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**NEGOTIATED CONTRACT FOR THE  
PURCHASE OF FIRM CAPACITY AND  
ENERGY FROM A QUALIFYING FACILITY**

Dated the 28<sup>th</sup> day of April, 2006

by and between

**FLORIDA POWER CORPORATION**

d/b/a

**PROGRESS ENERGY FLORIDA, INC.**

and

**FLORIDA BIOMASS ENERGY GROUP, L.L.C.**

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This Negotiated Contract for the Purchase of Firm Capacity and Energy From a Qualifying Facility (the "Agreement") is made this ~~28th~~ 29th day of April, 2006, by and between Florida Power Corporation d/b/a Progress Energy Florida, Inc. ("Buyer"), whose principal place of business is 100 Central Avenue, BT9G, St. Petersburg, Florida 33701 and Florida Biomass Energy Group, L.L.C., a Florida limited liability company whose principal place of business is 1198 Gulf Breeze Parkway, Suite 6, Gulf Breeze, Florida 32561 ("Project LLC"). Each of Buyer and Project LLC may hereafter be referred to as a "Party", collectively, the "Parties."

#### WHEREAS:

- (A) Project LLC intends to design and construct a power generation facility of approximately 116.6 MW gross electric output in South Central Florida, which will consist of materials handling equipment, a materials handling area, processing equipment, a processing area, and an integrated pyrolysis combined cycle power plant (the "Facility"), to be fueled principally by biomass derived from the cultivation and harvesting of the Arundo Donax plant, also known as E-Grass™, which is being used as an energy crop with environmentally advantageous attributes.
- (B) For purposes of this Agreement, the Facility and the farm on which the E-Grass will be cultivated (the "Farm") shall hereinafter be referred to as the "Project". The Farm will be owned and operated by an Affiliate of Project LLC.
- (C) Project LLC intends to procure the interconnection of the Facility to the Transmission System operated by the Transmission Provider.
- (D) Project LLC shall have all rights in and to the Facility (whether by direct ownership or by leasehold), provided that Project LLC may assign such rights and interests in the Facility to designated and approved assignee(s) (who may be either third parties or Affiliates of Project LLC), pursuant to, inter alia, the terms of this Agreement and the other Project Contracts (as herein defined).
- (E) Project LLC will convert E-Grass or other Fuel (as herein defined) into syngas and/or bio-liquid, which it will then convert into Energy (as herein defined). Project LLC shall generate and deliver Committed Capacity (as herein defined) to Buyer pursuant to the terms and conditions of this Agreement and the other Project Contracts.

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth in this Agreement, and for other good and valuable consideration, the receipt and adequacy of which is acknowledged, the Parties hereby agree as follows:

#### 1. DEFINITIONS

##### 1.1. Defined Terms

Unless otherwise defined herein or in any exhibit, schedule or appendix hereto, the following terms, when used herein or in any exhibit or appendix hereto shall have the meanings set forth below.

“Additional Consents” means the approvals, consents, authorizations or other requirements not listed in the definition of Consents in this Agreement that are required from any Government Agency with respect to the Facility.

“Additional Maintenance Outages” has the meaning assigned to it in Section 6.5.

“Affiliate” of any Person shall mean a Person (other than a natural person) that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such Person.

“Agreement” means this Negotiated Contract for the Purchase of Firm Capacity and Energy From a Qualifying Facility and the Appendices and Exhibits hereto.

“Ancillary Services” means the generation and transmission related services required by the Transmission Provider to maintain stable, secure and reliable operation of the Transmission System, including but not limited to, any system services referred to in the Project Contracts, frequency-sensitive operation, automatic generation control, spinning reserve, generators with fast-start capability or low frequency relays, reactive power capability and production and emergency services.

“Annual Capacity Billing Factor” has the meaning assigned to it in Appendix 12.1.

“Appendix” means an appendix attached to this Agreement.

“Applicable Law” shall include any and all constitutions, charters, acts, statutes, laws (including, but not limited to, all environmental laws), decrees, ordinances, rules, codes, regulations, orders, conditions, standards and/or objective criteria applicable to this Agreement or to any Party’s obligations, performance, or rights under this Agreement and/or contained in any Consent (where any such items have enforceable legal effect), including any final decree, judgment or order of any court or Government Agency of competent jurisdiction.

“Authorization to Construct” means authorization issued by any appropriate Government Agency to construct or reconstruct the Facility granted to Project LLC in accordance with the laws of the State of Florida and any relevant federal law.

“Avoided Unit Gas Cost” has the meaning assigned to it in Section 12.2(b)(iv).

“Base Capacity Payment” has the meaning assigned to it in Appendix 12.1.

“Business Day” means any Day except a Day upon which banks licensed to operate in the State of Florida are authorized, directed or permitted to close, Saturday, Sunday or a weekday that is observed as a public holiday in the State of Florida.

“Buyer” has the meaning assigned thereto in the opening paragraph of this Agreement.

“Buyer Non-Remediable Event” has the meaning assigned to it in Section 17.1(d).



“Buyer Remediable Event” has the meaning assigned to it in Section 17.1(c).

“CAMD” has the meaning assigned to it in Section 8.2(b).

“Capacity” means the total continuous generating net MW capability of the Facility.

“Capacity Commencement Date” means the date that the Facility has achieved Capacity Commencement Status.

“Capacity Commencement Status” means that (i) the Facility is in compliance with all applicable Facility permits; (ii) the Facility has maintained an hourly MW output, as metered at the Electrical Interconnection Point, equal to or greater than the Committed Capacity, as such Committed Capacity has been determined in accordance with Section 6.2, for a consecutive twenty-four (24) hour period; and (iii) such twenty-four (24) hour period reasonably reflects the Facility’s day-to-day operations, which status must be achieved no later than the Required Capacity Commencement Date.

“Capacity Payment” means, for each Monthly Billing Period during the Term, the payment to be made by Buyer to Project LLC for making the Facility available to Buyer during such Monthly Billing Period, as described in Section 12.1 and calculated in accordance with Appendix 12.1.

“Carbon Sequestration Credits” means any and all air quality credits, green energy credits, renewable energy credits, emissions reduction credits or any other credits, certificates, tags, offsets, allowances or similar products or rights, however entitled, resulting from the sequestration or the long-term storage of carbon in the root systems and other non-Fuel parts of the E-Grass™ or other Fuel crop or crops that are grown or supplied to provide Fuel to the Facility.

“Change in Environmental Law” has the meaning assigned to it in Section 12.4(a).

“Claims” means any claims, judgments, losses, liabilities, costs, expenses (including reasonable legal fees) and damages of any nature whatsoever, including but not limited to, in relation to breach of contract, personal injury, death, property damage incurred or other legal or equitable claims made by third parties.

“Commencement Obligations” means those obligations set out in Section 3.3.

“Commissioning” means, with respect to any Unit, the commencement of the period during which such Unit has begun Testing and ending when such Unit has been approved for the production of Energy and authorized to commence delivery of Energy pursuant to the provisions of Sections 6 and 14 hereof, provided, however, that for certain tax and other corporate purposes, in accordance with Applicable Law, Commissioning shall be deemed to occur when any measurable amount of Energy is first produced at a Unit of the Facility and delivered and sold to Buyer consistent with the provisions hereof.

“Committed Capacity” means the minimum electrical Capacity of the Facility guaranteed to be provided by Project LLC being total net electric Capacity of approximately 116.6 MW which

shall be definitively quantified by the Parties upon initial Start-Up of the Facility and which shall be subject to increase or decrease in accordance with Section 6.2.

“Conditions Precedent” means the conditions precedent specified in Section 3.1.

“Consent” means a Governmental Approval or other contract, license, approval, permission, authorization or other right of whatsoever nature (including any renewal or replacement of same) necessary or desirable for the construction of the Facility infrastructure or for the use of the Facility for the generation of electricity or for the transmission of electricity to the Transmission System (including, but not limited to, the Project Consents); for the delivery to or storage of E-Grass or LEG at the Facility; or for any other matters relevant to the performance of either Party’s obligations under this Agreement. For the avoidance of doubt, the definition of “Consent” shall include a determination by the FPSC that the Facility is a Qualifying Facility.

“Contract Year” means, initially, the period commencing on the Delivery Start Date and ending twelve (12) Months after the last Day of the Month in which the Delivery Start Date occurs and, subsequently, each twelve (12) Month period thereafter for the remainder of the Term.

“Contractor” means any Person with whom Project LLC contracts for the provision of goods or services relating to the engineering, design, construction, operation and/or maintenance of the Facility.

“Coverage Ratio Failure” has the meaning assigned to it in Section 6.9(g).

“CPI” has the meaning assigned to it in Section 12.2(b)(iii).

“Day” means a period beginning at 12:00 a.m. Eastern Prevailing Time on any day and ending at 12:00 a.m. Eastern Prevailing Time on the following day.

“Default Rate” has the meaning assigned to it in Section 13.6.

“Delivery Excuse” means an event solely or substantially due to actions or omissions by Buyer and no more than nominally attributable to Project LLC and/or the EPC Contractor, which prevents or delays delivery of Energy hereunder.

“Delivery Start Date” means the Taking Over Date, as defined in the EPC Contract, provided that, in the event the Taking-Over Date is delayed as a result of a Delivery Excuse, the Delivery Start Date shall be the earliest date on which the Taking-Over Date would otherwise have occurred in the absence of a Delivery Excuse.

“Dispute” has the meaning assigned to it in Section 16.1.

“Disputing Party” has the meaning assigned to it in Section 13.7(a).

“Distribution System” means the distribution system consisting of electric lines, electric plant, transformers and switchgear is used for conveying electricity to ultimate consumers, but not including any part of the Transmission System.

"Dollars" means United States Dollars.

"Downgrade Event" has the meaning assigned to it in Section 6.9(f).

"Drop Dead Date" means the date which is twelve (12) Months following the latest date by which any appeal could have been (but was not) taken in connection with the final approval of this Agreement by the FPSC.

"Due Date" means, with respect to any invoice delivered by Project LLC pursuant to Section 13.1, the 15th Day of the Month following the Month in which the invoice was sent, or if such 15th Day is not a Business Day, then the next succeeding Business Day.

"Eastern Prevailing Time" or "EPT" means the time in effect in the Eastern Time Zone of the United States of America, whether Eastern Standard Time or Eastern Daylight Savings Time.

"Effective Date" has the meaning assigned to it in Section 3.1(n).

"E-Grass" has the meaning assigned to it in Recital (A).

"Electrical Interconnection and Operating Agreement" means the agreement between Project LLC and the Transmission Provider providing for the physical connection and operation of the Electrical Interconnection Facilities between the Facility and the Transmission System.

"Electrical Interconnection Facilities" means the interconnection facilities that physically connect the Facility with the Transmission System, as well as any required network upgrades thereto, as more fully described in the Electrical Interconnection and Operating Agreement.

"Electrical Interconnection Point" means the physical point at which the Facility is connected with the Transmission System or, if Project LLC interconnects with a Transmission System other than Buyer's, Buyer's interconnection with the Transmission Provider's Transmission System, or such other physical point on which Project LLC and Buyer may agree.

"Emergency Condition" means a condition or situation that presents an imminent physical threat of danger to life, health or property, and/or could reasonably be expected in the opinion of the Transmission Provider to cause a significant disruption to the Transmission System or otherwise be required in accordance with the requirements of the FPSC or any system condition not consistent with Prudent Utility Practices.

"Energy" means megawatt-hours generated by the Facility of the character commonly known as three-phase, sixty hertz electric energy that is delivered at a nominal voltage at the Electrical Interconnection Point.

"Environmental Attributes" has the meaning assigned to it in Section 8.2(b).

"EPC Contract" means the Turnkey Engineering, Procurement and Construction Contract entered into between Project LLC and the EPC Contractor in relation to the engineering, procurement and construction of the Facility.

"EPC Contractor" means [REDACTED] or another EPC Contractor acceptable to Buyer.

"Event(s) of Default" means any of the Project LLC Remediable Events of Default, Project LLC Non-Remediable Events of Default, Buyer Remediable Events of Default, or Buyer Non-Remediable Events of Default referred to in Section 17 hereof.

"Execution Date" has meaning assigned to it in Section 3.1(o).

"Extension Request" has the meaning assigned to it in Section 2.2(a).

"Facility" has the meaning assigned to it in Recital (A).

"Facility Site" means the site on which the Facility is to be constructed in South Central Florida.

"Facility Site Lease" means the lease between [REDACTED] as lessor and Project LLC as lessee in respect of the land on which the Facility will be built, or such other lease agreement between Project LLC and the provider of leasehold property in respect of the same.

"Farm" has the meaning assigned to it in Recital (B).

"Farm Lease" means the lease between [REDACTED] as lessor and Project LLC as lessee in respect of the land on which the E-Grass will be grown, or such other lease agreement between Project LLC or its Affiliates and the provider of leasehold property in respect of the same.

"Financial Closing" means the fulfillment of each of the following conditions:

- (a) the execution and delivery of the Financing Documents; and
- (b) all Conditions Precedent to the initial availability for disbursement of funds under the Financing Documents (other than relating to the effectiveness of this Agreement) are satisfied or waived.

"Financial Closing Date" means the date upon which Financial Closing is achieved.

"Financing Agreement" has the meaning assigned to it in Section 6.9(g).

"Financing Documents" shall mean documentation with respect to any private equity investment in Project LLC, any loan agreements (including agreements for any subordinated debt), notes, bonds, indentures, guarantees, security agreements and hedging agreements relating to the financing or refinancing of the design, development, construction, Testing, Commissioning, operation and maintenance of the Facility or any guarantee by any Financing Party of the repayment of all or any portion of such financing or refinancing.

"Financing Parties" means the Persons (including any trustee or agent on behalf of such Persons) providing financing or refinancing to or on behalf of Project LLC for the design, development, construction, Testing, Commissioning, operation and maintenance of the Facility (whether limited recourse, or with or without recourse).

“Firm Acceptance” has the meaning assigned to it in Section 17.2(d).

“Firm Energy Rate” has the meaning assigned to it in Section 12.2(b)(ii).

“Firm Offer” has the meaning assigned to it in Section 17.2(b).

“Fixed Energy Payment” has the meaning assigned to it in Section 12.2(b)(ii).

“Fixed Operations and Maintenance Payment” has the meaning assigned to it in Appendix 12.1.

“FM Ratio” has the meaning assigned to it in Section 14.5(b).

“Force Majeure Event” means an event, condition or circumstance described in Section 14.

“Forced Outage” means a reduction of, or cessation in the delivery of, or inability to deliver, Energy that is not the result of (a) a Scheduled Maintenance Outage, (b) a Force Majeure Event, (c) a Delivery Excuse, or (d) an Emergency Condition.

“FPSC” means the Florida Public Service Commission.

“Fuel” means E-Grass or biomass material with environmentally advantageous attributes comparable to those of E-Grass.

“Fuel Supply Agreement” means the agreement between Project LLC and its farming Affiliate pursuant to which such Affiliate will supply Fuel to the Facility.

“Government Agency” means the United States of America, or any state or any other political subdivision thereof, including without limitation, any municipality, township or county, and any domestic entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government, including, without limitation, any corporation or other entity owned or controlled by any of the foregoing.

“Governmental Approval” means any authorization, Consent, approval, license, ruling, permit, exemption, variance, order, judgment, instruction, condition, direction, directive, decree, declaration of or regulation by any Government Agency relating to the construction, development, ownership, occupation, start-up, Testing, operation or maintenance of the Facility or to the execution, delivery or performance of this Agreement as any of the foregoing are in effect as of the date of this Agreement.

“Increased Environmental Costs” has the meaning assigned to it in Section 12.4(b).

“Independent Engineer” means such independent consulting engineering firm of national repute and appropriate expertise in integrated pyrolysis combined cycle power production and technology as is appointed by Buyer from time to time after consultation with and upon the prior written consent of Project LLC (not to be unreasonably withheld or delayed).

“Issuer” has the meaning assigned to it in Section 6.9(b).

“kW” means one or more kilowatts of electricity, as the context requires.

“Letter(s) of Credit” has the meaning assigned to it in Section 6.9.

“Liquid E-Grass” or “LEG” means a bio-liquid derived from E-Grass or other biomass material with environmentally advantageous attributes comparable to those of E-Grass.

“Maintenance Outage” means a time period during which the Facility is shut down or its output reduced to undergo maintenance in accordance with Section 6.4 or as otherwise agreed by the Parties.

“Metering Equipment” has the meaning assigned to it in the Electrical Interconnection and Operating Agreement and shall include Buyer’s communications media, remote terminal unit, and access to metering data.

“Minimum Investment Rating” is the credit rating assigned to a Party’s unsecured, senior long-term debt obligations of at least BBB- by Standard & Poor’s, a division of the McGraw-Hill Companies (“S&P”) or Baa3 by Moody’s Investors Service, Inc. (“Moody’s”).

“Minimum Debt Coverage Ratio” has the meaning assigned to it in Section 6.9(g).

“Month” means a calendar month.

“Monthly Billing Period” has the meaning assigned to it in Appendix 12.1.

“Monthly Capacity Factor” has the meaning assigned to it in Appendix 12.1.

“Monthly Capacity Payment” has the meaning assigned to it in Appendix 12.1.

“MW” means one or more megawatts of electricity, as the context requires.

“MWh” means one or more megawatt-hours of electricity, as the context requires.

“Offer Period” has the meaning assigned to it in Section 17.2(c).

“Offer Price” has the meaning assigned to it in Section 17.2(a).

“Operating Parameters” has the meaning assigned to it in Section 6.8.

“Operation and Maintenance Agreement” means that certain operation and maintenance agreement between Project LLC and the Operation and Maintenance Contractor with respect to the Facility.

