

## **TERMINATION AGREEMENT**

This TERMINATION AGREEMENT (“**Agreement**”) is entered into as of \_\_\_\_\_, 2023 (“**Effective Termination Date**”), by and between the New York State Energy Research and Development Authority (“**NYSERDA**”), a public benefit corporation, having a principal business address of 17 Columbia Circle, Albany, New York 12203, and \_\_\_\_\_ (“**Seller**”), a limited liability company, having a principal business address of \_\_\_\_\_ . NYSERDA and Seller are each referred to herein as a “**Party**” and are collectively referred to herein as the “**Parties**.”

### **RECITALS**

WHEREAS, NYSERDA and Seller are parties to that certain Renewable Energy Standard (“**RES**”) Agreement dated as of \_\_\_\_\_, 20\_\_ (as amended and modified from time to time, the “**Tier-1 Agreement**”). Capitalized terms not otherwise defined herein have the meaning assigned to such terms in the Tier-1 Agreement;

WHEREAS, the Bid Facility has not achieved Notice to Proceed (as defined below), and does not intend to meet the Commercial Operation Milestone Date under the Tier-1 Agreement;

WHEREAS, Seller has determined that the further development and construction of the Bid Facility is no longer economically feasible under the pricing agreed to and set forth in the Tier-1 Agreement;

WHEREAS, Seller has provided to NYSERDA Contract Security in accordance with Article XV of the Tier-1 Agreement;

WHEREAS, under the terms of the Tier-1 Agreement, NYSERDA may retain the Contract Security delivered by Seller in the event that the Bid Facility does not achieve such Commercial Operation Milestone Date, in accordance with Section 15.07(c) of the Tier-1 Agreement;

WHEREAS, as of the Effective Termination Date, NYSERDA has not drawn on the Contract Security;

WHEREAS, the Parties may terminate the Tier-1 Agreement at any time by the mutual written consent of the Parties, pursuant to Section 14.01(c) of the Tier-1 Agreement;

WHEREAS, NYSERDA has agreed to terminate the Tier-1 Agreement and to treat such Contract Security in accordance with the terms and subject to the conditions set forth herein; and

WHEREAS, NYSERDA intends, in 2023, to conduct a competitive solicitation to procure Tier-1 RECs in the form of RESRFP23-1, and, in 2024, to conduct a subsequent solicitation to procure Tier-1 RECs, in the form of RESRFP24-1, and Seller, as a consequence of the termination of the Tier-1 Agreement, may be eligible to participate in either solicitation, as further described herein;

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

## AGREEMENT

1. Termination of the Tier-1 Agreement. Subject to the terms and conditions of this Agreement, the Tier-1 Agreement is hereby terminated effective as of the Effective Termination Date. From and after the Effective Termination Date, the Tier-1 Agreement will be of no further force or effect, and the rights and obligations of each of the Parties thereunder shall terminate, except for any rights and obligations of the Parties that are expressly designated thereunder to survive the termination of the Tier-1 Agreement, as such rights and obligations may be modified herein.

2. Continuation of Contract Security. In consideration for NYSERDA's agreement to terminate the Tier-1 Agreement as provided herein, and subject to the occurrence of a Termination Event, as defined in Section 3(b)(iii) below, the Parties agree that NYSERDA shall continue to hold one hundred percent (100%) of the Contract Security delivered by Seller to NYSERDA pursuant to the Tier-1 Agreement as of the Effective Termination Date as provided in this Agreement. To the extent that such Contract Security has been delivered to NYSERDA in the form of a Letter of Credit, as a condition to the effectiveness of this Agreement, Seller shall deliver to NYSERDA a substitute letter of credit in replacement of such Letter of Credit, in the amount of such Letter of Credit, conforming to the requirements of Section 15.04 of the Tier-1 Agreement and substantially in the form of Exhibit A attached hereto (the "**Substitute Letter of Credit**").

3. Treatment of Contract Security.

(a) Participation in Upcoming Solicitations.

(i) Seller shall participate in good faith in NYSERDA's RESRFP23-1 solicitation unless, prior to the Step Two Bid Proposal submission deadline for RESRFP23-1, Seller delivers to NYSERDA evidence, reasonably satisfactory to NYSERDA, that Seller does not meet the eligibility criteria for participation in such Solicitation. In the event that NYSERDA determines, in response to evidence presented by Seller, that Seller is not eligible to participate in NYSERDA's RESRFP23-1 solicitation, Seller shall not participate in such solicitation but shall participate, subject to the provisions of Sections 3(a)(ii), below, in NYSERDA's RESRFP24-1 solicitation.

