selection will be based on the pricing submitted in the proposal.

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<b>RFP Characteristics</b>	<b>2019 Renewable Energy RFP</b>
	<ul style="list-style-type: none"> <li>• Transmission and/or distribution system costs</li> <li>• Other costs and system impacts</li> <li>• Potential federal regulation or carbon emission costs</li> <li>• Taxes and tax credits</li> </ul>
Non-Economic Evaluation	<p>EPE indicated it may also consider non-economic criteria not incorporated into the economic analyses in evaluating each proposal such as:</p> <ul style="list-style-type: none"> <li>• Development feasibility and completion risk</li> <li>• Financial and operational viability</li> <li>• Operating characteristics</li> <li>• Other factors</li> <li>• EPE financial impact</li> </ul>
Resource Selection	<p>The RFP states that EPE reserves the right to enter into an agreement at any time with a Bidder who, in the opinion of EPE, would provide the greatest value to EPE and its customers. EPE also reserved the right to pursue contracts with other than the lowest price Bidder or with other than the Bidder evidencing the greatest technical ability, if EPE, in its sole discretion, determines that to do so would result in the greatest value to EPE and its customers. EPE reserved the right to enter into discussions with multiple bidders at any time in order to determine and pursue what EPE believes is in the best interest of EPE and its customers.</p>
Transmission Requirements	<p>All renewable energy or capacity and energy that EPE may purchase pursuant to this RFP must be delivered to EPE’s local transmission system (transmission system within the EPE Balancing Authority Area) to ultimately serve EPE’s New Mexico retail customers. It may be possible for proposals between 5-20 MW to interconnect to EPE’s distribution system or local transmission system (depending on location and feeder/system characteristics) which may facilitate shorter project lead-times. However, EPE is open to all proposals which demonstrate ability to deliver renewable energy to EPE, regardless of proposal arrangement, i.e., PPA or a facility build/transfer of ownership structure.</p> <p>Where the Bidder’s resource is interconnected to a third-party transmission system, and not to the EPE local transmission or distribution system, the Bidder should identify in its proposal (a) the charges assessed by the third-party transmission service provider to reach the EPE transmission system and (b) the point on the EPE transmission system at which the Bidder’s energy is to be</p>

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<b>RFP Characteristics</b>	<b>2019 Renewable Energy RFP</b>
	<p>tendered by the Bidder to EPE. In addition, the proposal must be accompanied by a demonstration that the Bidder has (or will) secure firm transmission capacity on such third-party systems from the location of the resource to EPE’s local transmission system.</p> <p>In cases where a resource directly interconnects to the EPE transmission system, the Bidder should define the current status of the Bidders generator interconnection request and the estimated Network Upgrade costs, if any identified in the generator interconnection process as necessary to permit the Bidder’s generating facility to interconnect to the EPE transmission system.</p> <p>The winning Bidders will be required to have in place or to secure Network or Energy Resource Interconnection Service as identified in the EPE Large Generator Interconnection Procedures or Small Generator Interconnection Procedures and sign a Generator Interconnection Agreement as specified in EPE’s OATT. In addition, the resource must also be eligible to be designated by EPE as a Network Resource under EPE’s OATT.</p>
Site Control	<p>EPE requires Bidders to have, and provide evidence to EPE, of a feasible site(s) selected and at a minimum have a Letter of Intent for site control with the land owners and other stakeholders that may impact the execution of the land purchase. For sites on federal land such as the Bureau of Land Management, alternate documentation may be considered.</p>
Bid Fees	<p>A \$2,500 non-refundable filing fee must be submitted with each proposal. The filing fee will apply to a Bidder’s proposal and an additional two alternative options. Any additional options from the Bidder will incur an additional fee of \$1,500 per option. A proposal is defined by proposal site/location and resource technology type. An option is defined as same proposal with varying options for project size, COD, pricing, or inclusion of battery storage.</p>
Information Required of Bidders	<p>The RFP contains in Attachment 9.2 a list of all the information required from bidders with regard to submission of their proposals. Bidders must complete Attachments in Section 9 and Excel workbook “2019 RFP Excel Input Templates”. Section 6 of the RFP also identifies the outline of the proposal by topic area to ensure the format is consistent for all proposals.</p>



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### **Bidding Documents**

The 2019 Renewable Energy RFP contains a number of Attachments which bidders were required to complete and submit with their proposals, as applicable to each proposal type. These include the following:

1. Attachment 9.1 – Notice of Intent to Bid;
2. Attachment 9.2 – Data Required for All Projects;
3. Attachment 9.3 – Additional Data for Purchased Power Agreements;
4. Attachment 9.4 – Additional Data for Equity Purchase (Full or Partial);
5. Attachment 9.5 – Additional Data for Intermittent Non-Dispatchable Renewable Energy Resources;

Additionally, EPE provided an Excel file Workbook on the website for the 2019 RFP which Bidders were also required to complete and submit with their proposals. These files included project specific information and pricing information which EPE could utilize to populate its evaluation models for undertaking the levelized cost of energy (“LCOE”) assessment for purposes of ranking proposals and selecting a shortlist. The Excel File posted to the website contained the following tabs:

- 10.1 – General Information for All Bids;
- 10.2 – Standalone Renewable Bids;
- 10.3 – Renewable Plus Storage Bids;
- 10.4 – Bid Pricing;
- 10.5 – 8760 Energy Profile

In early July 2019, EPE decided to extend the scheduled dates for the 2019 RFP to allow Bidders three months to prepare their proposals. On July 11, 2019 EPE posted an amended RFP (both redlined version of the original RFP and a new clean version) to its website and also informed those bidders who had submitted a NOI of the schedule change.<sup>6</sup> To accommodate this change in schedule and avoid a longer delay in completing the 2019RFP, EPE decided to revise its evaluation process to include a one-stage rather than two-stage pricing process which originally included both initial bids and best and final offer. Under the amended process, Bidders would be required to submit their best and final proposal on the proposal due date of August 28, 2019 with no opportunity to revise pricing. Section IV of this report provides additional details regarding the changes to the RFP.

### **III. Role of the Independent Evaluator**

The role of the IE was agreed to by Merrimack Energy and EPE and was included in the Consulting Services Agreement between the parties. The general roles of the IE are defined

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<sup>6</sup> EPE noticed three changes to the schedule on its website: (1) the proposals submittal date was extended to August 28, 2019; (2) the NOI date was extended to July 29, 2019; and (3) the notice of Contract Award was extended to October 30, 2019.

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in Section I (i.e., Introduction) of this report. Provided below are the more specific roles and activities which the IE was expected to be involved in throughout this competitive bidding process. The discussion in Section IV of this report will also identify the specific roles and activities of Wayne Oliver as the IE in the solicitation process.

### **Activities of the IE**

#### **1. RFP Development and Implementation**

- a. Review and comment on the draft RFP documents and supporting documentation with the goal of ensuring that the process and procedures would lead to a fair and equitable solicitation, the process was reasonably transparent, the documents prepared for bidders were clear and concise, and the RFP provided adequate information on which bidders could base their proposals and did not contain any undue biases favoring one resource over another;
- b. Assist EPE with the development of the evaluation process and methodology, evaluation criteria, and proposal ranking and selection process based on the IE's experience in a number of other similar competitive procurement solicitation processes;
- c. Participate in the Pre-Bid Meeting with prospective Bidders;
- d. Review and comment on the Company responses to Bidders' questions provided through the Company's website. Merrimack Energy also made suggestions to EPE regarding the responses to questions that should be provided to all Bidders. The IE also monitored all communications with Bidders throughout the solicitation process;
- e. Merrimack Energy also reviewed and coordinated with EPE on the implementation of procedures for ensuring that the self-build or affiliate options do not receive any undue preferential treatment, that all proposals were evaluated consistently and fairly and to ensure the process overall was fair and transparent for all Bidders;
- f. Merrimack Energy maintained an advisory function in the solicitation process by identifying industry best practices to ensure the process was consistent with industry standards. Merrimack Energy advised EPE on several occasions regarding bid evaluation methodology and industry practices associated with the evaluation of energy storage options, combined assessment of renewable and storage options, and other issues addressed between the IE and the EPE team. The IE's role in this area was also to identify and resolve any issues as they arose that could affect the fairness and integrity of the competitive bidding process.

#### **2. Receipt of Bids**

The IE performed the following functions associated with this activity:

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- a. Attended the receipt, opening, logging in, and summary of proposals at EPE's offices upon submission of proposals;
- b. Reviewed all the proposals received by EPE and prepared a summary of the proposals received. The IE provided its summary to EPE to ensure both parties had the same list of proposals;
- c. Prepared follow-up and clarification questions for specific proposals and the self-build option and provided the questions to EPE for incorporation into a larger list of questions compiled by the EPE project team;
- d. Reviewed response of Bidders to follow-up questions about their proposals;
- e. Participated in several conference calls with EPE staff ("project team") to discuss the interpretation of the proposals;
- f. Reviewed and summarized best and final offers submitted by short-listed Bidders.

### **3. Bid Evaluation and Selection Process**

The IE performed the following activities during the bid evaluation phase of the process:

- a. Reviewed the model inputs and outputs compiled by EPE for the bid evaluation process. Prepared questions on the evaluation methodologies and inputs and participated in calls with EPE to discuss the evaluation methodology and evaluation results;
- b. Reviewed the revenue requirements model and spreadsheet models developed by EPE to conduct the quantitative evaluation of the bids based on the levelized cost of energy ("LCOE") for purposes of selecting a short list;
- c. Identified industry "best practices" or strategies used by others to address similar issues regarding bid evaluation methodologies;
- d. Reviewed and discussed EPE's decision to reject or accept any bids during each step of the process;
- e. Participated in calls and meetings with EPE to discuss the evaluation results and decisions to select the preferred resources for contract negotiations;
- f. Reviewed and commented on the bid evaluation pricing results for the proposals submitted;
- g. Participated in reviewing information to be provided to internal management on bid ranking and selection and recommendations for final resource selection.

