OPERATIONS AND MAINTENANCE
AGREEMENT

**BY AND BETWEEN

EL PASO ELECTRIC COMPANY,**

 **as Owner

and

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_,**

 **as Operator**

**Dated as of \_\_\_\_\_\_\_\_\_\_ \_\_, 2019**

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Exhibit B Project and Site Descriptions

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**OPERATIONS AND MAINTENANCE AGREEMENT**

This Operations and Maintenance Agreement (this “Agreement”) is entered into as of \_\_\_\_\_\_ \_\_, 2019, by and between El Paso Electric Company, a Texas corporation (“Owner”), and \_\_\_\_\_\_\_\_\_\_\_\_\_, a \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Operator”). Owner and Operator are sometimes referred to herein each as a “Party” and collectively as the “Parties”.

**RECITALS**

**WHEREAS**, Owner is the owner of a solar photovoltaic electric generating facility, as more fully described in Exhibit B (the “Project”);

**WHEREAS**, Operator is knowledgeable and experienced in the operation and maintenance of solar photovoltaic electric generating facilities similar to the Project;

**WHEREAS**, in accordance with the terms and conditions set forth herein, Owner desires to engage Operator to operate and maintain the Project; and

**WHEREAS**, capitalized terms used and not otherwise defined herein shall have the respective meanings set forth in Exhibit A;

 **NOW, THEREFORE**, in consideration of the foregoing and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

# SERVICES

## **Engagement of Operator**.

On the terms and conditions set forth in this Agreement, Owner hereby engages Operator to perform the Services (as defined below), including the Services as set forth in Exhibit C, and the Additional Services, if any, in accordance with the procedure set forth in Section 1.04(c), all in consideration of the Service Fees set forth in Article 2. Operator hereby accepts the engagement and agrees to perform the Services in accordance herewith.

## **Relationship of the Parties**.

Operator has been retained by Owner as an independent contractor to operate and maintain the Project on behalf of Owner pursuant to the terms and conditions hereof and shall not be an employee or, except as expressly provided in this Agreement, an agent of Owner. Nothing contained in this Agreement shall be construed as constituting a joint venture or partnership between Owner, on the one hand, and Operator, on the other hand. Owner has delegated to Operator the overall responsibility of operating and maintaining the Project for the production of electricity for sale by Owner, subject to the terms and conditions hereof.

## **Services**.

During the Service Period, Operator shall operate, and maintain the Project and provide the services expressly provided herein, including the Services and, if applicable, the Additional Services agreed to by written Change Order, for the Project in accordance with the terms and conditions of this Agreement (collectively, the “Services”).

## **Operator Services**.

### **Services**. Subject to the terms and conditions of this Agreement, including, without limitation, Section 1.07, throughout the Term, Operator shall provide the Services to Owner which shall include, but shall not be limited to, those services as described in Exhibit C. The Parties hereby acknowledge and agree that, subject to Section 2.08, Owner may update Exhibit C from time to time and that promptly following any such update Owner shall provide Operator with a copy of such updated Exhibit C.

### [Intentionally Omitted.]

### **Additional Services**. Subject to the terms and conditions of this Agreement, including, without limitation, Section 1.03 and clause (g) of this Section 1.04, if Owner desires that Operator provide services not contemplated or otherwise included in this Agreement (“Additional Services”), then Owner shall submit to Operator a written request for such services. If Operator is reasonably capable of providing such services, Operator shall provide the same to Owner on mutually agreeable terms and conditions, as set forth in a written Change Order; provided, that the associated costs are either contemplated in the applicable then-current O&M Budget or consented to by Owner in its sole discretion via the execution of a mutually agreed Change Order. Examples of Additional Services shall include, but shall not be limited to, those services as described in Exhibit D.

### **Title**. Good, exclusive and marketable title to all goods, materials, equipment and parts, including (subject to subsection (e)) Spares, and documents (including manuals, data, designs, drawings, plans, specifications, reports and accounts), required to operate and maintain the Project in accordance with this Agreement shall vest in Owner upon payment by Owner therefor; provided, that such transfer of title shall in no way affect Operator’s obligations as set forth in the other provisions of this Agreement. All documents (including manuals, data, designs, drawings, plans, specifications, reports and accounts) supplied as part of the Services shall be available for review by Owner; provided that Owner’s review or approval of any such documents shall not relieve Operator of its responsibility to perform its obligations under this Agreement. Operator shall deliver all such documents to Owner upon expiration or termination of this Agreement; provided, further, that Operator shall be entitled to retain for its own purposes a copy of all such documents prepared by Operator. Notwithstanding any provision of this Agreement to the contrary, all Intellectual Property of Operator owned by or under license to Operator shall remain property of Operator.

### **Spares; Used or Refurbished Equipment**.

#### During the Term, Operator shall:

##### use commercially reasonable efforts to efficiently utilize the initial inventory of Spares located at the Site required for the operation and maintenance of the Project at the Site; and

##### except to the extent covered by any Supplier Warranties then in effect (whether directly, by assignment or otherwise), procure the supply of and provide Spares utilized in Project repairs or replacements at the actual cost thereof (following the exhaustion of the initial inventory thereof referred to in clause a. above) from reputable providers reasonably acceptable to Owner.

#### With respect to those Subcontractors that intend to discontinue the manufacture of Spares and provide notice thereof to Operator, then to the extent that, under the terms of the relevant Subcontract, Operator is entitled to afford Owner an opportunity to order such Spares, Operator shall promptly give notice to Owner thereof. With respect to those Subcontractors that intend to discontinue the manufacture of Spares and for whom, under the terms of the relevant Subcontract, Operator is not entitled to afford Owner an opportunity to order Spares, Operator shall promptly identify suitable replacement components.

#### To the extent that Owner holds title to any Spares in the possession of Operator at a location other than at the Site, Operator shall clearly indicate Owner’s title on the Spares themselves and any records relating to those Spares.

#### Without the prior written approval of Owner, Operator may not procure used or refurbished equipment or parts for incorporation into the Project, whether in connection with repairs, outages, routine maintenance or otherwise.

### **Emergencies**. In the event of an Emergency at the Site, notwithstanding anything in this Agreement to the contrary, Operator shall take such action as is necessary and reasonable, in accordance with Applicable Standards, to prevent, avoid, or mitigate injury, damage, or loss or to minimize the adverse consequences thereof at the Site. As soon as practicable but in any event within forty-eight (48) hours after Operator becomes aware of any Emergency, Operator shall provide a written report to Owner summarizing the nature of such Emergency, the corrective actions taken by Operator and the probable duration of such Emergency.

### **Subcontracts**.

#### Without the prior written consent of Owner (not to be unreasonably withheld or delayed), Operator shall not enter into or permit any Subcontract in an amount in excess of $10,000.

#### Without limiting the foregoing clause (i), each Subcontract (A) shall be in writing, (B) shall permit the assignment thereof by Operator (or, if Operator is not a party thereto, the applicable Subcontractor) to Owner, at any time upon notice but without any further consent of the other party to such Subcontract (the “Subcontract Counterparty”), and (C) to the extent that any Subcontract requires the Subcontract Counterparty to indemnify Operator (or, if Operator is not a party thereto, the applicable Subcontractor), Operator shall use reasonable efforts to ensure that Owner and its Affiliates are expressly named as indemnitees with respect to any such indemnification obligation.

#### For the avoidance of doubt, and without limiting Operator’s obligations under the preceding subsections (i) and (ii) of this Section 1.04, no Subcontract shall have the effect hereunder of relieving Operator from any of its obligations under this Agreement or its responsibility for the Services. Operator shall at all times be responsible for the acts, omissions, failures and faults of any Subcontractor as fully as if they were the acts, omissions, failures and faults of Operator. Operator shall be fully responsible for the performance of the Services in accordance with the terms of this Agreement (including with respect to the standards of performance set forth in Section 1.05), whether performed by Operator or any Subcontractor. Nothing in this Agreement shall constitute any contractual relationship between Owner, on the one hand, and any Subcontractor, on the other hand, and Owner shall not undertake any obligation to pay, or to be responsible for the payment of, any sums to any Subcontractor. Subject to Section 2.07, Operator shall promptly pay when due all amounts payable to Subcontractors for labor and materials, including equipment, furnished in the performance of this Agreement and shall ensure that the Project and the Site remain free of any Liens arising through Operator or any Subcontractor.

## **Standards of Performance**.

### Operator shall perform the Services in a good, workmanlike, and commercially reasonable manner in accordance with this Agreement, Applicable Standards, the applicable Manuals, the O&M Budget and, to the extent applicable, the Lease. Without limiting the foregoing, Operator specifically agrees that it shall at all times fully comply, and cause all Subcontractors to fully comply, with Applicable Law, and Operator shall give all applicable notices with respect to, and in accordance with, Applicable Law.

### Operator shall make commercially reasonable efforts to ensure that Owner’s rights under any Supplier Warranties (whether by assignment or otherwise) are not impaired as a result of any actions or inactions by Operator or any Subcontractor hereunder.

### All periodic maintenance and inspection services shall be performed at regular intervals and all maintenance and inspection services shall be performed by qualified technical personnel in accordance with the applicable Manuals.

### Operator shall use, and shall require any Subcontractor to use, persons who are qualified, properly trained and, if required by Applicable Law, licensed, permitted, registered or approved, so that Operator may perform the Services in an efficient, prompt, economical and professional manner.

## **Obligations of Operator**.

### Operator has obtained and shall maintain in effect, and comply with, at all times during the Service Period, all Applicable Permits required in order for Operator to perform the Services. Owner shall provide Operator with such assistance and cooperation, at no additional cost and expense to Owner, as Operator may reasonably request in order to obtain and maintain any such Applicable Permits.

### Operator shall comply with all applicable labor and immigration laws that are relevant to Operator’s performance of the Services under this Agreement, including the Immigration Reform and Control Act of 1986 and Form I-9 requirements. Operator shall perform all required employment eligibility and verification checks and maintain all required employment records to the extent required by Applicable Law. By providing an employee or Subcontractor under this Agreement, Operator warrants and represents that it has completed the screening measures with respect to such employee or Subcontractor and that such screening measures did not reveal any information that could reasonably be expected to adversely affect such employee’s or Subcontractor’s suitability for employment or engagement by Operator or competence or ability to perform duties under this Agreement. In all circumstances, Operator shall ensure that the substance and manner of any and all screening measures performed by Contractor pursuant to this Section 1.06(b) conform to Applicable Law. Within two (2) Business Days after written request by Owner, Operator shall remove from the Site and performance of the Services, and as soon as reasonably practicable, replace, any Operator or Subcontractor Personnel performing the Services in the event Owner possesses reasonable evidence that any such personnel poses a material risk of non-performance by Operator of the Services in accordance with this Agreement. In the event Owner possesses reasonable evidence that any such personnel poses a safety hazard, Owner may require that such personnel be removed immediately.

### Operator shall comply and shall cause its Subcontractors to comply with all applicable Site procedures regarding safety, security, environmental incidents, environmental compliance, fire protection and the prevention of accidents and injuries to persons or damage to property on the Site. Prior to Operator performing any Services at the Site, Owner shall provide Operator with a copy of the EH&S Plan prepared by Owner applicable to the Site. Operator shall comply and shall cause its Subcontractors to perform the Services in accordance with such EH&S Plan and Operator shall not deviate from such plan without the prior written consent of Owner.

#### Operator shall be responsible for the on-Site management of, and the off-Site transportation, treatment, storage and disposal of, all Hazardous Materials generated on or brought onto the Site by Operator or any of its Subcontractors in connection with the provision of the Services, all in compliance with Applicable Law. For the avoidance of doubt, title to all Hazardous Materials required to operate and maintain the Project (including any Hazardous Materials that are incorporated into, or to be incorporated into, the Project) are the Owner’s and Owner shall retain the ultimate responsibility for proper disposal of its Hazardous Materials. Operator shall have title to any Hazardous Materials generated on or brought onto the Site (other than any Hazardous Materials that are incorporated into, or to be incorporated into, the Project), unless said Hazardous Materials are brought on the Site by Owner or any of its other contractors, contractual counterparties (other than Operator or any of its Subcontractors) or any other Persons (other than Operator or any of its subcontractors). In addition, Operator shall ensure that its management of Hazardous Materials as contemplated by this subsection, including its transportation, storage, use, disposal and clean up thereof, is in strict compliance with Applicable Law, so as to ensure the proper operation of the Project, the health or safety of any person and the protection of the environment. Operator shall give any notice required to be made by Applicable Law with respect to a release of Hazardous Materials by Operator or any of its Subcontractors, and in any such event, Operator shall, where possible, provide Owner with advance notice of any such notice required to be made by Operator. In addition, Operator shall notify Owner promptly upon its discovery of the actual or suspected presence of any Hazardous Materials on the Site and work diligently to ensure proper management thereof.

#### Except as otherwise authorized by Owner in writing, no equipment or other materials furnished, delivered or installed by Operator or any Subcontractor in connection with the Services (including, for the avoidance of doubt, any materials or tools used by Operator or any Subcontractor) shall contain any Prohibited Substances. If Owner authorizes in writing such delivery or use, Operator and any such Subcontractor shall clearly mark all containers or other materials containing any Prohibited Substances, and such containers or materials shall be sealed to help prevent any leakage of any such Prohibited Substances.

#### Operator shall, and shall cause all Subcontractors performing Services to, establish and implement a substance abuse and drug testing program that, among other things, prohibits the use of illegal drugs or alcohol on the Site and prohibits any employees or agents of Operator or any Subcontractor from entering the Site while under the influence of illegal drugs or alcohol and is otherwise in accordance with this subsection. The program shall be incorporated in Operator’s Health & Safety Plan, and the program criteria shall include, to the extent permitted by Applicable Law, a pre-employment five (5) panel drug screen, post-accident/incident drug screening, reasonable cause and suspicion and clearly defined responses to positive test results.

