



May 20, 2021

EXHIBIT E - EMP-108 SUB 0  
Ann L. Warren  
Associate General Counsel  
Duke Energy Corporation  
550 South Tryon Street  
Charlotte, NC 28202  
Phone: 704.382.2108  
Ann.Warren@duke-energy.com

Kimberly D. Bose, Secretary  
Nathaniel J. Davis, Sr., Deputy Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, DC 20426

**Re: *Duke Energy Progress, LLC -- Affected System Operating Agreement with American Beech Solar, LLC, Docket No. ER21-\_\_\_\_-000***

Dear Secretaries:

Pursuant to Section 205 of the Federal Power Act<sup>1</sup> and Part 35 of the regulations<sup>2</sup> of the Federal Energy Regulatory Commission (the "Commission"), Duke Energy Progress, LLC ("DEP") hereby submits for filing an Affected System Operating Agreement, between itself and American Beech Solar, LLC ("American Beech"), designated as Service Agreement No. 388 respectively ("DEP ASOA") under DEP's Joint OATT Volume No. 4.

**I. BACKGROUND**

American Beech is developing a new 80 MW solar generating facility in Halifax County, North Carolina, interconnecting to the transmission system on the Dawson-South Justice 115kv transmission line owned by Dominion Energy North Carolina ("Dominion") which is in the footprint of PJM Interconnection, L.L.C. ("PJM"). Since the proposed interconnection of the solar generation facility will cause adverse impacts on DEP's Rocky Mount-Battleboro 115 kV line, DEP is an Affected System. Accordingly, DEP performed an affected system study and finalized its report on May 6, 2020. The results of such study identified the need to reconnector the Rocky Mount-Battleboro 115 kV line, replace current poles with steel poles on 8.5 miles of the line, and uprate the existing Rocky Mount 230 kV substation. The Interconnection Service Agreement among American Beech, PJM and Dominion states in Schedule F that "the Customer Facility under this ISA cannot come fully in service prior to the completion of the Duke Energy Process upgrade reconductoring the Battleboro – Rocky Mount 115 kV line."<sup>3</sup>

DEP and American Beech entered into negotiations to create an Affected System Operating Agreement setting forth the terms and conditions relating to (a) the impact of the proposed generation facility on DEP's system and (b) the Network Upgrades to the DEP system required to accommodate the proposed interconnection of the solar generating facility. Under the DEP ASOA, the parties have agreed that American Beech will not be reimbursed for costs of the needed upgrades identified in the ASOA.

DEP's affiliates have entered into several Affected System Operating Agreements with counterparties in the past, all of which have been filed with and accepted for filing by the Commission without modification.<sup>4</sup>

<sup>1</sup> 16 U.S.C. § 824d.

<sup>2</sup> 18 C.F.R. Part 35.

<sup>3</sup> Docket No. ER20-3024.

<sup>4</sup> Docket Nos. ER20-340, ER20-374, ER18-2082, ER17-567, ER16-2295, ER05-1452.

Kimberly D. Bose

Page 2

## II. CONTENTS OF FILING

The following documents are included in this filing in addition to the relevant tariff records:

- This transmittal letter; and
- The DEP ASOA (DEP Service Agreement No. 388).

## III. INFORMATION REQUIRED BY 18 C.F.R. § 35.13

The DEP ASOA sets forth terms for the Affected System Network Upgrades required to mitigate impacts on DEP's transmission system resulting from the interconnection of the new solar generating facility to Dominion's system. American Beech has agreed to pay DEP's actual costs for construction of the network upgrades identified in the DEP ASOA. The cost estimate for such network upgrades that is contained in the DEP ASOA is \$31,285,275. There is ample Commission precedent supporting cost allocation to an interconnection customer of all costs of network upgrades to a neighboring affected system under affected system agreements.

### 1. The Commission Has Accepted ASOAs in Which Parties Mutually Agreed that Customer Would Pay Network Upgrade Costs Without Reimbursement

The Commission has accepted for filing without modification other affected system agreements under which the parties have mutually agreed to an arrangement under which the interconnecting customer has paid the affected system for all of its costs in constructing affected system Network Upgrades without receiving reimbursement for such costs.<sup>5</sup> The cost allocation provided for in the DEP ASOA is appropriate because it is consistent with Commission precedent in which the Commission has permitted the interconnection customer to be responsible for such costs when the parties have agreed to such allocation as DEP and American Beech have under the DEP ASOA.

### 2. The Commission Has an Objective to Protect Existing Transmission Customers from Adverse Rate Impacts from Network Upgrades to Accommodate Generator Interconnections

The Commission stated in Order No. 2003-B that "an important objective of our interconnection pricing policy continues to be the protection of existing Transmission Customers, including the Transmission Provider's native load, from adverse rate implications associated with Interconnection Facilities and Network Upgrades required to interconnect a new Generating Facility."<sup>6</sup> The parties have structured the DEP ASOA to eliminate adverse impacts to DEP's existing transmission customers. If instead DEP was required to reimburse American Beech for network upgrade costs, it would seek reimbursement of the costs (estimated to be \$31.3 million) from wholesale customers (30% allocation) and retail customers (70% allocation (90% from NC and 10% from SC)).

<sup>5</sup> Docket Nos. ER21-1701 (pending), ER20-2825, ER20-2419, ER20-1788, ER19-2445, ER09-1654.

<sup>6</sup> Order No. 2003-B at P 56.

Kimberly D. Bose

Page 3

### 3. Information Required by 18 C.F.R. § 35.13

The assignment of costs for Network Upgrades specific to the new generating facilities does not result in a rate increase to a customer under any existing rate schedule. Since the DEP ASOA constitutes a rate change other than a rate increase under 18 C.F.R. § 35.13(a)(2)(iii), DEP seeks waiver of any filing requirements of 18 C.F.R. § 35.13 necessary to allow the Commission to accept this filing. Per 18 C.F.R. §§ 35.13(b) and (c), the agreement of the customer has been obtained, and no expenses or costs in connection with this agreement have been alleged or judged in any administrative or judicial proceeding to be illegal, duplicative, or unnecessary costs that are demonstrably the product of discriminatory employment practices.

### IV. REQUESTED EFFECTIVE DATE

DEP seeks an effective date for the DEP ASOA as of May 21, 2021. Since DEP is filing this service agreement prior to 30 days after service has commenced under the agreement, no waiver is necessary to permit such requested effective date.<sup>7</sup>

### V. COMMUNICATIONS

All communications should be addressed to the person listed below.

Ann L. Warren, Associate General Counsel  
Duke Energy Corporation  
550 S. Tryon St.(DEC 45A), Charlotte, NC 28202  
704-382-2108, [ann.warren@duke-energy.com](mailto:ann.warren@duke-energy.com)

### VI. SERVICE OF FILING

This filing will be served electronically per 18 C.F.R. § 385.2010(f)(2) on the Interconnection Customer<sup>8</sup> and the state regulatory commissions within DEP's footprint.<sup>9</sup>

### VII. CONCLUSION

DEP respectfully requests that the Commission accept the DEP ASOA being submitted through this filing as just, reasonable, and not unduly preferential under Section 205 of the Federal Power Act and grant the requested effective date for the agreement. Please contact the undersigned if you have any questions.

Respectfully submitted,

/s/ Ann L. Warren

Ann L. Warren, Associate General Counsel  
Duke Energy Corporation

<sup>7</sup> See *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,983-84 (1993); 18 C.F.R. § 35.3(a)(2) (“[s]ervice agreements that are required to be filed ... shall be tendered for filing with the Commission and posted not more than 30 days after electric service has commenced ...”).

<sup>8</sup> [Jared.Quient@baywa-re.com](mailto:Jared.Quient@baywa-re.com); [Whitney.Rubin@baywa-re.com](mailto:Whitney.Rubin@baywa-re.com); [Bill.Gulley@baywa-re.com](mailto:Bill.Gulley@baywa-re.com)

<sup>9</sup> [kcampbell@ncuc.net](mailto:kcampbell@ncuc.net); [chiefclerksoffice@ncuc.net](mailto:chiefclerksoffice@ncuc.net); [dianna.downey@psncuc.nc.gov](mailto:dianna.downey@psncuc.nc.gov)  
[lucy.edmondson@psncuc.nc.gov](mailto:lucy.edmondson@psncuc.nc.gov); [jocelyn.boyd@psc.sc.gov](mailto:jocelyn.boyd@psc.sc.gov); [jnelson@ors.sc.gov](mailto:jnelson@ors.sc.gov)

**AFFECTED SYSTEM OPERATING AGREEMENT**

**BETWEEN**

**DUKE ENERGY PROGRESS, LLC**

**AND**

**AMERICAN BEECH SOLAR, LLC**

**SERVICE AGREEMENT NO. 388**

**OFFICIAL COPY**

**May 24 2022**

## AFFECTED SYSTEM OPERATING AGREEMENT

**THIS AFFECTED SYSTEM OPERATING AGREEMENT** (“Agreement”) is made and entered into this 21 day of May 2021, by and between American Beech Solar, LLC, a limited liability company organized and existing under the laws of the state of Delaware (“Customer”), and Duke Energy Progress, LLC, a limited liability company organized and existing under the laws of the State of North Carolina (“Affected System Operator”). Customer and Affected System Operator each may be referred to as a “Party” or collectively as the “Parties.”

### Recitals

**WHEREAS**, Customer intends to own, lease and/or control and operate a Large Generating Facility in adjoining Control Area of Affected System Operator’s Control Area;

**WHEREAS**, Customer intends to enter into an interconnection agreement (“Customer IA”) with the Interconnecting Utility (defined below);

**WHEREAS**, the Affected System Operator’s transmission system is an Affected System;

**WHEREAS**, Affected System Operator performed an Affected System Study which identified the Affected System Network Upgrades required to mitigate impacts resulting from the interconnection of the Large Generating Facility; and

**WHEREAS**, Customer and Affected System Operator have agreed to enter into this Agreement for the purpose of setting forth terms and conditions that address matters related to the impact of the Large Generating Facility on the Affected System and the Affected System Network Upgrades.

**NOW, THEREFORE**, in consideration of and subject to the mutual covenants contained herein, it is agreed:

When used in this Agreement, terms with initial capitalization that are not defined in Article 1 shall have the meanings specified in the Article in which they are used.

## Article 1. Definitions

**Affected System** shall mean the electric system belonging to Duke Energy Progress, LLC (“DEP”).

**Affected System Operator** shall mean the entity that operates an Affected System.

**Affected System Network Upgrades** shall mean, as set forth in Appendix A, the additions, modifications, and upgrades to the Affected System Operator’s Transmission System required to accommodate the interconnection of the Large Generating Facility.

**Affiliate** shall mean, with respect to a corporation, partnership or other entity, each such other corporation, partnership or other entity that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such corporation, partnership or other entity.

**Applicable Laws and Regulations** shall mean all duly promulgated applicable federal, state and local laws, regulations, rules, ordinances, codes, decrees, judgments, directives, or judicial or administrative orders, permits and other duly authorized actions of any Governmental Authority.

**Applicable Reliability Council** shall mean the reliability council applicable to the Affected System Operator.

**Applicable Reliability Standards** shall mean the requirements and guidelines of NERC, the Applicable Reliability Council, and the Control Area of the Affected System Operator.

**Breach** shall mean the failure of a Party to perform or observe any material term or condition of the Agreement.

**Breaching Party** shall mean a Party that is in Breach of the Agreement.

**Business Day** shall mean Monday through Friday, excluding Federal Holidays.

**Calendar Day** shall mean any day including Saturday, Sunday or a Federal Holiday.

**Commercial Operation** shall mean the status of a Generating Facility that has commenced generating electricity for sale, excluding electricity generated during Trial Operation.

**Commercial Operation Date** of a unit shall mean the date on which the Generating Facilities commence Commercial Operation as agreed to in Appendix E to the Customer IA.

**Confidential Information** shall mean any confidential, proprietary or trade secret information of a plan, specification, pattern, procedure, design, device, list, concept, policy or compilation relating to the present or planned business of a Party, which is designated as confidential by the Party supplying the information, whether conveyed orally, electronically, in writing, through inspection, or otherwise.

**Control Area** shall mean an electrical system or systems bounded by interconnection metering and telemetry, capable of controlling generation to maintain its interchange schedule with other Control Areas and contributing to frequency regulation of the interconnection. A Control Area must be certified by the Applicable Reliability Council.

**Customer IA** shall mean the interconnection agreement between Customer and the Interconnecting Utility or any successor agreement thereto.

**Customer's Interconnection Facility** shall mean all facilities and equipment, as identified in the Customer IA.

**Default** shall mean the failure of a Breaching Party to cure its Breach in accordance with Article 12 of the Agreement.

**Dispute Resolution** shall mean the procedure for resolution of a dispute between the Parties in which they will first attempt to resolve the dispute on an informal basis.

**Effective Date** shall mean the date on which the Agreement becomes effective upon execution by the Parties subject to acceptance by FERC, or if filed unexecuted, upon the date specified by FERC.

**Federal Power Act** shall mean the Federal Power Act, as amended, 16 U.S.C. §§ 791a et seq.

**FERC** shall mean the Federal Energy Regulatory Commission or its successor.

**Force Majeure** shall mean any act of God, labor disturbance, act of the public enemy, war, insurrection, riot, fire, storm or flood, explosion, breakage or accident to machinery or equipment, any order, regulation or restriction imposed by governmental, military or lawfully established civilian authorities, or any other cause beyond a Party's control. A Force Majeure event does not include acts of negligence or intentional wrongdoing by the Party claiming Force Majeure.



**Generating Facility** shall mean Customer's device for the production of electricity identified in the Interconnection Request to the Interconnecting Utility, but shall not include the Customer's Interconnection Facilities.

**Generating Facility Capacity** shall mean the net capacity of the Generating Facility and the aggregate net capacity of the Generating Facility where it includes multiple energy production devices.

**Good Utility Practice** shall mean any of the practices, methods and acts engaged in or approved by a significant portion of the electric industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather to be acceptable practices, methods, or acts generally accepted in the region.

**Governmental Authority** shall mean any federal, state, local or other governmental regulatory or administrative agency, court, commission, department, board, or other governmental subdivision, legislature, rulemaking board, tribunal, or other governmental authority having jurisdiction over the Parties, their respective facilities, or the respective services they provide, and exercising or entitled to exercise any administrative, executive, police, or taxing authority or power; provided, however, that such term does not include Customer, Affected System Operator, or any Affiliate thereof.

**Initial Synchronization Date** shall mean the date upon which the Affected System Network Upgrades are initially synchronized to the Affected System Operator's system.

**In-Service Date** shall mean the date upon which the Affected System Network Upgrades are placed in-service on Affected System Operator's system.

**Interconnecting Utility** shall mean Dominion Energy North Carolina ("Dominion") located in the footprint of PJM Interconnection, L.L.C. ("PJM").

**Interconnection Request** shall mean a Customer's request submitted to Interconnecting Utility to interconnect a new Generating Facility, or to increase the capacity of, or make a Material Modification to the operating characteristics of, an existing Generating Facility that is interconnected with a Transmission Provider's Transmission System.



**Interconnection Service** shall mean the service provided by Interconnecting Utility associated with interconnecting the Customer's Generating Facilities to the Interconnecting Utility's system.

**IRS** shall mean the Internal Revenue Service.

**Large Generating Facility** shall mean a Generating Facility having a Generating Facility Capacity of more than 20 MW.

**Loss** shall mean any and all losses relating to injury to or death of any person or damage to property, demand, suits, recoveries, costs and expenses, court costs, attorney fees, and all other obligations by or to third parties, arising out of or resulting from the other Party's performance, or non-performance of its obligations under this Agreement on behalf of the Indemnifying Party, except in cases of gross negligence or intentional wrongdoing by the Indemnifying Party.

**NERC** shall mean the North American Electric Reliability Corporation or its successor organization.

**Notice of Dispute** shall mean a written notice of a dispute or claim that arises out of or in connection with this Agreement.

**Party or Parties** shall mean Affected System Operator or Customer or any combination of the above.

**Reasonable Efforts** shall mean, with respect to an action required to be attempted or taken by a Party under the Agreement, efforts that are timely and consistent with Good Utility Practice and are otherwise substantially equivalent to those a Party would use to protect its own interests.

**Tariff** shall mean the Affected System Operator's Tariff through which open access transmission service and Interconnection Service are offered, as filed with FERC, and as amended or supplemented from time to time, or any successor tariff.

**Transmission Provider** shall mean a public utility (or its designated agent) that owns, controls, or operates transmission or distribution facilities used for the transmission of electricity in interstate commerce and provides transmission service under a tariff.

**Transmission System** shall mean the facilities owned, controlled or operated by the Affected System Operator that are used to provide transmission service under its Tariff.

**Trial Operation** shall mean the period during which Customer is engaged in on-site test operations and commissioning of the Large Generating Facility prior to Commercial Operation.

**Variable Energy Resource** shall mean a device for the production of electricity that is characterized by an energy source that: (1) is renewable; (2) cannot be stored by the facility owner or operator; and (3) has variability that is beyond the control of the facility owner or operator.

## **Article 2. Effective Date, Term, and Termination**

**2.1 Effective Date.** This Agreement shall become effective upon execution by the Parties subject to acceptance by FERC, or if filed unexecuted, upon the date specified by FERC. Affected System Operator shall promptly file this Agreement with FERC upon execution in accordance with Article 3.1, if required.

**2.2 Term of Agreement.** Subject to the provisions of Article 2.3, this Agreement shall remain in effect for as long as the Customer IA is in effect.

