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**BUILD TRANSFER AGREEMENT**

**RFP 2017R**

dated as of

**[DATE]**

by and between

**PACIFICORP**

and

**[DEVELOPER]**

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**THIS DRAFT DOES NOT CONSTITUTE A BINDING OFFER AND SHALL NOT FORM THE BASIS FOR AN AGREEMENT BY ESTOPPEL OR OTHERWISE. PACIFICORP RESERVES THE RIGHT, IN ITS SOLE DISCRETION, TO MODIFY THIS DRAFT AT ANY TIME. ANY ACTIONS TAKEN BY A PARTY IN RELIANCE ON THE TERMS SET FORTH IN THIS DRAFT OR ON STATEMENTS MADE DURING NEGOTIATIONS PURSUANT TO THIS DRAFT SHALL BE AT THAT PARTY'S OWN RISK. UNTIL PACIFICORP HAS COMPLETED ITS DUE DILIGENCE AND THIS AGREEMENT IS NEGOTIATED, APPROVED BY MANAGEMENT, EXECUTED AND DELIVERED, NO PARTY SHALL HAVE ANY LEGAL OBLIGATIONS, EXPRESSED OR IMPLIED, OR ARISING IN ANY OTHER MANNER UNDER THIS DRAFT OR IN THE COURSE OF ANY NEGOTIATIONS.**

## **BUILD TRANSFER AGREEMENT**

THIS BUILD TRANSFER AGREEMENT (this "Agreement") is made and entered into as of [\_\_\_\_\_] (the "Effective Date"), by and between PacifiCorp, an Oregon corporation ("PacifiCorp"), and [DEVELOPER], a [STATE, ENTITY] ("Developer"). Each of PacifiCorp and Developer are referred to herein individually as "Party" and, collectively, as the "Parties."

### **RECITALS**

WHEREAS, Developer has responded to PacifiCorp's Request for Proposal - Renewable Resources (RFP 2017R) (the "RFP") which was issued by PacifiCorp on [\_\_\_\_\_] , 2017;

WHEREAS, PacifiCorp's selection of Developer's bid was based upon a competitive bidding process and was, in part, based upon Developer's representations and warranties contained herein and Developer's obligations contained herein, including the obligation to develop, design, procure, construct and commission the Facility, subject to and on the terms and conditions provided herein. Such matters were a material inducement for the selection of Developer, and Developer's failure to perform in accordance with the terms and conditions herein shall cause material damages to PacifiCorp; and

WHEREAS, following negotiations with Developer, PacifiCorp desires to engage Developer and Developer desires to be engaged to develop, design, procure, construct, and commission the Facility for PacifiCorp, subject to and on the terms and conditions hereinafter set forth.

NOW THEREFORE, in consideration of the premises and mutual representations, warranties, covenants and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows.

## **AGREEMENT**

### **ARTICLE 1 DEFINITIONS AND INTERPRETATION**

#### **Section 1.1 Defined Terms.**

Unless the context requires otherwise, capitalized terms used in this Agreement shall have the meanings assigned to them in the Glossary of Defined Terms attached hereto as Appendix Z.

#### **Section 1.2 Interpretation.**

(a) Unless the context requires otherwise, in this Agreement:

(i) Headings and the rendering of text in bold or italics are for convenience and reference purposes only and do not affect the meaning or interpretation of this Agreement.

(ii) A reference to an Appendix, Exhibit, Schedule, Article, Section or other provision shall, unless otherwise specified, be deemed to be a reference to appendices, exhibits, schedules, articles, sections or other provisions of this Agreement, which appendices, exhibits and schedules are incorporated herein by reference.

(iii) Any reference in this Agreement to another Contract or document shall be a reference to that other Contract or document as the same may be amended, modified, supplemented or replaced from time to time.

(iv) Any reference in this Agreement to “this Agreement,” “herein,” “hereof,” “hereunder” or “herewith” shall be a reference to this Agreement as a whole and not limited to the particular Appendix, Article, Section, Exhibit, Schedule or provision in which the relevant reference appears and to this Agreement as amended, modified, supplemented or replaced from time to time.

(v) References to any Party shall include any successors and assigns of the Party but, if applicable, only if such successors and assigns are permitted by this Agreement.

(vi) References to the term “includes” or “including” shall mean “includes, without limitation” or “including, without limitation.”

(vii) Words importing the singular shall include the plural and vice versa and the masculine, feminine and neuter genders shall include all genders.

(viii) The word “or” shall be deemed to be disjunctive but not necessarily exclusive (i.e., unless the context dictates otherwise, “or” shall be interpreted to mean “or” rather than “either/or”).

(ix) “Shall” and “will” have equal force and effect.

(x) Relative to the determination of any period of time, “from” shall mean “including and after,” “to” shall mean “to but excluding,” and “through” shall mean “through and including.”

(xi) If the time for performing an obligation under this Agreement occurs or expires on a day that is not a Business Day, the time for performance of such obligation shall be extended until the next succeeding Business Day.

(xii) References to Laws shall be references to the same as amended, modified, supplemented or reenacted and in effect from time to time, and shall include references to all bylaws, instruments, orders, rules and regulations for the time being made thereunder or deriving validity therefrom, unless the context otherwise requires.

(xiii) References to any amount of money shall mean a reference to the amount in United States dollars.

(xiv) Unless specifically stated to the contrary, reference in this Agreement to the “discretion” of a Party or Person means the Party’s or Person’s sole and absolute discretion. Such discretion is not subject to any external standard, including any standard of custom, “good faith” or reasonableness.

(xv) Any reference in this Agreement to time of day refers to the prevailing Mountain Time.

(xvi) Unless specifically stated to the contrary, all references to days, months and years in this Agreement refer to calendar days, months and years, respectively.

## **ARTICLE 2 PURCHASE AND SALE OF DEVELOPMENT ASSETS**

### **Section 2.1 Sale and Transfer of Development Assets.**

On the terms and subject to the conditions set forth in this Agreement, Developer shall sell, convey, transfer, deliver and assign to PacifiCorp, and PacifiCorp shall purchase, receive and accept from Developer, the Development Assets, free and clear of all Liens and Liabilities not otherwise permitted hereunder. Title to the Project (other than the Development Assets), including the Facility, Equipment and Materials, will be transferred over time as provided in Section 20.6

### **Section 2.2 Closing Deliverables.**

(a) Developer’s Deliverables. At the Closing, Developer shall deliver or cause to be delivered to PacifiCorp the following documents and such other documents, bills of sale, assignments and other instruments of transfer or assignment, together with such releases of Liens and Liabilities and certificates, as PacifiCorp shall deem necessary or PacifiCorp may reasonably request to effect the Closing contemplated by this Agreement, all of which shall be in form and substance reasonably satisfactory to PacifiCorp:

(i) An assignment or assignments of the Leases (the “Assignment of Leases”), deeds in recordable form, properly executed and acknowledged by an Authorized Officer of Developer, and if required by the Leases, the landlords under the Leases, conveying to PacifiCorp the Leases, and upon such assignment of the Leases, PacifiCorp shall assume the obligations of Developer under such Leases on and after the Closing Date and shall be entitled to any return of any security deposit pursuant to the Leases;

(ii) any assignment or assignments of the Easements (the “Assignment of Easements”), in form acceptable to PacifiCorp, properly executed and acknowledged by an Authorized Officer of Developer, and if required by the Easements, the landowners under the Easements, assigning to PacifiCorp the Easements, and upon such Assignment of the Easements, PacifiCorp shall assume the obligations of Developer under such Easements on and after the Closing Date;

(iii) the Title Policy issued for the benefit of PacifiCorp;

(iv) a complete and accurate survey of the Real Property, in accordance with minimum ALTA/ACSM standards then in effect and sufficient in form and substance to permit issuance of the Title Policy, prepared and certified as correct by a licensed land surveyor or registered engineer reasonably satisfactory to PacifiCorp. Such survey shall show the location of the Site and all improvements thereon, and the location of all easements and rights-of-way, whether above or underground, and shall show no encroachments of any improvements onto such easements or rights-of-way (except as expressly permitted under the documents governing such easements and rights-of-way) or onto property outside the boundaries of the Site as shown on the survey;

(v) estoppels from each applicable landlord under the Leases and each applicable owner under the Easements, dated no more than thirty (30) days prior to the Closing, each of which shall include a statement that the respective Lease or Easement is in full force and effect (the “Estoppels”);

(vi) a certification of non-foreign status of Developer (or if Developer is a disregarded entity, the entity treated as owning Developer’s assets for federal income tax purposes), duly executed by an Authorized Officer of Developer or other appropriate Person in the form and manner which complies with the requirements of Section 1445(b)(2) of the Code and Treasury Regulation Section 1.1445-2(b)(2);

(vii) a counterpart signature page to a bill of sale with respect to any Improvements, including the Equipment, Materials or any other component of the Facility, at the Site as of the Closing Date (the “Bill of Sale”), duly executed by an Authorized Officer of Developer;

(viii) a counterpart signature page to an assignment and assumption agreement with respect to the Developer Permits and any Contracts which are part of the Development Assets (the “Assignment and Assumption Agreement”), together with the consent of the applicable Persons, as may be required or reasonably requested by PacifiCorp, duly executed by an Authorized Officer of Developer;

(ix) a certificate of the Secretary or an Assistant Secretary of Developer certifying that: (A) attached thereto is a true, correct and complete copy of a certificate of good standing with respect to Developer, issued by the Secretary of State of the State of [STATE] as of a date not more than thirty (30) days prior to the Closing Date; (B) attached thereto are true, accurate and complete copies of the organizational documents of Developer, and all amendments thereto, as in effect at Closing; (C) attached thereto are copies of resolutions duly adopted by Developer's board of directors (or similar body), authorizing the sale of the Development Assets to PacifiCorp and the execution, delivery and performance by Developer of this Agreement and the transactions contemplated hereby and attesting that such resolutions are in full force and effect without amendment or modification at Closing; (D) attached thereto is the name, title and signature of each of the Authorized Officers of Developer authorized to execute and deliver this Agreement and the Project Documents, and any other document or instrument contemplated hereby or thereby; (E) the conditions specified in Section 2.7(a) and Section 2.7(b) have been satisfied; and (F) attached thereto are true, correct and complete originals (or copies where originals do not exist) of the Project Documents, including the Leases (together with all amendments, supplements, schedules and exhibits thereto), the Transferred Permits, the Reports and any Contracts which are part of the Development Assets;

(x) a current and valid Phase I environmental site assessment with respect to the Site conducted in accordance with ASTM E1527-13 and, if reasonably required by PacifiCorp, a Phase II environmental site assessment with respect to the Site, and a reliance letter from the environmental consultant; and

(xi) such other documents and instruments as may be reasonably requested by PacifiCorp to complete the transactions contemplated by this Agreement.

(b) PacifiCorp's Deliverables. At the Closing, PacifiCorp shall deliver or cause to be delivered to Developer the following documents and such other documents, deeds, bills of sale, assignments and other instruments of transfer or assignment, together with such certificates, as Developer shall deem necessary or Developer may reasonably request to effect the Closing contemplated by this Agreement, all of which shall be in form and substance reasonably satisfactory to Developer:

(i) a counterpart signature page to the Assignment of Leases, duly executed by an Authorized Officer of PacifiCorp;

(ii) a counterpart signature page to the Assignment of Easements, duly executed by an Authorized Officer of PacifiCorp; and

(iii) a counterpart signature page to the Bill of Sale, duly executed by an Authorized Officer of PacifiCorp;

(iv) a counterpart signature page to the Assignment and Assumption, duly executed by an Authorized Officer of PacifiCorp;

(v) a certificate of the Secretary or an Assistant Secretary of PacifiCorp certifying that: (A) attached thereto is a true, correct and complete copy of a certificate of good standing with respect to PacifiCorp, issued by the Secretary of State of the State of Oregon as of a date not more than thirty (30) days prior to the Closing Date; (B) attached thereto are true, accurate

and complete copies of the organizational documents of PacifiCorp, and all amendments thereto, as in effect at Closing; (C) attached thereto are copies of resolutions duly adopted by PacifiCorp's board of directors (or similar body), authorizing the purchase of the Development Assets by PacifiCorp and the execution, delivery and performance by PacifiCorp of this Agreement and the transactions contemplated hereby and attesting that such resolutions are in full force and effect without amendment or modification at Closing; (D) attached thereto is the name, title and signature of each of the Authorized Officers of PacifiCorp authorized to execute and deliver this Agreement and the Project Documents, and any other document or instrument contemplated hereby or thereby; (E) the conditions specified in Section 2.7(a) and Section 2.7(b) have been satisfied; and

(vi) such other documents and instruments as may be reasonably requested by Developer to complete the transactions contemplated by this Agreement.

### **Section 2.3 Purchase Price.**

(a) Purchase Price. The aggregate consideration payable by PacifiCorp to Developer for the Development Assets shall be [\_\_\_\_\_] Dollars (\$[\_\_\_\_\_]) (the "Purchase Price").

(b) Prorated Amounts. The Purchase Price shall include a proration of operating expenses, rent, and any other amounts due from tenants pursuant to the Leases. Developer shall be responsible for all operating expenses, rent, and any other amounts due from tenants pursuant to the Leases allocable to the period prior to the Closing Date, and PacifiCorp shall be responsible for all operating expenses, rent, and any other amounts due from tenants pursuant to the Leases allocable to the period on and after the Closing Date. Any "true up" payments, credits, or other reimbursements received under the Leases after the Closing Date shall be allocated between Developer and PacifiCorp pro rata in accordance with the Closing Date.

### **Section 2.4 Closing.**

(a) Closing Date, Place and Time. The closing of the transactions contemplated by this ARTICLE 2 (the "Closing") shall take place at PacifiCorp's offices in Portland, Oregon, at 10:00 a.m., Pacific Time (11:00 a.m. Mountain Time) on the date all of the conditions precedent set forth in Section 2.6 and Section 2.7 have been satisfied (or waived in writing by PacifiCorp or Developer, as applicable), which date shall be on or before the Target Closing Date, or at such other time and date as the Parties shall mutually designate in writing (the "Closing Date"). The Closing shall be effective as of 12:01 a.m. Mountain Time on the Closing Date.

(b) Payment of Purchase Price. At the Closing, PacifiCorp shall pay to Developer the Purchase Price via wire transfer of immediately available federal funds to an account located in the United States and designated by Developer at least ten (10) Business Days prior to the Closing Date.

### **Section 2.5 Assumption of Liabilities.**

(a) Excluded Liabilities. Except for the Assumed Liabilities, PacifiCorp shall not assume by virtue of this Agreement or any of the Project Documents or the transactions contemplated hereby or thereby, by operation of law or otherwise, and shall have no liability for and Developer shall remain liable in respect of, any and all debts, liabilities and obligations, of any kind whatsoever, whether



absolute, accrued, contingent, fixed, known or unknown, or whether due or to become due, of Developer, Contractor or any Subcontractor.

(b) Assumed Liabilities. PacifiCorp shall assume, and shall thereafter pay, perform and discharge, without recourse to Developer, as and when due, any liabilities and obligations under the Leases arising out of events, conditions or circumstances first occurring on or after the Closing Date (collectively, the “Assumed Liabilities”).

#### **Section 2.6 Further Assurances.**

From time to time after the Closing Date, Developer shall, at the request of PacifiCorp but without further consideration, promptly execute and deliver to PacifiCorp such other agreements, certificates and further instruments of sale, assignment, transfer and conveyance and take such other and further actions as PacifiCorp may reasonably request in order to vest or perfect in PacifiCorp or its assigns, and put PacifiCorp or its assigns in possession of, the Development Assets and to carry out and implement the Closing and the transactions contemplated in this ARTICLE 2, including any regulatory requirements of PacifiCorp.

#### **Section 2.7 Conditions Precedent to PacifiCorp’s Obligation to Complete the Closing.**

The obligations of PacifiCorp to effect the Closing and the transactions contemplated in this ARTICLE 2 are subject to the satisfaction or waiver by PacifiCorp on or prior to the Closing Date of each of the following conditions:

(a) Accuracy of Representations and Warranties. The representations and warranties made by Developer in this Agreement that are qualified with respect to materiality shall be true and accurate in all respects, and the representations and warranties made by Developer in this Agreement that are not so qualified shall be true and accurate in all material respects, on and as of the Closing Date (or on the date when made in the case of any representation and warranty which specifically relates to an earlier date).

(b) Performance. Developer shall have performed or complied in all material respects with all obligations and covenants required by this Agreement to be performed or complied with by it on or prior to the Closing Date.

(c) Deliveries. Developer shall have executed and delivered or caused to be executed and delivered to PacifiCorp the items set forth in Section 2.2(a).

(d) Project Documents. All of the Project Documents (together with all amendments, supplements, schedules and exhibits thereto) other than the Consents shall have been duly authorized, executed and delivered by each party thereto, shall be in full force and effect, and shall be in form and substance satisfactory to PacifiCorp in its discretion.

(e) Transferred Permits. All of the Transferred Permits required to be transferred as of the Closing shall have been so transferred, shall be in full force and effect, and shall be in form and substance satisfactory to PacifiCorp in its discretion.

(f) PacifiCorp Consents. All of the PacifiCorp Consents shall have been duly obtained, made or given, shall be in full force and effect, and shall be in form and substance satisfactory to PacifiCorp in its discretion.

(g) PacifiCorp Regulatory Approvals. All of the PacifiCorp Regulatory Approvals shall have been duly obtained, made or given, shall be in full force and effect, and shall be in form and substance satisfactory to PacifiCorp in its discretion.

(h) Reports. All of the Reports shall be in form and substance satisfactory to PacifiCorp in its discretion.

(i) Absence of Orders; Law. No preliminary or permanent injunction or other Judgment of any Governmental Authority to prevent the consummation of the transactions contemplated by this Agreement, including the Closing, shall be in effect or pending, and no applicable Law shall have been enacted by any Governmental Authority that makes consummation of such transactions illegal.

(j) Material Adverse Change. No Material Adverse Change shall have occurred and be continuing.

(k) Estoppels. Prior to the Closing, Developer shall have delivered to PacifiCorp estoppels from each applicable landlord under the Leases and each applicable owner under the Easements, in forms approved by PacifiCorp in advance, dated no more than thirty (30) days prior to the Closing. Each estoppel shall include a statement that the respective Lease or Easement is in full force and effect. PacifiCorp shall have five (5) Business Days after receipt of each estoppel to approve the same.

(l) Notice to Proceed. PacifiCorp shall have issued to Developer the Notice to Proceed.

(m) Network Resource Integration. PacifiCorp Transmission shall have demonstrated to PacifiCorp, in PacifiCorp's satisfaction, such satisfaction in its discretion, that the Project can be integrated with PacifiCorp Transmission's system as a network resource.

(n) Appendices, Exhibits and Schedules. Each Appendix, Exhibit and Schedule to this Agreement shall be in final form and substance satisfactory to PacifiCorp.

(o) Equipment, Materials and Facility. PacifiCorp shall be satisfied in its discretion with the Equipment, Materials and Facility, and all anticipated storage plans with respect thereto.

## **Section 2.8 Conditions Precedent to Developer's Obligations to Complete the Closing.**

The obligation of Developer to effect the Closing and the transactions contemplated in this ARTICLE 2 is subject to the satisfaction or waiver by Developer on or prior to the Closing Date of each of the following conditions:

(a) Accuracy of Representations and Warranties. The representations and warranties made by PacifiCorp in this Agreement that are qualified with respect to materiality shall be true and accurate in all respects, and the representations and warranties made by PacifiCorp in this Agreement that are not so qualified shall be true and accurate in all material respects, on and as of the Closing Date (or on the

date when made in the case of any representation and warranty which specifically relates to an earlier date).

(b) Performance. PacifiCorp shall have performed or complied in all material respects with all obligations and covenants required by this Agreement to be performed or complied with by it on or prior to the Closing Date.

(c) Deliveries. PacifiCorp shall have executed and delivered or caused to be executed and delivered to Developer the items set forth in Section 2.2(b).

(d) Developer Consents. All of the Developer Consents shall have been duly obtained, made or given, shall be in full force and effect, and shall be in form and substance satisfactory to Developer in its discretion.

(e) Developer Regulatory Approvals. All of the Developer Regulatory Approvals shall have been duly obtained, made or given, shall be in full force and effect, and shall be in form and substance satisfactory to Developer in its discretion.

(f) Absence of Orders; Law. No preliminary or permanent injunction or other Judgment of any Governmental Authority to prevent the consummation of the transactions contemplated by this Agreement shall be in effect or pending, and no applicable Law shall have been enacted by any Governmental Authority that makes consummation of such transactions illegal.

(g) Notice to Proceed. PacifiCorp shall have issued to Developer the Notice to Proceed.

## **Section 2.9 Early Termination.**

(a) Notwithstanding anything contained in this Agreement to the contrary, this Agreement may be terminated at any time prior to the Closing Date:

(i) by the mutual written agreement of the Parties;

(ii) by Developer upon notice to PacifiCorp, if there has been a breach by PacifiCorp of any representation, warranty, covenant, agreement or obligation contained in this Agreement which would result in a failure of, or inability of PacifiCorp to satisfy, any condition set forth in Section 2.8, and such breach has not been cured to Developer's reasonable satisfaction within thirty (30) days following PacifiCorp's receipt of notice of such breach;

(iii) by PacifiCorp upon notice to Developer, if there has been a breach by Developer of any representation, warranty, covenant, agreement or obligation contained in this Agreement which would result in a failure of, or inability of Developer to satisfy, any condition set forth in Section 2.7, and such breach has not been cured to PacifiCorp's reasonable satisfaction within thirty (30) days following Developer's receipt of notice of such breach;

(iv) by PacifiCorp, if it becomes apparent that any of the conditions precedent set forth in Section 2.7 will not be satisfied or become impossible to satisfy, by the Target Closing Date, other than if PacifiCorp's breach of this Agreement has been the cause of, or resulted in, such failure or impossibility to satisfy any of the conditions precedent set forth in Section 2.7;

(v) by either Party, if any Law shall become effective after the Effective Date or a Governmental Authority shall have issued a final and non-appealable order, injunction, judgment, decree or ruling, in each case, restraining, enjoining or otherwise prohibiting or making illegal the Closing or the transactions contemplated in connection therewith; and

(vi) by either Party, if the Closing has not occurred by [\_\_\_\_\_] (the “Target Closing Date”); provided, however, that the right to terminate this Agreement pursuant hereto shall not be available to any Party whose breach of this Agreement has been the cause of, or resulted in, the failure of the Closing to occur on or before the Target Closing Date.

(b) Either Party desiring to terminate this Agreement pursuant to Section 2.9(a) shall give written notice thereof to the other Party.

(c) If this Agreement is terminated by PacifiCorp pursuant to Section 2.9(a)(iii), (iv), or (vi) or by Developer pursuant to Section 2.9(a)(vi), then Developer shall be liable for an early termination fee in the amount of Fifty Dollars (\$50.00) per kW of the nameplate capacity of the Facility. The Parties agree that such early termination fee shall be PacifiCorp’s sole and exclusive remedy for termination by PacifiCorp pursuant to Section 2.9(a)(iii), (iv), or (vi) or termination by Developer pursuant to Section 2.9(a)(vi). The Parties agree that PacifiCorp’s actual damages as a result of termination of this Agreement by PacifiCorp pursuant to Section 2.9(a)(iii), (iv), or (vi) or by Developer pursuant to Section 2.9(a)(vi) would be extremely difficult or impracticable to determine. After negotiation, the Parties have agreed that the above liquidated damages are in the nature of liquidated damages and are a reasonable and appropriate measure of the damages that PacifiCorp would incur as a result of such delays or failures, and do not represent a penalty.

(d) If either Party terminates this Agreement pursuant to Section 2.9(a), then all further obligations of the Parties under this Agreement (other than the provisions which by their terms are intended to survive the expiration or termination of this Agreement) shall be terminated and, except as provided in Section 2.9(c) and notwithstanding any provisions to the contrary contained in this Agreement, neither Party shall have any further liability to the other Party pursuant hereto and termination by such Party shall be its sole and exclusive remedy.

### **ARTICLE 3 CONTRACT PRICE; TERMS FOR PROGRESS PAYMENTS**

#### **Section 3.1 Contract Price.**

(a) The aggregate consideration payable by PacifiCorp to Developer for the Project, comprising the sum of Progress Payments made pursuant to ARTICLE 3 on or prior to Final Acceptance, plus any amounts retained by PacifiCorp as Retainage pursuant to Section 3.5, but excluding the Purchase Price (collectively, the “Contract Price”).

(b) Basis of Contract Price

(i) Developer Duty to Inform Itself. Developer shall be deemed to have satisfied itself, through its own due diligence efforts and not based on any representation of PacifiCorp or its representatives (except as set forth in this Section), as to the nature and location of the Work, the general, local, physical and other conditions of the Work, and all other matters which could

in any way affect the Work or the cost thereof under this Agreement. Without limiting the foregoing, Developer shall be deemed to have inspected the Site and to have satisfied itself as to the state and condition (including ground, geological, climatic and hydrological condition) of all circumstances affecting the Site (including any and all safety regulations of PacifiCorp or otherwise applicable to the Work and the Project) and to have examined any documentation and information supplied or made available to Developer by PacifiCorp or available for inspection in the public domain, the conditions or the Technical Specification (with such drawings, exhibits, plans and information as may be annexed thereto or referred to therein) and to have satisfied itself as to the feasibility of executing the Work at the Site. Developer shall be responsible for its own interpretation of such documentation and information. The failure of Developer to adequately investigate and acquaint itself with any applicable conditions and other matters shall not relieve Developer from any of its obligations under this Agreement or any other Project Document, including the responsibility for properly estimating the difficulties and costs of successfully performing the Work and completing this Agreement, and shall not be grounds for adjusting either the Contract Price or the Project Schedule agreed to in this Agreement.

(ii) Underground Obstructions. Without prejudicing or limiting the provisions of Section 3.1(b)(i) or Section 10.1, Developer shall be responsible for ascertaining the location of and avoiding damage to all underground installations including cable, gas, water pipes, telephone lines, and other underground installations, whether the location of the excavation, digging, or trenching required for performance of the Work is fixed by PacifiCorp or by Developer. Developer shall be responsible for all delays, costs, loss or expense arising, whether directly or indirectly, from any ground conditions or artificial obstructions or hazards, including Regulated Materials encountered by Developer during the execution of the Work and including any Work underground or involving excavation that Developer should have been made reasonably aware of based on information available and Developer shall not be entitled to any adjustment as a result thereof to either the Contract Price or the Project Schedule.

(iii) Surveying. Developer is responsible for performing, and shall include in the Contract Price, all construction layout surveying required for execution of the Work.

(iv) Responsibility for Information. Developer shall be responsible for any misunderstanding or incorrect information in connection with the Site (including information provided by PacifiCorp or its representative prior to the date of commencement of the Work).

(v) Existing Improvements, Equipment and Materials. Developer shall be solely responsible for the consequences of incorporating into the Work any existing Improvements, Equipment or Materials. To the extent that the same are incorporated into the Work, such preexisting items shall be subject to the applicable conditions of this Agreement as if they were supplied by Developer hereunder. Without prejudice to the foregoing, Developer shall notify PacifiCorp's Representative of its intention to incorporate any existing Improvements, Equipment or Materials into the Work, other than those specifically identified in this Agreement, as soon as is practicable and seek the prior written consent of PacifiCorp's Representative to the use or utilization thereof, which consent shall be in PacifiCorp's discretion.

## **Section 3.2 Terms.**

(a) Procedures. Subject to the Closing occurring, PacifiCorp shall pay Developer Progress Payments, subject to and in accordance with the requirements of Appendix R and this ARTICLE 3, including satisfaction of the conditions precedent set forth in Section 3.3. To the extent that a Progress Payment Date is other than a Business Day, no interest shall accrue on such Progress Payment until the next Business Day.

(b) Payment in Dollars. All payments to Developer hereunder shall be paid in U.S. Dollars via wire transfer of immediately available federal funds to a bank account located in the United States as specified by Developer. Any payments to PacifiCorp hereunder shall be paid in U.S. Dollars via wire transfer of immediately available federal funds to a bank account located in the United States as specified by PacifiCorp.

## **Section 3.3 Conditions Precedent to PacifiCorp's Obligation to Pay Progress Payments.**

The obligation of PacifiCorp to pay Progress Payments is subject to the satisfaction on each Progress Payment Date of each the following conditions precedent:

(a) Payments on Business Days. The Progress Payment Date shall be a Business Day. If any Progress Payment becomes payable on a day that is not a Business Day, the Progress Payment shall be paid on the next succeeding Business Day. Developer shall bear the cost of any and all banking charges imposed by Developer's bank with respect to any Progress Payment.

(b) Milestones. Developer shall have achieved the Milestones associated with the Work for which the Progress Payment is requested prior to Developer submitting its invoice with respect thereto, and shall have completed all Milestones to have been achieved prior to the date of such Progress Payment in accordance with Appendix R.

(c) Representations and Warranties. (i) The representations and warranties made by Developer in this Agreement and each Project Document to which it is a party that are qualified with respect to materiality shall be true and accurate in all respects, and the representations and warranties made by Developer in this Agreement and each Project Document to which it is a party that are not so qualified shall be true and accurate in all material respects, on and as of such Progress Payment Date (or on the date when made in the case of any representation and warranty which specifically relates to an earlier date), both before and after giving effect to the making of such Progress Payment; and (ii) the representations and warranties made by each Project Party (other than Developer) in the Project Documents that are qualified with respect to materiality shall be true and accurate in all respects, and the representations and warranties made by each Project Party (other than Developer) in this Agreement and each Project Document to which it is a party that are not so qualified shall be true and accurate in all material respects, on and as of such Progress Payment Date (or on the date when made in the case of any representation and warranty which specifically relates to an earlier date), in each case, such representations and warranties shall be deemed renewed and restated as of the date of such Progress Payment.