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### **IV. Description of the Competitive Bidding Process and Evaluation of Proposals**

#### **Overview**

EPE's 2019 Renewable Energy RFP solicitation process was comprised of several phases, with a number of major activities within each phase. This section of the report will discuss each of the RFP phases and the major activities, issues and decisions which occurred in each Phase. The primary phases of most power procurement solicitation processes include the following:

**1. RFP Development Phase** - includes activities associated with the development of the RFP documents, bid evaluation process, methodology and evaluation criteria, outreach activities to inform bidders of the issuance of the RFP, and coordination of project team members. In addition, at the beginning of this phase, the self-bid team and RFP management and evaluation team are separated with regard to their functions in the process before the RFP document preparation begins. The EPE project team<sup>7</sup> and IE held discussions during this phase to identify issues and tasks that needed to be addressed with regard to the implementation of the solicitation process and the timing for completing such tasks.

**2. Bid Preparation Phase** - once the RFP was issued, the second phase of the solicitation process generally involves activities associated with proposal development on the part of the bidders and preparation for receipt of proposals by the utility. Activities in this phase include implementation of a Bidders Conference to describe the solicitation process and seek questions from Bidders, an extended Q&A process after the Bidders Conference to allow bidders to seek responses to questions which aid in the development of their proposals, completion and lock-down of the bid evaluation methodology and evaluation criteria, and preparation and lock-down of input assumptions that will be used to ensure a consistent evaluation of proposals.

**3. Receipt and Evaluation of Proposals** – the third phase of the solicitation process begins with the receipt of proposals, and includes evaluation of proposals, selection of a shortlist (if applicable), submission and evaluation of final offers (if applicable) and culminates with final proposal(s) selection after a thorough review of the quantitative and qualitative aspects of the proposals. As noted, EPE initially intended to implement a solicitation process which incorporated a two-step pricing process which included selection of a shortlist in step 1 followed by a best and final offer process for shortlisted bidders. However, in conjunction with the extension of the schedule by approximately one-month to allow bidders an additional month to complete their proposal, EPE revised the solicitation pricing process to a single-stage process whereby the evaluation and selection of proposals would be based solely on those

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<sup>7</sup> EPE's project team for the RFP was largely comprised of members of the Resource Planning Department at EPE which were responsible for managing the solicitation process and conducting the evaluation of proposals.

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proposals submitted on the extended proposal due date of August 28, 2019, with no opportunity to submit Best and Final proposals.<sup>8</sup>

**4. Contract Negotiations** – once the final selection list has been identified, the utility will begin negotiation of contracts with the selected entities with the objective of executing a final contract with third-party bidders.

**5. Regulatory Filing** – the final stage in the process is the resource approval stage in which the utility makes the required filings to the regulatory commissions seeking regulatory approval for the resources selected.

As noted, Merrimack Energy was primarily involved in the initial three phases of the solicitation process. Subsequent sections of the report address the activities and decisions in each of these phases.

### **Phase 1 RFP Development Phase**

As noted, EPE retained Wayne Oliver of Merrimack Energy to serve as Independent Evaluator for its 2019 Renewable Energy RFP in May, 2019, before development of the final RFP and associated documents. The IE had the opportunity to comment on drafts of the RFP and also worked closely with EPE to assess the bid evaluation methodology and evaluation criteria. As a result, the IE was involved in the solicitation process from development of the RFP and development of the evaluation methodology and processes through the final selection of the preferred resources.

#### **A. Development of the 2019 Renewable Energy RFP**

Shortly after retaining the IE, EPE provided a draft of the RFP to the IE for review and comment. The IE submitted only a few clarifying comments on the draft of the RFP. The IE was also the IE in EPE's 2017 All Source RFP and had provided a number of suggested changes that were originally reflected in the 2017 All Source solicitation, and these changes were also reflected in this 2019 RFP.

#### **B. Bid Evaluation Methodology and Evaluation Inputs and Criteria**

One of the initial areas of discussion between the IE team and the EPE RFP team was generally focused on the development of the appropriate evaluation methodology and process along with the evaluation criteria that would be used to evaluate and select proposals submitted in response to the RFP. The teams discussed both quantitative or price evaluation methodologies for shortlisting and final selection as well as qualitative or non-price criteria that would also be considered in ranking and selecting proposals. The IE was focused on any changes that EPE intended to make to the evaluation process and methodology relative to the methodology and processes used by EPE for the 2017 All Source RFP. The IE prepared a list of questions for discussion with EPE to assess whether there were expected to be any major changes to the 2017 RFP models and methodologies as well as questions about the

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<sup>8</sup> Both approaches are commonly used in the industry to evaluate and select proposals.

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implementation of the evaluation and selection process after the revision to a single stage pricing process. EPE's team and the IE held a conference call to discuss the IEs questions in preparation for the completion of the evaluation process and methodology. From a fairness and consistency perspective, the IE's view was that the overall methodology constructs and input assumptions should be prepared prior to receipt of proposals. EPE conformed to this suggestion.

### **C. Safeguards**

Since EPE identified the expectation that a self-build resource would be bid into the solicitation by the company's generation group, one of the issues was the safeguards that were adopted by EPE to ensure that the self-build would have no undue advantage over other bidders and that all bidders would be treated equally. EPE's RFP team and the IE held discussions about the safeguards that were in place to ensure that all bidders would be treated equitably as a follow-up to similar discussions during the 2017 All Source solicitation process. EPE notified the IE that similar safeguards were in place for this solicitation as well. These included the following:

- The team that would submit the self-build proposal and the team responsible for management and implementation of the RFP were separate from both a physical and operational perspective. The "walls" between the self-build team and the RFP team were established before the development of the RFP commenced;
- EPE retained the services of Wayne Oliver of Merrimack Energy as IE early in the development of the solicitation process. Mr. Oliver has served as IE or in a similar function on over 110 competitive bidding processes in 20 states and 3 Canadian Provinces;
- The RFP team implemented a secure filing and database system that would only be accessible to 2019 Renewable RFP evaluation team members. Files associated with confidential information regarding the 2019 RFP were stored in a document management system ("Live-Link") with restricted access only to select members of the RFP evaluation team. Live-Link is a password protected database that would be used to share information about the RFP, proposals received, and evaluation results among only the evaluation team members responsible for implementing the RFP process;
- In addition, EPE established a shared network drive accessible only by the Resource Planning Department, who was responsible for the management of the RFP process;
- EPE has detailed Standards of Conduct and a Code of Ethics in place to which all employees must adhere and agree to be bound;
- While the self-build team submitted its proposal on the same date as all other proposals, Merrimack Energy staff would be on-site at EPE's offices for proposal "opening" and review to ensure all proposals were treated equitably;
- The self-build proposal was required to provide all the same information for their proposal(s) as all other proposals to ensure all proposals were evaluated based on the same general information.

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**D. Issuance of the 2019 Renewable Energy RFP**

EPE issued its 2019 Renewable Energy RFP for New Mexico on May 29, 2019 and posted the RFP to its website. EPE sent notification to its list of potential bidders regarding issuance of the RFP. EPE stated in the notification that through the 2019 RFP EPE plans to obtain cost effective and reliable renewable electric resources to comply with the New Mexico Renewable Portfolio Standard requirements starting in 2020. Only proposals for renewable energy that is delivered to EPE and assigned to EPE’s New Mexico retail customers are eligible for this 2019 RFP, and the RFP is only open to renewable energy resources as defined by SB 489.

The notification also provided information on the Pre-Bid Webcast scheduled for June 7, 2019. The notification provided information for those who wished to call into the Webcast. EPE also encouraged interested bidders to submit questions in advance of the Webcast so that EPE could strive to have prepared responses available at the Webcast.

As previously noted, EPE issued an amended RFP in early July, 2019 with four key changes: (1) the proposal submittal deadline was extended to August 28, 2019, or about a one month extension from the original schedule; (2) to accommodate the extension in the proposal submittal date, EPE revised the evaluation and selection phase of the RFP process to be based on a single-stage pricing process; (3) the NOI deadline was extended as well; and (4) the notice of contract award was extended until October 30, 2019.

The 2019 Renewable RFP document and website included a revised schedule for the 2019 Renewable Energy RFP. The schedule listed in Table 2 below provides the original as well as the revised schedule for the RFP as included in the Amended RFP.

**Table 2: Original RFP Schedule and Revised Dates**

<b>Activity</b>	<b>Original Dates</b>	<b>Revised Dates</b>
RFP Issuance	May 29, 2019	Same
Pre-Bid Meeting	June 7, 2019	Same
Notice of Intent to Bid	June 28, 2019	July 29, 2019
Final Submission of Questions	June 19, 2019	August 7, 2019
Response to Questions	June 26, 2019	August 14, 2019
Proposals and Proposal Fees Due	July 29, 2019	August 28, 2019
Notice of Contract Award	September 30, 2019	October 30, 2019

As a result of the changes to the schedule and evaluation and selection process, EPE, with input from the IE, decided to post a revised RFP document on its website as well as a redline of the original RFP document so bidders were fully aware of all changes made.