#### If any Subcontractor employees performing Services are non-English speakers, Operator shall provide a bilingual employee or translator who shall (A) be responsible for communicating safety and hazard related communications, emergency response, and other similar information translated from English for such non-English speaking employees, (B) be on-Site in the vicinity of non-English speaking employees at all times to communicate emergency information and instructions, and (C) conduct a walk-down of the work area with all non-English speaking employees, translating signs, explaining hazards and warnings prior to commencing Services. Operator shall further ensure that all written and verbal safety training, hazard communications, and work rules are provided, or a translator is made available to communicate such instructions orally, in the appropriate language for non-English speaking employees.

## **Commencement of Services**.

Notwithstanding anything contained herein to the contrary, the Parties hereby acknowledge and agree that neither Operator’s obligation to provide Services hereunder, including, without limitation, any Services or Additional Services, nor Owner’s obligation to pay any Service Fees hereunder, shall commence until the Effective Date.

## **Operating Data and Records**.

### During the Service Period, Operator shall monitor and record all power generated by the Project and shall provide to Owner the reports described in Section 1.09(a), (b) and (c) below.

### Operator shall keep and maintain operating logs, records and reports documenting the operation and maintenance of the Project, including a separate “Maintenance Log” for the Project in paper or electronic format, which will be made available to Owner and its representatives, at any time upon reasonable prior written request.

## **Reports**.

### **Monthly Reports**. Within ten (10) Business Days after the end of each calendar month (or portion thereof) during the Service Period, Operator shall submit to Owner a report summarizing in reasonable detail the generation, performance and downtime (if any), Availability, and performance ratio of the Project for the preceding calendar month (each, a “Monthly Report”). Operator shall also summarize any maintenance or repair activities performed on the Project and any Spares used. Such report shall be in substantially the form thereof attached hereto as Exhibit E.

### **Quarterly Reports**. As soon as available, and in any event within thirty (30) days after the end of the calendar quarterly periods (or portion thereof) ended March 31th, June 30th and September 30th respectively, of each calendar year (or portion thereof) during the Service Period, Operator shall submit to Owner a quarterly operating report, summarizing in reasonable detail with respect to such quarterly period, power generation, Availability, capital improvements, and suggestions (if any) for improving the performance and output of the Project and any other significant matters associated therewith (each, a “Quarterly Report”). Operator shall also summarize any maintenance or repair activities performed on the Project and any Spares used. Such report shall be in substantially the form thereof attached hereto as Exhibit E.

### **Annual** **Reports**. As soon as available, and in any event within forty-five (45) days after the end of each calendar year (or portion thereof), during the Service Period, Operator shall submit to Owner an annual operating report, summarizing in reasonable detail with respect to such annual period, power generation, Availability, capital improvements, and suggestions (if any) for improving the performance and output of the Project and any other significant matters associated therewith (each, an “Annual Report”). Operator shall also summarize any maintenance or repair activities performed on the Project and any Spares used. Such report shall be in substantially the form thereof attached hereto as Exhibit E.

### **Governmental Reports**. Proposed filing copies of any reports that may be required to be submitted by Operator to any Governmental Authority shall, if practicable under the circumstances, be provided to Owner for its review and comment and approved by Owner prior to submittal by Operator to any Governmental Authority. Operator shall promptly provide to Owner a complete copy of each such report after filing thereof with the applicable Governmental Authority. For the avoidance of doubt, Operator shall have no authority to submit any reports on behalf of Owner, in its capacity as Owner of the Project, to any Governmental Authority absent the express written consent of Owner; provided, however, that Operator shall, upon the request of Owner, provide reasonable assistance to Owner in connection with any such reports requested to be submitted by Owner to any Governmental Authority.

## **Warranty Services**.

### During the Service Period, Operator shall use commercially reasonable efforts to submit, process and pursue, at Operator’s sole cost and expense (except as otherwise provided in clause (b) below), any claims arising under the Supplier Warranties.

### Operator agrees to act as agent on behalf of Owner for purposes of this Section 1.10

### Operator shall use commercially reasonable efforts to (i) assign all warranties provided by any Subcontractor performing Services hereunder to Owner and (ii) (A) secure the longest commercially reasonable manufacturers’ warranties, with respect to any equipment or materials provided to and used by Operator under this Agreement, including Spares, and (B) where possible, ensure that such warranties are assignable to Owner upon the end of the Term or earlier termination of this Agreement.

## **Taxes**.

###  This Section 1.11 shall set forth each Party’s responsibilities with respect to the invoicing and payment of state gross receipts, or similar taxes, if any, applicable to the Services and any materials or equipment (including Spares) incorporated into the Project. Operator shall be solely responsible for and pay all federal, state, local, and other income Taxes and all federal, state, and local employment-related Taxes applicable to the compensation paid to Operator for Services and such materials or equipment.

### Operator shall separately state the subtotal due for labor, materials, consumables, other miscellaneous charges and Equipment and/or parts on the invoice. Operator shall invoice Owner for and Owner agrees to pay, state gross receipts or similar Taxes, if applicable.

###  Except as otherwise provided in this Agreement, Owner shall be solely responsible for all applicable property Taxes related to the Project and the Site .

## **Operator’s Insurance**

Throughout the Term, Operator shall maintain in force policies of insurance meeting the requirements set forth in Exhibit F. Such policies shall be issued by responsible insurance companies authorized to do business in the State of New Mexico and each shall have an A.M. Best Insurance Reports rating of ‟A-IX” or better or otherwise be reasonably acceptable to Owner. Such insurance required to be maintained by Operator hereunder shall be primary without the right of contribution of any other insurance carried by or on behalf of Owner, the Department of the Air Force and any additional insured, and shall contain waivers of subrogation against Owner and the Department of the Air Force. Except for Workers Compensation and Professional Liability, all other policies shall include Owner, the Department of the Air Force and Owner’s Affiliates, agents and employees as additional insureds. All policies required pursuant to this Section 1.12 shall, unless otherwise approved by Owner, provide for thirty (30) days prior written notice to Owner of any cancellation, material change, or nonrenewal, with the exception of nonpayment of premium, in which case such prior written notice period shall be ten (10) days. For the avoidance of doubt, Operator’s compliance with this Section 1.12 and the limits of insurance specified in this Agreement shall not constitute a limitation of Operator’s liability or otherwise affect Operator’s indemnification obligations under this Agreement.

## **General Obligations of Owner**

### **Site Access**. Subject to the terms and conditions of the Lease, Owner shall provide Operator, or its authorized agents, employees or Subcontractors, access to the Site in order to provide scheduled or unscheduled maintenance activities, maintenance of the grounds, emergency services, or to conduct other Services, in all cases, to the extent that such activities or services are within the scope of this Agreement and are provided in accordance with the terms of this Agreement. Operator shall, and shall ensure that its agents, employees and Subcontractors shall, comply with all reasonable requirements of Owner and the Site when on the Site and shall indemnify Owner for any losses arising out of or in connection with a failure by Operator to comply with its obligations hereunder (including without limitation as a result of any breach of the Lease by Operator or its authorized agents, employees or Subcontractors.

### **Applicable Permits**. Owner has obtained and shall maintain in effect, and comply with, at all times during the Service Period, all Applicable Permits to allow Owner to own the Project at the Site and sell or otherwise make use of the electricity to be generated therefrom in accordance with Applicable Law. Operator shall provide Owner with such assistance and cooperation as Owner may reasonably request in order to obtain and maintain such Applicable Permits.

### **Telephone and Data Communications**. Owner shall supply and maintain, at its cost, the telephone and data communications system (whether ISDN, GSM or GPRS (3G if available) or otherwise) furnished by the EPC Contractor pursuant to the EPC Contract for the purpose of enabling Owner (and its contractors, including Operator) to remotely monitor the Project. Owner shall directly pay utility or other third party service provider invoices as the same become due as may be required for Operator’s remote access to telephone or data communications service available at the Site to the extent necessary for the performance by Operator of the Services under this Agreement. Owner will be responsible for all monthly service charges related to telephone and data communications service. If the Project is being monitored by Owner with any other remote monitoring system, Operator shall be permitted reasonable access (taking into account Owner’s enterprise-wide IT security protocols) to data generated by such remote monitoring system to monitor the Project and use of the data generated by such monitoring system.

### **Utility Costs**. Owner shall be directly responsible for all utility, interconnection, and transmission costs of the Project and its operation.

### **Insurance**. Throughout the Service Period, Owner shall carry and maintain, or cause to be carried and maintained, at its own expense, “All Risk” property insurance coverage for the Project against the risk of physical loss or damage. Such policy or policies shall be obtained from and maintained with insurance carriers that maintain a Best’s rating of at least ‟A-”. The foregoing provisions of this subsection notwithstanding, Operator expressly acknowledges and agrees that Owner may self-insure all of the foregoing insurance coverages.

## **Party Representatives**.

### **Owner Representative**. Owner designates, and Operator agrees to accept, Richard E. Turner as the “Owner Representative” with respect to this Agreement and the transactions hereunder. Subject to subsection (c) of this Section 1.14, the actions taken by the Owner Representative shall be deemed the acts of Owner and shall be fully binding on Owner. Owner may, upon written notice to Operator, from time to time change the designated Owner Representative.

### **Operator Representative**. Operator designates, and Owner agrees to accept, Jerry Shinn as the “Operator Representative” with respect to this Agreement and the transactions hereunder. Subject to subsection (c) of this Section 1.14, the actions taken by Operator Representative shall be deemed the acts of Operator and shall be fully binding on Operator. Operator may, in each case upon the prior written consent of Owner (not to be unreasonably withheld or delayed), from time to time change the designated Operator Representative.

### **Limited Authority**. Notwithstanding the foregoing subsections (a) and (b), except as otherwise expressly set forth in this Agreement, an Owner or Operator Representative shall have no power or authority on behalf of the Party appointing such individual to enter into, or execute any amendments or other formal communications with respect to this Agreement on behalf of a Party hereunder.

## **Litigation; Permit Lapses**.

As promptly as possible after obtaining knowledge thereof, each Party shall submit prompt written notice to the other Party of: (a) any litigation, material claims, disputes or actions, threatened or filed, concerning the Project or the Services that could reasonably be expected to have a material adverse effect on the operation or maintenance of the Project; (b) any refusal or threatened refusal to grant, renew or extend, or any action pending or threatened that could reasonably be expected to affect the granting, renewal or extension of, any Applicable Permit, approval, authorization or consent, any of which could reasonably be expected to have a material adverse effect on the operation or maintenance of the Project; (c) any dispute with any Governmental Authority which could reasonably be expected to have a material adverse effect on the operation or maintenance of the Project; and (d) any and all penalties or notices of violation issued by any Governmental Authority with respect to the Services or either Party to the extent related to this Agreement.

## **Limitations on Operator Authority**.

Notwithstanding any provision in this Agreement to the contrary, without the prior written consent of Owner, Operator shall not (and shall not permit any of its Subcontractors, agents or representatives to):

### **Disposition of Assets**. Sell, lease, pledge, assign, mortgage, convey or make any license, exchange or other transfer or otherwise dispose of any property or assets of Owner or any of its Affiliates, including any property or assets purchased by Operator hereunder the cost of which is included as part of the Services;

### **Contracts**. Make, enter into, execute, amend, modify or supplement any contract, agreement, commitment, letter of intent, term sheet or other arrangement (including any labor or collective bargaining agreement), whether or not purporting to be legally binding, on behalf of or in the name of Owner or any of its Affiliates;

### **Expenditures**. Make any recoverable expenditure or acquire on a recoverable cost basis any equipment, materials, assets or other items, or consent or agree to do any of the foregoing; provided, however, that in the event of an Emergency, subject to compliance with Section 1.04(f), Operator, without approval from Owner, shall be authorized to take all reasonable actions to prevent or mitigate such threatened damage, injury or loss;

### **Lawsuits**. Settle, compromise, assign, pledge, transfer, release or consent to the compromise, assignment, pledge, transfer or release of any claim, suit, debt, demand or judgment against or due by Owner, any of its Affiliates or Operator, or submit any such claim, dispute or controversy to arbitration or judicial process, or stipulate in respect thereof to a judgment, or consent to do the same (it being understood that in the event of any conflict or inconsistency between this Section 1.16(d) and Article 4, Article 4 shall control);

### **Project Alterations**. Modify or alter the Project or any component thereof in a manner that materially alters the function, output or efficiency of the Project or any component thereof; or

### **Other Transactions**. Engage in any other transaction with third parties purportedly on behalf of or in the name of Owner or any of its Affiliates.

## **Separateness**.

Operator shall maintain its existence separate and distinct from any other Person, including maintaining in full effect its existence, rights and franchises as a corporation under the laws of the State of Delaware and obtaining and preserving its qualification to do business in each jurisdiction in which such qualification is or will be necessary to protect the validity and enforceability of this Agreement.

# SERVICE FEES

## **Compensation**.

### **Service Fees**. During the Service Period, as full compensation for provision of the Services by Operator, Owner shall pay Operator an annual fee of $75,141 in the first Measurement Year during the Service Period, with a three percent escalator for each subsequent Measurement Year. Such fee shall be paid in equal monthly installments in each Measurement Year in the manner set forth in Section 2.01(c) below (all such fees, collectively, the “Service Fees”).