### **2.3 Termination Procedures.**

**2.3.1 Written Notice.** Upon termination of the Customer IA, Customer shall notify Affected System Operator in writing of such termination. Within 30 Calendar Days of such notification, Affected System Operator shall file a notice of termination of this Agreement with FERC.

**2.3.2 Default.** Either Party may terminate this Agreement in accordance with Article 11.

**2.3.3** Notwithstanding Articles 2.3.1 and 2.3.2, no termination shall become effective until the Parties have complied with all Applicable Laws and Regulations applicable to such termination, including the filing with FERC of a notice of termination of this Agreement, which notice has been accepted for filing by FERC.

**2.4 Termination Costs.** If a Party elects to terminate this Agreement pursuant to Article 2.3 above, each Party shall pay all costs incurred or charges assessed by the other Party, as of the date of the other Party's receipt of such notice of termination, that are the responsibility of the Terminating Party under this Agreement. In the event of termination by a Party, the Parties shall use commercially Reasonable Efforts to mitigate the costs, damages and charges arising as a consequence of termination. Upon termination of this Agreement, unless otherwise ordered or approved by FERC:

- 2.4.1** If Customer terminates this Agreement, it shall be responsible for all costs incurred in association with this Agreement, including any Affected System Network Upgrades for which Affected System Operator has incurred expenses and has not been reimbursed by Customer.
- 2.4.2** Affected System Operator may, at its option, retain any portion of such materials, equipment, or facilities that Customer chooses not to accept delivery of, in which case Affected System Operator shall be responsible for all costs associated with procuring such materials, equipment, or facilities.
- 2.4.3** With respect to any facilities already installed or constructed pursuant to the terms of this Agreement, Customer shall be responsible for all costs associated with the removal, relocation or other disposition or retirement of such materials, equipment, or facilities.
- 2.5 Survival.** This Agreement shall continue in effect after termination to the extent necessary to provide for final billings and payments and for costs incurred hereunder, including billings and payments pursuant to this Agreement; to permit the determination and enforcement of liability and indemnification obligations arising from acts or events that occurred while this Agreement was in effect.

### **Article 3. Regulatory Filings**

- 3.1 Filing.** Affected System Operator shall file this Agreement (and any amendment hereto) with FERC. Customer shall reasonably cooperate with Affected System Operator with respect to such filing and to provide any information reasonably requested by Affected System Operator needed to comply with applicable regulatory requirements.

### **Article 4. Scope of Service**

- 4.1 Performance Standards.** Each Party shall perform all of its obligations under this Agreement in accordance with Applicable Laws and Regulations, Applicable Reliability Standards, and Good Utility Practice, and to the extent a Party is required or prevented or limited in taking any action by such regulations and standards, such Party shall not be deemed to be in Breach of this Agreement for its compliance therewith. If such Party is an Affected System Operator then that Party shall amend the Agreement after first attempting to obtain the consent of Customer, which consent shall not be unreasonably withheld. If the parties are unable to reach agreement upon any necessary amendments, the Affected System shall submit the proposed amendment to FERC for approval.

**Article 5. Affected System Network Upgrades Facilities Engineering, Procurement, and Construction**

**5.1 In-Service Date, Initial Synchronization Date, and Commercial Operation Date.** The parties shall mutually agree upon the In-Service Date, Initial Synchronization Date, and Commercial Operation Date for the completion of Affected System Operator's Affected System Network Upgrades. Such dates and selected option shall be set forth in Appendix B, Milestones.

**5.1.1 Design, Procurement and Construction of Affected System Network Upgrades.** Affected System Operator shall design, procure, and construct Affected System Network Upgrades using Reasonable Efforts to complete Affected System Network Upgrades by the dates set forth in Appendix B, Milestones. Affected System Operator shall not be required to undertake any action which is inconsistent with its standard safety practices, its material and equipment specifications, its design criteria and construction procedures, its labor agreements, and Applicable Laws and Regulations.

**5.2 Equipment Procurement.** Affected System Operator shall commence design of Affected System Network Upgrades and procure necessary equipment as soon as practicable after all of the following conditions are satisfied, unless the Parties otherwise agree in writing:

**5.2.1** Affected System Operator has received written authorization to proceed with design and procurement from Customer by the date specified in Appendix B, Milestones; and

**5.2.2** Customer has provided security to Affected System Operator in accordance with Article 7.3 by the dates specified in Appendix C, Payment Schedule.

**5.3 Construction Commencement.** Affected System Operator shall commence construction of Affected System Network Upgrades as soon as practicable after the following additional conditions are satisfied:

**5.3.1** Approval of the appropriate Governmental Authority has been obtained for any facilities requiring regulatory approval;

**5.3.2** Necessary real property rights and rights-of-way have been obtained, to the extent required for the construction of a discrete aspect of Affected System Network Upgrades;

- 5.3.3** Affected System Operator has received written authorization to proceed with construction from Customer by the date specified in Appendix B, Milestones; and
- 5.3.4** Customer has provided security to Affected System Operator in accordance with Article 7.3 by the dates specified in Appendix C, Payment Schedule.
- 5.4 Work Progress.** The Affected System Operator will keep Customer advised periodically as to the progress of its respective design, procurement and construction efforts. Customer may, at any time, request a progress report from the Affected System Operator
- 5.5 Limited Operation.** If any Affected System Network Upgrades are not reasonably expected to be completed prior to the Commercial Operation Date of the Large Generating Facility, Affected System Operator shall, upon the request and at the expense of Customer, perform operating studies on a timely basis to determine the extent to which the Large Generating Facility may operate prior to the completion of Affected System Network Upgrades consistent with Applicable Laws and Regulations, Applicable Reliability Standards, Good Utility Practice, and this Agreement. Affected System Operator shall inform Interconnecting Utility and Customer that Affected System Operator may permit Customer to operate the Large Generating Facility in accordance with the results of such studies, provided however, that if Interconnecting Utility informs Affected System Operator that it objects to such proposed Limited Operation, then Limited Operation will not be permitted.
- 5.6 Lands of Other Property Owners.** If any part of Affected System Network Upgrades is to be installed on property owned by persons other than Affected System Operator, Affected System Operator shall at Customer's expense use efforts, similar in nature and extent to those that it typically undertakes on its own behalf or on behalf of its Affiliates, including use of its eminent domain authority, and to the extent consistent with state law, to procure from such persons any rights of use, licenses, rights of way and easements that are necessary to construct, operate, maintain, test, inspect, replace or remove Affected System Network Upgrades upon such property.
- 5.7 Permits.** The Affected System Operator shall obtain all permits, licenses and authorizations that are necessary to install and construct the Affected System Network Upgrades in compliance with Applicable Laws and Regulations.

## 5.8 Taxes.

**5.8.1 Customer Payments Not Taxable.** The Parties intend that all payments or property transfers made by Customer to Affected System Operator for the installation of Affected System Network Upgrades shall be non-taxable, either as contributions to capital, or as an advance, in accordance with the Internal Revenue Code and any applicable state income tax laws and shall not be taxable as contributions in aid of construction or otherwise under the Internal Revenue Code and any applicable state income tax laws.

**5.8.2 Indemnification for the Cost Consequences of Current Tax Liability Imposed Upon the Affected System Operator.**

Affected System Operator shall not include a gross-up for the cost consequences of any current tax liability in the amounts it charges Customer under this Agreement unless (i) Affected System Operator has determined, in good faith, that the payments or property transfers made by Customer to Affected System Operator should be reported as income subject to taxation or (ii) any Governmental Authority directs Affected System Operator to report payments or property as income subject to taxation. Customer shall reimburse Affected System Operator for such costs on a fully grossed-up basis, in accordance with Article 5.8.3, within thirty (30) Calendar Days of receiving written notification from Affected System Operator of the amount due, including detail about how the amount was calculated.

**5.8.3 Tax Gross-Up Amount.** Customer's liability for the cost consequences of any current tax liability under this Article 5.8 shall be calculated on a fully grossed-up basis. Except as may otherwise be agreed to by the parties, this means that Customer will pay Affected System Operator, in addition to the amount paid for the Affected System Network Upgrades, an amount equal to (1) the current taxes imposed on Affected System Operator ("Current Taxes") on the excess of (a) the gross income realized by Affected System Operator as a result of payments or property transfers made by Customer to Affected System Operator under this Agreement (without regard to any payments under this Article 5.8) (the "Gross Income Amount") over (b) the present value of future tax deductions for depreciation that will be available as a result of such payments or property transfers (the "Present Value Depreciation Amount"), plus (2) an additional amount sufficient to permit Affected System



Operator to receive and retain, after the payment of all Current Taxes, an amount equal to the net amount described in clause (1).

For this purpose, (i) Current Taxes shall be computed based on Affected System Operator's composite federal and state tax rates at the time the payments or property transfers are received and Affected System Operator will be treated as being subject to tax at the highest marginal rates in effect at that time (the "Current Tax Rate"), and (ii) the Present Value Depreciation Amount shall be computed by discounting Affected System Operator's anticipated tax depreciation deductions as a result of such payments or property transfers by Affected System Operator's current weighted average cost of capital. Thus, the formula for calculating Customer's liability to Transmission Owner pursuant to this Article 5.8.3 can be expressed as follows:  $(\text{Current Tax Rate} \times (\text{Gross Income Amount} - \text{Present Value of Tax Depreciation})) / (1 - \text{Current Tax Rate})$ . Customer's estimated tax liability in the event taxes are imposed shall be stated in Appendix A.

**5.8.4 Private Letter Ruling or Change or Clarification of Law.** At Customer's request and expense, Affected System Operator shall file with the IRS a request for a private letter ruling as to whether any property transferred or sums paid, or to be paid, by Customer to Affected System Operator under this Agreement are subject to federal income taxation. Customer will prepare the initial draft of the request for a private letter ruling, and will certify under penalties of perjury that all facts represented in such request are true and accurate to the best of Customer's knowledge. Affected System Operator and Customer shall cooperate in good faith with respect to the submission of such request.

Affected System Operator shall keep Customer fully informed of the status of such request for a private letter ruling and shall execute either a privacy act waiver or a limited power of attorney, in a form acceptable to the IRS, that authorizes Customer to participate in all discussions with the IRS regarding such request for a private letter ruling. Affected System Operator shall allow Customer to attend all meetings with IRS officials about the request and shall permit Customer to prepare the initial drafts of any follow-up letters in connection with the request.

**5.8.5 Contests.** In the event any Governmental Authority determines that Affected System Operator's receipt of payments or property



constitutes income that is subject to taxation, Affected System Operator shall notify Customer, in writing, within thirty (30) Calendar Days of receiving notification of such determination by a Governmental Authority. Upon the timely written request by Customer and at Customer's sole expense, and after consultation with Customer and the exercise of good faith efforts to accommodate Customer's concerns, Affected System Operator may appeal, protest, seek abatement of, or otherwise oppose such determination. Upon Customer's written request and sole expense, and after consultation with Customer and the exercise of good faith efforts to accommodate Customer's concerns, Affected System Operator may file a claim for refund with respect to any taxes paid under this Article 5.8, whether or not it has received such a determination. Affected System Operator reserves the right, after exercising good faith efforts to accommodate Customer's concerns and views, to make all decisions with regard to the prosecution of such appeal, protest, abatement or other contest, including the selection of counsel and compromise or settlement of the claim, but Affected System Operator shall keep Customer informed, shall consider in good faith suggestions from Customer about the conduct of the contest, and shall reasonably permit Customer or a Customer representative to attend contest proceedings. Customer reserves the right to protest any efforts by Affected System Operator to recover in rates from Customer any tax expenses resulting from government actions described in the first sentence of this subsection.

Customer shall pay to Affected System Operator on a periodic basis, as invoiced by Affected System Operator, Affected System Operator's documented reasonable costs of prosecuting such appeal, protest, abatement or other contest. At any time during the contest, Affected System Operator may agree to a settlement either with Customer's consent or after obtaining written advice from nationally-recognized tax counsel, selected by Affected System Operator, but reasonably acceptable to Customer, that the proposed settlement represents a reasonable settlement given the hazards of litigation. Customer's obligation shall be based on the amount of the settlement agreed to by Customer, or if a higher amount, so much of the settlement that is supported by the written advice from nationally-recognized tax counsel selected under the terms of the preceding sentence. Any settlement without Customer's consent or such written advice will relieve Customer from any obligation to indemnify Affected System Operator for the tax at issue in the contest.

**5.8.6**

**Refund.** In the event that (a) a private letter ruling is issued to Affected System Operator which holds that any amount paid or the value of any property transferred by Customer to Affected System Operator under the terms of this Agreement is not subject to federal income taxation, (b) any legislative change or administrative announcement, notice, ruling or other determination makes it reasonably clear to Affected System Operator in good faith that any amount paid or the value of any property transferred by Customer to Affected System Operator under the terms of this Agreement is not taxable to Affected System Operator, (c) any abatement, appeal, protest, or other contest results in a determination that any payments or transfers made by Customer to Affected System Operator are not subject to federal income tax, or (d) if Affected System Operator receives a refund from any taxing authority for any overpayment of tax attributable to any payment or property transfer made by Customer to Affected System Operator pursuant to this Agreement, Affected System Operator shall promptly refund to Customer the following:

(i) any payment made by Customer under this Article 5.8 for taxes that is attributable to the amount determined to be non-taxable, together with interest thereon,

(ii) interest on any amount paid by Customer to Affected System Operator for such taxes which Affected System Operator did not submit to the taxing authority, calculated in accordance with the methodology set forth in FERC's regulations at 18 CFR § 35.19a(a)(2)(iii) from the date payment was made by Customer to the date Affected System Operator refunds such payment to Customer, and

(iii) with respect to any such taxes paid by Affected System Operator, any refund or credit Affected System Operator receives or to which it may be entitled from any Governmental Authority, interest (or that portion thereof attributable to the payment described in clause (i), above) owed to Affected System Operator for such overpayment of taxes (including any reduction in interest otherwise payable by Affected System Operator to any Governmental Authority resulting from an offset or credit).

The intent of this provision is to leave the Parties, to the extent practicable, in the event that no taxes are due with respect to any

payment for Affected System Network Upgrades hereunder, in the same position they would have been in had no such tax payments been made.

**5.8.7 Taxes Other Than Income Taxes.** Upon the timely request by Customer, and at Customer's sole expense, Affected System Operator may appeal, protest, seek abatement of, or otherwise contest any tax (other than federal or state income tax) asserted or assessed against Affected System Operator for which Customer may be required to reimburse Affected System Operator under the terms of this Agreement. Customer shall pay to Affected System Operator on a periodic basis, as invoiced by Affected System Operator, Affected System Operator's documented reasonable costs of prosecuting such appeal, protest, abatement, or other contest. Customer and Affected System Operator shall cooperate in good faith with respect to any such contest. Unless the payment of such taxes is a prerequisite to an appeal or abatement or cannot be deferred, no amount shall be payable by Customer to Affected System Operator for such taxes until they are assessed by a final, non-appealable order by any court or agency of competent jurisdiction. In the event that a tax payment is withheld and ultimately due and payable after appeal, Customer will be responsible for all taxes, interest and penalties, other than penalties attributable to any delay caused by Affected System Operator.

**5.9 Tax Status.** Each Party shall cooperate with the other to maintain the other Party's tax status. Nothing in this Agreement is intended to adversely affect any Affected System Operator's tax exempt status with respect to the issuance of bonds including, but not limited to, Local Furnishing Bonds.

## **Article 6. Performance Obligation**

**6.1 Affected System Network Upgrades.** Affected System Operator shall design, procure, construct, install, and own the Affected System Network Upgrades described in Appendix A, Affected System Network Upgrades. The Affected System Network Upgrades shall be funded by Customer. Nothing in this agreement limits the Customer's rights to separately seek or obtain reimbursement from other projects within the PJM AC1 cluster.

**6.2 Provision of Security.** At least thirty (30) Calendar Days prior to the commencement of the procurement, installation, or construction of a discrete portion of an Affected System Network Upgrades Customer shall provide Affected System Operator a cash deposit or letter of credit that is reasonably

acceptable to Affected System Operator and is consistent with the Uniform Commercial Code of the jurisdiction identified in Article 8.2.1. The letter of credit must be issued by a financial institution reasonably acceptable to Affected System Operator and must specify a reasonable expiration date. Such security for payment shall be in an amount sufficient to cover the costs for constructing, procuring and installing the applicable portion of Affected System Network Upgrades in accordance with the schedule set forth in Appendix C, and shall be reduced on a dollar-for-dollar basis for payments made to Affected System Operator for these purposes.

## **Article 7. Invoice**

- 7.1 General.** Affected System Operator shall submit to Customer, on a monthly basis, unless otherwise agreed to by the Parties, invoices of amounts due for the preceding month as set forth on Appendix C. Each invoice shall state the month to which the invoice applies and fully describe the services and equipment provided.
- 7.2 Final Invoice.** Within six months after completion of the construction of Affected System Network Upgrades, Affected System Operator shall provide an invoice of the final cost of the construction of Affected System Network Upgrades and shall set forth such costs in sufficient detail to enable Customer to compare the actual costs with the estimates and to ascertain deviations, if any, from the cost estimates. Affected System Operator shall refund to Customer any amount by which the actual payment by Customer for estimated costs exceeds the actual costs of construction within thirty (30) Calendar Days of the issuance of such final construction invoice.
- 7.3 Payment.** Invoices shall be rendered to the Customer at the address specified in Appendix D. The Customer shall pay the invoice within thirty (30) Calendar Days of receipt. All payments shall be made in immediately available funds payable to the Affected System Operator, or by wire transfer to a bank named and account designated by the Affected System Operator. Payment of invoices by the Customer will not constitute a waiver of any rights or claims either Party may have under this Agreement.
- 7.4 Disputes.** In the event of a billing dispute between Affected System Operator and Customer, Affected System Operator shall continue to provide service under this Agreement as long as Customer: (i) continues to make all payments not in dispute; and (ii) pays to Affected System Operator or into an independent escrow account the portion of the invoice in dispute, pending resolution of such dispute. If Customer fails to meet these two requirements for continuation of service, then Affected System Operator may provide notice to Customer of a Default pursuant to Article 11. Within thirty (30) Calendar Days after the resolution of the dispute,

the Party that owes money to the other Party shall pay the amount due with interest calculated in accord with the methodology set forth in FERC's regulations at 18 CFR § 35.19a(a)(2)(iii) if so required.