“Operation and Maintenance Contractor” means [REDACTED] or another operation and maintenance contractor reasonably acceptable to Buyer.

“Party” has the meaning assigned to it in the opening paragraph of this Agreement.

“Person” means any individual, partnership, corporation, association, joint stock company trust, joint venture, unincorporated organization, or Governmental Agency (or any department, agency, or political subdivision thereof).

“Point of Metering” means the point(s) where Energy made available for delivery to Buyer is measured.

“Production Tax Credits” means production tax credits under Section 45 of the Internal Revenue Code of the United States as in effect on the date of this Agreement or any successor or other provision providing for a federal tax credit determined by reference to renewable electric Energy produced from “closed-loop” biomass resources.

“Project” has the meaning assigned to it in Recital (B).

“Project Consents” mean the following Consents, each of which is necessary to Project LLC for the fulfillment of Project LLC’s obligations hereunder:

- (a) the Authorization to Construct;
- (b) planning permission and consents in respect of the Facility, and any electricity substation located at the Facility Site, including but not limited to, a prevention of significant deterioration permit, a noise, proximity and visual impact permit, and any required zoning permit; and
- (c) any integrated pollution control license.

“Project Contracts” means this Agreement, the EPC Contract, the Electrical Interconnection and Operating Agreement, the Fuel Supply Agreement, the Facility Site Lease, the Farm Lease and the Operation and Maintenance Agreement.

“Project LLC” has the meaning assigned to it in the opening paragraph of this Agreement.

“Project LLC Non-Remediable Event” has the meaning assigned to it in Section 17.1(b).

“Project LLC Remediable Event” has the meaning assigned to it in Section 17.1(a).

“Projected Schedule” means the projected time-frame for delivery of a specific quantity of Energy by Project LLC to Buyer at the Electrical Interconnection Point during the Term.

“Prudent Utility Practices” means the practices, methods, standards and acts that, at a particular time, in the exercise of reasonable judgment in light of the facts known or that should reasonably have been known at the time a decision was made, could have been expected to accomplish the required result reliably, economically, safely, expeditiously and consistent with good business practices, which practices, methods, standards and acts generally conform to operation and maintenance standards recommended by the Facility’s equipment suppliers and manufacturers, the design limits, applicable Governmental Approvals and Applicable Law.

“Purchase Offer” has the meaning assigned to it in Section 17.2(a).

“Purchaser” has the meaning assigned to it in Section 17.2(a).

“Qualifying Facility” or “QF” means a cogenerator, small power producer, or non-utility generator that meets certain ownership, operating and efficiency criteria established by the Federal Energy Regulatory Commission pursuant to the Public Utility Regulatory Policies Act of 1978 (“PURPA”), the criteria for which are set forth in 18 C.F.R. § 292, *et al.* (2005), Section 210 of PURPA, 16 U.S.C. § 824a-3 (2005), 16 U.S.C. 792 *et al.* (2005), and Section 1253 of EPA Act 2005, Pub. L. No. 109-58, § 1253, 119 Stat. 594 (2005) or, alternatively, analogous provisions under the laws of the State of Florida.

“Remedial Notice” has the meaning assigned to it in Section 17.1(e).

“Remedial Program” has the meaning assigned to it in Section 17.1(b)(iii)(D).

“Required Capacity Commencement Date” means December 1, 2009.

“Restoration” has the meaning assigned to it in Section 14.6(b).

“Restoration Report” has the meaning assigned to it in Section 14.8.

“Restoration Schedule” has the meaning assigned to it in Section 14.6(b).

“Sale Notice” has the meaning assigned to it in Section 17.2(b).

“Schedule” or “Scheduling” means the act of Project LLC notifying and confirming a specific event, such as, but not limited to, a quantity of Energy to be delivered to Buyer during a specified period of time during the Term at the Electrical Interconnection Point in accordance with Section 6. “Scheduled” and other cognate terms derived from “Schedule” shall be construed accordingly.

“Scheduled Maintenance Outage” means a time period during which the Facility is shut down or its output reduced to undergo scheduled maintenance in accordance with Section 6.4 or as otherwise agreed by the Parties.

“Senior Debt Rating” means the rating assigned to an Issuer’s senior unsecured long-term debt obligations (not supported by third party credit enhancements) or, if Issuer does not have a rating for its senior unsecured long-term debt, then the rating then assigned to such Issuer by S&P, Moody’s or any other rating agency agreed to by the Parties.

“Start-Up” means the ignition of the Facility, for the purpose of synchronization to the Transmission System and the continued increase of Energy up to the Committed Capacity determined in Testing or, if the Facility is not capable of achieving Committed Capacity, until the Facility has achieved its maximum level of Capacity at that time.



“Start-Up Fuel” means fuel whose attributes do not precisely correspond with those set forth in the definition of Fuel and is used for the purpose of Start-Up procedures, operational stabilization, or other short term operational procedures. Start-Up Fuel may include distillate oil, natural gas or other fossil fuels. The aggregate amount of Start-Up Fuel that may be used by the Facility in any Contract Year shall not exceed five percent (5%) of total Fuel used in such Contract Year.

“Target Capacity Commencement Date” shall mean the date (as such date may be extended in accordance with Section 3.4) falling [REDACTED] months after the Financial Closing Date.

“Tax” or “Taxes” means any tax, charge, impost, tariff, duty, levy or fee of any kind charged, imposed or levied, directly or indirectly, by any Government Agency or Taxation Authority.

“Taxation Authority” means any revenue, customs, fiscal, statutory, federal, state, local governmental or municipal authority having the legal right to impose any tax, charge, impost, duty, levy or fee in the nature of taxation payable in the United States.

“Term” has the meaning assigned to it in Section 2.1.

“Termination Notice” has the meaning assigned to it in Section 17.1(f)(i).

“Test” or “Testing” means those tests, evaluations and measurements of the Facility’s output capability that are undertaken in connection with the commissioning of the Facility pursuant to Section 6 of this Agreement, which shall include such tests as are consistent with Prudent Utility Practices and generally applicable standards for such tests followed by utilities, independent power producers, and manufacturers of electrical generating equipment in the United States and other parts of the developed world.

“Test Date” means the date on which Project LLC shall commence Commissioning of the Facility and shall be the date falling forty-five (45) Days before the Capacity Commencement Date or such other date as Project LLC and Buyer may agree in writing, provided that such date shall not fall before [REDACTED]

“Transmission Provider” means the operator(s) of the Transmission System(s) or any successor thereof or any other entity or entities authorized to transmit Energy on behalf of Project LLC from the Electrical Interconnection Point.

“Transmission System” means the system of electric lines comprised wholly or substantially of high voltage lines, associated system protection, system stabilization, voltage transformation, and capacitance, reactance and other electric plant used for conveying electricity from a generating station to a substation, from one generating station to another, from one substation to another, or to or from any Electrical Interconnection Point or to ultimate consumers and shall include any interconnection owned by the Transmission Provider or Buyer, but shall in no event include any lines which the Transmission Provider has specified to be part of the Distribution System.

“UNFCCC” has the meaning assigned to it in Section 8.2.

“Unit” means any of the generator units forming a part of the Facility.

“Year” means calendar year.

## 1.2. Interpretation

- (a) Words singular and plural in number shall be deemed to include the other and pronouns having masculine or feminine gender shall be deemed to include the other.
- (b) Article or section headings appearing in this Agreement are inserted for convenience only and shall not be construed as interpretations of text.
- (c) Any reference in this Agreement to any Person, whether or not a Party to this Agreement, includes its successors and assigns and, in the case of any Government Agency, any Person succeeding to its functions and capacities.
- (d) Any reference in this Agreement to any Section, Exhibit or Appendix means and refers to the Section contained in, or Exhibit or Appendix attached to, this Agreement.
- (e) Other grammatical forms of defined words or phrases have corresponding meanings.
- (f) A reference to writing includes typewriting, printing, lithography, photography and any other mode of representing or reproducing words, figures or symbols in a lasting and visible form.
- (g) Unless otherwise provided, a reference to a specific time for the performance of an obligation is a reference to that time in the place where that obligation is to be performed.
- (h) A reference to a document, code, contract or agreement, including this Agreement, includes a reference to that document, code, contract or agreement as novated, amended, modified, revised, supplemented, replaced or restated from time to time in accordance with the relevant provisions thereof.
- (i) If any payment, act, matter or thing hereunder would occur on a Day that is not a Business Day, then such payment, act, matter or thing shall, unless otherwise expressly provided for herein, occur on the next succeeding Business Day.
- (j) Where reference is made to an Applicable Law, such reference shall be deemed to include all prior and subsequent enactments, amendments and modifications pertaining thereto.
- (k) Any reference to the word “include” shall be interpreted to mean “including without limitation”.

- (1) If any index referred to in this Agreement ceases to be published or if there is any material change to the way in which such index is compiled, either Party may request the adoption of such substitute index as most closely resembles the original index prior to it ceasing to be published or changing. If the Parties are unable to agree upon an appropriate substitution, the matter shall be settled in accordance with Section 16.

### **1.3. Technical Meanings**

Words not otherwise defined herein that have well-known and generally accepted technical or trade meanings are used herein in accordance with such recognized meanings.

## **2. TERM**

### **2.1. Term**

This Agreement shall continue in effect for a period ending on the date that is twenty-five (25) years from the Capacity Commencement Date (the "Term"), unless otherwise extended or terminated in accordance with the provisions of this Agreement.

### **2.2. Extension of Term**

The Term of this Agreement may be extended for an additional five (5) years upon the mutual written agreement of both Parties. Either Party may submit a request for an extension to the other Party, which request shall be made in writing not less than twelve (12) Months prior to the expiration of the Term.

### **2.3. QF Status**

Throughout the Term of this Agreement, the Facility shall be a Qualifying Facility. Each Party shall use its best efforts to enforce the validity of this Agreement and to expedite FPSC action on Buyer's request for FPSC approval of this Agreement. Buyer shall submit this Agreement and related documentation to the FPSC for approval within ten (10) Days of the Execution Date. The Parties recognize that under this Agreement, Project LLC desires to sell, and Buyer desires to purchase, electricity to be generated by Project LLC consistent with Florida Statute 366.91 and FPSC Rules 25-17.080 through 25-17.091 F.A.C.

## **3. CONDITIONS PRECEDENT**

### **3.1. Conditions Precedent**

With the exception of:

- (a) the Recitals;
- (b) Section 1 (Definitions);
- (c) Section 2 (Term);

- (d) Section 3 (Conditions Precedent);
- (e) Section 4 (Representations and Warranties);
- (f) Section 5 (Insurance);
- (g) Section 14 (Force Majeure Events);
- (h) Section 15 (Liability and Indemnification);
- (i) Section 16 (Resolution of Disputes);
- (j) Section 17 (Termination and Default); and
- (k) Section 18 (Miscellaneous),

which in each case shall come into effect upon the execution of this Agreement, this Agreement shall not otherwise come into force and shall be conditional upon no Event of Default having occurred or continuing and the following conditions precedent ("Conditions Precedent") set forth below being fulfilled to the reasonable satisfaction of Buyer or Project LLC, as the case may be, or otherwise waived in writing by Buyer or Project LLC, as the case may be:

- (l) Conditions Precedent to be fulfilled by Project LLC, to the reasonable satisfaction of, or waived in writing by, Buyer, include the following:
  - (i) Project LLC shall have obtained firm transmission service necessary to deliver Capacity and Energy from the Facility to the Electrical Interconnection Point;
  - (ii) Project LLC having obtained or being in the process of obtaining (with no reasonably foreseeable expectation of a failure to obtain) the Project Consents and any other Consents for which it is responsible under the terms hereof;
  - (iii) Project LLC having entered into Financing Documents relative to the construction of the Facility and having achieved Financial Closing;
  - (iv) Project LLC having entered into the Project Contracts;
  - (v) Project LLC having obtained or being in the process of obtaining (with no reasonably foreseeable expectation of a failure to obtain) insurance policies or coverage in compliance with Section 5;
  - (vi) Project LLC having delivered to Buyer (i) a copy of its constitutional documents (certified by its corporate secretary as true, complete and up-to-date) and (ii) a copy of a corporate resolution approving the terms of this Agreement and the transactions contemplated hereby and authorizing one or more individuals to execute this Agreement on its behalf (such copy to

- have been certified by its corporate representative as true, complete and up-to-date);
- (vii) any legislation relevant to the above items being in full force and effect; and
  - (viii) Project LLC obtaining Qualifying Facility Status as set forth in Section 2.3 of this Agreement.
- (m) Conditions Precedent to be fulfilled by Buyer to the reasonable satisfaction of, or waived in writing by, Project LLC, include the following:
- (i) Buyer having obtained all Consents for which it is responsible under the terms hereof;
  - (ii) Buyer and its advisers having completed to their reasonable satisfaction due diligence on the Project Contracts and the Financing Documents and having provided Project LLC with written confirmation of the same (not to be unreasonably withheld or delayed);
  - (iii) Buyer having delivered to Project LLC (i) a copy of all Buyer constitutional documents (duly certified by its company secretary as true, complete and up-to-date) and (ii) a copy of a resolution of Buyer approving the terms hereof and the transactions contemplated hereby and authorizing one or more individuals to execute this Agreement on behalf of Buyer (such copy to have been certified by its company secretary as true, complete and up-to-date); and
  - (iv) any legislation relevant to the above items being in full force and effect.
- (n) Promptly upon satisfaction (or waiver by Buyer) of the Conditions Precedent to be satisfied by Project LLC, Buyer shall deliver to Project LLC a certificate evidencing such satisfaction. Promptly upon satisfaction (or waiver by Project LLC) of the Conditions Precedent to be satisfied by Buyer, Project LLC shall deliver to Buyer a certificate evidencing such satisfaction. Subject to there being no Event of Default which has occurred and/or is continuing as at the date upon which the last of such certificates is delivered, the date of such last certificate shall constitute the effective date of this Agreement (the "Effective Date").
- (o) The effectiveness of this Agreement as a whole shall be contingent upon the satisfaction of all Conditions Precedent by the Drop Dead Date, this Agreement to have been entered into on or before the \_\_\_ day of April, 2006 (the "Execution Date"). Unless all Conditions Precedent are satisfied or waived by each applicable Party on or before the Drop Dead Date, this Agreement shall terminate on such date and neither Party shall have any further liability to the other Party hereunder.

### **3.2. Capacity Commencement Date**

Project LLC shall achieve the Capacity Commencement Date on or before the Required Capacity Commencement Date.

### **3.3. Commencement Obligations**

Project LLC shall ensure that before the Test Date:

- (a) the Facility shall have been constructed in accordance with the EPC Contract so that Commissioning may be duly and properly undertaken in accordance with Section 6; and
- (b) an operable physical connection from the Facility to the Transmission System shall have been effected in accordance with the Electrical Interconnection and Operating Agreement, provided, however, that such physical connection shall be made consistent with the terms hereof.

### **3.4. Extension of Target Capacity Commencement Date**

The Parties agree that the date of the Target Capacity Commencement Date shall be extended on a Day-for-Day basis for any delay resulting from:

- (a) any Delivery Excuse; or
- (b) any Force Majeure Event,

but, provided that the Capacity Commencement Date shall not be later than the Required Capacity Commencement Date.

## **4. REPRESENTATIONS AND WARRANTIES**

### **4.1. Representations and Warranties of Project LLC**

Project LLC represents and warrants to Buyer that:

- (a) Project LLC is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Florida, has all requisite power and authority to own or lease and operate its properties and to carry on its business as proposed to be conducted hereunder.
- (b) Project LLC has full power and authority to execute and deliver this Agreement on its own behalf and full power and authority to perform its obligations hereunder. The execution, delivery and performance of this Agreement by Project LLC (i) has been duly authorized by all requisite action on the part of Project LLC and no other proceedings on the part of Project LLC or any other Person are necessary for such authorization, and (ii) will not (A) violate (1) any Applicable Law or (2) any provision of the formation documents of Project LLC, (B) violate,

be in conflict with, result in a breach of or constitute (with or without due notice or lapse of time or both) a default under any indenture, agreement for borrowed money, bond, note, instrument or other agreement to which Project LLC is a party or by which Project LLC or any of its property is bound, excluding defaults or violations that would not, individually or in the aggregate, have a material adverse effect on the business, properties, financial condition or results of operation of Project LLC, or on the ability of Project LLC to perform any of its obligations hereunder. Project LLC has duly executed and delivered this Agreement.

- (c) Assuming it constitutes a legal, valid and binding obligation of Buyer, this Agreement constitutes a legal, valid and binding obligation of Project LLC, enforceable against it in accordance with its terms, subject to (i) bankruptcy, insolvency, reorganization, moratorium, or other similar laws now or hereafter in effect relating to creditors' rights generally and (ii) general principles of equity.
- (d) To the best of its knowledge after reasonable inquiry, no filing or registration with, no notice to, and no permit, authorization, Consent or approval of any Person is required for the execution, delivery or performance of this Agreement by Project LLC, except for (i) those Consents referenced herein that have been or are in the process of being obtained and are or are expected to be in full force and effect and (ii) such Consents as may be required in the future, which Consents have been or will be applied for in due course and diligently pursued.
- (e) Project LLC is not in default under any agreement or instrument of any nature whatsoever to which it is a party or by which it is bound in any manner that would have a material adverse effect on its ability to perform its obligations hereunder or on the validity or enforceability of this Agreement.
- (f) There is no action, suit, proceeding or investigation pending or, to the knowledge of Project LLC, threatened (i) for the dissolution of Project LLC, (ii) against Project LLC which, if adversely determined, would have a material adverse effect on its ability to perform its obligations hereunder or on the validity or enforceability of this Agreement.
- (g) Project LLC has knowledge of all laws and business practices that must be followed in performing its obligations under this Agreement. Project LLC is in compliance with all laws, except to the extent that failure to comply therewith would not, in the aggregate, have a material adverse effect on Project LLC or Buyer.
- (h) Except as expressly contemplated herein, neither the execution and delivery by Project LLC of this Agreement, nor the consummation by Project LLC of any of the transactions contemplated herein, requires the consent or approval of, the giving of notice to, the registration with, the recording or filing of any document with, or the taking of any other material action with respect to governmental authority, except with respect to permits (a) which have already been obtained and

are in full force and effect or are in the process of being obtained (with no reasonably foreseeable expectation of a failure to obtain) or (b) are not yet required (and with respect to which Project LLC has no reason to believe that the same will not be readily issued in the ordinary course of business upon due application for the same).