(d) No Default. (i) No circumstance, event or condition shall exist which either immediately or with the passage of time or the giving of notice, or both, would (A) permit Developer to withhold payment under any Project Document to which Developer is a party, (B) permit any Project Party to

terminate or suspend performance under any Project Document, or (C) reasonably be expected to result in a Material Adverse Change; and (ii) no breach, violation or default shall have occurred and be continuing under any Project Document to which a Project Party is a party.

(e) No Proceeding or Litigation. No action, suit, proceeding or investigation by or before any Governmental Authority or any arbitrator shall be pending or, to Developer's Knowledge, threatened against or affecting a Project Party or the Project which would reasonably be expected to result in a Material Adverse Change, unless such action, suit, proceeding or investigation has been initiated or threatened by PacifiCorp.

(f) Material Adverse Change. Since the date of this Agreement, no Material Adverse Change shall have occurred and be continuing, except and to the extent that such Material Adverse Change is a result of an act or omission of PacifiCorp (other than acts of PacifiCorp contemplated by this Agreement).

(g) Notice of Request for Progress Payment. PacifiCorp shall have received a Notice of Request for Progress Payment in compliance with Section 3.4, together with all supporting documents required thereby.

(h) Permits. All Developer Permits required by applicable Law and the Project Documents to have been obtained prior to the Progress Payment Date shall have been obtained and shall be in full force and effect.

(i) Right to Withhold Payment. Other than with respect to Retainage withheld in accordance with Section 3.5, PacifiCorp shall have determined that it is not necessary to withhold payment to protect PacifiCorp from loss relating to any of the following causes:

(i) Work not in accordance with the requirements of the Project Documents;

(ii) Claims filed against PacifiCorp or the Project as a result of the actions or inactions of Developer, Contractor or any Subcontractor in connection with the performance of the Work (and not otherwise covered by insurance), unless Developer, Contractor or any Subcontractor is disputing such Claims in good faith and if reasonably requested by PacifiCorp, has bonded the Claim with a bonding company or other surety reasonably acceptable to PacifiCorp, and if any Lien is imposed with respect to such Claims, Developer, Contractor or any Subcontractor has discharged such Lien; or

(iii) Failure of Developer to make payments in respect of Equipment, Material and Supplies, or labor or other obligations incurred as a result of activities covered by this Agreement, unless Developer has, in good faith, disputed such payments and, if any Lien is filed with respect thereto, Developer has posted a bond against such Lien with a bonding company or other surety reasonably acceptable to PacifiCorp.

### **Section 3.4 Notice of Request for Progress Payment.**

(a) Notice Required. It shall be a condition precedent to PacifiCorp's obligation to make any Progress Payment pursuant to Section 3.2(a), that Developer deliver to PacifiCorp a Notice of Request

for Progress Payment that satisfies all of the requirements of this Section 3.4 and that is otherwise in form and substance reasonably satisfactory to PacifiCorp.

(b) Documents to be attached to Notice for Progress Payment. Each Notice of Request for Progress Payment shall be accompanied by the following documents:

(i) an invoice of Developer, substantially in the form of Appendix Y, substantiating the amounts payable by PacifiCorp in connection with such Progress Payment and the Work covered thereunder in accordance with Appendix R and certifying as to the other matters provided for therein. Developer's invoice shall provide separate invoices, line-items, breakdowns or further descriptions for amounts payable by PacifiCorp in connection with such Progress Payment and Work covered thereunder as PacifiCorp may reasonably require;

(ii) a Progress Report that indicates the percentage completion of Work achieved compared to the planned percentage completion of Work pursuant to the Project Schedule and, where any Work is behind the Project Schedule, providing comments, describing likely consequences and stating the corrective action being taken by Developer to cause the Work to progress in accordance with the Project Schedule. The Progress Report also shall present any other information reasonably requested by PacifiCorp relating to progress of the Work;

(iii) an officer's certificate signed by an Authorized Officer of Developer certifying that each of the conditions in Section 3.3(b), (c), (d), (e), (f) and (h) has been and will be satisfied as of the applicable Progress Payment Date and such other items as may be required by this Agreement or as PacifiCorp may reasonably request;

(iv) A bill of sale transferring title to all Work subject to the Notice of Request for Progress Payment, in form and substance reasonably satisfactory to PacifiCorp; and

(v) Lien releases from Developer, Contractor and all Subcontractors, in the forms attached in Appendix J, with respect to all Liens that arise with respect to the Project, including the Work, subject to the Notice of Request for Progress Payment.

(c) Address. All Notices of Request for Progress Payment shall be addressed in accordance with Section 35.1.

(d) Review of Notice.

(i) PacifiCorp shall, within fifteen (15) days after receipt of any Notice of Request for Progress Payment, notify Developer if it disputes whether: (A) the Work evidenced by the Notice of Request for Progress Payment has been completed in conformance with the requirements of this Agreement; (B) the Notice of Request for Progress Payment and any additional information requested by PacifiCorp pursuant hereto have been delivered to PacifiCorp in accordance with the requirements of this Section 3.4; or (C) the Progress Payment requested by Developer pursuant to the Notice of Request for Progress Payment is in accordance with Appendix R. If PacifiCorp disputes all or any portion of the Notice of Request for Progress Payment, then PacifiCorp may, in its discretion, withhold such portion of the Progress Payment requested by Developer in the Notice of Request for Progress Payment as PacifiCorp, in its



discretion, determines may be reasonably necessary to complete any portion of the Work in accordance with the Notice of Request for Progress Payment and this Agreement.

(ii) Upon receipt of notice from PacifiCorp that a Notice of Request for Progress Payment is disputed, Developer shall promptly take any and all reasonable actions as may be necessary to remedy any condition identified by PacifiCorp leading to such dispute. Payment of the disputed portion of any Notice of Request for Progress Payment shall be made by PacifiCorp within ten (10) Business Days following the date on which the Parties mutually agree upon resolution of such dispute or such dispute is finally resolved pursuant to Section 32.2. In no event shall any action taken by PacifiCorp in compliance with this ARTICLE 3 affect the Guaranteed Substantial Completion Date for the Facility.

(iii) Subject to the satisfaction of the conditions set forth in Section 3.3, as determined by PacifiCorp in its discretion, and except for disputed portions of any Notice of Request for Progress Payment pursuant to Section 3.4(d)(i), PacifiCorp shall pay Developer on the applicable Progress Payment Date the requested amount of Progress Payment, less any disputed portion of such Notice of Request for Progress Payment pursuant to Section 3.4(d)(i) and any withholding and Retainage permitted under this Agreement.

(iv) Late payments not excused under the provisions of Section 3.4(d)(iii) shall accrue interest at the Late Payment Rate at that time from the date due until paid. Disputed late payments shall not accrue interest until the event giving rise to the dispute has been remedied; provided, however, that if it is later determined that a disputed payment or withholding or Retainage was improper, interest shall accrue at the Late Payment Rate on the amount which should have been paid from the date such amount should have been paid until actual payment is received by Developer.

(v) If PacifiCorp, in its discretion, pays a disputed portion of a Progress Payment requested by Developer pursuant to a Notice of Request for Progress Payment and the Parties mutually agree or it is subsequently determined that PacifiCorp was entitled to withhold such disputed portion of Progress Payment in accordance with the provisions of this Agreement, then Developer shall pay to PacifiCorp upon demand interest at the Late Payment Rate on the disputed portion of the Progress Payment that PacifiCorp was entitled to withhold from the date of payment by PacifiCorp until the earlier of the date of repayment to PacifiCorp and the date on which PacifiCorp offset such disputed portion of the Progress Payment against other payments owing by PacifiCorp to Developer under this Agreement. The determinations made by PacifiCorp pursuant to this ARTICLE 3 are solely for the purpose of determining whether to pay a Progress Payment, and such determinations shall not prevent PacifiCorp from subsequently asserting that Developer, Contractor or any Subcontractor failed to perform its respective obligations under this or any other Project Document, nor shall such determinations be used as evidence that Developer, Contractor or any Subcontractor performed such obligations in accordance with this or any other Project Document.

**(e) A NOTICE OF REQUEST FOR PROGRESS PAYMENT THAT DOES NOT MEET THE REQUIREMENTS OF THIS SECTION 3.4 MAY RESULT IN A PAYMENT DELAY.**

### **Section 3.5 Retainage**

There shall be withheld as retainage from each Progress Payment due and payable to Developer hereunder (other than from the payment due and payable with respect to the achievement of Final Acceptance) five percent (5%) of the amount of such payment (the "Retainage"). Such amount shall be held by PacifiCorp as security for the performance of Developer's obligations hereunder and any interest thereon shall accrue for the account of PacifiCorp and not Developer. PacifiCorp may use the Retainage to cure a Developer Default, for liquidated damages, for payment of unpaid Subcontractors and payments made to remove Liens filed by Subcontractors, and any and all other amounts payable to PacifiCorp hereunder. In accordance with Section 20.3(b), within twenty (20) Business Days after the Substantial Completion Date, PacifiCorp shall pay to Developer the result of subtracting the Punch List Holdback Amount from the Retainage, if a positive dollar value. As Final Punch List items are completed, the Punch List Holdback Amount shall be reduced to an amount equal to two hundred percent (200%) of the aggregate estimated cost of completing the then-remaining Final Punch List items. PacifiCorp shall pay, within twenty (20) Business Days of the reduction of such Punch List Holdback Amount, the amount of the Retainage in excess of such adjusted Punch List Holdback Amount then held by PacifiCorp. PacifiCorp shall pay the balance of the Retainage then held by it to Developer within twenty (20) Business Days after the achievement of Final Acceptance.

## **ARTICLE 4 REPRESENTATIONS AND WARRANTIES OF DEVELOPER**

Developer hereby represents and warrants to PacifiCorp that all of the statements contained in this ARTICLE 4 are true and correct: (a) as of the Effective Date, except to the extent such representations and warranties are specifically made as of a particular date (in which case such representations and warranties will be true and correct as of such date); and (b) on each date such statements are made or are deemed made pursuant to this Agreement.

### **Section 4.1 Organization, Standing and Power.**

Developer is duly formed, validly existing and in good standing, under the applicable Laws of the jurisdiction of its formation. Developer has the requisite [\_\_\_\_\_] power and authority to own, operate and lease its properties and assets and to carry on its business as now being conducted and as proposed to be conducted pursuant hereto. Developer is duly qualified or licensed to do business and is in good standing in all jurisdictions in which the character of the properties owned or held under lease by it or the nature of the business now being transacted by it or proposed to be transacted by it pursuant hereto makes qualification necessary, including the State of [STATE WHERE FACILITY IS LOCATED].

### **Section 4.2 Authority; Execution and Delivery.**

Developer has full [\_\_\_\_\_] power and authority to execute and deliver this Agreement and the Project Documents to which it is or will be a party in connection with the transactions contemplated hereby, to perform its obligations hereunder and thereunder, and to complete the transactions contemplated hereby and thereby. The execution and delivery by Developer of this Agreement and the Project Documents to which it will be a party, and the performance by Developer of its obligations hereunder and thereunder, have been duly and validly authorized by all necessary [\_\_\_\_\_] action.

### **Section 4.3 Binding Agreement.**

This Agreement and the Project Documents to which Developer is, or will be, a party have been, or will be when delivered, duly executed and delivered by Developer and, assuming due and valid authorization, execution and delivery thereof by PacifiCorp and each other party thereto, this Agreement and the Project Documents to which it is, or will be, a party are, or will be when delivered, valid and binding obligations of Developer enforceable against Developer in accordance with their terms, subject to applicable bankruptcy, insolvency, reorganization, moratorium or other similar applicable Laws relating to or affecting the enforcement of creditors' rights generally and to general principles of equity.

### **Section 4.4 No Conflicts.**

The execution and delivery by Developer of this Agreement and the Project Documents to which Developer is, or will be, a party does not, and the performance by Developer of its obligations hereunder and thereunder and the completion of the transactions contemplated hereby and thereby, shall not:

(a) conflict with or result in a violation or breach of any of the terms, conditions or provisions of Developer's organizational documents;

(b) assuming all of the consents and approvals set forth on Schedule 4.4 (the "Developer Consents") have been obtained or given, result in a breach, default or violation (or give rise to any right of termination, cancellation or acceleration) under any of the terms, conditions or provisions of any Contract or Permit (with or without notice or lapse of time or both) with respect to which Developer or any of its Affiliates is a party or by which Developer, any of its Affiliates or the Project may be bound, except for such breaches, defaults or violations (or rights of termination, cancellation or acceleration) as to which requisite waivers or consents have been obtained in writing (true and correct copies of which have previously been furnished to PacifiCorp);

(c) assuming all of the Developer's Consents have been obtained or given, conflict with or result in a violation or breach in any term or provision of any applicable Law applicable to Developer or the Project; or

(d) assuming all of the Developer's Consents have been obtained or given, result in the imposition or creation of any Lien of any nature on the Project, other than Permitted Liens.

### **Section 4.5 Developer Permits; Developer Regulatory Approvals.**

(a) Schedule 4.5(a) sets forth all Permits (other than PacifiCorp Permits) required by applicable Law in connection with the design, engineering, development, construction, startup, testing, commissioning, completion, ownership and operation of the Project in accordance with this Agreement and the other Project Documents (the "Developer Permits").

(b) All Developer Permits that are required by applicable Law on or prior to the date this representation is made or deemed made pursuant to this Agreement have been obtained, are in full force and effect, and are final and all appeal periods with respect thereto have expired or terminated. There is no action, suit, investigation or proceeding pending, or, to Developer's Knowledge, threatened, that could result in the modification, rescission, termination, or suspension of any Developer Permit obtained prior to the date this representation is made or deemed made pursuant to this Agreement.

(c) To Developer's Knowledge, no facts or circumstances exist that would reasonably be expected to hinder, impair, restrict, limit or disqualify Developer or the Project from obtaining any Deferred Permit in the ordinary course prior to the time it is required to be obtained hereunder or under the other Project Documents and, in any event, prior to the time required by applicable Law.

(d) Except as set forth on Schedule 4.5(d), no consent or approval of, filing with or notice to, any Governmental Authority by Developer (each, a "Developer Regulatory Approval") is required in connection with the execution, delivery and performance by Developer of this Agreement or any of the Project Documents to which it is or will be a party or the completion of the transactions contemplated hereby or thereby.

#### **Section 4.6 No Proceedings.**

Except as set forth on Schedule 4.6, there are no actions, suits, investigations or proceedings by or before any Governmental Authority or arbitrator or, to Developer's Knowledge, threatened against or affecting Developer or any other Project Party or the Project, which would reasonably be expected to result in a Material Adverse Change.

#### **Section 4.7 Compliance with Laws.**

(a) The Project is being, and at all times has been, developed, constructed and permitted in compliance with all applicable Laws, all Developer Permits and Prudent Industry Practice. As constructed, the Project shall conform to and comply with all zoning, environmental, wildlife, land use and other applicable Laws and the requirements of all Developer Permits.

(b) Developer is, and at all times has been, and, to Developer's Knowledge, Contractor and each Subcontractor is, and at all times has been, in compliance with all applicable Laws, including those relating to occupational health and safety, and the Developer Permits with respect to the Project, including the design, engineering, supply, construction, installation, testing, commissioning, operation and ownership of the Facility.

#### **Section 4.8 Taxes.**

Developer has timely filed all Tax Returns that it was required to file. All such Tax Returns were prepared in compliance with applicable Law and were complete and correct in all material respects. All Taxes due and owing by Developer or with respect to the Project (whether or not shown due on any Tax Return) have been paid. There are no Liens for Taxes (other than Liens for Taxes that are not yet due and payable) upon any assets of Developer, nor to the Knowledge of Developer are any such Liens pending or threatened. Developer has withheld and paid all Taxes required to have been withheld and paid by it in connection with amounts paid or owing to any employee, independent contractor, creditor, owner or other person, and all Forms W-2 and 1099 required with respect thereto have been properly completed and timely filed. The unpaid Taxes of Developer (i) did not, as of the date of its (or, if applicable, its Affiliate's) most recent financial statements, exceed the amount accrued for Tax (excluding amounts accrued for deferred Taxes to reflect book-tax timing differences) in the most recent financial statements and (ii) do not, as of the Closing Date, exceed that amount as adjusted for the passage of time in accordance with the past custom and practice of Developer. No extension of time for filing a Tax Return of Developer has been received or requested. No written claim, and no other claim to Developer's Knowledge, has been made by a Tax authority in a

jurisdiction in which Developer does not file Tax Returns that Developer is or may be subject to taxation by that jurisdiction. There is no audit, claim, assessment, levy, or other proceeding concerning any Tax liability of Developer either claimed or raised by any Tax authority in writing or as to which Developer has Knowledge. Developer has not waived any statute of limitations with respect to Taxes or agreed to any extension of time with respect to a Tax assessment or deficiency. Developer does not have liability for the Taxes of any person under Treasury Regulation Section 1.1502-6 or any similar provision of state, local, or foreign law, as a transferee or successor, by contract, or otherwise. Developer is not a “foreign person” within the meaning of Code Section 1445.

#### **Section 4.9 Environmental Matters.**

(a) Schedule 4.9(a) sets forth all environmental reports, assessments and audits, including reports, assessments and audits relating to wetlands, air and emissions or discharges, studies relating to threatened or endangered species, and studies related to avian species, including those species protected by Environmental Law, and studies relating to archaeological, cultural, and historical resources prepared by or on behalf of Developer in connection with the Project or otherwise in Developer’s possession or control with respect to the Project. Developer has provided PacifiCorp with copies of the materials included in Schedule 4.9(a).

(b) (i) Developer has maintained a due diligence program designed to identify all Developer Permits; (ii) as of the Closing Date and any date thereafter on which this representation and warranty is made or deemed made, Developer holds and is in compliance with, all Developer Permits; (iii) PacifiCorp appears properly as the permittee, co-permittee or authorized party with respect to all Developer Permits other than as set forth on Schedule 4.5(a); (iv) the Project has been constructed and can be operated, and the Work has been performed, in compliance with all Environmental Laws; (v) Developer has not received any notice of a pending or threatened Claim, or inquiry by any Governmental Authority or other Person relating to any actual or alleged violations of Environmental Laws or any actual or potential obligation on the part of Developer to investigate or take any other action relative to any Regulated Material or threatened Release of any Regulated Material, in each case, related to the Project, and is and has been in compliance with all Environmental Laws; (vi) Developer has not entered into or agreed to any decree or order with any Governmental Authority and Developer is not subject to any Judgment relating to compliance with any Environmental Law or to the investigation or cleanup of Regulated Materials; (vii) neither Developer nor any other Person has generated, transported, treated, stored, disposed of, arranged to be disposed of, Released or threatened to Release any Regulated Materials at, on, from or under the Site in violation of, or so as would reasonably be expected to result in liability under, any Environmental Laws; (viii) Developer has not assumed any liabilities or obligations arising under any Environmental Law in connection with the Project; and (ix) Developer has not utilized any underground storage tanks (“USTs”) or Equipment using PCBs or asbestos in the conduct of its operations at the Site. For the avoidance of doubt, compliance with Environmental Laws includes performance of all studies required or recommended under Environmental Law to assess the impacts of the Project on the environment, wildlife, or cultural resources and the development and implementation of best management practices and mitigation measures to reduce or avoid impacts to environmental, wildlife, or cultural resources, including, as applicable, an Avian Protection Plan, Bird and Bat Conservation Strategy, Conservation Agreement, Eagle Conservation Plan, and a Cultural Resources Treatment Plan.

(c) No Environmental Law imposes any obligation upon Developer or PacifiCorp arising out of or as a condition to any transaction contemplated by this Agreement or any other Project Document, including (i) any requirement to modify or to transfer any Developer Permit, (ii) any requirement to file any notice or other submission with any Governmental Authority, (iii) the placement of any notice, acknowledgment or covenant in any land records, or (iv) the modification of or provision of notice under any Contract, consent order or consent decree. No Lien has been placed upon any of Developer's currently-owned properties related to the Project under any Environmental Law.

#### **Section 4.10 Title to Properties.**

(a) Developer has good and marketable title to the Project assets (whether tangible or intangible, and whether real property, personal property, or mixed real and personal property) free and clear of all Liens, except for Permitted Liens.

(b) At the Closing, PacifiCorp will acquire good and marketable title to the Development Assets, free and clear of all Liens, except for Permitted Liens.

#### **Section 4.11 Real Estate.**

(a) The Leases constitute the sole real property leases which are required in connection with the Project, including the design, engineering, supply, construction, installation, testing, commissioning, operation and ownership of the Facility. Neither Developer nor any of its Affiliates owns any real property associated with the Project. The Leases are in full force and effect, and the applicable landlords under the Leases have not given Developer or any of its Affiliates any notice of breach, default or termination of any of the Leases. There exists no breach, default, or event or condition which, with the giving of notice or the passage of time or both, would constitute a breach or default under the Leases either by Developer or the applicable landlord. The rent, fees, and other sums due and payable under the Leases will be or have been paid through the Closing Date. There exists no lease superior to the Leases, and there is no mortgage, deed of trust, or security interest which may disturb the Leases, as long as there is no tenant default under the Leases. The Leases are free and clear of all Liens other than Permitted Liens.

(b) The Easements constitute the sole easements which are required for the Project, including the design, engineering, supply, construction, installation, testing, commissioning, operation and ownership of the Facility. The Easements are in full force and effect, and the applicable land downers under the Easements have not given Developer or any of its Affiliates any notice of breach, default or termination of any of the Easements. There exists no breach, default, or event or condition which, with the giving of notice or the passage of time or both, would constitute a breach or default under the Easements either by Developer or the applicable landowner. Any amounts due and payable under the Easements will be or have been paid through the Closing Date. There is no mortgage, deed of trust, or security interest which may disturb the Easements, as long as there is not default by grantee under the Easements. The Easements are free and clear of all Liens other than Permitted Liens.

(c) At the Closing, Developer will assign the Leases and the Easements to PacifiCorp, free and clear of all Liens other than Permitted Liens. Developer has delivered to PacifiCorp true, correct and complete copies of (i) the Leases, (ii) any Easements with respect to the Real Property or the Site,

and (iii) the most recent leasehold title insurance policy (together with exceptions thereto) and survey with respect to the Real Property and the Site that are in the possession of Developer.

(d) Developer has delivered to PacifiCorp true, correct and complete copies of all Contracts providing for the sale, lease, transfer or other disposition, including any option Contracts, of or with respect to the Real Property or the Site.

(e) Except as set forth on Schedule 4.11, there is no pending appropriation or condemnation Claim of which Developer or any of its Affiliates has been notified, and there is no contemplated or threatened appropriation or condemnation Claim, in each case, affecting the Real Property or the Site or any part thereof, or any sale or other disposition of the Real Property or the Site or any part thereof in lieu of condemnation;

(f) To Developer's Knowledge, except for assessments occurring on a regular basis in accordance with applicable Law or as a result of the sale of the Development Assets contemplated by this Agreement, there is no pending or contemplated reassessment of any parcel included in the Site that is reasonably expected to increase the real estate Tax assessment for such parcels; and

(g) There is no violation of any applicable Law relating to or affecting the Real Property or the Site.

#### **Section 4.12 Project Documents; Representations and Warranties in Project Documents.**

(a) Set forth on Schedule 4.12(a) is a list of all Contracts (including all amendments, supplements, waivers, letter agreements, interpretations and other documents amending, supplementing or otherwise modifying or clarifying such Contracts) to which Developer or its Affiliates is a party or by which Developer or its Affiliates or their respective property is bound that, in each case, may affect the Project or any transaction contemplated by this Agreement and (i) the termination or cancellation of which would reasonably be expected to result in a Material Adverse Change, or (ii) have a value of Twenty-Five Thousand Dollars (\$25,000) or more.

(b) All representations and warranties made by Developer in each Project Document (other than this Agreement) are true and correct in all material respects as of the date made or deemed made pursuant to this Agreement, and, to Developer's Knowledge, all representations, warranties and other factual statements made by each Project Party other than Developer in the Project Documents are true and correct in all material respects as of the date made or deemed made pursuant to this Agreement except, in each case, for any such representations and warranties which are not true and correct in all materials but which would not reasonably be expected to result in a Material Adverse Change.

(c) All Project Documents required for the ownership, development, construction, operation and maintenance of the Project are in full force and effect.

(d) Except as set forth on Schedule 4.12(d), no event has occurred that constitutes or, with the giving of notice or passage of time, or both, would constitute, (i) a Developer Default under this Agreement, (ii) a default by Developer under any other Project Document to which it is a party, or (iii) to Developer's Knowledge, a default by any other Project Party under any Project Document to which it is a party and which, in the case of clause (ii) or (iii) would reasonably be expected to result in a Material Adverse Change.

(e) No Claim, action, proceeding or investigation is pending, or to Developer's Knowledge, threatened, that challenges the enforceability of this or any other Project Document.

#### **Section 4.13 Sufficiency of Assets.**

(a) Developer has, or will have at the Closing, the power and right to sell, convey, deliver, transfer and assign to PacifiCorp, the Development Assets free and clear of all Liens, other than Permitted Liens.

(b) Other than the Project Documents, the Developer Permits, the Transferred Intellectual Property, the Contractor Guaranties, the Transferred Warranties, the Improvements, the Equipment, the Materials, the Leases and the Easements, there are no other material assets or rights of any kind, whether tangible or intangible, real or personal, owned or held by Developer or any of its Affiliates relating to, associated with or concerning the Project.

(c) To Developer's Knowledge, there are no adverse Claims of ownership to the Project or any assets of the Project, including the Development Assets, and neither Developer nor any of its Affiliates has received any notice that any Person has asserted a Claim of ownership or right of possession or use in or to the Project or any assets of the Project, including the Development Assets.

(d) The Project Documents, the Developer Permits, the Transferred Intellectual Property, the Contractor Guaranties, the Transferred Warranties, the Improvements, the Equipment, the Materials, the Leases and the Easements, constitute all of the material Contracts, Permits, assets and properties necessary to develop, permit, design, engineer, supply, construct, install, test, commission, use, operate and maintain the Facility in accordance with applicable Law, Prudent Industry Practice, the Developer Permits and the Project Documents.

#### **Section 4.14 Renewable Energy Incentives; Tax Incentives.**

(a) To Developer's Knowledge, no facts or circumstances exist that would reasonably be expected to hinder, impair, restrict, limit or disqualify the Project from qualifying for, and producing and giving rise to, the Renewable Energy Incentives.

(b) Neither the Project nor any property that is part of the Project has been placed in service for federal income tax purposes, and there has been no "original use" (within the meaning of Section 48 or Section 168(k) of the Code) of the Project or any property that is part of the Project. Neither Developer nor any Developer Affiliate has claimed or intends to claim any depreciation deductions, amortization deductions, the ITC, the PTC, or other income tax credits or deductions with respect to the Project or any property that is part of the Project. No grants have been provided by the United States, a State, or a political subdivision of a State for use in connection with the Project within the meaning of Section 45(b)(3)(A)(i) of the Code. No proceeds of any issue of State or local governmental obligations have been used to provide financing for the Project within the meaning of Section 45(b)(3)(A)(ii) of the Code, the interest on which is exempt from tax under Section 103 of the Code. No "subsidized energy financing" within the meaning of Section 45(b)(3)(A)(iii) of the Code has been provided directly or indirectly under a federal, state, or local program provided in connection with the Project (within the meaning of Section 45(b)(3)(A)(iii) of the Code.) No application with respect to any of the foregoing grants, rebates or financings has been filed or submitted with respect to the Project. No portion of the Site is currently enrolled in the U.S. Department of Agriculture's Conservation Reserve Program. No



property that is part of the Project is (i) “tax-exempt bond financed property” or “tax-exempt use property” within the meaning of Section 168 of the Code or (ii) imported property of the kind described in Section 168(g)(6) of the Code.

(c) For purposes of the Begin Construction Guidance, construction of the Project, any PTC Facility in the Project, and any property that is part of the Project began not earlier than [YEAR] and no later than [YEAR]. The factual certifications contained in Schedule 4.14(c) are accurate as to Developer’s efforts to begin construction within the meaning of the Begin Construction Guidance. For purposes of the Begin Construction Guidance (including Section 4.04 of IRS Notice 2013-29 and Section 5.04 of Notice 2016-31), all PTC Facilities in the Project and any property that is part of the Project will be operated as part of a single project and treated as a single facility.

(d) The transactions contemplated by this Agreement will not have an adverse effect on the continuing validity and effectiveness of any Tax exemption, Tax holiday, other Tax-sharing arrangement or Tax incentives for which the Project is currently eligible. The Site has not been subject to a preferential or special property tax assessment, value limitation, or other favored tax treatment. The Site is not, has not been, and will not be (as a result of the Closing and the transactions contemplated hereby) subject to rollback Taxes.

(e) Developer has no legal obligation, absolute or contingent, to any Person other than PacifiCorp to sell or effect a sale of all or any portion of the Project, including any electric power, net metering credits, Environmental Attributes or Renewable Energy Credits in connection with or related to the Project. All Renewable Energy Incentives (including all Renewable Energy Credits) and Environmental Attributes shall belong to PacifiCorp.

#### **Section 4.15 Financial Resources.**

Developer has the financial resources, assets, operating capital, credit and other resources and means necessary to fulfill its obligations under this Agreement and the other Project Documents to which it is or will be a party on a timely basis.

#### **Section 4.16 Construction of the Facility; Expertise.**

(a) To Developer’s Knowledge, there exist no facts or circumstances that reasonably could be expected to hinder, delay, restrict or prevent: (a) the ability of the Facility to be developed, permitted, designed, engineered, supplied, constructed, installed, tested and commissioned in all material respects in accordance with the terms and conditions of the Project Documents, applicable Laws, the Developer Permits and Prudent Industry Practice; (b) the Facility from achieving Substantial Completion on or prior to the Guaranteed Substantial Completion Date; or (c) the Facility from achieving Final Acceptance in accordance with the Project Schedule.