(ii) In the event that Seller is not eligible to participate in NYSERDA's RESRFP23-1 solicitation, Seller shall participate in good faith in NYSERDA's RESRFP24-1 solicitation unless, prior to the Step Two Bid Proposal submission deadline for RESRFP24-1, Seller delivers to NYSERDA evidence, reasonably satisfactory to NYSERDA, that Seller does not meet the eligibility criteria for participation in such Solicitation. In the event that NYSERDA determines, in response to evidence presented by Seller, that Seller is not eligible to participate in

NYSERDA's RESRFP24-1 solicitation, the Parties agree to negotiate in good faith to amend this Agreement to address the treatment of Contract Security, provided, however, that, if the Parties do not execute an amendment of this Agreement pursuant to this Section 3(a)(ii) on or before the date on which all bids are due with respect to RESRFP24-1, and if Seller fails to submit a timely bid for such solicitation, the Contract Security will be treated in accordance with Section 3(b)(iii)(B).

(b) All Contract Security retained by NYSERDA pursuant to Section 2 above shall be treated as follows:

(i) RESRFP23-1 Solicitation.

(A) In the event that Seller is an awardee under NYSERDA's RESRFP23-1 solicitation and executes a RES Agreement by and between Seller and NYSERDA for the purchase and sale of Tier-1 RECs associated with the energy production of the Bid Facility submitted in response to RESRFP23-1 (an "**RES23-1 Agreement**"), the Contract Security shall be added to, and not credited to or in substitution of, the Contract Security (as such term is defined in the RES23-1 Agreement, the "**RES23-1 Contract Security**") to be delivered in connection with RESRFP23-1. Such Contract Security shall be deemed RES23-1 Contract Security and shall be refunded or retained by NYSERDA in accordance with the terms of the RESRFP23-1 Standard Form Agreement applicable to such RES23-1 Contract Security.

(B) In the event that Seller is an awardee under NYSERDA's RESRFP23-1, and Seller has delivered to NYSERDA a Substitute Letter of Credit under this Agreement, in connection with the execution of the RES23-1 Agreement, and as a condition to the effectiveness thereof, Seller shall, in addition to the delivery of the RES23-1 Contract Security, deliver to NYSERDA a Letter of Credit in replacement of such Substitute Letter of Credit, in the amount of such Substitute Letter of Credit, complying with all of the requirements for a Letter of Credit to be delivered as RES23-1 Contract Security under the terms of the RES23-1 Agreement.

(ii) RESRFP24-1 Solicitation.

(A) In the event that Seller is not eligible to participate in NYSERDA's RESRFP23-1 solicitation as provided in Section 3(a), NYSERDA shall continue to hold such Contract Security pursuant to Section 2, above. In the event that Seller is an awardee under NYSERDA's RESRFP24-1 solicitation, and executes a RES Agreement by and between Seller and NYSERDA for the purchase and sale of Tier-1 RECs associated with the energy production of the Bid Facility submitted in response to RESRFP24-1 (an "**RES24-1 Agreement**") the Contract Security shall be added to, and not credited to or in substitution of, the Contract Security (as such term is defined in the RES24-1 Agreement, the "**RES24-1 Contract**

**Security”)** to be delivered in connection with RESRFP24-1. Such Contract Security shall be deemed RES24-1 Contract Security, and shall be refunded or retained by NYSERDA in accordance with the terms of the RESRFP24-1 Standard Form Agreement applicable to such RES24-1 Contract Security.

(B) In the event that Seller is not eligible to participate in NYSERDA’s RESRFP23-1 solicitation in accordance with Section 3(a), above, and Seller is an awardee under NYSERDA’s RESRFP24-1, and Seller has delivered to NYSERDA a Substitute Letter of Credit under this Agreement, in connection with the execution of the RES24-1 Agreement, and as a condition to the effectiveness thereof, Seller shall, in addition to the delivery of the RES24-1 Contract Security, deliver to NYSERDA a Letter of Credit in replacement of such Substitute Letter of Credit, in the amount of such Substitute Letter of Credit, complying with all of the requirements for a Letter of Credit to be delivered as RES24-1 Contract Security under the terms of the RES24-1 Agreement.

(iii) Termination Event. If, upon the earliest to occur of the following (the “Termination Event”):

(A) Seller’s failure to submit a timely bid for NYSERDA’s RESRFP23-1 solicitation or to provide reasonably satisfactory evidence to NYSERDA of its ineligibility to participate in such solicitation in accordance with Section 3(a)(i), above;

(B) In the event that Seller is ineligible to participate in NYSERDA’s RESRFP23-1 solicitation in accordance with Section 3(a)(i), above, Seller fails to submit a timely bid for NYSERDA’s RESRFP24-1;

(C) If the Seller has submitted a timely bid for NYSERDA’s RESRFP23-1 solicitation, NYSERDA has made all awards in connection with such solicitation and Seller is not an awardee;

(D) In the event that Seller is ineligible to bid in NYSERDA’s RESRFP23-1 solicitation in accordance with Section 3(a)(i), above, and Seller has submitted a timely bid for NYSERDA’s RESRFP24-1 solicitation, NYSERDA has made all awards in connection with such solicitation and Seller is not an awardee;

(E) An Event of Default by Seller has occurred under this Agreement; and

(F) the third anniversary of this Agreement;

then, effective upon the Termination Event, NYSERDA shall have the right, as its sole remedy with respect thereto, to terminate this Agreement upon delivery of written notice to Seller, and permanently retain all Contract Security delivered to

NYSERDA by Seller prior to the Effective Termination Date, including without limitation drawing on any Substitute Letter of Credit delivered by Seller to NYSERDA as Contract Security.