- (i) To the best of its knowledge after diligent inquiry, Project LLC knows of no (a) existing violations of any environmental laws with respect to the Project, including those governing hazardous materials or (b) pending, ongoing, or unresolved administrative or enforcement investigations, compliance orders, claims, demands, actions, or other litigation brought by governmental authorities or other third parties alleging violations of any environmental law or permit which would materially and adversely affect the operation of the Project as contemplated by this Agreement.

#### **4.2. Representations and Warranties of Buyer**

Buyer hereby represents and warrants to Project LLC that:

- (a) Buyer is a utility established under the laws of the State of Florida and has all requisite corporate power and authority to own or lease and operate its properties and to carry on its business as now being conducted and as proposed to be conducted under the terms of this Agreement.
- (b) Buyer has full corporate power and authority to execute and deliver this Agreement and to perform its obligations hereunder. Subject to the receipt of applicable regulatory Consents for which Buyer is responsible, the execution, delivery and performance of this Agreement by Buyer (i) has been duly authorized by all requisite action on the part of Buyer (whether corporate, governmental, or otherwise) and/or any other Person, and (ii) will not (A) violate any Applicable Law or (B) violate, be in conflict with, result in a breach of or constitute (with due notice or lapse of time or both) a default under any indenture, agreement for borrowed money, bond, note, instrument or other agreement to which Buyer is a party or by which Buyer or its property is bound, excluding defaults or violations that would not, individually or in the aggregate, have a material adverse effect on the business, properties, financial condition or results of operation of Buyer or on its ability to perform its obligations hereunder. Buyer has duly executed and delivered this Agreement.
- (c) Assuming it constitutes a legal, valid and binding obligation of Project LLC, this Agreement constitutes a legal, valid and binding obligation of Buyer, enforceable against it in accordance with its terms, subject to (i) bankruptcy, insolvency, reorganization, moratorium, or other similar laws now or hereafter in effect relating to creditors' rights generally and (ii) general principles of equity.



- (d) To the best of its knowledge after reasonable inquiry, no filing or registration with, no notice to, and no permit, authorization, consent or approval of any Person is required for Buyer to execute, deliver or perform this Agreement, except for (i) Consents referenced herein that have been obtained or are in the process of being obtained and are or are expected to be in full force and effect and (ii) such Consents as may be required in the future, which have been or will be applied for in due course and diligently pursued.
- (e) Save as otherwise disclosed to Project LLC in writing prior to the date of this Agreement, Buyer is not in default under any agreement or instrument of any nature whatsoever to which it is a party or by which it is bound in any manner that would have a material adverse effect on its ability to perform its obligations hereunder, the validity or enforceability of this Agreement, or the financial condition or operation of Buyer.
- (f) There is no action, suit, proceeding or investigation pending or, to the knowledge of Buyer, threatened (i) for the dissolution of Buyer or (ii) against Buyer which, if adversely determined, would have a material adverse effect on its ability to perform its obligations hereunder, the validity or enforceability of this Agreement, or on the financial condition or operation of Buyer.

## **5. INSURANCE**

### **5.1. Maintenance of Insurance Policies**

- (a) In addition to other insurance carried by Project LLC in accordance with this Agreement, Project LLC shall deliver to Buyer, at least fifteen (15) Days prior to the commencement of any work on the Facility, a certificate of insurance certifying Project LLC's coverage under a liability insurance policy issued by an insurer acceptable to Buyer that is authorized to do business in the State of Florida with an AM Best rating of no less than A- and naming Project LLC as a named insured and Buyer as an additional insured, which policy shall contain a broad form contractual endorsement specifically covering liabilities arising out of the interconnection with the Facility, or caused by the operation of the Facility or by Project LLC's failure to maintain the Facility in satisfactory and safe operating condition.
- (b) The insurance policy providing such coverage shall provide public liability insurance, including bodily injury and property damage, in an amount not less than \$3,000,000 for each occurrence. The required insurance policy shall be endorsed with a provision requiring the insurance company to notify Buyer at least thirty (30) Days prior the effective date of any cancellation or material change in the policy.

- (c) Project LLC shall pay all premiums, deductibles and other charges due on said insurance policy and shall keep said policy in force during the Term of the Agreement.

## **5.2. Maintenance of "Occurrence" Form Policies**

The coverage required by this Section 5 and any "umbrella" or excess coverage shall be "occurrence" form policies. In the event Project LLC should have "claims-made" form coverage the retroactive date shall be the Effective Date and coverage shall be extended for two years following termination of this Agreement. Prior written approval of all "claims-made" policies must be obtained from Buyer.

## **5.3. Policy Endorsements**

Project LLC shall cause its insurers to provide the following endorsement items in all comprehensive or commercial general liability and, if applicable, umbrella or excess liability policies required by this Section 5 relating to the ownership, construction, operation and maintenance of the Facility:

- (a) Buyer, its directors, officers and employees shall be additional insureds under such policies.
- (b) The insurance shall be primary with respect to the interests of Buyer, its directors, officers, and employees, and any other insurance maintained by them shall be excess and not contributory with such policies.
- (c) A cross liability clause substantially to the effect set forth below shall be made a part of the policy:

"In the event of Claims being made by reason of (i) personal and/or bodily injuries suffered by any employee or employees of one insured hereunder for which another insured hereunder is or may be liable, or (ii) damage to property belonging to any insured hereunder for which another insured is or may be liable, then this policy shall cover such insured against whom a claim is made or may be made in the same manner as if separate policies had been issued to each insured hereunder, except with respect to the limits of insurance."

- (d) The insurer shall waive all rights of subrogation against Buyer and its officers, directors and employees.
- (e) Notwithstanding any provision of the policy, the policy may not be cancelled, non-renewed or materially changed by the insurer without giving thirty (30) Days prior written notice to Buyer. All other terms and conditions of the policy shall remain unchanged.

#### **5.4. Endorsements to Fire and All Perils and Machinery Breakdown Policies**

Project LLC shall insure the Facility against all risks of physical loss or damage, including boiler and machinery breakdown, and cause its insurers and/or insurance brokers to provide the endorsements referred to in Section 5.3(a), (b), (d) and (e) in such policies covering the Facility, as applicable, and such coverage and endorsements shall be reasonable and customary in the power generation industry for projects of the size and scope of the Facility and, further, shall cause its insurers and brokers to provide standard thirty (30) Day non-cancellation provisions in such policies naming Buyer as an additional named insured.

#### **5.5. Certificates of Insurance**

- (a) Project LLC shall cause its insurers or agents to provide Buyer with certificates of insurance evidencing the policies and endorsements required by this Section 5.
- (b) If Project LLC is unable to obtain the insurance coverage required by this Section 5, it shall promptly notify Buyer.
- (c) Failure by Project LLC to obtain the insurance coverage or certificates of insurance required by this Section 5 shall not in any way relieve or limit obligations and liabilities of Project LLC under any provision of this Agreement.
- (d) If Project LLC should fail to procure or maintain any insurance required pursuant to this Section 5, then Buyer shall have the right, but not the obligation, to procure such insurance and shall be entitled to recover the premiums paid for such insurance as if the same were a debt due and payable against any amounts owed to Project LLC pursuant to the terms of this Agreement.

#### **5.6. Insurance Reports**

Project LLC shall provide Buyer with copies of any technical underwriters' reports or other technical reports received by it from any insurer; provided, however, that Buyer shall not disclose such reports to any other Person except as necessary in connection with administration and enforcement of this Agreement or as may be required by any Governmental Agency or other relevant authority having jurisdiction over Buyer, and shall use and internally distribute such reports only as necessary in connection with the administration and enforcement of this Agreement.

### **6. FACILITY CONSTRUCTION, COMMISSIONING AND OPERATION**

#### **6.1. Construction of the Facility**

- (a) Starting on the date which falls one Month after the date upon which Notice to Proceed (as defined in the EPC Contract) is given in accordance with the terms of the EPC Contract and, thereafter, at monthly intervals, Project LLC shall report to Buyer on the construction of the Facility during the previous Month and shall

provide progress reports and an updated completion schedule for the Facility. Such monthly reports shall provide a schedule showing items completed and to be completed and a non-binding time-frame within which Project LLC expects the EPC Contractor to complete such non-completed works. Project LLC shall, from time to time, upon reasonable advance request from Buyer, meet with Buyer to discuss the progress of the construction of the Facility and development of the Farm.

- (b) Project LLC shall use commercially reasonable efforts to obtain any permits and land rights necessary for the Facility configured substantially as set forth in Appendix 6.1. If, despite its commercially reasonable efforts, Project LLC is able to obtain construction permits or land rights only for a portion of the Facility or for a configuration different than that set forth in Appendix 6.1, the Parties shall, in a commercially reasonable manner consistent with the transactions contemplated by this Agreement, redefine such aspect of Appendix 6.1 as is necessary and execute amendments to this Agreement as are appropriate in relation to the size and configuration authorized by the permits that Project LLC is able to obtain; provided, however, that, except as specifically provided herein, no payment rates due from Buyer to Project LLC shall be subject to renegotiation so long as Project LLC can otherwise perform all of its obligations under this Agreement. Any portion of the Facility that is thereafter excluded from this Agreement shall become part of a project expansion plan subject to a project expansion option to be negotiated among the Parties. Project LLC agrees to provide Buyer with information regarding the reconfiguration or redefinition of the Facility and any other information reasonably requested by Buyer to enable the Parties to redefine and reconfigure the Facility expeditiously and to execute any other amendments to this Agreement that may be appropriate in relation to such redefinition and reconfiguration.
- (c) Other than the rights and obligations of Buyer specified in this Agreement and any documents ancillary hereto, neither this Agreement nor any such ancillary document shall be interpreted to create in favor of Buyer, and Buyer specifically disclaims, any right, title or interest in any part of the Facility or Project.

## 6.2. Commissioning Tests

- (a) Project LLC shall give Buyer at least three (3) Months' prior notice of the Test Date and of any Commissioning Tests relating to the Facility. Buyer's representatives shall have the right to be present at all such Testing that takes place. Project LLC shall promptly notify Buyer of any changes to the Test Date or the date of any Commissioning Tests relating to the Facility in order that Buyer may arrange for its representatives to attend.

[REDACTED]

(c)

[REDACTED]

It is further provided, however, that nothing herein shall prevent or limit the Parties, upon their mutual written agreement to same, from establishing a new Committed Capacity at any level that they mutually agree is appropriate and desirable under this Agreement.

- (d) During a Force Majeure Event declared by Project LLC, Project LLC may temporarily redesignate the Committed Capacity for up to twenty-four (24) consecutive months; provided, however, that no more than one such temporary redesignation may be made by Project LLC within any twenty-four (24) month period, unless Buyer otherwise agrees to such additional temporary redesignation in writing. Within three (3) months after any such Force Majeure Event is cured, Project LLC may, on one occasion, and without penalty, designate a new Committed Capacity to apply for the remainder of the Term; provided, however, that such new Committed Capacity shall be at [REDACTED] and no more than [REDACTED] of the Committed Capacity at the time of the Force Majeure Event. Any temporary or final redesignation of the Committed Capacity pursuant to this Section 6.2(d) must be directly attributable to the Force Majeure Event and of a magnitude commensurate with the scope and impact of the Force Majeure Event. Any Dispute regarding the amount of such temporary or final redesignation shall be settled in accordance with Section 16 of this Agreement.
- (e) Energy produced during any Tests shall be delivered by Project LLC to Buyer at the Electrical Interconnection Point, and Buyer shall purchase such Energy at Buyer's actual as-available Energy cost, which costs shall be calculated by Buyer in accordance with FPSC Rule 25-17.0825, F.A.C .
- (f) Buyer shall have the right to require that Project LLC, not more than once in any twelve (12) Month period beginning with the Capacity Commencement Date, re-demonstrate the Capacity Commencement Status of the Facility within sixty (60) Days of the demand; provided, however, that such demand shall be coordinated

with Project LLC so that the sixty (60) Day period for re-demonstration avoids, if practical, previously notified periods of Scheduled Maintenance Outages and Additional Maintenance Outages pursuant to this Section 6.

### **6.3. Maintenance of the Facility**

Project LLC shall maintain all Facility equipment or cause the same to be maintained at all times in accordance with manufacturers' recommendations and Prudent Utility Practices and otherwise in accordance with this Agreement.

### **6.4. Scheduled Maintenance**

- (a) By October 1 of each Year, Project LLC shall deliver to Buyer the Projected Schedule for the Facility for the subsequent year including Scheduled Maintenance Outages. Project LLC shall take manufacturers' recommendations and Prudent Utility Practices into account when establishing the proposed schedule for Scheduled Maintenance Outages, which schedule shall correspond with the Projected Schedule. Scheduled Maintenance Outages and/or Additional Maintenance Outages may not be Scheduled during the Months of January, February, June, July, August, or September unless agreed to by Buyer at its sole discretion.
- (b) Within thirty (30) Days of receiving the proposed schedule for Scheduled Maintenance Outages from Project LLC, Buyer may propose amendments thereto. Project LLC shall not unreasonably withhold its consent to Buyer's proposed amendments, provided that, for the avoidance of doubt, it shall not be unreasonable for Project LLC to withhold its consent to any proposed amendments of Buyer that would be contrary to Prudent Utility Practices.
- (c) In the event that Project LLC should reject any of Buyer's proposed amendments as set forth in Section 6.4(b) above, Project LLC shall promptly notify Buyer of its reasons for such rejection, whereupon Project LLC and Buyer shall in good faith negotiate a reasonable schedule of Scheduled Maintenance Outages. If agreement between the Parties is not reached within ten (10) Days of receipt by Buyer of Project LLC rejection notice, Project LLC shall submit a final schedule of Scheduled Maintenance Outages based on Prudent Utility Practices and the availability of the Operation and Maintenance Contractor which final schedule shall, to the extent reasonably possible, take into account Buyer's proposed amendments.
- (d) Project LLC shall be entitled to change any Scheduled Maintenance Outages for the then current Year if such changes are required to comply with Prudent Utility Practices or, in the alternative, if Buyer consents to the change, provided that: (i) any change in annual scheduled maintenance of up to two (2) Days' duration shall require one (1) Month's prior written notice to Buyer and (ii) any changes in annual scheduled maintenance of greater than two (2) Days but less than three (3)

weeks' duration shall require three (3) Months' prior written notice to Buyer. Project LLC shall not unreasonably refuse to change the schedule of Scheduled Maintenance Outages if requested to do so by Buyer upon not less than thirty (30) Days' prior notice, provided that: (1) any such change would not be contrary to Prudent Utility Practices and (2) the Operation and Maintenance Contractor would be available.

- (e) Any maintenance outages that do not correspond to the descriptions contained in clauses (a)-(d) of this Section 6.4 shall be deemed to be Additional Maintenance Outages under Section 6.5.

#### **6.5. Additional Maintenance Outages**

As the need arises for Project LLC to conduct further maintenance on the Facility in addition to that conducted pursuant to Section 6.4 hereof ("Additional Maintenance Outages"), Project LLC shall notify Buyer of such required maintenance, together with proposed dates for carrying out such additional maintenance and the estimated duration of the work to be carried out. Unless deferral of such maintenance would cause an Emergency Condition, without prejudice to the commitment of Project LLC in respect of the availability of the Facility, Project LLC and Buyer shall negotiate in good faith a reasonable schedule during which such Additional Maintenance Outages shall take place. If agreement is not reached within twenty (20) Days of receipt of such notice, Project LLC shall prepare a schedule of such Additional Maintenance Outages based on Prudent Utility Practices taking into account the reasonable requests of Buyer to the extent reasonably possible.

#### **6.6. Access and Information**

- (a) Project LLC shall provide Buyer and its authorized agents, employees and inspectors with reasonable access to the Facility for the purposes set forth herein. Buyer acknowledges that such access does not provide Buyer with the right to direct or modify the operation of the Facility in any way and further acknowledges that any exercise by Buyer of its rights under this Section 6.6 shall be at its own risk and expense.
- (b) Any inspections or testing by Buyer shall not relieve Project LLC of its obligation to maintain the Facility. In no event shall any Buyer statement, representation, or lack thereof, either express or implied, relieve Project LLC of its exclusive responsibility for the Facility. Any Buyer inspection of property or equipment owned or controlled by Project LLC or any Buyer review of or consent to Project LLC plans, shall not be construed as endorsing the design, fitness or operation of the Facility equipment nor as a warranty or guarantee.
- (c) Project LLC shall reactivate the Facility at its own expense if the Facility is rendered inoperable due to actions of Project LLC or its agents or a Force Majeure Event or a Delivery Excuse.

