**FORM OF CAPACITY PURCHASE AGREEMENT**

**BETWEEN**

**LONG ISLAND POWER AUTHORITY**

**AND**

**[*Insert name of Seller*]**

**[\_\_\_\_\_], 2024**

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1. DESCRIPTION AND LOCATION OF THE PROJECT
2. BUYER’S FORM OF INCOMING LETTER OF CREDIT
3. SAMPLE MONTHLY INVOICE
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**SUPPLEMENTS**

1. SUPPLEMENT 1: STANDARD CLAUSES FOR LIPA’S CONTRACTS

FORM OF CAPACITY PURCHASE AGREEMENT

THIS FORM OF CAPACITY PURCHASE AGREEMENT (“Agreement”), dated as of [\_\_\_\_\_], 2024, is by and between the Long Island Power Authority, a corporate municipal instrumentality of the State of New York, having its principal place of business at 333 Earle Ovington Boulevard, Uniondale, New York 11553 (“Buyer”) and the [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_], having its principal place of business at [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] (“Seller”) (collectively, Buyer and Seller are also referred to herein as the “Parties”). This Agreement includes the general terms and conditions set forth herein, all exhibits, schedules and any written supplements hereto.

WITNESSETH:

WHEREAS, the Long Island Lighting Company d/b/a LIPA, is a corporation organized and existing under the laws of the State of New York and a wholly owned subsidiary of Buyer;

WHEREAS, pursuant to the Second Amended and Restated Operation Services Agreement (“A&R OSA”) dated December 15, 2021, as may be restated, amended, modified, or supplemented from time to time, between Long Island Lighting Company d/b/a LIPA and PSEG Long Island, PSEG Long Island through its operating subsidiary, Long Island Electric Utility Servco LLC (“Servco”), assumed the responsibility as Buyer’s service provider, to operate and manage Buyer’s transmission and distribution system and other utility business functions, including Buyer’s power supply planning, and Servco’s affiliate provides certain services to Buyer, such as purchasing power and fuel procurement, related to these responsibilities;

WHEREAS, Seller owns, operates and maintains the [*Seller to insert name of facility(ies) proposed to provide Contract Capacity*] Power Plant, a energy generation facility(ies) with a nominal rating (net of auxiliary power consumption and transmission losses) of [\_\_\_] MW [*Seller to insert facility(ies) MW rating*], located in [*Seller to* *insert location of facility(ies)*], as further described in **Appendix 1: DESCRIPTION AND LOCATION OF THE PROJECT** (the “Project”);

WHEREAS, Seller has agreed to sell to Buyer, and Buyer has agreed to purchase from Seller, [XX] MW [*Seller to insert proposed MW amount of Contract Capacity*] of Contract Capacity and SRE Energy (both as defined herein and collectively referred to as “Products”) from the Project, all in accordance with the provisions of this Agreement; and

WHEREAS, Buyer intends to use the Contract Capacity to contribute to meeting NYISO’s Locational Installed Capacity requirements.

NOW, THEREFORE, for and in consideration of the premises, the mutual promises and agreements set forth herein and other good and valuable consideration, the receipt, sufficiency and adequacy of which are hereby acknowledged, Buyer and Seller, each intending to be legally bound, agree as follows.

1. GENERAL DEFINITIONS
	1. **Definitions**

**.** In addition to the initially capitalized terms and phrases defined in the preamble of this Agreement, the following initially capitalized terms and phrases as and when used in this Agreement shall have the respective meanings set forth below:

*AC* – means alternating current.

*Act* – means the LIPA Act (Public Authorities Law of the State of New York § 1020 et seq.).

*Affiliate* – means, with respect to any Person, any other Person (other than an individual) that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, such Person. For this purpose, “control” includes but is not limited to the direct or indirect ownership of fifty percent (50%) or more of the outstanding capital stock or equity interest. A voting interest of ten percent (10%) or more shall create a rebuttable presumption of control.

*Aggrieved Party* – has the meaning set forth in Section 12.1.

*Agreement* – has the meaning set forth in the preamble.

*Availability Damages* – has the meaning set forth in Section 4.2.

*Availability Percentage* – means, for any Month during the Term, the quotient, expressed as a percentage, the numerator of which is the difference between the total number of hours in such Month and the sum of the total number of Forced Outage Hours and Forced Derate Hours which occurred during such Month, and the denominator of which is the total number of hours in such Month.

*Availability Report* – has the meaning set forth in Section 4.1.

*Bankrupt* – means, with respect to any entity, such entity (i) files a petition or otherwise commences, authorizes or acquiesces in the commencement of a proceeding or cause of action under any bankruptcy, insolvency, reorganization or similar law, or has any such petition filed or commenced against it which shall remain undismissed or unstayed for a period of sixty (60) days, (ii) makes an assignment or any general arrangement for the benefit of creditors, (iii) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, and if such appointment is sought by a party other than such entity, the proceeding in which such action is sought shall remain undismissed or unstayed for a period of sixty (60) days, or (iv) is generally not paying its debts as they fall due.

*Bid –* means an offer to sell or bid to purchase Energy that is duly submitted to the NYISO pursuant to NYISO Rules.

*Bidding and Scheduling Instructions –* has the meaning set forth in Section 3.11.

*Business Day* – means any Day except a Saturday, Sunday, or holiday defined by NERC. A Business Day shall open at 0800 and close at 1700 EPT for the relevant Party’s principal place of business. The relevant Party, in each instance unless otherwise specified, shall be the Party from whom the notice, payment or delivery is being sent and by whom the notice or payment or delivery is to be received.

*Buyer* – has the meaning set forth in the preamble.

*Buyer Event of Default* – has the meaning set forth in Section 5.2.

*Buyer's* *Electric* *System* – means all equipment and facilities now or hereafter comprising Buyer's system for transmission and/or distribution of electricity.

*Capacity* – means the capability to generate and deliver Energy measured in MW.

*Capacity Performance Payment* - shall have the meaning designated by ISO\_NE in their tariff agreements.

“*CEII”* – means “critical energy infrastructure information” as defined under applicable FERC rules and policies.

*Change in Law* – means the enactment, adoption, promulgation, modification, suspension, repeal, or judicial determination, after the Effective Date, by any Governmental Authority of any Legal Requirement that materially affects the costs associated with a Party’s performance of its obligations hereunder or its ability to perform its obligations hereunder. For the avoidance of doubt, neither of the following shall be considered a Change in Law: (a) a new Legal Requirement imposed on the Project that is not applicable generally to electric generating facilities, or (b) a change in interpretation or enforcement of any existing Legal Requirement.

*“CII”* – means “critical infrastructure information” exempted from disclosure under Article 6 of the Public Officers Law, the New York State Freedom of Information Law (“FOIL”).

*“CIP”* – means “critical infrastructure protection” information, as defined or described under applicable NERC standards and procedures, including, without limitation, information related to Bulk Electric System Cyber System Information as defined by NERC and physical security measures related to any critical physical and/or cyber assets.

*Claiming Party* – has the meaning set forth in Section 13.3.

*Code* – means the Internal Revenue Code of 1986, as amended.

*Confidential Information* – means information regarding a Party or a Party’s Affiliates and Representatives that is (i) disclosed to the other Party by or on behalf of the Disclosing Party or (ii) derived by Receiving Party (defined below) from information described in or through an inspection of property, operations or documents. Confidential Information includes, but is not limited to: business secrets; business information; business plans and practices; financial and pricing information; financial statements and reports; project specifications; projections; schematics and drawings; trade secrets; processes; materials; employee information or data; customer information or data; Personal Information; shareholder information or data; supplier lists; sales volume; territories; markets; current, future, or potential acquisitions; technical, production, operational, marketing, or sales information; and any and all other financial, business, organizational, and technological information related to a Party’s or Affiliates’ or Representatives’ businesses and/or organizations, whether or not such information is specifically marked “Confidential” or with other similar legend. Confidential Information shall also include all information which should reasonably be understood by Receiving Party to be confidential due to the strategic or sensitive nature of the information. Confidential Information shall include CEII, CII and CIP, whether such information is designated in writing, by label, stamp, or other written communication, as “confidential” or “proprietary,” together with all writings, notes, memoranda, analyses, compilations, data, studies, interpretations, media, or other documents that are based upon or derived from, reflect, or contain, in whole or in part, any such furnished or obtained information. Confidential Information may be in the form of electronic, paper, oral, or visual, including, without limitation, all forms of written, printed and electronic documents; information given or received orally in meetings, informal discussions or telephone conversations; data stored on magnetic or other electronic media or in the memory of a computer; streams of data being transmitted over communications lines; and information in digital, graphic, text, voice or image format.

*Connecting Transmission Owner* – means Long Island Lighting Company d/b/a LIPA.

*Consent(s) –* means any material approval, consent, permit, license, decree, certificate or other authorization that is necessary to own, construct, operate, and maintain the Project from any Governmental Authority having jurisdiction in accordance with applicable Legal Requirements, including, without limitation, all material environmental certificates, licenses, permits and approvals.

*Contract Capacity* – means XX MW of Installed Capacity from the Project [*Seller to insert proposed Contract Capacity amount*]as specified in the recitals.

*Contract Capacity Monthly Payment* – means the product of the Contract Capacity Price and the Contract Capacity.

*Contract Capacity Price* – means $X.XX/kW (AC) (US$) per Month [*Seller to insert proposed Contract Capacity Price*].

*Costs* – means, with respect to the Non–Defaulting Party, brokerage fees, commissions and other similar third party transaction costs and expenses reasonably incurred by such Party either in terminating any arrangement or entering into new arrangements which replace the terminated Agreement and all reasonable attorneys’ fees and expenses incurred by the Non–Defaulting Party in connection with the termination of the transactions contemplated by this Agreement.

*Credit Rating* – means, with respect to any Person, the rating by S&P, Moody’s, Fitch or any other rating agency agreed to by the Parties then assigned to such Person’s unsecured, senior long–term debt obligations (not supported by third party credit enhancements) or if such Person does not have a rating for its senior unsecured long–term debt, then the rating then assigned to such Person as an issuer rating by S&P, Moody’s, Fitch or any other rating agency agreed by the Parties.

*Credit Requirements* – means, with respect to any Person, that such Person has at least two of the following Credit Ratings: (a) “Baa2” or higher from Moody’s; (b) “BBB” or higher from S&P; and (c) “BBB” or higher from Fitch.

*CRIS Rights or Capacity Resource Interconnection Service Rights* – has the meaning set forth in the NYISO Rules.

*Critical Infrastructure* – means systems, assets, places, or things, whether physical or virtual, so vital to the state that the disruption, incapacitation or destruction of such systems, assets, places, or things could jeopardize the health, safety, welfare or security of the state, its residents or its economy as defined under New York State Public Officers Law section 86.

*Cross Sound Cable or CSC* – means the HVDC transmission cable connecting the converter station in New Haven, Connecticut with the converter station at the decommissioned Shoreham Nuclear Power Station in Brookhaven, New York.

*Data Security Incident* – means the actual or reasonably suspected: (a) loss or misuse (by any means) of a Disclosing Party’s Confidential Information; (b) inadvertent, unauthorized and/or unlawful Processing, corruption, modification, transfer, sale or rental of a Disclosing Party’s Confidential Information; (c) act or omission that compromises the security, confidentiality, or integrity of a Disclosing Party’s Confidential Information; or (d) breach of any applicable law, rule or regulation or Disclosing Party’s internal requirements and procedures applicable to the Processing of the Disclosing Party’s Confidential Information by the Receiving Party or any current or former Representatives, including (but not limited to) CEII, CII and CIP.

*Day* – means twenty–four (24) consecutive hours commencing with the hour ending 0100 EPT through the hour ending 2400 EPT on any calendar day.

*Day-Ahead Market – has the meaning set forth in NYISO Rules.*

*Defaulting Party* – means (a) with respect to a Seller Event of Default, the Seller and (b) with respect to a Buyer Event of Default, the Buyer.

*Delist* – has the meaning set forth in the ISO-NE Rules.

*Delivery Point* – means the interconnection point between the New England High Voltage Pool Transmission Facility and the Cross Sound Cable which is identified as .I.SHOREHAM 138 99.

*Disclosing Party* – means a Party to this Agreement or its Representatives who are authorized to provide Confidential Information to the Receiving Party in accordance with the provisions of this Agreement.

*DMNC* –means the generator output capability test (Dependable Maximum Net Capacity) used to establish the NYISO Installed Capacity of the Project for the NYISO Summer Capability Period and NYISO Winter Capability Period (as applicable) as set forth in the NYISO Rules.

*Early Termination Date* – has the meaning set forth in Section 5.3.

*Effective Date* – means the first date on which all of the following shall have occurred: (1) this Agreement has been executed by both Seller and Buyer; and (2) the executed Agreement has been (a) approved in writing by both (i) the New York State Attorney General (as to form), and (ii) the State Comptroller and (b) filed in the office of the State Comptroller (as provided for in Supplement 1).

*Energy* – means three–phase, 60–hertz alternating current electric energy, expressed in MWh.

*EPT* – means Eastern Prevailing Time which shall be Eastern Standard Time or Eastern Daylight Savings Time, as applicable, with respect to any given hour.

*Equitable Defenses* – means any defense to an obligation arising under bankruptcy, insolvency, reorganization and other laws affecting creditors’ rights generally of which may be allowed in the discretion of a court before which such bankruptcy, insolvency or creditors rights proceedings may be pending.

*Extended Force Majeure Event* – has the meaning set forth in Section 13.4.1.

*FEMA* – means the Federal Emergency Management Agency and its successors.

*FERC* – means the Federal Energy Regulatory Commission and its successors or assigns.

*Fitch* – means Fitch Ratings, Ltd., or its successor.

*FOIL* – has the meaning set forth in Section 15.1.5.

*Forced Outage Hour* – means any hour (or any portion of any hour) in which a Forced Outage (as defined in the NYISO Tariff) has occurred and is continuing.

*Forced Derate Hour* – means, for any hour (or any portion of any hour) in which the Project is able to produce Energy, but in an amount less than the Installed Capacity of the Project, the product of (a) the ratio of (i) the difference between the Installed Capacity of the Project, minus the actual amount of Energy that the Project is able to Produce over (ii) the Installed Capacity of the Project, multiplied by (b) such period of time.

*Force Majeure Event* – has the meaning set forth in ARTICLE 13:.

*Force Majeure Remedy Plan* – has the meaning set forth in Section 13.4.1.

*GAAP* – means generally accepted accounting principles as established from time–to–time by the Financial Accounting Standards Board, consistently applied.

*Governmental Authority* – means (i) any federal, state, local, municipal, or other government, (ii) any governmental, regulatory or administrative agency, commission or other authority lawfully exercising or entitled to exercise any administrative, executive, judicial, legislative, police, regulatory or taxing authority or power (including, for the avoidance of doubt, the NYISO, FERC, and NERC), and (iii) any court or governmental tribunal; provided that LIPA and its subsidiaries shall not be included in such definition when acting as Buyer or the Connecting Transmission Owner pursuant to this Agreement and any related agreement between the Parties hereto.

*Governmental Charges* – has the meaning set forth in Section 9.2.