4. Seller's Representations and Warranties. As a material inducement to NYSERDA to enter into this Agreement, Seller makes the following representations and warranties, all of which shall survive the execution and delivery of this Agreement:

(a) that it has requested to terminate the Tier-1 Agreement as provided herein due to its conclusion that, as of the date hereof and based on its current projections of construction and operating costs and available financing, the Bid Facility is not economically feasible under the pricing agreed to and set forth in such Tier-1 Agreement;

(b) that it has not delivered a notice to its general contractor (or in the event that there is no general contractor to all material internal construction unit(s) and/or third party contractor(s)) to proceed with the construction of the Bid Facility, at a minimum of eighty percent (80%) of the Bid Capacity, other than a limited notice to proceed only with site preparation and/or site civil work ("**Notice to Proceed**");

(c) that Seller has determined in good faith that the Commercial Operation Milestone Date under the Tier-1 Agreement will not be timely achieved in accordance with the terms of such Tier-1 Agreement;

(d) that Seller is a limited liability company duly organized, validly existing and in good standing under the laws of the jurisdiction of its organization;

(e) that Seller has all necessary power and authority to execute and deliver this Agreement and all other agreements contemplated herein and hereby and to consummate the transactions contemplated hereby and thereby. The execution and delivery by Seller of this Agreement and all other agreements contemplated herein and hereby and the consummation of the transactions contemplated hereby and thereby have been or, if not yet executed and delivered, will be when executed and delivered, duly authorized by Seller, and no other actions or proceedings on the part of Seller are necessary to authorize this Agreement or any other agreement contemplated herein and hereby or the consummation of the transactions contemplated hereby and thereby;

(f) that this Agreement has been duly executed and delivered by Seller and constitutes the legal, valid and binding obligation of Seller enforceable against Seller in accordance with the terms herein;

(g) that the execution, delivery and performance by Seller, the entry into this Agreement by Seller, and the consummation of the transactions contemplated by this Agreement will not violate (i) Applicable Law or any provision of the limited liability company agreement or other governing documents of Seller; (ii) violate, conflict with, result in a breach of or constitute (alone or with notice or lapse of time or both) a default or an event of default under any indenture, agreement (including the limited liability company agreement of Seller), mortgage, deed of trust, note, lease, contract or other

instrument to which Seller is a party or by which it or any of its property is bound; or (iii) result in the creation or imposition of any lien upon any property or assets of Seller;

(h) there are no undisclosed material legal actions, claims, or encumbrances, or liabilities pending or, to Seller's knowledge, threatened that may adversely affect Seller's performance of this Agreement or NYSERDA's rights hereunder;

(i) to Seller's knowledge, there are no claims against Seller or NYSERDA relating to or arising out of the Tier-1 Agreement that are not covered by the release contained in Section 7;

(j) Seller has neither assigned nor transferred any claims released herein, and no person or entity has subrogated to or has any interest or rights in any such claims.

5. NYSERDA's Representations and Warranties. As a material inducement to Seller to enter into this Agreement, NYSERDA makes the following representations and warranties, all of which shall survive the execution and delivery of this Agreement:

(a) that NYSERDA is an instrumentality of the State of New York and a public authority and public benefit corporation, created under the New York State Public Authorities Law, validly existing and in good standing under the laws of the State of New York;

(b) that NYSERDA has all necessary power and authority to execute and deliver this Agreement and all other agreements contemplated herein and hereby and to consummate the transactions contemplated hereby and thereby. The execution and delivery by NYSERDA of this Agreement and all other agreements contemplated herein and hereby and the consummation of the transactions contemplated hereby and thereby have been or, if not yet executed and delivered, will be when executed and delivered, duly authorized by NYSERDA, and no other actions or proceedings on the part of NYSERDA are necessary to authorize this Agreement or any other agreement contemplated herein and hereby or the consummation of the transactions contemplated hereby and thereby;

(c) that this Agreement has been duly executed and delivered by NYSERDA and constitutes the legal, valid and binding obligation of NYSERDA enforceable against NYSERDA in accordance with the terms herein;