## **Article 8. Regulatory Requirements and Governing Law**

**8.1 Regulatory Requirements.** Each Party's obligations under this Agreement shall be subject to its receipt of any required approval or certificate from one or more Governmental Authorities in the form and substance satisfactory to the applying Party, or the Party making any required filings with, or providing notice to, such Governmental Authorities, and the expiration of any time period associated therewith. Each Party shall in good faith seek and use its Reasonable Efforts to obtain such other approvals. Nothing in this Agreement shall require Customer to take any action that could result in its inability to obtain, or its loss of, status or exemption under the Federal Power Act, the Public Utility Holding Company Act of 1935, as amended, or the Public Utility Regulatory Policies Act of 1978.

### **8.2 Governing Law.**

**8.2.1** The validity, interpretation and performance of this Agreement and each of its provisions shall be governed by the laws of the state of North Carolina without regard to its conflicts of law principles.

**8.2.2** This Agreement is subject to all Applicable Laws and Regulations.

**8.2.3** Each Party expressly reserves the right to seek changes in, appeal, or otherwise contest any laws, orders, rules, or regulations of a Governmental Authority.

## **Article 9. Notices.**

**9.1 General.** Unless otherwise provided in this Agreement, any notice, demand or request required or permitted to be given by either Party to the other and any instrument required or permitted to be tendered or delivered by either Party in writing to the other shall be effective when delivered and may be so given, tendered or delivered, by recognized national courier, or by depositing the same with the United States Postal Service with postage prepaid, for delivery by certified or registered mail, addressed to the Party, or personally delivered to the Party, at the address set out in Appendix D, Addresses for Delivery of Notices and Billings.

Either Party may change the notice information in this Agreement by giving five (5) Business Days written notice prior to the effective date of the change.

**9.2 Billings and Payments.** Billings and payments shall be sent to the addresses set out in Appendix D.

**9.3 Alternative Forms of Notice.** Any notice or request required or permitted to be given by a Party to the other and not required by this Agreement to be given in writing may be so given by telephone, facsimile or email to the telephone numbers and email addresses set out in Appendix D.

## **Article 10. Force Majeure**

### **10.1 Force Majeure.**

**10.1.1.** Economic hardship is not considered a Force Majeure event.

**10.1.2** Neither Party shall be considered to be in Default with respect to any obligation hereunder, other than the obligation to pay money when due, if prevented from fulfilling such obligation by Force Majeure. A Party unable to fulfill any obligation hereunder (other than an obligation to pay money when due) by reason of Force Majeure shall give notice and the full particulars of such Force Majeure to the other Party in writing or by telephone as soon as reasonably possible after the occurrence of the cause relied upon. Telephone notices given pursuant to this article shall be confirmed in writing as soon as reasonably possible and shall specifically state full particulars of the Force Majeure, the time and date when the Force Majeure occurred and when the Force Majeure is reasonably expected to cease. The Party affected shall exercise due diligence to remove such disability with reasonable dispatch, but shall not be required to accede or agree to any provision not satisfactory to it in order to settle and terminate a strike or other labor disturbance. The Party impacted by the Force Majeure shall also exercise due diligence to minimize any payments otherwise due from the other Party, including, but not limited to, cancellation of orders for parts and cessation of construction, until such Force Majeure is resolved or otherwise ceases to exist.

## **Article 11. Default**

**11.1.1 General.** No Default shall exist where such failure to discharge an obligation (other than the payment of money) is the result of Force Majeure as defined in this Agreement or the result of an act of omission of the other Party. Should a failure to discharge an obligation occur as a result of Force Majeure as defined in this



Agreement, or as a result of an act of omission of the other Party, Affected System Operator shall exercise due diligence to minimize any payments otherwise due, including, but not limited to, cancellation of orders for parts and cessation of construction until such Force Majeure or other act or omission of the other Party is resolved or otherwise ceases to exist. Upon a Breach, the non-breaching Party shall give written notice of such Breach to the breaching Party. Except as provided in Article 11.1.2, the breaching Party shall have thirty (30) Calendar Days from receipt of the Default notice within which to cure such Breach; provided however, if such Breach is not capable of cure within thirty (30) Calendar Days, the breaching Party shall commence such cure within thirty (30) Calendar Days after notice and continuously and diligently complete such cure within ninety (90) Calendar Days from receipt of the Default notice; and, if cured within such time, the Breach specified in such notice shall cease to exist.

- 11.1.2 Right to Terminate.** If a Breach is not cured as provided in this article, or if a Breach is not capable of being cured within the period provided for herein, the non-breaching Party shall have the right to declare a Default and terminate this Agreement by written notice at any time until cure occurs, and be relieved of any further obligation hereunder and, whether or not that Party terminates this Agreement, to recover from the breaching Party all amounts due hereunder, plus all other damages and remedies to which it is entitled at law or in equity. The provisions of this article will survive termination of this Agreement. Should the non-breaching Party elect to declare a Default and terminate this Agreement, Affected System Operator shall exercise due diligence to minimize any damages or payments otherwise due, including but not limited to cancellation of orders for parts and cessation of construction.

## **Article 12. Indemnity and Consequential Damages**

- 12.1 Indemnity.** The Parties shall at all times indemnify, defend, and hold the other Party harmless from, any and all damages, losses, claims, including claims and actions relating to injury to or death of any person or damage to property, demand, suits, recoveries, costs and expenses, court costs, attorney fees, and all other obligations by or to third parties, arising out of or resulting from the other Party's action or inactions of its obligations under this Agreement on behalf of the Indemnifying Party, except in cases of gross negligence or intentional wrongdoing by the Indemnified Party.



**12.1.1 Indemnified Person.** If an Indemnified Person is entitled to indemnification under this Article 12 as a result of a claim by a third party, and the Indemnifying Party fails, after notice and reasonable opportunity to proceed under Article 12.1, to assume the defense of such claim, such Indemnified Person may at the expense of the Indemnifying Party contest, settle or consent to the entry of any judgment with respect to, or pay in full, such claim.

**12.1.2 Indemnifying Party.** If an Indemnifying Party is obligated to indemnify and hold any Indemnified Person harmless under this Article 12, the amount owing to the Indemnified Person shall be the amount of such Indemnified Person's actual Loss, net of any insurance or other recovery.

**12.1.3 Indemnity Procedures.** Promptly after receipt by an Indemnified Person of any claim or notice of the commencement of any action or administrative or legal proceeding or investigation as to which the indemnity provided for in Article 12.1 may apply, the Indemnified Person shall notify the Indemnifying Party of such fact. Any failure of or delay in such notification shall not affect a Party's indemnification obligation unless such failure or delay is materially prejudicial to the Indemnifying Party.

The Indemnifying Party shall have the right to assume the defense thereof with counsel designated by such Indemnifying Party and reasonably satisfactory to the Indemnified Person. If the defendants in any such action include one or more Indemnified Persons and the Indemnifying Party and if the Indemnified Person reasonably concludes that there may be legal defenses available to it and/or other Indemnified Persons which are different from or additional to those available to the Indemnifying Party, the Indemnified Person shall have the right to select separate counsel to assert such legal defenses and to otherwise participate in the defense of such action on its own behalf. In such instances, the Indemnifying Party shall only be required to pay the fees and expenses of one additional attorney to represent an Indemnified Person or Indemnified Persons having such differing or additional legal defenses.

The Indemnified Person shall be entitled, at its expense, to participate in any such action, suit or proceeding, the defense of which has been assumed by the Indemnifying Party. Notwithstanding the foregoing, the Indemnifying Party (i) shall not be entitled to assume and control the defense of any such action, suit

or proceedings if and to the extent that, in the opinion of the Indemnified Person and its counsel, such action, suit or proceeding involves the potential imposition of criminal liability on the Indemnified Person, or there exists a conflict or adversity of interest between the Indemnified Person and the Indemnifying Party, in such event the Indemnifying Party shall pay the reasonable expenses of the Indemnified Person, and (ii) shall not settle or consent to the entry of any judgment in any action, suit or proceeding without the consent of the Indemnified Person, which shall not be reasonably withheld, conditioned or delayed.

- 12.2 Consequential Damages.** In no event shall either Party be liable under any provision of this Agreement for any losses, damages, costs or expenses for any special, indirect, incidental, consequential, or punitive damages, including but not limited to loss of profit or revenue, loss of the use of equipment, cost of capital, cost of temporary equipment or services, whether based in whole or in part in contract, in tort, including negligence, strict liability, or any other theory of liability; provided, however, that damages for which a Party may be liable to the other Party under another agreement will not be considered to be special, indirect, incidental, or consequential damages hereunder.

### **Article 13. Assignment**

- 13.1 Assignment.** This Agreement may be assigned by either Party only with the written consent of the other; provided that either Party may assign this Agreement without the consent of the other Party to any Affiliate of the assigning Party with an equal or greater credit rating and with the legal authority and operational ability to satisfy the obligations of the assigning Party under this Agreement; and provided further that Customer shall have the right to assign this Agreement, without the consent of Affected System Operator, for collateral security purposes to aid in providing financing for the Large Generating Facility, provided that Customer will promptly notify Affected System Operator of any such assignment. Any attempted assignment that violates this article is void and ineffective. Any assignment under this Agreement shall not relieve a Party of its obligations, nor shall a Party's obligations be enlarged, in whole or in part, by reason thereof. Where required, consent to assignment will not be unreasonably withheld, conditioned or delayed.

### **Article 14. Severability**

- 14.1 Severability.** If any provision in this Agreement is finally determined to be invalid, void or unenforceable by any court or other Governmental Authority

having jurisdiction, such determination shall not invalidate, void or make unenforceable any other provision, agreement or covenant of this Agreement.

## **Article 15. Comparability**

**15.1 Comparability.** The Parties will comply with all applicable comparability and code of conduct laws, rules and regulations, as amended from time to time.

## **Article 16. Confidentiality**

**16.1 Confidentiality.** Confidential Information shall include, without limitation, all information relating to a Party's technology, research and development, business affairs, and pricing, and any information supplied by either of the Parties to the other prior to the execution of this Agreement.

Information is Confidential Information only if it is clearly designated or marked in writing as confidential on the face of the document, or, if the information is conveyed orally or by inspection, if the Party providing the information orally informs the Party receiving the information that the information is confidential.

If requested by either Party, the other Party shall provide in writing, the basis for asserting that the information referred to in this Article 16 warrants confidential treatment, and the requesting Party may disclose such writing to the appropriate Governmental Authority. Each Party shall be responsible for the costs associated with affording confidential treatment to its information.

**16.1.1 Term.** During the term of this Agreement, and for a period of three (3) years after the expiration or termination of this Agreement, except as otherwise provided in this Article 16, each Party shall hold in confidence and shall not disclose to any person Confidential Information.

**16.1.2 Scope.** Confidential Information shall not include information that the receiving Party can demonstrate: (1) is generally available to the public other than as a result of a disclosure by the receiving Party; (2) was in the lawful possession of the receiving Party on a non-confidential basis before receiving it from the disclosing Party; (3) was supplied to the receiving Party without restriction by a third party, who, to the knowledge of the receiving Party after due inquiry, was under no obligation to the disclosing Party to keep such information confidential; (4) was independently developed by the receiving Party without reference to Confidential Information of the disclosing Party; (5) is, or becomes, publicly known, through no

wrongful act or omission of the receiving Party or Breach of this Agreement; or (6) is required, in accordance with Article 16.1.7 of the Agreement, Order of Disclosure, to be disclosed by any Governmental Authority or is otherwise required to be disclosed by law or subpoena, or is necessary in any legal proceeding establishing rights and obligations under this Agreement. Information designated as Confidential Information will no longer be deemed confidential if the Party that designated the information as confidential notifies the other Party that it no longer is confidential.

- 16.1.3 Release of Confidential Information.** Neither Party shall release or disclose Confidential Information to any other person, except to its Affiliates (limited by the Standards of Conduct requirements), subcontractors, employees, consultants, or to parties who may be or considering providing financing to or equity participation with Customer, or to potential purchasers or assignees of Customer, on a need-to-know basis in connection with this Agreement, unless such person has first been advised of the confidentiality provisions of this Article 16 and has agreed to comply with such provisions. Notwithstanding the foregoing, a Party providing Confidential Information to any person shall remain primarily responsible for any release of Confidential Information in contravention of this Article 16.
- 16.1.4 Rights.** Each Party retains all rights, title, and interest in the Confidential Information that each Party discloses to the other Party. The disclosure by each Party to the other Party of Confidential Information shall not be deemed a waiver by either Party or any other person or entity of the right to protect the Confidential Information from public disclosure.
- 16.1.5 No Warranties.** By providing Confidential Information, neither Party makes any warranties or representations as to its accuracy or completeness. In addition, by supplying Confidential Information, neither Party obligates itself to provide any particular information or Confidential Information to the other Party nor to enter into any further agreements or proceed with any other relationship or joint venture.
- 16.1.6 Standard of Care.** Each Party shall use at least the same standard of care to protect Confidential Information it receives as it uses to protect its own Confidential Information from unauthorized disclosure, publication or dissemination. Each Party may use

Confidential Information solely to fulfill its obligations to the other Party under this Agreement or its regulatory requirements.

- 16.1.7 Order of Disclosure.** If a court or a Government Authority or entity with the right, power, and apparent authority to do so requests or requires either Party, by subpoena, oral deposition, interrogatories, requests for production of documents, administrative order, or otherwise, to disclose Confidential Information, that Party shall provide the other Party with prompt notice of such request(s) or requirement(s) so that the other Party may seek an appropriate protective order or waive compliance with the terms of this Agreement. Notwithstanding the absence of a protective order or waiver, the Party may disclose such Confidential Information which, in the opinion of its counsel, the Party is legally compelled to disclose. Each Party will use Reasonable Efforts to obtain reliable assurance that confidential treatment will be accorded any Confidential Information so furnished.
- 16.1.8 Termination of Agreement.** Upon termination of this Agreement for any reason, each Party shall, within ten (10) Calendar Days of receipt of a written request from the other Party, use Reasonable Efforts to destroy, erase, or delete (with such destruction, erasure, and deletion certified in writing to the other Party) or return to the other Party, without retaining copies thereof, any and all written or electronic Confidential Information received from the other Party.
- 16.1.9 Remedies.** The Parties agree that monetary damages would be inadequate to compensate a Party for the other Party's Breach of its obligations under this Article 16. Each Party accordingly agrees that the other Party shall be entitled to equitable relief, by way of injunction or otherwise, if the first Party Breaches or threatens to Breach its obligations under this Article 16, which equitable relief shall be granted without bond or proof of damages, and the receiving Party shall not plead in defense that there would be an adequate remedy at law. Such remedy shall not be deemed an exclusive remedy for the Breach of this Article 16, but shall be in addition to all other remedies available at law or in equity. The Parties further acknowledge and agree that the covenants contained herein are necessary for the protection of legitimate business interests and are reasonable in scope. No Party, however, shall be liable for indirect, incidental, or consequential or punitive damages of any nature or kind resulting from or arising in connection with this Article 16.

**16.1.10 Disclosure to FERC, its Staff, or a State.** Notwithstanding anything in this Article 16 to the contrary, and pursuant to 18 CFR section 1b.20, if FERC or its staff, during the course of an investigation or otherwise, requests information from one of the Parties that is otherwise required to be maintained in confidence pursuant to this Agreement, the Party shall provide the requested information to FERC or its staff, within the time provided for in the request for information. In providing the information to FERC or its staff, the Party must, consistent with 18 CFR section 388.112, request that the information be treated as confidential and non-public by FERC and its staff and that the information be withheld from public disclosure. Parties are prohibited from notifying the other Party to this Agreement prior to the release of the Confidential Information to FERC or its staff. The Party shall notify the other Party to the Agreement when it is notified by FERC or its staff that a request to release Confidential Information has been received by FERC, at which time either of the Parties may respond before such information would be made public, pursuant to 18 CFR section 388.112. Requests from a state regulatory body conducting a confidential investigation shall be treated in a similar manner, consistent with the applicable state rules and regulations.

**16.1.11** Subject to the exception in Article 16.1.10, any information that a Party claims is competitively sensitive, commercial or financial information under this Agreement (“Confidential Information”) shall not be disclosed by the other Party to any person not employed or retained by the other Party, except to the extent disclosure is (i) required by law; (ii) reasonably deemed by the disclosing Party to be required to be disclosed in connection with a dispute between or among the Parties, or the defense of litigation or dispute; (iii) otherwise permitted by consent of the other Party, such consent not to be unreasonably withheld; or (iv) necessary to fulfill its obligations under this Agreement or as a transmission service provider or a Control Area operator including disclosing the Confidential Information to an RTO or ISO or to a regional or national reliability organization. The Party asserting confidentiality shall notify the other Party in writing of the information it claims is confidential. Prior to any disclosures of the other Party’s Confidential Information under this subparagraph, or if any third party or Governmental Authority makes any request or demand for any of the information described in this subparagraph, the disclosing Party agrees to promptly notify the other Party in writing and agrees to assert confidentiality and cooperate with the other Party in



seeking to protect the Confidential Information from public disclosure by confidentiality agreement, protective order or other reasonable measures.