*Guaranteed Availability Percentage* – means 100% for the NYISO Summer Capability Period and 95% for the NYISO Winter Capability Period.

*Guarantor* – means the guarantor, if any, providing a Guaranty hereunder.

*Guaranty* – means the instrument obligating the Guarantor to unconditionally guarantee the payment obligations of Seller.

*Hazardous Materials* – means all explosive or radioactive substances or wastes and all hazardous or toxic substances, materials or wastes, including petroleum or petroleum distillates, asbestos or asbestos–containing materials, toxic mold, polychlorinated biphenyls, radon gas, infectious or medical wastes and all other substances, materials or wastes of any nature that are regulated as “hazardous” or “toxic,” or as a “pollutant” or a “contaminant,” pursuant to any environmental laws.

*ICAP Manual -* has the meaning set forth in NYISO Rules.

*Indemnifying Party* – has the meaning set forth in Section 11.3.1.

*Installed Capacity* – has the meaning set forth in NYISO Rules.

*Installed Capacity Supplier* – has the meaning set forth in NYISO Rules.

*Interest Rate* – means the effective interest rate as established by Section 2880 of the Public Authorities Law of the State of New York, and any successor thereto.

*ISO-New England or ISO-NE* – means the Independent System Operator of New England, and any successor in interest thereto.

*ISO-NE Rules* – means the ISO-NE Tariff and all ISO-NE manuals, rules, procedures, agreements or other documents relating to sale of Capacity, Energy and ancillary services that govern the participation of market participants with respect thereto in the ISO-NE Markets as in effect from time to time.

*ISO-NE Tariff* – means the ISO-NE Open Access Transmission or any other tariff applicable to ISO-NE.

*Legal Requirements* – means (i) all laws, statutes, codes, acts, treaties, ordinances, orders, judgments, writs, decrees, injunctions, rules, regulations, governmental approvals or Consents, directives, and requirements of all Governmental Authorities, including Supplement 1 to this Agreement, and (ii) NYISO Rules.

*Lender* – means any Person (or any successor in interest, agent, or trustee of such Person) providing senior or subordinated construction, interim or long–term debt or equity financing or refinancing for or in connection with the development, construction, purchase, installation or operation of the Project, whether that financing or refinancing takes the form of private debt, public debt or any other form (including debt financing or refinancing provided to a member or other direct or indirect owner of Seller), including any equity and tax investor directly or indirectly providing financing or refinancing for the Project or purchasing equity ownership interests of Seller and/or its Affiliates, any Person providing any interest rate protection agreements to hedge any of the foregoing obligations, any Person providing financing pursuant to a sale lease–back or other lease financing, and any trustee or agent acting on behalf of one or more of the foregoing Persons.

*Letter(s) of Credit* – means one or more irrevocable standby letters of credit governed by the International Standby Practices 1998 (ISP 98) or later edition issued by a U.S. commercial bank or a foreign bank with a U.S. branch with such bank having at all times (i) total shareholders’ equity of not less than ten billion dollars, and (ii) a Credit Rating of at least “A-” from S&P or “A3” from Moody’s or such lower Credit Rating as is acceptable in accordance with customary market practice at the time of issuance of the letter of credit for standby letters of credit issued by a U.S. commercial bank or a foreign bank with a U.S. branch for credit support on large-scale infrastructure projects, in a form acceptable to the Party in whose favor the letter of credit is issued, which may be drawn at a location in the City of New York, New York.

*LIPA* – means the Long Island Power Authority, herein referred to as the Buyer.

*Locational Installed Capacity* - means Installed Capacity that the NYISO recognizes as being eligible to supply load located in NYISO Zone “K” (Long Island) pursuant to NYISO Rules.

*Losses* – means, with respect to a Non–Defaulting Party, an amount equal to the present value of the economic loss to it, if any (exclusive of Costs), resulting from termination of this Agreement pursuant to Section 5.3, determined by such Non–Defaulting Party in a commercially reasonable manner.

*Market Participant* – means a market participant as such term is defined for purposes of the Market Administration and Control Area Services Tariff of the NYISO, as set forth more particularly in Section 2.13 thereof.

*Month or Monthly* – means a period commencing with the start of the hour ending 0100 EPT on the first Day of a calendar month and closing at the end of the hour ending 2400 EPT on the last Day of that calendar month.

*Monthly Invoice* – means an invoice delivered after the end of a Month, in accordance with ARTICLE 6.

*Moody’s* – means Moody’s Investor Services, Inc. or its successor. MW–means one megawatt (1,000 kilowatts) of Capacity.

*MWh* – means one megawatt hour (1,000 kilowatt hours) of Energy.

*NERC* – means the North American Electric Reliability Corporation or any successor government agency.

*Net Tangible Assets* – means the total assets of a company, minus any intangible assets such as goodwill, patents and trademarks, less all liabilities and the par value of preferred stock.

*New England Control Area* – means the area defined as such by the Northeast Power Coordinating Council glossary of terms dated January 19, 1966, as may be amended from time to time.

*New England High Voltage Pool Transmission Facility* – is defined in the ISO-NE Tariff.

*New York Control Area* – has the meaning set forth in the NYISO Rules.

*Non-Claiming Party* – has the meaning set forth in Section 13.3.

*Non–Defaulting Party* – means the Party that is not the Defaulting Party.

*Noticed Party* – has the meaning set forth in Section 12.1.

*NYISO* – means the New York Independent System Operator, Inc. or any successor in interest thereto.

*NYISO Capability Year* – has the meaning set forth in the NYISO Rules, which is currently May 1 to April 30.

*NYISO Information Obligations –* means the following information to be provided by Seller to the NYISO in accordance with NYISO Rules:

1. Name, location and other project identification data of the Project;

##### DMNC test data of the Project as required by the NYISO Rules;

##### Documentation that satisfies the maintenance scheduling requirements (as such term is used in the NYISO Rules) relating to the Project; and

1. Documentation certifying that Seller has not sold to a Person other than Buyer the same Contract Capacity made available and sold to Buyer.

*NYISO Market Administration and Control Area Services Tariff or MST–* has the meaning set forth in NYISO Rules.

*NYISO Market Participant Service Agreement* - means the agreement between a market participant and NYISO, consistent with the terms of the NYISO Rules.

*NYISO Markets* – means markets administered by the NYISO.

*NYISO Open Access Transmission Tariff -* has the meaning set forth in NYISO Rules.

*NYISO Rules* – means the NYISO Tariff, and all NYISO manuals, rules, procedures, agreements or other documents governing the participation of market participants in the NYISO Markets as in effect from time to time.

*NYISO Summer Capability Period -* has the meaning set forth in the NYISO Rules, which is currently May 1 through October 31.

*NYISO Tariff* – means the NYISO Open Access Transmission Tariff and/or the NYISO Market Administration and Control Area Services Tariff or any other tariff applicable to the NYISO, as in effect from time to time.

*NYISO Winter Capability Period* – has the meaning set forth in the NYISO Rules, which is currently November 1 through April 30.

*Outage* – means any reduction in the Capacity of the Project below the Contract Capacity.

*Parties* – has the meaning set forth in the preamble.

*Party* – means either Buyer or Seller.

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

*Processing* – means any operation, action, error, omission, negligent act, or set of operations, actions, errors, omissions, or negligent acts that is performed using or upon Confidential Information, whether it be by physical, automatic or electronic means, including, without limitation, collection, recording, organization, storage, access, adaptation, alteration, retrieval, use, transfer, hosting, maintenance, handling, retrieval, consultation, use, disclosure, dissemination, exfiltration, taking, removing, copying, processing, making available, alignment, combination, blocking, deletion, erasure, or destruction.

*Products –* has the meaning set forth in the recitals.

*Project* – has the meaning set forth in the recitals.

*Prudent Utility Practice(s)* – means the practices, methods, and acts (including the practices, methods, and acts engaged in or approved by a significant portion of the electric power generation industry in the Northeast region and/or NERC) 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, would have been expected to accomplish the desired result in a manner consistent with Legal Requirements, regulation, permits, codes, standards, equipment manufacturer’s recommendations, reliability, safety, environmental protection, economy, good business practices and expedition. Prudent Utility Practice(s) are not intended to be limited to the optimum practice, method or act to the exclusion of others, but rather to be a spectrum of possible practices, methods or acts.

*Real-Time Market* – has the meaning set forth in NYISO Rules.

*Receiving Party* – means a Party to this Agreement or its Representatives who are authorized to receive Confidential Information in accordance with the provisions of this Agreement.

*Regulatory Event* – has the meaning set forth in Section 11.9.

*Representatives* – means, in relation to a Party, its officers, directors, members, partners, trustees, employees, consultants, advisors and Affiliates, and their officers, directors, members, partners, trustees, employees, consultants and advisors.

*S&P* –means the S&P Global Ratings (a division of S&P Global, Inc.) or its successor.

*Seller* – has the meaning set forth in the preamble.

*Seller Event of Default* – has the meaning set forth in Section 5.1.

*Service Commencement Date* – means May 1, 2025 or May 1, 2026 [*Respondent to insert applicable date*]

*Site* – means the Project premises described in **Appendix 1: DESCRIPTION AND LOCATION OF THE PROJECT**.

*SRE Energy –* means Energy associated with the Contract Capacity that has been requested from the Project pursuant to a Supplemental Resource Evaluation issued by the NYISO.

*SRE Energy Monthly Payment –* means the sum of the difference between the Seller’s cost of generation to supply SRE Energy and the ISO-NE LMP price of Energy, for all hours in a Month in which the generator is supplying SRE Energy and such generation costs to supply SRE Energy exceed the ISO-NE LMP price of Energy.

*State Comptroller* – means the New York State Office of the State Comptroller.

*Station Service Energy* – means Energy consumed by the Project(s).

*Supplemental Resource Evaluation or SRE – has the meaning set forth in NYISO Rules.*

*Term* – has the meaning set forth in Section 2.1.

*Termination Payment* – has the meaning set forth in Section 5.3.

*Title* – has the meaning set forth in Section 3.13.

*UDRs* – means unforced capacity deliverability rights, as defined in the NYISO Rules

*Unforced Capacity* – has the meaning set forth in the NYISO Rules.

*Year* – means a period of 365 consecutive days, or 366 consecutive days if such period includes a February 29.

* 1. **Construction**

**.** Unless otherwise indicated, (i) defined terms include the plural as well as the singular; (ii) any agreement defined or referred to herein includes each amendment, modification and supplement thereto and waiver, approval and consent in respect thereof as may become effective from time to time and includes references to all Appendices, Exhibits, Schedules and other attachments thereto and instruments, agreements or other documents incorporated therein; (iii) any term defined by reference to any instrument, agreement or other document, has such meaning set forth in such document as of the date hereof and unless expressly amended, such meaning shall remain in effect whether or not such document is subsequently amended, modified or terminated; (iv) a reference to any law or Legal Requirement includes any amendment, modification or successor thereto; (v) a reference to any Person includes its permitted successors and assigns; (vi) all references to Appendices, Articles, Sections, Schedules and Exhibits shall mean and refer to the respective Appendices, Articles, Sections, Schedules and Exhibits in or attached to this Agreement or any document in which such reference appears; (vii) the words “include,” “includes” and “including” are not limiting and shall be deemed to be followed by the words “without limitation” whether or not in fact followed by such words or words of like import; and (viii) the terms “hereof,” “herein,” “hereunder” and comparable terms refer to this entire Agreement with respect to which such terms are used and not to any particular Article, Section or subdivision hereof; (ix) the word “day” means a “Day” as defined herein and includes each calendar day including Saturdays, Sundays and holidays; and (x) the term “or” shall have the inclusive meaning “or”, unless expressly indicated otherwise or the context so requires.

1. TERM
	1. **Term.**
		1. This Agreement shall become effective on the Effective Date. Buyer shall give Seller written notice within fifteen (15) Business Days after the occurrence of the Effective Date. The term of this Agreement shall begin on the Effective Date and shall remain in effect until no later than *April 30, 2026 or April 30, 2027, as applicable*], unless terminated earlier in accordance with the terms hereof (the “Term”); provided, however, that such termination shall not affect or excuse the performance of either Party under any provision of this Agreement that by its terms survives any such termination and, provided further, that this Agreement and any other documents executed and delivered hereunder shall remain in effect until both Parties have fulfilled all of their obligations hereunder unless such obligations have been terminated as provided herein.
2. OBLIGATIONS AND DELIVERIES
	1. **Delivery and Sale of Contract Capacity**
		1. **.** Beginning on the Service Commencement Date and continuing through the Term, Seller shall sell and deliver to Buyer at the Delivery Point the Contract Capacity, and Buyer shall purchase the Contract Capacity by paying Seller the Contract Capacity Monthly Payment.
	2. **Delivery and Sale of SRE Energy.**
		1. Delivery of SRE Energy. If the NYISO issues Seller a request for SRE Energy: (i) in the Day-Ahead Market, Seller shall deliver to the Delivery Point the SRE Energy required to comply with the NYISO’s requested SRE delivery schedule; or (ii) in the Real-Time Market (provided that Seller receives notice prior to the start of the requested hours for delivery of SRE Energy pursuant to the Bidding and Scheduling Instructions), then Seller shall use its best efforts to deliver SRE Energy as necessary to comply with the NYISO’s requested SRE delivery schedule. Seller’s obligation to provide SRE Energy shall be reduced to the extent that Buyer has an outstanding Bid to provide Energy at the Delivery Point in the Day-Ahead Market or the Real-Time Market, as applicable, for the requested SRE hours. Buyer shall purchase SRE Energy by paying Seller the SRE Energy Monthly Payment.
		2. Sale of SRE Energy. Buyer shall pay Seller the SRE Monthly Energy Payment in accordance with the following terms and conditions: In any Month in which Seller has provided SRE Energy, Seller will provide to Buyer and Buyer may provide to the NYISO pertinent documentation in accordance with Section 4.1.8 of the NYISO Market Administration and Control Area Services Tariff (“NYISO MST”) demonstrating Seller’s generation costs for the Project to the extent necessary to support any make-whole amount that may be applicable due to the negative difference in the Seller’s cost of generation to supply SRE Energy and the ISO-NE LMP price of Energy (“Supporting Information for SRE Energy Monthly Payment”). Buyer shall not be responsible for making any payments to Seller for SRE Energy beyond the SRE Monthly Energy Payment. An SRE Monthly Energy Payment shall not include any hour for which the ISO-NE LMP exceeds Seller’s generation costs during an SRE call.
	3. **Buyer’s Resale of Products**
		1. **.**  Buyer shall be free to use or resell the Products without restriction and to retain all proceeds from any such sales.
	4. **No Encumbrances**
		1. **.** At the time of any conveyance by Seller to Buyer of the Contract Capacity, (i) such Contract Capacity shall be free and clear of any restrictions on transfer (other than those imposed under the NYISO Tariff and the ICAP Manual), taxes, security interests, options, warrants, purchase rights, contracts, commitments, equities, claims, or demands, and (ii) Seller shall not have conveyed such Contract Capacity to any other Person, nor sold any such Contract Capacity for the purpose of meeting the electric generation capacity requirements in the New York Control Area or any External Control Area (as defined in the NYISO Tariff).
	5. **Maintenance Outages**

**.** Seller will ensure that the Project will not be subject to a scheduled maintenance Outage from May 1 to September 30 during the Term consistent with Prudent Utility Practices.