(b) The assets constituting the Project to be sold, transferred, conveyed, assigned and delivered to PacifiCorp pursuant to this Agreement or any other Project Document, include all of the assets used, held by or necessary or convenient for the ownership and operation of the Project, and collectively provide to PacifiCorp an operational Project at the Site in accordance with all Developer Permits, applicable Law and Prudent Industry Practice, and no Person other than Developer or PacifiCorp owns or has any rights in or to the Project.

(c) The development, permitting, design, engineering, supply, construction, installation, testing, commissioning and operation of the Project in accordance with this and the other Project Documents is in compliance with all Developer Permits, applicable Law and Prudent Industry Practice.

(d) Each of Developer and Contractor has substantial experience and expertise in the development, design, engineering, construction, and management of turnkey construction of renewable energy facilities such as the Facility and the capability to carry out the Work in accordance with terms and conditions of this Agreement and the other Project Documents, and acknowledges that PacifiCorp is relying on such experience, expertise and capability in entering into this Agreement.

(e) Neither Developer nor, to Developer's Knowledge, Contractor has relied on any information supplied by PacifiCorp regarding the environmental condition or Regulated Materials at, on, or under the Site in order to make any representation or warranty in this Agreement accurate or not misleading.

#### **Section 4.17 Reports.**

Developer has delivered to PacifiCorp a true, accurate and complete copy of each Report. The Reports neither individually nor in the aggregate indicate any event, result, occurrence, development, fact, change or effect of whatever nature or kind that has or would reasonably be expected to result in a Material Adverse Change. To Developer's Knowledge, there has been no material change in any findings or conclusions of any Report delivered by Developer to PacifiCorp other than for which Developer has redelivered such Report to PacifiCorp in final form as revised to address any such change.

#### **Section 4.18 Due Diligence.**

Developer has made available for PacifiCorp's review all material information in its possession or control or in the possession or control of its Affiliates relating to the Project in connection with PacifiCorp's due diligence examination conducted with respect to the transactions contemplated by this Agreement. To Developer's Knowledge, none of the information provided by Developer or its Affiliates to PacifiCorp contains any untrue or incorrect statement of fact, or omits to state any fact necessary to make the information, in light of the circumstances in which it was provided, not misleading.

#### **Section 4.19 Disclosure.**

No representation or warranty by Developer in this Agreement or any Project Document to which it is a party contains or, as of the Effective Date and any date on which this representation and warranty is made or deemed made, will contain any untrue statement of a material fact, or omits or, as of the Effective Date and any date on which this representation and warranty is made or deemed made, will omit any material fact necessary to make the statements or facts contained herein or therein not misleading.

#### **Section 4.20 No Material Adverse Change.**

No Material Adverse Change has occurred and is continuing and, to Developer's Knowledge, no event, result, occurrence, development, fact, change or effect of whatever nature or kind exists that would reasonably be expected to result in a Material Adverse Change.

#### **Section 4.21 Brokers.**

All negotiations relative to this Agreement and the other Project Documents and the transactions contemplated hereby and thereby have been carried out by Developer directly with PacifiCorp without the intervention of any Person on behalf of Developer in such manner as to give rise to any valid Claim by any Person against PacifiCorp or any of its Affiliates for a finder's fee, brokerage commission or similar payment.

### **ARTICLE 5 REPRESENTATIONS AND WARRANTIES OF PACIFICORP**

PacifiCorp hereby represents and warrants to Developer that all of the statements contained in this ARTICLE 5 are true and correct (a) as of the Effective Date, except to the extent such representations and warranties are specifically made as of a particular date (in which case such representations and warranties will be true and correct as of such date), and (b) on each date such statements are made or are deemed made pursuant to this Agreement.

#### **Section 5.1 Organization, Standing and Power.**

PacifiCorp is duly formed, validly existing and in good standing under the applicable Laws of the jurisdiction of its formation. PacifiCorp has the requisite corporate power and authority to own, operate and lease its properties and assets and to carry on its business as now being conducted and as proposed to be conducted pursuant hereto.

#### **Section 5.2 Authority; Execution and Delivery.**

PacifiCorp has full corporate power and authority to execute and deliver this Agreement and the Project Documents to which it is or will be a party in connection with the transactions contemplated hereby, to perform its obligations hereunder and thereunder, and to complete the transactions contemplated hereby and thereby. The execution and delivery by PacifiCorp of this Agreement and the Project Documents to which it will be a party, and the performance by Developer of its obligations hereunder and thereunder, have been duly and validly authorized by all necessary corporate action.

#### **Section 5.3 Binding Agreement.**

This Agreement and the Project Documents to which PacifiCorp is, or will be, a party have been, or will be when delivered, duly executed and delivered by PacifiCorp and, assuming due and valid authorization, execution and delivery thereof by Developer and each other party thereto, this Agreement and the Project Documents to which it is, or will be, a party are, or will be when delivered, valid and binding obligations of PacifiCorp enforceable against PacifiCorp in accordance with their terms, subject to applicable bankruptcy, insolvency, reorganization, moratorium or other similar applicable Laws relating to or affecting the enforcement of creditors' rights generally and to general principles of equity.

#### **Section 5.4 No Conflicts.**

The execution and delivery by PacifiCorp of this Agreement and the Project Documents to which it is a party does not, and the performance by PacifiCorp of its obligations hereunder and thereunder, and the completion of the transactions contemplated hereby and thereby, shall not:

(a) conflict with or result in a violation or breach of any of the terms, conditions or provisions of PacifiCorp's organizational documents;

(b) assuming all of the consents and approvals set forth on Schedule 5.4 (the "PacifiCorp's Consents") have been obtained or given, result in a breach, default or violation (or give rise to any right of termination, cancellation or acceleration) under any of the terms, conditions or provisions of any material Contract or Permit (with or without notice or lapse of time or both) with respect to which PacifiCorp is a party or by which PacifiCorp or its assets may be bound, except for such breaches, defaults or violations (or rights of termination, cancellation or acceleration) as to which requisite waivers or consents have been obtained in writing (true and correct copies of which have previously been furnished to Developer) or which would not reasonably be expected to result in a Material Adverse Change; or

(c) assuming all of the PacifiCorp's Consents have been obtained or given, conflict with or result in a violation or breach in any term or provision of any applicable Law applicable to PacifiCorp.

### **Section 5.5 PacifiCorp Permits; PacifiCorp Regulatory Approvals.**

(a) Schedule 5.5(a) sets forth all Permits required with respect to the design, engineering, development, construction, startup, testing, commissioning and completion of the Project that are the responsibility of PacifiCorp to obtain (the "PacifiCorp Permits").

(b) Except as set forth on Schedule 5.5(b), no consent or approval of, filing with or notice to, any Governmental Authority by PacifiCorp (each, a "PacifiCorp Regulatory Approval") is required in connection with the execution, delivery and performance by PacifiCorp of this Agreement or any of the Project Documents to which it is or will be a party or the completion of the transactions contemplated hereby or thereby.

### **Section 5.6 No Proceedings.**

Except as set forth on Schedule 4.6, there are no actions, suits, investigations or proceedings by or before any Governmental Authority or arbitrator pending against PacifiCorp or, to PacifiCorp's Knowledge, threatened against PacifiCorp, which would reasonably be expected to result in a Material Adverse Change.

### **Section 5.7 Brokers.**

All negotiations relative to this Agreement and the other Project Documents and the transactions contemplated hereby and thereby have been carried out by PacifiCorp directly with Developer without the intervention of any Person on behalf of PacifiCorp in such manner as to give rise to any valid Claim by any Person against Developer or any of its Affiliates for a finder's fee, brokerage commission or similar payment.

## **ARTICLE 6 CREDIT REQUIREMENTS**

### **Section 6.1 Credit Requirements.**

(a) At any time during the Term, Developer may have to post Credit Support Security in the amounts outlined on the Credit Matrix based upon its Credit Rating or that of the entity providing credit assurances as Credit Support Security on behalf of Developer, and the size of the Project. If the required Credit Support is greater than zero dollars (\$0.00), upon the request of PacifiCorp, Developer shall provide the Credit Support in the form of: (x) a guaranty, in the form set forth in Appendix S from a Person acceptable to PacifiCorp in its discretion; (y) a Letter of Credit, in the form set forth in Appendix X, from a Person acceptable to PacifiCorp in its discretion; or (z) a Cash Escrow.

(b) If requested by PacifiCorp, Developer shall, within thirty (30) days, provide PacifiCorp with copies of its most recent annual and quarterly financial statements prepared in accordance with GAAP.

## **ARTICLE 7 GENERAL OBLIGATIONS OF DEVELOPER**

### **Section 7.1 Developer's General Obligations.**

(a) Developer's general obligation under this Agreement is to provide PacifiCorp with the Project for the Contract Price, completed in accordance with the terms of this Agreement.

(b) The finished Work shall be complete in all respects. The intent of this Agreement, the Appendices, Exhibits and the Scope of Work is for Developer to provide to PacifiCorp an engineered solution of first class workmanship in each and every respect. All hardware shall be manufactured, fabricated, assembled, finished and documented with workmanship of the highest quality throughout, and all of its components shall be new and suitable for the purposes specified. In addition, the solution shall be engineered, implemented, tested and documented in accordance with the Prudent Industry Practice and shall be suitable for the purpose specified.

(c) The Work shall be manufactured and executed in the manner set forth in the Technical Specification or, where not so set forth, to the reasonable satisfaction of PacifiCorp's Representative and all Work on the Site shall be carried out in accordance with Prudent Industry Practice and such reasonable directions as PacifiCorp or PacifiCorp's Representative may give.

(d) Developer shall, in accordance with the terms and conditions of this Agreement, employ Contractor and the Subcontractors who in turn shall provide all labor, services, management, supervision, Equipment, Materials, tools, facilities, utilities, Permits and other aspects of the Work necessary for the design, engineering, construction, startup, testing, commissioning and completion of the Facility including those items specifically required in Appendix A.

(e) Developer shall: (i) cause Contractor and Subcontractors to carry out and complete the Work in accordance with the requirements, duties and obligations imposed on Contractor and Subcontractors pursuant to Prudent Industry Practice and all applicable Site conditions; (ii) ensure that Contractor and every Subcontractor designs and performs the Work so as to achieve the objective of a

Project which complies with applicable Laws and the other requirements of this Agreement and their respective Project Documents; (iii) have the resources, experience, qualifications and capabilities as are required to fully perform its obligations under this Agreement; (iv) keep PacifiCorp informed as to the status of deliveries, and if any such Materials or Equipment are not being properly manufactured or fabricated in accordance with the requirements of the Project Documents and, if different, the Contracts pursuant to which they were purchased, or do not otherwise conform with such requirements, promptly making PacifiCorp aware thereof and taking necessary corrective action; (v) acquire the Site, all Permits necessary for the design, engineering, development, construction, startup, testing, commissioning, completion, ownership and operation of the Facility, and the Emission Reduction Credits consistent with the Project Schedule; (vi) cause each of the conditions precedent to complete the Closing set forth in Section 2.7 to occur; and (vii) maintain at least one office in the State of Wyoming.

### **Section 7.2 Contractor and Subcontractors.**

(a) In connection with its performance of this Agreement, Developer shall either (i) cause Contractor and each Subcontractor to purchase Equipment from the Approved Subcontractors set forth in Appendix C, or (ii) elect to use vendors (including, for the avoidance of doubt, substation and transmission line consultants) that are reasonably satisfactory to PacifiCorp, in which event, Developer shall provide PacifiCorp a Change Order Request for a price adjustment to the Contract Price. A Change Order for a price adjustment to the Contract Price shall be approved by PacifiCorp in accordance with ARTICLE 13.

(b) Developer shall be fully liable to PacifiCorp hereunder for all acts and omissions of Contractor and each Subcontractor to the same extent as though any such act or omission had been performed or omitted to be performed by Developer directly. In no case shall Developer's engagement of Contractor or any Subcontractor relieve Developer of any of its obligations or Liabilities hereunder and, notwithstanding the use of Contractor or any Subcontractors hereunder, Developer shall remain fully and primarily liable to the PacifiCorp for the full and complete performance of Developer's obligations hereunder.

(c) PacifiCorp shall have no contractual obligation to, and shall not be deemed to be in privity with, Contractor or any Subcontractor; provided, however, that in the event this Agreement is terminated, then PacifiCorp may require Developer to assign one or more of the Project Documents and other Contracts to PacifiCorp in accordance with Section 30.3. Developer shall include in all Contracts with Contractor, any Subcontractors and all other vendors, a consent by such Contractor, Subcontractor(s) and other vendor(s) in advance to such future assignment(s).

### **Section 7.3 Compliance With Law.**

(a) Developer shall comply with all applicable Laws, and shall cause Contractor and each Subcontractor to comply with all applicable Laws with respect to the Work to be performed by such Contractor or Subcontractor. Developer shall be responsible for ascertaining the nature and extent of any applicable Law, which may affect the Work, the Facility or the operation of the Facility prior to Substantial Completion, or the Site as a result of the performance by Developer of its obligations under this Agreement. Developer shall ensure that all of the Work complies with applicable Laws, Prudent Industry Practice and the Developer Permits and the product manuals, copies of which are included in Appendix F.

(b) Subject to the preceding paragraph, Developer shall be responsible for fines and penalties which may arise (including those that PacifiCorp pays or becomes liable to pay) as a direct result of Developer's non-compliance with applicable Law, or as a result of PacifiCorp's inability to operate the Project in compliance with applicable Law due to the inaccuracy of Developer's representations and warranties or the breach by Developer of any of its obligations under this Agreement, other than any fines and penalties arising from any act or omission of PacifiCorp or its employees and agents.

#### **Section 7.4 Permits.**

(a) Developer shall obtain and maintain in accordance with applicable Law all Developer Permits required in connection with the design, engineering, development, construction, startup, testing, commissioning, completion, ownership and operation of the Project in accordance with this Agreement and the other Project Documents. PacifiCorp shall be properly included as the permittee, co-permittee or authorized party with respect to all Developer Permits.

(b) Developer shall, and cause Contractor and the Subcontractors to, reasonably support PacifiCorp in obtaining the PacifiCorp Permits, including providing such engineering and environmental data and statistical information as may be reasonably requested by PacifiCorp.

(c) Developer shall, and cause Contractor and any Subcontractor to, at its or their sole cost and expense, obtain and maintain all applicable construction and construction-related Permits which are required by applicable Law in order to undertake and perform the Work and their respective obligations under the Project Documents to which they are a party.

#### **Section 7.5 Opportunities for Other Contractors; Labor Relations.**

(a) Developer shall, in accordance with PacifiCorp's reasonable instructions, afford to other contractors identified by PacifiCorp all reasonable opportunities for carrying out their work at the Site, provided that the same shall not materially obstruct or disturb the progress of the Work. Developer shall also afford access to PacifiCorp's employees, including employees who will operate and maintain the Facility, to perform their work at the Site.

(b) Developer shall be responsible for coordinating PacifiCorp's contractors and employees as it relates to mobilization and laydown space requirements, interconnection with Site construction power and temporary storage facilities, water, emergency evacuation requirements, trash/waste disposal, Site access, temporary office space, safety and security and other Site regulations and requirements. Each of PacifiCorp's contractors shall be responsible for any costs with respect to that contractor's work, including mobilization and laydown space requirements, interconnection with Site construction power and temporary storage facilities, water, emergency evacuation requirements, trash/waste disposal, Site access, safety and security and other Site regulations and requirements.

(c) Developer agrees that Claims resulting from the concurrent PacifiCorp contractor activities shall be brought to PacifiCorp's attention within ten (10) Business Days of their occurrence. PacifiCorp and Developer agree to informally resolve Claims as they occur and otherwise in accordance with ARTICLE 32.

## **Section 7.6 Labor and Employment.**

(a) Developer shall, and shall cause Contractor and each Subcontractor to, ensure that all construction Contracts and subcontracts of any tier for the Project be awarded (i) in compliance with [STATE] State and Federal and all other applicable Law and (ii) on a Merit Shop basis or (iii) through a project labor Contract. Contractor and each Subcontractor shall, subject to applicable Law or applicable collective bargaining agreement, and to the fullest extent commercially reasonable, perform the Work using [STATE] labor. Any Contract or subcontract shall be awarded on the basis of the best value to the Project including an evaluation of the Subcontractors' ability to work in harmony with others working on the Project including Contractor, the existing labor force, Governmental Authorities, and without regard to whether or not the successful bidder is signatory or non-signatory to agreements with labor organizations. Developer shall, and shall cause Contractor and each Subcontractor to, refrain from any discrimination against any employee on the basis of such employee's membership in any labor organization, or his or her lack of such membership. All employees working on the Project shall be permitted to exercise their right to engage in protected concerted activity, as defined in Section 7 of the National Labor Relations Act, as amended, or to refrain from doing so, without any discrimination or other adverse consequence. Developer shall, and shall cause Contractor and each Subcontractor to, comply with applicable Law regarding labor relations and employment matters. Any administrative or civil proceedings filed against a Project Party shall be promptly reported to PacifiCorp. Nothing in this provision shall affect any obligation of a Subcontractor under a lawful collective bargaining agreement applicable to some or all of such Person's operations on the Project.

(b) Developer shall be aware of, and familiar with, all collective bargaining agreements, which do or may pertain to or affect the work under this Agreement or other work at the Site. Developer shall plan and conduct its operations so that its employees and subcontractors of any tier will work harmoniously with PacifiCorp employees and other workers employed on the same or related projects to assure that there will be no delays, work stoppages, excessive labor costs, or other labor difficulties. Developer shall ensure that Contractor and each and every Subcontractor comply with all applicable Laws pertaining to such labor.

(c) Scarcity and Quality of Labor. Developer shall have no Claim for an extension of the Time for Completion or a Claim for loss, damage or additional costs and expenses of any kind in respect of any alleged or proved unsuitability, scarcity, inefficiency of the labor it may engage or wish to engage.

(d) Equal Employment Opportunity and Other Non-Discrimination Clauses.

(i) Developer shall, at all times, comply with all applicable Laws applicable to employees, including those governing wages, hours, desegregation, employment discrimination, employment of minors, health and safety. Developer shall comply with equal opportunity applicable Laws to the extent that they are applicable.

(ii) Developer shall indemnify, defend and hold harmless PacifiCorp Indemnified Parties from and against all losses, costs and damages by reason of any violation thereof and from any liability, including fines, penalties and other costs arising out of Developer's failure to so comply.



(iii) Developer shall execute and deliver to PacifiCorp a completed Certificate of Compliance using PacifiCorp's form of Certificate before starting to perform Work under this Agreement.

(e) Workers Compensation. Developer shall comply with all applicable Laws regarding workers' compensation and shall, prior to commencing Work, furnish proof thereof satisfactory to PacifiCorp.

#### **Section 7.7 Authority for Access for Inspection.**

Inspection of the Work at the Site and attendance at meetings (whether conducted in-person, telephonically or through similar medium) relating to the Project which are attended by Developer and Contractor or Subcontractor and related to status, progress, quality, scope, schedule and coordination shall at all times be afforded by Developer to PacifiCorp, PacifiCorp's Representative and such other Persons as shall be designated by PacifiCorp or PacifiCorp's Representative. PacifiCorp, in its inspection, shall give due consideration to the needs of Developer to carry out Developer's obligations and strive not to hinder or unduly impede Developer while carrying out such inspection. PacifiCorp, in its inspection, may observe the progress and quality of the Work to determine if the Work is proceeding in accordance with the Project Documents. Inspections under this Section 7.7 are solely for the benefit of PacifiCorp and any inspection or failure to inspect and any objection or failure to object by PacifiCorp shall not (i) relieve Developer, Contractor, or any Subcontractor of its respective obligations under any Project Document or (ii) be used as evidence that PacifiCorp agreed that Developer, Contractor, or any Subcontractor had fulfilled any obligations under any Project Document or that PacifiCorp had waived any of its rights under any Project Document.

#### **Section 7.8 Developer's Use of PacifiCorp's Drawings.**

Developer may use PacifiCorp's Drawings only for fulfilling its obligations under this Agreement. PacifiCorp's Drawings, specifications and other information submitted by PacifiCorp to Developer shall remain the property of PacifiCorp. Such materials shall not, without the written consent of PacifiCorp, which consent may be withheld in PacifiCorp's discretion, be used, copied or communicated to a third party, other than Contractor, by Developer unless necessary to fulfill the purposes of this Agreement, and then pursuant to a full reservation of rights in PacifiCorp. PacifiCorp makes no representations or warranties as to the accuracy, completeness or suitability of PacifiCorp's Drawings and Developer shall not rely on such PacifiCorp's Drawings.

#### **Section 7.9 Contractor Drawings and Manuals.**

(a) Developer shall at all times keep a copy of the most recent version of the Contractor Drawings and Manuals at Developer's office on the Site to be made available for PacifiCorp's review. In addition, Developer shall provide and make available to PacifiCorp electronic versions of the Contractor Drawings and Manuals accessible by PacifiCorp through a file transfer protocol site to be maintained by Developer.

(b) Developer shall cause to be set forth in the Contractor Drawings and Manuals provided to PacifiCorp such information as is required to operate and maintain the Work, including to the extent applicable, recommended operating and maintenance procedures, system descriptions, product catalogs, drawings, design sheets, specifications, logic diagrams, maintenance and instruction sections, spare parts

lists, any vendor-supplied training documents, and as otherwise set forth in Appendix F and Appendix G. The Contractor Drawings and Manuals shall be (i) prepared in accordance with the Technical Specification, Appendix F and Appendix G and when completed, shall be in sufficient detail to accurately represent the Project as constructed. The Contractor Drawings and Manuals shall be maintained and be available, with up-to-date drawings, specifications and design sheets, for the training of PacifiCorp's personnel as set forth in Section 7.10.

(c) Developer shall prepare initial system descriptions, design basis documents, and operational guidelines for the Project and deliver such to PacifiCorp for its review at least one (1) year prior to the Guaranteed Substantial Completion Date.

(d) At least sixty (60) days prior to the expected Guaranteed Substantial Completion Date, Developer shall provide PacifiCorp with initial drafts of the final Contractor Drawings and Manuals for review (the "Draft Manuals"). The Draft Manuals shall contain such information described in Section 7.9(b), other than the drawings which, in accordance with this Section 7.9, are being maintained so as to be up-to-date. Two (2) complete sets of the Draft Manuals shall be provided to PacifiCorp at least sixty (60) days prior to Substantial Completion and shall be a condition to the achievement of Substantial Completion.

(e) Developer shall provide to PacifiCorp both hard and electronic final copies of the Contractor Drawings and Manuals. Developer shall provide to PacifiCorp five (5) final hard copies of the Contractor Drawings and Manuals within sixty (60) days after achievement of Substantial Completion. PacifiCorp shall not be required to deliver the Notice of Final Acceptance until all such Contractor Drawings and Manuals have been so delivered.

(f) Any modifications to the Contractor Drawings and Manuals made necessary as a consequence of any Final Punch List items or modifications to the Work shall be issued as addenda to the Contractor Drawings and Manuals within sixty (60) days following completion thereof.

## **Section 7.10 Training.**

(a) Training of PacifiCorp's personnel (or other employees or agents of PacifiCorp) shall be given by Developer or Contractor prior to the Substantial Completion Date as required by the Technical Specification, in accordance with the timetable to be agreed upon with PacifiCorp prior to the Substantial Completion Date and shall include training (including on-site and classroom) in connection with the operation and maintenance of the Project. Such training shall be provided directly to PacifiCorp's personnel as specified by PacifiCorp in Appendix A and shall be conducted by a trainer experienced in the operation and maintenance of the Project.

(b) As more fully described in Appendix A, starting at least sixty (60) days prior to the first energization of the Facility at the Site and continuing until Final Acceptance, Developer shall oversee the development of and provide qualified and experienced support for PacifiCorp's execution of a practical and participatory training program at the Site for an adequate number of employees designated by PacifiCorp, which personnel shall be experienced in renewable electric generating facility operations appropriate to their respective job descriptions.

## **Section 7.11 Safety.**

(a) Developer shall be solely responsible for being aware of and initiating, maintaining and supervising compliance with all safety Laws, regulations, precautions, and programs in connection with the performance of this Agreement, including the provisions of Section 9.2, Section 9.6, and Section 9.9. Developer's or Contractor's health and safety plan for the Project is attached hereto as Appendix T (the "Developer Safety Assurance Program"), which Developer acknowledges and agrees is no less stringent than PacifiCorp's form of Safety Assurance Plan attached hereto as Appendix L. Developer is responsible for ensuring that the Developer Safety Assurance Program complies in all material respects with the requirements of PacifiCorp's Safety Assurance Program set forth in Appendix L. Prior to the start of, and throughout the performance of, the Work, Developer shall ensure that each of its employees, together with all employees of its Contractor and each Subcontractor, are fully informed concerning all safety, health, and security regulations pertaining to the Work, and the Developer Safety Assurance Program. Developer shall conduct all operations under this Agreement in such a manner as to avoid the risk of bodily harm to persons or risk of damage to any property.

(b) In the event Developer fails to promptly correct any violation of safety or health regulations, PacifiCorp may suspend all or any part of the Work. Developer shall not be entitled to any extension of time or reimbursement for costs caused by any such suspension order. Failure of PacifiCorp to order discontinuance of any or all of Developer's operations shall not relieve Developer of its responsibility for the safety of personnel and property. Developer shall maintain an accurate record of and shall promptly report to PacifiCorp all cases of property damage in excess of One Hundred Dollars (\$100.00) and of death, occupational diseases, or injury to employees or any other third parties and incident to performance of Work under this Agreement. Developer shall promptly notify PacifiCorp and provide a copy of any safety citation issued by any Governmental Authority. Developer shall perform all Work under this Agreement in strict accordance with the Developer Safety Assurance Program.

## **Section 7.12 Intellectual Property Rights.**

(a) Developer shall not take any action that would violate or infringe any Person's Intellectual Property Rights.

(b) Developer shall, at its sole expense, settle or defend and pay any costs (including attorneys' fees) and damages awarded in connection with, and shall defend, indemnify and hold harmless each PacifiCorp Indemnified Party from and against, any and all Claims, suits or proceedings based on a Claim that any part of the Work or the ownership or operation of the Project infringes or violates any patent or copyright. PacifiCorp shall give Developer notice of any such Claim promptly after PacifiCorp has actual knowledge thereof, provided that the omission of PacifiCorp to give such notice shall not relieve Developer of its obligations hereunder except to the extent that such omission results in a failure of actual notice to Developer and Developer is damaged as a result of such failure. The provisions of ARTICLE 26 and ARTICLE 32 shall also apply to any Claim under this Section 7.12(b).

(c) In case any part of the Work or the ownership or operation of the Project is held to infringe or violate any patent or copyright and the use of the Work, or the operation of the Project is restricted or prohibited as a result thereof, Developer shall, at its sole cost and expense, at Developer's option, either (i) procure for PacifiCorp the right to continue using the Work, (ii) replace the same with non-infringing

comparable substitute Work, or (iii) modify the Work so that it becomes non-infringing; provided that such modification does not adversely affect the Work.

(d) Developer shall obtain and transfer to PacifiCorp perpetual, fully-paid licenses to use all computer programs and any other intellectual property necessary or useful for the operation of the Facility, together with all warranties related thereto.

### **Section 7.13 Developer's Representatives.**

(a) Developer shall employ one or more competent representatives (each, a "Developer's Representative"), whose name or names and details of qualifications and previous experience shall have been provided to PacifiCorp and PacifiCorp's Representative by Developer, to manage the Project and who shall have Developer's authority in respect of all matters arising out of or in connection with this Agreement and the Work.

(b) Key Personnel.

(i) Prior to beginning the Work, Developer shall provide to PacifiCorp, for its approval pursuant to Section 7.13(b)(iii), a list setting forth the name of the proposed natural Person for each Key Personnel position for itself, Contractor and all Subcontractors performing material portions of the Work. All employees assigned by Developer to perform any of Developer's obligations shall be fully qualified to perform the tasks assigned them.

(ii) All Key Personnel shall be present on the Site during working hours and at all times the Work is in progress during the times relevant to the Key Personnel's duties are applicable to the Work, and any orders or instructions which PacifiCorp or PacifiCorp's Representative may give to such Key Personnel shall be deemed to have been given to Developer.

(iii) The appointment of every Key Personnel provided for in Section 7.13(a) shall be subject to the approval of PacifiCorp or PacifiCorp's Representative, such approval to be in the discretion of PacifiCorp or PacifiCorp's Representative. Appendix H shall be amended to list all Key Personnel approved by PacifiCorp or PacifiCorp's Representative pursuant to this Section 7.13(b)(iii).

(iv) Developer shall give PacifiCorp fifteen (15) days advance written notice in the event Developer intends to remove or change any of its Key Personnel assigned to the Project or to reassign any such Key Personnel to another project. PacifiCorp shall give due consideration to any request by Developer and shall respond within fifteen (15) days to any such requests. Developer shall not remove, change or reassign any of its Key Personnel assigned to the Project without the prior written consent of PacifiCorp, such consent to be in its discretion, and then only if a suitable replacement for such representative has been approved by PacifiCorp prior to the removal of such representative.

(v) PacifiCorp shall have the right to approve Developer's senior staff on Site (in addition to its Key Personnel), and may request the removal of any of Contractor's or any Subcontractor's personnel.

(c) Objection to Representatives and Persons Employed by Developer, Contractor or Subcontractors. Developer shall remove or cause to be removed any representative or Person employed directly or indirectly by Developer, Contractor or any Subcontractor in the execution of the Work who, in the opinion of PacifiCorp, misconducts itself, is incompetent or negligent.