**E. Outreach Activities**

In addition to the issuance of a press release and information posted to EPE’s 2019 Renewable RFP website that notified prospective bidders and interested parties of the

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availability of the RFP, the notice also identified the website address for accessing the RFP, and identified the date for the Pre-bid Webcast. The press release was also sent to major energy publications and newswires who typically publish information about power procurement activities.<sup>9</sup>

With regard to outreach activities, EPE also sent out formal invitations to approximately 650 contacts, in addition to issuing the press release. The list of potential bidders included the original list of over 400 contacts from past RFPs, and a list from the Company's renewable energy group.<sup>10</sup>

### **Phase 2 – Proposal Development Phase**

#### **A. Pre-Bid Webcast**

A Pre-Bid Webcast was held on June 7, 2019 as scheduled. EPE's project team manager introduced the RFP Project team, EPE staff and the IE, along with identifying the role of the IE. EPE's project team manager also provided an overview of the EPE system along with a high-level map of its service territory. He also provided an overview of the New Mexico SB 489 RPS requirements and the RFP requirements, including the timing of energy needed to meet RPS requirements, expected amount of energy required in 2020 (i.e., 141,000 MWh) to fulfill its 20% RPS requirement per SB 489, transmission service requirements, overall requirements for the resources requested, eligible contract arrangements and requested that bids for standalone solar and wind also provide an option paired with battery storage. The project manager also discussed the solicitation process schedule, the forms, tables and documents bidders were required to complete and submit with their proposal. In addition, the project team manager also discussed the Question and Answer process should bidders wish to submit questions about the RFP. EPE estimated that there were approximately 50-80 participants in the Pre-Bid Webcast.

#### **B. Questions and Answers**

EPE received and responded to 82 questions from prospective bidders.<sup>11</sup> All the questions and responses were completed and posted to the RFP website by August 12, 2019. The IE reviewed the responses to the questions by EPE and provided comments to EPE prior to posting the final responses to the website, if necessary. One of the areas of focus of the IE in reviewing the responses was to identify which Q&As may be specific to a bidder, in which case, only the bidder would receive a response, versus which responses should be provided to all bidders. The responses posted on the website were applicable to all bidders. The IE also found that EPE was efficient in preparing responses to bidders and posted the responses in a timely manner.

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<sup>9</sup> The IE did see mention of issuance of the EPE 2019 RFP in several trade publications, including Energy Central.

<sup>10</sup> EPE issued RFPs for power resources in 2003, 2006, 2008, 2011, and 2017.

<sup>11</sup> There was a total of 82 separate questions although the List of Bidder Questions and Responses includes several multi-part questions that the IE classified as separate questions as the basis for the total of 82 separate questions and responses.



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### **C. Notice of Intent to Bid**

EPE received a Notice of Intent to bid forms from 30 companies in response to the NOI request for the 2019 Renewable RFP. The majority of the NOIs were for solar projects or solar with storage options. Other resources included wind projects, wind with storage, and geothermal.

### **D. Overview of the Bid Evaluation Methodology**

Prior to the submission of proposals, EPE and the IE discussed EPE's proposed evaluation methodology. As noted, EPE initially proposed to use a two-stage pricing process for review and assessment of the proposals received which included the phases listed below. The revised RFP included the same overall phases, but eliminated the opportunity for bidders to provide a Best and Final offer and instead informed bidders that the evaluation and selection would be based on proposals submitted on August 28, 2019. A description of the bid evaluation methodology and evaluation process phases is provided below:

1. **Threshold Evaluation** - review of the proposals received to determine whether the proposals satisfy the threshold criteria of responsiveness, technical viability, and Bidder financial ability and capability. The responsiveness review ensures that the proposal is complete, follows the guidelines set forth in the RFP, and includes all information required for a more thorough review. The technical viability review will determine whether the proposal meets EPE's requirements in a reliable manner and for the timeframe stated in the RFP. The Bidder's financial ability and capability review would judge whether the Bidder has adequate financial capability and adequate competence, resources and skills to perform as proposed;
2. Proposals that passed the threshold evaluation would be subject to the economic evaluation.<sup>12</sup> Proposals will be evaluated on a levelized cost of energy basis and will be compared to proposals within their resource type group (i.e. solar only, solar with battery storage, wind only, wind with battery storage), as well as the type of proposal being offered (i.e. PPAs, BTAs, and equity participation) from an economic standpoint to determine the proposed resource's relative cost effectiveness in meeting EPE's requirements. Once EPE revised the process to a single-stage process, then only the original proposals would be considered and bidders would not be allowed to refresh their prices.

While the comparative evaluation of proposals submitted was based on the levelized cost of energy for each proposal, EPE recognized that since it was seeking to procure 141,000 MWhs as early as 2020, the total cost of the resource or portfolio of resources selected was an important consideration for resource selection. In addition, EPE was also concerned about the possibility of paying a premium for early term

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<sup>12</sup> As noted, EPE originally proposed to use a two-stage process for proposal pricing but decided to change the process to a one-stage price evaluation process to ensure the evaluation could be conducted within a reasonable timeframe once the decision was made to allow bidders three months to submit their proposals.

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deliveries or acquiring much more than is required based on project size. As a result, other factors such as initial date of delivery, pricing for each delivery period, and size of the proposal relative to EPE's requirements were also considerations for resource selection.

EPE used three spreadsheet models to calculate the Levelized Cost of Energy ("LCOE") as part of conducting the initial evaluation of the proposals received: (1) a spreadsheet model for PPA proposals including solar, wind, and other renewable only bids; (2) a revenue requirements model for cases where EPE would own the project and include the project in rate base (i.e., self-build, build-transfer for EPE to purchase proposed generation resources for standalone solar and solar paired with storage, and proposals for EPE purchase or equity participation in the Bidder's existing generating facility); and (3) an extension of the PPA spreadsheet model for evaluating the combination of renewable resources and energy storage options by calculating the levelized cost of renewable energy plus separate or bundled storage costs given the round-trip efficiencies proposed for charging and discharging the battery or storage facility;

The use of spreadsheet models to evaluate the LCOE values for various resource types and contract options was based on the expected energy generation profile, as provided by the bidder. Thus, for renewable resources, EPE used the estimated generation or generation profile provided by the bidder;

3. EPE also conducted an initial assessment of non-price factors in conjunction with the economic analysis for informing selection decisions. Non-economic criteria include development feasibility and completion risk criteria; financial and operational viability; operating characteristics; and other factors or criteria;
4. Following review of the proposals from an economic and non-economic perspective, EPE may select and enter into contract negotiations with proposals that in the opinion of EPE provide the greatest value to EPE and its customers. EPE also indicated it reserves the right to pursue contracts with other than the lowest price bidder if EPE determines that to do so would result in the greatest value or lowest risk to EPE and its customers.

The models were designed to calculate the levelized cost of each bid based on the pricing proposal submitted by each bidder subject to the input assumptions developed by EPE prior to receipt of bids. EPE planned to calculate two metrics using the spreadsheet models: (1) the models calculated the net present value of the total cost stream for each proposal over the contract term or economic life of the project divided by the net present value of the generation output over the same term and (2) the models calculated the net present value of the cost stream, calculated an annual annuity of the stream and divided by the annual average generation.

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For utility-owned projects, the cost stream included the capital cost associated with constructing the project as well as the cost of operating the project.<sup>13</sup> Annual costs (“Revenue Requirements”) were discounted based on the utility’s discount rate. The present value of revenue requirements was calculated as the sum of the discounted annual revenue requirements. The LCOE was then calculated as the present value of revenue requirements over the life of the resource divided by the present value of the annual Mega-watt hours (MWh) generated by the project. An LCOE value was calculated by EPE for all offers in 2018 dollars and 2022 or 2023 dollars. These spreadsheet models are best used to assess the costs of similar projects and select the best proposals or a short list of proposals from a group of similar projects.

As IE for the 2017 All Source RFP, the IE reviewed and commented on EPE’s spreadsheet models designed to calculate the LCOE values for each resource type including the PPA options, combination of renewable resources and energy storage and a revenue requirements model designed to evaluate utility ownership options, which could include a self-build resource, purchase of an existing generation asset, or a Build-Transfer option built by a third-party on a bidder owned site. The Merrimack Energy project team and EPE staff conducted several discussions about the revenue requirements model to ensure the model contained consistent assumptions and methodologies to reflect the valuation of a cost of service resource option.<sup>14</sup>

In addition to the economic evaluation, EPE also considered several non-economic factors in its evaluation, including factors associated with viability of the project including, but not limited to financial risk, technology risk and project execution risk.

After the change in the evaluation and selection process, the IE submitted several clarification questions to EPE as the basis for discussion regarding any potential changes that would occur in any aspect of the evaluation and selection process as a result of the change to a single step process. The IE asked questions about any changes to the LCOE models, capacity value estimates for wind and solar resources, preference for COD dates, shorter-term contracts, and process to address transmission assessments generally undertaken by EPE transmission planning team members.

During a call to discuss the above issues, EPE informed the IE that it was considering using additional information than just LCOE as the basis for selection of offers. EPE noted that based on the NOIs submitted, it expected that some bidders may offer larger projects that may be less costly if they can take advantage of economies of scale or longer-term contracts to lower LCOE values. However, since EPE’s goal for this RFP is primarily to meet 2020 RPS requirements of approximately 141,000 MWh, larger volumes and longer-term contracts could result in EPE paying a substantial amount of money to meet an earlier RPS need. It

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<sup>13</sup> For a project owned by the utility, the cost of service is based on utility annual revenue requirements associated with the project. For a PPA or tolling service agreement, the model assessment is based on the capacity charge, fixed O&M charge, variable O&M charge and fuel costs included in the bidders pricing proposal.

<sup>14</sup> Wayne Oliver of Merrimack Energy has served as Independent Evaluator for three large-scale EPE RFP processes and is very familiar with the bid evaluation process and methodologies used by EPE for bid evaluation purposes.