* 1. **Station Service Energy**

**.** Seller shall have the sole responsibility to obtain and pay for such Station Service Energy as applicable to the Project.

* 1. **Change in Law**

**.** Seller shall be responsible for and pay for all additional costs resulting from a Change in Law affecting Seller’s ability to perform its obligations under this Agreement.

* 1. **Buyer’s Access to Records**

**.** At Buyer’s request, Seller shall make available all records pertaining to (i) the determination of the Project’s Installed Capacity and Unforced Capacity and qualification for CRIS Rights, (ii) the calculation of the Availability Percentage and (iii) the conveyance of the Contract Capacity to Buyer.

* 1. **Seller as Owner of the Project**

**.** Seller shall at all times retain title to and be the legal and beneficial owner of the Project and the Project shall remain the property of the Seller or Seller’s permitted assigns. The Parties specifically acknowledge and agree that Seller shall be the owner of the Project for federal income tax purposes and, in that connection, shall be entitled to the depreciation deductions associated with the Project as well as any tax credits or other income tax benefits provided under the Code to which the Project may be entitled.

* 1. **Facility Control**

. Seller shall (directly or indirectly through contractors or Affiliates) control the operation of the Project in accordance with applicable Law, this Agreement and Prudent Utility Practices. Seller shall perform all obligations of an Installed Capacity Supplier (as defined in NYISO Rules) under the NYISO Tariff and the ICAP Manual with respect to the Project and the Project’s Unforced Capacity, including conducting DMNC tests as required to determine and establish the Project’s rated capacity during the NYISO Summer and Winter Capability Periods. Seller shall conduct DMNC testing or report data from actual operations in accordance with Section 5.2.18 of the NYISO Tariff and Section 4.2 of the NYISO ICAP Manual.  DMNC test data or data from actual operation that has been validated per NYISO rules constitutes a DMNC rating for the purpose of establishing the Project’s availability relative to the Installed Capacity. Seller shall also take all actions reasonably requested by Buyer to maintain the qualification of the Capacity of the Project as Installed Capacity and Unforced Capacity under the NYISO ICAP Manual. Seller shall be responsible for all costs of maintaining and operating the Project, including procuring all fuel necessary to operate and dispatch the Project.

* 1. **Bidding and Scheduling Instructions**

**.** No later than the Effective Date, Buyer and Seller shall jointly and cooperatively develop detailed written bidding and scheduling instructions setting forth the procedures for scheduling the Products (the “Bidding and Scheduling Instructions”). The Bidding and Scheduling Instructions shall comply with ISO-NE Rules and NYISO Rules with respect to the delivery and receipt of Contract Capacity and SRE Energy.

* 1. **NYISO Penalties**

**.** Seller shall be responsible for any and all penalties incurred due to failures by the Seller to fulfill all applicable requirements under NYISO Rules, which include but are not limited to: (i) failure to provide required information to the NYISO in accordance with Section 5.12.12.1 of the NYISO Market Administration and Control Area Services Tariff; (ii) failure to respond to a NYISO request for SRE Energy in accordance with Section 5.12.12.2 of the NYISO Market Administration and Control Area Services Tariff; and (iii) failure to qualify part or all of the Contract Capacity as Installed Capacity in accordance with the rules and requirements set forth in the ICAP Manual. If the NYISO imposes a deficiency charge on Buyer as a result of a Capacity shortfall from the Project pursuant to Section 5.14.2 of the MST, Seller will be responsible for any such deficiency charge. In the event that NYISO imposes any of the foregoing penalties on Buyer, Seller shall reimburse Buyer for the same.

* 1. **Capacity Performance Charges and Payments**

**.** To the extent the Seller is assessed ISO-NE charges directly, including negative Capacity Performance Payments, the Seller shall be solely responsible for such charges. To the extent a positive Capacity Performance Payment is made to the Seller pursuant to the ISO-NE and NYISO Rules, Buyer shall be entitled to receive such credits for performance of the Contract Capacity, during the Term.

* 1. **Term**

**.** Title to and risk of loss the Products provided under the terms of this Agreement shall pass from Seller to Buyer at the Delivery Point.

* 1. **Role of the Parties.**
		1. Role of Seller. Seller shall, at its sole cost and expense:
1. Ensure that the Project is maintained and operated in accordance with Prudent Utility Practices, Consents and Legal Requirements and is capable of delivering Contract Capacity to the Delivery Point;
2. Comply with all ISO-NE Rules required for the delivery of Contract Capacity to the Delivery Point;
3. Sell and deliver Contract Capacity to Buyer at the Delivery Point pursuant to the terms and conditions of this Agreement;
4. Maintain a valid interconnection agreement for the Project during the Term;
5. Maintain a valid Market Participant Service Agreement such that Seller is recognized as a market participant under ISO-NE Rules;
6. Ensure that the Contract Capacity is available (uncommitted) in accordance with ISO-NE Rules such that the Contract Capacity will be available for sale to Buyer by the Service Commencement Date. If the Project currently has a forward Capacity obligation in the ISO-NE Capacity markets for the applicable NYISO Capability Year(s), Seller shall buy out of such obligation to ensure that the Contract Capacity will be available as required by this Agreement;
7. With respect to Contract Capacity, comply with the NYISO Information Obligations;
8. Provide to Buyer the information required under NYISO Rules such that the Project (Contract Capacity) can be qualified as an Installed Capacity Supplier;
9. Provide SRE Energy at the Delivery Point in response to SRE requests issued by the NYISO;
10. Register the Project(s) with the NYISO; and
11. Arrange for the Contract Capacity to qualify as NYISO Installed Capacity pursuant to NYISO Rules.
12. Role of Buyer. Buyer shall, at its sole cost and expense:
13. Comply with all ISO-NE Rules for the receipt of Products at the Capacity Delivery Point;
14. Purchase and receive Products pursuant to the terms and conditions of this Agreement;
15. Maintain the required UDRs and CRIS Rights such that the Contract Capacity qualifies as NYISO Installed Capacity pursuant to NYISO Rules;
16. Maintain a valid Market Participant Services Agreement as required by ISO-NE Rules for the purchase of Products; and
17. Maintain a valid NYISO Market Participant Services Agreement as required for the transfer of Contract Capacity from the New England Control Area to the New York Control Area.
18. AVAILABILITY GUARANTEE
	1. **Calculation of Availability Percentage**

**.** Seller shall, within fifteen (15) days after the end of each Month, provide to Buyer a report calculating the Availability Percentage of the Project over the previous Month (the “Availability Report”).

* 1. **Calculation of Availability Damages**

**.** If the Availability Percentage in any Month is less than the Guaranteed Availability Percentage, then Seller shall pay liquidated damages to Buyer equal to the product of (i) the Contract Capacity Monthly Payment, multiplied by (ii) the difference between (x) the Guaranteed Availability Percentage and (y) the Availability Percentage for the applicable Month (the “Availability Damages”).

* 1. **Payment of Availability Damages**

**.** Upon determination by the Parties of any Availability Damages owed for any Month, the Availability Damages shall be deducted from the Contract Capacity Monthly Payment on the next invoice issued pursuant to ARTICLE 6.

* 1. **Availability Damages are Sole Remedy**

**.** Except as set forth in Sections 3.12 and 11.3, the payment of Availability Damages in the circumstances contemplated by and according to this ARTICLE 4 shall be Buyer’s sole and exclusive remedy, and Seller’s sole and exclusive liability, for any reduced Availability Percentage in a given Month. The Parties acknowledge and agree that the terms, conditions and amounts determined according to this ARTICLE 4 for the payment of Availability Damages are reasonable considering the damages that Buyer would be expected to sustain if any event or circumstance described in the immediately preceding sentence occurs. The Parties have agreed upon and established the amounts of the Availability Damages because of the difficulty of ascertaining the exact amount of such damages in such event or circumstance and because otherwise obtaining an adequate remedy would be difficult or inconvenient. The Availability Damages are not penalties and shall be paid in the circumstances contemplated by and according to this ARTICLE 4, regardless of the amount of damages that Buyer actually sustains. For the avoidance of doubt, the payment of Availability Damages shall be in addition to any obligations of Seller to reimburse Buyer for any NYISO penalties as described in Section 3.12.

1. EVENTS OF DEFAULT; REMEDIES
	1. **Default by Seller.**

The occurrence of one or more of the following events shall constitute a “Seller Event of Default”:

* + 1. the failure by Seller to make, when due, any payment required pursuant to this Agreement if such failure is not remedied within ten (10) Business Days after written notice from Buyer;
		2. any representation or warranty made by Seller herein or in any certificate delivered to Buyer pursuant to this Agreement is false or misleading in any material respect when made or when deemed made or repeated;
		3. the failure by Seller to perform any material covenant or obligation set forth in this Agreement (except and to the extent such failure constitutes a separate Seller Event of Default) if such failure is not remedied within thirty (30) Business Days after written notice; provided that if such failure is not reasonably capable of being cured within thirty (30) Business Days, and if Seller is exercising diligent efforts to remedy such failure, then such additional period of time, not to exceed ninety (90) additional Business Days, as shall be required to remedy such failure with the exercise of diligent efforts;
		4. Seller becomes Bankrupt;
		5. Seller consolidates or amalgamates with, or merges with or into, or transfers all or substantially all of its assets to, another entity and, at the time of such consolidation, amalgamation, merger or transfer, the resulting, surviving or transferee entity fails to assume all the obligations of Seller under this Agreement if such failure is not remedied within sixty (60) Business Days after written notice;
		6. any sale of Contract Capacity during the Term to any entity other than Buyer, unless a Buyer Event of Default is continuing;
		7. the average Availability Percentage falls below 70% for any two consecutive Months other than as a direct result of a Force Majeure Event; or
		8. failure to provide insurance in accordance with ARTICLE 10 if such failure is not cured within ten (10) Business Days.
	1. **Default by Buyer.**

The occurrence of any of the following events shall constitute a “Buyer Event of Default”:

* + 1. the failure by Buyer to make, when due, any payment required pursuant to this Agreement if such failure is not remedied within ten (10) Business Days after written notice from Seller;
		2. any representation or warranty made by Buyer herein is false or misleading in any material respect when made or when deemed made or repeated;
		3. the failure by Buyer to perform any material covenant or obligation set forth in this Agreement (except and to the extent such failure constitutes a separate Buyer Event of Default) if such failure is not remedied within thirty (30) Business Days after written notice; provided that if such failure is not reasonably capable of being cured within thirty (30) Business Days, and if Buyer is exercising diligent efforts to remedy such failure, then such additional period of time, not to exceed ninety (90) additional Business Days as shall be required to remedy such failure with the exercise of diligent efforts;
		4. Buyer becomes Bankrupt; or
		5. Buyer consolidates or amalgamates with, or merges with or into, or transfers all or substantially all of its assets to, another entity and, at the time of such consolidation, amalgamation, merger or transfer, the resulting, surviving or transferee entity fails to assume all the obligations of Buyer under this Agreement if such failure is not remedied within sixty (60) Business Days after written notice.
	1. **Declaration of an Early Termination Date and Calculation of Termination Payment**

**.** If a Seller Event of Default or a Buyer Event of Default shall have occurred and is continuing, the Non–Defaulting Party shall have the right, upon providing written notice to the Defaulting Party (i) to designate a Day, no earlier than the Day such notice is effective and no later than forty–five (45) Days after such notice is effective, as an early termination date (“Early Termination Date”) to accelerate all amounts owing between the Parties and to determine in a commercially reasonable manner the Non–Defaulting Party’s Losses and Costs, which shall be the termination payment payable by the Defaulting Party hereunder (the “Termination Payment”), and terminate this Agreement, (ii) withhold any payments due to the Defaulting Party under this Agreement, and (iii) suspend performance in accordance with Section 5.6. For the avoidance of doubt, a Defaulting Party shall not be entitled to receive payment of any Termination Payment.

* 1. **Notice of Payment of Termination Payment**

**.** As soon as practicable after an Early Termination Date has been established pursuant to Section 5.3, notice shall be given by the Non–Defaulting Party to the Defaulting Party of the amount and a calculation of the Termination Payment due to the Non–Defaulting Party. The notice shall include a written statement explaining in reasonable detail the calculation of such amount. The Termination Payment shall be made by the Defaulting Party to the Non–Defaulting Party within five (5) Business Days after such notice is received by the Defaulting Party.

* 1. **Disputes With Respect to Termination Payment**

**.**  If the Defaulting Party disputes the Non–Defaulting Party’s calculation of the Termination Payment, in whole or in part, the Defaulting Party shall, within fifteen (15) Business Days of receipt of Non–Defaulting Party’s calculation of the Termination Payment, provide to the Non­ Defaulting Party a detailed written explanation of the basis for such dispute. Such dispute shall be settled in accordance with the dispute resolution process set forth ARTICLE 12.

* 1. **Suspension of Performance**

**.** Notwithstanding any other provision of this Agreement, if a Seller Event of Default or a Buyer Event of Default shall have occurred and be continuing, the Non–Defaulting Party, upon written notice to the Defaulting Party, shall have the right (i) to suspend performance under this Agreement provided, however, in no event shall any such suspension continue for longer than twenty (20) Business Days unless an early Termination Date shall have been declared and notice thereof given pursuant to Section 5.3, and (ii) to the extent a Seller Event of Default or a Buyer Event of Default, as applicable, shall have occurred and be continuing, to exercise any remedy available at law or in equity.

1. PAYMENT
	1. **Billing Period**

**.** Unless otherwise specifically agreed upon by the Parties, the calendar Month shall be the standard period for all payments under this Agreement (other than Termination Payments). As soon as practicable after the end of each Month, each Party will render to the other Party an invoice for the payment obligations, if any, incurred hereunder during the preceding Month.

* 1. **Invoices**

**.** All invoices presented by Seller shall be in the form of the sample Monthly Invoice as set forth in **Appendix 3: SAMPLE MONTHLY INVOICE,** which shall be provided by the Seller.

* + 1. Monthly Invoice
			1. Contract Capacity Monthly Payment. Commencing with the Month in which the Effective Date occurs and continuing throughout the Term, Seller shall prepare and submit to Buyer a Monthly Invoice for the Contract Capacity. Each Monthly Invoice that includes the Contract Capacity Monthly Payment shall be accompanied by the calculation thereof to be provided in **Appendix 3: SAMPLE MONTHLY INVOICE**.
			2. Supporting Information for SRE Energy Monthly Payment. To the extent that Seller provides SRE Energy during a Month, the Monthly Invoice for such Month shall include pertinent documentation in accordance with Section 4.1.8 of the NYISO Market Administration and Control Area Services Tariff (“NYISO MST”) for the SRE Energy Monthly Payment in accordance with Section 3.2.2.
			3. Availability Damages Adjustment. To the extent that any Availability Damages arise as set forth in ARTICLE 4, Seller shall include on the Monthly Invoice to Buyer such credit as a separate line item detailing the nature and amount to be deducted from the Contract Capacity Monthly Payment.
		2. Other Costs. After the Effective Date, each Party shall submit to the other Party an invoice for any amount due and payable to such Party under this Agreement which is not otherwise subject to reimbursement or payment in Section 6.2.1.
	1. **Timeliness of Payment**

**.** Unless otherwise agreed by the Parties, all invoices under this Agreement shall be due and payable in accordance with each Party’s invoice instructions on or before the thirtieth (30th) Day after receipt of the invoice or, if such Day is not a Business Day, then on the next Business Day. For the avoidance of doubt, such thirtieth (30th) Day after receipt of the invoice, or such following Business Day, shall be the date on which the amounts invoiced therein shall be due for all purposes of this Agreement. Each Party will make payments by electronic funds transfer, or by other mutually agreeable method(s), to the account designated by the other Party. Any amounts not paid by the due date will be deemed delinquent and will accrue interest at the Interest Rate, such interest to be calculated from and including the due date to but excluding the date the delinquent amount is paid in full.