(d) that the execution, delivery and performance by NYSERDA of this Agreement will not (i) violate Applicable Law; (ii) violate, conflict with, result in a material breach of or constitute (alone or with notice or lapse of time or both) a material default or event of default under any indenture, agreement, mortgage, deed of trust, note, lease, contract or other instrument to which NYSERDA is a party or by which NYSERDA or any of its property is bound; or (iii) result in the creation or imposition of any lien upon any property or assets of NYSERDA. This Agreement will not conflict with any other agreement or contract to which NYSERDA is a party;

(e) that NYSERDA is familiar with and in compliance with all Applicable Law, except where the failure to so comply would not result in a material adverse effect on NYSERDA's ability to perform its obligations; and

(f) that there is no action, suit or claim at law or in equity, or before or by a governmental authority pending or, to the knowledge of NYSERDA, threatened against NYSERDA or affecting any of its properties or assets which could reasonably be expected to result in a material adverse effect on NYSERDA's ability to perform its obligations.

6. Events of Default. For the purposes of this Agreement, "**Event of Default**" shall mean any of the following:

(a) Representations and Warranties. Any representation or warranty made in this Agreement that shall prove to have been false or misleading in any material respect as of the time made or deemed to be made, except for such representations or warranties that are qualified by a standard of materiality, in which case such representations and warranties shall prove to have been false or misleading in any respect, and such false or misleading representation, warranty, or guarantee is not fully cured within ten (10) days after the responsible Party discovers its error, provided, however, that such period shall be extended for an additional period of up to sixty (60) days if the responsible Party is unable to cure within the initial ten (10) day period so long as such cure is diligently pursued by the responsible Party until such breach has been corrected; or

(b) Voluntary Proceedings. A Party shall (i) apply for or consent to the appointment of, or the taking of possession by, a receiver, custodian, trustee or liquidator of itself or of all or a substantial part of its property; (ii) make a general assignment for the benefit of its creditors; (iii) commence a voluntary case under the Bankruptcy Code; (iv) file a petition seeking to take advantage of any other law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or readjustment of debts; (v) acquiesce in writing to, any petition filed against it in an involuntary case under the Bankruptcy Code; or (vi) take any corporate action for the purpose of effecting any of the foregoing; or

(c) Involuntary Proceedings. A proceeding or case shall be commenced against a Party, without its application or consent, in any court of competent jurisdiction, seeking (i) its liquidation, reorganization, dissolution or winding-up, or the composition or readjustment of its debts; (ii) the appointment of a trustee, receiver, custodian, liquidator or the like of all or any substantial part of its assets; or (iii) similar relief under any law relating to bankruptcy, insolvency, reorganization, winding-up, or composition or adjustment of debts, and such proceeding or case shall continue un-dismissed, or an order, judgment or decree approving or ordering any of the foregoing shall be entered and continue un-stayed and in effect, for a period of 60 or more days; or an order for relief against a Party, shall be entered in an involuntary case under the Bankruptcy Code; or

(d) Occurrence of Notice to Proceed. The Bid Facility shall achieve Notice to Proceed during the Term of this Agreement, except after Seller has received any award under NYSERDA's RESRFP23-1 or RESRFP24-1 solicitation for such Bid Facility.

7. Mutual Release.

(a) In consideration of the covenants, agreements, and undertakings of the Parties under this Agreement, each Party, on behalf of itself and its respective present and former parents, subsidiaries, affiliates, officers, directors, managers, shareholders, members, successors, and assigns (collectively, “**Releasors**”) hereby releases, waives, and forever discharges the other Party and its respective present and former, direct and indirect, parents, subsidiaries, affiliates, employees, officers, directors, managers, shareholders, members, agents, representatives, permitted successors, and permitted assigns (collectively, “**Releasees**”) of and from any and all actions, causes of action, suits, losses, liabilities, rights, debts, dues, sums of money, accounts, reckonings, obligations, costs, expenses, liens, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands, of every kind and nature whatsoever, whether now known or unknown, foreseen or unforeseen, matured or unmatured, suspected or unsuspected, in law, admiralty, or equity (collectively, “**Claims**”), which any of such Releasors ever had, now have, or hereafter can, shall, or may have against any of such Releasees for, upon, or by reason of any matter, cause, or thing whatsoever from the beginning of time through the date of this Agreement arising out of or relating to the Tier-1 Agreement, except for any Claims relating to rights and obligations preserved by, created by, or otherwise arising out of this Agreement (including any surviving indemnification obligations under the Tier-1 Agreement).

(b) Each Party, on behalf of itself and each of its respective Releasors, understands that it may later discover Claims or facts that may be different than, or in addition to, those that it or any other Releasor now knows or believes to exist regarding the subject matter of the release contained in this Section 7, and which, if known at the time of signing this Agreement, may have materially affected this Agreement and such Party's decision to enter into it and grant the release contained in this Section 7. Nevertheless, the Releasors intend to fully, finally, and forever settle and release all Claims that now exist, may exist or previously existed, as set forth in the release contained in this Section 7, whether known or unknown, foreseen or unforeseen, or suspected or unsuspected, and the release given herein is and will remain in effect as a complete release, notwithstanding the discovery or existence of such additional or different facts. The Releasors hereby waive any right or Claim that might arise as a result of such different or additional Claims or facts.