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was also expected by EPE and the IE that projects with later COD dates may be less expensive but will not meet the earlier RPS timing requirements. EPE suggested that it would also consider total annual procurement cost of proposals as opposed to strictly selecting resources based on LCOE values only which do not differentiate proposals by size or project type. The IE felt that this approach made economic sense and would serve to lower customer costs.

### **E. Transmission System Impact Assessment**

One of EPE's RFP project team concerns was the implication of transmission constraints and cost on project evaluation and selection. As EPE noted, the company system is constrained by transmission import limits given its physical location as a terminal point in the WECC. In addition, the RFP requires that all renewable energy that EPE may purchase pursuant to this RFP must be delivered to EPE's local transmission system (transmission system within EPE Balancing Authority Area) to ultimately serve EPE's New Mexico retail customers.<sup>15</sup>

As noted in the Renewable RFP document, delivery of power to EPE's local transmission system into Springville, Greenlee and West Mesa is constrained by WECC Path 47 and this factor will be taken into consideration during bid evaluation. Furthermore, if the resource is intermittent/non-dispatchable (e.g. solar and wind), the bid must also include a proposed method of dealing with regulating and balancing requirements, and any associated costs.

After EPE evaluates and identifies the proposals that best meet its objectives, those comprised of the most economical and reliable renewable resources based upon each resource's total cost to deliver the renewable energy to a substation on EPE's local transmission system, EPE will then select the preferred proposals. evaluate the shortlisted proposals from a transmission perspective. Such evaluation will include consideration of whether the preferred resources require network upgrades in order for EPE to receive the projects energy into the EPE local transmission system and/or in order to deliver the renewable energy to EPE's New Mexico retail customers. EPE will estimate the network upgrade costs associated with each selected proposal and include such costs in the overall evaluation. The winning bidders will be required to have in place or to secure Network or Energy Resource Interconnection service in a manner set forth in the EPE Large Generator Interconnection or Small Generator Interconnection Procedures.

The EPE RFP project team worked with other departments within EPE, including System Planning, during the evaluation process to ensure all projects that were expected to be considered for selection were evaluated to consider the impact of each potential preferred proposal on import capability, transmission line loading, voltage and frequency support. This

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<sup>15</sup> Where the bidder's resource is interconnected to a third-party transmission system, and not to the EPE local transmission or distribution system, the bidder should identify in its proposal (a) the charges assessed by the third-party transmission service provider, including applicable ancillary services, to reach the EPE transmission system; and (b) the point on the EPE transmission system at which the bidder's energy is to be tendered by the bidder to EPE. In addition, the proposal must be accompanied by a demonstration that the bidder has (or will) secure firm transmission capacity on such third-party systems, from the location of the resource to EPE's local transmission system. The bidder must also identify the total cost to have its resource delivered to a substation on EPE's local transmission system and must include those third-party transmission system costs in its proposal.

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input would be used to determine any system upgrades that would be essential to maintain a reliable grid. EPE assessed if any additional transmission upgrades were required to import the power into its local, underlying transmission system or to distribute the power within its underlying transmission system. Estimated costs for transmission upgrades were included in the analysis for all applicable proposals.

The requirements outlined in the RFP and methodology used by EPE is designed to ensure that all proposals are fairly treated from a transmission cost and access perspective given that transmission related issues can have a major impact on project success.

**Phase 3 – Receipt and Evaluation of Proposals**

**Receipt of Proposals**

Proposals were received at EPE’s offices on August 28, 2019 as requested. A Merrimack Energy staff member on the IE team was present at EPE’s offices for proposal opening and initial review. EPE provided Merrimack Energy a copy of each of the proposals received for review and to ensure the IE had access to all information used in the evaluation. Merrimack Energy also prepared a list of the proposals and alternatives submitted and provided the list to EPE for review and confirmation to ensure the Company and IE had accounted for all proposals and options received. EPE received a total of 69 proposal options from 16 Companies.<sup>16</sup> The proposals submitted represented a diverse range of technologies (see Table 3 below) and contract structures, including Power Purchase Agreements, Build-Transfer options, and equity participation offers for EPE. In addition, Bidders submitted a number of alternatives or proposal options which included different project sizes, in-service dates, solar and storage project structures, contract term and pricing options (fixed vs escalating prices). Table 3 below lists the proposals by product type.

**Table 3: Summary of the Proposals Received By Type of Project**

<b>Product/Technology</b>	<b>Number of Alternative Proposals</b>
Solar PV PPA	22 <sup>17</sup>
Solar PV and Storage PPA	30
Solar PV BTA	4
Solar PV and Storage BTA	8
Wind PPA	2
Wind and Storage Tolling PPA	1

<sup>16</sup> Galehead Development is counted as one company with two projects. Galehead Development submitted a proposal as the sole developer for the La Mesa PV 1 project. Galehead Development is also jointly developing a project with Elgin Energy, through Elgin Energy’s wholly-owned affiliate Solar PV Development NM 18 LLC.

<sup>17</sup> A number of bidders submitted proposals which included both stand-alone Solar PV projects as well as options which included Solar PV plus Energy Storage as a combined proposal. There were 13 project proposals that offered Solar PV options, while 15 project proposals included Solar plus Energy Storage options (including PPAs and BTAs). Twelve project proposals offered both stand-alone Solar PV and Solar plus Storage options, with a number of these submitting multiple proposals for solar plus storage with different size projects, different levels of discharge duration and different COD dates.

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Wind, Solar PV, and Storage Tolling PPA	1
Solar PV DG Capital Equipment Lease	1

Table 4 provides a summary of the proposals received based on the Bidder and Project names along with the type of resource proposed. The focus of Table 4 is on the name of the project and Bidder. This table provides an overall list of projects by resource types submitted. For example, it was common for bidders who submitted a solar PV option to also offer a combined solar + storage option in which the solar project is the source of charging energy for the storage component.

**Table 4: List of Bidders by Project Name and Resource Submitted**

<b>Bidder</b>	<b>Project Name</b>	<b>Resources Proposed</b>	<b>Total Proposals</b>
174 Power Global	Iris Solar	Solar PV PPA; Solar PV plus Storage PPA	3
Alpha Green Renewables	El Paso Solar	Solar PV BTA; Solar plus Storage BTAs	3
Community Energy	Santa Teresa Solar	Solar PV PPA; Solar plus Storage PPA	4
EDF Renewables	Pecos Wind	Wind PPA	1
EDF	Milagro Solar	Solar PV PPA; Solar plus Storage PPA	3
El Paso Electric	EPE Afton	EPC Turnkey/BTA	2
Entech		Solar PV PPA	2
Galehead	La Mesa PV	Solar PV plus Storage PPA	2
Geronimo Energy	Hidalgo Solar	Solar PV PPA; Solar plus Storage PPA; Solar PV BTA; Solar plus Storage BTA	9
Hecate	Santa Teresa 2	Solar PV PPA; Solar PV plus Storage PPA; Solar BTA	2
ibV Energy Partners	Isaack Lake Solar	Solar PV PPA; Solar PV plus Storage PPA	12
juwi	Bishop Cap Solar	Solar PV PPA; Solar PV plus Storage PPA; Solar PV BTA; Solar PV plus Storage BTA	8
NextEra	Coyote Energy Center	Solar PV PPA; Solar plus Storage PPA	3
NextEra	Buena Vista Energy Center	Solar PV PPA; Solar plus Storage PPA	3
PowerFin Partners	Solar Host	Distributed Generation Solar PV	1
Photosol US	Four Corners Solar	Solar PV PPA; Solar plus Storage PPA	4
Solar Development Holdings/Onyx	Deming Solar Farm	Solar PV PPA; Solar PV plus Storage PPA	2
Scout Clean Energy	Great Divide Wind Project	Wind PPA; Wind plus Storage PPA; Wind plus Solar PV plus Storage	3
Solar PV Development NM/Galehead	Elgin Energy	Solar PV plus Storage PPA	2

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### **Initial Proposal Review**

The first step following receipt of bids was for the bid evaluation team to review the proposals, determine if the bids were conforming to or in compliance with the eligibility and threshold requirements<sup>18</sup> of the RFP, and that the bidders provided the appropriate bid fees.<sup>19</sup> The team also agreed to prepare follow-up questions to bidders to clarify information about the bidder's proposals. Two bidders provided incomplete proposals. EPE requested that the bidders provide complete proposals. Eventually the two bidders were disqualified for non-conformance and non-viability, after EPE provided multiple opportunities for the bidders to offer a complying proposal.

EPE, in conjunction with the IE, who also identified information gaps, did issue a number of emails to bidders requesting follow-up information or clarifying information based on proposal information submitted by the Bidders. The IE agreed with EPE's approach to maintain flexibility with regard to allowing bidders to comply with proposal requirements.

### **Initial Proposal Review and Evaluation**

EPE began to review the proposals for purposes of conducting the evaluation shortly after proposals were submitted. The initial review conducted by both EPE and the IE was focused on those proposals that offered a 2020 in-service date and those proposals that offered a 2021 in-service date. The IE focused its initial review on identifying the most cost-effective proposals by year and proposal size to assess whether there were proposals available to meet EPE's objective for securing RPS compliant resources in the 2020 timeframe. While four proposals were submitted with a 2020 in-service date, all four proposals were high cost options and some offered larger projects than was required to meet the 2020 RPS.

### **Issuance of Term 1 Request for Proposals (Short-Term RFP)**

Based on the results of the initial review, which resulted in no reasonable or viable offers for a 2020 delivery date, EPE decided to contact the bidders who submitted the original proposals as well as power marketers and utilities to assess market opportunities for renewable energy resources available for 2020. EPE issued an RFP to the market on September 19, 2019 seeking renewable energy, including associated RECs from an existing facility to be delivered to EPE's local transmission system located in southern New Mexico and West Texas.<sup>20</sup> The RFP issued by EPE to the market was in the form of a Term Sheet seeking proposals for 2020 (called Term 1 by EPE). EPE noted it was seeking proposals for a renewable energy purchase to meet the recently passed New Mexico Renewable Energy Act's 20 percent RPS requirement. The IE was supportive of this decision based on the lack

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<sup>18</sup> The Eligibility and Threshold requirements are listed in Table 1.