## 6.7. Permits: Compliance with Laws

- (a) Project LLC shall acquire and maintain in effect for the Term all Governmental Approvals from all Governmental Agencies having jurisdiction over the Facility insofar as necessary (i) for the construction, operation, development and maintenance of the Facility in accordance with this Agreement and (ii) to permit the Facility to operate, provided that Project LLC shall not be required to acquire and maintain those Governmental Approvals for which Buyer is responsible under Sections 3.1(m)(i) and 13.4 hereof. Upon request from Project LLC, Buyer shall use commercially reasonable efforts to assist in procuring all Governmental Approvals for which Project LLC is responsible, provided that any reasonable expenses incurred by Buyer in providing such assistance shall be reimbursed by Project LLC.
- (b) Project LLC shall secure and maintain all Governmental Approvals and other Consents referenced in clause (a) above at its sole cost and expense, provided that Buyer shall bear all costs associated with those Governmental Approvals for which Buyer is responsible under Sections 3.1(m)(i) and 13.4 hereof.
- (c) In the event that the Parties are required to make any regulatory filings or are subject to the jurisdiction of any regulatory authorities, including but not limited to the FPSC, then each of Project LLC and Buyer agrees to abide by any applicable regulatory rulings or orders issued by such authorities.
- (d) Notwithstanding the foregoing, a Party shall not be deemed to be in breach of its obligations to acquire any Governmental Approvals or other Consents to the extent that such Party is in good faith contesting the application, interpretation, order or other legal direction that would mandate the obtaining of any such Governmental Approvals or other Consents or to the extent that non-compliance would not have a material adverse effect on the performance of Project LLC under this Agreement or on the rights of Buyer under this Agreement.
- (e) Project LLC shall at all times comply with all Applicable Laws to which it or any part of the Facility may be subject, including but not limited to (i) all environmental laws in effect during the Term and (ii) all Applicable Laws pertaining generally to Fuel storage, back-up or security or otherwise relating to the generation of electric power by a closed-loop biomass facility. Notwithstanding the foregoing, Project LLC shall not be deemed to be in breach of its compliance obligations with respect to any Applicable Laws to the extent that it is in good faith contesting the application, interpretation, order or other legal direction pursuant to which it would be rendered subject to any such Applicable Laws or to the extent that non-compliance would not have a material adverse effect on the performance of Project LLC under this Agreement or on the rights of Buyer under this Agreement.



## **6.8. Operating Parameters**

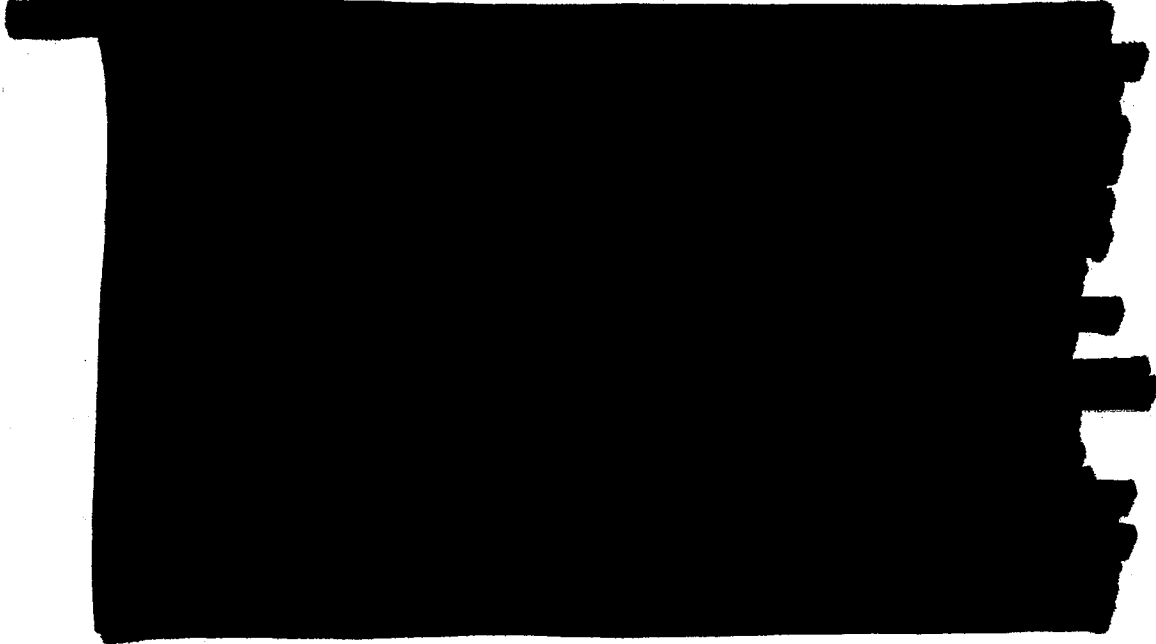
- (a) Project LLC agrees to operate or procure the operation of the Facility in accordance with Prudent Utility Practices and in compliance with all Applicable Laws and Governmental Approvals (the "Operating Parameters"), subject only to Emergency Conditions, Force Majeure Events and Delivery Excuses; provided that, during the Term of this Agreement, Project LLC shall: (a) have the sole responsibility to, and shall at its sole expense, operate and maintain the Facility in accordance with all requirements set forth in this Agreement, and (b) comply with reasonable requirements of Buyer regarding day-to-day or hour-by-hour communications with Buyer. Subject to compliance with the Operating Parameters, Project LLC agrees to operate the Facility in such a manner that Energy delivered by Project LLC will meet all requirements for voltage level, harmonics, power factor, vars, ancillary services and other electrical specifications required by the Transmission Provider.
- (b) Project LLC shall operate the Facility in accordance with Prudent Utility Practices and with all system protective equipment in service whenever the Facility is connected to, or is operated in parallel with, the Transmission System, except for normal testing and repair. Project LLC shall provide adequate system protection and control devices to ensure safe and protected operation of all energized equipment during normal testing and repair. The Facility's protective equipment shall meet IEEE and industry standards. Project LLC shall have qualified independent, third party personnel test, calibrate and certify in writing the proper functioning of all protective equipment at least once every twelve (12) months in accordance with Prudent Utility Practices. Project LLC shall perform a unit functional trip test after each overhaul of the Facility's turbine, generator and boilers and shall provide results to Buyer in writing prior to returning the equipment to service. The specifics of the unit functional trip test will be consistent with Prudent Utility Practices.

## **6.9. Security**

- (a) As security for the achievement of the Required Capacity Commencement Date and satisfactory performance of its obligations hereunder, Project LLC shall provide Buyer with either: (i) one or more unconditional, irrevocable, direct pay Letter(s) of Credit (as herein defined), with the costs associated with any such Letter of Credit to be borne by Project LLC, or (ii) cash deposits in the amounts specified in this Section 6.9.
- (b) As used herein, a "Letter of Credit" shall mean a standby letter of credit issued by a U.S. commercial bank or a foreign bank having a licensed U.S. branch, provided that any such bank shall have a credit rating of at least A- from S&P or A3 from Moody's (the "Issuer") and, provided further, that any such letter of credit shall be in a form reasonably acceptable to the Party in favor of whom it is being issued.



- (d) Buyer shall have the right and Project LLC shall be required to monitor the financial condition of the Issuer(s) in the event any Letter of Credit is provided by Project LLC. In the event the Senior Debt Rating of any Issuer(s) has deteriorated to a level below the level stated in clause (b) of this Section 6.9, Buyer may require Project LLC to replace the Letter(s) of Credit. Replacement Letter(s) of Credit must meet the requirements listed in clause (b) of this Section 6.9 within ten (10) Days following written notification to Project LLC of the requirement to replace.
  
- (e) Failure by Project LLC to comply with the requirements of this Section 6.9 shall, absent a cure by Project LLC in accordance with Section 17 hereof, be grounds for Buyer to draw in full on the existing Letter of Credit and will constitute a Project LLC Remedial Event. In the event of any other Project LLC Remedial Event, Buyer shall not be entitled to receive, draw upon or retain, as the case may be, any portion of the applicable security until such Project LLC Remedial Event shall be deemed a Project LLC Non-Remedial Event, as described in Section 17.1(b)(iii) hereof. In the case of any Project LLC Non-Remedial Event, Buyer shall be entitled immediately to receive, draw upon or retain, as the case may be, one hundred percent (100%) of the applicable security.



- (g) Project LLC covenants that if its Minimum Debt Coverage Ratio (as defined in the Financing Documents) should not be met for any Measurement Period (as defined in the Financing Agreement) and such failure to meet its Minimum Debt Coverage Ratio shall not have been cured within the applicable time period specified in the Financing Agreement (a "Coverage Ratio Failure"), then, in addition to the provisions set forth in this Section 6.9, Project LLC shall, within ten (10) Days of the expiration of the applicable cure period for the Coverage Ratio Failure under the Financing Documents, post additional security in the form of a Letter of Credit in favor of and reasonably acceptable to Buyer. Such Letter of Credit shall be in the amount of [REDACTED] of Committed Capacity. Project LLC's failure to post or maintain such additional security in the form, at the time, and at the level described in this Section 6.9 shall constitute a Project LLC Remediable Event. If and when Project LLC shall have cured its Coverage Ratio Failure to the satisfaction of the Financing Parties, then the Letter of Credit referenced in this subsection shall no longer be required and shall be cancelled. In the event of a subsequent instance of a Coverage Ratio Failure by Project LLC, Project LLC shall again be required to post security in the form of a Letter of Credit as herein described. Should a Coverage Ratio Failure result in the declaration of an Event of Default (as defined in the Financing Documents) against Project by the Financing Parties, and such Event of Default shall not have been cured in accordance with, and to the reasonable satisfaction of, the Financing Parties under the provisions of the Financing Documents, then such circumstances shall constitute a Project LLC Non-Remediable Event and Buyer shall be entitled to draw upon the Letter of Credit. In order to give effect to the foregoing provisions, Project LLC hereby further covenants to provide Buyer with such financial reporting information as Project LLC is required to provide the Financing Parties under the Financing Documents, including but not limited to, annual audited financial statements and quarterly reports on Project LLC's compliance with the Coverage Ratio, to permit Buyer to determine if and when a Coverage Ratio Failure shall have occurred and/or be continuing.

#### **6.10. Submission of Data**

- (a) Project LLC shall submit or cause to be submitted to Buyer the following documents on or before the dates specified below:
- (i) No later than thirty (30) Days after the Financial Closing Date and ending on the Capacity Commencement Date, (A) monthly construction progress reports in such form as may be agreed to by the Parties, (B) such other reports as are submitted to Project LLC by the Independent Engineer, and (C) reports, when and as Project LLC becomes aware, of any new condition or event that may have a material adverse effect on the timely completion of the Facility.
  - (ii) Project LLC shall maintain all records, invoices and other information relating to the costs of construction of the Facility. Quarterly, beginning

no later than ninety (90) Days after the Financial Closing Date and ending when all costs have been determined or incurred, a statement from Project LLC showing the percentage of the contract price properly paid by Project LLC to any Contractor pursuant to the EPC Contract, together with the date of payment.

- (iii) No later than thirty (30) Days prior to the Capacity Commencement Date, (A) evidence demonstrating that Project LLC has obtained all Consents then required to be obtained for the ownership, operation and maintenance of, and the supply of Energy from, the Facility in accordance with this Agreement, and (B) a list identifying the remaining Consents for which Project LLC is responsible under the terms of this Agreement, which Consents are not yet required for the operation and maintenance of, and the supply of Energy from, the Facility, together with a plan reasonably acceptable to Buyer for obtaining such Consents and an estimate of the time within which such Consents will be obtained by Project LLC.
- (iv) On or before the Capacity Commencement Date, a certificate from the Independent Engineer to the effect that, based upon its monitoring and review of construction, the Facility has been constructed in all material respects in compliance with the development plan for the Facility and all permanent equipment installed as part of the Facility was new (or remanufactured) and unused (as remanufactured, if applicable) when installed.
- (v) A certificate dated as of the Capacity Commencement Date signed by the representative of Project LLC, which certificate shall specify that no default or Event of Default has occurred that would, with or without the giving of notice or passage of time, or both, constitute an Event of Default by Project LLC.
- (vi) As soon as available, but not later than sixty (60) Days following the Capacity Commencement Date, two (2) copies of all results of Commissioning Tests performed on the Facility, including Tests of major equipment included in the Facility and the Transmission System.
- (vii) Upon request by the Buyer and at least thirty (30) Days following the Capacity Commencement Date, one (1) copy, as received by Project LLC pursuant to the EPC Contract, of all manufacturers' specifications and manufacturers' operation manuals for all major items of equipment incorporated into the Facility.
- (viii) Upon request by the Buyer, one (1) signed and sealed copy of all as-built drawings for the Facility, including the civil and architectural works, and when provided to Project LLC, as well as other design and engineering data and information necessary to enable the Operation and Maintenance

Contractor to operate and maintain the Facility during any period when such operation and maintenance is required under the Operation and Maintenance Agreement.

- (b) In the event that Project LLC should determine that the expected Capacity Commencement Date is unfeasible or inappropriate, Project LLC shall promptly notify Buyer and shall advise Buyer of the new expected Capacity Commencement Date, which shall be on or before the Required Capacity Commencement Date.
- (c) The receipt of the above schedules, data, certificates and reports by Buyer shall not be construed as an endorsement by Buyer of the design of the Facility, does not constitute a warranty by Buyer as to the safety, durability or reliability of the Facility, otherwise relieve Project LLC of any of its obligations or potential liabilities under the Project Contracts or the Financing Documents or, except with respect to the obligations of Buyer to maintain the confidentiality of documents and information received by it, impose any obligation or liability on Buyer.

## **7. FUEL**

### **7.1. Compliant Fuel**

All Energy to be supplied by Project LLC to Buyer under this Agreement, other than Energy produced using Start-Up Fuel, which shall not exceed five percent (5%) of the total annual thermal Energy production output of the Facility during a Contract Year, shall be produced using Fuel.

### **7.2. Fuel Storage**

During the Term of this Agreement, Project LLC shall maintain sufficient Fuel at the Facility Site to deliver the Capacity and Energy associated with the Committed Capacity for an uninterrupted fourteen (14) Day period. At Buyer's request, Project LLC shall demonstrate this capability to Buyer's reasonable satisfaction.

## **8. ENVIRONMENTAL ATTRIBUTES**

### **8.1. Limited Sale of Environmental Attributes**

Other than as specified in Sections 8.2(d), 8.2(e) and 8.2(f) below, effective from the Capacity Commencement Date, Buyer shall purchase all Energy from Project LLC and Buyer shall retain the right to market and sell all of the Environmental Attributes (defined below) associated with the generation of Energy by the Facility; provided, however, that nothing in this Section shall have any effect upon the monetary amounts for the Capacity Payment or Firm Energy Rate, as the same may otherwise be provided for herein.

## 8.2. Retention of Environmental Attributes

- (a) The Parties understand and agree that the Facility is a “renewable” electricity generation source that produces “green electricity” using biomass fuel. Other than as specified in clauses (d), (e) and (f) below, Buyer shall retain all right, title, and interest in and to all Environmental Attributes associated with the production of Energy from the Facility, including but not limited to, those not subsumed within and created specifically in relation to “renewable” electricity generation.
- (b) **“Environmental Attributes”** means all attributes of an environmental or other nature that are created or otherwise arise from the Facility’s generation of electricity from a biomass-based fuel in contrast with the generation of electricity using nuclear or fossil fuels or other traditional resources. Forms of such attributes include, without limitation, any and all environmental air quality credits, green credits, renewable energy credits (“RECs”), carbon credits, emissions reduction credits, certificates, tags, offsets, allowances, or similar products or rights, howsoever entitled, (i) resulting from the avoidance of the emission of any gas, chemical, or other substance, including but not limited to, mercury, nitrogen oxide, sulfur dioxide, carbon dioxide, carbon monoxide, particulate matter or similar pollutants or contaminants of air, water or soil gas, chemical, or other substance, and (ii) attributable to the generation, purchase, sale or use of Energy from or by the Facility, or otherwise attributable to the Facility during the Term. Environmental Attributes include, without limitation, those currently existing or arising during the Term under local, state, regional, federal, or international legislation or regulation relevant to the avoidance of any emission described in this Section 8.2 under any governmental, regulatory or voluntary program, including, but not limited to, the United Nations Framework Convention on Climate Change (“UNFCCC”) and related Kyoto Protocol or other programs, laws or regulations involving or administered by the Clean Air Markets Division of the Environmental Protection Agency or successor administrator (collectively with any local, state, regional, or federal entity given jurisdiction over a program involving transferability of Environmental Attributes, the “CAMD”), including Production Tax Credits. The Parties shall execute all documents and instruments necessary to effect retention of the Environmental Attributes by Buyer or its designees. Should the CAMD notify either Party that it will not authorize the retention by Buyer of any Environmental Attributes as contemplated by this Agreement, the Parties shall cooperate with one another and with the CAMD and take all reasonable action to enable Buyer to retain the Environmental Attributes as herein described. Neither Project LLC nor Buyer shall submit to the CAMD, under §1605(b) of the Energy Policy Act of 1992 or any other applicable program, any reports describing any of the Environmental Attributes as belonging to anyone other than Buyer. Each Party will promptly give the other copies of any documents it submits to the CAMD.
- (c) Buyer’s ownership of Environmental Attributes shall be for the entire Term of this Agreement. Buyer may, to the extent permitted by Applicable Law and this

Agreement, assign its rights, title and interest in and to any Environmental Attributes associated with the Facility to one or more third parties.