## **Article 17. Information Access and Audit Rights**

**17.1 Information Access.** Each Party (the “disclosing Party”) shall make available to the other Party information that is in the possession of the disclosing Party and is necessary in order for the other Party to: (i) verify the costs incurred by the disclosing Party for which the other Party is responsible under this Agreement; and (ii) carry out its obligations and responsibilities under this Agreement. The Parties shall not use such information for purposes other than those set forth in this Article 17.1 and to enforce their rights under this Agreement.

**17.2 Reporting of Non-Force Majeure Events.** Each Party (the “notifying Party”) shall notify the other Party when the notifying Party becomes aware of its inability to comply with the provisions of this Agreement for a reason other than a Force Majeure event. The Parties agree to cooperate with each other and provide necessary information regarding such inability to comply, including the date, duration, reason for the inability to comply, and corrective actions taken or planned to be taken with respect to such inability to comply. Notwithstanding the foregoing, notification, cooperation or information provided under this article shall not entitle the Party receiving such notification to allege a cause for anticipatory breach of this Agreement.

**17.3 Audit Rights.** Subject to the requirements of confidentiality under Article 16 of this Agreement, each Party shall have the right, during normal business hours, and upon prior reasonable notice to the other Party, to audit at its own expense the other Party’s accounts and records pertaining to either Party’s performance or either Party’s satisfaction of obligations under this Agreement. Such audit rights shall include audits of the other Party’s costs and calculation of invoiced amounts. Any audit authorized by this article shall be performed at the offices where such accounts and records are maintained and shall be limited to those portions of such accounts and records that relate to each Party’s performance and satisfaction of obligations under this Agreement. Each Party shall keep such accounts and records for a period equivalent to the audit rights periods described in Article 17.4.

### **17.4 Audit Rights Periods.**

**17.4.1 Audit Rights Period for Construction-Related Accounts and Records.** Accounts and records related to the design, engineering, procurement, and construction of Affected System Network Upgrades shall be subject to audit for a period of twenty-four months



following Affected System Operator's issuance of a final invoice in accordance with Article 7.2.

**17.4.2 Audit Rights Period for All Other Accounts and Records.**

Accounts and records related to either Party's performance or satisfaction of all obligations under this Agreement other than those described in Article 17.4.1 shall be subject to audit as follows: (i) for an audit relating to cost obligations, the applicable audit rights period shall be twenty-four months after the auditing Party's receipt of an invoice giving rise to such cost obligations; and (ii) for an audit relating to all other obligations, the applicable audit rights period shall be twenty-four months after the event for which the audit is sought.

- 17.5 Audit Results.** If an audit by a Party determines that an overpayment or an underpayment has occurred, a notice of such overpayment or underpayment shall be given to the other Party together with those records from the audit which support such determination.

**Article 18. Subcontractors**

- 18.1 General.** Nothing in this Agreement shall prevent Affected System Operator from utilizing the services of any subcontractor as it deems appropriate to perform its obligations under this Agreement; provided, however, that Affected System Operator shall require its subcontractors to comply with all applicable terms and conditions of this Agreement in providing such services and each Party shall remain primarily liable to the other Party for the performance of such subcontractor.
- 18.2 Responsibility of Principal.** The creation of any subcontract relationship shall not relieve the Affected System Operator of any of its obligations under this Agreement. The Affected System Operator shall be fully responsible to the other Party for the acts or omissions of any subcontractor the Affected System Operator hires as if no subcontract had been made. Any applicable obligation imposed by this Agreement upon the hiring Party shall be equally binding upon, and shall be construed as having application to, any subcontractor of such Party.
- 18.3 No Limitation by Insurance.** The obligations under this Article 18 will not be limited in any way by any limitation of subcontractor's insurance.

## Article 19. Disputes

**19.1 Submission.** In the event either Party has a dispute, or asserts a claim, that arises out of or in connection with this Agreement or its performance, such Party (the “disputing Party”) shall provide the other Party with written notice of the dispute or claim (“Notice of Dispute”). Such dispute or claim shall be referred to a designated senior representative of each Party for resolution on an informal basis as promptly as practicable after receipt of the Notice of Dispute by the other Party. In the event the designated representatives are unable to resolve the claim or dispute through unassisted or assisted negotiations within thirty (30) Calendar Days of the other Party’s receipt of the Notice of Dispute, such claim or dispute may, upon mutual agreement of the Parties, be submitted to arbitration and resolved in accordance with the arbitration procedures set forth below. In the event the Parties do not agree to submit such claim or dispute to arbitration, each Party may exercise whatever rights and remedies it may have in equity or at law consistent with the terms of this Agreement.

**19.2 External Arbitration Procedures.** Any arbitration initiated under this Agreement shall be conducted before a single neutral arbitrator appointed by the Parties. If the Parties fail to agree upon a single arbitrator within ten (10) Calendar Days of the submission of the dispute to arbitration, each Party shall choose one arbitrator who shall sit on a three-member arbitration panel. The two arbitrators so chosen shall within twenty (20) Calendar Days select a third arbitrator to chair the arbitration panel. In either case, the arbitrators shall be knowledgeable in electric utility matters, including electric transmission and bulk power issues, and shall not have any current or past substantial business or financial relationships with any party to the arbitration (except prior arbitration). The arbitrator(s) shall provide each of the Parties an opportunity to be heard and, except as otherwise provided herein, shall conduct the arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association (“Arbitration Rules”) and any applicable FERC regulations or RTO rules; provided, however, in the event of a conflict between the Arbitration Rules and the terms of this Article 19, the terms of this Article 19 shall prevail.

**19.3 Arbitration Decisions.** Unless otherwise agreed by the Parties, the arbitrator(s) shall render a decision within ninety (90) Calendar Days of appointment and shall notify the Parties in writing of such decision and the reasons therefor. The arbitrator(s) shall be authorized only to interpret and apply the provisions of this Agreement and shall have no power to modify or change any provision of this Agreement in any manner. The decision of the arbitrator(s) shall be final and binding upon the Parties, and judgment on the award may be entered in any court having jurisdiction. The decision of the arbitrator(s) may be appealed solely on the grounds that the conduct of the arbitrator(s), or the decision itself, violated the

standards set forth in the Federal Arbitration Act or the Administrative Dispute Resolution Act. The final decision of the arbitrator must also be filed with FERC if it affects jurisdictional rates, terms and conditions of service, or Affected System Network Upgrades.

- 19.4 Costs.** Each Party shall be responsible for its own costs incurred during the arbitration process and for the following costs, if applicable: (1) the cost of the arbitrator chosen by the Party to sit on the three member panel and one half of the cost of the third arbitrator chosen; or (2) one half the cost of the single arbitrator jointly chosen by the Parties.

## **Article 20. Representations, Warranties, and Covenants**

- 20.1 General.** Each Party makes the following representations, warranties and covenants:

- 20.1.1 Good Standing.** Such Party is duly organized, validly existing and in good standing under the laws of the state in which it is organized, formed, or incorporated, as applicable; that Affected System Operator is qualified to do business in the state or states in which Affected System Network Upgrades are located; and that it has the corporate power and authority to own its properties, to carry on its business as now being conducted and to enter into this Agreement and carry out the transactions contemplated hereby and perform and carry out all covenants and obligations on its part to be performed under and pursuant to this Agreement.
- 20.1.2 Authority.** Such Party has the right, power and authority to enter into this Agreement, to become a Party hereto and to perform its obligations hereunder. This Agreement is a legal, valid and binding obligation of such Party, enforceable against such Party in accordance with its terms, except as the enforceability thereof may be limited by applicable bankruptcy, insolvency, reorganization or other similar laws affecting creditors' rights generally and by general equitable principles (regardless of whether enforceability is sought in a proceeding in equity or at law).
- 20.1.3 No Conflict.** The execution, delivery and performance of this Agreement does not violate or conflict with the organizational or formation documents, or bylaws or operating agreement, of such Party, or any judgment, license, permit, order, material agreement or instrument applicable to or binding upon such Party or any of its assets.

- 20.1.4 Consent and Approval.** Such Party has sought or obtained, or, in accordance with this Agreement will seek or obtain, each consent, approval, authorization, order, or acceptance by any Governmental Authority in connection with the execution, delivery and performance of this Agreement, and it will provide to any Governmental Authority notice of any actions under this Agreement that are required by Applicable Laws and Regulations.

## **Article 21. Miscellaneous**

- 21.1 Binding Effect.** This Agreement and the rights and obligations hereof, shall be binding upon and shall inure to the benefit of the successors and assigns of the Parties hereto.
- 21.2 Conflicts.** In the event of a conflict between the body of this Agreement and any attachment, appendices or exhibits hereto, the terms and provisions of the body of this Agreement shall prevail and be deemed the final intent of the Parties.
- 21.3 Rules of Interpretation.** This Agreement, unless a clear contrary intention appears, shall be construed and interpreted as follows: (1) the singular number includes the plural number and vice versa; (2) reference to any person includes such person's successors and assigns but, in the case of a Party, only if such successors and assigns are permitted by this Agreement, and reference to a person in a particular capacity excludes such person in any other capacity or individually; (3) reference to any agreement (including this Agreement), document, instrument or tariff means such agreement, document, instrument, or tariff as amended or modified and in effect from time to time in accordance with the terms thereof and, if applicable, the terms hereof; (4) reference to any Applicable Laws and Regulations means such Applicable Laws and Regulations as amended, modified, codified, or reenacted, in whole or in part, and in effect from time to time, including, if applicable, rules and regulations promulgated thereunder; (5) unless expressly stated otherwise, reference to any Article, Section or Appendix means such Article of this Agreement or such Appendix to this Agreement; (6) "hereunder", "hereof", "herein", "hereto" and words of similar import shall be deemed references to this Agreement as a whole and not to any particular Article or other provision hereof or thereof; (7) "including" (and with correlative meaning "include") means including without limiting the generality of any description preceding such term; and (8) relative to the determination of any period of time, "from" means "from and including", "to" means "to but excluding" and "through" means "through and including".

**21.4 Entire Agreement.** This Agreement, including all Appendices and Schedules attached hereto, constitutes the entire agreement between the Parties with reference to the subject matter hereof, and supersedes all prior and contemporaneous understandings or agreements, oral or written, between the Parties with respect to the subject matter of this Agreement. There are no other agreements, representations, warranties, or covenants which constitute any part of the consideration for, or any condition to, either Party's compliance with its obligations under this Agreement.

**21.5 No Third Party Beneficiaries.** This Agreement is not intended to and does not create rights, remedies, or benefits of any character whatsoever in favor of any persons, corporations, associations, or entities other than the Parties, and the obligations herein assumed are solely for the use and benefit of the Parties, their successors in interest and, where permitted, their assigns.

**21.6 Waiver.** The failure of a Party to this Agreement to insist, on any occasion, upon strict performance of any provision of this Agreement will not be considered a waiver of any obligation, right, or duty of, or imposed upon, such Party.

Any waiver at any time by either Party of its rights with respect to this Agreement shall not be deemed a continuing waiver or a waiver with respect to any other failure to comply with any other obligation, right, duty of this Agreement. Termination or Default of this Agreement for any reason by Customer shall not constitute a waiver of Customer's legal rights to obtain an interconnection from Affected System Operator. Any waiver of this Agreement shall, if requested, be provided in writing.

**21.7 Headings.** The descriptive headings of the various Articles of this Agreement have been inserted for convenience of reference only and are of no significance in the interpretation or construction of this Agreement.

**21.8 Multiple Counterparts.** This Agreement may be executed in two or more counterparts, each of which is deemed an original but all constitute one and the same instrument.

**21.9 Amendment.** The Parties may by mutual agreement amend this Agreement by a written instrument duly executed by the Parties.

**21.10 Modification by the Parties.** The Parties may by mutual agreement amend the Appendices to this Agreement by a written instrument duly executed by the Parties. Such amendment shall become effective and a part of this Agreement upon satisfaction of all Applicable Laws and Regulations.


**21.11 Reservation of Rights.** Affected System Operator and Customer shall have the right to make a unilateral filing with FERC to modify this Agreement with respect to any rates, terms and conditions, charges, classifications of service, rule or regulation under section 205 or any other applicable provision of the Federal Power Act and FERC's rules and regulations thereunder, and Customer shall have the right to make a unilateral filing with FERC to modify this Agreement pursuant to section 206 or any other applicable provision of the Federal Power Act and FERC's rules and regulations thereunder; provided that each Party shall have the right to protest any such filing by the other Party and to participate fully in any proceeding before FERC in which such modifications may be considered. Nothing in this Agreement shall limit the rights of the Parties or of FERC under sections 205 or 206 of the Federal Power Act and FERC's rules and regulations thereunder, except to the extent that the Parties otherwise mutually agree as provided herein.

**21.12 No Partnership.** This Agreement shall not be interpreted or construed to create an association, joint venture, agency relationship, or partnership between the Parties or to impose any partnership obligation or partnership liability upon either Party. Neither Party shall have any right, power or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as or be an agent or representative of, or to otherwise bind, the other Party.

**IN WITNESS WHEREOF**, the Parties have executed this Agreement in duplicate originals, each of which shall constitute and be an original effective Agreement between the Parties.

**Duke Energy Progress, LLC, as Affected System Operator**

By: Dhiaa Jamil

Signature: 

Title: COO

Date: 5/19/2021

**American Beech Solar, LLC, as Customer**

By: William Gulley

Signature:   
William Gulley (May 11, 2021 11:35 PM)

Title: CFO of the Sole Member

Date: 05/11/2021



**Appendix A to Agreement****Affected System Network Upgrades**

<b>Ref #</b>	<b>Description of Affected System Network Upgrade</b>	<b>Date Required</b>	<b>Estimated Cost</b>
1	The entire 8.5 miles of Rocky Mount-VEPCO Battleboro 115kV Line will be removed which includes forty-six existing wood H frame structures and twenty-two single steel structures along with the conductor, OHGW, and OPGW. These structures will be replaced with eighty steel single pole structures and two steel 3 pole dead-end structures along with new conductor, OHGW, and OPGW.	06/01/2024	\$30,347,728
2	Rocky Mount 230 kV substation will be uprated which includes the 1200A breaker hook disconnect switches to be replaced with 2000A disconnect switches on the existing dead-end structure	06/01/2024	\$937,547
	<b>TOTAL</b>		<b>\$31,285,275</b>

OFFICIAL COPY

May 24 2022

## Appendix B to Agreement

### Milestones

This Agreement requires that the milestones be achieved by the dates in the chart below and in sequence. Schedule durations may be impacted by outage availability and time of the year the work is planned. Outage availability may have a significant impact on schedule. The consequence of not completing a milestone by the applicable date set forth below is that (a) the parties may need to amend any or all subsequent milestone dates per Article 21.10 of this Agreement to extend those dates farther out into the future and (b) it may not be feasible to achieve the Ready for Service Date that is identified in the chart below.

#### Acronyms Used in Chart:

ASO = Affected System Operator

C = Customer

\*Note: Dates in table of milestones below assumes ASOA execution date of May 21, 2021.