<sup>19</sup> EPE did determine that every proposal submitted an appropriate bid fee.

<sup>20</sup> EPE clearly noted in the RFP letter sent to bidders that this Renewable Energy RFP for 2020 does not replace EPE's May 2019 RFP for Renewable Energy Resources for New Mexico. This Renewable Energy RFP was intended to provide compliance with the 2020 RPS. .

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of viable and reasonable proposals submitted via the 2019 RFP and the potential for short-term transactions for renewable energy as witnessed by the IE in western markets.

The short-term RFP sought 25 to 100 MW of renewable resources for delivery during the preferred period of June 2020 through August 2020<sup>21</sup> with a delivery point in southern New Mexico (identified points of delivery included Luna, Pyramid, Lordsburg, Hidalgo, Afton, the east side of the Eddy County HVDC interconnection, or from other points at which power can be imported into EPE's load serving territory). EPE identified four product options which were generally consistent with the WSPP products traded.

Proposals were due on October 18, 2019 to conform to the schedule implemented for the 2019 Renewable Energy RFP. However, EPE did not receive any proposals in response to the short-term RFP despite its aggressive approach for targeting the market for short-term renewable energy resources.

### **Detailed Proposal Review and Evaluation**

EPE continued to conduct its economic and non-economic analysis of the proposals submitted in response to the 2019 Renewable RFP. The IE also conducted its own assessment of the proposals from a price and non-price perspective. For the non-price assessment, the IE initially focused its review on those proposals which had an earlier in-service date (i.e., 2020 and 2021) and those which were lower cost. One of the concerns raised by the IE in discussions with the EPE team was that all the lower cost proposals with earlier in-service dates appeared to have optimistic schedules for completing their project on time even with caveats or conditions imposed for securing transmission access and meeting interconnection requirements. The IE was skeptical that these projects were capable of meeting the proposed in-service date.

The IE completed its initial evaluation of the PPA proposals in late September and also sent a few follow-up questions for the bidders to EPE. EPE completed its LCOE evaluation results shortly thereafter. EPE and the IE exchanged evaluation results for PPA proposals, discussed the differences in the evaluation methodology<sup>22</sup> and some of the assumptions (e.g. the IE used the weighted average cost of capital (WACC) from the 2017 All Source RFP as a place holder while EPE had updated the WACC), and assessed the LCOE rankings for each PPA proposal. The parties found that while there were differences in the LCOE calculations, the relative rankings were similar. The IE made adjustments to its analysis to reflect the updated WACC value and tested the results using EPE's Net Present Value ("NPV") methodology rather than the methodology applied by the IE. Based on these revisions, the LCOE results were very close. EPE and the IE held two meetings to review each proposal and reconcile any differences, including a few cases where there were differences in generation profiles and degradation rates. The result was that EPE and the IE agreed on the rankings of the lowest cost proposals.

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<sup>21</sup> EPE also indicated it would consider an offer for calendar year 2020.

<sup>22</sup> The IE discounted the costs back to a common date of 2020 while EPE discounted the costs to the COD date. The result was that the LCOE values calculated by the IE were consistently lower than EPE.



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The IE also reviewed EPE's Build Transfer (i.e., Revenue Requirements) model and the evaluation results for the utility-owned options. As expected, the results illustrated that the Build Transfer LCOE values were quite a bit higher than the PPA options.<sup>23</sup> In particular, for bidders that submitted both PPA and Build Transfer options, the Build Transfer costs were significantly higher on an LCOE basis. As a result, EPE decided to consider only PPA options for final selection.

EPE's bid evaluation process includes both price and non-price or risk factors in the analysis. While price was an important factor, in addition to price, EPE also assessed operational factors, non-economic criteria, and other risk factors for each project but does not rely on a specific scoring or ranking process for assessing the non-economic factors or risk factors associated within each of the proposals.<sup>24</sup>

EPE does weigh project location coupled with transmission access and cost as important criteria when considering shortlist selection. EPE's overall rationale is that if there are multiple low-cost proposals in a general location with a delivery constraint of X MW that would all deliver power to the same area of the system, at some point as more projects are stacked up in that area then the constraint would be affected and costs would increase since the system would need to be expanded. Also, EPE did not include a copy of any proforma contracts or term sheets with the RFP to provide a perspective to bidders of the contractual provisions required by the utility.

### **Transmission Analysis**

As a final step in the economic evaluation, EPE conducted a transmission analysis for each eligible project to calculate the levelized network upgrade cost to add to the levelized cost of the proposal. EPE initially identified the delivery point on its system for each project proposed. EPE then estimated the expected capital cost for the system upgrade at each of the delivery points proposed. EPE then used its revenue requirements model to estimate the annual revenue requirements associated with each project and generated a net present value (NPV) calculation associated with the network upgrade costs. EPE then divided the NPV of the revenue requirements stream for the network upgrade by the NPV of the MWh generated by the project based on the generation profile submitted by the Bidder to derive an

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<sup>23</sup> Third-party owned PPA solar PV projects are generally lower cost than BOT options because the third-party PPA option is generally able to take full advantage of the 30% Investment Tax Credits ("ITC") in year 1 of the project, while utility-owned solar PV options are required to spread out the tax benefits. Even though utilities are eligible for the ITC associated with solar projects, they are required to account for the ITC benefits differently than third-party solar providers. The difference in accounting treatment is driven by an IRS requirement for regulated utilities called "normalization accounting." Normalization accounting rules require utilities to levelize the ITC benefits when setting customer rates. In other words, the tax benefits associated with the ITC must benefit all customers over the life of the project. The intent of normalization accounting is a sense of ratepayer fairness. Allowing the utility to pass on (or flow through) all tax benefits to ratepayers in the period in which the benefits are incurred at the beginning of the project would lower rates in the early years and raise them in later years., thus unfairly benefitting current as compared to future ratepayers. The reasoning behind normalization accounting rule is that current and future ratepayers should equitably share the benefits of the ITC.

<sup>24</sup> EPE did conduct a non-economic assessment of each project but used the assessment as a means of identifying the viability of a project to inform selection.

## ***Report of the Independent Evaluator – March 2020***

incremental levelized cost of energy associated with the network upgrade that is then added to the levelized cost of the proposal to generate a total levelized cost for each proposal as the basis for ranking proposals.

Five solar PV proposals were close in terms of the LCOE values prior to including the LCOE costs associated with network upgrade costs. While four of the proposals had reasonably low LCOE values for network upgrade costs, one of the proposals had relatively high network upgrade costs. After accounting for network upgrade costs in the evaluation as well as project size,<sup>25</sup> two proposals were clearly ranked at the top from an LCOE perspective and both were classified as viable options.

### **Management Meeting**

An internal management meeting was held in mid-November to discuss the evaluation results from the 2019 RFP for Renewable Energy for New Mexico. The EPE project team manager noted that the objective of the RFP was to meet the 20% New Mexico RPS requirement in 2020 or as early as possible. He provided a summary of the requirements of the RFP and also provided an overview of the number and type of proposals submitted. He also discussed the overall pricing trends by COD, project structure (PPA vs BTA), and project size. The project manager indicated that the focus for selection of the preferred resources would be on the lowest cost options regardless of COD year since the earlier year projects (i.e., 2020 and 2021) had higher overall costs and lower project viability given the development hurdles relative to the COD date. The project manager noted that a selection criterion for EPE would be selecting resources with the lowest annual procurement costs as opposed to the lowest LCOE.

The project manager also discussed the evaluation results for each of the standalone renewable proposals and presented a recommendation to select two projects for a total of 70 MW as the preferred solution. The combination of the generation of the two projects exceeded the 141,000 MWh requirements and had the lowest annual cost of any other combinations of projects that were similar in size and scope. Through this process, EPE selected two Solar PV projects under 20-year PPA contracts for 50 MW with Hecate for the Santa Theresa 2 project and 20 MW with NextEra for the Buena Vista project. In addition to these proposals being among the lowest cost proposals from both a pricing and total annual cost perspective, the projects were also rated as low timing risk by the EPE RFP project team.

### **Resource Selection**

Bidders were notified of contract award on December 20, 2019. EPE selected two projects for contract negotiations.

1. Hecate Energy, LLC Santa Teresa project – 50 MW solar PV project under a 20-year PPA. The project has a Delivery Start Date of May 1, 2022 and is expected to produce 143,319 MWh in the first full year of operation. The project is anticipated to interconnect to

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<sup>25</sup> Two of the five proposals were larger projects in the 150 MW level.

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either the Santa Teresa substation or Verde substation in Dona Ana County, New Mexico. The bid price of the project is \$18.93/MWh fixed for the 20-year contract term.

2. NextEra Energy Resources Development Buena Vista project – 20 MW solar PV project under a 20-year PPA. The project has a Delivery Start Date of May 1, 2022 and is expected to produce 62,688 MWh in the first full year of operation. The project is anticipated to interconnect to the Chaparral Substation in Otero County, New Mexico. The bid price of the project is \$19.88/MWh fixed for the 20-year contract term.

Contracts with Hecate and NextEra were subsequently executed in March 2020.

## **V. Conclusions and Recommendations**

### **A. Conclusions**

The RFP procedures followed by EPE and the subsequent bid evaluation and selection processes and methodologies are, in substance, consistent with industry standards and represent a fair, consistent, and unbiased evaluation and selection process. The information included in the RFP, the evaluation process and evaluation criteria, and requirements are also consistent with industry standards. The following summarize some of the major considerations relative to the consistency of the RFP with industry standards.