* 1. **Disputes and Adjustments of Invoices**

**.** A Party may, in good faith, dispute the accuracy of any invoice or any adjustment (including any calculation of Availability Damages) to an invoice, rendered under this Agreement or adjust any invoice for any arithmetic or computational error within six (6) years of the date the invoice, or adjustment to an invoice, was rendered. In the event an invoice or portion thereof, or any other claim or adjustment arising hereunder, is disputed, payment of the undisputed portion of the invoice shall be required to be made when due, with notice of the objection given to the other Party. Any invoice dispute or invoice adjustment shall be in writing and shall state the basis for the dispute or adjustment. If an invoice is not rendered within twelve (12) Months after the close of the Month during which performance occurred, the right to payment for such performance is waived.

* 1. **Payment Obligation**

**.** Each Party shall pay the other Party all amounts owed in full when due except for amounts in dispute in accordance with Section 6.4.

1. LIMITATIONS

THE PARTIES AGREE THAT THE WARRANTIES GIVEN BY SELLER IN THIS AGREEMENT ARE IN LIEU OF ALL OTHER WARRANTIES AVAILABLE AT LAW OR IN EQUITY, INCLUDING THOSE OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND ANY AND ALL OTHER WARRANTIES, WHETHER EXPRESS OR IMPLIED, ARE HEREBY DISCLAIMED. THE PARTIES CONFIRM THAT THE EXPRESS REMEDIES AND MEASURES OF DAMAGES PROVIDED IN THIS AGREEMENT SATISFY THE ESSENTIAL PURPOSES HEREOF AND SHALL BE THE SOLE AND EXCLUSIVE REMEDY FOR THE BREACH OF ANY PROVISION TO WHICH SUCH EXPRESS REMEDY RELATES. UNLESS EXPRESSLY HEREIN PROVIDED, NEITHER PARTY SHALL BE LIABLE FOR CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT OR CONTRACT, UNDER ANY INDEMNITY PROVISION OR OTHERWISE. IT IS THE INTENT OF THE PARTIES THAT THE LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER SUCH NEGLIGENCE BE SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE. TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, OR OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT AND THE LIQUIDATED DAMAGES CALCULATED HEREUNDER CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS, AND NOT A PENALTY.

1. CREDIT REQUIREMENTS
	1. **Letter of Credit or Guaranty**

**.** Within ten (10) Business Days after the Effective Date, Seller will provide security to Buyer in the form of a Guaranty (subject to the Credit Requirements) or a Letter of Credit in the amount of $50,000.00 per MW. The Letter of Credit must be substantially in the form set forth in Appendix 2.

* 1. **Draw or Demand on Letter of Credit**

**.** Any undisputed amounts due and owing to Buyer by Seller with respect to Seller’s failure to perform any of its obligations under this Agreement that are not paid by the date due may be satisfied by a draw on the Letter of Credit (or demand on Guarantor if all or a portion of the Seller Security is in the form of a Guaranty). Buyer shall return to Seller the original Letter of Credit or Guaranty within thirty (30) Business Days after the Term, provided that Seller has fulfilled all of its obligations under this Agreement.

* 1. **Replenishment**

**.** In the event that Buyer draws down or makes a claim on the Letter of Credit or Guaranty, Seller shall replenish such amount within ten (10) Business Days.

1. GOVERNMENTAL CHARGES
	1. **Cooperation**

**.** Each Party shall use commercially reasonable efforts to implement the provisions of and to administer this Agreement in accordance with the intent of the Parties to minimize all taxes, so long as neither Party is materially adversely affected by such efforts.

* 1. **Governmental Charges**

**.** Seller shall pay or cause to be paid all taxes imposed by any Government Authority (“Governmental Charges”) on or with respect to the Project and the purchase and sale of the Products, including (a) ad valorem, franchise or income taxes which are related to the conveyance of the Contract Capacity and (b) all costs of qualifying Contract Capacity of the Project as Installed Capacity and Unforced Capacity under the NYISO Tariff and the ICAP Manual. In the event Seller is required by Legal Requirements to remit or pay Governmental Charges which are Buyer’s responsibility hereunder, Buyer shall promptly reimburse Seller for such Governmental Charges. If Buyer is required by Legal Requirements to remit or pay Governmental Charges which are Seller’s responsibility hereunder, Buyer may deduct the amount of any such Governmental Charges from the sums due to Seller under ARTICLE 6 of this Agreement. Nothing shall obligate or cause a Party to pay or be liable to pay any Governmental Charges for which it is exempt under Legal Requirements. Notwithstanding the foregoing, Buyer shall not be required to pay any portion of Governmental Charges arising from Seller’s failure to perform any obligation under this Agreement.

1. INSURANCE
	1. **Insurance Required**

**.** Seller, at its sole cost and expense, shall acquire and maintain in full force and effect the types and amounts of insurance coverage described in **Appendix 4 INSURANCE REQUIREMENTS**. Thirty (30) Business Days prior to the Service Commencement Date, Seller shall submit to Buyer insurance certificates or other documents providing evidence of such insurance and that insurance policies name Buyer as an additional insured to the extent that such insurance policies are required to do so pursuant to **Appendix 4: INSURANCE REQUIREMENTS**. Failure by Seller to obtain the insurance coverage required by this ARTICLE 10 shall not relieve Seller of the insurance requirements set forth or in any way relieve or limit Seller’s obligations and liabilities under any other provision of this Agreement.

* 1. **Insurance Notice to Buyer**

**.** Seller shall promptly notify Buyer in the event of underwriters’ cancellation or termination of any of Seller’s insurance coverages required under this ARTICLE 10.

1. MISCELLANEOUS
	1. **Seller’s Representations and Warranties.**

As of the Effective Date, Seller represents and warrants to Buyer that:

* + 1. it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation;
		2. it has all regulatory authorizations necessary for it to legally perform its obligations under this Agreement, other than any such authorizations and approvals that are not required to be obtained on and as of the Effective Date;
		3. the execution, delivery and performance of this Agreement are within its powers, have been duly authorized by all necessary action and do not violate in any material respect any of the terms and conditions in its governing documents, any contracts to which it is a party or any law, rule, regulation, order or the like applicable to it;
		4. this Agreement, constitutes its legally valid and binding obligation, enforceable against it in accordance with its terms, subject to any Equitable Defenses;
		5. it is not Bankrupt and there are no proceedings pending or being contemplated by it or, to its knowledge, threatened against it which would result in it being or becoming Bankrupt;
		6. there is not pending or, to its knowledge, threatened against it or any of its Affiliates any legal proceedings that could materially adversely affect its ability to perform its obligations under this Agreement;
		7. no Seller Event of Default has occurred and is continuing and no such event or circumstance would occur as a result of its entering into or performing its obligations under this Agreement;
		8. it is acting for its own account, has made its own independent decision to enter into this Agreement and as to whether this Agreement is appropriate or proper for it based upon its own judgment, is not relying upon the advice or recommendations of the other Party in so doing, and is capable of assessing the merits of and understanding, and understands and accepts, the terms, conditions and risks of this Agreement;
		9. it has entered into this Agreement in connection with the conduct of its business and, it will have the capacity or ability (as applicable) to transfer the Contract Capacity; and
		10. with respect to the conveyance or of Contract Capacity, it will be a producer, processor, commercial user or merchant handling the Contract Capacity, and it is entering into this Agreement for purposes related to its business as such.
	1. Buyer’s Representations and Warranties.

As of the Effective Date, Buyer represents and warrants to Seller that:

* + 1. it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation;
		2. it has all regulatory authorizations necessary for it to legally perform its obligations under this Agreement;
		3. the execution, delivery and performance of this Agreement are within its powers, have been duly authorized by all necessary action and do not violate in any material respect any of the terms and conditions in its governing documents, any contracts to which it is a party or any law, rule, regulation, order or the like applicable to it;
		4. this Agreement, constitutes its legally valid and binding obligation, enforceable against it in accordance with its terms, subject to any Equitable Defenses.
		5. it is not Bankrupt and there are no proceedings pending or being contemplated by it or, to its knowledge, threatened against it which would result in it being or becoming Bankrupt;
		6. there is not pending or, to its knowledge, threatened against it any legal proceedings that could materially adversely affect its ability to perform its obligations under this Agreement;
		7. no Buyer Event of Default has occurred and is continuing and no such event or circumstance would occur as a result of its entering into or performing its obligations under this Agreement;
		8. it is acting for its own account for its customers as a load–serving entity, has made its own independent decision to enter into this Agreement and as to whether this Agreement is appropriate or proper for it based upon its own judgment, is not relying upon the advice or recommendations of the other Party in so doing, and is capable of assessing the merits of and understanding, and understands and accepts, the terms, conditions and risks of this Agreement;
		9. all acts necessary to the valid execution, delivery and performance of this Agreement, including without limitation, competitive bidding, public notice, election, referendum, prior appropriation or other required procedures has or will be taken and performed as required under the Act;
		10. entry into and performance of this Agreement by Buyer are for a proper public purpose within the meaning of the Act and all other relevant constitutional, organic or other governing documents and Legal Requirements; and
		11. the Term does not extend beyond any applicable limitation imposed by the Act or other relevant constitutional, organic or other governing documents and Legal Requirements.
	1. **Indemnity**
		1. Each Party (the “Indemnifying Party”) agrees to indemnify, defend and hold harmless the other Party and its Affiliates, directors, trustees, officers, employees and agents (collectively, the “Indemnified Party”) from and against all claims, demands, losses, liabilities, penalties, and expenses (including reasonable attorneys’ fees) for personal injury or death to Persons and damage to the property of any third party to the extent arising out of, resulting from, or caused by the negligent or willful misconduct of the Indemnifying Party, its Affiliates, its directors, trustees, officers, employees, or agents.
		2. Seller, as Indemnifying Party, agrees to indemnify, defend and hold harmless the Buyer and its Affiliates, directors, trustees, officers, employees and agents (each being an Indemnified Party), from and against all claims, demands, losses, liabilities, sanctions, deficiency damages, penalties, and expenses (including reasonable attorneys’ fees) (i) arising out of or relating to the operation and maintenance of the Project; and (ii) failure to comply with this Agreement or any of Seller’s obligations as an Installed Capacity Supplier (as defined in the NYISO Tariff) pursuant to the NYISO Tariff and the ICAP Manual.
		3. Nothing in this Section 11.3 shall relieve Seller or Buyer of any liability to the other for any breach of this Agreement. This indemnification obligation shall apply notwithstanding the negligence or willful misconduct of the Indemnified Party, but the Indemnifying Party’s liability to pay damages to the Indemnified Party shall be reduced in proportion to the percentage by which the Indemnified Party’s negligence or willful misconduct contributed to the claim giving rise to, or increased the level of, the damages. Neither Party shall be indemnified for its damages resulting from its sole negligence, intentional acts or willful misconduct. These indemnity provisions shall not be construed to relieve any insurer of its obligation to pay claims consistent with the provisions of a valid insurance policy.
	2. **Claims**

**.** Promptly after receipt by a Party of any claim or notice of the commencement of any action, administrative, or legal proceeding, or investigation as to which the indemnity provided for in this ARTICLE 11 may apply, the Indemnified Party shall notify the Indemnifying Party in writing of such fact. The Indemnifying Party shall assume the defense thereof with counsel designated by such Party and satisfactory to the Indemnified Party, provided, however, that if the defendants in any such action include both the Indemnified Party and the Indemnifying Party and the Indemnified Party shall have reasonably concluded that there may be legal defenses available to it which are different from or additional to, or inconsistent with, those available to the Indemnifying Party, the Indemnified Party shall have the right to select and be represented by separate counsel, at the Indemnifying Party’s expense, unless a liability insurer shall pay such costs. The Indemnified Party may not make any admission or offer or accept any settlement or compromise without prior written consent of the Indemnifying Party.

* 1. **Additional Seller’s Warranties.**

Additionally, Seller warrants at all times during the Term (except as expressly provided in this Agreement):

* + 1. Seller has qualified and shall maintain the Project as an Installed Capacity Supplier in accordance with the ICAP Manual.
		2. The Installed Capacity of the Project as calculated in accordance with the ICAP Manual shall be equal to or greater than the Contract Capacity in each Month during the Term.
		3. The Contract Capacity is not sold or committed to any other party for any period during the Term.
	1. **Governing Law**

**.** THIS AGREEMENT AND THE RIGHTS AND DUTIES OF THE PARTIES HEREUNDER SHALL BE GOVERNED BY AND CONSTRUED, ENFORCED AND PERFORMED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK, WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAW. THE PARTIES HERETO AGREE THAT VENUE IN ANY AND ALL ACTIONS AND PROCEEDINGS RELATED TO THE SUBJECT MATTER OF THIS AGREEMENT SHALL BE IN THE SUPREME COURTS OF NEW YORK LOCATED IN NASSAU COUNTY AND SUFFOLK COUNTY NEW YORK, OR THE FEDERAL COURTS IN AND FOR THE EASTERN DISTRICT OF NEW YORK, WHICH COURTS SHALL HAVE EXCLUSIVE JURISDICTION FOR SUCH PURPOSE, AND THE PARTIES HERETO IRREVOCABLY SUBMIT TO THE EXCLUSIVE JURISDICTION OF SUCH COURTS AND IRREVOCABLY WAIVE THE DEFENSE OF AN INCONVENIENT FORUM TO THE MAINTENANCE OF ANY SUCH ACTION OR PROCEEDING. SERVICE OF PROCESS MAY BE MADE IN ANY MATTER RECOGNIZED BY SUCH COURTS. EACH PARTY WAIVES ITS RESPECTIVE RIGHT TO ANY JURY TRIAL WITH RESPECT TO ANY LITIGATION ARISING UNDER OR IN CONNECTION WITH THIS AGREEMENT.