### **Additional Services**. During the Service Period, Operator shall invoice Owner, in accordance with Section 2.01(c) for any costs and expenses payable by Owner for any Additional Services that Owner has agreed to receive from Operator.

### **Invoices**. No later than the fifteenth (15th) day after the end of each calendar month during the Service Period, Operator shall prepare and deliver to Owner an invoice for the amounts owed by Owner to Operator for such month pursuant to Section 2.01(a) and Section 2.01(b). Owner shall pay to Operator the undisputed portion of each invoice within ten (10) Business Days after the date of receipt by Owner of the invoice. If the due date for any payment under this Agreement is not a Business Day, the payment shall be due on the next Business Day thereafter. Invoices shall be provided in accordance with Section 8.14.

## **Late Payments**.

Interest at the Default Rate shall be charged on all late payments due from either Party (accruing on a day by day basis), including amounts disputed that subsequently are determined to have been owed, from the day after the due date until the date of payment (including the day on which payment is made) without the need for previous notice of delay or demand. Interest so accrued shall be payable, together with any amount due, by the Party owing such payment to the other Party.

## **Disputed Payments**.

If either Party discovers an error in the amount of any invoice or payment made pursuant to this Article 2 or otherwise pursuant to this Agreement or disputes a payment requested pursuant to this Article 2 or otherwise pursuant to this Agreement, such Party shall notify the other Party within thirty (30) days of discovery of such dispute or error; provided that neither Party shall be entitled to correction of any such error if notice of such error is not delivered in writing to the other Party within one (1) year of the applicable invoice or payment. If the correct amount of any invoice is disputed in good faith, the Party with the payment obligation shall pay any amount not in dispute, and failure to pay the amount in dispute shall not during the pendency of such dispute be deemed to be a default hereunder.

## **Records**.

Operator shall keep and maintain all records reasonably necessary in order for Owner to verify the accuracy, in accordance with Section 2.05, of all costs and expenses invoiced by Operator to Owner solely and directly part of this Agreement, until the later of (a) the one-year anniversary of the date of any such invoice or (b) if a dispute arises with respect to such invoice in accordance with Section 2.03, the one-year anniversary of the date on which such dispute was resolved.

## **Audits**.

Owner shall have the right, through its authorized representatives and at its sole expense, upon ten (10) Business Days’ prior notice, during normal business hours, to examine and copy the records of Operator solely and directly part of this Agreement to the extent reasonably necessary to verify the accuracy of any invoice submitted.

## **No Acceptance by Payment**.

Owner’s payment of any invoice does not constitute approval or acceptance of any item or cost in that invoice nor shall be construed to relieve Operator of any of its obligations under this Agreement.

## **Liens**.

To the extent that Owner timely pays Operator all amounts due hereunder, Operator shall pay when due all valid charges for labor and material furnished to Operator by any Subcontractor. Operator shall take prompt steps to discharge any Lien filed by any Subcontractor in connection with Spare Parts or any other equipment supply obligations of Operator hereunder. Operator shall, by appropriate agreements, take commercially reasonable efforts to require each of its Subcontractors to make payments to their respective Subcontractors and sub-Subcontractors in a similar manner, and shall indemnify and hold harmless Owner against any claim against Owner, or any Lien imposed on any portion of the Project, by any of its Subcontractors, including any expenses and reasonable attorneys’ fees incurred in discharging any such Liens. Each Subcontractor shall provide Operator with a Lien waiver upon completion of the relevant work and, upon request from Owner, Operator shall promptly supply copies of such Lien waivers to Owner. In lieu of a Lien waiver, Operator may provide a Lien bond or other security reasonably acceptable to Owner within thirty (30) days of the earlier of a written demand therefor from Owner and Operator learning of the imposition of any such Lien. Owner shall have no obligation to pay or ensure the payment of any monies to any of Operator’s Subcontractors. Promptly following request therefor in writing from Owner, in connection with any termination or expiration of this Agreement, either in whole or in part (other than as a result of an Owner Event of Default), and upon the receipt by Operator of any and all payments due and payable at the time of such termination or expiration, Operator shall also provide Owner with a Lien waiver with respect to the Project.

## **[Intentionally Omitted.]**

## **O&M Budget.**

### No later than July 30 of the first calendar year of the Initial Term beginning after the Effective Date, Operator shall deliver to Owner an Operator budget, detailing the expected expenses associated with the operation and maintenance of the Project for each year of the Initial Term (the “O&M Budget”).

### Owner shall have thirty (30) days from receipt of the proposed O&M Budget to review such O&M Budget, add Owner related expenses, and, upon written notice to Operator, require any changes, additions, deletions and modifications thereto. Such proposed O&M Budget, as so modified, shall be the O&M Budget for the Initial Term.

# TERM; EVENTS OF DEFAULT; TERMINATION

## **[Intentionally Omitted**.]

## **Term**.

### The term of this Agreement (the “Term”) shall begin on the Effective Date and, subject to early termination as provided herein and extension as provided below in this Section 3.02, terminate on the third (3rd) anniversary of the Effective Date (the “Initial Term”).

### If this Agreement has not earlier been terminated in accordance herewith, then, no later than three (3) months prior to the end of the Initial Term or any Extension Term (as defined below), Owner may request that the term of this Agreement be extended by up to an additional five (5) year period (each such term extension shall be an “Extension Term”).

### If Owner delivers a request under subsection (b), then not later than two (2) months prior to the end of the Initial Term or any Extension Term, Operator may, in its sole discretion, provide to Owner its proposals as to the fee structure to be applicable for the Extension Term and as to any other amendments to this Agreement that are proposed by Operator to apply to any such Extension Term.

### Not later than thirty (30) days after submission by Operator of its proposals described in the foregoing subsection (c), Owner shall inform Operator whether such proposals are rejected or accepted and the Parties shall then:

#### in good faith and in a timely fashion, negotiate and use their reasonable efforts to determine whether they can agree upon the terms of any such extension (though neither Party shall be under any obligation to do so); and

#### if a mutually acceptable agreement is reached, execute such further documents as may be necessary to give effect thereto.

## **Operator Events of Default**.

Each of the following is an “Operator Event of Default:”

### Operator becomes Insolvent;

### Operator fails to pay any amount due hereunder on the due date and the amount remains unpaid and not disputed in good faith twenty (20) Business Days following receipt of notice thereof from Owner;

### Operator is in breach of any of its material obligations under this Agreement (other than (i) payment obligations or (ii) those referenced in clause (e), (f), (g), (h), or (i) of this Section 3.03) and such breach has not been remedied within thirty (30) days following receipt of notice thereof from Owner; provided that if Operator is diligently seeking to effect such cure but has not done so by such thirtieth (30th) day, it shall be entitled to an additional period not to exceed thirty (30) days to effect such cure;

### any of Operator’s material representations or warranties set forth in this Agreement proves to have been false when made and such false representation or warranty has a material adverse effect on the Project or the Site or on Operator’s ability to perform its obligations hereunder;

### Operator effects any assignment or transfer of its rights or obligations hereunder in violation of Section 8.04;

### Operator fails to maintain any insurance coverages required pursuant to Section 1.12 and Operator fails to remedy such breach within five (5) days after the earlier of (i) the date on which Operator first had actual knowledge of such breach and (ii) the date on which Operator first receives notice thereof from Owner;

### for any rolling twelve-month period during the Service Period (each, an “Availability Period”), the average Availability (as defined below) of the Project is less than ninety-five percent (95%), provided, that Operator shall have the ability to cure such breach by achieving no less than a ninety-five percent (95%) average Availability for the Project for the twelve-month period immediately following notification of such breach. For purposes of this clause (g), “Availability” shall mean the availability of the Project for the period in question determined as provided in Exhibit G; and

### Operator is in breach of its obligations set forth in Section 2.07.

## **Owner Events of Default**.

Each of the following is an “Owner Event of Default:”

### Owner becomes Insolvent;

### Owner fails to pay any amount due hereunder on the due date and the amount remains unpaid and not disputed in good faith twenty (20) Business Days following receipt of notice thereof from Operator;

### Owner is in breach of any of its material obligations under this Agreement (other than (i) payment obligations or (ii) those referenced in clause (e) or (f) of this Section 3.04) and such breach has not been remedied within thirty (30) days following receipt of notice thereof from Operator; provided that if Owner is diligently seeking to effect such cure but has not done so by such thirtieth (30th) day, it shall be entitled to an additional period not to exceed thirty (30) days to effect such cure;

### any of Owner’s material representations or warranties set forth in this Agreement proves to have been false when made and such false representation or warranty has a material adverse effect on the Project or the Site or on Owner’s ability to perform its obligations hereunder;

### Owner effects any assignment or transfer of its rights or obligations hereunder in violation of Section 8.04; and

### Owner fails to maintain any insurance coverages required pursuant to Section 1.12 and Owner fails to remedy such breach within five (5) days after the earlier of (i) the date on which Owner first had actual knowledge of such breach and (ii) the date on which Owner first receives notice thereof from Operator.

## **Owner Remedies**.

In the event of an Operator Event of Default, Owner shall have any or all of the following remedies:

### **Suspension**. Owner shall be entitled to cause Operator to suspend performance of the Services under this Agreement, in whole or in part, until Operator cures such Operator Event of Default;

### **Termination**. Upon thirty (30) days prior notice, and subject to the limitation on liability provisions set forth in this Agreement, Owner, without prejudice to any of its other rights or remedies under this Agreement, may terminate this Agreement by delivery of a notice of termination to Operator;

### **Equitable Remedies**. Owner may pursue the equitable remedies contemplated by Section 8.09;

### **Recover Amounts Due**. Subject to the limitations on liability set forth in this Agreement, Owner shall be entitled to recover from Operator any unpaid amounts due from Operator to Owner under this Agreement;

### **Dispute Resolution Procedures**. Owner shall be entitled to pursue the dispute resolution procedures set forth in Section 8.12 to enforce the provisions hereof; and

### **Other Remedies**. Subject to the limitation on liability provisions set forth in this Agreement, Owner shall be entitled to pursue any other remedies available to it under this Agreement or otherwise available at law or in equity.

## **Operator Remedies**.

In the event of an Owner Event of Default, Operator shall have any or all of the following remedies:

### **Suspension**. Operator shall be entitled to suspend performance of the Services under this Agreement, in whole or in part, until Owner cures such Owner Event of Default;

### **Termination**. Upon thirty (30) days prior notice, and subject to the limitation on liability provisions set forth in this Agreement, Operator, without prejudice to any of its other rights or remedies under this Agreement, may terminate this Agreement by delivery of a notice of termination to Owner;

### **Equitable Remedies**. Operator may pursue the equitable remedies contemplated by Section 8.09;

### **Recover Amounts Due**. Subject to the limitations on liability set forth in this Agreement, Operator shall be entitled to recover from Owner any unpaid amounts due from Owner to Operator under this Agreement;

### **Dispute Resolution Procedures**. Operator shall be entitled to pursue the dispute resolution procedures set forth in Section 8.12 to enforce the provisions hereof; and

### **Other Remedies**. Subject to the limitation on liability provisions set forth in this Agreement, Operator shall be entitled to pursue any other remedies available to it under this Agreement or otherwise available at law or in equity.

## **Other Terminations**.

### Effective upon receipt of notice from Owner to Operator, upon the occurrence of a Force Majeure Event meeting the requirements of Section 6.01, Owner may terminate this Agreements.

### Effective upon receipt of notice from Owner to Operator, accompanied by a certification in writing to such effect executed on behalf of Owner by an executive officer thereof, Owner may terminate this Agreement if the Project becomes permanently incapable of operation.

## **Accrued Rights and Liabilities**.

Any termination of this Agreement (whether upon the scheduled expiration date or as earlier provided in this Article 3) shall be without prejudice to the accrued rights and liabilities (with respect to payments or otherwise) of the Parties as set forth herein as of the applicable termination date.

## **Project Condition at End of Term**.

### Upon expiration or termination of this Agreement, Operator shall remove its personnel from the Site. Operator shall leave the Project in good working condition and in accordance with Applicable Law, normal wear and tear excepted.

### Upon expiration or termination of this Agreement, subject to Section 1.04(e), the documents referred to in Section 1.04(e), together with all software, programming and hardware related to the remote operations and monitoring of the Project, communications links, software patches, the Manuals, special tools, improvements, inventory of supplies, Spares, safety equipment, in each case as provided to or obtained by or provided by Operator during the Term, and any other items furnished and paid for by Owner on a reimbursable cost basis under this Agreement, will be left at the Site and will become or remain the property of Owner without additional charge (it being understood that Operator shall assist Owner in preparing an inventory of all such supplies, Spares, special tools, safety equipment and the like, including making all necessary arrangements to enable Owner to collect any Spares held by or on behalf of Operator pursuant to Section 1.04(e)). Upon expiration or termination of this Agreement for any reason (other than as a result of an Owner Event of Default), Operator agrees to grant and, effective upon such expiration or termination, hereby grants to Owner an irrevocable, sublicensable, non-exclusive, royalty-free license under all patents, copyrights and other proprietary hardware, software and other technology and information of Operator related to the Services now or hereafter owned or controlled by Operator to the extent reasonably necessary for the operation, maintenance, decommissioning or repair of the Project or any subsystem or component thereof (including, for the avoidance of doubt, with respect to the SCADA).