(c) This Agreement is not intended to be and shall not be construed as an admission by either Party of any liability, including whether an event of default has occurred with respect to either Party.

(d) Each Party acknowledges that it has had the opportunity to be represented by counsel of its choice throughout the negotiations, which preceded the execution of this Agreement, and in connection with the preparation and execution of this Agreement. Each Party acknowledges that it has executed this Agreement voluntarily, without coercion or duress of any kind, and on the advice of its counsel. Neither Party, nor any person acting on behalf of either Party has made any statement or representation to any other Party regarding any fact relied upon in entering into this Agreement, and neither Party relies upon any statement, representation, or promise of the other Party, or any person

acting on behalf of the other Party, in executing this Agreement, or in making the releases provided for herein, except as expressly stated herein.

(e) Each Party has made such investigation of the facts pertaining to this Agreement, and of all matters pertaining hereto, as it deems necessary. Each Party has read this Agreement and understands its contents. In executing this Agreement, each Party assumes the risk of any misrepresentation, concealment, or mistake. If either Party should subsequently discover that any fact relied upon by it in entering into this Agreement was untrue, or that any fact was concealed from it, or that its understanding of the facts below is incorrect, such Party shall not be entitled to any relief in connection therewith, including without limitation on the generality of the foregoing, any alleged right or claim to set aside or rescind this Agreement. This Agreement is intended to be and is final and binding, regardless of any claims of misrepresentation, concealment of fact, or mistake of law or fact.

(f) Notwithstanding any provision in this Agreement to the contrary, the provisions of this Section 7 shall survive the termination of this Agreement.

8. Indemnification. Seller shall protect, indemnify and hold harmless NYSERDA and the State of New York from and against all liabilities, losses, claims, damages, judgments, penalties, causes of action, costs and expenses (including, without limitation, reasonable attorneys' and/or experts' fees and expenses) imposed upon or incurred by or asserted against NYSERDA or the State of New York resulting from, arising out of or relating to Seller's breach of this Agreement. The obligations of Seller under this Article shall survive any expiration or termination of this Agreement and shall not be limited by the amount of Seller's insurance coverage. Notwithstanding any provision of this Agreement to the contrary, this Section 8 shall survive the termination of this Agreement.

9. Miscellaneous.

(a) Governing Law; Venue. This Agreement shall be governed by and construed in accordance with the laws of the State of New York applicable to contracts executed and to be performed in New York State without regard to its conflicts of laws principles. The Parties irrevocably acknowledge and accept that all actions arising under or relating to this Agreement, and the transactions contemplated hereby and thereby shall be brought exclusively in a United States District Court or New York State Court located in Albany, New York having subject matter jurisdiction over such matters, and each of the Parties hereby consents to and accepts such personal jurisdiction of, and waives any objection as to the laying of venue in, such courts for purposes of such action.

(b) All Legal Provisions Deemed Included. It is the intent and understanding of Seller and NYSERDA that each and every provision of law required by the laws of the State of New York to be contained in this Agreement shall be contained herein, and if, through mistake, oversight or otherwise, any such provision is not contained herein, or is not contained herein in correct form, this Agreement shall, upon the application of either NYSERDA or Seller, promptly be amended so as to comply strictly with the laws of the State of New York with respect to the inclusion in this Agreement of all such provisions.

In such event, the Parties shall negotiate such amendment in good faith with the intent that such amendment reflects, as closely as possible, the terms and conditions of this Agreement in effect prior to such amendment; provided that such amendment shall not in any event alter (a) the purchase and sale obligations of the Parties pursuant to this Agreement, or (b) the pricing and payment provisions of this Agreement.

(c) Other Legal Requirements. The references to particular laws of the State of New York in this Article and elsewhere in this Agreement are not intended to be exclusive and nothing contained in such Article, Exhibit and Agreement shall be deemed to modify the obligations of Seller to comply with all legal requirements.

(d) Term. The term of this Agreement (the “**Term**”) shall commence on the Effective Termination Date and shall expire upon the earliest to occur of:

(i) the execution by NYSERDA and Seller of a RES23-1 Agreement and completion of the steps described in Section 3(b)(i);

(ii) the execution by NYSERDA and Seller of a RES24-1 Agreement and completion of the steps described in Section 3(b)(ii); and

(iii) delivery by NYSERDA of a notice of termination upon the occurrence of a Termination Event in accordance with Section 3(b)(iii) of this Agreement.