- (d) Environmental Attributes in the form of Production Tax Credits as defined under Section 45 of the Internal Revenue Code of the United States as in effect on the date of this Agreement or any successor or other provision providing for a federal tax credit determined by reference to renewable electric energy produced from biomass resources shall be owned by Project LLC.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**9. SCHEDULING AND DELIVERY**

**9.1. Energy Sale and Delivery**

In accordance with the terms and conditions hereof, commencing on the Capacity Commencement Date and continuing throughout the Term, Project LLC shall sell and deliver to the Electrical Interconnection Point, and Buyer shall purchase at the Electrical Interconnection Point, Committed Capacity and all of the Energy produced by the Facility.

**9.2. Scheduling**

- (a) Scheduling shall [REDACTED] except for Forced Outages, Scheduled Outages, Additional Maintenance Outages, and Emergency Conditions. At least thirty (30) Days prior to the anticipated Capacity Commencement Date, Project LLC shall provide Buyer with a good faith estimate of the quantity of Energy for the remainder of that Year and, thereafter, by October 1 of each such Year, Project LLC shall provide Buyer with a good faith estimate of the quantity of Energy that Project LLC will deliver in each subsequent Year (the "Projected Schedule").
- (b) Project LLC shall provide or cause the Operation and Maintenance Contractor to provide to Buyer its good faith, non-binding estimates of the quantity of Energy to



be delivered by Project LLC to the Interconnection Point for each week (starting on Sunday) by 4:00 p.m. Eastern Prevailing Time on the date falling at least three (3) Days prior to the beginning of that week.

- (c) By 8:00 a.m. Eastern Prevailing Time on each Day, Project LLC shall submit a good faith schedule of the quantity of Energy to be supplied to Buyer for the next two (2) subsequent Days.
- (d) If, at any time following submission of a good faith estimate to Buyer on the Day preceding the next subsequent Day, Project LLC becomes aware of any change to any of the values contained in the good faith estimate or predicts that such values will be subject to change before the end of the next subsequent Day, then Project LLC shall promptly notify Buyer of such change or predicted change.

### **9.3. Forced Outages**

Project LLC shall notify Buyer by telephone call and/or via e-mail message (with confirmation to follow by written notice in each case) immediately upon discovering that the Facility is unable to deliver all or part of any Scheduled quantity of Energy due to a Forced Outage and, as soon as reasonably practicable following such discovery, shall notify Buyer in writing of its best estimate of the expected duration of such Forced Outage. Such estimate by Project LLC shall be based on the best information available to it. Should Project LLC expect any further changes in the duration of any such Forced Outage, it shall promptly notify Buyer of the same.

## **10. ELECTRICAL INTERCONNECTION; OTHER AGREEMENTS**

### **10.1. Electrical Interconnection Facilities**

Pursuant to the Electrical Interconnection and Operating Agreement, Project LLC shall secure any and all Electrical Interconnection Facilities up to and including the Electrical Interconnection Point and shall assume all costs and expenses associated with the same, including any Transmission System network upgrade charges. Buyer shall be responsible for securing any transmission rights downstream of the Electrical Interconnection Point for Energy being transmitted on the Transmission System and Project LLC shall assume all costs and expenses associated with the same.

### **10.2. Electrical Interconnection Point**

Project LLC shall deliver Energy into the Transmission System at the Electrical Interconnection Point.

### **10.3. Risk of Loss**

Project LLC shall be deemed to be in exclusive control of the Capacity and Energy prior to its arrival at the Electrical Interconnection Point and shall be responsible for any losses, costs, damages or injury arising therefrom. Buyer shall be deemed to be in exclusive control of the

Capacity and Energy as from its arrival at the Electrical Interconnection Point and shall be responsible for any losses, costs, damages or injury arising therefrom.

#### 10.4. Additional Agreements

- (a) Buyer hereby covenants to perform its obligations under any Project Contracts to which it is a party.
- (b) Project LLC hereby covenants to perform its obligations under any Project Contracts to which it is a party, and to indemnify Buyer against and hold Buyer harmless against any Claims, costs, losses and penalties sustained by Buyer as a consequence of a material breach by Project LLC of any Project Contract, except to the extent that any such Claims, costs, losses and penalties are ultimately determined to have resulted primarily or in substantial part from Buyer's bad faith or gross negligence.
- (c) In the event that Project LLC commits a material breach of any Project Contract to which it is a party, Project LLC hereby covenants with Buyer to rectify such material breach within thirty (30) Days of receipt of written notification of such breach from Buyer.
- (d) In the event that any Project Contract to which Project LLC is a party is suspended, Project LLC hereby covenants with Buyer to use its commercially reasonable efforts to lift such suspension (or to procure the lifting of the same) within thirty (30) Days of receipt of a written request from Buyer; provided, however, that Project LLC shall have no obligation to do so if the suspension was imposed primarily or in substantial part as a result of Buyer's bad faith or gross negligence.
- (e) In the event that any Project Contract to which Project LLC is a party is terminated or repudiated, Project LLC hereby covenants with Buyer to commence negotiations for a replacement contract within thirty (30) Days of such repudiation or termination; provided, however, that Project LLC shall have no obligation to commence negotiations or to conclude a replacement contract if such repudiation or termination resulted primarily or in substantial part as a result of Buyer's bad faith or gross negligence.
- (f) In the event that Project LLC should fail:
  - (i) to use its commercially reasonable efforts to have the suspension of any contract lifted in compliance with clause (d) above; or
  - (ii) to conclude a replacement contract in compliance with clause (e) above; or
  - (iii) to cure a material breach of Project Contracts,

then such failure by Project LLC shall be deemed to be an Event of Default with respect to Buyer and shall be treated in accordance with Section 17; provided, however, that no such failure by Project LLC shall be deemed to be an Event of Default where the suspension was imposed or the repudiation or termination resulted primarily or in substantial part from Buyer's bad faith or gross negligence.

- (g) Project LLC shall provide Buyer with the interim and final drafts of each of the Project Contracts to which Project LLC is a party for review and comment by Buyer. Buyer shall cooperate with Project LLC and provide such information as Project LLC may reasonably request in relation to the negotiation and performance of the Project Contracts, providing such information is not previously subject to confidentiality.

## **11. METERING**

Except as provided otherwise herein, the Parties agree that all requirements with respect to metering and Metering Equipment shall be set forth in the Electrical Interconnection and Operating Agreement. Project LLC shall be responsible for all metering costs in accordance with FPSC rules governing Qualifying Facilities.

## **12. PAYMENTS**

### **12.1. Capacity Payments**

- (a) Except as otherwise provided in this Agreement, commencing on the Capacity Commencement Date, Buyer shall pay Project LLC the Monthly Capacity Payment due and payable in each Monthly Billing Period; provided that, if the Capacity Commencement Date should occur on a date that falls other than on the first Day of a Month, then the Monthly Capacity Payment for that Monthly Billing Period shall be prorated by the number of actual Days in such Month. The Monthly Capacity Payment for each Monthly Billing Period during the Term shall be calculated in accordance with the formulae set forth in Appendix 12.1 and shall be paid in accordance with the invoicing procedures set forth in Section 13.1.
- (b) No Monthly Capacity Payment will be due prior to the Capacity Commencement Date.
- (c) Except as otherwise provided in this Agreement, Buyer shall make the Monthly Capacity Payment notwithstanding Buyer's inability to receive Committed Capacity and Energy that Project LLC delivers or is capable of delivering to the Electrical Interconnection Point.

### **12.2. Energy Payments**

- (a) Except as otherwise provided in this Agreement, for each Monthly Billing Period prior to the Capacity Commencement Date, Buyer shall pay Project LLC the

Buyer's actual avoided costs for all Energy delivered to the Electrical Interconnection Point, which costs shall be calculated by Buyer in accordance with FPSC Rule 25-17.0825, F.A.C. The calculation of such payments due to Project LLC shall be based on the sum over all hours of the Monthly Billing Period of the product of each hour's avoided Energy cost and the amount of Energy delivered to Buyer from the Facility for that hour. All purchases shall be adjusted for losses from the Point of Metering to the Electrical Interconnection Point.

(b) Except as otherwise provided in this Agreement, for each Monthly Billing Period commencing on or after the Capacity Commencement Date, Buyer shall pay Project LLC for all Energy delivered to the Electrical Interconnection Point as follows:

(i) The calculation of payments to Project LLC for Energy delivered to Buyer on and after the Capacity Commencement Date shall be the sum over all hours of the Monthly Billing Period, as defined in Appendix 12.1, of the product of (A) each hour's Firm Energy Rate (\$/MWh); and (B) the amount of Energy (MWh) delivered to Buyer from the Facility during that hour.

(ii) The Firm Energy Rate (\$/MWh) shall mean the sum of



(iii) CPI shall mean the revised monthly consumer price index for All Urban Consumers, U.S. City Average (CPI-U) (All Items 1982-84 = 100) promulgated by the Bureau of Labor Statistics of the United States Department of Labor. The average CPI shall be calculated by dividing by twelve the sum of each monthly CPI for a particular Year. Should this index be discontinued or modified, the CPI shall be the successor or modified index adopted by the Bureau of Labor Statistics or, if none, any similar index as agreed by the Parties.

(iv) The Avoided Unit Gas Cost shall be equal to the gas prices published in Platts Inside FERC, Gas Market Report, first of the month posting for Florida Gas Transmission Zone 3, plus Gulfstream Natural Gas System's applicable Usage-2 rate (Reservation Charge of \$0.55), Usage-1 rate (Commodity Charge of \$0.02) and the applicable Gulfstream Natural Gas System's Use percentage (not to exceed 1.53%) in accordance with the

terms and conditions of Gulfstream Natural Gas System's tariff, as all such charges, surcharges and percentages are in effect from time to time for service under Gulfstream Natural Gas System's Rate Schedule FTS. If this index is discontinued or modified, the successor or modified index adopted Platts Inside FERC or, if none, any similar index as agreed by the Parties.

### 12.3. Regulatory Changes

- (a) Buyer's payment obligations under this Agreement are expressly conditioned upon the mutual commitments set forth in this Agreement and upon Buyer being fully reimbursed for the retail service portion of all payments to Project LLC through the Fuel Adjustment Clause (as herein defined) and the Capacity Cost Recovery Clause (as herein defined) or other authorized rates or charges.
- (b) For purposes of this Agreement, "Fuel Adjustment Clause" shall mean the clause set forth in FPSC Order No. 2515-A dated April 24, 1959, that is intended to compensate Buyer for day-to-day fluctuations in the cost of fuel incurred in serving its retail customers, which cost cannot be anticipated in base rates; the Fuel Adjustment Clause shall be constructed and applied so as to reimburse Buyer for the increase in the cost of fuel as related to the generation of Energy for retail customers and operates so as to pass on to the retail customers the allocated portion of any savings realized by Buyer from any decrease in the cost of fuel.
- (c) For purposes of this Agreement, "Capacity Cost Recovery Clause" shall mean the clause set forth in FPSC Order No. 25773 dated February 24, 1992, that is intended to compensate Buyer for day-to-day fluctuations in the cost of Capacity related purchase power costs related to service to Buyer's retail customers that is not currently being recovered through fuel or oil backout charges. The Capacity Cost Recovery Clause shall be constructed and applied so as to reimburse Buyer for the increase in the cost of capacity-related purchased power costs related to service to its retail customers and operates so as to pass on to the retail customers the allocated portion of any savings realized by the utility from decreases in the cost of capacity-related purchased power.
- (d) Notwithstanding any other provisions of this Agreement, should Buyer at any time during the Term be denied authorization by FPSC (or any other regulatory bodies having future jurisdiction over Buyer's retail rates and charges) to recover from its retail customers all payments required to be made to Project LLC under the terms of this Agreement, payments to Project LLC from Buyer shall be reduced accordingly. Neither Party shall initiate any actions to deny recovery of payments under this Agreement and each Party shall use its best efforts to defend all terms and conditions of this Agreement, including without limitation, the payment levels specified in this Agreement. Any amounts initially recovered by Buyer from its retail ratepayers, which recovery is subsequently disallowed by FPSC and charged back to Buyer, may be off-set or credited against subsequent payments made by Buyer for purchases from Project LLC or, alternatively, shall be repaid by Project

LLC. If any disallowance is subsequently reversed, Buyer shall repay Project LLC such disallowed payments with interest at a rate equal to the thirty (30) Day highest grade commercial paper rate as published in the *Wall Street Journal* on the first Business Day of each Month to the extent such payments and interest are recovered by Buyer. Such interest shall be compounded monthly.

- (e) If Buyer elects to reduce payments to Project LLC pursuant to this Section 12.3, Project LLC may terminate this Agreement upon one hundred eighty (180) Days notice; provided, however, that Project LLC gives Buyer written notice of said termination within one hundred eighty (180) Days after such payment reductions to Project LLC take effect or, thereafter, upon one (1) year's written notice to terminate at any time within five (5) years after the date upon which such payment reductions to Project LLC take effect.

#### **12.4. Change in Environmental Law**

- (a) As used herein, "Change(s) in Environmental Law(s)" means: (i) the enactment, adoption, promulgation, implementation, or issuance of, or a new or changed interpretation of, any statute, rule, regulation, permit, license, judgment, order or approval by a governmental entity that specifically addresses environmental issues and that takes effect after the Effective Date; and (ii) the imposition on a Party by any governmental entity of any requirement with respect to compliance with the Clean Air Interstate Rule promulgated on May 12, 2005 (70 Fed. Reg. 25,162) or the Clean Air Mercury Rule promulgated on May 18, 2005 (70 Fed. Reg. 28,606) and any re-promulgation or re-issuance of such rules in response to a petition for reconsideration or litigation challenging such rules, regardless of the date on which such requirements are imposed.
- (b) The Parties acknowledge that Change(s) in Environmental Law(s) could significantly increase the costs of complying with the terms of this Agreement ("Increased Environmental Costs") and agree that, if any Change(s) in Environmental Law(s) should increase(s) a Party's cost of performing its obligations under this Agreement above the Threshold defined in Section 12.4(c) below, the Party affected by such Change(s) in Environmental Law(s) may avail itself of the remedies set forth in Section 12.4(d) below as its sole and exclusive remedies for such Change(s) in Environmental Law(s).
- (c) The Parties recognize and agree that certain Change(s) in Environmental Law(s) may occur that do not rise to a level that the Parties desire to impact this Agreement. Accordingly, the Parties agree that for the purposes of this Agreement, Change(s) in Environmental Law(s) will not be deemed to have occurred unless the Increased Environmental Costs resulting from such Change(s) in Environmental Law(s) exceed [REDACTED] in the aggregate during the Term.

- (d) If a Party's Increased Environmental Costs should meet the threshold requirements set forth in Section 12.4(c) above, and the non-affected Party does not agree, in its sole discretion, to compensate the affected Party for such Increased Environmental Costs, then the affected Party may terminate this Agreement upon one hundred and eighty (180) Days written notice to the other Party in the manner provided for in Section 18.3.

#### **12.5. Payment Adjustments**

Payments to be made under this Agreement shall, for a period of not longer than two (2) years, remain subject to adjustment based on billing adjustments due to error or omission by either Party, provided that such adjustments have been agreed to between the Parties or resolved in accordance with the provisions of Section 16 hereof.

#### **12.6. Survival on Termination**

The provisions of this Section 12 shall survive the repudiation, termination or expiration of this Agreement for so long as may be necessary to give effect to any outstanding payment obligations of the Parties due and payable prior to any such repudiation, termination or expiration.

### **13. BILLING AND PAYMENT**

#### **13.1. Statements and Payment of Electricity Payments**

- (a) Project LLC shall read or have read on its behalf the Metering Equipment at the Electrical Interconnection Points at midnight Eastern Prevailing Time on the last Day of each Month, unless otherwise mutually agreed by the Parties.
- (b) Payments due shall be determined and adjusted in accordance with Appendix 12.1.
  - (i) From and after the Capacity Commencement Date, Buyer shall pay to Project LLC, monthly in arrears, Capacity Payments in accordance with the provisions of clause (c) below.
  - (ii) Prior to the Capacity Commencement Date, Buyer shall pay to Project LLC, monthly in arrears in accordance with the provisions of clause (d) below, for all Energy delivered to Buyer.
- (c) On or before the tenth Day of each Month following the Month in which the Capacity Commencement Date occurs, Project LLC shall prepare an invoice showing the Capacity Payment, Fixed Operations and Maintenance Payment, and the Energy Payment payable by Buyer pursuant to Section 12.1 and 12.2 of this Agreement (in Dollars) payable to Project LLC for the preceding Month. Each such invoice shall show information and calculations, in reasonable detail.

- (d) Beginning with the first Month following the Month in which the first Unit has been Commissioned until an invoice is required to be prepared pursuant to clause (c) aforementioned, Buyer shall prepare an invoice showing the charges for Energy payable to Project LLC for the preceding Month in accordance with FPSC Rule 25-17.0825, F.A.C., which invoice shall show information and calculations, in reasonable detail.
- (e) Buyer shall, subject to Section 13.7, pay all invoices on or before the Due Date. If Buyer should dispute a portion of the charges set forth on any invoice, it shall nonetheless pay all amounts not in dispute by the applicable Due Date.
- (f) If banks in the State of Florida shall be closed for more than three (3) weekdays in succession, then Buyer shall make any payment that would otherwise have been due but for its bank being closed by any reasonable means at its disposal.
- (g) All payments specified in this Section 13.1 shall be made to an account designated by Project LLC and notified to Buyer.

### **13.2. Miscellaneous Payments**

Any amounts due to either Project LLC or Buyer under this Agreement, other than those specified in Sections 13.1 above, shall be paid within twenty-eight (28) Days following receipt by the other Party of an itemized invoice from the Party to whom such amounts are due setting forth, in reasonable detail, the basis for such payment.