### Upon expiration or termination of this Agreement, Owner shall also have the right, in its sole discretion, to direct Operator to, and Operator shall use its commercially reasonable efforts to, assign and transfer to Owner (it being understood that as part of such assignment, Owner shall make a corresponding assumption of) any Subcontracts (in whole or in part, including with respect to warranties) then in effect, or outstanding purchase orders, in each case between Operator and any Subcontractors in connection with the Services, and in each case as so designated for assignment by Owner. Operator shall execute all necessary documents and take all other reasonable steps requested by Owner that may be required to assign to and vest in Owner all rights, benefits, interests and title in connection with such contracts or obligations; provided, however, that (i) Operator shall indemnify and hold harmless Owner and its Affiliates for all liabilities thereunder caused by acts or omissions of or otherwise attributable to Operator to the extent relating to, or otherwise attributable to the period, prior to the date of any such assignment and (ii) Owner shall indemnify and hold harmless Operator and its Affiliates for all liabilities thereunder caused by negligent acts or omissions of or otherwise attributable to Owner to the extent relating to, or otherwise attributable to the period, following the date of any such assignment.

# INDEMNIFICATION

## **Indemnification**.

### **Operator Indemnity**. Subject to the provisions of Article 5, Operator shall indemnify, defend and hold harmless the Owner Indemnitees from and against any and all Losses incurred by any Owner Indemnitee in connection with or arising out of any Action by any third party (including any Governmental Authority), on account of (x) illness, injury to or death of any person, (y) any loss of or damage to the property of any third parties occurring at the Site, or (z) any fine or penalty imposed by a Governmental Authority, in each case to the extent such Losses relates to (i) any material breach of any covenant or agreement of Operator contained in this Agreement or any material inaccuracy of any representation and warranty of Operator contained in this Agreement or (ii) any negligent acts or omissions, willful misconduct or violation or alleged violation of Applicable Law in connection with the transactions contemplated by this Agreement by Operator or any of its Subcontractors or any other Person acting under Operator’s direction or control or on Operator’s behalf.

### **Operator Environmental Indemnity**. Subject to the provisions of Article 5, Operator shall indemnify, defend and hold harmless the Owner Indemnitees from and against any and all Losses incurred by any Owner Indemnitee in connection with or arising out of any Action by any third party (including any Governmental Authority), on account of: (i) any presence of a Hazardous Material at or adjacent to the Project or the Site solely to the extent caused during the Term by Operator or any Subcontractor or any other Person acting under Operator’s direction or control or on Operator’s behalf; and (ii) any unauthorized Prohibited Substances, solely to the extent during the Term furnished or delivered to or installed at the Project or the Site by Operator or any Subcontractor or any other Person acting under Operator’s direction or control or on Operator’s behalf.

### **Owner Indemnity**. Subject to the provisions of Article 5, Owner shall indemnify, defend and hold harmless the Operator Indemnitees from and against any and all Losses incurred by any Operator Indemnitee to the extent relating to any Action by any third party (including any Governmental Authority), on account of (x) illness, injury to or death of any person, (y) any loss of or damage to the property of any third parties occurring at the Site, or (z) any fine or penalty imposed by a Governmental Authority, in each case to the extent such Losses relates to (i) any material breach of any covenant or agreement of Owner contained in this Agreement or any material inaccuracy of any representation and warranty of Owner contained in this Agreement or (ii) any negligent acts or omissions, willful misconduct or violation or alleged violation of Applicable Law in connection with the transactions contemplated by this Agreement by Owner or its contractors, subcontractors and suppliers (other than Operator and its Subcontractors) or any other Person acting under Owner’s direction or control or on Owner’s behalf.

### **Owner Environmental Indemnity**. Subject to the provisions of Article 5, Owner shall indemnify, defend and hold harmless the Operator Indemnitees from and against any and all Losses incurred by any Operator Indemnitee to the extent relating to any Action by any third party (including any Governmental Authority), on account of: (i) any presence of a Hazardous Material at the Site solely to the extent caused during the Term by Owner or its contractors, subcontractors and suppliers (other than Operator and its Subcontractors) or any other Person acting under Owner’s direction or control or on Owner’s behalf; and (ii) any unauthorized Prohibited Substances, solely to the extent during the Term furnished or delivered to or installed at the Site by Owner or its contractors, subcontractors and suppliers (other than Operator and its Subcontractors) or any other Person acting under Owner’s direction or control or on Owner’s behalf.

### The Party or other Person making a claim for indemnification pursuant to this Section 4.01 shall be, for purposes of this Agreement, referred to as the “Indemnified Party” and the Party against whom such claims are asserted pursuant to this Section 4.01 shall be, for purposes of this Agreement, referred to as the “Indemnifying Party”. For purposes of this Section 4.01 and for the avoidance of doubt, an Action by an employee of Owner or Operator, or of a contractor of Owner (other than Operator) or of a Subcontractor, unless made on behalf of Owner or Operator, shall be considered an Action by a third party.

### For purposes of this Article 4, in the event that both the Indemnifying Party and the Indemnified Party(ies) are negligent, each Party shall be responsible for the liability that would be assigned to it under a comparative negligence standard.

## **Indemnification Process**.

If any claim is brought against an Indemnified Party with respect to which it has a right to claim for indemnification under this Article 4, then the Indemnified Party must notify the Indemnifying Party thereof in writing of the existence of such claim and must deliver copies of any documents served on the Indemnified Party with respect to such claim; provided, however, that any failure to notify the Indemnifying Party or deliver such copies will not relieve the Indemnifying Party from any obligation hereunder unless (and then solely to the extent that) the Indemnifying Party is materially prejudiced by such failure. Each Party and each Owner or Operator Indemnitee shall have the right, but not the obligation, to assume and control the defense of, and to contest, and litigate any claim, action, suit or proceeding by any third party alleged or asserted against it arising out of any matter in respect of which it is entitled to be indemnified hereunder and the reasonable costs and expenses thereof (including reasonable attorneys' fees and expert witness fees) shall be subject to the said indemnity. The Indemnified Party shall provide reasonable assistance to the Indemnifying Party, at the Indemnifying Party's expense, in connection with such claim, action, suit or proceeding. Upon such assumption, the Indemnifying Party shall reimburse the Indemnified Party for the reasonable costs and expenses previously incurred by it prior to the assumption of such defense by the Indemnifying Party. The Indemnifying Party shall keep the Indemnified Party informed as to the status and progress of such claim, action, suit or proceeding. Except as set forth below, in the event the Indemnifying Party assumes the control of the defense, the Indemnifying Party will not be liable to the Indemnified Party under this Article for any legal fees or expenses subsequently incurred by the Indemnified Party in connection with such defense. The Indemnifying Party shall control the settlement of all claims over which it has assumed the defense; provided, however, that the Indemnifying Party shall not agree to or conclude any settlement that affects the Indemnified Party without the prior written approval of the Indemnified Party, whose said approval shall not be unreasonably withheld.

In the event the Indemnifying Party assumes control of the defense, the Indemnified Party shall have the right to employ its own counsel and such counsel may participate in such claim, action, suit or proceeding, but the fees and expenses of such counsel shall be at the expense of such Indemnified Party, when and as incurred, unless the:

* + - 1. Employment of counsel by such Indemnified Party has been authorized in writing by the Indemnifying Party;
			2. Indemnified Party shall have reasonably concluded that there may be a material or important conflict of interest between the Indemnifying Party and the Indemnified Party in the conduct of the defense of such action; or
			3. Indemnified Party shall have reasonably concluded and specifically notified the Indemnifying Party either that there may be a specific defense available to it which is different from or additional to those available to the Indemnifying Party.

If any of the preceding clauses (a) through (c) shall be applicable, then counsel for the Indemnified Party shall have the right to direct the defense of such claim, action, suit or proceeding on behalf of the Indemnified Party and the reasonable fees and expenses of such counsel shall be reimbursed by the Indemnifying Party.

# LIMITATIONS OF LIABILITY

## **Consequential Damages**.

NOTWITHSTANDING ANY PROVISION IN THIS AGREEMENT TO THE CONTRARY, NO PARTY, NOR ANY OF ITS AFFILIATES, PARTNERS, OFFICERS, DIRECTORS, SHAREHOLDERS, AGENTS, REPRESENTATIVES, SUBCONTRACTORS, VENDORS OR EMPLOYEES, SHALL BE LIABLE UNDER THIS AGREEMENT FOR SPECIAL, PUNITIVE, EXEMPLARY, INCIDENTAL, CONSEQUENTIAL OR INDIRECT DAMAGES OR LOST PROFITS WHETHER BASED ON CONTRACT, TORT, STRICT LIABILITY, OTHER LAW OR OTHERWISE AND WHETHER OR NOT FROM ANY OTHER PARTY’S SOLE, JOINT OR CONCURRENT NEGLIGENCE, STRICT LIABILITY OR OTHER FAULT, EXCEPT SUCH DAMAGES THAT ARE PAYABLE TO A THIRD PARTY WITH RESPECT TO A THIRD PARTY CLAIM FOR WHICH ANY PERSON IS SEEKING INDEMNIFICATION HEREUNDER, AND EACH PARTY HEREBY WAIVES, TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, ANY RIGHT IT MAY HAVE TO RECEIVE SUCH DAMAGES UNDER THIS AGREEMENT.

## **Total Aggregate Liability**.

For each Measurement Year during the Service Period, the aggregate liability of either Party under this Agreement during such Measurement Year (whether based on breach of contract, negligence or otherwise) arising out of or in connection with the performance by that Party of its obligations under this Agreement shall not exceed an amount equal to the Service Fees payable for such Measurement Year (the “Liability Cap”); provided that such amount shall exclude: (a) any indemnification obligations under Article 4, (b) the proceeds of insurance required to be maintained by this Agreement that are available to pay for any such Losses and (c) any Losses arising from the fraud, willful misconduct or gross negligence of (i) Operator or its Subcontractors or any other Person acting under Operator’s direction or control or on Operator’s behalf or (ii) Owner or its contractors, subcontractors and suppliers (other than Operator and its Subcontractors) or any other Person acting under Owner’s direction or control or on Owner’s behalf. The Parties further agree that the sole remedy for Operator’s failure to comply with the separateness covenants set forth in Section 1.17 shall be the termination of this Agreement.

## **No Warranties or Guarantees**.

EXCEPT AS EXPRESSLY PROVIDED IN THIS AGREEMENT, NEITHER PARTY MAKES ANY REPRESENTATIONS, WARRANTIES OR GUARANTEES TO THE OTHER, EITHER EXPRESS OR IMPLIED, WITH RESPECT TO THE SUBJECT MATTER OF THIS AGREEMENT, AND BOTH PARTIES DISCLAIM AND WAIVE ANY IMPLIED WARRANTIES OR WARRANTIES IMPOSED BY LAW INCLUDING MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE.

#  FORCE MAJEURE

## **Force Majeure Events**.

### Neither Party shall be considered to be in default of its obligations under this Agreement when and to the extent that performance of such obligations is prevented by any Force Majeure Event affecting the Project which arises after the Effective Date. The burden of proof shall be on the Party claiming to be affected by the Force Majeure Event.

### If either Party shall rely on the occurrence of a Force Majeure Event as a basis for being excused from the performance of its obligations under this Agreement, then the Party relying on the event or condition shall (i) provide written notice, as promptly as reasonably possible, upon learning of such event and ascertaining that it will delay its performance hereunder (but in any event within ten (10) Business Days after the occurrence of such Force Majeure Event), to the other Party of the occurrence of the Force Majeure Event giving an estimation of its expected duration and the probable impact on the performance of its obligations hereunder; (ii) exercise all commercially reasonable efforts to continue to perform its obligations hereunder, and in any event the suspension of performance shall be of no greater scope and of no longer duration than is reasonable in light of the nature and magnitude of such event; (iii) expeditiously take any action within its reasonable control to correct or cure the Force Majeure Event excusing performance; (iv) exercise all commercially reasonable efforts to mitigate the duration of, and the costs arising from, any suspension or delay in its performance, or limit damages to the other Party to the extent such action will not adversely affect its own interests; and (v) provide periodic notices to the other Party with respect to its actions and plans for actions in accordance with (ii), (iii) and (iv) above and promptly notify the other Party in writing of the cessation of the event or condition giving rise to it being excused from performance. Suspension of performance due to a Force Majeure Event and any related remedy shall be permitted only if the affected Party could not have avoided the impacts of the Force Majeure Event by the exercise of due diligence.

### Damages or injuries to Persons or properties resulting from a Force Majeure Event during the performance of the obligations provided for in this Agreement shall not relieve Operator of the indemnity responsibility described in Article 4.

### In the event that Operator is prevented from providing all or part of the Services as a result of a Force Majeure Event for a continuous period of thirty (30) days and it is reasonably expected that Operator will not be able to resume full performance of the Services within a further thirty (30) days, Owner shall be entitled to require Operator to reduce the scope of the Services commencing from the date so notified thereof by Owner until such time as Operator can demonstrate to the reasonable satisfaction of Owner that Operator is able to resume full performance of the Services. From the date on which Owner reduces the scope of the Services until the date on which Operator resumes full performance of such Services, the obligation of Owner to pay the Service Fee pursuant to Section 2.01 shall be reduced proportionately to an amount mutually determined in good faith by the Parties to take account of the level of Services that Operator is actually performing.

### If, within a reasonable time after a Force Majeure Event that has caused Operator to suspend or delay performance of the Services, action to be undertaken has been identified and recommended to Operator, and Operator has failed within five (5) Business Days after receive of written notice thereof from Owner to take such action as Operator could lawfully and reasonably initiate to remove or relieve either the Force Majeure Event or its direct or indirect effects, Owner may, in its sole discretion and after written notice to Operator, initiate such reasonable measures as will be designed to remove or relieve such Force Majeure Event or its direct or indirect effects and thereafter require Operator to resume full or partial performance of the Services. To the extent Operator’s failure to make such measures results in additional expense in addition to the amount Owner would have paid to Operator (whether as part of the original Service Fees, as additional compensation to the extent requested measures required alteration of the scope of Services, or as additional out of pocket expenses incurred by Owner), had Operator taken such measures, such additional expense shall be for Operator’s account.