**Section 7.14 Developer's Personnel/Drugs, Alcohol and Firearms.**

With regard to the performance of the Work, Developer shall, and shall ensure that Contractor and any Subcontractor shall, only employ Persons qualified to perform the Work. Developer shall, at all times, enforce strict discipline and good order among its employees and the employees of Contractor and any Subcontractor. Developer shall not permit or allow the introduction or use of any firearms, illegal drugs or intoxicants upon the Work under this Agreement, or upon any of the grounds occupied, controlled, or used by Developer in the performance of the Work. Developer shall immediately remove from the Work, whenever requested by PacifiCorp, any Person considered by PacifiCorp to be incompetent, insubordinate, careless, disorderly, in violation of the above restriction on firearms, illegal drugs or intoxicating liquor, or under the influence of illegal drugs or intoxicants, and such person shall not again be employed in the performance of the Work herein without the consent of PacifiCorp.

**Section 7.15 Use of Premises and Trespassing.**

Developer shall confine the storage of materials and construction equipment to locations acceptable to PacifiCorp and in accordance with applicable Laws. Developer shall, at all times, prohibit its staff, workers and all other persons employed directly or indirectly by Developer on the Site from poaching or trespassing and any such person found so doing shall be removed from the Work and shall not again be employed in the performance of the Work without the consent of PacifiCorp.

**Section 7.16 Temporary Facilities.**

Developer shall make provisions, at its cost, for all temporary facilities necessary for the construction of the Project and the installation of the Equipment, including arrangements for the supply of telephone, office equipment, sanitary toilet facilities, compressed air and other services for the Work and shall provide and maintain all pipes, cables and services required for its operation. Developer shall provide and maintain on the Site office accommodations for itself and an office for PacifiCorp and PacifiCorp's Representative. Developer shall also install and maintain, at its own cost and expense, a system of lighting to provide a reasonable degree of illumination over the area of its Work during performance of the Work. Developer shall remove any of such temporary installations pursuant to Section 20.8.

**Section 7.17 Decisions and Instruction of PacifiCorp's Representative.**

(a) Developer shall proceed with the decisions and instructions given by PacifiCorp's Representative in accordance with this Agreement. Such decisions or instructions may be given orally, but shall be effective only when confirmed in writing unless and only to the extent that such instructions are necessary to remedy an emergency situation that would make the provision of written instructions impractical.

(b) If Developer disputes or questions any decision or instruction by PacifiCorp's Representative, Developer shall give notice to PacifiCorp within five (5) days after receipt thereof,

giving reasons therefor. PacifiCorp shall within a further period of five (5) days by notice to Developer with reasons, confirm, reverse or vary such decision or instruction. If Developer disagrees with PacifiCorp's response, or if PacifiCorp fails to reply to Developer's notice within the stipulated days, the matter shall be resolved in accordance with ARTICLE 32. Notwithstanding the foregoing, to the extent that an instruction by PacifiCorp's Representative is necessary to remedy an emergency situation and Developer disputes the action requested in such instruction, then Developer shall nonetheless comply with PacifiCorp's instruction and the dispute shall be resolved as provided in ARTICLE 32.

### **Section 7.18 Cooperation Between the Parties.**

The Parties are expected to be called upon to make decisions regarding matters not reasonably anticipated in order to meet their respective obligations under this Agreement. In making such decisions, the Parties shall cooperate with the intent to improve the performance of the Work and reduce the likely operating and maintenance impacts. The vehicle for reaching agreement and causing a change to occur in the Work or the schedule for performance or the Guaranteed Substantial Completion Date or additional substantiated costs as a result of errors and omissions in information supplied by PacifiCorp shall be by Change Order in accordance with ARTICLE 13. Additionally, if errors or omissions in information provided by Developer affect PacifiCorp's or its other contractors' work during construction of the Facility, PacifiCorp shall be entitled to make a Claim against Developer for PacifiCorp's costs as the result of errors or omissions.

### **Section 7.19 Spare Parts Inventory.**

(a) Developer shall provide and include in the Contract Price all spare parts and consumables necessary for the installation, startup and commissioning of the Facility and the complete performance of the Work through Final Acceptance. Such spare parts and consumables shall be located at the Site and immediately available to Developer, Contractor and any Subcontractors to ensure that all Work, including testing and commissioning activities continue unimpeded by the absence of such onsite spare parts and consumables. PacifiCorp shall not be liable in any way for Developer's inability to achieve Substantial Completion or Final Acceptance due to lack of any spare parts or consumables and shall not be entitled to Change Order in respect of same as to change in Contract Price or Project Schedule.

(b) Developer shall submit to PacifiCorp not later than one hundred thirty five (135) days prior to the Substantial Completion Date a proposed list of spare parts and associated pricing for the first five (5) years of operation following Final Acceptance in accordance with Appendix O. Within thirty (30) days of receipt of the proposed list, PacifiCorp shall determine, in its discretion, to procure such spare parts or, at PacifiCorp's election pursuant to a PacifiCorp-Initiated Change, request Developer to procure or cause to be procured such spare parts and have such spare parts delivered to the Site prior to the Guaranteed Substantial Completion Date. Upon the request of PacifiCorp, Developer shall meet with PacifiCorp and its designees to discuss the proposed inventory of spare parts.

(c) If available, PacifiCorp shall allow Developer to use any spare parts or consumables owned by PacifiCorp, but in no event shall PacifiCorp be liable or shall Developer be entitled to a Change Order in the event that the absence of any particular spare part or consumable impacts completion of the Work. In the event Developer uses PacifiCorp's spare parts and consumables with PacifiCorp's written consent, such spare parts and consumables shall be expeditiously replaced by Developer at its sole cost and expense. PacifiCorp does not warrant the condition, quality, suitability, absence of defects, fitness

for any purpose or aspect of any PacifiCorp-supplied spare part and if Developer uses any PacifiCorp-supplied spare part, it does so at its own risk.

#### **Section 7.20 Further Assurances.**

Developer shall take all such further actions and execute all such further documents and instruments as PacifiCorp may at any time reasonably determine to be necessary to further carry out and consummate the transactions contemplated by the Project Documents.

#### **Section 7.21 Other Liens.**

(a) Until after Final Acceptance shall have occurred, Developer shall not create, incur, assume or suffer to exist, directly or indirectly, any Lien on any of its property now owned or hereafter acquired in connection with the Project, other than the following:

(i) Easements or other encumbrances on Real Property affecting the Project required to be granted (x) pursuant to applicable Laws or (y) by order of a Governmental Authority; provided, that such easements or other encumbrances on Real Property would not reasonably be expected to have a Material Adverse Change;

(ii) Mechanics Liens relating to the Work supplied and performed by Contractor or by any Subcontractor that have not yet been paid in the ordinary course of business; and

(iii) Liens filed with respect amounts payable to Contractor or any Subcontractor that are being disputed in good faith, provided that Developer has posted a bond against such Liens with a bonding company or other surety reasonably acceptable to PacifiCorp.

(b) Developer shall, and shall cause Contractor, all Subcontractors, and all Suppliers to deliver Lien releases in the forms attached in Appendix J, for all Liens that arise with respect to the Project.

#### **Section 7.22 Restriction on Fundamental Changes.**

(a) Until after Final Acceptance shall have occurred, Developer shall not, without PacifiCorp's prior written consent, enter into any business combination, merger or consolidation, or liquidate, wind-up, dissolve (or suffer any liquidation or dissolution), or discontinue its business.

(b) Until after Final Acceptance shall have occurred, and except in the ordinary course of business (such as the replacement or substitution of items from customary wear and tear), Developer shall not convey, sell, lease, assign, transfer or otherwise dispose of any of Developer's assets, except in connection with the Closing, if such sale, lease, assignment, transfer or other disposition would, individually or in the aggregate, reasonably be expected to result in a Material Adverse Change.

**Section 7.23 [Reserved]**

**Section 7.24 Amendment of Project Documents; Additional Project Documents.**

Developer shall not:

(a) without the prior written consent of PacifiCorp (i) assign or permit any Person to assign any of its rights or obligations to or under any Project Document, (ii) terminate any Project Document, or (iii) make any amendment or other modification to any Project Document that would (A) result in a breach of this Agreement or the inaccuracy of any representation or warranty in this Agreement, (B) increase the Contract Price, (C) extend the Guaranteed Substantial Completion Date, or (D) have a Material Adverse Change;

(b) to the extent not covered by Section 7.24(a), amend, modify, grant any Consent with respect to any obligation under, waive timely performance or observance by any Person (other than PacifiCorp) of any obligation under, exercise any options or remedies or issue any change order, notice or make any elections under any Project Document without providing notice thereof and copies of all material documentation related thereto, to PacifiCorp;

(c) without the prior written consent of PacifiCorp, compromise or settle any Claim against any Project Party if to do so would have a Material Adverse Change; or

(d) enter into any Additional Project Document that would have a Material Adverse Change. Developer shall deliver copies of all Additional Project Documents to PacifiCorp within three (3) Business Days of the execution thereof.

**Section 7.25 Environmental Matters.**

Until Final Acceptance shall have occurred, Developer shall not permit (a) any USTs (other than for water or sewage) to be located on the Site, (b) any asbestos to be contained in or form part of any building, building component, structure or office space on the Site, and (c) any polychlorinated biphenyls to be used or stored at the Site.

**Section 7.26 Records and Accounts.**

Developer shall maintain all records and accounts in accordance with GAAP consistently applied and in Dollars in order to support any and all invoices, Claims and disputes under this Agreement. Developer shall permit PacifiCorp, upon reasonable prior notice and during business hours, to audit Developer's records and accounts to verify invoice amounts and to confirm any increases or decreases to the Contract Price and any Change Orders, as well as any report or correspondence related to Developer Permits or safety or environmental compliance.

**Section 7.27 Condemnation, Eminent Domain, Casualty Events.**

(a) In the event that any Governmental Authority or any Person, acting under any Governmental Authority, other than PacifiCorp, takes any action to condemn, seize or appropriate all or any substantial part of the Project (each a "Condemnation Proceeding"), Developer shall promptly notify PacifiCorp of the Condemnation Proceeding and promptly update PacifiCorp on significant events in



connection with the Condemnation Proceeding, including with respect to settlement offers, and provide other information reasonably requested by PacifiCorp as often as may be reasonably requested by PacifiCorp. Any monetary offer to settle a Condemnation Proceeding or compensate Developer with respect thereto shall at all times be subject to PacifiCorp's discretion to accept or reject such offer, and in the event that PacifiCorp directs Developer to accept such offer, and provided that no Developer Default, shall have occurred and be continuing, the proceeds thereof shall be paid to PacifiCorp.

(b) In the event that any casualty event (other than a Force Majeure) shall occur which causes a suspension of all or a substantial portion of the Work for a period greater than (i) forty-five (45) days after the receipt of insurance proceeds in an amount required to successfully restore or repair the Project without having to increase the Contract Price or (ii) ninety (90) days after the occurrence of such casualty event, then, provided that no Developer Default shall have occurred and be continuing, the proceeds of any insurance policies in respect of such casualty event shall be paid to PacifiCorp.

### **Section 7.28 Import Permits, Licenses and Duties.**

Developer shall obtain all import Permits required for any part of the Facility, Equipment, Materials or Work within the time stated in the Project Schedule or, if not so stated, in reasonable time having regard to the time for delivery of the Facility, the Equipment and Materials and the Time for Completion. Developer shall pay all customs and import duties arising upon the importation of the Facility, Equipment and Materials into the applicable port of entry. All such payments shall be deemed to be included in the Contract Price.

### **Section 7.29 Compliance with Planning Permissions, Consents.**

Developer shall comply fully in respect of design and work at the Site and all other obligations under this Agreement, with the terms, conditions and requirements of all applicable Consents and Permits.

### **Section 7.30 Lay Out.**

(a) Developer shall be, and shall ensure that Contractor and any Subcontractor is, responsible for the true and accurate laying out of the Work by reference to original points, lines and levels of reference provided by Developer's Representative and Developer shall provide all necessary instruments, appliances and labor therefor.

(b) If, at any time during the execution of the Work, any error appears in the positions, levels, dimensions or alignment of the Work, Developer shall rectify the error.

(c) Developer shall bear the cost of rectifying any error caused or permitted, directly or indirectly, by Developer.

(d) Developer shall identify and protect bench marks, sight rails, pegs and other monuments or reference points used in laying out the Work.

**ARTICLE 8**  
**GENERAL OBLIGATIONS OF PACIFICORP**

**Section 8.1 PacifiCorp's General Obligations.**

PacifiCorp shall:

- (a) keep Developer informed as to the status of any governmental or regulatory or other activities undertaken by PacifiCorp that relates to the Facility and that is likely to materially and adversely affect Developer's ability to perform the Work;
- (b) comply with all applicable Laws, the noncompliance with which are likely to materially and adversely affect the Work, the Facility, the Site or Developer's or PacifiCorp's obligations under this Agreement; and
- (c) maintain its records and accounts in accordance with GAAP consistently applied in order to support any and all invoices, Claims and disputes under this Agreement.

**Section 8.2 Operations and Maintenance Staff.**

PacifiCorp shall provide Developer reasonable and necessary support personnel during the commissioning and startup of the Facility as set out in this Section 8.2. Developer shall supply a schedule of requested support personnel not less than sixty (60) days prior to commencing commissioning and start-up activities. PacifiCorp's support personnel shall work under the direction of Developer and, subject to the following sentence, shall have acceptable minimum skill levels to perform their work in connection with the commissioning and start-up activities. Participation by PacifiCorp's support personnel shall be considered on the job training.

**Section 8.3 PacifiCorp's Representative.**

- (a) PacifiCorp's Power to Delegate. PacifiCorp may at any time and from time to time delegate to its representative (the "PacifiCorp's Representative") any of its duties and obligations (other than its payment obligations) under this Agreement. Except as explicitly provided herein, any written decision, instruction or order given by PacifiCorp's Representative to Developer in accordance with such delegation shall have the same effect as though it had been given by PacifiCorp.
- (b) Duties of PacifiCorp's Representative. PacifiCorp's Representative shall carry out such duties as are specified in this Agreement but except as expressly provided in this Agreement neither the performance of or the failure to perform such duties whether properly or at all by PacifiCorp's Representative, nor the fact that a PacifiCorp's Representative has been appointed by PacifiCorp shall in any way relieve Developer of any responsibility or liability for any of its obligations under this Agreement. No approval of, or consent to or failure to approve or consent to any matter by PacifiCorp or PacifiCorp's Representative shall relieve Developer of any liability or any of its obligations under this Agreement.

#### **Section 8.4 Standard of Conduct.**

Unless explicitly stated otherwise in this Agreement, whenever the Parties or their representatives are required to exercise their discretion: (a) to make a decision, (b) to give consent or approval, (c) to express satisfaction or approval, (d) to determine value, or (e) otherwise to take action which may affect their respective rights and obligations hereunder, the exercise of such discretion shall be made in a reasonable manner and in good faith consistent with this Agreement so as to reasonably minimize any disruption to the other Party, and having regard to all the circumstances reasonably applicable thereto.

### **ARTICLE 9 WORKING ARRANGEMENTS**

#### **Section 9.1 Site Regulations.**

Developer Parties, while performing Work at the Site, shall comply with PacifiCorp's Site regulations, including environmental, wildlife, and cultural resources protection, loss control, dust control, safety, and security, as well as any Site special conditions, copies of which PacifiCorp shall provide to Developer from time to time.

#### **Section 9.2 Site Security.**

(a) Developer shall be responsible for Site security, which shall be in accordance with Developer's established security procedures, which, at a minimum, shall ensure compliance with all requirements of applicable Laws, the Developer Permits, the Technical Specification and this ARTICLE 9. All Developer Parties shall strictly adhere to all Site security provisions.

(b) Unless and until care, custody, control and risk of loss transfer to PacifiCorp pursuant to this Agreement, Developer shall be fully responsible for all Materials and Equipment, including any PacifiCorp-furnished Materials and Equipment in the care, custody and control of Developer.

#### **Section 9.3 Preservation of Public and Private Access.**

Developer shall not damage, close, or obstruct any highway, road, or other public or private easement, except to the extent allowed by applicable Laws or the Developer Permits. If such facilities are closed, obstructed, damaged, or made unsafe by Developer, Developer shall, at its sole cost and expense, make such repair as necessary and shall also provide such temporary guards, lights, and other signals as may be necessary or required for safety or by applicable Laws or the Developer Permits.

#### **Section 9.4 Avoidance of Noise and Disturbance.**

All Work at the Site shall be carried out in such a way as to minimize noise and disturbance and Developer shall defend, indemnify and hold harmless all PacifiCorp Indemnified Parties from and against all third party Claims and Liabilities for injury, including death, and property damage caused by, arising out of, or in connection with noise or other disturbance, falling outside of the limits specified in applicable Laws or the Developer Permits and created by Developer Parties in connection with performing the Work.

## **Section 9.5 Opening Up of Work.**

(a) No major material part of the Work shall be covered up or put out of view without the prior written consent of PacifiCorp's Representative. Developer shall timely inform PacifiCorp's Representative and shall afford full opportunity for PacifiCorp's Representative or its designee to inspect any part of such Work which is about to be covered up or put out of view and to examine foundations before any part of the Work is placed thereon.

(b) Developer shall uncover any part of such Work or make openings in or through the same as PacifiCorp's Representative may from time to time direct and shall reinstate and repair such part. The cost of such uncovering, repair or reinstatement shall be borne by Developer unless: (i) the requirements of Section 13.2(c), if applicable, have been fulfilled with respect to such part; and (ii) such part is found to have been executed in accordance with this Agreement.

(c) Any Defects that are uncovered shall be addressed in accordance with ARTICLE 23.

## **Section 9.6 Fencing, Protection, Lighting.**

Developer shall provide adequate safety barriers, signs, lanterns, and other warning devices and service to properly protect any person having access to or near the Site in accordance with the requirements of applicable Laws and the Technical Specification. Developer shall be solely responsible for any act of trespass or any damage to adjacent property resulting from or in connection with the Work or its operations under this Agreement.

## **Section 9.7 Site Services.**

Developer shall be responsible for obtaining and the cost of any and all electricity, water, fuel, air and other services as the Developer Parties may require for the purposes of the Work.

## **Section 9.8 Cleanup.**

Developer shall keep the Site, including the Work area and storage areas used by Developer, free from accumulation of waste materials or garbage arising out of the Work, and shall, prior to completion of the Work, remove and properly dispose of any such waste materials or garbage from and about the Site in accordance with applicable Laws as well as remove all Non-PacifiCorp Materials. Upon completion of the Work, Developer shall leave the Site in a condition reasonably satisfactory to PacifiCorp.

## **Section 9.9 Regulated Materials.**

Developer shall, at all times, be responsible for preventing Releases of Regulated Materials brought to or generated at the Site by Developer Parties or preexisting at the Site. Prior to the Closing, Developer shall manage and be responsible for any Regulated Materials, whether brought on to or generated at the Site by Developer Parties or pre-existing at the Site, according to applicable Law.

## **Section 9.10 Wildlife and Cultural Concerns.**

(a) In the event that any surveys or studies indicate that wildlife protected by Environmental Laws will be impacted (killed, harassed, harmed, disturbed, or otherwise “taken” as defined under Environmental Laws) as a result of development or construction activities (including due to grading, ground disturbance, tree clearing, nest removal, etc.) or during operation of the Project, Developer shall coordinate with PacifiCorp in developing a plan for minimizing impacts, which may include coordination with federal and state wildlife Governmental Authorities. During development and construction of the Project, any wildlife protected by Environmental Laws discovered on the Site, including wildlife carcasses, shall be immediately reported to PacifiCorp. Live, injured, or deceased wildlife protected by Environmental Laws shall not be harassed or collected without appropriate local, state and/or federal permits or other written authority. All development and construction activities will be in accordance with applicable Laws, including applicable avian, threatened/endangered species, and/or other protected wildlife Contracts or other documents, such as an Avian Protection Plan, Bird and Bat Conservation Plan, Conservation Agreement, and/or an Eagle Conservation Plan for the Project.

(b) In the event that any relics, items or structures with archaeological, geographical or historical value or any articles (including fossils, coins, articles of value or antiquity and any Native American relics) are discovered by Developer Parties or any of their respective representatives or employees, Developer shall leave said items undisturbed and shall immediately notify PacifiCorp and the appropriate federal or state Governmental Authorities and await further direction before proceeding with any Work in the vicinity.

## **ARTICLE 10 PROJECT SCHEDULE**

### **Section 10.1 Project Schedule.**

Attached hereto as Appendix B is a preliminary project schedule setting forth the major tasks that must be completed by Developer (each a “Milestone”) and completion dates for such tasks (“Milestone Completion Dates”) as provided by Developer in accordance with the Technical Specification, including the Critical Milestones and associated Critical Milestone Completion Dates which will be consistent with Appendix M. The preliminary project schedule shall include a Milestone (and a corresponding Milestone Completion Date) for development of a final project schedule (the “Project Schedule”) setting forth in more detail the Milestones and Milestone Completion Dates, including the Critical Milestones and Critical Milestone Completion Dates.

### **Section 10.2 Form of Project Schedule.**

The Project Schedule shall be in the form set forth in Appendix B. The Project Schedule shall specify any tasks, obligations, or responsibilities under this Agreement (each a “PacifiCorp Obligation”) which PacifiCorp must perform or fulfill in order for Developer to achieve the Milestone Completion Dates for each Milestone, and the date by which PacifiCorp is required to fulfill each and every PacifiCorp Obligation in accordance with this Agreement.

### **Section 10.3 Rejection of the Project Schedule.**

(a) No later than sixty (60) days prior to Closing, Developer shall submit a draft Project Schedule to PacifiCorp's Representative for its review and comment. PacifiCorp's Representative may request that the Critical Milestones and associated Critical Milestone Completion Dates are not different from the Critical Milestones and Critical Milestone Completion Dates set forth in Appendix M.

(b) If PacifiCorp's Representative comments on any Project Schedule submitted by Developer, Developer shall, within seven (7) days of such comments, submit four (4) copies of the final form of Project Schedule consistent with the PacifiCorp Representative's comments with respect to same.

(c) PacifiCorp's Representative shall have the right to reasonably request Developer to vary, amend, substitute or otherwise change the Project Schedule after approval thereof. Any such variation, amendment, substitution, or other change (other than as provided in Section 10.5 or caused by Developer's failure to perform any of its obligations in accordance with the terms of this Agreement) shall be considered a PacifiCorp-Initiated Change under Section 13.1.

### **Section 10.4 Alterations and Updates to Project Schedule.**

Developer shall not, without the prior written consent of PacifiCorp's Representative, make any material change to the Project Schedule, including change any Critical Milestone or Critical Milestone Completion Date. Developer shall provide an expanded detailed Project Schedule and any updates thereto on a weekly basis as the Work progresses, including the incorporation of delay and acceleration analyses where appropriate.

### **Section 10.5 Revision of Project Schedule.**

If PacifiCorp determines, in its discretion, that progress of the Work does not or is unlikely to match the Project Schedule, or otherwise is unlikely to allow Substantial Completion to be completed by the Guaranteed Substantial Completion Date, PacifiCorp's Representative may order Developer to revise the Project Schedule. Developer shall thereafter revise the Project Schedule to show the modifications necessary to ensure completion of the Work within the Time for Completion. Developer shall notify PacifiCorp's Representative as soon as possible of any circumstances of which Developer is or becomes aware which might result in progress of the Work not matching the Project Schedule.

### **Section 10.6 Developer's Responsibility to Comply with Milestone Completion Dates.**

Developer shall be responsible to complete and to commit sufficient manpower and resources to insure the completion of each Milestone by the applicable Milestone Completion Date. In the event that Developer is made aware that any Milestone will fail to meet its applicable Milestone Completion Date, Developer shall notify PacifiCorp within five (5) Business Days and provide a statement to PacifiCorp analyzing the effect of such failure on the Project Schedule. Developer shall use best efforts to minimize the impact of the delay.

## **Section 10.7 Rate of Progress.**

(a) PacifiCorp shall notify Developer if PacifiCorp reasonably determines that (i) the rate of progress of the Work is too slow to allow Developer to achieve the Substantial Completion Date by the Guaranteed Substantial Completion Date and (ii) Developer is not entitled to an extension of the Time for Completion under the provisions of this Agreement.

(b) Following receipt of such a notice, Developer shall at its own cost and expense take such steps as may be necessary and as PacifiCorp's Representative may approve to remedy or mitigate the likely delay, including revision of the Project Schedule pursuant to Section 10.4. Developer shall not be entitled to any additional payment, including an increase in the Contract Price, for taking such steps.

## **Section 10.8 Progress Reports.**

(a) Developer shall submit to PacifiCorp's Representative on the third (3rd) working day of each month or such other date as is agreed upon between Developer and PacifiCorp, a progress report ("Progress Report") in compliance with the applicable requirements set forth in the Technical Specification and Appendix N. Developer shall submit two (2) copies of each Progress Report to PacifiCorp's Representative.

(b) In addition to the applicable requirements set forth in the Technical Specification and Appendix N, the Progress Reports submitted by Developer shall specify in detail:

(i) any fact, event or circumstance (each a "Project Problem") encountered by any Developer Party during the preceding month (including the failure of PacifiCorp to perform any PacifiCorp Obligations under this Agreement) which might (A) prevent Developer from completing any Milestone by its respective Milestone Completion Date or (B) cause Developer to incur additional expenses in completing any Milestone;

(ii) the estimated length of any delay and the estimated amount of any additional costs and expenses, if any, which may be chargeable to PacifiCorp hereunder, as a result of any Project Problem identified pursuant to this Agreement; and

(iii) to Developer's Knowledge, the cause of any Project Problem specified pursuant to this Agreement and the specific steps taken or proposed to be taken by Developer to correct such Project Problem.

(c) In the event that Developer fails to specify in writing any Project Problem (an "Unidentified Project Problem") with respect to a given monthly period in the appropriate Progress Report and in such manner and at such time as specified pursuant to this Agreement as a Project Problem, Developer shall not be entitled to rely on any such Unidentified Project Problem as a purported justification for either (i) claiming that it is entitled to receive any additional amounts pursuant to this Agreement (including damages arising out of any alleged failure by PacifiCorp to perform any of PacifiCorp Obligations) or (ii) failing to complete any Milestone by the specified Milestone Completion Date.

(d) The submission by Developer of any Progress Report shall not alter, amend or modify Developer's or PacifiCorp's rights or obligations pursuant to this Agreement, including the Contract

Price. In the event and to the extent any Milestone is not completed by the specified Milestone Completion Date as a direct and unavoidable result of PacifiCorp's failure (other than as a result of Developer's failure to perform any of its obligations under this Agreement on a timely basis) to fulfill any PacifiCorp Obligation by its respective completion date, then Developer shall be entitled to a Required Change to adjust the Milestone Completion Date for such Milestone by one (1) day for each day in which completion of any such PacifiCorp Obligation is delayed beyond its respective completion date and increase the Contract Price for any extra costs or expenses actually incurred by Developer by reason of such delay.

#### **Section 10.9 Progress Meetings.**

Progress meetings will be held as deemed necessary by PacifiCorp, but normally shall not be less than once a week. Such meetings shall be at the Site unless PacifiCorp requests to change the location of such meetings. Progress meetings will be utilized to review the progress of the Work and its compliance with the Project Schedule and discuss any delays, unusual conditions or critical items, which have affected or could affect the progress of the Work.

### **ARTICLE 11 DELIVERY, SHIPPING, AND HANDLING OF FACILITY AND EQUIPMENT**

#### **Section 11.1 Delivery Responsibility.**

Developer shall be responsible for the safe delivery of all Equipment and Developer's Equipment to the Site. Developer shall abide by the requirements of Appendix A for the delivery of major items of Equipment and of Developer's Equipment to the Site. Developer shall be responsible for the reception and unloading at the Site of all Equipment and Developer's Equipment.

#### **Section 11.2 Packing.**

(a) Developer is responsible for assuring that the Equipment is suitably packaged to ensure against damage under normal handling and transportation methods. All Equipment shall be identified with PacifiCorp's equipment number or tag number, if required by the Technical Specification. All shipping shall be in accordance with Appendix A.

(b) The Equipment shall be shipped FOB the Site, Freight Prepaid and Allowed, with Developer retaining risk, liability and responsibility, financial or otherwise, until Substantial Completion, and then only in accordance with this Agreement.

(c) Prior to the shipment of any Equipment to the Site, Developer shall become knowledgeable of transportation conditions, such as clearances and restrictions, height and width, bridge load limits and other limitations affecting such shipment. Notwithstanding any other provision of this Agreement to the contrary, any limitations or the lack of transportation facilities shall not become the basis for Claims or for a Change for increased costs or for an extension of time for completion of Work under this Agreement.

#### **Section 11.3 Transportation.**



Developer shall observe all applicable Laws in relation to and obtain all necessary Permits for the transport of Equipment and Developer's Equipment over highways, bridges or culverts.

**Section 11.4 Extraordinary Traffic.**

Developer shall use best efforts to prevent damage to any of the highways, bridges or culverts on the routes to the Site caused by vehicles used by or on behalf of Developer Parties in the performance of the Work. Developer shall be responsible for the cost of protecting or strengthening any highway, bridge or culvert as necessary to facilitate the moving of Equipment and Developer's Equipment and shall be liable for and indemnify the PacifiCorp Indemnified Parties against any Liabilities arising from or in connection with any injury to persons or damage to highways, bridges or culverts arising out of the execution of the Work.

**Section 11.5 Allocation.**

In the event of a partial failure of Developer's sources of supply, Developer will first meet all of PacifiCorp's requirements hereunder prior to any allocation of supply among other customers.