Ref #	Description of Milestone	Responsible Party	Date Required*	Estimated Cost
1.	Agreement executed by both parties and Agreement filed with FERC.	ASO and C	05/21/2021	None
2.	Receipt of FERC Order accepting this Agreement for filing without modification. In the event of FERC rejection, Customer protest, or litigation and settlement, the subsequent dates are at risk and shall be modified through an amendment to this Agreement.	ASO	07/21/2021	None
3.	Notice to Proceed: Written authorization from Interconnection Customer to proceed with engineering and design work necessary to produce a Class III estimate and cash prepayment of estimated cost of \$1,000,000, and to proceed with completion of erosion control plan necessary to produce a Class III estimate and cash prepayment of estimated cost of \$725,221	C	08/23/2021	\$1,725,221
4.	Begin preparation of engineering and design work: conduct site visit to obtain right-of-way, clearance, and easement encroachment information, obtain vegetation survey, obtain environmental survey for Environmental Control Plan	ASO	09/23/2021	None
5.	Design work for engineering and erosion control plan to support Class III estimate	ASO	09/23/2021 – 09/09/2022	None
6.	Notice to Proceed: Written authorization from Interconnection Customer to proceed with procurement of long lead time materials necessary to produce a Class III estimate and cash prepayment of estimated cost of \$3,300,000	C	04/01/2022	\$3,300,000

Ref #	Description of Milestone	Responsible Party	Date Required*	Estimated Cost
7.	Issue purchase orders to material suppliers for long lead time materials	ASO	04/01/2022	None
8.	Compile Class III estimate from bid packages for labor and equipment from vendors, estimate for cost of Environmental Control Plan requirements	ASO	04/01/2022 – 02/13/2023	None
9.	Provide Class III estimate to Interconnection Customer	ASO	02/13/2023	None
10.	Notice to Proceed: Written authorization from Interconnection Customer to proceed with construction	C	03/13/2023	None
11.	Provide cash prepayment for estimated Phase I cost of construction work in the amount of \$8,389,062	C	03/13/2023	\$8,389,062
12.	Begin signing contracts for construction service with contractors, conduct pre-construction meetings with contractors, conduct site visits with contractors, review scope of work with contractors	ASO	03/13/2023 – 06/12/2023	None
13.	Begin construction of all projects	ASO	06/12/2023	None
14.	Provide cash prepayment for estimated Phase II cost of construction work in the amount of \$9,516,426	C	09/01/2023	\$9,516,426
15.	Provide cash prepayment for estimated Phase III cost of construction work in the amount of \$8,354,566	C	12/01/2023	\$8,354,566
16.	Ready for service	ASO	6/1/2024	None

OFFICIAL COPY

May 24 2022

**Appendix C to Agreement****Payment Schedule**

<b>Ref #</b>	<b>Description of Customer's Financial Commitment</b>	<b>Date Required</b>	<b>Amount</b>
1.	Cash prepayment of estimated cost of \$1,000,000 for engineering and design work necessary to produce a Class III estimate and cash prepayment of estimated cost of \$725,221 for completion of erosion control plan necessary to produce a Class III estimate	08/23/2021	\$1,725,221
2.	Cash prepayment of estimated cost of \$3,300,000 for procurement of long lead time materials necessary to produce a Class III estimate	04/01/2022	\$3,300,000
3.	Cash prepayment of estimated Phase I cost of construction work in the amount of \$8,389,062	03/13/2023	\$8,389,062
4.	Cash prepayment for estimated Phase II cost of construction work in the amount of \$9,516,426	09/01/2023	\$9,516,426
5.	Cash prepayment for estimated Phase III cost of construction work in the amount of \$8,354,566	12/01/2023	\$8,354,566
	<b>TOTAL</b>		<b>\$31,285,275</b>

OFFICIAL COPY

May 24 2022

**Appendix D to Agreement****Addresses for Delivery of Notices and Billings****Notices:**Affected System Operator:

Duke Energy Progress, LLC  
Kristina Straple, Transmission Contracts Sr Analyst  
526 S Church Street  
Mailcode: EC3ZJ  
Charlotte, NC 28202  
(980) 373-6173  
[Kristina.Straple@duke-energy.com](mailto:Kristina.Straple@duke-energy.com)

With a copy to:  
Duke Energy Corporation  
550 S. Tryon Street (DEC 45A)  
Charlotte, NC 28202  
Attn: General Counsel

Customer:

American Beech Solar, LLC  
c/o BayWa r.e. Solar Projects LLC  
Jared Quient, Chief Compliance Officer & EVP, General Counsel  
18575 Jamboree Road, Suite 850  
Irvine, CA 92612  
(949) 398-3915  
[Jared.Quient@baywa-re.com](mailto:Jared.Quient@baywa-re.com)

**Billings and Payments:**Affected System Operator:**Payments:****Wire and ACH**

Wells Fargo  
420 Montgomery Street  
San Francisco, CA 94104  
ABA Number: 121000248  
For Credit To: Duke Energy Progress, LLC  
Account Number: 2062660000020

**Billing Data:**

Jayne Cook  
Mail Code ST17  
550 S Tryon Street  
Charlotte, NC 28202  
Phone: (980) 373-8719  
Jayne.Cook@duke-energy.com

**Billing Addresses**

Duke Energy Progress, LLC  
Attn: Steve Collis  
Manager Accounting  
PO Box 1006  
Charlotte, NC 28201-1006  
Phone: (704) 382-0895

**For Overnight use:**

526 South Church Street  
Charlotte NC 28202-1802

Customer:

American Beech Solar, LLC  
c/o BayWa r.e. Solar Projects LLC  
Jared Quient, Chief Compliance Officer & EVP, General Counsel  
18575 Jamboree Road, Suite 850  
Irvine, CA 92612

[Ussp.ap@baywa-re.com](mailto:Ussp.ap@baywa-re.com)

[Whitney.Rubin@baywa-re.com](mailto:Whitney.Rubin@baywa-re.com)

FERC rendition of the electronically filed tariff records in Docket No. ER21-01955-000

Filing Data:

CID: C000135

Filing Title: DEP-American Beech Solar ASOA SA No. 388

Company Filing Identifier: 167

Type of Filing Code: 10

Associated Filing Identifier:

Tariff Title: Tariffs, Rate Schedules and Service Agreements

Tariff ID: 1

Payment Confirmation:

Suspension Motion:

Tariff Record Data:

Record Content Description, Tariff Record Title, Record Version Number, Option Code:

OATT SA. No. 388, DEP-American Beech Solar - ASOA, 0.0.0, A

Record Narrative Name:

Tariff Record ID: 171

Tariff Record Collation Value: 1814036480 Tariff Record Parent Identifier: 3

Proposed Date: 2021-05-21

Priority Order: 1000000000

Record Change Type: NEW

Record Content Type: 1

Associated Filing Identifier:

## **AFFECTED SYSTEM OPERATING AGREEMENT**

### **BETWEEN**

**DUKE ENERGY PROGRESS, LLC**

### **AND**

**AMERICAN BEECH SOLAR, LLC**

**SERVICE AGREEMENT NO. 388**

**AFFECTED SYSTEM OPERATING AGREEMENT**

OFFICIAL COPY

May 24 2022



**THIS AFFECTED SYSTEM OPERATING AGREEMENT** (“Agreement”) is made and entered into this 21 day of May 2021, by and between American Beech Solar, LLC, a limited liability company organized and existing under the laws of the state of Delaware (“Customer”), and Duke Energy Progress, LLC, a limited liability company organized and existing under the laws of the State of North Carolina (“Affected System Operator”). Customer and Affected System Operator each may be referred to as a “Party” or collectively as the “Parties.”

### **Recitals**

**WHEREAS**, Customer intends to own, lease and/or control and operate a Large Generating Facility in adjoining Control Area of Affected System Operator’s Control Area;

**WHEREAS**, Customer intends to enter into an interconnection agreement (“Customer IA”) with the Interconnecting Utility (defined below);

**WHEREAS**, the Affected System Operator’s transmission system is an Affected System;

**WHEREAS**, Affected System Operator performed an Affected System Study which identified the Affected System Network Upgrades required to mitigate impacts resulting from the interconnection of the Large Generating Facility; and

**WHEREAS**, Customer and Affected System Operator have agreed to enter into this Agreement for the purpose of setting forth terms and conditions that address matters related to the impact of the Large Generating Facility on the Affected System and the Affected System Network Upgrades.

**NOW, THEREFORE**, in consideration of and subject to the mutual covenants contained herein, it is agreed:

When used in this Agreement, terms with initial capitalization that are not defined in Article 1 shall have the meanings specified in the Article in which they are used.

### **Article 1. Definitions**

**Affected System** shall mean the electric system belonging to Duke Energy Progress, LLC (“DEP”).

**Affected System Operator** shall mean the entity that operates an Affected System.

**Affected System Network Upgrades** shall mean, as set forth in Appendix A, the additions, modifications, and upgrades to the Affected System Operator's Transmission System required to accommodate the interconnection of the Large Generating Facility.

**Affiliate** shall mean, with respect to a corporation, partnership or other entity, each such other corporation, partnership or other entity that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, such corporation, partnership or other entity.

**Applicable Laws and Regulations** shall mean all duly promulgated applicable federal, state and local laws, regulations, rules, ordinances, codes, decrees, judgments, directives, or judicial or administrative orders, permits and other duly authorized actions of any Governmental Authority.

**Applicable Reliability Council** shall mean the reliability council applicable to the Affected System Operator.

**Applicable Reliability Standards** shall mean the requirements and guidelines of NERC, the Applicable Reliability Council, and the Control Area of the Affected System Operator.

**Breach** shall mean the failure of a Party to perform or observe any material term or condition of the Agreement.

**Breaching Party** shall mean a Party that is in Breach of the Agreement.

**Business Day** shall mean Monday through Friday, excluding Federal Holidays.

**Calendar Day** shall mean any day including Saturday, Sunday or a Federal Holiday.

**Commercial Operation** shall mean the status of a Generating Facility that has commenced generating electricity for sale, excluding electricity generated during Trial Operation.

**Commercial Operation Date** of a unit shall mean the date on which the Generating Facilities commence Commercial Operation as agreed to in Appendix E to the Customer IA.

**Confidential Information** shall mean any confidential, proprietary or trade secret information of a plan, specification, pattern, procedure, design, device, list, concept, policy or compilation relating to the present or planned business of a Party, which is designated as confidential by the Party supplying the information, whether conveyed orally, electronically, in writing, through inspection, or otherwise.

**Control Area** shall mean an electrical system or systems bounded by interconnection metering and telemetry, capable of controlling generation to maintain its interchange schedule with other Control Areas and contributing to frequency regulation of the interconnection. A Control Area must be certified by the Applicable Reliability Council.

**Customer IA** shall mean the interconnection agreement between Customer and the Interconnecting Utility or any successor agreement thereto.

**Customer's Interconnection Facility** shall mean all facilities and equipment, as identified in the Customer IA.

**Default** shall mean the failure of a Breaching Party to cure its Breach in accordance with Article 12 of the Agreement.

**Dispute Resolution** shall mean the procedure for resolution of a dispute between the Parties in which they will first attempt to resolve the dispute on an informal basis.

**Effective Date** shall mean the date on which the Agreement becomes effective upon execution by the Parties subject to acceptance by FERC, or if filed unexecuted, upon the date specified by FERC.

**Federal Power Act** shall mean the Federal Power Act, as amended, 16 U.S.C. §§ 791a et seq.

**FERC** shall mean the Federal Energy Regulatory Commission or its successor.

**Force Majeure** shall mean any act of God, labor disturbance, act of the public enemy, war, insurrection, riot, fire, storm or flood, explosion, breakage or accident to machinery or equipment, any order, regulation or restriction imposed by governmental, military or lawfully established civilian authorities, or any other cause beyond a Party's control. A Force Majeure event does not include acts of negligence or intentional wrongdoing by the Party claiming Force Majeure.

**Generating Facility** shall mean Customer's device for the production of electricity identified in the Interconnection Request to the Interconnecting Utility, but shall not include the Customer's Interconnection Facilities.

**Generating Facility Capacity** shall mean the net capacity of the Generating Facility and the aggregate net capacity of the Generating Facility where it includes multiple energy production devices.

**Good Utility Practice** shall mean any of the practices, methods and acts engaged in or approved by a significant portion of the electric industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather to be acceptable practices, methods, or acts generally accepted in the region.

**Governmental Authority** shall mean any federal, state, local or other governmental regulatory or administrative agency, court, commission, department, board, or other governmental subdivision, legislature, rulemaking board, tribunal, or other governmental authority having jurisdiction over the Parties, their respective facilities, or the respective services they provide, and exercising or entitled to exercise any administrative, executive, police, or taxing authority or power; provided, however, that such term does not include Customer, Affected System Operator, or any Affiliate thereof.

**Initial Synchronization Date** shall mean the date upon which the Affected System Network Upgrades are initially synchronized to the Affected System Operator's system.

**In-Service Date** shall mean the date upon which the Affected System Network Upgrades are placed in-service on Affected System Operator's system.

**Interconnecting Utility** shall mean Dominion Energy North Carolina ("Dominion") located in the footprint of PJM Interconnection, L.L.C. ("PJM").

**Interconnection Request** shall mean a Customer's request submitted to Interconnecting Utility to interconnect a new Generating Facility, or to increase the capacity of, or make a Material Modification to the operating characteristics of, an existing Generating Facility that is interconnected with a Transmission Provider's Transmission System.

**Interconnection Service** shall mean the service provided by Interconnecting Utility associated with interconnecting the Customer's Generating Facilities to the Interconnecting Utility's system.

**IRS** shall mean the Internal Revenue Service.

**Large Generating Facility** shall mean a Generating Facility having a Generating Facility Capacity of more than 20 MW.

**Loss** shall mean any and all losses relating to injury to or death of any person or damage to property, demand, suits, recoveries, costs and expenses, court costs, attorney fees, and all other obligations by or to third parties, arising out of or resulting from the other Party's performance, or non-performance of its obligations under this Agreement on behalf of the Indemnifying Party, except in cases of gross negligence or intentional wrongdoing by the Indemnifying Party.

**NERC** shall mean the North American Electric Reliability Corporation or its successor organization.

**Notice of Dispute** shall mean a written notice of a dispute or claim that arises out of or in connection with this Agreement.

**Party or Parties** shall mean Affected System Operator or Customer or any combination of the above.

**Reasonable Efforts** shall mean, with respect to an action required to be attempted or taken by a Party under the Agreement, efforts that are timely and consistent with Good Utility Practice and are otherwise substantially equivalent to those a Party would use to protect its own interests.

**Tariff** shall mean the Affected System Operator's Tariff through which open access transmission service and Interconnection Service are offered, as filed with FERC, and as amended or supplemented from time to time, or any successor tariff.

**Transmission Provider** shall mean a public utility (or its designated agent) that owns, controls, or operates transmission or distribution facilities used for the transmission of electricity in interstate commerce and provides transmission service under a tariff.

**Transmission System** shall mean the facilities owned, controlled or operated by the Affected System Operator that are used to provide transmission service under its Tariff.

**Trial Operation** shall mean the period during which Customer is engaged in on-site test operations and commissioning of the Large Generating Facility prior to Commercial Operation.

**Variable Energy Resource** shall mean a device for the production of electricity that is characterized by an energy source that: (1) is renewable; (2) cannot be stored by

the facility owner or operator; and (3) has variability that is beyond the control of the facility owner or operator.

## **Article 2. Effective Date, Term, and Termination**

**2.1 Effective Date.** This Agreement shall become effective upon execution by the Parties subject to acceptance by FERC, or if filed unexecuted, upon the date specified by FERC. Affected System Operator shall promptly file this Agreement with FERC upon execution in accordance with Article 3.1, if required.

**2.2 Term of Agreement.** Subject to the provisions of Article 2.3, this Agreement shall remain in effect for as long as the Customer IA is in effect.

### **2.3 Termination Procedures.**

**2.3.1 Written Notice.** Upon termination of the Customer IA, Customer shall notify Affected System Operator in writing of such termination. Within 30 Calendar Days of such notification, Affected System Operator shall file a notice of termination of this Agreement with FERC.

**2.3.2 Default.** Either Party may terminate this Agreement in accordance with Article 11.

**2.3.3** Notwithstanding Articles 2.3.1 and 2.3.2, no termination shall become effective until the Parties have complied with all Applicable Laws and Regulations applicable to such termination, including the filing with FERC of a notice of termination of this Agreement, which notice has been accepted for filing by FERC.

**2.4 Termination Costs.** If a Party elects to terminate this Agreement pursuant to Article 2.3 above, each Party shall pay all costs incurred or charges assessed by the other Party, as of the date of the other Party's receipt of such notice of termination, that are the responsibility of the Terminating Party under this Agreement. In the event of termination by a Party, the Parties shall use commercially Reasonable Efforts to mitigate the costs, damages and charges arising as a consequence of termination. Upon termination of this Agreement, unless otherwise ordered or approved by FERC:

**2.4.1** If Customer terminates this Agreement, it shall be responsible for all costs incurred in association with this Agreement, including any Affected System Network Upgrades for which Affected System Operator has incurred expenses and has not been reimbursed by Customer.

**2.4.2** Affected System Operator may, at its option, retain any portion of such materials, equipment, or facilities that Customer chooses not to accept delivery of, in which case Affected System Operator shall be responsible for all costs associated with procuring such materials, equipment, or facilities.

**2.4.3** With respect to any facilities already installed or constructed pursuant to the terms of this Agreement, Customer shall be responsible for all costs associated with the removal, relocation or other disposition or retirement of such materials, equipment, or facilities.

**2.5 Survival.** This Agreement shall continue in effect after termination to the extent necessary to provide for final billings and payments and for costs incurred hereunder, including billings and payments pursuant to this Agreement; to permit the determination and enforcement of liability and indemnification obligations arising from acts or events that occurred while this Agreement was in effect.

### **Article 3. Regulatory Filings**

**3.1 Filing.** Affected System Operator shall file this Agreement (and any amendment hereto) with FERC. Customer shall reasonably cooperate with Affected System Operator with respect to such filing and to provide any information reasonably requested by Affected System Operator needed to comply with applicable regulatory requirements.

### **Article 4. Scope of Service**

**4.1 Performance Standards.** Each Party shall perform all of its obligations under this Agreement in accordance with Applicable Laws and Regulations, Applicable Reliability Standards, and Good Utility Practice, and to the extent a Party is required or prevented or limited in taking any action by such regulations and standards, such Party shall not be deemed to be in Breach of this Agreement for its compliance therewith. If such Party is an Affected System Operator then that Party shall amend the Agreement after first attempting to obtain the consent of Customer, which consent shall not be unreasonably withheld. If the parties are unable to reach agreement upon any necessary amendments, the Affected System shall submit the proposed amendment to FERC for approval.

### **Article 5. Affected System Network Upgrades Facilities Engineering, Procurement, and Construction**

**5.1 In-Service Date, Initial Synchronization Date, and Commercial Operation Date.** The parties shall mutually agree upon the In-Service Date, Initial Synchronization Date, and Commercial Operation Date for the completion of



Affected System Operator's Affected System Network Upgrades. Such dates and selected option shall be set forth in Appendix B, Milestones.

**5.1.1 Design, Procurement and Construction of Affected System Network Upgrades.** Affected System Operator shall design, procure, and construct Affected System Network Upgrades using Reasonable Efforts to complete Affected System Network Upgrades by the dates set forth in Appendix B, Milestones. Affected System Operator shall not be required to undertake any action which is inconsistent with its standard safety practices, its material and equipment specifications, its design criteria and construction procedures, its labor agreements, and Applicable Laws and Regulations.