### If the Force Majeure Event has not been overcome within sixty (60) days from its inception, Operator or Owner may terminate this Agreement pursuant to Section 3.07(a).

# CONFIDENTIALITY

## **General**.

* + - 1. For purposes of this Agreement, "Confidential Information" shall mean all:
				1. financial, statistical, marketing, customer, and personnel data and information furnished by or obtained from Owner;
				2. deliverables, output data, and information prepared for Owner related to any Services;
				3. working papers, proprietary software, tools, and other methodologies of each party;
				4. software or other intellectual property licensed to Owner by any third party;
				5. computer system and network security configuration and infrastructure, network diagrams and infrastructure (including network configuration), transmission data and information, information pertaining to systems defined as “Critical Cyber Assets” under the Critical Infrastructure Protection Standards promulgated by the North American Electric Reliability Corporation;
				6. all “critical energy infrastructure information” and other information concerning “critical infrastructure” as such terms are defined by the Federal Energy Regulatory Commission pursuant to 18 C.F.R. § 388.113(c) as may be amended or codified from time to time;
				7. other data or information identified by a party in writing as confidential, proprietary, or secure or bearing a similar legend affixed by a party; and
				8. oral information that is designated as confidential, proprietary, or secure at the time of disclosure and which is summarized and reduced to a writing otherwise conforming to Article 7 within ten (10) Business Days following disclosure.
			2. Commencing on the Effective Date and continuing until the third (3rd) anniversary of the termination of this Agreement in whole, unless otherwise agreed to in writing by a Disclosing Party, each Party agrees to hold all Confidential Information disclosed to it by the other Party in confidence and not disclose it other than to its Affiliates, contractors (or potential contractors), subcontractors, vendors, consultants, advisors, potential financing parties, employees, directors, officers, agents, advisors or representatives (collectively, the "Personnel") for purposes of the Project or to any purchaser of the Project or a direct or indirect interest in Owner. Each Party agrees that only Personnel who need to have access to Confidential Information in order to perform their duties will be authorized to receive the same, and then only to the extent needed and provided such Personnel have been advised of the obligations and restrictions set forth in this Section 7.01. Each Party shall be responsible for any breach of this Agreement by its Personnel.

## **Exceptions**.

Notwithstanding the foregoing, information shall not be deemed to be Confidential Information where it:

### Is or becomes public information or otherwise generally available to the public through no act of or failure to act by the receiving Party;

### Was, prior to the date of this Agreement, already in the possession of the receiving Party and was not received by such Party directly or indirectly from the other Party;

### Is rightfully received by the receiving Party from a third party who is not prohibited from disclosing it to such Party and is not breaching any agreement by disclosing it to such Party; or

### Is independently developed by the receiving Party without benefit of Confidential Information received from the other Party.

Specific information shall not be deemed to be within the foregoing exceptions merely because it is embraced by more general information within such exceptions, nor shall a combination of features be deemed to be within such exceptions merely because the individual features are within such exceptions.

Operator shall coordinate with Owner with respect to, and provide advance copies to Owner for review of, the text of any proposed announcement or publication that includes any non-public information concerning the Services prior to the dissemination thereof to the public or to any Person other than Subcontractors, Vendors or advisors of Operator, in each case, who agree to keep such information confidential. If Owner delivers written notice to Operator rejecting any such proposed announcement or publication within two (2) Business Days after receiving such advance copies, Operator shall not make such public announcement or publication; provided, however, that Operator may disseminate or release such information in response to requirements of Government Authorities.

## **Required Disclosure**.

If a Party is required by Applicable Law or any Government Authority to disclose any Confidential Information, such Party shall promptly notify the other Party of such requirement prior to disclosure so that the other Party may seek an appropriate protective order and/or waive compliance with the terms of this Section 7.03. If such protective order or other remedy is not obtained, then such Party shall furnish only that portion of the Confidential Information which is legally required to be furnished by the Applicable Law or Government Authority; provided, however, that prior to making any such disclosure, such Party will:

* + - 1. Minimize the amount of Confidential Information to be provided consistent with the interests of the other Party; and
			2. Make every reasonable effort (which shall include participation by the other Party in discussions with the Government Authority involved) to secure confidential treatment of the Confidential Information to be provided.

If efforts to secure confidential treatment are not successful, the other Party shall have the prior right to revise such information in a manner consonant with its interests and the requirements of the Government Authority involved. Each Party acknowledges that the other Party would not have an adequate remedy at law for money damages if the covenants contained in this Section 7.03 were breached and that any such breach would cause the other Party irreparable harm. Accordingly, each Party also agrees that in the event of any breach or threatened breach of this Section 7.03 by such Party or its Personnel, the other Party, in addition to any other remedies it may have at law or in equity, shall be entitled, without the requirement of posting a bond or other security, to equitable relief, including injunctive relief and specific performance. All right and title to, and interest in, Owner's Confidential Information shall remain with Owner. All Confidential Information obtained, developed or created by or for Operator exclusively for the Project, including copies thereof, is the exclusive property of Owner whether delivered to Owner or not. No right or license is granted to Operator or any third party respecting the use of Confidential Information owned by Owner by virtue of this Agreement, except to the extent required for Operator's performance of its obligations hereunder. Except for that Confidential Information which Owner requires to construct, operate, and/or maintain the Project, which Confidential Information shall not be subject to any obligation of return by Owner, at any time upon written request by a disclosing Party, the other Party shall promptly return to the disclosing Party all its Confidential Information, including all copies thereof, and shall promptly purge all electronic copies of such Confidential Information; provided that the other Party shall be entitled to keep one (1) copy of such Confidential Information for its legal records. The return of Confidential Information to the disclosing Party, the purging of electronic copies of Confidential Information or the retention of a copy of Confidential Information for legal records shall not release a Party from its obligations hereunder with respect to such Confidential Information.

# MISCELLANEOUS

## **Governing Law**.

This Agreement shall be governed by and construed in accordance with the laws of the State of New Mexico without regard to principles of conflict of laws thereof.

## **Amendments**.

No amendments to this Agreement shall be binding on the Parties unless in writing that is expressly stated to constitute an “amendment” to this Agreement, and signed by an authorized representative of each Party.

## **No Waiver**.

No provision of this Agreement shall be considered waived by either Party except when such waiver is made in writing. The failure of either Party to insist, on one or more occasions, upon strict performance of any of the provisions of this Agreement or to take advantage of its rights hereunder or the delay or failure in exercising totally or partially any right or remedy under this Agreement, shall not be construed as a waiver of any such provisions or the relinquishment of any such rights or any other rights for the future, but the same shall continue and remain in full force and effect.

## **Successors and Assigns**.

### Except as set forth in subsection (b) of this Section 8.04, no Party shall be entitled to assign this Agreement or any of its rights or obligations under this Agreement, nor shall it enter into any transaction as a result of which it may transfer, assign, charge or dispose any of its right, title or interest in and to any of those rights and obligations, without the prior written consent of the other Party, which may be withheld in its sole discretion. Any such assignment or other transfer in violation of the preceding sentence shall be void.

### The foregoing subsection (a) of this Section 8.04 notwithstanding, upon prior notice to the other Party, (i) this Agreement may be assigned, in whole or in part, by Owner without such consent to: (A) any successor of Owner, (B) a Person acquiring all or a controlling interest in the business assets of Owner, or (C) in connection with a sale or transfer of the Project; and (ii) this Agreement may be assigned by Operator without such consent to any of its Affiliates or in connection with a merger or acquisition of Operator or of substantially all of its assets; provided that any such assignment pursuant to the preceding clause (i) or (ii) shall not relieve the assigning party of any of its obligations under this Agreement.

### Subject to the foregoing, this Agreement shall be binding upon and shall inure to the benefit of the successors and permitted assigns of the Parties.

## **[Intentionally Omitted**.]

## **Access**

### Owner and its agents and representatives shall have access at all reasonable times, to the Project and the Site, all operations of the Project and any documents, materials and records and accounts relating to the operations of the Project for purposes of inspection and review. Upon the reasonable request of Owner and its agents and representatives, Operator shall promptly make available to such Persons and provide them with reasonable access to any operating data and all operating logs.

### During any such inspection or review of the Project, Owner and its agents and representatives shall comply with all of Operator’s safety and security procedures, and Owner and its agents and representatives shall conduct such inspection and reviews in such a manner as to cause minimum interference with Operator’s activities. Operator also shall reasonably cooperate with Owner in allowing other visitors access to the Project under conditions mutually agreeable to the Parties.

## **No Third Party Beneficiaries**.

Except as otherwise expressly provided herein, this Agreement and each provision hereof is for the exclusive benefit of the Parties and is not for the benefit of any third party.

## **Representations and Warranties**.

Each Party represents and warrants to the other Party as of the date of this Agreement that:

### Such Party has the full power and authority to execute, deliver and perform this Agreement and to carry out the transactions contemplated hereby;

### The execution, delivery and performance of this Agreement by such Party and the carrying out by such Party of the transactions contemplated hereby have been duly authorized by all requisite corporate or limited liability company, as applicable, action, and this Agreement has been duly executed and delivered by such Party and (upon execution and delivery by all parties thereto) constitutes the legal, valid and binding obligation of such Party, enforceable against it in accordance with the terms hereof, subject as to enforceability of remedies to limitations imposed by bankruptcy, insolvency, reorganization, moratorium or other similar laws relating to or affecting the enforcement of creditors rights generally and general principles of equity;

### No authorization, consent, approval or order, or notice to or registration, qualification, declaration or filing with any governmental authority or other third party is required for the execution, delivery and performance by such Party of this Agreement or the carrying out by such Party of the transactions contemplated hereby, other than any permits, licenses, or other regulatory and similar approvals needed with respect to the performance by such Party of its obligations hereunder as contemplated herein (and not currently held by such Party and in full force and effect), all of which such Party expects to timely obtain in the ordinary course as and when required pursuant to Applicable Law;

### None of the execution, delivery and performance by such Party of this Agreement, the compliance with the terms and provisions hereof, and the carrying out of the transaction contemplated hereby, conflicts or will conflict with or result in a breach or violation of any of the terms, conditions, or provisions of (i) the organizational documents, as amended, supplemented, or otherwise modified, of such Party, (ii) any Applicable Law, including any order, writ, injunction, judgment or decree of any court or other Governmental Authority against such Party or by which it or any of its properties is bound, (iii) any loan agreement, indenture, mortgage, bond, note, contract or other agreement or instrument to which such Party is a party or by which it or any of its properties is bound, or (iv) constitutes or will constitute a default thereunder; and

### There are no Actions pending or, to such Party’s knowledge, threatened against it or any of its Affiliates before any Governmental Authority that, individually or in the aggregate, could reasonably be expected to materially impair its ability to perform its obligations under this Agreement.

## **Specific Performance**.

The Parties recognize and agree that if for any reason any of the provisions of this Agreement are not performed in accordance with their specific terms or are otherwise breached, immediate and irreparable harm or damage may be caused for which money damages would not be an adequate remedy. Accordingly, each Party agrees that, in addition to any other available remedies, the other Party shall be entitled to seek to enforce specifically the terms and provisions of this Agreement or an injunction restraining any breach or violation or threatened breach or violation of the provisions of this Agreement without the necessity of posting a bond or other form of security. In the event that any Action should be brought in equity to enforce the provisions of this Agreement, no Party shall allege, and each Party hereby waives the defense, that there is an adequate remedy at law.

## **Public Disclosure**.

Notwithstanding anything to the contrary contained in this Agreement, no press release or similar public announcement or communication relating to this Agreement shall be made or caused to be made without the prior written consent of each of the Parties, other than any such press release or similar public announcement or communication that must be made or caused to be made by a Party to comply with the requirements of any applicable law or the rules and regulations of any stock exchange upon which the securities of it or any of its Affiliates is listed (it being agreed that in the event that any such press release or similar public announcement or communication must be made or caused to be made by a Party, such Party shall, to the extent permitted by Applicable Law, provide the other Party with advance notice of the details of, and a reasonable opportunity to comment on, such press release or similar public announcement or communication).

## **Further Assurances**.

Each Party agrees to execute and deliver such additional documents and instruments and to perform such additional acts, as in each case the other Party may reasonably request from time to time after the Effective Date, in order to fully effectuate the intent of this Agreement and the transactions contemplated hereby.

## **Dispute Resolution**.

### **Good Faith Negotiations.** Any disagreements arising pursuant to this Agreement (a “Dispute”) that cannot be resolved between Owner's Representative and Operator's Representative within fourteen (14) days after receipt by each of written notice of such Dispute shall be referred, by Notice signed by Owner's Representative and Operator's Representative, to the executive level officers of each entity comprising Owner and Operator as their designated representatives (which shall not be the Owner's Representative or Operator’s Representative) for resolution. If Owner and Operator, negotiating in good faith, fail to reach an agreement within a reasonable period of time, not exceeding twenty (20) days after such referral, then Owner and Operator agree that any and all Disputes arising from, relating to or in connection with this Agreement, whether based in contract, tort or otherwise shall be settled by binding arbitration in accordance with Section 8.12(b).