(e) Waiver. NYSERDA’s determination to hold and not draw on the Contract Security delivered by Seller prior to the Termination Effective Date in accordance with and subject to the conditions set forth in this Agreement shall not be deemed to be a waiver of any rights or remedies NYSERDA may have under the Tier-1 Agreement with respect to such Contract Security. Either Party to this Agreement may (a) extend the time for the performance of any of the obligations or other acts of the other Party, (b) waive any inaccuracies in the representations and warranties of the other Party contained herein or in any document delivered by the other Party pursuant hereto, or (c) waive compliance with any of the agreements or conditions of the other Party contained herein. Any such extension or waiver shall be valid only if set forth in an instrument in writing signed by the Party to be bound thereby. Any waiver of any term or condition shall not be construed as a waiver of any subsequent breach or a subsequent waiver of the same term or condition, or a waiver of any other term or condition, of this Agreement. No provision of this Agreement will be deemed to have been waived unless the waiver is in writing; no delay by either Party in exercising its rights hereunder, including the right to terminate this Agreement, shall be deemed to constitute or evidence any waiver by such Party of any right hereunder. The rights granted in this Agreement are cumulative of every other right or remedy that the enforcing Party may otherwise have at law or in equity or by statute.

(f) Severability. If any provision of this Agreement shall be declared by any court of competent jurisdiction to be illegal, void or unenforceable, all other provisions of this Agreement shall not be affected and shall remain in full force and effect. If any

provision of this Agreement is so broad as to be unenforceable, that provision shall be interpreted to be only so broad as will enable it to be enforced.

(g) Assignment. This Agreement may not be assigned by Seller without the prior written consent of NYSERDA. Any assignment by Seller in conflict with this Section 9(g) shall be void *ab initio*.

(h) No Third-Party Beneficiaries. Nothing herein is intended to or should be construed to create any rights of any kind whatsoever in any persons not party to this Agreement.

(i) Good Faith Negotiation. Both Parties agree that, should any dispute arise during the term of this Agreement, the Parties will make a good faith, though non-binding effort to reconcile any difference or dispute before the filing of an action in any court.

(j) Damages. Neither Party shall be liable to the other for consequential, incidental, punitive, exemplary, or indirect damages, lost profits or other business interruption damages arising from the breach of this Agreement.

(k) Notices. All notices to be provided under this Agreement shall be delivered in the manner set forth for delivery of notices in the Tier-1 Agreement.

(l) Confidentiality.

(i) Freedom of Information Law. Seller acknowledges that NYSERDA is subject to and must comply with the requirements of New York's Freedom of Information Law ("FOIL;" see Public Officers' Law Article 6).

(ii) Trade Secrets/Commercial Information. The FOIL Law (Public Officers Law § 87(d)(2)) provides an exception to disclosure for records or portions thereof that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." If NYSERDA receives a request from a third party for information or a document received from Seller and which has been marked "Confidential" or "Proprietary," NYSERDA will process such request under the procedures provided by NYSERDA's FOIL regulations.

(iii) Claim of Confidentiality. Information of any tangible form including any document that Seller wishes to be protected from disclosure to third parties, including any information provided pursuant to Section 3(a), must be marked "Confidential" or "Proprietary" at the time such information is provided to NYSERDA.

(iv) Publication of Agreement. Seller acknowledges that NYSERDA may publish this Agreement. Prior to such publication, NYSERDA will redact any critical electric infrastructure information contained in this Agreement, if any,

including in the exhibits hereto, and will consider Seller's requests for the redaction of confidential business information; provided, however that NYSERDA shall not accept any request to redact price information contained in this Agreement, specifically any terms which may contribute to the calculation of financial obligations under this Agreement.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed and delivered by their duly authorized representatives.

By:  
SELLER

By:  
NEW YORK STATE ENERGY RESEARCH  
AND DEVELOPMENT AUTHORITY

Signature: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Signature: \_\_\_\_\_  
NYSERDA Authorized Signatory

By:  
SELLER

Signature: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**EXHIBIT A  
LETTER OF CREDIT**

FORM OF IRREVOCABLE STANDBY LETTER OF CREDIT

IRREVOCABLE STANDBY LETTER OF CREDIT NO. \_\_\_\_\_

DATE: \_\_\_\_\_, 20\_\_

**BENEFICIARY:**

THE NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY  
17 COLUMBIA CIRCLE, ALBANY, NEW YORK 12203-6399

LADIES AND GENTLEMEN:

BY THE ORDER OF:

[SELLER]

[SELLER'S ADDRESS]