**5.2 Equipment Procurement.** Affected System Operator shall commence design of Affected System Network Upgrades and procure necessary equipment as soon as practicable after all of the following conditions are satisfied, unless the Parties otherwise agree in writing:

**5.2.1** Affected System Operator has received written authorization to proceed with design and procurement from Customer by the date specified in Appendix B, Milestones; and

**5.2.2** Customer has provided security to Affected System Operator in accordance with Article 7.3 by the dates specified in Appendix C, Payment Schedule.

**5.3 Construction Commencement.** Affected System Operator shall commence construction of Affected System Network Upgrades as soon as practicable after the following additional conditions are satisfied:

**5.3.1** Approval of the appropriate Governmental Authority has been obtained for any facilities requiring regulatory approval;

**5.3.2** Necessary real property rights and rights-of-way have been obtained, to the extent required for the construction of a discrete aspect of Affected System Network Upgrades;

**5.3.3** Affected System Operator has received written authorization to proceed with construction from Customer by the date specified in Appendix B, Milestones; and

**5.3.4** Customer has provided security to Affected System Operator in accordance with Article 7.3 by the dates specified in Appendix C, Payment Schedule.

- 5.4 Work Progress.** The Affected System Operator will keep Customer advised periodically as to the progress of its respective design, procurement and construction efforts. Customer may, at any time, request a progress report from the Affected System Operator
- 5.5 Limited Operation.** If any Affected System Network Upgrades are not reasonably expected to be completed prior to the Commercial Operation Date of the Large Generating Facility, Affected System Operator shall, upon the request and at the expense of Customer, perform operating studies on a timely basis to determine the extent to which the Large Generating Facility may operate prior to the completion of Affected System Network Upgrades consistent with Applicable Laws and Regulations, Applicable Reliability Standards, Good Utility Practice, and this Agreement. Affected System Operator shall inform Interconnecting Utility and Customer that Affected System Operator may permit Customer to operate the Large Generating Facility in accordance with the results of such studies, provided however, that if Interconnecting Utility informs Affected System Operator that it objects to such proposed Limited Operation, then Limited Operation will not be permitted.
- 5.6 Lands of Other Property Owners.** If any part of Affected System Network Upgrades is to be installed on property owned by persons other than Affected System Operator, Affected System Operator shall at Customer's expense use efforts, similar in nature and extent to those that it typically undertakes on its own behalf or on behalf of its Affiliates, including use of its eminent domain authority, and to the extent consistent with state law, to procure from such persons any rights of use, licenses, rights of way and easements that are necessary to construct, operate, maintain, test, inspect, replace or remove Affected System Network Upgrades upon such property.
- 5.7 Permits.** The Affected System Operator shall obtain all permits, licenses and authorizations that are necessary to install and construct the Affected System Network Upgrades in compliance with Applicable Laws and Regulations.
- 5.8 Taxes.**
- 5.8.1 Customer Payments Not Taxable.** The Parties intend that all payments or property transfers made by Customer to Affected System Operator for the installation of Affected System Network Upgrades shall be non-taxable, either as contributions to capital, or as an advance, in accordance with the Internal Revenue Code and

any applicable state income tax laws and shall not be taxable as contributions in aid of construction or otherwise under the Internal Revenue Code and any applicable state income tax laws.

**5.8.2 Indemnification for the Cost Consequences of Current Tax Liability Imposed Upon the Affected System Operator.**

Affected System Operator shall not include a gross-up for the cost consequences of any current tax liability in the amounts it charges Customer under this Agreement unless (i) Affected System Operator has determined, in good faith, that the payments or property transfers made by Customer to Affected System Operator should be reported as income subject to taxation or (ii) any Governmental Authority directs Affected System Operator to report payments or property as income subject to taxation. Customer shall reimburse Affected System Operator for such costs on a fully grossed-up basis, in accordance with Article 5.8.3, within thirty (30) Calendar Days of receiving written notification from Affected System Operator of the amount due, including detail about how the amount was calculated.

**5.8.3 Tax Gross-Up Amount.** Customer's liability for the cost consequences of any current tax liability under this Article 5.8 shall be calculated on a fully grossed-up basis. Except as may otherwise be agreed to by the parties, this means that Customer will pay Affected System Operator, in addition to the amount paid for the Affected System Network Upgrades, an amount equal to (1) the current taxes imposed on Affected System Operator ("Current Taxes") on the excess of (a) the gross income realized by Affected System Operator as a result of payments or property transfers made by Customer to Affected System Operator under this Agreement (without regard to any payments under this Article 5.8) (the "Gross Income Amount") over (b) the present value of future tax deductions for depreciation that will be available as a result of such payments or property transfers (the "Present Value Depreciation Amount"), plus (2) an additional amount sufficient to permit Affected System Operator to receive and retain, after the payment of all Current Taxes, an amount equal to the net amount described in clause (1).

For this purpose, (i) Current Taxes shall be computed based on Affected System Operator's composite federal and state tax rates at the time the payments or property transfers are received and Affected System Operator will be treated as being subject to tax at the highest marginal rates in effect at that time (the "Current Tax

Rate”), and (ii) the Present Value Depreciation Amount shall be computed by discounting Affected System Operator’s anticipated tax depreciation deductions as a result of such payments or property transfers by Affected System Operator’s current weighted average cost of capital. Thus, the formula for calculating Customer’s liability to Transmission Owner pursuant to this Article 5.8.3 can be expressed as follows:  $(\text{Current Tax Rate} \times (\text{Gross Income Amount} - \text{Present Value of Tax Depreciation})) / (1 - \text{Current Tax Rate})$ . Customer’s estimated tax liability in the event taxes are imposed shall be stated in Appendix A.

**5.8.4 Private Letter Ruling or Change or Clarification of Law.** At Customer’s request and expense, Affected System Operator shall file with the IRS a request for a private letter ruling as to whether any property transferred or sums paid, or to be paid, by Customer to Affected System Operator under this Agreement are subject to federal income taxation. Customer will prepare the initial draft of the request for a private letter ruling, and will certify under penalties of perjury that all facts represented in such request are true and accurate to the best of Customer’s knowledge. Affected System Operator and Customer shall cooperate in good faith with respect to the submission of such request.

Affected System Operator shall keep Customer fully informed of the status of such request for a private letter ruling and shall execute either a privacy act waiver or a limited power of attorney, in a form acceptable to the IRS, that authorizes Customer to participate in all discussions with the IRS regarding such request for a private letter ruling. Affected System Operator shall allow Customer to attend all meetings with IRS officials about the request and shall permit Customer to prepare the initial drafts of any follow-up letters in connection with the request.

**5.8.5 Contests.** In the event any Governmental Authority determines that Affected System Operator’s receipt of payments or property constitutes income that is subject to taxation, Affected System Operator shall notify Customer, in writing, within thirty (30) Calendar Days of receiving notification of such determination by a Governmental Authority. Upon the timely written request by Customer and at Customer’s sole expense, and after consultation with Customer and the exercise of good faith efforts to accommodate Customer’s concerns, Affected System Operator may appeal, protest, seek abatement of, or otherwise oppose such

determination. Upon Customer's written request and sole expense, and after consultation with Customer and the exercise of good faith efforts to accommodate Customer's concerns, Affected System Operator may file a claim for refund with respect to any taxes paid under this Article 5.8, whether or not it has received such a determination. Affected System Operator reserves the right, after exercising good faith efforts to accommodate Customer's concerns and views, to make all decisions with regard to the prosecution of such appeal, protest, abatement or other contest, including the selection of counsel and compromise or settlement of the claim, but Affected System Operator shall keep Customer informed, shall consider in good faith suggestions from Customer about the conduct of the contest, and shall reasonably permit Customer or a Customer representative to attend contest proceedings. Customer reserves the right to protest any efforts by Affected System Operator to recover in rates from Customer any tax expenses resulting from government actions described in the first sentence of this subsection.

Customer shall pay to Affected System Operator on a periodic basis, as invoiced by Affected System Operator, Affected System Operator's documented reasonable costs of prosecuting such appeal, protest, abatement or other contest. At any time during the contest, Affected System Operator may agree to a settlement either with Customer's consent or after obtaining written advice from nationally-recognized tax counsel, selected by Affected System Operator, but reasonably acceptable to Customer, that the proposed settlement represents a reasonable settlement given the hazards of litigation. Customer's obligation shall be based on the amount of the settlement agreed to by Customer, or if a higher amount, so much of the settlement that is supported by the written advice from nationally-recognized tax counsel selected under the terms of the preceding sentence. Any settlement without Customer's consent or such written advice will relieve Customer from any obligation to indemnify Affected System Operator for the tax at issue in the contest.

#### 5.8.6

**Refund.** In the event that (a) a private letter ruling is issued to Affected System Operator which holds that any amount paid or the value of any property transferred by Customer to Affected System Operator under the terms of this Agreement is not subject to federal income taxation, (b) any legislative change or administrative announcement, notice, ruling or other determination makes it reasonably clear to Affected System Operator in good faith that any

amount paid or the value of any property transferred by Customer to Affected System Operator under the terms of this Agreement is not taxable to Affected System Operator, (c) any abatement, appeal, protest, or other contest results in a determination that any payments or transfers made by Customer to Affected System Operator are not subject to federal income tax, or (d) if Affected System Operator receives a refund from any taxing authority for any overpayment of tax attributable to any payment or property transfer made by Customer to Affected System Operator pursuant to this Agreement, Affected System Operator shall promptly refund to Customer the following:

(i) any payment made by Customer under this Article 5.8 for taxes that is attributable to the amount determined to be non-taxable, together with interest thereon,

(ii) interest on any amount paid by Customer to Affected System Operator for such taxes which Affected System Operator did not submit to the taxing authority, calculated in accordance with the methodology set forth in FERC's regulations at 18 CFR § 35.19a(a)(2)(iii) from the date payment was made by Customer to the date Affected System Operator refunds such payment to Customer, and

(iii) with respect to any such taxes paid by Affected System Operator, any refund or credit Affected System Operator receives or to which it may be entitled from any Governmental Authority, interest (or that portion thereof attributable to the payment described in clause (i), above) owed to Affected System Operator for such overpayment of taxes (including any reduction in interest otherwise payable by Affected System Operator to any Governmental Authority resulting from an offset or credit).

The intent of this provision is to leave the Parties, to the extent practicable, in the event that no taxes are due with respect to any payment for Affected System Network Upgrades hereunder, in the same position they would have been in had no such tax payments been made.

#### **5.8.7**

**Taxes Other Than Income Taxes.** Upon the timely request by Customer, and at Customer's sole expense, Affected System Operator may appeal, protest, seek abatement of, or otherwise



contest any tax (other than federal or state income tax) asserted or assessed against Affected System Operator for which Customer may be required to reimburse Affected System Operator under the terms of this Agreement. Customer shall pay to Affected System Operator on a periodic basis, as invoiced by Affected System Operator, Affected System Operator's documented reasonable costs of prosecuting such appeal, protest, abatement, or other contest. Customer and Affected System Operator shall cooperate in good faith with respect to any such contest. Unless the payment of such taxes is a prerequisite to an appeal or abatement or cannot be deferred, no amount shall be payable by Customer to Affected System Operator for such taxes until they are assessed by a final, non-appealable order by any court or agency of competent jurisdiction. In the event that a tax payment is withheld and ultimately due and payable after appeal, Customer will be responsible for all taxes, interest and penalties, other than penalties attributable to any delay caused by Affected System Operator.

- 5.9 Tax Status.** Each Party shall cooperate with the other to maintain the other Party's tax status. Nothing in this Agreement is intended to adversely affect any Affected System Operator's tax exempt status with respect to the issuance of bonds including, but not limited to, Local Furnishing Bonds.

## **Article 6. Performance Obligation**

- 6.1 Affected System Network Upgrades.** Affected System Operator shall design, procure, construct, install, and own the Affected System Network Upgrades described in Appendix A, Affected System Network Upgrades. The Affected System Network Upgrades shall be funded by Customer. Nothing in this agreement limits the Customer's rights to separately seek or obtain reimbursement from other projects within the PJM AC1 cluster.
- 6.2 Provision of Security.** At least thirty (30) Calendar Days prior to the commencement of the procurement, installation, or construction of a discrete portion of an Affected System Network Upgrades Customer shall provide Affected System Operator a cash deposit or letter of credit that is reasonably acceptable to Affected System Operator and is consistent with the Uniform Commercial Code of the jurisdiction identified in Article 8.2.1. The letter of credit must be issued by a financial institution reasonably acceptable to Affected System Operator and must specify a reasonable expiration date. Such security for payment shall be in an amount sufficient to cover the costs for constructing, procuring and installing the applicable portion of Affected System Network Upgrades in accordance with the schedule set forth in Appendix C, and shall be



reduced on a dollar-for-dollar basis for payments made to Affected System Operator for these purposes.

## **Article 7. Invoice**

- 7.1 General.** Affected System Operator shall submit to Customer, on a monthly basis, unless otherwise agreed to by the Parties, invoices of amounts due for the preceding month as set forth on Appendix C. Each invoice shall state the month to which the invoice applies and fully describe the services and equipment provided.
- 7.2 Final Invoice.** Within six months after completion of the construction of Affected System Network Upgrades, Affected System Operator shall provide an invoice of the final cost of the construction of Affected System Network Upgrades and shall set forth such costs in sufficient detail to enable Customer to compare the actual costs with the estimates and to ascertain deviations, if any, from the cost estimates. Affected System Operator shall refund to Customer any amount by which the actual payment by Customer for estimated costs exceeds the actual costs of construction within thirty (30) Calendar Days of the issuance of such final construction invoice.
- 7.3 Payment.** Invoices shall be rendered to the Customer at the address specified in Appendix D. The Customer shall pay the invoice within thirty (30) Calendar Days of receipt. All payments shall be made in immediately available funds payable to the Affected System Operator, or by wire transfer to a bank named and account designated by the Affected System Operator. Payment of invoices by the Customer will not constitute a waiver of any rights or claims either Party may have under this Agreement.
- 7.4 Disputes.** In the event of a billing dispute between Affected System Operator and Customer, Affected System Operator shall continue to provide service under this Agreement as long as Customer: (i) continues to make all payments not in dispute; and (ii) pays to Affected System Operator or into an independent escrow account the portion of the invoice in dispute, pending resolution of such dispute. If Customer fails to meet these two requirements for continuation of service, then Affected System Operator may provide notice to Customer of a Default pursuant to Article 11. Within thirty (30) Calendar Days after the resolution of the dispute, the Party that owes money to the other Party shall pay the amount due with interest calculated in accord with the methodology set forth in FERC's regulations at 18 CFR § 35.19a(a)(2)(iii) if so required.

## **Article 8. Regulatory Requirements and Governing Law**

**8.1 Regulatory Requirements.** Each Party's obligations under this Agreement shall be subject to its receipt of any required approval or certificate from one or more Governmental Authorities in the form and substance satisfactory to the applying Party, or the Party making any required filings with, or providing notice to, such Governmental Authorities, and the expiration of any time period associated therewith. Each Party shall in good faith seek and use its Reasonable Efforts to obtain such other approvals. Nothing in this Agreement shall require Customer to take any action that could result in its inability to obtain, or its loss of, status or exemption under the Federal Power Act, the Public Utility Holding Company Act of 1935, as amended, or the Public Utility Regulatory Policies Act of 1978.

**8.2 Governing Law.**

**8.2.1** The validity, interpretation and performance of this Agreement and each of its provisions shall be governed by the laws of the state of North Carolina without regard to its conflicts of law principles.

**8.2.2** This Agreement is subject to all Applicable Laws and Regulations.

**8.2.3** Each Party expressly reserves the right to seek changes in, appeal, or otherwise contest any laws, orders, rules, or regulations of a Governmental Authority.

**Article 9. Notices.**

**9.1 General.** Unless otherwise provided in this Agreement, any notice, demand or request required or permitted to be given by either Party to the other and any instrument required or permitted to be tendered or delivered by either Party in writing to the other shall be effective when delivered and may be so given, tendered or delivered, by recognized national courier, or by depositing the same with the United States Postal Service with postage prepaid, for delivery by certified or registered mail, addressed to the Party, or personally delivered to the Party, at the address set out in Appendix D, Addresses for Delivery of Notices and Billings.

Either Party may change the notice information in this Agreement by giving five (5) Business Days written notice prior to the effective date of the change.

**9.2 Billings and Payments.** Billings and payments shall be sent to the addresses set out in Appendix D.

**9.3 Alternative Forms of Notice.** Any notice or request required or permitted to be given by a Party to the other and not required by this Agreement to be given in

writing may be so given by telephone, facsimile or email to the telephone numbers and email addresses set out in Appendix D.

## **Article 10. Force Majeure**

### **10.1 Force Majeure.**

**10.1.1.** Economic hardship is not considered a Force Majeure event.

**10.1.2** Neither Party shall be considered to be in Default with respect to any obligation hereunder, other than the obligation to pay money when due, if prevented from fulfilling such obligation by Force Majeure. A Party unable to fulfill any obligation hereunder (other than an obligation to pay money when due) by reason of Force Majeure shall give notice and the full particulars of such Force Majeure to the other Party in writing or by telephone as soon as reasonably possible after the occurrence of the cause relied upon. Telephone notices given pursuant to this article shall be confirmed in writing as soon as reasonably possible and shall specifically state full particulars of the Force Majeure, the time and date when the Force Majeure occurred and when the Force Majeure is reasonably expected to cease. The Party affected shall exercise due diligence to remove such disability with reasonable dispatch, but shall not be required to accede or agree to any provision not satisfactory to it in order to settle and terminate a strike or other labor disturbance. The Party impacted by the Force Majeure shall also exercise due diligence to minimize any payments otherwise due from the other Party, including, but not limited to, cancellation of orders for parts and cessation of construction, until such Force Majeure is resolved or otherwise ceases to exist.