* 1. **Currency**

**.** All references to “dollar(s)”, “US$” or “$” in this Agreement shall refer to United States dollars (US$).

* 1. **Notices**

**.** All notices, requests, statements or payments shall be made as follows:

If to Seller:

[\_\_*Seller to provide*\_\_\_]

If to Buyer:

Long Island Electric Utility Servco LLC as agent of and acting on behalf

of Long Island Lighting Company d/b/a LIPA

175 Old Country Road, Suite 1–16

Hicksville, NY 11801

Attn: Manager of Power Portfolios

Email PowerContractMgmt@pseg.com

With a copy of legal notices only to:

Long Island Power Authority

333 Earle Ovington Boulevard, Suite 403

Uniondale, New York 11553

Attn: General Counsel

Email generalcounsel@lipower.org

Unless otherwise specified, where notice is required by this Agreement, such notice shall be in writing and shall be deemed given: (i) upon receipt, when mailed by United States registered or certified mail, postage prepaid, return receipt requested; (ii) upon the next Business Day, when sent by overnight delivery, postage prepaid using a recognized courier service; or (iii) upon receipt, when sent by electronic or facsimile transmission, provided receipt of such electronic or facsimile transmission is confirmed before 1700 EPT and written confirmation of such notice is sent on the same Day in accordance with either subsection (i) or (ii) above. A Party may change its addresses by providing notice of same in accordance herewith.

* 1. **General**

**.** This Agreement (including the appendices, schedules and any written supplements hereto), constitutes the entire agreement between the Parties relating to the subject matter. This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this Agreement). Any provision declared or rendered unlawful by any applicable court of law or regulatory agency or deemed unlawful because of a statutory change (individually or collectively, such events referred to as “Regulatory Event”) will not otherwise affect the remaining lawful obligations that arise under this Agreement; and provided, further, that if a Regulatory Event occurs, the Parties shall use commercially reasonable efforts to reform this Agreement in order to give effect to the original intention of the Parties. The term “including” when used in this Agreement shall be by way of example only and shall not be considered in any way to be in limitation. The headings used herein are for convenience and reference purposes only. All indemnity and audit rights shall survive the termination of this Agreement for six (6) Years. This Agreement shall be binding on each Party’s successors and permitted assigns. References to any Person herein shall include such Person’s permitted successors and assigns.

* 1. **Audit**

**.** Each Party has the right (at its sole expense during normal working hours and provided that such Party has given reasonable prior notice) to examine the records of the other Party to the extent reasonably necessary to verify the accuracy of any statement, charge or computation made pursuant to this Agreement. If any such examination reveals any inaccuracy in any statement, the necessary adjustments in such statement and the payments thereof will be made promptly and shall bear interest calculated at the Interest Rate from the date the overpayment or underpayment was made until paid.

* 1. **Forward Contract**

**.** The Parties acknowledge and agree that this Agreement constitutes a “forward contract” within the meaning of the United States Bankruptcy Code (Title 11, United States Code).

* 1. **Counterparts**

**.** This Agreement may be executed in counterparts, each of which shall be an original and all of which shall constitute a single agreement.

* 1. **Amendment**

**.** No amendment or modification to this Agreement shall be enforceable unless reduced to writing, executed by both Parties, and approved by the State Comptroller.

* 1. **Compliance with Legal Requirements, Regulations, NYISO Rules**

 **and ISO-NE Rules**. Each Party will comply with applicable Legal Requirements, regulations, NYISO Rules and ISO-NE Rules at all times, provided that failure of a Party to do so shall not constitute a Seller Event of Default or a Buyer Event of Default unless such failure has, or with the passage of time or upon initiation of enforcement actions by any Governmental Authority is reasonably expected to have, a material adverse impact on the other Party’s realization of benefits for which this Agreement provides.

* 1. **Waiver**

**.** The failure of either Party to enforce at any time any of the provisions of this Agreement, or to require at any time performance by the other Party of any of the provisions hereof; shall in no way be construed to be a waiver of such provisions, or in any way to affect the validity of this Agreement or any part hereof or the right of such Party hereafter to enforce every such provision. No modification or waiver of all or any part of this Agreement shall be valid unless it is reduced to a writing, signed by both Parties, that expressly states that the Parties agree to a waiver of modification, as applicable. Waiver by a Party of any default by the other Party shall not be construed as a waiver of any other default.

* 1. **Agency**

**.** This Agreement shall not be interpreted or construed to create an association, joint venture, or partnership between the Parties or to impose any partnership obligation or liability upon either Party. Neither Party shall have any right, power or authority to enter into any agreement or undertaking for, or act on behalf of, or be an agent or representative of, or to otherwise bind, the other Party.

* 1. **Severability.**
		1. If any term or provision of this Agreement or the application thereof to any Party, or circumstance, shall to any extent be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to Persons or circumstances other than those as to which it is invalid or unenforceable, shall not be effected thereby, and each term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by Legal Requirements.
		2. If any term or provision of this Agreement or the application thereof to any Party, or circumstance, shall to any extent be invalid or unenforceable and if this results in one Party being materially affected compared to the other Party, or being deprived of a material element of its original bargain, then the Parties shall negotiate in good faith to restore as nearly as possible or rebalance the benefits of this Agreement to those existing prior to the term or provision being determined to be invalid or unenforceable.
	2. **Negotiated Agreement**

**.** This Agreement shall be considered for all purposes as prepared through the joint efforts of the Parties and shall not be construed against any one Party or the other as a result of the preparation, substitution or other event of negotiation, drafting or execution hereof.

* 1. **Business Continuity Plan**

**.** Seller shall address potential exposure to internal and third–party threats to Seller’s supply chain and operations which may adversely impact Seller’s performance under this Agreement. Seller shall establish and maintain a current and effective Business Continuity Plan, approved by managers with highest responsibility for overall direction of Seller’s business, which demonstrates business continuity management capability, and delineates the prevention of and recovery from events that disrupt or adversely impact Seller’s ability to provide Products to Buyer. Prevention efforts may include, but need not be limited to, making standby arrangements with disaster recovery contractors, establishing risk mitigation inventory processes and/or stock of raw materials or spares/sub-assemblies, or, for critical applications, flow down protective contract provisions in contracts with Seller’s subcontractors and third–party providers of goods and services. Seller shall review and update its Business Continuity Plan as circumstances require to assure that Business Continuity Plan is appropriate and adequate for Seller’s duties to Buyer under this Agreement and that it meets generally accepted industry standards (such as NFPA 1600 or those promulgated by FEMA, among others). Upon Buyer’s request, Seller shall provide Buyer a copy of the most recently updated Business Continuity Plan.

1. DISPUTE RESOLUTION
	1. **Notice**

**.** Either Party (“Aggrieved Party”) shall have the right to give written notice (via overnight delivery) and email confirmation to the other Party (“Noticed Party”) that Noticed Party is not performing in accordance with Aggrieved Party’s interpretation of the terms and conditions of this Agreement. Such notice shall describe with specificity the basis for Aggrieved Party’s belief and may describe the recommended options to correct the failure.

* 1. **Response**

**.** Noticed Party shall respond to Aggrieved Party’s written notice within twenty (20) Days after receipt. If Noticed Party agrees with Aggrieved Party’s concern, Noticed Party shall promptly take appropriate action to correct such failure and include in its response a description of the action taken and a good faith estimate of the time necessary to correct the failure. In such circumstance, Noticed Party shall bear all costs incurred by both Parties associated with the corrective action.

* 1. **Resolution of Dispute**

**.** If Noticed Party disagrees with Aggrieved Party’s concern, each Party shall designate a member or members of senior management to discuss the matter and attempt to resolve the dispute. The representatives of the Parties shall meet in a location mutually agreed upon by the Parties within twenty (20) Days after Noticed Party’s response to Aggrieved Party’s notice. The Parties agree to meet promptly (and in any event not more than fifteen (15) Days after such response) and use their commercially reasonable efforts to settle promptly any disputes or claims arising out of or related to this Agreement through their respective representatives, and shall negotiate in good faith to resolve the dispute. All negotiations and discussions pursuant to this Section 12.3 shall be confidential, subject to Legal Requirements, and shall be treated as compromise and settlement negotiations for purposes of Federal Rule of Evidence 408 and applicable state rules of evidence. If at any time at least thirty (30) Days after Noticed Party’s response to Aggrieved Party’s notice, either Party believes that continued discussions will not result in a resolution of the dispute, then such Party may pursue its rights and remedies at law.

* 1. **Tolling Statute of Limitations**

**.** All applicable statutes of limitation and defenses based upon the passage of time and similar contractual limitations shall be tolled while the discussions specified in this ARTICLE 12 are pending. The Parties will take such action, if any, required to effectuate such tolling. Without prejudice to the procedures specified in this ARTICLE 12, a Party may file a complaint for statute of limitations purposes, if in its sole judgment such action may be necessary to preserve its claims or defenses. Notwithstanding such action, the Parties will continue to participate in good faith in the procedures specified in this ARTICLE 12, subject, however, to the rights of the Parties under the last sentence of Section 12.3.

1. FORCE MAJEURE EVENTS
	1. **Definition of Force Majeure Event**

**.** The term “Force Majeure Event” as used herein, shall mean those events, acts, omissions or circumstances which are outside of the affected Party’s control, which were not reasonably foreseeable, and which could not have been avoided by the affected Party through the employment of Prudent Utility Practices, including any act of God, an act or threatened act of the public enemy, war (imminent, declared or otherwise) blockade, accidents of navigation or breakdown or injury of vessels, accidents to harbors, docks, canals or other assistances to, or adjuncts of, shipping or navigation, perils of the sea, air crash, shipwreck, train wrecks or other failures or delays of transportation, nuclear emergency, radioactive contamination, cyber–attack, ionizing radiation, release of hazardous waste or materials, sabotage, terrorist acts, invasion, insurrection, riot, non­ site specific industrial disturbance by a union or organized labor (including any non–site specific strike or boycott), fire, flood, lightning, earthquake, hurricane, tornado, winds of extreme force, extreme accumulation of snow or ice, naturally occurring epidemic, explosion or any similar cataclysmic occurrence, acts or restraints of a Governmental Authority other than Buyer (which do not constitute a Change in Law), which temporarily or permanently prevent required performance under this Agreement. Neither Party may claim a Force Majeure Event for any delay or failure to perform or carry out any provision of this Agreement to the extent that such Party has been negligent or has engaged in willful misconduct and such negligence or willful misconduct contributed to that Party’s delay or failure to perform or carry out its duties and obligations under this Agreement. Neither (i) economic hardship of a Party, (ii) Seller’s ability to sell the Contract Capacity at a price greater than that for which such is herein contracted, (iii) Buyer’s ability to purchase Contract Capacity at a price less than that for which such is herein contracted, (iv) inability of a Party to obtain financing, arrange credit support or make payments, (v) inability to obtain or maintain Consents, nor (vi) loss of Seller’s supply including any breakdown of machinery or equipment, which loss is not itself caused by a Force Majeure Event, shall constitute a Force Majeure Event.

* 1. **Force Majeure Event**

**.** Except as specifically provided for in this Agreement, if a Force Majeure Event causes either Party to be wholly or partially unable to perform its obligations under this Agreement, that Party shall be excused from performance (other than payment obligations). The suspension of performance due to a Force Majeure Event shall be of no greater scope (or amount) and of no longer duration than is required by such Force Majeure Event and the Claiming Party (as defined below) shall not be construed to be in default with respect to any obligation hereunder for so long as, but only to the extent that, failure to perform such obligation (or make such payment) is due to a Force Majeure Event. No Force Majeure Event shall extend this Agreement beyond the Term.

* 1. **Due Diligence**

**.** A Party claiming a Force Majeure Event (“Claiming Party”) shall: (a) provide oral notice as promptly as practicable followed by written notice to the other Party (“Non–Claiming Party”) no later than five (5) Business Days after such Claiming Party has provided oral notice of such Force Majeure Event, giving the Non–Claiming Party a detailed written explanation of the event and an estimate of its expected duration and probable effect on the performance of the Claiming Party’s obligations hereunder, (b) use commercially reasonable efforts in accordance with Prudent Utility Practices to remedy the condition that prevents performance and to mitigate the effects of same in order to continue to perform its obligations under this Agreement, and (c) keep the Non­ Claiming Party informed in writing of all efforts to mitigate and remedy the Force Majeure Event.

* 1. **Extended Force Majeure Events.**
		1. If the Claiming Party has reason to believe that a Force Majeure Event will prevent it from performing its obligations under this Agreement for one (1) Month or longer (“Extended Force Majeure Event”), it shall notify the Non–Claiming Party in writing within fifteen (15) Days from the beginning of said Force Majeure Event and shall submit a plan to remedy the impact of such Force Majeure Event(s) (a “Force Majeure Remedy Plan”) to the Non–Claiming Party within ten (10) Days of such notification.
		2. While the Force Majeure Remedy Plan is in effect, the Claiming Party shall provide (a) weekly status reports notifying the Non–Claiming Party of the steps which have been taken to remedy the Extended Force Majeure Event, and (b) the expected remaining duration of its inability to perform hereunder.
	2. **Insurance Proceeds**

**.** In the event Seller obtains insurance proceeds to restore the Project or its related facilities and equipment that has been damaged as a result of a Force Majeure Event, Seller shall apply such proceeds to the restoration of the damaged facility; provided that, (a) such proceeds shall be required to be so applied only if such proceeds alone are sufficient to complete such restoration without the addition of any capital investment beyond such insurance proceeds, (b) the requirements of this Section 13.5 shall be subject and subordinate to the rights of the Lenders under the Seller’s financing or financial arrangements, and (c) if Seller notifies Buyer that it proposes to restore the Project pursuant to this Section 13.5, Buyer’s rights under Section 13.6 to terminate this Agreement as a result of such Force Majeure Event shall be deemed to have been waived and shall be of no force and effect.

* 1. **Right to Terminate or Discontinue Obligations**

**.** Either Party may terminate this Agreement if the Claiming Party remains unable to perform its material obligations hereunder for (i) six (6) consecutive Months or (ii) the remaining period of the Term, whichever is less, consecutive Months following the date of a Force Majeure Event; provided, that (i) subject to (ii) below, neither Party shall be entitled to terminate this Agreement if the Claiming Party (a) has commenced to remedy the Force Majeure Event and (b) is diligently pursuing such remedy; and (ii) if a Force Majeure Event occurs which is not curable within (6) Months through commercially reasonable efforts of the Claiming Party, the Non–Claiming Party shall have the right to terminate this Agreement immediately upon written notice to the Claiming Party.

* 1. **Liability Following Termination for Force Majeure Event**

**.** Upon termination of this Agreement as provided in Section 13.6 the Parties shall have no further liability or obligation to each other as a consequence of such termination, except for any obligation accruing prior to the occurrence of such Force Majeure Event.

1. SALE OF PROJECT
	1. **Sale of Project**

. Seller may not, without the prior written consent of Buyer, sell its interest in the Project to a third party (other than an Affiliate of Seller that assumes all obligations to perform this Agreement and complies with the requirements of Section 14.1.1) or sell its interest in the Project to any Person succeeding to all or substantially all of the assets of Seller, and any such consent by Buyer may be conditioned upon such transferee or successor entity assuming all obligations to perform this Agreement and complying with the requirements of Section 14.1.1.