**ARTICLE 12  
DEVELOPER'S EQUIPMENT**

**Section 12.1 Developer's Equipment.**

Developer shall, within thirty (30) days after the Effective Date, provide to PacifiCorp an indicative list of equipment ("Developer's Equipment") that Developer Parties intends to use on the Site, which list shall be updated from time to time by Developer during the execution of the Work and available for inspection by PacifiCorp's Representative. Developer's Equipment shall not be part of the Equipment or otherwise part of the Facility and title to Developer's Equipment shall in no event transfer to PacifiCorp.

**Section 12.2 Developer's Equipment on Site.**

All of Developer's Equipment shall, when brought on to the Site, be deemed to be exclusively intended for the execution of the Work. Neither Developer nor any other Developer Parties shall remove Developer's Equipment or any part thereof from the Site without the prior consent of PacifiCorp, which consent shall not be unreasonably withheld in the case of Developer's Equipment not currently required for the execution of the Work on Site.

**Section 12.3 Loss or Damage to Developer's Equipment.**

Developer shall be liable for loss or damage to any of Developer's Equipment, other than loss or damage caused by PacifiCorp in breach of this Agreement.

**Section 12.4 Maintenance of Developer's Equipment.**

Developer shall be responsible for maintaining Developer's Equipment on the Site in safe working order.

## **ARTICLE 13 CHANGE ORDERS**

### **Section 13.1 Changes.**

(a) No Change shall be effective unless authorized by PacifiCorp by issuance of a Change Order pursuant to the provisions of this ARTICLE 13.

(b) PacifiCorp shall, when reviewing each potential Change and determining the nature and extent of any Change Order which is requested or required in connection with this Agreement, consider the following information:

(i) The nature, scope and extent of the Change, including any additions or deletions from the Scope of Work;

(ii) The effect, if any, of the Change on the Project Schedule, including the Guaranteed Substantial Completion Date;

(iii) The effect, if any, of the Change on the Contract Price; and

(iv) Such other information as may reasonably be necessary for the implementation of the Change Order, including the effect on any other provisions hereof which may be impacted by the Change.

PacifiCorp shall, in the case of a PacifiCorp-Initiated Change or Required Change and may, if it elects to do so, in the case of a Developer-Initiated Change, issue such Change Order having regard to all such circumstances as is just and equitable and in a form substantially similar to the form of Change Order attached hereto as Exhibit D-1 which shall address, to the extent required, all of the issues set out in this Section 13.1(b).

(c) Developer shall make any request for a Change Order which is permitted to be made in accordance with Section 13.2 in the form of a Change Order Request which shall be delivered to PacifiCorp in writing as soon as possible and in any event within ten (10) days after Developer becomes aware of the facts or circumstances giving rise to a Change which it reasonably believes necessitates a Change Order. In no case shall Developer be entitled to recover costs in a Change Order that arise prior to the date of the Change Order Request. Any Change Order Request shall be substantially and in all material respects in the form attached hereto as Exhibit D-2 and include the following information: (i) the facts or circumstances giving rise to the Change; (ii) the impact, if any, which the proposed Change is likely to have on the Contract Price, the Project Schedule, including the Guaranteed Substantial Completion Date, and any other provisions hereof; and (iii) such other information which PacifiCorp may reasonably request in connection with such proposed Change.

(d) The issuance of a Change Order shall not result in invalidation of this Agreement.

(e) Notwithstanding any provision to the contrary in this Agreement, no facts or circumstances will constitute grounds for a Change Order unless and only to the extent that (i) the costs of such Change Order is in excess of Twenty-Five Thousand Dollars (\$25,000), or (ii) the applicable Change delays the achievement of a Critical Milestone by its corresponding Critical Milestone

Completion Date by more than five (5) days. Neither Party shall manipulate the foregoing process, by aggregating or disaggregating cost or facts or circumstances, as the case may be, for the purpose of recovering or avoiding additional cost or time in accordance with the foregoing.

(f) Change Orders shall address the change, if any, in the amount of the Contract Price in one of the following manners:

(i) PacifiCorp and Developer shall agree upon the amount by which the Change will impact the Contract Price; or

(ii) PacifiCorp and Developer shall agree as to the nature and extent of the Change, but in lieu of changing the Contract Price, Developer shall perform the activities associated with the Change on a cost-reimbursement basis, in which event no change shall be made in the amount of the Contract Price and PacifiCorp shall pay Developer in accordance with the provisions of Appendix BB.

### **Section 13.2 Procedure for Changes.**

(a) Changes Initiated by Developer. Developer may, at any time and from time to time, submit a Change Order Request to PacifiCorp pursuant to Section 13.1(c) for improvements, efficiencies, cost savings and other similar Changes to the Work (each a "Developer-Initiated Change"), but no such Change Order Request shall be carried out by Developer except pursuant to a Change Order executed by PacifiCorp, which execution shall be in PacifiCorp's discretion. Any Change Order Request submitted pursuant to this Section 13.2(a) shall also contain and be supplemented with such information as PacifiCorp may reasonably require in order to determine whether to accept or reject the Change Order Request.

(b) Changes Initiated by PacifiCorp. If PacifiCorp desires to make a Change (each a "PacifiCorp-Initiated Change") not comprising recovery Work due to the negligence of or breach of this Agreement by Developer, Contractor or any Subcontractor, PacifiCorp will submit a written Change Order Notice to Developer, substantially in the form of Exhibit D-3, comprising the nature and extent of the proposed change to the Scope of Work together with, to the extent available or applicable, PacifiCorp's opinion as to those matters required to be taken into account in accordance with Section 13.1. Developer will promptly review the Change Order Notice and notify PacifiCorp in writing within a reasonable amount of time of the options for implementing the proposed PacifiCorp-Initiated Change (including, if possible, any option that does not involve an increase in the Contract Price and an extension of the Project Schedule) and the estimated effect(s), if any, that each such option would have on the Contract Price and Project Schedule, and any other affected provision herein, as applicable. Such response shall also contain all those matters required to be set out in a Change Order Request. Based upon such information, PacifiCorp may, in its discretion, issue a Change Order for the PacifiCorp-Initiated Change.

(c) Required Change Orders. Developer shall be entitled to the issuance of a Change Order pursuant to this ARTICLE 13 in connection with any circumstances which constitute a Change and which are attributable to the matters identified in subparagraphs (i) through (iii) below (each a "Required Change"):

(i) Due to Change in Law, Permit or Site Condition. If and to the extent that a change in any Law or Developer Permit after the Effective Date results in an increase in the cost of the Work or an extension of the Project Schedule.

(ii) Change Order Due to Suspension of Work by PacifiCorp. If and to the extent that PacifiCorp suspends the Work and Developer is entitled to a Change Order pursuant to ARTICLE 16.

(iii) Change Order Due to Non-Performance by PacifiCorp. If and to the extent that PacifiCorp fails to perform or is late in performing in any material respect any material obligation of PacifiCorp under this Agreement, provided that such failure is not the result of Developer Parties' negligence or breach of this Agreement.

Developer shall in all cases use or have used commercially reasonable efforts to mitigate potential delays to the Project Schedule or potential increases to the Contract Price (the cost of such mitigation efforts to be addressed in any applicable Change Order).

(d) Except in the circumstances as set out in this Section 13.2 and with respect to which an application is properly made in accordance with this ARTICLE 13, Developer shall not be entitled to seek a Change, a Change Order, extension of the Project Schedule, including the Guaranteed Substantial Completion Date, an increase of the Contract Price, or the receipt of additional remuneration or reimbursement with respect to the Work.

### **Section 13.3 Continued Performance Pending Resolution of Disputes.**

Notwithstanding and pending the resolution of any dispute with respect to a Change or Change Order, Developer must proceed with the Work and the performance of any Change ordered by PacifiCorp as a result of a PacifiCorp-Initiated Change or a Required Change, unless PacifiCorp directs Developer not to so proceed, provided that Developer is being paid on a current basis for all undisputed Work and for all disputed Work which has been ordered to be paid through the dispute resolution provisions of ARTICLE 32.

### **Section 13.4 Preservation of Schedule and Contract Price.**

Where any proposed Change may give rise to an extension of the Project Schedule or an increase in the Contract Price, then PacifiCorp reserves, in its discretion and to the extent possible, the right to require Developer to vary, amend or effect such other Change to the Work in such a manner as will mitigate or avoid the requirement for such extension of the Project Schedule or increase in the Purchase Price.

## **ARTICLE 14 WORKMANSHIP AND MATERIALS**

### **Section 14.1 Manner of Execution.**

The Work to be supplied, including all materials, manufactured components and labor and services to be performed, shall be designed and executed in the manner set out in this Agreement. Except where the manner of design, manufacture and execution is otherwise specifically set out in this

Agreement, the Work shall be designed, manufactured and executed in a proper and workmanlike manner, all in accordance with accepted industry standards, applicable safety standards, and Prudent Industry Practice.

#### **Section 14.2 Condition of Materials.**

The Materials and Equipment, including any rented Equipment, fixtures, software, any related items of personal property and other tangible personal property of Developer, Contractor or any Subcontractor constituting the Facility, shall be OEM Certified, and shall be suitable for their current use in the generation of energy in accordance with the Technical Specification. All Equipment and Materials shall be procured solely for use in connection with the Project. Except as agreed to in writing by PacifiCorp, Developer shall not allow any Equipment to be placed into storage for more than one (1) year prior to shipping to the Site, nor utilize any Equipment in the Project that has been so stored.

#### **Section 14.3 Inspection.**

(a) In addition to the inspection rights of PacifiCorp under Section 7.7, within ninety (90) days after the Effective Date, Developer shall submit to PacifiCorp a schedule (the “Witness Point Schedule”) of tests and inspections (the “Witness Point Events”) reasonably acceptable to PacifiCorp which shall include locations where the Equipment shall be manufactured or tested and the location at which such tests and inspections can be viewed by PacifiCorp. Developer shall provide no less than ten (10) Business Days’ advance confirmation of the actual date of each Witness Point Event identified on the Witness Point Schedule. PacifiCorp shall be entitled to attend and witness all Witness Point Events. To the extent that any Witness Point Events have been completed prior to the date on which the Witness Point Schedule is submitted to PacifiCorp, at PacifiCorp’s discretion, Developer shall (i) allow PacifiCorp to observe the materials and workmanship of the Project and to review documentation which may be available in lieu of viewing or witnessing the Witness Point Event, or (ii) re-open the affected portion of the Project for inspection by PacifiCorp and repair or correct (if necessary) and restore the affected portion of the Project at no additional cost to PacifiCorp. All inspections shall take place on the Site, on a Contractor’s or a Subcontractor’s premises or such other reasonable site as the Parties may agree, as appropriate, during normal working hours. No such inspection or examination or witnessing of tests shall release Developer from any obligation or liability under this Agreement. Inspections under this Section 14.3 are solely for the benefit of PacifiCorp and any inspection or failure to inspect and any objection or failure to object by PacifiCorp shall not (i) relieve Developer, Contractor or any Subcontractor of any of their obligations under any Project Document or (ii) be used as evidence that PacifiCorp agreed that Developer, Contractor or any Subcontractor had fulfilled any obligations under any Project Document or that PacifiCorp had waived any of its rights under any Project Document.

(b) If, as a result of an inspection or examination referred to in paragraph (a) above, PacifiCorp decides that any portion of the Work is nonconforming or otherwise not in accordance with this Agreement, PacifiCorp shall promptly notify Developer thereof. Such notice shall state PacifiCorp’s objections and its reasons therefor in reasonable detail. Developer shall correct any nonconforming Work to ensure that such Work complies with this Agreement at no additional cost to PacifiCorp. For purposes of this paragraph (b), “nonconforming” means defective or not in conformity with the Technical Specification.

#### **Section 14.4 Comparable Quality.**

Appendix A sets forth all major Equipment, including all major systems/sub-systems/equipment/components which will be supplied in performance of the Work. Notwithstanding the foregoing, the Parties recognize that Appendix A is not all inclusive and does not specify all Equipment required for the Facility. Therefore, the Parties agree that for Equipment not specifically set forth in Appendix A, the quality standards of such unspecified Equipment shall be consistent with the requirements of ARTICLE 14.

### **ARTICLE 15 DRAWINGS**

#### **Section 15.1 Drawings.**

(a) Following receipt and approval of the Project Schedule, Developer shall prepare a contract documentation and drawing list identifying those key data, calculations (as required for regulatory purposes and consents), drawings, technical specifications and concepts required for review for conformance with this Agreement.

(b) Developer shall, within the time detailed in the Project Schedule or elsewhere in this Agreement, submit to PacifiCorp's Representative in hard copy and electronic form (the specific form of which shall be agreed to by the Parties) such key data, calculations, drawings, technical specifications and concepts.

(c) Developer shall timely submit to PacifiCorp's Representative drawings of temporary and permanent buildings and structures and any other information required under the terms and conditions of consents, licenses and planning permissions obtained by Developer or PacifiCorp.

(d) PacifiCorp's Representative may, in its discretion, disapprove any drawing; provided, however, it shall notify Developer of any such disapproval within twenty (20) days of receipt, except for documents and information (including calculations) which are required by PacifiCorp's Representative for consultation with PacifiCorp's third party contractors for the purposes of the interconnections at terminal points, where the period shall be thirty (30) days. Developer shall supply additional copies of documents or information (including calculations) in the form and numbers stated in this Agreement. Without waiver of or prejudice to any rights of PacifiCorp, Developer shall bear all risk in relation to its performance of work arising from or in relation to all documents or information (including calculations).

#### **Section 15.2 Consequences of Documents not in accordance with Agreement.**

Any documents or information (including calculations) which PacifiCorp's Representative identifies as not in compliance with this Agreement shall be modified to be in compliance and resubmitted without delay.

#### **Section 15.3 Drawings Submitted.**

Developer shall not deviate from drawings accepted or approved by PacifiCorp or PacifiCorp's Representative or issued by Developer as approved for construction, except with the prior written consent of PacifiCorp or PacifiCorp's Representative.

#### **Section 15.4 Inspection of Drawings.**

Developer shall maintain and provide to PacifiCorp's Representative from time to time or upon request of PacifiCorp's Representative a complete list of drawings, identifying which are approved for construction. PacifiCorp and PacifiCorp's Representatives shall have the right at all reasonable times to inspect all drawings of any part of the Work.

#### **Section 15.5 Operating and Maintenance Instructions.**

(a) Not less than six (6) months prior to the scheduled Substantial Completion Date, Developer shall deliver to PacifiCorp's Representative one (1) set of preliminary operating and maintenance manuals sufficiently complete that the Facility, including the Equipment, may be safely commissioned and PacifiCorp's personnel properly trained pursuant to Section 7.10. Developer shall, at its sole cost and expense, continuously update such manuals so that, as of three (3) months prior to the scheduled Substantial Completion Date, such operating and maintenance manuals are substantively in their final form with any amendments made as necessary.

(b) Not less than three (3) months prior to the scheduled Substantial Completion Date, Developer shall supply to PacifiCorp three (3) copies of final operation and maintenance manuals, startup and shutdown manuals and the then current drawings of the Work as-built, in accordance with Appendix F and Appendix G.

(c) All operating and maintenance manuals, startup and shutdown manuals and drawings of the Work as-built shall be in such detail as will enable PacifiCorp to operate, maintain, dismantle, reassemble, adjust and repair all parts of the Work, as described in Appendix F and Appendix G. Where this Agreement is terminated before the Substantial Completion Date (other than as a result of a PacifiCorp Default), Developer shall provide to PacifiCorp such information including copy drawings and Draft Manuals as is reasonable and as is necessary for PacifiCorp to complete, use and maintain the Work.

(d) The provision by Developer of the final operation and maintenance manuals and drawings of the Work as-built in accordance with the provisions of this Section 15.5 shall be identified as a Milestone in Appendix B and the provisions of ARTICLE 10 shall apply.

#### **Section 15.6 PacifiCorp's Use of Drawings.**

(a) Drawings and information created by Developer for purposes of designing, developing, constructing, commissioning and operating the Project constitute "work made for hire," and Developer hereby transfers and assigns all rights in and to such drawings and information to PacifiCorp.

(b) Drawings and information supplied by Developer that are not created by Developer specifically for or in connection with the Project, but that are necessary or useful for the operation and maintenance of the Project, the Work or any portion of thereof, may be used by PacifiCorp for the purposes of completing, maintaining, operating, improving, adapting, renewing, enlarging, dismantling, re-assembly, adjusting and repairing the Work, and for any other legal purpose, pursuant to the license granted in Section 15.6(c).

(c) Developer grants to PacifiCorp an irrevocable, perpetual, royalty free license to use all drawings and information for the foregoing purposes and Developer shall provide PacifiCorp with copies of such drawings and information.

### **Section 15.7 Manufacturing Drawings.**

In the event of a Defect resulting in outage of the Facility in excess of two (2) days during the applicable Warranty Period, Developer shall immediately give PacifiCorp full, unimpeded, and unqualified access to all information, documents, processes and operations so as to enable PacifiCorp to satisfy itself that the Facility and Equipment shall in all respects be properly and timely repaired or replaced and so as to be in full compliance with the requirements of this Agreement.

### **Section 15.8 Errors in Drawings Supplied by Developer.**

(a) Developer shall be responsible for the accuracy, completeness and suitability of all drawings, samples, patterns, models, calculations or information submitted by Developer Parties in connection with the Work. Notwithstanding PacifiCorp's or PacifiCorp's Representative's inspection or approval of drawings, samples, patterns, models, calculations or information submitted by Developer Parties, Developer shall not be relieved of any responsibility or liability imposed on it by any provisions of this Agreement and shall be responsible for any errors, omissions or discrepancies therein.

(b) Developer shall bear any and all costs Developer or PacifiCorp may incur as a result of delay in providing such drawings, samples, patterns, models, calculations or information or as a result of errors, omissions or discrepancies therein or for the correction thereof.

(c) Developer shall, at its sole cost and expense, carry out or cause to be carried out any alterations or remedial work necessitated by such errors, omissions or discrepancies for which it is responsible and modify the drawings, samples, patterns, models, calculations or information accordingly.

## **ARTICLE 16 SUSPENSION OF WORKS, DELIVERY OR ERECTION**

### **Section 16.1 Order to Suspend.**

(a) PacifiCorp may, in its sole option, upon not less than ten (10) Business Days' prior written notice to Developer, suspend at any time (i) performance of all or any portions of the Work, (ii) delivery of Equipment, Materials or a component of the Work, or (c) erection of any portion of the Work that has been delivered to the Site. Such notice shall specify the anticipated length of the suspension.

(b) If the cumulative days of Work suspension totals one hundred and eighty (180) days, or if the Work is suspended four (4) or more separate times for a period of more than forty-five (45) days in any single instance or one hundred and eighty (180) days in aggregate, then Developer may, upon thirty (30) days' prior written notice to PacifiCorp, terminate this Agreement, unless the suspension is lifted within such 30-day period. If Developer terminates this Agreement pursuant to this Section 16.1(b), then the provisions of Section 30.3(a) shall apply.



(c) Unless otherwise instructed by PacifiCorp, Developer shall during any suspension affecting the progress of the Work on the Site, maintain its staff, labor and equipment on or near the Site ready to proceed with the Work upon receipt of further instructions of PacifiCorp.

(d) If PacifiCorp desires to extend the period of suspension for a longer time than that specified in the original notice given by PacifiCorp, PacifiCorp shall so notify Developer in writing and the provisions of this ARTICLE 16 shall apply to such extended suspension notice.

#### **Section 16.2 Protection of Work.**

(a) Developer shall, during any suspension under this ARTICLE 16, store, preserve, protect and otherwise secure each of the Work, Equipment, Materials and the Facility.

(b) If PacifiCorp is unwilling or unable to receive any of the Equipment or Materials as a result of a suspension by PacifiCorp under this ARTICLE 16, Developer shall, upon written notice to PacifiCorp and giving PacifiCorp reasonable opportunity to designate a mutually acceptable destination, place such Equipment or Materials in storage. If any Equipment or Materials are placed into storage pursuant to this provision, delivery thereof to the Site shall not be deemed to occur until such Equipment and Materials are delivered to the Site or PacifiCorp has notified Developer that it is prepared to accept delivery at some other location.

#### **Section 16.3 Resumption of Work.**

(a) PacifiCorp shall provide Developer not less than five (5) Business Days' prior written notice to resume progress of the Work, which resumption of progress of the Work may occur before the time such suspension was anticipated to end pursuant to the notice provided by PacifiCorp to Developer pursuant to Section 16.1(a).

(b) Following any suspension by PacifiCorp under this ARTICLE 16, after receipt of notice to resume progress of the Work, Developer shall examine the Work affected by the suspension. Developer shall, within twenty-one (21) days after receipt of notice to resume the suspended Work, submit to PacifiCorp a written report detailing any damages, deterioration, nonconformities and losses to the Project or any portion thereof.

(c) Developer may, at any time prior to thirty (30) days after receipt of notice to resume progress of the Work under Section 16.3(a), notify PacifiCorp of a Change Order Request with respect to the costs to correct, repair or replace any damages, deterioration, nonconformities and losses and any extension of the Project Schedule as a result of suspension by PacifiCorp under this ARTICLE 16.

#### **Section 16.4 Compensation Following Event of Suspension.**

(a) Developer shall, within five (5) Business Days following receipt of any notice from PacifiCorp to suspend the performance of all or any portion of the Work under this ARTICLE 16, deliver to PacifiCorp an itemized account of the estimated charges and costs which Developer believes will be incurred by PacifiCorp pursuant to or as a result of such suspension. Developer shall make a good faith estimate of such charges and cost that will be accurate within a range of plus or minus five percent (5%). Following receipt of such estimate, PacifiCorp shall have the right by written notice to Developer at any time prior to the effective date of suspension specified in PacifiCorp's suspension notice, to either (i)

revoke its decision to suspend performance, in which event Developer will not suspend performance of such Work, (ii) instruct Developer to suspend performance in accordance with the terms of PacifiCorp's suspension notice and to confirm that the charges and costs quoted by Developer are acceptable, or (iii) instruct Developer to suspend performance in accordance with the terms of PacifiCorp's suspension notice, with PacifiCorp reserving the right to contest the charges and costs estimated by Developer.

(b) In the event of suspension of the Work under this ARTICLE 16, Developer shall, unless the notice in Section 16.1(b) requires otherwise:

(i) Discontinue the Work on the date and to the extent specified in the suspension notice;

(ii) Place no further orders or subcontracts for Equipment, Materials, or services with respect to the suspended Work, other than to the extent required in the suspension notice;

(iii) Promptly make every reasonable effort to obtain suspension, upon terms reasonably satisfactory to PacifiCorp, of all Project Documents and other orders, subcontracts and rental agreements to the extent they relate to performance of the Work suspended; and

(iv) Unless otherwise specifically stated in the suspension notice, continue to protect and maintain the Work theretofore completed, including the Work suspended hereunder.

(c) As full compensation for any such suspension (and in lieu of the right of Developer to any Change Order pursuant to ARTICLE 13), Developer shall be reimbursed for the following costs, reasonably incurred, without duplication of any item, to the extent that such costs directly result from such suspension of Work, up to a maximum of one hundred and five percent (105%) of the estimate submitted by Developer pursuant to Section 16.4(c):

(i) If determined necessary by PacifiCorp, a standby charge to Developer during the period of suspension of the Work, which standby charge shall be sufficient to compensate Developer for the reasonable costs of keeping, to the extent required in the suspension notice, its personnel and equipment committed to the Work in a standby status;

(ii) Expenses reasonably and necessarily incurred by Developer in connection with storage of Equipment and Materials pursuant to Section 16.2, including preparation for and placement into storage, handling, transportation, storage, inspection, preservation, Taxes and insurance and any necessary rehabilitation prior to installation; and

(iii) Reasonable costs associated with demobilization of Developer's personnel and equipment to the extent such costs are not recovered by Developer in using such personnel and equipment on other projects during the standby period; and an equitable amount to reimburse Developer for the actual cost to Developer, if any, of maintaining and protecting that portion of the Work upon which activities have been suspended.

(d) PacifiCorp shall have the right, in accordance with Section 7.26, to inspect and audit Developer' books and records in order to verify the accuracy of or to determine the amount of any cost-based reimbursement associated with any suspension of the Work.

## **ARTICLE 17 PROJECT COMPLETION**

### **Section 17.1 Time for Completion.**

Developer shall complete the Work in accordance with the Project Schedule and the terms of this Agreement. Without limiting the foregoing, Developer shall cause the Substantial Completion Date to occur no later than the Guaranteed Substantial Completion Date.

### **Section 17.2 PacifiCorp's Request for Earlier Completion.**

PacifiCorp may request completion of the Project earlier than the Guaranteed Substantial Completion Date and Developer shall make all commercially reasonable efforts to comply with such request.

## **ARTICLE 18 PERFORMANCE TESTING**

### **Section 18.1 Performance Tests.**

At PacifiCorp's election, Developer shall conduct or cause to be conducted the Performance Tests as soon as practicable in accordance with the Technical Specification, the procedures and protocols of Appendix AA and the other tests, procedures and protocols as may be developed by the Parties pursuant hereto. If PacifiCorp elects for Developer to conduct the Performance Tests, at least nine (9) months prior to the Guaranteed Substantial Completion Date, Developer shall deliver to PacifiCorp a supplement to Appendix AA further outlining the tests, procedures and protocols to be followed in conducting the Performance Tests. Such supplement shall include, at a minimum, provisions addressing: (a) testing procedures for each item of Equipment; (b) functional performance tests for starting up the Facility under different specified operating conditions; and (c) any other activities that, in accordance with Prudent Industry Practices, should be included. Thereafter, the Parties shall promptly agree on modifications to such supplement so that Appendix AA, as supplemented, is satisfactory to PacifiCorp.

### **Section 18.2 Cost and Direction.**

(a) The Performance Tests shall be conducted by a PacifiCorp-approved third party, under the direction of Developer. PacifiCorp will cooperate with Developer's reasonable requests in connection with the Performance Tests, but shall not be required to provide any materials, electricity, fuel, water or stores.

(b) Developer shall provide all materials, electricity, fuel, water and stores, and all personnel necessary to supervise startup and the conducting of the Performance Tests and shall provide all necessary technical assistance and advice in connection with the Performance Tests. Except as approved by PacifiCorp in writing, Developer shall not use personnel in excess of the normal contingent of Facility operations staff to operate the Facility during the Performance Tests. During training and conducting the Performance Tests PacifiCorp's operating personnel shall be working under the technical direction and instruction of Developer and Developer shall be responsible for the accuracy of its instructions/directions provided to PacifiCorp's operating personnel.

### **Section 18.3 PacifiCorp's Right to Validate.**

PacifiCorp and PacifiCorp's Representative shall have the right and opportunity to be present and observe the Performance Tests and shall have the right and opportunity in advance or during the Performance Tests to inspect and validate all meters, meter readings and other pertinent data necessary to verify the results of the Performance Tests. PacifiCorp shall provide reasonable notice to Developer of any such observation and inspection, including the specific information desired and method of obtaining such information. Developer and PacifiCorp shall coordinate such observation, inspection and validation so as not to interfere with the Performance Tests yet provide for a verifiable result.

### **Section 18.4 Test Energy.**

(a) PacifiCorp shall have the exclusive right to all electric energy generated by the Facility during the testing, start-up and commissioning of the Facility, including in connection with any Performance Tests, and any revenue derived from the sales of such elective energy.

(b) By such time as mutually agreed to by the Parties on the Business Day immediately preceding the day on which test energy from the Facility is to be delivered, Developer shall provide PacifiCorp with an hourly forecast of deliveries for each hour of the next day; provided, however, that a forecast provided on a day before any non-Business Day shall include forecasts for each day to and including the next Business Day. Upon request by PacifiCorp, Developer shall provide a 24 hour telephone number that PacifiCorp may contact to determine the then-current status of the Facility. The forecasts called for above shall be non-binding, good faith estimates only, and PacifiCorp expressly releases and holds harmless Developer from any liability for forecasting errors. Developer shall prepare such forecasts and updates by utilizing a wind speed and direction prediction model or service that is (i) commercially available or proprietary to Developer or an Affiliate of Developer, and (ii) comparable in accuracy to models or services commonly used in the wind energy industry and that reflect turbine availability, so long as such model or service is available at a commercially reasonable cost and is reasonably satisfactory to PacifiCorp.

### **Section 18.5 Timing.**

Developer shall provide PacifiCorp at least ninety (90) days' prior written notice of the anticipated date on which the Performance Tests will begin and at least five (5) days' prior notice of the actual date (or any change to the actual date) on which the Performance Tests will begin.

### **Section 18.6 Test Reports.**

(a) Developer shall deliver to PacifiCorp a preliminary test report, including the test data sheets and calculated results for each Performance Test or retest (the "Preliminary Performance Test Report"), promptly after completion of each Performance Test, together with a notice to PacifiCorp certifying completion of the Performance Tests in accordance with this Agreement and the results of such Performance Tests. Promptly after receipt of such Preliminary Performance Test Report, PacifiCorp and Developer shall consult concerning the results of such Performance Tests, and within three (3) days thereafter, PacifiCorp shall provide Developer written notice that it either accepts or disputes the results of the Performance Tests, including the reasons for any dispute.

(b) Within fifteen (15) Business Days following completion of the Performance Tests, Developer shall provide to PacifiCorp a final test report, including test data sheets and calculated results of each Performance Test or retest (the “Final Performance Test Report”) and a final notice to PacifiCorp certifying completion of the Performance Tests. The Final Performance Test Report shall reflect the Parties’ consultation with one another with respect to the Preliminary Performance Test Report. Within fifteen (15) days of receipt of such documentation from Developer, PacifiCorp shall provide Developer written notice that it either accepts or disputes the results of the Performance Tests, including the reasons for any dispute. If PacifiCorp disputes the results of the Performance Tests in the Final Performance Test Report, then Developer shall re-perform the applicable Performance Tests (or part thereof) in accordance with the procedures set forth in Appendix AA. If the results of the re-test confirm the accuracy of the initial Performance Test, then PacifiCorp shall pay the increased costs directly resulting from the re-test. If the results of the re-test do not confirm the accuracy of the initial Performance Test, then Developer shall pay for the costs of the re-test and any subsequent Performance Tests necessary to confirm compliance with all Performance Guarantees.