In the opinion of Merrimack Energy, the bid evaluation and selection process was undertaken by EPE in a fair, consistent and comprehensive manner. In addition, in our view, this process was a very thorough, rigorous, and comprehensive evaluation and selection process, with every eligible bid scrutinized in detail. The implementation of the solicitation process was effectively managed by EPE, and should lead to economic benefits for consumers. Through this solicitation process, EPE issued two solicitations in an attempt to do all it could to meet New Mexico RPS requirements for 2020.

A list of important aspects of the bid evaluation and selection process is provided below.

1. The 2019 Renewable RFP solicitation process was a robust and competitive process, with many more Mega-watt hours (“MWh”) submitted relative to the amount required. Furthermore, there was a reasonable level of competition from several types of resource options and contract structures, notably solar PV PPA and BTA proposals, solar plus storage PPA and BTA options, wind, wind plus storage and wind plus solar PV plus storage PPA options and distributed generation. EPE received a total of 19 project proposals from 17 Bidders with a total of 69 alternative proposal options;
2. EPE, however, only received four proposals with 2020 COD dates. All of these proposals were fairly high cost options with questions regarding the ability of the project to meet a 2020 COD date. EPE and the IE also reviewed and evaluated

### ***Report of the Independent Evaluator – March 2020***

proposals with a 2021 COD date and concluded such proposals were not very viable and were not likely to achieve a 2021 COD date given their status of development;

3. The 2019 Renewable RFP documents were reasonably detailed and transparent documents that clearly identified the nature of the solicitation process and requirements, the products requested, the amount of energy required, eligible projects, characteristics of importance to EPE, the information required of the bidders' and the context of the solicitation within the EPE system. These documents allowed bidders to effectively reflect the requirements outlined in the RFP and related documents in structuring their proposals;
4. One criterion regarding the quality of the solicitation process is whether the procurement targets, products solicited, evaluation methodology and criteria, information required of bidders, and principles and objectives of the process are clearly defined in the bidding documents. EPE's RFP documents clearly defined the amount of renewable energy required and the timing for the requirements. While EPE revised the evaluation methodology after issuance of the RFP, EPE did inform bidders of the revisions to the document, provided information regarding the changes to the schedule and methodology and posted a new, red-lined and clean copy of the RFP on its website;
5. The outreach process was broad reaching and was targeted to a large number of potential bidders based on past solicitations and bidder contacts. The outreach activities were designed to attract a wide range of bidders. The types of outreach activities initiated included marketing of the 2019 Renewable RFP via direct contacts with known bidders, issuance of a press release associated with release of the RFP, and through industry trade publication options, bidder access to the EPE website for the RFP, the inclusion of a Bidders Conference, and response to bidder questions. In addition, EPE issued a short-term RFP for deliveries in 2020 in conjunction with the 2019 Renewable RFP to attempt to solicit offers from existing bidders and power marketers who may have product available to meet the 2020 RPS requirements. Although EPE was not successful in securing renewable energy for the 2020 timeframe to meet its New Mexico RPS requirements, it was not for lack of aggressively soliciting offers from potential bidders to provide these requirements;
6. As outlined in the RFP, EPE initially proposed to implement a two-stage price evaluation process to reach final selection. However, after revising the schedule to allow bidders three months to prepare a proposal, EPE decided to revise its process to be a single-stage pricing process. EPE's review and evaluation included the following steps: eligibility and threshold requirements, economic evaluation of the proposals submitted, non-economic assessment, resource selection, and contract negotiations with the selected proposals. The result was, in substance, a reasonable process consistent with industry standards, particularly in a situation where the schedule is short by nature in an attempt to secure resources for a very early COD date to qualify to meet 2020 RPS requirements;

### ***Report of the Independent Evaluator – March 2020***

7. EPE did make one major change to the evaluation process that was not transparent to bidders but was designed to be beneficial to ratepayers. EPE indicated to the IE that another criterion it would consider in the evaluation was to assess the total cost to bidders associated with the proposal selection. EPE included this criterion because several bidders offered proposals with energy output much higher than EPE required. If LCOE values were the basis of ranking and selection, it would be possible for a larger proposal to have a lower LCOE value even if the generation is not needed to meet early year RPS requirements. As the process evolved, this potential was not a factor since EPE selected two of the lowest cost offers from an LCOE perspective, which also represented the lowest cost portfolio overall and were viable offers that also provided generation that closely matched its requirements, although coming on line two years after the proposed RPS need date of 2020;
8. EPE took steps to ensure there were no inherent advantages afforded to the self-build options that were submitted by EPE's generation group. As noted, EPE retained an IE at the very beginning of the RFP development process to oversee the solicitation process and ensure the process was fair and equitable to all bidders. The self-build options were submitted at the same time as other proposals, with the IE present for "bid opening" and initial review and summary. In addition, the self-build team followed the protocols identified in the All Source RFP for all bidders and provided the same information as required of other bidders. EPE informed the IE that a separate self-build team was established to prepare the self-build options and that no member of the self-build team would be involved in bid evaluation. Also, all files associated with the proposals received, evaluation results, and other information that needed to be shared among the members of the RFP evaluation team were stored in a document management system ("Live-Link"), with restricted access only to select members of the All Source RFP evaluation team. In addition, EPE had a shared network drive accessible only by the Resource Planning Department;
9. EPE engaged bidders throughout the process including requesting information from bidders to ensure their proposals conformed to the RFP requirements. Only one bidder was deemed to be non-conforming regarding the requirements of the RFP for bidder eligibility;
10. The project portfolio selected for contract negotiations; the Hecate Santa Teresa (50 MW solar PV project) with a 5/1/2022 delivery date and the NextEra Buena Vista (20 MW solar PV project) with a 5/1/2022 delivery date represents two of the lowest cost projects from an LCOE perspective. The projects together are expected to produce approximately 206,000 MWh in the first full year of operations. The combination of the two projects also offer the lowest cost portfolio, with an annual cost of \$4.5 million, lower than any other portfolio which produces the same or similar amount of annual output;
11. In the IE's view, EPE's evaluation and selection process was generally consistent throughout the process and was reviewable and verifiable by the IE. Merrimack Energy's independent review of the quantitative and qualitative evaluation confirms

## ***Report of the Independent Evaluator – March 2020***

that the proposals were consistently and fairly evaluated from both a quantitative and qualitative perspective;

In conclusion, it is our view that the solicitation process and assessment undertaken by EPE was fair, consistent, comprehensive and unbiased. EPE established procedures and rules that guided the evaluation and selection process. While EPE allowed flexibility to bidders to offer proposal variations in order to provide the most competitive and reliable options possible, EPE was consistent in its approach to all bidders. The resulting portfolio of resources selected by EPE includes the lowest cost resource options proposed. The low costs for the resources selected will result in benefits to customers over the longer term while also serving to diversify EPE's generation resource portfolio and enhancing EPE's ability to meet RPS requirements in New Mexico.

### **B. Recommendations**

1. Since EPE has now negotiated and executed several PPAs for solar PV, solar PV plus storage, and stand-alone storage options, the IE recommends that EPE develop pro forma contracts or detailed Term Sheets that could be included in similar future solicitations to allow bidders to price in the risks included in the pro forma agreements.
2. EPE values non-price factors such as project viability, operational factors, and operational flexibility in its resource selection process given the size and nature of its system. The IE believes that EPE should assess how the qualitative criteria should be applied in future RPS solicitations based on the results of the All Source RFP and the 2019 RFP. For example, should the shortlist selection process be more formalized to include a combined price and non-price score or combine price analysis with risk analysis as the basis for shortlist selection. Both approaches are consistent with industry standards.
3. Merrimack Energy has suggested that EPE may want to consider enhancing its templates for collecting pricing and operational data for each proposal to allow for more consistent and detailed input files so that the information provided could be directly linked to the evaluation models.

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

<b>AMENDED APPLICATION FOR APPROVAL OF )</b>	
<b>EL PASO ELECTRIC COMPANY'S AMENDED )</b>	
<b>2019 RENEWABLE ENERGY ACT PLAN AND )</b>	
<b>2020 RENEWABLE ENERGY ACT PLAN )</b>	
<b>PURSUANT TO THE RENEWABLE ENERGY )</b>	<b>CASE NO. 19-00099-UT</b>
<b>ACT AND 17.9.572 NMAC, AND THIRD )</b>	
<b>REVISED RATE NO. 38 – RPS COST RIDER )</b>	
<b>EL PASO ELECTRIC COMPANY, )</b>	
<b>Applicant. )</b>	
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**DECLARATION OF WAYNE OLIVER IN SUPPORT  
OF THE FOREGOING DIRECT TESTIMONY TO THE APPLICATION FOR  
APPROVAL OF EL PASO ELECTRIC COMPANY'S 2019-2020 RENEWABLE  
ENERGY PLAN PURSUANT TO THE RENEWABLE ENERGY ACT**

I *Wayne Oliver*, pursuant to Rule 1-011 NMRA, state as follows:

1. I affirm in writing under penalty of perjury under the laws of the State of New Mexico that the following statements are true and correct.
  
2. I am over 18 years of age and have personal knowledge of the facts stated herein. I am employed by El Paso Electric Company ("EPE" or "the Company") as an *Independent Evaluator – Merrimack Energy Group, Inc.*
  
3. The foregoing Direct Testimony of Wayne Oliver, together with all exhibits sponsored therein and attached thereto, is true and accurate based on my knowledge and belief.
  