* + 1. With respect to any transfer of interest in the Project in compliance with Section 14.1 above, the transferee or successor entity shall execute this Agreement and assume all of the duties and obligations of Seller under this Agreement pursuant to an assumption agreement in which the transferee or successor entity unconditionally assumes and agrees to be bound by all of the terms and conditions of this Agreement as Seller and whereby the transferee or successor entity makes certain additional representations and warranties as appropriate for such transferee or successor entity that are substantially similar to those contained in Section 11.1 and such transferee or successor entity delivers such corporate powers, due authorization and enforceability assurance as Buyer may reasonably request. Upon any permitted transfer by Seller pursuant to Section 14.1, Seller shall be, without further action by Buyer, released and discharged from all obligations under this Agreement arising after the effective date of such transfer. Notwithstanding the foregoing provisions, no sale by Seller pursuant to this Section 14.1 shall be effective until the State Comptroller has confirmed to Buyer that Seller and/or its transferee has satisfied all relevant requirements for such sale, including, but not limited to, submission of a Vendor Responsibility Questionnaire.

For the purposes of the Non–Assignment Clause of Supplement 1: STANDARD CLAUSES FOR LIPA’S CONTRACTS, the Parties’ compliance with the provisions of this Section 14.1.1 with respect to a proposed sale under this Section 14.1.1, shall be deemed to be written consent to such sale by Buyer. Seller agrees to compensate Buyer for Buyer’s reasonable, verifiable and documented costs and expenses incurred by its use of outside attorneys, consultants, accountants and advisors in connection with this Agreement in response to Seller’s requests made pursuant to this Section 14.1.1. Buyer shall provide an invoice to Seller for such charges, with appropriate documentation, and Seller shall pay such invoice within thirty (30) Bays.

* 1. **New York State Finance Law Section** **138**

**.** Notwithstanding any other provision of this ARTICLE 14, the provisions set forth in New York State Finance Law Section 138 shall apply.

1. CONFIDENTIALITY
	1. **Confidential Information**

**.**

* + 1. Exclusions from Definition of Confidential Information. The “Confidential Information” of a Disclosing Party shall not include, and the confidentiality obligations of this Agreement shall not apply to: (a) information that is or becomes public knowledge by acts other than those of the Receiving Party or its Agents or Representatives; (b) information rightfully obtained by the Receiving Party from a third party without a duty of confidentiality; (c) information independently discovered or developed by the Receiving Party without use of or reliance on the Confidential Information of the Disclosing Party, as substantiated by written evidence of the Receiving Party; (d) information rightfully in the Receiving Party’s possession or that was rightfully known to the Receiving Party prior to its receipt from the Disclosing Party, as substantiated by written evidence of the Receiving Party; and (e) information disclosed by the Receiving Party with the Disclosing Party’s prior written approval. Said Exclusions do not apply to any Confidential Information that is CEII, CIP information or CII.
		2. Survival. The obligations in ARTICLE 15 will survive for so long as any Confidential Information disclosed in accordance with this Agreement is retained by Receiving Party (in whatever form) and such information continues to be Confidential Information.
		3. Nondisclosure; No Export.
1. Except as otherwise provided herein, each Receiving Party shall (i) protect and hold all Confidential Information of a Disclosing Party in strict confidence; (ii) shall not disclose, publish, or disseminate to any other Person, or copy, reproduce, photocopy or take photographs of such Confidential Information under any circumstances; and (iii) shall use such Confidential Information only for the purposes of this Agreement.
2. Each Receiving Party further agrees to access and view a Disclosing Party’s CEII, CII or CIP information, as described in Section 15.1.3(e), in person at a Receiving Party’s office upon providing, at a minimum, 48-hours advance notice to Disclosing Party of such request for information in writing, and not to capture or transmit such information in any fashion (whether to or among its Representatives) for any purpose, at any time. Parties may transmit Confidential Information that does not contain CEII, CII or CIP electronically via secure email, as set forth in Section 15.1.3(e), and/or by other means consistent with the requirements of this Agreement. Disclosing Party shall use its best efforts to mark each document and individual pages as “CONFIDENTIAL,” and to include the word “CONFIDENTIAL” in the subject line of any transmittals, but the failure to mark any document or transmittal as such shall not waive its confidentiality.
3. Each Receiving Party shall comply with all laws, rules and regulations, including those applicable to Confidential Information constituting CEII, CII or CIP information.
4. Each Receiving Party shall maintain appropriate and reasonable processes and systems, to protect the security of Disclosing Party’s Confidential Information consistent with the foregoing and prevent a Data Security Incident, including, without limitation, a breach resulting from or arising out of the Receiving Party’s internal use, Processing, or other transmission of the Disclosing Party’s Confidential Information between or among the Receiving Party’s Representatives. A Receiving Party’s information security program is subject to a Disclosing Party’s review for best industry practices for the type of Confidential Information to be disclosed by Disclosing Party prior to the disclosure of any such Confidential Information. Each Disclosing Party has the right to withhold Confidential Information if it determines, in its sole discretion, that a Receiving Party does not maintain appropriate and reasonable processes and systems to protect the security of its Confidential Information.
5. Each Receiving Party and its authorized Representatives shall keep all Confidential Information disclosed to it in the Continental United States (CONUS) and store, access, act upon, and locate it solely in data centers in CONUS. If Receiving Party transmits any Confidential Information, it shall do so in such a way that the Confidential Information will remain in CONUS while in transit and be encrypted, at a minimum, in accordance with the requirements of the New York State Information Technology Encryption Standard, NYS-14-007.
6. Consistent with the FERC Standards of Conduct, no Receiving Party shall disclose any Confidential Information to any Representative (other than those of its own Representatives to whom disclosure is permitted pursuant to Section 15.1.4), including to any Representative that engages in Marketing Function activities (as defined by 18 CFR Part 358).
7. No Receiving Party shall disclose any Confidential Information of a Disclosing Party to any other Party or its Representative(s) without the prior written consent of the Disclosing Party.
8. Promptly upon a Disclosing Party’s written request, the Receiving Party shall provide documentation reasonably detailing its confidentiality and security practices.
	* 1. Permitted Disclosure to Representatives. Notwithstanding the provisions of Section 15.1.3 hereof, each Receiving Party may disclose Confidential Information of a Disclosing Party to those Representatives of such Receiving Party on a “need to know” basis, provided that such persons (i) have a lawful “need to know” such Confidential Information, (ii) have been advised by such Receiving Party of the sensitive/confidential nature of the Confidential Information; and (iii) have agreed or will agree to be bound by the provisions hereof by corporate policy or executing an agreement. Without limiting any direct rights that a Disclosing Party may have against a Receiving Party’s Representatives, a Receiving Party shall be responsible to the Disclosing Party for any act or omission of the Receiving Party’s Representatives that, if committed by the Receiving Party, would constitute a breach of this Agreement. Each Disclosing Party may require a Receiving Party’s Representatives to successfully pass a background screening or present evidence of having passed a NERC-CIP background screening prior to obtaining access to Confidential Information.

A Receiving Party shall not disclose CEII, CII or CIP information to any Person, including its Representatives, without Disclosing Party’s written consent. A Receiving Party may make notes of Confidential Information and may perform analyses in reliance on Confidential Information, which notes and analyses shall also be treated as Confidential Information if they contain Confidential Information.

* + 1. Compelled Disclosure of Confidential Information; FOIL.
1. In the event that a Receiving Party or any of its Representatives, pursuant to applicable law, regulation, order, judicial order, U.S. stock exchange rule or legal process the response to which shall be governed by Section 15.1.5(b) below, or pursuant to FERC or NERC rules or regulations, is requested to disclose any of the Confidential Information of a Disclosing Party, the Receiving Party shall, to the extent permitted, provide the Disclosing Party with prompt written notice of such request . A party objecting to disclosure shall provide the Disclosing Party with a written basis for withholding disclosure within 10 business days of notification of the request. A Party that concludes it is legally required to disclose certain information shall give Disclosing Party not less than an additional 10 business days to seek an appropriate protective order from a court of competent jurisdiction or other remedy reducing the extent of the Confidential Information that must be disclosed. The Receiving Party shall provide, and cause its Representatives to provide, reasonable cooperation to the Disclosing Party in undertaking any lawfully permitted steps to reduce or minimize the extent of the Confidential Information to be disclosed. In any event, the Receiving Party may disclose only such Confidential Information that such parties are advised by their legal counsel is legally required in order to comply with applicable law, rule, regulation, order, U.S. stock exchange rule or legal process and the Receiving Party shall use reasonable efforts to ensure that all Confidential Information that is so disclosed will be accorded confidential treatment and, if applicable, CEII, CII and CIP protected status by the party to whom the information is disclosed.
2. FOIL and Additional Public Access to Records Requirements. The Parties expressly acknowledge that LIPA is subject to the requirements of the NYS Public Officers Law, including New York’s Freedom of Information Law (“FOIL”) and the New York Code, Rules and Regulations (“NYCRR”) and must comply therewith. If LIPA is requested by a third party to disclose Confidential Information that it has received from the Contractor, LIPA will (i) notify the Contractor of the request, (ii) provide the Contractor with the information LIPA intends to provide in response to the FOIL request, (iii) provide the Contractor the opportunity to provide information regarding the need for confidential treatment, including pursuant to the NYS Public Officers Law § 87, (iv) evaluate Contractor’s request for confidential treatment, and (v) determine if the Confidential Information is subject to disclosure under FOIL. If LIPA determines that Confidential Information is subject to disclosure, it will provide prompt written notice of such determination to the Contractor so that the Contractor may seek to appeal LIPA’s determination, as applicable, or seek another appropriate remedy, or both, and the Parties may pursue their respective rights and remedies pursuant to NYS Public Officers Law § 89(5).
	* 1. Breach Notification. In the event that a Receiving Party or its Representatives (a) loses or improperly discloses any Confidential Information of a Disclosing Party or (b) suffers a data breach or a breach in security, and such breach has affected or may affect a Disclosing Party’s Confidential Information, the Receiving Party shall promptly notify the Disclosing Party. T. The Receiving Party (and its Representatives) shall reasonably cooperate and coordinate with the Disclosing Party in connection with any investigation, monitoring, notification, retrieval effort, prevention and mitigation, and reporting obligations rendered necessary or appropriate in connection with the potential or actual breach, loss or disclosure, consistent with the Disclosing Party’s data security policy.
		2. Return of Information. Upon the termination or expiration of this Agreement, or upon a Disclosing Party’s earlier request, each Receiving Party will return (and cause its Representatives to return), or at the Receiving Party’s option, destroy, the Disclosing Party’s Confidential Information that is in the Receiving Party’s and/or its Representative’s possession. The Receiving Party (and its Representatives) shall complete any destruction of Confidential Information in a commercially reasonable manner, complying with all applicable laws, and shall promptly provide the Disclosing Party with a duly executed certificate certifying that the Receiving Party and its Representatives have complied with the requirements of this provision. The terms of this provision shall survive the expiration or termination of this Agreement.
		3. Data Security Incidents. Each Receiving Party is responsible for all Data Security Incidents involving Confidential Information Processed by, or on behalf of, the Receiving Party. The Receiving Party shall notify the Disclosing Party in writing immediately (and in any event within twenty-four (24) hours) whenever the Receiving Party reasonably believes that there has been a Data Security Incident. After providing such notice, the Receiving Party will investigate the Data Security Incident, and immediately take steps to eliminate or contain any exposure of Confidential Information, keeping the Disclosing Party advised of the status of the same. The Receiving Party further agrees to provide, at the Receiving Party’s sole cost, reasonable assistance and cooperation requested by the Disclosing Party and/or the Disclosing Party’s designated representatives, in the furtherance of any correction, remediation, or investigation of any such Data Security Incident and/or the mitigation of any damage. Unless required by law, the Receiving Party shall not notify any Person other than law enforcement of any potential Data Security Incident involving the Disclosing Party’s Confidential Information without first consulting with, and obtaining the permission of, the Disclosing Party. In addition, within 30 days of an identified Data Security Incident, the Receiving Party shall develop and execute a plan, subject to the Disclosing Party’s approval, to reduce the likelihood of recurrence. Without limiting its other rights and remedies at law, the Disclosing Party may, without penalty, immediately suspend performance hereunder or terminate this Agreement if a Data Security Incident occurs.
		4. No Warranty; No Implicit Rights. Each Receiving Party acknowledges that the Disclosing Party makes no representation or warranty (express or implied) as to the accuracy or completeness of any of the Disclosing Party’s Confidential Information, and the Receiving Party agrees to assume full responsibility for all conclusions it may derive from such Confidential Information. A Disclosing Party and its officers, employers, trustees, agents, contractors, and assigns shall have no liability whatsoever based upon the Confidential Information provided to Receiving Party under this Agreement and shall have no liability based upon any errors or omissions contained in the Confidential Information. Nothing in this Agreement requires that a Party disclose its Confidential Information to any other Party nor grants or confers any rights, by license or otherwise, expressly, implicitly, or otherwise, under any patents, copyrights, other intellectual property, or trade secrets of the Disclosing Party, even if Confidential Information of a Disclosing Party is disclosed. Similarly, a Party that elects to disclose Confidential Information to some Parties may restrict its disclosure to other Parties. In all cases, the Confidential Information of a Disclosing Party shall remain its property. This Agreement grants no rights or obligations other than those expressly stated herein, and none may be implied. The Receiving Party shall obtain no ownership rights whatsoever in, nor any license to use, sell or exploit, a Disclosing Party’s Confidential Information by virtue of this Agreement.
		5. Liabilities and Remedies. Each Receiving Party acknowledges and agrees that unauthorized disclosure or improper use of a Disclosing Party’s Confidential Information would cause the Disclosing Party irreparable harm, the amount of which may be difficult to ascertain, and which monetary damages cannot adequately compensate. Each Disclosing Party therefore has the right to seek specific performance and/or injunctive relief to enforce compliance by the Receiving Party (and its Representatives) with the terms of this Agreement, in addition to any other rights and remedies that the Disclosing Party may have at law and in equity, including monetary damages, without the need to post a bond.

To the fullest extent permitted by law, each Receiving Party shall defend, indemnify, and hold harmless Disclosing Party, Affiliates, Representatives and each of its respective officers, agents, servants, representatives, subcontractors, employees, shareholders, successors, assigns, and customers against any claims, complaints, suits, proceedings, demands, disputes, actions, or allegations of any kind, whether just or unjust, incurred by Disclosing Party, Affiliates or Representatives and their officers, agents, servants, representatives, subcontractors, employees, shareholders, successors, assigns, or customers as a result of Receiving Party’s failure to treat such Disclosing Party, Affiliate, or Representative employee, shareholder, or customer Confidential Information in accordance with this Agreement. The terms of this provision will survive the expiration or termination of this Agreement.

* + 1. The Parties agree that this Agreement contains rate, cost, financial, and other economic and material terms the disclosure of which would cause substantial injury to the competitive position of both Buyer and Seller.
	1. **Contract Value Disclosure**

**.** Notwithstanding any other provision in this Agreement, Buyer may publicly disclose the estimated total contract value associated with this Agreement, which value shall be an aggregated amount. Furthermore, Buyer may disclose certain Confidential Information in furtherance of Buyer’s requirements to receive approval to execute this Agreement or to seek State Comptroller approval.