### **Arbitration.** Any Dispute that is not settled to the mutual satisfaction of the Parties within the applicable notice or cure periods provided in this Agreement or settled pursuant to Section 8.12(a) shall be settled by binding arbitration between the Parties conducted in El Paso, Texas, in accordance with the Commercial Arbitration Rules of the American Arbitration Association in effect on the date that a Party gives notice of its demand for arbitration under this Section. The submitting Party shall submit such Dispute to arbitration by providing a written demand for arbitration to the other Party and the Parties shall select a single neutral arbitrator with significant contract resolution experience and experience and understanding of the contemporary solar PV power industry and photovoltaic systems. If the Parties cannot agree on a single neutral arbitrator within fifteen (15) Business Days after the written demand for arbitration is provided, then the arbitrator shall be selected pursuant to the Commercial Arbitration Rules of the American Arbitration Association in effect on the date such selection is to be made. Once an arbitrator has been selected, the Parties may then commence with and engage in discovery in connection with the arbitration as provided by New Mexico statutes and shall be entitled to submit expert testimony or written documentation in such arbitration proceeding. The decision of the arbitrator shall be final and binding upon Owner and Operator and shall be set forth in a reasoned, written opinion, and any award may be enforced by Owner or Operator, as applicable, in a court of competent jurisdiction. Any award of the arbitrator shall include interest from the date of any damages incurred for breach or other violation of this Agreement, and from the date of the award until paid in full, at the rate of the lesser of one percent (1%) per month and the maximum rate allowed by Applicable Law. Each of Owner and Operator shall bear its own cost of preparing and presenting its case; provided, however, the Parties agree that the prevailing party in such arbitration shall be awarded its reasonable attorney’s fees, expert fees, expenses and costs incurred in connection with the Dispute. The cost of the arbitration, however, including the fees and expenses of the arbitrator, shall initially be shared equally by Owner and Operator, subject to reimbursement of such arbitration costs and attorney’s fees and costs to the prevailing party. The arbitrator shall be instructed to establish procedures such that a decision can be rendered within one hundred and twenty (120) days of the appointment of the arbitrator.

### **Arbitrator Confidentiality Obligation.** The Parties shall ensure that any arbitrator appointed to act under this Section will agree to be bound to the provisions of Article 7 with respect to the terms of this Agreement and any information obtained during the course of the arbitration proceedings.

### **Attorney’s Fees.** In the event of any Dispute pursuant to this Article 8, the prevailing Party shall be entitled to recover its reasonable attorneys’ fees and costs and expenses incurred in connection therewith.

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

### **Audit Rights.** In the event of a claim by Owner under this Agreement involving an amount greater than $5,000, Operator shall grant audit rights solely for the Services provided hereunder to Owner and only with respect to all relevant documentation pertaining to such claim. The costs of such audit shall be paid by Owner unless the audit reveals an overpayment to Operator of three percent (3%) of the amount originally paid, in which case Operator shall reimburse Owner for the costs of the audit.

### **Continued Performance.** Subject to the provision of Section 3.06(a) permitting Operator to suspend performance as described therein, the commencement of any dispute resolution procedures specified in this Section 8.12 shall not excuse Operator from continuing to perform its obligations under this Agreement. Operator shall continue to perform its obligations hereunder in good faith during any ongoing dispute resolution procedure until final resolution of such dispute is achieved.

## **Survival**.

Notwithstanding any provisions herein to the contrary, the obligations set forth in Section 1.04(d) (Title), Section 1.11 (Taxes), Article 2 (Service Fees), Article 3 (Term; Events of Default; Termination), Article 4 (Indemnification), Article 5 (Limitations of Liability), Article 7 (Confidentiality), Section 8.01 (Governing Law), Section 8.03 (No Waiver), Section 8.08 (Representations and Warranties), Section 8.09 (Specific Performance), Section 8.10 (Public Disclosure), Section 8.12 (Dispute Resolution), this Section 8.13, Section 8.14 (Notices) and Section 8.16 (Construction) (other than subsection (p) thereof) shall in each case survive the expiration or any termination of this Agreement until the later of (i) two years after such termination or (ii) the expiration of the applicable statute of limitations.

## **Notices**.

Any notice, request, demand or other communication required or permitted under this Agreement, shall be deemed to be properly given by the sender and received by the addressee if made in writing and (a) delivered in person, (b) mailed, postage prepaid, either by registered or certified mail, return receipt requested, (c) sent by reputable overnight express courier, (d) transmitted by facsimile where confirmation of successful transmission is received from the receiving Party’s facsimile machine (such transmission to be effective on the day of receipt if received prior to 5:00 p.m. Mountain time on a business day or in any other case on the next business day following the day of transmittal) or (e) transmitted by e-mail if receipt of such transmission by e-mail is specifically acknowledged by the recipient (automatic responses not being sufficient for acknowledgment, addressed in each case to the addresses set forth below, or to any other address either of the Parties to this Agreement shall designate in a written notice to the other Party:

If to Owner (other than invoices):

El Paso Electric Company

PO Box 982

El Paso, Texas 79960.

Attention: Richard E. Turner

Fax: (915) 521-4779

With a copy to:

El Paso Electric Company

PO Box 982

El Paso, Texas 79960

Attention: Paul Garcia, Jr.

And:

El Paso Electric Company

PO Box 982

El Paso, Texas 79960

Attention: Office of General Counsel

Invoices to Owner:

El Paso Electric Company

Attention Accounts Payable

100 N. Stanton Street

El Paso, Texas 79901

If to Operator:

## **Time of Essence**.

Time is expressly agreed to be of the essence with respect to this Agreement and each, every and all of the terms, conditions and provisions herein shall be construed in accordance with such principle.

## **Construction**.

The following rules of construction and interpretation shall govern the construction and interpretation of this Agreement, unless otherwise specified or where the context otherwise requires:

### **Days**. Any reference to days in this Agreement shall mean calendar days.

### **Including**. All uses of “include” or “including” mean “without limitation.”

### **Laws; Contracts**. References to a law, rule, regulation, contract, agreement, or other document mean that law, rule, regulation, contract, agreement, or document as amended, modified, or supplemented, if applicable, from time to time.

### **Or**. The word “or” has the inclusive meaning represented by the phrase “and/or.”

### **Hereof**. The words “this Agreement,” “hereof,” “hereunder,” “herein,” “hereby” or words of similar import refer to this Agreement as a whole and not to a particular Article, Section, subsection, clause, or other subdivision of this Agreement.

### **Person**. Any reference to a Person includes such Person’s successors and permitted assigns and any reference to a Governmental Authority includes any successor thereto.

### **Parts of Speech**. Any definition in one part of speech of a word, such as definition of the noun form of that word, shall have a comparable meaning when used in a different part of speech, such as the verb form of that word.

### **Written**. Any provisions hereof including the words "written" or "in writing" means hand-written, type-written, printed or electronically made and resulting in a permanent record.

### **Number; Gender**. Terms defined in the singular shall have the corresponding meaning when used in the plural and vice versa. References to any gender include all others if applicable in the context.

### **Interpretation and Joint Drafting**. The Parties expressly agree that this Agreement was jointly drafted and that each had the opportunity to negotiate its terms and to obtain the assistance of counsel in reviewing its terms prior to execution. The language in all parts of this Agreement shall be in all cases construed according to its fair meaning and not strictly for or against any of the Parties. In the event any claim is made by any Party relating to any conflict, omission or ambiguity in this Agreement, no presumption or burden of proof or persuasion shall be implied by virtue of the fact that this Agreement was prepared by or at the request of a particular Party or counsel for any particular Party.

### **Complete Agreement**.

#### This Agreement, including all Exhibits attached hereto and incorporated herein by this reference, constitutes the entire agreement between the Parties concerning the subject matter hereof and supersedes any other agreement or understanding, whether written or oral, that may have been made or entered into between the Parties concerning the subject matter hereof.

#### Each Party acknowledges that, in agreeing to enter into this Agreement, it has not relied on any representation, warranty, collateral contract or other assurance (except those set forth in this Agreement) made by or on behalf of any Party at any time before the execution of this Agreement. Each Party waives all rights and remedies which, but for this clause (ii), might otherwise be available to it in respect of any such representation, warranty, collateral contract or other assurance.

### **Cross References**. All cross-references in this Agreement to “Articles,” “Sections,” “subsections,” “clauses,” the “preamble” and “recitals” refer to Articles, Sections, subsections, clauses, the preamble and recitals, in each case of this Agreement.

### **Exhibits**. All cross-references in this Agreement to “Exhibits” are to Exhibits attached to this Agreement, each of which is an integral part of this Agreement and made a part of this Agreement for all purposes. In the event of a conflict or inconsistency between any provision of this Agreement (excluding for this purpose the Exhibits) and any provision of any Exhibit, the former shall control.

### **Captions**. The titles of the various Exhibits to this Agreement and of the various Articles, Sections or subsections of this Agreement:

#### are inserted for convenience, identification and ease of reference purposes only,

#### do not form part of this Agreement, and

#### are in no way intended to define or limit the scope, extent or intent of this Agreement or any of the provisions of this Agreement and shall not in any way affect the interpretation, application or construction of this Agreement or any of the provisions of this Agreement.

### **Severability**. The provisions contained in each section, subsection and clause of this Agreement shall be enforceable independently of each of the others and their validity shall not be affected if any of the others are invalid. If any of those provisions is void but would be valid if some part of the provision were deleted, the provision in question shall apply with such modification as may be necessary to make it valid.

### **Multiple Counterparts**. This Agreement and any amendments of this Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument. Any counterpart may be delivered by facsimile transmission or by electronic communication in portable document format (.pdf) or tagged image format (.tif), and the Parties agree that their electronically transmitted signatures shall have the same effect as manually transmitted signatures.

*[signature page follows]*

**IN WITNESS WHEREOF**, the Parties have executed this Operations and Maintenance Agreement as of the Effective Date.

|  |  |
| --- | --- |
| **El Paso Electric Company** | **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_** |
| By:  | By:  |
| Name:  | Name:  |
| Title: Date:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | Title: Date:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  |

|  |  |
| --- | --- |
| By:  | By:  |
| Name:  | Name:  |
| Title: Date:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | Title: Date:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  |

**EXHIBIT A**

**DEFINED TERMS**

As used in this Agreement, the following terms shall have the meanings set forth below:

“**Action**” means any action, claim, suit, demand, charge, complaint, dispute, grievance, investigation or proceeding, whether civil, administrative or criminal.

“**Additional Services**” means the services described in Section 1.04(c).

“**Affiliate**” means any Person that directly or indirectly through one of more intermediaries, controls or is controlled by or is under common control with the Person specified. For the purpose of this definition, “control” of a Person means the power, direct or indirect, to direct or cause the direction of the management and policies of such Person, whether through the ownership of voting securities, by contract or otherwise.

“**Agreement**” has the meaning given to such term in the preamble.

“**Applicable Law**” means, for any Person, any constitution, code, statute, law, regulation, ordinance, rule, judgment, order, decree, permit, concession, grant, franchise, license, agreement, directive, guideline, treaty, policy or requirement of, or other governmental restriction or any similar form of decision of or determination by, or any interpretation or administration of any of the foregoing, by any Governmental Authority to which the Person or any of its business is subject. Applicable Laws shall include, without limitation, those requirements mandated by any Governmental Authority related to the United States Air Force or the United States Department of Defense or similar entities having jurisdiction over the Project or the Project Site.

“**Availability**” has the meaning given to such term in Section 3.03(g).

“**Availability Period**” has the meaning given to such term in Section 3.03(g).

“**Applicable Permits”** means any and all permits, clearances, licenses, authorizations, consents, filings, exemptions, rulings or approvals from or required by any Government Authority that are necessary for the performance of the Services or ownership or use of the Project.

“**Applicable Standards**” means those sound and prudent practices, acts, methods, specifications, codes and standards of design, engineering, assembly, erection, installation, construction, performance, safety and workmanship prudently and generally engaged in or observed by the majority of the solar operation, maintenance, repair, engineering, construction services and installation firms that perform operations and maintenance services on utility-grade, grid-connected photovoltaic solar electric generating facilities in the United States that, in the exercise of good judgment, would have been expected to accomplish the desired result in a manner consistent with Applicable Laws, Applicable Permits, reliability, safety, environmental protection, local conditions, economy and efficiency.

“**Business Day**” means a day (other than a Saturday or Sunday) on which banks are generally open in New York City for normal business.

“**Confidential Information**” has the meaning given to such term in Section 7.01(a).

**“Critical Cyber Assets”** has the meaning given to such term in Section 7.01(a)(v).

“**Default Rate**” means the lesser of (a) the Prime Rate plus 2% and (b) the maximum rate of interest per annum allowed by Applicable Law.

“**Disclosing Party**” means, in each instance that Confidential Information is furnished by one Party to the other Party, the Party furnishing Confidential Information to the other Party.

“**Dispute**” has the meaning given to such term in Section 8.12(a).

“**Effective Date**” means the date that the Commercial Delivery of Power, as defined under the EPC Contract, has been achieved.

“**EH&S Plan**” means the Environmental, Health and Safety Plan applicable to the Site.

“**EPC Contract**” means the Engineering, Procurement and Construction Contract between Owner and the EPC Contractor.

“**EPC Contractor**” means \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, the Person providing engineering, procurement and construction services for the Project and party to the EPC Contract.

“**Emergency**” means an event occurring at the Site or any adjoining property that poses actual or imminent risk of serious personal injury to any person or material physical damage to the Project or to any interconnection facilities requiring, in the good faith determination of Operator, immediate preventative or remedial action by Operator.