## **Article 11. Default**

**11.1.1 General.** No Default shall exist where such failure to discharge an obligation (other than the payment of money) is the result of Force Majeure as defined in this Agreement or the result of an act of omission of the other Party. Should a failure to discharge an obligation occur as a result of Force Majeure as defined in this Agreement, or as a result of an act of omission of the other Party, Affected System Operator shall exercise due diligence to minimize any payments otherwise due, including, but not limited to, cancellation of orders for parts and cessation of construction until such Force Majeure or other act or omission of the other Party is resolved or otherwise ceases to exist. Upon a Breach, the

non-breaching Party shall give written notice of such Breach to the breaching Party. Except as provided in Article 11.1.2, the breaching Party shall have thirty (30) Calendar Days from receipt of the Default notice within which to cure such Breach; provided however, if such Breach is not capable of cure within thirty (30) Calendar Days, the breaching Party shall commence such cure within thirty (30) Calendar Days after notice and continuously and diligently complete such cure within ninety (90) Calendar Days from receipt of the Default notice; and, if cured within such time, the Breach specified in such notice shall cease to exist.

- 11.1.2 Right to Terminate.** If a Breach is not cured as provided in this article, or if a Breach is not capable of being cured within the period provided for herein, the non-breaching Party shall have the right to declare a Default and terminate this Agreement by written notice at any time until cure occurs, and be relieved of any further obligation hereunder and, whether or not that Party terminates this Agreement, to recover from the breaching Party all amounts due hereunder, plus all other damages and remedies to which it is entitled at law or in equity. The provisions of this article will survive termination of this Agreement. Should the non-breaching Party elect to declare a Default and terminate this Agreement, Affected System Operator shall exercise due diligence to minimize any damages or payments otherwise due, including but not limited to cancellation of orders for parts and cessation of construction.

## **Article 12. Indemnity and Consequential Damages**

- 12.1 Indemnity.** The Parties shall at all times indemnify, defend, and hold the other Party harmless from, any and all damages, losses, claims, including claims and actions relating to injury to or death of any person or damage to property, demand, suits, recoveries, costs and expenses, court costs, attorney fees, and all other obligations by or to third parties, arising out of or resulting from the other Party's action or inactions of its obligations under this Agreement on behalf of the Indemnifying Party, except in cases of gross negligence or intentional wrongdoing by the Indemnified Party.

- 12.1.1 Indemnified Person.** If an Indemnified Person is entitled to indemnification under this Article 12 as a result of a claim by a third party, and the Indemnifying Party fails, after notice and reasonable opportunity to proceed under Article 12.1, to assume the defense of such claim, such Indemnified Person may at the expense of the

Indemnifying Party contest, settle or consent to the entry of any judgment with respect to, or pay in full, such claim.

**12.1.2 Indemnifying Party.** If an Indemnifying Party is obligated to indemnify and hold any Indemnified Person harmless under this Article 12, the amount owing to the Indemnified Person shall be the amount of such Indemnified Person's actual Loss, net of any insurance or other recovery.

**12.1.3 Indemnity Procedures.** Promptly after receipt by an Indemnified Person of any claim or notice of the commencement of any action or administrative or legal proceeding or investigation as to which the indemnity provided for in Article 12.1 may apply, the Indemnified Person shall notify the Indemnifying Party of such fact. Any failure of or delay in such notification shall not affect a Party's indemnification obligation unless such failure or delay is materially prejudicial to the Indemnifying Party.

The Indemnifying Party shall have the right to assume the defense thereof with counsel designated by such Indemnifying Party and reasonably satisfactory to the Indemnified Person. If the defendants in any such action include one or more Indemnified Persons and the Indemnifying Party and if the Indemnified Person reasonably concludes that there may be legal defenses available to it and/or other Indemnified Persons which are different from or additional to those available to the Indemnifying Party, the Indemnified Person shall have the right to select separate counsel to assert such legal defenses and to otherwise participate in the defense of such action on its own behalf. In such instances, the Indemnifying Party shall only be required to pay the fees and expenses of one additional attorney to represent an Indemnified Person or Indemnified Persons having such differing or additional legal defenses.

The Indemnified Person shall be entitled, at its expense, to participate in any such action, suit or proceeding, the defense of which has been assumed by the Indemnifying Party. Notwithstanding the foregoing, the Indemnifying Party (i) shall not be entitled to assume and control the defense of any such action, suit or proceedings if and to the extent that, in the opinion of the Indemnified Person and its counsel, such action, suit or proceeding involves the potential imposition of criminal liability on the Indemnified Person, or there exists a conflict or adversity of interest between the Indemnified Person and the Indemnifying Party, in such

event the Indemnifying Party shall pay the reasonable expenses of the Indemnified Person, and (ii) shall not settle or consent to the entry of any judgment in any action, suit or proceeding without the consent of the Indemnified Person, which shall not be reasonably withheld, conditioned or delayed.

- 12.2 Consequential Damages.** In no event shall either Party be liable under any provision of this Agreement for any losses, damages, costs or expenses for any special, indirect, incidental, consequential, or punitive damages, including but not limited to loss of profit or revenue, loss of the use of equipment, cost of capital, cost of temporary equipment or services, whether based in whole or in part in contract, in tort, including negligence, strict liability, or any other theory of liability; provided, however, that damages for which a Party may be liable to the other Party under another agreement will not be considered to be special, indirect, incidental, or consequential damages hereunder.

### **Article 13. Assignment**

- 13.1 Assignment.** This Agreement may be assigned by either Party only with the written consent of the other; provided that either Party may assign this Agreement without the consent of the other Party to any Affiliate of the assigning Party with an equal or greater credit rating and with the legal authority and operational ability to satisfy the obligations of the assigning Party under this Agreement; and provided further that Customer shall have the right to assign this Agreement, without the consent of Affected System Operator, for collateral security purposes to aid in providing financing for the Large Generating Facility, provided that Customer will promptly notify Affected System Operator of any such assignment. Any attempted assignment that violates this article is void and ineffective. Any assignment under this Agreement shall not relieve a Party of its obligations, nor shall a Party's obligations be enlarged, in whole or in part, by reason thereof. Where required, consent to assignment will not be unreasonably withheld, conditioned or delayed.

### **Article 14. Severability**

- 14.1 Severability.** If any provision in this Agreement is finally determined to be invalid, void or unenforceable by any court or other Governmental Authority having jurisdiction, such determination shall not invalidate, void or make unenforceable any other provision, agreement or covenant of this Agreement.

### **Article 15. Comparability**



**15.1 Comparability.** The Parties will comply with all applicable comparability and code of conduct laws, rules and regulations, as amended from time to time.

## **Article 16. Confidentiality**

**16.1 Confidentiality.** Confidential Information shall include, without limitation, all information relating to a Party's technology, research and development, business affairs, and pricing, and any information supplied by either of the Parties to the other prior to the execution of this Agreement.

Information is Confidential Information only if it is clearly designated or marked in writing as confidential on the face of the document, or, if the information is conveyed orally or by inspection, if the Party providing the information orally informs the Party receiving the information that the information is confidential.

If requested by either Party, the other Party shall provide in writing, the basis for asserting that the information referred to in this Article 16 warrants confidential treatment, and the requesting Party may disclose such writing to the appropriate Governmental Authority. Each Party shall be responsible for the costs associated with affording confidential treatment to its information.

**16.1.1 Term.** During the term of this Agreement, and for a period of three (3) years after the expiration or termination of this Agreement, except as otherwise provided in this Article 16, each Party shall hold in confidence and shall not disclose to any person Confidential Information.

**16.1.2 Scope.** Confidential Information shall not include information that the receiving Party can demonstrate: (1) is generally available to the public other than as a result of a disclosure by the receiving Party; (2) was in the lawful possession of the receiving Party on a non-confidential basis before receiving it from the disclosing Party; (3) was supplied to the receiving Party without restriction by a third party, who, to the knowledge of the receiving Party after due inquiry, was under no obligation to the disclosing Party to keep such information confidential; (4) was independently developed by the receiving Party without reference to Confidential Information of the disclosing Party; (5) is, or becomes, publicly known, through no wrongful act or omission of the receiving Party or Breach of this Agreement; or (6) is required, in accordance with Article 16.1.7 of the Agreement, Order of Disclosure, to be disclosed by any Governmental Authority or is otherwise required to be disclosed by law or subpoena, or is necessary in any legal proceeding establishing



rights and obligations under this Agreement. Information designated as Confidential Information will no longer be deemed confidential if the Party that designated the information as confidential notifies the other Party that it no longer is confidential.

- 16.1.3 Release of Confidential Information.** Neither Party shall release or disclose Confidential Information to any other person, except to its Affiliates (limited by the Standards of Conduct requirements), subcontractors, employees, consultants, or to parties who may be or considering providing financing to or equity participation with Customer, or to potential purchasers or assignees of Customer, on a need-to-know basis in connection with this Agreement, unless such person has first been advised of the confidentiality provisions of this Article 16 and has agreed to comply with such provisions. Notwithstanding the foregoing, a Party providing Confidential Information to any person shall remain primarily responsible for any release of Confidential Information in contravention of this Article 16.
- 16.1.4 Rights.** Each Party retains all rights, title, and interest in the Confidential Information that each Party discloses to the other Party. The disclosure by each Party to the other Party of Confidential Information shall not be deemed a waiver by either Party or any other person or entity of the right to protect the Confidential Information from public disclosure.
- 16.1.5 No Warranties.** By providing Confidential Information, neither Party makes any warranties or representations as to its accuracy or completeness. In addition, by supplying Confidential Information, neither Party obligates itself to provide any particular information or Confidential Information to the other Party nor to enter into any further agreements or proceed with any other relationship or joint venture.
- 16.1.6 Standard of Care.** Each Party shall use at least the same standard of care to protect Confidential Information it receives as it uses to protect its own Confidential Information from unauthorized disclosure, publication or dissemination. Each Party may use Confidential Information solely to fulfill its obligations to the other Party under this Agreement or its regulatory requirements.
- 16.1.7 Order of Disclosure.** If a court or a Government Authority or entity with the right, power, and apparent authority to do so requests

or requires either Party, by subpoena, oral deposition, interrogatories, requests for production of documents, administrative order, or otherwise, to disclose Confidential Information, that Party shall provide the other Party with prompt notice of such request(s) or requirement(s) so that the other Party may seek an appropriate protective order or waive compliance with the terms of this Agreement. Notwithstanding the absence of a protective order or waiver, the Party may disclose such Confidential Information which, in the opinion of its counsel, the Party is legally compelled to disclose. Each Party will use Reasonable Efforts to obtain reliable assurance that confidential treatment will be accorded any Confidential Information so furnished.

**16.1.8 Termination of Agreement.** Upon termination of this Agreement for any reason, each Party shall, within ten (10) Calendar Days of receipt of a written request from the other Party, use Reasonable Efforts to destroy, erase, or delete (with such destruction, erasure, and deletion certified in writing to the other Party) or return to the other Party, without retaining copies thereof, any and all written or electronic Confidential Information received from the other Party.

**16.1.9 Remedies.** The Parties agree that monetary damages would be inadequate to compensate a Party for the other Party's Breach of its obligations under this Article 16. Each Party accordingly agrees that the other Party shall be entitled to equitable relief, by way of injunction or otherwise, if the first Party Breaches or threatens to Breach its obligations under this Article 16, which equitable relief shall be granted without bond or proof of damages, and the receiving Party shall not plead in defense that there would be an adequate remedy at law. Such remedy shall not be deemed an exclusive remedy for the Breach of this Article 16, but shall be in addition to all other remedies available at law or in equity. The Parties further acknowledge and agree that the covenants contained herein are necessary for the protection of legitimate business interests and are reasonable in scope. No Party, however, shall be liable for indirect, incidental, or consequential or punitive damages of any nature or kind resulting from or arising in connection with this Article 16.

**16.1.10 Disclosure to FERC, its Staff, or a State.** Notwithstanding anything in this Article 16 to the contrary, and pursuant to 18 CFR section 1b.20, if FERC or its staff, during the course of an investigation or otherwise, requests information from one of the

Parties that is otherwise required to be maintained in confidence pursuant to this Agreement, the Party shall provide the requested information to FERC or its staff, within the time provided for in the request for information. In providing the information to FERC or its staff, the Party must, consistent with 18 CFR section 388.112, request that the information be treated as confidential and non-public by FERC and its staff and that the information be withheld from public disclosure. Parties are prohibited from notifying the other Party to this Agreement prior to the release of the Confidential Information to FERC or its staff. The Party shall notify the other Party to the Agreement when it is notified by FERC or its staff that a request to release Confidential Information has been received by FERC, at which time either of the Parties may respond before such information would be made public, pursuant to 18 CFR section 388.112. Requests from a state regulatory body conducting a confidential investigation shall be treated in a similar manner, consistent with the applicable state rules and regulations.

- 16.1.11** Subject to the exception in Article 16.1.10, any information that a Party claims is competitively sensitive, commercial or financial information under this Agreement (“Confidential Information”) shall not be disclosed by the other Party to any person not employed or retained by the other Party, except to the extent disclosure is (i) required by law; (ii) reasonably deemed by the disclosing Party to be required to be disclosed in connection with a dispute between or among the Parties, or the defense of litigation or dispute; (iii) otherwise permitted by consent of the other Party, such consent not to be unreasonably withheld; or (iv) necessary to fulfill its obligations under this Agreement or as a transmission service provider or a Control Area operator including disclosing the Confidential Information to an RTO or ISO or to a regional or national reliability organization. The Party asserting confidentiality shall notify the other Party in writing of the information it claims is confidential. Prior to any disclosures of the other Party’s Confidential Information under this subparagraph, or if any third party or Governmental Authority makes any request or demand for any of the information described in this subparagraph, the disclosing Party agrees to promptly notify the other Party in writing and agrees to assert confidentiality and cooperate with the other Party in seeking to protect the Confidential Information from public disclosure by confidentiality agreement, protective order or other reasonable measures.

## **Article 17. Information Access and Audit Rights**

**17.1 Information Access.** Each Party (the “disclosing Party”) shall make available to the other Party information that is in the possession of the disclosing Party and is necessary in order for the other Party to: (i) verify the costs incurred by the disclosing Party for which the other Party is responsible under this Agreement; and (ii) carry out its obligations and responsibilities under this Agreement. The Parties shall not use such information for purposes other than those set forth in this Article 17.1 and to enforce their rights under this Agreement.

**17.2 Reporting of Non-Force Majeure Events.** Each Party (the “notifying Party”) shall notify the other Party when the notifying Party becomes aware of its inability to comply with the provisions of this Agreement for a reason other than a Force Majeure event. The Parties agree to cooperate with each other and provide necessary information regarding such inability to comply, including the date, duration, reason for the inability to comply, and corrective actions taken or planned to be taken with respect to such inability to comply. Notwithstanding the foregoing, notification, cooperation or information provided under this article shall not entitle the Party receiving such notification to allege a cause for anticipatory breach of this Agreement.

**17.3 Audit Rights.** Subject to the requirements of confidentiality under Article 16 of this Agreement, each Party shall have the right, during normal business hours, and upon prior reasonable notice to the other Party, to audit at its own expense the other Party’s accounts and records pertaining to either Party’s performance or either Party’s satisfaction of obligations under this Agreement. Such audit rights shall include audits of the other Party’s costs and calculation of invoiced amounts. Any audit authorized by this article shall be performed at the offices where such accounts and records are maintained and shall be limited to those portions of such accounts and records that relate to each Party’s performance and satisfaction of obligations under this Agreement. Each Party shall keep such accounts and records for a period equivalent to the audit rights periods described in Article 17.4.

### **17.4 Audit Rights Periods.**

**17.4.1 Audit Rights Period for Construction-Related Accounts and Records.** Accounts and records related to the design, engineering, procurement, and construction of Affected System Network Upgrades shall be subject to audit for a period of twenty-four months following Affected System Operator’s issuance of a final invoice in accordance with Article 7.2.

**17.4.2 Audit Rights Period for All Other Accounts and Records.**

Accounts and records related to either Party's performance or satisfaction of all obligations under this Agreement other than those described in Article 17.4.1 shall be subject to audit as follows: (i) for an audit relating to cost obligations, the applicable audit rights period shall be twenty-four months after the auditing Party's receipt of an invoice giving rise to such cost obligations; and (ii) for an audit relating to all other obligations, the applicable audit rights period shall be twenty-four months after the event for which the audit is sought.

**17.5 Audit Results.** If an audit by a Party determines that an overpayment or an underpayment has occurred, a notice of such overpayment or underpayment shall be given to the other Party together with those records from the audit which support such determination.

**Article 18. Subcontractors**

**18.1 General.** Nothing in this Agreement shall prevent Affected System Operator from utilizing the services of any subcontractor as it deems appropriate to perform its obligations under this Agreement; provided, however, that Affected System Operator shall require its subcontractors to comply with all applicable terms and conditions of this Agreement in providing such services and each Party shall remain primarily liable to the other Party for the performance of such subcontractor.

**18.2 Responsibility of Principal.** The creation of any subcontract relationship shall not relieve the Affected System Operator of any of its obligations under this Agreement. The Affected System Operator shall be fully responsible to the other Party for the acts or omissions of any subcontractor the Affected System Operator hires as if no subcontract had been made. Any applicable obligation imposed by this Agreement upon the hiring Party shall be equally binding upon, and shall be construed as having application to, any subcontractor of such Party.