* 1. **FERC**

**.** The Parties agree to seek confidential treatment of the Confidential Information in this Agreement from FERC, but acknowledge that certain Confidential Information may need to be disclosed in Seller’s rate filing or reporting with FERC or in any other regulatory filings to the FERC required to be made by Seller that will be publicly available.

* 1. **Confidential** **Treatment**

**.** Seller shall request confidential treatment of the Confidential Information in this Agreement in connection with filings under Sections 15.3; provided, however, that the Parties acknowledge that such request may be denied in whole or in part, and accordingly, that confidential treatment may not be afforded to such information.

[signatures on next page]

IN WITNESS WHEREOF, the Parties have caused this Agreement to be duly executed as of the date first written above

|  |  |
| --- | --- |
| [*Insert name of Seller*]By: Name: Title: Date:  | LONG ISLAND POWER AUTHORITYBy: Name: Title: Date:  |
| Approved as to Form: Approved:Office of the Attorney GeneralBy: Name: Title: Date:  | Approved:Office of the State ComptrollerBy: Name: Title: Date:  |

STATE OF [***INSERT STATE***] )

 ) ss.:

COUNTY OF [***INSERT COUNTY***] )

On the \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ before me personally came \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_,who proved to me on the basis of satisfactory evidence to be the individual who executed the foregoing instrument in his authorized capacity on behalf of ***[INSERT SELLER NAME]***, a ***[SELLER INSERT ENTITY TYPE]*** described in and which executed the foregoing instrument, who being duly sworn did acknowledge that [he/she] executed same on behalf of, and that [he/she] was authorized to execute same on behalf of the aforementioned entity.

I certify under PENALTY OF PERJURY under the laws of the State of [INSERT STATE] that the foregoing paragraph is true and correct.

**WITNESS MY HAND AND OFFICIAL SEAL**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Notary Public

APPENDIX 1

DESCRIPTION AND LOCATION OF PROJECT

[*Seller to provide.*]

APPENDIX 2

BUYER’S FORM OF incoming letter of credit

[Issuing Bank Name]

Irrevocable Transferable Standby

Letter of Credit No. \_\_\_\_\_\_\_\_\_

DATE:

|  |  |
| --- | --- |
| **BENEFICIARY**: | **APPLICANTS**: |
| Long Island Power Authority | [\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] |
| 333 Earle Ovington Boulevard, Suite 403 |  |
| Uniondale, New York 11553 |  |
| Attn: TBD |  |

INITIAL AMOUNT: USD $ [***RESPONDENT TO INSERT AMOUNT THAT IS $75,000 PER MW OF CONTRACT CAPACITY***]

DATE OF EXPIRY: [\_\_\_\_\_\_\_\_\_\_]

We hereby issue in your favor our Irrevocable Nontransferable Standby Letter of Credit No. \_\_\_\_\_ (this “Letter of Credit”) for the account of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, [and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] ([collectively], the “Applicant(s)”), [on behalf of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Seller”)], in the aggregate stated amount not to exceed AND /100 US DOLLARS (US$ ) (as the same may be reduced from time to time as a result of draws made pursuant to the provisions of this Letter of Credit, the “Available Amount”), effective immediately and expiring at 5:00 p.m., New York, New York, time, on the Expiration Date at our counters at [ ].

This Letter of Credit shall be of no further force or effect upon the close of business on the Date of Expiry written above (or, if such day is not a Business Day) (as hereinafter defined), on the next preceding Business Day) (the “Expiration Date”). For the purposes hereof, “Business Day” shall mean any day on which commercial banks are not authorized or required to close in New York, New York.

Subject to the terms and conditions herein, funds under this Letter of Credit are available to you by presentation in strict compliance on or prior to 5:00 p.m., New York, New York time, on or prior to the Expiration Date at our counters of:

(1) the original of this Letter of Credit and all amendments; and

(2) your sight draft drawn on us; and

(3) Beneficiary’s Certificate issued in the form of Annex I attached hereto and which forms an integral part hereof, duly completed and purportedly bearing the original signature of an officer of the Beneficiary.

Drafts drawn under this Letter of Credit must contain the clause: “Drawn under [Issuing Bank Name] Irrevocable Transferable Standby Letter of Credit No. \_\_\_\_\_\_\_\_\_, dated, \_\_\_\_.”

Partial and multiple draws are permitted under this Letter of Credit; *provided* that the Available Amount of this Letter of Credit shall be permanently reduced by the amount of each such draw.

This Letter of Credit may be transferred, and Beneficiary’s rights hereunder may be assigned in accordance with our standard Transfer Document duly executed and properly submitted by Beneficiary. Any purported transfer or assignment shall be void and of no force or effect.

This Letter of Credit sets forth in full our undertaking and such undertaking shall not in any way be modified, amended, amplified or limited by reference to any documents, instruments or agreements referred to herein, except only the annexes referred to herein; and any such reference shall not be deemed to incorporate by reference any document, instrument or agreement except for such annexes.

We engage with you that your drafts drawn under and in strict compliance with the terms of this Letter of Credit will be duly honored if presented to us on or before the Expiration Date.

Except so far as otherwise stated, this Letter of Credit is subject to the “International Standby Practices ISP98”[[1]](#footnote-2) of the International Chamber of Commerce as in effect on the date of issuance thereof (the “ISP98”) excluding Section 3.12(a), and provided Issuer shall furnish a replacement for a lost original credit upon Beneficiary’s execution of indemnification and other reasonable requirements of Issuer, and except to the extent that the terms hereof are inconsistent with the provisions of ISP98, including but not limited to Rule 5.01ai of ISP98, in which case the terms of this Letter of Credit shall govern. As to matters not covered by the ISP98, this Letter of Credit shall be governed by and construed in accordance with the laws of the State of New York.

[Issuing Bank Name]

By:
Authorized Signature

Address: [                    ]
 [                    ]
 [                    ]

ANNEX I TO [Issuing Bank Name]
IRREVOCABLE TRANSFERABLE STANDBY LETTER OF CREDIT NO. \_\_\_\_\_\_\_\_

|  |  |
| --- | --- |
| [Issuing Bank Name] | Date: \_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_ |
| [                                    ] |  |
| [                                    ] |  |
| [                                    ] |  |

Ladies and Gentlemen:

The undersigned, the duly elected and acting of LONG ISLAND POWER AUTHORITY (the “Beneficiary”), hereby certifies to [Issuing Bank Name] (the “Bank”), \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, [and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_] ([collectively], the “Applicant(s)”), and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Seller”), with reference to Irrevocable Transferable Standby Letter of Credit No. \_\_\_\_\_\_\_\_\_, dated, \_\_\_\_\_ (the “Letter of Credit”), issued by the Bank in favor of the Beneficiary, as follows as of the date hereof:

1. The Beneficiary is a party to that certain Capacity Purchase Agreement dated as of \_\_\_\_\_\_\_\_\_\_\_\_ (as amended from time to time, the “Agreement”), between the Beneficiary and Seller.

2. The Beneficiary has not heretofore disposed of its right, title or interest in or to the Agreement.

3. The Beneficiary is entitled to draw under the Letter of Credit an amount equal to $\_\_\_\_\_\_\_, pursuant to the provision of Section 8.1of the Agreement because [indicate applicable reason]:

[   ] The amount drawn hereunder constitutes undisputed amounts that are owed to Beneficiary by Seller under the Agreement and that remain unsatisfied for at least ten (10) Days (as defined in the Agreement) of becoming due and payable.

[   ] The amount drawn hereunder constitutes undisputed amounts that are owed to Beneficiary by Seller under the Agreement as a result of a declaration of an early termination date by Beneficiary as a result of a Seller Event of Default (as defined in the Agreement).

[   ] The Seller is Bankrupt (as defined in the Agreement) and the amount drawn hereunder constitutes not less than the amounts paid by Seller to Beneficiary that could be challenged or recovered as a preference or fraudulent conveyance.

[   ] The Letter of Credit is to expire in five (5) Business Days (as defined in the Agreement) or less and Beneficiary has not been provided substitute Seller Security (as defined in the Agreement), permitting Beneficiary to draw the entire amount of the Letter of Credit.

4. Based upon the foregoing, the Beneficiary hereby makes demand under the Letter of Credit for payment of $\_\_\_\_\_\_\_\_\_\_\_U.S. DOLLARS AND /100ths (U.S.$), which amount does not exceed (i) the amount set forth in Paragraph 3, above, and (ii) the Available Amount under the Letter of Credit as of the date hereof.

5. The undersigned has concurrently presented to you its sight draft drawn in the amount specified in Paragraph 4 above. The date of the sight draft is the date hereof, which is not later than the Expiration Date or any New Expiration Date.

6. Funds paid pursuant to the provisions of the Letter of Credit shall be wire transferred to the Beneficiary in accordance with the following instructions:

Unless otherwise provided herein, capitalized terms which are used and not defined herein shall have the meaning given each such term in the Letter of Credit.

IN WITNESS WHEREOF, this Certificate has been duly executed and delivered on behalf of the Beneficiary by its duly elected and acting \_\_\_\_\_\_\_\_\_\_\_ as of this \_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_, \_\_\_\_\_.

Beneficiary: LONG ISLAND POWER AUTHORITY

By:
Name:
Title:

[*remainder of page intentionally blank*]

APPENDIX 3

SAMPLE MONTHLY INVOICE

[*Seller to provide Sample Monthly Invoice for Capacity only.*]

APPENDIX 4

INSURANCE REQUIREMENTS

Commencing with the Effective Date and at all times throughout the Term of this Agreement except as expressly provided below, Seller shall, at its own cost, maintain and cause to be maintained the types and amounts of insurance required by this Appendix. Such insurance shall be placed with responsible and reputable insurance companies (i) which have an A.M. Best rating of at least “A–” or (ii) an S&P rating of A or better, or (iii) which are reasonably acceptable to Buyer. Seller shall give Buyer prompt notice of any non–renewal of any insurance coverages or cancellations of such coverages, but in no event later than thirty (30) Business days after it learns of such material alteration.

1. Insurance Policies and Limits:

1.1 Workers’ Compensation/Employer’s Liability:

Workers’ Compensation insurance including coverage for occupational disease, covering all employees in compliance with all applicable state and federal laws, and Employer’s Liability Insurance of not less than $1,000,000 each accident/$1,000,000 disease per employee/$1,000,000 disease policy limit.

1.2 Automobile Liability:

Automobile Liability Insurance covering all owned, non–owned and hired vehicles with a combined single limit for bodily injury and property damage liability in an amount not less than $5,000,000 each occurrence.

1.3 Commercial General Liability:

Commercial General Liability insurance including contractual liability coverage for the indemnity provisions of this Agreement for Bodily Injury, personal Injury and Property Damage Liability in amounts no less than $10,000,000 each occurrence and in the annual aggregate.

1.4 Umbrella or Excess Liability:

The limits of insurance specified in the foregoing Sections 1.1 through 1.3 may be satisfied by the specified limits in the separate policies or with the purchase of Umbrella or Excess Liability insurance which, in combination with the limits of the separate policies provides the total limit required by each type of insurance.

1.5 Builders Risk Property Insurance:

From and after the date that Seller or its contractors commence construction at the Site, and subject to availability on commercially reasonable terms, Property Insurance providing coverage as required by its Lenders or if there are no Lenders for all risks of direct physical loss or damage (including the perils of flood, earthquake and named windstorm to, and for the total replacement cost value of, all property and equipment of Seller used for probable maximum loss as determined by a third party independent appraiser, to (subject to standard loss sublimits) all property and equipment of Seller used for or in connection with the Capacity provided under this Agreement. Such coverage shall provide the costs of continuing expenses and additional expenses necessary to continue operations, insofar as reasonably possible, following loss of or damage to the property and equipment of Seller.

1. General Provisions.

2.1 Evidence of Coverage:

Seller shall, prior to supplying Capacity under this Agreement, upon renewal of each of the required insurance coverages, and within ten (10) Days after each reasonable request by Buyer, provide certificates of insurance to Buyer’ for all insurance policies required hereunder.

2.2 Additional Insureds:

With the exception of Workers’ Compensation/Employer’s Liability and Prope1ty Insurance, all insurance policies shall name Buyer and Servco, (“Agent”) their respective subsidiaries and affiliates and their respective successors and assigns, as additional insured and Seller shall maintain the required coverage, naming Buyer and Agent as an additional insured. The following language should be used when referencing the additional insured status: Long Island Lighting Company d/b/a LIPA and Long Island Electric Utility Servco LLC, as well as their subsidiaries and affiliates, and their respective successors and assigns shall be named as additional insured.

2.3 Waiver of Subrogation:

Buyer and its Affiliates shall be granted waivers of subrogation by Seller and the insurers providing coverage as required by this Appendix.

2.4 Severability of Insureds:

Each policy under which Buyer is required by this Appendix to be named as an additional insured shall provide that (i) inclusion of more than one Person or organization as insured hereunder shall not in any way affect the rights of any such Person or organization as respects any claim, demand, suit or judgment made, brought or recovered, by or in favor of any other insured, or by or in favor of any employee of such other insured, and (ii) each Person or organization is protected thereby in the same manner as though a separate policy had been issued to each, but nothing therein shall operate to increase the insurance company’s liability as set forth elsewhere in the policy beyond the amount for which the insurance company would have been liable if only one Person or interest had been named as insured.

2.5 Primary Insurance:

For each policy under which Buyer is required by this Appendix to be named as an additional insured, the insurance coverage required by this Appendix shall be primary insurance with respect to the interests of Buyer and its Affiliates; any other insurance maintained by Buyer or such Affiliates shall be excess and shall not contribute with the insurance required by this Appendix.

2.6 Notice of Cancellation:

Seller shall provide Buyer with copies of any notices of cancellation or non–renewal of any insurance policy required by this Appendix, within thirty (30) Business Days of receipt of such notice by Seller, or within ten (10) Business Days if such notice is for non–payment of premium.

2.7 Deductibles:

Any and all deductible amounts and self–insured retention under policies maintained by Seller pursuant to this Appendix 3: INSURANCE REQUIREMENTS shall be assumed by, or for the account of, and at the sole risk of Seller.

SUPPLEMENT 1: STANDARD CLAUSES FOR LIPA’S CONTRACTS

For the purposes of this Supplement I, the Long Island Power Authority and its operating subsidiary the Long Island Lighting Company d/b/a LIPA are hereinafter referred to as “LIPA.”

The parties to the attached contract, license, lease, amendment or other agreement of any kind (hereinafter, “the contract” or “this contract”) agree to be bound by the following clauses which are hereby made a part of the contract (the word “Contractor” herein refers to any party other than LIPA, whether a contractor, consultant, licensor, licensee, lessor, lessee or other party):

**NON-ASSIGNMENT CLAUSE**. In accordance with Section 138 of the State Finance Law, this contract may not be assigned by Contractor or its right, title or interest therein assigned, transferred, conveyed, sublet or otherwise disposed of without the previous consent, in writing, of LIPA, and any attempts to assign the contract without LIPA’s written consent are null and void. Contractor may, however, assign its right to receive payment without LIPA’s prior written consent unless this contract concerns Certificates of Participation pursuant to Article 5–A of the State Finance Law.