“**Environmental Law**” means any Applicable Law relating to pollution or protection of the environment and human health and all amendments to such laws and all regulations implementing any of the foregoing, including, without limitation, the Hazardous Materials Transportation Act, 49 U.S.C. §1471 et seq.; the Toxics Substances Control Act, 15 U.S.C. §§2601 through 2629; the Clean Air Act, 42 U.S.C. §7401, et seq., the Resource Conservation and Recovery Act, 42 U.S.C. §6901 et seq., the Federal Water Pollution Control Act, 33 U.S.C. §1251 et seq., the Safe Drinking Water Act, 42 U.S.C. §300f, et seq., the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601 et seq., the Oil Pollution Act, 33 U.S.C. § 2701, et seq., and the Emergency Planning and Community Right‑to‑Know Act, 42 U.S.C. § 11001, et seq.

“**Extension Term**” has the meaning given to such term in Section 3.02(b).

“**Force Majeure Event**” means an event not reasonably anticipated as of the date of this Agreement, which is not within the reasonable control of the Party affected thereby, could not have been avoided by the exercise of due diligence, is not the result of the failure to act or the negligence or willful misconduct of such Party and which, by the exercise of due diligence, the affected Party is unable to overcome or obtain or cause to be obtained a commercially reasonable substitute therefor. To the extent that such event satisfies the test set forth in the preceding sentence, Force Majeure includes: any war, declared or not, hostilities, belligerence, blockade, revolution, insurrection, riot, terrorist act, public disorder, strikes or general labor disturbances of a national or regional nature and not specific to Operator's personnel or Subcontractor's personnel at the Site, expropriation, requisition, confiscation or nationalization, hurricanes, tornadoes, earthquakes, flood, explosion, civil disturbance, sabotage, acts or threats of terrorism, war, action, inaction or restraint by court order or public or Governmental Authority; provided, however, that none of the following constitute Force Majeure: (a) strikes or labor disturbances by Operator or Subcontractor personnel occurring at the Site or Operator's or Subcontractor's facilities except to the extent such strikes or labor disturbances at the Site or Operator's or any Subcontractor's facilities are directly related to strikes or labor disturbances that are (A) on a regional or national level and are (B) simultaneously disrupting other business operations in the applicable regional or national area, but only to the extent there are other like business operations in the applicable regional or national area; (b) shortages (real or perceived) of labor unless such shortage is caused by a direct and local Force Majeure Event that prevents labor from accessing the Site; (c) delay or failure by Operator to obtain the requirement for or properly apply for any Applicable Permit which is customarily obtained by Operator in connection with the Services as contemplated by this Contract other than the delay or failure to obtain an Applicable Permit occasioned by (x) revocation, stay or similar action by a Government Authority of an Applicable Permit after issuance thereof by a Government Authority, (y) the failure of a Government Authority to comply with rules, procedures or Applicable Law applicable to such Government Authority or (z) an Force Majeure Event; (d) economic hardship including lack of money or credit and changes in exchanges rates; (e) utility interruptions, unless caused by an independent Force Majeure Event; (f) transportation or shipping accidents that are not of themselves caused by an Force Majeure Event; or (g) unavailability of preferred shipping methods, unless caused by an independent Force Majeure Event.

“**Governmental Authority**” means any national, autonomic, regional, province, town, city, or municipal government, whether domestic or foreign, or other administrative, regulatory or judicial body of any of the foregoing, including without limitation the United States Air Force or the United States Department of Defense or similar entities having jurisdiction over the Project or the Project Site.

“**Hazardous Material**” means and includes each substance designated as a hazardous waste, hazardous substance, hazardous material, hazardous waste, special waste, radioactive material, pollutant, contaminant, toxic substance or other compound, element or substance in any form as designated with words of similar meaning and regulatory effect under any Environmental Law, petroleum and petroleum products, derivatives, wastes or additives, polychlorinated biphenyls, asbestos, and any other substance for which liability or standards of conduct may be imposed under Environmental Law.

“**Income Taxes**” means all Taxes based on or calculated with reference to a Person’s revenues, receipts, gross income, net income or any other measure based on any of the foregoing (but excluding social security and payroll Taxes).

“**Indemnified Party**” has the meaning given to such term in Section 4.01(e).

“**Indemnifying Party**” has the meaning given to such term in Section 4.01(e).

“**Initial Term**” has the meaning given to such term in Section 3.02(a).

“**Insolvent**” means (a) a Party shall file a voluntary petition in bankruptcy or shall be adjudicated as bankrupt or insolvent, or shall file any petition or answer or consent seeking any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief for itself under the present or future applicable Federal, state or other statute or law relative to bankruptcy, insolvency or other relief for debtors, or shall seek or consent to or acquiesce in the appointment of any trustee, receiver, conservator or liquidator of such Party or of all or any substantial part of its properties (the term “acquiesce”, as used in this definition, includes the failure to file a petition or motion to vacate or discharge any order, judgment or decree within fifteen (15) days after entry of such order, judgment or decree); (b) a court of competent jurisdiction shall enter an order, judgment or decree approving a petition filed against a Party seeking a reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under the present or any future Federal bankruptcy act, or any other present or future applicable Federal, state or other statute or law relating to bankruptcy, insolvency or other relief for debtors, and such Party shall acquiesce and such decree shall remain unvacated and unstayed for an aggregate of sixty (60) days (whether or not consecutive) from the date of entry thereof, or a trustee, receiver, conservator or liquidator of such Party shall be appointed with the consent or acquiescence of such Party and such appointment shall remain unvacated and unstayed for an aggregate of sixty (60) days, whether or not consecutive; (c) a Party shall admit in writing its inability to pay its debts generally as they mature; (d) a Party shall give notice to any governmental body of insolvency or pending insolvency, or suspension or pending suspension of operations; (e) a Party shall make an assignment for the benefit of creditors or take any other similar action for the protection or benefit of creditors; or (f) any other similar relief is granted against such Party under any applicable federal or state law.

“**Lease**” means the Leases Agreement between Owner and the underlying fee owner of the Site, which agreement allows Owner to construct and operate the Project thereon.

“**Liability Cap**” has the meaning given to such term in Section 5.02.

“**Lien**” means any lien, mortgage, pledge, encumbrance, charge, security interest, defect in title, or other claim filed or asserted in connection with the Project by or through Operator, a Subcontractor or any other third party under the control or supervision of Operator or any Subcontractor against the Project, the Site, or any other structure or equipment at or adjacent to the Site.

“**Losses**” means any and all claims, liabilities, losses, causes of action, fines, penalties, litigation, lawsuits, administrative proceedings, administrative investigations, costs, and expenses, including reasonable attorneys’ fees, court costs, and other costs of suit.

“**Manuals**” means (a) the operation and maintenance procedures manual provided to Owner by the EPC Contractor pursuant to the EPC Contract, (b) any operation and maintenance manual prepared by any manufacturer of components of the Project, and (c) any other operation and maintenance manual approved by Owner in respect of the Project.

“**Measurement Year**” means, during the Service Period:

1. in the case of the first Measurement Year, the period from the Effective Date until (and including) the next occurring 31st December;
2. in the case of each successive Measurement Year, the twelve (12) calendar month period from and including 1st January in such year until (and including) the next occurring 31st December; and
3. in respect of the last Measurement Year, the period from and including 1st January in the calendar year in which this Agreement expires or terminates in accordance with its terms until the date that this Agreement expires or terminates in accordance with its terms.

“**O&M Budget**” has the meaning given to such term in Section 2.09(a).

 “**Operator**” has the meaning given to such term in the preamble.

“**Operator Event of Default**” has the meaning given to such term in Section 3.03.

“**Operator Indemnitees**” means Operator and its Affiliates and each of the respective members, managers, directors, officers, employees, agents, advisors and representatives of Operator and its Affiliates.

“**Operator Representative**” has the meaning given to such term in Section 1.14(b).

“**Owner**” has the meaning given to such term in the preamble.

“**Owner Event of Default**” has the meaning given to such term in Section 3.04.

“**Owner Indemnitees**” means Owner and its Affiliates and each of the respective members, managers, directors, officers, employees, agents, advisors and representatives of Owner and its Affiliates.

“**Owner Representative**” has the meaning given to such term in Section 1.14(a).

“**Party**” and “**Parties**” has the meaning given thereto in the preamble.

“**Person**” means any individual, corporation, partnership, company, joint venture, association, trust, unincorporated organization or Governmental Authority.

**“Personnel”** has the meaning given thereto in Section 7.01(b).

“**Prime Rate**” means, as of the date of any determination, the rate of interest per annum quoted in *The Wall Street Journal* as the “Prime Rate” for such date of determination.

“**Prohibited Substances**” means asbestos, refractory ceramic fibers, lead, methylene chloride and polychlorinated biphenyls.

“**Project**” has the meaning given thereto in the Recitals.

“**Receiving Party**” means, in each instance that Confidential Information is furnished by one Party to the other Party, the Party receiving Confidential Information from the other Party.

“**Representatives**” means, with respect to a Party, the directors, officers, employees, counsel, accountants, financial advisors, consultants and other advisors of such Party or any Affiliate thereof. Such term shall also include, in the case of Owner, its contractors (other than Operator) and, in the case of Operator, its Subcontractors.

“**Service Fees**” has the meaning given in Section 2.01(a).

“**Service Period**” means the period of time commencing on the Effective Date and ending on the day this Agreement ceases to be in full force and effect.

“**Services**” has the meaning given to such term in Section 1.03.

“**Site**” means the location of the Project as described in Exhibit B.

“**Site Agreements**” shall mean, collectively, those certain leases, licenses, easements and rights-of-way between Owner, or its Affiliates, and underlying fee owners of the Site, which agreements allow Owner or its Affiliates to construct and operate the Project thereon, including without limitation the Lease.

“**Spares**” means (a) the initial inventory of spare parts for the Project supplied pursuant to the EPC Contract and (b) any new replacement parts purchased on behalf of Owner for the Project in accordance with this Agreement.

“**Subcontract**” means an agreement between Operator and a Subcontractor or, as applicable, between two Subcontractors.

“**Subcontract Counterparty**” has the meaning given to such term in Section 1.04(g)(ii).

“**Subcontractor**” means (a) any Person to whom Operator subcontracts any of its obligations under this Agreement, including any equipment suppliers or vendors, and (b) any Person of any tier to whom such obligations are further subcontracted.

“**Supplier Warranties**” means all rights of Owner under or pursuant to all warranties or guarantees provided to Owner under the EPC Contract or any other agreement or purchase order with a contractor or supplier providing equipment or services to the Project.

“**Taxes**” means all present and future license, documentation, recording and registration fees, all taxes (including income, gross receipts, unincorporated business income, payroll, sales, use, privilege, personal property (tangible and intangible), real estate, excise and stamp taxes), levies, imports, duties, assessments, fees (customs or otherwise), charges and withholdings of any nature whatsoever, and all penalties, fines, additions to tax, and interest imposed by any Governmental Authority.

“**Term**”has the meaning given to such term in Section 3.02(a).

**“Vendor”** means any supplier, manufacturer or vendor of equipment to Operator or any Subcontractor.

**EXHIBIT B**

**DESCRIPTION OF PROJECT AND SITE**

A 2 MWAC solar photovoltaic generating facility located in Doña Ana County, New Mexico, more fully described in the “Engineering, Procurement, and Construction Agreement for Solar Photovoltaic Generating Facility” dated \_\_\_\_\_\_\_ \_\_, 2019, between El Paso Electric Company and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.

**EXHIBIT C**

**SYSTEM SERVICES**

On the terms and conditions set forth in the attached Operation and Maintenance Agreement, Owner elects to receive, and Operator to provide, the services described below.

In the event of any conflict or inconsistency between the terms of such Operation and Maintenance Agreement (without taking into account this Exhibit C), and the terms of this Exhibit C, the former shall control.