### **Section 18.7 Failure on Tests or Inspection.**

If after inspection, examination or witnessing the testing of the Work or the Facility or any Equipment or Materials, PacifiCorp determines, in its discretion, that such Work or the Facility or any such Equipment or Materials or any part thereof is Defective or otherwise not in accordance with this Agreement, it may reject such Work or the Facility or any such Equipment or Materials or any part thereof by giving to Developer, within ten (10) days of such determination, notice of such rejection, stating the grounds upon which such determination is based. Following any such rejection, Developer shall replace or repair the rejected Work, Facility, Equipment or Materials and re-submit the same for test or inspection in accordance with this ARTICLE 18. All expenses reasonably incurred by or on behalf of PacifiCorp in connection with such re-testing or inspection shall be deducted from the Contract Price and the next Progress Payment, if any. PacifiCorp rights pursuant to this Section 18.7 are in addition to its rights pursuant to ARTICLE 19.

### **Section 18.8 Duty to Advise of Defects, Errors and Omissions in Facility and Equipment.**

Developer shall promptly advise PacifiCorp upon it becoming aware of any Defect in any Work performed or Equipment, Materials or the Facility supplied or used by Developer Parties or error or omission that might affect the Work, the Equipment, the Materials or the Facility and its operability, operational life or maintenance.

## **ARTICLE 19**

### **DEFECTS BEFORE TRANSFER OF POSSESSION AND CONTROL OF WORK**

#### **Section 19.1 Identification of Defects.**

(a) If at any time prior to the Substantial Completion Date PacifiCorp’s Representative (i) determines, in its discretion, that any Work performed or Equipment, Materials or the Facility supplied or used by Developer Parties is or are defective in design, materials, equipment, manufacture or workmanship or otherwise not in accordance with the requirements of this Agreement, or that any part thereof is defective or does not fulfill the requirements of this Agreement (each a “Defect”) and (ii)

notifies Developer of such determination, including particulars of the Defect, then Developer shall, at its sole cost and expense, promptly remedy the Defects so specified.

(b) If Developer fails to remedy such Defect, then PacifiCorp may elect, at the sole cost and expense of Developer, to take such steps as may be reasonably necessary or convenient to remedy such Defect, and the cost and expense of remedying such Defect may be deducted by PacifiCorp from any payment due Developer under this Agreement.

## **Section 19.2 Replacement of Defects.**

All Equipment or Materials supplied or Work performed by PacifiCorp to replace defective Equipment, Materials or the Facility or Work shall comply with the requirements of this Agreement and shall be obtained at reasonable prices and where reasonably practicable under competitive conditions. Developer shall be entitled, at its own expense, to remove and retain all defective Equipment or Materials that PacifiCorp may have replaced.

## **ARTICLE 20**

### **NOTICE OF MECHANICAL COMPLETION, NOTICE OF SUBSTANTIAL COMPLETION, NOTICE OF FINAL ACCEPTANCE AND TRANSFER OF CARE, CUSTODY AND CONTROL**

#### **Section 20.1 Notice of Mechanical Completion**

(a) When the Work meets the Mechanical Completion Criteria set forth in Appendix AA with respect to each turbine, Developer shall so notify PacifiCorp and provide PacifiCorp a certificate of an Authorized Officer of Developer, in the form of Appendix D, certifying that the Mechanical Completion Criteria have been achieved and the date thereof (the “Certificate of Mechanical Completion”).

(b) Within ten (10) Business Days after receipt of each Certificate of Mechanical Completion, PacifiCorp shall either: (i) reject such Certificate of Mechanical Completion and by written notice (the “Notice of Rejection of Mechanical Completion”) specify the Mechanical Completion Criteria Developer failed to achieve; or (ii) accept the Certificate of Mechanical Completion by countersigning the Certificate of Mechanical Completion, in which case, Mechanical Completion shall be deemed to occur with respect to the applicable turbine on the date set forth in the Certificate of Mechanical Completion.

(c) If PacifiCorp rejects a Certificate of Mechanical Completion pursuant to Section 20.1(b)(i), then Developer shall promptly provide to PacifiCorp a plan and schedule for remedying the deficiencies specified in PacifiCorp’s Notice of Rejection of Mechanical Completion, and shall carry out such plan at its own cost and expense. Upon completion of such remedial work and Developer’s belief that the Mechanical Completion Criteria are satisfied, Developer shall issue a new Certificate of Mechanical Completion for the applicable turbine to PacifiCorp pursuant to Section 20.1(a).

(d) The foregoing procedure shall be repeated until PacifiCorp accepts the Certificate of Mechanical Completion pursuant to Section 20.1(b)(ii). Disputes as to whether Developer has achieved Mechanical Completion shall be resolved pursuant to ARTICLE 32.

## **Section 20.2 Notice of Substantial Completion of Work.**

(a) When the Work meets the Substantial Completion Criteria set forth in Appendix AA, Developer shall so notify PacifiCorp and provide PacifiCorp a certificate of an Authorized Officer of Developer, in the form of Appendix D, certifying that the Substantial Completion Criteria have been achieved and the date thereof (the “Certificate of Substantial Completion”).

(b) Within five (5) Business Days after receipt of the Certificate of Substantial Completion, PacifiCorp shall either: (i) reject such Certificate of Substantial Completion and by written notice (the “Notice of Rejection of Substantial Completion”) specify the Substantial Completion Criteria Developer failed to achieve; or (ii) accept the Certificate of Substantial Completion by countersigning the Certificate of Substantial Completion, in which case, Substantial Completion shall be deemed to occur on the date set forth in the Certificate of Substantial Completion.

(c) If PacifiCorp rejects the Certificate of Substantial Completion pursuant to Section 20.2(b)(i), then Developer shall promptly provide to PacifiCorp a plan and schedule for remedying the deficiencies specified in PacifiCorp’s Notice of Rejection of Substantial Completion, and shall carry out such plan at its own cost and expense. Upon completion of such remedial work and Developer’s belief that the Substantial Completion Criteria are satisfied, Developer shall issue a new Certificate of Substantial Completion to PacifiCorp pursuant to Section 20.2(a).

(d) The foregoing procedure shall be repeated until PacifiCorp accepts the Certificate of Substantial Completion pursuant to Section 20.2(b)(ii). Disputes as to whether Developer has achieved Substantial Completion shall be resolved pursuant to ARTICLE 32.

## **Section 20.3 Care, Custody and Control; Punch List Items.**

(a) Developer shall be responsible for care, custody, control and risk of loss of the Work, including all Equipment, Materials and the Facility, and shall make good at Developer’s own cost and expense any loss or damage that may occur to the Work or any part thereof from any cause whatsoever until the Substantial Completion Date. Developer shall also be responsible for any loss or damage to the Work, including all Equipment, Materials and the Facility, caused by the Developer Parties in the course of any work carried out under the Project Documents or in connection with the Project until Final Acceptance. Developer hereby waives any and all Claims or causes of action it might have now or in the future against PacifiCorp, whether by way of affirmative action, offset, cross claim or otherwise, and shall be liable for any loss or damage that may occur to the Work, including all Equipment, Materials and the Facility, or any part thereof, caused by PacifiCorp’s negligent acts in the course of any work carried out by PacifiCorp in connection with the Project.

(b) Care, custody and control of the Work, including all Equipment, Materials and the Facility, shall be transferred to PacifiCorp as of the Substantial Completion Date. PacifiCorp shall begin to compile a preliminary punch list as the Work progresses (with Developer and PacifiCorp in good faith mutually determining the Dollar value of such list). PacifiCorp shall submit to Developer the completed preliminary punch list at least fifteen (15) Business Days prior to the anticipated Substantial Completion Date. At least five (5) Business Days prior to the Substantial Completion Date, Developer and PacifiCorp shall mutually agree on the final punch list of items, the value related thereto and on a schedule for completion of such items (the “Final Punch List”). PacifiCorp shall withhold from its

Progress Payment at the Substantial Completion Date an amount equal to two hundred percent (200%) of the agreed upon value of the Final Punch List (the “Punchlist Holdback Amount”), but shall make periodic pro-rata payments as Developer demonstrates to PacifiCorp completion of the items on the Final Punch List. All of the items on the Final Punch List shall be completed expeditiously after the Substantial Completion Date and in accordance with the schedule for completion provided as part of the Final Punch List. PacifiCorp shall provide to Developer for such purpose reasonable access to the Work.

#### **Section 20.4 Dispatch Coordination.**

During the startup, testing and commissioning of the Facility, Developer shall coordinate with PacifiCorp’s Representative and PacifiCorp’s operating personnel the orderly startup and shut-down of the Facility. Ninety (90) days prior to the initial startup of the Facility, Developer shall provide to PacifiCorp a schedule of dispatch for the Facility during the commissioning period, including expected net Facility output and duration of the commissioning activities. Within thirty (30) days of the initial startup of the Facility, Developer shall provide to PacifiCorp an update to this schedule and thereafter on a weekly basis until the Substantial Completion Date is achieved. Developer shall also provide 72 hours’ advance notice to PacifiCorp of the planned Pant dispatch profile including net Facility output, and duration of the commissioning period.

#### **Section 20.5 Use Before Acceptance Date.**

PacifiCorp shall not operate or assume control of all or a portion of the Work prior to the Substantial Completion Date.

#### **Section 20.6 Title and Risk of Loss.**

(a) Risk of loss with respect to the Work, including all Equipment, Materials and the Facility, shall remain with Developer until Final Acceptance, whereupon the same shall pass to PacifiCorp.

(b) Title to the Equipment, Materials and other Work to be supplied pursuant to this Agreement shall pass to PacifiCorp at the earlier of:

(i) the Substantial Completion Date;

(ii) when Developer has received a Progress Payment with respect to such Equipment, Materials or other Work; or

(iii) when the Equipment, Materials or other Work is delivered to the Site or incorporated into the Facility.

#### **Section 20.7 Marking of Equipment and Facility.**

(a) Where, prior to delivery to the Site, title to any Equipment, Materials or Work passes to PacifiCorp, Developer shall, so far as is practicable, set such Equipment, Material or Work aside and mark it as PacifiCorp’s property in a manner reasonably required by PacifiCorp. Until such Equipment, Material or Work has been so set aside and marked, PacifiCorp shall be entitled to withhold any Progress Payment to which Developer might otherwise be entitled hereunder.



(b) Developer shall permit PacifiCorp at any time upon reasonable notice to inspect any Equipment, Materials or Work which has become the property of PacifiCorp and shall grant or cause to be granted to PacifiCorp access to Developer's premises for such purposes or any other premises where such Equipment, Materials or Work may be located. Such inspection shall not constitute acceptance of the Equipment, Materials or Work.

(c) No Progress Payment issued by PacifiCorp shall prejudice its right to reject the Facility, Equipment, Materials or Work which is not in accordance with this Agreement.

(d) Developer shall cause Contractor and any Subcontractors to transfer the Equipment, Materials and Work supplied and performed by Contractor or Subcontractor to PacifiCorp: (i) prior to the Substantial Completion Date, free and clear of all Liens other than (A) mechanics liens relating to Equipment, Materials and Work supplied and performed by Contractor or Subcontractors that have not yet been paid and (B) amounts payable to Contractor or Subcontractors that are being disputed in good faith provided that Contractor or Subcontractor has posted a bond against such Liens with a bonding company or other surety reasonably acceptable to PacifiCorp, and (ii) upon the Substantial Completion Date, free and clear of all Liens.

(e) Ownership of the Non-PacifiCorp Materials used in connection with the Work shall remain with the Developer Parties.

#### **Section 20.8 Removal of Equipment.**

Prior to Final Acceptance, Developer shall remove from the Site all Developer's Equipment, materials, temporary structures constructed by or on behalf of Developer or other items of any nature required for execution or completion of the Work (collectively, "Surplus Items"), but excluding equipment, materials, appliances or other items intended to form or forming part of the Work, including the Equipment, Materials and the Facility. Prior to removal of the Surplus Items, Developer shall make a written offer to sell the Surplus Items to PacifiCorp which Developer, Contractor or any Subcontractor desire to sell. Developer shall leave the Site in good order and in neat and presentable condition. Any of the Surplus Items left at the Site will become the property of PacifiCorp if not removed by Developer, Contractor or its Subcontractors within thirty (30) days after Final Acceptance (or such later date contemplated in any completion and demobilization procedure mutually agreed to by PacifiCorp and Developer). All costs to dispose of the Surplus Items not removed by Developer within the thirty (30) days following Final Acceptance (or such later date contemplated in any completion and demobilization procedure mutually agreed to by PacifiCorp and Developer) and which PacifiCorp does not wish to keep shall be for the account of Developer. Prior to removing any equipment from the Site Developer shall provide to PacifiCorp a detailed list of Developer's Equipment to be removed. No equipment shall be Developer's Equipment unless it is included in the then-current list approved pursuant to Section 12.1.

#### **Section 20.9 Notice of Final Acceptance of Work.**

(a) When Developer believes the Work satisfies the Final Acceptance Criteria set forth in Appendix AA, Developer shall so notify PacifiCorp and provide PacifiCorp a certificate of an Authorized Officer of Developer, in the form of Appendix D, certifying that the Final Acceptance Criteria have been achieved and the date thereof (the "Certificate of Final Acceptance").

(b) Within five (5) Business Days after receipt of the Certificate of Final Acceptance, PacifiCorp shall either: (i) reject such Certificate of Final Acceptance and by written notice (the “Notice of Final Acceptance”) specify the Final Acceptance Criteria Developer failed to achieve; or (ii) accept the Certificate of Final Acceptance by countersigning the Certificate of Final Acceptance, in which case, Final Acceptance shall be deemed to occur on the date set forth in the Certificate of Final Acceptance.

(c) If PacifiCorp rejects the Certificate of Final Acceptance pursuant to Section 20.9(b)(i), then Developer shall promptly provide to PacifiCorp a plan and schedule for remedying the deficiencies specified in PacifiCorp’s Notice of Final Acceptance, and shall carry out such plan at its own cost and expense. Upon completion of such remedial work and Developer’s belief that the Final Acceptance Criteria are satisfied, Developer shall issue a new Certificate of Final Acceptance to PacifiCorp pursuant to Section 20.9(a).

(d) The foregoing procedure shall be repeated until PacifiCorp accepts the Certificate of Final Acceptance pursuant to Section 20.9(b)(ii). Disputes as to whether Developer has achieved Final Acceptance shall be resolved pursuant to ARTICLE 32.

## **ARTICLE 21 TAX MATTERS**

### **Section 21.1 Tax Indemnification.**

(a) Developer shall defend, indemnify and hold harmless the PacifiCorp Indemnified Parties from and against any: (i) income or franchise Taxes of Developer, Contractor or Subcontractors or any of their respective Affiliates; (ii) Pre-Closing Taxes; (iii) Transfer Taxes for which Developer is responsible pursuant to Section 21.2; (iv) any Taxes attributable to a breach by Developer of its representations, warranties or covenants pursuant to Section 4.8 and Section 4.14; and (v) Taxes imposed on PacifiCorp, as a transferee or successor, by contract or pursuant to any Law, which Taxes relate to an event or transaction occurring prior to the close of business on the day immediately preceding the Closing Date.

(b) Developer shall defend, indemnify and hold harmless the PacifiCorp Indemnified Parties from and against any Change in Tax Law Losses suffered by the PacifiCorp Indemnified Parties.

(c) If Developer fails to cause all property (including all PTC Facilities) in the Project to be placed in service within the meaning of Section 45 of the Code no later than the end of the fourth calendar year after the date on which construction began, regardless of whether such failure is caused by or the result of Force Majeure, but not if such failure is solely the result of the acts or omissions of PacifiCorp in breach of this Agreement, then Developer shall defend, indemnify and hold harmless the PacifiCorp Indemnified Parties from and against any and losses suffered by the PacifiCorp Indemnified Parties as a result thereof.

(d) PacifiCorp may set off against the Contract Price and any Progress Payments any amounts due PacifiCorp or any other PacifiCorp Indemnified Parties pursuant to this Section 21.1.

## **Section 21.2      Transfer Tax.**

Developer shall be responsible for any sales, use, value added, gross receipts, excise, registration, stamp duty, transfer or other similar Taxes or governmental fees (including any interest or penalties related thereto) that may be payable in connection with the development, design, engineering, construction and commissioning and transfer to PacifiCorp of the Project, including the Facility and the Work (the “Transfer Tax”). Developer shall prepare and file all Tax Returns for any Transfer Tax and shall remit the Transfer Tax shown as due on each such Tax Return. PacifiCorp and Developer shall, upon request, use their commercially reasonable efforts to obtain any certificate or other document from any Governmental Authority or any other person that may be necessary to mitigate, reduce or eliminate any Transfer Tax.

## **Section 21.3      Allocation.**

Within sixty (60) days after the Closing Date, PacifiCorp shall prepare and provide to Developer an allocation of the Purchase Price and any liabilities properly included for U.S. federal income Tax purposes among the assets of the Project (the “Purchase Price Allocation”). If Developer does not provide any comments within ten (10) days after its receipt of the Purchase Price Allocation from PacifiCorp, the Purchase Price Allocation will be final. If Developer proposes to PacifiCorp in writing any changes to such Purchase Price Allocation within ten (10) days after its receipt of the Purchase Price Allocation, PacifiCorp shall consider in good faith any such comments and shall provide to Developer a final Purchase Price Allocation within ten (10) days after its receipt of Developer’s comments. PacifiCorp and Developer shall file all Tax Returns in a manner consistent with the Purchase Price Allocation as finally determined, and PacifiCorp and Developer shall not take any position on any Tax Return, in any audit, administrative, or judicial proceeding, or otherwise that is inconsistent with the Purchase Price Allocation except as otherwise required applicable Law. If any adjustment is required to be made to the Purchase Price Allocation as a result of the payment of additional Purchase Price or otherwise, this Section 21.3 shall govern the rights and obligations of PacifiCorp and Developer with respect to such revised Purchase Price Allocation.

## **Section 21.4      Tax Incentives.**

(a) Neither Developer nor any Affiliate of Developer will engage in any action or fail to take any action that would jeopardize the receipt by PacifiCorp or any of its Affiliates of any Renewable Energy Incentive, or the eligibility of the Project (or any property in the Project) for any other Tax benefit or incentive made available by a Governmental Authority.

(b) Developer shall cause all property (including all PTC Facilities) in the Project to be placed in service within the meaning of Section 45 of the Code no later than the end of the fourth calendar year after the date on which construction began.

## **Section 21.5      Cooperation.**

PacifiCorp and Developer shall cooperate fully, as and to the extent reasonably requested, in connection with the filing of Tax Returns and any audit, litigation or other proceeding with respect to Taxes. Such cooperation shall include the retention and (upon request) the provision of records and information that are reasonably relevant to the filing of such Tax Returns and any such audit, litigation

or other proceeding and making employees available on a mutually convenient basis to provide additional information and explanation of any material provided hereunder.

**Section 21.6 Survival.**

The representations, warranties and covenants set forth in Section 4.8, Section 4.14, and this ARTICLE 21 shall remain in effect until ninety (90) days after the expiration of the applicable statute of limitations (giving effect to any extensions or waivers thereof) relating to the Tax or Tax Return in question.

**Section 21.7 Coordination with General Indemnification.**

The provisions of this ARTICLE 21 shall govern the indemnification rights and obligations of PacifiCorp, Developer and their Affiliates with respect to Tax matters in the event of any conflict between the provisions of ARTICLE 26 and this ARTICLE 21.

**ARTICLE 22  
ENVIRONMENTAL MATTERS**

**Section 22.1 General.**

Not less than ninety (90) days prior to the Closing, Developer shall prepare and submit to PacifiCorp materials management and emergency response procedures in accordance with Environmental Law covering any Regulated Materials Developer expects to be used in the completion and testing of the Work, which procedures shall be satisfactory to PacifiCorp. Developer shall comply, and shall cause all other Developer Parties to comply, at all times with the PacifiCorp-approved materials management and emergency response procedures, all Environmental Laws and all Permits applicable to the Work and the Site. No Regulated Materials shall be Released on the Site.

**Section 22.2 Release On-Site.**

Developer shall immediately notify PacifiCorp of any Release of Regulated Materials at the Site by the Developer Parties or otherwise. In addition, Developer shall immediately notify any applicable Governmental Authorities of any Release that is reportable to Governmental Authorities under applicable Environmental Laws and take such emergency measures as are prudent and necessary to protect the environment consistent with the PacifiCorp-approved materials management and emergency response procedures and applicable Law. Developer shall take all appropriate steps consistent with the PacifiCorp-approved materials management and emergency response procedures and applicable Law for immediate containment of any such Release and Remediation of the affected area.

**Section 22.3 Release Off-Site.**

In the event of a Release by any Developer Party of a Regulated Material off the Site but related to the Work which is reportable to Governmental Authorities under applicable Environmental Laws, Developer shall be responsible for notifying all applicable federal, state and local Governmental Authorities in accordance with applicable Law or for causing such notification to occur by the party responsible for such action. Developer shall take all appropriate steps consistent with the PacifiCorp-

approved materials management and emergency response procedures and applicable Law for immediate containment of any such Release and Remediation of the affected area.

#### **Section 22.4 Liability.**

Unless a Release referred to in Section 22.2 and Section 22.3 is caused by an act or omission of PacifiCorp or a representative of PacifiCorp, Developer shall be responsible for all Liabilities with respect to such Release and the Remediation of the affected area and the indemnification provisions set forth in Section 26.1 shall apply.

#### **Section 22.5 Pre-existing Regulated Materials.**

(a) Developer shall develop a contingency plan to address the presence of Regulated Materials in soils or groundwater that Developer may encounter during construction of the Project. The purpose of the contingency plan is to avoid any delays in construction of the Project by planning in advance how to respond to unexpected pre-existing environmental conditions that could impact the Project Schedule or the Guaranteed Substantial Completion Date. The contingency plan shall, at a minimum, provide for:

(i) a staging area for soil containing Regulated Materials so that construction of the Project can continue without delays. Such soils (that must be removed for construction purposes) can be placed in the staging area while testing and subsequent disposal decisions are made;

(ii) the handling of any groundwater containing Regulated Materials that might be extracted, including the prospective procurement of a [STATE; AGENCY] Permit in the event the contingency plan calls for such extracted water being discharged into an area that is subject to Clean Water Act jurisdiction; and

(iii) the final disposal of all Regulated Materials and associated soil and groundwater encountered on the Site.

(b) Developer shall be responsible for implementing any recommendations relating to pre-existing Regulated Materials contained in any environmental surveys or reports.

#### **Section 22.6 Notice.**

Developer shall immediately notify PacifiCorp of the occurrence of any event that would or could reasonably be expected to result in any violation or noncompliance or potential violation or noncompliance of any Environmental Law relating to the Work, the Facility, or the Site, or otherwise constitutes a Material Adverse Change under this Agreement.

### **ARTICLE 23 WARRANTIES OF WORK**

#### **Section 23.1 Warranties.**

(a) Developer warrants (the "Warranty"), for the duration of the applicable Warranty Period, as follows:

(i) that the Facility and all Equipment and Materials and other Work furnished by Developer, Contractor or any Subcontractor, including installation, but excluding the wind turbines to which the wind turbine warranty in Appendix E applies (provided, that Work related to wind turbine installation shall not be excluded) shall: (A) be free from improper workmanship and Defects in design, engineering, construction, fabrication, workmanship, materials and operations, (B) be new and unused (except for use as part of the Facility); (C) be of good quality, undamaged and in good condition; and (D) conform to the applicable requirements of this Agreement and the other Project Documents, including the Scope of Work and Technical Specification, in effect as of the Substantial Completion Date;

(ii) that the procurement, design, engineering and construction services included as part of the Work (including for the avoidance of doubt, Work related to installation of the wind turbines) shall be performed with Developer's, Contractor's and Subcontractor's best skill and judgment, in a good and workmanlike manner, and conform to and be designed, engineered and constructed in accordance with the terms and conditions of the Project Documents, including the Scope of Work and Technical Specification, Prudent Industry Practice, applicable Laws, and the Developer Permits, in each case, in effect as of the Substantial Completion Date, and conform with, and be designed and engineered according to professional standards and skill, expertise and diligence of design professionals regularly involved in wind power projects similar to the Project, and contain the Equipment, Materials and supplies described in the Scope of Work;

(iii) that the completed Work shall perform its intended functions as a complete, integrated wind energy generation operating system as explicitly described or implied in the Project Documents;

(iv) that none of the Work, the Facility, the Equipment, the Materials, the final plans and the design, engineering and other services rendered by Seller, Contractor or any Subcontractor hereunder, nor the use or ownership thereof by PacifiCorp in accordance with the licenses granted hereunder, infringes, violates or constitutes a misappropriation of any trade secrets, proprietary rights, intellectual property rights, patents, copyrights or trademarks; and

(v) the individual warranties set forth in Appendix E, other than the wind turbine warranty.

(b) The Warranty shall not extend to Defects or deficiencies to the extent resulting from: (i) operation by PacifiCorp's personnel in a manner inconsistent with or contrary to instructions contained in the operation and maintenance manuals provided by Developer pursuant to Section 15.5; (ii) repairs or alterations by PacifiCorp's personnel in a manner inconsistent with or contrary to instructions provided by Developer or as contained in the operation and maintenance manuals provided by Developer pursuant to Section 15.5; or (iii) normal wear and tear.

## **Section 23.2 Warranty Period.**

Subject to the provisions in this ARTICLE 23, the Warranty: (a) in Section 23.1(a)(i), Section 23.1(a)(ii), Section 23.1(a)(iii) and Section 23.1(a)(iv) shall remain in full force and effect for a period beginning on the Substantial Completion Date and ending on the date twenty-four (24) months thereafter; and (b) in Section 23.1(a)(v), shall remain in full force and effect for the period of time beginning on the

Substantial Completion Date and ending on the date set forth in Appendix E (each period, a “Warranty Period”); provided, however, if ten percent (10%) or more of any type of component of the Project requires repair or replacement within the Warranty Period, then the Warranty for that type of component shall be automatically extended for all such components of that type for an additional two (2) years from the date of the failure that caused the percentage of failures to reach ten percent (10%). Notwithstanding the foregoing, with the exception of the wind turbine warranty set forth in Appendix E, in no event shall any Warranty (including for the avoidance of doubt, any wind turbine pad mounted transformer warranty, high voltage switch gear warranty, step-up transformer warranty or SCADA monitoring system and security system warranty set forth in Appendix E, if applicable) terminate less than twenty-four (24) months following the Substantial Completion Date.

### **Section 23.3 Repair of Defects.**

If PacifiCorp or Developer discovers that the Work, or any portion thereof, fails to meet the Warranty, then it shall notify the other Party of such failure within a reasonable time after discovery, along with the reasonable basis therefore. Upon receipt of such notice, or promptly upon Developer’s own discovery thereof, Developer shall (a) cure such failure in accordance with the Warranty and (b) perform such tests as PacifiCorp may reasonably require demonstrating the cure of such failure. Developer shall coordinate repairing, replacing or re-performing any of the Work with PacifiCorp so as to minimize any adverse effects on the operation of the Project.

### **Section 23.4 Warranty Period Extension.**

(a) Extension for Corrected Work. Any Work re-performed and any part of the Site that is reworked, repaired or replaced in satisfaction of Developer’s obligations in connection with the Warranty will be re-warranted by Developer pursuant to the same Warranty set forth in this ARTICLE 23, and Developer will have the same obligations in relation thereto as set forth in this ARTICLE 23 for a period equal to eighteen (18) months from the date such re-performance, rework, repair or replacement is completed.

(b) Extension for Total Shutdown. If, during the Warranty Period, the Facility is shut down (other than for the purpose of scheduled or routine maintenance) and such shutdown is caused by a defect or failure covered by the Warranty, then the Warranty Period will be extended by a period equal to the duration of the shutdown required to repair such defect or failure.

### **Section 23.5 Contractor and Subcontractor Warranties.**

Developer will procure from Contractor and each Subcontractor warranties with respect to services, Equipment, Materials and Work provided by such entity for a period of no less than twenty-four (24) months after the Substantial Completion Date and for a further twenty-four (24) months after any warranty repair with respect to the subject of the repair. Developer shall obtain and maintain all such warranties in full force and effect.

### **Section 23.6 Delay in Remediating Defects.**

If any such Defect or damage is not remedied by Developer within a reasonable time or requires prompt remediation as a result of an emergency situation existing at the Site, then PacifiCorp may proceed to do the Work or have others perform such Work at Developer’s risk and expense provided that it does so in a reasonable manner and notifies Developer of PacifiCorp’s intention so to do.

Developer reserves the right to investigate and determine the eligibility for such Work to classify as part of a warranty claim. All costs incurred by or on behalf of PacifiCorp in connection with such Work shall be deducted from the Contract Price or be paid by Developer to PacifiCorp within thirty (30) days.

### **Section 23.7 Removal of Defective Work.**

Developer may, with the consent of PacifiCorp, remove from the Site any part of the Work which is Defective or damaged, if the nature of the Defect or damage is such that repairs cannot be expeditiously carried out on the Site.

### **Section 23.8 Further Tests.**

If repairs or replacements are of such a character as may affect the operation of the Facility or any part thereof, PacifiCorp may, within one (1) month after such repair or replacement, give to Developer notice requiring further testing to be conducted, in which case such tests shall be carried out at Developer's cost and as provided in ARTICLE 18.

### **Section 23.9 Developer to Diagnose.**

Developer shall, if required by PacifiCorp's Representative in writing and under the direction of PacifiCorp's Representative, diagnose the cause of any Defect. Unless such Defect or its cause shall be one which Developer would otherwise be responsible for repairing, the costs incurred by Developer in diagnosing such Defect shall, subject to this ARTICLE 23, be borne by PacifiCorp and added to the Contract Price.