WE HEREBY ISSUE OUR IRREVOCABLE CREDIT NO: \_\_\_\_\_ IN YOUR FAVOR FOR THE ACCOUNT OF \_\_\_\_\_ (THE "SELLER") FOR AN AMOUNT OR AMOUNTS NOT TO EXCEED IN THE AGGREGATE [STATE IN WORDS] U.S. DOLLARS AVAILABLE BY YOUR DRAFTS AT SIGHT ON [INSERT NAME AND ADDRESS OF ISSUING BANK], NEW YORK, NEW YORK, USA, WHEN ACCOMPANIED BY THE FOLLOWING DOCUMENTS:

1. YOUR SIGHT DRAFT DRAWN ON US IN THE FORM OF ANNEX A HERETO (THE "SIGHT DRAFT"); AND
2. A DATED PAYMENT CERTIFICATE PURPORTEDLY SIGNED BY A DULY AUTHORIZED OFFICER OF NYSEDA IN THE FORM OF ANNEX B HERETO (THE "PAYMENT CERTIFICATE").

MULTIPLE DRAWINGS ARE PERMITTED IN AMOUNTS NOT TO EXCEED, IN COMBINATION, THE AGGREGATE AMOUNT.

DRAWINGS PRESENTED BY FACSIMILE TO FACSIMILE NUMBER \_\_\_\_\_ ARE ACCEPTABLE; PROVIDED THAT SUCH FAX PRESENTATION IS RECEIVED ON OR BEFORE THE EXPIRY DATE ON THIS INSTRUMENT IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF THIS LETTER OF CREDIT, IT BEING UNDERSTOOD THAT ANY SUCH FAX PRESENTATION SHALL BE CONSIDERED THE SOLE OPERATIVE INSTRUMENT OF DRAWING. IN THE EVENT OF PRESENTATION BY FAX, THE ORIGINAL DOCUMENTS SHOULD NOT BE PRESENTED.

FUNDS UNDER THIS LETTER OF CREDIT ARE AVAILABLE TO YOU AGAINST YOUR PAYMENT CERTIFICATE AND SIGHT DRAFT PRESENTED IN FULL COMPLIANCE WITH THE TERMS AND CONDITIONS OF THIS LETTER OF CREDIT ON OR BEFORE 5:00 P.M., NEW YORK TIME, ON THE EXPIRATION DATE HEREOF. THIS LETTER OF CREDIT WILL EXPIRE ON [INSERT DATE].

PAYMENT AGAINST CONFORMING DOCUMENTS PRESENTED UNDER THIS LETTER OF CREDIT SHALL BE MADE BY US AT OR BEFORE 2:00 P.M., NEW YORK TIME, ON THE NEXT (OR, IN THE CASE OF A PRESENTATION AFTER 10:30 A.M., NEW YORK TIME, THE SECOND NEXT) BANKING DAY AFTER PRESENTATION.

ALL PAYMENTS MADE BY US UNDER THIS LETTER OF CREDIT WILL BE MADE IN IMMEDIATELY AVAILABLE FUNDS AND WILL BE DISBURSED FROM OUR OWN FUNDS. IF REQUESTED BY YOU, PAYMENT UNDER THIS LETTER OF CREDIT MAY BE MADE BY WIRE TRANSFER OF FEDERAL RESERVE BANK OF NEW YORK FUNDS TO YOUR ACCOUNT IN A BANK ON THE FEDERAL RESERVE WIRE SYSTEM. BENEFICIARY'S BANK [INSERT NAME AND ACCOUNT NUMBER].

THIS LETTER OF CREDIT IS NOT TRANSFERABLE. ONLY YOU MAY MAKE ANY PAYMENT CERTIFICATE AND SIGHT DRAFT UNDER THIS LETTER OF CREDIT.

ANY SIGHT DRAFT DRAWN HEREUNDER MUST BE MARKED "DRAWN UNDER [INSERT NAME AND ADDRESS OF ISSUING BANK], STANDBY LETTER OF CREDIT NUMBER \_\_\_\_\_ DATE \_\_\_\_\_."

ALL BANK CHARGES INCLUDING BUT NOT LIMITED TO, FEES OR COMMISSIONS, SHALL BE FOR APPLICANT'S ACCOUNT.

IT IS A CONDITION OF THIS LETTER OF CREDIT THAT IT SHALL BE DEEMED AUTOMATICALLY EXTENDED WITHOUT WRITTEN AMENDMENT FOR ONE YEAR PERIODS FROM THE PRESENT OR ANY FUTURE EXPIRY DATE UNLESS AT LEAST 30 CALENDAR DAYS PRIOR TO SUCH EXPIRATION DATE, WE SEND THE BENEFICIARY NOTICE AT THE ABOVE STATED ADDRESS BY OVERNIGHT COURIER, ATTN: NYSERDA GENERAL COUNSEL, WITH ELECTRONIC COPIES SENT TO CESLEGAL@NYSERDA.NY.GOV AND RES@NYSERDA.NY.GOV, THAT WE ELECT NOT TO EXTEND THIS LETTER OF CREDIT BEYOND THE INITIAL OR ANY EXTENDED EXPIRY DATE HEREOF.