### **13.3. Currency and Timing of Payment**

Notwithstanding anything contained in this Agreement:

- (a) all payments to be made by either Project LLC or Buyer under this Agreement shall be made in Dollars in immediately available cleared funds by wire transfer into the relevant account specified in this Agreement or, if no account is specified, into the account designated by the receiving Party; and
- (b) any payment that becomes due and payable on a Day that is other than a Business Day shall be paid in accordance with Section 1.2(i).

### **13.4. Regulatory Approvals**

- (a) The obligations of the Parties hereunder, including but not limited to Buyer's obligation to purchase Capacity and Energy at the rates specified in Section 12. hereto, shall be conditioned upon the receipt of any regulatory approvals required by any Party hereto in connection with its execution and performance of this Agreement, including but not limited to, a final order or other regulatory determination from FPSC that the Facility has been designated a Qualifying Facility. In particular:



- (i) Buyer shall petition the FPSC for approval of this Agreement within thirty (30) Days of the Execution Date. Buyer agrees to use all necessary efforts to request and obtain FPSC approval and Project LLC agrees to cooperate with and assist Buyer in these efforts as Buyer may reasonably request.
- (ii) FPSC approval shall be considered received when the FPSC issues its final written order that is no longer subject to appeal (i) approving this Agreement, or (ii) approving this Agreement in part or subject to conditions, provided that each of Project LLC and Buyer agrees, subject to its reasonable discretion, to accept those conditions or such partial approval as sufficient.
- (iii) If the FPSC disapproves this Agreement and/or either Party elects not to accept any partial or conditioned approval as described in clause (ii) above, or if the FPSC refuses to enter an order upon the request for approval, Project LLC or Buyer may elect to terminate this Agreement with no further obligation or liability to the other Party or to any other Person.

### **13.5. Records**

Each Party shall have the right, upon reasonable prior written notice to the other Party, to examine and/or make copies of the records and data of such other Party relating to this Agreement (including all records and data relating to or substantiating any charges paid by or to such other Party and including, without limitation, Fuel consumed and MWh generated) at any time during normal business hours during the period such records and data are required to be maintained. All such records and data shall be maintained for a minimum of five (5) years after the creation of such record or data and for any additional time period required under Applicable Law or by Government Agencies having jurisdiction over the Parties.

### **13.6. Default Interest**

Except where payment is the subject of a bona fide Dispute (in which case it shall be treated under Section 13.7 below), if any payment due from Buyer to Project LLC or from Project LLC to Buyer under this Agreement shall not be paid when due then, in addition to such unpaid amount, interest shall be due and payable thereon. Applicable interest shall be calculated at a rate equal to the thirty (30) Day highest grade commercial paper rate as published in the Wall Street Journal on the first Business Day of each Month (the "Default Rate"), as in effect from time to time and shall continue to accrue from the date on which such payment became overdue to and until the date such payment is made in full (both dates inclusive).

### **13.7. Disputed Items**

- (a) Either Party (the "Disputing Party") may dispute in good faith the accuracy of a reading of the Metering Equipment and/or the accuracy of an invoice. Where a reading or bill is the subject of a Dispute in good faith, the Disputing Party shall give written notice to the other Party within ten (10) Days after the delivery of the

invoice or statement by the other Party, together with details of its reasons for such Dispute. The Disputing Party shall make payment of any undisputed amounts to the other Party by the Due Date for payment. The Parties shall use all reasonable endeavors to resolve the Dispute in accordance with Section 16. Any amount or adjustment with respect to a meter reading subsequently agreed to by the Parties or determined to be due shall be made (in each case in settlement of a Dispute) by a credit or additional charge on the next bill rendered (as the case may be).

- (b) All amounts paid as a result of the settlement of a Dispute shall be paid with interest thereon at the Default Rate from the Day on which such payment originally fell due to and until the date such payment is made in full (both dates inclusive).

### **13.8. Statement Errors**

In the event that either Party becomes aware of any error in any statement, such Party shall, immediately upon discovery of the error, notify in writing the other Party of such error and shall rectify such error (whether in the form of an underpayment or overpayment) within thirty (30) Days of such notification. Provided that the other Party is satisfied (in its sole and reasonable discretion) that the aforementioned notification requirements have been complied with in good faith by the Party who has made the error, no interest shall be payable in respect of any amount that was erroneously overpaid or underpaid. Failure of any Party to comply with the notification provisions contained in this Section 13.8 shall result in the application of interest on the underpaid or overpaid amount at the Default Rate beginning with the date upon which the underpaid or overpaid amount was originally due and owing or paid, as the case may be, and ending upon the date upon which it was actually received (both dates inclusive).

### **13.9. Taxes**

- (a) Project LLC shall pay or cause to be paid any public utility taxes or taxes on revenue imposed upon it in the State of Florida and shall pay or cause to be paid all Taxes on or with respect to the sale of Energy pursuant to this Agreement.
- (b) Buyer shall pay or cause to be paid all Taxes (other than those referenced in clause (a) above) on or with respect to the sale of Energy pursuant to this Agreement.
- (c) If a Party is required to remit or pay Taxes that are the other Party's responsibility hereunder, such Party shall promptly reimburse the other for such Taxes. The Parties shall use all reasonable efforts to administer this Agreement and implement the provisions hereof in a manner that will minimize Taxes due and payable by all Parties.
- (d) The Parties shall provide each other, upon written request, with copies of any documentation that may be reasonably necessary in the ordinary course of any inter-governmental, state, local, municipal or other political subdivision tax audit.

### **13.10. Set-Off**

Save as otherwise expressly provided for in this Agreement, all payments between the Parties under this Agreement shall be made free of any restriction or condition and without deduction or withholding on account of any other amount, whether by way of set-off or otherwise.

### **13.11. Survival on Termination**

The provisions of this Section 13 shall survive the repudiation, termination or expiration of this Agreement for so long as may be necessary to give effect to any outstanding payment obligations of the Parties that became due and payable prior to any such repudiation, termination or expiration.

## **14. FORCE MAJEURE**

### **14.1. Definition of Force Majeure Event**

- (a) A "Force Majeure Event" shall mean an event or circumstance that is not reasonably foreseeable, is beyond the reasonable control of and is not caused by the negligence or lack of due diligence of the affected Party or its contractors or suppliers and adversely affects the performance by that Party of its obligations under or pursuant to this Agreement. Such events or circumstances may include, but are not limited to: actions or inactions of civil or military authority (including courts and governmental or administrative agencies), acts of God, war, riot or insurrection, terrorism, blockades, embargoes, sabotage (including, but not limited to, arson and vandalism), epidemics, explosions and fires not originating in the Facility or caused by its operation, hurricanes, floods, strikes, lockouts or other labor disputes (not caused by the failure of the affected Party to comply with the terms of a collective bargaining agreement).
- (b) Equipment breakdown or the inability of Project LLC to use equipment due to its design, construction, operation, maintenance, the inability of Project LLC to meet regulatory standards, or failure by Project LLC to obtain on a timely basis and maintain a necessary permit or other regulatory approval, shall not be considered a Force Majeure Event, unless Project LLC can conclusively demonstrate, to the reasonable satisfaction of Buyer, that the event was not reasonably foreseeable, was beyond Project LLC's reasonable control, and was not caused by the negligence or lack of due diligence by Project LLC or its agents, contractors or suppliers.
- (c) Except as otherwise provided in this Agreement, each Party shall be excused from performance when non-performance was caused, directly or indirectly, by a Force Majeure Event.

#### 14.2. Effect of a Force Majeure Event

- (a) If Project LLC should suffer a Force Majeure Event that reduces the generating capability of the Facility below the Committed Capacity, Project LLC may, upon notice to Buyer, temporarily adjust the Committed Capacity as provided in Section 14.2(d) hereof. Such adjustment shall be effective upon the first Day immediately following Buyer's receipt of such notice or such later date as may be specified by Project LLC. Such adjustment shall not exceed the minimum amount necessary to accommodate the Force Majeure Event.
- (b) If the Facility should be rendered completely inoperative as a result of a Force Majeure Event, Project LLC [REDACTED] until such time as the Facility can partially or fully operate at the Committed Capacity that existed prior to the Force Majeure Event. If the Committed Capacity [REDACTED], Buyer shall have no obligation to make any Payments hereunder.
- (c) Upon the cessation of a Force Majeure Event or upon its cure, the Committed Capacity shall be restored to the Committed Capacity that existed immediately prior to such Force Majeure Event. Notwithstanding any other provisions of this Agreement, upon such cessation or cure, Buyer shall have the right to require a Committed Capacity test to demonstrate the Facility's compliance with the requirements of this Section. Any Committed Capacity test required by Buyer under this Section shall be in addition to any Committed Capacity test required under any other Section.
- (d) During the occurrence of a Force Majeure Event and a reduction in Committed Capacity under this Section 14.2, all Monthly Capacity Payments shall reflect, pro rata, the reduction in Committed Capacity, and the Monthly Capacity Payments will continue to be calculated in accordance with the pay-for-performance provisions in Appendix 12.1.
- (e) Project LLC agrees to be responsible for and pay the costs necessary to reactivate the Facility and/or the interconnection with the Transmission Provider's system if the same is (are) rendered inoperable due to actions of Project LLC, its employees, representatives or agents, or Force Majeure Events affecting Project LLC, the Facility or the interconnection with the Transmission Provider's system.

#### 14.3. Notification Obligations

In the event of any delay or nonperformance resulting from a Force Majeure Event, the Party claiming that a Force Majeure Event has occurred shall notify the other Party in writing, within five (5) Days of such occurrence, of the nature, cause, date of commencement thereof and the anticipated duration, and shall indicate whether any deadlines or date(s) imposed hereunder may be affected thereby. The suspension of performance shall be of no greater scope and of no greater duration than the cure for the Force Majeure Event requires. A Party claiming that a

Force Majeure Event has occurred shall not be entitled to any relief therefor unless and until conforming notice is provided. The Party claiming that a Force Majeure Event has occurred shall notify the other Party of the cessation of the Force Majeure Event or of the conclusion of the affected Party's cure for the Force Majeure Event, in either case within two (2) Business Days thereof.

#### **14.4. Duty to Mitigate**

The Party claiming that a Force Majeure Event has occurred shall use its best efforts to cure the cause(s) preventing its performance of this Agreement; provided, however, that the settlement of strikes, lockouts and other labor disputes shall be entirely within the discretion of the affected Party and such Party shall not be required to settle such strikes, lockouts or other labor disputes by acceding to demands which such Party deems to be unreasonable.

#### **14.5. Delay Caused by Force Majeure Event**

Upon the occurrence and during the continuance of a Force Majeure Event and the effects thereof:

- (a) To the extent that a Force Majeure Event affects the ability of either Buyer or Transmission Provider to accept Energy from the Facility or to the extent that a Force Majeure Event affects the ability of Project LLC to Test for Committed Capacity pursuant to Section 6.2 or to deliver Energy from the Facility, then the hours during which the Force Majeure Event occurs shall be excluded from the calculations as set forth in Appendix 12.1.
- (b) If the occurrence or effects of an Force Majeure Event affects the operation of all or a portion of the Facility, Buyer shall continue, during the continuance of such Force Majeure Event or its effects, to make the Capacity Payment, after deducting from the Capacity Payment a sum determined by multiplying the Capacity Payment by the FM Ratio. The "FM Ratio" shall be a fraction reflecting (i) the ratio of such Capacity unavailable due to the Force Majeure Event to Committed Capacity and (ii) the ratio of the number of hours during which the relevant Force Majeure Event or the effects thereof existed to the number of hours in such Month.

#### **14.6. Force Majeure Restoration**

- (a) In the event that, as a result of one or more Force Majeure Event(s) or its or their effects or by any combination thereof, the construction or operation of the Facility or any part thereof is affected and is not restored or remedied within thirty (30) Days following the date the Force Majeure Event(s) began, then Project LLC shall prepare and deliver a Restoration Report pursuant to Section 14.8 and provisions (c)-(e) of this Section 14.6 shall apply.

- (b) Subject to the terms of the Financing Documents and clauses (c) and (d) below, Project LLC shall proceed with the remedying of the construction or operation of the Facility ("Restoration") in accordance with a schedule contained in the relevant Restoration Report, as defined in Section 14.8 hereof (the "Restoration Schedule"). The cost of such Restoration shall be the sole responsibility of Project LLC and no compensation shall be payable by Buyer to Project LLC with respect to any damage to the Facility as a result of the Force Majeure Event.
- (c) If Buyer does not agree with the Restoration Schedule contained in the Restoration Report, then Buyer shall notify Project LLC within fifteen (15) Days of receipt of the Restoration Report and shall, in such notice, propose an alternative Restoration Schedule. If the Parties cannot agree upon a revised Restoration Schedule within the fifteen (15) Day period following the notice, then either Party may submit the matter to arbitration pursuant to Section 16 to determine the proper Restoration Schedule. Notwithstanding the foregoing, Project LLC shall, subject to satisfying any of the conditions or requirements of the entity providing the financing for the Restoration (including any insurance company paying a claim to Project LLC), have the option to proceed with the Restoration or while the issue of the Restoration Schedule is being resolved.
- (d) If Restoration of the Facility is not technically feasible or the Restoration cost estimate is greater than [REDACTED] then Project LLC shall have the right to terminate this Agreement. Project LLC shall not be entitled to any compensation from Buyer unless Buyer, at its option, elects that Project LLC shall sell the Facility to Buyer or its designee. If Buyer does not give notice of its election to purchase within ninety (90) Days of the effective date of termination, Buyer shall have no further rights with respect to the Facility.
- (e) Where Project LLC is prevented from complying with its obligations under this Agreement as a result of one or more Force Majeure Event(s) or its or their effects or by any combination thereof for a continued period of one hundred eighty (180) Days, then either Party shall have the right to terminate this Agreement.

#### **14.7. Restoration Consents**

Notwithstanding anything herein to the contrary, Project LLC shall not be required to proceed with any Restoration unless and until it shall have received all necessary Additional Consents and renewals of existing Consents in connection therewith. If Project LLC does not receive any such Additional Consents or renewals of Consents for any reason (other than an act, omission or default of Project LLC) within six (6) Months after the date that it becomes obligated to proceed with such Restoration, then either Project LLC or Buyer shall have the right to terminate this Agreement.

#### **14.8. Preparation of Restoration Report**

When required by Section 14.6, Project LLC shall commence the preparation of an appraisal report (the "Restoration Report") within thirty (30) Days after the date it was required to provide a notice under Section 14.3 and shall deliver a copy of such Restoration Report to Buyer within sixty (60) Days after provision of such notice was required. Buyer shall provide Project LLC such information as it reasonably requires to prepare such Restoration Report. The Restoration Report shall be accompanied by reasonable supporting data and certificates and reports of financial and technical advisers of Project LLC, as appropriate or as reasonably requested by Buyer, in support of the Force Majeure Event in question, and shall include (a) a description of such Force Majeure Event and its impact on the Facility, (b) an estimate in good faith of the time required to restore the Facility (insofar as practicable) to its condition immediately prior to the occurrence of the Force Majeure Event and (c) a proposed Restoration Schedule.

#### **14.9. Discussion of Restoration Report**

Within fifteen (15) Days of the delivery of a Restoration Report to Buyer or such further time as the Parties may agree, the Parties shall meet to discuss the Restoration Report and any action to be taken. Project LLC shall promptly provide to Buyer such additional financial and related information pertaining to the Restoration Report and the matters described therein as Buyer may reasonably request in connection with its review of the Restoration Report.

### **15. LIABILITY AND INDEMNIFICATION**

#### **15.1. Limitation of Liability**

Except as specifically provided herein, neither Party shall be liable to the other Party in contract, tort, warranty, strict liability or any other legal theory for any indirect, consequential, incidental, punitive or exemplary damages. Neither Party shall have any liability to the other Party except pursuant to, or for breach of, this Agreement; provided, however, that this provision is not intended to constitute a waiver of any rights of either Party against the other with regard to matters unrelated to this Agreement or any activity not contemplated by the Project Contracts or Financing Documents.

#### **15.2. Indemnification**

- (a) Each of Buyer and Project LLC shall be responsible for its own facilities. Buyer and Project LLC shall each be responsible for ensuring adequate safeguards for Buyer customers, Buyer and Project LLC's personnel and equipment, and for the protection of their own generating systems.
- (b) Each Party (the "Indemnifying Party") agrees, to the extent permitted by Applicable Law, to indemnify, pay, defend, and hold harmless the other Party (the "Indemnified Party") and its officers, directors, employees, agents and contractors (hereinafter called respectively, "Buyer Entities" and "Project LLC Entities") from and against any and all claims, demands, costs or expenses for loss, damage, or

injury to persons or property of the Indemnified Party (or to third parties) directly caused by, arising out of, or resulting from:

- (i) a breach by the Indemnifying Party of its covenants, representations, and warranties or obligations hereunder;
- (ii) any act or omission by the Indemnifying Party or its contractors, agents, servants or employees in connection with the installation or operation of its generation system or the operation thereof in connection with the other Party's system;
- (iii) any defect in, failure of, or fault related to, the Indemnifying Party's generation system; or
- (iv) the negligence or willful misconduct of the Indemnifying Party or its contractors, agents, servants or employees.

#### **15.3. Assertion of Claims to Exceed Minimum Indemnification Amount**

Each Party shall be solely liable, and shall not be entitled to assert any claim for indemnification for any loss that would otherwise be the subject of indemnification until all losses of such Party during the then-current Year exceed [REDACTED] in the aggregate, in which event such Party shall seek recovery for all its losses for such Year. For the purposes of this Section 15.3, a loss (or claim for indemnification) shall be deemed to arise in the Year the event giving rise to such loss (or claim for indemnification) occurred, or if the event is continuing in more than one (1) Year, in the Year such event ends.