|  |  |  |
| --- | --- | --- |
| **Item** | **Service Description** | **Frequency / Response Time** |
| 1 | Monitoring of the solar system from a control point through internet connection: Including the setup of alarm points for abnormal inverter shutdowns / faults | Daily (minimum 5 days per week) |
| 2 | Remote troubleshooting of inverter / system faults and remote inverter resets when the fault is understood | Daily as needed. Response: Same day (minimum 5 days per week) |
| 33 | On-site troubleshooting of inverter / system faults when the troubleshooting cannot be accomplished remotely. This extends past inverter issues to include open circuit, shorted cabling, opened/blown fuse scenarios, tracker problems including gear box and motor replacements (if system is a tracker system), and grounding issues. | As needed. Response within 48 hours of fault / problem. |
| 44 | On-site troubleshooting includes warranty claim items. | As needed. Response within 48 hours of fault / problem. |
| 55 | Representation of all warranty claims, including documentation collection and filings. | As needed. |
| 66 | To the extent necessary or applicable, the scheduling of power with the applicable power off-taker. | As needed. |
|  |
|  |
| **Preventive Maintenance** |
| 11 | Visually inspect entire solar system: Record, correct, apparent problems. | Twice per year |
| 22 | Visually inspect solar panels: Record if panels are properly affixed in racking system, correct if panels are not firmly affixed. | Twice per year |
| 33 | Visually inspect solar panels: Are any panels broken (replace panel if broken/ damaged / cracked). | Twice per year |
| 44 | Visually inspect underside of modules for discoloration, bubbling, or de-lamination. If bird nests are present, contact Owner and remove if requested to do so. | Twice per year |
| 55 | Visually inspect overall racking structure connections (including lateral links). | Annually |
| 6 | Visually inspect racking foundation. | Twice per year |
| 7 | Visually test for grounding continuity between frames and racking structure on a sampling of PV panels. Visually inspect for corrosion at grounding wire connection. | Annually |
| 8 | Inspect weather station components and verify operation with operations center. | Twice per year |
| 9 | Inspect wind deflectors for physical damage, spot check torque on fasteners. | Twice per year |
| 10 | Verify the points where array wiring enters into conduit are secure, sealed to prevent rain from entering and free of abrasion on the wire insulation. | Annually |
| 11 | Spot check connections within a sampling of combiner boxes. Verify combiner boxes are free of water/moisture. | Annually |
| 12 | Verify DC disconnects are free of damage, corrosion or arc evidence and that they open and close freely. | Annually |
| 13 | Verify AC disconnects are free of damage, corrosion or arc evidence and that they open and close freely. | Annually |
| 14 | Test each string for proper operating current during normal inverter operations. | Annually |
| 15 | Test each string for proper open circuit voltage. | Annually |
| 16 | Verify conduit is structurally supported and secured. | Annually |
| 17 | Verify conduit junctions and box connectors are secure and sealed. | Annually |
| 18 | Inspect and replace as needed the air inlet filters on the inverters | Twice per year |
| 19 | Inspect and clean the inside of the inverter for dirt deposits and water penetrations. Seal penetrations if found. | Twice per year |
| 20 |  Inspect all cooling fans, test for functionality, replace if warranted. | Twice per year |
| 21 | Infrared scan all AC/DC connections, note all hot spots and correct issues. | Annually |
| 22 | Check the condition of AC and DC surge suppressors | Annually |
| 23 | Check the safety circuit for switching off the grid contactor in the event of a failure (e.g. emergency off, over/under voltage, etc.) | Annually |
| 24 | Measure and record phase to phase input voltages and currents | Annually |
| 25 | Record HMI voltage and current readings | Annually |
| 26 | Measure the output of all power supplies to be within tolerances. | Annually |
| 27 | Record and clear all faults on the inverters. This is done at the HMI screen. | Twice per year |
| 28 | Verify the operation of the ground fault monitor. | Annually |
| 29 | Check power capacitors for signs of damage | Annually |
| 30 | Check charging resistors  | Annually |
| 31 | Check operation of all anti-condensation heaters | Annually |
| 32 | Check fuses for open or signs of heating (inverter and combiner) | Annually |
| 33 | Inspect sub-assemblies, and major components. | Annually |
| 34 | Correct all deficiencies found. | As needed. |
|  |
| **Single Axis Tracker Maintenance** |
| 1 | Inspection of module clamp and module rail fasteners for torque integrity. | Twice per year |
| 2 | Inspection of gear drives and drive shaft assemblies for proper gear tooth alignment, limit switch operation, motor operation, and overall structural integrity. | Twice per year |
| 3 | Test wind stow function by tripping wind sensor and verify performance. | Twice per year |
| 4 | Lubricate all moving parts including drive shaft and u-joints. | Twice per year |
| 5 | Inspect bushings, bearings, seals and shock absorbers and replace if function is compromised. | Twice per year |
| 6 | Inspect ground braids between (driveshaft) movable torque tube and posts for wear due to cyclic motion, replace if necessary. | Twice per year |
| 7 | Inspect flexible conduit and homerun wires between moving modules and posts for wear and cyclic motion, replace as necessary. | Twice per year |

**EXHIBIT D**

**ADDITIONAL SERVICES**

|  |  |
| --- | --- |
| **Item** | **Service Description** |
| 1 | Vegetation Abatement & Grass Cutting |
| 2 | Removal of vegetation to avoid shading issues and potential system damage. Appropriate removal method will be used depending of site characteristics, including weed eaters, lawn mowing, and herbicides. so that grass & any other vegetation growth is kept at 18” or lower |
| 3 | Module Washing |
| 4 | Replenishment of Spare Parts |
| 5 | Order and replenishment of Owner’s spare parts as needed on the project site. |

**EXHIBIT E**

**OPERATING REPORTS**

**See Attached**

Monthly Operating Report

**Facility:**

**Month/Year: Prepared By:**

**Commercial Operation Date:**

**kWp:**

**kWac:**

**1. Executive Summary**

**2. Generation Summary**

|  |  |  |  |
| --- | --- | --- | --- |
| **Invoiced MWh\*** | **Actual MWh** | **Budget MWh** | **Variance** |
| **Month** |  |  |  |
| **YTD** |  |  |  |

**3. Performance Summary**

|  |  |  |  |
| --- | --- | --- | --- |
| **Performance Ratio\*** | **Actual PR** | **Budget PR** | **Variance** |
| **Month** |  |  |  |
| **YTD** |  |  |  |

**Availability**

|  |  |  |  |
| --- | --- | --- | --- |
| **POA IRR (kWh/m2)** | **Actual POA** | **Typical POA** | **Variance** |
| **Month** |  |  |  |

**Daily Generation and Performance Ratio** MWh Production PR

80

100%

60 75%

40 50%

20 25%

0 0%

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31

(Chart above is an example only)

**4. Major Operating Events**

\*Invoiced MWh and PR metrics include the [ ] meter adjustment factor.

**5. Major Maintenance Activities**

**6. Safety and Environmental Issues/Notes**

**7. Monthly Availability (**availabilities are included as examples only)

|  |  |
| --- | --- |
| Inv 1 | 99.72% |
| Inv 2 | 99.72% |
| Inv 3 | 99.72% |
| Inv 4 | 99.54% |
| Inv 5 | 100.00% |
| Inv 6 | 99.72% |
| Inv 7 | 99.82% |
| Inv 8 | 99.08% |
| Inv 9 | 98.71% |
| Inv 10 | 99.82% |
| Inv 11 | 99.54% |
| Inv 12 | 99.82% |
| Inv 13 | 100.00% |
| Inv 14 | 99.72% |
| Inv 15 | 84.41% |
| Inv 16 | 99.72% |
| Inv 17 | 99.63% |
| Inv 18 | 99.72% |
| Inv 19 | 99.63% |
| Inv 20 | 99.63% |
| Inv 22 | 99.72% |
| Inv 22 | 99.82% |
| Inv 23 | 100.00% |

**IN WITNESS WHEREOF**, Operator has caused its duly authorized representative below to submit this Report as of the date first set forth above.

**[**OPERATOR]

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

Name:

Title:

**Facility:**

**Quarter/Year: Prepared By:**

Monthly Operating Report

**Commercial Operation Date:**

**kWp:**

**kWac:**

**1. Executive Summary**

**2. Generation Summary**

|  |  |  |  |
| --- | --- | --- | --- |
| **Invoiced MWh\*** | **Actual MWh** | **Budget MWh** | **Variance** |
| **Quarter X**  |  |  |  |
| **YTD** |  |  |  |

**3. Performance Summary**

|  |  |  |  |
| --- | --- | --- | --- |
| **Performance Ratio\*** | **Actual PR** | **Budget PR** | **Variance** |
| **Quarter X** |  |  |  |
| **YTD** |  |  |  |

**Availability**

|  |  |  |  |
| --- | --- | --- | --- |
| **POA IRR (kWh/m2)** | **Actual POA** | **Typical POA** | **Variance** |
| **Quarter X** |  |  |  |

**Quarterly Generation and Performance Ratio** MWh Production PR

80

100%

60 75%

40 50%

20 25%

0 0%

1 2 3 4 5 6 7 8 9 10 11 12

(Chart above is an example only - Weekly)

**4. Major Operating Events**

\*Invoiced MWh and PR metrics include the [ ] meter adjustment factor.

**5. Major Maintenance Activities**

**6. Safety and Environmental Issues/Notes**

**7. Quarterly Availability (**availabilities are included as examples only)

|  |  |
| --- | --- |
| Inv 1 | 99.72% |
| Inv 2 | 99.72% |
| Inv 3 |  |

8. **Suggestions & Improvements**

**IN WITNESS WHEREOF**, Operator has caused its duly authorized representative below to submit this Report as of the date first set forth above.

**[**OPERATOR]

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

Name:

**Facility:**

**Year:**

**Prepared By:**

Monthly Operating Report

**Commercial Operation Date:**

**kWp:**

**kWac:**

**1. Executive Summary**

**2. Generation Summary**

|  |  |  |  |
| --- | --- | --- | --- |
| **Invoiced MWh\*** | **Actual MWh** | **Budget MWh** | **Variance** |
| **Year X** |  |  |  |
| **YTD** |  |  |  |

**3. Performance Summary**

|  |  |  |  |
| --- | --- | --- | --- |
| **Performance Ratio\*** | **Actual PR** | **Budget PR** | **Variance** |
| **Year X** |  |  |  |
|  |  |  |  |

**Availability**

|  |  |  |  |
| --- | --- | --- | --- |
| **POA IRR (kWh/m2)** | **Actual POA** | **Typical POA** | **Variance** |
| **Year X** |  |  |  |

**Annual Generation and Performance Ratio** MWh Production PR

80

100%

60 75%

40 50%

20 25%

0 0%

1 2 3 4 5 6 7 8 9 10 11 12

(Chart above is an example only)

**4. Major Operating Events**

\*Invoiced MWh and PR metrics include the [ ] meter adjustment factor.

**5. Major Maintenance Activities**

**6. Safety and Environmental Issues/Notes**

**7. Annual Availability** (availabilities are included as examples only)

|  |  |
| --- | --- |
| Inv 1 | 99.72% |
| Inv 2 | 99.72% |
| Inv 3 | 99.72% |

8. **Suggestions & Improvements**

**IN WITNESS WHEREOF**, Operator has caused its duly authorized representative below to submit this Report as of the date first set forth above.

**[**OPERATOR]

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

Name:

**EXHIBIT F**

**INSURANCE**

Operator shall maintain in effect, insurance coverage of the following types and limits:

(i) Workers’ Compensation Insurance. Workers’ compensation insurance to comply with statutory limits of the Workers’ Compensation laws of the State of New Mexico, and Employer’s Liability (including Occupational Disease) coverage with limits of not less than $1,000,000 per occurrence (including a $1,000,000 disease limit per employee). Workers’ compensation insurance shall cover all of Operator’s employees providing Services or Additional Services.

(ii) Commercial General Liability Insurance. Commercial general liability insurance with a $4,000,000 combined single limit for bodily injury and/or property damage for each occurrence and $4,000,000 in the aggregate. Subject to the terms of the policy, coverage shall include premises, operations, blanket contractual liability, independent contractors, products and completed operations and personal injury coverages, and all other requirements of the Lease.

(iii) Pollution Liability Insurance. Pollution liability insurance with a limit of $1,000,000 each claim/$2,000,000 annual aggregate. Including sudden and gradual pollution liability with coverage for bodily injury, sickness, disease, mental anguish sustained by any person, including death and property damage including physical injury to or destruction of tangible property including the resulting loss of use thereof, cleanup costs and any related legal and defense costs.

(iv) Automobile Liability Insurance.  Automobile liability insurance covering any automobiles used in connection with the Services in an amount not less than $2,000,000 per accident for combined bodily injury, property damage or death.

(v) Umbrella or Excess Liability Insurance. Umbrella/Excess Insurance covering claims in excess of the underlying insurance described in clauses (ii) and (iii) above, with a $10,000,000 minimum per occurrence and in the aggregate. Coverage shall also conform to the requirements of the Lease.

(vi) All Risk Contractor’s Equipment Insurance covering owned, used, and leased equipment required to perform the Services. Operator or Subcontractors may elect to self-insure such exposure if approved in writing by Owner, which approval shall not be unreasonably withheld or delayed.

**EXHIBIT G**

**ANNUAL AVAILABILITY DEFINITION AND CALCULATION**

Project availability is defined per the intent of the ANSI/IEEE 762-1987 Standard Definition for Use in Reporting Electric Generating Unit Reliability, Availability, and Productivity, Section 3.1.2:

1. “Equipment is in an unavailable state when the equipment is not capable of operation because of operational or equipment failures, external restrictions, testing, work being performed, or some adverse condition. The unavailable state persists until the unit is made available for operation by being synchronized to the system in service state.”
2. The following formula shall be used for the calculation of annual Project Availability:



1. Where,

**Theoretical Total Production Hours (Http):** the hours in the Availability Period when minimum point of array irradiance conditions persisting for periods greater than one hour of 100 W/m2 or greater.

**Nameplate Power (KWnp):** the nameplate power rating of the Project determined by the sum of the flash test data for the Project, and adjusted annually based on an 0.5% degradation.

**Component Unavailability Hours (Hun):** the hours in the Availability Period when minimum point of array irradiance conditions persisting for periods greater than one hour of 100 W/m2 or greater, yet an inverter within the Project is not available to generate power, due to the inverter or any other component creating this condition.

**Derated Power (KWdr):** the kilowatts of lost system power due to Project unavailability. Derated Power will be calculated from the period the Project entered the derated state until it returns to a fully operational state. The value for Derated Power will be calculated by the amount of unavailable DC nameplate capacity for the period and is determined by the sum of flash test data for that given unavailable system. For periods when a tracker is unavailable, the Derated Power is 25% of the total DC Capacity installed in that tracking system.

**Incident:** every outage incident during the Availability Period except for Externally Caused Outages.

**Externally Caused Outages are defined to be**:

* The times when a fault in the utility power system outside of the Operator scope of work prevents the export of Project power;
* The times when a fault in the utility power system (voltage, frequency disruption) outside of the scope of work of Operator trips the Project;
* The times when warranty repairs are occurring;
* The times when a Force Majeure Event occurs;
* The times when a fluctuation in the utility network parameters (e.g., a frequency or voltage variation) disconnected the Project from the utility network and prevented energy from being distributed from the Project.
* The times when a failure in the distribution network or in the connection infrastructure prevents energy from being distributed from the Project.
* The times when the Project is off-line due to Owner required outages.
* The times when the Project is off-line due to major maintenance work pre-approved by Owner.