4. I submit this Declaration, based upon my personal knowledge and upon information and belief, in support of EPE's *Application for Approval of El Paso Electric Company's 2019-2020 Renewable Energy Plan Pursuant to the Renewable Energy Act.*

FURTHER, DECLARANT SAYETH NAUGHT.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on MARCH 26, 2020.

  
WAYNE OLIVER



**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

**AMENDED APPLICATION FOR APPROVAL OF )  
EL PASO ELECTRIC COMPANY'S AMENDED )  
2019 RENEWABLE ENERGY ACT PLAN AND )  
2020 RENEWABLE ENERGY ACT PLAN )  
PURSUANT TO THE RENEWABLE ENERGY )  
ACT AND 17.9.572 NMAC, AND THIRD )  
REVISED RATE NO. 38 – RPS COST RIDER )  
)  
EL PASO ELECTRIC COMPANY, )  
Applicant. )  
\_\_\_\_\_ )**

**CASE NO. 19-00099-UT**

**DIRECT TESTIMONY**

**OF**

**RENE F. GONZALEZ**

**MARCH 31, 2020**

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**EXHIBITS**

Exhibit RFG-1	Reconciliation of 2019 Renewable Portfolio Standard Costs and Revenues
Exhibit RFG-2	Calculation of the 2021 Renewable Portfolio Standard Cost Rider
Exhibit RFG-3	Residential Bill Impacts

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**I. INTRODUCTION AND QUALIFICATIONS**

**Q. PLEASE STATE YOUR NAME, BUSINESS ADDRESS AND OCCUPATION.**

**A.** My name is Rene F. Gonzalez, and my business address is 100 N. Stanton Street, El Paso, Texas, 79901.

**Q. HOW ARE YOU EMPLOYED?**

**A.** I am employed by El Paso Electric Company ("EPE" or the "Company") as a Senior Rate Analyst in the Rates and Regulatory Affairs section.

**Q. PLEASE SUMMARIZE YOUR EDUCATIONAL AND PROFESSIONAL QUALIFICATIONS.**

**A.** In 2005, I graduated from the University of Texas at El Paso with a Bachelor of Business Administration with a double major in Economics and Finance. After graduation, I joined ADP (Automatic Data Processing) as an Account Executive in the Insurance Services Division as a licensed Property and Casualty insurance agent specializing in the sale of Workers Compensation Insurance. I subsequently transferred within the same division to work as a Retention Specialist. In 2010, I obtained a position with the City of El Paso as a Procurement Analyst in the Purchasing Department.

1 I have worked with EPE in the Rate Research section of the Rates and  
2 Regulatory Affairs group since October 2012. I was first hired as an Associate Rate  
3 Analyst. In November of 2014, I earned a progressive promotion to Staff Financial  
4 Analyst. In 2016, after receiving a graduate certificate from New Mexico State  
5 University in Public Utility Regulation & Economics, I earned a progressive  
6 promotion to Senior Rate Analyst.

7 In addition to the above education and profession experience, I have  
8 attended professional development seminars covering rate design, marginal cost,  
9 load research statistical applications, and transmission and distribution systems.

10

11 **Q. PLEASE DESCRIBE YOUR CURRENT RESPONSIBILITIES WITH EPE.**

12 **A.** As a Senior Rate Analyst in the Rates and Regulatory Affairs section, I am  
13 responsible for preparing economic, customer, statistical, cost, and rate design  
14 studies and analysis; developing models and methodologies for cost of service,  
15 profitability, and pricing studies; and conducting annualization, jurisdictional, and  
16 class cost of service studies. I often perform this work as part of a team.

17

18 **Q. HAVE YOU PRESENTED TESTIMONY BEFORE UTILITY**  
19 **REGULATORY BODIES?**

20 **A.** Yes, I have previously filed testimony with the Public Utility Commission of Texas  
21 ("PUCT").

1

2

**II. PURPOSE OF TESTIMONY**

3

**Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

4

**A.** The purpose of my testimony is to present EPE's reconciliation of actual 2019 Renewable Portfolio Standard Cost Rider ("RPS Rider") revenues to actual costs. I also present EPE's proposed RPS Rider for the 2021 Plan Year and an illustrative RPS Rider for the Next Plan Year (2022) which is based on anticipated costs and RECs from the proposed procurements which are expected to be commercially operational in 2022.

5

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11

**Q. ARE YOU SPONSORING ANY EXHIBITS IN THIS FILING?**

12

**A.** Yes, I am sponsoring the exhibits listed in the Table of Contents.

13

14

**III. RECONCILIATION OF THE 2019 RPS RIDER CALCULATION**

15

**Q. WHAT ARE THE ACTUAL COSTS USED IN EPE'S RECONCILIATION OF THE 2019 RPS RIDER CALCULATION?**

16

17

**A.** The total actual costs used in the reconciliation were \$15,534,353. This total includes the following:

18

19

- Actual 2019 procurement costs for EPE's RPS resources that were approved by the New Mexico Public Regulatory Commission ("Commission") in Case No. 18-00109-UT are \$15,532,986; and

20

21

- 1           • Western Renewable Energy Generation Information System ("WREGIS")  
2           fees incurred during 2019 in the amount of \$1,367.

3           These actual costs are consistent with the invoiced contract costs included  
4           with EPE RPS report for 2019, which will be filed on May 1, 2020.

5  
6   **Q. PLEASE DESCRIBE THE ACTUAL REVENUES USED IN THE 2019**  
7   **RECONCILIATION.**

8   **A.** The actual revenues refers to the 2019 revenues of \$16,192,176 billed to customers  
9           under Rate No. 38 – Renewable Portfolio Standard Cost Rider rate schedule. The  
10          Commission approved that rate schedule in Case No. 18-00109-UT, which went  
11          into effect January 1, 2019.

12  
13   **Q. PLEASE EXPLAIN EPE'S RECONCILLIATION OF THE 2019 RPS**  
14   **RIDER.**

15   **A.** EPE compared the actual costs described above against actual revenues also  
16          described above. Exhibit RFG-1 outlines the reconciliation.

17  
18   **Q. WHAT DO THE RESULTS OF THE RECONCILIATION INDICATE?**

19   **A.** As shown in Exhibit RFG-1, the reconciliation indicates 2019 RPS Rider revenue  
20          exceeding actual cost by \$657,823, or 4.2 percent. Most of that variance is  
21          attributable to a \$370,333 difference between the 2019 Plan Year Portfolio

1 Procurement Costs, which were projected at \$15,982,266 and 2019 actual costs  
2 which were \$15,534,353. The remaining variance of \$287,490 is the result of actual  
3 energy sales exceeding projected energy sales.

4  
5 **Q. WHAT IS EPE PROPOSING TO DO WITH THE 2019 RECONCILIATION**  
6 **AMOUNT?**

7 **A.** EPE proposes to incorporate the \$657,823 overcollection as an offset to forecasted  
8 2021 Plan Year Portfolio Procurement Cost, reducing the amount to be recovered  
9 from customers in EPE's proposed RPS Rider rate for billing in 2021. This is  
10 explained in the following section of my testimony.

11

12 **IV. 2021 RPS COST RIDER**

13 **Q. HOW DOES EPE CALCULATE ITS 2021 RPS COST RIDER?**

14 **A.** EPE calculates the RPS cost rider by dividing Net Plan Year Portfolio Procurement  
15 Cost by Net Forecasted New Mexico Jurisdictional kiloWatt-hour ("kWh") Sales  
16 in each plan year. The resulting \$/kWh rider will apply to all monthly retail energy  
17 sales.

18

19 **Q. WHAT IS EPE'S PROPOSED 2021 RPS COST RIDER?**

20 **A.** Exhibit RFG-2 presents the calculation of the proposed 2021 RPS cost rider of  
21 \$0.011158 per kWh.

1 As discussed earlier, and as presented in Exhibit RFG-2, EPE proposes to  
2 incorporate and apply the over-collection of \$657,823 for 2019 to the 2021 RPS  
3 Plan Year Portfolio Procurement Cost of \$19,894,014 as calculated by EPE witness  
4 Omar Gallegos in his Exhibit OG-3. The proposed 2021 RPS Rider costs of  
5 \$19,894,014 reflect a 17.8 percent increase from the current 2020 RPS Rider costs  
6 of \$16,886,451 as seen in Exhibit OG-3. Dividing the Net Plan Year Portfolio  
7 Procurement Cost by 2021 forecasted retail sales for New Mexico customers  
8 produces the proposed RPS Cost Rider of \$0.011158 per kWh reflected in the  
9 revised Rate No. 38 presented in the testimony of EPE witness James Schichtl.

10

11 **Q. HOW DOES RECONCILIATION OF 2019 RPS COSTS AND REVENUES**  
12 **IMPACT THE PROPOSED 2021 RPS RIDER?**

13 **A.** Reconciliation of the 2019 Plan Year actual costs and RPS Rider revenues produced  
14 an overcollection of \$657,823 which is applied against 2021 Plan Year  
15 Procurement Costs in calculating the proposed RPS Cost Rider. If approved by the  
16 Commission, the calculated factor of \$0.011158 per kWh will go into effect in  
17 January 1, 2021.