**18.3 No Limitation by Insurance.** The obligations under this Article 18 will not be limited in any way by any limitation of subcontractor's insurance.

**Article 19. Disputes**

**19.1 Submission.** In the event either Party has a dispute, or asserts a claim, that arises out of or in connection with this Agreement or its performance, such Party (the “disputing Party”) shall provide the other Party with written notice of the dispute or claim (“Notice of Dispute”). Such dispute or claim shall be referred to a designated senior representative of each Party for resolution on an informal basis as promptly as practicable after receipt of the Notice of Dispute by the other Party. In the event the designated representatives are unable to resolve the claim or dispute through unassisted or assisted negotiations within thirty (30) Calendar Days of the other Party’s receipt of the Notice of Dispute, such claim or dispute may, upon mutual agreement of the Parties, be submitted to arbitration and resolved in accordance with the arbitration procedures set forth below. In the event the Parties do not agree to submit such claim or dispute to arbitration, each Party may exercise whatever rights and remedies it may have in equity or at law consistent with the terms of this Agreement.

**19.2 External Arbitration Procedures.** Any arbitration initiated under this Agreement shall be conducted before a single neutral arbitrator appointed by the Parties. If the Parties fail to agree upon a single arbitrator within ten (10) Calendar Days of the submission of the dispute to arbitration, each Party shall choose one arbitrator who shall sit on a three-member arbitration panel. The two arbitrators so chosen shall within twenty (20) Calendar Days select a third arbitrator to chair the arbitration panel. In either case, the arbitrators shall be knowledgeable in electric utility matters, including electric transmission and bulk power issues, and shall not have any current or past substantial business or financial relationships with any party to the arbitration (except prior arbitration). The arbitrator(s) shall provide each of the Parties an opportunity to be heard and, except as otherwise provided herein, shall conduct the arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association (“Arbitration Rules”) and any applicable FERC regulations or RTO rules; provided, however, in the event of a conflict between the Arbitration Rules and the terms of this Article 19, the terms of this Article 19 shall prevail.

**19.3 Arbitration Decisions.** Unless otherwise agreed by the Parties, the arbitrator(s) shall render a decision within ninety (90) Calendar Days of appointment and shall notify the Parties in writing of such decision and the reasons therefor. The arbitrator(s) shall be authorized only to interpret and apply the provisions of this Agreement and shall have no power to modify or change any provision of this Agreement in any manner. The decision of the arbitrator(s) shall be final and binding upon the Parties, and judgment on the award may be entered in any court having jurisdiction. The decision of the arbitrator(s) may be appealed solely on the grounds that the conduct of the arbitrator(s), or the decision itself, violated the standards set forth in the Federal Arbitration Act or the Administrative Dispute Resolution Act. The final decision of the arbitrator must also be filed with FERC



if it affects jurisdictional rates, terms and conditions of service, or Affected System Network Upgrades.

- 19.4 Costs.** Each Party shall be responsible for its own costs incurred during the arbitration process and for the following costs, if applicable: (1) the cost of the arbitrator chosen by the Party to sit on the three member panel and one half of the cost of the third arbitrator chosen; or (2) one half the cost of the single arbitrator jointly chosen by the Parties.

## **Article 20. Representations, Warranties, and Covenants**

- 20.1 General.** Each Party makes the following representations, warranties and covenants:

- 20.1.1 Good Standing.** Such Party is duly organized, validly existing and in good standing under the laws of the state in which it is organized, formed, or incorporated, as applicable; that Affected System Operator is qualified to do business in the state or states in which Affected System Network Upgrades are located; and that it has the corporate power and authority to own its properties, to carry on its business as now being conducted and to enter into this Agreement and carry out the transactions contemplated hereby and perform and carry out all covenants and obligations on its part to be performed under and pursuant to this Agreement.
- 20.1.2 Authority.** Such Party has the right, power and authority to enter into this Agreement, to become a Party hereto and to perform its obligations hereunder. This Agreement is a legal, valid and binding obligation of such Party, enforceable against such Party in accordance with its terms, except as the enforceability thereof may be limited by applicable bankruptcy, insolvency, reorganization or other similar laws affecting creditors' rights generally and by general equitable principles (regardless of whether enforceability is sought in a proceeding in equity or at law).
- 20.1.3 No Conflict.** The execution, delivery and performance of this Agreement does not violate or conflict with the organizational or formation documents, or bylaws or operating agreement, of such Party, or any judgment, license, permit, order, material agreement or instrument applicable to or binding upon such Party or any of its assets.



- 20.1.4 Consent and Approval.** Such Party has sought or obtained, or, in accordance with this Agreement will seek or obtain, each consent, approval, authorization, order, or acceptance by any Governmental Authority in connection with the execution, delivery and performance of this Agreement, and it will provide to any Governmental Authority notice of any actions under this Agreement that are required by Applicable Laws and Regulations.

## **Article 21. Miscellaneous**

- 21.1 Binding Effect.** This Agreement and the rights and obligations hereof, shall be binding upon and shall inure to the benefit of the successors and assigns of the Parties hereto.
- 21.2 Conflicts.** In the event of a conflict between the body of this Agreement and any attachment, appendices or exhibits hereto, the terms and provisions of the body of this Agreement shall prevail and be deemed the final intent of the Parties.
- 21.3 Rules of Interpretation.** This Agreement, unless a clear contrary intention appears, shall be construed and interpreted as follows: (1) the singular number includes the plural number and vice versa; (2) reference to any person includes such person's successors and assigns but, in the case of a Party, only if such successors and assigns are permitted by this Agreement, and reference to a person in a particular capacity excludes such person in any other capacity or individually; (3) reference to any agreement (including this Agreement), document, instrument or tariff means such agreement, document, instrument, or tariff as amended or modified and in effect from time to time in accordance with the terms thereof and, if applicable, the terms hereof; (4) reference to any Applicable Laws and Regulations means such Applicable Laws and Regulations as amended, modified, codified, or reenacted, in whole or in part, and in effect from time to time, including, if applicable, rules and regulations promulgated thereunder; (5) unless expressly stated otherwise, reference to any Article, Section or Appendix means such Article of this Agreement or such Appendix to this Agreement; (6) "hereunder", "hereof", "herein", "hereto" and words of similar import shall be deemed references to this Agreement as a whole and not to any particular Article or other provision hereof or thereof; (7) "including" (and with correlative meaning "include") means including without limiting the generality of any description preceding such term; and (8) relative to the determination of any period of time, "from" means "from and including", "to" means "to but excluding" and "through" means "through and including".
- 21.4 Entire Agreement.** This Agreement, including all Appendices and Schedules attached hereto, constitutes the entire agreement between the Parties with

reference to the subject matter hereof, and supersedes all prior and contemporaneous understandings or agreements, oral or written, between the Parties with respect to the subject matter of this Agreement. There are no other agreements, representations, warranties, or covenants which constitute any part of the consideration for, or any condition to, either Party's compliance with its obligations under this Agreement.

- 21.5 No Third Party Beneficiaries.** This Agreement is not intended to and does not create rights, remedies, or benefits of any character whatsoever in favor of any persons, corporations, associations, or entities other than the Parties, and the obligations herein assumed are solely for the use and benefit of the Parties, their successors in interest and, where permitted, their assigns.
- 21.6 Waiver.** The failure of a Party to this Agreement to insist, on any occasion, upon strict performance of any provision of this Agreement will not be considered a waiver of any obligation, right, or duty of, or imposed upon, such Party.
- Any waiver at any time by either Party of its rights with respect to this Agreement shall not be deemed a continuing waiver or a waiver with respect to any other failure to comply with any other obligation, right, duty of this Agreement. Termination or Default of this Agreement for any reason by Customer shall not constitute a waiver of Customer's legal rights to obtain an interconnection from Affected System Operator. Any waiver of this Agreement shall, if requested, be provided in writing.
- 21.7 Headings.** The descriptive headings of the various Articles of this Agreement have been inserted for convenience of reference only and are of no significance in the interpretation or construction of this Agreement.
- 21.8 Multiple Counterparts.** This Agreement may be executed in two or more counterparts, each of which is deemed an original but all constitute one and the same instrument.
- 21.9 Amendment.** The Parties may by mutual agreement amend this Agreement by a written instrument duly executed by the Parties.
- 21.10 Modification by the Parties.** The Parties may by mutual agreement amend the Appendices to this Agreement by a written instrument duly executed by the Parties. Such amendment shall become effective and a part of this Agreement upon satisfaction of all Applicable Laws and Regulations.
- 21.11 Reservation of Rights.** Affected System Operator and Customer shall have the right to make a unilateral filing with FERC to modify this Agreement with respect

to any rates, terms and conditions, charges, classifications of service, rule or regulation under section 205 or any other applicable provision of the Federal Power Act and FERC's rules and regulations thereunder, and Customer shall have the right to make a unilateral filing with FERC to modify this Agreement pursuant to section 206 or any other applicable provision of the Federal Power Act and FERC's rules and regulations thereunder; provided that each Party shall have the right to protest any such filing by the other Party and to participate fully in any proceeding before FERC in which such modifications may be considered. Nothing in this Agreement shall limit the rights of the Parties or of FERC under sections 205 or 206 of the Federal Power Act and FERC's rules and regulations thereunder, except to the extent that the Parties otherwise mutually agree as provided herein.

- 21.12 No Partnership.** This Agreement shall not be interpreted or construed to create an association, joint venture, agency relationship, or partnership between the Parties or to impose any partnership obligation or partnership liability upon either Party. Neither Party shall have any right, power or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as or be an agent or representative of, or to otherwise bind, the other Party.

**IN WITNESS WHEREOF**, the Parties have executed this Agreement in duplicate originals, each of which shall constitute and be an original effective Agreement between the Parties.

**Duke Energy Progress, LLC, as Affected System Operator**

By: Dhiaa Jamil

Signature: /s/ Dhiaa Jamil

Title: COO

Date: 5/19/2021

**American Beech Solar, LLC, as Customer**

By: William Gulley

Signature: /s/ William Gulley

Title: CFO of the Sole Member

Date: 05/11/2021

**Appendix A to Agreement****Affected System Network Upgrades**

Ref #	Description of Affected System Network Upgrade	Date Required	Estimated Cost
1	The entire 8.5 miles of Rocky Mount-VEPCO Battleboro 115kV Line will be removed which includes forty-six existing wood H frame structures and twenty-two single steel structures along with the conductor, OHGW, and OPGW. These structures will be replaced with eighty steel single pole structures and two steel 3 pole dead-end structures along with new conductor, OHGW, and OPGW.	06/01/2024	\$30,347,728
2	Rocky Mount 230 kV substation will be uprated which includes the 1200A breaker hook disconnect switches to be replaced with 2000A disconnect switches on the existing dead-end structure	06/01/2024	\$937,547
	<b>TOTAL</b>		<b>\$31,285,275</b>

OFFICIAL COPY

May 24 2022

## Appendix B to Agreement

### Milestones

This Agreement requires that the milestones be achieved by the dates in the chart below and in sequence. Schedule durations may be impacted by outage availability and time of the year the work is planned. Outage availability may have a significant impact on schedule. The consequence of not completing a milestone by the applicable date set forth below is that (a) the parties may need to amend any or all subsequent milestone dates per Article 21.10 of this Agreement to extend those dates farther out into the future and (b) it may not be feasible to achieve the Ready for Service Date that is identified in the chart below.

#### Acronyms Used in Chart:

ASO = Affected System Operator

C = Customer

\*Note: Dates in table of milestones below assumes ASOA execution date of May 21, 2021.

Ref #	Description of Milestone	Responsible Party	Date Required*	Estimated Cost
1.	Agreement executed by both parties and Agreement filed with FERC.	ASO and C	05/21/2021	None
2.	Receipt of FERC Order accepting this Agreement for filing without modification. In the event of FERC rejection, Customer protest, or litigation and settlement, the subsequent dates are at risk and shall be modified through an amendment to this Agreement.	ASO	07/21/2021	None
3.	Notice to Proceed: Written authorization from Interconnection Customer to proceed with engineering and design work necessary to produce a Class III estimate and cash prepayment of estimated cost of \$1,000,000, and to proceed with completion of erosion control plan necessary to produce a Class III estimate and cash prepayment of estimated cost of \$725,221	C	08/23/2021	\$1,725,221
4.	Begin preparation of engineering and design work: conduct site visit to obtain right-of-way, clearance, and easement encroachment information, obtain vegetation survey, obtain environmental survey for Environmental Control Plan	ASO	09/23/2021	None
5.	Design work for engineering and erosion control plan to support Class III estimate	ASO	09/23/2021 – 09/09/2022	None
6.	Notice to Proceed: Written authorization from Interconnection Customer to proceed with procurement of long lead time materials necessary to produce a Class III estimate and cash prepayment of estimated cost of \$3,300,000	C	04/01/2022	\$3,300,000

7.	Issue purchase orders to material suppliers for long lead time materials	ASO	04/01/2022	None
8.	Compile Class III estimate from bid packages for labor and equipment from vendors, estimate for cost of Environmental Control Plan requirements	ASO	04/01/2022 – 02/13/2023	None
9.	Provide Class III estimate to Interconnection Customer	ASO	02/13/2023	None
10.	Notice to Proceed: Written authorization from Interconnection Customer to proceed with construction	C	03/13/2023	None
11.	Provide cash prepayment for estimated Phase I cost of construction work in the amount of \$8,389,062	C	03/13/2023	\$8,389,062
12.	Begin signing contracts for construction service with contractors, conduct pre-construction meetings with contractors, conduct site visits with contractors, review scope of work with contractors	ASO	03/13/2023 – 06/12/2023	None
13.	Begin construction of all projects	ASO	06/12/2023	None
14.	Provide cash prepayment for estimated Phase II cost of construction work in the amount of \$9,516,426	C	09/01/2023	\$9,516,426
15.	Provide cash prepayment for estimated Phase III cost of construction work in the amount of \$8,354,566	C	12/01/2023	\$8,354,566
16.	Ready for service	ASO	6/1/2024	None



**Appendix C to Agreement****Payment Schedule**

<b>Ref #</b>	<b>Description of Customer's Financial Commitment</b>	<b>Date Required</b>	<b>Amount</b>
1.	Cash prepayment of estimated cost of \$1,000,000 for engineering and design work necessary to produce a Class III estimate and cash prepayment of estimated cost of \$725,221 for completion of erosion control plan necessary to produce a Class III estimate	08/23/2021	\$1,725,221
2.	Cash prepayment of estimated cost of \$3,300,000 for procurement of long lead time materials necessary to produce a Class III estimate	04/01/2022	\$3,300,000
3.	Cash prepayment of estimated Phase I cost of construction work in the amount of \$8,389,062	03/13/2023	\$8,389,062
4.	Cash prepayment for estimated Phase II cost of construction work in the amount of \$9,516,426	09/01/2023	\$9,516,426
5.	Cash prepayment for estimated Phase III cost of construction work in the amount of \$8,354,566	12/01/2023	\$8,354,566
	<b>TOTAL</b>		<b>\$31,285,275</b>

OFFICIAL COPY

May 24 2022

## Appendix D to Agreement

### Addresses for Delivery of Notices and Billings

#### Notices:

##### Affected System Operator:

Duke Energy Progress, LLC  
Kristina Straple, Transmission Contracts Sr Analyst  
526 S Church Street  
Mailcode: EC3ZJ  
Charlotte, NC 28202  
(980) 373-6173  
[Kristina.Straple@duke-energy.com](mailto:Kristina.Straple@duke-energy.com)

With a copy to:  
Duke Energy Corporation  
550 S. Tryon Street (DEC 45A)  
Charlotte, NC 28202  
Attn: General Counsel

##### Customer:

American Beech Solar, LLC  
c/o BayWa r.e. Solar Projects LLC  
Jared Quient, Chief Compliance Officer & EVP, General Counsel  
18575 Jamboree Road, Suite 850  
Irvine, CA 92612  
(949) 398-3915  
[Jared.Quient@baywa-re.com](mailto:Jared.Quient@baywa-re.com)

**Billings and Payments:**Affected System Operator:**Payments:****Wire and ACH**

Wells Fargo  
420 Montgomery Street  
San Francisco, CA 94104  
ABA Number: 121000248  
For Credit To: Duke Energy Progress, LLC  
Account Number: 2062660000020

**Billing Data:**

Jayne Cook  
Mail Code ST17  
550 S Tryon Street  
Charlotte, NC 28202  
Phone: (980) 373-8719  
Jayne.Cook@duke-energy.com

**Billing Addresses**

Duke Energy Progress, LLC  
Attn: Steve Collis  
Manager Accounting  
PO Box 1006  
Charlotte, NC 28201-1006  
Phone: (704) 382-0895

**For Overnight use:**

526 South Church Street  
Charlotte NC 28202-1802

Customer:

American Beech Solar, LLC  
c/o BayWa r.e. Solar Projects LLC  
Jared Quient, Chief Compliance Officer & EVP, General Counsel  
18575 Jamboree Road, Suite 850  
Irvine, CA 92612

[Ussp.ap@baywa-re.com](mailto:Ussp.ap@baywa-re.com)

[Whitney.Rubin@baywa-re.com](mailto:Whitney.Rubin@baywa-re.com)

Document Content(s)

Trans Letter ASOA DEP- Beech SA 388 (FINAL).DOCX .....1

SA No. 388 DEP - American Beech ASOA 05.21.2021.PDF .....4

FERC GENERATED TARIFF FILING.RTF.....43

OFFICIAL COPY

May 24 2022