#### MISCELLANEOUS

THIS LETTER OF CREDIT SETS FORTH IN FULL THE TERMS OF OUR UNDERTAKING. SUCH UNDERTAKING SHALL NOT IN ANY WAY BE MODIFIED, AMENDED OR AMPLIFIED BY REFERENCE TO ANY DOCUMENT OR INSTRUMENT REFERRED TO HEREIN OR IN WHICH THIS LETTER OF CREDIT IS REFERRED OR TO WHICH IT RELATES (INCLUDING, WITHOUT LIMITATION, THE AGREEMENT) AND ANY SUCH REFERENCE SHALL NOT BE DEEMED TO INCORPORATE HEREIN BY REFERENCE ANY DOCUMENT OR INSTRUMENT.

WE HEREBY AGREE WITH YOU THAT EACH DULY COMPLETED PAYMENT CERTIFICATE AND SIGHT DRAFT DRAWN UNDER AND IN COMPLIANCE WITH THE TERMS OF THIS LETTER OF CREDIT WILL BE DULY HONORED UPON PRESENTATION TO US ON OR BEFORE THE EXPIRY DATE. THE OBLIGATION OF [ISSUING BANK] UNDER THIS LETTER OF CREDIT IS THE INDIVIDUAL OBLIGATION OF [ISSUING BANK] AND IS IN NO WAY CONTINGENT UPON REIMBURSEMENT WITH RESPECT THERETO.

EXCEPT AS OTHERWISE EXPRESSLY STATED HEREIN, THIS LETTER OF CREDIT IS SUBJECT TO THE UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (2007 REVISION), INTERNATIONAL CHAMBER OF COMMERCE PUBLICATION 600 (PROVIDED, HOWEVER, THAT DRAWINGS PERMITTED HEREUNDER SHALL NOT BE DEEMED TO BE DRAWINGS BY INSTALLMENTS WITHIN ARTICLE 32 OF THE UCP) AND AS TO MATTERS NOT GOVERNED BY THE UCP, SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK AND APPLICABLE U.S. FEDERAL LAW.

PLEASE ADDRESS ALL CORRESPONDENCE REGARDING THIS LETTER OF CREDIT TO THE ATTENTION OF OUR STANDBY LETTER OF CREDIT UNIT, INCLUDING THE LETTER OF CREDIT REFERENCE NUMBER AS IT APPEARS ABOVE.

[NAME AND ADDRESS OF ISSUING BANK]

\_\_\_\_\_  
AUTHORIZED SIGNATURE  
OF OFFICER OF ISSUING BANK

Annex A to Exhibit A - Irrevocable Standby Letter of Credit

SIGHT DRAFT

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

Date of Letter of Credit: \_\_\_\_\_

Date of Draft: \_\_\_\_\_

FOR VALUE RECEIVED

Pay on Demand to: THE NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY, U.S. \_\_\_\_\_ Dollars (U.S. \$ \_\_\_\_\_). The amount of this draft does not exceed the amount available to be drawn by the Beneficiary under the Letter of Credit.

Charge to account of [Name of Seller].

Drawn under [Name of Bank] Letter of Credit No. \_\_\_\_\_.

Payment by the bank pursuant to this drawing shall be made to \_\_\_\_\_, ABA Number \_\_\_\_\_, Account Number \_\_\_\_\_, Attention: \_\_\_\_\_, Re: \_\_\_\_\_.

To: [Issuing Bank]  
[Address]  
Attention: \_\_\_\_\_

\_\_\_\_\_  
As Beneficiary

By: \_\_\_\_\_  
[Name and Title]

Annex B to Exhibit A - Irrevocable Standby Letter of Credit

PAYMENT CERTIFICATE

To: [Issuing Bank]  
[Address]

Re: Irrevocable Standby Letter of Credit No: \_\_\_\_\_ [Insert]

The undersigned, a duly authorized officer of the undersigned Beneficiary, hereby certifies to [Issuing Bank], with reference to the Irrevocable Standby Letter of Credit No: [Insert] ("Letter of Credit"), that Seller, having provided the Letter of Credit to the New York State Energy Research and Development Authority ("NYSERDA") as Security for performance under an agreement related to the purchase and sale of Tier-1 Renewable Energy Credits ("Agreement") or the termination thereof ("Termination Agreement") in the aggregate amount of \$ \_\_\_\_\_, ("Letter of Credit Amount"):

\_\_\_\_\_ a Termination Event has occurred under the Termination Agreement,

The terms used herein which are not specifically defined herein are defined in the Letter of Credit or the Agreement, referenced above. IN WITNESS WHEREOF, the Beneficiary has executed and delivered this payment Certificate as of the \_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_  
As Beneficiary

By: \_\_\_\_\_  
[Name and Title]