### **Section 23.10 Latent Defects.**

(a) Developer's liability for Latent Defects shall remain in full force and effect during all phases of the Work for a period beginning on the Substantial Completion Date and ending five (5) years thereafter (the "Latent Defects Liability Period").

(b) If any Latent Defect shall appear in any part of the Work during the Latent Defects Liability Period, such Latent Defect shall be repaired by Developer with all possible speed and at Developer's sole cost and expense, provided that the Latent Defect existed and would not have been disclosed by a reasonable examination conducted in accordance with Prudent Industry Practice prior to the expiration of the Defects Liability Period.

(c) Developer agrees that any examination of the Work undertaken by PacifiCorp at a relevant time shall, in respect of that part of the Work examined, constitute a reasonable examination conducted in accordance with Prudent Industry Practice within the meaning of this Article.

(d) During the Latent Defects Liability Period, in the event Developer's OEM issues any notice, including Technical Information Letters, service bulletins or similar notices recommending replacement or repair of one or more parts of the Equipment and such repair or replacement is necessary for continued safe operation of the Equipment or is issued to address a defect in material, or workmanship (each a "Latent Defect"), Developer shall repair or replace the affected parts in accordance with and subject to all the terms of the Warranty provided that PacifiCorp shall make the affected Work reasonably available for performance of the repairs or modifications and Developer shall cooperate with PacifiCorp in scheduling such modifications or repairs in order to avoid disruption to PacifiCorp's operations.



**Section 23.11 Significant Defects.**

Developer warrants and guarantees to PacifiCorp that there will be no Significant Defects. In the event that a Significant Defect occurs, Developer shall cure or otherwise make good the Significant Defect.

**Section 23.12 Assignment of Warranties.**

On or before the date that is twenty four (24) months following the Substantial Completion Date, Developer shall enter into a partial assignment agreement, in form and substance acceptable to PacifiCorp, pursuant to which Developer shall assign to PacifiCorp all of Developer’s rights with respect to the warranties set forth in Appendix E and such other existing Contractor and Subcontractor warranties as exist with respect to Section 23.5 (the “Other Warranty Assignment”), provided on and as a condition precedent to the Substantial Completion Date, Developer shall enter into a partial assignment agreement, in form and substance acceptable to PacifiCorp, pursuant to which Developer shall assign to PacifiCorp all of Developer’s rights with respect to the turbine warranties set forth in Appendix E (the “Turbine Warranty Assignment”).

**Section 23.13 Wind Turbine Warranty Obligations.**

PacifiCorp’s exclusive remedy with respect to the wind turbine warranty obligations shall be against the wind turbine supplier under the wind turbine warranty so assigned.

**ARTICLE 24  
LIQUIDATED DAMAGES**

**Section 24.1 General.**

The Parties agree that it is difficult or impossible to determine with precision the amount of damages that would be incurred by PacifiCorp as a result of Developer’s failure to timely achieve the Substantial Completion Date by the Guaranteed Substantial Completion Date or meet the Performance Guarantees, if applicable. Accordingly, the Parties expressly agree that if Developer fails to timely achieve the Substantial Completion Date by the Guaranteed Substantial Completion Date or meet the Performance Guarantees, if applicable, any sums which would be payable under this ARTICLE 24 because of such failures are liquidated damages and not a penalty, and are fair and reasonable and any such sums represent a reasonable estimate of fair compensation for the losses that may reasonably be anticipated from such failures. Notwithstanding anything to the contrary herein: (a) provisions of this Agreement providing for liquidated damages only relate to damages arising out of Developer’s performance under this Agreement, and do not limit damages payable to PacifiCorp related to or arising from the termination of this Agreement, by PacifiCorp or otherwise; and (b) in no event are liquidated damages PacifiCorp’s exclusive remedy for any breach or failure to perform by Developer.

**Section 24.2 Liquidated Damages for Delay in Substantial Completion.**

If the Project fails to achieve the Substantial Completion Date on or prior to close of business on the Substantial Completion Guaranteed Date, then Developer shall pay to PacifiCorp liquidated damages for each day until the Project achieves the Substantial Completion Date, in an amount equal to [\_\_\_\_\_ (\$\_\_\_\_\_) ] per day for the first thirty-one (31) days following the Substantial

Completion Guaranteed Date and [\_\_\_\_\_ (\$\_\_\_\_\_)] per day thereafter (collectively, the “Delay Liquidated Damages”).

### **Section 24.3 Liquidated Damages for Performance Guarantees.**

If PacifiCorp elects for Developer to perform the Performance Tests and the Project fails to achieve the Performance Guaranty by the Guaranteed Substantial Completion Date, then Developer shall pay to PacifiCorp liquidated damages in an amount and on such terms and conditions as are set forth in Appendix AA (collectively, the “Performance Liquidated Damages”).

### **Section 24.4 Calculations and Payments of Liquidated Damages.**

(a) All amounts payable as liquidated damages under this ARTICLE 24 shall be made by Developer to PacifiCorp as follows: (i) in the case of Delay Liquidated Damages, thirty (30) days after the final day of each month during which liquidated damages became payable pursuant to Section 24.3; and (ii) in the case of Performance Liquidated Damages, if applicable, thirty (30) days after PacifiCorp’s receipt of the Final Performance Test Report or as otherwise provided in Appendix AA. PacifiCorp shall have the right to audit Developer’s calculations of all liquidated damages. Developer shall itemize such calculations and such calculations shall include such supporting documentation as PacifiCorp may reasonably request and shall be in sufficient detail to permit PacifiCorp to verify each calculation. PacifiCorp shall notify Developer, as soon as reasonably possible, of any portion of the calculations with which PacifiCorp disagrees.

(b) Liquidated damages shall bear interest at the Late Payment Rate, compounded daily from the date such amount was due, but not to exceed the maximum rate of interest permitted by applicable Law.

## **ARTICLE 25 LIMITATION OF LIABILITY**

### **Section 25.1 Duty to Mitigate.**

In all cases, but subject to any right or remedy which the Party may have under or by virtue of this Agreement, the Party establishing or alleging a breach or default of this Agreement or a right to recover damages or to be indemnified in accordance with this Agreement shall be under a duty to take all commercially reasonable actions necessary to mitigate any loss which has occurred.

### **Section 25.2 Limitation of Liability.**

SUBJECT TO THE OBLIGATION OF DEVELOPER TO PAY LIQUIDATED DAMAGES TO PACIFICORP UNDER THIS AGREEMENT AND OTHERWISE AS PROVIDED IN SECTION 2.9 AND SECTION 25.3, NEITHER DEVELOPER NOR PACIFICORP SHALL BE LIABLE TO THE OTHER BY WAY OF INDEMNITY OR BY REASON OF ANY BREACH OR DEFAULT OF THIS AGREEMENT OR ANY STATUTORY DUTY OR TORT (INCLUDING NEGLIGENCE BUT EXCLUDING ANY DAMAGES PAYABLE TO A THIRD PARTY CAUSED BY A TRESPASS OR NUISANCE FOR WHICH DEVELOPER IS RESPONSIBLE PURSUANT TO THIS AGREEMENT) FOR ANY LOSS OF PROFIT OR INCOME, LOSS OF USE, LOSS OF PRODUCTION, LOSS OF

CONTRACTS OR FOR ANY INDIRECT OR CONSEQUENTIAL, MULTIPLE, PUNITIVE OR EXEMPLARY DAMAGES THAT MAY BE SUFFERED BY THE OTHER.

**Section 25.3 Enforceability of Liquidated Damages.**

The Parties explicitly agree and intend that the provisions of ARTICLE 24 shall be fully enforceable by any court exercising jurisdiction over any dispute between the Parties arising under this Agreement. Each Party hereby irrevocably waives any defenses available to it under law or equity relating to the enforceability of the liquidated damages provisions set forth in ARTICLE 24.

**Section 25.4 Limitations on Liabilities.**

Notwithstanding any other provision of this Agreement to the contrary, the cumulative maximum liability of a Party to the other Party under this Agreement shall not exceed one hundred percent (100%) of the sum of the Contract Price and the Purchase Price. The foregoing limitation of liability shall not apply with respect to (a) Developer's indemnification obligations in Section 21.1 and (b) claims made by, damages incurred by, or amounts payable to third parties pursuant to an indemnity given hereunder or claims arising out of such Party's fraud, willful misconduct or gross negligence. To the extent any provision of this Agreement establishes a lower limit of liability of a Party with respect to a particular component or type of liability, such lower limit of liability shall control with respect to the relevant component or type of liability. Notwithstanding anything herein to the contrary, no liabilities of Developer to PacifiCorp that are covered by insurance carried by Developer pursuant to ARTICLE 27 (except deductibles paid by Developer) shall count towards Developer's cumulative maximum liability to PacifiCorp pursuant to this Agreement.

**ARTICLE 26  
INDEMNIFICATION**

**Section 26.1 Indemnification for Third Party Claims.**

(a) Developer shall defend, indemnify and hold harmless PacifiCorp and the other PacifiCorp Indemnified Parties from and against all third party Claims and Liabilities for injury, including death, and property damage caused by, arising out of, or in connection with the performance by any Project Party of the Project Documents to the extent any of such Claims or Liabilities were caused by breach of any representation, warranty or obligation under this Agreement or any Project Document by or the negligence, gross negligence or willful misconduct of any Developer Parties.

(b) PacifiCorp shall defend, indemnify and hold harmless Developer and its directors, officers, employees and agents, from and against all third party Claims and Liabilities for injury, including death, and property damage caused by, arising out of, or in connection with the performance by PacifiCorp of the Project Documents to which it is a Party to the extent any of such Claims or Liabilities were caused by the breach of any representation, warranty or obligation under this Agreement or any other Project Document to which it is a party by or the negligence, gross negligence or willful misconduct of PacifiCorp, its employees or agents.

(c) Either Party seeking indemnification under this Agreement (the "Indemnified Party") shall give notice to the Party required to provide indemnification hereunder (the "Indemnifying Party") promptly after the Indemnified Party has actual knowledge of any Claim as to which indemnity may be

sought hereunder, and the Indemnified Party shall permit the Indemnifying Party (at the expense of the Indemnifying Party) to assume the defense of any Claim resulting therefrom; provided that:

(i) counsel for the Indemnifying Party who shall conduct the defense of such Claim shall be reasonably satisfactory to the Indemnified Party;

(ii) the Indemnified Party may participate in such defense at its own expense, except the Indemnifying Party shall reimburse the Indemnified Party for its participation in such defense to the extent that the Indemnifying Party requests the Indemnified Party to participate in its own defense; and

(iii) the omission by the Indemnified Party to give notice as provided herein shall not relieve the Indemnifying Party of its indemnification obligations hereunder except to the extent that such omission results in a failure of actual notice to the Indemnifying Party and the Indemnifying Party is damaged as a result of such failure to give notice.

Notwithstanding the foregoing, the Indemnifying Party may not settle any Claim related to the indemnity being provided hereunder without the consent of the Indemnified Party, such consent not to be unreasonably withheld or delayed.

(d) With regard to any Claim or Liability which is the result of the joint or concurrent fault or negligence of Developer and PacifiCorp, the Parties agree to jointly defend any Claim with respect thereto that is based on such joint or concurrent fault or negligence of PacifiCorp and Developer. Any Claim of contribution or indemnification between PacifiCorp and Developer relating to such Claims shall be resolved on the basis of the percentage of fault or negligence and the Parties agree to reserve the determination of such percentage until after resolution of such Claim. Such pro rata share shall be based upon a final judicial determination of the Parties' comparative fault or negligence or, in the absence of such determination, by mutual agreement of the Parties.

(e) Nothing in this Section 26.1 is intended to allow any Indemnified Party to be indemnified from and against any third party Claims and Liabilities caused by, arising out of, or in connection with the performance of this Agreement or any other Project Document to the extent any of such Claims or Liabilities were caused by, arose out of, or were in any way incidental to or in connection with its own breach of any representation, warranty or obligation under this Agreement or any other Project Document to which it is a party or its negligence, gross negligence or willful misconduct.

## **Section 26.2 Title Indemnity and Liens.**

(a) Developer shall promptly pay or cause to be paid when due all obligations for labor and material in connection with the Work. Developer shall discharge at once, or bond with a bonding company or surety acceptable to PacifiCorp or otherwise secure against all Liens and attachments which are filed in connection with the Work.

(b) Developer shall keep the Work and the Site free and clear of and shall promptly release or cause the release of all Liens and Claims, including recorded notices, Claims for nonpayment and *lis pendens*, arising from the performance of any Work covered by this Agreement or any other Project Document by the Developer Parties and all laborers, materialmen, mechanics and other such persons. Developer shall have the right to contest any such Lien or Claim, provided that Developer first provide

to PacifiCorp financial assurances in amount, form and substance satisfactory to PacifiCorp and otherwise complies with applicable Law with respect to removal of such Lien or Claim.

(c) Developer shall indemnify, defend, and hold harmless all PacifiCorp Indemnified Parties from and against (i) all laborers', material men's and mechanics' Liens, or Claims made or filed upon the Work or the Site on account of any labor performed or labor, services, equipment, and materials furnished by the Developer Parties and all laborers, materialmen, mechanics, and other persons in connection with the Work and (ii) any defect in title upon any of Work, including the Equipment, Materials and the Facility, supplied pursuant to this Agreement.

(d) If any Lien or Claim arising out of this Agreement or any other Project Document is filed before or after Work is completed, Developer, within ten (10) days after receiving from PacifiCorp written notice of such Lien or Claim, shall obtain release or provide financial assurance satisfactory to PacifiCorp to protect PacifiCorp from or otherwise satisfy such Lien or Claim. If Developer fails to do so, PacifiCorp may take such steps and make such expenditures as in its discretion it deems advisable to obtain release of or otherwise satisfy any such Lien or Claim, and Developer shall upon demand reimburse PacifiCorp for all costs incurred and expenditures made by PacifiCorp in obtaining such release or satisfaction including administrative costs, attorneys' fees and other expenses or PacifiCorp shall have the right to deduct the amount of such costs from the amount payable to Developer.

(e) Developer's obligation to indemnify, defend and hold harmless PacifiCorp Indemnified Parties from Liens and Claims shall not in any way be rendered unenforceable, or altered, amended, eliminated or otherwise conditioned by any applicable Laws related to processing such Liens or Claims. PacifiCorp shall have no obligation to deliver a copy of any notice of Claim or right to a Lien to Developer or any other person or entity.

(f) Developer shall at its own expense defend any suit or proceeding based on any Claim for which Developer is responsible under this Section 26.2. PacifiCorp shall give Developer such assistance as Developer may reasonably require in the defense of such Claim, and PacifiCorp shall have the right to be represented therein by counsel of its own choosing at its own expense. If Developer fails to defend diligently any such Claim, PacifiCorp may, in its reasonable discretion, either defend or settle the Claim without the consent of Developer and without relieving Developer of the obligation to indemnify as provided herein. In such a case Developer's obligation to defend shall include reimbursement of PacifiCorp's reasonable legal fees and related costs incurred in defending or settling the Claim.

### **Section 26.3 Indemnity Period.**

The Parties' obligation to indemnify one another consistent with the provisions of this ARTICLE 26 shall continue after the Substantial Completion Date as follows (collectively, the "Indemnity Period"):

(a) With respect to Claims and Liabilities brought by third parties against PacifiCorp Indemnified Parties, Developer's obligation to indemnify PacifiCorp Indemnified Parties pursuant to Section 26.1(a) shall continue for a period of five (5) years following the Substantial Completion Date.

(b) With respect to Claims and Liabilities brought by third parties against Developer and its directors, officers, employees and agents, PacifiCorp's obligation to indemnify pursuant to Section 26.1(b) shall continue for a period of five (5) years following the Substantial Completion Date.

(c) With respect to Claims and Liabilities relating to the title of the Site, the Project, the Facility or the Work, Developer's obligation to indemnify PacifiCorp pursuant to Section 26.2 shall continue indefinitely.

(d) With respect to any other Claims and Liabilities relating to the Site, the Project, the Facility or the Work, Developer's obligation to indemnify PacifiCorp pursuant to Section 26.2 shall continue for a period of five (5) years following the Substantial Completion Date.

## **ARTICLE 27 INSURANCE**

### **Section 27.1 Contractor's and Subcontractors' Insurance Coverage.**

Developer shall maintain and shall require and cause Contractor and all Subcontractors, while performing work on the Site, to provide, pay for and continuously maintain in full force and effect insurance coverage in accordance with the requirements of Appendix Q-1 and Appendix Q-3.

### **Section 27.2 PacifiCorp's Insurance.**

PacifiCorp shall during the term of this Agreement maintain in full force and effect insurance coverage in accordance with the requirements of Appendix Q-2 and Appendix Q-3.

### **Section 27.3 Developer's Cooperation with PacifiCorp.**

Developer agrees to provide such assistance and documentation as PacifiCorp may request in connection with Claims PacifiCorp may make under its insurance policies purchased in connection with the Project for damage or events that occur after the Effective Date and prior to the expiration of the applicable Warranty Period.

## **ARTICLE 28 FORCE MAJEURE**

### **Section 28.1 Effect of Force Majeure.**

Neither Party shall be in default or in breach of its obligations under this Agreement or otherwise be liable to the other Party for any delay or failure in the performance of any of its obligations under this Agreement if and to the extent such delay or failure is a result of Force Majeure arising after the Effective Date. The protections afforded under this Section 28.1 to a Party shall be of no greater scope and no longer duration, than is required by the Force Majeure. Notwithstanding anything to the contrary contained in this Section 28.1, no Force Majeure shall relieve, suspend or otherwise excuse any Party from performing any obligation to make any payment owed to another Party or to indemnify, defend or hold harmless another Party pursuant to this Agreement. In no event may Developer claim a Force Majeure for economic reasons or for changes in Developer's costs or the costs of Contractor or Subcontractors, including commodity price changes, changes in labor markets, increased cost of labor or transportation, or due to changes in scope due to changes in engineering, design or applied engineering not requested by PacifiCorp.

### **Section 28.2 Notice of Occurrence.**

If either Party considers that any event of Force Majeure has occurred which may affect performance of its obligations under this Agreement, it shall promptly notify the other Party thereof stating the full particulars, including the obligations that are affected thereby, the estimated period during which performance may be delayed or prevented, and the particulars of the program to be implemented

to resume normal performance hereunder. If a force majeure under any of the Project Documents occurs with respect to Contractor or any Subcontractor, then Developer shall promptly provide notice thereof to PacifiCorp describing: (i) the obligations of Contractor or Subcontractor that are affected; (ii) the estimated period during which performance may be delayed or prevented; and (iii) the particulars of the program to be implemented by Contractor or Subcontractor in order to resume normal performance thereunder, provided that in no event shall Developer be relieved of any of its obligations under this Agreement as a result thereof unless such force majeure qualifies as an event of Force Majeure under this Agreement.

### **Section 28.3 Performance to Continue.**

Upon the occurrence of any event of Force Majeure, the affected Party shall use reasonable efforts to mitigate the effects of Force Majeure, resume normal performance of this Agreement within the shortest time practicable and continue to perform its obligations under this Agreement insofar as they are not affected by the Force Majeure.

### **Section 28.4 Termination in Consequence of Force Majeure.**

If an event of Force Majeure continues for a period of forty-five (45) days in the aggregate that materially affects the ability of Developer to perform the Work, and as a result thereof there is a corresponding delay in the schedule for performance of the Work and the Guaranteed Substantial Completion Date of at least forty-five (45) days, then, notwithstanding that Developer may by reason thereof have been granted an extension of the schedule for performance of the Work and the Guaranteed Substantial Completion Date, by Change Order, PacifiCorp shall be entitled to terminate this Agreement upon thirty (30) days advance written notice to Developer. If at the expiration of such thirty (30)-day period such Force Majeure shall still continue, this Agreement shall automatically terminate without any further action on the part of either Party and the provisions of Section 30.3(a) shall apply.

### **Section 28.5 Risk of Loss.**

Prior to termination of this Agreement, nothing in this ARTICLE 28 shall change the allocation to Developer of the risk of loss or damage prior to the Substantial Completion Date, and any Change Order resulting from a Force Majeure shall take into account such allocation of the risk of loss or damage.

## **ARTICLE 29 DEFAULT**

### **Section 29.1 Developer Default.**

Developer shall be in default (a “Developer Default”) hereunder if:

(a) Developer fails to pay PacifiCorp any undisputed amount due PacifiCorp under this Agreement, and such failure continues for fifteen (15) Business Days after Developer receives notice thereof from PacifiCorp;

(b) Developer fails to deliver and maintain Credit Support as required by ARTICLE 6, and such failure continues for five (5) days after Developer receives notice thereof from PacifiCorp;

(c) Developer fails to achieve the Substantial Completion Date by the Guaranteed Substantial Completion Date;

(d) Developer makes a false or unsubstantiated claim of Force Majeure;

(e) A Project Party: (i) fails to comply with the approved Developer Safety Assurance Program set forth in Appendix T, and such failure continues for fifteen (15) Business Days after Developer receives notice thereof from PacifiCorp; or (ii) assigns a Project Document to which it is a party or all or a portion of its rights and obligations thereunder other than as permitted both hereunder and thereunder;

(f) Developer fails in any material respect to comply with any of its other material obligations under this Agreement (not otherwise described in this Section 29.1); provided, however, that if such failure can be cured or remedied by Developer within a period of thirty (30) Business Days and Developer is diligently pursuing such cure or remedy, then such failure shall not become a Developer Default until thirty (30) Business Days after Developer receives notice thereof from PacifiCorp (unless such failure is cured or remedied prior thereto);

(g) A Project Party shall (i) commence a voluntary case under the Bankruptcy Code; (ii) file a petition seeking to take advantage of any Bankruptcy Laws; (iii) consent to or fail to contest in a timely and appropriate manner any petition filed against it in an insolvency case under Bankruptcy Laws; (iv) apply for, or consent to or fail to contest in a timely and appropriate manner, the appointment of, or the taking of possession by, a receiver, custodian, trustee, liquidator or the like of itself or of a substantial part of its assets; (v) admit in writing its inability to pay, or generally not be paying, its debts (other than those that are the subject of bona fide disputes) as they become due; (vi) make a general assignment for the benefit of creditors; (vii) take any action for the purpose of effecting any of the foregoing; or (viii) have a case or other proceeding commenced by a third party against it seeking (A) relief under the Bankruptcy Code or under any other Bankruptcy Laws or (B) the appointment of a trustee, receiver, custodian, liquidator or the like of such Project Party of all or any substantial part of its assets, and such case or proceeding shall continue undismissed or unstayed for a period of sixty (60) days;

(h) any representation or warranty made by Developer for which an express remedy is not provided shall prove to have been false in any material respect as of the date made or deemed made; provided, however, that if the circumstances which make such representation or warranty false are subject to cure or remedy by Developer within a period of thirty (30) Business Days and Developer is diligently pursuing such cure or remedy, then such representation or warranty being false in any material respect shall not become a Developer Default until thirty (30) Business Days after Developer receives notice thereof from PacifiCorp (unless such representation and warranty is no longer false in any material respect prior thereto); or

(i) a Material Adverse Change shall have occurred and be continuing, unless such Material Adverse Change is a result of an act or omission of PacifiCorp in violation of the terms of this Agreement.



## **Section 29.2 PacifiCorp Default.**

PacifiCorp shall be in default (a “PacifiCorp Default”) hereunder if:

(a) PacifiCorp fails to pay Developer any undisputed amount due Developer under this Agreement, and such failure continues for fifteen (15) Business Days after PacifiCorp receives notice thereof from Developer;

(b) PacifiCorp fails in any material respect to comply with any of its other material obligations under this Agreement (not otherwise described in this Section 29.2); provided, however, that if such failure can be cured or remedied by PacifiCorp within a period of thirty (30) Business Days and PacifiCorp is diligently pursuing such cure or remedy, then such failure shall not become a PacifiCorp Default until thirty (30) Business Days after PacifiCorp receives notice thereof from Developer (unless such failure is cured or remedied prior thereto);

(c) PacifiCorp shall (i) commence a voluntary case under the Bankruptcy Code; (ii) file a petition seeking to take advantage of any other Laws, domestic or foreign, relating to bankruptcy, insolvency, reorganization, winding up or composition or adjustment of debts (collectively, “Bankruptcy Laws”); (iii) consent to or fail to contest in a timely and appropriate manner any petition filed against it in an insolvency case under the Bankruptcy Laws; (iv) apply for, or consent to or fail to contest in a timely and appropriate manner, the appointment of, or the taking of possession by, a receiver, custodian, trustee, liquidator or the like of itself or of a substantial part of its assets; (v) admit in writing its inability to pay, or generally not be paying, its debts (other than those that are the subject of bona fide disputes) as they become due; (vi) make a general assignment for the benefit of creditors; (vii) take any action for the purpose of effecting any of the foregoing; or (viii) have a case or other proceeding commenced by a third party against it seeking (A) relief under the Bankruptcy Code or under any other Bankruptcy Laws or (B) the appointment of a trustee, receiver, custodian, liquidator or the like of PacifiCorp of all or any substantial part of its assets, and such case or proceeding shall continue undismissed or unstayed for a period of sixty (60) days; or

(d) any representation or warranty made by PacifiCorp in this Agreement for which an express remedy is not provided shall have been false in any material respect as of the date made; provided, however, that if the circumstances which make such representation or warranty false are subject to cure or remedy by PacifiCorp within a period of thirty (30) Business Days and PacifiCorp is diligently pursuing such cure or remedy, then such representation or warranty being false in any material respect shall not become a PacifiCorp Default until thirty (30) Business Days after PacifiCorp receives notice thereof from Developer (unless such representation and warranty is no longer false in any material respect prior thereto).

## **Section 29.3 Remedies on Default.**

(a) Step-In Rights. During the occurrence and continuance of any Developer Default, and in addition to any other rights PacifiCorp may have hereunder or at law or in equity, PacifiCorp shall have the right, but not the obligation, to take all actions necessary to perform or cause to be performed any and all work and labor it deems necessary to construct, complete, operate or maintain the Project in accordance with the terms of this Agreement, including causing Developer to vacate the Site and surrender possession of the Project and all proprietary information, Equipment, Materials, spare parts

and other supplies located at the Site to PacifiCorp. If PacifiCorp at any time exercises its rights under this Section 29.3(a), PacifiCorp shall be relieved of its obligations of payment during such time as it is exercising its right under this Section 29.3(a), and shall be entitled to recover all costs incurred by PacifiCorp, plus twenty percent (20%) for general and administrative costs in connection with work performed during that time.

(b) Cure Rights. During the occurrence and continuance of any Developer Default and upon receipt of any notice that Developer is in default of any of its obligations under this or any of the Project Documents, and in addition to any other rights PacifiCorp may have hereunder or at law or in equity, PacifiCorp shall have the right, but not the obligation, to cure any Developer Default under this or any Project Document. If PacifiCorp at any time exercises its right under this Section 29.3(b), PacifiCorp shall be relieved of its obligations of payment during such time as it is exercising its right under this Section 29.3(b).

(c) No Excuse. Notwithstanding the exercise by PacifiCorp of any of its rights under this Section 29.3, nothing set forth in this Section 29.3 shall excuse Developer of its obligations to remedy a Developer Default and perform its obligations hereunder.

## **ARTICLE 30 TERMINATION**

### **Section 30.1 Termination by PacifiCorp.**

(a) Upon the occurrence and continuation of a Developer Default, this Agreement shall terminate as follows:

(i) with respect to a Developer Default described in Section 29.1(c), immediately;  
and

(ii) with respect to a Developer Default described in Section 29.1 (other than Section 29.1(c)), upon delivery to Developer of written notice of termination after the end of the applicable cure period provided for in Section 29.1, and if no such cure period is provided for in Section 29.1, then fourteen (14) days after delivery to Developer of such written notice of termination.

(b) Notwithstanding anything to the contrary in this Agreement, PacifiCorp's right to collect damages from Developer will not be limited or foreclosed by any termination by PacifiCorp under this Section 30.1 or otherwise.

### **Section 30.2 Termination by Developer.**

(a) Upon the occurrence and continuation of a PacifiCorp Default, this Agreement shall terminate as follows:

(i) with respect to a PacifiCorp Default described in Section 29.2(c), immediately;  
and

(ii) with respect to a PacifiCorp Default described in Section 29.2 (other than Section 29.2(c)), upon delivery to Developer of written notice of termination after the end of the applicable cure period provided for in Section 29.1, and if no such cure period is provided for in Section 29.1, then fourteen (14) days after delivery to Developer of such written notice of termination.

(b) Developer may elect to terminate this Agreement due to suspension of the Work as provided in Section 16.1(b).

### **Section 30.3 Procedures Following Termination.**

(a) Upon termination of this Agreement pursuant to Section 16.1(b), Section 28.4 or Section 30.2, the following provisions shall apply: (i) PacifiCorp shall pay to Developer such portion of the Progress Payment as shall be applicable to any Work performed by Developer prior to the effective date of termination of this Agreement consistent with Appendix R; (ii) at PacifiCorp's option, title (to the extent not already transferred) and risk of loss to some or all of the Site, Equipment, Materials and the Facility shall transfer to PacifiCorp; (iii) PacifiCorp shall be responsible for, as applicable, any transportation, storage and insurance of and for the Equipment, Materials and the Facility for which PacifiCorp has elected to take title; and (iv) Developer shall be entitled to remove during normal working hours all of the Developer's Equipment that is on the Site, provided that prior to removing any Developer's Equipment from the Site, Developer shall provide to PacifiCorp a detailed list of Developer's Equipment to be removed; provided, further, that no equipment shall be Developer's Equipment unless it is included in the then-current list of Developer's Equipment approved pursuant to Section 12.1.