18

19 **Q. HAS EPE CALCULATED BILL IMPACTS AS A RESULT OF THE**  
20 **CHANGE RPS COST RIDER FROM 2020 TO 2021?**





El Paso Electric Company  
2019-2020 Plan Filing  
Reconciliation of 2019 Renewable Portfolio Standard Costs and Revenues

2019	Hatch	NRG	Sun Edison EPE1	Sun Edison EPE2	Macho Springs	CRLEF	SWEC	Holloman AFB	Distributed Generation	RPS Procurement Cost	WREGIS	Total REC Cost	RPS Cost Rider	(Over)/Under Recovery
January	\$ 95,631.22	\$ 358,860.86	\$ 199,186.26	\$ 199,685.21	\$ -	\$ 44,354.22	\$ 45.24	\$ -	\$ 97,976.14	\$ 995,739.15	\$ -	\$ 995,739.15	\$ 1,250,969.03	\$ (255,229.88)
February	89,880.64	385,005.53	185,684.27	203,925.25	-	35,992.20	71.89	-	117,538.29	1,018,098.07	189.30	1,018,287.37	\$ 1,235,124.02	(216,836.65)
March	119,136.61	516,861.06	206,002.27	264,409.52	-	44,670.21	107.38	-	125,214.28	1,276,401.33	35.41	1,276,436.74	\$ 1,082,127.65	194,309.09
April	136,806.37	647,991.04	256,652.86	303,646.29	-	45,028.83	120.77	-	154,401.46	1,544,647.62	-	1,544,647.62	\$ 1,073,626.83	471,020.79
May	151,762.91	725,495.90	280,383.10	327,876.73	-	36,139.32	134.29	-	165,246.14	1,687,038.39	979.24	1,688,017.63	\$ 1,173,888.19	514,129.44
June	148,647.64	719,195.76	278,018.31	309,867.29	-	53,195.25	112.32	-	166,772.51	1,675,809.08	10.25	1,675,819.33	\$ 1,365,464.42	310,354.91
July	129,846.10	649,151.20	240,935.16	282,895.33	-	40,617.87	-	-	157,885.62	1,501,331.28	22.80	1,501,354.08	\$ 1,707,147.74	(205,793.66)
August	127,204.23	572,644.34	246,204.88	271,962.76	-	48,153.87	-	-	150,610.63	1,416,780.71	14.79	1,416,795.50	\$ 1,796,387.82	(379,592.32)
September	115,051.68	542,745.83	192,881.56	234,271.19	-	37,853.61	-	-	158,405.47	1,281,209.34	12.99	1,281,222.33	\$ 1,890,955.50	(609,733.17)
October	117,314.42	514,818.89	228,153.40	270,876.24	-	23,791.29	-	-	136,330.98	1,291,285.22	45.78	1,291,331.00	\$ 1,392,238.76	(100,907.76)
November	90,013.43	312,302.08	160,740.09	182,056.09	-	42,410.61	-	-	120,448.37	907,970.67	56.89	908,027.56	\$ 1,087,495.36	(179,467.80)
December	94,984.35	325,670.68	171,657.13	194,070.00	-	57,015.48	-	-	93,277.02	936,674.66	-	936,674.66	\$ 1,136,751.13	(200,076.47)
<b>Total</b>	<b>\$ 1,416,279.60</b>	<b>\$ 6,270,743.17</b>	<b>\$ 2,646,499.29</b>	<b>\$ 3,045,541.90</b>	<b>\$ -</b>	<b>\$ 509,222.76</b>	<b>\$ 591.89</b>	<b>\$ -</b>	<b>\$ 1,644,106.91</b>	<b>\$ 15,532,985.52</b>	<b>\$ 1,367.45</b>	<b>\$ 15,534,352.97</b>	<b>\$ 16,192,176.45</b>	<b>\$ (657,823.48)</b>
											Variance>>			4.2%

El Paso Electric Company  
2019-2020 Plan Filing  
Renewable Portfolio Standard Cost Rider

Line No.	(a) Description	(b) Reference	(c) 2020	(d) 2021	(e) 2022
1	Plan Year Portfolio Procurement Cost	Exhibit OG-3	\$ 16,886,451	\$ 19,894,014	\$ 18,610,138
2	2019 (Over)/Under Collection	Exhibit RFG-1	\$ -	\$ (657,823)	\$ -
3	Net Plan Year Portfolio Procurement Cost		<u>\$ 16,886,451</u>	<u>\$ 19,236,191</u>	<u>\$ 18,610,138</u>
4	Net Forecasted New Mexico Jurisdictional kWh Sales	Exhibit OG-1	<u>1,711,307,257</u>	<u>1,724,010,083</u>	<u>1,733,289,306</u>
5	Renewable Portfolio Standard Cost Rider, per kWh		0.009868	\$ 0.011158	\$ 0.010737

El Paso Electric Company  
2019-2020 Plan Filing  
Residential Summer/Winter Monthly Bill Impact

Line No.	(a) Description	(b) kWh	(c) - (f) Typical Residential Bill - Summer* (May - October)			
			(c) Current	(d) Proposed	(e) \$ Change	(f) % Change
1	Customer Charge	-----	\$ 7.00	\$ 7.00	\$ -	0.0%
2	Energy Charge (\$/kWh) First 600 kWh Summer (May-Oct)	600	\$ 45.17	\$ 45.17	\$ -	0.0%
3	Energy Charge (\$/kWh) All other kWh Summer (May-Oct)	180	\$ 16.81	\$ 16.81	\$ -	0.0%
4	Subtotal - Non-Fuel Base Charges		\$ 68.98	\$ 68.98	\$ -	0.0%
5	Fuel Charge	780	\$ 15.31	\$ 15.31	\$ -	0.0%
6	RPS Cost Rider	780	\$ 7.12	\$ 8.70	\$ 1.58	22.2%
7	Federal Tax Credit		\$ (2.67)	\$ (2.67)	\$ -	0.0%
8	EUERF	780	\$ 2.73	\$ 2.78	\$ 0.05	1.8%
9	Total Bill @ 780 kWh		\$ 91.47	\$ 93.10	\$ 1.63	1.8%

Line No.	(a) Description	(g) kWh	(h) - (k) Typical Residential Bill - Winter* (November - April)			
			(h) Current	(i) Proposed	(j) \$ Change	(k) % Change
10	Customer Charge	-----	\$ 7.00	\$ 7.00	\$ -	0.0%
11	Energy Charge (\$/kWh) Winter	554	\$ 36.17	\$ 36.17	\$ -	0.0%
12	Subtotal - Non-Fuel Base Charges		\$ 43.17	\$ 43.17	\$ -	0.0%
13	Fuel Charge	554	\$ 10.88	\$ 10.88	\$ -	0.0%
14	RPS Cost Rider	554	\$ 5.06	\$ 6.18	\$ 1.12	22.2%
15	Federal Tax Credit		\$ (1.67)	\$ (1.67)	\$ -	0.0%
16	EUERF	554	\$ 1.77	\$ 1.80	\$ 0.03	2.0%
17	Total Bill @ 554 kWh		\$ 59.20	\$ 60.36	\$ 1.16	2.0%

\*Bill Impact excludes Franchise Fees and Taxes

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

<b>AMENDED APPLICATION FOR APPROVAL OF )</b>	
<b>EL PASO ELECTRIC COMPANY'S AMENDED )</b>	
<b>2019 RENEWABLE ENERGY ACT PLAN AND )</b>	
<b>2020 RENEWABLE ENERGY ACT PLAN )</b>	
<b>PURSUANT TO THE RENEWABLE ENERGY )</b>	<b>CASE NO. 19-00099-UT</b>
<b>ACT AND 17.9.572 NMAC, AND THIRD )</b>	
<b>REVISED RATE NO. 38 – RPS COST RIDER )</b>	
<b>EL PASO ELECTRIC COMPANY, )</b>	
<b>Applicant. )</b>	
<hr/>	

**DECLARATION OF RENE F. GONZALEZ IN SUPPORT  
OF THE FOREGOING DIRECT TESTIMONY TO THE APPLICATION FOR  
APPROVAL OF EL PASO ELECTRIC COMPANY'S 2019-2020 RENEWABLE  
ENERGY PLAN PURSUANT TO THE RENEWABLE ENERGY ACT**

I *Rene F. Gonzalez*, pursuant to Rule 1-011 NMRA, state as follows:

1. I affirm in writing under penalty of perjury under the laws of the State of New Mexico that the following statements are true and correct.
2. I am over 18 years of age and have personal knowledge of the facts stated herein. I am employed by El Paso Electric Company ("EPE" or "the Company") as a *Senior Rate Analyst in Rates and Regulatory Affairs*.
3. The foregoing Direct Testimony of Rene. F. Gonzalez, together with all exhibits sponsored therein and attached thereto, is true and accurate based on my knowledge and belief.
4. I submit this Declaration, based upon my personal knowledge and upon information and belief, in support of EPE's *Application for Approval of El Paso Electric Company's 2019-2020 Renewable Energy Plan Pursuant to the Renewable Energy Act*.

FURTHER, DECLARANT SAYETH NAUGHT.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 25, 2020.

/s/ *Rene F. Gonzalez*

*RENE. F. GONZALEZ*

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

**AMENDED APPLICATION FOR APPROVAL OF )  
EL PASO ELECTRIC COMPANY'S AMENDED )  
2019 RENEWABLE ENERGY ACT PLAN AND )  
2020 RENEWABLE ENERGY ACT PLAN )  
PURSUANT TO THE RENEWABLE ENERGY )  
ACT AND 17.9.572 NMAC, AND THIRD )  
REVISED RATE NO. 38 – RPS COST RIDER )  
)  
EL PASO ELECTRIC COMPANY, )  
Applicant. )**

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**CASE NO. 19-00099-UT**

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that *El Paso Electric Company's Amended Application for Approval of its Amended 2019 Renewable Energy Act Plan and 2020 Renewable Energy Act Plan and Third Revised Rate No. 38-RPS Cost Rider* was emailed on March 31, 2020, to each of the following:

Nancy Burns	<a href="mailto:nancy.burns@epelectric.com">nancy.burns@epelectric.com</a> ;	Jason Marks	<a href="mailto:lawoffice@jasonmarks.com">lawoffice@jasonmarks.com</a> ;
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**DATED** this 31<sup>st</sup> day of March 2020.

By: /s/ Kari E. Olson  
Kari E. Olson