#### **15.4. Indemnification for Fines and Penalties**

Any fines or other penalties incurred by a Party (other than fines or penalties due to the negligence or intentional acts or omissions of the other Party) for non-compliance with any municipal, state or federal laws shall be the sole responsibility of the non-complying Party.

#### **15.5. Notice of Proceedings**

Each Party shall promptly notify the other Party of any loss or proceeding in respect of which such notifying Party is or may be entitled to indemnification pursuant to Section 15.2. Such notice shall be given as soon as reasonably practicable after the relevant Party becomes aware of the loss or proceeding and that such loss or proceeding may give rise to an indemnification, but in any event no later than fourteen (14) Days after the receipt by the Party seeking indemnification of notice of the commencement of any action for which indemnity may be sought. The delay or failure of such Indemnified Party to provide the notice required pursuant to this Section 15.5 to the other Party shall not release the other Party from any indemnification obligation which it may have to such Indemnified Party except (i) to the extent that such failure or delay materially and adversely affected the Indemnifying Party's ability to defend such action or increased the amount of the loss, and (ii) that the Indemnifying Party shall not be liable for any



costs or expenses of the Indemnified Party in the defense of the claim, suit, action or proceeding during such period of failure or delay.

#### **15.6. Defense of Claims**

- (a) Upon acknowledging in writing its obligation to indemnify an Indemnified Party to the extent required pursuant to this Section 15.6, the Indemnifying Party shall be entitled, at its option, to assume and control the defense of such claim, action, suit or proceeding at its expense with counsel of its selection, subject to the prior approval of the Indemnified Party, which shall not be unreasonably withheld.
- (b) Unless and until the Indemnifying Party acknowledges in writing its obligation to indemnify the Indemnified Party to the extent required pursuant to this Section 15.6 and assumes control of the defense of a claim, suit, action or proceeding in accordance with clause (a) above, the Indemnified Party shall have the right, but not the obligation, to contest, defend and litigate, with counsel of its own selection, any claim, action, suit or proceeding by any third party alleged or asserted against such Party in respect of, resulting from, related to or arising out of any matter for which it is entitled to be indemnified hereunder, and the reasonable costs and expenses thereof shall be subject to the indemnification obligations of the Indemnifying Party hereunder.
- (c) Neither the Indemnifying Party nor the Indemnified Party shall be entitled to settle or compromise any such claim, action, suit or proceeding without the prior consent of the other; provided, however, that after agreeing in writing to indemnify the Indemnified Party, the Indemnifying Party may, subject to clause (d) below, settle or compromise any claim without the approval of such Indemnified Party. Except where such consent is unreasonably withheld, if a Party settles or compromises any claim, action, suit or proceeding in respect of which it would otherwise be entitled to be indemnified without the prior consent of the Indemnifying Party, the Indemnifying Party shall be excused from any indemnification obligation in respect of such settlement or compromise.
- (d) Following the acknowledgement of the indemnification and the assumption of the defense by the Indemnifying Party pursuant to clause (a) above, the Indemnified Party shall have the right to employ its own counsel and such counsel may participate in such action, but the fees and expenses of such counsel shall be at the expense of the Indemnified Party, when and as incurred, unless: (i) the employment of counsel by the Indemnified Party has been authorized in writing by the Indemnifying Party; (ii) the Indemnified Party shall have reasonably concluded and specifically notified the Indemnifying Party that there may be a conflict of interest between the Indemnifying Party and the Indemnified Party in the conduct of the defense of such action; (iii) the Indemnifying Party shall not in fact have employed independent counsel reasonably satisfactory to the Indemnified Party to assume the defense of such action and shall have been so notified by the Indemnified Party; or (iv) the Indemnified Party shall have

reasonably concluded and specifically notified the Indemnifying Party that there may be specific defenses available to it which are different from or additional to those available to the Indemnifying Party or that such claim, action, suit or proceeding involves or could have a material adverse effect upon the Indemnified Party beyond the scope of this Agreement. If clause (ii), (iii) or (iv) of the preceding sentence 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 disbursements of such counsel shall constitute reimbursable legal or other expenses hereunder.

#### **15.7. Subrogation**

Upon payment of any indemnification pursuant to Section 15.2 above, the Indemnifying Party, without any further action, shall be subrogated to any and all Claims that the Indemnified Party may have relating thereto, and the Indemnified Party shall, at the request and expense of the Indemnifying Party, cooperate with the Indemnifying Party and give at the request and expense of the Indemnifying Party such further assurances as are necessary or advisable to enable the Indemnifying Party vigorously to pursue such Claims.

### **16. RESOLUTION OF DISPUTES**

#### **16.1. Notice of Dispute**

In the event that any dispute, controversy or claim arising out of or relating to this Agreement or the breach, termination or validity thereof should arise between the Parties (a "Dispute"), the Party wishing to declare a Dispute shall deliver to the other Party a written notice identifying the disputed issue.

#### **16.2. Resolution by Parties**

Either Party may give the other Party written notice of any Dispute not resolved in the normal course of business. Executives of both Parties shall meet at a mutually acceptable time and place within ten (10) Business Days after delivery of such notice and thereafter as often as they reasonably deem necessary, to exchange relevant information and to attempt to resolve the Dispute. In such meetings and exchanges, a Party shall have the right to designate as confidential any information that such Party offers. No confidential information exchanged in such meetings for the purpose of resolving a Dispute may be used by a Party in litigation against the other Party. If the matter has not been resolved in the aforementioned manner within thirty (30) Days of the disputing Party's notice having been issued, or if the Parties fail to meet within ten (10) Business Days as required above, either Party may initiate binding arbitration in St. Petersburg, Florida, as hereafter provided. The binding arbitration proceeding shall be conducted in accordance with the then current American Arbitration Association's ("AAA") Large, Complex Commercial Rules or other mutually agreed upon procedures.

## 17. TERMINATION AND DEFAULT PROVISIONS

### 17.1. Termination upon Events of Default

- (a) Remediable Events of Default by Project LLC. Each of the Events of Default described below shall be deemed a "Project LLC Remediable Event":
- (i) the failure of Project LLC within [REDACTED] Days after the Effective Date to commence construction of the Facility as evidenced by the undertaking of the activities usually and customarily undertaken under internationally accepted construction standards and practices applicable to projects similar to the Facility;
  - (ii) after commencement of construction of the Facility, a general suspension or abandonment by Project LLC or any Contractor of the construction of the Facility for more than [REDACTED] consecutive Days;
  - (iii) Project LLC fails upon request by Buyer pursuant to Section 6.2(f) hereof to redemonstrate the Facility's Capacity Commencement Status to the satisfaction of Buyer;
  - (iv) the failure by Project LLC to make any payment under this Agreement when due and payable;
  - (v) Project LLC fails to perform or comply with any other material terms and conditions of this Agreement and fails to conform to said terms and conditions within sixty (60) Days after a demand by Buyer to do so or within another period as specified otherwise in this Agreement;
  - (vi) Project LLC materially changes or modifies the Facility from that provided in Recital (A) with respect to its type, location, technology or fuel source, without the prior written approval of Buyer;
  - (vii) Project LLC fails to satisfy its obligations to maintain sufficient fuel on the site of the Facility to deliver the Capacity and Energy associated with the Committed Capacity for an uninterrupted [REDACTED] under Section 7.2 hereof;
  - (viii) Project LLC fails to provide the security and to comply with any of the provisions of Section 6.9 hereof;
  - (ix) the failure of the Project LLC to maintain QF status for the Facility;
  - (x) any of the representations or warranties made by Project LLC in this Agreement is false or misleading in any material respect as of the time made.

- (b) Non-Remediable Events of Default by Project LLC. Each of the Events of Default set forth below shall be deemed a "Project LLC Non-Remediable Event":
- (i) the occurrence of any of the following events:
    - (A) the voluntary passing of a resolution for the bankruptcy, insolvency, winding up, liquidation of, or other similar proceeding relating to Project LLC, which resolution has not been reversed or rescinded within thirty (30) Days;
    - (B) the appointment of a trustee, liquidator, custodian, provisional manager or similar Person in a proceeding referred to in clause (A) above, which appointment has not been set aside or stayed within sixty (60) Days of such appointment; or
    - (C) the making by a court having jurisdiction of an order winding up or otherwise confirming the bankruptcy or insolvency of Project LLC, which order has not been set aside or stayed within sixty (60) Days;
  - (ii) after the Capacity Commencement Date, the Facility fails for twelve (12) consecutive Months to maintain an Annual Capacity Billing Factor, as described in Appendix 12.1, of [REDACTED]
  - (iii) after a Project LLC Remediable Event shall have occurred and a Remedial Notice shall have been given by Buyer to Project LLC:
    - (A) in the case of a Project LLC Remediable Event described in Section 17.1(a)(i), the failure of Project LLC to commence construction of the Facility (evidenced as provided in Section 17.1(a)(i)) within thirty (30) Days after receipt of the Remedial Notice;
    - (B) in the case of an Project LLC Remediable Event described in Section 17.1(a)(ii), the failure of Project LLC to resume construction of the Facility within thirty (30) Days after receipt of the Remedial Notice;
    - (C) in the case of an Project LLC Remediable Event described in Section 17.1(a)(iv), the failure of such Event to have been remedied by Project LLC within forty-five (45) Days after receipt of the Remedial Notice; and
    - (D) in the case of any other Project LLC Remediable Event described in Section 17.1 the failure of Project LLC to furnish Buyer a plan of remediation (a "Remedial Program") within the time provided in Section 17.1(e), or (2) the failure of Project LLC to implement such Remedial Program with due diligence, or (3) the manifest or

demonstrated inability of the Remedial Program so furnished to be capable of reasonable implementation, or (4) the manifest or demonstrated inability to remedy the relevant Project LLC Remediable Event notwithstanding the exercise of diligent effort by Project LLC in implementing the Remedial Program;

- (iv) Project LLC fails to give proper assurance of adequate performance as specified under this Agreement within thirty (30) Days after Buyer, with reasonable grounds, has requested in writing such assurance;
  - (v) the failure of Project LLC to achieve the Capacity Commencement Status on or before the Required Capacity Commencement Date; or
  - (vi) Project LLC fails to achieve permitting, licensing, certification, and any federal, state and local governmental, environmental, Consents, and licensing approvals required to initiate construction of the Facility.
- (c) Remediable Events of Default by Buyer. Each of the Events of Default described below shall be deemed a "Buyer Remediable Event":
- (i) the failure of Buyer to make any payment under this Agreement; and
  - (ii) the breach by Buyer of any of its material obligations under this Agreement (other than any such breach referred to in Section 17.1(c)(i)) which is not remedied within sixty (60) Days after notice from Project LLC to Buyer stating that such a breach has occurred, identifying the breach in question in reasonable detail and demanding remedy thereof.

While a Buyer Remediable Event has occurred and is continuing, Project LLC shall have the right, but not the obligation, to sell Energy from the Facility to third parties.

- (d) Non-Remediable Events of Default by Buyer. Each of the Events of Default set forth below shall be deemed a "Buyer Non-Remediable Event":
- (i) the occurrence of any of the following events:
    - (A) the voluntary passing of a resolution for the bankruptcy, insolvency, winding up, liquidation of, or other similar proceeding relating to Buyer, which resolution has not been reversed or rescinded within thirty (30) Days;
    - (B) the appointment of a trustee, liquidator, custodian, provisional manager or similar Person in a proceeding referred to in clause (A) above, which appointment has not been set aside or stayed within sixty (60) Days of such appointment; or

- (C) the making by a court having jurisdiction of an order winding up or otherwise confirming the bankruptcy or insolvency of Buyer, which order has not been set aside or stayed within sixty (60) Days;
- (ii) after a Buyer Remediable Event shall have occurred and a Remedial Notice shall have been given by Project LLC to Buyer:
  - (A) in the case of a Buyer Remediable Event described in Section 17.1(c)(i), the failure of Buyer to make such payment within thirty (30) Days after receipt of the Remedial Notice; and
  - (B) in the case of a Buyer Remediable Event described in Section 17.1(c)(ii), (1) the failure of Buyer to furnish Project LLC with a Remedial Program within the time provided in Section 17.1(e), or (2) the failure of Buyer to implement such Remedial Program with due diligence, or (3) the manifest or demonstrated inability of the Remedial Program so furnished to be capable of reasonable implementation, or (4) the manifest or demonstrated inability of Buyer to remedy the Buyer Remediable Event notwithstanding the exercise of due diligence in implementing the Remedial Program, provided, however, that the foregoing shall not be considered to be a Buyer Non-Remediable Event in the case of Section 17.1(c)(ii) if, subject to Section 17.1(d)(iii), the breach in question shall have been remedied; or
- (iii) the failure of any breach described in Section 17.1(c)(ii) to have been remedied within sixty (60) Days after receipt of a Remedial Notice in respect thereof.
- (e) Remedial Procedures. Upon the occurrence of a Project LLC Remediable Event or a Buyer Remediable Event, the following procedures shall be strictly followed by the Parties:
  - (i) Buyer shall give notice to Project LLC of a Project LLC Remediable Event and Project LLC shall give notice to Buyer of a Buyer Remediable Event (a "Remedial Notice").
  - (ii) Upon receipt by Project LLC of a Remedial Notice notifying them of a Project LLC Remediable Event and/or upon receipt by Buyer of a Remedial Notice notifying Buyer of a Buyer Remediable Event, the Party receiving the Remedial Notice shall prepare and furnish to the other Party as promptly as practicable, and in any event within ten (10) Days, a Remedial Program for the remediation of the event giving rise to such Remedial Notice.

- (f) Termination upon Project LLC or Buyer Non-Remediable Events. Upon the determination that a Project LLC Non-Remediable Event or a Buyer Non-Remediable Event has occurred, the following procedure shall apply:
- (i) The non-defaulting Party may give a notice (the "Termination Notice") to the other Party, specifying Project LLC Non-Remediable Event or Buyer Non-Remediable Event, as the case may be, giving rise to such Termination Notice, and the date on which the non-defaulting Party proposes to terminate this Agreement, which date shall not be less than thirty (30) Days after the date of such notice.
  - (ii) During the period of thirty (30) Days (or such longer period set forth in the Termination Notice or as the Parties may agree) following the giving of such Termination Notice, the Parties shall consult with one another as to what steps could be taken with a view to mitigating or remedying the consequences of the relevant event having regard to all the circumstances.
  - (iii) If the Party receiving the Termination Notice intends to raise a Dispute regarding the other Party's right to give effect to the Termination Notice, such Party shall, within fifteen (15) Days of receipt of the Termination Notice, so inform the other Party and immediately refer the Dispute to arbitration in accordance with the provisions of Section 16.
  - (iv) Upon the expiration of the period referred to in Section 17.1(f)(ii) and unless:
    - (A) the Parties shall have otherwise agreed;
    - (B) a proceeding regarding the question whether the Party receiving the Termination Notice has a reasonable basis to dispute the right to give effect thereto has been commenced pursuant to Section 17.1(f)(iii) and not yet been concluded;
    - (C) (1) the proceeding contemplated by Section 17.1(f)(iii) has been concluded and (2) the Events of Default giving rise to the Termination Notice have been referred to arbitration pursuant to Section 16 and such proceeding has not concluded and is being diligently pursued;
    - (D) the proceeding referred to in paragraph (C) above has concluded with a final determination that the Party having given the Termination Notice does not have a right to give effect thereto,the Party having issued the Termination Notice may terminate this Agreement by giving written notice thereof to the other Party, whereupon this Agreement shall terminate on the date specified for termination in such notice or such later date as the Parties shall have agreed.

## 17.2. Consequences of Termination

Upon termination of this Agreement by Project LLC pursuant to this Article 17, Project LLC may opt to sell the Facility, provided that no sale of the Facility shall be permitted unless Project LLC has first offered to sell the Facility to Buyer pursuant to the terms of this Section 17.2:

- (a) No sale of the Facility may be made to a party other than Buyer under this Section 17.2 unless Project LLC has received a bona fide written offer (a "Purchase Offer") from a third party purchaser (the "Purchaser") to purchase the Facility for a purchase price (the "Offer Price") denominated and payable in Dollars at closing or according to specified terms, with or without interest, which offer shall be in writing, signed by the Purchaser, and irrevocable for a period ending no sooner than the Day following the end of the Offer Period, as defined in clause (c) below.
- (b) Prior to proceeding with a sale of the Facility to any Purchaser, Project LLC shall give Buyer written notice (the "Sale Notice"), which notice shall include a copy of the Purchase Offer and an offer to sell the Facility to Buyer for the Offer Price, payable according to the same terms as those contained in the Purchase Offer (the "Firm Offer").
- (c) The Firm Offer shall be irrevocable for a period ending at 11:59p.m. Eastern Prevailing Time on the [REDACTED] following the day of the Offer Notice (the "Offer Period").
- (d) Buyer may accept the Firm Offer at any time during the Offer Period by giving written notice of such acceptance to Project LLC (the "Firm Acceptance"). If Buyer does not accept the Firm Offer prior to the expiration of the Offer Period, the Firm Offer shall be deemed to have been rejected.
- (e) In the event that the Buyer gives a Firm Acceptance, the closing of the sale shall take place within [REDACTED] after such acceptance or, if later, the date of closing set forth in the Purchase Offer. Buyer shall execute such documents and instruments as may be necessary or appropriate to effect the sale pursuant to the terms of the Firm Acceptance and this Section 17.2.
- (f) If the Firm Offer is not accepted in the manner hereinabove provided, Project LLC may sell the Facility to the Purchaser at any time within [REDACTED] after the last Day of the Offer Period, provided that such sale shall be made on terms no more favorable to the Purchaser than the terms contained in the Purchase Offer and, provided further, that such sale complies with other terms, conditions, and restrictions of this Agreement that are applicable to a sale of the Facility and are not expressly made inapplicable to sales occurring under this Section 17.2. In the event that the Facility is not sold in accordance with the terms of the preceding sentence, the Facility shall again become subject to all of the conditions and restrictions of this Section 17.2.