**COMPTROLLER’S APPROVAL**. In accordance with Section 112 of the New York State Finance Law (the “State Finance Law”), this Agreement shall not be valid, effective or binding upon LIPA until it has been approved by the State Comptroller and filed in his office.

**WORKER’S COMPENSATION BENEFITS**. In accordance with Section 142 of the State Finance Law, this Agreement shall be void and of no force and effect unless Contractor provides and maintains coverage during the life of this Agreement for the benefit of such employees as are required to be covered by the provisions of the Workers’ Compensation Law.

**NON-DISCRIMINATION REQUIREMENTS**. In accordance with Article 15 of the Executive Law (also known as the Human Rights Law) and all other New York State and Federal statutory and constitutional non–discrimination provisions, Contractor shall not discriminate against any employee or applicant for employment because of race, creed, color, sex (including gender identity or expression), national origin, age, disability, marital status, sexual orientation, genetic predisposition or carrier status. Furthermore, in accordance with Article 220–e of the New York Labor Law, and to the extent that this Agreement shall be performed within the State of New York, Contractor agrees that neither it nor its subcontractors shall, by reason of race, creed, color, disability, sex, national origin, sexual orientation, genetic predisposition or carrier status; (a) discriminate in hiring against any New York State citizen who is qualified and available to perform the work; or (b) discriminate against or intimidate any employee for the performance of work under this Agreement.

**WAGE AND HOURS PROVISIONS**. If this is a public work contract covered by Article 8 of the Labor Law or a building service contract covered by Article 9 thereof, neither Contractor’s employees nor the employees of its subcontractors may be required or permitted to work more than the number of hours or days stated in said statutes, except as otherwise provided in the Labor Law and as set forth in prevailing wage and supplement schedules issued by the State Labor Department. Furthermore, Contractor and its subcontractors must pay at least the prevailing wage rate and pay or provide the prevailing supplements, including the premium rates for overtime pay, as determined by the State Labor Department in accordance with the Labor Law and shall comply with all requirements set forth in Article 8 or Article 9 of the Labor Law whichever Article applies.

**NON-COLLUSIVE BIDDING CERTIFICATION**. In accordance with Section 2878 of the Public Authorities Law, if this contract was awarded based upon the submission of bids, Contractor warrants, under penalty of perjury, that its bid was arrived at independently and without collusion aimed at restricting competition. Contractor further warrants that, at the time Contractor submitted its bid, an authorized and responsible person executed and delivered to LIPA a non–collusive bidding certification on Contractor’s behalf.

**INTERNATIONAL BOYCOTT PROHIBITION**. In accordance with Section 220–f of the Labor Law and Section 139–h of the State Finance Law, if this contract exceeds $5,000, Contractor agrees, as a material condition of the contract, that neither Contractor nor any substantially owned or affiliated person, firm, partnership or corporation has participated, is participating, or shall participate in an international boycott in violation of the federal Export Administration Act of 1979 (50 USC app. Sections 2401 et seq.) or regulations thereunder. If such Contractor, or any of the aforesaid affiliates of Contractor, is convicted or is otherwise found to have violated said laws or regulations upon the final determination of the United States Commerce Department or any other appropriate agency of the United States subsequent to the contract’s execution, such contract, amendment or modification thereto shall be rendered forfeit and void. Contractor shall so notify the State Comptroller within five (5) business days of such conviction, determination or disposition of appeal (2NYCRR 105.4).

**SET-OFF RIGHTS**. LIPA shall have all of its common law, equitable and statutory rights of set-off. These rights shall include, but not be limited to, LIPA’s option to withhold for the purposes of set-off any moneys due to Contractor under this contract up to any amounts due and owing to LIPA with regard to this contract, any other contract with LIPA, including any contract for a term commencing prior to the term of this contract, plus any amounts due and owing to LIPA for any other reason including, without limitation, tax delinquencies, fee delinquencies or monetary penalties relative thereto. LIPA shall exercise its set–off rights in accordance with normal State practices including, in cases of set-off pursuant to an audit, the finalization of such audit by LIPA, its representatives, or the State Comptroller.

**RECORDS**. Contractor shall establish and maintain complete and accurate books, records, documents, accounts and other evidence directly pertinent to performance under this contract (hereinafter, collectively, “the Records”). The Records must be kept for six (6) years following the expiration or earlier termination of the contract. The State Comptroller, the Attorney General and any other person or entity authorized to conduct an examination, as well as the agency or agencies involved in this contract, shall have access to the Records during normal business hours at an office of Contractor within the State of New York or, if no such office is available, at a mutually agreeable and reasonable venue within the State, for the term specified above for the purposes of inspection, auditing and copying. LIPA shall take reasonable steps to protect from public disclosure any of the Records which are exempt from disclosure under Section 87 of the Public Officers Law (the “*Statute*”) provided that: (i) Contractor shall timely inform LIPA in writing, that said records should not be disclosed; and (ii) said records shall be sufficiently identified; and (iii) designation of said records as exempt under the Statute is reasonable. Nothing contained herein shall diminish, or in any way adversely affect, the State’s right to discovery in any pending or future litigation.

**DISCLOSURE OF LIPA RECORDS OR INFORMATION**. If any third party requests that Contractor disclose LIPA records or information, as defined in subdivision 4 of section 86 of the Public Officers Law, to the extent permitted by law, Contractor shall notify LIPA of such request and LIPA shall determine, in accordance with Chapter 39 of the Laws of 2010, whether such LIPA records or information may be disclosed.

**EQUAL EMPLOYMENT FOR MINORITIES AND WOMEN**. In accordance with Section 312 of the New York Executive Law: (i) Contractor shall not discriminate against employees or applicants for employment because of race, creed, color, national origin, sex, age, disability, marital status, sexual orientation, genetic predisposition or carrier status and shall undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination. Affirmative action shall mean recruitment, employment, job assignment, promotion, upgradings, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation; (ii) at the request of LIPA, Contractor shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union or representative will not discriminate on the basis of race, creed, color, national origin, sex, age, disability, marital status, sexual orientation, genetic predisposition or carrier status and that such union or representative will affirmatively cooperate in the implementation of Contractor’s obligations herein; and (iii) Contractor shall state, in all solicitations or advertisements for employees, that, in the performance of this Agreement, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability, marital status, sexual orientation, genetic predisposition or carrier status. Contractor shall include the provisions of (i), (ii) and (iii) above, in every subcontract over twenty–five thousand dollars ($25,000.00) for the construction, demolition, replacement, major repair, renovation, planning or design of real property and improvements thereon (the “*Work*”) except where the Work is for the beneficial use of Contractor.

**MINORITY AND WOMEN-OWNED BUSINESS ENTERPRISES**. It is the policy of the Authority to provide Minority and Women–Owned Business Enterprises (M/WBEs) the greatest practicable opportunity to participate in the Authority’s contracting activity for the procurement of goods and services. To effectuate this policy, Contractor shall comply with the provisions of this Supplement 1 and the provisions of Article 15–A of the New York Executive Law. The Contractor will employ good faith efforts to achieve the below–stated M/WBE Goals set for this contract, and will cooperate in any efforts of the Authority, or any government agency which may have jurisdiction, to monitor and assist Contractor’s compliance with the Authority’s M/WBE program.

Minority-Owned Business Enterprise (MBE) Subcontracting Goal **0%**

Women-Owned Business Enterprise (WBE) Subcontracting Goal **0%**

Waivers shall only be considered in accordance with the provisions of Article 15–A of the Executive Law.

To help in complying, Contractor may inspect the current New York State Certification Directory of Minority and Women Owned Businesses, prepared for use by state agencies and contractors in complying with Executive law Article 15–A, (the Directory) at the same location where the Authority’s bid document or request for proposals may be obtained or inspected and also at the Authority’s office at 333 Earle Ovington Boulevard, Suite 403, Uniondale, NY 11553. In addition, printed or electronic copies of the Directory may be purchased from the New York State Department of Economic Development, Minority and Women’s Business Division.

If requested, Contractor shall submit within ten (10) days of such request, a complete Utilization Plan, which shall include identification of the M/WBEs which the Contractor intends to use; the dollar amount of business with each such M/WBE; the Contract Scope of Work which the Contractor intends to have performed by such M/WBEs; and the commencement and end dates of such performance. The Authority will review the plan and, within twenty (20) days of its receipt, issue a written acceptance of the plan or comment–s on deficiencies in the plan.

The Contractor shall include in each Subcontract, in such a manner that the provisions will be binding upon each Subcontractor, all of the provisions herein including those requiring Subcontractors to make a good faith effort to solicit participation by M/WBEs.

If requested, the Contractor shall submit monthly compliance reports regarding its M/WBE utilization activity. Reports are due on the first business day of each month, beginning thirty (30) days after Contract award.

The Contractor shall not use the requirements of this section to discriminate against any qualified company or group of companies.

**CONFLICTING TERMS**. In the event of a conflict between the terms of the contract (including any and all attachments thereto and amendments thereof) and the terms of this Supplement I, the terms of this Supplement 1 shall control.

**GOVERNING LAW**. This contract shall be governed by the laws of the State of New York except where the Federal supremacy clause requires otherwise.

**LATE PAYMENT**. Timeliness of payment and any interest to be paid to Contractor for late payment shall be governed by Section 2880 of the Public Authorities Law and the guidelines adopted by LIPA thereto.

**PROHIBITION ON PURCHASE OF TROPICAL HARDWOODS**. Contractor certifies and warrants that all wood products to be used under this contract award will be in accordance with, but not limited to, the specifications and provisions of State Finance Law §165 (Use of Tropical Hardwoods) which prohibits purchase and use of tropical hardwoods, unless specifically exempted, by the State or any governmental agency or political subdivision or public benefit corporation. Qualification for an exemption under this law will be the responsibility of Contractor to establish to meet with the approval of the State. In addition, when any portion of this contract involving the use of woods, whether supply or installation, is to be performed by any subcontractor, Contractor will indicate and certify in the submitted bid proposal that the subcontractor has been informed and is in compliance with specifications and provisions regarding use of tropical hardwoods as detailed in §165 State Finance Law. Any such use must meet with the approval of the State; otherwise, the bid may not be considered responsive. Under bidder certifications, proof of qualification for exemption will be the responsibility of Contractor to meet with the approval of the State.

**MACBRIDE FAIR EMPLOYMENT PRINCIPLES**. In accordance with the MacBride Fair Employment Principles (Chapter 807 of the New York Laws of 1992), Contractor hereby stipulates that Contractor either (i) has no business operations in Northern Ireland, or (ii) shall take lawful steps in good faith to conduct any business operations in Northern Ireland in accordance with the MacBride Fair Employment Principles (as described in Article 165 of, the New York State Finance Law), and shall permit independent monitoring of compliance with such principles.

**OMNIBUS PROCUREMENT ACT OF 1992**. It is the policy of New York State to maximize opportunities for the participation of New York State business enterprises, including minority and women–owned business enterprises as bidders, subcontractors and suppliers on its procurement contracts. Information on the availability of New York State subcontractors and suppliers is available from:

NYS Department of Economic Development

Division for Small Business

One Commerce Plaza

Albany, New York 12245.

A directory of certified minority and women–owned business enterprises is available from:

NYS Department of Economic Development

Minority and Women’s Business Development Division

One Commerce Plaza

Albany, New York 12245

The Omnibus Procurement Act of 1992 requires that by signing this Agreement, Contractor certifies that:

(a) Contractor has made commercially reasonable efforts to encourage the participation of New York State Business Enterprises as suppliers and subcontractors, including certified minority and woman–owned business enterprises, on this Project, and has retained the documentation of these efforts to be provided upon request to the State;

(b) Contractor has complied with the Federal Equal Opportunity Act of 1972 (P.L. 92–261), as amended; and

(c) Contractor agrees to make commercially reasonable efforts to provide notification to New York State residents of employment opportunities on this Project through listing any such positions with the Job Service Division of the New York State Department of Labor, or providing such notification in such manner as is consistent with existing collective bargaining contracts or agreements. Contractor agrees to document these efforts and to provide said documentation to the State upon request.

(d) Contractor acknowledges that the State may seek to obtain offset credits from foreign countries as a result of this contract and agrees to cooperate with the State in these efforts.

**RECIPROCITY AND SANCTIONS PROVISIONS**. Contractor is hereby notified that if its principal place of business is located in a state that penalizes New York State vendors, and if the goods or services it offers are substantially produced or performed outside New York State, the Omnibus Procurement Act 1994 amendments (Chapter 684, Laws of 1994) require that Contractor be denied contracts which it would otherwise obtain.

**PURCHASES OF APPAREL**. In accordance with State Finance Law 162 (4–a), LIPA shall not purchase any apparel from any Contractor unable or unwilling to certify that: (i) such apparel was manufactured in compliance with all applicable labor and occupational safety laws, including, but not limited to, child labor laws, wage and hours laws and workplace safety laws, and (ii) Contractor will supply, with its bid (or, if not a bid situation, prior to or at the time of signing a contract with LIPA), if known, the names and addresses of each subcontractor and a list of all manufacturing plants to be utilized by the bidder.

**CONTRACTOR AFFIRMATION OF COMPLIANCE AND CERTIFICATION OF DISCLOSURE**. Contractor affirms that it understands and agrees to comply with the procedures of the Governmental Entity relative to permissible contacts as required by the State Finance Law § 139– j (3) and§ 139–j (6)(b). Furthermore, Contractor certifies that the information disclosed pursuant to State Finance Law§ 139–k (5) is complete true and accurate.

**OPTIONAL TERMINATION BY THE AUTHORITY**. LIPA reserves the right to terminate this contract in the event it is found that the certification filed by Contractor in accordance with New York State Finance Law § 139–k was intentionally false or intentionally incomplete. Upon such finding, LIPA may exercise its termination right by providing written notification to Contractor in accordance with the written notification terms of the contract.

**CONTINGENT FEES**. Contractor hereby certifies and agrees that (a) Contractor has not employed or retained and will not employ or retain any individual or entity for the purpose of soliciting or securing any LIPA contract or any amendment or modification thereto pursuant to any agreement or understanding for receipt of any form of compensation which in whole or in part is contingent or dependent upon the award of any such contract or any amendment or modification thereto; and (b) Contractor will not seek or be paid an additional fee that is contingent or dependent upon the completion of a transaction by LIPA.

**NONPUBLIC PERSONAL INFORMATION**. Contractor shall comply with the provisions of the New York State Information Security Breach and Notification Act (General Business Law Section 899–aa; State Technology Law Section 208). Contractor shall be liable for the costs associated with such breach if caused by Contractor’s negligent or willful acts or omissions, or the negligent or willful acts or omissions of the Contractor’s agents, officers, employees or subcontractors.

**IRAN DIVESTMENT ACT CERTIFICATION**. Contractor certifies under penalty of perjury, that to the best of its knowledge and belief that it is not on the list created pursuant to paragraph (b) of subdivision 3 of Section 165–a of the State Finance Law. In addition, Contractor agrees that no person on the list created pursuant to paragraph (b) of subdivision 3 of Section 165–a of the State Finance Law will be utilized as a subcontractor on this contract.

1. Issuing Bank entitled to choose later version. [↑](#footnote-ref-2)