(b) Upon termination of this Agreement pursuant to Section 30.1, PacifiCorp may elect one or more of the following remedies: (i) require, at no cost to PacifiCorp, that Developer take all steps necessary or requested by PacifiCorp to assign to PacifiCorp its rights and obligations under the Project Documents and the Developer Permits identified by PacifiCorp and to transfer to PacifiCorp all Work and other property, whether tangible or intangible, in which Developer or its Affiliates has rights which is necessary or desirable for the development, construction, ownership or operation of the Project; (ii) enter onto the Site and remove, at Developer's cost, all Equipment and Materials for which PacifiCorp has elected to take title pursuant to Section 30.3(b)(i); (iii) Developer shall pay to PacifiCorp within five (5) Business Days of receipt of an invoice from PacifiCorp: (A) the positive difference, if any, obtained by subtracting from the Contract Price PacifiCorp's cost to replace or otherwise have performed, as determined and calculated by PacifiCorp in its discretion, any Work that Developer was otherwise obligated to provide during the remaining term of this Agreement; (B) compensation for additional managerial and administrative services incurred by or on behalf of PacifiCorp; and (C) such other costs and expenses and damages as PacifiCorp may suffer as a result of the Developer Default; and (iv) exercise all of PacifiCorp's other rights and remedies under this Agreement or otherwise available at law or in equity.

(c) If this Agreement is terminated pursuant to Section 30.1 or Section 30.2 or otherwise in accordance with its terms, then all further obligations of the Parties under this Agreement (other than the provisions which by their terms are intended to survive the expiration or termination of this Agreement) shall be terminated without further liability of any Party to the other Party; provided, however, that

nothing herein shall relieve any Party from liability provided for herein for its breach or default of this Agreement.

**Section 30.4 Exclusive Remedy.**

THE RIGHTS AND REMEDIES OF DEVELOPER SET FORTH HEREIN FOR A BREACH OR DEFAULT BY PACIFICORP AND TERMINATION OF THIS AGREEMENT BY DEVELOPER ARE EXCLUSIVE AND NO OTHER REMEDIES OF ANY KIND WHATSOEVER SHALL APPLY IN THE EVENT OF SUCH BREACH OR DEFAULT BY PACIFICORP OR TERMINATION OF THIS AGREEMENT BY DEVELOPER.

**ARTICLE 31  
TAXES**

**Section 31.1 PacifiCorp's Obligation.**

In addition to the Contract Price, PacifiCorp shall be obligated to pay the amount of any property, privilege, license, sales, use, excise, gross receipts, value added, privilege or similar Taxes or assessments applicable to the sale of the Work or to the use of the Work after the Substantial Completion Date. Developer shall use all reasonable efforts to minimize the amount of such Taxes and assessments payable by PacifiCorp. All real or personal property Taxes related to the Project shall be paid by PacifiCorp and shall not be apportioned at the Closing.

**Section 31.2 Developer's Obligation.**

Developer has included in the Contract Price the amount of any customs duties, and related customs broker fees and charges or similar charges, for delivery of any components to the United States from countries outside of the United States and transportation to the Site. Developer shall be liable for all payroll and other employee related Taxes and costs, for all property Taxes related to the Site prior to Closing and for all Taxes based on its income. Contractor shall cooperate with PacifiCorp's reasonable requests with respect to any challenge that PacifiCorp elects to make with respect to any Taxes imposed in connection with the Project.

**ARTICLE 32  
CLAIMS, CLAIM NOTICE AND DISPUTE RESOLUTION**

**Section 32.1 Claims.**

(a) Submission of Claims.

(i) In the event Developer has a Claim or request for a time extension, additional compensation, any other adjustment to the terms and conditions of this Agreement, or any dispute with PacifiCorp arising out of the Work or this Agreement (each a "Developer Claim"), Developer shall notify PacifiCorp in writing within five (5) Business Days following the occurrence of the event giving rise to the Developer Claim. Developer's failure timely to give notice as required herein will constitute a waiver of all of Developer's rights and remedies with respect to the Developer Claim.

(ii) As soon as practicable, but in no event longer than sixty (60) days after notification of the Developer Claim, Developer shall submit the Developer Claim to PacifiCorp with all supporting information and documentation. Developer shall also respond promptly to all PacifiCorp inquiries about the Developer Claim and its basis.

(iii) Any Developer Claim which is not disposed of by mutual agreement between the Parties within sixty (60) days after submission of the Developer Claim to PacifiCorp pursuant to Section 32.1(a)(ii) shall be decided by PacifiCorp, which decision shall be in writing and delivered to Developer. Such decision shall be final unless Developer, within thirty (30) days after receipt of PacifiCorp's decision, provides to PacifiCorp a written protest, stating clearly and in detail the basis thereof, and such protest shall be resolved in accordance with Section 32.2. Developer's failure timely to protest PacifiCorp's decision as required herein shall constitute a waiver by Developer of its Developer Claim.

(iv) Developer shall continue its performance of this Agreement and the Project Documents notwithstanding the submission of any Developer Claim.

(b) Notification Prior to Incurring Costs. Developer shall, before incurring any cost or expense in connection with a Developer Claim, first give PacifiCorp every opportunity to determine whether the cost or expense should be incurred or whether any act or forbearance shall or might mitigate the cost or expense of any such Developer Claim.

(c) PacifiCorp's Liability to Pay Developer Claims. PacifiCorp shall not be liable to make payment in respect of any Developer Claim for an additional payment unless Developer has complied with each and all of the requirements of this ARTICLE 32, whether as to the time within which Developer Claims must be made or information provided or otherwise, it being acknowledged and agreed by the Parties that the absence of complete compliance herewith will involve significant prejudice to PacifiCorp.

## **Section 32.2 Dispute Resolution.**

Following written notice from either Party to the other Party setting forth a dispute arising from, relating to or otherwise in connection with or arising out of this Agreement (including any Developer Claim, but only if it has not been resolved in accordance with the requirements of Section 32.1), the Parties shall use good faith efforts to settle such dispute through negotiation between PacifiCorp's Representative and Developer's Representative. If the dispute is not resolved by such negotiations within fifteen (15) days after delivery of such initial notice, either Party may, by delivering a subsequent written notice to the other Party, cause the matter to be referred to a meeting of appropriate senior management representatives of the Parties with the power and authority to resolve such dispute. Such meeting shall be held within thirty (30) days following the delivery of the subsequent notice. If the matter is not resolved within thirty (30) days after the first such meeting of the senior management representatives or such later date as may be mutually agreed upon by the Parties, either Party may then, subject to the terms of this Agreement, commence legal action in a court of competent jurisdiction in order to resolve the dispute.

## **ARTICLE 33 ASSIGNMENT**

### **Section 33.1 Assignment of Developer's Interests.**

Developer shall not sell, transfer or otherwise assign, in whole or in part, this Agreement or any Product Document to which it is a party or any of its rights or obligations hereunder or thereunder, except with PacifiCorp's prior written consent, which consent shall be in PacifiCorp's discretion.

## **ARTICLE 34 CONFIDENTIALITY**

### **Section 34.1 Confidentiality.**

(a) It is understood that certain information may be exchanged among PacifiCorp and Developer that the disclosing Party considers proprietary and confidential. Each Party agrees that it shall and shall cause its Affiliates and its and their respective officers, directors, consultants, employees, legal counsel, agents and representatives (together with the Affiliates, the "Confidentiality Affiliates") to: (i) hold confidential and not disclose (other than to its Confidentiality Affiliates having a reasonable need to know in connection with the permitted purposes hereunder), without the prior consent of the other Party, all confidential or proprietary written information which is marked confidential or proprietary or oral information or data which is reduced to writing within five (5) days of such disclosure and marked as confidential or proprietary (including sources of equity or other financing, development strategy, competitor information, cost and pricing data, warranties, technical information, research, developmental, engineering, manufacturing, marketing, sales, financial, operating, performance, business and process information or data, knowhow and computer programming and other software techniques) provided or developed by the other Party or its Confidentiality Affiliates in connection herewith or the Work ("Confidential Information"); and (ii) use such Confidential Information only for the purposes of performing its obligations or exercising its rights hereunder. In no event shall any Confidential Information be disclosed to any competitor of Developer or PacifiCorp. As to Confidential Information that is not a trade secret under applicable Law, the foregoing obligations shall expire three (3) years after the Substantial Completion Date.

(b) The obligations contained in the preceding paragraph shall not apply, or shall cease to apply, to Confidential Information if or when, and to the extent that, such Confidential Information (i) was known to the receiving Party or its Confidentiality Affiliates prior to receipt from the disclosing Party or its Confidentiality Affiliates; (ii) was, or becomes through no breach of the receiving Party's obligations hereunder, known to the public; (iii) becomes known to the receiving Party or its Confidentiality Affiliates from other sources under circumstances not involving any breach of any confidentiality obligation between such source and the disclosing Party's or disclosing Party's Confidentiality Affiliates or a third party; (iv) is independently developed by the receiving Party or its Confidentiality Affiliates; or (v) is required to be disclosed by applicable Law or Governmental Authority or applicable legal process. Developer acknowledges that PacifiCorp is subject to regulation as a public utility, and as such may be required to disclose all or substantially all information provided by Developer pursuant to this Agreement, including the terms of this Agreement and any Project Document, by order of state and federal Governmental Authorities, and that such disclosure shall in no event be deemed a violation of this Section 34.1.

(c) When required by a Governmental Authority, a Party may disclose the Confidential Information of the other Party to such Governmental Authority; provided, however, that prior to making any such disclosure, such Party shall (unless prohibited from doing so by applicable Law or the Governmental Authority): (i) provide the other Party with timely advance notice of the Confidential Information requested by such Governmental Authority and the intent of such Party to so disclose; (ii) minimize to the extent possible (consistent with applicable Law and the requirements of the Governmental Authority involved) the amount of Confidential Information to be provided to the Governmental Authority involved ; and (iii) make every reasonable effort (which shall include participation by the other Party in discussions with the Governmental Authority involved) to secure confidential treatment and to minimize the Confidential Information to be provided. In the event that efforts to secure confidential treatment are unsuccessful, the other Party shall have the prior right to revise such information to minimize the disclosure of such Confidential Information in a manner consistent with applicable Laws and the requirements of the Governmental Authority involved.

(d) PacifiCorp's disclosure of drawings and manuals received from Developer Parties to third parties in accordance with PacifiCorp's rights and obligations hereunder shall not be a breach of this ARTICLE 34.

## **ARTICLE 35 MISCELLANEOUS PROVISIONS**

### **Section 35.1 Notices, Consents and Approvals.**

Contact information for notices, requests, demands and other communications required or permitted hereunder is as follows:

(a) if to Developer, to:

*with copies to:*

or to such other person(s) or address(es) as Developer shall provide to PacifiCorp from time to time in accordance with this Section 35.1;

(b) if to PacifiCorp, to:

PacifiCorp

825 NE Multnomah, Suite [\_\_\_\_]  
Portland, Oregon 97232-2315  
Attn: \_\_\_\_\_

Tel: \_\_\_\_\_  
Fax: \_\_\_\_\_

*with copies to:*

PacifiCorp  
825 NE Multnomah, Suite [\_\_\_\_]  
Portland, Oregon 97232-2315  
Attn: Law Department

Tel: \_\_\_\_\_  
Fax: \_\_\_\_\_

or to such other person(s) or address(es) as PacifiCorp shall provide to Developer from time to time in accordance with this Section 35.1.

(c) All notices (including acceptances, consents, approvals, agreements, deliveries of information, designations), requests, demands and other communications required or permitted hereunder shall be in writing, properly addressed as provided in paragraphs (a) and (b) above, and given by (i) hand delivery, (ii) a national overnight courier service, (iii) confirmed facsimile transmission, followed by a hard copy, or (iv) certified or registered mail, return receipt requested, and postage prepaid. Any such notice, request, demand or other communication shall be deemed to have been duly given as of the date delivered if by hand delivery, national overnight courier service or confirmed facsimile transmission (provided a hard copy promptly follows by other means provided herein), or five (5) calendar days after mailing if by certified or registered mail.

### **Section 35.2 Entire Agreement.**

This Agreement, together with the Appendices, Schedules and Exhibits attached hereto, contains the entire agreement and understanding of the Parties with respect to the subject matter hereof and supersedes all prior agreements and understandings, whether written or oral, of the Parties relating to the subject matter hereof. Any oral or written representation, warranty, course of dealing or trade usage not contained or referenced herein shall not be binding on either Party.

### **Section 35.3 Amendment; Waiver.**

No amendment or other modification of any provision of this Agreement shall be valid or binding unless it is signed by each of the Parties. No waiver of any provision of this Agreement shall be valid or binding unless it signed by the Party waiving compliance with such provision. No delay on the part of either Party in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any waiver or any partial exercise of any such right, power or privilege preclude any further exercise thereof or the exercise of any other such right, power or privilege. No waiver of any breach,



term or condition of this Agreement by any Party shall constitute a subsequent waiver of the same or any other breach, term or condition of this Agreement.

**Section 35.4 Successors and Assigns.**

Each and all of the rights, obligations, covenants, terms, provisions and agreements herein contained shall be binding upon and inure to the benefit of the Parties hereto and, to the extent permitted by this Agreement, their respective successors and assigns.

**Section 35.5 Third Party Beneficiaries.**

The provisions of this Agreement shall only be for the benefit of, and enforceable by, the Parties hereto and shall not inure to the benefit of or be enforceable by any third party.

**Section 35.6 Severability.**

In the event any one or more of the provisions contained in this Agreement should be held invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby.

**Section 35.7 Further Assurances.**

Each Party shall execute and deliver or cause to be executed and delivered such documents and instruments not otherwise specified herein, and take or cause to be taken all such other actions, as the other Party may reasonably request to more fully and effectively carry out the intent and purposes of this Agreement.

**Section 35.8 Publicity.**

Except as required by applicable Law, Developer agrees that Developer will not issue or release for external publication any press release, article, advertising or other publicity matter in any form (including print, electronic, or interview) relating to the Project, or to this Agreement without first consulting with and obtaining the prior written consent of PacifiCorp, which consent shall not be unreasonably withheld or delayed.

**Section 35.9 Independent Contractor.**

Developer is an independent contractor with respect to the Work, and each part thereof, and in respect of all work to be performed hereunder. Neither Developer nor any of the other Developer Parties shall be deemed to be agents, representatives, joint ventures, employees or servants of PacifiCorp by reason of their performance hereunder or in any manner dealt with herein. Neither Party shall perform any act or make any representation to any Person to the effect that Developer or any other Developer Parties is the agent of PacifiCorp.

**Section 35.10 Survival.**

The provisions of ARTICLE 4 (Representations and Warranties of Developer), ARTICLE 12 (Developer's Equipment), ARTICLE 23 (Warranties of Work), ARTICLE 24 (Liquidated Damages),

ARTICLE 25 (Limitation of Liability), ARTICLE 26 (Indemnification), ARTICLE 27 (Insurance), ARTICLE 32 (Claims, Claim Notice and Dispute Resolution), ARTICLE 34 (Confidentiality), Section 7.9 (Contractor Drawings and Manuals), Section 7.12 (Intellectual Property Rights), Section 7.21 (Other Liens), Section 7.25 (Environmental Matters), Section 7.26 (Records and Accounts), Section 9.1 (Site Regulations), Section 9.2 (Site Security), Section 9.8 (Cleanup), Section 15.6 (PacifiCorp's Use of Drawings), Section 15.7 (Manufacturing Drawings), Section 22.4 (Liability), and Section 35.11 (Governing Law; Waiver of Jury Trial) of this Agreement shall survive the expiration or earlier termination of this Agreement indefinitely, provided that the foregoing enumeration shall not be interpreted to bar survival of any other provision hereof which by its express terms or by operation of Law would otherwise be deemed to survive.

### **Section 35.11 Governing Law; Waiver of Jury Trial.**

(a) THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF WYOMING (WITHOUT GIVING EFFECT TO THE PRINCIPLES THEREOF RELATING TO CONFLICTS OF LAW).

(b) EACH PARTY HEREBY IRREVOCABLY WAIVES ALL RIGHT OF TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR ANY OTHER PROJECT DOCUMENT OR ANY MATTER ARISING HEREUNDER OR THEREUNDER. EACH PARTY HEREBY WAIVES ANY RIGHT TO CONSOLIDATE ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR IN CONNECTION WITH THIS AGREEMENT OR ANY OTHER PROJECT DOCUMENT OR ANY MATTER ARISING HEREUNDER OR THEREUNDER IN WHICH A JURY TRIAL HAS NOT OR CANNOT BE WAIVED.

### **Section 35.12 Counterparts.**

This Agreement may be executed by the Parties in two or more separate counterparts (including by facsimile transmission), each of which shall be deemed an original, and all of said counterparts taken together shall be deemed to constitute one and the same instrument.

### **Section 35.13 Captions.**

The captions for Articles and Sections contained in this Agreement, including the Appendices, Schedules and Exhibits attached hereto, are for convenience and reference only and in no way define, describe, extend or limit the scope or intent of this Agreement or the intent of any provision contained herein.

### **Section 35.14 Consent Agreements.**

Developer agrees to cooperate with PacifiCorp's efforts to obtain on a timely basis such direct agreements, consents, opinions and related documents from Project Parties or any of Developer's counterparties to any Additional Project Document as may be reasonably requested by PacifiCorp or its Affiliates or financing parties.

**Section 35.15    Offset**

Notwithstanding any other provision of this Agreement to the contrary, any and all amounts owing or to be paid by PacifiCorp or Developer to the other hereunder for the Work, shall be subject to offset and reduction in an amount equal to any amounts that may be owing at any time. Further, for the avoidance of doubt, with respect to any provision of this Agreement that allows PacifiCorp to offset, set-off or draw against a bond or other credit support any amount then owed to Developer, PacifiCorp shall have the express right to include in the amount offset, set-off or drawn under a bond or other credit support all of the reasonable costs and expenses it incurs in connection with enforcing such provision (including attorneys' and other consultants' fees).

**Section 35.16    Time of the Essence**

Time is of the essence in the performance of the Work by Contractor hereunder.

**Section 35.17    Recitals.**

The Recitals in this Agreement are true and correct and hereby incorporated into this Agreement by reference.

[Signature page follows.]

IN WITNESS WHEREOF, each of the authorized representatives of the Parties have executed this Agreement as of the first date set forth above.

**PACIFICORP:**

**PACIFICORP,**  
an Oregon corporation

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**DEVELOPER:**

[ \_\_\_\_\_ ],

a [ \_\_\_\_\_ ]

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**EXHIBITS**

EXHIBIT A  
Form of Notice of Request for Progress Payment

[ \_\_\_\_\_, 20\_\_ ]\*

PacifiCorp  
825 NE Multnomah, Suite 600  
Portland, Oregon 97232-2315  
Attention: Director of Contract Administration

Ladies and Gentlemen:

Reference is made to the Build Transfer Agreement, dated as of [ \_\_\_\_\_ ] (as amended, modified or supplemented from time to time, the “Agreement”), by and between PacifiCorp, an Oregon corporation (“PacifiCorp”), and [ \_\_\_\_\_ ], a [ \_\_\_\_\_ ] (“Developer” and together with the PacifiCorp, collectively, the “Parties”). Capitalized terms used herein but not otherwise defined herein shall have the meanings given to them in the Agreement.

1. Developer hereby irrevocably requests payment of a Progress Payment on the date (the “Requested Progress Payment Date”) (which is a Business Day) and in the aggregate amount (the “Requested Progress Payment Amount”) indicated below (the “Requested Progress Payment”):

Requested Progress Payment Date:	_____
Requested Progress Payment Number <sup>†</sup>	_____
Requested Progress Payment Amount: <sup>‡</sup>	\$ _____

2. The undersigned, an Authorized Officer of Developer, hereby certifies on behalf of Developer that, in accordance with Section 3.3:

(a) As of the Requested Progress Payment Date, Developer has achieved (i) the Milestones for which the Requested Progress Payment is requested and (ii) all of the Milestones with Milestone Dates prior to the Requested Progress Payment Date.

(b) The representations and warranties made by Developer in this Agreement and each Project Document to which it is a party that are qualified with respect

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\* Must be submitted not less than 30 days prior to the date Developer expects to be paid (*i.e.*, payment, net 30 days). See Agreement, § 3.2(a) (Procedures).

† Must correspond with Progress Payment Number identified on Appendix R of the Agreement.

‡ Must correspond with Progress Payment Amount identified opposite Progress Payment Number on Appendix R.

to materiality are true and accurate in all respects, and the representations and warranties made by Developer in this Agreement and each Project Document to which it is a party that are not so qualified are true and accurate in all material respects, on and as of such Requested Progress Payment Date (or on the date when made in the case of any representation and warranty which specifically relates to an earlier date), both before and after giving effect to the making of such Progress Payment , (ii) the representations and warranties made by each Project Party (other than Developer) in the Project Documents that are qualified with respect to materiality are true and accurate in all respects, and the representations and warranties made by each Project Party (other than Developer) in this Agreement and each Project Document to which it is a party that are not so qualified are true and accurate in all material respects, on and as of such Requested Progress Payment Date (or on the date when made in the case of any representation and warranty which specifically relates to an earlier date), in each case such representations and warranties shall be deemed renewed and restated as of the date of such Progress Payment.

(c) As of the Requested Progress Payment Date (i) no circumstance, event or condition exists which either immediately or with the passage of time or the giving of notice, or both, (A) permits Developer to withhold payment under any Project Document, (B) permits any Project Party to terminate or suspend performance under any Project Document, or (C) is reasonably expected to result in a Material Adverse Change; and (ii) no breach, violation or default has occurred and is continuing under any Project Document to which a Project Party is a party.

(d) As of the Requested Progress Payment Date, no action, suit, proceeding or investigation by or before any Governmental Authority or any arbitrator is pending or to Developer's Knowledge threatened against or affecting a Project Party or the Project which is reasonably expected to result in a Material Adverse Change [other than \_\_\_\_\_].<sup>§</sup>

(e) Since the Effective Date of the Agreement, no Material Adverse Change has occurred and is continuing [other than \_\_\_\_\_].\*\*

(f) As of the Requested Progress Payment Date, all Developer Permits have been obtained and are in full force and effect.

(g) As of the Requested Progress Payment Date, PacifiCorp has not determined that it is necessary to withhold payment to protect PacifiCorp from loss relating to, (i) Work not in accordance with the requirements of the Project Documents, (ii) Claims filed against PacifiCorp or the Project as a result of the actions or inactions of Developer, Contractor or any Subcontractor in connection with the performance of the Work (and not otherwise covered by insurance) [other than \_\_\_\_\_]\*\*\*\*\* or (iii) failure of Developer to make payments in respect of Equipment, Material and supplies, or labor or

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<sup>§</sup> Insert if any action, suit, proceeding or investigation has been threatened by the PacifiCorp. See Section 3.3(e) of the Agreement.

\*\* Insert if any Material Adverse Change is the result of an act or omission by PacifiCorp. See Section 3.3(f) of the Agreement.

other obligations incurred as a result of activities covered by the Agreement [other than \_\_\_\_\_]#####

3. In accordance with Section 3.4(b)(i) of the Agreement, the commercial invoice of Developer (in the form of Appendix Y) substantiating the amounts payable by PacifiCorp in connection with the Requested Progress Payment and the Work covered thereunder (in accordance with Appendix R) and certifying as to the other matters provided therein is attached hereto as Annex 1.

4. In accordance with Section 3.4(b)(ii) of the Agreement, the monthly Progress Report (in the form of Appendix N) is attached hereto as Annex 2.<sup>††</sup>

5. In accordance with Section 3.4(b)(iii) of the Agreement, an officer's certificate signed by an Authorized Officer of Developer certifying that the conditions in Section 3.3(b), c, d, e, f, and h of the Agreement has been and is satisfied as of the Requested Progress Payment Date.

6. In accordance with Section 3.4(b)(iv) of the Agreement, a bill of sale transferring title to all Work relating to this Notice of Request for Progress Payment, in form and substance reasonably satisfactory to PacifiCorp is attached hereto as Annex 5.

7. In accordance with Section 3.4(b)(v) of the Agreement, Lien releases from Developer, Contractor and all Subcontractors, in the forms attached in Appendix J, with respect to all Liens that arise with respect to the Project, including the Work are attached hereto as Annex 6.

8. Developer hereby requests that the Requested Progress Payment be paid in the amounts and to the payees, in each case as set forth on Annex 4.

**[THE NEXT PAGE IS THE SIGNATURE PAGE]**

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†† Progress Reports to be prepared monthly.

\*\*\*\*\* Insert if Developer, Contractor or any Subcontractor is disputing such Claims in good faith and if reasonably requested by PacifiCorp, has bonded the Claim with a bonding company or other surety reasonably acceptable to PacifiCorp, and if any Lien is imposed with respect to such Claims, Developer, Contractor or any Subcontractor has discharged such Lien.

##### Insert if Developer has, in good faith, disputed such payments and, if any Lien is filed with respect thereto, Developer has posted a bond against such Lien with a bonding company or other surety reasonably acceptable to PacifiCorp.



Very truly yours,

By: \_\_\_\_\_  
Name:  
Title:

COMMERCIAL INVOICE

[To be attached]

PROGRESS REPORT

[To be attached]

OFFICER'S CERTIFICATE

[To be attached]

PAYMENT INSTRUCTIONS

Payee

Amount

Wire Instructions

BILL OF SALE

[To be attached]

**EXHIBIT B**  
**Form of Notice to Proceed**

[Date]

DEVELOPER  
Street  
City, State Zip Code

Attention: \_\_\_\_\_

This Notice to Proceed is delivered pursuant to that certain Build Transfer Agreement, dated as of [\_\_\_\_\_] (as amended, modified or supplemented from time to time, the “Agreement”), by and between PacifiCorp, an Oregon corporation (“PacifiCorp”), and [\_\_\_\_\_] (“Developer”). Capitalized terms used herein but not otherwise defined herein shall have the meanings given to them in the Agreement.

Pursuant to, and in accordance with, terms of the Agreement, PacifiCorp hereby issues this Notice to Proceed to Developer.

Very truly yours,

PacifiCorp,  
an Oregon corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

cc:

**EXHIBIT C**  
**Credit Matrix**

[Credit Matrix from RFP to be attached]



**EXHIBIT D-1**  
**Form of Change Order**

**Change Order**

Change Order No.: \_\_\_\_\_ Date Issued: \_\_\_\_\_

Description (Attach Appropriate Documentation): \_\_\_\_\_

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Cost of Change:

- I. Non-Manual Labor Man-hours Cost: \_\_\_\_\_
- II. Non-Manual Labor Expenses: \_\_\_\_\_
- III. Manual Labor Man-hours Cost: \_\_\_\_\_
- IV. Material Cost: \_\_\_\_\_
- V. Subcontracts Cost: \_\_\_\_\_
- VI. Mobilization/Demobilization Cost: \_\_\_\_\_
- VII. Equipment Cost: \_\_\_\_\_
- VIII. Other Cost (if any) \_\_\_\_\_
- IX. Mark-up (Profit and Overhead): \_\_\_\_\_
- X. **Total Cost of Change:** \_\_\_\_\_

Impact on Project Schedule, including all Milestone Dates: \_\_\_\_\_

Impact on Progress Payment Schedule: \_\_\_\_\_

Impact on the Warranties: \_\_\_\_\_

Anticipated Differences in the Costs of O & M Following Substantial Completion: \_\_\_\_\_

Other Impacts on Agreement: \_\_\_\_\_

Revised Contract Price (Including Change): \_\_\_\_\_

**PacifiCorp Approval:**

**Developer Approval:**

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

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

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**EXHIBIT D-2**  
**Form of Change Order Request**

**CHANGE ORDER REQUEST**

Developer: [\_\_\_\_\_]

Change Request No.: [\_\_\_\_\_]

Agreement No. (if applicable): [\_\_\_\_\_]

Date: [\_\_\_\_\_]

Date of Agreement: [\_\_\_\_\_]

Reference is made to that certain Build Transfer Agreement, dated as of [\_\_\_\_\_] (as amended, modified or supplemented from time to time, the "Agreement"), by and between PacifiCorp, an Oregon corporation ("PacifiCorp"), and [\_\_\_\_\_] a [\_\_\_\_\_] ("Developer"). Capitalized terms used herein but not otherwise defined herein shall have the meanings given to them in the Agreement.

Pursuant to Article 13 of the Agreement, the following Change is requested and modifies the Agreement as follows:

Adjustment to Scope of Work:

Adjustment to Project Schedule:

Adjustment to Pricing:

DEVELOPER

PACIFICORP

By \_\_\_\_\_

By \_\_\_\_\_

\_\_\_\_\_  
Name

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

**EXHIBIT D-3**  
**Form of Change Order Notice**

**CHANGE ORDER NOTICE**

Developer:  
[\_\_\_\_\_]

Change Notice No.: [\_\_\_\_\_]

Agreement No. (if applicable) : [\_\_\_\_\_]

Date: [\_\_\_\_\_]

Date of Agreement: [\_\_\_\_\_]

Reference is made to that certain Build Transfer Agreement, dated as of [\_\_\_\_\_] (as amended, modified or supplemented from time to time, the "Agreement"), by and between PacifiCorp, an Oregon corporation ("PacifiCorp"), and [\_\_\_\_\_] a [\_\_\_\_\_] ("Developer"). Capitalized terms used herein but not otherwise defined herein shall have the meanings given to them in the Agreement.

Pursuant to Article 13 of the Agreement, we are issuing this form to notify you of a Change to the Agreement as follows:

Adjustment to Scope of Work:

Adjustment to Project Schedule:

Adjustment to Pricing:

[DEVELOPER/CONTRACTOR]

PACIFICORP

By \_\_\_\_\_

By \_\_\_\_\_

\_\_\_\_\_  
Name

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Title

Date

Date