### **17.3. Other Rights and Remedies**

Upon the breach by either Party hereto of any covenant or warranty hereunder, the Party damaged by any such default or breach may, except as otherwise expressly provided herein, in its sole discretion, in addition to exercising any other remedies provided for hereunder, proceed in accordance with Section 16 to protect and enforce its rights, to recover any damages to which it may be entitled (including all costs and expenses reasonably incurred in the exercise of its remedy).

## **18. MISCELLANEOUS PROVISIONS**

### **18.1. Expenses of the Parties**

All expenses incurred by or on behalf of each Party, including all fees and expenses of agents, representatives, counsel and accountants employed by the Parties in connection with the preparation of this Agreement and the consummation of the transactions contemplated by this Agreement, shall be borne solely by the Party who shall have incurred such expenses, and the other Party shall have no liability in respect thereof, except as otherwise agreed.

### **18.2. Confidentiality**

- (a) Subject to the provisions of clause (c) below, each Party and its employees, contractors, consultants and agents shall hold in confidence all documents and other forms of information, including electronic communications, marked as confidential by or on behalf of the Party providing the information relating to the design, construction, insurance, operation, maintenance, management and financing of the Facility. Each Party undertakes that all information obtained by it under this Agreement shall only be made available to and used by its employees or staff having a need for such information in order to permit the Party to perform its obligations and exercise its rights under this Agreement and, except as may be required by law or appropriate regulatory authorities, shall not publish or otherwise disclose the same to third parties. Notwithstanding the foregoing, either Party may disclose such information to its professional advisors and to prospective transferees and assignees and their professional advisors that, in each case, have agreed to be bound by these confidentiality provisions.
- (b) The provisions of this Section 18.2 shall not apply to (i) any information in the public domain otherwise than by a breach of clause (a) above by the same Party; (ii) information in the possession of the Party before divulgence that was not obtained under an obligation of confidentiality; or (iii) information contained in a document that has been reviewed and cleared for public disclosure by the Party claiming confidentiality in the information.
- (c) Project LLC may disclose information to the Financing Parties and any other financial institutions expressing interest in providing debt financing or refinancing and/or other credit support to Project LLC, and the agent or trustee of any of them

and to prospective purchasers. Neither Party shall issue any press or publicity release or otherwise release, distribute, or disseminate any information for publication concerning this Agreement or the participation of the other Party in the transactions contemplated hereby without the prior written consent of the other Party, which consent shall not be unreasonably withheld; provided, however, that such limitation on disclosure shall not apply to disclosures or reporting required by a governmental or regulatory authority if the Party seeking disclosure informs the other Party of the need for such disclosure and, if reasonably requested by the other Party, seeks, through a protective order or other appropriate mechanism, to maintain the confidentiality of confidential information.

- (d) The provisions of this Section 18.2 shall survive for a period of two (2) years from the termination of this Agreement.

### 18.3. Notices

- (a) All notices or other communications to be given or made hereunder shall be in writing, shall be addressed for the attention of the Persons indicated below, and shall be delivered personally or sent by a nationally recognized overnight courier service or facsimile. The addresses of the Parties and their respective facsimile numbers shall be:

If to Buyer: Progress Energy Florida, Inc.  
100 Central Avenue, BT9G  
St. Petersburg, Florida 33701  
Attn: Cogeneration Manager  
Telephone: (727) 820-4550  
Facsimile: (727) 820-4598

with a copy to: Progress Energy Florida, Inc.  
100 Central Avenue, BT9G  
St. Petersburg, Florida 33701  
Attn: Deputy General Counsel  
Telephone: (727) 820-4550  
Facsimile: (727) 820-4598

If to Project LLC: Florida Biomass Power L.P.  
1198 Gulf Breeze Parkway, Suite 6  
Gulf Breeze, FL 32561  
Attn: Allen N. Sharpe  
Telephone: (850) 916-1300  
Facsimile: (850) 916-1305

with a copy to: Troutman Sanders LLP  
405 Lexington Avenue

New York, NY 10174  
Attn: Howard L. Margulis, Esq.  
Telephone: (212) 704-6336  
Facsimile: (212) 704-8330

Except as otherwise expressly provided in this Agreement, all notices shall be deemed to be delivered (i) when delivered by hand or by overnight courier, or (ii) if received during business hours on a Business Day for the receiving Party, when transmitted by facsimile to the receiving Party's facsimile number and, if received after business hours or on a Day that is not a Business Day for the receiving Party, on the receiving Party's first Business Day following the date transmitted by facsimile to the receiving Party's facsimile number. Any notice given by facsimile shall be confirmed in writing, delivered personally or sent by courier, but the failure to so confirm shall not void or invalidate the original notice if it is in fact received by the Party to whom it is addressed.

- (b) Either Party may by written notice change the address, addressee and/or facsimile number to which such notices and communications to it are to be delivered or mailed.

#### **18.4. Waiver**

- (a) No waiver by either Party of any default by the other Party in the performance of any of the provisions of this Agreement:
  - (i) shall operate or be construed as a waiver of any other or further default or defaults whether of a like or different character, or
  - (ii) shall be effective unless in writing duly executed by a duly authorized representative of such Party.
- (b) Neither the failure by a Party to insist on any occasion upon the performance of the terms, conditions and provisions of this Agreement nor time or other indulgence granted by one Party to the other shall act as a waiver of such breach nor as an acceptance of any variation or as the relinquishment of any such right or any other right hereunder.

#### **18.5. Relationship of the Parties**

In executing this Agreement, Buyer does not, nor should it be construed to, extend its credit or financial support for the benefit of any third parties lending money to or having other transactions with Project LLC or any assignee of this Agreement, nor does it create any third party beneficiary rights with respect thereto. Nothing contained in this Agreement shall be construed to create an association, trust, partnership, or joint venture between the Parties. Except as otherwise specified herein, no payment by Buyer to Project LLC for Energy or Capacity shall

be construed as payment by Buyer for the acquisition of any ownership or property interest in the Facility.

**18.6. No Third Parties**

Other than as specified in the assignment provisions contained in Section 18.10 below, this Agreement is intended solely for the benefit of the Parties and nothing in this Agreement shall be construed as creating any duty to, standard of care with reference to, or any liability to, or conferring any right of suit or action on any Person not a Party to this Agreement.

**18.7. Consents**

Unless otherwise provided herein, whenever a consent or approval is required by either Party from the other Party, such consent or approval shall not be unreasonably withheld or delayed.

[REDACTED]

**18.9. Further Assurances**

If, after the execution hereof, it should prove necessary and proper to execute any additional documents or to take further action to effectuate the intent of this Agreement, the Parties agree to take such action.

**18.10. Assignment and Security**

[REDACTED]

**18.11. Choice of Law**

This Agreement shall be governed by and construed in accordance with the laws of the State of Florida, without reference to its conflict of laws rules or any principles that would trigger the application of any other law.

#### **18.12. Severability**

If any term or provision of this Agreement should be held by any court or other authority of competent jurisdiction to be invalid, void, unenforceable or against the public policy, the remainder of this Agreement will remain in full force and effect and will in no way be adversely affected; provided, however, that the severance of such term or provision does not render the performance of a Party's material obligations impracticable or impossible.

#### **18.13. Amendments**

This Agreement may be amended only by written agreement among the Parties.

#### **18.14. Counterparts**

This Agreement may be executed in two (2) or more counterparts, all of which will be considered one and the same Agreement and each of which will be deemed an original.

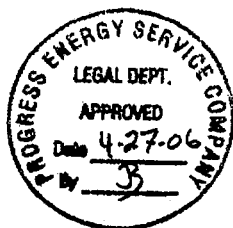
#### **18.15. Entire Agreement**

This Agreement, together with any other Project Contracts and any Financing Documents to which either of Buyer or Project LLC is a party, is intended by the Parties as the final expression of their agreement, is intended also as a complete and exhaustive statement of their agreement with respect to the subject matter contained herein, and supersedes any previous agreements or understandings between the Parties.


#### **18.16. Survival**

The Provisions of Section 1 (Definitions), Section 13.5 (Records), Section 15 (Liability and Indemnification), Section 16 (Resolution of Disputes), Section 17 (Termination and Default Provisions), and this Section 18 (Miscellaneous Provisions) shall survive the termination of this Agreement.

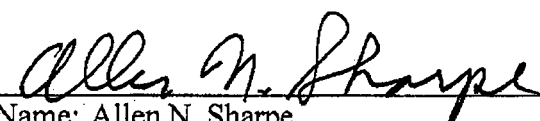
IN WITNESS WHEREOF, the Parties have executed and delivered this Agreement as of the date first above written.



FLORIDA POWER CORPORATION d/b/a  
PROGRESS ENERGY FLORIDA, INC.

By:   
Name: Robert F. Caldwell  
Title: Vice-President, Regulated  
Commercial Operations

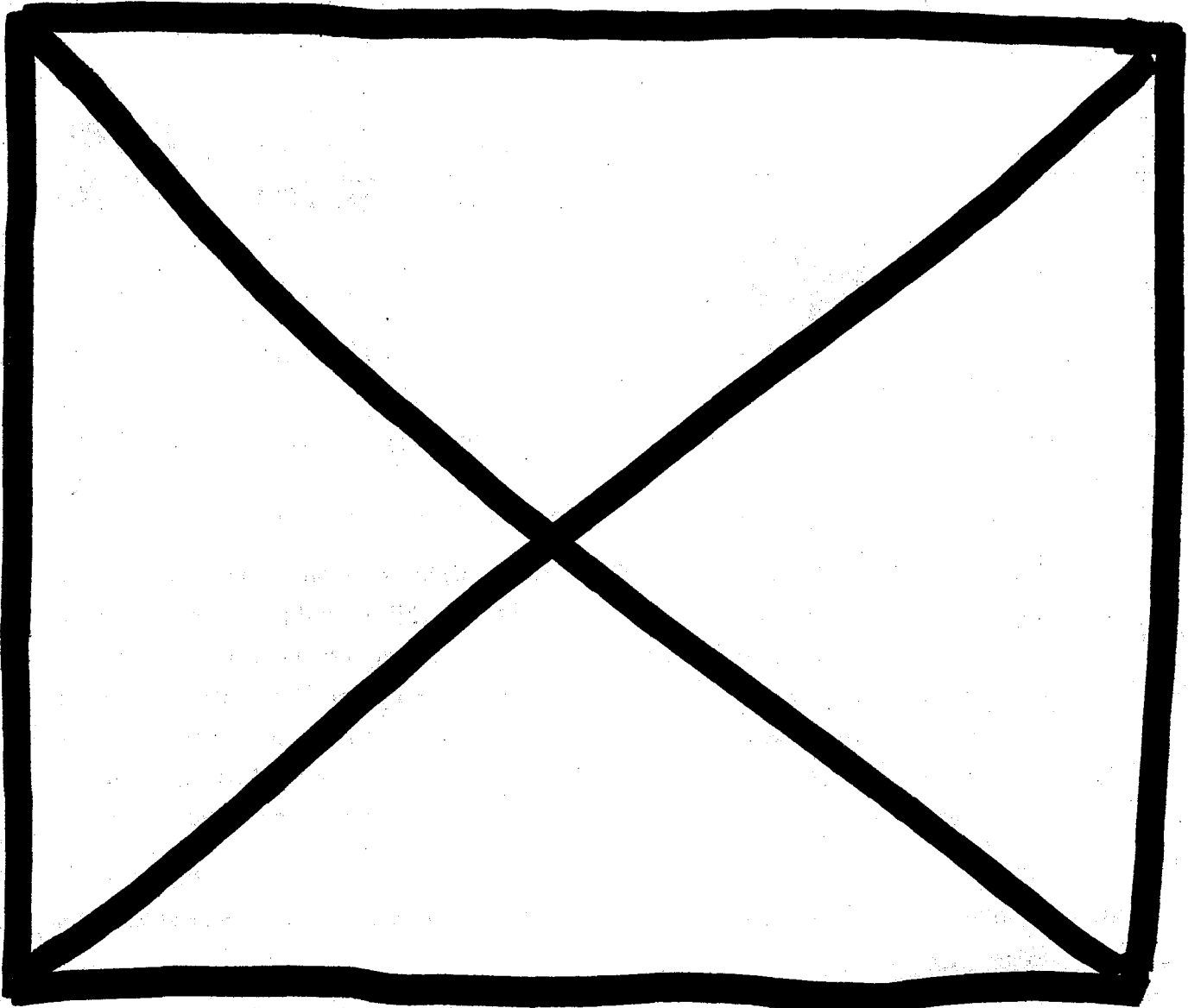
FLORIDA BIOMASS ENERGY GROUP L.L.C.  
By: BIOMASS INVESTMENT GROUP, INC.  
Its Managing Member

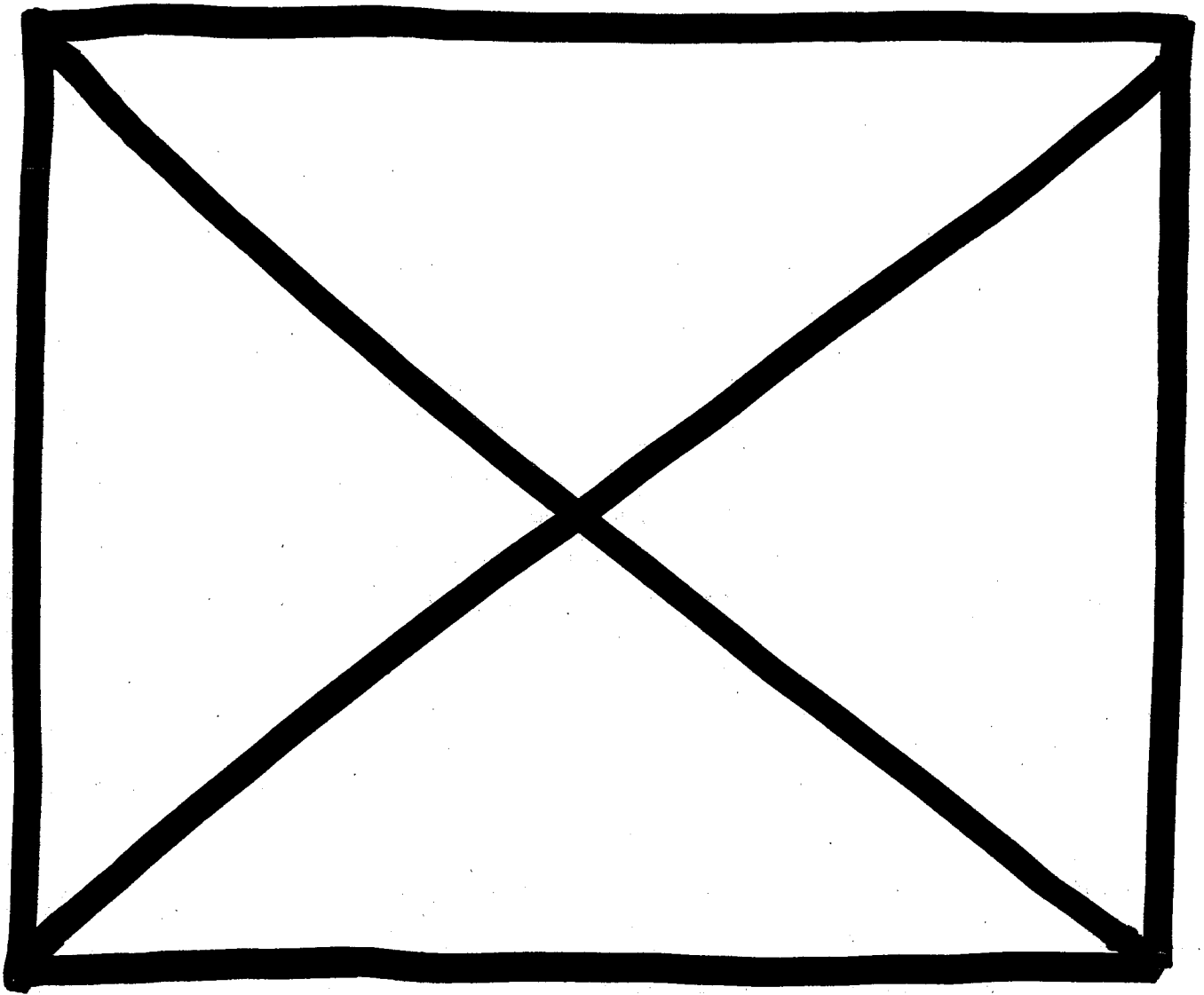
By:   
Name: Allen N. Sharpe  
Title: Chief Executive Officer

**Appendix 6.1  
Facility Configuration**

The Project is a closed-loop biomass project consisting of the Farm and the [REDACTED] Plant. Once E-Grass is harvested on the Farm, it will be supplied to the [REDACTED] Plant pursuant to a Fuel Supply Agreement between the Farm and the [REDACTED] Plant. Upon delivery to the [REDACTED] Plant, E-Grass will be converted into [REDACTED] [REDACTED] it will be converted into electricity in a combined cycle combustion turbine/heat recovery steam generator power generation process.

[REDACTED] consists of an integrated series of operations from delivery of a roughly prepared feedstock of E-Grass chips and/or pellets [REDACTED] [REDACTED]







**Appendix 12.1**  
**Monthly Capacity Payment Calculation**

